

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF AMENDMENT No. 3)
TO THE MINING PERMIT FOR BULL)
MOUNTAIN COAL MINE NO. 1)
(PERMIT ID: SMP C1993017))

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
July 31, 2015
1:40 p.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,
ROY SAYLES O'CONNOR, ROBIN SHROPSHIRE,
MICHELE REINHART LEVINE; and
HEARINGS EXAMINER BEN REED.

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

A P P E A R A N C E S

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1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 (Ms. Canty present)

5 (Mr. Hernandez not present)

6 CHAIRMAN MILES: With that, we'll
7 basically adjourn our regular business meeting,
8 and open the contested case hearing, and I am
9 going to turn it over to Ben Reed for a few
10 introductory comments. He did issue an order
11 prior to this hearing which spells out exactly
12 what's going to happen today, and what's going to
13 happen next. That went to the parties. Ben will
14 explain that to the Board, and explain some of
15 what we might want to do or not do during the
16 hearing today. And Marietta.

17 MS. CANTY: So I have conflicts of
18 interest on this contested case hearing, so I'm
19 going to recuse myself, and depart.

20 CHAIRMAN MILES: Thank you.

21 (Ms. Canty not present)

22 CHAIRMAN MILES: Ben.

23 MR. REED: Thank you, Madam Chair. This
24 matter is on cross motions for summary judgment in
25 Case No. BER 2013-07-SM. The Board members I

1 believe have had the opportunity to review the
2 documents that the parties believe to be
3 pertinent. The parties themselves will be
4 represented today by Mr. David of the Department,
5 Ms. Sara Berg of Signal Peak, and Derf Johnson and
6 Shiloh Hernandez representing MEIC.

7 MR. JOHNSON: Madam Chair, my co-Counsel
8 Shiloh ran over to grab a bite to eat and he is
9 just not here yet. He'll be here any minute.

10 CHAIRMAN MILES: We will take a few
11 minutes before we get started.

12 MR. REED: I'd like to briefly go over
13 what it is that we're going to be doing today in
14 the hearing. It's a contested case hearing on
15 competing motions for summary judgment. The
16 initial motion for summary judgment was filed by
17 MEIC. A cross motion for summary judgment was
18 filed by Signal Peak.

19 The parties will be appearing before
20 you. First Montana Environment Environmental
21 Information Center will present its argument;
22 second, the Department will present its argument;
23 and finally Signal Peak will present its argument.
24 Each of the parties will have a finite amount of
25 time for their case in chief. MEIC will have 45

1 minutes, the Department will have 30 minutes, and
2 Signal Peak will have 20 minutes. The parties
3 will then go in the same order: MEIC first, then
4 Department, then Signal Peak with fifteen minutes,
5 ten minutes, and ten minutes respectively each for
6 rebuttal.

7 The Board has essentially three options
8 at the close of the entire process. The parties
9 believe that there are no significant questions of
10 fact to present to you at this time. They believe
11 that given the facts that are in evidence, that
12 this matter can be decided as a question of law.

13 They have all agreed that at the end of
14 today's hearing -- during today's hearing they
15 will take questions from the Board. Between now
16 and September 11th they will prepare findings of
17 fact, proposed findings of fact and conclusions of
18 law for the Board, as well as responding via
19 briefing to any issues that they believe remain
20 outstanding or the Board believes remain
21 outstanding.

22 The Board will then have between
23 September 11th and October 16th to review the
24 proposed findings of fact, conclusions of law, and
25 whatever other issues remain in briefing before

1 the Board makes whatever final order or final
2 decision it chooses to make at that time.

3 There are three options for the Board at
4 that time. One will be to grant MEIC's motion for
5 summary judgment; one will be to grant Signal
6 Peak's cross motion for summary judgment; and the
7 third will be to rule that the matter is not
8 appropriate for summary judgment, and to proceed
9 as the Board sees fit at that point.

10 Procedurally, do the parties believe
11 that I have misstated anything of significance?

12 (Mr. Hernandez present)

13 MR. DAVID: No.

14 MS. BERG: No.

15 MR. HERNANDEZ: Nothing.

16 MR. REED: The parties and I met during
17 the lunch period, and we all agreed that with the
18 Board's permission, the parties would not exceed
19 the time that was allotted to them unless the
20 Board has further questions for them. The parties
21 are comfortable with the idea that if they don't
22 get to present every argument that they have, that
23 they will be allowed to do so via briefings, via
24 supplementary briefing after this hearing between
25 now and September 11th.

1 So unless the Board has any questions of
2 me regarding procedural issues at this point, I
3 would invite either Mr. Hernandez or Mr. Johnson
4 to approach the podium. Mr. Tweeten.

5 CHAIRMAN MILES: Chris.

6 MR. TWEETEN: Madam Chair, just for the
7 record, I wonder if Counsel could stand and
8 identify themselves.

9 CHAIRMAN MILES: Before we start.

10 MR. TWEETEN: Before we start, and who
11 they present.

12 MR. HERNANDEZ: My name is Shiloh
13 Hernandez. I'm with the Western Environmental Law
14 Center. I represent Appellant Montana
15 Environmental Information Center and the Sierra
16 Club. With me at Counsel table is Derf Johnson.

17 MR. JOHNSON: Derf Johnson. I'm with
18 the Montana Environmental Information Center. I'm
19 their staff attorney, and I'm representing the
20 Sierra Club and MEIC.

21 MR. DAVID: Madam Chair, members of the
22 Board, my name is Dana David, and I'm a staff
23 attorney for DEQ. I'm Counsel for the coal
24 program.

25 MS. BERG: Good afternoon. My name is

1 Sara Berg. I'm an attorney at Browning, Kaleczyc,
2 Berry and Hoven, and I'm here today representing
3 Signal Peak. This is Christy McCann.

4 MS. McCANN: Good afternoon. My name is
5 Christy McCann, and I'm also with Browning,
6 Kaleczyc, Berry and Hoven, and I'm here
7 representing Signal Peak.

8 CHAIRMAN MILES: Just to reiterate what
9 Ben said, we can interrupt and ask any questions
10 we need -- if you've ever been in any other
11 judicial hearings -- they have a presentation, but
12 we can just ask them to clarify, ask questions,
13 ask other questions, and feel free to do so, and
14 I'll keep track of the time. We'll open it with
15 MEIC.

16 MR. HERNANDEZ: Madam Chair, members of
17 the Board. This Board should vacate DEQ's
18 approval of the massive mine expansion for the
19 Bull Mountain Mine because DEQ's assessment of
20 impacts to water resources, called its Cumulative
21 Hydrologic Impact Assessment, or CHIA -- a term
22 that I'll be using throughout this presentation --
23 was legally insufficient. Without a lawful CHIA,
24 the mine expansion may not be approved.

25 This afternoon I will first briefly

1 sketch the background setting of this mine
2 expansion; I will then discuss the appropriate
3 standard of review, which has received a bit of
4 attention in the briefing; and I will next go on
5 to present our first and principal argument from
6 our briefs, namely that DEQ's CHIA employed an
7 incorrect legal standard to measure the impacts to
8 water resources, that is, it used the wrong legal
9 yardstick, in layman's terms. After that, Derf
10 will then present our second merits argument.

11 As part of my argument, I'm going to use
12 a power point presentation of the rules at issue
13 here, because this is a very legal argument, and
14 being able to see the rules and go through them
15 ourselves I think will facilitate that. Derf is
16 in the process of getting that booted up right
17 now.

18 So first, a bit of background. At issue
19 here is DEQ's approval of a 7,000 acre expansion
20 of the Bull Mountain Mine which will allow the
21 mine operator, Signal Peak Energy, to access 176
22 million tons of coal reserves. With this
23 expansion, Signal Peak intends to ramp up
24 production to 12 million tons of coal annually,
25 which would make this the largest underground coal

1 mine in the nation.

2 The Board may take judicial notice that
3 95 percent of the coal being mined at Bull
4 Mountain is being exported. This is not a case
5 about national energy security.

6 CHAIRMAN MILES: Excuse me. What's the
7 current production prior to any expansion?

8 MR. HERNANDEZ: The production has
9 varied by year. The Court may take judicial
10 notice of detailed accounts of mine production
11 which are included on the Energy Information
12 Administration, United States Energy Information
13 Administration's website. The production has
14 varied from year to year according to market
15 needs, market availability. I think that sales in
16 the most recent year were approximately around
17 eight million tons of coal annually.

18 MR. TWEETEN: Mr. Hernandez, it doesn't
19 really matter whether this coal is for export or
20 not, does it?

21 MR. HERNANDEZ: It does as far as the
22 policy behind it. It is not a major part of our
23 argument, but the surface mining laws that govern
24 this, they basically struck a bargain. They said,
25 "We're going to allow coal mining even though it

1 has impacts on water resources, because coal is
2 essential to our domestic energy needs." So the
3 whole statutory framework behind this assumes that
4 coal is being used for domestic purposes.

5 MR. DAVID: I've got to object. This
6 whole argument is something that's never been --
7 we're here to explain our briefs. This is a brand
8 new argument. It is not in our briefs. It's not
9 in the record anywhere.

10 MR. HERNANDEZ: With respect, Dana, this
11 has nothing to do with argument. This is just
12 background. As far as the relevant genuine facts
13 at issue, this is neither here nor there as Mr.
14 Tweeten said.

15 The coal seam -- and now to the specific
16 facts of this case -- that's being removed is an
17 aquifer. It's the Mammoth Coal Aquifer. Signal
18 Peak intends to removes this aquifer by a process
19 called long wall mining, a technique that allows
20 the mine to remove all of the coal without leaving
21 any pillars to support the roof of the mine.
22 Accordingly, as the coal is mined out, portions of
23 the mine workings collapse into the void below.

24 On the surface above the mine, this
25 leads to splitting and subsidence. The land above

1 the mine is currently used for cattle ranching.
2 It also supports diversity of plant and wildlife.
3 From the summit of Dunn Mountain, a person can see
4 the Crazy Mountains, the Pryors, Big Snowies, the
5 Beartooth, and to the south the Big Horn Mountains
6 of Wyoming. This is beautiful country. It is not
7 country to be sacrificed.

8 There are many reasons to doubt the
9 wisdom of this massive coal expansion. This case
10 concerns DEQ's requirement to analyze the mining
11 impacts to water resources, and to assure that the
12 mine will not cause, quote, "material damage" to
13 the hydrologic balance outside the permit area.
14 This is the relevant statute which is before the
15 Board. I'll get into it more in detail in just a
16 second.

17 The relevant analysis document is called
18 a Cumulative Hydrologic Impact Assessment, or
19 CHIA, and that fundamental determination of this
20 document is called a material damage
21 determination. In layman's term, they can't trash
22 the water outside of the mine permit area. The
23 legal term is "cause material damage." A permit
24 application must be refused unless the mine
25 applicant can affirmatively show, and the agency

1 can determine based on evidence in the record,
2 that the mine will not cause material damage to
3 the hydrologic balance outside of the permit area.

4 MS. SHROPSHIRE: Is there a time frame
5 by which that's judged?

6 MR. HERNANDEZ: There is, and that's a
7 matter of dispute in this case that Derf will
8 address. The relevant time frame for impacts that
9 they have to analyze is the length of time that
10 those impacts will occur. We know this because
11 that's what the federal agency entrusted with
12 administering the federal statute -- the Surface
13 Mining Control and Reclamation Act -- said in
14 their initial regulations that were promulgated.
15 They said impacts must be considered for the
16 length of time they will exist. But Derf will
17 address more of that in a bit. And we cite the
18 relevant provisions in our briefs.

19 Here the CHIA that DEQ produced is
20 legally insufficient because it employed an
21 incorrect legal standard, that is it used the
22 incorrect legal measuring stick to determine
23 whether or not material damage would occur. I
24 will address that in a second, but first I want to
25 pause to discuss the appropriate standard of

1 review on which a bit of ink has been spilled.

2 Appellants MEIC and DEQ, we tussled in
3 our brief over what the proper standard of review
4 is. At bottom, this dispute is about whether DEQ
5 may manufacture new arguments to support its CHIA
6 during this contested case hearing that it never
7 articulated in the CHIA itself. DEQ says it can
8 do this; we say that it cannot.

9 To answer the question, we must consider
10 the issue presently before the Board, that is, the
11 legal sufficiency of this CHIA. Administrative
12 Rule of Montana ARM 17.24.314 Subsection (5) which
13 is cited in our brief says that the CHIA itself
14 must be sufficient to determine, for purposes of a
15 permit decision, whether the proposed operation
16 has been designed to prevent material damage to
17 the hydrologic balance, that is, the material
18 damage determination must be made in the CHIA, and
19 the CHIA must be sufficient to make this decision.

20 In reviewing the sufficiency of the
21 CHIA, we must look at the facts that were before
22 the agency at the time of its decision, and we had
23 to just look at the analysis contained within the
24 four corners of that document, the CHIA. Limiting
25 DEQ to the analysis that it actually articulated

1 in its CHIA is consistent with the foundational
2 principle of administrative law that an agency
3 action must be upheld, if at all, on the basis
4 articulated by the agency at the time of the
5 decision.

6 That was announced by the United States
7 Supreme Court in *Motor Vehicle Manufacturers*, and
8 the principle is implicit in the public
9 participation provisions of SMCRA, the federal
10 strip mining law, SMCRA, Surface Mining Control
11 and Reclamation Act, and the State analogue, the
12 Montana Surface and Underground Mine and
13 Reclamation Act, MSUMRA. Those provisions say
14 that the public must be involved in the permitting
15 process. The public is entitled to review all of
16 documents the agency produces, including the CHIA.

17 If the agency is allowed to produce one
18 CHIA that is patently inadequate, and then when
19 citizens challenge it, it can go to its legal
20 bureau and build up new arguments that support the
21 CHIA, the public participation provisions of the
22 law are entirely thwarted. Public participation
23 doesn't count. The agency action then rides or
24 falls on the analysis of agency's attorneys in
25 their legal bureau, not the analysis presented by

1 the agency in its CHIA.

2 DEQ in its contrary argument presents,
3 cites case MEIC versus DEQ, case citation 2005
4 Montana 96; and a statute Montana Code Annotated
5 2-4-623 that's in the briefs. You don't have to
6 note it right now. But neither this case nor the
7 statutory provision supports DEQ's position.

8 It is true that this Board has to make
9 findings of fact and conclusions of law, and it
10 must do so de novo. That's a legal term that
11 basically means this Board affords no deference to
12 the agency's factual or legal determinations. You
13 make them on your own. However, that doesn't
14 change the fact that the issue before the Board is
15 the sufficiency of this CHIA, and that CHIA
16 sufficiency is determined by that document and the
17 facts before the agency at the time.

18 As a matter of principle, this is quite
19 important, for DEQ's position, as I noted, would
20 allow the agency to remove its actual analysis
21 from the daylight of CHIA, and place it in the
22 shadows of the agency's legal bureau. As this
23 matter pertains to this case, however, fortunately
24 it is less important, because all of the after the
25 fact arguments offered by DEQ here are unavailing.

1 With that, I will address our first argument.

2 MR. TWEETEN: Mr. Hernandez, before you
3 move to the merits. With respect to the summary
4 judgment standard, you have to demonstrate, the
5 other party has to demonstrate in support of their
6 cross motion that there are no genuine issues of
7 material fact, and that you're entitled to
8 judgment as a matter of law. The second point
9 you're going to address with respect to substance.

10 But the Department, in its brief in
11 Paragraphs 41 through 84, states an entire long
12 list of facts that the Department contends are
13 uncontested in this case. Do you agree that all
14 those issues are uncontested?

15 MR. HERNANDEZ: I don't necessarily
16 agree with all of DEQ's characterization of the
17 facts, but for the purpose of this decision for
18 summary judgment, all parties agree, including
19 Appellants MEIC and Sierra Club, that the facts
20 are undisputed, the facts are those that are found
21 in the record. That includes all the documents
22 before the agency at the time of its permitting
23 decision, including the CHIA, Environmental
24 Assessment, the review, prior EIS's that DEQ
25 cited. There is no dispute about that.

1 There are -- We certainly disagree with
2 DEQ's characterization of some of the evidence,
3 but we do not believe that there is any material
4 issue of -- genuine issue of material fact. The
5 facts are those that were before the agency in the
6 record, in the exhibit presented by DEQ and MEIC
7 here.

8 MR. TWEETEN: I guess I'll count on your
9 opposing Counsel to point out any material factual
10 issues that they want to raise with respect to
11 your motion, and you can do so with respect to
12 theirs as well. It doesn't help us very much to
13 say "all of the facts are -- there is no genuine
14 issue of material fact, and all you have to do to
15 figure that out is to look at the record," because
16 then we have to review all of the documents, we
17 have to figure out on our own whether the parties
18 are taking conflicting views as to any of those
19 points.

20 It would be helpful I guess if the
21 parties would point out the extent to which they
22 think their opposing Counsel may be making factual
23 statements that are not quite accurate.

24 MR. HERNANDEZ: That's fair, and it
25 would be nice if they could cite to specific

1 facts, but there has been no specific facts over
2 which the parties have disputed in this matter.
3 It is principally -- In fact our principal
4 argument is almost exclusively legal, and I'll go
5 to that right now, and if you have any factual
6 questions, I'm happy to answer it, but we're
7 hoping to present argument that is a strictly
8 legal question about the proper legal metric for
9 assessing material damage in the CHIA.

10 This whole case turns on this statutory
11 provision, 82-4-227(3)(a) of the Montana Code
12 Annotated. It says, "The DEQ is forbidden from
13 approving application for coal mining unless the
14 proposed operation -- unless it is shown in the
15 record that the proposed operation has been
16 designed to prevent material damage to the
17 hydrologic balance outside of the permit area."

18 The question is what is material damage.
19 Fortunately that is defined by statute as well,
20 and that's a provision right here. 82-4-203(31)
21 MCA, and it's last sentence of this definition
22 that really is the determining factor in this
23 case. It says that, "The violation of a water
24 quality standard, whether or not an existing water
25 use is affected, is material damage." That

1 sentence says that existing water uses are not the
2 metric for assessing material damage. It is
3 whether or not there are water quality standards
4 that are violated.

5 As we will see here, DEQ's material
6 damage determination here ignores water quality
7 standards at all. This is the key sentence of
8 DEQ's CHIA. DEQ says, "As explained above, any
9 degradation of groundwater quality is not expected
10 to render groundwater unsuitable for current or
11 anticipated use."

12 Now, that's precisely what the statute
13 says they cannot do. They do not measure material
14 damage by impacts to uses. It is water quality
15 standards. And here if you review the CHIA,
16 nowhere do they actually assess water quality
17 standards.

18 This is particularly troubling because
19 DEQ's CHIA itself says that -- elsewhere in the
20 CHIA it says that in order to make their material
21 damage determination, they have to assess impacts
22 to water quality standards. That's in Table 2-1.
23 I didn't cite it in the briefs, but I think it's
24 really important if you look there. It says what
25 they should do. They need to assess impacts to

1 water quality standards. And they didn't do it
2 when it comes to their actual analysis, which is
3 at Page 10-4.

4 CHAIRMAN MILES: So what are you
5 actually defining as a water quality standard?

6 MR. HERNANDEZ: I will address that
7 right now. This case involves groundwater,
8 specifically Class II groundwater. There are
9 three applicable water quality standards to
10 groundwater, and they're right here, but before I
11 get to them, I'll say that the CHIA doesn't
12 address water quality standards anywhere. You can
13 search it time and again. They don't address
14 them.

15 However, in its briefs, DEQ makes an
16 argument that is as extraordinary as it is
17 mistaken. DEQ contends -- Derf, could you go back
18 one slide -- that this sentence, "As explained any
19 degradation of groundwater quality is not expected
20 to render groundwater unsuitable for current or
21 anticipated use." They contend that this sentence
22 about rendering current or anticipated uses
23 impossible, that embraces all water quality
24 standards applicable to Class II groundwater.

25 Derf, if you'd advance to the next

1 slide. These are the three standards applicable
2 to Class II groundwater. Not one of them is
3 addressed in the CHIA.

4 But to address DEQ's argument that that
5 sentence on the previous slide embraces all of
6 these, we can show that it's wrong simply by
7 comparing the CHIA's material damage determination
8 with the actual applicable water quality
9 standards.

10 Derf, would you advance the next slide,
11 please. This is the first standard from the other
12 slide, just isolated. It is Human Health
13 Standards for Groundwater listed in DEQ7. These
14 are numeric water quality standards. They apply
15 to parameters such as lead and arsenic, and
16 there's a specific number that constitutes the
17 standard that may not be violated. The CHIA
18 nowhere mentions whether or not numeric water
19 quality standards will be violated by this mine.

20 The next standard -- and that alone is
21 fatal to the CHIA. They don't address that
22 standard at all. So that's one that they don't
23 address.

24 Moving to the next one. This is a
25 narrative standard. It says, "For concentrations

1 of parameters for which human health standards are
2 not listed in DEQ7, no increase of a parameter to
3 a level that renders the waters harmful,
4 detrimental, or injurious to the beneficial uses
5 listed for Class II water." It says, "The
6 Department may use any pertinent prevalent
7 information to determine those levels." This is a
8 narrative standard. The standard is they can't
9 render the water harmful, detrimental, or
10 injurious to designated beneficial uses.

11 Now, DEQ's CHIA, they use this "existing
12 or anticipated uses" standard. That is not
13 designated beneficial uses. These are the
14 designated beneficial uses for Class II
15 groundwaters. Public and private water supplies,
16 culinary and food processing purposes, irrigation
17 and some agricultural crops, drinking water, and
18 commercial industrial purposes. The CHIA does not
19 go through each of these designated beneficial
20 uses in its analysis, and that alone is fatal.

21 In particular if, as the record
22 indicates, the groundwater will degrade from Class
23 II to Class III groundwater, all of these
24 beneficial uses will either be limited or they
25 will be eliminated.

1 Derf, would you advance to the next
2 slide. These are the uses for Class III
3 groundwater. They're either not the same uses for
4 Class II, which is considered a high quality
5 water, or they're limited.

6 Derf, could you advance one more slide,
7 please. This is comparison of the two uses, the
8 designated uses for Class II on the left, and for
9 Class III on the right. We see that some, like
10 public and private water supplies, no longer are
11 designated uses for Class III groundwater; and
12 then we see all the other ones are more limited.
13 For example, irrigation of some agricultural crops
14 for Class II; you have irrigation of some salt
15 tolerant crops for Class III.

16 Recognizing that this changed the water
17 quality eliminates or limits all the designated
18 uses. DEQ presents the argument in its briefs
19 that because of the low transmissivity of the
20 aquifer -- the water doesn't move very quickly
21 there -- they contend that the uses that will be
22 limited or eliminated aren't feasible. These
23 aren't feasible, so we could ignore them, so
24 that's not a problem.

25 This argument is sorely mistaken because

1 there is no feasibility exception to these water
2 quality standards for a Class II groundwater. We
3 know this because there is an express exception
4 for feasibility for impacts to Class III and Class
5 IV groundwater that is expressly enumerated in
6 this very provision. It is ARM 17.30.106
7 subsection (5). They say if the transmissivity of
8 the water is very low, that there is not a lot of
9 water and doesn't move very fast in the aquifer,
10 that has Class III or Class IV water, well, then
11 you can ignore some impacts to designated uses.

12 There is no similar exception for Class
13 II waters, and neither DEQ nor the Board may read
14 such an exception into the statute. It is a
15 accepted canon of statutory construction that if
16 there is a general prohibition which is impacting
17 these uses, and then there is an express exception
18 made to it in statute, that exception is the only
19 intended exception by the body that promulgated
20 the rule; in this case, it's the Board of
21 Environmental Review.

22 So because there is an exception for
23 feasibility that only applies to Class III and
24 Class IV waters, DEQ can't in its briefs create a
25 new exception that applies to Class II waters. It

1 doesn't work that way.

2 The other reason that DEQ's feasibility
3 argument fails is because it is inconsistent with
4 the record. DEQ says, for example, public and
5 private water supplies, it's not feasible to use
6 the Mammoth Coal Aquifer for public and private
7 water supplies. However, the record cites and
8 shows -- we cited -- that there are in fact
9 domestic wells sunk in this aquifer.

10 DEQ would quibble and say they're not
11 exclusively in that aquifer, and that's right.
12 There's not a dispute of fact here. But they are
13 in this aquifer. This water is used for domestic
14 use.

15 The CHIA says nothing about feasibility,
16 and the documents before the agency at the time of
17 its decision nowhere said that the uses that will
18 be eliminated if the water transitions from Class
19 II to Class III water, that they're not feasible.

20 Another example is irrigation.
21 Irrigation uses are significantly limited from
22 some crops to salt tolerant crops when you go from
23 Class II to Class III groundwater. The CHIA says
24 nothing about irrigation. DEQ argues, well, it's
25 evident by the light of nature that this water

1 can't be used for irrigation. Well, that may be
2 according to opposing Counsel's beliefs, but he
3 can't put evidence in the record. The CHIA and
4 the record says nothing about the feasibility of
5 using this water for irrigation.

6 So the long and short of this discussion
7 is that the narrative standard for Class II
8 groundwaters is not the same as the standard
9 employed in the CHIA.

10 There is a third standard that applies
11 to Class II groundwaters, and that standard isn't
12 met either. The third water quality standard that
13 applies to Class II groundwater, and was entirely
14 ignored in the CHIA, is nondegradation. Now, the
15 nondegradation portion of our brief will make your
16 head spin. We're going to significantly simplify
17 that here because we're not going to advance --
18 I'm not going to advance our argument that
19 salinity is subject to a numeric standard for
20 nondegradation. There's a lot of discussion on
21 that in the briefs. I'm putting that all to the
22 side.

23 Further, for the sake of simplicity, I'm
24 just going to limit the discussion to salinity,
25 nondegradation for salinity impacts.

1 MR. TWEETEN: Counsel, by putting it to
2 the side, do you mean you're abandoning that
3 argument?

4 MR. HERNANDEZ: No, I'm not abandoning
5 it, but we can resolve this matter in a very -- in
6 a much simpler way, if -- resolve it in my favor.
7 If you don't agree with this argument, then you
8 can wrestle with that other one. But this one
9 that I offer now is much simpler, and it will
10 solve the matter.

11 MS. REINHART-LEVINE: Madam Chair,
12 Counsel. What about mentions of lead and arsenic
13 in your briefs?

14 MR. HERNANDEZ: Yes, lead and arsenic
15 are examples of pollutants for which there are
16 numeric water quality standards, and we use them
17 just as a example. The CHIA never discusses
18 whether or not there will be violations of the
19 numeric water quality standards for pollutants
20 such as lead or arsenic. DEQ in its surreply
21 brief comes back and says, "Well, We haven't
22 detected any violations of water quality standards
23 for lead or arsenic yet," but that doesn't matter
24 for two reasons.

25 First off, the CHIA never discusses

1 whether or not numeric standards for lead and
2 arsenic will be violated if this mine goes
3 forward, and the groundwater pollution results;
4 and the second reason is that the fact that there
5 have been no violations of numeric standards for
6 lead and arsenic right now is because right now
7 all of the water is flowing into the mine pit, and
8 then it's being pumped out to settling ponds.

9 The reason for this is hydrological.
10 Those of you with scientific background understand
11 that digging out this aquifer creates a cone of
12 depression. All the surrounding connected
13 groundwater flows into the mine pit and is then
14 pumped out. It's not until the mine is abandoned
15 and the pit fills back up with water that the
16 water begins to flow back into the groundwater
17 that's adjacent to the mine area.

18 So the fact that they haven't detected
19 any water quality violations in the wells next to
20 the mine isn't indicative of anything, because the
21 water is not flowing towards the permit boundary
22 right now. Does that make sense? So the short
23 answer is they never addressed it in the CHIA in
24 the material damage determination, which is
25 important. And the other citations that DEQ

1 mentions, they don't solve the problem.

2 So back to nondegradation. It is the
3 last standard, and the standard for nondegradation
4 for salinity, just looking at a narrative standard
5 -- Derf, if you'll advance one more slide. This
6 is the nondegradation standard. It says you can't
7 cause an increase in the parameters of causes of
8 violations of nondegradation provisions of Montana
9 code.

10 And so from this, we have to jump over
11 to all the nondegradation rules for Montana, and
12 those are at ARM 17.30.700. Derf, if you can
13 advance that one slide. And the relevant
14 provision that all parties discuss and I think
15 applies here is this one. It is 715(1) sub (8),
16 and it says that the nondegradation standard --

17 This is nonsignificance. And it is kind
18 of confusing, but basically if a change in water
19 quality because of some activity is determined to
20 be non-significant, then by law it is not
21 degradation. So if they get over the
22 nonsignificance hurdle, then nondegradation is
23 solved. But they can't get over the
24 nonsignificance hurdle because they never analyzed
25 it, and this was where we look at the specific

1 language.

2 It says, "A change in water quality is
3 non-significant if it will --" this is highlighted
4 language -- "will not have a measurable effect on
5 existing or anticipated uses." Now, that is not
6 the same standard as was applied in the CHIA.

7 "Not expected to render groundwater unsuitable."

8 Having a measurable effect is not the same as
9 rendering unsuitable. The standards aren't the
10 same. The standards used in the CHIA is a more
11 lax standards, a more permissive standard, and
12 it's also an unlawful standard under Montana Code
13 Annotated 82-4-203 subsection 31, the definition
14 of material damage, which must include violations
15 of water quality standards.

16 Now, so that's the first reason. The
17 nondegradation standard for salinity is not the
18 standard that they used in the CHIA. They're not
19 the same. The CHIA standard is less stringent,
20 and unlawful therefore.

21 The second reason for that is that
22 nondegradation review and the non-significance
23 determination doesn't end with 715(1)(h). They
24 have to do this analysis, too, to determine
25 whether or not there is going to be a violation of

1 a non-significance provisions of nondegradation
2 review. It says basically even if you meet all of
3 the non-significance factor enumerated in Part 1,
4 change in water quality may still be significant,
5 and you may still have to go through
6 nondegradation analysis if any of these other
7 discretionary factors apply.

8 Here I've highlighted "G," because the
9 Montana Supreme Court in Clark Fork Coalition
10 versus DEQ said that if pollution is going to be
11 for perpetuity, it's going to be forever, then
12 agencies have to consider that in determining
13 whether or not it is going to be significant.
14 That's a big problem. Montana has a big history
15 of perpetual pollution. You don't have to look
16 too far to see it.

17 The CHIA however has no analysis of
18 these additional discretionary factors, and this
19 just underscores that the language from the CHIA
20 is not equivalent to all of the water quality
21 standards applicable to Class II groundwater. It
22 just didn't match. DEQ used a metric, a
23 yardstick, that wasn't as demanding as the one
24 that the law requires, and for that, it is purely
25 a question of law. Their CHIA is unlawful.

1 Because it is unlawful CHIA, the permit approval
2 must be vacated. This matter must be remanded to
3 DEQ for completion of a lawful CHIA.

4 If the Board has any questions, I'm
5 happy to enter them now. Otherwise I'll save my
6 time for rebuttal, and turn the lectern over to my
7 colleague.

8 CHAIRMAN MILES: Thank you, Mr.
9 Hernandez. Any questions right now?

10 MR. TWEETEN: I have one. This seems to
11 me to be a bit of a departure from the argument
12 that you made in your opening brief, which as I
13 understood it was that consideration of current
14 and potential uses was inappropriate in all cases.
15 Am I wrong about that?

16 MR. HERNANDEZ: Yes. The argument from,
17 our first argument from our opening brief was that
18 they did this use-based standard. There are some
19 situations where use is part of a water quality
20 standard, but it is not sufficient. In order to
21 have an adequate material damage determination,
22 the agency has to also consider potential
23 violations of water quality standard. That was
24 our argument in our opening brief. They didn't do
25 it at all.

1 MR. TWEETEN: But now you're conceding
2 that least for purpose of your degradation
3 analysis and the other things that you've just
4 argued, with respect to regulations that
5 specifically make reference to current and
6 potential uses, to that extent, a use basis
7 analysis would be appropriate, right?

8 MR. HERNANDEZ: Well, yes and no. It's
9 more precise than just a use base analysis.
10 Existing and anticipated uses is the standard that
11 they use. In fact it was "render water unfit for
12 current and anticipated uses." But that standard
13 that they use, it doesn't match any of the
14 standards for the applicable water quality
15 standards. Some involve the use of -- it's like
16 the narrative standard. Some of the water quality
17 standards involve uses, but they're not the uses--
18 they're not the standard that they use in the
19 CHIA.

20 For example, the narrative standard is
21 designated beneficial uses, which is broader than
22 just existing anticipated uses. There is more
23 there. And the same with nondegradation. They
24 talk about uses there, and it is relevant, and
25 that's the basis of my esteemed opposing Counsel's

1 argument.

2 The difference, though, is the exact
3 standard -- if you look at the details, and I
4 tried to show them up here -- they're just not the
5 same. The standard for nondegradation, for
6 example, is "cause a measurable effect to existing
7 or anticipated uses." However, the CHIA said
8 "renders water unsuitable." I hope that helps.

9 MR. TWEETEN: Sure. Thank you.

10 CHAIRMAN MILES: Mr. Johnson, I think
11 there is about just about eleven minutes left.

12 MR. JOHNSON: Madam Chair, members of
13 the Board. Thank you. And I will be a little
14 more expedient, and do not have as much to speak
15 to as Mr. Hernandez. He has walked us through the
16 standard of review argument, and our first
17 principal argument, and I'm going to be making our
18 final argument, which is that the DEQ has issued
19 an unlawful CHIA, and that it's not supported by
20 record evidence, evidence within the record at the
21 time they made the decision, demonstrating that
22 the mine will not harm water resources.

23 And as my colleague had mentioned
24 briefly, the relevant provision up on the screen
25 here is Section 82-4-227(3)(a) which prohibits the

1 DEQ from approving a mining permit unless the
2 application affirmatively demonstrates, and the
3 DEQ affirmatively determines in writing based on
4 record evidence, that the proposed mining
5 operation is designed to prevent material damage
6 to the hydrologic balance outside of the permit
7 area.

8 It is absolutely critical that this
9 information be contained within the record before
10 the Department makes its review. What we're
11 talking about is major decisions that could impact
12 the public, and they need to have the opportunity
13 to petition the government to review the decisions
14 that are being made by the government, well in
15 advance of any decisions.

16 Now, the material damage determination
17 is a long term assessment. The assessment must be
18 co-extensive with the impacts. That's both
19 through Congressional intent, and also a policy
20 that you find in Montana law, both in the Clark
21 Fork Coalition case that's cited in the briefs,
22 and really part of our Constitution, and the right
23 to a clean and healthful environment, and the
24 requirement that all lands disturbed by the taking
25 of natural resources shall be reclaimed.

1 What we're talking about, and the reason
2 that's important, is perpetual pollution has been
3 a very big problem in Montana. It's the most
4 serious kind of pollution that we've ever had to
5 deal with, and certainly a very difficult problem.
6 You think about Zortman Landusky, you think about
7 the Berkeley Pit, you think about Belt Creek, coal
8 mines which will probably be polluting forever,
9 and the ability or the requirement for us to treat
10 those.

11 Now, specific to the record, it failed
12 to include any affirmative evidence that material
13 damage would be prevented outside of the permit
14 boundary. In fact, what the record demonstrates
15 is that pollution may or may not emigrate outside
16 the permit boundary and cause material damage.
17 That is not a sufficient analysis, and that does
18 not comply with the law.

19 Furthermore, in reviewing the record
20 before DEQ, it is clear that post-mining degraded
21 water at some point will migrate outside the
22 permit area. The only analysis that was conducted
23 on the migration of contaminated water was a
24 particle tracking evaluation in the ground model.

25 That analysis concluded that if the gate

1 roads were to collapse, and they are designed to
2 collapse -- Now, the gate roads are part of the
3 mine workings, to help them access panels. If
4 those remain intact, they're designed to collapse,
5 but if they remain intact, that water, the gob
6 water, would move beyond the permit boundary
7 within fifty years. If the gate roads collapse,
8 the polluted water would still move beyond the
9 permit boundary, albeit at a slower pace.

10 Again, there is no exception for long
11 term damage outside of the permit boundary. DEQ
12 can't truncate its analysis by imposing an
13 arbitrary horizon in which they actually analyze
14 when this polluted water will move outside the
15 permit boundary. They need to conduct the
16 analysis co-extensive with when the pollution will
17 cause damage.

18 DEQ contends that they can ignore these
19 long term and adverse impacts, but they have to
20 take them into consideration. And in fact, they
21 do take water quantity into analysis, and you'll
22 find in the CHIA that they note that within fifty
23 years, water quantity will be restored in that
24 area. So on the one hand they're saying no water
25 in the short term, but polluted water in the long

1 term, is what they're suggesting.

2 The DEQ also rationalizes in their
3 briefing, and suggest that we can discount the
4 impacts associated with the gob water moving
5 relatively outside of the permit boundary. Not
6 very far. DEQ cannot write that sort of exception
7 into the rule. This is a plain rule, and by the
8 language, the statutory language does not provide
9 for any exception for the water to go a few
10 hundred feet or a few hundred yards outside of the
11 permit boundary.

12 The DEQ also argues that the gob water
13 will, if it migrates outside of the permit
14 boundary, it will only be isolated in a single
15 aquifer. Again, there's no exception to material
16 damage that occurs within a single aquifer.
17 Material damage, as my colleague suggested, is the
18 violation of a water quality standard in an
19 aquifer, regardless of its isolation, regardless
20 of its connectivity to other aquifers. And
21 actually the record does show that the upper
22 underburden is connected to the Mammoth aquifer.
23 So there is a connection.

24 DEQ again applies the wrong standard,
25 ignoring violation of water quality standards, and

1 instead applying that current and anticipated uses
2 incorrect standard.

3 To conclude, based upon an inadequate
4 and illegal CHIA, and approval for a mine permit,
5 we would respectfully ask that you vacate the
6 CHIA, and remand to the agency to conduct a lawful
7 CHIA process.

8 Any additional time, we'd like to
9 reserve for rebuttal, and I'll be available for
10 any questions you might have.

11 CHAIRMAN MILES: Thank you. Are there
12 any questions right now? Robin.

13 MS. SHROPSHIRE: What is the definition
14 for hydrologic balance, or as a hydrologist, do I
15 use my own definition?

16 MR. HERNANDEZ: There is a statutory
17 definition for it, and we cite it in our opening
18 brief. In the early 2000's, DEQ tried to limit
19 the definition of hydrologic balance only to
20 include uses. The Federal Office of Surface
21 Mining that oversees the program rejected that
22 change. Sorry. It wasn't DEQ, it was the
23 Legislature. They said the hydrologic balance
24 must include not only uses, but also non-human use
25 impacts. Water quality standards.

1 So it is not really pertinent to this
2 analysis, but before, the federal regulators that
3 oversee this have said that the hydrologic balance
4 can't be defined in such a way that limits the
5 analysis just to uses. We cite this in our
6 opening brief, make some hay with it.

7 MR. JOHNSON: Does that answer your
8 question, or would you like to have a full --

9 MS. SHROPSHIRE: No, I guess I just
10 wanted to confirm that it's both quality and
11 quantity.

12 MR. JOHNSON: I believe it is, yes.

13 CHAIRMAN MILES: Any other questions?

14 (No response)

15 CHAIRMAN MILES: Thank you. So you'll
16 have about four minutes extra on your reply.
17 Let's take a very short break here. About five
18 minutes.

19 (Recess taken)

20 CHAIRMAN MILES: We're ready to
21 reconvene. Thank you. Mr. David.

22 MR. DAVID: Madam Chair, members of the
23 Board. I'm not sure. I kind of ran out to make
24 sure I had some resources here, but just as kind
25 of a preliminary matter, did we tack down what the

1 definition of hydrologic balance was? I have it
2 if we need it.

3 CHAIRMAN MILES: Would you like to hear
4 it?

5 MS. SHROPSHIRE: If you --

6 MR. DAVID: I've got it right here if
7 you want me to read it into the record.

8 CHAIRMAN MILES: Sure. And that won't
9 count against your time.

10 MR. DAVID: Thank you. So I'm reading
11 from 82-4-203, MCA, Subparagraph 24. It says,
12 "Hydrologic balance means the relationship between
13 the quantity and quantity of water inflow to,
14 water outflow from, and water storage in a
15 hydrologic unit, such as a drainage basin,
16 aquifer, soil zone, lake, or reservoir, and
17 encompasses the dynamic relationships among
18 precipitation, runoff, evaporation, and changes in
19 groundwater and surface water storage."

20 MS. SHROPSHIRE: Thank you.

21 CHAIRMAN MILES: The Department can open
22 its argument.

23 MR. DAVID: Madam Chair, members of the
24 Board, this is a difficult case, and the decision
25 in front of the Board here is a momentous one

1 that's going to carry consequences for coal mine
2 permitting in Montana. The issue before the Board
3 here, one of the primary issues that the Board has
4 to wrestle with, is evaluating what the material
5 damage determination requires, is what is the
6 acceptable level of risk for a mine plan that's
7 described in a permit application.

8 If the Board's conclusion is that there
9 is no acceptable level of risk, then any potential
10 impact to a groundwater resource outside of the
11 permit boundary is unacceptable, as MEIC wants the
12 Board to interpret the statutes, this is going to
13 make it very difficult to issue coal mine permits,
14 or renew coal mine permits, or issue major
15 revisions to coal mine permits in the state of
16 Montana.

17 The DEQ believes that a reasonable
18 reading of MSUMRA is that no material damage
19 determination allows for a certain reasonable risk
20 of material impacts outside of the permit
21 boundary, and I'll describe that as we go on.

22 The first thing, back to our favorite
23 issue, I'm going to defer largely discussions
24 about the scope of review, burden of production,
25 burden of persuasion to Ms. Berg. I'll spend most

1 of my time talking about the merits of the CHIA.
2 But just to highlight an issue, just because it
3 has been talked about so much, about what the
4 scope of review here is.

5 There is nothing I see in MSUMRA or the
6 rules for material damage definition to trump
7 MAPA. The rules of MAPA are the rules that we're
8 governed by in this open contested case
9 proceeding, and under MAPA, it's expressed that
10 this proceeding is an open record proceeding.
11 There is a difference between an open record
12 proceeding and a closed record proceeding.

13 In this case it is a de novo proceeding,
14 and all arguments of law and arguments for
15 evidence that are -- evidence that are relevant to
16 the -- that are in the permit review record are
17 available to the Board. Had MEIC wanted to --
18 they chose not to. They wanted to go forward and
19 do this on summary judgment motions, which the
20 Department and Signal Peak agreed to. They could
21 have challenged every finding supporting the
22 permit that is relevant to the issues of law that
23 they raised in their notice of appeal.

24 And to suggest that DEQ can't do the
25 same is -- I mean basically we'd have to do the

1 CHIA and sit here and be quiet while they make
2 arguments. That is not -- this is an open record
3 proceeding. Both sides are able to supplement.
4 Basically in this open record proceeding, largely
5 the Board acts as the agency and is able to refine
6 the findings that supports the CHIA, and issue a
7 new document which will be the findings supporting
8 the permit, that will go on to judicial review
9 should this happen. I'll allow Ms. Berg to
10 elaborate on those.

11 Also one issue about the open record
12 proceedings is MEIC claiming that by allowing DEQ
13 to make, the quote unquote, ad hoc
14 rationalizations is denying public process. The
15 public process is happening here. They're here.
16 The CHIA that's issued -- the CHIA that's issued
17 is part of the findings of facts that support the
18 permit. The CHIA is not published until the final
19 findings are issued 45 days after the application
20 is deemed complete. The CHIA does not exist until
21 it triggers the 30 day petition deadline for
22 seeking review by this Board.

23 So the idea that somehow following the
24 MAPA procedures for an open case proceeding deny
25 the public the ability to participate in this

1 permit process, the public has far more ability to
2 participate in this process than they do from
3 writing -- submitting a comment when the
4 Department finds that a permit is acceptable. So
5 here had the MEIC and Sierra Club decided they
6 wanted to do so, they could have challenged every
7 fact in the record, they could have put on a case,
8 and they could have tried to either get the CHIA
9 remanded or they could have try to rewrite it.
10 That's the scope of authority that the Board
11 enjoys.

12 So the claim that somehow by having full
13 argument and full legal argument that the public
14 is denied an opportunity for due process is just
15 not sustained by the law and also the MAPA rules.

16 CHAIRMAN MILES: I'm a little bit
17 confused, because it sounds like you're accusing
18 them of doing something they didn't do, when
19 you're saying they could have done this and they
20 didn't.

21 MR. DAVID: They chose not to challenge
22 the facts. So the argument is that DEQ can't make
23 any legal arguments supporting -- that wasn't
24 already in the CHIA in this administrative review.
25 I'm saying that's by -- The arguments that DEQ

1 makes, should they be adopted by the Board as
2 their legal findings, does not deprive the public
3 of an opportunity to participate in this matter
4 because they are here, they're participating, and
5 the level of participation they have now is far
6 greater than any participation that's granted to
7 them before the permit is approved.

8 MS. SHROPSHIRE: If what I'm hearing you
9 say -- and normally I hear people say, "I'm not a
10 scientist" -- I'm not a lawyer -- is that having
11 to have a contested case where you hire attorneys
12 is part of the public -- that's public process?

13 MR. DAVID: It is part of the public
14 process. Ms. Shropshire, I kind of have to look
15 at this in the context of how MSUMRA permits are
16 approved. Basically before the permit -- before
17 the findings are issued with approval of a permit,
18 there is two opportunities for public comment:
19 One, when the Department determines the original
20 application to be complete, there is a public
21 comment period on the sufficiency of the original
22 application, whether it meets completeness
23 standards or not.

24 Then at the time the Department
25 determines that the application is

1 administratively acceptable, that triggers another
2 public comment period, and it is a ten day public
3 comment period.

4 MS. SHROPSHIRE: I guess I'm confused
5 because the public doesn't have the opportunity to
6 participate in this contested case hearing, so
7 this doesn't really seem like a public process.
8 Maybe that's where my confusion is.

9 MR. DAVID: So MEIC is an interested
10 party that made comments. They have been in this
11 game since the get-go. So as a part of this
12 administrative review process, they had the right
13 under MAPA to come in and put on a case, bring in
14 expert witnesses, and challenge every finding that
15 DEQ made to support their permit. So being able
16 to bring in -- They could have brought in their
17 own hydrologists, they could have brought in their
18 own mining engineers, they could have challenged
19 whether or not -- they could have put on evidence
20 of whether or not the gate roads are going to
21 collapse, they could have put on evidence of
22 whether or not the particle tracking model is
23 adequate, they could have put on evidence whether
24 the particle tracking model is a valid and
25 consistent measure of what's going to happen after

1 mining stops, but they chose not to do that.

2 MS. SHROPSHIRE: Are we able to do -- If
3 I were to say typically a particle tracking model
4 addresses like the zone of influence, but doesn't
5 really address geochemistry, are we able to bring
6 that up in this hearing? Am I able to ask,
7 contest that, question whether or not that's
8 adequate demonstration of water quality?

9 HEARING OFFICER REED: I think that this
10 hearing is more appropriate to investigate rather
11 the arguments of law that the parties are
12 bringing. You can look at the facts.

13 MS. SHROPSHIRE: If I have a factual
14 concern this is -- I'm not able to bring that up?

15 CHAIRMAN MILES: I think the parties
16 stipulated to the facts.

17 MS. SHROPSHIRE: But if we --

18 MR. TWEETEN: Kind of.

19 HEARING OFFICER REED: It can go to the
20 weight that you give specific facts, but I don't
21 think it is appropriate for the Board to contest
22 the facts if none of the parties are in fact
23 contesting the facts.

24 MR. TWEETEN: Mr. David, I've got one
25 for you. Looking at your argument from the

1 perspective of MEIC, what they're suggesting is
2 that it is not appropriate for the Department,
3 once the CHIA has been issued, to wait until MEIC
4 comes in and complains about the defects in the
5 CHIA, and then after the fact in this proceeding
6 try to supply the glue that fixes all of those
7 defects; that rather what you have to do is go
8 back to square one and do the CHIA over.

9 Are you really arguing here that you get
10 to fix the CHIA in this proceeding, and then let
11 the Board try to put it together in a manner that
12 complies with the statute?

13 MR. DAVID: Mr. Tweeten, yes, we are.
14 The Board still -- If the Board believes that the
15 CHIA is so much of a dog's breakfast that it's not
16 worth fixing, that's a conclusion that you can
17 make. But to say that DEQ doesn't have the
18 opportunity to fix it I believe is against the
19 requirements of MAPA, that this is an open case
20 hearing, and we can put on the evidence -- I mean
21 put on the argument, whether it's legal or
22 evidentiary argument.

23 MR. TWEETEN: Conversely it would be
24 permissible for the Board to look at the
25 presentation and say, "No, we're not going to do

1 your work for you, DEQ. You're going to go back
2 and you're going to do it over, and you're going
3 to do it appropriately, and you're going to do it
4 in public, and then you're going come back and
5 give MEIC an opportunity to take another shot at a
6 properly prepared CHIA as opposed to the one
7 that's in front of us."

8 MR. DAVID: If you believe the defects
9 are that grave, then yes, you do have that right,
10 or you have that discretion.

11 MR. TWEETEN: Let me ask you another one
12 then. I'm not sure I understand your management
13 of risk argument. When you started out -- and let
14 me tell you what I think I heard, and you can tell
15 me whether I got it right or not. I thought what
16 you said was that in applying the statutes, there
17 is implicit in the Board's role and in the
18 Department's role the opportunity to put in effect
19 a sort of significance overlay on some of these
20 items that constitute material damage.

21 For example, it provides that material
22 damage occurs when water quality standards are
23 violated. And what I understand you to argue is
24 that even if there is a water quality standard
25 violation, we don't have to find material damage

1 if we are convinced it is not important, it is not
2 a significant standards violation. Is that in
3 effect what you're arguing?

4 MR. DAVID: Mr. Tweeten, it is a nuance
5 to argument.

6 MR. TWEETEN: It certainly is that.

7 MR. DAVID: I mean if the water quality
8 standards apply, there is no doubt about it. It's
9 a question of kind of how they are applied. Water
10 quality standards cannot be applied in a way that
11 makes it -- that raises the bar so high that it
12 precludes a mining company from getting a permit.

13 MR. TWEETEN: They can't?

14 MR. DAVID: If a mine design indicates
15 that the mine will violate a water quality permit,
16 then --

17 MR. TWEETEN: A standard.

18 MR. DAVID: -- a water quality standard
19 -- I'm sorry -- then there is more likely not
20 material damage, and the Department has to
21 explain; or if there is material damage, then the
22 operator has to propose mitigation measures for
23 it. Just because there's material damage doesn't
24 mean that you can't issue the permit. There's
25 material damage if you --

1 17.24.314(3) and (4) are clear that
2 that's the process, that the mine company issues
3 the probable hydrologic conditions report, then
4 the Department can go back and say, "Well, this
5 looks like there's material damage. Please tell
6 us what the mitigation measures are," and that
7 analysis is part of the CHIA. So the CHIA has to
8 consider whether or not there is mitigation
9 measures available.

10 So the Department -- so just because
11 there might be material damage, under the rules --
12 I mean you have to read the rules as they're
13 written. It doesn't -- and the game. I mean the
14 CHIA has -- part of the Department's role when it
15 issues the CHIA, when it evaluates the PHC is
16 determining whether or not, one, is there material
17 damage indicated; and two, are there mitigation
18 measures that will control it.

19 MR. TWEETEN: But the Department can't
20 simply overlook the question of whether there are
21 violations of standards.

22 MR. DAVID: No, they can't.

23 MR. TWEETEN: You have to analyze --

24 MR. DAVID: If the PHC indicates a
25 violation of a water quality standard, it would be

1 very difficult for the Department to conclude
2 there is not material damage, no. But then that
3 raises the issues of whether or not the potential
4 violation of a water quality standard can be
5 mitigated or not.

6 MR. TWEETEN: But if MEIC is writing in
7 their argument that in this case the Department
8 didn't consider standards violations at all, then
9 you have to go back and consider that, and then
10 take the second step of considering mitigation.

11 MR. DAVID: We vociferously disagree
12 that they weren't considered.

13 MR. TWEETEN: I gather that you do, but
14 I guess my point hypothetically is that if in fact
15 you did overlook them, then you have to go back
16 and do it over, don't you?

17 MR. DAVID: I believe it would probably
18 result in a factual addition to the record that
19 would require the Department to go back to the
20 drawing board, yes. If it is just legal argument
21 that would take care of it, maybe not, but if it
22 requires additional fact finding, additional data
23 to support whether or not a violation occurs or
24 not, then yes, it would have to go back to the
25 drawing board.

1 MR. TWEETEN: Well, the CHIA speaks for
2 itself as to whether it considered those
3 violations of standards or not.

4 MR. DAVID: It does.

5 MR. TWEETEN: So if we look at the CHIA,
6 and decide that they weren't considered, you have
7 to go back and redo the CHIA to consider that,
8 don't you?

9 MR. DAVID: Unless it's a question of
10 explanation, it is legal argument, then I believe
11 that the Board can -- can adopt the findings
12 necessary to sustain the permit -- I'm sorry --
13 adopt the legal conclusions necessary to sustain
14 the permit. Let me say that.

15 MS. SHROPSHIRE: I want to follow up on
16 your question regarding the acceptable level of
17 risk, because you had commented on that that zero
18 level of risk wasn't acceptable, and you started
19 off your argument with that. I want to make sure
20 I understood what you said. What is the
21 acceptable level of risk?

22 MR. DAVID: Well, it's kind of a preface
23 -- it's kind of a hook to let you know where I'm
24 going with my argument. I hadn't really gotten
25 there yet, but since we're there. In DEQ's

1 opening brief, we explained -- When you look at
2 the material damage definition, the material
3 damage definition says that the mine has to be
4 designed to be prevent material damage to the
5 hydrologic balance outside of the permit area.

6 So how do you parse the word "prevent"?
7 Is "prevent" an on/off switch that means -- does
8 "prevent" mean that if there is any migration of
9 mineralized gob water beyond the permit boundary,
10 is that material damage? If that is the way the
11 Board is going to construe MSUMRA, it is going to
12 be very difficult to issue a coal mine permit in
13 this state, and based -- I'm sorry.

14 MS. SHROPSHIRE: If so, you're saying
15 what is measurable?

16 MR. DAVID: What is measured. The crux
17 here is that the material damage determination has
18 two functions in coal mine regulation in Montana.
19 One function, and the function that we're
20 discussing here today, is that function is part of
21 a permit review process; and as the definition of
22 material damage is: Is the mine designed to
23 prevent material damage to the hydrologic balance
24 outside -- it is a design review process.

25 So absent any indication of a potential

1 discharge -- we don't have one in this case. We
2 don't -- the CHIA is plain, and MEIC agrees the
3 CHIA is plain, and it says there's no evidence of
4 any discharges from the mine in the past. We
5 don't have one. And the particle tracking model
6 says that if the gate roads collapse as they're
7 designed to do, there won't be any migration of
8 mineralized gob water beyond the permit area for
9 fifty years at least. And the fifty years thing
10 gets into the reasonable risk that we're talking
11 about here.

12 I think the idea that the mine should be
13 able to present a mine design that is guaranteed
14 forever to prevent purely -- absolutely zero
15 migration behind the permit boundary, if that is
16 the standard, then it is going to be difficult to
17 issue a mine permit. The reason we have a fifty
18 year horizon is two fold. One, it's predicated on
19 a general assumption about the usability and
20 reliability of the data that's being used to
21 determine whether or not -- how the mine is going
22 to function, whether or not there is going to be a
23 potential for a discharge.

24 MS. REINHART-LEVINE: Madam Chair,
25 Counsel. Please show me the authority that you're

1 using to sort of read the fifty year standard into
2 the statute. I just see "prevent material
3 damage," period. I'm not seeing within fifty
4 years.

5 MR. DAVID: Ms. Levine, it's explained
6 in detail in our opening brief. What the
7 Department is asking the Board to do is parse the
8 word "prevent." if you look at the legislative
9 history of SMCRA when it was enacted, and also as
10 we explained, when MSUMRA was enacted, it was
11 enacted to implement SMCRA, but only to the limits
12 that SMCRA requires, and the Congress -- and I'll
13 read it to you. In the legislative report for
14 SMCRA, it said, quote, "The total prevention of
15 adverse hydrologic effects from mining is
16 impossible, and thus the bill sets attainable
17 standards to protect the hydrologic balance of
18 impacted areas within the limits of feasibility."

19 MS. REINHART-LEVINE: Isn't there a
20 second sentence?

21 MR. DAVID: And there's a second
22 sentence. The second sentence is that, "The
23 purpose of the material damage determination --
24 would prevent material damage to the hydrologic
25 balance means is to minimize disturbance to the

1 hydrologic balance."

2 MR. TWEETEN: That's not what prevent
3 is.

4 MS. SHROPSHIRE: It says prevent, not
5 minimize.

6 MR. DAVID: We're arguing that it's
7 vague, and that you have to look to the
8 legislative history of the statute, and the
9 legislative history of the statute clearly states
10 it's not supposed to be an on/off switch.

11 MR. TWEETEN: But we don't get to the
12 legislative history unless we find that the
13 language of the statute is ambiguous, correct?

14 MR. DAVID: That's true, but I think it
15 arguably is. I mean what is the risk that we're
16 assuming here with the word "prevent"?

17 MR. TWEETEN: The Legislature chose the
18 word, and they didn't say "has been designed to
19 minimize to the extent reasonably feasible
20 material damage to the hydrologic balance," they
21 said prevent; and prevent, it seems to me, is --
22 as you characterized it -- an on/off switch.

23 MR. DAVID: Go back to the argument in
24 the opening brief. That's done much more
25 elegantly than I can do standing at the podium

1 here.

2 But when the Legislature adopted 2003
3 amendments to the MSUMRA, they specifically said
4 that the regulatory burden of Montana adopting
5 SMCRA in this state is to go no further than what
6 MSUMRA requires. So I think it's plain that this
7 legislative history informing SMCRA is equally
8 valid here in the state of Montana, and it
9 requires an evaluation of what the word "prevent"
10 really means.

11 And we're not saying this is license to
12 violate a water quality standard. The way this
13 comes in in the argument here is that MEIC makes a
14 big issue -- actually the difference between Class
15 II and Class III groundwater is, "Oh, well, if it
16 goes from Class II to Class III groundwater, it's
17 no longer available to be a private water supply."

18 Well, the Mammoth Coal is not capable of
19 functioning as a private water supply, so to deny
20 this permit based on the fact that it might have
21 consequences for a resource, is incapable of being
22 used for its designated, functionally incapable of
23 being used for its designated use, I believe flies
24 in the face of the appropriate construction of
25 what "prevent" means.

1 MR. TWEETEN: I believe one of the
2 Counsel for MEIC -- I don't recall which one --
3 told us that there were in fact domestic wells
4 sunk into the aquifer. Were they wrong about
5 that?

6 MR. DAVID: Well, there is also
7 uncontroverted evidence in the record that we put
8 in an affidavit with one of our hydrologists,
9 Martin VanOort, that there is not -- the evidence
10 is that there is not one single groundwater well
11 in the cumulative impact area that produces solely
12 from the Mammoth Coal. The Mammoth Coal makes at
13 best by itself two gallons a minute. So every
14 well that's out there produces from the Mammoth
15 Coal and something else. It's not even clear that
16 the Mammoth Coal is a substantial contribution to
17 any well out there.

18 And that point is something that the
19 Board really needs to keep a hold of here because
20 there is -- functionally to protect the Mammoth
21 Coal as a separate aquifer resource is infeasible
22 here because the Mammoth Coal has minimal
23 communication with the underburden, has no
24 communication with the overburden except through
25 if there's fractures; and when mining is

1 completed, the Mammoth Coal will not daylight,
2 will not supply any surface water to any surface
3 water drainage.

4 So the Mammoth Coal is completely
5 contained, and so in the event that the worse case
6 scenario occurs, and there is some migration of
7 mineralized gob water outside of the permit area,
8 the only way you'll know is if it affects the use.
9 Somebody is going to have to have a well out there
10 that all of sudden the sulphate goes up and it
11 affects their cows. That's the only way you're
12 ever going to know that there is an impact.

13 And there is no way to treat the Mammoth
14 Coal to stop it from happening. Here is the point
15 that Congress said is that the point of material
16 damage determination in protecting hydrologic
17 balance is to avoid irreparable harm, and if you
18 look at the CHIA, if you look at the record in the
19 CHIA, the CHIA is clear that this mine does not
20 contemplate any irreparable harm to the Mammoth
21 Coal or the hydrologic regime in the cumulative
22 impact area in the CHIA.

23 CHAIRMAN MILES: Just letting you know
24 you have about five minutes left.

25 MR. TWEETEN: I don't want to take up

1 the rest of your time.

2 MR. DAVID: There's a couple of points
3 that I really want the Board to understand here,
4 and through a briefing I think the Board is
5 invited to conclude there is -- the Board has to
6 sustain the CHIA because the CHIA concludes that
7 there is no impact to the hydrologic balance,
8 because based on the particle tracking model, and
9 the mine is designed so the gate roads will
10 collapse, there is no reasonable potential that
11 any mineralized gob water will go beyond the
12 permit area.

13 MEIC's argument that Class II
14 groundwaters will go to Class III groundwater is
15 pure speculation. There is no evidence whatsoever
16 that mineralized groundwater is going to go beyond
17 the permit area and change the groundwater quality
18 of any groundwater outside of the permit area,
19 because the CHIA concludes, based on the particle
20 tracking model, that the mine, based on its design
21 that the gate roads will collapse, that the mine
22 pool will not have enough head to progress forward
23 so that in fifty years, any particle of the
24 mineralized gob water would go beyond the mine
25 permit boundary.

1 That's just flat what the CHIA says. So
2 no migration, no water quality violation, no
3 nondegradation issues. The mine is in fact
4 designed to prevent material damage to the
5 hydrologic balance, because it's designed such
6 that -- I mean it's basically in a lucky geologic
7 situation, so that when the gate roads collapse,
8 the water is not going anywhere. That's what the
9 CHIA concludes, and there is no evidence on the
10 record to say that those facts aren't the facts of
11 the case.

12 The CHIA does go on and discuss the
13 possibility that the gate roads don't collapse,
14 and what those results would be. It would be a
15 minor migration of the mineralized gob water
16 outside of the permit area. But again, given the
17 characteristics of the Mammoth Coal, given the way
18 that Mammoth Coal is expressed in uses, any such
19 very, very local migration of groundwater would be
20 easily mitigated.

21 CHAIRMAN MILES: What about the
22 contention that -- I don't remember exactly where
23 it is now, but the language where the Department
24 says it will not render unsuitable -- and I think
25 the statutory language was having a measurable

1 impact. How did the Department get to the
2 unsuitable --

3 MR. DAVID: The measurable effect is the
4 nondegradation standard, and I would say that if
5 there is a measurable difference in how you
6 implement that standard as opposed to what's in
7 the CHIA, I don't know exactly what it would be.
8 But again, we would say first that the
9 nondegradation standard doesn't apply because
10 there is not going to be -- because the mine is
11 designed so there won't be any migration of
12 mineralized gob water outside of the permit area;
13 ergo no mitigation, no nondegradation, no
14 violation of a water quality standard.

15 But MEIC's argument that the CHIA
16 doesn't demonstrate that there's no violation of a
17 water quality standard, first their argument is it
18 doesn't address numeric standards. I don't know
19 what CHIA they're reading. That's why I filed a
20 supplemental reply. I mean the CHIA explains it
21 in detail that there is -- why there will be no
22 migration of any toxic parameters outside the
23 permit area. It is just not indicated. There's
24 no evidence that it's there. The few instances
25 where there was evidence of arsenic were

1 transitory. So there is no evidence in the record
2 that any DEQ7 numeric standard will be violated.

3 MS. SHROPSHIRE: When you say the few
4 instances of arsenic are transitory, what do you
5 mean by that?

6 MR. DAVID: That they're not long term.
7 They were there and they were gone. Sometimes
8 it's due to the sampling area, sometimes if there
9 is a well that's in clinker, you might get a pop,
10 but it's either up gradient or it is transitory.
11 The CHIA concluded that there was no risk of
12 contamination due to arsenic.

13 And one other quick point that's really
14 necessary to the Board to understand. If the
15 Board is invited to conclude that there is going
16 to be some big plume of mineralized gob water
17 that's going to be migrating into dewatered coal,
18 that's just not what the CHIA says. If you look
19 at the CHIA, if you look at the groundwater model
20 carefully, what they say is -- the question here
21 is how they will recharge. Both the dewatered
22 coal and the mined out area are going to be
23 recharged from above and below, not laterally.

24 So the whole impetus here about whether
25 or not it is a scenario one or a scenario two

1 issue is basically it's going to take fifty years
2 for the coal and for the gob water to come under
3 pressure, equilibrium; and at that time, depending
4 on the status of the gate roads, there might be a
5 migration, but outside of the permit boundary.
6 But the idea that there is going to be some big
7 plume and this big body of gob water that's going
8 to move outside of the mine area is predicated on
9 the idea that there is someplace for it to go.

10 MS. SHROPSHIRE: Sorry. I don't want to
11 interrupt.

12 CHAIRMAN MILES: I want to just say that
13 the time is up, so you might want to save that
14 question for when Mr. David comes back.

15 MS. SHROPSHIRE: I'll just make a quick
16 comment then. It won't be a question. I keep
17 hearing arguments of fact, and so I'm struggling
18 with the factual parts of this.

19 MR. DAVID: Can I answer?

20 CHAIRMAN MILES: Yes, if you can do it
21 in thirty seconds.

22 MR. DAVID: If you look at our opening
23 brief, there is a recitation of undisputed facts.
24 The undisputed facts are all referenced back to
25 the primary documents. And I believe that what

1 I'm telling you is it's right there. What I'm
2 explaining to you about the recharge of the gob
3 water is Page 22 of the groundwater model.

4 CHAIRMAN MILES: Thank you. Ms. Berg.

5 MS. BERG: Good afternoon, Madam
6 Chairperson, and members of the Board, Counsel.
7 I'm here representing Signal Peak Energy. My name
8 is Sara Berg, as I mentioned. I practice law here
9 in Helena at Browning, Kaleczyc, Berry and Hoven.

10 And at the outset, I just want to
11 acknowledge that I know that you have all slugged
12 through an immense amount of written material, and
13 before I've even had the opportunity to stand up
14 and say hello to you today, you've listened to
15 about an hour of argument. And it is also Friday.
16 And so I will do my very best to be brief.

17 Mostly I just want to speak about some
18 issues that are unique to Signal Peak. Obviously
19 any questions that you have that are specific to
20 the CHIA I would defer to the Department. You all
21 know that the Department is prohibited from making
22 decisions about issuing a permit based on what we
23 have to say. They have to do their own
24 independent analysis, and in this case they did.
25 They did the cumulative hydrologic impact

1 assessment, and determined that the issuance of
2 the permit was appropriate here.

3 A little bit of historical context from
4 the position of Signal Peak. We submitted an
5 application -- we being SPE, or Signal Peak Energy
6 -- to amend the permit and expand the use of Bull
7 Mountain Mine No. 1, which is near Roundup, so
8 that we could continue to do the long wall mining
9 at current production rates for the next ten
10 years. We submitted the application fall of 2012.

11 Initially DEQ did find some technical
12 deficiencies with the application, I think three
13 rounds of making sure that our application was
14 complete and done correctly, and then following
15 that began their own assessment of whether or not
16 a permit would be issued.

17 During that process, it involved public
18 comment. MEIC was present and made public
19 comment. And eventually about a year later in the
20 fall of 2013, DEQ issued the amendment to the
21 permit, which is Amendment No. 3, to Signal Peak
22 Energy to expand the use of the mine. MEIC
23 challenged that permit, and that triggered this
24 contested case proceeding.

25 At the outset when the contested case

1 proceeding was triggered, there were just two
2 parties, MEIC as the challenger, and DEQ as the
3 issuer of the permit. What SPE said was we'd like
4 to participate in this process, too, as the
5 permittee. The Hearing Examiner at the time
6 agreed that we should be able to participate as a
7 permittee, that we have a dog in the fight, so to
8 speak, but said that we would only be allowed to
9 participate to the extent that our issues, our
10 interests, our voice wasn't already spoken for by
11 DEQ.

12 And so my discussion with you today is
13 kind of in that vein. That's why I'm probably
14 going to be the shortest one up here. I'm going
15 to do my best to be short up here, the smallest
16 length of time. Obviously in the limited context
17 of today's proceeding, we agree with DEQ. We
18 think the permit was appropriately issued. We
19 think the CHIA was lawful, and that their
20 assessment meets the requirements of MSUMRA, so
21 I'm not going to restate everything that Mr. David
22 has said.

23 Instead I want to talk to you about a
24 couple issues that I think are unique to SPE from
25 the perspective of them being the permittee. And

1 I don't want to put words in anybody's mouth. I'm
2 sure that both DEQ and MEIC will correct me if I
3 do that. But for the most part, the other parties
4 that are involved in this matter are concerned
5 with process. DEQ is concerned with process.
6 When they accept our application for amendment to
7 our permit, they don't care whether or not the
8 permit ultimately gets issued. They care that
9 they follow the appropriate process, and that if
10 they follow the process, that the process itself
11 will answer the question of whether or not it's
12 appropriate to issue the permit. They want to
13 make sure they've followed the right process.

14 Similarly MEIC is here because of the
15 process. They want to make sure that they
16 preserve and protect a process in which the public
17 can meaningfully participate, and have a say in
18 what happens in these things. Obviously SPE is
19 concerned with process, too. That's why we
20 intervened and I'm here today.

21 But we have other concerns as well:
22 Servicing customers, paying employees, and running
23 business. And so unlike these other two parties,
24 we'd like to move the ball forward, and anytime
25 you're trying to move the ball forward in the

1 context of a legal setting, it is a delicate
2 balance between doing it quickly and making sure
3 that you're doing it right, so you don't have to
4 come back and do it again.

5 And so the things that I want to talk to
6 you about today are mainly procedural in nature,
7 so that hopefully we can avoid having to come back
8 and give you arguments on all this again a year
9 from now because a Judge in Mushelshell County has
10 determined that we did it the wrong way the first
11 time.

12 And the areas that jump out to me as the
13 attorney for SPE are three fold: First, scope of
14 review; second, standard of review; and third,
15 burden of proof. I think as a general rule, all
16 the attorneys here have done a remarkable job of
17 briefing an incredibly scientific matter. This
18 is, Ms. Shropshire, way out of our wheelhouse, and
19 so it's been a huge challenge to argue both the
20 technical points and legal points.

21 But I think that when you read the
22 briefs -- and maybe the lawyers on the Board will
23 agree with me -- in terms of scope, and standard,
24 and burden, you guys are left with a hot mess.
25 It's really hard for you to determine what you're

1 supposed to be looking at, what measuring stick
2 you're supposed to use when you're assessing DEQ
3 and their preparation of the CHIA, and ultimately
4 whose job it is to prove did the right or did the
5 wrong thing. And so those are the things that I
6 want to touch on today.

7 And the first is the scope of review,
8 which is what you're supposed to be looking at.
9 And Mr. David touched on this a little bit in his
10 presentation when he said as the challenger, they
11 could have challenged anything they wanted.
12 Goodness knows, there's plenty of material. I
13 think there's 1,000 pages of exhibits to these
14 briefs that you all have in your packets --
15 thankfully online. But they could have picked any
16 single thing or all of them to challenge as a
17 basis to overturn the issuance of this permit.

18 I think what's important for you to
19 remember in your review, they picked two things,
20 just two. Now, in their subsequent briefing they
21 tried to expand the number of things that they
22 wanted to challenge, and Mr. Tweeten brought that
23 point up today -- which reminded me when Judge
24 McLean told me the most important thing I should
25 ever do is wait and see if the Judge will ask the

1 question for me -- because I wanted to make that
2 point, and then you made it for me, which is:

3 The two issues that they brought forth
4 in their opening brief, which is the only thing
5 that you have to look at in terms of scope, are
6 one, whether the standard for assessing material
7 damage to the hydrologic balance outside of the
8 permit area was unlawful in terms of their
9 preparation of the CHIA; and the second one, which
10 you all just spent quite a significant amount of
11 time talking about with Mr. David, is whether or
12 not there is evidence in the record to demonstrate
13 that the permit is designed to prevent material
14 damage, including the violation of water standards
15 outside the boundary area of the mine.

16 That's it. Those two issues. They're
17 narrow. To the extent that you find yourself
18 reviewing any other reason to overturn the
19 issuance of this permit, you've gone outside the
20 scope. They had the chance to bring forth
21 whatever they wanted in their opening brief;
22 that's what they chose, just those two issues.

23 I think that when you analyze those two
24 issues in light of what's in the CHIA, what is on
25 the face of the CHIA, you find either, "A," that

1 the Department appropriately conducted this
2 analysis, the CHIA is lawful, that the permit is
3 designed to prevent material damage outside the
4 boundary; or you're going to find yourself back
5 here in a year listening to us again because you
6 will have applied an inappropriate scope.

7 MR. TWEETEN: Ms. Berg, do you agree
8 with Mr. David then that it is permissible for the
9 Department to go outside of the four corners of
10 the CHIA in trying to supply reasons why what they
11 did was appropriate, if they find explanations
12 outside of what they used within the four corners
13 of that document?

14 MS. BERG: Mr. Tweeten, what I would say
15 is I don't think that happened here. I don't know
16 whether or not I can answer your question that
17 yes, I agree, they should be able to present
18 additional evidence today or not. I do agree that
19 it's a de novo standard, it's an open proceeding.

20 What I think happened in the briefing
21 was I think the CHIA is sufficient on its face,
22 and that what Mr. Hernandez and MEIC took issue
23 with DEQ doing was explaining why it said what it
24 said, which is perfectly and totally appropriate.
25 They're certainly entitled to brief the issues.

1 They're allowed to say, "The CHIA says 'X,' and
2 here is why it says that." I think that when you
3 read the CHIA, you will find it is not
4 insufficient. It is sufficient on its face.

5 But obviously DEQ is writing a
6 cumulative hydrologic impact assessment. They're
7 not making legal arguments. Those are up to
8 Counsel if the process proceeds this far. And so
9 I think what this kind of ad hoc or post hoc
10 language was I think a criticism of DEQ making
11 legal arguments about what the CHIA already says.
12 I don't think that anybody is trying to add
13 factual information to the CHIA in this
14 proceeding. Does that answer your question?

15 MR. TWEETEN: Not really. Mr. David
16 argued pretty strenuously that it was okay for him
17 to go outside of the four corners of the document
18 to find explanations for why the CHIA did what it
19 did. My question to you is simple. Do you agree
20 with that or not? That's what he said. That's
21 not what you said.

22 MS. BERG: I guess I would defer to the
23 Department in that regard, Mr. Tweeten, because
24 that is an assessment that they perform. It's not
25 one that Signal Peak would have performed. But my

1 answer to you would be, the second part of it
2 would be: I don't think that happened here. I
3 think that the CHIA, the four corners of the
4 document are sufficient, and all that DEQ in its
5 briefing did was explain the legal arguments
6 associated with why they did what they did, and
7 why that meets the requirements of MSUMRA.

8 In terms of standard of review, which I
9 think is the second thing that is important for
10 you to consider as you move forward in your review
11 of this process, it's really kind of messy in the
12 briefing, and that's simply because with all due
13 respect, the standard that MEIC argued that you
14 should apply was wrong. I don't think they
15 indicated in their opening brief that the standard
16 you should apply was one of a review of arbitrary
17 and capricious, which is not what's at the issue
18 here. This is, as we've said, a contested case
19 proceeding that's governed by MAPA.

20 And the Montana Administrative Procedure
21 Act says in regards to the standard of review that
22 all parties shall be given the opportunity to
23 appear, and present evidence and argument
24 regarding the issues raised in the proceeding. It
25 is a de novo review. You are reviewing it for the

1 first time, not the second, not the third, not the
2 fourth.

3 And I think where it gets a little bit
4 confusing is that when DEQ issues the permit, the
5 language that we used to talk about how MEIC
6 responds is we say that they appealed the issuance
7 of the permit. Really they're challenging the
8 issuance of the permit. It's not an appeal.
9 You're not acting as an appellate body. We're not
10 functioning under the appellate rules. This is a
11 summary judgment hearing. It is not an oral
12 argument before the Supreme Court.

13 And so I think when we say that they
14 appealed the permit, and we refer to them as the
15 Appellant, sometimes we get things kind of general
16 use terms confused with terms of art. You all are
17 functioning much more like our District Court
18 Judges down on Broadway than the Supreme Court
19 Judges across the street here in this proceeding
20 today. You're hearing it for the first time.

21 But the interesting thing that I think
22 is important to note in terms of standard of
23 review is that in addition to the fact that this
24 is not appellate, it's de novo, that under MAPA,
25 under 2-4-612 Subsection 7, you get the agency's

1 experience -- so DEQ, the folks that prepared the
2 CHIA here, that their experience, technical
3 competence, and specialized knowledge may be
4 utilized in the evaluation of the evidence.

5 So the fact that DEQ, that performed the
6 CHIA is trained to do that -- that that's their
7 job, they know how, they've studied that, that's
8 their profession -- that doesn't have to be lost
9 on you. You can evaluate this matter, knowing
10 that they know how to do their jobs. That is part
11 of what you can consider, and that is unique to a
12 standard of review under MAPA.

13 One of the reasons I think that it's
14 important to talk about the standard of review is
15 because of some of the cases that MEIC cites as
16 being persuasive to you in your decision making.
17 You heard him talk about the Clark Fork case
18 twice. The Clark Fork case is an appellate case.
19 The body that reviewed that matter was the Supreme
20 Court. They were reviewing it from an appellate
21 standard. You're not functioning as the Supreme
22 Court. You're not reviewing it as an appellate
23 standard.

24 So when MEIC says to you, "Board of
25 Environmental Review, look at this case. Look at

1 this Clark Fork case. It has facts similar to the
2 SPE case, so you should do what they did." They
3 are telling you apple to apple, and because you
4 are not functioning as an appellate body here,
5 you're functioning de novo, it is not apple to
6 apple, it's apple to orange, and that needs to be
7 taken into consideration when you're reviewing
8 this. The measuring stick that you use to decide
9 if DEQ acted lawfully is very different than the
10 measuring stick that the Supreme Court would use
11 in an appellate review.

12 And again, I think that if you look and
13 use the correct standard of review under MAPA, you
14 will find that DEQ acted lawfully, the CHIA is
15 appropriate, and the permit should be issued. If
16 you use the wrong standard of review, we'll be
17 back here again in a year.

18 Lastly is burden of proof, and I'm sure
19 you're all very familiar with burden of proof.
20 It's just whose job is it to flip the table
21 basically today. The best way burden of proof was
22 ever explained to me is that if MEIC challenges
23 the issuance of this permit, and if nobody does
24 anything, nobody presents any evidence, nobody
25 writes any briefs, nobody makes any arguments --

1 I'm sure that seems like a dream to you right now
2 -- but that nobody says anything, and we just come
3 here and we be quiet, and nobody says a word.

4 What ends up happening? What ends up
5 happening is the permit gets issued, and they
6 lose. They have the burden today. They are the
7 ones that have to show things. And their briefing
8 tries to turn that burden on its head. Their
9 briefs are replete with reference to things that
10 DEQ failed to do, that DEQ has to establish, that
11 DEQ needed to do.

12 That's not the standard here today. The
13 Supreme Court has said that the challenger bears
14 the burden, so they have to carry the burden.
15 They're also -- as Mr. Tweeten has pointed out
16 several times -- the moving party here for summary
17 judgment. I recognize we have cross moved for
18 summary judgment, and we did that so that the
19 Board knows that the parties stipulate that there
20 are no issues of material fact.

21 We think this is ripe for judgment on
22 the law. We think the law says that DEQ and SPE
23 win. They think the law says that MEIC wins. But
24 we all agree that there are no material issues of
25 fact.

1 Simply I think that when you look at the
2 procedural issues associated with this, things
3 like standard, things like burden, things like the
4 scope of review, that you have to be careful to
5 apply the right ones, or otherwise we're going to
6 have to redo this. And when you're applying the
7 correct standard of review, and you're looking at
8 the narrow scope, and you give them the burden
9 that they have as a challenger here, I think the
10 answer is that the permit survives, the CHIA is
11 lawful, and that their challenge should be denied.

12 I'd be happy to entertain any procedural
13 questions. Anything about the CHIA, like I said,
14 I would defer to the Department. But if you have
15 questions for me, I'm happy to do my best to
16 answer them.

17 CHAIRMAN MILES: Any questions?

18 (No response)

19 MS. BERG: Thank you very much.

20 CHAIRMAN MILES: We'll take another five
21 minute break before we go into rebuttals.

22 (Recess taken)

23 CHAIRMAN MILES: We'll get started
24 again, and Mr. Hernandez and Mr. Johnson, the
25 floor is yours for the next fifteen minutes.

1 MR. HERNANDEZ: I'd like to try and keep
2 this as brief as possible just to address mainly
3 questions that were raised by Board members during
4 the arguments of opposing Counsel.

5 First, I don't want to belabor this, but
6 briefly about standard of review, and specifically
7 the fairly outrageous suggestion that my opposing
8 Counsel at DEQ suggested, which was that they can
9 defend the CHIA based on whole new evidence that
10 they bring in here. They come in here and say,
11 "We have new law. We have new facts," and that's
12 justified, that's consistent with the public
13 participation process, because Derf and I are here
14 today.

15 And I submit that that's absolutely
16 contrary to the public participation process.
17 He's basically saying that in order to challenge
18 the CHIA, our clients can invest in hundreds or
19 thousands of hours of attorney time, and tens of
20 thousand of dollars, potentially hydrologists, and
21 come to the Board and make an argument, and then
22 DEQ can pull the rug out from under us, and say,
23 "Actually we have this other CHIA, and other
24 arguments, and other evidence to support, so it's
25 all copacetic.

1 So it just doesn't make sense that they
2 should be able to present new evidence, and new
3 argument that's not contained within the four
4 corners of the document at this stage. They've
5 already made their decision. That's the CHIA.
6 That's what has to be sufficient. It utterly
7 thwarts the public participation process if they
8 can cause members of the public to invest
9 thousands of dollars to challenge what they've
10 said, and then change what they say.

11 MR. TWEETEN: Mr. Hernandez, if we agree
12 with you and remand it back to them to do another
13 CHIA, you're going to have to do that anyway,
14 aren't you?

15 MR. HERNANDEZ: Before we make the
16 determination of whether or not to invest in
17 attorneys, potentially hydrologists, we can review
18 their CHIA, and know that's the document that we'd
19 be challenging. It doesn't make sense for us to
20 review that, come in here and argue it, and they'd
21 say, "Actually it's these other things, not the
22 CHIA." We should be able to rely on the CHIA in
23 making our determination of whether or not we want
24 to challenge their permitting decision.

25 MR. TWEETEN: But you're asking us to

1 remand it, so in effect they're going to go back
2 and do it over, and you're going to have to gear
3 up and challenge the new CHIA anyway, right?

4 MR. HERNANDEZ: Not necessarily. If
5 they go back and do the CHIA, and they correct the
6 mistakes that we think are mistakes, they first
7 off may determine, "Wait a second. We have
8 material damage here. We'd better not permit this
9 mine." But they may say, "Well, there is not
10 material damage," and their analysis in their CHIA
11 may be sufficiently robust that we look at it and
12 we say, "Wait a second. We're not going to invest
13 our time and our energy in challenging this CHIA.
14 It is done right; compliance with the law; the
15 hydrology is sound. We're not going to -- we have
16 other things to do." We have better ways to spend
17 our time frankly.

18 I'll move on just briefly to the burden
19 of proof. And it's true, as Ms. Berg stated, that
20 we have the burden of proof here, but it's kind of
21 a weird hybrid creature because as far as the
22 determination of material damage goes, the burden
23 of proof is in the statute that you see on the
24 screen right there that says, "The Department may
25 not approve an application unless the application

1 affirmatively demonstrates." Not Signal Peak
2 Energy. They have to affirmatively demonstrate
3 that the operation of the mining operation has
4 been designed to prevent material damage to
5 hydrologic balance.

6 And so we can come in here, and if we
7 say nothing, we lose, but if we can say, "Listen.
8 They haven't presented affirmative evidence that
9 they're not going to trash the water outside the
10 permit area," then we win. We can point to the
11 lack of evidence they presented to the agency
12 under that statute.

13 MR. TWEETEN: Excuse me. The statute
14 says, "designed to prevent," it doesn't say
15 "prevent."

16 MR. HERNANDEZ: It is true. It's a
17 design standard.

18 MR. TWEETEN: And so do you argue then
19 that there are not features of the design of this
20 mining proposal that are aimed at preventing the
21 migration of affected waters outside of the permit
22 area? Isn't that included in the design? You may
23 dispute whether the design is efficacious or not,
24 but is it not designed to address that issue and
25 prevent that migration?

1 MR. HERNANDEZ: I don't think they have
2 presented affirmative evidence that demonstrates
3 from the record that this mine is going to prevent
4 material damage, and I think --

5 MR. TWEETEN: But that's not the
6 standard. The standard is it's designed to
7 prevent.

8 MR. HERNANDEZ: They haven't presented
9 affirmative evidence showing that this mine is
10 designed to prevent material damage, and the
11 reasons for that are we just -- First off,
12 specifically this goes to Derf's argument which
13 was about the probable hydrologic consequences,
14 and actually goes to Ms. Shropshire's comment
15 about the particle tracking study. It never
16 considered geochemistry. In fact, you don't have
17 to rely on your own expertise to determine that.
18 The groundwater model itself says that. That's in
19 the record, the groundwater model at Page
20 314-6-25.

21 They say, "We've assessed whether or not
22 water is going to be past the permit boundary,"
23 but we haven't done the particle transport
24 modeling that would allow us to determine whether
25 or not the pollution is going to move past the

1 mine permit boundary.

2 DEQ picked this up in their
3 environmental assessment, which is in the record,
4 and their analysis there is frankly stunning.
5 They say, "Well, the evidence shows that if the
6 gate roads don't collapse, the water will migrate
7 beyond the permit boundary in fifty years, but we
8 never analyzed whether or not the particles would
9 move across that way --" There are questions of
10 absorption, dilution, and all this -- "and since
11 we didn't analyze it, we don't think it's going to
12 be a problem."

13 Well, that doesn't comply with that
14 standard. "We didn't analyze it, so it's not a
15 problem;" that's not affirmative evidence, and
16 that's what they did here. They never considered
17 the geochemistry, and that was the argument that
18 Derf said, the evidence that the application
19 submitted wasn't sufficient.

20 MR. TWEETEN: Thank you. I understand
21 your argument.

22 MR. HERNANDEZ: Then briefly to address
23 Mr. David's argument that prevent is the same as
24 minimize, I think it seems that the Board clearly
25 rejected that. Mr. David's support for that

1 argument is a snippet of the legislative history,
2 and as was pointed out, the very next sentence of
3 that legislative history says that, "For most
4 critical areas in certain fragile hydrologic
5 settings, the bill set standards that are
6 imperative to begin to assure that adverse impacts
7 of the hydrologic balance are not irreparable."

8 So there are some times that a statute
9 says the impacts are too much, and you cannot mine
10 here. It is not the case that every mine has to
11 be allowed. In some cases they can just say, "The
12 water will be impacted, so you can't do it."
13 That's how the statute reads, and it's troubling
14 frankly that DEQ suggests that "prevent" means
15 "minimize."

16 And then the final point I want to
17 address is that DEQ seems to put all of the weight
18 of its argument on this contention that it really
19 only has to consider a fifty year time horizon for
20 impacts. They suggest that, "If it happens over
21 fifty years, who cares, who knows. It is not a
22 problem. The statute doesn't require it."

23 But in our brief, we go on at length in
24 our reply brief at Pages 34 to 38, explaining that
25 this fifty year time horizon that they have used

1 is not at all supported by the law, neither the
2 express language of the law. As Ms.
3 Reinhart-levine pointed out, there is no exception
4 there that says within fifty years; designed to
5 prevent material damage within fifty years.
6 That's not there. So the express language doesn't
7 state it.

8 The legislative history says that the
9 Congress was specifically concerned about long
10 term impacts of water pollution, so the fact that
11 the impacts aren't going to manifest for fifty
12 years is not a reason to ignore them. The long
13 term impacts are the most serious. I think we in
14 Montana recognize this from the many legacies of
15 pollution that we're dealing with today.

16 In addition to both the statutory test,
17 the legislative history, there are also the
18 regulations that promulgated the water standards
19 for the surface mining laws, and there, as Derf
20 mentioned, the agency specifically addressed this
21 issue, and they said, "Consideration of impacts
22 has to be coextensive with the impacts." So long
23 as impacts are going to occur, you have to
24 consider them.

25 Now, if they were to say the impacts

1 aren't going to happen for 20,000 years, that
2 might be one thing; but fifty years is a
3 generation, and fifty years is something that we
4 in Montana can recognize. We're still dealing
5 with impacts that happened a hundred years ago.
6 The fifty year timeline is not supported at all.

7 And I think the final point on this --
8 and at risk of gilding the lily -- is that DEQ in
9 its CHIA itself kind of flip flopped on the fifty
10 years. With respect to water quantity rather than
11 water quantity -- Derf mentioned -- they said,
12 "There won't be any problems because the water
13 quantity will recover from the zone of depression
14 after fifty years." So looking forward after
15 fifty years, things will be great. But then with
16 respect to water quantity, they said, "We're going
17 stop at fifty years. We're going to look at up to
18 fifty years."

19 So they contradict themselves, and that
20 contradiction is a hallmark of arbitrary and
21 capricious decision making. This isn't arbitrary
22 and capricious standard, but it's not consistent.
23 They can't have it both ways on that.

24 Then the final point I'll make is just
25 with respect to our first argument about the CHIA.

1 The CHIA has to be supported by the four corners
2 of the CHIA. We argue about what it says, but I
3 submit that if the Board looks at the CHIA, it
4 will see no analysis in the material damage
5 determination. That's a relevant point, when they
6 determine whether or not material damage will
7 happen. There's no analysis there of any of the
8 water quality standards that I elaborated in the
9 opening presentation.

10 If the Board has no questions --

11 CHAIRMAN MILES: I do have a question
12 actually. Mr. David said that the CHIA did have
13 extensive information in it about the water
14 quality standards. Would you distinguish what
15 you're saying from the fact that there is
16 reference to a number of standards?

17 MR. HERNANDEZ: There is some discussion
18 in the CHIA here and there about water quality
19 standards. For example, I mentioned that they say
20 there were some violations in wells for arsenic
21 and lead, but they were out of the mining area,
22 and they weren't sure if that was a problem. But
23 there wasn't actually a determination in the
24 material damage determination -- that's the
25 relevant portion -- where they say whether or not

1 water quality standards will be followed.

2 They try to piece together an analysis
3 from different portions of CHIA, and import it to
4 the material damage determination. They say, "We
5 did it. If you look at Page 6, Page 35, and Page
6 36, it all comes together," but it doesn't in fact
7 come together. We point that out in our briefs.
8 For example, they say, "Well, we haven't had any
9 violations of the water quality standards outside
10 of the mine since mining has started, so we don't
11 think there will be any."

12 But as I mentioned in my opening part,
13 the water is not traveling away from the mine yet.
14 It will only do that after they stop mining and
15 they allow the mine pit to fill back up, and then
16 cause the groundwater to migrate back away from
17 the line and towards the mine permit boundary. So
18 they talk a little bit about water quality
19 standards, but they never address it in the
20 material damage determination.

21 And my last point. In Table 2-1, they
22 say exactly how a material damage determination is
23 supposed to consider water quality standards.
24 They say it there, but then they never fulfill the
25 promise in the actual analysis of the material

1 damage determination.

2 CHAIRMAN MILES: I have one further
3 question. Could you just clarify for me what MEIC
4 and Sierra Club believe is the appropriate
5 standard of review for the Board in this case.

6 MR. HERNANDEZ: The standard of review
7 is de novo review. You are going to make your
8 determinations about what the facts are, and
9 they're not disputed. There are some questions
10 about what the record does say, but it is a record
11 there. You guys will make your determinations of
12 fact and your conclusion of law de novo. You will
13 decide what the law is, and that will be subject
14 to review eventually, but you don't have to give
15 us any deference. We're not experts at all as far
16 as you're concerned.

17 Ms. Berg mentioned the provisions of
18 MAPA, but the Montana Supreme Court was quite
19 clear in the MEIC versus DEQ case I cited, 2005
20 Montana 96, that the review is de novo. There's
21 no deference accorded to the agency. That was the
22 issue there. The District Court didn't follow the
23 Board of Environmental Review -- a previous one,
24 not as wise as this one -- didn't follow it, and
25 the Court reversed them. So the standard of

1 review is de novo which is no deference.

2 CHAIRMAN MILES: Any other questions?

3 (No response)

4 CHAIRMAN MILES: Mr. Johnson, did you
5 have anything? There's a few more minutes.

6 MR. JOHNSON: No.

7 CHAIRMAN MILES: Thank you very much.
8 The Department, Mr. David.

9 MR. DAVID: Thank you, Madam Chair,
10 members of the Board. Scope of review. At the
11 risk of repeating myself, I just want the Board to
12 understand that the argument that full de novo
13 review of the CHIA before this Board somehow
14 circumscribes the public's ability to participate
15 in the decision is a total red herring, because
16 you have to understand the process for mine permit
17 approval is the CHIA is part of the findings. The
18 CHIA, there is no draft CHIA issued. The public
19 only knows what the CHIA says when the Department
20 issues the permit, and its findings, and so the
21 only way the CHIA can be challenged is through
22 this kind of proceeding.

23 Denying the Department the opportunity
24 to make a legal argument to support the CHIA is to
25 basically hamstringing the Department to sit here and

1 say nothing during an administrative appeal. If
2 they're going to take the appeal -- If you
3 actually look at MAPA, and look at what it says
4 when a decision of the Department is appealed to
5 this Board, the Board is the agency; and the final
6 findings of fact that support the permit if the
7 Board sustains the permit are the findings of fact
8 that are prepared by the Department as amended and
9 revised by the Board as a result of this
10 proceeding.

11 The idea that somehow this process cuts
12 off public participation -- I mean there is no
13 opportunity for the public to review the CHIA
14 until here. So the idea that the Department can't
15 make -- there is no other opportunity for the
16 Department to make its arguments but here. So to
17 say that the Department has give you a CHIA with
18 every possible legal argument in it before
19 somebody makes an objection to it, and we can't
20 sit here and raise and expand our legal arguments
21 or refine them is to deny the Department due
22 process.

23 A de novo hearing is a de novo hearing.
24 It's de novo on the law, and it's to a certain
25 extent de novo on the facts. And to clarify the

1 Department -- I mean the CHIA is supported by
2 findings of fact. For the Department to come in
3 here and offer completely different findings of
4 fact would create a huge preponderance of the
5 evidence problem because we're in effect
6 contradicting our own facts. When the Department
7 makes factual determinations to support a mine
8 permit determination, it kind of has to come in
9 here and support those facts. The Department's
10 ability from a legal process perspective to walk
11 away from the facts that it originally proposed
12 and propose something totally different are very,
13 very limited, and probably would compel the Board
14 to deny the Department's position.

15 The argument that the particle tracking
16 model is defective because there's no geochemistry
17 involved in it is another red herring. There's no
18 geochemistry because the particle tracking model
19 says that no particle will migrate beyond the
20 permit boundary if the gate roads collapse. If
21 there is no particle of gob water going beyond the
22 permit boundaries, there is no geochemistry to
23 consider. The chemistry is not being changed.
24 That's why the particle tracking model is
25 conclusive and persuasive that the mine is

1 designed to prevent material damage to the
2 hydrologic balance outside of the permit area.

3 Again, project opponents say that the
4 Department's position is that "prevent" means
5 "minimize." That's a very over-simplification of
6 the argument that we're making. We're saying that
7 the word "prevent" has to be parsed according to
8 the legislative history of the statute, that the
9 material damage standard is designed to prevent.

10 What does "designed to prevent" mean?
11 It means it must demonstrate that disturbances of
12 the hydrologic balance will be minimized without
13 violating a water quality standard, or a
14 detrimental effect to an existing or anticipated
15 use or a listed use in the water quality statutes.

16 Another point that I wanted to --

17 MR. TWEETEN: Mr. David, can you point
18 me to the specific place in the CHIA that
19 evaluates the design of the project with respect
20 to prevention of material damage.

21 MR. DAVID: I don't know if I understand
22 your question, Mr. Tweeten, but I would say it is
23 the fact that the CHIA incorporates the particle
24 tracking model, and the particle tracking model
25 being based on the undisputed fact that the gate

1 roads are designed to collapse with time. There
2 is no evidence in the record that the gate roads
3 will collapse. The only evidence in the record,
4 based on Mr. Agabeto's (phonetic) opinion -- which
5 is not twenty years old. He has a cover letter
6 that says as of the date that it was issued, it's
7 still his current opinion -- and also the BLM EA
8 that MEIC relies on also states that the gate
9 roads are designed to collapse.

10 The discussion in the CHIA about the
11 possibility of gate roads not collapsing are just
12 to evaluate the worst case scenario. The CHIA
13 concludes in black and white that is not going --
14 it's not likely to happen in the context of a
15 permit design.

16 MR. TWEETEN: Thank you.

17 CHAIRMAN MILES: So that's your
18 contention, that when the application
19 affirmatively demonstrates that, it is the
20 discussion of those roads?

21 MR. DAVID: Exactly. There's no
22 evidence in the record to dispute that the gate
23 roads are designed to collapse with time. They
24 may not have collapsed yet, but at the time the
25 permit was initially filed, long wall mining at

1 the Bull Mountain Mine had only been going on for
2 two years. So you have to understand that when we
3 talk about the potential for migration of gob
4 water outside the permit area, we're talking about
5 maybe at the worst some fifty years after mining
6 stops.

7 So again understanding the gate roads
8 are designed to collapse with time, there is no
9 evidence in the record that by the time the gob
10 pool, the mine pool reaches equilibrium with the
11 resaturated unmined coal, that those gate roads
12 won't have indeed collapsed. There is no evidence
13 in the record to suggest otherwise.

14 Another really important point I want
15 the Board to understand is that in this design
16 review portion of permit review and the material
17 damage determination, that doesn't mean that
18 there's water under the bridge. The material
19 damage determination has two functions in the
20 MSUMRA program: One, is permit review design
21 standard; and two, it is also an operational
22 controls standard.

23 So at any time during operations of the
24 Signal Peak Mine, if the Department concludes
25 there is a potential for a violation of a water

1 quality standard, or for migration of mineralized
2 gob water to go beyond the permit boundary, then
3 the Department can require the mining company to
4 take remedial action to control it; or if indeed
5 that becomes a fact at the time that the mine is
6 seeking another major revision, or if it becomes a
7 fact at the time the mine has a pending permit
8 renewal application, those would be things that
9 the mine would have to address. The CHIA would
10 have to address that.

11 So just because we do the material
12 damage determination with regard to this permit
13 review doesn't mean it's foreclosed forever and
14 that the ship has gone out and there is no control
15 over it. Again, it is an operational standard, as
16 well as a permit review standard, so at any time
17 in the operation of this mine until they quit
18 mining, and after they quit mining, if it becomes
19 apparent that there is going to be a migration of
20 mineralized gob water beyond the permit area, the
21 Department can take action.

22 It is also important -- here again
23 talking about that the CHIA is defective because
24 it doesn't do a full nondeg review -- again, I'd
25 just ask the Board to take judicial notice of the

1 elements of 17.30.708 that MEIC had in their power
2 point presentation, and you look at those
3 elements, and decide for yourself: How is the
4 Department going to go forward and do an
5 authorization to degrade when you, one, don't know
6 if there's a discharge, you don't know how large
7 the discharge is going to be, you don't know what
8 the volume of the discharge is, you don't know
9 what the concentration of the discharge is, and
10 you don't now fast the discharge is moving?

11 There is no evidence in the record of
12 any potential discharge of salty water from this
13 mine at this time, and until it becomes apparent
14 that there will be such a discharge, an
15 authorization to degrade is just inappropriate.
16 You just don't have enough facts to even begin to
17 do one. That's why the Department didn't do it.

18 CHAIRMAN MILES: You have about one
19 minute.

20 MR. DAVID: Again, the basic premise of
21 MEIC's attack is that we didn't follow the
22 standards. The issue -- If you look at all the
23 standards, all the standards that apply to this
24 are stated in the terms of use. The CHIA
25 concluded that even in the worst case scenario, if

1 there's a migration, that it would not be
2 detrimental or harmful to a beneficial or
3 anticipated use.

4 Those are the standards. They're the
5 only standards that apply here. And absent an
6 actual migration of groundwater across the permit
7 boundary, the Department could do no more than it
8 did in this CHIA because, again, there is no
9 evidence that any use would be impacted, damaged,
10 harmed, or there would be measurable effect in any
11 way under the facts of this case.

12 CHAIRMAN MILES: Thank you.

13 MR. DAVID: Any questions?

14 MS. SHROPSHIRE: I did, and I appreciate
15 your comment about the particle tracking in terms
16 of containing the flow. What was the extent of
17 the particle tracking model carried out? How many
18 years?

19 MR. DAVID: Fifty years.

20 MS. SHROPSHIRE: So it stopped at fifty
21 years?

22 MR. DAVID: It stopped at fifty. I
23 believe that the fifty year horizon was determined
24 to be just a limit to the validity of the
25 background data that was used for the model. Also

1 the fifty year horizon is commensurate with the --

2 The particle tracking model, if you look
3 at it really carefully, from about Page 24, it
4 explains this, that there is kind of two phases to
5 it. One phase talks about recharge the coal
6 aquifer; and the next phase actually talks about
7 the particle tracking function. And so actually I
8 believe it says that the recharge of the aquifers
9 would reach equilibrium at about fifty years. I
10 think that's another buttress for the fifty year
11 time period.

12 And also the facts in the record are
13 that there is no other model available that would
14 be able to determine the geochemistry of the mine
15 pool after fifty years with attenuation, dilution.
16 Martin VanOort also in his affidavit said there's
17 nothing available that would give you a reasonable
18 ability to model this. So what we've got is the
19 best that we could provide.

20 CHAIRMAN MILES: Thank you. That's
21 pretty much enough of the ten minutes. Signal
22 Peak.

23 MS. BERG: I will be very, very brief.
24 The first thing I want to just highlight is --
25 obviously the lawyers on the Board know this --

1 but this is just an opportunity for us to try to
2 highlight things from our brief. I hope that all
3 of you will take the opportunity to read the
4 briefs. They're very extensive, they're very
5 thorough, and I think that they will do a much
6 better job than we've been able to do kind of on
7 the fly in a very short period of time. But we
8 appreciate you letting us make oral arguments to
9 you and highlight points in our brief.

10 I also want to just touch briefly on
11 this kind of the affirmative demonstration that
12 the mine is designed to prevent material damage.
13 The particle tracking model, that's the best that
14 there is available. The fifty years is because
15 that's as far as out as they can go in terms of --
16 that's my understanding from the CHIA and the
17 affidavits, that that's what's available, that's a
18 technology that's available to be used -- that the
19 particle tracking model, using the design of our
20 mine, shows no migration.

21 I would say that's an affirmative
22 demonstration that the mine has been designed to
23 prevent material damage, is that the particle
24 tracking -- which my understanding again is also
25 conservative, because it just tracks the

1 particles. It doesn't take into consideration
2 absorption, or other things that may slow things
3 down -- that it says it won't go beyond the
4 boundary of the mine. I would say that that is
5 proof positive that the mine is designed to
6 prevent this material damage on and beyond the
7 boundary, and as such I would respectfully but
8 vehemently disagree with their assertions
9 otherwise.

10 I think that that's exactly what the
11 application showed. We've talked quite a bit
12 about the gate roads collapsing, and certainly
13 that is a design feature, but I think the proof
14 positive that the mine was designed to prevent the
15 material damage is the fact that the tracking
16 model shows that the particles don't leave the
17 mine boundary. I think that's proof positive of
18 that.

19 I don't have anything further unless the
20 Board has questions for me, other than to thank
21 you for your time today.

22 CHAIRMAN MILES: Thank you. Are there
23 any further questions?

24 MR. O'CONNOR: I do have one quick
25 question. I gather there's some springs on the

1 property, and obviously, the flow of these
2 springs, which now I would assume are Class II
3 water, how do you keep those springs flowing, or
4 how does the mining affect these springs? And
5 obviously it would, especially --

6 MS. BERG: I'm not sure that I'm the
7 right person to ask that question. My
8 understanding is that within the boundaries of the
9 mine -- and Dana, jump in if I'm incorrect -- and
10 surrounding, there is naturally occurring both
11 Class II and Class III water, and that the way
12 that the springs -- the springs are going to be
13 monitored, like 1,005 different monitoring
14 stations that are currently place or to be in
15 place. But I will let him take over because I
16 think he can answer your question better.

17 MR. DAVID: If you look at the CHIA, the
18 CHIA specifically describes -- I can't remember
19 the name of it, but there is at least one spring
20 that was actually in the active mining area that
21 was subject to some subsidence, and I think for a
22 couple two or three years the spring went away,
23 and then after the subsidence was complete, it
24 came back. And I don't believe there was any data
25 that the quality of the spring has changed.

1 I would say that's consistent with the
2 findings in the CHIA and the probable hydrologic
3 consequences document, that springs in the mine
4 area are basically being fed from the alluvium in
5 the upper aquifer, the overburden aquifers, which
6 the CHIA is quite plain that will not be impacted
7 by mining as far as water quality goes. I did not
8 answer your question?

9 MR. O'CONNOR: No. I would have to be
10 much more familiar with the terrain and stuff like
11 that, but springs sometimes come from very deep,
12 and sometimes come from surface, almost surface
13 water. If it came out of the coal seam, I would
14 assume you would definitely affect the spring, but
15 I don't know that --

16 MR. DAVID: It depends on where -- If
17 the spring comes out of the coal seam, it would
18 come out of the aquifer outcrop.

19 MR. O'CONNOR: If it came out of the
20 aquifer, that's right. I guess to refine my
21 question a bit. Do you have enough information on
22 the springs that are present in the mining area
23 that you can determine whether they're coming out
24 of the aquifer, or whether they're coming out of
25 basically shallow surface waters?

1 MR. DAVID: I would have to go back to
2 the PHC and read it in detail. So that's a
3 document that is available to you, but my
4 recollection -- I would just return you to the
5 findings in the CHIA that I believe that the
6 springs are generally fed by water horizons that
7 are rather close, and to the extent that those
8 water horizons would be aquifers that are in the
9 overburden above the coal, that the CHIA states
10 that those overburden aquifers are not going to be
11 adversely impacted by mining. There is minor
12 impact at the time of subsidence, but usually the
13 subsidence fractures heal and the springs in the
14 aquifers return. That's the experience so far.

15 CHAIRMAN MILES: Mr. Hernandez.

16 MR. HERNANDEZ: Could I just offer a
17 rejoinder? The CHIA, in the attachments to the
18 CHIA, which has tables in it, it has a table -- I
19 don't have the exact number -- but it lists all of
20 the springs that are used in the mining area. It
21 includes springs that are sourced in the Mammoth
22 Coal Aquifer, both springs and wells.

23 One important point on this is we
24 haven't addressed in this argument, but in our
25 briefs, they talk about, well, if the springs are

1 undermined or mined through, or if there are
2 surface springs and undermining cause them to go
3 dry, generally if somebody is using them, we might
4 be able to mitigate that, and they rely on the
5 deep aquifer, this channel sandstone, to get
6 water.

7 But in the probable hydrologic
8 consequences analysis, which is what Signal Peak
9 Energy did, which is in the record -- and I think
10 you all have it -- they say they're not certain
11 about the extent of this deep aquifer, and they're
12 not certainly there is enough water there to
13 replace all the uses of groundwater that might go
14 dry, specifically non-uses for wildlife and
15 plants, like springs that just flow into the
16 ground and create a perennial or intermittent
17 stream. They're not sure that that can be mitigated.
18 And that's a problem. We've addressed it in the
19 briefs.

20 CHAIRMAN MILES: Any response?

21 MR. DAVID: Unfortunately, yes. I would
22 just direct the Board to the Bureau of Land
23 Management EA that the MEIC relies on, and that EA
24 specifically states that replacement wells will
25 not be a problem because of the prolific water

1 resource and the deep aquifer. The deep
2 underburden aquifer. Black and white in the EA.

3 MS. BERG: My response to that is the
4 Board needs to remember what is taking place
5 inside the boundary of the mine and outside the
6 boundary of the mine is obviously your standard of
7 review for what's going on inside the boundary of
8 the mine is very different in terms of impacts
9 than what's going on outside of the boundary of
10 the mine.

11 MR. HERNANDEZ: I could rebut both of
12 those, but it is collateral at this point. Thank
13 you for your time.

14 CHAIRMAN MILES: Thank you all very
15 much. We appreciate all the time and preparation,
16 and again I apologize that we had to wait so late
17 in the day. I really appreciate how patient
18 everyone was, and with that, we'll close the
19 hearing.

20 MR. TWEETEN: Madam Chair, I just looked
21 at Section 82-4-231, which is the statute that
22 deals with the permitting for this mine and other
23 kinds of mines, and I'm concerned about declaring
24 the hearing closed because of the provision of
25 Subsection 9 of that statute.

1 CHAIRMAN MILES: Would you repeat that
2 number, please?

3 MR. TWEETEN: It's 82-4-231. And in
4 Subsection 9, it says, "The Board shall within 20
5 days of the hearing notify the person who
6 requested the hearing by certified mail, and all
7 other persons by regular mail, of the findings and
8 decisions," which implies to me that once we
9 declare the hearing closed, we then have 20 days
10 to finish the case, which I think --

11 CHAIRMAN MILES: I think what we're
12 doing is closing this oral argument.

13 MR. TWEETEN: Can we declare the hearing
14 recessed as opposed to being closed, and that way
15 I think we clarify for the record that this does
16 not trigger the provisions of Subsection (9).

17 CHAIRMAN MILES: We will be waiting to
18 get --

19 MR. TWEETEN: The parties will be
20 submitting further --

21 CHAIRMAN MILES: -- submitting further
22 information. Sure. The hearing is recessed. The
23 Board's action on this is in recess.

24 HEARING OFFICER REED: If I might simply
25 remind the parties that they're to submit their

1 proposed findings of fact and conclusions of law,
2 separately stated, with the conditions that obtain
3 in the original order of July 16th, 2015. There
4 are no other legal issues that require briefing at
5 this time. I would ask the parties submit the
6 matters both in paper format as per usual, as well
7 as electronic format in PDF/A to the Board and to
8 myself.

9 MR. TWEETEN: Again, I hate to prolong
10 this matter, but in light of the representations
11 of all of the parties that there are no genuine
12 issues of material fact here, would it be out of
13 line to ask the parties to collaborate on an
14 agreed statement of facts, followed by their
15 conclusions of law, as opposed to having each
16 party submit separate findings of fact that may
17 not mesh with each other, and may simply prolong
18 and underscore the question of whether there are
19 actually genuine issues of material fact or not.

20 I think if this is in fact a situation
21 where there are no disputes, the parties should be
22 able to get together on an agreed statements of
23 facts fairly simply.

24 CHAIRMAN MILES: Ben.

25 HEARING OFFICER REED: I have two

1 reservations on that issue, Madam Chair, Mr.
2 Tweeten. One is that the parties have indicated
3 -- and I think this is correct -- that developing
4 their own findings of fact in the timeline set out
5 in the original order is going to still put them
6 up against the wall scheduling wise. And while I
7 don't necessarily believe that there are
8 significant disputes about what the record should
9 show, what the record before the Board should
10 show, as we've seen today, each of the parties is
11 relying on separate hooks, as it were, upon which
12 to hang their arguments.

13 So the other issue is that I'm not sure
14 that the parties would be able -- the parties have
15 indicated that they're going to be relatively
16 unable to do that in the time within which they've
17 been allotted to present findings and conclusions.

18 MR. TWEETEN: Let me just say then that
19 for the parties to come before the Board and say
20 that "the record is what it is" basically is not
21 really satisfactory for purposes of summary
22 judgment. All that says is that the factual
23 record is closed. It doesn't exclude the
24 possibility that the parties have differing
25 contentions as to what the facts actually are.

1 So I want to emphasize from my own
2 perspective that the Board, according to the law
3 as I understand it, has an affirmative duty to
4 review the record, and assure that there are no
5 genuine issues of material fact; and the fact that
6 the parties stipulate that there are no genuine
7 issues of material fact is not binding on us. We
8 have an independent obligation to ensure that
9 there are no genuine issues of material fact.

10 So I'm just cautioning the parties that
11 if we get three different set of proposed findings
12 of fact that are not congruent with each other
13 with respect to all of the material facts, my
14 inclination is going to be to vote to deny summary
15 judgment on both motions, because I'm not sure and
16 convinced under those circumstances that there are
17 no genuine issues of material fact.

18 So I would caution you then to be
19 careful in how you construct your proposed
20 findings, and if you expect summary judgment, at
21 least my vote for summary judgment, I think it's
22 incumbent on you to make sure that everybody
23 agrees as to what the historical facts are here.

24 MR. DAVID: Madam Chair, Mr. Tweeten, if
25 I may. I understand your argument, and you're

1 correct, but in this case MEIC has not put on any
2 evidence. They may have attempted to characterize
3 the facts in the record, and to the extent that
4 their characterization of the facts is inaccurate,
5 well, that's something for the Board to deal with.

6 MR. TWEETEN: But Mr. David, that
7 doesn't address my problem. I don't care who put
8 the evidence in. I don't care whether it was
9 sponsored by them, or you, or whether it is just
10 the administrative record before the Department.
11 That's not my concern.

12 My concern is that the parties not come
13 before the Board and present differing
14 interpretations of what the historical facts are,
15 because in order to grant summary judgment
16 pursuant to Rule 56, we as a Board have to find
17 that there are no genuine issues of material fact.
18 And if, as I say, the parties come before the
19 Board with independently stated findings, proposed
20 findings of fact that are not consistent with each
21 other, I will argue and assert that the Board has
22 no choice then but to send the parties back to
23 conduct a hearing, and to deny the summary
24 judgment motion.

25 So I would just urge you to be cautious

1 in how you direct your findings with that
2 particular provision of Rule 56 in mind.

3 MR. HERNANDEZ: May I offer a thought
4 that might help? I understand your concern. I
5 don't think that we've been terribly helpful by
6 saying, "Look at the record." I understand that.
7 I think I'm concerned that if we present findings
8 of fact and conclusions of law that aren't
9 identical, that requiring a hearing still wouldn't
10 be necessary, because if we're characterizing the
11 facts differently, it's not that we're going to
12 put on different evidence. We would just come
13 back here for the hearing and say what's in the
14 record.

15 And as far as that goes, the Board is
16 well suited to compare our proposed findings of
17 fact and conclusions of law with the record to see
18 whether or not they're accurate, and to the degree
19 that we are mischaracterizing that record, that's
20 our fault, and we should be sanctioned accordingly
21 frankly. Not sanctioned, but you know, we --

22 MR. TWEETEN: Mr. Hernandez, that's
23 fine, but the provision of Rule 56 requires the
24 moving party to demonstrate that there are no
25 general issues of material fact. It doesn't

1 require the tribunal to do that. It's the
2 obligation of the moving party. And the Supreme
3 Court has emphasized that in more than one case,
4 that if the moving party doesn't carry that
5 burden, the moving party doesn't get summary
6 judgment.

7 So that's why I say you can put in
8 whatever proposed findings of fact you want, but
9 I, when I see them, will be looking at the three
10 sets and comparing them with each other, and if
11 I'm not convinced by your submissions that there
12 are no genuine issues of material fact, I'm not
13 going to vote to grant either one of the motions,
14 and I'm going to suggest to my colleagues on the
15 Board that they not do so either.

16 MS. BERG: Mr. Tweeten, if I may, too.
17 I think Mr. Reed brought this up at the beginning
18 of the hearing, that you have three options: You
19 can grant the motion of MEIC, you can grant SPE's
20 motion, or you can deny both of them. DEQ did not
21 join in our cross motion for summary judgment, so
22 there is a party that is a non-moving party. So
23 certainly that's an available answer for the
24 Board, and I think that all three parties
25 understand that.

1 MR. TWEETEN: Sure, and technically we
2 can grant summary judgment in favor of a
3 non-moving party if we decide to do that. But the
4 threshold is still being convinced that there are
5 no genuine issues of material fact, so I would
6 just caution you all that I'm sceptical about
7 whether that standard has been met at this pint,
8 and I'm going to be looking at your proposed
9 findings carefully to make sure that we're not
10 making assumptions of fact, or being asked to sort
11 between different descriptions of the same event
12 or same situation, and pick which one seems to us
13 the most likely, because if that's the situation,
14 then none of you are entitled to summary judgment
15 as far as I'm concerned.

16 CHAIRMAN MILES: Thank you for your
17 comments. Thank you. So at that point, we will
18 consider this in recess until we receive the
19 proposed findings of fact and conclusions of law
20 and meet in October. Everyone, please be advised
21 that of course the ex parte communication rule is
22 still in effect, and that includes the Department
23 of course, as they're a party, so we can't call
24 the Department to ask for clarification or we
25 didn't understand something. So that line of

1 communication is closed.

2 In terms of this morning's meeting, if
3 anyone remembers that, with Otter Creek, and the
4 questions that we might have for the Department to
5 request in terms of an educational and more
6 background session, would you be kind enough to
7 perhaps just send -- if you have specific things
8 you want to know more about, would you be kind
9 enough to send it to Joyce, and she'll get it to
10 me, and I'll just put them all together, so the
11 Department is not getting seven different
12 messages. We'll just trying to get all of our
13 questions in one document. And if you can do that
14 within the next week, that would be appreciated.
15 I think we all probably need a little time to take
16 a break, and think about it, and get those
17 questions. So I appreciate that, and I'll get
18 that to the Department as soon as possible.

19 I think the Department intends also to
20 draw up a list of issues that they heard, so we
21 may be hearing from them even before they hear
22 from us about, "These are the things we heard the
23 Board probably wanted more information on."

24 And with that, I want to thank
25 everybody, thank the Board members, especially all

1 the new Board members for your perseverance. And
2 this is the longest Board meeting I've been in in
3 two years, so I appreciate everybody's
4 participation. And thank you. And I do need a
5 motion to adjourn.

6 MR. TWEETEN: So moved.

7 MS. REINHART-LEVINE: Second.

8 CHAIRMAN MILES: All in favor, please
9 say aye.

10 (Response)

11 CHAIRMAN MILES: The meeting is
12 adjourned. Thank you very much.

13 (The proceedings were concluded
14 at 4:18 p.m.)

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