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1 BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2 OF THE STATE OF MONTANA

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

8
9 TRANSCRIPT OF PROCEEDINGS

10
11 Heard at Room 111 of the Metcalf Building
12 1520 East Sixth Avenue
13 Helena, Montana
14 October 16, 2015
15 11:35 a.m.

16
17 BEFORE CHAIRMAN JOAN MILES,
18 BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,
19 ROY SAYLES O'CONNOR,
20 MICHELE REINHART-LEVINE; and
21 HEARINGS EXAMINER BEN REED.

22
23 PREPARED BY: LAURIE CRUTCHER, RPR
24 COURT REPORTER, NOTARY PUBLIC
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1 WHEREUPON, the following proceedings were
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2 had:

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4 (MS. CANTY NOT PRESENT)

5 CHAIRMAN MILES: We'll reconvene the
6 meeting. And we were taking final action on the
7 matter of the notice of appeal for hearing by
8 Montana Environmental Information Center regarding
9 DEQ's approval of coal mine permit issued to
10 Signal Peak Energy.

11 As you all recall, we had testimony in
12 July regarding the motions for summary judgment,
13 and we have now been provided with several
14 proposed findings of fact and conclusions of law,
15 and presumably our role is to adopt one of those.

16 I'm going turn it over to Ben to really
17 talk about what kind of options we have for
18 action, time frames that we're required to act
19 under; and also if you could kind of give us some
20 guidance and side boards on what kind of a
21 discussion we can have today regarding this, I'd
22 appreciate that.

23 MR. REED: Thank you, Madam Chair. The
24 proposed findings of fact and conclusions of law
25 have been submitted. Clearly they're very

0004 1 lengthy.

2 If I can begin with your last question
3 first, Madam Chair. As far as the side boards to
4 the issue, the primary issue that is going to be
5 decided today, or that the Board may choose to
6 decide today, is whether or not there is
7 sufficient material within these proposed findings
8 of fact and the conclusions of law to allow the
9 Board to make a decision on them without any
10 further hearing; and whether it is possible to
11 rule in favor of either the Appellant MEIC or in
12 favor of the Department of Environmental Quality
13 today without a hearing, without an elicitation of
14 further facts.

15 CHAIRMAN MILES: Ben, so a further
16 hearing, how would that be focused?

17 MR. REED: That's an interesting
18 question, Madam Chair. It would essentially I
19 think very much follow the pattern of the hearing
20 that took place previously, except that the issues
21 that were presented during the hearing would be
22 essentially questions of fact.

23 I think that probably what would happen
24 would be that the experts for either side would
25 come before the Board and explain -- for example,

0005 1 just to pick an issue that seems to be a
2 significant one -- why those experts regard the
3 CHIA as sufficient or insufficient in terms of
4 this coal mine permit. The hearing would of
5 course be guided by both the parties -- or would
6 be guided by the Board, and what the Board felt it
7 needed to have presented to it.

8 Today's discussion should be focused on
9 the question of whether the Board believes it has
10 enough information contained within the prior
11 briefs supporting the various motions for summary
12 judgment, and if the Board believes that it does,

13 then the Board can rule in favor of either MEIC or
14 the Department of Environmental Quality.

15 If the Board feels that there are issues
16 within the briefs and within these proposed
17 findings of fact and conclusions of law that
18 require further exposition, or illumination, or
19 explanation, then the Board can request further
20 briefing by the parties; the Board can simply rule
21 in favor of one party or the other; the Board can
22 request further briefing from the parties on
23 particular issues; or the Board can simply say
24 that it does not feel that the matter has been
25 sufficiently set out that there is enough

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1 information that it can make a ruling based solely
2 on the information that has been presented to it
3 thus far.

4 CHAIRMAN MILES: Ben, a couple of
5 further questions. So if we were to rule in favor
6 of one of the parties, does that mean also that we
7 would adopt the findings of fact and conclusions
8 of law as presented by that party?

9 MR. REED: Broadly speaking, yes, Madam
10 Chair. The Board would be adopting the findings
11 of fact in whole or in part of that party. The
12 Board would need to respond with specificity to
13 each of the findings of fact proposed by the other
14 party, explaining why it had not taken on those
15 findings of fact. If the Board does make a
16 decision, the Board has ninety days, as set out in
17 statute, to have a final order put together on
18 that decision, with an extra thirty days if there
19 is good cause required.

20 CHAIRMAN MILES: And that ninety day
21 time period has not started running yet because we
22 have not determined that we have all of the
23 information we need; is that what you explained to
24 me earlier?

25 MR. REED: The way that the statute

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1 reads is that as soon as the -- let me actually
2 find the statute.

3 MR. TWEETEN: It's 2-4-623.

4 MR. REED: Thank you, Mr. Tweeten. The
5 final decision must be issued within ninety days
6 after a contested case is considered to be
7 submitted for a final decision. So at this point,
8 the Board has not indicated whether it considers
9 the matter submitted for a final decision, or
10 whether further briefing is required, or whether
11 further hearings are required.

12 MR. TWEETEN: Madam Chair. As I recall
13 the last meeting, the Board did not declare the
14 hearing concluded. The Board recessed rather than
15 concluded the hearing specifically because of this
16 question of when the ninety day time period was
17 going to run. So I think as things stand now, we
18 have not triggered the running of that because we
19 have not finally determined that the hearing is
20 concluded and the matter is submitted.

21 So if we are to take action today, I
22 think the first thing is that as part of that we
23 have to declare the hearing concluded, and then

24 decide what action we want to take, and then from
25 that point we would have ninety days.

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1 CHAIRMAN MILES: But we can undertake
2 discussion prior to doing that?

3 MR. TWEETEN: I think we certainly can,
4 yes.

5 CHAIRMAN MILES: Then my last question
6 is: Is discussion now solely among the Board
7 members? Do we have opportunities to ask
8 questions of you or -- obviously we can ask them
9 of you -- but any other parties?

10 MR. REED: Madam Chair, as Mr. Tweeten
11 points out, because the hearing was only recessed
12 and parties are in fact present, I believe it
13 would be appropriate, it is absolutely appropriate
14 for the Board to ask the parties questions, and to
15 entertain discussion. Then of course I'm always
16 here, too.

17 MR. TWEETEN: Just a question or point
18 of clarification maybe. If we were to decide the
19 matter in favor of one party or another of the
20 moving parties for summary judgment, then would
21 Ben undertake the task of creating our findings of
22 fact and conclusions of law? So it would be your
23 responsibility to wade through 300 findings of
24 fact from the various parties, and figure out
25 which ones we would need to adopt in order to

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1 support a decision that we decided to make?

2 MR. REED: Madam Chair, Mr. Tweeten, it
3 would be my pleasure to do so.

4 MR. TWEETEN: You're a strange man, Mr.
5 Reed.

6 MR. REED: All levity aside, there are I
7 think two chores for whoever this gets dropped on,
8 which is I believe likely to be me. One is both
9 to go through the findings of fact, and see which
10 need to be adopted; and the second is that the
11 statute requires that to the degree that a party
12 has submitted proposed findings of fact, and the
13 Board does not follow those findings of fact, the
14 Board needs to explain why either it has not
15 followed those findings of fact, whether the Board
16 finds those not to be persuasive, or whether the
17 Board finds them not to be as useful in guiding
18 its decision, or whatever the Board's decision may
19 be.

20 CHAIRMAN MILES: Is that in respect to
21 all of the findings of facts from all parties that
22 we don't include? And you said something about
23 doing that individually.

24 MR. REED: The way that the statute
25 reads, Madam Chair, I believe it is that if a

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1 party is ruled against, and it has submitted
2 findings of fact, each and every one of those
3 findings of fact needs to be addressed.

4 MR. TWEETEN: But, Madam Chair, it is
5 permissible to group them together, so that if you
6 have two dozen proposed findings that the Board
7 deems to be irrelevant to its ultimate decision,
8 you can just say "Findings of fact one, four, six,

9 seven, and so on, are not accepted by the Board
10 because they're deemed to be irrelevant," or
11 whatever. So you can group the ones that are
12 ruled upon similarly together, so that you don't
13 have to have a 500 page document.

14 CHAIRMAN MILES: Does anyone else have
15 procedural questions for Ben before we open
16 discussion?

17 (No response)

18 CHAIRMAN MILES: Let's open discussion.
19 Anyone want to start? I think we can just start
20 to get input from some people on your review of
21 these proposals.

22 MR. TWEETEN: Madam Chair, if I might.
23 One question that's raised by MEIC regarding the
24 Department's position has to do with the
25 application of what I call the four corners rule

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1 to the CHIA, in other words, whether the
2 Department can buttress its factual arguments and
3 the factual materials on which it wants to rely to
4 support the CHIA with additional facts and
5 arguments that weren't considered at the time that
6 the CHIA was adopted.

7 And I'm persuaded that lawfully that's
8 not permissible, that the matter that we consider
9 is confined to the administrative record, and it
10 is not appropriate for the Department to go
11 outside the factual record at least that was in
12 front of the agency, and now at this stage during
13 the contested case argue additional facts or
14 additional considerations that weren't considered
15 at that time.

16 And I rely for that on Section 2-4-623
17 Sub (2) which says that, "Findings of fact must be
18 based exclusively on the evidence and on matters
19 officially noticed." I think by the evidence, it
20 means the evidence that is in front of the agency.
21 The administrative record that's in front of us,
22 because of the cross motions for summary judgment
23 that have been filed, but there is no other
24 evidence, and that's as I understand it the reason
25 why the parties take the position that there is no

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1 genuine issue of material fact.

2 But bringing additional evidence outside
3 that record, or attempting to bring additional
4 evidence or additional spins on the evidence in
5 front of the Board that are not part of the
6 administrative record I don't think is
7 permissible.

8 So I would recommend that the Board
9 confine its consideration, for purposes of the
10 findings of fact, to those matters that were
11 officially part of the record in front of the
12 agency when it made its decision that's before us
13 on appeal.

14 CHAIRMAN MILES: Thank you. And are you
15 able to identify which particular findings
16 presented by the Department involve additional
17 material?

18 MR. TWEETEN: Madam Chair, I haven't
19 tracked them down number by number, but they're

20 described in the MEIC findings of fact and
21 conclusions of law. So I think Ben could root
22 those out based on the map that's provided in the
23 MEIC findings and conclusions.

24 CHAIRMAN MILES: Any further discussion?
25 MR. TWEETEN: I guess I'll move to

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1 another point then. At the July meeting I was
2 among those who was concerned about whether the
3 MEIC as a moving party, and then the company as
4 cross-moving party, had sufficiently excluded the
5 existence of genuine issues of material fact,
6 because under the Rules of Civil Procedure,
7 summary judgment can't be used as a method of
8 sorting out disputes as to what the facts are.

9 The facts have to be undisputed for a
10 summary judgment to be rendered, and that's the
11 choice we have, is do we make summary judgment
12 now, or do we remand it for an evidentiary
13 hearing, at which point it would be appropriate
14 for the Department to ask the Hearing Examiner
15 what evidence would be permissible and so forth.

16 And so the point is that we have to
17 decide whether these motions, cross motions are
18 properly supported initially, before we can get on
19 to the question of what we want to do about the
20 merits.

21 I guess after reflecting on the parties'
22 proposed findings and conclusions, and upon my
23 conviction that it is only appropriate to consider
24 those matters that are part of the administrative
25 record, and the further point that nobody seems to

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1 be interested in challenging the factual bases
2 that are part of the CHIA or part of the other
3 fact finding documents that are in the
4 administrative record, it seems to me that it is
5 probably appropriate to go ahead and consider on
6 summary judgment whether the permit was properly
7 issued or not, taking into consideration and
8 limiting our consideration to those particular
9 allegations of error that have been made by the
10 MEIC in their appeal from the Department's
11 decision.

12 So I would throw that out for the
13 Board's consideration. I don't know whether any
14 of you have thought about that or have any
15 differing views on that. As long as the parties
16 are prepared to acknowledge the accuracy of what's
17 in the administrative record, and nobody wants to
18 challenge the factual accuracy of anything that's
19 in the record, I think that summary judgment is
20 probably appropriate.

21 MR. O'CONNOR: Madam Chair, a couple of
22 comments. I'm not so strong on the legal aspects,
23 but I have a real issue with some of the facts and
24 timelines, such as fifty years, after fifty years
25 nobody cares. Well, some of us here are over

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1 fifty years old, and we are living with the
2 problems that occurred fifty years ago or more.
3 So we should care about fifty years, and what's
4 happening with the available water for the

5 necessary uses that landowners adjacent to it
6 have, into the streams and tributaries they flow
7 into.

8 The other real issue I have is it was
9 probably outlined in both, but the issue of
10 mitigation on a large coal mine, and there's
11 springs on the property, there is headwaters to a
12 few creeks and things like that, and the amount of
13 available water to use to mitigate the losses that
14 would occur over a 6,000 or 7,000 acre parcel
15 really concern me, and I don't see any answers
16 there. And I'm not sure if that's a legal issue
17 or not. But putting a well down and saying,
18 "Well, we'll mitigate," with what, and where are
19 you going to get it? I don't have those answers;
20 at least in the readings, I did not find those
21 answers.

22 MR. DAVID: Madam Chair, DEQ would like
23 to be heard on the issue about mitigation. I
24 think DEQ has some information for the Board that
25 might assist it in its deliberations.

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1 MR. HERNANDEZ: May I object?

2 CHAIRMAN MILES: Yes.

3 MR. HERNANDEZ: It's my understanding
4 that we're not presenting evidence, but if the
5 Board should have questions on any of these
6 issues, it is the Board's prerogative to ask the
7 parties to answer questions, rather than the
8 parties having the authority to just present
9 argument where they can deem appropriate.

10 CHAIRMAN MILES: I think that's correct.
11 I guess the question is do we --

12 MR. O'CONNOR: I was putting this out to
13 the Board really. I was not asking the question.
14 I was clarifying. These are real problems I have
15 with the position of the DEQ, and I guess Signal
16 Peak.

17 MR. TWEETEN: Madam Chair, I share the
18 concern about the fifty year time horizon that the
19 Department apparently employed in deciding on the
20 likelihood of adverse impacts to water outside of
21 the mine area. I don't see anything in the
22 statutes or regulations that refers to the
23 creation of a time horizon, or I didn't see
24 anything in the findings and conclusions to
25 suggest that the fifty year time horizon was for

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1 some reason more appropriate than 100 years, or
2 ten years, or 200 years.

3 Why the model was created with this
4 fifty year time horizon in it is something, as far
5 as I can tell from reading the parties' findings,
6 is unexplained. So I think there is a legal error
7 in adopting a timeline where one doesn't exist in
8 the statutes and regulations. There a question,
9 even if it were appropriate to adopt the timeline,
10 whether the evidence in the record supports the
11 appropriateness of this one as opposed to some
12 other one.

13 For all the record shows, this was an
14 arbitrary figure that was picked by the
15 Department, as far as I can tell, without much

16 explanation as to why it is the appropriate
17 number. So that is I think an error that is
18 significant in terms of the final outcome of the
19 Department's considerations, because apparently
20 from all that appears in the record, there was no
21 mechanism in place for the Department to determine
22 whether water quality outside of the mine area
23 might potentially be affected 75 or 100 years down
24 the road.

25 Then they have calculated how far the
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1 polluted water is likely to travel within this
2 fifty year time horizon, but at that point their
3 analysis seems to stop, and I don't find a legal
4 basis for that in either the statute or
5 regulations.

6 So I think on that basis alone, I would
7 support remanding this matter to the Department
8 for further proceedings, in which the parties can
9 fill that out, and the Department could explain
10 its reasoning, and the MEIC can introduce its
11 thoughts about whether what the Department did is
12 right or wrong, but as it stands right now, I
13 don't think the evidence is sufficient to support
14 what the Department did.

15 CHAIRMAN MILES: Are you saying then
16 that we need to discuss -- I think we need to wait
17 for you for a minute, and if we'd like to hear
18 from the Department, we will, and we will also
19 call other parties.

20 MR. DAVID: I just wanted to clarify why
21 I'm standing here, is that Board Member Sayles
22 O'Connor indicated that he was concerned about the
23 sufficiency of replacement water. If that issue
24 is going to be an issue the Board is going to
25 determine, use as its determination, the

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1 Department has procedural information that the
2 Board needs to consider before it goes down that
3 road so it doesn't commit an error.

4 So the Department would like to be
5 heard. Of course, MEIC can then respond to the
6 Department's concerns, but I'll just leave that
7 for you guys to ponder.

8 CHAIRMAN MILES: Thank you.

9 MR. TWEETEN: I think we can defer on
10 that for now because that's not the topic we're
11 talking about.

12 CHAIRMAN MILES: Your question about
13 remanding for further proceedings about the fifty
14 years, wouldn't that introduce new evidence that
15 we have -- I think I concur with what you have
16 said, that it has to be what's in the record.

17 MR. TWEETEN: There might be something
18 in the record that hasn't been focused on in the
19 proposed findings and conclusions. And I for one
20 have to confess I haven't sifted through the
21 entire administrative record. I haven't looked at
22 much of it, any of it, other than the CHIA itself,
23 and so I'm really not in a position to know what's
24 in the administrative record.

25 If there's some justification on that

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1 that the parties haven't argued yet, then there
2 would be an opportunity to make a record of that,
3 either through pointing us to the place in the
4 record where that information is; MEIC obviously
5 would, I'm guessing, dispute whatever the
6 Department says in terms of a time horizon.

7 So that's a point that hasn't been -- It
8 has been argued that it's deficient because of the
9 fifty year time horizon, but I'm not convinced
10 that that issue has been considered thoroughly
11 enough by us. It may be that rather than remand
12 it for hearing, we just remand it to the
13 Department and tell them to fix it; tell them as a
14 matter of law that the Board finds that they have
15 to consider this without a time horizon, unless it
16 is completely infeasible to do that, or make a
17 record as least as to why fifty years is an
18 appropriate time horizon or whether some other
19 would be more appropriate.

20 MS. REINHART-LEVINE: Madam Chair, Mr.
21 Tweeten. Are you proposing that we basically hold
22 off on making any decision on summary judgment one
23 way or the other, and that we are basically asking
24 for additional information at this time from the
25 parties prior to making a decision in summary

0021 judgment?

1 MR. TWEETEN: Madam Chair. I guess I'm
2 not suggesting the latter. What I'm suggesting is
3 that we should grant summary judgment to MEIC at
4 least on that issue -- and maybe other members of
5 the Board have other issues that they want to
6 bring up and discuss as well -- but at least on
7 that issue, I think what the Department has done
8 is deficient, or at least not supported by statute
9 or rule; and that at a minimum, I would at the
10 appropriate time move the Board to grant summary
11 judgment to MEIC on that limited issue, and remand
12 it to the Department for further work on the
13 record of the decision in order to fill in that
14 gap, and maybe that requires recalibrating the
15 model in some way to fix that.

16 MS. REINHART-LEVINE: Madam Chair, a
17 question for Mr. Reed. If we grant summary
18 judgment to one party or the other, my
19 understanding is one of the parties will then
20 probably appeal to District Court. When are we
21 able to remand items to the Department? Is that
22 an option available to us? If so, can we do that?

23 MR. REED: I don't believe the matter
24 can simply be remanded to the Department. I

0022 1 believe that if summary judgment is granted for
2 MEIC, then the permit returns -- then the permit
3 is -- I'm not sure whether the permit is void, or
4 if the permit at that point will be reviewed by,
5 will be re-reviewed by DEQ, which can then
6 establish the factual basis that would respond to
7 Mr. Tweeten's concerns. I honestly don't know the
8 answer.

9 MR. TWEETEN: Perhaps I can clarify. My
10 intention would be to vacate the permit, and
11 remand the matter to DEQ for further proceedings

12 on a permit application consistent with our
13 decision, which I think is permissible at this
14 stage, and that tees it up for District Court
15 review in the event that the Department wants to
16 stand on the existing permit with the existing
17 supporting information that's in the record, and
18 appeal our decision to District Court, then the
19 Department I think could do that, couldn't it?

20 MR. REED: I believe so, yes.

21 MR. TWEETEN: And the other option the
22 Department would have to have at that point would
23 be to accept the remand, and go back and buttress
24 the decision record with additional information
25 responding to that particular defect, and then

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1 based on that information, either grant or deny
2 the permit. Either way I suspect the matter will
3 come back to us for our consideration.

4 But I'm convinced, and there are lots
5 and lots of arguments flying back and forth about
6 what may or may not be wrong with this permit.
7 All I'm saying is that I think this one is well
8 taken, and that by itself it is grounds for
9 vacating the permit, and sending it back to DEQ
10 for more work.

11 CHAIRMAN MILES: Thank you. Other
12 comments? I guess I would just say -- I agree.
13 From my review of the various proposals we were
14 given -- and I will admit to a lot of confusion,
15 because I kept going back to what you were talking
16 about, that the parties had agreed there was not a
17 dispute about factual items, and yet we were given
18 -- The proposals are just flooded with facts which
19 I didn't feel really addressed, as I understood,
20 some of the issues that we talked about during the
21 July meeting about really does the law in this
22 instance require prevention or mitigation of
23 damage, what is material damage, and what is
24 required --

25 I mean there was a lot of discussion in

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1 MEIC's proposal about the Class 2 to Class 3
2 degradation. I did not really see that addressed
3 in the Department's proposal. I also was
4 concerned about the fifty years, and that felt
5 arbitrary at that point. So I probably at this
6 point agree with the approach that Mr. Tweeten is
7 suggesting.

8 Are there further discussion, comments,
9 questions? There is no motion on the floor yet.

10 MR. TWEETEN: Madam Chair, a couple of
11 other issues that have been raised, and I think
12 that if we are to vacate and remand ought to be
13 considered, and more fully fleshed out by the
14 Department, with some supporting legal authority
15 if possible.

16 In the statute it is required that the
17 permit be designed to prevent -- I'm paraphrasing
18 here -- but to prevent adverse impact to water
19 quality outside of the mine area. That's a
20 statutory requirement. And there are a couple of
21 issues related to each other that I think are
22 argued by MEIC and are subsumed within that

23 statutory definition. One is what does prevent
24 mean? Does prevent mean stop, or does prevent
25 mean mitigate to the greatest extent possible,

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1 which is I think what the Department argues is the
2 responsibility.

3 So what was the intention of the
4 Legislature when they used the word "prevent" as
5 opposed to the word "mitigate." I think that's a
6 fair question. The word is prevent, the word is
7 not mitigate, and there is no way -- If the
8 Legislature had meant mitigate, it could have said
9 so. I think there are other environmental
10 reclamation statutes where mitigation is a part of
11 a reclamation plan. So there is that, just
12 generally what does prevent mean.

13 And then on top of that specifically for
14 purposes of this case, there is a discussion of
15 deep groundwater aquifers, and the ability to
16 bring up additional water presumably to dilute the
17 available groundwater supply to make it more
18 acceptable and usable. Is that kind of mitigation
19 within the concept of prevention or not? And
20 that's an argument that was briefed by MEIC.

21 Again, I'm not sure I've identified
22 anywhere in the Department's argumentation where
23 that particular issue is fleshed out. So if we
24 are going to remand I'd like to suggest that that
25 be among the questions that we ask the Department

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1 to answer, if it decides to -- if it wants to
2 grant this permit, that it needs to have some sort
3 of a rationale, or why this concept of mitigation
4 water is even relevant when the term in the
5 statute is prevent, and not mitigate.

6 Then overarching all of that is the
7 statutory language that says that the project
8 needs to be designed to prevent. It doesn't say
9 it needs to prevent, it says it needs to be
10 designed to prevent. What is the significance of
11 the emphasis on design?

12 A project can -- If your hydrologists
13 and engineers and so forth put together a
14 plausible program for prevention, is that enough?
15 Because I think you can argue with some
16 justification that if they do that, it is designed
17 to prevent. So why is the word "designed" in
18 there, and what significance does that have on the
19 Department's decision making?

20 That's a question that I don't think
21 either party has really grappled with. MEIC I
22 don't think has grappled with it very well in
23 their proposed findings, and I don't think -- it
24 certainly didn't look like a point of emphasis on
25 the Department's part to me either.

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1 So it is an obscure statute in a couple
2 of different ways that might be worthy of further
3 consideration by the Department in making its
4 final decision. I'd love to have in front of us a
5 cogent and encompassing definition of how the
6 statute is supposed to work from the Department's
7 viewpoint, including the question of design and

8 what prevention means, and that would certainly
9 maybe do a couple things, I guess. One, it would
10 give a signal to the regulated public as to how
11 the Department plans to enforce this statute going
12 forward, and it would certainly make our job
13 easier in trying to figure out what to do with
14 these matters when they come in front of us under
15 this particular statute.

16 So I'd like to have that -- if it is the
17 sense of the Board to remand this, then I think
18 that's another deficiency that I'd like to see
19 filled in, if possible.

20 CHAIRMAN MILES: Thank you. Any
21 comments? Discussion?

22 DR. BYRON: Madam Chair, I think Mr.
23 Tweeten is alluding to the fact that we may have
24 sufficient information to make a decision on
25 summary judgment today. That's my take on your

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1 discussion. I guess where do we proceed from
2 here?

3 CHAIRMAN MILES: Sufficient information
4 because we're lacking information that we feel was
5 in the permitting process.

6 MR. TWEETEN: Madam Chair, if we are
7 going to send this back, I think we owe it to the
8 parties to try to be as comprehensive as we can in
9 covering all of the things that we think need to
10 be filled in here in order to make a complete
11 record of decision for granting this permit.

12 And I've pointed out the ones that have
13 occurred to me, but I certainly don't want to
14 exclude the possibility or likelihood that there
15 may be others in here that other members of the
16 Board might be concerned about, and I'd urge them
17 to articulate those as best we can, so that we
18 only have to do this once, as opposed to
19 piecemealing it, sending it back multiple times,
20 in the event that something could have been
21 covered and wasn't at this stage.

22 CHAIRMAN MILES: I think that's
23 important. I think we need to think about that if
24 there are specific areas, but I wanted to just
25 comment about a statement you made, Chris, that I

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1 think articulated what was going through my head.

2 I'm really concerned about how
3 enforcement of these particular statutory
4 provisions would move forward, and I've been very
5 reluctant to -- I think that MEIC has raised some
6 important issues again to things we've talked
7 about -- prevention versus mitigation, the
8 violation of standards, narrative standards versus
9 what is harming existing or anticipated uses. So
10 I'm reluctant to sort of sweep those aside, and
11 have this happen again in the future that those
12 issues are not addressed.

13 So I think my position right now is very
14 similar to your position on this. I do think we
15 need to think about what would be the specific
16 issues we need addressed.

17 MR. O'CONNOR: Madam Chair, for further
18 clarification on Class 2, Class 3, it seemed like

19 Class 3 had a huge range for the EC. So I don't
20 know if there is reasons it is Class 2 and Class
21 3, but it looks like maybe we could get more of a
22 definition on what is usable for human use. Class
23 3 is for washing food, I guess, but not for
24 drinking. But still it is such a huge range.
25 Maybe a little better definition of that.

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1 CHAIRMAN MILES: But it was identified
2 that they would anticipate a degradation from
3 Class 2 to Class 3.

4 MR. O'CONNOR: That's right, and
5 "anticipate" probably means it is going to happen,
6 but then where does that migrate to, and when, and
7 things like that. We're dealing with a lot of
8 unknowns as far as whether the walls collapse or
9 don't collapse, and the water fills in, and the
10 gob, how it is going to affect the class of
11 water quality when it starts to leave the mining
12 site. I guess we don't have specific answers for
13 that, but clarification a little more would be
14 helpful.

15 CHAIRMAN MILES: Is there a motion to
16 consider this matter submitted for final decision,
17 I guess, and close the hearing?

18 MR. TWEETEN: Madam Chair, we do have
19 the parties represented in the room, and if
20 anybody has questions for them, we probably should
21 entertain those before, get those out, and let
22 them respond to them before we make that --

23 CHAIRMAN MILES: Do you have questions?

24 MR. TWEETEN: I don't think I have any
25 at this point.

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1 MR. O'CONNOR: Can we actually do that,
2 if all the facts have been agreed upon, so to
3 speak? I mean we don't think we have all the
4 facts.

5 MR. TWEETEN: I think it's certainly
6 fair game to pose questions to the parties about
7 the arguments that have been made in their
8 proposed findings and conclusions which we didn't
9 see prior to the July meeting, so those are newly
10 in front of us. If there is anything in there
11 that somebody sees that they want to ask about, I
12 think it would certainly be appropriate to do that
13 at this point before we close the hearing. I
14 don't have any in particular that I want to pose,
15 but certainly --

16 CHAIRMAN MILES: If anyone does. I
17 didn't see anything new in there. What I saw was
18 a lack of addressing some of the issues that had
19 been brought up in the July proceedings. Does
20 anyone have questions for the Department or the
21 parties?

22 MS. REINHART-LEVINE: Madam Chair, I
23 would like to hear from DEQ and MEIC regarding
24 mitigation and potential error that you were
25 concerned the Board may be committing. I'd also

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1 specifically like to hear about degradation of
2 Class 2 waters to Class 3, because I do think
3 that's an area where the permit is flawed. So I'd

4 like comment on those two things from DEQ and then
5 MEIC.

6 MR. DAVID: Madam Chair, members of the
7 Board. Thank you very much for the opportunity to
8 address this issue.

9 About the mitigation matter, DEQ would
10 like to bring to the Board's attention that MEIC's
11 proposed findings of facts and conclusions of law
12 contains a Paragraph No. 133, and Paragraph 133
13 cites text from the PHC that allegedly contradicts
14 DEQ's argument that sufficient replacement water
15 is available in the deep aquifer to mitigate any
16 adverse impacts to groundwater and surface water
17 resources.

18 The citation set forth in Item 133 is an
19 excerpt from Attachment 3-M of the groundwater
20 model, which is attached to the PHC and included
21 in the AM-3 permit that's included in MEIC Exhibit
22 No. 6 in its entirety.

23 The text quoted by MEIC was not included
24 in any briefs submitted by MEIC, or subject to any
25 previous argument by MEIC to the Board. The

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1 finding proposed in Paragraph 133 of MEIC's
2 proposed findings of fact and conclusions of law
3 raises issues that cannot be addressed in the
4 record before the Board in this proceeding.
5 Specifically in Paragraph 133, MEIC does not
6 reference or explain the recommendation for a
7 study that followed the quotation.

8 Had the text excerpted from Attachment
9 3-M of the groundwater model been briefed by MEIC,
10 DEQ would have had the opportunity to argue to the
11 Board that the cited text was taken out of
12 context, that it must be understood as an
13 introduction to a recommendation to study the
14 capacity of the deep underburden aquifer to serve
15 as replacement water.

16 Because MEIC raised the argument for the
17 first time in its proposed findings of fact and
18 conclusions of law, DEQ is unable to demonstrate
19 to the Board that the recommendation for
20 investigation was included and made part of the
21 PHC at Page 314-5-35, and as such is part of the
22 AM-3 permit, and thereby obligated SPE to
23 undertake the study. You can verify that through
24 looking at MEIC Exhibit No. 5.

25 Had MEIC raised this issue in briefing,

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1 DEQ would have had the opportunity to introduce
2 evidence that the proposed study of the capacity
3 of the underburden aquifer was undertaken and
4 completed by SPE, and the results included in the
5 permit as minor revision No. 205 in January of
6 this year. Minor revision No. 205 is not part of
7 the record before the Board.

8 Given the opportunity, DEQ would offer
9 evidence to the Board that the study as adopted
10 and approved in minor revision 205 indicates that
11 the underburden aquifer is capable of supplying
12 replacement water from multiple water sources that
13 may be impacted by proposed mining activity in the
14 life of mine area.

15 On the basis of the foregoing, DEQ
 16 requests, and if the Board is inclined to consider
 17 Paragraph No. 133 in its deliberations, that this
 18 proceeding be extended to afford the parties the
 19 opportunity to completely develop the record on
 20 this issue before the Board. So that's DEQ's
 21 concerns about the availability of mitigation
 22 water.

23 The other question about potential
 24 degradation of groundwater outside the permit
 25 boundary from Class 2 to Class 3 groundwater, DEQ

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1 believes that this issue was addressed, and
 2 explored, and explained in detail in its proposed
 3 findings of fact and conclusions of law,
 4 specifically the mine is designed such that spoil
 5 water is not likely to migrate beyond the permit
 6 boundary given the design assumption that the gate
 7 roads will collapse. That is the basis of DEQ's
 8 support of the permit.

9 The mine is designed to prevent material
 10 damage because the gate roads would collapse,
 11 because when the gate roads collapse, mine pool
 12 water in the mined out area will not migrate
 13 beyond the permit boundary. If mine pool water is
 14 not going to migrate beyond the permit boundary,
 15 then Class 2 water is not going to change to Class
 16 3 water. There is not going to be any
 17 degradation.

18 That's the basis for DEQ's -- it is
 19 very, very simple. DEQ didn't address that issue
 20 because the permit is based on the finding in the
 21 CHIA and the PHC that that migration is not going
 22 to occur. The Board needs to keep in mind that
 23 the standard for material damage applies to
 24 impacts to the hydrologic balance outside of the
 25 permit boundary. Although the CHIA does describe

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1 potential impacts within the permit boundary, that
 2 is subject to a far different standard for
 3 potential impacts within the permit boundary. The
 4 mine must demonstrate that the disturbances are
 5 minimized. Totally different standard.

6 MR. TWEETEN: Counsel, can I ask you a
 7 question. MEIC argues in their findings and
 8 conclusions that SPE and the Department conceded
 9 that they don't know whether the walls are going
 10 to collapse or not, and that the assumption that
 11 they will doesn't appear to have been reasonably
 12 based on evidence, if I understand their argument
 13 correctly. Are they wrong about that? Did you
 14 not base -- Was that evidence not in the record
 15 that it was unclear whether those would collapse
 16 or not?

17 MR. DAVID: Madam Chair, Board member
 18 Tweeten, the evidence is in the record. The
 19 original permit, which is part of the record in
 20 this proceeding, contains the letter by the mining
 21 engineer that says that the gate roads are
 22 designed to collapse with time. It is a matter of
 23 fact that the Bureau of Land Management EA that
 24 MEIC cites also states that the presumption is
 25 that the gate road would collapse with time. It

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1 is a fact that's in the evidence of this -- in the
2 administrative record in this proceeding, and
3 there is no contradictory evidence.

4 MR. TWEETEN: Counsel, my question is
5 not what the assumption was. I understand what
6 your assumption was. My question was whether
7 given the uncertainty about whether that would
8 actually occur or not, whether that presumption or
9 assumption is reasonable under the circumstances
10 for the Department and SPE to draw.

11 MR. DAVID: Madam Chair, Board Member
12 Tweeten. My only response is that the record
13 before the Board shows that the only statement
14 about the gate roads that is part of the permit is
15 that the gate roads are designed to collapse.
16 That was the statement of the mining engineer that
17 was included in the original permit that is part
18 of -- that was introduced into evidence in this
19 proceeding by DEQ.

20 The Department understands that perhaps
21 the Board would deem some of the text used in the
22 CHIA as somewhat confusing because it does do
23 analysis based on the possibility that the gate
24 roads would collapse. Again, that was always
25 treated as an examination of a worst case

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1 scenario. I don't believe that the language in
2 the CHIA or the permit conceded the gate roads
3 will not collapse with time.

4 The only design consideration that is
5 available -- Again, the design of the gate roads
6 to collapse was part of the original permit, was
7 also an element of the original permit that was
8 relied upon, or at least it was noted by the
9 Bureau of Land Management when it did its EA.
10 It's something also that DEQ argued in its -- not
11 argued, but presented to the Board in its proposed
12 findings of fact, conclusions of law, and order.

13 I would, if you permit me, just make a
14 suggestion. Perhaps we've kind of gotten wrapped
15 around the axle on whether or not there is facts
16 in dispute or not. If Board's Legal Counsel will
17 permit me, I guess DEQ would suggest the Board has
18 two ways to go here. The Board can remand the
19 permit to DEQ to resolve any inconsistencies that
20 it believes exist in the language of the CHIA, or
21 it could continue this hearing, and give the
22 parties an opportunity to present evidence to
23 resolve those inconsistencies.

24 MR. TWEETEN: In other words, Counsel,
25 we would deny both motions for summary judgment,

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1 and remand it to the Hearing Examiner for a
2 hearing.

3 MR. DAVID: Yes, Your Honor.

4 CHAIRMAN MILES: Is there questions for
5 the Department? I would like to give the other
6 parties --

7 MS. REINHART-LEVINE: I would like to
8 hear from MEIC now.

9 CHAIRMAN MILES: Mr. Hernandez.

10 MR. HERNANDEZ: Madam Chair, Ms.

11 Reinhart-Levine, to respond to your questions, the
12 first question was about mitigation, and the
13 adequacy of mitigation here. In our proposed
14 findings of fact and conclusions of law in
15 Paragraph 133, cited by my esteemed opposing
16 Counsel, and as well as our findings of fact
17 portion in paragraph I believe it is 15, we cite
18 this attachment to the groundwater model which was
19 included in the record. It was before DEQ and the
20 whole Board all along.

21 We cite this portion where the
22 groundwater hydrologist discusses the possibility
23 of mitigation, and says there is this deep water,
24 this deep aquifer in these channel sandstones. It
25 has good quality water, but we're not certain if

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1 there is enough water to mitigate. That statement
2 is really filled out in that attachment. That's
3 why I include it in there.

4 But it was included in our briefs
5 repeatedly, and was presented before the Board by
6 citation to other places in both the groundwater
7 model, and in the Probable Hydrologic Consequences
8 analysis, PHC, that we talked about so much, both
9 of which say there is a big question about whether
10 or not the deep underburden aquifer has sufficient
11 water to mitigate all potential impacts from the
12 mine. We cited that in both of our briefs, and is
13 also cited in our proposed findings of fact and
14 conclusions of law at Paragraph 36.

15 In the Probable Hydrologic Consequences
16 report, we quote in Paragraph 36 that, "If this
17 aquifer," meaning the deep underburden aquifer,
18 "is to be used to serve the existing uses, and
19 also serve potentially as a mitigation source, a
20 better understanding of its overall capacity to
21 meet existing and potential future demands is
22 necessary."

23 So there Signal Peak Energy itself was
24 saying, "We are not certain that this deep
25 underburden aquifer has the capacity to meet all

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1 mitigation needs." They said it again also in --
2 they actually said this numerous times, and was
3 repeated no less than three times in the Probable
4 Hydrologic Consequences report, which was cited in
5 our briefs, and which DEQ certainly read.

6 They cite elsewhere in the -- also cited
7 in Paragraph 36 of our proposed findings that,
8 "While the evidence to date suggests that the
9 deeper underburden aquifer has the characteristics
10 to meet existing demands, what is not so clear is
11 does that aquifer have the capacity to provide
12 full scale mitigation water for wetlands and
13 stream reaches." That's in the PHC at 314-5-35.

14 A few pages later in the Probable
15 Hydrologic Consequences, again, "If significant
16 mitigation flow from the underburden either
17 evolves or becomes necessary, additional
18 hydrologic evaluation will be necessary to ensure
19 that existing groundwater users dependent upon the
20 deeper underburden are not adversely affected."
21 They're saying there is a deep underburden, and

22 people are already using it.
23 We need to evaluate the capacity of this
24 channel sandstone to see whether or not it has
25 enough additional water to supply waters that will

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1 be affected by this proposed mine. The Probable
2 Hydrologic Consequences was entirely uncertain
3 about whether or not mitigation exists. That was
4 the record before the agency at the time of this
5 decision. That was cited in our briefs. The
6 Board and DEQ had the opportunity to review it.

7 In fact, we cited this additional
8 portion farther in the groundwater model that
9 further fleshed out the additional concerns. Not
10 only are there questions about what is the
11 capacity of the water, but the groundwater model
12 has this addendum that says, "We're not sure it's
13 even legal to use this groundwater deep
14 underburden aquifer to discharge water onto the
15 ground to replace stream segments." That's a big
16 question about the legality of it. So that was
17 just an additional reason that mitigation was far
18 from certain here.

19 DEQ cites a subsequent permit revision,
20 something that happened after they approved this
21 mine expansion. There was a subsequent revision
22 where they did additional analysis, and that
23 analysis reached additional conclusions. They are
24 not before the Board right now. I've read them,
25 the federal government has read them, and I can

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1 say that there is significant uncertainty
2 remaining about that, but that's not before the
3 Board.

4 If the matter is remanded to the agency,
5 the expansion is vacated, DEQ will be able to use
6 that information, Signal Energy will be able to
7 use that information, and they can make a fuller
8 assessment of the availability of mitigation water
9 from the deep underburden aquifer.

10 But as Board Member Tweeten -- the
11 appropriate way to deal with additional evidence
12 would be for the agency to incorporate it in its
13 subsequent analysis of the application on remand
14 after the permit is vacated.

15 Now, the question about Class 2/Class 3
16 groundwater, that's the big issue before the
17 Board. The agency has said that the water, the
18 gob water in the mine area will degrade from Class
19 2 to Class 3 groundwater, and that will change the
20 designated uses of that water. The big question
21 is whether or not that polluted gob water will
22 migrate.

23 Here we have to recall that the
24 governing statute says that the applicant and the
25 agency have to affirmatively demonstrate that the

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1 mine is designed to prevent material damage beyond
2 the permit boundary, so they have the burden to
3 show, present evidence, that affirmatively
4 demonstrates in some positive manner, with some
5 degree of confidence, that this pollution is not
6 going to move beyond the mine permit boundary.

7 My esteemed colleague here, he pointed
8 to two things that he says shows that the water is
9 not going to move beyond the mine permit boundary.
10 He said there is certainty that the gate roads
11 will collapse. He cites this letter from the
12 mining engineers from 1995, that was then updated
13 apparently in 2006, that said, "Generally the way
14 that the gate roads are designed is that you mine
15 them, they're there, and as you move on, they
16 collapse." The CHIA also says that the gate roads
17 are designed to collapse.

18 But in the analysis of material damage
19 in the CHIA, and in the Probable Hydrologic
20 Consequences report, neither DEQ nor Signal Peak
21 Energy relies on the certain collapse of the gate
22 roads to conclude that the water won't move beyond
23 the mine permit boundary.

24 Recall that two scenarios that were
25 presented in the groundwater model said that if

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1 they don't collapse, the water is going to -- the
2 gob water is going to move farther faster. Now,
3 neither the PHC nor the CHIA said they're surely
4 going to collapse, so the water is not going to
5 move. They were entirely uncertain. We cite in
6 our proposed findings of fact and conclusions of
7 law multiple places where both Signal Peak Energy
8 and DEQ say they may or they may not collapse.
9 They repeat it over and over.

10 There's not one statement in the
11 determinative analysis, the PHC or the CHIA, that
12 says that these are going to collapse. There is
13 complete uncertainty. And the reason for that is
14 that the gate roads had not collapsed. In both
15 the groundwater model, the Probable Hydrologic
16 Consequences -- the PHC-- and in the CHIA, they
17 note that at present, the gate roads have not
18 collapsed.

19 So the prediction from this engineer, it
20 hadn't played out, and it seems to be that that is
21 the reason that neither the PCC nor the CHIA rely
22 on prompt collapse of the gate roads to reach
23 their conclusions. They didn't because the gate
24 roads have not collapsed. It would be -- I posit
25 that it would be entirely unreasonable, arbitrary

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1 and capricious if you will, to rely on a report, a
2 prediction that evidence has proved not to be the
3 case. The gate roads have not yet collapsed, and
4 that is why neither the PHC or the CHIA relied on
5 it.

6 CHAIRMAN MILES: These are gate roads
7 from the previous mining activity that you're
8 referring to?

9 MR. HERNANDEZ: Yes, that's right.
10 There is an ongoing mining operation. So in their
11 analysis, they say the gate roads haven't
12 collapsed, and because of that, it seems to me
13 neither the PHC nor the CHIA relies on prompt
14 collapse of the gate roads. In fact, instead they
15 have two scenarios, scenario one where they do
16 collapse, scenario two where they don't.

17 As Board Member Tweeten pointed out

18 earlier, it's the CHIA analysis and the PHC
19 analysis that we must rely on, the four corners of
20 those documents. Nowhere does the CHIA say all
21 the gate roads are going to promptly collapse, and
22 therefore the polluted gob water is not going to
23 migrate and not cause degradation of the Class 2
24 groundwaters outside the permit boundary to Class
25 3. They don't make that analysis. They say it

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1 may or may not collapse.
2 That's what they determine, and it is
3 simply not enough, we argue, to say material
4 damage may or may not occur. That's not the
5 standard. They have to show that material damage
6 will not occur, and that's in the regulations
7 17.24.406(5) I believe, or 405(6). There has to
8 be some affirmative conclusion that they're not
9 going to trash the water outside the permit
10 boundary. May or may not isn't enough.
11 The second point that my esteemed
12 colleague made was with respect to the fifty year
13 time horizon. He said first, all of the gate
14 roads are affirmatively going to collapse. That's
15 not warranted. And then he says therefore it is
16 not -- the gob water is not going to migrate. But
17 he forgets to add the asterisk that's in all of
18 this that says for fifty years.

19 Even if all of the gate roads collapse
20 -- this is scenario one -- they all collapse, the
21 groundwater model, and the PHC, and the CHIA all
22 say, well, then degradation of groundwater outside
23 the mine permit boundary from Class 2 to Class 3
24 will not happen for fifty years, and that's an
25 arbitrary fifty year time horizon that they've

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1 used. There's nothing that addresses this beyond
2 fifty years.
3 So that is the big question at the end
4 of the day, Board Member Reinhart-Levine, is there
5 is not an affirmative showing in the PHC or the
6 CHIA about what's going to become of this
7 groundwater beyond the mine permit boundary.
8 There's one scenario in which the gate roads do
9 not collapse, as they have not collapsed. It says
10 that this water is going to move beyond the mine
11 permit boundary, and that is a big problem. They
12 haven't shown that that's not going to happen.

13 As we say in our proposed findings,
14 they've said that material damage to the
15 hydrologic balance outside the permit boundary may
16 or may not happen, and there may or may not be
17 mitigation water to mitigate the impacts if it
18 does. So that doesn't satisfy the standard of the
19 Montana Surface and Underground Mining Act, it
20 doesn't satisfy the CHIA provision.

21 If the Board has any other questions,
22 I'd be happy to answer them. Otherwise I'll sit
23 down. Thank you for your time.

24 MR. WADE: Madam Chair, I know it was
25 asked for the Department and MEIC to speak, but

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1 we're here on behalf of Signal Peak Energy. And
2 we don't want to rehash the discussions that have

3 been going on, the discussions amongst the Board
4 members, or the arguments between Mr. David and
5 Mr. Hernandez.

6 What I think we'd like to point out is
7 the discussion in some ways reflects that maybe
8 there isn't an agreement on the facts, and that if
9 there isn't an agreement on the facts, that that
10 warrants some evidentiary type of hearing. And I
11 say that not because we want to prolong this.
12 We'd like to move along.

13 But as you heard before, the Department
14 has undertaken an analysis, and it is in the
15 record. It may not be within the proposed
16 findings of fact and conclusions of law, but you
17 have to look at the entire record. We do our best
18 to try to parse those items out, and I think that
19 a view of the various submittals shows that there
20 is some disagreement on what people's take away
21 from the record is.

22 Our take away is the Department has some
23 expertise, some technical expertise and background
24 in this, and they're allowed to make decisions.
25 Nowhere in this record are you going to see any

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1 contradictory expert opinion or evidence that
2 calls into question the Department's findings.
3 What you see are some statements and allegations
4 of folks who don't necessarily agree with the
5 Department, but the Department is the permitting
6 entity, they're allowed to make the decision, and
7 we think we should be able to move forward under
8 the permit. We think we should be entitled to
9 summary judgment, or at a minimum, we should have
10 an evidentiary hearing to flesh these issues out.
11 Thank you.

12 CHAIRMAN MILES: Thank you. Any further
13 questions? What's the pleasure of the Board at
14 this point?

15 MR. TWEETEN: Madam Chair, if I may, I
16 think Mr. Wade makes an interesting point, and one
17 that we ought to consider.

18 It seems to me that if we vacate the
19 permit and remand to DEQ, that puts the parties
20 back at square one. As the record stands right
21 now, the parties have all stipulated that they're
22 satisfied with the administrative hearing record,
23 and don't take exception to any of the facts that
24 are shown by all of the materials that are in the
25 record.

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1 As I said in July, I'm a little uneasy
2 about that as to whether it satisfies the
3 requirement of Rule 56, but having given the
4 matter considerable thought, I think I'm
5 satisfied, and if the parties want us to rule on
6 the question of whether summary judgment ought to
7 be entered on the existing record, I think we can
8 do that.

9 If we decide to vacate and remand, the
10 parties are back at square one, and DEQ would then
11 be required to review the existing record and then
12 decide what to do from there.

13 And if it chose to, I suppose DEQ at

14 that point could simply reissue the permit, and
15 put the ball in MEIC's court to decide what to do,
16 and MEIC then would undoubtedly appeal from that
17 decision; and at that point, if the parties don't
18 feel like they want to stipulate as to what's in
19 the administrative record, it would go to a
20 factual hearing in front of a Hearing Examiner,
21 and would come to us with proposed findings and
22 conclusions from the Hearing Examiner, which
23 frankly would make me a lot more comfortable than
24 what we're presented with right now.

25 On the other hand, DEQ could decide that
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1 they need to study the matter further, and conduct
2 additional investigations based on the objections
3 that MEIC has brought forward, as well as other
4 objections, if there are any, or other ideas or
5 concepts that DEQ has about things that need to be
6 further fleshed out, and then rule on the permit
7 one way or the other, and let the parties decide
8 at that point, depending on who is aggrieved by
9 the ultimate decision the Department makes, what's
10 going to happen next; either the permit will be
11 denied, in which case SPE will in all likelihood
12 demand an administrative hearing, or if the permit
13 is granted, then MEIC would.

14 But in either case, I don't think the
15 parties are bound by the stipulation that they've
16 made to agree with what's in the record, and no
17 other facts be considered should we vacate and
18 remand.

19 So I've taken the liberty of scribbling
20 some things down here, and they're going to be
21 illegible to anybody by me, I think. They might
22 be illegible to me, too, for that matter.

23 I'm not going to move this, but I'm
24 going to put it on the table for consideration by
25 the Board, and if it appears that it is a road to
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1 get us past this particular step in the process in
2 the judgment of the Board, then I would make it in
3 the form of a motion.

4 But what I would suggest is that the
5 Board grant partial summary judgment in favor of
6 MEIC, and against DEQ and SPE, and deny SPE's
7 motion for summary judgment on the grounds, first
8 of all, that the CHIA is based on a fifty year
9 time horizon for evaluating migration of
10 groundwater from the mine site, and the Board
11 finds that there is no legal authority for
12 limiting the consideration of material damage
13 outside the permitting area to effects that occur
14 within fifty years of the cessation of mining;
15 and since the best case scenario in the record on
16 which the Department relied, in which the gate
17 roads collapse and limit groundwater migration,
18 the effects are only considered in the modeling up
19 to fifty years, but not beyond, basing the grant
20 of a permit on such a time limited analysis is
21 error and requires that the permit be vacated. So
22 that would be the first grounds.

23 Then second, the second ground that I
24 would suggest would be that DEQ performed

25 insufficient legal analysis of the role of

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1 mitigation water in preventing material damage
2 outside the permit area.

3 First, in my view anyway, the evidence
4 does not support the assumption that mitigation
5 waters from deep aquifers will prevent or assist
6 in preventing material damage outside of the
7 permit area for the reasons that are argued in
8 MEIC's proposed findings and conclusions, that
9 there are substantial qualifications in the
10 material in the record with respect to the
11 likelihood that that mitigation will actually
12 happen, using, relying on these deep groundwater
13 aquifers.

14 And second, that the use of the term
15 "prevent" in the statute raises serious questions
16 as to whether mitigation plays a role in analyzing
17 whether the project is designed to prevent
18 material damage at all.

19 So that would be my idea, and I'd love
20 to hear what the rest of the Board thinks about
21 that as a remand.

22 CHAIRMAN MILES: Would you clarify a
23 little bit about the concept of partial summary
24 judgment.

25 MR. TWEETEN: Rule 56 of the Rules of

0055

1 Civil Procedure allows for the filing of summary
2 judgment motions, and a summary judgment motion
3 asks the Court to enter a final judgment in the
4 matter on the grounds that there is no factual
5 dispute -- the only arguments are about questions
6 of law which are submitted to the Court for
7 decision -- and that there is a basis in the
8 existing record for entry of a final judgment in
9 favor of one party against the other.

10 So we have two of those motions in front
11 of us, one from MEIC and one from SPE. The Court
12 is not obligated to either grant or deny summary
13 judgment on the whole case. There is also an
14 option for the Court to enter what's called
15 partial summary judgment, in which a party is
16 granted some relief with respect to those matters
17 on which there aren't any factual issues, but the
18 Court does not issue a judgment on the entire
19 case.

20 So I guess as we discuss it, I'm not
21 entirely sure that partial summary judgment is the
22 right standard here, but --

23 CHAIRMAN MILES: Does that vacate the
24 permit?

25 MR. TWEETEN: Partial summary judgment

0056

1 ordinarily wouldn't vacate, so I think partial
2 probably shouldn't be in there, because you would
3 be granting summary judgment, in that the Board's
4 ruling would vacate the existing permit, which is
5 the relief MEIC has asked for in their motion. So
6 it probably shouldn't be partial summary judgment,
7 it should just be summary judgment.

8 And we would grant MEIC's summary
9 judgment on the following grounds, and then deny

10 SPE's motion for summary judgment. Since the
11 Department hasn't moved for summary judgment,
12 there is nothing to grant them, but they are
13 nonetheless going to be bound by the vacate or
14 remand as a party to the case.

15 CHAIRMAN MILES: Thank you.

16 MR. TWEETEN: So that would be my
17 thought. Again, I'll fish around for whether
18 there are any other particular errors or questions
19 that the Board would want to include in the
20 grounds for vacating the remand decision, because
21 as I said, I think we owe it to the parties to be
22 as comprehensive as we can at this point.

23 CHAIRMAN MILES: Board members comments?

24 MR. O'CONNOR: I would agree with your
25 position on this, that we grant summary judgment

0057

1 to MEIC for the reasons you specified.

2 DR. BYRON: As would I.

3 CHAIRMAN MILES: Michelle, do you have
4 any comments?

5 MS. REINHART-LEVINE: Madam Chair, Mr.
6 Tweeten, I agree with the reasons that you set
7 forth. I would I guess add that I would support
8 summary judgment for MEIC regarding findings just
9 generally. I would not limit it to just the one
10 and two that you put forth, but would grant the
11 additional findings of fact and conclusions of law
12 set forth by MEIC for their summary judgment,
13 because I agree that DEQ probably employed the
14 incorrect material damage standard here for some
15 of the reasons that you set forth, but I think
16 that that's the overarching flaw.

17 I commend all parties involved for very
18 detailed findings of fact and conclusions, and
19 very detailed briefing, and very well argued; but
20 at the end of the day, I do think that the
21 incorrect standards for material damage have been
22 applied under the statute.

23 MR. TWEETEN: Madam Chair. Michelle,
24 would you want the Board to grant summary judgment
25 and adopt MEIC's proposal findings and conclusions

0058

1 in total? Is that the suggestion?

2 MS. REINHART-LEVINE: Madam Chair, Mr.
3 Tweeten. I think for the sake of simplicity, as
4 well as for Mr. Reed's benefit, who would
5 otherwise have to cherry pick which findings and
6 which conclusions, is that that's the simplest way
7 to proceed at this moment in time.

8 DR. BYRON: Madam Chair, I would agree
9 with Michelle that the points Mr. Tweeten has made
10 certainly deserve emphasis, but that we are also
11 obligated to address all of the issues that both
12 sides have put forth if we grant summary judgment.
13 So we still have to address those other issues,
14 but I agree these need to be emphasized.

15 CHAIRMAN MILES: Procedurally then, I'm
16 hearing consensus at least conceptually on your
17 motion and your proposal. I guess I go back to
18 what I said earlier. Do we need to close the
19 hearing and determine that this is submitted for
20 final decision? I need to ask Ben.

21 MR. REED: Madam Chair, procedurally,
22 yes. Once the hearing is closed, then I think the
23 motion to grant summary judgment would be at that
24 point appropriate.

25 MR. TWEETEN: Madam Chair, I so move to
0059 close the hearing.

1 MR. O'CONNOR: Second.

2 CHAIRMAN MILES: Any discussion?

3 (No response)

4 CHAIRMAN MILES: All in favor, please

5 say aye.

6 (Response)

7 CHAIRMAN MILES: Opposed.

8 (No response)

9 CHAIRMAN MILES: None. The hearing is
10 closed. The matter is submitted for final
11 decision. Would you like to put your
12 recommendation in the form of a motion? We have
13 it all on the record.

14 MR. TWEETEN: Madam Chair, if I might.
15 Respectfully -- and I understand the point that
16 Michelle makes -- but I am most comfortable basing
17 the remand on these specific points. I'm not at
18 this stage prepared to agree with everything that
19 MEIC has argued in their proposed findings and
20 conclusions. So if it is the judgment of a
21 majority of the Board to go that way, I think I
22 would want to register a concurring vote, in which
23 I'd agree in the Board's judgment to vacate and
24 remand, but nonetheless limit the grounds for the

0060 vacate and remand to the ones that I've specified.

1 I don't think it affects what the
2 majority of the Board has done, but I'd like to be
3 on the record as saying that I'm most comfortable
4 with the approach I've suggested; not that I have
5 to have my way, or I'm going to fold up and go
6 home, but I just feel more comfortable in being
7 more specific in terms of the grounds on which the
8 Board should rely on sending this back.

9 CHAIRMAN MILES: The implications of
10 that are to -- I think actually what Michelle was
11 getting at -- then do we go through the findings
12 and conclusions in their proposal?

13 MR. TWEETEN: Madam Chair, as I
14 suggested and in the questions that I asked
15 Michelle, as I understand her proposal, it is that
16 the Board grant summary judgment in favor of MEIC,
17 and adopt their proposed findings and conclusions
18 as presented, and I'm not comfortable agreeing to
19 that.

20 CHAIRMAN MILES: Your proposal is to
21 grant summary judgment and remand to the
22 Department?

23 MR. TWEETEN: Right, and I think
24 Michelle's proposing a remand to the Department as

0061 well, are you not?

2 MS. REINHART-LEVINE: Madam Chair, Mr.
3 Tweeten. Yes, I would also propose that. And if
4 we only granted partial summary judgment on the
5 items that you specified, then I think what would

6 happen is the parties would basically continue on
7 with the proceedings, and the other items, which I
8 think while there may be agreement about what is
9 in the record, I do agree with Mr. Wade that there
10 is substantial disagreement on the interpretation
11 of the facts.

12 And so I think that your recommendation
13 is the prudent way to proceed, and at least we
14 have agreement amongst those of us present on
15 those areas that you've mentioned.

16 CHAIRMAN MILES: But I don't think it
17 was a partial summary judgment.

18 MR. TWEETEN: No, it is a full summary
19 judgment, because we're granting the relief that
20 they're asking for. We're going to vacate and
21 remand, and it is not partial. But the grounds
22 are important, I think, in terms of explaining to
23 the parties what we're troubled by, and that's why
24 I'm more comfortable having more limited grounds
25 as opposed to simply adopting MEIC's proposed

0062
1 findings and conclusions in their totality.

2 So that's my position, and I don't mean
3 to impugn the action of a majority of the Board by
4 any stretch. If it's the Board's judgment to go
5 the way that Michelle has suggested, that is
6 certainly a legitimate thing for the Board to do.
7 If I want to take a separate view as to how I
8 think the matter ought to come out, it's not going
9 to undercut what the Board has done, and certainly
10 if we have a majority vote of the Board, and the
11 Board acts by majority vote, so --

12 CHAIRMAN MILES: So just getting back to
13 that, I think we've raised some other issues that
14 would be -- should you move your proposal -- that
15 should be added to yours. But my question is if
16 the motion passes, do we ask Ben to write an order
17 since we're not adopting any of the others?

18 MR. TWEETEN: Yes, Ben will have to do
19 that. By adopting MEIC's proposals as advanced by
20 MEIC in their proposed findings and conclusions,
21 we've made his job easier, because those become
22 the Board's findings and conclusions, and all he
23 will have to do then is tackle the question of
24 what to do with the ones that were submitted by
25 the Department and by SPE. So we've basically

0063
1 taken a third of your job away at that point, and
2 left you with the hardest part to complete. But
3 at least it's something, I think. Ben, is that
4 the way you would see it as well?

5 MR. REED: I believe so. The more that
6 the Board -- The statute requires that if a party
7 submits proposed findings of fact, that the
8 decision must include a ruling on each proposed
9 finding. So if the Board adopts MEIC's findings
10 and conclusions in toto, then that does cut out a
11 significant portion of the labor; but respectfully
12 speaking, Madam Chair, I don't think that should
13 have a bearing on the Board's decision.

14 CHAIRMAN MILES: My question more went
15 to Mr. Tweeten's motion, which would not adopt
16 MEIC's proposed findings of fact and conclusions

17 of law. What do we -- vis-a-vis you -- need to
18 draft as a final order?

19 MR. REED: Madam Chair, once Mr. Tweeten
20 makes his motion, then the order would be put
21 together by developing findings of fact that
22 either adopt or make some other ruling on each and
23 every one of the parties that is not covered by
24 Mr. Tweeten's motion, or positing that Mr. Tweeten
25 makes a motion and no one else does.

0064

1 Once that happens, the findings of fact
2 will be added, or adopted, or otherwise ruled on,
3 and the conclusions of law will be adopted, and an
4 order that simply and clearly states what the
5 motion was will then be sort of embraced as a
6 matter of law at the end. I would, in drafting
7 that, as a mechanical matter, take that from the
8 transcript to assure clarity, and circulate it
9 among the members of the Board, along with the
10 necessary transcript portions, so that the Board
11 could be sure that what was coming off of my desk
12 was in fact what the Board had in mind.

13 Now the Board has, as I indicated
14 previously, ninety days to make a ruling on the
15 matter, to formally adopt its findings of fact and
16 conclusions of law and order, with an additional
17 thirty days if necessary. So if at the end of
18 whatever period the Board selects, the Board is
19 still unhappy with the state of the findings of
20 fact and conclusions of law and order, the Board
21 can have a total of 120 days to worry about making
22 sure that everything is in apple pie order.

23 MR. TWEETEN: We'd have to adopt the
24 motion to extend the deadline for thirty days, and
25 state the good cause on the record, but we could

0065

1 do that. Sure.

2 CHAIRMAN MILES: So if you do proceed to
3 put your proposal into the form of a motion, and
4 it passes, then do we need to address reasons for
5 not accepting the other findings of fact and
6 conclusions of law submitted by the Department and
7 Signal Peak?

8 MR. TWEETEN: Madam Chair, if I might.
9 First of all, I would suggest that Michelle make
10 her motion first, because if it gathers a majority
11 of the Board's votes, then it is clear that those
12 become the findings and conclusions of the Board,
13 and the only thing Ben will need to do then is to
14 deal with the others that are proposed by the
15 other parties.

16 And in my experience at least, the best
17 way to do that, as I said before, is to group them
18 together, and go through the proposals by the
19 other parties. And I think Ben is best equipped
20 to do that, and come back to the Board with a
21 proposal as to how to deal with the other parties'
22 proposed findings and conclusions, whether the
23 conclusions are erroneous as a matter of law,
24 whether the findings of fact are not supported by
25 the evidence, or irrelevant, or whatever grounds.

0066

1 I'd leave it to Ben's judgment to at

2 least initially propose how those ought to be
3 dealt with, rather than have all of us go through
4 them one at a time, and discuss each one
5 individually. I think if Ben presents us with a
6 discussion draft that we can look at, and then at
7 our next meeting perhaps, or after the ninety days
8 has run, we can decide on a final judgment.

9 CHAIRMAN MILES: Is there a motion from
10 the Board?

11 MS. REINHART-LEVINE: Madam Chair, just
12 a quick clarification. Mr. Reed, does that
13 basically satisfy our obligations under Montana
14 Code Annotated 2-4-623 requiring the Board to rule
15 on each proposed findings of fact, to basically
16 have you make those recommendations for us, and
17 then we can basically adopt what you -- or review
18 and adopt as we see fit what you present?

19 MR. REED: Madam Chair, Board Member
20 Reinhart-Levine, I think it does, yes. If I
21 follow Mr. Tweeten's sage advice, I think that
22 will be exactly what the law had in mind.

23 MS. REINHART-LEVINE: Madam Chair, Mr.
24 Reed. If we only granted partial summary
25 judgment, how would the rest of the case proceed?

0067

1 MR. REED: Madam Chair, Board Member
2 Reinhart-Levine. "It depends" is a deeply
3 unsatisfactory answer, I know, but I think that if
4 the partial summary judgment about which Mr.
5 Tweeten was speaking were granted, it would still
6 have the effect of vacating, functionally vacating
7 the Department's permit or approval of the permit.
8 So I don't think that at the end of the day there
9 would be a significant difference between the two.

10 MS. REINHART-LEVINE: Madam Chair, I
11 would like to make a motion that the Board grant
12 MEIC's motion for summary judgment, and deny SPE's
13 cross motion for summary judgment; and then I
14 would further move that DEQ's cumulative
15 hydrologic impact assessment accompanying its
16 approval of SPE's permit amendment be vacated and
17 set aside; and incorporated therein, I would
18 recommend the Board remand this matter to DEQ for
19 further proceedings consistent with the Board's
20 decision.

21 CHAIRMAN MILES: Is there a second?

22 MR. SAYLES O'CONNOR: I'll second it.

23 CHAIRMAN MILES: Further discussion?

24 (No response)

25 CHAIRMAN MILES: All in favor of the

0068

1 motion, please say aye.

2 (Response)

3 CHAIRMAN MILES: Opposed.

4 MR. TWEETEN: No.

5 CHAIRMAN MILES: Thank you for
6 explaining that. Motion carries.

7 MR. TWEETEN: Just for purposes of the
8 record, Madam Chair, I will be preparing a brief
9 concurring statement on my own behalf, explaining
10 that while I agree with the Board's judgment
11 vacating remand, my reasoning would be somewhat
12 different.

13 CHAIRMAN MILES: Thank you.
 14 MS. REINHART-LEVINE: Madam Chair,
 15 members of the Board. For the sake of clarity, I
 16 move that the Board adopt MEIC's findings of fact
 17 and conclusions of law.
 18 CHAIRMAN MILES: Is that necessary, that
 19 motion?
 20 MR. REED: It would certainly clear up
 21 the record.
 22 CHAIRMAN MILES: Is there a second to
 23 that motion?
 24 DR. BYRON: Second.
 25 CHAIRMAN MILES: Seconded by Dr. Byron.

0069

1 I would just make one quick note. Believe me this
 2 is going to sound silly. I did see a typo in
 3 MEIC's proposed findings. It just jumped out me.
 4 It is on Page 4. You might want to just make a
 5 note of that.
 6 It is on Page 4, Paragraph 9. It states
 7 that, "On October 5th, 2015, Signal Peak Energy
 8 submitted a permit amendment." That should be
 9 2012. I certainly didn't read all of these to the
 10 extent that I would notice any other typos, but I
 11 did notice that one, so that needs to be
 12 corrected.

13 Is there any further discussion about
 14 adopting the proposed findings of fact and
 15 conclusions of law with that correction?

16 (No response)
 17 CHAIRMAN MILES: Seeing none, all in
 18 favor, please say aye.

19 (Response)
 20 CHAIRMAN MILES: Opposed?

21 MR. TWEETEN: No.
 22 CHAIRMAN MILES: Motion passes, motion
 23 carries, and you will prepare for the record a
 24 concurring --

25 MR. TWEETEN: Certainly, and I'll

0070

1 circulate that to the members of the Board, of
 2 course.

3 CHAIRMAN MILES: I think that item of
 4 business is completed.

5 (The proceedings were concluded
 6 at 1:15 p.m.)

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C E R T I F I C A T E

1 STATE OF MONTANA)
2)
3 : SS.

4 COUNTY OF LEWIS & CLARK)
5 I, LAURIE CRUTCHER, RPR, Court Reporter,
6 Notary Public in and for the County of Lewis &
7 Clark, State of Montana, do hereby certify:

8 That the proceedings were taken before me at
9 the time and place herein named; that the
10 proceedings were reported by me in shorthand and
11 transcribed using computer-aided transcription,
12 and that the foregoing - 70 - pages contain a true
13 record of the proceedings to the best of my
14 ability.

15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and affixed my notarial seal
17 this _____ day of _____, 2015.

18
19 LAURIE CRUTCHER, RPR
20 Court Reporter - Notary Public
21 My commission expires
22 March 12, 2016.
23
24
25