



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

3                           \* \* \* \* \*

4           (Ms. Kaiser and Mr. Skunkcap not present)

5                   CHAIRMAN RUSSELL: It's eleven after  
6 nine. I'll call this regular meeting of the Board  
7 of Environmental Review to order. The first item  
8 on the agenda will actually be skipped because the  
9 minutes weren't mailed, so we'll just review and  
10 approve those at the next regular meeting. And I  
11 usually catch that, and I didn't.

12                   So the next item on the agenda is to set  
13 the 2008 meeting schedule. Tom.

14                   MR. LIVERS: Thanks. Mr. Chairman,  
15 members of the Board, for the record, I'm Tom  
16 Livers, Deputy Director of the Department of  
17 Environmental Quality. We've passed some around  
18 -- and Larry, you've got an email. You should  
19 have gotten this just this morning -- just  
20 reminding you of the dates, the Board meeting  
21 dates. And with one exception, they're the same  
22 options that were presented at the September  
23 meeting for folks to go back and take a look at  
24 their calendar.

25                   Larry, I know you and I have talked

1 about this a little bit. The one change as well  
2 -- and we'll talk about the scheduling of the SME  
3 hearing. We're looking at moving the January  
4 Board meeting date from Friday to Tuesday the  
5 22nd. That would be on the front end of the SME  
6 hearing. Because of the variability and  
7 difficulty in predicting exactly how long that's  
8 going to take, it seemed to logistically make more  
9 sense to hold the Board meeting first, and then on  
10 conclusion of the Board meeting, move into the  
11 hearing for the potential remainder of that week.

12 So what we need to do today is not only  
13 agree on the regular Board meeting dates, but nail  
14 down the schedule for the SME hearing.

15 CHAIRMAN RUSSELL: Thanks, Tom. With  
16 that, I don't think we need to move every line  
17 through here, but we'll try to do this by some  
18 head shaking. And so the 22nd is the -- So the  
19 25th would be the regular meeting. No one  
20 responded to Tom except for Larry on that, and  
21 Larry says it's okay, so we're going to proceed  
22 with that as our regular date; and then working  
23 with Katherine on the SME hearing, we'll figure  
24 out exactly whether we have to start the week  
25 before, sometime during that week, or the day

1 before. The 25th would be the regular meeting  
2 date, right?

3 MR. LIVERS: No. What we're looking at  
4 is moving the regular meeting date to Tuesday the  
5 22nd, and having it on the front end.

6 CHAIRMAN RUSSELL: And have the hearing  
7 after that?

8 MR. LIVERS: Have the hearing afterward,  
9 and that way we'll eliminate the risk of any down  
10 time for Board members.

11 CHAIRMAN RUSSELL: That would make  
12 sense. So the 22nd. Is everyone all right with  
13 that?

14 MR. LIVERS: Larry, you and I -- I got  
15 your message, but I just wanted to confirm. I  
16 know --

17 MR. MIRES: That's confirmed.

18 MR. LIVERS: You're okay with that.

19 MR. MIRES: That's great.

20 CHAIRMAN RUSSELL: The next one is  
21 generally a conflict with Spring Break for anyone  
22 who has Spring Breaks.

23 MR. ROSSBACH: I forgot to check, but  
24 I'm almost positive that either April 4 or 11th  
25 would be okay.

1 CHAIRMAN RUSSELL: The 4th or the 11th?

2 MR. ROSSBACH: I think.

3 MR. MIRES: April 4th is my best date.

4 CHAIRMAN RUSSELL: I think ours is  
5 probably in March. So April 4th, we'll pick that  
6 as our date. April 4th.

7 May 30th, June 6th or 13th. The 6th is  
8 usually the last week of school. Is that going to  
9 be a problem for you, Bill?

10 MR. MIRES: I'm gone the 6th and the  
11 13th. My best date is the 30th of May.

12 CHAIRMAN RUSSELL: Is the 30th all  
13 right?

14 MR. ROSSBACH: How does that -- Is that  
15 Memorial Day?

16 MR. LIVERS: We can check. It's  
17 probably the Friday on the tail end of Memorial  
18 Day week. I can go nail that down.

19 (Ms. Kaiser enters)

20 CHAIRMAN RUSSELL: We'll circle that  
21 tentatively as the 30th.

22 MR. LIVERS: That's right.

23 MR. MIRES: The 30th is the Friday of  
24 the end of the Memorial Day week?

25 MR. LIVERS: That's correct. Memorial

1 Day is the 26th, the Monday of that week.

2 CHAIRMAN RUSSELL: Some of you  
3 government people like me might be just be getting  
4 back to work. So we'll pick the 30th. The summer  
5 meeting?

6 MR. MIRES: August 8th or 15th are great  
7 for me.

8 CHAIRMAN RUSSELL: So the 8th or the  
9 15th. Anyone else?

10 MR. ROSSBACH: I'd rather not do the  
11 15th.

12 CHAIRMAN RUSSELL: So August 8th.

13 MR. MIRES: That sounds good.

14 CHAIRMAN RUSSELL: September 26th,  
15 October 3rd, or October 10th.

16 MR. MIRES: They're all okay for me.

17 MS. KAISER: 26th.

18 CHAIRMAN RUSSELL: 26th of September.  
19 Then the last meeting of the year, the 21st,  
20 December 5th, or the 12th.

21 MR. MIRES: Either the 5th or the 12th.

22 CHAIRMAN RUSSELL: How about the 5th?  
23 So the January 22nd, April 4th, May 30th, August  
24 8th, September 26th, and December 5th.

25 MR. LIVERS: We'll lock those in. That

1 will be good. So then talking about the hearing  
2 for the Highwood Generating permit, we had tossed  
3 out an email and sent out earlier. We're looking  
4 at prehearing motions on December 21st. It's a  
5 Friday. So we'd have a Board meeting. And I'd  
6 really encourage a face to face meeting for that,  
7 and not try to do that as a telephone meeting.

8           And then looking at scheduling, what we  
9 would need out of the remainder of that third week  
10 in January following the Board meeting on the  
11 22nd, we could start on that afternoon, we could  
12 start immediately after the Board meeting moving  
13 into that for the hearing itself. The Board did  
14 opt to hear this one directly.

15           MR. MARBLE: That would be in Helena?

16           MR. LIVERS: Yes.

17           CHAIRMAN RUSSELL: So the next date  
18 we'll meet would be?

19           MR. LIVERS: The next day the Board  
20 would meet would be the Friday the 21st of  
21 December for pretrial motions, and then the  
22 hearing the third week of January. And I think  
23 Katherine wanted to speak to the possibility of  
24 another potential meeting early in January; is  
25 that correct, Katherine? You were looking at

1 possibly whether we were going to be able to get  
2 through everything on the 21st, and whether we  
3 need to reserve possibly another Friday in early  
4 January.

5 MS. ORR: Right. Mr. Chairman, Tom,  
6 conceivably there could be oral argument on the  
7 21st of December, and then I don't know if the  
8 Board would be ready with its decision right then.  
9 It may want to absorb the information, and meet at  
10 some other date, arrive at a decision, and direct  
11 me to write whatever it is that is the Board's  
12 decision. So it all depends.

13 The reply briefs are due on December  
14 11th, so it gives the Board ten days to absorb all  
15 of the information before the oral argument. And  
16 I don't know if right after the oral argument the  
17 Board can have decided the cross motions for  
18 summary judgment. So that's one issue here. And  
19 it's just going to have to be up to the Board  
20 whether it thinks it can absorb all of the oral  
21 and written information on the 21st, and give me  
22 direction about what to say, and then I would  
23 circulate a draft to the Board, and the Board  
24 would then adopt or revise whatever is written,  
25 and I assume that would be in a meeting. So those

1 are the alternatives.

2 MR. LIVERS: Mr. Chairman, one option  
3 might be to set a tentative date as a fall back if  
4 that's needed, and then we would know on the 21st  
5 whether we would have to take that early January  
6 date or not.

7 MS. ORR: That's a good idea.

8 CHAIRMAN RUSSELL: So we're looking for  
9 probably -- I don't have a calendar.

10 MR. LIVERS: Mr. Chairman, the Fridays  
11 in early January are the 4th and the 11th. I  
12 don't think we'd want to make anything later than  
13 the 11th, and that might even be a little bit  
14 problematic.

15 CHAIRMAN RUSSELL: I'm guessing the 11th  
16 would be a better date, so let's realize that  
17 January 11th may be another face to face.

18 MR. LIVERS: Mr. Chairman -- and I might  
19 defer to either Katherine or possibly David. My  
20 only concern with that might be how much time that  
21 leaves for the parties between the 11th and the  
22 22nd to respond to Board action if the Board  
23 doesn't make its decision in December. That's a  
24 fairly tight time frame.

25 MS. ORR: It seems like the whole

1 schedule is very, very compressed. Again,  
2 whatever the Board decides.

3 CHAIRMAN RUSSELL: Well, just looking  
4 back at our meeting dates, we could go -- Let's  
5 say things fall into place in December. We could  
6 possibly use the 22nd, but we have to meet by  
7 February 1st to stay within our rulemaking. John,  
8 is that right? Tom? These dates in the early  
9 calendar year, we couldn't have a regular meeting  
10 later than the 1st and keep with our six month  
11 rulemaking.

12 MR. LIVERS: Mr. Chairman, I'd have to  
13 check on the timing. As I understand it -- and  
14 David has been in contact with the parties. But  
15 one of the parties has an out-of-the-country  
16 commitment, and that's one of the things driving.  
17 Obviously we'll have that six month time frame as  
18 well, but I think there is a commitment that makes  
19 meeting past January difficult, or maybe  
20 impossible, unless it's delayed another couple  
21 months.

22 CHAIRMAN RUSSELL: I guess we have to  
23 figure out what goes on in December then, and just  
24 have to get light on our feet.

25 MS. ORR: I know Mr. Chairman that the

1 21st is a Friday.

2 CHAIRMAN RUSSELL: Right, because  
3 Christmas is the Tuesday. All right. Well, I  
4 guess then we have a tentative January 11th that  
5 you need to block out for a potential meeting.  
6 December 21st is a face to face; plan on being  
7 here. And I guess we need to talk about -- Board,  
8 just so you know, don't miss a meeting once we get  
9 started.

10 MR. MARBLE: Joe, I have to be in Tucson  
11 on the 21st, but I could call in, could I?

12 CHAIRMAN RUSSELL: I think we need to be  
13 real careful about -- If we hear oral arguments  
14 that -- Didn't we get into this in Roundup with  
15 one of our Board members that missed a meeting,  
16 that pretty much they had to recuse themselves  
17 from the rest of the process. We've talked about  
18 this before. But if the Board hears this in  
19 person, then there certainly is reason to follow  
20 through with it, and be there.

21 MR. ROSSBACH: I think it's different  
22 between facts and oral argument, though, in terms  
23 of actually being present.

24 CHAIRMAN RUSSELL: Facts. Right.

25 MR. ROSSBACH: So the 21st is the

1 motions. I don't think there is any factual  
2 presentation. I'd be willing to listen to John on  
3 that or Katherine on that, but I don't see how  
4 there would be a problem with a phone, and even  
5 not being present on that one, just to be a part  
6 of the hearings. It's the factual testimony for  
7 which they have to be --

8 CHAIRMAN RUSSELL: But if one of the  
9 motions that's out there is for summary  
10 judgment --

11 MR. ROSSBACH: But that's because the  
12 facts are not in dispute.

13 CHAIRMAN RUSSELL: If the facts aren't  
14 in dispute, then there shouldn't be any  
15 objections, but there will be.

16 MR. ROSSBACH: Right, but that -- I  
17 don't want to get into sort of legal --

18 CHAIRMAN RUSSELL: Right, and I don't  
19 either. I just realized that there will be  
20 arguments that will be in front of us that will  
21 not be controlled based on facts or not, so --

22 (Mr. Skunkcap enters)

23 CHAIRMAN RUSSELL: Just so you're aware.

24 MR. ROSSBACH: But I think that there is  
25 a difference between the hearing on the facts

1 where witnesses are testifying, versus hearings  
2 where lawyers who cannot be trusted to be telling  
3 the truth, right? That's a joke. Nobody got it,  
4 I guess.

5 CHAIRMAN RUSSELL: I was trying not to  
6 get it.

7 MR. ROSSBACH: I think there is a big  
8 difference between hearing testimony and witnesses  
9 who are sworn and testifying and versus hearing  
10 oral argument. I think there is a distinction in  
11 terms of whether you have to be there to be able  
12 to decide.

13 CHAIRMAN RUSSELL: Just my thoughts are  
14 -- since I've been through this with Roundup --  
15 that you really should be there as much as  
16 possible. Don, I don't know if Bill --

17 MR. MARBLE: I have a medical issue, but  
18 I don't want to be bumped off the main hearing.

19 CHAIRMAN RUSSELL: Well, one of the  
20 things that possibly -- Can we videotape it? We  
21 videotape all our local board meetings.

22 MR. LIVERS: Mr. Chairman, we certainly  
23 could. We can look at a video hook up. But I  
24 think for something --

25 CHAIRMAN RUSSELL: No, tape it, put it

1 on a disc.

2 MR. LIVERS: Right, and that's certainly  
3 doable. That's something we can do that's  
4 possible. I would tend to agree with Mr. Rossbach  
5 for the pretrial material being in touch by phone  
6 would probably be adequate, but we could have that  
7 back up as well, because I think it's going to be  
8 a lot more important to be present for the hearing  
9 itself in January.

10 CHAIRMAN RUSSELL: Well, the point is  
11 there is motions for summary judgment out there  
12 that might preclude a full fledged hearing in  
13 January, and that's what concerns me.

14 MR. LIVERS: That's fair.

15 CHAIRMAN RUSSELL: Just so if we  
16 videotape it, I'd feel a lot more comfortable you  
17 continuing to participate. At least then you get  
18 the feel, for what it's worth.

19 MR. MARBLE: Okay.

20 CHAIRMAN RUSSELL: So should we move on?  
21 Katherine, are you ready to go? The next item on  
22 the agenda is the contested case updates that now  
23 takes up almost two pages.

24 MS. ORR: Mr. Chairman, members of the  
25 Board, these cases are proliferating a little bit.

1 Under Item II-A, basically those can be  
2 divided into two groups: Waiting to get a  
3 prehearing schedule done, or the hearing has been  
4 set. And then I think we ought to discuss SME a  
5 little bit more. But those cases where hearing  
6 has been set are under that II-A(1), Item (f),  
7 which is coming up here shortly on December 6th;  
8 Item (n); Item (p); Item (q), and Item (t). So  
9 five hearings coming up. And the proposed  
10 findings of fact, conclusions of law, and order in  
11 the Thompson River CO-Gen case are due, and I  
12 should have those fairly shortly.

13 Then on the SME matter, the only thing  
14 that I would add is that there are other pending  
15 motions. There is a motion to strike an expert,  
16 and there is a motion to strike items of the  
17 affidavit that was filed by MEIC, and I'd like to  
18 know what the Board's pleasure is in terms of  
19 disposition of those motions.

20 CHAIRMAN RUSSELL: Two things. We  
21 either hear it, or we allow Katherine as our  
22 prehearing examiner to execute those motions. So  
23 I need a motion to that effect. We certainly can  
24 get a motion on and discuss it. Do we want to  
25 separate them? You said you have one? Well, no,

1 we can't do that.

2 MR. ROSSBACH: Are they fully briefed  
3 now?

4 MS. ORR: No. They'll be fully briefed  
5 as of December 11th.

6 MR. ROSSBACH: What other motions are we  
7 hearing on the 21st?

8 MS. ORR: Cross motions for summary  
9 judgment. MEIC, and the Department, and SME filed  
10 motions for summary judgment.

11 MR. ROSSBACH: And they are fully  
12 briefed now?

13 MS. ORR: No. They'll be fully briefed  
14 on the 11th.

15 MR. ROSSBACH: So all briefs are due on  
16 the 11th?

17 MS. ORR: Right.

18 MR. ROSSBACH: What are the two motions  
19 again?

20 CHAIRMAN RUSSELL: There is one to  
21 exclude an expert witness.

22 MS. ORR: MEIC filed a motion to exclude  
23 the expert testimony of one of SME's experts.

24 MR. ROSSBACH: What's the grounds for  
25 that?

1 MS. ORR: They filed that brief -- I  
2 guess one of the grounds is he doesn't have the  
3 expertise in the area that he's testifying in; and  
4 the second is that is his testimony would go to a  
5 legal conclusion rather than a factual conclusion.

6 MR. ROSSBACH: What's the other one?

7 MS. ORR: The other one is that SME  
8 filed a motion to strike portions of MEIC's  
9 affidavit and those --

10 MR. ROSSBACH: On the basis of what?

11 MS. ORR: One of those bases is that the  
12 allegation was more inflammatory than factual.  
13 And one of them was a misallegation -- if I'm  
14 recalling correctly -- a misallegation of the law,  
15 and there was one other that I can't recall.

16 MR. ROSSBACH: Can I make a motion then?

17 CHAIRMAN RUSSELL: You certainly may.

18 MR. ROSSBACH: I make a motion that we  
19 hear the expert witness issue, that is, that seems  
20 to involve some factual determinations about  
21 qualifications that may be part of all of the  
22 other more substantive part, and that we authorize  
23 Katherine to make a determination on the second  
24 motion to strike.

25 CHAIRMAN RUSSELL: Is there a second?

1 MS. SHROPSHIRE: Second.

2 CHAIRMAN RUSSELL: It's been seconded by  
3 Robin. Any further discussion?

4 MR. ROSSBACH: And that we hear that as  
5 a part of the -- on December 21st. That would be  
6 a part of the motion.

7 CHAIRMAN RUSSELL: Correct.

8 MR. SKUNKCAP: Mr. Chairman, so that's  
9 based on factual testimony? Is that what you  
10 said? And the other one is what?

11 MS. ORR: Which one do you have a  
12 question about?

13 MR. SKUNKCAP: Expert witness.

14 MS. ORR: The two allegations there was  
15 that the expert was really testifying in an area  
16 that is a question of law rather than a question  
17 of fact.

18 MR. ROSSBACH: The other one is whether  
19 he's qualified to testify.

20 MS. ORR: Right.

21 CHAIRMAN RUSSELL: Are you good, Gayle?

22 MR. SKUNKCAP: Yes.

23 CHAIRMAN RUSSELL: Any further?

24 (No response)

25 CHAIRMAN RUSSELL: Hearing none, all

1 those in favor, signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 (No response)

5 CHAIRMAN RUSSELL: Motion carries.

6 Anything else on that one, Katherine?

7 MS. ORR: No, I think -- Oh, the  
8 logistical matter of documents. I talked to Tom  
9 -- I think I talked to you about this, Tom --  
10 whether we ought to have a link for you guys, for  
11 whether you want hard copy, because the documents  
12 are fairly voluminous.

13 CHAIRMAN RUSSELL: It pretty much took  
14 up a box in the Roundup case, a box --  
15 (indicating) --

16 MR. LIVERS: Mr. Chairman, and I  
17 appreciate Katherine bringing this up as well  
18 because I had intended and forgot to raise this  
19 during our discussion on next year's meetings.  
20 But Chris has expressed some interest in  
21 suggesting we move to more electronic based, and  
22 cut down on the paper. I think that's a great  
23 idea. I think there is a lot of things we can do  
24 here. For one thing, for anybody who would like  
25 it, we have enough laptops in the Department, we

1 can always arrange to have them available for the  
2 meetings if you want stuff in front of you  
3 electronically.

4 But we would look at whatever means made  
5 the most sense, whether it's discs, flash drives,  
6 links, whatever. But we would look at going that  
7 direction in general for the coming year for most  
8 of our board business, if not all of it, and then  
9 I think Katherine has also kind of independently  
10 looked at this particular case coming up, and just  
11 the volume and the amount of duplication, and  
12 suggested that this was a good time to start.

13 MR. ROSSBACH: I thought we had already  
14 addressed the question of scanning all of these  
15 materials and sending them to us, and there was  
16 some reason why we couldn't do it earlier. I  
17 thought we had talked about this about a year ago,  
18 scanning all of this stuff and sending it to us on  
19 discs or something like that.

20 CHAIRMAN RUSSELL: I think you might  
21 have asked that.

22 MR. ROSSBACH: We looked into it, and  
23 for some reason we didn't go forward.

24 MR. LIVERS: Mr. Chairman, Mr. Rossbach,  
25 I don't recall that. But I think we're interested

1 in trying to go that direction. Probably one  
2 caveat is that it would probably need to be an all  
3 or nothing. I know some people might still prefer  
4 hard copy, and the difficulty is if we do take the  
5 time to run down electronic copies and/or scan  
6 certain things, that's going to be pretty time  
7 consuming, and we'd probably want to shift that  
8 way entirely if we could.

9 But I apologize. I think I do recall  
10 the general discussion, and there may have been  
11 some hurdles, but I think we're assuming we can  
12 get this done, and we'd like to.

13 MR. ROSSBACH: The other thing is is it  
14 seems to me you could also require the parties to  
15 submit it electronically to us as PDF files. At  
16 least the Courts are all going that way also. And  
17 so there is a certain amount of additional expense  
18 probably, but ultimately when you -- the number of  
19 copies people have to make to do a filing, by the  
20 time they do that, they might as well take it in  
21 and get it commercially scanned.

22 I don't know. I feel like if we had  
23 this stuff on disc, then you could still print it  
24 if you wanted hard copies. If we get a disc, and  
25 you want a hard copy, we can still print it up. I

1 still use hard copy for lots of what I do, but I  
2 also -- You can see, I like it on disc. I would  
3 rather have it on disc, and not be having to carry  
4 this all around.

5 CHAIRMAN RUSSELL: The only thing I  
6 would like -- and I know a lot of them that do,  
7 and I'm sure Chris is already thinking about this  
8 -- is a searchable table of contents, so basically  
9 with the -- If everyone remembers the last time we  
10 did this, we had pages of tables of documents.  
11 And if we could actually click on those, and it  
12 would take us to those, instead of having to  
13 search through, it would really help a lot.

14 Even when we go electronic for regular  
15 Board meetings, if we could have a searchable  
16 table of contents, or a searchable agenda, it  
17 would save tons of time for us, especially in a  
18 hearing when someone says, "Look at Exhibit 4-H,"  
19 and we're scrolling through trying to find it on  
20 whatever page it comes up, if you could just click  
21 that 4-H, it would take you right to that  
22 document. Most web searchable web pages are like  
23 that anymore anyway. So it can be done. So we'll  
24 try it.

25 MR. LIVERS: Yes.

1                   CHAIRMAN RUSSELL: Let's get started  
2 today.

3                   MS. ORR: That's all I had, Mr.  
4 Chairman.

5                   CHAIRMAN RUSSELL: We're not going to  
6 keep Fed Ex in business anymore, I'm guessing.

7                   MR. ROSSBACH: Take it to Kinkos to get  
8 it scanned, and it will ultimately go to Fed Ex  
9 anyway.

10                  CHAIRMAN RUSSELL: So that takes care of  
11 those cases in litigation?

12                  MS. ORR: And there was oral argument on  
13 the petition for judicial review on October 17th,  
14 and we haven't heard from the Court yet on that.

15                  CHAIRMAN RUSSELL: That moves us into  
16 other briefing items. Tom, do you want to take  
17 them in this order?

18                  MR. LIVERS: Sure. That would be fine,  
19 Mr. Chairman. Thank you. Mr. Chairman, members  
20 of the Board, at the last meeting, Mr. Skunkcap  
21 had asked for an update today on the status of  
22 Zortman Landusky, and I think there were at least  
23 a couple of specific areas of interest. We've got  
24 some general information, and we also will  
25 specifically touch on what's happening with Swift

1 Gulch treatment, and also the issue of the short  
2 term operating costs for water treatment.

3 So with that, Wayne Jepson from the  
4 Department is here, and we do have a Power Point  
5 for this, so we may ask for a little bit of  
6 rearranging.

7 MR. JEPSON: Mr. Chairman, and members  
8 of the Board, I'm Wayne Jepson. I've been the  
9 DEQ's project manager since the bankruptcy of  
10 Pegasus Gold. This is a brief summary on status.  
11 We'll cover the status of reclamation work in  
12 Swift Gulch, our coordination with Fort Belknap on  
13 the project, and site operating costs and  
14 projected funding needs in near term.

15 As you know, Zortman Landusky are  
16 located in north central Montana just south of the  
17 Fort Belknap Reservation. There was extensive  
18 historic mining from the late 1800's through early  
19 1900's, followed by modern open pit mining between  
20 1979 and 1997, followed shortly by the bankruptcy  
21 of the company.

22 Since then, the State, in cooperation  
23 with the Bureau of Land Management, have managed  
24 the sites largely using the reclamation and water  
25 treatment bonds posted by the company, with

1 additional state and federal funding to cover  
2 short falls due to the inadequate bond.

3 Reclamation at the Zortman mine was  
4 mostly performed between 2001 and 2003, and  
5 Landusky between 2000 and 2005. The EIS that was  
6 prepared during 2002 recommended preferred closure  
7 alternatives for both mines, most of which was  
8 completed largely with surety bond funds from the  
9 Pegasus bond again, and with supplemental funding  
10 largely provided by the Bureau of Land Management.

11 The last remaining reclamation item in  
12 those preferred alternatives from the EIS was  
13 recapping of the Alder Gulch waste rock dump at  
14 the Zortman Mine; and with funding, the DEQ  
15 received a grant from DNRC. We completed that  
16 this summer. The soil was spread, and the site  
17 was reseeded in October.

18 So the remaining tasks at the sites are  
19 primarily continued operation of water treatment  
20 plants, and additional work on Swift Gulch. I  
21 apologize for the small text here. We can provide  
22 copies of this later if you want paper copies of  
23 this.

24 A brief overview of Swift Gulch.  
25 Deterioration of the water quality in Swift Gulch

1 didn't become evident until after the bankruptcy,  
2 so consequently, we hadn't set aside bonding or  
3 established bonding for future water treatment in  
4 Swift Gulch. It wasn't recognized as a problem.  
5 The deteriorating water quality in Swift Gulch led  
6 us to modify reclamation plans for the mine during  
7 preparation of the supplemental EIS between 2000  
8 and 2002, in an attempt to improve source controls  
9 and reduce infiltration of water through the  
10 acidic materials that would then contaminate the  
11 creek.

12           Despite this work, we haven't seen any  
13 improvement in the water quality in Swift Gulch.  
14 It's continuing to deteriorate. And consequently,  
15 DEQ has been applying for funding and seeking  
16 funding from the BLM and from other sources to  
17 address the problems in Swift Gulch.

18           The 2000 Legislature both awarded grants  
19 under the Reclamation Development Grants Program.  
20 We had applied for money for further research,  
21 installation of additional monitoring wells,  
22 tracer tests, etc., to better understanding the  
23 groundwater flow regime between the Landusky Mine  
24 and the creek; and we also applied for funding to  
25 establish settling ponds and treatment of wetlands

1 in Swift Gulch. And in addition, DEQ requested  
2 special funding from the Legislature of \$500,000  
3 to initiate development of a treatment system in  
4 the creek.

5 So we have received a total of \$950,000  
6 from the past Legislature, which we're now working  
7 with to begin treatment system development and  
8 other construction to improve the water quality  
9 there. And we are cooperating with the Bureau of  
10 Land Management and Fort Belknap through a  
11 technical working group to discuss these issues,  
12 and come to a mutual resolution of how to proceed  
13 and how best to spend the funding that's available  
14 at this time.

15 MR. ROSSBACH: Can I -- I don't know  
16 what are you -- What's the thinking about the sort  
17 of the geochemical hydrogeological issues that are  
18 leaving this or making it continue to deteriorate?  
19 And that's the first question. The second  
20 question is: What are the treatment, quote  
21 unquote, options that you're looking at? Are  
22 there passive treatment possibilities, or is it  
23 all going to have to be active?

24 MR. JEPSON: For both of your questions,  
25 I guess the answer is that that research grant

1 received from DNRC is intended to answer both of  
2 those questions. Initially I would say that the  
3 geochemical problem is that beneath the mine pits,  
4 the bedrock that the company was mining down into  
5 has a high concentration of sulfide minerals --  
6 and either due to the excavation of the mine pit  
7 causing infiltration of rain water to follow  
8 different flow paths to the ground water table  
9 than it used to, or shifts in the ground water  
10 table as a result of mining above it, changing  
11 flow paths and changing the water table -- results  
12 in oxygen getting into areas of bedrock that used  
13 to be beneath the water table, and are remaining  
14 in a reducing condition; and oxygen getting into  
15 these portions of bedrock is causing it to  
16 acidify.

17           So it's unlikely to be -- for the most  
18 part, it's unlikely to be mine waste or materials  
19 that were moved during the mining causing the  
20 pollution. It's change in flow of the groundwater  
21 beneath the open pits that's causing the problem.

22           Solutions. Here are some pond designs  
23 which we've recently come up with and discussed  
24 with the technical working group earlier this  
25 month, which would involve collecting the creek

1 water and running the water through a series of  
2 settling ponds to drop out the iron hydroxide  
3 sludges that are forming when this acidic water  
4 reaches the creek.

5           And when we first began working on this  
6 approach, and proposed to DNRC that these ponds be  
7 built, because the pH of the creek was naturally  
8 rising as it flowed from the area of seepage down  
9 toward the reservation boundary -- which is a  
10 distance of about a mile or so -- water quality  
11 was naturally improving over that distance as the  
12 sludges dropped out of the water. We initially  
13 thought that settling ponds alone would be a  
14 solution.

15           But during 2006, the pH of the water  
16 continued to drop, and the zone of the acidity  
17 continued to move downstream, so we've since  
18 concluded that that alone isn't enough. And we'll  
19 be studying the options for passive or  
20 semi-passive wetlands that the creek could flow  
21 through; but for those to function in the long  
22 term, you have to remove a lot of the metals load  
23 first, and we think active treatment will be  
24 necessary for that.

25           In the longer term, there is a

1 possibility of a number of things, including  
2 improved reclamation and capping on the mine site,  
3 or grouting of fractures and shear zones that the  
4 water is traveling through to prevent the water  
5 from moving that way. So in that case, it may  
6 somewhat raise the water table and inundate areas  
7 that are oxidizing, and slow down the process; or  
8 it may simply contain the water beneath the pit so  
9 it doesn't migrate into the creek.

10 I don't hold a great deal of hope that  
11 those are really going to be -- they could  
12 possibly be an effective solution decades down the  
13 road, but it will cost a lot of money to do it,  
14 far more money than we have right now, and it  
15 would probably also not show any benefits for  
16 several years after these steps were taken.

17 MR. ROSSBACH: It seems like what you're  
18 telling us is that we also don't even know how to  
19 do that, or where to do that, or how it's  
20 happening, so we wouldn't even know whether it's  
21 feasible until much more extensive study were  
22 done.

23 MR. JEPSON: Right. So we're looking at  
24 relatively brief -- a study of \$100,000 to  
25 \$200,000 in the next couple of years, in part to

1       decide whether it's even worth pursuing further,  
2       and if it's worth pursuing further, what we should  
3       focus on.  But in the near term, we think the only  
4       immediate and appropriate solution is to deal with  
5       the discharge into the creek, and we're looking at  
6       these treatment ponds right now to do that.

7                 MR. ROSSBACH:  So some portion of it  
8       will hopefully be passive, and you're just not  
9       determining how much is going to have to be  
10      active.

11                MR. JEPSON:  We know that some of it has  
12      to be active.  Probably the larger component.

13                MR. SKUNKCAP:  What do you mean some of  
14      it -- determining what it is worth?

15                MR. JEPSON:  Whether it's worth pursuing  
16      passive controls and source controls?  It may be  
17      that there is no way that we can stop the water  
18      from moving in the direction that it's moving, or  
19      prevent the water from becoming acidic in the  
20      groundwater beneath the pits.  The studies will  
21      indicate whether --

22                MR. SKUNKCAP:  Can you go back to the  
23      slide before that, please.

24                MR. JEPSON:  Sure.

25                MR. SKUNKCAP:  To that third bullet up.

1           MR. JEPSON: "Continued deterioration of  
2 water quality led us to conclude settling ponds  
3 alone wouldn't prevent the water quality impacts  
4 from extending further downstream."

5           MR. SKUNKCAP: The Tribe, have they seen  
6 your Power Point? And what is their thoughts on  
7 that? And what is your Power Point to the  
8 Tribe --

9           MR. JEPSON: They haven't seen this one,  
10 but we've been discussing it with the technical  
11 working group, and we've had tours with members of  
12 the Tribal Council on the site since 2006, as well  
13 as they've been to the Legislature for hearings,  
14 and we have discussed this with them.

15           Initially we proposed simply to divert  
16 the creek into settling ponds, and assume that the  
17 natural attenuation and improvement of water  
18 quality as it flowed downstream would handle the  
19 treatment aspect, and then the ponds would be used  
20 to trap these sludges as it settled out, as the  
21 creek naturally increased pH, and improved in  
22 water quality.

23           But over the past year, the acidity has  
24 -- which used to be only near where the seeps were  
25 entering the creek, the creek was acidic for maybe

1 a quarter mile or so. That acidity is now  
2 extending all the way to the reservation boundary.  
3 And as long as the water is acidic, metals will  
4 stay dissolved, and the settling ponds will not  
5 allow them to drop out. It requires more than  
6 just settling, because the water's pH needs to be  
7 raised, and there is no longer enough attenuation  
8 in the creek to raise the pH naturally.

9           And the water, the quality of the  
10 seepage entering the creek is continuing to get  
11 worse, more acidic. And so the creek used to be  
12 able to essentially clean itself up on its own, up  
13 until about a year ago.

14           MR. SKUNKCAP: And it's getting worse  
15 and worse the further it goes down, because I seen  
16 where it was right where the Pow-Wow grounds.

17           MR. JEPSON: Right.

18           MR. SKUNKCAP: Hurry up.

19           MS. SHROPSHIRE: Can I just comment  
20 along the "Hurry up" lines, which I agree with.  
21 But you were talking about groundwater tracers. I  
22 don't know if you've pursued that or not.

23           MR. JEPSON: We did do a tracer test  
24 between monitoring wells on the north edge of the  
25 pit and the creek about a year ago, and we

1 determined that there is a pathway from those  
2 monitoring wells, which are north, to the creek,  
3 and we measured a travel time of several months.  
4 And from that monitoring well to the creek, we  
5 found where the tracer appeared in the creek, and  
6 no tracer from that monitoring well ever showed up  
7 in the largest spring that has the worst water  
8 quality, and has the greatest flow discharge into  
9 the creek.

10 So we don't yet know what the pathway is  
11 for the water to get to that spring. We have some  
12 guesses, and we don't have any monitoring wells in  
13 the right location to inject dye where we would  
14 determine what that pathway is. So we can  
15 probably put in some more monitoring wells to  
16 better understand that, and then try to determine  
17 if that flow path can be shut off through grouting  
18 or through some other means.

19 CHAIRMAN RUSSELL: You still predict  
20 that it's happening on other side of that divide?

21 MR. JEPSON: Well, it's not on the other  
22 side of the divide, but --

23 CHAIRMAN RUSSELL: Where the top of the  
24 Gulch, it's happening to the --

25 MR. JEPSON: We believe the acid

1 generation is forming directly beneath the mine  
2 pits which are south of the creek.

3 MS. SHROPSHIRE: And it's more of a  
4 comment, but it's clear that the contamination is  
5 getting worse.

6 MR. JEPSON: Yes.

7 MS. SHROPSHIRE: And you think it's  
8 coming from the bottom of the pits?

9 MR. JEPSON: Not truly in the pits, but  
10 in the undisturbed bedrock beneath the pits, and  
11 it's geochemical process as a result of changes  
12 into the water table resulting from mining, and  
13 also additional oxygen getting into the bedrock.

14 MS. SHROPSHIRE: Although I'm a big  
15 proponent of groundwater tracers, they often are  
16 really expensive, and sometimes they take years  
17 for the results to be exposed because the  
18 groundwater may move slowly. And so I would just  
19 be careful to not rely on tracers too much, and  
20 wait five years to see what the results are going  
21 to show.

22 MR. JEPSON: Yes. And that's the sort  
23 of approach that was suggested in 2002 when we  
24 were on the supplemental EIS. Consultants and  
25 representatives of the EPA and others said that

1 the source control work that we did on the mine  
2 site was probably adequate to address the problem,  
3 but it would take a few years before we saw the  
4 results. That's now six years ago, and there has  
5 been no improvement that we can tell.

6 And so I don't think it's appropriate to  
7 wait years more before we take action. I think we  
8 need to start treating the creek, if possible  
9 intercepting the seeps themselves and treating  
10 them, but that's very difficult considering the  
11 topography of the area. And at least initially,  
12 we have to deal with the treatment of the entire  
13 creek as opposed to individual seeps.

14 So in terms of our work with Fort  
15 Belknap, we have been working with them since the  
16 Pegasus bankruptcy. Initially we formed a  
17 technical working group to help establish the best  
18 approach to developing reclamation and water  
19 treatment alternatives; and the Tribes, DEQ, EPA,  
20 and BLM met frequently during that period. And  
21 that technical working group was essentially  
22 disbanded when the EIS was completed.

23 In 2005, Fort Belknap requested that  
24 rather than pursue some lawsuits that had been  
25 stayed for some time addressing water quality

1 issues and the reclamation alternatives to the  
2 EIS, that we start a new technical working group  
3 to try to work through the issues, if possible,  
4 and keep open communication between the State and  
5 the Tribes on what was occurring up there.

6           So we met a number of times during 2006  
7 and 2007. We go back to Court each year with a  
8 recommendation to continue to stay the litigation  
9 while the technical working group goes through  
10 these issues.

11           We have recommended an extension of the  
12 group through 2008. We have a lot of work planned  
13 for this year, so we expect a lot of discussion  
14 with Fort Belknap, both through the technical  
15 working group, and from time to time directly with  
16 the Tribal Council when we have some major issues  
17 that we need to reach agreement on.

18           And so the plans that we're currently  
19 developing for Swift Gulch treatment, we will  
20 present those to the Council sometime early in  
21 2008, as soon as we have a fairly well defined  
22 plan.

23           And the next item on my agenda here is  
24 to talk about funding. We've put a lot of work  
25 into trying to lower the cost of operation of the

1 site through efficient management. And here is  
2 the list from our consultant or our site  
3 contractor of their cost of site management from  
4 2004 to 2007. You can see that the costs have  
5 dropped by a few hundred thousand dollars per year  
6 each year.

7 We believe the 2007 costs are probably  
8 as low as they can ever get. We reduced staff to  
9 six full-time employees on the site; we've put in  
10 smaller pumps that work more often, as opposed to  
11 large pumps that we have a constant use of  
12 electricity, instead of peaks which cost us a lot  
13 more. We've routed water to the treatment systems  
14 in a more efficient manner. So we're down to the  
15 lowest possible cost we can run the site with at  
16 this time.

17 MS. SHROPSHIRE: Is there any evidence  
18 that the change in pumping could have contributed  
19 to the deterioration?

20 MR. JEPSON: No. Actually the  
21 deterioration in Swift Gulch -- There is neither  
22 any treatment systems nor pumping systems in that  
23 area at this time. There is at the south end of  
24 the mine pits, there is an artesian well which  
25 discharges maybe 120 gallons per minute, which

1 goes to the treatment plant, and that well has  
2 been open continuously for the last eight years.

3           And that lowering of the water table  
4 with an open artesian well actually may be an  
5 issue, which at the time of the EIS was a good  
6 thing, and now we're wondering if we need to do  
7 some more research, whether reducing the flow out  
8 of that well might slow down the reactions, but  
9 certainly wouldn't stop them. So that's something  
10 that we need to look at.

11           But the changes in pumping are just a  
12 matter of capture systems and ponds that were  
13 originally set up with very large pumps that kick  
14 on maybe once every two weeks to drain a pond and  
15 pump the water into another pond, and now they  
16 cycle on every couple hours, and that reduces our  
17 electricity costs a lot. But it's moving water  
18 that's already contained from one pond to another.

19           And again, the annual bond increment we  
20 receive from Pegasus Surety Companies is \$731,000,  
21 so you can see that's a shortfall of about  
22 \$460,000 compared to 2007 operating costs.

23           MR. ROSSBACH: What about renewable  
24 energy to run these things? Have you looked into  
25 that?

1           MR. JEPSON: We have discussed the  
2 possibility of small hydro, which means  
3 discharging, say, from a water treatment plant,  
4 putting in a small turbine somewhere in that line  
5 to generate a little electricity. That might be  
6 worth pursuing. It wouldn't generate a lot of  
7 power, but it would maybe cover the cost just a  
8 little bit of some of the pumps that we run.

9           Another option is wind power. We're  
10 very interested in that. We may consider writing  
11 some grants to develop wind power there in the  
12 future. We would need to negotiate that with Fort  
13 Belknap, and we have talked with Big Flat Electric  
14 Cooperative in the past, who has been very opposed  
15 to us getting off the grid because we are their  
16 major customer. So we will pursue that more in  
17 the future, but at this time, we focused just on  
18 getting our costs down to what we feel is the  
19 minimum we can operate the site on, and now we're  
20 going to look at what we can do with renewable  
21 energy.

22           We've had anemometers on the site for a  
23 couple of years. We know that average wind speeds  
24 are great for wind power development.

25           MR. ROSSBACH: It seems like it would

1 be.

2 MR. LIVERS: Mr. Rossbach, let me just  
3 throw, in, too. As Wayne was saying, we've got  
4 anemometers on the saddle right above the Landusky  
5 pit, and wind speeds consistently in excess of 17  
6 miles an hour. So technically, there is a lot of  
7 potential.

8 The issue with Big Flat, unfortunately  
9 they're -- in the rate base, they're amortizing  
10 some of that costs of that line that went down.  
11 The problem with just going off the system is they  
12 would spread those costs to the other captives on  
13 the system, the other captive customers, which is  
14 primarily folks down in Hayes, and so it's not  
15 just a simple matter of taking it out of their  
16 rate base.

17 We're real interested in doing that, but  
18 we are also worried about the derivative effects  
19 of that, too.

20 MR. ROSSBACH: If it's such a good site,  
21 maybe we can generate an excess of power, and then  
22 reduce the rates for the people in Hayes. If we  
23 generate an excess of power, we could become the  
24 major power source, and give cheaper power to  
25 people.

1           MR. LIVERS: I agree. That's the next  
2 iteration. We're trying to do that.

3           MR. ROSSBACH: If that's a good site, it  
4 seemed like knowing the site, that that would be a  
5 long term goal, and somebody might want to give us  
6 some money to see how we can do that.

7           MR. LIVERS: I tend to agree with you --  
8 personally, I do -- but it's just some of the  
9 stuff that makes it a little more complicated to  
10 figure out.

11           MR. JEPSON: This is a breakdown of  
12 where we're getting funding. Again, \$731,000 from  
13 the bond each year. To date over the last five  
14 years, the BLM has contributed over \$2 million  
15 toward covering the shortfall. Of that, we are  
16 projecting as of the end of December, we'll still  
17 have \$883,000 of funds that BLM has already  
18 awarded us. And given the rate of expenditures in  
19 2007, that could carry us for almost two years  
20 covering the shortfall, if it stays at the current  
21 rate.

22           Other funds we have. There is \$226,000  
23 remaining in the Zortman site reclamation bond,  
24 which we have in the bank in an interest bearing  
25 account. And we also have other funds totalling

1 about \$616,000 that have been generated from  
2 interest off the bond amounts that we had in the  
3 bank, sale of some of the equipment that we owned  
4 on the sites, and various other sources.

5 We're holding this basically until the  
6 end. As long as BLM continues to fund us, we want  
7 to keep these funds held for later, for say a year  
8 when BLM can't come up with the money. We're  
9 earning interest on these funds, and BLM might not  
10 pay interest, so we're spending the bond first,  
11 and then the BLM money, and that is the water  
12 treatment bond that comes in anyway.

13 And as a last ditch measure, the State,  
14 through -- A law was passed shortly after the  
15 Pegasus bankruptcy. We were given the ability to  
16 sell bonds to raise funding to put toward  
17 additional water treatment costs. The State  
18 actually did this to cover short falls at the  
19 Beal Mountain site, which is another Pegasus site.  
20 We haven't done this in Zortman yet because, first  
21 of all, we've still been spending bond money, and  
22 the shortfall has largely come from the BLM to  
23 cover the additional costs to date.

24 Based on a 2007 cost of \$1.12 million,  
25 I'm using \$1.2 million as the estimated annual

1 cost in the future. Depending on what it takes to  
2 treat Swift Gulch, that might be a little low.  
3 But here is the breakdown. \$731,000 per year from  
4 the bond; the BLM funding that we have to date --  
5 BLM has also assured us that if they can come up  
6 with more money each year, they'll continue to do  
7 so. And our agreement with them has an additional  
8 \$3 million of potential future funding within the  
9 agreement, but it hasn't been guaranteed to us as  
10 yet.

11 So with the existing BLM funding, it  
12 will carry us almost two years. With what DEQ has  
13 in the bank for Zortman, that will carry us about  
14 another two years. So you can see we're  
15 projecting a shortfall of -- we'll run out of the  
16 funds we have right now to cover all costs  
17 somewhere around 2011, maybe November of that  
18 year; and then the \$731,000 will continue to come  
19 in through 2017. Based on that, we would need  
20 about another \$3 million to cover all future costs  
21 through 2017 at that annual cost estimate.

22 The Pegasus bond was set up that the  
23 funding under that would end in 2017, and Pegasus  
24 started a trust fund to cover costs beyond 2017.  
25 They didn't fully fund that trust fund before

1 their bankruptcy. DEQ has put in about another  
2 \$900,000 into that trust fund, so that in the year  
3 2017, that fund will have a value of \$14.6  
4 million.

5 In 2005, Jonathan Windy Boy introduced a  
6 bill that would put \$1.2 million per year into a  
7 new trust fund that would have a value of  
8 approximately \$20 million by 2017. The combined  
9 of the two trust funds is about \$34 million. It's  
10 been estimated that running the site largely off  
11 interest on that \$34 million for the first several  
12 years, that should cover all our treatment costs  
13 for about 100 years or more beyond that.

14 And that's basically the end of the  
15 presentation. This is a photograph of -- aerial  
16 photo of the Landusky Mine in 2006 viewed from the  
17 south. As you can see, except for a few pit high  
18 walls and some roadways, the site is pretty well  
19 vegetated at this point.

20 And there is a mine site photograph, two  
21 mine sites, with the BLM's CRCLA site boundary  
22 outlined in orange.

23 Further questions?

24 MR. MARBLE: The treatment costs that  
25 you're estimating include the Swift Gulch

1 treatment?

2 MR. JEPSON: Well, when we proposed --  
3 When we requested \$500,000 from the Legislature  
4 for development of the treatment system, our  
5 consultant at that time estimated that the system  
6 we were proposing would cost about \$35,000 per  
7 year to operate. I think based on further study  
8 in Swift Gulch, it looks like the volume of water  
9 we were estimating that would require treatment is  
10 about double what it was at that time. So that  
11 would be maybe \$70,000. The \$1.2 million per year  
12 figure I used is \$80,000 less than what the cost  
13 of this year.

14 So assuming those costs don't go up,  
15 assuming the treatment system we proposed is  
16 sufficient, then it does. But we're very early in  
17 the planning phases. We haven't built and tested  
18 anything at this point. It could easily cost  
19 more. That's something that we just can't say  
20 right now.

21 MS. SHROPSHIRE: Can you -- I don't know  
22 if you have a pointer.

23 MR. JEPSON: Yes, I do.

24 MS. SHROPSHIRE: Show where the acidity  
25 was first noticed in Swift Gulch, and then where

1 it has migrated to.

2 MR. JEPSON: It was first noticed right  
3 about here in some small seeps and springs that  
4 were entering the creek from -- actually from both  
5 the south and the north sides, and that's because  
6 there is an upward hydraulic gradient beneath the  
7 creek there so that the seep is filling in from  
8 both sides, even though it's, we believe, only  
9 being derived from the mine pit area to the south.

10 So the acidity is probably being  
11 generated in this region here, which is the mine  
12 pits. And the last sample I have seen for the  
13 fall of 2007 showed a pH of about five all the way  
14 down here. The pH down here has been running at  
15 neutral pH seven up until this year, but it's now  
16 becoming acidic all the way to the reservation  
17 boundary. The sample taken, the zinc  
18 concentration was two or three parts per million  
19 at that location, whereas it had been about 10  
20 percent of that up until the middle of this past  
21 year.

22 So concentrations of zinc, nickel, and  
23 -- I think primarily zinc and nickel are rising,  
24 have exceeded aquatic water quality standards down  
25 to the reservation boundary as of September.

1 MS. KAISER: What's your estimate?  
2 What's your flow estimate? What is your estimate  
3 of flow water seeping into the creek?

4 MR. JEPSON: Well, in the reach, the  
5 seepage enters the creek. Base flows in the creek  
6 at the upper end of that zone are maybe five  
7 gallons a minute, and at the lower end of that  
8 zone are something like 55 to 60 gallons per  
9 minute. So I don't know if all that is coming out  
10 of the shear zone, or some of it is probably  
11 contributed from the drainage area to the north  
12 side of the creek as well.

13 We have in the past always assumed that  
14 the flow from that shear zone entering the creek  
15 is on the order of 30 or 35 gallons a minute  
16 regardless of that, because the seeps come in at  
17 the bottom of a very narrow bedrock canyon. We  
18 can't really -- The seeps are kind of seeping out  
19 of the wall of the canyon, so we have to collect  
20 the whole creek, and the base flow is maybe 60  
21 gallons per minute. Because we have to collect  
22 the whole creek, we may not be able to treat it in  
23 peak runoff. Maybe in May and June. We probably  
24 can't treat the entire thing.

25 MS. KAISER: And that creek runs year

1 around?

2 MR. JEPSON: Yes, it does. It's running  
3 further all the time as this iron precipitate  
4 coats the creek bottom. It used to lose all its  
5 water into the groundwater system, and perennial  
6 flow is moving farther and farther down stream  
7 each year, and as the creek bottom becomes coated,  
8 it's flowing further.

9 MS. SHROPSHIRE: Based on what you're  
10 seeing at Swift Gulch, are there other areas that  
11 are currently uncontaminated that you're worried  
12 about in areas to the east?

13 MR. JEPSON: No. Swift Gulch is one of  
14 the few places where there wasn't a capture system  
15 installed in the mid 1990s, because acid drainage  
16 was identified in other areas first. The last  
17 phase of mining involved deepening those pits, and  
18 so those are the last areas to be impacted by the  
19 mine, and the last areas where the effect showed  
20 up, in part because it's not simply an oxidation  
21 of mine waste that was excavated and relocated,  
22 but it's oxidation of in-place bedrock itself,  
23 which reacts more slowly than rock that has been  
24 crushed and moved.

25 And also there is a major fault zone

1 that runs basically parallel to the pits this way.  
2 It's monitored by an artesian well at this end,  
3 and the shear zone runs directly into the creek at  
4 Swift Gulch. So it's a major flow of groundwater  
5 through the system. There is no other major  
6 bedrock pathways in the mine area that are  
7 extensive -- you know, miles of continuous fault  
8 zone that are highly transmissive.

9 So we have monitoring wells throughout  
10 the site that we check elsewhere, and this is the  
11 only area where there appears to be significant  
12 contamination that's not flowing into a collection  
13 system.

14 CHAIRMAN RUSSELL: Any other questions?

15 MR. SKUNKCAP: You mentioned on there  
16 the vegetation has come back and stuff. How much  
17 is the native vegetation that came back and  
18 alfalfa everywhere as opposed to that? Plus you  
19 never mentioned any wildlife. How much has it  
20 swayed wildlife, and raptors? What kind of  
21 monitoring of wildlife is going on through that?

22 MR. JEPSON: We don't monitor wildlife,  
23 except that we noticed that there are large herds  
24 of mule deer and big horn sheep on the site.

25 MR. SKUNKCAP: From the alfalfa.

1           MR. JEPSON: I'm not a vegetation  
2 expert, but I know that our vegetation cover is  
3 dominated by grasses and alfalfa, and I think that  
4 draws the wildlife in, because the forested area  
5 is a little rocky, predominantly lodgepole pine,  
6 and very little other forage. So there seems to  
7 be a boom in wildlife on the site since the  
8 reclamation.

9           MR. SKUNKCAP: So the alfalfa holds more  
10 water?

11           MR. JEPSON: It draws more water back  
12 out of the soil, so it's valuable in the water  
13 treatment sense in that less water is getting into  
14 the mine waste, because the alfalfa has deep  
15 roots, and rapidly draws water back out of the  
16 soil cover.

17           MR. SKUNKCAP: So like roots and herbs  
18 and stuff, are some of the tribes -- cultural  
19 points. Is any of that, besides their Pow-Wow  
20 grounds, is any fasting places up there got  
21 affected by that?

22           MR. JEPSON: I don't know the answer to  
23 that. On the mine site, we primarily again  
24 planted this alfalfa and grass mix with trees and  
25 shrubs in local areas, and we did plant

1 specifically some native shrubs and native plants,  
2 especially in selected areas on the mine site  
3 where we thought they'd survive better. And part  
4 of that concept was to establish a quick cover  
5 crop that would vegetate the area and control  
6 erosion quickly, and then plant some of these  
7 native species that we hoped would in time spread  
8 to these other areas. But again, I'm not the  
9 vegetation expert. I can't say a lot on either  
10 what the theory was behind it, or how well it's  
11 doing.

12 CHAIRMAN RUSSELL: Since Wayne is up in  
13 front, if there is anyone in the -- because we  
14 allow public comment. If there is anyone of the  
15 audience that would like to ask Wayne a question  
16 as part of the public comment phase, that would be  
17 appropriate now before we break down, and get on  
18 to the next item. Anyone out there want to have a  
19 question?

20 MR. STIFFARM: Mr. Chairman and Board  
21 members, my name is Wayne Stiffarm. I'm from the  
22 Fort Belknap Tribe in the Environmental  
23 Department. I'd like to thank Tom for notifying  
24 us of this meeting, and the topic being on the  
25 agenda.

1           One of the comments that Board member  
2 Bill stated here was about wind power, and that's  
3 one of the biggest concerns that we have, that if  
4 the mine site -- that our enrolled members of the  
5 reservation on the south side are going to be  
6 impacted again, because once the mines did shut  
7 down, Big Flat raised their rates on our enrolled  
8 members, and the mines go off line, and probably  
9 looking at a bigger rate increase. And so that's  
10 just something that I want to make a comment on.  
11 Thank you.

12           CHAIRMAN RUSSELL: Thanks, Dean. Thanks  
13 for coming down.

14           MR. ROSSBACH: Maybe this is obvious,  
15 but I'd like to make a general comment here about  
16 hard rock mining, and the future of hard rock  
17 mining, and our future analysis of hard rock  
18 mining projects.

19           We've had -- This has been a big lesson,  
20 I think, for all of us. One of the lessons, of  
21 course, was first of all, this kind of mining  
22 causes acid mine drainage. But what I'm hearing  
23 today, and maybe was obvious to other people  
24 beforehand, but what I'm hearing today, which is  
25 an even bigger lesson to me, is that it's not the

1 waste rock.

2           It's not the waste rock pile that's  
3 causing this problem. It's a permanent problem  
4 that may be irremediable, because you can move all  
5 the waste rock, and cap the waste rock, you can  
6 put the waste rock in a safe or in a lock box, and  
7 it ain't going to make any difference to the  
8 future of this. So once you start opening these  
9 geological formations up, you're creating a  
10 permanent problem, because you're altering the  
11 essential underground ecosystem.

12           And I think that that is an important  
13 lesson that I think none of us really had any idea  
14 about before we got here, and that it's no longer  
15 just a waste rock issue. We can clean this thing  
16 up to the end of time, and we're still going to  
17 have an acid water problem, and I think that  
18 that's incredibly important as we go forward in  
19 analyzing future hard rock projects.

20           CHAIRMAN RUSSELL: Thanks, Bill.

21           MR. SKUNKCAP: I have a question for Mr.  
22 Stiffarm. Mr. Stiffarm, thank you for attending  
23 today's meeting. What are the Tribe's feelings on  
24 -- You mentioned about power rates going up, too.  
25 So the Tribe is aware if there is wind power, or

1 renewable resource or power, that the Tribe will  
2 get some compensation from that.

3 MR. STIFFARM: Board Member Skunkcap, we  
4 just went through our new tribal elections, and so  
5 next Thursday I've got an orientation for the new  
6 Tribal Council, and some of this information on  
7 this, on both mine sites are going to be new to  
8 them. And that was one of our biggest concerns,  
9 was having the mines go off Big Flat's grid lock  
10 there, and they be absorbing the cost.

11 The members from Hayes and Lodgepole,  
12 they're way below poverty level, and they won't be  
13 able to absorb the higher rate on the electric  
14 bill. And like a lot of them places out there are  
15 run completely on -- their houses are completely  
16 run on electricity rather than propane.

17 MR. SKUNKCAP: So you're going to brief  
18 the new Council. I think that the Tribe should be  
19 compensated on that. I think that's a minimum.

20 MR. STIFFARM: Yes, because we already  
21 went through one rate increase from Big Flat when  
22 the mines did shut down. They raised the rates  
23 out there to cover the -- Big Flat did -- they  
24 upgraded their transmission lines or something out  
25 there. So we absorbed that cost. So if the mines

1 go off line, then we'll have to absorb that cost.

2 But anyway, what I wanted to do, too, is  
3 if possible, I wanted to ask Wayne if I take this  
4 Power Point, and show them when I do my  
5 orientation next Wednesday.

6 MR. SKUNKCAP: Open invitation right  
7 there.

8 MR. JEPSON: You've got it.

9 MR. SKUNKCAP: So the Tribe's feelings  
10 on that, and what has happened, I guess that's the  
11 first time I openly heard it from Board Member  
12 Bill about -- we realize it's a mistake, and we  
13 have to learn from this, and we're trying to fix  
14 it now, but we can remove everything, and it's  
15 something we're going to have to live with. And I  
16 think the power deal would compensate a little on  
17 that. But I think we all need to learn from this.

18 There is another issue that's going on  
19 with Northern Cheyenne, too, and we realize those  
20 people need the water, and I lived with that water  
21 for four or five years, too, and I needed it, too.  
22 But bringing that up really fast like that, and  
23 the company going bankrupt, and leaving the  
24 people, that's -- I don't know. But just as long  
25 as the Tribe knows, and thank you for coming.

1 Thank you, Mr. Chairman. I'd like to thank Tom  
2 for my request on that update. That was very  
3 informative.

4 CHAIRMAN RUSSELL: Any closing comments?

5 (No response)

6 CHAIRMAN RUSSELL: Thanks, Wayne.

7 Appreciate it. We're going to take a break.

8 (Recess taken)

9 CHAIRMAN RUSSELL: Let's get started.

10 The next briefing item is regarding enforcement  
11 and penalty calculation process. Tom.

12 MR. LIVERS: Mr. Chairman, thank you.

13 John Arrigo is the Division Administrator of our  
14 Enforcement Division. We felt there was some  
15 value in kind of just running through for the  
16 Board how we take enforcement actions, and how we  
17 set penalties and fines, and statutory concerns  
18 that go into it, because I know this Board gets  
19 involved in some of those activities.

20 MR. ARRIGO: Mr. Chairman, members of  
21 the Board, for the record, my name is John Arrigo,  
22 Administrator of the Enforcement Division.

23 And the Board promulgated new penalty  
24 rules in 2006, and you see a lot of our appeals of  
25 our enforcement actions, so I thought it might be

1       beneficial to just give you an overview of our  
2       enforcement process, and how we calculate these  
3       penalties, and let you know how it's been going  
4       since these new rules have been in effect for over  
5       a year.

6                I have a hand out, which I believe Chris  
7       distributed, which looks like this. And first of  
8       all, I want to draw your attention to this table  
9       which shows all of the statutes that we enforce,  
10      and the administrative and civil penalty  
11      authorities, and where those penalties go to. A  
12      lot of our penalties go into the General Fund, but  
13      some go into special revenue accounts. And there  
14      is a lot of authority there, a lot of different  
15      statutes that we have to deal with, and we  
16      centralize all of our enforcement in the  
17      Enforcement Division. And so when one of the  
18      programs has a significant violation, they refer  
19      it to us, and we pursue the enforcement.

20               It's also notable that for the statutes  
21      that are -- Montana statutes that mirror federal  
22      statutes, the administrative penalties are  
23      significantly higher. For example, air, asbestos,  
24      the administrative penalty is \$10,000 a day. In  
25      contrast to the Montana specific statutes, like

1 the Open Cut Mining Act, that penalty authority is  
2 \$1,000 a day. For the Montana Motor Vehicle  
3 Recycling Law, those penalties are only \$50 a day.

4 So because of the federal government's  
5 oversight, and the requirements of the federal  
6 legislation, our penalties are quite high for  
7 those laws that we are authorized to administer on  
8 behalf of the EPA.

9 I also want to talk a little bit about  
10 our enforcement discretion, and where do we use  
11 our judgment in taking cases or calculating  
12 penalties, just to let you know that it's not  
13 willy-nilly, let the good times roll, whatever Mr.  
14 Arrigo wants goes.

15 The statutes give us the ultimate  
16 discretion. They all say that the Department may  
17 issue an order, and that order may include a  
18 penalty. So that's our first question is whether  
19 or not we actually pursue enforcement. So we must  
20 follow the statutes, rules, legal practices, there  
21 is Rules of Civil Procedure, there is the Montana  
22 Administrative Procedures Act. We have guidance  
23 and common sense. We try to follow all of that in  
24 exercising our enforcement discretion.

25 The first phase of the process is

1 violation discovery and notification. We discover  
2 violations through a variety of ways. Citizen  
3 complaints, they'll call and complain about an  
4 activity that they think is illegal, we'll  
5 investigate it, and possibly discover a violation.  
6 We have inspectors who go to sites that may  
7 discover violations.

8           But a lot of our violations come from  
9 the regulated entities themselves. Most of the  
10 permits require some sort of self-monitoring and  
11 reporting. We go through those reports, and did  
12 they exceed the air emission limit, did they  
13 exceed the water quality effluent limit on their  
14 permit.

15           After we discover the violation, the  
16 next step is to determine its significance, and  
17 that helps us decide what violations deserve  
18 enforcement and a penalty. It also helps to  
19 eliminate personal bias and inconsistency. We may  
20 have an individual or a program that is very  
21 aggressive, and they want to fine everybody for  
22 everything, and another program that is a little  
23 more lax. And if we have definitions of what  
24 constitutes a significant violation, we have a set  
25 threshold there that helps everybody decide which

1 ones deserve enforcement.

2           Also we have an enforcement agreement  
3 with EPA, and that states that significant  
4 violations will be typically addressed with an  
5 enforcement action and penalty. Also as part of  
6 that agreement, we've agreed upon these  
7 definitions of significant violations, and there  
8 is also the ever present concern that EPA may over  
9 file, take their own action, if they don't believe  
10 that ours is adequate, or that the penalty is  
11 large enough. So we have kind of the gorilla in  
12 the closet that's watching us also.

13           We also need to determine if there is  
14 any corrective action that is necessary to fix a  
15 violation or return the person to compliance. The  
16 next step is to send a warning letter or a  
17 violation letter, and this is to notify the  
18 alleged violator of the violation, explain our  
19 findings. We don't like to back door anybody or  
20 surprise them. We're up front and say, "We think  
21 there is a violation, and this is why." Then we  
22 describe what's necessary to fix the problem.

23           Some of the statutes actually require  
24 that we send this notice or violation letter  
25 before we take an action, but it's always been

1 DEQ's practice to send a notice letter to inform  
2 the violators of our position, and these letters  
3 are considered compliance assistance. They  
4 provide an opportunity to cooperate with the  
5 Department, plus they also create documentation  
6 that could be used in any future enforcement  
7 action.

8           The letters also ask if they have any  
9 information to show that the violation did not  
10 occur, or that it didn't occur as we described it.  
11 And we invite them to discuss these facts so that  
12 we can get everything on the table. We are not  
13 always correct. We have to gain information from  
14 them.

15           If it's a significant violation that  
16 deserves enforcement, the program prepares an  
17 enforcement request. I've given you a blank one  
18 of those. This is the document that initiates  
19 enforcement. It goes through the chain of command  
20 as far as signatures, and it's ultimately approved  
21 by the Director, and that initiates the  
22 development of an enforcement action.

23           If we have an emergency situation where  
24 something needs to be stopped immediately, we  
25 would file in court for an injunction to have the

1 Court order somebody to stop doing something that  
2 might be causing pollution, or continuing a  
3 violation.

4 After the enforcement request is  
5 approved, the next phase is actually taking  
6 enforcement action. The first thing we have to do  
7 is evaluate the case strength. We assign a case  
8 manager, an attorney, and we evaluate the evidence  
9 to determine what violations we have, which ones  
10 are significant, which ones deserve a penalty, and  
11 which ones are a strong case. We always have to  
12 keep in mind that any of these administrative  
13 actions may end up in District Court, so we want  
14 to be confident that we have a strong case.

15 We then have to select if we go  
16 administrative or judicial. Most of the laws have  
17 administrative order authority, but we can also  
18 file a Complaint in court and seek civil  
19 penalties. That decision kind of depends on a  
20 variety of factors, the recalcitrance of the  
21 violator. Sometimes we've worked with these  
22 people, and we know that they would ignore an  
23 order, so we decide to go straight to court.

24 We also have to look at the impacts or  
25 threats posed by the violation. Again, if it's

1 something that's kind of an emergency, that we  
2 need to get it stopped, and we need the weight of  
3 the Court behind us, we'll go to court right off  
4 the bat. But all in all, about 93 percent of our  
5 cases are administrative.

6 We next calculate the penalty and  
7 identify any necessary corrective action that  
8 might be needed in the order. We like to have our  
9 orders require something, and assess a penalty for  
10 the violation. And I'll explain the penalty  
11 calculation in more detail later.

12 So we work with the regulatory programs  
13 and the attorneys, and determine what corrective  
14 action is needed. They may be ordered to do more  
15 monitoring, or testing, or submit a permit  
16 amendment, or submit a cleanup plan.

17 Then our staff drafts the administrative  
18 order, and it is submitted to the attorneys, and  
19 they review and finalize the orders, and then I  
20 sign the orders, and they're issued basically.  
21 Our goal is to have the orders issued within 120  
22 days of the enforcement request, and we meet this  
23 about 90 percent of the time.

24 Sometimes we use what we call a demand  
25 letter, and I've shown that on the flow chart as

1 kind of an off shoot here. Demand letters are  
2 typically used in air, asbestos, and sometimes  
3 hazardous waste cases, and the use of a demand  
4 letter is kind of based on past practices. The  
5 old DHES air program always sent demand letters,  
6 and we have kind of continued that. But they're a  
7 useful tool.

8           And the reason we will send a demand  
9 letter is that under air, our administrative  
10 penalties are capped at \$80,000. A lot of times  
11 the penalties we calculate are much higher, so if  
12 it's a higher penalty, we have to go to court.  
13 But instead of filing a Complaint in court, we  
14 will send a demand letter, which avoids a  
15 protracted court case, and immediately initiates  
16 settlement discussions.

17           So in a demand letter we'll say we  
18 believe we've documented those violations, we've  
19 calculated this penalty. If you agree to pay the  
20 penalty and do the necessary corrective action,  
21 we'll settle this with an Administrative Order on  
22 Consent. If they agree to those terms, we've  
23 arrived at a settlement. If not, then we'll file  
24 a Complaint in court, and start the legal action.  
25 That's why you don't see a lot of appeals of air

1 orders, because we don't issue that many.

2 After we issue the order or send a  
3 demand letter, that starts the settlement or  
4 litigation phase. All our orders provide a 30 day  
5 opportunity to appeal. We average about ten or  
6 twelve appeals per year, or 3 percent. You  
7 wouldn't know that from looking at today's agenda,  
8 but for the past seven or so years, that's about  
9 the average.

10 Most violators want to settle. Most of  
11 our violations are documented. They're kind of  
12 accepted as fact. But they also want to preserve  
13 their right to appeal, so a lot of people will  
14 appeal, and at the same time, undergo settlement  
15 negotiations. And we do settle most of our cases.  
16 That's why you see a lot of appeals, but then we  
17 ask you to dismiss the appeal. Very few appeals  
18 actually go to a contested case hearing. I think  
19 you can count on your hand how many actual  
20 hearings we've had.

21 If there is a hearing, the Board makes a  
22 decision, and they may uphold, modify, or rescind  
23 our action. If we do settle outside of a hearing,  
24 we'll sign an Administrative Order on Consent, and  
25 ask the Board to dismiss the appeal.

1           If the case is filed in court, the DEQ  
2 attorney is kind of the lead in taking all of the  
3 action, but he represents the Department as his  
4 client. But court processes take much, much  
5 longer, and consume a lot of our staff time.

6           And as in administrative cases, if we're  
7 in court, usually there is concurrent settlement  
8 discussions ongoing, and sometimes a Judge will  
9 require mediation before we actually have a court  
10 hearing. So a lot of these court cases settle  
11 before we have a hearing, and if we settle, we'll  
12 sign a stipulation or a consent decree. That's  
13 brings us to the end of the flow chart.

14           As far as the penalty calculation  
15 process, I'd like you to refer to the blank  
16 template that was handed out. We have an Excel  
17 spreadsheet which helps us calculate our  
18 penalties, and I'll try and highlight where we  
19 have discretion in this process.

20           The 2005 Legislature passed a new law  
21 which standardized the penalty factors for all of  
22 the environmental statutes that we administer, and  
23 then the Board promulgated rules that became  
24 effective in June of 2006 which described the  
25 penalty calculation process. The rules provide a

1 consistent process for calculating penalties, but  
2 they're still subjective and qualitative. But  
3 having rules in place attempts to minimize that  
4 subjectivity, and attempts to quantify some of  
5 these factors.

6           The purpose of the penalty rules as  
7 stated in the rules is to calculate a penalty that  
8 is commensurate with the severity of the  
9 violation. That's kind of our favorite phrase  
10 here. Also penalties are supposed to provide an  
11 adequate deterrent to future violations or other  
12 violators. We want them to know that if they  
13 violate the law, they will have to pay a penalty.  
14 We also want to capture the economic benefit of  
15 noncompliance.

16           The first step in the penalty  
17 calculation process is to determine the base  
18 penalty, and that's based on nature, extent, and  
19 gravity. Nature defines whether or not it's an  
20 administrative penalty, a paperwork type  
21 violation, or a reporting violation, or if it's a  
22 violation that has potential to harm human health  
23 and the environment.

24           Depending upon the nature, it kicks it  
25 into one of two matrixes that are shown on the

1 bottom of the spread sheet. Then we look at the  
2 extent and gravity, and assign a degree of major,  
3 moderate, or minor. Depending upon all those, we  
4 come up with a percentage that is multiplied times  
5 the maximum penalty, and that's our base penalty.

6 In addition to the language in the  
7 rules, we have put together some guidance which  
8 help us decide on nature, extent, and gravity, and  
9 the adjustment factors. And I can tell you that  
10 nature, extent, and gravity are usually not  
11 negotiable. We've basically predetermined those  
12 for a lot of the common violations. However, the  
13 adjustment factors -- circumstances, good faith  
14 and cooperation, amounts voluntarily expended --  
15 are negotiable, but we have guidance on how we  
16 weigh those.

17 After we adjust the penalty, we come up  
18 with our adjusted base penalty, and the next  
19 decision is the days of violation. The days of  
20 violation is the big multiplier that can result in  
21 large penalties, and this is the area where we  
22 have the most discretion, and where we exercise  
23 our discretion the most, to the largest degree, I  
24 guess is correct. Basically each day of violation  
25 constitutes a separate violation, and we would

1 multiply the number of days times the adjusted  
2 base penalty to arrive at the total adjusted  
3 penalty.

4           We can also have continuing violations  
5 that can last for months, and the rules state that  
6 for continuing violations, if the number of days  
7 results in a penalty that is higher than the  
8 Department believes is necessary to provide an  
9 adequate deterrent, the Department may reduce the  
10 number of days. We knew in advance when we wrote  
11 those rules that we're going to have violations  
12 that continue for many, many months, and if we  
13 multiply the penalty times that, huge penalties.  
14 So we have discretion in the rules to adjust the  
15 number of days.

16           Other considerations we take into  
17 account when we might adjust the number of days is  
18 we do not intentionally want to put someone out of  
19 business. Some people should not be in business,  
20 but we do want to settle and obtain a penalty that  
21 is commensurate with the severity of the  
22 violation. If someone claims they don't have the  
23 funds to pay a penalty, we have a formal process  
24 to measure their ability to pay; and if they have  
25 an inability to pay, we may suspend a portion of

1 the penalty or put them on a payment schedule.

2 We also need to be consistent with past  
3 practices as far as the ranges of penalties that  
4 we have sought in the past. Our intent was not to  
5 pass these new rules and have penalties that were  
6 significantly larger or smaller than what we had  
7 done in the past, so we have our past record in  
8 mind.

9 We also have to manage our legal and  
10 enforcement resources. We don't want to force a  
11 lot of appeals. We're not afraid of them, but  
12 they take a lot of time to deal with, a lot of  
13 Katherine's time. Also we do not have the  
14 resources to fight everybody in court, and seek  
15 large penalties. That just takes too long, and we  
16 wouldn't accomplish much if we focused on a couple  
17 large cases.

18 We also have EPA's considerations. If  
19 they believe the penalty is not large enough,  
20 they'll let us know, or threaten to over file.  
21 For most of the EPA type programs -- like air,  
22 water, etc. -- we meet with EPA representatives on  
23 a regular basis and talk about these cases, talk  
24 about what the penalties might be, and we get  
25 their input.

1           Also we consider the harm. Did  
2           pollution occur? Was there a fish kill?  
3           Somebody's water contaminated? Will the pollution  
4           persist, or is it going to be cleaned up? And why  
5           did the violation occur? Was it accidental or  
6           intentional, human error, equipment error? Was it  
7           an act of God? Sometimes we've had floods causing  
8           things to go all over and cause pollution. How  
9           much control did the responsible party have?

10           We also have to consider what a Judge  
11           might do. It's impossible to predict what a Judge  
12           might do, but what are the litigation risks. And  
13           then does the penalty survive the last test, both  
14           sides: Is it ridiculously low or ridiculously  
15           high? We try and apply that. And what is the  
16           equitability there? We often get violators who --  
17           we will issue an issue or something, and they'll  
18           come in, and review all of our files, and all of  
19           our penalty calculations, and go to the Judge and  
20           say, "Look. They only fined these people 'X.'  
21           now they're fining us ten 'X'. That's not fair,"  
22           and that is a credible defense in some courts.

23           So we consider all of these kind of  
24           intangible things. And granted that some of these  
25           are considered in the prior factors, we still take

1 a global look, and try to help us make a decision  
2 in adjusting the days.

3           Some examples of how this might work  
4 that are pretty real examples. If we have a  
5 source that has a Clean Air Act permit, they're  
6 required to test their stacks for emissions on an  
7 annual basis. If they measure the emissions on  
8 day one, and they exceed the limit, that is the  
9 start of the violation. We assume that that  
10 exceedence continues until they can do a test and  
11 show that the emissions have been brought into  
12 compliance.

13           It may take two or three months to get  
14 the testers back in to retest. Some of are these  
15 pretty sophisticated tests. They're climbing up  
16 the stack, and they have to collect samples, and  
17 send them to a lab. And these testers don't just  
18 hang around waiting to do tests. So it may be a  
19 couple of months before they can get back into  
20 compliance.

21           In this hypothetical example, if the  
22 exceedence is such that it might have a major  
23 gravity or extent, the base penalty could be  
24 \$7,500. Sixty days times \$7,500 is \$450,000. In  
25 my opinion, that penalty is too large given the

1 severity of the violation, and it's not consistent  
2 with the past practices.

3           But we also have to consider the  
4 violation itself. What was the pollutant? Was it  
5 a hazardous air pollutant, or was it an ordinary  
6 pollutant? If there is such a thing. The amount  
7 of the exceedence, the circumstances, and whether  
8 it was preventable or a malfunction. A lot of  
9 these plants are sophisticated, and if you turn  
10 the dial wrong, or something wears out, it can  
11 cause all sorts of problems. They have a  
12 responsibility to maintain those. But we try to  
13 figure out what caused it.

14           Also in air, because people don't have a  
15 choice of what air they breathe, emissions may  
16 affect many people and contribute to regional air  
17 problems, so we take air violations very seriously  
18 from the start, and believe they should be  
19 assessed a larger penalty in comparison to some of  
20 the other statutes. Under the Water Quality Act,  
21 you can cause water pollution or groundwater  
22 pollution, if it affects somebody's drinking  
23 water, but you have a small area; whereas air  
24 pollution goes everywhere.

25           So we kind of bring all of these factors

1 into consideration, and what we might typically do  
2 in a situation like this, instead of sixty days,  
3 we might drop it down to ten, and we'd come up  
4 with a penalty of \$75,000. In my mind, that's  
5 consistent with past practices, and that's a  
6 respectable penalty.

7           What we might do in the demand letter is  
8 say, "We have documented this violation for this  
9 many days, and we could seek a penalty of  
10 \$450,000, but we'll settle if you agree to pay  
11 75," and sometimes that brings them to the table.  
12 If they don't settle, then we would file a  
13 Complaint in court, and then pursue the maximum  
14 penalty.

15           Another common example is in the gravel  
16 mining industry, and given the size of the  
17 regulated community, there is probably 2,000  
18 gravel mines across the state, and the size of our  
19 work force -- I think there's a half a dozen  
20 inspectors -- they may only get to visit a gravel  
21 mine once every other year.

22           So an inspector goes to a mine, and  
23 documents that they have mined beyond their  
24 permitted boundary. That's a significant  
25 violation. What the inspector would do is send

1       them a violation letter that says, "You need to  
2       amend your permit and provide additional bond."  
3       Nothing happens. A year later, they go to  
4       inspect, and find out that they didn't amend their  
5       permit, and they're still mining beyond their  
6       permit boundary. We've got a violation that has  
7       continued for 300 days.

8                 A typical base penalty in open cut,  
9       where the maximum is \$1,000 a day, would be \$600.  
10      So 300 days times \$600, \$180,000. That I think is  
11      outrageously high. Prior to the legislation, the  
12      maximum open cut penalty was \$1,000. \$180,000 is  
13      completely unreasonable, given past practices and  
14      the severity of the violation. Mining beyond the  
15      boundary is a significant violation -- it's  
16      essentially a disturbance that needs to be  
17      reclaimed; it may cause noxious weeds to spread;  
18      it may waste top soil -- but it's not a  
19      significant impact to health.

20                Also many gravel operators are small and  
21      not sophisticated. If this was a large operation,  
22      they would have responded to the violation letter,  
23      and --

24                CHAIRMAN RUSSELL: John, I think Robin  
25      has a question.

1 MS. SHROPSHIRE: You were just talking  
2 about the gravel pit violations, and you said that  
3 you thought that \$100,000 or whatever was  
4 unreasonable, because a fine that high hasn't been  
5 assessed before. Why is that unreasonable?

6 MR. ARRIGO: Mr. Chairman, Ms.  
7 Shropshire, a couple of reasons. Prior to the  
8 legislation, the maximum open cut penalty was  
9 \$1,000. \$180,000 in comparison is pretty  
10 outrageous, I think. You may not agree.

11 Also the severity of the violation.  
12 Mining beyond the permit boundary doesn't create  
13 significant impacts to human health. It does --

14 MS. SHROPSHIRE: You're basing that on  
15 your opinion?

16 MR. ARRIGO: My experience in viewing  
17 these, and my technical opinion, and managerial  
18 opinion. What this would constitute is if you  
19 have a pit, and you're mining beyond your  
20 boundaries, you've possibly wasted top soil,  
21 you've possibly dug into the side of the pit that  
22 may cause weeds to spread, but it wouldn't  
23 necessarily result in contaminants leaching into  
24 the groundwater. It does create a liability for  
25 the State in that if they don't have an adequate

1 bond, we have to come up with the money to  
2 properly reclaim those sites. But an open cut  
3 violation is much less severe than an air  
4 violation, and I think \$180,000 is outrageous.

5 Also I think that if the Legislature a  
6 \$1,000 a day penalty on these operations, the  
7 penalty should be in that range, thousands of  
8 dollars, not hundreds of thousands of dollars.

9 One other thing is: We might not be  
10 able to say that the violation continued for 300  
11 days. Although it was documented on this year,  
12 and then the following year, they could come back  
13 and say, "I only mined for ten days. We only  
14 actually mined for a much, much shorter period of  
15 time," and sometimes that has been a good defense.

16 So given all that, I think \$180,000 is  
17 too high.

18 If it's a large operation, and the  
19 degree of mining beyond the boundary was large,  
20 and they should have known, we might get a higher  
21 penalty -- \$10,000, \$20,000 -- but a hundred just  
22 doesn't do it for me.

23 MS. SHROPSHIRE: And the reason I ask is  
24 it just seems over the last year we've had in  
25 front of us a whole bunch of open pit violations.

1 I don't know if -- It seems like those violations  
2 are one of the largest that we see. And I'm  
3 wondering if there is -- maybe there is no  
4 incentive for --

5 MR. ARRIGO: There is an explanation for  
6 that. You're correct. There have been a lot of  
7 open cut enforcement actions. What happened was  
8 as part of the Open Cut Law and rules, they have  
9 to submit an annual report on how much gravel they  
10 mine, and that requirement had not been enforced  
11 in the past. A couple years ago, the program  
12 decided, "We want to make people submit their  
13 reports." There is a couple reasons why, but --

14 So we have probably issued 50, or 100,  
15 75, open cut orders for failure to submit annual  
16 reports, and we have a standard penalty of \$480.  
17 Some operators say, "Baloney. I'm not paying  
18 that. I'm appealing," and they do appeal, and you  
19 guys see it on your agenda, and we settle and say,  
20 "Look, you didn't submit your report. Pay the  
21 fine," and we don't reduce those penalties.

22 CHAIRMAN RUSSELL: Just an editorial  
23 thought. First of all, you don't do enough  
24 regulation of them, so they don't understand.  
25 You're just not there enough to regulate them, and

1       there is not a lot of economic benefit derived  
2       either.  When you look at the penalties of  
3       \$180,000, you've got to mine a lot of material to  
4       start deriving economic benefit from going outside  
5       of your area that's marked.

6                 But the bottom line is -- and I wish  
7       Steve was here, but he's retired -- is the fact  
8       that you don't regulate them to the extent that  
9       they need to be regulated to understand rules, and  
10      then they turn around and get violated because  
11      they don't see you enough.

12                MR. LIVERS:  If you want, I can speak to  
13      that in terms of resources, Mr. Chairman.

14                CHAIRMAN RUSSELL:  I know it's a  
15      resource issue.  They should be charged more for  
16      their permits.

17                MS. SHROPSHIRE:  It's one of the few  
18      industries in the state -- Mr. Chairman and  
19      members of the Board -- that does not have a fee  
20      based regulatory program.  That's a historic  
21      accident.  We fund that through a combination of  
22      General Fund and Resource Indemnity Trust dollars,  
23      both of which are historically typically in short  
24      supply.

25                We have gone to the Legislature in the

1 last couple of sessions with proposals to add an  
2 industry fee to regulate this program, and we've  
3 even had some industry support in that respect,  
4 because actually the numbers are a little worse  
5 than John said. We've got three and a half  
6 inspectors to cover about 2,200 gravel pits.

7 We run into stakeholder issues with  
8 eastern counties in particular who run a lot of  
9 gravel pits, and don't want to see a fee based  
10 program, and struggle with the concept of the  
11 additional fee that they'd have to undertake. So  
12 we're going to go back with another proposal to  
13 try to get that program adequately funded and  
14 staffed, but that's where we are.

15 CHAIRMAN RUSSELL: There is  
16 externalities to this, and I deal with them a lot  
17 in Flathead County. I know this generally about  
18 gravel pits. But you see it in western Montana  
19 where you have all of this growth. Growth doesn't  
20 happen without mining a lot of gravel. And it  
21 bothers neighbors, which creates a lot of  
22 complaints. Just generally you get a lot of  
23 complaints because it's noisy.

24 And then they try to equate to an issue  
25 about their permit, which doesn't always happen.

1 But they really try very hard, and it makes a lot  
2 of work, and then when you don't have an inspector  
3 that can go out there and investigate these  
4 complaints, it just makes the problem worse.

5 MR. ARRIGO: So in that type of  
6 situation, what we might do is count one day for  
7 each month, and in this situation, if we had 300  
8 days, we'd call that ten months. Ten days times  
9 600, the penalty would probably be about \$6,000.  
10 So we think that's pretty big hit on some of these  
11 small operators.

12 So after we calculate the number of days  
13 and adjust the penalty, we add amounts for  
14 economic benefit and history of violation, and the  
15 economic benefit calculation is to determine the  
16 amount of money they avoided or delayed spending  
17 to comply. And we use the best information we  
18 can. Sometimes we have to actually ask them for  
19 financial information, and we put that into an EPA  
20 computer model, and it comes out with an economic  
21 benefit.

22 Mr. Chairman, since you mentioned  
23 profits from gravel mines, we do not consider  
24 wrongful profits in our economic benefit, and  
25 gravel is the best example. Inspectors say that

1 you maybe make 50 cents a yard on gravel. They  
2 can go in and mine 100,000 yards in a couple  
3 weeks. The permit would have cost a couple  
4 thousand dollars to apply for, hire consultants  
5 and do all the technical work.

6 So what we are limited to is the avoided  
7 cost of compliance. They failed to spend a couple  
8 thousand dollars to get the permit. That would be  
9 our economic benefit. We could not go after them  
10 for the profit they made by mining illegally.  
11 That's just a little subtlety.

12 And then so we add economic benefit to  
13 our penalty, and then we look at history of  
14 violation. History of violation is pretty  
15 straight forward. We really don't have a lot of  
16 discretion. You look at the violations that have  
17 been documented in orders for the past three  
18 years, and we may increase the penalties by up to  
19 30 percent. The daily penalty we would increase.

20 So in summary, we use our best judgment  
21 and policies and procedures in adjusting the  
22 number of days of violation to arrive a penalty  
23 that we think is commensurate with the severity of  
24 the violation, and which provides an adequate  
25 deterrent. So we have some discretion, but we

1 exercise it judiciously, we think.

2 That's my talk. If you have any  
3 questions, I'd be happy to try to answer them.

4 CHAIRMAN RUSSELL: Any questions for  
5 John?

6 (No response)

7 CHAIRMAN RUSSELL: It was so well done,  
8 there is no questions. Is there anyone in the  
9 audience that -- I wouldn't guess so, but I'm  
10 supposed to ask.

11 (No response)

12 CHAIRMAN RUSSELL: Let's move then.  
13 What's next? The next item on the agenda is  
14 another briefing item on the Montana Wyoming  
15 settlement discussions regarding coal bed natural  
16 gas related matters. Tom.

17 MR. LIVERS: Mr. Chairman, thank you.  
18 And Art Compton, head of our Planning Division,  
19 will tee this one off.

20 MR. COMPTON: Art Compton from the  
21 Planning Division. Since we last talked about the  
22 agreement -- that was two months ago at your last  
23 meeting -- I thought I'd let you know what's  
24 happened.

25 The federal cases, the four federal

1 cases that have been combined were stayed in until  
2 November 1st -- that's tomorrow -- because both  
3 states were still actively negotiating. The  
4 states have completed a draft settlement agreement  
5 and a couple of legal documents, including a  
6 motion to dismiss without prejudice to accompany  
7 the agreement, and the stay expires tomorrow.  
8 We're not going to turn into pumpkins at midnight  
9 or anything, but I believe that ultimately the two  
10 governors, Governor Freudenthal, and Governor  
11 Schweitzer up here, are going to be deciding soon  
12 whether or not to execute the agreement.

13           Also since we talked last, one of the  
14 final phases of the negotiation was outreach to  
15 stakeholders. We have done that. Over the past  
16 month and a half, our stakeholders quite frankly  
17 are not happy with the agreement, and they may  
18 speak for themselves today.

19           I would characterize their general  
20 concerns over the agreement into two main areas:  
21 One, that the agreement needs to be a more  
22 comprehensive compliance and enforcement tool.  
23 And I think from our perspective -- and I think  
24 you can understand this if you've ever been  
25 involved in litigation settlement negotiations --

1 the settlement agreement and the legal documents  
2 that accompany it are designed to address the  
3 subjects at issue in the litigation, and they do  
4 not provide us comprehensive new enforcement  
5 mechanisms that we don't already have now under  
6 the Montana Water Quality Act and the Federal  
7 Clean Water Act. I think our constituents would  
8 like to see the agreement go farther than it does  
9 in that realm.

10 I think their general other area of  
11 concern has to do with the Board adopted  
12 standards, particularly the 2003 standards,  
13 although it includes the 2006 as well, that with  
14 respect to waters like the Powder River and  
15 tributaries, that the agreement does not align  
16 itself with those numbers, and there is other  
17 issues brought in that tend to make the water  
18 quality standard numbers on the Powder River and  
19 the tributaries less applicable. That is the  
20 case, and I suspect we'll talk about that a little  
21 bit more.

22 Finally, Mr. Chairman, in closing, I  
23 think there is two things that we find compelling  
24 benefits to the state and to our constituents in  
25 the settlement agreement. The first is that if

1 the agreement is executed, we have received  
2 assurances from EPA that they will act fairly  
3 rapidly in approving the Board's 2006 rulemaking.  
4 That's one of the issues that EPA got sued over,  
5 was not disapproving those. We believe that they  
6 will approve the 2006 anti-degradation numeric  
7 rulemaking withing thirty days of execution of the  
8 agreement.

9 That obviously is one of the things that  
10 EPA was sued on by Wyoming, and Wyoming is  
11 embracing that anti-degradation approach on the  
12 Tongue River in executing the agreement.

13 And the second thing that I believe  
14 we're getting, I think we felt was pretty  
15 extraordinary, and that is that before EPA will  
16 allow Wyoming to violate either an anti-deg  
17 provision on the Tongue or a water quality  
18 standard provision on the Powder River, it will  
19 require -- it will not allow Wyoming to do that.  
20 They are not going down the notion of a waiver of  
21 anti-degradation on the Tongue. Rather they are  
22 saying, "Wyoming, to avoid that, you will employ  
23 best available treatment technologies for that  
24 subset of produced water that you discharge to  
25 surface waters in Wyoming and flow into Montana."

1                   And I think the reason that's  
2 extraordinary is that's one of the only things, if  
3 you'll recall, back in 2006 that our constituents,  
4 the Petitioners asked for, and didn't get, is that  
5 requirement to treat or reinject produced water.  
6 EPA is on record as insisting that that is going  
7 to be done under this agreement to avoid either  
8 standards exceedences on the Powder, or anti-deg  
9 threshold exceedences on the Tongue. Again, we  
10 think that's an extraordinary position for EPA to  
11 come out with and commit to.

12                   And Mr. Chairman, those are the two  
13 areas that we feel provide compelling benefits for  
14 the state of Montana, and that's why we hope the  
15 Governor signs it. I know the main voice in  
16 Wyoming has been the Wyoming Attorney General. He  
17 also hopes that his Governor signs it. We have no  
18 assurance that either Governor will. And clearly  
19 the Wyoming constituents, Wyoming's constituents,  
20 their aligned parties, if you will, are the  
21 producers, the ones that brought the lawsuit.  
22 They are not thrilled about the prospects of the  
23 agreement either. So both states don't have a lot  
24 of support from our constituents.

25                   And Mr. Chairman, I'll close with the

1 fact that in no dialogue that I've undertaken  
2 since I've been working water quality issues have  
3 the cultural differences and the priorities of the  
4 two states been so clear; and I can tell you there  
5 isn't a day that goes by that Richard and John and  
6 I aren't involved in these negotiations that we  
7 are not just enormously proud of who our  
8 constituents and aligned parties are in this, when  
9 you compare them with who Wyoming's constituents  
10 and aligned parties are. The cultural  
11 differences between the two states could not be  
12 clearer.

13 And while we have not satisfied our  
14 constituents, again, we believe the agreement is  
15 in our best interests, and like I said, I think  
16 this discussion will go on for awhile. Thank you  
17 very much.

18 CHAIRMAN RUSSELL: Is there any  
19 questions for Art? I know there'll be some  
20 questions generated by our public response.

21 (No response)

22 CHAIRMAN RUSSELL: Thanks, Art. I  
23 appreciate it. How many folks want to talk to  
24 this matter? Three. I'm sure you're very concise  
25 about what your points are going to be to make,

1 and they'll precipitate any discussions. Board,  
2 this was asked earlier of some folks in the  
3 audience. Let's get back to moving through the  
4 Chair for things and speaking up so the folks in  
5 the audience can hear. Always speak up, and let's  
6 work through the Chair, just so everyone  
7 understands what's going on out there. Let's go.  
8 Brenda, are you going to start then?

9 MS. LINDLIEF-HALL: Mr. Chairman,  
10 members of the Board, my name is Brenda  
11 Lindlief-Hall. I'm here on behalf of the Tongue  
12 River Water Users Association.

13 Art Compton was correct. We have some  
14 difficulties with this agreement. I have to say  
15 that the Tongue River Water Users Association of  
16 course appreciates all of the hard work that DEQ  
17 has undertaken in these settlement negotiations to  
18 protect the Tongue River. We strongly believe,  
19 however, that -- and I know that you have been  
20 given and hopefully read the letter that I wrote  
21 to Richard Opper, which I distributed to you all,  
22 expressing our very deep concerns about the  
23 lawfulness of this agreement, both the process,  
24 and the substantive outcome of this agreement.

25 I think that you all have also seen the

1 latest draft of this agreement. Really I think  
2 the very last section is the one that is the one  
3 that provides us with most hope, and that allows  
4 other stakeholders to not be bound by the  
5 agreement.

6 Our concerns are first that the  
7 significant protections for the Powder, the Little  
8 Powder, and the tributaries have been given up  
9 because they no longer are afforded nondegradation  
10 review. They've now been -- and the term that I  
11 have used is -- reclassified as Tier 1 waters.  
12 Under Federal Clean Water Act, Tier 1 waters are  
13 not considered high quality waters, and therefore  
14 they don't get the protections of nondegradation  
15 review.

16 In Montana, nondegradation review is  
17 required to protect high quality waters. If  
18 waters are classified as high quality,  
19 nondegradation review is required. In Montana,  
20 all state waters are considered high quality  
21 waters unless they're not capable of sustaining  
22 their designated beneficial uses and they're not  
23 sustaining aquatic life, that sort of thing.

24 So all of the waters in question in  
25 Montana are high quality waters. So when this

1 agreement takes waters that are high quality  
2 waters, and puts them under a Tier 1  
3 classification under the Federal Clean Water Act,  
4 that means those waters aren't considered high  
5 quality anymore. They've been reclassified. They  
6 don't get nondegradation review protection.

7 We feel that that is significant, that  
8 it takes away all of the protections and the hard  
9 work that these people have gone to, and that you  
10 have certainly undertaken over the last number of  
11 years.

12 Before this agreement, I really was  
13 excited, because my clients got to be on the same  
14 side as the DEQ in this litigation, and it was  
15 fun. We were sitting in depositions together, and  
16 we had Pennaco Energy, and we were up against the  
17 attorneys from Washington, D.C., and we were  
18 working together, and really that was pretty  
19 exciting, and it was pretty fun. And we did that  
20 also in the State Court litigation defending these  
21 same water quality standards. As I'm sure that  
22 you know Judge Jones in Bighorn County, the 22nd  
23 Judicial District Court, ruled hands down in our  
24 favor supporting Montana's water quality standards  
25 across the board.

1           So it just seems disheartening that the  
2 Department would try and would enter into these  
3 negotiations, and give away some of the most  
4 significant protections that we have.

5           I think that Mark Fix is going to  
6 address some of the issues related to the  
7 tributaries, but in a nutshell, the tributaries  
8 have high quality water at times. I think that  
9 you all know that, and you've seen ample science  
10 in that regard, and heard lots of testimony in  
11 that regard. There are times of the year when the  
12 EC drops down, and it is true it perhaps is not a  
13 very significant part of the year in terms of the  
14 number of days, but in terms of allowing and  
15 protecting the existing agricultural practices,  
16 it's essential.

17           There are times when the EC on those  
18 tributaries is down to 1,000, and then they get a  
19 big rain event or a big precipitation event, water  
20 comes down the tributaries, and flushes out all of  
21 those salts and the sodium that have  
22 evapoconcentrated in those river beds and stream  
23 beds over a number of years; and once that is  
24 flushed out, then we get this real high quality  
25 water, and they put up those spreader dikes, and

1 they flood those fields. And that happens in  
2 December; it happens in January, February. They  
3 use and take that water whenever they can.

4 So we feel that those protections are  
5 essential, and we don't have them anymore.

6 And the other part of that, too, is of  
7 course these tributaries drain into the main stem  
8 of the Tongue, and we feel that if all of the time  
9 they're getting a lot more water than those  
10 tributaries are used to getting, then that brings  
11 the EC up to 2,500, or whatever, all of the time  
12 with consistent flows above what the flows have  
13 traditionally been, that's going to adversely  
14 impact the main stem of the Tongue and as that  
15 water moves downstream. Once it gets to Miles  
16 City, there is going to be some real harm.

17 I would like to finally just bring to  
18 your attention the letter that I believe I also  
19 provided to you, and it's a letter that Dr. James  
20 Bauder drafted for -- I believe it was the Bureau  
21 of Reclamation. There are a couple of things I  
22 would like to highlight in that letter from Dr.  
23 Bauder.

24 And to sort of summarize, I think his  
25 letter really highlights the fact that EC and SAR

1 have had a much greater impact than we knew back  
2 in 2003. I think some of these studies he cites,  
3 the Wang (phonetic) study and perhaps the Koon  
4 (phonetic) study discuss water quality, and that  
5 they have looked at their time frame for study  
6 from 2002 to 2006. Your original water quality  
7 standards were promulgated in 2003. So there is a  
8 lot of new information.

9 Dr. Bauder's opinion on Page 2 of his  
10 letter is highlighted, and it states, "The results  
11 of these studies lead me to the opinion that there  
12 is a greater likelihood that discharges of CBM  
13 production water into the Powder River will have  
14 the potential to have greater impact on irrigators  
15 sourcing water from the Powder River than sourcing  
16 from the Yellowstone. I'm correspondingly of the  
17 opinion that a time series analysis of the Tongue  
18 River water quality, similar to the analysis  
19 completed by Wang, et. al., for the Powder River  
20 would result in the conclusion that both EC and  
21 SAR of the Tongue River water downstream of the  
22 Montana/Wyoming border are elevated above pre-CBM  
23 development conditions."

24 So we have concerns that we have seen  
25 impacts. And the standards in this agreement and

1 the standards that you promulgated even with  
2 nondeg review I think allow degradation of the  
3 Tongue from its natural background condition. A  
4 lot of those numbers have -- the background  
5 numbers were gathered pre-CBM development, but  
6 some of those were post-CBM development. We have  
7 some concerns about that.

8 The other thing that I wanted to  
9 highlight, I wanted you to really take some  
10 consideration of in Dr. Bauder's letter -- if I  
11 can find it -- is where he talks about  
12 evapoconcentration. Again, it's Page 2, the very  
13 last paragraph.

14 He says, "Two additional points I wish  
15 to present on this matter are, one, elevated EC  
16 and SAR conditions are likely to be amplified  
17 during conditions of low flow, combined with high  
18 in-channel evapoconcentration."

19 And I think that we've been in a period  
20 of drought for pushing ten years now. If we're  
21 seeing water with elevated levels of EC and SAR  
22 building up in those stream channels, and then you  
23 get a significant rain event, it's going to flush,  
24 and those salts and sodium, they concentrate,  
25 evapoconcentrate, in the stream bed as well as in

1 the Tongue River Reservoir, and that is a real  
2 cause of concern.

3 I would just like to finish on this  
4 note, and I apologize for not being better  
5 organized here. But I just came across an October  
6 18th, 2000 letter from the Montana Department of  
7 Environmental Quality to the State of Wyoming.  
8 And back in October of 2000, the DEQ said, "MDEQ  
9 believes that both SAR and specific conductants  
10 have the potential to adversely impact uses.  
11 These parameters should be limited in the permits  
12 so that violations of standards will not occur,  
13 and uses of the waters will be protected."

14 On Page 4 of the September 29th, 2000  
15 public notice, there is the following statement:  
16 "These permittees have demonstrated an effluent  
17 sodium adsorption ratio and specific conductants  
18 will not adversely impact agricultural use." The  
19 next sentence goes on to say, "Specific  
20 conductants is limited to 715 microns per  
21 centimeter. This limitation apparently would  
22 apply at the discharge point."

23 I'm sorry. I was reading the wrong  
24 paragraph. Some of that is relevant, but the  
25 paragraph before that says that, "Chief among

1 MDEQ's concerns about the issuance of these  
2 permits at this time is our belief that the  
3 proposed new discharges in Wyoming will flow into  
4 stream reaches already impaired in Montana.

5 "Although the Powder, Little Powder, and  
6 Tongue Rivers are naturally salty, they are on  
7 Montana's 303D list of impaired water bodies,  
8 requiring total maximum daily load. Salinity and  
9 solids are two of the primary reasons for this  
10 listing. The proposed discharges may further  
11 increase the salinity of the Powder River as  
12 Wyoming projects have in the past. The Powder has  
13 been impacted in the past significantly by oil  
14 development in Wyoming."

15 Montana goes on to say that, "Under  
16 Montana law, such increases in an impaired stream  
17 would not be permitted. We are concerned that  
18 when a TMDL is established for each of these  
19 rivers, it must address the contribution of salt  
20 for both existing and anticipated new discharges  
21 in Montana and Wyoming."

22 I can't help but feel that by this  
23 agreement, we're taking a couple of steps  
24 backward, and perhaps a giant step backward. I  
25 know that I was at the meeting where you requested

1       that the Department of Environmental Quality -- I  
2       believe it was March 2006 -- that you requested  
3       that the DEQ come to you with a treatment proposal  
4       in September of 2006; and to the best of my  
5       knowledge, that's never occurred.

6                 We believe that treatment is essential;  
7       that effluent limitation guidelines are essential;  
8       they're required under the Federal Clean Water Act  
9       in Montana, and we don't think that they should be  
10      allowed to continue discharging at unknown rates  
11      into the tributaries and the Powder up to what is  
12      considered ambient water quality levels as defined  
13      in this agreement. We think that there is going  
14      to be real harm from that.

15                On that note, I'll let somebody else  
16      have a chance.

17                CHAIRMAN RUSSELL: Thank you.

18                MR. ROSSBACH: Do we have more  
19      presentation?

20                CHAIRMAN RUSSELL: I think Mark is going  
21      to --

22                MR. ROSSBACH: Could I ask a question of  
23      Brenda? This is more of a legal question. Let's  
24      just say -- The Department seems to be taking the  
25      position that the Board of Environmental Review

1 has nothing to say about this one way or the  
2 other. What if we're concerned about this? What  
3 are our options at this point? What would you say  
4 if you were sitting on the Board of Environmental  
5 Review? What would be -- or if you were advising  
6 us privately, as Ms. Orr might be advising us --  
7 although she works for the Attorney General who  
8 may be a part of this.

9           If I were to go hire my own attorney as  
10 a Board of Environmental Review member, what would  
11 be my options as a Board of Environmental Review  
12 member if I was not happy with this agreement?

13           MS. LINDLIEF-HALL: Mr. Chairman, Mr.  
14 Rossbach, that's a sort of politically tricky  
15 question.

16           MR. ROSSBACH: And it's a legal issue,  
17 too. I'm not sure where I am legally.

18           MS. LINDLIEF-HALL: I would have to  
19 advise you that the Montana Water Quality Act  
20 gives the Board of Environmental Review sole  
21 authority to promulgate water quality standards,  
22 and the sole authority to classify streams. And  
23 in order to do that, the Montana Water Quality Act  
24 requires that you provide public notice, and that  
25 you have a public hearing, and that there is

1 public participation in that process.

2 In my letter to Richard Opper, I  
3 expressed my concerns about the closed door nature  
4 of these meetings because of the Montana  
5 Constitution's fundamental right to public  
6 participation in Montana governmental proceedings.  
7 And I understand that that is constrained somewhat  
8 where there are matters of privacy, and there are  
9 some other times that that may be constrained.  
10 But I don't see those privacy concerns here.

11 And in particular, I think this is an  
12 issue of broad public importance, and certainly I  
13 think that the Board of Environmental Review  
14 should be concerned about potential usurpation of  
15 its authority to promulgate water quality  
16 standards and classify streams, and I think there  
17 should be real concerns about public  
18 participation.

19 The Federal Clean Water Act, in addition  
20 to the Montana Water Quality Act and the Montana  
21 Constitution, also requires public participation  
22 in the promulgation of water quality standards and  
23 the classification of streams. So I think there  
24 are a number of points and authorities that should  
25 cause the Board to have some concern.

1           I perhaps would advise you to contact  
2           the DEQ and ask why you weren't involved in those  
3           discussions.

4           MR. ROSSBACH: Hopefully they're going  
5           to tell us.

6           CHAIRMAN RUSSELL: Any other questions?

7           (No response)

8           CHAIRMAN RUSSELL: Thanks.

9           MR. FIX: Mr. Chairman, members of the  
10          Board, I'm Mark Fix. I'm a rancher and irrigator.  
11          I live 20 miles southwest of Miles City. I'm also  
12          the past Chair of the Northern Plains Resource  
13          Council.

14          First off, I wanted to thank the BER for  
15          all the work that you guys did helping us get  
16          these standards in the first place, and working on  
17          nondeg. It took a lot of years, and a lot of  
18          trips to Helena. I appreciate all the work that  
19          you guys have done in getting there. Also I think  
20          this Judge Jones agreement was really good, and I  
21          think it stood up for what the Board of  
22          Environmental Review has been doing, and pointing  
23          out that they are -- what they're doing is  
24          important and good.

25          I think some of the things that we're

1 seeing problems on is -- Basically it seems like  
2 kind of the implementation of the standards that  
3 you guys have put in place. Kind of going way  
4 back, when Fidelity was discharging into Squirrel  
5 Creek, there was no enforcement then by DEQ. When  
6 the standards were exceeded at the mouth at Miles  
7 City, no enforcement was done. Basically in  
8 applying the permits, the TMDL process was not  
9 used. They just used the standards of like, I  
10 think 2003, and it was way up towards the state  
11 line and not at the mouth. So no TMDL work has  
12 been done.

13 The TMDL's, that I talked to somebody in  
14 DEQ to see where they are, they're apparently held  
15 up waiting to see what happens with this  
16 Montana/Wyoming agreement. I'm concerned about  
17 that, because it seems like things are not going  
18 forward. It seems like kind of everything is  
19 holding up. Just it's a lack of enforcement in  
20 general, self-reported by the companies, those  
21 sort of things.

22 Kind of another additional thing that  
23 doesn't have to do with DEQ, but it is of concern,  
24 is that we're not getting funding for the USGS  
25 monitoring sites for 2008. Some of those are

1       losing funding. That's another concern.

2               This agreement, some of the problems we  
3       see with it is that it basically moves the  
4       standard that was set at Miles City, moved it to  
5       the state line.

6               And if you recall when we first brought  
7       our petition to the Board of Environmental Review,  
8       we weren't aware of how you set those standards  
9       and stuff, and we set a number at the mouth, one  
10      at the Northern Cheyenne Reservation, maybe  
11      another one at the upper end of the Cheyenne  
12      Reservation, and one at the state line.

13              I can't remember if it was the Board of  
14      Environmental Review or EPA or DEQ, but they came  
15      back and said, "You cannot set a standard at the  
16      state line. It has to be set at the mouth." So  
17      that's of concern to us.

18              Also as Brenda pointed out, this  
19      agreement ignores the standard, the 500 standard,  
20      EC standard that was set on the tributaries.  
21      Basically it allows it to go up to the ambient  
22      levels. On Badger Creek, there is no baseline of  
23      data, so I don't know what they're going to use  
24      for a number there. If I had to guess, I'd bet  
25      it's going to be like 2,050 SAR, because that's

1        what coal bed methane.  Essentially it's  
2        perennialized dry creeks.

3                    And basically to go back to our 500  
4        standard, right now in the Montana, there are no  
5        discharge permits on the tributaries, so that 500  
6        standard must have done something.  They realize  
7        that there shouldn't be discharges going into the  
8        tributaries.

9                    Also on the Powder, this agreement is  
10       moving the standard from the mouth of the Powder  
11       to the state line, and it eliminates the nondeg  
12       provision.

13                   I wanted to read you a couple sentences  
14       here.  This is from a statement that the Governor  
15       made in Washington, D.C. dated July 17th.  "The  
16       waters in Montana most at risk of now losing  
17       Federal Clean Water Act protections include  
18       creeks, small streams, seasonal rivers, waters in  
19       depressional wetlands, fens, and wet meadows.  
20       These waters in Montana are critical to our rural  
21       economy.  Farmers and ranchers alike rely on  
22       access to clean water, and ongoing drought  
23       conditions over the past several years have  
24       heightened our awareness of their needs."

25                   I think the Governor realizes that it

1 seems like this Clean Water Act stuff that's going  
2 on, they're trying to basically treat waters  
3 differently, and say, "This water is not good  
4 enough, so we don't need to protect it." And I  
5 feel that the Board of Environmental Review did  
6 their work. They didn't do that. They treated  
7 all waters equally, and you set standards, whether  
8 it was a tributary, the Powder, Tongue, and  
9 treated them equally. And I think that's the way  
10 it should be done.

11 I've got something I wanted to hand out  
12 to you. I've give you some data that I got from  
13 Hanging Woman this spring. (Provides document)

14 Basically these have to do with -- This  
15 spring, we had a good rainfall down in  
16 southeastern Montana. We got a pretty good flow  
17 down Hanging Woman. I just got these plots, a  
18 couple of these first ones from USGS this morning,  
19 because when the event happened, the flow was  
20 higher than what the charts could show, and it  
21 went off their charts. I think they could only go  
22 to 200 and some CFS.

23 The first couple there have to do with  
24 Hanging Woman, and I wanted to show you a couple  
25 things there. On one of them, you can see that

1 the flow got up to about 325, 330, something like  
2 that, cubic feet per second on the 7th of May.  
3 The other one shows the electric conductivity of  
4 the water in Hanging Woman, it got up to around  
5 3,500 when that hit.

6 Also you can see on that chart with  
7 electric conductivity, about a day later, the  
8 quality got down to close to 1,000. And when  
9 people irrigate on Hanging Woman, this is the way  
10 they irrigate. They usually let the water go by  
11 for about a day, and then they open up their  
12 dikes, and let the water go on there, so they're  
13 making use of this high quality water.

14 Our concerns with this agreement is  
15 under their best quality actions, they have things  
16 like attainment ponds, all these things. When you  
17 get a rainfall like you did this spring, and these  
18 containment ponds overflow, you get that stuff all  
19 coming down.

20 So our concern is that we may not see  
21 this valley and this opportunity for people to  
22 irrigate when they've got the good quality water.  
23 It may just end up staying up there the whole  
24 time. So that's one of the concerns.

25 As you go farther on through this,

1 basically what I did is I followed this piece of  
2 water all the way to Miles City, and it went from  
3 -- the first one starts at Birney Day School. It  
4 shows on the Tongue, there was close to 1,000  
5 cubic feet per second. You can see that that  
6 spike, when the water came from Hanging Woman, it  
7 took it up over almost 1,100 at Birney Day School.  
8 And then as you continue to go downstream in the  
9 Tongue, when it hit the next station at  
10 Brandenburg, it did the same thing again, and just  
11 a little further down time because it took a  
12 little while for it to run down the river. So it  
13 got up over 1,100.

14           There was quite a bit of rain down in  
15 our country, too. I figured that some of the  
16 creeks like Pumpkin Creek and stuff would put some  
17 water in, and that there might be some dilution by  
18 the time it got there, but all the way to Miles  
19 City, even to Miles City, again, we were up over  
20 1,100 all the way down.

21           So that's our concern is what's going to  
22 happen if we start putting water down Hanging  
23 Woman all of the time. It seems like we're going  
24 to run into problems.

25           And we had some other concerns, and I've

1 got a list of them here I'll hand out as well. I  
2 won't go into them now, and let you look over  
3 them. The kind of the thing that I want to kind  
4 of basically ask the Board, and I feel like what  
5 they should do now is probably ask the Governor  
6 not to sign this agreement, because it does  
7 directly go against what standards you guys have  
8 set. That's all I have, Joe. Thank you.

9 CHAIRMAN RUSSELL: Thanks, Mark. I  
10 appreciate you driving over to talk to us.

11 MR. McRAE: Mr. Chairman, members of the  
12 Board, I want to honestly thank you for the  
13 opportunity to speak. I didn't expect this today.  
14 I've got kind of some bad handwriting, but bear  
15 with me. I will be as concise I can be.

16 I want to talk about something a little  
17 bit different today, and that's one word, and  
18 that's trust. We have a situation with the  
19 Flathead River, with Coal Bed Methane development,  
20 and a fine line as proposed in British Columbia is  
21 affecting that river. We have a TMDL, I assume,  
22 that's done on it. I have not disagreed with the  
23 Governor's stand on protecting the river nor the  
24 DEQ's stand, because we have talked about this  
25 before.

1           But as I speak, we have one company  
2           that's dumping 1.4 million gallons of water in the  
3           Tongue River per day. It has a 1,600 gallon  
4           permit for one of the companies. It is impacting  
5           that river as we speak. I want to congratulate  
6           you and thank you for passing the Board -- the  
7           numeric water quality standards of a few years  
8           ago, but the matter of trust that happens is with  
9           the DEQ enforcing the law. They have not done it.

10           I live just south of Colstrip. I live  
11           in the shadow of the power plants down there. I  
12           also have two coal mines as neighbors. There has  
13           been some issues with the lack of enforcement with  
14           some other environmental problems down there that  
15           I won't go into unless you want me to. But  
16           believe me, there is a lack of trust with DEQ.

17           Mr. Rossbach a minute ago asked what we  
18           can do, and I have a couple of suggestions for you  
19           of what I think that you can do, and number one is  
20           to ask this question, and I asked this during the  
21           TMDL process, which I was a member. I said:  
22           "When we have multiple companies in the Tongue  
23           River drainage that are discharging water into the  
24           river, and those numeric water quality standards  
25           are exceeded, what mechanism --" and this is the

1 question you need to ask -- "What mechanism does  
2 DEQ have to ensure that that level comes down  
3 below the threshold?"

4 I was told at that time that they don't  
5 know. And I think we're at a time right now to  
6 ask them before we have any more permits or deal  
7 with this issue anymore: What mechanism do they  
8 have in place? Because if they haven't enforced  
9 the law over the last couple of years, the numeric  
10 water quality standards, they're not going to do  
11 it after this agreement is signed, if it's going  
12 to be signed.

13 I think that they owe it to the public  
14 to spell it out very specifically on how they're  
15 going to enforce this law. I think that we need  
16 and we deserve as much protection on the Tongue on  
17 we do on the Flathead.

18 As I said, these laws have been ignored  
19 for the last three years. Mark made a very good  
20 point, that the numbers need to be at the mouth of  
21 the Tongue River at the Yellowstone at Miles City,  
22 and not at the state line. There is a lot of  
23 country in there that will be ignored, and the  
24 nondeg will not apply if they do it just at the  
25 state line.

1           In closing, and again to Mr. Rossbach's  
2 question on what we can do, I think the easiest  
3 thing that the Board of Environmental Review can  
4 do right now is direct the attention of the  
5 mission statement on the wall back to the  
6 Department, and say, "Enforce the law." I don't  
7 think they're doing that. I think they are  
8 enforcing that mission statement on the Flathead.  
9 They are not doing it on the Tongue. And I ask  
10 you as a Board to remind them of that. Thank you.

11           MR. SKUNKCAP: Mr. Chairman, I have a  
12 question. What are some of the problems you had  
13 with coal mines that you have as neighbors?

14           MR. McRAE: The power plants, we have  
15 four generating power plants in Colstrip, and the  
16 settling ponds are in two different drainages.  
17 One is in the drainage right around Colstrip, and  
18 the other is in the Rosebud drainage. The  
19 predecessor, I believe, of the DEQ was -- I was  
20 going to say the Board of Health. I'm not sure if  
21 that's true -- I think at that time, the Board of  
22 Health permitted those ash ponds. We were told  
23 that they would not leak. We were assured that  
24 they would not leak. They're leaking like a  
25 sieve.

1           There is forty some landowners around  
2 Colstrip that filed a lawsuit because those wells  
3 have been contaminated in the Rosebud drainage. I  
4 have neighbors that have lost stock water wells,  
5 and have reservoirs from the drought that are  
6 killing it from the bottom up. This stuff is  
7 toxic to cattle, and they have it fenced off  
8 because it would kill a cow to drink the water.

9           The DEQ is aware of this. They have  
10 done nothing about it, and we have pushed -- The  
11 gentleman's name that we had asked the question to  
12 was Will Clark. And when we pushed him to say,  
13 "What if they do? What if there are impacts?,"  
14 and Will said, "We'll shut the power plants down."  
15 That is not going to happen. So again, that goes  
16 back to the issue of trust.

17           MR. SKUNKCAP: How many cattle have you  
18 lost?

19           MR. McRAE: We haven't lost any, but my  
20 neighbor realized that this water from the drought  
21 was coming into the reservoir, he had the water  
22 tested, and they came back and said, "Do not let  
23 your cows water out of that reservoir." I didn't  
24 have any cattle in there at the time, but he was  
25 going to put his cattle in there that spring.

1                   MR. SKUNKCAP: Has it affected the birth  
2 rate then on them, too?

3                   MR. McRAE: They haven't drank the water  
4 yet because they fenced it off. They said it  
5 probably would -- health wise, it would kill a cow  
6 if she drank the water. We had a line of pump  
7 back -- or monitor wells below the dam. We had to  
8 put in pump back wells. And the plume has moved  
9 at least a mile that we know of. But it's an  
10 issue of passing on the cost of production to  
11 other people, and I'm concerned about it.

12                   MS. KAISER: I have a question. What is  
13 your name?

14                   MR. McRAE: My name is Clint McRae. I  
15 own and operate a ranch on the Rosebud south of  
16 Colstrip. The eastern boundary of our place runs  
17 up against the Tongue River.

18                   MS. KAISER: You said there is a  
19 discharge permit on the Tongue, and that CBM  
20 producers discharge 1600 gallons a minute?

21                   MR. McRAE: Yes.

22                   MS. KAISER: And they have a discharge  
23 permit?

24                   MR. McRAE: Yes.

25                   MS. KAISER: And you say they're

1 exceeding the standards?

2 MR. McRAE: Well, yes, I think they are  
3 exceeding the standards. We've had members down  
4 river that are seeing some collapse on their  
5 irrigated ground. And there's a little bit of  
6 conjecture on what's causing that, but the problem  
7 we're having is this is all self-reported. The  
8 DEQ does not have an individual down there  
9 physically taking water quality samples or water  
10 volume samples. We have a problem with that. If  
11 I have a cattle feeding operation, if I've got a  
12 feed lot, and that's a point source that dumps  
13 into a river, DEQ is going to drop the boom on me,  
14 and I would deserve it. But it's a two way  
15 street. The self-reporting is problem.

16 MS. KAISER: So that's where you think  
17 the problem is, that they're not truthfully  
18 reporting what they're discharging?

19 MR. McRAE: I'm not going to say that  
20 they're lying, but we don't know. They might be  
21 under 1600 gallons a minute. I think the issue  
22 here is DEQ needs to have somebody on the ground  
23 at the mouth of the Tongue River to ensure that  
24 the standards are not violated.

25 CHAIRMAN RUSSELL: Just for

1 clarification, Tom, is that the -- that's the  
2 discharge that the Board saw, right? That's the  
3 only discharge into the Tongue?

4 MR. LIVERS: Mr. Chairman, that's my  
5 understanding. I don't know that for sure.

6 CHAIRMAN RUSSELL: But that's the only  
7 permit that has a discharge to the Tongue?

8 MR. LIVERS: Yes.

9 MS. KAISER: Going into the Tongue, not  
10 the reservoir.

11 CHAIRMAN RUSSELL: It's going into the  
12 Tongue.

13 MS. LINDLIEF-HALL: The Fidelity permit  
14 and the Pennaco permit. Fidelity has a renewal of  
15 its own permit for untreated discharges. Then the  
16 second one is the treatment, the mixture.

17 CHAIRMAN RUSSELL: So the Board on a  
18 previous road trip saw the untreated discharge.  
19 That's the only untreated discharge to the Tongue.

20 MS. LINDLIEF-HALL: Correct.

21 CHAIRMAN RUSSELL: That's right. And  
22 then the one subsequent to that, the discharge is  
23 actually fixed, and it's employing the water  
24 quality standards that the initial board set. No,  
25 the second set of rules that had nondeg for the

1 Tongue.

2 MS. LINDLIEF-HALL: No nondeg on it.  
3 That permit is being litigated, and there is no  
4 nondeg on that permit. It was issued before the  
5 Board's rules went into effect.

6 CHAIRMAN RUSSELL: But it was a mixed  
7 discharge. Any other questions for Clint?

8 (No response)

9 CHAIRMAN RUSSELL: Thank you for coming  
10 over.

11 MR. McRAE: Thank you again for the  
12 opportunity to be here.

13 CHAIRMAN RUSSELL: I'm sure the Board  
14 has some questions for the Department. I have a  
15 few myself, but I won't start. Questions?

16 MR. ROSSBACH: I have questions. I  
17 guess the issue for me is sort of process and  
18 jurisdiction, I guess as much as anything. It  
19 seems to me that in effect, my concern is that you  
20 are effectively rewriting the Clean Water Act, at  
21 least in terms of the standards that were set, and  
22 I have significant problems with that. And I also  
23 have significant problems that this is considered  
24 to be something that's within the Board of  
25 Environmental Review's authority. And I guess I'm

1 interested in your response to that.

2 MR. OPPER: Mr. Chairman, Mr. Rossbach,  
3 for the record, I'm Richard Oppen. I'm the  
4 director of DEQ.

5 And Mr. Rossbach, I believe that your  
6 question goes back to something that Brenda  
7 Lindlief-Hall pointed out, that should the  
8 Department have taken the position that it is  
9 rewriting standards, it would be a usurpation of  
10 the Board's authority.

11 I actually agree 100 percent with what  
12 Ms. Lindlief-Hall said, that if that's what we  
13 were doing, indeed the Board should have great  
14 concerns. We do not for a minute believe that is  
15 what we are doing here, that we are rewriting the  
16 standards for the Tongue River, the Powder River,  
17 or the tributaries. If we believed that, then  
18 certainly the Board would have to be the deciding  
19 authority for that.

20 MR. ROSSBACH: My question -- That's  
21 fine for you to say that, but what's the authority  
22 for that? That's just -- What is your basis for  
23 saying that it isn't? I guess that's my question.  
24 Maybe that's a legal opinion I need from John.

25 MR. OPPER: I think I probably would

1 like to defer to John.

2 MR. ROSSBACH: Let me ask you a  
3 different question. Maybe we need to have Art or  
4 somebody answer this. Jim Bauder's letter of  
5 November 13th, 2007 -- and I don't see where --  
6 Has anyone drafted a response to Mr. Bauder's  
7 letter?

8 MR. OPPER: I don't believe so. John  
9 North, do you know if we have responded to it?

10 MR. NORTH: No.

11 MR. ROSSBACH: I thought it was included  
12 in the materials that you sent to us.

13 MR. LIVERS: Mr. Chairman, that was not  
14 a letter to the Department, as I recall.

15 MR. ROSSBACH: I understand, but it  
16 raises some significant questions that I think the  
17 Department would be interested in trying to  
18 respond to.

19 Just going to the last page -- and Dr.  
20 Bauder appeared before us, so we all know his  
21 credentials and credibility. The two items under  
22 No. 7 -- There is a lot of other questions in here  
23 -- but the two items here give me a great deal of  
24 concern. First, "A," "It is my professional  
25 opinion that the settlement agreement as written

1 and when applied to Montana create a highly likely  
2 circumstance that Montana will find itself in  
3 jeopardy in its own water quality standards when  
4 nondegradation rules are applied to the Tongue and  
5 the Powder River downstream of the Montana/Wyoming  
6 border."

7 How do you respond to that?

8 MR. OPPER: I'm not exactly sure what --  
9 Mr. Chairman, Mr. Rossbach, I'm not exactly sure  
10 what he is alleging there. Would you read that  
11 one more time, and I do have a response. Read  
12 that again for me, please.

13 MR. ROSSBACH: Let me read the start.  
14 It says, seven, "Finally it appears to me that the  
15 terms of this agreement present two possible  
16 scenarios for irrigators, individuals, and  
17 potential CBM development entities in the Montana  
18 portion of the Powder River Basin.

19 "My professional opinion is that the  
20 settlement agreement as written and when applied  
21 creates a highly likely circumstance that Montana  
22 will find itself in jeopardy of its own water  
23 quality standards when nondegradation rules are  
24 applied to the Tongue and the Powder River  
25 downstream of the Wyoming/Montana border."

1           And I guess my question is -- and this  
2           is what bothers me, sort from the bigger picture,  
3           is it seems to me that we're giving authority of  
4           -- our authority to Wyoming, and that we are  
5           giving up quite a bit here to enforce our water  
6           quality standards on Montana, as we are permitted  
7           to do under Arkansas versus Oklahoma, and other  
8           precedents, and what we are, I think, going to try  
9           to do, as Mr. McRae pointed out, in the Flathead  
10          Basin.

11           So it disturbs me that we are giving up  
12          our authority and jurisdiction to enforce our  
13          water quality standards by this agreement.

14           MR. OPPER:   And Mr. Chairman, Mr.  
15          Rossbach, we think exactly the opposite.  We think  
16          that this agreement will result in -- EPA has told  
17          us verbally and has put in writing in --

18           MR. ROSSBACH:  Do we have it in writing?

19           MR. OPPER:  We have it in writing this  
20          agreement that the standards, the 2006  
21          antidegradation standards adopted by the Board are  
22          approvable.  It does not say that EPA will approve  
23          the standards.  I've had conversations with the  
24          Tongue River Water Users Association that if these  
25          standards aren't approved within a reasonable time

1 frame, 30 to 60 days, Montana would be willing to  
2 walk away from this agreement.

3 That is what we needed from this  
4 negotiation session, is EPA approval of our 2006  
5 antidegradation numbers adopted by the Board.  
6 That's we've been trying for in this whole  
7 agreement. We think we've gotten that plus quite  
8 a bit more in that agreement, as Mr. Compton  
9 pointed out. So fundamentally, from Montana's  
10 perspective, when we entered into those  
11 negotiations, it was to get approval of our 2006  
12 antidegradation numbers.

13 MR. ROSSBACH: It's fine to get  
14 approval, but we're not getting authority to  
15 enforce them over certain important waters and  
16 tributaries to the Tongue River. So we've got our  
17 standards approved, but then what good does it do?

18 MR. OPPER: Some of our staff can  
19 address this. As you well know, having gone  
20 through the process, antidegradation is designed  
21 -- the numeric nondeg numbers adopted by the Board  
22 were adopted in order to protect high quality  
23 water which exists on the Tongue River certainly,  
24 rarely on the Powder, and even less rarely on the  
25 tributaries.

1           So the antidegradation numbers that were  
2           adopted, essentially they apply to all of the  
3           waters in question here, but the numbers  
4           themselves only will work for the Tongue River,  
5           because that is the river that has the high  
6           quality water where applicable.

7           MR. ROSSBACH: But don't we have high  
8           quality water on the other, and aren't we creating  
9           basically at -- this is my concern, is we're  
10          making these tributaries basically essentially  
11          toilets into Montana permanently.

12          MR. OPPER: That's a legitimate concern,  
13          Mr. Rossbach, certainly, and that was probably  
14          unquestionably the most contentious aspect of  
15          these whole negotiations. But we tried to  
16          exercise whatever authority we had to protect  
17          these rivers, and there is a stipulation in the  
18          agreement that the discharges into the  
19          tributaries, even though they have to meet ambient  
20          water quality conditions, they can't make the  
21          quality worse. These discharges have to be  
22          protective of beneficial uses on the river system,  
23          and agriculture is also singled out.

24          So that in itself would have to be  
25          self-limiting on the flows, so that provision in

1       there, I think, protects the uses of the  
2       tributaries that it puts it in writing in the  
3       agreement.

4               MR. ROSSBACH: Let me go back to another  
5       question. You say if the EPA doesn't approve this  
6       within 30 to 60 days, we can walk away. What kind  
7       of contract is it if we can walk away on our own?  
8       How could that be an agreement or contract if we  
9       can walk away from it? I don't understand that.

10              MR. OPPER: Mr. Chairman, Mr. Rossbach,  
11       probably the only kind of contract that Montana  
12       would be interested in working on, because we  
13       wanted a back door on this. Again, our primary  
14       objective is to get EPA's approval of our 2006  
15       standards. That would help us in the litigation;  
16       that would help us be able to hopefully be given  
17       enforcement of our anti-deg numbers on the Tongue  
18       River.

19              So if we don't get what we need out of  
20       this agreement, I think Montana is a signatory to  
21       this agreement with an exit strategy to be able to  
22       walk away from this agreement if it's not serving  
23       the State.

24              MR. ROSSBACH: But an agreement has to  
25       have an exit strategy. Is there something in the

1 agreement -- Maybe I missed it -- that says if EPA  
2 doesn't approve this within 60 days, the agreement  
3 is off?

4 MR. OPPER: No. We asked for that from  
5 EPA, and we did not get that. EPA has never done  
6 that on any water quality standards issue, we've  
7 been told, where they guaranteed they would  
8 approve a standard, a number, within a certain  
9 time period.

10 MR. ROSSBACH: That's not my question.  
11 The question is: In between Governor Freudenthal  
12 and Governor Schweitzer, is there an agreement  
13 that says if EPA does not approve this within some  
14 period of time, Governor Schweitzer can walk away.  
15 That's an agreement between Schweitzer and  
16 Freudenthal. Is there something that says that  
17 Governor Schweitzer can say, "I'm walking away  
18 from this"?

19 MR. OPPER: Mr. Chairman, Mr. Rossbach,  
20 if there is, I don't know about it.

21 MR. ROSSBACH: Then it doesn't seem like  
22 it's an agreement that allows Montana to walk  
23 away, as you suggested in your prior testimony.

24 MR. OPPER: John, do you want to address  
25 our ability to exit from this agreement?

1           MR. ROSSBACH: I guess I have another  
2 question. This agreement doesn't have anything --  
3 this agreement doesn't really affect the lawsuit.  
4 That's why. It doesn't affect the lawsuit. So  
5 what if Judge Brimmer down there says, "Sorry.  
6 Even after EPA approves it, sorry, the State of  
7 Montana over exceeded its authority. EPA exceeded  
8 it authority. None of this matters anyways."  
9 What happens then?

10           MR. OPPER: Well, Mr. Chairman, Mr.  
11 Rossbach, I'd have to say we're not real  
12 optimistic about how we're going to fare in Judge  
13 Brimmer's court anyway, just so you know that, and  
14 I don't think that's a surprise to you. I think  
15 that we're looking farther down to the appeal  
16 process which you would think would probably be  
17 inevitable.

18           So let's play the scenario out that an  
19 agreement is signed; Wyoming drops out of the  
20 lawsuit; EPA approves our 2006 water quality  
21 standards; the original litigants, the development  
22 companies, do not drop the lawsuit, so the  
23 litigation continues. I think Montana is in a  
24 much better position in the appeal process if our  
25 standards are approved already, and the 2006

1 anti-deg numbers are approved, and Wyoming is no  
2 longer involved in the lawsuit. We're in a much  
3 better position.

4 CHAIRMAN RUSSELL: I have a question for  
5 Director Oppper then. Not to excite anyone, but  
6 are the rules that BER put in place at risk?

7 MR. OPPER: Mr. Chairman, members of the  
8 Board, I think that we have been working extremely  
9 hard this past year to ensure that the rules that  
10 the Board put in place are adopted by EPA, and I  
11 think the whole focus of our effort has been to  
12 protect those rules.

13 CHAIRMAN RUSSELL: If the rules are  
14 adopted by the EPA, or approved by EPA as we  
15 adopted them, what impact does that have on  
16 Wyoming?

17 MR. OPPER: Wyoming in this agreement  
18 has agreed to abide by those numbers at least on  
19 the Tongue River. And again, I understand Mr.  
20 McRae's concerns about do we have the ability to  
21 enforce that. There is a great deal of suspicion  
22 about our neighbors to the south of us, and  
23 understandably. So I can understand that, too.  
24 If my livelihood was dependent upon them abiding  
25 by this agreement, I'd be nervous, too.

1           However, the fundamental question in our  
2 mind is: Is the State better protected having  
3 those numbers approved, having EPA approve those  
4 numbers, and do we think this agreement is the  
5 best way to do that? And the answer is in our  
6 mind unquestionably yes.

7           CHAIRMAN RUSSELL: So we've taken -- and  
8 there has been talk about -- and I have a few  
9 questions more on this. But let's talk about the  
10 standard at the border. What standard is at the  
11 border? Is it the standard that we set where the  
12 Tongue goes into the Yellowstone, or is it that  
13 standard that we set from that reach of the water  
14 up there?

15           There was a comment that we didn't treat  
16 all waters equally, and we didn't, because we set  
17 different standards. We took all the information  
18 that we had, and we set the standard based on the  
19 best science that were given to us at the time.  
20 So I don't think we can say we treated everything  
21 equally or we would have set an EC and SAR at --  
22 whatever for everything, if I interpret that.

23           So moving to the border establishes one  
24 thing to me, and maybe this is too simple. It  
25 says: "At the border, this water can't exceed the

1 standard that Montana has set." If you put it  
2 down here, there is all this other stuff that  
3 comes into there that says Wyoming may or may not  
4 have contributed to that.

5           So if you use a standard off the border,  
6 it's not enforceable. It's just like doing a  
7 water sample on a road, or an oil sample on a  
8 road. Once it's on the road, there's all kinds of  
9 other things could have been put into there. So  
10 don't you have to do it at the border? If you're  
11 going to hold Wyoming to a standard, doesn't it  
12 have to be at the border?

13           MR. OPPER: Mr. Chairman, yes. If the  
14 standard is established at the Montana/Wyoming  
15 border, then it's very easy to determine if a  
16 standard is being exceeded. You don't have to  
17 determine the reasons why necessarily, you just  
18 have to find out that the numbers are being  
19 violated at the border. That means the next round  
20 of permits that come up, either for renewal or for  
21 approval within the state of Wyoming, would have  
22 to compensate for that exceedence, according to  
23 this agreement. It makes it simple.

24           And Montana has issued -- and since I've  
25 been here, I think the three permits we talked

1 about before. Wyoming, just to give you an idea  
2 of the different nature of development down there,  
3 every month they have 40, roughly 40 permits that  
4 come up for either renewal or new permits that are  
5 coming on board.

6 CHAIRMAN RUSSELL: Another comment that  
7 was made, and Mark made it, that these standards  
8 could be violated because Wyoming may not -- I  
9 don't hold Wyoming in high regard when it comes to  
10 environmental, but I'm guessing that they must  
11 build their ponds under some permitting that says  
12 they have to be able to capture a rain event. If  
13 you looked at -- Just because it rains doesn't  
14 mean they're going to overflow, does it? We can't  
15 just make that assumption.

16 I'm not trying to argue a point for the  
17 Department or anything else, but we have made some  
18 statements here that have been onto the record  
19 that I don't think are totally factual, and it  
20 concerns me, because we would hold the Department  
21 to the standard that if you're going build a pond,  
22 it better be -- it better have the capacity to  
23 withstand a rain event of such magnitude that's in  
24 the rule. I'm hoping that Wyoming has that also.  
25 Mark -- and that's my comment. You don't need to

1 respond.

2 The other thing that concerns me is  
3 Brenda mentioned that if this agreement is signed,  
4 that all of the work that the Board does to  
5 establish classifications of Montana waters, some  
6 of them go away. I'd like to know how that  
7 happens.

8 MR. OPPER: Mr. Chairman, I'm not  
9 capable of addressing that. I would have to defer  
10 to --

11 CHAIRMAN ROSSBACH: Do you have the same  
12 question?

13 MR. ROSSBACH: I have a question of your  
14 question right before that.

15 MR. SKUNKCAP: So do I.

16 MR. ROSSBACH: About the ponds. DEQ  
17 doesn't have any jurisdiction over the ponds.

18 CHAIRMAN RUSSELL: In Wyoming.

19 MR. ROSSBACH: In Montana they don't.  
20 Why would they in Wyoming?

21 CHAIRMAN RUSSELL: My point is: Are we  
22 better off trying to get an agreement signed  
23 between the states, or are we better off  
24 petitioning the Governor, in whatever little bit  
25 of authority we have, to say, "Don't do anything"?

1       Because I think there is a legal remedy out there.  
2       If the Department is not doing what the Board has  
3       put in place, then those people that are aggrieved  
4       should sue the Department.  And where is the  
5       damage from trying to get at least something --  
6       push Wyoming to do something.

7               MR. ROSSBACH:  I guess my only point was  
8       that from my experience, there is no -- very  
9       little design consideration for storm events, that  
10      these ponds run over every time there is a storm,  
11      and that's where the water goes.

12             CHAIRMAN RUSSELL:  In Wyoming.

13             MR. ROSSBACH:  I don't know.  I know  
14      I've walked some of those so-called streams.  
15      They're intermittent drainages.  When there is  
16      storm event, they all run over.  I've seen the run  
17      over.  So I don't know who is in charge of  
18      Wyoming, but I know in Montana, at least five  
19      years ago, DEQ had no authority over how the ponds  
20      were built, what size they were, what the dams  
21      were, what kind of events were supposed to be  
22      contained within them.  There was nothing about  
23      that.  If a storm event came, they ran over.

24             CHAIRMAN RUSSELL:  Are you talking about  
25      ponds that were built in Montana?

1 MR. ROSSBACH: Uh-huh. Oil and gas.

2 CHAIRMAN RUSSELL: I think we've come a  
3 long ways in understanding that we need to get  
4 these off-channel, and we need a lot of these  
5 things, and we need to make sure Wyoming is doing  
6 it, too, because they killed off the sage grouse.  
7 They don't know how to build ponds. They killed  
8 the sage grouse because of West Nile down there.  
9 They've done a lot of things that we would expect  
10 not to be of benefit to northern Wyoming, but  
11 that's not our state.

12 What we're trying to do right now is try  
13 to get Wyoming to abide by the same standards that  
14 Montana has put in, and how are we going to do  
15 that? We've already written a rule that -- I  
16 haven't heard anyone here want to rewrite the rule  
17 yet. We've got nondeg in there. We have done  
18 whatever we can to protect Montana waters. Aren't  
19 we just trying to hold Wyoming to the same  
20 standard? And if they're not, isn't there other  
21 remedies? But it's not with us, is it? Unless  
22 you want us to tighten up the standard. That's  
23 what --

24 MR. ROSSBACH: No, I don't think --

25 CHAIRMAN RUSSELL: I guess I still --

1 Are we losing high quality water in Montana by  
2 signing this agreement? I want to know.

3 MR. OPPER: Mr. Chairman, we don't think  
4 that's the case. I will say that when we have a  
5 number, a standard or the nondeg number  
6 that applies at the border, the thing that we  
7 cannot control is the fact that Wyoming gets to  
8 use whatever assimilative capacity there is, the  
9 difference between what the standard is and what  
10 the ambient water quality assumes that's better  
11 than the standard. Wyoming gets that.

12 There is nothing we can do legally about  
13 that, as far as we know, and that has some  
14 implications, because it means that the waters of  
15 the state can be degraded up to the numbers that  
16 apply to that particular water body, and that's --

17 CHAIRMAN RUSSELL: At the border.

18 MR. OPPER: At the border.

19 MR. ROSSBACH: As it comes across the  
20 border.

21 MR. OPPER: Yes. That's not something  
22 this agreement addresses. We wouldn't have had  
23 EPA's support. We certainly wouldn't have had  
24 Wyoming's support on doing that. I will say that  
25 early in the negotiations, Wyoming's objective was

1 to try to get Montana to change its numbers, the  
2 2003 standards, and its 2006 anti-deg numbers; and  
3 there is no way the State would have agreed to  
4 that. And obviously that would have been  
5 something that would have required the Board's  
6 involvement, but we were not going to going to go  
7 there. We were very clear about that.

8           So it's hard for me to see why the State  
9 would possibly be worse off with this agreement in  
10 place than it would be without this agreement. I  
11 don't have a good answer for that. We spent a lot  
12 of time with our stakeholders. We've heard their  
13 concerns, and we understand them, and we're very  
14 sympathetic to the fact that their lives or  
15 livelihood depend upon the quality of water in the  
16 tributaries and in the rivers. But we still think  
17 that even though this agreement doesn't address  
18 all of their concerns, it does provide some  
19 tangible benefits to the State, and that would  
20 leave us in a better position.

21           CHAIRMAN RUSSELL: No offense, but maybe  
22 to ask Art a question. Just dealing with  
23 assimilative capacity -- and I think this concern  
24 that Mark raised, and it's somewhat valid if --  
25 Let's say that there is -- We look at all of the

1 contributions to the Powder, which is certainly  
2 impaired -- and I listen to irrigators out there  
3 -- the event. Wait until it flushes, and do  
4 everything you can to irrigate with high quality  
5 water.

6           The concept that there won't -- with the  
7 fact that they could use assimilative capacity  
8 when the water is higher quality would take away  
9 that flush and good event. Is that fairly likely?  
10 And I know it's a loaded question for me to ask  
11 that way, but --

12           MR. COMPTON: Mr. Chairman, we don't  
13 think so, either on the Powder or the tribs, and  
14 the reason is that on a water body whose natural  
15 condition exceeds the Board approved standard,  
16 what we're holding Wyoming to is the same -- the  
17 agreement holds Wyoming to the same thing we would  
18 hold a Montana discharger to, and that is when the  
19 water quality is better than the standard, then  
20 the standard is your compliance criteria. When  
21 the natural water quality is worse than the  
22 standard, you can't make it any worse. You can't  
23 ask for much more than that.

24           Chris has two small tables. We don't  
25 need to pass them out, Chris -- Mr. Mires, we

1       emailed him one so he had one -- that shows the  
2       month by month water quality for Hanging Woman  
3       Creek, and it's between 2000 and 3000. And  
4       looking at that table, you can gain appreciation  
5       for how difficult it would be to implement a  
6       standard at 500.

7                 Chris also has a narrative Section 306  
8       of the Montana Water Quality Act that we provided  
9       the Board in 2003, in the rulemaking. That  
10      specifically says when ambient water quality,  
11      natural water quality exceeds the standard, that  
12      natural water quality is the bar, is the criteria.  
13      That's right out of the Montana Water Quality Act,  
14      it was included in the information provided to the  
15      Board in the 2003 rulemaking, and this agreement  
16      doesn't change anything with that.

17                Mr. Rossbach came to the conclusion that  
18      maybe we don't think the Board is involved in  
19      this. I think we believe the Board is 100 percent  
20      involved in this. And as Richard said, our main  
21      objective in these negotiations, other than to try  
22      to protect our constituents, our stakeholders, and  
23      the beneficial uses they depend upon, is to  
24      preserve and have Wyoming embrace everything this  
25      Board has done.

1           And the difference between the standards  
2           that you adopted on the Powder and on the tribbs,  
3           which are exceeded by natural water quality, has  
4           been strictly in compliance with Section 306 of  
5           the Montana Water Quality Act, and that's how  
6           we've behaved with a discharger, and we're holding  
7           Wyoming to that exact same criteria.

8           Overall, I think where Director Opper is  
9           coming from with his question, "Are we better off  
10          or not?," right now the water quality criteria at  
11          the border on the Tongue, that Wyoming has to  
12          comply with, is an EC of 1,000 during the  
13          irrigation season. Execution of the agreement  
14          chops that number in half to 500. That is the  
15          bottom line from an agency that does permitting.

16          What drives permit math in Wyoming?  
17          There isn't nothing more important than that  
18          number that drives permit math in Wyoming. And  
19          the agreement and the EPA approval of the 2006  
20          Board nondeg numbers that we are virtually assured  
21          will follow within thirty days, does that. It  
22          cuts those border water quality criteria in half.

23          And again, it's easy to say that all  
24          these other considerations are details compared to  
25          one main fact, that the number at the border that

1 drives Wyoming permit math is where the rubber  
2 meets the road, and that's what this agreement  
3 gives us, and I think that's why we're such  
4 advocates for it.

5 CHAIRMAN RUSSELL: Just because I'm not  
6 real not fast on the take up, let's say that at  
7 ten feet up off the border, or down -- whichever  
8 way you look at the map -- the EC is -- or the SAR  
9 is 98 percent. The next permit that's written in  
10 there, they're not going to be discharging into  
11 the stream.

12 MR. COMPTON: Are you talking about  
13 Wyoming, Mr. Chairman?

14 CHAIRMAN RUSSELL: The next permit  
15 written in Wyoming.

16 MR. ROSSBACH: You mean up or down  
17 really.

18 CHAIRMAN RUSSELL: Correct. If you're  
19 at 98 percent of the standard, the nondeg  
20 standard, there isn't going to be any more  
21 in-stream discharge.

22 MR. COMPTON: The agreement requires  
23 that once that assimilative capacity mark, once  
24 the anti-deg threshold on the Tongue has been  
25 reached, for any water that they discharge to the

1 surface waters after that, they have to apply best  
2 available treatment technologies to avoid  
3 exceeding that nondeg threshold at the border.  
4 That's part and parcel of the agreement. We don't  
5 have that now.

6 CHAIRMAN RUSSELL: I've said this in  
7 past rulemakings, just like I did with the open  
8 cut stuff, the gravel pits: Jack up the fees, and  
9 do a better job on site regulating this stuff. I  
10 totally agree with the Northern Plains folks, that  
11 if you're going to go out there and regulate this  
12 stuff, don't let them self-regulate. I've  
13 mentioned this. I've been on the record before  
14 about this. Get fees up, and get someone  
15 stationed out there that can monitor this  
16 activity.

17 MR. COMPTON: Mr. Chairman, it's  
18 happening as we speak. I think our first  
19 dedicated FTE in Miles City is either there or  
20 will be there shortly.

21 CHAIRMAN RUSSELL: We need to take a  
22 break.

23 (Recess taken)

24 (Ms. Kaiser not present)

25 CHAIRMAN RUSSELL: We'll get started.

1 So the next item on the agenda is actually an  
2 initiation of rules to adopt changes to Department  
3 CRCLA --

4 MR. ROSSBACH: Are we all done with  
5 that?

6 CHAIRMAN RUSSELL: I think we're done.

7 MR. ROSSBACH: Any other questions from  
8 any other Board members?

9 CHAIRMAN RUSSELL: Yes, I guess we can  
10 see --

11 MS. SHROPSHIRE: I did have a comment, a  
12 short comment. And it's one of the -- Actually  
13 there was a question in terms of the rationale for  
14 the closed meetings that I thought was brought up,  
15 and I'm not sure if that was addressed. But what  
16 was the rationale for closed meetings?

17 MR. OPPER: Mr. Chairman, Ms.  
18 Shropshire, these negotiations began actually at  
19 the request of the State of Wyoming that asked EPA  
20 to serve a mediation role between the two states  
21 on our disagreement over primarily the 2006 nondeg  
22 standards. So this was a process that was  
23 controlled by EPA, and it was EPA that determined  
24 that these meetings would be between the sovereign  
25 parties themselves. Now, the Tribes, of course,

1 also sat in on every one of our meetings that we  
2 had with them. The stakeholders were not invited  
3 to the meetings. And it was EPA's decision, not  
4 the states'.

5 As you know, the State of Montana,  
6 that's not the way we generally do business here,  
7 and frankly it did cause us considerable  
8 discomfort, because it's just not how we generally  
9 do business. But this one was not in our control.  
10 It was EPA's decision. Did that answer your  
11 question?

12 MS. SHROPSHIRE: If EPA were to hold  
13 meetings in Montana, within the state of Montana,  
14 would that -- could they still have a closed  
15 meeting, or because it's in Montana, are they  
16 required to have open meetings?

17 MR. OPPER: Mr. Chairman, Ms.  
18 Shropshire, EPA did come out to the state of  
19 Montana and toured coal bed methane country prior  
20 to a lot of the discussions that we had that took  
21 place generally in Denver, and those meetings were  
22 open to the public and the stakeholders.

23 MS. SHROPSHIRE: But in general, do you  
24 think this violated Montana's open meeting policy  
25 rule?

1           MR. LIVERS: I wonder if that might be a  
2 better question for Legal Counsel.

3           MR. OPPER: Mr. Livers, you anticipated  
4 my next move.

5           MR. NORTH: Mr. Chairman, Ms.  
6 Shropshire, John North, Chief Legal Counsel with  
7 the Department. No, I don't think it would have  
8 had to have been open. There are two things at  
9 play here. One is the open meeting law itself,  
10 and I don't think the open meeting law would apply  
11 in this instance unless it was a meeting of a  
12 multi member board or commission. Until we were  
13 at that point, it wasn't a meeting of decision  
14 makers.

15           There is also the open meeting policy,  
16 and generally speaking, the policy of the  
17 Governors have always been that all get togethers  
18 -- for want of a better term, to distinguish it  
19 from a legal term meeting -- are open to the  
20 public. And certainly when it's a policy, things  
21 like this can be a policy exception.

22           CHAIRMAN RUSSELL: Bill.

23           MR. ROSSBACH: No.

24           MS. SHROPSHIRE: Then just one comment.  
25 I'll be brief, if you'll let me do it.

1           CHAIRMAN RUSSELL: Please.

2           MS. SHROPSHIRE: Just looking at Mr.  
3 Arrigo's presentation on enforcement, and then the  
4 briefing that we had on Zortman Landusky, and at  
5 times the short sightedness that Montana has had  
6 in environmental events, I just would hope that we  
7 would be more cautious in how we look at coal bed  
8 methane than have to react to these things.

9           And I'm not sure it's within our  
10 purview, but I would hate to see degradation of  
11 water quality in Montana. And I think our  
12 Constitution, although it's not necessarily within  
13 our purview, addresses that. Again, I would  
14 encourage DEQ to look at their enforcement of a  
15 variety of different areas with maybe more  
16 scrutiny than has been done in the past.

17          MR. LIVERS: Mr. Chairman, we certainly  
18 take the points on enforcement. Appreciate that.  
19 We have had attempts ongoing to recruit the Miles  
20 City based position, and we've just finally  
21 succeeded in having that, so we do hope to have a  
22 better infield presence there. I think those are  
23 fair comments.

24          Again, we do not see anything in the  
25 agreement that undermines or violates standards,

1 so if caution, more caution is what's desired,  
2 then it's maybe different standards that the Board  
3 sets is nothing in our action -- I'm not  
4 advocating that. I'm just saying that would be  
5 how that would manifest. We're not -- and it's  
6 perhaps debatable -- but we have looked at this  
7 pretty carefully, and we do not believe it's a  
8 violation of standards for the classification of  
9 water in the agreement, so the caution would  
10 manifest in two different board standards.

11 MS. SHROPSHIRE: I have some concerns  
12 that some of the penalties that are assessed may  
13 be -- I'm making a pretty broad statement here --  
14 but in terms of the days assessed, may be  
15 arbitrary, and --

16 MR. LIVERS: Are we talking coal bed  
17 methane still?

18 MS. SHROPSHIRE: No. So maybe it's a  
19 general comment. But in terms of funding for  
20 being able to enforce these issues, if the number  
21 of days assessed weren't so lenient, there may be  
22 more funding to be able to hire people to enforce  
23 these issues.

24 MR. LIVERS: We probably should take  
25 this off line, Mr. Chairman. The ability to be

1 able to keep the fines, those were General Fund.  
2 General Fund, the Legislature has typically been  
3 averse to what they consider -- for lack of a  
4 better term -- bounty hunting. So these fines get  
5 funneled back to the Department's budget.

6 CHAIRMAN RUSSELL: I just think it's  
7 wonderful that we're going to get someone out  
8 there to enforce the standards.

9 MS. SHROPSHIRE: I do, too.

10 CHAIRMAN RUSSELL: I appreciate your  
11 efforts to do that. Anything else before we leave  
12 this? We certainly have some other things on the  
13 agenda to cover.

14 (No response)

15 CHAIRMAN RUSSELL: No? All right.  
16 Let's roll then. The next item on the agenda, as  
17 I started, was to initiate rulemaking, possibly  
18 initiate rulemaking to adopt changes to DEQ7, and  
19 incorporate by reference in ARM 17.30.502, 619,  
20 646, 702, 1001, and 1007. And there is some other  
21 ones that I won't cite. Tom.

22 MR. LIVERS: With that, Mr. Chairman,  
23 I'm going to turn this over to Bob Bukantis of our  
24 Water Quality Standards Section.

25 MR. BUKANTIS: Mr. Chairman, members of

1 the Board, for the record, my name is Bob  
2 Bukantis, and I'm the supervisor of the Water  
3 Quality Standards Section for DEQ. And what we  
4 have before you for this agenda item is basically  
5 something similar to what you received about two  
6 years ago in terms of a cleanup of the standards,  
7 particularly focusing on some new additions and  
8 changes to DEQ7.

9 Just to run through them very briefly,  
10 some proposed rulemaking where we have got eight  
11 new pesticides and metabolites that we're required  
12 to adopt standards for under the Montana Chemical  
13 Ground Water Protection Act. Once the Department  
14 of Agriculture detects these pesticides in  
15 groundwater, they come to us, and ask us to  
16 develop standards. So we've worked with EPA to  
17 develop those numbers, those in this rulemaking  
18 package.

19 We have two 304(a) criteria that we want  
20 to adopt for aquatic life. Just to explain that a  
21 little bit, under the Clean Water Act, EPA --  
22 under Section 304(a) of the Clean Water Act, EPA  
23 develops criteria for potential of human health  
24 and aquatic life, and states typically adopt those  
25 numbers into our standards. So these are a couple

1 updates where EPA has developed those criteria for  
2 Diazinon and Nonylphenol, and we would like to  
3 adopt those into our standards.

4           The third update is basically to bring  
5 up the current science, how dioxin standards are  
6 referenced, the method for calculating toxicity of  
7 dioxin and furan breakdown products in the  
8 standards. We want to update that in DEQ7. And  
9 then you may recall that last time, we changed the  
10 arsenic standard to reflect EPA's new MCL, and  
11 because we are uncertain about the date of  
12 adoption, we've footnoted that. This is just a  
13 cleanup to put that number, typical of all the  
14 other standards, right into the document.

15           And then the last change that we're  
16 proposing in this case is to incorporate by  
17 reference new changes to EPA's methods that they  
18 do in 40 CFR 136 for the analysis of wastewater  
19 and water quality, etc. And EPA did a thorough  
20 revision of that, so we want to update our  
21 reference to EPA's new revised methods to -- it  
22 just cleans up things for our permit writers, etc.

23           So with that, I would propose that the  
24 Board initiate rulemaking, and if you concur --  
25 I'd be happy to answer any questions, too -- but

1       assuming you concur, we would file the rule notice  
2       with the Secretary of State on the 10th of  
3       December, to publish it around the 20th of  
4       December. And then we've talked to Katherine  
5       already, and we propose holding a hearing here in  
6       this room on the 30th of December, and close the  
7       public comment on the 4th of February.

8                 One other thing I need to point out is  
9       on your executive summary, there is two typos in  
10      that list of rules. 17.55.111 should be struck,  
11      and the next one should be 17.55.507. I'd be  
12      happy to answer any questions.

13                CHAIRMAN RUSSELL: It sounds like if we  
14      didn't concur, you weren't going to answer any  
15      questions from us.

16                MR. BUKANTIS: I'd be happy to.

17                CHAIRMAN RUSSELL: Any questions for  
18      Bob?

19                (No response)

20                CHAIRMAN RUSSELL: I have a quick one, I  
21      hope. The way the pesticides are posted to the  
22      circular, do you have to work with the EPA to  
23      develop the standard? It sounded like there  
24      weren't standards already in place.

25                MR. BUKANTIS: Basically how this is set

1 up is in an ideal world, typical to -- similar to  
2 Diazinon and Nonylphenol, EPA would develop, have  
3 already developed a criterion under Section 304(a)  
4 under the Clean Water Act, and we would adopt  
5 that. That's always our first choice. In the  
6 absence of that, we then go to an MCL, which EPA  
7 would develop under the Safe Drinking Water Act.  
8 Then we keep going to kind of less and less  
9 regulatory numbers.

10 In the absence of an MCL, we drop to  
11 down to a health advisory, which is not a  
12 regulatory number, etc., and then sometimes will  
13 go with -- We'll work with an EPA toxicologist on  
14 this, by the way, to come up with these numbers.  
15 And then we'll go with -- Say, if there is an  
16 updated information there, to come up with a  
17 number, you have calculated a reference dose or  
18 what's a no adverse effect level, we'll go to  
19 those numbers.

20 CHAIRMAN RUSSELL: So were there any  
21 MCL's on that eight pesticides?

22 MR. BUKANTIS: Yes, and actually that  
23 list of compounds -- Bear with me for a moment  
24 here. Until about 15 minutes ago, I was thinking  
25 my staff member who had done this work was going

1 to give this presentation, and she had to leave on  
2 short notice. But I know she gave me the list  
3 with that detail.

4 CHAIRMAN RUSSELL: That's fine. I  
5 didn't really want to get into the detail. I was  
6 really concerned more about the process. And  
7 let's say there is no MCL for these, as we're  
8 backing into them, and after there is pesticide in  
9 the groundwater -- which I think maybe we should  
10 be a little more proactive on. But if there is an  
11 applicable standards at the feds, does that bring  
12 up some stringency issues?

13 MR. BUKANTIS: In terms of being more  
14 stringent than the feds? I know there was some  
15 language in the Montana Act, Chemical Groundwater  
16 Protection Act, about that. Is that something you  
17 could address, Claudia?

18 CHAIRMAN RUSSELL: This can all come out  
19 in the process, and basically I just -- The way  
20 this works with ag pesticides is it seems a little  
21 bass ackwards to me, and I think if all of a  
22 sudden we find it in the groundwater, then we're  
23 going to determine an MCL for it at the state  
24 level, and if there is an MCL, Feds pretty much --  
25 okay. That makes a lot of sense. But if there

1 isn't -- I'm probably just editorializing more  
2 than I should right now.

3 MR. BUKANTIS: I can maybe perhaps try  
4 -- although I'm not quite sure I can really  
5 address that. But just to try to clarify it is we  
6 work with EPA to access the data that's available  
7 there to set a number, and kind of go through that  
8 hierarchy, if you will, starting ideally with a  
9 regulatory number, and then getting a little  
10 deeper into the stuff that's just health advisory  
11 or whatever.

12 CHAIRMAN RUSSELL: Understood. Just  
13 another process thing. The way these are being  
14 worded now, they don't say "Hearings Examiner,"  
15 and do you want us to still ask if you can do  
16 them? Because in the notice, it's saying  
17 Katherine Orr or someone else. Is that new  
18 language in the notice? Do we still want to  
19 appoint you, or do you want to allow you to back  
20 out and not being overwhelmed, or --

21 MS. ORR: I'm fine.

22 CHAIRMAN RUSSELL: The language has  
23 changed a little bit in the notices now.

24 MR. LIVERS: Mr. Chairman, I don't think  
25 that's an intentional or conscious. We can go

1 back if we need to.

2 CHAIRMAN RUSSELL: It's all right.  
3 We're just dumping a lot of stuff on Katherine.  
4 Maybe if she has an out for two weeks from now,  
5 and "I shouldn't have said I could do this,"  
6 but --

7 MR. ROSSBACH: It does in the notice  
8 give her that out.

9 CHAIRMAN RUSSELL: If we appoint her, I  
10 wonder if that binds her. We should just adopt  
11 it.

12 MR. ROSSBACH: Leave it as that notice.

13 CHAIRMAN RUSSELL: That's what my point  
14 is. Just initiate rulemaking, and that's in the  
15 notice that you can either do it or --

16 MS. ORR: Mr. Chairman, members of the  
17 Board, I think it's best to get clarified who is  
18 in charge right now. And I can certainly handle  
19 this -- it's not a problem -- because the proposed  
20 hearing on the SME matter, that was part of this  
21 strategy in setting the dates.

22 CHAIRMAN RUSSELL: With that in mind,  
23 I'll entertain a motion to initiate rulemaking and  
24 appoint Katherine as the Hearings Examiner.

25 MR. ROSSBACH: So moved.

1                   CHAIRMAN RUSSELL:  It's been moved by  
2  Bill.  Is there a second?

3                   MR. MARBLE:  Second.

4                   CHAIRMAN RUSSELL:  It's been seconded by  
5  Don.  Any further discussion?

6                   (No response)

7                   CHAIRMAN RUSSELL:  Seeing none, all  
8  those in favor, signify by saying aye.

9                   (Response)

10                  CHAIRMAN RUSSELL:  I should have asked  
11  for public comment.  Is there any public comment,  
12  since we're going to initiate?

13                  (No response)

14                  CHAIRMAN RUSSELL:  None.  Thanks, Bob.

15  The next item on the agenda is actually to change  
16  the water quality standard of the Marias River,  
17  Dry Fork of the Marias River, from B-2 to B-3.

18                  MR. BUKANTIS:  Mr. Chairman, members of  
19  the Board, for the record, again, I'm Bob Bukantis  
20  representing the Department of Environmental  
21  Quality on this issue.  And what we're proposing  
22  is an amendment to the rules to reclassify a short  
23  segment of the Dry Fork of the Marias including a  
24  tributary to that segment.

25                  Basically what started us looking at

1 this particular issue is the City of Conrad -- who  
2 is represented here today also by the way -- was  
3 looking at an upgrade to their wastewater  
4 treatment facility, and then through some  
5 discussions called into question on whether the  
6 water that they discharged to was really  
7 appropriately considered a trout water in essence.  
8 It's currently classified as B-2 water.

9           So we put some staff to work on this  
10 issue to go out and take a look at this piece of  
11 the Dry Fork of the Marias and this tributary, and  
12 do a use attainability analysis, basically do a  
13 structured investigation, and collected a variety  
14 of physical, chemical, and biological data to try  
15 to determine what the most appropriate use is of  
16 this water.

17           MR. ROSSBACH: To go fishing?

18           MR. BUKANTIS: Actually we did, and on  
19 the first trip here, found some Sticklebacks.

20           Anyway, and as it turns out -- just a  
21 little bit of history on this particular water.  
22 This water was addressed in 1981 where the Fish,  
23 Wildlife and Parks approached the earlier version  
24 of this agency, and said, "Okay. The Dry Fork of  
25 the Marias is currently classified for support of

1 salmonids, and marginal propagation and support of  
2 salmonids and associated aquatic life." And we  
3 really think that's expecting too much of this  
4 water.

5           And at that time, the Department  
6 downgraded the classification from B-2 to B-3, and  
7 that classification reach break was rated the  
8 interstate, and is about two-thirds of a mile  
9 upstream of where this tributary comes in.

10           And so we went out and looked at this  
11 water, and decided that the most appropriate  
12 classification really should be B-3. We don't  
13 think it's really expecting too much for it to  
14 support salmonids and similar aquatic life based  
15 on temperature data, etc.

16           One of the things that we also did,  
17 based on some questions that we got from our Water  
18 Pollution Control Advisory Council, was took a  
19 look at similar -- what we thought was a pretty  
20 comparable looking prairie stream, and then  
21 compared the fish that we did find in this  
22 tributary in the Dry Fork to a B-3 stream. We  
23 thought it looked pretty comparable, and saw that  
24 those fish assemblages were also similarly  
25 comparable.

1           So in a nutshell -- The other thing that  
2       I should point out is in your packet, you also  
3       have a letter from EPA that was written to the  
4       Board and copied to myself earlier this week in  
5       support of this concept. We took EPA's standards  
6       folks out to look at this site with us, and they  
7       wrote us a letter in support of the concept, and  
8       with some suggestions about how to refocus our --  
9       actually the first UAA that we drafted in Montana,  
10      to refocus that to try to address some of the  
11      questions that they had in there a little more  
12      clearly.

13           So I'll leave it at that, and then I'll  
14      be happy to answer any questions on this.

15           One thing I forgot that I think is very  
16      important. We brought this to the Water Pollution  
17      Control Advisory Council twice, once as kind of an  
18      update and say, "What do you guys think about  
19      this?," the second time as an action item, and  
20      they did approve for us to go forward to the  
21      Board. There was quite a bit of discussion.

22           The motion that carried -- and I think  
23      you have a copy of this that we got out to you,  
24      but I'll read it to you. "Given the information  
25      that the council was provided, we do not oppose

1 this moving forward, but urge the Board to  
2 carefully consider the precedential implications,  
3 and whether any additional information would be  
4 helpful and related to the potential of this  
5 stream to support salmonids."

6 Three folks voted for it, and basically  
7 one opposed, and two abstained, and the Chair made  
8 the point of abstaining since he didn't have to  
9 vote. There were two abstentions. So there was  
10 quite bit of discussion about it.

11 MR. MARBLE: I have a question. The Dry  
12 Fork flows into the Marias?

13 MR. BUKANTIS: I believe it does.

14 MR. MARBLE: What you're proposing  
15 doesn't have any impact on what's flowing in the  
16 Dry Fork, it's just classifying the quality of the  
17 water?

18 MR. BUKANTIS: Right. It would not  
19 affect the Dry Fork. Basically all we're talking  
20 about -- just to be more clear -- is just moving  
21 our reach break that now occurs from B-3 to B-2  
22 from the Interstate up to Highway 91, and that's  
23 about two-thirds of a mile upstream, and would  
24 also specifically include the tributary, unnamed  
25 tributary that receives the effluent from Conrad's

1 wastewater treatment facility.

2 MR. MARBLE: Doesn't allow Conrad to  
3 release any different or more effluent --

4 MR. BUKANTIS: I'm just looking to see  
5 if we have a permits person here. We don't. So  
6 I'll give you my understanding. Basically I think  
7 the main benefit that Conrad would derive in terms  
8 of relaxation of any permit limits is basically  
9 the way we calculate our acute standards for  
10 ammonia is the standards are a little bit more  
11 protective when there is a consideration of  
12 salmonids than when it's just warm water fishes.  
13 Cold water fishes tend to be a little bit more  
14 sensitive to ammonia concentrations. So that  
15 would be the main difference.

16 There's also slightly different  
17 temperature expectations, too, in terms of allowed  
18 change.

19 MR. MARBLE: Is it B-3 then from this  
20 point all the way to the Marias, or does it turn  
21 into B-2 below?

22 MR. BUKANTIS: I'm sure that it would be  
23 all the way downstream to the Marias. Right now,  
24 the Dry Fork is B-3 all the way down to the Marias  
25 from the Interstate. We would just extend that

1 just a short piece upstream.

2 CHAIRMAN RUSSELL: Any other questions?

3 (No response)

4 CHAIRMAN RUSSELL: Well, with that, is  
5 there anyone out in the audience that would like  
6 to speak to this?

7 MR. SHEVLIN: Mr. Chairman, members of  
8 the Board, for the record, my name is John P.  
9 Shevlin. I'm the Mayor of Conrad, Montana. And I  
10 guess I would like to open with -- The City of  
11 Conrad would like to thank the DEQ and Harry  
12 especially for their hard work in providing  
13 evidence consisting of photographs, temperature  
14 data, and fish data, and we support their beliefs  
15 that the segment of the Dry Fork of the Marias  
16 River was misclassified at the time it received  
17 its B-2 designation. We support their  
18 recommendation that this portion be reclassified  
19 to a B-3 designation. Thank you. Are there any  
20 questions?

21 CHAIRMAN RUSSELL: Any questions for the  
22 Mayor?

23 (No response)

24 CHAIRMAN RUSSELL: Thanks for coming  
25 down.

1           MR. SHEVLIN: Thank you. I don't envy  
2 your position in this Board, but you're doing a  
3 good job. Thank you.

4           CHAIRMAN RUSSELL: With that, I'll  
5 entertain a motion to initiate rulemaking to  
6 change that specific reach of the Dry Fork of the  
7 Marias from B-2 to B-3. Is there a motion?

8           MR. ROSSBACH: So moved.

9           CHAIRMAN RUSSELL: Is there a second?

10          MR. MARBLE: Second.

11          CHAIRMAN RUSSELL: It's been seconded by  
12 Don. Any further discussion?

13          (No response)

14          CHAIRMAN RUSSELL: Hearing none, all  
15 those in favor, signify by saying aye.

16          (Response)

17          CHAIRMAN RUSSELL: Opposed.

18          (No response)

19          CHAIRMAN RUSSELL: The next item on the  
20 agenda --

21          MS. SHROPSHIRE: Do we have to assign  
22 Katherine?

23          CHAIRMAN RUSSELL: Katherine, are you  
24 okay with this one?

25          MS. ORR: I'm fine.

1 MR. ROSSBACH: It's in the notice.

2 CHAIRMAN RUSSELL: We're on to the next  
3 item which is back to Katherine. Are you ready to  
4 race through these new contested cases on appeal?

5 MS. ORR: Mr. Chairman, members of the  
6 Board, this first case is Item III-B(1) is a storm  
7 water discharge permit violation, a failure to  
8 maintain BMP's, and maybe there are other  
9 allegations, but that's the main one. And the  
10 penalty requested is \$8,400.

11 CHAIRMAN RUSSELL: What we need to do is  
12 have a motion appointing Katherine the permanent  
13 Hearings Examiner on this Flathead County  
14 subdivision case, which I'm not even backing down  
15 on.

16 MR. SKUNKCAP: So moved.

17 CHAIRMAN RUSSELL: That motion has been  
18 made by Gayle. Is there a second?

19 MS. SHROPSHIRE: Second.

20 CHAIRMAN RUSSELL: It's been seconded by  
21 Robin. Further discussion.

22 (No response)

23 CHAIRMAN RUSSELL: All those in favor,  
24 signify by saying aye.

25 (Response)

1 MS. ORR: Mr. Chairman, members of the  
2 Board, the next item, Item (2) under III-B,  
3 involves an open cut mining case, and failure to  
4 submit an annual report, and the requested penalty  
5 is \$480.

6 MS. SHROPSHIRE: Because all open cut  
7 cases are assigned that value?

8 CHAIRMAN RUSSELL: It appears so, does  
9 it not? Is there a motion to appoint Katherine  
10 the permanent Hearings Examiner?

11 MR. MARBLE: I so move.

12 CHAIRMAN RUSSELL: It's been moved by  
13 Don. Is there a second?

14 MS. SHROPSHIRE: Second.

15 CHAIRMAN RUSSELL: It's been seconded by  
16 Robin. Any further discussion?

17 (No response)

18 CHAIRMAN RUSSELL: Seeing none, all  
19 those in favor, signify by saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 MS. ORR: The next item on the agenda,  
24 Mr. Chairman, is an appeal of an operating permit  
25 in the air quality area. It was issued to CHS,

1 Inc., which is a refinery at Laurel. And I have  
2 that file here if you wanted more information  
3 about -- Well, actually I did try to find out what  
4 it is that they were objecting to, and all that we  
5 have submitted by Mr. Veeder (phonetic) is a very  
6 short cover letter saying that on behalf of his  
7 client, they're objecting to some of the terms of  
8 the permit.

9 CHAIRMAN RUSSELL: Any questions for  
10 Katherine before we move on this one?

11 MS. SHROPSHIRE: I should know the  
12 answer to this because I received some Title 5  
13 training from the Department at one point, but  
14 it's a federal permit through the State? Is that  
15 how it works? Can you--

16 MR. HOMER: Mr. Chairman, Ms. Shropshire  
17 Montana, for the record, Charles Homer, Air  
18 Resource Management Bureau. The State of Montana  
19 DEQ has gotten delegation from EPA to operate our  
20 own Title 5.

21 CHAIRMAN RUSSELL: Thanks, Chuck.

22 MS. SHROPSHIRE: That completes my  
23 questions.

24 CHAIRMAN RUSSELL: This is kind of  
25 shooting in the dark on what they're appealing?

1 MS. ORR: Mr. Chairman, I did look, and  
2 it did seem odd to me that there wasn't more  
3 detail. I looked in the rule and the statute on  
4 that, and there is nothing dispositive about the  
5 amount of detail for this kind of objection.

6 MR. HOMER: Mr. Chairman, I can give you  
7 a small explanation. Part of Title 5 is to  
8 include every applicable requirement for a source,  
9 whether it's a federal requirement, a state  
10 requirement, or in this case, a consent decree.  
11 And there is a consent decree that all of the  
12 Billings refineries each entered into, and CHS is  
13 the first one to argue whether or not that consent  
14 decree is actually an applicable requirement of  
15 their Title 5 permit. You can probably expect to  
16 see a couple more appeals of the other refineries'  
17 permits coming up.

18 CHAIRMAN RUSSELL: Did they talk among  
19 themselves or what?

20 MR. HOMER: As far as I know, it may be  
21 a coincidence.

22 CHAIRMAN RUSSELL: With that all --  
23 thank you for the background -- do I have a motion  
24 to appoint --

25 MR. ROSSBACH: Can I -- Charles, is this

1 going to be a big deal? Is this something that we  
2 need to have on our radar screen, rather than --  
3 Is it going to end up being a huge thing for  
4 Katherine here? Do you expect this appeal,  
5 because there is other ramifications and others  
6 coming down the line as a part of this dispute  
7 over the applicability of the consent decree, that  
8 this may have some longer term thing we need to be  
9 thinking about? Can we take the jurisdiction back  
10 from Katherine if it becomes a big deal?

11 MR. HOMER: Mr. Chairman, Mr. Rossbach,  
12 it is not an extremely complex question. It's  
13 very simple: Is the consent decree an applicable  
14 requirement or not? For them, it will be an  
15 important issue.

16 MR. ROSSBACH: It may not be that  
17 they're changing what they're doing in terms of  
18 air pollution by this.

19 MR. HOMER: No. They will still be  
20 subject to the consent decree. The question is  
21 whether or not it will be included as a Title 5  
22 requirement, which has other reporting  
23 requirements and federally enforceable provisions.

24 MR. ROSSBACH: So it's in the nature of  
25 a legal agreement as much as anything, rather than

1 a major factual dispute; is that right?

2 MR. HOMER: Exactly. It's a legal  
3 termination of whether or not --

4 MR. ROSSBACH: I'm very confident about  
5 Katherine having full authority to do that, not  
6 having to get involved.

7 CHAIRMAN RUSSELL: If it is really  
8 simple, then I think the Board should hear it.  
9 The more complex, I'm sure we should give those to  
10 Katherine.

11 MR. ROSSBACH: I have no problem with  
12 Katherine dealing with complexity, but I don't  
13 have any problem with us doing it either. But if  
14 it's purely legal determinations largely, then I  
15 just -- When you said, "They're all going to be  
16 doing this," I'm thinking once again it's one of  
17 these things that all of a sudden may blow up into  
18 something that we should be attending to, and not  
19 laying all of the stuff off on Katherine. But  
20 with that explanation, which I very much  
21 appreciate, I will so move.

22 CHAIRMAN RUSSELL: It's been moved by  
23 Bill. Is there a second?

24 MR. MARBLE: Second.

25 CHAIRMAN RUSSELL: It's been seconded by

1 Don. Any further comments, questions?

2 (No response)

3 CHAIRMAN RUSSELL: Hearing none, all  
4 those in favor, signify by saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: Opposed.

7 (No response)

8 CHAIRMAN RUSSELL: Next.

9 MS. ORR: The next matter, Mr. Chairman,  
10 members of the Board, Item 4 involves a challenge  
11 by the City of Whitefish to certain permit  
12 conditions that are contained in an MPDES permit.  
13 The challenge -- just very quickly skimming the  
14 points that were made in the letter -- of appeal  
15 involve a challenge to the nitrogen effluent  
16 limitations, and there is a suggestion that those  
17 limitations be established once the TMDL's have  
18 been determined for that discharge area.

19 And another set of objections had to do  
20 with the monitoring requirements, and the  
21 frequency of that monitoring, and the costs  
22 associated with that.

23 CHAIRMAN RUSSELL: If they squawk real  
24 loud, maybe we should just hold them to the same  
25 standards that the Kalispell tertiary treatment

1 plant is.

2 MR. ROSSBACH: Don't you have to recuse  
3 yourself?

4 CHAIRMAN RUSSELL: No, I don't.

5 MS. SHROPSHIRE: Should we hear it?

6 CHAIRMAN RUSSELL: No.

7 MR. ROSSBACH: Why don't you tell us  
8 more.

9 CHAIRMAN RUSSELL: No. I'll tell you  
10 after --

11 MS. SHROPSHIRE: The results of the TMDL  
12 could potentially not be in their favor.

13 CHAIRMAN RUSSELL: Very good point,  
14 Robin.

15 MR. ROSSBACH: That's what I'm  
16 wondering. Why do they want us to wait for the  
17 TMDL? Do they get grandfathered in somewhere?

18 CHAIRMAN RUSSELL: Just a point of  
19 background. Certainly the Department has been  
20 accosted by the POTW's in Flathead County about  
21 the ramifications of that TMDL on their permits,  
22 and possible limitations that are put in there.  
23 So some of what they are saying might actually be  
24 good if they don't actually do something now --

25 If you read it, there is one point in

1       there that they don't want to do treatment  
2       controls twice, and if the TMDL comes down on them  
3       too hard, then if they do anything now, and the  
4       TMDL comes in several years from now, they could  
5       actually have a stricter permit limitation than  
6       they would now.  But what they have now isn't that  
7       awfully good, and that comes out in the -- that  
8       certainly comes out in the discussion that's in  
9       here, is the old cell technology that they're  
10      using.

11               MR. ROSSBACH:  Well, then I ask the  
12      question that I posed about six months ago:  Is  
13      this one of these that we want to look at?  We  
14      were going to look at Superior, and then we  
15      didn't; then we were going to look at Butte, and  
16      then we didn't.  Why don't we -- What is the time  
17      frame for this?

18               MS. ORR:  No time frame has been set.  I  
19      think the parties are -- there is a schedule to be  
20      submitted by the parties on November 13th, and I  
21      can check to see whether that's in the file yet,  
22      but I haven't issued a scheduling order yet in  
23      that.

24               MR. ROSSBACH:  I'm going to move that we  
25      move forward on this with Katherine as the Hearing

1 Examiner for all pretrial matters, and then make  
2 the decision further as the case proceeds to  
3 determine whether this would be a matter that the  
4 Board would hear when the time comes for the final  
5 hearing.

6 MS. SHROPSHIRE: I'll second that.

7 CHAIRMAN RUSSELL: It's been moved and  
8 seconded. Any further discussion?

9 (No response)

10 CHAIRMAN RUSSELL: If Whitefish does  
11 come in front of us, then I probably will recuse  
12 myself. That's certainly not a threat at all.  
13 But I should try to keep my working relationship  
14 with my --

15 So it's been moved and seconded. All  
16 those in favor, signify by saying aye.

17 (Response)

18 CHAIRMAN RUSSELL: Opposed.

19 (No response)

20 CHAIRMAN RUSSELL: Next.

21 MS. ORR: Mr. Chairman, members of the  
22 Board, this Item 5 is an open cut case. There is  
23 failure to submit an annual progress report, and  
24 request for a penalty in the amount of \$480.

25 CHAIRMAN RUSSELL: So do I have a motion

1 to appoint Katherine the permanent Hearings  
2 Examiner.

3 MR. ROSSBACH: So moved.

4 CHAIRMAN RUSSELL: It's been moved by  
5 Bill. Is there a second?

6 MR. SKUNKCAP: Second.

7 CHAIRMAN RUSSELL: It's been seconded by  
8 Gayle. All those in favor, signify by saying aye.

9 (Response)

10 CHAIRMAN RUSSELL: Opposed.

11 (No response)

12 MS. ORR: Mr. Chairman, members of the  
13 Board, Item 6 is a junk vehicle case. It's a  
14 challenge to an order denying the issuance of a  
15 license application.

16 CHAIRMAN RUSSELL: Interesting read and  
17 great appeal.

18 MS. ORR: Very factual.

19 CHAIRMAN RUSSELL: You know, the citizen  
20 appeal to air quality permits that actually  
21 requires an affidavit, I think every appeal should  
22 require something more than, "I appeal the  
23 decision." I just think that this certainly isn't  
24 due process when they just appeal the decision.  
25 They should put the basis for their appeal in the

1 -- or on the record.

2 MR. ROSSBACH: Maybe we should -- maybe  
3 the Department should consider that as the  
4 possible subject of rulemaking, sending out forms  
5 or required elements.

6 CHAIRMAN RUSSELL: It's not a statute  
7 change? It would be all rulemaking?

8 MR. ROSSBACH: We could make a rule, set  
9 out the forms and what's required to be included  
10 in an appeal, couldn't we? This has come up twice  
11 today.

12 MR. LIVERS: Mr. Chairman, Mr. Rossbach,  
13 why don't we think about that and come back to  
14 you. We could probably report back by the next  
15 meeting, and just look at some options anyway.

16 MR. ROSSBACH: I am sympathetic to sort  
17 of -- what I would call here from legalistic point  
18 of view -- for pro se appellants, somebody who  
19 can't afford an attorney to fight a \$480; but on  
20 the other hand, there should be something why,  
21 what's the basis for it. And I think that that  
22 wouldn't be that hard to make them, in  
23 handwriting, fill out a form that says, "Why are  
24 you appealing? What is the basis for your  
25 appealing? Is there a statute or a code section

1 that you think applies to you?," or something like  
2 that, that could be user friendly, but at least we  
3 would have -- kind of make them do something. But  
4 it needs to be user friendly. I'm not trying to  
5 say it needs to be something that they have to  
6 hire a lawyer for.

7 CHAIRMAN RUSSELL: Is that stuff still  
8 on the website about how to do an appeal?

9 MS. BREWER: I think there's a  
10 frequently asked questions that includes that.

11 CHAIRMAN RUSSELL: I think we still have  
12 to appoint Katherine the permanent Hearings  
13 Examiner.

14 MR. ROSSBACH: So moved.

15 CHAIRMAN RUSSELL: It's been moved.  
16 Is there a second?

17 MS. SHROPSHIRE: Second.

18 CHAIRMAN RUSSELL: It's been seconded by  
19 Robin. All those in favor, signify by saying aye.

20 (Response)

21 CHAIRMAN RUSSELL: Opposed.

22 (No response)

23 CHAIRMAN RUSSELL: Now we are on to  
24 final actions on contested cases. The first case  
25 is the matter of violations of the Montana Public

1 Water Supply Laws by Kountry Korner Enterprises  
2 doing business as Kountry Korner Cafe.

3 MS. ORR: Mr. Chairman, members of the  
4 Board, this is a case where the violator got  
5 together with the Department and entered into an  
6 Administrative Order on Consent. The violator is  
7 paying a penalty of \$2,000, and submitting plans  
8 and specs, and modifying their drainfield, and  
9 that's about it.

10 CHAIRMAN RUSSELL: It seems like they  
11 did a little work on their drainfield without  
12 permission.

13 MS. ORR: Yes. You said it.

14 CHAIRMAN RUSSELL: So I do have an order  
15 of dismissal for Case No. BER 2006-09, Public  
16 Water Supply. Do I have a motion to authorize the  
17 Board Chair to sign?

18 MR. MARBLE: So moved.

19 CHAIRMAN RUSSELL: It's been moved by  
20 Don. Is there a second?

21 MR. SKUNKCAP: Second.

22 CHAIRMAN RUSSELL: It's been seconded by  
23 Gayle. All those in favor, signify by saying aye.

24 (Response)

25 CHAIRMAN RUSSELL: Opposed.

1 MS. SHROPSHIRE: We can't vote to not  
2 dismiss it?

3 CHAIRMAN RUSSELL: That would not be a  
4 good thing.

5 The next matter in front of the Board is  
6 the matter of the violation of the Montana Strip  
7 and Underground Mine Reclamation Act by  
8 Westmoreland Resources, doing business as Western  
9 Energy Company, Colstrip, Rosebud County, Montana.

10 MS. ORR: Mr. Chairman, members of the  
11 Board, this case has involved the issue of what is  
12 the scope of the Board's authority, if you will,  
13 to alter the terms of an Administrative Order on  
14 Consent. And submitted in the hand out materials  
15 today is a stipulation to dismiss signed by the  
16 Department and the representative, Mr. Forsyth,  
17 for Western Energy, together with a request for  
18 dismissal under 41-A, and the proposed order of  
19 dismissal.

20 And I would submit that when parties  
21 jointly and voluntarily agree to the jurisdiction  
22 of the Board being terminated, that in fact it has  
23 been. So that's why an order would be appropriate  
24 here.

25 CHAIRMAN RUSSELL: With that in mind,

1 I'll entertain a motion to authorize the Board  
2 Chair to dismiss BER 2006-30-SM. Is there a  
3 motion?

4 MR. SKUNKCAP: So moved.

5 CHAIRMAN RUSSELL: It's been moved by  
6 Gayle. Is there a second?

7 MR. ROSSBACH: I'll second it.

8 CHAIRMAN RUSSELL: It's been seconded by  
9 Bill.

10 MR. ROSSBACH: I have heartburn about  
11 this.

12 CHAIRMAN RUSSELL: I know you do, but  
13 you did second it. Any further discussion?

14 MR. ROSSBACH: That doesn't mean I have  
15 to vote for it.

16 MR. MARBLE: I have some discussion. We  
17 had the hand out material, and it seems like we're  
18 kind of in an adversarial position against the  
19 Department on this to some degree. But their  
20 attorney has filed that, submitted to us this memo  
21 saying that we have no discretion. Once they have  
22 signed their stipulation, the Board's authority  
23 quits. But they didn't cite any -- as far as I  
24 recall, they didn't cite any specific rule or  
25 anything, they just said, "Based on that, this

1 other board," and so on, that's what you would  
2 assume.

3 But I wonder if our attorney, if she  
4 concurs in the Department's position or --

5 MS. ORR: You're referring to the brief  
6 that was filed?

7 MR. MARBLE: Yes.

8 MS. ORR: I have looked at that.

9 MR. MARBLE: The question is: Once they  
10 come to us, do we have no discretion? We'll just  
11 go ahead, and once they've signed the stipulation  
12 to dismiss, we're out of the -- we're just a -- we  
13 just go ahead and approve it, I guess.

14 MS. ORR: I think that -- and this is my  
15 opinion, and maybe Bill and you would want to also  
16 chime in. But the Board's jurisdiction is invoked  
17 when an appeal is filed.

18 Then there has to be a formal reason for  
19 that jurisdiction to terminate. One of those  
20 could be Rule 41, and Rule 41 does specify certain  
21 conditions that have to occur before that can  
22 happen, one of which is there can't have been any  
23 substantive disposition, such as a summary  
24 judgment motion, or a default order, or something  
25 like that. Beyond the point of those two

1 procedural eventualities, then there couldn't be a  
2 41-A dismissal.

3 I also believe that -- and I've thought  
4 about it in my experience -- Courts do maintain  
5 continuing jurisdiction over certain  
6 administrative -- well, not administrative -- but  
7 orders on consent at the request of the parties.

8 If the Department were to request that  
9 the Board continue jurisdiction over an Order on  
10 Consent, then we would do that. But in the  
11 context of a 41-A situation, I don't think the  
12 Board has any say-so over what the Administrative  
13 Order on Consent says.

14 (Ms. Kaiser present)

15 MS. ORR: Any other dismissal, I think  
16 it could go case-by-case whether the Department  
17 wants the Board to wait to exercise its  
18 jurisdiction, and be there to enforce the Order on  
19 Consent.

20 CHAIRMAN RUSSELL: Anything further?

21 MR. ROSSBACH: Yes. Here is the problem  
22 I have. And we had this detailed presentation  
23 about calculations, and yet here it is clearly  
24 totally discretionary, because I'm looking at No.  
25 3, Days of Violation. They violated the permit

1 for 100 days. "The Department realizes that using  
2 100 days to calculate the penalty for this  
3 violation would result in a penalty that is larger  
4 than the amount needed to provide an adequate  
5 degree of deterrent for future violations."

6 What's that based on? This is  
7 Westmoreland Coal, which is a multi billion dollar  
8 corporation. So how does two days provide  
9 adequate deterrence for environmental violations?  
10 What's the basis for that?

11 "Therefore, in its discretion, it is  
12 choosing to calculate a penalty for only two  
13 days."

14 I have a problem with going from 100 to  
15 two days. It doesn't seem to be something that is  
16 -- gives me a reasonable confidence level that  
17 there is any basis for it -- other than literally  
18 picking a number out of the hat, because you come  
19 with up a final decision -- about the amount of  
20 money. And when you've got --

21 I don't want mean to belabor this,  
22 because I don't know. But it bothers me. We're  
23 the ones that are ultimately approving a  
24 settlement, it still seems to me, and the  
25 settlement includes an amount of penalty. If

1 we're not satisfied with the amount of penalty,  
2 then it seems like we have jurisdiction to say no.

3 MS. SHROPSHIRE: Can you remind me the  
4 amount?

5 MR. ROSSBACH: \$6,000. It's based on  
6 \$3,000 something a day. And so they calculate two  
7 days, so the amount is \$6,325. And the economic  
8 benefit. Clearly they didn't have a lot of  
9 economic benefit for doing this. It wasn't  
10 something --

11 But it's bothersome that it's something  
12 that appears to be fairly clear cut. And I'm just  
13 wondering if it's not because the Department kind  
14 of messed this up in terms of its analysis of the  
15 wrong doing, and let it go for 100 days rather  
16 than catching it. Isn't that why we're not --  
17 isn't that the true reason why we're not giving  
18 them a bigger penalty? And maybe that is a valid  
19 reason for not giving them a bigger penalty. I  
20 don't know.

21 If I remember the facts correctly, we  
22 had a guy out there who approved an incorrect  
23 construction, and if that's the case, then why  
24 don't we say that, rather than saying, "The  
25 penalty is too big." "The penalty would be too

1 big."

2 Well, I don't think the penalty would be  
3 too big if they were -- If in fact there was  
4 knowing wrongdoing by a multi billion dollar  
5 corporation, \$6,000 is no deterrence whatsoever.  
6 That's like walking around money. And so I don't  
7 like the --

8 This is what I don't like. I don't like  
9 our, quote unquote, rationale for the penalty.  
10 And you may have decided that the penalty of  
11 \$6,000 is a reasonable penalty because we screwed  
12 up. Fine. But not because it's too big of a  
13 deterrent for a multi billion dollar corporation.

14 And I'm not attacking the multi billion  
15 dollar corporation. I don't know the facts of  
16 this to know -- and this is where I came down  
17 before. I'm in trouble because I really don't  
18 know why they did it this way, and who did it, and  
19 who's to blame, and all of that. And I still  
20 don't know the answer to that.

21 And that's why I wanted Andy Forsyth to  
22 come here and at least do a mea culpa, and instead  
23 I've got this document again, and I'm asked to  
24 walk away from it. And it gives me heartburn.  
25 That's all. I'm not accusing anybody of anything.

1 I'm just telling you this is the same thing I said  
2 before, and I still don't feel like I got any  
3 better answer to --

4 I'd like Andy to tell me, and if Andy  
5 had just written me a letter and said, "We screwed  
6 up, and here is why, and we were stupid, and this  
7 guy didn't do what he was supposed to do, and my  
8 guy -- this guy, I talked to him," and blah, blah,  
9 blah. But instead I've got the regulator telling  
10 us, "We think the deterrence -- the money would  
11 be too high."

12 Well, not if they were intentionally  
13 doing it, and trying to save some money for a long  
14 term deal, and were trying to get away with  
15 something. If they weren't trying to get away  
16 with something, then fine, but we screwed up, and  
17 so we shouldn't penalize them for our screw up.  
18 Fine. That's a better rationale than the one that  
19 I've been given.

20 CHAIRMAN RUSSELL: Do you know what, you  
21 probably -- 95 percent of what you said is how I  
22 feel about, too.

23 MR. ROSSBACH: What's the other 5  
24 percent?

25 CHAIRMAN RUSSELL: 95 is a lot, Bill.

1 And I think you're right, but I think that the  
2 parties have said -- and with that in mind, we  
3 should just get this resolved, and hopefully the  
4 next time the inspector goes out there and doesn't  
5 -- I think that there was some issues there, and I  
6 doubt it will ever happen again, and we need to  
7 get on with it. I'll tell you my other 5 percent  
8 after the meeting.

9 MR. ROSSBACH: Here is my last bit on  
10 this. I still would like to know why it happened.  
11 And if we're only given the \$6,000 fine for it,  
12 it's going to happen again. That's my problem.  
13 If I don't know why it happened, then how do I  
14 know that a \$6,000 thing is going to be a  
15 deterrent?

16 I'm not convinced. That's what we're  
17 trying to do. We're trying to deter the conduct.  
18 And if I don't know what the conduct was, how can  
19 I know whether \$6,000 is a deterrent or not.

20 MS. SHROPSHIRE: What I want to know is  
21 how the number of days is assigned, because there  
22 was an \$8,000 fine assessed to a subdivision for  
23 sediment that was discharge into a creek, and they  
24 knowingly -- the fence had fallen over, and it was  
25 one day. So I still am not clear on how the

1 number of days is assigned.

2 CHAIRMAN RUSSELL: That wasn't one day,  
3 though. The violation happened more than one day.

4 MS. SHROPSHIRE: But they were assessed  
5 one day.

6 CHAIRMAN RUSSELL: I think John said  
7 that sometimes they do that.

8 MS. SHROPSHIRE: But I don't understand  
9 why.

10 MR. MARBLE: Maybe we need to take a  
11 look at our rules on enforcement.

12 MR. ROSSBACH: I don't have problem. I  
13 think what it is is we decide how much money we're  
14 going to fine them, and then we back calculate the  
15 number of days. Isn't that what we're really  
16 doing? And that's fine. I understand why you're  
17 doing that. But I still don't understand how we  
18 can say that \$6,000 is a deterrent from doing it  
19 again if we don't know why or how it happened.

20 MR. LIVERS: Mr. Chairman, I've got some  
21 mixed feelings about getting into the substance of  
22 this, and I'll try to contain it, but there has  
23 been a lot said, and I think it has to be  
24 addressed. So while I think the jurisdictional  
25 issues are really what ought to rule in this case,

1 I think some of the stuff has to be addressed.

2 Frankly, I don't disagree, Mr. Rossbach,  
3 with your statement regarding the deterrent, and I  
4 think in reality there are a lot of factors that  
5 go into any penalty assessment, and maybe  
6 sometimes we over simplify a little bit in  
7 summarizing those factors. One obvious one is  
8 there was no harm, unlike the subdivision case.  
9 That's blatant. There was a potential for harm,  
10 and that is an issue, but there was no harm, and  
11 that is a piece of the consideration.

12 I think the Department's responsibility  
13 in terms of the contractor that we had hired going  
14 out and looking at that, and the questionable  
15 follow up after that is a consideration. And  
16 could we have done a better job perhaps of more  
17 precisely going into some of the details on some  
18 of the factors in that? Yes, that's possible.

19 But again, as we tried to lay out in the  
20 penalty discussion, there are a host of factors,  
21 there are some statutory requirements, there is  
22 equity considerations, a lot of things that go  
23 into it. Yes, the number of days is the number  
24 one discretionary variable that we've got, and  
25 that is where you're going to see the most

1 Department discretion, and that's essentially the  
2 balancing factor for taking into account all of  
3 those equity concerns.

4 MR. ROSSBACH: Then what I would like to  
5 see, Tom, is that when we're talking about gravity  
6 and extent, then you can say, "But no harm  
7 occurred." That is where that would come in. And  
8 instead, we're not talking about that there. Then  
9 it seems to be that the gravity and extent factor  
10 would be like .1. I'm just having trouble with  
11 the way this is done.

12 MR. LIVERS: Mr. Chairman, Mr. Rossbach,  
13 I understand.

14 MR. ROSSBACH: And then to just sort of  
15 pick two days out of the air because you want to  
16 get a number around \$6,000, fine.

17 CHAIRMAN RUSSELL: I believe we have a  
18 motion on the floor, right? I think we'll roll  
19 call this one.

20 MS. KAISER: I have to recuse myself  
21 from taking action on this one.

22 CHAIRMAN RUSSELL: Do we need to roll  
23 call this? If we need to, we'll back up. The  
24 motion to have the Board Chair sign the order of  
25 dismissal of 2006-30-SM. All those in favor,

1 signify by saying aye.

2 (Response)

3 CHAIRMAN RUSSELL: Opposed.

4 MR. ROSSBACH: No.

5 CHAIRMAN RUSSELL: Motion carries.

6 Next.

7 (Ms. Shropshire not present)

8 CHAIRMAN RUSSELL: The next item on the  
9 agenda is the matter of the waiver denial of  
10 Slevin.

11 MS. ORR: This involved a granting of a  
12 waiver by the Department, and so the appellant  
13 withdrew its appeal.

14 CHAIRMAN RUSSELL: I don't have the  
15 order in front of me, but I'm guessing there is an  
16 order of dismissal. I do have it. I'm sorry. I  
17 have an order of dismissal for Case No. BER  
18 2007-03-SUB. Do I have a motion to authorize the  
19 Board Chair to sign this dismissal?

20 MR. MARBLE: So moved.

21 CHAIRMAN RUSSELL: Is there a second?

22 MS. KAISER: Second.

23 CHAIRMAN RUSSELL: It's been seconded by  
24 Heidi. All those in favor, signify by saying aye.

25 (Response)

1 CHAIRMAN RUSSELL: Opposed.

2 (No response)

3 CHAIRMAN RUSSELL: The next matter is  
4 violations of the Montana Public Water Supply laws  
5 by John Pendleton at Ponderosa Mobile Home Court,  
6 PWS-ID-MT-0002131.

7 MS. ORR: Mr. Chairman, members of the  
8 Board, this involved a public water supply system  
9 and community water supply system, and there was a  
10 violation, and I think the penalty requested was  
11 \$500, and the parties reached a settlement, and I  
12 think it is that Mr. Pendleton will pay the \$500  
13 penalty.

14 CHAIRMAN RUSSELL: I have an order of  
15 dismissal for Case No. BER 2007-04-PWS. Is there  
16 a motion authorizing the Board Chair to sign?

17 MS. KAISER: So moved.

18 CHAIRMAN RUSSELL: It's been moved by  
19 Heidi. Is there a second?

20 MR. MARBLE: Second.

21 CHAIRMAN RUSSELL: It's been seconded by  
22 Don. All those in favor, signify by saying aye.

23 (Response)

24 CHAIRMAN RUSSELL: Opposed.

25 (No response)

1           CHAIRMAN RUSSELL: The next matter is  
2 violations of the Montana Public Water Supply law,  
3 the Gallatin National Forest at Soda Butte  
4 Campground.

5           MS. ORR: And this is also a public  
6 water supply system. And the appellant in this  
7 case withdrew its appeal, in essence conceding all  
8 of the violations, and therefore there is a  
9 stipulation for dismissal.

10           CHAIRMAN RUSSELL: And I do have that  
11 stipulation, and I have an order of dismissal for  
12 Case No. BER 2007-09-PWS. Do I have a motion to  
13 authorize the Board Chair to sign?

14           MR. MARBLE: So moved.

15           CHAIRMAN RUSSELL: It's been moved by  
16 Don. Is there a second?

17           MS. KAISER: Second.

18           CHAIRMAN RUSSELL: It's been seconded by  
19 Heidi. All those in favor, signify by saying aye.

20           (Response)

21           CHAIRMAN RUSSELL: Opposed.

22           (No response)

23           CHAIRMAN RUSSELL: The next item on the  
24 agenda is the notice of violation of the Metal  
25 Mine Reclamation Act by Philip P. Cox, Wheatland

1 County, Montana.

2 MS. ORR: Mr. Chairman, members of the  
3 Board, Mr. Cox withdrew his request for the  
4 hearing, and therefore is conceding the alleged  
5 violations, and submitting to the Administrative  
6 Order on Consent.

7 CHAIRMAN RUSSELL: I have an order of  
8 dismissal for Case No. BER 2007-16-MM. Do I have  
9 a motion to authorize the Board Chair to sign?

10 MR. MARBLE: So moved.

11 CHAIRMAN RUSSELL: It's been moved by  
12 Don. Is there a second?

13 MS. KAISER: Second.

14 CHAIRMAN RUSSELL: It's been seconded by  
15 Heidi. All those in favor, signify by saying aye.

16 (Response)

17 CHAIRMAN RUSSELL: Opposed.

18 (No response)

19 CHAIRMAN RUSSELL: Last one. The matter  
20 of violations of the Montana Public Water Supply  
21 Laws by Oasis Water Fill, LLC.

22 MS. ORR: Mr. Chairman, members of the  
23 Board, the Department determined that the  
24 Appellant was not subject to the requirements of  
25 the cited order, and the Department in essence --

1 Well, it vacated its order, and that prompted the  
2 Appellant to withdraw its appeal.

3 CHAIRMAN RUSSELL: With that, I have an  
4 order for dismissal of Case No. BER 2007-20-PWS.  
5 Do I have a motion authorizing the Board Chair to  
6 sign?

7 MS. KAISER: I so move.

8 CHAIRMAN RUSSELL: It's been moved by  
9 Heidi. Is there a second?

10 MR. MARBLE: Second.

11 CHAIRMAN RUSSELL: It's been seconded by  
12 Don. All those in favor, signify by saying aye.

13 (Response)

14 CHAIRMAN RUSSELL: Opposed.

15 (No response)

16 CHAIRMAN RUSSELL: The last item on the  
17 agenda is the time for the general public comment.  
18 Is there anyone in the audience that would like to  
19 address the Board on matters relating to the  
20 Board's activities?

21 (No response)

22 CHAIRMAN RUSSELL: Seeing none, do I  
23 have a motion to adjourn?

24 MR. MARBLE: So moved.

25 CHAIRMAN RUSSELL: It's been moved by

1 Don. Second.

2 MR. SKUNKCAP: Second.

3 CHAIRMAN RUSSELL: It's been seconded by

4 Gayle. All those in favor, signify by saying aye.

5 (Response)

6 CHAIRMAN RUSSELL: We will see each

7 other again on the 21st.

8 (The proceedings were concluded

9 at 2:09 p.m.)

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C E R T I F I C A T E

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

I, LAURIE CRUTCHER, RPR, Court Reporter,  
Notary Public in and for the County of Lewis &  
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing -193- pages contain a true  
record of the proceedings to the best of my  
ability.

IN WITNESS WHEREOF, I have hereunto set my  
hand and affixed my notarial seal  
this                      day of                      , 2007.

LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2008.