

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 Oppper. 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 Oppen then. Not to excite anyone, but
6 are the rules that BER put in place at risk?

7 MR. OPPEN: 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. OPPEN: 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 tribbs, 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.