

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

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

8  
9                           TRANSCRIPT OF PROCEEDINGS

10  
11           Heard at Room 111 of the Metcalf Building  
12                           1520 East Sixth Avenue  
13                           Helena, Montana  
14                           December 4, 2015  
15                           10:00 a.m.

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

22  
23 PREPARED BY: LAURIE CRUTCHER, RPR  
24                           COURT REPORTER, NOTARY PUBLIC  
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1                           A P P E A R A N C E S

2           ATTORNEYS APPEARING ON BEHALF OF WEIC AND MEIC:

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WHEREUPON, the following proceedings were

had:

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CHAIRMAN MILES: I think we'll call the meeting back to order. I haven't heard anyone else on the phone, so I think we'll proceed.

7 I'm going to open the discussion for the  
8 Board on finalizing our findings of fact and  
9 conclusions of law in regard to the Signal Peak  
10 case. I want to just take a minute. I'm going to  
11 turn it over to Ben, and I want to just take a  
12 minute to say that I was working with Ben recently  
13 just going through the order, and I think asking  
14 some questions of him about timing, and  
15 implication, and what are we exactly doing in the  
16 order, because we hadn't really come to that stage  
17 of the discussion; and I think it raised a number  
18 of questions that then Ben spoke with the parties.

19 So I anticipate today that we will ask  
20 some questions of the parties, so we really  
21 understand exactly how we want to word the order,  
22 and what we want to be in it, as well as going  
23 through the findings and the conclusions; and I  
24 think we do need to take some time to go through  
25 those conclusions to see if there is anything that

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1 we do not want in here.  
2 Our directions to Ben were to put  
3 everything in there that was in the MEIC proposal,  
4 but based on our discussions or based on our  
5 reasoning for ruling in favor of MEIC, we may want  
6 to look at those conclusions, and see if we're  
7 comfortable with them. So I anticipate that we'll  
8 be having some discussion here for the next hour  
9 or two.

10 So Ben, I'm going to turn it over to

11 you. Thank you.

12 MR. REED: Thank you, Madam Chair. I  
13 sent out an email to Board members. The Board  
14 previously agreed to adopt in whole the findings  
15 of fact and conclusions of law of MEIC. This led  
16 to a couple of problems that I was attempting to  
17 resolve, and did to a greater or lesser extent in  
18 a way that I explained in my email to the Board.  
19 So I'd like to go through that email.

20 The other problem was with respect to  
21 the findings of fact that had been put forward by  
22 the adverse parties, by DEQ and SPE, and the way  
23 in which I addressed those is something that I'll  
24 also take up. But since this email came out, I've  
25 had some discussion with the parties, and with Mr.

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1 Tweeten, and somewhat changed my position from  
2 what the initial email said. So the current  
3 solution is vastly more straight forward, so it is  
4 an improvement. It does no significant harm to  
5 anything other than my own estimation of my  
6 professional acumen.

7 The two issues that I would call to the  
8 Board's attention in which the conclusions of law  
9 differ from those that were set out by MEIC are  
10 that in Paragraph 64, MEIC stated that the Board  
11 reviewed DEQ's decision to approve a coal mine  
12 expansion de novo with no deference accorded to  
13 the Agency, and then cited a case called MEIC  
14 versus DEQ.

15 BOARD MEMBER REINHART-LEVINE: Did you  
16 say 64?

17 MR. REED: It is still Page 29 of the  
18 draft.

19 CHAIRMAN MILES: Thank you.

20 MR. REED: The long and short is that I  
21 think that that's not precisely what the case  
22 says. It is arguably what the case says, but I  
23 thought that it would be more appropriate, and do  
24 no harm to MEIC's argument, to simply set forth  
25 the actual holding of the case. I've since shared

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1 that opinion with DEQ, SPE, and MEIC. Neither DEQ  
2 nor SPE had a problem with it, and MEIC thought  
3 that it was appropriate as well.

4 CHAIRMAN MILES: And that's the language  
5 that you now have in Paragraph 64, "The Board may  
6 in its discretion rely entirely on the record  
7 before it," or receive -- is that the paragraph  
8 you're talking about?

9 MR. REED: Yes, Madam Chair. I note  
10 that there are, by the way, two periods at the end  
11 of that sentence, which is something that I'll  
12 clean up prior to the final. But yes, the current  
13 Paragraph 64 states the actual holding of the  
14 case.

15 CHAIRMAN MILES: Thank you.

16 MR. REED: Moving then to the third  
17 point that I made in the email that I sent out to  
18 the Board. In Paragraph 66, in its initial

19 conclusions of law, MEIC stated that the only  
20 relevant analysis is that which had been contained  
21 within the four corners of the CHIA, and the only  
22 relevant facts were those before the Agency at the  
23 time of its permitting decision.

24 That was a slight misstatement of its  
25 argument, and I think it was probably either a

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1 typo, or one of those grammatical errors that<sup>7</sup>  
2 creep into everyone's writing. I changed it to  
3 state that the only relevant analysis is what was  
4 contained within the four corners of the CHIA,  
5 which is not a change, and the only relevant facts  
6 are those concluded by the Agency in the  
7 permitting process before the Agency made its  
8 permitting decision, which I think, as I said,  
9 more closely tracks MEIC's overall argument.

10 Again, I shared those with Counsel for  
11 all parties, and no one objected to those changes  
12 and conclusions.

13 CHAIRMAN MILES: In Paragraph 66?

14 MR. REED: Yes, Madam Chair.

15 CHAIRMAN MILES: As it stands right now.  
16 You've got two points in your email about  
17 Paragraph 66.

18 MR. REED: I'm not sure that I do, Madam  
19 Chair. I think all I said was that the primary  
20 question was whether MEIC's argument was, as I  
21 understood it, that the only information that  
22 could be in the CHIA was the information that was

23 either available to the Department at the time of  
24 the drafting of the CHIA, as opposed to just what  
25 was in the CHIA. And so that was just a minor bit

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1 of clean-up on my part. As I say, MEIC did not<sup>8</sup>  
2 object. It's not I think a significant change in  
3 the conclusions of law.

4 CHAIRMAN MILES: I don't disagree with  
5 that. The email that you sent describing some of  
6 the changes you made, Item No. 2 talks about --

7 MR. REED: I'm sorry. I was going to  
8 address Item No. 2 separately.

9 CHAIRMAN MILES: That also says  
10 Paragraph 66.

11 MR. REED: Yes, it does, yes, and I  
12 apologize for that lack of clarity.

13 CHAIRMAN MILES: So one and three we're  
14 settled on, unless anyone has any questions.

15 MR. REED: Right. One and three raised  
16 no eyebrows. No. 2 did, and this is going to be  
17 slightly more discursive, and I apologize because  
18 I speak slowly, but as I said, I think that the  
19 conclusion that I have come to is going to be  
20 different from what I had in the email, but it is  
21 a substantially more straight forward solution to  
22 the problem.

23 CHAIRMAN MILES: Are we in --

24 MR. REED: We're not in my changes. The  
25 changes that I made as per the email, I would like

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1 to withdraw those changes, and suggest a  
2 substantially more straight forward --

3 CHAIRMAN MILES: What paragraph are you  
4 talking about?

5 MR. REED: This would be essentially  
6 what in the draft became Paragraphs 61 and 62.

7 CHAIRMAN MILES: Thank you. About MAPA  
8 defining a contested case?

9 MR. REED: Yes. Then I refer to a  
10 statement that MEIC made in Paragraph 66 that's  
11 not germane to this discussion.

12 One of the problems that I had while  
13 engaging in my analysis was that while this matter  
14 was a hearing, there was no evidence offered. The  
15 parties essentially agreed that there were no  
16 issues of material fact, which is to say all of  
17 the parties agreed on all of the underlying facts.

18 The problem then became by and large how  
19 to address some of the issues that Mr. Tweeten  
20 raised in his concurring statement, which is to  
21 say that there were a variety of facts that needed  
22 to be addressed as findings of fact potentially.  
23 The problem is that if you have a party that is  
24 adversely affected, you have to address that  
25 party's findings of fact.

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1 And so the way that I attempted to  
2 address this, which I believe is incorrect and  
3 which I think that the parties correctly disagreed



4 with, is to say that this was not in fact a  
5 contested case hearing in a very narrow sense.  
6 And the parties raised an issue of if you have  
7 something that quacks like a duck, and looks like  
8 a duck, you can go pretty deep into  
9 technicalities, but ultimately it is a duck.

10 The solution that Mr. Tweeten suggested  
11 to me is if you look on Page 28 of the draft order  
12 that I sent around, Paragraph 61 and 62 can simply  
13 be crossed out, and a paragraph can be inserted --  
14 and the numbering of paragraphs falls apart at  
15 this point -- a paragraph can be inserted that  
16 says because no material issues of fact -- because  
17 the parties agreed that there were no conflicting  
18 issues of material fact, none of the proposed  
19 findings of fact that were offered by DEQ or SPE  
20 are contradicted by these conclusions of law.

21 And I think it cuts through the Gordian  
22 knot of whether these are actually findings of  
23 fact, or whether we had evidence before the Board  
24 how exactly to handle the findings of fact in  
25 question.

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1 BOARD MEMBER REINHART-LEVINE: Would you  
2 repeat that one more time.

3 MR. REED: Certainly. And again this is  
4 sort of --

5 BOARD MEMBER TWEETEN: I was just going  
6 to suggest before you do that, I would suggest  
7 that the substituted language track the language

8 of Rule 56, which is genuine issues of material  
9 fact, and that's what a Court will be looking for  
10 if this matter were to go in front of a Court on  
11 judicial review. So I would suggest that you use  
12 that language, instead of the language that you  
13 have in there describing what the standard is.  
14 The standard is pretty clear, and Courts have  
15 applied it for a long time, and kind of have a  
16 pretty good handle on what it means.

17 MR. REED: Madam Chair. Thank you, Mr.  
18 Tweeten. Madam Chair, Ms. Reinhart-Levine, the  
19 language in question would read, "Because the  
20 parties agreed that there were no genuine issues  
21 of material fact, none of the proposed findings of  
22 fact offered by DEQ or SPE are contradicted by  
23 these conclusions of law."

24 CHAIRMAN MILES: Are contradicted by  
25 these conclusions of law?

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1 MR. REED: Yes.

2 CHAIRMAN MILES: And that you believe is  
3 supported by what was in all of the briefs, that  
4 there weren't differing findings of fact?

5 MR. REED: Madam Chair, it is an  
6 interesting question. One of the problems that I  
7 have in giving a completely direct answer to it is  
8 that very few of the findings of fact are findings  
9 of fact per se. The findings of fact that were  
10 presented would be items that if they were offered  
11 in court would require substantially more

12 foundation than was presented to the Board. And  
13 so I'm less comfortable than I might be in  
14 asserting that at their core, none of those  
15 findings of fact --

16 I think that you could find very minor  
17 differences in the end result of the findings of  
18 fact, but I think ultimately they are sort of like  
19 the parable of the blind man and the elephant.  
20 They all proceed ultimately from the material in  
21 the CHIA, which was asserted by the parties to be  
22 the basis for this motion for summary judgment.  
23 And so all of them assume the facts that were set  
24 out in the CHIA and were used by the Department in  
25 developing the CHIA. However, some of those

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1 findings of fact take some portions of the overall  
2 facts and privilege them, I'll say, more than  
3 others.

4 BOARD MEMBER TWEETEN: Madam Chair, if I  
5 might. I generally agree with what Ben said. I  
6 think what, from my perspective as an old lawyer,  
7 is that the all of the findings and conclusions  
8 seem to rest on the same set of historical facts,  
9 in the sense that this is what happened on this  
10 day, the CHIA is a document, here is a copy of it,  
11 its language is what it is, those sort of things;  
12 but all of the parties in their proposed findings  
13 of fact engaged in argumentation as well.

14 And lawyers do this all the time. When  
15 you're drafting your proposed findings and



20 in the other briefs?

21 BOARD MEMBER TWEETEN: Madam Chair, I  
22 think that's right.

23 CHAIRMAN MILES: Michele.

24 BOARD MEMBER REINHART-LEVINE: Madam  
25 Chair, Mr. Reed. So we have an obligation to

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1 examine and deliberate on each proposed <sup>15</sup> finding,  
2 correct? Because it quacks like a duck, so it is  
3 a contested case, so the Board need to address the  
4 findings of fact and conclusions of law submitted  
5 by each of the parties, right?

6 MR. REED: Madam Chair, Ms.  
7 Reinhart-Levine, yes, that's correct.

8 BOARD MEMBER REINHART-LEVINE: And your  
9 suggested paragraph is a way to address the  
10 findings of fact submitted by DEQ and SPE for that  
11 purpose.

12 MR. REED: That's correct.

13 BOARD MEMBER TWEETEN: Madam Chair, just  
14 if I might add one additional observation. During  
15 the break, Ben and I had a chance to talk, and I  
16 don't think it just quacks like a duck, I think it  
17 is a duck. I think there was a hearing in this  
18 case. It wasn't an evidentiary hearing, it was a  
19 hearing on oral argument, but there's a lot of law  
20 in Montana for the position that if there aren't  
21 genuine issues of material fact, the agency does  
22 not have to hold an evidentiary hearing, and can  
23 essentially decide a case on summary judgment,

24 which is what we did.

25 So that's one of the reasons I think why

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1 Ben crossed out those two paragraphs, <sup>16</sup> is that they  
2 proceeded from the assumption there may not have  
3 been a hearing in this case, but I think as a  
4 matter of law, what happened two meetings ago when  
5 Counsel presented their oral arguments on their  
6 motions was in fact a hearing.

7 So I'm satisfied that this is a  
8 contested case under MAPA, and that the rules  
9 regarding contested cases and also the rules about  
10 judicial review of contested cases would apply if  
11 this matter were taken up on appeal.

12 BOARD MEMBER REINHART-LEVINE: Madam  
13 Chair, a question for Mr. Tweeten. Are you  
14 satisfied that this proposed paragraph stating  
15 that findings of fact by DEQ and SPE would not be  
16 contradicted by our conclusion, that that  
17 satisfies our obligations to agree or disagree  
18 with each of the parties' findings of fact?

19 BOARD MEMBER TWEETEN: Madam Chair,  
20 Michele. As you know, at the last meeting I had  
21 problems with the idea of adopting the entire  
22 document that was submitted by MEIC, and one of  
23 the reasons that I had some misgivings about that  
24 was that we have not done exactly what you just  
25 described with respect to all of the issues that

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1 were raised by MEIC in their motion for summary  
2 judgment, and that are covered by their proposed  
3 findings and conclusions.

4 I don't want to reargue the motion that  
5 I made, but my thought was that it becomes a much  
6 more streamlined and simple task if the Board  
7 makes enough of a finding to conclude that the  
8 permit is flawed and needs to be vacated, and then  
9 not go into any other issues beyond the ones that  
10 are necessary to make that final conclusion of  
11 law.

12 So in answering your question, I don't  
13 think that what Ben has said in this paragraph  
14 demonstrates that the Board has in fact considered  
15 individually each ground for summary judgment that  
16 was offered by MEIC, and fly specked the proposed  
17 findings of fact in support of all of those  
18 issues, and considered the correctness of the  
19 legal assertions that were made with respect to  
20 every single issue that MEIC raised. I don't  
21 think that's been done.

22 CHAIRMAN MILES: How would you suggest  
23 that be accomplished?

24 BOARD MEMBER TWEETEN: Well, I'd suggest  
25 it not be accomplished, and we go back to the idea

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1 that I had. But if the Board thinks that it is  
2 necessary -- and I think it is. If Madam Chair is  
3 going to put her name at the bottom of this on

4 behalf of the Board, you just go through the  
5 findings grouped issue by issue, and consider  
6 those findings, and either ratify them as being  
7 supported by the record or not.

8           And if there are significant deviations  
9 in those proposed findings from what the Board  
10 thinks is a reasonable assessment of the facts,  
11 then I guess we would have to amend the motion  
12 that we passed at the last meeting, and rather  
13 than adopt them in their totality, we would adopt  
14 them except as modified in the Board's findings of  
15 fact, conclusions of law, and order.

16           So that's what I think needs to happen  
17 here. If we want to be able to say with a  
18 straight face that we have in fact reviewed all of  
19 these findings of fact with respect to all of the  
20 issues raised in MEIC's motion for summary  
21 judgment, we actually have to do that.

22           CHAIRMAN MILES: Ben.

23           MR. REED: Madam Chair. With all that  
24 having been said, I was able to speak with the  
25 parties yesterday, and we had some discussion of

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1 the practical, both some of the legal and  
2 practical issues that were going to be raised at  
3 today's meeting. The parties have a couple of  
4 suggestions about the way in which the Board's  
5 determination might be effected without unduly  
6 harming any of the parties and be effected most  
7 efficiently, and so they're prepared to answer any



8 of the questions that the Board may have at this  
9 time.

10 CHAIRMAN MILES: Any other comments  
11 right now? I'm concerned about a couple of  
12 things, and I want to make sure that as this  
13 matter is remanded, that we are very clear about  
14 what we believe was legally inadequate in terms of  
15 the permit that was granted. On the other hand, I  
16 don't want to make that so narrow because we maybe  
17 focus on one small issue that it becomes just a  
18 paper exercise to fix one thing. I think there  
19 are a lot of very important issues brought in  
20 here, and if it needs us going through them all, I  
21 think we need to do that.

22 I think to say that probably the one  
23 thing we talked about the most was the 50 year  
24 time frame. I don't think that was the only  
25 issue. It wasn't the only issue that persuaded

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1 me. I don't know about other people. So I want  
2 to make sure that we are very thorough in what we  
3 send back. I'm also concerned about what the  
4 implications of that are, and how the next steps  
5 take place, without causing any unintended  
6 consequences.

7 So what's the Board's pleasure on  
8 proceeding here? We could hear from the parties.  
9 Ben said he has talked to the parties about some  
10 of the bigger issue of perhaps how the order is  
11 worded, the final order; and then we can decide

12 how to proceed on the findings and conclusions.  
13 And I guess if it takes us all day to go through  
14 them, we may need to do that, or at least try to  
15 pick out places that we don't feel that maybe are  
16 the embellished areas that we thought we need to  
17 do that.

18 I want this to be right. I don't want  
19 it to be just pick on one issue that we all felt  
20 stood out to us, because I'm not sure that really  
21 gives -- It doesn't give the Department guidance,  
22 and I think it's unfair if it is just, "Well, this  
23 one stood out, so let's just send it back for that  
24 one reason." I think there was more than that, at  
25 least in my opinion.

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1 Any comments before I'll ask the  
2 parties?

3 MR. REED: Madam Chair, the thing that I  
4 would point out is that if the Board goes through  
5 with ratifying the current, the draft order that  
6 it voted on in its last meeting, the only things  
7 that need to be addressed are the degree to which  
8 the findings of fact within the SPE's and DEQ's  
9 proposed findings of fact and conclusions of law  
10 are at odds ultimately with the order, or I guess  
11 the order is at odds with those findings of fact.

12 And so my suggestion would be that if  
13 the Board hears from the parties, and finds that  
14 it is necessary to go through and address each of  
15 those findings of fact that was offered by SPE and

16 DEQ, I can simply run up six copies of those  
17 adverse findings of fact for the Board, and we can  
18 go through them at the Board's leisure.

19 CHAIRMAN MILES: So you're saying we  
20 need to go through all of the MEIC ones as well  
21 as --

22 MR. REED: Madam Chair, no. What I'm  
23 saying is that the Board has adopted MEIC's  
24 findings of fact. What needs to be addressed is  
25 the findings of fact, is I think solely the

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1 findings of fact for SPE and DEQ. That's what the <sup>22</sup>  
2 statute requires. However --

3 CHAIRMAN MILES: That may not be  
4 necessary?

5 MR. REED: Well, as a practical matter,  
6 it may not be necessary, Madam Chair; and as a  
7 legal matter, I think that those can be, depending  
8 on the Board's pleasure, those can either be  
9 addressed as a whole as being, as Mr. Tweeten  
10 suggested, founded on facts not in dispute, and  
11 simply nuanced through argumentation; or the Board  
12 can address them individually. But I don't think  
13 the Board does not absolutely have to -- there is  
14 nothing in the statute that requires the Board to  
15 drill down into each of those findings of fact and  
16 go from there. But I would suggest asking the  
17 parties what their current status is.

18 CHAIRMAN MILES: I will give time to  
19 each party. I think I'd like to start with Mr.

20 Hernandez as the prevailing party in this case.

21 MR. HERNANDEZ: Absolutely. Thank you,  
22 Madam Chair, honorable members of the Board. Good  
23 morning. Thank you for deliberating this case. I  
24 understand the findings of fact are quite lengthy,  
25 and it is kind of a bear, but I appreciate your

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1 bearing with us.

2 So what I wanted to talk about, and what  
3 I spoke with Ben and my esteemed colleagues about  
4 on Wednesday, was the proper remedy in this case.  
5 There was some question about what authority the  
6 Board has to issue different remedies upon ruling  
7 that the CHIA is inadequate. MEIC's belief is  
8 that the available remedy is quite clear -- we  
9 addressed it in our findings of fact and  
10 conclusions of law -- that a permit application  
11 may not be approved absent a valid CHIA.

12 However, MEIC here is interested in a  
13 reasonable remedy that is able to protect our  
14 interests in clean water, and that may also be  
15 able to protect the interests of both DEQ and SPE.  
16 Particularly we're interested in clean water, not  
17 putting people out of work. And we think that  
18 there is space for negotiation between the parties  
19 on this matter, and it seems clear from my  
20 discussions with Steve and with Dana that there is  
21 space to negotiate.

22 So in light of that, what we would like  
23 to propose to the Board is that -- and this is

24 just about remedy -- that the Board bifurcate its  
25 ruling on the merits and the remedies ruling.

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1 This is, as Mr. Tweeten knows, and Ms.  
2 Reinhart-Levine, Ms. Miles, the lawyers know that  
3 it is not uncommon in court cases where the Court  
4 will issue a ruling on the merits, and let the  
5 parties hash out a remedy in hopes that they can  
6 select the most efficient remedy that works for  
7 everyone.

8           So what we would suggest is that the  
9 Board issue an order saying that the CHIA is  
10 legally inadequate, and then instead of a remedy  
11 -- and that the real question here is whether or  
12 not to vacate the permit. The matter has to be  
13 remanded to DEQ in any event. But instead of  
14 making a ruling on whether or not to vacate, the  
15 Board would just grant the parties through January  
16 15th -- and this is a date that I picked out just  
17 because it accommodates the holidays, and gives  
18 the parties a little bit of time. I'm certainly  
19 willing to discuss whether or not another date  
20 works better -- but through a certain period of  
21 time, to either "A," reach an agreement, a  
22 stipulated agreement that we can submit to the  
23 Board; or "B," submit simultaneous briefs of "X"  
24 length of pages, preferably short, ten to fifteen  
25 pages, on what the proper remedy is.

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1 I think that that would avoid any  
2 challenges about remedy; it would encourage the  
3 parties to negotiate; and if negotiations fail,  
4 then the Board would have briefs on which to  
5 assess the proper remedy. I'm hopeful that we can  
6 reach an agreement on remedy that can just be  
7 stamped by the Board and move forward there.

8 A couple of issues that have come up,  
9 that will come up, are first, the timing. The  
10 Board, as you mentioned at the hearing last time,  
11 has ninety days to issue a final decision in a  
12 contested case after the case is deemed submitted.  
13 Assuming that was the 16th of October at the last  
14 hearing, the Board would have through mid February  
15 to issue its final decision here, or mid January;  
16 we would need an additional thirty days.

17 The statute provides for a request by  
18 the parties for an additional thirty days upon a  
19 showing of a good cause. I think the prospect of  
20 a negotiated settlement on remedy is sufficient  
21 cause to extend the period for a decision for  
22 thirty days. And I assume, I think the parties  
23 can all agree that we'd like to request thirty  
24 additional days, if the Board is amenable to this  
25 approach.

♀

1 CHAIRMAN MILES: And that is for the 26  
2 remedy portion of it?

3 MR. HERNANDEZ: Yes, just the remedy  
4 portion. We would ask that the Board issue a

5 written decision on the merits ruling saying that  
6 the CHIA is inadequate for reasons discussed in  
7 our proposed findings and conclusions.

8           There would have to be an adjustment to  
9 the proposed conclusions in order to address the  
10 remedy. Specifically the last paragraph in the  
11 conclusion, it just says that the permit is set  
12 aside because there is no valid CHIA. That would  
13 just be deleted, and then in the final order,  
14 which in the proposed findings and conclusions  
15 that MEIC submitted would be Paragraphs 140, 141,  
16 and 142, they would simply be deleted, and in  
17 their place, the Court would direct the parties to  
18 confer on the appropriate remedy, and then issue  
19 -- present the Board either with a stipulated  
20 agreement that could be turned into some sort of  
21 consent decree on the 15th, or alternatively  
22 submit simultaneous briefs on what the proper  
23 remedy should be, and then just leave it at that.

24           So that's the proposal that we have --  
25 it's all that we've discussed. We haven't talked

♀

1 about having to make findings on each of the <sup>27</sup>  
2 conclusions and findings, which is provided for in  
3 the statute. And if the Board wishes, I could  
4 address that. My position is basically that you  
5 guys are right, that it has to be addressed. The  
6 statute says to deny the findings of the party,  
7 then you have to do them individually, or some --

8           Specifically I'm not sure if DEQ and SPE  
Page 23

9 would be willing to say that they stipulate that  
10 there are indeed no issues of fact, and that that  
11 can be foregone, and basically waive that  
12 requirement. That might save everyone a bit of  
13 time. But absent that, I think that it just has  
14 to be done. If there are no questions, I'll sit  
15 down.

16 CHAIRMAN MILES: I do have a question.  
17 Any questions from any other Board members?

18 BOARD MEMBER TWEETEN: Madam Chair, if  
19 you don't mind me going ahead of you.

20 Counsel, the last point that you talked  
21 about, the idea that there might be some sort of a  
22 stipulation on the part of the parties to waive  
23 the requirement that the Board's final order  
24 address individually each of the proposed findings  
25 of fact and conclusions of law of the other

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1 parties, is that something you've discussed with  
2 Counsel or --

3 MR. HERNANDEZ: No, I haven't. I  
4 thought it flowed from the briefs that repeatedly  
5 say that there is no genuine issues of material  
6 fact, and no disputed facts in this case. I  
7 haven't. They might say it's totally unwarranted.

8 BOARD MEMBER TWEETEN: And the consent  
9 decree that you're talking about would cut off the  
10 possibility of any appeal to District Court with  
11 the initial conclusion that the CHIA is  
12 inadequate.



13 MR. HERNANDEZ: I think that would be  
14 subject to discussion, but it would operate as the  
15 final decision of the Board, and I assume that it  
16 would cut off any prospect for appeal, because  
17 frankly MEIC would require that. There is no  
18 sense in reaching a settlement if it subsequently  
19 can be appealed. There may be room for  
20 disagreement on that, but I don't see it as a  
21 possibility.

22 The prospect of a consent decree that  
23 would foreclose appeal I think doesn't get us  
24 around the question of making specific findings in  
25 each of them, because for all we know, we might

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29

1 not reach an agreement.

2 BOARD MEMBER TWEETEN: I'm trying to  
3 think about whether there are any options out  
4 there that would allow the Board to put off the  
5 obligation to consider every one of the findings  
6 of fact by both of the other parties and at  
7 today's meeting, which is something I would submit  
8 we're not prepared for right now, or at least I'm  
9 not prepared for. I don't know what Ben has in  
10 store for us as he rolls this proposed order out.

11 But if we could find a way, think of a  
12 way procedurally to push that issue down the road  
13 to a subsequent meeting, and allow you folks to  
14 sit around a table and try to hammer out how to  
15 end this case, that would certainly be efficient  
16 for the Board in terms of the expenditure of its

17 time and its staff's time, and I'm not sure that a  
18 formal order from the Board adopting your client's  
19 proposed findings of fact is necessary to kick off  
20 that negotiation process that you're talking  
21 about.

22 Do you disagree with that, or do you  
23 think we have to have an order on the merits  
24 before you can negotiate about remedy?

25 MR. HERNANDEZ: Madam Chair, Mr.

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1 Tweeten. I don't think it is necessary, but I  
2 think it is a requirement that our clients would  
3 insist on. We think that the matter, as a matter  
4 of precedent and a matter of how a CHIA is done,  
5 it's a really important issue that goes beyond  
6 this case. It's something that we've been at  
7 loggerheads with the Agency for awhile, and we  
8 think that it has to be cleared up.

9 That's why we would really condition our  
10 negotiations on issuance of a final order on the  
11 merits. So it is not required, but we are willing  
12 to be a little stubborn on this. I apologize for  
13 that. I understand it's a burdensome process.

14 BOARD MEMBER TWEETEN: But you think it  
15 is required, but not necessarily required today?  
16 The parties understand where the Board is going on  
17 this, I think. There is a certain amount of  
18 formality in the obligation to go through and vet  
19 all of the other proposed findings and  
20 conclusions, and come up with explanations for why

21 each one of them was not adopted.

22 But you have a sense from the motion we  
23 adopted, which is still passed by the Board, that  
24 the Board is of the opinion that the CHIA is  
25 inadequate, and therefore the permit can't stand

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1 in its present configuration. So I think to <sup>31</sup>  
2 finalize that with a final order on the merits  
3 through that bifurcation process that you talked  
4 about, I don't see how that necessarily forecloses  
5 you from trying to settle the remedy part.

6 MR. HERNANDEZ: Madam Chair, Mr.  
7 Tweeten. Our concern is that even though this  
8 Board has made it clear, we think that the  
9 precedent has to be made clear. This illustrious  
10 Board won't be around forever, alas. And so as a  
11 matter of precedent, we really think it is  
12 important, so that's kind of our precondition.  
13 And I hate to be obstinate up here. I understand.  
14 I hope that there is some possibility of moving  
15 forward without having to go through 80 pages of  
16 proposed findings of fact and conclusions of law  
17 this morning and this afternoon.

18 The only suggestion I have is that maybe  
19 the other parties might stipulate or waive that  
20 process. I don't think it is necessary, given  
21 that there really is not a dispute about facts.  
22 It really is a question of how the law is  
23 interpreted. I hope it is possible. I'm not  
24 certain that it is. That's where we're at. I beg

25 your indulgence. I apologize for being a little

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32

1 bit stubborn on this.

2 BOARD MEMBER TWEETEN: No apology  
3 necessary, but you still haven't answered my  
4 question. Does it have to be done today, or is  
5 that something we could do within the 120 day  
6 period that's running right now?

7 MR. HERNANDEZ: It could be done under  
8 the 120 day period. We're reluctant to really  
9 give up. Frankly we believe that the law is quite  
10 clear on the appropriate remedy, and we think that  
11 we're in a strong position legally to demand a  
12 strong remedy. We're willing to forego that  
13 strong medicine and be reasonable, but kind of the  
14 precondition for that is that we want a clear  
15 ruling on the merits.

16 It doesn't have to be issued today  
17 perhaps, but if we get to 90 days, then it starts  
18 to be becoming unclear about whether or not we'll  
19 have time to do that if negotiations fall apart,  
20 and that could back us into a corner about trying  
21 to reach some kind of agreement that we might not  
22 otherwise want.

23 So the short answer is no, it doesn't  
24 have to be issued today; but if the Board was  
25 willing to push this off to the next meeting in

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1 January or February, I think it would be a  
2 non-starter for us. We would like to be  
3 reasonable and try to accommodate the Board's  
4 concerns, both with time and having the adequate  
5 ability to look at this and vet their arguments;  
6 but if it were pushed out to February or January,  
7 I think it would actually be an impediment to  
8 negotiations, because for the reasons I said, we  
9 would be uncertain about whether or not a final  
10 decision on the merits would be issued, and it  
11 would affect our negotiating position. I'm kind  
12 of thinking this through right now.

13 CHAIRMAN MILES: We're putting you on  
14 the spot.

15 BOARD MEMBER TWEETEN: And then you need  
16 to consult with your client obviously. This is an  
17 idea that you may not have had a chance to  
18 thoroughly vet with MEIC, so I don't want to put  
19 you on the spot on that basis either.

20 But I guess I'm not sure I necessarily  
21 understand or agree with your point that the  
22 adoption of a final order complying with MAPA that  
23 would happen a month from now, say, would impede  
24 your settlement negotiations. The Board is on  
25 record through a motion that's been passed on a

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34  
1 majority vote by the Board members that the permit  
2 has to be vacated, so I don't understand why the  
3 anticipation of a final order would necessarily  
4 stand in the way of you all sitting down and

5 talking about remedy.

6 MR. HERNANDEZ: Madam Chair, Mr.

7 Tweeten. I'm thinking on my feet here, and the  
8 way that I had envisioned it was that if we reach  
9 a stipulated agreement on remedy, that we would  
10 submit it to the Board to approve as some sort of  
11 consent decree, give it your imprimatur, and then  
12 let the case go forward with obligations to Signal  
13 Peak and obligations to DEQ flowing from that.

14 But if we were to not have a decision on  
15 the merits at that time, and reach an agreement,  
16 then we don't have -- it seems like it could  
17 eclipse the need for having a ruling on the merits  
18 that says, "This is how a CHIA is supposed to go  
19 forward. This is how the CHIA provision is  
20 supposed to be interpreted." It's not a question  
21 of minimizing harm, but really it is a red line  
22 that has to be addressed and has to be addressed  
23 thoroughly.

24 I worry that if we kind of lump them  
25 together that the important legal decisions on how

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35  
1 a CHIA is conducted would get lost in the mix, and  
2 I'm trying to verbalize how they could be mixed  
3 together in one order from the Board, but it  
4 doesn't seem really clear to me. It seems like it  
5 would result us working with Signal Peak and DEQ  
6 to draft a consent decree that includes all the  
7 findings of fact and conclusions of law, and then  
8 additional remedy part to it that would be both

9 approved by the Board.

10 And maybe I'm missing something. I  
11 probably am. But it just seems cumbersome in my  
12 thinking.

13 BOARD MEMBER TWEETEN: Thank you.

14 CHAIRMAN MILES: And I'd like to hear  
15 from the other parties, because we may find a  
16 resolution to this. But I do want to thank you  
17 very, very much, because you are on very firm  
18 ground. It was a unanimous decision of the Board  
19 that the CHIA was insufficient, pending some  
20 qualifications that Mr. Tweeten mentioned, but it  
21 was a unanimous decision. And we would have the  
22 right, and you would have the right for us to  
23 issue an order today that vacated the permit.

24 And I appreciate very much your  
25 willingness to work with the parties, because you

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1 mentioned something -- and I don't know that <sup>36</sup>  
2 you're the one to address it, but I think we'll  
3 probably hear from the other parties -- but you  
4 mentioned about the potential for putting people  
5 out of work, and those were the questions that I  
6 had for Ben. I just didn't understand what the  
7 current status quo was, what is going on, what  
8 will change or could change depending on the  
9 order. And you may not be the person to elaborate  
10 on your comment there, but I think we'll hear  
11 that, and I appreciate that very much.

12 So I think we need to look pretty

13 carefully at recognizing that we made a fairly  
14 unanimous decision, and we need to move forward  
15 with that, but look at ways to -- I think your  
16 proposal to have a separate discussion about a  
17 remedy is one that I certainly appreciate. That's  
18 not really a question. That's a statement. But  
19 if you have a comment.

20 MR. HERNANDEZ: Thank you, Madam Chair.  
21 I appreciate it. We would like to be reasonable.  
22 We don't want to put anyone out of work. We want  
23 to protect the water, we want to protect the  
24 people that depend on it.

25 CHAIRMAN MILES: I assume that Counsel

♀

1 for Signal Peak can explain a little bit more  
2 about the concept of putting people out of work.

3 MR. HERNANDEZ: That's the situation  
4 where we're really in the dark. We don't have all  
5 the facts on how the operation is, where they're  
6 at, how much they can do before they reach the  
7 Amendment 3 area, what preparatory work has to be  
8 done. So we're not certainly -- and that's  
9 something we'd like to discuss with them further  
10 in negotiations.

11 CHAIRMAN MILES: We may get back to you  
12 with more questions. Does anyone have any  
13 questions?

14 (No response)

15 CHAIRMAN MILES: Who would like to go  
16 next, the Department or --



17 MR. WADE: Thanks, Madam Chair, members  
18 of the Board. I'm Steve Wade here on behalf of  
19 Signal Peak Energy. And you're right. We wanted  
20 to provide some background with respect to the  
21 ongoing operations at the Signal Peak Mine.

22 You've also kind of heard that we are --  
23 I think the parties collectively, based upon  
24 conversations within the last 24 hours, kind of  
25 share a common goal. But to put that in context,

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1 you specifically asked about the risks to jobs and  
2 things like that. I just wanted to explain  
3 exactly what's going on at the mine right now.

4 This is small to see. I have extra  
5 copies that we can hand out. We didn't really  
6 want to -- I wanted to make sure people could  
7 illustrate it, because the mine process at Signal  
8 Peak is complex, and it is also coordinated, not  
9 only with the equipment, but also with the  
10 permitting perspective. It's kind of like an  
11 ongoing process that has to be finely  
12 choreographed to make sure it meets that --

13 But you can see this -- and if you want  
14 copies, I can hand them out to make it a little  
15 clearer -- but the black panels, these are panels,  
16 illustrate mining that's already gone on. And so  
17 right here, this is what Panel 5 is. It's the  
18 black and red line.

19 They currently have mined long haul  
20 mining through just a portion of Panel 5. The red

21 line is where it is projected to go sometime in  
22 May. They're projected to be wrapping up Panel 5  
23 around May 2016.

24 CHAIRMAN MILES: That's your existing  
25 permit, not the expansion permit?

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1 MR. WADE: That's right. That's under  
2 Amendment No. 2, not at issue in this proceeding.

3 Then what you'll see is Panel 6 and  
4 Panel 7. There are some red lines over here that  
5 indicate ongoing, or black lines indicating  
6 ongoing development work, and red lines about  
7 where development work would be around March of  
8 2016.

9 The reason I bring that up is because  
10 you have to have ongoing development of the future  
11 work to be able to facilitate the movement of the  
12 long wall miner. If you have a disruption, and in  
13 this case a vacation of Amendment No. 3,  
14 development work would have to be immediately shut  
15 down in Panel 6 and 7. And what it does is that  
16 would put two-thirds of the work force at Signal  
17 Peak Energy out of work, two-thirds of roughly 300  
18 employees.

19 The development work is the most labor  
20 intensive part of the work, but it is also  
21 coordinated, as I said, choreographed to time.  
22 There is a certain float period you can have when  
23 you reach the end of a long wall mining panel to  
24 be able to move, but that window is kind of short.

25 And to bring that I think back into

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1 perspective on kind of the discussion that was <sup>40</sup>  
2 going on earlier about timing and kind of pushing  
3 the issue down the road, Signal Peak isn't here  
4 today to talk, to argue about the CHIA or the PHC.  
5 We understand you guys have voted. We want to  
6 talk about having an order done in a manner that  
7 does not vacate the permit, doesn't put those jobs  
8 at risk, but allows the Department a process that  
9 can start quickly to update the CHIA to address  
10 the noted issues.

11 And that process we already know what it  
12 is because it is a regulatory process. I think  
13 Shiloh had mentioned it before. There is going to  
14 be some information, probably an updated PHC  
15 submitted. And the process we envision we think  
16 is already established. It is really the  
17 regulatory process, one where there is the back  
18 and forth deficiency process over the PHC; there  
19 is public comment; it is transparent. But what we  
20 really need to have the Board do, if it's so  
21 inclined, is to figure out timing in a way that  
22 allows the Department to go through the process,  
23 the parties and the rest of the public to vet the  
24 process, and reach a conclusion before the end of  
25 Long wall mining in No. 5.

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1 I understand there is some nuances that <sup>41</sup>  
Page 35

2 -- Our preference really is to have the Board  
3 direct the Department as quickly as possible, if  
4 not today, to start that process, because what we  
5 don't want to have happen is too much time goes by  
6 before the Department has the possession of the  
7 amendment to continue the work, and then we're  
8 looking at May coming up.

9           And so then I think then we'd be  
10 artificially shortening that permitting and review  
11 process of the CHIA if we want to make sure it  
12 gets done right. And we really think that that's  
13 something that is possible for the Board to do.  
14 We think that there is sufficient case law out  
15 there. Frankly, what we started looking at was  
16 the recently issued Spring Creek Mining decision  
17 by the Federal Court that said, "Look, Agency, fix  
18 the problems. You have 180 days. And in doing  
19 that, we're going to kind of hold off and see what  
20 happens, but we're not going vacate it."

21           Vacating Amendment No. 3 would have  
22 devastating effects on the employees and the  
23 operations, and it would be long term, if not  
24 unrecoverable from.

25           CHAIRMAN MILES: Thank you, Mr. Wade.

♀

1 Questions?

2           BOARD MEMBER REINHART-LEVINE: Madam  
3 Chair, Mr. Wade. Can you just show on the map  
4 everything that is included in this particular  
5 permit, including but beyond also Panel 6 and 7,

6 so we have a better sense of the scope of this  
7 particular permit.

8 MR. WADE: If you want a copy of this.

9 MR. SAYLES O'CONNOR: Madam Chair, we  
10 really can't see that from here. If we could get  
11 copies, that would be great.

12 CHAIRMAN MILES: Do you mind if I ask  
13 another question while that's going on? Oh, you  
14 have copies.

15 MR. WADE: (Provides document)

16 CHAIRMAN MILES: So there is extra  
17 you've just given us.

18 MR. WADE: So what you'll see on the  
19 map, as I mentioned, those black lines are panels,  
20 and the red is projected work. And the thing  
21 that's a little misleading on this map is you'll  
22 see where it says "Amendment 2 Boundary." That is  
23 why -- that's the permit boundary that SPE had  
24 been operating under.

25 CHAIRMAN MILES: Where is that?

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1 MR. WADE: If you look just to the right  
2 over here, you see Amendment No. 2, with the line  
3 to this dark black line. So that was SPE's  
4 commonly understood and depicted Amendment No. 2  
5 boundary. It wasn't until after this Board's last  
6 meeting that, unbeknownst to Signal Peak, that  
7 mine boundary actually has some adjustments made  
8 to it, and it goes into Panel 6, which is why the  
9 vacating of Amendment No. 3 causes huge problems

10 for the mine.

11 CHAIRMAN MILES: Does Amendment No. 3  
12 have everything through long wall 15?

13 MR. WADE: Through 14. So that's the  
14 problem that's been created, and why there is so  
15 much risk in how the remedy, so to speak, is  
16 implemented.

17 CHAIRMAN MILES: So, Mr. Wade, are you  
18 willing to basically go with the proposal that Mr.  
19 Hernandez made about perhaps bifurcating our  
20 decision, so we make a decision on the CHIA today,  
21 and that the parties would work out a solution to  
22 a remedy and the timing for that?

23 MR. WADE: Madam Chair, like I said, how  
24 the Board ultimately wants to decide its proposed  
25 findings and conclusions, we know you've already

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1 voted on that. What we're really interested in<sup>44</sup>  
2 doing is addressing the process and getting it  
3 started quickly. We are concerned that by just  
4 creating the 30 day period, that then we're now  
5 looking past May, and doesn't help solve our  
6 problem.

7 We think there is a way. We think that  
8 you can look at the Spring Creek case, pick 180  
9 days from now, establish the process that it will  
10 be pursuant to the regulations, get the thing back  
11 to DEQ today without vacating it, and allow that  
12 process to commence. If there is other issues, we  
13 are more than willing to enter into discussions.

14 We just want the Board to understand how important  
15 the timing is, and too much of a delay, it either  
16 truncates and will result in not a very good  
17 process, or it will go too long and interrupt the  
18 operations. And I've already explained the  
19 consequences.

20 CHAIRMAN MILES: Do you have any comment  
21 about the obligation that we have to go through  
22 all of the findings of fact that you proposed in  
23 your materials?

24 MR. WADE: Madam Chair, I think I was  
25 the first one to respond to Ben and say we think

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1 it is a contested case, and I haven't really<sup>45</sup>  
2 thought about that much, other than to know --  
3 because we were working yesterday trying to figure  
4 out this remedy part. But I think it is a  
5 statutory obligation.

6 The question was whether we would  
7 stipulate not to have to do that. I can't answer  
8 that right now because I don't know where this is  
9 going; and depending on where it goes, we would --  
10 we understand the consequences. We want to  
11 reserve all our rights if this can't get worked  
12 out in a proper way.

13 BOARD MEMBER TWEETEN: Mr. Wade, since  
14 you were the one who handed this document out, I'm  
15 assuming that your client doesn't have any  
16 objection to the Board looking at it, even though  
17 it is not part of the record in this case.

18 MR. WADE: No. I was going to use it  
19 for illustration. I recognized that was small.  
20 You do have to understand that that one boundary  
21 line apparently is not accurate, that it is  
22 through Panel 6 and through the Panel 6 which  
23 interrupts that. But we understand it is a public  
24 document.

25 BOARD MEMBER TWEETEN: That's not my

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1 point. My point is under MAPA, we're restricted  
2 in considering in this case to matters that are  
3 found in the record, and I just want to make sure  
4 that the parties are comfortable with us looking  
5 at this document, and are willing to confirm on  
6 the record they don't object to us looking at it,  
7 so that's clear.

8 MR. WADE: We're certainly fine with it.  
9 Like I said, this is a development that occurred  
10 after your last Board meeting, and we think it is  
11 important for people to understand why vacatur of  
12 the amendment or setting aside Amendment No. 3 is  
13 important.

14 CHAIRMAN MILES: Thank you. Any other  
15 questions?

16 MR. SAYLES O'CONNOR: Madam Chair, I  
17 assume the Signal Peak 2 is the unmined area that  
18 you're showing on the map, and Signal Peak 1, your  
19 present mine, is that boundary line is the  
20 difference between the two of those properties?

21 MR. WADE: So the actual boundary, as I



22 understand it from the Department, is not that  
23 black line that you see there that has the line  
24 setting Amendment 2 boundary, that that boundary  
25 actually impacts LW6, Long Wall 6.

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1 MR. SAYLES O'CONNOR: So how long have<sup>47</sup>  
2 you been mining permit boundary No. 1?

3 MR. WADE: We're in Permit Amendment No.  
4 2.

5 MR. SAYLES O'CONNOR: Oh, there's the  
6 battery. How long have you been mining there?

7 MR. WADE: Several years.

8 MR. SAYLES O'CONNOR: And the boundary  
9 has been off for that long?

10 MR. WADE: Well --

11 MR. SAYLES O'CONNOR: I guess I don't  
12 understand. The boundary has to do with the  
13 permits, or does it have to do with the mining  
14 leases, or what exactly is the boundary?

15 MR. WADE: Madam Chair. The boundary is  
16 actually related to the permit amendment. There  
17 are complicating factors because there is a number  
18 of different approvals you have to get. You have  
19 to get your mine site plan, your mine site permit,  
20 you have to get your mining permit, you also have  
21 to get -- because there is federal lands here, you  
22 have to get OSM approval.

23 So all of those I think complicate the  
24 issue, and usually the boundaries are established  
25 as you step out and get your new amendments to

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1 your mining permit. I don't know if that answers  
2 your question, but I'm trying to be simplistic on  
3 a fairly complicated process.

4 MR. SAYLES O'CONNOR: I'm just surprised  
5 with all that goes into these, permitting and  
6 mining and everything else, that this boundary has  
7 just in the last thirty days been moved.

8 MR. WADE: I would think that that would  
9 be a great question for DEQ. Mr. David can better  
10 answer it.

11 MR. DAVID: I can answer your question.

12 CHAIRMAN MILES: We'll call you next.

13 MR. SAYLES O'CONNOR: I'll hold it then.

14 CHAIRMAN MILES: I just have one other  
15 question, and maybe it's not germane here, but if  
16 the mine was contemplated to be this large, why  
17 was the original permit just for a very small  
18 portion of it?

19 MR. WADE: I'm not sure I have the  
20 entire history with me, but generally the way the  
21 coal mine permitting works -- and DEQ can  
22 certainly answer this -- is you get a five year  
23 mine permit to actually mine. So the way they do  
24 it is you do it five years; as you move, then you  
25 go through a new permitting process to expand.

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1 Generally the mine site is larger. That changes,

2    though, at times because you may not have had the  
3    leases for the federal coal, you may not have had  
4    the state coal, so you have to have control and  
5    right to mine the minerals before you can get your  
6    mining permit, and that's why things are  
7    incrementally stepped, and as I mentioned,  
8    choreographed and complex as things go forward.

9           CHAIRMAN MILES: We may have more  
10   questions. Thank you very much. Department.

11           MR. DAVID: Madam Chair, members of the  
12   Board, I'm Dana David, DEQ Legal Counsel. There's  
13   a lot of things I want to say here, but let me  
14   just answer the question of the moment about the  
15   permit boundary. The line on the map is correct,  
16   so --

17           CHAIRMAN MILES: Which line?

18           MR. DAVID: The line that's designated  
19   here as Amendment 2 boundary. But there is a  
20   little bit of nuance here. So Signal Peak is  
21   permitted up to that permit boundary, but the mine  
22   plan does not include Panel 6. The approved mine  
23   plan does not include Panel 6 because at the time  
24   that Amendment 2 was approved, Signal Peak did not  
25   have the right to mine the blue square, which is

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1   State land.

2           So although the permit boundary goes  
3   beyond Panel 6, the current approved mine plan  
4   does not include the panel. The Amendment 3  
5   application that is the subject of this appeal

6 does include Panel 6 into the current mine plan.  
7 So there is a regulatory distinction between what  
8 is the permit area, and then what you can mine  
9 within the permit area. So that's the distinction  
10 here.

11 So that line is not necessarily  
12 incorrect. That's probably the nuance that --  
13 maybe that was the source of Signal Peak's  
14 confusion, that usually you just assume that  
15 whatever is in the permit area you can mine it,  
16 but in this case it was excluded from the mine  
17 plan because at the time that Amendment 2 was  
18 approved by the Department, they didn't have the  
19 rights to that very small corner of the State  
20 land, that blue square, and for that reason it was  
21 kept out of the mine plan.

22 BOARD MEMBER REINHART-LEVINE: Madam  
23 Chair, Mr. David. Is the basic permit that is at  
24 issue at this time basically covering then  
25 everything from Panel 6 through Panel 15?

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1 MR. DAVID: That's correct.

2 BOARD MEMBER REINHART-LEVINE: Thank  
3 you.

4 CHAIRMAN MILES: A quick question. Is  
5 the scrutiny that is given to expansion  
6 applications the same as that original  
7 application?

8 MR. DAVID: Madam Chair, members of the  
9 Board. The permit matter that's before the Board

10 today is a permit amendment, and the permit  
11 amendment is treated exactly the same as a new  
12 permit for procedural review process, except for  
13 the fact that you have an existing permit, which  
14 is a large part of the information base that the  
15 Agency would consider in reviewing the amendment  
16 application. So this is amendment, the  
17 application, and it would require basically the  
18 same amount of scrutiny as an original application  
19 for a new mine.

20 CHAIRMAN MILES: Thank you.

21 BOARD MEMBER REINHART-LEVINE: Madam  
22 Chair, Mr. David. Can you discuss the  
23 Department's timeline in responding to our  
24 concerns over the sufficiency of the CHIA, and  
25 addressing those things, such as Class 2 versus

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1 Class 3 water, such as the 50 years, those <sup>52</sup> type of  
2 items, and how quickly those things could be  
3 addressed.

4 MR. DAVID: Madam Chair, Ms.  
5 Reinhart-Levine, I would love to. First as a  
6 general overview, certainly the Department  
7 appreciates the unanimous decision that the Board  
8 rendered on October 16th, appreciate that the  
9 Board has found that the CHIA legally defective.  
10 The Department also appreciates the opportunity to  
11 try to reach a conclusion here that permits the  
12 mine to keep functioning and keep people in work.

13 The Department is confident, and it

14 apologizes, that the CHIA that was prepared  
15 apparently was inadequate to convince the Board  
16 that the mine is designed to prevent material  
17 damage, i.e., the mine is designed such that there  
18 will be not any significant contamination of  
19 groundwater or damage to the hydrologic balance  
20 outside the permit area. The Department is  
21 confident that that is true.

22 It's unfortunate the current CHIA has  
23 not been able to demonstrate that to the Board,  
24 but the Department is comfortable that it can  
25 revise the CHIA in a way that would persuade the

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1 Board that the conclusions that were made in  
2 support of this permit approval are correct, and  
3 so would appreciate the opportunity to revise the  
4 CHIA in order to do that, understanding that the  
5 CHIA is based on the probable hydrologic condition  
6 determination that's provided by the mining  
7 company, so to a large degree, the CHIA is based  
8 on the language that's in the PHC, so in order to  
9 revise the CHIA, we would also require the mining  
10 company to provide us with a revised PHC.

11 I think that a lot of the basis for Mr.  
12 Wade's concern about timing is it would be nice if  
13 we could today get an order of the Board at least  
14 directing the Department to begin work on revising  
15 the PHC, and also to direct Signal Peak to provide  
16 a new and revised CHIA that would address the  
17 issues that the Board discussed at the October



22 Chair, Mr. David. Please respond to Mr.  
23 Hernandez's proposal about bifurcation and how  
24 that relates to your comment regarding  
25 preservation of legal rights for DEQ and SPE.

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1 MR. DAVID: I believe that we are <sup>55</sup>  
2 amenable to bifurcation, with the idea that  
3 however the bifurcation would work, that it would  
4 not result in a final order today disposing of --  
5 that would actually trigger the thirty day appeal  
6 deadline on the existing -- on the Board's  
7 decision on the merits of the CHIA. That's  
8 probably our biggest concern, that whatever order  
9 the Board issues, that it would contemplate that  
10 there would be final order of the Board, and in  
11 that final order all of the rights of the parties  
12 would be preserved until a final order of the  
13 Board disposing of this matter is issued and  
14 approved by the Board.

15 I think also with the suggestion I've  
16 provided to the Board, if MEIC agrees, that also  
17 probably -- I think that would also give you  
18 reason not to have to go through -- I agree with  
19 Mr. Wade. I think the statute is very clear that  
20 the Board does indeed -- I mean our briefing to  
21 the Board and also our proposed findings of fact  
22 and conclusions of law also had specific findings  
23 of fact. They're there, and those findings of  
24 fact are what the Department relied for the  
25 arguments it made to the Board.



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1                   So I think as the matter stands now, the  
 2 Board would be legally required to specifically  
 3 address each of those findings. If indeed it's  
 4 not going to issue a final order on those today,  
 5 then I don't think you'd have to do it. And also  
 6 considering that we're talking about remanding the  
 7 CHIA back to the Department, why would you want  
 8 to? Because there is going to be a new -- to the  
 9 extent that we can put these issues to bed, the 50  
 10 year issue, maybe --

11                   If indeed it is possible, through this  
 12 process and reaching a stipulation, that the  
 13 Department can redo the CHIA, it is possible that  
 14 we could produce a CHIA that MEIC would be  
 15 satisfied -- that MEIC and Signal Peak would be  
 16 satisfied with, and that we could actually end up  
 17 submitting a stipulation to the Board to dismiss  
 18 this matter and it would be over.

19                   There is also a possibility that the  
 20 Department could not produce a CHIA that MEIC  
 21 would be comfortable with, and the Board would  
 22 then have to review and consider the revised CHIA  
 23 that the Department prepares, and in which case  
 24 this matter would be disposed of in an ultimate  
 25 final order of the Board when that time happened.

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1                   So I think the proposal I've offered  
 2 gives the Board a way to satisfy MEIC's interest  
 Page 49

3 in getting some sort of order from the Board today  
 4 that supports the permit is legally defective, and  
 5 then also would give the Board -- would preserve  
 6 all the parties' rights to a final decision; and  
 7 also would relieve the Board of the necessity of  
 8 picking through all these findings if some of them  
 9 might change or might be different when the new  
 10 CHIA comes out, at such time the new CHIA is  
 11 prepared by the Department.

12 CHAIRMAN MILES: Any further questions?

13 BOARD MEMBER TWEETEN: I'm just a little  
 14 confused, I have to say. You have a permit  
 15 application that starts this process off, and as  
 16 part of the approval for the permit, you have to  
 17 do a CHIA, which has been done, and you've  
 18 approved the permit; and the decision to approve  
 19 the permit is in front of us now under MAPA and  
 20 authorizing statutes for the Board because the  
 21 argument has been made that the CHIA that you've  
 22 already done is inadequate. That's the case  
 23 that's in front of us now.

24 And I don't understand, I have to  
 25 confess, how you're going to -- how do we send

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1 this case back to DEQ to prepare a second CHIA  
 2 without ruling that the first one is inadequate in  
 3 advance?

4 MR. DAVID: Madam Chair, Mr. Tweeten.  
 5 Because if you actually look at the Title Chapter  
 6 6 of MAPA is fairly loose, and there is no

7 language in that that says the Board can't do it.  
8 As a matter of fact --

9 BOARD MEMBER TWEETEN: But that's not  
10 the standard legally. Legally the Board can only  
11 do what the Legislature has authorized us to do,  
12 not everything except what the Legislature has  
13 prohibited, so --

14 I'm not trying --

15 MR. DAVID: If you have that concern --  
16 I have thought about that, that perhaps the issue  
17 would be raised. If you wanted to do it fairly  
18 within the four corners of procedure, and not have  
19 any possible loose ends to this, what the Board  
20 would have to do is to rescind its decision that  
21 this matter has been submitted to final  
22 determination, conclude that there are factual  
23 inconsistencies in the CHIA, and remand the CHIA  
24 back to DEQ to clarify those legal --

25 Basically you're saying that summary

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1 judgment has failed, and you're asking the parties  
2 to come forward and clarify the factual  
3 inconsistencies. We could do it through briefing,  
4 or we could do it by just providing a revised PHC  
5 and the CHIA to you.

6 BOARD MEMBER TWEETEN: Well, that ship  
7 has sailed. We had that argument two meetings ago  
8 about whether summary judgment was appropriate in  
9 this case or not, and last meeting the Board  
10 passed a motion. Inherent in that motion was the

11 concept that summary judgment was appropriate. So  
 12 it is a little late in the day to suddenly have a  
 13 party who represented to us to two meetings ago  
 14 that this matter was ripe for summary judgment,  
 15 come in and suggest that we do a 180 on that  
 16 issue, and find, say, that it is not, after we did  
 17 what you asked us to do two meetings ago.

18 MR. DAVID: I would respectfully submit,  
 19 Madam Chair, Mr. Tweeten, I would respectfully  
 20 submit that no ship has sailed until the Board has  
 21 actually signed an order.

22 CHAIRMAN MILES: Mr. David, are you  
 23 willing to continue in negotiations with the other  
 24 parties as proposed by Mr. Hernandez to come up  
 25 with a remedy if we were to issue a final order on

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1 the merits today --

2 MR. DAVID: Madam Chair. I think Mr.  
 3 Hernandez very accurately spelled out, explained  
 4 to the Board kind of the process that we were  
 5 looking at, is that we would go forward, and  
 6 attempt to negotiate a stipulation, and basically  
 7 the stipulation would be a procedural stipulation  
 8 for how DEQ would review the CHIA. Basically the  
 9 idea would be that after DEQ directed -- I think  
 10 just this is just going to be agreement in  
 11 principle -- after DEQ directed SPE to go back and  
 12 revise the PHC, that we would give Signal Peak an  
 13 opportunity to comment on the PHC before we issue  
 14 a final CHIA.



19 position here right now to waive the requirement  
20 that the Board actually specifically review all  
21 the findings in DEQ's submittal.

22 CHAIRMAN MILES: Thank you.

23 BOARD MEMBER TWEETEN: Madam Chair. Mr.  
24 David, please have a seat. This is not a  
25 question, this is just sort of thinking on my feet

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1 except I'm not on my feet.

2 The requirement that all of the parties'  
3 proposed findings and conclusions be addressed is  
4 part of the section of MAPA dealing with the  
5 issuance of a final order, and I gather that the  
6 three parties are asking us not to issue a final  
7 order at this point.

8 Now, I am sensitive to Counsel for  
9 MEIC's position that they don't want to lose any  
10 ground as a condition of engaging in these  
11 settlement talks. I get that. But I would submit  
12 that if we're not going to issue a final order  
13 that's fully dispositive of the case today, and  
14 under MAPA a final order is an order that disposes  
15 of everything that's in front of the Agency, so  
16 there is nothing left for the Agency to do, that's  
17 what constitutes a final order under MAPA.

18 And I gather that it is not being  
19 suggested that we do that today, and I'm sensing  
20 that the Board is at least willing to consider not  
21 issuing a final order today. I guess I would say  
22 in response to that if we're not going to issue a

23 final order today, why do we want to go through  
24 the exercise today of fly specking all of the  
25 proposed findings of fact, and deciding which ones

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1 we're going to reject and why, when we're not<sup>63</sup>  
2 going to be issuing a final order today.  
3 We've got at least until January, it  
4 seems to me, to be prepared for the opportunity to  
5 enter a final order if these negotiations don't  
6 bear fruit; or even if they do, we're going to  
7 have to issue a final order of some kind of at  
8 some point. But we've got the luxury of not, it  
9 seems to me, crafting the language that would be  
10 in our final order today if we're not going to  
11 issue a final order today.

12 So I would suggest that the response to  
13 MEIC's concern is the one that I mentioned before.  
14 The Board has passed a motion that essentially  
15 unanimously concluded what needs to be done here,  
16 and I have a separate statement indicating that I  
17 don't necessarily agree with all of the Board's  
18 reasoning in reaching that conclusion, but I  
19 certainly agree with the conclusion that the CHIA  
20 is defective, and that the permit cannot be  
21 allowed to stand without further work being done  
22 by DEQ to shore up the inadequacies in the  
23 existing process.

24 That's already on the record. That was  
25 done at our last meeting. It was done unanimously

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1 by the Board. It would require an affirmative  
2 vote of at least three members of the Board to  
3 reverse that decision in the future, and I'm not  
4 sensing any sentiment on the part of the Board to  
5 do that at this stage. Certainly nobody, as I can  
6 tell anyway, is having second thoughts about  
7 whether the finding of deficiencies in the CHIA is  
8 right or not. I think we all still think that it  
9 is right.

10 So to Counsel's concern about whether  
11 they're going to be necessarily back sliding, or  
12 the Board is going to back slide on the finding  
13 that was made at the last meeting that, despite my  
14 objection, adopted in full everything that was in  
15 MEIC's proposed findings and conclusions. That's  
16 a done thing, and it would take, as I said, a  
17 majority vote of the Board to reconsider that at  
18 this point, unless we've got some by-law that says  
19 that there is something more than an majority is  
20 required for a reconsideration. I'm not familiar  
21 with that.

22 So let's assume it is a majority vote.  
23 Somebody is going to have to move to reconsider  
24 that, and the Board is going to have to vote, on a  
25 vote of at least three members of the Board, agree

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1 to rescind that decision. So that doesn't seem to  
2 me to be likely, and I think that while I



3 understand that MEIC would be much more  
4 comfortable if there was a semi-final order issued  
5 here, the fact of the matter is that until we  
6 issue it as a final order, anything in it is  
7 interlocutory and subject to change.

8           So I don't think Counsel is placing his  
9 bets on the right horse here when he's saying that  
10 we need to have something that looks like a final  
11 order but isn't a final order to give them the  
12 confidence to go ahead and negotiate the question  
13 of what the remedy should be.

14           So I'm just throwing that out as an  
15 observation. When we get to the point of  
16 considering an action on this, I think frankly Mr.  
17 David's idea has some appeal, and when we get  
18 around to talking about what we're going to do  
19 about this, I'm inclined to think that if we  
20 maintain jurisdiction of the appeal on the permit,  
21 and reaffirm what we decided last meeting, and  
22 then issue a partial remand for the purposes of  
23 giving the Department jurisdiction to go forward  
24 with further consideration of the CHIA, that would  
25 pretty much take care of what we need to do today.

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1           And during the time when the parties are  
2 negotiating about a remedy, our Counsel can be  
3 assisting us in getting ready to rule on all of  
4 the parties' proposed findings and conclusions,  
5 because I understand that Ben has done a  
6 tremendous amount of work on this, but I don't

7 think that the work that would need to be done to  
8 be helpful to the Board in going through finding  
9 by finding, and conclusion by conclusion, the  
10 several hundred findings that are on the table  
11 right now, and conclusions that are on the table,  
12 I don't think that's been done yet in a way that  
13 makes it efficient for the Board to consider that.

14 What I'd like to see in that respect is  
15 something that isolates all of the separate issues  
16 that are raised by MEIC in its proposed findings  
17 and conclusions, and to have Ben, issue by issue,  
18 pull out and segregate all of the findings of fact  
19 and conclusions of law that pertain to each issue,  
20 and that way I think that makes it much more  
21 efficient and rational, in my mind, for us to look  
22 at it issue by issue, take up the findings and  
23 conclusions issue by issue, rather than just  
24 starting at the beginning of the document and  
25 going through them one to 150, or however many

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1 there are.

2 So that's kind of where my thinking is  
3 headed right now, just for the Board's  
4 information.

5 CHAIRMAN MILES: I'm going to call on  
6 you in just a second. I do want to have Mr.  
7 Hernandez respond as well.

8 But my concern about the general order  
9 that Mr. David talked about, we have an obligation  
10 to make a final decision on this, and I don't



15 wanted us to provide that information today so  
16 that we didn't kick the can down the road. What I  
17 heard from Mr. David was, "Don't make a decision."  
18 And so I'd like to hear from Mr. Wade again in  
19 regards to how we issue a decision that provides  
20 that clear guidance, without hurting the remedy  
21 negotiation aspect, and while making it clear what  
22 we want on water quality, at the same time  
23 preserving jobs and the current operations.

24 MR. WADE: Madam Chair, I think it is  
25 somewhat of a nuanced response, because I think I

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1 heard -- I don't know who said it. It might have<sup>69</sup>  
2 been Mr. Tweeten -- refer to kind of a partial  
3 order that at least remands the thing to let DEQ  
4 start the process.

5 I guess when we were preparing for this,  
6 I really didn't anticipate getting into the  
7 argument over the other stuff. Our focus has been  
8 on the path forward. However, I think the Board  
9 has a lot of discretion in what it can do. I  
10 think it can probably issue a partial order today  
11 to partially remand it, and deal with how to go  
12 through the laundry list of findings of fact and  
13 conclusions of law.

14 I don't foresee us having that battle.  
15 If we're going to have that battle, that would be  
16 sometime in the future. Signal Peak is prepared  
17 to move as quickly as possible with the parties  
18 through the established permitting process to get

19 the deficiencies solved.

20           And I don't know if that's the answer  
21 you're looking for, but the way I viewed it really  
22 was not -- That coming in here the Board could  
23 issue a decision, its final decision, and that  
24 decision would say, "Department, you have 180 days  
25 in which to complete the process,

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1 Department/Signal Peak to complete the process to  
2 update the CHIA."

3           That time period would start within  
4 three or five days from now. During that time  
5 period, you'd follow the required permit process,  
6 that you'd invite the updated PHC from Signal  
7 Peak. You have need to have a little bit of time  
8 for the back and forth for deficiencies. Then  
9 that would be done, and it would go out to public  
10 comment. Then after public comment, public  
11 review, then the Department would have the  
12 opportunity to make its decision. And that would  
13 have to be done with the 180 days to kind of  
14 coalesce with the operations and the development  
15 work out there, so we don't run into that problem.

16           CHAIRMAN MILES: Why are you picking 180  
17 days?

18           MR. WADE: Frankly the 180 days is the  
19 precedent in the Spring Creek Mine case; and we  
20 also think that coincidentally it actually ties  
21 right around the end of Panel 5 as well. So we  
22 have two things. We wanted to look to make sure

23 that it wasn't arbitrary; but we also wanted to  
24 look at a time period that was sufficient to allow  
25 a meaningful CHIA process to address the concerns

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1 that have been noted going forward.

2           And then frankly the order that I would  
3 envision -- and this is a little bit separate --  
4 but that the Board would retain some jurisdiction.  
5 If the CHIA wasn't issued within that 180 days,  
6 that's when the Board could then resurrect the  
7 vacating issue. If it was, the way I would  
8 envision it is then this case would be done, you  
9 would have the order with the stuff that the Board  
10 has already decided; and because the process  
11 followed the regular permitting process, there  
12 would be a new opportunity for a challenge for  
13 interested parties once a new CHIA decision and  
14 amendment was done.

15           That's conceptually the framework that  
16 we had, and that's kind of what we've been  
17 discussing. We have not wanted to get into this  
18 other part. We're frankly most interested in  
19 getting the process started, fix the issues, and  
20 not disrupt the mine operations.

21           CHAIRMAN MILES: Thank you. Mr.  
22 Hernandez, what's going on through your head at  
23 this point? Then I probably will need to take a  
24 short break before we resolve what we're doing.

25           MR. HERNANDEZ: Thank you, Chairman

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1 Miles, honorable members of the Board.

2 I think a break is warranted. I heard a  
3 lot of discussion up here from my friends and  
4 opposing Counsel that frankly troubles me and  
5 confuses me. I think that we would appreciate a  
6 little bit of time to talk with them, and make  
7 sure we can all be on the same page as to what is  
8 going forward.

9 I think that Dana did a good job up here  
10 confusing the Board about the distinction between  
11 a final order and a final written decision. The  
12 final order is what a contested case can produce.  
13 I looked at -- it doesn't appear to be defined in  
14 MAPA, but Montana Code Annotated 2-4-623, that's  
15 the provision that requires looking at each  
16 proposed finding. Subsection (1)(a) of that  
17 section talks about a final decision, and that's  
18 what we're asking for on the merits -- sorry. A  
19 final order -- a final order on the merits.

20 The final decision, if you look on the  
21 other page, it is 2-4-702, that's the judicial  
22 review provision, what DEQ has to follow to appeal  
23 any decision from this Board. That is keyed on a  
24 final written decision, not a final order, and  
25 it's no different from a District Court. A

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1 District Court will issue orders. They're final  
2 for all basic purposes. They're not preliminary,  
3 they're orders, it's all consummated with a final

4 remedies decision and judgment.

5           Here we're just asking you to break up  
6 the final order on merit and remedy. We want a  
7 final decision of the Board that says, "This is  
8 what the merits decision is. This is how a CHIA  
9 operates," and then give the parties an  
10 opportunity to discuss remedy. By doing that,  
11 making a final decision on issuing a final order  
12 on the merits, it is not a final appealable  
13 decision under the judicial review provisions  
14 2-4-702, that would in any way trigger the appeal  
15 period, or therefore affect DEQ's or Signal Peak  
16 Energy's appeal rights.

17           That's not a concern here. I think that  
18 given these representations, there is no chance  
19 that they would try to appeal and subsequently be  
20 foreclosed based on their not appealing the merits  
21 order first. We've basically said that we  
22 understand the rules, that the final order on the  
23 merits doesn't trigger the appellate review time  
24 period.

25           The final decision is what would be the

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1 merits, and I just really want to be clear to <sup>74</sup>  
2 break those out. We don't want some preliminary,  
3 partially cooked, not clear rule. We want a final  
4 order on the merits. The final order on remedy,  
5 we can get to that. Hopefully we can negotiate a  
6 decision. I think that we need to speak with  
7 Signal Peak Energy and with DEQ to get on the same



8 page here, because I think there's some divergence  
9 that is troubling to my clients and is troubling  
10 to me, but that is the general proposition.

11 I'm sorry that this procedural  
12 requirement of making a finding on each proposed  
13 finding is being held over us as like the sword of  
14 Damocles, that we have to do this. It's not that  
15 we can't do it, it's just that nobody wants to go  
16 through the time of doing it, the procedural  
17 tedious task that I feel is being forced upon the  
18 Board to forego issuing a final order on the  
19 merits, which is what is really our precondition  
20 for negotiating a remedy.

21 So I just wanted to pull that apart. I  
22 think that we're talking almost past each other.  
23 We're close, but we're saying different things,  
24 and it really affects what we're asking the Board  
25 to do today. So I would appreciate the

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1 opportunity to speak with my friends and opposing  
2 Counsel about this for ten, fifteen minutes, to  
3 see if we could get on the same page, if that's  
4 all right with the Board.

5 CHAIRMAN MILES: Yes. And you are  
6 familiar I'm sure with the Spring Creek decision.

7 MR. HERNANDEZ: I am, yes, and 180 days,  
8 that was just the --

9 CHAIRMAN MILES: I guess I'm not asking  
10 so much about 180 days in that decision, and I  
11 don't know if any of the other Board members are

12 aware of it, but I did read that case. I think it  
13 is essentially -- to take 180 days out of there,  
14 because I'm not sure why they put that in there,  
15 but essentially in that case --

16 It is a very similar case where the NEPA  
17 process was inadequate, and that the Court  
18 recommended that vacating the permit be deferred  
19 for a period of time from the date of the final  
20 order on the motion for summary judgment. So  
21 that's basically what you're asking, is that we  
22 make our final order on the summary judgment  
23 motion, but we're working with the parties to look  
24 at some way to defer --

25 MR. HERNANDEZ: -- ruling on vacatur.

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1 Yes, that's right. And there are other  
2 distinctions that they talk about, the surface  
3 mining law and NEPA, but they're not relevant as  
4 far as what we're asking for is that exact  
5 bifurcation.

6 CHAIRMAN MILES: That's exactly what  
7 happened in that decision. There is strong  
8 precedent.

9 MR. HERNANDEZ: There are a handful of  
10 other cases, mining cases, from Federal Courts in  
11 the past year that have done just that, that have  
12 said, "Okay. Here is the merits. Parties, take  
13 thirty days." The proposal that we're offering is  
14 taken from another mining case from District of  
15 Colorado. It is High Country Conservation

16 Advocates versus Forest Service; the District of  
17 Colorado did another case, Danay Systems  
18 (phonetic) against --

19           Anyhow, there are two recent cases from  
20 the District of Colorado from 2005, Federal  
21 District Court decisions, that have done exactly  
22 this. They've bifurcated merits and remedies.  
23 "This is our merits order. Parties talk about  
24 remedy, and if you can't reach an agreement, file  
25 simultaneous briefs."

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1           CHAIRMAN MILES: Thank you. We'll take <sup>77</sup>  
2 a least a 15 minute break here, and reconvene at  
3 noon.

4           (Recess taken at 11:40 a.m.

5           And reconvened at 1:00 p.m.)

6           CHAIRMAN MILES: We're going to  
7 reconvene the meeting. I think we'd like to hear  
8 from the parties first if there is any resolution.  
9 And then during the time period that we've been in  
10 recess, I have had some conversations with  
11 individual Board members, and I think we have some  
12 ideas and work we need to do in order to move  
13 forward as well, but I think first we'd like to  
14 hear from the parties.

15           MR. HERNANDEZ: I could start. Madam  
16 Chair, members of the Board, sorry it's taken so  
17 long. I think that the parties are able to reach  
18 an agreement that provides a path forward. Part  
19 of this is premised on leaving some stuff unsaid

20 but understood that hopefully the Board would be  
21 all right with.

22 So what we want here is the Plaintiffs  
23 want a final order on the merits. What the  
24 company wants is they want some assurance that DEQ  
25 can go forward with the remand process, and that

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1 their operations won't be unduly interrupted. DEQ  
2 wants to get going on fixing its CHIA and moving  
3 forward.

4 To this end, I believe that the parties  
5 would not object to the Board adopting the  
6 findings of fact and conclusions of law on the  
7 merits that MEIC has submitted today in whole,  
8 with some provisos. One, that this does not  
9 constitute a final decision, triggering the thirty  
10 day appeal period in Montana Code Annotated  
11 2-4-702 Subsection (1)(a); and also subject to the  
12 proviso that this does not in any way limit the  
13 parties' abilities to challenge any individual  
14 finding of fact or any individual conclusion of  
15 law contained within the findings of fact and  
16 conclusions of law via judicial review.

17 The parties -- and I think we're on the  
18 same page here, but the other parties are  
19 certainly welcome to say if it isn't right. MEIC  
20 is willing to, and the other parties agree, that  
21 with regard to the remedies, that the final order  
22 would remove -- the final merits order would  
23 remove any language discussing vacatur or the

24 setting aside of the permit that is in the  
25 proposed findings and conclusions that we

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1 submitted, Paragraphs 138, 140, 141 and 142.<sup>79</sup> In  
2 their place, that the Board would remand --

3 CHAIRMAN MILES: I want to get to that  
4 place. So you said 138, 139 --

5 MR. HERNANDEZ: Not 139. 138, 140, 141,  
6 and 142. That's just the language about setting  
7 aside the permit.

8 CHAIRMAN MILES: You don't actually have  
9 a 142, Ben.

10 MR. REED: I don't, Madam Chair. I've  
11 renumbered the originals as submitted by MEIC.

12 CHAIRMAN MILES: Do you know exactly  
13 what --

14 MR. REED: I think I do in fact.

15 MR. HERNANDEZ: Basically it would just  
16 be removing any language that speaks of remedy.

17 The one remedy that we are willing to  
18 concede at this point is the remand. I think all  
19 parties are in agreement that a remand could occur  
20 immediately, and the Agency could begin correcting  
21 this CHIA.

22 Then the order would have language  
23 saying that the Board will not make any decision  
24 on the question of vacatur, but the parties shall  
25 have until the 15th of January to confer amongst

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1 themselves and either, one, reach a stipulated  
2 agreement that could be submitted to the Board, or  
3 submit simultaneous briefs not to exceed whatever  
4 page limit you guys think is appropriate -- I  
5 suggest ten to fifteen pages -- on the remedy, the  
6 appropriate remedy. There has been a lot of paper  
7 in this case.

8           So that's it. The crux of what we were  
9 talking about before was this question about going  
10 through each individual finding of fact and  
11 conclusion of law. With respect to that, the  
12 parties are willing just to say that none of them  
13 object to the Board adopting the order today, but  
14 reserve the right to challenge any fact or  
15 conclusion.

16           I think this leaves some stuff unsaid,  
17 but I think it is good enough for the parties.  
18 Whether or not it is good enough for the Board is  
19 for you guys. But that's what where I think we  
20 are. I think if there is anything I've left out,  
21 the other parties can go forward, and to the  
22 degree that there isn't agreement on any further  
23 point, I think we just have to leave it to the  
24 Board to make up its mind.

25           CHAIRMAN MILES: Thank you so much for

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1 your help and willingness to work on that. Mr.  
2 Wade.

3           MR. WADE: Madam Chair, members of the

4 Board. I guess what I want to convey is to get a  
5 sense of how close we are. Signal Peak, though,  
6 does want to go on record that it would reserve  
7 all of its appealable rights with respect to going  
8 forward.

9 On the issue of the conclusions of law  
10 and findings of fact, I mentioned this earlier in  
11 an order of adopting it. We view the Board as  
12 having voted on that previously. Our big issue is  
13 having the amendment vacated, what it does to the  
14 operation of the employees, as well as  
15 facilitating an appropriate time frame for the  
16 development of an updated CHIA by the Department.

17 We have some concern. We would leave it  
18 to the Board over the 30 day period. It seems  
19 like that just kind of hangs it out. We think  
20 that having a time period established would be a  
21 good idea. So I think in general, what you see is  
22 conceptually a big picture. We're all trying to  
23 get to the same deal, we just have a different  
24 view on some of the details of how you get there,  
25 and you guys will have to decide that. But we

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1 would continue to want to make sure that we can  
2 give the mine and its employees certainty as it  
3 goes forward, and not just the 30 day lumps.

4 CHAIRMAN MILES: Thank you. Department.

5 MR. DAVID: Madam Chair, members of the  
6 Board. I'd like to thank you all so much for your  
7 indulgence while we try to hash this out.





12 should make an effort before we've actually  
13 finalized that order to go through those, and  
14 establish sort of our rationale more clearly as to  
15 why we adopted those, so that's clear information  
16 for the Department.

17 I think the other findings of fact deal  
18 with what's in Signal Peak and DEQ's briefs, which  
19 for the Administrative Procedures Act, we do need  
20 to go through those. So we have talked about  
21 going through MEIC's findings of facts right now,  
22 and asking Ben to help go through the other sets  
23 of findings from the other two parties, and help  
24 lump them together, or look at them.

25 An awful lot of them and all of the

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1 briefs are right out of the CHIA, so it is very  
2 simple, but there may be some others that we need  
3 to discuss if we reject those and why, and that  
4 Ben could help us do that within probably the next  
5 two weeks, and then we would have a special  
6 meeting to take final action.

7 I'm going to ask Ben and Chris, based on  
8 what has just been discussed, does that change  
9 anything? Should we go ahead with that? Thank  
10 you all very much. I think you're right that  
11 we're all conceptually in the same place. We just  
12 want to get moving forward on this, and have it be  
13 very clear, and get it done, and give the  
14 Department really clear information, and establish  
15 our record so it's very defensible.

16 BOARD MEMBER TWEETEN: Thanks. Madam  
17 Chair. I think it's a bad idea to bifurcate this  
18 case and issue a final order today on one part of  
19 it and remand the other part. The thirty day time  
20 period for taking a case to judicial review in  
21 front of the District Court is not in our control.  
22 If you need relief from that, you have to apply to  
23 the District Court, because it is essentially  
24 jurisdictional.

25 Once the thirtieth day has passed, you

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1 are time barred by statute from seeking judicial  
2 review from that point forward. So we don't have  
3 the authority as Board to extend that thirty day  
4 period of time, that's in statute, and the only  
5 party that would be able to give you relief from  
6 that particular provision would be the District  
7 Court.

8 So if we issue a final order on any part  
9 of this case, I think there is a risk going  
10 forward. And the parties can waive all they want,  
11 but the thirty days I think is jurisdictional,  
12 just like the time for filing notice of appeal  
13 would be from District Court. So the Judge may  
14 not be able to overlook that, if he determines, he  
15 or she determines, in reading the statute that  
16 something we did triggered running of that thirty  
17 days inadvertently, and somebody tries to get to  
18 the Court after that thirty day period has run.

19 I think what Madam Chair has outlined

20 briefly is -- let me put some more detail to that.  
21 The idea would be that the Board, led by Ms.  
22 Reinhart-Levine, will go through the MEIC findings  
23 of fact, provide the rationale for the Board in  
24 adopting those findings of fact, so the parties  
25 will know how we feel about all those issues that

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1 are addressed in MEIC's findings of fact, and why  
2 we adopted them, why the Board adopted them in  
3 whole, but we will not issue a final order on that  
4 part of the case today.

5           We will reconvene probably sometime  
6 during Christmas week by telephone, and before  
7 that time, we've asked Counsel to give us a  
8 memorandum in effect that will give us a road map  
9 to work through all of the other parties' findings  
10 of fact and conclusions of law; single out those  
11 that are simply quotations from the CHIA, for  
12 example, "The document speaks for itself. There  
13 is no dispute about what the document says," so  
14 those we can say there is basically subsumed in  
15 the MEIC's proposed findings, and should be  
16 considered as having been in effect adopted.

17           Any that take issue at any point for any  
18 reason with the findings that MEIC filed will have  
19 to distinguish and discuss why we preferred MEIC's  
20 approach to that particular question to the one  
21 that was offered by the parties. And as I said,  
22 the plan is that Counsel will give us that road  
23 map document sometime within the next two weeks,

24 and then we will reconvene by telephone during  
25 Christmas week for a special meeting, and during

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1 that telephone conference we will go through, and  
2 formulate our thoughts with respect to all of  
3 those other findings of fact and conclusions from  
4 the other parties, which will then be reduced to  
5 writing; and when we get to the point of issuing a  
6 final order, those will be incorporated in the  
7 final order separately.

8           What I think we can do now, and what I  
9 think the Chair and others on the Board have  
10 individually considered, is that we can in effect  
11 issue a partial remand at this point for purposes  
12 of further consideration by the parties of the  
13 issue of remedy, and all we have to say in that  
14 respect is that the parties have requested that we  
15 remand for the purpose of consideration of an  
16 additional approach to remedies, and we're in our  
17 discretion willing to grant them that opportunity.

18           So we will remand, and the period of the  
19 remand will be this long, and so on and so forth,  
20 what conditions will be for ending the remand and  
21 bringing the case back, so that at all times the  
22 Board will maintain jurisdiction over the matter.

23           There will not be a final order on any  
24 issues, so the time for appealing will not begin  
25 to run. We would I think in the motion clearly

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1 state that it is our intention not to make a final  
2 decision on any question until we've made a final  
3 decision on all questions, and that should make it  
4 clear that whatever we're doing today is not  
5 intended to be a final order that triggers the  
6 running of the thirty days for judicial review.

7           So that would give you all a window. I  
8 think it would give SPE the clarity that it needs  
9 with respect to what the Board's intentions are  
10 going forward. I think it will give MEIC the  
11 assurance that it's asking for that the Board  
12 meant what it said in October when we adopted  
13 their findings in total. It will give the  
14 Department what it needs, which is the time to go  
15 back and refashion the CHIA, and figure out what,  
16 if anything, it does to the permitting decision as  
17 refashioned by the Department.

18           So I think this is a procedure that  
19 meets all of your requirements without creating  
20 any undue risks that we might inadvertently issue  
21 a final order of some kind that might deprive one  
22 of you of your appeal rights to District Court,  
23 while at the same time giving you all what you  
24 need to have in your hand during the negotiation  
25 process to come.

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1           Madam Chair, have I sort of capsulized  
2 that correctly?

3           CHAIRMAN MILES: Yes. I need a little  
4 bit more clarity on issuing a final order that

5 also has a remedy in there, and some timing there,  
6 because I don't think we want to delay on that.

7 BOARD MEMBER TWEETEN: Well, we've  
8 already voted to vacate by adopting the findings  
9 that MEIC initially proposed, but I guess I take a  
10 different approach than Counsel for MEIC does with  
11 respect to the effect of these decisions that we  
12 make prior to the issuance of a final order.

13 The term "interlocutory," which lawyers  
14 use all the time, means not final. So anything  
15 that we issue in this case as a result of a motion  
16 or any order that the Chair signs prior to the  
17 final decision is interlocutory. It is not final,  
18 and it's subject to being changed by the Board for  
19 good cause anytime up to the issuance of the final  
20 decision.

21 Once we issue the final decision, and  
22 that's approved by a vote of the Board and signed  
23 by the Chair, then it is a done deal, and the only  
24 place that the case can go is up at that point in  
25 terms of somebody seeking judicial review. But up

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1 until that time, nothing that we do is <sup>90</sup>final.

2 So my thinking is that we can go ahead  
3 and reaffirm our decision to adopt MEIC's proposed  
4 findings and conclusions, subject to minor  
5 amendments as to form that our Counsel may deem to  
6 be advisable, and remand the remedy section of the  
7 case back to DEQ for further consideration, all  
8 the while not having entered a final order.

9           And then once January rolls around and  
10 the parties have settled on the remedy question --  
11 which I'm confident that you will -- then that  
12 portion can come up, and we can issue a final  
13 order at that point. And January 14th I think is  
14 the running of ninetieth day on making that  
15 decision, by my count anyway. Sometime before  
16 midnight on January 14th we can issue a final  
17 decision that includes the MEIC's findings of  
18 fact, as we've tweaked them as to form and so  
19 forth through the efforts of our Counsel.

20           Plus as a consent decree essentially,  
21 whatever settlement you all reach on the question  
22 of remedy, and that document will include all of  
23 the disclaimers that you've asked for with respect  
24 to everything is without prejudice, to your  
25 raising on appeal whatever issues you want to

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1 raise.

2           At that point we will have all the  
3 pieces of a final order in place. We'll have the  
4 findings of fact and conclusions of law that we've  
5 adopted, following whatever special meeting we  
6 have later this month; we will have our response  
7 to the findings of fact proposed by the other  
8 parties to include in that order; and we'll have  
9 the remedy piece that you all agree to put in  
10 place as a consent decree.

11           And if you fail to reach an agreement,  
12 obviously then the prior motion will control, and

13 we'll simply vacate and send it back, and you'll  
14 go back to square one and start over, because  
15 that's what we've already voted to do.

16 So at that time we'll be ready to issue  
17 a final order, and the thirty day period of time  
18 would run from whatever date the Chair signs that  
19 final order that we will put together, once we  
20 know that you either have or have not reached a  
21 consensus on the issue of remedy. Does that help?

22 CHAIRMAN MILES: Any questions? Any  
23 comments from the parties on that approach?

24 MR. HERNANDEZ: If I may. It's not  
25 everything I wanted. I can live with it. A

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1 question of clarity. I just want to know what you  
2 expect from us. You mentioned that you would like  
3 some memoranda from the parties on findings of  
4 fact and conclusions of law, I thought I heard?

5 CHAIRMAN MILES: No.

6 MR. HERNANDEZ: Any objections to that?

7 BOARD MEMBER TWEETEN: I think what I  
8 said was that we're going to get a memorandum from  
9 our attorney. When I said Counsel, I mean Counsel  
10 in the singular, not putting any burden on you all  
11 to do that. Our task is relatively ministerial.  
12 What we have to do is make sure that we cover all  
13 of the findings that you also have proposed, and  
14 either said first they're subsumed in the findings  
15 that MEIC offered that we've already adopted; or  
16 in the alternative, that they're not subsumed in



17 the MEIC findings, and we're not going to adopt  
18 these, and here is the reason why.

19           And we can group them together, so if  
20 there are similar findings proposed by the  
21 Department and by SPE, we can group all those  
22 together and deal with them as a bunch. "We've  
23 got findings one, two, four, six, and eight from  
24 the Department, and findings nine, twelve, and  
25 fifteen from SPE, all of which say essentially the

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1 same thing, and we're not going to adopt those,  
2 and here is why."

3           CHAIRMAN MILES: And we felt that was a  
4 more efficient use of our time, rather than just  
5 walking through all of those today. It has to be  
6 done, and so we're going to do it, but Ben is  
7 going to sort of do the ground work for it, and  
8 then we know exactly which ones are right out of  
9 the CHIA, and which ones we accept, and which ones  
10 we don't. So we're not asking you to do anything  
11 there. What we're prepared to do now is to just  
12 basically reaffirm and go through MEIC's findings  
13 of fact, so the Department has very clear  
14 direction and information from us on our rationale  
15 for doing that.

16           MR. HERNANDEZ: Thank you, Madam Chair,  
17 Mr. Tweeten.

18           BOARD MEMBER TWEETEN: Can I add one  
19 more thing? I think you mentioned the idea of the  
20 parties all agreeing that you don't want to make a

21 big deal of the obligation to respond to each one  
22 of the individual findings of fact of the other  
23 parties.

24 The reason I'm not thrilled about that  
25 idea is that that requirement doesn't exist for

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1 your benefit, it exists for the benefit of the  
2 Court on judicial review. It's designed to make  
3 sure the Court has a full understanding of what  
4 the Board actually did.

5 And you can stipulate all you want about  
6 that, but if the Judge isn't satisfied with what's  
7 in the order with respect to that, and isn't about  
8 to go and do our job him or herself, they're just  
9 going to throw it back to us, and tell us, "This  
10 is inadequate. It doesn't comply with the  
11 statute. I don't care what the parties say, I  
12 want this done." I don't think that you want that  
13 kind of a road block in front of your case, so  
14 that's why I'm not wild about going that  
15 direction.

16 MR. HERNANDEZ: Thank you. I  
17 understand. Mr. Tweeten, Madam Chair. That makes  
18 sense. It's tedious. I appreciate you guys  
19 taking the effort to do that.

20 So let me just repeat so that I  
21 understand what is expected of me. What the  
22 parties have to do now is to go back and try to  
23 reach some kind of agreement with respect to the  
24 vacatur. Beyond that, there's nothing. You're

25 not asking us to file additional briefs by the

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1 15th or anything. If we don't reach an agreement,<sup>95</sup>  
2 vacatur is there as the alternative, and any  
3 agreement we have to have, we have to submit to  
4 you sufficiently in advance of January 14th so  
5 that you may incorporate it into the final  
6 appealable decision; is that right, or is there a  
7 date by which you need it? The 14th --

8 BOARD MEMBER TWEETEN: I would say we  
9 need at least a week's notice as to whether you've  
10 got it settled or not. If you do, if you could  
11 boil those terms of the settlement down into a  
12 document that we can incorporate by reference in  
13 the final order, that would be I think the most  
14 efficient thing for us.

15 Failing that, you can tell us what the  
16 terms are, and I guess we'll ask our Counsel to  
17 regurgitate those into the order, and put them in  
18 that way. But ideally something that the three of  
19 you have signed off on that we can just  
20 incorporate by reference as the remedy section of  
21 the decision, since it is going to be in effect a  
22 partial consent decree anyway. And I think that  
23 would be the most efficient way to do that.

24 MR. HERNANDEZ: I agree, Mr. Tweeten.  
25 Madam Chair. Thank you. I understand.

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1 BOARD MEMBER TWEETEN: If we can have  
2 that by the 7th, that would be good, of January.

3 MR. HERNANDEZ: I anticipate putting  
4 together essentially a consent decree on that.

5 CHAIRMAN MILES: I think our intent is  
6 hopefully before Christmas, if we can do it, the  
7 Department can help us put together a conference  
8 call for the Board members to go through the work  
9 that Ben does, and then we would basically just be  
10 waiting for your agreement, so we can actually  
11 issue this final order by January 14th.

12 MR. HERNANDEZ: Thank you. Thank you  
13 for your time. That's all I have, if you have no  
14 questions.

15 CHAIRMAN MILES: Anyone else? I think  
16 Michele actually did have a question for Mr. Wade.

17 BOARD MEMBER REINHART-LEVINE: Madam  
18 Chair, Mr. Wade. You had mentioned that there was  
19 maybe some disagreement or some different  
20 viewpoints on certainty, and I wanted to better  
21 understand what you meant by certainty, and what  
22 you were looking for there.

23 MR. WADE: The certainty that we're  
24 looking for is actually a time where there isn't  
25 this back and forth idea of vacatur. You heard us

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1 mention 180 days, but really the most important  
2 time for us to make sure that this Amendment No. 3  
3 currently stays active is until Panel 5 long wall  
4 mining is complete.

5 That is the certainty really that we're  
6 looking for, is that we're not going to start  
7 going down the CHIA process and the PHC process,  
8 and then all of a sudden turn around and then be  
9 back here having the permit potentially vacated.  
10 We want that process to be able to see itself  
11 through, so that the new CHIA, updated CHIA  
12 process, is completed, so it removes the cloud and  
13 the risk over what is essentially two-thirds of  
14 the employees at Signal Peak.

15 CHAIRMAN MILES: We're assuming that  
16 that is what will be worked out in the remedy  
17 portion that we're asking the groups to come back  
18 with.

19 MR. WADE: Okay.

20 CHAIRMAN MILES: Anyone else?

21 (No response)

22 CHAIRMAN MILES: Then I think we need to  
23 get to work. Thank you all. I really appreciate  
24 all the work you've done. I know this has been a  
25 long day, and I think we're getting there. We

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1 want to actually do due diligence right now, as I  
2 mentioned, to just establish for the record --  
3 because we didn't spend a lot of time at the last  
4 Board meeting -- just to go through the findings,  
5 and really establish our rationale for the motion  
6 that we passed. I'm going to turn it to Michele  
7 for that. We'll take ten minutes. 1:30, 1:45  
8 we'll be back.

9 (Recess taken)

10 CHAIRMAN MILES: We're going to get  
11 started. We will be working from the original --  
12 brief --

13 BOARD MEMBER TWEETEN: Proposed findings  
14 of fact.

15 CHAIRMAN MILES: -- from the original  
16 proposed findings of fact submitted by Montana  
17 Environmental Information Center. As opposed to  
18 working through the proposed order, this one will  
19 be clearer because some numbers changed in the  
20 order, and so we're going to work with your  
21 original document. Anyone on the phone, that's  
22 what we're working from, the proposed findings of  
23 fact and conclusions of law submitted by MEIC.

24 Did you get that message? I was told,  
25 Ben told me he had said that.

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1 UNKNOWN SPEAKER: We were working with  
2 Ben out there, so hopefully we're working on the  
3 same sheet of music.

4 CHAIRMAN MILES: I'm sorry about that.  
5 I went to find you, and he said he'd taken care of  
6 it, so he's the one that needed to know.

7 We're going to begin our work of going  
8 through this document, and establishing the record  
9 for our rationale for the motion that we made in  
10 October, and I'll turn it over to Michele  
11 Reinhart-Levine.

12 BOARD MEMBER REINHART-LEVINE: Madam

13 Chair, members of the Board. I made a motion to  
14 adopt MEIC's findings of fact and conclusions of  
15 law on October 16th. I move to amend that motion  
16 as passed to modify as follows:

17 I move that we amend the motion to  
18 reaffirm adoption of MEIC's findings of fact and  
19 conclusions of law as modified by our Board Legal  
20 Counsel Ben Reed, except for findings of fact and  
21 conclusions of law dealing with setting aside the  
22 permit. I move that we exclude all mention of  
23 vacating the permit from our findings and  
24 conclusions of law.

25 Secondly, I move that we amend our

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1 motion to get a special meeting to consider a  
2 response to the findings of fact by DEQ and SPE as  
3 required by Montana Code Annotated 2-4-623 subpart  
4 (4).

5 Thirdly, I direct our Legal Counsel to  
6 prepare a memo for us prior to our special  
7 meeting, and to analyze the findings of fact  
8 proposed by DEQ and SPE, and recommend Board  
9 action in compliance with Montana Code Annotated  
10 2-4-623 subpart (4).

11 Fourthly, I move to amend my prior  
12 motion to partially remand to the DEQ to allow the  
13 parties to negotiate an agreement as to the  
14 appropriate remedy for the violations outlined in  
15 the Board's findings of fact and conclusions of  
16 law. The parties must report the success or

17 failure of their negotiation discussions to  
18 resolve the issue to the Board by January 7th,  
19 2016.

20 And then with that, Madam Chair, I'd  
21 like to have some discussion on the motion to  
22 amend.

23 BOARD MEMBER TWEETEN: I'll second the  
24 motion.

25 CHAIRMAN MILES: It's been moved and

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1 seconded, and we'll open it up for discussion.

2 BOARD MEMBER REINHART-LEVINE: Madam  
3 Chair, I believe that amending the motion would  
4 allow for us to meet our statutory obligation to  
5 lay out our rationale for our decision, as well as  
6 to give us time to address the findings of fact  
7 and conclusions of law of DEQ and SPE after review  
8 by our Legal Counsel Ben Reed.

9 I think that this amendment through  
10 motion also makes sense to allow the parties more  
11 time to negotiate, and to come up with a mutually  
12 agreeable solution to both address the water  
13 quality concerns that the Board had with the  
14 deficiencies in the CHIA, while allowing mining to  
15 continue at SPE.

16 And with that, Madam Chair, I would like  
17 to go through some of our rationale for the  
18 findings of fact and conclusions of law set forth,  
19 as well as what we're excluding.

20 CHAIRMAN MILES: Before you do that, are



21 there any questions or comments from other Board  
22 members?

23 (No response)

24 CHAIRMAN MILES: Please proceed. Thank  
25 you.

♀

1 BOARD MEMBER REINHART-LEVINE: Madam  
2 Chair, members of the Board, looking at MEIC's  
3 proposed findings of fact and conclusions of law,  
4 the introductory findings are fine. They just  
5 state some general background facts. The factual  
6 setting, that is all straight forward as set forth  
7 in Paragraph 2.

8 The same with Paragraph 3. That just  
9 describes the hydrological setting.

10 Paragraph 4 deals with the wetland  
11 vegetation area. That is fine.

12 Paragraph 5 deals with the vegetative  
13 communities, as well as the wildlife communities.  
14 That's a straight forward fact.

15 Paragraph 6 deals with the dominant  
16 historical land use in the area, including  
17 ranching. That's fine and straight forward.

18 Paragraph 7 deals with coal mining in  
19 the area. That's also straight forward.

20 Paragraph 8 also deals with some of the  
21 historical background.

22 Then the next section is permitting  
23 proceedings. So Paragraphs 9, 10, 11, 12, 13, 14,  
24 and 15 deal with some of the procedural history.

25 That is not disputed.

♀

1 The next section, Hydrological Overview  
2 on Page 6, discusses the Mammoth coal aquifer.  
3 That is not disputed. That's straight forward.

4 Paragraph 18 further describes the  
5 Mammoth coal aquifer and the domestic wells in  
6 that aquifer. That is not disputed.

7 Paragraph 19 deals with the proposal to  
8 remove additional millions of tons of coal,  
9 describing the operation. That's straight  
10 forward.

11 Paragraph 20 describes the long wall  
12 panel mining. That is also straight forward.

13 Paragraph 21 deals with the proposed  
14 mine expansion.

15 Paragraph 22 deals with some of the  
16 water quality issues that can develop from the  
17 mining process.

18 On Page 9, we have findings of fact  
19 relating to the degradation of water. This is  
20 information that comes directly from the CHIA, and  
21 is not disputed.

22 That also applies to Paragraph 24 which  
23 cites the CHIA, as well as the PHC.

24 Turning to Page 10, Paragraph 25 deals  
25 with definition of Class 2 groundwaters. That's

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1 not in dispute.

2 Paragraph 26 deals with Class 3  
3 groundwaters. That's not in dispute.

4 Paragraph 27 discusses DEQ projections  
5 for gob water, and that also cites the CHIA.  
6 That's not in dispute.

7 On Page 11, groundwater migration is  
8 discussed, and there are citations to the  
9 groundwater model. That is straight forward and  
10 not in dispute.

11 Page 12 Paragraph 30 discusses the gate  
12 roads, and also cites the CHIA and the PHC.  
13 Again, these are facts that are not in dispute.

14 Paragraph 31 also cites the groundwater  
15 model needs the same record.

16 Same with Paragraph 32 regarding gob  
17 water mining and different scenarios.

18 Paragraphs 33 and 34 also deal with the  
19 groundwater model, and are citations to the  
20 existing record.

21 On Page 14, mitigation is discussed, and  
22 again, there is a citation in Paragraph 35 to the  
23 CHIA and the PHC.

24 With Paragraph 36, that also deals with  
25 mitigation water and citations to the record.

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1 Paragraph 37 is another citation to the  
2 groundwater model.

3 On Page 16, then we have an overview of  
4 DEQ's material damage assessment and  
5 determination, with again additional citations to

6 the CHIA.

7 Paragraphs 39, 40, and 41 also cite the  
8 CHIA directly, as do Paragraphs 42, 43, 44, and  
9 45. So these are all things that are in the  
10 existing record. They are not in dispute. They  
11 are part of the parties' stipulation to the fact  
12 that there are no genuine issues of material fact.

13 Next looking at Page 21, with  
14 administrative proceedings, this is an overview of  
15 the procedural history. That applies to  
16 Paragraphs 47 all the way through Paragraph 58.  
17 That is not disputed.

18 Paragraph 59 is basically us reaffirming  
19 that there are no general issues of material fact,  
20 and that resolution of this matter is appropriate  
21 via summary judgment based on the undisputed  
22 record, and that paragraph is fine.

23 Next looking at the conclusions of law,  
24 unfortunately my document stops at Page 24. I do  
25 think we probably ought to discuss the conclusions

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1 of law as well.

2 CHAIRMAN MILES: So we go into the draft  
3 document, the draft order. We all have that. You  
4 didn't change any of the conclusions?

5 MR. REED: Not significantly, other than  
6 the ones that --

7 CHAIRMAN MILES: -- we talked about.

8 MR. REED: -- other than the ones that I  
9 addressed at the outset, I did not. I would say,

10 however, that the only problem with that is the  
11 renumbering, but they start at 60, so perhaps  
12 that's not going to be a problem at all.

13 CHAIRMAN MILES: I think we can follow  
14 it on here. You've printed yours out.

15 BOARD MEMBER REINHART-LEVINE: Shall I  
16 operate off your draft?

17 MR. REED: Madam Chair, Ms.  
18 Reinhart-Levine --

19 BOARD MEMBER REINHART-LEVINE: In the  
20 alternative, if you happen to have MEIC's handy, I  
21 can operate off of that.

22 MR. REED: I'll get that printed if  
23 you'll give me about one minute.

24 CHAIRMAN MILES: While we're getting  
25 that information printed, why don't we settle on a

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1 date for the special meeting to look at Ben's  
2 summary of the findings of fact from the other two  
3 parties. And it looks like the week following  
4 Christmas, so it would be Monday the 28th, Tuesday  
5 the 29th --

6 BOARD MEMBER TWEETEN: Monday, Tuesday,  
7 Wednesday, Thursday. Friday is New Years Day.

8 CHAIRMAN MILES: So I would prefer we  
9 keep it on the 28th, 29th, or 30th. Is there a  
10 preference? Again, I think we can do it over the  
11 phone. I'll be here, I'll come in here so it can  
12 be open to the public.

13 BOARD MEMBER DR. BYRON: I propose

14 Tuesday the 29th.

15 CHAIRMAN MILES: I actually have a  
16 conference call from 8:00 until 10:30 that day. I  
17 could do it after that. We can set it up for  
18 anytime. About how about 11:00 on Tuesday the  
19 29th? Hearing no objection, I'm going to wait and  
20 just double check with Ben on that date, and if  
21 not, we can plan to do this 11:00 a.m. on Tuesday  
22 the 29th of December, and I don't think it is  
23 going to take more than an hour. Ben, December  
24 29th?

25 MR. REED: (Indicating)

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1 CHAIRMAN MILES: The 29th at 11:00.<sup>108</sup>  
2 We'll make sure George gets that message before we  
3 leave.

4 So we're going to move into conclusions  
5 of law here, and Michele will be working from the  
6 original document submitted by MEIC. The rest of  
7 us don't have paper copies of that, so if you  
8 could find it on your computers, or it is  
9 comparable to what's in the draft order. You  
10 might just go a little slower.

11 MR. REED: They're going to be bringing  
12 other copies.

13 MR. DAVID: Are the copies that are  
14 being brought of the draft order? The one I gave  
15 her was the draft order.

16 CHAIRMAN MILES: No, we went back to the  
17 original. I'm not sure there is a big difference.

18 MR. DAVID: The paragraph numbers will  
19 be off.

20 MR. HERNANDEZ: I have an extra copy. I  
21 can review it on my computer if that helps.

22 CHAIRMAN MILES: I know I've got it. I  
23 just need to find it. Five minute pause here.

24 (Recess taken)

25 CHAIRMAN MILES: Robin, are you still

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1 with us?

2 (No response)

3 MR. HERNANDEZ: Madam Chair, I have a  
4 question. I won't be in Helena on the 29th. Is  
5 there a call-in number that will be available?

6 CHAIRMAN MILES: We just picked that  
7 date. Is there a better date?

8 MR. HERNANDEZ: It can work if I can  
9 call in.

10 CHAIRMAN MILES: I don't have the number  
11 yet, but we'll get the Department to set it up.  
12 I'll be here. It will be a phone-in number here,  
13 and we'll make sure you get it.

14 MR. HERNANDEZ: I'll be able to talk to  
15 the secretary of the Board and get the phone  
16 number?

17 CHAIRMAN MILES: Yes.

18 Who is on the phone, please?

19 MR. WISE: Chris Wise. (Phonetic)

20 CHAIRMAN MILES: We noticed one other  
21 typo on the proposed order, and it was the same

22 correction that I had noted last meeting, but it  
23 didn't get recorded, and it is on Page 9 of the  
24 order. I think it is on Page 9.

25 MR. HERNANDEZ: Paragraph 9 on Page 4.

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1 CHAIRMAN MILES: It is on Page 7 of <sup>110</sup>  
2 proposed order, Ben. Thank you. It should say  
3 October 2012, not 2015.

4 MR. REED: I see it.

5 MR. SAYLES O'CONNOR: It says October  
6 5th.

7 MR. REED: 2012. Thank you. Madam  
8 Chair.

9 CHAIRMAN MILES: We're going to get  
10 started again, continuing with the conclusions of  
11 law.

12 BOARD MEMBER REINHART-LEVINE: Madam  
13 Chair, members of the Board. Looking at Page 27  
14 of MEIC's proposed conclusions of law starting  
15 with Paragraph 60, this basically just cites MAPA  
16 regarding contested cases and a cite to Montana  
17 Code Annotated. So that conclusions of law is  
18 fine.

19 CHAIRMAN MILES: We decided to keep that  
20 in after the discussion this morning.

21 BOARD MEMBER REINHART-LEVINE: Indeed.  
22 This is a contested case, and so that Paragraph 60  
23 is appropriate.

24 Likewise Paragraph 61 is also okay. It  
25 is the definition of contested case from the  
Page 96



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1 statute.

2 Paragraph 62 needs to be stricken  
3 because it is alleging that this is not a  
4 contested case, which is incorrect. So we would  
5 request that staff prepare the draft to strike  
6 Paragraph 62.

7 Paragraph 63 is a reiteration of the  
8 fact that there are no genuine issues of material  
9 fact that are disputed, and there are no evidence  
10 or facts presented to the Board outside of the  
11 CHIA or other parts of the administrative record.

12 CHAIRMAN MILES: Are you reading from  
13 the draft, or are you reading from MEIC's?

14 BOARD MEMBER REINHART-LEVINE: I'm  
15 reading from MEIC's.

16 CHAIRMAN MILES: I don't think so.

17 BOARD MEMBER TWEETEN: I think you're  
18 reading from Ben's draft.

19 MR. DAVID: (Provides document)

20 BOARD MEMBER REINHART-LEVINE: Indeed  
21 that is correct.

22 BOARD MEMBER TWEETEN: Which one are we  
23 going to do?

24 BOARD MEMBER REINHART-LEVINE: I think  
25 we need to do MEIC's.

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1 CHAIRMAN MILES: I have the original

2 MEIC one. Do you have the original?

3 BOARD MEMBER TWEETEN: I'll have it in a  
4 moment here.

5 BOARD MEMBER REINHART-LEVINE: I regret  
6 the confusion here.

7 CHAIRMAN MILES: We're going to start  
8 over again with the conclusions of law working  
9 from MEIC's draft proposed findings -- I shouldn't  
10 even say draft -- MEIC's proposed findings and  
11 conclusions.

12 BOARD MEMBER REINHART-LEVINE: Starting  
13 over.

14 So Paragraph 60 states that the Board  
15 reviewed DEQ's decision to approve a coal mining  
16 expansion de novo with no deference to the Agency.  
17 For that one, I believe we had a substitution for  
18 that paragraph, so we would strike Paragraph 60,  
19 and instead insert Paragraph 64 from Ben Reed's  
20 draft, which states, "The Board may in its  
21 discretion rely entirely on the record before it,  
22 or receive additional evidence on such matters as  
23 it may deem appropriate," citing Montana  
24 Environmental Information Center versus DEQ 2005  
25 MT 96, Paragraph 18. So we'll make that

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113  
1 substitution of Paragraph 64 in the draft, and  
2 strike Paragraph 60 from MEIC's original findings  
3 of fact and conclusions of law.

4 Paragraph 61. This is a reference to  
5 the Montana Strip and Underground Mine Reclamation

6 Act, and it is a cite to the statute Section  
7 82-4-206, so that is fine. It also contains  
8 language that contested case provisions of MAPA  
9 apply to a hearing before the Board. That also is  
10 fine.

11 Paragraph 62 is another reference to  
12 MAPA. Then on to Page 25, and that section is  
13 fine.

14 Paragraph 63 is a further citation to  
15 Title 82, and that is straight forward. It is  
16 another citation of the law. And then there is a  
17 citation to Administrative Rule 17.24.314 Subpart  
18 (5) citing the standards for CHIA, and that is  
19 fine.

20 Paragraph 64 is a citation to Rule 56  
21 from the Montana Rules of Civil Procedure  
22 regarding summary judgment. That is fine.

23 Paragraph 65 basically notes that the  
24 parties agree there are no disputed issues of  
25 fact, and all relevant facts are those in the

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1 administrative record. So that is not disputed,  
2 so Paragraph 65 is fine.

3 Paragraph 66 is that DEQ and SPE contend  
4 that DEQ should be permitted to support the  
5 adequacy of its CHIA, and so that is basically a  
6 summary of DEQ's argument, so that is fine.

7 Paragraph 67 states that the Board  
8 disagrees that DEQ should be allowed to raise new  
9 facts, argument, and analysis, and I believe that

10 Paragraph 67 is inconsistent with Paragraph 64,  
11 which allows us to receive additional evidence as  
12 we see appropriate. So I would recommend we  
13 strike Paragraph 67. Is there any objection to  
14 that?

15 CHAIRMAN MILES: I think that's  
16 inconsistent with what we've been doing, which was  
17 looking at the phrase we've been using, the four  
18 corners of the CHIA.

19 BOARD MEMBER TWEETEN: May I propose  
20 that instead of keeping the entire paragraph or  
21 striking the entire paragraph, we strike the  
22 portion that ends in a period immediately before  
23 the words "under MSUMRA, DEQ's CHIA." I think the  
24 first paragraph makes an argument that we're not  
25 accepting, but from the point that I indicated

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1 forward, I think it is fine.

2 CHAIRMAN MILES: Okay.

3 BOARD MEMBER REINHART-LEVINE: So  
4 basically after MSUMRA, you would strike that, the  
5 rest of the paragraph?

6 BOARD MEMBER TWEETEN: Strike everything  
7 up until that.

8 CHAIRMAN MILES: No. That's the  
9 language that I was talking about that we were  
10 looking at the relevant analysis is what is  
11 contained in the four corners of the CHIA, and  
12 only those relevant facts are before the Agency at  
13 the time of its permitting decision.

14 BOARD MEMBER REINHART-LEVINE: Is  
15 everyone in agreement on that? So then Paragraph  
16 67 would be amended as stated by Mr. Tweeten and  
17 Madam Chair.

18 Paragraph 68 is basically a further  
19 statement that DEQ's findings be based on the  
20 record evidence supporting its decision, and that  
21 evidence must be shared with the public; that DEQ  
22 is required to provide its specific reasons for  
23 its permitting decision; and basically alleging  
24 that DEQ should not be permitted to present new  
25 evidence, analysis, or argument. As everyone okay

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1 with Paragraph 68, or are there any objections?

2 CHAIRMAN MILES: I concur with that.

3 BOARD MEMBER REINHART-LEVINE: So then  
4 we would also adopt Paragraph 68.

5 Paragraph 69 is along the same lines of  
6 not having additional new evidence, analysis, be  
7 presented. So it appears the Board would also  
8 adopt Paragraph 69; is that right?

9 (Affirmative response)

10 BOARD MEMBER REINHART-LEVINE: So that  
11 basically limits the record to the record before  
12 us.

13 Paragraph 70 basically is along the same  
14 lines. The Board notes that while DEQ asserts the  
15 right to provide new evidence, basically DEQ has  
16 stated that all relevant information was limited  
17 to the administrative record. Are there any

18 objections to Paragraph 70?

19 (No response)

20 BOARD MEMBER REINHART-LEVINE: Seeing  
21 none, the Board would adopt Paragraph 70.

22 Paragraph 71 is basically allowing DEQ  
23 to present its arguments to explain and  
24 demonstrate basically what is in the record before  
25 the Agency, and that is basically a furtherance of

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1 the paragraphs that we have already adopted.<sup>117</sup> So  
2 we would also adopt that paragraph.

3 Moving on to Page 30, this is statutory  
4 and regulatory background on the Strip and  
5 Underground, the Surface Mining Control and  
6 Reclamation Act, SMCRA. That's a citation of  
7 statute, so that's fine. And then there is some  
8 citation of case law regarding SMCRA, so I think  
9 Paragraph 72 is fine.

10 Paragraph 73 states the principal  
11 purpose of SMCRA, so that is fine. That's not in  
12 dispute. That's just a direct quotation from the  
13 statute.

14 Paragraph 74 basically cites case law  
15 stating that SMCRA establishes a system of  
16 cooperative federalism, and that is fine. It is  
17 just a direct citation from case law.

18 Paragraph 75 basically states that under  
19 SMCRA, the Department of Interior may grant state  
20 regulatory authority over coal mining if the state  
21 demonstrates that it has the capacity to implement

22 the program and meet minimum federal standards.  
23 So that's also just an explanation of the existing  
24 law. That's fine.

25 Paragraph 76 is the citation to case law

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1 and statute regarding safeguards against the  
2 ineffective State regulation of coal mining  
3 operations, so that again is citations to statute  
4 and case law, so no issues with that. That seems  
5 straight forward.

6 Paragraph 77 is the central purpose of  
7 SMCRA is to protect water resources from coal mine  
8 development under the statute, so no issues there;  
9 and that citizens may petition for prohibition of  
10 coal mining that affects aquifer and aquifer  
11 recharge where mining will cause a substantial  
12 loss or reduction of long range productivity of  
13 water supply. Again, that's directly from  
14 statute, so that is fine.

15 Paragraph 78 is additional citation to  
16 SMCRA.

17 Paragraph 79 is a further citation to  
18 SMCRA.

19 Paragraph 80 is in regards to Montana's  
20 delegated program under Title 82. There is also a  
21 citation to Montana Constitution. So there are no  
22 issues with that paragraph.

23 Paragraph 81 is a further citation of  
24 the statute and the requirements from Title 82, as  
25 well as from administrative law, regarding

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1 material damage. So that is straight forward. <sup>119</sup>

2 Paragraph 82 is a citation to the  
3 Administrative Rules governing Cumulative  
4 Hydrologic Impact Assessment, or the CHIA. So  
5 again, that's just a straight citation, so that's  
6 fine.

7 Paragraph 83 is the definition from the  
8 statute regarding material damage, so again, it is  
9 just a direct quote of statute. That's fine.

10 Paragraph 84 is in regards to the US  
11 Secretary of Interior striking down amendments by  
12 the 2003 Montana Legislature, and there is a  
13 citation to the Federal Register for that. So  
14 that's straight forward.

15 Continuing on, Page 34 part (c), DEQ's  
16 CHIA employed an incorrect material damage  
17 standard. So Paragraph 85 states that as matter  
18 of law, the CHIA employed the incorrect legal  
19 standard in its material damage assessment and  
20 determination, that the CHIA was not sufficient to  
21 determine whether the proposed operation has been  
22 designed to prevent material damage to the  
23 hydrologic balance outside of the permit area.

24 And building on all of the citations  
25 that have previously been stated, I believe that

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1 this paragraph is acceptable for the reasons that <sup>120</sup>  
2 I'll get into as we continue further on, but I do





7 address either the threshold or limit for material  
 8 damage to groundwater quality in the CHIA itself  
 9 laid out in the table. And it goes on to state,  
 10 "Material damage determination failed to assess  
 11 whether there would be any persistent or long term  
 12 change in water quality within the permit area  
 13 that is approaching or exceeding narrative or  
 14 numeric limits, and may be expected to extend to  
 15 areas outside of the permit area with time."

16 The CHIA's material damage assessment  
 17 did not address the limit of whether violation of  
 18 water quality standards would occur outside of the  
 19 permit area, and so I do agree with Paragraph 88,  
 20 and I would encourage DEQ and SPE to address that  
 21 deficiency moving forward.

22 Paragraph 89, "The CHIA's complete  
 23 failure to address applicable water quality  
 24 standards was unlawful and in violation of the  
 25 statute and the Administrative Rules," and again,

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1 it was finding that the CHIA was unlawful because  
 2 it failed to adequately address impacts to  
 3 groundwater, so I would also agree with that  
 4 statement that the CHIA did not address the  
 5 applicable water quality standards when making the  
 6 material damage assessment, and I would also find  
 7 that to be in violation of the applicable statute  
 8 and Administrative Rule. So I would adopt  
 9 Paragraph 89.

10 Paragraph 90, "DEQ contends that the  
 Page 106

11 standard employed in the material damage  
 12 assessment and determination of the CHIA that no  
 13 material damage is expected because any  
 14 degradation of groundwater is not expected to  
 15 render groundwater unsuitable is basically  
 16 equivalent to applicable narrative and  
 17 nondegradation standards." I think that DEQ erred  
 18 in how it reviewed material damage in relation to  
 19 groundwater quality, so for that reason, I would  
 20 adopt Paragraph 90.

21 CHAIRMAN MILES: Agreed.

22 BOARD MEMBER REINHART-LEVINE: Paragraph  
 23 91 goes on to say that why DEQ was mistaken.  
 24 First DEQ is wrong that MEIC's sole concern is  
 25 with DEQ's failure to consider potential water

♀

1 quality violations of narrative and nondegradation  
 2 standards for salinity. MEIC raised two separate  
 3 claims, first that a material damage assessment  
 4 employed the incorrect legal standard, and second,  
 5 that the record evidence did not support DEQ's  
 6 conclusion that the mine expansion was designed to  
 7 prevent material damage.

8 While MEIC's second claim focused on  
 9 salinity, its first claim addressed DEQ's failure  
 10 to address potential violations of water quality  
 11 standards in general, so that is basically a  
 12 reference directly to the briefs and to the  
 13 arguments that MEIC raised, and when MEIC raised  
 14 them; and so for those reasons, I would adopt

15 Paragraph 91 because MEIC did raise water quality  
16 standards in general.

17 Paragraph 92, "The material damage  
18 standard employed in the CHIA was not equivalent  
19 to any of the water quality standards applicable  
20 to Class 2 groundwater," and so I would adopt  
21 Paragraph 92 because the material damage standard  
22 employed in the CHIA was not sufficient to address  
23 the applicable water quality standards, especially  
24 those applied to Class 2 groundwater; and I would  
25 encourage DEQ and SPE to address that in the CHIA

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1 and moving forward.

2 Paragraph 93, "The Administrative Rules  
3 establish three general water quality standards  
4 applicable to Class 2 groundwater," and those are  
5 set forth here. Again, I would encourage that the  
6 parties address Class 2 groundwater standards in  
7 the remand process. So I would adopt Paragraph 93  
8 for that reason.

9 Paragraph 94. This relates to DEQ's  
10 CHIA failing to address numeric water quality  
11 standards, and those would be those set forth in  
12 Administrative Rule 17.30.1006, that is whether  
13 groundwater pollution from the mine would violate  
14 human health standards listed in DEQ7. So again,  
15 I would encourage the parties to address Paragraph  
16 94 moving forward.

17 "DEQ attempts to excuse this failure by  
18 asserting that numeric standards are not of

19 concern because groundwater monitoring wells have  
20 not detected any exceedences," and that is from  
21 DEQ's surreply. "The CHIA however refutes DEQ's  
22 argument. It says no exceedences of DEQ7  
23 standards were observed in any of the Mammoth coal  
24 aquifers because mine dewatering produces  
25 groundwater flows toward the mine workings during

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125  
1 mining. No water quality effects are expected  
2 during mining."  
3 Then it goes on to say, "The absence of  
4 exceedences in groundwater monitoring wells is not  
5 because there is no potential for such  
6 exceedences. Instead as the CHIA clarifies, it is  
7 because at present, groundwater is flowing towards  
8 the mining. Only after mining ceases will  
9 degraded gob water from the mine workings begin to  
10 flow away from the mine." So after mining ceases,  
11 the water flowing away from the mine needs to be  
12 addressed in the CHIA moving forward, in my  
13 opinion. So for that reason I would adopt  
14 Paragraph 94.

15 Moving on to Paragraph 95, "DEQ's CHIA  
16 failed to address narrative water quality  
17 standards." This is on Page 38. "The standard  
18 applied by the CHIA is not expected to render  
19 groundwater suitable for current or anticipated  
20 use is not equivalent to the narrative standard  
21 for Class 2 groundwater." So moving forward, I  
22 encourage the parties to address the standard for

23 Class 2 groundwater.

24 The narrative standard for Class 2  
25 groundwater prohibits increases in pollution that

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1 render the waters harmful, detrimental, or <sup>126</sup>  
2 injurious to the beneficial uses of Class 2 water,  
3 and that the beneficial uses are set forward.  
4 The current CHIA does not address each beneficial  
5 use. It only addressed the anticipated uses, such  
6 as livestock and domestic use. So I think in that  
7 aspect the CHIA was inadequate, and it needs to  
8 address all of the beneficial uses set forth in  
9 Class 2 groundwater from the Administrative Rule.  
10 So for those reasons, I would adopt Paragraph 95,  
11 because I would agree that current and anticipated  
12 use is narrower than beneficial use, and is less  
13 protective as was the inadequate standard.

14 So then moving on to Paragraph 96, the  
15 CHIA and the record evidence indicate the  
16 potential for groundwater outside of the permit  
17 area to degrade from Class 2 to Class 3, and then  
18 it sets forth the beneficial uses for Class 3.  
19 Degradation of groundwater from Class 2 to Class 3  
20 either eliminates or limits each designated  
21 beneficial use. Pollution that eliminates or  
22 curtails the beneficial use is harmful,  
23 detrimental or injurious to the beneficial use,  
24 and therefore would violate the narrative  
25 standards. I agree with that interpretation of

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1 the law, and I would encourage DEQ to address  
2 Paragraph 96 moving forward.

3 Paragraph 97, "DEQ contends that  
4 potential degradation of groundwater from Class 2  
5 to Class 3 would not violate the narrative water  
6 quality standard because the uses that would be  
7 eliminated, such as water supply and irrigation,  
8 are not feasible to due to the load trends."

9 Basically it's saying that it's not  
10 really happening in the Mammoth coal aquifer now.  
11 I disagree with DEQ's interpretation of the law  
12 there, and I think that it needs to look at the  
13 uses that would be lost by the degradation of  
14 groundwater from Class 2 to Class 3 in the CHIA  
15 moving forward. So for those reasons, I would  
16 adopt Paragraph 97.

17 Paragraph 98. "DEQ's argument which  
18 focuses exclusively on uses that are eliminated  
19 does not account for the use of the Class 2 water  
20 that while not eliminated, are limited if the  
21 water is degraded to Class 3. Class 2 groundwater  
22 may be used for drinking water for most livestock  
23 and wildlife, but Class 3 groundwater may only be  
24 used for drinking water for some livestock and  
25 wildlife," so that is still a degradation.

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1 "Class 2 groundwater may be used for  
2 most commercial and industrial purposes, but Class

3 3 groundwater may only be used for some commercial  
4 and industrial purposes. Thus the degradation  
5 from Class 2 to Class 3 may be harmful,  
6 detrimental, or injurious to some beneficial  
7 uses." So the CHIA moving forward needs to  
8 address this potential degradation from Class 2  
9 Class 3. So for those reasons, I would adopt  
10 Paragraph 98.

11 Paragraph 99, "Second, DEQ's argument  
12 about eliminated uses is unsupported by the law or  
13 facts. As a matter of law, there is no  
14 feasibility exception to the narrative water  
15 quality standards for Class 2 groundwater." And I  
16 would agree with that as a correct interpretation  
17 of the law.

18 "The regulations create a narrow  
19 exception to groundwater quality standards for  
20 groundwater with low hydrologic conductivity, but  
21 that exception is only for Class 3 and Class 4  
22 groundwater, and it is only for groundwater with a  
23 hydrologic conductivity of less than .1 feet per  
24 day. Because most groundwater in the Mammoth coal  
25 aquifer is Class 2 groundwater with a hydraulic

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1 conductivity of .16 feet per day, according to the  
2 CHIA, the narrow exception does not apply." And I  
3 would agree with that the statement.

4 "The regulations express recognition for  
5 this narrow exception, which precludes an  
6 adjudicative body or a Court from implying



7 additional exceptions," and then case law is  
8 cited. For those reasons, I would adopt Paragraph  
9 99.

10 I'm on Page 41, Paragraph 100.  
11 "Further, there is no evidence in the record that  
12 groundwater from the coal aquifer is not capable  
13 of being used for irrigation or public or private  
14 water supply. The only citation offered by DEQ  
15 regarding irrigation says nothing about the  
16 suitability for the Mammoth coal aquifer for  
17 irrigation." So this is something that should be  
18 addressed moving forward, and for those reasons I  
19 would adopt Paragraph 100.

20 Paragraph 101, "Nor does the record  
21 compiled by DEQ demonstrate that the Mammoth coal  
22 aquifer is not suitable for public or private  
23 water supply due to its low hydrologic  
24 conductivity in the arable mountains. The Mammoth  
25 coal aquifer is an important source of water, and

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130  
1 some of the highest yielding wells and springs are  
2 sourced in the Mammoth coal aquifer."

3 "Domestic wells also tap this aquifer,  
4 and the Board notes that the pumping rate is  
5 sufficient for SPE's public water supply well, so  
6 no evidence shows that the Mammoth coal aquifer  
7 cannot produce similar yield."

8 So for those reasons, I would encourage  
9 the parties to look at the Mammoth coal aquifer's  
10 suitability for public or private water supplies,

11 and any potential impacts to those moving forward.

12 And for that reason, I would adopt Paragraph 101.

13 Paragraph 102. "While the CHIA states  
14 that the hydrologic conductivity of the Mammoth  
15 coal aquifer is typically inadequate to provide a  
16 reliable source of well water, it is acknowledged  
17 that a few production wells are completed in the  
18 coal." This is in the CHIA.

19 "Nor is it significant that no wells  
20 produce water solely from the Mammoth coal  
21 aquifer. That does not mean that it is not  
22 possible for wells to produce water solely from  
23 the Mammoth coal aquifer. Numerous springs,  
24 including high yielding springs, are sourced in  
25 this aquifer, and because there are wells into

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1 this aquifer, post mining water pollution is  
2 expected to affect those; and in sum, no evidence  
3 in the record demonstrates that the Mammoth coal  
4 aquifer could not feasibly be a source of  
5 irrigation, public or private water supply."

6 So again, I would encourage SPE and DEQ  
7 to examine the impacts to wells in the aquifer,  
8 and I would adopt Paragraph 102.

9 On Page 43, Paragraph 103. "DEQ  
10 contends that the CHIA's failure to consider all  
11 beneficial uses was justified because the  
12 provisions of MSUMRA that protect the hydrologic  
13 balance must be construed to require only  
14 reasonable and feasible constraints on mine

15 operations." That is basically a summary of DEQ's  
16 argument, and the Board disagrees with that. I  
17 think that it is inappropriate to only look at  
18 reasonable and feasible constraints, and that the  
19 CHIA needs to consider all beneficial uses moving  
20 forward.

21 Paragraph 104 is additional summary of  
22 DEQ's argument, basically saying that a coal mine  
23 operator must minimize disturbances to the  
24 prevailing hydrologic balance at the mine site,  
25 but Paragraph 104 goes on to say, "An operator's

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1 duty to minimize disturbance to the hydrologic  
2 balance does not alter DEQ's duty to withhold a  
3 permit in the first instance unless and until the  
4 applicant demonstrates and the record shows that  
5 the operation has been designed to prevent  
6 material damage to the hydrologic balance outside  
7 of the permit area," and that's a cite to the  
8 statute.

9 "Prevent does not mean minimize," and  
10 I agree with that statement, that "prevention" is  
11 a much stronger word than the word "minimize."  
12 And I agree with the statement, "The Board must  
13 honor the legislative decision to use the word  
14 'prevent' and not 'minimize,'" and I agree with  
15 the citation to statute and to the case law there.

16 The word "prevent" was intentional by  
17 the Legislature. That word has meaning, and we  
18 cannot convey a different meaning to the word

19 "prevent." So for those reasons, I would adopt  
20 Paragraph 104.

21 Paragraph 105. "DEQ also cites a  
22 sentence in the legislative history that reads,  
23 'The total prevention of adverse hydrologic  
24 effects from mining is impossible, and thus the  
25 bill sets attainable standards to protect the

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1 hydrologic balance of impacted areas." This is <sup>133</sup>  
2 cited in DEQ's response brief at Page 33.

3 But the next sentence of the report  
4 clarifies, "The imperative provisions of SMCRA,  
5 and the Montana equivalent in Title 82, may  
6 preclude mining altogether in certain critical and  
7 hydrologically fragile areas to prevent  
8 irreparable damage," and then there is a quote to  
9 the congressional history. "For most critical  
10 areas and in certain fragile hydrological  
11 settings, the bill sets standards that are  
12 imperative to begin to assure that adverse impacts  
13 to the hydrologic balance are not irreparable."

14 So that is basically a cite to the  
15 historical and to the legislative intent of the  
16 statute, so I agree with that Paragraph 105.

17 Paragraph 106 on Page 45. "Contrary to  
18 DEQ's position, MSUMRA, like SMCRA, requires the  
19 adjustment of a mining operation to the  
20 environmental protection standards, rather than  
21 the opposite. The drafters of SMCRA rejected the  
22 notion that the standard should be adjusted to an

23 what an individual mine operator states they can  
24 or cannot afford, noting that SMCRA laws were  
25 inadequate because they were tailored to suit

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1 ongoing mine practices, rather than requiring  
2 modifications of mining practices to meet  
3 established standards. If a mine operation cannot  
4 meet mandatory legal standards, the DEQ's legal  
5 duty is to deny approval of a mining operation  
6 unless or until the mining operation can be  
7 adjusted to meet the standard under the statute.  
8 DEQ may not adjust the law to allow the mining  
9 operation to proceed."

10 I do agree with that statement. The law  
11 is what it is, and DEQ and SPE must follow the  
12 law.

13 Then moving on to Part 3. "DEQ's CHIA  
14 failed to address nondegradation water quality  
15 standards."

16 Under Paragraph 107. "contrary to DEQ's  
17 assertion, the standard applied in CHIA's material  
18 damage assessment and determination was not  
19 equivalent to the nondegradation standard for  
20 salinity." So I agree with that statement, that  
21 the material damage assessment is not equivalent  
22 to the standard for salinity alone.

23 Paragraph 108 basically cites that, "The  
24 nondegradation standard for Class 2 groundwater  
25 prohibits increases in any parameter that would

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1 cause a violation of the nondegradation  
2 provisions. Under the administrative regulations  
3 of the nondegradation provisions of Part 75-5-303,  
4 a change in groundwater quality is deemed  
5 insignificant and therefore exempt from further  
6 nondegradation review if it meets the criteria set  
7 forward in the Administrative Rule. "

8 Paragraph 108 is just basically a  
9 citation to what the statute and Administrative  
10 Rules require, so that paragraph is fine.

11 Likewise Paragraph 109 is a recitation  
12 of the standards set forth in the Administrative  
13 Rule, as well as in statute, in regards to the  
14 nondegradation review, and so for those reasons,  
15 Paragraph 109 is fine.

16 Paragraph 110 on Page 47 is a citation  
17 to the administrative rule regarding the standard  
18 for salinity, which may be deemed insignificant if  
19 it will not have a measurable effect on any  
20 existing or anticipated use or cause measurable  
21 change in aquatic life. As noted, the CHIA  
22 determined that material damage was not expected  
23 to occur because any degradation of groundwater  
24 quality is not expected to render groundwater  
25 unsuitable. The standard employed in material

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1 damage determination of the CHIA is less stringent  
2 than the nonsignificance degradation standard.  
3 Thus the standard employed in the CHIA was not

4 equivalent to the nondegradation water quality  
5 standard for Class 2 water."

6 I agree with that statement. I would  
7 encourage DEQ and SPE to address that in the CHIA  
8 moving forward.

9 Paragraph 111 states that, "Further,  
10 even if the standard employed in the CHIA were  
11 equivalent to the standard in the Administrative  
12 Rule, DEQ would still have been required to  
13 consider the discretionary factors set forth in  
14 Administrative Rule 17.30.715 part (2), including  
15 the length and time the degradation will occur.  
16 The CHIA nowhere examines the length of time that  
17 polluted water will continue to migrate from the  
18 mine void after the cessation of mining," and it  
19 says, "beyond the arbitrary 50 year horizon  
20 established in the groundwater model."

21 I agree that the 50 year horizon  
22 established in the groundwater model is arbitrary,  
23 and I do not think it is consistent with statute  
24 or Administrative Rule. I would encourage DEQ and  
25 SPE to address the 50 year horizon, and rectify

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1 that in the CHIA moving forward.

2 Paragraph 111 goes on to state, "Indeed  
3 in its responses to MEIC's discovery responses,  
4 DEQ asserted it was unable to speculate on how  
5 long the water in the mine void would continue to  
6 degrade, or how long the degraded water would  
7 continue to migrate away from the mine." I would

8 submit that is not consistent with the standard  
9 regarding material damage, and would encourage the  
10 parties to address that moving forward.

11 Paragraph 112 on Page 48. "The CHIA's  
12 material damage assessment and determination was  
13 not equivalent to nondegradation standards for  
14 Class 2 groundwater because it did not assess  
15 whether changes in salinity concentrations would  
16 have a measurable effect on existing and  
17 anticipated use as required by Administrative Rule  
18 17.30.715(1) part (h) because the analysis did not  
19 consider the discretionary factors of this  
20 Administrative Rule, including the length of time  
21 of the degraded water, and how long it will  
22 continue to migrate from the mine." So I would  
23 encourage to CHIA to address those moving forward.

24 Paragraph 113. "In sum, the CHIA's  
25 material damage assessment and determination

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1 failed to address whether the proposed mining  
2 operation would cause violation of water quality  
3 standards outside the permit boundary. As such it  
4 was insufficient as a matter of law." I would  
5 agree with that statement. I do believe that the  
6 CHIA needs to address any proposed violations of  
7 water quality standards outside the permit  
8 boundary, and so I would encourage the parties  
9 that address that moving forward.

10 Moving now on to Paragraph 114. This is  
11 a citation of Montana Code Annotated 82-4-227



12 that, "The Department may not approve an  
13 application for strip or underground coal mining  
14 or a major revision unless the application  
15 affirmatively demonstrates that the assessment of  
16 the probable cumulative impacts on all anticipated  
17 mining in the area on the hydrologic balance has  
18 been made by the Department, and the proposed  
19 operations of the mining operation has been  
20 designed to prevent material damage to the  
21 hydrologic balance outside of the permitting  
22 area." So Paragraph 114 is just a recitation of  
23 the applicable statute, and that is straight  
24 forward and fine.

25 Likewise Paragraph 115 is a citation of

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1 the implementing regulation, and that is fine. <sup>139</sup>

2 Paragraph 116 on Page 49 is a citation  
3 to the statute and the Administrative Rule that is  
4 applicable. That is fine.

5 Paragraph 117 states that, "The  
6 application and the record before DEQ showed only  
7 that the proposed operation may or may not be  
8 designed to prevent material damage outside the  
9 permit area within 50 years after mining. This  
10 showing does not constitute affirmative evidence  
11 that the cumulative hydrologic consequences will  
12 not result in material damage to the hydrologic  
13 balance outside of the permit area." And I agree  
14 with that statement, and I encourage DEQ and SPE  
15 to look at potential damages to the hydrologic

16 balance outside of the permit area beyond the 50  
17 years.

18 Paragraph 118. "The record demonstrates  
19 that at present, the groundwater in the Mammoth  
20 coal aquifer is predominantly high quality Class 2  
21 water, and DEQ and SPE agree that the cessation of  
22 mining of gob water in the mine void will degrade  
23 from Class 2 to Class 3." So that is a citation  
24 to the record, and that is not disputed. So I  
25 would adopt Paragraph 118.

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1 Paragraph 119. "Because degradation of <sup>140</sup>  
2 high quality Class 2 groundwater to low quality  
3 Class 3 groundwater eliminates some beneficial  
4 uses and limits others, it violates the narrative  
5 water quality standard," and there is a citation  
6 to the Administrative Rule which prohibits  
7 increase in any parameter that renders the water  
8 harmful, detrimental, or injurious to beneficial  
9 uses. And I agree that degradation of Class 2  
10 water groundwater to low quality Class 3  
11 groundwater does eliminate the beneficial use, and  
12 would violate narrative water quality standards.  
13 For that reason, I would adopt Paragraph 119, and  
14 I would encourage the parties to address that  
15 paragraph moving forward.

16 Paragraph 120 states that, "The only  
17 analysis that considered migration of the plume  
18 and polluted gob water beyond the mine permit  
19 boundary was the groundwater model. The

20 groundwater model conducted a particle tracking  
21 evaluation under two different scenarios, one in  
22 which the gate roads collapse and one in which  
23 they remain intact. Neither the groundwater  
24 model, the PHC, or the CHIA stated that either  
25 scenario was more likely than the other.

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1 Presently the mine gate roads have tended to <sup>141</sup>  
2 remain intact. It may be that while some gate  
3 roads remain intact, and that others collapse --"  
4 and that is according to the CHIA -- "after the  
5 conclusion of mining, the gate roads may remain  
6 intact or may collapse," and that's according to  
7 the groundwater model.

8 I would consider that the CHIA look at  
9 whether or not the roads may not collapse, and  
10 what will happen in that scenario. Because  
11 Paragraph 120 is just a citation to the existing  
12 record, I would adopt it.

13 Paragraph 121. "Using a 50 year time  
14 frame, the particle tracking evaluation determines  
15 that in Scenario 2 in which the gate roads remain  
16 intact, the degraded gob water will migrate beyond  
17 the mine permit boundary in numerous locations."  
18 That is a citation to the groundwater model.

19 "In Scenario 1, in which the gate roads  
20 collapse, the gob water would migrate more slowly,  
21 traveling approximately half the distance it would  
22 in Scenario 2. In Scenario 1, the degraded gob  
23 water would migrate towards, but would not pass

24 the mine permit boundary within 50 years."

25 Again, I would adopt Paragraph 121

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1 because I think the 50 year time frame is <sup>142</sup>  
2 arbitrary, and is not consistent with the statute  
3 or Administrative Rule.

4 Paragraph 122 states, "The record  
5 evidence presented by SPE in the groundwater  
6 model, and other evidence before DEQ at the time  
7 of its decision, demonstrated only that it was not  
8 likely that degraded water that violates water  
9 quality standards would migrate beyond the mine  
10 permit boundary. The lack of any likelihood or  
11 defensible level of confidence that material  
12 damage would not result does not constitute an  
13 affirmative demonstration of record evidence that  
14 expansion of the mine is designed to prevent  
15 material damage to the hydrologic balance outside  
16 of the permit area."

17 I agree with Paragraph 122, and I would  
18 again encourage the DEQ and SPE to address this  
19 deficiency in the CHIA moving forward.

20 Paragraph 123 states that, "In light of  
21 the uncertainty surrounding whether the gate roads  
22 will remain intact, DEQ's 2013 EA determined that  
23 material damage outside the permit area will not  
24 occur because of factors that the groundwater  
25 model has failed to address," and then there is a

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1 citation to the Environmental Assessment, and then  
2 there is also a citation to the groundwater model.

3 "The analysis does not meet the  
4 standards of Title 82-4-227 or the Administrative  
5 Rule. An analysis that is not conducted and  
6 evidence that is not presented does not constitute  
7 an affirmative demonstration on the basis of  
8 information set forth in the application, or  
9 information otherwise available as compiled by the  
10 Department."

11 I would agree with that statement, and  
12 would encourage DEQ and SPE to address Paragraph  
13 123 moving forward.

14 Moving on to Page 53, Paragraph 124.  
15 "In a briefing before this Board, DEQ developed  
16 various additional arguments. DEQ contended that  
17 the evidence before the Agency was sufficient to  
18 support permit approval because the gob water is  
19 not likely to migrate a distance beyond the permit  
20 boundary within 50 years, and because the  
21 pollution impacts would be limited to the Mammoth  
22 coal aquifer and upper underburden. Gob water  
23 will migrate no further than a few hundred feet  
24 outside the permit boundary 50 years after mining.  
25 Contamination by higher salinity water migrating

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1 outside the permit will affect only, if at all,  
2 water in the Mammoth coal and possibly the upper  
3 underburden."

4            "This argument fails because it is  
5            premised on the mistaken belief that Montana Code  
6            Annotated 82-4-227(3)(a) does not establish a  
7            prohibition, but merely requires DEQ to develop  
8            reasonable and feasible measures to minimize  
9            potential impacts. As explained above, this  
10           statute employs the term 'prevent,' and 'prevent'  
11           does not mean minimize, a term used elsewhere in  
12           the statute. The express language of the statute  
13           allows no exception for small amounts of material  
14           damage that harm only one or potentially two  
15           aquifers."

16           Because I agree that "minimize" is not  
17           the same as "prevent," I would adopt Paragraph  
18           124, and I would encourage DEQ and SPE to address  
19           Paragraph 124 moving forward.

20           Paragraph 125 on Page 54. "DEQ argues  
21           in its brief that the gob water will not migrate  
22           beyond the permit boundary because the gate roads  
23           are designed to collapse. DEQ's proposed  
24           analysis, however, was not presented in the CHIA  
25           or in the 2013 Environmental Assessment, and as

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1           such, is not properly before the Board, providing  
2           that the CHIA must be sufficient for a material  
3           damage determination. Both the CHIA and the PHC  
4           determined that it is uncertain whether the gate  
5           roads would collapse," and there's a citation to  
6           the CHIA and the PHC.

7           "As mentioned, the transparency

8 requirements and the public oversight provisions  
9 would be nullified if during a contested case  
10 proceeding, DEQ could present analysis and  
11 arguments that were never articulated in the CHIA  
12 or other written findings. The CHIA must be  
13 sufficient for a material damage determination,  
14 and DEQ's written findings must confirm based on  
15 record evidence that cumulative hydrologic impacts  
16 will not result in material damage."

17 I agree with the statements made in  
18 Paragraph 125 regarding the uncertainty regarding  
19 the gate roads, and the standard of what must be  
20 in the CHIA. I would encourage SPE and DEQ to  
21 address Paragraph 125 moving forward.

22 CHAIRMAN MILES: Michele, I agree. I  
23 guess I would just add. I can't remember where I  
24 read it. There has been so much material on this.  
25 But it talked about the fact that some of the

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1 original gate roads, some have collapsed and some  
2 haven't; is that correct?

3 BOARD MEMBER REINHART-LEVINE: That is  
4 correct.

5 CHAIRMAN MILES: And the fact that we  
6 don't know --

7 BOARD MEMBER REINHART-LEVINE: There is  
8 also a statement in the PHC which is cited in  
9 Paragraph 125 stating that mine roads have tended  
10 to remain intact, and also acknowledging that the  
11 gate road integrity may persist far into the

12 future. So given that the gate roads may not  
13 collapse, that needs to be addressed in the CHIA  
14 moving forward, and that is captured by this  
15 paragraph.

16 Paragraph 126 basically again notes,  
17 "Ground movement should be relatively uniform and  
18 subsidence gradual because of massive sandstone  
19 beds. These should concentrate the overburden  
20 loads on the gate pillars, causing them to crush  
21 and lower the surface uniformly. The CHIA also  
22 states that the gate roads are designed to yield  
23 as the adjacent panel is mined out. These  
24 statements, however, cannot bear the weight that  
25 DEQ places on them. First, as SPE pointed out,

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1 the actual operation of the mine has disproved the  
2 initial engineering prediction. Presently the  
3 gate roads are remaining intact."

4 So that needs to be addressed moving  
5 forward, because the gate roads may not collapse.  
6 So for those reasons, I would adopt Paragraph 126.

7 Paragraph 127 is also regarding  
8 presumptions regarding the collapse of the gate  
9 roads, and again it is limited to the arbitrary 50  
10 year horizon which we have already rejected. So  
11 for those reasons, I would support adoption of  
12 Paragraph 127.

13 Paragraph 128 states that, "By law, DEQ  
14 may not ignore the long term water pollution  
15 impacts of the mine." That statement is



16 consistent with a statute, and so I would agree  
17 with it. "The statute does not contain an  
18 exception for material damage outside of the  
19 permit area that occurs 50 years after mining,"  
20 and I agree with that statement. So for that  
21 reason, I also agree with the sentence that, "The  
22 Board declines DEQ's invitation to write such an  
23 exception into the law regarding the 50 years  
24 after mining." So for those reasons, I would  
25 adopt Paragraph 128.

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1 Paragraph 129 relates to the legislative  
2 history of SMCRA, and shows that Congress enacted  
3 the CHIA provision to prevent long term impacts to  
4 water resources. So I think that is another  
5 reason why the 50 year time frame is arbitrary.

6 Paragraph 129 goes on to state, "These  
7 specific standards are emphasized at the permit  
8 approval stage due to the critical and long term  
9 impacts mining can have on water resources of the  
10 affected area." For those reasons, I would  
11 encourage SPE and DEQ to look at the long term  
12 impacts that mining may have beyond 50 years.

13 "When OSM promulgated its initial  
14 regulations implementing SMCRA's hydrology  
15 protections, the Federal Agency declared that the  
16 time frame for the analysis must be co-extensive  
17 with the time period, and that such impacts are  
18 expected to persist. The impacts resulting from  
19 mining reclamation activities may extend beyond

20 the time frame required to complete actual mining  
21 and reclamation. The predictive analysis in the  
22 PHC determination, and therefore the CHIA, must  
23 cover the full extent of such impacts. That must  
24 be the full extent of long term impacts. As the  
25 Montana Supreme Court has taught, and Montana

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1 history repeatedly shows, long term pollution  
2 impacts from mining are among the most serious  
3 environmental problems because after the mine  
4 closes, the mine operator will be gone, and the  
5 polluted discharge will continue and cannot be  
6 shut off."

7 I agree with that citation to the  
8 Federal Register and to case law. For those  
9 reasons, I would adopt Paragraph 129, and I would  
10 urge SPE and DEQ to look at the long term  
11 potential pollution impacts.

12 Paragraph 130. "Indeed, with respect to  
13 water quality, the CHIA determined that the  
14 appropriate time frame for analysis was the period  
15 50 years after cessation of mining. The CHIA  
16 determined that the impacts of the draw down  
17 outside of the permit boundary were acceptable  
18 because groundwater will recover to near premining  
19 levels approximately 50 years after cessation of  
20 mining." That's under the CHIA.

21 "DEQ cannot have it both ways. If the  
22 period after 50 years is appropriate for assessing  
23 impacts to water quantity, it must also be

24 appropriate for assessing impacts to water  
25 quality. In short, there is no basis in law for

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1 limiting the material damage assessment and  
2 determination to 50 years."

3 I agree with that statement, and that's  
4 why I would adopt Paragraph 130, because there is  
5 no place in the law allowing the analysis to be  
6 limited to 50 years.

7 Paragraph 131 again is in regards to the  
8 polluted gob water migrating beyond the permit  
9 boundary, and it also relates to water being  
10 replaced by water from the deep underburden  
11 aquifer. And I would agree with Paragraph 131  
12 because I disagree with DEQ's argument.

13 Paragraph 132. "DEQ's migration  
14 argument repeats the CHIA's misunderstanding of  
15 material damage to the hydrologic balance.  
16 Replacing water supplies polluted by the mining  
17 operation only alleviates harm to existing and  
18 anticipated water users, but it does not prevent  
19 violation of water quality standards. It is  
20 violation of water quality standards regardless of  
21 the effect on existing and anticipated water use  
22 that is the standard for material damage."

23 I agree with that statement, which comes  
24 from the statute, and therefore would adopt  
25 Paragraph 132.

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1 Moving on to Page 59, Paragraph 133.  
2 This is in regards to mitigation, and it states,  
3 quote, "Second, the proposed mitigation from water  
4 from the deep underburden aquifer is illusory, and  
5 SPE admitted repeatedly in the record that the  
6 groundwater model admits that there are multiple  
7 physical and legal barriers to the use of the deep  
8 underburden aquifer as a source of mitigation  
9 water," and it cites the groundwater model for  
10 that premise.

11 "Thus the PHC concluded that further  
12 investigation was required to determine whether  
13 the deep underburden aquifer would be suitable to  
14 meet all potential mitigation needs," and there is  
15 a cite to the PHC.

16 "The mere possibility of mitigation is  
17 not sufficient to meet the standard of Montana  
18 Code Annotated 82-4-227, and the Administrative  
19 Rule." I agree with that statement. Mitigation  
20 is not sufficient to meet the legal standard. So  
21 for that reason, I would urge DEQ and SPE to  
22 address Paragraph 133, and I would adopt Paragraph  
23 133.

24 Paragraph 134 on Page 60 states, "DEQ  
25 may not approve a permit unless the application

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1 affirmatively demonstrates, and the Department's  
2 written findings confirm on the basis of  
3 information set forth in that application or  
4 otherwise available that is compiled by the  
Page 132

5 Department, that the cumulative hydrologic impacts  
6 will not result in material damage to the  
7 hydrologic balance outside the permit area." And  
8 that is a citation directly to the Administrative  
9 Rule and the statute.

10 This paragraph goes on to state, quote,  
11 "Here at most the record demonstrates that the  
12 proposed expansion mine may or may not be designed  
13 to prevent material damage outside of the permit  
14 area for 50 years, and there may or may not be  
15 water available to mitigate the operations'  
16 impacts to water quality and quantity. This  
17 statement does not satisfy the legal standard of  
18 MSUMRA." I agree with that statement, for all the  
19 reasons previously discussed.

20 Paragraph 135 discusses that, "The  
21 proposed 7,161 acre expansion of the Bull Mountain  
22 Mine is a considerable undertaking. It promises  
23 sizable economic benefits. However, as the  
24 Montana Department of State Lands determined years  
25 ago, it threatens significant economic harm in the

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1 long term." There is a citation to the record  
2 regarding that statement.

3 "The record before the Board suggests  
4 that long term environmental harm may also result.  
5 The Bull Mountains are an arid landscape.  
6 Existing ranching operations and ecosystem in the  
7 Bull Mountains are wholly dependent on the area's  
8 limited water resources," and there is additional

9 citation to the record for that statement.

10 Because that statement is backed up by  
11 the record, including the 1992 EIS at subpart (4),  
12 I would adopt Paragraph 135.

13 Paragraph 136 states that, "The MSUMRA  
14 prohibits DEQ from approving an application to  
15 expand unless the permit application affirmatively  
16 demonstrates, and DEQ confirms in writing, that  
17 the operation is designed to prevent material  
18 damage." Again, that's the same statute, the same  
19 citation to the statute and Administrative Rule.

20 "By statute, DEQ's material damage  
21 assessment and determination must consider whether  
22 the mine expansion will cause violation of water  
23 quality standards."

24 I agree with this paragraph because it  
25 is a correct citation of the statute and

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1 Administrative Rule.

2 Paragraph 137 addresses that, "DEQ's  
3 approval of SPE's application committed two  
4 errors. The first error is DEQ's material damage  
5 determination failed to consider whether the mine  
6 expansion would lead to violations of water  
7 quality standards. Second, the record evidence  
8 did not affirmatively demonstrate that the mine  
9 expansion is designed to prevent material damage  
10 to the hydrologic balance outside the permit area.  
11 Instead it demonstrated that the mine expansion as  
12 currently designed may or may not cause damage

13 outside the permit area in the next 50 years, and  
14 that there may or may not be water resources  
15 available for mitigation."

16 I agree with that statement. Again, the  
17 50 years is arbitrary, and is not consistent with  
18 statute, nor is the mitigation analysis.

19 Paragraph 138. "Because DEQ is  
20 prohibited from approving a permit application  
21 until it makes findings required by Montana Code  
22 Annotated 82-4-227 and the Administrative Rules,  
23 DEQ's approval for the application must be set  
24 aside."

25 I disagree with this paragraph, and

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1 would recommend that we strike Paragraph 138 to<sup>155</sup>  
2 allow the parties the time to address the  
3 appropriate remedy. So for those reasons, I would  
4 reject Paragraph 138.

5 Moving on to Paragraph 139. "It is  
6 hereby ordered that MEIC's motion for summary  
7 judgment is granted, and SPE's cross motion for  
8 summary judgment is denied." I would agree with  
9 Paragraph 139 and with our intent to grant MEIC's  
10 motion for summary judgment, because I concur that  
11 DEQ applied the wrong legal standard to the CHIA  
12 analysis. So for those reasons, I would adopt  
13 Paragraph 139.

14 I would reject Paragraph 140 because 140  
15 would set aside the permit, and we have stated we  
16 want the parties to have an opportunity to further

17 negotiate a remedy. So for those reasons, I would  
18 strike Paragraph 140.

19 I would also for that same reason strike  
20 Paragraph 141 to allow the parties to further  
21 negotiate an appropriate remedy.

22 Paragraph 142 would allow the Board to  
23 remand this matter to DEQ for further proceedings  
24 consistent with this order. I would recommend  
25 that we keep Paragraph 142. I think that will be

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1 consistent with still allowing the parties to  
2 negotiate a remedy.

3 I think that Paragraph 143 is fine. It  
4 just relates to whether or not the Sierra Club  
5 would be joined, and that would be denied as moot,  
6 and I think that paragraph is fine.

7 So Madam Chair, members of the Board,  
8 for all of those reasons, after reviewing the  
9 MEIC's proposed findings of fact and conclusions  
10 of law, those that we have decided to adopt,  
11 amend, or reject, I would urge the Board to  
12 support the motion I made to amend my prior motion  
13 to adopt the --

14 CHAIRMAN MILES: It's a substitute  
15 motion?

16 BOARD MEMBER REINHART-LEVINE: It is a  
17 motion to amend the motion that I made on October  
18 16th. I can make it a substitute motion if you  
19 think that would be --

20 BOARD MEMBER TWEETEN: Madam Chair, as  
Page 136



21 it relates to the changing of the motion  
22 previously adopted, I think motion to amend is  
23 appropriate. We can't substitute the motion  
24 because it is already done.

25 Madam Chair, one suggestion. In the

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1 heading immediately preceding Paragraph 139, I<sup>157</sup>  
2 would strike the word "final," since we've agreed  
3 pursuant to the motion that we would not be  
4 adopting a final order, and just make it "order"  
5 rather than "final order."

6 BOARD MEMBER REINHART-LEVINE: Madam  
7 Chair, I would agree.

8 CHAIRMAN MILES: Are there any other  
9 questions or comments?

10 (No response)

11 CHAIRMAN MILES: Have we included  
12 everything we need language wise in the order part  
13 of it at this stage to move to remand it to the  
14 Department, and to move forward, and that we will  
15 then undertake an analysis of the other findings  
16 of facts?

17 MR. REED: Yes, Madam Chair, I believe  
18 so.

19 CHAIRMAN MILES: Then is there any  
20 further discussion?

21 (No response)

22 CHAIRMAN MILES: I would ask as we vote  
23 if we would verbally vote in either favor or  
24 opposition to the motion, and if in favor, that

25 you would state that you concur with the reasons

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1 and rationale outlined by Board Member  
2 Reinhart-Levine. 158

3 BOARD MEMBER SAYLES O'CONNOR: I agree  
4 with it, and concur with the motions by Board  
5 Member Reinhart-Levine.

6 BOARD MEMBER DR. BYRON: I also agree  
7 with it and concur with the motions by Board  
8 Member Reinhart-Levine.

9 BOARD MEMBER TWEETEN: Madam Chair, I do  
10 as well.

11 BOARD MEMBER REINHART-LEVINE: Madam  
12 Chair, I concur with the motion that I made, and  
13 the reasons for which I made it.

14 CHAIRMAN MILES: Board Chair Miles  
15 concurs, and for the reasons stated. Thank you.  
16 Robin, I don't think you're on the phone, are you?

17 (No response)

18 CHAIRMAN MILES: So that's a unanimous  
19 vote of this Board.

20 MR. SAYLES O'CONNOR: Madam Chair, many  
21 thanks to Board Member Reinhart-Levine for going  
22 through the effort necessary to organize our  
23 thoughts for us like that. Thank you.

24 BOARD MEMBER REINHART-LEVINE: Thank you  
25 for suffering through it.

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1 CHAIRMAN MILES: I think we actually all  
2 have a better understanding of things to be able  
3 to do that at this stage. We would appreciate the  
4 Department setting up a conference call, special  
5 meeting, for Tuesday, December 29th at 11:00 a.m.

6 MS. HOULE: Room 111 is free the entire  
7 day if you need an actual meeting room.

8 CHAIRMAN MILES: Is this room open? I  
9 don't really care what -- I can come and be here  
10 for that, so that if any members of the public  
11 want to be here as well, we can have it in this  
12 room.

13 MS. HOULE: We can do that.

14 CHAIRMAN MILES: So we can do that over  
15 the phone, Ben and I will be here at a minimum,  
16 depending on your travel schedules. If you would  
17 make sure the phone number, the call-in number is  
18 provided to the parties, and the public, and the  
19 members.

20 BOARD MEMBER TWEETEN: Madam Chair, if I  
21 might. In light of the motion that we just  
22 adopted, I would call your attention to the  
23 concurring statement that I drafted and had  
24 circulated.

25 In light of the motion we just adopted

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1 for which I voted, I will withdraw this document,  
2 and I have no plans to request that it be included  
3 with the final decision.

4 CHAIRMAN MILES: Thank you. We did try

5 hard to address some of the questions you brought  
6 up in there.

7 Is there any other business to come  
8 before the Board before I call for public comment?

9 (No response)

10 CHAIRMAN MILES: No further business.

11 Are there any general comments from the public?

12 (No response)

13 CHAIRMAN MILES: Hearing none, we're  
14 adjourned. Thank you very much.

15 (The proceedings were concluded  
16 at 3:24 p.m. )

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1 C E R T I F I C A T E

2 STATE OF MONTANA )

3 : SS.

4 COUNTY OF LEWIS & CLARK )

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

8 That the proceedings were taken before me at

9 the time and place herein named; that the  
10 proceedings were reported by me in shorthand and  
11 transcribed using computer-aided transcription,  
12 and that the foregoing - 160 - pages contain a  
13 true record of the proceedings to the best of my  
14 ability.

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

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LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 12, 2016.

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