

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 29, 2015
15 11:00 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 (by telephone); and
21 HEARINGS EXAMINER BEN REED

22
23 PREPARED BY: LAURIE CRUTCHER, RPR
24 COURT REPORTER, NOTARY PUBLIC

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN MILES: This is Joan Miles,
5 Chair of the Board of Environmental Review. We
6 will convene today's meeting, Tuesday, December
7 29, 2015. I'll ask George to take roll, and then
8 also to find out who else is on the line with us.
9 Thank you.

10 MR. MATHIEUS: Thank you, Madam Chair.
11 George Mathieus, Board liaison for the Department.
12 In no particular order, Robin Shropshire.

13 (No response)

14 MR. MATHIEUS: Chris Tweeten.

15 BOARD MEMBER TWEETEN: Present.

16 MR. MATHIEUS: Joan Miles.

17 CHAIRMAN MILES: Yes.

18 MR. MATHIEUS: Roy O'Connor.

19 BOARD MEMBER O'CONNOR: Present.

20 MR. MATHIEUS: Dr. Robert Byron.

21 BOARD MEMBER DR. BYRON: Present.

22 MR. MATHIEUS: Marietta Canty.

23 (No response)

24 MR. MATHIEUS: Michele Reinhart-Levine.

25 BOARD MEMBER REINHART-LEVINE: Present.

1 MR. MATHIEUS: Now I'm going to ask the
2 members of the public to please give us your name,
3 spell it, and tell us your affiliation. And it
4 may be a little hard to organize this over the
5 phone, but have at it.

6 CHAIRMAN MILES: We have Derf Johnson,
7 and you've already gotten that, from MEIC. Can
8 others on the line please identify yourself.

9 MS. LINDLIEF-HALL: Brenda Lindlief-Hall,
10 and just a member of the public.

11 MS. PFISTER: Ellen Pfister,
12 P-F-I-S-T-E-R. I have several interests in this.
13 Among them, my ranch is being undermined by Signal
14 Peak.

15 CHAIRMAN MILES: Thank you for
16 identifying yourself. Anyone else on the line?

17 MR. MUNSON: Yes. My name is Galen
18 Munson. I'm an employee of Signal Peak Energy. I
19 work underground there. I'm trying to support my
20 family.

21 CHAIRMAN MILES: Thank you for being on
22 the line. Anyone else?

23 (No response)

24 CHAIRMAN MILES: Okay. We'll get
25 started. Thanks, George. And present in the room

1 are a number of -- you'll record the DEQ staff
2 that are here.

3 OPERATOR: Now joining.

4 MR. KUYKENDALL: Taylor Kuykendall.

5 MR. MATHIEUS: Whoever just joined,
6 could you please state your name and tell us you
7 who are affiliated with.

8 MR. KUYKENDALL: I apologize. I got cut
9 off the first time. Taylor Kuykendall,
10 T-A-Y-L-O-R K-U-Y-K-E-N-D-A-L-L, and I'm with
11 SNLEnergy.

12 MR. MATHIEUS: Thank you.

13 CHAIRMAN MILES: We're going to get
14 started. Ben Reed from the Office of the Attorney
15 General, who is the Board's attorney is here. And
16 I don't know if we need to identify members of the
17 Department.

18 MR. MATHIEUS: I don't think so.

19 CHAIRMAN MILES: And our Court Reporter
20 Laurie Crutcher. I'm going to actually turn this
21 over to Ben. The purpose of today's meeting is to
22 go through the findings of fact that were
23 submitted by Signal Peak Energy and by the
24 Department of Environmental Quality, and to make a
25 determination whether we accept those facts, if

1 anything is in conflict with the findings of fact
2 that we adopted or approved at our last meeting,
3 and then we can have a discussion about the next
4 steps in terms of finalizing our order when we
5 complete that.

6 And then we'll also have a discussion
7 about the request from the Water Policy Interim
8 Committee to get updated on this case. So I'll
9 turn that over to Ben.

10 MR. REED: Thank you, Madam Chair.
11 Madam Chair, before I say too much, I had a
12 conversation with Ms. Reinhart-Levine over some
13 areas of concern she had with the draft findings
14 of fact and conclusions of law that I had
15 circulated; and I would ask her, if she wouldn't
16 mind, to present those to the Board.

17 CHAIRMAN MILES: Do you want to just
18 explain first what you did in terms of the two
19 categories of facts that you outlined, and then
20 we'll listen to what Michele has specifically.

21 MR. REED: Certainly, Madam Chair. As
22 the Board members are probably aware, I circulated
23 a draft of the findings of fact that Signal Peak
24 and the Department of Environmental Quality had
25 presented, and the way in which I thought those

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1 either were supported by the record or were not;
2 and they by and large, to my -- at least
3 superficially were supported by the record, or at
4 least were not in conflict with the record as
5 presented.

6 As the Board is probably aware, I
7 highlighted the two sources from the record for
8 which those findings of fact had their basis, or
9 in which they had their basis, I suppose. And as
10 I say, I'm not sure that I found very many, if
11 any, of the findings of fact that were actually in
12 conflict with the administrative record, whether
13 that is the CHIA or other sources in the record.

14 I then incorporated those two findings
15 of fact as sort of preliminary statements of
16 findings of fact that were presented by Signal
17 Peak Energy and by the Department of Environmental
18 Quality, but that the Board was not adopting, and
19 put those as prefatory statements of findings of
20 fact.

21 I then inserted the findings of fact
22 that had been adopted by the Board, as well as the
23 conclusions of law, and then circulated that to
24 the Board as the draft order.

25 So having said that, Ms. Reinhart-Levine

1 then pointed out that several paragraphs of the
2 conclusions of law that I had left in the draft
3 that I had circulated had been taken out by the
4 Board, which is to say Paragraphs 59 through 63,
5 or 60 through 63, and then made some other
6 corrections.

7 CHAIRMAN MILES: Michele, do you want to
8 address the areas you talked about with Ben?

9 MS. REINHART-LEVINE: Sure, Madam Chair.
10 And I did email you my proposed changes at 11:00,
11 so if some of you have access to your email, you
12 can follow along. I will also read those changes.

13 Madam Chair, do you want to have me make
14 a motion and vote on the changes one by one, or as
15 one whole package?

16 CHAIRMAN MILES: I would think as a
17 package would be sufficient, unless when you're
18 going through them, if anybody has any questions
19 or concerns, please speak up.

20 MS. REINHART-LEVINE: Madam Chair, would
21 you prefer that I make a motion at the beginning
22 or at the end?

23 CHAIRMAN MILES: Let's do it at the
24 beginning.

25 MS. REINHART-LEVINE: Okay. Madam

1 Chair, Members of the Board. I move to adopt the
2 final order with highlights as amended, and I'll
3 go through those amendments now one by one.
4 Starting on Page 3 of the final order document one
5 highlights.

6 CHAIRMAN MILES: Excuse me a minute.
7 Are the other Board members able to open the
8 proposed order with Ms. Reinhart-Levine's changes
9 in them, that 11:00 email that you received?

10 BOARD MEMBER SAYLES-O'CONNOR: Yes.

11 BOARD MEMBER DR. BYRON: Yes, I am able
12 to. I have it in front of me.

13 CHAIRMAN MILES: Thank you. Michele,
14 you can go ahead.

15 MS. REINHART-LEVINE: Starting on Page
16 3, middle paragraph. "The Board met again on
17 October 16th, 2015 to determine whether or not
18 there is sufficient material within these proposed
19 findings of fact and conclusions of law to allow a
20 decision without any further hearing, and whether
21 or possible to rule." I would amend that sentence
22 to say "to rule on the facts in the CHIA and the
23 administrative record."

24 In the third paragraph in that sentence,
25 "Ultimately the Board voted." I would insert the

1 word "to rule on the motion."

2 And the last sentence of that paragraph,
3 "The Board chose to adopt MEIC's proposed findings
4 of fact and conclusions of law with amendments."

5 CHAIRMAN MILES: Okay.

6 BOARD MEMBER REINHART-LEVINE: That is
7 all for my changes on proposed Page 3.

8 CHAIRMAN MILES: Any questions?

9 (No response)

10 CHAIRMAN MILES: Thanks. You can go
11 ahead.

12 BOARD MEMBER REINHART-LEVINE: My next
13 proposed change is on Page 6 to Paragraph 9. That
14 paragraph starts, "MEIC challenges only the legal
15 sufficiency of the CHIA, and the Probable
16 Hydrologic Consequences (PHC) evaluation upon
17 which the CHIA is based, relating to possible
18 impacts due to salinity as measured by natural
19 specific conductance in the Mammoth coal."

20 So that is actually inaccurate, and
21 conflicts with our findings of fact and
22 conclusions of law at Paragraphs 94 to 116, so I
23 would amend our statement to say, "This proposed
24 finding of fact is inaccurate, and is at variance
25 with the Board's conclusions of law. See

1 Paragraphs 94 to 116."

2 The reason for that is MEIC's challenges
3 to the CHIA were much broader than just salinity,
4 but included additional challenges to the
5 narrative and numeric standards as we set those
6 forth in our conclusions. Any questions on
7 Paragraph 9?

8 (No response)

9 BOARD MEMBER REINHART-LEVINE: I would
10 make the same change to the end of Paragraph 9 for
11 the same reason.

12 CHAIRMAN MILES: So that's on Page 7, at
13 the top of Page 7?

14 BOARD MEMBER REINHART-LEVINE: Yes, Page
15 6 and 7.

16 CHAIRMAN MILES: Okay. Thank you. Does
17 anyone disagree with that?

18 (No response)

19 CHAIRMAN MILES: Okay. You can move
20 ahead.

21 MR. TWEETEN: Excuse me. This is Chris
22 Tweeten. Madam Chair, may I interrupt for just a
23 moment?

24 CHAIRMAN MILES: Yes, you may. Please.

25 MR. TWEETEN: I don't seem to have

1 Michele's email from this morning, so I don't have
2 a copy of the document that she's reading from.
3 Could either Hillary or someone forward that email
4 to me?

5 MS. REINHART-LEVINE: Chris, this is
6 Michele. I will resend it to you. Okay. I just
7 sent it to you. Let me know if you receive it.

8 MR. TWEETEN: Okay. Thanks very much.

9 CHAIRMAN MILES: Chris, Michele was
10 working from --

11 BOARD MEMBER TWEETEN: It just came in.

12 CHAIRMAN MILES: She was working from
13 the draft that Ben sent out about a week and a
14 half ago, with the highlights and categorizing the
15 findings either as being contained in the CHIA, or
16 in the record. Thank you. Michele, you can
17 continue. I think we're on --

18 BOARD MEMBER REINHART-LEVINE: Madam
19 Chair, Members of the Board, please go to Page 21.
20 My next proposed change is to Paragraph 67, which
21 is in regards to the collapse of the gate roads,
22 and whether or not that would occur within 50
23 years.

24 We found that finding of fact to be
25 unpersuasive in light of findings of fact and

1 conclusions of law set out below at Paragraph 29
2 and 32, and 126 to 130, which deal with the fact
3 that the gate roads have remained intact and have
4 not collapsed.

5 OPERATOR: Now joining.

6 MR. JARDINE: Chris Jardine.

7 CHAIRMAN MILES: Thank you, Michele.

8 I'm glad you caught that one. I think that that's
9 a good, at least in my opinion, that's a good to
10 describe that, that it was unpersuasive in light
11 of the other findings of fact.

12 BOARD MEMBER REINHART-LEVINE: Madam
13 Chair, Members of the Board, I would make the same
14 change for the same reason to Paragraphs 58, 59,
15 and 60, which all deal with the assumption that
16 the gate roads collapse. Again, the gate roads
17 have not collapsed, and we have found that fact to
18 be unpersuasive. I would just add that to be in
19 light of the findings of fact and conclusions of
20 law set forth below.

21 CHAIRMAN MILES: Okay. Any questions?

22 (No response)

23 CHAIRMAN MILES: Please continue.

24 BOARD MEMBER REINHART-LEVINE: Moving
25 on.

1 CHAIRMAN MILES: It looks like you're on
2 Page 27, is the next area with a notation.

3 BOARD MEMBER REINHART-LEVINE: Yes. I
4 would direct the Board to Page 28, and again this
5 is dealing with mitigation measures. We had
6 discussed that we found mitigation measures to be
7 mitigating material damage. We did not find
8 support for mitigation to minimize material damage
9 to be persuasive.

10 And so at the end of Paragraph 72
11 dealing with mitigation, I would insert the
12 sentence, "The Board found this finding of fact to
13 be unpersuasive in light of the findings of fact
14 and conclusions of law set out below, and see
15 specifically our conclusions of law at Paragraphs
16 135 and 136," which address the mitigation
17 measures.

18 That is also carried over to the top of
19 Page 29, as well as Paragraph 73 which is on Page
20 29 and 30, as well as Page 31. All of those
21 paragraphs deal with mitigation measures which we
22 have found to be unpersuasive, and which we
23 addressed at Paragraphs 135 and 136.

24 CHAIRMAN MILES: Thank you for finding
25 those.

1 BOARD MEMBER REINHART-LEVINE: Paragraph

2 135 basically states, "First, DEQ's mitigation
3 argument repeats the CHIA's misunderstanding of
4 material damage to the hydrologic balance.
5 Replacing water supplies polluted by the mining
6 operation only alleviates harm to existing and
7 anticipated water uses, but it does not prevent
8 violation of water quality standards. It is a
9 violation of water quality standards regardless of
10 the effects on existing and anticipated water use,
11 that is the standard for material damage. See
12 Montana Code Annotated 82-4-203 subpart (31), as
13 well as 227 Part (3)(a), also supra Part C."

14 So Paragraph 136 states, "Second, the
15 proposed mitigation from water from the deep
16 underburden aquifer is illusory, as SPE admitted
17 repeatedly in the record. The Groundwater Model
18 admits that there are multiple physical and legal
19 barriers to the use of the deep underburden
20 aquifer as the source of mitigation water." And
21 there is a cite to the groundwater model.

22 So that is what Paragraph 135 and 136
23 say. Any questions about those pages and
24 paragraphs?

25 CHAIRMAN MILES: I'm not finding that in

1 this hard copy, Ben. I don't have a Paragraph
2 135.

3 UNKNOWN SPEAKER: Madam Chair, nor do I
4 have page numbers on mine, so it's very difficult
5 to follow.

6 CHAIRMAN MILES: I've got consistent
7 page numbers, but it goes from -- this is under
8 our conclusions. It goes 131, 132, 133, and then
9 it jumps to 138.

10 MR. REED: (Provides document)

11 CHAIRMAN MILES: You crossed that out.

12 MR. REED: This is the one that I sent
13 around initially. In the one that Ms.
14 Reinhart-Levine sent out just now, it has been
15 reassigned 132.

16 BOARD MEMBER REINHART-LEVINE: I
17 apologize. It should be 132.

18 CHAIRMAN MILES: You might check that,
19 131 and 132, in wherever you're referencing those
20 particular conclusions.

21 BOARD MEMBER REINHART-LEVINE: Correct.
22 So that should then be revised to 130 to 132. So
23 we'll need to make that change.

24 CHAIRMAN MILES: On all of these
25 sections where you refer to our conclusions?

1 BOARD MEMBER REINHART-LEVINE: Correct.

2 CHAIRMAN MILES: Do you have that, Ben?
3 Okay. So whenever it says, "The proposed finding
4 of fact is inaccurate and is at variance with the
5 Board's conclusion of law, see paragraphs," it
6 will now read one --

7 BOARD MEMBER REINHART-LEVINE: 130 to
8 132. Good catch.

9 CHAIRMAN MILES: 130 to 132. So that
10 takes us through, as I understand it, through the
11 Department's findings, and now we move into the
12 proposed findings that were submitted by Signal
13 Peak Energy; is that correct?

14 BOARD MEMBER REINHART-LEVINE: That is
15 correct.

16 CHAIRMAN MILES: That starts on Page 31
17 of the proposed order.

18 BOARD MEMBER REINHART-LEVINE: Next go
19 to Page 35. This is starting with Paragraph 10,
20 which states, "The groundwater model predicts the
21 particles of mineralized gob water are unlikely to
22 migrate from mine areas and cross the permit
23 boundary within a period of 50 years after mining
24 ceases, assuming the gate roads collapse. This is
25 taken from the contents of the CHIA, which is part

1 of the administrative record, and as such speaks
2 for itself."

3 However, I would insert the sentence,
4 "The Board found this finding of fact to be
5 unpersuasive in light of the findings of fact and
6 conclusions of law set out below. See Paragraphs
7 29 and 32," which deal with the fact that the gate
8 roads have not collapsed, and that they may not
9 collapse, and that assumption is faulty.

10 Paragraph 29 says, "The groundwater
11 model explained the significance of whether the
12 gate roads collapse. In the event that the gate
13 roads remain intact, they will serve as long term
14 sinks. The gate roads would then convey
15 groundwater northward where it would 'pool' in the
16 northern portions of the mine. On the other hand,
17 if the gate roads collapse, the fragmentation zone
18 would be more uniform, the groundwater flow would
19 be more uniform, and the tendency to pool would be
20 less significant as well. Presently the gate
21 roads are remaining intact. However, this does
22 not necessarily confirm that they will remain
23 intact in the future."

24 Paragraph 30 states, "Both DEQ and SPE
25 stated that it is uncertain whether the gate roads

1 would collapse. DEQ wrote; After the conclusion
2 of mining, the gate roads may remain intact or may
3 collapse, thus each scenario was tested using the
4 groundwater model.' CHIA at 10-2."

5 "SPE wrote, 'It may well be that some
6 gate roads remain intact, yet others collapse into
7 the future. It is also possible that the gate
8 roads collapsing will occur gradually over time.'

9 PHC at 314-5-54, ID. at 314-5-64, (noting
10 possibility that 'gate road integrity [may]
11 persist far into the future after the Amendment 3
12 mining ceases'). 'Presently the mine roads have
13 tended to remain intact.'

14 So for those reasons, the Board
15 disagreed with the assumption that the gate roads
16 would collapse, and that is why I would insert the
17 statement, "The Board found this finding of fact
18 --" again, this is regarding gate road collapse --
19 "to be unpersuasive in light of the findings of
20 fact and conclusions of law set forth below."

21 CHAIRMAN MILES: Are those paragraphs
22 numbers correct?

23 BOARD MEMBER REINHART-LEVINE: The
24 conclusions of law would be at 126 to 130. I
25 believe those will be thrown off since we have

1 deleted Paragraphs 60, 61, and so forth. So I'll
2 need to check.

3 CHAIRMAN MILES: Excuse me a minute.
4 This proposed change, Ben, is not in the hard copy
5 that you gave me, but it is in the email that
6 Michele sent, so would you make sure you check on
7 No. 10 on Page 35.

8 MR. REED: Yes, Madam Chair.

9 BOARD MEMBER REINHART-LEVINE: Ben,
10 would like me to try to do that now?

11 MR. REED: Madam Chair, Ms.
12 Reinhart-Levine. This is primarily an
13 administrative matter, and so I can simply get the
14 rest of this done this afternoon, and send it to
15 you by close of business.

16 BOARD MEMBER REINHART-LEVINE: It looks
17 like 126 has become 122, and 130 is now 126. So
18 it would be 122 to 126. So I will save those for
19 you, Ben.

20 CHAIRMAN MILES: So he'll make sure
21 those numbers are consistent. Is that the sum of
22 the changes that you had proposed for the draft
23 that Ben sent out?

24 BOARD MEMBER REINHART-LEVINE: Let me
25 check. I'm still slowly going through the

1 document.

2 So I would make the same change to
3 Paragraph 11 for the same reasons regarding the
4 assumption of the gate roads collapsing.

5 Then my next proposed change appears on
6 Page 56 regarding our conclusions of law.

7 CHAIRMAN MILES: Let me just bring
8 everyone up to speed then. We're on Page 36. The
9 findings of fact that we adopted start on Page 36,
10 and I think those are consistent with what we did
11 at our last meeting. And you are on what page
12 now, Michele?

13 BOARD MEMBER REINHART-LEVINE: 56.

14 CHAIRMAN MILES: That's the beginning of
15 the conclusions of law.

16 BOARD MEMBER REINHART-LEVINE: Correct,
17 Madam Chair.

18 I would insert a paragraph stating,
19 "Having adopted the findings of fact set out
20 above, the Board makes the following conclusions
21 of law based on the rationale set out in the
22 transcript of proceedings before it on December
23 4th, 2015, a copy of which is attached hereto as
24 Exhibit 8, and which is incorporated herein by
25 reference."

1 So then this would be a guidepost to the
2 parties; and if this is to proceed to further
3 litigation, a guidepost to the Courts to look to
4 our transcript for our further rationale for why
5 we made the decisions we did regarding the
6 conclusions of law, and why we chose to adopt them
7 or not.

8 CHAIRMAN MILES: Okay. Any questions?

9 (No response)

10 CHAIRMAN MILES: Then it looks like on
11 Page 56 we have deleted Nos. Paragraph 60, 61, 62,
12 and 63. I think Ben did that.

13 BOARD MEMBER REINHART-LEVINE: At our
14 December 4th meeting, we decided that it was an
15 inaccurate statement to say that this was not a
16 contested case proceeding, and so we suggested
17 that Paragraph 62 be deleted.

18 And we also have already stated in
19 Paragraph 59 that the parties agreed that there
20 were no general issues of material fact, making
21 some of the other paragraphs unnecessary.

22 So for those reasons, Paragraphs 60
23 through 63 are recommended to be stricken.

24 CHAIRMAN MILES: Then that's resulting
25 in the renumbering of all of the other

1 conclusions.

2 BOARD MEMBER REINHART-LEVINE: Correct.

3 CHAIRMAN MILES: Are there any other
4 changes?

5 (No response)

6 CHAIRMAN MILES: I think what we should
7 do now is just have -- Our vote today is not a
8 final order. So I would like Ben to just discuss
9 what's in here at this point, the language that
10 you've included in here right now. And maybe we
11 just today adopt everything up until the final
12 order, because we are waiting to hear from the
13 parties on that prior to January 14th; is that
14 correct?

15 MR. REED: Yes, Madam Chair, it is. The
16 parties, as was discussed on December 4th, are
17 currently trying to come to some agreement. My
18 understanding, from a relatively brief amount of
19 correspondence that I had with the parties
20 yesterday, is that Signal Peak Energy and DEQ have
21 proposed a solution to the problem, let's say, to
22 MEIC, and MEIC is going to be making a counter
23 offer at some point this week, and will get back
24 to the parties.

25 Mr. Wade and Mr. David are here. I

1 think that's an accurate representation of the
2 current situation; is that correct?

3 MR. WADE: This is Steve Wade, here on
4 behalf of Signal Peak Energy. We put together a
5 proposed stipulation or agreement and sent it out.
6 We're waiting to hear back. I think that time
7 frame is right. I think Shiloh said this week.

8 BOARD MEMBER REINHART-LEVINE: Madam
9 Chair, I'm having trouble hearing Mr. Wade.

10 CHAIRMAN MILES: He was basically just
11 reaffirming I think what Ben said, that there is a
12 proposal being circulated, and Mr. Hernandez has
13 that right now, and will be getting back to the
14 parties. So we know that that is still taking
15 place in terms of the final remedy. So I think it
16 would be appropriate at this point for us to adopt
17 the proposal in front of us with the changes made
18 by Ms. Reinhart-Levine, the findings of fact and
19 conclusions of law, and we will not act on the
20 final order at this point, but we'll adopt
21 everything else so that part of it is ready. Does
22 that make sense?

23 MR. REED: Madam Chair, I'm not sure
24 exactly where we are procedurally, but I believe
25 that Ms. Reinhart-Levine made a motion, and I'm

1 not sure that that has --

2 CHAIRMAN MILES: Specified that.

3 MR. REED: I don't know where that
4 motion is as far as being passed, or whether there
5 are amendments to that motion, whether other
6 people have spotted deficiencies in the existing
7 document or anything else.

8 CHAIRMAN MILES: Would you repeat your
9 motion, Ms. Reinhart-Levine.

10 BOARD MEMBER REINHART-LEVINE: Madam
11 Chair, I move that the Board adopt the final order
12 with highlights as -- with amendments as proposed
13 on today's call.

14 CHAIRMAN MILES: I'm still having
15 trouble with the language "the final order,"
16 because we don't have the actual last page of the
17 order ready.

18 BOARD MEMBER REINHART-LEVINE: Madam
19 Chair, I move that the Board adopt the -- do you
20 want it to be adoption of a draft order?

21 CHAIRMAN MILES: I would suggest you say
22 the findings of fact and conclusions of law with
23 the changes --

24 BOARD MEMBER REINHART-LEVINE: As
25 amended?

1 CHAIRMAN MILES: Yes.

2 BOARD MEMBER REINHART-LEVINE: Madam
3 Chair, I move that the Board adopt the findings of
4 fact and conclusions of law as amended on today's
5 call, and that the Board hold off on adopting a
6 final order pending negotiations between the
7 parties.

8 CHAIRMAN MILES: I'm going to consider
9 that a --

10 MR. SAYLES O'CONNOR: I would second
11 that motion.

12 CHAIRMAN MILES: I was going to say I
13 consider that a substitution motion. Is there any
14 further discussion on the motion that is on the
15 floor?

16 MR. TWEETEN: Madam Chair, this is Chris
17 Tweeten. I have one.

18 In looking at the changes that are
19 before the Board, let me say first of all, I think
20 Ms. Reinhart-Levine has done a tremendous job of
21 going through what Ben has prepared, and giving us
22 a document that we can work with in fairly
23 expedited fashion, but I do have one proposed
24 addition to the amendments that are in front of
25 the Board right now that's Ben's draft, and I'm

1 just finalizing it right now. It is not really a
2 matter of tremendous substance, but I do think
3 that it tends to strengthen what's in front of us.

4 I'm looking at Page 56 of the document I
5 have, but anyway, it is conclusion of law
6 Paragraph 67 I think, under Standard of Review.

7 CHAIRMAN MILES: Just a second, please,
8 because some of these numbers changed.

9 MR. TWEETEN: I noticed that my page
10 numbers that I'm looking at are a page or two off
11 one way or the other from the ones that you all
12 have been referring to, so I can't account for
13 that, but it seems to be the case anyway. It is
14 Paragraph 67 in any event.

15 CHAIRMAN MILES: Then in the revised one
16 it would be Paragraph 63, for people. "Summary
17 judgment is proper;" is that the paragraph?

18 MR. TWEETEN: Correct. The addition
19 that I would make is simply to note that the
20 Montana Supreme Court has approved the use of
21 summary judgment procedures in contested cases
22 under MAPA, and there is a case that so holds, and
23 I think it is useful to put that in for the
24 guidance of any Court that might be reviewing it
25 that may not be familiar with Montana

1 Administrative Law.

2 Under the new venue rules, as I
3 understand it, if a challenge were brought to this
4 it could be brought in Musselshell County, and
5 with all respect to the Courts there, they don't
6 handle nearly as much administrative law
7 litigation as some of the other districts in
8 Montana, and might be useful for the Judges over
9 there to understand that we thought about the
10 question of applying summary judgment in contested
11 cases, and that the Montana Supreme Court has said
12 it's okay.

13 So what I've done is I've just drafted
14 one sentence which I'll slowly read into the
15 record.

16 CHAIRMAN MILES: And this would be to
17 continue after the citation of the Montana Rules
18 of Civil Procedure in Paragraph 63?

19 MR. TWEETEN: Correct, and the sentence
20 would say, "Summary judgment procedures may be
21 used in contested cases under MAPA when the case
22 satisfies the requirements of Mont.R.Civ.P.56.
23 And then the citation is In re: Peila, and that's
24 249 Mont. 272, 280, 815 P.2d 139, 144-45 (1991).

25 So can we deem the motion amended to

1 include the addition of that sentence in the
2 appropriate place?

3 BOARD MEMBER REINHART-LEVINE: Madam
4 Chair, I second Mr. Tweeten's proposed amendment.

5 CHAIRMAN MILES: So we'll include that
6 in the document that your motion now would seek to
7 approve.

8 MR. TWEETEN: Thank you, Madam Chair.

9 CHAIRMAN MILES: Any further comment or
10 discussion?

11 (No response)

12 CHAIRMAN MILES: So the vote is to
13 accept the findings of fact and conclusions of law
14 as included and revised in the document that is
15 before us today, and without a final order. All
16 in favor, please say aye.

17 (Response)

18 CHAIRMAN MILES: Anyone opposed?

19 (No response)

20 CHAIRMAN MILES: Hearing none, the
21 motion passes unanimously. Thank you. I second
22 the thanks to Ms. Reinhart-Levine for all of the
23 work that you did going through these. I had
24 questions about some of them, but I thought that
25 the language Ben had come up with perhaps would

1 suffice, but I think you did much a better job of
2 pointing out the few areas that we really felt
3 that the record didn't support those statements.

4 So we now have a document. We're close.
5 We have all of our findings of fact and
6 conclusions of law; we've addressed all the
7 findings of the parties who did not prevail; and
8 we will commence to issue a final order once we
9 hear from the parties on a proposed remedy no
10 later than January 14th.

11 Do we need to set a conference call for
12 that date? I think we do. Are people available
13 for a short conference call that morning?

14 MR. SAYLES O'CONNOR: Yes, I'll be
15 available. This is Roy O'Connor.

16 DR. BYRON: Dr. Byron.

17 CHAIRMAN MILES: So I'll ask someone
18 from the Department to help us set that up. A
19 time?

20 BOARD MEMBER REINHART-LEVINE: Madam
21 Chair, this is Michele, and I am unavailable on
22 the 13th through the 15th. I am available on the
23 12th after 11:30.

24 CHAIRMAN MILES: That's okay with me.
25 How about others on the 12th, the afternoon of the

1 12th?

2 MR. SAYLES O'CONNOR: This is Roy. It's
3 okay with me.

4 MR. TWEETEN: Madam Chair, this is
5 Chris. Will we have heard back from the parties
6 regarding their discussions by the 12th? I think
7 we gave them until the 14th, didn't we?

8 CHAIRMAN MILES: I thought we originally
9 said the 7th, and that we knew that we needed to
10 have a final order issued by the 14th, but I
11 believe the date we had put out was the 7th.

12 MR. TWEETEN: Okay. Great. Then never
13 mind.

14 BOARD MEMBER SAYLES-O'CONNOR: Madam
15 Chair, I would make it if it was early afternoon,
16 but not after about 3:00.

17 CHAIRMAN MILES: How about if we try to
18 do 1:00 January 12th. What day of the week is
19 that?

20 BOARD MEMBER SALES O'CONNOR: Tuesday.

21 CHAIRMAN MILES: Tuesday, January 12th,
22 at 1:00 p.m. That works at least for me. I'm
23 assuming that right after the 7th we'll be able to
24 circulate draft language, so hopefully that could
25 be a fairly quick phone call.

1 The two other -- I guess that was the
2 first item, was to decide on when we will
3 reconvene to come up with the final language for
4 the final part of the order for the remedy, so
5 we'll be doing that on January 12th.

6 The other item was the letter that we
7 circulated. We did receive a request from the
8 Legislative Water Policy Interim Committee to
9 appear before the committee on January 12th --
10 interesting. That's why that date was ringing a
11 bell -- to discuss this case.

12 And I contacted Ben when I received that
13 request. My initial reaction was very similar to
14 Ms. Reinhart-Levine, her comments, that we should
15 not be appearing before a legislative committee
16 and discussing this while the matter is still
17 pending, that we did not have a final order
18 issued.

19 After I visited with Ben, we realized
20 that the legislative committee -- The Board is an
21 entity of State government of the Executive
22 Branch, and the Legislature does have purview to
23 ask for an update. So Ben had offered to go and
24 basically just discuss procedurally what's going
25 on. I think the thought now is -- well, I'll let

1 Ms. Reinhart-Levine speak to it, but it is the
2 same thought that was my initial reaction, was
3 that we should probably not have anyone there
4 discussing it until we have issued a final order.
5 Do you want to comment, Michele, on your
6 statements and your proposal?

7 BOARD MEMBER REINHART-LEVINE: Sure,
8 Madam Chair. In a contested case, we're acting in
9 a quasi-judicial capacity. Just as Judges do not
10 comment on judicial decisions, and especially
11 before they are issued, I think that it is
12 inappropriate for the Board or its representative
13 to be commenting on its quasi-judicial decision in
14 this contested case matter, especially before the
15 final order is finalized, and because this matter
16 could be further litigated, and any comment could
17 compound litigation.

18 CHAIRMAN MILES: Discussion?

19 MR. TWEETEN: Madam Chair, this is
20 Chris. May I just embellish that just a little
21 bit? I agree with Michele entirely, and also with
22 Madam Chair's comments as well, but I'd go a
23 little bit farther than that.

24 My concern extends to making sort of
25 collateral explanations of what's in our written

1 order pretty much at any time, even after the
2 final order issues. The order speaks for itself,
3 and contains the Board's reasoning. And I would
4 be reluctant I guess to appear in a public forum,
5 or in any forum for that matter, and embellish on
6 what's in the final order in response to questions
7 from the members of the committee.

8 I think our response to those questions
9 should be that the order constitutes the BER's
10 analysis of the questions presented in this case,
11 and in issuing that order, we didn't believe any
12 further explanation was required. Certainly the
13 parties haven't demanded any other further
14 explanation at this point.

15 So we ought to just refer them to the
16 order, and I think we can explain what the
17 procedures might be going forward and so forth, if
18 members of the committee are curious about that.
19 But if the parties themselves want to be present
20 at the committee meeting, and talk about the
21 order, and talk about the evidence that was
22 introduced, they're certainly free to do so; but I
23 don't think it is appropriate for a quasi-judicial
24 board, as Michele has described it, to go making
25 statements about this case beyond what we put in

1 our written orders.

2 So I just wanted to put that out for the
3 record, and for discussion by the members of the
4 Board if there is any.

5 CHAIRMAN MILES: Thanks for those
6 comments. I know ostensibly part of the request
7 from the legislative committee was to understand I
8 think the process, but to also to understand the
9 whole permitting process, and we should recommend
10 to them that they need to contact the Department
11 for that to speak to exactly what a permitting
12 process involves.

13 I would suggest an additional sentence
14 in the letter that Ben sent out this morning for
15 review which respectfully declines the invitation
16 to discuss it at their meeting on June 12th,
17 basically because the final order will not be
18 completed. And I would just add a sentence at the
19 end of the letter that says we could provide the
20 committee with a full copy of the final order when
21 that is issued, and that will include all of our
22 reasoning, our rationale, and our conclusions, and
23 just let the committee know we can provide them
24 with that information. Does that make sense?

25 MR. TWEETEN: Madam Chair, this is Chris

1 again. Correct me if I'm wrong, but I think the
2 draft order that we just adopted would be a public
3 document as well, would it not?

4 CHAIRMAN MILES: Yes.

5 MR. TWEETEN: And we could certainly
6 provide that to the committee as well. But
7 anybody on this call or in the room would be able
8 to have access to a copy of that since we
9 discussed it at the meeting. We could provide
10 that.

11 CHAIRMAN MILES: That could go with the
12 letter, but it is not a final order yet, so I
13 don't want the committee to think that that's the
14 final order. There is no discussion at the end of
15 it as to what the remedy is.

16 MR. TWEETEN: That's why I think we
17 should stamp "draft" all over it, just so it's
18 clear that it is not final, and maybe put in
19 writing at the heading of it, "This is not a final
20 order, and further consideration is required
21 regarding the contents of this order, and this is
22 just a draft that's been approved by the Board to
23 date, but the final order will be different from
24 this," or some language to that effect. Make it
25 as clear as we possibly can that this is not final

1 at this stage.

2 CHAIRMAN MILES: So Ben can revise that
3 letter, and I guess include what we have so far,
4 and we will decline to discuss it on January 12th.
5 We may have a final order by that afternoon, but
6 that's in conflict with -- I think they were
7 requesting us to come in the morning. Is everyone
8 in agreement with that?

9 (Affirmative response)

10 CHAIRMAN MILES: We'll take care of that
11 then, Ben. Have you sent the first letter to the
12 committee?

13 MR. REED: Yes.

14 CHAIRMAN MILES: So Ben will prepare
15 that letter, and he can send out a copy of that to
16 each of us so we have record of that.

17 Is there any other business to come
18 before the Board? I do want to open it for public
19 comment before we adjourn, but is there any other
20 business to come before the Board?

21 (No response)

22 CHAIRMAN MILES: Hearing none, is there
23 any comment from members of the public and the
24 Department?

25 (No response)

1 CHAIRMAN MILES: Thank you. I
2 appreciate again the work Ben has done, and the
3 work that Ms. Reinhart-Levine did on some of those
4 specific findings that were some troublesome
5 statements, and we will reconvene on January 12th
6 at 1:00. Meeting adjourned.

7 (The proceedings were concluded

8 at 11:54 a.m.)

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 38 - pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal
this _____ day of _____, 2016.

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

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