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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF:) CASE NO.
APPEAL AMENDMENT AM4) BER 2016-03SM
WESTERN ENERGY COMPANY)
ROSEBUD STRIP MINE AREA B,)
PERMIT NO. C1984033B)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
November 15, 2016
10:00 a.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS CHRIS TWEETEN, DR. ROBERT BYRON,
ROY O'CONNOR, MICHELE REINHART-LEVINE;
and HEARINGS EXAMINER BEN REED.

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

A P P E A R A N C E S

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN MILES: Good morning,
5 everybody. Thank you for being here. This is a
6 special hearing in the matter of BER 2016-03SM,
7 Appeal Amendment AM4, Western Energy Company,
8 Rosebud Strip Mine Area B, Permit No. C1984003B.

9 A few preliminaries today. I will ask
10 whoever provided all these to just let us know
11 what's in here. I think it is the Department. If
12 you'd let us what's in here. Is there anything
13 different from what we would have already had
14 access to on the website? Do you want to do that
15 right now, and then we'll start. Anyone speaking,
16 please identify yourself.

17 MS. CONVERY: Madam Chair, members of
18 the Board. My name is Becky Convery, and I
19 represent the Department in this matter. The
20 white binder in front of you is a binder provided
21 by the Department. It includes in the front
22 portion a copy of the overhead slides that I will
23 be presenting today. The second inclusion in the
24 document is a copy of our Supplemental Statement
25 of Undisputed Facts which was provided last week,

1 I believe.

2 And then subsequent to that, we have
3 included, to the best of our ability, the
4 excerpted copies of the Department's exhibits that
5 are referenced in the Supplemental Statement of
6 Disputed Facts. We have not replicated
7 Petitioner's exhibits in that document, nor have
8 we replicated Western Energy's exhibits. It was
9 our understanding that they would be providing
10 them themselves, so rather than provide triplicate
11 copies, we only provided copies of our exhibits.

12 CHAIRMAN MILES: And the black book, or
13 did you already get to that?

14 MR. MARTIN: No, that is from Western
15 Energy. My name is John Martin, and I represent
16 the Defendant Intervenors in this case.

17 The binder that we have provided
18 includes excerpts from Petitioners, excerpts from
19 DEQ, and excerpts from the Defendant Intervenors.
20 I didn't include every one of them, but we did
21 include nearly all of them, and the exceptions of
22 course are the ones that are voluminous -- the
23 CHIA, the PHC, those sorts of things. And the
24 second dollop of documents is just the overhead
25 slides that I'll be using today.

1 CHAIRMAN MILES: Thank you, and it is
2 helpful to have some of those things in hard copy.
3 I know I've already printed off a lot of it, or
4 Hillary printed it off for me. So it is helpful
5 if we need to mark things up.

6 I think the second thing I'd like to ask
7 is to have all of the attorneys who are up front
8 here identify themselves for the record ahead of
9 time, so we have you on record, and know what to
10 expect. Becky, do you want to start.

11 MS. CONVERY: Absolutely. Madam Chair,
12 members of the Board, again, my name is Becky
13 Convery, and I represent the Department in this
14 matter.

15 MR. MARTIN: Madam Chair, members of the
16 Board, my name is John Martin, and I have the
17 privilege of representing Western Energy Company,
18 Local 400 of the International Union of Operating
19 Engineers, the Northern Cheyenne Coal Miners
20 Association, and Natural Resource Partners.

21 MR. LEFF: Madam Chair, members of the
22 Board, my name is Daniel Leff. I also represent
23 the Respondent Intervenors in this matter.

24 MR. HERNANDEZ: Madam Chair, members of
25 the Board, Shiloh Hernandez for the Petitioners

1 Montana Environmental Information Center and the
2 Sierra Club.

3 MR. JOHNSON: Madam Chair, members of
4 the Board, my name is Derf Johnson. I'm here
5 representing the Petitioners.

6 CHAIRMAN MILES: Thank you. What I'd
7 like to do today -- and again, respecting the time
8 so that we are out of here or conclude our work by
9 1:00, that's what we've asked people to set aside
10 -- we will have each of the parties present their
11 arguments. We would like to keep that to fifteen
12 minutes, please. I'm very serious about that.
13 And then there will be an opportunity for
14 everybody to rebut, probably for about ten
15 minutes, and then we do want to open it up so we
16 have time for questions, discussion, and an
17 opportunity for all of you to respond in that
18 case.

19 But we would prefer, I think to ensure
20 that we can focus on the issues that we need to
21 focus on in this, and so keep your arguments very
22 direct, very concise, very on point.

23 We have couple of issues of law that are
24 the focus of this discussion, and I would ask that
25 that is what we focus on, and that material facts,

1 whether undisputed or disputed, be relevant, and
2 be on point to that discussion, and have direct
3 bearing on those issues we're looking at. There
4 is a lot of material here. We've been given over
5 500 pages in briefs; and the discussion about
6 undisputed facts; we've also got all of this
7 information that I know we've looked at or parts
8 of it, some of the exhibits. So let's stay on
9 point today with direct bearing on the issue in
10 hand for this summary judgment motion.

11 With that, I think we start with Mr.
12 Hernandez. Is there anybody on the Board that has
13 any comments to add?

14 MR. REED: Madam Chair, Ben Reed. I
15 would advise the parties that I'll give you a
16 little bit of a high sign -- I wanted to have a
17 bell, but they wouldn't let me -- when you have
18 two minutes left to go. And we do have someone
19 burly with a fairly large hook who will haul you
20 off at fifteen minutes, so conduct yourselves
21 accordingly, please.

22 MR. HERNANDEZ: Madam Chair, Honorable
23 Members of the Board, Shiloh Hernandez for
24 Petitioners.

25 Here MEIC challenges the Department's

1 approval of the AM4 amendment to Area B of the
2 massive Rosebud Strip Mine. As demonstrated in
3 our briefing, the Department's Cumulative
4 Hydrologic Impact Assessment was flawed in
5 multiple respects, and we are entitled to summary
6 judgment as a matter of law. This morning I would
7 like to address three issues on which we're most
8 clearly entitled to summary judgment.

9 First, Issue 1 in our reply brief is the
10 Department's irrational determination that East
11 Fork Armells Creek meets water quality standards
12 for aquatic life; second is the Department's use
13 of a legally incorrect definition of anticipated
14 mining; and third is the Department's complete
15 failure to assess numeric water quality standards
16 for nitrogen to protect aquatic life.

17 Before jumping into these specific
18 arguments, I'd like to take a step back and have a
19 broader look at the regulatory failure that
20 occurred here.

21 The Department's Coal Program has
22 repeatedly and intentionally closed its eyes to
23 inconvenient facts and inconvenient laws in order
24 to assure issuance of this permit. By so doing,
25 the Coal Program undermined the precautionary

1 principle of the governing strip mining laws, and
2 effectively deemed East Fork Armells Creek a
3 sacrifice area for the coal industry. This
4 failure is apparent in the first issue, the Coal
5 Program's intentional and inconsistent assessment
6 of impacts to water quality standards in the East
7 Fork Armells Creek.

8 In short, the CHIA concluded that a
9 survey of East Fork Armells Creek conducted by
10 WECO's consultants -- this is on CHIA Page 9-8 --
11 "demonstrated that a diverse community of
12 macroinvertebrates --" water bugs -- "was using
13 the creek, and therefore the creek meets narrative
14 water quality standards for aquatic life." They
15 based this determination on a survey.

16 Here is the problem. The Coal Program
17 intentionally designed this survey so that it
18 would not actually assess aquatic life health, and
19 they admit to that in the Department's Exhibit E
20 at Paragraph 33.

21 And WECO itself acknowledges that the
22 survey didn't actually comply with the
23 Department's own protocols for assessing water
24 quality health. That is in their Exhibit 10 at
25 Paragraphs 38 to 41. Consequently this survey on

1 which they relied did not follow the Department's
2 protocols for assessing aquatic life health, or
3 assessing compliance with water quality standards.

4 Here is what happens. Here is what
5 happened. It is clear, and it was clear from the
6 beginning of this application process, that East
7 Fork Armells Creek is in bad shape. The
8 Department's Water Protection Bureau determined in
9 2006 that the upper and lower segments of this
10 creek are not meeting water quality standards, and
11 that's important because that's material damage
12 under the strip mining laws. That's in our
13 Exhibit 6 and 7.

14 Fast forward to 2014 and the permit
15 application process. The Coal Program's
16 scientists were reviewing the application, and
17 they identified increased pollution in the creek
18 that was in some cases exceeding a threshold for
19 harm to aquatic life, so they saw the pollution
20 levels rising. This was a red flag, again because
21 violation of water quality standards is material
22 damage. And there was some discussion between
23 WECO and the Department about the Department's
24 concern that there was material damage in the
25 creek. That's our Exhibit 9. It's a memo from a

1 conference call by WECO.

2 So the Department asks WECO to actually
3 conduct a survey of aquatic life in the creek to
4 see if it's being harmed by this increased
5 pollution. WECO worries -- and this is in their
6 internal notes -- they say, "Are we setting
7 ourselves up for disaster if we actually look at
8 aquatic life in the creek?" And they say, "Do we
9 have a leg to stand on if we refuse to actually
10 analyze aquatic life in the creek?" And they did
11 refuse. They said, "We don't want to do this
12 survey. We don't think it would help."

13 The Department to its credit insisted on
14 the survey, but in an apparent nod to WECO's
15 concerns, they assured that the survey would be a
16 sham. They intentionally instructed their aquatic
17 life expert to tell WECO's consultant who was
18 going to conduct the survey how to do a survey,
19 but intentionally told him not to tell them how to
20 analyze the result to actually assess aquatic life
21 health. And that is again in DEQ's Exhibit E
22 Paragraph 33. They specifically said, "Don't tell
23 them how to look at the results and interpret them
24 to tell whether or not the creek is trashed."

25 Consistent with these instructions,

1 WECO's aquatic life survey collected benthic
2 macroinvertebrates -- water bugs -- but it did not
3 -- there is no question about this -- it did not
4 follow the Department's protocol for using this
5 collection of bugs to determine whether or not the
6 creek was healthy, and whether or not it was
7 complying with the water quality standards. This
8 is WECO's Exhibit 10, Paragraphs 38 to 41.

9 It was irrational for the Coal Program
10 to use this incomplete survey that deviated from
11 the Department's own established protocols to
12 conclude that the creek -- quote, unquote --
13 "currently meets narrative standards for providing
14 beneficial use of aquatic life," and consequently
15 that the mine will not cause material damage.

16 The Department raises a couple of post
17 hoc arguments in opposition to this issue, but
18 they both actually cut against the Department, and
19 demonstrate how irrational the CHIA was.

20 First, the Department contends in its
21 supplemental statement of disputed facts at
22 Paragraph 78 that it designed the survey, this
23 survey that they relied on, not to consider
24 aquatic life health -- they say, "Don't consider
25 aquatic life health because the Department does

1 not believe --" quote, "-- the health of aquatic
2 life in eastern Montana streams can be determined
3 by a macroinvertebrate study alone."

4 The argument undermines the CHIA because
5 the CHIA says the opposite. At Page 9-8 in the
6 CHIA, they say that this incomplete inadequate
7 survey -- quote, unquote -- "demonstrates that the
8 creek meets water quality standards for aquatic
9 life." So even though the Department now says you
10 can't tell anything from an aquatic life survey,
11 or at least you can't make a complete
12 determination, that's just what the CHIA did. It
13 took this incomplete, insufficient survey, and
14 said because of it, the creek meets water quality
15 standards.

16 Second, the Department says it didn't
17 have to follow its protocols in doing this survey,
18 WECO didn't have to follow the protocols, because
19 it wasn't assessing compliance with water quality
20 standards. It was just making material damage
21 determination under the strip mining laws.

22 This argument again fails because the
23 CHIA says the opposite. The CHIA says we use the
24 survey -- and this is on Page 9-8 of the CHIA --
25 to determine that the creek meets water quality

1 standards. So they were making a determination of
2 compliance with the water quality standards in the
3 CHIA, and contrary to the Department's argument,
4 the law requires this, because by law -- This is
5 Montana Code Annotated 82-4-203 sub (31) -- the
6 definition of material damage includes violation
7 of water quality standards.

8 So they have to assess compliance with
9 water quality standards to determine if there is
10 going to be material damage. That's the question
11 that they have to answer in approving a mine.

12 WECO takes a different tack. They say,
13 "We actually did comply with the Department's
14 protocols for assessing aquatic life health."
15 This argument fails because not only does the
16 Department disagree, but WECO's own expert
17 disagrees. In their Exhibit 10, the consultant
18 who conducted the survey, Penny Hunter, she says,
19 "I did the survey, and it followed the protocol
20 for collecting the bugs, but I didn't actually
21 then apply the indexes that tell us whether this
22 collection of bugs indicates a healthy creek or
23 not."

24 She says she did one, but one clearly
25 isn't a complete protocol. There are a number of

1 different indexes that have to be applied, and
2 then an interpretive result has to come out. She
3 didn't do that.

4 Parenthetically, the one index that she
5 did apply and said that the creek was in poor to
6 fairly poor conditions, or to very poor
7 conditions, that's Paragraph 41 of Exhibit 10 of
8 WECO/Penny Hunter's discussion.

9 So in sum, they use this survey that
10 unquestionably didn't follow the protocols for
11 determining aquatic life health to say that the
12 creek was healthy. It doesn't make any sense at
13 all, it is an irrational determination, and MEIC
14 is entitled to summary judgment on this issue.

15 The second issue I'd like to address is
16 the Coal Program intentionally changed the law in
17 issuing the permit. They're supposed to assess
18 anticipated mining, and anticipated mining is
19 defined as all mining operations with pending
20 applications. So even though it is not approved,
21 they still have to consider it.

22 In the record -- and this is Exhibits
23 17, 19, 24, and 27. We pointed them out -- the
24 Department analyzing the permit, they said, "We're
25 going to redefine anticipated mining to only

1 include all permitted operations, rather than all
2 anticipated operations," and therefore WECO
3 exclude various applications that are just
4 pending. This was clearly wrong as a matter of
5 law.

6 The CHIA carried forward this unlawful
7 definition of anticipated mining at Page 5-1, and
8 consequently they entirely ignored the massive
9 Area F expansion, among others in their CHIA.
10 They're supposed to analyze this, and the
11 requirement to analyze it is Montana ARM 17-24-314
12 Subsection (5). It says, "When you have your
13 Cumulative Impacts Area --" they have to draw this
14 area of what cumulative impacts are going to occur
15 -- then they have to assess all anticipated
16 mining, impacts of all anticipated mining within
17 that area.

18 There is no question that portions of
19 Area F are in this area. The Department has
20 admitted it conclusively. They just didn't
21 consider it. MEIC is entitled to summary judgment
22 on this claim as well.

23 The Department counters. They say,
24 "Well, we didn't have to consider Area F because
25 Area F is over here, and Area B is over here, and

1 nary the twain shall meet." The problem with this
2 argument is, one, it's an improper post hoc
3 rationalization. It appears nowhere in the CHIA.
4 Second, it conflicts with the CHIA because the
5 CHIA actually draws this Cumulative Impact Area
6 that includes part of Area F.

7 Their argument, they try to rejigger
8 their Cumulative Impact Area. They want a
9 different area. They say, "Oh, if we read the
10 statute this way, we can draw it differently, and
11 therefore we don't have to consider Area F." But
12 the Cumulative Impact Area they drew includes
13 portions of Area F. They had to consider it.

14 And finally, the Department's argument
15 is entirely unsupported. They say, "We didn't
16 have to consider Area F because there is no
17 hydrologic connection between Area F over here
18 which is on the West Fork Armells Creek, and Area
19 B over here which is on East Fork Armells Creek."
20 But it's clear, there is no dispute in fact, that
21 these two creeks join. There is a confluence
22 north of Colstrip where they join.

23 The Department said, "Well, we never
24 looked at that. We have no data one way or
25 another about that, so we didn't consider it."

1 But the Board in its ruling in the Bull Mountain
2 case said the burden of proof is on the mining
3 company, and the Department has to confirm that.

4 You can't use a lack of information as a
5 basis for not considering impacts. So the
6 Department can't say, "Well, we never looked at
7 this downstream confluence, and therefore, we
8 don't have to consider it." If they were going to
9 ignore that, they had to have some scientific
10 basis for doing so.

11 At the end of the day, their argument is
12 just a post hoc argument that they put together
13 from random pieces of the record. It doesn't hang
14 together. It conflicts with their statements in
15 the permitting process. It conflicts with the
16 CHIA, and it conflicts with the law, and it has no
17 merit.

18 Finally, with respect to nitrogen
19 standards for aquatic life in East Fork Armells
20 Creek, this is the fifth issue in our reply brief.
21 No question that the creek is impaired. The
22 Department itself concluded that the creek is
23 impaired. They think that nitrogen is the
24 problem, and their scientists performing the CHIA,
25 they acknowledge the mine is going to contribute

1 nitrogen to the creek. They say some of the
2 highest readings of nitrogen were from downstream
3 of mining because of blasting, blasting agents.

4 But the Department failed entirely to
5 consider impacts of nitrogen on the already
6 impaired portion of this creek. This creek is not
7 meeting water quality standards. And they're
8 going to add more nitrogen to it. But they didn't
9 consider nitrogen standards for aquatic life at
10 all. Not at all. That was error as a matter of
11 law. We're entitled to summary judgment on that
12 case.

13 I'm going to wrap up to respect
14 everyone's time. In sum, the record shows that
15 the Coal Program is intentionally ignoring impacts
16 identified by its own scientists in other bureaus
17 in the Department, and is intentionally rewriting
18 applicable laws to facilitate issuing strip mining
19 permits. They intentionally chose not to look at
20 actual health of aquatic life in East Fork Armells
21 Creek; they intentionally rewrote the definition
22 of anticipated mining to exclude other mining
23 operations; and they completely ignored nitrogen
24 pollution impacts on aquatic life in East Fork
25 Armells Creek.

1 This is not a dispute of science. It is
2 a matter of the Department failing to lawfully
3 analyze the cumulative hydrologic impacts of this
4 mining operation. East Fork Armells Creek is not
5 a sacrifice area. The Department has to protect
6 it, even if doing so may prove inconvenient for
7 WECO's strip mining operations.

8 Petitioners respectfully request that
9 this Board grant summary judgment on all their
10 claims, remand this matter to the Department, and
11 vacate the AM4 amendment permit. Thank you.

12 CHAIRMAN MILES: Thank you. Should we
13 be following in this white book if we want --

14 MS. CONVERY: Madam Chair, the overheads
15 will be on the front screen. I've provided those
16 for your convenience. You can either look at them
17 now or later.

18 I do wish to hand out, if I may, a
19 supplement, mainly because I would like you to
20 have a copy of the first exhibit in front of you.

21 CHAIRMAN MILES: Is that the same
22 information that all of the parties would have --

23 MS. CONVERY: This is actually not
24 included because of the scale of it. The
25 photograph is not included with the slides. This

1 is a demonstrative exhibit only.

2 MR. HERNANDEZ: Could we see that?

3 MS. CONVERY: (Provides document) I
4 apologize. This is a little bit difficult for you
5 to see, Shiloh.

6 BOARD MEMBER TWEETEN: Counsel, if I
7 may, as you go through your argument, I wonder if
8 you could, for the benefit of the Board, for the
9 benefit of me at least, highlight any areas where
10 you think there may be questions of material
11 fact --

12 MS. CONVERY: Absolutely.

13 BOARD MEMBER TWEETEN: -- that may
14 preclude summary judgment.

15 MS. CONVERY: Absolutely. I certainly
16 will.

17 BOARD MEMBER TWEETEN: Let me give you
18 an example. On the handout that you just gave us,
19 delineation of the Cumulative Impact Area, Mr.
20 Hernandez just told us that part of Area F is
21 included in that Cumulative Impact Area. It
22 doesn't show on your map as having any portion of
23 Area F. I wonder if you could clarify that for
24 me.

25 MS. CONVERY: I intend to do so in my

1 presentation. Thank you.

2 Madam Chair, members of the Board, my
3 name is Becky Convery, and as I stated earlier, I
4 represent the Department in this matter. There
5 will be a number of slides that I will skip over
6 given the time constraint, the fifteen minute time
7 constraint, but I will attempt to address all of
8 Mr. Hernandez's arguments with the exception of
9 the aquatic life argument. I will defer that
10 argument to Mr. Martin. I would just like to
11 refer the Board to Pages 23-26 of the Department's
12 Supplemental Statement of Disputed Facts, which
13 very clearly disputes the factual presentation
14 made by Mr. Hernandez on the aquatic life survey.

15 I also would like to briefly introduce
16 Dr. Emily Hinz, who is sitting behind me. She was
17 the primary surface water hydrologist in this
18 project.

19 This is a summary judgment motion, and
20 as such, Petitioners have the burden to show that
21 there are no material issues of fact in dispute.
22 If there are issues of material fact in dispute,
23 Petitioner's motion must be denied. Also very
24 clearly pursuant to Rule 56 of the Montana Rules
25 of Civil Procedure, the Department is entitled to

1 rely on affidavits and other testimony to show
2 that there are in fact material facts in dispute.
3 Further, pursuant to Montana Administrative
4 Procedures Act, the Petitioners have the burden to
5 show that the Department's permit decision was
6 incorrect.

7 Contrary to Petitioner's assertion,
8 explanation of the factual information contained
9 in the record does not constitute post hoc
10 rationalization of the Department's decision. On
11 the contrary, as this Board stated very clearly in
12 the Board's decision in the Bull Mountain Mine
13 case, and I quote, "DEQ's Counsel may surely
14 present argument to explain and demonstrate that
15 the evidence before the Agency at the time of its
16 permitting decision and the analysis within the
17 CHIA satisfy the legal standards."

18 What is the legal standard that the
19 Department must meet? The Department must assess
20 the cumulative hydrologic impacts to surface and
21 groundwater in the Cumulative Impact Area, and
22 determine that the proposed operation has been
23 designed to prevent material damage outside of the
24 permit area.

25 In its simplest terms, the Cumulative

1 Hydrologic Impact Area, or CIA, is that area
2 within which impacts from the proposed operation
3 may interact with impacts from all other mining in
4 the area. In other words, if there is no
5 interaction between impacts of Area F and Area B,
6 or AM 4, then Area F was properly excluded from
7 the CHIA.

8 What is material damage? It is an
9 impact to ground or surface water from the
10 proposed operation that occurs outside the permit
11 area. It is not material damage unless a
12 beneficial use of water is adversely affected, a
13 water right is impacted, or a water quality
14 standard is violated.

15 The proposed operation that we are
16 talking about is Amendment 4 or AM 4 to the Area B
17 permit of the Rosebud Mine. The Rosebud Mine
18 covers more than 26,000 acres, but this permit
19 area adds only 49 acres to the permit area and 146
20 acres of surface disturbance.

21 In the interests of time, I'm going to
22 very briefly describe AM4. What you will see is
23 these mine cuts right here are the AM4 mine cuts.
24 This is East Fork Armells Creek. You can see that
25 previous mining in Area B along here mined close

1 to the alluvium in East Fork Armells Creek. These
2 are currently disturbed areas, and AM4 is a mere
3 continuation of the mining that has already
4 occurred in that area, and mining has moved
5 further away from the creek, and the AM4 cuts are
6 located over a mile from East Fork Armells Creek.

7 Also many of these areas along the creek
8 have already been reclaimed. This is a photograph
9 of reclaimed grazing land that exists in Area B
10 near East Fork Armells Creek.

11 There are so many issues of material
12 fact in dispute in this case that Petitioner's
13 motion simply must be denied. We have submitted
14 an 80 page Supplemental Statement of Disputed
15 Facts, and previous to that we submitted a 34
16 pages Statement of Disputed Facts along with our
17 brief. While it is impossible to cover all of
18 those facts in this presentation, I will attempt
19 to focus on the facts raised by Mr. Hernandez.

20 Let's start with the Department's
21 failure to properly define the Cumulative Impact
22 Area. Petitioners have alleged that the
23 Department intentionally excluded Area F from the
24 AM4 CHIA based on the Department's erroneous legal
25 interpretation of the term "anticipated mining."

1 The exhibit that I handed out to you previously is
2 Figure 5-1 of the CHIA. It very clearly
3 delineates the Cumulative Impact Area, and you
4 will notice that Area F is not listed at all in
5 any of the permitted mining areas within that
6 figure.

7 The Department disputes the factual
8 allegation made by Mr. Hernandez. Petitioners are
9 incorrect because anticipated mining is only
10 included in the CHIA for the proposed operation if
11 it will impact the same -- same -- surface or
12 groundwater resources that are impacted by the
13 proposed operation, and the proposed operation is
14 AM4, the amendment area.

15 Both the State and Federal definition of
16 Cumulative Impact Area make clear that anticipated
17 mining which is spatially and hydrologically
18 isolated from the proposed operation are not
19 included in the CHIA. They will be covered in a
20 separate CHIA of their own. Area F is both
21 spatially and hydrologically isolated from the
22 Area B, AM4, and therefore was properly excluded
23 from the CHIA.

24 Now I'd like to point your attention to
25 the demonstrative exhibit in front of you.

1 Petitioners allege that there is a hydrologic
2 connection between surface water in Area F and
3 AM4. The Department disputes this allegation.
4 This surface water drainage map in front of you
5 shows the location of Area F, which for purposes
6 of the demonstrative exhibit, we have shown on
7 this map which is right here. You'll notice the
8 majority of Area F is outside the Cumulative
9 Impact Area for groundwater and surface water.

10 Area F is spatially isolated from AM4,
11 which is located down here. The two are
12 approximately ten miles apart. The Cumulative
13 Impact Area for surface water is represented by
14 the green line which you will see here, and the
15 groundwater CIA or Cumulative Impact Area is
16 located here.

17 The CIA boundaries were drawn broadly to
18 include all mining areas that may impact common
19 surface or groundwater resource impacted by
20 operations in AM4. This determination was based
21 not upon an erroneous definition of anticipated
22 mining, but rather it was based upon the
23 groundwater and surface water hydrology of the
24 area as determined by the DEQ's expert surface
25 water hydrologist and groundwater hydrologist.

1 The dark blue lines on this map indicate
2 surface water drainage divides. Area F is located
3 here. This is a surface water drainage divide
4 around Area F. This is West Fork Armells Creek.

5 A surface water divide, the simplest
6 example of that is the Continental Divide. It's a
7 high point or ridge, an area which determines the
8 direction of surface water flow. Water flows
9 downhill. All surface waters on the east side of
10 the Divide flow to the Atlantic; all surface
11 waters on the west side of the Divide flow to the
12 Pacific. It is a very simple concept.

13 This surface water divide here precludes
14 surface water in Area F from entering Area B AM4
15 and vice versa.

16 Therefore, as I mentioned earlier, Area
17 F is in fact scientifically hydrologically
18 isolated from surface water in Area B AM4.
19 Because of that, it is not necessary to discuss it
20 in the CHIA.

21 BOARD MEMBER TWEETEN: Counsel, is that
22 true of groundwater as well as surface water?

23 MS. CONVERY: Yes, it is true, and I
24 will move to this next slide which will
25 demonstrate that.

1 You're looking at the Department's
2 Exhibit T which is an actual figure from the CHIA.
3 It is CHIA Figure 8-5. Essentially the
4 Petitioners have alleged that there is a
5 hydrologic connection between groundwater in Area
6 F and Area B, and that is simply untrue. We
7 dispute that fact.

8 Figure 8-5 demonstrates that there is a
9 groundwater divide or a groundwater mound located
10 here that's 3500 feet. It gets lower on this side
11 of the divide, and lower on this side of the
12 divide. In other words, groundwater does not flow
13 between Area B and Area C, and Area F is over
14 here. If groundwater is precluded by this
15 groundwater mound from flowing to Area C, it's
16 precluded from flowing to Area F. Area F simply
17 wasn't included in the CHIA because there was no
18 hydrologic connection, and no reason to discuss
19 it.

20 BOARD MEMBER TWEETEN: Counsel, can you
21 briefly tell us why that's a material fact.

22 MS. CONVERY: Well, it is absolutely a
23 material fact because one of the primary
24 allegations made by Petitioners is that our CHIA
25 fails as a matter of law to include all areas of

1 anticipated mining, and the basis of that
2 assertion is the fact that Area F was not included
3 in the CHIA; and their assertion is based upon
4 incorrect facts, and an incorrect interpretation
5 of the science.

6 I'd also just briefly like to point out
7 that in spite of Petitioners' allegation, it was
8 very clearly explained within the CHIA that there
9 would be no flow of surface water or groundwater
10 between Area B and AM4, and Area C. Area F was
11 not discussed. However, it is obvious, and was
12 obvious to the surface and groundwater
13 hydrologist, that if Area C and Area B did not
14 interact, and there was no hydrologic connection,
15 then ergo there was no hydrologic connection
16 further west in Area F.

17 I'm going to skip a couple of slides
18 here. I'd like to address the issue raised with
19 regards to impairment of East Fork Armells Creek
20 due to nitrogen.

21 The Petitioners have alleged that East
22 Fork Armells Creek is impaired due to nitrogen
23 pollution from the Rosebud Mine. The Department
24 again disputes this factual allegation. The
25 Department has never made a determination that

1 upper or lower East Fork Armells Creek is impaired
2 for aquatic life support due to nitrogen pollution
3 from the mine.

4 That is an erroneous factual assertion
5 made by Petitioners. It is based upon a 2006
6 attainment record for lower East Fork Armells
7 Creek, and in that attainment record, the
8 Department did not include surface mining as a
9 cause or a source of nitrogen that was causing the
10 impairment of lower East Fork Armells Creek. On
11 the contrary, the source that was identified is
12 agriculture.

13 Additionally, I would like to note that
14 within the CHIA, there are many references to
15 other sources of nitrogen in lower East Fork
16 Armells Creek. Among them are municipal runoff
17 from the town of Colstrip. Keep in mind that
18 lower East Fork Armells Creek is that segment of
19 East Fork Armells Creek below the town of
20 Colstrip. There is the power plant, there is
21 runoff from agriculture, and grazing.

22 Further, I would like to note that
23 within the CHIA, the Department determined that
24 the only source of nitrogen from the mine or
25 potential source of nitrogen from the mine is from

1 blasting operations. The blasting operations in
2 AM4 will occur over a mile from the stream, and it
3 was determined by the Department that the distance
4 was sufficient to preclude material damage to the
5 stream.

6 In closing, I would like to state that
7 there are numerous issues of material fact in
8 dispute which preclude summary judgment in this
9 case. These factual issues concern highly
10 technical issues that require specialized
11 knowledge, skill, and experience to explain and
12 understand. The Department is entitled to present
13 affidavits and testimony to explain the
14 information contained within the CHIA.

15 On the other hand, Petitioners have
16 failed to provide any credible expert testimony to
17 challenge the factual conclusions drawn by the
18 Department's experts in the CHIA. Therefore
19 Petitioners' motion must be denied.

20 CHAIRMAN MILES: Thank you.

21 MR. MARTIN: Madam Chair, members of the
22 Board, in the interests of time, and out of
23 respect for both the Board and Counsel, I'm going
24 to skip over some of what otherwise would have
25 been my presentation, and instead what I'd like to

1 do is I'd like to address some of the arguments
2 that Mr. Hernandez has presented.

3 BOARD MEMBER TWEETEN: Excuse me,
4 Counsel. I'm going to ask you to do the same
5 thing that I asked Ms. Convery to do. As you go
6 through your argument, I'd really find it helpful
7 if you would highlight those areas where you
8 believe there are genuine issues of material fact
9 between your position and the position that's been
10 espoused by the Petitioners.

11 MR. MARTIN: I certainly will, Mr.
12 Tweeten. Thank you.

13 First I'd like to introduce, if I may,
14 some folks who are with me. We have with me Mike
15 Johnson from Local 400; we have Mr. Rusty Beatty
16 and Mr. Wade Steere from Western Energy who have
17 come from Colstrip to attend this hearing.

18 I'd like to, if I can, begin with a
19 discussion just briefly about the perspective of
20 the mine and its miners. We have an abiding
21 interest in the environment. We share the
22 concerns that those of you who are on the Board of
23 protecting the environment really do have, and I
24 think it is fair to say that the miners and the
25 environmental experts at Western Energy are in

1 essence the first line of defense for the
2 environment. We take great pride in what we do,
3 and we take great pride in what was done with
4 respect to the application, the PHC, and all of
5 the efforts pursuant to this permitting process.

6 In response to Mr. Hernandez's argument,
7 what I'd like to do is I'd like to address four
8 different general issues. First, I'd like to
9 confront directly this argument that everything
10 we've presented is essentially a post hoc
11 rationalization. Second, I'd like to talk, if I
12 may, about cumulative impacts, and what that term
13 really means in the context of these regulations;
14 and at the same time, I'd like to talk about what
15 is the object of permitting, what is it that DEQ
16 was obligated to focus itself on, and frankly what
17 were we as the mine required to submit by way of
18 demonstrating that in fact there is no material
19 impact. And lastly I'll talk about the aquatic
20 life issues that Mr. Hernandez raised.

21 Let's talk then about the argument
22 concerning the post hoc rationalization. The
23 essence, if I understand Mr. Hernandez's argument,
24 is that, "Gosh, what you've done is you've looked
25 at that CHIA, and you've developed these arguments

1 that -- they're post hoc. They are separate
2 arguments that are kind of an after the fact
3 justification."

4 I think that's an unfair
5 characterization. In fact, what really happens --
6 I'm skipping over some of this. What's really
7 happened in this proceeding is that we have a
8 series of arguments that came in response to the
9 decision document in the CHIA. We're responding
10 to Petitioners' arguments. This is not a post hoc
11 rationalization.

12 And in fact, if you carry that argument
13 to its extreme, all of these arguments that have
14 been advanced by the Petitioners are outside the
15 administrative record, and they shouldn't be
16 allowed to go outside the administrative record if
17 we're not allowed to go outside the administrative
18 record.

19 Let me be more precise. The Area F
20 argument was never raised in any of the comments,
21 and certainly the rationale that you've heard
22 expressed today was never part of any of the
23 comments. The Rosebud Creek drainage, with due
24 respect to Petitioners, that argument was never
25 raised in the context of their comments. The

1 argument that they've advanced, the materials that
2 they've advanced in support of that argument is
3 not part of the administrative record.

4 The intersection of West Fork and East
5 Fork Armells Creek, not only was that not raised
6 in any of the comments, but in addition to that,
7 in the 30(b)(6) deposition that was conducted of
8 the Petitioners in this case, we were told that
9 that was not an issue. We were told that that was
10 not a concern on the part of the Petitioners.
11 Nonetheless it is raised in the briefing here.

12 The attack on the aquatic life survey.
13 It is fair for us to say that aquatic life was an
14 issue that was raised. What didn't happen is we
15 didn't have these arguments into the methodology.
16 And Mr. Tweeten, that is distinctly an issue of
17 material fact in the way that they pose that
18 argument.

19 Finally, there is an argument that
20 they've advanced -- and this is a new argument.
21 It was not part of the comments, it's not part of
22 the administrative record. The essence of the
23 argument, as I understand Petitioners, is that
24 they would have us go through and repermit all of
25 Area B in addition to the AM4, which is the

1 subject of this particular application.

2 I'd like to, if I can, talk about what
3 should be the object of this permitting exercise.
4 One of the things that we've seen from Petitioners
5 in their argument is they tend to skip over the
6 overall language, the overall structure of this
7 permitting process. The point is that we're
8 required to address the proposed operation. And
9 you can see first in terms of the mining statute,
10 the Montana mining statute, it speaks to the
11 proposed operation, not an operation that was
12 permitted some twenty years ago, for example. It
13 is the proposed operation that should be the
14 subject of this exercise. It is reiterated and
15 echoed in the regulation that implements that
16 provision. Again, it is the proposed operation.

17 And here is what the Petitioners have
18 focused on. Now, I've separated this particular
19 definition into the blue portion, which was not
20 quoted in the initial brief, and we think that's
21 actually very important to an understanding of the
22 definition of cumulative hydrologic impact area.

23 Instead, what's happening with the
24 Petitioners' argument is they focus on the second
25 half, and they focus on anticipated mining, but we

1 think actually the entire definition should be
2 considered, and we think it is important to an
3 analysis of this case. Notice that it speaks to
4 proposed operation; and notice as well that it
5 speaks to interaction, i.e., there must be
6 interaction before it is something that would be
7 cumulative impact.

8 Again, we see a focus on the term
9 "operation," and it is divorced from the term
10 "proposed." But even in the definition of
11 operation, it is not just all premises. It is the
12 premises that are used in the designated strip
13 mine or underground mine area.

14 I think that as a consequence we have
15 perhaps a crabbed interpretation of what it is
16 that this Board needs to look at. What this Board
17 needs to look at is the proposed operation. But
18 there is an issue that we're not avoiding, and
19 that is the cumulative impacts.

20 I'd like to invite the Board's attention
21 to the exhibit that we have up there on the easel.
22 This first exhibit is an exhibit that is taken
23 from the data in the CHIA. We've added the blue
24 arrows just so the Board will understand the
25 direction of the groundwater flow.

1 The important point here is to define
2 what is a cumulative impact. A cumulative impact
3 necessarily entails interaction, a combined
4 impact, something that combines the impact of the
5 object of this permitting effort. The proposed
6 operation was something else.

7 Now, if you look here, we've with the
8 dotted line shown what is in the CHIA, in the PHC,
9 where the groundwater divide is. Notice for
10 example that we see Area C and Area A having an
11 impact on East Fork Armells Creek. You can see
12 that the projected impact from AM4 is also on East
13 Fork Armells Creek because it's on that side of
14 the groundwater divide.

15 By contrast, the argument that we've
16 read about in the briefing with respect to the
17 Rosebud Creek drainage is not a cumulative impact,
18 and the reason why it is not a cumulative impact
19 is because with respect to AM4, we don't have any
20 groundwater flow into the Rosebud Creek drainage.

21 If AM4 doesn't have a combined effect
22 from these other sources, it can't be a cumulative
23 impact. So when they say that there is a small
24 portion of Area B that could conceivably have some
25 impact on local groundwater in the area of the

1 Rosebud Creek drainage, that is something that we
2 don't have an interacting impact on -- using the
3 term from the definition of Cumulative Impact Area
4 -- there is no interaction, and therefore, it is
5 not a cumulative impact.

6 And we believe that to the extent there
7 is disagreement between ourselves and the
8 Petitioners, Mr. Tweeten, we believe that that is
9 in fact an issue of material fact.

10 Let's talk then about aquatic life.
11 This was in fact an issue that was raised in the
12 comments that we received from the Petitioner. It
13 was an issue that was raised and it was responded
14 to.

15 What we have up on this particular
16 exhibit is the response to the Petitioner's
17 comments that was provided by the Department. And
18 I hope you'll notice that the conclusion is that
19 the survey provides empirical evidence -- not just
20 argumentation -- but empirical evidence that
21 aquatic life support is not adversely impacted by
22 any mining activity.

23 And by the way, lest there be any
24 question about this issue, that survey was a part
25 of the CHIA. It was one of the exhibits. It is

1 in fact in the administrative record. There is a
2 reference back to the CHIA at 9-8, if you're
3 interested in going back to the CHIA.

4 We receive an argument from the
5 Petitioners that this survey was defectively done,
6 that in some fashion, there is a problem with the
7 survey. And the only support that we find, or the
8 only support that's been offered in this hearing,
9 is that there were memos that bear on the
10 background of how this survey was decided to have
11 been performed.

12 These are memos and emails that at best
13 provide a question of fact. Whatever happened in
14 that deliberative process before they decided to
15 send someone out to conduct this survey, and
16 whatever was meant by those emails, is something
17 that should be the subject of testimony. You
18 should be able to hear testimony from Ms. Hunter
19 about what she did, and about the interpretation
20 of this survey.

21 In any event, she does conclude -- and I
22 think the Petitioners recognize that this is the
23 case -- that there is no evidence showing that
24 mining negatively affects aquatic life in East
25 Fork Armells Creek.

1 Petitioners didn't raise this in their
2 comments. The attack on methodology is something
3 that's new. And again, we ought to properly be
4 allowed to respond to it. We have a declaration
5 from Mr. Niklin that explains the groundwater
6 divide and some of the issues that are associated
7 with AM4.

8 There is some confusion on the part of
9 Petitioners in this case. They ascribe
10 conclusions to Ms. Hunter that are just simply not
11 the case. Ms. Hunter did two things: One, she
12 compared East Fork Armells Creek with other
13 streams in eastern Montana, and found that the
14 level of aquatic life was similar to those other
15 streams; and second, she compared the upstream
16 portion of the stream, i.e., upstream of mining,
17 to the lower portion of East Fork Armells Creek,
18 and again found no material difference.

19 MR. REED: You're out of time.

20 CHAIRMAN MILES: We have your
21 presentation. Is there a particular page?

22 MR. MARTIN: There is, and there is some
23 important points that I'd like to go through. Do
24 you have the hard copy of it there, Dan?

25 CHAIRMAN MILES: Can you do that very,

1 very quickly, please.

2 MR. MARTIN: Indeed I can.

3 CHAIRMAN MILES: You'll have a few
4 minutes again for additional comments.

5 MR. MARTIN: And I would very much like
6 to be able to do that.

7 Aside from the general conclusions, I
8 think it is appropriate for us to discuss the
9 protocol issue. In fact there are two different
10 protocols that are at issue here. If you look the
11 declaration of Mr. Urban that was provided by the
12 Department, he explains that there is a protocol
13 for assessing a stream as to whether or not it is
14 impaired, and there is a separate protocol in
15 terms of determining whether or not there is
16 material damage.

17 There is no issue of fact as to whether
18 or not Ms. Hunter followed the second protocol,
19 and in fact, that's clear from her declaration,
20 and it is also clear from the CHIA, and they're
21 cited in those overhead slides.

22 There is some confusion on the part of
23 the Petitioners because they think that the
24 impairment protocol is the same protocol that one
25 would use for a survey of this sort, which is only

1 intended to determine whether or not there is
2 material damage that is caused by the mining.
3 That's a completely separate determination than
4 what is required for impairment of a stream under
5 EPA's regulation.

6 Let me conclude by saying again that we
7 -- that is the mine and its miners -- share the
8 environmental values of this Board, and we welcome
9 the scrutiny not only from this Board, but
10 additionally from the Petitioners, and we would
11 look forward to a hearing where this Board would
12 have the opportunity to ask our experts and our
13 witnesses any questions that you think are
14 appropriate; and in addition to that, Mr.
15 Hernandez will have the capacity to cross-examine
16 our witnesses. Thank you.

17 CHAIRMAN MILES: Thank you, Mr. Martin.
18 I'd like to offer each of the parties ten minutes
19 to respond, rebut, what you've heard. Mr.
20 Hernandez.

21 MR. HERNANDEZ: Madam Chair, members of
22 the Board, I'd like to first address the last
23 issue that Mr. Martin was discussing, the question
24 of protocols. There is no dispute about this. It
25 is clear that Ms. Hunter did not follow the

1 protocols that the Department has for assessing
2 aquatic life or assessing water quality standards.
3 I would direct the Board to our Exhibit 34. It is
4 the Department's protocol for surveying and then
5 analyzing aquatic life health in creeks in
6 Montana.

7 There are two parts of it. The first
8 part is the protocol for sampling, how you collect
9 the bugs. The second part is how you analyze that
10 collection of bugs to see whether or not the creek
11 is healthy or whether it is trashed.

12 And if you turn to Ms. Hunter's
13 declaration -- this is not disputed fact. It is
14 her own declaration. It is WECO's Exhibit 10 at
15 Paragraphs 38. And she discusses that she
16 assessed, that she collected the bugs pursuant to
17 this protocol that's for collecting and analyzing.
18 It says the Petitioners' statement that the
19 aquatic life did not follow DEQ's assessment
20 metric is misleading, and furthermore, irrelevant
21 to the accuracy and quality of the survey.

22 But we don't question the survey. We
23 don't question the survey. She did the survey,
24 and collected bugs, but she didn't analyze it.
25 Then she says, "Such metrics are not part of the

1 survey, but rather interpretive tools applied to
2 the samples and data gathered in the survey." So
3 there are these interpretive tools that are part
4 of this protocol that the Department has, and
5 that's Exhibit 34 at Page 11. It lays out the
6 process that the protocol is supposed to follow.

7 "The application or non-application of
8 metrics had no connection to the methods and
9 protocols I used in concluding the survey, and had
10 no effect on the content or accuracy of the
11 samples and data obtained in the survey." Well,
12 that's right and well. We're not challenging the
13 survey. What we are challenging is the complete
14 failure to actually assess the metrics which are
15 part of the protocol.

16 Then she says, "In summary, I followed
17 DEQ's protocol as well as my scientific judgment
18 in conducting the aquatic life survey. Not
19 applying metrics to the survey results had no
20 effect on the survey methodology or the accuracy
21 of the survey results themselves." She admits
22 that she did not apply these metrics to determine
23 -- you can look at a picture of bugs, and they
24 have metrics of whether or not it shows healthy
25 composition of bugs. She admits that she didn't

1 do that.

2 Then she says, "Well, I did calculate
3 one metric." Well, that is good, but there are
4 multiple metrics that are part of this protocol.

5 BOARD MEMBER TWEETEN: Counsel, if she's
6 correct in saying that it didn't affect the
7 outcome of the survey, doesn't that go to the
8 weight of the argument that you're making?

9 MR. HERNANDEZ: No, not at all. The
10 survey, the outcome of the survey is the
11 collection of the bugs. She collected the bugs.
12 There is no question about that. We're not
13 disputing that she collected this group of bugs.
14 What she didn't do is then say, "This picture of
15 bugs," we have thirteen bugs, and they're in these
16 different genus and species, do they correspond to
17 what a healthy creek would look like? That didn't
18 happen.

19 The survey, she followed the survey for
20 sampling the bugs, but she didn't analyze it, and
21 we know this because in the Department's affidavit
22 of their Bureau Chief for their Water Protection
23 Bureau, they say, "At the request of DEQ Coal
24 Program staff, their aquatic life specialist
25 advised Penny Hunter how to collect samples --"

1 That's what she did. She collected the sample --
2 "but was instructed --" they instructed their
3 aquatic life specialist not to advise her how the
4 samples could be used to determine aquatic life
5 health.

6 They said, "Don't tell her how she can
7 use the survey results to see whether or not the
8 creek is healthy." That is the problem. That is
9 what was omitted, and that's exactly what they had
10 to do. You can collect bugs and say, "Well, there
11 are bugs in the creek," but that doesn't tell you
12 whether or not the creek is healthy. You have to
13 then analyze the bugs pursuant to these metrics,
14 and she didn't do that because the Department told
15 her that --

16 BOARD MEMBER TWEETEN: Counsel, are
17 there any expert declarations or other evidence
18 from your side in the record that would contradict
19 her statement that it didn't affect the outcome of
20 her study?

21 MR. HERNANDEZ: Her study was a survey,
22 and that's what she's talking about. We're not --

23 BOARD MEMBER TWEETEN: That's not my
24 question. My question is: Are there any expert
25 declarations or other evidence, or are we simply

1 to rely on your argument?

2 MR. HERNANDEZ: We have no expert
3 declarations, but we're not arguing -- we're
4 pointing to the facts admitted by Western Energy
5 Company and the Department. They said, "We did
6 not ask her to analyze the sample, the survey, to
7 determine aquatic life health." That is the
8 important part, because you can't tell whether or
9 not the creek complied with water quality
10 standards, and hence will not result in material
11 damage -- material damage is violation of water
12 quality standards -- without applying their
13 protocol for assessing water quality health and
14 compliance with water quality standards.

15 BOARD MEMBER TWEETEN: Well, Counsel,
16 I'm not an expert in this field, and I don't know
17 that anybody else on the Board is. And the
18 question of whether you can rely on the survey to
19 say one thing or another it seems to me is a
20 quintessential subject of expert testimony, of
21 which you've offered none.

22 MR. HERNANDEZ: With due respect, Mr.
23 Tweeten, I disagree. You can look at the
24 protocol. You can look at the protocol. It is
25 our Exhibit 34. There is the protocol and it has

1 the steps -- they're numbered one, two, three,
2 four, five, six, seven -- and then you can look at
3 the survey. And you can look at the steps of the
4 protocol that are not included in the survey.

5 It is all in the record. She didn't
6 follow the test. It is like as if someone said
7 there wasn't negligence in this action because one
8 of the elements of negligence wasn't met. Well,
9 you can't know that as a matter of law until you
10 assess the other elements, and it's the absence,
11 complete absence of assessing the other elements.

12 And the most important one here is an
13 observed expected analysis. It is in Exhibit 34.
14 That's the protocol. It is on Page 11. They say
15 you have to conduct an observed expected analysis
16 to -- "These are the bugs we observed." What
17 would be expected in a healthy creek? It is not
18 there. There is no question that there is not an
19 observed expected analysis in the survey that Ms.
20 Hunter conducted.

21 BOARD MEMBER TWEETEN: She surveyed the
22 aquatic life in the East Fork and the West Fork,
23 and compared those, and found that they were
24 similar, didn't she?

25 MR. HERNANDEZ: She conducted some kind

1 of survey, but she didn't follow their protocol.
2 That's what she didn't do. She admits it. It is
3 right there on WECO Exhibit 10.

4 BOARD MEMBER TWEETEN: But if under the
5 facts of this case it doesn't matter to the
6 outcome whether she followed all of those steps in
7 the protocol, why shouldn't that be a material
8 fact?

9 MR. HERNANDEZ: It is material because
10 you can't ever know -- If they are not going to
11 follow the Department's own protocols, you can't
12 say, "Well, it doesn't matter." The protocols are
13 the protocols.

14 BOARD MEMBER TWEETEN: Of course you can
15 know. You can cross-examine the preparer of the
16 survey, and you can put your own expert testimony
17 on. That's what hearing is for.

18 MR. HERNANDEZ: The question isn't the
19 results, the question is whether or not she
20 followed the protocol, and it is our contention
21 that as a matter of law, they can't reach the
22 lawful determination of whether or not aquatic
23 life is harmed unless they follow the protocols,
24 and they omitted important parts of this. And
25 that's --

1 BOARD MEMBER TWEETEN: Okay.

2 MR. HERNANDEZ: That's our question,
3 point, as a matter of law. And I think more
4 importantly, if you look at the record, their
5 conclusion was there are bugs in the water, so it
6 meets water quality standards. They have the
7 burden of affirmatively demonstrating that they're
8 not going to violate water quality standards.

9 The results of the survey didn't say
10 that everything was copacetic. Quite the
11 contrary. The results of the survey said, showed
12 that the creek was in bad shape. It was in
13 Paragraph 41 of Penny Hunter's declaration. She
14 says, "The results of the index that we did
15 apply," they applied one index, "and it showed
16 that the aquatic life was poor to very poor."
17 That's the result.

18 And so even if you were to assume that
19 this survey met all the protocol -- which it
20 clearly did not by their own admission -- the
21 results of the survey said the creek is in bad
22 shape, which confirmed DEQ's evidence that
23 pollution was increasing, and they confirmed DEQ's
24 Water Protection Bureau determination that the
25 creek is actually impaired and not meeting water

1 quality standards.

2 Where is the evidence, that even
3 interpreted in the light most favorable to them,
4 shows that they're not harming water quality
5 standards? All the evidence stacks up that the
6 creek is in very bad shape.

7 Penny Hunter's own survey and the
8 results say, Paragraph 41 Exhibit 10, "Aquatic
9 life was poor to very poor." That's the same
10 conclusion that the Department had in its water
11 quality assessment -- that's Exhibit 7,
12 Petitioner's Exhibit 7 -- when they determined the
13 creek was impaired.

14 BOARD MEMBER TWEETEN: Doesn't her
15 report attribute the impairment to causes other
16 than mining?

17 MR. HERNANDEZ: Yes, she does. She
18 says, "We think it would be --" She says, "we
19 can't determine what it would be. We're not sure
20 what this is," but that's not an affirmative
21 demonstration. She said, "Well, we don't think
22 this is from mining," but mining certainly hasn't
23 been exculpated here.

24 In fact, the only reason they did this
25 -- the record shows that they ignored this

1 information because they didn't want to look at
2 aquatic life health. That's what DEQ's Bureau
3 Chief in their Water Protection Bureau said. He
4 said, "We told them to conduct a survey, but don't
5 look at aquatic life health." They conducted the
6 survey --

7 And I can quote from that. That's
8 Paragraph 33, Department Exhibit E. "At the
9 request of DEQ Coal Program staff, Dave Feldman,"
10 the Department's aquatic life expert, "advised
11 Penny Hunter, their consultant, how to collect
12 samples --" No question she collected the samples
13 -- "but was instructed not to advise her how the
14 sample results could be used to determine aquatic
15 life health."

16 BOARD MEMBER TWEETEN: That doesn't
17 equate to a statement that they didn't want to
18 consider it. That just says that they let the
19 expert determine, making whatever use of the
20 protocols they want, that there either was or was
21 not an effect. It doesn't say that they're
22 instructed not to consider it. It says they're
23 just left to consider it based on their own
24 understanding of the rules. Isn't that what it
25 says?

1 MR. HERNANDEZ: Well, no. I think it
2 says she was instructed not to advise her how
3 these sample results could be used to determine
4 aquatic health.

5 BOARD MEMBER TWEETEN: It doesn't say
6 that the Department didn't want to consider
7 aquatic life. It doesn't say that.

8 MR. HERNANDEZ: True, but why else would
9 they instruct her not to actually look at the
10 health of the creek?

11 BOARD MEMBER TWEETEN: Perhaps we should
12 have a hearing in order to let them explain that
13 decision.

14 MR. HERNANDEZ: I contend that this was
15 a short circuiting of the protocol. They have a
16 protocol for determining whether the creek is
17 healthy. They have a protocol for determining
18 whether the creek is violating water quality
19 standards. They didn't follow it. Penny Hunter
20 admits she didn't follow it.

21 BOARD MEMBER TWEETEN: Counsel, you just
22 posed a rhetorical question, "Why else would that
23 decision be made?" Aren't they entitled to an
24 opportunity to explain that at a hearing?

25 MR. HERNANDEZ: Well, no. There is no

1 mens rea requirement for this determination.

2 Whether or not it is intentional, it sure looked
3 like it. In the record we have WECO exchanging
4 emails saying, "We don't want to look at aquatic
5 life because it could be bad for us. It could be
6 disastrous for us," but we don't have to show that
7 it's intentional. We just have to show that they
8 didn't take a hard look at whether or not the mine
9 as proposed, whether or not there was an
10 affirmative demonstration that it won't cause
11 material damage to the hydrologic balance.

12 And they reached this conclusion. They
13 say, "There is aquatic life in the creek, based on
14 the survey, and therefore it meets water quality
15 standards." But there is no question that that
16 survey didn't follow their protocol.

17 BOARD MEMBER TWEETEN: If there is no
18 requirement for proving of intent, why did you
19 raise intent?

20 MR. HERNANDEZ: Because I think it shows
21 that the issue here is fairly egregious, that
22 they're telling their aquatic life specialist not
23 to tell them how to sample to determine whether or
24 not the creek is healthy. That's the very issue
25 here, whether or not the creek is healthy. That's

1 why the Department's hydrologist said, "We want an
2 aquatic life sample," because we have increasing
3 pollution in the creek beyond thresholds for harm
4 to aquatic life, so we want to look at the bugs in
5 the creek to determine whether or not the creek is
6 healthy.

7 So WECO says, "No, we don't want to do
8 that. We're afraid it will be a disaster." They
9 refuse. "Do we have a leg to stand on if we
10 refuse to do this?," and the Department said, "Do
11 it, but only do it halfway. You can collect bugs,
12 but don't follow the protocol for assessing
13 compliance with water quality standards."

14 And there is another point here that's
15 worth underscoring. Even if what -- your point
16 about them following partially this assessment.
17 Granted that. Set that entirely aside.

18 The Department has a protocol. They
19 have two protocols. It's kind of complex, and we
20 could discuss it more. I don't want to run over.
21 But they have two protocols, one for assessing
22 aquatic life health, and one for assessing
23 compliance with water quality standards. And they
24 halfway did the one for assessing aquatic life
25 health. They collected the bugs, but they didn't

1 actually assess the health.

2 They have another one, and this is in
3 our Exhibit 20, for assessing compliance with
4 water quality standards, and that is a question of
5 material damage. The material damage is violation
6 of water quality standards. And in Exhibit 20,
7 WECO's consultant said, "We dug up the protocol
8 for assessing compliance with water quality
9 standards. Should we do that?," and the
10 Department personnel says, "No, don't do that.
11 That's not required. We have this other protocol
12 for assessing bugs, and use that." And that's
13 what they did.

14 But there is absolutely no question they
15 didn't follow the protocol for assessing
16 compliance with water quality standards. None at
17 all. And that's clear in Exhibit 20. They say,
18 "Here is the protocol for bugs, and here's the
19 protocol for water quality standards." Did they
20 look at it? No.

21 I think that I'm just going to make two
22 fact points and then sit down. The first is the
23 Department's contention that there is a disputed
24 issue of fact regarding a hydrologic connection
25 between Area F and Area B. I just ask that the

1 Board ask my friend Ms. Convery whether or not
2 Area B and Area F water flows into the same creek.
3 They do. There is no question about that. So
4 there is not a question about a hydrologic
5 connection.

6 That issue is a little bit to the side,
7 because it's our response to their post hoc
8 argument. The initial question is, well, is Area
9 F within the Cumulative Impact Area? And you can
10 ask Ms. Convery that. They drew a Cumulative
11 Impact Area in the CHIA, and then they admitted in
12 discovery that portions of Area F are within that
13 Cumulative Impact Area. You can ask Ms. Convery
14 whether or not that's the case. They admitted it.
15 We could point it out, but I believe that Ms.
16 Convery will also admit that portions of Area F
17 are within the Cumulative Impact Area.

18 BOARD MEMBER TWEETEN: Counsel, if we're
19 to consider the effects on Armells Creek after the
20 confluence of the East and West Fork -- which I
21 gather is your argument.

22 MR. HERNANDEZ: No.

23 BOARD MEMBER TWEETEN: You said they
24 flow to the same creek, and the only sense in
25 which they do that is that they fork, and below

1 the fork they're together. Am I correct about
2 that?

3 MR. HERNANDEZ: That is our response to
4 their post hoc argument that these two issues,
5 these two areas were entirely disconnected. Our
6 argument -- That's not our response to their
7 counter arguments. They bring in this new
8 information, so there's no -- we have this new
9 argument.

10 Our argument is that they used an
11 unlawful definition of "anticipated mining."
12 There is no question -- it is a question of law --
13 that their definition of anticipated mining is
14 incorrect.

15 There is also when they say -- and this
16 was an issue because there were other areas that
17 qualified anticipated mining that were within the
18 Cumulative Impact Area drawn in the CHIA; and
19 there is no question that the Cumulative Impact
20 Area drawn in the CHIA includes land that would be
21 in Area F. That's the case.

22 So we said they have to analyze it, and
23 by law they do. It is ARM 17-24-314(5), and we
24 can talk about that later. That is our argument.
25 In their beliefs they say, "No, we want to draw a

1 new cumulative impact area. We've looked at the
2 statute again, new interpretation of it, and we
3 believe that the cumulative area should be much
4 smaller. We should draw it differently."

5 So we would respond to that and say,
6 "Okay. Well, even given your new argument, where
7 you want to rejigger your Cumulative Impact Area,
8 and trying to exclude stuff, you still don't have
9 a basis for including Area F because you haven't
10 looked at all associated potential impacts," and
11 that's where the confluence comes into play. If
12 you want to redraw it, you have to have a basis
13 for doing that.

14 BOARD MEMBER TWEETEN: A couple of
15 questions. One, if we accept your argument that
16 the fact that these two forks of Armells Creek
17 join together at some point down the stream, if
18 you extend that to its logical conclusion, then
19 the Cumulative Impact Area goes all the way down
20 to New Orleans.

21 MR. HERNANDEZ: It is true.

22 BOARD MEMBER TWEETEN: And so I guess my
23 question is: At what point -- I mean do we use an
24 abuse of discretion standard to look at the
25 decision they made to draw the CIA the way they

1 did, or by what standard is that evaluation made?

2 MR. HERNANDEZ: There is guidings on
3 this by the US Office of Surface Mining about how
4 to design a Cumulative Impact Area, and we cite in
5 our reply brief Pages 26, 27, and 28, and it says,
6 of course if you have a major river, and you have
7 two mines, there is a mine in Appalachia that
8 affects the Mississippi River and one over here,
9 no, you don't.

10 But they do provide some examples, and
11 they say what you need to do is you have to have
12 an evidence based reason for drawing your
13 Cumulative Impact Area. And here, they say, they
14 create this new argument that says, "We want to
15 redraw our Cumulative Impact Area to not include
16 Area F, and not include downstream impacts." We
17 said, "Okay. Where is your -- Where is the
18 science behind this? Where is your evidence based
19 determination that these two aren't going to
20 connect?," and our response is a resounding
21 silence. They just never looked at it.

22 And that's the problem with post hoc
23 arguments. They created this new argument, but it
24 is only -- with due respect -- half cooked. It
25 doesn't look at all the different elements that

1 are required. And as far as how do they draw
2 their Cumulative Impact Area, our initial position
3 is they drew a Cumulative Impact Area in the CHIA.
4 They're stuck with it. And the Cumulative Impact
5 Area they drew in the CHIA includes portions of
6 Area F. They should have considered it, they
7 didn't, because they defined anticipated mining
8 wrong.

9 But then we say, "Okay. Let them draw a
10 new Cumulative Impact Area." They're trying to
11 draw a new one in the briefs, after they've made
12 their decision, which isn't permitted per the Bull
13 Mountain case.

14 Nevertheless, indulging that argument we
15 say, "Where is the evidence to show that this is a
16 rational Cumulative Impact Area?" They said,
17 "Well, it is far away. We eye-balled it. It
18 looks fine." But Office of Surface Mining
19 guidelines say, "Well, what you have to do is you
20 have to have some evidence for doing this."

21 So if you were to look at the impacts of
22 Area F, the impacts of Area B, and all of the
23 other cumulative impacts, and to find that there
24 is no impact downstream, that would be a rational
25 basis for excluding it. But not looking at that

1 at all we submit is not a rational basis.

2 CHAIRMAN MILES: I'd like to wrap up
3 your time, and then I think there will be more
4 questions, but I'd like to continue with maybe the
5 short rebuttals, take a break, and then we'll get
6 back into more questions, and I know I have some
7 as well.

8 MR. HERNANDEZ: All right. Thank you.

9 MS. CONVERY: Madam Chair, members of
10 the Board, I believe Mr. Hernandez's most novel
11 interpretation of the facts and the law in this
12 case has done nothing other than to prove my
13 point, and that is that there are hundreds of
14 material facts in dispute in this case. We have
15 just spent twenty minutes discussing two of those
16 facts.

17 And I would assert and challenge Mr.
18 Hernandez to show you anywhere in the record where
19 the Department has stated that it wishes to redraw
20 the cumulative impact boundaries that were
21 originally included in Figure 5-1 of the CHIA.
22 That simply is inaccurate, and a
23 mischaracterization of the facts and our legal
24 argument.

25 We have maintained all along that Area

1 F, as you see in Figure 5-1 in front of you, was
2 never intended to be included in the Cumulative
3 Impact Area. In fact, it is not included in
4 Figure 5-1 at all. Just because the line includes
5 a very small portion of what is Area F, the
6 eastern portion, the Petitioners have asserted,
7 and this in fact is the post hoc argument raised
8 by Petitioners. It was not raised in their
9 comments during the public comment period, but it
10 was raised afterwards.

11 And in fact if you review the
12 deposition, the portions or excerpts of the
13 deposition from Petitioners' 30(b)(6) witness Ann
14 Hedges, you will find that she stated in her
15 deposition that she did not challenge the lines or
16 where the boundary lines were drawn, and yet she
17 asserted that because a portion of Area F was
18 included within the CHIA, that we should have
19 analyzed all impacts from Area F.

20 The further post hoc rationalization or
21 argument made by Petitioners was that because it
22 was pointed out that Area F was not included, and
23 that in fact Area F was properly excluded pursuant
24 to the guidelines provided by OSM in their 1983
25 guidance document. Because Area F is isolated

1 hydrologically and spatially from AM4, it was
2 properly excluded and not considered.

3 The next argument that Petitioners then
4 raised is, "Well, then you should have considered
5 any potential impacts seventeen miles downstream
6 at the confluence of East Fork Armells Creek and
7 West Fork Armells Creek." As I pointed out in our
8 demonstrative exhibit, there is only one point
9 where surface waters interact, and it is seventeen
10 miles downstream.

11 As I also pointed out, the expert
12 hydrologists for the Department carefully defined
13 that boundary very conservatively to take into
14 consideration any areas based on scientific data
15 from the monitoring stations, from monitoring of
16 water quality, surface water quality over a forty
17 year period at the mine, that there would be no
18 measurable impact to surface water outside that
19 boundary. I challenge Petitioners to produce an
20 expert that can show that there will be a
21 measurable change in water quality to surface
22 water seventeen miles downstream.

23 I next would like to address the aquatic
24 life argument. Petitioners have come up with
25 novel interpretation of the law and the facts.

1 First of all, I challenge Petitioners to point out
2 where in the Montana Surface and Underground Mine
3 Reclamation Act there is a legal requirement that
4 the Department require the mine to produce an
5 aquatic life survey for that stream.

6 I further challenge them to point out
7 where in the law the Department Coal Program is
8 required to follow Standard Operating Procedures
9 used by the Department's Water Quality Bureau for
10 the purpose of making an impairment determination
11 for a stream in developing aquatic life survey
12 that is used for the purpose of determining
13 whether there is aquatic life, or whether aquatic
14 life is impaired in East Fork Armells Creek.

15 There is simply no such legal
16 requirement. In fact, you would be told, and you
17 were told in the affidavit by Eric Urban, who is
18 the Water Quality Planning Bureau Bureau Chief,
19 that the reason the SOPs were not applied was not
20 because the Coal Program asked Penny Hunter not to
21 apply them, but because the Water Quality Bureau
22 did not think it was appropriate to apply them.

23 Those standard SOPs are used by the
24 Water Quality Bureau for the purpose of making an
25 impairment determination, not by Coal Program

1 staff, for the purpose of determining aquatic life
2 health in a stream.

3 Further, Mr. Hernandez read to you
4 Paragraph 33 of Mr. Urban's affidavit. I would
5 like to read to you Paragraph 34. Paragraph 33
6 indicated that the Coal Program staff asked David
7 Feldman to advise Penny Hunter how to collect
8 samples, but was instructed not to advise her how
9 the samples could be used to determine aquatic
10 life health. Direction came from the Water
11 Quality Bureau staff, not from the Coal Program
12 staff.

13 Paragraph 34 goes on to state that
14 because of the high variability of the natural
15 system, the DEQ Water Quality Bureau does not
16 believe that the health of aquatic life in eastern
17 Montana streams can be determined by the
18 composition of a macroinvertebrate sample alone.
19 In other words, collecting bugs in and of itself
20 does not meet the standard for determining the
21 aquatic health of that stream.

22 The impairment determination, if you
23 look at the other SOPs provided by us in our
24 exhibits, you will find that generally there are
25 three criteria used by the Water Quality Bureau

1 for determining impairment of a stream. They
2 collect vegetative data, physical data; they
3 collect chemistry; and they collect biology.

4 In this case, it is the nature of the
5 stream, the ephemeral nature of the stream, which
6 makes it difficult to collect water quality
7 samples, chemistry data. So it is the Water
8 Quality Bureau's position that one sample alone of
9 aquatic life does not determine the impairment of
10 a stream.

11 I would then like to, if I may, return
12 briefly to my presentation, if it is possible to
13 put up an extra slide. I would like to just
14 briefly -- I mentioned earlier that with regards
15 to aquatic life, I referred you to Pages 23
16 through 26 of our supplemental factual statement.

17 I would like to point out that in
18 Paragraph 68 of that factual statement, we
19 specified all of the different types of data that
20 the Department looked at in addition to the
21 aquatic life survey conducted by Penny Hunter on
22 which the Department based its determination that
23 the stream is not impaired for aquatic life as a
24 result of mining.

25 In Paragraph 68, you will see that in

1 preparing the AM4 CHIA, DEQ reviewed all of the
2 available aquatic life data for upper East Fork
3 Armells Creek, including aquatic life surveys
4 conducted in the 1970s, and a 1995 wetland
5 assessment conducted on two reaches of upper East
6 Fork Armells Creek that had previously been
7 sampled in the 1970s.

8 On Paragraph 69, we state, "However,
9 those surveys were older, and although they
10 indicated that there was sufficient water at two
11 sampling sites to support a number of aquatic
12 species, they could not be used to assess the
13 quality of habitat or water in the stream reach."

14 In Paragraph 71, we go on to explain why
15 the aquatic life survey was performed.
16 Accordingly, the Department required the mine to
17 conduct an updated aquatic life survey prior to
18 issuing its written findings.

19 The 2014 aquatic life survey conducted
20 by Ms. Hunter concluded that the low quality of
21 habitat and benthic communities do not provide a
22 strong indicator of water quality due to mining
23 activity. "The aquatic communities in East Fork
24 Armells Creek are likely affected by the lack of
25 flow --" i.e., the ephemeral nature of the stream.

1 Mr. Hernandez left that fact out of his recitation
2 of her aquatic life survey -- "and natural levels
3 of organic matter that exist in East Fork Armells
4 Creek other than mining." Ms. Hunter concluded
5 that mining was not the likely cause of aquatic
6 life impairment in the stream.

7 I would then like to go on to point out
8 and focus you on my next slide here, and that is
9 that in 2006, the Department's Water Quality
10 Bureau incorrectly determined that upper East Fork
11 Armells Creek was impaired for aquatic life
12 support due to alteration in stream side
13 vegetation from surface mining.

14 The Coal Program staff believed that the
15 2006 survey, it had not been updated in nearly ten
16 years at the time this CHIA was produced.
17 Further, they were aware that the information
18 provided in the 2006 attainment record was based
19 upon incorrect information. It was based upon a
20 single statement made by a mine employee who said
21 that the mine had cut through the stream.

22 The Coal Bureau Program staff, through
23 their annual inspections, had determined that was
24 not true. The mine had never cut through upper
25 East Fork Armells Creek.

1 In 2016, the Water Quality Bureau, at
2 the request of the Department and in response to
3 public comments they received on the 2016
4 integrated water quality report, admitted that the
5 information contained in the 2006 attainment
6 record on which they based their impairment
7 determination for East Fork Armells Creek was
8 incorrect. They have removed the incorrect
9 information, and they have removed surface mining
10 as a cause of impairment of the stream. The cause
11 that is identified in the record now is
12 agriculture, i.e., cows trampling the stream bed.

13 CHAIRMAN MILES: I'd like to go back to
14 a different issue, go back to the Area F issue.
15 And I am not of course equipped to challenge what
16 the impacts by considering Area F would be, but
17 what I don't understand, what I'm having trouble
18 with is the statutory language that, as I
19 understand it, that clearly includes that there
20 has to be an analysis of the entire premises. And
21 I'm trying to find that specific language in here.
22 I know it is in here somewhere.

23 But looking at the entire premises and
24 the entire operation, why that wasn't included in
25 the CHIA rather than summarily dismissing it and

1 not including it in the CHIA, why you're not
2 addressing those issues to say, and evaluate, and
3 assess why there would be no impact? And that's
4 the question I'm having.

5 MS. CONVERY: And Madam Chair, I don't
6 have that language in front of me right now, but
7 what I would say is that the statutory language is
8 very similar to the federal definition.

9 First of all, I'd like to say this:
10 Anticipated mining. Petitioners would like you to
11 think that anticipated mining is a stand alone
12 definition.

13 CHAIRMAN MILES: That's a different
14 question than I have about Area F.

15 MS. CONVERY: Then perhaps I didn't
16 understand your question.

17 CHAIRMAN MILES: We may get into the
18 anticipated mining question later. I'll find the
19 language and redirect it, and may redirect it to
20 Mr. Hernandez, because I think that that was
21 referenced in your brief.

22 MS. CONVERY: Right, and perhaps, Madam
23 Chair, the reason I bring up anticipated mining is
24 because Area F, it is our contention that Area F
25 does not meet the definition of anticipated

1 mining.

2 Anticipated mining, if you look at the
3 State's definition, if you compare that with
4 30 CFR 701.5, and if you compare that with the
5 Federal Register which is the OSM's interpretation
6 of its own regulations, you will find that
7 anticipated mining is not a stand alone
8 definition. It is a subpart to the definition of
9 Cumulative Impact Area.

10 The Cumulative Impact Area, the way that
11 it is defined, is that you consider the proposed
12 operation, and you consider all other mining
13 operations that may have an impact, that will
14 interact with the impact from proposed mining. In
15 the State definition, it says proposed operation.
16 "The impacts from proposed operation with all
17 other previous existing and anticipated mining."

18 Anticipated mining in that same
19 definition is then defined as including all
20 operations with pending applications. In other
21 words, anticipated mining doesn't drive where the
22 boundary is drawn. Hydrology drives it. Science
23 drives it. The Cumulative Impact Area is defined
24 first, and you will find this in OSM's CHIA
25 guidance on how to develop the CIA boundaries.

1 It's first drawn broadly to include all areas in
2 which the proposed operation may have impacts on
3 the hydrologic balance that interact with all
4 other mining in that area.

5 CHAIRMAN MILES: And I understand that
6 the decisions are scientifically based, but I also
7 am confused about what was included in the CHIA in
8 order to validate excluding those areas, that --

9 MS. CONVERY: I think the simple
10 explanation of that is that Area C was included in
11 the CHIA. Perhaps if I can -- May I reference
12 just very briefly the demonstrative exhibit again
13 to show you where I'm pointing to.

14 (Provides map) So clearly, as mentioned
15 earlier, the CIA boundary is here, and Area F
16 encompasses this entire area. So the boundary
17 only includes a very small portion. But what
18 you'll also notice is that boundary line wasn't
19 drawn to include Area F, it was drawn to include
20 the majority of Area C, which is this area here.

21 Now, we mentioned surface water divides,
22 groundwater divides. Well, Area C in the
23 southeastern portion will have or may have some
24 impacts that will interact with operations from
25 Area B or AM4 in East Fork Armells Creek. There

1 is a possibility of that because surface water
2 from the southeastern portion of Area C does in
3 fact flow in the direction of East Fork Armells
4 Creek. Remember I mentioned earlier that East
5 Fork Armells Creek, that's one of those common
6 water resources that will be impacted by AM4.

7 Therefore what the Department did is
8 said, "Any other mining areas that may also impact
9 East Fork Armells Creek were included within the
10 CHIA boundary." Area F, as I mentioned earlier,
11 because of the surface water divides, will only
12 impact West Fork Armells Creek. There will be no
13 impacts to East Fork Armells Creek. So it was
14 properly excluded.

15 Area C was included primarily for the
16 reason that even though there is a surface water
17 divide through the middle of Area C, which causes
18 surface water on one end of Area C to flow towards
19 -- there is a creek here. I can't remember the
20 name of it, so I don't want to misstate it -- but
21 it flows more towards Area F, and some of the
22 surface water flows towards East Fork Armells.
23 That's why Area C was included.

24 So the logical conclusion is that upon
25 further analysis, the Department determined,

1 however, that there would be no impacts between
2 Area C and AM4. And so Area C was included for
3 that reason, but if there are no impacts to
4 Area C, there couldn't possibly be impacts to
5 Area F.

6 So this was the furthest boundary where
7 the Department felt there may be some interactions
8 between mining in Area C and mining in AM4. I
9 don't know that that's clarified any more.

10 CHAIRMAN MILES: More information.

11 MS. CONVERY: I would point you to the
12 affidavits of Emily Hinz and Angela McDannel.
13 They do explain in greater detail and with
14 citations to the CHIA, I believe it is on Page 5-1
15 of the CHIA, where the Department gave a general
16 description of the CIA boundaries, and what it
17 encompasses. Their affidavits include in greater
18 detail what specific areas were included, and why
19 they were included.

20 CHAIRMAN MILES: I think we'd better get
21 the next ten minutes.

22 MR. O'CONNOR: One quick question. I
23 still don't understand why the Department -- or
24 why there wasn't some baseline data or some
25 studies done on this creek, East Fork, when it

1 flows right through the mining area, so that you
2 would have data on it to see if it is being
3 impacted or has been impacted in the past.
4 Obviously it goes right through the mine.

5 And another question is: Is Area F
6 being mined right now, or is this a proposed
7 mining site or --

8 MS. CONVERY: I'll answer the second
9 question first. Area F is proposed mining. The
10 application, it is in the third round deficiency,
11 and it is proposed mining at this point in time.
12 There is no mining.

13 With respect to the data, perhaps the
14 impression has been given throughout these
15 proceedings this morning that we don't have any
16 data on East Fork Armells Creek, and that is
17 absolutely not true. The CHIA is full of tables
18 and figures containing data from water monitoring
19 on East Fork Armells Creek over the last forty
20 years.

21 This is simply one example. There was
22 an assertion made that lower East Fork Armells
23 Creek is impaired due to nitrogen from the mine.
24 This is a table from the CHIA Table 9-7 in which
25 the Department analyzed nitrogen samples over that

1 period against DEQ7, the human health standard for
2 nitrogen, which is ten milligrams per liter.

3 And you'll see here that in upper East
4 Fork Armells Creek, which is the area most
5 impacted by mining, that zero of 46 samples taken
6 had an exceedence of the DEQ human health standard
7 of ten milligrams per liter. What you do see is
8 where other sources of nitrogen have been
9 identified, that is that area of EFAC, lower EFAC
10 below Colstrip. There were twelve exceedences of
11 DEQ7 standards. However, the source of that
12 nitrogen the Department has identified as likely
13 not being mining. It is due to agriculture,
14 grazing, municipal runoff, etc.

15 And if I may just briefly, my very last
16 slide here, there has been an allegation that we
17 simply have failed to apply DEQ12-A, the more
18 stringent standard, numeric nutrient standard for
19 nitrogen to the samples at the mine.

20 We do not deny that we did not discuss
21 DEQ12-A in the CHIA. However, what I would like
22 to point out, first of all, is DEQ12-A only
23 applies to wadeable streams. It is undisputed
24 that the majority of upper East Fork Armells
25 Creek, with the possible exception of two segments

1 is ephemeral. Therefore we don't believe it was
2 appropriate to apply DEQ12-A to upper East Fork
3 Armells Creek.

4 But what I would like to point out is
5 that the data that was available to the Department
6 at the time for total nitrogen, which is DEQ12-A
7 standard for total nitrogen for aquatic life
8 support, is 1.3 milligrams per liter. And you'll
9 notice that this is information that we put
10 together after the fact. It is not included in
11 the CHIA. However, we did have this information
12 available to us at the time.

13 This was taken near the town of
14 Colstrip. It's surface water monitoring well 55,
15 and you will see that there is not a single total
16 nitrogen sample that exceeds DEQ12-A.

17 So there are numerous tables and figures
18 which summarize the data that we have on East Fork
19 Armells Creek because we have been monitoring that
20 creek for forty years. Thank you.

21 CHAIRMAN MILES: Thank you. If you can
22 keep it to just ten minutes, we'd very much
23 appreciate it so we have an opportunity for
24 questions.

25 MR. MARTIN: I'd be happy to.

1 If I may, Madam Chair, members of the
2 Board, I'd like to address very briefly three
3 different issues. One is the aquatic life issue;
4 second, the CIA, the Cumulative Impact Area; then
5 lastly, I'd like to address your question, Madam
6 Chair, about the all premises argument that we see
7 in Petitioner's argument.

8 I'm only going to talk about aquatic
9 life very briefly, and I'd like to, if I may,
10 build on Mr. Tweeten's colloquy with Mr.
11 Hernandez. He points out that there is a serious
12 question, a serious factual question, a question
13 of what it is that the experts might say.

14 One thing that's patently the case is
15 that the CHIA and Ms. Hunter say that they
16 followed the applicable protocol. Mr. Urban in
17 his declaration says, "This is the protocol that
18 ought to be applied for a material damage sort of
19 determination." That is where we see a clear
20 conflict in terms of the facts.

21 It may well be the case that Mr.
22 Hernandez will in cross-examination somehow
23 demonstrate that Mr. Urban is wrong, that Ms.
24 Hunter is wrong. Perhaps that's the case, and
25 that's something that's to be resolved in the

1 hearing. Quite frankly, we'd like to have members
2 of this Board ask Ms. Hunter why it was that she
3 thought that was the appropriate protocol.

4 The instruction to Mr. Feldman, much has
5 been made of that. I frankly don't know why at
6 this point there was that sort of instruction to
7 Mr. Feldman that he shouldn't do the analysis. If
8 you ask me to speculate rather than draw the
9 conclusions that Mr. Hernandez has, I would guess
10 it is because Mr. Feldman may not be a biologist
11 with twenty years of expertise the way Ms. Hunter
12 is, and perhaps he was deferring to her expertise.

13 That's speculation on my part, but that
14 is the sort of thing, the sort of inference that
15 could be drawn from that piece of paper. It is
16 plainly not a legal issue. It is not something
17 that can be resolved on summary judgment.

18 I think beyond that, Ms. Convery
19 explained many of the issues associated with
20 aquatic life, so let me talk just briefly about
21 the CIA, the Cumulative Impact Area.

22 This truly falls in the category of no
23 good deed goes unpunished. I firmly believe that
24 what we have here is an agency that is taking the
25 very responsible position of drawing broadly the

1 Cumulative Impact Area. If you look at those
2 lines, there are many areas that are not at issue
3 in this litigation.

4 For example, let me posit the
5 hypothetical that there is a mud puddle someplace
6 in the far northeastern corner of that CIA. I
7 don't think anyone, I don't think Mr. Hernandez or
8 anyone else would say that we're required to do an
9 analysis of that mud puddle. There is no
10 interaction, there is no material impact, and it
11 makes sense, it only makes sense for this expert
12 agency to say, "We have a CIA out here. Let's
13 decide where the interaction is, and let's go
14 ahead and explore those areas. Let's do the
15 analysis."

16 Area F that has been the subject of much
17 of the argumentation from the Petitioners I think
18 is a case in point. They didn't raise it in their
19 comments, and quite understandably, the folks at
20 DEQ said, "Well, let's consider what's important
21 here, and let's decide what it is that we're
22 actually going to analyze."

23 There are a number of pieces of data out
24 there that demonstrate there is no groundwater
25 interaction between AM4 and Area F. Quite

1 understandably, the Department said, "We really
2 don't need to go beyond this." There is no
3 indication that the Petitioners in this case
4 thought this was an issue. We can see from the
5 data, from the groundwater flows, that there is no
6 interactions, and certainly no one has suggested
7 that there is interaction vis-a-vis the surface
8 water.

9 And finally let me touch just briefly on
10 the question that you raised, Madam Chair. There
11 is an all premises argument that we see from the
12 Petitioners in this case, and I'll tell you what
13 it builds on. It builds on the definition of
14 "operation." You'll see this is in Slide No. 8,
15 that if I were better at manipulating up this
16 thing would be up on the screen right now. But
17 Slide No. 8 is where all of this comes from.

18 In their initial brief, the only thing
19 that we heard from the Petitioners were the two
20 words "all premises." In fact -- and this is the
21 definition of operation.

22 There are two things that are wrong with
23 that, Madam Chair. First, it is divorcing the
24 word "operation" from "proposed." In fact, under
25 the statute and the implementing regulations, as

1 we went through earlier, what DEQ is required to
2 evaluate is the proposed operation, not all
3 premises throughout. In fact that would make no
4 sense.

5 What that would mean is that we're
6 basically repermitting every single area within
7 the Rosebud Mine, and that would mean that we
8 would be paralyzed through a permitting process
9 that required an analysis of every existing
10 operation that has been permitted throughout the
11 mine.

12 The only thing we're required to do, and
13 what we're not shirking, what we're not running
14 away from, is an analysis of those cumulative
15 impacts from AM4 with other portions of the mine,
16 whether it is proposed, or whether it's something
17 that's been permitted in the past. That's the
18 sort of obligation that the statute and the
19 regulations visit on the mine and on DEQ.

20 The second problem with it is that,
21 again, if you focus only on the two words that
22 were quoted in the initial brief, "all premises,"
23 you lose the rest of that definition of operation.
24 In fact, under MCA 82-4-203 sub (35), this
25 definition says that it's, sure, "all premises

1 that are used in the designated area," the
2 designated strip mine, the designated underground
3 mine. It is only those that are used in that area
4 that's designated.

5 In context, that plainly means the
6 proposed operation is that which you've proposed
7 to permit. So we think it is clear from the
8 definition, and we think just as a matter of
9 practicality, it makes no sense that we would have
10 to go out and repermit all these different areas
11 of the Rosebud Mine.

12 Let me stop there, and open myself up
13 for questions, and/or I will conclude.

14 CHAIRMAN MILES: Any immediate
15 questions?

16 (No response)

17 MR. MARTIN: Thanks so much. Again, I'd
18 like to express the gratitude of Western Energy
19 and Local 400 for all of the effort that's been
20 engaged in in going through this process, and we
21 want to thank you personally for all of your work
22 on this subject. Thank you.

23 CHAIRMAN MILES: We're going to take a
24 short break, and then I think come back for any
25 discussion and questions.

1 Hillary, I do have one question, though.
2 I was trying last night to find, I think it was
3 Appendix A of the Department. But at any rate,
4 the only thing that's on the website right now are
5 all of the exhibits supporting the Statement of
6 Disputed Facts for each entity and their exhibits,
7 but I don't see any of the exhibits from the
8 original briefs that we had access to a month ago.
9 Could you --

10 MS. HOULE: Thank you, Madam Chair.
11 That is actually correct. Each party submitted
12 the exhibits that they would be referencing, and
13 the disputed facts, and those were uploaded to
14 make your lives easier going through the
15 statements.

16 CHAIRMAN MILES: Right, and I appreciate
17 that, but I can't get to the original exhibits.

18 MS. HOULE: Right, and that's something
19 that we could easily remedy. I just don't want to
20 overwhelm the Board or the public at this time.

21 CHAIRMAN MILES: If you could at least
22 get that so we can get access to some of those
23 original exhibits. Thank you. Ten minutes,
24 please.

25 (Recess taken)

1 (Board Member Tweeten not present)

2 CHAIRMAN MILES: I'm going to go ahead
3 and get started. Mr. Tweeten will be I'm sure
4 coming back in just a second.

5 So I'm going to open it up to questions
6 and discussion with the Board. I do have a
7 question I would like to direct to Mr. Hernandez,
8 please.

9 So in the Department's conclusion this
10 morning, the statement about, "The Department is
11 entitled to rely on affidavits and testimony from
12 its own expert witnesses to explain the factual
13 conclusions reached in the CHIA," assuming that
14 that's information that was outside of the CHIA,
15 could you comment about that, and particularly in
16 relation to the decision in Bull Mountain.

17 MR. HERNANDEZ: Yes. Absolutely. And
18 the Board has already decided this issue. They
19 may not present post hoc evidence. That's what
20 the Board said in the Bull Mountain case.

21 The Board did provide a caveat saying
22 that the parties could certainly present argument,
23 and that was a citation that Ms. Convery
24 presented, was a statement from the Board's ruling
25 that said an attorney certainly can present

1 argument interpreting the evidence that was before
2 the Board, but the Board, this Board in the Bull
3 Mountain case, relied on a very important
4 provision -- that I could pull up here if you'd
5 like -- that neither of my friends have cited
6 because it's unfavorable to them. It's ARM
7 17.24.405(6.) And Madam Chair if I may, could --

8 (Board Member Tweeten present)

9 CHAIRMAN MILES: 17.24 what?

10 MR. HERNANDEZ: 405(6). It was my very
11 first slide.

12 CHAIRMAN MILES: This is fine to stay
13 seated here. You don't need to come up to the
14 podium for all this. Chris, while they're getting
15 the sign up, I'm just asking about the issue that
16 was in our Bull Mountain decision about whether
17 the Department can rely on affidavits and
18 testimony to explain factual conclusions reached
19 in the CHIA that were actually -- that those
20 affidavits and that information is not in the
21 CHIA.

22 MR. HERNANDEZ: In this provision, as
23 the Board interpreted it in the Bull Mountain
24 case, it's quite clear. It says, "The Department
25 must make this finding. There has to be material

1 presented by the mining company that affirmatively
2 demonstrates, and the Department must confirm --"
3 and this is the important language not highlighted
4 here, but -- "on the basis of the information set
5 forth in the application, or information otherwise
6 available that is compiled by the Department."

7 The Department is supposed to compile
8 all the evidence that supports its determination,
9 and that is the record for review, and that's what
10 the Board said in the Bull Mountain case. In our
11 briefs, we show basically that there is no
12 compelling argument to revisit that issue here.
13 And pursuant to that language and the Board's
14 determination, affidavits attached by the
15 Department or Western Energy Company simply are
16 irrelevant and not sufficient to establish a
17 material issue of fact.

18 CHAIRMAN MILES: Thank you.

19 BOARD MEMBER TWEETEN: Can I follow up
20 on that for a second. If the conclusions that are
21 reached by the Department are put into question,
22 as your client has done in this case, are they
23 therefore not allowed to rebut that argument?

24 MR. HERNANDEZ: Absolutely not. They
25 certainly can, and that's what the Board said.

1 They can argue about it, but they have to have
2 evidence supporting their decision compiled at the
3 at the time of the decision in the CHIA. That's
4 what the language says. It says on the basis of
5 information compiled by Department.

6 I think that dovetails exactly with the
7 Supreme Court's ruling in the Kiley Construction
8 Case (phonetic) that we cited in our briefs, where
9 a county commission in issuing approval for a
10 subdivision, they have to make a finding based on
11 their decision then. And they didn't do it, and
12 after the fact they came in and presented evidence
13 saying, "This is why we did this, and this is how
14 we did it," and the Court said no, that doesn't
15 count. The statute is clear. You have to make it
16 based on the information there.

17 And this post hoc stuff is not
18 sufficient to substitute for that, and on summary
19 judgment it is irrelevant, and not sufficient to
20 establish a genuine issue of material fact.

21 BOARD MEMBER TWEETEN: So hypothetically
22 -- this may sound like this case, but it's not
23 intended to be -- if the Department were to say in
24 its finding that, "We're not considering the Area
25 F for purposes of impacts because there is a

1 hydrological divide, and the groundwater is not
2 connected," and then comments are filed that
3 question that judgment, they're not allowed to
4 then go further and say, "Here's why we said
5 that"?

6 MR. HERNANDEZ: Well, in their response
7 to comments, yes, they have response to comments.
8 That's included in the record, is response to
9 comments, in their final decision. And we're not
10 trying to exclude anything that's in their
11 response to comments. That's part of the record,
12 the way we submit comments and they respond to the
13 comments, and then issue their decision.

14 So their response to comments is of
15 course fair game, but that's not what they're
16 trying to get in here. They're trying to bring
17 other stuff, stuff that came in two days ago from
18 an assessment they made a couple weeks ago.
19 That's not the way it works.

20 I think if you look at this case, it
21 really is to protect the public, because once it
22 goes into appeal mode, the Department is defending
23 an action, and all of their collection of evidence
24 is towards defending an action, and that's their
25 goal. They're not acting as the defender of the

1 public, which is their regulatory role.

2 Right now they're developing evidence,
3 they're collecting evidence, they're doing new
4 studies to try and defend this decision, and
5 that's not the role they're supposed to have, and
6 that's not the system set up by the regulations as
7 we interpret them and as this Board interpreted
8 them just eleven months ago in the Bull Mountain
9 case.

10 BOARD MEMBER TWEETEN: So if there is a
11 nexus to information that is in the decision, then
12 expanding on that after comments are filed is
13 okay, but if there is no evidentiary support for
14 this particular decision in the CHIA itself, then
15 trying to muster that support after the decision
16 has been issued is out of bounds; is that the way
17 I understand your argument?

18 MR. HERNANDEZ: That's right.

19 BOARD MEMBER REINHART-LEVINE: Madam
20 Chair, a question for Mr. Hernandez. Please
21 address the argument that the Petitioners'
22 arguments on summary judgment were not in the
23 public record.

24 MR. HERNANDEZ: Yes. I can address
25 that. It's simply not the case. I think that

1 argument has been directed mostly towards our
2 arguments about the anticipated mining, and that
3 we didn't actually address Area F in our comments.
4 It is factually incorrect as a matter of law,
5 wrong as a matter of fact.

6 We pointed out in our reply that we
7 submitted comments. In our comments we included
8 one attachment with other comments in a related
9 federal action on Area B. And there we said,
10 "Listen. You have to consider cumulative effects
11 of Area F." Within our comments we presented to
12 the agency it is -- if you'll indulge me -- it is
13 one of our exhibits attached with our reply brief,
14 and gives the exhibit number.

15 It is Exhibit 43 are the comments that
16 we submitted with our comments in this case to the
17 Department. It clearly addresses Area F numerous
18 locations. We've cited this in our reply brief.
19 And it is just not the case that we didn't flag
20 Area F. They may not have looked at it, but we
21 certainly did flag it.

22 And two more points, Ms.
23 Reinhart-Levine, on that are that, one, the
24 question about the definition of anticipated
25 mining, we really couldn't have anticipated it in

1 our comments because they presented this incorrect
2 definition in the CHIA, which was after we had
3 commented. So we talked about Area F, but we
4 couldn't have foreseen the Department would have
5 used this legally erroneous definition of
6 anticipated mining.

7 And for what it's worth, we cite case
8 law that says that exhaustion is not required here
9 under the regulations; but furthermore, there is
10 an exception to exhaustion if the issue is purely
11 legal. And here we said, "Wait a second. They're
12 using a purely legally erroneous definition of
13 anticipated mining. That's not good," and as we
14 dug into the record, we saw this was a basis for
15 excluding Area F, and that's the basis of that.

16 There were a few other suggestions that
17 some of our other issues were not in the record,
18 and I can address those, too, if you prefer, Ms.
19 Reinhart-Levine.

20 BOARD MEMBER REINHART-LEVINE: Go ahead.

21 MR. HERNANDEZ: There were a few
22 suggestions by my friend Mr. Martin that our
23 argument with respect to aquatic life wasn't
24 adequately raised in our comments, and it was.
25 Our issue with respect to aquatic life, we said

1 it's been our concern all along that the
2 Department in its CHIA is saying there is no
3 material damage, while at the same time the
4 Department's Water Protection Bureau is saying
5 East Fork Armells Creek is impaired because they
6 think the potential cause is mining. And we said
7 it just doesn't fit together. We don't understand
8 this.

9 The Department responded to our
10 comments, and they said, "We determined that our
11 prior determination that the creek is not meeting
12 water quality standards can be disregarded on the
13 basis of this aquatic life survey." That was
14 their response to comments. And so in our appeal
15 we said, "Wait a second. That doesn't stack up.
16 This survey didn't meet any of your protocols, and
17 it certainly is enough to overturn your prior
18 determination by the Water Protection Bureau that
19 the creek is impaired, i.e., not in compliance
20 with water quality standards."

21 So we raised that issue as well in our
22 comments. It morphed a little bit in the
23 briefing, but that was because we were addressing
24 their response to our comments.

25 BOARD MEMBER REINHART-LEVINE: Madam

1 Chair, further question.

2 CHAIRMAN MILES: Sure. I do think Mr.
3 Martin would follow you next.

4 BOARD MEMBER REINHART-LEVINE: Madam
5 Chair, Mr. Hernandez, why is it not a disputed
6 fact regarding whether or not mining is the cause
7 of impacts to the East Fork? In other words, it
8 appears to be disputed whether or not mining is
9 the cause in comparison to the harsh conditions of
10 the natural environment, in comparison to
11 agriculture. Doesn't that seem to be a disputed
12 fact?

13 MR. HERNANDEZ: It certainly is an
14 undecided matter. Our argument, though, isn't
15 that the mine is affirmatively causing harm to the
16 water. Our argument is they didn't look at this
17 closely enough. The statutory language is that
18 they must affirmatively demonstrate, and then
19 confirm based on record evidence, that the mine is
20 not going to cause material damage.

21 And we looked at the record, and we
22 said, "There are a lot of questions here. We
23 don't see an affirmative demonstration." We have
24 the Department saying the receiving waters are not
25 meeting water quality standards, i.e., that there

1 is material damage.

2 And in the record, the only response
3 that the Department uses to come back at this is
4 this incomplete survey that deviated from their
5 own protocols, and it is our contention that that
6 survey can't trump their own prior determination
7 following their actual protocols that the water is
8 impaired, and possibly because of mining.

9 And so it really is a statement their --
10 they can't disregard their prior determination
11 without actually a determination of equal weight,
12 and it is a question. We're presenting it as a
13 question of law.

14 And I think that it is our contention,
15 Ms. Reinhart-Levine, that we don't have to -- it
16 is not our burden to show that mining is causing
17 this. It's their burden to show that it is not
18 causing the harm, and they short cut the analysis
19 that they had to do to do this.

20 They could have done it. They could
21 have done an assessment of their protocol
22 assessing compliance with water quality standards
23 and said, "No, our prior determination was
24 incorrect," but they didn't do that. They said,
25 "Well, there's some bugs in the water. Therefore,

1 clearly it is supporting aquatic life," and that's
2 what they say specifically in the CHIA at Page
3 9-8. There are some bugs in the water, so it's
4 meeting water quality standards.

5 But that doesn't make any sense. It's
6 simply an irrational determination. Their own
7 protocols say it is not just the presence of bugs
8 that determines if a creek is healthy. You can
9 have bugs living in the Berkeley Pit. It doesn't
10 mean that the pit is meeting water quality
11 standards. You actually have to analyze those
12 bugs to see if it's healthy. They didn't do it.

13 So our argument isn't that they can't
14 prove it, we're saying they didn't follow their
15 own steps that would be required for an
16 affirmative demonstration.

17 BOARD MEMBER TWEETEN: Counsel, Dr.
18 Hunter certainly talks about that in her
19 declaration, and provides a background explanation
20 as to why it was her opinion that the mining was
21 not a cause of the condition of the aquatic life
22 in the East Fork of Armells Creek. Why doesn't
23 that create an issue of fact?

24 MR. HERNANDEZ: Because we contend that
25 as a matter of law, if they're going to gainsay

1 the Department's own prior determination that the
2 creek is not meeting water quality standards --
3 and they do that in the CHIA. They say it is
4 meeting water quality standards here. If they're
5 going to set aside their own prior determination
6 that it's not meeting water quality standards,
7 they have to at least do an analysis of equal
8 robustness to do that, and they just didn't do it
9 here. There is no question.

10 I mean Penny Hunter did do an analysis,
11 or she did a survey, and she interpreted it, but
12 the prior determination is the Department's, and
13 the Department still stands behind it. They still
14 say that lower East Fork Armells Creek to this day
15 is impaired and not meeting water quality
16 standards, and they think that mining might be the
17 cause. They haven't disproved that from their
18 Water Protection Bureau.

19 Ms. Convery might be able to speak to
20 this. She's presented their most recent
21 integrated report where they talk about what
22 waters --

23 The Department every two years, they
24 determine whether or not -- they restate to the
25 EPA whether or not waters are meeting water

1 quality standards, and they had this draft report
2 that they were going to send to EPA that was
3 available to the public for awhile. And we looked
4 at it, and there they still said that East Fork
5 Armells Creek is not meeting water quality
6 standards, in direct conflict with what they say
7 in their CHIA, that there is some bugs there, so
8 it's meeting water quality standards.

9 And we haven't seen the final. It is
10 not available online as of yesterday, and I
11 haven't received a copy of their final impairment
12 list, which is presumably out there.

13 But it seems that it's fundamentally
14 arbitrary and capricious for the Department on one
15 hand, the Department's Water Protection Bureau,
16 saying, "This creek does not meet water quality
17 standards, and we think it might be from pollution
18 from the mine." They do say that they don't think
19 that nitrogen is from the mine, but they also say
20 that they think salinity and specific conductance
21 -- which is another measure of salinity -- is from
22 the mine. And then the Coal Bureau saying,
23 "Everything is copacetic. There is no violation
24 of water quality standards."

25 With respect, it is the Water Protection

1 Bureau in the Department that's the expert on
2 determining compliance with water quality
3 standards. That's their job. And for the Coal
4 Bureau to come in and say, "Well, we have this
5 evidence that there are bugs in the water,
6 therefore you can disregard what our expert
7 portion of our agency says," it is just irrational
8 as a matter of law, and I think there definitely
9 is federal case law that says where an agency says
10 two things at the same time, it's arbitrary and
11 capricious.

12 I'd be happy to dig up some citations
13 for that, but I think it's an understood principle
14 of administrative law.

15 CHAIRMAN MILES: Unless you have
16 something pressing, I'd like to -- A minute ago
17 you looked like you were anxious to say something,
18 Mr. Martin.

19 MR. MARTIN: I am, Madam Chair, and I
20 really appreciate your indulging me.

21 First I'd like to address just very
22 briefly the legal argument that was advanced by
23 Mr. Hernandez. He indicated that the Kiley
24 decision is what controls this case.

25 In fact, what controls this case is the

1 Montana Supreme Court's decision in MEIC v. DEQ.
2 There it is very clear from that decision that
3 they bear, that is the Petitioners, bear the
4 burden of proving that DEQ made a mistake. They
5 need to demonstrate by a preponderance of the
6 evidence that there is in fact a mistake here.

7 If you look at the regulations under,
8 and for that matter Chapter 6 of the Montana EPA,
9 there is no question but what a contested case
10 hearing, as a general proposition, we're allowed
11 to present evidence, to cross-examine witnesses;
12 and in fairness to Mr. Hernandez, he is as well.
13 And again, we welcome that opportunity.

14 I'd like to talk about a place where he
15 and I actually agree about the process. He makes
16 the point that they didn't -- or that they made an
17 argument about aquatic life. He acknowledges
18 that --

19 CHAIRMAN MILES: Who is "they"?

20 MR. MARTIN: I'm sorry. The
21 Petitioners. The Petitioners did make an argument
22 in their comments about aquatic life. What he
23 didn't do is he didn't attack the methodology. We
24 haven't seen the sorts of arguments that he's
25 advancing at this point in time. And I guess

1 maybe the initial question is whether or not he
2 has to confine himself to the administrative
3 record, and only raise the issues that were in his
4 comments.

5 We're willing to recognize that he can
6 in fact build on those comments. If he raises an
7 issue, and it is necessary to go outside those
8 comments, and bring in other facts, we don't
9 object to that as a procedural matter. At the
10 same time, we have to be allowed under the Montana
11 administrative process to respond.

12 So when he brings into this proceeding
13 an argument to the effect that the protocols were
14 not followed, we're perfectly entitled to submit
15 the declaration of Ms. Hunter who says point
16 blank, and very directly, that she followed the
17 applicable protocol. And as Mr. Tweeten alluded
18 to, this may well be an issue of expert testimony.
19 Perhaps they disagree with the expert who has
20 spent twenty years in this area, and believes that
21 that survey in fact was adequate. And if they
22 want to cross-examine Ms. Hunter, present their
23 own expert in this proceeding, they're allowed to
24 do it.

25 Let me digress for a moment. The

1 Montana administrative procedure in this area is
2 different from, for example, what we see under the
3 APA and 5 USC Section 552, where you have a
4 rulemaking, where you have a proposal from an
5 agency, and there is a series of comments that are
6 made with respect to that proposal.

7 There, the case law is virtually uniform
8 that one is confined to the administrative record,
9 because you have seen what the agency plans to do,
10 you commented on it, and only after that comment
11 period does this matter become the subject of
12 litigation. And in that setting, it is perfectly
13 appropriate to confine one to the administrative
14 record.

15 Here it is different. We have a PHC
16 that's submitted to DEQ. In fairness to Mr.
17 Hernandez, that's the only thing he sees at that
18 point in time. He raises his issues. He looks
19 then, after we go through the CHIA process and
20 issue our decision, he looks at what the
21 Department did. His only recourse at that point
22 in time is to go through a contested case
23 proceeding. He bears the burden of proving that
24 DEQ is wrong.

25 We in turn are allowed to defend

1 ourselves, the Department is allowed to defend
2 itself. They advance evidence. We respond to
3 that evidence. They have the burden of
4 persuasion. We're allowed to defend the decision
5 and what it was that we did.

6 His reference to Bull Mountain is I
7 think misguided. Necessarily this Board is in a
8 position where it needs to accord Bull Mountain
9 with MEIC v. DEQ. And the obvious way to make
10 those two decisions consonant is to recognize that
11 in Bull Mountain there was a stipulation, and the
12 stipulation was that there are no material facts.
13 At least implicit in that stipulation between the
14 parties in that case is that we're going to
15 confine ourselves to an administrative record.

16 Here we don't have a stipulation of that
17 nature. We're willing to go through the contested
18 case proceeding. We're willing to have all of
19 this evidence exposed to the Board, and frankly
20 exposed to the Petitioners.

21 The argument about water quality
22 standards in the context of aquatic life -- and
23 I'm not going to spend too much time on this.

24 CHAIRMAN MILES: We're really trying to
25 get our questions out on the floor right now, so I

1 don't want to have this be a lot more testimony.

2 MR. MARTIN: Okay. Let me just say very
3 quickly that the water quality standard in this
4 case is the narrative standard. It must be able
5 to support aquatic life. We believe, and the
6 Department believes as it said in its CHIA, that
7 the survey conducted by Ms. Hunter demonstrates
8 that in fact it complies with that narrative
9 standard. I'll stop. Thank you.

10 BOARD MEMBER REINHART-LEVINE: Madam
11 Chair, can I just ask a follow up question about
12 that.

13 Mr. Martin, I'd like to refer you to
14 Intervenor's Exhibit 10, Ms. Hunter's declaration,
15 Paragraphs 12 and 13. She discusses in her own
16 opinion that there is insufficient data in DEQ's
17 proposal to draw any conclusion regarding the
18 existence or causes of impairment in the East
19 Fork.

20 In Paragraph 13 she says, "Most of the
21 data cited by DEQ in 303(d) are not specific to
22 the East Fork, and DEQ did not study any aquatic
23 life or habitat data collected along the upper
24 segments. In fact to my knowledge, no aquatic
25 life data has been collected" and until she did

1 her surveys. She goes on to say in Paragraph 15
2 that, "The 303(d) list did not consider other
3 aquatic life studies."

4 Please respond to Mr. Hernandez's
5 argument that the adequacy of the study is just
6 not there as a matter of law.

7 MR. MARTIN: And let me begin with the
8 question, and I think what you pointed out, Ms.
9 Reinhart-Levine, is that this truly is an issue of
10 fact. It truly is an application of the facts to
11 the law in this instance.

12 Now, Ms. Hunter points out -- and by the
13 way, I'm going to defer to Ms. Convery about the
14 attainment records -- but she points out that
15 there is a dearth of information that would
16 support the kind of conclusion that we see in the
17 attainment records.

18 What she did -- and this is an
19 attachment to the CHIA -- is she did a comparison.
20 She compared the aquatic life in East Fork Armells
21 Creek to the aquatic life in other eastern Montana
22 streams, including, as Mr. Tweeten noted, the
23 aquatic life in West Fork Armells Creek, obviously
24 a creek that's very close, but that has not been
25 affected by mining.

1 Now, her task was not to do an
2 impairment determination because that's a
3 technical issue that was beyond the assignment
4 here. What she was required to discern was
5 whether or not the aquatic life had been harmed in
6 East Fork Armells Creek. She points out that the
7 attainment records really don't have sufficient
8 information to support the kind of conclusion that
9 they have made.

10 This gets down to I think a question of
11 when is enough enough. We have in this instance
12 an expert who went out, conducted these surveys.
13 They were surveys that hadn't been conducted for
14 many, many years. There was some 1976 data that
15 she looked at.

16 But she looked at the aquatic life,
17 determined that the critters in East Fork Armells
18 Creek were comparable in number to what you see in
19 streams like that in eastern Montana. She
20 compared upstream of mining with downstream of
21 mining, and concluded that this is in essence a
22 stream that complies with that requirement under
23 the WQS that it support aquatic life. So we do
24 have that determination as to whether or not there
25 is material damage.

1 But I want to make sure that I'm
2 answering the question, Ms. Reinhart-Levine,
3 because I see a quizzical look on your face.

4 BOARD MEMBER REINHART-LEVINE: Madam
5 Chair, if I could just redirect to Ms. Convery.

6 Both Ms. Hunter and MEIC seem to raise
7 some doubts about the adequacy of the information
8 that the Department had regarding East Fork, and
9 Mr. Hernandez has argued that it is inadequate as
10 a matter of law. Please address that argument
11 regarding the adequacy of the information
12 regarding the East Fork.

13 MS. CONVERY: Madam Chair, Ms.
14 Reinhart-Levine, I would like to take it a step
15 further than Mr. Martin. I would like to assert
16 that the issue of whether Ms. Hunter followed the
17 Standard Operating Procedures for collecting bug
18 samples that is used by the Water Quality Bureau
19 department to make an impairment determination for
20 a stream is neither relevant nor material to this
21 determination of this matter, and the reason for
22 that is simple.

23 The legal issue we are addressing here
24 today is whether the Department met, whether the
25 Coal Program staff of the Department met the legal

1 standard under the Montana Surface and Underground
2 Mine Reclamation Act for making a material damage
3 determination with regards to groundwater and
4 surface water systems within the Cumulative Impact
5 Area.

6 His assertion that we were required to
7 follow, whether we were required to follow an SOP
8 or not for a single aquatic life survey is one
9 speck of information that was considered by the
10 Department in making that material damage
11 determination, might be relevant if the legal
12 issue we were discussing is whether the
13 Department's Water Quality Bureau had made an
14 impairment determination for East Fork Armells
15 Creek that they were challenging.

16 The legal standard is not whether the
17 stream, whether the Department made an appropriate
18 impairment determination for East Fork Armells
19 Creek. That legal issue is outside these
20 proceedings.

21 Now, it has been presented as if the
22 legal standard is that we must meet the Standard
23 Operating Procedures for conducting an aquatic
24 life survey for making an impairment
25 determination, but the fact is that is not the

1 legal standard, and that is not the determination
2 we're making.

3 It was one single piece of evidence,
4 after considering all of the water quality data
5 for surface water and groundwater that has been
6 collected over a forty year period of monitoring
7 those streams. That aquatic life survey was
8 conducted after the Department reviewed all
9 previous aquatic life surveys available to the
10 Department from the 1970s and 1990s, and it is
11 simply not material or relevant for that purpose.
12 It is not the legal standard we're addressing here
13 today.

14 So the real issue is whether mining has
15 caused material damage to East Fork Armells Creek.
16 And the other evidence that is inside the record
17 that has been pointed to by the Department, the
18 Department based its determination on all of that
19 information, and made a determination that coal
20 mining is not the cause of impairment of East Fork
21 Armells Creek for aquatic life life support.

22 CHAIRMAN MILES: I think we're getting a
23 little away from answering direct questions here.
24 We are running out of time.

25 Ben, I have a question for you. This

1 matter obviously is not going to be decided today.
2 We will be taking this up in December. Will there
3 be further opportunities to get input from the
4 parties if we feel we have outstanding questions?

5 MR. REED: Yes, Madam Chair. To the
6 degree that there is further briefing required on
7 legal issues, then that can be referred to the
8 parties between now and then, or for some future
9 time.

10 CHAIRMAN MILES: One thing I do need to
11 do is to make sure I give a couple of minutes to
12 public comment if we need it. So are there any
13 further questions?

14 (No response)

15 CHAIRMAN MILES: Mr. Hernandez, you were
16 looking like you needed to respond. Very quickly,
17 please.

18 MR. HERNANDEZ: If I may, I think that
19 Ms. Convery's last argument is the exact point
20 that we're trying to make. She ultimately says
21 this is a question of law. A matter of law, we
22 don't have to determine whether or not the creek
23 complies with water quality standards, as a matter
24 of law in a material damage determination.

25 And it is our position as a matter of

1 law that you do, because by law, Montana Code
2 Annotated 82-4-203 sub (31), the definition of
3 material damage includes violation of a water
4 quality standard. It just doesn't make sense to
5 say they can determine whether or not there's a
6 violation of water quality standards without
7 actually having to look at whether or not it was a
8 violation of water quality standards. So that I
9 think is a legal issue, that their argument
10 they're presenting is a legal issue. They don't
11 have to determine whether or not there's
12 compliance with water quality standards as a
13 matter of law. We contend they do.

14 BOARD MEMBER TWEETEN: Madam Chair, I
15 have one follow up to that, which can be answered
16 yes and no. It doesn't require an extended
17 discussion.

18 That's correct that a violation of water
19 quality standards is one element of material
20 damage, but there is a causation requirement there
21 as well, in other words, that material damage has
22 to be the result of the mining operation. If it
23 is the result of something else, like agriculture,
24 then it doesn't constitute material damage; am I
25 wrong about that? And please just say yes or no.

1 MR. HERNANDEZ: It depends. If the mine
2 has no contribution whatsoever, then that's right.
3 There has to be some causation. However, the mine
4 has to take the stream as it comes. If it's
5 already impaired, they can't add to the
6 impairment.

7 BOARD MEMBER TWEETEN: Thank you.

8 CHAIRMAN MILES: Any pressing questions
9 from anybody else?

10 (No response)

11 CHAIRMAN MILES: We'll take this matter
12 up in December. Thank you all very, very much. I
13 want to thank all of the attorneys here. I
14 appreciate all of the time you put in and all the
15 information, and we will continue this in
16 December, and thank you again.

17 With that, I'll close the public hearing
18 on this issue, and open up for public comment on
19 this or any other matters that the public wishes
20 to comment on. Is there anybody who wishes to
21 comment?

22 (No response)

23 CHAIRMAN MILES: Let the record show no
24 one stood up.

25 BOARD MEMBER TWEETEN: Move to adjourn.

1 CHAIRMAN MILES: It has been moved to
2 adjourn.

3 BOARD MEMBER REINHART-LEVINE: Second.

4 CHAIRMAN MILES: All in favor, please
5 say aye.

6 (Response)

7 CHAIRMAN MILES: Thank you very much.

8 (The proceedings were concluded

9 at 12:46 p.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 - 116 - 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 9, 2020.

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