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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

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 9, 2016
1:05 p.m.

BEFORE CHAIRMAN JOAN MILES, BOARD MEMBERS
DR. ROBERT BYRON, ROY O'CONNOR;
and BOARD MEMBERS CHRIS TWEETEN, MICHELE
REINHART-LEVINE (by telephone);
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: We'll get started here.
5 I want to make sure the Board members are still on
6 the phone. Chris, are you still there?

7 (No response)

8 BOARD MEMBER REINHART-LEVINE: Yes,
9 still here.

10 CHAIRMAN MILES: Thank you, Michele.
11 And I know that Marietta was going to sign off at
12 this point, so we just need to get Chris back.

13 BOARD MEMBER CANTY: I'll go ahead and
14 sign off, Joan.

15 (Ms. Canty not present)

16 CHAIRMAN MILES: Chris, I'm trying to
17 find out if you're on the line still.

18 (No response)

19 CHAIRMAN MILES: Do you have the phone
20 on mute?

21 BOARD MEMBER TWEETEN: Chris.

22 CHAIRMAN MILES: Okay. Thanks, Chris.
23 We were just looking for you. Thank you very
24 much. We're reconvening. Marietta Canty has
25 recused herself for the rest of this discussion,

1 but we have five of us, Rob Byron, Roy O'Connor,
2 and myself; Michele and Chris are on the line.

3 So we will take up the matter of Western
4 Energy and the Rosebud Mine that we heard in
5 November. Is there anyone who wants to start a
6 discussion on the outstanding motion for summary
7 judgment?

8 Is there anyone that wants to comment on
9 this, please?

10 BOARD MEMBER TWEETEN: Madam Chair, I
11 think that if one were to comb the briefs and comb
12 the record, one would find numerous questions of
13 material fact here that are suggested by the
14 Department's response brief, where the Department
15 I think has done a very thorough job of going
16 through the papers basically, or the evidence
17 basically line by line, and then looking at the
18 Petitioner's brief, and identifying a substantial
19 number of places where there appears to be a
20 conflict in the evidence.

21 So I guess I would start from the
22 position that whatever we might think about the
23 merits, based on the limited amount of information
24 that's in front of us -- and I say limited
25 advisedly obviously, because there is a huge

1 amount of information in front of us -- but there⁵
2 would be much more were we to get this case back
3 after an evidentiary hearing.

4 So in that sense, I think what we're
5 looking at here is just a slice of the picture,
6 that making a decision based on what's in front of
7 us I think would be reversible error given the
8 substantial number of points that are contested by
9 the Department and the Petitioner.

10 So I'm starting from the position that I
11 think that a remand is probably required here for
12 a full blown evidentiary hearing before we can
13 determine this issue. And remand is probably not
14 the right word, because as I understand the status
15 of this, the Board has not assigned this to a
16 Hearing Examiner, so we would have to take up that
17 matter --

18 CHAIRMAN MILES: That's correct.

19 BOARD MEMBER TWEETEN: From where I'm
20 standing right now, I think if we remand this to
21 the Hearing Examiner with instructions to conduct
22 an evidentiary hearing on the allegations in the
23 petition, and then give us a proposed decision
24 based on that.

25 CHAIRMAN MILES: I'm wondering if a

1 motion to remand is even the appropriate one,⁶ or
2 if it is just to deny summary judgment, and then
3 that automatically continues in a -- I'm just
4 trying to find the appropriate motion, if we
5 concur with what you're saying.

6 MR. REED: Madam Chair, I think Mr.
7 Tweeten has it exactly right. The motion for
8 summary judgment currently before the Board would
9 be denied, the matter would be referred or
10 remanded -- I don't think the term of art is
11 particularly relevant -- to a Hearings Examiner
12 for a full hearing, and then the Hearings Examiner
13 would set the schedule for and conduct that
14 hearing, and get proposed findings and conclusions
15 from the parties.

16 BOARD MEMBER TWEETEN: I could not have
17 said it better myself, Madam Chair.

18 BOARD MEMBER REINHART-LEVINE: This is
19 Michele. And I agree. There appear to be many
20 facts that are in dispute that are material, and
21 would agree with denying the motion for summary
22 judgment.

23 But I think that we should probably hear
24 the evidentiary hearing ourselves because
25 ultimately it's all going to probably come back to

1 us anyway, and if we do hear the hearing, I think⁷
2 it will help us better understand the issues, have
3 an opportunity to cross-examine expert witnesses,
4 and be more well versed in the evidence when the
5 matter does ultimately come back to us.

6 CHAIRMAN MILES: Further discussion?

7 I would anticipate that would be a
8 several day hearing potentially. I'm guessing.
9 Just food for thought. Anyone else?

10 BOARD MEMBER TWEETEN: Perhaps we might
11 ask Ben his view on how extensive an evidentiary
12 hearing might be in this case. He may be more
13 familiar with the record evidence than anybody at
14 this point.

15 MR. REED: Madam Chair, I believe that
16 the parties could get it done in between three to
17 five days, but I suspect that the parties would --
18 given that parties have at least -- I think that
19 there might be areas in which the hearing could be
20 truncated. But I'm not familiar at this point as
21 to whether --

22 I believe that MEIC does have an expert,
23 and I'm looking over in the direction of Counsel
24 for MEIC. The primary thing that would tend to
25 prolong a hearing would be whether the parties

1 needed to present expert testimony, and that
2 expert testimony diverged significantly.

3 CHAIRMAN MILES: We might be jumping
4 ahead a bit on trying to figure out what a hearing
5 would look, but as long as you're up there, Mr.
6 Hernandez.

7 MR. HERNANDEZ: Yes, if I will. We had
8 a schedule that had expert disclosures. We never
9 reached that point. So we have not made decisions
10 about experts at this point. And if it were to go
11 to a hearing, we'd want to have the opportunity to
12 obtain experts and find out information about
13 their experts. So I think the question is still
14 open, Madam Chair.

15 CHAIRMAN MILES: And that may be jumping
16 ahead. I think we need to get a sense first of
17 whether people agree with the suggestion to deny
18 summary judgment.

19 And I would comment that I can't
20 disagree with the fact that there appears to be
21 disputed facts that are material to this, but I do
22 for the record want to say that I do think there
23 is some very important questions of law as well,
24 as was pointed out in the briefs supporting the
25 motion for summary judgment. So I don't think

1 this is all just a question of factual disputes,
2 but I do believe that there are enough that would
3 probably make it inappropriate to grant summary
4 judgment at this point.

5 BOARD MEMBER TWEETEN: Madam Chair, I
6 agree with you on that point. I do think, though,
7 that we will make a more informed decision with
8 respect to those issues of law if we have a fully
9 fleshed out factual picture in front of us as
10 opposed to trying to discern the facts based on
11 declarations and exhibits that are in many
12 instances contested.

13 CHAIRMAN MILES: I agree with your
14 assessment there. Any comments from others?

15 BOARD MEMBER TWEETEN: Madam Chair, if I
16 might, one more point. Another way to shorten the
17 hearing might be to look at the way that the
18 Public Service Commission handles their technical
19 matters in the proceedings in front of them.

20 Their practice generally is for the
21 experts to submit their direct examination
22 testimony in writing in advance of the hearing,
23 and then the experts would appear and be available
24 for cross-examination by the other party. I think
25 this tends to sharpen the focus of the issues with

1 respect to which the experts will be testifying.
2 It would give the Board an opportunity to review
3 that direct testimony in advance of the hearing,
4 and thus be better prepared to understand,
5 cross-examination, and ask questions of its own.

6 So I'm just throwing that out as an
7 option in the event you decide to take this path.

8 CHAIRMAN MILES: Does that make sense to
9 you, Mr. Haladay, that suggestion?

10 MR. HALADAY: That does. I can make
11 sure that it is permissible to do it that way, but
12 if the Board so chose, that would be one way you
13 could go.

14 CHAIRMAN MILES: Further discussion?

15 (No response)

16 CHAIRMAN MILES: So Chris, could you
17 perhaps restate -- or maybe you haven't made a
18 motion, but if you would place one on the floor.

19 BOARD MEMBER TWEETEN: Madam Chair, I
20 have not made a motion, so let me make one now.

21 I move that the Board overrule the
22 Petitioner's motion for summary judgment, and that
23 the Board appoint a Hearing Examiner to preside
24 over proceedings in this matter on remand, and
25 direct the Hearing Examiner to conduct a hearing

1 with respect to all issues factual and legal that
2 are presented in this matter.

3 CHAIRMAN MILES: Is there a second?

4 BOARD MEMBER O'CONNOR: I'll second it.

5 CHAIRMAN MILES: Roy O'Connor seconds.

6 Is there further discussion?

7 (No response)

8 CHAIRMAN MILES: Would you call for the
9 vote.

10 MS. HOULE: Absolutely, Madam Chair.
11 Just like before, we'll start with those on the
12 phone. Ms. Reinhart-Levine, will you please give
13 us your vote.

14 BOARD MEMBER REINHART-LEVINE: Aye.

15 MS. HOULE: Mr. Tweeten.

16 BOARD MEMBER TWEETEN: Yes.

17 MS. HOULE: Madam Chair.

18 CHAIRMAN MILES: Yes.

19 MS. HOULE: Mr. O'Connor.

20 BOARD MEMBER O'CONNOR: Yes.

21 MS. HOULE: Dr. Byron.

22 BOARD MEMBER DR. BYRON: Yes.

23 MS. HOULE: Thank you. I guess that's
24 that.

25 MS. CONVERY: May I address the Board

1 for just a brief moment?

2 CHAIRMAN MILES: Yes, if that's
3 appropriate.

4 MS. CONVERY: It is in response to the
5 comment made by Mr. Hernandez, if I may just very
6 briefly.

7 CHAIRMAN MILES: I don't want to get
8 into anything argumentative.

9 MS. CONVERY: No, nothing argumentative.
10 I do want to raise an objection however to the
11 assertion made by Mr. Hernandez. I would like to
12 point out that there was a scheduling order in
13 this matter, that there was a date for disclosure
14 of witnesses and exhibits. That discovery has
15 closed, and that Petitioners have not met that
16 deadline. In fact they have not identified any
17 witnesses or experts in this matter, or exhibits
18 that they intend to introduce at the contested
19 case proceeding.

20 So I would just like to object to the
21 fact that they suggest that the schedule was open
22 to that at this point, and that it would further
23 prejudice the Department, as well as the
24 Respondent Intervenors, if discovery were reopened
25 in order to allow them to introduce additional

1 witnesses or experts at this time. Thank you.

2 CHAIRMAN MILES: Well, then I need to
3 give Mr. Hernandez an opportunity here.

4 MR. HERNANDEZ: Absolutely, Madam Chair.
5 The scheduling order provided a date for
6 disclosure of experts. That was thirty days prior
7 to a hearing. The Board decided that this matter
8 should be addressed via summary judgment first.
9 Therefore, we never had a hearing. The scheduling
10 order that had the initial hearing date was
11 vacated, so there was no hearing, and therefore
12 there was no deadline thirty days prior to a
13 hearing to submit expert disclosures.

14 We note that in discovery responses,
15 both Western Energy Company and the Department
16 said that they would give us their expert
17 disclosures at the deadline prior to the hearing,
18 and they used that as an excuse not to give us
19 certain discoverable information. When that
20 matter was -- When the scheduling order that
21 allowed disclosure prior to hearing was vacated,
22 that disclosure went away. So we would be
23 handicapped and prejudiced going into the hearing
24 without having had the opportunity to see this
25 disclosure and scrutinize it.

1 CHAIRMAN MILES: Thank you.

2 BOARD MEMBER TWEETEN: Madam Chair, may
3 I?

4 CHAIRMAN MILES: I'm going to let Mr.
5 Tweeten speak for a minute.

6 BOARD MEMBER TWEETEN: Thank you. The
7 scope of the remand to the Hearing Examiner
8 includes the opportunity on the Hearing Examiner's
9 part to set a scheduling order, and I think it is
10 premature for us as a Board to consider any
11 objections to a scheduling order that doesn't
12 exist yet with respect to how it is prejudicial to
13 the parties.

14 So while I don't necessarily agree with
15 the Petitioner that it was the Board that decided
16 that this would go on summary judgment, they are
17 in fact the ones that filed the motion, so I'm not
18 sure how much discretion we had to do anything
19 other than to hear their motion.

20 But that being said, I just want it
21 clear on the record that the scope of the remand,
22 or the assignment to Mr. Haladay is going to
23 include an opportunity on his part to set a new
24 scheduling order, and an opportunity for the
25 parties to object to that if they want and make

1 their record, which would then come back to us as
2 part of the appeal on whatever proposed decision
3 the Hearing Examiner makes.

4 MR. HERNANDEZ: We're amenable to that
5 approach.

6 CHAIRMAN MILES: And Western Energy.

7 MR. MARTIN: We're also amenable to that
8 approach. And let me just for the record add that
9 there were Interrogatories in this case. We asked
10 for the identification of all of the witnesses.
11 No witness was identified for the other side. But
12 I agree with Mr. Tweeten that the appropriate
13 procedure here is to have that issue addressed by
14 the Hearing Examiner. Thank you.

15 CHAIRMAN MILES: I think that that is
16 the appropriate course, and I did not want to get
17 into any arguments here on issues that will be
18 addressed by Mr. Haladay. Any further discussion
19 on this matter?

20 (No response)

21 (The proceedings were concluded

22 at 1:23 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 - 15 - 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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