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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF VIOLATIONS OF)BER 2017-020C
OPENCUT MINING ACT BY WAGONER)
FAMILY PARTNERSHIP)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
February 9, 2018
10:35 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT, DEXTER BUSBY,
HILLARY HANSON;
and CHRIS TWEETEN and TIM WARNER (By telephone)

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

A P P E A R A N C E S

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ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

MR. MARK LUCAS, ESQ.

Special Assistant Attorney General
Montana Department of Environmental
Quality

1520 East Sixth Avenue

Helena, MT 59620

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR DEVENY: I think everybody is
5 here. We'll go ahead and get started. Lindsay,
6 would you double check, and do another roll call,
7 make sure we have a quorum.

8 MS. FORD: Chris Deveny.

9 CHAIR DEVENY: Present.

10 MS. FORD: Dexter Busby.

11 MR. BUSBY: Present.

12 MS. FORD: Hillary Hanson.

13 MS. HANSON: Here.

14 MS. FORD: John Dearment.

15 MR. DEARMENT: Here.

16 MS. FORD: Tim Warner.

17 MR. WARNER: Here.

18 MS. FORD: Chris Tweeten.

19 MR. TWEETEN: Here.

20 CHAIR DEVENY: Thanks. Could we have
21 anybody in the room who wasn't here earlier please
22 identify themselves, to get a record of who all is
23 attending. We'll start over here on the right.

24 MR. ANDERSON: Chad Anderson,
25 Enforcement Program Manager here at DEQ.

1 MS. ANDERSON: Leaa Anderson,
2 Enforcement.

3 MR. KENNEY: Dan Kenney, Enforcement.

4 MR. SIVERS: Eric Sivers, Groundwater
5 Discharge Permitting DEQ.

6 CHAIR DEVENY: So we're getting ready to
7 start our second case today, and before we start
8 that, Sarah had just a couple of things she wanted
9 to mention.

10 MS. CLERGET: I just wanted to say to
11 you guys that this is the first time that this has
12 ever happened, is that this is obviously a
13 decision that I proposed to you. So I've done a
14 bunch of research, because this question came up
15 for the Board before.

16 And so in some discussion with John
17 previously, and then some discussion among my
18 office, and some research, I wanted to let you
19 guys know that the way I believe you should
20 proceed when I am the Hearing Examiner is -- I
21 wear two hats for you, one of them is as Hearing
22 Examiner, and one is your Board attorney.

23 But they're sort of the same hat, in
24 that my goal here is to make sure that you guys
25 have a product that is unassailable as possible

1 for appeal purposes.

2 So I want you guys to get this right. I
3 have no ego in any of these decisions. And while
4 I'm not an advocate for my own decision or anybody
5 else's position, I am available to answer
6 questions if you need to. I think that is
7 something that is possible.

8 If for some reason I believe it is
9 inappropriate for me to answer a question, or it
10 might involve a conflict for any reason, I'll let
11 you know, and you can seek advice of another
12 attorney. There are attorneys available in my
13 office who can answer any questions that you have
14 other than me.

15 So I want to just be clear that although
16 I have rendered these decisions, I am still your
17 attorney, and if you need a technical or
18 procedural question answered, I'm happy to do
19 that.

20 With that said, you have a memo from me
21 on this case reminding you of your options.
22 They're the same options as were in Payne based on
23 2-4-621. And you have the materials on the case,
24 from the case in your packet.

25 Just a reminder that we have DEQ, Mark

1 Lucas is here live to argue, but Wagoner Family
2 chose to essentially give their argument in
3 written form, so they're not going to be here
4 today. And so you look at their written argument
5 as though it were their oral argument. You can
6 proceed.

7 CHAIR DEVENY: All right. We're going
8 to hear oral arguments now on the Wagoner Sand and
9 Gravel appeal of the Opencut Mining Act. And as
10 Sarah mentioned, the Wagoners presented their oral
11 arguments in written form, and it was posted on
12 the BER website, and all of the Board members were
13 sent a copy of that, I think yesterday or the day
14 before. So everybody should have had a chance to
15 read that.

16 And it appears that there is nobody here
17 from them, so we will proceed then with the DEQ
18 oral arguments on this case.

19 MR. LUCAS: Thank you, Madam Chair, and
20 good morning. Good morning, Board members. My
21 name is Mark Lucas. I'm a staff attorney with
22 DEQ.

23 The matter before you is an enforcement
24 matter which involves a permit with an expired
25 reclamation date, and the permittee's inability to

1 present a complete application to extend that
2 reclamation date over a period of roughly nine
3 months, despite the exchange of five deficiency
4 letters with the Department.

5 I would like to note one minor error in
6 the Board's agenda today. It indicates that both
7 parties sought clarification of the Hearing
8 Examiner's ruling. That is actually a mistake.

9 MS. CLERGET: I meant to correct that.
10 I apologize. I meant to say that it was only
11 Wagoners who asked for clarification on the order,
12 not DEQ. And Mark informed me of that, and I
13 meant to correct the record and I forgot, so thank
14 you Mark for reminding me.

15 MR. LUCAS: You're welcome, Sarah. DEQ
16 did not seek any clarification on the order which
17 we think is sufficiently clear, nor did DEQ take
18 any exceptions to the order. We're here today to
19 ask the Board to adopt the findings of fact and
20 conclusions of law contained in the Hearing
21 Examiner's partial summary judgment order in their
22 entirety.

23 As has been noted, Counsel for Wagoner
24 is not present today. Counsel for Wagoner did
25 submit to you a 14 page written statement. We

1 have some objections to that statement.

2 First of all, that written statement
3 raises new arguments not raised below, including
4 factual allegations that the Department was
5 somehow unhelpful to Wagoner in the permit
6 amendment process, and if we had been more
7 helpful, then Wagoner would have never gotten into
8 trouble.

9 We haven't had a chance to address those
10 allegations below, but the record before you
11 actually reflects the contrary in this case. What
12 that record reflects is that Wagoner's violation
13 of the Opencut Mining Act resulted from its own
14 inability to present a complete application,
15 despite numerous attempts, multiple extensions
16 from the Department, and clear written
17 instructions, which you can find in the Opencut
18 Mining permit amendment application itself, and in
19 the five subsequent deficiency letters.

20 CHAIR DEVENY: Excuse me, Mr. Lucas. I
21 forgot to say I'm going to limit you to fifteen
22 minutes. So we are timing you on this.

23 MR. LUCAS: Thank you. This is a simple
24 case. The law plainly requires opencut operators
25 to comply with the terms of their permits,

1 including reclamation conditions. And the Hearing
2 Examiner's order found that Wagoner was in
3 violation of its permit for 42 days, from August
4 11th, 2016 until September 22nd, 2016, because
5 during that period, Wagoner did not have a
6 completed application pending before DEQ, and it
7 had not completed reclamation.

8 What I'd like to do now is turn to some
9 of the arguments that Wagoner has raised as their
10 exceptions, and just touch upon them briefly, and
11 then I would make myself available for any
12 questions the Board has. Given the fact that my
13 opponent is not here, I would like to keep it
14 short.

15 The material facts in this case were not
16 disputed by the parties, so this case really turns
17 on questions of law, and with regard to each
18 argument Wagoner made on a question of law, the
19 Hearing Examiner quite appropriately, I would
20 submit to you, ruled in the Department's favor.

21 One of Wagoner's legal arguments is that
22 subsequent compliance moots out past violations.
23 The law is very clear that a defendant's voluntary
24 cessation of unlawful conduct does not suffice to
25 moot a case. That would be the equivalent of me

1 letting the registration tag on my license plate
2 expire, get pulled over, take the ticket, and then
3 go to court and fight it, and say, "Well, after I
4 got pulled over, I updated my registration."

5 The Hearing Examiner made some good
6 points about this. It's an absurd reading of the
7 act, and that's a theme that you're going to see
8 again and again with Wagoner's legal arguments.
9 These are absurd readings that disregard the plain
10 language that put the act in conflict with itself.

11 In this case, to allow the subsequent
12 amendment of a permit to moot out the violation
13 leads to an absurd result that essentially
14 sanctions the misconduct that occurred. Such a
15 reading is in contravention of applicable
16 regulations, which state that a permit amendment
17 is effective only upon approval and issuance, and
18 such a reading would negate the deterrent power of
19 the Department's Administrative Order authority.

20 Another legal argument which Wagoner has
21 carried over into their exceptions that DEQ must
22 first issue a cease mining order under Section
23 8-2-434(4) before DEQ can issue an Administrative
24 Order under Section 80-2-441 Subsection (5).

25 The Examiner really covered this pretty

1 well, too. The reality is that those are separate
2 and independent enforcement options that DEQ's
3 approval, if we issue a cease mining order, we
4 then have to proceed through the District Court to
5 get fines and to get corrective action. If we
6 issue an Administrative Order, we proceed through
7 the Board.

8 Wagoner raised a variety of new
9 arguments in its exceptions, all of which we
10 object to, and we encourage you to reject. These
11 issues were not raised below. Wagoner failed to
12 exhaust its administrative remedies during the
13 hearing process and during the summary judgment
14 process.

15 The first argument is that Wagoner was
16 not given sufficient time to reclaim the site.
17 That's not only factually incorrect based on the
18 record, it's brand new. We've never seen it
19 before.

20 The second new argument is that equity
21 dictates that there is no violation. Here Wagoner
22 is basically taking -- is at odds with the Hearing
23 Examiner over what her ruling means. An order to
24 clarify was issued. It is very clear that Wagoner
25 was in violation, and that equity does not dictate

1 that Wagoner should somehow be absolved from the
2 violation.

3 And there is also another new argument
4 which is a general exception, that it is not
5 reasonable to punish Wagoner because there was no
6 violation.

7 Again, Madam Chair, members of the
8 Board, these arguments are at odds with the ruling
9 below and the law. So at this stage we would
10 suggest and we would request that you adopt the
11 Hearing Examiner findings of fact and conclusions
12 of law in their entirety. And I would make myself
13 available for any questions you may have. Thank
14 you.

15 MS. CLERGET: You have seven minutes
16 remaining.

17 CHAIR DEVENY: Thank you, Mr. Lucas. Do
18 members of the Board have questions of Mr. Lucas?

19 MR. DEARMENT: Madam Chair, if I could.

20 CHAIR DEVENY: John Dearment.

21 MR. DEARMENT: Thank you, Madam Chair.
22 Mr. Lucas, in the written comments, the attorney
23 for Wagoner -- and this is on Page 9 first
24 sentence or two under Section A -- "The only
25 violation which is at issue now is whether or not

1 Wagoner failed to timely reclaim the mining site.
2 This should be a moot point considering that
3 Wagoner began the process of amending its permit
4 in December 2015, and was finally granted
5 amendment to continue operations in March of
6 2017."

7 Do you agree with the first part of
8 that, that the only issue is -- the only violation
9 is the failure to timely reclaim? And if so, why
10 is it not moot given the ongoing permitting
11 process through that time period, and eventual
12 approval in 2017?

13 MR. LUCAS: Member Dearment, I think
14 I've addressed that in my opening statements.

15 But the violation was the failure to
16 reclaim, and then they were in violation of their
17 permit, and they had two choices: Reclaim the
18 site, or amend their permit. So they were out of
19 compliance with the law for 42 days. They are
20 required to comply with the terms of their permit,
21 including reclamation conditions.

22 So it doesn't moot it out. We withdrew
23 the violation for basically operating without a
24 permit as a matter of prosecutorial discretion,
25 and we proceeded with the violation of failing to

1 comply with the terms of their permit.

2 So that violation was not mooted out for
3 the reasons I said. It would create a perverse
4 incentive for people who once they got their
5 permit amended, they would be absolved of all
6 responsibility. The fact is the law was violated
7 here for a 42 day period, and Wagoner is still
8 arguing about reclamation, whether they had to do
9 that or not.

10 MR. DEARMENT: Follow up, Madam Chair,
11 please.

12 CHAIR DEVENY: Yes.

13 MR. DEARMENT: Just to make sure I
14 understand correctly. The original permit
15 required reclamation by the last day of 2015,
16 December 2015, for the Department to mean the
17 31st.

18 MR. LUCAS: That's correct.

19 MR. DEARMENT: And on that day you
20 received an application from the permittee to --
21 when he notified the Department that he would not
22 reclaim the site, but pursue a new amendment to
23 the application.

24 MR. LUCAS: On that day, the permittee
25 mailed an amendment application to the Department,

1 which was so deficient as to not even allow
2 meaningful review. We received that on or about
3 January 4th. So yes, it was clear that they were
4 at least trying to extend their reclamation date,
5 and they were given nine months to submit a
6 complete application and do that.

7 MR. DEARMENT: But as of DEQ's receipt
8 of that amendment application in early January,
9 the Department had not considered the applicant,
10 the permittee, in violation for failure to
11 reclaim, did it?

12 MR. LUCAS: We exercised our
13 prosecutorial discretion, and once again,
14 reasonably I would say, given the fact the
15 permittee had evinced an intent to extend the
16 reclamation date. But the fact is that
17 application was incomplete. Had that application
18 been complete, we wouldn't be here right now. In
19 fact, this case really terminated upon the
20 applicant's provision of a complete application.

21 MR. DEARMENT: I guess I'm struggling a
22 little bit to understand the Department's view of
23 this as a violation through early 2016, given the
24 Department's ongoing interaction with the
25 permittee to revise and extend the permit after

1 its expiration at the end of 2015.

2 MR. LUCAS: Well, yes, that's a good
3 point, and that is a ruling the Hearing Examiner
4 made that the period of violation was 42 days,
5 which runs from the last date of the last
6 extension we gave Wagoner to come into compliance.
7 I believe it was September 11th -- I think I'm
8 wrong there -- it was in August. And then that
9 period of violation ended upon Wagoner's provision
10 of a complete application.

11 And I'd like to point out that in the
12 four months before that, all the deficiency
13 letters were going back and forth because Wagoner
14 would not provide a zoning form signed by the
15 Zoning Administrator. So during those final four
16 months, there was just one issue they couldn't get
17 resolved for whatever reason.

18 So we worked with them, we exercised our
19 discretion, until it became apparent that we could
20 no longer do so. And the Hearing Examiner
21 determined that the appropriate period for the
22 fine was from the time of our last extension,
23 which did expire, to the time they submitted a
24 complete application.

25 So in other words, Member Dearment,

1 they're not being fined, and there is no violation
2 for the periods during which they were attempting
3 to work with the Department under the extension.

4 MR. DEARMENT: Another follow up if I
5 could. One more clarification. So you
6 characterized them as unable to complete or to
7 provide the Department with a completed
8 application through most of 2016; they failed to
9 respond by the final deadline given to you by DEQ;
10 but 42 days later you did receive an application
11 that ultimately the Department was able to
12 approve; is that correct?

13 MR. LUCAS: That is correct.

14 MR. DEARMENT: So we're really talking
15 about a period here of about a month where they
16 went from non-compliance or inability to submit a
17 complete application to having done so to the
18 Department's satisfaction?

19 MR. LUCAS: That's correct. That's the
20 time period at issue with respect to the
21 violation, based on the Hearing Examiner's order
22 which we have not taken exception to.

23 MR. DEARMENT: Thank you.

24 CHAIR DEVENY: Other questions from
25 Board members?

1 MR. BUSBY: Just a quick process
2 question. Were they actually mining during this
3 entire period, or what was physically going on out
4 there?

5 MR. LUCAS: We don't know what was
6 physically going on out there, except to a limited
7 extent. We don't know if they were mining up to a
8 certain point, but on one day, I believe it was
9 like August 8th, we observed and recorded them
10 mining out there.

11 So we know that on one day at least they
12 were mining, but there were no facts really
13 adduced, and we won't probably be able to find out
14 those facts until the penalty phase how many days
15 they operated and mined out there, while their
16 reclamation date was expired, and their permit was
17 yet to be amended.

18 MR. BUSBY: So just to follow up on
19 John's question. This is just a window we're
20 talking about, not any part of it? This is just a
21 window of time that we're talking about, not any
22 mining violation or reclamation violation? It is
23 a window of time between expiration and their
24 application being approved?

25 MR. LUCAS: It is the window of time

1 between the last date of the multiple extensions
2 we provided them over a nine month period, until
3 they submitted a complete application, at which
4 point they were in compliance, because they'd
5 submitted a complete application to extend their
6 reclamation date.

7 And that was all they had to do from the
8 beginning. And you have an extensive record in
9 front of you with back and forth and back and
10 forth letters. And again, I would focus the Board
11 on those four -- I believe there were four letters
12 between June and September, where the program kept
13 coming back and saying, "Give us an updated zoning
14 compliance form." And that was required because
15 Wagoner had added about three acres to the mine
16 site.

17 So the way Wagoner characterizes this is
18 that somehow we were unhelpful. And look, we're
19 always trying to do our job better. We always can
20 do better. We always will do better. The program
21 staff of the Opencut Program works with a variety
22 of technical consultants who have a large span of
23 particular abilities with what they can do, and we
24 work closely with people.

25 And Wagoner simply did not submit a

1 complete application. At one point in the record,
2 you'll see they actually began arguing over
3 whether they even had to submit a complete
4 application, which chewed up a couple months. And
5 here we are.

6 MR. DEARMENT: Madam Chair.

7 CHAIR DEVENY: John.

8 MR. DEARMENT: One more. Given the
9 roughly nine months of back and forth between the
10 Department and Wagoner between the expiration of
11 the original permit at the end of 2015 and the
12 final deadline at the beginning of the 42 day
13 period that we're talking about here, in roughly
14 September of 2016, was Wagoner ever given notice
15 that this was in fact -- "This is it. You're out
16 of time. This is the final time we'll extend it"?

17 And why was the Department at the end of
18 its rope, so to speak, at that point, and
19 unwilling to consider another month or so that it
20 took Wagoner to submit what was ultimately an
21 acceptable application?

22 MR. LUCAS: I don't think Wagoner was
23 ever told, "This is your final extension," but
24 every extension in it of itself is an exercise of
25 discretion. So at any point during that period we

1 could have said "Time is up."

2 I wasn't here during the time, the nine
3 months that that took. We don't have any evidence
4 in the record as to why we finally said enough is
5 enough.

6 One thing that probably didn't help was
7 the fact that our staff saw them out there mining
8 actively.

9 But the other thing is it is a huge
10 problem. Reclamation is the heart of the statute,
11 just like the hard rock statute, just like MSUMA,
12 the coal mining statute. And when that hasn't
13 occurred, and the applicant is out there refusing
14 to submit a complete application, that becomes not
15 so much a public welfare issue as it is a question
16 of what we need to do as a matter of protecting
17 the public trust.

18 And eventually you reach a point with an
19 applicant -- in this case it was nine months --
20 where all you can say is, "We're going to refer to
21 Enforcement." Once it was referred to
22 Enforcement, that signature on that zoning
23 application materialized.

24 Sometimes that's what it takes. Where
25 we draw the line is a question of prosecutorial

1 discretion on a case-by-case basis. My guess is
2 facts would be adduced with respect to that in the
3 penalty phase, but we don't have anything in the
4 record on that, and I would prefer not to
5 speculate for you.

6 MR. DEARMENT: Thank you.

7 CHAIR DEVENY: I had a question. This
8 is Chris Deveny. I noticed there were, I think I
9 counted five extensions that DEQ gave for the
10 submittal of the application, and I wonder.

11 Is there a policy in place that DEQ
12 would follow saying how many extensions would be
13 allowed before a notice of violation or other
14 action would be taken, or is it, as you say, a
15 case-by-case? And are there cases that actually
16 go beyond five extensions?

17 MR. LUCAS: I'm not aware of any such
18 policy, Madam Chair. I do believe that it is a
19 case-by-case basis, that is heavily dependent on
20 the facts and circumstances. And I can't say, as
21 I sit here today, whether there have ever been
22 more than five extensions granted to any
23 applicant.

24 What the facts of this case illustrate
25 is if we were granting them extensions, and they

1 were giving us what we'd asked for, my only guess
2 is that we might look at it differently.

3 But when we're granting an extension,
4 and four times we have to ask for a zoning
5 compliance form, that really kind of informs the
6 discretion, I would think, that we're at the end
7 of our rope; we don't have this person's
8 attention; and it is necessary to resort to an
9 enforcement action, which ultimately did resolve
10 the case.

11 CHAIR DEVENY: I have one more question.
12 DEQ is supposed to respond to the applications
13 within a certain time period, and they went way
14 over, according to the operator's written
15 statement that it was 131 days late in approving
16 the amended application. And I wonder why there
17 was that lengthy delay.

18 MR. LUCAS: Once again, Madam Chair, I
19 would have to speculate. That happened before I
20 got here. We have nothing in the record that
21 indicates why that delay occurred. I don't know
22 if that's something that would come up in the
23 penalty phrase. I do not know why that delay
24 occurred.

25 I do know it was an extremely

1 problematic project, where we asked again and
2 again and again for relatively simple materials.
3 And it is also, as some of the non-material
4 disputed facts in this case show, a fact that they
5 are operating a gravel mine in the middle of the
6 Flathead River.

7 So I don't want to guess, but if I was
8 looking at that application, that would certainly
9 give me pause to consider. But ultimately the
10 application was granted. And again, Madam Chair,
11 I can't explain the delay as I stand here today.

12 CHAIR DEVENY: Any other questions by
13 Board members or comments?

14 MR. TWEETEN: Yes, Madam Chair. This is
15 Chris. Mr. Lucas, I'm trying to make sure I
16 understand your argument correctly here, just sort
17 of in over-arching general terms.

18 Are you contending that the permit that
19 was in place expired by operation of law on
20 December 31st, 2015, and at all times thereafter
21 until 2017 there was no permit in place to allow
22 them to mine? Is that your point?

23 MR. LUCAS: Member Tweeten, that is not
24 what we are contending. In fact, that is why we
25 withdrew the violation count for operating with an

1 expired permit.

2 Ultimately in fact the Hearing Examiner
3 found that the permit did not expire because
4 Wagoner got some kind of an application in front
5 of us before the reclamation date, even though it
6 was so incomplete as to really not even allow
7 meaningful review.

8 So the contention is not that the permit
9 expired. The permit was in place. The permit was
10 not complied with, was not amended. That's the
11 violation, Member Tweeten.

12 MR. TWEETEN: It was not complied with
13 because they hadn't completed reclamation by
14 December 31st of 2015?

15 MR. LUCAS: They had not completed
16 reclamation by December 31st of 2015, nor had they
17 submitted a complete application to extend their
18 reclamation date.

19 MR. TWEETEN: So if we accept the
20 Hearing Examiner's proposed order, the only thing
21 they're being penalized for is the fact that they
22 took awhile to get their complete application
23 together; is that correct?

24 MR. LUCAS: They're being penalized for
25 operating in violation of their permit, the

1 Board's rules, and the Opencut Mining Act for a
2 period of 42 days.

3 CHAIR DEVENY: Chris, did you have any
4 follow up on that?

5 MR. TWEETEN: I'm just processing, Madam
6 Chair.

7 CHAIR DEVENY: Okay. I can hear that.

8 MR. TWEETEN: I'll pass to somebody else
9 here for the time being.

10 CHAIR DEVENY: Any other questions from
11 Board members?

12 MR. DEARMENT: Madam Chair, I guess I'm
13 struggling with what I think is the same thing Mr.
14 Tweeten is struggling with, is that we are asked
15 to penalize them for a failure to reclaim when
16 that obligation to reclaim had essentially been
17 placed on hold for the duration of the permitting
18 process in 2016, at the end of which I think now
19 it feels to me like it's shifting a little bit to
20 saying they hadn't submitted a complete
21 application, and now at that point that's the
22 problem. And I'm having a little trouble
23 reconciling that.

24 MR. LUCAS: That was the problem from
25 the beginning, but the important point to remember

1 is that a permit amendment is not effective until
2 the Department receives a complete application and
3 approves the amendment. So they were out of
4 compliance.

5 The only reason you're hearing "failed
6 to reclaim" and "failed to amend their permit" is
7 because they were given two options, once again,
8 in the exercise of our discretion: You can either
9 reclaim it, or you can amend your permit. There
10 were two ways to get into compliance. They
11 declined to take either way until approximately
12 September 22nd of 2016.

13 MR. DEARMENT: Thank you.

14 CHAIR DEVENY: Further comments?
15 Questions?

16 MR. BUSBY: This is Dexter, by the way.
17 So they did not make any application to amend
18 prior, at all, even if it was not complete or
19 before this September 22nd date?

20 MR. LUCAS: They made an application to
21 amend the permit to extend the reclamation date on
22 or about December 31st, 2015 which is why they're
23 not in violation for that entire permit period,
24 according to the Examiner's ruling.

25 MR. BUSBY: I'm having a little problem

1 with the timelines on this. We're jumping back
2 and forth between 2016 and 2015.

3 MR. LUCAS: Well, I mean the important
4 timeline, Member Busby, is the 42 days from the
5 time our last extension expired until the time
6 they submitted a complete application; and
7 basically all the time leading up to that from
8 December 31st, 2015 was a wash because we had
9 continued to grant them extensions.

10 And again, that is a matter of
11 prosecutorial discretion in our enforcement of the
12 Act. We tried to work with them.

13 CHAIR DEVENY: Was there any indication
14 to Wagoner that you would have considered another
15 extension?

16 MR. LUCAS: Not to my knowledge --

17 CHAIR DEVENY: Based on previously that
18 you had just extended, and extended, and extended,
19 and extended, and extended, for the fifth time?

20 MR. LUCAS: Not to my knowledge, and
21 there is certainly nothing in the record to that
22 effect.

23 CHAIR DEVENY: Chris, did you have any
24 more comments, questions?

25 MR. TWEETEN: Yes. I'm still trying to

1 figure out exactly what the bone of contention
2 here is.

3 Mr. Lucas, so the operator had a period
4 of time within which to file an application for
5 modification of the permit, and that period of
6 time was then extended by DEQ in its discretion a
7 number of times until August of 2016; am I right
8 so far?

9 MR. LUCAS: You're right so far with a
10 minor, but important clarification, that they
11 needed to submit a complete permit application.
12 They submitted an application --

13 MR. TWEETEN: But in either the original
14 period of time or whatever period of time they
15 would have under these various extensions,
16 correct?

17 MR. LUCAS: That's correct, Member
18 Tweeten.

19 MR. TWEETEN: Okay. And then the last
20 extension in place expired, when was it, August
21 22nd of 2016; is that correct?

22 MR. LUCAS: I believe it was earlier
23 than that.

24 MS. CLERGET: August 11th, 2016.

25 MR. TWEETEN: The last extension expired

1 sometime in August of 2016.

2 CHAIR DEVENY: It was August 11th, 2016.

3 MR. TWEETEN: Okay. It was August 11th.

4 Okay.

5 CHAIR DEVENY: Then a notice of
6 violation was issued by DEQ on August 16th.

7 MR. TWEETEN: Right. Okay. And then
8 for the next 42 days, the operator did nothing
9 until at the end of that 42 day period, they filed
10 another application for modification of the
11 permit; is that right?

12 MR. LUCAS: As far as we know, they
13 filed that application, complete application for
14 the modification of the permit on September 22nd.

15 MR. TWEETEN: Okay.

16 MR. BUSBY: And that's the 42 days.

17 MR. TWEETEN: Okay. And so the
18 contention is that simply by virtue of the fact
19 that the Department had not in its discretion
20 entered an additional extension, there is a 42 day
21 period there where they were -- and again, what's
22 the evidence that they were continuing to operate
23 the mine during that 42 day period?

24 MR. LUCAS: Member Tweeten, there is no
25 evidence they were continuing to operate the mine

1 during that 42 day period except for the day when
2 we were there and videotaped them.

3 But it's important to note that the
4 violation is not operating without a permit. The
5 violation is not complying with the permit that
6 they had.

7 And early on in my argument, I gave the
8 example of myself driving with an expired
9 registration tag. All I would have to do is get
10 out on the street, drive, get pulled over, and I
11 would be guilty, and I would get a ticket. It
12 would mean nothing to the Court to go in and say,
13 "Well, my car was parked for most of those days.
14 They just happened to catch me when I was out of
15 compliance."

16 So again, the issue is: They were
17 required to comply with their permit; they didn't
18 comply with their permit; and there was a 42 day
19 period, at which point our patience ran out. And
20 after that, once they were referred to
21 Enforcement, we got the complete application,
22 including the zoning compliance form that we'd
23 been looking for since June.

24 MR. TWEETEN: Okay. Thank you, Mr.
25 Lucas. I appreciate it.

1 MR. LUCAS: Thank you, Member Tweeten.

2 CHAIR DEVENY: Any other questions or
3 comments by Board members?

4 (No response)

5 CHAIR DEVENY: Sarah, would you like --

6 MS. CLERGET: I just want to note that
7 if we're counting the time that Mr. Lucas has been
8 answering questions, then he's five minutes over
9 his fifteen minutes.

10 CHAIR DEVENY: Okay.

11 MR. TWEETEN: I don't care.

12 CHAIR DEVENY: We'll continue since
13 we're not -- we don't have anybody else that is
14 testifying today.

15 MR. BUSBY: Quick question for Sarah.
16 Had you seen the final arguments that we just got
17 yesterday or the day before, before that time from
18 the --

19 MS. CLERGET: No. My findings, proposed
20 findings of fact and conclusions of law are based
21 on the prior briefing, and then everything else
22 that you have in your packet comes after I issued
23 those proposed findings of fact and conclusions of
24 law.

25 MR. BUSBY: Okay. Thank you.

1 CHAIR DEVENY: Is there any interest by
2 any of the Board members to propose a motion for
3 our consideration?

4 MR. TWEETEN: Madam Chair, this is
5 Chris. Sure. I'll try one. Let me preface this
6 by saying that I think the argument that is
7 advanced by the Department, although I think
8 correct as a matter of law, is extraordinarily
9 technical, and that that ought to be taken into
10 consideration when we proceed to the penalty
11 phase.

12 I will move that the Board accept the
13 Hearing Examiner's proposed decision as our final
14 decision granting summary judgment, partial
15 summary judgment to both sides.

16 CHAIR DEVENY: I would second that
17 motion. Is there any discussion by Board members?

18 (No response)

19 CHAIR DEVENY: And I agree with Chris
20 that this seems very convoluted and complicated,
21 and that we should consider this when we will
22 proceed to discussing penalties.

23 Which Sarah, could you just enlighten us
24 on that phase of this case.

25 MS. CLERGET: Sure. Assuming that if

1 you take the motion the way that it is currently
2 presented, then you decide this phase of the case,
3 and then it goes back to a Hearing Examiner, if
4 you want to assign it to a Hearing Examiner, the
5 penalty phase proceeds; and then you'll get
6 another proposed findings of fact and conclusions
7 on law on the penalty that will go the same way
8 this has. Does that make sense?

9 CHAIR DEVENY: Is that a decision we
10 make today what to do with the -- where to assign
11 the penalty?

12 MS. CLERGET: After you decide on the
13 current motion, then yes, you can decide whether
14 to keep it, or whether to send it back for a
15 Hearing Examiner.

16 CHAIR DEVENY: So there is a motion
17 before the Board. Discussion. John.

18 MR. DEARMENT: I was just going to add
19 before we vote that I know that the Opencut
20 Program and the Department in general works very
21 hard to keep its permittees in compliance and
22 avoid enforcement, and despite whatever convoluted
23 or technical nature of the discussion we see here
24 today, it appears to me that they offered the
25 carrot of a new permit to avoid having to take

1 enforcement action for the failure to reclaim.

2 And it does seem clear that it also then took the
3 stick of the Enforcement Division to finally bring
4 that compliance about.

5 So from my mind, that help cuts through
6 the confusion a little bit. So with that, I'll
7 turn it over for the vote to you.

8 CHAIR DEVENY: Thank you, John. Other
9 comments or questions, discussion on the motion?

10 MR. LUCAS: If I may, Madam Chair. I
11 know you're addressing Board members, but with
12 respect to the penalty phase of this proceeding,
13 the Board has regulations on how penalties are
14 calculated, and those penalties will allow the
15 Board to consider a number of factors, including
16 the interests of justice, in assessing the
17 penalties; and I can assure you the Department
18 will do the same.

19 CHAIR DEVENY: Thank you. The question
20 is before the Board to -- make sure I've got the
21 motion correctly. Just a second here.

22 MS. CLERGET: It was adopt the
23 findings --

24 CHAIR DEVENY: -- to adopt the proposed
25 order in its entirety, and adopt it as the Board's

1 final order. It's been moved and seconded. All
2 in favor, please say aye.

3 (Response)

4 CHAIR DEVENY: Any opposed?

5 (No response)

6 CHAIR DEVENY: None oppose. The motion
7 carries.

8 MR. LUCAS: Thank you, Madam Chair,
9 Board members.

10 CHAIR DEVENY: So do we move on then to
11 the penalty aspect of this case, Sarah?

12 MS. CLERGET: Yes, you have to decide
13 now whether you would like to keep that phase, or
14 whether you would like to assign it to a Hearing
15 Examiner.

16 CHAIR DEVENY: What's the Board's
17 pleasure?

18 MR. TWEETEN: Madam Chair, this is Chris
19 again. I would move to refer this matter to the
20 Hearing Examiner for purposes of conducting the
21 penalty phase of this proceeding.

22 MS. HANSON: I'll second.

23 CHAIR DEVENY: It's been moved and
24 seconded. Any discussion?

25 (No response)

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CHAIR DEVENY: All those in favor,
please say aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Motion carries. Will we
see that at the next meeting?

MS. CLERGET: Probably not. It will
probably be another meeting or so at least.

(The proceedings were concluded
at 11:15 a.m.)

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

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 37 - 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 _____, 2018.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2020.

<u>1</u>	4th - 15:3	[4] 10:19, 10:23, 11:6, 11:12 Administrator - 16:15 adopt [5] 7:19, 12:10, 35:22, 35:24, 35:25 advanced - 33:7 advise - 5:11 advocate - 5:4 affixed - 38:16 agenda - 7:6 agree [2] 13:7, 33:19 ahead - 3:5 allegations [2] 8:4, 8:10 allow [5] 10:11, 15:1, 24:21, 25:6, 35:14 allowed - 22:13 although [2] 5:15, 33:7 amend [5] 13:18, 27:6, 27:9, 27:17, 27:21 amended [4] 14:5, 18:17, 23:16, 25:10 amending - 13:3 amendment [10] 8:6, 8:18, 10:12, 10:16, 13:5, 14:22, 14:25, 15:8, 27:1, 27:3 among - 4:17 Anderson [4] 3:24, 3:24, 4:1, 4:1 answered - 5:18 answering - 32:8 apologize - 7:10 apparent - 16:19 appeal [2] 5:1, 6:9 APPEARING - 2:3	11:20, 12:3, 24:16, 31:7, 33:6 arguments [10] 6:8, 6:11, 6:18, 8:3, 9:9, 9:21, 10:8, 11:9, 12:8, 32:16 aspect - 36:11 assessing - 35:16 assign [3] 34:4, 34:10, 36:14 Assistant - 2:5 Assuming - 33:25 assure - 35:17 attempting - 17:2 attempts - 8:15 attending - 3:23 attention - 23:8 attorney [7] 2:3, 2:5, 4:22, 5:12, 5:17, 6:21, 12:22 attorneys - 5:12 August [10] 9:3, 16:8, 18:9, 29:7, 29:20, 29:24, 30:1, 30:2, 30:3, 30:6 authority - 10:19 available [4] 5:5, 5:12, 9:11, 12:13 Avenue [2] 1:11, 2:8 avoid [2] 34:22, 34:25 awhile - 25:22 aye [2] 36:2, 37:2	became - 16:19 becomes - 21:14 beginning [3] 19:8, 20:12, 26:25 BEHALF - 2:3 BER [2] 1:4, 6:12 best - 38:13 better [3] 19:19, 19:20, 19:20 beyond - 22:16 bit [3] 15:22, 26:19, 35:6 Board [25] 1:1, 1:18, 4:15, 4:22, 6:12, 6:20, 7:19, 9:12, 11:7, 12:8, 12:18, 17:25, 19:10, 24:13, 26:11, 32:3, 33:2, 33:12, 33:17, 34:17, 35:11, 35:13, 35:15, 35:20, 36:9 Board's [4] 7:6, 26:1, 35:25, 36:16 bone - 29:1 brand - 11:18 briefing - 32:21 briefly - 9:10 bring - 35:3 Building - 1:10 bunch - 4:14 Busby [11] 1:18, 3:10, 3:11, 18:1, 18:18, 27:16, 27:25, 28:4, 30:16, 32:15, 32:25
<u>2</u>	<u>5</u>	<u>8</u>	<u>B</u>	
10:35 - 1:14 111 - 1:10 11:15 - 37:11 11th [5] 9:4, 16:7, 29:24, 30:2, 30:3 131 - 23:15 14 - 7:25 1520 [2] 1:11, 2:8 16th - 30:6	5 - 10:24 59620 - 2:9	8-2-434(4 - 10:23 80-2-441 - 10:24 8th - 18:9	basically [3] 11:22, 13:23, 28:7	
<u>3</u>	<u>9</u>	<u>A</u>	<u>C</u>	
2-4-621 - 5:23 2015 [11] 13:4, 14:15, 14:16, 16:1, 20:11, 24:20, 25:14, 25:16, 27:22, 28:2, 28:8 2016 [13] 9:4, 9:4, 15:23, 17:8, 20:14, 26:18, 27:12, 28:2, 29:7, 29:21, 29:24, 30:1, 30:2 2017 [3] 13:6, 13:12, 24:21 2017-02OC - 1:4 2018 [2] 1:13, 38:17 2020 - 38:22 22nd [5] 9:4, 27:12, 27:19, 29:21, 30:14	9 [3] 1:13, 12:23, 38:22	a.m [2] 1:14, 37:11 abilities - 19:23 ability - 38:14 able [2] 17:11, 18:13 absolved [2] 12:1, 14:5 absurd [3] 10:6, 10:9, 10:13 accept [2] 25:19, 33:12 acceptable - 20:21 according [2] 23:14, 27:24 acres - 19:15 act [7] 1:5, 6:9, 8:13, 10:7, 10:10, 26:1, 28:12 action [4] 11:5, 22:14, 23:9, 35:1 actively - 21:8 add - 34:18 added - 19:15 additional - 30:20 address - 8:9 addressed - 13:14 addressing - 35:11 adduced [2] 18:13, 22:2 administrative	calculated - 35:14 can't [2] 22:20, 24:11 care - 32:11 carried -	
<u>4</u>				
42 [15] 9:3, 13:19, 14:7, 16:4, 17:10, 20:12, 26:2, 28:4, 30:8, 30:9, 30:16, 30:20, 30:23, 31:1, 31:18				

<p>10:21 carries [2] 36:7, 37:6 carrot - 34:25 case [19] 4:7, 5:21, 5:23, 5:24, 6:18, 8:11, 8:24, 9:15, 9:16, 9:25, 10:11, 15:19, 21:19, 22:24, 23:10, 24:4, 33:24, 34:2, 36:11 case-by-case [3] 22:1, 22:15, 22:19 cases - 22:15 catch - 31:14 cease [2] 10:22, 11:3 certain [2] 18:8, 23:13 certainly [2] 24:8, 28:21 certify - 38:7 cessation - 9:24 Chad - 3:24 Chair [60] 1:17, 3:4, 3:9, 3:20, 4:6, 6:7, 6:19, 8:20, 12:7, 12:17, 12:19, 12:20, 12:21, 14:10, 14:12, 17:24, 20:6, 20:7, 22:7, 22:18, 23:11, 23:18, 24:10, 24:12, 24:14, 26:3, 26:6, 26:7, 26:10, 26:12, 27:14, 28:13, 28:17, 28:23, 30:2, 30:5, 32:2, 32:5, 32:10, 32:12, 33:1, 33:4, 33:16, 33:19, 34:9, 34:16, 35:8, 35:10, 35:19, 35:24, 36:4, 36:6, 36:8, 36:10, 36:16, 36:18, 36:23, 37:1, 37:4, 37:6</p>	<p>chance [2] 6:14, 8:9 characterized - 17:6 characterizes - 19:17 check - 3:6 chewed - 20:4 choices - 13:17 chose - 6:2 Chris [11] 1:17, 1:20, 3:8, 3:18, 22:8, 24:15, 26:3, 28:23, 33:5, 33:19, 36:18 circumstances - 22:20 clarification [5] 7:7, 7:11, 7:16, 17:5, 29:10 clarify - 11:24 Clark [2] 38:4, 38:7 clear [7] 5:15, 7:17, 8:16, 9:23, 11:24, 15:3, 35:2 CLERGET [11] 4:10, 7:9, 12:15, 29:24, 32:6, 32:19, 33:25, 34:12, 35:22, 36:12, 37:8 closely - 19:24 coal - 21:12 comes - 32:22 coming - 19:13 comments [6] 12:22, 24:13, 27:14, 28:24, 32:3, 35:9 commission - 38:21 complete [23] 7:1, 8:14, 15:6, 15:18, 15:20, 16:10, 16:24, 17:6, 17:17, 19:3, 19:5, 20:1, 20:3, 21:14, 25:17, 25:22, 26:20, 27:2,</p>	<p>27:18, 28:6, 29:11, 30:13, 31:21 completed [5] 9:6, 9:7, 17:7, 25:13, 25:15 compliance [12] 9:22, 13:19, 16:6, 19:4, 19:14, 23:5, 27:4, 27:10, 31:15, 31:22, 34:21, 35:4 complicated - 33:20 complied [2] 25:10, 25:12 comply [5] 8:25, 13:20, 14:1, 31:17, 31:18 complying - 31:5 computer-aided - 38:11 concluded - 37:10 conclusions [5] 7:20, 12:11, 32:20, 32:23, 34:6 conditions [2] 9:1, 13:21 conduct - 9:24 conducting - 36:20 conflict [2] 5:10, 10:10 confusion - 35:6 consider [4] 20:19, 24:9, 33:21, 35:15 consideration [2] 33:3, 33:10 considered [2] 15:9, 28:14 considering - 13:2 consultants - 19:22 contain - 38:12 contained - 7:20 contending [2] 24:18, 24:24</p>	<p>contention [3] 25:8, 29:1, 30:18 continue [2] 13:5, 32:12 continued - 28:9 continuing [2] 30:22, 30:25 contrary - 8:11 contravention - 10:15 convoluted [2] 33:20, 34:22 correct [11] 7:9, 7:13, 14:18, 17:12, 17:13, 17:19, 25:23, 29:16, 29:17, 29:21, 33:8 corrective - 11:5 correctly [3] 14:14, 24:16, 35:21 couldn't - 16:16 Counsel [2] 7:23, 7:24 count - 24:25 counted - 22:9 counting - 32:7 County [2] 38:4, 38:6 couple [2] 4:8, 20:4 court [6] 1:23, 10:3, 11:4, 31:12, 38:5, 38:20 covered - 10:25 create - 14:3 CRUTCHER [3] 1:22, 38:5, 38:19 current - 34:13 currently - 34:1 cuts - 35:5</p>	<p>6:25, 7:2, 15:4, 15:16, 16:5, 18:16, 19:1, 19:6, 25:5, 25:18, 27:19, 27:21 deadline [2] 17:9, 20:12 Dearment [22] 1:18, 3:14, 3:15, 12:19, 12:20, 12:21, 13:13, 14:10, 14:13, 14:19, 15:7, 15:21, 16:25, 17:4, 17:14, 17:23, 20:6, 20:8, 22:6, 26:12, 27:13, 34:18 December [7] 13:4, 14:16, 24:20, 25:14, 25:16, 27:22, 28:8 decide [4] 34:2, 34:12, 34:13, 36:12 decision [5] 4:13, 5:4, 33:13, 33:14, 34:9 decisions [2] 5:3, 5:16 declined - 27:11 defendant's - 9:23 deficiency [3] 7:3, 8:19, 16:12 deficient - 15:1 delay [4] 23:17, 23:21, 23:23, 24:11 Department [19] 2:3, 2:6, 7:4, 8:4, 8:16, 14:16, 14:21, 14:25, 15:9, 17:3, 17:7, 17:11, 20:10, 20:17, 27:2, 30:19, 33:7, 34:20, 35:17 Department's [5] 9:20, 10:19, 15:22,</p>	<p>15:24, 17:18 dependent - 22:19 DEQ [17] 3:25, 4:5, 5:25, 6:17, 6:22, 7:12, 7:15, 7:17, 9:6, 10:21, 10:23, 17:9, 22:9, 22:11, 23:12, 29:6, 30:6 DEQ's [2] 11:2, 15:7 despite [3] 7:3, 8:15, 34:22 determined - 16:21 deterrent - 10:18 Deveny [46] 1:17, 3:4, 3:8, 3:9, 3:20, 4:6, 6:7, 8:20, 12:17, 12:20, 14:12, 17:24, 20:7, 22:7, 22:8, 23:11, 24:12, 26:3, 26:7, 26:10, 27:14, 28:13, 28:17, 28:23, 30:2, 30:5, 32:2, 32:5, 32:10, 32:12, 33:1, 33:16, 33:19, 34:9, 34:16, 35:8, 35:19, 35:24, 36:4, 36:6, 36:10, 36:16, 36:23, 37:1, 37:4, 37:6 Dexter [3] 1:18, 3:10, 27:16 dictate - 11:25 dictates - 11:21 differently - 23:2 Discharge - 4:5 discretion [10] 13:24, 15:13, 16:19,</p>
---	--	--	--	---	--

<p>20:25, 22:1, 23:6, 27:8, 28:11, 29:6, 30:19</p> <p>discussing - 33:22</p> <p>discussion [7] 4:16, 4:17, 33:17, 34:17, 34:23, 35:9, 36:24</p> <p>disputed [2] 9:16, 24:4</p> <p>disregard - 10:9</p> <p>District - 11:4</p> <p>Division - 35:3</p> <p>double - 3:6</p> <p>draw - 21:25</p> <p>drive - 31:10</p> <p>driving - 31:8</p> <p>duration - 26:17</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>earlier [2] 3:21, 29:22</p> <p>East [2] 1:11, 2:8</p> <p>effect - 28:22</p> <p>effective [2] 10:17, 27:1</p> <p>ego - 5:3</p> <p>either [3] 27:8, 27:11, 29:13</p> <p>else's - 5:5</p> <p>encourage - 11:10</p> <p>ended - 16:9</p> <p>enforcement [13] 3:25, 4:2, 4:3, 6:23, 11:2, 21:21, 21:22, 23:9, 28:11, 31:21, 34:22, 35:1, 35:3</p> <p>enlighten - 33:23</p> <p>entered - 30:20</p> <p>entire [2] 18:3, 27:23</p> <p>entirety [3] 7:22, 12:12, 35:25</p> <p>Environmental</p>	<p>[2] 1:1, 2:6</p> <p>equity [2] 11:20, 11:25</p> <p>equivalent - 9:25</p> <p>Eric - 4:4</p> <p>error - 7:5</p> <p>ESQ - 2:4</p> <p>essentially [3] 6:2, 10:13, 26:16</p> <p>eventual - 13:11</p> <p>eventually - 21:18</p> <p>everybody [2] 3:4, 6:14</p> <p>everything - 32:21</p> <p>evidence [3] 21:3, 30:22, 30:25</p> <p>evinced - 15:15</p> <p>exactly - 29:1</p> <p>Examiner [15] 4:20, 4:22, 9:19, 10:5, 10:25, 11:23, 12:11, 16:3, 16:20, 25:2, 34:3, 34:4, 34:15, 36:15, 36:20</p> <p>Examiner's [7] 7:8, 7:21, 9:2, 17:21, 25:20, 27:24, 33:13</p> <p>example - 31:8</p> <p>except [2] 18:6, 31:1</p> <p>exception [2] 12:4, 17:22</p> <p>exceptions [4] 7:18, 9:10, 10:21, 11:9</p> <p>exchange - 7:3</p> <p>Excuse - 8:20</p> <p>exercise [2] 20:24, 27:8</p> <p>exercised [2] 15:12, 16:18</p> <p>exhaust - 11:12</p> <p>expiration [3] 16:1, 18:23, 20:10</p>	<p>expire [3] 10:2, 16:23, 25:3</p> <p>expired [9] 6:24, 18:16, 24:19, 25:1, 25:9, 28:5, 29:20, 29:25, 31:8</p> <p>expires - 38:21</p> <p>explain - 24:11</p> <p>extend [8] 7:1, 15:4, 15:15, 15:25, 19:5, 20:16, 25:17, 27:21</p> <p>extended [6] 28:18, 28:18, 28:18, 28:19, 28:19, 29:6</p> <p>extension [11] 16:6, 16:22, 17:3, 20:23, 20:24, 23:3, 28:5, 28:15, 29:20, 29:25, 30:20</p> <p>extensions [9] 8:15, 19:1, 22:9, 22:12, 22:16, 22:22, 22:25, 28:9, 29:15</p> <p>extensive - 19:8</p> <p>extent - 18:7</p> <p>extraordinarily - 33:8</p> <p>extremely - 23:25</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>factors - 35:15</p> <p>facts [7] 9:15, 18:12, 18:14, 22:2, 22:20, 22:24, 24:4</p> <p>factual - 8:4</p> <p>factually - 11:17</p> <p>failed [5] 11:11, 13:1, 17:8, 27:5, 27:6</p> <p>failing - 13:25</p> <p>failure [5]</p>	<p>13:9, 13:15, 15:10, 26:15, 35:1</p> <p>Family [2] 1:6, 6:1</p> <p>favor [3] 9:20, 36:2, 37:1</p> <p>February - 1:13</p> <p>feels - 26:19</p> <p>fifteen [2] 8:21, 32:9</p> <p>fifth - 28:19</p> <p>fight - 10:3</p> <p>figure - 29:1</p> <p>file - 29:4</p> <p>filed [2] 30:9, 30:13</p> <p>final [8] 16:15, 17:9, 20:12, 20:16, 20:23, 32:16, 33:13, 36:1</p> <p>finally [3] 13:4, 21:4, 35:3</p> <p>findings [7] 7:19, 12:11, 32:19, 32:20, 32:23, 34:6, 35:23</p> <p>fine - 16:22</p> <p>fined - 17:1</p> <p>fines - 11:5</p> <p>five [6] 7:3, 8:19, 22:9, 22:16, 22:22, 32:8</p> <p>Flathead - 24:6</p> <p>focus - 19:10</p> <p>follow [5] 14:10, 17:4, 18:18, 22:12, 26:4</p> <p>FORD [6] 3:8, 3:10, 3:12, 3:14, 3:16, 3:18</p> <p>foregoing - 38:12</p> <p>forgot [2] 7:13, 8:21</p> <p>forth [5] 16:13, 19:9, 19:10, 20:9, 28:2</p> <p>front [2] 19:9, 25:4</p>	<hr/> <p style="text-align: center;">G</p> <hr/> <p>gave [3] 16:6, 22:9, 31:7</p> <p>general [4] 2:5, 12:4, 24:17, 34:20</p> <p>given [10] 9:12, 11:16, 13:10, 15:5, 15:14, 15:23, 17:9, 20:8, 20:14, 27:7</p> <p>giving - 23:1</p> <p>goal - 4:24</p> <p>goes - 34:3</p> <p>gotten - 8:7</p> <p>grant - 28:9</p> <p>granted [3] 13:4, 22:22, 24:10</p> <p>granting [3] 22:25, 23:3, 33:14</p> <p>gravel [2] 6:9, 24:5</p> <p>Groundwater - 4:4</p> <p>guess [5] 15:21, 22:1, 23:1, 24:7, 26:12</p> <p>guilty - 31:11</p> <p>guys [4] 4:11, 4:19, 4:24, 5:2</p> <hr/> <p style="text-align: center;">H</p> <hr/> <p>hadn't [2] 25:13, 26:20</p> <p>Hanson [4] 1:19, 3:12, 3:13, 36:22</p> <p>happened [3] 4:12, 23:19, 31:14</p> <p>happy - 5:18</p> <p>hasn't - 21:12</p> <p>hat - 4:23</p> <p>hats - 4:21</p> <p>haven't - 8:9</p> <p>having [4] 17:17, 26:22, 27:25, 34:25</p> <p>he's - 32:8</p> <p>hear [2] 6:8, 26:7</p> <p>Heard - 1:10</p>	<p>hearing [22] 4:20, 4:21, 7:7, 7:20, 9:1, 9:19, 10:5, 11:13, 11:22, 12:11, 16:3, 16:20, 17:21, 25:2, 25:20, 27:5, 33:13, 34:3, 34:4, 34:15, 36:14, 36:20</p> <p>heart - 21:10</p> <p>heavily - 22:19</p> <p>Helena [2] 1:12, 2:9</p> <p>helpful - 8:7</p> <p>hereby - 38:7</p> <p>herein - 38:9</p> <p>hereunto - 38:15</p> <p>Hillary [2] 1:19, 3:12</p> <p>hold - 26:17</p> <p>huge - 21:9</p> <hr/> <p style="text-align: center;">I</p> <hr/> <p>identify - 3:22</p> <p>illustrate - 22:24</p> <p>inability [3] 6:25, 8:14, 17:16</p> <p>inappropriate - 5:9</p> <p>incentive - 14:4</p> <p>including [5] 8:3, 9:1, 13:21, 31:22, 35:15</p> <p>incomplete [2] 15:17, 25:6</p> <p>incorrect - 11:17</p> <p>independent - 11:2</p> <p>indicates [2] 7:6, 23:21</p> <p>indication - 28:13</p> <p>informed - 7:12</p> <p>informs - 23:5</p> <p>instructions - 8:17</p> <p>intent - 15:15</p> <p>interaction -</p>
--	---	--	--	---	---

<p>15:24 interest - 33:1 interests - 35:16 involve - 5:10 involves - 6:24 issuance - 10:17 issue [10] 10:22, 10:23, 11:3, 11:6, 12:25, 13:8, 16:16, 17:20, 21:15, 31:16 issued [3] 11:24, 30:6, 32:22 issues - 11:11 itself [3] 8:18, 10:10, 20:24</p> <hr/> <p style="text-align: center;">J</p> <p>January [2] 15:3, 15:8 job - 19:19 John [7] 1:18, 3:14, 4:16, 12:20, 20:7, 34:17, 35:8 John's - 18:19 judgment [4] 7:21, 11:13, 33:14, 33:15 jumping - 28:1 June [2] 19:12, 31:23 justice - 35:16</p> <hr/> <p style="text-align: center;">K</p> <p>Kenney [2] 4:3, 4:3 kept - 19:12 knowledge [2] 28:16, 28:20</p> <hr/> <p style="text-align: center;">L</p> <p>language - 10:10 later - 17:10 LAURIE [3] 1:22, 38:5, 38:19 law [14] 7:20, 8:24, 9:17, 9:18, 9:23, 12:9, 12:12,</p>	<p>13:19, 14:6, 24:19, 32:20, 32:24, 33:8, 34:7 Leaa - 4:1 leading - 28:7 leads - 10:13 least [3] 15:4, 18:11, 37:9 legal [3] 9:21, 10:8, 10:20 lengthy - 23:17 letters [5] 7:4, 8:19, 16:13, 19:10, 19:11 letting - 10:1 Lewis [2] 38:4, 38:6 license - 10:1 limit - 8:21 limited - 18:6 Lindsay - 3:5 longer - 16:20 looking [2] 24:8, 31:23 Lucas [42] 2:4, 6:1, 6:19, 6:21, 7:15, 8:20, 8:23, 12:17, 12:18, 12:22, 13:13, 14:18, 14:24, 15:12, 16:2, 17:13, 17:19, 18:5, 18:25, 20:22, 22:17, 23:18, 24:15, 24:23, 25:15, 25:24, 26:24, 27:20, 28:3, 28:16, 28:20, 29:3, 29:9, 29:17, 29:22, 30:12, 30:24, 31:25, 32:1, 32:7, 35:10, 36:8</p> <hr/> <p style="text-align: center;">M</p> <p>Madam [16] 6:19, 12:7, 12:19, 12:21, 14:10, 20:6, 22:18, 23:18, 24:10, 24:14, 26:5, 26:12, 33:4, 35:10, 36:8, 36:18</p>	<p>mailed - 14:25 Manager - 3:25 March [2] 13:5, 38:22 Mark [5] 2:4, 5:25, 6:21, 7:12, 7:14 material - 9:15 materialized - 21:23 materials [2] 5:23, 24:2 matter [8] 1:4, 6:23, 6:24, 13:24, 21:16, 28:10, 33:8, 36:19 meaningful [2] 15:2, 25:7 means - 11:23 meant [3] 7:9, 7:10, 7:13 meeting [2] 37:7, 37:9 Member [8] 13:13, 16:25, 24:23, 25:11, 28:4, 29:17, 30:24, 32:1 members [13] 1:18, 6:12, 6:20, 12:7, 12:18, 17:25, 24:13, 26:11, 32:3, 33:2, 33:17, 35:11, 36:9 memo - 5:20 mention - 4:9 mentioned - 6:10 Metcalf - 1:10 middle - 24:5 mind - 35:5 mine [5] 19:15, 24:5, 24:22, 30:23, 30:25 mined - 18:15 mining [15] 1:5, 6:9, 8:13, 8:18, 10:22, 11:3, 13:1, 18:2, 18:7, 18:10, 18:12, 18:22, 21:7, 21:12, 26:1</p>	<p>minor [2] 7:5, 29:10 minutes [4] 8:22, 12:15, 32:8, 32:9 misconduct - 10:14 mistake - 7:8 modification [3] 29:5, 30:10, 30:14 Montana [5] 1:2, 1:12, 2:6, 38:2, 38:7 month [3] 17:15, 19:2, 20:19 months [8] 7:3, 15:5, 16:12, 16:16, 20:4, 20:9, 21:3, 21:19 moot [5] 9:25, 10:12, 13:2, 13:10, 13:22 mooted - 14:2 moots - 9:22 morning [2] 6:20, 6:20 motion [9] 33:2, 33:17, 34:1, 34:13, 34:16, 35:9, 35:21, 36:6, 37:6 move [3] 33:12, 36:10, 36:19 moved [2] 36:1, 36:23 MSUMA - 21:11 MT - 2:9 multiple [2] 8:15, 19:1 myself [3] 9:11, 12:12, 31:8</p> <hr/> <p style="text-align: center;">N</p> <p>named - 38:9 nature - 34:23 necessary - 23:8 needed - 29:11 negate - 10:18</p>	<p>nine [6] 7:2, 15:5, 19:2, 20:9, 21:2, 21:19 nobody - 6:16 non-compliance - 17:16 non-material - 24:3 None - 36:6 nor [2] 7:17, 25:16 notarial - 38:16 Notary [3] 1:23, 38:6, 38:20 note [3] 7:5, 31:3, 32:6 noted - 7:23 nothing [4] 23:20, 28:21, 30:8, 31:12 notice [3] 20:14, 22:13, 30:5 noticed - 22:8 notified - 14:21 numerous - 8:15</p> <hr/> <p style="text-align: center;">O</p> <p>object - 11:10 objections - 8:1 obligation - 26:16 observed - 18:9 obviously - 4:12 occurred [4] 10:14, 21:13, 23:21, 23:24 odds [2] 11:22, 12:8 offered - 34:24 office [2] 4:18, 5:13 ongoing [2] 13:10, 15:24 opencut [8] 1:5, 6:9, 8:13, 8:17, 8:24, 19:21, 26:1, 34:19 opening - 13:14</p>	<p>operate [2] 30:22, 30:25 operated - 18:15 operating [5] 13:23, 24:5, 24:25, 25:25, 31:4 operation - 24:19 operations - 13:5 operator [2] 29:3, 30:8 operator's - 23:14 operators - 8:24 opponent - 9:13 oppose - 36:6 opposed [2] 36:4, 37:4 options [4] 5:21, 5:22, 11:2, 27:7 oral [5] 1:8, 6:5, 6:8, 6:10, 6:18 order [15] 7:11, 7:16, 7:18, 7:21, 9:2, 10:19, 10:22, 10:24, 11:3, 11:6, 11:23, 17:21, 25:20, 35:25, 36:1 original [3] 14:14, 20:11, 29:13 ought - 33:9 over-arching - 24:17</p> <hr/> <p style="text-align: center;">P</p> <p>packet [2] 5:24, 32:22 pages - 38:12 parked - 31:13 partial [2] 7:21, 33:14 particular - 19:23 parties [2] 7:7, 9:16 PARTNERSHIP</p>
--	---	--	--	---	--

<p>- 1:6 pass - 26:8 past - 9:22 patience - 31:19 pause - 24:9 Payne - 5:22 penalize - 26:15 penalized [2] 25:21, 25:24 penalties [4] 33:22, 35:13, 35:14, 35:17 penalty [10] 18:14, 22:3, 23:23, 33:10, 34:5, 34:7, 34:11, 35:12, 36:11, 36:21 pending - 9:6 period [25] 7:2, 9:5, 13:11, 14:7, 16:4, 16:9, 16:21, 17:15, 17:20, 18:3, 19:2, 20:13, 20:25, 23:13, 26:2, 27:23, 29:3, 29:5, 29:14, 29:14, 30:9, 30:21, 30:23, 31:1, 31:19 periods - 17:2 permit [39] 6:24, 8:5, 8:18, 9:3, 10:12, 10:16, 13:3, 13:17, 13:18, 13:20, 13:24, 14:1, 14:5, 14:14, 15:25, 18:16, 20:11, 24:18, 24:21, 25:1, 25:3, 25:8, 25:9, 25:9, 25:25, 27:1, 27:6, 27:9, 27:21, 27:23, 29:5, 29:11, 30:11, 30:14, 31:4, 31:5, 31:17, 31:18, 34:25 permits - 8:25 permittee [5]</p>	<p>14:20, 14:24, 15:10, 15:15, 15:25 permittee's - 6:25 permittees - 34:21 permitting [3] 4:5, 13:10, 26:17 person's - 23:7 perverse - 14:3 phase [9] 18:14, 22:3, 33:11, 33:24, 34:2, 34:5, 35:12, 36:13, 36:21 phrase - 23:23 physically [2] 18:3, 18:6 placed - 26:17 plain - 10:9 plainly - 8:24 plate - 10:1 please [4] 3:21, 14:11, 36:2, 37:2 pleasure - 36:17 point [13] 13:2, 16:3, 16:11, 18:8, 19:4, 20:1, 20:18, 20:25, 21:18, 24:22, 26:21, 26:25, 31:19 points - 10:6 policy [2] 22:11, 22:18 position - 5:5 possible [2] 4:25, 5:7 posted - 6:11 power - 10:18 preface - 33:5 prefer - 22:4 PREPARED - 1:22 present [5] 3:9, 3:11, 7:1, 7:24, 8:14 presented [2] 6:10, 34:2 previously [2]</p>	<p>4:17, 28:17 prior [2] 27:18, 32:21 probably [4] 18:13, 21:6, 37:8, 37:9 problem [4] 21:10, 26:22, 26:24, 27:25 problematic - 24:1 procedural - 5:18 proceed [7] 4:20, 6:6, 6:17, 11:4, 11:6, 33:10, 33:22 proceeded - 13:25 proceeding [2] 35:12, 36:21 proceedings [6] 1:8, 3:1, 37:10, 38:8, 38:10, 38:13 proceeds - 34:5 process [7] 8:6, 11:13, 11:14, 13:3, 13:11, 18:1, 26:18 processing - 26:5 product - 4:25 program [5] 3:25, 19:12, 19:20, 19:21, 34:20 project - 24:1 propose - 33:2 proposed [7] 4:13, 25:20, 32:19, 32:23, 33:13, 34:6, 35:24 prosecutorial [4] 13:24, 15:13, 21:25, 28:11 protecting - 21:16 provide [2] 16:14, 17:7 provided - 19:2 provision [2] 15:20, 16:9</p>	<p>public [5] 1:23, 21:15, 21:17, 38:6, 38:20 pulled [3] 10:2, 10:4, 31:10 punish - 12:5 purposes [2] 5:1, 36:20 pursue - 14:22</p> <hr/> <p style="text-align: center;">Q</p> <p>Quality - 2:7 quick [2] 18:1, 32:15 quite - 9:19 quorum - 3:7</p> <hr/> <p style="text-align: center;">R</p> <p>raised [4] 8:3, 9:9, 11:8, 11:11 raises - 8:3 ran - 31:19 reach - 21:18 reading [3] 10:6, 10:15, 10:18 readings - 10:9 ready - 4:6 reality - 11:1 really [7] 9:16, 10:25, 15:19, 17:14, 18:12, 23:5, 25:6 reason [4] 5:8, 5:10, 16:17, 27:5 reasonable - 12:5 reasonably - 15:14 reasons - 14:3 receipt - 15:7 receive - 17:10 received [2] 14:20, 15:2 receives - 27:2 reclaim [12] 11:16, 13:1, 13:9, 13:16,</p>	<p>13:17, 14:22, 15:11, 26:15, 26:16, 27:6, 27:9, 35:1 reclamation [18] 6:25, 7:2, 9:1, 9:7, 13:21, 14:8, 14:15, 15:4, 15:16, 18:16, 18:22, 19:6, 21:10, 25:5, 25:13, 25:16, 25:18, 27:21 reconciling - 26:23 record [12] 3:22, 7:13, 8:10, 8:12, 11:18, 19:8, 20:1, 21:4, 22:4, 23:20, 28:21, 38:13 recorded - 18:9 refer [2] 21:20, 36:19 referred [2] 21:21, 31:20 reflects [2] 8:11, 8:12 refusing - 21:13 regard - 9:17 registration [3] 10:1, 10:4, 31:9 regulations [2] 10:16, 35:13 reject - 11:10 relatively - 24:2 remaining - 12:16 remedies - 11:12 reminder - 5:25 reminding [2] 5:21, 7:14 rendered - 5:16 reported - 38:10 Reporter [3] 1:23, 38:5, 38:20 request - 12:10</p>	<p>required [4] 13:20, 14:15, 19:14, 31:17 requires - 8:24 research [2] 4:14, 4:18 resolve - 23:9 resolved - 16:17 resort - 23:8 respect [3] 17:20, 22:2, 35:12 respond [2] 17:9, 23:12 response [7] 32:4, 33:18, 36:3, 36:5, 36:25, 37:3, 37:5 responsibility - 14:6 result - 10:13 resulted - 8:13 review [3] 1:1, 15:2, 25:7 revise - 15:25 River - 24:6 rock - 21:11 roll - 3:6 room [2] 1:10, 3:21 rope [2] 20:18, 23:7 roughly [3] 7:2, 20:9, 20:13 RPR [3] 1:22, 38:5, 38:19 ruled - 9:20 rules - 26:1 ruling [5] 7:8, 11:23, 12:8, 16:3, 27:24 runs - 16:5</p> <hr/> <p style="text-align: center;">S</p> <p>sanctions - 10:14 Sand - 6:8 Sarah [7] 4:8, 6:10, 7:15, 32:5, 32:15, 33:23, 36:11 satisfaction - 17:18 saying [4]</p>
---	---	---	--	--	---

<p>19:13, 22:12, 26:20, 33:6 seal - 38:16 seconded [2] 36:1, 36:24 Section [3] 10:22, 10:24, 12:24 seek [2] 5:11, 7:16 seem - 35:2 seems - 33:20 send - 34:14 sense - 34:8 sent - 6:13 separate - 11:1 September [7] 9:4, 16:7, 19:12, 20:14, 27:12, 27:19, 30:14 seven - 12:15 shifting - 26:19 short - 9:14 shorthand - 38:10 sides - 33:15 signature - 21:22 signed - 16:14 simple [2] 8:23, 24:2 simply [2] 19:25, 30:18 sit - 22:21 site [5] 11:16, 13:1, 13:18, 14:22, 19:16 Sivers [2] 4:4, 4:4 Sixth [2] 1:11, 2:8 somebody - 26:8 somehow [3] 8:5, 12:1, 19:18 sometime - 30:1 sort [2] 4:23, 24:16 sought - 7:7 span - 19:22 speak - 20:18 Special - 2:5 speculate [2] 22:5, 23:19</p>	<p>SS - 38:3 staff [3] 6:21, 19:21, 21:7 stage - 12:9 stand - 24:11 start [3] 3:23, 4:7, 4:7 started - 3:5 state [4] 1:2, 10:16, 38:2, 38:7 statement [4] 7:25, 8:1, 8:2, 23:15 statements - 13:14 statute [3] 21:10, 21:11, 21:12 stick - 35:3 street - 31:10 struggling [3] 15:21, 26:13, 26:14 submit [9] 7:25, 9:20, 15:5, 17:16, 19:25, 20:3, 20:20, 21:14, 29:11 submittal - 22:10 submitted [7] 16:23, 19:3, 19:5, 25:17, 26:20, 28:6, 29:12 Subsection - 10:24 subsequent [3] 8:19, 9:22, 10:11 suffice - 9:24 sufficient - 11:16 sufficiently - 7:17 suggest - 12:10 summary [4] 7:21, 11:13, 33:14, 33:15 supposed - 23:12</p> <hr/> <p>T</p> <hr/> <p>tag [2] 10:1, 31:9 taken [4]</p>	<p>17:22, 22:14, 33:9, 38:8 takes - 21:24 taking - 11:22 technical [4] 5:17, 19:22, 33:9, 34:23 telephone - 1:20 terminated - 15:19 terms [4] 8:25, 13:20, 14:1, 24:17 testifying - 32:14 thank [15] 6:19, 7:13, 8:23, 12:13, 12:17, 12:21, 17:23, 22:6, 27:13, 31:24, 32:1, 32:25, 35:8, 35:19, 36:8 Thanks - 3:20 theme - 10:7 themselves - 3:22 thereafter - 24:20 they'd - 19:4 they're [7] 4:23, 5:22, 6:3, 17:1, 25:21, 25:24, 27:22 thing [4] 21:6, 21:9, 25:20, 26:13 though [2] 6:5, 25:5 ticket [2] 10:2, 31:11 Tim [2] 1:20, 3:16 timeline - 28:4 timelines - 28:1 timely [2] 13:1, 13:9 timing - 8:22 today [10] 4:7, 6:4, 7:6, 7:18, 7:24, 22:21, 24:11, 32:14, 34:10, 34:24 touch - 9:10</p>	<p>transcribed - 38:11 TRANSCRIPT - 1:8 transcription - 38:11 tried - 28:12 trouble [2] 8:8, 26:22 true - 38:12 trust - 21:17 turn [2] 9:8, 35:7 turns - 9:16 Tweeten [26] 1:20, 3:18, 3:19, 24:14, 24:23, 25:11, 25:12, 25:19, 26:5, 26:8, 26:14, 28:25, 29:13, 29:18, 29:19, 29:25, 30:3, 30:7, 30:15, 30:17, 30:24, 31:24, 32:1, 32:11, 33:4, 36:18</p> <hr/> <p>U</p> <hr/> <p>ultimately [5] 17:11, 20:20, 23:9, 24:9, 25:2 unable - 17:6 unassailable - 4:25 understand [3] 14:14, 15:22, 24:16 unhelpful [2] 8:5, 19:18 unlawful - 9:24 unwilling - 20:19 updated [2] 10:4, 19:13 upon [4] 9:10, 10:17, 15:19, 16:9 using - 38:11</p> <hr/> <p>V</p> <hr/> <p>variety [2] 11:8, 19:21 various - 29:15</p>	<p>videotaped - 31:2 view - 15:22 violated - 14:6 violation [30] 8:12, 9:3, 10:12, 11:21, 11:25, 12:2, 12:6, 12:25, 13:8, 13:15, 13:16, 13:23, 13:25, 14:2, 15:10, 15:23, 16:4, 16:9, 17:1, 17:21, 18:22, 18:22, 22:13, 24:25, 25:11, 25:25, 27:23, 30:6, 31:4, 31:5 violations [2] 1:4, 9:22 virtue - 30:18 voluntary - 9:23 vote [2] 34:19, 35:7</p> <hr/> <p>W</p> <hr/> <p>Wagoner [34] 1:5, 6:1, 6:8, 7:23, 7:24, 8:5, 8:7, 9:2, 9:5, 9:9, 9:18, 10:20, 11:8, 11:11, 11:15, 11:21, 11:24, 12:1, 12:5, 12:23, 13:1, 13:3, 14:7, 16:6, 16:13, 19:15, 19:17, 19:25, 20:10, 20:14, 20:20, 20:22, 25:4, 28:14 Wagoner's [4] 8:12, 9:21, 10:8, 16:9 Wagoners [2] 6:10, 7:11 wanted [3] 4:8, 4:10, 4:18 Warner [3] 1:20, 3:16, 3:17 wash - 28:8</p>	<p>ways - 27:10 we'd [2] 23:1, 31:22 we'll [4] 3:5, 3:23, 20:16, 32:12 we're [14] 4:6, 6:7, 7:18, 17:14, 18:19, 18:21, 19:18, 20:13, 21:20, 23:3, 26:2, 28:1, 32:7, 32:13 We've - 11:18 wear - 4:21 website - 6:12 welcome - 7:15 welfare - 21:15 what's [2] 30:21, 36:16 whatever [3] 16:17, 29:14, 34:22 WHEREOF - 38:15 WHEREUPON - 3:1 whether [8] 12:25, 14:8, 20:3, 22:21, 34:13, 34:14, 36:13, 36:14 window [4] 18:19, 18:21, 18:23, 18:25 withdrew [2] 13:22, 24:25 within [2] 23:13, 29:4 WITNESS - 38:15 won't - 18:13 wonder [2] 22:10, 23:16 works [2] 19:21, 34:20 wouldn't - 15:18 written [8] 6:3, 6:4, 6:11, 7:25, 8:2, 8:16, 12:22, 23:14 wrong - 16:8</p>
--	--	--	--	--	---

Y

yesterday [2]

6:13, 32:17

yet - 18:17**you'll [2]**

20:2, 34:5

Z

zoning [6]

16:14, 16:15,

19:13, 21:22,

23:4, 31:22