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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
AUGUST 10, 2018)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
August 10, 2018
9:00 a.m.

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

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

1 WHEREUPON, the following proceedings were
2 had and testimony taken, to-wit:

3 * * * * *

4 CHAIR DEVENY: Welcome everybody to the
5 Board of Environmental Review. I'm Chris Deveny,
6 Chair of the Board. I'm the only one here today.
7 The rest of the Board members are calling in. So
8 Lindsay, if you'd take roll call and make sure
9 we've got a quorum and see who all is here.

10 MS. FORD: Chris Deveny.

11 CHAIR DEVENY: Present.

12 MS. FORD: John Felton.

13 MR. FELTON: Present.

14 MS. FORD: Dexter Busby.

15 MR. BUSBY: Present.

16 MS. FORD: Hillary Hanson.

17 MS. HANSON: Present.

18 MS. FORD: Tim Warner.

19 MR. WARNER: Present.

20 MS. FORD: John Dearment.

21 (No response)

22 MS. FORD: John Dearment.

23 (No response)

24 MS. FORD: Chris Tweeten.

25 MR. TWEETEN: Here.

1 MS. FORD: We have everyone present
2 except John Dearment. We do have a quorum.

3 CHAIR DEVENY: All right. Hello,
4 everybody. Good to have you on. It's kind of
5 quiet here today up at the -- on the board, but
6 let's go ahead and identify other people in the
7 room. George.

8 MR. MATHIEUS: George Mathieus,
9 Department/Board liaison.

10 MS. CLERGET: Sarah Clerget, Board
11 attorney.

12 MS. KELLY: Molly Kelly, intern with
13 Agency Legal services.

14 MR. DAVIS: Tim Davis, Water Quality
15 Division Administrator at DEQ.

16 MR. SIVERS: Eric Sivers, DEQ Water
17 Protection Bureau.

18 MS. TRENK: Peggy Trenk, Treasure State
19 Resources Association.

20 MR. BARTON: Darrell Barton, DEQ Water
21 Quality.

22 MR. COLEMAN: I'm Ed Coleman. I'm the
23 Bureau Chief over the Coal and Opencut Mining
24 Bureau.

25 MR. LUCAS: Mark Lucas, DEQ, staff

1 attorney, Coal and Opencut.

2 MS. BASS: Miranda Bass. I'm with the
3 Air, Energy Mining Division in the Energy Bureau.

4 MS. SCHERER: Cindy Scherer, legal
5 secretary, DEQ.

6 MR. HAYES: Ed Hayes, Acting Chief Legal
7 Counsel for DEQ.

8 MR. WILLIAMS: Keaton Williams. I'm
9 here on behalf of Cottonwood Environmental Law
10 Center.

11 MR. GARBER: Jason Garber, DEQ Water
12 Protection Bureau.

13 MR. KENNING: Jon Kenning, Water
14 Protection Bureau Chief, DEQ.

15 MR. URBAN: Eric Urban, Water Quality
16 Planning Bureau Chief.

17 CHAIR DEVENY: And the woman that just
18 came in.

19 MS. McLAUGHLIN: Joanna McLaughlin,
20 Water Protection Bureau.

21 CHAIR DEVENY: Thanks, everybody. Are
22 there any other members of the public on the
23 telephone today?

24 (No response)

25 CHAIR DEVENY: I just want to remind

1 people on the phone to keep your phones muted, and
2 to remember to state your name when you speak up
3 so our Court Reporter can get your names correct.
4 Thank you.

5 So the first order of business is to
6 review and approve the minutes from the last Board
7 meeting. Do any of the Board members have any
8 corrections or additions to the minutes?

9 (No response)

10 CHAIR DEVENY: Hearing none, is there
11 any public comment on the minutes, from DEQ or
12 others in the room?

13 (No response)

14 CHAIR DEVENY: Hearing none, would
15 somebody like to make a motion.

16 MR. BUSBY: So moved. This is Dexter.

17 CHAIR DEVENY: And a second?

18 MR. TWEETEN: Chris Tweeten. I'll
19 second.

20 CHAIR DEVENY: It's been moved and
21 seconded to approve the minutes. All in favor,
22 signify by saying aye.

23 (Response)

24 CHAIR DEVENY: Any opposed?

25 (No response)

1 CHAIR DEVENY: Hearing none, the minutes
2 are approved.

3 And next we'll move over to briefing
4 items with Sarah Clerget, our BER attorney, to
5 give us an update.

6 MS. CLERGET: Hi, everybody. This is
7 Sarah. So going through on Page 1, 1(a), the
8 enforcement cases. First is the CMG Construction.
9 That one I granted a stay on July 23rd, 2018, and
10 they're required to file status updates every
11 thirty days, and it's my understanding that
12 they're in settlement negotiations.

13 "B," Columbia Falls Aluminum, I
14 apologize. I was hoping to have an update for you
15 on this case today. I don't. I believe that it
16 will be -- my hope is to have it in front of you
17 for argument at the October meeting, but that will
18 be dependent a little bit on how much time the
19 parties feel they need for exceptions.

20 But that order is forthcoming, and will
21 definitely be issued before the October meeting,
22 hopefully with enough time before the October
23 meeting that we can put it on the agenda for
24 October.

25 "C," Copper Ridge, that decision is

1 issued, and I was hoping to have it in front of
2 you today for oral argument, but the parties asked
3 for more time on their exceptions briefs, and so
4 that will be in front of you at the December
5 meeting, that decision.

6 Going to Page 2, the Fischer Land
7 Development, this one has settled, or they're
8 working on a settlement agreement, and so I
9 granted a stay.

10 "E," Wagoner Family, there is an update
11 from what is on the agenda. My understanding is
12 that the parties have reached a settlement, and
13 that a motion to dismiss will be forthcoming. We
14 just don't have it yet. So that one will drop off
15 your agenda.

16 Wagoner, just to be clear, is the
17 penalty phase of the hearing that you heard
18 argument and a proposed order on. I believe it
19 was at the meeting before last.

20 "F" is Little Bear. There is a
21 scheduling order in place. I'm having a little
22 bit of trouble with the permit holder who has not
23 appeared as I ordered, and so we're going to have
24 a status conference on that hopefully next week to
25 figure out what to do with that situation. But

1 there is a scheduling order in place, and they're
2 proceeding accordingly.

3 Two, Non-enforcement Cases.

4 Westmoreland is a stay pending a decision from the
5 Supreme Court, so I don't have any further
6 information on when that will happen. They're
7 just going to file a status report within thirty
8 days of that decision.

9 "B," Signal Peak, as you guys remember,
10 this is the one that is stayed because there is an
11 action pending in District Court in which the
12 Board is named as a defendant about the subpoena
13 issue. And summary judgment was just filed on
14 that subpoena issue yesterday, I think, or the day
15 before, and so they're in the process of briefing
16 that summary judgment issue, and the underlying
17 case in front of the Board is stayed until that
18 District Court case is resolved.

19 Western Energy. The parties have filed
20 their proposed findings of fact and conclusions of
21 law. The responses to those were due or were
22 about to be due, but the parties asked for an
23 extension until September 20th to file those
24 responses. I granted that, but indicated there
25 would be no further extensions. And this is -- I

1 apologize -- an update from what's on the agenda.

2 I will have the findings and conclusions
3 and the responses from the parties by the end of
4 September, and then I will issue a decision; and
5 rather than double up this case with Copper Ridge,
6 which will be on the December agenda for you guys,
7 with discussion with Chris, I think we'd like to
8 not have two big cases in front of the Board at
9 the same time, so I'll get this one in front of
10 you in the February meeting, unless anybody has
11 any thoughts otherwise.

12 And Montanore, there is a summary
13 judgment motion pending right now. Hopefully the
14 decision should be out either today or tomorrow on
15 that, and then I will issue a scheduling order for
16 the remainder of the case.

17 It's only partial summary judgment, so
18 there is definitely going to be a hearing no
19 matter what I do. And currently the parties were
20 talking about that sometime in October, so that's
21 sort of what we're shooting for, but we'll see,
22 and that will be a full blown hearing, multi-day
23 hearing.

24 "E" is Laurel Refinery. That's stayed
25 until August 24th, so I haven't heard anything. I

1 will hear by the end of the month about that one.

2 JR Civil is dismissed, so you don't have
3 to worry about that.

4 License MVWF-0376, which is another
5 Payne Logging case, is dismissed without
6 prejudice. So unless they come back and refile
7 that one with an attorney, that's the last we're
8 going to hear about that.

9 And 3(a) is not me, so somebody at DEQ
10 needs to give an update on that.

11 CHAIR DEVENY: Could we have an update
12 from DEQ, please.

13 MR. HAYES: Chairwoman Deveny, other
14 members of the Board, this is Ed Hayes, Acting
15 Chief Legal Counsel for DEQ.

16 And as indicated in the agenda, the case
17 is currently being briefed before the Montana
18 Supreme Court. DEQ has filed its Appellant's
19 brief, and the Appellees have requested an
20 extension of time for them to file their response
21 brief, and that has a deadline of September 11th,
22 2018.

23 And after that is filed, then DEQ will
24 have 14 days to file its reply brief, at which
25 time the case will be fully briefed before the

1 Supreme Court, and they will then make a decision
2 in terms of whether to hear oral argument or not.
3 Usually the cases are decided without oral
4 argument.

5 And once it's fully briefed, then the
6 case is to be resolved at the convenience of the
7 Supreme Court. So we're still in the briefing
8 phase of that case.

9 CHAIR DEVENY: Thank you, Mr. Hayes. Do
10 Board members have any questions of Sarah about
11 any of the scheduling or contested case procedural
12 matters?

13 (No response)

14 CHAIR DEVENY: Hearing none, I'd like to
15 have the Board consider whether, since we've sort
16 of had a lot of quiet meetings, whether we would
17 maybe want to take on one of these cases, and I
18 was thinking perhaps the Montanore Minerals case.
19 It has to do with the MPDES permit in Libby,
20 Montana.

21 Is there any interest by the Board
22 members to leave the procedural matters with
23 Sarah, but to have Board members conduct the
24 hearing?

25 MR. BUSBY: This is Dexter. I think

1 that's -- because they are so quiet, I think that
2 would be a good idea, either that or the Cenex
3 case, either one. Laurel Refinery.

4 CHAIR DEVENY: Any other thoughts from
5 other Board members?

6 MR. TWEETEN: Madam Chair, this is Chris
7 Tweeten. I guess I'd like to hear from Sarah with
8 respect to Montanore what other matters are
9 anticipated to come up before the evidentiary
10 hearing takes place, so we can get a better idea
11 what the status of the thing is. Sarah, could you
12 fill us in on any of that? Do you anticipate
13 anything further beyond a partial summary judgment
14 before the evidentiary hearing will be ready to
15 tee up?

16 MS. CLERGET: There will probably be --
17 in my scheduling orders, I usually require a bunch
18 of prehearing filings, so they'll probably -- if
19 they have any motions in limine, and then the
20 prehearing filings include prehearing memo, the
21 exchange of exhibits, and objections on those.

22 And so there is that sort of procedural
23 stuff, which I can take care of, and I can take
24 care of any motions in limine if you want me to.
25 Other than that, I think it's pretty ready. We

1 will have done the partial summary judgment, so
2 that there won't be any other dispositive motions.

3 And the parties -- I have to remember.
4 I think the parties indicated that it would be a
5 three day hearing, but I can double check on that.
6 I will have that answer momentarily.

7 MR. TWEETEN: Madam Chair, if I might.

8 CHAIR DEVENY: Go ahead, Chris.

9 MR. TWEETEN: Thank you. I guess I've
10 done quite a few contested cases, but I've never
11 been involved in an evidentiary hearing in front
12 of a multi-member Board like this. So I'm not
13 real clear in my mind as to what the established
14 procedure would be, if there is one, for actually
15 conducting the hearing, in terms of things like
16 ruling on objections, ruling on the admissibility
17 of evidence, those kinds of things that Judges do
18 during -- or Administrative Law Judges do during
19 ordinary contested cases.

20 Would those things be put to a vote of
21 the Board, or would the Chair be empowered to rule
22 on those things on behalf of the Board?

23 I'm in favor of the idea. I think it
24 would be a good use of the Board's time. But I do
25 think that we need to make some decisions about

1 how the Board is going to proceed as the presiding
2 entity with the hearing.

3 And perhaps, Sarah, you can brief us on
4 that at our next meeting.

5 MS. CLERGET: Sure. Chris, right now I
6 can respond, too, if that would be helpful.

7 CHAIR DEVENY: Yes.

8 MS. CLERGET: This is Sarah again. I
9 think my understanding, from the way I have seen
10 it done with some other boards, is that it's up to
11 the Board how you want to run it.

12 If you have an attorney on the Board, as
13 we do, or if the Board Chair is comfortable, then
14 the Board can retain those sorts of decisions,
15 usually by designating a point person, like the
16 Board Chair is going to be the acting Hearing
17 Examiner for the purposes of the hearing; or the
18 attorney that's on the Board, as a Board member,
19 can be designated as that Hearing Examiner for the
20 purposes of that hearing.

21 Or you can designate me as the Hearing
22 Examiner for the purposes of evidentiary rulings,
23 but any substantive rulings would be the Board's
24 to make, and essentially the way practically that
25 works is that the Board sits as though they were a

1 panel of Judges, but any evidentiary objections
2 are made to me, and then I would rule on them as
3 the hearing progresses.

4 MR. TWEETEN: Madam Chair, may I follow
5 up?

6 CHAIR DEVENY: Yes. Go ahead, Chris.

7 MR. TWEETEN: I figured it would be
8 probably left to the Board's discretion to as how
9 it wanted to handle all of those things, and all
10 of those options I think are certainly available.
11 We just need to decide which of them we want to
12 get, or whether there are any other options we
13 want to follow, I guess, in terms of how to handle
14 all of those procedural matters.

15 So again, I'd like to ask that those --
16 Well, at some point before we get to an
17 evidentiary hearing, all of those decision points
18 are going to have to be identified as to what
19 we're going to do in this situation or that
20 situation that comes up during the hearing in
21 terms of making rulings.

22 And then the Board is going to have to
23 adopt a hearing protocol for how we're going to
24 handle that, because I think the parties are
25 entitled to know as they prepare for the hearing

1 what the protocol is going to be.

2 So again, I guess, Sarah, if you could
3 -- Madam Chair, I would suggest that we ask Sarah
4 to maybe look back in history, and try to figure
5 out when was the last time the Board did one of
6 these, and if it is possible, what we did in those
7 circumstances, and maybe look to some other
8 multi-member Boards that have presided over
9 evidentiary hearings. The PSC comes to mind, but
10 they're probably not a good example.

11 You'll get some ideas as to how to do
12 these things, and then as we prepare to conduct
13 this evidentiary hearing, we should I think issue
14 some sort of a prehearing order, letting the
15 parties know what we decided to do in terms of the
16 nuts and bolts of presiding over the hearing.

17 MS. CLERGET: Madam Chair, I can
18 certainly do that, and the only thing I would need
19 to know is if the Board were not -- if the Board
20 were to just leave it in my hands as it is now, my
21 expectation was to have a scheduling conference
22 after I issued a summary judgment order, like I
23 said, today or Monday, and have a scheduling
24 conference sometime within the next couple of
25 weeks to set up the hearing schedule. And the

1 hearing, when the hearing is will determine when
2 all of those prehearing deadlines are.

3 And so if this is something that the
4 Board wants to do, I do probably need to know at
5 this meeting, so that I can set up the schedule
6 accordingly after this summary judgment ruling,
7 and the idea being essentially are you willing
8 to --

9 I just looked at the scheduling order,
10 and it does not indicate -- Kurt is not here, so
11 he can't tell me how long this hearing is going to
12 be -- but from what I know of the case, I would
13 expect it to be at least two to three days. I
14 think we could probably get it done in two, but we
15 might need three. And so the Board would need to
16 give me some dates that all of the Board members
17 would be available for that length of time.

18 CHAIR DEVENY: I'd like to hear from
19 some of the other Board members. Is there
20 interest in doing this, from those that we haven't
21 heard from?

22 MR. FELTON: This is John Felton. I'm
23 real concerned about, with the rest of my life the
24 way it is, carving out two full days and possibly
25 a third day to be away from the rest of my day

1 job. One day is a possibility. I think two or
2 three gets a little more challenging.

3 MS. HANSON: This is Hillary, and I
4 would ditto that.

5 CHAIR DEVENY: Tim Warner? Tim, what's
6 your thought?

7 MR. WARNER: Tim Warner. Sorry. I was
8 on mute. I'm fine.

9 CHAIR DEVENY: You would be fine with
10 attending a two to three day hearing?

11 MR. WARNER: Yes.

12 CHAIR DEVENY: Not an overwhelming
13 majority here saying, "Yes, let's do it." Four of
14 us, and we don't know about John Dearment.

15 MS. CLERGET: There may be other
16 opportunities aside from -- I mean there are lots
17 of cases, so this will not be your last chance.

18 CHAIR DEVENY: Dexter or Chris, what do
19 you think? Should we -- and Tim, with two people
20 saying no, do you think we should proceed, or
21 should we wait? I would just like your opinions.

22 MR. BUSBY: Madam Chair.

23 CHAIR DEVENY: Go ahead, Dexter.

24 MR. BUSBY: I would wish everybody to be
25 there or at least comfortably there, so maybe the

1 best thing is to wait on it, or pick another case.

2 CHAIR DEVENY: Chris.

3 MR. TWEETEN: Madam Chair, I think
4 that's right. Under MAPA, if even one of the
5 Board members is not available, unavailable Board
6 members who don't participate in the evidentiary
7 hearing would have to sit down and review the
8 entire evidentiary record, and then be prepared to
9 affirm that that's what they did, before they'd be
10 allowed to be participate in the decision.

11 So unless the entire Board can actually
12 be there, it gets a little -- I mean it's going to
13 be burdensome on those members who don't attend
14 the hearing either way. And perhaps we should
15 look for a better vehicle that might involve a one
16 day hearing as opposed to something as intricate
17 as the Libby case.

18 CHAIR DEVENY: Well, hearing that, I
19 think I'll move on, and ask Sarah to keep us in
20 mind, though, for another case that might be
21 coming up that maybe we can have a little more
22 advance notice on, and we could maybe be a little
23 bit more prepared.

24 MS. CLERGET: Okay. Sure.

25 CHAIR DEVENY: And something that's not

1 quite so lengthy.

2 MS. CLERGET: Okay.

3 CHAIR DEVENY: Let's move on to the
4 action items then. We have some rules proposed by
5 DEQ for initiating rulemaking, so turn it over to
6 George.

7 MR. MATHIEUS: Thanks, Madam Chair.
8 Jason Garber from the Department will be
9 presenting to you today.

10 MR. GARBER: Madam Chair, members of the
11 Board, my name is Jason Garber, last name is
12 spelled G-A-R-B-E-R. I am here today to request
13 the Board to initiate rulemaking for the
14 Administrative Rules for 401 certification.

15 I am the 401 certification coordinator
16 for the agency. 401 certification certifies
17 Federal permits and licenses for compliance with
18 State water quality standards.

19 These rules have not been addressed in
20 over 20 years, since they've been framed. In that
21 time, we've discovered some issues that arise when
22 we're working with our Federal partners on
23 permitting actions, and today I'm just going to go
24 over some of the high points of the amendments
25 we're proposing.

1 The first one would be: Part of the
2 completeness review, the current language has a 30
3 day completeness review window, in which if we
4 don't make that completeness determination, that
5 application is already deemed complete.

6 This can be problematic because we have
7 to align our time frames with the Federal
8 permitting agency, oftentimes the Army Corps of
9 Engineers, and so we're proposing to remove that
10 language out of the current rule.

11 The other high point that is important
12 to these rules is our tentative determination.
13 The current tentative language indicates that if
14 we don't make a tentative determination within 30
15 days after we receive a complete application, the
16 401 certification is automatically waived, meaning
17 that DEQ is out of the ballgame in terms of
18 conditioning a Federal permit for compliance with
19 water quality standards.

20 So we would like to remove that
21 language. It puts us in a position to rush to
22 make a decision in order to meet that deadline.
23 And that's basically the high points of it.

24 I would just add that this is for 401
25 certification only. It does not pertain to MPDES

1 permits in any way. With that, Madam Chair, I'll
2 take questions if you have any.

3 CHAIR DEVENY: Thank you. Do any of the
4 Board members have any questions about the
5 proposed rulemaking?

6 (No response)

7 CHAIR DEVENY: Hearing none, would
8 somebody like to make a motion?

9 MR. TWEETEN: Madam Chair, this is
10 Chris. I move to initiate rulemaking as
11 requested.

12 MR. FELTON: John Felton. I'll second.

13 CHAIR DEVENY: It's been moved and
14 seconded. Is there any further discussion?

15 (No response)

16 CHAIR DEVENY: Hearing none, all those
17 in favor, signify by saying aye.

18 (Response)

19 CHAIR DEVENY: Any opposed?

20 MR. BUSBY: Aye.

21 CHAIR DEVENY: Was the last aye an
22 affirmative or a negative?

23 MR. BUSBY: Affirmative.

24 CHAIR DEVENY: Thank you, Dexter. It
25 has been moved and seconded and passed, so DEQ is

1 authorized to proceed with the rulemaking on this.

2 MR. GARBER: Thank you, Madam Chair.

3 CHAIR DEVENY: Thank you. Moving right
4 along, we have two new contested cases. I'll turn
5 it over to Sarah to explain.

6 MS. CLERGET: Thank you. This is Sarah.
7 And the summaries are on the agenda, and the
8 materials are attached in your packet. My
9 suggestion for these two cases would be to
10 consolidate them pursuant to Montana Rule of Civil
11 Procedure 42, which allows you to combine cases
12 when they involve the same facts.

13 And as you can tell, both of these cases
14 involve the same mining permit. They are brought
15 by different residents around the permitted area,
16 and my suggestion would be that you consider
17 consolidating.

18 Mark from the Department is here. I
19 don't see anybody else in the audience from the
20 parties, and I haven't heard them on the phone.
21 But one option would be to allow anybody to
22 comment on that consolidation, if you would like.

23 The other options, as you are familiar
24 with, you can assign this to me for procedural
25 purposes only; you can assign it to me for

1 everything; you can assign it for summary judgment
2 only, or all the way through hearing.

3 CHAIR DEVENY: Do Board members have any
4 questions of Sarah at this time?

5 (No response)

6 CHAIR DEVENY: Hearing none --

7 MR. TWEETEN: Madam Chair, this is
8 Chris.

9 CHAIR DEVENY: Go ahead, Chris.

10 MR. TWEETEN: Just a question for Sarah,
11 in light of our previous discussion. It seems to
12 me there are some procedural issues here. One of
13 the objectors appears to be seeking to represent
14 an entire group of individuals. And so I'm
15 wondering if this might not be a good candidate
16 for the kind of Board consideration that we just
17 talked about.

18 The issue has to do with, as I read the
19 objections, whether the Department adequately
20 considered water quality issues in particular,
21 effect on groundwater, and other kinds of
22 potential environmental questions with this gravel
23 pit.

24 So perhaps this might be a good
25 candidate, and in light of that, maybe we should

1 assign it to Sarah for the prehearing procedures,
2 and then defer to a later date, once the matter is
3 fleshed out a little bit better, the question of
4 whether the Board wants to hear this, hear the
5 evidence on this itself, or whether it wants Sarah
6 to act as the Hearing Examiner.

7 MS. CLERGET: Madam Chair. This is
8 Sarah again. The only thing to keep in mind with
9 that is that I think these are probably -- or at
10 least some of them will be pro se, which may make
11 it a little bit more cumbersome as a hearing, but
12 that's not to say that it can't be handled. But
13 just as a practical matter.

14 CHAIR DEVENY: I think I'd rather wait
15 for something that's perhaps a little more
16 straight forward.

17 MS. CLERGET: Again, you can always
18 change your mind. You can assign it to me now,
19 and we can see how far you get, and if you want to
20 take it back at any point, you can do that.

21 CHAIR DEVENY: Does DEQ have any
22 comments on the consolidation, or anybody from the
23 public have any comments on the consolidation
24 issue?

25 MR. LUCAS: Madam Chair, members.

1 Without the other parties here or any
2 representatives they may have, it wouldn't be
3 appropriate for DEQ to comment on that at this
4 stage. That would be ex parte.

5 CHAIR DEVENY: Would you state your name
6 for the record.

7 MR. LUCAS: Mark Lucas.

8 CHAIR DEVENY: Thank you.

9 MS. CLERGET: Are we correct there is
10 nobody on the phone?

11 CHAIR DEVENY: There is nobody on the
12 phone. Thank you for pointing that out. Sarah,
13 do you have a recommendation for how to proceed at
14 this point?

15 MS. CLERGET: I would recommend that you
16 consolidate the cases into one case regarding
17 Opencut Mining Permit 2315, and we can keep the
18 double headers on it. We can keep them as two
19 separate cases, they're just consolidated for the
20 purposes of the record, which that's how I would
21 recommend you proceed, and then whatever your
22 pleasure is with regard to assigning it to a
23 Hearing Examiner.

24 CHAIR DEVENY: I would then make a
25 motion that the cases be consolidated, and that we

1 assign both of them to a Hearing Examiner for the
2 totality of the cases.

3 MR. TWEETEN: Madam Chair, this is
4 Chris. I second.

5 CHAIR DEVENY: It's been moved and
6 seconded. Is there any further discussion about
7 this?

8 (No response)

9 CHAIR DEVENY: Hearing none, all those
10 in favor of the motion, please signify by saying
11 aye.

12 (Response)

13 CHAIR DEVENY: Any opposed?

14 (No response)

15 CHAIR DEVENY: Motion passes. The
16 contested cases will be consolidated and assigned
17 to our Hearing Examiner.

18 Next we have the petition for
19 rulemaking, and Board members have had the
20 petition for awhile. Hopefully you have
21 information about that in front of you, as well as
22 the memo that Sarah put together two meetings ago
23 regarding the procedural issues. So Sarah, how
24 would you recommend proceeding with this?

25 MS. CLERGET: It is up to you, Madam

1 Chair, but perhaps hearing from the parties might
2 facilitate.

3 CHAIR DEVENY: There is somebody here
4 from -- Mr. Williams from the Cottonwood group.
5 Would you care to make a statement to the Board?
6 I know we had asked -- With new information that
7 came to your organization about the cost of the
8 EIS, and we had asked that you come before the
9 Board to tell us whether you were interested in
10 proceeding, or wanted to withdraw your petition,
11 based on that.

12 MR. WILLIAMS: Yes. My name is Keaton
13 Williams, and I'm here representing Cottonwood
14 Environmental Law Center.

15 Madam Chair and the Board, Cottonwood at
16 this time would like to continue with the
17 permitting process. Looking through the procedure
18 of the designation right now, before it has been
19 accepted, Cottonwood would like to continue and
20 deal with the EIS cost issues after acceptance or
21 rejection of the petition at that time.

22 CHAIR DEVENY: Do any members of the
23 Board have questions for Mr. Williams?

24 MR. TWEETEN: Madam Chair, this is
25 Chris. I have one.

1 CHAIR DEVENY: Go ahead, Chris.

2 MR. TWEETEN: Mr. Williams, thank you
3 for joining us this morning to give us the
4 petitioner's perspective. I just want to make
5 sure it is understood that there really isn't any
6 issue with respect to the allocation of costs of
7 the EIS.

8 The statute is extremely clear in saying
9 that you, that Cottonwood, as petitioners would be
10 required to accept the cost of preparing the EIS,
11 which has been estimated by DEQ at a quarter of a
12 million dollars. We don't have the discretion to,
13 as a Board, allocate that cost in any way other
14 than as directed by the statute.

15 So what you're essentially telling us
16 this morning is that Cottonwood is prepared to pay
17 whatever the cost of the EIS is, up to whatever it
18 turns out to be, whether it's a quarter of a
19 million or more or less.

20 Just so that's understood, I think the
21 petition is complete, and in my opinion at least
22 as an individual Board member, I think it is
23 appropriate to accept the petition, and move
24 forward under the fairly convoluted procedure
25 that's set forth in the statute; but there is no

1 point in doing that if at some point in the future
2 Cottonwood is going to ask the Board to make some
3 other arrangement with respect to the financial
4 burden that's placed on Cottonwood by the statute
5 for paying for the EIS.

6 So is that understood by Cottonwood that
7 there is no flexibility here on the Board's part?
8 If we go forward, and the EIS is prepared,
9 Cottonwood is going to have to pay for it.

10 MR. WILLIAMS: Yes, I believe that's --
11 I'm a contract attorney for Cottonwood. I don't
12 have access to all of their financial information.
13 But from what I understand, Cottonwood understands
14 that under Section 6 of the procedure after the
15 petition is accepted, and that the EIS will not
16 begin until Cottonwood has put forward that money.
17 So yes, Cottonwood does understand that.

18 MR. TWEETEN: Thank you, Mr. Williams, I
19 appreciate that. Thank you for the information.

20 CHAIR DEVENY: Thank you. Do other
21 Board members have questions of Mr. Williams?

22 (No response)

23 CHAIR DEVENY: Sarah, do you have any
24 questions?

25 MS. CLERGET: No.

1 CHAIR DEVENY: Thank you. Thank you for
2 coming today and telling us.

3 So Board members, what's before us is a
4 decision that we need to make whether the petition
5 contains sufficient credible information or not,
6 and we need to decide whether we feel that that
7 information is there before us today, or whether
8 we want DEQ to review the petition further and
9 give us a recommendation. Are there any thoughts
10 on how to proceed with that?

11 MR. TWEETEN: Madam Chair, this is Chris
12 again. I hate to dominate the conversation, but
13 I'd be interested in hearing DEQ's opinion as to
14 the completeness of the application, but it is the
15 Board's decision as to whether that sufficient
16 credible information is there, and on its face it
17 looks pretty darn complete to me, but I would like
18 to hear from DEQ as to whether they think there
19 are any omissions, or errors, or other
20 deficiencies in the petition that would justify
21 the Board in declining to accept it at this point.

22 CHAIR DEVENY: Thank you. And any other
23 Board members have any comments at this time? I
24 also agree that I think that -- Dexter, am I
25 hearing you?

1 MR. BUSBY: I would like to hear from
2 Sarah also on the completeness issue.

3 CHAIR DEVENY: Okay, Sarah.

4 MS. CLERGET: Again, I think that this
5 is sort of a Board decision, but the statute, the
6 way the statute reads is this is a very
7 preliminary stage, essentially: Does what you're
8 given, on its face, meet the requirements of the
9 statute, which are 3(a)? And those are laid out
10 in my memo.

11 And given what Cottonwood said today, in
12 addition to their filing, it would seem to me that
13 at least at this stage, there is sufficient
14 credible information to proceed, but that is the
15 Board's ultimate decision.

16 CHAIR DEVENY: Other questions or
17 comments from Board members?

18 (No response)

19 CHAIR DEVENY: As a Board member, I also
20 feel that there is sufficient credible information
21 before us, based on the previous EIS that was done
22 some years ago, and also just the fact that a
23 previous Board of Environmental Review accepted a
24 previous petition which was also based on that
25 EIS. So I'm willing to proceed, but I'd like to

1 hear other Board member comments, if there are
2 any.

3 MR. FELTON: This is John Felton. If I
4 could make a quick comment.

5 CHAIR DEVENY: Sure. Go ahead, John.

6 MR. FELTON: I sort of am kind of in the
7 same boat that Chris Tweeten brought up, which is
8 when we had the Cottonwood folks at a previous
9 meeting, it seemed pretty solid cut and dried that
10 there was no way in the world that they can afford
11 that EIS. And now I'm not sure what happened.

12 Is there any way that they would need to
13 certify or warrant somehow that they have the
14 capacity, or does it just proceed until they say,
15 "Well, it turns out we couldn't raise the money so
16 we're not going to do it"? How does that work if
17 for instance they decide, "We just can't do this
18 if we proceed now"?

19 CHAIR DEVENY: That's a good question
20 for somebody with a legal mind, and I'll ask
21 Sarah.

22 MS. CLERGET: I think all we have is the
23 statute to guide us through this process, and
24 there is nothing that requires that in the statute
25 at any stage, until we get to the point where the

1 money has to be given up front before the EIS
2 occurs.

3 And so while we might be able to take
4 the information of their ability to pay into
5 account at any stage, I did not hear them today
6 say that they cannot pay, and we have not reached
7 the point in the statute where they're required to
8 pay.

9 So I don't think that there is any way
10 that we could guarantee what that answer is going
11 to be until it comes time to put money on the
12 table, at least under the statutory authority.

13 MR. FELTON: Thank you very much.

14 CHAIR DEVENY: Thanks, John. I'm going
15 to ask DEQ to comment, but first, are there any
16 other questions or comments from Board members?

17 MR. BUSBY: This is Dexter again. Is
18 there any way for DEQ to give us a guesstimate on
19 how much it is going to cost just to get to the
20 place where they do need the EIS money?

21 CHAIR DEVENY: I think it's time to
22 bring DEQ forward to answer Dexter's question, as
23 well as make other comments that they might want
24 the Board to consider.

25 MR. HAYES: Sure. This is Ed Hayes,

1 Acting Chief Counsel. I was not involved with
2 coming up with the estimate for the EIS, but I
3 understand it was either \$250,000 or \$350,000.

4 Generally if DEQ is preparing the EIS,
5 or has a third party contractor preparing the EIS,
6 we would enter into a memorandum of agreement or
7 understanding with the proponent, in this case
8 Cottonwood Environmental Law Center.

9 And the way that usually works then is
10 obviously it is the contract under which they
11 agree to pay for the cost of the EIS. And the
12 usual mechanism is that they provide us a sum of
13 money to give us a working balance to actually
14 start performing tasks under the EIS in
15 preparation of the EIS.

16 So there is some amount of money that
17 they would have to put up front in order to fund
18 the EIS, and then they would have to maintain that
19 working capital as we go through the EIS process.

20 In terms of the second question I think
21 is out there, and that's DEQ's input in regard to
22 whether there is sufficient credible information,
23 I personally have not read the petition, and the
24 two Water Quality attorneys that may have neither
25 are here, so I don't think DEQ is in a position

1 today to indicate whether we believe there is
2 sufficient credible information one way or
3 another.

4 We could get that to Sarah probably in
5 the next couple weeks, but I'm not able to
6 represent that today.

7 CHAIR DEVENY: Thank you. Any other
8 comments or questions by Board members?

9 MR. TWEETEN: Madam Chair, this is Chris
10 again. I appreciate Dexter's question, but I
11 don't think the statute permits the Board to
12 decline to accept the petition simply because
13 we're skeptical about the petitioner's ability to
14 pay.

15 I think it is an important
16 consideration, and I understand that there may be
17 burdens that we as a Board and a Department are
18 going to have to undertake, but I don't see where
19 that's a consideration that goes into our calculus
20 today with respect to whether to accept the
21 petition or not.

22 And while I appreciate DEQ's statements
23 regarding the absence of the people who are
24 prepared to advise us as to DEQ's position with
25 respect to the acceptability of the petition, this

1 is on the agenda, and it has been on the agenda
2 since it was first published, and actually we've
3 known it's going to be on the agenda since the
4 last meeting.

5 So I think the DEQ has been on notice
6 that it has been the case that we might take this
7 matter up if the petition were not withdrawn by
8 Cottonwood, which they haven't done.

9 So rather than wait for DEQ and put this
10 over to yet another meeting, I think it's prudent
11 for us to go forward today and accept the
12 petition. As Sarah indicates, this is a very
13 preliminary step.

14 I guess in my lawyer mind, it's akin to
15 the determination that you make in any civil case
16 as to whether a complaint states a claim under the
17 law in which relief could be granted, and I
18 certainly think that this petition states the
19 facts, the credible facts that are supported by a
20 prior EIS that was done, and it states sufficient
21 facts to justify going forward with it at this
22 point.

23 So my view would be that we should go
24 ahead and go forward, and accept the petition, and
25 move ahead. And I said, the statute laid down a

1 pretty convoluted trail that we have to follow to
2 get to the finish line on this proceeding, and
3 rather than delay this further, I'm prepared to
4 move that we accept the petition and proceed with
5 it as provided in the statutes.

6 CHAIR DEVENY: There is a motion before
7 the Board to move the petition forward by --
8 Excuse me. I think I need to think how I'm going
9 to word this.

10 MS. CLERGET: If I may interrupt, Madam
11 Chair. Chris, the motion you just made was to
12 accept the petition, from what I heard, and I'm
13 not sure that's what we do at this stage. If I
14 might offer, at this stage the Board only has to
15 determine whether there is sufficient credible
16 information for the Board to accept the petition.
17 That's the decision to be made today.

18 MR. TWEETEN: Madam Chair, may I amend
19 my motion?

20 CHAIR DEVENY: Could you withdraw that
21 one and just start over.

22 MR. TWEETEN: Sure. Let's withdraw that
23 one and start over. Madam Chair, I move that the
24 Board find that there is sufficient credible
25 evidence in the petition to justify moving forward

1 as provided under the statute.

2 CHAIR DEVENY: There is a motion before
3 the Board. Is there a second?

4 (No response)

5 CHAIR DEVENY: I'll second it. It's
6 been moved and seconded that the petition contains
7 sufficient credible information. Is there Board
8 discussion on the motion?

9 (No response)

10 CHAIR DEVENY: At this time I'd like to
11 allow George to make a comment.

12 MR. MATHIEUS: Thanks, Madam Chair. It
13 is probably partially moot based on the action you
14 just took, but I was just going to add to some of
15 Mr. Tweeten's comments that we've been in
16 communication with Cottonwood, I think at least on
17 two occasions since the last Board meeting, and it
18 was our understanding they were coming here to
19 today to say that they could not afford it.

20 So the fact that we weren't maybe
21 completely ready to address a different scenario,
22 today was a surprise to us. That notwithstanding,
23 something probably came to light, and it seems
24 that they can.

25 So I just wanted to make that

1 clarification on some of Mr. Tweeten's comments.

2 Thank you.

3 CHAIR DEVENY: Thank you, George. Are
4 there other comments? It looks like Tim Davis has
5 a comment from DEQ.

6 MR. DAVIS: Madam Chair, members of the
7 Board, Tim Davis, Water Quality Division
8 Administrator at DEQ.

9 George is right that the communications
10 that we had, I think we were in touch both -- I
11 was in touch with Mr. Meyer both over the phone
12 and in email. He indicated an inability to pay.

13 But I think it might behoove the Board
14 to have Sarah kind of walk through those next
15 steps, because there are costs prior to the EIS
16 that the petitioner is responsible for, and I
17 think it may just behoove the Board to hear just
18 kind of what are those next steps. There's a
19 public notice, there is other pieces that go along
20 that the petitioner will be responsible for,
21 before we get to the EIS question.

22 CHAIR DEVENY: Question of you, Tim.
23 Does the petitioner pay for that up front?

24 MR. DAVIS: It says, I believe that the
25 statute says that the petitioner is responsible

1 for the costs. It doesn't require, I think, in
2 the same way that the EIS cannot be completed
3 prior to, but I would defer to Sarah to answer
4 that question, Madam Chair.

5 CHAIR DEVENY: Thank you, Mr. Davis.
6 Mr. Williams, would you like to add anything to
7 these comments that have been said?

8 MR. WILLIAMS: Yes. Again, Keaton
9 Williams, Cottonwood Environmental Law Center.

10 Personally I am not aware, or was
11 involved in any previous communications. I came
12 here today to say what I said, and I have been
13 told, though, by John Meyer, the Executive
14 Director, that Cottonwood -- I believe the next
15 step for costs for Cottonwood would be the
16 publishing in the newspaper, and I received
17 assurances from the Executive Director yesterday
18 that Cottonwood will pay those costs, and has no
19 issue paying those, and that's all I can
20 personally speak to.

21 CHAIR DEVENY: Thank you, Mr. Williams.
22 So is there further discussion by Board members
23 based on what you've heard regarding the motion
24 that's before the Board to agree that there is
25 sufficient credible information for the Board to

1 accept the petition?

2 (No response)

3 CHAIR DEVENY: Hearing none, let's have
4 a vote on the motion before us. All those in
5 favor of accepting the motion, agreeing that there
6 is sufficient credible information to accept the
7 petition, signify by saying aye.

8 (Response)

9 CHAIR DEVENY: Any opposed?

10 (No response)

11 CHAIR DEVENY: Hearing none, the motion
12 passes. So next steps. Sarah, would you run us
13 through that.

14 MS. CLERGET: Sure. This is Sarah. In
15 your memo, you've moved from Section 1 into
16 Section 2 now; and on the flow chart, you've moved
17 from the first -- on my mine it's green -- into
18 the second decision point, which is labeled No. 2.

19 The steps that need to happen now are
20 you need to decide whether or not you're going to
21 accept the petition -- that's the next decision
22 point -- and in order to do that, you have to make
23 a written finding.

24 Essentially you're deciding whether you
25 intend to accept the petition; and then if you

1 intend to accept the petition, you need to go
2 through the public notice period; and then at the
3 end of the public notice, you accept or reject the
4 petition.

5 So I would suggest that there is a bunch
6 of analysis that needs to go through in order to
7 decide whether or not you intend to accept or
8 reject the petition. So probably the most
9 efficient way to do that is to have me prepare a
10 memo for your next meeting.

11 And I would ask that that memo be based
12 on information -- I would like information from
13 both Cottonwood and DEQ about their positions on
14 the analysis of these factors, and then from those
15 positions, I can put an analysis and a memo
16 together for your next meeting that analyzes the
17 factors that you have to consider, and recommend
18 whether or not those factors are met under the
19 statute, which will then inform your decision
20 about whether you intend to accept or reject.

21 If at that meeting, based on that memo,
22 you intend to accept, then we can after that
23 meeting put it out for a public comment period.

24 CHAIR DEVENY: Do members of the Board
25 have questions of Sarah on that procedural matter?

1 (No response)

2 CHAIR DEVENY: Hearing none, I'd like to
3 make a motion that we have Sarah prepare a memo
4 with involvement from Cottonwood and DEQ to
5 determine, based on the preponderance of evidence,
6 whether the petition meets all of the
7 requirements. Is there a second?

8 MR. TWEETEN: Madam Chair, this is
9 Chris. I'll second.

10 CHAIR DEVENY: It's been moved and
11 seconded. Any further discussion?

12 (No response)

13 CHAIR DEVENY: Hearing none, I'd like to
14 go to a vote on this. All those in favor, signify
15 by saying aye.

16 (Response)

17 CHAIR DEVENY: Any opposed?

18 (No response)

19 CHAIR DEVENY: Motion passes for Sarah
20 to prepare a memo for us.

21 Moving right along. Any updates from
22 our Board Counsel? Sarah, back to you.

23 MS. CLERGET: No.

24 CHAIR DEVENY: No updates. At this time
25 I'd like to open the meeting up for comment from

1 the general public on any matter that has not been
2 on our agenda today. Are there any members in the
3 public or people that may have called in on the
4 phone?

5 (No response)

6 CHAIR DEVENY: Hearing none, I'd like to
7 move to adjourn this meeting. Is there a second?

8 MR. TWEETEN: This is Chris. I will
9 second.

10 CHAIR DEVENY: It's been moved and
11 seconded to adjourn. All those in favor, signify
12 by saying aye.

13 (Response)

14 CHAIR DEVENY: Any opposed?

15 (No response)

16 CHAIR DEVENY: Hearing none, this
17 meeting is adjourned.

18 (The proceedings were concluded

19 at 10:00 a.m.)

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C E R T I F I C A T E

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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 - 45 - 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.

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