

A P P E A R A N C E S

1
2 ATTORNEY APPEARING ON BEHALF OF MEIC:

3 MR. SHILOH HERNANDEZ, ESQ.
4 Attorney at Law
5 Western Environmental Law Center
6 103 Reeders Alley
7 Helena, MT 59601

8
9 ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT:

10 MR. MARK LUCAS, ESQ.
11 Special Assistant Attorney General
12 Department of Environmental Quality
13 P.O. Box 200901
14 Helena, MT 59620

15
16 ATTORNEY APPEARING ON BEHALF OF WESTERN ENERGY
17 COMPANY:

18 MR. JOHN MARTIN, ESQ.
19 Attorney at Law
20 Holland & Hart, LLP
21 P.O. Box 68
22 Jackson Hole, WY 83001
23
24
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1 WHEREUPON, the following proceedings were
2 had:

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4 CHAIR DEVENY: I think we're ready to
5 reconvene. Lindsay, could you take roll call,
6 please.

7 MS. FORD: Yes.

8 CHAIR DEVENY: I believe we're all here.
9 Could you just for the record show that all the
10 Board members are present. If you'd check with
11 Hillary.

12 MS. FORD: Hillary Hanson.

13 BOARD MEMBER HANSON: Yes, I'm here.

14 MS. FORD: All Board members are still
15 present.

16 CHAIR DEVENY: Glad to hear from you,
17 Hillary. Okay. I believe there have been some
18 other folks that have joined the room since we
19 first identified ourselves this morning, so if we
20 could go around the room, and identify any new
21 people here, and if you could speak up for our
22 Court Reporter.

23 MR. COLEMAN: I'm Ed Coleman. I'm the
24 Bureau Chief over the Coal and Opencut Mining
25 Bureau here at DEQ.

1 CHAIR DEVENY: Any other folks?

2 UNKNOWN SPEAKER: Dan from the public.

3 I'm just an anonymous.

4 CHAIR DEVENY: Yes.

5 MR. GROSS: Steve Gross, I'm the
6 Business Manager for Operating Engineers Local 400
7 for the state of Montana.

8 CHAIR DEVENY: Anybody else?

9 MR. SMITH: I'm Bob Smith. I'm the
10 permit coordinator for the coal program for
11 Montana DEQ.

12 MR. STALDINE: I'm John Staldine, MPDES
13 permit writer for the coal program.

14 CHAIR DEVENY: Any members of the public
15 on the telephone?

16 MR. SULLIVAN: Yes. This is Roger
17 Sullivan in Kalispell, Montana, and I'm also
18 Counsel for MEIC and the conservation
19 organizations in the Rosebud matter of the appeal
20 of AM4.

21 CHAIR DEVENY: Okay. Any other members
22 of the public on the telephone?

23 (No response)

24 CHAIR DEVENY: All right. Hearing none.
25 Before we get started on this case, I know Dexter

1 has to leave later this afternoon, probably before ⁵
2 5:00. Are there other members of the Board that
3 are going to have to leave this afternoon?

4 BOARD MEMBER HORNBEIN: I have child
5 care obligations at 5:00.

6 CHAIR DEVENY: So 5:00, and you have to
7 leave before 5:00?

8 BOARD MEMBER HORNBEIN: 4:45.

9 CHAIR DEVENY: 4:45 appears to be latest
10 that those two members could stay. We would still
11 have a quorum if you left. I hope we don't go
12 past 5:00, but I guess now we know at what point
13 folks have to leave. Thank you.

14 So the big case today is the matter of
15 the appeal of Amendment AM4 Western Energy
16 Company, Rosebud Strip Mine Area B. And the first
17 order of business is to deal with the motion to
18 disqualify myself and Board Member Dr. David
19 Lehnherr.

20 And I guess I'll start with myself. I
21 do not plan to recuse myself, but I will leave it
22 up to the Board to make a decision whether you
23 want to disqualify me or not. And David, do you
24 have thoughts on that?

25 BOARD MEMBER LEHNHERR: I feel the same

1 way.

2 CHAIR DEVENY: So with that, I don't
3 plan to allow any members of the public to speak
4 on this. I don't think that's necessary. But I
5 would like the Board to express their opinion, and
6 if we could have a motion one way or the other, or
7 -- I believe I'm correct -- with Robert's Rules of
8 Order, we could not have any motion and the issue
9 would go away; is that correct? Sarah, could I
10 get your --

11 MS. CLERGET: It would fail for lack of
12 a motion.

13 BOARD MEMBER DEARMENT: Madam Chair, I'm
14 perfectly comfortable with both of you remaining
15 as part of the case.

16 CHAIR DEVENY: Any other comments?

17 BOARD MEMBER BUSBY: I would make that
18 same statement. I'm comfortable with your ability
19 to be unbiased.

20 CHAIR DEVENY: Do Board members want to
21 take any action?

22 (No response)

23 CHAIR DEVENY: Seeing none, I believe
24 this issue fails for lack of a motion.

25 MS. CLERGET: I believe so.

1 CHAIR DEVENY: Does that settle
2 everything and we move on?

3 MS. CLERGET: You still have the motion
4 to strike to deal with.

5 MR. MARTIN: If it please the Board,
6 we'll withdraw that motion in light of your
7 resolution of the underlying issue.

8 CHAIR DEVENY: Please identify yourself.

9 MR. MARTIN: I apologize. John Martin
10 for the Intervenors. And in light of the fact
11 that the Board has made its decision on the
12 underlying issue, we will withdraw that motion to
13 strike.

14 CHAIR DEVENY: The motion to strike has
15 been withdrawn. I believe we've resolved this
16 particular issue in this case.

17 MS. CLERGET: Yes.

18 CHAIR DEVENY: Okay. So the next part
19 of this case will be to hear oral argument from
20 the parties. This will be from all three parties,
21 MEIC, DEQ, and Western Energy, and all of their
22 affiliated partners, etc.

23 And I would like to limit oral argument
24 to fifteen minutes each, and we will have some
25 time for rebuttal, but in the interests of time

1 and the fact that we have a lot of written
2 materials from you, I think that's probably a fair
3 amount of time. And I've asked Lindsay to time.
4 She will give you a one minute notice, and then
5 ask you to wrap up within that minute. And Sarah,
6 you're looking at me like I've forgotten
7 something.

8 MS. CLERGET: Did you want me to go
9 through my motion you told me you wanted me to do?

10 CHAIR DEVENY: I do, and pardon me for
11 forgetting that. Yes. Just to remind and inform
12 the Board members of the procedure for today,
13 Sarah has a memo that's in our packet, but I've
14 asked her to go over that so that we're all clear
15 on the decision process.

16 MS. CLERGET: So this memo lays out for
17 you the things that you've received in the packet.
18 The most operative part of it is under Montana
19 Code Annotated 2-4-621(3), you have three options,
20 and this is on the second page of the packet at
21 the bottom, lays out the three options that you
22 have as a result of today.

23 After you hear the oral arguments, you
24 can accept the proposed findings of fact and
25 conclusions of law in its entirety, and adopt it

1 as the Board's final agency action for final
2 order. That's your first option.

3 Your second option is accept the
4 findings of fact in the proposed FOFCOL, but
5 modify the conclusions of law in the Board's final
6 agency order.

7 And then your third option is to reject
8 the findings of fact and conclusions of law
9 because they are not based on substantial
10 evidence, or there was violation of some
11 substantive law in the procedure; and then you can
12 review the entire record that was before the
13 Hearing Examiner, and take the Board's final
14 agency action, which can look like either a
15 modified version of the FOFCOL that's before you,
16 or you can write a new one.

17 And so those are your three options that
18 you have. And this is also the time where I
19 usually say -- you guys, many of you have heard me
20 say before -- but even though I was the Hearing
21 Examiner in this case, I have no ego about this,
22 and we need to just make sure we get it right.

23 So if I got something wrong, nobody
24 needs to pull any punches about saying that. We
25 just need to talk about it, and make sure we get

1 it right. So we don't need to have the
2 "respectfully disagree" and all of that business.
3 We can just go forward about this, and let's make
4 sure it gets right.

5 So unless anybody has any other
6 procedural questions, you can proceed.

7 BOARD MEMBER HORNBEIN: Madam Chair, I
8 do have one procedural question for Counsel.

9 Sarah, if you could clarify sort of the
10 email communication that you and I had on this
11 issue, that the Board presumably will take action
12 on this in one way or another today, and may or
13 may not be dispositive action as to the underlying
14 issues of the case. Could you clarify that.

15 MS. CLERGET: Right. So you had just
16 emailed me asking essentially that question, and
17 my response was yes. For example, if you decide,
18 if you take option three, and you decide that you
19 need to review the entire case, then you don't
20 have to take a dispositive action today.
21 Obviously you can take the time you need to to go
22 review the case, and then we can reconvene at
23 another meeting, whether it be a special meeting
24 or the next meeting, to decide how you want to
25 proceed after you've reviewed those materials,

1 which are here. (Indicating)

2 CHAIR DEVENY: Any other questions from
3 Board members about procedures today?

4 (No response)

5 CHAIR DEVENY: With that, we'll proceed
6 with oral arguments. Mr. Hernandez, would you
7 like to start.

8 MR. HERNANDEZ: I would. Thank you,
9 Madam Chair. Shiloh Hernandez for Petitioners
10 Montana Environmental Information Center and
11 Sierra Club. I'd like to reserve five minutes of
12 my time for rebuttal, please. And Ms. Ford, if
13 you could give me the one minute warning at nine.

14 MS. FORD: Absolutely.

15 MR. HERNANDEZ: I'll try and cut to the
16 chase on this. From the get go, I'm probably
17 going to use a few abbreviations that I wanted to
18 make sure everyone was comfortable with.

19 On Page Roman Numeral X of our
20 objections, we have a list of acronyms and short
21 forms that we've used in here. I apologize for so
22 many. It's a technical case, and the brief would
23 have been ninety pages if I hadn't used these.

24 The most important ones are the word
25 CHIA, which we use throughout. It means

1 Cumulative Hydrologic Impact Assessment. It's
2 basically the review of the environmental
3 hydrologic impacts from the mining operation,
4 proposed operation that DEQ does, and that's the
5 document that's at issue in this case.

6 The other two acronyms I'd like to use
7 are SMCRA, which sounds like a bad word, but it
8 means the Surface Mining Control Reclamation Act,
9 which is a federal law that governs surface mining
10 throughout the United States.

11 The second acronym is MSUMRA, which is
12 the Montana Strip and Underground Mine Reclamation
13 Act, which is the Montana program under SMCRA.
14 It's a cooperative federalism situation where the
15 state program complies with the minimum federal
16 standards, grant the state jurisdiction to
17 regulate coal mining with some exceptions in
18 Montana.

19 So with that, the other statute that
20 comes into play in this is the Clean Water Act,
21 which I may refer to as the CWA, but probably
22 Clean Water Act because that's just as short.

23 There are five issues in our objections
24 to be raised with the proposed findings, two are
25 merits issues, and three are procedural issues.

1 I'm going to focus on the merits issues, but I'm
2 happy to discuss the procedural issues if the
3 Board wishes at some point.

4 First is the finding's erroneous legal
5 conclusion with respect to salinity, namely the
6 finding's conclusion that adding more salt to a
7 creek that's already impaired and not meeting
8 water quality standards due to excessive salinity
9 is not a violation of water quality standards.

10 Under controlling Ninth Circuit -- Under
11 Ninth Circuit law, it is clear that if a creek is
12 beyond its carrying capacity for a pollutant, and
13 not meeting water quality standards, if you add
14 more of that pollution to the creek, you will
15 violate water quality standards.

16 And there's no dispute here that this
17 mining expansion and the cumulative impacts of
18 mining are going to add more salt to East Fork
19 Armells Creek, and I think everyone will refer to
20 it as EFAC, just because it's a mouthful. Adding
21 more salt to a creek impaired for salt and not
22 meeting water quality standards for salt will
23 violate water quality standards. There is no
24 question that that's the case here.

25 And given that fact, DEQ's only options

1 were either "A," to deny the permit; or "B," clean
2 up the creek; and the way they would do that is
3 with a remedial plan called a total maximum daily
4 load. That would create assimilative capacity in
5 the creek to accommodate further pollution.

6 Until they do that, the injunction in
7 MSUMRA is that the State may not approve a mine
8 expansion unless the application affirmatively
9 demonstrates that the cumulative hydrologic
10 impacts will not result in a violation of water
11 quality standards would bar approval of this
12 permit.

13 The second issue that I'll address --
14 I'm not going to give a whole outline here, given
15 the time constraints -- is the analysis of water
16 quality standards for the growth and propagation
17 of aquatic life, but I'll get to that in a couple
18 of minutes.

19 The findings disagree with our analysis
20 of MSUMRA and SMCRA on two legal grounds, and both
21 of those grounds are flawed as we point out in our
22 briefing.

23 The first is that findings impermissibly
24 segment the AM4 expansion of the mine. Now as you
25 can see on the screen behind you, there's a

1 picture of the outline of all of the areas of the
2 mine operation. And in Area B there is an area
3 that's in green. That's the mine expansion here,
4 called AM4, the Amendment 4. It's a small segment
5 of the overall mine.

6 The findings said that in assessing the
7 cumulative hydrologic impact, and whether they
8 will result in material damage, you don't consider
9 all that mining from the mine, you only consider
10 the little orange spot.

11 That position has been clearly rejected
12 both by the Federal authorities that oversee
13 implementation of SMCRA, the US Office of Surface
14 Mining, which says in making the material damage
15 determination, you have to consider the cumulative
16 effects of everything.

17 And there we have a quote in our brief
18 where they say it's first come, first serve. If
19 the existing mining operations are going to
20 violate water quality standards, here by adding
21 undisputed increase in base flow salt levels to
22 the creek of 13 percent, if the existing mining
23 operations are going to do that, they can't add
24 more. They can't extend it.

25 And that goes to the second legal error

1 the findings make, which is they discount the
2 importance of long term water pollution. The
3 Board was very clear in the In Re: Bull Mountains
4 decision that long term water pollution is a
5 serious problem, both addressed in SMCRA and is
6 plain on the ground in Montana, looking no further
7 than the Berkeley Pit. These impacts can go on
8 for generations, and they have to be addressed at
9 the time of permitting.

10 And so the hearing contended that, well,
11 if you're not increasing the concentration of salt
12 in the creek, you're just extending the period of
13 time that salt will be high, that that's not a
14 violation of water quality standards, and that's
15 just not correct.

16 And the flaw there is that the creek is
17 already beyond the water quality standards limit.
18 It's past its carrying capacity for salt. And
19 extending the duration of that violation of water
20 quality standards will cause further violations of
21 water quality standards.

22 Notably the Clean Water Act and SMCRA
23 both say that each day of a violation is an
24 additional violation. And here, the DEQ's own
25 expert said this, just the little orange part, is

1 going to extend the time period that increased
2 salt levels will be discharged -- and when I say
3 discharged, not in the Clean Water Act sense --
4 but just salty, more salty water is going to go
5 into the creek through base flow for tens to
6 hundreds of years.

7 And there is some question about what
8 was actually said on this score, and I will just
9 point to the record. This is DEQ's expert Dr.
10 Hinz. She said, "We would expect that the
11 duration would increase changes to water quality.
12 It would probably be an increase of some tens or
13 hundreds of years."

14 Now, the idea that extending the period
15 of time that higher salt levels are going to go
16 into a creek that's already past its carrying
17 capacity for salt by tens to hundreds of years is
18 legally irrelevant is contrary to the basic
19 purposes of SMCRA and the Clean Water Act.

20 And I'd like to return to the purposes
21 of these acts, which are environmental protection.
22 They should guide the Board's analysis. And here
23 I would direct the Court to the Ninth Circuit's
24 analysis in the Friends of Pinto Creek case, which
25 we cite in our brief.

1 There the Court addressed the same
2 situation where a proposed mine was going to add
3 more copper to a creek that was impaired for
4 copper because of other prior mining operations.
5 The Court said that will lead to a violation of
6 water quality, and a contrary analysis would be
7 contrary to the very purpose of the Clean Water
8 Act, which is to restore and maintain the
9 integrity of our nation's waters.

10 And the idea that they can continue to
11 add more salt to a creek impaired for salt for
12 tens to hundreds of years is contrary to the very
13 purposes of the Clean Water Act and the surface
14 mining law.

15 I'd now like to -- I assume there will
16 be time for questions from the Board later, but
17 now I'd just like to canvas our issues with
18 respect to water quality standards for growth and
19 propagation of aquatic life.

20 MS. FORD: One minute.

21 MR. HERNANDEZ: Basically, DEQ applied
22 the standard of is anything alive in the creek.
23 If they could find anything in the creek, then it
24 meets water quality standards for growth and
25 propagation of aquatic life. That is not the

1 water quality standard for growth and propagation
2 of aquatic life.

3 Moreover, DEQ's entire analysis of this
4 water quality standard for growth and propagation
5 of aquatic life was based on a metric,
6 macroinvertebrates, that DEQ also says is just not
7 reliable. And for DEQ to say, "We relied on a
8 metric, a study of water bugs, that we don't think
9 is reliable" violates the basic requirement of
10 reasoned decision making, which Justice Scalia
11 pointed out most recently in Michigan versus EPA.
12 And we don't have the citation in our brief, but
13 there is only one case that's authored by Scalia
14 called Michigan versus EPA.

15 Reasoned decision making is the basis of
16 agency -- for lawful agency decisions. To rely on
17 unreliable information is not reasoned decision
18 making. Thank you.

19 CHAIR DEVENY: Thank you, Mr. Hernandez.
20 I think I'd like to hear from all parties before
21 we have questions. Do the Board members think
22 that's the right way to go ahead?

23 BOARD MEMBER DEARMENT: That's fine.

24 CHAIR DEVENY: DEQ or Western Energy,
25 whichever one of you wants to go next.

1 MR. LUCAS: Thank you, Madam Chair, and
2 hello again, Board members. I'd like to welcome
3 the new Board members, and thank you for
4 volunteering to participate here, and on behalf of
5 the Department, I'd like to say I'm glad that
6 you're all here to make this decision.

7 We'd really like to thank the Hearing
8 Examiner and the hearing assistant for managing a
9 complex and rather contentious litigation.
10 Eventually in these cases, you go on for four
11 days, people aren't sleeping, we're all in the
12 same room, breathing the same air, things can get
13 a little chippy, as they say in hockey. If you're
14 a hockey fan, I hope you're rooting for the Boston
15 Bruins in this year's Stanley Cup finals.

16 It's a good example of how intense
17 competition can become between adversaries over a
18 repeated series of contests. It's not that hockey
19 players or lawyers don't like each other. We all
20 actually shake hands when it's all over. But when
21 you do get placed in that grist mill of
22 litigation, someone has to wear the stripes,
23 someone has to call the fouls, someone has to blow
24 the whistle.

25 The Hearing Examiner has done her job,

1 and you know what we think of that, and now Board
2 members, it's your job to put on the striped shirt
3 and call the whistle.

4 Petitioners don't like the Hearing
5 Examiner's decision, and they toss around words
6 like draconian, and Kafka-esque, and whatnot.
7 Make no mistake. The outcome of this case is
8 tough on Petitioners. That's not because the
9 Department's tough or the Hearing Examiner was
10 tough. It's because the law is tough, and the law
11 has to be tough to be fair for all involved.

12 And the science is actually even tougher
13 because lawyers can argue all day about what the
14 words on a page and a piece of evidence says.
15 Science alone produces the disinterested search
16 for the truth.

17 Under the Rules of Evidence, only
18 scientists and other experts can legally speak to
19 the ultimate conclusion in the case. Advocacy on
20 the other hand is antithetical to science. That's
21 precisely why it's the obligation of this tribunal
22 and all the attorneys involved in the system of
23 justice to respect the scientific disciplines, and
24 the practitioners thereof. Your role here today
25 in part is to be the gatekeeper of both the law

1 and the science.

2 Petitioners had their day in court, four
3 days in total, but the law required them to
4 present a preponderance of evidence establishing
5 facts essential to a determination that the
6 Department's decision in this case violated the
7 law.

8 None of us are here to crow over the
9 decision in order to excoriate Petitioners'
10 scientific professionals with respect to the
11 science. It's important even when they're on the
12 other side.

13 Science isn't conducted in the
14 courtroom, so it's always strange to bring experts
15 into the courtroom, but when scientific evidence
16 misses the boat by failing to address the relevant
17 regulatory construct as the proposed ruling here
18 illustrates, the best science in the world can
19 have no probative value whatever, and that's the
20 case you have at bar here today.

21 Now, I'm not going to speculate as to
22 the motives for the 54 pages of exceptions you
23 received. It does to me look like an attempt to
24 compensate for the self-inflicted predicament of
25 not making their case at trial, and it makes

1 arguments which are plainly contradicted by the
2 ruling itself.

3 By way of an example, and not of
4 limitation, I'll go over a few things Mr.
5 Hernandez said earlier with regard to this tens to
6 hundreds of years issue. That's not what the
7 proposed ruling says. You can read it for
8 yourself.

9 On Page 73, I believe, Footnote 6, it's
10 right up there. And it says, "Neither side
11 presented convincing evidence about the extent and
12 the duration of salt loading." It says right
13 there.

14 So what Mr. Hernandez did to a Ph.D.
15 scientist was to pull one statement of hers, throw
16 it up there for you in isolation, when actually
17 the record reflects the opposite. That is not
18 respect for the science.

19 And again, going back to Dr. Hinz,
20 Petitioners attack her qualifications to opine on
21 biological issues, but Petitioners' own aquatic
22 ecology expert did not challenge Dr. Hinz's
23 conclusions, did not conduct a material damage
24 assessment, and in fact he even agreed that the
25 data Dr. Hinz applied could be reliably used for

1 the purposes the Department had presented it.

2 I'm not going to go into all of the
3 distortions. They are in our reply brief. But
4 the reason I am spending my time on this is
5 because there is an overarching problem of lawyers
6 characterizing science. That's not only unlawful,
7 inadmissible, and with no probative value, but
8 that should be considered an anathema to rational
9 policy and implementation, and we look to the
10 Board to be the gatekeepers not only of the
11 science but of the lawyer's characterizations
12 thereof.

13 I'm honored to be joined here today by
14 the Department's coal program hydrogeologists Dr.
15 Emily Hinz and Martin Van Oort, along with the
16 other dedicated professional public servants who
17 truly are the shield that guards the realms of
18 humanity from our own self-inflicted environmental
19 predicaments.

20 I can prep the witnesses for trial, put
21 them in the chair, ask questions, make objections,
22 do redirect.

23 Only you can ensure that the integrity
24 of the science will be respected, and we are
25 looking for a resounding rejection of the type of

1 mischaracterization of scientific evidence that's
2 at stake in this case. We think it's important to
3 send a message. We're not here to crow. But by
4 God, show these people the respect they deserve as
5 professionals.

6 I can argue all day long, and I hope we
7 don't wind up doing that, but the duty of DEQ's
8 expert witnesses has been discharged. They've
9 done their duty, and now it's up to you.

10 We also ask that the law be followed in
11 the permitting process. You have the issue of
12 exhaustion in front of you. Petitioners decry the
13 outcome. Once again, they didn't do what they
14 were supposed to do under the law. The law is
15 tough, and if you don't do that, there are
16 consequences.

17 And Petitioners mischaracterize the
18 ruling on the motion in limine because the motion
19 in limine was based on the structure of the
20 statute, the regulations, and the prior decisions
21 of the Board.

22 I think it's very clear that Signal
23 Peak, the first case, was about issue exhaustion,
24 and we were hammered for not exhausting our issues
25 in the permitting process. You have to apply the

1 law even-handedly. Otherwise you place us in a
2 position where MEIC could hold back a comment on a
3 CHIA, and then show up at hearing and say, "You
4 should have addressed that."

5 And under Signal Peak it's basically a
6 four corners of the case rule. So to not apply
7 issue exhaustion is to set the Department up for
8 failure every time.

9 Another thing that we have a huge
10 problem with is the attempt to amalgamate
11 inapplicable Clean Water Act regulatory
12 requirements with this case. This is an MSUMRA
13 case. Petitioners cited you to Pinto Creek. That
14 is under Section 402 of the Clean Water Act. That
15 is a so-called MPDES case.

16 And Mr. Hernandez used words like
17 "adding pollution." A MPDES case is about a
18 discharge of a pollutant from a point source to a
19 water in the United States. That's not what
20 you're dealing with here.

21 The issues in this case regard the base
22 flow from groundwater flowing into East Fork
23 Armells Creek, and what, if any, that effect has
24 on the environment. So they went in, they did an
25 MSUMRA case, it didn't go good for them, and on

1 the eve of trial in their prehearing brief, they
2 suddenly started raising Clean Water Act
3 arguments, and using this word "contribute" that
4 just doesn't appear in MSUMRA.

5 You have our exceptions on the burden of
6 proof. I really don't need to belabor that point.
7 I think that's extremely clear. All I would like
8 to highlight for the Board is that the assessment
9 is one of the probable hydrology consequences, as
10 our brief explains.

11 There is a probability standard. And
12 the demonstration that must take place in the
13 permitting process, while it is an affirmative
14 demonstration, an affirmative demonstration is not
15 a guarantee. It's a demonstration based on the
16 dictionary that speaks directly to the issue and
17 shows basis for the contention.

18 We have that here. The Applicant's
19 burden was to make an affirmative demonstration.
20 The Department's burden was to confirm that
21 affirmative demonstration. And MEIC's job coming
22 in trying to contest the permit was to meet a
23 burden of proof to show that we acted unlawfully,
24 and that just didn't happen.

25 You're going to have some arguments,

1 you've heard some arguments about Area F not being
2 included. We include other areas of the mine --
3 and I'm quoting ARM 17.24.301(32) -- only where
4 the operation may interact with the impacts of all
5 previous, existing, and anticipated mining.

6 54 pages of Petitioners' brief. They're
7 saying we used the wrong definition. The word
8 "interact" does not appear in that brief. That's
9 the important point.

10 And there was an offer of proof
11 permitted at the hearing, and in that offer of
12 proof, Petitioners were allowed to cross-examine
13 the Coal Program Supervisor, to explain that the
14 reason Area F is not included is because there is
15 no hydrological connection between Area F and AM4.

16 And when Petitioners' own witness
17 attempted to testify about his theories that there
18 was a connection -- and I'm citing Volume I, 167,
19 Pages 1 through 5 of the transcript, all he could
20 say was they could cumulatively impact Area F and
21 AM4.

22 Again, on 167, at 17 to 25, he said,
23 "Yes, it's possible they could interact." Well,
24 we're on our probability standard of probable
25 hydrologic consequences. The proposed ruling

1 found that the CHIA included a cumulative impact
2 analysis of all mining that would interact with
3 AM4, finding No. 210. We believe that ruling
4 should not be disturbed, and that it was correct.

5 The real thing you need to remember with
6 these Area F arguments is all they did was they
7 put in their comments during the permitting
8 process, and they attached to their comments NEPA
9 comments -- the National Environmental Protection
10 Agency comments -- that they filed with the Office
11 of Surface Mining and Regulation.

12 So when the Department opened those
13 comments, we saw a bunch of comments about how
14 these are cumulative and connected actions under
15 NEPA, citing to NEPA regulations. Again, it's the
16 same story. They're arguing the law wrong. That
17 did not put us on notice that they believed there
18 was a hydrologic connection between Area F and
19 AM4.

20 They also make claims that the mine has
21 dewatered East Fork Armells Creek. If you look at
22 their comments, there was a section that talked
23 about existing violations of MSUMRA. So when they
24 put in their comments on AM4, they said East Fork
25 Armells Creek has been dewatered; therefore,

1 that's existing material damage. And then they
2 had another section on prospective material
3 damage.

4 So you will be able to look at those
5 comments for yourself. I'm not going to put them
6 on the board for you.

7 The point is if you tell us to deny the
8 permit because of existing material damage, and
9 then you bring an appeal and say, "Oh, we were
10 talking about prospective material damage from
11 dewatering," again, we're left to wonder.

12 The permitting process is so that we can
13 sort all these things out, and if MEIC wants to
14 put comments in front of us, we're more than happy
15 to respond to them, or at least determine if they
16 need to be addressed.

17 They are also upset because chloride was
18 excluded. The word "chloride" does not appear in
19 their comments or their notice of appeal. What
20 they're arguing is that, "Well, the CHIA mentioned
21 chloride. Therefore it's a fair issue for
22 litigation."

23 Dr. Hinz is attempting to put up Table
24 7.1 for the CHIA for you. That will show that DEQ
25 analyzed perhaps two dozen different ionic

1 components. That doesn't mean that we've been
2 notified that they're all issues for trial.

3 Chloride is on there. Am I supposed to
4 walk into trial, and hear for the first time that
5 someone has an issue with iron? How can we
6 prepare for that? That's surprise, it's
7 prejudicial, it shouldn't be allowed.

8 And with that, I don't think I have
9 reserved any time for rebuttal, but I thank you
10 for your time, and I will be available for what
11 questions and assistance we can provide to the
12 Board.

13 CHAIR DEVENY: Thank you, Mr. Lucas.
14 Now we'll hear from Western Energy.

15 MR. MARTIN: Thank you, Madam Chair,
16 members of the Board. Bear with us for just a
17 moment. We're trying to get some slides up.

18 CHAIR DEVENY: Please identify yourself
19 for the record.

20 MR. MARTIN: I apologize. John Martin
21 on behalf of the Intervenors Local 400 of the
22 International Union of Operating Engineers, the
23 Cheyenne Miners Association, Great Northern
24 Properties, and Western Energy.

25 If it please the Board, what I'd like to

1 do is I'd like to talk about some of the
2 extraordinary effort that went into this
3 litigation, and specifically on behalf of my
4 clients, and I actually think I speak for all
5 Counsel in this case.

6 We can't help but admire and thank Ms.
7 Clerget and her able assistant Ms. Solem for all
8 the work they put in on this case. It was an
9 extraordinary effort, it was difficult, and we
10 admire what they did, even if there are elements
11 that we might disagree with. And I think that's
12 true of all the lawyers in this case.

13 I'd like to as well introduce Steve
14 Gross. I think you heard that he's the Business
15 Manager for the International Union of Operating
16 Engineers; and we have with us today Wade Steere
17 who is the environmental engineer for the mine.
18 Let me add that that local represents roughly 260
19 jobs for the Rosebud mine.

20 I'd like to, if I can, walk through some
21 of the findings of fact because this is what's
22 important about this case. You heard Mr. Lucas
23 talk about science. Well, the science is included
24 in the findings of fact, and what we've had here
25 is a characterization of those findings of fact

1 that are supposedly legal issues. They're not
2 legal issues.

3 Many of these issues, notably the
4 salinity issue is purely a finding of fact, and
5 we'll go through this in a little bit of detail
6 here. Let's go to the first slide.

7 Folks, I could walk you through the
8 permitting timeline, but that's not been raised in
9 the oral argument here, and frankly, I think
10 everyone on this Board has been inundated with it.

11 My only point with this slide is that
12 there were various elements, various points in
13 time, when the public had the capacity to
14 participate. Notably in the notice of
15 application, we had a month of notice to the
16 public, and we had thirty days of comment.

17 We also had a period of time in August
18 of 2015, after the acceptability notice when we in
19 fact did receive comments, more precisely DEQ
20 received those comments. DEQ expended a great
21 deal of time, and the CHIA that's so much at issue
22 in this case comprises roughly 500 pages; we had a
23 PHC that was a couple hundred pages; we had an
24 addendum that was about 100 pages -- I'm not
25 recalling it specifically. Perhaps more

1 importantly we had eight rounds of deficiency
2 notices and responses from the mining company.

3 All of that was in the administrative
4 record, and MEIC and their colleagues had the
5 capacity to comment on everything leading up to
6 the CHIA. We had roughly six years of an
7 administrative record at that point in time that
8 they could have reviewed and that they could have
9 commented on. And in many instances, those issues
10 that they're raising today were not commented on.

11 Much to the credit of the Hearing
12 Examiner, she winnowed down those issues so that
13 issues that were the subject of the comment, that
14 were the subject of the notice of appeal, were
15 properly heard in the four days of trial.

16 Let's go the next slide. We did have a
17 motion for summary judgment. I think Mr. Tweeten
18 will remember this. This was heard in November of
19 2016, and then decided in December of 2016.
20 Suffice it to say that many of the arguments that
21 we're hearing again were effectively rejected in
22 that motion for summary judgment when the Board
23 said, "No. There are material issues of fact that
24 remained to be resolved," and those issues now are
25 resolved.

1 We had four days of hearing, 1200 pages
2 of transcript, eight expert witnesses, five fact
3 witnesses. It came down to three surface water
4 claims. They said total dissolved solids were an
5 issue, they said aquatic life was an issue, and
6 then finally nitrogen was one of the issues that
7 they argued.

8 Let me remind the Board that the Hearing
9 Examiner actually granted a motion for directed
10 verdict, and for the non-lawyers here what means
11 is if the Hearing Examiner were presented with
12 only the evidence from the Petitioners, without
13 hearing any of the evidence from the Respondents,
14 that she would have decided this case in our
15 favor. In other words, they didn't prove their
16 case with their witnesses.

17 Let's go to the next slide. In the
18 briefing that we get from the Petitioners in this
19 case, there is a little confusion about the way
20 this process works. What happens in this process
21 under MSUMRA is that there must be an affirmative
22 demonstration from the Applicant; that would be
23 the PHC, that would be the deficiency notices or
24 responses to those deficiency notices.

25 The second stage -- By the way, we as

1 the Applicant bear the burden of proof at that
2 stage. DEQ then must confirm in writing that in
3 fact, we meet the requirements of the statute, and
4 that there is no material damage.

5 And then finally in the process, we go
6 to the contested case hearing. At that point the
7 burden shifts, and this is clear from MEIC v. DEQ,
8 the burden shifts to those who are challenging the
9 Department, and they must bear the burden of proof
10 in the contested case. They couldn't shoulder the
11 burden of proof in this particular case.

12 Let's go to the next slide. The only
13 point of including this slide -- and you folks
14 have seen this statutory provision before -- is
15 just to underline the reality that there has to be
16 some element of causation. The degradation that
17 they're claiming causes material damage must have
18 come from coal mining or reclamation operations in
19 order for the Petitioners to prevail.

20 Next slide. Folks, again, the only
21 reason we're including this particular slide is
22 because there has been some confusion.

23 Petitioners have a tendency to class
24 Upper East Fork with Lower East Fork. Upper East
25 Fork is the ephemeral portion of the stream. It's

1 upstream, if you're looking at a map, from the
2 highway, and that's ephemeral, which is to say for
3 the most part it's a dry stream bed. There are
4 short stretches of intermittent flow, but for the
5 most part it's dry most of the year.

6 Lower EFAC is that portion of the stream
7 that begins at roughly where the highway goes
8 through Colstrip, and then eventually makes its
9 way to the confluence of the West Fork and on to
10 the Yellowstone River.

11 What's important about this is that
12 Lower East Fork is influenced by cattle grazing,
13 agriculture, fertilizer from residential lawns,
14 fertilizer from the golf course, and discharges
15 from a municipal water treatment plant.

16 And you'll note -- and we'll talk about
17 this in greater detail here in a moment -- that
18 the Hearing Examiner concluded that the impairment
19 of Lower East Fork Armells Creek was not caused by
20 mining. That was what the evidence showed, that's
21 what the science shows. And the same was true of
22 Upper East Fork Armells Creek.

23 Let's go to the next slide. Let's talk
24 about surface water because that's the argument
25 that we're hearing from the Petitioners.

1 In terms of findings of fact, the
2 Hearing Examiner noted that there were multiple
3 lines of data, and then she concluded -- and by
4 the way, this conclusion applies to salinity,
5 which was the focus of Mr. Hernandez's argument --
6 that the AM4 permit will cause no measurable
7 change in the quality of the ephemeral runoff
8 flowing over the surface of the land into East
9 Fork Armells Creek, so there will be no effect in
10 terms of the ephemeral runoff.

11 Beyond that, the conclusion -- and this
12 is the factual conclusion after hearing from eight
13 different experts -- is that the AM4 permit would
14 not result in material damage to surface water.
15 That's the ultimate conclusion that applies in
16 this case, and that's after hearing all of the
17 experts. Mining wouldn't affect the designated
18 uses of the stream as well.

19 Now, we all understand that propagation
20 of fur bearing animals in a dry stream bed is not
21 such a big use, and that's one of the points that
22 we had to deal with in this litigation was that we
23 really don't have the C3 uses -- that's the
24 categorization for these dry stream beds -- that
25 they will not be affected by the AM4 mining.

1 Next slide. Let's talk about salinity.
2 That was the thrust of Mr. Hernandez's argument.
3 The first thing that I think we all have to bear
4 in mind is that East Fork Armells Creek has
5 extremely variable flow, that is to say there is a
6 wide range of -- I'm going to call it salinity.
7 More precisely it's total dissolved solids -- but
8 it ranges widely, and this is a natural
9 phenomenon. It's because we have the rain that
10 falls in the spring, it brings dissolved solids
11 into the stream, and it varies greatly.

12 Perhaps the most important point on this
13 slide is the last point, that the magnitude of
14 salt loading to East Fork Armells Creek will not
15 increase as a result of the AM4 amendment,
16 although the duration will increase.

17 You've heard from Mr. Hernandez that
18 that's a serious issue, but the point is this is
19 just an offshoot of what we've described as the
20 one molecule theory. When you don't have a
21 measurable increase from this element, but the
22 fact that it's going to last for a longer period
23 of time is frankly irrelevant.

24 And I should say that the regulation at
25 issue only speaks to magnitude. It doesn't speak

1 to duration. And the fact of the matter is that
2 AM4 is not going to have an effect on the salt
3 loading in that stream in the sense that it will
4 not increase it.

5 Let's move to the next slide. I don't
6 want to get into this in a lot of detail, but
7 suffice it to say that the Petitioners in this
8 case did not present evidence that actually
9 calculated the salt loading from AM4 in East Fork
10 Armells Creek. To the extent that they're making
11 the argument now that that's their big issue, they
12 never presented any calculations on that subject.

13 And you've already heard about Dr. Hinz
14 and Martin Van Oort's testimony in response. They
15 point out that you really cannot distinguish
16 between pre-mine and post-mine conditions in East
17 Fork Armells Creek. And by the way, that's for
18 all mining, not just AM4.

19 Let's move to the next slide. Let's
20 talk about the aquatic life issue. One of the
21 mainstays of the argument that we're hearing from
22 Petitioners is, "But there is going to be a
23 violation of the water quality standards because
24 aquatic life is going to be harmed." And then you
25 heard the argument, "Well, the only thing you

1 really determined was that there were critters in
2 the stream. You never really assessed whether or
3 not there was an impact."

4 That's simply not true. Without going
5 into detail -- these are obviously quoted findings
6 of fact -- suffice it to say that there were 38
7 separate findings of fact on aquatic life. This
8 was not the sort of thing where we simply said,
9 "There are critters there, so everything must be
10 just hunky dory."

11 To the contrary, what we had from DEQ is
12 they compared data from the 1970s, which is to say
13 pre-mining, to the data that were accumulated by
14 an expert, and what's referred to as the Arcadis
15 report, and concluded that the conditions, the
16 aquatic life in that stream, was largely the same;
17 the same diversity, not just the presence, the
18 diversity of macroinvertebrates.

19 And we were told by Petitioners that in
20 fact measuring macroinvertebrates was a good way
21 to assess whether or not there was material
22 damage.

23 Let's move through some of these slides
24 and get to the last one. Here's the ultimate
25 conclusion, and let me say up front that I view

1 this as a fact law conclusion, largely factually
2 based, but unquestionably it's something that's
3 with the back drop of the statute and the
4 regulations.

5 The ultimate conclusion -- and this is
6 the conclusion from all of the evidence in a four
7 day trial -- is that AM4 will not degrade the
8 water quality of an offsite hydrologic unit in a
9 manner or to an extent that uses are adversely
10 affected or that the water quality standards of
11 the unit are violated.

12 So with that, I'll conclude my remarks.
13 Thank you.

14 CHAIR DEVENY: Thank you, Mr. Martin.
15 Mr. Hernandez, would you like to use your five
16 minutes for rebuttal?

17 MR. HERNANDEZ: Madam Chair, I would,
18 please. And members of the Board, I really hope
19 that you take a really hard look at the facts here
20 in the record, because with respect to opposing
21 Counsel, there are some serious misrepresentations
22 of what was said, that from their presentation
23 black is turning to white. I'm going to try and
24 go over what I can now, but their presentations
25 were very misleading.

1 With respect, first, Mr. Lucas said,
2 "Respect the science. Respect Dr. Hinz's
3 assessment of the science."

4 Well, let's look at the science. The
5 question of -- The big thing about the science is
6 that Dr. Hinz is a hydrologist, not a biologist,
7 and yet DEQ relied on a hydrologist, who admitted
8 to having no expertise, no scientific expertise in
9 aquatic life, to determine whether or not aquatic
10 life standards were being met.

11 This is her testimony, and Mr. Martin
12 pointed -- this Ms. Hinz's testimony. "What I did
13 is determine whether or not there was life in the
14 stream." That's not a scientific assessment. She
15 admitted she's not a scientist. The standard they
16 applied is: Is there life or is there not life in
17 the creek?

18 Later on -- and this is what they said
19 in the CHIA. "The survey demonstrated that there
20 is a diverse community of macroinvertebrates using
21 the stream reach, and therefore it meets aquatic
22 life standards." They said based on this survey,
23 just the survey, which they used to state whether
24 or not anything was alive in the creek, is that it
25 meets the water quality standards. That's what

1 the record says.

2 I asked Dr. Hinz about the diversity on
3 the stand, and this is what she said. This is the
4 testimony. This isn't characterization, this is
5 the testimony. All right. I asked, "This
6 assessment -- it wasn't some kind of expert
7 determination of aquatic biology?" "No. It
8 wasn't about science. It was not science. And I
9 do not mean to use the word diverse in any sort of
10 impairment or biological determination." "Does it
11 just mean plural?" "Yes. It means that we had
12 multiple taxa in the stream. Two different types
13 --" "There was more than one taxa?" "Yes, that's
14 what that means."

15 This was not a scientific assessment.
16 They looked at the creek and said, "Is anything
17 alive? Have they sterilized the creek? If they
18 haven't sterilized the creek, then it meets water
19 quality standards."

20 That emphatically is not a scientific
21 assessment, and it demeans the Clean Water Act to
22 say just finding stuff alive in the creek is
23 enough to show that water quality standards are
24 met. By that standard, the Berkeley Pit is not an
25 impaired water. It's not science, and it's not

1 legal.

2 The next point. Mr. Lucas raises Pinto
3 Creek. This is an important case, and this should
4 be the touchstone of the Court's assessment of
5 water quality standards. What that case is about
6 is what constitutes a violation of water quality
7 standards. That's the standard under SMCRA, is
8 there a violation of water quality standards.

9 And there the Court says, "Adding more
10 of a pollutant to an impaired creek is a violation
11 of water quality standards." Who cares what
12 caused it? We don't have to ask who caused the
13 impairment of Lower East Fork Armells Creek. It
14 doesn't matter, and they're stuck with it.

15 If they're going to add more pollution
16 to that creek, they're going cause a violation of
17 water quality standards. The more pollution is --
18 you worsen the water quality standards, a
19 violation, that's a violation. And I would submit
20 to the Board that if you are admittedly going to
21 worsen a violation of water quality standards, you
22 have not affirmatively demonstrated that a
23 violation of water quality standards will not
24 result, and that's the legal standard.

25 Briefly, Mr. Martin made a big scene

1 about all the time we had to review this record
2 before submitting administrative comments. Two
3 important points. The public had 25 days to
4 review this voluminous document that they
5 mentioned, numerous documents that are over 1,000
6 pages long.

7 And importantly we never got to see the
8 CHIA. We never got to see DEQ's actual analysis.
9 And how were we to know in advance that DEQ was
10 going to use an unquestionably illegal definition
11 of anticipated mining? We shouldn't have to --
12 The public shouldn't have to submit in its
13 comments a statement that says, "DEQ, follow all
14 of the laws, and don't get them wrong." We don't
15 have to go through every element of the law to do
16 that.

17 Critically, it would be -- Our brief
18 supports it. There is no basis for requiring
19 administrative exhaustion here. DEQ's suggestion
20 that In Re: Bull Mountain addressed that is simply
21 wrong.

22 And yet Mr. Martin also spoke at some
23 length about finding -- the most important point
24 -- comparison of taxa in the creek in the 1970s to
25 2014. They make that argument.

1 MS. FORD: Time.

2 MR. HERNANDEZ: But right here in the
3 CHIA, Page 9-8, the CHIA rejected that argument.
4 The CHIA said, "The methods used were different,
5 so we can't make a valid comparison." It's a
6 testament to the weakness of their argument.

7 CHAIR DEVENY: That's fine.

8 MR. HERNANDEZ: Their argument here is
9 an argument that was expressly rejected in the
10 CHIA. Thank you, Madam Chair.

11 CHAIR DEVENY: We've heard oral
12 arguments, and we will obviously have lots of
13 opportunity for Board members to ask questions. I
14 wanted to talk to the Board first.

15 I thought there were a couple of key
16 issues that maybe we should settle before we
17 actually get into more of the scientific
18 discussions about this case, and one is the burden
19 of proof; and the other is looking at the order on
20 motions in limine.

21 And with regard to the burden of proof,
22 we have differing opinions about who has the
23 burden of proof, and I think we really need to
24 settle that.

25 And from looking at MEIC versus Montana

1 Department of Environmental Quality, the Supreme
2 Court decision from 2005, this was an air quality
3 case where there was a challenge on a permit.
4 They talk about the initial burden of proof during
5 the permitting process falling on the permittee;
6 but once the case moves to being a contested case
7 under MAPA, that burden of proof falls on the
8 petitioners.

9 And I believe that that is what we
10 should be applying here, but I'd like the Board to
11 discuss this and see if I'm on track or not. Any
12 thoughts on this?

13 BOARD MEMBER TWEETEN: Madam Chair,
14 these are issues, the burden of proof issues are
15 issues that the Montana Supreme Court has written
16 about quite a bit, because there is a tendency on
17 the part of litigants to confuse the burden of
18 proof as it applies at various stages of an
19 administrative proceeding.

20 I don't think there is any dispute that
21 initially at the application stage, the burden is
22 on the applicant to convince the DEQ that its
23 application meets the legal and factual standards
24 for approval. I don't think anybody disputes
25 that. I don't think -- The company certainly has

1 the same thing.

2 Once DEQ has made that determination,
3 interested parties have the opportunity to object
4 to the issuance of a permit as recommended by DEQ
5 and to seek a contested case hearing, and that's
6 what the Conservation Groups have done here. At
7 that stage, I think it's clear that the burden of
8 persuasion with respect to whether any approval of
9 the permit application was proper or not rests
10 with the objector, in this case MEIC, at that
11 stage.

12 And as will I think become significant
13 later today, once a contested case is concluded,
14 the hearing has been had, findings of fact have
15 been entered, conclusions of law have been made,
16 and a proposed decision has been submitted to the
17 Board, yet a third set of requirements applies in
18 that according to MAPA, the findings of fact that
19 have been made by the Hearing Examiner must be
20 affirmed by the Board unless the Board finds,
21 after a review of the entire record, that those
22 findings of fact are not supported by substantial
23 evidence.

24 And the conclusions of law, on the other
25 hand, may be overturned by the Board simply

1 because the Board disagrees with the analysis that
2 the Hearing Examiner has done. The standard for
3 findings of fact is much more deferential to the
4 Hearing Examiner's decisions than is the standard
5 for conclusions of law.

6 And then in the event that this were to
7 go to District Court -- which doesn't seem to be a
8 hair brained idea at this point -- the Courts will
9 apply yet a different set of standards to how they
10 reviewed the Board's decision with respect to
11 those facts and conclusions of law.

12 So I think I agree that at this stage,
13 before the Board, the burden of persuasion with
14 respect to the burden of proof with respect to
15 factual issues falls on MEIC.

16 And I think the Hearing Examiner,
17 although I think DEQ and the companies have
18 quibbled I think with the way that was expressed
19 in the proposed findings and conclusions in
20 various places, I think it's clear that the
21 Hearing Examiner applied the proper standard as
22 far as burden of proof is concerned.

23 So I don't see any grounds for
24 disturbing what the Hearing Examiner did based on
25 any misallocation of proof.

1 CHAIR DEVENY: Any other comments from
2 the Board? Are we in agreement on the burden of
3 proof?

4 (No response)

5 CHAIR DEVENY: Next I thought we should
6 look at the order on motions in limine, which are
7 Page 8 in the order I have. It might be
8 different. This has to do with what testimony
9 will be allowed, and I thought we wanted to get
10 clarity on this among the Board before we proceed.

11 The Hearings Officer put a limit on the
12 issues based on what was in the record, and MEIC
13 has objected to that for a number of reasons. And
14 I guess we need to talk about whether or not the
15 Hearings Officer was correct in limiting that
16 testimony, or limiting the issues that were
17 allowed to be discussed.

18 MS. CLERGET: I just want to clarify
19 what you're looking at, because I think the
20 conclusions of law on this start on Page 80.
21 You've got Conclusions of Law 13 through 17 that
22 are the operative conclusions of law on the
23 relevance motion in limine issue.

24 BOARD MEMBER BUSBY: What page?

25 MS. CLERGET: Page 80 of the Findings of

1 Fact and Conclusions of Law. I think it's Page
2 233 in your packet.

3 CHAIR DEVENY: So we're looking at --
4 this is the relevance --

5 MS. CLERGET: Yes.

6 CHAIR DEVENY: The start of the
7 relevance Section C on Page 80 that moves on, and
8 talks about the order on motions in limine
9 incorporated by reference, relevant evidence
10 limited to those issues contained in the
11 administrative record.

12 And there has been some discussion that
13 additional issues should have been allowed,
14 including anticipated mining, dewatering, impacts
15 to Rosebud Creek, dissolved oxygen, and chloride
16 levels. And I believe the Hearings Officer felt
17 that there needed to be a limit on that based on
18 what was in the administrative hearing record.

19 Any discussion by the Board members on
20 this, whether do we think -- if she applied the
21 correct standard in this, or should the
22 administrative record -- should issues beyond the
23 administrative record have been allowed?

24 BOARD MEMBER TWEETEN: Madam Chair, I
25 have a question for Sarah. Sarah, are there any

1 findings of fact that are specific to the question
2 of procedurally when these various issues were
3 raised?

4 MS. CLERGET: No. I dealt with it as a
5 conclusion of law, because they were raised during
6 the motions in limine, and so the order on the
7 motions in limine dealt with them.

8 BOARD MEMBER TWEETEN: And that was
9 incorporated by reference in your proposed
10 decision?

11 MS. CLERGET: Yes. So I guess to
12 answer, I think what your question is getting at
13 is: When were the various things raised?

14 BOARD MEMBER TWEETEN: That's right.

15 MS. CLERGET: It varies based on the
16 issue when they were raised. So the different
17 issues were raised at different times in the
18 proceeding, but the ultimate decision came as a
19 motion in limine, if that makes sense.

20 CHAIR DEVENY: I believe that one of the
21 arguments that Petitioners made was that they did
22 not see the CHIA document until after the
23 administrative record was closed; is that stating
24 that correctly?

25 MS. CLERGET: Yes, which is something

1 that the motion, the order on the motions in
2 limine addressed.

3 BOARD MEMBER TWEETEN: Madam Chair. I'm
4 looking at the order on the motions in limine at
5 Page 6 where I think Sarah discusses the question
6 of the timing of the CHIA, what effect it had on
7 the Conservation Groups' opportunity to make
8 objections.

9 And what Sarah writes here is that,
10 "There does not appear to be any argument that
11 anything contained in the CHIA was manifestly new
12 or different than any of the issues previously
13 raised by the administrative record. In other
14 words, the undersigned is not aware of any
15 argument by Conservation Groups that anything in
16 the CHIA was an entirely surprising issue unheard
17 of in the previous six years, never mentioned by
18 the PHC addendum, or any of the deficiency
19 correspondence.

20 "Rather the Conservation Groups have
21 argued that potential evidence in this case was
22 not contained in the CHIA, not that anything in
23 the CHIA was a surprise."

24 And so that seems to be the factual
25 basis for the conclusion of law that Sarah reached

1 there.

2 MS. CLERGET: And Chris, I guess I just
3 go on to say, the next paragraph that you didn't
4 read says if there was something new, that I would
5 allow it.

6 BOARD MEMBER DEARMENT: Which page is
7 that on?

8 MS. CLERGET: So Chris was reading from
9 Page 6, and then it goes on to Page 7.

10 BOARD MEMBER DEARMENT: Of the packet
11 which page?

12 BOARD MEMBER HORNBEIN: Page 250 to 251.

13 BOARD MEMBER TWEETEN: So Sarah, I
14 gather that what you were saying is that at the
15 hearing, the Conservation Groups would have the
16 opportunity to point to anything, any issue in the
17 CHIA that was not foreshadowed by the
18 administrative record, and that if they pointed to
19 such an issue, you would allow them to explore it.

20 And implicit in that I guess is your
21 conclusion that at the hearing they did not do so;
22 is that correct?

23 MS. CLERGET: Yes.

24 CHAIR DEVENY: Thank you for that. Any
25 other thoughts or comments? Are you guys still

1 reviewing that?

2 BOARD MEMBER DEARMONT: Madam Chair,
3 just a general concern that in fairness to MEIC,
4 that we're trying to, I guess, as one of the
5 non-attorneys on the Board, evaluate the fairness
6 with which they were able to review the case, that
7 they hadn't yet seen the CHIA, making sure that
8 the public and represented by MEIC has a full
9 opportunity to review the case in a meaningful
10 way, and have an opportunity to object.

11 I guess I'm still scratching my head a
12 little bit about how they can do that without
13 having seen the full analysis.

14 CHAIR DEVENY: I guess I have a question
15 of DEQ, if I could. Am I correct that the CHIA is
16 sort of similar to an EIS in some way, even though
17 it's under a different statute?

18 MR. LUCAS: I wouldn't say that, Madam
19 Chair. I would compare it to any other permit
20 that the Department issues, because eventually
21 there has to be final agency action.

22 CHAIR DEVENY: Oftentimes, documents are
23 put out in draft form to get some comments,
24 whether people have issues to raise that might not
25 have been explored completely, and I noted this

1 wasn't done in the case of the CHIA.

2 MR. LUCAS: It wasn't for a reason. The
3 statutory framework does not provide for a draft
4 CHIA. If we were issuing a MPDES permit under the
5 Clean Water Act or a Clean Air Act permit, there
6 we have a statutory structure for a draft permit.
7 Here the statute is clear, and is really what
8 drives the issue here.

9 And what the statute says is that we
10 will determine acceptability, but we do that based
11 on the applicant's Probable Hydrologic
12 Consequences document, and Mr. Martin showed you
13 that. I think it was an eight year process of
14 back and forth. And the statute contemplates that
15 we will take petitioner's comments and everything
16 else into consideration, then issue a final
17 decision. Then that's subject to a contested case
18 review.

19 So I understand the fairness concerns,
20 Member Dearment. I believe the Hearing Examiner
21 completely on her own, because I don't think
22 anybody suggested it, provided a very important
23 exception to the exhaustion rule, and I believe
24 that should be there. But once again, MEIC did
25 not avail themselves of that.

1 But we are stuck with what the statute
2 provides. If it is suboptimal in terms of public
3 process, perhaps we can go hand in hand to the
4 Legislature when they come back. We are a
5 creature of State law, we are bound by State law,
6 and State law does not provide for a draft CHIA
7 like it does for a draft Clean Water Act or Clean
8 Air Act permit.

9 However, if you look at this process and
10 what it involves, to my knowledge -- and I've got
11 some of the Clean Water Act folks in the room with
12 me, but I've been a Clean Water Act lawyer most of
13 my career -- a MPDES permit will have a fact
14 sheet, but it won't be based on a 500 page
15 Probable Hydrologic Consequences document, which
16 is then the conclusions which are confirmed in a
17 CHIA that's 100 pages long.

18 It's a different type of process. It's
19 the process the Legislature has given us. We're
20 bound by it, and MEIC was bound by it.

21 CHAIR DEVENY: Okay. Thank you.

22 BOARD MEMBER TWEETEN: Madam Chair,
23 question for Mr. Hernandez, please.

24 CHAIR DEVENY: Go ahead.

25 BOARD MEMBER TWEETEN: Can you -- Having

1 heard and discussed with the Hearing Examiner the
2 opportunity that was laid before you to point in
3 the CHIA to any issues that you feel were not
4 adequately foreshadowed by the administrative
5 record, can you point us to where in the
6 transcript of the administrative hearing, or in
7 what document that was following the issuance of
8 order on the motion in limine MEIC identified in
9 the CHIA issues that MEIC believed were not
10 adequately foreshadowed by the administrative
11 record?

12 MR. HERNANDEZ: Madam Chair, Board
13 Member Tweeten. Rather than rifle through the
14 transcript right now, I can say dispositively here
15 that the issue that we had with Area F was the DEQ
16 used an erroneous definition of anticipated
17 mining. There was nowhere where this definition
18 was defined in the record.

19 We just reviewed their CHIA, which we
20 hadn't seen when we submitted our comments, and we
21 saw that they had used a definition of anticipated
22 mining, which informed a whole cumulative
23 analysis, that cut out a huge portion of the mine.
24 And we said -- we checked it with the statute, and
25 we said, "They just used the wrong definition,"

1 that was it.

2 There was nowhere -- and I challenge
3 either Mr. Martin or Mr. Lucas to find any point
4 in any of the documents that were available to us
5 for 25 days, prior to -- during our comment period
6 where any of them used that erroneous definition.
7 It just isn't there. That's my response to that.

8 The second important point, Board Member
9 Tweeten, is that I can point in their response to
10 comments where they addressed our issue of
11 dewatering, and we put dewatering in our comments,
12 they addressed it, and they said, "We can't tell
13 whether or not this creek has been dewatered.
14 We're not sure. So we can't make a material
15 damage determination with respect to that."

16 And we said, "Wait a second. You
17 responded to our question, but you responded with
18 a legally erroneous interpretation of the
19 statute." The statute says they can't permit the
20 mine unless they make an affirmative material
21 damage determination, and here they were saying,
22 "We can't make a material damage determination."
23 And we said, "Wait a second. That analysis is
24 just incorrect."

25 It's a situation where we raised the

1 issue of dewatering, and they responded to it, and
2 their response was such that it was illegal. So
3 we responded to their response to our comment.

4 And of course, we couldn't have foreseen
5 how they would respond to our comment by saying,
6 "We can't make a material damage determination,"
7 and then we raised that in our appeal.

8 So I think that in the record it's
9 clear, without having to go through the
10 transcript, where this wasn't -- I don't think
11 it's clear. You can look at the record and you
12 can see that the erroneous definition appears in
13 the CHIA the first time we saw it.

14 The question of dewatering, we raised it
15 in our comments. DEQ responded to it, and their
16 response was wrong. There was no way we could
17 foresee their unique response. So even assuming
18 that the issue of exhaustion applies -- and Board
19 Member Dearment is right that in fairness, it
20 doesn't apply, and the statute says that -- Mr.
21 Lucas won't be able to point to any point in the
22 statute that establishes issue exhaustion. He
23 can't. Every body that's issued an opinion on
24 this has said it doesn't apply.

25 Setting that entirely aside, assuming it

1 applies, there was no way that we can address
2 these issues, and Courts that address the question
3 of issue exhaustion in NEPA, where you have a
4 draft document, unlike here, has said that if the
5 agency actually addresses the issue, issue
6 exhaustion doesn't apply because the whole point
7 of issue exhaustion is giving the agency notice of
8 the issue.

9 And here, no question the agency knew
10 that it was using a wrong definition of
11 anticipated mining, and there is no question the
12 agency knew that we were raising issues about
13 dewatering of East Fork Armells Creek because they
14 responded to it in their response to comments.

15 CHAIR DEVENY: Follow up question,
16 Chris.

17 BOARD MEMBER TWEETEN: That wasn't my
18 question. What I want to know is after the
19 Hearing Examiner extended this opportunity to you
20 to bring to her attention any issues that were not
21 adequately foreshadowed in the administrative
22 record, whether it was in the CHIA or otherwise,
23 did you take advantage of that opportunity? And
24 if so, can you point us to the place in the record
25 where you did it?

1 MR. HERNANDEZ: If you could give me a
2 moment, Mr. Tweeten, I will. I made the exact
3 argument I made right now. Ms. Clerget said,
4 "Where did these -- were these issues entirely
5 new?" I made the exact argument saying -- now
6 they're day one. I'll dig them up.

7 And the answer, to cut to the chase, is
8 they weren't. And this is the important part. We
9 can't point to a point, a position in the record
10 where they didn't raise an issue. We can't. We
11 can point to every single page of the 10,000 pages
12 of record and say it's not there, not there, not
13 there. It's just not there.

14 Ms. Clerget asked, and our response was
15 it's just not there. Nowhere did they say we're
16 using the wrong definition of Area F. We can't
17 prove a negative, but we can point to the entire
18 record and say it's not there, and no one to this
19 day has pointed where this erroneous definition of
20 Area F appears in the administrative record.

21 BOARD MEMBER TWEETEN: Madam Chair.

22 CHAIR DEVENY: Do you want to see the
23 hearing record on this?

24 BOARD MEMBER TWEETEN: No. I would
25 suggest -- I'm assuming we're going to take a

1 lunch break at some point.

2 CHAIR DEVENY: Yes, I was going to say
3 this might be a place --

4 BOARD MEMBER TWEETEN: You might want to
5 use part of that lunch break to humor me by
6 finding that place in the record where you took
7 advantage of this opportunity, because I think my
8 colleague, Mr. Dearment, is quite correct. It's
9 about fairness. And I think the offer that the
10 Hearing Examiner made you in the order in limine
11 was quite fair in giving you the chance to bring
12 up any issue in which you feel you were unfairly
13 denied the opportunity to raise it in a timely
14 fashion.

15 I just want to see where it is in the
16 record, so if you could humor me and find that
17 during the lunch break, I'd appreciate it.

18 MR. HERNANDEZ: Madam Chair, Mr.
19 Tweeten, I will.

20 CHAIR DEVENY: I think this would be a
21 good place to break and have lunch. We'll
22 reconvene here at 12:30.

23 (Lunch recess taken)

24 CHAIR DEVENY: I'm going to reconvene
25 this meeting. I believe all the Board members

1 present in person are here. Lindsay, could you
2 check with Hillary.

3 MS. FORD: Hillary Hanson.

4 BOARD MEMBER HANSON: Yes, I'm here.

5 CHAIR DEVENY: And let's see if there
6 have been any additional people that have entered
7 the room since we last checked in for the hearing
8 record. Could you state your name, please.

9 MS. HEDGES: Ann Hedges with the Montana
10 Environmental Information Center.

11 CHAIR DEVENY: Thank you. Anybody else?

12 (No response)

13 CHAIR DEVENY: Are there any other
14 members of the public on the phone?

15 MR. SULLIVAN: Roger Sullivan still here
16 in Kalispell, Montana, but I was present this
17 morning.

18 CHAIR DEVENY: Okay. Thank you. All
19 right. Let's pick up where we left off, and that
20 was Mr. Hernandez was going to answer Chris
21 Tweeten's question.

22 MR. HERNANDEZ: Yes. Thank you, Madam
23 Chair. Member Tweeten, I've looked back through
24 the record and haven't found the ideal quotation
25 where we said, "This wasn't raised there."

1 But there are two things I want to point
2 to. One, in our response to DEQ's and WECO's
3 motions in limine, we made the argument that I
4 just made today, and that document was found on
5 February 26th, 2018. I don't know the sequence
6 number of the document.

7 But on Page 5 we made the argument that
8 I just made, and I'll quote. We said, we argued
9 that, "Administrative exhaustion shouldn't apply,"
10 said, "This is logical because the public doesn't
11 have the opportunity to review the CHIA before
12 filing administrative comments on the permit
13 application."

14 And then I said, "Thus here, the
15 Conservation Groups could not have known during
16 the comment period on WECO's permit application
17 that the Department's CHIA would formulate a
18 legally erroneous definition of anticipated
19 mining, which would reverse the burden of proof,
20 and would ignore governing legal standards."

21 So we made the argument that we couldn't
22 have known about this because it wasn't anywhere
23 except the CHIA.

24 One point, and I'd like to have Ms.
25 Clerget clarify this for me. After the order on

1 the motions in limine was issued, there was some
2 uncertainty about it, and the Friday prior to
3 hearing we had a conference call to discuss this.
4 And the transcript for that conference call I
5 understand has been lost because it wasn't
6 properly recorded. And so the best place to find
7 a more specific response to this argument would be
8 there. Ms. Clerget, is that the case?

9 MS. CLERGET: Yes. We had an audio
10 recording of the preliminary pretrial conference
11 which apparently didn't audio record the way it
12 was supposed to.

13 I would not agree, though, that there
14 was anything relevant to Mr. Tweeten's question
15 during that discussion on the preliminary pretrial
16 conference.

17 MR. HERNANDEZ: Mr. Tweeten, I can't
18 recall one way or another what the discussion was,
19 but the point that you asked about whether we
20 stated whether this was ever in the record, we
21 made that point in our response to motions in
22 limine.

23 CHAIR DEVENY: Mr. Tweeten, do you have
24 a response to that?

25 BOARD MEMBER TWEETEN: Just --

1 CHAIR DEVENY: Formulating the process.

2 BOARD MEMBER TWEETEN: Just that once
3 the question of exhaustion became part of the
4 case, and the order on the motions in limine was
5 entered, there was a clear path for you to blow
6 that exhaustion argument out of the water by
7 following the process that Ms. Clerget outlined in
8 her order on the motion in limine.

9 And I guess I'm -- There doesn't appear
10 to be a place in the record where you clearly took
11 advantage of that opportunity, so that's the only
12 point I was wanting to make.

13 MR. HERNANDEZ: Madam Chair, may I just
14 offer one rejoinder?

15 CHAIR DEVENY: Very briefly. Thank you.

16 MR. HERNANDEZ: In our response to the
17 motions in limine we clearly said we had no
18 opportunity to address this in our comments
19 because the erroneous definition appeared for the
20 first time in the CHIA. Whether or not we
21 reiterated that argument at a later point I think
22 is beside the point. We clearly raised it.

23 CHAIR DEVENY: This kind of comes back
24 to the issue of fairness that Mr. Dearment has
25 raised, and this Board needs to decide whether

1 we're comfortable limiting the issues to what was
2 in the administrative record, or -- I guess we
3 would have some other options. Remanding it back
4 to the Hearings Officer would be one thing that
5 could be done.

6 BOARD MEMBER BUSBY: I'd like to hear
7 from John on what his thoughts on that fairness
8 issue are --

9 BOARD MEMBER DEARMENT: Sure. I
10 guess --

11 BOARD MEMBER BUSBY: I just wanted to
12 hear from John on whether he felt the fairness
13 argument has been answered in his --

14 BOARD MEMBER DEARMENT: I guess I'm
15 still concerned then. In Ms. Clerget's order it
16 says that there does not appear to be any
17 argument, or appear to be any argument that
18 anything contained in the CHIA was manifestly new
19 or different than any of the issues previously
20 raised by the administrative record.

21 I think Mr. Hernandez has just pointed
22 out that in his view, that's not true.

23 MR. HERNANDEZ: Yes. That's right.

24 BOARD MEMBER DEARMENT: So if he's
25 correct, has fairness been served?

1 CHAIR DEVENY: That's the question
2 and --

3 BOARD MEMBER DEARMENT: I guess it's a
4 little hard for me to get to yes at this point,
5 based upon that assessment.

6 BOARD MEMBER HORNBEIN: I share that
7 concern also.

8 BOARD MEMBER TWEETEN: Let me play
9 devil's advocate at this point.

10 Certainly Mr. Hernandez's argument today
11 disputes what the Hearing Examiner said in her
12 order on the motion in limine, but the motion did
13 leave open the opportunity to pursue that matter
14 or other matters, any other matters, that were not
15 adequately foreshadowed during the administrative
16 hearing.

17 The Hearing Examiner gave the parties
18 the opportunity to bring up and to argue about the
19 novelty of any issue in the order on the motion in
20 limine, and thus far at least MEIC has not been
21 able to point out the place in the hearing record
22 where that occurred.

23 And if in fact the motion in limine was
24 erroneous on that point, and there was this issue
25 hanging out that the MEIC had not had an

1 opportunity previously to raise, they had a golden
2 opportunity to raise it in response to the offer
3 that was made in the motion in limine, and they
4 failed to do so.

5 So you can argue about whether, what
6 your view of fairness is with respect to that
7 state of facts; but I think it's important to
8 remember that the Hearing Examiner didn't slam the
9 door in the order on the motion in limine, and the
10 Hearing Examiner left the door ajar to perfect any
11 issues like the one about the alleged erroneous
12 standard in response to the motion in limine.

13 And that's why I was sort of insistent
14 about the idea that MEIC ought to bring our
15 attention to the place in the hearing record where
16 they took of advantage of that opportunity, and
17 they've been unable at this stage at least to do
18 so.

19 So I don't see anything unfair about
20 that. I think the motion in limine order was
21 manifestly fair in giving them the opportunity to
22 cure any problems with respect to the exhaustion
23 arguments that were being made, and it doesn't
24 appear that they took advantage of that
25 opportunity.

1 So in my mind that's not unfair, but
2 others may draw different conclusions certainly.
3 But the option, it seems to me, is that we would
4 then have to adjourn this hearing, remand the case
5 back to the Hearing Examiner, allow her to take up
6 this issue and any other issues that MEIC decides
7 they want to raise that the Hearing Examiner had
8 previously held not to be exhausted; and then the
9 Hearing Examiner makes a supplemental proposed
10 disposition, which comes back to us, and one or
11 two meetings down the road we get right back to
12 where we are now. That seems to me that's the
13 option.

14 BOARD MEMBER DEARMENT: Madam Chair, I
15 guess just a procedural question. If not for this
16 question, and we had moved on to other topics at
17 hand, and at some point in the hearing found in
18 MEIC's favor, if we were to do that later, this
19 question would become irrelevant, would it not?

20 I guess I ask that wondering if we could
21 put this on hold for a bit, and see how the rest
22 of the hearing unfolds, rather than -- if that's
23 our other option, as Mr. Tweeten has said, and not
24 derail the rest of conversation at this time with
25 that.

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

3 CHAIR DEVENY: Yes.

4 BOARD MEMBER TWEETEN: Certainly that's
5 right. The lawyers would call the issue moot at
6 that point if we found in favor of MEIC on one of
7 these other grounds, that had clearly been
8 exhausted, and it was clearly properly before us,
9 and they got all of the relief from that decision
10 that they felt they were entitled to, and then the
11 motion in limine issue would be moot, and would no
12 longer have any bearing on the outcome.

13 So I think that's right, and we
14 certainly could, at your discretion, Madam Chair,
15 go ahead and hear the rest of the case, and see
16 where we are at that point, and defer a decision
17 on this question, on the exhaustion question
18 until --

19 MR. LUCAS: Madam Chair, may the
20 Department be heard?

21 CHAIR DEVENY: Yes. Go ahead.

22 MR. LUCAS: I'm a little concerned with
23 what I'm hearing because we're accepting what Mr.
24 Hernandez said as fact, that there is an erroneous
25 definition. He hasn't pointed to this definition,

1 it's not in his brief.

2 We did have a process where they had the
3 opportunity to make an offer of proof, and I
4 explained that. Even the offer of proof didn't
5 rise to the level. The best their expert could
6 say was, "There could be a connection."

7 But if we're going to start -- I think
8 you're heading down a road where you're going to
9 be questioning and changing findings of fact, and
10 I don't think this Board can do that with respect
11 -- without reviewing the whole factual record on
12 this motion in limine issue.

13 And I just wanted to state that, make my
14 record, and reserve my objection to going down
15 that path without actually taking the MAPA step of
16 digging into the whole record, because it's a
17 factual issue, you've taken his facts as true, we
18 have a record here, and I just want to preserve
19 the Department's rights on appeal. Thank you.

20 CHAIR DEVENY: Thank you. Other --

21 BOARD MEMBER HORNBEIN: I have an
22 additional question. I would just also like to
23 clarify. I don't think that we're taking this
24 assertion as true. I think the question we're
25 trying to get to the bottom of is whether it was

1 raised in a timely manner, so as to be properly
2 before -- so as to properly have been before the
3 Hearing Examiner, and now to be before the Board,
4 whether it should be included. I don't think
5 we're opining at all as to whether the allegation
6 is true.

7 The question I have for Mr. Hernandez is
8 it sounded to me, and maybe I heard this wrong,
9 but after the order on the motions in limine, you
10 said that you responded with objections. Where
11 was that response contained?

12 MR. HERNANDEZ: There was an initial
13 motion ruling on the motions in limine prior to
14 the hearing. It wasn't entirely clear. We had a
15 phone call, the transcript of which has been lost,
16 in which Ms. Clerget clarified the scope of the
17 motions in limine; and then there was further
18 discussion in the transcript during the hearing
19 where we did some further arguing about whether or
20 not issues had been raised or not.

21 And the proposed findings states where
22 some of those discussions occur. It seems that
23 when I look at the citation to where the
24 anticipated mining was addressed in the record
25 that's provided in the findings, there it seems to

1 be that it's already a decision, that this
2 evidence has been excluded with respect to Area F.
3 And I could go back and find it, but it's kind of
4 spread over a number of different places where
5 it's discussed. I'm not sure if I'm answering
6 what you're getting at.

7 BOARD MEMBER HORNBEIN: I don't know. I
8 may be trying to rehash the question that Board
9 Member Tweeten had asked, which is: Was there
10 anywhere in the record that this concern about the
11 definition that appeared first and only in the
12 CHIA was raised such that it should properly have
13 been before the Hearing Examiner when she made her
14 decision, and then ultimately be before the Board
15 now?

16 MR. HERNANDEZ: Yes. The facts are
17 right, and I'm willing to be corrected if anywhere
18 in the record prior to the CHIA this erroneous
19 definition of anticipated mining appears. I never
20 saw it. No one has pointed to anyplace where this
21 was.

22 The question of what that meant, how we
23 could litigate that, was we raised our arguments
24 in our pretrial briefing and said this is our
25 issue with respect to the erroneous definition.

1 That argument was deemed to be not have been
2 exhausted, and was excluded from the hearing, so
3 we never --

4 We made some offers of proof, but the
5 matter was deemed, whatever, not raised
6 sufficiently, and it was never addressed in the
7 proposed findings beyond affirming the ruling in
8 motions in limine. Does that --

9 BOARD MEMBER HORNBEIN: I think -- So
10 there is a place, however, in the hearing
11 transcript you're indicating where following the
12 order on the motions in limine, you again raised
13 this issue, and indicated that you disagreed with
14 the position taken on the order on the motions in
15 limine?

16 MR. HERNANDEZ: We've I think repeated
17 our arguments on issue of exhaustion almost ad
18 nauseam. We very strongly disagree that it
19 applies there, and certainly with respect to
20 anticipated mining multiple times.

21 MR. LUCAS: Madam Chair, if I may be
22 heard briefly again?

23 CHAIR DEVENY: Just a moment, please.
24 Ms. Clerget, are you looking for something
25 particular? Do you have a copy of the record on

1 the motions in limine?

2 MS. CLERGET: I was looking for
3 something to follow my own train. But yes. But I
4 have the motions in limine. The thing I was
5 looking for, I guess, was what I heard in your
6 question was about: Where was the argument that
7 this appeared only in the CHIA? And that argument
8 was raised in the motions in limine, which I then
9 ruled on. So that was what I was looking for, to
10 find that citation.

11 CHAIR DEVENY: Go ahead, Mr. Lucas.

12 MR. LUCAS: Thank you, Madam Chair. And
13 I'll just note again, based on Member Hornbein's
14 questions. The questions are going to what is or
15 is not in the record. The Petitioner cannot point
16 you to anything in the record. We are discussing
17 a hypothetical which is not tethered to the
18 record. This is a fact issue.

19 So again, I would respectfully caution
20 the Board that if you're going to be making or
21 assuming facts in evidence or factual findings, to
22 do that, a review of the entire record is
23 required.

24 The sad fact is they failed to exhaust
25 their administrative remedies with respect to an

1 order on an exception for exhaustion to
2 administrative remedies, and that's what we're
3 stuck with. And the reason we're going around and
4 around here is precisely because they did not
5 avail themselves of that opportunity, as Member
6 Tweeten I think has gone into and established.

7 So I'm sorry to keep weighing in here.
8 I just see us starting to skate down a very
9 dangerous road, and again, I have a client to
10 represent, as does Mr. Hernandez. Thank you.

11 BOARD MEMBER TWEETEN: May I ask Mr.
12 Lucas a question?

13 CHAIR DEVENY: Yes.

14 BOARD MEMBER TWEETEN: Not having the
15 entire record in front of us physically, and I
16 know that as matter of law the entire record is in
17 front of us, but we don't all have a copy of it on
18 the table.

19 Mr. Hernandez I believe has suggested
20 that after the CHIA issued, but before the motions
21 in limine were filed -- and Mr. Hernandez, please
22 correct me if I'm not correct -- but after the
23 CHIA issued but before the motions in limine were
24 filed, MEIC raised the question, that was
25 presented for the first time apparently in the

1 CHIA, about the incorrect definition in regard to
2 the Area F argument.

3 Mr. Hernandez seems to be saying, I
4 think, that sometime between the issuance of the
5 CHIA and the motion in limine, that argument was
6 raised in the record. Is that your recollection
7 or do you dispute that?

8 MR. LUCAS: Frankly, Member Tweeten, I'm
9 not even sure what the argument about the
10 erroneous definition is, or what he's saying,
11 because his argument, as far as the definition
12 goes, if I understand it -- and he's here to
13 correct me -- is that we didn't include
14 anticipated mining, which Area F would be
15 anticipated.

16 However, the definition of the
17 cumulative impact area requires that other mining
18 interact with the project at issue. That's in the
19 definition. That's plain. So he might disagree
20 with the definition, but the reality of the
21 situation is it was not raised in their comments.
22 We have a clear finding on that.

23 What was in front of them was a CHIA
24 that quite clearly included Areas A, B, and maybe
25 C, and Area F wasn't there. So the notion that

1 they didn't know Area F wasn't going to be in the
2 CHIA is absolutely incorrect. You're being misled
3 on that point. You can tell right from the PHC
4 what areas were included in the mine. And we've
5 hashed through all of this.

6 So I don't know what he's talking about
7 on erroneous definition. Had it come to us -- and
8 I think the record demonstrates this -- these two
9 back here are quite happy to sit on the stand and
10 answer any questions. We are happy to get to the
11 bottom of anything. All we're asking for is a
12 fair process where we don't get sandbagged.

13 MR. HERNANDEZ: Your Honor, if I may
14 object to Mr. Lucas's suggestion that we're in any
15 way sandbagging them by saying that they used an
16 erroneous definition of anticipated mining.

17 Madam Chair, if I may just respond to
18 Mr. Lucas's point about where this erroneous
19 definition appears. The Board is directed to the
20 CHIA, it's easy to prepare, after we submitted our
21 comments, Page 4-5-1. And Mr. Lucas is well aware
22 of this page.

23 Here is the definition of anticipated
24 mining. That definition is unlawfully narrow.
25 The correct definition of anticipated mining

1 appears in the regulations ARM 17.24.301.(31),
2 sub(31). There it says that anticipated mining,
3 which must be included in this EIS-like analysis
4 called a CHIA, includes -- must consider all
5 cumulative mining, including anticipated mining,
6 which means applications that have been submitted
7 at least.

8 In the CHIA they say anticipated mining
9 only includes permitted mining. The difference
10 seems small, but it's important. Mining has been
11 applied for or a mine was permitted. The
12 difference here was at least one 6,500 acre
13 expansion of the mine called Area F, which we
14 discussed earlier today.

15 Discovery in this matter has turned up
16 interagency documents and memos where they say
17 "Exclude Area F because it's not anticipated
18 mining because it has not yet been approved." I
19 could point the Board to the exhibit where that is
20 said.

21 Since that time, DEQ has come up with a
22 new argument. They say, "Well, we actually
23 analyzed it. We did some technical stuff, and we
24 determined that technically it doesn't apply."

25 This argument is entirely post hoc. If

1 you look at the record, nowhere is that discussed.
2 The record shows that the DEQ excluded Area F, and
3 there were a couple minor expansions of Area A and
4 B, on the basis of this erroneous definition.

5 CHAIR DEVENY: Okay. Thank you.

6 MR. MARTIN: Madam Chair, may I be
7 heard?

8 CHAIR DEVENY: Just a moment. We have a
9 question from the Board Member Dr. Lehnherr.

10 BOARD MEMBER LEHNHERR: At some point I
11 had a question for Mr. Lucas, and I can save it
12 until after Mr. Martin speaks.

13 CHAIR DEVENY: Okay. Mr. Martin.

14 MR. MARTIN: Dr. Lehnherr, I'm happy to
15 wait if that is your preference.

16 CHAIR DEVENY: Go ahead.

17 MR. MARTIN: If I may, this is the issue
18 that Mr. Tweeten will remember was something that
19 we argued in the motion for summary judgment. And
20 the fundamental argument that we made, and that
21 the Department made, was "You knew. You had the
22 PHC in front of you. You had the addendum to the
23 PHC. You had a series of eight different
24 deficiency notices. You knew exactly what the
25 CHIA was," that is to say, the area that was being

1 considered for cumulative impacts.

2 "You had all of that before you. You
3 made your comments, and you didn't say, 'But you
4 need to consider Area F.'" And there is a reason
5 why we have to have that sort of thing in this
6 process and at that stage.

7 Let me digress for moment. I wouldn't
8 expect Mr. Tweeten or others to know about what
9 the maps, the hydrologic maps, and the details of
10 hydrology demonstrate; but suffice it to say that
11 we have groundwater divides between AM4 and Area
12 F. There is no reason why anyone should be
13 evaluating the impact on Area F because the
14 science demonstrates that there is no interaction
15 between AM4 and Area F.

16 So what happens is we have -- and I
17 hesitate to use the word because it does sound
18 disparaging, and it sounds like a cheap shot --
19 but it looks like sandbagging. What's going on is
20 everyone had this detail in front of them.

21 They could have at that point in time
22 said, "Gee, we really want you to evaluate the
23 impact on Area F," and then we'd have in the
24 record a response that said, "Oh, no. There is no
25 reason for us to evaluate this beyond what the

1 groundwater science demonstrates, which is that
2 there is no interaction between AM4 and Area F."
3 It was their obligation to raise that issue in
4 their comments.

5 Let me add just a couple of minor points
6 about public participation. We hear that they had
7 only 25 days; well, that's not quite right.
8 Actually the first notice was a notice that came
9 out where they had four weeks of notice, public
10 notice, in public newspapers, 28 days. It has to
11 be done once a week, and then thirty days
12 thereafter.

13 When it came time for them to comment,
14 they did have 25 days. With due respect, they had
15 at that point in time access to a public record,
16 and they'd had that access for a very long time.
17 So I think it's a little unfair to accuse the
18 Department of somehow preventing them from having
19 the public input that's appropriate on a project
20 of this nature.

21 And then finally, at the risk of
22 repetition, let me also point out that this is a
23 process that's defined by statute and the
24 regulations. It's not as if we have the ability
25 to say, "Here is a draft CHIA. We'll give you

1 thirty days to look at that draft CHIA."

2 The CHIA is the decision document. It's
3 based on a very detailed application, including
4 hundreds of pages of analysis in the PHC and the
5 addendum, hundreds of pages of analysis including
6 various studies in response to deficiency notices.

7 That's the point at which they were on
8 notice of the nature of the CHIA, the bounds of
9 CHIA, and they should have been able to at that
10 point in time say, "Go off and evaluate Area F,"
11 and then we'd have in the record that there is no
12 reason to further evaluate Area F.

13 CHAIR DEVENY: Board Member Lehnherr.

14 BOARD MEMBER LEHNHERR: I assume that
15 after my tenure on the Board I'll earn an honorary
16 JD from someplace. But I have a two part question
17 for Mr. Lucas.

18 You said that the Board would be going
19 down a dangerous path. That's probably, maybe a
20 stronger word than you could have used. But I
21 would appreciate just a summary of where you think
22 we would be going when you say that dangerous
23 path.

24 And the second part of my question, or
25 second question, is regarding sandbagging -- it's

1 a fairly commonly used term -- but I'm just
2 curious what you mean by sandbagging, and how that
3 refers to what Mr. Hernandez was saying.

4 MR. LUCAS: Certainly, Member Lehnherr.
5 Thank you. The dangerous path I see us going down
6 is -- or I see the Board heading down is you're
7 here affirming, or denying, or modifying a
8 proposed ruling, findings of fact, and conclusions
9 of law. In connection with that, the motion in
10 limine ruling is incorporated therein by
11 reference.

12 Mr. Hernandez is asserting factual
13 contentions, although he can't point to anywhere
14 in the record where he supposedly preserved his
15 rights pursuant to the motion in limine. That is
16 a factual argument that "X" issue was raised at
17 "Y" point in the brief, and therefore he met a
18 legal standard of alerting the Hearing Examiner to
19 the fact that he, in his view, had been
20 sandbagged, that he didn't know Area F was in the
21 CHIA.

22 So that's the dangerous area I see us
23 going into here. You're getting away from, as we
24 know, as this meeting opened with, and your Board
25 attorney advised you, if it's a conclusion of law,

1 and you can do it here, that's fine.

2 But if you're going to start -- I guess
3 I don't want to use a strong word -- you're going
4 to start second guessing the facts that have been
5 found including the facts in connection with the
6 motion in limine, which is part of that ruling,
7 you all would need go into the complete factual
8 record.

9 And I'll go further and even submit to
10 you that once again, it was Mr. Hernandez's
11 responsibility to not ask you all to read 1200
12 pages to find where his argument is supported. If
13 they had made the effort to qualify for the
14 exception to exhaustion, it would be in the
15 record, it would be very clear. We wouldn't be
16 doing any of this.

17 So that's the danger that I see is that
18 you're making conclusions based on disputed facts,
19 and to do that, you really have to get into the
20 record. It's not just a conclusion of law issue.

21 And I do use strong words, and
22 sandbagging is a strong word, but I believe it's
23 totally appropriate. As I use sandbagging in
24 reference, we both feel like we've been
25 sandbagged, right?

1 As I use sandbagging in reference to Mr.
2 Hernandez, what I'm saying is you're sandbagged
3 when someone doesn't raise an issue in the
4 permitting process. And then under Signal Peak,
5 everything needs to be in the record and the four
6 corners of the CHIA. So if they don't raise the
7 issue, as they didn't, and then they come in
8 afterwards, and they're pointing to the record
9 saying, "You never addressed this issue," well, we
10 can't --

11 Again, it cuts both ways. We can't
12 address the issue if you haven't raised it in
13 front of us during the permitting process. We'll
14 lose every time.

15 So that's what I'm getting at with the
16 sandbagging, because now -- and he's pointing to a
17 -- Once again, take something out of context,
18 stick it up on the board or whatever. There is a
19 statement in the CHIA, and yes, that might be a
20 wrong statement, but did not affect the outcome.

21 Area F was not excluded from the PHC
22 because it hadn't been permitted. Area F was
23 excluded, and there is no dispute in the record
24 about this, although Mr. Hernandez made --

25 MR. HERNANDEZ: There is.

1 MR. LUCAS: Area F was excluded because
2 there is no hydrologic connection, there is no
3 interaction between the groundwater, because there
4 is a groundwater divide.

5 With respect to surface water -- can we
6 get MEIC's Exhibit 23 up there? East Fork Armells
7 Creek kind of hooks around this way and goes
8 through the town of Colstrip. I actually have a
9 demonstrative.

10 West Fork Armells Creek is in Area F,
11 and that basically heads north.

12 There is a confluence of those two
13 streams seventeen miles past Colstrip. So the
14 hydrologist looked at that, and you've got a lot
15 of information here on all of the confounding
16 variables that you have between the mine and
17 Colstrip.

18 And they determined that the surface
19 water interaction of seventeen miles away with the
20 town of Colstrip in between, especially with all
21 of the data that we have right at the edge of the
22 mine by the highway bridge, everything together
23 showed that you really couldn't detect any signals
24 or impacts. In other words there is no
25 interaction.

1 But the fact that that wasn't raised in
2 the comments is why we're here doing this. The
3 fact that with the order on motions in limine with
4 an exception, the Hearing Examiner painted a path
5 for a way forward, and once again, they didn't do
6 that. So it's --

7 And there it is up there. That's MEIC's
8 Exhibit 23. And all of the way down at the far
9 end above Area C is Area F. And had we gotten a
10 comment that there was, pursuant to the
11 definition, an interaction between the Area F and
12 Area B AM5, we would have responded quite simply
13 that there wasn't.

14 But that's not in front of you. Going
15 back and trying to do this all post hoc, that's
16 also dangerous in my opinion, Member Lehnherr. I
17 mean I --

18 CHAIR DEVENY: That's enough. Thank
19 you. Dr. Lehnherr, did that answer your question?

20 BOARD MEMBER LEHNHERR: Yes.

21 CHAIR DEVENY: I really hope we can move
22 along and resolve this issue. Do Board members
23 have any other thoughts on this, or feeling your
24 concerns are being addressed?

25 BOARD MEMBER TWEETEN: Madam Chair, if

1 it takes a separate motion with respect to the
2 order on the motions in limine, I move that the
3 Board affirm the Hearing Examiner's order on the
4 motions in limine, and the importation of that
5 order into the proposed findings of fact and
6 conclusions of law that are before us for
7 decision.

8 CHAIR DEVENY: There is a motion before
9 the Board. Is there a second?

10 BOARD MEMBER BUSBY: I'll second that
11 motion.

12 CHAIR DEVENY: Further discussion.

13 (No response)

14 CHAIR DEVENY: Further discussion.

15 (No response)

16 CHAIR DEVENY: We'll vote on the matter.
17 All in favor of the motion -- would you repeat it
18 again?

19 BOARD MEMBER TWEETEN: Madam Chair, I
20 move that the Board affirm the Hearing Examiner's
21 decision on the motion in limine, and the Hearing
22 Examiner's proposed decision to the extent that it
23 imports the decision on the motion in limine into
24 the Hearing Examiner's proposed order.

25 CHAIR DEVENY: You've heard the motion.

1 All those in favor, please signify by saying aye.

2 (Response)

3 CHAIR DEVENY: Opposed.

4 (No response)

5 CHAIR DEVENY: Hillary, do we have a
6 vote from you?

7 MS. HANSON: Yes. I said aye.

8 CHAIR DEVENY: Motion carries. All
9 right.

10 MR. HERNANDEZ: Madam Chair, I don't
11 want to prolong things. May I take a break?

12 CHAIR DEVENY: You bet.

13 (Recess taken)

14 CHAIR DEVENY: We can go ahead and get
15 started again. Hillary, are you still with us?

16 MS. HANSON: Yes, I'm here.

17 CHAIR DEVENY: Be sure and speak up. I
18 sometimes forget you're out there.

19 MS. HANSON: I will. Thanks.

20 CHAIR DEVENY: I think the next thing we
21 will do is take a look at the findings of fact,
22 just go through there, and determine if we're in
23 approval of them or not. At this point I think
24 that's the important next step to take.

25 So if those of you could turn, Board

1 members could turn to the findings of fact, which
2 in my hard copy is on Page 10. You guys might
3 have different page numberings if you got it off
4 the website. Is everybody with me?

5 (No response)

6 CHAIR DEVENY: Findings of facts,
7 starting on -- The findings of fact are broken
8 down into several sections, and I hope we can take
9 these sections at a time rather than each one.

10 The first one is just the general
11 background on the Rosebud --

12 MS. CLERGET: Sorry. It's in your Board
13 packet at 163. And then yes, it's Page 10 of
14 the FOFCOL.

15 CHAIR DEVENY: Thank you for clarifying.
16 Everybody there? Okay. Findings of fact, Section
17 A, general background on the Rosebud Mine. I
18 can't imagine that we would have any issues with
19 those, or with the standings. So that would take
20 us through No. 17, permitting process; continues
21 on through No. 33, description of the hydrologic
22 impacts of strip mining generally.

23 MR. HERNANDEZ: Pardon me, Madam Chair.
24 Are Counsel going to be offered the opportunity to
25 make any comments on any of this, or --

1 CHAIR DEVENY: Yes.

2 MR. HERNANDEZ: I just wanted to make
3 one small point with respect to the Finding of
4 Fact Paragraph 27, is that in our comments we
5 plainly addressed Area F. I'll leave it at that,
6 and move on. But we want to make that point
7 clear, that from our -- I don't want to belabor
8 the point, but we raised the Area F anticipated
9 mining issue in our comments.

10 MR. LUCAS: Madam Chair, may the
11 Department be briefly heard?

12 CHAIR DEVENY: Yes.

13 MR. LUCAS: Petitioners had their
14 opportunity to take exceptions to this proposed
15 ruling. We would object to any process where now
16 we go through them and Petitioner provides
17 additional objections. Thank you.

18 BOARD MEMBER TWEETEN: Madam Chair.

19 CHAIR DEVENY: Board Member Tweeten.

20 BOARD MEMBER TWEETEN: Sure. As long as
21 Mr. Hernandez has spoken up, I'd like to ask him a
22 question I guess.

23 In your exceptions, is there anywhere
24 where you object to any of these findings of fact
25 on the grounds that they're not supported by

1 substantial evidence in the record or are
2 otherwise contrary to law?

3 MR. HERNANDEZ: In our objections we
4 note that any finding of fact that includes a
5 conclusion of law is something that we object to.
6 And just because it's denominated a finding of
7 fact does not mean that it's a finding of fact.
8 If there is a legal issue embedded within it, we
9 have objected within the four or five points we
10 raised in our brief, which included the exhaustion
11 issue that I raised.

12 BOARD MEMBER TWEETEN: But your
13 objection is not based on the argument that these
14 are not supported by substantial evidence in the
15 record; am I correct about that?

16 MR. HERNANDEZ: We have not expressly
17 raised any substantial evidence. There are a few
18 points where we said that some of the evidence
19 included in the findings of fact was post hoc,
20 based on post hoc information, and therefore
21 legally improper. And there are a few points
22 where we say that some findings were wrong. But
23 we didn't identify individual ones as separate
24 subheadings in our brief.

25 For example, the question of diversity,

1 it's stated in the findings, that it was a finding
2 of diversity of macroinvertebrates. We cite in
3 our exhibits that the statements about diversity
4 in the findings are misleading to the degree that
5 suggested some kind of biological conclusion,
6 rather than what DEQ testified to, which is that
7 it meant two different kinds of bugs were found in
8 the water.

9 And I understand that this -- I don't
10 want to prolong this process. I have family
11 obligations this afternoon as well. I just want
12 to make sure that as MAPA requires, that each of
13 our findings of fact have a specific ruling on it
14 -- that is 6-23-4 -- that that not be lost in the
15 shuffle.

16 MR. MARTIN: Madam Chair, may I be heard
17 just very briefly?

18 CHAIR DEVENY: Yes.

19 MR. MARTIN: And it's only to assure
20 that the record is clear on this point.

21 We dispute MEIC's perspective that they
22 in fact made a comment in their comments about how
23 Area F should have been included. In fact what
24 happened, and you can see it in the motion in
25 limine, is that there was a footnote that

1 incorporated a separate document that never
2 addressed anything even approaching the
3 interaction between AM4 and Area F. I'll leave it
4 at that.

5 CHAIR DEVENY: I would like to ask DEQ
6 and Western Energy, Mr. Martin, Mr. Lucas. Do
7 either of you have any objections to the findings
8 of fact that were before you in the Hearing
9 Officer's document?

10 MR. LUCAS: Thank you, Madam Chair. No.
11 As our brief on exceptions indicates, we had what
12 Member Tweeten correctly characterized as a
13 quibble with the articulation of the burden of
14 proof, but there was nothing in our exceptions
15 regarding these findings of fact, or that they
16 weren't supported by substantial evidence.

17 CHAIR DEVENY: Mr. Martin, would you
18 answer that same question.

19 MR. MARTIN: Yes, Madam Chair. We would
20 echo what the Department has said. We did not
21 have any issues with findings of fact, but we
22 quibbled.

23 CHAIR DEVENY: Mr. Hernandez, if I heard
24 you correctly, you didn't have any either based on
25 the substantial --

1 BOARD MEMBER TWEETEN: Supported by
2 substantial evidence.

3 CHAIR DEVENY: -- not supported by
4 substantial evidence?

5 MR. HERNANDEZ: As we go through some of
6 this, Madam Chair -- I don't want to prolong this
7 process at all -- but there are individual
8 findings of fact that we will have issues with,
9 and we'd like to say to the degree that they're
10 contrary to our proposed findings of fact and
11 conclusions of law, we are entitled to a statement
12 that our findings are not accurate. I cited the
13 section already.

14 I think what our position is -- and
15 maybe this would make the matter easier -- is that
16 given the limited time constraints we were given
17 to object to this 100 page proposed findings and
18 conclusion, we focused on what we perceived as key
19 legal errors.

20 MS. HANSON: Sorry to interrupt, but I
21 can't hear who's speaking. I don't know if the
22 microphone is not working.

23 MR. HERNANDEZ: Chair, Member Hanson,
24 this is Shiloh Hernandez from the Conservation
25 Groups.

1 And what I would propose to the Board,
2 and maybe this could limit the suffering, if we
3 could just address the legal issues that we raised
4 with respect to whether or not adding more
5 pollution to a creek that's violating water
6 quality standards is a violation of water quality
7 standards.

8 Most of our objections were addressed in
9 -- addressed the discussion section of the
10 proposed findings, and I think if we can get
11 clarity on that, we might not have to go through
12 every proposed findings of fact. I don't want to
13 try to usurp your authority. I just am careful
14 because I want to preserve our record; but I also
15 want to move this along.

16 CHAIR DEVENY: I want to move it along,
17 too, which is why I asked, because if all three of
18 you were in agreement, we were just going to go
19 ahead and approve all of the findings of fact.

20 So Mr. Hernandez, if you could point to
21 the specific findings of facts, and give us the
22 numbers, perhaps we could just go to those, have
23 brief discussion, and then the Board could make a
24 decision, if that's an appropriate way to proceed.
25 Mr. Tweeten.

1 BOARD MEMBER TWEETEN: Madam Chair, the
2 time for any of the parties to bring to our
3 attention findings of fact that they believe are
4 either not supported by substantial evidence or
5 are contrary to the law is in their exceptions,
6 and the Petitioners' exceptions point us to no
7 findings of fact that they claim, as far as I can
8 tell -- and please correct me if I'm wrong -- but
9 I don't see anywhere in your exceptions where you
10 suggest that any finding of fact is not supported
11 by substantial evidence on the record as a whole.

12 You do make some arguments with respect
13 to findings of fact that you believe may be built
14 on an incorrect legal foundation, but those are
15 subsumed within your arguments with respect to the
16 conclusions of law.

17 So I don't believe that -- unless
18 anybody on the Board has a particular problem with
19 a finding of fact, and it's in the factual support
20 for it in the record, I would suggest that we
21 adopt the finding that the findings of fact are
22 supported by substantial evidence in the record,
23 and that any arguments with respect to the legal
24 basis of a finding of fact be dealt with as they
25 are incorporated in the challenges that are raised

1 in the conclusions of law.

2 CHAIR DEVENY: Other Board members
3 thoughts on this?

4 BOARD MEMBER BUSBY: If they haven't
5 raised them in their exceptions, then I would make
6 a motion that we accept the findings of fact. I
7 don't know if that's properly worded, but --

8 MS. CLERGET: Is it a motion?

9 BOARD MEMBER BUSBY: Yes, that we accept
10 the findings of fact.

11 BOARD MEMBER TWEETEN: I'll second the
12 motion.

13 CHAIR DEVENY: There is a motion before
14 the Board. Is there further discussion about
15 accepting the findings of fact? If the Board
16 members object to any of the findings of fact,
17 would you like to hear from any of the parties on
18 any of those?

19 (No response)

20 CHAIR DEVENY: Hearing none --

21 MR. HERNANDEZ: May I motion before we
22 vote on this?

23 BOARD MEMBER TWEETEN: No. Only Board
24 members can --

25 MR. HERNANDEZ: I'm sorry. May I leave

1 an objection -- I just want to preserve an issue
2 which is our entitlement to a finding of each of
3 our proposed findings of fact that is a safe legal
4 basis, and then we can move on. It's 4-4-623 sub
5 (6), and with that, I just want to preserve our --

6 CHAIR DEVENY: Chris, I would like to
7 ask the advice of our Board attorney on the
8 procedure.

9 MS. CLERGET: I believe there's a
10 Supreme Court case on point -- I can't cite it
11 right now, but I can find it quickly at a break --
12 that you don't need to individually go through as
13 long as the reasons are sufficiently made in the
14 record for what you're doing, which I believe they
15 are. We don't need to go through each individual
16 one.

17 BOARD MEMBER TWEETEN: Madam Chair.

18 CHAIR DEVENY: Board Member Tweeten.

19 BOARD MEMBER TWEETEN: A question for
20 Mr. Hernandez. With respect to the application of
21 the statute on findings on individual proposed
22 findings of fact, is that raised in your
23 exceptions?

24 MR. HERNANDEZ: I don't think that that
25 -- It's not. I don't think that we have to raise

1 it then, but it's not.

2 BOARD MEMBER TWEETEN: Why would you not
3 have to? If it's an objection to the proposed
4 decision, why would you not have to raise it in
5 your exceptions?

6 MR. HERNANDEZ: We cite to the statutory
7 provision in our exceptions, but we're raising it
8 now, and whether or not that is appropriate is a
9 question for someone else.

10 MR. LUCAS: Madam Chair, if the
11 Department could be heard. I would reiterate our
12 objection. Member Tweeten, once again, this was
13 not raised in their exceptions, and now with the
14 exceptions, and as you're deliberating on a final
15 agency action, he's continuing to raise new
16 arguments. He's continuing to fail to exhaust his
17 administrative remedies to the detriment of this
18 entire proceeding. We object. Thank you.

19 CHAIR DEVENY: Thank you, Mr. Lucas.

20 BOARD MEMBER TWEETEN: Madam Chair, I
21 don't see any reason why that argument could not
22 have been raised in the exceptions, but beyond
23 that, the only thing he's entitled to under the
24 statute is a determination by this Board with
25 respect to those findings of fact that we don't

1 accept, and there is boiler plate language, and
2 we've seen it before in final agency orders, that
3 is to the effect that the findings of fact are
4 adopted. Any contrary findings of fact that have
5 been offered by the parties are rejected as being
6 contrary to the facts as found by the Hearing
7 Examiner.

8 We can include that in our final
9 decision, in a motion on our final decision, and
10 Mr. Hernandez will have the ruling on his findings
11 of fact that he seeks; and if he chooses to seek
12 judicial review and challenge the adequacy of
13 that, he can do so.

14 MR. HERNANDEZ: We're amenable to that,
15 Madam Chair, Mr. Tweeten.

16 CHAIR DEVENY: Will you remember to do
17 that?

18 BOARD MEMBER TWEETEN: I'm hoping our
19 attorney will remember to do that. Yes, I will
20 remember to do that.

21 CHAIR DEVENY: Thank you.

22 MS. CLERGET: Yes.

23 CHAIR DEVENY: There is a motion before
24 the Board to accept the findings of facts in this
25 case and there has been a second. And I don't

1 believe there is any more discussion, so we will
2 have a vote on that. All those in favor of
3 approving the findings of facts in this case,
4 please signify by saying aye.

5 (Response)

6 CHAIR DEVENY: Any opposed?

7 (No response)

8 CHAIR DEVENY: Motion carries. That
9 moves us on to the conclusions of law.

10 MS. CLERGET: Madam Chair, I want to
11 clarify, because I know you guys need a specific
12 motion on the relevant conclusions of law, and I
13 think you agreed on the burden of proof, but we
14 didn't get a motion on it, so we might need a
15 motion on the burden of proof.

16 CHAIR DEVENY: I will so move that the
17 burden of proof lies with the Petitioners in this
18 case.

19 MS. CLERGET: Are you adopting the
20 conclusion of law?

21 CHAIR DEVENY: Adopting the conclusion
22 of law that deals with the burden of proof.

23 BOARD MEMBER TWEETEN: I'll second that
24 motion.

25 CHAIR DEVENY: Is there any discussion?

1 We had a discussion earlier on burden of proof
2 without putting it in the form of a motion.

3 BOARD MEMBER HORNBEIN: Madam Chair, I
4 don't have anything to add to -- I don't have any
5 disagreement where the burden lies. I do believe,
6 and I think all of the parties before us in this
7 matter have pointed out, that there were some
8 inconsistencies with how the actual burden was
9 articulated.

10 And so I want to make sure that if we're
11 voting on that, we're all agreeing on the same
12 wording.

13 CHAIR DEVENY: That's probably a really
14 good point, and I need to get to the findings of
15 fact where we are.

16 MS. CLERGET: You're on conclusions of
17 law, and you're going to look at Paragraphs 5
18 through 13. And just to shortcut this a little
19 bit, I think most of the disagreement comes from
20 the discussion section, with the exception of
21 Paragraph 5.

22 So that might just put a parameter on
23 what you're discussing. I don't know what you're
24 going to do with the discussion section, but
25 whatever you do with the discussion section, if

1 you're looking about whether or not you're going
2 to adopt the conclusions of law as they're
3 written, Paragraph 5 is the one that everybody has
4 raised their objections to. It's on Page 78 of
5 the findings of fact and conclusions of law.

6 CHAIR DEVENY: So Melissa, do you have
7 any problems with No. 5 as it's written in the
8 conclusions of law? That is the conclusion of law
9 that the motion right now is --

10 BOARD MEMBER HORNBEIN: No, I don't.

11 CHAIR DEVENY: So point of order, Sarah.
12 With respect to the differences in discussions
13 about burden of proof, if we go ahead and approve
14 Conclusion of Law No. 5, do we still discuss those
15 issues that were in your discussion regarding
16 burden of proof?

17 MS. CLERGET: It's up to you whether or
18 not you want to hear from the parties on this.
19 But MEIC and Intervenors have objected to the
20 language in No. 5 specifically. And then again,
21 correct me if I'm wrong, but the Department has
22 objected to the language that's in the discussion
23 section, is my understanding.

24 CHAIR DEVENY: Maybe we should open this
25 up.

1 MR. LUCAS: Madam Chair, if I may. The
2 Department specifically objected to the proposed
3 rulings Conclusion of Law No. 12, and offered a
4 strike through for that, but that is where the
5 language about that something could happen appears
6 in the conclusions of law outside of the
7 discussion section.

8 CHAIR DEVENY: That would be --

9 MR. LUCAS: Conclusion of Law No. 12 is
10 -- let me see if I can track it down for you.

11 MS. CLERGET: It's on Page 80, 233 in
12 the Board packet I'm told. And yes. I apologize.
13 That's correct. DEQ raised the objection to No.
14 12; and MEIC and Intervenors raised objections to
15 No. 5.

16 CHAIR DEVENY: Perhaps we can take those
17 two together, and hear from the parties.

18 MR. MARTIN: Madam Chair, just a quick
19 correction. I don't think we objected to No. 5.
20 But the issue that we objected to in Paragraph 12
21 was repeated again in Paragraph 18, and we did
22 object to that.

23 MS. CLERGET: Yes. Sorry. No. 18 I
24 have under material damage, though. Yes, it may
25 also become an issue there.

1 But for the purposes of the burden of
2 proof section of the conclusions of law, it's No.
3 5 and No. 12 that are the objections.

4 CHAIR DEVENY: So we're going to talk
5 about No. 5 and No. 12, and have the parties talk
6 about it, and have a discussion among ourselves.

7 And I just wanted to point out, just for
8 people's -- it's interesting. The law and the
9 rule are a little bit different when it comes to
10 talking about the hydrologic consequences.

11 The law, for example, says, "The
12 Department may not approve an application for
13 strip or underground coal mining permit or major
14 revision unless the application affirmatively
15 demonstrates that the assessment of the probable
16 cumulative impact of all anticipated mining in the
17 area on the hydrologic balance has been made by
18 the Department, and the proposed operation of the
19 mining operation has been designed to prevent
20 material damage to the hydrologic balance outside
21 of the permit area."

22 Now the rule says a little bit
23 differently when it is talking about, "The
24 Department may not approve an application," blah,
25 blah, blah, unless -- it comes into "an

1 application compiled by the Department that shows
2 that the hydrologic consequences and cumulative
3 hydrologic impacts will not result in material
4 damage to the hydrologic balance outside the
5 permit area."

6 There's a little bit of distinction
7 between the two, and we may need to keep that in
8 mind as we're deliberating this issue.

9 MS. CLERGET: Can you just give them the
10 ARMs, that section?

11 CHAIR DEVENY: Yes. This would be
12 82.4.227.

13 MS. CLERGET: And Chris, can we just put
14 them up here.

15 CHAIR DEVENY: Okay. Great. 17-24-405.

16 MS. CLERGET: Subsection (6).

17 CHAIR DEVENY: So the difference there
18 is one says "will not result in material damage,"
19 the other one says, "designed to prevent material
20 damage." The law is designed to prevent, the rule
21 is "will not result in material damage."

22 Those are just some distinctions that --
23 I don't know whether those two conflict with each
24 other or not, or if they're complementary, but we
25 need to -- it's probably something that's going to

1 enter into this deliberation that we have on the
2 this particular burden of proof.

3 So with that, I'd like to hear from the
4 parties. Mr. Hernandez, would you like to start.

5 MR. HERNANDEZ: I will try to be brief.

6 CHAIR DEVENY: I'm going to limit this
7 to five minutes.

8 MR. HERNANDEZ: Yes. Our big -- The
9 issue that needs to be clarified by the Board is
10 the difference in the inconsistency between
11 Paragraphs 12, Conclusion 12 and Conclusion 18.
12 And they basically say that -- One says the burden
13 is on the Conservation Groups to show that the
14 permit could result in violation of water quality
15 standards, and No. 18 says that we have to show
16 that it will result in material damage, which
17 includes water quality standards.

18 And I think "could" is clearer, and I
19 would just offer the Board for its entertainment a
20 hypothetical. Imagine that Western presented no
21 evidence about groundwater in their application.
22 DEQ approved it with no evidence about impacts to
23 groundwater. They clearly didn't meet the burden.
24 Whatever burden their original burden was, they
25 didn't meet that. No evidence.

1 Then it goes to an appeal, and the
2 Conservation Group says, "You didn't meet your
3 burden of proof --" or "You didn't show that the
4 mine was designed to prevent material damage to
5 groundwater because you never addressed it."

6 Now, in that case, does the Conservation
7 Groups lose unless they can present evidence that
8 there is going to be impacted groundwater and the
9 groundwater is going to violate water quality
10 standards; or is it enough just to say they've not
11 presented any evidence?

12 And I think how the Board resolves that
13 hypothetical will inform how they address this
14 question as to the burden of proof. If they
15 present no evidence on an issue, at appeal, on
16 appeal does the public have to show that harm will
17 occur, or is it enough just to say, "They didn't
18 actually present any evidence showing that harm
19 will not occur."

20 And with that, I think it has been
21 adequately briefed.

22 CHAIR DEVENY: All right. DEQ or
23 Western Energy.

24 MR. LUCAS: Thank you, Madam Chair. You
25 will notice that there is an apparent discrepancy

1 between the statutory language and the regulatory
2 language which says that "hydrologic impacts will
3 not result in material damage."

4 First of all, to the extent there is any
5 perceived conflict, the language of the statute
6 controls. We just got that ruling in the MFSA
7 case, a recent ruling from the Examiner, and
8 that's pretty much boiler plate black letter law.

9 But I think what's important when you
10 read this regulation, the Board's regulation, is
11 that you have to take it in the context of
12 everything else that's going on in the statute.
13 So we can't -- I'm on Subsection (6) of 17-24-405.
14 We can't approve an application unless it
15 affirmatively demonstrates and our written
16 findings confirm on the basis of information in
17 the application.

18 The information in that application, as
19 I think we all know by now, mostly consists of
20 what's called a Probable Hydrologic Consequences
21 document. And throughout our brief on exceptions,
22 I refer the Board to all the places in MSUMRA
23 where it's very clear that what we're assessing is
24 the probable outcome.

25 So if you read it with that in mind, and

1 understanding what the rest of the statute says, I
2 don't read 17-24-405 to require an absolute
3 guarantee against material damage. Science can't
4 give you absolute guarantees. Things can be
5 designed to prevent material damage. My pickup
6 truck is designed with anti-lock brakes. We have
7 product liability lawsuits all the time. Things
8 don't always the work the way they're designed.

9 So we think the statute is very clear on
10 this, that what we're doing is we're assessing
11 probable hydrologic consequences.

12 And if I could get our brief on
13 exceptions with respect to Paragraph 12, we
14 proposed a strike-through -- I don't know if
15 that's going to come up over there --

16 But basically the strike-through that we
17 proposed, and it appears on Page 14 of our brief,
18 is just to get the word "could" out of there,
19 because scientists will also tell you that in
20 terms of projecting impacts going forward,
21 conceivably anything could happen. The issue is
22 what other probable hydrologic consequences here.

23 And that is why we took issue with
24 Paragraph 12 of the proposed ruling. And I don't
25 know if my strike-through is ever going to pop up

1 over there.

2 CHAIR DEVENY: So just to clarify, you
3 want to take the word "could" out of No. 12?

4 MR. LUCAS: Yes, and I proposed an
5 actual complete rewriting of it, because once you
6 pull the "could" out. But basically what I
7 proposed is that Paragraph 12 would say, "The
8 Conservation Groups have the burden to show by a
9 preponderance of the evidence that DEQ had
10 information available to it --" and it's up there
11 behind you now -- "at the time of issuing the
12 permit that indicated --" strike-through -- "that
13 the project at issue is not designed to prevent
14 land uses or beneficial uses of water from being
15 adversely affected, water quality standards from
16 being violated, or water rights from being
17 impacted."

18 We think that's consistent with the
19 ultimate conclusion in the case, and the burden of
20 proof as it has elsewhere been articulated in the
21 rule. You don't necessarily have to go with that
22 language. The real take home point we want you to
23 have is once you throw the word "could" in there,
24 preponderance of the evidence is no longer an
25 issue, probable hydrologic consequences are not an

1 issue.

2 And any scientist will tell you that
3 Yetis could exist. We just can't prove that they
4 don't. Thank you.

5 MR. MARTIN: Madam Chair, following on
6 the Yeti discussion, this will be a moment in time
7 where Mr. Hernandez and I actually agree. Mr.
8 Hernandez makes the point in the hypothetical that
9 he described that they can't be in the position of
10 proving an absolute.

11 In the hypothetical that he described, I
12 happen to agree with him. They shouldn't have to
13 demonstrate that there is a certainty that
14 material damage will occur. And in fact, in the
15 discussion, Hearing Examiner addresses that very
16 issue and says it's a more probable than not
17 standard. It's the one taken from MAPA. That's
18 their burden of proof.

19 We're not taking the position that they
20 have to prove material damage, and we'd ask the
21 same consideration on our side of the issue. We
22 can't definitively say, as Mr. Lucas pointed out,
23 that there will be no material damage. What we
24 can say is that a project is designed to prevent
25 material damage.

1 Now, there is some language in Paragraph
2 12, Paragraph 18, and to a degree in the
3 discussion beginning on Page 65 extending through
4 66, another passage on 71, and the language that's
5 used -- and this is where we're quibbling, I have
6 to concede -- is the Hearing Examiner is saying
7 that the only thing that a petitioner needs to
8 prove is the possibility of material damage. The
9 possibility of material damage I think always
10 exists, or at least for some people it arguably
11 always exists.

12 I think that language was probably
13 frankly not intended to be read the way I'm
14 reading it. I suspect what the Hearing Examiner
15 meant was a probability.

16 So in the discussion, in fact I think
17 that if we replace the word "possibility" with
18 "probability" on those pages, that that would go a
19 long way toward making sure that we need only
20 demonstrate the probability that there will not be
21 material damage. We need to demonstrate that the
22 project is designed to prevent, use the term of
23 the statute. Thank you.

24 CHAIR DEVENY: Do Board members have
25 questions of any of the parties at this time?

1 BOARD MEMBER HORNBEIN: I have a
2 question for Mr. Lucas. Could you just address a
3 little bit more -- I'm familiar with the concept
4 that if an agency's regulation conflicts with the
5 enabling statute, or has the potential to
6 conflict, we have to go back to the statutory
7 language.

8 I don't necessarily read these two
9 provisions as being conflicting. I'm seeing the
10 regulation is carrying out the purpose of the
11 statute, which is the point of agencies enacting
12 regulations.

13 But the explanation you just gave seems
14 to me that it would try to read out a portion of
15 the regulation that's there. So I'd just like you
16 to address that a little bit more specifically, if
17 you could.

18 MR. LUCAS: Yes, of course, but could
19 you tell me. Do you believe that it reads the
20 word "will" out of the regulation? "Will not
21 result."

22 BOARD MEMBER HORNBEIN: Let me just pull
23 the regulation back up.

24 MS. CLERGET: It's up here.

25 BOARD MEMBER HORNBEIN: It's a little

1 easier for me to get it right here. I think the
2 language I'm referring to in the regulation is the
3 provision that says "will not."

4 MR. LUCAS: "Will not"?

5 BOARD MEMBER HORNBEIN: Yes.

6 MR. LUCAS: And that is the area where
7 it could be argued that there is a conflict
8 between the two.

9 And what I was getting at is one of the
10 other provisions from reading regulations and
11 statutes is that you're supposed to read them so
12 they can be harmonized, not in conflict.

13 So when you look at the rest of MSUMRA
14 -- and I'm trying to find where I address this in
15 my exceptions -- it's always talking about
16 probability. It's about probable hydrologic
17 consequences.

18 So what I'm saying there is that you
19 don't have to read these two in conflict, even
20 though the Department says "will not." If you
21 read the part of the regulation up above, right in
22 sub (6) before you get to the subsections, we
23 can't approve an application unless it
24 affirmatively demonstrates -- the written findings
25 confirm on the basis of the information as set

1 forth in the application or otherwise available.

2 And all of that information, including
3 the title of the Probable Hydrologic Consequences
4 document, is about what the reasonably anticipated
5 outcome would be, which is also really what in my
6 understanding science addresses; the most likely
7 outcome from a particular set of facts.

8 So I guess I still might not be
9 articulating it very well, but I don't necessarily
10 see a conflict here, because once we determine
11 that the project is designed to prevent material
12 damage, we reach a conclusion that it will not
13 result in material damage. And I know that's kind
14 of qualified. But there was a decision made where
15 my truck rolled off the pickup line, and we got
16 past QA and QC, that that truck was ready.

17 And my brakes haven't failed -- don't
18 get me wrong -- but there has to be an
19 acknowledgment that things don't always work as
20 they're designed, which the statute clearly
21 acknowledges all over the place.

22 In fact, if the statute required that
23 material damage wouldn't occur, there would be no
24 requirement for bonding for material damage, there
25 wouldn't be that section at the back of MSUMRA

1 which provides a right for an impacted water
2 supply.

3 If you impact a water supply, that's
4 material damage, yet MSUMRA contemplates that
5 material damage could still occur; and in that
6 sense, it's a very good statute because it doesn't
7 just have all these precautionary and preventative
8 things in it, but it recognizes that humans are
9 fallible, things don't always operate as they're
10 designed, and material damage could occur.

11 So the whole statute contemplates the
12 possibility. We don't want it to occur obviously.
13 We're using reliable science to make sure that the
14 project is designed to prevent that from
15 occurring.

16 So when I read this regulation with the
17 words "will not" in the context of all that, I
18 don't necessarily see a conflict; but someone
19 could argue that there is one, and if there is,
20 the answer is real easy there, too. The statute
21 does control.

22 And that's certainly how the Signal Peak
23 ruling went. There was nothing in there that we
24 had to guarantee that material damage would not
25 occur. We needed to show a more likely than not

1 probability that material damage would occur.
2 Signal Peak clearly states that may or may not
3 doesn't put the bunny in the hat, so to speak.

4 So I think it's clear from the Board
5 precedent, as well as the structure of the statute
6 and the surrounding regulations, that even though
7 we've expressed it as a finding that it will not
8 happen, that finding itself is still subject to
9 the limits of reliable science, and the directive
10 throughout the statute that what we are assessing
11 are the probable hydrologic consequences.

12 CHAIR DEVENY: Melissa, does that answer
13 your question?

14 BOARD MEMBER HORNBEIN: I don't disagree
15 with anything you've said. I do think that the
16 language in the rule has to play a role in
17 determining what the burden of proof is, that you
18 can't just read out "will not" just because the
19 statute contemplates that things may not always
20 work out. I mean that's why we have any sort of
21 regulatory provisions for dealing with situations
22 where things don't work out.

23 But I don't think that that necessarily
24 answers the question of what determines what the
25 burden is in this case. The language is in the

1 agency's rule. I agree with Mr. Lucas. I don't
2 think that they're necessarily conflicting. So I
3 think we have to take that language into account
4 when we're determining what the burden is. That's
5 all I'm saying.

6 MR. LUCAS: Madam Chair, if I could just
7 clarify for Member Hornbein. I'm sorry if I
8 wasn't clear there.

9 If we can pull up the language of
10 82.4.227(a)(3). It's not just that it's from the
11 structure of the statute. The statute itself
12 requires that the project be designed to prevent
13 material damage. So to the extent "will not"
14 conflicts with the language of the statute -- let
15 me pull that up.

16 MS. CLERGET: I think 227 is up.

17 MR. LUCAS: 227 is up there. So (a)(3)
18 is on the left, right?

19 MS. CLERGET: (a)(3) Yes. Material
20 damage.

21 MR. LUCAS: "The assessment of probable
22 cumulative impact of all anticipated mining has
23 been made, and the Department determines that the
24 project has been designed to prevent material
25 damage to the hydrologic balance outside of the

1 permit area."

2 That is the standard that controls,
3 notwithstanding any potentially conflicting "will
4 not" that you see in there. We can't take
5 statutory language and through our reg change it
6 from "designed to prevent" to "will not happen."
7 That's my point.

8 So the statute is clear. It's not just
9 from the structure of the statute. I made those
10 arguments about the structure and the other places
11 in the statute to kind of put finer points on
12 that, but this is a plain language issue, Member
13 Hornbein. Thank you.

14 MR. HERNANDEZ: Madam Chair, I'm sorry.
15 It's been a long afternoon. I just wanted to
16 offer for the Board's consideration the MEIC case
17 that you guys addressed as far as being,
18 establishing the standard of proof.

19 I think that in Paragraph 38 of that
20 case, the Court addresses this. I'm not sure I
21 have a clear answer. Our position I think has
22 been rejected, so we're doing damage control at
23 this point.

24 I think that Paragraph 38 provides some
25 insight into how the Montana Supreme Court sees

1 such a -- how such provisions should be
2 interpreted. I'll just read for the Board, if the
3 Board wishes, or else you can just refer to it on
4 your own. I'll leave that to you.

5 CHAIR DEVENY: Is it pretty brief?

6 MR. HERNANDEZ: It's quite brief.

7 CHAIR DEVENY: Yes. Go ahead.

8 MR. HERNANDEZ: There the Board said
9 that -- It was an air pollution permit that was
10 appealed. The Court made a statement about the
11 burden, and Court said on remand -- this was the
12 second to the last paragraph of the opinion,
13 Paragraph 38.

14 It says, "Thus on remand, the Board
15 shall enter findings and conclusions of law
16 determining whether, based on all of the evidence
17 presented, Bull Mountain --" that was the permit
18 applicant -- "established that emissions from its
19 proposed project will not cause or contribute to
20 adverse impact on visibility in the Class 1 areas
21 at issue."

22 So there the Court seemed to say that
23 allocating the burden how it was, on remand the
24 Board had to look at the evidence presented in the
25 permit application, and see whether it stood up to

1 the statutory language, and whether or not the
2 plaintiffs had shown that it didn't.

3 I'm not sure exactly how that worked.
4 It might be able to be harmonized with Mark
5 Lucas's proposal. I think Ms. Clerget mentioned
6 it before. It's a bit entangled as far as how
7 this works.

8 Our position is clear that controls and
9 they have the burden, but to the degree that
10 you're following MEIC, I think Paragraph 38
11 provides the best explanation, the MEIC case,
12 about how this burden should apply.

13 CHAIR DEVENY: David.

14 BOARD MEMBER LEHNHERR: I just wanted to
15 be clear about the two statutes that are up here.
16 Is someone proposing that there is conflict
17 between the two when it comes to material damage?
18 I wasn't clear about that.

19 CHAIR DEVENY: I just brought it up
20 because the rule and the law were a little bit
21 different.

22 MS. CLERGET: The law is the one on the
23 right that says -- the law says, "designed to
24 prevent material damage" in (a)(3); and then the
25 rule is on the left.

1 BOARD MEMBER LEHNHERR: But on the left
2 the law says, (b), you sort of have to read No. 2
3 with (b) preceding it, which says, "The proposed
4 strip or underground coal mining operation would
5 not materially damage." It seems like that's
6 saying pretty much the same thing that the rule is
7 saying on the right.

8 MR. LUCAS: Madam Chair, if I may. The
9 Member has read down to a different provision in
10 the statute which talks about material damage to
11 the quality or quantity of water in surface or
12 underground systems and alluvial valley floors.

13 That is not an issue in this case. The
14 citation that we've been focusing on is the
15 material damage analysis at issue in this case.
16 Thank you.

17 CHAIR DEVENY: Did you catch that?

18 BOARD MEMBER LEHNHERR: I'm sorry. If
19 you can clarify that further just briefly.

20 CHAIR DEVENY: Sarah, could you just go
21 up there and point out the ones that we're talking
22 about.

23 MS. CLERGET: Sure. So you've got what
24 applies here is subsection (6). "Hydrologic
25 consequences and cumulative impacts will not

1 result in" versus over here in (a), you've got
2 "material damage and quantity of water."

3 MR. HERNANDEZ: (3)(a).

4 MS. CLERGET: (3)(a). It says "designed
5 to prevent" right here.

6 BOARD MEMBER LEHNHERR: The (b) section
7 says, "The proposed strip and underground coal
8 mining would not." I guess I'm comparing "would
9 not" versus --

10 CHAIR DEVENY: That's not applying to
11 this case. That's talking about surface water and
12 underground systems.

13 BOARD MEMBER LEHNHERR: Thank you.

14 CHAIR DEVENY: Chris, you've been quiet.

15 MR. MARTIN: Madam Chair, if I may weigh
16 in very briefly. First I think this has been a
17 thoughtful discussion, and you were wise to bring
18 up the distinction between the regulation and the
19 statute. I won't repeat what the Department has
20 said, but frankly we agree.

21 To the extent that there is a conflict,
22 the "design to prevent" language obviously should
23 prevail. If somehow or another Mr. Lucas can read
24 those two provisions together, and still allow
25 science to operate the way it should, so that we

1 only have to demonstrate more probable than not
2 the probability that something like that will not
3 happen, then it makes sense.

4 Either of those two readings will
5 achieve what I think is the proper result when you
6 read both the regulation and the statute. To the
7 extent that there is a conflict, again, obviously
8 the statute prevails. Thank you.

9 MR. HERNANDEZ: Madam Chair, may I offer
10 a thirty second rejoinder?

11 CHAIR DEVENY: Yes.

12 MR. HERNANDEZ: The statute says " is
13 designed to prevent." "Prevent" the Board said in
14 In Re: Bull Mountains means will not happen. The
15 regulation, as Board Member Hornbein suggested,
16 really just complements the statute by saying "is
17 designed to prevent," not minimize -- the Board
18 said In Re: Bull Mountains -- "designed to prevent
19 material damage, then material damage will not
20 result."

21 I think that they read together without
22 any conflict. I think anybody interpreting a
23 statute and regulation to harmonize them and not
24 jettison one or the other.

25 MR. LUCAS: Madam Chair, if the

1 Department could very briefly respond to that.

2 CHAIR DEVENY: Okay.

3 MR. LUCAS: That proposed reading reads
4 the word "designed" out of the statute. It
5 doesn't say, "We need to find the project will
6 prevent." It says, "The project must be designed
7 to prevent." Thank you.

8 CHAIR DEVENY: Board member comments,
9 questions? Talk about whether or not we agree
10 with burden of proof issues in No. 5, 12, and 18.
11 Chris.

12 BOARD MEMBER TWEETEN: Madam Chair, I
13 think Conclusions of Law 5 is unobjectionable. It
14 uses the term "violates the law," so that's fine.

15 As far as No. 12 is concerned, I would
16 move that we reconfigure Conclusion of Law 12 to
17 conform to Mr. Lucas's proposed strike-out and
18 insert that's found in his brief at the place he
19 indicated.

20 As to No. 18, I would move that we
21 modify Conclusion of Law 18 by striking everything
22 after the word "a" in first line of 18, including
23 and after "a" through the word "damage," and
24 insert the language that conforms 18 to the
25 amendment that Mr. Lucas proposed that referred

1 back to the "designed to prevent" language in the
2 statute.

3 CHAIR DEVENY: Could you put that
4 language up there? Is it still up there, Mr.
5 Lucas? And did I hear -- Mr. Martin, you said you
6 were okay with that?

7 MR. MARTIN: The language in 12 and 18
8 as proposed meets our concern, and the only
9 request that I would have is that the discussion
10 be conformed to these changes in 12 and 18. There
11 is some language in the discussion that refers to
12 "possibility" rather than "probability." And we
13 could provide that language after this hearing if
14 that's useful.

15 CHAIR DEVENY: Mr. Hernandez, are you
16 amenable to that language?

17 MR. HERNANDEZ: Madam Chair, we maintain
18 our initial position. I don't think we need to
19 argue this anymore. I think this is probably the
20 least bad definition that the Board could use.

21 CHAIR DEVENY: Just a point of
22 clarification question for the Board attorney.
23 Does the discussion in your findings of fact and
24 conclusions of law necessarily have to be included
25 in our final decision?

1 MS. CLERGET: Not at all. You can adopt
2 the findings of fact and conclusions of law. You
3 don't have to adopt anything else. You have to
4 make a decision specifically on findings of fact
5 and conclusions of law, but you don't even have to
6 make a decision on the rest of it.

7 CHAIR DEVENY: Forgive me for not
8 knowing this procedure because we haven't gone
9 through it very much, but is there always a
10 discussion?

11 MS. CLERGET: No, not always. I provide
12 it when I feel like it might assist you in getting
13 to the conclusions of law from the findings of
14 fact, but if there are things specifically in the
15 discussion that are not in the conclusions of law
16 to make your lives easier when it comes to the
17 conclusions of law.

18 CHAIR DEVENY: If we didn't include the
19 discussion in our adoption of the conclusions of
20 law when we get to that, would there be gaps
21 between making the leap from findings of fact and
22 conclusions of law?

23 MS. CLERGET: I don't think you need to
24 worry about that. I think you need to adopt
25 findings of fact and conclusions of law. That's

1 what you have to do. If you want to adopt
2 discussion, you certainly can, but you don't have
3 to.

4 CHAIR DEVENY: If I'm hearing this
5 right, Board members, we would have an option of
6 not including the discussion that's in the
7 findings of fact and conclusions of law document
8 if we so choose.

9 BOARD MEMBER TWEETEN: In that case, my
10 motion is waiting for a second.

11 BOARD MEMBER BUSBY: Can you repeat your
12 motion?

13 MS. CLERGET: I think Aleisha has got
14 it, if that would be --

15 MS. SOLEM: I have you down for two
16 motions. The first is to reconfigure Conclusion
17 of Law No. 12, and to make that in compliance with
18 DEQ's proposed language in their brief that was on
19 Page 14, that was displayed on the screen.

20 And then the second was to modify
21 Conclusion of Law No. 18, strike everything after
22 "a" in the first line through "damage," and then
23 insert the language that conforms with the
24 language on 14.

25 BOARD MEMBER TWEETEN: That's it.

1 CHAIR DEVENY: It's been moved and
2 seconded. Is there further discussion by Board
3 members?

4 (No response)

5 CHAIR DEVENY: Hearing none, could we
6 have a vote on --

7 MS. CLERGET: There wasn't a second.

8 CHAIR DEVENY: I thought Dexter did.

9 BOARD MEMBER BUSBY: I did, yes. I said
10 I'd second it if I could get the motion for sure.

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

14 (Response)

15 CHAIR DEVENY: Any opposed?

16 BOARD MEMBER HORNBEIN: Nay.

17 CHAIR DEVENY: Motion carries. Hillary,
18 did we get your vote?

19 MS. HANSON: Yes. I said aye.

20 CHAIR DEVENY: Okay. Thank you.

21 MS. CLERGET: So I think you have dealt
22 with 18 under material damage. That's where you
23 left off.

24 CHAIR DEVENY: We dealt with 18, and
25 didn't we deal with 12, too?

1 MS. CLERGET: You dealt with 12.

2 CHAIR DEVENY: 18 and 12.

3 MS. CLERGET: Yes. So you've left off
4 with 18, the material damage.

5 CHAIR DEVENY: Have we done one through
6 -- we haven't voted on anything up to 12.

7 MS. CLERGET: No, we haven't done burden
8 -- Yes, we just did the burden of proof. I guess
9 you did it with --

10 CHAIR DEVENY: We haven't. We need to.

11 BOARD MEMBER TWEETEN: Madam Chair, I
12 move we accept Conclusions of Law 1 through 4
13 dealing with standing.

14 CHAIR DEVENY: Could we add No. 5,
15 burden of proof, on to that?

16 BOARD MEMBER HORNBEIN: I'll second
17 that.

18 CHAIR DEVENY: Could you add that?

19 BOARD MEMBER TWEETEN: Why don't we take
20 the burden of proof section as a separate section.

21 CHAIR DEVENY: The motion before the
22 Board, and it has been seconded, is for adopting
23 Conclusions of Law 1 through 4. All those in
24 favor, signify by saying aye.

25 (Response)

1 CHAIR DEVENY: All those opposed.

2 MS. HANSON: Aye.

3 BOARD MEMBER LEHNHERR: Madam Chair,
4 could we get a printout of the revised wording for
5 12?

6 MS. CLERGET: Yes. Can we at a break?

7 BOARD MEMBER LEHNHERR: Sure.

8 CHAIR DEVENY: Let's move on to No. 5.
9 I would move that we -- Let's look at the burden
10 of proof Section 5 through 12. We've already
11 voted on 12, so it's actually 5 through 11. Are
12 there any objections or suggested changes to any
13 of the Conclusions of Law 5 through 11?

14 (No response)

15 CHAIR DEVENY: I would move that we
16 adopt Conclusions of Law 5 through 11.

17 BOARD MEMBER TWEETEN: Second.

18 CHAIR DEVENY: It's been moved and
19 seconded. Is there any discussion?

20 (No response)

21 CHAIR DEVENY: Hearing none, all those
22 in favor, signify by saying aye.

23 (Response)

24 CHAIR DEVENY: Any opposed?

25 (No response)

1 CHAIR DEVENY: Motion passes. We've
2 done 12. Let's move on to relevance.

3 MS. CLERGET: I think you did that
4 already.

5 CHAIR DEVENY: We didn't have a motion
6 on the section of relevance. We did talk about
7 those issues that were on the orders of motion in
8 limine, so let's see, 15 might have been covered.
9 No. 14.

10 BOARD MEMBER TWEETEN: Madam Chair, I
11 thought that we adopted a motion approving the
12 Hearing Examiner's incorporation by reference of
13 the order on the motion in limine.

14 CHAIR DEVENY: We did.

15 BOARD MEMBER TWEETEN: In that case, I
16 think that all of the Conclusions of Law under "C"
17 have been covered, so I would move the adoption of
18 Conclusions of Law 13 through 17.

19 CHAIR DEVENY: I'll second that. Any
20 discussion on the relevance issues?

21 (No response)

22 CHAIR DEVENY: Hearing none, all those
23 in favor, please signify by saying aye.

24 (Response)

25 CHAIR DEVENY: All opposed.

1 (No response)

2 CHAIR DEVENY: Hearing none, the motion
3 passes. We'll move on now to the material damage
4 section that starts at 18. We just did 18, so --

5 MS. CLERGET: If I can interject here.
6 I think I didn't -- and the parties may correct me
7 if I'm wrong -- but I don't have any other
8 objections to specific conclusions of law until
9 Paragraph 39.

10 MR. HERNANDEZ: Madam Chair, our
11 objections to the material damage determination
12 addressed the analysis in the discussion portion,
13 but it fundamentally informs all of the findings
14 with respect to material damage.

15 The question before the Board is whether
16 or not adding more pollution to an impaired creek
17 violates water quality standards, and depending on
18 how the Board addresses and responds to that
19 question, then we don't believe that the findings
20 of fact -- or sorry -- conclusions of law after
21 Paragraph 18 on the material damage assessment can
22 be affirmed, and that goes all the way to
23 Paragraph 39.

24 We didn't address nitrogen in our
25 exceptions, but then beginning with Paragraph 42,

1 that goes to our arguments about whether or not
2 the "anything is alive" standard for assessing
3 aquatic life water quality standards is
4 appropriate.

5 So even though we didn't enumerate every
6 one of them, our objections to the discussion
7 analysis addresses this conclusion. They're not
8 compatible.

9 CHAIR DEVENY: So we heard oral argument
10 this morning on some of these issues, and I guess
11 it would be time to open up the Board to questions
12 to the parties about material damage issues.

13 BOARD MEMBER DEARMENT: Madam Chair. So
14 I think as Mr. Hernandez has said, when he opened
15 his comments today and his objections brief by
16 stating factually that East Fork of Armells Creek
17 is impaired for salinity related pollutants, and
18 arguing that any contribution from any mining
19 activity in the watershed to that stream is
20 already impaired would prohibit DEQ from issuing
21 this amended permit, correct?

22 MR. HERNANDEZ: Until they prepare a
23 TMDL to remedy the impairment, yes.

24 BOARD MEMBER DEARMENT: Thank you. And
25 so it seems to me I think that is the question

1 that we need to address here, is that accurate or
2 not.

3 If he's correct -- and I think as he
4 just said most of these conclusions of law that
5 remain are erroneous. I think if he's wrong, I
6 guess we need to hear why and make that
7 determination.

8 CHAIR DEVENY: Go ahead.

9 BOARD MEMBER DEARMENT: I'm not sure
10 where I was going to go from that. I guess I
11 would like to hear from the attorneys some
12 additional discussion.

13 Mr. Hernandez has made it pretty clear
14 that he thinks that is the case. I'm not sure in
15 the comments and rebuttals I heard earlier today,
16 or in the testimony from the other attorneys that
17 we heard today, that that point was clearly
18 rebutted, at least not in my mind.

19 CHAIR DEVENY: I thought I kind of heard
20 it was from the point of the Clean Water Act and
21 the MPDES permit being the ones that triggered
22 water quality standards, but it would probably
23 behoove us to maybe have the attorneys talk about
24 those issues very briefly, if you could. Mr.
25 Lucas.

1 MR. LUCAS: Thank you, Madam Chair,
2 Member Dearment. I'm happy to address this.

3 Mr. Hernandez is sitting there and he
4 says this project is going to add more salt. The
5 record, the undisputed record, demonstrates the
6 contrary. It's not going to increase
7 concentrations of salinity in the primary
8 receiving water of the East Fork Armells Creek,
9 Upper East Fork Armells Creek, or the secondary
10 receiving water of Lower East Fork Armells Creek.

11 So first of all, adding more pollution,
12 wrong. We're not adding anything. There is a 13
13 percent change in TDS in alluvial water quality
14 that comes from previously approved mining permits
15 in the mine. And obviously the statute of
16 limitations ran on the challenge to those a long
17 time ago. So number one, no pollution is being
18 added.

19 What will happen is when you do AM4, you
20 will increase the duration. Now, we've had some
21 discussion about the duration. Here's the key
22 thing on that. Material damage is a threshold
23 issue. If you don't violate a water quality
24 standard today, it doesn't matter that 100 years
25 down the road you're not to going to violate a

1 water quality standard. The only thing the record
2 shows is that the Rosebud mine meets regulatory
3 standards and will continue to do so for 100
4 years.

5 I'd like to talk a little bit about --
6 and this is in our response to their exceptions.

7 CHAIR DEVENY: I'm going to ask that you
8 limit it to five minutes, please.

9 MR. LUCAS: Sure.

10 CHAIR DEVENY: Lindsay, if you could
11 maybe take a minute off that and give him four.

12 MR. LUCAS: And I'll try and be very
13 succinct.

14 But one of the other key things about
15 the Department's finding here was that this 13
16 percent change in alluvial TDS was well within the
17 range of natural variation, well within the range
18 of the natural variability of that ionic
19 component, both in the alluvium and in the East
20 Fork Armells stream. So they determined material
21 damage.

22 Now, the CHIA assesses both groundwater
23 and surface water impacts. When it comes to
24 surface water impacts that are regulated under the
25 MPDES program, the CHIA says, and appropriately so

1 -- and this is in my brief -- those discharges --
2 we're not talking about discharges here. Mr.
3 Hernandez incessantly refers to them as such --
4 those discharges are covered by MPDES permits,
5 which means they have to meet all water quality
6 standards.

7 If we were on appeal of that MPDES
8 permit, Mr. Hernandez would at least be in the
9 right ballpark in arguing Pinto Creek. Pinto
10 Creek applies to point source surface water
11 discharges governed by a MPDES permit. We're not
12 here on that.

13 In fact, they've challenged the mine's
14 MPDES permit, and I believe you guys got an update
15 from Ms. Bowers this morning on where that stands
16 in the Supreme Court. So he's importing a
17 standard that does not belong here.

18 MSUMRA is clear. The language I've
19 cited to you, again going back to 227(3)(a) --
20 hopefully I have it right now -- it is a causation
21 standard. The definition of material damage is
22 degradation by mining.

23 If you look at Signal Peak, which I cite
24 repeated in our brief, there the Board applied a
25 causation standard. It doesn't mean we don't look

1 at everything else. We are looking at the impacts
2 of mining, and that was done here.

3 And to argue contribution is to try and
4 bring in a standard that doesn't exist in the
5 statute. He might think it's bad policy, he might
6 think it's a bad outcome. There are avenues to
7 pursue that. If he thinks -- and I'm not going to
8 invite him to sue the Department on other grounds
9 -- but it's pretty clear there is avenues to
10 pursue that.

11 I guess the last thing I want to say
12 about Pinto Creek is to the extent you folks look
13 at it, you'll see it does not stand for the
14 proposition which Mr. Hernandez contends. Pinto
15 Creek does not say you can't have another
16 discharge of a pollutant of concern to an impaired
17 water body until the entire water body is
18 remediated. Anyone who has worked with TMDL's
19 know they take decades.

20 What Pinto Creek actually says is you
21 can't authorize a new discharge of a pollutant of
22 concern to an impaired water for which a TMDL has
23 not yet been issued unless all the other
24 dischargers are on schedules of compliance, and
25 that those schedules of compliance include

1 so-called waste load allocations.

2 I appreciate that Mr. Hernandez and the
3 Petitioners are trying to protect East Fork
4 Armells Creek, but you have to use the law that
5 applies in a particular case, and those laws don't
6 apply here. The material damage finding was 100
7 percent on point. You have a ruling, an
8 undisputed ruling that tells you that.

9 And in response, the only evidence they
10 could present -- we've been over their evidence --
11 their TDS expert didn't even calculate any change
12 in concentration, didn't even take a qualitative
13 approach, couldn't even tell us if the change in
14 concentration of TDS would be sufficient.

15 What Mr. Hernandez is doing is trying to
16 link the mine to the pollution in the stream, when
17 the whole record before you, including our water
18 quality assessments that we do, found that it was
19 an unconfirmed source. So such impairments as are
20 exists in that stream are not attributable to
21 mining. That is undisputed. There was no dispute
22 of that.

23 And the proposed ruling clearly states
24 that Petitioners' arguments with respect to
25 existing water quality violations were based on

1 nothing but the Department's so-called assessment
2 records, which the Water Quality Division does.

3 And if I can just finish on that point,
4 the ruling also found that that's a different
5 program, and those assessment records do not
6 equate material damage or a violation of water
7 quality standards. Thank you.

8 CHAIR DEVENY: Thank you, Mr. Lucas.

9 MR. HERNANDEZ: Madam Chair, Member
10 Dearment, may I respond to your question? Mr.
11 Lucas's response before, it kind of becomes
12 diluted by Mr. Martin's response.

13 BOARD MEMBER DEARMENT: With the Chair's
14 permission, I'd like to hear it, yes.

15 CHAIR DEVENY: Yes.

16 MR. HERNANDEZ: All right. The first
17 important thing is that material damage is a
18 violation of water quality standards -- that's the
19 statute -- and that's what DEQ is trying to read
20 out of MSUMRA. MSUMRA in 82.4.203(31) says,
21 "Material damage includes a violation of a water
22 quality standard."

23 So if there is a violation of water
24 quality standards, that's material damage. And
25 DEQ has already determined that water quality

1 standards in East Fork Armells Creek are not being
2 met. That's undisputed here.

3 The findings Page 70 says that if the
4 water is already exceeding the water quality
5 standards, as is the case with EFAC, already not
6 meeting water quality standards. The question is
7 water quality standards, they're already past the
8 limit. What do you do in that situation? How do
9 you assess water quality standards when a creek is
10 already past the limit?

11 That's what Friends of Pinto Creek said.
12 We're not arguing that they need a discharge
13 permit. The salt here is coming from base flow --
14 as a hydrologist, you know this -- groundwater
15 contribution, and you know this more than I do,
16 the creek.

17 And Ms. Solem, if you could put our
18 slides up there. Again, briefly DEQ's CHIA says
19 on Page 9-9, "Base flow in EFAC by surface water
20 55," this is Slide 3. "Base flow in EFAC is
21 predicted to increase by 13 percent." So all
22 mining is going to add 13 percent more salt. So
23 they're going to worsen that violation of water
24 quality standards.

25 Pinto Creek says adding more. And 13

1 percent isn't immeasurable. They measured it, 13
2 percent. That will worsen the water quality
3 standard, and that under Pinto Creek is a
4 violation. We're not talking about a discharge
5 permit, we're just talking about how you assess
6 water quality standards. And worsening water
7 quality standards and impairment is a violation of
8 water quality standards.

9 They dispute that, and they don't like
10 that idea. They would like to ignore the fact
11 that East Fork Armells Creek is being trashed.
12 But the statute says they can't. The hard limit
13 is water quality standards.

14 So what they say -- and this might be
15 where you're going -- but AM4 isn't doing it.
16 That 13 percent is the result of all the other
17 cumulative mining operations there. That's true.
18 They're right. The 13 percent is from the
19 cumulative other mining impacts that will go into
20 the creek.

21 So what do you do in that situation?
22 Don't trust me. I'm an environmental lawyer. Who
23 knows? But I can tell you what, I can research
24 the law, and in our brief, I point to where -- and
25 this is at Page 15, 16, Page 16 of our exceptions.

1 The Office of Surface Mining, the
2 Federal regulators of surface mining, they answer
3 this question. They say that when you're making
4 your material damage assessment, it has to be with
5 respect to all previous mining. They say mining
6 is first come, first serve. If the existing
7 mining is already going to take you past that
8 threshold, which the 13 percent will do, then you
9 may not add any more. That's what OSM has said.

10 We cite on the next Page on Page 17,
11 where the Alaska Supreme Court says the same
12 thing, and the Alaska Supreme Court explained that
13 this is mandated by the intent and language of the
14 purpose -- the language, the purpose of the
15 statute, which is to assess cumulative impacts.

16 If they could do, as Mr. Lucas is
17 proposing, and say, "Sorry. That's material
18 damage, but that was all the earlier mining."
19 This stuff is just going to extend that material
20 damage for 100 years. That completely undermines
21 the purpose of the statute if they can say, "We're
22 causing material damage, but we already did that
23 before. We can just go on forever to expand
24 mining."

25 And they quibble about whether or not

1 the -- how long this will take. Here is Dr. Hinz
2 again saying, "This is going to extend that
3 duration for hundreds of years."

4 So I think that we need to anchor our
5 discussion of this to authorities and law, and I
6 think that is clearly on our side. They cited
7 none to the contrary.

8 BOARD MEMBER DEARMENT: Madam Chair, Mr.
9 Hernandez. Some of your argument made hydrologic
10 and some common sense to me. In your brief you
11 mention sort of the rule of holes. If you find
12 yourself in one, stop digging. And if you find
13 yourself with an impaired stream, stop adding to
14 the source of impairment.

15 I think Mr. Lucas has said despite any
16 hydrologic or common sense I might see in it,
17 there is not much legal basis for this argument,
18 although we might both want there to be one, and
19 that Pinto Creek does not apply, and that's your
20 only legal hook, and it's not valid. I'm trying
21 to make sense, I guess, of is there really a basis
22 in law for that stop digging premise of your
23 argument?

24 MR. HERNANDEZ: I think that the basis
25 -- Madam Chair, Mr. Dearment. I think this is a

1 little bit of a unique question, and the reason
2 there is not an abundance of State case law on
3 this is because material damage is only defined to
4 include water quality standards in Montana. This
5 is unique, kind of the first issue here.

6 But what is absolutely clear in the law
7 that I point to is that when you're assessing
8 material damage, you have to look at the whole
9 picture. That is undisputed. Mr. Lucas, despite
10 his pleas for law on it, has cited no law to the
11 contrary suggesting that taking piecemeal this
12 analysis.

13 Page 16 and 17 I extended the brief by
14 putting extensive quotes in there, because I don't
15 want you to take my word for it. I want you to
16 take the word of the Office of Surface Mining and
17 the word of the Alaska Supreme Court. You have to
18 look at the whole picture.

19 And then next question is they have to,
20 as we saw in 405(6), they have to affirmatively
21 determine that the cumulative hydrologic impacts
22 will not result in a violation of the water
23 quality standards. Well, where do we find
24 information as to what causes a water quality
25 standards violation?

1 We look to case law that's interpreted.
2 The case law that's interpreted what causes a
3 violation of water quality standards is Pinto
4 Creek. And you say, "Well, that's the Clean Water
5 Act," but as the proposed findings recognize, the
6 fact that Montana chose to define material damage
7 in a very protective way by including a violation
8 of any water quality standard in it incorporates
9 the Clean Water Act concept of water quality
10 standards into MSUMRA.

11 And what under the Clean Water Act
12 causes a violation of water quality standards?
13 Adding more pollution to a creek that's already
14 impaired, and that's what Pinto Creek says.

15 BOARD MEMBER DEARMENT: Madam Chair. I
16 notice you focus on the water quality standards as
17 the definition of material damage, but as I read
18 it here in the findings of fact and conclusions of
19 law, the definition also seems to include -- it
20 says, "Beneficial uses of water are adversely
21 affected."

22 Does it not also incorporate
23 specifically these types of TMDL level
24 considerations that benefit aquatic life
25 beneficial use support? It seems broader than

1 just water quality standards.

2 MR. HERNANDEZ: It is. I think the
3 clear intent of the legislation there was to be
4 broadly protective, as protective as possible, not
5 just beneficial uses, all designated uses, and
6 specifically water quality standards. And the
7 Board, the other authority that's important that's
8 already addressed this issue is In Re: Bull
9 Mountain decision by this Board.

10 And the Board said material damage is
11 the suite of water quality standards that Montana
12 has. And the CHIA, DEQ in fact in its CHIA, they
13 do a good job of saying material damage criteria,
14 criteria by which we assess material damage
15 assessment are water quality standards. They say
16 that in the CHIA. It's Page 2-2, 2-3, 2-4.

17 And we're not inventing -- This is a
18 standard they set. It's a high standard. It's a
19 standard the Legislature set. Unquestionably it's
20 a high standard. They can't ignore it, and that's
21 what they're doing here.

22 And like the Florida Court said about
23 the rule of holes. They can't ignore -- they
24 can't just say, because of the language of the
25 water quality standards, they can't just say, "So

1 what? It's just a small creek in eastern
2 Montana."

3 The standard applies everywhere, even if
4 it's a big mine with important corporations that
5 own it, even if there is a big power plant, the
6 standard's the same. Violation of water quality
7 standards. And if --

8 What happens if you accept their
9 argument? Basically they can piecemeal destroy
10 all of the creeks in Montana, take one step at a
11 time. "This only extends the violation. This was
12 only a little bit. The pollution was caused by
13 our other mining operations."

14 And this point I think is startling. In
15 the world of civil law, there is a common defense
16 argument called the empty chair defense, where you
17 point to someone else and say, "It wasn't us."
18 That's what they're doing. "It wasn't us, it was
19 them," and you point to the empty chair. "That's
20 the person you should be getting after." And it
21 saves --

22 But here what they're doing incredibly
23 is pointing at themselves. They're saying, "It's
24 not us. The 13 percent is our other mining
25 operation," and that's just mind boggling that

1 they can say that, "Sorry. We're not getting,
2 causing material damage here because our other
3 mining operations are causing that." And I feel
4 that --

5 CHAIR DEVENY: I'd ask you to cut it
6 short.

7 MR. HERNANDEZ: I feel that the Board
8 should be guided both by its prior decisions, the
9 case law that we've cited, and the very purpose of
10 the statute, which is what In Re: Friends of Pinto
11 Creek was about, interpreting a statute in a way
12 that ensures its goals of environmental
13 protection. If they can go piecemeal destruction
14 of creeks, well, the statute means nothing.

15 CHAIR DEVENY: Thank you.

16 MR. MARTIN: Madam Chair, may I be
17 heard?

18 CHAIR DEVENY: John, do you have further
19 questions of Mr. Hernandez at this point, or do
20 you --

21 BOARD MEMBER DEARMENT: Not right now.
22 I would appreciate hearing from Mr. Martin if he
23 has follow-up.

24 CHAIR DEVENY: Mr. Martin.

25 MR. MARTIN: Thank you very much, Madam

1 Chair, Mr. Dearment. Let's talk about what was
2 really found as opposed to this speculation that
3 we've heard.

4 We've just heard that, "Gee, it's
5 obvious that this mining company has caused this
6 impairment." That's just not true. And I would
7 invite the Board's attention to Page 67. And by
8 the way, these findings are repeated elsewhere in
9 the decision document.

10 First let's talk about Upper EFAC.
11 There the Hearing Examiner notes that, "The
12 evidence showed that the salinity in Upper EFAC
13 was likely attributable to its inherent nature as
14 an ephemeral stream, and the loss of stream side
15 vegetation most likely is the result of
16 agriculture," farming.

17 So first with respect to Upper EFAC.
18 The salinity issue, the impairment issue that he
19 cites didn't come from mining, it came as a
20 natural consequence of a prairie stream in
21 Montana, and also from agriculture.

22 Let's move to Lower EFAC. With respect
23 to Lower EFAC, impairments were likely
24 attributable to other downstream sources, e.g.,
25 the town of Colstrip. Similarly -- and now we're

1 going to talk about the uses, your question --
2 Upper EFAC was not supporting most of its
3 beneficial uses, such as wading, swimming,
4 salmonid fishes, "because of its ephemeral
5 nature."

6 The Conservation Groups did not produce
7 any convincing evidence that EFAC's existing
8 impairment was previously attributed to the
9 operations of the Rosebud Mine. This isn't the
10 empty chair. This isn't pointing the finger back
11 at us. We didn't do it. And that's apparent from
12 the findings of the Hearing Examiner.

13 In fact, the decision goes on to note,
14 "As a matter of fact, Conservation Groups
15 conclusions fail because there is no evidence that
16 the AM4 amendment, which is the only permitting
17 decision at issue in this case, will cause any
18 increase in salinity in the EFAC alluvium."

19 Let's talk about that issue. This
20 assertion that this amendment is going to increase
21 salt and TDS in the stream is simply belied by the
22 evidence. First, there was an evaluation of all
23 mining, and I'm not talking just about AM4, I'm
24 talking about all of the mining that contributes
25 any salts to East Fork Armells Creek.

1 The evidence that was accepted by the
2 Hearing Examiner determined that there was not a
3 detectable increase in salts in the surface waters
4 of East Fork Armells Creek, even with the
5 projection, the 13 percent projection that we all
6 talk about, because of the variability of the
7 stream. It's not statistically significant, and
8 in fact, you cannot discern downstream any impact
9 associated with all mining.

10 You just heard me say all mining, not
11 AM4. Obviously AM4 would be a subset of all
12 mining, and it's adamantly the case that the
13 evidence demonstrates that there is no impact from
14 AM4. In fact, there was evidence, interestingly
15 enough, Dr. Nicklin's testimony, and if I were
16 better able to point you to a specific citation, I
17 could be more precise about this.

18 There is some interesting evidence that
19 when they evaluated TDS levels downstream from the
20 mine, and in fact downstream from the intersection
21 with the West Fork Armells Creek, salinity levels
22 had actually decreased since the beginning of
23 mining.

24 I'm not suggesting that mining decreased
25 salinity in the stream, but what I am suggesting

1 is there is absolutely no proof of this assertion
2 that there is some sort of material damage either
3 from AM4, or for that matter, from all mining.

4 Just very quickly, the OSM discussion in
5 the regulations is irrelevant. Montana has had
6 this program for many years under the shared
7 responsibility under the SMCRA statute. Montana
8 gets to decide this. MSUMRA governs this. SMCRA
9 has no role.

10 If you look at Judge Christensen's
11 decision in 2015, he cited that provision of SMCRA
12 that expressly says that once you have primacy for
13 a state, you have exclusive jurisdiction over
14 surface mining. That argument is completely
15 irrelevant. Thank you.

16 CHAIR DEVENY: Thank you.

17 BOARD MEMBER DEARMENT: Could I follow
18 up one more time?

19 CHAIR DEVENY: Yes.

20 BOARD MEMBER DEARMENT: I don't mean to
21 make Mr. Hernandez's argument for him, or even
22 validate. I'm just, as a non-lawyer trying to get
23 some understanding of what the law requires.

24 I think even if we were to grant
25 everything you said as just true, that Mr.

1 Hernandez might say that that is irrelevant
2 because the law prohibits even a single grain of
3 salt in a single drop of water from going to that
4 listed impaired stream from this permitted mining
5 operation; that in its most extreme, that's what
6 it is. They simply cannot discharge any salinity
7 to the stream, because it's already impaired,
8 until the TMDL has been completed.

9 If that's true, then I don't know that
10 it matters that the mine caused the impairment
11 initially, or that the variability is very great,
12 or that the contribution is very small. It's
13 simply the Department is prohibited from issuing
14 the permit under those circumstances.

15 If there is no legal basis in that for
16 that, no salt whatever can go from the mine to the
17 stream, and I don't think we have much -- I think
18 you've articulated the way out.

19 MR. MARTIN: And Mr. Dearment, I think
20 you make a very valid point, that unless there is
21 a statutory constraint, a regulatory constraint,
22 something that says if it's an impaired stream,
23 there can be no further contribution -- and we're
24 not talking about a surface water discharge under
25 the Clean Water Act. You know more about TMDL's

1 than I'll ever know. This is not that regime.

2 Rather we're required under MSUMRA to
3 assess whether or not there is material damage to
4 the hydrologic balance outside of the permit area.
5 That's the standard. And the fact that we have an
6 impaired stream really shouldn't impinge on that.

7 Let me add. If we were to look at --
8 and it's always dangerous when a pointy-headed
9 lawyer started to stray into technical scientific
10 issues. But if I had to guess, based on my
11 experience with these issues, I'm guessing that a
12 very significant portion of the prairie streams in
13 eastern Montana are impaired for TDS. That's
14 their natural state.

15 And by the reasoning that we've heard
16 from the MEIC folks, that means that there can
17 basically be no contribution of anything from any
18 surface water discharge. That's a Clean Water Act
19 argument.

20 I think what they would say is, "Well,
21 that means that there can be no mining at all."
22 If there is even one molecule added to an impaired
23 stream, even if it's impaired naturally, that's
24 prohibited. Simply put, that cannot be what
25 MSUMRA was intended to do.

1 BOARD MEMBER DEARMENT: I just have one
2 follow-up. I think -- I don't want to speak for
3 him -- but if they're arguing that can't happen
4 until the TMDL has been completed, there would
5 never be a discharge, but there needs to be a plan
6 in place to address the existing impairments
7 before any action could occur that might
8 exacerbate those impairments.

9 MR. MARTIN: And two responses to that.
10 One is the obvious, and that is that's a
11 completely different regime that applies to
12 surface water discharges, and doesn't apply in
13 this context. What you're talking about now is
14 water that is not controlled under the Clean Water
15 Act.

16 And second, I should also say that the
17 one case that addressed this issue, it was the
18 Ninth Circuit in Wild Swan. There the Ninth
19 Circuit said the fact of impairment does not
20 prevent entirely the contribution of any
21 pollutants under the Clean Water Act. That's what
22 the case law says.

23 Now, that said, you don't need to reach
24 that issue. And again, I can't help but add:
25 Mining had nothing to do with the high levels of

1 TDS. That's a naturally occurring circumstance in
2 probably the majority of prairie streams in
3 eastern Montana. So it strikes me as a non
4 sequitur. I don't think there's a legal basis for
5 the argument.

6 MR. LUCAS: Madam Chair, if the
7 Department could briefly be heard with respect to
8 Board Member Dearment's concerns?

9 CHAIR DEVENY: Okay.

10 MR. LUCAS: I think the most important
11 thing the Board needs to keep in mind is that
12 MEIC, Petitioners, did not even prove
13 contribution, Member Dearment. Their expert
14 failed to calculate any increase in TDS.

15 So even if contribution did apply as the
16 directed verdict shows us, they didn't even meet
17 that standard. There is no increase. There is no
18 adding more of salt. The impairment --

19 MR. HERNANDEZ: That's a
20 misrepresentation. I'd like to have the
21 opportunity to correct that.

22 MR. LUCAS: Well, it says -- they can
23 correct it as much -- We can sit here all day, and
24 I can point to what the proposed ruling action
25 says.

1 CHAIR DEVENY: We're not going to have
2 arguments between the two of you. Continue to
3 answer --

4 MR. LUCAS: I would rather not. Thank
5 you.

6 CHAIR DEVENY: -- the question, and
7 after the break, we may allow you to address that.

8 MR. HERNANDEZ: Thank you, Madam Chair.

9 MR. LUCAS: They did not prove a
10 contribution. They've got this vacuous argument
11 that was a hypothesis. Not only did he not
12 calculate any increase in concentration, Member
13 Dearment, he couldn't even say -- He said, "Well,
14 there will be an increase," and he couldn't even
15 tell us qualitatively whether it was significant
16 or not.

17 So what really bothers me is underlying
18 a lot of Mr. Hernandez's arguments are conclusions
19 and evidence that is contradicted by the record,
20 and that's a big problem.

21 Now, is there a water quality violation
22 in East Fork Armells Creek? The creek itself is
23 not meeting water quality standards. What we're
24 looking at here is whether the mine operating as
25 proposed is designed to prevent that. That's a

1 very different issue.

2 Now, the definition of material damage,
3 which keeps getting glossed over, it's not simply
4 that there be a violation of water quality
5 standards, but that be -- and I think I'm quoting
6 the exact language. It probably won't get up
7 there in time -- by mining, by coal mining and
8 reclamation operations. Okay? The stream could
9 be impaired for any number of reasons, but if the
10 violation is not caused by mining, that's not
11 material damage.

12 So I just wanted to point out one of the
13 underlying assumptions in what he's saying is that
14 material damage is existing. His witness couldn't
15 establish that, the findings don't say that.
16 Please don't make your decision based on his
17 characterization. Analysis is what should guide
18 you. Thank you.

19 CHAIR DEVENY: Our Court Reporter and
20 everybody needs a break at this point, so we'll
21 come back in ten minutes.

22 (Recess taken)

23 CHAIR DEVENY: Let's reconvene.
24 Hillary, are you still with us?

25 MS. HANSON: (No response)

1 CHAIR DEVENY: Hillary Hanson?

2 (No response)

3 CHAIR DEVENY: We seem to have lost
4 Hillary. We'll continue without her.

5 MS. FORD: I'll send her an email.

6 CHAIR DEVENY: Mr. Hernandez, you wanted
7 to respond to Mr. Lucas's comments. If you could
8 just keep it to one to two minutes at the most.

9 MR. HERNANDEZ: Absolutely. Four brief
10 points. There is a question about whether or not
11 the mining would cause an increase. The CHIA is
12 unambiguous. CHIA 99 base flow in EFAC in surface
13 water 55 is predicted to experience a post-mining
14 increase of 13 percent. It's 13 percent. And DEQ
15 is trying to get away from that by saying, "We can
16 piecemeal it and separate out AM4."

17 OSM in the Alaska Supreme Court says you
18 can't. There is causation here, causing a 13
19 percent increase. And it's not a molecule. If we
20 advance to -- WECO's own expert said it's going to
21 be 82 tons. The cumulative contribution of salt
22 in this creek that is already impaired with salt
23 from the mine is going to be 82 tons each year.

24 How long is this going to persist? Ms.
25 Hinz says, Dr. Hinz, tens to hundred of years.

1 We're not talking about molecules here, we're
2 talking about almost 100 tons of salt every year
3 to a creek that's impaired.

4 Now, if you accept their argument and
5 say, "Well, we didn't cause the initial
6 impairment," that does that mean? That is a
7 dangerous path that would happen, because then it
8 would mean that as long as a creek is already
9 impaired by any other cause, surface mining can't
10 violate water quality standards. You can just
11 continue to violate it forever.

12 They can't do that. That's what
13 environmental law has gotten past by saying you
14 have to have a cumulative analysis. It's not a
15 free pass once the water is polluted. They can't
16 get -- If you did that, it would mean the statutes
17 mean nothing.

18 And finally the question of
19 measurability and significance, that it's just a
20 red herring, it was post hoc information presented
21 by WECO's experts after the fact. And they said
22 actually, when pressed, they said it's measurable.
23 Maybe it's not within the deviation if we take
24 twelve samples. If you take enough samples, you
25 can detect a 13 percent increase in the creek.

1 Everyone admitted that. That's not disputed. And
2 with that, I'll close.

3 CHAIR DEVENY: All right. I have a
4 question of DEQ. I kind of need some
5 clarification on the magnitude issue. And my
6 background in science kind of helps me understand
7 the saturation of the alluvium, and the fact that
8 the contribution of the increased runoff through
9 the mining areas is going to continue to keep that
10 saturation up there.

11 And it appears that -- Mr. Hernandez
12 pointed out that there have been statements that
13 we're not going to have increases in
14 concentrations per se, but the duration of the TDS
15 is going to be for a much longer period.

16 And can you point me to the place in the
17 statute or the law regarding the material damage,
18 or wherever it is, that says that duration is not
19 to be considered.

20 MR. LUCAS: No. You have to read -- the
21 definition of material damage is a violation of a
22 water quality standard. The proposed action, as
23 the proposed ruling found, will not violate a
24 water quality standard.

25 So it's like I can do 80 out there on

1 15. No Highway Patrolman is going to pull me over
2 and say, "Well, you've been within the bounds of
3 the law. However, you did 80 for five hours."
4 It's a threshold issue, Madam Chair.

5 If there is no violation of water
6 quality standard, then it does not matter how long
7 there will be a change in TDS from mining.
8 They've complied with the law. Material damage is
9 a violation of a water quality standard. There is
10 no finding that a water quality standard is being
11 violated here. So that's what that is getting at.

12 And when Signal Peak talked about
13 duration, my predecessor or my predecessor's
14 predecessor made a very bad argument to this Board
15 that, "Well, material damage will happen, but that
16 won't be for 50 years."

17 That's not the case here. The only
18 evidence here shows that material damage has not
19 happened, will not happened if the project
20 proceeds as proposed. So that's why the duration
21 is a true red herring.

22 And material damage, the definition
23 talks about magnitude in a manner or to an extent.
24 Those are the words of magnitude. And more
25 importantly, all of the applicable water quality

1 standards are set forth in terms of concentration.
2 Even the narrative standards say no increase in
3 concentration that would result in "X."

4 So the duration issue, if it was
5 material, if this CHIA showed that there would be
6 material damage but only for one day, the flip
7 side of that coin, we'd have to deny the permit
8 because it's material damage.

9 CHAIR DEVENY: Thank you.

10 BOARD MEMBER DEARMENT: Could I follow
11 up on that, please?

12 CHAIR DEVENY: Yes.

13 BOARD MEMBER DEARMENT: I'm trying to
14 figure out how to phrase this, but you focus on
15 exclusively on the water quality standard
16 violation as the definition of material damage;
17 but it clearly says there, "In a manner or an
18 extent that beneficial uses of water are adversely
19 affected."

20 MR. LUCAS: Correct.

21 BOARD MEMBER DEARMENT: If the
22 beneficial uses of the water include aquatic life,
23 and they're already impaired, extending that
24 impairment or contributing additional pollutants
25 to that impairment for an additional length of

1 time is pretty clearly an adverse effect on the
2 aquatic life of that stream.

3 MR. LUCAS: Well, first of all, they're
4 not contributing additional salt, so you start
5 with that, right? The definition of material
6 damage clearly encompasses beneficial uses.

7 In this case, Petitioners allege that
8 the beneficial use for aquatic life support would
9 be materially damaged by the mine, and that's why
10 Dr. Hinz in part -- she used multiple lines of
11 physical, chemical, and biological evidence.

12 Dr. Hinz went and took macroinvertebrate
13 sampling data from 1970, compared it to
14 macroinvertebrate data from 2014 at the mine, and
15 that showed that a diverse community of aquatic
16 insects consistent with what we find elsewhere in
17 eastern Montana streams, and consistent with the
18 diversity that was present in the 1970s, was still
19 using the reach.

20 So the issue, Member Dearment, isn't
21 whether the stream is impaired. The issue is will
22 the mining cause material damage by violating
23 either a water quality standard, or adversely
24 affecting a beneficial use.

25 That issue did come up in this case. It

1 was decided against Petitioners. So we are
2 looking at the beneficial uses, as we know from
3 the Supreme Court case of PUD No. 1 out of
4 Washington, water quality standards consist of
5 designated uses, criteria to support those uses,
6 and anti-degradation policy.

7 So we are looking at the beneficial use,
8 the issue of the beneficial use did come up, but
9 their witness, their aquatic expert did not
10 conduct a material damage analysis, and that's why
11 the proposed ruling found that their claims of
12 existing water quality violations were limited to
13 the Department's so-called assessment records for
14 303(d) purposes. And none of those found that the
15 mine was the cause of the impairment of aquatic
16 life use in Upper East Fork or Lower East Fork
17 Armells Creek.

18 So again, you have to have that nexus of
19 caused by mining. And what this does, we have all
20 these other statutes, and we can talk about those,
21 but there are other ways to go about this. I
22 don't want to paint him a path to the door, but
23 they're obviously -- Pinto Creek applies to MPDES
24 permits. They've appealed the MPDES permit to the
25 Supreme Court. All their other remedies, they've

1 exhausted them.

2 It's not like the Department doesn't
3 care about East Fork Armells Creek. The
4 undisputed evidence in this case shows that mining
5 is not the cause of impairment, and that continued
6 operation will not result in material damage.

7 Thank you.

8 CHAIR DEVENY: Mr. Hernandez, if you'd
9 like one more.

10 MR. HERNANDEZ: One minute. Madam
11 Chair, Board Member Dearment. I don't understand
12 what Mr. Lucas said. He said they're not going to
13 add salt. The CHIA says they're going to add 13
14 percent more salt. It's already impairing,
15 violating water quality standards by impairing
16 aquatic life. I just don't see how they can get
17 past this.

18 The only way they can is by taking water
19 quality standards right out of the statute. It
20 just doesn't make sense. It's telling that they
21 then rely on Dr. Hinz's assessment of aquatic life
22 because she's not an expert in aquatic life.
23 She's admitted that. If that's what they're
24 relying on, we win, because she admits she's not
25 an expert on aquatic life.

1 And moreover, they admit that assessing
2 macroinvertebrates isn't a way to tell the creek
3 is impaired in eastern Montana. It just doesn't
4 make sense. They're already causing harm, causing
5 -- adding more pollution will just cause more
6 harm.

7 MR. LUCAS: Your Honor, if I may briefly
8 be heard.

9 CHAIR DEVENY: No, I think we're going
10 to --

11 BOARD MEMBER TWEETEN: Madam Chair.

12 CHAIR DEVENY: We've gone around a lot.

13 BOARD MEMBER TWEETEN: Question for Mr.
14 Hernandez. That doesn't say mining causes a 13
15 percent increase. It doesn't say that. It says
16 that it follows post-mining, but it doesn't say
17 that mining is the causative agent for that. It
18 doesn't say that.

19 MR. HERNANDEZ: But that matter is
20 undisputed in the record. That 13 percent is
21 attributable to mining. And if it's not, I invite
22 Mr. Lucas to clarify that 13 percent was referring
23 to cattle or anything else.

24 MR. LUCAS: I would have to look at the
25 particular section of the CHIA. If you want me to

1 clarify what is in the record, I would like an
2 opportunity to do that, but I will give you my
3 understanding.

4 The 13 percent increase is the result of
5 all related mining, including previously permitted
6 mining. That 13 percent was found by the previous
7 CHIA's to not violate water quality standards.
8 AM4, that 13 percent would exist with or without
9 AM4, so that's why I'm taking issue with him
10 saying that AM4 is adding anything, because it
11 doesn't.

12 And the record again -- This is very
13 frustrating for me because we have actual
14 findings, we did a whole trial on this, and he's
15 over there arguing to you without citing to the
16 record, because the record doesn't support his
17 position.

18 BOARD MEMBER LEHNHERR: Madam Chair.

19 MR. MARTIN: May I be heard very
20 briefly? Excuse me, Doctor.

21 BOARD MEMBER LEHNHERR: Go ahead.

22 MR. MARTIN: Just very briefly. There
23 is a bit of confusion I think about this 13
24 percent. Number one, it's not statistically
25 significant. Number two, this is in the alluvium,

1 it's not in the surface water. Number three, it's
2 not detectable in the surface water downstream.
3 And then finally the most important point is that
4 it just simply doesn't violate a water quality
5 standard.

6 Now I can get into the aquatic life
7 issue, but my sense is that the Board wants to for
8 the moment just focus on TDS. Mr. Dearment, would
9 you prefer that I talk about aquatic life as well?

10 BOARD MEMBER DEARMENT: Why don't you
11 start with TDS.

12 MR. MARTIN: Okay. Well, I think there
13 is some misunderstanding of what actually occurred
14 with respect to aquatic life. And I understand
15 your point when you say, "Look, TDS has an effect
16 on the critters." The bugs react to elevated
17 levels of TDS.

18 And as you might imagine, and this is
19 the expert testimony that we heard at trial,
20 prairie streams in eastern Montana have a lot of
21 TDS. Those critters react to it. And the
22 diversity, the numbers of critters is lower in
23 eastern Montana prairie streams than it might be
24 in some other streams.

25 What we had here was a comparison. The

1 comparison was first the data from the 1970s,
2 which is to say pre-mining, and it was a
3 comparison that was done by an expert. It was a
4 report that was required in one of those
5 deficiency notices. It was a report that was
6 referred to in the record as the Arcadis report.

7 This is not simply Dr. Hinz speculating
8 about what might be the impact on aquatic life.
9 As it turns out, this was done by an expert who
10 actually testified in the hearing.

11 Peggy Hunter concluded that in fact, the
12 population that you see in East Fork Armells Creek
13 is the standard population that you see in eastern
14 Montana prairie streams, and that there was
15 effectively no difference between the data that
16 she saw in the 1970s from what she saw when she
17 did her analysis, her survey in 2014.

18 This is not simply somebody saying,
19 "Well, there are a few critters there, so there
20 can't be an effect on aquatic life." It was
21 scientifically done. It was done in accordance
22 with DEQ protocol. There were experts who
23 conducted this survey, and they concluded that
24 there was no impact on aquatic life.

25 CHAIR DEVENY: And we know that those

1 are not the standards that are usually used for
2 eastern Montana streams, but --

3 MR. HERNANDEZ: In fact --

4 CHAIR DEVENY: If that's what you were
5 going to say, let's just move on.

6 MR. HERNANDEZ: Yes. That's it, but
7 other than that, almost everything that my
8 colleague and friend Mr. Martin said was just not
9 accurate. They didn't have an expert analyze
10 bugs. It was Dr. Hinz.

11 Aleisha, would you please put up my
12 slides? I think the slides are important because
13 the Board has got to look at the record and see
14 what it says, because here -- This was the
15 assessment they did to determine whether or not
16 there was aquatic life in the stream. That's as
17 far as they used that data. Is anything alive?
18 That's what Dr. Hinz testified to.

19 That is not a scientific assessment.
20 She's not a scientist in aquatic life. She's a
21 wonderful hydrologist, but not a biologist of any
22 kind. This is their assessment of diversity:
23 More than one. That's all they meant. It was not
24 some kind of scientific assessment.

25 And then as far as Ms. Hunter goes, DEQ

1 expressly told her not to assess the health of
2 aquatic life in the creek. You indicated to Ms.
3 Hunter not to apply the biological indices of
4 their assessment. They have biological indexes
5 for health of aquatic bugs, which the metrics they
6 used was aquatic life health in eastern Montana
7 streams. They said, "Don't use them."

8 And that's Ms. Penny Hunter's statement
9 below. "I was instructed not to follow the water
10 quality assessment method," that over and over DEQ
11 said, "Don't look at the science. We don't want a
12 scientific assessment, and we don't want you to
13 actually do an assessment." And for them to come
14 in here and then say, "But we did," it's just not
15 accurate.

16 And the final point that I'll leave here
17 with is that they talk about this comparison.
18 This is what the CHIA says. It expressly rejects
19 making comparison between the 1970s data and the
20 2014 data, because Dr. Hinz, even though she's a
21 hydrologist, and not a biologist, she recognized
22 that these assessments used different
23 methodologies, and if they're using different
24 methodologies, they're not comparable. That's
25 what every expert who testified also said.

1 So the fact that they're relying on this
2 means they have nothing to rely on. Thank you,
3 Madam Chair.

4 CHAIR DEVENY: Mr. Dearment.

5 MR. LUCAS: Madam Chair, if I could be
6 heard in response to that.

7 CHAIR DEVENY: Mr. Dearment, go ahead.

8 BOARD MEMBER DEARMENT: Thank you, Madam
9 Chair. Mr. Hernandez, even if we took for the
10 sake of argument, and assumed that DEQ's
11 macroinvertebrates assessment was valid and
12 correct, isn't it largely irrelevant to your
13 fundamental argument, which is that simply that
14 any discharge by the mine to the impaired stream
15 is unlawful, regardless of the macroinvertebrates,
16 regardless of the magnitude of the discharge, that
17 it's simply protected until the TMDL is complete?
18 Isn't that kind of the heart of what you've been
19 arguing?

20 MR. HERNANDEZ: Madam Chair, Board
21 Member Dearment. They're distinct claims.
22 They're distinct assessments of water quality
23 standards. They're both wrong, we maintain, and
24 this Board in In Re: Bull Mountain said that DEQ
25 applied the water quality standard that's not

1 right, that's unlawful under SMCRA.

2 And here, there's no question -- Mr.
3 Lucas to his credit said correctly that aquatic
4 life uses, designated uses, are water quality
5 standards. That's the Supreme Court's decision in
6 PUD number whatever 13.

7 How did they assess growth and
8 propagation of aquatic life in the creek? They
9 said, "Is there anything there?" There is no
10 question that that is not the standard that DEQ
11 uses to assess water quality standards for aquatic
12 life, because it's absurd. If the mere presence
13 of aquatic life were sufficient, water quality
14 standards mean nothing.

15 CHAIR DEVENY: I'd like to ask Mr. Lucas
16 a question, and that is: If we totally threw out
17 the macroinvertebrates sampling, were there other
18 methods that were used to assess the health of the
19 creek that are -- I'm not asking for something
20 that's outside the record.

21 MR. LUCAS: Yes, Madam Chair. We cite
22 this in our response to their exceptions. The
23 proposed ruling clearly found that Dr. Hinz and
24 others assessed multiple lines of evidence,
25 physical, chemical, and in the case of the

1 macroinvertebrates biological data. So there are
2 other grounds, other lines of evidence supporting
3 this conclusion.

4 But I do want to speak to the continued
5 mischaracterization of what happened here. As
6 we've tried to explain to you, there was a coal
7 program that does MSUMRA, there was a water
8 quality program that implements the Clean Water
9 Act.

10 Section 303 of the Clean Water Act
11 requires that they go out and they assess the
12 health of streams. Assessing the overall health
13 of a stream, as our expert Eric Urban explained,
14 and as these findings -- which by the way, you've
15 already adopted -- explained, we don't use
16 macroinvertebrates data to determine overall
17 stream health for 303(d) listing impairment
18 purposes in eastern Montana, because it's not
19 reliable.

20 And we did tell Arcadis: "Do not do
21 this quantitative analysis because we're not
22 asking you whether the stream is impaired. We
23 know it is. We want to know the impact of this
24 operation, and to determine that impact, we're
25 going to do an empirical analysis of the biota

1 that were there in the 1970s, and the biota that
2 were there in 2014."

3 So again, you're being misled with the
4 argument that we told people not to use science.
5 This is why you need to hear from scientists and
6 not lawyers characterizing science. It's a
7 perfect example. The issue is: Is it a reliable
8 method? Yes, but for what? What's the
9 application?

10 There was an impact assessment that was
11 done under MSUMRA. The water quality division did
12 not want some kind of quantitative analysis
13 because that wasn't the issue. We're trying to
14 protect our methods, and the integrity of the
15 science. And you can't let Petitioners keep
16 blurring the lines.

17 We put a witness on the stand. You've
18 got paragraph after paragraph of findings
19 explaining to you why we told them not to do a
20 quantitative analysis, to give us the information
21 that Dr. Hinz requested, and how we used that
22 here. And even their own expert agreed that that
23 was an appropriate application of the data for the
24 purposes Dr. Hinz used it on.

25 So we can sit here all day, and

1 eventually it will be a question of stamina,
2 because I'm already losing where I am in this
3 ruling. But we have a ruling. Can we please
4 focus on the ruling? And the ruling says what it
5 says, not what Mr. Hernandez wants it to say.
6 Thank you.

7 MR. MARTIN: May I offer just a
8 supplement to that, Madam Chair?

9 CHAIR DEVENY: Very briefly.

10 MR. MARTIN: Very briefly, and I'll
11 focus on what was actually decided in this
12 hearing.

13 First Paragraph 177 on Page 46. Western
14 Energy through Arcadis conducted the aquatic life
15 survey consistent with guidance provided by DEQ
16 regarding the appropriate methodology and
17 protocols, and submitted the aquatic life survey
18 to DEQ on February 2015.

19 And moving over to Paragraph 188 in
20 connection with DEQ's informed material damage
21 determination, Dr. Hinz appropriately utilized the
22 updated macroinvertebrate sampling data via
23 qualitative analysis as an indicator of whether or
24 not aquatic life was still being supported in EFAC
25 in its current TDS concentration. And recall that

1 the TDS levels are not a product of mining.

2 Go to Paragraph 190 on Page 50. Dr.
3 Hinz has concluded that the updated
4 macroinvertebrate survey empirically demonstrated
5 that a diverse community of macroinvertebrates
6 consisting of taxa commonly found in eastern
7 Montana prairie streams was using the stream reach
8 at issue.

9 193 on the same page, the 2014 Arcadis
10 report shows that EFAC's beneficial use of aquatic
11 life is supported and consistent with natural
12 conditions of ephemeral prairie streams and with
13 historic data.

14 And then finally, taxa richness was
15 similar to all of the sites sampled along East
16 Fork Armells Creek in the 1970s, and the 2014
17 Arcadis report demonstrates similar diversity of
18 the macroinvertebrate community in East Fork
19 Armells Creek. I could go on.

20 CHAIR DEVENY: Thank you. So have we
21 exhausted our discussion on TDS and material
22 damage, or do Board members want to ask more
23 questions or get more clarification?

24 BOARD MEMBER HORNBEIN: I actually have
25 a couple more questions. The first one for Mr.

1 Lucas or perhaps your hydrologic expert. This is
2 really more of a hydrologic question.

3 You said a number of times that there is
4 no additional salt going into the system, but the
5 way I read the findings of fact was there is in
6 fact additional salt that would be added, but the
7 carrying capacity of the water is such that at a
8 certain level, there just isn't more salt that
9 will dissolve into the water, and therefore
10 increase the concentration.

11 I just want to make sure that I'm
12 understandingly correctly the way this is working,
13 because no salt being added to the system is a
14 little bit different than there will not be an
15 increase in the concentration of salt.

16 MR. LUCAS: There won't be an increase
17 in the concentration of salt. That's pretty
18 clear.

19 The carrying capacity is another example
20 where Petitioners put this in their brief without
21 a citation to the record --

22 BOARD MEMBER HORNBEIN: I'm only looking
23 at the findings of fact here. I'm not --

24 MR. LUCAS: Right, but I'm trying to get
25 back to carrying capacity. Where carrying

1 capacity is discussed, that's not in terms of a
2 surface water TMDL. Dr. Hinz discussed carrying
3 capacity with respect to the ability of the ground
4 water to only carry so much salt on its way to
5 contributing base flow to the stream. So I want
6 to be clear about what that carrying capacity
7 issue is.

8 BOARD MEMBER HORNBEIN: Doesn't that
9 also encompass the 13 percent increase? Is that
10 with reference to the groundwater, or is that with
11 reference to what would be added to the surface
12 water?

13 MR. LUCAS: I'm glad you asked that
14 question, Member Hornbein, because this is another
15 area where Petitioners have distorted and
16 mischaracterized the record, and we talk about
17 this in our --

18 CHAIR DEVENY: Just answer the question,
19 please.

20 BOARD MEMBER HORNBEIN: And for
21 clarification, it's Hornbein.

22 MR. LUCAS: Hornbein. I apologize.
23 What the record shows is that Petitioners never
24 prove, although they just assumed, that a 13
25 percent increase in the alluvial translates to a

1 13 percent increase in the stream.

2 The proposed ruling in fact finds that
3 they did not establish that it's a one-to-one 13
4 percent in the alluvium equals 13 percent in the
5 steam. And that was all based on what happened at
6 trial.

7 There -- and I'm going to have to look
8 for this since you've asked this specific
9 question. Petitioners' experts failed to
10 calculate an increase in salinity in EFAC as
11 opposed to the alluvium. That's at Page 36,
12 Finding of Fact 125, Page 39, Finding of Fact 143.

13 Groundwater base flow from the alluvium
14 to EFAC is actually insignificant -- and now I'm
15 going to quote the proposed ruling -- which means
16 that, quote, "TDS levels in EFAC will not be
17 significantly impacted by groundwater TDS levels
18 associated with the AM4 permit."

19 So it's important to note that the only
20 evidence we have shows that while the alluvium
21 will increase by 13 percent, which again is well
22 within the nature and range of natural variability
23 and indistinguishable in the alluvium, it will
24 only be a minor contribution of base flow from the
25 alluvium to the stream.

1 So you just can't say 13 percent in the
2 alluvium equals 13 percent in the stream. I tried
3 to lay that out in my response to their
4 exceptions. And all I'm doing is citing what the
5 proposed ruling says. So I'm sorry I keep going
6 back to that, Madam Chair, but this is --

7 CHAIR DEVENY: No, I don't mind. I just
8 don't want the editorializing.

9 MR. LUCAS: What this is is exactly what
10 lawyers are not supposed to do. We're not
11 supposed to multiply proceedings. You're supposed
12 to work in a proceeding, and the issues are
13 supposed to get narrower and more refined.

14 Everything you're dealing with here is
15 obfuscation and mischaracterization. This is what
16 I started with in my opening statement here. This
17 is not respecting the science. This is someone
18 trying to tell you that a proposed ruling says
19 something that it doesn't.

20 And if you guys are okay with that, I
21 understand you're impartial, you're independent,
22 you must have the judicial temperament. Maybe it
23 just looks a little bit more aggravated from where
24 I sit. But it is a big problem, and it's
25 prejudicial, and it needs to please come to an

1 end. I'll answer any question you have, but the
2 record is the record, and it's not what you're
3 being told.

4 BOARD MEMBER LEHNHERR: Madam Chair.
5 I'm just looking for a little bit of
6 clarification. We're talking about an amendment
7 that would increase the amount of minable acres in
8 Area B. Is Area B currently being mined?

9 MR. LUCAS: I would have to --

10 MR. MARTIN: Dr. Lehnherr, I think I can
11 answer that question.

12 MR. LUCAS: Yes, it is currently being
13 mined.

14 MR. MARTIN: The answer is yes.

15 MR. LUCAS: This is an increase of 49
16 acres of that area.

17 BOARD MEMBER LEHNHERR: Thank you.

18 CHAIR DEVENY: So Board, what's your
19 pleasure with the TDS and material damage
20 conclusions of law? Are we wanting to stick with
21 the finding of the Hearings Officer, or have you
22 been convinced that we should make some changes to
23 any of these?

24 BOARD MEMBER BUSBY: I think the Hearing
25 Officer's conclusions of law are at least

1 consistent with the facts as we've approved them.

2 BOARD MEMBER TWEETEN: Madam Chair,
3 could I suggest that we simply proceed through the
4 numbered paragraphs, and just consider them one at
5 time, and cumulatively as we go through. It seems
6 to me the most orderly way to start addressing
7 this. We've already done 18.

8 CHAIR DEVENY: We've done 18, so we're
9 going to start at 19, starting at Page 82 of the
10 hard copy I have, and it's probably a different
11 number on the electronic copy.

12 BOARD MEMBER LEHNHERR: 235.

13 CHAIR DEVENY: 235.

14 BOARD MEMBER LEHNHERR: Of the agenda
15 packet.

16 CHAIR DEVENY: No. 19.

17 BOARD MEMBER TWEETEN: For purposes of
18 discussion, I move we adopt 19.

19 BOARD MEMBER BUSBY: I'll second that.

20 CHAIR DEVENY: It's been moved and
21 seconded. Is there any further discussion by the
22 Board?

23 BOARD MEMBER TWEETEN: Well, Madam
24 Chair, this is really one of the ultimate
25 questions of law in this case, which is whether

1 the company's met their burden before the
2 Department of demonstrating in their application
3 that the hydrologic consequences and cumulative
4 hydrologic impacts will not result in material
5 damage to the hydrologic balance outside of the
6 permit area.

7 I'm convinced that this is an accurate
8 conclusion. I guess I think that there is an
9 implicit causation requirement in this statutory
10 language, because it uses term "result," "will not
11 result in," and that implies a cause and effect
12 relationship.

13 And I'm convinced that the findings of
14 fact support the conclusion that the amendment
15 that's being permitted here will not result in
16 material damage outside the permit area, as
17 material damage is defined in the statute.

18 I don't think the cause and effect
19 relationship has been shown here. In fact, to the
20 contrary, I think the findings of fact support the
21 conclusion that the cause of whatever incremental
22 increase there is in TDL's in the stream is
23 predominantly something other than the mining
24 project.

25 And I think we've heard discussion about

1 this at length today. The nature of Armells Creek
2 is that it's an ephemeral prairie stream, and it
3 looks like every other ephemeral prairie stream in
4 eastern Montana for the most part, including those
5 that are not located anywhere near a coal mine,
6 because increased salt deposits in the stream are
7 endemic to eastern Montana streams.

8 They exist all over eastern Montana
9 regardless of whether there is any mining activity
10 close by. And I think the findings of fact make
11 that finding, and I think this conclusion flows
12 from that. So I'm convinced that this is an
13 accurate conclusion of law.

14 CHAIR DEVENY: Other Board members
15 opinions?

16 BOARD MEMBER DEARMENT: I would -- Madam
17 Chair, Chris -- add that I tend to agree with all
18 of that, with one possible exception as a matter
19 of law, as I characterize MEIC's argument, is that
20 any contribution of a pollutant to a listed stream
21 in the absence of a TMDL is essentially in itself
22 by definition material damage.

23 If that's not correct as a matter of
24 law, and I think we've heard from DEQ and Mr.
25 Martin that they certainly don't think it is, but

1 if the Pinto case doesn't apply, and that perhaps
2 MEIC has overstepped, then I agree with everything
3 Mr. Tweeten said, again, with that possible
4 assumption. I'm not sure how else to resolve that
5 with the conversation we've already had.

6 CHAIR DEVENY: I'm still struggling with
7 the duration issue, but I do think our findings of
8 fact that we've approved have sort of led us to
9 this conclusion.

10 BOARD MEMBER HORNBEIN: I also struggle
11 with the duration issue, but I can't find any
12 authority that supports incorporating that into an
13 analysis of water quality violation has occurred.

14 The other thing I'm really struggling
15 with still, but the more I read it, the more I
16 think that the intent is clear in the statute, is
17 the argument that Mr. Hernandez was making that at
18 the end of the definition for material damage in
19 82.4.203(31), it basically says that any water
20 quality violation is material damage.

21 At the same time it is clear from the
22 first part of that definition that it's
23 anticipating damage caused by mining, and I can't
24 get away from that, even though the argument
25 you're making makes intuitive sense to me. When I

1 read that, especially in combination with the
2 language in 82.4.227(3)(a), I think it's pretty
3 clear that the statutory intent here is looking at
4 it within the mining picture.

5 And if there is already an impairment,
6 there is a process for dealing with that through
7 an alternative statutory process. I just can't
8 quite see how you can layer those two things
9 together. So it's not a comfortable decision for
10 me, but that's where I'm coming down on it.

11 CHAIR DEVENY: Any other Board members
12 want to make any comments, or have further
13 discussion, before we take a vote on the motion to
14 approve the Conclusion of Law No. 19?

15 (No response)

16 CHAIR DEVENY: Hearing none, all those
17 in favor of Conclusion of Law No. 19, please
18 signify by saying aye.

19 (Response)

20 CHAIR DEVENY: All those opposed.

21 (No response)

22 CHAIR DEVENY: Hillary, did we get your
23 vote?

24 MS. HANSON: Yes, I was in favor.

25 CHAIR DEVENY: Thank you.

1 MR. LUCAS: Madam Chair, if I may.

2 CHAIR DEVENY: Excuse me. The motion
3 carries.

4 MR. LUCAS: You weren't voting on 18? I
5 guess I misunderstood.

6 CHAIR DEVENY: We already voted on 18.

7 MR. LUCAS: All right. I'll stop there.

8 CHAIR DEVENY: Moving on to 20. I think
9 21 and the rest of the material damage section
10 probably all fall if we approve 19. I think it's
11 pretty hard for us to not approve 20, 21, and 22.
12 Let me give you a chance to read it.

13 BOARD MEMBER TWEETEN: Madam Chair, I
14 move that we approve Conclusions 22 through 27
15 inclusive, for those same reasons that we've
16 discussed with respect to 21.

17 CHAIR DEVENY: I'll second it. Is there
18 discussion on that?

19 (No response)

20 CHAIR DEVENY: Seeing nobody raising
21 their hand, we'll have a vote on numbers 20
22 through 27; is that correct?

23 BOARD MEMBER TWEETEN: Yes.

24 CHAIR DEVENY: All those in favor of
25 approving Conclusions of Law 20 through 27,

1 signify by saying aye.

2 (Response)

3 CHAIR DEVENY: Any opposed?

4 MS. HANSON: Aye.

5 CHAIR DEVENY: Hillary, what was your
6 vote? Hillary, we didn't get your vote.

7 MS. HANSON: I'm in favor.

8 CHAIR DEVENY: Thank you. The next
9 section has to do with East Fork Armells Creek
10 impairment, and this goes on through No. 38.
11 Let's take a minute to read through there and see
12 if we can handle this as a group, or if we want to
13 take them one by one, we can. Are Board members
14 ready to make a motion?

15 BOARD MEMBER TWEETEN: Madam Chair, I
16 move that we approve Conclusions of Law 28 through
17 38 inclusive.

18 CHAIR DEVENY: It's been moved that
19 Conclusions of Law 28 through 38 be approved. Is
20 there a second?

21 BOARD MEMBER BUSBY: Second.

22 CHAIR DEVENY: Any discussion?

23 (No response)

24 CHAIR DEVENY: All those in favor,
25 please signify by saying aye.

1 (Response)

2 CHAIR DEVENY: Any opposed?

3 (No response)

4 CHAIR DEVENY: Motion carries. Let's
5 move on to TDS. I believe we're not addressing --
6 I'm sorry. I think we can take TDS, nitrogen, and
7 aquatic life together. What's the Board pleasure
8 here?

9 BOARD MEMBER BUSBY: Do you want to make
10 a motion on that?

11 CHAIR DEVENY: Do you?

12 BOARD MEMBER BUSBY: I will. I move
13 that we approve the three separate items here,
14 TDS, nitrogen, and aquatic life --

15 BOARD MEMBER TWEETEN: Madam Chair.

16 BOARD MEMBER BUSBY: -- in their
17 entirety.

18 BOARD MEMBER TWEETEN: I'll second the
19 motion.

20 CHAIR DEVENY: Discussion on this
21 motion?

22 BOARD MEMBER TWEETEN: Madam Chair. The
23 provision on TDS incorporates the discussion
24 section by reference, and that requires us to look
25 at the issue that we punted for the moment a

1 couple hours ago about the burden of proof
2 language that's in the discussion section.

3 And the two instances that I was able to
4 find in the discussion section were on Page 65,
5 and if you look eight lines from the bottom
6 paragraph, it starts, "Therefore." It says,
7 "Therefore the Conservation Groups have the burden
8 to show by a preponderance of the evidence that
9 DEQ had information available to it at the time of
10 issuing the permit that indicated issuing the
11 permit could result in material damage."

12 And this, if I understand the prior
13 argument correctly, the use of the word "could"
14 there is problematic. So I see Mr. Lucas is
15 chomping at the bit here, so I'll --

16 MR. LUCAS: I am, but the bit's wearing
17 out today, and I apologize. Madam Chair, Member
18 Tweeten. It appears from where I sit that the
19 discussion section is broken up into Section A
20 burden of proof, Section B TDS and everything
21 else.

22 BOARD MEMBER TWEETEN: Oh, I see.

23 MR. LUCAS: So it might be you could.
24 And that is expressly incorporated by reference in
25 Section B of the discussion.

1 BOARD MEMBER TWEETEN: Excellent. Thank
2 you. You're correct. So I withdraw my comment.

3 CHAIR DEVENY: Do we have any problems
4 with the discussion section in the findings of
5 fact and conclusions of law Section B on TDS
6 material damage?

7 MR. MARTIN: Madam Chair, just a minor
8 point. Toward the bottom of Page 71 there is
9 language that I think might be changed, if I
10 understood the Board's previous ruling.

11 CHAIR DEVENY: Could you speak up a
12 little bit. I'm having a hard time hearing you.

13 MR. MARTIN: I apologize. I could have
14 pushed the button. Sorry. Here's the sentence,
15 Madam Chair, and Member Tweeten. It's toward the
16 bottom of Page 71. It reads, "However,
17 Conservation Groups fail to provide sufficient
18 evidence even to make this hypothesis into a more
19 likely than not possibility."

20 I believe if we change that word to
21 "probability," it would conform with the Board's
22 previous ruling.

23 We find the same issue on Page 76, and
24 it begins with the word "ultimately." "The burden
25 of proof in this action falls to Conservation

1 Groups to present a more likely than not
2 possibility that a water quality standard could be
3 violated by the permitted action."

4 Again, if we were to change the word
5 "possibility" to "probability," I think it would
6 conform with the Board's ruling. Thank you.

7 CHAIR DEVENY: So we have a motion
8 before us to approve 39, 40, 41, 42, and 43 as is;
9 but it sounds like we would be more consistent if
10 we could either delete the language in Subsection
11 B, or change it as has been proposed.

12 BOARD MEMBER TWEETEN: Madam Chair, I
13 move an amendment to the existing motion.

14 CHAIR DEVENY: Go ahead, Chris.

15 BOARD MEMBER TWEETEN: In Subsection B
16 of the discussion section on Page 71, three lines
17 from the bottom, the line that begins "likely than
18 not," that we strike the word "possibility" and
19 insert the word "probability."

20 And then on Page 76, again three lines
21 from the bottom of the text that exists above
22 Footnote 5, we strike the word "possibility" and
23 insert the word "probability."

24 And with those amendments, we then make
25 one further change in Paragraph 39 of the

1 conclusions of law on Page 88, two lines from the
2 bottom of the page. After the word "above," we
3 insert the words, "As amended by the Board,"
4 comma. So that's the extent of my proposed
5 motion.

6 CHAIR DEVENY: Dexter, are you amenable
7 to the amendment to your --

8 BOARD MEMBER BUSBY: I am, and I would
9 second his amendment.

10 CHAIR DEVENY: The motion and the
11 amendment have been moved and seconded. And I
12 guess we'll vote first on the amendment.

13 BOARD MEMBER HORNBEIN: I have an
14 additional comment for whatever it's worth. So
15 the standard in Paragraph 39, "The Conservation
16 Groups failed to present evidence necessary to
17 establish the facts essential to a determination
18 that the AM4 permit will cause material damage" is
19 not the same as what is articulated on Page 76,
20 even taking into account the change we're about to
21 vote on, which states, "Ultimately the burden of
22 proof in this action falls to Conservation Groups
23 to present a more likely than not probability --"
24 with the change proposed -- "that a water quality
25 standard could be violated by the permitted

1 action." Those are two different standards.

2 CHAIR DEVENY: Good point. So let's
3 figure out a way to change that, and make them fit
4 without causing additional issues.

5 BOARD MEMBER HORNBEIN: Madam Chair, if
6 I could. I would just add -- and this is based
7 entirely on my reading of the statute and the
8 agency's own regulation, which basically says to
9 paraphrase that they cannot approve a permit
10 basically unless it will not cause material
11 damage.

12 I don't think that -- if we're going to
13 include that, and I'm not sure if we are going
14 take that into account because the changes we
15 already made to Paragraph 18, which I voted
16 against for this specific reason because it
17 doesn't take the regulation into account.

18 If we were going to take the language of
19 the regulation into account, I don't think that we
20 can then flip and require the Petitioner to prove
21 with certainty that damage will occur, if that
22 makes sense.

23 So that was the basis for my not voting
24 for the amendment to 18, and I probably won't vote
25 this one based on the same thing.

1 BOARD MEMBER TWEETEN: All right. Let's
2 fix this.

3 CHAIR DEVENY: Do we need to have the
4 discussion in here at all? I guess that doesn't
5 necessarily fix the "will cause" issue, however.

6 BOARD MEMBER BUSBY: Sarah, could we
7 amend --

8 MR. MARTIN: May it please the Board.

9 CHAIR DEVENY: Dexter, did you have a
10 question of Sarah?

11 BOARD MEMBER BUSBY: Could we amend 39
12 just to remove the section, the discussion
13 section?

14 MS. CLERGET: Yes, you can.

15 BOARD MEMBER BUSBY: Would that change
16 the legal ruling at all?

17 MS. CLERGET: I don't think that
18 addresses -- Well, it will not -- If you withdraw
19 the reference to the discussion section, it
20 doesn't change the ultimate conclusion, but it
21 also keeps the "will cause" language.

22 CHAIR DEVENY: It doesn't address
23 Melissa's concern.

24 BOARD MEMBER BUSBY: That doesn't
25 address her concern.

1 MR. MARTIN: Madam Chair.

2 BOARD MEMBER TWEETEN: Madam Chair, I'd
3 like to withdraw my prior motion to amend at least
4 in part. Well, actually I guess I'd like to move
5 to amend my prior motion to amend, because I don't
6 want to change it all. Particularly I don't want
7 to change the parts on Pages 71 and 76.

8 But what I would suggest -- and Melissa,
9 please let me know if this solves the problem --
10 if we amend Paragraph 39 on Page 88 by striking
11 everything after "Conservation Groups failed to"
12 in the second line through "EFAC" in the second
13 line on the next page, and amend it to read,
14 "Conservation Groups failed to sustain their
15 burden to show that issuance of the permit would
16 be unlawful," period, and I'd put in the
17 citations. We'd used that idea at least once
18 before, so --

19 CHAIR DEVENY: Specific to TDS?

20 BOARD MEMBER TWEETEN: Yes. I don't
21 think we used it specifically for TDS, but --

22 CHAIR DEVENY: But I mean do we need to
23 do that because it's specific to TDS?

24 BOARD MEMBER TWEETEN: Right. I think
25 that's right. And it takes out the objectionable

1 burden of proof language altogether. I don't
2 think there is any dispute that the burden to show
3 that the issuance of the permit would be unlawful
4 rests with the Petitioners, MEIC.

5 So if we say "Conservation Groups failed
6 to sustain their burden to show," it's still a
7 good conclusion of law I think, but it works
8 around the --

9 CHAIR DEVENY: Are we doing this for
10 nitrogen and aquatic life as well? Because the
11 same language is there. I asked Chris if we were
12 going to apply that same language to nitrogen and
13 aquatic life as we are to the TDS, as we would to
14 the TDS section, because it's also included there.

15 MR. LUCAS: Madam Chair, may the
16 Department offer a hopefully helpful suggestion?

17 CHAIR DEVENY: Yes, please.

18 MR. LUCAS: Going back to 39, leaving it
19 as it is, "Conservation Groups failed to present
20 the evidence necessary to establish facts
21 essential to a determination that the AM4 permit
22 is not designed to prevent material damage." Now
23 you've got the statutory language in there.
24 That's really what they need to show by a
25 preponderance of the evidence, based on your

1 change to Conclusion of Law No. 12.

2 And I hope it addresses Member
3 Hornbein's concerns, because I don't think we've
4 ever argued, and we would not support a burden of
5 proof that they had to show that something will
6 happen. That's the opposite side of the coin than
7 what we've argued.

8 But I think if you again focus on the
9 design standard, it might be the simplest way to
10 fix it. Thank you.

11 CHAIR DEVENY: I'd like to ask our Legal
12 Counsel if that language would be acceptable, an
13 acceptable change to a conclusion of law, or is
14 that --

15 MS. CLERGET: It's your conclusion of
16 law. You get to change it however you want.

17 BOARD MEMBER TWEETEN: I actually like
18 that.

19 CHAIR DEVENY: I do, too.

20 BOARD MEMBER BUSBY: That works for me.

21 BOARD MEMBER HORNBEIN: So it doesn't
22 alleviate my concern, and the reason I voted
23 against the change to Conclusions of Law No. 18.
24 It does address the issue that Mr. Lucas raised,
25 which I believe was the impermissible shifting of

1 a burden to the petitioner to show that something
2 will happen.

3 So I'm going to vote for it because the
4 Board voted for the changes to 18, and this is
5 consistent with that, but I just maintain my
6 objection to what we did to 18.

7 CHAIR DEVENY: Are there any other
8 questions or discussion of anybody?

9 (No response)

10 BOARD MEMBER TWEETEN: So my amended
11 motion to amend would include the amendments to
12 Pages 71 and 76 as previously discussed; and then
13 would modify Conclusions of Law 40, 41, and 42, as
14 suggested by Mr. Lucas, which would make 39, for
15 example, read "Conservation Groups failed to
16 present evidence necessary to establish the facts
17 essential to a determination that the AM4 permit
18 was not designed to prevent material damage to the
19 hydrologic balance outside the permit boundary by
20 increasing TDS levels in EFAC."

21 Is that the essence of yours?

22 MR. LUCAS: I'd say that captures it.

23 BOARD MEMBER TWEETEN: Then in 40, I
24 would make a similar change after "AM4 permit" in
25 the second line of 40, so it would read,

1 "Essential to a determination the AM4 permit was
2 not designed to prevent material damage," and the
3 rest of the paragraph would remain the same.

4 MR. LUCAS: Yes.

5 BOARD MEMBER TWEETEN: Then in 42, we
6 would make a similar change in the second line of
7 42. After "AM4 permit," it would read, "The
8 determination that the AM4 permit was not designed
9 to prevent material damage to aquatic life use of
10 EFAC." So that gets us through all three of those
11 subsections.

12 CHAIR DEVENY: Is everybody clear on the
13 amended motion, and then the motion that's before
14 the Board?

15 Let's vote first then on the amended
16 motion. All those in favor, please signify by
17 saying aye.

18 (Response)

19 CHAIR DEVENY: All those opposed.

20 (No response)

21 CHAIR DEVENY: Motion carries. Now we
22 will vote on the -- or have further discussion, if
23 there is, on the motion to adopt Conclusions of
24 Law 39, 40, 41, and 42. Did you just go through
25 43? I think it was just --

1 BOARD MEMBER BUSBY: Yes.

2 CHAIR DEVENY: Did it go through 43 as
3 well?

4 BOARD MEMBER BUSBY: 43.

5 CHAIR DEVENY: Okay. Through 43. Do
6 members have discussion on the motion before us?

7 (No response)

8 CHAIR DEVENY: All those in favor,
9 signify by saying aye.

10 (Response)

11 CHAIR DEVENY: All those opposed.

12 (No response)

13 CHAIR DEVENY: All right. So all we
14 have left now is the recommended decision
15 Conclusions of Law No. 44. Does the Board have
16 discussion on this point, or wish to entertain a
17 motion?

18 BOARD MEMBER TWEETEN: Madam Chair.

19 CHAIR DEVENY: Chris.

20 BOARD MEMBER TWEETEN: I move that the
21 Board adopt as its own decision the Hearing
22 Examiner's recommended decision as stated in
23 Paragraph 44, Conclusions of Law 44, and the
24 "therefore it is ordered" Sub(a) and (b)
25 paragraphs found on Page 90 of the Hearing

1 Examiner's proposed decision.

2 CHAIR DEVENY: I would like to ask,
3 before anybody seconds that -- and it's just a
4 point of matter. We were going to go through and
5 take out the discussion of burden of proof out of
6 the discussion section of the conclusions of law
7 and findings of fact. Can we do that before --

8 BOARD MEMBER TWEETEN: Sure. I'll
9 withdraw that motion, and I'll make this one
10 instead.

11 Madam Chair, I move that with the
12 exception of Subsection (b) of the discussion
13 section the Board remove from its decision --
14 excuse me. Strike that -- the Board decline to
15 adopt the discussion section of the proposed
16 decision of the Hearing Examiner set forth in the
17 discussion section of the proposed decision.

18 CHAIR DEVENY: I would second that. Is
19 there discussion about removing that from our
20 conclusions?

21 BOARD MEMBER BUSBY: The entire
22 discussion section?

23 BOARD MEMBER TWEETEN: With the
24 exception of (b).

25 BOARD MEMBER BUSBY: Okay.

1 CHAIR DEVENY: It's --

2 BOARD MEMBER TWEETEN: We've already
3 incorporated (b) by reference, so I don't want to
4 keep that.

5 CHAIR DEVENY: Any other questions for
6 clarification or discussion?

7 (No response)

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

11 (Response)

12 CHAIR DEVENY: All those opposed.

13 BOARD MEMBER HORNBEIN: Nay.

14 CHAIR DEVENY: Motion carries. Now
15 we'll move on to No. 44.

16 BOARD MEMBER TWEETEN: Madam Chair, I
17 move that the Board adopt as its decision the
18 recommended decision of the Hearing Examiner found
19 in Conclusion of Law 44 on Page 90 of the Hearing
20 Examiner's proposed decision, and that the Board
21 adopt as its order the provisions of the
22 "therefore it's ordered" paragraph, including
23 subparagraphs (a) and (b), of the Hearing
24 Examiner's proposed decision found on Page 90.

25 CHAIR DEVENY: There is a motion before

1 the Board. Is there a second?

2 BOARD MEMBER BUSBY: I'll second it.

3 CHAIR DEVENY: It has been seconded. Is
4 there discussion? David.

5 BOARD MEMBER LEHNHERR: Madam Chair, I
6 just wanted to go on the record to say something
7 in response to Board Member Tweeten's comments.

8 Looking at the information, I think it's
9 not clear where the degradation in EFAC comes
10 from, but I don't think there is evidence that
11 says that mining has not contributed to the
12 degradation. I just don't want an assumption
13 being made by everyone that mining could not
14 contribute to that degradation. I just wanted to
15 add that to the record. Thank you.

16 CHAIR DEVENY: Other comments by members
17 of the Board?

18 BOARD MEMBER HORNBEIN: I just wanted to
19 reiterate that I believe that the burden of proof
20 definitions that we have adopted have
21 impermissibly read out of the statute the agency's
22 regulation, which I don't believe is inconsistent
23 with the statutory language.

24 Having said that, because a majority of
25 the Board voted to adopt that burden of proof

1 language, I will ultimately vote to adopt the
2 resolution articulated in Paragraph 44, but I just
3 want to be clear on that point.

4 CHAIR DEVENY: Any other Board members
5 have comments?

6 BOARD MEMBER LEHNHERR: I would just ask
7 that we get these revisions printed out as soon as
8 soon as possible for our review.

9 MS. CLERGET: Yes. It will probably be
10 Monday.

11 BOARD MEMBER LEHNHERR: Thank you.

12 CHAIR DEVENY: Any other comments,
13 discussion points, questions from Board members
14 before we vote on No. 44?

15 (No response)

16 CHAIR DEVENY: All those in favor of the
17 motion before us to approve Conclusion of Law No.
18 44, please signify by saying aye.

19 (Response)

20 CHAIR DEVENY: All those opposed.

21 (No response)

22 CHAIR DEVENY: Motion carries.

23 MS. CLERGET: The rest of the agenda.

24 CHAIR DEVENY: So with that, we'll move
25 to the rest of the agenda. I want to thank the

1 parties for their time, and their indulgence, and
2 their professionalism in being here today, and
3 working together on this case, and I have a
4 feeling we might see you all again.

5 (The proceedings were concluded

6 at 4:06 p.m.)

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

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 216 - 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 _____, 2019.

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

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