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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
MAY 31, 2019)

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
May 31, 2019
9:00 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT,
CHRIS TWEETEN, DEXTER BUSBY,
MELISSA HORNBEIN, DAVID LEHNHERR;
and HILLARY HANSON (By phone)

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

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

3 * * * * *

4 CHAIR DEVENY: Welcome to the Board of
5 Environmental Review. I will call this meeting to
6 order. Lindsay, could you do a roll call, please.

7 MS. FORD: Chris Deveny.

8 CHAIR DEVENY: Here.

9 MS. FORD: Dexter Busby.

10 MR. BUSBY: Here.

11 MS. FORD: Hillary Hanson.

12 (No response)

13 MS. FORD: Hillary Hanson.

14 MS. HANSON: Here.

15 MS. FORD: John Dearment.

16 MR. DEARMENT: Here.

17 MS. FORD: Chris Tweeten.

18 MR. TWEETEN: Here.

19 MS. FORD: Melissa Hornbein.

20 MS. HORNBEIN: Here.

21 MS. FORD: David Lehnherr.

22 MR. LEHNHERR: Here.

23 MS. FORD: We have seven Board members
24 present. We do have a quorum.

25 CHAIR DEVENY: I think that might be a

1 record. Let's go around and introduce other folks
2 that are in the room. Maybe Aleisha, we'll start
3 with you and go around the room.

4 MS. SOLEM: Aleisha Solem, Agency Legal
5 Services.

6 MS. CLERGET: Sarah Clerget, Agency
7 Legal Services, Board Attorney.

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

10 MS. FORD: Lindsay Ford, Board
11 secretary.

12 MS. SCHERER: Sandy Scherer, DEQ.

13 MS. BOWERS: Kirsten Bowers, DEQ Legal.

14 MR. MULLAN: Norm Mullan, DEQ Legal.

15 MR. MOSER: Kurt Moser, DEQ Legal.

16 MR. MARTIN: John Martin, Holland and
17 Hart for Western.

18 MR. YEMINGTON: Samuel Yemington,
19 Holland and Hart for Western.

20 MR. STEERE: Wade Steere with Western
21 Energy Company.

22 MS. CHRISTOPHERSON: Sarah
23 Christopherson, DEQ Legal.

24 MS. MAVENCAMP: Terry Mavencamp, DEQ
25 Remediation.

1 MR. MORGAN: Jon Morgan, DEQ Legal.

2 MS. BOWDEN: Susan Bowden, DEQ

3 Enforcement.

4 MR. VANOORT: Martin VanOort, DEQ Coal.

5 MS. HINZ: Emily Hinz, DEQ Coal.

6 MS. TRANK: Peggy Trank, Treasure State

7 Resources Association.

8 MR. OLSON: Alan Olson, Montana

9 Petroleum Association.

10 MR. KLEMP: David Klemp, DEQ.

11 MR. YDE: Chris Yde, DEQ.

12 MS. ULRICH: Liz Ulrich, DEQ.

13 MS. MERKEL: Julie Merkel, DEQ.

14 MR. LUCAS: Mark Lucas, DEQ Legal.

15 MR. PETTIS: Aaron Pettis, DEQ Legal.

16 MR. REGENSBURGER: Eric Regensburger,

17 DEQ Water Quality Standards.

18 MR. FERGUSON: Cody Ferguson, Northern

19 Plains Resource Council.

20 DR. SUPLEE: Mike Suplee, Water Quality

21 Standards, DEQ.

22 MR. KENNING: Jon Kenning, DEQ Water

23 Quality.

24 MS. McLAUGHLIN: Joanna McLaughlin, DEQ.

25 MR. FLEMING: Derek Fleming, DEQ.

1 MR. DAVIS: Tim Davis, Water Quality
2 Division, DEQ.

3 MS. SULLIVAN: Lauren Sullivan, DEQ
4 Water Quality Standards.

5 MS. KELLY: Mila Kelly, DEQ Water
6 Quality Planning Bureau.

7 MR. HERNANDEZ: Shiloh Hernandez,
8 Western Environmental Law Center, for the Sierra
9 Club and MEIC.

10 MR. JOHNSON: Derf Johnson, MEIC.

11 MS. HARBAGE: Rebecca Harbage, DEQ.

12 CHAIR DEVENY: Thank you. Are there any
13 members of the public on the phone that would like
14 to give their names?

15 (Inaudible)

16 MR. ROSS: This is Travis Ross with --

17 CHAIR DEVENY: We had two people
18 speaking at once. Could the woman who spoke
19 first, please go ahead.

20 MS. MARQUIS: This is Vicki Marquis with
21 Holland and Hart.

22 CHAIR DEVENY: Gentleman.

23 MR. ROSS: Travis Ross, Missoula County
24 Health Department.

25 CHAIR DEVENY: Are there other members

1 on the phone that would like to speak up and let
2 us know that you're there?

3 (No response)

4 CHAIR DEVENY: Hearing none, there is a
5 gentleman just coming in the door. We were just
6 in the process of identifying ourselves. Would
7 you mind doing that, please.

8 MR. KROGSTAD: Kevin Krogstad, DEQ Coal
9 Section.

10 CHAIR DEVENY: I'd like to remind people
11 on the phone to please mute their phones, and to
12 also indicate who they are when you speak. Thank
13 you very much.

14 With that, we'll move on to the minutes
15 of the last meeting. Do any of the Board members
16 or DEQ or other staff have any corrections or
17 additions to the minutes?

18 (No response)

19 CHAIR DEVENY: Hearing none, is there
20 any public comment on the minutes?

21 (No response)

22 CHAIR DEVENY: Hearing none, could I
23 have a motion to either approve or deny them?

24 MR. TWEETEN: Move to approve.

25 MR. BUSBY: I'll second.

1 CHAIR DEVENY: It's been moved and
2 seconded to approve the minutes of the last Board
3 meeting. Would all the Board members in favor of
4 the motion signify by saying aye.

5 (Response)

6 CHAIR DEVENY: Any opposed?

7 (No response)

8 CHAIR DEVENY: Motion carries. The
9 minutes are passed. Okay. Next we'll move on to
10 the briefing items, and I'll turn it over to the
11 Board's attorney, Sarah Clerget.

12 MS. CLERGET: Hi, everybody. So this is
13 going through your briefing items that are on your
14 agenda, and just an update to the cases that we
15 currently have open.

16 First under A(1)(a), these are
17 enforcement cases. CMG Construction. We held a
18 scheduling conference on this one on April 2nd,
19 2019, and parties agreed to a schedule for
20 discovery. I issued a scheduling order, and they
21 are proceeding accordingly.

22 "B," Copper Ridge, we had a final
23 prehearing schedule. Remember, you remanded the
24 case back to me. I decided that there needed to
25 be additional factual hearing. We had a

1 prehearing conference on Thursday of last week,
2 and oral arguments on motions in limine about
3 that. It's set for hearing Wednesday of next
4 week, and it's a one day hearing, so that is
5 proceeding.

6 2(a), Non-Enforcement Cases. The first
7 is the Major Facility Siting Act certificate by
8 Talen, and this is the one that we had the
9 emergency meeting on, so you guys generously
10 assigned it to me.

11 And so after that meeting where you
12 assigned it to me, the parties and I stayed, and
13 we had a hearing that lasted a couple of hours on
14 the issue of whether the fifteen day deadline for
15 all of the evidence applied; and then after the
16 end of that hearing, or during that hearing, Talen
17 moved to intervene as a party, which I granted.
18 So we now have three parties on that case.

19 And then they asked for additional time
20 to respond, which I granted them until midnight
21 Thursday night; and then on Friday, I issued an
22 order on that, essentially ruling that the fifteen
23 day deadline doesn't apply, and we're going to the
24 regular MAPA route.

25 The parties have until Monday to elect

1 whether or not to go directly to District Court,
2 and so we will know at that point whether or not
3 they elected to do that, or whether we're going to
4 proceed down the contested case road in front of
5 the BER.

6 "B," this is Spring Creek Coal, which
7 was a new case at the last meeting. I issued a
8 prescheduling order on this, which is an update
9 from what's on the agenda. I issued a
10 pre-scheduling order on 5/29, and so we'll get a
11 schedule in place for that.

12 CHS, which is Item (c), we consolidated
13 that case with 2015-07WQ, and I've issued a
14 scheduling order. The parties entered a
15 stipulation regarding some of the appealed permit
16 provisions, and then amended notice of appeal, but
17 they're proceeding according to the original
18 scheduling order.

19 I'm going to go off agenda here for a
20 minute about CFAC, which should be in here,
21 Columbia Falls Aluminum Company, which you guys
22 may remember you've heard arguments on a few
23 meetings ago. We just received last night and
24 granted a motion to dismiss in that case, so it is
25 now dismissed and gone. So that's resolved.

1 "D" is the Absaloka Mine, which has been
2 stayed since March 28th of 2018 pending the
3 resolution of the Supreme Court Case Sierra Club
4 v. DEQ.

5 "E" is Montanore. The matter is ripe
6 for me to make a decision. We had a hearing, they
7 submitted the post hearing briefing, and it's now
8 before me for a decision.

9 However, DEQ Counsel cannot be at the
10 August meeting, so we're going to push that oral
11 argument off until October when he can attend. So
12 you will be hearing that case for decision in
13 October, at your October meeting.

14 Moving on to "F," this is the Laurel
15 Refinery case. You consolidated this case with
16 2019-01, and there is a scheduling order in place,
17 and they're proceeding.

18 "G" is Golden West Properties. They
19 filed cross motions for summary judgment, which
20 are ripe in front of me now, so I will issue a
21 decision on that; and then depending on what that
22 decision is, and what the parties decide, you may
23 or may not have that decision in front of you, or
24 it may wait until a hearing occurs, depending on
25 what happens. So that one may or may not be

1 coming in front of you quickly, but it is ripe for
2 a decision in front of me on summary judgment.

3 No. 3(a) is not mine, so that's a DEQ
4 update.

5 CHAIR DEVENY: DEQ, could I ask for an
6 update on the Western Energy permit.

7 MS. BOWERS: Yes, Madam Chair, members
8 of the Board. Kirsten Bowers with DEQ. And as
9 summarized in your packet, the Montana Supreme
10 Court requested additional briefing on that case,
11 and the briefs are due simultaneously on June
12 17th.

13 We're to provide additional information
14 on the three issues I outlined, and two of which
15 pertain to the DEQ's representative monitoring
16 protocol, and the third, the Court wanted more
17 information on the modifications to that permit in
18 2014, and to address Western Energy's argument
19 that the District Court shouldn't have considered
20 the case until these modifications were complete.
21 So we'll just keep you posted on that.

22 CHAIR DEVENY: Thank you, Ms. Bowers.

23 MS. CLERGET: That completes the
24 briefing item update.

25 CHAIR DEVENY: Next we'll move on to

1 action items. We've got some rules to consider.
2 The first one pertains to the groundwater standard
3 incorporated in DEQ Circular 7, and George, if you
4 could have your staff come up and give us
5 information on this.

6 MR. MATHIEUS: Sure, Madam Chair. I
7 believe Dr. Mike Suplee is presenting on the first
8 item.

9 DR. SUPLEE: Good morning, everyone.
10 Madam Chair, Members of the Board, my name is Dr.
11 Mike Suplee, and I'm the Acting Section Supervisor
12 of the Water Quality Standards and Modeling
13 Section here at DEQ, and I'm here to speak on the
14 adoption of proposed groundwater standards per MAR
15 Notice No. 17-403.

16 Today the Board and the Department are
17 proposing four groundwater criteria for adoption
18 of standards into Department Circular DEQ7. These
19 are diallate; dioxane 1,4; perfluorooctane
20 sulfonate or PFOS, and perfluorooctinoic acid,
21 PFOA.

22 At the start of this rulemaking in
23 December of 2019, manganese and iron criteria were
24 also included on this list, but these are not
25 being proposed for adoption today for reasons I

1 will outline shortly.

2 I would like to point out that diallate;
3 dioxane 1,4; PFOS and PFOA are all manmade
4 compounds, and therefore their natural background
5 concentrations are zero.

6 In contrast, iron and manganese are
7 naturally occurring elements, and in some
8 locations in Montana, natural background
9 concentrations can equal or exceed the criteria
10 that were proposed.

11 Most of the comments we received
12 pertained to the manganese and iron criteria,
13 often touching on how the Department would address
14 cases where elevated natural background
15 concentrations occurred. Several Department
16 programs implement groundwater standards, for
17 example, remediation, hard rock mining and coal,
18 and each has its own specific rules and practices
19 governing how implementation occurs, including how
20 to characterize natural background concentrations.

21 This fact bears directly on the
22 implementation of the manganese and iron criteria.
23 To create a more consistent implementation process
24 across the Department, the Department is working
25 towards identifying and synchronizing these

1 programs' implementation methods. However, this
2 work is not complete.

3 Some Department programs might need to
4 update implementation policies, or possibly
5 undertake rulemaking of their own, and it is
6 better that this work be completed before instead
7 of after manganese and iron are adopted as
8 groundwater standards.

9 Through this work, the Department also
10 expects that specific technologies for removing
11 manganese and iron will be identified, along with
12 the associated costs.

13 Returning to the four criteria under
14 consideration today, we received a comment of
15 general support, as well as a comment of general
16 discontent regarding more regulation. We received
17 one comment pertaining to diallate and dioxane
18 1,4, and several pertaining to PFOS and PFOA,
19 regarding the Board's and Department's authority
20 to regulate these compounds.

21 In our responses, we clarified that the
22 adoption of these compounds as groundwater
23 standards falls clearly within the Board and
24 Department authority.

25 To recap, today the Department and the

1 Board are proposing that four groundwater criteria
2 be adopted as standards into Department's Circular
3 DEQ7. Again, these are diallate, dioxane 1,4,
4 PFOS, and PFOA.

5 Thank you, and I or others from the
6 Department can answer any questions you may have.

7 CHAIR DEVENY: Thank you. You might as
8 well stay up here in case people have questions.
9 Do Board members have questions of DEQ regarding
10 this? I know we've talked about it before.

11 MR. DEARMENT: Madam Chair, I have just
12 a quick question. Dr. Suplee, you're not giving
13 up on manganese and iron, you're just delaying
14 that, if I understand correctly; is that true?

15 DR. SUPLEE: Madam Chair, Mr. Dearment,
16 yes, that's correct. The main issue that we ran
17 into as we went into this was the complexity of
18 the different techniques, the different branches
19 that our Department use to implement the
20 standards, especially with the high natural
21 background, were really leading to complexities
22 that we needed to get figured out, so that when we
23 came back with the standard in the future, we
24 could more readily explain how it would be
25 implemented, what the ramifications of that were,

1 etc., etc.

2 MR. DEARMENT: Madam Chair. Do you have
3 a sense of the time frame you're looking at before
4 those tasks will be accomplished, and you might
5 come back to the Board to propose those standards
6 again?

7 DR. SUPLEE: I don't have an immediate
8 answer for that. I think it was an ongoing
9 project. We've had some -- One of the main key
10 players who was kind of shepherding that
11 coordination identification project for us left
12 the Department, so that kind of sets everything
13 back. But I know that it remains a priority for
14 us.

15 So I can't give you an exact answer, but
16 it will become a priority again once things kind
17 of settle down.

18 MR. DEARMENT: Thank you.

19 CHAIR DEVENY: Do other Board members
20 have questions of Dr. Suplee?

21 (No response)

22 CHAIR DEVENY: Hearing none, is there
23 any public comment today on the proposed
24 regulations?

25 (No response)

1 CHAIR DEVENY: You could go ahead and
2 sit down.

3 DR. SUPLEE: Thank you.

4 MR. ROSS: My name is Travis Ross. I'm
5 with Missoula City-County Health Department. And
6 we -- for the initial proposal for change of DEQ7,
7 we would prefer not to see these proposed
8 standards bifurcated, but understand DEQ's
9 position on it.

10 We do want to urge diligent work to not
11 delay establishing protective standards for iron
12 and manganese. Newer research indicates that
13 there is higher absorption rates in children and
14 infants and have neurological issues. So from a
15 public health standpoint, it's important to
16 recognize there is risk, and work diligently to
17 develop those protective standards.

18 In Missoula, we do not see naturally
19 high concentration of manganese in the alluvial
20 aquifer. We can associate it with contaminated
21 sites.

22 So the other part of this is these
23 standards can have underground impacts for
24 clean-up, State and Federal clean-up, where
25 there's -- it could be considered an applicable

1 and relevant standard. So we would be interested
2 in working with the Department on the next steps,
3 but do want to see it move sooner than later. So
4 thank you.

5 CHAIR DEVENY: Thank you, Mr. Ross.
6 Your comments will be entered into the record, and
7 will be considered. Thank you. Are there any
8 other public comments?

9 (No response)

10 CHAIR DEVENY: Hearing none, does the
11 Board wish to take action on this item?

12 MR. TWEETEN: Madam Chair, I'd move
13 adoption of the rules as proposed.

14 CHAIR DEVENY: There has been a move to
15 adopt the rules as proposed by DEQ.

16 MR. BUSBY: I'll second that.

17 CHAIR DEVENY: It's been moved and
18 seconded. Is there any discussion by the Board?

19 MS. HORNBEIN: Madam Chair. Is there
20 any way that we can request a follow-up on the
21 iron and manganese issue at our next meeting to
22 get a report from the Department?

23 CHAIR DEVENY: We certainly can, and the
24 hearing record will reflect that request of DEQ.
25 Thank you. Other comments on the motion before

1 the Board?

2 (No response)

3 CHAIR DEVENY: Hearing none, could we
4 have a vote. All those in favor of the motion,
5 signify by saying aye.

6 (Response)

7 CHAIR DEVENY: Any opposed?

8 (No response)

9 CHAIR DEVENY: None. The motion
10 carries. Thank you, DEQ, for your efforts on
11 this.

12 And next we have another rule to
13 consider. And DEQ, if you could go ahead and give
14 a presentation on the Administrative Rules for
15 Circulars DEQ1, 2, and 3.

16 MR. MATHIEUS: Madam Chair, Eric
17 Regensburger is going to give you that
18 presentation.

19 MR. REGENSBURGER: Good morning. Madam
20 Chair, Members of the Board, my name is Eric
21 Regensburger. I'm a hydrologist with the
22 Department's Water Quality Standards and Modeling
23 Section. I'm here to speak on the adoption of
24 proposed setback rules between sewage lagoons and
25 wells for MAR Notice 17-404.

1 For the members of the Board that are
2 new and weren't present when I presented the
3 details of the rule previously, I'll provide a
4 quick summary.

5 Prior to 2017, there was a statutory
6 setback of 500 feet between sewage lagoons and
7 water wells. In 2017, the Legislature removed
8 that statutory setback, and directed the
9 Department to adopt new rules. New Rule I, which
10 we're reviewing today, was written to comply with
11 that legislative directive.

12 To ensure that the setback applies
13 evenly across various programs in the Department
14 that are administered by the Department, we are
15 asking that the Board adopt New Rule I by
16 reference into the Board rules and circulars for
17 public water and wastewater systems, and for
18 concentrated animal feeding operations.

19 The basic components of New Rule I are a
20 maximum default setback of 1,000 feet which is
21 designed to protect wells from pathogens. The
22 default setback can be reduced up to a minimum or
23 down to a minimum setback of 100 feet using
24 science based methods, and estimate pathogen
25 reduction and vulnerability. Water or sewage

1 treatment for pathogens can be used to reduce the
2 default setback also to 200 feet.

3 The Department coordinated with the DNRC
4 well construction rules to provide consistency
5 between DEQ and DNRC rules which did not exist
6 under the previous statute.

7 The Board and Department held a public
8 hearing on January 17th, 2019. The public
9 submitted oral written comments which have been
10 addressed in the proposed Notice of Adoption. The
11 Department has modified New Rule I in response to
12 some of these comments to correct some formulas
13 parameters, and to make the rule easier to
14 understand.

15 The proposed Notice of Adoption also
16 updates the citation of authority and
17 implementation for ARM 17.30.1334.

18 The Department requests that the Board
19 amend ARM 17.30.1001 and 17.38.101 as proposed,
20 amend ARM 17.30.1334, and update the citation of
21 authority and implementation to adopt the provided
22 HB 521 and 311 analysis. Thank you, and I or
23 others in the Department answer any questions that
24 you might have.

25 CHAIR DEVENY: Thank you, Mr.

1 Regensburger. Do members of the Board have
2 questions of DEQ on this issue? Mr. Tweeten.

3 MR. TWEETEN: Just for the record, the
4 proposed setback is different from the one that
5 existed by statute prior to 2017. Is there
6 legislative history or something to indicate that
7 by removing the statutory setback, the Legislature
8 was suggesting that a greater default setback
9 should be established by the Department, or is
10 that something that the Department arrived at
11 independently through its research before engaging
12 in the rulemaking?

13 MR. REGENSBURGER: Madam Chair, Mr.
14 Tweeten. The setback and the discussion with the
15 Legislature was that the new setback should be
16 based on a science based method rather than a
17 somewhat arbitrary 500 foot or 100 foot, or
18 whatever number you want to pick. So the 1,000
19 feet was based on analysis of pathogen migration
20 and such to protect wells from a typical, not a
21 worst case scenario, but a typical scenario that
22 can occur in Montana in certain aquifers.

23 CHAIR DEVENY: Mr. Lehnherr, David, did
24 you have a question?

25 MR. LEHNHERR: Yes. Eric, you mentioned

1 that there could be exceptions to the 1,000 foot
2 setback rule. Can you go over those once again,
3 and maybe say a little something about how easy or
4 difficult the process to obtain an exception is.

5 MR. REGENSBURGER: Madam Chair, Mr.
6 Lehnherr. Sure. The different exceptions are
7 designed to account for site specific conditions.
8 The main way that you can reduce that setback from
9 1,000 feet are if the aquifer that the well is
10 completed in is in a different aquifer than where
11 the wastewater is discharged to; or if the
12 groundwater flow direction prohibits the movement
13 of wastewater towards the well, just a physical
14 impossibility of the wastewater to get to the
15 well.

16 The other method requires some
17 calculations and data collection. It's designed
18 to look at a four log or 99.99 percent removal of
19 pathogens between discharge in the wastewater
20 lagoon to the well.

21 And the rule has several different
22 methods for calculating some of the parameters.
23 There are hydrogeologic parameters that govern how
24 pathogens will move through the water into a well.

25 We specifically included several methods

1 in the rule, some being very quick and easy --
2 just reading a number off a table -- to more
3 complicated, but more accurate methods. The
4 simple, cheap methods are conservative in nature,
5 so that by using a simple method, we're not going
6 to endanger a well.

7 So we have accounted for that cost issue
8 in this rule, knowing that it can cost some money
9 to reduce the setback. We also have provisions
10 for treatment. If a well has disinfection, for a
11 public well, the setback can reduce 200 feet; and
12 if the sewage lagoon is disinfected per
13 requirements in the rule, that setback can also be
14 reduced 100 feet so there's a lessened chance of
15 pathogens getting to the well.

16 So there are several methods to reduce
17 the setback, and cost could be minimal, cost could
18 be a little bit higher in some cases where the
19 hydrogeology is a more complex and requires more
20 data collection.

21 MR. LEHNHERR: One other question. How
22 often do you think there would be exceptions
23 sought by parties? Say a percentage roughly.

24 MR. REGENSBURGER: That would want to go
25 less than 1,000 feet? That's a hard one to figure

1 out, but probably half, I guess. In some cases it
2 may not be an issue to drill a well 1,000 feet,
3 but in many cases logistics might dictate that
4 they want to go a shorter distance.

5 So I think it would be at least probably
6 half the cases where putting in a new lagoon for
7 wells is going to be a lot less, because most
8 wells aren't within 1,000 feet of a lagoon. Most
9 wells will go in without having to even worry
10 about this rule, but a new lagoon is going to have
11 to look most likely at this issue.

12 MR. LEHNHERR: Thank you.

13 CHAIR DEVENY: Do any other Board
14 members have questions of DEQ?

15 MS. HORNBEIN: Madam Chair, I have a
16 question. Under the previous version of this
17 statute, the setback was 500 feet; is that
18 correct?

19 MR. REGENSBURGER: Madam Chair, Ms.
20 Hornbein, yes.

21 MS. HORNBEIN: Was there any provision
22 under the previous statutory language for reducing
23 a setback?

24 MR. REGENSBURGER: No.

25 MS. HORNBEIN: So just to make sure that

1 I have it correct. Under the new statutory
2 provisions in the rule proposed by the agency, the
3 default would be 1,000 feet, no analysis would be
4 done to incorporate setback unless a request was
5 made by a petitioning party?

6 MR. REGENSBURGER: Correct.

7 MS. HORNBEIN: Thank you.

8 CHAIR DEVENY: Any other questions?

9 (No response)

10 CHAIR DEVENY: Hearing none, would the
11 Board like to entertain a motion?

12 MS. HORNBEIN: I will move to adopt the
13 rule as proposed by DEQ.

14 CHAIR DEVENY: I'll second it. Any
15 further discussion?

16 (No response)

17 CHAIR DEVENY: Hearing none, all those
18 in favor of the motion, please signify by saying
19 aye.

20 (Response)

21 CHAIR DEVENY: Any opposed?

22 (No response)

23 CHAIR DEVENY: Motion carries. Thank
24 you, Mr. Regensburger.

25 That concludes our work on rulemaking

1 today. Next is new contested cases, and we'll go
2 back to Sarah for this.

3 MS. CLERGET: So in looking at your
4 updated agenda -- we apologize for that, but
5 that's the one that went out, I can't remember if
6 it was yesterday or the day before -- that should
7 have two contested cases, new contested cases on
8 it.

9 One of them is the appeal for Western
10 Energy Company regarding Permit No. DEQ-01103F,
11 which I'm going to refer to as the Western Energy
12 Area F case, so as to not confuse it with the
13 current Western Energy case that's in front of us
14 right now. That notice of appeal came in from
15 Western Energy.

16 Then the second appeal is the same
17 permit, appealing the same permit, and so I would
18 ask that you probably combine those appeals for
19 procedural purposes, since they're essentially
20 cross appeals of the same permit, the one is by
21 Western and one is by MEIC.

22 And I'll reiterate your options you
23 have. You can keep one or both; you can assign
24 them for procedural purposes, and keep the
25 substantive decisions like summary judgment or

1 hearing; or you can assign it to me for all
2 purposes.

3 CHAIR DEVENY: I have a question of you.
4 Would there be any reason to keep them separate?

5 MS. CLERGET: I think as they were filed
6 separately, and given separate case numbers, we
7 should keep them separate, but combine them for
8 procedural purposes.

9 CHAIR DEVENY: Any questions of Sarah on
10 this procedure? Chris.

11 MR. TWEETEN: Just a practical one. Do
12 you have time to take these on as the Hearing
13 Examiner at this point, if we were to combine them
14 for procedural purposes?

15 MS. CLERGET: I think so. That raises
16 another question, which is just for the assignment
17 purposes, I wanted to clarify with you guys that
18 if I need help, there are other attorneys in my
19 office who can help, and so when you assign a case
20 to me, my assumption is that you assign it to me,
21 and then I can delegate as necessary for work flow
22 if needed. But ultimately I will be the one who
23 will be presenting it to you, but I may need help
24 from some other attorneys as these cases get
25 larger and more. So can somebody just make sure,

1 orally make sure that that's okay?

2 MR. TWEETEN: I think that's understood,
3 unless anybody has a different understanding.

4 CHAIR DEVENY: That's quite clear.

5 MS. CLERGET: So with that caveat, yes,
6 I can take it.

7 MR. TWEETEN: Madam Chair, I would move
8 to assign these, to consolidate these cases for
9 prehearing purposes, and assign them to our
10 Hearing Examiner, our Counsel to serve as Hearing
11 Examiner.

12 CHAIR DEVENY: That assignment is in
13 totality or for procedural purposes?

14 MR. TWEETEN: I think we start with
15 procedural purposes, and then I think down the
16 road we can make a determination if it appears
17 that the case is susceptible to summary judgment,
18 perhaps we could make a determination to expand
19 the scope of the assignment to handle that, or to
20 assign a hearing on the merits if it comes to
21 that.

22 I think initially we ought to just get
23 through the procedural matters, and then Sarah can
24 report back to us, as she does at every meeting,
25 and we can make a determination as to whether we

1 want to expand the scope or reference that point.

2 CHAIR DEVENY: Any other discussion on
3 this?

4 (No response)

5 MR. TWEETEN: I think I made that in the
6 form of a motion.

7 MR. BUSBY: I'll second.

8 CHAIR DEVENY: It's been moved and
9 seconded. Further discussion on the motion to
10 consolidate the cases and to assign to Sarah for
11 procedural purposes?

12 (No response)

13 CHAIR DEVENY: Hearing none, all in
14 favor of the motion, signify by saying aye.

15 (Response)

16 CHAIR DEVENY: Any opposed?

17 (No response)

18 CHAIR DEVENY: Hearing none, the motion
19 passes.

20 MS. CLERGET: I think that concludes the
21 new cases.

22 CHAIR DEVENY: Then next we have some
23 action on contested cases, and the Signal Peak.
24 Sarah, would you provide --

25 MS. CLERGET: We don't have the table

1 set up for this, but for the purposes of
2 expedition, if the parties need to be heard, they
3 can come up to the podium.

4 But the main issue for the Board is the
5 Signal Peak case, there's two issues. I'll take
6 the easier one first.

7 The easier one is that there was an
8 underlying subpoena issue that was taken up to
9 District Court, that has been decided by the
10 District Court, and has now been appealed up to
11 the Montana Supreme Court.

12 I filed something called a Notice of
13 Non-Participation that essentially told the Court
14 that I'm a party, but I don't intend to
15 practically participate.

16 I anticipate that the same thing can be
17 done in the Supreme Court, which in my opinion
18 would allow me to continue to represent the Board.
19 If that becomes from the filings not what needs to
20 happen, that something more substantive needs to
21 happen, then I would probably suggest that we get
22 another attorney in to represent the Board, so I'm
23 not both the Hearing Examiner and making
24 substantive arguments in front of the Supreme
25 Court.

1 So I just wanted to clear that procedure
2 with you guys on the Supreme Court appeal for
3 Signal Peak.

4 MR. TWEETEN: I have a question.

5 CHAIR DEVENY: Chris, go ahead.

6 MR. TWEETEN: Would you anticipate
7 another attorney from Agency Legal Services taking
8 that on, or would it have to be outside Counsel?

9 MS. CLERGET: I think we could probably
10 have somebody from ALSB do it, but if you guys
11 don't feel that way, then we can get outside
12 Counsel.

13 CHAIR DEVENY: I can see you have some
14 concerns there, Chris.

15 MR. TWEETEN: Well, I guess I understand
16 the reasoning behind separating the representation
17 function from the Hearing Examiner function. I
18 guess I'm not sure that those concerns are fully
19 allayed if one of your colleagues from Agency
20 Legal Services is arguing the merits in front of
21 you as a Hearing Examiner. It seems to me there
22 is at least a question as to --

23 MS. CLERGET: They wouldn't be in front
24 of me. They'd be in front of the Supreme Court.

25 MR. TWEETEN: Oh, right. Okay.

1 MS. CLERGET: So it would be we'd build
2 a wall, and then they can go in front of the
3 Supreme Court and do whatever they're going to do.

4 MR. TWEETEN: But you don't anticipate
5 that there would be a situation in which they'd be
6 arguing in front of you as the Hearing Examiner?

7 MS. CLERGET: No.

8 CHAIR DEVENY: I'm not sure this is
9 anything that needs a motion on this discussion.

10 MS. CLERGET: I don't think so.

11 CHAIR DEVENY: Are we comfortable having
12 Sarah represent us in front of the Supreme Court
13 unless we otherwise need another attorney to do
14 so?

15 (No response)

16 CHAIR DEVENY: I think that's fine.

17 MS. CLERGET: Then the harder piece of
18 that is there is a large summary judgment motion
19 that is pending right now in this case, and
20 originally I had thought that was in front of me,
21 but the parties, MEIC pointed out that in fact in
22 2016, which was two Hearing Examiners before me,
23 the case was only assigned to the Hearing Examiner
24 for procedural purposes, which meant that the
25 Board retained the substantive decision on summary

1 judgment.

2 So you guys have a choice now about
3 whether you want to continue that, and you want to
4 hear the summary judgment in front of you, which
5 means essentially that I will take all of the
6 briefing on summary judgment, and give it to you,
7 and then you hear oral arguments on the summary
8 judgment briefing, and then you make your
9 decision; as opposed to me reviewing the summary
10 judgment materials, making a proposed decision,
11 and then you guys hearing oral arguments on the
12 proposed decision with exceptions briefs.

13 So those are sort of the two options
14 that are available to you, and you need to decide
15 what you want to do about that.

16 CHAIR DEVENY: Chris, I'm going to put
17 you on the spot, because I believe you were on the
18 Board then. Do you remember or recall, was the
19 Board at that time planning to take on this case?

20 MR. TWEETEN: Well, the answer is I
21 don't recall whether any specific discussion was
22 had at that time about the question of referring
23 the decision to the Hearing Examiner, or keeping
24 it before the Board itself.

25 I think our experience generally is that

1 using our Hearing Examiner to make proposed
2 decisions is an efficient way to handle these
3 matters, because if the Board were to hear the
4 matter on its own, the question would come up as
5 to who would preside over the hearing, for one
6 thing, but who would prepare the initial decision
7 on behalf of the Board, which I suppose we could
8 refer to our Counsel to take care of.

9 But if that's going to be the approach
10 that we take, why wouldn't we just refer the
11 decision for a preliminary proposed decision to
12 our Counsel as Hearing Examiner? It seems to me
13 to make more sense to do it that way than to
14 retain jurisdiction, hear the oral arguments, and
15 then ask our Counsel to prepare a proposed
16 decision.

17 I value the input of Counsel with
18 respect to how these arguments ought to be
19 analyzed, as I think important advice for the
20 Board in how to proceed. We don't always accept
21 our Counsel's advice in these matters, but I
22 certainly find it helpful.

23 So I guess I would propose that we refer
24 the summary judgment motions to our Counsel to act
25 as Hearing Examiner, make a proposed decision as

1 provided in MAPA, and then the Board can take it
2 up on the record with the written advice of our
3 Counsel in form of a proposed decision.

4 CHAIR DEVENY: Is that a motion?

5 MR. TWEETEN: Yes. Did that make sense,
6 or should I rephrase that?

7 MS. CLERGET: I think the parties might
8 want to be heard. I did tell them that at your
9 discretion, you guys you might allow them to be
10 heard on that issue, so at your discretion.

11 CHAIR DEVENY: There is a motion before
12 us.

13 MR. TWEETEN: I don't have any
14 objection.

15 CHAIR DEVENY: I have no objection. I
16 have a question of Sarah before we proceed, and I
17 will allow the parties to speak on this.

18 Sarah, if the Board did retain this
19 case, and under our jurisdiction, what's the
20 hearing record look like on that now that we would
21 be required to review?

22 MS. CLERGET: It's about six or seven
23 binders, I would say, of motions, and attachments,
24 and exhibits.

25 CHAIR DEVENY: How big are those

1 binders?

2 MS. CLERGET: Three inch binders. It's
3 not as big as Western.

4 CHAIR DEVENY: Are both parties here for
5 both Signal Peak and --

6 MR. HERNANDEZ: We are, yes.

7 MR. MARTIN: We are.

8 CHAIR DEVENY: You decide who's going to
9 speak first.

10 MS. CLERGET: Chris, I think you need a
11 second to your motion to get to discussion.

12 CHAIR DEVENY: Okay. I'm sorry. Is
13 there a second to Chris's motion?

14 MR. DEARMENT: I'll second it.

15 CHAIR DEVENY: It's been seconded, and
16 we'll have discussion. Are there further
17 questions of Board members before we hear from the
18 parties?

19 MR. LEHNHERR: Could we have the motion
20 restated?

21 MR. TWEETEN: Madam Chair, I move that
22 the Board refer to our Counsel, acting as Hearing
23 Examiner, the pending summary judgment motions in
24 the matter of Signal Peak Energy, Bull Mountain
25 Coal Mine No. 1, for the preparation of a proposed

1 decision in accordance with MAPA, which then would
2 be brought back to the Board for further
3 proceedings.

4 CHAIR DEVENY: That was the motion. Did
5 you have further questions? And before we hear
6 from the parties, Sarah, could you just go through
7 what that procedure would be if we retained, the
8 Board retained.

9 MS. CLERGET: Sure. It's a lot like --
10 because these are only motions, all you get is you
11 get a file, the file, and then you go through it,
12 and then at whatever meeting you decide, you have
13 oral arguments on the motions from the parties,
14 much like the oral arguments that you have on the
15 proposed decision. You just don't have a proposed
16 decision from me. You only have the briefing from
17 the parties.

18 And then you have your discussion and
19 decide what you want to do, and then however you
20 want to do it, one of you can write it, or you can
21 ask me to write something that reflects the
22 decisions that you've made, and then that decision
23 becomes the final agency action.

24 So the step that you skip is the
25 proposed decision from me, and the briefing, the

1 exceptions briefs from the parties.

2 CHAIR DEVENY: Do Board members need any
3 further clarification on that before we hear from
4 the parties?

5 MS. HORNBEIN: I just have an additional
6 procedural question for Counsel.

7 So in the case where the Board retains
8 -- or no. In the case where we pass it off to
9 you, when you provide us with your proposed
10 decision, and then we have the exceptions briefs
11 from the parties, do we also have access to the
12 summary judgment briefing from the parties that
13 you reviewed in putting your decision together?

14 MS. CLERGET: Yes, just as in these
15 decisions. You can go look at anything you want
16 to in the record.

17 CHAIR DEVENY: Further questions from
18 Board members?

19 (No response)

20 CHAIR DEVENY: If not, let's hear from
21 the parties. I'll let you decide who goes first.

22 MR. HERNANDEZ: Madam Chair, members of
23 the Board, Shiloh Hernandez for MEIC and Sierra
24 Club.

25 I think I'd like to start out with my

1 proposal, which is that the Board retain
2 jurisdiction of this. It was a decision made
3 after some consideration in 2016. I was here.
4 I've reviewed the transcript for that, and the
5 Board provided two reasons for its decision in
6 2016 to retain jurisdiction.

7 First, the Board said that this case,
8 unlike the Western case, raises -- it's just not a
9 replay of prior cases, it's new issues, questions
10 about how the reclamation provisions in MSUMRA,
11 the Montana Strip and Underground Mining
12 Reclamation Act -- and you'll hear that acronym
13 repeatedly today, MSUMRA -- and how they apply.

14 The Board hasn't yet addressed it. It's
15 a question of law, so it's appropriate for the
16 Board to address it in the first instance. That
17 was the reasoning of then Chair Miles for not
18 assigning the merits to the then Hearing Examiner
19 Benjamin Reed.

20 The second basis was a matter of
21 efficiency, and this was raised by Mr. Tweeten.

22 In fact what happens, as Ms. Clerget
23 just explained, if this is assigned to Ms.
24 Clerget, and her docket has space, then she'll
25 review the nine briefs that have been filed on

1 summary judgment, make cross motions, we have nine
2 briefs; she'll issue a proposed ruling, and then
3 the parties will then write six more briefs
4 objecting to the proposed ruling, and then briefs
5 responding to those objections.

6 So then the issue comes to you, the
7 Board, with fifteen briefs and a proposed ruling,
8 instead of the current nine briefs and no proposed
9 ruling.

10 And having written three of the current
11 nine briefs, I'm not anxious, enthusiastic, to
12 write two additional briefs. I don't think it
13 helps the Board in any material manner to have six
14 more briefs and a proposed ruling.

15 So the Board has already addressed this
16 issue. I think the reasons that the Board offered
17 in 2016 for retaining jurisdiction of the merits
18 and not assigning the merits to a Hearing Examiner
19 remain. They still have force today for everyone
20 involved.

21 The Board, as Ms. Hornbein said, you
22 guys can either read nine briefs, or you can read
23 sixteen briefs. You don't have any efficiency
24 gained by having an additional intermediary step
25 here.

1 The other important point that I would
2 like to add, the reasoning that the Board offered
3 in 2016 is that the parties in this have filed
4 cross motions for summary judgment. It's not one
5 party arguing that we need to get a hearing, and
6 the other party arguing there are no disputed
7 facts. The parties, all three of them, argue that
8 there are no disputed facts, and that the
9 resolution of the case turns on questions of law.

10 Questions of law are reviewed denovo,
11 after Ms. Clerget would issue a proposed order.
12 So there is no change. The Board has to make a
13 ruling as a question of law, either on nine briefs
14 or on fifteen briefs.

15 And more importantly, questions of law
16 are -- that is the province of the Board. The
17 Board interprets these laws. That's assigned to
18 the Board in particular.

19 And on that point, since this is just a
20 summary judgment matter and not a hearing, it's
21 not a matter where the sides are going to come up
22 here, and present experts, and have evidentiary
23 objections, and you go through the whole trial
24 type proceeding of a contested case. It will just
25 be oral arguments.

1 So it wouldn't be a situation where the
2 Board would be trying to juggle ruling on and
3 addressing objections and evidentiary matters.
4 That's in some cases much easier for a Hearing
5 Examiner, although different boards do it
6 differently. For example, the PSC, the Board
7 rules on evidentiary matters in hearings.

8 But that wouldn't be the case here. It
9 would just be an oral argument, just like you're
10 going to hear later this afternoon in the Western
11 case. The parties will come up, first you'll
12 receive the briefs, you'll review them, the
13 parties will present their argument of the briefs,
14 and Board will review it and resolve the questions
15 of law that are presented to the Board.

16 I mention in our briefing in the Western
17 case the principle of mercy. All of you have day
18 jobs. We'll all busy attorneys. Ms. Clerget has
19 a very busy docket. Adding a supplemental two
20 months of briefing and a proposed ruling, it's
21 just not what we need in this case.

22 The last thing that I'll say is that
23 this case was filed in 2016. It's now 2019, and
24 we haven't had a summary judgment ruling.

25 Part of that owes to the fact that

1 Signal Peak Energy filed a motion to subpoena
2 non-parties to this case that then went to the
3 District Court in Billings. The Judge there ruled
4 that the subpoena had no merit, it was filed for
5 improper purposes. That's what the District Court
6 in Billings said.

7 The result is this case has been delayed
8 for at least a year on account of Signal Peak
9 Energy's maneuvering, and now they're bring that
10 to the Supreme Court.

11 We, the petitioners in this case, think
12 that the case should be moved forward, and the
13 most expeditious way to do that now is to just
14 have the Board hear the summary judgment motions.
15 And with that, I'll step down.

16 CHAIR DEVENY: Maybe some Board members
17 have questions, Mr. Hernandez, so if you'd stay.

18 MR. TWEETEN: I do. A couple of
19 questions. One, I think we have been around
20 before with your client about the issue of both
21 parties agreeing that there are no genuine issues
22 of material fact. Those agreements are not
23 binding on the Board, are they?

24 MR. HERNANDEZ: They're not, but that's
25 what happened in the prior iteration of Signal

1 Peak. Both parties said there are no disputed
2 issues of fact, the Board agreed, and moreover the
3 Board made a very important statement. They said
4 this case will be resolved based on information in
5 the four corners of the CHIA, and the record
6 available to the agency, and beyond that, nothing
7 matters.

8 And the contents of the CHIA and the
9 information before the Board, that administrative
10 record that the Board recognized in the prior
11 case, it's not going to change. So they're really
12 following the Board's prior ruling. There is not
13 really space for summary judgment.

14 In fact, Board Member Tweeten, I'm glad
15 that you mentioned that, because really it does
16 show that this case should be resolved on summary
17 judgment based on the record that's in existence,
18 which as I mentioned is precisely the province of
19 the Board to make that legal analysis.

20 MR. TWEETEN: Well, as I said in a prior
21 case, you've come before the Board having agreed
22 with your opposing Counsel that there are no
23 genuine issues of material fact, and we've
24 disagreed with that, and referred the matter back
25 to our Hearing Examiner to conduct an evidentiary

1 hearing. In fact, it may be the Western Energy
2 case that we're hearing this afternoon.

3 I guess my point is a tribunal
4 considering a summary judgment motion has two
5 burdens. One is to ensure that there are no
6 genuine issues of material fact. And then once
7 the tribunal has satisfied itself of that point,
8 then going on and deciding the merits.

9 And the fact that you've stipulated that
10 there are no issues of material fact doesn't
11 relieve us of the obligation to make that decision
12 independently for ourselves.

13 I guess my second observation is that I
14 understand the question regarding nine briefs
15 versus fifteen, or sixteen, or however many you've
16 calculated, but you're certainly free to
17 incorporate by reference briefing that you've done
18 before. You don't have to restate matters that
19 you've already argued in full in your exceptions.

20 And I guess my second point is that it's
21 I think less burdensome on the Board to -- Well, I
22 won't say it that way. I think the parties need
23 to be reminded that they should exercise economy
24 in their drafting of their briefs, and that fifty
25 page briefs aren't necessarily helpful for the

1 Board, although they are very burdensome for the
2 Board members to wade through.

3 I'm reminded of what Benjamin Franklin
4 wrote to one of his correspondents apologizing for
5 the length of the letter, and saying that, "If I'd
6 had more time, I would have made it shorter."

7 I would urge the parties, all parties,
8 to take that to heart, and edit down your briefs,
9 so that we don't necessarily receive fifty page
10 briefs on the merits of every point, because I do
11 think those are somewhat burdensome for the
12 members of the Board to deal with, and I do think
13 that with some effort, I think Counsel can pare
14 those briefs down to a much more manageable size.

15 And now an observation, Madam Chair, if
16 I might. I continue to go back to the point that
17 I made before, which I think it's useful for the
18 Board members to have the viewpoint of our Counsel
19 with respect to how contested matters ought to be
20 resolved, and to receive that in the form of a
21 proposed decision, is most consistent with the
22 statutes in MAPA that deal with receiving advice
23 from a Hearing Examiner.

24 And you as the parties would have an
25 opportunity to comment on the proposed decision.

1 If we simply heard your argument, and then
2 assigned our Counsel to draft a proposed order for
3 our consideration, you would not have the
4 opportunity to except to that under MAPA.

5 So I think it's actually beneficial for
6 you as parties, by giving you an opportunity to
7 state your objections to our Counsel's proposed
8 decision as provided in MAPA, rather than going
9 the other route, which is to hear the arguments
10 ourselves, and then ask our Counsel to draft up a
11 proposed order.

12 Even if we take a vote on which way the
13 proposed order should go, I would think from your
14 perspective, you'd want to have the opportunity to
15 provide your comments on that before we decide
16 whether to adopt the order or not.

17 And of course, MAPA doesn't require us
18 to have a second hearing on a memorandum, a
19 proposed decision that our Counsel drafts for us,
20 as opposed to what MAPA provides with respect to
21 the proposed decision by a Hearing Examiner.

22 So I guess my mind is not changed at
23 this point on my thoughts on this.

24 MR. HERNANDEZ: Board Member Tweeten,
25 Madam Chair, if I may briefly just respond to your

1 points.

2 Your second point about over-length
3 briefs, I would agree with Benjamin Franklin. If
4 I would have had more time, I would have written a
5 shorter brief. I appreciate your indulgence. It
6 was a long brief that we filled in the Western
7 case.

8 With respect to summary judgment and
9 disputed facts, you referred to the Western case,
10 and I wanted to point out a really important
11 distinction between the Bull Mountain case, the
12 first one, Bull Mountains, and the Western case,
13 which is that in the Bull Mountains case, which
14 the Board resolved on summary judgment, they had
15 cross motions where the parties agreed there were
16 no disputed facts; whereas in the Western case,
17 there were not cross motions, and there was a
18 dispute of facts. DEQ filed a 100 page statement
19 of disputed facts, and so that's a critical
20 distinction here.

21 So even though, yes, the Board does have
22 an obligation to determine whether or not there
23 are disputed facts, In Re: Bull Mountains the
24 parties had no disputed facts, the Board agreed.
25 Western, the parties said disputed facts, the

1 Board agreed.

2 And finally on the point of what is
3 useful to the Board and the parties. I won't
4 belabor the point. I feel that nine briefs and
5 oral argument is adequate for us to present our
6 positions, and that we don't need -- As a party,
7 and you suggested that, in the parties' best
8 interests, I don't think an additional round
9 briefing and additional hearing isn't necessary.
10 I think it's a little overkill.

11 CHAIR DEVENY: I'd like to move along
12 here. Do any other Board members have questions
13 of --

14 MS. CLERGET: I think you need to hear
15 from the other parties, too.

16 CHAIR DEVENY: We do. Could we hear
17 from Signal Peak attorney.

18 MR. LUCAS: Actually, Madam Chair, if I
19 could jump in there. Mark Lucas with the
20 Department.

21 CHAIR DEVENY: You bet.

22 MR. LUCAS: As you know -- good morning,
23 Madam Chair, Board members. As you know, we've
24 taken really no position on this, and we've left
25 it up to you, and the only reason I have jumped up

1 here is because it sounded like Mr. Hernandez was
2 saying that there are no disputed facts in the
3 Signal Peak case.

4 The facts are in fact disputed, and more
5 importantly, the Department, the general
6 proposition that we like to go with, and I think
7 it's a good one, is that matters of disputed
8 expert fact are ill suited to summary judgment.
9 You have to have something so far over the top
10 with an expert that you can just say, "We don't
11 even need to put them in the chair and discuss
12 this."

13 So we moved for partial summary
14 judgment. We did not move for summary judgment in
15 Signal Peak on the issue of what I will call
16 hydrologic availability of replacement water, not
17 because --

18 We probably could have because MEIC did
19 not even come forward with an expert affidavit,
20 but we didn't because we respect the science, we
21 cherish the process in front of this Board,
22 whichever way you want to go, and I just wanted to
23 clarify that there are no -- we couldn't stipulate
24 to a single fact in Signal Peak.

25 And at the end of summary judgment, if

1 you rule in our favor, there will still be one
2 small issue of disputed fact requiring a hearing.
3 So I would ask that you take that into
4 consideration in reaching this decision as to
5 which we otherwise have no position, and I'd like
6 to make myself available for any questions the
7 Board may have.

8 CHAIR DEVENY: Questions of Mr. Lucas?

9 (No response)

10 CHAIR DEVENY: Seeing none, could we
11 hear from the Signal Peak attorney, please.

12 MR. MARTIN: Thank you, Madam Chair,
13 members of the Board. My name is John Martin, and
14 in addition to representing Western, I also
15 represent Signal Peak.

16 I think that there must be some
17 confusion. There are distinctly disputed facts in
18 this particular litigation. In fact, DEQ's
19 statement of disputed facts goes on for 150 pages.
20 Ours goes on for 102 pages.

21 We only moved for partial summary
22 judgment. We believe we're entitled to partial
23 summary judgment, but we've left the hydrologic
24 issues as issues that should be subject to trial.
25 My view, if you don't mind our interjecting it,

1 and we believe this is completely in the
2 discretion of the Board, but my view is akin to
3 Mr. Tweeten's.

4 We would want the same entity that hears
5 the motion for summary judgment also hear the
6 trial. And in my estimation, the likelihood of a
7 trial is very, very high in this instance. There
8 distinctly is no stipulation vis-a-vis these facts
9 in this particular case. So if there are any
10 questions, I'm happy to answer them.

11 CHAIR DEVENY: Any questions of Mr.
12 Martin?

13 MR. MARTIN: And just one other point,
14 and I apologize. It's advancing senility. It
15 came to me late.

16 There are issues, technical legal
17 issues, that you may actually benefit from having
18 Ms. Clerget opine on. We have some res judicata
19 issues in this case. They're a bit thorny, I have
20 to admit. And it might be useful for the Board's
21 purposes to have Ms. Clerget explain those issues
22 and opine on them in the first instance. Thank
23 you.

24 CHAIR DEVENY: Thank you, Mr. Martin.
25 There has been a motion before the Board. Is

1 there further Board discussion on the motion?

2 MS. HORNBEIN: Madam Chair, I have a
3 question for Counsel for the Board, a couple of
4 questions actually.

5 In this type of a situation, is it
6 possible to get from you an opinion as to whether
7 resolution on summary judgment grounds is
8 appropriate?

9 MS. CLERGET: How detailed of an opinion
10 do you want? I can give you an opinion right now
11 off the cuff, or I can give you a more detailed
12 opinion after I have more thoroughly reviewed the
13 briefs.

14 MS. HORNBEIN: To start with, why don't
15 you give us your opinion right now.

16 MS. CLERGET: I think it's possible that
17 some issues will be resolved on summary judgment,
18 but not all.

19 MS. HORNBEIN: Follow up, Madam Chair?

20 CHAIR DEVENY: Go ahead.

21 MS. HORNBEIN: Would it be possible for
22 us to review the Board minutes from, I believe it
23 was 2016 when this was originally assigned for
24 procedural purposes?

25 MS. CLERGET: I have them here if you'd

1 like to review them now, or I can read you the
2 operative portions. But essentially the point of
3 the discussion was that the prior Board had dealt
4 with Signal Peak a lot already, and so they were
5 familiar with the facts and the issues, and so
6 they were going to keep it for themselves for that
7 reason.

8 Obviously that's no longer the case
9 because only Chris is left. But that was their
10 main reasoning for why they wanted to keep it.

11 MS. HORNBEIN: Understood. Thank you.

12 CHAIR DEVENY: Any other questions or
13 comments from the Board members on the motion for
14 before us?

15 MS. HORNBEIN: Madam Chair, I apologize.
16 I would like to make one comment before we vote.

17 In this instance, I think I'm going to
18 vote for retaining the Hearing Examiner. I do
19 feel that there is a strong argument to be made
20 that when there is a question purely -- that's
21 appropriate for resolution on summary judgment, I
22 do think the Board has a role in that case, and it
23 might be appropriate to retain jurisdiction.

24 Given the turnover on the Board, and
25 lack of continuity of knowledge of this case and

1 the surrounding facts, I think it's appropriate in
2 this instance to refer it to Counsel, but I don't
3 necessarily think that's going to be the case in
4 every case.

5 CHAIR DEVENY: Thank you for that
6 opinion. I agree with it. Any other comments,
7 questions?

8 (No response)

9 CHAIR DEVENY: Let's have a vote then on
10 the motion that Chris made. All those in favor of
11 assigning the case to Sarah for its entirety -- is
12 that correct? Does that summarize it?

13 MS. CLERGET: (Nods head)

14 CHAIR DEVENY: -- please signify by
15 saying aye.

16 (Response)

17 CHAIR DEVENY: All those opposed.

18 (No response)

19 CHAIR DEVENY: Motion carries.

20 MS. CLERGET: Chris, I think we might
21 want to take a break because we need to set the
22 room up before the next argument.

23 CHAIR DEVENY: It's a good time to take
24 break. Let's come back here in fifteen minutes.

25 (Recessed at 10:11 a.m.)

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and reconvened at 4:05 p.m.)

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CHAIR DEVENY: Board Counsel update. Do we have any items?

MS. CLERGET: No.

CHAIR DEVENY: At this point I'd like to open up the meeting for any public comment on issues other than contested cases.

(No response)

CHAIR DEVENY: Seeing none, I would take a motion to adjourn.

BOARD MEMBER TWEETEN: So moved.

CHAIR DEVENY: It's been moved. I'll second it. All those in favor of adjourning, please signify by saying aye.

(Response)

CHAIR DEVENY: All those opposed.

(No response)

CHAIR DEVENY: The meeting is adjourned.
(The proceedings were concluded

at 4:07 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 - 57 - 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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