BEFORE THE BOARD OF ENVIRONMENTAL REVIEW

OF THE STATE OF MONTANA

BOARD MEETING

February 7, 2020

TRANSCRIPT OF PROCEEDINGS

Heard at Room 111 of the Metcalf Building

1520 East Sixth Avenue

Helena, Montana

February 7, 2020

9:00 a.m.

BEFORE CHAIR CHRIS DEVENY, DEXTER BUSBY;

and BOARD MEMBERS CHRIS TWEETEN,

HILLARY HANSON, and DAVID LEHNHERR

(By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC
WHEREUPON, the following proceedings were had and testimony taken, to-wit:

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CHAIR DEVENY: We're going to go ahead and get started. Good morning, and welcome to the February Board of Environmental Review meeting. I'll call it to order, and ask Sara Nelsen to take roll call.

MS. NELSEN: Good morning. Chris Deveny.

CHAIR DEVENY: Here.

MS. NELSEN: Dexter Busby.

MR. BUSBY: I'm here.

MS. NELSEN: Hillary Hanson.

MS. HANSON: Here.

MS. NELSEN: John Dearment.

(No response)

MS. NELSEN: John Dearment.

(No response)

MS. NELSEN: Chris Tweeten.

MR. TWEETEN: Here.

MS. NELSEN: David Lehnherr.

(No response)

MS. NELSEN: David Lehnherr.

MR. LEHNHERR: Here. I'm having a hard
time hearing the audio.

   MS. NELSEN:  Okay.  Sorry about that, David.  So we do have five of six members for a quorum.

   CHAIR DEVENY:  Okay.  Thank you, Sara.  We'll go around and have introductions here in the room, and David, Chris, and those of you on the phone, let us know if you're having audio problems and we'll try to fix it.  So go ahead, let's start with --

   MS. BOWERS:  Kirsten Bowers, DEQ Legal.

   MR. MOSER:  Kurt Moser, DEQ Legal.

   MR. HAYES:  Ed Hayes, Deputy Chief Legal.

   MR. GEORGE:  William George, Water Quality Standards.

   MS. STEFFENS:  Galen Steffens, Water Quality Planning, DEQ.

   MS. COLAMARIA:  Angie Colamaria, Chief Legal, DEQ.

   MS. CHRISTOPHERSON:  Sarah Christopherson, DEQ Legal.

   MR. COLEMAN:  I'm Ed Coleman.  I'm the Bureau Chief over DEQ's Coal and Opencut Mining Bureau.
MS. SCHERER: Sandy Scherer, DEQ Legal.

MR. FLEMING: Derek Fleming, DEQ Water Protection Bureau.

MS. MARQUIS: Vicki Marquis with Holland and Hart.

DR. SUPLEE: Mike Suplee, Water Quality Standards and Modeling Section, DEQ.

MR. KENNING: Jon Kenning, DEQ Water Protection Bureau.

MS. McLAUGHLIN: Joanna McLaughlin, DEQ Water Protection Bureau.

MS. HORNE: Melinda Horne, DEQ Water Protection Bureau.

MR. BARTON: Darryl Barton, DEQ Water Protection Bureau.

CHAIR DEVENY: Thank you. Did we get everybody in the room?

MS. NELSEN: Sara Nelsen, interim Board secretary. And it looks like we have another late arrival.

MS. DEVANEY: Rainey Devaney, Water Protection Bureau.

MR. MATHIEUS: George Mathieus, Board liaison.

MS. CLERGET: Sarah Clerget, Board
attorney.

CHAIR DEVENY:  I think we've got everybody in the room.  Is there anybody on the phone today other than the Board members?  Are there any members of the public?

(No response)

CHAIR DEVENY:  It doesn't sound like there is anybody else.  We'll go ahead and move forward.  Board members, are you able to hear me?

(No response)

CHAIR DEVENY:  Is there anybody out there?

MS. HANSON:  We can hear you fine.

CHAIR DEVENY:  Thanks, Hillary.  Anybody else?  Chris, David?

MR. TWEETEN:  I can hear you just fine.  Apparently you don't hear me very well.  This is the third time I've answered, so --

CHAIR DEVENY:  I just heard this last time.  Thanks.  How about you, David?

MR. LEHNHERR:  I can hear you, Chris.  I'm having a hard time hearing some of the other people in the room.

CHAIR DEVENY:  That's because they weren't miked.  And you just came through now, so
it sounds like we're still all aboard. So we'll
go ahead and get started.

You have in your packet the December
13th, 2019 minutes. Is there any discussion,
corrections, or additions to the minutes by the
BER members?

(No response)

CHAIR DEVENY: Hearing none, are there
any discussions, or comments, additions,
corrections by members of the DEQ or the public?

(No response)

CHAIR DEVENY: Hearing none, I would
move to approve the minutes of the December 13th
BER meeting. Is there a second?

MR. BUSBY: I'll second that.

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

(No response)

CHAIR DEVENY: Hearing none, all those
in favor of approving the minutes from the
December 13th meeting, please signify by saying
aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)
CHAIR DEVENY: Hearing none, the meeting minutes are approved.

We'll move on to the briefing items now with the contested case update by our Board attorney, Sarah Clerget.

MS. CLERGET: Hi, everybody. So starting with II(A)(1)(a), we've got CMG. This is just an update to you that this case is dismissed. They filed a stipulation, and although they didn't file a Rule 41 dismissal, DEQ filed it, and I granted it, so it is now dismissed.

Next 1(b) is Copper Ridge and Reflections. This one, they have a fully briefed motion to sever the cases, which means to separate Copper Ridge from Reflections, which were two cases that were originally joined for procedural purposes. That motion is fully briefed and in front of me for decision.

Otherwise they have discovery closing I think in April, and then dispositive motions in June, and we don't have a hearing set beyond that. So that one is proceeding according to the scheduling order and has pending motions.

2(a) Alpine Pacific Utilities. This one has a scheduling order in place. Discovery closes
June of 2020, so they're proceeding according to that.

City of Great Falls. They've got a scheduling order. Dispositive motions are fully briefed in September of 2020, so they're continuing with their scheduling order.

Absaloka Mine, Westmoreland. We've got a scheduling order in place. Dispositive motions are fully briefed December 2020, so again, that one is a ways out, and they're proceeding.

Montanore Minerals. This one is stayed pending the outcome of any Supreme Court appeal that was of -- they're appealing Judge Seeley's order in the District Court, which the way it was written affects our case, and so the appeal to the Supreme Court will affect whether our case continues or not, and they filed their opening brief in the Supreme Court. So that is continuing, they'll keep me updated, and we'll proceed depending on what the Supreme Court does.

(e) is Golden West. I just issued an order on summary judgment in this case, which granted summary judgment. The parties have a schedule for doing their exceptions briefs, and you will see this at the April meeting. They'll
be in front of you for oral argument.

CHAIR DEVENY: So just to interrupt. So April sounds like a good time to plan on being here physically if at all possible.

MS. CLERGET: Yes, please. That's another one that has three parties. And there is a prior summary judgment order, and then the summary judgment order that fully resolved the case. So it's not as complicated as some of you have had before, but it is a complicated one, and three parties make it a lot. So it would really be awesome.

And there is no way that that one is not going. They've already confirmed that they're doing exceptions briefing, and asked for an extension on that, so that I know they're briefing it, and I know there'll be oral argument, so definitely happening in April.

Talen. They have partially briefed motions to stay and vacate the case essentially. The parties are briefing what they want to do with the remainder of this case that hasn't been resolved. Those I think are fully briefed, I want to say the 14th, sometime the middle of February. So once I get those, I'll issue a decision on
that, and depending on what that decision is, it may or may not be in front of you, or it may continue. It's hard to know at this point.

Spring Creek Coal. The parties have until February 28th to file a settlement agreement or ask for a scheduling order. Essentially they needed more time. We originally thought that I had an answer on this by now, but they asked for an extension to keep working out the details of the settlement agreement. So February 28th is their deadline for that.

Western Energy. This is (h). I'm referring to it as Western Energy Area F, so as not to confuse it with the District Court cases going on right now. The Area F, they have partially briefed partial motions for summary judgment in front of me right now. I think those are fully briefed the middle, end of February.

So once I have those, I will be working on a decision for that. Because they're partial summary judgment, they may or may not come in front of you. That will again be up to the parties, depending on what happens. But probably if it did come in front of you, it probably wouldn't be until the June meeting, given when
they're going to be fully briefed.

And then CHS. This case is stayed right now. I had a good meeting with the parties to talk about -- it has been stayed for awhile, but if you'll remember at the last meeting, you did final decision on most of the case.

There is only two issues left. One of them, they're working hard to resolve, and the last one is an issue about arsenic, and that issue on arsenic is dependent on rulemaking which DEQ is going to talk about more today, and then hopefully will be in front of you at the next meeting.

So it makes the most sense for everybody to stay in this case pending that rulemaking, because otherwise it's going to be sort of a waste of everybody's time and energy to do it maybe twice. And I'm told from the parties that there is nothing changing on the ground by staying it, because the permit provisions that are left and that would take effect wouldn't take effect until either 2021 or 2022. I can't remember.

So the point is we have time. We're not changing anything by taking the time to wait until this rulemaking is done. So that one is continued to be stayed. We're going to meet, after this
meeting we're going to meet in March to talk about
the non-arsenic issue -- hopefully they can get
that resolved -- and then to talk about what we
need to do for schedule based on the rulemaking
from DEQ.

(j), Laurel Refinery, this is the same
as CHS.

(k). You've got Signal Peak. There is
the District Court case. Now it's a Supreme Court
case. That is assigned to outside Counsel.

CHAIR DEVENY: I can give an update on
that. I've been in touch with our outside
Counsel, and Amy Christensen has given me an
update. I'll just read it to you, just to remind
you what the background is on this a little bit,
and then what's currently happening.

Signal Peak Energy appealed the District
Court order denying its request to obtain
discovery from two landowners, who are also
members of MEIC. In the District Court matter,
BER filed a notice of non-participation, and we
filed a similar notice in the appeal pending
before the Montana Supreme Court.

Signal Peak has filed its opening brief
on the appeal, and the Respondents filed their
response brief on December 20th, 2019. Signal Peak's reply brief was due on February 3rd, but they requested and were granted an extension until February 28th. If the oral argument is not ordered by the Court, the case will be submitted for decision after the reply brief is filed. So this is ongoing.

MS. CLERGET: Then the contested case piece of it that is left in front of me, we've got scheduled for a hearing April of 2020. They just submitted their pretrial filings, their exhibits, and things like that. Now they have some time to work on motions in limine, if they want them, and then we'll proceed to hearing. And I can't remember if it's a three day hearing or four day hearing that we've got it scheduled for, but it's a longer one.

Then we've got Moudy Pit. This one, if you'll remember, there were 14 separate cases that we combined for procedural purposes. I filed an order asking everybody in the case.

First we needed some clarification, because there was a Rippling Woods Homeowners Association had filed a case, but an individual had appeared. We needed some clarification
because individuals can't represent entities in front of a lawyer like me, so we filed something informing them of that; and then telling the parties that they needed to file either a pro se appearance, which listed their address and how they wanted things to be filed, or whether they were going to have a lawyer.

A bunch of the Appellants, including the Homeowners Association, are now represented by a lawyer, so they filed an appearance. The Appellants who are listed here did not file the appearance as I ordered. I then issued an order to show cause saying essentially, "I'm going to dismiss your case if you don't appear and tell me where you are, and how you want things served on you," and they failed to respond to that order as well.

So those listed parties have now been dismissed. Their appeals have been dismissed. We're left only with the parties who are represented by the lawyer, which includes the Homeowners Association and a number of listed individual parties. And we have a scheduling order in place, and they're going to proceed according to that.
3(a) is not assigned to me.

CHAIR DEVENY: Okay. Western Energy.

Ms. Bowers.

MS. BOWERS: Good morning, Madam Chair, Members of the Board. Just briefly, as I stated in my written update, this case has been remanded to the First Judicial District Court after the Montana Supreme Court's order.

And the most recent development are the mining company filed a motion to substitute the District Court Judge Seeley, and Judge Seeley invited Judge Reynolds to assume jurisdiction of the case, and Judge Reynolds did assume jurisdiction on December 18th. There has been no further development since then.

CHAIR DEVENY: Thank you, Ms. Bowers. And then the next one is also a case that we have outside Counsel for because the BER was named as a defendant in the petition. An update from Amy. This is the Western Energy one as well.

The update from Amy states that the motion has been fully briefed and now waiting a decision. And the Court did issue an amended scheduling order this week, and it's ongoing with documents not required to be submitted until
sometime in May. So this, too, is ongoing, and we will continue to have Amy keep us updated.

So unless Board members have any questions on these contested cases regarding status, we'll turn this over to George to talk about some DEQ proposed rulemaking.

MR. MATHIEUS: Thank you, Madam Chair. Thankfully it is not me talking to you, but it is just an opportunity for the Department to continue to keep the Board updated on this arsenic standard issue that we're planning on proposing rulemaking before you guys, maybe in the upcoming months. So Dr. Mike Suplee is going to be presenting to you today.

DR. SUPLEE: Madam Chair, members of the Board, good morning. My name is Dr. Michael Suplee, that's S-U-P-L-E-E, and I'm in the Water Quality Standards and Modeling Section here at the Department of Environmental Quality.

Today I'd like to give the Board a brief update on the status of nonanthropogenic arsenic standards for parts of the Yellowstone River. We intend to come to you at your April 17th meeting to request initiation of rulemaking for these standards.
The Department last updated you on the standards in June of 2018. Here some key facts and aspects of these standards.

Arsenic concentrations in the main stem Yellowstone River from Yellowstone National Park to around Billings are elevated above the human health standard, which is ten micrograms per liter. Upstream near Gardiner, Montana, average annual concentrations are around 30 micrograms per liter, and decrease in a downstream direction.

The arsenic in the river is mainly from natural geothermal sources in Yellowstone National Park. 97 percent of the river's arsenic load measured downstream of Billings, we have found through our work, is from Yellowstone National Park sources.

The river's concentrations are much lower than the aquatic life arsenic standard, which is 150 micrograms per liter. Therefore, the aquatic life beneficial use is not really in question here.

The Department has identified nonanthropogenic arsenic concentrations and developed standards for the river. The work is documented and through reports on the Department's
website. At our last briefing, the exact means by which the new standards would be implemented was still being worked out. Since then, those details have been addressed.

We said in June 2018, the last time we were here on the subject, that we would come to the Board with a rule package in the fall of that year. Due to a key staff departure, however, there were delays, and the Department did not finalize the technical work until the fall of 2019.

Additional technical work, which aided the Department in finalizing the standards, was completed just last month in January 2020.

Going back to 2015, Senate Bill 325, which is now 75-5-222, MCA, was passed, and required the Department to implement nonanthropogenic conditions as the water quality standards when those conditions exceed the otherwise applicable standards.

Via the Senate Bill 325 Work Group, which is an advisory group, the Department has worked from the start with diverse stakeholders on implementation of the Yellowstone River arsenic standards. The Department will be recommending a
single annual standard, the annual median nonanthropogenic concentration, for each of four river segments.

Among several possible ways of expressing the nonanthropogenic standards, the Department found that the single annual standards are the best option to protect human health and the drinking water beneficial use. The standards will also preclude unnecessarily stringent permit limits for dischargers along the Yellowstone River who have arsenic in their MPDES permits. There’s strong support for the new rule and Yellowstone River arsenic standards among members of the Senate Bill 325 Work Group.

The Water Pollution Control Advisory Council was briefed on the rule and standards at their January 10th meeting, and they recommended the rule be brought to you, the Board.

Again, we intend to come to you at your April 17th meeting to request initiation of rulemaking on that rule. Thank you, and if you have any questions, I'd be happy to answer them now.

CHAIR DEVENY: Thank you, Dr. Suplee. Do members of the Board have questions?
(No response)

CHAIR DEVENY: I'm not hearing any. I did hear a little beep. Did somebody try to call in or speak up?

MR. LEHNHERR: Yes. Chris, this is David Lehnherr. Was this item provided in our Board packet? I didn't see anything about this in our Board packet I received.

CHAIR DEVENY: David, it's under "Other Briefing Items," where it's just listed that DEQ would be giving us an update on the proposed rulemaking. There were no details in the packet.

MR. LEHNHERR: Okay. I'm sure before April we'll be getting more information on all of this. Thank you.

CHAIR DEVENY: Could you tell Mr. Lehnherr where he can find documents that are going to be, that might be available between now and the April meeting.

DR. SUPLEE: Yes, Madam Chair, Members of the Board. Right now we have three technical reports out on the DEQ website under our Water Quality Standards page, and they have executive summaries, or you can wade through all of the guts of it if you want to, and they basically outline
all of the technical materials that have led to
the standards that we have, including an
explanation in the last document from just last
month about the specific water quality standards,
and the way we're expressing those standards, is
all detailed in those documents.

CHAIR DEVENY: Then I'm sure at the
April meeting you will be giving us a fairly
detailed summary of what you're proposing.

DR. SUPLEE: Madam Chair, correct. Yes.

CHAIR DEVENY: Does that help answer
your question, David?

MR. LEHNHERR: Yes. Thank you very
much.

CHAIR DEVENY: Any other questions or
comments from Board members on the phone?

(No response)

CHAIR DEVENY: Hearing none, thank you
very much for the presentation. We'll look
forward to hearing from you in April.

DR. SUPLEE: Thank you.

CHAIR DEVENY: Moving on to Action
Items, we have another Department discussion about
water quality standards. George.

MR. MATHIEUS: Yes. Thank you, Madam
Chair. Galen is going to present to you this morning.

MS. STEFFENS: Good morning, Madam Chair and members of the Board. Thank you for having me. My name is Galen Steffens, and I'm the Water Quality Planning Bureau Chief here at Montana DEQ.

And we are requesting opening the water quality standards to public comment for triennial review. The last triennial review was completed in May of 2017. The triennial review is consistent with state and federal regulations, specifically Montana Code Annotated 75-5-301 for classification and standards for State waters, which states: "The Board shall review from time to time at intervals of no more than three years and to the extent permitted by this chapter revise, establish classification --"

MR. TWEETEN: Madam Chair, excuse me.

This is Chris.

CHAIR DEVENY: Yes, Chris.

MR. TWEETEN: I can't hear what the person is saying.

CHAIR DEVENY: Thanks for speaking up, Chris.

MS. STEFFENS: So I'm going to start
over so that the members on the phone can hear me.

CHAIR DEVENY: Is this better, Chris, and others?

MR. TWEETEN: Much better. Thank you.

MR. LEHNHERR: Yes.

CHAIR DEVENY: I think you might want to start over.

MS. STEFFENS: Yes, I will, Madam Chair. Thank you. So again, my name is Galen Steffens, and I am the Water Quality Planning Bureau Chief here at Montana DEQ.

And we are requesting opening water quality standards to public comment for triennial review. The last time the triennial review was completed was May of 2017. The triennial review is consistent with state and federal regulations, specifically Montana Code Annotated 75-5-301, for classification and standards for State waters, which states:

"The Board shall review from time to time at intervals not more than three years, and to the extent permitted by this chapter, revise established classifications of waters and adopted standards of water quality."

Beyond the statutory requirement, this
provides an opportunity for solicitation of public input, and allows for congruency with current research and data on aspects pertaining to water quality standards.

So real quick, what comprises the water quality standards? We have beneficial uses for surface waters, such as aquatic life, recreation, drinking water, etc.; and groundwater, which is also drinking water, irrigation, livestock watering, etc.

We have criteria standards; we have numeric criteria; and narrative criteria, as well as nondegradation standards, which are implemented in discharge permits for new and increased sources, and protects existing uses of all State waters, and limits or prohibits changes in water quality in high quality and outstanding resource waters respectively.

We also have mixing zones, which is implemented in discharge permits when applicable, and included in water quality standards because it's a requirement of Montana Code Annotated 75-5-301, which is the section in State law on classification and standards of State waters.

So to recap, I know that when we
reference administrative rule sections it gets a little abstract, but the standards that would be open to comment include surface water, designated uses, and water quality criteria which are found in ARM 17.30 Subchapter (6); groundwater rules found in ARM 17.30 Subchapter (10); and numeric water quality criteria included in Departmental Circulars DEQ7 and DEQ12; nondegradation rules in ARM 17.30 Subchapter (7); compliance schedule authorizing provision of ARM 17.30.1350; and mixing zone rules in ARM 17.30 Subchapter (5).

So moving from what standards would be open to public comment into the process for the triennial review, staff brought this request to the Water Pollution Control Advisory Committee, WPCAC, at the January 10th meeting, and they recommended proceeding to the BER with a request to open water quality standards to public comment.

If the BER approves, the water quality standards will be open for recommended 60 day public comment period and associated public hearing; and outreach would include publishing notice in newspapers across the state, mailing information to our invested parties list, email our invested party list serves, updating the
standards website, having internal discussion within the Department and other agencies, as well as having EPA involvement.

Then once that period is completed, the Department would consider all internal and external comments and feedback that we received. Where appropriate, the Department will then propose changes and updates to water quality standards.

This is followed by staff conducting stakeholder meetings on any proposed changes, and we would then come back to WPCAC and the Board with any proposed changes, and would request initiating rulemaking. The timeline for that, if this moves forward, would be summer of this year.

And that would trigger formal public process on any proposed changes, and we would come back to the Board for adoption.

So in closing, we just would like to state that we're now requesting opening the triennial review period by scheduling a public hearing, and soliciting public comments on Montana's water quality standards. And I'm available for questions and so is staff if you have any questions. Thank you.
CHAIR DEVENY: Thank you. Do members of the Board have questions of Ms. Steffens?

(No response)

CHAIR DEVENY: I have a question. Does the public hearing process involve needing to use a Hearings Officer?

MS. STEFFENS: Yes, it does, Madam Chair.

CHAIR DEVENY: So are we at the point where we need to have action where we would potentially assign this to Ms. Clerget?

MS. CLERGET: (Nods head)

MS. STEFFENS: Yes, Madam Chair.

CHAIR DEVENY: Thank you for clarifying that. Board members, any comments, questions of Ms. Steffens?

MR. BUSBY: You were a little bit unclear about your scheduling, the starting point I guess of your scheduling. Is that in April, did you say, or March, or --

MS. STEFFENS: So this is a very valid question, and I was running through with staff to make sure I was clear on it. This is the first time I'm going through this.

And the 60 day period would start once
we provide that notice to our stakeholders through a letter, as well as in the newspapers, and start that period. Then we'd have the public hearing, and that would be scheduled prior to when we're sending the notice, so everybody can know when the hearing was.

So that would be as soon as the next couple of weeks that we would open this, if the Board decides to do that.

CHAIR DEVENY: Thank you, Dexter. Any other questions from Board members for Ms. Steffens?

(No response)

CHAIR DEVENY: It sounds like we probably need to have a motion to either -- I'm assuming that the Board is in favor of proceeding with the rulemaking, which is based on the fact that it's required that we do a triennial review.

I lost my mike. I'm back on again. So let me again ask if any Board members have any further questions of Ms. Steffens.

(No response)

CHAIR DEVENY: Hearing none, I'm going to move that we direct the Department to solicit comments from interested parties on the water
quality standards found in ARM Title 17 Chapter 30, initiate a public comment process, and assign this to our Hearings Officer Sarah Clerget. Sarah, does that cover everything that we need to have in a motion?

    MS. CLERGET: Yes, I think so.

    CHAIR DEVENY: Is there a second to my motion?

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

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

    (No response)

    CHAIR DEVENY: Hearing none, we will have some public comment on this item before we vote. Is there any members of the public that would like to comment on this particular action item?

    (No response)

    CHAIR DEVENY: Hearing none, we'll have a vote on the motion to have DEQ proceed with the rulemaking, and assign Ms. Clerget as the Hearings Officer.

    MS. STEFFENS: Thank you, Madam Chair,
members of the Board.

   CHAIR DEVENY: All those in favor of the
motion, please signify by saying aye.

   (Response)

   CHAIR DEVENY: Any opposed?

   (No response)

   CHAIR DEVENY: Hearing none, the motion
      carries. Thank you.

   We have a new contested case I'd like
      Sarah Clerget to describe to us.

   MS. CLERGET: There was a little more in
your packet this time with this new contested case
because a little more was filed with the initial
request for a hearing.

   And as you could tell if you looked at
the motion, there was a motion that came in before
the Board meeting that Chris ruled on, since I
wasn't assigned, so I can't rule on anything until
I get assigned.

   So she granted that motion to stay the
proceedings pending some settlement discussions
that they're having. So right now, there is
nothing going on in the case and it's stayed.

   However, I do think it should still be
assigned because unless you guys want to -- If
you're going to keep it, that's fine, but then if not, then we need to go ahead and assign it so that I can babysit what's going on with the settlement discussions, and make any appropriate orders; or if you're going to keep the jurisdiction, that we know that, and then we can set up a schedule that works with the Board's schedule.

So that's why even though it's stayed, it's in front of you to decide about assigning it or not.

CHAIR DEVENY: So our options today are to keep the case, to assign it to Sarah for procedural purposes, or to assign it to Sarah for all purposes.

MS. CLERGET: It's like you've done this before. We're getting it down.

CHAIR DEVENY: We'll see what happens next time. Do members of the Board have any questions?

(No response)

CHAIR DEVENY: Would anybody like to make a motion regarding this particular case?

MR. BUSBY: I'll make a motion that we assign it to Sarah for the complete package, not
just part of it. All purposes.

CHAIR DEVENY: It's been moved to assign it to Sarah for all purposes. Is there a second?

MR. LEHNHERR: I'll second it.

CHAIR DEVENY: Was it David that did the second? It's been moved and seconded. Any further discussion?

(No response)

CHAIR DEVENY: Hearing none, all those in favor of assigning the new contested case to Sarah Clerget for all purposes, please signify by saying aye.

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Hearing none, it's been assigned to Sarah. Thank you. And then we'll turn it over to Sarah for a Board Counsel update.

MS. CLERGET: The first thing I have on here is just I wanted to let you know we're continuing to work with DEQ on doing a general review of the rules that we need to do every two years. It has been assigned from our discussions to their Chief Legal for some review and work with the Department on that, so we're continuing to
work with them. I don't know if you have anything else you want to say about that, George. He's shaking his head for those of you who can't see.

The other thing on the rules. I did a round table yesterday that was really pretty productive, and we had a bunch of our sort of regular stakeholders in the contested case come, and from all sides, which was really, really helpful. And we had a really good discussion about ways to make the contested case process better.

The big take-aways from that were that we need some specific rules, especially rules talking about which Rules of Civil Procedure apply, which model rules apply, particularly updated model rules apply. The overwhelming consensus was that we need specifically rules that will make the process better.

Another general consensus I think was that the process is long and arduous, and anything we can do to make that better, to make discovery work better. We had some specific ideas about ways to make initial disclosures potentially different and better that are sort of a tailored rule to the BER process that might help.
And then we talked about potentially different ways to make some of these cases -- we called it a fast track option, sort of an opt-in, which is similar to some things that some of the District Courts are doing.

And so those were some general ideas we had that I think we're going to start to sort of translate into some specific rule outlines -- we're not ready to call them rules yet -- but I'll start putting those ideas to paper, and see what we can work out.

And then the other big point of discussion that I wanted to raise for you guys is that a lot of the stakeholders on all sides said that it would be very helpful, and they think it's very important to get the BER final decisions out into the public in some way, and on the website particularly.

Right now in order to get any BER decision, somebody from the public has to make a public records request, and either come to DEQ and look through them, or have somebody at DEQ look through them. And really you can only find something if you know it exists. There is no way to search prior decisions or to find prior
decisions.

And under 2-4-623 Montana Code Annotated, it says, "Each agency shall index and make available for public inspection all final decisions and orders." And while they I think are at least arguably publicly available right now, and indexed, it is not in a particularly useful way to anybody. And so the access is somewhat dependent on how easily you can access Helena or DEQ, and how much -- and that puts a burden on DEQ staff as well.

So before the meeting, I anticipated this was going to be an issue, and I kind of looked around at what other agencies do. I looked at the PSC, the Tax Board, Commission on Political Practice, Workers Comp, other agencies that have contested case decisions, and how their final decisions are presented.

So there is a bunch of different options, you know, sort of Cadillac versions, all the way down to the sort of, "Let's just get what we can up as soon as possible."

And so with your permission, I'd like to start some discussions with IT, both at DOJ and at DEQ, to see what might be available, what the cost
options are, and then start talking to the stakeholders again about --

The overall main consensus was we need at least the decisions out, but ideally I think everybody would like to have the docket available much like the PSC does, so that those who are participating in contested cases can see what has been filed in their case, and everything is following along.

If, for example, we miss something, we miss something that should be docketed, the parties can tell us that, and it's not at the end when we're getting ready to transfer to District Court that we learn that there is something missing from the docket, or that the docket is mis-ordered, or something like that.

So that was sort of the deluxe end of what the stakeholders would like, I think, but the agreement was at the very least we need to get the decisions up there in some way. And again, there is lots of options to do that.

Some of the agencies, for example COPP and the PSC, have searchable decisions, where you can search the decisions by keyword. Some others, like Workers Comp and the Tax Board, have them
indexed by sort of type or general subject matter. So that requires somebody to go through the decisions and tag them for what they relate to.

    Again, all of that takes time and money, but I'd like to at least start the discussion to find out what time or money it might take, and what might be possible for very little input of either, but I wanted to run that by you guys and see if you wanted me to pursue that as a possibility with this.

    The reason to do it now is because the availability of that may change the procedural rules, so whether or not we have the ability to put up the old decisions at least, or to put up the docket if we're going to go that direction, may change what we want to do with the procedural rules a little bit.

    So it was just an idea for further exploration at this point if you would like that.

    CHAIR DEVENY: Do any Board members have any questions or comments to make regarding Sarah's presentation on the rule-updating round tables that she held?

    MR. TWEETEN: Madam Chair, this is Chris.
Mr. Tweeten: Can everybody hear me?

Chair Deveny: Yes.

Mr. Tweeten: I think Sarah raises a really good point. In my experience, this rule requiring that the agency decisions be made available to the public and indexed is not followed by a lot of agencies in State government, especially the smaller agencies.

And the indexing requirement I think is designed exactly for the purpose that Sarah mentioned, which is to help members of the public -- agency decisions might be pertinent to a particular problem that they're having, and don't have to read every single decision in order to conduct research into what the Board has done.

There's a myriad of different ways that this can be addressed. I think having her initiate the process of examining this question, soliciting input from stakeholders and others, is a really good idea, and I would strongly support having Sarah do that. Do we need a motion to that effect, or can we just make that assignment?

Chair Deveny: I don't think we need a motion. I concur with you, Chris. I did listen
in on the round tables yesterday, and found to be
some really good input from all the parties that
were in attendance, and some really positive and
some really great suggestions.

And I am in agreement that I think the
IT issue may need to be looked at first or in
conjunction as Sarah continues to do the round
tables, and get feedback from the parties. And so
I also agree that we should have Sarah continue to
do this work. I think our procedural rules
eventually really are a little outdated, and need
to be modernized, and this is I think a good
start. Other comments from any Board members?
Anybody feeling differently?  Dexter.

MR. BUSBY:  No.  I think Chris is right
on, both Chris and Sarah are right on.  This needs
to be done.  And I heard some feedback yesterday
also from that meeting that this would be a good
step forward.

CHAIR DEVENY:  Hillary, David, any
comments?

MS. HANSON:  I agree.  It sounds like a
great idea.

MR. LEHNHERR:  Yes.  This is David. I
concur.
It sounds like you've got a unanimous go ahead, Sarah. So thank you for your work, and we'll look forward to hearing an update as this proceeds.

MS. CLERGET: I think that's all I've got for my Board Counsel update.

CHAIR DEVENY: So with that, we're down to opening this meeting up to general public comment, if there is any, from anybody that wants to speak on any issue other than contested cases, which we don't speak about.

(No response)

CHAIR DEVENY: Hearing none, I would entertain a motion to adjourn.

MR. BUSBY: So moved.

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

(No response)

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

(Response)

CHAIR DEVENY: Any opposed?

(No response)

CHAIR DEVENY: Chris, I'm assuming that
was to adjourn, and not an opposition vote. I'm going to assume that. Meeting is adjourned. Thanks, everybody. We'll see you all in April hopefully.

(The proceedings were concluded at 9:51 a.m.)

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CERTIFICATE

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 - 41 - 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 17th day of February, 2020.

________________________________________
LAURIE CRUTCHER, RPR
Court Reporter - Notary Public

My commission expires

March 9, 2020.