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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

An appeal in the matter of) CASE NO.
amendment application AM3,) BER 2016-07-SM
Signal Peak Energy LLC's)
Bull Mountain Coal Mine #1)

TRANSCRIPT OF PROCEEDINGS
ORAL ARGUMENT - VIA ZOOM

Heard Via Zoom
February 25, 2022
9:45 a.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
STACY AGUIRRE, and DAVID LEHNHERR

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A P P E A R A N C E S

A P P E A R A N C E S:

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN RUFFATTO: This is Action Item
5 (a) on Page 6 of the agenda. This is the amended
6 application AM3 for Signal Peak Energy's Bull
7 Mountain Coal Mine No. 1, BER 2016-7. And what
8 we're scheduled to do today is to take up the
9 motion of DEQ to stay this matter pending the
10 appeal of the Western Energy matter to the Montana
11 Supreme Court.

12 We will hear oral arguments on this
13 today, and decide whether or not we're going to
14 grant the stay. To give the folks that are going
15 to be arguing a heads up, my plan is to give the
16 movant DEQ fifteen minutes, and then I'll give
17 Signal Peak fifteen minutes, and then I'll give
18 MEIC twenty minutes, and probably a little more if
19 they want to respond and to make their points, and
20 then five minutes each for DEQ and Signal Peak.

21 Now, I have assumed that Signal Peak
22 would want to say something, but they may not.
23 Let's figure out who is going to be speaking for
24 DEQ.

25 MR. LANGSTON: Good morning, Mr.

1 Chairman. I'm Jeremiah Langston, and I'll be
2 appearing on behalf of the Department of
3 Environmental Quality.

4 CHAIR RUFFATTO: Thank you, Jeremiah.
5 And is someone appearing on behalf of Signal Peak?

6 MS. BORDELON: Yes, Your Honor, I am.
7 Sarah Bordelon.

8 CHAIR RUFFATTO: Okay. And Mr.
9 Hernandez, are you appearing on behalf of MEIC?

10 MR. HERNANDEZ: I am, yes.

11 CHAIR RUFFATTO: Okay. Do any of you
12 have any questions about the oral argument
13 schedule?

14 MR. LANGSTON: Mr. Chairman, just to
15 clarify. If I understand you correctly, the
16 Department will be getting fifteen minutes for our
17 opening, and five minutes for a rebuttal; is that
18 correct?

19 CHAIR RUFFATTO: Correct.

20 MR. LANGSTON: Thank you.

21 MR. HERNANDEZ: If I may, may I ask a
22 question?

23 CHAIR RUFFATTO: Go ahead.

24 MR. HERNANDEZ: Chairman Ruffatto.
25 After all sides have presented their arguments,

1 will there be an open discussion between the Board
2 members, and will Counsel be responding to
3 questions during that discussion?

4 CHAIR RUFFATTO: I would say yes and
5 yes. My plan would be as soon as oral arguments
6 are over, we will give the Board members a chance
7 to ask any questions, and then we will begin
8 deliberations. And during that process, if you're
9 still here and available, and if a Board member
10 wants to ask somebody a question, that will be
11 appropriate.

12 MR. HERNANDEZ: Thank you.

13 CHAIR RUFFATTO: Any other questions or
14 comments?

15 (No response)

16 CHAIR RUFFATTO: Okay. I know Mr.
17 Langston, you are ready, but I don't want to break
18 this up too much, so we're going to take a ten
19 minute break now, and we will reconvene at 10:00
20 a.m., and we will start oral arguments then.
21 Thank you.

22 (Recess taken)

23 CHAIR RUFFATTO: I'll call the meeting
24 back into order, and the first thing I'd like to
25 do is to ask Sandy or Shawna to call the roll of

1 the Board to make sure we have a quorum.

2 MS. MOISEY-SCHERER: Chair Ruffatto.

3 CHAIR RUFFATTO: Yes. Here.

4 MS. MOISEY-SCHERER: David Simpson.

5 BOARD MEMBER SIMPSON: You're breaking

6 up. This is Dave. I'm here.

7 MS. MOISEY-SCHERER: Joe Smith.

8 BOARD MEMBER SMITH: Here.

9 MS. MOISEY-SCHERER: Jon Reiten.

10 BOARD MEMBER REITEN: Here.

11 MS. MOISEY-SCHERER: Julia Altemus.

12 BOARD MEMBER ALTEMUS: Here.

13 MS. MOISEY-SCHERER: David Lehnherr.

14 BOARD MEMBER LEHNHERR: Here.

15 MS. MOISEY-SCHERER: Stacy Aguirre.

16 BOARD MEMBER AGUIRRE: Here.

17 CHAIR RUFFATTO: You've got a bad echo

18 again now, Shawna.

19 BOARD MEMBER AGUIRRE: Can you hear me

20 now?

21 CHAIR RUFFATTO: Yes.

22 BOARD MEMBER AGUIRRE: All right. I'm

23 here.

24 MS. MOISEY-SCHERER: Sorry for the echo.

25 CHAIR RUFFATTO: I think everyone is

1 here, correct, Shawna?

2 MS. PIESKE: Yes, sir.

3 CHAIR RUFFATTO: We have a quorum. So
4 we will proceed with oral arguments on the Signal
5 Peak matter, particularly the DEQ's motion to
6 stay, and I think we're going to start with Mr.
7 Langston.

8 MR. LANGSTON: Good morning, and may it
9 please the Board, I'm Jeremiah Langston appearing
10 on behalf of the Montana Department of
11 Environmental Quality.

12 The Board should grant the Department's
13 motion for stay pending an appeal of the District
14 Court's decision on the Rosebud Mine AM4 permit
15 for three reasons.

16 First, Rule 17.24.425 sub (3) allows the
17 Board to grant such temporary relief, and MEIC is
18 incorrect to argue that this provision is limited
19 to injunctive relief.

20 Second, the District Court's AM4
21 decision implicates this case, and MEIC's efforts
22 to distinguish these two cases is without merit.

23 Third, the balance of potential harm
24 favors granting a stay, because all of the parties
25 and the Board will be harmed if this case proceeds

1 under an incorrect legal standard.

2 Before I start my argument, I'd like to
3 inform the Board that DEQ and Westmoreland filed
4 an appeal and a motion to stay the District
5 Court's AM4 decision on February 8, 2022. I
6 believe Westmoreland has already provided the
7 Board notice of this, but I wanted to make sure
8 that this important fact gets conveyed in today's
9 argument.

10 Turning to my first argument, Rule
11 17.24.425 sub (3) authorizes the Board to grant a
12 temporary stay pending an appeal of the District
13 Court's AM4 decision to the Montana Supreme Court.

14 MEIC argues that this rule is limited to
15 injunctive relief, but there's no such limitation
16 in the rule. Instead MEIC advocates the standard
17 applicable to judicial procedural stays. This
18 standard comes from a Court's inherent authority
19 to control its docket. This Board need not rely
20 on such inherent authority because Rule 17.24.425
21 explicitly allows this Board to grant such relief.

22 But even if the Board were to apply the
23 standard advocated by MEIC applicable to
24 procedural stays in court, a stay is still
25 justified. Two recent Montana Supreme Court cases

1 which we cited in our reply brief, Flying T Ranch
2 and State v. Montana First Judicial District
3 Court, focused on the comparative harm that the
4 parties would endure as a result of a stay.

5 Because Subsection (3)(c) of Rule
6 17.24.425 accounts for these comparative harms,
7 and the Department has satisfied this requirement,
8 a stay should be granted under either standard.

9 Moving on to my second argument.

10 There's considerable overlap between this
11 proceeding and the District Court's decision in
12 AM4. The Department identified three areas of
13 overlap: One, the parties' burden of proof; two,
14 exhaustion of administrative remedies; and three,
15 the Department's ability to explain its permitting
16 decisions on appeal.

17 MEIC only argues that the burden of
18 proof issue is distinguishable between AM3 and
19 AM4. Because MEIC fails to address these two
20 other issues that overlap, the Board should find
21 that the Department's argument on this point is
22 well taken.

23 But even MEIC's attempts to distinguish
24 the burden of proof analysis in AM3 and AM4 is
25 without merit. They argue that the burden of

1 proof is different between these two cases because
2 the relevant issue in AM3 hinges on Subsection
3 (6)(c) of Rule 17.24.405; whereas AM4 hinges on
4 Subsection (6)(a) of the same rule.

5 This is incorrect for a number of
6 reasons. To begin with, the operative standard in
7 this case comes from Rule 17.24.304(1)(f)(iii),
8 not the provisions cited by MEIC.

9 Additionally, Rule 17.24.415 Sub(7)
10 assigns the burden of proof to petitioners
11 challenging all of the Department's MSUMRA
12 decisions before the Board. This rule is equally
13 applicable to AM3 and AM4.

14 The language within this rule stating
15 that the burden of proof at such hearing is on the
16 party seeking to reverse the decision of the Board
17 is plainly a scrivener's error. This language
18 should instead read, "The burden of proof at such
19 hearing is on the party seeking to reverse the
20 decision of the Department."

21 This rule was errantly amended in 2012
22 to reflect a 2005 legislative change that
23 transferred the responsibility for holding a
24 hearing from the Department to the Board. This
25 rulemaking should not have inserted the Board into

1 subsection (7) of this rule because the Department
2 retained permitting authority, and any hearing
3 before the Board would attempt to reverse the
4 Department's permitting decision, not the Board's
5 permitting decision.

6 Further, in AM3, the Hearing Examiner
7 cited this Board's AM4 decision in determining the
8 parties' burden of proof. Thus the Hearings
9 Examiner has already identified these issues as
10 being common between those two cases.

11 Finally, the District Court based its
12 decision on the general provisions in MSUMRA, and
13 did not base its burden of proof decision on the
14 specific subsection that MEIC identifies here.
15 MEIC's exceptions to the Hearing Examiner's
16 proposed FOFCOL in AM3 are a mirror image of the
17 District Court's analysis in AM4.

18 Accordingly, this Board should view
19 these issues as overlapping between AM3 and AM4,
20 and reject MEIC's efforts to distinguish these two
21 cases.

22 Turning to my third and final argument,
23 the comparative harms favor granting a stay. If a
24 stay is not granted, all of the parties and the
25 Board will be harmed because we might be advancing

1 under the incorrect legal standard.

2 By comparison, MEIC asserts that it has
3 already incurred litigation expenses in this case,
4 and should not be required to incur more through
5 delaying this litigation; but MEIC's argument
6 ignores that this alleged harm will only be
7 exacerbated if we continue this litigation under
8 the incorrect standard and are required to repeat
9 steps at some later date.

10 Furthermore, MEIC provides the Board no
11 clear guidance on how it should accommodate the
12 District Court's decision. For instance, the
13 Department prepared for trial based on the
14 Hearings Examiner's order on summary judgment with
15 the expectation that MEIC would have the burden of
16 proof.

17 If the Department and Westmoreland truly
18 have the burden of proof, as the District Court's
19 AM4 decision suggests, the only appropriate remedy
20 is to have another trial under the correct
21 standard. Simply remanding this matter to the
22 Department would not cure this alleged deficiency.

23 But rather than retrying this case, the
24 far better approach is to get guidance from the
25 Montana Supreme Court on this important issue

1 before advancing to the next steps in this case.

2 To conclude, this case reminds me of the
3 Montana Supreme Court's 2010 Whitehall Wind
4 decision, and the pin cite for that is 2010 MT2
5 Paragraph 18.

6 In that case, a District Court had found
7 that the Montana Public Service Commission had
8 erred in setting a rate for a small scale
9 renewable energy generator.

10 The petitioner in that case argued that
11 that case had to be remanded to the Public Service
12 Commission before the Montana Supreme Court could
13 hear the appeal of the District Court's decision.
14 The Montana Supreme Court rejected petitioner's
15 argument, finding that this approach would deprive
16 the PSC of its right to appeal the District
17 Court's decision.

18 Here, too, the Department has a right to
19 appeal the District Court's decision. In the
20 meantime, the Department should not be subjected
21 to the District Court's procedural rulings that
22 bear directly on this case.

23 Accordingly, the Board should grant a
24 stay, so that these issues may be resolved before
25 the Montana Supreme Court, and to avoid wasting

1 time by advancing under incorrect procedure and
2 standards.

3 And with that, I urge the Board to grant
4 the Department's motion to stay, and am happy to
5 answer any questions that the Board might have.

6 CHAIR RUFFATTO: Thank you, Mr.
7 Langston. I think we'll defer the questions until
8 we have heard arguments from all of the folks.

9 Now I would ask the attorney for Signal
10 Peak to make her arguments.

11 MS. BORDELON: Thank you, Mr. Chairman.
12 Signal Peak supports the Department's motion in
13 this case, and we won't burden your time with
14 repeating those arguments, but will instead
15 provide Signal Peak's perspective on this issue.

16 Specifically MEIC had noted in its
17 response brief that Signal Peak has repeatedly
18 urged for a prompt resolution in this matter, and
19 we continue to maintain that position. In this
20 case, we think the most expeditious resolution
21 would be to stay it pending the resolution of the
22 AM4 appeal that's currently pending before the
23 Montana Supreme Court.

24 As Mr. Langston noted, this case was
25 litigated from its inception upon the assumption

1 that Petitioners as the Plaintiffs in the case
2 bore the burden of proof. Every portion of this
3 case was undertaken under that assumption, which
4 means all of the strategic decisions that Signal
5 Peak made throughout discovery, and hearing, and
6 summary judgment, were based on that assumption.

7 As Mr. Langston noted, if as Petitioners
8 appear to urge we were to adopt the District
9 Court's burden of proof, the only way to resolve
10 this case without undo prejudice to Signal Peak's
11 rights would be to reinitiate the case.

12 That would cause enormous cost and time
13 obviously, when delay for a few months --
14 hopefully -- as the Supreme Court moves forward on
15 Westmoreland's appeal will provide clarity to the
16 Board on multiple fundamental procedure questions
17 that arose in that case.

18 To speak a little bit more about the
19 question of what it means for Petitioners to have
20 the burden of proof versus the Defendants, the
21 Petitioners determined the scope of the case with
22 their notice of appeal, so all of the information
23 that was presented and elicited during discovery
24 went to the questions and issues they raised in
25 their notice of appeal.

1 They went first in the hearing,
2 presented their affirmative case. Signal Peak
3 created a litigation strategy based on defeating
4 their affirmative case, not presenting an
5 independent affirmative case.

6 Had Signal Peak known that it was going
7 to bear the burden of proof, we would have
8 presented different information, additional
9 information, potentially different witnesses. To
10 move forward at this advanced point without that
11 opportunity would create significant problems.

12 Specifically, if this case now being
13 poised for the Board's decision -- all of the
14 post-hearing briefing being completed -- if the
15 Board were to issue a decision, likely one party
16 would then seek judicial review.

17 That judicial review would go forward
18 under potentially a question about what the
19 appropriate legal standard is, and regardless of
20 what the Supreme Court does, would likely result
21 in motion practice at the District Court to send
22 it back to the Board probably. Undoing all of
23 this work would create substantial work for all of
24 the parties that could be avoided with this stay.

25 One final point is the scope of the

1 evidence. In the AM4 case there's a question of
2 how much, how broadly the evidence can be
3 collected beyond the terms of the actual permit
4 application.

5 MEIC has maintained that it should be
6 confined to the four corners of the permit
7 application and the CHIA.

8 Signal Peak in motions practice in this
9 case attempted to present post-decisional evidence
10 regarding the accuracy of DEQ's predictions of
11 impacts in this case. That information was
12 excluded from the hearing, but the question of
13 whether that was post-decisional or extra-record
14 evidence, as MEIC calls it, is appropriate under
15 MAPA, which provides all parties the right to
16 present and respond to evidence, will be before
17 the Supreme Court in the AM4 appeal.

18 So it is possible that we will receive
19 an order from the Supreme Court that will instruct
20 that parties like Signal Peak should have the
21 opportunity to present that extra-record evidence,
22 and Signal Peak may wish to present that in this
23 case if that occurs.

24 So these are complicated procedural
25 issues, and we have struggled with them

1 internally. We are happy to provide the Board and
2 respond to any questions about how this may work,
3 but in the interests of time, we'll leave it at
4 that.

5 CHAIR RUFFATTO: Thank you. We'll move
6 to Mr. Hernandez.

7 MR. HERNANDEZ: Thank you, Chairman
8 Ruffatto, members of the Board. Shiloh Hernandez
9 with EarthJustice. I represent Petitioner,
10 Montana Environmental Information Center.

11 Here to stay this proceeding pending
12 resolution by the Supreme Court of the Rosebud
13 case would constitute an abuse of discretion. I'd
14 like to cover three points this morning, and then
15 respond to a few items that Ms. Bordelon and Mr.
16 Langston addressed.

17 First, Ms. Bordelon was right when she
18 said five years is too much. This case has been
19 pending too long and needs resolution. If
20 anything, the District Court's decision in the
21 Rosebud case has made the Board's job easier by
22 clarifying the correct burden of proof applicable
23 in this case.

24 Second, DEQ's contention that it's
25 entitled to a stay based on ARM 17.24.425(3) is

1 plainly wrong, as the plain text of that provision
2 indicates.

3 Third, DEQ has failed to demonstrate, as
4 it must, that its request for the extraordinary
5 remedy of a stay is necessary to avoid a clear
6 case of hardship or inequity.

7 To my first point. As I mentioned,
8 Signal Peak had it right the first time when they
9 said five years is too much. This case has been
10 pending since 2016 with no resolution. Finally,
11 it's teed up for a merits decision from the Board.
12 That's the Board's only obligation with respect to
13 this case: Review the briefs and issue a
14 decision.

15 By law -- and this is ARM 17.24.425 --
16 this hearing is supposed to be conducted within 30
17 days of the appeal. This is approximately 50
18 times longer than expected. It's supposed to be
19 an expeditious process. Five years is simply too
20 long. And the reason this is the problem is
21 because the case simply becomes more difficult to
22 resolve with the passage of time.

23 We see the personnel for both DEQ, the
24 parties, and the Board has shifted numerous times
25 over the case of this litigation, the evidence

1 grows stale, the hearing fades in everyone's
2 memory, and all the while the mining operation in
3 the Bull Mountains continues, causing harm to
4 MEIC's members, and the people who ranch above the
5 mining operation.

6 As the Federal District Court of
7 Colorado said, and we cite this in our brief, in
8 the Glasser decision, a stay of the proceedings
9 only makes the tribunal's management of its docket
10 more difficult, because it injects uncertainty and
11 unpredictability into the Court's docket.

12 Here we don't know if this case is
13 stayed indefinitely, we don't know who is going to
14 be the Hearing Examiner when the Supreme Court
15 case is finally resolved, we don't know who's
16 going to be on the Board, we don't even know who
17 Counsel for the parties are going to be.

18 And we see this with DEQ. DEQ's Counsel
19 has shuffled time and again over the course of
20 this case, and each time they get a new attorney,
21 they ask for additional stay.

22 And here, we see where DEQ lost their
23 prior attorney, Ms. Christopherson; and then Mr.
24 Lucas left; and when DEQ's attorneys changed, they
25 requested more time for filing briefs, months of

1 time. And during that time, new events unfold --
2 the AM4 decision, the Rosebud decision -- which
3 prompted DEQ to seek further delay and extension.

4 You can see how this leads to
5 compounding problems by continuing to push off a
6 resolution of this case.

7 And to the second point. With respect
8 to the provision DEQ cited as justification for
9 its stay, ARM 17.24.415(3), I urge the Board and
10 the Board members to review this provision because
11 it simply isn't applicable to stays of a
12 proceeding pending a resolution of a separate
13 proceeding.

14 You see this in the terms that it
15 addresses. For example, 425(3), one of the
16 provisions under this is a demonstration of
17 success on the merits. Why would analysis of
18 likely success on the merits be relevant for a
19 stay pending appeal of another case? You don't
20 see that in any case law addressing stays in these
21 circumstances.

22 Even if it were applicable, DEQ's whole
23 argument is that the Rosebud decision undermines
24 its case here. So even if 17.24.425(3) were
25 applicable, DEQ couldn't satisfy the standard

1 because under the existing case law -- which is
2 the Rosebud case -- DEQ loses.

3 And DEQ went as far as effectively
4 admitted this by saying their entire theory of
5 their case loses if the Court's decision in the
6 Rosebud case applies.

7 But as I mentioned, the Board doesn't
8 have to go there because 425(3) simply isn't
9 applicable. It establishes temporary relief, and
10 I quote, "pending final determination of the
11 proceedings." So the purpose of 425(3) is to
12 allow relief, which would be on the ground
13 injunctive type relief, pending resolution of the
14 decision.

15 So it's understood by the operation of
16 the provision that the matter will move forward
17 towards resolution, while temporary relief is in
18 place. That's not applicable if the whole
19 proceeding is put on ice for a stay.

20 And then I think the Board should also
21 look at 425 Subsection (2), which says that a
22 hearing is supposed to commence within 30 days of
23 an appeal.

24 Now, DEQ's contention that they can
25 indefinitely stay this case under 425(3), it

1 doesn't work with that 30 day period, because what
2 DEQ is effectively saying is that that provision
3 should say that a hearing should commence within
4 30 days unless the Board grants an indefinite
5 stay. Now, that's DEQ just reading new language
6 into the provision.

7 As we explain in our brief, the
8 applicable standard for a stay of one case pending
9 resolution of another case was set forth long ago
10 by the United Supreme Court in the Landis
11 decision, and adopted by the Montana Supreme Court
12 in the Henry decision, and applied in a number of
13 cases since then.

14 Now, Mr. Langston was more or less right
15 that this analysis is pretty much just a balancing
16 test, considering the hardship to different
17 parties. The problem for DEQ, though, is that no
18 case that any party has cited has approved a stay
19 of one case pending an appeal of another case.
20 We've cited numerous cases where Courts have held
21 that it's been an abuse of discretion for a
22 tribunal to stay one case pending resolution of
23 another case.

24 The case that most clearly addresses
25 this is the original case, the Landis decision,

1 written by the United States Supreme Court in
2 1936. I urge all of the members of the Board to
3 review that case. It was written by Justice
4 Cardozo, one of the best writers of the Court, in
5 the history of the Court, and the analysis was
6 quite clear.

7 The Court said that there were two cases
8 that were operating on parallel tracks that
9 involved a similar question, and the Court in the
10 second case imposed a stay pending resolution of
11 the first.

12 The Court ultimately said that the stay
13 made sense through resolution of the first case at
14 the District Court, but staying it longer than
15 that fails for two reasons.

16 The first is that the District Court's
17 decision provides sufficient certainty as to what
18 the law should be. That's what we have here. The
19 Rosebud case provides the certainty that DEQ
20 wants, that the Board needs with respect to the
21 burden of proof.

22 The second point the Supreme Court made
23 in the Landis decision was that to stay a
24 proceeding longer than just resolution at the
25 District Court was indefinite, immoderate, and

1 abuse of discretion here, and that's the case
2 here.

3 Neither Mr. Langston, nor Ms. Bordelon,
4 has given us any idea how long it will take the
5 Montana Supreme Court to resolve the Rosebud
6 appeal. There's motions practice right now.
7 There are motions before the Board saying that the
8 appeal was not properly raised. There are matters
9 pending resolution at the District Court still.

10 There's no clarity about when this
11 matter will be resolved, and to put this case on
12 ice pending resolution of the Rosebud case in the
13 Montana Supreme Court would be an abuse of
14 discretion.

15 Now, the Board can review DEQ's filing
16 in this case. They have not cited one decision
17 where any tribunal has approved an indefinite stay
18 pending the appeal of another case. There's not
19 one decision that's said that. By contrast,
20 numerous Courts have said it's simply an abuse of
21 discretion to deny a party resolution of its case
22 pending the appeal of another case.

23 The important part of this is an
24 analysis of the competing hardships. On the one
25 hand here, we have this case which has moved

1 forward for five years, going on six, with no
2 resolution. By any measure that's an
3 extraordinary period of time, as Signal Peak
4 itself said at length to this Board just this
5 summer.

6 Now, consider the harm that DEQ has
7 offered. DEQ has hypothesized allowing this case
8 to go forward prior to a resolution of the Rosebud
9 case by the Montana Supreme Court may result in
10 harm to DEQ.

11 But what harm has DEQ identified? It's
12 not at all clear. In their brief, in their
13 opening brief, the only thing DEQ identified as
14 far as harm to the agency -- and this is at Page 5
15 of their brief -- they cite potential uncertainty.
16 Potential uncertainty. That's not harm. It is
17 not at all clear how that is harm.

18 And if anything, the Rosebud decision
19 has dispelled uncertainty because the 16th
20 Judicial District Court in a very detailed opinion
21 explained the operation of the burden of proof in
22 an MSUMRA case.

23 Now, the second thing that DEQ has
24 offered by way of potential harm is their
25 prognostication in their reply brief about a

1 potential new trial. Now, this is at best
2 speculation. How would a new trial work here?

3 There are a few possibilities. Now, if
4 the Board moves forward on the basis of the
5 existing law, DEQ should lose. Signal Peak should
6 lose. The Board should reverse DEQ's permitting
7 decision.

8 Now, if the Board does that, then DEQ
9 and Signal Peak can exercise their ability to
10 appeal, just as Ms. Bordelon mentioned. They
11 would bring this matter to the District Court.
12 There they can raise their arguments about
13 appropriate burden of proof, and if they lose
14 there, they can appeal to the Montana Supreme
15 Court.

16 By that time there's no question that
17 there will be a resolution of the Rosebud case,
18 and the burden of proof will be clarified.
19 There's no chance that this matter is going to go
20 back to a new trial at some point in time before
21 the Supreme Court resolved the Rosebud case. It
22 just wouldn't happen.

23 Now, Ms. Bordelon talked about potential
24 motions practice in an appeal, and it's not at all
25 clear what that was a reference to. Yes, a Board

1 decision in this case will be appealed to the
2 District Court, and the parties will brief the law
3 and facts, and the Court will resolve it one way
4 or another, depending on what the law is, either
5 the District Court in Rosebud got it right or it
6 didn't.

7 But either way it will be resolved at
8 District Court. This isn't going back to a trial,
9 and resolution of this case won't lead to any more
10 briefing than it otherwise would. There will be
11 merit briefing at a District Court and then an
12 appeal.

13 Now, there may be something that I've
14 missed here, some allegation of additional harm to
15 DEQ, but I haven't seen it. And their obligation
16 merely to go forward and defend this case isn't
17 cognizable harm. We point that out in our brief.
18 Numerous cases say just having to litigate a case
19 isn't harm. That's what DEQ has to do. They
20 issued this decision, this permit. If they think
21 they did it right, then they have to defend it.

22 In sum, this case has been pending now
23 for over five years. It's teed up for resolution
24 on the merits, and that's what the Board should
25 do, move forward with resolution. All that

1 remains is a hearing, discuss the merits, and
2 issuance of an order.

3 DEQ's motion for a stay rests on
4 inapplicable grounds, and even if DEQ had
5 addressed the actual standards set forth in the
6 Landis decision, it wouldn't meet the applicable
7 standard. Therefore, DEQ's motion for a stay, an
8 indefinite stay would be immoderate, and an abuse
9 of discretion, and should be denied. Thank you.
10 I'm happy to answer any questions after the
11 rebuttal arguments of Signal Peak and DEQ.

12 CHAIR RUFFATTO: Thank you, Mr.
13 Hernandez. And now we'll move to rebuttal, and
14 Mr. Langston, if you would be up first, please.

15 MR. LANGSTON: Thank you, Mr. Chairman.
16 I'd first like to address Mr. Hernandez's argument
17 that if the District Court's AM4 decision is
18 adopted here, then DEQ loses.

19 I'd like to note that in our opening
20 brief requesting a stay, the DEQ reserved the
21 position that even if we were subject to the
22 burden of proof in this case, that we would
23 nevertheless have satisfied our obligations, and
24 the Department's permit decision should be upheld.
25 So I disagree with Mr. Hernandez's position on

1 that.

2 Furthermore, Mr. Hernandez took the
3 perspective that the District Court's AM4 decision
4 clarified law.

5 I think it's notable that the District
6 Court's AM4 decision departed from the Montana
7 Supreme Court's well-established precedent in
8 MEIC-2 concerning the Clean Air Act that said that
9 the party seeking to overturn the Department's
10 permitting decision bears the burden of proof.

11 So there is a lot going on in this case,
12 but to be sure, this District Court's decision is
13 in tension with Montana Supreme Court precedent.
14 We believe that they departed from this precedent
15 without adequately explaining its reasons for
16 doing so, and accordingly I don't think that it's
17 entirely correct to say that the District Court
18 resolved all these issues, and we don't need to
19 consider what future appellate decision making
20 might be made in AM4.

21 Mr. Hernandez's first argument was a
22 riff on the mine's position that in the summer
23 that five years had been too much delay in this
24 case. But I would argue that our waiting several
25 months to get resolution from the Montana Supreme

1 Court on these important issues is far better than
2 advancing under the wrong standard.

3 And if we advance under the standard,
4 and make a decision, the delays that could result
5 from having to have an appeal to a District Court,
6 and have it remanded back, or remanding this case
7 by the Board back to the Trial Court could
8 potentially be -- excuse me -- to a trial posture
9 would result in much longer delays.

10 It is far better to wait a few months
11 for guidance from the Montana Supreme Court,
12 rather than go off into uncertainty, and not know
13 what future procedures this case might be
14 subjected to.

15 I just think it's notable, too, that Mr.
16 Hernandez complained about transitions between
17 attorneys in this case. I think it's notable that
18 when we filed this reply in our motion to stay
19 this case, we didn't ask for any extensions. We
20 filed it in a timely fashion. So there's no
21 indication that at least current Counsel isn't
22 going to meet all deadlines and advance in this
23 case expeditiously.

24 MEIC has argued that the rule cited by
25 the Department as providing the basis for a stay

1 here is inapplicable, and they point to the
2 analysis on the merits in that rule, and the
3 requirement that the party asking for relief has
4 to show a certain likelihood of success.

5 I think it's notable that this relief is
6 rather broad. It's not limited to injunctive
7 relief. It allows the Board to grant all sorts of
8 relief, and accordingly you would expect that the
9 inquiries that the Board might look to would
10 similarly be broad.

11 But even if we were to focus on the
12 merits, the Department already has a favorable
13 decision from the Hearings Examiner in this case.
14 It's MEIC who is filing exceptions to the Hearing
15 Examiner's order, not the Department, so we've
16 already demonstrated a certain likelihood of
17 success in the merits on this case.

18 Mr. Hernandez asserted that by arguing
19 that these cases overlap between AM3 and AM4, we
20 have conceded our central theory of this case.
21 This is wrong by MEIC's own concession.

22 They're the ones who have argued here
23 that the applicable standards are different
24 between AM4 and AM3, so they've already done the
25 distinguishing on the merits in this case to make

1 the point that we just don't automatically lose if
2 we view AM4 as having bearing on this case.

3 So to the extent that they do have
4 bearing, that that case has bearing on this case,
5 it's from a procedural standpoint. It's the
6 procedural process that occurs under MSUMRA, and
7 that is how these cases overlap in process, not in
8 substance.

9 Mr. Hernandez argued that we needed to
10 initiate this case and have a hearing after 30
11 days. This 30 day limitation is limited to
12 initiating the contested case proceeding. It does
13 not bear on the Court -- or excuse me -- the Board
14 accepting the proposed findings of fact. There's
15 no such limitation or time constrictions on the
16 Board in this process.

17 So the contested case has already been
18 initiated, the Board has already satisfied that
19 requirement, and referring back to that time
20 requirement is inapplicable to the current posture
21 of this case.

22 And I see with that I've exceeded my
23 five minutes. I appreciate you indulging me in me
24 taking an extra minute. I'm happy to answer any
25 questions that Board members may have, but at this

1 point I'll end my rebuttal.

2 CHAIR RUFFATTO: Thank you, Mr.
3 Langston. Ms. Bordelon. Thank you.

4 MS. BORDELON: Thank you. It's a Cajun
5 name. I inherited it when I married my husband,
6 so I have to explain it every time.

7 CHAIR RUFFATTO: Thank you.

8 MS. BORDELON: I'd like to echo Mr.
9 Langston's argument about the validity of this
10 permit, and the fact that the Hearing Examiner has
11 issued a proposed decision dismissing -- or
12 advising the rejection of MEIC's claims here.

13 And in particular, in that decision, the
14 Hearing Examiner issued a -- proposes a conclusion
15 of law that MEIC did not challenge, which stated
16 that, "Signal Peak affirmatively demonstrated that
17 there are water supplies that could be developed
18 to replace water supplies diminished or otherwise
19 adversely impacted as contemplated under the law."
20 She supported this with 85 discrete findings of
21 fact, most of which were also not challenged by
22 MEIC.

23 So like DEQ, we would oppose and
24 strongly reject MEIC's contention that they
25 automatically win because of AM4, because the

1 proposed decision in this case -- which they have
2 not challenged -- held that Signal Peak did meet
3 its affirmative burden in this case.

4 Notwithstanding, we also strongly
5 dispute the claim from Mr. Hernandez that there
6 would be no hearing. It simply is a clear
7 prejudicial error for the Board to move forward
8 under a different burden of proof at the end of
9 the proceedings than was litigated under in the
10 beginning.

11 Yes, we could appeal, and clear
12 prejudice in the procedure is a basis for appeal
13 of an MSUMRA decision, but we think the Board
14 would be better advised, if it wished to proceed,
15 to reinitiate the case under the standard if it
16 wishes to adopt the AM4 standard.

17 That would avoid the necessity of
18 further appeal in which the Board would almost
19 certainly be reversed because of the clear
20 prejudicial error of forcing parties to move
21 forward under a changed burden of proof at the
22 eleventh hour.

23 While MEIC does not wish to have a
24 hearing, would like to assert by fiat that it wins
25 this case by virtue of AM4, which they also argue

1 is distinguishable in a difficult to understand
2 argument, that simply is not the case.

3 The Board here is presented with a
4 difficult position, that the case was litigated
5 under one standard, a standard that's established
6 by Montana Supreme Court law -- which the Board
7 had adopted and considered deeply in the AM4
8 decision -- and then the District Court in the AM4
9 decision changed that, grappling with some of the
10 Supreme Court precedent, but obviously the
11 District Court does not have the authority to
12 overturn the Supreme Court precedent, which as Mr.
13 Langston said, puts the Board in a difficult
14 position of having conflicting authorities.

15 In this point we think that the most
16 expeditious process that would preserve party and
17 Board resources would be simply to wait, and look
18 to the Supreme Court to resolve this question.
19 The question is teed up before the Supreme Court
20 now, and we believe that the Board should grant
21 DEQ's motion to stay pending that certainty.
22 Thank you.

23 CHAIR RUFFATTO: Thank you. I would at
24 this point like to thank all of you for your
25 excellent arguments, and I think you've done a

1 good job of grappling with a lot of unknowns and
2 conflicting lines of thought. So thank you for
3 that. I'd like open it up. Mr. Hernandez.

4 MR. HERNANDEZ: Chairman Ruffatto, may I
5 have one minute to address one point that Ms.
6 Bordelon and Mr. Langston addressed that I think
7 would be helpful to the Board, and shouldn't take
8 up more than one minute of your time?

9 CHAIR RUFFATTO: You may.

10 MR. HERNANDEZ: Now, there was some
11 discussion of the expectations of Signal Peak
12 Energy and DEQ at the outset of this hearing about
13 the burden of proof.

14 Now, I think they had clear evidence
15 from the Board about the appropriate burden of
16 proof in the Board's decision in the prior
17 iteration of this case. This is the In Re: Bull
18 Mountain Mine decision that the Board issued in
19 2016.

20 And there I would just direct the Board
21 to Pages 86 and 87 of the Board's decision, where
22 the Board said that DEQ and Signal Peak lost that
23 case because they did not affirmatively
24 demonstrate that their mining operation would not
25 cause harm to water resources.

1 So there the Board applied a burden of
2 proof that held DEQ and the mining operators to
3 the standard that the District Court held in the
4 Rosebud case. They had the burden of proof. They
5 should not act surprised that the burden of proof
6 rests with them. That's what this Board said in
7 its prior decision in this case.

8 And that's the In Re: Bull Mountain Mine
9 decision from 2016 at Pages 86 and 87. I think
10 that the Board needs to consider that information
11 in resolving this matter. Thank you, Chairman
12 Ruffatto. I appreciate the indulgence.

13 CHAIR RUFFATTO: Of course. I'm not
14 familiar with what Mr. Hernandez referred to. If
15 either Signal Peak or DEQ have a response to that,
16 I'll give you a minute if you want.

17 MR. LANGSTON: Mr. Chairman, if I might
18 briefly just address that very quickly.

19 The precedent for determining which
20 party had the burden of proof was established in
21 AM4, and it was looking back to these prior MSUMRA
22 cases, including Bull Mountain.

23 Now, if I understand Mr. Hernandez
24 correctly, this language about the Department
25 adequately explaining its decision making, I mean

1 that's a well established principle in
2 administrative law that you have to adequately
3 explain your decision making, and if you don't do
4 so, then the agency's decision can be overturned.

5 And from the sounds of it, that's what
6 his comment is getting at, that there the
7 Department did not adequately explain why it
8 granted the permit. And you see that all over in
9 administrative law.

10 Now, that's different than the burden of
11 proof. I mean a burden of proof is ultimately
12 what you have to prove, and here it would be the
13 Petitioner proving that the Department
14 inadequately explained its decision making. They
15 would have the burden of proof. But nevertheless,
16 the Department still has to explain its decision
17 making.

18 So it's important to fine slice these
19 issues, and I think there's a lot of confusion all
20 over the place, both in AM4 and AM3, as to who has
21 to explain what, and what time; but once you start
22 to bear down on it, it becomes exceptionally
23 clear that normal administrative law principles
24 give them the burden of proof.

25 CHAIR RUFFATTO: Thank you, Mr.

1 Langston.

2 MS. BORDELON: Mr. Chairman, may I add
3 one short point?

4 CHAIR RUFFATTO: If it's short. We're
5 getting really down in the weeds here.

6 MS. BORDELON: Yes. The case that Mr.
7 Hernandez referred was a separate case. It was
8 resolved, and in the Board's order resolving it,
9 it said that any future appeal would be a new
10 case. The case we're dealing now is separate, so
11 there's no question that a law of the case
12 principle could apply here.

13 CHAIR RUFFATTO: Thank you. All right.
14 At this point, I would like to ask the Board
15 members if you have any questions at this point.
16 And this won't be your last chance to ask
17 questions, but if any of you have questions
18 immediately, we can present them to these
19 advocates.

20 BOARD MEMBER SIMPSON: Mr. Chairman,
21 this is Dave Simpson.

22 CHAIR RUFFATTO: Go ahead.

23 BOARD MEMBER SIMPSON: Just to make
24 sure. Okay. I have a question. I'm not even
25 sure who to direct it to.

1 But if I understand correctly the
2 situation here, this case, Signal Peak, has
3 proceeded under existing law and precedent
4 established by the Montana Supreme Court regarding
5 burden of proof. We have a conflicting District
6 Court decision in another district.

7 So the two questions I have are, first
8 of all, since the decision is in a different
9 district, is it applicable to Signal Peak?

10 Second is since we are operating under
11 established law and precedent so far in this case,
12 does this District Court decision affect our
13 process at this point, the Supreme Court not
14 having yet heard it?

15 CHAIR RUFFATTO: Let's direct that
16 question to all three, because I think it's
17 critical. It goes to the question of whether or
18 not the AM4 decision is binding on this Board,
19 which I think is hugely significant. So if we
20 would -- I'd like to give each of the advocates
21 one minute to address that. Mr. Hernandez, go
22 ahead.

23 MR. HERNANDEZ: Chair Ruffatto, whatever
24 order you wish.

25 CHAIR RUFFATTO: You go ahead, Mr.

1 Hernandez.

2 MR. HERNANDEZ: To the first point: Is
3 the District Court's decision binding on the
4 Board?

5 The District Court reversed the Board.
6 The Board is not at liberty to ignore the District
7 Court decision. That's what happened. Now, it
8 was a different case, but it would seem to usurp
9 the Court's role of judicial review, the Board
10 simply to ignore a decision of a State District
11 Court that reversed the Board. But I think that
12 it would be a very risky endeavor for the Board to
13 follow, to simply ignore the AM4 decision.

14 And the second question, Member Simpson,
15 is with respect to existing case law. Now, the
16 Board has been provided with a copy of the
17 District Court's decision, I presume, and there is
18 this question about this 2005 MEIC versus DEQ
19 decision under the Clean Air Act that Mr. Langston
20 cited.

21 The District Court distinguished that
22 case in the AM4 litigation of the Rosebud case on
23 the basis of a number of authorities. First was
24 the law at issue here, the strip mining law, the
25 Montana Strip and Underground Mine Reclamation

1 Act, which expressly places the burden on the
2 applicant, and the regulations place the burden on
3 the applicant and DEQ. The Board noted that the
4 Clean Air Act in its statutory text doesn't do
5 that, and that's critical.

6 The second authority that the District
7 Court relied on in the Rosebud case was existing
8 Montana Supreme Court case law about the Montana
9 Water Use Act, which says in this type of case
10 where you have the burden of proof on the
11 applicant to show that certain environmental harm
12 will not occur, that burden remains on the
13 applicant in an appeal of a decision.

14 And the reason for that is that if no
15 one presents any evidence in an appeal, then the
16 Applicant won't have met its burden. If there's
17 no evidence, if Signal Peak presents zero evidence
18 that they're not going to cause harm to water
19 resources, then they're not entitled to a permit.
20 That doesn't change in an appeal.

21 Now, that's the authority that the
22 District Court found binding, and found in the
23 Montana Environmental Information Center case
24 wasn't applicable. To the degree that the MEIC
25 case from 2005 was applicable, the District Court

1 noted that when it analyzed a provision in the
2 Clean Water Act roughly analogous to the provision
3 at issue here, under MSUMRA, the Montana Supreme
4 Court in that case, the MEIC case, said that the
5 burden of establishing that certain environmental
6 harm will not occur rested with the applicant.
7 And there it was an applicant for a coal plant
8 near Signal Peak.

9 So the question of whether or not there
10 is binding Supreme Court authority about the
11 applicable burden of proof in an MSUMRA case, here
12 the answer is no. And there are a number of other
13 authorities on different issues that are relevant
14 that the District Court analyzed and concluded
15 demonstrates that the burden of proof here is with
16 DEQ and the mine applicant, which in this case
17 would be Signal Peak.

18 CHAIR RUFFATTO: Thank you, Mr.
19 Hernandez. Mr. Langston.

20 MR. LANGSTON: Mr. Chairman, and Board
21 Member Simpson.

22 I think this question gets at the crux
23 of the issue before today, before the Board today.
24 It is the Department's position that the District
25 Court's decision, because it is an out of district

1 decision, is not binding on Signal Peak. It's a
2 well-established principle, and accordingly the
3 Board could disregard that decision.

4 However, I understand that ignoring a
5 Court decision is an awkward position to be in. I
6 wouldn't want to be in your shoes. And the better
7 solution to avoid that awkwardness is to grant the
8 stay, and allow the Montana Supreme Court to opine
9 on this issue. It's not going to take years.
10 We've already filed the appeal. It's going to
11 move forward at an expeditious pace.

12 And accordingly, the Board should grant
13 a stay, even if the District Court's decision
14 isn't binding on this proceeding.

15 CHAIR RUFFATTO: Thank you, Mr.
16 Langston. Ms. Bordelon.

17 MS. BORDELON: Thank you. I would echo
18 Mr. Langston's position regarding the decision not
19 being binding. Agency non-acquiescence is a
20 well-established principle in Federal law that
21 where a decision is issued in one district, it's
22 not binding in another.

23 And as to the AM4 decision affecting
24 settled law, I would first note that the decision
25 signed by the District Court in that case was a

1 nearly verbatim adoption of MEIC's proposed
2 decision. So when MEIC is telling you that the
3 District Court did this analysis, what they're
4 really saying is they did this analysis which was
5 signed by the District Court.

6 That analysis is replete with errors,
7 including fundamental misstatements of cases. One
8 example is the Bostwick case. This is the case
9 that Mr. Hernandez cites for the proposition that
10 the applicant carries the burden of proof
11 throughout the process, because if the Applicant
12 doesn't present proof at the hearing challenging
13 the permit, then the applicant would automatically
14 lose.

15 That is a misunderstanding of Bostwick
16 fundamentally. In that case the applicant
17 had applied for a permit which was denied. The
18 applicant then appealed from that denial, and
19 because the applicant was challenging the agency
20 decision, the applicant carried the burden of
21 proof.

22 In the original MEIC v. DEQ case, the
23 air quality case, there MEIC was challenging the
24 decision to grant the permit, so it carried the
25 burden of proof.

1 We are in the exact same position here.
2 Because MEIC has challenged the decision to grant
3 a permit, so it carries the burden of proof. The
4 distinction between the Clean Air Act and MSUMRA
5 is unavailing. The Clean Air Act in its
6 permitting regulations includes almost identical
7 language to the MSUMRA statutory language about
8 the affirmative obligation for the applicant to
9 demonstrate that it qualifies for the permit.

10 That is not a burden of proof, that is
11 not the type of instruction that the Supreme Court
12 was looking at in MEIC v. DEQ when it discussed
13 whether there was a statutory instruction in terms
14 of burden of proof. Thank you.

15 CHAIR RUFFATTO: Thank you. I think at
16 this point we will take a short break. We will
17 reconvene at 11:05, and then we'll proceed with
18 questions, and Board Members, please prepare your
19 questions so that we can put them forward. I know
20 Dr. Lehnherr has a question. And I think
21 questions are going to be appropriate. It's a
22 very complex situation. Thank you. We'll
23 reconvene at 11:05.

24 (Recess taken)

25 CHAIR RUFFATTO: Let's reconvene, and

1 Sandy, can you call roll again.

2 MS. MOISEY-SCHERER: Chair Ruffatto.

3 CHAIR RUFFATTO: Here.

4 MS. MOISEY-SCHERER: Mr. Lehnherr.

5 BOARD MEMBER LEHNHERR: Here.

6 MS. MOISEY-SCHERER: Mr. Simpson.

7 BOARD MEMBER SIMPSON: Here.

8 MS. MOISEY-SCHERER: Mr. Smith.

9 BOARD MEMBER SMITH: Here.

10 MS. MOISEY-SCHERER: Mr. Reiten.

11 BOARD MEMBER REITEN: I'm here.

12 MS. MOISEY-SCHERER: Ms. Altemus.

13 BOARD MEMBER ALTEMUS: Here. Thank you.

14 MS. MOISEY-SCHERER: Ms. Aguirre.

15 BOARD MEMBER AGUIRRE: Here.

16 MS. MOISEY-SCHERER: We have a quorum.

17 CHAIR RUFFATTO: Thank you, Sandy. So

18 let's proceed with any questions that the Board

19 has for the parties. Dr. Lehnherr. Go ahead.

20 BOARD MEMBER LEHNHERR: Thank you,
21 Chairman Ruffatto. There are just a couple points
22 I was hoping to get some additional information
23 on.

24 I have some documents from January of
25 this year that say that an appeal in the Rosebud

1 case has yet to be filed. I want know if that's
2 still the case.

3 The second part of my questioning has to
4 deal with: Once an appeal is filed, is there any
5 idea how long it would take before that appeal
6 went before the Supreme Court? Thank you.

7 CHAIR RUFFATTO: Mr. Hernandez, do you
8 want to try that?

9 MR. HERNANDEZ: Yes, sure. Chair
10 Ruffatto, Board Member Lehnherr.

11 The appeal has been filed, an appeal has
12 been filed in the Rosebud case, two, in fact three
13 appeals have been filed. That's very emphatic.
14 But they've been filed under different theories,
15 and there's a question before the Supreme Court
16 right now about whether or not they are properly
17 filed, pending resolution of other matters that
18 remain before the District Court.

19 And if you give me a second, I'll
20 explain that, and then I'll jump to your second
21 question about how long you can expect it to take
22 the Supreme Court to resolve all these matters.

23 So both DEQ and Westmoreland in the
24 Rosebud case filed what are called interlocutory
25 appeals, which are appeals before entry of a final

1 judgment in the case, because there has been no
2 final entry of judgment yet. Interlocutory
3 appeals are allowed under, among other theories,
4 for appeals of an injunction.

5 Now, the District Court didn't in fact
6 issue an injunction in the Rosebud case, but
7 Westmoreland for its position, and DEQ for their
8 position, they argue that the District Court's
9 decision was vacatur, was the equivalent of an
10 injunction more or less; and the Plaintiffs, the
11 Petitioners in that case, opposed that and
12 challenged it. There is, for what it's worth,
13 Federal case law saying that vacatur isn't the
14 same as an injunction.

15 Now, Westmoreland also raised another
16 interlocutory appeal about being forced to
17 surrender a property right or property. That also
18 is subject to challenge, because there's
19 statements from the Federal regulatory authority
20 under the Federal strip mining law that a strip
21 mining permit or a coal mining permit is not in
22 fact a property right.

23 So there's a cloud over those
24 interlocutory appeals. And the petitioners,
25 appellees, the conservation groups in that case,

1 have said that the appeals are premature.

2 Now, there was a second appeal filed by
3 Westmoreland in that case, arguing that -- for
4 appeal of the whole case, rather than just a
5 remedy. And there, Westmoreland, the mining
6 company, admitted that the prerequisite for an
7 appeal wasn't met, and that's a final judgment.

8 And just a bit of background. The
9 Montana Rules of Appellate Procedure require a
10 final judgment before an appeal can take place
11 under normal circumstances. Final judgment is a
12 term of art, and in Montana that necessitates a
13 resolution of attorney fees. There is an
14 outstanding motion for attorneys fees before the
15 District Court that is working its way towards
16 resolution.

17 The mining company has sought to appeal,
18 suspend the Rules of Appellate Procedure, to allow
19 their appeal to go forward. That motion is now
20 pending before the Montana Supreme Court, and it
21 has been opposed by conservation groups.

22 So at this stage, the appeal, the
23 multiple appeals that have been filed in the
24 Rosebud case, are operating under a cloud of
25 uncertainty, and it's not clear that they will be

1 -- the appeals will even be able to move forward.

2 Which leads to the second question,
3 which is: How long can we expect it to take an
4 appeal at the Montana Supreme Court? And I don't
5 think there's a lot of clarity on that.

6 The Montana Supreme Court prides itself,
7 I think, on trying to move appeals forward on
8 average at a faster clip. And I think they say
9 roughly 180 days from when an appeal is submitted,
10 which means when all of the briefing is done.

11 That, however, can take quite some time,
12 and that average is often based on the Court's
13 summary disposition of lot of appeals that don't
14 have much meat to them, so the Court disposes of a
15 lot of appeals by way of what they call
16 unpublished opinions, which are just short two
17 page rulings.

18 For a case like this, where you have
19 what will be six merits arguments, and then a host
20 of remedies arguments, that really raise issues of
21 first impression. I think that at least from my
22 perspective, it's far from certain that this
23 matter will be able to be resolved within a year,
24 let alone the matter of months that Mr. Langston
25 and Ms. Bordelon have posited, because in this

1 case I think there's a decent likelihood that
2 there will be oral argument, which takes
3 additional time.

4 So I think that as a general rule, the
5 Montana Supreme Court tries to resolve cases
6 quickly, but I don't think this case lends itself
7 to a simple resolution.

8 And for what it's worth, there's a
9 little bit of prognostication here and reading tea
10 leaves. The data points that we do have that are
11 solid is that the Montana Supreme Court generally
12 tries to resolve cases after submission within 180
13 days, but submission itself can take months
14 because that's the time it takes all parties to
15 write their briefs.

16 So that's -- and like I said, I think
17 this case is an exception. It's not going to be a
18 case that's resolved quickly, given, as we've all
19 discussed, the complexities involved.

20 CHAIR RUFFATTO: Thank you, Mr.
21 Hernandez. Ms. Bordelon, can you offer your
22 views.

23 MS. BORDELON: Yes. And I also am
24 involved in the Westmoreland appeal, so can
25 provide some clarity on Mr. Hernandez's statements

1 there.

2 The first point I would like to make is
3 that the District Court has -- again adopting
4 MEIC's proposed order -- issued what it called a
5 deferred vacatur, which will vacate the AM4 permit
6 on April 1st.

7 At that point the mine will be
8 prohibited from mining in the AM4 area, which will
9 have prompt ramifications for the power that is
10 generated at the Colstrip power plant. Because of
11 those severe consequences, Westmoreland and other
12 parties are seeking to expedite this appeal in
13 multiple fashion.

14 So Mr. Hernandez's suggestion that this
15 won't be resolved quickly I think fails to take
16 into account the very significant public interest
17 concerned with this appeal because of its serious
18 public interest impacts in terms of electrical
19 rates, and the possibility of brown-outs and
20 black-outs as a result of the District Court's
21 decision. We are working expeditiously to get the
22 Supreme Court to act on this.

23 And in terms of Mr. Hernandez's question
24 about whether this decision represents an
25 injunction based on Federal law, obviously the

1 Montana Supreme Court will make that decision, if
2 and when MEIC actually files a motion to dismiss,
3 which they have not done at this point.

4 However, what they should do when they
5 do that is look to Montana law, and the definition
6 of injunction under Montana law, which looks to
7 the effect of the Court's order, regardless of
8 what it calls it, and in this case the Court -- I
9 don't think MEIC would contest -- the Court has,
10 is preventing, or will prevent as of April 1
11 Westmoreland from conducting previous lawful
12 mining activities.

13 We don't necessarily contest Mr.
14 Hernandez's estimates of the Supreme Court's
15 procedures in general.

16 CHAIR RUFFATTO: Thank you. I take it
17 that that answers your question, Doctor?

18 BOARD MEMBER LEHNHERR: Yes. There's a
19 lot of --

20 CHAIR RUFFATTO: It is an answer, yes.
21 Any more questions?

22 BOARD MEMBER REITEN: I guess I've got
23 one, and probably opens me up to my ignorance of
24 the legal issues. But if a stay is not approved,
25 what would happen next?

1 CHAIR RUFFATTO: Actually I'm going to
2 give one of the proponents of the motion the first
3 opportunity to respond to that, and that actually
4 was a question that I was going to ask if no one
5 else did, and that is:

6 Please outline how you think it would --
7 how the Board should proceed if the stay is not
8 granted. If the stay is not granted. And I think
9 that will be instructive, and I think that's what
10 you're asking, Jon, right?

11 BOARD MEMBER REITEN: Yes. Correct.

12 CHAIR RUFFATTO: Mr. Langston, can you
13 start with that question.

14 MR. LANGSTON: Mr. Chairman, yes. So if
15 a stay is not granted, then the Board would be in
16 a position of considering whether to adopt the
17 Hearing Examiner's proposed findings of fact and
18 conclusion of law.

19 As the Board members probably remember,
20 today was slated to be the day that we would have
21 oral argument on that matter, and the exceptions
22 that MEIC filed on the proposed findings of fact
23 and conclusion of law.

24 So the next immediate procedural step
25 would be to have an oral argument on what amounts

1 to the merits of this case, and whether or not
2 this Board should adopt the proposed findings of
3 fact and conclusion of law.

4 Now, there's additional paths that the
5 Board would have to go down if it were in that
6 posture, and namely it would have to consider
7 whether or not it views the District Court's
8 decision as binding on the Board.

9 As we argued earlier, we do not think it
10 is, but if you were to find that the District
11 Court's decision was binding, well, then that
12 would invalidate some of the Hearing Examiner's
13 previous decisions on who bears the burden of
14 proof.

15 So there's two things you could do with
16 that. You could say, "Well, we don't think that
17 the Department made the correct decision, but they
18 weren't given the appropriate opportunity to carry
19 their burden of proof, so we have to remand this
20 back to a trial posture, and retry the case."

21 Alternatively, you could say, "Even
22 though the Department wasn't in the position of
23 believing it had the burden of proof, it
24 nevertheless satisfied its obligation, the permit
25 was properly issued," and adopt the proposed

1 findings of fact and conclusions of law with
2 modifications as you see necessary.

3 But I do not believe that the proposed
4 outcome that I think MEIC thinks is appropriate,
5 in which you reverse the permit, and don't remand
6 this case back to a trial posture, is appropriate
7 because that would, as the Westmoreland's Counsel
8 has pointed out, would substantially prejudice our
9 rights in this proceeding.

10 CHAIR RUFFATTO: Thank you, Mr.
11 Langston. Sarah.

12 MS. BORDELON: Yes. I think Mr.
13 Langston had a great summary of the process here.
14 I just wanted to point out that if the Board
15 determines that it does need to modify or reject
16 any of the proposed findings of fact, it can do so
17 only after a review of the full record under
18 2-4-621, MCA.

19 CHAIR RUFFATTO: Thank you. Mr.
20 Hernandez.

21 MR. HERNANDEZ: I think Mr. Langston had
22 it right. If the Board doesn't grant a stay, then
23 what it does procedurally is sets this matter for
24 oral argument, probably at the next Board meeting,
25 which would be three months.

1 During that time the Board members would
2 have the opportunity to review the proposed
3 findings of then Hearing Examiner Buzzas, and the
4 exceptions filed by all parties, hear oral
5 argument then at the next Board meeting, and then
6 issue a decision after that oral argument, which
7 could happen quickly.

8 One question about the remedy that the
9 Board could issue. The Board would have the
10 opportunity to either issue a remedy right away,
11 or ask the party to discuss remedy.

12 The proposal by DEQ and Signal Peak that
13 the Board would have to remand for a new trial if
14 they found that DEQ and Signal Peak were simply
15 wrong as a matter of law with their conception of
16 the burden of proof at the outset is just wrong.
17 They're wrong on that.

18 If they made a mistake of law that they
19 adhere to across the state, the fact that they're
20 found to be mistaken doesn't give them a chance
21 for a redo. It means they go back and they do a
22 new permit.

23 Now, consider for a second if the shoe
24 were on the other foot. In this case, Petitioner
25 Montana Environmental Information Center, based on

1 the Board's prior decision in the Bull Mountain
2 case -- which was the decision before this one --
3 operated under the assumption that DEQ and Signal
4 Peak bore the burden of proof.

5 Now, if the Board determines that MEIC
6 was wrong with that, and we in fact bore the
7 burden of proof, would the remedy be to go back
8 and have another trial with MEIC bearing the
9 burden of proof, even though we didn't think we
10 had to?

11 I would submit that neither Ms. Bordelon
12 nor Mr. Langston would say that in that case it
13 would be prejudicial to Petitioner MEIC to have an
14 adverse ruling, based on MEIC's hypothetically
15 mistaken conception of the burden of proof. It's
16 not just the case.

17 If you go into the case with -- and your
18 whole position is based on an error of law, you
19 lose the case. You don't get a redo.

20 And now I think the Board should ask Ms.
21 Bordelon and Mr. Langston if they think that it's
22 basis for a new case, that one party was mistaken
23 on the appropriate burden of proof, because as it
24 stands, the remedy appropriate from the current
25 proposed findings of fact and conclusion of law

1 would be a new trial, in which MEIC would have to
2 prepare on the assumption that they bore the
3 burden of proof.

4 But that's just not how it works, and I
5 invite the Board to ask Ms. Bordelon or Mr.
6 Langston to clarify that point, because from our
7 perspective, they're just mistaken.

8 CHAIR RUFFATTO: Well, I really don't
9 want to get a lot of back and forth here, but
10 since you asked the question, Mr. Hernandez, I'm
11 going to let Ms. Bordelon respond.

12 MS. BORDELON: There's a fundamental
13 difference here and that Mr. Hernandez is
14 overlooking, which is that the question of burden
15 of proof was litigated in this case, and was
16 resolved at summary judgment against MEIC.

17 The Hearing Examiner issued a decision
18 stating that the burden of proof rested with MEIC
19 as the Petitioner. This wasn't a mere mistake of
20 theory of law, theory of the case, this was a
21 decision issued by the Board's delegated Hearing
22 Examiner, which makes a fundamental difference in
23 my mind.

24 CHAIR RUFFATTO: Thank you. Board
25 Member Reiten, did we help you?

1 BOARD MEMBER REITEN: I guess. I think
2 it helps. It does help. I'm thinking of what the
3 whole underlying issue is, and eventually it goes
4 back to: Is there water available or not? So
5 that's kind of where I'm going.

6 CHAIR RUFFATTO: Understood. Thank you.
7 Any more questions from the Board?

8 (No response)

9 CHAIR RUFFATTO: Well, I don't think
10 we're precluded from asking more questions, but I
11 think it would be appropriate if we had a motion
12 from the Board that we can consider, and then
13 consider and then discuss that motion. I'm not
14 trying to cut off any discussion or any questions,
15 but let's get a motion on the table and see where
16 we go.

17 BOARD MEMBER SIMPSON: Mr. Chairman, I'd
18 like to move, make a motion that the Department's
19 petition be denied, and that we proceed with the
20 case, and move forward with a decision based on
21 the facts at the next Board meeting.

22 BOARD MEMBER LEHNHERR: I will second
23 that.

24 CHAIR RUFFATTO: Is there discussion?

25 BOARD MEMBER AGUIRRE: I guess I just

1 want to be clear on what that does. It kind of
2 goes back to Jon's question on -- Like April 1st,
3 kind of how this proceeds, and the time frame. I
4 don't know if I'm asking that right, but --

5 CHAIR RUFFATTO: Can I ask you: What is
6 the April 1st date important for for your
7 question? Are you thinking about the April 1st
8 date that is embodied in the District Court's
9 decision?

10 BOARD MEMBER AGUIRRE: Yes.

11 CHAIR RUFFATTO: I don't think that
12 we're affecting that at all. I mean that may
13 affect how the proceeding in the AM4 case goes,
14 but that date I don't think has any relevance to
15 us, because that relates to whether mining can
16 occur at the Rosebud Mine, and it doesn't affect
17 how the Signal Peak mine will go. Does that help?

18 BOARD MEMBER AGUIRRE: I think so.

19 CHAIR RUFFATTO: Any more discussion?

20 (No response)

21 CHAIR RUFFATTO: I will offer my
22 thoughts. I think that either granting or denying
23 this motion is within the Board's discretion, and
24 I don't think it will be an abuse of discretion on
25 either side. I think this is within our

1 discretion. It is, as the parties have argued,
2 it's a weighing of competing interests and various
3 competing interests, so I don't think that we will
4 be abusing our discretion whichever way we go.

5 Having said that, I would lean towards
6 granting the stay, but that's -- I'm not strongly
7 of that view. I'm not -- and the reason I go
8 there is that I think the Board is in kind of a
9 difficult spot to figure out how we deal with the
10 AM4 decision, but we can certainly deal with that,
11 and we will if the stay is not granted.

12 And so I think what would happen if the
13 stay is not granted is we will set this for oral
14 argument at the next meeting on the proposed
15 findings of fact, and we will go from there.

16 BOARD MEMBER AGUIRRE: Chairman, that
17 was kind of the line of questioning that I was
18 going down, because it seemed to me that granting
19 the stay seemed to be the best option for where
20 we're at versus not. In my, you know, from a
21 legal --

22 I'm not coming from a legal stance, but
23 more just all of the components of this, and where
24 we're at now, and the fact that people have talked
25 about here we are after five years.

1 So I think hearing your comment really
2 speaks to what I was trying to ask not very
3 eloquently from a legal standpoint, but it seemed
4 to me like the stay was, in my mind, the better
5 way to move forward.

6 CHAIR RUFFATTO: Ms. Altemus, Board
7 Member Altemus.

8 BOARD MEMBER ALTEMUS: Thank you, Mr.
9 Chairman. I guess if I may ask a question of Mr.
10 Simpson. I guess I was thinking along the same
11 lines as you, Mr. Chair, that the stay might be
12 more appropriate, but I would ask Mr. Simpson
13 maybe if he could provide some thoughts as to his
14 reasoning to move forward with his motion. May I
15 ask that question?

16 CHAIR RUFFATTO: Of course. Mr.
17 Simpson.

18 BOARD MEMBER SIMPSON: Mr. Chairman,
19 Member Altemus. My reasoning is that we made a --
20 I think it's been made clear that we are not bound
21 by the case in question for a couple reasons, and
22 there's nothing preventing our moving forward with
23 this. We in our last Board package received all
24 of the materials on this case that make it ripe
25 for a decision on the merits.

1 This question of burden of proof in my
2 mind is really -- there's a lot of paper been
3 generated on it, but in my mind it's really
4 irrelevant from a practical standpoint, and that
5 is because our job here is to make a determination
6 as to whether or not the Signal Peak application
7 meets the requirements of the statute and the
8 rules.

9 And we have a lot of paper been
10 generated to provide us with the information that
11 we need to make a decision. I think it's ripe for
12 a decision. I think if we do move ahead with
13 this, and the District Court decision is
14 ultimately upheld by the Supreme Court -- which I
15 think is very unlikely, based on past precedent.
16 It could happen. We can't guess what they're
17 going to do -- but the worst that could happen is
18 that it would be remanded to us, and it would have
19 to be retried.

20 And so I don't really -- and so let's
21 back up and say that we decide to grant the
22 petition. What happens then? Well, I think the
23 same thing happens. It goes back and is retried
24 based on a different burden of proof, so we end up
25 with the same result. So that's really the basis

1 for my motion.

2 CHAIR RUFFATTO: Dr. Lehnherr.

3 BOARD MEMBER LEHNHERR: Chairman
4 Ruffatto, if I could speak. I don't know if Board
5 Member Smith had a comment. I've spoken already.
6 I would like to say something, but maybe Joe Smith
7 would like to say something before me.

8 CHAIR RUFFATTO: Go ahead, Doctor.
9 You're on.

10 BOARD MEMBER LEHNHERR: Not unlike some
11 of the cases that come before the Board, it is
12 somewhat confusing, and as Chairman Ruffatto
13 alludes to, there are justifications for going
14 either way.

15 I tend to be in support of this motion.
16 We are trying to, this Board has been trying to
17 expedite cases, make the process more efficient.
18 If we grant a stay, it's unclear how long it will
19 be before the Supreme Court deals with this issue.

20 There's a FOFCOL in this case. I've
21 been involved in hearing oral arguments before,
22 and it's work, and it's time consuming, and
23 sometimes there's still a fog that is there that
24 becomes a little bit less foggy after you've spent
25 all day listening to a case.

1 But despite the onus that it puts on us,
2 it would -- we're sort of trading a more, or we're
3 sort of putting a more certain time frame on
4 dealing with this as opposed to granting a stay,
5 and hoping that the forces, the multiple factors
6 come together, and there isn't a really prolonged
7 delay in an appeal getting to the Supreme Court,
8 or appeals getting to the Supreme Court.

9 CHAIR RUFFATTO: Thanks, Doctor. Board
10 Member Smith, did you have something to offer?

11 BOARD MEMBER SMITH: Yes. I don't
12 necessarily have a comment, other than I wanted to
13 ask the same question that Ms. Altemus asked of
14 Mr. Simpson for his rationale. I assume his
15 rationale was more on expediency, being that
16 that's something we've talked about a lot in the
17 past, which Dr. Lehnherr pointed out.

18 But it sounds like there's more to it
19 than that. That was mainly a -- I just want to
20 ask Mr. Simpson where he was coming from on that,
21 and touch on the expediency route.

22 CHAIR RUFFATTO: Thank you. More
23 discussion?

24 (No response)

25 CHAIR RUFFATTO: Before we vote, I would

1 like to take five minutes, because there have been
2 some good points made here that maybe I haven't
3 thought about, so I want to take about five
4 minutes to think through some things before I
5 vote, and so I would like to take a five minute
6 break, and we'll come back and vote at that time,
7 unless there's more discussion. We will reconvene
8 at 11:42. Thank you.

9 (Recess taken)

10 CHAIR RUFFATTO: Let's reconvene. And
11 Sandy, I hate to do this to you, but would you
12 please call the roll one more time.

13 MS. MOISEY-SCHERER: Chairman.

14 CHAIR RUFFATTO: Here.

15 MS. MOISEY-SCHERER: Mr. Lehnherr.

16 BOARD MEMBER LEHNHERR: Here.

17 MS. MOISEY-SCHERER: Mr. Reiten.

18 BOARD MEMBER REITEN: Here.

19 MS. MOISEY-SCHERER: Mr. Simpson.

20 BOARD MEMBER SIMPSON: Here.

21 MS. MOISEY-SCHERER: Ms. Altemus.

22 BOARD MEMBER ALTEMUS: Here.

23 MS. MOISEY-SCHERER: Ms. Aguirre.

24 BOARD MEMBER AGUIRRE: Here.

25 CHAIR RUFFATTO: Thank you. We have a

1 quorum.

2 As I told you, I think we can go either
3 way on this, and we will not be abusing our
4 discretion. And the points that Dr. Lehnherr and
5 Board Member Simpson made are persuasive to me, in
6 particular the idea that it's all teed up at this
7 point. We can make a decision, and whatever we do
8 there's a potential for being reversed, and so I
9 am going to vote against the stay.

10 So I wanted to pass that along. And
11 just so you know what I'm thinking, if that motion
12 passes, I intend to make a second motion that the
13 parties be asked to give us a very short brief on
14 the issue that seems pretty central to our
15 decision, and that is the binding effect of the
16 AM4 decision, District Court decision. I just
17 wanted to say that so you wouldn't be surprised
18 when I do that if this motion passes. So any more
19 discussion?

20 (No response)

21 CHAIR RUFFATTO: A motion has been made
22 and seconded to deny the stay requested by DEQ.
23 All in favor, say aye.

24 (Response)

25 CHAIR RUFFATTO: Opposed, nay.

1 UNKNOWN SPEAKER: Nay.

2 CHAIR RUFFATTO: I think we should take
3 a roll call vote, just to make sure we don't have
4 any doubt here. So Sandy, would you please call
5 the roll and we'll vote. So all in favor of --
6 Well, call the roll, and say either yea or nay.

7 MS. MOISEY-SCHERER: Chairman.

8 CHAIR RUFFATTO: Yea.

9 MS. MOISEY-SCHERER: Mr. Smith.

10 BOARD MEMBER SMITH: Yea.

11 MS. MOISEY-SCHERER: Mr. Lehnherr.

12 BOARD MEMBER LEHNHERR: Yea.

13 MS. MOISEY-SCHERER: Mr. Reiten.

14 BOARD MEMBER REITEN: Yea.

15 MS. MOISEY-SCHERER: Mr. Simpson.

16 BOARD MEMBER SIMPSON: Yea.

17 MS. MOISEY-SCHERER: Ms. Altemus.

18 BOARD MEMBER ALTEMUS: Yea.

19 MS. MOISEY-SCHERER: Ms. Aguirre.

20 BOARD MEMBER AGUIRRE: Nay.

21 CHAIR RUFFATTO: All right. The motion
22 passes.

23 And so I would like to make a motion
24 that the parties be asked to submit a short,
25 limited to five pages, brief on the question of

1 whether the AM4 District Court decision is binding
2 on this Board, and that that brief be submitted by
3 the 18th of March, and there will only be one
4 round of briefs; no responses, just one brief from
5 each party on that issue. Is there a second to my
6 motion?

7 BOARD MEMBER REITEN: I'll second it.

8 CHAIR RUFFATTO: Discussion.

9 (No response)

10 CHAIR RUFFATTO: A motion has been made
11 and seconded that the parties be directed to file
12 briefs limited to five pages by March 18th on the
13 question of the binding effect of the AM4 District
14 Court decision on this Board. All in favor, say
15 aye.

16 (Response)

17 CHAIR RUFFATTO: Opposed, nay.

18 (No response)

19 CHAIR RUFFATTO: The motion passes. We
20 will not be issuing a written order, so I want to
21 make sure that the parties understand what the
22 directive is. March 18th is the deadline for that
23 brief if you want to file one. Okay.

24 MS. BORDELON: Mr. Chairman, is the
25 Board scheduling the merits argument for its next

1 hearing, or will the parties be informed of the
2 Board's decision on the binding nature before the
3 hearing?

4 CHAIR RUFFATTO: Good question. Board
5 members, do you have a view of that? I will offer
6 my view, because I think -- and then you can weigh
7 in or disagree with me, and change my mind.
8 That's kind of easy to do sometimes.

9 I think we should hear oral arguments on
10 the findings of fact and conclusions of law at the
11 next Board meeting, and as part of that we will
12 address the question of binding effects of the
13 District Court decision.

14 So I guess what I'm saying is in my
15 view, we plan on addressing all of the issues at
16 the next meeting on this matter.

17 BOARD MEMBER AGUIRRE: Chairman.

18 CHAIR RUFFATTO: Yes.

19 BOARD MEMBER AGUIRRE: I would like to
20 understand why we would not address the binding
21 argument prior to the oral arguments. I'm, again,
22 not a lawyer, so I'm just trying to figure out
23 process, and how that weighs into the oral
24 arguments, the basis of the oral arguments.

25 CHAIR RUFFATTO: Well, we could take it

1 in two steps, but I don't think it's necessary,
2 because already presented in the case before the
3 District Court decision was the question of burden
4 of proof, and all this does is help us decide that
5 question with this additional development.

6 So we had that issue in front of us
7 regardless of whether or not the AM4 decision had
8 come out, so it's just one element of the issues
9 that will be before us at our next meeting. Does
10 that help?

11 BOARD MEMBER AGUIRRE: I don't know,
12 because it seems -- and I might be missing
13 something, so help me through this. It seems like
14 it would help my thought process, when I hear oral
15 arguments, to understand that binding matter
16 prior. But again, I'm not a legal -- I'm not a
17 lawyer, so --

18 CHAIR RUFFATTO: Any other thoughts from
19 Board members? Let's try to answer that. Board
20 Member Simpson. It seems to me you have your hand
21 up.

22 BOARD MEMBER SIMPSON: Mr. Chairman, I
23 do. Thank you. Unless I missed something, all
24 three of the parties in their oral argument today
25 in response to questions are in concurrence that

1 the District Court decision is not binding on this
2 Board. Am I correct?

3 CHAIR RUFFATTO: No.

4 BOARD MEMBER SIMPSON: I'm not?

5 CHAIR RUFFATTO: I'm pretty confident
6 that MEIC says it is binding.

7 BOARD MEMBER SIMPSON: Well, then I
8 misunderstood. I'm sorry.

9 BOARD MEMBER AGUIRRE: Right, and that's
10 the reasoning for my questioning, right there, is
11 that there isn't agreement on that.

12 CHAIR RUFFATTO: No, and I understand
13 that. But there was disagreement on the proper
14 burden of proof even before this other development
15 occurred.

16 So MEIC has been arguing in the case
17 that we were, or that the Board -- that the
18 Hearing Examiner had applied the wrong burden of
19 proof, and that issue was in the case before this.
20 Now this is just one more factor we have to take
21 into account in deciding that issue.

22 BOARD MEMBER AGUIRRE: Okay. Thank you.

23 CHAIR RUFFATTO: I am going to just
24 state that as Chairman, we're going to put the
25 oral argument for the binding effect, as well as

1 all the other oral arguments on the FOFCOL, for
2 the next meeting, and we'll go that route unless
3 someone wants to make a motion to the contrary.

4 Mr. Simpson.

5 BOARD MEMBER SIMPSON: I'm a little bit
6 confused here, because the MEIC, the Petitioner,
7 has argued that we should not -- that we should
8 not affirm the Department's petition. And so in
9 that case, we would be going ahead with this.

10 Now, my understanding is that MEIC does
11 not agree that we are not bound by the District
12 Court decision. There seems to me to be an
13 inconsistency there.

14 CHAIR RUFFATTO: Mr. Hernandez, would
15 you like to address MEIC's position.

16 MR. HERNANDEZ: If I understand the
17 question correctly, the question is MEIC's
18 position with respect to the binding nature of the
19 Rosebud decision on the Board of Environmental
20 Review? Is that the question?

21 BOARD MEMBER SIMPSON: Yes.

22 MR. HERNANDEZ: Our position is that
23 under judicial review, the AM4 decision of the
24 Board was reversed, and that reversal is binding
25 on the Board.

1 Its applicability to this case, the Bull
2 Mountain decision -- which wasn't reversed in the
3 Rosebud decision -- I think is a little less
4 clear, but we certainly would appreciate the
5 opportunity to present a short brief on the
6 binding nature of that for this case. Does that
7 help?

8 CHAIR RUFFATTO: Actually that confuses
9 me, Mr. Hernandez.

10 BOARD MEMBER AGUIRRE: I want to second
11 that. It even makes the question I was calling
12 even more relevant, I think.

13 CHAIR RUFFATTO: Good work, Mr. Simpson,
14 Ms. Aguirre, for smoking that out. That suggests
15 to me -- I mean I think that you're right, Board
16 Member Simpson, that there was an inconsistency in
17 MEIC's arguments.

18 For purposes of -- now that Mr.
19 Hernandez has answered. For purposes of the
20 FOFCOL, it's very clear that they argued that the
21 Board was bound by that decision. For purposes of
22 the stay motion, they argued there was a
23 difference. So there is an inconsistency there
24 that you saw.

25 So I think it's important that we get

1 that briefed, because now Mr. Hernandez is saying
2 it's unclear of whether or not it's binding. So I
3 think we need to get that briefed.

4 So I have to ask you, Mr. Simpson, would
5 that change your position on the stay?

6 BOARD MEMBER SIMPSON: No.

7 CHAIR RUFFATTO: I think where we're at,
8 we're almost at noon, and so I think -- Go ahead,
9 Dr. Lehnherr.

10 BOARD MEMBER LEHNHERR: I just want to
11 share that it's certainly not uncommon with these
12 complex cases to have confusion. I have certainly
13 seen it in the past.

14 But I'm wondering when we're talking
15 about binding, I'm wondering about the terminology
16 here. When we're talking about binding,
17 ultimately isn't that something that the Supreme
18 Court would decide as opposed to -- Well, sure,
19 what the District Court has decided may not be
20 applicable in this case, but whether or not it's
21 binding.

22 And like I say, maybe it's a matter of
23 semantics, but how binding it really is, doesn't
24 that really depend on what the Supreme Court might
25 ultimately decide?

1 CHAIR RUFFATTO: That's a really good
2 question, Doctor, but there is a difference in the
3 law between binding and persuasive, and what --
4 and these arguments have not been fleshed out in
5 the briefs. That's why I wanted more briefs.

6 But Signal Peak has argued that at most
7 it's persuasive and not binding. If once the
8 Supreme Court rules, whichever way it rules, that
9 will be binding, and we would be duty bound to
10 follow that. Does that answer your question? But
11 I believe that --

12 BOARD MEMBER LEHNHERR: Yes.

13 CHAIR RUFFATTO: -- MEIC is arguing that
14 we're bound by the District Court decision because
15 it is a Court decision, which therefore at a
16 higher level in the process -- I'm not going to
17 call it the judicial process -- but at a higher
18 level than we are. Any more discussion?

19 (No response)

20 CHAIR RUFFATTO: If I could summarize,
21 we're going to, at the next meeting, we're going
22 to consider the FOFCOL, along with the issue of
23 the binding or versus persuasive effect of the AM4
24 District Court decision. Any questions?

25 (No response)

(The proceedings were concluded
at 12:00 p.m.)

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C E R T I F I C A T E

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 - 80 - 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 11th day of
March, 2022.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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