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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

Heard Via Zoom
April 8, 2022
1:00 p.m.

BEFORE CHAIRMAN STEVEN RUFFATTO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS
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 CHAIR RUFFATTO: Let's reconvene the
5 meeting. Sandy, can you please call roll.

6 MS. SCHERER: Chairman Ruffatto.

7 CHAIR RUFFATTO: Here.

8 MS. SCHERER: Board Member Lehnherr.

9 BOARD MEMBER LEHNHERR: Here.

10 MS. SCHERER: Board Member Simpson.

11 BOARD MEMBER SIMPSON: Here.

12 MS. SCHERER: Vice Chair Aguirre.

13 (No response)

14 MS. SCHERER: Board Member Reiten.

15 BOARD MEMBER REITEN: Here.

16 MS. SCHERER: Board Member Smith.

17 BOARD MEMBER SMITH: Here.

18 MS. SCHERER: Board Member Altemus.

19 BOARD MEMBER ALTEMUS: Here.

20 MS. SCHERER: We have a quorum.

21 CHAIR RUFFATTO: Thank you, Sandy.

22 We're going to move to Item (c) on Page 7. This
23 is in the appeal of the matter of the amended
24 application AM3, Signal Peak Energy, LLC, Bull
25 Mountain Coal Permit No. 1, BER 2016-07.

1 The Board will now hear oral arguments
2 from the parties on the exceptions to the proposed
3 FOFCOL, including the binding effect of the AM4
4 decision, and then we will deliberate on the
5 exceptions.

6 To give you a little schedule, we will
7 have oral arguments first that I believe will take
8 around an hour give or take, and then we'll take a
9 break, and we'll come back and have questions from
10 the Board members to the parties, and then we will
11 move into deliberations.

12 So we have Mr. Hernandez representing
13 MEIC. Who is representing DEQ?

14 MR. LANGSTON: Mr. Chairman, I'm
15 Jeremiah Langston appearing on behalf of
16 Respondent Montana Department of Environmental
17 Quality.

18 CHAIR RUFFATTO: Thank you, Mr.
19 Langston. And on behalf of Signal Peak.

20 MS. BORDELON: Mr. Chairman, my name is
21 Sarah Bordelon from Holland and Hart. I'm
22 appearing on behalf of Signal Peak.

23 CHAIR RUFFATTO: Thank you, Ms.
24 Bordelon. As I said before, we will start with
25 MEIC. We'll give MEIC twenty minutes. Sandy,

1 will you please monitor that, and let us know if
2 we start to get close or get past. And then we'll
3 give DEQ twenty minutes, and then Signal Peak
4 twenty minutes, and then MEIC ten minutes to
5 respond. Any questions about that?

6 MS. SCHERER: No, sir.

7 CHAIR RUFFATTO: Any questions from the
8 Board before we start on the oral arguments?

9 (No response)

10 CHAIR RUFFATTO: If not, Mr. Hernandez,
11 please proceed.

12 MR. HERNANDEZ: Thank you. Chairman
13 Ruffatto, members of the Board, Shiloh Hernandez
14 with EarthJustice on behalf of the Petitioner
15 Montana Environmental Information Center.

16 Before I lay out the order that I'm
17 going to address various issues, and give you my
18 outline for this oral argument, I want to take a
19 step back, and note that there are stories to tell
20 in this story; stories about the Bull Mountains.

21 I'm not sure if any of you have been to
22 the Bull Mountains, but I suspect Mr. Reiten has,
23 who studied it at some length. The Bull Mountains
24 are pine breaks. They're small hill-ish mountains
25 that really form the first foothills of the Rocky

1 Mountains, and the country there is glorious.⁶ I
2 recommend visiting them if you get the chance.

3 The first important story that will
4 cover everything that I say this afternoon is the
5 people who live in the Bull Mountains. And the
6 Bull Mountains is home to various
7 multi-generational family ranching operations.
8 These operations depend on the availability of
9 water resources in the Bull Mountains. If these
10 water resources are lost, their livelihoods will
11 also be lost.

12 To give one example, one important well
13 on the Bull Mountains that's used for livestock
14 watering was impacted by the underground mine at
15 Signal Peak, and to replace the water temporarily,
16 the mining company trucked up water that was laden
17 with oil. It was dumped into the reservoir of the
18 rancher who uses this well, and he had water that
19 was laden with oil.

20 It goes without saying that water that's
21 contaminated with oil does not slake the thirst of
22 cattle, and this is in the record. It's in the
23 transcript at Page 82.

24 I tell this brief vignette just to
25 underscore the critical importance of water

1 resources to the people who have lived and whose
2 families have lived for generations in this area.

3 The second important story that will
4 also color everything that I say this afternoon is
5 about Signal Peak Energy, and its chronic knowing
6 violations of the law.

7 Board Member Simpson, I know you worked
8 with Westmoreland at the Absaloka Mine. The
9 Signal Peak mine is not Absaloka, and Signal Peak
10 Energy is not like Westmoreland. Just this early
11 2020 -- and I note this is in the record at
12 Exhibits 2 and 4 to our response to the exceptions
13 -- Signal Peak Energy was criminally prosecuted
14 and admitted to intentionally disposing of
15 hazardous waste in the mine void of this
16 underground mine at Bull Mountains, pumping water
17 slurry into the mine void.

18 This is important because Signal Peak
19 Energy itself has stated in the record that the
20 mine void, once it refills with water, will not be
21 an available source of replacement water to people
22 who use the water above the mines.

23 As with the oil that was dumped in one
24 of the ranchers' stock reservoirs, water from the
25 mine void contaminated with hazardous waste is not

1 a replacement water source, and that's just one
2 example.

3 The record also demonstrates -- and this
4 is in the transcript at Page 619 -- that Signal
5 Peak Energy has repeatedly violated its monitoring
6 requirements, which are what are required to
7 determine whether or not water resources above the
8 mine have been impacted, and whether or not Signal
9 Peak Energy has an obligation to replace those
10 water resources.

11 The third example that I will point to
12 about Signal Peak Energy's repeated lawlessness
13 affecting the people who live in the area is that
14 the company -- and this is the design standard
15 violations that are noted in the order that the
16 Board put together -- the permit for this mine has
17 design standards that specify with great detail
18 how the company is to go about assessing whether
19 or not its mining operations affected waters above
20 the mine.

21 And we know, and we point this out
22 repeatedly in our brief, that these design
23 standards have never been followed by Signal Peak
24 Energy. Never in the history of the mine. We
25 also know that these design standards are part of

1 the permit, and they have been part of the permit
2 throughout this proceeding.

3 I'd just ask the Board members to keep
4 in mind these important stories that will color
5 all of my presentation this afternoon. Here I
6 will give you my outline for where I'm going, and
7 what issues I'm going to address.

8 Now, there are nine issues that I would
9 like to address. Given time constraints, I won't
10 address all of them. Some I will just rest on the
11 briefs, and some I will cover in fairly short
12 order. But they can be grouped into three pieces.

13 First, I will address the FOFCOL's three
14 global legal errors. First, the question of
15 deference to DEQ, and Chairman Ruffatto you
16 already addressed this, so I'll go through that
17 quickly.

18 The second is the FOFCOL's complete
19 failure to actually address the legal basis of
20 MEIC's claim, and that's ARM 17-24-405(6)(a), the
21 requirement that in order to obtain a permit, the
22 mining company must demonstrate that reclamation
23 can be accomplished. That's the standard.

24 The third global legal error in the
25 FOFCOL that I will address is the burden of proof,

1 and I suspect we'll all have questions about this.
2 The matter in my mind is clear. In the mind of
3 the Sixteenth Judicial District Court in Rosebud
4 County it's also clear. I'm sure that we'll have
5 discussion of that.

6 Looking more specifically at the FOFCOL,
7 there are three areas of important substantive
8 flaws in the FOFCOL, and this is a second basket
9 of issues that I'll address, and these are the
10 ones I want to focus on most throughout the
11 presentation.

12 The first is the question of water
13 quantity; second is water quality -- replacement
14 water quantity, replacement water quality -- and
15 the third issue is the legal availability of
16 replacement water.

17 The third basket of errors that I'd like
18 to address are with respect to specific finding of
19 fact, and our analysis of the findings of fact
20 fall into two categories. One is specific
21 questions of fact. I'm not going to go into those
22 for time sake right now.

23 But I'd like to address instead three
24 global areas where the FOFCOLs don't address
25 important lines of evidence presented by

1 Petitioners, and the complete failure to address
2 these issues is legal error that must be
3 corrected.

4 And these are, first, the FOFCOL's
5 failure to assess Signal Peak Energy's failure to
6 adhere to the design standards for assessing the
7 impacts of mining on water resources.

8 The second line of evidence that the
9 FOFCOL entirely ignores is that the FOFCOL never
10 assessed Dr. Nicklin's finding that replacement
11 water needs could substantially exceed 100 gallons
12 per minute. The 100 gallons per minute figure is
13 critical to the analysis of this case.

14 And the third area of fact that the
15 FOFCOL doesn't address at all is DEQ's admission
16 that the language used in its CHIA that the deep
17 underburden aquifer can satisfy any mitigation
18 needs that may be possible was wrong by DEQ's own
19 admission. DEQ says, "We said that, but that's
20 not right. We meant to say something else."

21 The first broad issue is the question of
22 deference. And Chair Ruffatto, you addressed this
23 at the beginning, and I don't think I have to
24 dwell on this very long.

25 The point is that, yes, there is

1 deference to agency fact finding when it's based
2 on the agency's expertise. As Chair Ruffatto
3 noted, this deference occurs on judicial review.
4 The expertise here for this analysis that's to be
5 taken into account is the Board's expertise, and
6 that's clear in MAPA, the Montana Administrative
7 Procedure Act.

8 The citation cited by DEQ in its brief
9 is 2-4-612, which talks about recognizing agency
10 expertise. The term "agency" there refers to the
11 Board of Environmental Review, as is clear
12 throughout that section of MAPA where "agency" is
13 used to designate the adjudicative body that's
14 conducting the contested case hearing.

15 I'm going to pass over this quickly
16 because I believe the Chair had it right in the
17 prior case, and it's clear that the fact finding
18 here isn't entitled to any deference under the
19 MEIC case from 2005. And I'll try to be clear
20 with the MEIC cases, because I know there are a
21 handful of them.

22 The second important global legal
23 failing of the FOFCOL is its complete failure to
24 address the statute that is at the heart of MEIC's
25 claim, and that's ARM 17.24.405(6)(a), which is

1 the requirement on the applicant to demonstrate
2 that reclamation can be accomplished.

3 There's no question that this has been
4 at the heart of MEIC's claim since the get-go.
5 The very first document in the lengthy record
6 before the Board is MEIC's appeal, and the very
7 first paragraph in that document cites ARM
8 17.24.405(6)(a), the requirement for Signal Peak
9 Energy to affirmatively demonstrate that
10 reclamation can be accomplished.

11 For whatever reason -- I think this is
12 really Signal Peak Energy and DEQ convincing the
13 Hearing Examiner that it wasn't necessary to
14 actually address this issue, but it would be legal
15 error for the Board not to actually address the
16 issue that is at the heart of MEIC's claim.

17 I think the best case standing for that
18 proposition is the Debuff case which we cite in
19 our brief, and I'll direct the Board's attention
20 to Paragraph 24 and 39, where the Montana Supreme
21 Court expressly overturned a contested case before
22 DNRC where the agency just didn't address
23 fundamental issues of the parties' claim.

24 Now, DEQ and Signal Peak Energy have one
25 response to this, one principal response to why it

1 was unnecessary to address MEIC's claim that the
2 relevant statute here, or regulation here, is
3 17-24-405 Sub (6) Sub(a), and the requirement to
4 demonstrate that reclamation can be accomplished.

5 And they say "We don't have to address
6 that because reclamation doesn't involve replacing
7 water resources." That's their argument. They
8 say reclamation only talks about land. It has
9 nothing to do with water.

10 That argument is entirely mistaken.
11 It's completely wrong. I'll give two reasons why.
12 The first is the regulations.

13 Now, I'll direct the Board to ARM
14 17.24.111(6). These are reclamation standard for
15 bond release, and this one says that to get final
16 bond release, the mining operator has to replace
17 water resources, including wildlife and aquatic
18 life habitat, and all water users' water.

19 Now it's stunning frankly that DEQ
20 contends that this isn't reclamation, because for
21 years -- and Mr. Simpson, I'm sure you know this
22 -- DEQ in Montana has prided itself on the fact
23 that Montana has what's called stage four
24 reclamation requirements, water reclamation
25 requirements, which aren't present in many other

1 states, if any.

2 It's been the cornerstone of DEQ
3 vaunting the importance of its program, the
4 requirement to reclaim water resources, so the
5 argument that DEQ's Counsel has made -- and I
6 understand this was prior Counsel who made the
7 argument -- that reclamation does not include
8 reclamation of water resources is wrong.

9 I'll move to the next point which I'm
10 going to cover in fairly short order, but I assume
11 the Board is going to have questions on this point
12 when we get to the question and answer period, and
13 that's the burden of proof.

14 This point was hotly contested, and some
15 clarity was offered on it by the Sixteenth
16 Judicial District's decision in October saying
17 that the statute means what it says.

18 The statute says the burden is on the
19 applicant to demonstrate that it complies with
20 requirements to obtain a permit. That's what
21 17.24.405(6) says. It says DEQ may not issue a
22 permit unless and until the applicant
23 affirmatively demonstrates, and DEQ concludes
24 based on evidence in the record, that reclamation
25 can be accomplished. That's the standard.

1 We've talked about --Everyone has
2 offered some case law in support of this. There
3 are two cases that I want to direct the Board to,
4 and then one case I want to talk about because it
5 goes the other way.

6 The first and most important case is the
7 prior iteration of this case, the in re: Bull
8 Mountains decision which we've cited throughout
9 our brief. And I would direct the Board to Pages
10 85 and 87 for that case.

11 And there the analysis that the Board
12 had was that Signal Peak Energy had not
13 demonstrated that mitigation of harm to water
14 resources -- had not affirmatively demonstrated
15 that impacted water could be mitigated.

16 And the reasoning was that the evidence
17 before the Board didn't point either way. The
18 Board said all that has been shown is that Signal
19 Peak Energy may or may not be able to reclaim
20 water resources. The Board said that is not
21 enough. That is insufficient.

22 Now, that's this Board's prior ruling,
23 and the Board should give it especially
24 significant weight.

25 The second important case is a case that

1 we recently presented to the Montana Supreme Court
2 in the wrangling over the Sixteenth Judicial
3 District case, and that's the in re: Royston case,
4 and that case, the citation to it is 249 Montana
5 425.

6 That case is important because it lays
7 out why it is that the burden of proof doesn't
8 change in a contested case, as Respondents contend
9 here, and the reason they say is that you have to
10 look at the statutory burden.

11 And here in -- that was a Montana water
12 use act case, but the burden was essentially the
13 same. The applicant has to demonstrate that
14 certain environmental harm will not occur.

15 Now in that case, there was a contested
16 case, and the party who had sought the permit
17 said, "No, no, no. On a contested case, the
18 burden flips, and the other side that's opposing
19 the permit has to show that environmental harm
20 will occur."

21 The Montana Supreme Court said, "No,
22 that's inconsistent with the Rules of Evidence,
23 and here's why." They say, "We have to consider
24 who will lose if no evidence is presented." And
25 they said there, "If no evidence is presented to

1 the adjudicative body in a contested case, then
2 the party who has the initial burden loses."

3 And in the water use act case, the
4 applicant for a water use permit loses if there's
5 no evidence, because if there's no evidence, they
6 have not shown that environmental harm will not
7 occur.

8 The exact same analysis applies here.
9 If we go into the Board of Environmental Review
10 and we say, "DEQ issued this permit for Signal
11 Peak, but Signal Peak provided zero evidence,
12 nothing, no evidence, completely blank
13 application," who wins? The party who has the
14 burden of proof loses.

15 And there would be Signal Peak because
16 they have the burden to show that reclamation can
17 be accomplished. Obviously if they present no
18 evidence, they can't meet that burden.

19 That's what the Supreme Court explained
20 in the Royston case, and I submit that the same
21 analysis applies here.

22 MS. SCHERER: Mr. Hernandez, you have
23 two minutes left.

24 MR. HERNANDEZ: Let me just fast forward
25 to the merits, and the merits can go quite

1 quickly. They're important. There are three
2 merits questions -- water quantity, water quality,
3 and legal availability.

4 Water quantity. The important two
5 points, two points for the Board. One is that
6 replacement water needs may exceed 100 gallons per
7 minute. We know that because Dr. Nicklin said it
8 in his 2013 groundwater modeling.

9 And we also know it because when DEQ was
10 pressed on this at trial, they said, "We don't
11 have any ballpark understanding of what the
12 replacement needs are," but they hedged a little
13 bit, and they said, "Look at Table 7-1 and 8-1 of
14 the CHIA. Those say how much reclamation water
15 could be needed. And if you add up the water in
16 the well, in the spring that's identified in 7-1,
17 and the wells that will be impacted in 8-1, you
18 get over 150 gallons per minute of replacement
19 water."

20 That's important because the next
21 critical piece of evidence is that Dr. Nicklin
22 testified under oath that it has not been
23 affirmatively demonstrated that the underburden
24 aquifer can supply 100 gallons per minute without
25 impacting existing users.

1 Those two pieces of evidence demonstrate
2 that there has been no affirmative showing that
3 reclamation can be accomplished.

4 Water quality. Two important points.
5 One, no question the deep aquifer exceeds the
6 maximum thresholds for livestock consumption in
7 sodium. Water above the mine doesn't.

8 DEQ, however, and Westmoreland, they
9 admit that, but they say, "We can meet that
10 standard with treatment." Now, the treatment
11 argument fails for two reasons: One, because DEQ
12 didn't present any competent evidence on it.

13 Their only witness, Mr. VanOort, was not
14 qualified as an expert in water treatment, so his
15 testimony doesn't count; and Dr. Nicklin, he
16 testified --

17 MS. SCHERER: Mr. Hernandez, your time
18 is up.

19 CHAIR RUFFATTO: Mr. Hernandez, we'll
20 give you two minutes to wrap up.

21 MR. HERNANDEZ: Chair Ruffatto, may I
22 request five minutes of my rebuttal, and just
23 cover it right now, and cut rebuttal to five
24 minutes?

25 CHAIR RUFFATTO: Sure.

1 MR. HERNANDEZ: This should be quick.
2 Now, the reason we can't consider treatment here,
3 one, the permit doesn't talk about treatment for
4 sodium; two, Mr. VanOort couldn't offer testimony
5 on it because he wasn't qualified as an expert;
6 and three, Dr. Nicklin also testified about
7 treatment, reverse osmosis for sodium.

8 The problem with his testimony is that
9 he never disclosed it. He never disclosed to us
10 in advance that he was going to testify about
11 sodium treatment.

12 Now, this is in our motion in limine.
13 We recognize that the Hearing Examiner ruled
14 against us on this. We're maintaining our
15 argument, and the Hearing Examiner's determination
16 that he could present this evidence was error.

17 The final point that I'll make is legal
18 availability. There the whole question is exempt
19 wells. DEQ never did a close analysis of legal
20 availability. They said the exempt well provision
21 will allow that to work. And we pointed out that
22 the exempt well provision is limited to one well,
23 one well that's from the same source aquifer.

24 And now for a long time, if the wells
25 weren't manifolded together, if they weren't stuck

1 together, you could put a whole bunch of them
2 under the exempt well loophole.

3 The Montana Supreme Court said that
4 didn't work in 2015 or thereabouts. The
5 Legislature, though, put in a grandfathering
6 statute, and that's House Bill 168 cited by DEQ,
7 relied on by DEQ, and they said, "We can use the
8 grandfathering provision of this for the mine."

9 The problem with that argument is that
10 that grandfathering statute only applied to
11 housing subdivisions under Title 76, not to coal
12 mines under Title 82, and therefore their argument
13 fails as a matter of law.

14 With that, Your Honor, I will rest on
15 our briefs on the remaining issues with respect to
16 findings of fact, and the violations of design
17 standards. We implore the Board to reverse, to
18 reject the findings of fact, and remand this
19 matter for a lawful analysis. Thank you.

20 CHAIR RUFFATTO: Thank you, Mr.
21 Hernandez. Very good argument. Thank you. Mr.
22 Langston, you have 20 minutes.

23 MR. LANGSTON: Good afternoon, Mr.
24 Chairman and members of the Board.

25 This case dates back to the year 2012,

1 so I think it's prudent to give the Board some
2 background on how we got to this case and why
3 we're here today, so I'll initially be providing a
4 procedural history of this case. After that I'll
5 be discussing the central issue present in today's
6 case. After that I'll be discussing the relevant
7 standards, both for the Board's substantive
8 decision, and also procedurally in evaluating the
9 proposed FOFCOL from the Hearings Examiner.

10 After that I will address MEIC's
11 exceptions, I'll also address DEQ's exceptions to
12 the Hearing Examiner's proposed FOFCOL, and
13 finally, if time permits, I'll address the binding
14 nature of the AM4 decision.

15 So as I mentioned earlier, this case
16 dates all the way back to 2012 when Signal Peak
17 filed its third amendment to its Bull Mountain
18 Mine permit, and that's why we refer to this case
19 as AM3, Amendment 3.

20 In January 2016, this Board remanded the
21 2012 permit back to DEQ to resolve issues under
22 the material damage standard.

23 Now, after this remand occurred, and DEQ
24 corrected these problems under the material damage
25 standard, DEQ provided notice to the public that

1 Signal Peak's revised AM3 permit was deemed
2 acceptable, and at that point, the permit was made
3 available for objections from the public.

4 And under statute, this objection period
5 is provided and limited in time. MEIC of course
6 provided objections to this revised AM3 permit.
7 And based off of the objection that MEIC provided
8 other parties, DEQ issued its written findings
9 approving the AM3 permit, the revised AM3 permit,
10 which also included a Cumulative Hydrologic Impact
11 Assessment, otherwise known as a CHIA.

12 These written documents constitute DEQ's
13 final decision on the matter, the final decision
14 on the AM3 permit. This is why MEIC exhausting
15 their administrative remedy is so important in the
16 objections period, because this is the last
17 opportunity that DEQ has to correct any problems
18 with the permit before it is final.

19 Additionally, it's important for the
20 issue of burden of proof. Of course, DEQ has a
21 burden to explain why the permit should be issued
22 at this permitting stage; but after the permit has
23 been issued, it has the force of law, and the
24 mining company, Signal Peak, may rely on this
25 permit to conduct mining activities.

1 And accordingly any party who thinks
2 that that permit was unlawfully issued before this
3 Board has the burden of proof of demonstrating why
4 the Department did not satisfy its obligations in
5 the permitting stage, and that alludes to the next
6 step in this procedure.

7 In August of 2016, MEIC filed its notice
8 of appeal to the Board to challenge the revised
9 AM3 permit.

10 But it's important to note that this new
11 objection, this new challenge to the AM3 permit,
12 did not concern the material damage standard as it
13 did in the previous litigation that was remanded
14 back to DEQ. Instead it concerns the issue of
15 replacement water.

16 So one of the first steps that really
17 happened in this case that resolved issues was
18 that the parties filed motions for summary
19 judgment. And one of the reasons why parties file
20 motions for summary judgment is to narrow issues
21 as the case advances. It's a central principle of
22 judicial and administrative law that you want to
23 narrow issues as the case proceeds.

24 And in that order for summary judgment
25 from the Hearing Examiner, there were three

1 distinct issues that were resolved. First, the
2 Hearings Examiner found that MEIC had the burden
3 of proof in its appeal before the Board.

4 Second, the Hearings Examiner found that
5 MEIC could not raise issues of bonding because,
6 one, they had not exhausted their administrative
7 remedies; and two, they had not identified an
8 expert witness for this issue.

9 And finally, and importantly, the
10 Hearings Examiner's order found that the relevant
11 standard for whether water replacement could be
12 available is dictated by Montana Administrative
13 Rule 17.24.304(1)(f)(iii).

14 And it's important to note that MEIC in
15 its motion for summary judgment provided the
16 authority that Mr. Hernandez cites here today, and
17 the Hearings Examiner did not accept that
18 argument. The Hearings Examiner identified this
19 administrative rule as the relevant standard.

20 At the last Board meeting that this
21 Board conducted, we heard a lot of emphasis on
22 expediency in addressing these contested case
23 proceedings, and I think it's really worth
24 contemplating how we can make these procedures
25 more effective.

1 And I would present here today that
2 allowing MEIC to relitigate all these issues that
3 have already been resolved in motions for summary
4 judgment is contrary to the principle of
5 expediency.

6 After the Hearings Examiner ruled on
7 those motions for summary judgment, the Hearings
8 Examiner -- or excuse me -- this Board reassigned
9 the case back to the Hearings Examiner, and the
10 implicit conclusion of that is that the Board was
11 signing off on the Hearings Examiner's order on
12 summary judgment.

13 With the provided jurisdiction, the
14 Hearings Examiner held a four day hearing. After
15 the conclusion of this four day hearing, the
16 parties provided proposed findings of fact and
17 conclusions of law to the Hearings Examiner; and
18 then in July 30th, 2021, the current Hearings
19 Examiner issued their proposed FOFCOL, and that's
20 why we're here today.

21 Pursuant to Montana Code Annotated
22 2-4-621, the parties may file exceptions to the
23 Hearings Examiner's proposed FOFCOL, and depending
24 on how the Board rules today, you will either
25 accept the proposed FOFCOL, you'll make amendments

1 as necessary, or you will reject the proposed
2 FOFCOL. That's fundamentally what we're here to
3 do today.

4 Now I want to talk about the central
5 issue in this case. The Bull Mountain Mine is an
6 underground coal mine, and the way that they
7 remove coal from the earth is by putting panel
8 sections underground, and this is called the long
9 wall method of underground coal mining.

10 And what you do is you remove the target
11 coal seam, and at the completion of removing all
12 of that coal seam, the long wall panel will
13 collapse down into the mine void, and this
14 collapsed material is called the gob.

15 And the collapse of the gob results in
16 subsidence, and this impacts the hydrology of the
17 surrounding area. I mean you might imagine that
18 dirt and earth that's been disturbed, the way that
19 water runs down through it is going to be
20 different than an undisturbed piece of dirt.

21 And the reason why that matters is that
22 there are existing springs in the Bull Mountain
23 area that primarily are used for livestock
24 purposes, and the question is provided by MSUMRA,
25 which requires that replacement water be required

1 when these hydrological impacts occur; and in
2 particular, the application must describe a water
3 source that could be used for replacement water.
4 So that's going back to the substantive standard
5 that was derived in the motion for summary
6 judgment stage of this proceeding.

7 So among other sources, Signal Peak has
8 identified drilling into the deep underburden
9 aquifer to provide replacement water to springs
10 that might be impacted by subsidence, and the
11 fundamental question here today is whether or not
12 the deep underground aquifer has sufficient water
13 to replace the water at these impacted springs.

14 And it's critical to note that we don't
15 exactly know how these springs are going to be
16 impacted. The subsidence process is
17 unpredictable, and hydrology is candidly
18 unpredictable, so we have to evaluate this
19 replacement water issue with an understanding that
20 we cannot know exactly what's going to happen in
21 the future.

22 So now I want to move on to the relevant
23 standards for this Board's decision today, and
24 I'll start with the procedural standard.

25 And findings of fact in a proposed

1 FOFCOL from a Hearings Examiner are evaluated
2 under the substantial evidence standard, and
3 basically that requires the Board to find that the
4 Hearings Examiner's findings are supported by
5 competent substantial evidence, and substantial
6 evidence is also defined as what a reasonable mind
7 might accept as adequate to support the
8 conclusion.

9 It consists of more than a mere
10 scintilla of evidence, but may be less than a
11 preponderance. So we're basically looking just
12 for some source in the record that supports the
13 Hearings Examiner's conclusion.

14 On the question of conclusions of law,
15 those are evaluated under the correctness
16 standard.

17 Turning to the substantive standard at
18 issue in this case, that is addressed by the
19 "could be" language that I described earlier from
20 17.24.304(1)(f)(i). Additionally, Montana Code
21 Annotated 82-4-253(3)(d) requires the mining
22 operator to replace the water in like quantity,
23 quality, and duration.

24 As I mentioned earlier, the standard
25 which MEIC raises today was already resolved in

1 motions for summary judgment, and we should not be
2 here today to relitigate things that have already
3 been resolved in this case.

4 And additionally, I think it's worth
5 noting that these those two standards use
6 different language. The standard advanced by DEQ
7 is the "could be provided," and Mr. Hernandez has
8 advocated the "can be conducted," reclamation can
9 be conducted.

10 And I think it's worth considering that
11 these are inconsistent standards, and the
12 Legislature would not require the DEQ to go and
13 engage in contradictory analysis. I mean it
14 either requires us to evaluate whether replacement
15 water could be provided, or can. It's not going
16 to require the simultaneous components of
17 analysis, which by all the advocacy that's been
18 provided are contradictory in the level of
19 certainty that they require.

20 Now I want to turn to the issues that
21 MEIC has raised in their exceptions, and the first
22 is on the quantity of water that could be provided
23 by the deep underburden aquifer.

24 And as you'll note at Page 47 in the
25 proposed FOFCOL, the Hearings Examiner described

1 the multitude of sources that DEQ looked at in
2 determining that the deep underburden aquifer
3 would be adequate to supply replacement water to
4 these springs.

5 But ultimately the contention that MEIC
6 brings up comes down to a difference in
7 qualitative analysis versus quantitative analysis,
8 and they fault the DEQ for not providing an exact
9 amount of water that would be provided by this
10 aquifer.

11 But as the Hearings Examiner's order
12 notes, when DEQ looked at this aquifer, it looked
13 at the geology of the aquifer, and based off of
14 the geology and understood assumptions about what
15 type of water is typically available in these
16 formations, it arrived at the reasonable
17 conclusion that there would be adequate water
18 supplies for replacement water.

19 And I think it's important to go back to
20 the substantial evidence standard to evaluate why
21 MEIC's arguments on this point fall short. So I'm
22 going to quote a Northwestern Corporation versus
23 the Montana Department of Public Service
24 Commission case, in which the Montana Supreme
25 Court said, "In reviewing findings of fact, the

1 question is not whether there is evidence to
2 support different findings, but whether competent
3 substantial evidence supports the findings
4 actually made."

5 As the proposed findings of fact and
6 conclusions of law makes abundantly clear, there
7 was sufficient evidence in the record to support
8 this decision. The advocacy MEIC has presented
9 today is a preference to arrive at a different
10 conclusion about the evidence, but under the
11 substantial evidence standard, their arguments
12 fail.

13 Now I want to turn to MEIC's second
14 substantive contention, and that's on the quality
15 of water that would be provided by the deep
16 underburden aquifer.

17 Water treatment was indeed addressed by
18 the CHIA, and in particular the at-trial and
19 testimony addressed that commercially available
20 water treatment systems could be used to treat
21 sodium.

22 And MEIC's witness had an opportunity to
23 talk about this issue, and failed to provide any
24 testimony that would support the position that
25 these commercially available water treatment

1 systems couldn't treat sodium.

2 And MEIC's contention is that this is a
3 post hoc explanation provided by the Department
4 and Signal Peak, but this ignores the guidance
5 that the Board has consistently given parties in
6 these contested case proceedings. We are simply
7 required to be able to trace back the testimony to
8 things that were discussed in the CHIA, and the
9 written findings that were conducted at the
10 permitting stage.

11 Under the Montana Code Annotated
12 2-4-612, parties may present evidence and argument
13 in a contested case proceeding, and that's
14 precisely what the parties did on this point.
15 This was an issue that came up through the course
16 of the contested case proceeding.

17 That was a matter that was already
18 addressed in the CHIA, but was further elaborated
19 upon in testimony, and that is adequate
20 information to support the Hearings Examiner's
21 proposed FOFCOL that rejected MEIC's arguments
22 that the quality of water would be inadequate from
23 the aquifer.

24 MS. SCHERER: Mr. Langston, you have two
25 minutes left.

1 MR. LANGSTON: Just on the -- MEIC
2 brings up another issue under water quality, that
3 they argue that bonding is insufficient to address
4 these water treatment systems, but this is again
5 another relitigation of issues that were
6 previously addressed at the motion for summary
7 judgment stage.

8 And finally I want to address the issue
9 of legal availability of water. DEQ identified
10 exempt wells, groundwater wells, as the source of
11 these replacement waters. And the basic principle
12 here is that if you have a well that produces less
13 than 35 gallons per minute, or ten acre feet per
14 year of water, then you are eligible for one of
15 these exempt permits.

16 The complicating aspect that MEIC has
17 brought up, and does not bear directly on the
18 agency's analysis, is the question of combined
19 appropriation.

20 And the Montana Supreme Court looked at
21 this issue, and found that a new rule proposed by
22 the DNRC that required combined appropriation to
23 mean two interconnected wells physically should be
24 rejected, and drafted additional requirements onto
25 the Montana Water Use Act.

1 In a subsequent legislative session, the
2 Montana Legislature provided a grandfathering
3 exemption for certain subdivisions, but that's
4 completely irrelevant to the ultimate
5 determination that these groundwater wells will be
6 able to use the exempt provisions in Montana Code
7 to be provided water.

8 And it's important to note that the
9 current status of the combined appropriation rule,
10 it's in DNRC's judgment as to whether or not
11 something constitutes a combined appropriation.

12 And so sitting here today, and also
13 sitting back when the DEQ was making its
14 determination, we can't make a future prediction
15 about how DNRC is going to look at this issue.
16 All we can do is look at the statute, and make
17 reasonable predictions about whether or not a well
18 will be able to qualify as an exempt well in the
19 future.

20 Based off of the information that the
21 DEQ considered, it looks abundantly clear that all
22 of these replacement water wells will qualify as
23 exempt wells, and accordingly, this consideration
24 of combined appropriation really shouldn't even
25 enter into this Board's analysis.

1 MS. SCHERER: Your time is up.

2 MR. LANGSTON: With that, I'll finish
3 and answer any questions the Board might have.

4 CHAIR RUFFATTO: Thank you, Mr.
5 Langston. Good argument. We will save our
6 questions until we hear all of the arguments. So
7 we will go to Ms. Bordelon at this point.

8 MS. BORDELON: Thank you, Mr. Chairman.
9 And thank you to the Board for the time and your
10 consideration of this issue.

11 Signal Peak endorses the fine
12 presentation from Mr. Langston, and I'm going to
13 endeavor not to repeat those issues, and focus on
14 issues to add some supplemental discussion.

15 First I will address the stories that
16 Counsel for MEIC presented to you, and ask you to
17 ask yourself why he presented you those stories.
18 They're not relevant to DEQ's decision to issue
19 this permit. If they were, he would have made
20 that argument.

21 What he is doing is inviting you to make
22 an emotive response, to look outside the record
23 based on what you may perceive as a bad actor.
24 Signal Peak has had some challenges in the past.
25 It's dealing with them. Those are not connected

1 to this permitting action, and they're bought up
2 here primarily just to distract and to seek an
3 emotive response.

4 One point I find interesting is the
5 discussion of the stories of the people from the
6 Bull Mountains. None of those people brought this
7 challenge. MEIC brought this challenge. None of
8 their members in the Bull Mountain participated as
9 parties to this challenge. So the question of
10 their interest is certainly an open one, on
11 whether they actually have the concerns that MEIC
12 purports to profess on their behalf.

13 So moving forward, I'm going to focus on
14 first the key issues in this case, address what
15 the case is about, then move to the conclusions of
16 law that MEIC has challenged, and then discuss the
17 factual findings which they take issue with.

18 The first issue is the key issues in
19 this case. Although MEIC argues that the Hearing
20 Examiner got it wrong, used the wrong standard,
21 what they do not appear to challenge is that the
22 Hearing Examiner understood their substantive
23 concern.

24 Their substantive concern, which they've
25 repeated ad nauseam, is will there be enough

1 replacement water should water supplies be
2 impacted by mining.

3 The question is what is the right legal
4 standard to determine that, and MEIC proffers that
5 that is reclamation, pointing you to approval
6 standard Administrative Rule 17.24.405 subsection
7 (6).

8 And they identify the last clause of
9 that provision which says that DEQ may not approve
10 unless the application is complete and accurate --
11 that's the first portion -- that the applicant has
12 complied with the act and rules -- that's the
13 second portion -- and then the third, that the
14 application has demonstrated that reclamation can
15 be accomplished.

16 MEIC argues that reclamation includes
17 water replacement. We dispute that. MEIC does
18 not get to define reclamation. The Legislature
19 does and has, and it did so in MCA 82-4-203, which
20 identified reclamation using terms like
21 "backfilling," "subsidence stabilization," "water
22 control," "grading," "high wall reduction," all of
23 it to make those lands capable of supporting the
24 uses that those lands were capable of supporting
25 prior to any mining or higher or better uses.

1 Still a very general definition of what
2 reclamation might be.

3 And the agency has further defined what
4 an applicant has to do to be able to show at the
5 permitting standard that it has satisfied that
6 reclamation can be accomplished.

7 And it is not in the bond release
8 regulation that Mr. Hernandez pointed you to. In
9 fact, it's in the reclamation plan, which is in
10 17.24.313. It is extensive, it is detailed, it
11 lists in very minute detail what an applicant has
12 to do and has to present to the agency to meet a
13 qualifying reclamation plan.

14 But what is not in that reclamation plan
15 regulation is anything having to do with water
16 quantity, water replacement.

17 However, Mr. Hernandez is correct that
18 MSUMRA definitely does require an applicant to
19 have a plan in place to replace this water. It's
20 just not in the reclamation plan because it's not
21 reclamation.

22 It's identified in the plan for the
23 protection of the hydrologic balance, which is in
24 17.24.314, which requires that the applicant have
25 a plan for the protection of -- and this in

1 subsection (c) -- the quantity of surface and
2 groundwater, or to provide alternate sources of
3 water in accordance with ARM 17.24.314(1)(e) and
4 (f) -- that's the provision that the Hearing
5 Examiner used -- and 17.24.648 -- that's the
6 performance standard -- where protection of
7 quantity cannot be ensured.

8 So at the permit stage, the plan
9 requirement for demonstrating replacement is not
10 found in the reclamation plan, it's found in the
11 plan for the protection of the hydrologic balance,
12 which itself refers back to the very specific
13 regulation that the Hearing Examiner used.

14 So what happened here is not the Hearing
15 Examiner ignoring MEIC, purposely rejecting their
16 theory of the case. It's actually the Hearing
17 Examiner giving them a lift, finding the right
18 regulation that actually applied to the
19 substantive claim -- replacement water -- that
20 they were making.

21 So if we move forward, and look at what
22 the actual legal requirement was at the permitting
23 stage, it is simply that the applicant provide a
24 description of alternative water supplies, not to
25 be disturbed by mining, that could be developed to

1 replace water supplies diminished or otherwise
2 adversely impacted in quality or quantity by
3 mining activities, so as not to be suitable for
4 the approved post-mining land use.

5 What this really does is a simple
6 question, and it's the question the Hearing
7 Examiner identified. Does the application that
8 Signal Peak put forward identify alternative water
9 supplies that could be developed to replace those
10 that might be affected?

11 And the Hearing Examiner separated that
12 into three quantities: The quantity of the water,
13 the quality of the water, and the legal
14 availability.

15 Now, as to quantity, MEIC's expert made
16 a dispositive concession at the hearing, which the
17 Hearing Examiner included in unchallenged Finding
18 of Fact 125, when he agreed that the underburden
19 might produce enough water for mitigation
20 purposes, and explained that, "I think it could."

21 Right then and there, you have a
22 dispositive concession. This argument there won't
23 be enough water, their expert concedes that it
24 could be enough water, which is, as they concede,
25 all that the baseline requirement actually

1 requires.

2 In terms of water quality, Mr. Langston
3 addressed this in detail that MEIC's expert lacked
4 the expertise to challenge these findings, and
5 MEIC has not challenged the Findings of Fact 137
6 and 139 that the Hearing Examiner relied on in
7 looking at the water quality that identified that
8 the office supply well -- which is drilled into
9 the deep underburden -- has never exceeded the
10 arsenic standard; that the quality of water in the
11 deep underground is variable, it is not uniform;
12 and that if a hypothetical mitigation well did
13 require treatment, it would be available.

14 And on legal availability, Mr. Langston
15 generally covered this, but I wanted to add one
16 important point. While an exempt well is
17 certainly the easiest way to permit a groundwater
18 well, it is not the only way.

19 If for whatever reason the exempt well
20 were not available, if MEIC's interpretation, or
21 prediction rather, of what DNRC would do when
22 faced with a legal availability question -- or
23 with a combined appropriation question is
24 accurate, that does not mean that a well is
25 unavailable, or legally unavailable.

1 What it means is that the applicant
2 would have to go through more process, to go
3 through the water appropriations process. And
4 what MEIC has not done at all is present any
5 evidence that Signal Peak would be somehow
6 precluded from going through that process to
7 obtain the water rights.

8 So there really is no evidence in the
9 record, and the Hearing Examiner found correctly
10 that MEIC presented no evidence that the water
11 would be legally unavailable.

12 Which brings me to the questions I keep
13 emphasizing -- MEIC presented no evidence, MEIC
14 presented no evidence -- and MEIC would argue they
15 don't need to, they don't bear the burden of
16 proof. And they're wrong. This has been
17 discussed at length.

18 I want to address the Royston case,
19 because this is something that MEIC has argued
20 repeatedly, and they're fundamentally wrong. This
21 is the same question that was raised in the Debuff
22 case and raised in the Bostwick case.

23 All of those cases were brought under
24 the Water Use Act. The Water Use Act is different
25 from MSUMRA, and creates different proceedings, so

1 the conclusions that MEIC is drawing from it do
2 not apply here in the MSUMRA context.

3 In the Water Use Act procedures, which
4 the Supreme Court has laid out at length, I think
5 the Clarks Fork Coalition case has a detailed
6 discussion of how this works. An applicant
7 submits a request for water appropriation, and
8 goes through a permitting process with DNRC. DNRC
9 then issues a preliminary determination.

10 At that point there's a fork in the
11 road, and either if the preliminary determination
12 goes against the applicant, they have preliminary
13 determinations to deny it, then the applicant
14 bears the burden of proof in the contested case,
15 because, as Mr. Hernandez accurately states, if
16 the applicant did not present any evidence in the
17 face of a denial, the denial would stand.

18 However, if the preliminary
19 determination is to issue the water appropriation,
20 then there's public notice sent out, and if
21 somebody objects to that appropriation, it is
22 their burden to challenge or to present evidence
23 as to why the appropriation should not issue. And
24 then at the conclusion of the contested case we go
25 forward.

1 So it is the party bearing the burden of
2 proof for the change. So when the applicant's --
3 In the Water Use Act, when their permit is denied,
4 then if they do nothing, it's over. They don't
5 have a permit.

6 If the preliminary determination is to
7 grant it, and a party presenting a challenge
8 presents no evidence, then the preliminary
9 determination to grant it, it goes forward.

10 Here in MSUMRA, we don't have that
11 bifurcated process that the Water Use Act has. We
12 have an actual permit. So what has happened is
13 that DEQ went through the process. During that
14 permitting process, Signal Peak affirmatively
15 demonstrated that it met the permitting
16 requirements.

17 DEQ took a hard look, and confirmed
18 that. It issued the permit. The permit is
19 effective now. If no action were taken, the
20 permit continues to be valid.

21 So in the contested case, the only way
22 to change the circumstance is if MEIC, the party
23 bringing the contested case, brings sufficient
24 evidence to demonstrate that the permit was issued
25 in violation of law. If they fail to do that, the

1 permit continues to be valid, and we go forward.

2 This is a fundamental misunderstanding
3 of the Supreme Court's case law, and the Board
4 should not be swayed by it.

5 So given MEIC bears the burden of proof,
6 it's important -- let me quickly point out. We
7 haven't discussed much on the binding nature of
8 the AM4 decision, and quickly note that the
9 Supreme Court has been very clear that agencies
10 have the right of appeal, and while this appeal is
11 pending -- and it is -- the Board need not
12 implement its remand, these remand instructions,
13 even in the AM4 case, let alone another case.

14 So moving on beyond that, I'd like to
15 point out that the substantive legal conclusions
16 that MEIC takes issue with, particularly the
17 physical availability in terms of water quantity
18 and quality.

19 Although they frame these as challenges
20 to conclusions of law, they are not. They are
21 based on facts they want you to find that are
22 contrary to those that were found by the Hearing
23 Examiner; and what they'd like you to do is
24 substitute these new different facts for those
25 found by the Hearing Examiner to reach the

1 conclusion that the Hearing Examiner was
2 arbitrary.

3 Let me give you an example. So physical
4 availability. MEIC claims that DEQ failed to
5 assess how much water would probably be needed.
6 This is their exceptions at 15. But this is
7 absolutely contrary to the unchallenged Finding of
8 Fact 149, which states that DEQ determined that
9 the maximum flow rate of any particular DUB --
10 that's deep underburden -- well if required for
11 permit water replacement needs is not anticipated
12 to exceed 14.2 gallons per minute.

13 It is also contrary to unchallenged
14 Findings of Fact 66 and 69, which identify and
15 quantify the springs that may be impacted by
16 mining. And it's contrary to the challenged
17 Findings of Fact 92 and 95, and unchallenged
18 Finding of Fact 93, all of which describe why it's
19 impractical to predict whether and how a
20 particular spring will be impacted by mining, and
21 require replacement.

22 The overwhelming evidence indicates that
23 DEQ did the appropriate analysis in terms of the
24 quantity of water that might be needed for
25 replacement, and it also analyzed and determined

1 that the deep underburden had that quantity.

2 I reiterate Mr. Langston's point in
3 terms of water quality. MEIC's concern in terms
4 of the discussion of -- well, I guess two points
5 here. One is that MEIC appears to claim that the
6 proposed decision is arbitrary because the
7 discussion of water quality comes only from the
8 order on summary judgment.

9 This is obviously false. Unchallenged
10 Findings of Fact 127, 128, 132, and 142 all
11 discuss and evaluate the water, the variable water
12 quality of the deep underburden, and the fact that
13 treatment is available.

14 Now MEIC would try to push from your
15 mind the idea that sodium can be treated by saying
16 it wasn't disclosed enough. This is fly specking
17 at best. But moreover, MEIC objects because they
18 claim this was undisclosed testimony from Signal
19 Peak's expert.

20 However, in the hearing, Signal Peak and
21 DEQ objected to the admission of the sodium issue
22 at all, because we argued that MEIC had not
23 properly raised it. The Hearing Examiner
24 overruled us.

25 But the fundamental fact that parties

1 are able to present responsive testimony under
2 MSUMRA, which has been endorsed by the Supreme
3 Court, should not be overlooked in an effort to
4 blind you to commercially available treatment
5 systems that are commonly known.

6 The final point I want to bring up is
7 the findings of fact, and as this Board has
8 repeated extensively, to reverse a finding of
9 fact, the Board would have to go through the
10 entire record, and identify whether any findings
11 are not supported by substantial credible
12 evidence.

13 MEIC challenges many of them.
14 Interestingly they don't tie them very well to the
15 actual conclusions of law that they challenge, so
16 they may be asking you to go on a big fishing
17 expedition through the record that doesn't have a
18 meaningful implication for the resolution of this
19 case.

20 One that might is the question that MEIC
21 now characterizes as the performance standards,
22 but are actually monitoring requirements. This
23 issue was raised by MEIC on the second day of
24 hearing. It did not come up in the Notice of
25 Appeal; it did not come up in summary judgment; it

1 did not come in the prehearing MOMO (phonetic).

2 But on the second day of hearing, MEIC
3 argued that a historic portion of the permit had
4 been violated, and therefore evidence regarding
5 the impacts of mining on springs that had been
6 under-mined prior to the date of the permit
7 issuance should be excluded because this historic
8 monitoring provision was not addressed.

9 MS. SCHERER: You have two minutes left.

10 MS. BORDELON: Thank you, Sandy. What
11 MEIC does not take issue with is what we call the
12 MQAP, the Monitoring and Quality Assurance Plan,
13 that was used to actually develop the data that
14 they challenge.

15 This plan went into effect a couple
16 years before the AM3 amendment was approved. MEIC
17 did not challenge it, and they didn't present any
18 evidence as to why this state of the art
19 monitoring program would result in unreliable
20 data.

21 What they are trying to do is get a
22 gotcha, that a document from 1990, which is
23 included as the permit, as a historical document.
24 The Hearing Examiner made that finding that this
25 is a historical document in the permit, but not an

1 enforceable standard, somehow renders the actual
2 data, the monitoring data that was collected
3 according to modern methods, unreliable.

4 This is a distraction. And
5 fundamentally what they haven't presented is
6 credible -- or any argument or evidence as to why
7 this modern data is not supported by substantial
8 credible evidence, and why the Hearing Examiner
9 wasn't entitled to rely on it.

10 In conclusion, this case is about a very
11 simple question: Is there enough water in the
12 aquifer? And the answer is a resounding yes.
13 It's been used by people throughout the area.
14 Signal Peak went through enormous geologic
15 investigations to determine that, yes, it is.

16 And MEIC simply picked a hard case for
17 themselves when they chose to make this argument,
18 that having made that case one, that is the one
19 they're stuck with, and I think it's a fairly
20 simple question for the Board to determine that
21 the permit application met the standard that was
22 required in identifying the replacement water.

23 Thank you.

24 CHAIR RUFFATTO: Thank you, Ms.
25 Bordelon. Good argument. Now we'll go back to

1 Mr. Hernandez, and you have five or so minutes to
2 respond.

3 MR. HERNANDEZ: Thank you, Chairman
4 Ruffatto. I'd like to make three points on
5 rebuttal, and then address more issues as
6 questions arise.

7 First, Ms. Bordelon says the stories of
8 the people in the Bull Mountains that we addressed
9 at first are not relevant. That's not the case,
10 and that's not why we raised them.

11 Through those stories, I'd like to point
12 to two of the fundamental flaws in Ms. Bordelon's
13 argument. So she says disregard the people who
14 use the Bull Mountains. Well, in fact, use of the
15 Bull Mountains demonstrates why water is so
16 important.

17 Ms. Bordelon read to you the definition
18 of reclamation, which requires that the uses of
19 the lands be returned to as they were before. You
20 can ask anyone in the Bull Mountains if they can
21 use the Bull Mountains without water to ranch, and
22 they'll tell what the answer is. I think you
23 know. Uses unquestionably require water.

24 And if you look at ARM 17.24.111(6), you
25 will see that reclamation involves reclamation of

1 water, water resources. This isn't even a close
2 question. DEQ has been asserting to Federal
3 regulators for decades that reclamation of water
4 resources is part and parcel and a fundamental
5 part of its MSUMRA program.

6 The second point about the stories is
7 Signal Peak Energy's long and continuing history
8 of malfeasance. Ms. Bordelon would like to say
9 that's not relevant, but it's critical and central
10 to this case for the reasons that Ms. Bordelon
11 addressed at the end of her argument: Signal Peak
12 Energy's continuing failure to follow the design
13 standards in its own permit for assessing impacts
14 to water resources.

15 Now, what Ms. Bordelon did is she said,
16 "Don't look at the design standards. Look at this
17 document called the MQAP," which is a document
18 exclusively about monitoring protocols. What it
19 does not talk about is the method required to
20 assess whether or not springs are impacted.

21 It's hard to do. It's not obvious. But
22 the permit has a very detailed mathematical
23 quantitative method for assessing whether springs
24 have been impacted.

25 Signal Peak Energy admitted on the stand

1 that they have never followed this design
2 standard. Never. And that is critical because
3 Signal Peak Energy says, "We haven't seen any
4 impact to springs, so we don't think there will be
5 any impact in the future, so we don't need lots of
6 reclamation water."

7 They can't make that argument because
8 they can't profit from their own violation of the
9 law. The permit is a lawfully enforceable
10 document, as Mr. Langston said. It's the law.
11 And Signal Peak Energy's refusal to follow that
12 document was unlawful. They may not therefore
13 benefit from that unlawful conduct.

14 The final point I'll make is that Ms.
15 Bordelon ended her argument with the statement of
16 the question is whether there's water in the Bull
17 Mountains, and the answer is resoundingly yes.
18 That's not the question.

19 Don't fall for the head fake, for two
20 reasons: One, the question isn't whether there's
21 water in the Bull Mountains. The question is
22 whether you can withdraw 100 gallons per minute
23 through the deep aquifer without impacting
24 existing users.

25 Many people already use that aquifer,

1 and if you're going to suck up 100 more gallons
2 per minute, you may impact those users. There has
3 absolutely not been an affirmative demonstration
4 that that won't happen. In fact, that's what Dr.
5 Nicklin admitted on the stand.

6 And second, from a matter of
7 understanding what's at issue here, Ms. Bordelon
8 says the question isn't whether or not there's
9 water. There is water. That's not the question
10 Ms. Bordelon wants you to ask. She wants you to
11 ask may there be water. And unless we can tell
12 that it's not possible for water to exist in the
13 Bull Mountains, we can't carry our burden.

14 That is unquestionably not the standard.
15 The standard that we have to show that it's
16 impossible to replace water impacted by the mine,
17 it's not realistic. It's not based on anything in
18 the record or in the law.

19 And you can see why. If all that Signal
20 Peak has to do to is show that it's possible that
21 water could be replaced, well, they could say,
22 "Well, it's possible that unicorns will land on
23 top of that mountain, and start spitting out water
24 to replace impacted streams."

25 That's possible. I can't prove it's

1 impossible, but that's not the standard, and
2 that's not how you protect the people who live and
3 depend on those water resources for their
4 livelihood. That standard requires Signal Peak
5 Energy to demonstrate by a preponderance of the
6 evidence that there's sufficient water to replace
7 impacted waters. They have not done that.

8 With that, I will rest, and address any
9 questions that the Board may have. Thank you.

10 CHAIR RUFFATTO: Thank you, Mr.
11 Hernandez. It is now 2:13. I think we should
12 take a break for just ten minutes. At 2:23 we
13 will return, and at that time, we will have the
14 Board members ask questions, if they have any, of
15 the three parties. So we'll reconvene at 2:23.

16 (Recess taken)

17 CHAIR RUFFATTO: Sandy, please call roll
18 and we'll reconvene.

19 MS. SCHERER: Chairman Ruffatto.

20 CHAIR RUFFATTO: Here.

21 MS. SCHERER: Board Member Lehnherr.

22 BOARD MEMBER LEHNHERR: Here.

23 MS. SCHERER: Board Member Simpson.

24 BOARD MEMBER SIMPSON: Here.

25 MS. SCHERER: Vice Chair Aguirre.

1 (No response)

2 MS. SCHERER: Board Member Reiten.

3 BOARD MEMBER REITEN: Here.

4 MS. SCHERER: Board Member Smith.

5 BOARD MEMBER SMITH: Here.

6 MS. SCHERER: Board Member Altemus.

7 BOARD MEMBER ALTEMUS: Here.

8 MS. SCHERER: We have a quorum.

9 CHAIR RUFFATTO: Thank you, Sandy.

10 Well, the first thing I'd like to do is to ask the
11 Board members if you have any questions of the
12 parties at this time, but I want to let you know
13 that this will not be your last opportunity. As
14 we deliberate this afternoon, I expect that there
15 will be more questions directed to the parties.
16 But as a preliminary matter, are there any upfront
17 questions that you'd like to direct to any of the
18 parties?

19 BOARD MEMBER SIMPSON: Mr. Chairman, I'd
20 like to direct a question to Mr. Hernandez.

21 CHAIR RUFFATTO: Please go ahead.

22 BOARD MEMBER SIMPSON: Mr. Hernandez, do
23 you know how Mr. Nicklin came up with his estimate
24 of 100 gallons per minute or more? That seems
25 pretty extreme to me.

1 MR. HERNANDEZ: Chairman Ruffatto, Board
2 Member Simpson. I think that what we know from
3 the relevant exhibit -- and that's Exhibit MEIC 17
4 at Page 85 -- that what he did was to sum, to add
5 up, the flow of the springs, and he notes one
6 specific spring that has historical monitoring
7 data that shows that it flowed at a high rate, and
8 he said that's one example.

9 We know that it's not a high figure
10 because DEQ stated in their testimony of Mr.
11 VanOort that the potential replacement needs were
12 set forth for springs in Table 7-1 of the CHIA,
13 and the CHIA lists a non-exhaustive number of
14 wells in the project area that have regular flow
15 greater than 25 gallons per minute. And if you
16 total the flow of all these springs, you come to
17 over 100 gallons per minute.

18 So that what's DEQ used roughly, and
19 they were a little inconsistent on it. But they
20 said look at 7-1, and then they said look at Table
21 8-1 of the CHIA which is wells, because wells also
22 may be impacted by under-mining. We know this
23 because one well already has been impacted, and
24 that's the one that Signal Peak replaced with the
25 oil contaminated water.

1 If you look at Table 8-1, and you only
2 consider the wells that will either be mined
3 through, or else will have over 40 feet of
4 drawdown, if you total the flow of those wells,
5 you get over 50 gallons per minute.

6 So if you look at the springs and the
7 well together, you come up with about 100, over
8 150 gallons per minute, and that's being very
9 selective with respect to wells, and that's
10 actually very close to the number that Dr. Nicklin
11 first put together in his groundwater model in
12 2013, which again is MEIC Exhibit 17 at Page 85.

13 So to answer your question, Member
14 Simpson, 100 gallons per minute appears to be a
15 summing of springs. It doesn't include wells, but
16 when you add springs and wells together, it's
17 clear that substantially greater than 100 gallons
18 per minute may be needed for replacement water.

19 BOARD MEMBER SIMPSON: Thank you. One
20 additional question for any of the three of you.
21 Does anybody know right offhand how many acres
22 we're talking about, that is, how many acres are
23 going to be mined under this amendment and in the
24 life of the mine?

25 MR. HERNANDEZ: I can answer, then I

1 invite my friend Mr. Langston to clarify if I'm
2 wrong, but it's over 7,000 acres.

3 BOARD MEMBER SIMPSON: 7,000. Thank
4 you.

5 CHAIR RUFFATTO: Any more questions from
6 the Board at this point?

7 (No response)

8 CHAIR RUFFATTO: I will have some
9 questions, but I don't at this point. So if the
10 Board members have no other questions, let's talk
11 about how we're going to deliberate on this
12 matter.

13 The point I'd like to make is that it
14 seems like the heart of this problem, or the heart
15 of the matter, is a technical scientific issue,
16 and so I would like to be able to look to our
17 technical people on the Board to help interpret
18 what's going on here. And I know that this area
19 of science is Jon Reiten's specialty, and Dave
20 Simpson also has a lot of experience, and I don't
21 know about the others.

22 So I want to point that out, and then
23 I'd like to open up, just for an initial
24 deliberation by the Board members, where you think
25 we're going with this, and I would focus on the

1 technical scientific findings of fact and where
2 that leads us.

3 Does anybody have some thoughts they'd
4 like to offer just generally on what their
5 impressions are, and where they think we're going
6 with this? Because that will guide us on the next
7 steps.

8 (No response)

9 CHAIR RUFFATTO: If not, then I will
10 offer a thought that I had, but I'm not expert in
11 this stuff.

12 But as I read the findings of fact, if
13 we can accept them -- and we'll talk a little bit
14 about whether we can or can't -- it seemed like
15 there was very little doubt that the evidence
16 shows that the deep underground aquifer, the DUB
17 or DUA, could provide -- and we'll talk about the
18 standard there -- but could provide the water,
19 that it is there, and the evidence would show,
20 based on findings of fact, that there's sufficient
21 water there to meet existing needs and future
22 needs.

23 Now, is that conclusion an accurate
24 conclusion from your point of view, other members?

25 BOARD MEMBER REITEN: I have to agree

1 with that. I'd say that's a good goal.

2 BOARD MEMBER SIMPSON: I agree with that
3 also, Mr. Chairman.

4 CHAIR RUFFATTO: And can I ask you what
5 level of confidence would you say you have from
6 those findings of fact that water is there for the
7 purposes --

8 BOARD MEMBER REITEN: Mr. Chairman, I'd
9 like interject here a little bit, and Board
10 members.

11 I get asked these questions a lot of
12 times. So where is there water? Can I predict if
13 there's going to be water at someone's location?
14 They give me the locations, and I usually look at
15 nearby wells, and see what they do.

16 And I've done some of that up in the
17 Bulls -- not a whole lot -- but there's dozens of
18 wells up there that produce adequate amounts of
19 water for stock and domestic purposes. There's a
20 lot of little ranchettes and little houses up
21 through that whole area, and they seem to be doing
22 just fine.

23 I think, again, sometimes saying, I
24 usually say, I have to couch it in that it's
25 likely you're going to find water. Virtually

1 anyplace in the world, you cannot guarantee how
2 much they're going to get, or exactly what the
3 water quality is. So I think the standards that
4 they're put to are that there could be water there
5 is fine.

6 And another thing about -- and I feel
7 that the exempt wells is a good way of going about
8 it. Most ranch wells that people have are exempt
9 wells. Most domestic wells that people have, we
10 know they're exempt wells. That's the controversy
11 in the subdivisions.

12 But the exempt wells for ranchers -- Say
13 that you'd have to distribute those in a likely
14 arrangement that they're not going to interfere
15 with each other, pumping from them won't interfere
16 with each other.

17 And that's generally these Fort Union
18 wells that we've got here, that's the case. You
19 could likely find water in many different
20 sandstone layers or coal beds in the Bulls, all
21 the way down to the formation underlying it.

22 So I think the fact that there is likely
23 to be water there is certainly the case. And the
24 quality is used by locals for domestic and stock
25 purposes.

1 The concern over the sodium level, I
2 think that's an extremely low tolerance. There's
3 cattle that deal with many, many times that. It's
4 usable in many cases.

5 So those are just some of my feeling, my
6 understanding of the water potential up in that
7 area. And the thing is if you've got 7,000 acres,
8 you can easily spread the wells around that they
9 wouldn't interfere with each other.

10 Anyway, I could have more later, but
11 that's it for now.

12 CHAIR RUFFATTO: Thank you, Jon.

13 BOARD MEMBER SIMPSON: Mr. Chairman, if
14 I could follow up just a little bit.

15 I agree that this is really a very
16 narrow issue, and that is the question of
17 quantity, quality, and accessibility of water to
18 support the post-mining land use.

19 One point that I think is important is
20 that under the rules, the operator, the applicant
21 is required to demonstrate that there is
22 sufficient water to support the post-mining land
23 use. The post-mining land use here is grazing of
24 cattle, I assume; probably horses, maybe a few
25 sheep, but livestock grazing. And so that's the

1 amount of water demand that we're talking about
2 here.

3 I'm not familiar -- I mean I've been to
4 the Bull Mountains, but I'm not familiar with what
5 the grazing practices are there, the grazing
6 capacities, and so on and so forth. But that's
7 the kind of thing that can be readily calculated.
8 I'm sure the information is in the application
9 because it's something that DEQ routinely
10 requires.

11 As far as the amount of water that's
12 required -- Well, let me back up a little bit.

13 I think it's been demonstrated that
14 through the public water supply well for the
15 office that the unit is capable of supplying six
16 gallons per minute at that point, and six GPM
17 doesn't sound like a whole lot, but that's enough
18 water to probably water 150, 150 head of
19 livestock, 150 cows.

20 And it's not exactly the same situation
21 here, as I'm familiar with at Absaloka, where I
22 worked for so many years, because Absaloka is a
23 surface mine, and in surface mining all of the
24 overburden is removed and dumped back in the hole,
25 so that all this stratigraphy in the overburden is

1 completely destroyed.

2 In the case of a deep mine like we're
3 talking about here, Signal Peak, the point was
4 made that it's impossible to predict what the
5 impact on the springs is going to be, and it's
6 certainly true, in my opinion.

7 Most of these springs, if they're
8 similar to areas I've worked further east, are
9 going to be seasonal and locally recharged. There
10 could be exceptions, but it would be unusual.

11 The other thing, I have to agree with a
12 comment that Mr. Reiten made about the quality.
13 And talking about sodium, I think what we're
14 talking about is salt probably expressed as
15 electrical conductivity.

16 And the 300 seemed to me to be very
17 conservative as well, because I went back and
18 looked at some data from some of the more recent
19 projects I've worked on in eastern Montana, and I
20 could only find one sample of surface water from a
21 spring that was less than 1,000, and most were in
22 the range 2,000 to 3,000 and higher.

23 So the level of salinity that's
24 contemplated by this guideline seems to me to be
25 much more conservative than it needs to be, at

1 least based on general practices in eastern
2 Montana.

3 Now, as far as making the water
4 available to livestock, I do know that at
5 Absaloka, what the company has done there is to
6 install wells into the underburden -- very similar
7 situation as what we have here. There it's called
8 the Subrobinson, the Robinson being the lowest
9 coal seam, but it's essentially a similar unit,
10 underburden sandstone.

11 And with a well installation that
12 includes enough storage to capture a significant
13 amount of water, that is, three, four, five stock
14 tanks in series, the one overflowing into the
15 other. A well with a solar pump in it can produce
16 enough water for quite a few head of livestock.

17 And I suspect -- I'm sure the same thing
18 will be true here, if the wells are capable of
19 producing four to six gallons per minute, eight
20 gallons per minute.

21 I don't see where 100 gallons per minute
22 comes from, which is why I raised the question.
23 If that's the sum of the productivity of the
24 various wells and springs on the property, or the
25 springs I should say, we know that those springs

1 are highly seasonal, and so I question whether
2 that represents the amount of water that is
3 necessary to support the post-mining land use.

4 I would submit that -- I just did some
5 quick calculations here. Over that 7,000 acres,
6 you could supply the likely grazing capacity of
7 that land with just a few wells at four to six
8 gallons per minute.

9 CHAIR RUFFATTO: Thank you. Any other
10 what I would call kind of preliminary general
11 comments? Until we have questions, we're not
12 going to call on the parties. We're in
13 deliberations now, and if we have questions, we'll
14 call on the parties. Thank you.

15 So first of all, I want to start with
16 reminding you what we're about here. We have to
17 focus on the findings of fact made by the Hearing
18 Examiner, and we have to focus on the conclusions
19 of law made by the Hearing Examiner.

20 And everybody has pointed out to you the
21 rules we have to follow, and I'm looking right
22 here at Page 2 of MEIC's exceptions, and it states
23 the standards that we have to follow.

24 We can only change a finding of fact --
25 and we have to rely on these findings of fact. I

1 want to make that clear, rely on the findings of
2 fact that are in the proposed FOFCOL, but we could
3 only change the findings of fact if we read the
4 entire record, which I think is voluminous. I
5 don't know if we've got a lot of volunteers to do
6 that this weekend. But we can change the
7 conclusions of law if we explain our reasoning.
8 So we're limited in what we could do with the
9 findings of fact.

10 Another possibility in any case is to
11 remand it to the Hearing Examiner to address any
12 findings we're concerned about.

13 So with that, I want to start our
14 deliberations. If you read the materials, you
15 probably know that I've given you a menu of work
16 for this afternoon that is fairly long. I did
17 this outline. I hope you have copied that or
18 somehow have that in front of you, because I
19 intend to follow that unless someone has a better
20 idea or a different idea, think about it. And we
21 have to in my mind go through all of those
22 exceptions.

23 And I also want to use this document,
24 this outline, to help us talk about the exceptions
25 with specificity. For example, if I want to talk

1 about MEIC's exception, their first exception, to
2 make it easy I'll refer to MEIC Exception A, or
3 MEIC Exception B.

4 So I hope you have that document in
5 front of you. I also hope that you have the
6 findings of fact and conclusions of law, the
7 proposed ones, in front of you, so you can refer
8 to those easily. Do you have any questions about
9 that?

10 (No response)

11 CHAIR RUFFATTO: If not, I will keep
12 talking for a little while. The process that I
13 propose is that we will go through these one by
14 one. I will introduce an exception, and then it's
15 our job to decide if we're going to reject the
16 exception or accept it, and maybe a little more
17 about what we do for it. We'll ask for a motion
18 to deal with it.

19 I want to make it clear that we're not
20 going to end up today, unless something really
21 strange happens, with a final document. There are
22 going to be changes to this document, and there's
23 going to be some drafting to do between now and
24 when we look at a final proposed document.

25 And I want to make it clear that nothing

1 is final until we approve a final document. So
2 while we will make some decisions today, those
3 decisions will ultimately be confirmed or rejected
4 in our next opportunity to discuss this. Does
5 that make any sense?

6 If I could just compare this to a
7 judicial process -- which we are a judicial body
8 -- if we were a panel of Judges, what would happen
9 is we would have a meeting; we would discuss it;
10 we would go out; and then we'd come back and make
11 some tentative decisions; and then we'd come back
12 and have a document. That might involve two or
13 three meetings with a judicial panel, as I
14 understand it. But those all would be within the
15 office, and it wouldn't be a public meeting.

16 Because of our charge, we have to do our
17 deliberations in public at public meetings, so
18 it's a more laborious process than a judicial
19 panel would have to do.

20 So my point is that we're not going to
21 reach final conclusions today, and nothing we do
22 today is cast in stone, but we need to get some
23 direction as to where we're going, so whoever is
24 going to work on this document has some direction.
25 Does that make some sense? Any questions?

1 (No response)

2 CHAIR RUFFATTO: So let's go to the
3 outline, and I'm going to put first on the table
4 MEIC Exception A, and this is the deference
5 question.

6 MEIC argues that the Montana Supreme
7 Court in MEIC versus DEQ -- that's a 2005 decision
8 at Montana 96. You don't probably care much about
9 that citation, but I'll refer to it as the 2005
10 MEIC decision.

11 What MEIC argues is that DEQ is not
12 entitled to deference before this Board the same
13 way that judicial deference is granted to
14 agencies, and that really was pretty clear in that
15 case.

16 DEQ argues otherwise, but I've already
17 told you what I view it. I told you in the last
18 discussion what my view was.

19 So is there some preliminary discussion
20 or some discussion on this, or does someone want
21 to make a motion? Yes, Dave.

22 BOARD MEMBER SIMPSON: Mr. Chairman, I
23 have kind of an overreaching question that I'd
24 like to bring up before we start through the list,
25 and that is that the exceptions from the three

1 parties, DEQ and Signal Peak listed their specific
2 exceptions, and then requested relief in terms of
3 additional or modified language.

4 MEIC on the other hand has not provided
5 specific requests for relief. They have listed a
6 number of issues which they disagree with, but
7 they have not specifically requested relief other
8 than to either reject or remand the findings of
9 fact and conclusions of law.

10 And so I find it rather awkward trying
11 to address these individual items point by point
12 when there's no specific relief requested to which
13 we can say yes or no.

14 CHAIR RUFFATTO: I don't disagree with
15 your statement, but I guess I would say that the
16 way you stated it is exactly what they're
17 requesting, that we reject the findings of fact
18 and to send it back. It's not item by item.
19 They're not asking for specific changes. They're
20 saying there are problems, significant problems
21 with the document, and you need to send it back.
22 That's what they're saying.

23 Does that answer your question, or would
24 you like to ask Mr. Hernandez that question?

25 BOARD MEMBER SIMPSON: No, my question

1 is whether or not in the format presented that
2 it's feasible for us to go through these point by
3 point and be responsive. And if you feel that we
4 can, why, by all means let's proceed, but since
5 you're the attorney.

6 I'm just looking at it from the
7 standpoint of ease of organization, is the best
8 way I can put it, that is, to have -- In the case
9 of the other exceptions we have suggested specific
10 suggested relief or requested relief. Here we
11 don't for the individual items.

12 So unless we decide to remand or reject,
13 I feel it's kind of hard to go through, and deal
14 with these issues one by one.

15 CHAIR RUFFATTO: I don't disagree with
16 what you're saying, and a couple of weeks ago I
17 was overwhelmed by that possibility myself, and so
18 that's when I went to work and prepared this
19 outline as a means of doing that.

20 BOARD MEMBER SIMPSON: Well, I've made
21 my point, so let's proceed.

22 CHAIR RUFFATTO: And we could decide at
23 any point that we have to do something different,
24 but we have a long afternoon, I think, unless
25 something unusual happens.

1 So I'm going back to the first point.
2 To be honest with you, we have to reject the
3 majority, the vast majority of MEIC's exceptions
4 in order to move forward with this document.
5 That's the simple fact of the matter.

6 If there are some critical ones here
7 that if we accept their exception, we're probably
8 going to send it back. So we have to deal with
9 all of these, I believe.

10 Now, we could go another approach. I
11 have it organized my thinking this way, but we
12 could go through the findings of fact and
13 conclusions of law, and say do we accept that one
14 and that one and that one. We could do that. But
15 my concern if we do that is that we're not
16 specifically addressing MEIC's exceptions.

17 BOARD MEMBER SIMPSON: I understand your
18 point of view, and I guess my next comment or
19 question then relates specifically to this item,
20 Point A, and that is the question of deference to
21 DEQ.

22 On the one hand, you have pointed out
23 that we have to make -- we are required to make
24 our decision based on the information that is
25 contained in the findings of fact and conclusions

1 of law.

2 On the other hand, if we are not
3 required to defer to DEQ in the same manner that a
4 Judge would, I think that means that as member,
5 citizen members of this Board, we're expected to
6 bring our own experience and expertise into our
7 decision making, and if that's the case, we're not
8 specifically bound to the letter with what's in
9 the findings of fact and conclusions of law.

10 The latter I think is the case, but I
11 guess I'd like to have that resolved before we
12 proceed any further.

13 CHAIR RUFFATTO: That's a good point.
14 What I am trying to address here is a reversal
15 that occurred from this Board as a result of a
16 misapplication of this deferral question, and this
17 Board was reversed in 2005 because this Board gave
18 judicial deference to DEQ.

19 Now, there is some deference that we can
20 give to DEQ. Actually there are two kinds of
21 deference that we have to give here. First of
22 all, we have to give significant deference to the
23 Hearing Examiner, not DEQ necessarily, but to the
24 Hearing Examiner, because we can't change a
25 finding of fact unless we review the whole record.

1 So if we think the finding of fact is
2 correct, and there isn't really a basis for
3 rejecting it or changing it, we accept it. Does
4 that make sense?

5 BOARD MEMBER SIMPSON: Yes.

6 CHAIR RUFFATTO: So I in advance
7 prepared a few motions -- not very many -- that I
8 thought would help us, and I prepared a possible
9 motion for this one, and I sent it to Sandy. And
10 so Sandy, if you could put up just that first
11 motion on that first sheet.

12 I will read it into the record. I move
13 that the Board accept MEIC's Exception A, that the
14 judicial deference afforded the agency is not
15 applicable to Board review of DEQ decisions, and
16 then I say, "See MEIC versus DEQ 2005." But the
17 Board may utilize DEQ's experience, technical
18 competence, and specialized knowledge in the
19 evaluation of evidence.

20 Now, you may think that's a distinction
21 without a difference, but there is a legal
22 distinction there. The language that we may
23 utilize DEQ's experience, technical competence,
24 and special knowledge is contained in a Montana
25 Code Annotated section which specifically applies

1 to contested case proceedings.

2 And then that we would also "move that
3 the proposed FOFCOL language on Pages 38 and 39
4 referring to judicial deference be deleted, and
5 that the proposed FOFCOL appropriately utilizes
6 DEQ's experience, technical competence, and
7 specialized knowledge in the evaluation of
8 evidence, but does not afford judicial type
9 deference to DEQ."

10 And I went through the FOFCOL with great
11 care to make sure that there was no place in that
12 where the findings of fact were deferring to
13 agency decision the way judicial deference is
14 granted.

15 So that is the motion I propose. Sandy,
16 could you move it down a little bit so we see the
17 start of it. No, the other way. There. Get all
18 of the underlined material on the screen, please.
19 I make that motion. Does anybody want to second?

20 BOARD MEMBER SIMPSON: Second.

21 CHAIR RUFFATTO: Discussion.

22 (No response)

23 CHAIR RUFFATTO: If there's no
24 discussion, I call the question. All in favor say
25 aye.

1 (Response)

2 CHAIR RUFFATTO: Opposed.

3 (No response)

4 CHAIR RUFFATTO: The motion carries
5 unanimously.

6 Now let's go to their second exception,
7 and I will set this up. What's going on here is
8 that MEIC is arguing that the reclamation
9 regulation that's 17.28.405(6) applies and
10 controls, as opposed to the water mitigation
11 regulation ARM 17.24.304(1)(f)(iii).

12 Now, you heard the arguments, and I hope
13 you've read the briefs. And MEIC is arguing the
14 reclamation statute applies. The other parties
15 are arguing that the controlling regulation is the
16 water mitigation regulation. But SPE goes on to
17 argue that even if the reclamation statute would
18 apply, the result would not be different.

19 And the issue here, I would submit, is
20 focused on the standard of proof that MEIC argues
21 about. They argue that if we go under ARM -- I'm
22 going to call it the mitigation statute -- the
23 standard of proof is less than if we go under the
24 reclamation statute.

25 And then so the question -- and this is

1 what I was driving at when we asked the first
2 question. If we can say that we believe that the
3 findings of fact show that it's more probable than
4 not that the water is there to be used, the water
5 that would be necessary, and all these things are
6 -- as Jon Reiten pointed out -- all these things
7 are uncertain, but they evaluated it, and the
8 finding of fact is very clear that they evaluated
9 it based upon the probabilities of various things
10 happening.

11 And one of the probabilities is that
12 it's very unlikely, almost impossible, that all of
13 the water springs would be impacted, and it's
14 probable that very few of them will.

15 So the conclusion was, as I read it,
16 probable that there is enough water to meet both
17 the existing uses and any potential further needs
18 for mitigation water.

19 So what the possible motion is -- and
20 I'm not making it yet -- but what the possible
21 motion says is that it would agree with DEQ and
22 SPE that the mitigation statute or regulation
23 applies, but even if we did apply the other one,
24 that the result would not be different.

25 Discussion?

1 (No response)

2 CHAIR RUFFATTO: All right. I will make
3 this motion, and we'll see if there's a second.

4 BOARD MEMBER SMITH: I'll second it.

5 CHAIR RUFFATTO: Discussion.

6 (No response)

7 CHAIR RUFFATTO: If there's no
8 discussion, all in favor say aye.

9 (Response)

10 CHAIR RUFFATTO: It passes unanimously.

11 Sandy, would you please take those down now
12 because I want to get into a little different
13 point. And I'm sorry that this stuff is so --

14 I mean I think I want to go back and say
15 that the issue here is the likelihood of there
16 being sufficient water in the deep underburden
17 aquifer, but we need to work through these, I'm
18 going to call them procedural technical issues
19 that MEIC has raised, because we need to make sure
20 that we have thought about it and make a decision
21 on this.

22 The next, if you look at our menu of
23 topics, our next topic is the impossible standard
24 of proof. If you read --

25 MS. SCHERER: Dr. Lehnher has a

1 question.

2 BOARD MEMBER LEHNHERR: Chairman
3 Ruffatto, I have a question.

4 CHAIR RUFFATTO: Yes. Of course,
5 Doctor.

6 BOARD MEMBER LEHNHERR: I appreciate the
7 deliberation outline. I'm wondering if there is a
8 way to correlate, as we go through these points
9 and the deliberation outline, is there some way to
10 correlate them with sections of the FOFCOL for
11 more direct comparison?

12 CHAIR RUFFATTO: MEIC did not do that.
13 That's one of the objections that was made. MEIC
14 just said, "It's all wrong," and so there is no
15 way to do that, they didn't do it, and I'm not
16 going to try to do that job for them.

17 BOARD MEMBER LEHNHERR: Thank you.

18 CHAIR RUFFATTO: If you would rather, we
19 could go through the findings of fact and say do
20 we accept that or not. We could do that, and then
21 come back and do this.

22 BOARD MEMBER LEHNHERR: I don't really
23 have a good answer at this point as to which
24 process would be better. Just off the top of my
25 head, I think that that might be a reasonable

1 option, trying to correlate as much as possible as
2 we go through the FOFCOL point by point.

3 CHAIR RUFFATTO: I would not be able to
4 do that. When we get a little further into this,
5 we probably can, because I gave you page numbers
6 for all of these, and I assuming that you checked
7 those page numbers for each of those exceptions.

8 I gave you page numbers from the briefs.
9 I didn't give you page numbers for these related
10 to the FOFCOL, although I can tell you where some
11 of them are. I did in the first one, of course,
12 and the second one.

13 In this one, in the next one, the word
14 -- the argument about impossibility permeates the
15 whole brief, the entire brief. Virtually every
16 other page at least it talks about the impossible
17 standard that MEIC is complaining was imposed on
18 it.

19 What will happen here, just so you know,
20 we could just approve or not approve the FOFCOL,
21 but I'm afraid if we do that, we will not have
22 done our job, and a Court will reverse us.

23 BOARD MEMBER LEHNHERR: Chairman
24 Ruffatto, it may be good to go through the
25 deliberation outline, and then I don't see a way

1 to not go through the FOFCOL point by point as
2 well, but perhaps --

3 CHAIR RUFFATTO: I agree with that
4 completely, and as I pointed out initially, we
5 will do that before we approve the final FOFCOL.
6 But in order to draft that, we need to know how
7 you're going to look at each of these issues.

8 BOARD MEMBER LEHNHERR: That makes
9 sense. Thank you.

10 CHAIR RUFFATTO: The next argument that
11 MEIC makes is that this impossible standard --
12 I'll call it "the unicorn standard" that Mr.
13 Hernandez outlined for us -- was the standard that
14 he claims was imposed here. DEQ and SPE argue
15 that a preponderance of the evidence standard was
16 applied.

17 Now, to put that in some mathematical
18 terms, the unicorn, if all we have to do is to
19 conclude that a unicorn may come in and squirt out
20 water, we only need a, let's say it's a .1 percent
21 or even less than that. A preponderance of the
22 evidence standard essentially is that it's more
23 likely than not.

24 The FOFCOL is full of references to the
25 preponderance of evidence standard. Now, there is

1 some language that you can pick out in this that
2 would suggest there's this impossibility or it's
3 only a mere possibility in the FOFCOL; but I think
4 if you read it all in general, a preponderance of
5 the evidence standard was applied.

6 And a preponderance of the evidence more
7 likely than not, that means more than 50 percent
8 chance, if you want to put it in mathematical
9 terms. So that's where we're at.

10 Now, I will add a complication
11 unfortunately, and that is the question of the
12 meaning of "could" in the mitigation regulation.
13 What does that mean? And I frankly don't believe
14 that the parties have told us what the standard of
15 proof is for "could." What does "could" mean?
16 Mr. Hernandez argues that it's just the teeniest
17 chance is all you need.

18 So I'm going to ask the parties to
19 address what is the standard of proof -- and we'll
20 start out with Mr. Hernandez -- what is the
21 standard of proof for the idea that the DUA could
22 be a source of alternative water? Just go ahead,
23 Mr. Hernandez.

24 MR. HERNANDEZ: Chairman Ruffatto,
25 members of the Board. I think this is an issue

1 that's not entirely fleshed out in the proposed
2 findings and conclusions. As you note, they use
3 both the term "impossible," albeit one time; and
4 the term "preponderance," which is used 13 times.
5 Preponderance is accepted as 51 percent or 50.1
6 percent.

7 However, the findings of fact and
8 conclusions of law also repeatedly say that in
9 order to carry our burden of proof, we have to
10 show that these water resources could not be used,
11 which means it's not possible to be used.

12 If you look at the ruling on summary
13 judgment the Hearing Examiner used as a basis for
14 the standard, the standard there is even more
15 demanding. It says that we have to show that it's
16 obviously impossible to use the underburden
17 aquifer to replace water sources. That standard
18 is obviously impossible, is the unicorn standard.

19 If we're looking at the text -- and
20 that's where we have to go -- the text here, there
21 are two words that are relevant: The "could"
22 standard and the "can" standard.

23 If you look at the definition of these
24 term, "can" means able to, you can do something.
25 It's known. "Could" is defined to denote

1 possibility, which just means possible. It's
2 possible.

3 So if you're going with the 301(1)(f)
4 standard, the based on information standard, then
5 just it's a possible standard, at least that's how
6 the definition defines the term, and that's how
7 the proposed findings and conclusions seem to find
8 it as just possible, and we submit that that's
9 just wrong.

10 CHAIR RUFFATTO: Thank you. Mr.
11 Langston, can you respond to this point?

12 MR. LANGSTON: Mr. Chairman, members of
13 the Board. I agree with Mr. Hernandez that this
14 matter was addressed in the order on summary
15 judgment. The Hearings Examiner provided an
16 extensive analysis of what "could" meant in the
17 context of mitigating water supplies.

18 It would be hard for me to encapsulate
19 all this analysis here today, but I think the
20 Board could easily incorporate its prior analysis
21 on this, since it is a matter of law.

22 Of course the Hearings Examiner deferred
23 the application of facts to this standard to
24 trial, and that's why this matter was not resolved
25 in the motion for summary judgment portion of the

1 proceeding.

2 CHAIR RUFFATTO: I'm going to follow up,
3 Mr. Langston. I don't understand your comment
4 that that's the law. That was a decision by the
5 Hearing Examiner that was never approved by this
6 Board, unless I missed something.

7 MR. LANGSTON: Well, two things, Mr.
8 Chairman. One, the language of "could" is of
9 course being examined from the applicable standard
10 which we previously discussed,
11 17.24.304(1)(f)(iii).

12 Additionally, the Board was
13 contemplating the question of whether or not it
14 was going to reassign jurisdiction to the Hearing
15 Examiner after the order on summary judgment was
16 issued.

17 While the Board never explicitly
18 endorsed it, I would find it unusual if the Board
19 was okay with allowing the Hearings Examiner to
20 continue hearing the case if they disagreed with
21 the substance of the order on summary judgment, in
22 particular the order on summary judgment in other
23 matters limited to issues that were presented at
24 trial.

25 So I think there's an implicit

1 endorsement from the Board of the legal
2 conclusions provided by the Hearings Examiner, but
3 yet again --

4 CHAIR RUFFATTO: I want to follow up on
5 that, because I read most of this stuff, and all I
6 saw is that they further assigned the case, and
7 they confirmed that the case would be with the
8 Hearing Examiner for everything, and not just at
9 that point.

10 Was there explicit discussion about,
11 "Now we accept the summary judgment, and you go
12 forward," or was it just, "We've done this in
13 steps. We give you this, and then we give you
14 this, and now we're giving you the whole thing"?
15 I guess I certainly didn't read it as an implicit
16 affirmation of everything that was in that summary
17 judgment motion.

18 MR. LANGSTON: Mr. Chairman, you are
19 certainly correct that there was no explicit
20 endorsement of the findings in the motion for
21 summary judgment.

22 But with all due respect, I think common
23 sense would yield an inference that the Board
24 intended to allow the proceeding to advance under
25 the determinations provided in the order on

1 summary judgment, and if it did not intend for
2 that to happen, it would not have provided
3 jurisdiction to the Hearings Examiner.

4 CHAIR RUFFATTO: I'm going to follow up
5 a little more, because this is a really important
6 point. Did the summary judgment get submitted to
7 the Board and argued?

8 MR. LANGSTON: Not in substance. Not as
9 parties filing exceptions or anything like that.
10 And of course, it's not a final decision issued by
11 the Hearings Examiner, so it's not subject to the
12 rule that permits exceptions. But presumably the
13 Board was aware of the decision when it reassigned
14 jurisdiction to the Hearings Examiner.

15 CHAIR RUFFATTO: Thank you, Mr.
16 Langston. Ms. Bordelon, will you -- let's not get
17 down that quagmire. Let's get to the standard
18 that you think applies in the mitigation
19 regulation.

20 MS. BORDELON: So the mitigation
21 regulation does use the "could," the term "could."
22 I believe it does not because it's not clear at
23 the time that the permit is issued that the water
24 replacement will be required, and the contrast to
25 the reclamation regulation is telling.

1 There in the case of reclamation, we
2 know it's going to be required. We know. We have
3 a plan to disturb the ground in a certain way
4 under the mine plan, so we know that reclamation
5 will be required. So there's a question of can,
6 that it can be required.

7 In this case, as we've discussed
8 extensively, there is a question that cannot
9 resolved at permitting whether water replacement
10 will be required. So there's a conditional
11 element that the regulators, the drafters of the
12 regulations built into it that it could be used if
13 necessary. I think that's why they used that
14 term.

15 So the standard of proof that carries
16 through into the contested case is that MEIC must
17 prove that it's more likely than not that the
18 water could not be sourced from the DUA for
19 anticipated water replacement use.

20 CHAIR RUFFATTO: Thank you. That's the
21 conclusion I reached, but that's not what DEQ is
22 saying. It's not what -- So that's the conclusion
23 I reached, that the reason why "could" was used
24 was not because a unicorn standard is supposed to
25 be applied, it was because it was really

1 questionable whether it ever had to occur, so that
2 was the conditional aspect. It might never occur,
3 so it's like you would put "could if necessary be
4 used," but that's the first time I've seen a good
5 explanation for that usage. So thank you.

6 Board members, forgive the lawyers for
7 this. It is important, and it will be, if this is
8 ever appealed, this issue will be significant. I
9 can assure you of that. So let me ask another
10 question. Yes, Dave.

11 BOARD MEMBER SIMPSON: Mr. Chairman,
12 could I ask a question, please, of Mr. Langston.
13 What was the rule citation that you relied on?
14 I've got the rules in front of me, but for some
15 reason I can't find it.

16 MR. LANGSTON: Mr. Chairman, Board
17 Member Simpson, the citation that I provided was
18 Montana Administrative Rule 17.24.304 sub
19 (1)(f)(iii).

20 BOARD MEMBER SIMPSON: 304 -- say again,
21 please.

22 MR. LANGSTON: 304 Subsection
23 (1)(f)(iii). And I will convey that I myself have
24 had a hard time locating the precise subsection in
25 this rule because it is quite long and it's nested

1 in a funny way, and candidly I'm only ever able to
2 find it when I "control F quality."

3 BOARD MEMBER SIMPSON: What was the last
4 part of that again? I'm sorry. Okay. I've found
5 it. I'm sorry. Yes, Roman Numeral (iii). Okay.
6 It says, "A description of alternative water
7 supplies not to be disturbed by mining that could
8 be developed to replace water supply." So it's in
9 the rule if that's -- Maybe I'm not understanding
10 the argument, but --

11 CHAIR RUFFATTO: The argument, Dave, is
12 what does "could" mean? Does "could" mean a mere
13 possibility, or does "could" mean that it's based
14 on a preponderance of the evidence?

15 As I read the FOFCOL, there was lots of
16 information showing that by a preponderance of the
17 evidence, in other words it was more likely than
18 not, that there is sufficient water in the DUA
19 that could be used for replacement water if
20 necessary. That's the way I read the FOFCOL and
21 the findings of fact.

22 BOARD MEMBER SIMPSON: Well, I believe
23 Ms. Bordelon got it correctly as far as how it's
24 used in the rule. And the way it's always been
25 interpreted is that it's not possible before the

1 fact to anticipate where and how much water might
2 be needed, would be needed, because in the plan
3 itself, the water replacement plan is generally,
4 is pretty general. There may be a well location
5 or two, but that would be about it, which are
6 flexible.

7 So I think what it's intended to mean is
8 that in the event there is a need post-mining for
9 water to be provided from an alternate source, the
10 source is there for it to be provided from. So to
11 me, it's even more precise than a preponderance of
12 the evidence, that is, if it's needed, is it
13 there. And the demonstration that the applicant
14 has to make is that it's available.

15 CHAIR RUFFATTO: I believe that's what
16 Ms. Bordelon was saying. Can I ask -- not you,
17 Dave. Can I ask the attorneys for the parties.

18 Is there any authority, anything in the
19 legislative or rulemaking that would help, to any
20 judicial authority, or rulemaking history
21 authority, that would help us answer this
22 question? Has it ever been answered before by
23 this Board, a Court, or anybody else?

24 MR. HERNANDEZ: Chairman Ruffatto,
25 members of the Board. In preparing for this case,

1 I found no cases interpreting a provision
2 equivalent to what we're calling the mitigation
3 provision, which is ARM 17.24.304(1)(f)(iii).

4 There is the broader question of how the
5 burden of proof operates in a contested case, and
6 we've cited plenty of authority on that, but
7 nothing addressing that specific question of
8 "could" that I found. Thank you.

9 CHAIR RUFFATTO: Thank you, Mr.
10 Hernandez. I assume that you would have cited it
11 if there was something, but -- I'm assuming that
12 Mr. Langston and Ms. Bordelon, you don't have any
13 authority or anything you can point to.

14 MR. LANGSTON: Mr. Chairman, I don't
15 know if this is helpful in response to your
16 question, but I offer it just to make sure that
17 everything is clean in the record.

18 There is the statutory provision,
19 Montana Code Annotated 82-4-253(3)(d), that
20 concerns replacement of water, and it's more from
21 an enforcement standpoint, and that's where we get
22 the language of quality, quantity, and duration.

23 And the way that DEQ has interpreted
24 this as being instructive to the administrative
25 rule is that if there were some disruption of

1 water because of mining operations, this would be
2 the standard that the mine would be held to. So
3 it's another way of answering the same question.
4 It's albeit in an enforcement context, but it
5 helps inform the thrust of this administrative
6 rule.

7 CHAIR RUFFATTO: I agree. What I would
8 say, what that does is -- I don't think that's a
9 preponderance question, that's an absolute
10 obligation on the mine operator to replace water.
11 It's not a matter of if we can or not, you've got
12 to replace it, and if that means a pipeline from
13 Billings, you've got to do it. Is that the way
14 you interpret that?

15 MR. LANGSTON: Mr. Chairman, I agree. I
16 think that's right. And I guess the way that you
17 kind of square the two standards is one is forward
18 looking. And like we've discussed here, we don't
19 know exactly what impacts are going to happen on
20 all these springs, and that's why we use the
21 standard of "could," as Ms. Bordelon suggested.

22 And of course this other provision in
23 statute contemplates the future situation where
24 water is not available, but of course that needs
25 to be expressed in more absolute terms.

1 CHAIR RUFFATTO: That's a good point.
2 Sandy, would you put up my third proposed motion.
3 It's at the bottom of the second page under
4 "Impossible standard of proof." If you could get
5 the whole -- Okay.

6 So I will read this. I'm not making a
7 motion yet, because I want you to understand it
8 before I make it. But I would move that the Board
9 reject MEIC Exception C; also that -- I'm not
10 going to trying to recite all those -- but that
11 the mitigation provision requires the mine permit
12 applicant include a description of alternative
13 water supplies that more likely than not could be
14 developed as a water replacement source, not that
15 the applicant include a description of alternative
16 water supplies that could have a mere possibility
17 of being developed as a replacement source.

18 What that part is saying is that we're
19 determining, maybe as a first impression, that the
20 applicant has to show that it's more likely than
21 not that the alternative water sources could be
22 developed, and that it isn't the unicorn standard,
23 which is what the second part of that says.

24 And then the final part of the motion is
25 that the proposed FOFCOL clearly applies a

1 preponderance of the evidence, that is, more
2 likely than not standard of proof, and not an
3 impossible standard. Questions?

4 (No response)

5 CHAIR RUFFATTO: Does anybody want to
6 make that motion?

7 BOARD MEMBER SIMPSON: I'll make the
8 motion.

9 CHAIR RUFFATTO: It's been moved. Do we
10 have a second?

11 BOARD MEMBER REITEN: I'll second it.

12 CHAIR RUFFATTO: Discussion.

13 (No response)

14 CHAIR RUFFATTO: There being no
15 discussion, all in favor of the motion, please say
16 aye.

17 (Response)

18 CHAIR RUFFATTO: Opposed.

19 (No response)

20 CHAIR RUFFATTO: The motion passes. Now
21 Sandy, please take that down, and now we're going
22 to go to all of our favorite topic, burden of
23 proof.

24 This is the one that we've discussed the
25 most for sure in the past, and it was discussed as

1 much as anything in the briefs. We even had some
2 supplemental briefs on this one.

3 And what MEIC is arguing is that the
4 burden of proof is on DEQ and Signal Peak Energy,
5 and that the Board is bound by the Rosebud Mine
6 case that was decided earlier this year -- or no,
7 it was in 2021. It's on appeal to the Supreme
8 Court.

9 DEQ and Signal Peak argue that the
10 Rosebud Mine case is not controlling, and that the
11 2005 Montana Supreme Court case of MEIC versus
12 DEQ, and the Administrative Rules of Montana
13 17.24.425 Sub(7) are controlling.

14 And you can find this, if you want to
15 refer to something in the FOFCOL, you can find it
16 stated on Page 8 of the FOFCOL and probably a
17 couple of other places. But it is -- I'm sorry.
18 No, I think it is there. Yes. It's in the middle
19 of the page, the first full paragraph. It's
20 stated there.

21 And so this is a question of law, so we
22 can make this decision, and so the question is who
23 has the burden of proof. And we have had all
24 these arguments, and I'd like to have a little
25 discussion.

1 In other words, if you can visualize a
2 hearing, who has to come in and show, carry the
3 initial burden of proof? Is it DEQ and Signal
4 Peak, or is it MEIC?

5 And the way it's been offered here is if
6 there's no evidence put on at all, who loses?
7 That's the person who should have the burden of
8 proof. So if MEIC files an appeal, no evidence is
9 put on, who wins? Does the permit get approved,
10 or does the appeal get rejected, or does that mean
11 that now -- if there's no proof at that point,
12 does the appeal get kicked back to DEQ? That's
13 the question.

14 Since we have had lots of discussion, I
15 would like each of the attorneys to put in two
16 minutes of your best argument for this, whether
17 that's the Rosebud case or whatever, but two
18 minutes at most, and we'll start out with Mr.
19 Hernandez since he's the one that raised the
20 issue.

21 MR. HERNANDEZ: Thank you, Chairman
22 Ruffatto, members of the Board.

23 I think you asked the right question,
24 and I think the only answer to it can be that the
25 permit applicant loses.

1 If we appeal, and there's been no
2 evidence submitted as part of an application, the
3 application is completely blank, no evidence is
4 presented, then I think it's clear that Signal
5 Peak will not have shown by a preponderance of the
6 evidence, as you just said, that some water
7 resources can be used in the event that there is
8 harm to surface waters.

9 And I don't think there's any way of
10 getting around that, because the alternative
11 analysis would mean that Signal Peak Energy could
12 present nothing, nothing in their application, and
13 if we were to appeal a completely blank
14 application, we would lose unless we come forward
15 with information to show that these water
16 resources aren't available. That can't be right.

17 Finally, to address MEIC, the 2005
18 decision, I'd just direct the Court to Paragraph
19 36 through 38 of that decision, where the Court
20 analyzes a similar provision of the Clean Air Act
21 in a regulation, and it says that on remand, the
22 question for the Board in a contested case
23 proceeding is whether the applicant has shown that
24 environmental harm will not result.

25 I think that's the relevant analysis

1 from MEIC comes to this case, and I think that's
2 directly in line with the Royston decision, and I
3 suggested earlier.

4 So I think, Your Honor, that the
5 conclusion is in inexorable that the burden rests
6 with the permit applicant. Thank you.

7 CHAIR RUFFATTO: Thank you, Mr.
8 Hernandez, and the promotion is appreciated, but I
9 can't accept it. I'm trying to make a joke here
10 to lighten up the day. I was bringing communion
11 to some people in the hospital yesterday, and they
12 kept calling me "father." I was ordained
13 yesterday, today I'm the Judge. So who knows
14 where I'm going next.

15 Ms. Bordelon, can we hear your response,
16 your best points.

17 MS. BORDELON: I think the best point is
18 the MEIC v. DEQ, the 2005 decision, which
19 articulates the difference between the permitting
20 process and the contested case. This is the
21 distinction that MEIC is blurring and creating
22 substantial confusion.

23 Signal Peak and DEQ do not contest in
24 that in the permitting process, the applicant
25 bears the burden of proof to affirmatively

1 demonstrate compliance with the standards that are
2 required to issue the permit.

3 So there is no -- If you get a permit,
4 which is what you have to do to get to the
5 contested case. If there's no permit, we're not
6 in a contested case. But once we have the permit,
7 there is no blank application. The permit would
8 not be issued if there was a blank application.

9 The question is: Given a complete
10 application that has been determined by DEQ to
11 meet the regulatory standards, who then has the
12 burden of proof to show that there was a problem
13 with what the agency did?

14 And the Supreme Court in MEIC v. DEQ
15 indicates that it's completely analogous -- and
16 it's nice to hear MEIC acknowledge that.
17 Sometimes we try to differentiate it depending on
18 the context.

19 But a case that is completely analogous
20 says the party that would lose in that case, if no
21 evidence was put forward, is the party that bears
22 the burden of proof. When you have a permit
23 that's been issued, and now you're in a contested
24 case, the party that would lose if no evidence is
25 put forward in the contested case is the party

1 challenging the permit, the permit would retain.

2 CHAIR RUFFATTO: Thank you. Mr.

3 Langston. A couple of minutes.

4 MR. LANGSTON: I think the point, Mr.
5 Chairman, about emphasizing the difference between
6 the permit process and this contested case is
7 extremely important for understanding the burden
8 of proof.

9 So Mr. Hernandez said if the application
10 is blank, then we lose. Well, we wouldn't even be
11 in a contested case proceeding if the application
12 was blank, because the permit would not be issued.

13 And of course DEQ has obligations in the
14 permitting stage. We have to demonstrate that a
15 number of substantive requirements have been
16 satisfied. But as soon as DEQ does that in the
17 permitting stage, then that permit has the force
18 of law, and a mine can operate under that permit.

19 And if a party thinks that that permit
20 was improperly issued, illegally issued, then they
21 can seek an appeal before this Board to challenge
22 that permit.

23 And when you look at the CHIA that DEQ
24 issues, this is a massive document. I mean it
25 wouldn't be very helpful to the Board to come in

1 and present every item addressed in the CHIA.
2 We're supposed to be focusing on discrete issues,
3 and that's why when MEIC files their notice of
4 appeal, they identify discrete issues that they
5 think that DEQ failed to address in the permit, in
6 granting the permit.

7 And it's MEIC's burden throughout the
8 contested case proceeding to show why the issues
9 that they've appealed are in fact correct and
10 true, and that the Department screwed up in
11 failing to address them at the permit stage, but
12 it's not helpful to have DEQ essentially just
13 regurgitate its findings at the permit level when
14 it's before the Board in a contested case
15 proceeding.

16 CHAIR RUFFATTO: Thank you. Forgive me.
17 Have I blown past a potential break time? Are we
18 well over an hour into this? Let's take a break.
19 Let's go all the way to 4:00.

20 (Recess taken)

21 CHAIR RUFFATTO: Has Mr. Harry Richards
22 shown up?

23 MS. SCHERER: No, he hasn't. I mailed
24 him an agenda, and how to log in, so I never
25 received anything. I just had the street address.

1 That was all I had.

2 CHAIR RUFFATTO: That's fine. I didn't
3 really expect him to show up, but I thought he
4 might, and I wanted to maybe deal with him if he
5 was there enjoying this discussion. Let's call
6 roll to make sure we have a quorum.

7 MS. SCHERER: Chairman Ruffatto.

8 CHAIR RUFFATTO: Here.

9 MS. SCHERER: Board Member Lehnherr.

10 BOARD MEMBER LEHNHERR: Here.

11 MS. SCHERER: Board Member Simpson.

12 BOARD MEMBER SIMPSON: Here.

13 MS. SCHERER: Board Member Reiten.

14 BOARD MEMBER REITEN: Here.

15 MS. SCHERER: Board Member Smith.

16 BOARD MEMBER SMITH: Here.

17 MS. SCHERER: Board Member Altemus.

18 BOARD MEMBER ALTEMUS: Here.

19 MS. SCHERER: We have a quorum.

20 CHAIR RUFFATTO: Thank you, Sandy.

21 I have a plan for finishing up this
22 meeting. I want to remind you that we eventually
23 need to go through all of these exceptions. It's
24 apparent to me that we're not going to get there.
25 We don't have much to do after this.

1 But I'm going to try to get through the
2 burden of proof and the next four items, which get
3 into what you scientific people are interested in,
4 and then I think we'll probably call it a day, and
5 I have a way to proceed from there if it's
6 acceptable.

7 So Sandy, can you put up the proposed
8 motion, and this will be the burden of proof
9 motion. Right there. Thanks. Perfect. I will
10 read that and let you read it.

11 I move that the Board is not bound by
12 the District Court decision in MEIC versus MDEQ,
13 DV-19-34/Rosebud Mine AM4; and that the Board is
14 bound by the Montana Supreme Court decision in
15 MEIC v. DEQ, 2005 MT 96; and the controlling
16 regulation ARM 17.24.425(7) which establishes that
17 the burden of proof is on the party seeking to
18 reverse the DEQ decision appealed from. I move
19 that.

20 BOARD MEMBER SIMPSON: Second.

21 CHAIR RUFFATTO: Discussion. Yes,
22 David.

23 BOARD MEMBER LEHNHERR: Chairman
24 Ruffatto, I'm wondering why the two parts to the
25 motion, and how are they related? I understand

1 the second part of the motion, but perhaps you can
2 clarify the first part, and how the two are
3 related, if you don't mind.

4 CHAIR RUFFATTO: Certainly. The first
5 part of the motion is to address the arguments
6 that were made in the supplemental briefs that the
7 Rosebud Mine case, that was decided in late 2021,
8 that essentially reversed this Board's decision,
9 and said that the burden of proof is on DEQ and
10 the mine operator, not on the party challenging
11 the permit. So that addresses that legal
12 question.

13 I mean the second part is the critical
14 part, but I wanted to make sure that we addressed
15 the arguments that have been made with respect to
16 the AM4 decision.

17 Any more discussion? Dave, did I answer
18 your question adequately?

19 BOARD MEMBER LEHNHERR: Well, you
20 probably did. The second part makes a lot of
21 sense to me. The first part I'm still trying to
22 wrap my head around, especially since there was,
23 as I understand it, an appeals process in that
24 case. Like I say, I'm --

25 CHAIR RUFFATTO: I understand your

1 point. MEIC argued that because the District
2 Court decided that the Board was wrong, that we
3 have to proceed in that way, and what this is
4 saying is no, we disagree with that. We believe
5 that there's controlling Supreme Court authority.

6 BOARD MEMBER LEHNHERR: Thank you.

7 CHAIR RUFFATTO: It's been moved and
8 seconded as set forth on the screen. Any more
9 discussion?

10 (No response)

11 CHAIR RUFFATTO: Any more discussion?

12 (No response)

13 CHAIR RUFFATTO: I will call the
14 question. All in favor say aye.

15 (Response)

16 CHAIR RUFFATTO: Opposed.

17 (No response)

18 CHAIR RUFFATTO: It carries unanimously.
19 Now I'm going to pose a question to you that will
20 make you wonder why we went through all of this.

21 I'm going to suggest the possibility
22 that this whole burden of proof thing is a tempest
23 in a teapot, and doesn't mean much in this case.
24 So Sandy, could you scroll down to the next
25 motion.

1 Signal Peak pretty strongly -- DEQ has
2 not argued as strongly -- that regardless of the
3 burden of proof, that MEIC loses, and their point
4 is that because there was a complete hearing, a
5 complete trial, everybody put on their evidence,
6 that the findings of fact show that even if the
7 burden of proof was on DEQ and Signal Peak, that
8 the result is the same. That's what this motion
9 would say.

10 And that is not at all -- If the Court
11 had, or if the Hearing Examiner had granted what
12 was called a directed verdict at the end of the --
13 what's called the case in chief when MEIC rested,
14 this would probably not be a possibility; but the
15 parties went ahead and put on all their evidence,
16 all the evidence that they put on.

17 And when you read through the findings
18 of fact, if you can conclude that regardless of
19 who had the burden of proof, that the findings of
20 fact establish that DEQ and Signal Peak carried
21 that burden of proof.

22 We don't have to decide this, we can
23 defer this question, but it was argued by the
24 parties. And when I asked the question initially
25 at the beginning of our discussion, "What do you

1 think that the evidence shows?," the answer was
2 that we think it shows that the DUA, based on a
3 probability of the evidence, is available to be
4 developed.

5 If that's what the evidence shows, then
6 it doesn't matter whose burden it was. And the
7 reason why this would be important is if for some
8 reason -- and they might -- if the Supreme Court
9 upholds the Rosebud Mine case, if we believe that
10 this is the case, then it won't matter, and we
11 won't have to start all over.

12 BOARD MEMBER SIMPSON: I'll make the
13 motion, Mr. Chairman.

14 CHAIR RUFFATTO: Is there a second?

15 BOARD MEMBER REITEN: I'll second it.

16 CHAIR RUFFATTO: Discussion.

17 BOARD MEMBER SIMPSON: Just to follow
18 up, and at the risk of being too repetitive, I do
19 believe that regardless of who has the burden of
20 proof, the facts pretty much speak for themselves
21 in this case as far as whether the underburden
22 sandstone will supply water of acceptable quality
23 and sufficient quantity, and that it is legally
24 accessible.

25 CHAIR RUFFATTO: Thank you, David. Any

1 more discussion?

2 (No response)

3 CHAIR RUFFATTO: I'll call the question.

4 All in favor of this motion say aye.

5 (Response)

6 CHAIR RUFFATTO: Opposed.

7 (Response)

8 CHAIR RUFFATTO: Who voted nay?

9 BOARD MEMBER LEHNHERR: David Lehnherr.

10 CHAIR RUFFATTO: Let's call a roll so
11 we've got them.

12 MS. SCHERER: Chairman Ruffatto.

13 CHAIR RUFFATTO: Yes.

14 MS. SCHERER: Board Member Simpson.

15 BOARD MEMBER SIMPSON: Yes.

16 MS. SCHERER: Board Member Reiten.

17 BOARD MEMBER REITEN: Yes.

18 MS. SCHERER: Board Member Smith.

19 BOARD MEMBER SMITH: Yes.

20 MS. SCHERER: Board Member Altemus.

21 BOARD MEMBER ALTEMUS: Yes.

22 MS. SCHERER: Board Member Lehnherr.

23 BOARD MEMBER LEHNHERR: No.

24 CHAIR RUFFATTO: Thank you all. The
25 motion passes. Let's pull down what's on the

1 screen.

2 Let's go to the next point, and that's
3 -- and I think it's been answered by this group,
4 but I want motions on it.

5 The first next point is that MEIC argued
6 that the water quality analysis was unsupported,
7 and their basic argument is -- essentially it goes
8 to the 100 gallons per minute estimate, and the
9 wording of the CHIA about --

10 Well, the argument is that the CHIA was
11 admitted to be mistaken during the hearing. DEQ
12 argues that the 2013 permit application, including
13 the 100 gallons per minute estimate, was
14 superseded by more accurate information that was
15 included in the 2016 application.

16 And they also argue that there was no
17 mistake in the CHIA, that when you read the whole
18 document as a whole, that it shows that they were
19 talking about the probable needs and not any
20 needs.

21 And then there's also the argument about
22 whether it was necessary to calculate a precise
23 quantity of the total needs, and a precise
24 quantity of water in the deep underburden aquifer.

25 And I can point you to the pages in the

1 FOFCOL where this is addressed. It's Pages 46 and
2 48. And there the FOFCOL essentially focuses on
3 the potential need on a well-by-well basis as
4 opposed to a total number, therefore making the
5 100 gallons per minute or the total need
6 requirement unnecessary, and that it's not
7 necessary to calculate a precise total of the
8 water available.

9 I guess I think that Jon and Dave have
10 talked about this, but I would like to hear your
11 thoughts on this point.

12 BOARD MEMBER REITEN: Mr. Chairman, I'll
13 just throw in a couple more words. Again, we
14 can't precisely predict exactly what's there, and
15 we don't even know how much we need, potentially
16 might need.

17 So a couple of things are true. This
18 aquifer will not -- I can almost guarantee you
19 that it won't produce a 100 gallon a minute well
20 no matter how hard you tried, so I think that's
21 part of the argument against that 100 gallon
22 thing. It's going to require multiple wells.

23 And I anticipate, say if one spring goes
24 bad, they could drill another well nearby to the
25 DUB, and they would more than likely find enough

1 water of quantity and quality to replace that
2 spring, and it might even have enough water to go
3 to a couple of other watering tanks if they
4 wanted.

5 So that's kind of how I see this. I
6 think it's highly feasible, because there's lots
7 of people moving out in the Bull Mountains that
8 are drilling wells, and they're getting water that
9 they can use and feed their livestock.

10 So that's just kind of a reiteration of
11 what I said before, but a little differently.

12 CHAIR RUFFATTO: Any more discussion?

13 BOARD MEMBER SIMPSON: Mr. Chairman, at
14 the risk of being repetitive, I believe the well
15 that was drilled at the office, the public water
16 supply well, demonstrates in real terms what
17 quantity and quality of water is available in a
18 unit that leads to that location, and that that
19 well, if you do the math, would support -- I don't
20 know -- 150 cows at least during the summertime,
21 probably more.

22 And I haven't worked through all the
23 numbers, but that's just a representation of what
24 we're looking at for a well of that productivity.

25 CHAIR RUFFATTO: Sandy, can you put up

1 the next page of motions. Actually the first
2 little packet of them. You'll be thankful I
3 didn't write long ones here. These are example
4 motions that we can use pretty much for the rest
5 of these exceptions, that we either accept or
6 reject the MEIC exceptions.

7 And I'm suggesting we use it by -- we do
8 it by reference to the letter in the outline, so
9 we don't have to struggle with wording. So if
10 someone wants to make either a motion that we
11 reject MEIC's exception or accept their exception,
12 their exception is that water quality analysis is
13 unsupported.

14 BOARD MEMBER SIMPSON: Mr. Chairman,
15 having read through all of these, I haven't gone
16 to the lengths that you have as far as analyzing
17 each of these obviously, but I guess I'd ask the
18 question.

19 Are any from here to the end where you
20 see a legal issue that needs to be addressed
21 potentially by accepting it or commenting?

22 CHAIR RUFFATTO: I would rather do this
23 one at a time, Dave. I mean if you're leading to
24 the point you want to say accept or reject a bunch
25 of them, I would rather make sure that we discuss

1 them, because when we get past the next four, we
2 get into some legal questions that I think ought
3 to have some discussion to make sure we give MEIC
4 -- or the opportunity for us to consider their
5 legal arguments, because they move into a phase of
6 legal arguments that are related to these, but it
7 wouldn't --

8 BOARD MEMBER SIMPSON: That's the answer
9 to my question.

10 CHAIR RUFFATTO: You wanted to move
11 things along?

12 BOARD MEMBER SIMPSON: I wanted to move
13 things along, but since there are issues here that
14 need to be discussed from a legal standpoint, yes,
15 let's continue.

16 CHAIR RUFFATTO: Dave, if you want to
17 discuss "E," "F," "G," and "H" together, I think
18 those do not require a lot of legal discussion.
19 Those are more scientific questions based on the
20 findings of fact. But I think it would still be
21 better if we take one at a time, and we can go
22 through it quickly if you like. So I would prefer
23 we do "E" next.

24 BOARD MEMBER SIMPSON: I agree, Mr.
25 Chairman. Are we ready for a motion? I kind of

1 lost track of where we are with all of the
2 discussion.

3 CHAIR RUFFATTO: We're with "E," the
4 water quality analysis unsupported. So do we
5 reject that or accept that?

6 BOARD MEMBER SIMPSON: I move to reject
7 it.

8 BOARD MEMBER ALTEMUS: I'll second.

9 CHAIR RUFFATTO: Discussion.

10 (No response)

11 CHAIR RUFFATTO: All in favor, say aye.

12 (Response)

13 CHAIR RUFFATTO: Opposed.

14 (No response)

15 CHAIR RUFFATTO: It's unanimous. I made
16 a mistake. I should have had "F" and "G" together
17 because they relate to the same thing. They
18 relate to water quality, so I want to take them
19 together, "F" and "G."

20 MEIC argues that the evidence regarding
21 the arsenic and sodium shows that there's water
22 quality problems, and that it was improper to
23 considerable the availability of water treatment.

24 And then the other part of that is MEIC
25 argues that we can't consider water treatment

1 because it was not included as a line item in the
2 bonding.

3 DEQ and Signal Peak argue essentially
4 that the water treatment was valid evidence and,
5 number one, that the bonding issue was already
6 decided and dismissed; but even though apparently
7 that evidence came in. So apparently the Hearing
8 Examiner still ruled against MEIC on the quality
9 point.

10 So I think we should deal with "F" and
11 "G" at the same time, and it's essentially was the
12 water quality analysis, is it supported by the
13 evidence.

14 BOARD MEMBER SIMPSON: I'll move ahead
15 with a motion to reject MEIC Exceptions "F" and
16 "G."

17 CHAIR RUFFATTO: Do I hear a second?

18 BOARD MEMBER SMITH: I'll second.

19 CHAIR RUFFATTO: Discussion.

20 (No response)

21 CHAIR RUFFATTO: If there's no
22 discussion, all in favor, say aye.

23 (Response)

24 BOARD MEMBER LEHNHERR: Chairman
25 Ruffatto.

1 CHAIR RUFFATTO: Yes.

2 BOARD MEMBER LEHNHERR: I'm sorry. I
3 was having trouble muting and unmuting. Could I
4 hear the motion again, please?

5 CHAIR RUFFATTO: The motion is that Mr.
6 Simpson moved that the Board reject MEIC
7 Exceptions "F" and "G."

8 BOARD MEMBER LEHNHERR: Okay. I will
9 vote no. Thank you.

10 CHAIR RUFFATTO: Any more discussion?

11 (No response)

12 CHAIR RUFFATTO: Let's do a roll call on
13 this one, please, Sandy. I'll call the question.
14 All in favor, we'll say yes; opposed say no.

15 MS. SCHERER: Chairman Ruffatto.

16 CHAIR RUFFATTO: Yes.

17 MS. SCHERER: Board Member Lehnherr.

18 BOARD MEMBER LEHNHERR: No.

19 MS. SCHERER: Board Member Simpson.

20 BOARD MEMBER SIMPSON: Yes.

21 MS. SCHERER: Board Member Reiten.

22 BOARD MEMBER REITEN: Yes.

23 MS. SCHERER: Board Member Smith.

24 BOARD MEMBER SMITH: Yes.

25 MS. SCHERER: Board Member Altemus.

1 BOARD MEMBER ALTEMUS: Yes.

2 CHAIR RUFFATTO: Motion passes. Now
3 we'll go to "H." And I will leave these up there.

4 This is the question of whether or not
5 the water is available legally, and this goes
6 primarily to the exempt well discussion that we've
7 had. And we've had some discussion on this, but I
8 would open it up for further discussion or for
9 someone to make a motion.

10 BOARD MEMBER REITEN: Mr. Chairman,
11 Board members. My question on this one is we
12 don't know how much water we need to get that's
13 legally available until you know how many springs
14 or wells you have to replace. So I don't think
15 it's right to argue this, and I will go ahead and
16 move that the Board reject MEIC Exception H.

17 CHAIR RUFFATTO: Do we have a second?

18 BOARD MEMBER ALTEMUS: I'll second.

19 CHAIR RUFFATTO: Discussion.

20 (No response)

21 CHAIR RUFFATTO: No discussion, I'll
22 call the question. All in favor, say aye.

23 (Response)

24 CHAIR RUFFATTO: Opposed to the motion.

25 BOARD MEMBER LEHNHERR: Nay.

1 CHAIR RUFFATTO: Let's have a roll call.

2 MS. SCHERER: Chair Ruffatto.

3 CHAIR RUFFATTO: Yes.

4 MS. SCHERER: Board Member Lehnherr.

5 BOARD MEMBER LEHNHERR: No.

6 MS. SCHERER: Board Member Simpson.

7 BOARD MEMBER SIMPSON: Yes.

8 MS. SCHERER: Board Member Reiten.

9 (No response)

10 CHAIR RUFFATTO: Jon, we haven't heard
11 your vote.

12 BOARD MEMBER REITEN: Yes.

13 MS. SCHERER: Board Member Smith.

14 BOARD MEMBER SMITH: Yes.

15 MS. SCHERER: Board Member Altemus.

16 BOARD MEMBER ALTEMUS: Yes.

17 CHAIR RUFFATTO: The motion passes. I'm

18 going to suggest that we wrap this up for today.

19 And again, what I'm going to suggest is that you

20 charge Agency Legal Services to go back in, with

21 me involved, to go back in and revise the FOFCOL

22 to reflect the decisions that we've made, and

23 because we haven't completed it, we will also

24 revise it for possible conclusions.

25 At the next meeting, we will go through

1 the rest of these exceptions, and then we will go
2 through the FOFCOL and approve or disapprove in
3 total. So that's where we're at.

4 I have a proposed motion to close this
5 meeting out, and so Sandy, would you please put up
6 that motion. It will be the last page of the --
7 right there.

8 I'll read it. I move that a proposed
9 final FOFCOL be prepared by ALS working with the
10 Board Chair for submission to the Board for its
11 review and approval; that the proposed final
12 FOFCOL reflect that the Board has considered all
13 the exceptions filed by the parties; that the
14 proposed final FOFCOL reflect the motions passed
15 by the Board in this meeting, and to the extent
16 appropriate the Board deliberations in this
17 meeting; that the proposed final FOFCOL may
18 include points in the parties' briefs, even though
19 not specifically addressed in the deliberations;
20 and that the proposed final FOFCOL correct obvious
21 inadvertent errors and typos contained in the
22 proposed FOFCOL as prepared by the Hearing
23 Examiner.

24 That's my motion. Is there a second?

25 BOARD MEMBER SIMPSON: I'll second, Mr.

1 Chairman. And I have an additional request, if we
2 could include in the motion that the draft for our
3 review be interlined and underlined.

4 CHAIR RUFFATTO: Let's include that in
5 the motion that the draft will be -- I'll call it
6 -- red lined to show all of the changes and
7 deletions. Thank you for the second, and I accept
8 that friendly amendment.

9 Let me tell you what -- As I said at the
10 beginning, there is nothing final until it's
11 final. So whatever is in this FOFCOL that comes
12 to you after this drafting, you will still have
13 the opportunity to reject it, reject any part of
14 it, reject all of it, but at least we will have
15 made progress towards a final document. Does that
16 make sense?

17 BOARD MEMBER LEHNHERR: Chairman
18 Ruffatto, I'm wondering. Does the proposed, the
19 new proposed FOFCOL need to be presented to the
20 attorneys of three parties involved? Could there
21 be, say, language issues or some other problem
22 they may want to address?

23 CHAIR RUFFATTO: Good question. I don't
24 think that it's required, but I would not have a
25 problem if they -- We're not going to open it up

1 to briefing and formal oral arguments. But I
2 think that's a great question. I would be open to
3 having them make comments on the final document as
4 we go through it and suggest changes. That's a
5 good point. We will do that. I don't think we
6 need a motion on that, we'll just plan on doing
7 that.

8 BOARD MEMBER LEHNHERR: Thank you.

9 CHAIR RUFFATTO: Thank you, Dave. Any
10 more discussion?

11 (No response)

12 CHAIR RUFFATTO: A motion has been made
13 and seconded as set forth on the screen, with the
14 addition that the proposed final document show the
15 changes and deletions. If there's no further
16 discussion, all in favor say aye.

17 (Response)

18 CHAIR RUFFATTO: The motion carries
19 unanimously. And we will move -- and thank you
20 all, thank you parties' attorneys. It's a long
21 haul, and we'll probably have another long haul
22 before we get done with this, but we're making
23 progress.

24 BOARD MEMBER SIMPSON: Mr. Chairman.

25 CHAIR RUFFATTO: Yes.

1 BOARD MEMBER SIMPSON: Before we adjourn
2 the meeting, do you think we ought to consider a
3 special Board meeting to finish this? Since I
4 don't know what our next agenda is likely to look
5 like, but we have quite a bit of time left on
6 this, and I think there might be an advantage to
7 continue it while it's still reasonably fresh in
8 our mind, rather than waiting two months.

9 CHAIR RUFFATTO: It's going to take some
10 time for this drafting to be done, but if the
11 Board would like that, we can try to do that. Is
12 the consensus of the Board that you'd like to plan
13 a special meeting to address this?

14 BOARD MEMBER ALTEMUS: Yes, Mr. Chair.
15 I think two months is too long. Thank you.

16 BOARD MEMBER LEHNHERR: This is David
17 Lehnherr. I agree with Board Member Simpson.

18 CHAIR RUFFATTO: Okay. I can't fix a
19 date because I need to talk to ALS and find out
20 how quickly we can do this, but we will work in
21 that direction. And then we'll try to pick a
22 date, but I think it would not be worthwhile to
23 try now because I don't know when it's going to
24 happen that we would have something ready.

25 Good point, Dave.

(The proceedings were concluded

at 4:36 p.m.)

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C E R T I F I C A T E

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STATE OF MONTANA)

: SS.

COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 128 - 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 21st day of
April, 2022.

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

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