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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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BOARD MEETING )  
FEBRUARY 24, 2023 )

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TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

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February 24, 2023  
9:00 a.m.

BEFORE VICE CHAIRMAN STACY AGUIRRE,  
BOARD MEMBERS DAVID SIMPSON,  
JOSEPH SMITH, and JULIA ALTEMUS

PREPARED BY: LAURIE CRUTCHER, RPR  
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1           WHEREUPON, the following proceedings were  
2 had and testimony taken, to-wit:

3                           \* \* \* \* \*

4           VICE CHAIR AGUIRRE: I'll call this  
5 meeting to order. Sandy, will you do a roll call  
6 of the Board members, please.

7           MS. MOISEY-SCHERER: Vice Chair Aguirre.

8           VICE CHAIR AGUIRRE: Here.

9           MS. MOISEY-SCHERER: Board Member  
10 Altemus.

11          BOARD MEMBER ALTEMUS: Here.

12          MS. MOISEY-SCHERER: Board Member  
13 Simpson.

14          BOARD MEMBER SIMPSON: Here.

15          MS. MOISEY-SCHERER: Board Member Smith.

16          BOARD MEMBER SMITH: Here.

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

18          VICE CHAIR AGUIRRE: Thank you. At this  
19 time I'd like to ask anybody else on the call if  
20 you would please identify yourself for the record.  
21 Sandy, I don't know if you want to call off the  
22 names that you see or how you want to do that.

23          MS. MOISEY-SCHERER: I can call off the  
24 names.

25          VICE CHAIR AGUIRRE: Okay. Thank you.

1 MS. MOISEY-SCHERER: Deputy Director  
2 James Fehr.

3 MR. FEHR: (Indicating)

4 MS. MOISEY-SCHERER: Aislinn Brown.

5 MS. BROWN: Present.

6 MS. MOISEY-SCHERER: Kirsten Bowers,  
7 Laurie Crutcher, Adam Bradley.

8 MR. BRADLEY: Good morning.

9 MS. MOISEY-SCHERER: Kurt Moser,  
10 Catherine Armstrong, Chad Anderson, Colson  
11 Williams, Elena Hagen, Jessica Wilkerson, Katie  
12 Makarowski, Ray Stout, Sam King, Samuel Yemington,  
13 and Todd Briggs.

14 VICE CHAIR AGUIRRE: I have a question.  
15 Do we have to identify for the record the  
16 association of the people on the call, or just the  
17 names?

18 MS. BROWN: I think the names is fine.

19 VICE CHAIR AGUIRRE: Okay. Thanks,  
20 Sandy. Starting with the administrative items,  
21 Item A, Review and Approval of the Minutes. This  
22 is the approval of the minutes from the December  
23 9th, 2022 meeting. Do I have a motion to approve  
24 the minutes?

25 BOARD MEMBER SIMPSON: I move we approve

1 the minutes.

2 BOARD MEMBER SMITH: I'll second.

3 VICE CHAIR AGUIRRE: Any discussion?

4 (No response)

5 VICE CHAIR AGUIRRE: I'll call for a  
6 vote. All those in favor of approving the minutes  
7 from the December 9th, 2022 meeting, signify by  
8 saying aye.

9 (Response)

10 VICE CHAIR AGUIRRE: Opposed.

11 (No response)

12 VICE CHAIR AGUIRRE: Motion carried.

13 Item (b), I think at this time, I'd like to just  
14 introduce Aislinn Brown with ALSB. Aislinn is  
15 currently our Board Counsel, and Aislinn, do you  
16 want to say anything?

17 MS. BROWN: Sure. I'm the Bureau Chief  
18 at ALSB. For those who don't know, I've been in  
19 that role since September, and I will be taking  
20 over at least intermittently here as Board  
21 Counsel.

22 VICE CHAIR AGUIRRE: Thank you, Aislinn.  
23 Great to have you.

24 At this time I'd like to add an item to  
25 the administrative items, and look at the date for

1 the April Board meeting. That Board meeting is  
2 scheduled for April 14th, and I'd like to ask the  
3 Board if we have the ability to move that meeting  
4 either one week earlier or one week later. I for  
5 sure have a conflict with that, with that meeting  
6 on April 14th.

7 BOARD MEMBER SIMPSON: Madam Chairman,  
8 this is Dave. I have a conflict that day also, if  
9 we can possibly move it.

10 BOARD MEMBER ALTEMUS: I'm fine with  
11 either going either before or after, Madam Chair.

12 BOARD MEMBER SMITH: Same here. I can  
13 make before or after. I would prefer the week  
14 before, though.

15 VICE CHAIR AGUIRRE: The week before, so  
16 April 7th?

17 BOARD MEMBER SMITH: Yes.

18 VICE CHAIR AGUIRRE: I'll make a motion  
19 then that we move our April Board meeting to April  
20 7th at 9:00 a.m.

21 BOARD MEMBER ALTEMUS: I'll second.

22 VICE CHAIR AGUIRRE: Any further  
23 discussion?

24 (No response)

25 VICE CHAIR AGUIRRE: Call for a vote.

1 All in favor.

2 (Response)

3 VICE CHAIR AGUIRRE: Opposed.

4 (No response)

5 VICE CHAIR AGUIRRE: April 7th it is.

6 Moving into the briefing items. The  
7 contested case updates, how I'm going to do this  
8 is I'm going to go through page by page, instead  
9 of item by item, and ask for any updates or any  
10 questions on the items that are listed, the cases  
11 that are listed on that page. So I'm going to  
12 start with Page 1. Are there any updates or  
13 questions?

14 MS. BROWN: Oreo Refining, I don't have  
15 any updates to that agenda item.

16 VICE CHAIR AGUIRRE: Thanks, Aislinn.  
17 Page 2. Any updates or questions on the items on  
18 Page 2?

19 MS. BROWN: Again, nothing from Legal  
20 Counsel.

21 VICE CHAIR AGUIRRE: Thank you. Page 3,  
22 any updates or questions on items listed on Page  
23 3?

24 (No response)

25 VICE CHAIR AGUIRRE: Hearing none, Page

1 4, any updates or questions on item appearing on  
2 Page 4, starting on Page 4?

3 (No response)

4 VICE CHAIR AGUIRRE: Hearing none, any  
5 updates or questions on the matter appearing on  
6 Page 5?

7 (No response)

8 VICE CHAIR AGUIRRE: Hearing none, Page  
9 6, any updates or questions on the matter starting  
10 on Page 6?

11 MS. BROWN: That's my Hearing Examiner  
12 case. I don't have any updates.

13 VICE CHAIR AGUIRRE: Thank you. Page 7,  
14 any updates or questions on the items appearing  
15 starting on Page 7?

16 (No response)

17 VICE CHAIR AGUIRRE: Page 8, any updates  
18 or questions regarding the items starting on Page  
19 8?

20 (No response)

21 VICE CHAIR AGUIRRE: And Page 9, any  
22 updates or questions on the matter appearing at  
23 the top of Page 9?

24 (No response)

25 VICE CHAIR AGUIRRE: Okay. Moving into

1 the action items, the first action item, Item (a),  
2 In the Matter of Petitions of Teck Coal, Limited,  
3 and the Board of County Commissioners of Lincoln  
4 County, Montana, for review of ARM  
5 17.30.632(7)(a), pursuant to Montana Code  
6 Annotated Section 75-5-203, stringency review of  
7 rule pertaining to selenium standard for the Lake  
8 Kooocanusa BER 2021-4 and 08, Water Quality.

9 At the December 9th Board meeting, we as  
10 a Board considered the draft decision, and voted  
11 five to two to approve the decision. The Board  
12 also considered the draft letter to the EPA  
13 transitioning the Board's final agency action, and  
14 voted five to two to approve sending the letter  
15 and final agency action to the EPA.

16 On February 8th, 2023, the Board  
17 received correspondence from Kathleen Becker,  
18 Regional Administrator for EPA Region 8,  
19 indicating that the EPA will not begin considering  
20 the Board's request until the EPA has been  
21 notified by the State that the ongoing legal  
22 processes have concluded.

23 Do you want me to read the letter at  
24 this point, or have you read the letter?

25 BOARD MEMBER ALTEMUS: I've read the



1 letter, so I don't think it's necessary, but I'll  
2 let others respond.

3 VICE CHAIR AGUIRRE: It's in the meeting  
4 materials on Page 5, 005. At this point, I'm  
5 going to make a motion and propose no further  
6 action on this item. Is there a second for that  
7 motion?

8 BOARD MEMBER SIMPSON: I'll second it.

9 VICE CHAIR AGUIRRE: Discussion.

10 BOARD MEMBER ALTEMUS: Madam Chair, does  
11 that mean that you want to hold off until we get  
12 through court, or is this indefinitely? I'm not  
13 sure what you're trying to accomplish.

14 VICE CHAIR AGUIRRE: My proposal is that  
15 we take no further action on this matter. So I  
16 don't know if indefinitely -- that's a great  
17 question, and indefinitely, I think that is it,  
18 that we take no further action on the matter.

19 BOARD MEMBER SIMPSON: Madam Chair, just  
20 as a matter of clarification, in reading the  
21 status right now, I believe we concluded that at  
22 that last meeting. Is there in your opinion  
23 something else that we could be considering at  
24 this meeting with regard to the issue other than  
25 the next item?

1 VICE CHAIR AGUIRRE: No. That's  
2 correct.

3 BOARD MEMBER ALTEMUS: So Madam Chair,  
4 again, for clarification, if there's something  
5 that comes out of the legal process that we do  
6 need to readdress, that means that we could, or  
7 couldn't, or we would have to revisit this motion?

8 VICE CHAIR AGUIRRE: I might ask Aislinn  
9 to chime in here, but I'm going to say that I  
10 think on the matter of the response from EPA, I  
11 feel like there's no further action to take on  
12 their response. So if other actions come up that  
13 we have to take, then that would be separate from  
14 this letter.

15 MS. BROWN: Stacy, I would suggest that  
16 you amend your motion to say no further action in  
17 response to the letter from EPA, and be explicit  
18 about it.

19 VICE CHAIR AGUIRRE: Okay. Thank you  
20 very much. That's good. And I think that gets to  
21 what you're talking about, correct, Julia?

22 BOARD MEMBER ALTEMUS: Yes. I was  
23 actually going to ask you to do that, so thank  
24 you.

25 VICE CHAIR AGUIRRE: So I'll amend the

1 motion to propose that we take no further action  
2 on EPA's letter.

3 BOARD MEMBER SIMPSON: Do you need a  
4 second?

5 VICE CHAIR AGUIRRE: Yes.

6 BOARD MEMBER SIMPSON: I'll second it.

7 VICE CHAIR AGUIRRE: Any further  
8 discussion?

9 (No response)

10 VICE CHAIR AGUIRRE: Hearing none, call  
11 for a vote. All in favor.

12 (Response)

13 VICE CHAIR AGUIRRE: Opposed.

14 (No response)

15 VICE CHAIR AGUIRRE: Motion carried.

16 Item (b), In the Matter of Montana  
17 Department of Environmental Quality versus Montana  
18 Board of Environmental Review, Teck Coal, Limited,  
19 and the Board of County Commissioners of Lincoln  
20 County, Case CDV 2023-21.

21 On January 9th, DEQ filed a Petition for  
22 Judicial Review of the final agency action and  
23 order of Board of Environmental Review. The Board  
24 needs to consider what participation we'll have in  
25 this petition, or in this litigation.

1           So at this time, I make a motion that we  
2 recess this meeting, and the Board move to  
3 executive committee discussion to discuss legal  
4 strategy with regard to the litigation.

5           BOARD MEMBER SIMPSON:    Second.

6           VICE CHAIR AGUIRRE:    Any discussion?

7           (No response)

8           VICE CHAIR AGUIRRE:    Calling for a vote.

9           All in favor, signify by saying aye.

10          (Response)

11          VICE CHAIR AGUIRRE:    Opposed.

12          (No response)

13          VICE CHAIR AGUIRRE:    Motion carries.    So  
14 what we'll do now is close this public meeting,  
15 adjourn it, go into recess, and we'll take a 30  
16 minute recess, and reconvene this meeting at 9:50  
17 a.m., the public meeting at 9:50 a.m.    Aislinn.

18          MS. BROWN:    Yes.    Just to avoid  
19 confusion for the Board, so you will have gotten  
20 two links.    I cancelled the Teams one, so please  
21 use the Zoom link that Elena sent you all to  
22 attend the closed session.

23          VICE CHAIR AGUIRRE:    Okay.    So again,  
24 we'll resume the public meeting at 9:50.

25          (Recess taken at 9:20 a.m.)

1 and reconvened at 10:05 a.m.)

2 VICE CHAIR AGUIRRE: I apologize to  
3 everybody on the call for the delay. I want to  
4 call the February 24th meeting back into session.  
5 Can you start, Sandy, by calling the roll for the  
6 Board.

7 MS. MOISEY-SCHERER: Yes, I will. Vice  
8 Chair Aguirre.

9 VICE CHAIR AGUIRRE: Here.

10 MS. MOISEY-SCHERER: Board Member  
11 Altemus.

12 BOARD MEMBER ALTEMUS: Here.

13 MS. MOISEY-SCHERER: Board Member  
14 Simpson.

15 BOARD MEMBER SIMPSON: Here.

16 MS. MOISEY-SCHERER: Board Member Smith.

17 BOARD MEMBER SMITH: Here.

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

19 VICE CHAIR AGUIRRE: Thank you again.

20 For the record, we need to identify who is on the  
21 call. Sandy, do you want to call the names?

22 MS. MOISEY-SCHERER: Aislinn Brown.

23 MS. BROWN: (Indicating)

24 MS. MOISEY-SCHERER: Deputy Director  
25 James Fehr, Laurie Crutcher, Barbara Chillcott,

1 Catherine Armstrong, Chad Anderson, Colson  
2 Williams, Elena Hagen, Jessica Wilkerson, Katie  
3 Makarowski, Kirsten Bowers, Kurt Moser, Loryn  
4 Johnson, Ray Stout, Sam King, Samuel Yemington,  
5 Todd Briggs, Nicholas Whitaker.

6 VICE CHAIR AGUIRRE: Thank you, Sandy.  
7 So starting back on Page 10 Item (b), Montana  
8 Department of Environmental Quality versus Montana  
9 Board of Environmental Review, Teck Coal, Limited,  
10 and the Board of County Commissioners of Lincoln  
11 County, Case No. CDV 2023-21.

12 At this time I'll call for a motion for  
13 the action the Board will take.

14 BOARD MEMBER SIMPSON: Madam Chair, I'll  
15 make the motion that the Board continue with this  
16 litigation, and respond accordingly, represented  
17 by Aislinn Brown of Agency Legal Services.

18 VICE CHAIR AGUIRRE: Second. Is there  
19 any discussion?

20 (No response)

21 VICE CHAIR AGUIRRE: Hearing none, I'll  
22 call for the vote. All in favor say aye.

23 (Response)

24 VICE CHAIR AGUIRRE: Opposed.

25 (No response)

1 VICE CHAIR AGUIRRE: Motion carries.

2 Item (c), In the Matter of the Notice of  
3 Appeal and Request for Hearing by Alpine Pacific  
4 Utilities regarding issuance of MPDES Permit No.  
5 MTX000164, BER 2019-06 Water Quality.

6 At this time, the parties have filed a  
7 joint status report on November 23rd, and the  
8 Board will need to appoint a new Hearing Examiner  
9 in this matter. So at this time I'd call for a  
10 motion, or I can make a motion to appoint ALS as  
11 the Hearing Examiner in this matter.

12 BOARD MEMBER SIMPSON: Second.

13 VICE CHAIR AGUIRRE: Any discussion?

14 (No response)

15 VICE CHAIR AGUIRRE: All in favor of the  
16 motion to appoint ALS as the new Hearing Examiner,  
17 signify by saying aye.

18 (Response)

19 VICE CHAIR AGUIRRE: Opposed.

20 (No response)

21 VICE CHAIR AGUIRRE: Motion carries.

22 Item (d), In the Matter of Appeal and  
23 Request for Hearing by Westmoreland Rosebud  
24 Mining, LLC, regarding issuance of MPDES Permit  
25 No. MT0032042, Colstrip, Montana, BER 2022-06,

1 Water Quality.

2 On February 14th, Hearing Examiner  
3 Cameron granted the parties' joint motion to stay  
4 pending the Board's final determination and  
5 proposed final agency decision. We as a Board now  
6 need to act on those proposed stipulations that  
7 were on Page 63 of the material packet.

8 I guess I will call for a motion to  
9 approve the proposed stipulations as presented by  
10 Hearing Examiner Cameron.

11 BOARD MEMBER SIMPSON: Madam Chair,  
12 before proceeding with a motion, I would like to  
13 ask. Are there representatives of the parties  
14 available to brief the Board on what this is all  
15 about?

16 I mean I understand it, because this is  
17 in my wheelhouse, but I have a number of questions  
18 regarding the stipulations, and I'd kind of like  
19 to hear from the parties on it, if that's  
20 possible.

21 VICE CHAIR AGUIRRE: Yes, we can do  
22 that. We need to give the parties, all parties,  
23 equal time to present a summary, and we could --

24 I mean I guess I need to ask about this  
25 because is this kind of -- is this a call for oral



1 argument? Because I don't think we're at that  
2 point. I think it's open for the Board to ask  
3 questions to the parties, but I guess I'll ask  
4 Aislinn for a ruling on that, but I think we're  
5 just -- If that's what you're asking for, David,  
6 then yes, we can open this up for the Board to ask  
7 questions of the parties.

8 BOARD MEMBER SIMPSON: That's my request  
9 essentially, and in order to ask questions, it  
10 would probably be helpful if the parties could  
11 review for the Board members what this is about.  
12 I mean I could do that, but I think it's more  
13 appropriate for the parties to do it.

14 MS. BROWN: Since you're still -- as I  
15 see it, I think that's appropriate. I will say I  
16 don't know if I see someone from Westmoreland on  
17 right now.

18 VICE CHAIR AGUIRRE: And that's why I  
19 don't want to set up a situation where we -- It's  
20 not an oral argument situation where people would  
21 be on and prepared to discuss this.

22 MS. BROWN: I think you could probably  
23 just hear from DEQ for at least presenting what  
24 it's about, because it is a stipulation by the  
25 parties.

1 VICE CHAIR AGUIRRE: Okay. Ms. Bowers.

2 MS. BOWERS: Madam Chair Aguirre,  
3 members of the Board, I'm here on behalf of DEQ,  
4 and I see that Sam Yemington is on the call, and  
5 he is with Holland and Hart, and they represent  
6 Westmoreland in this stipulation, in this matter.

7 And I can just say generally that  
8 Westmoreland and DEQ agreed to the stipulation  
9 before you. We essentially agree that the ambient  
10 water quality of the receiving water may exceed  
11 the standard for electrical conductivity, and that  
12 further work needs to be done to establish what  
13 the nonanthropogenic condition is of the receiving  
14 water to account for the natural or the non-human  
15 caused condition.

16 And so the parties agreed to start the  
17 process of data gathering and analysis to  
18 determine what the nonanthropogenic condition is.  
19 And then if warranted and feasible, a rulemaking  
20 process will begin to adopt a standard, a new site  
21 specific standard that accounts for the  
22 nonanthropogenic condition of the receiving water,  
23 and that standard will be incorporated in  
24 Westmoreland's permit for this expansion.

25 VICE CHAIR AGUIRRE: Thank you, Ms.

1 Bowers. Does anybody -- Samuel, would you like to  
2 provide an overview as well? And then we'll open  
3 it up for any Board questions.

4 MR. YEMINGTON: Yes, with the caveat  
5 that I do represent Westmoreland in a number of  
6 matters. I'm not actively working this matter,  
7 and did not participate in the stipulation. I'm  
8 familiar with it, and certainly can communicate  
9 any questions that the Board has back to my  
10 colleagues who are working this case, but who had  
11 conflicts today and aren't able to attend.

12 So with that caveat, I would just note  
13 that we do generally agree with DEQ's  
14 presentation, and this is consistent with our  
15 negotiations.

16 VICE CHAIR AGUIRRE: Okay. Thank you.  
17 Board members, questions?

18 BOARD MEMBER SIMPSON: Madam Chair, with  
19 the indulgence of the Board, I'd like to take just  
20 a minute, and talk a little bit about the  
21 situation on the ground, and what this represents.

22 Surface mining for coal of course is  
23 very heavily regulated in great detail, but one of  
24 the requirements is that sediment ponds be put in  
25 place to control runoff from disturbed areas, the

1 obvious purpose being to keep sediment from moving  
2 from the site.

3 When a sediment pond is established, it  
4 has a discharge point, and that discharge point is  
5 seen as an MPDES discharge point, that is, not  
6 only subject to approval through the mining permit  
7 process, but also through the MPDES process.

8 These ponds are generally small dams or  
9 incised ponds, that is a hole dug in the ground,  
10 and they're located in the -- as I understand it  
11 from reading this -- located in the upper reaches  
12 of Lee Coulee, Fossil Fork of Lee Coulee, unnamed  
13 tributaries of Fossil Fork of Lee Coulee, unnamed  
14 tributaries to Richards Coulee.

15 I'm not familiar with -- I know  
16 generally where this permit area is located, but  
17 I'm not familiar with the details on the ground.

18 But the point is that these so-called  
19 receiving waters are dry coulees, and so my  
20 question really has -- it's more of a technical  
21 question. How is Westmoreland going to go about  
22 establishing the quality of receiving waters when  
23 there is no receiving water, except in the case of  
24 a major snowmelt or rainfall event; and in those  
25 cases, how are you going to get to the points to

1 collect samples.

2           Because in that situation, the ground is  
3 going to be so wet, unless you get a helicopter,  
4 you're not going to be there. The other  
5 possibility, I suppose, is some sort of an  
6 automated sampling system.

7           But there are real practical questions  
8 about how water quality standards are applied and  
9 enforced in a dry coulee bottom that as a normal  
10 matter of course has no water.

11           I'd call to your attention the Water  
12 Quality Act 75-5-103, Definitions, Definition No.  
13 12. "High quality waters means all State waters  
14 except ground or surface waters that, number one,  
15 are not capable of supporting any one of the  
16 designated uses for their classification, or have  
17 zero flow or surface expression for more than 270  
18 days during most years."

19           In these dry drainages in eastern  
20 Montana, you may get a runoff event once a year or  
21 less. And so I understand the concept certainly  
22 of nonanthropogenic quality, but I want to raise  
23 the question of whether it's an appropriate  
24 application of the Clean Water Act to be  
25 regulating water in these dry coulee bottoms,

1 water quality. And if there is no water there,  
2 there is no use.

3 Somewhere there's going to be a use  
4 downstream. Is that the proper place to be  
5 describing the receiving water quality?

6 And I have another question. This is on  
7 Page 70 of our packet, Item No. 25. It says, "DEQ  
8 and Westmoreland agree that until DEQ adopts new  
9 water quality standards based on the  
10 nonanthropogenic condition of receiving waters,  
11 and appropriate effluent limitations for EC and  
12 SAR incorporated into the permit, Westmoreland  
13 will not discharge to receiving waters, and will  
14 protect existing beneficial uses in the receiving  
15 waters and downstream water bodies."

16 Is that doable to commit to not  
17 discharge? What are you going to do with the  
18 water, or are these standards and regulations  
19 going to be written before the dams actually go  
20 into place? Those are my questions.

21 VICE CHAIR AGUIRRE: Okay. I'm not sure  
22 if it's appropriate at this time to ask for any  
23 comment from Ms. Bowers or from Mr. Yemington.  
24 I'm unclear how to proceed on Board Member  
25 Simpson's statements and questions.

1 MS. BROWN: I think one thing you could  
2 do is get a motion to defer ruling on this so that  
3 the parties have an opportunity to prepare more  
4 comprehensive responses at the next meeting.

5 VICE CHAIR AGUIRRE: Okay.

6 BOARD MEMBER ALTEMUS: Madam Chair, may  
7 I ask a question?

8 VICE CHAIR AGUIRRE: Yes.

9 BOARD MEMBER ALTEMUS: Since the parties  
10 stipulated to this -- I mean I do understand what  
11 Board Member Simpson is saying, and I do agree  
12 that maybe we need more information, but it seems  
13 like the parties stipulated, and our request or  
14 the request to the Board was to accept their  
15 findings or their stipulation. So I'm unclear as  
16 how we proceed.

17 VICE CHAIR AGUIRRE: Right, because  
18 they've agreed to it. And so we're questioning  
19 their agreement?

20 BOARD MEMBER SIMPSON: Madam Chair,  
21 they've agreed to it, and it's been approved by  
22 the Hearing Examiner. Now it is up for our  
23 approval, and I guess we could approve it and let  
24 them sort these things out, but I think there are  
25 -- my reading of it is -- and I'm cursed with

1 having the background knowledge to know what this  
2 is all about.

3 VICE CHAIR AGUIRRE: Not a curse.

4 BOARD MEMBER SIMPSON: I think there are  
5 questions that need to be resolved in this,  
6 additional questions that need to be resolved in  
7 this stipulation. That's my opinion.

8 VICE CHAIR AGUIRRE: So the thought  
9 would be that we as the Board would ask for  
10 further clarification regarding your questions?

11 BOARD MEMBER SIMPSON: That's my  
12 request. And I suppose we could be a little bit  
13 more definitive. I've kind of rambled on on the  
14 questions, but I guess my two key questions is  
15 more detail on, one, how we describe what -- how  
16 we determine, how we go about determining what the  
17 -- and what point, that is, is it at the point of  
18 discharge into a dry coulee, or is it the point  
19 downstream where water use occurs, or where water  
20 is available for use on at least an intermittent  
21 basis.

22 Then the second is the question of how  
23 Westmoreland is going to prevent discharges, and  
24 then should that section read that Westmoreland  
25 will comply with the proposed standards until --



1 at any existing points until the new rules are  
2 adopted?

3 It's a practical question of how is the  
4 regulated party going to prevent discharges in the  
5 event of heavy rainfall or snowmelt.

6 MR. YEMINGTON: Board Member Simpson,  
7 what if we did this. Instead of just approving,  
8 instead what if we revised it such that once the  
9 site specific standards are developed, then it  
10 comes back to the Board.

11 VICE CHAIR AGUIRRE: So you're  
12 essentially proposing to defer our action?

13 MR. YEMINGTON: Yes, until the site  
14 specific standard has been developed, so you can  
15 actually see the --

16 VICE CHAIR AGUIRRE: Standards.

17 MR. YEMINGTON: -- approve more the  
18 technical aspects of the end result.

19 VICE CHAIR AGUIRRE: I think in addition  
20 to that, if we're going to do that, there's also a  
21 question on where, at what point that standard is  
22 going to apply. Is it at the point of discharge  
23 into the dry coulee, or is it at some other point?

24 MR. YEMINGTON: And I would assume that  
25 it would specify at that point. There would be a

1 lot that we're going to develop in that.

2 VICE CHAIR AGUIRRE: So I see this as  
3 those questions needing to be answered, and the  
4 standards needing to be put in place before the  
5 Board takes any action?

6 BOARD MEMBER SIMPSON: Conceptually I  
7 believe that the stipulation and the -- So we've  
8 got the stipulation, and let me make sure I get  
9 the terminology here.

10 VICE CHAIR AGUIRRE: Mr. Yemington has  
11 his hand up as well.

12 MS. MOISEY-SCHERER: As does Kirsten  
13 Bowers.

14 VICE CHAIR AGUIRRE: Okay. I think, Mr.  
15 Yemington, would you like to comment while Board  
16 Member Simpson is looking for that reference?

17 MR. YEMINGTON: Sure, and thank you,  
18 Madam Chair. And just briefly to respond to some  
19 of those concerns that was raised, one thing I  
20 would caution is that this particular study can't  
21 go forward in the absence of the stipulation. And  
22 so the idea that the Board could defer on  
23 approving the stipulation and moving forward with  
24 the underlying study, it quite complicates the  
25 issue, and frustrates that process.

1           To Mr. Simpson's, Board Member Simpson's  
2 comment regarding the access to these locations,  
3 I'd just note this is related to the Amendment 5  
4 of the Area B part of the permit of this mine.  
5 It's an extension of existing mining.

6           And for purposes of just those practical  
7 limitations on access, of course, this is some  
8 rural eastern Montana land, but the client does  
9 have access here, and to the extent we need to  
10 access for purposes of the water monitoring and  
11 conducting the study, that is not a problem.

12           Again, we can talk about this question  
13 of where this point is located, and other  
14 practical limitations that need to be addressed  
15 before we move forward, but I would just note that  
16 there's not mining going on at this point.  
17 There's no constructed, to my knowledge no  
18 constructed retention pond, and this isn't a point  
19 source at this point.

20           The purpose of the study is to establish  
21 those background, the natural conditions for  
22 purposes of informing ultimately what those point  
23 source limitations are, if and when that is  
24 constructed.

25           So again, I'd just offer that to comfort

1 the Board, and then to the extent there's  
2 additional followup or questions, I'd be happy to  
3 communicate those to my colleagues who worked with  
4 DEQ to address this issue.

5 We do understand it's a relatively  
6 unique issue. Again, the lack of data here,  
7 that's the whole point of trying to get on the  
8 ground, trying to understand just what that  
9 background looks like, to make sure that the -- as  
10 Board Member Simpson implied -- that future point  
11 source water conditions are going to comply with  
12 whatever that standard ultimately is.

13 VICE CHAIR AGUIRRE: Thank you, Mr.  
14 Yemington. Ms. Bowers.

15 MS. BOWERS: Thank you, Chair Aguirre,  
16 and members of the Board.

17 I agree with Mr. Yemington's comments,  
18 that without the stipulation in place, we don't  
19 have the agreed process for sampling and standard  
20 development.

21 And I just wanted to offer that under  
22 the terms of this stipulation, the Board retains  
23 jurisdiction of this case.

24 And maybe to satisfy some of the Board's  
25 questions, again, requesting more detail on

1 sampling process, and how Westmoreland will stay  
2 in compliance with the permit if they can't  
3 discharge, and maybe any other questions that come  
4 up, we could offer to update the Board at some  
5 point, or maybe submit some sort of status report.

6 VICE CHAIR AGUIRRE: Okay. Thank you.  
7 Mr. Yemington, did you have another question or  
8 comment?

9 MR. YEMINGTON: No further comment,  
10 other than to agree with Ms. Bowers that the Board  
11 does retain jurisdiction on this issue.

12 VICE CHAIR AGUIRRE: Okay.

13 BOARD MEMBER SIMPSON: Just kind of  
14 circling back around, conceptually the stipulation  
15 and the final agency, proposed final agency  
16 decision here, it makes a lot of sense in this  
17 situation. No question in my mind about that.

18 The questions I have are practical  
19 questions, the first one being where the standard  
20 is applied, based on what water quality. Is it  
21 the water quality in the ephemeral drainage, which  
22 there normally is no water, or is it water quality  
23 at the point of use downstream?

24 Second, is the question of the permittee  
25 agreeing to no discharges until new rules are in

1 place, and depending on how long this takes, and  
2 how the mining plan is developed, and so on and so  
3 forth, that may or may not pose a problem.

4 But just to digress for a minute, I have  
5 been involved in trying to collect these kinds of  
6 water samples, and to define water quality in  
7 ephemeral drainages, and it's easy to talk about  
8 and very difficult to do, because there's very  
9 seldom any water there.

10 So I'm just concerned that there be a  
11 more definitive plan as to how to obtain enough  
12 samples to be able to define the pre-existing  
13 water quality, ambient water quality.

14 VICE CHAIR AGUIRRE: Board Member  
15 Simpson, and the rest of the Board, I'd like to  
16 make a proposal that we approve the stipulations  
17 that have been jointly agreed to.

18 Since we retain jurisdiction, the idea  
19 that we would receive status updates through the  
20 process, and address the questions that you are  
21 posing, Board Member Simpson, may be the best way  
22 to approach this, to have this matter move  
23 forward, as Mr. Yemington and Ms. Bowers have  
24 addressed, that the stipulations jointly approved  
25 to, need to start moving forward in order to not

1 hold up the project, and that we put some kind of  
2 requirement to have updates and these questions  
3 answered throughout the process. Does that sound  
4 like a potential option?

5 BOARD MEMBER SIMPSON: Yes, it does. I  
6 believe -- I agree that it's important to move  
7 forward with this. And I think literally the  
8 questions that I've raised are of an  
9 administrative nature, that is, how the law is  
10 applied in developing the rule. So I'm just  
11 pondering what a motion might look like.

12 VICE CHAIR AGUIRRE: Do you want me to  
13 make one and then we can discuss it?

14 BOARD MEMBER SIMPSON: Yes, please. Why  
15 don't we proceed with a motion, and then discuss  
16 it before the vote.

17 VICE CHAIR AGUIRRE: I'm going to make a  
18 motion for the Board to approve the proposed  
19 stipulations, and as part of that approval, that  
20 Montana DEQ and Westmoreland will provide updates  
21 to the Board on the process, and also specifically  
22 addressing the administrative questions that have  
23 been put forth in this meeting.

24 BOARD MEMBER ALTEMUS: I'll second your  
25 motion.

1 VICE CHAIR AGUIRRE: Discussion?

2 BOARD MEMBER SIMPSON: I think that  
3 covers it. I guess the question that would remain  
4 in my mind is: At what point would the parties  
5 report back on this? I mean do we need any kind  
6 of a definitive schedule, or review it as the  
7 program is developed?

8 I guess I'd feel better if we had  
9 something a little bit more definitive in terms of  
10 reporting back to the Board, but given the  
11 uncertain nature of where this is going, maybe  
12 that's not a practical request.

13 VICE CHAIR AGUIRRE: I guess, Ms. Bowers  
14 and Mr. Yemington, do you have any suggestions on  
15 update schedule?

16 MR. YEMINGTON: Members of the Board,  
17 Samuel Yemington again on behalf of Westmoreland.

18 I don't think there's any objection on  
19 our side to providing updates to the Board. That  
20 can certainly be done at your regularly scheduled  
21 meetings. I regularly participate, as do my  
22 colleagues when they don't have a conflict, and we  
23 can be prepared to address any developments and  
24 answer any questions that the Board may have in  
25 the interim.



1 VICE CHAIR AGUIRRE: Ms. Bowers.

2 MS. BOWERS: Chair Aguirre, members of  
3 the Board. I agree. We could provide updates for  
4 the Board to have in their packet for each  
5 upcoming Board meeting, if that's your preference,  
6 or we could do it on a quarterly schedule.  
7 Whatever you prefer.

8 BOARD MEMBER ALTEMUS: Madam Chair, I  
9 was going to say that the Board can reach out to  
10 the parties as well, and just put them on the  
11 agenda, or ask for the updates at the April  
12 meeting, or June meeting, or whatever. I think we  
13 can reach out to them, too.

14 VICE CHAIR AGUIRRE: I think that's a  
15 great idea.

16 BOARD MEMBER SIMPSON: Madam Chair, in  
17 the interests of moving forward, I guess I'd  
18 request that we go ahead with the approval on  
19 these documents, but request that the parties at  
20 our April meeting address the questions that have  
21 been raised, and at that point we can decide what  
22 might be an appropriate schedule or plan for  
23 reporting back to the Board.

24 VICE CHAIR AGUIRRE: Okay. So we want  
25 to revise the motion?

1           BOARD MEMBER SIMPSON: Yes, I believe  
2 so. I think I'd offer an amendment to request  
3 that the parties report to the Board on the  
4 specific questions that have been raised here at  
5 the next meeting, at the April meeting, and at  
6 that point, we'll discuss the schedule -- or plan  
7 is probably a better word -- for keeping the Board  
8 informed of progress.

9           VICE CHAIR AGUIRRE: Aislinn, do we need  
10 to restate the motion, or then can we just make  
11 that amendment?

12           MS. BROWN: If you could restate it as  
13 amended, that would be best.

14           VICE CHAIR AGUIRRE: So the motion as  
15 amended would be to approve the stipulations as  
16 presented, and ask that the parties present at the  
17 April 7th meeting to answer the questions that  
18 were discussed today in this meeting, and at the  
19 April 7th meeting, we will establish some kind of  
20 update schedule from there. Kind of messy.

21           BOARD MEMBER SIMPSON: That's correct.  
22 So do we need a more precise statement of the  
23 motion or can we proceed?

24           VICE CHAIR AGUIRRE: Mr. Yemington.

25           MR. YEMINGTON: Thank you, Madam Chair.

1 The only comment from our end is I think in order  
2 to accommodate, best accommodate Board Member  
3 Simpson and his questions, is it possible that we  
4 could get either a written directive from the  
5 Board before the April meeting, so we know the  
6 specific questions we're responding to; or  
7 alternatively, we could just state that on the  
8 record.

9 I'm certainly understanding what Board  
10 Member Simpson has said with respect to his  
11 concerns about location, and some of the  
12 jurisdictional and practical aspects of this  
13 stipulation, and whether or not the raw nature of  
14 this particular drainage complicates or otherwise  
15 frustrates the parties' ability to obtain this  
16 data.

17 I think just so that the motion is clear  
18 and that the expectation is obvious for purposes  
19 of the April hearing, that we are specific on  
20 those questions.

21 VICE CHAIR AGUIRRE: Thank you. Maybe  
22 Board Member Altemus, you want to make a motion.  
23 You might be able to take what Board Member  
24 Simpson and myself have put out there, and --

25 BOARD MEMBER ALTEMUS: Madam Chair --

1 MS. BROWN: Madam Chair, since there's a  
2 motion on the table, so that would need to be  
3 withdrawn before we can put another one out there.

4 VICE CHAIR AGUIRRE: Okay. I'll  
5 withdraw the amended motion to request a new  
6 amended motion.

7 BOARD MEMBER ALTEMUS: Madam Chair,  
8 since Board Member Simpson has raised those two  
9 questions, and is more succinct in what he's  
10 looking for than I wrote down, I would suggest  
11 that maybe he make the motion with his specific  
12 information.

13 BOARD MEMBER SIMPSON: Sorry. I will  
14 give it a try. Sorry to create all of the  
15 confusion.

16 I'll make the motion that we approve  
17 both the stipulation and the final action, and  
18 that we request the parties at the April meeting  
19 to address the questions of defining the receiving  
20 waters, and operation of the -- excuse me --  
21 management of discharges prior to the development  
22 of the new rule. Does that cover it?

23 VICE CHAIR AGUIRRE: I'm going to muddy  
24 this up. Does this need to be two separate  
25 motions, or are they -- is it dependent? Like our

1 approval of the stipulations would be one motion,  
2 and then maybe we make another motion to provide  
3 those questions to the parties to answer, and then  
4 we set a schedule on updates on the project from  
5 there? Aislinn, what are your thoughts about  
6 breaking that into two motions?

7 MS. BROWN: That might be more clear for  
8 the record. I am also happy to draft an order  
9 that you could sign, Vice Chair Aguirre, that  
10 explicitly sets forth, and work with Board Member  
11 Simpson on it, that explicitly sets forth those  
12 two questions that he has, if that helps as well.

13 So you could just move to assign me to  
14 draft an order that you will sign.

15 VICE CHAIR AGUIRRE: Okay. So we'd have  
16 to have Board Member Simpson withdraw his motion.

17 BOARD MEMBER SIMPSON: I never received  
18 a second, so I'll withdraw it.

19 VICE CHAIR AGUIRRE: Okay. So the new  
20 motion is for the Board to approve the proposed  
21 stipulations as presented.

22 BOARD MEMBER ALTEMUS: I'll second.

23 VICE CHAIR AGUIRRE: Any discussion on  
24 that motion?

25 (No response)

1 VICE CHAIR AGUIRRE: Okay. Hearing  
2 none, call for a vote. All in favor, say aye.

3 (Response)

4 VICE CHAIR AGUIRRE: Opposed.

5 (No response)

6 VICE CHAIR AGUIRRE: Moving forward, the  
7 Board would like to direct Aislinn to draft an  
8 order to the parties with the questions raised by  
9 Board Member Simpson, and ask that the parties  
10 respond to that order at the April 7th Board  
11 meeting, and then at that meeting, we will  
12 determine what kind of update schedule the parties  
13 will be providing to the Board on this project.

14 BOARD MEMBER SIMPSON: Is that a motion?

15 VICE CHAIR AGUIRRE: Yes.

16 BOARD MEMBER SIMPSON: I'll second it.

17 VICE CHAIR AGUIRRE: Any discussion?

18 (No response)

19 VICE CHAIR AGUIRRE: All in favor of the  
20 motion, signify by saying aye.

21 (Response)

22 VICE CHAIR AGUIRRE: Opposed.

23 (No response)

24 VICE CHAIR AGUIRRE: Moving on to the  
25 new contested case, In the Matter of the Denial of

1 Opencut Mine Permit No. 3115 for FirstMark  
2 Materials, Oscar's Site, BER 2022-8 OC.

3 The action that's required for this is  
4 for the Board to decide whether to hear the case  
5 itself, or assign a Hearing Examiner for some or  
6 the totality of the case.

7 And I will let you know that I believe  
8 we should assign a Hearing Examiner for the  
9 totality of the case, and assign that to ALS. I  
10 can frame that as a motion, or just letting the  
11 Board know my thoughts.

12 BOARD MEMBER SMITH: I'll motion we  
13 assign the case to ALS for the totality of the  
14 case.

15 VICE CHAIR AGUIRRE: I'll second it.  
16 Any discussion?

17 (No response)

18 VICE CHAIR AGUIRRE: Hearing no  
19 discussion, I'll call for the vote. All in favor,  
20 signify by saying aye.

21 (Response)

22 VICE CHAIR AGUIRRE: Opposed.

23 (No response)

24 VICE CHAIR AGUIRRE: Okay. Board  
25 Counsel update.

1 MS. BROWN: I don't have any updates  
2 unless anybody has questions for me. Vice Chair  
3 Aguirre, I would just recommend that you state for  
4 the record that the previous motion passed.

5 VICE CHAIR AGUIRRE: Oh, previous on the  
6 new contested case?

7 MS. BROWN: Yes.

8 VICE CHAIR AGUIRRE: The motion to  
9 assign a Hearing Examiner for totality of the case  
10 passed.

11 MS. BROWN: Okay. With respect to the  
12 Board Counsel update, does anybody have any  
13 questions for me?

14 (No response)

15 MS. BROWN: Okay.

16 VICE CHAIR AGUIRRE: Thank you. General  
17 public comment. Under this item, members of the  
18 public may comment on any public matter within the  
19 jurisdiction of the Board that is not otherwise on  
20 the agenda for the meeting.

21 Individual contested case proceedings  
22 are not public matters on which the public may  
23 comment. Having read that, is there any general  
24 public comment?

25 (No response)



1                   VICE CHAIR AGUIRRE:   Hearing none, I'll  
2 call for a motion to adjourn the meeting.

3                   MS. MOISEY-SCHERER:   One comment I  
4 received was DEQ has asked that cases be addressed  
5 what -- In the last meeting Rob Cameron was  
6 assigned five cases, but those were not spelled  
7 out, and DEQ has asked for what those case numbers  
8 are for specifics.

9                   MS. BROWN:   I can read off the cases  
10 currently assigned to Mr. Cameron, if you want me  
11 to, Vice Chair.

12                   VICE CHAIR AGUIRRE:   Please do.

13                   MS. BROWN:   Okay.   Western Sugar, BER  
14 2020-05.   Some of these, I'm not sure which ones  
15 are the new ones that you're referring to, Sandy,  
16 so I'm just going to read off all the ones that I  
17 have.   Harry Richards, BER 2022-02; Valley Garden,  
18 BER 2022-04; Rosebud, BER 2022-05; and then  
19 there's another Rosebud, BER 2022-06; CHS, Inc.,  
20 BER 2022-07.   I believe that's it.   Let me double  
21 check.   Yes, that's it.

22                   VICE CHAIR AGUIRRE:   Okay.   Thank you.  
23 Any other questions?

24                   (No response)

25                   VICE CHAIR AGUIRRE:   Okay.   Now I'll

1 call for a motion to adjourn the meeting.

2 BOARD MEMBER ALTEMUS: So moved.

3 BOARD MEMBER SMITH: Second.

4 BOARD MEMBER SIMPSON: Second.

5 VICE CHAIR AGUIRRE: Any discussion?

6 (No response)

7 VICE CHAIR AGUIRRE: No more discussion?

8 (No response)

9 VICE CHAIR AGUIRRE: All in favor,  
10 signify by saying aye.

11 (Response)

12 VICE CHAIR AGUIRRE: Motion passed to  
13 adjourn the meeting. Thanks, everybody.

14 (The proceedings were concluded

15 at 10:56 a.m. )

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C E R T I F I C A T E

STATE OF MONTANA )

: SS.

COUNTY OF LEWIS & CLARK )

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

That the proceedings were taken before me at  
the time and place herein named; that the  
proceedings were reported by me in shorthand and  
transcribed using computer-aided transcription,  
and that the foregoing -42- 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 6th day of  
March, 2023.

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

<b>0</b>	<b>5</b>	27:9, 27:10 <b>accommodate</b> [2] 35:2, 35:2 <b>accomplish</b> - 9:13 <b>accordingly</b> - 14:16 <b>account</b> - 18:14 <b>accounts</b> - 18:21 <b>act</b> [3] 16:6, 21:12, 21:24 <b>action</b> [16] 8:1, 8:1, 8:13, 8:15, 9:6, 9:15, 9:18, 10:11, 10:16, 11:1, 11:22, 14:13, 25:12, 26:5, 36:17, 39:3 <b>actions</b> - 10:12 <b>actively</b> - 19:6 <b>Adam</b> - 3:7 <b>add</b> - 4:24 <b>addition</b> - 25:19 <b>additional</b> [2] 24:6, 28:2 <b>address</b> [5] 28:4, 30:20, 32:23, 33:20, 36:19 <b>addressed</b> [3] 27:14, 30:24, 41:4 <b>addressing</b> - 31:22 <b>adjourn</b> [4] 12:15, 41:2, 42:1, 42:13 <b>administrative</b> [4] 3:20, 4:25, 31:9, 31:22 <b>Administrator</b> - 8:18 <b>adopt</b> - 18:20 <b>adopted</b> - 25:2 <b>adopts</b> - 22:8 <b>affixed</b> - 43:16 <b>agency</b> [7] 8:13, 8:15, 11:22, 14:17, 16:5, 29:15, 29:15 <b>agenda</b> [3] 6:15, 33:11, 40:20 <b>agree</b> [8]	18:9, 19:13, 22:8, 23:11, 28:17, 29:10, 31:6, 33:3 <b>agreed</b> [6] 18:8, 18:16, 23:18, 23:21, 28:19, 30:17 <b>agreeing</b> - 29:25 <b>agreement</b> - 23:19 <b>Aguirre</b> [123] 1:13, 2:4, 2:7, 2:8, 2:18, 2:25, 3:14, 3:19, 4:3, 4:5, 4:10, 4:12, 4:22, 5:15, 5:18, 5:22, 5:25, 6:3, 6:5, 6:16, 6:21, 6:25, 7:4, 7:8, 7:13, 7:17, 7:21, 7:25, 9:3, 9:9, 9:14, 10:1, 10:8, 10:19, 10:25, 11:5, 11:7, 11:10, 11:13, 11:15, 12:6, 12:8, 12:11, 12:13, 12:23, 13:2, 13:8, 13:9, 13:19, 14:6, 14:18, 14:21, 14:24, 15:1, 15:13, 15:15, 15:19, 15:21, 16:21, 17:18, 18:1, 18:2, 18:25, 19:16, 22:21, 23:5, 23:8, 23:17, 24:3, 24:8, 25:11, 25:16, 25:19, 26:2, 26:10, 26:14, 28:13, 28:15, 29:6, 29:12, 30:14, 31:12, 31:17, 32:1,	32:13, 33:1, 33:2, 33:14, 33:24, 34:9, 34:14, 34:24, 35:21, 36:4, 36:23, 37:9, 37:15, 37:19, 37:23, 38:1, 38:4, 38:6, 38:15, 38:17, 38:19, 38:22, 38:24, 39:15, 39:18, 39:22, 39:24, 40:3, 40:5, 40:8, 40:16, 41:1, 41:12, 41:22, 41:25, 42:5, 42:7, 42:9, 42:12 <b>ahead</b> - 33:18 <b>Aislinn</b> [14] 3:4, 4:14, 4:14, 4:15, 4:22, 6:16, 10:8, 12:17, 13:22, 14:17, 17:4, 34:9, 37:5, 38:7 <b>Alpine</b> - 15:3 <b>ALS</b> [4] 15:10, 15:16, 39:9, 39:13 <b>ALSB</b> [2] 4:14, 4:18 <b>Altemus</b> [20] 1:15, 2:10, 2:11, 5:10, 5:21, 8:25, 9:10, 10:3, 10:22, 13:11, 13:12, 23:6, 23:9, 31:24, 33:8, 35:22, 35:25, 36:7, 37:22, 42:2 <b>alternatively</b> - 35:7 <b>ambient</b> [2] 18:9, 30:13 <b>amend</b> [2] 10:16, 10:25 <b>amended</b> [4] 34:13, 34:15, 36:5, 36:6	<b>amendment</b> [3] 27:3, 34:2, 34:11 <b>analysis</b> - 18:17 <b>Anderson</b> [2] 3:10, 14:1 <b>Annotated</b> - 8:6 <b>answered</b> [2] 26:3, 31:3 <b>apologize</b> - 13:2 <b>Appeal</b> [2] 15:3, 15:22 <b>appearing</b> [4] 7:1, 7:5, 7:14, 7:22 <b>application</b> - 21:24 <b>applied</b> [3] 21:8, 29:20, 31:10 <b>apply</b> - 25:22 <b>appoint</b> [3] 15:8, 15:10, 15:16 <b>approach</b> - 30:22 <b>appropriate</b> [6] 17:13, 17:15, 21:23, 22:11, 22:22, 33:22 <b>approval</b> [7] 3:21, 3:22, 20:6, 23:23, 31:19, 33:18, 37:1 <b>approve</b> [12] 3:23, 3:25, 8:11, 8:14, 16:9, 23:23, 25:17, 30:16, 31:18, 34:15, 36:16, 37:20 <b>approved</b> [2] 23:21, 30:24 <b>approving</b> [3] 4:6, 25:7, 26:23 <b>April</b> [16] 5:1, 5:2, 5:6, 5:16, 5:19, 5:19, 6:5, 33:11, 33:20, 34:5, 34:17, 34:19, 35:5, 35:19, 36:18, 38:10 <b>areas</b> - 19:25 <b>aren't</b> - 19:11
<b>1</b>	<b>6</b>				
1 - 6:12 10 - 14:7 10:05 - 13:1 10:56 - 42:15 12 - 21:13 14th [3] 5:2, 5:6, 16:2 17.30.632(7)(a) - 8:5	5 [3] 7:6, 9:4, 27:3  6 [2] 7:9, 7:10 63 - 16:7 6th - 43:16  7  7 [2] 7:13, 7:15 70 - 22:7 75-5-103 - 21:12 75-5-203 - 8:6 7th [6] 5:16, 5:20, 6:5, 34:17, 34:19, 38:10  8  8 [3] 7:17, 7:19, 8:18 8th - 8:16  9  9 [3] 7:21, 7:23, 43:22 9:00 [2] 1:11, 5:20 9:20 - 12:25 9:50 [3] 12:16, 12:17, 12:24 9th [4] 3:23, 4:7, 8:9, 11:21  A  a.m [7] 1:11, 5:20, 12:17, 12:17, 12:25, 13:1, 42:15 <b>ability</b> [3] 5:3, 35:15, 43:14 <b>able</b> [3] 19:11, 30:12, 35:23 <b>absence</b> - 26:21 <b>accept</b> - 23:14 <b>access</b> [4] 27:2, 27:7,				
<b>2</b>					
2 [2] 6:17, 6:18 2019-06 - 15:5 2020-05 - 41:14 2021-4 - 8:8 2022 [2] 3:23, 4:7 2022-02 - 41:17 2022-04 - 41:18 2022-05 - 41:18 2022-06 [2] 15:25, 41:19 2022-07 - 41:20 2022-8 - 39:2 2023 [4] 1:6, 1:10, 8:16, 43:17 2023-21 [2] 11:20, 14:11 2024 - 43:22 23rd - 15:7 24 [2] 1:6, 1:10 24th - 13:4 25 - 22:7 270 - 21:17					
<b>3</b>					
3 [2] 6:21, 6:23 30 - 12:15 3115 - 39:1					
<b>4</b>					
4 [3] 7:1, 7:2, 7:2 42 - 43:12					

<p><b>argument [2]</b> 17:1, 17:20 <b>ARM - 8:4</b> <b>Armstrong [2]</b> 3:10, 14:1 <b>asking - 17:5</b> <b>aspects [2]</b> 25:18, 35:12 <b>assign [6]</b> 37:13, 39:5, 39:8, 39:9, 39:13, 40:9 <b>assigned [2]</b> 41:6, 41:10 <b>association -</b> 3:16 <b>assume -</b> 25:24 <b>attend [2]</b> 12:22, 19:11 <b>attention -</b> 21:11 <b>automated -</b> 21:6 <b>available [2]</b> 16:14, 24:20 <b>avoid - 12:18</b> <b>aye [8] 4:8,</b> 12:9, 14:22, 15:17, 38:2, 38:20, 39:20, 42:10</p> <hr/> <p style="text-align: center;"><b>B</b></p> <hr/> <p><b>background</b> <b>[3] 24:1,</b> 27:21, 28:9 <b>Barbara -</b> 13:25 <b>Becker - 8:17</b> <b>begin [2]</b> 8:19, 18:20 <b>behalf [2]</b> 18:3, 32:17 <b>beneficial -</b> 22:14 <b>BER [10] 8:8,</b> 15:5, 15:25, 39:2, 41:13, 41:17, 41:18, 41:18, 41:19, 41:20 <b>best [4]</b> 30:21, 34:13, 35:2, 43:13 <b>better [2]</b> 32:8, 34:7 <b>bit [3] 19:20,</b> 24:12, 32:9 <b>Board [146]</b> 1:1, 1:5, 1:14, 2:6, 2:9, 2:11,</p>	<p>2:12, 2:14, 2:15, 2:16, 3:25, 4:2, 4:15, 4:20, 5:1, 5:1, 5:3, 5:7, 5:10, 5:12, 5:17, 5:19, 5:21, 8:3, 8:9, 8:10, 8:11, 8:16, 8:25, 9:8, 9:10, 9:19, 10:3, 10:22, 11:3, 11:6, 11:18, 11:19, 11:23, 11:23, 12:2, 12:5, 12:19, 13:6, 13:10, 13:12, 13:13, 13:15, 13:16, 13:17, 14:9, 14:10, 14:13, 14:14, 14:15, 15:8, 15:12, 16:5, 16:11, 16:14, 17:2, 17:6, 17:8, 17:11, 18:3, 19:3, 19:9, 19:17, 19:18, 19:19, 22:24, 23:6, 23:9, 23:11, 23:14, 23:20, 24:4, 24:9, 24:11, 25:6, 25:10, 26:5, 26:6, 26:15, 26:22, 27:1, 28:1, 28:10, 28:16, 28:22, 29:4, 29:10, 29:13, 30:14, 30:15, 30:21, 31:5, 31:14, 31:18, 31:21, 31:24, 32:2, 32:10, 32:16, 32:19, 32:24, 33:3, 33:4, 33:5, 33:8, 33:9,</p>	<p>33:16, 33:23, 34:1, 34:3, 34:7, 34:21, 35:2, 35:5, 35:9, 35:22, 35:23, 35:25, 36:7, 36:8, 36:13, 37:10, 37:16, 37:17, 37:20, 37:22, 38:7, 38:9, 38:10, 38:13, 38:14, 38:16, 39:4, 39:11, 39:12, 39:24, 40:12, 40:19, 42:2, 42:3, 42:4 <b>Board's [4]</b> 8:13, 8:20, 16:4, 28:24 <b>bodies - 22:15</b> <b>bottom - 21:9</b> <b>bottoms -</b> 21:25 <b>Bowers [14]</b> 3:6, 14:3, 18:1, 18:2, 19:1, 22:23, 26:13, 28:14, 28:15, 29:10, 30:23, 32:13, 33:1, 33:2 <b>Bradley [2]</b> 3:7, 3:8 <b>breaking -</b> 37:6 <b>brief - 16:14</b> <b>briefing - 6:6</b> <b>briefly -</b> 26:18 <b>Briggs [2]</b> 3:13, 14:5 <b>Brown [25]</b> 3:4, 3:5, 3:18, 4:14, 4:17, 6:14, 6:19, 7:11, 10:15, 12:18, 13:22, 13:23, 14:17, 17:14, 17:22, 23:1, 34:12, 36:1, 37:7, 40:1,</p>	<p>40:7, 40:11, 40:15, 41:9, 41:13 <b>Bureau - 4:17</b></p> <hr/> <p style="text-align: center;"><b>C</b></p> <hr/> <p><b>calling [2]</b> 12:8, 13:5 <b>Cameron [4]</b> 16:3, 16:10, 41:5, 41:10 <b>can't [2]</b> 26:20, 29:2 <b>cancelled -</b> 12:20 <b>capable -</b> 21:15 <b>carried [2]</b> 4:12, 11:15 <b>carries [3]</b> 12:13, 15:1, 15:21 <b>case [17] 6:7,</b> 7:12, 11:20, 14:11, 19:10, 20:23, 28:23, 38:25, 39:4, 39:6, 39:9, 39:13, 39:14, 40:6, 40:9, 40:21, 41:7 <b>cases [5]</b> 6:10, 20:25, 41:4, 41:6, 41:9 <b>Catherine [2]</b> 3:10, 14:1 <b>caused -</b> 18:15 <b>caution -</b> 26:20 <b>caveat [2]</b> 19:4, 19:12 <b>CDV [2]</b> 11:20, 14:11 <b>certainly [4]</b> 19:8, 21:21, 32:20, 35:9 <b>certify - 43:7</b> <b>Chad [2]</b> 3:10, 14:1 <b>Chair [139]</b> 2:4, 2:7, 2:8, 2:18, 2:25, 3:14, 3:19, 4:3, 4:5, 4:10, 4:12, 4:22, 5:11, 5:15, 5:18, 5:22, 5:25, 6:3, 6:5, 6:16,</p>	<p>6:21, 6:25, 7:4, 7:8, 7:13, 7:17, 7:21, 7:25, 9:3, 9:9, 9:10, 9:14, 9:19, 10:1, 10:3, 10:8, 10:19, 10:25, 11:5, 11:7, 11:10, 11:13, 11:15, 12:6, 12:8, 12:11, 12:13, 12:23, 13:2, 13:8, 13:9, 13:19, 14:6, 14:14, 14:18, 14:21, 14:24, 15:1, 15:13, 15:15, 15:19, 15:21, 16:11, 16:21, 17:18, 18:1, 18:2, 18:25, 19:16, 19:18, 22:21, 23:5, 23:6, 23:8, 23:17, 23:20, 24:3, 24:8, 25:11, 25:16, 25:19, 26:2, 26:10, 26:14, 26:18, 28:13, 28:15, 29:6, 29:12, 30:14, 31:12, 31:17, 32:1, 32:13, 33:1, 33:2, 33:8, 33:14, 33:16, 33:24, 34:9, 34:14, 34:24, 34:25, 35:21, 35:25, 36:1, 36:4, 36:7, 36:23, 37:9, 37:15, 37:19, 37:23, 38:1, 38:4, 38:6, 38:15, 38:17,</p>	<p>38:19, 38:22, 38:24, 39:15, 39:18, 39:22, 39:24, 40:2, 40:5, 40:8, 40:16, 41:1, 41:11, 41:12, 41:22, 41:25, 42:5, 42:7, 42:9, 42:12 <b>Chairman [2]</b> 1:13, 5:7 <b>check - 41:21</b> <b>Chief - 4:17</b> <b>Chillcott -</b> 13:25 <b>chime - 10:9</b> <b>CHS - 41:19</b> <b>circling -</b> 29:14 <b>clarification</b> <b>[3] 9:20,</b> 10:4, 24:10 <b>Clark [2]</b> 43:4, 43:7 <b>classification -</b> 21:16 <b>Clean - 21:24</b> <b>clear [2]</b> 35:17, 37:7 <b>client - 27:8</b> <b>close - 12:14</b> <b>closed - 12:22</b> <b>coal [4] 8:2,</b> 11:18, 14:9, 19:22 <b>Code - 8:5</b> <b>colleagues [3]</b> 19:10, 28:3, 32:22 <b>collect [2]</b> 21:1, 30:5 <b>Colson [2]</b> 3:10, 14:1 <b>Colstrip -</b> 15:25 <b>comes [2]</b> 10:5, 25:10 <b>comfort -</b> 27:25 <b>comment [11]</b> 22:23, 26:15, 27:2, 29:8, 29:9, 35:1, 40:17, 40:18, 40:23, 40:24, 41:3 <b>comments -</b> 28:17 <b>commission -</b></p>
--	---	---	---	---	--

43:21 Commissioners [3] 8:3, 11:19, 14:10 commit - 22:16 committee - 12:3 communicate [2] 19:8, 28:3 compliance - 29:2 complicates [2] 26:24, 35:14 comply [2] 24:25, 28:11 comprehensive - 23:4 computer-aided - 43:11 concept - 21:21 conceptually [2] 26:6, 29:14 concerned - 30:10 concerns [2] 26:19, 35:11 concluded [3] 8:22, 9:21, 42:14 condition [5] 18:13, 18:15, 18:18, 18:22, 22:10 conditions [2] 27:21, 28:11 conducting - 27:11 conductivity - 18:11 conflict [3] 5:5, 5:8, 32:22 conflicts - 19:11 confusion [2] 12:19, 36:15 consider - 11:24 considered [2] 8:10, 8:12 considering [2] 8:19, 9:23 consistent - 19:14 constructed [3] 27:17, 27:18, 27:24 contain - 43:12 contested [4] 6:7, 38:25,	40:6, 40:21 continue - 14:15 control - 19:25 correct [3] 10:2, 10:21, 34:21 correspondence - 8:17 couldn't - 10:7 coulee [8] 20:12, 20:12, 20:13, 20:14, 21:9, 21:25, 24:18, 25:23 coulees - 20:19 Counsel [5] 4:15, 4:21, 6:20, 39:25, 40:12 County [8] 8:3, 8:4, 11:19, 11:20, 14:10, 14:11, 43:4, 43:6 course [3] 19:22, 21:10, 27:7 court [4] 1:23, 9:12, 43:5, 43:20 cover - 36:22 covers - 32:3 create - 36:14 Crutcher [5] 1:22, 3:7, 13:25, 43:5, 43:19 currently [2] 4:15, 41:10 curse - 24:3 cursed - 23:25	33:21, 39:4 decision [4] 8:10, 8:11, 16:5, 29:16 defer [3] 23:2, 25:12, 26:22 define [2] 30:6, 30:12 defining - 36:19 Definition - 21:12 Definitions - 21:12 definitive [4] 24:13, 30:11, 32:6, 32:9 delay - 13:3 Denial - 38:25 Department [2] 11:17, 14:8 dependent - 36:25 depending - 30:1 Deputy [2] 3:1, 13:24 DEQ [10] 11:21, 17:23, 18:3, 18:8, 22:7, 22:8, 28:4, 31:20, 41:4, 41:7 DEQ's - 19:13 describe - 24:15 describing - 22:5 designated - 21:16 detail [3] 19:23, 24:15, 28:25 details - 20:17 determination - 16:4 determine [3] 18:18, 24:16, 38:12 determining - 24:16 develop - 26:1 developed [4] 25:9, 25:14, 30:2, 32:7 developing - 31:10 development [2] 28:20, 36:21 developments	- 32:23 difficult - 30:8 digress - 30:4 direct - 38:7 directive - 35:4 Director [2] 3:1, 13:24 discharge [8] 20:4, 20:4, 20:5, 22:13, 22:17, 24:18, 25:22, 29:3 discharges [4] 24:23, 25:4, 29:25, 36:21 discuss [5] 12:3, 17:21, 31:13, 31:15, 34:6 discussed - 34:18 discussion [15] 4:3, 5:23, 9:9, 11:8, 12:3, 12:6, 14:19, 15:13, 32:1, 37:23, 38:17, 39:16, 39:19, 42:5, 42:7 disturbed - 19:25 doable - 22:16 documents - 33:19 double - 41:20 downstream [4] 22:4, 22:15, 24:19, 29:23 draft [5] 8:10, 8:12, 37:8, 37:14, 38:7 drainage [2] 29:21, 35:14 drainages [2] 21:19, 30:7 dry [6] 20:19, 21:9, 21:19, 21:25, 24:18, 25:23 dug - 20:9	easy - 30:7 EC - 22:11 effluent - 22:11 either [4] 5:4, 5:11, 5:11, 35:4 electrical - 18:11 Elena [3] 3:11, 12:21, 14:2 enforced - 21:9 Environmental [6] 1:1, 11:17, 11:18, 11:23, 14:8, 14:9 EPA [7] 8:12, 8:15, 8:18, 8:19, 8:20, 10:10, 10:17 EPA's - 11:2 ephemeral [2] 29:21, 30:7 equal - 16:23 essentially [3] 17:9, 18:9, 25:12 establish [3] 18:12, 27:20, 34:19 established - 20:3 establishing - 20:22 event [3] 20:24, 21:20, 25:5 everybody [2] 13:3, 42:13 Examiner [10] 7:11, 15:8, 15:11, 15:16, 16:2, 16:10, 23:22, 39:5, 39:8, 40:9 exceed - 18:10 except [2] 20:23, 21:14 excuse - 36:20 executive - 12:3 existing [3] 22:14, 25:1, 27:5 expansion - 18:24 expectation - 35:18 expires -	43:21 explicit - 10:17 explicitly [2] 37:10, 37:11 expression - 21:17 extension - 27:5 extent [2] 27:9, 28:1
<b>F</b>					
familiar [3] 19:8, 20:15, 20:17 favor [10] 4:6, 6:1, 11:11, 12:9, 14:22, 15:15, 38:2, 38:19, 39:19, 42:9 feasible - 18:19 February [5] 1:6, 1:10, 8:16, 13:4, 16:2 feel [2] 10:11, 32:8 Fehr [3] 3:2, 3:3, 13:25 filed [2] 11:21, 15:6 final [8] 8:13, 8:15, 11:22, 16:4, 16:5, 29:15, 36:17 findings - 23:15 fine [2] 3:18, 5:10 FirstMark - 39:1 five [3] 8:11, 8:14, 41:6 flow - 21:17 followup - 28:2 foregoing - 43:12 Fork [2] 20:12, 20:13 forth [4] 30:3, 31:23, 37:10, 37:11 forward [8] 26:21, 26:23, 27:15, 30:23, 30:25, 31:7, 33:17, 38:6					

<p><b>Fossil [2]</b> 20:12, 20:13 <b>frame - 39:10</b> <b>frustrates [2]</b> 26:25, 35:15 <b>future - 28:10</b></p> <hr/> <p style="text-align: center;"><b>G</b></p> <hr/> <p><b>Garden -</b> 41:17 <b>gathering -</b> 18:17 <b>general [2]</b> 40:16, 40:23 <b>generally [4]</b> 18:7, 19:13, 20:8, 20:16 <b>gets - 10:20</b> <b>given - 32:10</b> <b>gotten - 12:19</b> <b>granted - 16:3</b> <b>ground [6]</b> 19:21, 20:9, 20:17, 21:2, 21:14, 28:8 <b>guess [9]</b> 16:8, 16:24, 17:3, 23:23, 24:14, 32:3, 32:8, 32:13, 33:17</p> <hr/> <p style="text-align: center;"><b>H</b></p> <hr/> <p><b>Hagen [2]</b> 3:11, 14:2 <b>happy [2]</b> 28:2, 37:8 <b>Harry - 41:17</b> <b>Hart - 18:5</b> <b>having [2]</b> 24:1, 40:23 <b>he's - 36:9</b> <b>hear [3]</b> 16:19, 17:23, 39:4 <b>hearing [21]</b> 6:25, 7:4, 7:8, 7:11, 11:10, 14:21, 15:3, 15:8, 15:11, 15:16, 15:23, 16:2, 16:10, 23:22, 35:19, 38:1, 39:5, 39:8, 39:18, 40:9, 41:1 <b>heavily -</b> 19:23 <b>heavy - 25:5</b> <b>helicopter -</b></p>	<p>21:3 <b>helpful -</b> 17:10 <b>helps - 37:12</b> <b>hereby - 43:7</b> <b>herein - 43:9</b> <b>hereunto -</b> 43:15 <b>hold [2] 9:11,</b> 31:1 <b>hole - 20:9</b> <b>Holland - 18:5</b></p> <hr/> <p style="text-align: center;"><b>I</b></p> <hr/> <p><b>idea [3]</b> 26:22, 30:18, 33:15 <b>identify [3]</b> 2:20, 3:15, 13:20 <b>implied -</b> 28:10 <b>incised - 20:9</b> <b>incorporated</b> <b>[2] 18:23,</b> 22:12 <b>indefinitely</b> <b>[3] 9:12,</b> 9:16, 9:17 <b>indicating [3]</b> 3:3, 8:19, 13:23 <b>Individual -</b> 40:21 <b>indulgence -</b> 19:19 <b>information</b> <b>[2] 23:12,</b> 36:12 <b>informed -</b> 34:8 <b>informing -</b> 27:22 <b>instead [3]</b> 6:8, 25:7, 25:8 <b>interests -</b> 33:17 <b>interim -</b> 32:25 <b>intermittent -</b> 24:20 <b>intermittently</b> <b>- 4:20</b> <b>introduce -</b> 4:14 <b>involved -</b> 30:5 <b>isn't - 27:18</b> <b>issuance [2]</b> 15:4, 15:24 <b>issue [5]</b> 9:24, 26:25, 28:4, 28:6, 29:11</p>	<p><b>item [17]</b> 3:21, 4:13, 4:24, 6:9, 6:9, 6:15, 7:1, 8:1, 8:1, 9:6, 9:25, 11:16, 14:7, 15:2, 15:22, 22:7, 40:17 <b>items [9]</b> 3:20, 4:25, 6:6, 6:10, 6:17, 6:22, 7:14, 7:18, 8:1 <b>itself - 39:5</b></p> <hr/> <p style="text-align: center;"><b>J</b></p> <hr/> <p><b>James [2]</b> 3:2, 13:25 <b>January -</b> 11:21 <b>Jessica [2]</b> 3:11, 14:2 <b>Johnson -</b> 14:4 <b>joint [2] 15:7,</b> 16:3 <b>jointly [2]</b> 30:17, 30:24 <b>JOSEPH - 1:15</b> <b>Judicial -</b> 11:22 <b>Julia [2] 1:15,</b> 10:21 <b>June - 33:12</b> <b>jurisdiction</b> <b>[4] 28:23,</b> 29:11, 30:18, 40:19 <b>jurisdictional</b> <b>- 35:12</b></p> <hr/> <p style="text-align: center;"><b>K</b></p> <hr/> <p><b>Kathleen -</b> 8:17 <b>Katie [2]</b> 3:11, 14:2 <b>keeping - 34:7</b> <b>key - 24:14</b> <b>kinds - 30:5</b> <b>King [2] 3:12,</b> 14:4 <b>Kirsten [3]</b> 3:6, 14:3, 26:12 <b>knowledge [2]</b> 24:1, 27:17 <b>Koocanusa -</b> 8:8 <b>Kurt [2] 3:9,</b> 14:3</p>	<p style="text-align: center;"><b>L</b></p> <hr/> <p><b>lack - 28:6</b> <b>Lake - 8:7</b> <b>later - 5:4</b> <b>Laurie [5]</b> 1:22, 3:7, 13:25, 43:5, 43:19 <b>lauriecrutcher@g</b> <b>- 1:24</b> <b>law - 31:9</b> <b>least [3]</b> 4:20, 17:23, 24:20 <b>Lee [3] 20:12,</b> 20:12, 20:13 <b>legal [5]</b> 6:19, 8:21, 10:5, 12:3, 14:17 <b>less - 21:21</b> <b>letter [8]</b> 8:12, 8:14, 8:23, 8:24, 9:1, 10:14, 10:17, 11:2 <b>letting -</b> 39:10 <b>Lewis [2]</b> 43:4, 43:6 <b>limitations [4]</b> 22:11, 27:7, 27:14, 27:23 <b>Limited [3]</b> 8:2, 11:18, 14:9 <b>Lincoln [3]</b> 8:3, 11:19, 14:10 <b>link - 12:21</b> <b>links - 12:20</b> <b>listed [3]</b> 6:10, 6:11, 6:22 <b>literally -</b> 31:7 <b>litigation [3]</b> 11:25, 12:4, 14:16 <b>LLC - 15:24</b> <b>located [4]</b> 20:10, 20:11, 20:16, 27:13 <b>location -</b> 35:11 <b>locations -</b> 27:2 <b>looking [2]</b> 26:16, 36:10 <b>looks - 28:9</b> <b>Loryn - 14:3</b></p>	<p style="text-align: center;"><b>M</b></p> <hr/> <p><b>Madam [18]</b> 5:7, 5:11, 9:10, 9:19, 10:3, 14:14, 16:11, 18:2, 19:18, 23:6, 23:20, 26:18, 33:8, 33:16, 34:25, 35:25, 36:1, 36:7 <b>major - 20:24</b> <b>Makarowski</b> <b>[2] 3:12, 14:3</b> <b>makes - 29:16</b> <b>management -</b> 36:21 <b>March [2]</b> 43:17, 43:22 <b>material -</b> 16:7 <b>materials [2]</b> 9:4, 39:2 <b>matter [19]</b> 7:5, 7:9, 7:22, 8:2, 9:15, 9:18, 9:20, 10:10, 11:16, 15:2, 15:9, 15:11, 15:22, 18:6, 19:6, 21:10, 30:22, 38:25, 40:18 <b>matters [2]</b> 19:6, 40:22 <b>maybe [8]</b> 23:12, 28:24, 29:3, 29:5, 32:11, 35:21, 36:11, 37:2 <b>means [2]</b> 10:6, 21:13 <b>meeting [39]</b> 1:5, 2:5, 3:23, 4:7, 5:1, 5:1, 5:3, 5:5, 5:19, 8:9, 9:3, 9:22, 9:24, 12:2, 12:14, 12:16, 12:17, 12:24, 13:4, 23:4, 31:23, 33:5, 33:12, 33:12, 33:20, 34:5, 34:5, 34:17, 34:18,</p>	<p>34:19, 35:5, 36:18, 38:11, 38:11, 40:20, 41:2, 41:5, 42:1, 42:13 <b>meetings -</b> 32:21 <b>Member [75]</b> 2:9, 2:11, 2:12, 2:14, 2:15, 2:16, 3:25, 4:2, 5:7, 5:10, 5:12, 5:17, 5:21, 8:25, 9:8, 9:10, 9:19, 10:3, 10:22, 11:3, 11:6, 12:5, 13:10, 13:12, 13:13, 13:15, 13:16, 13:17, 14:14, 15:12, 16:11, 17:8, 19:18, 22:24, 23:6, 23:9, 23:11, 23:20, 24:4, 24:11, 25:6, 26:6, 26:16, 27:1, 28:10, 29:13, 30:14, 30:21, 31:5, 31:14, 31:24, 32:2, 33:8, 33:16, 34:1, 34:21, 35:2, 35:10, 35:22, 35:23, 35:25, 36:7, 36:8, 36:13, 37:10, 37:16, 37:17, 37:22, 38:9, 38:14, 38:16, 39:12, 42:2, 42:3, 42:4 <b>members [9]</b> 1:14, 2:6, 17:11, 18:3, 19:17, 28:16, 32:16, 33:2, 40:17 <b>messy - 34:20</b> <b>mind [2]</b></p>
---	--	---	---	---	--

29:17, 32:4 <b>mine</b> [2] 27:4, 39:1 <b>mining</b> [6] 15:24, 19:22, 20:6, 27:5, 27:16, 30:2 <b>minute</b> [3] 12:16, 19:20, 30:4 <b>minutes</b> [5] 3:21, 3:22, 3:24, 4:1, 4:6 <b>MOISEY-SCHERER</b> [19] 2:7, 2:9, 2:12, 2:15, 2:17, 2:23, 3:1, 3:4, 3:6, 3:9, 13:7, 13:10, 13:13, 13:16, 13:18, 13:22, 13:24, 26:12, 41:3 <b>monitoring</b> - 27:10 <b>Montana</b> [13] 1:2, 8:4, 8:5, 11:16, 11:17, 14:7, 14:8, 15:25, 21:20, 27:8, 31:20, 43:2, 43:7 <b>morning</b> - 3:8 <b>Moser</b> [2] 3:9, 14:3 <b>motion</b> [51] 3:23, 4:12, 5:18, 9:5, 9:7, 10:7, 10:16, 11:1, 11:15, 12:1, 12:13, 14:12, 14:15, 15:1, 15:10, 15:10, 15:16, 15:21, 16:3, 16:8, 16:12, 23:2, 31:11, 31:15, 31:18, 31:25, 33:25, 34:10, 34:14, 34:23, 35:17, 35:22, 36:2,	36:5, 36:6, 36:11, 36:16, 37:1, 37:2, 37:16, 37:20, 37:24, 38:14, 38:20, 39:10, 39:12, 40:4, 40:8, 41:2, 42:1, 42:12 <b>motions</b> [2] 36:25, 37:6 <b>move</b> [9] 3:25, 5:3, 5:9, 5:19, 12:2, 27:15, 30:22, 31:6, 37:13 <b>moved</b> - 42:2 <b>moving</b> [8] 6:6, 7:25, 20:1, 26:23, 30:25, 33:17, 38:6, 38:24 <b>MPDES</b> [4] 15:4, 15:24, 20:5, 20:7 <b>MT0032042</b> - 15:25 <b>MTX000164</b> - 15:5 <b>muddy</b> - 36:23 <b>myself</b> - 35:24 <hr/> <b>N</b> <b>named</b> - 43:9 <b>names</b> [5] 2:22, 2:24, 3:17, 3:18, 13:21 <b>natural</b> [2] 18:14, 27:21 <b>nature</b> [3] 31:9, 32:11, 35:13 <b>necessary</b> - 9:1 <b>needing</b> [2] 26:3, 26:4 <b>needs</b> [2] 11:24, 18:12 <b>negotiations</b> - 19:15 <b>Nicholas</b> - 14:5 <b>non-human</b> - 18:14 <b>nonanthropogenic</b>	21:22, 22:10 <b>none</b> [7] 6:25, 7:4, 7:8, 11:10, 14:21, 38:2, 41:1 <b>normal</b> - 21:9 <b>normally</b> - 29:22 <b>notarial</b> - 43:16 <b>Notary</b> [3] 1:23, 43:6, 43:20 <b>note</b> [3] 19:12, 27:3, 27:15 <b>nothing</b> - 6:19 <b>Notice</b> - 15:2 <b>notified</b> - 8:21 <b>November</b> - 15:7 <b>numbers</b> - 41:7 <hr/> <b>O</b> <b>objection</b> - 32:18 <b>obtain</b> [2] 30:11, 35:15 <b>obvious</b> [2] 20:1, 35:18 <b>OC</b> - 39:2 <b>occurs</b> - 24:19 <b>offer</b> [4] 27:25, 28:21, 29:4, 34:2 <b>ones</b> [3] 41:14, 41:15, 41:16 <b>ongoing</b> - 8:21 <b>open</b> [3] 17:2, 17:6, 19:2 <b>Opencut</b> - 39:1 <b>operation</b> - 36:20 <b>opinion</b> [2] 9:22, 24:7 <b>opportunity</b> - 23:3 <b>Opposed</b> [9] 4:10, 6:3, 11:13, 12:11, 14:24, 15:19, 38:4, 38:22, 39:22 <b>option</b> - 31:4 <b>original</b> [2] 16:25, 17:20 <b>order</b> [9] 2:5, 11:23, 17:9,	30:25, 35:1, 37:8, 37:14, 38:8, 38:10 <b>Oreo</b> - 6:14 <b>Oscar's</b> - 39:2 <b>others</b> - 9:2 <b>otherwise</b> [2] 35:14, 40:19 <b>overview</b> - 19:2 <hr/> <b>P</b> <b>Pacific</b> - 15:3 <b>packet</b> [3] 16:7, 22:7, 33:4 <b>pages</b> - 43:12 <b>participate</b> [2] 19:7, 32:21 <b>participation</b> - 11:24 <b>particular</b> [2] 26:20, 35:14 <b>parties</b> [26] 15:6, 16:3, 16:13, 16:19, 16:22, 16:22, 17:3, 17:7, 17:10, 17:13, 17:25, 18:16, 23:3, 23:9, 23:13, 32:4, 33:10, 33:19, 34:3, 34:16, 35:15, 36:18, 37:3, 38:8, 38:9, 38:12 <b>party</b> - 25:4 <b>passed</b> [3] 40:4, 40:10, 42:12 <b>pending</b> - 16:4 <b>permit</b> [9] 15:4, 15:24, 18:24, 20:6, 20:16, 22:12, 27:4, 29:2, 39:1 <b>permittee</b> - 29:24 <b>pertaining</b> - 8:7 <b>petition</b> [2] 11:21, 11:25 <b>Petitions</b> - 8:2 <b>plan</b> [4] 30:2, 30:11, 33:22, 34:6 <b>please</b> [5] 2:6, 2:20,	12:20, 31:14, 41:12 <b>point</b> [26] 8:24, 9:4, 17:2, 20:4, 20:4, 20:5, 20:18, 24:17, 24:17, 24:17, 24:18, 25:21, 25:22, 25:23, 25:25, 27:13, 27:16, 27:18, 27:19, 27:22, 28:7, 28:10, 29:5, 29:23, 32:4, 33:21, 34:6 <b>points</b> [2] 20:25, 25:1 <b>pond</b> [2] 20:3, 27:18 <b>pondering</b> - 31:11 <b>ponds</b> [3] 19:24, 20:8, 20:9 <b>pose</b> - 30:3 <b>posing</b> - 30:21 <b>possibility</b> - 21:5 <b>possible</b> [2] 16:20, 35:3 <b>possibly</b> - 5:9 <b>potential</b> - 31:4 <b>practical</b> [7] 21:7, 25:3, 27:6, 27:14, 29:18, 32:12, 35:12 <b>pre-existing</b> - 30:12 <b>precise</b> - 34:22 <b>prefer</b> [2] 5:13, 33:7 <b>preference</b> - 33:5 <b>prepare</b> - 23:3 <b>prepared</b> [3] 1:22, 17:21, 32:23 <b>present</b> [3] 3:5, 16:23, 34:16 <b>presentation</b> - 19:14 <b>presented</b> [3] 16:9, 34:16, 37:21 <b>presenting</b> -	17:23 <b>prevent</b> [2] 24:23, 25:4 <b>previous</b> [2] 40:4, 40:5 <b>prior</b> - 36:21 <b>probably</b> [3] 17:10, 17:22, 34:7 <b>problem</b> [2] 27:11, 30:3 <b>proceed</b> [4] 22:24, 23:16, 31:15, 34:23 <b>proceeding</b> - 16:12 <b>proceedings</b> [7] 1:8, 2:1, 40:21, 42:14, 43:8, 43:10, 43:13 <b>process</b> [11] 10:5, 18:17, 18:20, 20:7, 20:7, 26:25, 28:19, 29:1, 30:20, 31:3, 31:21 <b>processes</b> - 8:22 <b>program</b> - 32:7 <b>progress</b> - 34:8 <b>project</b> [3] 31:1, 37:4, 38:13 <b>proper</b> - 22:4 <b>proposal</b> [2] 9:14, 30:16 <b>propose</b> [2] 9:5, 11:1 <b>proposed</b> [7] 16:5, 16:6, 16:9, 24:25, 29:15, 31:18, 37:20 <b>proposing</b> - 25:12 <b>protect</b> - 22:14 <b>provide</b> [4] 19:2, 31:20, 33:3, 37:2 <b>providing</b> [2] 32:19, 38:13 <b>public</b> [12] 1:23, 12:14, 12:17, 12:24, 40:17, 40:18, 40:18, 40:22, 40:22,
---	--	--	---	--	---



40:24, 43:6, 43:20 <b>purpose</b> [2] 20:1, 27:20 <b>purposes</b> [4] 27:6, 27:10, 27:22, 35:18 <b>pursuant</b> - 8:5	18:22, 20:19, 20:22, 20:23, 22:5, 22:10, 22:13, 22:14, 36:19 <b>recess</b> [4] 12:2, 12:15, 12:16, 12:25 <b>recommend</b> - 40:3 <b>reconvene</b> - 12:16 <b>reconvened</b> - 13:1 <b>record</b> [7] 2:20, 3:15, 13:20, 35:8, 37:8, 40:4, 43:13 <b>reference</b> - 26:16 <b>referring</b> - 41:15 <b>Refining</b> - 6:14 <b>regard</b> [2] 9:24, 12:4 <b>regarding</b> [6] 7:18, 15:4, 15:24, 16:18, 24:10, 27:2 <b>Region</b> - 8:18 <b>Regional</b> - 8:18 <b>regularly</b> [2] 32:20, 32:21 <b>regulated</b> [2] 19:23, 25:4 <b>regulating</b> - 21:25 <b>regulations</b> - 22:18 <b>related</b> - 27:3 <b>relatively</b> - 28:5 <b>remain</b> - 32:3 <b>report</b> [4] 15:7, 29:5, 32:5, 34:3 <b>reported</b> - 43:10 <b>Reporter</b> [3] 1:23, 43:5, 43:20 <b>reporting</b> [2] 32:10, 33:23 <b>represent</b> [2] 18:5, 19:5 <b>representatives</b> - 16:13 <b>represented</b> - 14:16 <b>represents</b> -	19:21 <b>request</b> [13] 8:20, 15:3, 15:23, 17:8, 23:13, 23:14, 24:12, 32:12, 33:18, 33:19, 34:2, 36:5, 36:18 <b>requesting</b> - 28:25 <b>required</b> - 39:3 <b>requirement</b> - 31:2 <b>requirements</b> - 19:24 <b>resolved</b> [2] 24:5, 24:6 <b>respect</b> [2] 35:10, 40:11 <b>respond</b> [4] 9:2, 14:16, 26:18, 38:10 <b>responding</b> - 35:6 <b>response</b> [42] 4:4, 4:9, 4:11, 5:24, 6:2, 6:4, 6:24, 7:3, 7:7, 7:16, 7:20, 7:24, 10:10, 10:12, 10:17, 11:9, 11:12, 11:14, 12:7, 12:10, 12:12, 14:20, 14:23, 14:25, 15:14, 15:18, 15:20, 37:25, 38:3, 38:5, 38:18, 38:21, 38:23, 39:17, 39:21, 39:23, 40:14, 40:25, 41:24, 42:6, 42:8, 42:11 <b>responses</b> - 23:4 <b>rest</b> - 30:15 <b>restate</b> [2] 34:10, 34:12 <b>result</b> - 25:18 <b>resume</b> -	12:24 <b>retain</b> [2] 29:11, 30:18 <b>retains</b> - 28:22 <b>retention</b> - 27:18 <b>review</b> [10] 1:1, 3:21, 8:4, 8:6, 11:18, 11:22, 11:23, 14:9, 17:11, 32:6 <b>revise</b> - 33:25 <b>revised</b> - 25:8 <b>revisit</b> - 10:7 <b>Richards</b> [2] 20:14, 41:17 <b>Rob</b> - 41:5 <b>role</b> - 4:19 <b>roll</b> [2] 2:5, 13:5 <b>Rosebud</b> [3] 15:23, 41:18, 41:19 <b>RPR</b> [3] 1:22, 43:5, 43:19 <b>rule</b> [3] 8:7, 31:10, 36:22 <b>rulemaking</b> - 18:19 <b>rules</b> [2] 25:1, 29:25 <b>ruling</b> [2] 17:4, 23:2 <b>runoff</b> [2] 19:25, 21:20 <b>rural</b> - 27:8	39:20, 42:10 <b>says</b> - 22:7 <b>schedule</b> [8] 32:6, 32:15, 33:6, 33:22, 34:6, 34:20, 37:4, 38:12 <b>scheduled</b> [2] 5:2, 32:20 <b>seal</b> - 43:16 <b>section</b> [2] 8:6, 24:24 <b>sediment</b> [3] 19:24, 20:1, 20:3 <b>seems</b> - 23:12 <b>seldom</b> - 30:9 <b>selenium</b> - 8:7 <b>sending</b> - 8:14 <b>sense</b> - 29:16 <b>sent</b> - 12:21 <b>separate</b> [2] 10:13, 36:24 <b>September</b> - 4:19 <b>Services</b> - 14:17 <b>session</b> [2] 12:22, 13:4 <b>sets</b> [2] 37:10, 37:11 <b>shorthand</b> - 43:10 <b>sign</b> [2] 37:9, 37:14 <b>signify</b> [6] 4:7, 12:9, 15:17, 38:20, 39:20, 42:10 <b>Simpson</b> [46] 1:14, 2:13, 2:14, 3:25, 5:7, 9:8, 9:19, 11:3, 11:6, 12:5, 13:14, 13:15, 13:15, 14:14, 15:12, 16:11, 17:8, 19:18, 23:11, 23:20, 24:4, 24:11, 25:6, 26:6, 26:16, 28:10, 29:13, 30:15, 30:21, 31:5, 31:14, 32:2, 33:16, 34:1, 34:21, 35:3, 35:10, 35:24, 36:8, 36:13,	37:11, 37:16, 37:17, 38:9, 38:14, 38:16, 42:4 <b>Simpson's</b> [3] 22:25, 27:1, 27:1 <b>site</b> [5] 18:20, 20:2, 25:9, 25:13, 39:2 <b>situation</b> [5] 17:19, 17:20, 19:21, 21:2, 29:17 <b>Smith</b> [10] 1:15, 2:15, 2:16, 4:2, 5:12, 5:17, 13:16, 13:17, 39:12, 42:3 <b>snowmelt</b> [2] 20:24, 25:5 <b>so-called</b> - 20:18 <b>someone</b> - 17:16 <b>Somewhere</b> - 22:3 <b>Sorry</b> [2] 36:13, 36:14 <b>sort</b> [3] 21:5, 23:24, 29:5 <b>source</b> [3] 27:19, 27:23, 28:11 <b>specific</b> [7] 18:21, 25:9, 25:14, 34:4, 35:6, 35:19, 36:11 <b>specifically</b> - 31:21 <b>specifics</b> - 41:8 <b>specify</b> - 25:25 <b>spelled</b> - 41:6 <b>SS</b> - 43:3 <b>Stacy</b> [2] 1:13, 10:15 <b>standard</b> [10] 8:7, 18:11, 18:20, 18:21, 18:23, 25:14, 25:21, 28:12, 28:19, 29:19 <b>standards</b> [7] 21:8, 22:9, 22:18,
<hr/> <b>Q</b> <hr/> <b>quality</b> [20] 8:8, 11:17, 14:8, 15:5, 16:1, 18:10, 20:22, 21:8, 21:12, 21:13, 21:22, 22:1, 22:5, 22:9, 29:20, 29:21, 29:22, 30:6, 30:13, 30:13 <b>quarterly</b> - 33:6 <b>questioning</b> - 23:18 <b>quite</b> - 26:24 <b>quorum</b> [2] 2:17, 13:18	<hr/> <b>R</b> <hr/> <b>rainfall</b> [2] 20:24, 25:5 <b>raise</b> - 21:22 <b>raised</b> [6] 26:19, 31:8, 33:21, 34:4, 36:8, 38:8 <b>rambled</b> - 24:13 <b>raw</b> - 35:13 <b>Ray</b> [2] 3:12, 14:4 <b>reach</b> [2] 33:9, 33:13 <b>reaches</b> - 20:11 <b>readdress</b> - 10:6 <b>reading</b> [3] 9:20, 20:11, 23:25 <b>real</b> - 21:7 <b>really</b> - 20:20 <b>receive</b> - 30:19 <b>received</b> [3] 8:17, 37:17, 41:4 <b>receiving</b> [11] 18:10, 18:13,	<hr/> <b>S</b> <hr/> <b>Sam</b> [3] 3:12, 14:4, 18:4 <b>samples</b> [3] 21:1, 30:6, 30:12 <b>sampling</b> [3] 21:6, 28:19, 29:1 <b>Samuel</b> [4] 3:12, 14:4, 19:1, 32:17 <b>Sandy</b> [7] 2:5, 2:21, 3:20, 13:5, 13:21, 14:6, 41:15 <b>SAR</b> - 22:12 <b>satisfy</b> - 28:24 <b>saying</b> [7] 4:8, 12:9, 15:17, 23:11, 38:20,			

24:25, 25:9, 25:16, 26:4 <b>start</b> [4] 6:12, 13:5, 18:16, 30:25 <b>starting</b> [6] 3:20, 7:2, 7:9, 7:15, 7:18, 14:7 <b>state</b> [7] 1:2, 8:21, 21:13, 35:7, 40:3, 43:2, 43:7 <b>statement</b> - 34:22 <b>statements</b> - 22:25 <b>status</b> [4] 9:21, 15:7, 29:5, 30:19 <b>stay</b> [2] 16:3, 29:1 <b>stipulated</b> [2] 23:10, 23:13 <b>stipulation</b> [15] 17:24, 18:6, 18:8, 19:7, 23:15, 24:7, 26:7, 26:8, 26:21, 26:23, 28:18, 28:22, 29:14, 35:13, 36:17 <b>stipulations</b> [9] 16:6, 16:9, 16:18, 30:16, 30:24, 31:19, 34:15, 37:1, 37:21 <b>Stout</b> [2] 3:12, 14:4 <b>strategy</b> - 12:4 <b>stringency</b> - 8:6 <b>subject</b> - 20:6 <b>submit</b> - 29:5 <b>succinct</b> - 36:9 <b>Sugar</b> - 41:13 <b>suggest</b> [2] 10:15, 36:10 <b>suggestions</b> - 32:14 <b>summary</b> - 16:23 <b>supporting</b> - 21:15 <b>suppose</b> [2] 21:5, 24:12 <b>surface</b> [3]	19:22, 21:14, 21:17 <b>system</b> - 21:6 <hr/> <b>T</b> <hr/> <b>table</b> - 36:2 <b>taken</b> [3] 2:2, 12:25, 43:8 <b>takes</b> [2] 26:5, 30:1 <b>taking</b> - 4:19 <b>Teams</b> - 12:20 <b>technical</b> [2] 20:20, 25:18 <b>Teck</b> [3] 8:2, 11:18, 14:9 <b>terminology</b> - 26:9 <b>terms</b> [2] 28:22, 32:9 <b>testimony</b> - 2:2 <b>thank</b> [19] 2:18, 2:25, 4:22, 6:21, 7:13, 10:19, 10:23, 13:19, 14:6, 18:25, 19:16, 26:17, 28:13, 28:15, 29:6, 34:25, 35:21, 40:16, 41:22 <b>Thanks</b> [3] 3:19, 6:16, 42:13 <b>there's</b> [11] 10:4, 10:11, 22:3, 25:20, 27:16, 27:17, 28:1, 30:8, 32:18, 36:1, 41:19 <b>they're</b> - 20:10 <b>they've</b> [2] 23:18, 23:21 <b>thing</b> [2] 23:1, 26:19 <b>though</b> - 5:14 <b>thoughts</b> [2] 37:5, 39:11 <b>throughout</b> - 31:3 <b>to-wit</b> - 2:2 <b>today</b> [2] 19:11, 34:18 <b>Todd</b> [2] 3:13, 14:5 <b>top</b> - 7:23 <b>totality</b> [4] 39:6, 39:9,	39:13, 40:9 <b>transcribed</b> - 43:11 <b>TRANSCRIPT</b> - 1:8 <b>transcription</b> - 43:11 <b>transitioning</b> - 8:13 <b>tributaries</b> [2] 20:13, 20:14 <b>true</b> - 43:12 <hr/> <b>U</b> <hr/> <b>ultimately</b> [2] 27:22, 28:12 <b>uncertain</b> - 32:11 <b>unclear</b> [2] 22:24, 23:15 <b>underlying</b> - 26:24 <b>understand</b> [6] 16:16, 20:10, 21:21, 23:10, 28:5, 28:8 <b>understanding</b> - 35:9 <b>unique</b> - 28:6 <b>unless</b> [2] 21:3, 40:2 <b>unnamed</b> [2] 20:12, 20:13 <b>upcoming</b> - 33:5 <b>update</b> [6] 29:4, 32:15, 34:20, 38:12, 39:25, 40:12 <b>updates</b> [21] 6:7, 6:9, 6:12, 6:15, 6:17, 6:22, 7:1, 7:5, 7:9, 7:12, 7:14, 7:17, 7:22, 30:19, 31:2, 31:20, 32:19, 33:3, 33:11, 37:4, 40:1 <b>upper</b> - 20:11 <b>uses</b> [2] 21:16, 22:14 <b>using</b> - 43:11 <b>Utilities</b> - 15:4 <hr/> <b>V</b> <hr/> <b>Valley</b> - 41:17	<b>versus</b> [2] 11:17, 14:8 <b>VIA</b> - 1:8 <b>Vice</b> [121] 1:13, 2:4, 2:7, 2:8, 2:18, 2:25, 3:14, 3:19, 4:3, 4:5, 4:10, 4:12, 4:22, 5:15, 5:18, 5:22, 5:25, 6:3, 6:5, 6:16, 6:21, 6:25, 7:4, 7:8, 7:13, 7:17, 7:21, 7:25, 9:3, 9:9, 9:14, 10:1, 10:8, 10:19, 10:25, 11:5, 11:7, 11:10, 11:13, 11:15, 12:6, 12:8, 12:11, 12:13, 12:23, 13:2, 13:7, 13:9, 13:19, 14:6, 14:18, 14:21, 14:24, 15:1, 15:13, 15:15, 15:19, 15:21, 16:21, 17:18, 18:1, 18:25, 19:16, 22:21, 23:5, 23:8, 23:17, 24:3, 24:8, 25:11, 25:16, 25:19, 26:2, 26:10, 26:14, 28:13, 29:6, 29:12, 30:14, 31:12, 31:17, 32:1, 32:13, 33:1, 33:14, 33:24, 34:9, 34:14, 34:24, 35:21, 36:4, 36:23, 37:9, 37:15, 37:19, 37:23, 38:1, 38:4, 38:6, 38:15,	38:17, 38:19, 38:22, 38:24, 39:15, 39:18, 39:22, 39:24, 40:2, 40:5, 40:8, 40:16, 41:1, 41:11, 41:12, 41:22, 41:25, 42:5, 42:7, 42:9, 42:12 <b>vote</b> [8] 4:6, 5:25, 11:11, 12:8, 14:22, 31:16, 38:2, 39:19 <b>voted</b> [2] 8:10, 8:14 <hr/> <b>W</b> <hr/> <b>wanted</b> - 28:21 <b>warranted</b> - 18:19 <b>waters</b> [9] 20:19, 20:22, 21:13, 21:13, 21:14, 22:10, 22:13, 22:15, 36:20 <b>we'd</b> - 37:15 <b>we'll</b> [6] 11:24, 12:14, 12:15, 12:24, 19:2, 34:6 <b>we're</b> [6] 17:1, 17:4, 23:18, 25:20, 26:1, 35:6 <b>we've</b> - 26:7 <b>week</b> [4] 5:4, 5:4, 5:13, 5:15 <b>Western</b> - 41:13 <b>Westmoreland</b> [13] 15:23, 17:16, 18:6, 18:8, 19:5, 20:21, 22:8, 22:12, 24:23, 24:24, 29:1, 31:20, 32:17	<b>Westmoreland's</b> - 18:24 <b>wet</b> - 21:3 <b>whatever</b> [3] 28:12, 33:7, 33:12 <b>wheelhouse</b> - 16:17 <b>WHEREOF</b> - 43:15 <b>WHEREUPON</b> - 2:1 <b>whether</b> [3] 21:23, 35:13, 39:4 <b>Whitaker</b> - 14:5 <b>whole</b> - 28:7 <b>Wilkerson</b> [2] 3:11, 14:2 <b>Williams</b> [2] 3:11, 14:2 <b>withdraw</b> [3] 36:5, 37:16, 37:18 <b>withdrawn</b> - 36:3 <b>within</b> - 40:18 <b>WITNESS</b> - 43:15 <b>written</b> [2] 22:19, 35:4 <b>wrote</b> - 36:10 <hr/> <b>Y</b> <hr/> <b>Yemington</b> [21] 3:12, 14:4, 18:4, 19:4, 22:23, 25:6, 25:13, 25:17, 25:24, 26:10, 26:15, 26:17, 28:14, 29:7, 29:9, 30:23, 32:14, 32:16, 32:17, 34:24, 34:25 <b>Yemington's</b> - 28:17 <b>yourself</b> - 2:20 <hr/> <b>Z</b> <hr/> <b>zero</b> - 21:17 <b>Zoom</b> [2] 1:8, 12:21
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