

BEFORE THE BOARD OF ENVIRONMENTAL  
REVIEW OF THE STATE OF MONTANA

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IN THE MATTER OF: ) Cause No.  
APPEAL AND REQUEST FOR ) BER 2024-03 OC  
HEARING BY GATEWAY )  
CONSERVATION ALLIANCE )  
ISSUANCE OF OPENCUT MINING )  
PERMIT #3462 )

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TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT  
(VIA ZOOM)

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August 23, 2024

10:11 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,  
BOARD MEMBERS JON REITEN, JOSEPH SMITH,  
JULIA ALTEMUS, STACY AGUIRRE, AMANDA KNUTESON,  
and JENNIFER RANKOSKY

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1           WHEREUPON, the following proceedings were  
2 had:

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4           CHAIR SIMPSON: It's eleven minutes  
5 after. Let's bring the meeting back to order.  
6 Sandy, would you call the roll, please.

7           MS. MOISEY-SCHERER: Chair Simpson.

8           CHAIR SIMPSON: Here.

9           MS. MOISEY-SCHERER: Vice Chair Aguirre.

10          VICE CHAIR AGUIRRE: Here.

11          MS. MOISEY-SCHERER: Board Member

12 Altemus.

13          BOARD MEMBER ALTEMUS: Here.

14          MS. MOISEY-SCHERER: Board Member

15 Knuteson.

16          BOARD MEMBER KNUTESON: Here.

17          MS. MOISEY-SCHERER: Board Member

18 Rankosky.

19          BOARD MEMBER RANKOSKY: Here.

20          MS. MOISEY-SCHERER: Board Member

21 Reiten.

22   (No response)

23          CHAIR SIMPSON: Board Member Smith.

24          BOARD MEMBER SMITH: Here.

25          MS. MOISEY-SCHERER: We have a quorum,

1 sir.

2 CHAIR SIMPSON: Thank you. Let's  
3 proceed with Item (a) under action items, In the  
4 Matter of Notice of Appeal and Request for Hearing  
5 by Gateway Conservation Alliance regarding  
6 Issuance of Opencut Mining Permit No. 3462, Case  
7 No. BER 2024-03 0C.

8 And our agenda states that on May 15th,  
9 2024, GCA filed its preliminary hearing statement.  
10 Petitioners filed a motion to limit evidence on  
11 June 28th, 2024 with a brief in support. On July  
12 19th, 2024, DEQ filed an unopposed motion to  
13 extend response deadline to Petitioners' motion in  
14 limine. Chairman Simpson granted DEQ's motion for  
15 extension on July 23rd, 2024.

16 On August 2, 2024, DEQ filed its  
17 response in opposition to GCA's motion in limine,  
18 and TMC filed its opposition to Appellant's motion  
19 in limine to limit evidence. On August 8, 2024,  
20 GCA filed a motion for a stay and brief in  
21 support. On August 9th, 2024, GCA filed its reply  
22 brief in support of motion to limit evidence.

23 Chair Simpson issued an order setting  
24 oral argument on August 9th, 2024, setting oral  
25 argument for the August 23rd, 2024 Board meeting.

1 On August 13th, 2024, DEQ filed its response to  
2 motion for stay. The Board will hear oral  
3 argument from the parties on the pending motion to  
4 limit evidence.

5 And so before we start, if I could ask  
6 Terisa, please, to add anything appropriate for  
7 clarification of where this case stands and what  
8 we're about to do.

9 (Board Member Reiten present)

10 MS. OOMENS: Sure. So I think initially  
11 the first question that the Board has to consider  
12 is because the parties have all agreed to a stay  
13 in this case, which happened kind of after the  
14 briefing for motion in limine was in process,  
15 the Board can decide to stay the case, and push  
16 off the hearing on the motion in limine because  
17 all the parties have agreed to a stay.

18 However, as we previously discussed,  
19 this motion in limine is similar to the one that  
20 has come up in other cases, and will likely be  
21 coming back to the Board at some point. So the  
22 Board can make a decision now, and then stay the  
23 case, or you can stay the case and push off the  
24 motion because all the parties have agreed to the  
25 stay.

1           And then the second piece of this is  
2 kind of what I had discussed before. The parties  
3 had asked for a motion in limine in the Clearwater  
4 case, and then asked to certify my order to the  
5 Board, which was actually attached as an exhibit  
6 to the motion in limine in this case, and so I  
7 think the parties are really wanting the Board to  
8 weigh in on their motion in limine, and kind of  
9 what the Board thinks of the evidence that should  
10 and shouldn't be considered.

11           So I just kind of wanted to give you  
12 that background first.

13           CHAIR SIMPSON: Thank you, Terisa. I  
14 guess I would ask the Board, to start with, if  
15 there's any interest in staying this and putting  
16 off a discussion of the in limine motion. We have  
17 received the briefing on it, we've reviewed it in  
18 preparation for this meeting, and it's applicable  
19 to other parallel cases that are going on, so I  
20 certainly see some value in proceeding with the  
21 oral arguments. But before doing that, I'd be  
22 interested in whether there are any other thoughts  
23 from the Board.

24           VICE CHAIR AGUIRRE: Chairman Simpson,  
25 my thought going into this was to move forward.

1 That was my preference, was to move forward to<sup>7</sup>  
2 hear the oral argument, and try to move this  
3 decision forward, as it has connections to what  
4 may come and what's already on the plate.

5 CHAIR SIMPSON: Right. Well, I  
6 certainly agree with that, Stacy, and it's just  
7 consistent with what Terisa just put forward. But  
8 before proceeding, I wanted to see if there were  
9 any thoughts otherwise from the Board that we  
10 could discuss. I'm not asking for a motion at  
11 this point, but if there is significant opposition  
12 to moving forward, I think we ought to know about  
13 it now.

14 (No response)

15 CHAIR SIMPSON: Hearing nothing further,  
16 let's proceed.

17 BOARD MEMBER KNUTESON: Chairman  
18 Simpson, I had my hand raised. I'm sorry.

19 CHAIR SIMPSON: Oh, I'm sorry, Amanda.

20 BOARD MEMBER KNUTESON: It's okay. I'm  
21 not sure if the hand is very obvious.

22 So I don't have any strong opposition.  
23 I just wanted to know -- and this kind of goes to  
24 other discussion we had. This brief was filed on  
25 June 28th, and I just saw it on Friday, later in

1 the day last Friday.

2 And my process for reviewing briefs is  
3 that I like to read the briefs, but then I like to  
4 read all the authority that the briefs are relying  
5 upon, and that is a kind of a tall order with  
6 under, just at a week to prepare. So that was  
7 just going back to what I was saying before about  
8 would it be possible to receive -- especially  
9 something like this that was filed back in June,  
10 could that have been transmitted to us when it was  
11 filed, rather than Friday before our meeting.

12 CHAIR SIMPSON: I think it's certainly a  
13 valid concern, and it's something that has arisen  
14 before. And I think probably what we need to do  
15 is to -- I'd like to discuss this with Terisa,  
16 which is I guess beyond the scope of this meeting,  
17 but whether these briefs should be made available  
18 to the Board as soon as they're filed, or whether  
19 we ought to receive an advance package, say, a  
20 couple of weeks before in order to give us more  
21 time to review it. I can see confusion developing  
22 from receiving legal documents on a random, what  
23 would appear to be a random schedule. Terisa --

24 VICE CHAIR AGUIRRE: Would it be  
25 possible to kind of merge the two, Amanda's



1 feedback as well as mine, into some sort of  
2 hearing oral argument, and being able to then go  
3 back and have time with that before rendering a  
4 decision? I don't know, Amanda, if you want to --

5 BOARD MEMBER KNUTESON: That's what I  
6 was hoping. I don't know. I'm probably revealing  
7 my ignorance here. I don't know if that's  
8 procedurally acceptable. I would like to hear  
9 oral argument. I think we're all prepared. We  
10 read everything we were given. But I just was  
11 wondering if we have to come to a decision  
12 immediately after the oral argument at this  
13 meeting today, or could we hear the oral argument  
14 and then render a decision after the fact. That's  
15 a good way to phrase it. Thank you.

16 CHAIR SIMPSON: The answer to that is  
17 that we can make a decision today, or we can hold  
18 off until next meeting, depending on the will of  
19 the Board after we've gone through the oral  
20 arguments.

21 VICE CHAIR AGUIRRE: That would be, I  
22 think that would be a good path forward if the  
23 rest of the Board supports that.

24 CHAIR SIMPSON: Well, I think we'll just  
25 need to decide once we've heard the oral arguments

1 whether the Board is prepared to make a decision  
2 now, or whether you would like to consider it and  
3 go back and read the briefs, reread the briefs,  
4 before we make a final decision.

5 But this question certainly does have a  
6 bearing on other cases before us, and so it's  
7 important to get it resolved in the short term  
8 rather than the long term, because if the case is  
9 stayed, it could be a long time.

10 VICE CHAIR AGUIRRE: I have one other  
11 question, Chairman Simpson, before we proceed for  
12 consideration. Is there a -- Do we have the  
13 ability to have a special meeting prior to our  
14 next meeting to address this, if we should choose  
15 to hear the oral arguments, and determine that we  
16 need a little bit more time with it, but then hold  
17 a special meeting to address just this matter, so  
18 that it doesn't hold it up from moving forward?

19 CHAIR SIMPSON: Well, that's certainly  
20 an option. We can call a special meeting again by  
21 vote of the Board, if there's a need to do so. So  
22 I suggest we move forward, and then make that  
23 determination after we've heard the arguments.

24 I presume -- What we'll do is give each  
25 party -- I'd like to limit oral argument to 15

1 minutes if at all possible, with five minutes for  
2 rebuttal, just so hopefully we can complete this  
3 at or somewhere near the noon hour. I presume  
4 Gateway Conservation Alliance should lead off. Is  
5 there a representative here from the Petitioners?

6 MR. WILSON: Mr. Chairman, can you hear  
7 me?

8 CHAIR SIMPSON: I can.

9 MR. WILSON: I'm Kim Wilson. I'm one of  
10 the attorneys for Gateway. With me on the call is  
11 Graham Coppes of Ferguson and Coppes. And if it's  
12 okay, we will proceed -- We're going to split our  
13 argument up, and we were both planning on  
14 somewhere in the range of ten minutes, but we will  
15 cut that back to abide by your 15 total and five  
16 rebuttal, if that's okay with you.

17 CHAIR SIMPSON: Please proceed.

18 MR. WILSON: Thank you, Mr. Chairman.  
19 I'll speak generally in my portion about the  
20 motion to limit the scope of the hearing. Mr.  
21 Coppes will speak on the related issue of the  
22 finality of the permit.

23 So as you know and as you've discussed,  
24 we have filed a motion to limit testimony and  
25 evidence, essentially to limit the scope of the

1 hearing at the outset of this matter, because this  
2 issue is a threshold matter that's become patently  
3 clear to us in litigating these other cases in  
4 front of the Board that the DEQ intends to take  
5 advantage of the changes to the Opencut Act to  
6 buttress their decision here with after-the-fact  
7 documentation.

8 We think that approach is wrong, both in  
9 terms of the law itself, and in terms of contested  
10 case hearings, and that's why we're asking the  
11 Board to address this issue, and I think it sounds  
12 like the Board understands that you've got this  
13 issue on the plate on several other cases, and I  
14 do think it makes sense to make that decision, if  
15 not today, but before the stay is entered here.  
16 So we appreciate that, Mr. Chair.

17 DEQ and the Applicant see this process  
18 created by the Legislature, which is that the  
19 final mining permits must be appealed to the BER  
20 pursuant to the contested case provisions of MAPA,  
21 have an opportunity to buttress after the permit  
22 was issued. There were minimal efforts to  
23 document things during the application process.

24 And as I've said, you're seeing that in  
25 the Valley Garden case, you're seeing that in the

1 Clearwater case, you're seeing it in the Arlee  
2 case, and you will be seeing it in this one.

3 These efforts to document their  
4 decision, in particular on DEQ's part, are minimal  
5 because of the constraints imposed by the 2021  
6 Legislature. In essence, DEQ and TMC want to have  
7 it both ways. They want a final permit that  
8 allows mining to commence right away, but then  
9 they want to be able to create a record after the  
10 fact, and the finality of the permit is what Mr.  
11 Coppes will be talking to, speaking to.

12 So let me make a few points. First,  
13 what is at issue here in front of you and what  
14 drives this is what is relevant. This is an  
15 appeal of an opencut mining permit under  
16 82-4-427(1). Those appeals are defined. It says,  
17 "A person whose interests are or may be adversely  
18 affected by a final decision of the Department to  
19 approve or disapprove a permit application and  
20 accompanying material may file an appeal."

21 So that final decision in turn is based  
22 on certain evidence that was before the agency.  
23 And Section 82-4-422 says, "The Department has the  
24 powers, duties, and functions to issue permits,  
25 one, on the basis of the information set forth in

1 the application and an evaluation of the proposed  
2 opencut operation, the Department finds that the  
3 requirements of this part are met." And then  
4 82-4-432 in turn sets forth specific application  
5 requirements.

6 These provisions of the Opencut Act make  
7 crystal clear that the decision to issue a permit  
8 is based on the information that was in the hands  
9 of the decision maker, and that the appeal of that  
10 decision should be limited to the matters that  
11 were in front of the Hearing Officer.

12 As I said, under the appeal statute, it  
13 says, "An appeal may only be taken from a permit  
14 decision and its accompanying material." That  
15 accompanying material is necessarily  
16 pre-decisional. This is consistent with the case  
17 we've all cited and discussed at length in our  
18 briefing, MEIC versus Westmoreland.

19 There the Court basically agreed with  
20 the Board's approach. They said in Bull Mountain,  
21 "We agree with Bull Mountain's interpretation of  
22 the rule as requiring DEQ's permitting decision to  
23 be supportable before the Board, without reference  
24 to information that was not available to and  
25 relied upon by DEQ at the time of the permitting

1 decision."

2           And Westmoreland is consistent with the  
3 statute here, which is 432, which 432(10)(c)  
4 states, "The Department shall determine if  
5 information, the information submitted, meets the  
6 requirements of the part." It is also consistent  
7 with the regulations at ARM 17.24.212, which says,  
8 "Upon receipt of the application, the Department  
9 shall evaluate the application to determine if the  
10 requirements of the part have been met, have been  
11 satisfied."

12           Thus the only issue before the Board is  
13 whether GCA can establish that the information  
14 submitted in the application and evaluated by DEQ  
15 at the time before it made its decision was  
16 sufficient to meet the statutory requirements.  
17 Any post hoc evidence doesn't meet that  
18 requirement.

19           The second point I would make is that  
20 the MAPA contested case provisions do not prevent  
21 the Board from limiting the scope of its inquiry.  
22 The case is subject to MAPA. MAPA, of course,  
23 makes these cases subject to the rules of  
24 evidence. That means what is driving this is what  
25 is relevant.

1           Just because there's a contested case  
2 here doesn't mean that DEQ and the Applicant get a  
3 trial de novo, a several days trial to re-explain  
4 the decision that they made and documented with a  
5 one page decision two years before.

6           Third, cases discussing relevance of  
7 evidence and challenges to final agency actions  
8 that we discussed in our brief do determine the  
9 parameters of this Board's review. We discussed  
10 in detail at Pages 3 through 14 of our opening  
11 brief a series of Montana and Federal cases that  
12 evaluate the scope of evidence that's allowable  
13 when a party is challenging a final agency  
14 decision.

15           Now, DEQ agrees in their briefing that  
16 the permit under appeal here is a final agency  
17 decision -- I'll point you to their brief, Page 7  
18 Footnote 3 -- but they never nevertheless argue  
19 that these legal principles don't apply because  
20 this is not a judicial review, but rather  
21 administrative appeal.

22           Those arguments should not persuade the  
23 Board to ignore the rules of evidence which you  
24 are subject to, and admit a myriad of post hoc  
25 evidence.



1           The Federal cases that we cited in our  
2 brief, though all involving judicial review --  
3 which is the next step after your review -- they  
4 all turn, as this case does, on what is relevant  
5 to an evaluation of the agency's permitting  
6 decision.

7           And in the Kiely case cited in our  
8 opening brief, the Montana Supreme Court said,  
9 "Nor were the after-the-fact opinions of  
10 individual council members as to the reasons for  
11 denial relevant."

12           Now, we've all discussed the  
13 Westmoreland case at length in our brief. We  
14 showed how the language of the Opencut Act is  
15 similar to the language of the Coal Act, and as  
16 I've just discussed, how our regulations, or the  
17 regulations that we're operating under here, as  
18 well as the statutory provisions, limit the  
19 inquiry, or should limit the inquiry to what was  
20 submitted in the application.

21           Here the evidence is not contained in  
22 the TMC application or otherwise compiled by DEQ  
23 during the permit approval process, which is the  
24 statement in Westmoreland at Paragraph 50. It  
25 shouldn't be allowed in.

1           Finally, DEQ argues that GCA's motion to  
2 limit the scope is premature, but as noted  
3 throughout the briefing, this Board has enough  
4 similar -- as you guys have already discussed --  
5 you've got enough similar cases before you to know  
6 what is coming in this case; and you certainly  
7 have the power in advance of hearing this case  
8 directly to limit the scope of the hearing.

9           While both DEQ and TMC argue that we  
10 want to allow our expert, while completely  
11 excluding testimony from TMC, that argument  
12 misconstrues what we have argued in the brief.

13           However, Mr. Chairman, for the purposes  
14 of narrowing and simplifying the issues before the  
15 Board, and limiting the opportunity for DEQ and  
16 TMC to put in rebuttal evidence of new matters, if  
17 this motion is granted, GCA will withdraw our  
18 expert Dave Donohue as a witness, and we will  
19 solely rely on his comments that are submitted and  
20 are part of the administrative record.

21           With that, Mr. Chair, I'm going to turn  
22 it over to my co-Counsel Mr. Coppes. Thank you  
23 very much.

24           CHAIR SIMPSON: Thank you, Mr. Wilson.

25           MR. COPPES: Good morning. Mr.

1 Chairman, members of the Board, my name is Graham  
2 Coppes, and I'm here along with co-Counsel  
3 representing Gateway Conservation Alliance.

4 Finality of an agency action is a  
5 threshold issue that relates directly to the scope  
6 of relevant evidence in any administrative  
7 proceeding. So this ties in directly to what Mr.  
8 Wilson was just talking about.

9 While the Defendants attempt to paint  
10 this as a new issue, or rather as the Applicant  
11 does, it has been well established by the highest  
12 Courts in the land for decades. And finality  
13 matters for two reasons -- and I really want you  
14 guys to think about this -- first because it  
15 identifies at which point in an administrative  
16 process that an applicant can proceed to act on  
17 the entitlement that's granted in a given permit.  
18 So right, it confers rights to the applicant when  
19 there's a final decision.

20 But second, it identifies at which point  
21 in the administrative process that the record  
22 closes to new evidence essentially, and that just  
23 makes logical sense, as well as legal sense. Once  
24 we're giving you the keys to the car, our decision  
25 to do that, the information, the universe of

1 information that we considered is over because now  
2 you're taking off. So that is really the two  
3 reasons why this matters.

4 As early as 1979 in Montana, the Montana  
5 Supreme Court in Northern Plains Resource Council  
6 versus the Board of Natural Resources held that an  
7 agency decision is final when it imposes an  
8 obligation, denies a right, or fixes a legal  
9 relationship at the consummation of the agency  
10 process.

11 As the Court explained in that case,  
12 that the Hearing Officer's proposed decision was  
13 not a final agency action, merely a proposal,  
14 which may or may not be adopted by the agency.  
15 Once the agency acts on a proposed decision,  
16 however, it has made the final agency action, and  
17 the case is ready for judicial review.

18 This in turn mirrors what the United  
19 States Supreme Court has said about this exact  
20 same issue in Bennett v. Spear in 1997. The  
21 United States Supreme Court issued what is now the  
22 widely cited test for final agency actions where  
23 they said, "As a general matter, two conditions  
24 must be satisfied for an action to be final.  
25 First, the action must consummate the decision

1 making process, it must not be tentative or  
2 interlocutory in nature; and second, the action  
3 must be one in which rights or obligations have  
4 been determined or from which legal consequences  
5 flow."

6 So here the question before the Board is  
7 what is the final agency action in relationship to  
8 opencut mining permits. Is it the issuance of the  
9 permit itself, or is it the decision to approve  
10 that permit by this Board once contested?

11 And DEQ and the Applicant both want to  
12 have the best of both worlds here. They ask that  
13 both DEQ's permitting decision is final at the  
14 time that it is issued, so that the mining can  
15 commence; but they also do not want to be held to  
16 that standard of judicial review when it comes to  
17 what evidence can be reviewed to support that same  
18 decision.

19 And GCA filed this motion because it  
20 asks the Board to determine when the final agency  
21 action has occurred. This motion therefore really  
22 asks the BER to answer a simple and straight  
23 forward question. Opencut permits are either  
24 final on the date they're issued, or they are not.  
25 And we really need to know which one is it, and

1 that relates to the scope of relevant evidence, as  
2 Mr. Wilson discussed.

3 To be totally clear with you all, GCA  
4 really doesn't have a position either way on this  
5 issue. Our position is that it can't be both.  
6 Pursuant to decades of controlling case law as  
7 cited, if the DEQ's permit issuance is the final  
8 agency action, then we assert that the record  
9 before the Board must close on the date that that  
10 decision was made, and that makes sense both  
11 because of doctrinal concepts in evidentiary  
12 relevancy, as argued by my co-Counsel, but it also  
13 demands that the agency's decision be judged  
14 against the universe of documents and information  
15 that it had before it and considered as a part of  
16 making that final decision as conferring those  
17 rights to the mining company.

18 So if the other way, if the final agency  
19 action is the final order of this Board, and its  
20 final determination is what confers the rights and  
21 obligations to the company, then it cannot be  
22 valid, the permit cannot be valid as of today for  
23 mining purposes, and that really is the crux of  
24 the question.

25 And this question was put directly

1 before the Hearing Examiner in the matter of  
2 Protect the Clearwater, and she held that it was  
3 the latter. The Hearing Examiner said, "BER is  
4 building the final agency action record during the  
5 contested case proceeding," said, "If DEQ's permit  
6 decision is appealed to the BER, then the BER's  
7 decision becomes the final agency action."

8 Therefore, she held DEQ's permit  
9 decision is not final for purposes of judicial  
10 review, and that was in the order in limine in  
11 relation to the Protect the Clearwater matter.

12 And while we don't really take a  
13 position one way or another, it seems like that  
14 conclusion is correct and is logical for a number  
15 of reasons, but because certification was denied,  
16 we're here asking the Board to provide further  
17 clarity on whether that conclusion is correct or  
18 not.

19 As the Board noted earlier, this issue  
20 is pertinent across the state. In each of these  
21 cases in which these issues are pending, not only  
22 is DEQ trying to present evidence it never  
23 considered before issuing the permit, but the  
24 applicant is also trying to introduce expert  
25 hydrogeologic testimony and evidence by and

1 through witnesses who it never hired or never  
2 consulted with before or during the permitting  
3 process.

4 And if and when an appeal is filed, the  
5 issue of the permit is not final, and instead the  
6 Board's decision is final, then of course  
7 everybody may continue to develop the record. We  
8 may all just be able to have experts, and put  
9 evidence into the record to say whether the  
10 decision is correct or not.

11 And that path is mirrored by MAPA  
12 contested case processes held by DNRC and other  
13 agencies under other processes in MAPA, such that  
14 the agency's decision on the permit is essentially  
15 a preliminary decision until the contested case  
16 proceeding is over.

17 And so this is not a matter of mere  
18 semantics or needless formalism, but it reflects  
19 the core tenet of administrative law which is  
20 post-hoc examination of data to support a  
21 predetermined conclusion is not permissible.

22 And so the parties, the citizens of the  
23 state of Montana, need to know when and where the  
24 final agency action is being made here. And  
25 honestly, following DEQ and Applicants down the



1 requested path of letting them to have their cake  
2 and eat it too is contrary to established law,  
3 it's unfairly prejudicial to the public and  
4 citizens, and it constitutes reversible error.

5 And with that, thank you. We'll remain  
6 any time for rebuttal.

7 CHAIR SIMPSON: Thank you, Mr. Coppes.  
8 We'll hold any questions until all of the parties  
9 have made their presentations and rebuttals. DEQ.

10 MR. KING: Yes, good morning, Board  
11 Chair and Board members. Can you all here me? My  
12 name is Sam King appearing on behalf of DEQ.

13 DEQ is asking that the Board either  
14 delay ruling on this motion in limine until -- you  
15 know, if a stay is going to be entered, then so,  
16 too, should this question on this motion in  
17 limine. The Board need not even each reach this  
18 issue if, say, plaintiffs are successful in their  
19 constitutional challenge, this case might not end  
20 up going forward anyway. So I think to your point  
21 earlier, Chair Simpson, I don't think this motion  
22 should be entertained.

23 I understand that GCA wants a ruling on  
24 this motion because of the other contested cases  
25 and similar issues that are going on in those

1 cases. I think it would be improper for this  
2 Board in this proceeding, which is the only  
3 question before this Board to issue a  
4 determination in this case, and then is used  
5 against the Hearing Examiner in those other cases.

6 Counsel in those other cases will have  
7 an opportunity to submit their objections to the  
8 proposed FOFCOL, and can address whether a motion  
9 in limine should have been granted or should have  
10 been different in scope or content once they get  
11 to the proposed FOFCOLs and the objection period,  
12 but they shouldn't get a second bite of the apple  
13 through this proceeding to address this question.  
14 And I think for purposes of this Board, this  
15 Board's scope is limited to just addressing to  
16 whether a motion in limine should be granted in  
17 this case.

18 That said, my second piece is if the  
19 Board is inclined to reach this issue right now,  
20 as we laid out in briefing, the Board should deny  
21 this motion in limine, and there's two reasons for  
22 that.

23 The first one is, you know, I think it's  
24 worth clarification. I tried my best to clarify  
25 that in the briefing that this case is not record

1 review, and what I mean by that is this isn't a  
2 case where there is a set administrative record  
3 that is submitted to the Board in an appellate  
4 capacity, where the Board just simply looks at an  
5 existing record, and then makes an assessment on  
6 whether or not a permit should be issued.

7           Instead there's a full trial de novo  
8 hearing, and that's laid out specifically in Part  
9 6 of the Montana Administrative Procedures Act.

10 And again, I don't have any strong feelings about  
11 this either way, I really don't, because I  
12 actually think in honesty that it is in GCA's  
13 interest that this isn't a record review  
14 proceeding, that they do have an opportunity to  
15 present any evidence they want.

16           And the reason why that is so is because  
17 were this just a record review case, the standard  
18 of review for a record review case is the  
19 arbitrary, capricious, and abuse of discretion  
20 standard, and that standard is not good for a  
21 challenger because it grants discretion to the  
22 agency that made the decision, and it also means  
23 that an agency decision should be affirmed if  
24 there's substantial evidence in the record, which  
25 is a relatively low bar to meet. And it's to

1 their benefit, to be honest, for them to operate  
2 under the preponderance of the evidence standard  
3 truly.

4 The Montana Supreme Court has already  
5 addressed this precise question on whether or not  
6 a MAPA contested case procedure under Part 6 of  
7 MAPA is record review or not nearly twenty years  
8 ago in the case MEIC v. DEQ. That's 2005 MT 96.

9 And in that case, it involved the  
10 issuance of an air quality permit, and then the  
11 Montana Supreme Court said that the Board applied  
12 the incorrect standard, which was the arbitrary  
13 and capricious standard.

14 Instead they said the preponderance of  
15 the evidence standard applies, and the Board is  
16 supposed to consider what evidence is presented  
17 anew, meaning that there's no deference that's  
18 afforded to DEQ's decision. Challengers can come  
19 in, they can submit any evidence they want in  
20 support of their claims, whether or not that was  
21 presented to the agency before it made its  
22 decision, and then the Board puts together  
23 proposed findings of fact and conclusions of law.  
24 So this question is functionally settled.

25 GCA cites to a number of cases, both

1 state and federal, and again, all of those cases  
2 concern what evidence may be admitted into an  
3 already existing administrative record on judicial  
4 review before a Court. We're not there. We're  
5 just not. So none of those cases have any  
6 bearing.

7 Now, the second case I do want to  
8 address, though, is this Westmoreland case,  
9 because I think what GCA is arguing is not in fact  
10 what that case actually stands for. And again, in  
11 the briefing, I tried to point out some  
12 background, but I think it's important to  
13 understand the context of that case.

14 So there the In Re: Bull Mountains  
15 decision from the Signal Peak AM3 matter, and a  
16 couple things for the Board to note, one, that was  
17 the parties agreed in that case to just have a  
18 closed record, resolve the case on summary  
19 judgment with limited additional evidence; and  
20 from that came this kind of odd order from the  
21 Hearing Examiner in that matter that said that you  
22 must decide this case within the four corners of  
23 the CHIA, and then what other evidence was before  
24 DEQ at the time it made its decision. So that is  
25 a unique instance that we don't have in a typical

1 contested case proceeding.

2 That Bull Mountain decision was then  
3 used in subsequent MSUMRA decision cases, and it  
4 was also used in the understanding sort of that  
5 petitioners and challengers to a coal permit  
6 decision had some issue exhaustion requirement,  
7 meaning that if they wanted to present any  
8 evidence at a MAPA contested case hearing, they  
9 had to submit evidence during the comment period,  
10 and raise any necessary issues if they were going  
11 to then have that heard in front of the full  
12 Board.

13 AM4, the Montana Supreme Court said a  
14 petitioner doesn't have to do that, and that's the  
15 right decision, because there is no adversarial  
16 nature in either MSUMRA nor in the Opencut Act  
17 until after the permit has been issued, and so  
18 what that means is petitioners can, if they elect  
19 to, submit evidence to the agency during the  
20 comment period, but they certainly don't have to;  
21 and they can present all that evidence after a  
22 contested case has been filed.

23 And why that matters is because if they  
24 don't have to present any evidence to DEQ during  
25 the comment period, 2-4-612 of MAPA mandates that

1 all parties can present evidence and argument on  
2 all issues involved, and so we have to have an  
3 equal opportunity.

4 GCA has sort of represented that in  
5 these other cases we were trying to sort of  
6 backfill our decision, and that's just simply not  
7 the case. And I think there's also a distinction  
8 between what information is sufficient before DEQ  
9 for it to approve a permit, and what information  
10 can be received as evidence in a contested case  
11 for this Board to make an ultimate determination.

12 Now, the second piece I'd like to get  
13 into that I think warrants some discussion is the  
14 fact that GCA has suggested that there isn't a  
15 final -- you know, that it's DEQ's position to  
16 some extent that there hasn't been some final  
17 agency decision or final agency action until after  
18 the MAPA contested case proceeding.

19 The Opencut Act spells this out in  
20 82-4-432(10). It states that once an applicant  
21 has met the burden during the permit application  
22 phase, they can begin operations once we give them  
23 a permit; but both of those things can be true.  
24 So just because there's a final agency action and  
25 the applicant can begin mining doesn't mean that

1 we now have a closed evidentiary record.

2           Again, Counsel has said, "Well, you  
3 know, that's functionally unfair;" and one, I  
4 don't think it is because, one, they have better  
5 standard to operate under, which is the  
6 preponderance of the evidence; and two, they have  
7 the opportunity to present any evidence they want  
8 in support of their claims, whether or not that  
9 was before DEQ at the time it issued its decision.

10           And all we're really asking for is an  
11 opportunity to challenge that evidence to the  
12 extent we believe that it may be incorrect. We're  
13 just asking for an equal opportunity presented to  
14 the agency. We're not asking to try and somehow  
15 backfill our case here.

16           So two, I think they got Westmoreland  
17 wrong, and just because there's been a final  
18 agency decision doesn't mean you don't have a  
19 trial de novo. That's already been resolved.

20           The second reason this should be denied,  
21 too, is just because of where we're at in this  
22 proceeding. Right? Like we haven't exchanged any  
23 discovery. There's nothing really that's been  
24 exchanged by the parties where you can come before  
25 this Board and say, "This specific piece of



1 evidence is going to cause me prejudice," and that  
2 has always been required before you can get a  
3 motion to limit specific evidence, is you have to  
4 point to specific evidence that may be  
5 prejudicial, or isn't relevant, or may cause  
6 confusion.

7           Just from where we're at in this  
8 proceeding, they can't, because they just don't  
9 know what it is we're supposedly going to backfill  
10 our case with. They're just asking to narrow the  
11 scope of the evidence, and that is not -- you  
12 know, you can't use a motion in limine to do that.  
13 You need a specific piece of evidence.

14           And then the second piece of it is their  
15 basis is claiming that any post-decisional  
16 evidence isn't relevant, but the definition of  
17 what makes evidence relevant is whether it makes a  
18 fact at issue more or less probable, simply  
19 because just like in any civil proceeding, if I  
20 come into court --

21           Say I'm claiming some injury, and I come  
22 into court. Evidence that's gathered after that  
23 injury occurred can be relevant to both the claims  
24 and the defenses. Just because that evidence  
25 wasn't gathered before that injury doesn't make it

1 not relevant, because the only question is whether  
2 it makes a fact at issue more or less probable.

3           So for example in this case, if we're  
4 talking, you know, groundwater depth has become a  
5 big issue in these opencut cases. And they're  
6 coming in and they're saying that we have it wrong  
7 on where the groundwater is located, and then  
8 there's additional evidence that's collected that  
9 goes to the determination of where exactly that  
10 groundwater is located, for better or worse,  
11 that's relevant to this proceeding.

12           And the second piece is it doesn't make  
13 it unduly prejudicial, just because it's issued  
14 after a determination, and I don't think they  
15 pointed to any specific prejudice. Whether  
16 something is prejudicial essentially considers  
17 whether it has the ability to confuse a jury, or a  
18 elicit some emotional response that would cloud a  
19 jury's ability to make, you know, actual  
20 determination on the merits here.

21           Here we know that post-decisional  
22 evidence can be relevant, and we also know from --  
23 you know, it's axiomatic essentially in contested  
24 cases when there's cases before a board, cases  
25 before an Administrative Law Judge, that there's

1 very little risk of any prejudice involved because  
2 presumably the Board or a Hearing Examiner is well  
3 versed in the ability to try and suss out what  
4 evidence they should hear, and what weight they  
5 should give that evidence.

6 So for that second additional reason,  
7 again, if the Board is inclined to rule on this  
8 motion now, I think they should deny it. Unless  
9 the Board has questions, thank you.

10 CHAIR SIMPSON: Thank you, Mr. King.  
11 We'll hold questions until after everyone has  
12 spoken here. TMC.

13 MR. STERMITZ: Thank you, Mr. Chairman.  
14 Mark Stermitz here representing the permit holder.  
15 I won't take the time that everyone else has.  
16 They've covered this pretty well.

17 I do want to offer the perspective of  
18 someone who's practiced a lot in Federal Court,  
19 using the standards that the Plaintiffs want to  
20 import here.

21 And it's ironic, I find it really ironic  
22 that we're being accused of wanting to have our  
23 cake and eat it, too, when that must be some form  
24 of projection, because one thing that we haven't  
25 heard from them in this proposal to restrict your

1 review to record review using federal guidance is  
2 that for a person challenging a Federal permit  
3 action under judicial review of an administrative  
4 decision, they don't get to submit information  
5 like they do here before you. They have to meet  
6 one of the exceptions laid out in the Federal case  
7 law.

8           And the GCA here has listed those  
9 exceptions, and ironically want to apply them to  
10 the agency. That's completely backwards. It's  
11 completely inconsistent with the federal approach.

12           What happens in Federal Court is every  
13 judicial review case is decided on summary  
14 judgment. There are no -- generally very rare  
15 exceptions for discovery; rare exceptions for  
16 supplementing the administrative record; there are  
17 hurdles for the appellants to have to overcome in  
18 doing that. And as the Federal Courts say, those  
19 are limited circumstances.

20           So if we're going to apply the Federal  
21 standard, then let's apply it. Appellants here  
22 would have to meet one of those exceptions to  
23 submit anything that's not in the administrative  
24 record; and as Mr. King has already pointed out,  
25 they would be subject to a stricter standard of

1 review, and all cases would be decided on summary  
2 judgment. That's how it works.

3 Now, if that's the way the system is  
4 supposed to work, it really makes you wonder, as  
5 we've said in our brief, why the Legislature has  
6 set this up the way it has as a MAPA contested  
7 case proceeding, which involves discovery and  
8 everything else. There would be no, literally no  
9 reason for any of that if this wasn't strict  
10 judicial review.

11 I just think it stretches the history of  
12 this Board and the cases that have touched on this  
13 to say that this is intended to be just a preview  
14 of what the District Court, exactly what the  
15 District Court will do on an appeal from the  
16 Board's decision. There would be duplicate levels  
17 of record review. That doesn't make a lot of  
18 sense.

19 I want to echo what Mr. King said about  
20 the circumstances of this case. Counsel made the  
21 comment that we were trying, we, the applicant,  
22 was trying to submit extra expert, extra record  
23 expert testimony. We haven't in this case at all.  
24 We have in one of the other cases, so I think he  
25 probably just was confused about which case this

1 was.

2 But that isn't really a small thing,  
3 because as Mr. King said, these motions in limine  
4 are designed to prevent unfair prejudice from  
5 happening at the time of trial, and you'll see  
6 Judges defer a ruling on these things -- it's not  
7 uncommon -- until trial, so they can see how the  
8 evidence is coming in, and whether it really is  
9 prejudicial.

10 I don't know of a situation where you  
11 can make a motion in limine to limit evidence that  
12 hasn't even been offered yet, and that no one  
13 knows whether it will be offered. That's  
14 tantamount to just asking for the Board's advice  
15 on this particular issue, and that's really not an  
16 appropriate use of the Board's function in our  
17 view.

18 The last thing I'll say is that this  
19 whole, you know, this contention that this issue  
20 has arisen because of changes in the statute is a  
21 fiction to me. It's been raised by these Counsel  
22 in the same cases. It's their creation.

23 And maybe they feel -- and I wouldn't  
24 argue. I don't want to put words in their mouth  
25 -- that this is necessary because of those

1 changes; but it's not like changes have triggered  
2 anything different in terms of what this Board's  
3 function is because of any of the language that  
4 has occurred there.

5 So I just don't think the Board should  
6 essentially write the entire MAPA contested case  
7 process out of existence with a grant of their  
8 motion, which would be the effect of it. Thank  
9 you.

10 CHAIR SIMPSON: Thank you, Mr. Stermitz.  
11 Rebuttal, Mr. Wilson, Mr. Coppes.

12 MR. COPPES: Thank you, Mr. Chair. I'm  
13 going to take DEQ's rebuttal, and Mr. Wilson will  
14 take Mr. Stermitz.

15 So first of all, this is still a  
16 directly relevant issue for the Board to consider  
17 and make a decision on, not just because of other  
18 contested cases around the state, but also because  
19 even if this case is stayed, this question will  
20 remain live and ripe, because -- said another way  
21 -- the question of whether TMC can mine during the  
22 interim process of the District Court answering  
23 the question of constitutionality of House Bill  
24 599 is still something the parties need to know.

25 We need to know: Is the final agency

1 action when the permit was issued, thus conferring  
2 rights and obligations to TMC to begin mining; or  
3 is the final decision the decision of this Board?  
4 And so that question is ripe regardless of any  
5 other cases, and we're requesting an issue --  
6 we're requesting the Board to issue an order on  
7 that question regardless of whether it applies to  
8 any other cases statewide.

9 It is extremely telling to me that DEQ  
10 admits for the very first time now in this hearing  
11 that they are allowed to both issue final agency  
12 actions conferring mining rights, but also that  
13 they are not bound by the law which governs final  
14 agency actions. The law does not allow both. DEQ  
15 is flat out wrong about that.

16 In all of the cases DEQ relies upon,  
17 there was not a permit that allowed live mining  
18 while an administrative contested case process was  
19 proceeding. That is what makes the Opencut Act  
20 different. That is the exact problem which gives  
21 rise to the instant legal issue in this motion.

22 If the issued permit is the final agency  
23 action, an applicant may be allowed to immediately  
24 mine pursuant to that permit, then the bedrock  
25 principles of administrative law bind this Board



1 to a position that is analogous to judicial  
2 review, wherein evidence is limited to that which  
3 existed prior to the permitting process being  
4 decided.

5           Again, if and when an appeal is filed  
6 the issuance of the permit is not the final agency  
7 action, again, if this Board is taking the final  
8 agency action, then of course DEQ and all parties  
9 may continue to develop the record for this Board  
10 to consider. So DEQ is dead wrong that it can be  
11 both.

12           The Montana Supreme Court explicitly  
13 held that an agency decision is final when it  
14 imposes an obligation, denies a right, or fixes a  
15 legal relationship as a consummation of the  
16 administrative process; and once the agency acts  
17 on the proposed decision, it has made a final  
18 decision, and the case is ready for judicial  
19 review. Again, that's Northern Plains Resource  
20 Council.

21           And it is reversible error that DEQ  
22 invites you now to say that they can have both,  
23 that they can issue valid mining permits, and  
24 still have a trial de novo, still have post-hoc  
25 evidence come in to bolster that decision after it

1 has been made. Thank you.

2 MR. WILSON: Thank you, Mr. Chair. Just  
3 a few comments in response to Mr. Stermitz. He  
4 eludes to the judicial review, the exceptions  
5 under judicial review under the Federal case law.  
6 And again, as I've pointed out, those cases talk,  
7 do talk primarily about the relevance, what is  
8 relevant information when you have a final agency  
9 action as we have here.

10 There are exceptions that would allow  
11 us, for instance, to put in some limited evidence,  
12 and for that matter that would allow DEQ, for  
13 instance, to put in some limited evidence. Those  
14 are spelled, those exceptions are spelled out  
15 clearly in the Federal case law, and in particular  
16 in terms of a challenging plaintiff.

17 One of the things that we would be  
18 allowed to do in theory would be putting in  
19 evidence to show that the agency did not evaluate  
20 all of the relevant factors. And there are  
21 situations where the agency could put in post-hoc  
22 evidence to say, to explain, further explain what  
23 they had done.

24 But I think those exceptions, as Mr.  
25 Stermitz indicated, are pretty limited, and so

1 we're not saying we want our cake and eat it, too;  
2 we're saying we want ground rules in place before  
3 this case goes forward, so the parties know and  
4 can determine through discovery, if there's going  
5 to be discovery, what's going to be in and what's  
6 going to be out.

7           Mr. Stermitz also says that if we take  
8 our position, then you're basically writing out of  
9 MAPA the possibility of a trial de novo, or the  
10 possibility of discovery. We don't think that's  
11 the case. We think, though, that the Board has  
12 inherent power because of the Rules of Evidence to  
13 limit whatever testimony, whatever evidence is  
14 going to come in front of you, you have the  
15 inherent power to limit that to what is relevant.

16           Again, as Mr. Coppes said, the idea that  
17 you can issue a final agency decision,  
18 final-final, they're out mining the next day --  
19 which was the case in the Clearwater -- and spend  
20 two years developing a record to justify that  
21 decision, and for challengers to have to spend  
22 thousands of dollars to put in to create new  
23 evidence to challenge that decision, that's an  
24 absurd stretch of what this Board is allowed to  
25 do, or what we think you have power to do under

1 MAPA. We think you have the inherent power under  
2 MAPA to limit evidence to what's relevant.

3 Mr. Stermitz finally says that there was  
4 nothing in the 2021 changes to the legislation  
5 that triggered this time review, or these issues,  
6 and that this was our creation. Well, what  
7 changed in the 2021 legislation was not only  
8 limited time frames, but limited -- took out, the  
9 Legislature took out previous requirements,  
10 specific requirements for review of water quality,  
11 wildlife, habitat, etc.

12 And that is what has triggered citizens  
13 around the state suddenly finding their way to  
14 you, because the agencies are doing these  
15 abbreviated short evaluations without adequate  
16 review, and that's why all our clients are walking  
17 in to the Board and asking for relief.

18 It's not something that we, the lawyers,  
19 made up to gin up business. These are legitimate  
20 citizens all around this state that are having  
21 similar concerns with the same process. So with  
22 that, Mr. Chairman, I'll leave it. Thank you.

23 MR. COPPES: And I'd like to add just  
24 one final point here, Mr. Chairman, which is that  
25 as Mr. Wilson said, if for two years we're hearing

1 this contested case before the Board, but the  
2 company has begun mining, and has been actively  
3 cutting down trees, and mining the land as they're  
4 authorized to do under these permits, what  
5 actually is the role of this Board?

6 And essentially if you reverse after the  
7 fact, but the mine has already been acting for two  
8 years, then there is no remedy essentially that  
9 this Board can actively effectuate. There is no  
10 real reason that you're here, is what they're  
11 essentially saying. The mining would have already  
12 occurred, the mining harm would have already been  
13 done, and this Board would essentially just be a  
14 superfluous body, and that is an absurd  
15 conclusion. Thank you.

16 CHAIR SIMPSON: Thank you, Mr. Wilson  
17 and Mr. Coppes. Mr. King.

18 MR. KING: Thank you, Chairman. I'll be  
19 very brief. GCA posits this as there's some major  
20 uncertainty here about whether an applicant who  
21 obtains a permit can then start mining, and then  
22 if that's the case, then it has to be record  
23 review. And for good, bad, or indifferent, both  
24 of those things can be true. I just want to  
25 reiterate that.

1           This is subject to a MAPA Part 6  
2           contested case proceeding. That is a trial de  
3           novo, preponderance of the evidence standard.  
4           There's no limiting evidence in either the Opencut  
5           Act, and there is no limiting evidence in MAPA  
6           contested case rules or statutes that relegate  
7           this to a record review proceeding.

8           At the same time, once the permit is  
9           granted, they can begin mining, and in fact, there  
10          is a remedy available to GCA, as Counsel is aware  
11          in their other cases, which is to go seek a  
12          preliminary injunction, and that is under Title 82  
13          or Title 75 for a MEPA challenge, you can go seek  
14          a preliminary injunction in the District Court to  
15          preliminarily enjoin the issuance of that permit.

16          That wouldn't exist if there was some  
17          caveat whereby just because an appeal in the BER  
18          has been filed, that that all of a sudden wasn't  
19          final agency action.

20          And I think this confusion on the final  
21          agency action piece is GCA's own making. Just  
22          because the decision by DEQ is final doesn't mean  
23          the record review standard applies. All it means  
24          is it's final for purposes of them being able to  
25          file their appeal. They can't do that any sooner

1 than that.

2 And then this Board reviews this  
3 issuance of the permit de novo; that becomes final  
4 upon the Board's findings; that then gets appealed  
5 to the District Court. That's how that process  
6 works. But just because DEQ had a final agency  
7 action doesn't mean that it's now record review.  
8 I think it's laid out clearly in both case law and  
9 statute that that is not the case for good, bad,  
10 or indifferent.

11 And to be honest, we don't have any  
12 vested interest in this process one way or the  
13 other. And I do have some empathy with GCA's  
14 position that, "Okay, we've challenged this  
15 permit. It's sort of unfair that they can go  
16 begin mining."

17 Whether or not it is unfair, that is  
18 just the way that the process works, and that is  
19 also why there's a preliminary injunction  
20 procedure. As they well know, they can go seek to  
21 preliminarily enjoin that permit.

22 So with that, I just ask that the Board  
23 deny this motion in limine if it intends to rule  
24 on it. Thank you.

25 CHAIR SIMPSON: Thank you, Mr. King.

1 Mr. Stermitz.

2 MR. STERMITZ: I have nothing further,  
3 Mr. Chairman.

4 CHAIR SIMPSON: Thank you, Mr. Stermitz.  
5 That concludes the oral argument. Are there  
6 questions from the Board?

7 VICE CHAIR AGUIRRE: Mr. Chairman, I  
8 thought I was going to have questions, and after  
9 hearing the oral argument, I don't feel that I  
10 have any questions. I feel that my preparation to  
11 talk about this matter, the oral arguments  
12 actually solidified my thoughts, and I would be  
13 ready at any time to offer a motion. So I'll let  
14 others speak.

15 CHAIR SIMPSON: Thank you, Stacy. Other  
16 comments from the Board -- excuse me -- questions  
17 from the Board for representatives and the parties  
18 here.

19 BOARD MEMBER KNUTESON: I have a  
20 question, Chairman Simpson.

21 CHAIR SIMPSON: Amanda.

22 BOARD MEMBER KNUTESON: For Mr. Wilson  
23 or Mr. Coppes. I think it's from your brief Page  
24 14 in the top paragraph, you make the statement  
25 that, "Considering post-hoc evidence allows an



1 agency to flout its legal obligations to the  
2 public in the moment of its action, only  
3 supporting them after an appeal has been filed."

4 And that was something that concerned me  
5 because -- I guess I'm curious if you describe a  
6 scenario that maybe isn't directly using the facts  
7 of this case necessarily, but I can imagine  
8 scenarios, having observed this process, where if  
9 a petitioner is alleging a deficiency in the  
10 review process, and then allowed to fill that in  
11 in the appeal to BER, that does in a sense  
12 circumvent the public comment portion that would  
13 have occurred at the permitting level before DEQ;  
14 is that correct?

15 MR. COPPES: Yes. Absolutely, and I'll  
16 just quickly jump in, and then Kim also.

17 But this situation has come up in each  
18 one of these cases. So for instance, in the  
19 Protect the Clearwater case, the Board Chair last  
20 time asked, "How is it possible that we don't know  
21 what the groundwater elevation is in relation to  
22 the mine?" He said, "How is that possible that  
23 that's not in the record?"

24 And from our perspective, that was  
25 exactly our point, which is that they don't have

1 the information, and they can't go get it now,  
2 which means that they didn't have sufficient  
3 information at the time to issue the permit, and  
4 that's why this is a relevant issue.

5 In the Arlee, Protect the Jocko, Friends  
6 of the Jocko case, we saw that DEQ's employees are  
7 now seeking to use additional reports, additional  
8 hydrogeologic evidence from the Montana Bureau of  
9 Mines and Geology, all of which they never  
10 actually considered as a part of their decision  
11 making process.

12 And in each one of those cases the  
13 applicant is also intending to now hire a  
14 hydrogeologic expert, have them do additional  
15 after-the-fact research, and install monitoring  
16 wells, and provide additional evidence after the  
17 fact that really the agency never had any ability  
18 to review during the time that it made its final  
19 agency action. Does that answer your question?

20 BOARD MEMBER KNUTESON: It does, and not  
21 just information the agency didn't review prior to  
22 issuing the permit, but information that wasn't  
23 presented that the public didn't have an  
24 opportunity to review and comment on as part of  
25 that process?

1           MR. COPPES: Yeah, and that really goes  
2 to the inequity of the situation that Mr. King  
3 alluded to, which is that essentially the public  
4 is making a decision about whether to file these  
5 appeals or not.

6           And if they came to me, and there was a  
7 robust administrative record that showed that DEQ  
8 had a hydrogeologist looking at these issues, that  
9 they had reviewed reports of Montana Bureau of  
10 Mines and Geology, that they had monitoring wells  
11 on the site that showed exactly with reasonable  
12 scientific certainty what the groundwater level  
13 was at the site, we might not have filed this  
14 appeal at all, and you guys wouldn't even be here  
15 hearing from us today.

16           So the issue is one of sand-bagging, in  
17 essence, as we've said, which is to do nothing up  
18 front, and then only after an appeal is filed, to  
19 bolster that decision with after-the-fact  
20 evidence, and that's inherently unequitable and  
21 unlawful.

22           BOARD MEMBER KNUTESON: Thank you.  
23 I was just wondering if Mr. Stermitz or MDEQ's  
24 attorney Mr. King had any comment to that.

25           MR. STERMITZ: Yes. Thank you. I would

1 say that the premise that you're hearing that  
2 there's a do-nothing or a lackadaisical approach  
3 to the application, and a sand-bagging with later  
4 work, is only problematic from a legal standpoint  
5 if the original record, the original application,  
6 was erroneous or insufficient.

7 If it was sufficient by law, then what  
8 goes on afterwards is additional fact finding and  
9 assurances that, for example, my clients need to  
10 know as they go forward with actual on-the-ground  
11 work -- which hasn't happened in any of these  
12 cases yet by the way -- to make sure they're in  
13 compliance with their permit.

14 And they're in litigation. That's a  
15 fact of life. So we're responding also to the  
16 allegations made by Mr. Coppes's clients. So it's  
17 not a -- it's a fluid kind of situation, at least  
18 the way this process is structured at the moment.

19 So I disagree with the characterization.  
20 I don't disagree that in some situations they're  
21 going out and doing more work before anybody turns  
22 a shovel of dirt at these sites.

23 MR. KING: Board Member Knuteson, I'll  
24 just piggy-back on that comment and say, you know,  
25 while it may be, you know, one of the issues may

1 be whether there was sufficient information for  
2 the agency, for the DEQ to make the determination  
3 that it did at the time it issued its permit.

4 As Mr. Stermitz alluded to, just because  
5 there's additional fact finding that goes on  
6 doesn't make that evidence irrelevant. It is  
7 relevant to petitioner's claims in the case, and I  
8 also think it's incumbent on the Board to make a  
9 fulsome record for judicial review. Thank you.

10 BOARD MEMBER KNUTESON: Thank you. That  
11 was all.

12 CHAIR SIMPSON: Thank you. Further  
13 questions from the Board?

14 BOARD MEMBER SMITH: Chairman Simpson,  
15 if I may, I would just like to clarify, because  
16 some questions were raised about specific  
17 statements that we made in prior meetings about  
18 evidence.

19 Just to clarify, and correct me if I'm  
20 wrong, Chair Simpson, but a lot of our questions  
21 around evidence, especially on the Clearwater  
22 case, wasn't that it didn't exist. It was that it  
23 wasn't in the documents that we were provided,  
24 specifically the Hearing Examiner's report.

25 So if your question's around some of the

1 evidentiary data, it wasn't provided to us in that  
2 report, but that doesn't mean that it wasn't  
3 originally submitted to the DEQ, or wasn't  
4 originally submitted to our Hearing Examiner  
5 during those cases. We just didn't have it in  
6 front of us to make a good decision; is that  
7 correct?

8 CHAIR SIMPSON: I believe that to be  
9 correct. All we have to base our decision on is  
10 the FOFCOL. We don't have access to the permit  
11 materials that were considered by the Department.

12 And the point was made earlier that well  
13 over 100 of these dryland permits have been  
14 approved and proceeded without any challenges. In  
15 this case, I don't have any reason to believe, I  
16 don't think any of us has a reason to believe,  
17 that the Department didn't act consistently with  
18 what's required by the statute and the rules.

19 But in the form that it came to the  
20 Board in the case of an appeal, it was the Board's  
21 position that we did not have the information we  
22 needed to make a determination whether or not this  
23 was in fact a dryland permit, and that was the  
24 point.

25 BOARD MEMBER SMITH: Thank you. I just

1 thought that was an important clarification when  
2 we're talking about evidence.

3 CHAIR SIMPSON: It is an important  
4 point, and thank you, Joe. Further questions from  
5 the Board?

6 (No response)

7 CHAIR SIMPSON: I have a question for  
8 Mr. King, and that is: I'm not aware of any  
9 program administered by the Department where a  
10 permit would be suspended in the event of a  
11 petition challenging that permit. Are there any  
12 such cases?

13 MR. KING: Board Chair Simpson, no.  
14 Essentially issue an air quality permit, issue a  
15 coal mining permit, issue an opencut permit, as  
16 soon as the permit is issued, they're allowed to  
17 go forward, and that's always been the case. It  
18 just has been.

19 And if petitioners in a case are  
20 claiming that there's going to be some irreparable  
21 harm, and that they're likely to succeed on the  
22 merits, then their remedy then is to get a  
23 preliminary injunction in the District Court.

24 CHAIR SIMPSON: Well, and thank you for  
25 pointing that out, because that was a question I

1 was going to ask. And I also recall that in the  
2 case of Clearwater, that the petitioners have done  
3 just that, and that permit has been essentially  
4 stayed for the time being until the process is  
5 completed; is that correct, Mr. Coppes?

6 MR. COPPES: It was. That preliminary  
7 injunction was just reversed last week because the  
8 District Court used an improper standard,  
9 according to the Montana Supreme Court. But yes,  
10 that was the case.

11 But it is notable, Your Honor, that in  
12 none of the other contested case proceedings that  
13 the permit is live before the contested case  
14 proceeding is finished, that the MAPA contested  
15 case proceeding is about a preliminary  
16 determination, not the final agency action, which  
17 is what makes this completely different.

18 MR. KING: Board Chair Simpson, could I  
19 respond to that?

20 CHAIR SIMPSON: Yes, please, because I'm  
21 sitting here pondering, trying to figure out what  
22 that means.

23 MR. KING: I think that's incorrect. If  
24 you look at the Opencut Act -- and I'm going to  
25 direct you specifically to 82-4-432 subpart (10).



1 It says, "Once a permit is issued, the applicant  
2 or the operator can commence the operation." It  
3 doesn't say anything with respect to some caveat  
4 whereby they cannot begin the operation in the  
5 event that an appeal is filed.

6 There have been other instances where --  
7 and I believe that's the case in the present case  
8 that's before you where we've issued the permit,  
9 but for one reason or the other an operator hasn't  
10 begun mining, and that might be because they don't  
11 want to go through a preliminary injunction  
12 process for one reason or another, but that  
13 doesn't mean that they can't under the law, and  
14 they can do that unless and until a preliminary  
15 injunction is filed.

16 That makes -- Again, there's some  
17 conflation going on between what's a final agency  
18 decision that is then ripe for appeal to this  
19 Board, and whether then there's this  
20 administrative record review proceeding that  
21 happens. Both of those things are true.

22 And again, I want to point the Board to  
23 that MEIC v. DEQ 2005 MT 96 decision, where that  
24 was an air quality permit that was at issue in  
25 that case, and in that case it clarified that the

1 Board's role is not in an appellate capacity.

2 They're going to look at, they're going  
3 to do a trial de novo proceeding when there's an  
4 appeal to this Board. They're not looking at an  
5 administrative record that is submitted and  
6 applying the arbitrary and capricious standard.  
7 That is synonymous with record review, an  
8 arbitrary and capricious standard. That's not the  
9 standard that applies here.

10 So yes, they can begin operations; and  
11 yes, it's still a trial de novo proceeding. Both  
12 of those things are true. Whether that should be  
13 true under the law is a different question.

14 I think really what plaintiffs are  
15 asking for is what they think the law should be,  
16 and I just want to clarify for the Board that is  
17 not what the law currently is, for good, bad, or  
18 indifferent. Thank you.

19 MR. COPPES: May I respond, Chair  
20 Simpson? Which is that that is what makes the  
21 Opencut Act different. That's our point, is that  
22 the Open Cut Act is different from all other  
23 contested case proceedings, in that it allows the  
24 mining to commence, it allows a final agency  
25 action to crystallize before there has actually

1 been a decision by this Board. And that is what  
2 is different. That is what is in opposite with  
3 the law.

4 CHAIR SIMPSON: Well, excuse me, Mr.  
5 Coppes, but I think what you said directly  
6 contradicts what Mr. King stated earlier, and that  
7 is that in all of the programs administered by the  
8 Department, including coal, air, water, and  
9 opencut, once the permit is issued, the permittee  
10 is authorized to commence work, and can continue  
11 work unless, through an appeal process, until and  
12 unless they're enjoined from continuing while the  
13 process plays out.

14 MR. COPPES: That's correct, but the  
15 contested case proceeding is happening before  
16 that. That's the difference. Here the contested  
17 case hearing is happening after, which is the  
18 notable difference. Does that make sense?

19 CHAIR SIMPSON: It's entirely -- Well, I  
20 hear what you're saying, but I don't believe it's  
21 correct. Mr. King, could you weigh in on this,  
22 please?

23 MR. KING: Sure. I'll try my best,  
24 Board Chair. From our position it's not any  
25 different. It's exactly the same. We issue a

1 final decision to the applicant. If we grant the  
2 permit, they can begin mining. And then also  
3 under the Opencut Act it directs that the 30 day  
4 time for which they can appeal that decision to  
5 the Board, that clock starts running.

6 But that appeals process, which is also  
7 laid out in the Opencut Act, says that that is a  
8 contested case proceeding under MAPA Part 6. MAPA  
9 Part 6 is a trial de novo proceeding because it  
10 applies the preponderance of the evidence  
11 standard, Montana Rules of Civil Procedure,  
12 Montana Rules of Evidence.

13 And so there is no distinction. Issue  
14 the permit; clock starts running; they can then  
15 file their appeal. And I think Mr. Stermitz hit  
16 on this point earlier, and I think it bears  
17 repeating. It doesn't make any sense to have that  
18 and record review, because record review is --  
19 there's never any hearing. It's only a submission  
20 of an administrative record, and then it's just  
21 resolved on briefing every time. That's always  
22 how it goes.

23 And then if the parties want to submit  
24 some additional evidence, they have to demonstrate  
25 these certain factors that are narrowly construed,

1 and potentially get in some limited evidence that  
2 way. But that is not the process contemplated for  
3 here. This is Part 6 under MAPA clearly spelled  
4 out. I hope that answers your question.

5 CHAIR SIMPSON: Well, it answers my  
6 question. And I have another question for you,  
7 Mr. King, and then I'd like responses also from  
8 other parties.

9 How, if at all, do you see the Supreme  
10 Court, recent Supreme Court decision in the  
11 Rosebud AM4 case as applying here?

12 MR. KING: Good question, Board Chair.  
13 As I point out in briefing, it is applicable to  
14 the extent that that is also a MAPA contested case  
15 proceeding for a coal permit issued under MSUMRA.

16 What is unique about that case, again,  
17 is that Bull Mountain's decision, that kind of set  
18 this weird trajectory of Board hearings on coal  
19 permit decisions that preceded that. But there is  
20 some nuance there because what GCA is claiming is  
21 that case said basically in all instances the  
22 record is set before a permit is issued, and you  
23 can't hear any post-decisional evidence.

24 That's not what the Supreme Court said.  
25 What the Supreme Court said was that the Board's

1 interpretation of its own rule that limited  
2 evidence was reasonable, and therefore they didn't  
3 err; but it didn't say that the Board couldn't  
4 receive additional evidence, that it didn't want  
5 it to.

6 It made clear that under the MAPA  
7 contested case proceedings 2-4-612 that they just  
8 have to give all parties opportunity to present  
9 evidence and respond on all issues involved. That  
10 is -- So really it always comes down to a matter  
11 of equity.

12 And as I mentioned before, GCA controls  
13 this case, right? Like it's their burden. They  
14 can present evidence on any issues they want. If  
15 they limit it to before a permit was issued, there  
16 really is no need for DEQ to respond with some  
17 additional evidence afterwards to try and rebut  
18 that. Like I said, there's no attempt to backfill  
19 our case here.

20 The other thing that's worth pointing  
21 out in Westmoreland, that Westmoreland decision,  
22 is that the Board was not faulted for permitting  
23 Westmoreland's experts Dr. Schafer and Dr. Nicklin  
24 to present post-decisional analysis that wasn't in  
25 the CHIA at the time the DEQ had issued its

1 decision.

2           So by the very nature of that  
3 proceeding, it didn't say that post-decisional  
4 decision and analysis could be submitted. What it  
5 faulted the Board for doing was not permitting the  
6 Conservation Groups to submit evidence and  
7 argument on those issues, and that was because  
8 they said that they don't have an issue exhaustion  
9 requirement.

10           A challenger doesn't have to raise  
11 issues and arguments and submit information to DEQ  
12 before a permit is issued. If they want to  
13 comment, they can. If they want to provide  
14 evidence and argument during the comment period,  
15 they can, but they're not required to do so. And  
16 they're not hamstrung by what is submitted to DEQ  
17 before. They can bring a contested case  
18 proceeding brand new, and they can submit any  
19 evidence they want collected after the permit was  
20 issued in support of their cases.

21           So I think that's the clarification in  
22 that point. So I think it's within the Board's,  
23 soundly within the Board's discretion here to  
24 permit post-decisional evidence, and I think it is  
25 premature for the Board to make that determination

1 now because it's just not clear what evidence  
2 Petitioners will or will not submit in this case.  
3 We're just trying to preserve our opportunity to  
4 respond to any additional evidence or argument  
5 with additional evidence and argument of our own,  
6 as I think is required under MAPA.

7 MR. WILSON: May I respond, Mr.  
8 Chairman?

9 CHAIR SIMPSON: Thank you, Mr. King.  
10 Yes, you may. Please. Thank you.

11 MR. WILSON: Just a couple points. We  
12 do not have the kind of limited or qualified view  
13 of Westmoreland that DEQ has. I think  
14 Westmoreland, despite the procedural quirks that  
15 may exist there, contained some very general  
16 principles that -- and it comes down to what was  
17 before the agency at the time they made their  
18 decision.

19 And so in the limited situations with  
20 the experts that Mr. King was talking about, those  
21 new analyses or what have you after the fact,  
22 still had to be based on the record that was  
23 before the agency, and that's consistent, again,  
24 with the statute here 82-4-432(10)(c), which says,  
25 "The Department shall determine if the information



1 in the application meets the requirements of  
2 Subsection 14(a), and notify the operator in  
3 writing. If the requirements are met, the  
4 operator may commence the operation."

5 Our position is that the statute itself  
6 limits what's relevant in a contested case  
7 proceeding, and that you, as the ultimate decision  
8 makers, may rely on your statutory ability under  
9 MAPA to limit that evidence through the Rules of  
10 Evidence, and that's what we believe, that I think  
11 the Board is in a position up front to establish  
12 ground rules, and certainly that may have to be  
13 tweaked if this thing goes forward, both in terms  
14 of what would be allowed in at summary judgment at  
15 a hearing, but you certainly have the ability  
16 based on the Rules of Evidence to look at the  
17 statute at issue here, and decide what's relevant.  
18 Thank you.

19 MR. COPPES: And Board Chair, and  
20 members of the Board, again, what DEQ is not  
21 telling you is that in any of these other cases  
22 the contested case proceeding is happening before  
23 the company is allowed to begin mining.

24 So in the Westmoreland case, the CHIA  
25 comes out, and the analysis by Dr. Nicklin was

1 about the CHIA, was in rebuttal to petitioner's  
2 evidence being introduced about the CHIA, and that  
3 is all happening prior to the mining being  
4 authorized, and that's what's different about the  
5 Opencut Act.

6 Mr. King is correct that the Opencut Act  
7 prescribes that the mining may begin immediately  
8 upon the issuance of the permit, but that doesn't  
9 make it directly lawful in relation with other  
10 permitting principles of administrative law. And  
11 that's what we're asking this Board to rule upon,  
12 is that that provision of the Opencut Act is not  
13 consistent with other provisions of administrative  
14 law.

15 CHAIR SIMPSON: Mr. Coppes, I would  
16 disagree with you, having spent a career in the  
17 coal industry, because these recent cases  
18 involving Westmoreland, Bull Mountain, and so on,  
19 mining has proceeded immediately on approval of  
20 the permit, despite the fact that there was a  
21 petition challenging that permit that the cases  
22 sometimes went on for years. So it's really no  
23 different from what we're talking about here.  
24 Stacy.

25 VICE CHAIR AGUIRRE: I, Mr. Chairman,

1 was going to chime in with the same kind of  
2 comment, because without that opportunity, there's  
3 no regulatory certainty. You have to have  
4 regulatory certainty. And these programs like the  
5 opencut mining permit program are very specific,  
6 and lined out, and provide for regulatory  
7 certainty for people who are seeking these  
8 permits.

9           Whether they get challenged on the other  
10 end or not is, as Chair Simpson stated, is not  
11 relevant to the person working through a  
12 permitting process under a regulatory certainty  
13 landscape.

14           And that's part of what I see going on  
15 in this, is that it's almost like the Board is  
16 being used to stop opencut mining permits, and I  
17 didn't hear anything today to change my mind that  
18 that is in fact in my mind exactly what's going  
19 on. And what we're being asked today is to either  
20 approve or deny the motion to limit evidence.

21           And the way that stuff has been  
22 presented in this hearing to me today seems more  
23 clear that GCA wants to stop opencut mining  
24 permits, and that there's a larger scope there  
25 than what we're being asked to look at today.

1 MS. OOMENS: Chair Simpson.

2 CHAIR SIMPSON: Thank you, Stacy.

3 Before moving --

4 MS. OOMENS: Sorry. You may have been  
5 headed that direction. I just wanted to make sure  
6 that TMC had the opportunity to respond to your  
7 "how Westmoreland applies" question before we  
8 moved on. I just want to make sure all parties  
9 had the opportunity.

10 CHAIR SIMPSON: Well, yes. Is there  
11 further comment on that particular question? And  
12 I'd also give an opportunity to Mr. Stermitz to  
13 chime in as well, because he hasn't weighed in on  
14 it. But Mr. Coppes, back to you.

15 MR. COPPES: Was there a question -- I'm  
16 sorry -- that I missed?

17 CHAIR SIMPSON: I was wondering if you  
18 had any further comment on the Westmoreland  
19 Supreme Court decision on AM4.

20 MR. COPPES: Just that I agree with my  
21 co-Counsel. The Westmoreland decision laid down  
22 some really clear principles. And I agree with  
23 Mr. King that it established equity as a relevant  
24 factor, and in that case, what happened was they  
25 reversed on the decision that if an objector

1 identifies evidence as post-decisional, that of  
2 course other parties can as well, and that makes  
3 sense. If one party is taking that opportunity,  
4 then the other party gets to rebut that.

5 And that's why, as Mr. Wilson said in  
6 the beginning, if the Board decides to not limit  
7 evidence in this case, then we would obviously  
8 want to use our expert to explain what we think  
9 are the errors in the process that occurred; but  
10 if the Board does limit the evidence, then we  
11 would not be seeking to have that unfair  
12 advantage. We would not be introducing an expert.  
13 We would only rely on pre-decisional evidence.

14 And so I just want to make clear that  
15 consistent with Westmoreland, we are also asking  
16 for the even playing field that was described in  
17 that case.

18 CHAIR SIMPSON: Thank you. Mr.  
19 Stermitz, did you have anything further?

20 MR. STERMITZ: Quickly. On Westmoreland  
21 I do not, but I want say that the question about  
22 the ability of the applicant to go forward with  
23 the project before the Board has rendered a  
24 decision, the argument that you're hearing, if  
25 it's not explicitly, implies that it's an illegal

1 operation, or that somehow DEQ has given up its  
2 enforcement authority, or that we don't have to  
3 comply with the permit requirements, even though  
4 the Board hasn't decided yet, none of which is the  
5 case.

6 So there's just kind of a fundamental  
7 difference in attitude about what happens when  
8 that permit issues, and the Applicant can go  
9 forward. Thank you.

10 CHAIR SIMPSON: Thank you, Mr. Stermitz.  
11 Are there any other questions from the Board  
12 before we move forward?

13 (No response)

14 CHAIR SIMPSON: Hearing none, I guess  
15 I'd just like to make a comment that this question  
16 of evidence is important, not just relative to  
17 this case and the similar opencut cases that are  
18 before us, it's really fundamental to the way this  
19 Board does its job.

20 And what I got from the Westmoreland  
21 decision on AM4 at Rosebud was that the Board is  
22 obligated to consider all of the relevant evidence  
23 in making its decision. This is a citizen board,  
24 including one attorney, but each of us on this  
25 Board has a different background, and familiar

1 with various aspects of the kinds of issues that  
2 we consider on this board.

3 And I guess I see our responsibility is  
4 to somehow merge these legal arguments with common  
5 sense consistent with the law, and consistent with  
6 what is expected of us under the laws of the  
7 state. So it's much more far reaching than the  
8 opencut case before us.

9 So with that in mind, I would entertain  
10 a motion either to make a decision on this case at  
11 this point, or to defer it, or whatever the will  
12 of the Board is at this point.

13 VICE CHAIR AGUIRRE: Mr. Chairman, I  
14 have stated earlier that I was ready to make a  
15 motion on this, and I make a motion that we deny  
16 GCA's motion to limit evidence or in limine.

17 BOARD MEMBER ALTEMUS: I'll second.

18 CHAIR SIMPSON: A motion has been made  
19 and seconded to deny the motion in limine. Is  
20 there further discussion?

21 BOARD MEMBER ALTEMUS: Mr. Chairman, I  
22 would just make the comment. I think that we've  
23 heard a lot of great information, some of it's  
24 relevant, some of it's not. It's interesting, but  
25 it's not relevant.

1           We were asked to make a decision on the  
2           Petitioner's request to limit further information,  
3           and I just believe that this Board has the right  
4           and the authority to accept additional  
5           information, because as Mr. King said, that the  
6           record was pretty clear, so when they made the  
7           decision as to why they made their decision, but  
8           that we still have the right to ask for  
9           information from both parties, and I would hate  
10          for us to lose that ability. So I would prefer to  
11          make the decision today if we can. Thank you.

12           CHAIR SIMPSON: Further discussion.

13           (No response)

14           CHAIR SIMPSON: Hearing none, all in  
15          favor, say aye.

16           (Response)

17           CHAIR SIMPSON: Opposed.

18           (No response)

19           CHAIR SIMPSON: Motion carries  
20          unanimously. Thank you, everyone.

21           New contested cases.

22           MS. OOMENS: I'm sorry, Mr. Chair.  
23          Before we move on, quickly, because we have all  
24          the Board together at this point, I just wanted to  
25          maybe do a motion to -- on the parties' request to



1 stay the case, because all parties agree it would  
2 be normal for the Board to stay the case, but I  
3 just wanted to make sure that the Board was on  
4 board with that.

5 CHAIR SIMPSON: Thank you, Terisa, for  
6 the reminder. That had slipped my mind. All of  
7 the parties have agreed to a stay, and the reason  
8 for the stay is that the Petitioners have filed  
9 with the Courts an action challenging the  
10 constitutionality of House Bill 599. I think  
11 everybody is aware of that, and I think that's  
12 correct; is it not, Terisa?

13 MS. OOMENS: That is correct.

14 CHAIR SIMPSON: Is there a motion to  
15 stay this case pending resolution of the  
16 constitutional question?

17 BOARD MEMBER REITEN: Mr. Chairman, I  
18 make that motion that we grant the stay in this  
19 case until resolution.

20 CHAIR SIMPSON: Is there a second?

21 BOARD MEMBER ALTEMUS: I'll second.

22 CHAIR SIMPSON: A motion has been made  
23 and seconded to stay the case concerning Opencut  
24 Mining Permit No. 3462, Case No. BER 2024-03 0C.  
25 Is there a discussion?

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(No response)

CHAIR SIMPSON: All in favor, say aye.

(Response)

CHAIR SIMPSON: Opposed.

(No response)

CHAIR SIMPSON: Motion carries  
unanimously. Thank you, Board members and Terisa.

(The proceedings were concluded

at 11:52 a.m. )

\* \* \* \* \*

C E R T I F I C A T E

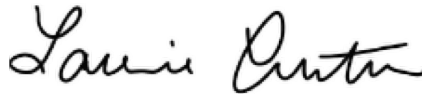
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STATE OF MONTANA )  
 : SS.  
COUNTY OF LEWIS & CLARK )

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 -74- 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 31st day of  
August, 2024.



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LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2028.

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