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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In re: Appeal and Request) CASE NO.
For Hearing regarding) BER 2022-05-SM
Rosebud Mine Area B)
Amendment 5 Permit Number)
C1984003B)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 24, 2025
11:07 a.m.

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

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: Let's go back to Item
5 (b), appeal and request for hearing regarding
6 Rosebud Mine Area B Amendment 5, Permit No.
7 C1984003B, Case BER 2022-05 SM, surface mining
8 case.

9 What we'll do here is we'd like to --
10 this is not a formal oral argument, but just as a
11 matter of general process, I think it's beneficial
12 for the Board to hear from the parties as to the
13 issues and their positions on those issues. So I
14 would invite the Petitioners to make a statement
15 before the Board. We would like to try and keep
16 this to, let's say, 20 minutes total, 15 minutes
17 plus five minutes for rebuttal. Petitioners,
18 please.

19 MR. HERNANDEZ: Thank you, Chairman
20 Simpson, members of the Board. Shiloh Hernandez
21 for Petitioners Montana Environmental Information
22 Center and the Sierra Club. I have prepared some
23 remarks on our exceptions. I had pared them down.
24 They still might be a little bit long, but I'm
25 going to endeavor to get them in 15 minutes, and

1 after that, I'll like to have five minutes for⁴
2 rebuttal.

3 I would first like to request leave to
4 be able to share my screen because I have some
5 visual materials that I would like to use to help
6 my presentation. Sandy, is that possible?

7 MS. MOISEY-SCHERER: Yes, you can.

8 MR. HERNANDEZ: Okay. Wonderful. I'm
9 not going to share my screen immediately, but I
10 will in just a little bit. First I would like to
11 thank the members of the Board for taking the time
12 to hear this matter, and really dig into this
13 case. It's not terribly simple, and I especially
14 appreciate all of you attending this hearing
15 occurring as it is on the eve of one of Montana's
16 most hallowed holidays, which is hunting season.

17 The parties in this case have addressed
18 a number of issues in the exceptions briefs.
19 Unless the Board has specific questions, this
20 morning I want to cut to the chase, and focus my
21 time and the Board's attention on two dispositive
22 issues.

23 The first is that the Hearing Examiner
24 and DEQ here both failed to base the critical
25 legal determination in this matter, which is the

5
1 material damage determination -- and I'm going to
2 say that word about 20 times in the next 15
3 minutes -- the material damage determination under
4 the Montana Stripmine and Underground Reclamation
5 Act, or MSUMRA, on the entirety of the proposed
6 action at hand, and that is the entirety of the
7 Rosebud Area B operation as amended by AM5.

8 This was a clear legal error which the
9 Board has plenary authority to correct. I'd like
10 to elaborate on this point in a moment, but for
11 now, I would just like to invite the Board to
12 think of it this way.

13 The Hearing Examiner and DEQ considered
14 just the tip of the iceberg, that is, the AM5
15 addition to Area B operations, but they ignored
16 the bulk of that iceberg which is the rest of the
17 Area B operation. Ignoring the remainder of the
18 iceberg did not work out well for the Titanic, and
19 I would submit that this error was equally fatal
20 here.

21 To resolve this issue, I implore the
22 Board to ask one simple question of DEQ and
23 Westmoreland, and that question is this: Did DEQ
24 base its material damage determination on the
25 entirety of the Rosebud B operation? Did DEQ base

1 its material damage determination on the entirety
2 of the Rosebud Area B operation?

3 Now, I suspect that DEQ and Westmoreland
4 will try to avoid answering this question, and
5 they may answer it by answering a different
6 question, such as: Did they consider its
7 cumulative hydrologic impacts? The question here
8 is: Did DEQ base its material damage
9 determination on the entirety of the impact from
10 Rosebud Area B?

11 The answer to that question has only one
12 correct answer, which is undisputed in the record,
13 and that is no, DEQ did not base its material
14 damage determination on the entirety of the
15 Rosebud Area B operation. DEQ's expert and
16 representative Martin VanOort admitted this under
17 oath at least three times. That matter, that
18 question should resolve the first claim that
19 Plaintiff's have brought in this case.

20 The second claim that I'd like to
21 discuss this morning is about Petitioner's climate
22 change claim. Here again, the Hearing Examiner
23 and DEQ both erred in concluding as a matter of
24 law -- and this is just a question of law -- that
25 under MSUMRA, DEQ has no authority to even

7

1 consider assessing climate change impacts when
2 assessing impacts to hydrology and the
3 availability of reclamation.

4 In fact, Respondent's briefs don't
5 really dispute this point. Rather they raise a
6 number of straw man arguments. But as with
7 material damage, the Board can resolve this
8 question and this issue by again asking DEQ a very
9 simple question which is this: Does MSUMRA
10 prohibit DEQ from considering climate change?
11 Again, does MSUMRA prohibit DEQ from considering
12 climate change?

13 Again, I suspect that Counsel for DEQ
14 and Westmoreland will attempt to avoid answering
15 this question. If they answer it directly, it
16 should resolve this case. I'm going to in a
17 moment elaborate a bit further on both of these
18 claims, but first I want to take a moment and
19 address Petitioner's position on our buffer zone
20 claim, which is Claim 2 in this appeal.

21 While we don't agree with Hearing
22 Examiner Cameron's resolution in this matter, we
23 have voluntarily declined to raise exceptions to
24 the proposed orders, analysis, and proposed ruling
25 on this claim. Now, DEQ and Westmoreland have

1 spilled considerable ink in response to our one
2 sentence for relinquishing this claim, and
3 declining to further pursue it, so let me clear
4 the air.

5 Petitioners are no longer pursuing this
6 claim. We have not filed exceptions. Hearings
7 Examiner Cameron's proposed decision recommended
8 dismissing this claim, dismissing all of the
9 Petitioner's claims. Here while we don't agree
10 with the entirety of Mr. Cameron's analysis, we
11 are not opposing his recommended decision which
12 was to dismiss this claim.

13 We are opposing his recommended decision
14 with respect to Claims 1 and 3, but not with
15 respect to Claim 2. To be clear, we're not moving
16 to amend our petition for review, and we're not
17 arguing that Claim 2 is moot. Those terms do not
18 appear in our brief.

19 We did state in our exceptions brief
20 that we believe Westmoreland had obliterated the
21 reach of Lee Coulee in question. This statement
22 was based on Westmoreland's statement to the Board
23 and its Hearing Examiner from last December,
24 notifying the Board that it would, quote, "soon,"
25 end quote, be mining through this reach of the

1 coulee.

2 We based our statement also on
3 statements by DEQ that they believed that this
4 mining would occur in June. We also reviewed
5 online satellite imagery of the mining operation
6 in this reach of the stream.

7 After receiving the response briefs, we
8 have looked more closely at the satellite imagery,
9 and it appears that at this moment mining remains
10 approximately 100 meters from the reach in
11 question. This does not, however, change our
12 position in relinquishing this claim, or our
13 belief that the proximity and imminence of mining
14 precludes our ability as a practical matter to
15 maintain this claim. I regret that this issue has
16 generated such controversy, and hope this puts the
17 matter to rest.

18 Here I would like to pause to note for
19 the Board that at the conclusion of oral argument
20 on summary judgment in this matter, Hearing
21 Examiner Cameron complimented all parties and all
22 attorneys on their, quote, "exemplary," end quote,
23 quality of their briefing and their arguments.
24 This is no small compliment coming from an
25 attorney as experienced as Mr. Cameron. I hope

1 going forward that all parties can uphold that
2 exemplary standard for the remainder of this case.

3 Now, with that short detour, I would
4 like to address our exceptions related to material
5 damage. Material damage. This is the pollution
6 iceberg. That's the heart of this claim. For
7 this I'm going to walk the Board through this
8 claim using some visual aids.

9 (Share screen)

10 MR. HERNANDEZ: Material damage. This
11 claim is about material damage, and I think we
12 need to start with the statute. The statute
13 Montana Code Annotated 82-4-227 subsection (3)
14 says in short that DEQ cannot approve a mining
15 operation unless, quote, "the proposed operation
16 of the mining operation has been designed to
17 prevent material damage."

18 Regulations bear this provision out in a
19 little bit more detail, and state that DEQ can't
20 approve a permit unless, quote, "the hydrologic
21 consequences and cumulative hydrologic impacts
22 will not result in material damage to the
23 hydrologic balance."

24 Material damage is the key question
25 here, and this, I would submit to the Court that

1 this basically sets forward a simple equation for
2 the Board. On one side of the equation the Board
3 has to consider the proposed operation, and the
4 impacts of that proposed operation. On the other
5 side of the scale, the Board has to consider what
6 is material damage.

7 If the impacts of the proposed operation
8 are greater than the threshold for material
9 damage, then DEQ has to put on the brakes. So
10 maybe it's an inequality, but essentially it's a
11 balance that the Board and DEQ have to meet.

12 Now, the Montana Supreme Court addressed
13 this provision in its decision in 2023, its
14 seminal ruling on material damage, in which it
15 ruled in MEIC's favor, and that case is MEIC 2023.
16 We cite it at length in our briefs. And there the
17 Board again -- the Court said, "Looking at these
18 statutes, DEQ has to --" when the Board reviews
19 DEQ's materials, it has to look at two things:
20 All the mining in the area, will that cause
21 material damage.

22 Here the Board says a violation of water
23 quality standards, because the law says that a
24 violation of the water quality standard is
25 material damage. So looking at everything, will

12

1 that cause a violation of the water quality
2 standards, and if that's the case, will the
3 proposed permit event, the proposed operation,
4 cause a violation of water quality standards or
5 material damage.

6 Now, the key term here is "operation."
7 That is defined in MSUMRA to include all of the
8 premises of a designated strip mine area. Here
9 there's only one strip mine area, and that is
10 Rosebud Area B, which Westmoreland proposes to
11 expand to the AM5 expansion.

12 The regulations also indicate that the
13 analysis has to include the totality of the
14 operation in assessing the cumulative hydrologic
15 impacts, which is the key to the material damage
16 determination. DEQ and the Board must consider
17 the total effect of the mining and reclamation
18 operations.

19 Now here is what DEQ's record of
20 decision identifies as the project. The entire
21 project is outlined in orange, and it includes all
22 of Rosebud Area B. This part in the dark gray
23 that you see here is the additional cuts
24 associated with AM5, but the AM5 amendment is the
25 AM5 amendment of the Area B operation. There is

1 no area AM5. It's Area B, and that's the smallest
2 unit with which DEQ can assess material damage
3 under the law.

4 Now, this is the same case, and in the
5 record of decision and written findings that DEQ
6 had, it notes that the total proposed permit area
7 -- this is the total operation -- is 15,153 acres.
8 That's the entirety of Rosebud Mine Area B.
9 That's the name of the mine, it's the Rosebud coal
10 mine Area B. That's the operation DEQ has to
11 consider when assessing material damage.

12 Now, the problem here -- and this is the
13 error that DEQ made -- is that it did not base its
14 material damage determination on the entirety of
15 Rosebud Area B. Unfortunately the proposed
16 decision of Hearing Examiner Cameron makes the
17 same error.

18 This is what DEQ's Cumulative
19 Hydrological Impact Assessment said on Page 79.
20 It said, "The AM5 alone won't cause salinity
21 levels in the alluvium outside of the mine area to
22 increase to Class 3 groundwater," and that's the
23 standard here is Class 3 groundwater. The
24 degradation of Class 2 groundwater to Class 3
25 groundwater is a violation of water quality

1 standards.

2 This Board held that in the Bull
3 Mountains decision in 2014, a decade ago, and DEQ
4 maintains that position today. And we're prepared
5 to submit additional evidence indicating that DEQ
6 recognizes the degradation of Class 2 to Class 3
7 groundwater.

8 Anyhow, the point being that DEQ
9 considered in making its material damage
10 determination -- and that's the key determination
11 here -- it only looked at the additional class
12 associated with the AM5 alone. Now, you might be
13 asking, "Well, how do we know they're not talking
14 about all of Area B and AM5?"

15 Well, we know that because DEQ's
16 representative stated under oath -- this is Mr.
17 VanOort -- at deposition, we asked him, "What if
18 AM5 in the existing Area B put it --" alluvial
19 water quality -- "over the limit compared to
20 baseline, which is over the limit of Class 2 to
21 Class 3 groundwater, which is 2,500 microsiemens
22 per centimeter, which is the measure of salinity.
23 Mr. VanOort responded, "I don't know."

24 "But does DEQ have a position on that?"
25 "Not that I'm aware of." "And that makes sense

15

1 because DEQ didn't consider that here, right?"
2 "Yes. And I can't be aware of DEQ's position
3 which has never occurred, so --" "You never
4 considered this analysis?" "No. That was not a
5 scenario that was on the table," period. That's
6 it.

7 DEQ considered just the tip of the
8 iceberg and not the entirety of the Rosebud Area B
9 operation. Again, they considered just this
10 little gray area here, not the entirety of the
11 Rosebud B operation.

12 Now, lest we think that the statement of
13 Mr. VanOort in his deposition on Page 166 isn't
14 clear, we can look at his earlier statement on
15 Page 159. We asked him, "What about AM5 and Area
16 B? What if Area B brings the water levels up to
17 just below Class 3," which is 2,499 microsiemens
18 per centimeter, "and AM5 brings it over?" Mr.
19 VanOort's response was, "We didn't consider that
20 scenario."

21 But now this is the key admission that
22 the proposed order doesn't look at, but if you
23 look at evaluation in the appendix. The mass from
24 existing Area B is greater than the mass from AM5,
25 and is actually also greater than the mass for the

1 Big Sky mine, which is the Peabody coal mine that
2 existed in the area before.

3 So in that case it would be highly
4 likely -- now, this is DEQ's own witness saying --
5 "It would be highly likely that Area B existing by
6 itself, albeit much further in the future because
7 it's farther away from Lee Coulee, would
8 eventually cause that change, but we didn't
9 actually run that calculation all the way to the
10 end because it wasn't anything relevant to our
11 decision, which was a decision for AM5, and if it
12 would be designated to prevent material damage,
13 which it is."

14 So there again Mr. VanOort said they
15 only considered the tip of this iceberg, and not
16 the entirety of the operation, which they're
17 required to do by law.

18 Just to gild the lily on this, I'll note
19 that on Page 138 of Mr. VanOort's deposition he
20 says the same thing. "So you don't know if the
21 Rosebud Mine alone would cause the alluvium to
22 transition from Class 2 to Class 3 groundwater?"
23 "No, and that's not an analysis that's required
24 anywhere." DEQ's position is legally that they
25 only have to consider the tip of the iceberg.

1 That's wrong as a matter of law.

2 Now, at this point, this is a procedural
3 error. DEQ just didn't do the math that it was
4 supposed to do. DEQ is supposed to take all the
5 pollution from Rosebud Area B plus AM5, that's the
6 totality of the operation, and see if it measures
7 up to material damage. DEQ didn't do that. They
8 just looked at the tip of the iceberg, the
9 additional pollution from AM5, and said, "Well,
10 that caused material damage." That is procedural
11 error, and that was fatal.

12 And worse this wasn't a harmless error,
13 because DEQ's own representative Mr. VanOort
14 testified that if they had looked at that whole
15 picture, he thinks that it's highly likely --
16 which is beyond a preponderance of the evidence
17 standard which applies here -- highly likely that
18 that pollution would cause this transition of
19 groundwater from Class 2 to Class 3, which is a
20 violation of water quality standards, which is
21 material damage.

22 Now, that's the same -- unfortunately
23 that's the same -- sorry. The Hearing Examiner in
24 the proposed order makes the same error. Here we
25 cite the relevant findings of fact. Finding of

1 Fact 56 was particularly telling. There Hearing
2 Examiner --

3 CHAIR SIMPSON: Mr. Hernandez, if I
4 could interrupt for just a moment. You've been
5 speaking for almost 20 minutes. Can you wrap this
6 up in another five? Is it possible, please?

7 MR. HERNANDEZ: I'll do my very best.
8 Yes. So in short, Mr. Cameron says that when
9 assessing the pollution from AM5, material damage,
10 he's only looking at AM5, and not the rest of the
11 mining operation. That was in error, and the
12 failure to consider the big picture, the whole
13 iceberg, is an error of law, which the Board can
14 correct here and find that DEQ and the Hearing
15 Examiner got it wrong, that actually this material
16 damage determination has to be made anew.

17 I'm going to pause briefly just to
18 address what DEQ and Westmoreland will probably
19 argue, and that's that they'll say that we didn't
20 raise this claim. They'll say, "Plaintiffs didn't
21 raise the claim about material damage," and that's
22 just factually incorrect.

23 Our notice, Amended Notice of Appeal
24 here, this is Paragraph 7, says that, "In
25 assessing material damage, DEQ erroneously

1 isolates the impact of AM5 from the Rosebud Mine.
2 But the material damage determination doesn't
3 compare whether or not one part of the operation
4 is worse than another part of the operation, it's
5 whether the whole thing will cause material
6 damage." So we did raise this claim.

7 The other argument that DEQ and
8 Westmoreland will make is they'll say, "Well, in
9 Appendix A we considered --" you know, they
10 tallied up all the pollution from Rosebud B and
11 AM5, and that's true, they did. This is Appendix
12 A, and particularly Figure 9 in Table 4.

13 The problem, though, is that they then
14 did not determine whether or not all this
15 pollution -- and here the pollution in yellow is
16 all the pollution from Area B, blue is AM5. In
17 assessing material damage, DEQ only considered the
18 blue line, the pollution from AM5, not the rest of
19 the salinity pollution from Area B, which is five
20 times greater. That's the problem. Their
21 material damage determination simply didn't use
22 the right math, and that was an error.

23 Now here, in the interests of wrapping
24 this up -- and I appreciate the Board's time on
25 this -- the second claim that the Plaintiffs raise

1 is about climate change, and there the fundamental
2 problem with DEQ's analysis and the Board of
3 Environmental Review's decision is that they don't
4 actually address Plaintiffs' claim.

5 The claims the Plaintiffs made here is
6 that MSUMRA doesn't prohibit DEQ from considering
7 climate change. That's what DEQ said in its
8 response to public comments, and here I'll share
9 that really fast. Well, I can share it later.

10 But DEQ said, "In public comments the
11 public submitted information to DEQ indicating
12 that climate change is going to cause
13 evapotranspiration to be worse, which is going to
14 have harmful impacts on anyone relying on surface
15 water." DEQ's response to comments was, "We don't
16 have authority under MSUMRA to consider this. We
17 can't do it."

18 They didn't offer any scientific
19 explanation, they just said, "As a matter of law
20 we don't have the discretion to consider climate
21 change," and if the Board looked at the language
22 of MSUMRA that we point out in our exceptions in
23 our briefing, DEQ has abundant discretion to
24 consider climate change in assessing impacts to
25 hydrology and reclamation.

1 So what DEQ has done -- and it's the
2 same error that the proposed order does -- is
3 they've changed our argument. They have said,
4 "The question isn't whether DEQ has discretion to
5 assess climate change, it's whether DEQ is
6 required to address climate change."

7 That's a different question. It's not
8 what DEQ said when it made its decision to issue
9 the permit. What DEQ said there was, "We don't
10 have authority to address climate change." That's
11 the claim that we made in our Notice of Appeal.
12 I'm going to share this just so that it's
13 absolutely clear on this.

14 Here is DEQ's response to comments.
15 "DEQ was not granted the authority to consider
16 climate change in the statute MSUMRA." Plaintiffs
17 claim was, "DEQ further refuses to assess the
18 impacts of climate change on hydrologic and other
19 resources in the project area on the basis that it
20 lacked legal authority to do so." DEQ's basis for
21 ignoring the impacts of climate change was error.
22 That's our position, and I don't think there's any
23 dispute here that DEQ is wrong on that.

24 Now, the last thing I'm going to say --
25 I see I've got 18 seconds to go, Chairman Simpson

1 -- is that the Board can resolve this issue by
2 asking DEQ directly: "Does DEQ have authority
3 under MSUMRA to consider climate change?" The
4 question isn't whether they're required to, the
5 question is whether or not they have authority to.
6 If DEQ says, "We do," this question is done, this
7 case was over. If they say, "We don't," then
8 they're wrong as a matter of law.

9 I won't take any more of the Board's
10 time. I appreciate your attention to this matter.
11 I'm happy to answer any questions in rebuttal, and
12 we request that the Board not accept the proposed
13 findings and conclusions, but instead determine
14 that DEQ erred with respect to Claims 1 and 3, and
15 order the remand of this matter to a Hearing
16 Examiner to issue a decision; or not even remand
17 it. The Board can issue a decision in favor of
18 the Petitioners on Claims 1 and 3. Thank you,
19 Chairman Simpson. I appreciate the indulgence.

20 CHAIR SIMPSON: Thank you, Mr.
21 Hernandez. I think we'll hold off on any
22 questions until we have heard from all the
23 parties. DEQ.

24 MR. KING: Good morning Board Chair,
25 Vice Chair, Board members. Sam King on behalf of

1 DEQ. I intend to keep my comments a bit shorter
2 here, and I will accept the invitation to indulge
3 some of the substantive arguments here, but first
4 I think it's important to just, as a reminder to
5 the Board of where we're at in this litigation. I
6 admire MEIC's fierce advocacy in this case, but
7 where we are now, the Board's role is very
8 limited.

9 2-4-621 puts the guardrails on what the
10 Board can and can't do at this point, and the
11 question for the Board to answer is for each
12 specific factual finding, to ask whether before
13 the Board can either reverse or modify any of
14 those factual findings, it has to first determine
15 after reviewing the whole record in the light most
16 favorable to the prevailing parties -- here DEQ
17 and Westmoreland -- whether any of those factual
18 findings were not supported by substantial
19 credible evidence; and then additionally, if it
20 intends to modify any of those conclusions of law,
21 if those factual findings, or those conclusions
22 upon which these factual findings were based were
23 likewise not support by substantial credible
24 evidence.

25 So just as a reminder, this isn't an

1 opportunity to relitigate the entire case and
2 relitigate the merits of the case. It's
3 essentially an opportunity just for the Board to
4 pressure check the decision that the Hearing
5 Examiner made, and I would implore the Board to
6 not accept MEIC's invitation to retry this whole
7 case at this late date.

8 Mr. Cameron assumed jurisdiction over
9 this case three years ago. The parties were
10 allowed to present all the evidence and argument
11 they wanted. Mr. Cameron issued a comprehensive
12 52 page decision. He addressed all of the factual
13 findings and legal conclusions. It's a very, very
14 strong decision, and I would submit that it would
15 be reversible error for the Board to do as MEIC
16 suggested it may do, and completely reverse this
17 decision at this point.

18 Nevertheless I will just briefly respond
19 to some of these two claims that MEIC is still
20 arguing about, with the first one regarding the
21 material damage determination.

22 MEIC is correct that DEQ continues to
23 contend that MEIC did not sufficiently raise this,
24 what it maintains is a procedural claim. I do
25 agree with the characterization of material damage

1 as a math equation, but there are different
2 components obviously to that math equation. There
3 is on the one hand what goes into that math
4 equation, and on the second piece is what comes
5 out of that math equation, and what comes out of
6 that math equation is whether or not material
7 damage will occur.

8 I would implore the Board to read the
9 Notice of Appeal and the Amended Notice of Appeal
10 at Paragraph 7 in its totality, because really
11 what MEIC was arguing throughout the duration of
12 this case, as supported not only by its Notices of
13 Appeal, but also information exchanged in
14 discovery and the expert witness disclosures, was
15 that we didn't put the relevant numbers into that
16 math equation to calculate material damage.

17 It did not occur to MEIC and their
18 expert until the deposition of their expert
19 witness that we in fact did that calculation, and
20 then based the accompanying material damage
21 determination on that calculation, because MEIC
22 was unaware of Appendix A to the CHIA.

23 So the claim had shifted. By the time
24 we got to summary judgment, the argument was that
25 in fact material damage will occur; and initially

1 and throughout the duration of the proceeding the
2 argument was we didn't put all of the correct
3 numbers into the calculation.

4 So it is a late, it is a belated claim,
5 but in either instance it doesn't really matter
6 because the Hearing Examiner, at DEQ and
7 Westmoreland's request, addressed both the
8 procedural claim and the newly raised substantive
9 claim in the proposed decision, and in both
10 instances were right.

11 Which leads me to my second point about
12 what is really material damage, because we're
13 hearing a bit of a truncated version here. And
14 Mr. Hernandez is correct that the 2023
15 Westmoreland decision did unpack what it means to
16 calculate material damage, but I do not believe
17 that it is accurate that the only consideration is
18 what the cumulative impacts analysis is.

19 That is Step 1 of the Montana Supreme
20 Court's test, and the relevant statutory language
21 is in fact in 82-4-227, and the test is as
22 follows: One, do the cumulative hydrological
23 impacts of all mining in the area that interact,
24 lead to a violation of a water quality standard?
25 Yes or no. And then the second analysis that must

1 occur is whether, if the answer is yes, whether
2 the proposed operation is a cause in fact of that
3 material damage.

4 So the Court characterized it as: Is
5 this addition of the new mine, new mining impacts,
6 the straw that broke the camel's back, and pushed
7 something -- pushed the cumulative impacts over
8 from not a water quality violation to a water
9 quality violation?

10 Only if the answers to both of those
11 questions is yes will it be determined that DEQ
12 has made an error, and in this case, the answer
13 was no for several reasons. And the big reason
14 was the only reason that groundwater changed from
15 a Class 2 on average to a Class 3 was because of
16 the previously permitted Big Sky Area B mine that
17 had already been released from bond.

18 And so if you look at that cumulatively
19 with Big Sky Area B, existing Rosebud Area B, plus
20 AM5 all together, the change from a two to a three
21 already occurred; and as a matter of law that
22 change could not have been a violation of a water
23 quality standard because that change occurred
24 before that definition appeared in material damage
25 in MSUMRA.

1 It occurred, when it occurred, it was
2 exempt under the Montana Water Quality Act from
3 degradation because it was already in existence
4 when that provision was added to the Water Quality
5 Act.

6 And then thirdly, that groundwater class
7 change happened within Big Sky Area B's permit
8 boundary.

9 So there is no water quality violation,
10 whether this is just looking at it in the context
11 of cumulative impacts, or it's looking at it in
12 the context of if you add AM5 to these cumulative
13 impacts does it cause a groundwater class change.
14 The answer to the first question is no; the answer
15 to the second question is no.

16 So in both instances, I agree with MEIC,
17 everything is undisputed here. We did the entire
18 analysis, and we considered whether in that entire
19 analysis if you add AM5 to the cumulative impact,
20 does it cause a groundwater class change? Again
21 no.

22 A couple other things I would like to
23 clear up as well. MEIC suggests that we left
24 information out of this equation, and that map, I
25 would point out, is from the EIS. That is not

1 from the permitting documents itself. Cumulative
2 impact does have a different and distinct meaning
3 in the context of the Montana Environmental Policy
4 Act versus MSUMRA.

5 The second thing I'd like to point out
6 is MEIC continues to suggest that we looked at AM5
7 alone, but really if you look at Page 79 of the
8 CHIA that was cited, all that's referring to there
9 is what the probable hydrologic consequences
10 report said, which was a consideration of what is
11 the effect on the existing groundwater of just
12 AM5.

13 Now the PHC -- I know, Chairman Simpson,
14 you understand this concept. The PHC alone is a
15 related but distinct requirement from the CHIA
16 itself. The PHC only looks at this specific
17 project or proposal. It is DEQ that is then
18 tasked with compiling the cumulative impacts of
19 all mining, and taking that PHC and doing the
20 ultimate equation, and that's what we did.

21 MEIC also sort of highlights some of the
22 statements made in Mr. VanOort's deposition. I
23 would encourage the Board, if it has questions, to
24 read the entirety of that deposition transcript.

25 Essentially the information that was

1 highlighted in there were questions related to,
2 "Well, what would you -- did you look at these
3 other sort of hypothetical scenarios?"

4 In total Mr. VanOort's testimony is
5 entirely consistent with what we did, which was we
6 looked at all of the potential impacts on the
7 operation. We didn't make certain exclusions.
8 And then we also considered whether is AM5 the
9 cause in fact of a groundwater quality violation.
10 Again, the first answer was no, the second answer
11 was no.

12 I think that essentially covers what I
13 wanted to cover here. The other thing I think is
14 worth pointing out is that DEQ didn't even need to
15 include the Big Sky Area B mine within its
16 Cumulative Hydrologic Impact Analysis.

17 And the reason being is if you look at
18 SMCRA authority under the federal standards, it
19 recognizes that once a mine has been released from
20 bond, you don't need to plug that mine into the
21 cumulative impact analysis because that is the new
22 baseline standard from which you're looking at.

23 And so the standard doesn't run from a
24 Class 2. In actuality as a matter of law the
25 standard runs from how does the water exist at the

1 release of the Big Sky mine, which was a Class 3,
2 and which we know was exempt from the Water
3 Quality Act. And so we included the area, the Big
4 Sky Area B mine anyway just as a matter, as a
5 conservative assumption, but we didn't even
6 necessarily need to do that.

7 But ultimately any way you cut this
8 claim, the Hearing Examiner addressed both
9 arguments, the procedural argument and the
10 substantive argument. He made the right decision
11 on both of those issues. And I would suggest
12 there is more than substantial evidence in the
13 record from which that decision should be upheld.

14 Touching briefly on climate change,
15 again, we have a similar argument here. DEQ does
16 maintain that MSUMRA does not contemplate for
17 authority of DEQ to consider prospective global
18 climate change impacts in determining whether
19 reclamation can be accomplished, and I think the
20 important component to this piece is the question
21 on whether reclamation can be accomplished is
22 driven by what are the impacts from this
23 particular operation on the land and water
24 resources.

25 We're not asking whether there are some

1 external factors that we're not approving or
2 permitting, and whether these external factors
3 could prohibit reclamation, and I think that's an
4 important nuance, because if you open the door to
5 prospective climate change impacts which at a site
6 specific level particularly are uncertain at best,
7 you could open up the door to all sorts of
8 hypothetical future impacts.

9 Now of course DEQ, just like the Board,
10 is a creature of statute. We have specific
11 authorities that have been granted to us by the
12 Montana Legislature. The question in all of those
13 instances when we're interpreting what our
14 statutory authority is is what did the Legislature
15 intend.

16 And I would submit that in 1982, when
17 MSUMRA was passed, the Legislature did not
18 anticipate this forward-looking prospective
19 climate change consideration, and whether we
20 should be accounting for that in determining
21 whether reclamation could be accomplished at the
22 conclusion of all mining.

23 And I think that's important because
24 throughout this case MEIC has been unable to point
25 to a specific decision or any sort of legal

1 authority, no case law, where any state, federally
2 approved state program has considered such a
3 consideration in determining whether reclamation
4 has been accomplished, and the same is true for
5 any sort of Federal authority under SMCRA.

6 There's no Federal decision, there's no
7 State decision from which I'm aware where any
8 program has ever considered such a thing. So I
9 don't believe that was the intent of either the
10 Federal government or the State government when
11 these acts went into effect over 40 years ago.
12 I'm not suggesting it might not be good policy
13 moving forward, but I do want to be clear that
14 when we are looking at our statutory authority, we
15 are bound by what the Legislature intended.

16 In either case, the Hearing Examiner did
17 conclude that it didn't require us to consider
18 climate change impacts in whether reclamation can
19 be accomplished. Even if that's in fact true,
20 then in order to prevail on their claim, I would
21 submit MEIC then needs to present evidence that
22 because of prospective climate change impacts
23 reclamation could not be accomplished.

24 It turns a procedural claim in which you
25 potentially could prevail simply by argument, into

1 a substantive claim where you need to prove that
2 substantive claim by a preponderance of the
3 evidence.

4 And here, not only did MEIC not present
5 affirmative evidence or any evidence that was
6 submitted into this record that would suggest as
7 much, but also Westmoreland actually ran the
8 numbers that their expert came up with, and
9 determined it would have no impacts on any of the
10 hydrologic resources based on projected warming.

11 So not only was there no evidence in
12 support of this substantive claim, but it was also
13 affirmatively disproved. The Hearing Examiner
14 recognized that as well.

15 The last point I'll just touch two
16 seconds on, this dismissal of Claim 2. The only
17 thing that the Board can do now on the second
18 claim, the stream buffer claim, is change or
19 modify the decision if there isn't -- again, the
20 factual findings aren't supported by competent
21 substantial evidence in the record.

22 Having forwent that opportunity to
23 identify those things, the decision has to stand
24 as is. I think the Board needs to issue a final
25 decision adopting the Hearing Examiner's findings

1 on the second claim. And I do not believe that
2 there is an opportunity in MAPA to now
3 unilaterally dismiss that claim on their own.

4 So even though the Hearing Examiner has
5 in fact recommended dismissal of the claims, the
6 dismissal comes upon the final judgment, as it
7 should, with both Claims 1 and 3. So again, I
8 suggest the Board we have -- there's a limited
9 role here. This is a very well reasoned and
10 thorough opinion, and we ask that you adopt that
11 decision in full subject to the very minor
12 exceptions that DEQ and Westmoreland have pointed
13 out. Thank you.

14 CHAIR SIMPSON: Thank you, Sam.
15 Intervenor Westmoreland and Local 400 Operating
16 Engineers.

17 MR. YEMINGTON: Good morning, Chairman
18 Simpson, members of the Board. Sam Yemington on
19 behalf of both the operator of the Rosebud mine,
20 Westmoreland, and the work force of the Rosebud
21 Mine, the Local 400.

22 As Chairman Simpson indicated, we
23 intervened on behalf of the Department in this
24 case to defend our coal mining permit. Similar
25 presentation with respect to the process and the

1 merits here as you just heard from DEQ. I will do
2 my best to avoid a duplicative presentation, but I
3 would note that we do join in their presentation
4 of both the facts and the law.

5 With respect to process, and the Board's
6 role, it's important, though, to re-emphasize the
7 limited nature of the Board's role at this
8 juncture. This is the penultimate or ultimately
9 the ultimate step of this contested case process.

10 This was assigned to a Hearing Examiner
11 who oversaw this case for three years, and issued
12 a thorough and comprehensive decision. It spans
13 52 pages. It is comprised of a discussion
14 section, 119 findings of fact, discrete findings
15 of fact, and 83 conclusions of law reached by
16 Hearing Examiner Cameron.

17 Understanding the Board has had
18 opportunity to review that, it's important to
19 understand where their jurisdiction ends, and Mr.
20 King touched on this, but MAPA controls here, and
21 it's 2-4-621 subpart (3), and it instructs the
22 Board that when a Hearing Examiner issues a
23 decision like this, a proposed FOFCOL decision,
24 that the Board's only role here is to assess the
25 proposed findings and the proposed conclusions

1 under the substantial evidence standard and the
2 correctness standard.

3 And what means that is to the extent
4 there's been an exception lodged against an
5 enumerated finding, the Board cannot modify or
6 reject that finding from Hearing Examiner Cameron
7 unless it first reviews the entirety of the
8 record, and after reviewing the entirety of the
9 record, the Board then must state with specificity
10 why Cameron got it wrong, and they have to
11 consider those facts as DEQ suggested in a light
12 most favorable to the prevailing parties, which is
13 my clients and the Department.

14 And so there's really no opportunity
15 here for the Board, absent assessing, absent
16 reviewing the entirety of the record, to make any
17 changes whatsoever to any of the 119 proposed
18 findings of fact. Full stop.

19 With respect to the conclusions of law
20 -- and again, I noted there's 83. With respect to
21 the conclusions of law, to the extent there's an
22 exception lodged, and the Board considers that
23 exception, they can assess those, they can modify
24 or change those conclusions to correct legal
25 misstatements. That's different than the

1 findings. You have more latitude as Board members
2 to assess those conclusions of law and make
3 changes.

4 But the facts are different. That's the
5 substantial evidence standard. And so again as
6 DEQ stated, this isn't an opportunity to
7 relitigate the case. That's over. It's not an
8 opportunity to lodge evidentiary objections. It's
9 not an opportunity to recast your claims or
10 present new arguments. All that is over. The
11 Board's role here is narrow, it's straightforward,
12 and it's clearly and unequivocally guided by and
13 controlled by MAPA.

14 With that understanding, I'd like to
15 move on, and instead of using my time to present
16 my perspective per se of the case and the facts
17 and the law, I think it's important to emphasize
18 what the Hearing Examiner found, and how those
19 findings erode and undercut the presentation made
20 by MEIC.

21 The Hearing Examiner found that the
22 permit application submitted by my client included
23 thousands, tens of thousands of pages of
24 hydrology, geology, climatology, vegetation,
25 wetlands, soils, wildlife, and other environmental

1 information and data relevant to AM5. That's
2 Finding of Fact 8. That's an established fact.

3 Hearings Examiner Cameron further found
4 that DEQ undertook an independent and
5 comprehensive review of the probable hydrologic
6 consequences and impacts of AM5, of the mining
7 activities, and it relied on an internal team of
8 technical and scientific experts to conduct that
9 review. That's Finding of Fact 9. It hasn't been
10 challenged. It's binding on the Board.

11 Following its review -- again, this is
12 Hearing Examiner Cameron's factual findings -- DEQ
13 concluded that it would not cause -- AM5 would not
14 cause material damage to hydrologic balance beyond
15 permit boundary. He found that the decision was
16 well documented through a series of formal
17 decision documents, including the CHIA, which is
18 the Cumulative Hydrologic Impacts Assessment,
19 hundreds and hundreds of pages of technical
20 hydrologic analysis developed and drafted by the
21 Department specific to this permit proposal.

22 Petitioners, again Cameron found that
23 the Petitioners' evidence failed to show that
24 DEQ's permitting decision was unlawful or
25 unsupported by the evidentiary record, and that's

1 in his discussion section. In contrast, Hearing
2 Examiner Cameron found that our evidence and DEQ's
3 evidence and legal arguments demonstrated
4 unequivocally that AM5, supported by substantial
5 evidence, including detailed technical and
6 scientific analysis, and consistent with all
7 applicable legal framework.

8 Moving forward to the claims at issue,
9 it's important to understand, understanding that
10 some of the Board members haven't been through
11 this process before, but in a MAPA contested case,
12 there's a presumption that the permit, if approved
13 by the Department, is lawful, and the burden of
14 proof to overturn the permit falls on the permit
15 challenger.

16 That burden of proof, that evidentiary
17 burden of proof, is settled law. This is civil
18 litigation. There's an opportunity to identify
19 witnesses, and experts, to conduct discovery,
20 depositions, site visits. This is an exercise in
21 developing an evidentiary record, and
22 demonstrating beyond a preponderance of the
23 evidence that the Department's decision was
24 unlawful. That's a legal standard and that is
25 settled law.

1 So with that understanding again, it was
2 the challengers here, the Sierra Club and MEIC,
3 who bore that evidentiary burden to overturn the
4 Department's decision, to overturn it with
5 evidence and argument, and to prove the facts
6 underlying their claims to the Hearing Examiner's
7 satisfaction, and MEIC failed to do that.

8 And so I want to just touch on a few of
9 these points, because not only did they fail to do
10 this, they failed to present evidence at all.

11 It's important to note that on summary judgment,
12 they maintained the position that they didn't have
13 to prove their claims. This is in their brief on
14 summary judgment. They said their argument, which
15 has since been defeated by the Montana Supreme
16 Court, that it was the operator, the permittee and
17 the Department, who bore the burden of proof to
18 disprove their claims.

19 That's false. It's been disproven time
20 and again. It goes contrary to a wealth of legal
21 precedent, and now it's nothing beyond settled law
22 based on the AM4 of the Supreme Court in 2023.

23 And so we know they attempted to overturn the
24 permitting decision and to prove their claims
25 without any evidence.

1 So let's look at some of these specific
2 findings that Hearing Examiner Cameron reached
3 with respect to this in Claim 1. This would be
4 the cumulative impact and material damage claim.

5 The Hearings Examiner found that the
6 Petitioners -- MEIC and Sierra Club -- on summary
7 judgment -- All parties have proposed facts.
8 That's part of the process. And all the parties
9 presented proposed facts on summary judgment in
10 support of their motions.

11 In assessing the proposed facts from
12 MEIC and Sierra Club, Hearing Examiner Cameron
13 found that they consisted primarily of legal
14 conclusions, and characterizations of DEQ's
15 decision documents, deposition testimony, and
16 discovery responses. Nothing from their expert,
17 no independent analysis, no independent evidence
18 whatsoever. That's Finding of Fact 47. It hasn't
19 been challenged, and it's binding on this
20 tribunal.

21 Hearing Examiner Cameron further found
22 that Petitioners -- explicitly he found that
23 Petitioners failed to establish that DEQ excluded
24 relevant mine areas. This goes to the
25 presentation by Petitioners at the outset of this

1 hearing, that somehow there were portions of the
2 mine that were overlooked. There's a specific
3 finding of fact embedded in Conclusion of Law 38
4 that they failed to establish throughout the
5 course of this case.

6 Now, they can tell you that they read
7 the decision documents differently, if they have,
8 and that it's somehow a tip of the iceberg, but it
9 flies in the face of a specific factual finding in
10 this case by the Hearing Examiner that they failed
11 to establish that very point.

12 The Hearing Examiner further found that
13 the CHIA and Appendix A specifically considered
14 these interactions, that is considered
15 specifically the interactions between AM5 and
16 existing and historic mining at the Rosebud Mine
17 and at Big Sky Mine. That's Conclusion of Law 38.

18 Cameron continues that the Petitioners
19 did not provide sufficient evidence to show that
20 DEQ's cumulative impact assessment or material
21 damage determination were substantively flawed.

22 Again, time and again, we are confronted
23 with the reality that Petitioners didn't present
24 any evidence in this case, and they can complain
25 that we misunderstood their claims, they can

1 complain that the Hearing Examiner didn't get what
2 they were trying to tell him, but at the end of
3 the day they didn't present any evidence.

4 I would further note, again in
5 Conclusions of Law 39, that the entirety of the
6 evidence presented on summary judgment in support
7 of the material damage claim from Petitioners was
8 found in Mr. Anderson's declaration, which was
9 appended to their motion for summary judgment. We
10 had to move to strike that declaration because it
11 was clear and obvious discovery abuse.

12 Hearing Examiner Cameron considered our
13 motion to strike and struck it, but fundamentally
14 what that means for this case is that they didn't
15 have any evidence to support their allegation with
16 respect to Claim 1. Again, that's Conclusion of
17 Law 39. Embedded in that is a factual finding
18 that this Board just can't overturn. It hasn't
19 been challenged. They had no evidence.

20 As noted by the Department in their
21 presentation, the claim as prosecuted from the
22 beginning of this case focused on this idea that
23 we had omitted some factor from that evaluation,
24 and that was the cumulative impact analysis and
25 the material damage determination.

1 On the deposition of their expert, who
2 they had identified as the individual with all
3 evidence supporting their claim, he testified
4 under oath that he was not aware of Appendix A; he
5 did not know that it existed prior to enunciating
6 his expert opinion; and that it appeared from his
7 review to include all of the information that he
8 felt was missing.

9 This is another finding by Hearing
10 Examiner Cameron. With respect to that discovery,
11 that deposition testimony, Hearing Examiner
12 Cameron found that Petitioners were operating
13 under a factual misunderstanding -- his words, a
14 factual misunderstanding -- from the beginning of
15 this case that certain information was omitted
16 from the analysis, and they only learned on the
17 deposition of their expert that in fact that
18 information was there the whole time. All they
19 had to do was read the permit decision documents.

20 Moving forward, this is consistent with
21 Claim 3 as well. We have heard from Petitioners
22 that, again, we misunderstand their claim, or that
23 somehow Hearing Examiner Cameron didn't adequately
24 respond to them. I resist that. Hearing Examiner
25 Cameron's decision is well reasoned, and it

1 addresses this question of climate change and
2 considering climate impacts from both a legal
3 perspective under MSUMRA, and also a factual
4 consideration whether even accepting the worst
5 case scenario as presented by Petitioners, whether
6 that would impact the Department's analysis. And
7 on both of these pieces, whether considered from a
8 factual perspective or a legal perspective, the
9 Hearing Examiner found against Petitioners and in
10 favor of my clients and the Department with
11 respect to questions concerning climate change
12 impacts and the role of climate change impacts
13 within the context of a permit application.

14 Understanding that we are short of time
15 here, I'd like to jump forward to a few other
16 questions. One that we find to be of particular
17 interest for purposes of correcting Hearing
18 Examiner Cameron's proposal and making it
19 consistent with the law is his resolution of the
20 question of standing.

21 We addressed this in detail in our
22 exceptions. This is where we moved alone without
23 DEQ. I'll just note that. This is purely from my
24 clients. We resist the fact that these folks have
25 standing under MSUMRA to challenge this particular

1 mine permit. We understand and recognize that
2 that's not a particularly high bar, and that this
3 Board has in the past found that certain members
4 of these organizations have sufficient standing to
5 challenge mine permits at the Rosebud Mine. But
6 each permit is different, and each must be
7 considered in isolation against the facts that are
8 presented.

9 Now, it's not our burden to disprove
10 that they have standing. It's their burden, it's
11 their burden as the challengers to establish that
12 they have standing based on their organization's
13 associational membership, and they have an
14 individual or individuals who use resources of
15 value that will be or may be impacted by the
16 proposed mining operation.

17 Now, those can be environmental, they
18 can be economic, they can be recreational, and
19 they can be esthetic. That's all defined in
20 statute and in regulation.

21 What we did at the outset of this case
22 in discovery is we asked these folks to identify
23 any of their members who have ever seen, ever
24 visited these lands. And to understand, we're
25 talking about a large swath of eastern Montana.

1 This is 10,000 acres, approximately 10,000 acres
2 within the AM5 permit boundary. It is buttressed
3 to the north by the Rosebud Mine, and active
4 mining, to the east and to southeast by the Big
5 Sky Mine, historic mining and reclamation
6 activities that have gone on for approximately
7 five or six decades.

8 It is just simply not plausible that
9 these folks recreate in this area, or that they
10 have some tie to this area. And so we asked them
11 during the discovery process to identify any of
12 those individuals who they claimed in fact had
13 these resource uses that would be impacted by AM5,
14 and they identified none.

15 And it's not surprising. AM5 is
16 landlocked, it is not accessible by public roads,
17 it is not accessible by paths, or easements, or
18 right-of-ways of any kind. The public cannot
19 access AM5. You can't actually see it. You can't
20 see AM5 because there's a water -- there's a
21 divide between the nearest most proximate public
22 road, county road, and AM5.

23 And so we know that their folks, their
24 members, while they may not like coal mining,
25 while they may resist the idea that the Rosebud

1 Mine is expanding, it does not serve as a basis to
2 establish standing in this case. They must use a
3 resource of value that will be impacted by AM5,
4 and we know that they don't. It's known.

5 So we would ask the Board to correct --
6 which is their authority -- correct the
7 conclusions of law offered, proposed by Hearing
8 Examiner Cameron, correct those under the correct
9 standard under MSUMRA and its implementing
10 regulations, and then apply those undisputed facts
11 that these folks have never walked on or even seen
12 AM5 lands, and that's simply not enough to
13 establish standing, and to initiate what now is a
14 three and a half year challenge before the Board
15 of Environmental Review on claims that have been
16 disproven factually and legally in spades.

17 So with that, I'll conclude my
18 presentation and answer any questions that the
19 Board might have. Thank you.

20 CHAIR SIMPSON: Thank you, Mr.
21 Yemington. Board members, it is 12 minutes after
22 12, and as I said earlier, I believe we can
23 probably conclude this by 1:00. However, if it is
24 the mood of the Board to break for lunch we can
25 certainly do that. Otherwise I'd suggest we take

1 a ten minute break and come back for rebuttal and
2 Board deliberations.

3 Let's take a ten minute break, then
4 return here, maybe seven minutes according to my
5 clock, return about 12:20, and resume. And as I
6 said, hopefully we can wrap this up well before
7 1:00. Thank you everybody.

8 (Recess taken)

9 CHAIR SIMPSON: I'll bring the meeting
10 to order. Sandy, would you call the roll, please.

11 MS. MOISEY-SCHERER: Yes, sir. Chair
12 Simpson.

13 CHAIR SIMPSON: Here.

14 MS. MOISEY-SCHERER: Vice Chair Aguirre.

15 VICE CHAIR AGUIRRE: Here.

16 MS. MOISEY-SCHERER: Board Member
17 Altemus.

18 BOARD MEMBER ALTEMUS: Present.

19 MS. MOISEY-SCHERER: Board Member Payne.

20 BOARD MEMBER PAYNE: Here.

21 CHAIR SIMPSON: Board Member Smith.

22 BOARD MEMBER SMITH: Here.

23 MS. MOISEY-SCHERER: We have a quorum,
24 sir.

25 CHAIR SIMPSON: Thank you. Let's

1 proceed with rebuttal. Mr. Hernandez, no more
2 than five minutes, please.

3 MR. HERNANDEZ: Thank you, Chairman
4 Simpson, members of the Board. I'm just going to
5 address four points fast: One point, standard of
6 review; material damage; climate change; and
7 standing.

8 The standard of review, I think Mr.
9 Yemington was correct. Facts, deferential. The
10 conclusions of law, the Board has plenary
11 authority, no deference to the proposed order with
12 respect to findings -- conclusions of law, and
13 that's what our exceptions are based on, erroneous
14 conclusions of law. So the Board has full
15 authority to revisit that.

16 Material damage. I asked, I suggested
17 that DEQ could answer the question of whether or
18 not the agency included all of Area B in its
19 material damage determination. I did not see or
20 hear any answer on that point, and the fact of the
21 matter is that they didn't.

22 Now, DEQ pointed to a couple of
23 different things. DEQ said, "Well, our CHIA, it
24 has that language on Page 79. We're not sure
25 about that. That wasn't right." Where DEQ

1 usually ended up going, and the same with
2 Westmoreland, was to say, "Look at Appendix A.
3 Appendix A considered material damage. It
4 considered --" and they said the whole kit and
5 caboodle.

6 But Appendix A refutes their claim.
7 Now, remember what I said about material damage.
8 It's basically an equation. You have to add up
9 all of the proposed operation, and compare that to
10 material damage. The proposed operation has to be
11 Rosebud Area B in its entirety, plus AM5, and
12 compare that to material damage.

13 Here, we see in Appendix A, the CHIA,
14 DEQ didn't do that. It said, "In Lee Coulee the
15 spoils TDS load --" that's the salts -- "from
16 existing Rosebud Area B mining and previous Big
17 Sky mining exceed projected loads from AM5,
18 resulting in no increase in load to Lee Coulee
19 from AM5."

20 I can translate that. So what DEQ is
21 saying is that AM5 won't have as much pollution as
22 the rest of Area B, therefore no material damage.
23 Now, that's subtraction. DEQ is not allowed to
24 subtract the rest of Area B from the proposed
25 action. No, they have to consider it together,

1 and consider that to material damage.

2 DEQ and Westmoreland, neither of them
3 will be able to point this Board to a point in the
4 record where DEQ said, "Material damage is based
5 on all the salt from Rosebud Area B and AM5."
6 They can't do it, and they haven't done it.

7 Now, DEQ talked about the Big Sky mine.
8 That's a red herring and shouldn't be considered.
9 DEQ admitted in testimony on deposition that
10 material damage for Rosebud B is based on the
11 baseline before the Big Sky mine to assess whether
12 or not Rosebud will cause material damage. DEQ
13 agreed at deposition that they don't get a free
14 pass, because the Big Sky trashed the alluvial
15 water quality in Lee Coulee, that shouldn't be an
16 issue. And I actually have a little trouble to
17 hear that DEQ suggests that the Big Sky mine's
18 pollution and destruction of Lee Coulee gives
19 Westmoreland a pass. That's just wrong.

20 Mr. Yemington talked about the standards
21 in his testimony. Mr. Anderson agreed that
22 Appendix A talked about salt from all of the
23 different places, and it identifies the salt from
24 all those different places. That's right, no
25 dispute on that, but Mr. Anderson said nowhere

1 that Appendix B bases a material damage
2 determination on that totality of the salt.

3 That didn't happen, and that's what I
4 want to implore the Board not to fall for the head
5 fake. They're giving the head fake that they can
6 consider all of these impacts, but the question is
7 was material damage based on all of the salt in
8 the proposed operation.

9 Climate change. DEQ didn't answer my
10 question of whether or not DEQ believes it has
11 authority to consider climate change. Mr. King
12 came close, but he didn't give us a direct answer
13 on that, and I think the law is that clearly they
14 have authority to address it.

15 MSUMRA notes climate at numerous
16 occasions, and we know from the congressional
17 record that Congress was very concerned in passing
18 SMCRA that reclamation in western lands might not
19 be possible because of the high evapotranspiration
20 rate in the west. I'm sure, Mr. Chair Simpson,
21 you're familiar with this. Here we submitted
22 unopposed evidence in the record that climate
23 change is going to cause those evapotranspiration
24 rates to worsen, which will affect agriculture and
25 surface water.

1 That's unrebutted, and Westmoreland did
2 present testimony from a number of hydrologists.
3 None of them have any expertise in climate, and it
4 was error for the Hearings Examiner to give them
5 any space to talk on climate change, because none
6 of them had expertise, and three of the four
7 denied having expertise --

8 CHAIR SIMPSON: One minute, Mr.
9 Hernandez, please. One more minute, please.

10 MR. HERNANDEZ: That sounds great, and
11 I'll wrap up a few seconds early.

12 The standing question, Mr. Yemington
13 overlooked his own recommendations. You can't
14 change the Hearings Examiner's findings of fact
15 absent some really big problem, and the Hearings
16 Examiner found standing. The Board should, too.
17 And absent some big factual information that Mr.
18 Yemington didn't present, that position has to
19 stand.

20 Final point. If for any reason the
21 Board were to accept Westmoreland's standing
22 argument, it would have to throw out the rest of
23 the findings and conclusions, because under
24 standing law, if there's no standing it's error to
25 go on and then consider the merits. So I would

1 just caution the Board that the invitation that
2 Mr. Yemington is offering is actually opening a
3 huge bag, or bucket, can of worms. Mr. Chairman,
4 members of the Board. Thank you for the time. I
5 stand available for any questions.

6 CHAIR SIMPSON: Thank you, Mr.
7 Hernandez. Mr. King, anything further?

8 MR. KING: I think you've heard
9 everything you need to hear from me, Mr. Chairman.
10 I reject any suggestion that anything was left out
11 of the necessary Cumulative Hydrologic Impacts
12 Analysis.

13 Any portion of existing Area B mining
14 that could have an influence outside of the permit
15 boundary -- not necessarily everything Area B --
16 but everything that could have an impact outside
17 of the permit boundary, cumulative hydrologic
18 impact was included in that analysis. It is all
19 in Appendix A. It is referenced in the CHIA. And
20 again, to the extent the Board has questions, I
21 would encourage them to read the totality of Mr.
22 VanOort's deposition. He does a fantastic job
23 explaining this concept.

24 So again, I ask that you affirm the
25 decision. What MEIC is suggesting is basically

1 for this Board to go back into this record, and
2 reweigh all the evidence, and reach a different
3 legal conclusion, and this the Board cannot and
4 should not do. Thank you.

5 CHAIR SIMPSON: Thank you, Mr. King.
6 Mr. Yemington, anything further?

7 MR. YEMINGTON: Chair Simpson, members
8 of the Board. Just very briefly touch on a few
9 points that are responsive to Petitioners'
10 rebuttal presentation.

11 With respect to material damage, we've
12 heard time and again that it is their position
13 that there were areas of Area B at the Rosebud
14 Mine that were omitted from the material damage
15 determination.

16 Now, we are at the exceptions stage. We
17 shouldn't be having this argument, this
18 relitigation of a factual consideration which was
19 resolved against Petitioners in the Hearings
20 Examiner's proposed decision, which their own
21 expert admitted -- that's at Finding of Fact 60
22 and 61 and Conclusions of Law 38 -- all existing
23 and historic mining that interacted with AM5 was
24 considered for purposes of the cumulative impact
25 assessment and the material damage determination.

1 What Petitioners would have you believe
2 is that there's other aspects of Area B that
3 weren't considered. Now, there were aspects of
4 Area B that were not considered for purposes of
5 the cumulative impact assessment and the material
6 damage determination. The reason they weren't
7 considered is critical to understanding how this
8 process works.

9 When you apply for a coal mining permit,
10 you must demonstrate to the satisfaction of the
11 Department, you must affirmatively demonstrate
12 that the proposal is designed to prevent material
13 damage outside the permit boundary. So how do you
14 do that? You present hydrologic data to the
15 Department to demonstrate that there will not be
16 material damage to either surface water or
17 groundwater outside of the permit boundary.

18 For purposes of assessing the cumulative
19 impacts and making that material damage
20 determination, the Department is required to
21 consider within the confines of those technical
22 analyses all existing historic and anticipated,
23 maybe pre-permit or in the permit process mining,
24 that will have a hydrologic interaction with the
25 present proposal; here AM5.

1 In layman's terms will the impacts from
2 AM5 interact on a groundwater level, or a surface
3 water, with other areas of these mines? If the
4 answer is yes, those other areas have to be
5 considered in the context of both cumulative
6 impact assessment and material damage. That's how
7 it works. You have to make a determination from a
8 hydrologic perspective whether there will be any
9 interaction between these various areas of
10 existing or historic mining with the present
11 proposal.

12 Here -- and this is critical and
13 compromises their claim -- there is a groundwater
14 divide and a surface water divide between portions
15 of Area B and AM5. To the extent there's any
16 interaction, based on our analysis of the
17 groundwater flows and surface waters flows, and
18 the proposed operation, that was factored into the
19 analysis.

20 To the extent there's no interaction
21 between these disparate places, there is no
22 hydrologic interaction of either a groundwater or
23 surface water level. As the Board probably
24 already understands, you can't assess impacts on
25 things that don't interact.

1 And so while it is true that there are
2 aspects of Area B that were not included in the
3 cumulative impact assessment and material damage
4 determination, that is because there was a
5 hydrologic determination in the permitting phase
6 that those areas weren't going to interact with
7 AM5. This is a highly technical scientific
8 determination.

9 If it were Petitioners' position that
10 gravity somehow works differently at this location
11 on the earth, and the groundwater flows as
12 presented in the permit application materials, and
13 the surface water flows as presented in, again,
14 the application materials and assessed by the
15 Department were wrong, it was their burden to
16 disprove that.

17 Our hydrologist, the Department's
18 hydrologist, all agree on this point. It is clear
19 and unequivocal in the record that there is a
20 hydrologic divide between those areas that they
21 wish were included, and the issues that were.
22 That's it. You cannot assess cumulative impacts
23 of things that don't interact. End of story.

24 With respect to climate, that's, again,
25 this is done and dusted. They lost on a factual

1 question whether or not worst case scenario
2 climate trends would impact the viability of
3 reclamation that's clearly enunciated in the
4 proposed decision.

5 With respect to whether or not MSUMRA
6 requires it, Hearing Examiner Cameron took a deep
7 dive into the regulatory requirements which are
8 spelled out both in MSUMRA and in the regulations
9 with respect to what information has to be
10 provided by an applicant to get a permit. One of
11 those pieces of information is site specific
12 climate data.

13 It makes sense. You're asking whether
14 or not the proposed operation and proposed
15 reclamation could be accomplished. So what do we
16 look at? We look at site specific climatological
17 information. That information was in the record,
18 it was in the application, it was reviewed by the
19 Department, and they concluded that reclamation
20 was viable.

21 Hearings Examiner Cameron considered
22 that within the context of the law, and concluded
23 that the Department was correct in requiring site
24 specific climatological data, and not global
25 climate trends. So again, whether considered from

1 a factual or a legal perspective, he resolved both
2 those claims against them, clearly and
3 unequivocally.

4 Lastly with respect to standing, I
5 suspect the Board fully appreciates our position.
6 If you're going to open up the doors to public
7 interest groups such as MEIC and Sierra Club to
8 challenge these permits -- which they do, which
9 the Board knows they do time and time again, and
10 clutter the Board's docket -- it is incumbent on
11 the Board to assure to its satisfaction that it
12 has jurisdiction to hear those challenges.

13 All my client can do is bring this
14 information to the Board that the Board must apply
15 to their statutory and regulatory jurisdictional
16 limitations. Here in MSUMRA, in MSUMRA world, we
17 are bound by a specific definition which says that
18 for these individual interest groups, third
19 parties from San Francisco and Bozeman, to fly in
20 here and challenge these coal mining permits in
21 Colstrip, Montana, they have to at least
22 demonstrate that they have a member who uses a
23 resource of value that will be impacted by that
24 specific permit. It's that simple. If you don't,
25 you can't challenge it. If you do, you can.

1 So we would ask the Board to update, or
2 correct the conclusions of law which we have
3 identified in our exceptions with respect to
4 standing, and then to apply those known facts with
5 respect to their lack of use under that standard,
6 and determine to the Board's satisfaction whether
7 or not it has sufficient standing to hear this
8 case.

9 Now, with that said, in the interest of
10 judicial economy, we would ask only that you find
11 that they don't have standing, but we would ask
12 that you uphold and adopt the merits decisions.
13 We expect that this will be challenged, and boots
14 and suspenders, we think you've got to get it
15 right, but we would also, understanding that you
16 could dismiss for a finding of lack of standing,
17 we would ask that you do adopt the merits decision
18 for purposes of judicial economy.

19 So in conclusion, this is a well
20 reasoned decision. Petitioners had an opportunity
21 to develop their case, present their arguments,
22 present their evidence. Ultimately they didn't do
23 so to the satisfaction of Hearing Examiner
24 Cameron. He found in favor of the Department and
25 Westmoreland on each claim from both a factual and

1 a legal basis. It's over.

2 So we would ask that you, that the Board
3 adopts this decision today, with the minor
4 exceptions that we've identified, and with that
5 I'll conclude my remarks. Thank you.

6 CHAIR SIMPSON: Thank you, Mr.
7 Yemington. Questions from the Board for any of
8 the parties?

9 BOARD MEMBER PAYNE: I'll jump in.
10 Actually I have a question for each of the Counsel
11 here.

12 Under 17.24.425 Sub (2), it requires the
13 Board to hold a hearing within thirty days of the
14 submission of a petition in this case. Obviously
15 that didn't happen. This case went on for three
16 and a half years. Can you tell me what happened
17 there. Why didn't it just go forward? Why are we
18 here three and a half years later? And if --

19 CHAIR SIMPSON: Civil procedure.

20 BOARD MEMBER PAYNE: What's that?

21 CHAIR SIMPSON: This is Dave. I was
22 just making -- sorry. Go ahead, Mr. Hernandez.

23 MR. HERNANDEZ: Chair Simpson, Member
24 Payne. You're entirely right, and that provision
25 just has not been honored by anyone in these

1 matters. We wish these matters could go fast. It
2 clearly indicates an intention that these cases
3 should go fast.

4 The reality is that to go through the
5 contested case process, which unfortunately
6 involves extensive discovery, depositions, and all
7 that, cannot possibly be accomplished in thirty
8 days.

9 The way that other states have addressed
10 this issue is that you can't get through a hearing
11 in thirty days. The work around other states have
12 done is they open the hearing, the hearing has to
13 commence. They open it, then they assign the
14 matter to a Hearings Examiner, complete discovery
15 and all pretrial process, and then bring it back.

16 But I think as it stands, the intention
17 of the law is that these matters should move
18 quickly. That's a provision from the Federal law,
19 and we support that. Despite efforts these
20 matters have taken longer.

21 And I'd be happy to have some rulemaking
22 process to discuss how we can make these cases
23 move more quickly, because they are time consuming
24 and a lot of work. That's a different question, I
25 think.

1 CHAIR SIMPSON: Thank you, Mr.
2 Hernandez.

3 BOARD MEMBER PAYNE: Either of the Sams?

4 MR. KING: I don't know if I have a good
5 answer for you, Board Member Payne, other than I'm
6 aware of the rule. I'm also aware of what happens
7 in practice, and in practice -- to Mr. Hernandez's
8 point -- these are usually comprehensive factual
9 inquiries. It takes extensive time, and I don't
10 know if anybody's ever explicitly raised the
11 issue, certainly not in the time which I've been
12 at DEQ, so --

13 MR. YEMINGTON: Sure, I'll just dovetail
14 with those two comments. I have litigated more of
15 these coal mine permit challenges before this
16 Board than I care to admit. In each of those
17 cases we were presented with, as Counsel for
18 Petitioners and the Department noted, complex
19 challenges to these mine permits.

20 And given the nature of the challenges,
21 it's just not possible, especially in light of
22 MAPA's requirement that each party have the
23 opportunity to particulate in discovery, develop
24 their claims and defenses, and fully be rewarded
25 with their owed due process. So it's well

1 intentioned, it just is an indication of reality
2 not aligning with desire.

3 I think all of us would share the
4 position that potentially a more streamlined
5 process or a quicker process certainly would be
6 beneficial to all involved. There's a number of
7 things that impact that timeline, as Member Payne
8 certainly knows from his experience as a
9 litigator. We have had cases stayed for years,
10 for example, waiting for a potentially material
11 determination on a case in the Supreme Court, for
12 example.

13 So there are a lot of considerations
14 that go into that. I don't think it's anyone's
15 intention to keep these things on the docket as
16 long as they are.

17 BOARD MEMBER PAYNE: Is the thirty day
18 requirement sourced in Federal law? Is there some
19 sort of preemption issue here, that regardless of
20 what the State law may say with respect to timing
21 or rights of discovery, are we obligated to go
22 forward on that time frame? I'd ask if any of the
23 Counsel want to weigh in on that.

24 MR. YEMINGTON: My response to that is
25 that it wouldn't be obligatory. Obviously it is

1 part of the State plan that has been reviewed and
2 adopted by Federal regulators. It is consistent
3 with SMCRA and SMCRA's implementing regulations,
4 and the intent of OSM. I mean that is reflected
5 in their approval of this plan.

6 I don't see any preemption issue. Once
7 that plan is approved, it's up to the State to
8 regulate it. To the extent there's opportunity or
9 desire to change that plan, that can be done
10 through the legislative process, and ultimately if
11 approved by OSM can change State law.

12 MR. KING: The other thing, too, I'd
13 just like pile on here, is that the implementing
14 statute for that regulation is, one of them is
15 82-4-206, which lays out what cases are subject to
16 MAPA contested cases, and it says "can request a
17 hearing before the Board on any of the following
18 by submitting a written request," meaning the
19 petition, stating the reasons for the request
20 within thirty days.

21 It doesn't impose in the statute a time
22 by which you need to have the hearing, the thirty
23 day hearing, and I don't believe MAPA itself in
24 Title 2 Chapter 4 Part 6 imposes such a
25 requirement.

1 So I am aware that the regulations, just
2 like the statutes, are part of the federally
3 approved program, and subject to Federal approval,
4 but to Mr. Yemington's point, I don't know if
5 there would be any sort of Federal preemption
6 issue here, and I'm sure all the parties in this
7 instance would like a decision at this point.

8 BOARD MEMBER PAYNE: Which actually gets
9 to my next question, and actually it goes to
10 standing. I guess I'd ask Mr. Hernandez. Is
11 there any situation where your clients would not
12 have standing? Is there any coal permit that
13 could be issued where your clients wouldn't have
14 standing to challenge it?

15 MR. HERNANDEZ: Yes. If there is a coal
16 mine that they had no member who had standing with
17 respect to. Here Hearings Examiner Cameron
18 expressly found that this project would harm MEIC
19 and Sierra Club's members. We submitted standing
20 declarations from three, four members who recreate
21 around the Rosebud Mine, and are impacted by the
22 operations, including the expansion of the Rosebud
23 B operation.

24 If there were -- Without that factual
25 basis there would be no standing. Here, however,

1 though, I think standing is -- it's not seriously
2 contested. DEQ doesn't contest it. And Mr.
3 Yemington was careful to note that every case is a
4 little bit different.

5 That's true, but no fewer than eight
6 prior Tribunals, including Federal Courts, State
7 Courts, and this Board itself, have found that
8 with respect to this mine, these plaintiffs'
9 organizations have standing. Hearings Examiner
10 Cameron agreed.

11 Unless the Board reviews the entire
12 record, as Mr. Yemington noted, and concludes even
13 viewing the standing information most favorable to
14 the Petitioners that there is no standing here,
15 then Mr. Cameron's factual findings that there is
16 standing must control.

17 BOARD MEMBER PAYNE: But didn't he make
18 his ultimate conclusion there in his -- not his
19 findings of fact, but his conclusions of law?
20 Isn't that Conclusion of Law 22, 23, 24?

21 MR. HERNANDEZ: I think that's right.
22 There are clearly findings of fact embedded in
23 that conclusion of law that is the basis of it.

24 BOARD MEMBER PAYNE: I have often been
25 frustrated with mixed questions of law and fact,

1 and then in particular here when we're allowed to
2 revisit, freely revisit conclusions of law, but
3 not the factual issues.

4 And I guess I'd like to hear Mr.
5 Yemington's take on that. As I read it, it's in
6 the conclusions of law, but it seems to me -- I
7 think, you know, Mr. Hernandez makes a good point
8 -- that there's really embedded facts there.

9 MR. YEMINGTON: Yes, and they're all
10 good points, and I provide the following response
11 here.

12 First of course standing is a question
13 of law, and as you noted, all the standing
14 determinations are embedded in the conclusions of
15 law. Our exception, to put a finer point on it,
16 is that Hearings Examiner Cameron, by applying the
17 constitutional standing standard instead of MSUMRA
18 statutory standard and regulatory definition,
19 applied the incorrect law.

20 And so we're asking the Board to update
21 the order to correct the order with the correct
22 law, and that's just black letter. I'm not
23 offering my interpretation on it. I'm not doing
24 anything other than saying that he applied the
25 wrong law.

1 We know from the Baxter Homeowners
2 decision, for example, that's cited in our
3 exceptions, that statutory standing, like here,
4 guides and governs the Board's jurisdiction, full
5 stop. And so it's our request in our exceptions
6 that the Board strike the constitutional standing
7 conclusion, legal conclusion from Hearings
8 Examiner Cameron, and replace that with the
9 statutory and regulatory standard.

10 Because it's a different legal standard,
11 it then requires the Board to assess the facts
12 against that standard. What answer you come to is
13 your answer. It doesn't require you to change any
14 of the facts. We have a very confined world here.
15 They submitted four declarations in support of
16 standing on summary judgment. That's it.

17 You could read the four declarations,
18 and you'll understand our objection here. When
19 the standard requires them to use a resource of
20 value -- to use a resource of value, whether
21 that's economic, whether that is recreational,
22 esthetic, or environmental, they have to use a
23 resource of value.

24 Again, it can't be some amorphous, "We
25 like the wildlife," or "We value eastern Montana

1 and open prairies," it has to be a specific
2 resource under this standard that they use that
3 will be harmed by AM5.

4 And what Mr. Hernandez said in his
5 response to your question speaks volumes to where
6 we think the Board should land on this. He said
7 that they have a number of individuals who
8 recreate in the vicinity of the Rosebud Mine, and
9 that should be enough to get him in the door.

10 You asked if there was ever a scenario
11 where they wouldn't have standing. Under his
12 world view, they would have standing anytime they
13 had an individual who said that once in their
14 life, somewhere or someplace they recreated in the
15 vicinity of the Rosebud mine, that would be
16 enough, and we submit that that is just not true,
17 that's not correct under that correct legal
18 standard under MSUMRA and its regulation.

19 What we would submit is that a third
20 party, the intention of the statute, the intention
21 of the regulation, is to only allow third parties
22 in the door to challenge these permits if they can
23 show to the Board's satisfaction that they have
24 members who use resources of value that will be
25 harmed by the proposal. That's black letter law.

1 And we would submit that a resource use
2 of value, for example, would be a cattle rancher
3 who grazes cattle on the lands that will be
4 disturbed, clearly and unequivocally a basis to
5 establish economic resource use, agricultural
6 resource use of value that will be impacted by the
7 proposal, by the mine permit. That would be a
8 great example.

9 Recently in the Supreme Court a case
10 went up and considered this very issue whether or
11 not this interest group had standing under a
12 statutory limitation such as this, and in a
13 concurring opinion, a member of the Supreme Court,
14 I believe it was McGrath, looked at this and he
15 said, "Yes, they do."

16 The organization was Trout Unlimited, I
17 believe, and their members had clearly
18 demonstrated, plausibly demonstrated that they
19 fished in the Smith's creek, river, and that they
20 would be impacted because the proposal that they
21 were challenging -- this is not a SMCRA case, it's
22 out of the Water Quality Act case, I believe --
23 but that the proposal that they were challenging
24 was going to reduce the flow of water at a
25 location where they actually fished, and it would

1 impact the number of fish at that location, and it
2 would impact their resource use.

3 That I submit is a great analogy for
4 what's missing here. When we just say, "We may
5 have hunted out in Rosebud County. We don't know
6 where, we don't know when. That should be enough
7 to get us in the door," we say, "No, it's not."
8 There must be some level of barrier here.

9 Now, just to put a finer point on this.
10 I noted in my presentation --

11 CHAIR SIMPSON: Mr. Yemington.

12 MR. YEMINGTON: I'll conclude after this
13 if allowed.

14 CHAIR SIMPSON: Well, if we could move
15 this along. I don't think that we're going to
16 resolve this question of standing at this juncture
17 frankly. And so we're kind off on a tangent here,
18 and we're running short of time.

19 MR. YEMINGTON: Fair enough, and I'll
20 cede all time. Thank you.

21 CHAIR SIMPSON: Thank you. Any further
22 questions?

23 (No response)

24 CHAIR SIMPSON: Hearing none, I had one
25 question, but Mr. Yemington has answered it

1 thankfully, and that is the question of hydrologic
2 divides, because I think that's one of the
3 critical items here in assessing the hydrologic
4 impacts, whether you're talking cumulative
5 probable hydrologic consequences.

6 So I don't think that needs any further
7 elaboration, but I think that's an important point
8 is the divide between the Armells Creek and
9 Rosebud Creek drainages. So anyway, further
10 questions from the Board on this case?

11 (No response)

12 CHAIR SIMPSON: Is there a motion?

13 VICE CHAIR AGUIRRE: That was going to
14 be my question on where we're at. We're not
15 relitigating the facts in this hearing, and we
16 have to be clear on that. And so --

17 CHAIR SIMPSON: Right. We're not
18 relitigating the facts.

19 VICE CHAIR AGUIRRE: Right. So my
20 question is what the actual motion needs to
21 contain, based on everything we've heard. Does it
22 need to be specific to the -- give me one second.
23 Does it need to be specific to Mr. Cameron's
24 findings of fact, and then the conclusions of law
25 as lined out in his decision?

1 And is there a second part that then
2 needs to address like specific -- I'm not a
3 lawyer, so excuse me for maybe misstating this --
4 but the conclusions of law --

5 CHAIR SIMPSON: I think I can answer --

6 VICE CHAIR AGUIRRE: -- does there need
7 to be a second part?

8 CHAIR SIMPSON: I can answer your
9 question, Stacy, and the decision before us is
10 whether or not to adopt the findings of fact,
11 proposed findings of fact and conclusions of law
12 as prepared and submitted by Mr. Cameron.

13 Once that is decided, then we go to the
14 exceptions, and which of those we would adopt into
15 that decision and which we would reject. That's a
16 separate motion. The first motion is do we accept
17 or -- I guess the only other option we would have
18 would be if we don't approve it, then we would
19 have to remand it for reconsideration based on the
20 facts, and that's been argued ad nauseam here, so
21 I think we know where we are.

22 VICE CHAIR AGUIRRE: Okay. Thank you
23 for that clarification. I'm going to make a
24 motion to accept the Hearings Examiner's findings,
25 proposed findings of fact and conclusions of law.

1 Please correct me if I'm not legally stating that
2 the right way.

3 CHAIR SIMPSON: I believe you got it
4 right. Is there a second?

5 BOARD MEMBER PAYNE: I'll second it to
6 move things along.

7 CHAIR SIMPSON: It's been moved and
8 seconded that the Board accept the proposed
9 findings of fact and conclusions of law as
10 presented by Hearings Examiner Cameron. Is there
11 further discussion before a vote?

12 (No response)

13 CHAIR SIMPSON: A motion has been made
14 and seconded to approve the findings of fact and
15 conclusions of law as presented to the Board by
16 Hearings Examiner Cameron. All in favor, say aye.

17 (Response)

18 CHAIR SIMPSON: Opposed.

19 (No response)

20 CHAIR SIMPSON: Motion carries
21 unanimously. So the Board has voted to accept the
22 findings of fact and conclusions of law as
23 presented. Now the question becomes -- there are
24 exceptions filed by all of the parties. In order
25 to simplify that, as stated earlier by I believe

1 it was DEQ -- I'm not entirely sure at this point.

2 But anyway, the exceptions filed by the
3 Petitioners specifically just in general oppose
4 the decision entirely. There wasn't anything in
5 the way of specifics there that would -- has
6 proposed changes in language and so on. It was
7 just a request that the Board reject the findings
8 of fact and conclusions of law in total. That
9 leaves -- So my suggestion is that with respect to
10 the Petitioners' exceptions that they be rejected.

11 Second would be that the Department as
12 the Defendant, the Department has filed a number
13 of exceptions that have to do with specific
14 language in some of the conclusions -- I don't
15 think we need to get into each one of those
16 specifically -- and also a number of errata.

17 In the case of the Intervenors,
18 Westmoreland Coal and Local 400 Operating
19 Engineers, their exceptions generally parallel
20 those from the Department, with the exception that
21 they are asking this Board to find that the
22 Petitioners don't have standing. There's a lot of
23 question in my mind whether this Board has the
24 authority to make that decision. And so with
25 respect to the standing question, I would suggest

1 that the findings be accepted as they are.

2 So that's what I'm suggesting is an
3 approach to the exceptions. Any further
4 discussion on that? I trust everybody on the
5 Board has read them, and that's where we are.

6 (No response)

7 CHAIR SIMPSON: Is there a motion first
8 of all? Why don't we handle them individually.
9 Let's start with the Petitioners' exceptions. Is
10 there a motion?

11 BOARD MEMBER PAYNE: I would move that
12 the Board reject the Petitioners' exceptions.

13 CHAIR SIMPSON: Is there a second?

14 VICE CHAIR AGUIRRE: Second.

15 CHAIR SIMPSON: It's been moved and
16 seconded that the Board reject the exceptions of
17 the Petitioners. Further discussion.

18 (No response)

19 CHAIR SIMPSON: Hearing none, all in
20 favor, say aye.

21 (Response)

22 CHAIR SIMPSON: Opposed.

23 (No response)

24 CHAIR SIMPSON: The motion carries.

25 Moving along to the DEQ's exceptions, my

1 suggestion is that they be accepted and
2 incorporated into the final FOFCOL. Is there a
3 motion?

4 BOARD MEMBER PAYNE: I would move that
5 the Board accept the DEQ's exceptions to the order
6 of the Hearings Examiner.

7 BOARD MEMBER SMITH: I'll second.

8 CHAIR SIMPSON: It's been moved and
9 seconded to accept the DEQ's exceptions and
10 incorporate it into the final FOFCOL. Further
11 discussion.

12 (No response)

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

15 (Response)

16 CHAIR SIMPSON: Opposed.

17 (No response)

18 CHAIR SIMPSON: Motion carries. With
19 respect to the exceptions filed by the
20 Intervenors, that is Westmoreland Coal and the
21 Local 400, I would suggest that the exception
22 having to do with standing be rejected, and the
23 remainder of their exceptions be accepted to the
24 extent they don't conflict with DEQ's objections.

25 There's some slight differences in

1 wording, and there are also a few typos, or I
2 should say errata in the Intervenor's filing that
3 aren't covered in DEQ. I believe that's the case.
4 Is there a motion?

5 BOARD MEMBER ALTEMUS: Mr. Chair, before
6 we go there, can I ask Mr. King? I think the DEQ
7 did not file that specific exception. Can I maybe
8 get an explanation from the DEQ as to why they did
9 not file that one?

10 CHAIR SIMPSON: I can't point to it
11 specifically right now, but you might -- DEQ may
12 be able to address it. It appeared to me --

13 BOARD MEMBER ALTEMUS: I was asking Mr.
14 King if he could tell us.

15 CHAIR SIMPSON: There were a couple
16 items there that I think were in addition. Mr.
17 King.

18 MR. KING: Yes. Thank you, Board Chair,
19 and Board Member Altemus. Can you specify what
20 particularly we're talking about?

21 BOARD MEMBER ALTEMUS: I think it's in
22 Mr. Yemington's comments. He said that you, that
23 the DEQ did not go after standing. So I'm talking
24 about standing right now. That's the one I'm
25 interested in.

1 MR. KING: Yes, I --

2 CHAIR SIMPSON: With respect to standing
3 -- go ahead, Mr. King.

4 MR. KING: We take no position on the
5 standing argument. I don't want to wade in here
6 either for or against standing. It's usually the
7 Department's preference to just defend our
8 decision on the merits. I'm not suggesting there
9 isn't a meritorious argument that Petitioners
10 don't have standing, I'm not suggesting that
11 Petitioners do either. So I prefer to just stay
12 out of it.

13 BOARD MEMBER ALTEMUS: Fair enough.

14 CHAIR SIMPSON: I guess that's --
15 Although I certainly sympathize with
16 Westmoreland's position on this, knowing the area
17 out there as I do, but Courts have been very
18 liberal in their interpretation of standing, and
19 I'm not sure that it's even within the Board's
20 purview to make a determination on it.

21 If this is appealed and goes forward to
22 the Courts, I think that's an appropriate question
23 for them, but I don't believe it's within the
24 purview of the Board.

25 VICE CHAIR AGUIRRE: Then do we have to

1 have two separate motions, one on either
2 dismissing or rejecting standing, and then to --

3 CHAIR SIMPSON: However you want to
4 frame it. We can do it as a single motion or as
5 two separate motions. Probably cleaner to do it
6 as two separate motions. So let's take a look at
7 the standing argument as presented by the
8 Intervenors.

9 BOARD MEMBER ALTEMUS: I guess I can
10 make a motion just for discussion, but I would
11 suggest that we reject Intervenors' request -- or
12 to reject the standing of the Petitioners, and to
13 reject that exception.

14 CHAIR SIMPSON: Is there a second?

15 BOARD MEMBER PAYNE: I would second
16 that.

17 CHAIR SIMPSON: It's moved and seconded
18 to reject the Intervenors' exceptions with respect
19 to standing. Further discussion?

20 BOARD MEMBER PAYNE: I think Counsel
21 both have made valid points on this issue. I
22 don't know if I quite agree with Mr. Yemington on
23 that the constitutional standing doesn't come into
24 play here. I think he raises a good point on the
25 statutory ones.

1 But my concern is that also if we
2 accepted their findings on the standing, I think
3 Mr. Hernandez is correct, then that's the end of
4 the case, and even though Mr. Yemington would
5 invite us to keep the decision on the merits, I
6 don't think we could. So I just, because of that,
7 I would support not accepting those exceptions of
8 the Intervenor.

9 CHAIR SIMPSON: Good point. Further
10 discussion.

11 (No response)

12 CHAIR SIMPSON: All in favor, say aye.

13 (Response)

14 CHAIR SIMPSON: And just for clarity,
15 we've kind of gone around in a little circle here,
16 but this has to do with rejecting the exceptions
17 from the Intervenor regarding standing, that is,
18 retaining the language as it is in the proposed
19 findings of fact and conclusions of law as
20 prepared by Mr. Cameron.

21 That leaves the balance of the
22 exceptions filed by the Intervenor. These have
23 mostly to do with specific language of some of the
24 conclusions of law, and also there are some
25 errata. And I think there's a large overlap, but

1 there may be items in there that aren't covered in
2 the DEQ exceptions.

3 So I believe it's appropriate to accept
4 the balance of the Intervenor's exceptions insofar
5 as they don't conflict with the DEQ exceptions.

6 BOARD MEMBER PAYNE: I will make a
7 motion based on the Chair's suggestion that the
8 Board accept the remaining exceptions from the
9 Intervenor to the extent they do not conflict
10 with the Department of Environmental Quality's
11 exceptions.

12 CHAIR SIMPSON: A motion has been made.
13 Is there a second?

14 BOARD MEMBER SMITH: I second it.

15 CHAIR SIMPSON: A motion has been made
16 and seconded. Further discussion.

17 (No response)

18 CHAIR SIMPSON: All in favor, say aye.

19 (Response)

20 CHAIR SIMPSON: Motion carries. Let me
21 back up. Opposed? Anybody opposed?

22 (No response)

23 CHAIR SIMPSON: I didn't hear -- I heard
24 five, so I think we're okay. Motion carries
25 unanimously. That concludes this item on the

1 agenda .

2 (The proceedings were concluded

3 at 1:11 p.m.)

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C E R T I F I C A T E

STATE OF MONTANA

)

: SS.

COUNTY OF LEWIS & CLARK

)

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

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 87 - 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 4th day of
November, 2025.



LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2028.

1 1 [7] 8:14, 22:14, 22:18, 26:19, 35:7, 42:3, 44:16 10,000 [2] 48:1, 48:1 100 - 9:10 107 - 2:4 119 [2] 36:14, 37:17 11:07 - 1:13 12 [2] 49:21, 49:22 12:20 - 50:5 138 - 16:19 15 [3] 3:16, 3:25, 5:2 15,153 - 13:7 1500 - 2:13 159 - 15:15 166 - 15:13 17.24.425 - 64:12 18 - 21:25 1982 - 32:16 1:00 [2] 49:23, 50:7 1:11 - 87:3 2 2 [13] 7:20, 8:15, 8:17, 13:24, 14:6, 14:20, 16:22, 17:19, 27:15, 30:24, 34:16, 64:12, 68:24 2,499 - 15:17 2,500 - 14:21 2-4-621 [2] 23:9, 36:21 20 [3] 3:16, 5:2, 18:5 200901 - 2:9 2014 - 14:3 2022-05 - 3:7 2022-05-SM - 1:5 2023 [4] 11:13, 11:15, 26:14, 41:22 2025 [2] 1:12, 88:17 2028 - 88:23 22 - 70:20 23 - 70:20	24 [2] 1:12, 70:20 3 3 [17] 8:14, 10:13, 13:22, 13:23, 13:24, 14:6, 14:21, 15:17, 16:22, 17:19, 22:14, 22:18, 27:15, 31:1, 35:7, 36:21, 45:21 31st - 2:13 38 [3] 43:3, 43:17, 57:22 39 [2] 44:5, 44:17 4 4 [2] 19:12, 68:24 40 - 33:11 400 [4] 35:15, 35:21, 79:18, 81:21 401 - 2:13 47 - 42:18 4th - 88:16 5 5 [2] 1:7, 3:6 52 [2] 24:12, 36:13 56 - 18:1 59101 - 2:14 59620 - 2:9 6 6 - 68:24 60 - 57:21 61 - 57:22 7 7 [2] 18:24, 25:10 79 [3] 13:19, 29:7, 51:24 8 8 - 39:2 82-4-206 - 68:15	82-4-227 [2] 10:13, 26:21 83 [2] 36:15, 37:20 87 - 88:12 9 9 [3] 19:12, 39:9, 88:23 A a.m - 1:13 ability [2] 9:14, 88:14 able [3] 4:4, 53:3, 82:12 absent [4] 37:15, 37:15, 55:15, 55:17 absolutely - 21:13 abundant - 20:23 abuse - 44:11 accept [12] 22:12, 23:2, 24:6, 55:21, 77:16, 77:24, 78:8, 78:21, 81:5, 81:9, 86:3, 86:8 accepted [4] 80:1, 81:1, 81:23, 85:2 accepting [2] 46:4, 85:7 access - 48:19 accessible [2] 48:16, 48:17 accompanying - 25:20 accomplished [8] 31:19, 31:21, 32:21, 33:4, 33:19, 33:23, 61:15, 65:7 according - 50:4 accounting - 32:20 accurate - 26:17 acres [3] 13:7, 48:1, 48:1 Act [6] 5:5, 28:2, 28:5, 29:4, 31:3, 74:22	action [2] 5:6, 52:25 active - 48:3 activities [2] 39:7, 48:6 acts - 33:11 actual - 76:20 actuality - 30:24 ad - 77:20 add [3] 28:12, 28:19, 52:8 added - 28:4 addition [3] 5:15, 27:5, 82:16 additional [4] 12:23, 14:5, 14:11, 17:9 additionally - 23:19 address [10] 7:19, 10:4, 18:18, 20:4, 21:6, 21:10, 51:5, 54:14, 77:2, 82:12 addressed [7] 4:17, 11:12, 24:12, 26:7, 31:8, 46:21, 65:9 addresses - 46:1 adequately - 45:23 admire - 23:6 admission - 15:21 admit - 66:16 admitted [3] 6:16, 53:9, 57:21 adopt [5] 35:10, 63:12, 63:17, 77:10, 77:14 adopted - 68:2 adopting - 34:25 adopts - 64:3 advocacy - 23:6 affect - 54:24 affirm - 56:24 affirmative - 34:5 affirmatively [2] 34:13, 58:11 affixed - 88:16 against [7]	37:4, 46:9, 47:7, 57:19, 62:2, 72:12, 83:6 agency - 51:18 agenda - 87:1 agree [6] 7:21, 8:9, 24:25, 28:16, 60:18, 84:22 agreed [3] 53:13, 53:21, 70:10 agricultural - 74:5 agriculture - 54:24 Aguirre [9] 1:17, 50:14, 50:15, 76:13, 76:19, 77:6, 77:22, 80:14, 83:25 ahead [2] 64:22, 83:3 aids - 10:8 albeit - 16:6 aligning - 67:2 ALLAN - 1:19 allegation - 44:15 allow - 73:21 allowed [4] 24:10, 52:23, 71:1, 75:13 alluvial [2] 14:18, 53:14 alluvium [2] 13:21, 16:21 alone [6] 13:20, 14:12, 16:21, 29:7, 29:14, 46:22 already [4] 27:17, 27:21, 28:3, 59:24 Altamus [9] 1:19, 50:17, 50:18, 82:5, 82:13, 82:19, 82:21, 83:13, 84:9 Although - 83:15 AM4 - 41:22 AM5 [53] 5:7, 5:14, 12:11, 12:24,	12:24, 12:25, 13:1, 13:20, 14:12, 14:14, 14:18, 15:15, 15:18, 15:24, 16:11, 17:5, 17:9, 18:9, 18:10, 19:1, 19:11, 19:16, 19:18, 27:20, 28:12, 28:19, 29:6, 29:12, 30:8, 39:1, 39:6, 39:13, 40:4, 43:15, 48:2, 48:13, 48:15, 48:19, 48:20, 48:22, 49:3, 49:12, 52:11, 52:17, 52:19, 52:21, 53:5, 57:23, 58:25, 59:2, 59:15, 60:7, 73:3 amend - 8:16 amended [3] 5:7, 18:23, 25:9 amendment [4] 1:7, 3:6, 12:24, 12:25 amorphous - 72:24 analogy - 75:3 analyses - 58:22 analysis [22] 7:24, 8:10, 12:13, 15:4, 16:23, 20:2, 26:18, 26:25, 28:18, 28:19, 30:16, 30:21, 39:20, 40:6, 42:17, 44:24, 45:16, 46:6, 56:12, 56:18, 59:16, 59:19
--	---	--	--	---	--

Anderson [2] 53:21, 53:25 Anderson's - 44:8 anew - 18:16 Annotated - 10:13 answered - 75:25 answering [3] 6:4, 6:5, 7:14 answers - 27:10 anticipate - 32:18 anticipated - 58:22 anybody's - 66:10 Anyhow - 14:8 anyone's - 67:14 anytime - 73:12 anyway [3] 31:4, 76:9, 79:2 appeal [8] 1:4, 3:5, 7:20, 18:23, 21:11, 25:9, 25:9, 25:13 appealed - 83:21 appear - 8:18 appeared [3] 27:24, 45:6, 82:12 APPEARING [3] 2:2, 2:6, 2:11 appears - 9:9 appended - 44:9 appendix [13] 15:23, 19:9, 19:11, 25:22, 43:13, 45:4, 52:2, 52:3, 52:6, 52:13, 53:22, 54:1, 56:19 applicable - 40:7 applicant - 61:10 application [5] 38:22, 46:13, 60:12, 60:14, 61:18 applied [2] 71:19, 71:24 applies -	17:17 apply [4] 49:10, 58:9, 62:14, 63:4 applying - 71:16 appreciate [4] 4:14, 19:24, 22:10, 22:19 appreciates - 62:5 approach - 80:3 appropriate [2] 83:22, 86:3 approval [2] 68:5, 69:3 approve [4] 10:14, 10:20, 77:18, 78:14 approved [5] 33:2, 40:12, 68:7, 68:11, 69:3 approving - 32:1 approximately [3] 9:10, 48:1, 48:6 areas [7] 42:24, 57:13, 59:3, 59:4, 59:9, 60:6, 60:20 aren't [3] 34:20, 82:3, 86:1 argue - 18:19 argued - 77:20 arguing [3] 8:17, 24:20, 25:11 argument [18] 3:10, 9:19, 19:7, 21:3, 24:10, 25:24, 26:2, 31:9, 31:10, 31:15, 33:25, 41:5, 41:14, 55:22, 57:17, 83:5, 83:9, 84:7 arguments [7] 7:6, 9:23, 23:3, 31:9, 38:10, 40:3, 63:21 Armells - 76:8 asking [8] 7:8, 14:13, 22:2, 31:25,	61:13, 71:20, 79:21, 82:13 aspects [3] 58:2, 58:3, 60:2 assess [10] 13:2, 21:5, 21:17, 36:24, 37:23, 38:2, 53:11, 59:24, 60:22, 72:11 assessed - 60:14 assessing [12] 7:1, 7:2, 12:14, 13:11, 18:9, 18:25, 19:17, 20:24, 37:15, 42:11, 58:18, 76:3 assessment [7] 13:19, 39:18, 43:20, 57:25, 58:5, 59:6, 60:3 assign - 65:13 assigned - 36:10 Assistant - 2:8 associated [2] 12:24, 14:12 associational - 47:13 assumed - 24:8 assumption - 31:5 assure - 62:11 attempt - 7:14 attempted - 41:23 attending - 4:14 attention [2] 4:21, 22:10 attorney [6] 2:3, 2:6, 2:8, 2:11, 2:12, 9:25 attorneys - 9:22 authorities - 32:11 authority [20] 5:9, 6:25, 20:16,	21:10, 21:15, 21:20, 22:2, 22:5, 30:18, 31:17, 32:14, 33:1, 33:5, 33:14, 49:6, 51:11, 51:15, 54:11, 54:14, 79:24 availability - 7:3 available - 56:5 average - 27:15 avoid [3] 6:4, 7:14, 36:2 aye [5] 78:16, 80:20, 81:14, 85:12, 86:18 B B's - 28:7 bag - 56:3 balance [5] 10:23, 11:11, 39:14, 85:21, 86:4 bar - 47:2 barrier - 75:8 base [6] 4:24, 5:24, 5:25, 6:8, 6:13, 13:13 baseline [3] 14:20, 30:22, 53:11 bases - 54:1 basically [3] 11:1, 52:8, 56:25 Baxter - 72:1 bear - 10:18 becomes - 78:23 beginning [2] 44:22, 45:14 behalf [6] 2:2, 2:6, 2:11, 22:25, 35:19, 35:23 belated - 26:4 belief - 9:13 believed - 9:3 believes - 54:10 beneficial [2] 3:11, 67:6 BER [2] 1:5, 3:7 best [4] 18:7,	32:6, 36:2, 88:13 beyond [4] 17:16, 39:14, 40:22, 41:21 Billings - 2:14 binding [2] 39:10, 42:19 bit [7] 3:24, 4:10, 7:17, 10:19, 23:1, 26:13, 70:4 black [2] 71:22, 73:25 blue [2] 19:16, 19:18 Board [136] 1:1, 1:18, 3:12, 3:15, 3:20, 4:11, 4:19, 5:9, 5:11, 5:22, 7:7, 8:22, 8:24, 9:19, 10:7, 11:2, 11:2, 11:5, 11:11, 11:17, 11:18, 11:22, 12:16, 14:2, 18:13, 20:2, 20:21, 22:1, 22:12, 22:17, 22:24, 22:25, 23:5, 23:10, 23:11, 23:13, 24:3, 24:5, 24:15, 25:8, 29:23, 32:9, 34:17, 34:24, 35:8, 35:18, 36:17, 36:22, 37:5, 37:9, 37:15, 37:22, 38:1, 39:10, 40:10, 44:18, 47:3, 49:5, 49:14, 49:19, 49:21, 49:24, 50:2, 50:16, 50:18, 50:19, 50:20, 50:21, 50:22, 51:4, 51:10, 51:14, 53:3, 54:4, 55:16,	55:21, 56:1, 56:4, 56:20, 57:1, 57:3, 57:8, 59:23, 62:5, 62:9, 62:11, 62:14, 62:14, 63:1, 64:2, 64:7, 64:9, 64:13, 64:20, 66:3, 66:5, 66:16, 67:17, 68:17, 69:8, 70:7, 70:11, 70:17, 70:24, 71:20, 72:6, 72:11, 73:6, 76:10, 78:5, 78:8, 78:15, 78:21, 79:7, 79:21, 79:23, 80:5, 80:11, 80:12, 80:16, 81:4, 81:5, 81:7, 82:5, 82:13, 82:18, 82:19, 82:21, 83:13, 83:24, 84:9, 84:15, 84:20, 86:6, 86:8, 86:14 Board's [13] 4:21, 19:24, 22:9, 23:7, 36:5, 36:7, 36:24, 38:11, 62:10, 63:6, 72:4, 73:23, 83:19 bond [2] 27:17, 30:20 boots - 63:13 bore [2] 41:3, 41:17 bound [2] 33:15, 62:17 boundary [7] 28:8, 39:15, 48:2, 56:15, 56:17, 58:13, 58:17 Box - 2:9 Bozeman - 62:19 brakes - 11:9 break [3] 49:24, 50:1, 50:3 brief [3] 8:18,
---	--	--	---	---	---

8:19, 41:13 briefing [2] 9:23, 20:23 briefly [4] 18:17, 24:18, 31:14, 57:8 briefs [4] 4:18, 7:4, 9:7, 11:16 bring [3] 50:9, 62:13, 65:15 brings [2] 15:16, 15:18 broke - 27:6 brought - 6:19 bucket - 56:3 buffer [2] 7:19, 34:18 bulk - 5:16 Bull - 14:2 burden [9] 40:13, 40:16, 40:17, 41:3, 41:17, 47:9, 47:10, 47:11, 60:15 buttressed - 48:2	78:10, 78:16, 85:20 Cameron's [8] 7:22, 8:7, 8:10, 39:12, 45:25, 46:18, 70:15, 76:23 can't [14] 10:19, 15:2, 20:17, 23:10, 44:18, 48:19, 48:19, 53:6, 55:13, 59:24, 62:25, 65:10, 72:24, 82:10 cannot [6] 10:14, 37:5, 48:18, 57:3, 60:22, 65:7 care - 66:16 careful - 70:3 carries [5] 78:20, 80:24, 81:18, 86:20, 86:24 case [53] 1:4, 3:7, 3:8, 4:13, 4:17, 6:19, 7:16, 10:2, 11:15, 12:2, 13:4, 16:3, 22:7, 23:6, 24:1, 24:2, 24:7, 24:9, 25:12, 27:12, 32:24, 33:1, 33:16, 35:24, 36:9, 36:11, 38:7, 38:16, 40:11, 43:5, 43:10, 43:24, 44:14, 44:22, 45:15, 46:5, 47:21, 49:2, 61:1, 63:8, 63:21, 64:14, 64:15, 65:5, 67:11, 70:3, 74:9, 74:21, 74:22, 76:10, 79:17, 82:3, 85:4 cases [6] 65:2, 65:22,	66:17, 67:9, 68:15, 68:16 cattle [2] 74:2, 74:3 cause [17] 11:20, 12:1, 12:4, 13:20, 16:8, 16:21, 17:18, 19:5, 20:12, 27:2, 28:13, 28:20, 30:9, 39:13, 39:14, 53:12, 54:23 caused - 17:10 caution - 56:1 cede - 75:20 Center [3] 2:2, 2:4, 3:22 centimeter [2] 14:22, 15:18 certain [3] 30:7, 45:15, 47:3 certainly [5] 49:25, 66:11, 67:5, 67:8, 83:15 certify - 88:7 Chair [71] 1:17, 3:4, 18:3, 22:20, 22:24, 22:25, 35:14, 49:20, 50:9, 50:11, 50:13, 50:14, 50:15, 50:21, 50:25, 54:20, 55:8, 56:6, 57:5, 57:7, 64:6, 64:19, 64:21, 64:23, 66:1, 75:11, 75:14, 75:21, 75:24, 76:12, 76:13, 76:17, 76:19, 77:5, 77:6, 77:8, 77:22, 78:3, 78:7, 78:13, 78:18, 78:20, 80:7, 80:13, 80:14,	80:15, 80:19, 80:22, 80:24, 81:8, 81:13, 81:16, 81:18, 82:5, 82:10, 82:15, 82:18, 83:2, 83:14, 83:25, 84:3, 84:14, 84:17, 85:9, 85:12, 85:14, 86:12, 86:15, 86:18, 86:20, 86:23 Chair's - 86:7 Chairman [10] 1:16, 3:19, 21:25, 22:19, 29:13, 35:17, 35:22, 51:3, 56:3, 56:9 challenge [8] 46:25, 47:5, 49:14, 62:8, 62:20, 62:25, 69:14, 73:22 challenged [4] 39:10, 42:19, 44:19, 63:13 challenger - 40:15 challengers [2] 41:2, 47:11 challenges [4] 62:12, 66:15, 66:19, 66:20 challenging [2] 74:21, 74:23 change [44] 6:22, 7:1, 7:10, 7:12, 9:11, 16:8, 20:1, 20:7, 20:12, 20:21, 20:24, 21:5, 21:6, 21:10, 21:16, 21:18, 21:21, 22:3, 27:20, 27:22, 27:23, 28:7,	28:13, 28:20, 31:14, 31:18, 32:5, 32:19, 33:18, 33:22, 34:18, 37:24, 46:1, 46:11, 46:12, 51:6, 54:9, 54:11, 54:23, 55:5, 55:14, 68:9, 68:11, 72:13 changed [2] 21:3, 27:14 changes [3] 37:17, 38:3, 79:6 Chapter - 68:24 characterization - 24:25 characterization - 42:14 characterized - 27:4 chase - 4:20 check - 24:4 CHIA [8] 25:22, 29:8, 29:15, 39:17, 43:13, 51:23, 52:13, 56:19 circle - 85:15 cite [2] 11:16, 17:25 cited [2] 29:8, 72:2 civil [2] 40:17, 64:19 claim [51] 6:18, 6:20, 6:22, 7:20, 7:20, 7:25, 8:2, 8:6, 8:8, 8:12, 8:15, 8:17, 9:12, 9:15, 10:6, 10:8, 10:11, 18:20, 18:21, 19:6, 19:25, 20:4, 21:11, 21:17, 24:24, 25:23, 26:4, 26:8, 26:9, 31:8, 33:20, 33:24, 34:1, 34:2, 34:12, 34:16,	34:18, 34:18, 35:1, 35:3, 42:3, 42:4, 44:7, 44:16, 44:21, 45:3, 45:21, 45:22, 52:6, 59:13, 63:25 claimed - 48:12 claims [19] 7:18, 8:9, 8:14, 20:5, 22:14, 22:18, 24:19, 35:5, 35:7, 38:9, 40:8, 41:6, 41:13, 41:18, 41:24, 43:25, 49:15, 62:2, 66:24 clarification - 77:23 clarity - 85:14 Clark [2] 88:4, 88:7 class [21] 13:22, 13:23, 13:24, 13:24, 14:6, 14:6, 14:11, 14:20, 14:21, 15:17, 16:22, 16:22, 17:19, 17:19, 27:15, 27:15, 28:6, 28:13, 28:20, 30:24, 31:1 cleaner - 84:5 clear [10] 5:8, 8:3, 8:15, 15:14, 21:13, 28:23, 33:13, 44:11, 60:18, 76:16 clearly [8] 38:12, 54:13, 61:3, 62:2, 65:2, 70:22, 74:4, 74:17 client [2] 38:22, 62:13 clients [5]
---	--	---	--	--	--

37:13, 46:10, 46:24, 69:11, 69:13 climate [37] 6:21, 7:1, 7:10, 7:12, 20:1, 20:7, 20:12, 20:20, 20:24, 21:5, 21:6, 21:10, 21:16, 21:18, 21:21, 22:3, 31:14, 31:18, 32:5, 32:19, 33:18, 33:22, 46:1, 46:2, 46:11, 46:12, 51:6, 54:9, 54:11, 54:15, 54:22, 55:3, 55:5, 60:24, 61:2, 61:12, 61:25 climatological [2] 61:16, 61:24 climatology - 38:24 clock - 50:5 close - 54:12 closely - 9:8 Club's - 69:19 clutter - 62:10 coal [11] 13:9, 16:1, 35:24, 48:24, 58:9, 62:20, 66:15, 69:12, 69:15, 79:18, 81:20 Code - 10:13 Colstrip - 62:21 comes [3] 25:4, 25:5, 35:6 coming - 9:24 commence - 65:13 comments [7] 20:8, 20:10, 20:15, 21:14, 23:1, 66:14, 82:22 commission - 88:22 compare [3] 19:3, 52:9,	52:12 compared - 14:19 competent - 34:20 compiling - 29:18 complain [2] 43:24, 44:1 complete - 65:14 completely - 24:16 complex - 66:18 compliment - 9:24 complimented - 9:21 component - 31:20 components - 25:2 comprehensive [4] 24:11, 36:12, 39:5, 66:8 comprised - 36:13 compromises - 59:13 computer-aided - 88:11 concept [2] 29:14, 56:23 concern - 85:1 concerned - 54:17 concerning - 46:11 conclude [5] 33:17, 49:17, 49:23, 64:5, 75:12 concluded [4] 39:13, 61:19, 61:22, 87:2 concludes [2] 70:12, 86:25 concluding - 6:23 conclusion [12] 9:19, 32:22, 43:3, 43:17, 44:16, 57:3, 63:19, 70:18, 70:20, 70:23, 72:7, 72:7 conclusions [34] 22:13, 23:20,	23:21, 24:13, 36:15, 36:25, 37:19, 37:21, 37:24, 38:2, 42:14, 44:5, 49:7, 51:10, 51:12, 51:14, 55:23, 57:22, 63:2, 70:19, 71:2, 71:6, 71:14, 76:24, 77:4, 77:11, 77:25, 78:9, 78:15, 78:22, 79:8, 79:14, 85:19, 85:24 concurring - 74:13 conduct [2] 39:8, 40:19 confined - 72:14 confines - 58:21 conflict [3] 81:24, 86:5, 86:9 confronted - 43:22 Congress - 54:17 congressional - 54:16 consequences [4] 10:21, 29:9, 39:6, 76:5 conservative - 31:5 consider [24] 6:6, 7:1, 11:3, 11:5, 12:16, 13:11, 15:1, 15:19, 16:25, 18:12, 20:16, 20:20, 20:24, 21:15, 22:3, 31:17, 33:17, 37:11, 52:25, 53:1, 54:6, 54:11, 55:25, 58:21 considerable - 8:1 consideration	[6] 26:17, 29:10, 32:19, 33:3, 46:4, 57:18 considerations - 67:13 considered [28] 5:13, 14:9, 15:4, 15:7, 15:9, 16:15, 19:9, 19:17, 28:18, 30:8, 33:2, 33:8, 43:13, 43:14, 44:12, 46:7, 47:7, 52:3, 52:4, 53:8, 57:24, 58:3, 58:4, 58:7, 59:5, 61:21, 61:25, 74:10 considering [4] 7:10, 7:11, 20:6, 46:2 considers - 37:22 consisted - 42:13 consistent [5] 30:5, 40:6, 45:20, 46:19, 68:2 constitutional [3] 71:17, 72:6, 84:23 consuming - 65:23 contain [2] 76:21, 88:12 contemplate - 31:16 contend - 24:23 contest - 70:2 contested [5] 36:9, 40:11, 65:5, 68:16, 70:2 context [6] 28:10, 28:12, 29:3, 46:13, 59:5, 61:22 continues [3] 24:22, 29:6, 43:18 contrary - 41:20 contrast - 40:1 control - 70:16 controlled -	38:13 controls - 36:20 controversy - 9:16 correct [20] 5:9, 6:12, 18:14, 24:22, 26:2, 26:14, 37:24, 49:5, 49:6, 49:8, 49:8, 51:9, 61:23, 63:2, 71:21, 71:21, 73:17, 73:17, 78:1, 85:3 correcting - 46:17 correctness - 37:2 coulee [7] 8:21, 9:1, 16:7, 52:14, 52:18, 53:15, 53:18 Counsel [5] 7:13, 64:10, 66:17, 67:23, 84:20 county [4] 48:22, 75:5, 88:4, 88:6 couple [3] 28:22, 51:22, 82:15 course [3] 32:9, 43:5, 71:12 Court [12] 1:22, 10:25, 11:12, 11:17, 27:4, 41:16, 41:22, 67:11, 74:9, 74:13, 88:5, 88:21 Court's - 26:20 Courts [4] 70:6, 70:7, 83:17, 83:22 cover - 30:13 covered [2] 82:3, 86:1 covers - 30:12 creature - 32:10 credible [2] 23:19, 23:23 creek [3] 74:19, 76:8, 76:9	critical [4] 4:24, 58:7, 59:12, 76:3 CRUTCHER [3] 1:21, 88:5, 88:20 cumulative [27] 6:7, 10:21, 12:14, 13:18, 26:18, 26:22, 27:7, 28:11, 28:12, 28:19, 29:1, 29:18, 30:16, 30:21, 39:18, 42:4, 43:20, 44:24, 56:11, 56:17, 57:24, 58:5, 58:18, 59:5, 60:3, 60:22, 76:4 cumulatively - 27:18 cut [2] 4:20, 31:7 cuts - 12:23 D damage [75] 5:1, 5:3, 5:24, 6:1, 6:8, 6:14, 7:7, 10:5, 10:5, 10:10, 10:11, 10:17, 10:22, 10:24, 11:6, 11:9, 11:14, 11:21, 11:25, 12:5, 12:15, 13:2, 13:11, 13:14, 14:9, 16:12, 17:7, 17:10, 17:21, 18:9, 18:16, 18:21, 18:25, 19:2, 19:6, 19:17, 19:21, 24:21, 24:25, 25:7, 25:16, 25:20, 25:25, 26:12,
---	--	--	--	---	---

26:16, 27:3, 27:24, 39:14, 42:4, 43:21, 44:7, 44:25, 51:6, 51:16, 51:19, 52:3, 52:7, 52:10, 52:12, 52:22, 53:1, 53:4, 53:10, 53:12, 54:1, 54:7, 57:11, 57:14, 57:25, 58:6, 58:13, 58:16, 58:19, 59:6, 60:3 dark - 12:22 data [4] 39:1, 58:14, 61:12, 61:24 date - 24:7 Dave - 64:21 DAVID - 1:16 decade - 14:3 decades - 48:7 December - 8:23 decided - 77:13 decision [57] 8:7, 8:11, 8:13, 11:13, 12:20, 13:5, 13:16, 14:3, 16:11, 16:11, 20:3, 21:8, 22:16, 22:17, 24:4, 24:12, 24:14, 24:17, 26:9, 26:15, 31:10, 31:13, 32:25, 33:6, 33:7, 34:19, 34:23, 34:25, 35:11, 36:12, 36:23, 36:23, 39:15, 39:17, 39:24, 40:23, 41:4, 41:24, 42:15, 43:7, 45:19, 45:25, 56:25, 57:20, 61:4,	63:17, 63:20, 64:3, 69:7, 72:2, 76:25, 77:9, 77:15, 79:4, 79:24, 83:8, 85:5 decisions - 63:12 declaration [2] 44:8, 44:10 declarations [3] 69:20, 72:15, 72:17 declined - 7:23 declining - 8:3 deep - 61:6 defeated - 41:15 defend [2] 35:24, 83:7 Defendant - 79:12 defenses - 66:24 deference - 51:11 deferential - 51:9 defined [2] 12:7, 47:19 definition [3] 27:24, 62:17, 71:18 degradation [3] 13:24, 14:6, 28:3 deliberations - 50:2 demonstrate [4] 58:10, 58:11, 58:15, 62:22 demonstrated [3] 40:3, 74:18, 74:18 demonstrating - 40:22 denied - 55:7 Department [21] 2:6, 2:8, 35:23, 37:13, 39:21, 40:13, 41:17, 44:20, 46:10, 58:11, 58:15, 58:20, 60:15, 61:19,	61:23, 63:24, 66:18, 79:11, 79:12, 79:20, 86:10 Department's [5] 40:23, 41:4, 46:6, 60:17, 83:7 deposition [13] 14:17, 15:13, 16:19, 25:18, 29:22, 29:24, 42:15, 45:1, 45:11, 45:17, 53:9, 53:13, 56:22 depositions [2] 40:20, 65:6 DEQ [101] 4:24, 5:13, 5:22, 5:23, 5:25, 6:3, 6:8, 6:13, 6:23, 6:25, 7:8, 7:10, 7:11, 7:13, 7:25, 9:3, 10:14, 10:19, 11:9, 11:11, 11:18, 12:16, 13:2, 13:5, 13:10, 13:13, 14:3, 14:5, 14:8, 14:24, 15:1, 15:7, 17:3, 17:4, 17:7, 18:14, 18:18, 18:25, 19:7, 19:17, 20:6, 20:7, 20:10, 20:11, 20:23, 21:1, 21:4, 21:5, 21:8, 21:9, 21:15, 21:17, 21:23, 22:2, 22:2, 22:6, 22:14, 22:23, 23:1, 23:16, 24:22, 26:6, 27:11, 29:17, 30:14, 31:15, 31:17, 32:9,	35:12, 36:1, 37:11, 38:6, 39:4, 39:12, 42:23, 46:23, 51:17, 51:22, 51:23, 51:25, 52:14, 52:20, 52:23, 53:2, 53:4, 53:7, 53:9, 53:12, 53:17, 54:9, 54:10, 66:12, 70:2, 79:1, 82:3, 82:6, 82:8, 82:11, 82:23, 86:2, 86:5 DEQ's [21] 6:15, 11:19, 12:19, 13:18, 14:15, 15:2, 16:4, 16:24, 17:13, 20:2, 20:15, 21:14, 21:20, 29:24, 40:2, 42:14, 43:20, 80:25, 81:5, 81:9, 81:24 designated [2] 12:8, 16:12 designed [2] 10:16, 58:12 desire [2] 67:2, 68:9 Despite - 65:19 destruction - 53:18 detail [2] 10:19, 46:21 detailed - 40:5 determination [30] 4:25, 5:1, 5:3, 5:24, 6:1, 6:9, 6:14, 12:16, 13:14, 14:10, 14:10, 18:16, 19:2, 19:21, 24:21, 25:21, 43:21, 44:25,	51:19, 54:2, 57:15, 57:25, 58:6, 58:20, 59:7, 60:4, 60:5, 60:8, 67:11, 83:20 determinations - 71:14 determine [4] 19:14, 22:13, 23:14, 63:6 determined [2] 27:11, 34:9 determining [3] 31:18, 32:20, 33:3 detour - 10:3 develop [2] 63:21, 66:23 developed - 39:20 developing - 40:21 differences - 81:25 differently [2] 43:7, 60:10 dig - 4:12 direct - 54:12 directly [2] 7:15, 22:2 disclosures - 25:14 discovery [11] 25:14, 40:19, 42:16, 44:11, 45:10, 47:22, 48:11, 65:6, 65:14, 66:23, 67:21 discrete - 36:14 discretion [3] 20:20, 20:23, 21:4 discuss [2] 6:21, 65:22 discussion [10] 36:13, 40:1, 78:11, 80:4, 80:17, 81:11, 84:10, 84:19, 85:10, 86:16 dismiss [3] 8:12, 35:3, 63:16 dismissal [3] 34:16, 35:5,	35:6 dismissing [3] 8:8, 8:8, 84:2 disparate - 59:21 dispositive - 4:21 disprove [3] 41:18, 47:9, 60:16 disproved - 34:13 disproven [2] 41:19, 49:16 dispute [3] 7:5, 21:23, 53:25 distinct [2] 29:2, 29:15 disturbed - 74:4 dive - 61:7 divide [5] 48:21, 59:14, 59:14, 60:20, 76:8 divides - 76:2 docket [2] 62:10, 67:15 documented - 39:16 documents [5] 29:1, 39:17, 42:15, 43:7, 45:19 door [5] 32:4, 32:7, 73:9, 73:22, 75:7 doors - 62:6 dovetail - 66:13 drafted - 39:20 drainages - 76:9 driven - 31:22 due - 66:25 duplicative - 36:2 duration [2] 25:11, 26:1 dusted - 60:25 E earlier [3] 15:14, 49:22, 78:25 easements - 48:17 east - 48:4 eastern [2] 47:25, 72:25
--	--	---	---	---	--

economic [3] 47:18, 72:21, 74:5 economy [2] 63:10, 63:18 effect [3] 12:17, 29:11, 33:11 efforts - 65:19 eight - 70:5 EIS - 28:25 either [10] 23:13, 26:5, 33:9, 33:16, 58:16, 59:22, 66:3, 83:6, 83:11, 84:1 elaborate [2] 5:10, 7:17 elaboration - 76:7 embedded [5] 43:3, 44:17, 70:22, 71:8, 71:14 emphasize - 38:17 encourage [2] 29:23, 56:21 endeavor - 3:25 ended - 52:1 ends - 36:19 Engineers [2] 35:16, 79:19 entire [5] 12:20, 24:1, 28:17, 28:18, 70:11 entirely [4] 30:5, 64:24, 79:1, 79:4 entirety [18] 5:5, 5:6, 5:25, 6:1, 6:9, 6:14, 8:10, 13:8, 13:14, 15:8, 15:10, 16:16, 29:24, 37:7, 37:8, 37:16, 44:5, 52:11 enumerated - 37:5 enuniated - 61:3 enunciating - 45:5 environmental [13] 1:1, 2:2, 2:4, 2:7, 2:8, 3:21, 20:3, 29:3,	38:25, 47:17, 49:15, 72:22, 86:10 equally - 5:19 equation [11] 11:1, 11:2, 25:1, 25:2, 25:4, 25:5, 25:6, 25:16, 28:24, 29:20, 52:8 erode - 38:19 errata [3] 79:16, 82:2, 85:25 erred [2] 6:23, 22:14 erroneous - 51:13 erroneously - 18:25 error [17] 5:8, 5:19, 13:13, 13:17, 17:3, 17:11, 17:12, 17:24, 18:11, 18:13, 19:22, 21:2, 21:21, 24:15, 27:12, 55:4, 55:24 especially [2] 4:13, 66:21 ESQ [3] 2:3, 2:7, 2:12 essentially [4] 11:10, 24:3, 29:25, 30:12 establish [7] 42:23, 43:4, 43:11, 47:11, 49:2, 49:13, 74:5 established - 39:2 esthetic [2] 47:19, 72:22 evaluation [2] 15:23, 44:23 evapotranspirati [3] 20:13, 54:19, 54:23 eve - 4:15 event - 12:3 eventually - 16:8 everybody [2] 50:7, 80:4 everything [6] 11:25, 28:17, 56:9,	56:15, 56:16, 76:21 evidence [33] 14:5, 17:16, 23:19, 23:24, 24:10, 31:12, 33:21, 34:3, 34:5, 34:5, 34:11, 34:21, 37:1, 38:5, 39:23, 40:2, 40:3, 40:5, 40:23, 41:5, 41:10, 41:25, 42:17, 43:19, 43:24, 44:3, 44:6, 44:15, 44:19, 45:3, 54:22, 57:2, 63:22 evidentiary [5] 38:8, 39:25, 40:16, 40:21, 41:3 Examiner [55] 4:23, 5:13, 6:22, 7:22, 8:7, 8:23, 9:21, 13:16, 17:23, 18:2, 18:15, 22:16, 24:5, 26:6, 31:8, 33:16, 34:13, 35:4, 36:10, 36:16, 36:22, 37:6, 38:18, 38:21, 39:3, 39:12, 40:2, 42:2, 42:5, 42:12, 42:21, 43:10, 43:12, 44:1, 44:12, 45:10, 45:11, 45:23, 45:24, 46:9, 46:18, 49:8, 55:4, 55:16, 61:6, 61:21, 63:23, 65:14, 69:17, 70:9, 71:16, 72:8, 78:10, 78:16, 81:6 Examiner's [5]	34:25, 41:6, 55:14, 57:20, 77:24 example [5] 67:10, 67:12, 72:2, 74:2, 74:8 exceed - 52:17 exception [8] 37:4, 37:22, 37:23, 71:15, 79:20, 81:21, 82:7, 84:13 exceptions [39] 3:23, 4:18, 7:23, 8:6, 8:19, 10:4, 20:22, 35:12, 46:22, 51:13, 57:16, 63:3, 64:4, 72:3, 72:5, 77:14, 78:24, 79:2, 79:10, 79:13, 79:19, 80:3, 80:9, 80:12, 80:16, 80:25, 81:5, 81:9, 81:19, 81:23, 84:18, 85:7, 85:16, 85:22, 86:2, 86:4, 86:5, 86:8, 86:11 exchanged - 25:13 excluded - 42:23 exclusions - 30:7 excuse - 77:3 exemplary [2] 9:22, 10:2 exempt [2] 28:2, 31:2 exercise - 40:20 exist - 30:25 existed [2] 16:2, 45:5 existence - 28:3 existing [11] 14:18, 15:24, 16:5, 27:19, 29:11, 43:16, 52:16,	56:13, 57:22, 58:22, 59:10 expand - 12:11 expanding - 49:1 expansion [2] 12:11, 69:22 expect - 63:13 experience - 67:8 experienced - 9:25 expert [10] 6:15, 25:14, 25:18, 25:18, 34:8, 42:16, 45:1, 45:6, 45:17, 57:21 expertise [3] 55:3, 55:6, 55:7 experts [2] 39:8, 40:19 expires - 88:22 explaining - 56:23 explanation [2] 20:19, 82:8 explicitly [2] 42:22, 66:10 expressly - 69:18 extensive [2] 65:6, 66:9 extent [8] 37:3, 37:21, 56:20, 59:15, 59:20, 68:8, 81:24, 86:9 external [2] 32:1, 32:2	76:15, 76:18, 77:20 factual [23] 23:12, 23:14, 23:17, 23:21, 23:22, 24:12, 34:20, 39:12, 43:9, 44:17, 45:13, 45:14, 46:3, 46:8, 55:17, 57:18, 60:25, 62:1, 63:25, 66:8, 69:24, 70:15, 71:3 factually [2] 18:22, 49:16 fail - 41:9 failed [7] 4:24, 39:23, 41:7, 41:10, 42:23, 43:4, 43:10 failure - 18:12 Fair [2] 75:19, 83:13 fake [2] 54:5, 54:5 fall - 54:4 falls - 40:14 false - 41:19 familiar - 54:21 fantastic - 56:22 farther - 16:7 fast [4] 20:9, 51:5, 65:1, 65:3 fatal [2] 5:19, 17:11 favor [9] 11:15, 22:17, 46:10, 63:24, 78:16, 80:20, 81:14, 85:12, 86:18 favorable [3] 23:16, 37:12, 70:13 federal [10] 30:18, 33:5, 33:6, 33:10, 65:18, 67:18, 68:2, 69:3, 69:5, 70:6
---	--	---	---	--	--

federally [2] 33:1, 69:2 felt - 45:8 fewer - 70:5 fierce - 23:6 Figure - 19:12 file [2] 82:7, 82:9 filed [6] 8:6, 78:24, 79:2, 79:12, 81:19, 85:22 filing - 82:2 final [5] 34:24, 35:6, 55:20, 81:2, 81:10 finding [13] 17:25, 23:12, 37:5, 37:6, 39:2, 39:9, 42:18, 43:3, 43:9, 44:17, 45:9, 57:21, 63:16 findings [36] 13:5, 17:25, 22:13, 23:14, 23:18, 23:21, 23:22, 24:13, 34:20, 34:25, 36:14, 36:14, 36:25, 37:18, 38:1, 38:19, 39:12, 42:2, 51:12, 55:14, 55:23, 70:15, 70:19, 70:22, 76:24, 77:10, 77:11, 77:24, 77:25, 78:9, 78:14, 78:22, 79:7, 80:1, 85:2, 85:19 finer [2] 71:15, 75:9 fish - 75:1 fished [2] 74:19, 74:25 five [7] 3:17, 4:1, 18:6, 19:19, 48:7, 51:2, 86:24 flawed - 43:21	flies - 43:9 flow - 74:24 flows [4] 59:17, 59:17, 60:11, 60:13 fly - 62:19 focus - 4:20 focused - 44:22 FOFCOL [3] 36:23, 81:2, 81:10 folks [5] 46:24, 47:22, 48:9, 48:23, 49:11 follows - 26:22 force - 35:20 foregoing - 88:12 formal [2] 3:10, 39:16 forward [9] 10:1, 11:1, 33:13, 40:8, 45:20, 46:15, 64:17, 67:22, 83:21 forward-looking - 32:18 forwent - 34:22 frame [2] 67:22, 84:4 framework - 40:7 Francisco - 62:19 frankly - 75:17 free - 53:13 freely - 71:2 frustrated - 70:25 full [4] 35:11, 37:18, 51:14, 72:4 fully [2] 62:5, 66:24 fundamental - 20:1 fundamentally - 44:13 future [2] 16:6, 32:8 G general [3] 2:8, 3:11, 79:3 generally - 79:19	generated - 9:16 geology - 38:24 gets - 69:8 gild - 16:18 given - 66:20 gives - 53:18 giving - 54:5 global [2] 31:17, 61:24 goes [5] 25:3, 41:20, 42:24, 69:9, 83:21 gone [2] 48:6, 85:15 government [2] 33:10, 33:10 governs - 72:4 granted [2] 21:15, 32:11 gravity - 60:10 gray [2] 12:22, 15:10 grazes - 74:3 greater [4] 11:8, 15:24, 15:25, 19:20 groundwater [20] 13:22, 13:23, 13:24, 13:25, 14:7, 14:21, 16:22, 17:19, 27:14, 28:6, 28:13, 28:20, 29:11, 30:9, 58:17, 59:2, 59:13, 59:17, 59:22, 60:11 group - 74:11 groups [2] 62:7, 62:18 guardrails - 23:9 guess [5] 69:10, 71:4, 77:17, 83:14, 84:9 guided - 38:12 guides - 72:4 H half [3] 49:14, 64:16, 64:18	handle - 80:8 happen [2] 54:3, 64:15 happened [2] 28:7, 64:16 happens - 66:6 happy [2] 22:11, 65:21 harm - 69:18 harmed [2] 73:3, 73:25 harmful - 20:14 harmless - 17:12 Hart - 2:13 hasn't [3] 39:9, 42:18, 44:18 haven't [2] 40:10, 53:6 having [4] 34:22, 55:7, 57:17, 81:22 he's - 18:10 hear [9] 3:12, 4:12, 51:20, 53:17, 56:9, 62:12, 63:7, 71:4, 86:23 heard [7] 22:22, 36:1, 45:21, 56:8, 57:12, 76:21, 86:23 hearing [59] 1:5, 3:5, 4:14, 4:23, 5:13, 6:22, 7:21, 8:23, 9:20, 13:16, 17:23, 18:1, 18:14, 22:15, 24:4, 26:6, 26:13, 31:8, 33:16, 34:13, 34:25, 35:4, 36:10, 36:16, 36:22, 37:6, 38:18, 38:21, 39:12, 40:1, 41:6, 42:2, 42:12, 42:21, 43:1, 43:10, 43:12, 44:1, 44:12, 45:9, 45:11, 45:23, 45:24, 46:9, 46:17, 49:7, 61:6, 63:23,	64:13, 65:10, 65:12, 65:12, 68:17, 68:22, 68:23, 75:24, 76:15, 80:19, 81:13 Hearings [17] 8:6, 39:3, 42:5, 55:4, 55:14, 55:15, 57:19, 61:21, 65:14, 69:17, 70:9, 71:16, 72:7, 77:24, 78:10, 78:16, 81:6 heart - 10:6 held - 14:2 Helena [2] 2:5, 2:9 hereby - 88:7 herein - 88:9 hereunto - 88:15 Hernandez [23] 2:3, 3:19, 3:20, 4:8, 10:10, 18:3, 18:7, 22:21, 26:14, 51:1, 51:3, 55:9, 55:10, 56:7, 64:22, 64:23, 66:2, 69:10, 69:15, 70:21, 71:7, 73:4, 85:3 Hernandez's - 66:7 herring - 53:8 highlighted - 30:1 highlights - 29:21 highly [5] 16:3, 16:5, 17:15, 17:17, 60:7 historic [5] 43:16, 48:5, 57:23, 58:22, 59:10 hold [2] 22:21, 64:13 holidays - 4:16 Holland - 2:13	hollowed - 4:16 Homeowners - 72:1 honored - 64:25 hope [2] 9:16, 9:25 hopefully - 50:6 however [4] 9:11, 49:23, 69:25, 84:3 huge - 56:3 hundreds [2] 39:19, 39:19 hunted - 75:5 hunting - 4:16 hydrologic [24] 6:7, 10:20, 10:21, 10:23, 12:14, 21:18, 29:9, 30:16, 34:10, 39:5, 39:14, 39:18, 39:20, 56:11, 56:17, 58:14, 58:24, 59:8, 59:22, 60:5, 60:20, 76:1, 76:3, 76:5 hydrological [2] 13:19, 26:22 hydrologist [2] 60:17, 60:18 hydrologists - 55:2 hydrology [3] 7:2, 20:25, 38:24 hypothetical [2] 30:3, 32:8 I iceberg [10] 5:14, 5:16, 5:18, 10:6, 15:8, 16:15, 16:25, 17:8, 18:13, 43:8 idea [2] 44:22, 48:25 identified [4] 45:2, 48:14, 63:3, 64:4 identifies [2] 12:20, 53:23
---	---	--	--	--	---

identify [4] 34:23, 40:18, 47:22, 48:11 ignored - 5:15 ignoring [2] 5:17, 21:21 imagery [2] 9:5, 9:8 immediately - 4:9 imminence - 9:13 impact [21] 6:9, 13:19, 19:1, 28:19, 29:2, 30:16, 30:21, 42:4, 43:20, 44:24, 46:6, 56:16, 56:18, 57:24, 58:5, 59:6, 60:3, 61:2, 67:7, 75:1, 75:2 impacted [7] 47:15, 48:13, 49:3, 62:23, 69:21, 74:6, 74:20 impacts [38] 6:7, 7:1, 7:2, 10:21, 11:4, 11:7, 12:15, 20:14, 20:24, 21:18, 21:21, 26:18, 26:23, 27:5, 27:7, 28:11, 28:13, 29:18, 30:6, 31:18, 31:22, 32:5, 32:8, 33:18, 33:22, 34:9, 39:6, 39:18, 46:2, 46:12, 46:12, 54:6, 56:11, 58:19, 59:1, 59:24, 60:22, 76:4 implementing [3] 49:9, 68:3, 68:13 implore [4] 5:21, 24:5, 25:8, 54:4 impose - 68:21 imposes -	68:24 include [4] 12:7, 12:13, 30:15, 45:7 included [6] 31:3, 38:22, 51:18, 56:18, 60:2, 60:21 includes - 12:21 including [4] 39:17, 40:5, 69:22, 70:6 incorporate - 81:10 incorporated - 81:2 incorrect [2] 18:22, 71:19 increase [2] 13:22, 52:18 incumbent - 62:10 independent [3] 39:4, 42:17, 42:17 indicate - 12:12 indicated - 35:22 indicates - 65:2 indicating [2] 14:5, 20:11 indication - 67:1 individual [4] 45:2, 47:14, 62:18, 73:13 individually - 80:8 individuals [3] 47:14, 48:12, 73:7 indulge - 23:2 indulgence - 22:19 inequality - 11:10 influence - 56:14 information [18] 2:2, 2:4, 3:21, 20:11, 25:13, 28:24, 29:25, 39:1, 45:7, 45:15, 45:18, 55:17, 61:9, 61:11, 61:17, 61:17, 62:14, 70:13 initially -	25:25 initiate - 49:13 ink - 8:1 inquiries - 66:9 insofar - 86:4 instance [2] 26:5, 69:7 instances [3] 26:10, 28:16, 32:13 instead [3] 22:13, 38:15, 71:17 instructs - 36:21 intend [2] 23:1, 32:15 intended - 33:15 intends - 23:20 intent [2] 33:9, 68:4 intention [5] 65:2, 65:16, 67:15, 73:20, 73:20 intentioned - 67:1 interact [5] 26:23, 59:2, 59:25, 60:6, 60:23 interacted - 57:23 interaction [5] 58:24, 59:9, 59:16, 59:20, 59:22 interactions [2] 43:14, 43:15 interest [5] 46:17, 62:7, 62:18, 63:9, 74:11 interested - 82:25 interests - 19:23 internal - 39:7 interpretation [2] 71:23, 83:18 interpreting - 32:13 interrupt - 18:4 intervened - 35:23 Intervenors [12] 35:15, 79:17,	81:20, 82:2, 84:8, 84:11, 84:18, 85:8, 85:17, 85:22, 86:4, 86:9 invitation [3] 23:2, 24:6, 56:1 invite [3] 3:14, 5:11, 85:5 involved - 67:6 involves - 65:6 isn't [8] 15:13, 21:4, 22:4, 23:25, 34:19, 38:6, 70:20, 83:9 isolates - 19:1 isolation - 47:7 issue [17] 5:21, 7:8, 9:15, 21:8, 22:1, 22:16, 22:17, 34:24, 40:8, 53:16, 65:10, 66:11, 67:19, 68:6, 69:6, 74:10, 84:21 issued [3] 24:11, 36:11, 69:13 issues [8] 3:13, 3:13, 4:18, 4:22, 31:11, 36:22, 60:21, 71:3 item [2] 3:4, 86:25 items [3] 76:3, 82:16, 86:1 itself [5] 16:6, 29:1, 29:16, 68:23, 70:7	44:9, 72:16 judicial [2] 63:10, 63:18 JULIA - 1:19 jump [2] 46:15, 64:9 juncture [2] 36:8, 75:16 June - 9:4 jurisdiction [4] 24:8, 36:19, 62:12, 72:4 jurisdictional - 62:15 K key [5] 10:24, 12:6, 12:15, 14:10, 15:21 King [17] 2:7, 22:24, 22:25, 36:20, 54:11, 56:7, 56:8, 57:5, 66:4, 68:12, 82:6, 82:14, 82:17, 82:18, 83:1, 83:3, 83:4 kit - 52:4 knowing - 83:16 known [2] 49:4, 63:4 knows [2] 62:9, 67:8 L lack [2] 63:5, 63:16 lacked - 21:20 landlocked - 48:16 lands [4] 47:24, 49:12, 54:18, 74:3 language [7] 20:21, 26:20, 51:24, 79:6, 79:14, 85:18, 85:23 Lastly - 62:4 later [2] 20:9, 64:18 latitude - 38:1 LAURIE [3] 1:21, 88:5, 88:20	lauriecrutcher@g - 1:23 law [65] 2:3, 2:12, 6:24, 6:24, 11:23, 13:3, 16:17, 17:1, 18:13, 20:19, 22:8, 23:20, 27:21, 30:24, 33:1, 36:4, 36:15, 37:19, 37:21, 38:2, 38:17, 40:17, 40:25, 41:21, 43:3, 43:17, 44:5, 44:17, 46:19, 49:7, 51:10, 51:12, 51:14, 54:13, 55:24, 57:22, 61:22, 63:2, 65:17, 65:18, 67:18, 67:20, 68:11, 70:19, 70:20, 70:23, 70:25, 71:2, 71:6, 71:13, 71:15, 71:19, 71:22, 71:25, 73:25, 76:24, 77:4, 77:11, 77:25, 78:9, 78:15, 78:22, 79:8, 85:19, 85:24 lawful - 40:13 Lawrence - 2:4 lawyer - 77:3 layman's - 59:1 lays - 68:15 lead - 26:24 leads - 26:11 learned - 45:16 least [2] 6:17, 62:21 leave - 4:3 leaves [2] 79:9, 85:21 Lee [6] 8:21,
--	---	--	--	---	--

16:7, 52:14, 52:18, 53:15, 53:18 legal [19] 4:25, 5:8, 21:20, 24:13, 32:25, 37:24, 40:3, 40:7, 40:24, 41:20, 42:13, 46:2, 46:8, 57:3, 62:1, 64:1, 72:7, 72:10, 73:17 legally [3] 16:24, 49:16, 78:1 legislative - 68:10 Legislature [4] 32:12, 32:14, 32:17, 33:15 length - 11:16 lest - 15:12 let's [7] 3:4, 3:16, 42:1, 50:3, 50:25, 80:9, 84:6 letter [2] 71:22, 73:25 level [4] 32:6, 59:2, 59:23, 75:8 levels [2] 13:21, 15:16 Lewis [2] 88:4, 88:6 liberal - 83:18 likely [4] 16:4, 16:5, 17:15, 17:17 likewise - 23:23 lily - 16:18 limit [2] 14:19, 14:20 limitation - 74:12 limitations - 62:16 limited [3] 23:8, 35:8, 36:7 lined - 76:25 litigated - 66:14 litigation [2] 23:5, 40:18 litigator - 67:9 load [2] 52:15, 52:18	loads - 52:17 Local [4] 35:15, 35:21, 79:18, 81:21 location [3] 60:10, 74:25, 75:1 lodge - 38:8 lodged [2] 37:4, 37:22 longer [2] 8:5, 65:20 looking [7] 11:17, 11:25, 18:10, 28:10, 28:11, 30:22, 33:14 looks - 29:16 lost - 60:25 lunch - 49:24 M maintain [2] 9:15, 31:16 maintained - 41:12 maintains [2] 14:4, 24:24 makes [5] 13:16, 14:25, 17:24, 61:13, 71:7 making [4] 14:9, 46:18, 58:19, 64:22 map - 28:24 MAPA [6] 35:2, 36:20, 38:13, 40:11, 68:16, 68:23 MAPA's - 66:22 March - 88:23 Martin - 6:16 mass [3] 15:23, 15:24, 15:25 material [76] 5:1, 5:3, 5:24, 6:1, 6:8, 6:13, 7:7, 10:4, 10:5, 10:10, 10:11, 10:17, 10:22, 10:24, 11:6, 11:8, 11:14, 11:21, 11:25, 12:5,	12:15, 13:2, 13:11, 13:14, 14:9, 16:12, 17:7, 17:10, 17:21, 18:9, 18:15, 18:21, 18:25, 19:2, 19:5, 19:17, 19:21, 24:21, 24:25, 25:6, 25:16, 25:20, 25:25, 26:12, 26:16, 27:3, 27:24, 39:14, 42:4, 43:20, 44:7, 44:25, 51:6, 51:16, 51:19, 52:3, 52:7, 52:10, 52:12, 52:22, 53:1, 53:4, 53:10, 53:12, 54:1, 54:7, 57:11, 57:14, 57:25, 58:5, 58:12, 58:16, 58:19, 59:6, 60:3, 67:10 materials [4] 4:5, 11:19, 60:12, 60:14 math [8] 17:3, 19:22, 25:1, 25:2, 25:3, 25:5, 25:6, 25:16 matter [20] 3:11, 4:12, 4:25, 6:17, 6:23, 7:22, 9:14, 9:17, 9:20, 17:1, 20:19, 22:8, 22:10, 22:15, 26:5, 27:21, 30:24, 31:4, 51:21, 65:14 matters [4] 65:1, 65:1, 65:17, 65:20 maybe [5] 11:10, 50:4, 58:23, 77:3, 82:7 McGrath - 74:14 meaning [2]	29:2, 68:18 means [3] 26:15, 37:3, 44:14 measure - 14:22 measures - 17:6 meet - 11:11 meeting - 50:9 MEIC [23] 11:15, 24:15, 24:19, 24:22, 24:23, 25:11, 25:17, 25:21, 28:16, 28:23, 29:6, 29:21, 32:24, 33:21, 34:4, 38:20, 41:2, 41:7, 42:6, 42:12, 56:25, 62:7, 69:18 MEIC's [3] 11:15, 23:6, 24:6 member [33] 50:16, 50:18, 50:19, 50:20, 50:21, 50:22, 62:22, 64:9, 64:20, 64:23, 66:3, 66:5, 67:7, 67:17, 69:8, 69:16, 70:17, 70:24, 74:13, 78:5, 80:11, 81:4, 81:7, 82:5, 82:13, 82:19, 82:21, 83:13, 84:9, 84:15, 84:20, 86:6, 86:14 members [18] 1:18, 3:20, 4:11, 22:25, 35:18, 38:1, 40:10, 47:3, 47:23, 48:24, 49:21, 51:4,	56:4, 57:7, 69:19, 69:20, 73:24, 74:17 membership - 47:13 meritorious - 83:9 merits [7] 24:2, 36:1, 55:25, 63:12, 63:17, 83:8, 85:5 meters - 9:10 microsiemens [2] 14:21, 15:17 mind - 79:23 mine [42] 1:6, 3:6, 12:8, 12:9, 13:8, 13:9, 13:10, 13:21, 16:1, 16:1, 16:21, 19:1, 27:5, 27:16, 30:15, 30:19, 30:20, 31:1, 31:4, 35:19, 35:21, 42:24, 43:2, 43:16, 43:17, 47:1, 47:5, 47:5, 48:3, 48:5, 49:1, 53:7, 53:11, 57:14, 66:15, 66:19, 69:16, 69:21, 70:8, 73:8, 73:15, 74:7 mine's - 53:17 mines - 59:3 mining [30] 3:7, 8:25, 9:4, 9:5, 9:9, 9:13, 10:14, 10:16, 11:20, 12:17, 18:11, 26:23, 27:5, 29:19, 32:22, 35:24, 39:6, 43:16, 47:16, 48:4, 48:5, 48:24, 52:16, 52:17,	56:13, 57:23, 58:9, 58:23, 59:10, 62:20 minor [2] 35:11, 64:3 minute [4] 50:1, 50:3, 55:8, 55:9 minutes [10] 3:16, 3:16, 3:17, 3:25, 4:1, 5:3, 18:5, 49:21, 50:4, 51:2 missing [2] 45:8, 75:4 misstatements - 37:25 misstating - 77:3 misunderstand - 45:22 misunderstanding [2] 45:13, 45:14 misunderstood - 43:25 mixed - 70:25 modify [5] 23:13, 23:20, 34:19, 37:5, 37:23 MOISEY-SCHERER [6] 4:7, 50:11, 50:14, 50:16, 50:19, 50:23 moment [5] 5:10, 7:17, 7:18, 9:9, 18:4 Montana [17] 1:2, 2:2, 2:4, 3:21, 5:4, 10:13, 11:12, 26:19, 28:2, 29:3, 32:12, 41:15, 47:25, 62:21, 72:25, 88:2, 88:7 Montana's - 4:15 mood - 49:24 moot - 8:17 morning [4] 4:20, 6:21, 22:24, 35:17 mostly - 85:23 motion [22]
--	---	---	---	---	---

44:9, 44:13, 76:12, 76:20, 77:16, 77:16, 77:24, 78:13, 78:20, 80:7, 80:10, 80:24, 81:3, 81:18, 82:4, 84:4, 84:10, 86:7, 86:12, 86:15, 86:20, 86:24 motions [4] 42:10, 84:1, 84:5, 84:6 Mountains - 14:3 move [8] 38:15, 44:10, 65:17, 65:23, 75:14, 78:6, 80:11, 81:4 moved [5] 46:22, 78:7, 80:15, 81:8, 84:17 moving [5] 8:15, 33:13, 40:8, 45:20, 80:25 MSUMRA [24] 5:5, 6:25, 7:9, 7:11, 12:7, 20:6, 20:16, 20:22, 21:16, 22:3, 27:25, 29:4, 31:16, 32:17, 46:3, 46:25, 49:9, 54:15, 61:5, 61:8, 62:16, 62:16, 71:17, 73:18 MT [3] 2:5, 2:9, 2:14 N N-6 - 2:4 named - 88:9 narrow - 38:11 nature [2] 36:7, 66:20 nauseam - 77:20 nearest - 48:21	necessarily [2] 31:6, 56:15 necessary - 56:11 needs [5] 33:21, 34:24, 76:6, 76:20, 77:2 neither - 53:2 Nevertheless - 24:18 newly - 26:8 none [6] 48:14, 55:3, 55:5, 75:24, 80:19, 81:13 north [2] 2:13, 48:3 notarial - 88:16 Notary [3] 1:22, 88:6, 88:21 note [7] 9:18, 16:18, 36:3, 41:11, 44:4, 46:23, 70:3 noted [6] 37:20, 44:20, 66:18, 70:12, 71:13, 75:10 notes [2] 13:6, 54:15 nothing [2] 41:21, 42:16 notice [5] 18:23, 18:23, 21:11, 25:9, 25:9 Notices - 25:12 notifying - 8:24 November - 88:17 nowhere - 53:25 nuance - 32:4 numbers [3] 25:15, 26:3, 34:8 numerous - 54:15 O oath [3] 6:17, 14:16, 45:4 objection - 72:18 objections [2] 38:8, 81:24	obligated - 67:21 obligatory - 67:25 obliterated - 8:20 obvious - 44:11 obviously [3] 25:2, 64:14, 67:25 occasions - 54:16 occur [5] 9:4, 25:7, 25:17, 25:25, 27:1 occurred [5] 15:3, 27:21, 27:23, 28:1, 28:1 occurring - 4:15 October - 1:12 offer - 20:18 offered - 49:7 offering [2] 56:2, 71:23 omitted [3] 44:23, 45:15, 57:14 ones - 84:25 online - 9:5 open [6] 32:4, 32:7, 62:6, 65:12, 65:13, 73:1 opening - 56:2 operating [3] 35:15, 45:12, 79:18 operation [35] 5:7, 5:17, 5:25, 6:2, 6:15, 9:5, 10:15, 10:15, 10:16, 11:3, 11:4, 11:7, 12:3, 12:6, 12:14, 12:25, 13:7, 13:10, 15:9, 15:11, 16:16, 17:6, 18:11, 19:3, 19:4, 27:2, 30:7, 31:23, 47:16, 52:9, 52:10, 54:8, 59:18, 61:14, 69:23 operations [3] 5:15, 12:18, 69:22	operator [2] 35:19, 41:16 opinion [3] 35:10, 45:6, 74:13 opportunity [13] 24:1, 24:3, 34:22, 35:2, 36:18, 37:14, 38:6, 38:8, 38:9, 40:18, 63:20, 66:23, 68:8 oppose - 79:3 opposed [5] 78:18, 80:22, 81:16, 86:21, 86:21 opposing [2] 8:11, 8:13 option - 77:17 oral [2] 3:10, 9:19 orange - 12:21 order [11] 15:22, 17:24, 21:2, 22:15, 33:20, 50:10, 51:11, 71:21, 71:21, 78:24, 81:5 orders - 7:24 organization - 74:16 organization's - 47:12 organizations [2] 47:4, 70:9 OSM [2] 68:4, 68:11 Otherwise - 49:25 outlined - 12:21 outset [2] 42:25, 47:21 outside [5] 13:21, 56:14, 56:16, 58:13, 58:17 overlap - 85:25 overlooked [2] 43:2, 55:13 oversaw - 36:11 overturn [5] 40:14, 41:3, 41:4, 41:23, 44:18	owed - 66:25 P p.m - 87:3 P.O - 2:9 pages [4] 36:13, 38:23, 39:19, 88:12 Paragraph [2] 18:24, 25:10 parallel - 79:19 pared - 3:23 particular [4] 31:23, 46:16, 46:25, 71:1 particularly [5] 18:1, 19:12, 32:6, 47:2, 82:20 particulate - 66:23 parties [15] 3:12, 4:17, 9:21, 10:1, 22:23, 23:16, 24:9, 37:12, 42:7, 42:8, 62:19, 64:8, 69:6, 73:21, 78:24 party [2] 66:22, 73:20 pass [2] 53:14, 53:19 passed - 32:17 passing - 54:17 past - 47:3 paths - 48:17 pause [2] 9:18, 18:17 Payne [19] 1:19, 50:19, 50:20, 64:9, 64:20, 64:24, 66:3, 66:5, 67:7, 67:17, 69:8, 70:17, 70:24, 78:5, 80:11, 81:4, 84:15, 84:20, 86:6 Peabody - 16:1 penultimate - 36:8 per [3] 14:22, 15:18, 38:16 period - 15:5	permit [31] 1:7, 3:6, 10:20, 12:3, 13:6, 21:9, 28:7, 35:24, 38:22, 39:15, 39:21, 40:12, 40:14, 40:14, 45:19, 46:13, 47:1, 47:6, 48:2, 56:14, 56:17, 58:9, 58:13, 58:17, 58:23, 60:12, 61:10, 62:24, 66:15, 69:12, 74:7 permits [5] 47:5, 62:8, 62:20, 66:19, 73:22 permitted - 27:16 permittee - 41:16 permitting [5] 29:1, 32:2, 39:24, 41:24, 60:5 perspective [6] 38:16, 46:3, 46:8, 46:8, 59:8, 62:1 petition [3] 8:16, 64:14, 68:19 Petitioner's [3] 6:21, 7:19, 8:9 Petitioners [34] 3:14, 3:17, 3:21, 8:5, 22:18, 39:22, 39:23, 42:6, 42:22, 42:23, 42:25, 43:18, 43:23, 44:7, 45:12, 45:21, 46:5, 46:9, 57:9, 57:19, 58:1, 60:9, 63:20, 66:18, 70:14, 79:3, 79:10,
---	---	---	--	--	--

79:22, 80:9, 80:12, 80:17, 83:9, 83:11, 84:12 phase - 60:5 PHC [4] 29:13, 29:14, 29:16, 29:19 piece [2] 25:4, 31:20 pieces [2] 46:7, 61:11 pile - 68:13 places [3] 53:23, 53:24, 59:21 Plaintiff's - 6:19 plaintiffs [6] 18:20, 19:25, 20:4, 20:5, 21:16, 70:8 plan [4] 68:1, 68:5, 68:7, 68:9 plausible - 48:8 plausibly - 74:18 play - 84:24 please [7] 3:18, 18:6, 50:10, 51:2, 55:9, 55:9, 78:1 plenary [2] 5:9, 51:10 plug - 30:20 plus [4] 3:17, 17:5, 27:19, 52:11 point [30] 5:10, 7:5, 14:8, 17:2, 20:22, 23:10, 24:17, 26:11, 28:25, 29:5, 32:24, 34:15, 43:11, 51:5, 51:20, 53:3, 53:3, 55:20, 60:18, 66:8, 69:4, 69:7, 71:7, 71:15, 75:9, 76:7, 79:1, 82:10, 84:24, 85:9 pointed [2] 35:12, 51:22 pointing - 30:14	points [5] 41:9, 51:5, 57:9, 71:10, 84:21 policy [2] 29:3, 33:12 pollution [13] 10:5, 17:5, 17:9, 17:18, 18:9, 19:10, 19:15, 19:15, 19:16, 19:18, 19:19, 52:21, 53:18 portion - 56:13 portions [2] 43:1, 59:14 position [15] 7:19, 9:12, 14:4, 14:24, 15:2, 16:24, 21:22, 41:12, 55:18, 57:12, 60:9, 62:5, 67:4, 83:4, 83:16 positions - 3:13 possible [4] 4:6, 18:6, 54:19, 66:21 possibly - 65:7 potential - 30:6 potentially [3] 33:25, 67:4, 67:10 practical - 9:14 practice [2] 66:7, 66:7 prairies - 73:1 pre-permit - 58:23 precedent - 41:21 precludes - 9:14 preemption [3] 67:19, 68:6, 69:5 prefer - 83:11 preference - 83:7 premises - 12:8 prepared [5] 1:21, 3:22, 14:4, 77:12, 85:20 preponderance	[3] 17:16, 34:2, 40:22 present [16] 24:10, 33:21, 34:4, 38:10, 38:15, 41:10, 43:23, 44:3, 50:18, 55:2, 55:18, 58:14, 58:25, 59:10, 63:21, 63:22 presentation [10] 4:6, 35:25, 36:2, 36:3, 38:19, 42:25, 44:21, 49:18, 57:10, 75:10 presented [11] 42:9, 44:6, 46:5, 47:8, 60:12, 60:13, 66:17, 78:10, 78:15, 78:23, 84:7 pressure - 24:4 presumption - 40:12 pretrial - 65:15 prevail [2] 33:20, 33:25 prevailing [2] 23:16, 37:12 prevent [3] 10:17, 16:12, 58:12 previous - 52:16 previously - 27:16 primarily - 42:13 prior [2] 45:5, 70:6 probable [3] 29:9, 39:5, 76:5 probably [4] 18:18, 49:23, 59:23, 84:5 problem [5] 13:12, 19:13, 19:20, 20:2, 55:15 procedural [6]	17:2, 17:10, 24:24, 26:8, 31:9, 33:24 procedure - 64:19 proceed - 51:1 proceeding - 26:1 proceedings [6] 1:10, 3:1, 87:2, 88:8, 88:10, 88:13 process [16] 3:11, 35:25, 36:5, 36:9, 40:11, 42:8, 48:11, 58:8, 58:23, 65:5, 65:15, 65:22, 66:25, 67:5, 67:5, 68:10 program [3] 33:2, 33:8, 69:3 prohibit [4] 7:10, 7:11, 20:6, 32:3 project [5] 12:20, 12:21, 21:19, 29:17, 69:18 projected [2] 34:10, 52:17 proof [4] 40:14, 40:16, 40:17, 41:17 proposal [10] 29:17, 39:21, 46:18, 58:12, 58:25, 59:11, 73:25, 74:7, 74:20, 74:23 proposed [42] 5:5, 7:24, 7:24, 8:7, 10:15, 11:3, 11:4, 11:7, 12:3, 12:3, 13:6, 13:15, 15:22, 17:24, 21:2, 22:12, 26:9, 27:2, 36:23, 36:25, 36:25, 37:17, 42:7, 42:9, 42:11, 47:16, 49:7, 51:11, 52:9,	52:10, 52:24, 54:8, 57:20, 59:18, 61:4, 61:14, 61:14, 77:11, 77:25, 78:8, 79:6, 85:18 proposes - 12:10 prosecuted - 44:21 prospective [4] 31:17, 32:5, 32:18, 33:22 prove [4] 34:1, 41:5, 41:13, 41:24 provide [2] 43:19, 71:10 provided - 61:10 provision [5] 10:18, 11:13, 28:4, 64:24, 65:18 proximate - 48:21 proximity - 9:13 public [10] 1:22, 20:8, 20:10, 20:11, 48:16, 48:18, 48:21, 62:6, 88:6, 88:21 purely - 46:23 purposes [5] 46:17, 57:24, 58:4, 58:18, 63:18 pursue - 8:3 pursuing - 8:5 purview [2] 83:20, 83:24 pushed [2] 27:6, 27:7 puts [2] 9:16, 23:9	28:9, 30:9, 31:3, 53:15, 74:22 Quality's - 86:10 quicker - 67:5 quickly [2] 65:18, 65:23 quite - 84:22 quorum - 50:23 quote [6] 8:24, 8:25, 9:22, 9:22, 10:15, 10:20 R raise [7] 7:5, 7:23, 18:20, 18:21, 19:6, 19:25, 24:23 raised [2] 26:8, 66:10 raises - 84:24 ran - 34:7 rancher - 74:2 rate - 54:20 rates - 54:24 Rather - 7:5 re - 1:4 re-emphasize - 36:6 reach [5] 8:21, 8:25, 9:6, 9:10, 57:2 reached [2] 36:15, 42:2 reality [3] 43:23, 65:4, 67:1 really [10] 4:12, 7:5, 20:9, 25:10, 26:5, 26:12, 29:7, 37:14, 55:15, 71:8 reason [5] 27:13, 27:14, 30:17, 55:20, 58:6 reasoned [3] 35:9, 45:25, 63:20 reasons [2] 27:13, 68:19 rebuttal [6] 3:17, 4:2, 22:11, 50:1, 51:1, 57:10 recast - 38:9 receiving - 9:7 Recently -
---	--	---	--	---	--

74:9 Recess - 50:8 reclamation [16] 5:4, 7:3, 12:17, 20:25, 31:19, 31:21, 32:3, 32:21, 33:3, 33:18, 33:23, 48:5, 54:18, 61:3, 61:15, 61:19 recognize - 47:1 recognized - 34:14 recognizes [2] 14:6, 30:19 recommendations - 55:13 recommended [4] 8:7, 8:11, 8:13, 35:5 reconsideration - 77:19 record [20] 6:12, 12:19, 13:5, 23:15, 31:13, 34:6, 34:21, 37:8, 37:9, 37:16, 39:25, 40:21, 53:4, 54:17, 54:22, 57:1, 60:19, 61:17, 70:12, 88:13 recreate [3] 48:9, 69:20, 73:8 recreated - 73:14 recreational [2] 47:18, 72:21 red - 53:8 reduce - 74:24 referenced - 56:19 referring - 29:8 reflected - 68:4 refuses - 21:17 refutes - 52:6 regarding [4] 1:5, 3:5, 24:20, 85:17 regardless - 67:19 regret - 9:15 regulate -	68:8 regulation [4] 47:20, 68:14, 73:18, 73:21 regulations [6] 10:18, 12:12, 49:10, 61:8, 68:3, 69:1 regulators - 68:2 regulatory [4] 61:7, 62:15, 71:18, 72:9 reject [10] 37:6, 56:10, 77:15, 79:7, 80:12, 80:16, 84:11, 84:12, 84:13, 84:18 rejected [2] 79:10, 81:22 rejecting [2] 84:2, 85:16 related [3] 10:4, 29:15, 30:1 release - 31:1 released [2] 27:17, 30:19 relevant [6] 16:10, 17:25, 25:15, 26:20, 39:1, 42:24 relied - 39:7 relinquishing [2] 8:2, 9:12 relitigate [3] 24:1, 24:2, 38:7 relitigating [2] 76:15, 76:18 relitigation - 57:18 relying - 20:14 remainder [3] 5:17, 10:2, 81:23 remaining - 86:8 remains - 9:9 remand [3] 22:15, 22:16, 77:19 remarks [2] 3:23, 64:5 reminder [2] 23:4, 23:25 replace - 72:8	report - 29:10 reported - 88:10 Reporter [3] 1:22, 88:5, 88:21 representative [3] 6:16, 14:16, 17:13 request [11] 1:4, 3:5, 4:3, 22:12, 26:7, 68:16, 68:18, 68:19, 72:5, 79:7, 84:11 require [2] 33:17, 72:13 required [5] 16:17, 16:23, 21:6, 22:4, 58:20 requirement [4] 29:15, 66:22, 67:18, 68:25 requirements - 61:7 requires [4] 61:6, 64:12, 72:11, 72:19 requiring - 61:23 resist [3] 45:24, 46:24, 48:25 resolution [2] 7:22, 46:19 resolve [6] 5:21, 6:18, 7:7, 7:16, 22:1, 75:16 resolved [2] 57:19, 62:1 resource [11] 48:13, 49:3, 62:23, 72:19, 72:20, 72:23, 73:2, 74:1, 74:5, 74:6, 75:2 resources [6] 2:11, 21:19, 31:24, 34:10, 47:14, 73:24 respect [27] 8:14, 8:15, 22:14, 35:25, 36:5, 37:19, 37:20, 42:3, 44:16, 45:10, 46:11,	51:12, 57:11, 60:24, 61:5, 61:9, 62:4, 63:3, 63:5, 67:20, 69:17, 70:8, 79:9, 79:25, 81:19, 83:2, 84:18 respond [2] 24:18, 45:24 responded - 14:23 Respondent's - 7:4 response [26] 8:1, 9:7, 15:19, 20:8, 20:15, 21:14, 67:24, 71:10, 73:5, 75:23, 76:11, 78:12, 78:17, 78:19, 80:6, 80:18, 80:21, 80:23, 81:12, 81:15, 81:17, 85:11, 85:13, 86:17, 86:19, 86:22 responses - 42:16 responsive - 57:9 rest [7] 5:16, 9:17, 18:10, 19:18, 52:22, 52:24, 55:22 result - 10:22 resulting - 52:18 resume - 50:5 retaining - 85:18 retry - 24:6 return [2] 50:4, 50:5 reverse [2] 23:13, 24:16 reversible - 24:15 review [10] 1:1, 8:16, 36:18, 39:5, 39:9, 39:11, 45:7, 49:15, 51:6, 51:8	Review's - 20:3 reviewed [3] 9:4, 61:18, 68:1 reviewing [3] 23:15, 37:8, 37:16 reviews [3] 11:18, 37:7, 70:11 revisit [3] 51:15, 71:2, 71:2 rewarded - 66:24 reweigh - 57:2 right-of-ways - 48:18 rights - 67:21 river - 74:19 road [2] 48:22, 48:22 roads - 48:16 role [7] 23:7, 35:9, 36:6, 36:7, 36:24, 38:11, 46:12 roll - 50:10 Rosebud [37] 1:6, 3:6, 5:7, 5:25, 6:2, 6:10, 6:15, 12:10, 12:22, 13:8, 13:9, 13:15, 15:8, 15:11, 16:21, 17:5, 19:1, 19:10, 27:19, 35:19, 35:20, 43:16, 47:5, 48:3, 48:25, 52:11, 52:16, 53:5, 53:10, 53:12, 57:13, 69:21, 69:22, 73:8, 73:15, 75:5, 76:9 RPR [3] 1:21, 88:5, 88:20 rule - 66:6 ruled - 11:15 rulemaking - 65:21 ruling [2] 7:24, 11:14 run [2] 16:9, 30:23 running - 75:18	runs - 30:25 S salinity [3] 13:20, 14:22, 19:19 salt [5] 53:5, 53:22, 53:23, 54:2, 54:7 salts - 52:15 Sam [5] 2:7, 2:12, 22:25, 35:14, 35:18 Sams - 66:3 Samuel.king@mt.g - 2:10 San - 62:19 Sandy [2] 4:6, 50:10 satellite [2] 9:5, 9:8 satisfaction [6] 41:7, 58:10, 62:11, 63:6, 63:23, 73:23 saying [3] 16:4, 52:21, 71:24 says [9] 10:14, 11:22, 11:23, 16:20, 18:8, 18:24, 22:6, 62:17, 68:16 scale - 11:5 scenario [5] 15:5, 15:20, 46:5, 61:1, 73:10 scenarios - 30:3 scientific [4] 20:18, 39:8, 40:6, 60:7 screen [3] 4:4, 4:9, 10:9 se - 38:16 seal - 88:16 season - 4:16 seconded [6] 78:8, 78:14, 80:16, 81:9, 84:17, 86:16 seconds [3] 21:25, 34:16, 55:11 section [2] 36:14, 40:1 seems - 71:6 seminal - 11:14
--	--	---	---	--	---

sense [2] 14:25, 61:13 separate [4] 77:16, 84:1, 84:5, 84:6 series - 39:16 seriously - 70:1 serve - 49:1 sets - 11:1 settled [3] 40:17, 40:25, 41:21 seven - 50:4 several - 27:13 share [7] 4:4, 4:9, 10:9, 20:8, 20:9, 21:12, 67:3 shernandez@earthlink.net - 2:5 shifted - 25:23 Shiloh [2] 2:3, 3:20 short [5] 10:3, 10:14, 18:8, 46:14, 75:18 shorter - 23:1 shorthand - 88:10 shouldn't [3] 53:8, 53:15, 57:17 Sierra [6] 3:22, 41:2, 42:6, 42:12, 62:7, 69:19 similar [2] 31:15, 35:24 simple [5] 4:13, 5:22, 7:9, 11:1, 62:24 simplify - 78:25 simply [4] 19:21, 33:25, 48:8, 49:12 Simpson [66] 1:16, 3:4, 3:20, 18:3, 21:25, 22:19, 22:20, 29:13, 35:14, 35:18, 35:22, 49:20, 50:9, 50:12, 50:13, 50:21,	50:25, 51:4, 54:20, 55:8, 56:6, 57:5, 57:7, 64:6, 64:19, 64:21, 64:23, 66:1, 75:11, 75:14, 75:21, 75:24, 76:12, 76:17, 77:5, 77:8, 78:3, 78:7, 78:13, 78:18, 78:20, 80:7, 80:13, 80:15, 80:19, 80:22, 80:24, 81:8, 81:13, 81:16, 81:18, 82:10, 82:15, 83:2, 83:14, 84:3, 84:14, 84:17, 85:9, 85:12, 85:14, 86:12, 86:15, 86:18, 86:20, 86:23 single - 84:4 site [5] 32:5, 40:20, 61:11, 61:16, 61:23 situation - 69:11 six - 48:7 Sky [14] 16:1, 27:16, 27:19, 28:7, 30:15, 31:1, 31:4, 43:17, 48:5, 52:17, 53:7, 53:11, 53:14, 53:17 slight - 81:25 SM - 3:7 smallest - 13:1 SMCRA [5] 30:18, 33:5, 54:18, 68:3, 74:21 SMCRA's - 68:3 Smith [5] 1:18, 50:21, 50:22, 81:7, 86:14	Smith's - 74:19 soils - 38:25 somehow [4] 43:1, 43:8, 45:23, 60:10 someplace - 73:14 somewhere - 73:14 sorry [2] 17:23, 64:22 sort [6] 29:21, 30:3, 32:25, 33:5, 67:19, 69:5 sorts - 32:7 sounds - 55:10 sourced - 67:18 southeast - 48:4 space - 55:5 spades - 49:16 spans - 36:12 speaking - 18:5 speaks - 73:5 Special - 2:8 specific [22] 4:19, 23:12, 29:16, 32:6, 32:10, 32:25, 39:21, 42:1, 43:2, 43:9, 61:11, 61:16, 61:24, 62:17, 62:24, 73:1, 76:22, 76:23, 77:2, 79:13, 82:7, 85:23 specifically [5] 43:13, 43:15, 79:3, 79:16, 82:11 specificity - 37:9 specifics - 79:5 specify - 82:19 spelled - 61:8 spilled - 8:1 spoils - 52:15 sryemington@hotmail.com - 2:14 SS - 88:3 St [2] 2:4, 2:13 Stacy [2]	1:17, 77:9 stage - 57:16 stand [3] 34:23, 55:19, 56:5 standard [25] 10:2, 11:24, 13:23, 17:17, 26:24, 27:23, 30:22, 30:23, 30:25, 37:1, 37:2, 38:5, 40:24, 49:9, 51:5, 51:8, 63:5, 71:17, 71:18, 72:9, 72:10, 72:12, 72:19, 73:2, 73:18 standards [7] 11:23, 12:2, 12:4, 14:1, 17:20, 30:18, 53:20 standing [56] 46:20, 46:25, 47:4, 47:10, 47:12, 49:2, 49:13, 51:7, 55:12, 55:16, 55:21, 55:24, 55:24, 62:4, 63:4, 63:7, 63:11, 63:16, 69:10, 69:12, 69:14, 69:16, 69:19, 69:25, 70:1, 70:9, 70:13, 70:14, 70:16, 71:12, 71:13, 71:17, 72:3, 72:6, 72:16, 73:11, 73:12, 74:11, 75:16, 79:22, 79:25, 81:22, 82:23, 82:24, 83:2, 83:5, 83:6, 83:10,	83:18, 84:2, 84:7, 84:12, 84:19, 84:23, 85:2, 85:17 stands - 65:16 start [2] 10:12, 80:9 state [15] 1:2, 8:19, 10:19, 33:1, 33:2, 33:7, 33:10, 37:9, 67:20, 68:1, 68:7, 68:11, 70:6, 88:2, 88:7 stated [3] 14:16, 38:6, 78:25 statement [6] 3:14, 8:21, 8:22, 9:2, 15:12, 15:14 statements [2] 9:3, 29:22 states [2] 65:9, 65:11 stating [2] 68:19, 78:1 statute [8] 10:12, 10:12, 21:16, 32:10, 47:20, 68:14, 68:21, 73:20 statutes [2] 11:18, 69:2 statutory [9] 26:20, 32:14, 33:14, 62:15, 71:18, 72:3, 72:9, 74:12, 84:25 stay - 83:11 stayed - 67:9 step [2] 26:19, 36:9 stop [2] 37:18, 72:5 straightforward - 38:11 straw [2] 7:6, 27:6 stream [2] 9:6, 34:18 streamlined - 67:4 strike [3] 44:10, 44:13, 72:6	strip [2] 12:8, 12:9 Stripmine - 5:4 strong - 24:14 struck - 44:13 Sub - 64:12 subject [3] 35:11, 68:15, 69:3 submission - 64:14 submit [10] 5:19, 10:25, 14:5, 24:14, 32:16, 33:21, 73:16, 73:19, 74:1, 75:3 submitted [7] 20:11, 34:6, 38:22, 54:21, 69:19, 72:15, 77:12 submitting - 68:18 subpart - 36:21 subsection - 10:13 substantial [7] 23:18, 23:23, 31:12, 34:21, 37:1, 38:5, 40:4 substantive [6] 23:3, 26:8, 31:10, 34:1, 34:2, 34:12 substantively - 43:21 subtract - 52:24 subtraction - 52:23 sufficient [3] 43:19, 47:4, 63:7 sufficiently - 24:23 suggest [8] 29:6, 31:11, 34:6, 35:8, 49:25, 79:25, 81:21, 84:11 suggested [3] 24:16, 37:11, 51:16 suggesting [5] 33:12, 56:25, 80:2,
--	---	---	--	---	---

83:8, 83:10 suggestion [4] 56:10, 79:9, 81:1, 86:7 suggests [2] 28:23, 53:17 Suite [2] 2:4, 2:13 summary [9] 9:20, 25:24, 41:11, 41:14, 42:6, 42:9, 44:6, 44:9, 72:16 support [8] 23:23, 34:12, 42:10, 44:6, 44:15, 65:19, 72:15, 85:7 supported [4] 23:18, 25:12, 34:20, 40:4 supporting - 45:3 supposed [2] 17:4, 17:4 Supreme [7] 11:12, 26:19, 41:15, 41:22, 67:11, 74:9, 74:13 surface [9] 3:7, 20:14, 54:25, 58:16, 59:2, 59:14, 59:17, 59:23, 60:13 surprising - 48:15 suspect [3] 6:3, 7:13, 62:5 suspenders - 63:14 swath - 47:25 sympathize - 83:15	tangent - 75:17 tasked - 29:18 TDS - 52:15 team - 39:7 technical [5] 39:8, 39:19, 40:5, 58:21, 60:7 telling - 18:1 ten [2] 50:1, 50:3 tens - 38:23 term - 12:6 terms [2] 8:17, 59:1 terribly - 4:13 test [2] 26:20, 26:21 testified [2] 17:14, 45:3 testimony [6] 30:4, 42:15, 45:11, 53:9, 53:21, 55:2 thank [22] 3:19, 4:11, 22:18, 22:20, 35:13, 35:14, 49:19, 49:20, 50:7, 50:25, 51:3, 56:4, 56:6, 57:4, 57:5, 64:5, 64:6, 66:1, 75:20, 75:21, 77:22, 82:18 thankfully - 76:1 there's [24] 12:9, 21:22, 33:6, 33:6, 35:8, 37:4, 37:14, 37:20, 37:21, 40:12, 40:18, 43:2, 48:20, 48:20, 55:24, 58:2, 59:15, 59:20, 67:6, 68:8, 71:8, 79:22, 81:25, 85:25 therefore - 52:22 they'll [3] 18:19, 18:20, 19:8 they're [6]	14:13, 16:16, 22:4, 22:8, 54:5, 71:9 they've - 21:3 thing [8] 16:20, 19:5, 21:24, 29:5, 30:13, 33:8, 34:17, 68:12 thinks - 17:15 third [3] 62:18, 73:19, 73:21 thirdly - 28:6 thirty [6] 64:13, 65:7, 65:11, 67:17, 68:20, 68:22 thorough [2] 35:10, 36:12 though [5] 19:13, 35:4, 36:6, 70:1, 85:4 thousands [2] 38:23, 38:23 threshold - 11:8 throughout [4] 25:11, 26:1, 32:24, 43:4 throw - 55:22 tie - 48:10 timeline - 67:7 timing - 67:20 tip [6] 5:14, 15:7, 16:15, 16:25, 17:8, 43:8 Titanic - 5:18 Title - 68:24 today [2] 14:4, 64:3 total [6] 3:16, 12:17, 13:6, 13:7, 30:4, 79:8 totality [5] 12:13, 17:6, 25:10, 54:2, 56:21 touch [3] 34:15, 41:8, 57:8 touched - 36:20 Touching - 31:14 transcribed - 88:11 transcript [2] 1:10, 29:24 transcription -	88:11 transition [2] 16:22, 17:18 translate - 52:20 trashed - 53:14 trends [2] 61:2, 61:25 tribunal - 42:20 Tribunals - 70:6 trouble - 53:16 Trout - 74:16 true [7] 19:11, 33:4, 33:19, 60:1, 70:5, 73:16, 88:12 truncated - 26:13 trust - 80:4 turns - 33:24 typos - 82:1	49:10 unequivocal - 60:19 unequivocally [4] 38:12, 40:4, 62:3, 74:4 unfortunately [3] 13:15, 17:22, 65:5 unilaterally - 35:3 unit - 13:2 unlawful [2] 39:24, 40:24 unless [5] 4:19, 10:15, 10:20, 37:7, 70:11 Unlimited - 74:16 unopposed - 54:22 unpack - 26:15 unrebutted - 55:1 unsupported - 39:25 update [2] 63:1, 71:20 upheld - 31:13 uphold [2] 10:1, 63:12 upon [2] 23:22, 35:6 uses [2] 48:13, 62:22 using [3] 10:8, 38:15, 88:11 usually [3] 52:1, 66:8, 83:6	29:22, 30:4, 56:22 various - 59:9 vegetation - 38:24 version - 26:13 versus - 29:4 via [4] 1:10, 2:3, 2:7, 2:12 viability - 61:2 viable - 61:20 Vice [10] 1:17, 22:25, 50:14, 50:15, 76:13, 76:19, 77:6, 77:22, 80:14, 83:25 vicinity [2] 73:8, 73:15 view - 73:12 viewing - 70:13 violation [12] 11:22, 11:24, 12:1, 12:4, 13:25, 17:20, 26:24, 27:8, 27:9, 27:22, 28:9, 30:9 visited - 47:24 visits - 40:20 visual [2] 4:5, 10:8 volumes - 73:5 voluntarily - 7:23 vote - 78:11 voted - 78:21
---	--	--	--	---	---

T

table [2]
15:5, 19:12
taken [3]
50:8, 65:20,
88:8
takes - 66:9
taking [2]
4:11, 29:19
tallied - 19:10

U

ultimate [3]
29:20, 36:9,
70:18
ultimately [4]
31:7, 36:8,
63:22, 68:10
unable -
32:24
unanimously
[2] 78:21,
86:25
unaware -
25:22
uncertain -
32:6
undercut -
38:19
Underground -
5:4
underlying -
41:6
understand
[6] 29:14,
36:19, 40:9,
47:1, 47:24,
72:18
understanding
[7] 36:17,
38:14, 40:9,
41:1, 46:14,
58:7, 63:15
understands -
59:24
undertook -
39:4
undisputed [3]
6:12, 28:17,

V

valid - 84:21
value [10]
47:15, 49:3,
62:23,
72:20,
72:20,
72:20,
72:23,
72:25,
73:24, 74:2,
74:6
VanOort [6]
6:16, 14:17,
14:23,
15:13,
16:14, 17:13
VanOort's [5]
15:19,
16:19,

W

wade - 83:5
waiting -
67:10
walk - 10:7
walked -
49:11
wanted [2]
24:11, 30:13
warming -
34:10
waters -
59:17
we'd - 3:9
we'll [2] 3:9,
22:21
we're [20]
8:15, 8:16,

14:4, 23:5, 26:12, 31:25, 32:1, 32:13, 47:24, 51:24, 71:1, 71:20, 75:15, 75:17, 75:18, 76:14, 76:14, 76:17, 82:20, 86:24 we've [4] 57:11, 64:4, 76:21, 85:15 wealth - 41:20 weigh - 67:23 weren't [3] 58:3, 58:6, 60:6 west [2] 2:4, 54:20 western - 54:18 Westmoreland [22] 2:11, 5:23, 6:3, 7:14, 7:25, 8:20, 12:10, 18:18, 19:8, 23:17, 26:15, 34:7, 35:12, 35:15, 35:20, 52:2, 53:2, 53:19, 55:1, 63:25, 79:18, 81:20 Westmoreland's [4] 8:22, 26:7, 55:21, 83:16 wetlands - 38:25 what's [2] 64:20, 75:4 whatsoever [2] 37:17, 42:18 WHEREOF - 88:15 WHEREUPON - 3:1 whether [41] 19:3, 19:5, 19:14, 21:4, 21:5, 22:4, 22:5, 23:12, 23:17, 25:6, 27:1, 27:1, 28:10, 28:18, 30:8, 31:18,	31:21, 31:25, 32:2, 32:19, 32:21, 33:3, 33:18, 46:4, 46:5, 46:7, 51:17, 53:11, 54:10, 59:8, 61:1, 61:5, 61:13, 61:25, 63:6, 72:20, 72:21, 74:10, 76:4, 77:10, 79:23 whole [7] 17:14, 18:12, 19:5, 23:15, 24:6, 45:18, 52:4 wildlife [2] 38:25, 72:25 wish [2] 60:21, 65:1 within [10] 28:7, 30:15, 46:13, 48:2, 58:21, 61:22, 64:13, 68:20, 83:19, 83:23 witness [4] 16:4, 25:14, 25:19, 88:15 witnesses - 40:19 won't [3] 13:20, 22:9, 52:21 Wonderful - 4:8 wording - 82:1 works [3] 58:8, 59:7, 60:10 worms - 56:3 worse [3] 17:12, 19:4, 20:13 worsen - 54:24 worst [2] 46:4, 61:1 worth - 30:14 wouldn't [3] 67:25, 69:13, 73:11 wrap [3] 18:5, 50:6, 55:11 wrapping - 19:23 written [2] 13:5, 68:18	wrong [8] 17:1, 18:15, 21:23, 22:8, 37:10, 53:19, 60:15, 71:25 Y yellow - 19:15 Yemington [23] 2:12, 35:17, 35:18, 49:21, 51:9, 53:20, 55:12, 55:18, 56:2, 57:6, 57:7, 64:7, 66:13, 67:24, 70:3, 70:12, 71:9, 75:11, 75:12, 75:19, 75:25, 84:22, 85:4 Yemington's [3] 69:4, 71:5, 82:22 you'll - 72:18 Z zone - 7:19 Zoom [4] 1:10, 2:3, 2:7, 2:12			
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