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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
APRIL 23, 2021)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

April 23, 2021

9:00 a.m.

BEFORE CHAIRMAN STEVEN RUFFATO,
BOARD MEMBERS DAVID SIMPSON,
JON REITEN, JOSEPH SMITH, JULIA ALTEMUS,
HILLARY HANSON, and DAVID LEHNHERR

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN RUFFATO: Good morning,
5 everyone. It's 9:00, and I'm going to call this
6 meeting of the Board of Environmental Review to
7 order. Welcome. I'll start out by welcoming new
8 Board member Julia Altemus. I hope you can hear
9 me. If you can't, someone let me know.

10 BOARD MEMBER ALTEMUS: I can hear you.
11 Good morning.

12 CHAIRMAN RUFFATO: Julia, did I
13 pronounce your name correctly?

14 BOARD MEMBER ALTEMUS: Yes, you did.
15 Thank you.

16 CHAIRMAN RUFFATO: Thank you, Julia. I
17 also want to welcome Regan. And am I pronouncing
18 your name?

19 MS. SIDNER: Regan Sidner.

20 CHAIRMAN RUFFATO: Regan. Thank you.
21 Thank you, Regan. I appreciate it. Sidner; is
22 that right?

23 MS. SIDNER: Yes.

24 CHAIRMAN RUFFATO: Thanks, Regan. And
25 so Regan is our new secretary, and Julia is a new

3
1 Board member. Let's start out by doing a roll
2 call. So is Joyce or Regan going to do that, one
3 of you?

4 MS. WITTENBERG: I am going to do that
5 today, Chairman.

6 CHAIRMAN RUFFATO: Thank you, Joyce.
7 Please go ahead.

8 MS. WITTENBERG: Chairman Ruffato.

9 CHAIRMAN RUFFATO: Here.

10 MS. WITTENBERG: Board member Lehnherr.

11 BOARD MEMBER LEHNHERR: Here.

12 MS. WITTENBERG: Board member Simpson.

13 BOARD MEMBER SIMPSON: Here.

14 MS. WITTENBERG: Board member Hanson.

15 BOARD MEMBER HANSON: Here.

16 MS. WITTENBERG: Board member Reiten.

17 BOARD MEMBER REITEN: Here.

18 MS. WITTENBERG: Board member Smith.

19 BOARD MEMBER SMITH: Here.

20 MS. WITTENBERG: Board member Altemus.

21 BOARD MEMBER ALTEMUS: Here.

22 MS. WITTENBERG: We have a full quorum
23 of the Board.

24 CHAIRMAN RUFFATO: Thank you, Joyce. Is
25 there someone from DEQ who is going to introduce

1 the DEQ staffers that are present?

2 MS. WITTENBERG: I'm not seeing George
3 on the line yet, Mr. Chairman. I think I can go
4 ahead and identify from those logged in. It looks
5 like we have -- I'm going to ask you to unmute
6 yourself and confirm. Is that Aaron Pettis?

7 MR. PETTIS: Yes, it is.

8 MS. WITTENBERG: Aaron Pettis. We have
9 Marguerite Thomas.

10 MS. THOMAS: Here.

11 MS. WITTENBERG: We have Kirsten Bowers.

12 MS. BOWERS: Yes. Here.

13 MS. WITTENBERG: Kurt Moser.

14 MR. MOSER: Yes. Here.

15 MS. WITTENBERG: Nicholas Whittaker.

16 MR. WHITTAKER: Here.

17 MS. WITTENBERG: And I believe that's it
18 for DEQ staff. If I've missed any DEQ staff,
19 please speak up.

20 MR. LUCAS: Mr. Chair, members of the
21 Board, Mark Lucas, DEQ staff attorney, Air,
22 Energy, and Mining Division. Good morning.

23 MS. WITTENBERG: Thank you, Mark. That
24 seems to be all the DEQ staff aside from Regan and
25 myself.

1 MR. BARTON: Darryll Barton, Water⁵
2 Quality, DEQ.

3 CHAIRMAN RUFFATO: Thank you, Joyce.
4 And now if we could identify the other individuals
5 present. Joyce, could you identify those, and
6 we'll get them on the record.

7 MS. WITTENBERG: Yes, I can do that.
8 Please, as I call out your name, tell me if you're
9 a member of the public, or if you're with ALSB or
10 another State agency, please. Michelle
11 Snowberger.

12 MS. SNOWBERGER: Good morning. Yes, I'm
13 here on behalf of Agency Legal Services Bureau.

14 MS. WITTENBERG: Laurie, our Court
15 Reporter is here I see. Lindsey Simon.

16 MS. SIMON: I'm here on behalf of Agency
17 Legal Services Bureau.

18 MS. WITTENBERG: Jeffrey Doud.

19 MR. DOUD: I'm here with Agency Legal
20 Services Bureau as well.

21 MS. WITTENBERG: Caitlin Buzzas.

22 MS. BUZZAS: Yes. I'm here. I'm part
23 of Agency Legal Services as well.

24 MS. WITTENBERG: Katherine Orr, Board
25 attorney. Vicki Marquis.

1 MS. MARQUIS: Yes. Hi. Good morning.
2 I'm Vicki Marquis. I'm here representing Copper
3 Ridge Development Corporation and Reflections at
4 Copper Ridge.

5 MS. WITTENBERG: Andrew --

6 MR. CZIOK: Good morning. It's
7 pronounced Chuck. It's easier than it looks. I'm
8 an attorney with Agency Legal Services as well.
9 Yes, ma'am.

10 MS. WITTENBERG: Perfect. Thank you.
11 Catherine Laughner.

12 MS. LAUGHNER: Public. I'm representing
13 Western Sugar.

14 MS. WITTENBERG: And the name is not
15 coming up. Is it Katherine Armstrong?

16 MS. ARMSTRONG: Yes, ma'am. I'm a
17 paralegal for DEQ.

18 MS. WITTENBERG: Did I miss anybody? If
19 I missed anybody, please speak up.

20 (No response)

21 MS. WITTENBERG: I think that's it.

22 CHAIRMAN RUFFATO: Thank you, Joyce. I
23 think at this point, first of all, I'd like to say
24 that I would like to take -- I think the tradition
25 is to take a break roughly every one hour. I'd

7

1 ask Regan and Joyce to remind me, but I'd like to
2 take those breaks at normal kind of natural
3 breaking points.

4 So the first order of business on the
5 agenda is review and approval of minutes. Before
6 we get into those, I wanted to ask a question of
7 Joyce, and that question is: When you're
8 preparing the minutes, do you typically rely on
9 the transcript of the hearing?

10 MS. WITTENBERG: Yes, mostly. I usually
11 draft the minutes from my notes with all but the
12 votes, motions and votes, and then complete it
13 when I get the transcript, yes.

14 CHAIRMAN RUFFATO: Thank you, Joyce.
15 Then we'll go to the first minutes we need to
16 review and approve, and that's the minutes of the
17 meeting of December 11th, 2020. Five of us were
18 not there. Dr. Lehnherr and Hillary Hanson were
19 there, so I'm going to ask them if they see
20 anything in the minutes that you thought were
21 problematic.

22 BOARD MEMBER HANSON: (Shakes head)

23 BOARD MEMBER LEHNHERR: (No response)

24 CHAIRMAN RUFFATO: If not, I will ask
25 the balance of the Board members if you had any

1 questions or comments about the minutes from
2 December 11th.

3 (No response)

4 CHAIRMAN RUFFATO: Any comments from the
5 public?

6 (No response)

7 CHAIRMAN RUFFATO: Then I will entertain
8 a motion to approve the minutes of the meeting of
9 December 11th, 2020.

10 BOARD MEMBER HANSON: So moved.

11 CHAIRMAN RUFFATO: Do I have a second?

12 BOARD MEMBER LEHNHERR: I'll second that
13 motion.

14 CHAIRMAN RUFFATO: Thank you, Hillary
15 and Dr. Lehnherr. A motion has been made and
16 seconded to approve the minutes of the Board
17 meeting of December 11th, 2020. All in favor, say
18 aye.

19 (Response)

20 CHAIRMAN RUFFATO: Opposed, same sign.

21 (No response)

22 CHAIRMAN RUFFATO: The motion carries
23 unanimously. The next item is the approval of the
24 minutes of February 26th, 2021, our February
25 meeting. Are there any comments from the Board on

1 the minutes?

2 (No response)

3 CHAIRMAN RUFFATO: Any comments from the
4 public on the minutes?

5 (No response)

6 CHAIRMAN RUFFATO: Then I'll entertain a
7 motion to approve those minutes.

8 BOARD MEMBER SIMPSON: So moved.

9 CHAIRMAN RUFFATO: I'll second that
10 motion. A motion has been made and seconded to
11 approve the minutes of February 26th, 2021. All
12 in favor, say aye.

13 (Response)

14 CHAIRMAN RUFFATO: Opposed, same sign.

15 (No response)

16 CHAIRMAN RUFFATO: The motion carries
17 unanimously.

18 At this point, I'm going to ask
19 Katherine Orr to introduce the Hearing Examiners
20 that have been appointed to the various cases or
21 may be appointed to the various cases. And I
22 would thank Katherine for giving us some little
23 biographical sketches for all of the Hearing
24 Examiners, so we know them a little better, get to
25 know them a little better. Katherine, I'll turn

1 it over to you at this point for those
2 introductions.

3 MS. ORR: Thank you very much. Board
4 members, you have in front of you the bios of the
5 Hearing Officers who are here at Agency Legal
6 Services, and what I thought I would do is just so
7 you can attach a description to a face, have each
8 one of the attorneys introduce themselves here via
9 the Zoom.

10 Before I do that, I wanted to say that
11 Amy Christensen, who is outside Counsel -- she
12 does not work for Agency Legal Services, she owns
13 and operates her own law firm in Helena -- her bio
14 is included here, and she mentioned to me she is
15 taking her first day of vacation in two years
16 today, so she can't be with us in person, but I
17 think this adequately describes her experience.
18 And she's representing the Board in District Court
19 when there's been a petition for judicial review.

20 So I'll start with, just so that they
21 know I'm going to read the list now, and then
22 we'll have each one of the staff here introduce
23 themselves. We didn't think it was necessary for
24 them to talk about their background today because
25 you have that in front of you in writing.

1 But I will say I am extremely proud of
2 each one of these individuals. They're absolutely
3 professional and very hard working, and it's a joy
4 to work with each one of them, and I think you
5 will find the same. So the list that I will go
6 through is as indicated on the bios, Jeffrey Doud,
7 Lindsey Simon, Drew Cziok, Caitlin Buzzas,
8 Michelle Snowberger.

9 So Jeff, would you like to introduce
10 yourself.

11 MR. DOUD: My name is Jeffrey Doud.
12 I've been with Agency Legal Services for about six
13 years now, and never dabbled in the environmental
14 realm, but certainly excited to learn this area of
15 law, and hopefully provide the Board with some
16 sound, well-reasoned decisions for your
17 consideration.

18 MS. ORR: Thanks, Jeff. Lindsey, would
19 you introduce yourself, please.

20 MS. SIMON: Mr. Chair, members of the
21 Board, I'm Lindsey Simon. I have been with Agency
22 Legal Services Bureau for a little over a year and
23 a half now. Prior to that, I was an attorney at
24 Montana Legal Services Association where I
25 practiced primarily in the world of state

1 administrative law.

2 So although I am new to environmental
3 law, I have a firm background in the Montana
4 Administrative Procedures Act and contested case
5 hearings. I'm excited to take on some Hearing
6 Examiner work for the Board.

7 MS. ORR: Thanks, Lindsey. Drew, would
8 you introduce yourself, please.

9 MR. CZIOK: Good morning. Like
10 Katherine said, my name is Drew Cziok. I'm also
11 an attorney at Agency Legal Services. I have been
12 here since last November. Before that I was an
13 associate at Crowley Fleck here in Helena; before
14 that I was with the US Department of Homeland
15 Security; and back before that was I working for
16 some Administrative Law Judges. So I'm excited to
17 be getting back into the world of administrative
18 law, and looking forward to working with all of
19 you.

20 MS. ORR: Thank you, Drew. Caitlin,
21 would you introduce yourself.

22 MS. BUZZAS: Hi. I'm Caitlin Buzzas.
23 This is my third week I think at Agency Legal
24 Services, so I'm pretty new here. But before I
25 went to law school, I spent about eight years in

1 D.C. doing environmental policy, so I'm very
2 excited to be back in the world of science and
3 being a Hearing Examiner for DEQ.

4 MS. ORR: Thank you. Michelle, would
5 you introduce yourself, please.

6 MS. SNOWBERGER: Good morning, Mr.
7 Chair, members of the Board. My name is Michelle
8 Snowberger, and I'm an Assistant Attorney General
9 with Agency Legal Services Bureau. I've held this
10 position for just over a month, so not very long
11 here. I came, though, from the -- it was a
12 transfer within the Department of Justice.

13 I was General Counsel for the Motor
14 Vehicle Division for just about a year; and prior
15 to that I was a Bureau Chief for five years for
16 MVD. So I have both operational and legal
17 familiarity with the administrative rule process,
18 both on drafting and making administrative rules,
19 but also the administrative rule hearing process,
20 as we did hearings throughout my term at MVD.

21 Prior to my coming to work for the
22 Department of Justice, I was the Belgrade City
23 Court Judge for 13 years; and prior to that, my
24 legal history, I was both a Cooke County Public
25 Defender in Chicago, Illinois, and also then

1 worked for a small litigation firm where we did
2 major criminal defense, and then kind of a slew of
3 additional litigation, both on the federal and
4 state matters.

5 So I'm excited to be continuing my work
6 within the administrative process and to be a
7 Hearing Examiner. Thank you.

8 MS. ORR: Thank you, Michelle. Did any
9 of the Board members or Mr. Chairman, if you'd
10 like, if anyone has any questions generally, we'd
11 be glad to answer them.

12 CHAIRMAN RUFFATO: Thank you, Katherine,
13 and welcome to this meeting, and to the Hearing
14 Examiner role. I appreciate all of you.

15 The next order of business is to discuss
16 the assignment of cases to Hearings Examiner. We
17 put this on the agenda as kind of a supplement to
18 the orientation that was conducted at the February
19 meeting, and primarily for the five of us that are
20 new, so that we understand what it means to assign
21 a case to a Hearing Examiner. And so I would like
22 Katherine again to introduce this subject, and
23 then to explain a little bit, and then maybe we
24 could open it up for questions from the Board.
25 Katherine, please.

1 MS. ORR: This is Katherine Orr
2 speaking. Mr. Chairman, members of the Board, the
3 Board as you know has quasi-judicial authority and
4 responsibility to adjudicate cases that are
5 brought before it, and most of those cases are on
6 appeal from an action of the Department of
7 Environmental Quality, whether that be a Notice of
8 Violation, or an original action before the Board.
9 And this is across all of the subject matters, for
10 instance, water, air, solid waste, that sort of
11 thing; subdivisions, which you have a case
12 involving that today.

13 And so the Board, it is within the
14 Board's full discretion to determine whether it
15 wants to delegate adjudication of a case to the
16 Hearing Officers, and that delegation can be full
17 or partial.

18 And what I mean by that is the Board is
19 well within its authority to designate a Hearing
20 Officer for the purposes of adjudicating
21 prehearing matters, or matters that don't result
22 in a final disposition of the case, such as a
23 summary judgment or a hearing on the merits.

24 So the spectrum is from delegating to
25 the Hearing Officers on sort of the smaller level

1 motions practice, through -- and then on the
2 spectrum through summary judgment if there is one,
3 and then on the spectrum through full hearing on
4 the merits. And so when we come to these
5 meetings, there will be an action item -- there
6 isn't this time -- but there may be an action item
7 where the Board members are to determine how they
8 want to delegate, if at all, adjudication of the
9 case.

10 As you can tell from the materials,
11 these cases tend to be lengthy, somewhat complex,
12 and extensive in the documentation, and briefing,
13 and exhibits, and transcripts. So a reason to
14 delegate to the Hearing Officer is to fulfill the
15 standards in the statute and the Administrative
16 Procedure Act of handling a case where the
17 individuals who are doing the adjudication have
18 the expertise, may do it in an expedient manner,
19 have the available time to review and rule on the
20 case given the record.

21 So for the purposes of all of the Board
22 members, if a case is delegated fully to a Hearing
23 Officer -- which has been the case in the past few
24 years -- then it's up to the Hearing Officer to
25 bring their decision to the Board for final

1 approval. And you have that matter before you
2 today, for example, whether or not to approve the
3 proposed decision that has been presented to you
4 by Jeff Doud in the Copper Ridge and the
5 Reflections cases.

6 So also there is a provision in MAPA
7 that you can bring in an outside Hearing Officer.
8 It all really depends on your decision concerning
9 expertise and availability really. The statute
10 that is the authority for what I've just been
11 saying is to 2-4-611 sub (4), if you wanted to
12 look at that.

13 So that's really what I have to say
14 about it, and I'd love to answer questions if I
15 haven't covered something.

16 CHAIRMAN RUFFATO: This is Steve
17 Ruffato. Any questions from the Board members?

18 (No response)

19 CHAIRMAN RUFFATO: I have a couple of
20 questions, Katherine. When a decision comes from
21 a Hearing Examiner to the Board, what is the
22 standard of review that the Board has to apply to
23 that decision? And if you would address the
24 findings of fact, conclusions of law, and the
25 order, all three of those, the standards of review

1 that apply.

2 MS. ORR: Okay. Automatically when you
3 use the term "standard of review," I would like to
4 emphasize that in my view, the Board and the
5 Hearing Officer are not different levels from
6 which there's an appeal. The Hearing Officer
7 proposes a decision, and it's up to the Board
8 whether it wants to accept that decision.

9 There's no jurisdictional deference.
10 The Hearing Officer's proposed order is just that,
11 it's a recommendation, and then it's up to the
12 Board to determine whether or not it will approve
13 the findings of facts and conclusions of law in
14 the proposed decision.

15 The standard that the Board applies when
16 it's determining whether to approve those findings
17 of fact and conclusions of law is whether the
18 claims are made based on a preponderance of the
19 evidence, and that applies to the findings of
20 fact.

21 Unfortunately the way that the
22 Administrative Procedure Act operates is that if
23 an entity such as yourselves -- an agency --
24 hasn't itself heard the record, and when it's
25 reviewing the proposed findings of fact, if the

1 Board determines that it wants to change a finding
2 of fact, having looked at the transcript, or
3 having determined that there's a finding of fact
4 that doesn't comport with what is on the record,
5 then the Board itself has to review the whole
6 record in order to alter that finding of fact.

7 That's not true of vis-a-vis conclusions
8 of law. The Board doesn't have to review the
9 whole record if it wants to change a conclusion of
10 law, and this is all governed by 2-4-621. I
11 believe that's it. No. I'm referring to another
12 section there.

13 But under 2-4-621, the Board -- and this
14 is scoping out to kind of a macro scale -- may in
15 general adopt a proposed decision, reject, remand,
16 or modify -- let me back up -- may adopt or reject
17 the findings of fact and/or modify them, but to do
18 that, the Board has to review the whole record.

19 The Board may also reject or modify the
20 conclusions of law, and doesn't have to review the
21 whole record. So if that answers your question.
22 I hope it does. Thank you.

23 CHAIRMAN RUFFATO: This is Steve
24 Ruffato. It answered the question, but I'd like
25 to drill down a little bit, Katherine.

1 MS. ORR: Absolutely.

2 CHAIRMAN RUFFATO: And then specifically
3 with findings of fact, as I read the statute, it
4 essentially says that in order to change a finding
5 of fact, we have to conclude that there is not --
6 I think the words are -- substantial evidence in
7 the record.

8 And to elaborate on that, my reading
9 suggested to me that if we disagree with the
10 finding of fact after review of the whole record,
11 but there's still substantial evidence on the
12 record for the finding the fact, we are not
13 permitted to change it. Am I stating that
14 accurately?

15 MS. ORR: Let me, if I might
16 respectfully amend that, or say that there's a
17 little bit more of an explanation.

18 What the Board is doing is basically
19 evaluating whether the preponderance of the
20 evidence, given the findings of fact, support the
21 overall conclusion of how to rule, whether or not
22 the claims are supported, for example, or not
23 supported. That's a preponderance of the evidence
24 standard.

25 But when the Board is looking at a

21
1 finding of fact -- just in itself, not in the
2 overall decision -- it has to be supported by
3 substantial evidence. So that's a little bit of a
4 twist on what you were saying.

5 CHAIRMAN RUFFATO: Thank you, Katherine.
6 Then the other question that I wanted to ask is to
7 talk about the process.

8 If we have before us a proposed finding
9 of fact and conclusion of law, and we look at
10 that, and we say, "We're not sure if the findings
11 of fact are supported by substantial evidence,"
12 what's the process at that point?

13 MS. ORR: Then you, Mr. Chairman --
14 Katherine Orr -- and Board members, then you would
15 look at the record, and determine for yourselves
16 what the findings of fact are as supported by the
17 substantial evidence, and then what the ultimate
18 decision should be based on the preponderance of
19 the evidence.

20 CHAIRMAN RUFFATO: I'll ask one more
21 question, then I think I'll be done, Katherine,
22 and that is: Will you explain what the process of
23 looking at the entire record looks like from the
24 Board members' point of view.

25 MS. ORR: The Board members would be

1 supplied with basically all of the briefs, all of
2 the previous rulings, all of the transcript, and
3 all of the attendant exhibits.

4 CHAIRMAN RUFFATO: Thank you.

5 MS. ORR: I must say, this is compounded
6 by the fact that there have been several hearings,
7 so I think a place to start -- if the Board were
8 to determine that it wanted to look at the whole
9 record -- would be to first look at the proposed
10 decision of the present Hearing Officer, Mr. Doud,
11 and to determine whether or not from that document
12 there should be a modification or an adoption of
13 that document, if that makes sense.

14 CHAIRMAN RUFFATO: That makes sense,
15 Katherine. Thank you. One of the reasons I
16 wanted to go through this is because we're going
17 to be getting into this later on today, but I kind
18 of wanted to do it as an educational process
19 particularly for us new Board members.

20 And Julia, I know that you weren't at
21 the prior Board meeting, and I would just
22 encourage you, if you haven't done so, to read the
23 transcript from the February Board meeting, and
24 the orientation materials that I'm sure you were
25 provided to kind of get you up to speed.

1 Then one more thing that I'd like to do,
2 and that is: I'd like to ask a few members of the
3 attorneys that regularly practice before the
4 Board, if you're willing -- don't feel compelled
5 to do it at all -- but if you have some comments
6 or points that you'd like to make about, first,
7 the decision of assigning cases to Hearing
8 Examiners, I would appreciate it. But I don't
9 want to put anybody on the spot. If you're not
10 inclined to make any comments, that's fine.

11 (No response)

12 CHAIRMAN RUFFATO: That will be great.
13 We will not receive any of those comments.

14 So the next point on the agenda that I'd
15 like to go into is a discussion of the disclosure
16 of Board member contact information on the
17 website. At our orientation meeting in February
18 we raised this issue, and decided to put it off
19 for discussion at this meeting.

20 The suggestion was made that maybe we do
21 not want to have our contact information on the
22 website because that tends to invite ex parte
23 contacts, and that it would be better if all
24 communications to Board members go through the
25 Board secretary. So I'd like to open that up to

1 discussion among the Board.

2 MS. ALTEMUS: Mr. Chair, this Julia
3 Altemus. I would prefer that all communication go
4 through the secretary at DEQ. That would be my
5 preference since I am still working.

6 CHAIRMAN RUFFATO: Thank you, Julia.
7 This is Steve Ruffato. I will make a motion, and
8 then we can open up it up for further discussion.
9 I will make a motion that we not place the contact
10 information of the Board members on the website,
11 and that the website contain an appropriate
12 statement that all communications directed to
13 Board members go through the Board secretary.

14 BOARD MEMBER LEHNHERR: (Indicating)

15 CHAIRMAN RUFFATO: David, are you
16 seconding that motion?

17 BOARD MEMBER LEHNHERR: Yes.

18 CHAIRMAN RUFFATO: Discussion?

19 (No response)

20 CHAIRMAN RUFFATO: Our agenda calls for
21 any public comments on this point, and so I will
22 ask for any public comments on this motion.

23 (No response)

24 CHAIRMAN RUFFATO: Hearing none, a
25 motion has been made and seconded that we not

1 place contact information of the Board members on
2 the website, and that a statement is included that
3 all communications are to go through the Board
4 secretary. All in favor, say aye.

5 (Response)

6 CHAIRMAN RUFFATO: Opposed, same sign.

7 (No response)

8 CHAIRMAN RUFFATO: Motion passes
9 unanimously.

10 The next item on the agenda are the
11 briefing items, and what I'd like to suggest we do
12 here is that we quickly walk through each of these
13 briefing items. I'm going to assume that Board
14 members have read the descriptive paragraphs in
15 each case, and then I'm going to ask the Hearing
16 Examiner if they have anything to add.

17 Again, I'm assuming that all Board
18 members have read the descriptive paragraph, and
19 so I'm asking the Hearing Examiners to just add
20 anything that's new or different in the
21 description. Does that procedure sound okay to
22 the Board, or does any of the member of the Board
23 have objection to that?

24 (No response)

25 CHAIRMAN RUFFATO: Hearing none, we'll

1 proceed on that basis. The first case is the
2 Copper Ridge case and Reflections at Copper Ridge.

3 At this point I'm only going to talk
4 about the District Court case, because we'll be
5 talking about the other aspect of it later. We do
6 not have a Hearing Examiner on this part of it.
7 We have a District Court case, and since Amy is
8 not here, I'm simply going to ask the Board if
9 there are any questions you'd like to pose to
10 Katherine or anyone else about this case.

11 (No response)

12 CHAIRMAN RUFFATO: Hearing none --
13 Excuse me. Go ahead.

14 BOARD MEMBER SIMPSON: Mr. Chairman,
15 this is Dave Simpson. Just a question. This
16 issue has not yet cleared the Board of
17 Environmental Review, and I'm a little confused as
18 to why there is a parallel proceeding in District
19 Court.

20 CHAIRMAN RUFFATO: This is Steve
21 Ruffato. Thank you for that question, Dave, and I
22 think Katherine can answer that for us. I would
23 try, but I'd probably screw it up. So Katherine,
24 can you answer that question for Mr. Simpson.

25 MS. ORR: Okay. I wish Amy were here,

1 Mr. Chairman, Mr. Simpson. It looks like this is
2 a question that is an interlocutory appeal on the
3 question of the admissibility of the photographs.
4 And I think it is pending, it looks like. In a
5 round about way, I hope I'll get to your question.

6 It is pending, and it's on a parallel
7 track with the administrative proceeding. And it
8 looks like the Judge hasn't ruled on the Board's
9 motion to dismiss.

10 As Amy described it to me, what's before
11 the District Court right now is the Board's motion
12 to remove itself from the case, so it's a
13 challenge to a previous Board action. And this
14 opens up a set of issues in general that I think
15 are really interesting, which is should a Board
16 itself be a party in a judicial review action.
17 And Amy has filed a motion to dismiss on the basis
18 that she doesn't think it should be a party.

19 So it was a challenge to a prior ruling
20 of the Board, and what is pending in District
21 Court is whether the Board itself should be a
22 party, and the Judge hasn't ruled on that.

23 CHAIRMAN RUFFATO: Thank you very much.

24 BOARD MEMBER SIMPSON: Thank you very
25 much.

1 CHAIRMAN RUFFATO: Thank you, Katherine.
2 I might add I was confused by this, too, David,
3 and I thought that it was strange to have an
4 interlocutory appeal. There is a provision in the
5 Administrative Procedure Act that allows that in
6 some cases, so I'm assuming that's what is going
7 on here.

8 A question that you may have, and I have
9 in my mind -- I'm not sure if we need to answer it
10 -- but Katherine, do you have a thought as to what
11 would happen if we were to accept the proposed
12 findings and conclusions, what would happen with
13 that District Court case, or what might happen?

14 MS. ORR: Yes. Interesting question,
15 Mr. Chairman. It's hard to say what the
16 disposition, what the follow-up would be after the
17 Board's ruling.

18 But I'd say hypothetically if it were
19 appealed, then there's a question whether it would
20 be in the same Court -- number one -- and there's
21 a question if it were, if it could be
22 consolidated. So I don't know.

23 CHAIRMAN RUFFATO: This is Steve
24 Ruffato. Thank you. I don't think we need to
25 know the answer to that question, but I think the

1 Board just maybe needs to know that it would have
2 impact on that in some respect probably, but I
3 don't think we need to try to think about the
4 answer. Any other questions?

5 (No response)

6 CHAIRMAN RUFFATO: If not, we'll go to
7 the next matter, and that is the Westmoreland
8 Resources Notice of Violation. The Hearing
9 Examiner is Mr. Doud. Is there anything to add to
10 what's in the agenda description?

11 MR. DOUD: No, I think that the
12 description is accurate, Mr. Chairman.

13 CHAIRMAN RUFFATO: Thank you, Mr. Doud.
14 Then I would ask: Do any members of the Board
15 have questions on this case?

16 (No response)

17 CHAIRMAN RUFFATO: Hearing none, we'll
18 go to the next one. That's Alpine Pacific
19 Utilities case, and the Hearing Examiner is Ms.
20 Lindsey Simon. Are there any changes or additions
21 that you would make to the description in the
22 agenda?

23 MS. SIMON: I do not believe so.

24 CHAIRMAN RUFFATO: Thank you. Any
25 questions for the Board?

1 (No response)

2 MS. SIMON: Not on my part, no.

3 CHAIRMAN RUFFATO: Thank you. Let's go
4 to the next case then, and that's the Westmoreland
5 Resources case, appeal from a final MPDES permit.
6 The Hearing Examiner in this case is again Lindsey
7 Simon, correct? Anything to add?

8 MS. SIMON: No, Mr. Chair.

9 CHAIRMAN RUFFATO: Any questions from
10 the Board?

11 (No response)

12 CHAIRMAN RUFFATO: We'll go the next
13 case. This is Montanore Minerals. The Hearing
14 Examiner is Drew Cziok. Any additions or changes?

15 MR. CZIOK: No, sir.

16 CHAIRMAN RUFFATO: Thank you. Any
17 questions from the Board?

18 (No response)

19 CHAIRMAN RUFFATO: The next case is
20 Spring Creek Coal. And Drew, you're the Hearing
21 Examiner on this one also?

22 MR. CZIOK: Yes, sir. I have nothing to
23 add beyond the description in the agenda.

24 CHAIRMAN RUFFATO: Thank you. Any
25 questions from the Board on this one?

1 (No response)

2 CHAIRMAN RUFFATO: Hearing none, we'll
3 go to Signal Peak. The Hearing Examiner is Mr.
4 Cziok.

5 MR. CZIOK: This one actually went to
6 Ms. Buzzas recently, but I believe she's still on
7 the call.

8 MS. BUZZAS: Yes, I am. I don't have
9 anything to add except, yes, this case has been
10 transferred to myself.

11 CHAIRMAN RUFFATO: Okay. Thank you.
12 Any questions from the Board?

13 (No response)

14 CHAIRMAN RUFFATO: Going to the next
15 one, the Rippling Woods Homeowners Association
16 case. Hearing Examiner is Michelle Snowberger.
17 Any changes or additions?

18 MS. SNOWBERGER: Mr. Chair, members of
19 the Board, we do have one addition to the status
20 for this. Recently I disclosed through a notice
21 of disclosure a potential conflict that I may have
22 with this case, because I was friends with one of
23 the individuals that was mentioned in a
24 deposition.

25 We held a status hearing on that issue

1 to determine what the parties' positions were at
2 that time. The Appellants had no objection to my
3 continuing to act as a Hearing Examiner. The
4 Department requested additional time, because
5 their lead attorney was unable to appear at that
6 status hearing. They filed a status report
7 yesterday requesting that I reconsider my decision
8 as to whether or not that I did not have a
9 conflict, and that's currently under review at
10 this time.

11 CHAIRMAN RUFFATO: Thank you. Any
12 questions from the Board on this one?

13 (No response)

14 CHAIRMAN RUFFATO: Katherine, I think
15 you started to ask a question, but I may be wrong.
16 Do you have a point?

17 MS. ORR: Thank you, Mr. Chairman. Ms.
18 Snowberger and I had had a discussion about this
19 yesterday, and I was concerned about the extent,
20 and she was too, about the extent to which she
21 could talk about an item that was not specifically
22 placed on the agenda here; and since you asked the
23 question of any changes, I think we covered it.

24 CHAIRMAN RUFFATO: Got it. Thank you,
25 Katherine. The next case is Western Energy. The

1 Hearing Examiner on this one is Mr. Doud again.

2 MR. DOUD: Thank you, Mr. Chairman. I
3 have nothing to add or to change to the
4 description provided to the Board.

5 CHAIRMAN RUFFATO: Any questions from
6 the Board?

7 (No response)

8 CHAIRMAN RUFFATO: Hearing none, we'll
9 go to the next case, and this is Montana
10 Environmental Information Center and Sierra Club
11 versus DEQ. I think there is no Hearing Examiner
12 that I found when I looked through this, and I
13 assume -- and so maybe someone can explain to me
14 the status of this. Katherine, can you do that.

15 MS. ORR: It looks to me like the case
16 is fully in front of -- Well, let me respond, Mr.
17 Chairman, by first saying honestly I don't know
18 the full status of this. And I can check.

19 MS. WITTENBERG: Chairman Ruffato, We do
20 have Kirsten Bowers on the line, and she is the
21 one who provided the status for this, so she could
22 update you further.

23 CHAIRMAN RUFFATO: Thank you, Joyce.
24 Kirsten, can you give me a short, give the Board a
25 short status report here, please.

1 MS. BOWERS: Yes. Good morning, Chair
2 Ruffato, members of the Board. I'm Kirsten
3 Bowers, for the record, an attorney with DEQ.

4 And the summary in your packet
5 accurately reflects what's going on in the
6 District Court, but for the Board members'
7 information, this is a case that's been all the
8 way to the Supreme Court, and it's now on remand
9 to District Court. And it's just been stayed on
10 your agenda while that action is pending. And
11 currently before the District Court the parties
12 are briefing pretrial motions, and that briefing
13 will be done in early May, I think May 7th.

14 CHAIRMAN RUFFATO: Thank you, Ms.
15 Bowers. Any questions from the Board?

16 (No response)

17 CHAIRMAN RUFFATO: Hearing none, we will
18 go to the Savco case. I gather from the
19 description that the Hearing Examiner is no longer
20 the Hearing Examiner, but the case has also been
21 dismissed. Is that correct, Katherine?

22 MS. ORR: Mr. Chair, that is correct.

23 CHAIRMAN RUFFATO: Any questions from
24 the Board?

25 (No response)

1 CHAIRMAN RUFFATO: Hearing none, we'll
2 go to the Signal Peak case. The Hearing Examiner
3 again is Drew. Any changes or additions?

4 MR. CZIOK: No, sir.

5 CHAIRMAN RUFFATO: Questions from the
6 Board?

7 (No response)

8 CHAIRMAN RUFFATO: Going on, the
9 Woodrock case looks like it is in the same status
10 as the Savco case. Any questions from the Board?

11 (No response)

12 CHAIRMAN RUFFATO: Hearing none, we'll
13 go on. The next one is the City of Great Falls.
14 The Hearing Examiner is Mr. Doud.

15 MR. DOUD: Thank you, Mr. Chairman.
16 There's nothing to add to the description that's
17 been provided to the Board.

18 CHAIRMAN RUFFATO: Questions from the
19 Board members, please.

20 (No response)

21 CHAIRMAN RUFFATO: Hearing none, we'll
22 move on to the next one. Actually just for the
23 sake of time, I'd do the next two, the Transcanada
24 Keystone Pipeline cases, the Keystone XL Pipelines
25 cases. There are two of them that we assigned to

1 a Hearing Examiner last meeting. Katherine has
2 been assigned to be the Hearing Examiner on both
3 of those. Katherine, is there any changes on
4 either of those two cases?

5 MS. ORR: Mr. Chairman, members of the
6 Board, the description is correct. And what I
7 would add is we had a status conference this week,
8 and it has been continued pending activities at
9 the Federal government level regarding those
10 Keystone permits.

11 CHAIRMAN RUFFATO: Thank you, Katherine.
12 Any questions from the Board on either of those
13 cases?

14 (No response)

15 CHAIRMAN RUFFATO: Hearing none, we'll
16 go to the Riverside Contracting case. The Hearing
17 Examiner is Mr. Cziok.

18 MR. CZIOK: Mr. Chair, I don't have
19 anything to add to what's stated in the agenda.

20 CHAIRMAN RUFFATO: Thank you. Any
21 questions from the Board?

22 (No response)

23 CHAIRMAN RUFFATO: Hearing none, we'll
24 go to the Talen Montana case. Katherine, you
25 again have been assigned to this -- or this case

1 has been assigned to you, I should say. Any
2 changes from the description?

3 MS. ORR: Mr. Chairman, no changes.
4 This is a case where the parties got together, and
5 decided that they would ask for a stay of the
6 proceedings in December, and that stay is still in
7 effect.

8 CHAIRMAN RUFFATO: Thank you. Any
9 questions from the Board?

10 (No response)

11 CHAIRMAN RUFFATO: Hearing none, I will
12 go to the Western Sugar case. Again, Mr. Cziok.

13 MR. CZIOK: Yes, sir. I have nothing to
14 add beyond the agenda item.

15 CHAIRMAN RUFFATO: Questions from the
16 Board.

17 (No response)

18 CHAIRMAN RUFFATO: Hearing none, we will
19 go to the one contested case not assigned to a
20 Hearing Examiner. So I have a question about this
21 one, if someone can answer. What is the status of
22 this case before the Board? I couldn't figure
23 that out from the paragraph. Katherine, do you
24 have an answer? Or I'll ask anybody on the line.

25 MS. ORR: Mr. Chairman, I think that if

1 you might direct yourself to one of the Department
2 attorneys, that would be useful.

3 CHAIRMAN RUFFATO: Kirsten Bowers.

4 MS. BOWERS: Thank you, Chair Ruffato, I
5 think I provided my summary maybe out of order.
6 What I provided my summary earlier, I meant to
7 talk about this case, and I guess I maybe
8 accidentally got out of order, and talked about a
9 related case.

10 This case is the one that went to the
11 Supreme Court, and then was remanded back to
12 District Court on the issue of the MPDES permit
13 for the Western Energy Coal Mine in Colstrip. And
14 so that case is now proceeding before the First
15 Judicial District Court in accordance with a
16 scheduling order that requires the party to brief
17 pretrial motions by May 7th. I'm sorry. I did my
18 summary out of order.

19 CHAIRMAN RUFFATO: No worries at all.
20 Is the hearing, or is the process before the Board
21 completed, or is it stayed?

22 MS. BOWERS: No, it's stayed pending
23 completion of the Court case, and it hasn't been
24 assigned to a Hearing Examiner.

25 CHAIRMAN RUFFATO: All right. Thank

1 you. Any questions, any additional questions from
2 the Board on this Western Energy case?

3 (No response)

4 CHAIRMAN RUFFATO: If not, that
5 concludes the briefing matters.

6 MS. WITTENBERG: Chairman Ruffato, this
7 might be a really good time to take a break.

8 CHAIRMAN RUFFATO: Thank you, Joyce.
9 That's a good idea. Let's take a ten minute
10 break. We will reconvene at 10:10.

11 (Recess taken 10:00 a.m.)

12 (Copper Ridge and Reflections
13 at Copper Ridge and Murray
14 Transcripts bound separately)

15 * * * * *

16 (Reconvened at 1:14 p.m.)

17 MS. ORR: Yes. As, Mr. Chairman,
18 members of the Board, you perhaps are aware of
19 Senate Bill 233, which is wending its way to the
20 Governor's Office as I understand it, and this is
21 a lengthy bill that basically removes from the
22 Board's responsibilities rulemaking in the areas
23 that it used to have rulemaking authority, and
24 those cover things like air quality, major
25 facility siting act, reclamation, water quality,

1 public water and sewage systems, solid waste
2 management, and agricultural chemical groundwater.

3 This doesn't mean that the Board doesn't
4 have its authority, as it always has, to hear
5 appeals, or exercise its quasi-judicial functions,
6 which include subpoenaing witnesses, conducting
7 hearings, administering oaths, compelling the
8 production of evidence, etc.

9 The one thing that struck me that I
10 haven't reviewed is what if the Board itself has
11 some need for instituting rules of procedure for
12 the conduct of its hearings. And I have not
13 researched that, and if you'd like me to research
14 that, I can. I don't know. In other words, I
15 don't know if this bill is affecting that. I'm
16 sorry. I should have an answer on that before
17 today, but it struck me this morning.

18 CHAIRMAN RUFFATO: I don't have any
19 concern that you don't have an answer to that
20 because it's not even a law yet. It just looks
21 like it's probably going to go there, and we will
22 find that out in the near future, and then we'll
23 also have to figure out when that's effective, and
24 then we'll have to address the question that you
25 asked, and that is how does it affect our ability

1 to make rules with respect to our procedure.

2 And I don't think we need to address
3 that, and if any Board member has a question or
4 comment, feel free to ask or comment, but I just
5 wanted the Board to be aware that this was
6 happening or could be happening, and I didn't want
7 it to come as a surprise if it happened. Any
8 questions or comments from the Board?

9 BOARD MEMBER SIMPSON: Mr. Chairman,
10 this is Dave Simpson again. Ms. Orr, what would
11 be the impact of Senate Bill 233 regarding the
12 Board's initiative to initiate rulemaking? That
13 is, if it takes the Board out of the rulemaking
14 process, but if there are issues that the Board
15 feels need to be addressed, can we take those to
16 the Department, and initiate the process?

17 MS. ORR: Mr. Chairman, Board Member
18 Simpson. The way I look at that is that the Board
19 doesn't have any formal authority to do that.
20 Informally as a citizen I think you could do it.

21 BOARD MEMBER SIMPSON: Any citizen can
22 file a petition for rulemaking, and I assume that
23 that would be an option for the Board as well if
24 there is no other avenue.

25 MS. ORR: Mr. Chair, Mr. Simpson. I

1 agree with that. I think the Board could look
2 through its formal motions practice, decide to
3 file a petition for rulemaking, and have that
4 entertained by the Department.

5 BOARD MEMBER SIMPSON: Thank you.

6 CHAIRMAN RUFFATO: Thank you, Mr.
7 Simpson and Katherine. Any more comments,
8 questions?

9 (No response)

10 CHAIRMAN RUFFATO: Katherine, do you
11 have anything else you would like to update us on?

12 MS. ORR: Mr. Chair, I do not at this
13 time.

14 CHAIRMAN RUFFATO: Thank you, Katherine.
15 At this point, I would like to open up the floor
16 to any member of the public that has comments
17 regarding the matters that might be before the
18 Board other than the contested cases.

19 (No response)

20 CHAIRMAN RUFFATO: So I've opened this
21 up to public comment.

22 (No response)

23 CHAIRMAN RUFFATO: Since there is none,
24 I would move that this meeting be adjourned. Do I
25 have a second?

1 BOARD MEMBER REITEN: I'll second it.

2 CHAIRMAN RUFFATO: Thank you, Jon. A
3 motion has been made and seconded that the meeting
4 be adjourned. All in favor, say aye.

5 (Response)

6 CHAIRMAN RUFFATO: Same sign, opposed.

7 (No response)

8 CHAIRMAN RUFFATO: The motion carries
9 unanimously. Thank you all for sticking with this
10 and getting the work done. We'll close the
11 meeting now. The meeting is adjourned.

12 (The proceedings were concluded
13 at 1:21 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 - 43 - 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 25th day of
April, 2021.

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

<p style="text-align: center;">1</p> <p>10:00 - 39:11 10:10 - 39:10 11th [4] 7:17, 8:2, 8:9, 8:17 13 - 13:23 1:14 - 39:16 1:21 - 43:13</p> <p style="text-align: center;">2</p> <p>2-4-611 - 17:11 2-4-621 [2] 19:10, 19:13 2020 [3] 7:17, 8:9, 8:17 2021 [5] 1:6, 1:10, 8:24, 9:11, 44:17 2024 - 44:22 23 [2] 1:6, 1:10 233 [2] 39:19, 41:11 25th - 44:16 26th [2] 8:24, 9:11</p> <p style="text-align: center;">4</p> <p>4 - 17:11 43 - 44:12</p> <p style="text-align: center;">7</p> <p>7th [2] 34:13, 38:17</p> <p style="text-align: center;">9</p> <p>9 - 44:22 9:00 [2] 1:11, 2:5</p> <p style="text-align: center;">A</p> <p>a.m [2] 1:11, 39:11 Aaron [2] 4:6, 4:8 ability [2] 40:25, 44:14 absolutely [2] 11:2, 20:1 accept [2] 18:8, 28:11 accidentally - 38:8 accordance - 38:15</p>	<p>accurate - 29:12 accurately [2] 20:14, 34:5 across - 15:9 act [6] 12:4, 16:16, 18:22, 28:5, 32:3, 39:25 action [7] 15:6, 15:8, 16:5, 16:6, 27:13, 27:16, 34:10 activities - 36:8 add [12] 25:16, 25:19, 28:2, 29:9, 30:7, 30:23, 31:9, 33:3, 35:16, 36:7, 36:19, 37:14 addition - 31:19 additional [3] 14:3, 32:4, 39:1 additions [4] 29:20, 30:14, 31:17, 35:3 address [3] 17:23, 40:24, 41:2 addressed - 41:15 adequately - 10:17 adjourned [3] 42:24, 43:4, 43:11 adjudicate - 15:4 adjudicating - 15:20 adjudication [3] 15:15, 16:8, 16:17 administering - 40:7 administrative [12] 12:1, 12:4, 12:16, 12:17, 13:17, 13:18, 13:19, 14:6, 16:15, 18:22, 27:7, 28:5 admissibility - 27:3 adopt [2] 19:15, 19:16</p>	<p>adoption - 22:12 affect - 40:25 affecting - 40:15 affixed - 44:16 agency [14] 5:10, 5:13, 5:16, 5:19, 5:23, 6:8, 10:5, 10:12, 11:12, 11:21, 12:11, 12:23, 13:9, 18:23 agenda [12] 7:5, 14:17, 23:14, 24:20, 25:10, 29:10, 29:22, 30:23, 32:22, 34:10, 36:19, 37:14 agree - 42:1 agricultural - 40:2 ahead [3] 3:7, 4:4, 26:13 allows - 28:5 Alpine - 29:18 ALSB - 5:9 Altemus [8] 1:15, 2:8, 2:10, 2:14, 3:20, 3:21, 24:2, 24:3 alter - 19:6 although - 12:2 amend - 20:16 among - 24:1 Amy [5] 10:11, 26:7, 26:25, 27:10, 27:17 and/or - 19:17 Andrew - 6:5 answered - 19:24 answers - 19:21 appeal [5] 15:6, 18:6, 27:2, 28:4, 30:5 appealed - 28:19 appeals - 40:5 appear - 32:5 Appellants -</p>	<p>32:2 applies [2] 18:15, 18:19 apply [2] 17:22, 18:1 appointed [2] 9:20, 9:21 appreciate [3] 2:21, 14:14, 23:8 appropriate - 24:11 approval [3] 7:5, 8:23, 17:1 approve [8] 7:16, 8:8, 8:16, 9:7, 9:11, 17:2, 18:12, 18:16 April [3] 1:6, 1:10, 44:17 areas - 39:22 Armstrong [2] 6:15, 6:16 aside - 4:24 asking - 25:19 aspect - 26:5 assign - 14:20 assigned [6] 35:25, 36:2, 36:25, 37:1, 37:19, 38:24 assigning - 23:7 assignment - 14:16 Assistant - 13:8 associate - 12:13 Association [2] 11:24, 31:15 assume [3] 25:13, 33:13, 41:22 assuming [2] 25:17, 28:6 attach - 10:7 attendant - 22:3 attorney [8] 4:21, 5:25, 6:8, 11:23, 12:11, 13:8, 32:5, 34:3 attorneys [3] 10:8, 23:3, 38:2 authority [6] 15:3, 15:19, 17:10, 39:23, 40:4, 41:19 Automatically</p>	<p>- 18:2 availability - 17:9 available - 16:19 avenue - 41:24 aye [4] 8:18, 9:12, 25:4, 43:4</p> <p style="text-align: center;">B</p> <p>background [2] 10:24, 12:3 balance - 7:25 Barton [2] 5:1, 5:1 basically [3] 20:18, 22:1, 39:21 behalf [2] 5:13, 5:16 Belgrade - 13:22 best - 44:13 better [3] 9:24, 9:25, 23:23 beyond [2] 30:23, 37:14 bill [4] 39:19, 39:21, 40:15, 41:11 bio - 10:13 biographical - 9:23 bios [2] 10:4, 11:6 bit [4] 14:23, 19:25, 20:17, 21:3 Board [138] 1:1, 1:5, 1:14, 2:6, 2:8, 2:10, 2:14, 3:1, 3:10, 3:11, 3:12, 3:13, 3:14, 3:15, 3:16, 3:17, 3:18, 3:19, 3:20, 3:21, 3:23, 4:21, 5:24, 7:22, 7:23, 7:25, 8:10, 8:12, 8:16, 8:25, 9:8, 10:3, 10:18, 11:15, 11:21, 12:6, 13:7, 14:9, 14:24, 15:2, 15:3, 15:8,</p>	<p>15:13, 15:18, 16:7, 16:21, 16:25, 17:17, 17:21, 17:22, 18:4, 18:7, 18:12, 18:15, 19:1, 19:5, 19:8, 19:13, 19:18, 19:19, 20:18, 20:25, 21:14, 21:24, 21:25, 22:7, 22:19, 22:21, 22:23, 23:4, 23:16, 23:24, 23:25, 24:1, 24:10, 24:13, 24:13, 24:14, 24:17, 25:1, 25:3, 25:13, 25:17, 25:22, 25:22, 26:8, 26:14, 26:16, 27:13, 27:15, 27:20, 27:21, 27:24, 29:1, 29:14, 29:25, 30:10, 30:17, 30:25, 31:12, 31:19, 32:12, 33:4, 33:6, 33:24, 34:2, 34:6, 34:15, 34:24, 35:6, 35:10, 35:17, 35:19, 36:6, 36:12, 36:21, 37:9, 37:16, 37:22, 38:20, 39:2, 39:18, 40:3, 40:10, 41:3, 41:5, 41:8, 41:9, 41:13, 41:14, 41:17,</p>
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41:18, 41:21, 41:23, 42:1, 42:5, 42:18, 43:1 Board's [6] 15:14, 27:8, 27:11, 28:17, 39:22, 41:12 bound - 39:14 Bowers [9] 4:11, 4:12, 33:20, 34:1, 34:3, 34:15, 38:3, 38:4, 38:22 break [3] 6:25, 39:7, 39:10 breaking - 7:3 breaks - 7:2 brief - 38:16 briefing [6] 16:12, 25:11, 25:13, 34:12, 34:12, 39:5 briefs - 22:1 bring [2] 16:25, 17:7 brought - 15:5 Bureau [6] 5:13, 5:17, 5:20, 11:22, 13:9, 13:15 Buzzas [7] 5:21, 5:22, 11:7, 12:22, 12:22, 31:6, 31:8	27:12, 28:13, 29:15, 29:19, 30:4, 30:5, 30:6, 30:13, 30:19, 31:9, 31:16, 31:22, 32:25, 33:9, 33:15, 34:7, 34:18, 34:20, 35:2, 35:9, 35:10, 36:16, 36:24, 36:25, 37:4, 37:12, 37:19, 37:22, 38:7, 38:9, 38:10, 38:14, 38:23, 39:2 cases [14] 9:20, 9:21, 14:16, 15:4, 15:5, 16:11, 17:5, 23:7, 28:6, 35:24, 35:25, 36:4, 36:13, 42:18 Catherine - 6:11 Center - 33:10 certainly - 11:14 certify - 44:7 Chair [12] 4:20, 11:20, 13:7, 24:2, 30:8, 31:18, 34:1, 34:22, 36:18, 38:4, 41:25, 42:12 Chairman [119] 1:13, 2:4, 2:12, 2:16, 2:20, 2:24, 3:5, 3:6, 3:8, 3:9, 3:24, 4:3, 5:3, 6:22, 7:14, 7:24, 8:4, 8:7, 8:11, 8:14, 8:20, 8:22, 9:3, 9:6, 9:9, 9:14, 9:16, 14:9, 14:12, 15:2, 17:16, 17:19, 19:23, 20:2, 21:5, 21:13, 21:20, 22:4,	22:14, 23:12, 24:6, 24:15, 24:18, 24:20, 24:24, 25:6, 25:8, 25:25, 26:12, 26:14, 26:20, 27:1, 27:23, 28:1, 28:15, 28:23, 29:6, 29:12, 29:13, 29:17, 29:24, 30:3, 30:9, 30:12, 30:16, 30:19, 30:24, 31:2, 31:11, 31:14, 32:11, 32:14, 32:17, 32:24, 33:2, 33:5, 33:8, 33:17, 33:19, 33:23, 34:14, 34:17, 34:23, 35:1, 35:5, 35:8, 35:12, 35:15, 35:18, 35:21, 36:5, 36:11, 36:15, 36:20, 36:23, 37:3, 37:8, 37:11, 37:15, 37:18, 37:25, 38:3, 38:19, 38:25, 39:4, 39:6, 39:8, 39:17, 40:18, 41:9, 41:17, 42:6, 42:10, 42:14, 42:20, 42:23, 43:2, 43:6, 43:8 challenge [2] 27:13, 27:19 change [5] 19:1, 19:9, 20:4, 20:13, 33:3 changes [8] 29:20,	30:14, 31:17, 32:23, 35:3, 36:3, 37:2, 37:3 check - 33:18 chemical - 40:2 Chicago - 13:25 Chief - 13:15 Christensen - 10:11 Chuck - 6:7 citizen [2] 41:20, 41:21 City [2] 13:22, 35:13 claims [2] 18:18, 20:22 Clark [2] 44:4, 44:7 cleared - 26:16 close - 43:10 Coal [2] 30:20, 38:13 Colstrip - 38:13 comes - 17:20 coming [2] 6:15, 13:21 comment [3] 41:4, 41:4, 42:21 comments [12] 8:1, 8:4, 8:25, 9:3, 23:5, 23:10, 23:13, 24:21, 24:22, 41:8, 42:7, 42:16 commission - 44:21 communication - 24:3 communications [3] 23:24, 24:12, 25:3 compelled - 23:4 compelling - 40:7 complete - 7:12 completed - 38:21 completion - 38:23 complex - 16:11 comport - 19:4 compounded - 22:5	computer-aided - 44:11 concern - 40:19 concerned - 32:19 concerning - 17:8 conclude - 20:5 concluded - 43:12 concludes - 39:5 conclusion [3] 19:9, 20:21, 21:9 conclusions [6] 17:24, 18:13, 18:17, 19:7, 19:20, 28:12 conduct - 40:12 conducted - 14:18 conducting - 40:6 conference - 36:7 confirm - 4:6 conflict [2] 31:21, 32:9 confused [2] 26:17, 28:2 consideration - 11:17 consolidated - 28:22 contact [4] 23:16, 23:21, 24:9, 25:1 contacts - 23:23 contain [2] 24:11, 44:12 contested [3] 12:4, 37:19, 42:18 continued - 36:8 continuing [2] 14:5, 32:3 Contracting - 36:16 Cooke - 13:24 Copper [7] 6:2, 6:4, 17:4, 26:2, 26:2, 39:12, 39:13 Corporation - 6:3 correct [4] 30:7, 34:21,	34:22, 36:6 correctly - 2:13 couldn't - 37:22 Counsel [2] 10:11, 13:13 County [3] 13:24, 44:4, 44:6 couple - 17:19 Court [21] 1:23, 5:14, 10:18, 13:23, 26:4, 26:7, 26:19, 27:11, 27:21, 28:13, 28:20, 34:6, 34:8, 34:9, 34:11, 38:11, 38:12, 38:15, 38:23, 44:5, 44:20 cover - 39:24 covered [2] 17:15, 32:23 Creek - 30:20 criminal - 14:2 Crowley - 12:13 CRUTCHER [3] 1:22, 44:5, 44:19 currently [2] 32:9, 34:11 Cziok [14] 6:6, 11:7, 12:9, 12:10, 30:14, 30:15, 30:22, 31:4, 31:5, 35:4, 36:17, 36:18, 37:12, 37:13
<hr/> C <hr/>					<hr/> D <hr/>
Caitlin [4] 5:21, 11:7, 12:20, 12:22 can't [2] 2:9, 10:16 carries [3] 8:22, 9:16, 43:8 case [50] 12:4, 14:21, 15:11, 15:15, 15:22, 16:9, 16:16, 16:20, 16:22, 16:23, 25:15, 26:1, 26:2, 26:4, 26:7, 26:10,	Caitlin [4] 5:21, 11:7, 12:20, 12:22 can't [2] 2:9, 10:16 carries [3] 8:22, 9:16, 43:8 case [50] 12:4, 14:21, 15:11, 15:15, 15:22, 16:9, 16:16, 16:20, 16:22, 16:23, 25:15, 26:1, 26:2, 26:4, 26:7, 26:10,				D.C - 13:1 dabbled - 11:13 Darryll - 5:1 Dave [3] 26:15, 26:21, 41:10 David [4] 1:14, 1:16, 24:15, 28:2 December [5] 7:17, 8:2, 8:9, 8:17,

37:6 decide - 42:2 decided [2] 23:18, 37:5 decision [14] 16:25, 17:3, 17:8, 17:20, 17:23, 18:7, 18:8, 18:14, 19:15, 21:2, 21:18, 22:10, 23:7, 32:7 decisions - 11:16 Defender - 13:25 defense - 14:2 deference - 18:9 delegate [3] 15:15, 16:8, 16:14 delegated - 16:22 delegating - 15:24 delegation - 15:16 Department [8] 12:14, 13:12, 13:22, 15:6, 32:4, 38:1, 41:16, 42:4 depends - 17:8 deposition - 31:24 DEQ [12] 3:25, 4:1, 4:18, 4:18, 4:21, 4:24, 5:2, 6:17, 13:3, 24:4, 33:11, 34:3 described - 27:10 describes - 10:17 description [11] 10:7, 25:21, 29:10, 29:12, 29:21, 30:23, 33:4, 34:19, 35:16, 36:6, 37:2 descriptive [2] 25:14, 25:18 designate - 15:19 determine [7] 15:14, 16:7, 18:12, 21:15, 22:8, 22:11, 32:1 determined - 19:3 determines - 19:1 determining - 18:16 Development - 6:3 direct - 38:1 directed - 24:12 disagree - 20:9 disclosed - 31:20 disclosure [2] 23:15, 31:21 discretion - 15:14 discuss - 14:15 discussion [6] 23:15, 23:19, 24:1, 24:8, 24:18, 32:18 dismiss [2] 27:9, 27:17 dismissed - 34:21 disposition [2] 15:22, 28:16 District [12] 10:18, 26:4, 26:7, 26:18, 27:11, 27:20, 28:13, 34:6, 34:9, 34:11, 38:12, 38:15 Division [2] 4:22, 13:14 document [2] 22:11, 22:13 documentation - 16:12 Doud [14] 5:18, 5:19, 11:6, 11:11, 11:11, 17:4, 22:10, 29:9, 29:11, 29:13, 33:1, 33:2, 35:14, 35:15 Dr [2] 7:18, 8:15 draft - 7:11 drafting - 13:18 Drew [7] 11:7, 12:7, 12:10, 12:20, 30:14, 30:20, 35:3 drill - 19:25 <hr/> E <hr/> earlier - 38:6 easier - 6:7 educational - 22:18 effect - 37:7 effective - 40:23 eight - 12:25 either [2] 36:4, 36:12 elaborate - 20:8 emphasize - 18:4 encourage - 22:22 Energy [4] 4:22, 32:25, 38:13, 39:2 entertain [2] 8:7, 9:6 entertained - 42:4 entire - 21:23 entity - 18:23 environmental [8] 1:1, 2:6, 11:13, 12:2, 13:1, 15:7, 26:17, 33:10 essentially - 20:4 etc - 40:8 evaluating - 20:19 everyone - 2:5 evidence [10] 18:19, 20:6, 20:11, 20:20, 20:23, 21:3, 21:11, 21:17, 21:19, 40:8 ex - 23:22 Examiner [28] 12:6, 13:3, 14:7, 14:14, 14:16, 14:21, 17:21, 25:16, 26:6, 29:9, 29:19, 30:6, 30:14, 30:21, 31:3, 31:16, 32:3, 33:1, 33:11, 34:19, 27:17, 32:6 15:22, 16:25, 30:5 finding [8] 19:1, 19:3, 19:6, 20:4, 20:10, 20:12, 21:1, 21:8 findings [11] 17:24, 18:13, 18:16, 18:19, 18:25, 19:17, 20:3, 20:20, 21:10, 21:16, 28:12 fine - 23:10 firm [3] 10:13, 12:3, 14:1 five [3] 7:17, 13:15, 14:19 Fleck - 12:13 floor - 42:15 follow-up - 28:16 foregoing - 44:12 formal [2] 41:19, 42:2 forward - 12:18 free - 41:4 front [3] 10:4, 10:25, 33:16 fulfill - 16:14 full [5] 3:22, 15:14, 15:16, 16:3, 33:18 fully [2] 16:22, 33:16 functions - 40:5 future - 40:22 <hr/> G <hr/> gather - 34:18 general [4] 13:8, 13:13, 19:15, 27:14 generally - 14:10 George - 4:2 given [2] 16:20, 20:20 giving - 9:22 glad - 14:11 governed - 19:10 government - 36:9 Governor's - 39:20 groundwater - 40:2 guess - 38:7 <hr/> H <hr/> half - 11:23 handling - 16:16 Hanson [6] 1:16, 3:14, 3:15, 7:18, 7:22, 8:10 happen [3] 28:11, 28:12, 28:13 happened - 41:7 happening [2] 41:6, 41:6 hasn't [4] 18:24, 27:8, 27:22, 38:23 haven't [3] 17:15, 22:22, 40:10 having [2] 19:2, 19:3 hear [3] 2:8, 2:10, 40:4 heard - 18:24 hearing [64] 7:9, 9:19, 9:23, 10:5, 12:5, 13:3, 13:19, 14:7, 14:13, 14:21, 15:16, 15:19, 15:23, 15:25, 16:3, 16:14, 16:22, 16:24, 17:7, 17:21, 18:5, 18:6, 18:10, 22:10, 23:7, 24:24, 25:15, 25:19, 25:25, 26:6, 26:12, 29:8, 29:17, 29:19, 30:6, 30:13, 30:20, 31:2, 31:3, 31:16, 31:25, 32:3, 32:6, 33:1, 33:8, 33:11, 34:17, 	
--	--

34:19, 34:20, 35:1, 35:2, 35:12, 35:14, 35:21, 36:1, 36:2, 36:15, 36:16, 36:23, 37:11, 37:18, 37:20, 38:20, 38:24 hearings [6] 12:5, 13:20, 14:16, 22:6, 40:7, 40:12 held [2] 13:9, 31:25 Helena [2] 10:13, 12:13 hereby - 44:7 herein - 44:9 hereunto - 44:15 Hi [2] 6:1, 12:22 Hillary [3] 1:16, 7:18, 8:14 history - 13:24 Homeland - 12:14 Homeowners - 31:15 honestly - 33:17 hope [3] 2:8, 19:22, 27:5 hopefully - 11:15 hour - 6:25 hypothetically - 28:18 <hr/> I <hr/> idea - 39:9 identify [3] 4:4, 5:4, 5:5 Illinois - 13:25 impact [2] 29:2, 41:11 inclined - 23:10 include - 40:6 included [2] 10:14, 25:2 indicated - 11:6 Indicating - 24:14 individuals [4] 5:4, 11:2, 16:17, 31:23	Informally - 41:20 information [6] 23:16, 23:21, 24:10, 25:1, 33:10, 34:7 initiate [2] 41:12, 41:16 initiative - 41:12 instance - 15:10 instituting - 40:11 interesting [2] 27:15, 28:14 interlocutory [2] 27:2, 28:4 introduce [10] 3:25, 9:19, 10:8, 10:22, 11:9, 11:19, 12:8, 12:21, 13:5, 14:22 introductions - 10:2 invite - 23:22 involving - 15:12 isn't - 16:6 issue [4] 23:18, 26:16, 31:25, 38:12 issues [2] 27:14, 41:14 item [6] 8:23, 16:5, 16:6, 25:10, 32:21, 37:14 items [2] 25:11, 25:13 itself [7] 18:24, 19:5, 21:1, 27:12, 27:16, 27:21, 40:10 <hr/> J <hr/> Jeff [3] 11:9, 11:18, 17:4 Jeffrey [3] 5:18, 11:6, 11:11 Jon [2] 1:15, 43:2 JOSEPH - 1:15 joy - 11:3 Joyce [11] 3:2, 3:6, 3:24, 5:3, 5:5, 6:22, 7:1, 7:7, 7:14, 33:23,	39:8 Judge [3] 13:23, 27:8, 27:22 Judges - 12:16 judgment [2] 15:23, 16:2 judicial [3] 10:19, 27:16, 38:15 Julia [8] 1:15, 2:8, 2:12, 2:16, 2:25, 22:20, 24:2, 24:6 jurisdictional - 18:9 Justice [2] 13:12, 13:22 <hr/> K <hr/> Katherine [33] 5:24, 6:15, 9:19, 9:22, 9:25, 12:10, 14:12, 14:22, 14:25, 15:1, 17:20, 19:25, 21:5, 21:14, 21:21, 22:15, 26:10, 26:22, 26:23, 28:1, 28:10, 32:14, 32:25, 33:14, 34:21, 36:1, 36:3, 36:11, 36:24, 37:23, 42:7, 42:10, 42:14 Keystone [3] 35:24, 35:24, 36:10 Kirsten [5] 4:11, 33:20, 33:24, 34:2, 38:3 Kurt - 4:13 <hr/> L <hr/> later [2] 22:17, 26:5 Laughner [2] 6:11, 6:12 Laurie [4] 1:22, 5:14, 44:5, 44:19	lauriecrutcher@g - 1:24 law [15] 10:13, 11:15, 12:1, 12:3, 12:16, 12:18, 12:25, 17:24, 18:13, 18:17, 19:8, 19:10, 19:20, 21:9, 40:20 lead - 32:5 learn - 11:14 legal [15] 5:13, 5:17, 5:19, 5:23, 6:8, 10:5, 10:12, 11:12, 11:22, 11:24, 12:11, 12:23, 13:9, 13:16, 13:24 Lehnerr [9] 1:16, 3:10, 3:11, 7:18, 7:23, 8:12, 8:15, 24:14, 24:17 lengthy [2] 16:11, 39:21 Let's [3] 3:1, 30:3, 39:9 level [2] 15:25, 36:9 levels - 18:5 Lewis [2] 44:4, 44:6 Lindsey [7] 5:15, 11:7, 11:18, 11:21, 12:7, 29:20, 30:6 litigation [2] 14:1, 14:3 logged - 4:4 longer - 34:19 looking [3] 12:18, 20:25, 21:23 looks [9] 4:4, 6:7, 21:23, 27:1, 27:4, 27:8, 33:15, 35:9, 40:20 love - 17:14 Lucas [2] 4:20, 4:21	<hr/> M <hr/> ma'am [2] 6:9, 6:16 macro - 19:14 major [2] 14:2, 39:24 makes [2] 22:13, 22:14 making - 13:18 management - 40:2 manner - 16:18 MAPA - 17:6 March - 44:22 Marguerite - 4:9 Mark [2] 4:21, 4:23 Marquis [3] 5:25, 6:1, 6:2 materials [2] 16:10, 22:24 matter [2] 17:1, 29:7 matters [6] 14:4, 15:9, 15:21, 15:21, 39:5, 42:17 maybe [6] 14:23, 23:20, 29:1, 33:13, 38:5, 38:7 means - 14:20 meant - 38:6 meeting [17] 1:5, 2:6, 7:17, 8:8, 8:17, 8:25, 14:13, 14:19, 22:21, 22:23, 23:17, 23:19, 36:1, 42:24, 43:3, 43:11, 43:11 meetings - 16:5 member [35] 2:8, 2:10, 2:14, 3:1, 3:10, 3:11, 3:12, 3:13, 3:14, 3:15, 3:16, 3:17, 3:18, 3:19, 3:20, 3:21, 5:9, 7:22, 7:23, 8:10, 8:12, 9:8, 23:16, 24:14, 24:17, 25:22, 26:14, 27:24, 41:3, 41:9, 41:17, 41:21, 42:5, 42:16, 43:1 members [29] 1:14, 4:20, 7:25, 10:4, 11:20, 13:7, 14:9, 15:2, 16:7, 16:22, 17:17, 21:14, 21:24, 21:25, 22:19, 23:2, 23:24, 24:10, 24:13, 25:1, 25:14, 25:18, 29:14, 31:18, 34:2, 34:6, 35:19, 36:5, 39:18 mentioned [2] 10:14, 31:23 merits [2] 15:23, 16:4 Michelle [6] 5:10, 11:8, 13:4, 13:7, 14:8, 31:16 mind - 28:9 Mine - 38:13 Minerals - 30:13 Mining - 4:22 minute - 39:9 minutes [14] 7:5, 7:8, 7:11, 7:15, 7:16, 7:20, 8:1, 8:8, 8:16, 8:24, 9:1, 9:4, 9:7, 9:11 miss - 6:18 missed [2] 4:18, 6:19 modification - 22:12 modify [3] 19:16, 19:17, 19:19 Montana [7] 1:2, 11:24, 12:3, 33:9, 36:24, 44:2, 44:7 Montanore -
--	--	--	---	---

30:13 month - 13:10 morning [10] 2:4, 2:11, 4:22, 5:12, 6:1, 6:6, 12:9, 13:6, 34:1, 40:17 Moser [2] 4:13, 4:14 mostly - 7:10 motion [19] 8:8, 8:13, 8:15, 8:22, 9:7, 9:10, 9:10, 9:16, 24:7, 24:9, 24:16, 24:22, 24:25, 25:8, 27:9, 27:11, 27:17, 43:3, 43:8 motions [5] 7:12, 16:1, 34:12, 38:17, 42:2 Motor - 13:13 move [2] 35:22, 42:24 moved [2] 8:10, 9:8 MPDES [2] 30:5, 38:12 Murray - 39:13 MVD [2] 13:16, 13:20 myself [2] 4:25, 31:10 <hr/> N <hr/> named - 44:9 natural - 7:2 necessary - 10:23 needs - 29:1 Nicholas - 4:15 none [15] 24:24, 25:25, 26:12, 29:17, 31:2, 33:8, 34:17, 35:1, 35:12, 35:21, 36:15, 36:23, 37:11, 37:18, 42:23 normal - 7:2 notarial - 44:16 Notary [3]	1:23, 44:6, 44:20 notes - 7:11 nothing [4] 30:22, 33:3, 35:16, 37:13 notice [3] 15:7, 29:8, 31:20 November - 12:12 <hr/> O <hr/> oaths - 40:7 objection [2] 25:23, 32:2 Office - 39:20 Officer [8] 15:20, 16:14, 16:23, 16:24, 17:7, 18:5, 18:6, 22:10 Officer's - 18:10 Officers [3] 10:5, 15:16, 15:25 open [4] 14:24, 23:25, 24:8, 42:15 opened - 42:20 opens - 27:14 operates [2] 10:13, 18:22 operational - 13:16 opposed [4] 8:20, 9:14, 25:6, 43:6 option - 41:23 order [11] 2:7, 7:4, 14:15, 17:25, 18:10, 19:6, 20:4, 38:5, 38:8, 38:16, 38:18 orientation [3] 14:18, 22:24, 23:17 original - 15:8 Orr [30] 5:24, 9:19, 10:3, 11:18, 12:7, 12:20, 13:4, 14:8, 15:1, 15:1, 18:2, 20:1, 20:15, 21:13, 21:14,	21:25, 22:5, 26:25, 28:14, 32:17, 33:15, 34:22, 36:5, 37:3, 37:25, 39:17, 41:10, 41:17, 41:25, 42:12 outside [2] 10:11, 17:7 overall [2] 20:21, 21:2 owns - 10:12 <hr/> P <hr/> p.m [2] 39:16, 43:13 Pacific - 29:18 packet - 34:4 pages - 44:12 paragraph [2] 25:18, 37:23 paragraphs - 25:14 paralegal - 6:17 parallel [2] 26:18, 27:6 parte - 23:22 partial - 15:17 particularly - 22:19 parties [3] 32:1, 34:11, 37:4 party [4] 27:16, 27:18, 27:22, 38:16 passes - 25:8 past - 16:23 Peak [2] 31:3, 35:2 pending [6] 27:4, 27:6, 27:20, 34:10, 36:8, 38:22 Perfect - 6:10 perhaps - 39:18 permit [2] 30:5, 38:12 permits - 36:10 permitted - 20:13 petition [3] 10:19, 41:22, 42:3	Pettis [3] 4:6, 4:7, 4:8 photographs - 27:3 Pipeline - 35:24 Pipelines - 35:24 placed - 32:22 please [11] 3:7, 4:19, 5:8, 5:10, 6:19, 11:19, 12:8, 13:5, 14:25, 33:25, 35:19 point [10] 6:23, 9:18, 10:1, 21:12, 21:24, 23:14, 24:21, 26:3, 32:16, 42:15 points [2] 7:3, 23:6 policy - 13:1 pose - 26:9 position - 13:10 positions - 32:1 potential - 31:21 practice [3] 16:1, 23:3, 42:2 practiced - 11:25 prefer - 24:3 preference - 24:5 prehearing - 15:21 PREPARED - 1:22 preparing - 7:8 preponderance [4] 18:18, 20:19, 20:23, 21:18 present [3] 4:1, 5:5, 22:10 presented - 17:3 pretrial [2] 34:12, 38:17 previous [2] 22:2, 27:13 primarily [2] 11:25, 14:19 prior [6] 11:23, 13:14, 13:21,	13:23, 22:21, 27:19 probably [3] 26:23, 29:2, 40:21 problematic - 7:21 procedure [6] 16:16, 18:22, 25:21, 28:5, 40:11, 41:1 Procedures - 12:4 proceed - 26:1 proceeding [3] 26:18, 27:7, 38:14 proceedings [7] 1:8, 2:1, 37:6, 43:12, 44:8, 44:10, 44:13 process [10] 13:17, 13:19, 14:6, 21:7, 21:12, 21:22, 22:18, 38:20, 41:14, 41:16 production - 40:8 professional - 11:3 pronounce - 2:13 pronounced - 6:7 pronouncing - 2:17 proposed [8] 17:3, 18:10, 18:14, 18:25, 19:15, 21:8, 22:9, 28:11 proposes - 18:7 proud - 11:1 provide - 11:15 provided [6] 22:25, 33:4, 33:21, 35:17, 38:5, 38:6 provision [2] 17:6, 28:4 public [13] 1:23, 5:9, 6:12, 8:5, 9:4, 13:24, 24:21, 24:22, 40:1,	42:16, 42:21, 44:6, 44:20 purposes [2] 15:20, 16:21 <hr/> Q <hr/> quality [4] 5:2, 15:7, 39:24, 39:25 quasi-judicial [2] 15:3, 40:5 quickly - 25:12 quorum - 3:22 <hr/> R <hr/> raised - 23:18 reading - 20:8 really [5] 17:8, 17:9, 17:13, 27:15, 39:7 realm - 11:14 reason - 16:13 reasons - 22:15 receive - 23:13 recently [2] 31:6, 31:20 Recess - 39:11 reclamation - 39:25 recommendation - 18:11 reconsider - 32:7 reconvene - 39:10 Reconvened - 39:16 record [16] 5:6, 16:20, 18:24, 19:4, 19:6, 19:9, 19:18, 19:21, 20:7, 20:10, 20:12, 21:15, 21:23, 22:9, 34:3, 44:13 referring - 19:11 Reflections [4] 6:3, 17:5, 26:2, 39:12 reflects - 34:5 Regan [9] 2:17, 2:19,
--	--	---	---	--	--

2:20, 2:21, 2:24, 2:25, 3:2, 4:24, 7:1 regarding [3] 36:9, 41:11, 42:17 regularly - 23:3 Reiten [4] 1:15, 3:16, 3:17, 43:1 reject [3] 19:15, 19:16, 19:19 related - 38:9 rely - 7:8 remand [2] 19:15, 34:8 remanded - 38:11 remind - 7:1 remove - 27:12 removes - 39:21 report [2] 32:6, 33:25 reported - 44:10 Reporter [4] 1:23, 5:15, 44:5, 44:20 representing [3] 6:2, 6:12, 10:18 requested - 32:4 requesting - 32:7 requires - 38:16 research - 40:13 researched - 40:13 Resources [2] 29:8, 30:5 respect [2] 29:2, 41:1 respectfully - 20:16 respond - 33:16 response [42] 6:20, 7:23, 8:3, 8:6, 8:19, 8:21, 9:2, 9:5, 9:13, 9:15, 17:18, 23:11, 24:19, 24:23, 25:5, 25:7, 25:24, 26:11, 29:5,	29:16, 30:1, 30:11, 30:18, 31:1, 31:13, 32:13, 33:7, 34:16, 34:25, 35:7, 35:11, 35:20, 36:14, 36:22, 37:10, 37:17, 39:3, 42:9, 42:19, 42:22, 43:5, 43:7 responsibilities - 39:22 responsibility - 15:4 result - 15:21 review [17] 1:1, 2:6, 7:5, 7:16, 10:19, 16:19, 17:22, 17:25, 18:3, 19:5, 19:8, 19:18, 19:20, 20:10, 26:17, 27:16, 32:9 reviewed - 40:10 reviewing - 18:25 Ridge [7] 6:3, 6:4, 17:4, 26:2, 26:2, 39:12, 39:13 Rippling - 31:15 Riverside - 36:16 role - 14:14 roll - 3:1 roughly - 6:25 round - 27:5 RPR [3] 1:22, 44:5, 44:19 Ruffato [107] 1:13, 2:4, 2:12, 2:16, 2:20, 2:24, 3:6, 3:8, 3:9, 3:24, 5:3, 6:22, 7:14, 7:24, 8:4, 8:7, 8:11, 8:14, 8:20, 8:22, 9:3, 9:6, 9:9, 9:14, 9:16, 14:12,	17:16, 17:17, 17:19, 19:23, 19:24, 20:2, 21:5, 21:20, 22:4, 22:14, 23:12, 24:6, 24:7, 24:15, 24:18, 24:20, 24:24, 25:6, 25:8, 25:25, 26:12, 26:20, 26:21, 27:23, 28:1, 28:23, 28:24, 29:6, 29:13, 29:17, 29:24, 30:3, 30:9, 30:12, 30:16, 30:19, 30:24, 31:2, 31:11, 31:14, 32:11, 32:14, 32:24, 33:5, 33:8, 33:19, 33:23, 34:2, 34:14, 34:17, 34:23, 35:1, 35:5, 35:8, 35:12, 35:18, 35:21, 36:11, 36:15, 36:20, 36:23, 37:8, 37:11, 37:15, 37:18, 38:3, 38:4, 38:19, 38:25, 39:4, 39:6, 39:8, 40:18, 42:6, 42:10, 42:14, 42:20, 42:23, 43:2, 43:6, 43:8 rule [4] 13:17, 13:19, 16:19, 20:21 ruled [2] 27:8, 27:22 rulemaking [6] 39:22, 39:23, 41:12,	41:13, 41:22, 42:3 rules [3] 13:18, 40:11, 41:1 ruling [2] 27:19, 28:17 rulings - 22:2 <hr/> S <hr/> sake - 35:23 Savco [2] 34:18, 35:10 saying [3] 17:11, 21:4, 33:17 says - 20:4 scale - 19:14 scheduling - 38:16 science - 13:2 scoping - 19:14 screw - 26:23 seal - 44:16 seconded [4] 8:16, 9:10, 24:25, 43:3 seconding - 24:16 secretary [5] 2:25, 23:25, 24:4, 24:13, 25:4 section - 19:12 Security - 12:15 seeing - 4:2 seems - 4:24 Senate [2] 39:19, 41:11 sense [2] 22:13, 22:14 separately - 39:14 Services [13] 5:13, 5:17, 5:20, 5:23, 6:8, 10:6, 10:12, 11:12, 11:22, 11:24, 12:11, 12:24, 13:9 several - 22:6 sewage - 40:1 Shakes - 7:22 she's [2] 10:18, 31:6 short [2] 33:24, 33:25 shorthand - 44:10	Sidner [4] 2:19, 2:19, 2:21, 2:23 Sierra - 33:10 sign [4] 8:20, 9:14, 25:6, 43:6 Signal [2] 31:3, 35:2 Simon [10] 5:15, 5:16, 11:7, 11:20, 11:21, 29:20, 29:23, 30:2, 30:7, 30:8 simply - 26:8 Simpson [16] 1:14, 3:12, 3:13, 9:8, 26:14, 26:15, 26:24, 27:1, 27:24, 41:9, 41:10, 41:18, 41:21, 41:25, 42:5, 42:7 siting - 39:25 six - 11:12 sketches - 9:23 slew - 14:2 smaller - 15:25 Smith [3] 1:15, 3:18, 3:19 Snowberger [8] 5:11, 5:12, 11:8, 13:6, 13:8, 31:16, 31:18, 32:18 solid [2] 15:10, 40:1 someone [4] 2:9, 3:25, 33:13, 37:21 somewhat - 16:11 sorry [2] 38:17, 40:16 sort [2] 15:10, 15:25 speak [2] 4:19, 6:19 speaking - 15:2 specifically [2] 20:2, 32:21 spectrum [3] 15:24, 16:2, 16:3	speed - 22:25 spent - 12:25 spot - 23:9 Spring - 30:20 SS - 44:3 staff [5] 4:18, 4:18, 4:21, 4:24, 10:22 staffers - 4:1 standard [4] 17:22, 18:3, 18:15, 20:24 standards [2] 16:15, 17:25 start [4] 2:7, 3:1, 10:20, 22:7 started - 32:15 state [6] 1:2, 5:10, 11:25, 14:4, 44:2, 44:7 stated - 36:19 statement [2] 24:12, 25:2 stating - 20:13 status [11] 31:19, 31:25, 32:6, 32:6, 33:14, 33:18, 33:21, 33:25, 35:9, 36:7, 37:21 statute [3] 16:15, 17:9, 20:3 stay [2] 37:5, 37:6 stayed [3] 34:9, 38:21, 38:22 Steve [5] 17:16, 19:23, 24:7, 26:20, 28:23 STEVEN - 1:13 sticking - 43:9 strange - 28:3 struck [2] 40:9, 40:17 sub - 17:11 subdivisions - 15:11 subject [2] 14:22, 15:9 subpoenaing - 40:6 substantial [5] 20:6, 20:11, 21:3, 21:11, 21:17 Sugar [2]
---	--	---	--	---	---

6:13, 37:12 suggest - 25:11 suggested - 20:9 suggestion - 23:20 summary [6] 15:23, 16:2, 34:4, 38:5, 38:6, 38:18 supplement - 14:17 supplied - 22:1 support - 20:20 supported [5] 20:22, 20:23, 21:2, 21:11, 21:16 Supreme [2] 34:8, 38:11 surprise - 41:7 systems - 40:1	33:23, 34:14, 35:15, 36:11, 36:20, 37:8, 38:4, 38:25, 39:8, 42:5, 42:6, 42:14, 43:2, 43:9 Thanks [3] 2:24, 11:18, 12:7 themselves [2] 10:8, 10:23 there's [9] 10:19, 18:6, 18:9, 19:3, 20:11, 20:16, 28:19, 28:20, 35:16 They're - 11:2 thing [3] 15:11, 23:1, 40:9 third - 12:23 Thomas [2] 4:9, 4:10 though - 13:11 throughout - 13:20 today [7] 3:5, 10:16, 10:24, 15:12, 17:2, 22:17, 40:17 track - 27:7 tradition - 6:24 Transcanada - 35:23 transcribed - 44:11 transcript [6] 1:8, 7:9, 7:13, 19:2, 22:2, 22:23 transcription - 44:11 transcripts [2] 16:13, 39:14 transfer - 13:12 transferred - 31:10 true [2] 19:7, 44:12 turn - 9:25 twist - 21:4 typically - 7:8	<hr/> U <hr/> ultimate - 21:17 unable - 32:5 unanimously [4] 8:23, 9:17, 25:9, 43:9 understand [2] 14:20, 39:20 Unfortunately - 18:21 unmute - 4:5 update [2] 33:22, 42:11 useful - 38:2 using - 44:11 usually - 7:10 Utilities - 29:19	33:8, 35:1, 35:12, 35:21, 36:15, 36:23, 40:22, 40:24, 43:10 we're [2] 21:10, 22:16 website [5] 23:17, 23:22, 24:10, 24:11, 25:2 week [2] 12:23, 36:7 welcome [3] 2:7, 2:17, 14:13 welcoming - 2:7 well-reasoned - 11:16 wending - 39:19 weren't - 22:20 Western [5] 6:13, 32:25, 37:12, 38:13, 39:2 Westmoreland [2] 29:7, 30:4 what's [5] 21:12, 27:10, 29:10, 34:5, 36:19 WHEREOF - 44:15 WHEREUPON - 2:1 whether [13] 15:7, 15:14, 17:2, 18:8, 18:12, 18:16, 18:17, 20:19, 20:21, 22:11, 27:21, 28:19, 32:8 Whittaker [2] 4:15, 4:16 whole [6] 19:5, 19:9, 19:18, 19:21, 20:10, 22:8 willing - 23:4 wish - 26:25 within [4] 13:12, 14:6, 15:13, 15:19 WITNESS -	44:15 witnesses - 40:6 WITTENBERG [29] 3:4, 3:8, 3:10, 3:12, 3:14, 3:16, 3:18, 3:20, 3:22, 4:2, 4:8, 4:11, 4:13, 4:15, 4:17, 4:23, 5:7, 5:14, 5:18, 5:21, 5:24, 6:5, 6:10, 6:14, 6:18, 6:21, 7:10, 33:19, 39:6 Woodrock - 35:9 Woods - 31:15 worries - 38:19 writing - 10:25 wrong - 32:15
<hr/> T <hr/> taken [2] 39:11, 44:8 takes - 41:13 taking - 10:15 Talen - 36:24 ten - 39:9 tend - 16:11 tends - 23:22 term [2] 13:20, 18:3 thank [53] 2:15, 2:16, 2:20, 2:21, 3:6, 3:24, 4:23, 5:3, 6:10, 6:22, 7:14, 8:14, 9:22, 10:3, 12:20, 13:4, 14:7, 14:8, 14:12, 19:22, 21:5, 22:4, 22:15, 24:6, 26:21, 27:23, 27:24, 28:1, 28:24, 29:13, 29:24, 30:3, 30:16, 30:24, 31:11, 32:11, 32:17, 32:24, 33:2,		<hr/> V <hr/> vacation - 10:15 various [2] 9:20, 9:21 Vehicle - 13:14 versus - 33:11 via [2] 1:8, 10:8 Vicki [2] 5:25, 6:2 view [2] 18:4, 21:24 Violation [2] 15:8, 29:8 vis-a-vis - 19:7 votes [2] 7:12, 7:12		<hr/> X <hr/> XL - 35:24
		<hr/> W <hr/> walk - 25:12 wanted [8] 7:6, 10:10, 17:11, 21:6, 22:8, 22:16, 22:18, 41:5 wants [4] 15:15, 18:8, 19:1, 19:9 waste [2] 15:10, 40:1 we'd - 14:10 we'll [18] 5:6, 7:15, 10:22, 25:25, 26:4, 29:6, 29:17, 30:12, 31:2,	<hr/> Y <hr/> yesterday [2] 32:7, 32:19 yet [3] 4:3, 26:16, 40:20 you'd [4] 14:9, 23:6, 26:9, 40:13 yourself [7] 4:6, 11:10, 11:19, 12:8, 12:21, 13:5, 38:1 yourselves [2] 18:23, 21:15	<hr/> Z <hr/> Zoom [2] 1:8, 10:9