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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
APRIL 7, 2023)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

April 7, 2023
9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
JULIA ALTEMUS, STACY AGUIRRE, JEN RANKOSKY,
and LEE BRUNER

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 (Board Member Reiten not present)

5 CHAIR SIMPSON: Sandy, we're ready to
6 proceed?

7 MS. MOISEY-SCHERER: Yes, sir, we are.

8 CHAIR SIMPSON: Take roll, please.

9 MS. MOISEY-SCHERER: Yes, sir. Chairman
10 Simpson.

11 CHAIR SIMPSON: Here.

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

14 BOARD MEMBER AGUIRRE: Here.

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

17 BOARD MEMBER ALTEMUS: Here.

18 MS. MOISEY-SCHERER: Board Member
19 Bruner.

20 BOARD MEMBER BRUNER: Here.

21 MS. MOISEY-SCHERER: Board Member
22 Rankosky.

23 BOARD MEMBER RANKOSKY: Here.

24 MS. MOISEY-SCHERER: Board Member
25 Reiten.

1 (No response)

2 MS. MOISEY-SCHERER: I'm not seeing he's
3 arrived yet. Board Member Smith.

4 BOARD MEMBER SMITH: Here.

5 MS. MOISEY-SCHERER: We do have a
6 quorum. And I do want to apologize. For some
7 reason my camera is not working.

8 CHAIR SIMPSON: Thank you very much,
9 Sandy. The first order of business is to review
10 and approve the minutes from our February 24th
11 meeting. Are there any comments, additions, or
12 changes to the minutes to be considered?

13 (No response)

14 CHAIR SIMPSON: Hearing none, do we have
15 a motion?

16 BOARD MEMBER SMITH: So moved.

17 BOARD MEMBER ALTEMUS: I did a second,
18 but I was on mute. Sorry.

19 CHAIR SIMPSON: I'll second it. It's
20 been moved and seconded to approve the minutes of
21 the February 24th meeting without changes. All in
22 favor, say aye.

23 (Response)

24 CHAIR SIMPSON: Opposed, nay.

25 (No response)

1 CHAIR SIMPSON: Motion carries. The
2 next order of business is introduction of new
3 Board members. I'm pleased to say we have a full
4 seven member Board once again. And what I would
5 like to do is just go down the list, and if you
6 wouldn't mind, have everybody just take about a
7 minute and tell us a little bit about yourself,
8 and also where you're from. Hopefully we'll be
9 able to have a meeting in person before too long
10 where we can meet, and become a little bit better
11 acquainted.

12 But I will start off. My name's Dave
13 Simpson. I was appointed to the Board by Governor
14 Gianforte two years ago. I'm retired, have been
15 retired for quite awhile. In my other life I
16 spent 34 years working for Westmoreland Coal
17 Company as -- primarily in coal mine permitting,
18 so it's a subject about which I know probably
19 enough to be dangerous at this point.

20 But I have also served on some other
21 boards in Helena, including Fish, Wildlife and
22 Parks Commission a number of years ago. So that
23 is my story. Board Member Aguirre.

24 BOARD MEMBER AGUIRRE: I'm Stacy
25 Aguirre. I have been on the Board for two years,

5
1 filling a position that was vacated early, and
2 then reappointed for a term through January 2027.

3 Grew up in Deer Lodge; and lived for
4 quite awhile in Butte; went to school at Montana
5 Tech; have an engineering degree -- go Diggers --
6 and have a career really professional hands-on
7 experience focused in the energy industry, mining,
8 oil and gas, including upstream, midstream,
9 downstream. So I am filling a public member role,
10 and live in Glendive.

11 CHAIR SIMPSON: Thank you, Stacy. Board
12 Member Altemus.

13 BOARD MEMBER ALTEMUS: Good morning,
14 everybody. Julia Altemus. I, too, served a two
15 year term prior to this, and I was filling in for
16 Judge Lynch who was out of Missoula. I reside in
17 Missoula. So I was reappointed by the Governor to
18 do a term, four year term, so my term will expire
19 in January 2027 as well.

20 I'm still working. I'm not retired.
21 I'm the Executive of the Montana Wood Products
22 Association, but my background is in
23 energy/national resources policy work, because I
24 worked for the US Senate for twelve years and the
25 US House for two years, and then have served in

1 other capacities along the way.

2 But I do also sit on other boards in
3 addition to this one, and as I said, I reside in
4 Missoula, and I also am the public, one of the
5 public representatives as well along with Stacy.
6 But welcome, everybody, and good to see everyone.
7 Thank you, Dave.

8 CHAIR SIMPSON: Thank you, Julia. Board
9 Member Bruner.

10 BOARD MEMBER BRUNER: Thanks, guys. I
11 looked at everybody's file before the meeting. It
12 looked like a real good crew. I'm happy to be
13 here.

14 I'm a fifth generation farmer out of
15 Montana. I was in the Air Force for a number of
16 years, got out, went to Bozeman, got a degree in
17 physics, and then went to --

18 There wasn't a lot of work for
19 theoretical physicists at the time, so I went to
20 law school in Missoula, and I practiced for about
21 30 years as a litigation attorney at a large
22 defense firm here in Montana. We did a bunch of
23 environmental law. We represented Atlantic
24 Richfield, was probably the flagship client, and
25 then a number of others.

1 I taught environmental law at Montana
2 Tech as needed for Kumar for a number of years,
3 still do that whenever he calls, but he hasn't
4 called in awhile, which is good, because there
5 never seems to be enough time.

6 I served on the petro board. I was
7 appointed there by Governor Racicot. And I
8 recently served on the Water Pollution Control
9 Advisory Council, appointed by Governor Gianforte,
10 which I resigned to take this position. I'm
11 really looking forward to it. Glad to be here.

12 CHAIR SIMPSON: Thank you, Lee. Board
13 Member Rankosky.

14 BOARD MEMBER RANKOSKY: My name is Jen
15 Rankosky, and I'm with the Flathead City-County
16 Health Department. I'm serving the Health Officer
17 role. And I was born and raised in Kalispell. I
18 got my MPH at the University of Montana.

19 And I work, I oversee the environmental
20 health program here in Flathead County, and have
21 worked within environmental health with them. For
22 twenty years I've been in public health. So
23 that's about it.

24 CHAIR SIMPSON: Thank you very much. Do
25 you prefer Jen, Jennifer?

1 BOARD MEMBER RANKOSKY: Jen is fine.
2 You can do Jennifer. I'll answer to pretty much
3 anything.

4 CHAIR SIMPSON: Okay. Thank you, Jen.
5 Has Board Member Reiten joined us yet? I don't
6 see him on the screen.

7 MS. MOISEY-SCHERER: No, sir, he has
8 not.

9 CHAIR SIMPSON: Apparently not. Okay.
10 Apparently not. Board Member Smith.

11 BOARD MEMBER SMITH: I'm Joe Smith. I
12 was appointed two years ago to the Board in the
13 community planning role. I'm an engineer by
14 trade, also Montana Tech grad, in primarily civil
15 engineering.

16 The first ten years of my career was in
17 water resources, dams, flood plain modeling, and
18 done a ton of work in development. I've served on
19 Ravalli County Planning Board for ten years now as
20 well. And for the last eight years I've been
21 working for utilities, both electric cooperative,
22 and now I'm managing the Grizzly Broadband, an
23 internet service provider in Hamilton, Montana.
24 And I live in Florence, Montana.

25 CHAIR SIMPSON: Thank you, Joe. Welcome

1 to all of our new members, and welcome back to⁹
2 those who have been on the Board up to this point.

3 So let's proceed to Item B in the
4 agenda, the briefing items. And I guess let's
5 just focus for the time being on Item 1(a). This
6 is the Oreo issue. Are there any comments or
7 questions from the Board? I have a few, but I'll
8 hold off for just a moment.

9 (No response)

10 CHAIR SIMPSON: Hearing none, I see that
11 this is scheduled for action by the Board at our
12 next meeting on June 9th, and I just want to be
13 clear on the status of the findings of fact,
14 conclusions of law, and all of the filings and
15 cross-filings with respect to exceptions.

16 Where do we stand on that, and what
17 documents are available? What are we waiting on?
18 I'm not sure who to direct that question to, I
19 suppose to either Ms. Oomens or Ms. Brown.

20 MS. MOISEY-SCHERER: Chairman, Nick
21 Whitaker from DEQ has his hand up.

22 MR. WHITAKER: Chair Simpson, can you
23 hear me?

24 CHAIR SIMPSON: Yes, I can.

25 MR. WHITAKER: Since no one else is

1 speaking up, this is Nick Whitaker, attorney for
2 the Department on this case. And just I guess
3 procedurally I can fill you in, if that's
4 appropriate.

5 CHAIR SIMPSON: Yes, please.

6 MR. WHITAKER: So the Hearing Examiner
7 in this has issued a summary judgment order, and
8 then issued an order on exceptions just setting
9 forth the procedure for filing exceptions to the
10 Hearing Examiner's summary judgment motion.

11 The deadline for filing those I think is
12 in a few weeks, I believe, and then it would be
13 ready for I guess the Board's, full Board's
14 consideration at the next meeting. So right now
15 we just have a summary judgment order issue, and
16 there's been no additional filings yet because
17 those deadlines haven't come up.

18 CHAIR SIMPSON: I see. Okay. Well, the
19 reason I'm asking the question is sometimes these,
20 when the cases come to the Board, more often than
21 not it's a rather involved process of going
22 through exceptions, and then issuing the Board's
23 decision.

24 And I suppose what I'd prefer to do at
25 this point is I'll keep in touch with Board

1 Counsel. Once we have at least the first round of
2 filings on that, plus the summary judgment, I'd
3 like to take a look at it, and make an assessment
4 whether or not, or how long, I should say how much
5 time this is likely to take at our next meeting.

6 And if it is a complex process we may
7 want to consider meeting in person. If not, if it
8 looks like it will be a fairly brief discussion,
9 then we can continue with the -- or proceed with a
10 Zoom meeting.

11 So just a heads up that I would like to
12 have as much lead time on that as possible to
13 assess how it will be approached at our next
14 meeting. Thank you.

15 The next item is 2(a). These are cases
16 in court. I see that this case was scheduled for
17 hearing I believe -- yes -- April 3rd, so it
18 should have been heard this week, earlier this
19 week. Is there any information to be -- that's
20 appropriate to pass on to the Board at this time
21 regarding that hearing before the State Supreme
22 Court?

23 BOARD MEMBER BRUNER: This is Lee. I
24 actually serve as the Deputy Clerk of the Montana
25 Supreme Court right now, and I can confirm we did

12
1 do oral argument on that case, I think it was down
2 in Missoula, and it's before the Supreme Court,
3 and in a couple months we'll probably get a
4 decision out of them.

5 CHAIR SIMPSON: Thank you very much,
6 Lee. Moving on. I don't see anything on Page 3.
7 We have MEIC versus the Department, having to do
8 with Signal Peak. That one is pending. Any
9 questions there on any of these on this page?

10 (No response)

11 CHAIR SIMPSON: 2(b) through 3(a).

12 (No response)

13 CHAIR SIMPSON: Hearing none, in the
14 matter of Item 3(a), Westmoreland Resources Appeal
15 of the Final MPDES Permit No. 21-229, I notice
16 there hasn't been any activity on this since June
17 of '20, and I was wondering if there's anyone who
18 can give a status report as to what is going on on
19 this case. Are they still working on settlement?
20 Is it likely that this will come back to the
21 Board, or is there any update on this case?

22 MS. MOISEY-SCHERER: Chairman Simpson,
23 Kirsten Bowers of DEQ has her hand up.

24 CHAIR SIMPSON: Yes, please.

25 MS. BOWERS: Good morning, Chair

1 Simpson, members of the Board. I've been working
2 with Westmoreland on this MPDES permit appeal, and
3 we are filing status reports with the Board, but I
4 think you're right. We haven't filed one for
5 awhile. And we're still continuing to work
6 through the mining system issues to update their
7 permit.

8 CHAIR SIMPSON: Thank you, Ms. Bowers.
9 Anything on Item 3(b)?

10 (No response)

11 CHAIR SIMPSON: I gather that from
12 reading this that this issue is tied in somehow
13 with the AM4 decision, and I'm not sure I
14 understand what that linkage is, and especially
15 since we have several new Board members, I wonder
16 if anybody can provide information of what the
17 relationship is between these two cases and what
18 the status is. Ms. Bordelon.

19 MS. BORDELON: Yes, Chair Simpson and
20 Board members. I represent Westmoreland in the
21 Area F proceeding, and this case has been stayed
22 because many of the procedural arguments that are
23 before the Supreme Court in AM4 would be
24 precedential and guiding in how Area F is
25 resolved. Obviously it's a different area of the

1 mine, but there are procedural issues in how the
2 contested case would proceed, and rather than go
3 forward and then perhaps redo in the event that
4 the -- depending on how the Supreme Court resolves
5 AM4, this case has been stayed waiting for the
6 Supreme Court's resolution there.

7 CHAIR SIMPSON: Thank you very much, Ms.
8 Bordelon. Any other comments or questions on Item
9 3(c), or (d) or (e) on the next page?

10 BOARD MEMBER ALTEMUS: Chairman Simpson,
11 can I go back up (b) for a second?

12 CHAIR SIMPSON: Certainly.

13 BOARD MEMBER ALTEMUS: There was
14 supposed to be oral argument before the Supreme
15 Court on April 3rd. I guess I'm just wondering if
16 that happened or not.

17 BOARD MEMBER BRUNER: (Indicating)

18 CHAIR SIMPSON: Yes, I believe so.

19 BOARD MEMBER ALTEMUS: We're waiting for
20 that decision then.

21 CHAIR SIMPSON: That's correct. We had
22 a brief review on that earlier, but it did happen,
23 so it will be a few months before we hear
24 anything, I'm sure.

25 BOARD MEMBER ALTEMUS: Okay. Thank you.

1 MS. MOISEY-SCHERER: Chairman Simpson,
2 Board Member Reiten is now joining the call.

3 (Board Member Reiten present)

4 CHAIR SIMPSON: Thank you, Sandy. I'm
5 looking at my screen here. Hearing nothing on (d)
6 and (e), how about (f), Sidney Sugars?

7 (No response)

8 CHAIR SIMPSON: I see with respect to
9 this case that Hearing Examiner Brown has issued
10 an order granting the motion for stay on February
11 28th.

12 And I guess one of the questions I've
13 had is I saw in the news that Sidney Sugars plant
14 is shutting down. So is this case likely to go
15 away for that reason, if I could ask --

16 (inaudible) --

17 MS. BROWN: Chairman Simpson, this is
18 Aislinn Brown. I'm the Hearing examiner on it.
19 So that's the reason for the stay is Counsel for
20 Sidney Sugars is figuring out what's going to
21 happen, and just needed some time to -- I asked
22 for an update, so she just needed some time to
23 figure that out, and then we'll be updating.

24 CHAIR SIMPSON: Okay. Thank you very
25 much, Aislinn.

1 Next is Item (g), request for hearing by
2 Harry Richards. There has been -- I see there's
3 been some exchange of letters on this. I'm still
4 unclear as to what this is about and what rule --
5 and under what rule it's being challenged. Is
6 this an MPDES issue, or is it something else? Is
7 there any information that -- let's see. Who is
8 -- Is there anything to be offered on this? Just
9 an update by the Department would be helpful.

10 MS. MOISEY-SCHERER: Chairman Simpson,
11 Nick Whitaker of DEQ has his hand up.

12 CHAIR SIMPSON: Oh, thank you.

13 MR. WHITAKER: Chair Simpson, members of
14 the Board. Nick Whitaker again on behalf of the
15 Department. I don't want to get too much into the
16 substance of this one, but I mean I can let you
17 know that this is an appeal of an administrative
18 order issued by DEQ for violation of the Montana
19 Hazardous Waste Act. It's relating to the dumping
20 of used oil.

21 CHAIR SIMPSON: Okay. Thank you very
22 much, Mr. Whitaker, and we'll --

23 BOARD MEMBER BRUNER: Mr. Chairman, I
24 have a question. I think this might be a good
25 place to bring it up, and it's just a procedural

1 question about these.

2 Typically the cases that go to contested
3 case hearing, do the Hearings Examiners set
4 discovery, dispositive motions, those sorts of
5 things, and then once the dispositive motions are
6 resolved, do they then set a hearing, or is the
7 hearing date set as part of the initial scheduling
8 order?

9 CHAIR SIMPSON: Ms. Brown, could you
10 respond to that, please.

11 MS. BROWN: Sure. So there's usually a
12 prehearing order that goes out, and then the
13 parties get together and kind of decide on how
14 much time is needed for discovery, and then the
15 Hearing Examiner issues a scheduling order in my
16 experience. Terisa might be able to speak more to
17 that as well.

18 MS. OOMENS: No, I think you covered it.
19 I mean the parties kind of run the discovery
20 section, and then the Hearing Examiner sets a
21 scheduling order, so --

22 BOARD MEMBER BRUNER: Sorry. My
23 question was more when that scheduling order comes
24 out, does it include a hearing date, or is it like
25 some of the District Courts in Montana where they

1 set the discovery schedule, expert witness
2 disclosures if there are some, and dispositive
3 motions briefed by this date, dispositive motions
4 are resolved, and they then set the hearing date,
5 or is the hearing date set when the scheduling
6 order initially comes out?

7 MS. OOMENS: I believe that the hearing
8 dates aren't set until dispositive motions are
9 resolved.

10 BOARD MEMBER BRUNER: Thank you.

11 CHAIR SIMPSON: Thank you, Ms. Oomens.
12 Okay. Moving forward. Any questions or comments
13 on Items (h), (i), or (j), or Item (k)?

14 BOARD MEMBER BRUNER: Mr. Chairman, I
15 have a question on Item (j).

16 CHAIR SIMPSON: Item (j)?

17 BOARD MEMBER BRUNER: Yes.

18 CHAIR SIMPSON: Please proceed.

19 BOARD MEMBER BRUNER: The last sentence
20 of that says, "CHS filed an objection and request
21 for oral argument on March 17th, 2023." Who is
22 that oral argument before? Is that before this
23 Board, is that before the Hearing Examiner, or is
24 that before some other entity?

25 CHAIR SIMPSON: It's before the Hearing

1 Examiner, I'm sure. Ms. Oomens?

2 MS. OOMENS: Yes, before the Hearing
3 Examiner.

4 CHAIR SIMPSON: Okay. Cases not
5 assigned to a Hearing Examiner. Under 4(a), this
6 has to do with the selenium issue, and that
7 concludes the background items. Before we move on
8 to action items, are there any further comments or
9 questions regarding any of these cases?

10 (No response)

11 CHAIR SIMPSON: Let's move forward to
12 Item 3(a), in the Matter of Appeal and Request for
13 Hearing by Westmoreland Rosebud Mining, LLC,
14 regarding issuance of MPDES Permit No. MT0032042
15 in Colstrip, BER Case 2022-06 WQ.

16 At our last meeting, a settlement
17 agreement was presented to the Board which was
18 approved, but with some follow-up questions on the
19 mechanics of implementing the settlement
20 agreement.

21 We have a copy of the final agency
22 decision, the order that was prepared. This was
23 primarily at my insistence, because having some
24 background in this issue, and having dealt with
25 trying to characterize water quality in ephemeral

1 streams that essentially by definition have no
2 water most of the time, I've found in my personal
3 experience to be quite challenging.

4 So I'm curious as to how the parties
5 were going to approach this. They have responded,
6 and my first question would be: Is there -- Are
7 the parties represented here to make a brief
8 statement to address this settlement agreement and
9 the questions that have been raised?

10 And I have some comments on it, but I'll
11 hold off until we've had a chance to hear from the
12 parties. Keep in mind this -- please correct me
13 if I'm wrong -- this came to us as a contested
14 case, but we now have a settlement agreement
15 before us, so it's not a matter of proponent and
16 opponent, it is a matter of the means in which the
17 parties plan to resolve this issue.

18 So is there someone from -- representing
19 either the Department or Western Energy that could
20 brief us for a few minutes on the issues here?

21 MS. MOISEY-SCHERER: Chairman Simpson,
22 Mr. Mercer has his hand up.

23 MR. MERCER: Good morning, Mr. Chairman.

24 CHAIR SIMPSON: Bill Mercer. Thank you.

25 MR. MERCER: Good morning, Mr. Chairman.

1 Bill Mercer on behalf of Westmoreland. And I know
2 Ms. Bowers is here on behalf of the Department.

3 We believe that we have satisfied the
4 Board's order by the filing that we made on the
5 24th of March, and we know that there is an
6 interest in some reporting to keep the Board
7 apprised of progress that parties are making
8 pursuant to the stipulation.

9 I think our thought would be that a
10 quarterly report would be something that we'd
11 recommend to the Board, if that's acceptable. And
12 we hope that we have answered the questions in a
13 way that is responsive to the order that you
14 issued. We believe that we have responded in a
15 comprehensive way.

16 And I guess the only other thing I would
17 like to add at this point is that we have a new
18 complaint that's been filed in State District
19 Court -- obviously not a matter in front of the
20 Board, but a matter in State District Court --
21 challenging actions of the Department, and taking
22 issue with what the Department has done with
23 respect to my client.

24 And so I think our preference would be
25 to rely on what we've submitted to you as

1 responsive to the requests, and not go into
2 further dialogue on that, as we are likely to be
3 trying to intervene in that litigation, and
4 defending what the Department has done, and what
5 the applicant is seeking to do.

6 So happy to follow up on that, but I'm
7 sure Ms. Bowers would like to be heard as well,
8 Mr. Chairman.

9 CHAIR SIMPSON: Thank you, Mr. Mercer.
10 Ms. Bowers.

11 MS. BOWERS: Chair Simpson, members of
12 the Board. Yes, I agree with Mr. Mercer's
13 comments. We were just filed with the complaint
14 on this MPDES permit, and some of the claims at
15 issue are hydrologic condition of the receiving
16 waters, as well as protection of uses, and
17 avoidance of downgradient impact.

18 So DEQ would prefer not to go into too
19 much further detail than what we provided in our
20 written responses, because we're developing a
21 response to the complaint at this time.

22 And then just to add. We could provide
23 regular updates to you, if you want to move this
24 to your briefing agenda. We would be happy to do
25 that. In the Rosebud case, which I kind of call

1 the main MPDES permit, that did stay on the
2 Board's agenda, and we regularly updated you on
3 what the status of the litigation was, just in a
4 general way, just to say that we were briefing
5 motions, or that a matter was fully briefed and
6 pending before the District Court. It would just
7 be a simple update of the litigation.

8 CHAIR SIMPSON: Is it appropriate or
9 inappropriate to ask what the subject of the
10 District Court litigation is?

11 MS. BOWERS: Chair Simpson, Board
12 Members, the complaint is on the MPDES permit for
13 the AM5 expansion, and the claims are based on the
14 ephemeral, DEQ's ephemeral rule, and protection of
15 uses for receiving waters. That's pretty general,
16 but that's basically what the complaint is.

17 CHAIR SIMPSON: Thank you very much.
18 Board Members, any comments or questions?

19 BOARD MEMBER BRUNER: This is Lee. I
20 have a question for either Bill or Kirsten,
21 whoever. Who is going to be the Judge in that
22 case?

23 MR. MERCER: Judge Murnion has been
24 assigned the case. I think it is conceivable that
25 any of the parties could seek reassignment under

1 33-1-804, but for now, the case is assigned to
2 him.

3 BOARD MEMBER BRUNER: Thanks, Bill.

4 MS. MOISEY-SCHERER: Chairman Simpson,
5 Board Member Aguirre has her hand up.

6 CHAIR SIMPSON: Board Member Aguirre.

7 BOARD MEMBER AGUIRRE: Based on the
8 responses from Mr. Mercer and Ms. Bowers, I want
9 to make sure I'm clear that we're really being
10 asked by both parties, based on their joint
11 response to the questions, to just accept the
12 responses, and because they were -- it was a joint
13 agreed-to responses, and to move on then to --
14 move on to getting updates, and that there's
15 another matter going on there that we're not part
16 of. Is that a correct general statement about
17 where we're at with this action?

18 MR. MERCER: Let me start, and I'm sure
19 Ms. Bowers will have additional thoughts as well,
20 but I would --

21 My starting point on this, Board Member
22 Aguirre, would be to say we had initiated an
23 appeal, but then both Westmoreland as the
24 appellant and DEQ as the appellee agreed to
25 resolve the appeal pending before the BER pursuant

1 to the stipulation that we filed on the 10th of
2 December of 2023.

3 And so we believe that by doing the --
4 by filing the stipulation and having the
5 stipulation accepted by the Board, we have
6 resolved on a preliminary basis the matter that we
7 had initiated in front of the Board.

8 The Board has retained I think a
9 continuing jurisdiction, and that's why we
10 responded to the order, but I do believe --
11 speaking on behalf of Westmoreland -- that we
12 believe that we have resolved the matters through
13 the stipulation, and that we have responded to the
14 Board's order, and that that should, at least at
15 this point in time, resolve the matter as it was
16 initiated.

17 And we certainly believe it would be
18 appropriate to come back to you and explain what
19 we're doing pursuant to the stipulation; and then
20 as Ms. Bowers has noted, and as I noted as well,
21 with the pendency of this new litigation, I think
22 for us to get into further detail beyond what
23 we've done pursuant to our response, our joint
24 response to your order, really goes beyond what
25 would be appropriate, but in the first instance we

1 think we've resolved the matter based upon the
2 stipulation which you accepted in your last
3 meeting.

4 BOARD MEMBER AGUIRRE: Thank you for
5 that clarification.

6 CHAIR SIMPSON: Further questions from
7 the Board?

8 BOARD MEMBER ALTEMUS: Chairman Simpson,
9 I guess I would take Ms. Bowers up on her and Mr.
10 Mercer's offer to keep us informed as things move
11 forward, just as maybe a matter of information and
12 courtesy, but I do agree that since they've
13 stipulated, and we agreed to that, that I think
14 ends our involvement at this point in time.

15 CHAIR SIMPSON: Any other comments?

16 BOARD MEMBER REITEN: I would agree 100
17 percent with that. It sounds like they've
18 resolved things. We don't really have to -- you
19 know. I think we can go along with their
20 resolution.

21 So anyway, I want to apologize for being
22 late today, but I normally do this out of my
23 office, and Montana Tech computers were down
24 today, so that's my -- I finally had to run home
25 and figure out how to get on, so that's why I'm

1 here. Thanks.

2 CHAIR SIMPSON: Thank you, Jon. Welcome
3 to the meeting. My voice is struggling here a
4 little bit. Any other comments on this?

5 MR. MERCER: Mr. Chairman, I guess I
6 think we would benefit from clarification from the
7 Board as to whether a quarterly update is
8 acceptable, or whether you wanted a different time
9 period. We want to -- it was our impression from
10 the agenda that the Board would like to have an
11 update, and if that's the case, we just want to
12 make sure we have clarity on the frequency of the
13 update.

14 CHAIR SIMPSON: I'll respond to that,
15 Mr. Mercer, if I might. I guess we have two
16 options here. One is a quarterly or scheduled
17 reporting. Another is reporting as milestones are
18 met.

19 And in looking at Response No. 2, which
20 talks about the collection or evaluation of
21 existing data, compilation of existing data, do
22 you have any idea how long that process will take?

23 MR. MERCER: Mr. Chairman, I think at
24 this point we don't. I don't think we could give
25 you an immediate forecast.

1 We know from Paragraph 21 of the
2 stipulation that we're hoping within 60 days that
3 DEQ will provide a quality assurance plan, and
4 then we've got a review period after that. So
5 there are, with those fairly limited number of
6 exceptions, some time frames in the stipulation,
7 and some of those would occur within the quarter,
8 this quarter, and probably we could have a report
9 that was filed, say, by July 1 that would capture
10 that, if that was something the Board was
11 interested in.

12 CHAIR SIMPSON: Well, quarterly
13 reporting doesn't exactly jibe with the Board's
14 schedule. We meet every two months, and I don't
15 know that in two months there will be sufficient
16 progress.

17 But maybe the way to approach this would
18 be the way we -- in sync with the way we report
19 progress on all of the cases that are before us,
20 that is, just an update at each meeting, and then
21 when you get to a point where there's a product to
22 present, that is, the compilation of data and what
23 was learned from it.

24 I mean I'm assuming that Rosebud Mine
25 has been operating for fifty years or more, and

1 there has to be a considerable data base out
2 there. I don't know how far back in time you'd
3 want to go, but there are numerous, certainly
4 numerous permitted discharge points there where
5 the data collection can be compiled.

6 So does that make any sense? Just to
7 give us a status report, even if it's a single
8 sentence saying, "Work is continuing," as we
9 approach an end point, so we can be informed at
10 that time.

11 MR. MERCER: That's satisfactory for my
12 client, if it's satisfactory for DEQ, Mr.
13 Chairman.

14 CHAIR SIMPSON: Ms. Bowers.

15 MS. BOWERS: Chair Simpson, members of
16 the Board. So just to clarify, would you then
17 just put this on your briefing items, and every
18 meeting we'll just let you know where we're at,
19 both with the stipulation, the tasks under the
20 stipulation, and maybe update you on the
21 litigation?

22 CHAIR SIMPSON: Yes, please. That's
23 what I have in mind. Is that satisfactory to the
24 Board?

25 MS. BOWERS: That's acceptable to DEQ.

1 CHAIR SIMPSON: Do we need a motion on
2 that? I'm asking Counsel.

3 MS. ALTEMUS: I was just going to ask
4 that.

5 CHAIR SIMPSON: Ms. Oomens.

6 MS. OOMENS: Sorry. I'm having issues
7 with my mike this morning. Yes, I would make a
8 motion on it, yes.

9 CHAIR SIMPSON: Do I hear a motion?

10 BOARD MEMBER ALTEMUS: I can take a stab
11 at it. Go ahead. Board Member Bruner, go ahead.

12 BOARD MEMBER BRUNER: So moved.

13 CHAIR SIMPSON: Second?

14 BOARD MEMBER REITEN: I'll second it.

15 CHAIR SIMPSON: A motion has been made
16 and seconded. Any further discussion?

17 (No response)

18 CHAIR SIMPSON: All in favor, signify by
19 saying aye.

20 (Response)

21 CHAIR SIMPSON: Opposed, nay.

22 (No response)

23 CHAIR SIMPSON: Motion passes. Thank
24 you very much.

25 Before we leave this subject, there is a

1 comment or two that I wanted to follow up with.

2 When we first saw this subject come up,
3 that is, the settlement agreement that we reviewed
4 at the last meeting, it occurred to me that
5 probably more than half of our contested cases
6 that we have before us have to do with MPDES
7 permits or permit renewals, and that over the last
8 several years there have been a significant number
9 of those that have had to do with coal mine
10 sediment ponds.

11 So I got to thinking whether or not
12 there is some programmatic way we could approach
13 this if we could understand just what the issues
14 are. Given the fact that there's litigation out
15 there now on this particular subject, that seems
16 to me to be perhaps not a road we want to go down
17 right now.

18 But it just seems to me that we need to
19 -- where we have an opportunity, this Board should
20 be proactive when we have similar matters coming
21 before us time after time.

22 So just something to keep in the back of
23 our minds. I won't pursue that any further at
24 this point. I guess I'd ask if there are any
25 other thoughts on that before we move on. I don't

1 think we need a motion or anything.

2 BOARD MEMBER BRUNER: I think that would
3 be a great idea.

4 BOARD MEMBER AGUIRRE: I think we talked
5 about that previously on these matters, is to, on
6 reoccurring type matters, to really start maybe
7 taking those kinds of actions or approaching it in
8 that way. So --

9 BOARD MEMBER REITEN: Mr. Chairman --

10 CHAIR SIMPSON: It's rather difficult --
11 I'm sorry. Sorry to interrupt.

12 BOARD MEMBER REITEN: Mr. Chairman, I
13 would agree that it seems like if there's a lot of
14 issues that are very similar, we should be able to
15 look at it in a programmatic way. Thank you.

16 CHAIR SIMPSON: Well, I don't want to
17 get too far into the weeds here, but this issue of
18 sediment pond regulation is -- you know, it's
19 driven from several different angles.

20 One is the EPA rules under 40 CFR 434,
21 which has to do with the coal mine category, and
22 of course that is enforced in Montana through the
23 MPDES program.

24 Also under the reclamation act, sediment
25 ponds and discharges therefrom are regulated

1 pretty rigorously, and the DEQ in their
2 implementation of the reclamation act looks very
3 closely at protection of the hydrologic balance.

4 And so I'm wondering if there is a way
5 administratively and as a matter of policy to
6 somehow divide this responsibility, so that we
7 don't have the duplication that we have now.

8 This is called thinking out loud. It's
9 food for thought. I'm not proposing anything
10 specific right now, but as we move forward,
11 something that I plan to keep in mind.

12 Anything else on this subject?

13 (No response)

14 CHAIR SIMPSON: Okay. Next item. Next
15 item. Let's see. I see it's ten minutes to ten.
16 This discussion may or may not take awhile. Why
17 don't we take a ten minute break, convene at
18 10:00, nine minutes now, and discuss item 3(b),
19 the matter of Luke Ployhar.

20 (Recess taken)

21 CHAIR SIMPSON: One thing we neglected
22 to do was go through the list of everyone else on
23 the call, just so we have a complete record.

24 MS. MOISEY-SCHERER: We can do that.

25 CHAIR SIMPSON: We can do that when we

1 reconvene.

2 BOARD MEMBER ALTEMUS: And maybe Jon
3 could introduce himself since he wasn't able to do
4 that.

5 CHAIR SIMPSON: Great idea. Yes.

6 BOARD MEMBER ALTEMUS: Okay. Thank you.

7 MS. MOISEY-SCHERER: Chairman Simpson,
8 we also have some people in 111 that showed up
9 thinking that it was an in-person meeting today,
10 so I do have 111 with microphones.

11 CHAIR SIMPSON: Yes. Okay.

12 It's 10:00. Let's resume the meeting,
13 please. Sandy, would you take the roll, please.

14 MS. MOISEY-SCHERER: Chairman Simpson.

15 CHAIR SIMPSON: Here.

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

18 BOARD MEMBER AGUIRRE: Here.

19 MS. MOISEY-SCHERER: Board Member
20 Altemus.

21 BOARD MEMBER ALTEMUS: Here.

22 MS. MOISEY-SCHERER: Board Member
23 Bruner.

24 BOARD MEMBER BRUNER: Here.

25 MS. MOISEY-SCHERER: Board Member

1 Rankosky.

2 BOARD MEMBER RANKOSKY: Here.

3 MS. MOISEY-SCHERER: Board Member

4 Reiten.

5 BOARD MEMBER REITEN: Here.

6 MS. MOISEY-SCHERER: Board Member Smith.

7 BOARD MEMBER SMITH: Here.

8 MS. MOISEY-SCHERER: We have a quorum

9 here.

10 CHAIR SIMPSON: Thank you. So before we

11 move on to the Luke Ployhar matter, two items.

12 One is at the beginning of the meeting,

13 we went around the room, and each Board member

14 gave a brief, just a brief statement of who we

15 are, and where we come from.

16 Board Member Reiten, you weren't here

17 unfortunately for that part of the meeting, but I

18 wondered if you'd mind just giving a brief

19 statement for the benefit of the other Board

20 Members as to what your background is, and

21 anything else you think appropriate.

22 BOARD MEMBER REITEN: Okay. Yes. My

23 name is Jon Reiten. I work with Montana Bureau of

24 Mines and Geology in Billings, and I've been here

25 for about 35 years or so. But I've got background

1 as a hydrogeologist. I started out working as a
2 coal hydrologist in looking at the issues
3 associated with groundwater, and coal mining, and
4 went to work in several other areas in the
5 groundwater thing.

6 I did some -- looked at the oil and gas
7 mine contamination up in northeastern Montana over
8 the years, and have stepped away from that.

9 Right now I deal mainly with irrigators
10 in eastern Montana, in Sheridan County and
11 Richland County, where they're using groundwater
12 for a resource for irrigation, and basically
13 helping the local farmers in -- manage and develop
14 their resource.

15 So that's kind of what I've been doing.
16 I've been with the Bureau of Mines forever, and I
17 came out of North Dakota, schooling at University
18 of North Dakota, and experience at the State Water
19 Commission over there. So yeah, that's kind of a
20 brief summary of where I've come from. So any
21 questions, I'd be glad to answer them.

22 CHAIR SIMPSON: Thank you, Jon. Moving
23 forward, one item we neglected at the beginning of
24 the meeting is to identify others on the call
25 besides the Board members. If we could do that,

1 please, Sandy.

2 MS. MOISEY-SCHERER: Laurie Crutcher,
3 Court Reporter; Aislinn Brown, Agency Legal
4 Services; Deputy James Fehr, Montana DEQ; Kaden
5 Keto, attorney; Kirsten Bowers, attorney, DEQ;
6 Terisa Oomens, Board Counsel, Agency Legal
7 Services. We do have some people in Room 111, if
8 you would identify yourselves.

9 MR. KING: Good morning. Sam King from
10 DEQ.

11 MS. WILKERSON: Jessica Wilkerson from
12 DEQ, an attorney.

13 MS. GALVAN: Amanda Galvan on behalf of
14 Intervenors, and an attorney.

15 MR. COULTER: I'm Robert Coulter, one of
16 the attorneys representing the Fort Belknap Indian
17 Community, one of the Intervenors.

18 MS. MOISEY-SCHERER: Moving on, Angie
19 Colamaria, Legal Counsel, DEQ; Elena Hagen,
20 Paralegal, Agency Legal Services; Nick Whitaker,
21 Attorney, DEQ; Sarah Bordelon, attorney, Holland
22 and Hart; Shiloh Hernandez, attorney,
23 EarthJustice; William Mercer, attorney, Holland
24 and Hart.

25 We have somebody on the phone with the

1 last three digits 955. Would you identify
2 yourself, please?

3 (No response)

4 MS. MOISEY-SCHERER: Hello?

5 (No response)

6 MS. MOISEY-SCHERER: Okay. They have
7 not identified themselves. Ann Hedges, MEIC;
8 Barbara Chillcott, attorney; Bob Smith, DEQ;
9 Catherine Armstrong, DEQ; Colson Williams,
10 attorney, DEQ; Derf Johnson, MEIC; Emily Lodman,
11 DEQ; Kurt Moser, attorney, DEQ; Luke Ployhar; and
12 Owen Voigt.

13 (Also present Ray Stout, Kootenai Valley Record;
14 Noelle Boyer; Moira Davis, DEQ; Lee McKenna, DEQ)

15 CHAIR SIMPSON: Thank you. Is there
16 anybody else on the meeting that has not been
17 identified?

18 (No response)

19 (Luke Ployhar matter bound separately)

20 (10:06 a.m. and reconvened 10:34 a.m.)

21 CHAIR SIMPSON: Thank you. The next
22 item is general public comment. Under this item,
23 members of the public may comment on any public
24 matter within the jurisdiction of the Board that's
25 not otherwise on the agenda for the meeting.

1 Individual contested case proceedings are not
2 public matters on which the public may comment.
3 Is there any comment?

4 (No response)

5 CHAIR SIMPSON: Hearing none, let's move
6 on to the next item. Board Counsel update.
7 Anything to add that we haven't already discussed,
8 Ms. Oomens or Ms. Brown?

9 MS. OOMENS: I don't believe we have
10 anything to add, no.

11 CHAIR SIMPSON: Thank you. At this
12 point, do we have a motion to adjourn and move on
13 to our executive session?

14 BOARD MEMBER ALTEMUS: So moved.

15 BOARD MEMBER REITEN: Second.

16 CHAIR SIMPSON: It's been moved and
17 seconded to adjourn the formal meeting and move on
18 to our executive session. All in favor, say aye.

19 (Response)

20 CHAIR SIMPSON: Opposed.

21 (No response)

22 CHAIR SIMPSON: Thank you. Meeting is
23 adjourned.

24 (The proceedings were concluded
25 at 10:37 a.m.)

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 -39- 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 12th day of
April, 2023.

/s/: Laurie Crutcher

LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2024.

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