

BEFORE THE BOARD OF ENVIRONMENTAL
REVIEW OF THE STATE OF MONTANA

IN THE MATTER OF THE FORMAL) Cause No.
APPEAL CHALLENGING THE) BER 2023-02 OC
DEPARTMENT OF ENVIRONMENTAL)
QUALITY'S APPROVAL OF THE)
RIVERSIDE CONTRACTING'S OPENCUT)
MINING PERMIT No. 3415 FOR THE)
MARVIN REHBEIN SITE NEAR ARLEE)
IN LAKE COUNTY, MONTANA.)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT
(VIA ZOOM)

December 20, 2024

9:14 a.m.

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

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: What we have before us
5 this morning is in the Matter of the Formal Appeal
6 challenging the Department of Environmental
7 Quality's approval of the Riverside Contracting's
8 Opencut Mining Permit No. 3415 for the Marvin
9 Rehbein site near Arlee in Lake County, Montana.

10 As has been our standard procedure, what
11 I'd like to do here is to proceed with the
12 statements by each of the parties. I'd like to
13 limit those to 15 minutes if we could with an
14 additional five for follow-up.

15 Excuse me. The reason I'm hesitating is
16 I'm still having trouble bringing up my screen,
17 and I'm not sure. Sandy, maybe you can help. I'm
18 getting the screen "Launch the Meeting," and when
19 I do that it says, "To leave the meeting start
20 over." I don't want to do that. I just want to
21 get my screen back.

22 MS. MOISEY-SCHERER: If you'd like to
23 leave the meeting, then I can go ahead and have
24 you re-enter. If you want to do that, I can hold.

25 VICE CHAIR AGUIRRE: Dave, I think you

1 can just shut -- just click on the straight little
2 line at the very top of that "Launch Meeting," and
3 minimize it, and then you should have your screen.

4 CHAIR SIMPSON: Thank you very much.
5 There it is. Okay. Like I said, I'm kind of
6 illiterate when it comes to computer programs,
7 especially since I only use this once every couple
8 months. All right.

9 Moving forward then, we'll start with
10 the Petitioners. Is there someone representing
11 the Friends of the Jocko at the meeting who would
12 like to give us a statement on their position?

13 MR. COPPES: Yes. Good morning, members
14 of the Board. My name is Graham Coppes, and I
15 represent the community of Arlee in its opposition
16 to the instant mining proposal.

17 The community opposes this project
18 because quite simply, the State of Montana has not
19 conducted any meaningful analysis of how this
20 project will negatively affect the health of their
21 community, their critical water resources, or
22 their cultural identity, all of which are required
23 by the Montana Constitution and the Opencut Act.

24 The plain language of the Opencut Act
25 mandates that DEQ only grant a permit where the

1 applicant meets the Act's burden of proof that the
2 environment will be protected. More specifically,
3 the Opencut Act lays out a clear obligation on DEQ
4 to protect natural resources, to protect aquatic
5 resources, in every mining permit that it issues,
6 and it requires this in various places, both in
7 the administrative regulations and in the
8 statute's plain language.

9 The balancing of its obligations to both
10 grant permits and protect the environment is found
11 directly at the forefront of the Opencut Act.

12 First and foremost, the Act states that
13 the Legislature's intent in passing the law is to
14 be mindful of its obligations under Article II
15 Section 3 and Article IX of the Montana
16 Constitution. It is the Legislature's intent that
17 the requirements of this part provide remedies for
18 the protection of the environmental life support
19 system from degradation, and provide adequate
20 remedies to prevent depletion and degradation of
21 natural resources.

22 It goes on to state that it is the
23 purpose of this part to prevent harm to natural
24 resources, and to aid in the protection of
25 wildlife and aquatic resources. This is from

1 Section 1 of the Opencut Act itself.

2 As we saw this week in DEQ's landmark
3 loss at the Montana Supreme Court, Montana Courts
4 will not defer to agencies' interpretation of law
5 that abrogate its responsibilities to anticipate
6 and prevent harm to Montana's environment.

7 In the Held decision just this week, of
8 which I'm sure you are all aware, the Montana
9 Supreme Court proclaimed that all State agencies,
10 including this Board, must protect and carry
11 forward their affirmative obligation to ensure
12 with each permitting decision that it issues that
13 the environment will not be harmed or degraded.

14 More specifically, the Court described
15 that the delegates of the Montana Constitution
16 intended the strongest, all encompassing
17 environmental protections in the nation, both
18 anticipatory and preventative for present and
19 future generations.

20 They went on to say that these
21 provisions prohibit the State from polluting the
22 Montana environment even if the Legislature says
23 that it must. Without question, Montana's right
24 to a clean and healthful environment and the
25 environmental life support system includes a

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1 healthy aquatic system and clean water supplies
2 for the citizens, which is what's directly at
3 issue in this case before you.

4 Just as in Held, DEQ's testimony and
5 arguments in this case evidence a fundamental
6 disagreement about the scope of its obligations
7 under the Montana Constitution and its
8 implementation through the Opencut Act.

9 DEQ staff testified under oath in this
10 case that the Opencut Act does not consider, and
11 that in this case it did not consider the impacts
12 of this mining to water quality. That's from the
13 deposition of Carly Russell at Page 34 Lines 9
14 through 12.

15 DEQ also testified that it does not
16 believe that it has the authority or the
17 obligation to verify the scientific information or
18 factual information that was submitted by
19 Applicants in this case. That's from the
20 deposition of Whitney Bausch at Page 47 Lines 1
21 through 11.

22 None of this made its way into the
23 Hearing Examiner's proposed findings of fact. Yet
24 as described in the statute, this position is at
25 odds with the plain language of the Act as I just

1 described to you previously.

2 In contrast to DEQ's arguments, the
3 Opencut Act lays out a clear obligation to protect
4 natural resources and healthy aquatic system.
5 Said another way, if DEQ cannot carry out its
6 legal obligations to ensure that the permit
7 criteria are met, it must as a matter of law deny
8 that permit, and that is the same obligation of
9 this Board.

10 In relation to water quality, the
11 Legislature proclaimed directly that the purpose
12 of the Opencut Act is to protect water resources.
13 As a result of DEQ's systemic misinformed beliefs
14 about the Opencut Act, neither DEQ nor the
15 Applicant put forward meaningful scientific
16 analysis in this case, let alone undisputed
17 evidence which would support a conclusion that
18 surface water or groundwater will not be affected
19 negatively by the proposed mine.

20 The testimony of DEQ's staff in this
21 case is undisputed. I want to direct you to DEQ's
22 expert, its hydrologist Kevin Krogstad, and his
23 testimony in this case, which did not find its way
24 into the Hearing Examiner's proposed findings.

25 Under sworn testimony, Kevin Krogstad

1 testified to me in his deposition. I asked him:
2 "And so what did you do to determine the seasonal
3 high and seasonal low groundwater at the site?"
4 He answered: "I don't have the data to determine
5 that information."

6 I asked him: "So you don't have the
7 data to determine the seasonally high groundwater;
8 is that correct?" He answered: "Correct."

9 I said: "Did the Applicant provide that
10 information? Do you know?" He answered: "No."

11 I then asked him again: "So neither the
12 Applicant nor DEQ know what the groundwater level
13 is at the site? I just want to be clear. Is that
14 correct?" He answered: "Correct."

15 This single piece of testimony, Board
16 Members, is conclusive proof that Friends of the
17 Jocko must win this case as a matter of law.
18 Without knowing this information, there is simply
19 no way that DEQ can determine whether the mine
20 will interact with or harm groundwater in the
21 area.

22 In direct contrast to DEQ's testimony,
23 the testimony of Petitioners' expert Dave Donohue
24 testified as follows in his sworn deposition: "As
25 you go to the north, the northern end of the

1 permit, there is a well, which the standard permit
2 application relies upon, that shows that the water
3 level was 30 feet below the surface at that
4 location, and when compared to the elevation of
5 the opencut mine, it shows that the opencut mine
6 will intercept or mine into that groundwater."

7 That's Donohue's deposition Page 29
8 Lines 19 through 25, carrying on at Page 30 Lines
9 1 through 18.

10 However, because DEQ admits that it does
11 not know this information, yet Petitioners do know
12 the information, Friends of the Jocko has
13 prevailed in meeting its burden to show that
14 undisputed evidence establishes that the statutory
15 criteria for issuance of the opencut mine were not
16 met.

17 Yet the Hearing Examiner completely
18 ignores this information in the proposed findings.
19 You will note that there is no testimony, none of
20 the testimony that I provided to you from any of
21 these depositions, find its way into the proposed
22 findings of fact. Why is that?

23 Administrative Regulation 17.24.218 and
24 17.24.219 both require -- these are DEQ's
25 obligations under the Opencut Act as promulgated

1 regulations -- that DEQ know what the seasonal
2 high groundwater is at the site. They require
3 that the applicant provide that information to
4 them.

5 And specifically 17.24.219 says that
6 where there will be asphalt production on the
7 site, such as in this case, that DEQ must ensure
8 that that asphalt production be placed 25 feet
9 above the seasonally high water level. That's
10 because chemicals used in asphalt production can
11 directly contaminate groundwater, and thus
12 separation of those materials is imperative from
13 groundwater drinking supplies.

14 Here, as I testified, or DEQ's witnesses
15 testified, they do not know this information.
16 Neither the Applicant nor DEQ know this
17 information. I said, "I just want to be clear.
18 Is that correct?," and DEQ's expert Kevin Krogstad
19 said, "Yes, that is correct."

20 This is the same aquifer which the
21 community draws its drinking water, which supports
22 the health of the immediately adjacent Jocko
23 River, and to which all these citizens have a
24 constitutional right to a clean and healthful
25 environment.

1 Similarly, Pallew Creek is listed as an
2 intermittent stream by the United States
3 Geological Survey National hydrologic data set,
4 and is shown on the USGS map as passing through
5 the project area. DEQ identified this information
6 in its initial review of this application.

7 The records show that the neighboring
8 property owners experienced and testified about
9 several times personally witnessing water flowing
10 over the project area, and one long time resident
11 witnessed a weather event forcing Pallew Creek to
12 flood through the project area.

13 FOTJ, my client, further elicited and
14 procured specific testimony on this issue from
15 DEQ, again through DEQ's expert Kevin Krogstad. I
16 asked Kevin Krogstad this question. I said: "So
17 is it true that the only evidence you have in
18 relation to Pallew Creek is that you couldn't see
19 it when you walked on the ground a week ago? Is
20 that true?" He answered: "Yes."

21 I said: "Okay. And you never had
22 actually been to this site prior to issuing this
23 permit; isn't that correct?" He said: "Yes."

24 Yet the Opencut Act defines an
25 intermittent stream as being below ground and out

1 of view of sight. It says at ARM 17.24.202 sub
2 (6) that a stream is that -- an intermittent
3 stream is that that is below the local water table
4 for at least some part of the year, meaning it's
5 not going to be physically witnessed on the site
6 at all times of the year.

7 The brief surface examination on one
8 single day after Krogstad had issued the permit
9 cannot in any way support DEQ's own promulgated
10 definition of an intermittent stream. In fact the
11 record evidence proves that not to be true. As I
12 indicated, the testimony of other personal
13 witnesses identifies that they had seen this both
14 above ground at various times of the year.

15 Because DEQ doesn't know the required
16 hydrologic stance of Pallew Creek, Friends of the
17 Jocko is entitled to summary judgment. The
18 Opencut Act requires that the Applicant and DEQ
19 prove that the aquifer underneath a gravel mine
20 will be protected from degradation and harm. Here
21 the record demonstrates there is no evidence to
22 support that conclusion.

23 However, in addition to water quality,
24 there were significant deficiencies in the
25 undisputed record with regards to notice, and as

1 regards to cultural resources as well.

2 DEQ notified Riverside that its
3 application was complete on April 7th, and the
4 Opencut Act requires that by April 22nd notice
5 must be posted at the site. That never happened.
6 DEQ admits that that didn't happen -- that's in
7 the record before you -- but they claim that there
8 is no harm.

9 The purpose of notice is to provide
10 citizens the opportunity to participate in
11 requesting public meetings, and requesting
12 additional information, and commenting on proposed
13 applications, etc. So harm is implicit when
14 notice is not provided in accordance with the law,
15 in addition to the fact that DEQ admits that the
16 statute was not followed.

17 In regard to cultural resources as well,
18 there is a significant dispute in the record about
19 what happened, and the disputes in the record
20 carry through the entire permitting decision. The
21 Hearing Examiner has simply sidestepped disputes
22 in the record to reach a decision that DEQ is
23 entitled to summary judgment.

24 If you look at the briefing that was
25 supplied by the parties, and if you look at the

15

1 findings of fact, you will see that there is
2 directly conflicting testimony about what
3 happened, both in relation to the cultural
4 resources comments that were submitted, and in
5 relation to how the Tribe viewed this project.

6 DEQ states that there was no comment
7 received in response to the Tribal Historic
8 Preservation Officer's participation with this
9 project. As you will see, the record demonstrates
10 that that is clearly not true.

11 The Tribal Historic Preservation Officer
12 submitted a detailed comment to DEQ about their
13 opposition to this project, about the fact that
14 this was a deeply concerning archeological site,
15 and that she said, quote, "I want to reiterate the
16 urgent need to do several archeological test pits
17 at the site. The project's operator is going into
18 the site location blind, and without any knowledge
19 of what could be damaged, and without any apparent
20 plans for mitigation should damage occur."

21 "This is a cultural property designated
22 by the Confederated Salish and Kootenai, and even
23 without surface finds, this is enough to warrant a
24 need for a full archeological investigation as
25 opposed to the surface pedestrian survey."

1 The Tribal Historic Preservation Officer
2 went on to inform DEQ before it issued the permit
3 that she said, "I am deeply concerned that no
4 archeological survey has occurred. Without
5 updated documentation for the Tribe to review, and
6 without the results of archeological test pits
7 conducted on the survey, DEQ's analysis is
8 insufficient, not complete, and neglectful of true
9 archeology. I strongly oppose further approval of
10 the project submitted by Riverside Contracting,
11 and the information provided to DEQ."

12 DEQ says that they didn't participate.
13 It belies any understanding of argument how that
14 could be true when that comment, direct quotes
15 that I just provided to you, were submitted to the
16 Agency prior to it issuing the permit.

17 Even if there was some response period
18 -- which is disputed in the record, as DEQ alleges
19 that they only had 30 days to respond, and if they
20 didn't respond after 30 days, then they were able
21 to accept this comment as not existing -- they
22 still received this comment prior to the permit
23 being issued, and it was on that day that they had
24 to fulfill their obligations to consult with the
25 Tribe under the Open-cut Act.

1 For all of these reasons, DEQ is not
2 entitled to summary judgment. At very best, there
3 are disputes in this record which preclude summary
4 judgment. At best there would be disputes in the
5 record about harm to groundwater. That's because
6 of a lack of information that DEQ had.

7 At best there would be disputes in the
8 record about whether the Tribal Historic
9 Preservation Officer communicated with DEQ about
10 its cultural concerns, and at best there would be
11 disputes in the record about the harm that the
12 lack of notice and the admitted failure to comply
13 with the notice requirements imparted on the
14 community by their inability to know about the
15 project in a timely fashion, and to communicate
16 with DEQ about their concerns.

17 At the end of the day, I want to draw
18 the Board's attention back to its constitutional
19 obligations here, and that is to protect a clean
20 and healthful environment, to anticipate and
21 prevent and protect a clean and healthful
22 environment for all citizens.

23 That cannot occur where DEQ fails to
24 comply with its own statutory obligation, and
25 where it fails to collect the requisite scientific

1 information that is necessary to make that
2 decision.

3 If the Board has any questions, I'd be
4 happy to answer them. Otherwise I'd like to
5 reserve the remainder of my time for rebuttal.

6 CHAIR SIMPSON: Thank you, Mr. Coppes.
7 We'll reserve questions until we've heard from all
8 parties. Department of Environmental Quality.

9 MS. WHITFIELD: Good morning, Chairman
10 Simpson. Can you hear me?

11 CHAIR SIMPSON: Yes.

12 MS. WHITFIELD: So good morning,
13 Chairman Simpson and members of the Board. My
14 name is Kaitlin Whitfield, and I'm here
15 representing DEQ in this matter. I expect my
16 portion of this argument to be very brief, and I
17 have laid out all the substantive arguments in
18 DEQ's exceptions briefing. Any remaining time I
19 have I'll reserve for rebuttal and answering
20 questions if the Board has any.

21 This case was fully assigned to a
22 Hearing Examiner on June 15th, 2023. Since that
23 assignment, the parties have conducted and
24 completed discovery, including depositions of
25 witnesses for both Friends of the Jocko and DEQ,

1 and written and submitted summary judgment
2 briefing.

3 Through this briefing, the Hearing
4 Examiner reviewed thousands of pages of exhibits
5 that are now part of the record upon which her
6 determination was made.

7 Today we are here to discuss the
8 exceptions filed by the parties. We are not here
9 to relitigate summary judgment motions, nor rehash
10 the merits of this case. The Board's role at this
11 stage is to determine whether it is appropriate to
12 adopt, modify, or reject the Hearing Examiner's
13 proposed findings of fact and conclusions of law.

14 While the Board may reject or modify the
15 conclusions of law and interpretation of
16 Administrative Rules in the proposal for decision,
17 it may not reject or modify the findings of fact
18 unless it first determines from a review of the
19 complete record, and states with particularity in
20 the order, that the findings were not based upon
21 competent substantial evidence, or that the
22 proceedings on which the findings were based did
23 not comply with the essential requirements of the
24 law.

25 Substantial evidence is more than a mere

1 scintilla, but may be less than a preponderance.
2 The standard of review is not whether there is
3 evidence to support findings different from those
4 made by the trier of fact, but whether substantial
5 evidence supports the trier's findings.

6 Friends of the Jocko have filed
7 exceptions in this matter, but it provides the
8 Board with zero legal authority to grant what it
9 is asking for, which is, one, to reverse the
10 Hearing Examiner and enter summary judgment in
11 favor of Friends of the Jocko; or two, remand it
12 the Hearing Examiner for a full evidentiary
13 hearing, as they now claim there are disputed
14 issues of material fact.

15 The Board does not have the authority to
16 grant either of these requests. Instead the
17 Board's sole role is either affirm and adopt,
18 affirm and modify, or reject with particularity.

19 The only legal way to reject the Hearing
20 Examiner's proposed findings of fact and
21 conclusions of law is if the Board first reviews
22 the entirety of the record, and states with
23 particularity that her findings were not based on
24 substantial competent evidence, or that her
25 conclusions were inconsistent with the law,

1 neither of which are true here.

2 As such, the Board's role today is to
3 determine whether to affirm and adopt the Hearing
4 Examiner's proposed findings of fact and
5 conclusions of law, or affirm and modify in
6 accordance with DEQ's recommendations in its
7 exceptions briefing.

8 DEQ filed exceptions for minor
9 modifications of the Hearing Examiner's proposed
10 findings of fact and conclusions of law. The
11 reason for DEQ's filing is to aid the Board in
12 being legally correct in a final agency decision,
13 as the conclusions of law DEQ requests to be
14 modified merely cites to the incorrect subsection
15 of the statute.

16 So DEQ respectfully requests that this
17 Board modify the Hearing Examiner's proposed
18 findings of fact and conclusions of law in
19 accordance with DEQ's recommendation.

20 The Hearing Examiner determined that
21 there were no issues of material fact, and DEQ is
22 entitled to judgment as a matter of law on Friends
23 of the Jocko's three claims, due to the absence of
24 evidence Friends of the Jocko produced to support
25 its claims.

1 The Hearing Examiner based her decision
2 and her analysis on what the Opencut Act requires,
3 not what the law should require, or could require.
4 DEQ agrees with the Hearing Examiner's
5 determination that DEQ lawfully issued Permit No.
6 3415, and requests that this Board adopt her
7 decision with the modifications provided by DEQ in
8 its exceptions brief.

9 I do want to touch just briefly on a
10 couple of the comments Mr. Coppes made regarding
11 depth to groundwater, which he states that DEQ nor
12 the Applicant know. I want to draw the Board's
13 attention to ARM 17.24.218 which requires a water
14 resource section that provides for the estimated
15 seasonal high and seasonal low groundwater.

16 This is typically conducted through the
17 Determining Depth to Groundwater Worksheet, which
18 was submitted here by the Applicant, and the
19 estimated low water table is 27 feet below ground
20 surface, which could be found in the permit, which
21 is Exhibit A to the record, and the seasonal high
22 is 30 feet. That is the estimated.

23 The depth of mining at the site is 12
24 feet. There is a 15 foot buffer between the
25 estimated seasonal low and the estimated seasonal

1 high.

2 Additionally, in terms of his comments
3 that DEQ is required to consult with the
4 Confederated Salish and Kootenai Tribes THPO, the
5 Opencut Act requires consultation with the State
6 Historic Preservation Office. There's no question
7 that that happened here. That is what the Opencut
8 Act requires.

9 I will save any remaining time for
10 rebuttal and questions.

11 CHAIR SIMPSON: Thank you, Ms.
12 Whitfield. Mr. Stermitz.

13 MR. STERMITZ: Thank you, Mr. Chairman.
14 Can you hear me?

15 CHAIR SIMPSON: Yes.

16 MR. STERMITZ: Very good. There are a
17 number of dogmatic and absolute statements made by
18 the Appellants here that are directly at odds with
19 the record that you have before you, and those
20 primarily include three areas: Notice to the
21 public of the project; groundwater and surface
22 water protection -- and I'll include in that both
23 the standard groundwater worksheet that was
24 submitted and the evidence that supported it --
25 and the business about this Pallem Creek being an

1 intermittent stream that goes through the site.

2 And I think it's very telling to
3 contrast the statements of Counsel with what's
4 actually in the record. Without reading the
5 entire depositions of the DEQ staff that were
6 mentioned in argument, it's difficult to put this
7 into context, but I would say -- and I don't mean
8 to be flippant about it -- what are you going to
9 believe, your lying eyes, or something else?

10 DEQ actually submitted a deficiency
11 notice to Riverside about calculating depth to
12 groundwater, so the statement that they don't know
13 or that no one knows is just simply incorrect.
14 Monitoring wells were placed at the site to
15 capture data in locations that was most likely to
16 be as informative as possible.

17 That supported the depth to groundwater
18 worksheet, and we just heard -- and you can see
19 for yourself -- starting at Bates No. 1224 in the
20 record that's before you, all of the depth to
21 groundwater analyses.

22 I'd also like to comment that the
23 community of Arlee is not on record as being
24 against this project. They're not a party.
25 There's no entity to that effect that submitted

1 any comments here. There were plenty of comments
2 certainly, and those are in the record, but it's
3 not accurate to say that the community is against
4 this.

5 Another theme here is -- and DEQ just
6 touched on it -- the idea that the constitutional
7 obligations of the State in light even of the
8 brand new ruling that came out on the well-known
9 climate litigation case, that those obligations
10 were violated here.

11 It's important to remember that in the
12 Held case, and in other litigation in fact that
13 Counsel for the Appellant here is involved in,
14 challenges were made to the constitutionality of
15 the statutes that were at issue. That's not the
16 case here. There's no challenge to the
17 constitutionality in this case.

18 And so as DEQ put it, if the statute is
19 followed, then that's what's required, that's what
20 was done, and that's what's legal. What somebody
21 may prefer is an issue for some other time and
22 some other place, but it's not here.

23 Lastly, on the record, I'd like to point
24 out that the idea that DEQ abrogated its
25 responsibilities here from the permitting

1 standpoint, who is my client, is pretty hard to
2 swallow, because we responded to DEQ multiple
3 times with notices of deficiency.

4 The statutory criteria that DEQ is
5 required to follow, and that we're required to
6 follow, and that Riverside in other sites has
7 plenty of experience with, is designed, as you can
8 see in the briefing, to address the most likely
9 pathways to any kind of environment degradation
10 that could occur.

11 And one of the things that tends to get
12 ignored, I feel, in these discussions is that when
13 the permit issues, it comes with a ton of
14 conditions, and if the applicant has met the
15 permit requirements to obtain it in the first
16 place, that's not where the protections stop.
17 Nobody walks away from this and forgets about it
18 through the mining process that occurs.

19 There are requirements, including
20 requirement to maintain a certain depth, a certain
21 distance between the floor of the mine and any
22 groundwater; there are requirements for what
23 happens if you encounter any water in the site;
24 and DEQ of course has enforcement authority over
25 all of that; and there are requirements that

1 pertain to any asphalt processing, or air quality,
2 or any of the other things that could
3 theoretically be encountered during the mining
4 process.

5 So from the Applicant's perspective, the
6 statute is protective of the resource, and we
7 complied with what DEQ wanted and with the letter
8 of the statute. Thank you.

9 CHAIR SIMPSON: I can't hear you.

10 MR. STERMITZ: I conclude my remarks,
11 Mr. Chairman.

12 CHAIR SIMPSON: Thank you, Mr. Stermitz.
13 Follow-up and rebuttal, Mr. Coppes.

14 MR. COPPES: Thank you. Members of the
15 Board, DEQ told you that you had the option to
16 reject the Hearing Examiner's findings -- that's
17 correct. We agree about that -- and you have the
18 authority to reject those findings where there is
19 not substantial evidence to support the findings,
20 or you have the option to reject those findings
21 where you believe and see that there was not
22 compliance with the law.

23 This rejection is appropriate here
24 because neither the Applicant nor DEQ offered any
25 argument which undercuts the undisputed testimony

1 that is in the record. This is sworn testimony of
2 DEQ's staff members about the facts relevant to
3 this case.

4 Mr. Stermitz said that they knew the
5 information about the groundwater at the site. He
6 said that they would protect the groundwater at
7 the site because they know this information. But
8 neither he nor DEQ offered any rebuttal to DEQ's
9 own staff hydrologist who testified, and this is
10 Krogstad's deposition Page 17 Line 5 through 25.

11 So I asked him: "So you don't have the
12 data to determine what the seasonal high
13 groundwater at the site; is that correct?" Mr.
14 Krogstad responded: "Correct."

15 I then said, "Did the Applicant provide
16 that information to you? Do you know?" He
17 answered: "No."

18 I then followed up. "So neither the
19 Applicant nor DEQ know what the seasonal high
20 groundwater level is at the site? I just want to
21 be clear. Is that correct?" He said: "Correct."

22 This is undisputed evidence that they
23 did not comply with the Opencut Act's own
24 regulations. The statute requires that they know
25 an estimate, as Ms. Whitfield says, in one part,

1 but it also requires that if there's going to be
2 asphalt generation on the site, that they have to
3 be able to identify that it's going to remain 25
4 feet above that production location.

5 You cannot maintain that 25 foot buffer
6 if you don't know where the seasonal high
7 groundwater is at the site. Thus DEQ violated
8 both its requirement to know the estimate, because
9 Krogstad said it does not know the estimate, and
10 that the Applicant did not provide that
11 information to DEQ, but they also violate their
12 own ARM administrative regulation 17.24.219, where
13 they have to require that the asphalt production
14 maintain a 25 foot separation between the
15 seasonally high groundwater.

16 That simply is not possible where
17 neither the Applicant nor DEQ know that
18 information, and admit it. Why did that not find
19 its way into the proposed findings of the Hearing
20 Examiner? Why is that information not in front of
21 you?

22 There cannot be substantial evidence
23 supporting those conclusions and findings where
24 there is directly contradictory evidence in the
25 record. DEQ flat out ignores this testimony and

1 offers no explanation for it.

2 So they want you to focus on what the
3 statute and the regulations require, and not think
4 about your constitutional obligations. You have
5 everything in front of you, both under the statute
6 and DEQ's regulations implementing that statute,
7 to reject the findings in whole.

8 Mr. Stermitz said that they complied
9 with the letter of the law, but he does not
10 dispute, and neither does DEQ, that they did not
11 post notice at the site as required by the
12 statute. That is admitted in the record.

13 They do not dispute that the Tribal
14 Historic Preservation Officer communicated with
15 DEQ that they were gravely concerned about this
16 project interfering with culturally designated and
17 protected property values. Again, this is
18 undisputed information in the record. It
19 undercuts any substantial evidence that could
20 support the proposed findings, and gives you all
21 of the authority you need to reject this proposed
22 set of findings of fact and conclusions of law.

23 Beyond all of that, what we saw this
24 week is the Montana Supreme Court telling every
25 State agency, including this Board, that it has an

1 obligation to deny permits where they cannot
2 establish that the environment will be protected.
3 Montana's clean and healthful environment is
4 implemented specifically through the express
5 language of the Opencut Act.

6 Thus this Board has the express
7 directive and clear authority granted by the
8 Montana Supreme Court to reject this application
9 and the proposed findings on that basis alone.

10 Thank you. Unless the Board has any
11 questions, I'll conclude my time.

12 CHAIR SIMPSON: Thank you, Mr. Coppes.
13 Ms. Whitfield.

14 MS. WHITFIELD: Thank you, Chairman
15 Simpson. I'm actually going to ask Sandy if she
16 wouldn't mind promoting Mr. King to panelist.
17 He's actually going to take the rebuttal. He is
18 co-Counsel on this case.

19 MS. MOISEY-SCHERER: He's being promoted
20 at this time.

21 MR. KING: Good morning, Board Chair and
22 Board members. Can you hear me?

23 CHAIR SIMPSON: Yes.

24 MR. KING: Just real quick, I'd like to
25 touch on a few points, and I think it's getting

1 lost here potentially in translation.

2 The Board, like DEQ, is a creature of
3 statute. We're only entitled to do what we can
4 based on the authority that we've been granted by
5 the Legislature. We can't act outside the bounds
6 of that authority.

7 What Mr. Coppes is suggesting is simply
8 untenable. Neither the Board nor DEQ can
9 circumscribe what our statutory authority is to
10 act how we see fit. All we can do is what is
11 required under the statute.

12 For DEQ's purposes, what that means is
13 when an applicant satisfies the criteria for a
14 permit, we need to grant it. When, like here,
15 there's an issue before the full Board, and the
16 Board assigns a Hearing Examiner who hears the
17 case, issues proposed findings of fact and
18 conclusions of law, and then it's up to the Board
19 to review those proposed findings of fact and
20 conclusions of law.

21 The Board needs to satisfy itself under
22 2-4-621 of -- not substantial evidence in the
23 record to support any of those particular
24 findings, based on particular evidence, and that
25 just isn't the case here. And if the Board goes

1 outside of that authority, that is an abuse of
2 discretion. There's a long line of US Supreme
3 Court cases that have recognized this.

4 And essentially that's what Mr. Coppes
5 is asking this Board to do, is to decide what it
6 should be doing, and take matters into its own
7 hands, impart obligations into the Opencut Act
8 that don't exist, and make a determination that
9 isn't in compliance with the law that we're
10 required to uphold. I urge the Board to avoid
11 that outcome.

12 A couple points here, and I want to
13 start with this issue of water quality, is much
14 has been made about this depth to groundwater, and
15 as you hear Mr. Coppes tell it, there's a
16 suggestion that folks need to know with certainty
17 what exactly the groundwater depth is, and that's
18 just simply not the case.

19 In fact, you can mine into groundwater
20 with an operating permit for a gravel mine.
21 There's nothing in the Opencut Act that precludes
22 that from happening. In fact, it happens all the
23 time. That's not to conflate the Opencut Act with
24 a water quality permit, which is a separate
25 consideration, and which is not at issue here.

1 The entire purpose of the Opencut Act is
2 a reclamation obligation, and to consider what an
3 applicant has to do upon conclusion of an
4 operation to restore the land. That's the
5 question, and from that question, then it flows
6 what kind of water resources may be impacted from
7 the mine so that you can account for those in your
8 reclamation obligations. That's what the purpose
9 is.

10 Exhibit O -- and as the Hearing Examiner
11 pointed out, DEQ did perform an informal review of
12 the groundwater information, consisted of reviews
13 of aerial photography, review of well logs, and a
14 web soil survey to consider the information that
15 was submitted by Riverside.

16 It's undisputed that Riverside did
17 submit, as consistent with ARM 17.24.218, a depth
18 to groundwater analysis, and in that specific
19 regulation, it says you're determining the
20 estimated depth of groundwater based on various
21 resources which may include well log information.

22 The Applicant provided well logs that
23 indicated what that depth to groundwater was.
24 CSKT's own engineering department agreed with the
25 Applicant's submission that the depth to

1 groundwater was approximately 30 feet below ground
2 surface.

3 And in fact, even in the permit it
4 states if you intercept groundwater, the remedy
5 for that is simply just to backfill three feet.
6 So were that to be the case, it's actually not
7 that big of a deal, and there wouldn't be a
8 violation in enforcing this permit unless the
9 Applicant didn't do so. So I just want to make
10 that clear.

11 Now, Mr. Coppes says that their
12 hydrologist in fact knows with certainty the depth
13 to groundwater, but he never testified to that.
14 In fact, he agreed that the well logs were, quote,
15 "a good start for determining a depth to
16 groundwater." That's what an estimation is.
17 Again, there's nothing that requires certainty
18 here.

19 And in fact, their own monitoring wells
20 -- and granted, these were drilled after the
21 permit was issued -- actually showed that the
22 depth to groundwater is approximately 60 to 80
23 feet below ground surface, and their hydrologist
24 knows that because he learned that information on
25 the Rule 34 site inspection that was requested by

1 Friends of the Jocko.

2 The other thing I'd like to point the
3 Board's attention to is ARM 17.24.219, which Mr.
4 Coppes has brought up in regards to asphalt
5 generation, and I urge the Board to read that
6 regulation in its entirety.

7 And really what that regulation means is
8 upon conclusion of an opencut operation, you
9 cannot bury asphalt on site if it's not at least
10 25 feet above the groundwater depth. There is
11 nothing that permits Riverside to bury asphalt on
12 the site, and it shouldn't be conflated with
13 asphalt generation. That's fundamentally a
14 different question here.

15 And ARM 17.24.219 is thus completely
16 irrelevant for this purpose because it doesn't
17 have any bearing on the depth to groundwater in
18 this situation.

19 The Hearing Examiner recognized this,
20 and at summary judgment stage, you can bring up
21 some certain facts, but not all facts are
22 material. Whether or not a fact is material is
23 based on the statutory or regulatory claim you
24 have.

25 So to say that DEQ doesn't know with

1 certainty about what the depth to groundwater is
2 isn't material if there's nothing in the statute
3 or regulation that requires the Agency to know
4 with certainty. The question that needs to be
5 answered is: Did the applicant provide
6 information to the agency sufficient to comply
7 with the law to get a permit? On that basis
8 alone, it's undisputed.

9 Touching briefly on Pallew Creek, this
10 is another -- I believe Mr. Coppes originally
11 represented that there was testimony. In fact
12 there wasn't. There was submissions of comments
13 in response to the EA, and in fact none of those
14 submissions of comments ever offered that Pallew
15 Creek ran through the site.

16 What Mr. Coppes is arguing is that an
17 intermittent stream may flow below the surface of
18 the ground, and that's not accurate with regards
19 to the definition of an intermittent stream. To
20 have a stream requires flow of water on the
21 surface of the ground.

22 And the reason for having to know
23 whether there is a stream that runs through the
24 site, the purpose of that regulation is so that
25 you can reconstruct the bed and bank channels at

1 the conclusion of an operation.

2 There's no evidence in the record that
3 Pallew Creek has flowed through the site in many
4 years, and in fact, Dave Donohue, their expert,
5 agreed with that statement, and in fact testified
6 that Pallew Creek is captured by the "K" Canal
7 approximately a mile from the site.

8 So Friends of the Jocko's entire
9 argument is based on this speculation that Pallew
10 Creek may one day resurface onto the site, and
11 therefore you cannot issue the permit, but that
12 doesn't make any sense because when you're
13 considering whether you need to reconstruct bed
14 and bank channels, that only means whether there
15 is currently in fact a stream through the site,
16 and on that grounds alone, it is undisputed.

17 And DEQ did an investigation. Everybody
18 agreed -- their expert, our expert -- there wasn't
19 a stream through the site.

20 My last two pieces are simply this issue
21 of public notice. Again, the only potential
22 deficiency was failure to post notice at the site,
23 and in fact, that did occur, and DEQ issued a
24 deficiency letter on that, and then the Applicant
25 went out and did post notice at two locations

1 approximately six months before the permit was
2 ever issued.

3 Beyond that, the question really is: Is
4 there any member of Friends of the Jocko whose
5 rights were prejudiced by any deficiency in
6 notice? And on that grounds alone, summary
7 judgment was appropriate for DEQ.

8 Friends of the Jocko was unable to point
9 to a single member that they need to point to to
10 show that, "I didn't know that the site was going
11 on; that I wasn't able to submit public comment;
12 and that I was deprived of some -- that I was
13 struck with substantial prejudice because of the
14 site," and they were unable to do so, because they
15 all submitted public comment.

16 They all knew this site was going to be
17 permitted. Years, literally a year before this
18 site was ever permitted, DEQ had a meeting with
19 CSKT where members of the public, including
20 Friends of the Jocko, showed up. They all
21 admitted in testimony deposition they had
22 opportunity to submit public comment at that
23 meeting, and in fact some of them did. And so to
24 suggest that one of their member's rights were
25 prejudiced is not true.

1 And then the last thing, and I just want
2 to hammer this home, this issue on cultural
3 resources. The only thing that's required is that
4 the applicant provide information that it
5 consulted with the State Historic Preservation
6 Office. That's all that's required.

7 It's not required under the Opencut Act
8 that DEQ consult with the State Historic
9 Preservation Office; it's not required under the
10 Act that DEQ or the Applicant consult with the
11 Tribal Historic Preservation Office; and so all of
12 those issues are a red herring, and even if they
13 weren't, all of those things still occurred.

14 And the only thing that Friends of the
15 Jocko points to is a single comment submitted by
16 the Tribal Historic Preservation Officer saying
17 she thought there needed to be additional
18 investigation done. But even by that very
19 comment, she acknowledges that she did have
20 contact with the Agency, and therefore even if the
21 agency were required to consult -- which is to get
22 their opinion -- DEQ did.

23 The Hearing Examiner made all these
24 findings, and all of the findings of fact that she
25 made and the conclusions of law that flow from

1 those findings are in the record, and at the very
2 least there is substantial evidence in the record.
3 And it doesn't matter if --

4 Even if Friends of the Jocko could come
5 in now at this juncture and say, "This evidence
6 was disputed. You need to remand. We need to do
7 this case again," it doesn't matter, because
8 substantial evidence can be weak, it can be
9 conflicting.

10 And I maintain that that's not the case
11 here, but even if it were, the Board still
12 couldn't reject the findings of fact and
13 conclusions of law. The appropriate course of
14 action here is to grant the conclusions of law and
15 findings of fact in the proposed FOFCOLs, and
16 finalize this case.

17 And to the extent Mr. Coppes believes he
18 has a legitimate argument, he may bring that up on
19 appeal. Thank you.

20 CHAIR SIMPSON: Thank you, Mr. King.
21 Mr. Stermitz, is there anything further?

22 MR. STERMITZ: Thank you, Mr. Chairman.
23 I'm just going to cite the Board to Mr. Krogstad's
24 deposition to hopefully drive a stake through the
25 contention that DEQ had no idea about depth to

1 groundwater at the site. And it's more -- As I
2 indicated when I first spoke, it's more
3 complicated than has been portrayed.

4 So if you look at Page 18 of his
5 deposition, which is at Bates No. 1714 in the
6 materials that are before the Board, he was being
7 asked a series of questions about seasonal
8 groundwater in relation to studies, hydrographs,
9 that were in place for different areas near the
10 site, the Jocko Valley in particular in this case.

11 And he was being asked about DEQ's
12 knowledge of that information, and whether it
13 needed to have the Applicant submit that and know
14 that in this application. And he said no, DEQ did
15 not need to know that, and he said, "The reason is
16 because it's site dependent, and that at this site
17 there's nothing that's going to cause a large
18 variation in water levels."

19 In other words, if DEQ sees information
20 suggesting that there might be a large variation,
21 then they would have more concern or any concern
22 about needing a hydrograph to determine seasonal
23 water levels.

24 And he said, "We often get applications
25 where the water level is maybe eight to ten feet

1 below the planned bottom of mining. In those
2 cases we absolutely need to know the seasonal
3 high, because six to eight feet of variation is
4 not at all unusual. When you find a site that has
5 30 to 50 feet of separation, we don't really need
6 the seasonal high and low because it's an
7 extremely unusual situation that would vary
8 anywhere near that much. Most of what we see is
9 two to three feet of annual variation." So then
10 they go on to talk further about the information
11 for the Jocko River Valley.

12 So this topic was analyzed by DEQ.
13 There were reasons for Mr. Krogstad's testimony
14 that wasn't simply an abrogation of DEQ's
15 responsibility here, and citing that testimony as
16 a deficiency in the review by DEQ is a misleading
17 statement. Thank you. That's all I have.

18 CHAIR SIMPSON: Thank you, Mr. Stermitz.
19 What I'd like to do now is to proceed with
20 questions, and once we've completed that, we'll
21 take a ten minute break, and then move on to Board
22 discussion and deliberations. So questions from
23 the Board for the Department, Friends of the
24 Jocko, or Riverside. Questions from the Board?

25 BOARD MEMBER KNUTESON: Chair Simpson,

1 this is Amanda Knuteson. I have a question. I'd
2 actually like to hear from any of the parties that
3 wanted to respond, but I would initially direct
4 the question to Mr. Coppes, if I may.

5 CHAIR SIMPSON: Yes. Please proceed.

6 BOARD MEMBER KNUTESON: So regarding the
7 notice deficiencies, the alleged notice
8 deficiencies, and the one that the Department
9 openly concedes occurred, which was the lack of
10 posted notice within that 15 day time frame, how
11 was the subsequent posting of notices and whatever
12 process followed that, or whatever --

13 I'm a little bit unclear on whether or
14 not that indeed was harmless, that lack of
15 posting, and if it was adequately cured by the
16 subsequent posting when the deficiency was noted,
17 and then the Applicant responded with the
18 postings.

19 I'd like to just hear a little bit about
20 that, because even though there is a footnote in
21 the Department's brief that advises us that we as
22 a Board are unable to reach any conclusions on
23 constitutional issues, but notices, the notice
24 statutes within the Opencut Act are unambiguous,
25 they're not really nuanced. They're very simple

1 and very clear.

2 And one of them where posting of notice
3 apparently didn't occur within that time frame, so
4 I'm trying to determine if that's on a statutory
5 basis something that we need to look at or not.
6 And I'd like to hear --

7 I guess the question would be: Since
8 that was mitigated at a later date, why isn't it
9 harmless? First from Mr. Coppes, please.

10 MR. COPPES: Thank you. As the Board is
11 aware, notice isn't just something that happens in
12 a vacuum. It has a purpose, and that purpose is,
13 "A," to provide for public participation in
14 government proceedings, and so that the public can
15 be informed of what's happening.

16 So the statute lays out a time period
17 within which that happens and is required to
18 happen. That time period relates directly to
19 other obligations DEQ has, like its obligation to
20 hold a public meeting if it receives a certain
21 number of comments and requests for a public
22 meeting during that period of time.

23 So it is directly relevant to other
24 obligations DEQ has, and it's directly prejudicial
25 to the community who doesn't receive notice

1 because it loses an opportunity, by a loss of
2 notice -- right? So when you lose notice, you
3 don't have time. When you don't have time, you
4 lose opportunity.

5 And that's what happened, is that there
6 are people that didn't have the opportunity to
7 submit comments who wanted to, and who wanted to
8 request a public meeting and did not have that
9 opportunity because the time elapsed. And that is
10 a part of the prejudice that occurred.

11 This was exacerbated by the mailing
12 notice deficiencies. So we're talking about, one,
13 that was notice that happened at the site, the
14 actual posting of a physical notice at the site;
15 but then there was also mailing notice that was
16 required to everybody that lived within
17 approximate location as required by the statute.

18 That also did not occur, because they
19 eliminated all of the leasehold interests, even
20 though those are Tribal members that hold leases
21 in perpetuity at those locations immediately
22 adjacent to the mine. So not only was there not
23 notice posted at the site, but then they also did
24 not receive notice in the mail.

25 And the Hearing Examiner issued a

1 finding, which was Finding 31 -- or 24, "Under the
2 statute, mail notice is not required to be sent to
3 leasehold owners of land," and 31, "Leasehold
4 interests like those of CSKT members are not
5 required to receive notice under the statute,"
6 that's simply not true.

7 There is nothing in the statute that
8 differentiates a leasehold interest in property
9 from that of a fee ownership in property, and in
10 fact, that's directly controverted by the trust
11 status of the land that's the issue, which is that
12 these Tribal members have lifelong leases on trust
13 properties, which is the case here.

14 So there is no reason why the
15 immediately adjacent and proximate landowners
16 couldn't have had a notice placed in their mailbox
17 except for just laziness and sloppiness on behalf
18 of the Applicant and DEQ. So failure to post
19 notice at the site and failure to provide notice
20 in the mail, both are prejudicial because of loss
21 of opportunity to provide comment, and to request
22 public meetings, and to participate in this
23 process.

24 Those are also constitutionally
25 protected rights. Article II Section 8 and 9

1 absolutely protect and fundamentally require that
2 the government provide notice to citizens of what
3 it's doing. That is implemented through the
4 Opencut Act, through the Public Participation in
5 Government Act, and then further through the
6 Opencut Act through these notice provisions.

7 So these are fundamental rights of
8 citizens that were abrogated here. "A," the
9 Montana Supreme Court has held that violation of
10 constitutional rights and these sorts of statutory
11 and public notice provisions are per se harmful.
12 Right? When the government doesn't follow
13 processes, that is per se harm. And then we
14 actually have actual harm, which is the loss of
15 opportunity.

16 So I guess and then third we provided
17 evidence and argument to the Court that this was
18 made worse by the fact that the Applicant then
19 published its third type of notice, the public
20 notice by publication in the newspaper, in a
21 different county. It didn't even publish its
22 obligation to provide public notice in the correct
23 county. It did it in a wholly different county,
24 not where the mine was located, and not where any
25 of the people would have read the local newspaper.

1 So those three things together certainly
2 are per se harm, and certainly provided a loss of
3 opportunity.

4 CHAIR SIMPSON: Thank you, Mr. Coppes.
5 Before proceeding, any response from the other
6 parties on that topic?

7 MR. KING: I'd like to respond, Board
8 Chair.

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

11 MR. KING: A couple things. So again,
12 the lack of a posted notice at the site did occur
13 six months before the permit was issued. So
14 before DEQ ever issued a permit, it sent a
15 deficiency; it required posting; the Applicant
16 complied with that obligation. Was it on time?
17 No, it wasn't on time. But then the question is:
18 Was anybody deprived of an opportunity?

19 And on that issue, in fact -- I just
20 want to let the Board know. It was in fact
21 members of Friends of the Jocko who let DEQ know
22 that there hadn't been notice posted at the site,
23 and DEQ issued that deficiency in response. So to
24 then turn around and say that members of Friends
25 of the Jocko didn't know is not true.

1 I would also like to direct the Board's
2 attention to the Liberty Cove case which we cite,
3 and it states, "At all stages of the proceeding,
4 it must be considered whether there was any
5 prejudice to substantial rights."

6 Now, it seems axiomatic to me that if
7 you're going to claim that your rights have been
8 prejudiced by your failure to participate, you
9 need to come forward with specific members of your
10 organization who weren't allowed to participate
11 because of any errors.

12 And on that, Friends of the Jocko offers
13 nothing more than speculation, and they can't,
14 because they were involved in this process at all
15 stages of the proceeding. They submitted
16 individual comments in regards to both the
17 acceptability phase and the completeness phase of
18 the application.

19 They had Counsel almost immediately also
20 submitting public comments on their behalf. They
21 submitted public comments in response to the draft
22 Environmental Assessment that was completed. They
23 simply can't point to anybody who wasn't allowed
24 to participate in this proceeding or whose voice was
25 not heard.

1 Regardless of these other claims about
2 the newspaper publication was deficient, or that a
3 public meeting was required, there weren't enough
4 votes for a public meeting to occur; and even if
5 there were, DEQ had a meeting with CSKT, Friends
6 of the Jocko members attended that meeting, and
7 ultimately were either allowed to provide public
8 comment or did provide public comment at that
9 meeting.

10 And with regards to this claim that
11 Tribal members were deprived of their rights
12 because of this leasehold interest, the thing that
13 must be, that's dispositive of this issue is that
14 when you look at the statute, it requires real
15 property ownership. Whether that should be
16 different rules in the context of a Tribal
17 Reservation boundary is really not for DEQ or the
18 Board to decide.

19 A leasehold interest is not synonymous
20 with real property ownership. They're different
21 rights. The Board Hearing Examiner went into this
22 as a conclusions of law. It's not an error
23 because the only question is under the plain
24 language of the statute. Under the plain language
25 of the statute, a leasehold interest is not real

1 property ownership. It's just not.

2 This last part about newspaper
3 publication, it says you've got to publish -- you
4 know, have newspaper publication within the
5 locality of the site. Mr. Coppes has argued that
6 a locality doesn't include Missoula, but the
7 definition of locality is "within the vicinity of
8 the site."

9 So it doesn't say anything about which
10 newspapers more people read. It's undisputed that
11 the Missoulian -- which is actually closer in
12 proximity to the site than any other publication
13 -- is within the, satisfies that definition of
14 locality. Again, the Hearing Examiner correctly
15 interpreted the law.

16 I just want to reiterate. Even if you
17 could point to other deficiencies in notice,
18 there's been no deprivation of rights or inability
19 for Friends of the Jocko to make comments because
20 the record just tells an entirely different story.

21 CHAIR SIMPSON: Thank you, Mr. King.
22 Mr. Stermitz, anything further on this topic?

23 MR. STERMITZ: I would say quickly, Mr.
24 Chairman, that the statement that because this
25 site is within the exterior boundaries of the

1 Reservation that it should be treated differently
2 when it comes to notice, I would reiterate what
3 Mr. King said.

4 But Mr. Coppes mentioned that these were
5 trust lands, and alluded to the trust
6 responsibility there, which is, as you may know, a
7 responsibility running from the federal government
8 to the Tribe. That's a legal status that is not
9 relevant to this case.

10 CHAIR SIMPSON: Thank you, Mr. Stermitz.
11 Amanda, anything further on that question?

12 BOARD MEMBER KNUTESON: The only
13 question that -- and part of the reason I'm still
14 struggling with it a little bit is that there's an
15 argument about standing with regard to some of the
16 other witnesses who it was ambiguous, were they or
17 were they not, or it was unknown if they were
18 members of Friends of the Jocko.

19 And I was just struggling a little bit
20 with the argument that potentially had physical
21 notice been posted on the site in the statutory
22 time frame, maybe the Friends of the Jocko would
23 have had more friends or more input. But that's
24 speculative. I think my questions were all
25 answered, and I appreciate all of the parties'

1 responses. That was helpful.

2 MR. COPPES: Board Member Knuteson, if I
3 may. I just want to direct your attention to
4 parts of the administrative record that's AR 301
5 through 306, and 208 through 209, and those are
6 the comments received by DEQ from both Debra and
7 Glenda Dumontier explicitly identifying themselves
8 as property owners within the half mile boundary,
9 and explicitly describing the insufficiency of the
10 notice they received, and their involvement in
11 Friends of the Jocko.

12 BOARD MEMBER KNUTESON: Thank you. I
13 did have that information.

14 CHAIR SIMPSON: Thank you very much.
15 Other questions from the Board?

16 (No response)

17 CHAIR SIMPSON: Hearing none, I do have
18 a question, more for clarification than anything
19 else.

20 Included in our packet -- and I believe
21 this was an exhibit to the Department's initial
22 brief on this, but I'm not certain -- and that is
23 a water resource analysis by -- statement by Adam
24 N. Klein (phonetic). Can someone clarify the
25 origin of that analysis?

1 MR. STERMITZ: Mr. Chairman, this is
2 Mark Stermitz. That was our expert who submitted
3 a declaration with our summary judgment filings.
4 Adam Perine is the name of our water quality
5 expert. Yes.

6 CHAIR SIMPSON: Excuse me. I can't read
7 my own writing. But anyway, just a comment.

8 In that report, there is a piezometric
9 map of the water surface, also monitoring well
10 data, that shows the high to be 41 feet below
11 ground level and the low to be 62 feet, and also a
12 discussion of the question of the status of the
13 drainage bottom that's in question here.

14 I thought it was pretty clear. And I
15 assume the other Board members have read that.
16 But I found it to be very informative as to this
17 question, and frankly dispositive in my opinion.
18 Any other questions from the Board?

19 (No response)

20 CHAIR SIMPSON: Why don't we take a ten
21 minute break, return at -- it's 10:27 now, ten
22 minutes from now -- 10:37, and then we will
23 proceed with the Board's discussion.

24 (Recess taken)

25 MR. REITEN: Chairman Simpson, I was

1 just checking to see if my microphone works.

2 CHAIR SIMPSON: I hear you.

3 BOARD MEMBER REITEN: Thanks.

4 CHAIR SIMPSON: I see everyone on
5 screen. Joe, are you with us?

6 BOARD MEMBER SMITH: Yes.

7 CHAIR SIMPSON: Thank you. I'll bring
8 the meeting back to order. Sandy, would you call
9 the roll again, please.

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

12 CHAIR SIMPSON: Here.

13 MS. MOISEY-SCHERER: Vice Chair Aguirre.

14 VICE CHAIR AGUIRRE: Here.

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

17 BOARD MEMBER ALTEMUS: Here.

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

20 BOARD MEMBER KNUTESON: Here.

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

23 BOARD MEMBER RANKOSKY: Here.

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

1 BOARD MEMBER REITEN: Here.

2 MS. MOISEY-SCHERER: Board Member Smith.

3 BOARD MEMBER SMITH: Here.

4 MS. MOISEY-SCHERER: We have a quorum,
5 sir.

6 CHAIR SIMPSON: Thank you very much.
7 Before we proceed with the Board consideration
8 here, one thing I would like to do is ask our
9 attorney Terisa to review for us once again what
10 our options are here. I believe the Department
11 Counsel did a good job of reviewing that earlier,
12 but I'd like to revisit that, along with each of
13 the options, what the likely result of that would
14 be. So Terisa, the floor is yours.

15 MS. OOMENS: So I agree. DEQ did a good
16 job of summarizing, both in their exceptions
17 response and now your options.

18 The first one would be to adopt the
19 FOFCOL in whole. That would end the case at this
20 point in front of the Board. You could also
21 reject or modify the conclusions of law, meaning
22 you think that my decision on summary judgment was
23 incorrect and needs to be changed in some way; or
24 you can reject or modify any of my findings of
25 fact, but as was previously stated, if you reject

1 a finding of fact, you have to have -- you're
2 essentially saying there's not substantial
3 evidence in the record to support that fact, and
4 you have to point to something specific in the
5 record that says it was incorrect.

6 And at that point, because we're on
7 summary judgment, if you say that there's not
8 substantial evidence to support a summary judgment
9 decision, then we would be going to a hearing in
10 this case. So these are kind of the options.

11 CHAIR SIMPSON: Okay. Any questions
12 from the Board on that?

13 VICE CHAIR AGUIRRE: Chair Simpson, I
14 have a question on that.

15 CHAIR SIMPSON: Please go ahead.

16 VICE CHAIR AGUIRRE: Terisa, on the
17 adopt, is that to adopt with any exceptions such
18 as ones made by Montana DEQ?

19 MS. OOMENS: Correct. You could adopt
20 and modify, as long as you're not changing in
21 whole a conclusion or a fact.

22 VICE CHAIR AGUIRRE: Okay. Thank you
23 for clarifying.

24 MS. OOMENS: You're welcome. Sorry. I
25 forgot to include that option.

1 CHAIR SIMPSON: Any other questions from
2 the Board?

3 (No response)

4 CHAIR SIMPSON: Thank you very much,
5 Terisa. And just for clarification, the reason
6 that I wanted to revisit that is that, at least in
7 my experience on the Board, this is only the
8 second time that we have considered a summary
9 judgment FOFCOL, and the last time had to do with
10 the Clearwater case, which we ended up remanding
11 for re-examination by the Hearing Examiner. So
12 moving forward, is there a motion?

13 VICE CHAIR AGUIRRE: So --

14 CHAIR SIMPSON: In order to proceed with
15 discussion, we need a motion.

16 VICE CHAIR AGUIRRE: I'll make a motion,
17 however I want to caveat it with the fact that I
18 am not a legal mind, or a lawyer, attorney, so I
19 may not state this properly, and if I don't, then
20 please assist.

21 I'm moving to adopt the FOFCOL, and I
22 guess modify to include DEQ's clarifications.
23 Again, I'm not exactly sure, Chair Simpson, how to
24 state that.

25 CHAIR SIMPSON: We will in the course of

1 our discussion I'm sure -- I plan to touch on all
2 of the exceptions, assuming that the Board does
3 decide to proceed with adopting the FOFCOL. So I
4 guess it's your choice whether you want to voice
5 the motion that way, or to just limit it to the --
6 at this point to the --

7 VICE CHAIR AGUIRRE: Adopting --

8 CHAIR SIMPSON: -- FOFCOL itself, and we
9 will consider the exceptions separately, consider
10 them later. Your choice.

11 VICE CHAIR AGUIRRE: I will amend it
12 then to just adopt, or amend my motion to just
13 adopt the FOFCOL.

14 CHAIR SIMPSON: Is there a second?

15 BOARD MEMBER ALTEMUS: I'll second it,
16 Mr. Chair.

17 CHAIR SIMPSON: It's been moved and
18 seconded that the Board adopt the FOFCOL as
19 presented to us by the Hearing Examiner.

20 Proceeding with discussion, in order to
21 bring a little bit of order to discussion, there
22 are four topics that I would like to discuss to
23 try to focus our discussion a little bit, and
24 those topics are: The notice and public review
25 questions that have been brought up; the water

1 resource analysis; cultural resources; and
2 standing.

3 So to start, is there any discussion
4 from the Board on the notice and public
5 participation issue in general? This has to do
6 with, of course, the question of a hearing, the
7 question of notification, questions related to
8 posting, and all of that.

9 I believe it's been covered in detail by
10 Counsel for the various parties. So does anyone
11 on the Board have any further comment for purposes
12 of discussion to be considered by the Board in
13 making its final decision here?

14 (No response)

15 CHAIR SIMPSON: Hearing none, I believe
16 we have heard enough on that issue to be able to
17 make up our minds.

18 Second is the water resource analysis.
19 This took up a lot of discussion having to do with
20 depth to water and etc. Again, the question is
21 whether there has been a sufficient data and
22 analysis to comply with requirements of the
23 statute, and also to be able to predict going
24 forward any potential impacts to the water
25 resource.

1 BOARD MEMBER REITEN: Mr. Chairman,
2 Board members. I have a couple of comments on
3 that. And I'd just like to reiterate your comment
4 about the hydrographs and things like that.

5 Unfortunately that was kind of an after
6 the fact thing. It wasn't done right away. And I
7 believe a lot of the hydrologist evaluations from
8 the company and the Friends of the Jocko people
9 were before they knew what those water levels were
10 doing.

11 And in hindsight, there's a clear
12 separation from the underlying ground water table,
13 but the way it was presented was kind of
14 unfortunate, I thought, and it was never really
15 clarified by anyone the timing of some of those
16 discussions.

17 But that's just my comment. I don't see
18 a -- There's plenty of separation between the mine
19 base and the groundwater table, based on those two
20 hydrographs that were included in the discussion.

21 And one kind of a minor, a point that
22 was brought up that may or may not be significant
23 in the long term of this, is the Pallew Creek. It
24 was clearly shown in pre -- before they put in
25 that pivot, and were irrigating that, the older

1 aerial photos clearly shows a stream coming across
2 the property, which obviously had been changed
3 after they put in the center pivot.

4 So there is a potential for a major --
5 if they have a major rain event, things like that,
6 that that channel could try to capture the water
7 again. So anyway, but that's kind of irrelevant,
8 but it's just an insight that I think might be of
9 some value. But that's it.

10 CHAIR SIMPSON: Thank you, Jon. I've
11 got a couple comments related to that also, and if
12 I go astray here, please let me know.

13 First is that the hydrograph from the
14 well pretty much affirms what was stated in the
15 application as far as depth to water. One
16 interesting point on the hydrograph, two
17 interesting points really, is that the depth to
18 water, even at the upper limit of what's been
19 observed, is nowhere near the surface. So the
20 opportunity for re-establishment of an
21 intermittent stream where the water table is above
22 the surface of the land is pretty remote.

23 Secondly, for the data that's shown, the
24 high water level was experienced in August, 20
25 feet higher than what was seen early the following

1 spring, that is 62 feet as opposed to 41 feet.

2 That tells me that it's influenced very probably
3 more by irrigation than natural processes. And of
4 course there is a center pivot on there, and there
5 are irrigation ditches in the area. So one, that
6 kind of behavior in the water level would be
7 consistent with influence by irrigation.

8 Third, like you, I took a look at the
9 aerial photographs, although I didn't go back very
10 far. I took a look at -- well, went to the state
11 property ownership site, and there clearly is at
12 least an historic drainage way that goes through
13 there.

14 I don't see evidence of an active
15 channel in recent photographs, but I think we can
16 certainly assume that in times of high snowmelt or
17 rainfall runoff, there are very likely to be
18 ephemeral flow in that drainage, but very low --
19 again, backing up to the water table -- very low
20 likelihood of an intermittent stream, if it ever
21 occurred in the first place, showing up there.

22 Would you agree with those observations,
23 Jon, or am I going wrong?

24 BOARD MEMBER REITEN: No, I agree
25 entirely. It makes sense to me.

1 CHAIR SIMPSON: Well, thank you very
2 much. Anything further from the Board on the
3 question of water resources?

4 VICE CHAIR AGUIRRE: Chairman Simpson.
5 Originally I believe in maybe our last discussion
6 about this, too, one of the main things that I
7 brought up was the application itself, and the
8 fact that the Applicant had looked to have
9 fulfilled the application requirements according
10 to the regulation and what they needed to submit
11 for information.

12 So I just wanted to kind of re-note
13 that, especially on the topic of the water
14 resources.

15 CHAIR SIMPSON: I certainly concur with
16 that observation, Stacy. Anything further on
17 water resources?

18 (No response)

19 CHAIR SIMPSON: Next cultural resources,
20 and of course, this has to do with the question of
21 State Historic Preservation Office versus Tribal
22 Historic Preservation Office.

23 I think that DEQ has made its point
24 clear for us as far as jurisdiction goes, although
25 this is a subject that was discussed quite at

1 length by Petitioners' briefing. So are there any
2 comments or discussion on, discussion points on
3 that matter, on the cultural resources?

4 VICE CHAIR AGUIRRE: Mr. Chairman, I
5 just would like to concur with Mr. King's
6 statement about the cultural resource question
7 really not being relevant as far as from a
8 cultural resource consultation standpoint for this
9 project.

10 CHAIR SIMPSON: And I certainly concur
11 with that. If the Tribe has specific requirements
12 relating to cultural resources, archeological
13 testing, those kinds of things, that's a matter
14 for the operator and the Tribe to sort out. I
15 don't see where the State has -- either the Board
16 or the Department has any jurisdiction in that
17 matter.

18 MS. MOISEY-SCHERER: Chairman Simpson,
19 Board Member Knuteson has her hand up.

20 CHAIR SIMPSON: Sorry. Amanda.

21 BOARD MEMBER KNUTESON: Thank you, Chair
22 Simpson. This doesn't relate specifically or
23 exclusively to the cultural resources issue. It
24 would primarily relate as a general comment to the
25 notice and public review and cultural resources,

1 in the sense that we've spoken before about
2 possibly some -- a little bit of murkiness with
3 regard to our Board attorney when she also serves
4 as the Hearing Examiner.

5 And for me right now, it feels to me
6 like I would really like to ask guidance from our
7 Board attorney. Even though I am an attorney, I'm
8 not functioning as the Board's attorney, and I
9 have gaps I would want to fill in for myself with
10 the benefit of our Board attorney, but because
11 she's the Hearing Examiner who gave us all of our
12 findings of fact and conclusions of law, I feel
13 slightly constrained in getting the feedback that
14 I would like.

15 So that's just a general comment to add
16 to this discussion. It is not specific to
17 cultural resources, although I would have some
18 questions I think with regard to jurisdiction on
19 that.

20 And I tend to agree. I accepted -- You
21 know, there were good arguments on both sides. I
22 would really like a little bit more feedback from
23 our Board attorney on that, but again, we've got a
24 Board attorney who is also serving as Hearings
25 Examiner, and I feel a little bit like that's --

1 I don't want to call it a conflict,
2 because I don't know if it's a conflict, but for
3 me I'm hesitant to get the full benefit of our
4 Board attorney's input based on the fact that
5 she's proposing the conclusions of law and
6 findings of fact to us today. So that's my
7 comment.

8 CHAIR SIMPSON: Understood. And thank
9 you for the comment. Terisa, do you have any
10 thoughts in that regard?

11 MS. OOMENS: I definitely understand
12 Board Member Knuteson's concerns. As far as me
13 acting as the Hearing Examiner, yes, my FOFCOL
14 should speak for itself. As far as me acting as
15 the Board attorney, if you have questions about
16 the Board process I can answer that.

17 But kind of the role that the attorney
18 position has filled on the Board is interpreting
19 the legal side to the rest of the Board, but I
20 understand your concern, and we can address it in
21 the future by having different Hearing Examiners
22 if that's what the Board would prefer.

23 CHAIR SIMPSON: Thank you, Terisa. I
24 suppose that's my thought as well is that that's a
25 separate issue that we can consider going forward

1 at a future meeting. But it is a valid point, and
2 probably ought to be addressed by the Board sooner
3 rather than later. But with respect to this
4 particular issue.

5 BOARD MEMBER KNUTESON: I think that all
6 I would add is just that this is a little bit of a
7 unique context, in that as you noted, this is the
8 only the second time that the Board has handled
9 the summary judgment scenario? Did I hear you
10 correctly?

11 CHAIR SIMPSON: Yes.

12 BOARD MEMBER KNUTESON: To me it sounds
13 like this situation more than others potentially
14 is where the friction happens for me.

15 CHAIR SIMPSON: Well, typically the
16 Board deliberations relate to a case that has gone
17 through the hearing process rather than summary
18 judgment, and so yes, I can see where there might
19 be a question there, but I think it's probably a
20 discussion that we ought to have at some point,
21 Terisa, and decide what might be a reasonable way
22 to go forward.

23 MS. MOISEY-SCHERER: Chair Simpson, Vice
24 Chair Aguirre has her hand up.

25 CHAIR SIMPSON: Please go ahead, Stacy.

1 VICE CHAIR AGUIRRE: I just wanted to
2 add on that questioning that -- and I'm not an
3 attorney. And so I felt in this case that there
4 was a benefit, and not a conflict, from having
5 that Hearing Examiner and our Board attorney being
6 the same person for this specific situation. I
7 felt it was beneficial. Again, I'm not an
8 attorney, but from a standpoint of the law and the
9 regulation itself, and that perspective, I felt
10 like that was a benefit.

11 CHAIR SIMPSON: Well, thank you very
12 much for that observation. I guess I would
13 comment that on this particular issue where we're
14 talking about State versus Tribal jurisdiction,
15 that is a whole complex area of law, and I'm
16 somewhat familiar with it having worked in my
17 other life for a coal company who was operating on
18 Crow Indian coal.

19 So it is a complex subject, but having
20 had that experience, there is jurisdiction by the
21 State, and there may or may not be jurisdiction by
22 a Tribe, depending on what their legal structure
23 is.

24 MS. MOISEY-SCHERER: Chair Simpson,
25 Board Member Altemus has her hand up.

1 CHAIR SIMPSON: Thank you. Please
2 proceed, Julia.

3 BOARD MEMBER ALTEMUS: Thank you, Mr.
4 Chair. I agree with Vice Chair Aguirre. I don't
5 think if we had another Hearing Examiner that the
6 conclusion would be different. I think we
7 benefited from this. And Terisa, you did a great
8 job. I think you're doing your job as a Hearing
9 Examiner, and you're doing your job as our Board
10 attorney.

11 So I certainly think we can have a
12 conversation moving forward, but I did not feel
13 that this was a conflict, or slighted, or I really
14 thought that we benefited. Personally I thought I
15 benefited. So I just want to say that I agree
16 with Vice Chair Aguirre.

17 CHAIR SIMPSON: Very good. Thank you
18 very much. Anything further?

19 (No response)

20 CHAIR SIMPSON: The fourth item has to
21 do with standing, and the reason I bring it up is
22 that at least in the course of reading the FOFCOL,
23 the point is made that the Petitioners did not
24 provide proof of one of their members being
25 harmed, and that was discussed, but at least in

1 terms of the FOFCOL and the record up to that
2 point, there was no affidavit, at least that I
3 saw, from any of the membership that expressed any
4 personal concern or harm that would likely be
5 caused by this operation.

6 On the other hand, Courts in Montana in
7 my recollection have been very liberal in their
8 interpretation of who has standing in
9 environmental actions. And going back to the
10 exceptions, Counsel for Riverside has requested in
11 the exceptions that all of the references to
12 standing be omitted because it really doesn't
13 affect the final outcome as proposed in the
14 FOFCOL.

15 So that being the case, I guess what
16 we're doing now is moving into the question of
17 exceptions, but what are the thoughts on the
18 Board, of Board members on this topic?

19 VICE CHAIR AGUIRRE: Chairman Simpson, I
20 agree with you that there wasn't any demonstrated
21 harm, and that also then it wouldn't have had an
22 outcome -- or an impact on the outcome.

23 CHAIR SIMPSON: Well, and the question
24 is here -- This is a case that should be decided
25 on the merits of the issues and not on legal

1 details, in my opinion.

2 VICE CHAIR AGUIRRE: I agree with your
3 assessment.

4 CHAIR SIMPSON: And so I guess I'm
5 uncertain as to the advantages or disadvantages of
6 accepting Riverside's exceptions with respect to
7 the question of standing. Amanda, do you have any
8 thoughts on that?

9 BOARD MEMBER KNUTESON: I don't
10 specifically. I actually was scrolling through.
11 I wanted to pull up the section that Mr. Coppes
12 brought up in the prior discussion, because it
13 sounded like there was some dispute as to whether
14 or not the individuals that were alleging that
15 they hadn't received the mailing were or were not
16 affiliated with the group, and that was integral
17 to the standing question.

18 But I didn't want to belabor that
19 discussion because I took up a lot of time
20 already. I don't have anything to add to that at
21 this point.

22 CHAIR SIMPSON: Thank you. And any
23 other thoughts?

24 VICE CHAIR AGUIRRE: I just want to make
25 a statement that I think Board Member Knuteson's

1 questioning and input is valuable as well, and
2 that I think that it helped to bring up the
3 ability for then everybody to speak to that again.
4 So the characterization that you took up too much
5 time by yourself, I think that what you brought up
6 was valuable, and helped me in my thought and
7 decision process as well.

8 BOARD MEMBER KNUTESON: Thank you.

9 CHAIR SIMPSON: Thank you. Is there
10 anyone on the Board who wants to -- (inaudible) --
11 filed by Riverside, or to the contrary?

12 COURT REPORTER: Mr. Chairman, this is
13 Laurie. You cut out there. Could you repeat your
14 statement?

15 CHAIR SIMPSON: What I'm asking is we've
16 moved into consideration of exceptions now, and
17 Riverside filed exceptions suggesting that the
18 Board modify the FOFCOL to eliminate the
19 references to standing, the basis being that
20 standing in environmental proceedings has been
21 interpreted pretty liberally by the Courts of
22 Montana.

23 And really what we're -- as far as
24 considering this particular matter, why it's much
25 more important from the Board standpoint, and I

1 think the public's standpoint, to focus on the
2 material issues.

3 But since the issue has been raised, I'm
4 raising it with the Board to question whether
5 there is anything to be gained by the Board
6 considering accepting the Riverside exceptions
7 with respect to standing.

8 I guess my own viewpoint on it is that
9 will be included in the record that we have
10 discussed it, and recognized it, but I think what
11 we do at this point probably is certainly not a
12 priority matter in my opinion, but I wanted to put
13 the question before the Board.

14 (No response)

15 CHAIR SIMPSON: Hearing no further
16 discussion, we'll move on to the exceptions filed
17 by DEQ.

18 VICE CHAIR AGUIRRE: There's several DEQ
19 clerical errors that look like they should be
20 incorporated, or those clerical errors should be
21 corrected.

22 CHAIR SIMPSON: Well, that's correct.
23 And is there a motion to accept the Department's
24 exceptions, and make the requisite changes in the
25 findings of fact and conclusions of law? And

1 these are -- I went through it just yesterday, and
2 to my recollection at least, they're all clerical
3 errors, both in terms of rule references, and
4 typographical errors for that matter.

5 VICE CHAIR AGUIRRE: I'll make a motion
6 that DEQ's exceptions, clerical errors, be
7 accepted.

8 CHAIR SIMPSON: The motion has been made
9 to accept for incorporation into the FOFCOL the
10 exceptions filed by the Department of
11 Environmental Quality. Is there a second?

12 BOARD MEMBER RANKOSKY: Second.

13 CHAIR SIMPSON: It's been moved and
14 seconded. Any further discussion?

15 (No response)

16 CHAIR SIMPSON: All in favor, say aye.

17 (Response)

18 CHAIR SIMPSON: Opposed.

19 (No response)

20 CHAIR SIMPSON: Motion passes. So the
21 final subject to be considered would be exceptions
22 filed by the Petitioners. Considering the
23 direction we're going on this, the Petitioners'
24 exceptions were generally in opposition to the
25 FOFCOL point by point and in general, with the

1 exception of -- There was a comment on standing
2 which I think is similar to what had been filed by
3 Riverside.

4 But beyond that, is there a motion with
5 respect -- I'm not sure we need a motion even, but
6 I'll ask Terisa. Do we need a motion to reject
7 the exceptions filed by the Petitioners, or by not
8 bringing it up is that automatically the case?

9 MS. OOMENS: I think it depends if
10 you're going to adopt the FOFCOL or not. If you
11 adopt the FOFCOL, I don't think you need to accept
12 or reject their exceptions, but if you reject the
13 FOFCOL, then you would need to address their
14 exceptions, if that makes sense.

15 CHAIR SIMPSON: It does make sense.
16 Thank you for the clarification.

17 VICE CHAIR AGUIRRE: Chairman Simpson --

18 CHAIR SIMPSON: The motion before us is
19 to accept the FOFCOL. Yes.

20 VICE CHAIR AGUIRRE: Based on that
21 question and response, do we need to look at the
22 standing then for -- if we're going to adopt, do
23 we need to look at the standing then for the
24 Riverside, if we're going to adopt, or is just as
25 you said our discussion on that matter kind of

1 just entered into the record?

2 CHAIR SIMPSON: The question of standing
3 as posed by Riverside really doesn't have any
4 bearing on the material facts of this case. It
5 has to do with the process.

6 VICE CHAIR AGUIRRE: Okay.

7 CHAIR SIMPSON: So my own view is that
8 it's immaterial from the overall standpoint --

9 VICE CHAIR AGUIRRE: Immaterial from the
10 decision -- trust is that --

11 CHAIR SIMPSON: Immaterial from the
12 effect of the decision. It is purely a legal
13 point. But as far as the question of standing,
14 it's been brought into question in the course of
15 the FOFCOL, because as I stated earlier, there
16 were no references to specific people who had
17 suffered or expected to suffer specific harm.

18 VICE CHAIR AGUIRRE: Terisa, do you have
19 a -- I saw you come on screen. Did you --

20 MS. OOMENS: No. I was just going to
21 say probably the cleanest way to do it is, as the
22 Chair said, looking at whether it affects the
23 merits of the case or not.

24 Clearly Friends of the Jocko's
25 exceptions go more towards the merits of the

1 decision, and so that kind of --

2 VICE CHAIR AGUIRRE: Right.

3 MS. OOMENS: It depends on whether
4 you're going to accept or reject were the other
5 two are less so.

6 VICE CHAIR AGUIRRE: All right. I was
7 just kind of clarifying the basis, so -- okay.
8 Thank you very much both, Chairman and Terisa.

9 CHAIR SIMPSON: Any further discussion?

10 (No response)

11 CHAIR SIMPSON: We have a motion before
12 us to accept the findings of fact and conclusions
13 of law as proposed with incorporation of the
14 exceptions filed by Department of Environmental
15 Quality, recognizing that these are clerical in
16 nature, and improve the accuracy of the document.
17 All in favor, say aye.

18 (Response)

19 CHAIR SIMPSON: Opposed.

20 VICE CHAIR AGUIRRE: What are we voting
21 on?

22 CHAIR SIMPSON: We're voting on
23 acceptance of the findings of fact and conclusions
24 of law with the --

25 VICE CHAIR AGUIRRE: On adopting.

1 CHAIR SIMPSON: -- exceptions -- On
2 adopting, yes.

3 VICE CHAIR AGUIRRE: I thought we
4 already voted on that. Did we not already vote on
5 that?

6 BOARD MEMBER ALTEMUS: No.

7 CHAIR SIMPSON: Well, am I missing a
8 point here?

9 BOARD MEMBER ALTEMUS: No. We've been
10 talking about the exceptions that --

11 CHAIR SIMPSON: We did not vote on it?

12 BOARD MEMBER ALTEMUS: No. We just did,
13 but --

14 VICE CHAIR AGUIRRE: Oh, okay. I
15 apologize.

16 CHAIR SIMPSON: What we did -- It's been
17 a little while back, and my memory was a little
18 fuzzy on it, too. But we had the motion, you'd
19 made the motion to accept the FOFCOL; it was
20 seconded. We've been in discussion. During the
21 course of that discussion, the motion was amended
22 to include acceptance of the DEQ exceptions for
23 incorporation into the FOFCOL, and that amendment
24 was approved by a vote. So now we are voting on
25 the --

1 VICE CHAIR AGUIRRE: -- adopting --

2 CHAIR SIMPSON: -- adopting the FOFCOL
3 as amended.

4 VICE CHAIR AGUIRRE: All right. Thank
5 you for the clarification.

6 CHAIR SIMPSON: I think we all voted.
7 Did we all vote?

8 VICE CHAIR AGUIRRE: No.

9 BOARD MEMBER ALTEMUS: I think we should
10 do it again, Mr. Chair. We were interrupted.

11 VICE CHAIR AGUIRRE: Apologies for
12 confusing whether we voted or not.

13 CHAIR SIMPSON: Let's take a step
14 backwards, and vote on the motion. All in favor,
15 say aye.

16 (Response)

17 CHAIR SIMPSON: Opposed.

18 BOARD MEMBER KNUTESON: Nay.

19 CHAIR SIMPSON: Nay?

20 BOARD MEMBER KNUTESON: One nay.

21 CHAIR SIMPSON: Where did that come
22 from?

23 BOARD MEMBER KNUTESON: Amanda.

24 CHAIR SIMPSON: Roll call, please.

25 MS. MOISEY-SCHERER: Chair Simpson.

1 CHAIR SIMPSON: Aye.

2 MS. MOISEY-SCHERER: Vice Chair Aguirre.

3 VICE CHAIR AGUIRRE: Aye.

4 MS. MOISEY-SCHERER: Board Member

5 Altemus.

6 BOARD MEMBER ALTEMUS: Aye.

7 MS. MOISEY-SCHERER: Board Member

8 Knuteson.

9 BOARD MEMBER KNUTESON: Nay.

10 MS. MOISEY-SCHERER: Board Member

11 Rankosky.

12 BOARD MEMBER RANKOSKY: Aye.

13 MS. MOISEY-SCHERER: Board Member

14 Reiten.

15 BOARD MEMBER REITEN: Aye.

16 CHAIR SIMPSON: Board Member Smith.

17 BOARD MEMBER SMITH: Aye.

18 MS. MOISEY-SCHERER: The vote is six to

19 one, sir.

20 CHAIR SIMPSON: Six to one. Motion

21 carries. Thank you very much. Find my agenda

22 here. That wraps up the question of the Friends

23 of the Jocko and the Riverside gravel pit.

24 (The proceedings were concluded at 11:22 a.m.)

25 * * * * *

C E R T I F I C A T E

STATE OF MONTANA

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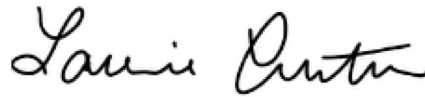
COUNTY OF LEWIS & CLARK

)

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 - 82 - 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 2nd day of
January, 2025.



LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2028.

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