



State of Idaho
DEPARTMENT OF ENVIRONMENTAL QUALITY
BOARD OF ENVIRONMENTAL QUALITY

1410 North Hilton, Boise, ID 83706-1255, (208) 373-0502

C. L. "Butch" Otter, Governor
Curt Fransen, Director

MEMBERS OF THE BOARD

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Kermit V. Kiebert
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LEGAL COUNSEL

Douglas M. Conde
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BOARD ASSISTANT

Rosie Alonzo
(208) 373-0240

IDAHO BOARD OF ENVIRONMENTAL QUALITY

MINUTES

December 4, 2014

The Idaho Board of Environmental Quality convened on December 4, 2014 at 3:00 p.m.
at:

**Department of Environmental Quality
Conference Room A
1410 N. Hilton
Boise, Idaho**

BOARD MEMBERS PRESENT

John McCreedy, Chairman
Kevin Boling, Vice-Chairman (*via teleconference*)
Beth Elroy, Secretary
Dr. John R. "Randy" MacMillan, Member
Kermit Kiebert, Member (*via teleconference*)
Carol Mascareñas, (*via teleconference*)

BOARD MEMBERS ABSENT

Nick Purdy, Member

DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

Curt Fransen, Director
Harriet A. Hensley, Deputy Attorney General, Legal Counsel for the Board
Ann Vonde, Deputy Attorney General, Office of the Attorney General
Douglas Conde, Senior Deputy Attorney General, DEQ
Paula Wilson, Rules Coordinator
Rosie Alonzo, Management Assistant, Assistant to the Board
Lisa Carlson, Deputy Attorney General, DEQ
Tiffany Floyd, Air Quality Division Administrator
Mike Simon, Stationary Source Program Manager
Kevin Schilling, Air Quality Dispersion Modeling Coordinator
Dan Pitman, Air Quality Permitting Engineer Tech 1
Darrin Mehr, Air Quality Permitting Analyst
Kari Kostka, Policy Analyst
Cris Riggs, Legal Assistant
Melissa Gibbs, SIP/Airshed Coordinator, Pocatello Regional Office (*via teleconference*)

OTHERS PRESENT:

Rachelle Cahoon, Tucker & Associates, Court Reporter
Erika Malmen, Perkins, Coie, LLP, representing ConAgra Lamb Weston (*via teleconference*)
Dylan Lawrence, Varin Wardwell, representing Magnida

Eric Groten, Vinson & Elkins, representing Magnida (*via teleconference*)
Taylor Holcomb, Vinson & Elkins, representing Magnida (*via teleconference*)
Jim Lehmann, Magnida (*via teleconference*)
Ric Sorbo, Magnida (*via teleconference*)
Tonn Petersen, Perkins, Coie, representing ConAgra Lamb Weston
Pat Sullivan, Sullivan Reberger
Rocky Barker, Idaho Statesman
Mark Mendiola, Green Market (*via teleconference*)

- ❖ All attachments referenced in these minutes are permanent attachments to the minutes on file at the Idaho Department of Environmental Quality.

NOTE: This Board meeting had a late start due to Board members being stuck in traffic congestion due to an accident.

CALL TO ORDER AND ROLL CALL

Chairman John McCreedy called the special meeting of the Idaho Board of Environmental Quality (Board) to order at 3:25 p.m. Roll call was taken with all members present except Mr. Nick Purdy.

AGENDA ITEM NO. 1: CONAGRA FOODS LAMB WESTON, INC. V. DEQ, DOCKET NO. 0101-14-01

Chairman McCreedy stated that this special meeting of the Board was called for continuation of the oral argument hearing on the recommended order granting motion for summary judgement relating to ConAgra Foods Lamb Weston, Inc. v. DEQ, under Docket No. 0101-14-01. He explained that the continuation allowed Board members to study the record and the briefing of the parties and to consider oral arguments to date.

Erika Malmen, Counsel, Perkins Coie, LLP, was present via teleconference on behalf of ConAgra Foods.
Tonn Peterson, Counsel, Perkins Coie, LLP, was present on behalf of ConAgra Foods.
Eric Groten, Counsel, Vinson & Elkins, was present via teleconference on behalf of Magnida.
Dylan Lawrence, Counsel, Varin Wardell, appeared on behalf of Magnida.
Lisa Carlson, Deputy Attorney General, appeared on behalf of the Idaho Department of Environmental Quality.
Harriet Hensley, Deputy Attorney General, appeared on behalf of the Idaho Board of Environmental Quality.

NOTE: A verbatim transcript of this hearing as prepared by a court reporter is attached to these minutes as part of the record. Only motions by the Board are listed in these minutes.

- **MOTION:** Chairman McCreedy moved that pursuant to Idaho Code §67-2345(1)(f) the Idaho Board of Environmental Quality move into executive session to communicate with legal counsel to discuss the ramifications of and legal options regarding this pending contested case.
- **SECOND:** Dr. Randy MacMillan.
ROLL CALL VOTE: Chairman McCreedy, aye; Mr. Kevin Boling, aye; Ms. Beth Elroy, aye; Dr. MacMillan, aye; Mr. Kermit Kiebert, aye; and Ms. Carol Mascareñas, aye. (Not present: Mr. Nick Purdy). Motion carried unanimously.

The meeting room was cleared for the Board to enter executive session with legal counsel. No votes were taken and no deliberation was conducted during the executive session.

Following the executive session, the public meeting resumed. Roll call of Board members was taken. Mr. Kiebert did not reconnect by the time of roll call but joined shortly after. All members were present with the exception of Mr. Purdy. Roll call was also taken of phone participants with all participants returning.

Further discussion on this case followed.

- **MOTION:** Chairman McCreedy moved that the Idaho Board of Environmental Quality remand this case in the matter of Air Quality Permit to Construct No. P-2013-0030 issued to Magnida Nitrogen Idaho, LLC, Docket No. 0101-14-01 back to the hearing officer with instructions that the hearing officer clarify the standard for deference to an agency at the summary judgment proceeding and to apply what the Board considers to be the correct standard set forth in Idaho Rules of Civil Procedure 56(c) and to either amend or supplement or modify his decision to make clear whether there are or are not genuine issues of material fact that require a full evidentiary hearing. As part of the motion, Chairman McCreedy requested that legal counsel to the Board draft a decision and order consistent with the findings and deliberations today and that the hearing officer and the parties comply with the Board's order on remand as expeditiously as possible.
- **SECOND:** Mr. Kiebert.

NOTE: During the first roll call vote, the motion was tabled temporarily for clarification from Ms. Harriett Hensley, Legal Counsel to the Board.

- **MOTION:** Ms. Elroy moved that the Idaho Board of Environmental Quality un-table the original stated motion.
 - **SECOND:** Mr. Boling.
- VOICE VOTE:** Motion carried unanimously.

ROLL CALL VOTE FOR ORIGINAL MOTION: Chairman McCreedy, aye; Mr. Boling, aye; Ms. Elroy, aye; Dr. MacMillan, nay; Mr. Kiebert, aye; and Ms. Mascareñas, aye. (Not present: Mr. Purdy). Motion carried with a quorum of five in favor and one opposed.

ADJOURNMENT

- **MOTION:** Mr. Kiebert moved that the Idaho Board of Environmental Quality meeting adjourn.
 - **SECOND:** Ms. Elroy.
- VOICE VOTE:** Motion carried unanimously.

THE MEETING ADJOURNED AT 6:13 P.M.



John McCreedy, Chairman



Beth Elroy, Secretary



Rosie Alonzo, Assistant to the Board and Recorder

1 BEFORE THE BOARD OF ENVIRONMENTAL QUALITY
2 STATE OF IDAHO

3 IN THE MATTER OF AIR QUALITY)
4 PERMIT TO CONSTRUCT)
5 NO. P-2013,0030 ISSUED TO)
6 MAGNOLIA NITROGEN IDAHO, LLC)
7) Docket No. 0101-14-01

8)
9 CONAGRA FOODS LAMB WESTON, INC.,)

10)
11 Petitioner,)

12 vs.)

13 IDAHO DEPARTMENT OF)
14 ENVIRONMENTAL QUALITY,)

15)
16 Respondent,)

17 and)

18)
19 MAGNOLIA NITROGEN IDAHO, LLC,)

20)
21 Respondent-Intervenor.)
22)

23)
24)
25 REPORTER'S TRANSCRIPT OF PROCEEDINGS

Held on December 4, 2014, 3:00 p.m.

Department of Environmental Quality
Conference Room A
1410 North Hilton
Boise, Idaho 83706

Reported by
Rachelle C. Cahoon
SRT No. 1026

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2 FOR PETITIONER
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1 A P P E A R A N C E S (continued)

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13 BOARD MEMBERS PRESENT

14 John McCreedy, Chairman

15 Kevin Boling, Vice-Chairman (via phone)

16 Beth Elroy, Member

17 Kermit Kiebert, Member (via phone)

18 Randy MacMillan, Member

19 Carol Mascarenas, Member (via phone)

20 DEPARTMENT OF ENVIRONMENTAL QUALITY STAFF PRESENT

21 Rosie Alonzo

22 Doug Conde

23 Tiffany Floyd

24 Curt Franssen

25 Melissa Gibbs (via phone)

Kari Kostka

Darrin Mehr

Dan Pitman

Cris Riggs

Kevin Schilling

Michael Simon

Paula Wilson

ALSO PRESENT

24 Rocky Barker Idaho Statesman

25 Taylor Holcomb Magnida (via phone)

26 Jim Lehmann Magnida (via phone)

1 Ric Sorbo Magnida (via phone)
2 Pat Sullivan Magnida

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1 DECEMBER 4, 2014, 3:25 p.m.
 2 BOISE, IDAHO
 3
 4 CHAIRMAN MCCREEDY: We'll go ahead and call
 5 the meeting to order.
 6 And, Rosie, if you could do roll call vote
 7 for the board members.
 8 MS. ALONZO: I sure will.
 9 Chairman McCreedy?
 10 CHAIRMAN MCCREEDY: Present. Late.
 11 Apologize.
 12 MS. ALONZO: Mr. Kevin Boling?
 13 MR. BOLING: Here. Early.
 14 MS. ALONZO: Ms. Beth Elroy?
 15 MS. ELROY: Present. Late. I apologize.
 16 MS. ALONZO: Mr. Nick Purdy?
 17 (Not present.)
 18 MS. ALONZO: Dr. Randy MacMillan?
 19 DR. MACMILLAN: Present. Early.
 20 MS. ALONZO: Mr. Kermit Kiebert?
 21 MR. KIEBERT: Here.
 22 MS. ALONZO: Ms. Carol Mascarenas?
 23 MS. MASCARENAS: Present. Early this time.
 24 CHAIRMAN MCCREEDY: Okay. It looks like we
 25 have a quorum.

1 I understand, Rosie, you've identified most
 2 of the folks on the phone already. So let me take a run
 3 at that.
 4 Erika Malmen, representing petitioner.
 5 MS. MALMEN: Present, Chairman.
 6 CHAIRMAN MCCREEDY: Thank you. And thank
 7 you for accommodating your schedule.
 8 Mr. Groten, are you on also?
 9 MR. GROTEN: I am, Mr. Chairman, remotely
 10 and unintentionally and with apologies. But you're in
 11 good hands with Mr. Lawrence.
 12 CHAIRMAN MCCREEDY: And then Mark Mendiolo.
 13 MR. MENDIOLE: Yes, sir. Right here.
 14 CHAIRMAN MCCREEDY: And your affiliation,
 15 Mark, please?
 16 MR. MENDIOLE: Green Markets.
 17 CHAIRMAN MCCREEDY: Okay.
 18 Taylor Holcomb.
 19 MR. HOLCOMB: Yes, sir.
 20 CHAIRMAN MCCREEDY: And your affiliation?
 21 MR. HOLCOMB: Eric's colleague from Magnida.
 22 CHAIRMAN MCCREEDY: Thank you.
 23 Melissa Gibbs?
 24 MS. GIBBS: Yes.
 25 CHAIRMAN MCCREEDY: And your affiliation,

1 please?
 2 MS. GIBBS: Idaho Environmental Quality out
 3 of Pocatello.
 4 CHAIRMAN MCCREEDY: Okay.
 5 Anyone else on the phone?
 6 MR. SORBO: Yes. This is Ric Sorbo. S-O-R,
 7 B as in baker, O. I'm with Magnida.
 8 CHAIRMAN MCCREEDY: Okay.
 9 MR. LEHMANN: Jim Lehmann. Last name,
 10 L-E-H-M-A-N-N. Magnida's in-house counsel.
 11 CHAIRMAN MCCREEDY: Anyone else on the
 12 phone?
 13 Okay. For the parties here in Boise.
 14 Lisa Carlson -- Ms. Carlson for DEQ.
 15 MS. CARLSON: Correct.
 16 CHAIRMAN MCCREEDY: Dylan Lawrence for
 17 Magnida.
 18 MR. LAWRENCE: Yes.
 19 CHAIRMAN MCCREEDY: Okay. And --
 20 MR. PETERSEN: Tonn Petersen for ConAgra.
 21 CHAIRMAN MCCREEDY: Welcome, Don [sic].
 22 MR. PETERSEN: Thank you.
 23 CHAIRMAN MCCREEDY: Any other preliminary
 24 matters, Rosie or Paula?
 25 MS. WILSON: I'm going to go email the board

1 members a different number in case you go into -- a
 2 number to call into for executive session.
 3 CHAIRMAN MCCREEDY: Okay.
 4 MS. WILSON: So I'm going to -- I was going
 5 to try it from here, but it's not working out. So --
 6 CHAIRMAN MCCREEDY: Well, this was the time
 7 and place set for the continuing oral argument on this
 8 case, which is entitled In the Matter of the Air Quality
 9 Permit to Construct, P-2013-0030 issued to Magnolia
 10 Nitrogen Idaho, LLC. It's Docket No. 0101-14-01.
 11 Oral argument and initial hearing was
 12 conducted a few weeks ago.
 13 The Board continued the matter to this point
 14 so individual board members could study the record and
 15 the briefing of the parties and consider the oral
 16 arguments that were provided on that date.
 17 I, personally, do not have any further
 18 questions for counsel at this point but would certainly
 19 welcome any comments or questions that other board
 20 members may have for counsel.
 21 DR. MACMILLAN: Mr. Chairman.
 22 CHAIRMAN MCCREEDY: Dr. MacMillan.
 23 DR. MACMILLAN: Once -- I assume we're going
 24 to go into executive session momentarily here. After we
 25 go through -- go through the executive session, I'm

1 presuming that there would be opportunity to ask
 2 questions of the counsels after that.
 3 CHAIRMAN MCCREEDY: I concur, and we'll make
 4 sure we provide for that, Dr. MacMillan.
 5 DR. MACMILLAN: Thank you.
 6 CHAIRMAN MCCREEDY: Any other questions or
 7 comments from board members at this point?
 8 If not, I would move that pursuant to Idaho
 9 Code Section 67.23.45-1(f) that the Board move into
 10 executive session to communicate with legal counsel to
 11 discuss the ramification of and legal options regarding
 12 this pending contested matter.
 13 MR. LAWRENCE: Chairman McCreedy, I'm sorry
 14 to interrupt you. If you guys are going into executive
 15 session, would you be willing to entertain just a brief
 16 comment from one of the parties and, of course,
 17 extending the same opportunity to the other parties?
 18 CHAIRMAN MCCREEDY: Absolutely.
 19 MR. LAWRENCE: Okay. Thank you. I
 20 appreciate it and appreciate the deviation from what you
 21 were intending to do.
 22 And for those on the phone, this is Dylan
 23 Lawrence who represents Magnida.
 24 And, again, I apologize that Mr. Groten
 25 can't be here in person today. He certainly intended

1 to. But due to weather-related reasons, his connecting
 2 flight from Las Vegas to Boise was actually canceled.
 3 So to save you all from the various bells, whistles,
 4 announcements, blings, and whatnot that occur in the Las
 5 Vegas Airport, I'll be doing, primarily, the fielding of
 6 questions that the board members may have. But I
 7 certainly hope you understand if he feels it necessary
 8 to chime in given the rather late change to the -- to
 9 the lineup.
 10 But, given that the Board has already
 11 continued this matter once, we just wanted to emphasize
 12 -- and it's something, if you go back and look at the
 13 record in this case, was alluded to a few times and even
 14 at the hearing a couple weeks ago. And that's the --
 15 and recognizing that this is a very complex matter. I
 16 mean, air permits are complex. We have a lot of papers
 17 in front of us. The board members have regular day jobs
 18 in addition to being board members. And so this isn't
 19 easy. But seeing that-- how it was continued once
 20 before, we just wanted to, you know, make clear to the
 21 Board that anytime you have a project of this size and
 22 complexity, there are a lot of moving parts to it:
 23 various contracts; agreements; you know, financial
 24 arrangements that need to be made. And those sometimes
 25 have a limited lifespan on them. In fact, quite short

1 lifespans.
 2 And so to the extent that a further
 3 continuation is something that the Board may feel it
 4 needs, we would hope to -- to emphasize that we feel
 5 that we can field any questions that you have and
 6 convince you that, you know, we feel that a vote
 7 approving the Recommended Order today is appropriate.
 8 And I appreciate the opportunity to say that.
 9 I should also say, obviously, we do have
 10 Magnida representatives on the line. And to the extent
 11 board members have any questions for them about the
 12 project, I'm sure they're happy to entertain --
 13 recognizing, though, that this is primarily an exercise
 14 for the attorneys.
 15 But I appreciate the opportunity to say that
 16 and would certainly understand if the other parties want
 17 to respond. Thank you, Chairman McCreedy.
 18 CHAIRMAN MCCREEDY: Well, thank you,
 19 Mr. Lawrence.
 20 First, any questions from the Board for
 21 Mr. Lawrence regarding his comments?
 22 Okay. Hearing none, any comment Ms. Carlson
 23 from DEQ's standpoint?
 24 MS. CARSLON: No, Chairman.
 25 CHAIRMAN MCCREEDY: Any comment, Ms. Malmen,

1 from the petitioner's standpoint?
 2 MS. MALMEN: No, Mr. Chairman. Thank you
 3 for the opportunity, however.
 4 CHAIRMAN MCCREEDY: Okay. And again, thank
 5 you, Mr. Lawrence. I understand the need for urgency on
 6 the behalf of the Board and the parties and how much
 7 time and effort and resources are at stake.
 8 We had a motion to go into the executive
 9 session.
 10 DR. MACMILLAN: Second.
 11 CHAIRMAN MCCREEDY: Second by Dr. MacMillan.
 12 Any discussion?
 13 CHAIRMAN MCCREEDY: Okay.
 14 All those in favor?
 15 MR. KIEBERT: Aye.
 16 DR. MACMILLAN: Aye.
 17 MR. BOLING: Aye.
 18 MS. MASCARENAS: Aye.
 19 MS. ELROY: Aye.
 20 CHAIRMAN MCCREEDY: Any opposed?
 21 Okay. We'll move into executive session.
 22 And I'm assuming, Paula and Rosie, you'll
 23 handle some of the logistics, and --
 24 MS. ALONZO: Are we supposed to have roll
 25 call again?

1 CHAIRMAN MCCREEDY: Are we supposed to have
 2 roll call vote?
 3 MS. HENSLEY: Yes.
 4 CHAIRMAN MCCREEDY: Okay. Well, let's back
 5 up and have a roll call vote on whether we go into
 6 executive session.
 7 MS. ALONZO: Chairman John McCreedy?
 8 CHAIRMAN MCCREEDY: Yes.
 9 MS. ALONZO: Mr. Kevin Boling?
 10 MR. BOLING: Yes.
 11 MS. ALONZO: Ms. Beth Elroy?
 12 MS. ELROY: Yes.
 13 MS. ALONZO: Dr. Randy MacMillan?
 14 DR. MACMILLAN: Yes.
 15 MS. ALONZO: Mr. Kermit Kiebert?
 16 MR. KIEBERT: Yes.
 17 MS. ALONZO: Ms. Carol Mascarenas?
 18 MS. MASCARENAS: Yes.
 19 CHAIRMAN MCCREEDY: Thank you for keeping,
 20 collectively, us and, particularly, me on track there,
 21 Rosie.
 22 Anything else?
 23 Okay. So we'll go into executive session.
 24 And I guess Paula and Rosie can handle some
 25 of the phone logistics to make sure we are truly in

1 We have five of seven board members. But since Mr.
 2 Kiebert did participate --
 3 Kermit Kiebert?
 4 Nope. But since he did participate so far
 5 today, Paula, would it be possible to try to --
 6 MS. WILSON: I'll go call him.
 7 CHAIRMAN MCCREEDY: -- ring him up while we
 8 take the remainder of roll call? We'll see if we can
 9 have our original six back.
 10 Kermit, are you on the line?
 11 Okay. So I believe you have the list of
 12 other parties who were on the phone.
 13 Ms. Malmen?
 14 MS. MALMEN: Present. Thank you.
 15 CHAIRMAN MCCREEDY: Mr. Groten?
 16 MR. GROTEN: If -- if I heard you call
 17 there, Mr. Chairman, Eric Groten is on.
 18 CHAIRMAN MCCREEDY: Thank you, Mr. Groten.
 19 Mark Mendiolo?
 20 Taylor Holcomb?
 21 MR. HOLCOMB: Present.
 22 CHAIRMAN MCCREEDY: Melissa Gibbs?
 23 MS. GIBBS: Present. Thank you.
 24 CHAIRMAN MCCREEDY: Ric Sorbo?
 25 MR. SORBO: I'm here.

1 executive session.
 2 (Executive session.)
 3 CHAIRMAN MCCREEDY: Okay. Let's try to go
 4 back on the record and see who we have.
 5 Rosie, roll call vote for the board members,
 6 please?
 7 MS. ALONZO: Sure.
 8 Chairman John McCreedy?
 9 CHAIRMAN MCCREEDY: Here.
 10 MS. ALONZO: Mr. Kevin Boling? Mr. Kevin
 11 Boling?
 12 MR. BOLING: I'm here.
 13 MS. ALONZO: Thank you.
 14 Ms. Beth Elroy?
 15 MS. ELROY: Present.
 16 MS. ALONZO: Mr. Nick Purdy?
 17 (Not present.)
 18 MS. ALONZO: Dr. Randy MacMillan?
 19 DR. MACMILLAN: Present.
 20 MS. ALONZO: Mr. Kermit Kiebert? Mr. Kermit
 21 Kiebert?
 22 (Not present.)
 23 MS. ALONZO: Ms. Carol Mascarenas?
 24 MS. MASCARENAS: Present.
 25 CHAIRMAN MCCREEDY: Okay. We have a quorum.

1 CHAIRMAN MCCREEDY: Any other folks on the
 2 phone?
 3 MR. LEHMANN: Yeah. This is Jim Lehmann.
 4 CHAIRMAN MCCREEDY: Okay, Mr. Lehmann.
 5 Thank you.
 6 Anyone else?
 7 Okay. And then here in the conference room,
 8 at Conference Room A at the DEQ building, we have
 9 Ms. Carlson, Mr. Lawrence, Mr. Petersen. Correct?
 10 MR. PETERSEN: Correct.
 11 CHAIRMAN MCCREEDY: Okay.
 12 Paula, were you able to get ahold of
 13 Mr. Kiebert?
 14 MS. WILSON: Yeah. He's calling. He's
 15 dialing.
 16 CHAIRMAN MCCREEDY: Okay. We'll wait just a
 17 minute then.
 18 Hello. Is that you Kermit?
 19 MR. KIEBERT: It sure is, John.
 20 CHAIRMAN MCCREEDY: Okay.
 21 Did anyone else join?
 22 MR. MENDIOLE: Yes. Mark Mendiolo. Green
 23 Markets.
 24 CHAIRMAN MCCREEDY: Okay.
 25 Anyone else?

1 Okay. Well, I think we're back on the
2 record again in Docket No. 01-01-14-01 having come out
3 of executive session.

4 Do any board members have any comments or
5 questions for any of the parties to start?

6 Okay. Well, I can start with a few of my
7 comments.

8 Having spent a fair amount of time reviewing
9 the hearing officer's Recommended Order and the briefing
10 of the parties and the records, I have three concerns,
11 two of which are with the Recommended Order and one of
12 which is just a general concern.

13 The first concern that I have with the
14 Recommended Order is that I cannot tell from review of
15 the order whether the hearing officer did or did not
16 apply at least what I consider to be the proper Rule
17 56(c) Summary Judgment standard.

18 And let me explain that. And this is a
19 concern. It's not a finding. I can't tell whether he
20 simply decided the case himself by giving the Agency
21 deference and weighing the evidence -- which he's not
22 allowed to do in a summary judgment proceeding -- or
23 whether he did what he was required to do -- at least in
24 my opinion -- and that was simply determine whether
25 there were or were not genuine issues of material fact.

1 comment and how the discussion goes today, ultimately, I
2 would like the parties and the hearing officer to spend
3 some briefing and decision time on exactly what amount
4 of deference is due to an Agency at a summary judgment
5 proceeding and why.

6 I'm aware that we have some Idaho statutes
7 and precedential decisions and some case law on that
8 issue. But, again, I'm a little concerned that he gave
9 significant deference to the Agency and weighed the
10 evidence instead of just determining whether a hearing
11 was warranted.

12 My last concern is one of time. I think the
13 record is relatively robust. I think the parties have
14 done an excellent job of moving the proceeding along. I
15 think the arguments were well presented. I very, very
16 much agree that people have put significant time and
17 resources into this matter, this file, this case,
18 including the amount of time the Agency has put into the
19 permitting process.

20 But without expressing any opinion on the
21 merits or whether there are or are not any genuine
22 issues of material fact -- because, again, I personally
23 can't tell from his decision -- I would ask that the
24 parties and the hearing officer, if this matter is
25 remanded, move it along quickly, particularly, in light

1 So I can't tell from his decision, again,
2 whether he simply decided the case himself or decided
3 whether there was a hearing required. And from my
4 perspective, I would like him to clarify his order.

5 If he concluded that there were no genuine
6 issues of material fact after reviewing the entire
7 record on all of the issues that are set forth in his
8 order and that were raised by the parties, I'd like him
9 to so state.

10 If, applying the correct standard, he
11 determines there are genuine issues of material fact on
12 any of those issues, then I'd like to see him have the
13 hearing so that everybody has their fair opportunity to
14 present their evidence.

15 But I simply cannot, in reading his order,
16 tell exactly what he did in that regard.

17 My second concern is I'm a little concerned
18 about the level of deference that he gave to the Agency
19 at the summary judgment hearing. I am not suggesting
20 that deference to the Agency is not appropriate at some
21 point in the proceeding. But I am a little concerned
22 that he gave significant deference at the judgment
23 proceeding and, again, weighed the evidence instead of
24 just determining whether a hearing was warranted.

25 So depending on how other board members

1 of comments that Magnida has made not only in the
2 record, but today, about the need for finality regarding
3 this matter.

4 Those are my comments. Certainly welcome
5 any questions or discussion or other comments from board
6 members.

7 Why don't we start with the folks on the
8 phone.

9 Kermit, any further comments or any comments
10 from you?

11 MR. KIEBERT: Well, John, I think that you
12 -- Mr. Chairman, I think you -- you verbalized exactly
13 what I was thinking.

14 And I think it puts the Board in the best
15 position in terms of the liability of what's going to
16 come down the pipe.

17 And I think it also, particularly your --
18 your focus on time is of the essence -- we've been
19 involved with this. And so out of just simply looking
20 at time and business and money, it needs to be -- come
21 to some kind of finality.

22 CHAIRMAN MCCREEDY: Thank you, Mr. Kiebert.
23 Kevin?

24 Mr. Boling? Kevin? Are you on mute?

25 MR. BOLING: Yeah. That's probably not a

1 bad thing.
 2 CHAIRMAN MCCREEDY: I imagine you said
 3 really good things, but I couldn't hear them.
 4 MR. BOLING: It was -- it was really artful.
 5 Very artful.
 6 Mr. Chairman, I would -- I -- a couple of
 7 weeks ago in our first gathering, it was -- after having
 8 read the record and listened to both comments from
 9 Magnida and ConAgra, it seemed to me that the hearing
 10 officer did skip a step and decide the case.
 11 And I'm -- I'm not an attorney. I'm a
 12 forester. So I don't have the luxury of citing Idaho
 13 Code 56-dash-blah-blah-blah. But it just seems to me we
 14 need to get the process right. And as painful as it is
 15 in terms of the time it will take to do that correctly,
 16 I do believe that this -- this needs to be remanded to
 17 the hearing officer to hear the facts correctly and if
 18 -- and, if it's appropriate, to go to an evidentiary
 19 hearing and then bring his decision back to the Board.
 20 That's how -- that's what I think.
 21 CHAIRMAN MCCREEDY: Thank you, Mr. Boling.
 22 Ms. Mascarenas?
 23 MS. MASCARENAS: Yes. I echo the sentiments
 24 of the other board members. And it appears we did --
 25 could have skipped a step in this process and -- and

1 need to get that straight. So I'm in concurrence with
 2 -- I don't have anything further to add than what other
 3 parties have stated on the phone.
 4 CHAIRMAN MCCREEDY: Thank you, Ms.
 5 Mascarenas.
 6 Dr. MacMillan or Ms. Elroy?
 7 DR. MACMILLAN: Ladies first.
 8 MS. ELROY: Mr. Chairman, it's difficult to
 9 determine if a step was missed or not based on the
 10 hearing officer's summary in his Recommended Order
 11 granting Motion For Summary Judgment.
 12 The clear standard is to determine if there
 13 are genuine issues of material facts. And after the
 14 five specific issues called out in this Summary
 15 Judgment, it's difficult to understand is there in this
 16 -- as part of this hearing, were there genuine issues of
 17 material facts? And until the record is clarified to
 18 determine of those five are any of those five truly
 19 genuine issues of material facts, it's difficult for the
 20 Board to make a determination. And so I, too, support
 21 sending this back to the hearing officer to clarify the
 22 record for us.
 23 I completely agree that the hearing officer
 24 needs to be very aware of the timing involved. And what
 25 I would ask is what -- what actions can the Board take

1 to make sure that the hearing officer clarifies the
 2 record in a timely manner? And what -- can we make that
 3 a time-bound decision from the Board?
 4 CHAIRMAN MCCREEDY: Okay. Thank you,
 5 Mrs. Elroy.
 6 Dr. MacMillan?
 7 DR. MACMILLAN: Thank you, Mr. Chairman.
 8 And I -- I do -- I am very, very concerned
 9 about the length of time this has taken, the amount of
 10 material that we have -- we've been presented with. But
 11 also --
 12 THE COURT REPORTER: Excuse me --
 13 MS. WILSON: Yeah.
 14 THE COURT REPORTER: Sorry. I need -- I
 15 need someone to mute their phone.
 16 CHAIRMAN MCCREEDY: For anyone on the phone
 17 who has a little bit of background noise, would you get
 18 that mute key pushed, and then we can proceed?
 19 Okay. Thank you very much.
 20 DR. MACMILLAN: Well, anyway, I -- I remain
 21 just very, very concerned about how much time and effort
 22 has gone into -- granted it's a complicated permitting
 23 process, but, nevertheless, it should have been
 24 completed by now.
 25 As a business person -- as well as a

1 biologist -- but as a business person, I need to know if
 2 I'm going to get a permit or not. And -- and it's just
 3 a -- it's a travesty that we're -- that after I don't
 4 know how many months of this permitting effort, we're
 5 still at this stage where there are questions --
 6 significant questions it sounds like -- about whether
 7 the hearing officer performed his job properly. And
 8 that is just, you know, just a shame for everyone. And
 9 for the businesses ConAgra, Magnida to -- to have to
 10 continue to put their resources into this process still
 11 is -- is -- is just a crying shame.
 12 So -- so I'm just deeply troubled and --
 13 that we still have these questions. And, you know, we
 14 -- the -- just so that the parties know, in executive
 15 session, we looked at different statutes that have been
 16 raised through the course of the various motions and --
 17 and this -- they -- the statutes support both sides of
 18 both parties. And so that makes it very difficult for
 19 me to weigh in on whether a remand is appropriate or
 20 just to move forward with the permit and let the courts
 21 really decide what's the right provisions, what's the
 22 right standard that a hearing officer should use at the
 23 summary judgment -- if summary judgment is petitioned
 24 for.
 25 So -- so that's where I am, Mr. Chairman.

1 And, you know, there is a significant part of me that
 2 says let's just issue the permit and let the courts
 3 decide that -- how the hearing officer should do things.
 4 You know, the approach that you
 5 identified -- if we decide to do that -- that perhaps
 6 gives the hearing officer opportunity to clarify for the
 7 record what standards he used in his -- his
 8 determination to grant the motion for summary judgment.
 9 And so -- so anyway, that's where I am, Mr.
 10 Chairman.
 11 CHAIRMAN MCCREEDY: Thank you, Dr.
 12 MacMillan.
 13 Any further comments from board members?
 14 I think the -- the one issue that Ms. Elroy
 15 raised is do we as a Board, in the event it's remanded,
 16 have the ability to impose any time frames on that
 17 remand?
 18 Did I understand that correctly, Ms. Elroy?
 19 Was that the question?
 20 MS. ELROY: Mr. Chairman, yes, that is the
 21 question.
 22 CHAIRMAN MCCREEDY: All right.
 23 I guess my sense on that is, just from my
 24 perspective, I would not want to tie the hearing
 25 officer's hands because, again, my concern is I can't

1 tell from his decision whether he concluded that there
 2 were no genuine issues of material fact or whether he
 3 just simply went ahead and decided the case and gave the
 4 Agency deference, which I don't think he's allowed to do
 5 at a summary judgment stage.
 6 So if we ask him to clarify his decision, I
 7 see that he has at least two avenues.
 8 The first, he can ask for briefing from the
 9 parties on what is the appropriate standard for
 10 deference at the summary judgment stage, and then he can
 11 re-evaluate the record, applying what he's instructed to
 12 is the right summary judgment standard, and issue a new
 13 decision.
 14 He'll either, at that point, conclude there
 15 are genuine issues of material fact or there are not.
 16 And I suppose we can impose a time limit on that phase.
 17 But if he concludes that there are genuine issues of
 18 material fact, I'd be reluctant to impose a time limit
 19 on when that hearing has to take place. I think that's
 20 just getting out a little too far in the crystal ball on
 21 what might happen on remand.
 22 So -- so I -- so I, personally, would be
 23 comfortable in saying, "Review the record again. Apply
 24 the correct summary judgment standard. And issue a
 25 decision within a certain period of time."

1 I -- I could support that. And I could
 2 support, you know, a 30- or a 45-day period of time on
 3 that. I think the parties should, you know, should get
 4 on and work that hard along with the hearing officer.
 5 And he can set a briefing schedule on that if he wants.
 6 But that second phase, I'd be a little
 7 concerned about it. And those are just my thoughts.
 8 MS. ELROY: And -- and Mr. Chairman, the
 9 Phase One approach. If we can include very clear
 10 instructions to -- in -- in the motion for summary
 11 judgment, to include for all five specific issues, is
 12 there a genuine issue of material fact and why and why
 13 not depending on his -- his clarification. If we can
 14 include that with the -- the Board order --
 15 CHAIRMAN MCCREEDY: Okay.
 16 Board Members, any comment on the time frame
 17 issue that -- that Ms. Elroy has raised?
 18 DR. MACMILLAN: I -- Mr. Chairman.
 19 CHAIRMAN MCCREEDY: Yes, Dr. MacMillan.
 20 DR. MACMILLAN: If that is the decision of
 21 the Board, I suggest ten days. I'm just --
 22 The point being that, again, this has just
 23 gone on way too long for businesses to -- to operate.
 24 And so we need to be as expeditious as humanly possible.
 25 CHAIRMAN MCCREEDY: I-- I am assuming that

1 you -- that you were not 100 percent serious about the
 2 ten days, though, just to clarify the record.
 3 DR. MACMILLAN: That's correct.
 4 CHAIRMAN MCCREEDY: Any of our board members
 5 on the phone care to comment on the time frame issue?
 6 MR. BOLING: Well, again, it's painful to
 7 have to -- just to take this back to make sure this
 8 stuff is --
 9 THE COURT REPORTER: Who is this, if I may?
 10 I'm sorry.
 11 DR. MACMILLAN: It's Kevin -- Kevin Boling.
 12 MR. BOLING: -- correctly implemented, and
 13 I'm certainly as just as concerned about the time as
 14 anyone else, but I also don't want to micromanage this
 15 process either. So I think expeditiously as possible is
 16 not as far as we can go.
 17 MR. KIEBERT: Mr. Chairman, I would -- I
 18 would agree with Kevin. I -- I think ten days is
 19 probably a little queasy. And I think that -- that
 20 there needs to be some good judgment involved in this
 21 thing. So I would hope that they understand that time
 22 is of the essence and they would recognize that with
 23 respect to whatever decision is made.
 24 CHAIRMAN MCCREEDY: Further comments on any
 25 of the matters before the Board today?

Page 29

1 If not, I would move that the Board remand
 2 this case In the Matter of Air Quality Permit to
 3 Construct No. P-2013-0030 issued to Magnolia Nitrogen
 4 Idaho, LLC, Docket No. 0101-14-01 back to the hearing
 5 officer with instructions that the hearing officer
 6 clarify the standard for deference to an agency at the
 7 summary judgment proceeding and to apply what the Board
 8 considers to be the correct standard set forth in Idaho
 9 Rules of Civil Procedure 56(c) and to either amend or
 10 supplement or modify his decision to make clear whether
 11 there are or are not genuine issues of material fact
 12 that require a full evidentiary hearing.

13 MR. LAWRENCE: Chairman McCreedy, I
 14 apologize for interrupting. I know this is the second
 15 time I've done this. But at the previous hearing, I
 16 thought it was indicated that there would be questions
 17 for the parties. Do you intend to allow the parties to
 18 make any other comments or any -- entertain any other
 19 questions?

20 CHAIRMAN MCCREEDY: I tried to just a few
 21 minutes ago before I made my motion.

22 MR. LAWRENCE: I'm sorry.

23 CHAIRMAN MCCREEDY: Why don't you let me
 24 finish my motion, Mr. Lawrence --

25 MR. LAWRENCE: Okay. I apologize.

Page 31

1 from Magnida's perspective, to be this far into the
 2 process and still be entertaining the idea of further
 3 briefing is -- is just -- it's -- it's potentially
 4 disastrous.

5 I -- I obviously heard a lot of reservation
 6 about the summary judgment standards. We believe that
 7 the hearing officer applied the correct summary judgment
 8 standards. And I'm, you know, happy to -- to entertain
 9 questions and -- and explain why that is.

10 But there's also something else that I think
 11 has flown under the radar screen a little bit in this
 12 matter. And it didn't come up a lot two weeks ago at
 13 the hearing. But that's the issue of, you know --
 14 whether you want to call it substantial injury or
 15 standing or what have you -- but under -- you know,
 16 whether you apply Idaho Code § 67-5279 or the Board's
 17 prior orders regarding standing, one way or the other,
 18 Lamb Weston has had to demonstrate that it is suffering
 19 an injury based upon the specific errors that it has
 20 alleged in this matter.

21 Now, going back to -- there were a lot of
 22 discussions about the written direct testimony and what
 23 that was. To -- to reiterate what Mr. Groten said two
 24 weeks ago, that was the entirety of Lamb Weston's case.
 25 I mean, literally, when we get to hearing, what's going

Page 30

1 CHAIRMAN MCCREEDY: -- and then we'll hold on
 2 a second and see if any board members have questions or
 3 comments.

4 As part of the motion, I would request that
 5 legal counsel to the Board draft a decision and order
 6 consistent with the findings and deliberations today and
 7 that the hearing officer and the parties comply with the
 8 Board's order on remand as expeditiously as possible.

9 So that's my motion. Let's pause there.

10 Mr. Lawrence, comments?

11 MR. LAWRENCE: Yes, thank you. And I
 12 apologize. I didn't realize when you asked that
 13 question that it was addressed to everyone.

14 MR. KIEBERT: Mr. Chairman, we can't hear
 15 what he's talking about.

16 CHAIRMAN MCCREEDY: Hang on just a minute,
 17 Mr. Kiebert.

18 MR. LAWRENCE: Thank you. Again, this is
 19 Dylan Lawrence for -- for Magnida, and I do apologize
 20 for interrupting. And I -- I didn't realize that when
 21 you posed the question, it was meant for everybody. I
 22 thought it was limited to the board members.

23 And I appreciate Dr. MacMillan's comments
 24 about the delay. Obviously, I already made comments
 25 about that and don't want to belabor it. But, you know,

Page 32

1 to happen is we call -- you know, bring -- in Lamb
 2 Weston's case, Mr. -- Dr. -- or Mr. Wilder up and ask
 3 him, "Is this" -- you know -- "your true and correct
 4 written direct testimony?" And he says yes. And then
 5 he's turned over for cross-examination.

6 So all of their case is in that written
 7 direct testimony. And nowhere in there will you find
 8 anything about any injuries that Lamb Weston is
 9 sustaining because of any of the alleged errors.

10 So if we take something like, you know, the
 11 BACT limit for PM from the primary reformer heater.
 12 And, you know, the permit has it at 0.0075 pounds per MM
 13 BTU. Lamb Weston proposes 0.0024. The thing is there's
 14 nothing in the written direct testimony that establishes
 15 or even talks to "Well, if they get the lower limit, how
 16 does that -- how does that help them?" Or, stated
 17 another way, "How does the -- having the higher limit
 18 actually affect them?" Are there actual impacts modeled
 19 to occur at the Lamb Weston facility based upon, you
 20 know, the higher limit in the permit versus the lower
 21 limit that they propose?

22 And regardless of summary judgment standards
 23 and getting caught up in whether he applied the right
 24 one or not, the fact is that there's nothing else that
 25 Lamb Weston can add to their case procedurally with

1 regard to standing or substantial injury, and it's just
2 not there. And that is a -- another totally
3 independent, you know, alternative basis to uphold the
4 Recommended Ordered, essentially like a directed
5 verdict, that the actual testimony that will be at
6 hearing is not sufficient to -- to -- to reverse DEQ's
7 action.

8 CHAIRMAN MCCREEDY: I appreciate your
9 comments, Mr. Lawrence, and I -- I do know that at the
10 original oral argument, Mr. Groten did make comments
11 about the issue of substantial injury.

12 I also know the Board indicated that board
13 members may have additional questions today. We did not
14 indicate we always would. Okay?

15 And I don't have any problems with allowing
16 counsel for the parties to make any comments or
17 statements they want to make for the record or
18 otherwise.

19 But I can tell you this. The issue of
20 standing or substantial injury did not fly under, at
21 least, my radar. I can't speak for the other board
22 members.

23 But I have the same concerns on that issue
24 that I do regarding the other what I consider to be
25 factual findings that this hearing officer made. I

1 cannot tell from his order one way or another whether he
2 simply weighed the evidence and decided the case, okay,
3 because of what he considered was the procedural posture
4 of the case or whether he did, in fact, apply the
5 correct summary judgment standard, which is are there
6 genuine issues of material fact regarding standing and
7 substantial injury. And if not, why not? And if so,
8 why aren't we going to the hearing?

9 So the issue hasn't, at least, flown under
10 my radar. I think the hearing officer has a duty to
11 inform the Board:

12 If there are no genuine issues of material
13 fact on that issue, why?

14 Not weigh the evidence, not decide the case,
15 but determine are there genuine issues of material fact?

16 And, if there are, have a hearing.

17 And the sooner he clarifies his order and
18 has the hearing, if he needs one, the sooner that I
19 think we'll be back on the right track.

20 I would certainly stand for any other board
21 members commenting on Mr. Lawrence's comments and
22 certainly open up the matter for any other attorneys or
23 counsel who want to comment or make statements for the
24 record.

25 But Mr. Lawrence, in response to your

1 comments, those are -- those are the concerns I have
2 with his order.

3 MR. KIEBERT: (Indiscernible) not what I
4 called it -- the question.

5 CHAIRMAN MCCREEDY: Well, there was a
6 motion, and we've had some discussion --

7 MR. GROTEN: I'm sorry, Mr. Chairman. I
8 apologize. This could have -- this would have been
9 avoided had I been present and could have side barred
10 with Mr. Lawrence.

11 But, preferably, while you have the motion
12 pending the Board's voted on, I -- I -- I'm trying to
13 avoid the -- the, it appears, unanimous concern of the
14 Board is this thing's dragged on. And I fear that
15 absent perhaps a little bit further clarification from
16 you, Mr. Chairman, or others and general counsel as to
17 the -- your -- your statements that the -- because there
18 was the deference is not appropriate in consideration of
19 the summary judgment.

20 The origin of that will leave certainly this
21 party and perhaps the hearing officer a bit at sea with
22 what to do because the genuineness of an issue of
23 material fact does depend -- and it's perfectly
24 permissible, so far as I understand the law, for the
25 presumption of correct decision for the -- the deference

1 given to the Agency in accordance with Garnet there --
2 there's no reason at any given stage -- procedural stage
3 to conclude that that deference isn't appropriate.

4 And so I -- I see here that if -- if we're
5 set back with the Board saying that's what its
6 expectations are but there -- that that appears to be --
7 with all due respect -- seems inconsistent with
8 innumerable other -- I apologize, Board Members, for the
9 background -- but that -- that there are innumerable
10 other precedential orders in which that -- that was done
11 and cases were disposed of on summary judgment.

12 I do understand, you know, the -- the, you
13 know, the interest in having confirmation if there were
14 no genuine issues of material fact. Or, at least, I
15 understand what you're asking the hearing officer to do
16 without agreeing that it's actual necessary to do here
17 since he -- he made quite clear in the beginning of his
18 order that that's what he was doing.

19 But I -- I just understand what you're
20 asking to be done here, Mr. Chairman. But I'm not sure
21 that when you, you know, actually apply the correct
22 standard as opposed to, you know, did he find any
23 genuine issues of material fact, I think there may be
24 some confusion among the parties as we go back in front
25 of him. And I hope, in the interest of avoiding delay,

Page 37

1 that you might expand on that before we conclude here
 2 today.
 3 CHAIRMAN MCCREEDY: I appreciate your
 4 comments, Mr. Groten. I think I've expanded on it at
 5 least from my concerns. And I understand the parties
 6 may or may not disagree. I believe when the Board's
 7 counsel has issued the written order, that will clarify.
 8 I can tell you this, Mr. Groten. I do not
 9 see the case law as uniformly established on this issue
 10 of deference as -- at the summary judgment stage. Nor
 11 does the advice that we've been given as a Board. Okay?
 12 That is what I'm specifically asking you
 13 folks to brief and for the hearing officer to decide as
 14 it relates to the summary judgment proceeding so if and
 15 when this goes to district court we have a clear record
 16 that he either gave deference and weighed the evidence
 17 and decided the case himself in summary judgment or
 18 decided that there were genuine issues of material fact
 19 that warranted a hearing. Okay?
 20 And we can argue about that for another half
 21 hour. I know you guys argued about it for about five
 22 hours at the hearing in front of the hearing officer.
 23 But at some point, we're going to bring the Board's
 24 deliberations to a close and counsel for the Board is
 25 going to issue an order. And the parties are going to

Page 39

1 law, I think, is clear that you can look at this de
 2 novo, meaning you can make your own decision and not
 3 even pay any attention to the hearing officer's decision
 4 if you so choose. And I would ask you to do that
 5 instead because I don't think there's any more briefing
 6 to be had.
 7 And in regard to the deference issue -- as
 8 -- and I'm -- DEQ doesn't even need deference in this
 9 case. I mean I think we pointed out over in all of our
 10 briefing why our decisions were correct. It wasn't
 11 like, "Oh, 50/50. Okay. Let's give it to DEQ because
 12 they deserve deference." That is not what we argued.
 13 And they don't even really need -- they don't need
 14 deference in this case. Their decisions were correct.
 15 And I think we established that in the briefing, and I
 16 think he established that in the hearing.
 17 And this is incredibly frustrating that --
 18 and so I urge you, Board Members, to read the briefs --
 19 and I know you have -- but read the briefs and come to
 20 your own decision instead of sending it back. I mean,
 21 I'm hoping that would be quicker because I don't know
 22 what else it is that we're going to brief. I've already
 23 briefed. There are no disputed issues of fact.
 24 CHAIRMAN MCCREEDY: Hold on, Ms. Carlson.
 25 Yes, Mr. Kiebert?

Page 38

1 do their best to comply with it, and we'll have to move
 2 on.
 3 Ms. Carlson.
 4 MS. CARSLON: Thank you, Chairman.
 5 A couple things. First of all, to address
 6 Dr. MacMillan's concern regarding the speed of this
 7 matter, I can tell you that DEQ, the State, as soon as
 8 we got the petition, we moved for the summary judgment.
 9 MS. MALMEN: I'm so sorry to speak up. This
 10 is Erika. I cannot hear Ms. Carlson.
 11 MS. CARSLON: We moved for summary judgment
 12 immediately, thinking that was the most expeditious way
 13 to get done with this. I can tell you after this
 14 process, I am frustrated enough where I think that
 15 perhaps the fastest process is to go straight to hearing
 16 because we did all of this briefing and all of this work
 17 and -- and we're -- we're still stuck where we were at
 18 the time of the petition.
 19 I think the State specifically -- and I'm
 20 not going to argue it, but we explained why there were
 21 no disputed facts. Petitioner could not state what a
 22 disputed fact was in the -- before you two weeks ago.
 23 There are no disputed facts.
 24 You can look at this de novo. So you don't
 25 have to send this back to the Board [sic]. I mean the

Page 40

1 MR. KIEBERT: I've got no idea what she's
 2 talking about. Does she have a mike or anything?
 3 MS. CARSLON: Is this not working?
 4 MS. WILSON: It's working. You have to hold
 5 it kind of a little closer.
 6 MR. KIEBERT: I mean, there's a whole bunch
 7 of us pilgrims out here that don't know what she's
 8 saying.
 9 CHAIRMAN MCCREEDY: What Ms. Carlson is
 10 asking is for the Board not to remand this matter back
 11 to the hearing officer but rather to decide ourselves,
 12 based on the record, whether there are genuine issues of
 13 material fact or not. And she's asserting there are
 14 not. That's her request.
 15 And I'm going to -- I'm going to basically
 16 make a comment. And I don't want the parties to, you
 17 know, feel like the Board is being impatient. I'll stay
 18 as long as we need to stay tonight. Okay? But I can
 19 assure you this, that the board members have spent a
 20 substantial amount of time on this case already. I
 21 remain very concerned that if this Recommended Order
 22 were to go to district court as is, okay, a district
 23 judge would have serious problems with it --
 24 MR. KIEBERT: Thank you very much, Mr.
 25 Chairman.

1 CHAIRMAN MCCREEDY: -- because it is not
 2 clear that he applied the proper standard.
 3 MR. KIEBERT: I appreciate that. I -- when
 4 you can't hear anything, you don't have any idea what's
 5 going on, you know.
 6 CHAIRMAN MCCREEDY: And while I'm certainly
 7 willing to have you folks try to change at least my mind
 8 today, I -- I can assure you that I've spent a fair
 9 amount of time not only on the order but on the briefs
 10 and on the record, as have other members of the Board.
 11 And our concern in that regard is very substantial here.
 12 MR. KIEBERT: You don't need to lobby me,
 13 Mr. Chairman. I'm -- I'm with you.
 14 CHAIRMAN MCCREEDY: Yeah. So let me ask
 15 this. Do any other board members want to entertain -- I
 16 don't, Ms. Carlson, with all due respect -- but do any
 17 other board members want to entertain Ms. Carlson's
 18 request that the Board decide the case itself and
 19 essentially determine based on this record whether there
 20 are or are not genuine issues of material fact as
 21 opposed to remanding it to the hearing officer to
 22 clarify -- let me emphasize clarify, okay -- the basis
 23 for his decision including providing a clear
 24 understanding of what he believes to be the level of
 25 deference afforded to an agency at a summary judgment

1 here to judge whether or not DEQ has done their job and
 2 then whether there is substantial reason to doubt that
 3 the hearing officer has -- has done his job.
 4 And -- and that's what -- so at least in
 5 response to your suggestion, Ms. -- I don't know how we
 6 could do that because it's -- it is a very complicated
 7 and it's a very technical sort of thing. I would end up
 8 giving deference to everybody. So I can't decide.
 9 CHAIRMAN MCCREEDY: And, Dr. MacMillan, my
 10 comments are, I believe on the Board there is that
 11 expertise --
 12 DR. MACMILLAN: There is.
 13 CHAIRMAN MCCREEDY: -- on an individual
 14 basis.
 15 DR. MACMILLAN: Right.
 16 CHAIRMAN MCCREEDY: Okay. I personally
 17 think the most expeditious way -- and this was the basis
 18 for my motion which we'll get back to, and I will ask
 19 for you to reread it for the record -- is for the
 20 hearing officer to clarify, amend, supplement, or modify
 21 his decision so we have a clear record in front of us
 22 that he properly applied Rule 56(c). Are there genuine
 23 issues of material fact or not? I am concerned that he
 24 went too far and weighed the evidence.
 25 But I think if he goes back and does what

1 proceeding?
 2 MR. KIEBERT: Well said.
 3 DR. MACMILLAN: Mr. Chairman.
 4 CHAIRMAN MCCREEDY: Mr. MacMillan.
 5 DR. MACMILLAN: So if -- if we were to do
 6 this ourselves, do we really have the expertise to -- to
 7 do something like that? A lot of the questions before
 8 us are -- are legal ones, I guess. And so I certainly
 9 don't have that. And that's why I'm -- I'm pretty much
 10 in favor of issuing the permit and let the court -- let
 11 the appeal process go forward, and let the court decide
 12 if this was -- if the hearing officer did his job
 13 properly.
 14 I don't have that expertise. If we do -- if
 15 we're talking about de novo, I assume that means looking
 16 at the record -- with all due respect -- and I'm really
 17 impressed at the expertise the DEQ and ConAgra and
 18 Magnida have put to this. I, for one, don't have that
 19 expertise to judge whether the permit itself is -- is
 20 adequate or not. I don't have that -- that expertise.
 21 When I signed on with the Board, I was
 22 really focused on water quality issues, not -- not air
 23 quality issues. And so -- and -- and -- and I would
 24 just challenge each board member, we're not here to --
 25 to -- to really to do a hearing officer's job. We're

1 the rule requires him to do, we will have a much clearer
 2 record -- without expressing an opinion on which way he
 3 should go -- before us and that any district court
 4 proceeding that might happen after that, okay, would
 5 benefit from that clarity.
 6 Otherwise, I wouldn't want to waste the
 7 parties time.
 8 And I recognize your frustration,
 9 Ms. Carlson. I understand.
 10 MS. ELROY: Mr. Chairman?
 11 Mr. Chairman, Ms. Carlson?
 12 CHAIRMAN MCCREEDY: Ms. Elroy.
 13 MS. ELROY: I am the air representative on
 14 the Board, and I have over 20 years of experience with
 15 air permitting. I have submitted PSC applications.
 16 I've done BACT analysis. I've -- I understand the
 17 modeling, what's involved with submitting your modeling
 18 protocol, running the modeling, ambient -- ambient air
 19 analyses. I've run an air monitoring station myself. I
 20 understand all aspects of this.
 21 And if we're asked to go back and rule
 22 this -- start this from the beginning and review the
 23 entire record, it's going to take longer, in my opinion,
 24 than to remand this back to the hearing officer.
 25 Because I have that expertise and ability, but I don't

1 think that we want my only -- my -- my opinion being the
2 one that makes decisions. We would need all seven
3 members of the Board to have that level of expertise to
4 make good decisions as we go through the record. And so
5 I wouldn't be comfortable because it would put me in a
6 position where I'm the one that has that technical
7 expertise to help the other six get through this
8 process. And I think it would take a considerable
9 amount of time to start from scratch on this record.

10 CHAIRMAN MCCREEDY: Hence the reason for
11 hiring hearing officers who are qualified to address the
12 issues that are in front of them.

13 Okay. Are you able to go back and find my
14 motion?

15 THE COURT REPORTER: If you give me three
16 minutes.

17 CHAIRMAN MCCREEDY: All right.
18 While our court reporter is doing that, and
19 I know you can't -- I'm going to wait until you find it.

20 THE COURT REPORTER: Okay.

21 CHAIRMAN MCCREEDY: Have you found it?

22 THE COURT REPORTER: Yes.

23 CHAIRMAN MCCREEDY: Can you mark that spot?

24 THE COURT REPORTER: Yes.

25 CHAIRMAN MCCREEDY: Okay.

1 one of the issues as to why I want the parties and the
2 hearing officer to brief this issue of what is the level
3 of deference due an agency in a summary judgment
4 proceeding.

5 The cases that I've reviewed -- and the
6 statute itself indicates that 67-5279 applies when a
7 court is reviewing an agency proceeding. And I'm
8 concerned that the officer's and the parties' reliance
9 on that statute may have been misplaced.

10 I've asked legal counsel for the Board to
11 address that issue -- or will ask legal counsel for the
12 Board to continue to address that issue and would
13 certainly entertain that issue being addressed in the
14 written order of the Board on remand.

15 So, I think, Mr. Groten, we can provide you
16 with some clarification on that issue.

17 MR. GROTEN: If -- if that's what's coming
18 in the -- in the order from your general counsel, that
19 would be greatly appreciated.

20 Otherwise, I -- I think we -- you know,
21 we've looked at your precedential orders. And it seems
22 abundantly clear, to be honest, that that's exactly what
23 we should do and exactly what the hearing officer did.

24 And so, you know, the sort of re-briefing --
25 something the Board seems to have already decided is --

1 Your comments, Mr. Groten? Eric Groten, you
2 indicated you had a question or comment? Are you there?
3 Okay. Before we have the court reporter
4 read the motion, are there any other comments, questions
5 from the Board?

6 MR. GROTEN: Can you hear me?

7 CHAIRMAN MCCREEDY: I can now, Eric. You
8 had a question or a comment?

9 MR. GROTEN: I -- in the interest of
10 avoiding having a new threshold issue arise on -- on
11 remand, I wanted to clarify, Mr. Chairman, Members of
12 the Board, whether there is still any question on the
13 part of the Board that -- that its function through the
14 presiding officer is to determine whether or not the
15 Agency acted arbitrarily -- if -- you know, in
16 accordance with the standards of 67-5729 and, you know,
17 as expressed in the -- in Sunnyside.

18 Or -- or is that an -- an issue as well?
19 Because you know that's the standard against the -- the
20 legal issue that you would have to resolve on summary
21 judgment or by other means.

22 And so I'll pause and see if there's any
23 guidance you can offer there, Mr. Chairman.

24 CHAIRMAN MCCREEDY: I cannot speak on behalf
25 of the other board members. But I can tell you that is

1 will be troubling.

2 I mean, if you -- if -- if what you're
3 saying is that's not what the Board wants to do going
4 forward, you know, there's -- you're overturning
5 Sunnyside, if you will, as a precedential order, then,
6 you know, we'll deal with that. But, you know, that's
7 what I'm struggling with and fear the parties will
8 struggle with on remand.

9 CHAIRMAN MCCREEDY: I think your point is
10 well taken, Mr. Groten. And I would again ask counsel
11 for Board to make sure that the Board's orders expressly
12 addresses both Sunnyside and the application of 67-5279
13 on remand.

14 Okay. Mrs. Carlson.

15 MR. GROTEN: Thank you.

16 MS. CARSLON: I have an important point to
17 note in that discussion and in the order is the fact
18 that that is what petitioner pled in their petition.

19 CHAIRMAN MCCREEDY: Understood. We've read
20 it.

21 MS. CARSLON: Okay.

22 CHAIRMAN MCCREEDY: Okay.

23 Let me see if I can walk through this. Any
24 comments or questions from board members before I ask
25 the court reporter to read the motion?

1 Any comments or questions from petitioner,
 2 respondent, or intervenor?
 3 Okay.
 4 Madam Court Reporter.
 5 (Court reporter read back the record.)
 6 CHAIRMAN MCCREEDY: And I would also
 7 supplement that initial motion with the request to
 8 counsel that the application of Idaho 67-5279 and the
 9 Sunnyside decision be expressly addressed in the Board's
 10 written order.
 11 So, Board Members, that is the motion
 12 pending before you.
 13 Is there any further discussion amongst
 14 board members?
 15 MS. ELROY: Mr. Chairman? Thank you.
 16 Does the Board -- does the Board have the
 17 authority to address your supplementary piece of your
 18 motion as far as going back and looking at the previous
 19 discussion on Sunnyside?
 20 MS. HENSLEY: Yes.
 21 CHAIRMAN MCCREEDY: And that was Ms. Hensley
 22 answering in the affirmative.
 23 Does that answer your question?
 24 MS. ELROY: Yes.
 25 CHAIRMAN MCCREEDY: Okay.

1 MS. ELROY: So I -- I choose to abstain from
 2 the vote because I'm confused on that.
 3 CHAIRMAN MCCREEDY: Okay. What I'd like to
 4 do is table the motion temporarily and open it back up
 5 for discussion if you feel that would help resolve your
 6 confusion.
 7 So your choice, Ms. Elroy.
 8 MS. ELROY: Mr. Chairman, can we do that
 9 procedurally?
 10 CHAIRMAN MCCREEDY: I believe that we are
 11 allowed to do that, but I would certainly stand
 12 corrected by counsel for the Board.
 13 MS. HENSLEY: I don't -- I believe you are
 14 allowed to do that as well.
 15 MS. ELROY: Mr. Chairman, can someone please
 16 explain to me the application of that Sunnyside to this
 17 case? I've read the record, and I don't recall the
 18 specifics around that element.
 19 CHAIRMAN MCCREEDY: Ms. Hensley, can you
 20 explain the Sunnyside decision and provide some
 21 clarification as to what Mr. Groten is requesting of the
 22 Board?
 23 MS. HENSLEY: I can. In the Sunnyside
 24 decision is a precedential order of the Board. And the
 25 allegation was made that the agency was arbitrary and

1 Any further questions or discussions
 2 regarding the pending motion?
 3 DR. MACMILLAN: Mr. Chairman, was there a
 4 second to this motion?
 5 CHAIRMAN MCCREEDY: I did not hear a second,
 6 and that's why I wanted to go back and read the motion
 7 and make sure we had it right. So --
 8 Is there a second to the motion?
 9 MR. KIEBERT: There is a second,
 10 Mr. Chairman.
 11 CHAIRMAN MCCREEDY: Is that Mr. Kiebert?
 12 Kermit Kiebert, was that you seconding the motion?
 13 MR. KIEBERT: It certainly was.
 14 CHAIRMAN MCCREEDY: Okay. There's been a
 15 motion and a second.
 16 Rosie, I believe roll call vote would be
 17 appropriate.
 18 MS. ALONZO: Chairman John McCreedy?
 19 CHAIRMAN MCCREEDY: Yes.
 20 MS. ALONZO: Mr. Kevin Boling?
 21 MR. BOLING: Yes.
 22 MS. ALONZO: Ms. Beth Elroy?
 23 MS. ELROY: Mr. Chairmen, I have a question.
 24 I'm confused about the -- the supplementary motion.
 25 CHAIRMAN MCCREEDY: Okay.

1 capricious. And Mr. Groten is asking if that standard
 2 would apply in this case.
 3 CHAIRMAN MCCREEDY: At the summary judgment
 4 hearing.
 5 MS. HENSLEY: At the summary judgement
 6 stage. And the -- the Chairman has asked that I address
 7 that issue in the order -- in your order, in the Board's
 8 order remanding it to the hearing officer and articulate
 9 what the questions might be about the use of that
 10 standard at this stage. So it will be -- it will be
 11 just like the question about material facts. It will be
 12 just like the question about discretion. So it's just
 13 another issue that will be addressed in the order.
 14 CHAIRMAN MCCREEDY: So, Ms. Elroy, just to
 15 clarify.
 16 We -- we -- we express, general findings --
 17 and this is my understanding, Ms. Hensley. Correct me
 18 if I'm wrong.
 19 We express general findings today.
 20 We have a motion based on those general
 21 findings in the motion.
 22 Counsel for the Board drafts an order.
 23 That order comes back to the Board for
 24 review.
 25 And then it's issued.

1 And it's in that order that counsel will,
 2 with specificity, clarify exactly what we're asking of
 3 the hearing officer and counsel regarding this case.
 4 Is that correct, Ms. Hensley?
 5 MS. HENSLEY: That's correct.
 6 MS. ELROY: So -- Mr. Chairman, Ms. Hensley.
 7 So, basically, we're going to include in our
 8 order, based on your legal review, whether or not the
 9 precedence set with the Sunnyside case is applicable to
 10 this situation with the summary judgment hearing.
 11 MS. HENSLEY: That's correct.
 12 MS. ELROY: Thank you.
 13 CHAIRMAN MCCREEDY: Ms. Elroy, does that
 14 resolve your concerns?
 15 MS. ELROY: Yes. Thank you.
 16 CHAIRMAN MCCREEDY: Okay. So I think
 17 procedurally, now, I need a motion to un-table the
 18 motion and a second and a vote on that to get the motion
 19 back before us.
 20 MS. ELROY: Mr. Chairman, I so move.
 21 CHAIRMAN MCCREEDY: You move to un-table the
 22 motion?
 23 MS. ELROY: I move to un-table the motion.
 24 CHAIRMAN MCCREEDY: Is there a second?
 25 MR. BOLING: Mr. Chairman, I second that.

1 Kevin Boling.
 2 CHAIRMAN MCCREEDY: There's been a motion
 3 and a second to pull the original motion off the table
 4 and back to the Board for consideration.
 5 Do I need a roll call vote on this Rosie?
 6 No?
 7 Okay. All those in favor of the motion?
 8 MS. ELROY: Aye.
 9 MR. KIEBERT: Aye.
 10 MR. BOLING: Aye.
 11 DR. MACMILLAN: Aye.
 12 MS. MASCARENAS: Aye.
 13 CHAIRMAN MCCREEDY: Any opposed?
 14 Hearing none opposed, the motion carries.
 15 So now we have the original motion and a
 16 second back before the Board.
 17 Are the board members clear as to what is
 18 being in the motion and the second?
 19 Okay. I guess I would ask it in the
 20 negative. If there's any confusion or lack of clarity
 21 amongst a board member, would you please say so?
 22 MR. KIEBERT: Well, Mr. Chairman, I think
 23 the only thing that needs to be said is that Robert's
 24 Rules says that once you go into a roll call, you can
 25 explain your vote. I'm not sure that you can get into

1 the situation where -- that -- that-- that you look into
 2 what the motion was. But, anyway, I'm going to drop
 3 that. I won't -- I won't get involved in that.
 4 CHAIRMAN MCCREEDY: Okay. Are you
 5 suggesting we do anything to remedy that?
 6 MR. KIEBERT: No. I think you're fine and
 7 dandy. I just -- I just don't want to have -- have a
 8 loophole where somebody looks at it and says that, you
 9 know, what we did was not proper, you know, with respect
 10 to Robert's Rules.
 11 CHAIRMAN MCCREEDY: Okay.
 12 Ms. Hensley, any comments on any action that
 13 I as Chairman of the Board must take to make sure the
 14 motion is properly before the Board?
 15 MR. KIEBERT: Mr. Chairman, I think the
 16 motion is properly before the Board as long as we don't
 17 back up again.
 18 CHAIRMAN MCCREEDY: Do you concur, Ms.
 19 Hensley?
 20 MS. HENSLEY: Yes. I concur. You do not
 21 need to explain your votes. You've deliberated in open
 22 session. And that's what you're basing your -- your
 23 opinions and votes on.
 24 CHAIRMAN MCCREEDY: So the motion pending
 25 before the Board was the motion to remand, okay, as

1 explained by the court reporter and as I originally
 2 made. And it was seconded. Okay?
 3 So let's begin roll call vote again on that
 4 motion.
 5 MS. ALONZO: Chairman John McCreedy?
 6 CHAIRMAN MCCREEDY: Yes.
 7 MS. ALONZO: Mr. Kevin Boling?
 8 MR. BOLING: Yes.
 9 MS. ALONZO: Ms. Beth Elroy?
 10 MS. ELROY: Yes.
 11 MS. ALONZO: Mr. Nick Purdy?
 12 (Not present.)
 13 MS. ALONZO: Dr. Randy MacMillan?
 14 DR. MACMILLAN: No.
 15 MS. ALONZO: Mr. Kermit Kiebert?
 16 MR. KIEBERT: Yes.
 17 MS. ALONZO: Ms. Carol Mascarenas?
 18 MS. MASCARENAS: Yes.
 19 MS. ALONZO: Five votes.
 20 CHAIRMAN MCCREEDY: So we have a quorum, and
 21 the motion carries five in favor, one opposed.
 22 Board Members, any concluding comments for
 23 today's proceedings?
 24 Okay. I would again apologize to the
 25 parties for being late. There was a traffic accident on

1 the highway on my way getting here. I appreciate your
 2 patience and all your time and effort in -- in this
 3 case.
 4 We stand adjourned.
 5 Do we need to motion to adjourn?
 6 MS. HENSLEY: I don't know.
 7 MR. KIEBERT: I vote we adjourn, Mr.
 8 Chairman.
 9 CHAIRMAN MCCREEDY: Is there a second?
 10 MS. ELROY: I second.
 11 CHAIRMAN MCCREEDY: Okay. There's been a
 12 motion and a second to adjourn.
 13 Call for the vote. All those in favor?
 14 MS. ELROY: Aye.
 15 MR. KIEBERT: Aye.
 16 MR. BOLING: Aye.
 17 DR. MACMILLAN: Aye.
 18 MS. MASCARENAS: Aye.
 19 CHAIRMAN MCCREEDY: Any opposed?
 20 Motion carries. We stand adjourned.
 21 (Hearing concluded at 6:13 p.m.)
 22
 23
 24
 25

1 REPORTER'S CERTIFICATE
 2
 3
 4
 5 I, Rachelle Cahoon, Court Reporter, a
 6 Notary Public, do hereby certify:
 7 That I am the reporter who took the
 8 proceedings had in the above-entitled action in
 9 machine shorthand and thereafter the same was
 10 reduced into typewriting under my direct
 11 supervision; and
 12 That the foregoing transcript contains a
 13 full, true, and accurate record of the proceedings
 14 had in the above and foregoing cause, which was
 15 heard at Boise, Idaho.
 16 IN WITNESS WHEREOF, I have hereunto set
 17 my hand December 17, 2014.
 18
 19
 20
 21
 22 Rachelle Cahoon, Court Reporter
 23 SRT No. 1026
 24
 25

<p style="text-align: center;">A</p> <p>ability 25:16 44:25 able 16:12 45:13 above-entitled 58:8 absent 35:15 Absolutely 9:18 abstain 51:1 abundantly 47:22 accident 56:25 accommodating 6:7 accurate 58:13 acted 46:15 action 33:7 55:12 58:8 actions 22:25 actual 32:18 33:5 36:16 add 22:2 32:25 addition 10:18 additional 33:13 address 38:5 45:11 47:11,12 49:17 52:6 addressed 30:13 47:13 49:9 52:13 addresses 48:12 adequate 42:20 adjourn 57:5,7,12 adjourned 57:4,20 advice 37:11 affect 32:18 affiliation 6:14,20 6:25 affirmative 49:22 afforded 41:25 agency 17:20 18:18 18:20 19:4,9,18 26:4 29:6 36:1 41:25 46:15 47:3 47:7 51:25 ago 8:12 10:14 21:7 29:21 31:12,24 38:22 agree 19:16 22:23 28:18 agreeing 36:16 agreements 10:23 ahead 5:4 26:3 ahold 16:12</p>	<p>air 1:3 8:8 10:16 29:2 42:22 44:13 44:15,18,19 Airport 10:5 allegation 51:25 alleged 31:20 32:9 allow 29:17 allowed 17:22 26:4 51:11,14 allowing 33:15 alluded 10:13 Alonzo 3:17 5:8,12 5:14,16,18,20,22 12:24 13:7,9,11 13:13,15,17 14:7 14:10,13,16,18,20 14:23 50:18,20,22 56:5,7,9,11,13,15 56:17,19 alternative 33:3 ambient 44:18,18 amend 29:9 43:20 amount 17:8 19:3 19:18 23:9 40:20 41:9 45:9 analyses 44:19 analysis 44:16 Ann 3:8 ann.vonde@ag.i... 3:11 announcements 10:4 answer 49:23 answering 49:22 anytime 10:21 anyway 23:20 25:9 55:2 apologies 6:10 apologize 5:11,15 9:24 29:14,25 30:12,19 35:8 36:8 56:24 appeal 42:11 appears 21:24 35:13 36:6 applicable 53:9 application 48:12 49:8 51:16 applications 44:15 applied 31:7 32:23</p>	<p>41:2 43:22 applies 47:6 apply 17:16 26:23 29:7 31:16 34:4 36:21 52:2 applying 18:10 26:11 appreciate 9:20,20 11:8,15 30:23 33:8 37:3 41:3 57:1 appreciated 47:19 approach 25:4 27:9 appropriate 11:7 18:20 21:18 24:19 26:9 35:18 36:3 50:17 approving 11:7 arbitrarily 46:15 arbitrary 51:25 argue 37:20 38:20 argued 37:21 39:12 argument 8:7,11 33:10 arguments 8:16 19:15 arrangements 10:24 artful 21:4,5 articulate 52:8 asked 30:12 44:21 47:10 52:6 asking 36:15,20 37:12 40:10 52:1 53:2 aspects 44:20 asserting 40:13 assume 8:23 42:15 assuming 12:22 27:25 assure 40:19 41:8 attention 39:3 attorney 2:14 3:4,8 21:11 attorneys 11:14 34:22 Austin 2:19 authority 49:17 avenues 26:7 avoid 35:13</p>	<p>avoided 35:9 avoiding 36:25 46:10 aware 19:6 22:24 Aye 12:15,16,17,18 12:19 54:8,9,10 54:11,12 57:14,15 57:16,17,18</p> <hr/> <p style="text-align: center;">B</p> <p>B 7:7 back 10:12 13:4 14:4 15:9 17:1 21:19 22:21 28:7 29:4 31:21 34:19 36:5,24 38:25 39:20 40:10 43:18 43:25 44:21,24 45:13 49:5,18 50:6 51:4 52:23 53:19 54:4,16 55:17 background 23:17 36:9 BACT 32:11 44:16 bad 21:1 baker 7:7 ball 26:20 Barker 3:24 barred 35:9 based 22:9 31:19 32:19 40:12 41:19 52:20 53:8 basically 40:15 53:7 basing 55:22 basis 33:3 41:22 43:14,17 beginning 36:17 44:22 behalf 12:6 46:24 belabor 30:25 believe 15:11 21:16 31:6 37:6 43:10 50:16 51:10,13 believes 41:24 bells 10:3 benefit 44:5 best 20:14 38:1 Beth 3:14 5:14</p>	<p>13:11 14:14 50:22 56:9 biologist 24:1 bit 23:17 31:11 35:15,21 blings 10:4 board 1:1 3:3,12 5:7 7:25 8:13,14 8:19 9:7,9 10:6,10 10:17,18,21 11:3 11:11,20 12:6 14:5 15:1 17:4 18:25 20:5,14 21:19,24 22:20,25 23:3 25:13,15 27:14,16,21 28:4 28:25 29:1,7 30:2 30:5,22 33:12,12 33:21 34:11,20 35:14 36:5,8 37:11,24 38:25 39:18 40:10,17,19 41:10,15,17,18 42:21,24 43:10 44:14 45:3 46:5 46:12,13,25 47:10 47:12,14,25 48:3 48:11,24 49:11,14 49:16,16 51:12,22 51:24 52:22,23 54:4,16,17,21 55:13,14,16,25 56:22 Board's 30:8 31:16 35:12 37:23 48:11 49:9 52:7 Boards's 37:6 Boise 1:21 2:4,5,9 2:10,15,23 3:5,10 5:2 7:13 10:2 58:15 Boling 3:13 5:12,13 12:17 13:9,10 14:10,11,12 20:24 20:25 21:4,21 28:6,11,12 50:20 50:21 53:25 54:1 54:10 56:7,8 57:16 Box 2:5,10 3:5,9</p>
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<p>brief 9:15 37:13 39:22 47:2 briefed 39:23 briefing 8:15 17:9 19:3 26:8 27:5 31:3 38:16 39:5 39:10,15 briefs 39:18,19 41:9 bring 21:19 32:1 37:23 BTU 32:13 building 16:8 bunch 40:6 business 20:20 23:25 24:1 businesses 24:9 27:23</p> <hr/> <p style="text-align: center;">C</p> <p>C 1:23 2:1 3:1 58:1 58:1 Cahoon 1:23 58:5 58:21 call 5:4,6 8:2 12:25 13:2,5 14:5 15:6,8 15:16 31:14 32:1 50:16 54:5,24 56:3 57:13 called 22:14 35:4 calling 16:14 canceled 10:2 capricious 52:1 care 28:5 Carlson 2:13 7:14 7:14,15 11:22 16:9 38:3,10 39:24 40:9 41:16 44:9,11 48:14 Carlson's 41:17 Carol 3:15 5:22 13:17 14:23 56:17 carries 54:14 56:21 57:20 CARSLON 11:24 38:4,11 40:3 48:16,21 case 8:1,8 10:13 17:20 18:2 19:7 19:17 21:10 26:3</p>	<p>29:2 31:24 32:2,6 32:25 34:2,4,14 37:9,17 39:9,14 40:20 41:18 51:17 52:2 53:3,9 57:3 cases 36:11 47:5 caught 32:23 cause 58:14 certain 26:25 certainly 8:18 9:25 10:7 11:16 20:4 28:13 34:20,22 35:20 41:6 42:8 47:13 50:13 51:11 certify 58:6 Chairman 3:13 5:4 5:9,10,24 6:5,6,9 6:12,14,17,20,22 6:25 7:4,8,11,16 7:19,21,23 8:3,6 8:21,22 9:3,6,13 9:18 11:17,18,24 11:25 12:2,4,11 12:13,20 13:1,4,7 13:8,19 14:3,8,9 14:25 15:7,15,17 15:18,22,24 16:1 16:4,11,16,20,24 20:12,22 21:2,6 21:21 22:4,8 23:4 23:7,16 24:25 25:10,11,20,22 27:8,15,18,19,25 28:4,17,24 29:13 29:20,23 30:1,14 30:16 33:8 35:5,7 35:16 36:20 37:3 38:4 39:24 40:9 40:25 41:1,6,13 41:14 42:3,4 43:9 43:13,16 44:10,11 44:12 45:10,17,21 45:23,25 46:7,11 46:23,24 48:9,19 48:22 49:6,15,21 49:25 50:3,5,10 50:11,14,18,19,25 51:3,8,10,15,19 52:3,6,14 53:6,13 53:16,20,21,24,25</p>	<p>54:2,13,22 55:4 55:11,13,15,18,24 56:5,6,20 57:8,9 57:11,19 Chairmen 50:23 challenge 42:24 change 10:8 41:7 chime 10:8 choice 51:7 choose 39:4 51:1 citing 21:12 Civil 29:9 clarification 27:13 35:15 47:16 51:21 clarified 22:17 clarifies 23:1 34:17 clarify 18:4 22:21 25:6 26:6 28:2 29:6 37:7 41:22 41:22 43:20 46:11 52:15 53:2 clarity 44:5 54:20 clear 10:20 22:12 27:9 29:10 36:17 37:15 39:1 41:2 41:23 43:21 47:22 54:17 clearer 44:1 close 37:24 closer 40:5 Code 9:9 21:13 31:16 COIE 2:3,8 colleague 6:21 collectively 13:20 come 17:2 20:16,20 31:12 39:19 comes 52:23 comfortable 26:23 45:5 coming 47:17 comment 9:16 11:22,25 19:1 27:16 28:5 34:23 40:16 46:2,8 commenting 34:21 comments 8:19 9:7 11:21 17:4,7 20:1 20:4,5,9,9 21:8 25:13 28:24 29:18</p>	<p>30:3,10,23,24 33:9,10,16 34:21 35:1 37:4 43:10 46:1,4 48:24 49:1 55:12 56:22 communicate 9:10 completed 23:24 completely 22:23 complex 10:15,16 complexity 10:22 complicated 23:22 43:6 comply 30:7 38:1 ConAgra 1:6 7:20 21:9 24:9 42:17 concern 17:12,13 17:19 18:17 19:12 25:25 35:13 38:6 41:11 concerned 18:17,21 19:8 23:8,21 27:7 28:13 40:21 43:23 47:8 concerns 17:10 33:23 35:1 37:5 53:14 conclude 26:14 36:3 37:1 concluded 18:5 26:1 57:21 concludes 26:17 concluding 56:22 concur 9:3 55:18 55:20 concurrence 22:1 Conde 3:17 conducted 8:12 conference 1:20 16:7,8 confirmation 36:13 confused 50:24 51:2 confusion 36:24 51:6 54:20 connecting 10:1 consider 8:15 17:16 33:24 considerable 45:8 consideration 35:18 54:4</p>	<p>considered 34:3 considers 29:8 consistent 30:6 Construct 1:4 8:9 29:3 contains 58:12 contested 9:12 continuation 11:3 continue 24:10 47:12 continued 3:1 8:13 10:11,19 continuing 8:7 contracts 10:23 convince 11:6 correct 7:15 16:9 16:10 18:10 26:24 28:3 29:8 31:7 32:3 34:5 35:25 36:21 39:10,14 52:17 53:4,5,11 corrected 51:12 correctly 21:15,17 25:18 28:12 counsel 7:10 8:18 8:20 9:10 30:5 33:16 34:23 35:16 37:7,24 47:10,11 47:18 48:10 49:8 51:12 52:22 53:1 53:3 counsels 9:2 couple 10:14 21:6 38:5 course 9:16 24:16 court 23:12,14 28:9 37:15 40:22 42:10 42:11 44:3 45:15 45:18,20,22,24 46:3 47:7 48:25 49:4,5 56:1 58:5 58:21 courts 24:20 25:2 Cris 3:21 cross-examination 32:5 crying 24:11 crystal 26:20 Curt 3:18</p>
---	---	--	--	---

<p style="text-align: center;">D</p> <p>Dan 3:20 dandy 55:7 Darrin 3:20 date 8:16 day 10:17 days 27:21 28:2,18 de 38:24 39:1 42:15 deal 48:6 December 1:18 5:1 58:17 decide 21:10 24:21 25:3,5 34:14 37:13 40:11 41:18 42:11 43:8 decided 17:20 18:2 18:2 26:3 34:2 37:17,18 47:25 decision 18:1 19:3 19:23 21:19 23:3 26:1,6,13,25 27:20 28:23 29:10 30:5 35:25 39:2,3 39:20 41:23 43:21 49:9 51:20,24 decisions 19:7 39:10,14 45:2,4 deeply 24:12 deference 17:21 18:18,20,22 19:4 19:9 26:4,10 29:6 35:18,25 36:3 37:10,16 39:7,8 39:12,14 41:25 43:8 47:3 delay 30:24 36:25 deliberated 55:21 deliberations 30:6 37:24 demonstrate 31:18 Department 1:9,19 3:16 depend 35:23 depending 18:25 27:13 DEQ 7:14 16:8 38:7 39:8,11 42:17 43:1 DEQ's 11:23 33:6 deserve 39:12</p>	<p>determination 22:20 25:8 determine 17:24 22:9,12,18 34:15 41:19 46:14 determines 18:11 determining 18:24 19:10 deviation 9:20 dialing 16:15 different 8:1 24:15 difficult 22:8,15,19 24:18 direct 31:22 32:4,7 32:14 58:10 directed 33:4 disagree 37:6 disastrous 31:4 discretion 52:12 discuss 9:11 discussion 12:12 19:1 20:5 35:6 48:17 49:13,19 51:5 discussions 31:22 50:1 disposed 36:11 disputed 38:21,22 38:23 39:23 district 37:15 40:22 40:22 44:3 Docket 1:5 8:10 17:2 29:4 doing 10:5 36:18 45:18 Don 7:21 doubt 43:2 Doug 3:17 Dr 5:18,19 8:21,22 8:23 9:4,5 12:10 12:11,16 13:13,14 14:18,19 22:6,7 23:6,7,20 25:11 27:18,19,20 28:3 28:11 30:23 32:2 38:6 42:3,5 43:9 43:12,15 50:3 54:11 56:13,14 57:17 draft 30:5</p>	<p>drafts 52:22 dragged 35:14 drop 55:2 due 10:1 19:4 36:7 41:16 42:16 47:3 duty 34:10 Dylan 2:22 7:16 9:22 30:19 dylanlawrence@... 2:25</p> <p style="text-align: center;">E</p> <p>E 2:1,1,3 3:1,1 58:1 58:1,1,1 Early 5:13,19,23 easy 10:19 echo 21:23 effort 12:7 23:21 24:4 57:2 egroten@velaw.c... 2:21 either 26:14 28:15 29:9 37:16 element 51:18 ELKINS 2:18 Elroy 3:14 5:14,15 12:19 13:11,12 14:14,15 22:6,8 23:5 25:14,18,20 27:8,17 44:10,12 44:13 49:15,24 50:22,23 51:1,7,8 51:15 52:14 53:6 53:12,13,15,20,23 54:8 56:9,10 57:10,14 email 7:25 emalmen@perki... 2:7 emphasize 10:11 11:4 41:22 entertain 9:15 11:12 29:18 31:8 41:15,17 47:13 entertaining 31:2 entire 18:6 44:23 entirety 31:24 entitled 8:8 Environmental 1:1 1:10,19 3:3,16 7:2</p>	<p>Eric 2:18 15:17 46:1,7 Eric's 6:21 Erika 2:3 6:4 38:10 errors 31:19 32:9 essence 20:18 28:22 essentially 33:4 41:19 established 37:9 39:15,16 establishes 32:14 event 25:15 everybody 18:13 30:21 43:8 evidence 17:21 18:14,23 19:10 34:2,14 37:16 43:24 evidentiary 21:18 29:12 exactly 18:16 19:3 20:12 47:22,23 53:2 excellent 19:14 Excuse 23:12 executive 8:2,24,25 9:10,14 12:8,21 13:6,23 14:1,2 17:3 24:14 exercise 11:13 expand 37:1 expanded 37:4 expectations 36:6 expeditious 27:24 38:12 43:17 expeditiously 28:15 30:8 experience 44:14 expertise 42:6,14 42:17,19,20 43:11 44:25 45:3,7 explain 17:18 31:9 51:16,20 54:25 55:21 explained 38:20 56:1 express 52:16,19 expressed 46:17 expressing 19:20 44:2</p>	<p>expressly 48:11 49:9 extending 9:17 extent 11:2,10</p> <p style="text-align: center;">F</p> <p>F 58:1 facility 32:19 fact 10:25 17:25 18:6,11 19:22 26:2,15,18 27:12 29:11 32:24 34:4 34:6,13,15 35:23 36:14,23 37:18 38:22 39:23 40:13 41:20 43:23 48:17 facts 21:17 22:13 22:17,19 38:21,23 52:11 factual 33:25 fair 17:8 18:13 41:8 far 15:4 26:20 28:16 31:1 35:24 43:24 49:18 fastest 38:15 favor 12:14 42:10 54:7 56:21 57:13 fear 35:14 48:7 feel 11:3,4,6 40:17 51:5 feels 10:7 field 11:5 fielding 10:5 file 19:17 finality 20:2,21 financial 10:23 find 32:7 36:22 45:13,19 finding 17:19 findings 30:6 33:25 52:16,19,21 fine 55:6 finish 29:24 first 11:20 17:13 21:7 22:7 26:8 38:5 five 15:1 22:14,18 22:18 27:11 37:21 56:19,21 flight 10:2</p>
---	--	---	--	--

<p>Floor 2:14 3:4,9 flown 31:11 34:9 Floyd 3:18 fly 33:20 focus 20:18 focused 42:22 folks 6:2 16:1 20:7 37:13 41:7 FOODS 1:6 foregoing 58:12,14 forester 21:12 forth 18:7 29:8 Fortuna 2:19 forward 24:20 42:11 48:4 found 45:21 frame 27:16 28:5 frames 25:16 Fransen 3:18 front 10:17 36:24 37:22 43:21 45:12 frustrated 38:14 frustrating 39:17 frustration 44:8 full 29:12 58:13 function 46:13 further 8:17 11:2 20:9 22:2 25:13 28:24 31:2 35:15 49:13 50:1</p> <hr/> <p style="text-align: center;">G</p> <p>Garnet 36:1 gathering 21:7 general 17:12 35:16 47:18 52:16 52:19,20 GENERAL'S 2:14 3:4,8 genuine 17:25 18:5 18:11 19:21 22:13 22:16,19 26:2,15 26:17 27:12 29:11 34:6,12,15 36:14 36:23 37:18 40:12 41:20 43:22 genuineness 35:22 getting 26:20 32:23 57:1 Gibbs 3:19 6:23,24</p>	<p>7:2 15:22,23 give 39:11 45:15 given 10:8,10 36:1 36:2 37:11 gives 25:6 giving 17:20 43:8 go 5:4 7:25 8:1,24 8:25,25 10:12 12:8 13:5,23 14:3 15:6 21:18 28:16 36:24 38:15 40:22 42:11 44:3,21 45:4,13 50:6 54:24 goes 19:1 37:15 43:25 going 7:25 8:4,4,23 9:14 20:15 24:2 31:21,25 34:8 37:23,25,25 38:20 39:22 40:15,15 41:5 44:23 45:19 48:3 49:18 53:7 55:2 good 6:11 21:3 28:20 45:4 grant 25:8 granted 23:22 granting 22:11 greatly 47:19 Green 6:16 16:22 Groten 2:18 6:8,9 9:24 15:15,16,17 15:18 31:23 33:10 35:7 37:4,8 46:1,1 46:6,9 47:15,17 48:10,15 51:21 52:1 guess 13:24 25:23 42:8 54:19 guidance 46:23 guys 9:14 37:21</p> <hr/> <p style="text-align: center;">H</p> <p>half 37:20 hand 58:17 handle 12:23 13:24 hands 6:11 25:25 Hang 30:16 happen 26:21 32:1</p>	<p>44:4 happy 11:12 31:8 hard 27:4 Harriet 3:3 harriet.hensley@... 3:7 He'll 26:14 hear 21:3,17 30:14 38:10 41:4 46:6 50:5 heard 15:16 31:5 58:15 hearing 8:11 10:14 11:22 17:9,15 18:3,13,19,24 19:2,10,24 21:9 21:17,19 22:10,16 22:21,23 23:1 24:7,22 25:3,6,24 26:19 27:4 29:4,5 29:12,15 30:7 31:7,13,25 33:6 33:25 34:8,10,16 34:18 35:21 36:15 37:13,19,22,22 38:15 39:3,16 40:11 41:21 42:12 42:25 43:3,20 44:24 45:11 47:2 47:23 52:4,8 53:3 53:10 54:14 57:21 heater 32:11 Held 1:18 Hello 16:18 help 32:16 45:7 51:5 Hensley 3:3 13:3 49:20,21 51:13,19 51:23 52:5,17 53:4,5,6,11 55:12 55:19,20 57:6 hereunto 58:16 higher 32:17,20 highway 57:1 Hilton 1:20 2:14 hiring 45:11 Holcomb 3:24 6:18 6:19,21 15:20,21 hold 30:1 39:24 40:4</p>	<p>honest 47:22 hope 10:7 11:4 28:21 36:25 hoping 39:21 hour 37:21 hours 37:22 humanly 27:24</p> <hr/> <p style="text-align: center;">I</p> <p>I-- 27:25 Idaho 1:1,5,9,13,21 2:4,5,9,10,15,23 3:4,5,8,10,24 5:2 7:2 8:10 9:8 19:6 21:12 29:4,8 31:16 49:8 58:15 idea 31:2 40:1 41:4 identified 6:1 25:5 imagine 21:2 immediately 38:12 impacts 32:18 impatient 40:17 implemented 28:12 important 48:16 impose 25:16 26:16 26:18 impressed 42:17 in-house 7:10 include 27:9,11,14 53:7 including 19:18 41:23 inconsistent 36:7 incredibly 39:17 independent 33:3 indicate 33:14 indicated 29:16 33:12 46:2 indicates 47:6 Indiscernible 35:3 individual 8:14 43:13 inform 34:11 initial 8:11 49:7 injuries 32:8 injury 31:14,19 33:1,11,20 34:7 innumerable 36:8 36:9 instructed 26:11</p>	<p>instructions 27:10 29:5 intend 29:17 intended 9:25 intending 9:21 interest 36:13,25 46:9 interrupt 9:14 interrupting 29:14 30:20 intervenor 49:2 involved 20:19 22:24 28:20 44:17 55:3 issue 19:8 25:2,14 26:12,24 27:12,17 28:5 31:13 33:11 33:19,23 34:9,13 35:22 37:9,25 39:7 46:10,18,20 47:2,11,12,13,16 52:7,13 issued 1:4 8:9 29:3 37:7 52:25 issues 17:25 18:6,7 18:11,12 19:22 22:13,14,16,19 26:2,15,17 27:11 29:11 34:6,12,15 36:14,23 37:18 39:23 40:12 41:20 42:22,23 43:23 45:12 47:1 issuing 42:10</p> <hr/> <p style="text-align: center;">J</p> <p>J 2:13 Jefferson 2:4,9 Jim 3:25 7:9 16:3 job 19:14 24:7 42:12,25 43:1,3 jobs 10:17 John 3:13 13:7 14:8 16:19 20:11 50:18 56:5 join 16:21 judge 40:23 42:19 43:1 judgement 52:5 judgment 17:17,22</p>
--	---	---	---	---

<p>18:19,22 19:4 22:11,15 24:23,23 25:8 26:5,10,12 26:24 27:11 28:20 29:7 31:6,7 32:22 34:5 35:19 36:11 37:10,14,17 38:8 38:11 41:25 46:21 47:3 52:3 53:10</p>	<p style="text-align: center;">L</p> <p>L-E-H-M-A-N-N 7:10 lack 54:20 Ladies 22:7 Lamb 1:6 31:18,24 32:1,8,13,19,25 Las 10:2,4 late 5:10,15 10:8 56:25 law 19:7 35:24 37:9 39:1 Lawrence 2:22 6:11 7:16,18 9:13 9:19,23 11:19,21 12:5 16:9 29:13 29:22,24,25 30:10 30:11,18,19 33:9 34:25 35:10 Lawrence's 34:21 leave 35:20 legal 9:10,11 30:5 42:8 46:20 47:10 47:11 53:8 Lehmann 3:25 7:9 7:9 16:3,3,4 length 23:9 let's 13:4 14:3 25:2 30:9 39:11 56:3 level 18:18 41:24 45:3 47:2 liability 20:15 lifespan 10:25 lifespans 11:1 light 19:25 limit 26:16,18 32:11,15,17,20,21 limited 10:25 30:22 line 11:10 15:10 lineup 10:9 Lisa 2:13 7:14 lisa.carlson@deq... 2:16 list 15:11 listened 21:8 literally 31:25 little 18:17,21 19:8 23:17 26:20 27:6 28:19 31:11 35:15 40:5</p>	<p>LLC 1:5,13 8:10 29:4 LLP 2:3,8 lobby 41:12 logistics 12:23 13:25 long 27:23 40:18 55:16 longer 44:23 look 10:12 38:24 39:1 55:1 looked 24:15 47:21 looking 20:19 42:15 49:18 looks 5:24 55:8 loophole 55:8 lot 10:16,22 31:5,12 31:21 42:7 lower 32:15,20 luxury 21:12</p>	<p>mark 6:12,15 15:19 16:22 45:23 Markets 6:16 16:23 Mascarenas 3:15 5:22,23 12:18 13:17,18 14:23,24 21:22,23 22:5 54:12 56:17,18 57:18 material 17:25 18:6 18:11 19:22 22:13 22:17,19 23:10 26:2,15,18 27:12 29:11 34:6,12,15 35:23 36:14,23 37:18 40:13 41:20 43:23 52:11 matter 1:3 8:8,13 9:12 10:11,15 19:17,24 20:3 29:2 31:12,20 34:22 38:7 40:10 matters 7:24 28:25 McCreehy 3:13 5:4 5:9,10,24 6:6,12 6:14,17,20,22,25 7:4,8,11,16,19,21 7:23 8:3,6,22 9:3 9:6,13,18 11:17 11:18,25 12:4,11 12:13,20 13:1,4,7 13:8,19 14:3,8,9 14:25 15:7,15,18 15:22,24 16:1,4 16:11,16,20,24 20:22 21:2,21 22:4 23:4,16 25:11,22 27:15,19 27:25 28:4,24 29:13,20,23 30:1 30:16 33:8 35:5 37:3 39:24 40:9 41:1,6,14 42:4 43:9,13,16 44:12 45:10,17,21,23,25 46:7,24 48:9,19 48:22 49:6,21,25 50:5,11,14,18,19 50:25 51:3,10,19 52:3,14 53:13,16</p>	<p>53:21,24 54:2,13 55:4,11,18,24 56:5,6,20 57:9,11 57:19 mean 10:16 31:25 38:25 39:9,20 40:6 48:2 meaning 39:2 means 42:15 46:21 meant 30:21 meeting 5:5 Mehr 3:20 Melissa 3:19 6:23 15:22 member 3:14,14,15 3:15 42:24 54:21 members 3:12 5:7 8:1,14,20 9:7 10:6 10:17,18 11:11 14:5 15:1 17:4 18:25 20:6 21:24 25:13 27:16 28:4 30:2,22 33:13,22 34:21 36:8 39:18 40:19 41:10,15,17 45:3 46:11,25 48:24 49:11,14 54:17 56:22 Mendiole 6:12,13 6:16 15:19 16:22 16:22 merits 19:21 Michael 3:22 micromanage 28:14 mike 40:2 mind 41:7 minute 16:17 30:16 minutes 29:21 45:16 misplaced 47:9 missed 22:9 MM 32:12 modeled 32:18 modeling 44:17,17 44:18 modify 29:10 43:20 momentarily 8:24 money 20:20 monitoring 44:19</p>
<p style="text-align: center;">K</p> <p>Kari 3:19 keeping 13:19 Kermit 3:14 5:20 13:15 14:20,20 15:3,10 16:18 20:9 50:12 56:15 Kevin 3:13,21 5:12 13:9 14:10,10 20:23,24 28:11,11 28:18 50:20 54:1 56:7 key 23:18 Kiebert 3:14 5:20 5:21 12:15 13:15 13:16 14:20,21 15:2,3 16:13,19 20:11,22 28:17 30:14,17 35:3 39:25 40:1,6,24 41:3,12 42:2 50:9 50:11,12,13 54:9 54:22 55:6,15 56:15,16 57:7,15 kind 20:21 40:5 know 10:20,23 11:6 24:1,4,8,13,14 25:1,4 27:2,3 29:14 30:25 31:8 31:13,15 32:1,3 32:10,12,20 33:3 33:9,12 36:12,13 36:21,22 37:21 39:19,21 40:7,17 41:5 43:5 45:19 46:15,16,19 47:20 47:24 48:4,6,6 55:9,9 57:6 Kostka 3:19</p>	<p style="text-align: center;">M</p> <p>machine 58:9 MacMillan 3:15 5:18,19 8:21,22 8:23 9:4,5 12:10 12:11,16 13:13,14 14:18,19 22:6,7 23:6,7,20 25:12 27:18,19,20 28:3 28:11 42:3,4,5 43:9,12,15 50:3 54:11 56:13,14 57:17 MacMillan's 30:23 38:6 Madam 49:4 Magnida 3:24,25 4:1,1 6:21 7:7,17 9:23 11:10 20:1 21:9 24:9 30:19 42:18 Magnida's 7:10 31:1 Magnolia 1:5,13 8:9 29:3 Malmen 2:3 6:4,5 11:25 12:2 15:13 15:14 38:9 manner 23:2</p>	<p>mark 6:12,15 15:19 16:22 45:23 Markets 6:16 16:23 Mascarenas 3:15 5:22,23 12:18 13:17,18 14:23,24 21:22,23 22:5 54:12 56:17,18 57:18 material 17:25 18:6 18:11 19:22 22:13 22:17,19 23:10 26:2,15,18 27:12 29:11 34:6,12,15 35:23 36:14,23 37:18 40:13 41:20 43:23 52:11 matter 1:3 8:8,13 9:12 10:11,15 19:17,24 20:3 29:2 31:12,20 34:22 38:7 40:10 matters 7:24 28:25 McCreehy 3:13 5:4 5:9,10,24 6:6,12 6:14,17,20,22,25 7:4,8,11,16,19,21 7:23 8:3,6,22 9:3 9:6,13,18 11:17 11:18,25 12:4,11 12:13,20 13:1,4,7 13:8,19 14:3,8,9 14:25 15:7,15,18 15:22,24 16:1,4 16:11,16,20,24 20:22 21:2,21 22:4 23:4,16 25:11,22 27:15,19 27:25 28:4,24 29:13,20,23 30:1 30:16 33:8 35:5 37:3 39:24 40:9 41:1,6,14 42:4 43:9,13,16 44:12 45:10,17,21,23,25 46:7,24 48:9,19 48:22 49:6,21,25 50:5,11,14,18,19 50:25 51:3,10,19 52:3,14 53:13,16</p>	<p>mark 6:12,15 15:19 16:22 45:23 Markets 6:16 16:23 Mascarenas 3:15 5:22,23 12:18 13:17,18 14:23,24 21:22,23 22:5 54:12 56:17,18 57:18 material 17:25 18:6 18:11 19:22 22:13 22:17,19 23:10 26:2,15,18 27:12 29:11 34:6,12,15 35:23 36:14,23 37:18 40:13 41:20 43:23 52:11 matter 1:3 8:8,13 9:12 10:11,15 19:17,24 20:3 29:2 31:12,20 34:22 38:7 40:10 matters 7:24 28:25 McCreehy 3:13 5:4 5:9,10,24 6:6,12 6:14,17,20,22,25 7:4,8,11,16,19,21 7:23 8:3,6,22 9:3 9:6,13,18 11:17 11:18,25 12:4,11 12:13,20 13:1,4,7 13:8,19 14:3,8,9 14:25 15:7,15,18 15:22,24 16:1,4 16:11,16,20,24 20:22 21:2,21 22:4 23:4,16 25:11,22 27:15,19 27:25 28:4,24 29:13,20,23 30:1 30:16 33:8 35:5 37:3 39:24 40:9 41:1,6,14 42:4 43:9,13,16 44:12 45:10,17,21,23,25 46:7,24 48:9,19 48:22 49:6,21,25 50:5,11,14,18,19 50:25 51:3,10,19 52:3,14 53:13,16</p>	<p>53:21,24 54:2,13 55:4,11,18,24 56:5,6,20 57:9,11 57:19 mean 10:16 31:25 38:25 39:9,20 40:6 48:2 meaning 39:2 means 42:15 46:21 meant 30:21 meeting 5:5 Mehr 3:20 Melissa 3:19 6:23 15:22 member 3:14,14,15 3:15 42:24 54:21 members 3:12 5:7 8:1,14,20 9:7 10:6 10:17,18 11:11 14:5 15:1 17:4 18:25 20:6 21:24 25:13 27:16 28:4 30:2,22 33:13,22 34:21 36:8 39:18 40:19 41:10,15,17 45:3 46:11,25 48:24 49:11,14 54:17 56:22 Mendiole 6:12,13 6:16 15:19 16:22 16:22 merits 19:21 Michael 3:22 micromanage 28:14 mike 40:2 mind 41:7 minute 16:17 30:16 minutes 29:21 45:16 misplaced 47:9 missed 22:9 MM 32:12 modeled 32:18 modeling 44:17,17 44:18 modify 29:10 43:20 momentarily 8:24 money 20:20 monitoring 44:19</p>

<p>months 24:4 motion 12:8 22:11 25:8 27:10 29:21 29:24 30:4,9 35:6 35:11 43:18 45:14 46:4 48:25 49:7 49:11,18 50:2,4,6 50:8,12,15,24 51:4 52:20,21 53:17,18,18,22,23 54:2,3,7,14,15,18 55:2,14,16,24,25 56:4,21 57:5,12 57:20 motions 24:16 move 9:8,9 12:21 19:25 24:20 29:1 38:1 53:20,21,23 moved 38:8,11 moving 10:22 19:14 mute 20:24 23:15 23:18</p>	<p>note 48:17 novo 38:24 39:2 42:15 number 8:1,2</p> <hr/> <p style="text-align: center;">O</p> <hr/> <p>O 7:7 58:1 obviously 11:9 30:24 31:5 occur 10:4 32:19 offer 46:23 OFFICE 2:14 3:4,8 officer 17:15 19:2 19:24 21:10,17 22:21,23 23:1 24:7,22 25:3,6 27:4 29:5,5 30:7 31:7 33:25 34:10 35:21 36:15 37:13 37:22 40:11 41:21 42:12 43:3,20 44:24 46:14 47:2 47:23 52:8 53:3 officer's 17:9 22:10 25:25 39:3 42:25 47:8 officers 45:11 Oh 39:11 okay 5:24 6:17 7:4 7:8,13,19 8:3 9:19 11:22 12:4,13,21 13:4,23 14:3,25 15:11 16:4,7,11 16:16,20,24 17:1 17:6 23:4,19 27:15 29:25 33:14 34:2 37:11,19 39:11 40:18,22 41:22 43:16 44:4 45:13,20,25 46:3 48:14,21,22 49:3 49:25 50:14,25 51:3 53:16 54:7 54:19 55:4,11,25 56:2,24 57:11 once 8:23 10:11,19 54:24 ones 42:8 open 34:22 51:4 55:21</p>	<p>operate 27:23 opinion 17:24 19:20 44:2,23 45:1 opinions 55:23 opportunity 9:1,17 11:8,15 12:3 18:13 25:6 opposed 12:20 36:22 41:21 54:13 54:14 56:21 57:19 options 9:11 oral 8:7,11,15 33:10 order 5:5 11:7 17:9 17:11,14,15 18:4 18:8,15 22:10 27:14 30:5,8 34:1 34:17 35:2 36:18 37:7,25 40:21 41:9 47:14,18 48:5,17 49:10 51:24 52:7,7,8,13 52:22,23 53:1,8 Ordered 33:4 orders 31:17 36:10 47:21 48:11 origin 35:20 original 15:9 33:10 54:3,15 originally 56:1 overturning 48:4</p>	<p>17:10 18:8 19:2 19:13,24 22:3 24:14,18 26:9 27:3 29:17,17 30:7 33:16 36:24 37:5,25 40:16 44:7 47:1 48:7 56:25 parties' 47:8 parts 10:22 party 35:21 Pat 4:1 patience 57:2 Paula 3:22 7:24 12:22 13:24 15:5 16:12 pause 30:9 46:22 pay 39:3 pending 9:12 35:12 49:12 50:2 55:24 people 19:16 percent 28:1 perfectly 35:23 performed 24:7 period 26:25 27:2 PERKINS 2:3,8 permissible 35:24 permit 1:4 8:9 24:2 24:20 25:2 29:2 32:12,20 42:10,19 permits 10:16 permitting 19:19 23:22 24:4 44:15 person 9:25 23:25 24:1 personally 8:17 19:22 26:22 43:16 perspective 18:4 25:24 31:1 Petersen 2:8 7:20 7:20,22 16:9,10 petition 38:8,18 48:18 petitioned 24:23 petitioner 1:7 2:2 6:4 38:21 48:18 49:1 petitioner's 12:1 phase 26:16 27:6,9 phone 3:13,14,15</p>	<p>3:19,24,25 4:1 6:2 7:5,12 9:22 13:25 15:12 16:2 20:8 22:3 23:15,16 28:5 piece 49:17 pilgrims 40:7 pipe 20:16 Pitman 3:20 place 8:7 26:19 please 6:15 7:1 14:6 51:15 54:21 pled 48:18 PM 32:11 PO 3:5 Pocatello 7:3 point 8:13,18 9:7 18:21 26:14 27:22 37:23 48:9,16 pointed 39:9 posed 30:21 position 20:15 45:6 possible 15:5 27:24 28:15 30:8 posture 34:3 potentially 31:3 pounds 32:12 precedence 53:9 precedential 19:7 36:10 47:21 48:5 51:24 preferably 35:11 preliminary 7:23 present 3:12,16,23 5:10,15,17,19,23 6:5 14:15,17,19 14:22,24 15:14,21 15:23 18:14 35:9 56:12 presented 19:15 23:10 presiding 46:14 presuming 9:1 presumption 35:25 pretty 42:9 previous 29:15 49:18 primarily 10:5 11:13 primary 32:11</p>
<hr/> <p style="text-align: center;">N</p> <hr/> <p>N 2:1,23 3:1 name 7:9 necessary 10:7 36:16 need 10:24 12:5 20:2 21:14 22:1 23:14,15 24:1 27:24 39:8,13,13 40:18 41:12 45:2 53:17 54:5 55:21 57:5 needs 11:4 20:20 21:16 22:24 28:20 34:18 54:23 negative 54:20 nevertheless 23:23 new 26:12 46:10 Nick 5:16 14:16 56:11 Nitrogen 1:5,13 8:10 29:3 noise 23:17 Nope 15:4 North 1:20 2:14 Notary 58:6</p>	<hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1 3:1,1 58:1 P-2013-0030 8:9 29:3 P-2013,0030 1:4 p.m 1:18 5:1 57:21 P.O 2:5,10 3:9 painful 21:14 28:6 papers 10:16 part 22:16 25:1 30:4 46:13 participate 15:2,4 particularly 13:20 19:25 20:17 parties 7:13 8:15 9:16,17 11:16 12:6 15:12 17:5</p>	<hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1 3:1,1 58:1 P-2013-0030 8:9 29:3 P-2013,0030 1:4 p.m 1:18 5:1 57:21 P.O 2:5,10 3:9 painful 21:14 28:6 papers 10:16 part 22:16 25:1 30:4 46:13 participate 15:2,4 particularly 13:20 19:25 20:17 parties 7:13 8:15 9:16,17 11:16 12:6 15:12 17:5</p>	<hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1 3:1,1 58:1 P-2013-0030 8:9 29:3 P-2013,0030 1:4 p.m 1:18 5:1 57:21 P.O 2:5,10 3:9 painful 21:14 28:6 papers 10:16 part 22:16 25:1 30:4 46:13 participate 15:2,4 particularly 13:20 19:25 20:17 parties 7:13 8:15 9:16,17 11:16 12:6 15:12 17:5</p>	<hr/> <p style="text-align: center;">P</p> <hr/> <p>P 2:1,1 3:1,1 58:1 P-2013-0030 8:9 29:3 P-2013,0030 1:4 p.m 1:18 5:1 57:21 P.O 2:5,10 3:9 painful 21:14 28:6 papers 10:16 part 22:16 25:1 30:4 46:13 participate 15:2,4 particularly 13:20 19:25 20:17 parties 7:13 8:15 9:16,17 11:16 12:6 15:12 17:5</p>

<p>prior 31:17 probably 20:25 28:19 problems 33:15 40:23 procedural 34:3 36:2 procedurally 32:25 51:9 53:17 Procedure 29:9 proceed 23:18 proceeding 17:22 18:21,23 19:5,14 29:7 37:14 42:1 44:4 47:4,7 proceedings 1:17 56:23 58:8,13 process 19:19 21:14,25 23:23 24:10 28:15 31:2 38:14,15 42:11 45:8 project 10:21 11:12 proper 17:16 41:2 55:9 properly 24:7 42:13 43:22 55:14 55:16 propose 32:21 proposes 32:13 protocol 44:18 provide 9:4 47:15 51:20 provided 8:16 providing 41:23 provisions 24:21 PSC 44:15 Public 58:6 pull 54:3 Purdy 5:16 14:16 56:11 pursuant 9:8 pushed 23:18 put 19:16,18 24:10 42:18 45:5 puts 20:14</p>	<p>3:3,16 7:2 8:8 29:2 42:22,23 queasy 28:19 question 25:19,21 30:13,21 35:4 46:2,8,12 49:23 50:23 52:11,12 questions 8:18,19 9:2,6 10:6 11:5,11 11:20 17:5 20:5 24:5,6,13 29:16 29:19 30:2 31:9 33:13 42:7 46:4 48:24 49:1 50:1 52:9 quicker 39:21 quickly 19:25 quite 10:25 36:17 quorum 5:25 14:25 56:20</p>	<p>11:13 Recommended 11:7 17:9,11,14 22:10 33:4 40:21 record 8:14 10:13 14:4 17:2 18:7 19:13 20:2 21:8 22:17,22 23:2 25:7 26:11,23 28:2 33:17 34:24 37:15 40:12 41:10 41:19 42:16 43:19 43:21 44:2,23 45:4,9 49:5 51:17 58:13 records 17:10 reduced 58:10 reformer 32:11 regard 18:16 33:1 39:7 41:11 regarding 9:11 11:21 20:2 31:17 33:24 34:6 38:6 50:2 53:3 regardless 32:22 regular 10:17 reiterate 31:23 relates 37:14 relatively 19:13 reliance 47:8 reluctant 26:18 remain 23:20 40:21 remainder 15:8 remand 24:19 25:17 26:21 29:1 30:8 40:10 44:24 46:11 47:14 48:8 48:13 55:25 remanded 19:25 21:16 25:15 remanding 41:21 52:8 remedy 55:5 remotely 6:9 Reported 1:23 reporter 23:12,14 28:9 45:15,18,20 45:22,24 46:3 48:25 49:4,5 56:1 58:5,7,21</p>	<p>REPORTER'S 1:17 representative 44:13 representatives 11:10 representing 6:4 represents 9:23 request 30:4 40:14 41:18 49:7 requesting 51:21 require 29:12 required 17:23 18:3 requires 44:1 reread 43:19 reservation 31:5 resolve 46:20 51:5 53:14 resources 12:7 19:17 24:10 respect 28:23 36:7 41:16 42:16 55:9 respond 11:17 respondent 1:11 2:13 49:2 Respondent-Inte... 1:14 2:17 response 34:25 43:5 reverse 33:6 review 17:14 26:23 44:22 52:24 53:8 reviewed 47:5 reviewing 17:8 18:6 47:7 Ric 4:1 7:6 15:24 Riggs 3:21 right 6:13 21:14 24:21,22 25:22 26:12 32:23 34:19 43:15 45:17 50:7 ring 15:7 Robert's 54:23 55:10 robust 19:13 Rocky 3:24 roll 5:6 12:24 13:2 13:5 14:5 15:8 50:16 54:5,24</p>	<p>56:3 room 1:20 16:7,8 Rosie 3:17 5:6 6:1 7:24 12:22 13:21 13:24 14:5 50:16 54:5 rule 17:16 43:22 44:1,21 Rules 29:9 54:24 55:10 run 6:2 44:19 running 44:18</p> <hr/> <p style="text-align: center;">S</p> <p>S 2:1 3:1 58:1 S-O-R 7:6 save 10:3 saying 26:23 36:5 40:8 48:3 says 25:2 32:4 54:24 55:8 schedule 6:7 27:5 Schilling 3:21 scratch 45:9 screen 31:11 sea 35:21 second 2:14 3:4,9 12:10,11 18:17 27:6 29:14 30:2 50:4,5,8,9,15 53:18,24,25 54:3 54:16,18 57:9,10 57:12 seconded 56:2 seconding 50:12 Section 9:9 see 14:4 15:8 18:12 26:7 30:2 36:4 37:9 46:22 48:23 seeing 10:19 send 38:25 sending 22:21 39:20 sense 25:23 sentiments 21:23 serious 28:1 40:23 session 8:2,24,25 9:10,15 12:9,21 13:6,23 14:1,2 17:3 24:15 55:22</p>
<hr/> <p style="text-align: center;">Q</p> <p>qualified 45:11 quality 1:1,3,10,19</p>	<p>R</p> <p>R 2:1 3:1 58:1,1,1 R' 58:1 Rachelle 1:23 58:5 58:21 radar 31:11 33:21 34:10 raised 18:8 24:16 25:15 27:17 ramification 9:11 Randy 3:15 5:18 13:13 14:18 56:13 re-briefing 47:24 re-evaluate 26:11 read 21:8 39:18,19 46:4 48:19,25 49:5 50:6 51:17 reading 18:15 realize 30:12,20 really 21:3,4 24:21 39:13 42:6,16,22 42:25 reason 36:2 43:2 45:10 reasons 10:1 recall 51:17 recognize 28:22 44:8 recognizing 10:15</p>			

<p>set 8:7 18:7 27:5 29:8 36:5 53:9 58:16 seven 15:1 45:2 shame 24:8,11 short 10:25 shorthand 58:9 sic 7:21 38:25 side 35:9 sides 24:17 signed 42:21 significant 18:22 19:9,16 24:6 25:1 Simon 3:22 simply 17:20,24 18:2,15 20:19 26:3 34:2 sir 6:13,19 situation 53:10 55:1 six 15:9 45:7 size 10:21 skip 21:10 skipped 21:25 somebody 55:8 soon 38:7 sooner 34:17,18 Sorbo 4:1 7:6,6 15:24,25 sorry 9:13 23:14 28:10 29:22 35:7 38:9 sort 43:7 47:24 sounds 24:6 speak 33:21 38:9 46:24 specific 22:14 27:11 31:19 specifically 37:12 38:19 specificity 53:2 specifics 51:18 speed 38:6 spend 19:2 spent 17:8 40:19 41:8 spot 45:23 SRT 1:24 58:22 STAFF 3:16 stage 24:5 26:5,10</p>	<p>36:2,2 37:10 52:6 52:10 stake 12:7 stand 34:20 51:11 57:4,20 standard 17:17 18:10 22:12 24:22 26:9,12,24 29:6,8 34:5 36:22 41:2 46:19 52:1,10 standards 25:7 31:6,8 32:22 46:16 standing 31:15,17 33:1,20 34:6 standpoint 11:23 12:1 start 17:5,6 20:7 44:22 45:9 state 1:1 3:4,9 18:9 38:7,19,21 stated 22:3 32:16 statements 33:17 34:23 35:17 Statesman 3:24 station 44:19 statute 47:6,9 statutes 19:6 24:15 24:17 stay 40:17,18 step 21:10,25 22:9 straight 22:1 38:15 Street 2:4,9,23 3:4 3:9 struggle 48:8 struggling 48:7 stuck 38:17 study 8:14 stuff 28:8 submitted 44:15 submitting 44:17 substantial 31:14 33:1,11,20 34:7 40:20 41:11 43:2 suffering 31:18 sufficient 33:6 suggest 27:21 suggesting 18:19 55:5 suggestion 43:5</p>	<p>Suite 2:4,9,19,23 Sullivan 4:1 summary 17:17,22 18:19 19:4 22:10 22:11,14 24:23,23 25:8 26:5,10,12 26:24 27:10 29:7 31:6,7 32:22 34:5 35:19 36:11 37:10 37:14,17 38:8,11 41:25 46:20 47:3 52:3,5 53:10 Sunnyside 46:17 48:5,12 49:9,19 51:16,20,23 53:9 supervision 58:11 supplement 29:10 43:20 49:7 supplementary 49:17 50:24 support 22:20 24:17 27:1,2 suppose 26:16 supposed 12:24 13:1 sure 5:8 9:4 11:12 13:25 14:7 16:19 23:1 28:7 36:20 48:11 50:7 54:25 55:13 sustaining 32:9</p> <hr/> <p style="text-align: center;">T</p> <hr/> <p>T 58:1,1,1 table 51:4 54:3 take 6:2 15:8 21:15 22:25 26:19 28:7 32:10 44:23 45:8 55:13 taken 23:9 48:10 talking 30:15 40:2 42:15 talks 32:15 Taylor 3:24 6:18 15:20 technical 43:7 45:6 tell 17:14,19 18:1 18:16 19:23 26:1 33:19 34:1 37:8 38:7,13 46:25</p>	<p>temporarily 51:4 ten 27:21 28:2,18 terms 20:15 21:15 testimony 31:22 32:4,7,14 33:5 Texas 2:19 thank 6:6,6,22 7:22 9:5,19 11:17,18 12:2,4 13:19 14:13 15:14,18,23 16:5 20:22 21:21 22:4 23:4,7,19 25:11 30:11,18 38:4 40:24 48:15 49:15 53:12,15 that-- 10:19 55:1 thing 21:1 28:21 32:13 43:7 54:23 thing's 35:14 things 21:3 25:3 38:5 think 17:1 19:12,13 19:15 20:11,12,14 20:17 21:20 25:14 26:4,19 27:3 28:15,18,19 31:10 34:10,19 36:23 37:4 38:14,19 39:1,5,9,15,16 43:17,25 45:1,8 47:15,20 48:9 53:16 54:22 55:6 55:15 thinking 20:13 38:12 thought 29:16 30:22 thoughts 27:7 three 17:10 45:15 threshold 46:10 tie 25:24 Tiffany 3:18 time 5:23 8:6 12:7 17:8 19:3,12,16 19:18 20:18,20 21:15 23:9,21 25:16 26:16,18,25 27:2,16 28:5,13 28:21 29:15 38:18 40:20 41:9 44:7</p>	<p>45:9 57:2 time-bound 23:3 timely 23:2 times 10:13 timing 22:24 tkpetersen@per... 2:12 today 9:25 11:7 15:5 19:1 20:2 28:25 30:6 33:13 37:2 41:8 52:19 today's 56:23 tonight 40:18 Tonn 2:8 7:20 totally 33:2 track 13:20 34:19 traffic 56:25 transcript 1:17 58:12 travesty 24:3 tried 29:20 troubled 24:12 troubling 48:1 true 32:3 58:13 truly 13:25 22:18 try 8:5 14:3 15:5 41:7 trying 35:12 turned 32:5 two 17:11 26:7 31:12,23 38:22 typewriting 58:10</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimately 19:1 un-table 53:17,21 53:23 unanimous 35:13 understand 6:1 10:7 11:16 12:5 22:15 25:18 28:21 35:24 36:12,15,19 37:5 44:9,16,20 understanding 41:24 52:17 Understood 48:19 uniformly 37:9 unintentionally 6:10 uphold 33:3</p>
--	--	---	---	--

<p>urge 39:18 urgency 12:5 use 24:22 52:9</p>	<p>24:3,4 36:4 37:23 38:17,17 39:22 42:15,24,25 44:21 53:2,7</p>	<hr/> <p style="text-align: center;">0</p> <hr/>	<hr/> <p style="text-align: center;">6</p> <hr/>
<hr/> <p style="text-align: center;">V</p> <hr/> <p>VARIN 2:22 various 10:3,23 24:16 Vegas 10:2,5 verbalized 20:12 verdict 33:5 versus 32:20 Vice-Chairman 3:13 VINSON 2:18 Vonde 3:8 vote 5:6 11:6 13:2,5 14:5 50:16 51:2 53:18 54:5,25 56:3 57:7,13 voted 35:12 votes 55:21,23 56:19 vs 1:8</p>	<p>we've 20:18 23:10 35:6 37:11 47:21 48:19</p>	<p>0.0024 32:13 0.0075 32:12 01-01-14-01 17:2 0101-14-01 1:5 8:10 29:4</p>	<p>6:13 57:21 67-5279 31:16 47:6 48:12 49:8 67-5729 46:16 67.23.45-1(f) 9:9</p>
<hr/> <p style="text-align: center;">W</p> <hr/> <p>wait 16:16 45:19 walk 48:23 want 11:16 25:24 28:14 30:25 31:14 33:17 34:23 40:16 41:15,17 44:6 45:1 47:1 55:7 wanted 10:11,20 46:11 50:6 wants 27:5 48:3 WARDELL 2:22 warranted 18:24 19:11 37:19 wasn't 39:10 waste 44:6 water 42:22 way 27:23 31:17 32:17 34:1 38:12 43:17 44:2 57:1 we'll 5:4 9:3 12:21 13:23 15:8 16:16 30:1 34:19 38:1 43:18 48:6 we're 8:23 17:1</p>	<p>weather-related 10:1</p>	<hr/> <p style="text-align: center;">1</p> <hr/>	<hr/> <p style="text-align: center;">7</p> <hr/>
<p>weeks 8:12 10:14 21:7 31:12,24 38:22 weigh 24:19 34:14 weighed 18:23 19:9 34:2 37:16 43:24 weighing 17:21 welcome 7:21 8:19 20:4 went 26:3 43:24 West 2:4,9 3:4,9 Weston 1:6 31:18 32:8,13,19,25 Weston's 31:24 32:2 whatnot 10:4 WHEREOF 58:16 whistles 10:3 Wilder 32:2 willing 9:15 41:7 Wilson 3:22 7:25 8:4 15:6 16:14 23:13 40:4 WITNESS 58:16 work 27:4 38:16 working 8:5 40:3,4 wouldn't 44:6 45:5 written 31:22 32:4 32:6,14 37:7 47:14 49:10 wrong 52:18</p>	<p>we've 20:18 23:10 35:6 37:11 47:21 48:19</p>	<p>100 2:19 28:1 1026 1:24 58:22 1111 2:4,9 1410 1:20 2:14 17 58:17</p>	<p>700 3:4,9 737 2:5,10 78746 2:19</p>
<hr/> <p style="text-align: center;">X</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>Y 3:8 Yeah 16:3,14 20:25 23:13 41:14 years 44:14</p>	<hr/> <p style="text-align: center;">X</p> <hr/>	<hr/> <p style="text-align: center;">2</p> <hr/>	<hr/> <p style="text-align: center;">8</p> <hr/>
<hr/> <p style="text-align: center;">Z</p> <hr/>	<hr/> <p style="text-align: center;">Z</p> <hr/>	<p>20 44:14 2014 1:18 5:1 58:17 208-334-2400 3:6 3:10 208-343-3232 2:6 2:11 208-343-3434 2:6 2:11 208-345-6021 2:24 208-373-0481 2:16 208-373-0494 2:15 208-854-8072 3:6 3:11 220 2:23 242 2:23 2801 2:19</p>	<p>83701 2:5,10 83702 2:4,9,23 83706 1:21 2:15 83720 3:5,5,9,10 866-717-1758 2:24 8th 2:23</p>
<hr/> <p style="text-align: center;">3</p> <hr/>	<hr/> <p style="text-align: center;">3</p> <hr/>	<p>3:00 1:18 3:25 5:1 30- 27:2</p>	<hr/> <p style="text-align: center;">3</p> <hr/>
<hr/> <p style="text-align: center;">4</p> <hr/>	<hr/> <p style="text-align: center;">4</p> <hr/>	<p>4 1:18 5:1 45-day 27:2</p>	<hr/> <p style="text-align: center;">4</p> <hr/>
<hr/> <p style="text-align: center;">5</p> <hr/>	<hr/> <p style="text-align: center;">5</p> <hr/>	<p>50/50 39:11 500 2:4,9 512-236-3272 2:20 512-542-8709 2:20 56-dash-blah-bla... 21:13 56(c) 17:17 29:9 43:22</p>	<hr/> <p style="text-align: center;">5</p> <hr/>