



MONTANA **FWP**

**Montana State Parks and Recreation Board
Meeting Minutes
Helena Headquarters
May 10, 2019**

Parks & Recreation Board Members Present:

Angie Grove, Chair; Scott Brown; Erica Lighthiser; Mary Sheehy Moe; and Betty Stone

Staff Present:

Becky Dockter, Pat Doyle, Aimee Hawkaluk, Tom Reilly, Paul Sihler, Jessica Snyder, and Ken Soderberg.

Guests: Michele Fromdahl, Chris Gallus, James Gustafson (petitioner), Jerry Hensleigh, Cindy Lott and Tom Towe.

Topics:

1. **Call to Order and Pledge of Allegiance**
2. **Approval of the February 22, 2019 Board Meeting Minutes**
3. **Appointment of Vice-Chair**
4. **Public Comment ~ For Issues Not On This Agenda**
5. **Individual Appeal of Department Decision Regarding Hell Creek State Park**
6. **Adjournment**

1. Call to Order – Pledge of Allegiance

Chair Grove called the meeting to order at 10:00 a.m. and led the Pledge of Allegiance.

Chair Grove congratulated all the Board members for being confirmed by the Senate. Will have a legislative session update at the next Board meeting. Do not have a Director's or Administrator's report on today's agenda as they are both out of the state and it also allows us to focus on the critical item we have on the agenda today.

2. Approval of the February 22, 2019 Board Meeting Minutes

Motion: Member Moe moved, and Member Brown seconded to approve the February 22, 2019 Board meeting minutes.

Action on Motion: Motion Passed. 5-0

3. Appointment of Vice-Chair

Motion: Member Stone moved, and Member Lighthiser seconded to appoint Member Moe as Vice-Chair.

Member Moe recused herself from the vote.

Action on Motion: Motion Passed. 4-0

4. Public Comment ~ For Issues Not On This Agenda

None

5. Individual Appeal of Department Decision Regarding Hell Creek State Park

Chair Grove explained there will be presentations from the Petitioner and Department within the allotted time frame. She asked the Board to refrain from asking any questions until after the formal presentations; it will make it easier to assure that every presenter gets their allotted time, and they may address your question later in the presentation; there will be unlimited timeframe for the Board to ask questions after the presentations are over; the Chair reserves the right to manage any repetitive information to respect the time limitation. Any questions are to be directed to the petitioner, the Department representative, the Board's legal counsel or herself; the Board is not to direct questions to other people within the body of the audience. Each question asked will be evaluated by the Board's legal counsel to assess if there is any impact to future litigation; for these questions, legal counsel will keep a running list and if need be, the Board would go into closed deliberations; after every question she will be checking with Becky Dockter, the Board's legal counsel, to make sure this is an appropriate discussion in a public format. All questions must pertain to the ruling on the two decision items: the upgrade of the fish cleaning waste water system and replacement of the water cistern. She suggested the deliberations be formulated around the three questions within the appeal criteria: did the Department fail to comply with laws, rules, policies or procedures; did the Department base its decision on invalid or incomplete information; or if the decision was arbitrary and capricious. The Board will take public comment prior to Board deliberation; important to get the public's input before the deliberations are done. Each commenter will be limited to three minutes. There will be no Board questions directed to the public. The final motion will be entertained after the deliberations and the public testimony. The motion can take three avenues: the appeal can be denied in whole, in-part or it can be rereferred back to the Department for further consideration or clarification.

Chair Grove asked if the Board has any questions or comments on the process.

Becky Dockter, FWP Chief Legal Counsel, stated she will be serving as the Board's legal counsel at today's meeting and is happy to answer any questions the Board may have. The authority for the Board and the criteria by which the Board will consider this appeal and make its decision is in an appeals procedure for Fishing Access Site and State Park Development that was approved by the Fish, Wildlife and Parks (FWP) Commission October 13, 1995 and applies to any development of state parks matters. This policy has not been repealed by the Board, so it continues in existence.

Dockter explained the Hell Creek appeal was filed by Mr. Gustafson regarding a development proposal by the Parks Division to upgrade the fish cleaning state waste water system and replace the existing potable water cistern. The Board will determine whether that decision was proper based on the following criteria:

1. The Department failed to comply with any applicable law, administrative rules, policies or procedures;
2. The Department based its decision on invalid or incomplete information that would substantially alter the decision; or
3. The decision made by the Department was arbitrary and capricious.

Dockter explained “arbitrary and capricious” is a basic standard of law that judges and courts generally apply. In practical terms it’s characterized by abusive use of discretion, clearly unwarranted exercise of discretion or was fraudulent. The Ninth Circuit Court of Appeals has found in case law, there should be an absence of rational connections between the facts found and the choice made.

Dockter stated she put together language considerations for the Board to consider when making the motion the Board can make their own motion, these are just suggestions:

1. The Board can move to deny the petition in whole;
2. The Board can move to deny the petition in-part (would need to specify which part and remand or grant the other parts of the petition); or
3. The Board can remand the entire petition back to the Department for further consideration.

Dockter stated Chair Grove mentioned the circumstance in which questions might actually elicit some matters that would implicate litigation. There is a litigation exception to the open meetings requirement; there is currently litigation filed on Hell Creek State Park; she will endeavor to ensure that the Board won’t inadvertently affect the litigation with what we are doing here today. If there is a circumstance where a question from the Board might actually implicate the litigation, she will raise her hand and ask that the question be put on a list and it will be discussed outside the public forum. Every other portion of the deliberation should be in the public eye; she will keep the list herself and will record the conversation if the meeting does end up being closed. In case there are any questions afterwards of what was discussed, there is a record.

Jim Gustafson (Petitioner), Friends of Hell Creek Inc. (FHC), President, stated he prepared very extensive notes for the Board and has copies if anyone would like them, will address his concerns and will answer any questions as the Board determines. He appreciates the opportunity to address this committee. He has some serious concerns about the proposed construction project at Hell Creek State Park. He feels the Board should be aware that this proposed project is indicative of other problems at Hell Creek. He hates to be so negative and really does appreciate this opportunity to talk to you and he is hopeful we can do something positive to not only redirect this project, but to use this situation as an example of how we can start working together to benefit the public who uses the park. He is here to tell you they are not happy, but he feels there is hope. He is going to talk about the construction project, why he appealed, how the appeals process wasn’t followed by FWP/MSP staff, how this relates to the bigger problem and conclude by asking you to delay any decision, actually follow the policy and come to Hell Creek to view things for yourself. He thinks it will give you the necessary information and insight to make the best decision and while adding some time to your actual decision will ultimately shorten the process because it satisfies the requirements of your own policy and it satisfies him and the other 518 plus users that you truly listened and made reasoned and informed decision with all the facts in front of you. His first official comment is he is confused by the tone and nature of FWP and their respective legal teams concerning his appeal and by their interpretation of the appeals process and its intent. He needs to make sure the Board is aware that when he filed the temporary restraining order (TRO), FWP asked for a stipulation. That stipulation was that FWP would suspend construction and honor his right to appeal, in accordance with the guidelines set forth in the 1995 Appeals Procedure document provided to me by FWP. That stipulation was a request for us to place our legal actions on hold until the appeal process was completed. He agreed, reserving his right to amend his action and continue with any necessary legal appeal, if necessary. It is important to remember what is stated in the appeal process. Section V states “The appeals process before the Department should be non-adversarial

and provide an additional opportunity for conflict resolution. Any appropriate means may be used to resolve an appeal, including but not limited to, fact finding, site visits, hearings, meetings with the appellant and other parties, informal mediation and negotiations.” None of these options were afforded to him. He feels this appeal process is anything but non-adversarial. He is here as a citizen of Montana to present his concerns to the Board. It is painfully obvious by the amount of legal correspondence that he has received, and stipulations placed on him by FWP and their respective legal team, that this is most definitely an adversarial action on the part of FWP. His hope is that this was not the intention of the Board members but the actions of an overzealous legal team. In accordance with the appeal procedure, Section V. paragraph 3, “any appropriate means may be used to resolve an appeal, including but not limited to, fact finding and site visits.” When his request for information to FWP was delayed, not once but twice, and his request for a postponement due to FWP was denied; how does that fit into the spirit of the appeal if he is not allowed to gather the information, he needs to either prove or disprove his case? The appeal process further stipulates in Section V. paragraph 3 ‘that several other actions be allowed, site visits, hearings, meetings with the appellant and other parties; informal mediation and negotiations.’ He was not afforded any of these options in accordance with the appeal process. Section V. (Decision Criteria) states the appeal must be upheld and the decision remanded back to the original decision maker for corrective action. FWP failed to meet any of the requirements in Section VI paragraphs 1 through 3. There has been no contact except with his attorney. At this time he is asking the Board to uphold his appeal and remand the current decision back to the original decision maker or better yet, as he asked for in his opening statement, he would like to invite the Board to conduct a site visit to allow FHC to present witnesses, conduct a fact finding mission and afford the Board a full picture of FHC concerns and to also hear the concerns of all other parties involved and get both sides of the story. This is his portion based on the appeal process. His direct issues he is appealing is after conferring with FHC legal team, that they agree that Mr. Habermann’s conclusion that there is no preclusion in the contact between Montana State Parks (MSP) and the Thomases to prevent any development on the Hell Creek Marina’s 55-acre lease. FHC and FHC legal team positions is that there is also no conclusion or verbiage, other than egress and regress, in the contract that allows MSP to take any portion of the Hell Creek Marina’s lease. FHC’s legal team feels that Mr. Habermann’s argument is not relevant. The only resolution in their opinion is arbitration or a judicial resolution if MSP maintains their current position. The other issue FHC has is in Mr. Habermann’s response to his initial repeal refers to the Thomas’s multiple times as concessioners, lessors, and sub-lessors. He also references the agreement between them as a landlord-tenant agreement. FHC’s legal team feels that the relationship between FWP and the Thomases needs to be clarified prior to any decisions being reached because it falls under a whole new spectrum of rules, laws and regulations within the State of Montana. On July 6, 2017, MSP acting director, Tom Reilly, made the statement that MSP did not have the legal right to occupy any portions of the 55-acre lease. (See attached sworn statement). The current director in her response to his appeal, disagrees with Mr. Reilly’s assertion, but FHC’s legal team feels Mr. Reilly was correct in his initial opinion. Obviously, there is a difference of opinion not only with the opposing attorneys, but the MSP senior staff. The only resolution in their opinion is arbitration or judicial resolution of MSP maintains their current position. Mr. Habermann stated in his letter “the improvements would not infringe on the Thomases’ source of income”. How could it not? It eliminates any possibility for expansion and has a definite impact on their dry dock operations. Did Mr. Habermann discuss any possible impact with the Thomases or their financial planner or their bank prior to reaching the conclusion? It is crucial that the Board realizes MSP currently has over 337 acres of their own property that this construction can take place on. On the other hand, Hell Creek Marina has 58 acres, which MSP has already taken a substantial portion away from them for other projects and now want to take away the last 10 acres of usable space; this does not mean there is only 10-acres left, it means there is only 10 acres of usable space. Regarding the Notice of

Decision dated February 29, 2016, the Board made their recommendation for MSP to proceed with option #3 in the Decision Notice. MSP adopted the Board's recommendation and implemented option #3. It is important to emphasize the fact that the previous Board recommended, and MSP made the decision to turn Hell Creek State Park back to the Corp in 2021. MSP implemented several provisions and milestones which needed to be reached prior to MSP making a reassessment of the decision in 2019. Also included in MSP decision letter was the following: The Division will continue to manage the site with minimal improvements to maintain public health and safety, while building strategic partnerships and pursue new funding sources for Hell Creek State Park. To the best of his knowledge, the 2019 legislature did not make any substantial funding sources available to MSP and MSP ignored the only proposal for any form of partnership as well. FHC don't feel the current plans meet the definition of minimal funding or short-term solution, but fall directly into MSP original long-term plans, as suggested by Peaks to Plains and others. Several other options do exist. For example, shutting down the fish cleaning station, the dump stations or possibly the shower facility. Of the fifty some state parks, very few, if any, have a dump station, a shower station or fish cleaning station, so it is not essential to the operations of Hell Creek State Park. Other options that have been researched and have been reviewed by engineers for the FHC are removing the fish cleaning station from the current drain field and place it on a separate, more modern systems. This would go a long way in relieving the burden it places on the current drain field and would extend the current system, possibly indefinitely. The estimated cost is \$20,000 - \$30,000 (substantially lower) and it's a Department of Environment Quality (DEQ)/Environmental Protection Agency (EPA) approved system and is currently in use in the State of Montana. According to FHC engineers and experts, FWP's proposed fix for the fish cleaning station could have as little as a five-year life expectancy, according to their engineers due to an inherent problem involving the disposal of proteins such as fish scales, bone particulates and oils. These materials do not break down or it could take years and years to break down; they will go into the septic system, into the drain field and contaminate/plug the sand doing away with the effectiveness of the system and will need to be moved or replaced. If MSP is allowed to disregard the conditions of their own decision letter and proceed with their current fix, FHC has a plan in place that could conservatively save MSP \$117,000 on their current project cost, in addition to fix, would accommodate any future expansion and the current cabin owners. It would require substantially less space than the MSP current plan, it is based on more advanced technology. There is currently a system in place that meets the needs of the community with a population of 4,500 people; the total cost was under \$700,000. In the Director's response to his appeal she stated, "FWP has reached out to you and others involved in this issue in response to the concerns you have raised and have made every effort to meet to regarding this issue." This is simply not true, no one from FWP has ever contacted myself or my attorney to schedule any meeting or discussions. All correspondence and communications I have received have been directed through my counsel, James Carr. He will affirm that no efforts were ever made to meet with me. Chris Gallus, an attorney working closely with FHC on our proposal that was supposed to be presented to the Legislature, will affirm that he made several attempts to have him included in numerous discussions involving FWP, legislators, the Thomas's and the Army Corps of Engineers (ACOE) to discuss several issues involving Hell Creek. Tom Reilly from FWP, insisted that he be excluded from all discussions. In a scheduled informational meeting that he was asked to attend with Senator Fred Thomas, FWP, Chris Gallus and the Thomases, FWP asked that I be excluded from that meeting as well and a separate meeting was then scheduled for me prior to the original meeting. In closing, I have brought up several points. Unfortunately, in accordance with the rules that I have been forced to abide by, I was not allowed to present any witnesses to help support our concerns and possible solutions. The Board has a golden opportunity to make a difference, to get down to the heart of the problem, and attempt to re-enfranchise the Hell Creek users and FHC hope they will take advantage of this opportunity. If the issues with the sewer system are so

critical to FWP and Hell Creek State Park, what is FWP's plan on upgrading all 50 state parks? The water at Hell Creek State Park is potable, so if the showers are shut down on a busy weekend to limit shortages during peak seasons, then you eliminate the shortage for water for the users. This falls under the definition of minimal users. There was an article in the Billings paper this morning regarding Hell Creek State Park; in the article it questions whether any improvements have been made in the operations. New Administration has been put in place and the new Board has a place to act whether there has been any improvement within the boundary of MSP. He hopes that Beth, Martha and the Board have every intention of going in the right direction. He lives his life under the common denominator rule. In the current situation with Hell Creek State Park and the ongoing problems he has been involved in since 2014, the ongoing problem is Tom Reilly. We need to take a fresh approach, an open and honest approach, forget past history and move on. Hell Creek State Parks survives for two reasons: because there it is a state park and the second is because of Hell Creek Marina. There are ways to fix this problem.

Chair Grove stated Mr. Gustafson's extra time will be reserved.

Aimee Hawkaluk (Department), FWP Attorney, stated she is appearing today on behalf of FWP to present the Department's argument regarding the petitioner's appeal. Mr. Gustafson brought his appeal under the FAS and Parks Development Appeals Procedure, which she will refer to the "Appeals Procedure" today. Just as a matter of housekeeping, Chair Grove, your order in this matter to both the parties, required that we serve any documents submitted to the Board also to the other side. Unfortunately, FHC submitted documents to you but did not serve them properly to her. She requested these documents earlier this week through the petitioner's counsel. She did not receive them. She then formally requested them from the Board, through Ms. Snyder, as public records. She received the documents yesterday and had a limited opportunity to review them prior to the hearing today, though she does now have them for reference purposes. The petitioner's contention is about the appeals procedure and whether FWP followed that procedure properly. The Department did follow the procedure properly; the section talking about mediation and non-adversarial measures refers to a list of measures that may be used in attempting to resolve this matter more informally. She hears today that perhaps there is a misunderstanding about whether the Department did that or not. The Parks Division Administrator, the Director and she were involved in reaching out to Mr. Gustafson's attorney, trying to set up a meeting; made multiple attempts to try and set up a meeting and were not able to set up a meeting successfully. If those conversations had been made, she would view that as attempts towards settlement. Mr. Gustafson also contends that proceedings has been rigid, adversarial and aggressive. The Department does not see it that way; the Department has directed all communication through Mr. Gustafson's counsel, but that's a requirement when a person or a party is represented by legal counsel, that triggers a requirement that the Department must contact the petitioner through their legal counsel, we cannot contact them directly regarding the matter for which they are represented. The subject of the appeal which is allowed for in the appeals procedure, and the decision that is before you today are limited to the issue of whether FWP properly made a decision regarding proposed infrastructure upgrades at Hell Creek State Park. The appeal is not the proper forum to raise or address any other issues involving Hell Creek. The petitioners appeal specifically challenges FWP's decision to "replace and relocate the public water storage system serving the park" and also "to remove the fish cleaning station from the existing system and construct a dedicated septic treatment system for the fish cleaning station." These improvements are necessary to address currently outdated and failing infrastructure. They are necessary for the health and safety of the public and to improve the recreational experience at the park. They are also necessary to ensure that FWP complies with the requirements in the law and administrative rule that apply to Hell Creek State Park as a general services campground. She is asking the Board to dismiss the

appeal today for three reasons: first, because FWP complied with all applicable laws, rules, policies and procedures in making its decision; second, FWP based its decision on valid and relevant information; and third, because FWP's decision was not arbitrary or capricious. Those reasons follow the standard of review outlined in the Appeals Procedure in which you discussed at the beginning of this hearing. The first standard for review, the record shows that FWP complied with all applicable laws, rules, and department policies and procedures in making its decision. This is a very standard and typical health and safety project to be proposed in a state park and is the sort of project that FWP is very familiar with, both in terms of the process involved and the proposed action to be taken itself. The process followed in reaching this particular decision was consistent with constitutional requirements for notice and for public participation, with state law, and with FWP's practice followed for dozens of agency decisions made each year. On April 29, 2019 FWP submitted the administrative record in this case to the Board for your review (attachment B in Board's May 10, 2019 meeting packet) to its position paper. That record shows the extensive process that FWP followed in reaching its decision. As the Board has read in FWP's position paper, state laws and rules guide public involvement and comment for state decisions on a broad scale as well as improvements specific to state parks. There are understandably many legal requirements that FWP is required to follow before reaching a decision to move forward with any project, including compliance with the public's constitutional rights to know and participate. For an example more specific to state parks, FWP is required through administrative rule to consider, and did consider, the wishes of the public, the capacity of the site for development, environmental impacts, long-range maintenance, protection of natural features and impacts on tourism as these elements relate to development or improvement to state parks. It's a balancing test; it's not as if public opinion could outweigh some other factor. FWP met all these requirements prior to making its decision and the record submitted to the Board shows that. This project has had extensive process surrounding it, including in front of the Parks Board on multiple occasions as well as at the legislature. The proposed project was initially presented to the Board as an agenda item on October 15, 2014, prior to the 2015 Legislative Session, because funding was sought in the Governor's proposed House Bill 5 capital budget. As you are aware, this project and Hell Creek State Park in general have been discussed by the Board several times since the 2014 timeframe. Most recently, on February 16, 2017 the Board again approved the capital funding and approved proceeding with this project. To complete the next step after approval from the Board, FWP prepared an Environmental Assessment (EA), which complied with the requirements of Montana Environmental Policy Act (MEPA). It also complied with Mont. Code Ann. §23-1-110 and Administrative Rules 12.2.433 and 12.8.601. FWP published legal notices in multiple newspapers, published the opportunity for public comment on the State Parks Website, and sent out a press release announcing the 30-day public comment opportunity. She understands the petitioner believes that public comment was only open for 20 days, but that understanding is incorrect. Public comment was taken from June 12, 2017 to July 13, 2017. FWP received public comments during this process, both for and against the project, including a comment from the Petitioner. That process worked the way it is supposed to. FWP considered the public comment prior to making its decision. The final step in the process in the Department making their decision was reached on August 14, 2017, when FWP issued its Notice of Decision to proceed with its preferred alternative. The decision was reached properly according to all laws, rules, policies, and procedures, and petitioner has not shown otherwise. FWP considered an extensive amount of information in making its decision and the Petitioner has not presented any information which would justify altering the decision. The aging infrastructure currently on site has experienced numerous breakdowns every summer. This has presented problems for the department and for the public. The DEQ conducted a sanitary survey in 2010 recommending full replacement of the water storage tank due to issues identified as problems at that time; now, nine years later without having acted upon that recommendation. Two separate private consulting firms, Peaks-To-Plains and Great

West Engineering, have identified both the fish cleaning station septic system and replacement water cistern as critical infrastructure upgrades which are necessary for public health and safety. This issue was even identified by the petitioner himself as problematic in July of 2018 in an update he publicly posted in the Friends of Hell Creek Facebook group online. Allowing the failure of the present systems would put FWP in violation of Department of Public Health and Human Services (DPHHS) administrative rules, cost FWP funds and time unnecessarily, and subject the public to any negative outcome resulting from a lack of site improvements, or the failure of the existing infrastructure. FWP intends to spend significant time and effort to be able to open the fish cleaning station to service this year without improvements being made, even though it has been professionally advised not to do so, but the Department is willing to put in the time and effort to make sure it is a positive experience for the public. Moving on to the location of the proposed improvements and contentions raised by the petitioner about a sublease that FWP has with Hell Creek Marina, which is our concessionaire. The petitioner is not a party to that sublease and our sublessee is not a party to this appeal. The Petitioner incorrectly contends that FWP's sublease with Hell Creek Marina somehow requires FWP to gain the concessionaire's permission before proceeding with the proposed site infrastructure projects. This is not the first time FWP has heard this argument. Some of the public comment you'll see in the public record, expressed a similar sentiment. FWP evaluated this argument prior to making its decision in this matter and it does not have any bearing on the decision made. This is because, the petitioner is incorrect. Page 10, paragraph 28 the agreement states "The concessionaire recognizes the right of ingress and egress to authorized employees and agents of the U.S. Army Corps of Engineers, the Department and other governmental agencies for the purpose of engaging in any activities deemed necessary for the construction, operation, and maintenance of the Reservoir, Hell Creek State Park, the concession and all works and facilities appurtenant thereto or for any other purpose authorized or required by law." The work the Department plans on conducting does not prevent the public from recreating and it does not prevent the concessionaire from doing business pursuant to their sublease. Hell Creek State Park is on ground owned by the ACOE and ultimately decisions made on the property are subject to their oversight and to their requirements. FWP's lease with the ACOE explicitly states that nothing in Hell Creek Marina's sublease agreement Park could affect, waive, modify or interpret in any manner whatsoever the terms, covenants and conditions of the Department of the Army Lease. The two documents are consistent with one another and the development at issue here is allowed by both; however, if there were some conflict, the Corps lease would supersede any inconsistent sublease. FWP sought and received approval from the Corps for the proposed locations of the cistern and septic system. FWP discussed the project with the concessionaire and with the Corps, on the ground, along with in consultation with engineering firms, before determining where to locate the proposed development. The Department has done site visits, may have not done a site visit specifically with the petitioner, but the Department has walked the ground. The Department has relied on the expert information made available to them. The development location is not inconsistent with the map attached to the sublease (last page of the agreement and permit). The Petitioner argues that FWP intends to close Hell Creek State Park in 2021. The question of the future of Hell Creek State Park is not before the board for decision today. FWP has had numerous leases with the Corps dating back decades, each one having a beginning and end date. While the current lease does expire in April 2021, FWP has no plans to "close" Hell Creek State Park and there are two entire recreational seasons yet to occur before the current lease concludes, which represent two recreational seasons for the department to improve sanitary conditions and the experience of the public on site or, for conditions to further deteriorate. The second criteria for dismissal has not been met by the petitioner. FWP considered valid information and none of the information presented by the Petitioner justifies upholding the Petitioner's appeal. FWP's decision was far from arbitrary or capricious. FWP followed the standard procedure used for evaluation this type of project, carefully considered a

reasonable number of alternatives and the public comment received and made a decision as the result of that process. The reasoning for the decision, including reasons involving public health and safety, is outlined in the Notice of Decision and supported by multiple professional reports. Just because the petitioner disagrees with this decision and thinks that different options might have been more advantageous, in his mind, does not mean FWP's decision was arbitrary or capricious. With the entire record before us, it seems clear to her that it might have been arbitrary and capricious for FWP not to move forward with any improvements. The existing 8,000-gallon metal water cistern, that will be replaced with a 20,000-gallon cistern, has reached the end of its useful life and was sized/installed prior to the much of the park infrastructure it supports being developed over the past decade. Hell Creek State Park is required to comply with the laws and rules applicable to it as a general services campground and these improvements are necessary to ensure that compliance and a positive recreational experience of the public. The decision in this matter is not arbitrary and capricious and the Petitioner's appeal should be denied in whole.

Chair Grove asked if the petitioner would like to provide a rebuttal.

Gustafson stated yes, he would like to speak.

Chair Grove stated he has nine minutes and thirty-nine seconds left on his time.

Gustafson stated the stipulations he received from the legal representation from MSP said he was not authorized to present any witnesses. At this time, he thinks it is imperative that he be allowed in the very near future to have Mr. Carr file an affidavit directly in response to MSP assertion that they tried to have contact with him because it didn't happen. He does not deny, nor has he ever denied that the current system is problematic. The key issue at hand is that MSP has a decision letter and based on that criteria of the decision letter. In his opinion and his attorney and others, if we continue with this project, the we violate the decision letter. You have two options in his opinion: abide by the decision letter or rescind the decision letter. MSP legal team's assertion that he has no standing in the case has been addressed by his legal team. First, as a user, any changes or impact on any portion of Hell Creek State Park, whether it be the Park, the marina, the boat landing could have and does have the direct effect on himself, therefore I have standing in that regard, because it has a direct impact on the public. When Mr. Habermann chose to address his concerns in his rebuttal to his appeal, apparently, he felt I had a standing otherwise he should have ignored it. Just because the opposing party says it is so, does not make it a fact; it must be determined, arbitrated and discussed among the Board. As far as the egress and regress, I will let the attorneys address that; that is far beyond his scope of his knowledge base.

Vice-Chair Moe stated the first standard of review is the agency's failure to comply with any applicable law, rule, policy or procedure in making its decision. The Board has heard assertions and what appears to be new evidence today. Makes her wonder if we are looking at the policies and the facts that were in place at the time the decision took place.

Dockter stated yes, that statement is true.

Vice-Chair Moe asked, so any new policy or evidence that would be presented would not be germane to the Boards decision?

Dockter stated yes and no; it all depends what policy and procedure you are talking about. A certain procedure that the Department applied to make the decision at the time, would have been the relevant one to review right now. In light of the fact that there are laws that could be applied in retrospect. Without specifics she cannot speak to that directly. As a general rule, if you are reviewing a decision that was made back in 2017, you apply the applicable laws, procedures and practices that were in place at that time.

Vice-Chair Moe asked if the issue of Hell Creek State Park on whether the lease will be continued or not in 2021 is relevant to this appeal.

Dockter stated, no it is not.

Vice-Chair Moe stated in Mr. Gustafson's notes that he provided, under #6, he talks in some length about other alternatives and options that have been researched and reviewed by engineers, etc. Was this information submitted in public comment at the time?

Gustafson stated no, they were not. They were by others in the audience, but he personally did not.

Vice-Chair Moe did not see that in the comments that were provided.

Gustafson stated they were submitted at a hearing in Miles City; not sure if anyone at FWP kept notes or records of that hearing. The meeting was chaired by Doug Haberman, and believes Melissa, Doug's boss was in attendance as well.

Vice-Chair Moe stated in regard to the materials that have been provided to the Board, there was a concern about adequate time for public comment prior to the Notice of Decision that was disputed by the Department.

Vice-Chair Moe asked Mr. Gustafson if he accepts the Department's statement that there was actually a 30-day comment period?

Gustafson replied he did not address that in this appeal. He accepted the condition that was originally presented; the appeal notification in the Jordan publication fell well short of that time frame; it apparently did appear in other papers, but the area that was immediately affected was far short of the required time period, for whatever reason which he cannot address that either.

Vice-Chair Moe asked Mr. Gustafson in the Decision letter he mentions in his rebuttal, is he talking about the Notice of Decision that is the basis of this issue?

Gustafson stated yes, it is the Decision Notice dated February 29, 2016. Everything he's been told, the notice is MSP's official stance concerning Hell Creek State Park.

Vice-Chair Moe asked Mr. Gustafson when he states, "this is the official stance," what does he mean by this?

Gustafson replied the decision letter has never been rescinded by MSP or opened up to the Board for reconsideration to the best of his knowledge, and it has never been open for public comment, which

would be required for this decision letter to be rescinded. According to what he's been told the Department has to follow the same procedure to revoke the decision letter that they followed to invoke the decision letter.

Vice-Chair Moe stated her questions to the Department focus on the first standard in terms of whether or not the Department has essentially followed the rules. There seems to be a dispute of whether the Department reached out in compliance with its policy with regard to an effort to informally resolve the conflict between the Department and petitioner. Does the Department have specific dates or evidence of that having occurred?

Hawkaluk stated if her recollection is correct, she believes there is email correspondence about attempting to set up a meeting; she does not have this information with her today, but she believes it does exist.

Chair Grove asked the Department to get documentation of the emails to the Board.

Hawkaluk replied certainly, will get them sent to the Board.

Vice-Chair Moe stated in the second paragraph of Martha Williams' January 8, 2019 response letter to the appeal, she references a paperwork error that led to a decision to expedite the decision. For clarification, what was the paperwork error and in what way was the decision expedited?

Dockter stated this is one of those questions that we need to put on a list and talk about according to the exception for the litigation strategy.

Chair Grove stated Vice-Chair Moe's question will be reserved and will be addressed in a closed deliberation prior to the final motion.

Vice-Chair Moe stated that agenda and the minutes for the February 16, 2017 Board meeting, Chairman Towe noted that the concessionaire objected to where they were thinking about putting the water tank and Administrator Reilly said he would try to work through that issue with the concessionaire. Did that effort to work the placement of the water tank ever happen and what were the results, if so?

Hawkaluk replied she is not sure of the timing, whether it was prior to or subsequent to that February conversation, but she is aware that MSP met on the ground with the concessionaire and the ACOE and discussed the option with the professional engineering firms where the systems could be located or sited appropriately. She is not sure when that exactly occurred, but she could find out. She does know the efforts and conversations did occur about different locations.

Vice-Chair Moe stated that concludes her questions in terms of the first criteria.

Chair Grove asked for documentation of the dates that the on-the-ground meeting occurred.

Hawkaluk replied certainly, she will get the documentation gathered for the Board.

Member Stone stated the Department talks about two engineering firms doing studies on both the water and the fish cleaning septic system, correct?

Hawkaluk replied that is correct.

Member Stone asked when were those studies done?

Hawkaluk stated she needs to reference the materials. Those are discussed and relied upon in the Environment Assessment (EA). Off the top of her head, she thought a lot was done in 2015.

Member Stone stated perhaps the Department could address that later for the Board.

Hawkaluk stated it will be easy to find.

Member Stone asked the petitioner, on the notes he provided under #5, it states “it eliminates any possibility for expansion that has a definite impact on his dry dock operations.” What do you mean by dry dock operations?

Gustafson replied the Thomases and the Hell Creek Marina have several funding sources, one of course is docks, they sit in the water and are rented; the dry docks is a storage area where they store campers and boats. Part of the current dry dock would have to be disturbed to replace the existing water tank, and it eliminates the ability for the expansion of the dry dock by the concessionaire.

Member Stone stated in item #6 it states, “there is currently a system in place that meets the needs of the community with a population of 4,500 people; the total cost was under \$700,000” and you stated one of the projects they did.....who is “they?”

Gustafson replied Adams Construction out of Billings, Montana; they specialize in all sorts of stuff; one of their key things is water and waste water management; they are very well renowned for what they do; if you think the EPA and DEQ standards are strict, try working in Ireland, that is where the project was done; when they completed their drain system it was environmentally friendly, easily maintained and the water that comes out of the system is drinkable.

Member Stone asked, when approximately was that system put in?

Gustafson replied 2016, but he is guessing at that year.

Chair Grove stated from what she understands, most of the infrastructure that is being proposed will be buried upon completion. She is still not clear if that was buried how that would preclude expansions.

Gustafson replied it was in the contract with the concessionaire; he has the right to install RV sites within the boundaries of his concession area; why or how he cannot address, it is in the contract; if the State of Montana is allowed to utilize that area as a waste water treatment of any type, that precludes any development on top as well as below; you cannot put a house directly on top of a drain field; once it is done you cannot put a camper, a storage shed or a bait shop on top once it is done; not by his rules but by DEQ and others.

Chair Grove asked the petitioner, when you are talking about your other proposed system in your testimony today, are you proposing that would be placed in the same site?

Gustafson replied no, actually the neat part of the proposed system is that system is a self-contained large vault system; it does not require a drain field; it is a direct discharge back into the lake which is already DEQ and EPA approved; it works on water treatment membranes that do the same thing as sand and gravel does, but it is done with a membrane; the issue with the particulates is addressed immediately because of how you take care of the fish bones, scales and oil is you replace the filter; pretty simple technology; there is currently one system on Flathead Lake and the Fort Peck reservation possibly might have one that dumps directly into Fort Peck. The vault could go directly next to the boat landing, which is unused; it would be a gravity feed into the boat landing and then a gravity feed into the lake.

Chair Grove asked for other questions.

Vice-Chair Moe stated to the petitioner, that he disputes the accuracy of the Notice of Decision statement that the proposed location is the most feasible and economic location and have the least impact on the park visitors including park visitors utilizing concession services. You indicated where else it could be put, but at the time the decision was made, was that the most feasible and economic location?

Gustafson replied he can't speak to that because he was not part of the engineering proposal and site visit the MSP conducted; was it available at the time, yes, it is not new engineering; as a matter of fact, Mr. Reilly spoke at a meeting and said the Department attempted, not necessarily waste water but the water system in 1995 (he thinks) and it wasn't feasible, which is probably right because it was expensive and it didn't work well, but cell phones and email didn't work well in 1995; the system has been greatly advanced and most of the materials you can now buy in a hardware store.

Vice-Chair Moe asked if the Department could answer her question.

Hawkaluk stated she will try to answer the question the best she can, she is not an engineering expert either. Clearly, the Department thought it was the most feasible at the time and we still believe that today. Also, just to answer the earlier question, she did refer to her materials and the engineering reports were from 2014 and 2015, in support of going to the 2015 legislative session.

Vice-Chair Moe stated one thing she finds confusing about the petitioner's opening statement is that he seems to be arguing that we should reduce the amenities at Hell Creek State Park. Did she understand him correctly?

Gustafson replied not really, why should the tax payers of Montana spend \$1.2 million, \$3.6 million or \$4.5 million dollars (all numbers that have been published in articles within the State of Montana) for a state park, as it stands right now, in 2021 they are going to walk-away from it; it is an irresponsible expenditure of funds; this is what initiated and started the whole process; through the development of the process alternative fixes were found, suggested and ignored by MSP; if the true intention of MSP, according to their decision letter is to close Hell Creek State Park, then yes, he suggests whatever the least and minimal expense to the taxpayers of Montana be used to satisfy that need; it can be done; a system could be put in that would take care of the fish cleaning station; MSP could pump the holding tank on the current fish station weekly, this could eliminate the demand that is on the drain field; MSP not too many years ago upgraded this system, it was the ultimate solution. Then, Walleyes Unlimited (WU) donated a fish cleaning station and MSP engineers decided they could attach it to the current drain field; the problem is, the fishing station is not a toilet; when you clean fish, a large amount of water is needed to flush the guts and scales into the septic system and to avoid damaging the grinder.

Chair Grove reminded the petitioner that we are not here today to discuss whether the park is going to close or not, and the Board is not qualified to design a system; the Board will not be making a ruling on whether there is an appropriate system or not.

Gustafson stated he was just trying to answer the question; asked Vice-Chair Moe to re-ask the question so he can answer it appropriately.

Vice-Chair Moe stated the focus of her question is that, as she understands it, the initial and continuing effort of MSP is to provide the health and safety for the public who use the park and the park itself, and those would seem to be amenities that would be desirable to the concessionaire as well, does he agree with that?

Gustafson replied he agrees it would be desirable for the concessionaire; he thinks he would attest it should be on the Department's 337 acres, not on his 55 acres.

Vice-Chair Moe asked if the Department would like to respond to her question.

Hawkaluk stated yes, she would. In her opinion, it would be desirable to the public. She cannot speak for the concessionaire, but if she were to be in their shoes it would be desirable. The petitioner points out there may have been different options may have been considered or different conclusions that may have been reached, but that doesn't mean the decision FWP made was improper, that's the point of going through a process is to consider different options and to choose what you think is the most advantageous. To her, what she just heard, sounds like trying to reopen the decision-making process because the petitioner didn't like the conclusion that was reached. She didn't hear anything about how the decision was reached improperly or inappropriately, just that the petitioner disagrees and thinks there were better options in his opinion.

Chair Grove stated one of the things the Department talked about in their presentation was that there are other examples of how they have done sewer upgrades and improvements to water systems throughout the state parks system. Would the Department like to give a couple of examples of where that has been done in state parks in the last three to five years?

Hawkaluk stated she could; she would have to refer to materials that she doesn't have in front of her; she has not been involved in the weeds and the nuances of those processes; that is how smoothly these run; there is Department staff who know how these are done and don't have to frequently interact with the legal counsel to do them correctly; she will find the materials for the Board.

Chair Grove asked if the Board had any further questions.

Vice-Chair Moe stated with the significant criteria on page 14(e) of the EA included, whether the project is expected to be significantly opposed or controversial? Didn't the public comment suggest that there was significant controversy?

Hawkaluk stated she wouldn't characterize this as potentially significant controversy. Twenty-four public comments were received; some that supported and some that opposed. In contrast the Department deals with issues all the time where there's much greater levels of opposition, much more significant impacts. Also, when you read the criteria it says: "Would it generate substantial debate or controversy

about the nature of the impacts that would be created by the project?" When she is looking at that, and you can refer the question to the Board's legal counsel as well, it's talking about the nature of the impacts created by the project, if you step back and think about the project itself, which is septic system upgrades, in her mind is not a substantial debate or controversy, it's something that benefits the public.

Chair Grove stated one of the issues that was raised is potential non-compliance and basically ties into the definition of decision maker in the appeal process and whether it should be referred back to the original decision maker. Can the Department speak to that component and who the appeal process is defining as the original decision maker?

Hawkaluk stated as she understands Chair Grove's question, if you were to choose to remand the decision back to the original decision maker for further consideration. In her opinion that would be back to the Department and particularly to state parks.

Chair Grove asked Ms. Dockter to define egress and ingress, so the Board is clear on these legal definitions.

Dockter stated ingress and egress generally refers to the ability to exit or enter property, usually there is a definition and she suspects there is; usually there is not a definition within the agreement itself, she believes there isn't in this circumstance, either. There is a circumstance under which you have the right of ingress and egress, for example, construction may be a reason why you'd have the legal right to enter or exit the property.

Chair Grove stated she is assuming that is a standard contract clause that we have in various lessee agreements across the state that is not specific to this agreement.

Dockter explained it is very common standard language for documents that has one party on the property of another party, like in this circumstance, MSP on ACOE land.

Chair Grove stated the other area of potential of non-compliance discussed is the comments made by staff made in public meetings versus language that is in the lease agreement. She would like Ms. Dockter to speak to the Board about the legal standing of how the Board should weigh each of those separately.

Dockter explained there is always a hierarchy of laws, policies, regulations and agreements that fall below and statements during public comments fall even below that. The agreement itself we are speaking of today is the legal language that dictates the actions of the parties to the agreement. That is essentially "the law" between the two parties. Obviously, there is law that can override; if there is anything in the agreement that is illegal it is considered void. Any comments, either interpretation of the agreement or not about the agreement are not legally binding upon the Department or the parties to that agreement. If that were the case, the policy to that is, if that were the case, we could change every legal document by just speaking about it in a public forum. I could change the obligation to the parties at the podium today if she was to speak differently about the agreement. This is the reason why it's the written document and the arms-length transaction in the agreement that needs to rule between those parties.

Chair Grove asked if there were any more questions from Board members.

Member Lighthiser stated it seems to her this issue comes back to the location of the proposed improvements and is curious if there is a possibility to still open up a discussion around the location, or not because of the current legal proceedings. Would it be a difficult and binding time to have an open discussion and dialogue because of the legal proceedings; just curious at what point an opportunity for discussion could occur.

Dockter stated that she reads Member Lighthiser's question as what authority does the Board have to look into things as detailed as the location of the cistern? The Board's authority in this circumstance is to look at the decision as a whole and agree with it or not agree with it. Member Lighthiser could say, she disagrees with the decision of the Department because there was not enough information for her to make a determination as to whether or not the location of the cistern was proper and that she agrees with the petitioners. In this circumstance, the answer is yes or no; the appeals procedure allows you to say, the Department didn't follow the law, policy, regulations; therefore, in making my final decision, I disagree with the Department decision, but it doesn't really allow you to dig into the details and make any changes one way or another. Hope this answer's Member Lighthiser's question.

Chair Grove stated, just to reiterate, why the Board is here today is to decide if there is any basis for overturning the appeal that was made to the Department. The Board is not here to redesign the facts relative to the case.

Member Lighthiser asked if the case was dismissed, is there still an opportunity for discussion?

Dockter explained the Board can remand a portion of the appeal for further information from the Department; this is in the Board's purview to do, basically suspending the decision until the Board gets the information they need to make a decision. The Department has the ability to get the Board information today, if the Board needs the Department to do that. There is already a list from Chair Grove of at least one item that Board wants more information on.

Chair Grove stated it is also discussed in Tab 5, under the EA analysis requirement, it states "Master Site and Management Plan identified that only 15 percent of the park as suitable for development"; the professional studies also speak to that as well; there are a couple places the Board has documentation already if the Board wants to talk about this later.

Chair Grove asked if the Board had any further questions.

Chair Grove asked if there was any member of the public that would like to make a comment directed to this process.

Chris Gallus, Attorney in Helena, represents the Hell Creek Marina owners, he did not prepare any remarks for today, he was just there to observe but he would be remiss if he didn't make a couple of comments since he was referred to, and his plan was referred to, on a number of occasions.

Chair Grove reminded Mr. Gallus he was limited to three minutes.

Gallus stated there were some comments about what was contained in the letters and whether or not Mr. Gustafson was included or excluded in certain events. There were several meetings with the Director and others where Mr. Gustafson was excluded, so he is correct in that regard. He made suggestions that

Mr. Gustafson be included because it could be helpful, but with the nature of the ongoing litigation the Department attorneys felt that it wasn't proper in the context we were discussing so he shared that with Mr. Gustafson. He certainly doesn't question the Department attorney's advice to their clients. A couple things that need to be resolved in this project; with respect to whether or not MSP is leaving Hell Creek, the motion that was adopted that states it would be, if there isn't a change in circumstance and that there will be minimal activity that occurs until that is done. Discussions since then, with an entirely new Board and Administrator, this is unlikely this will occur and most likely at some point change that position and renew the lease. It will benefit all involved if the Board makes some decisions, maybe even before a final decision on this particular project issue or appeal, as to how that is going to occur. This is his opinion, he is obviously not the Board's attorney in that regard, but he can speak from the perspective of his client and the situation of how he sees things. He can also tell you, he has a difference of opinion with respect to ingress and egress; he does not think it is as clear cut as others believe it to be; there is a question as it ties to activity; certainly ingress and egress means you can enter and exit upon property for a particular purpose, in this case construction, but it is not abundantly clear, at least not to him or his clients; you're not just going back and forth over the property to construct something on unleased property, you are putting something on the property that is going to stay there.

Chair Grove stated to Mr. Gallus to honor the three minutes.

Chair Grove asked if there was anyone else in Helena or across the state that would like to make a statement. (No further comment was given.)

Chair Grove thanked everyone for their input. Asked Ms. Dockter if this was the appropriate time to address the one question the Board has.

Doctor replied yes it is; asks the Board to make it clear that at this point the Board will be closing the meeting to the public, which means the Board and herself could leave and that would be pursuant to the exception for litigation under the open meetings law, which allows the Board to deliberate and ask questions outside the public purview.

Chair Grove stated the Board made arrangements for this discussion to occur in the Director's office; at this time, we will close the meeting to the public to discuss this further and will be back shortly to conduct deliberations back in the public meeting. Will be back at 12:00 pm.

11:42 am – Meeting closed to the public.

12:05 pm – Chair Grove reconvened the meeting.

Chair Grove explained the Board asked for several pieces of documentation during the question and answer session. Asked Ms. Dockter if the documentation was available or how the Board goes about getting those pieces of information.

Dockter stated the Board asked for emails regarding meetings with an attempt to try and engage Mr. Gustafson and Friends of Hell Creek. What she was told by Mr. Reilly and Ms. Hawkaluk was that those attempts were made by both Director Williams and Parks Administrator Beth Shumate both of whom are gone right now, and it may take some effort to get those emails. Could see if there was someone else involved in the emails, but it may take some time. The other pieces of information the Board wanted

was the dates of the meetings with the engineering group and improvements in state parks in the three to five years (asked Mr. Reilly if he has this information) responded Mr. Reilly stated the meetings were held in early 2017 and he gave her the information on the improvements in state parks which she will hand out to the Board. The other two items she will leave up to the Board on how they want to handle them. If the date of the on-the-ground inspections is enough to say “early 2017” or if you want more, the Department would have to look further, and the other item is the emails.

Chair Grove asked the Board what their preference was and how critical do we feel this information is for our deliberations today?

Vice-Chair Moe responded the others are reflected in the analysis of the engineers etc. in the subsequent decision and the supporting materials. However, she does not have any direct evidence of the efforts at conflict resolution and she feels that it is an important piece; would like to have some record of reaching out to the petitioner through his attorney so she could be assured that the Department has met that procedural obligation. Ms. Williams does allude to that in her response to the petitioner, but she does not have any supporting documentation for this and since it is disputed, she feels it is important.

Chair Grove stated she is handing out an example of recent sewer/water system upgrades just to give the Board an idea of where this has occurred in other parks and that it is a standard process. Asked the Board to look at the appeal procedure; what Vice-Chair Moe is talking about is in Section 5, third paragraph of the appeal, the language states “any appropriate means *may* be used, it is not required, it is permissible to resolve an appeal, including but not limited to, fact-finding, site visits, hearings and meetings with the appellant and other parties”. It isn’t necessarily imperative, but if the Board thinks it is important, we can certainly take a break and come back, or do we feel we have enough information about site visits, other meetings and fact-findings. Her perception on the fact-findings is the EA process did get the two surveys from the engineering firms and, also, through the EA process public comment was solicited extensively. She does feel there has been some fact-finding.

Vice-Chair Moe stated the way she understands it, the appeal occurred after the EA and so when she looks at the first line of Section 5, third paragraph of appeals process states “the appeal process before the Department should be non-adversarial and provide an additional opportunity for conflict resolution.” She’s not sure if the Board has met that criterion without documentation that subsequent to the appeal an effort was made to do that through any of those means. She would accept evidence of any of the means, but she thinks the site visits occurred prior to the appeal being made.

Chair Grove asked if it would be appropriate to take a break until 1:15 pm to give the Department time to compile whatever documentation they have, and then the Board can determine if we have enough documentation to continue with their deliberations.

Vice-Chair Moe stated it is important for her that the Board follow the rules and we hold ourselves to that standard. The public relies on this Board to represent the public interest; this is something she is concerned about and would like to be able to say “yes, we have documentation” and that the effort was made.

Member Stone stated she is only one person on the Board, but she did do a site visit to Hell Creek State Park a week ago knowing that the hearing was coming up. She found the visit very informative; visited

with one of the outfitter/guides operators, one of the cabin owners, a visitor at the boat dock and the concessionaire, Mr. Thomas.

Chair Grove stated the Board still needs to discuss whether they want to break until 1:15 pm for further documentation. Is everyone in support of taking a break for an hour and then reconvene? She would like to point out that Vice-Chair Moe's point is well-taken; the Board would like documentation from the Department that shows any efforts they made to comply with this appeal process.

12:14 pm – Break

1:14 pm – Chair Grove reconvened the meeting.

Chair Grove stated the Board is now at the point of deliberations but wants to follow-up and make sure the Board got the pieces of documentation they asked for.

Dockter reported the Department has gathered some of the information the Board asked for and asked the Department to present the information to the Board.

Hawkaluk explained during the break she was able to speak with the Parks Administrator, Beth Shumate and found one email which discusses this issue. Ms. Shumate was unable to access and search her emails, so she does not know if there are more. She did share what she found with Mr. Gustafson. She thinks there is different interpretations of conversations that were had but she gives good faith to everyone involved; she believes Mr. Gustafson's interpretation is truly what he interpreted the conversations to be. Specifically, Ms. Shumate reflected that last summer Mr. Gustafson walked into her office and she and Tom Reilly had a short meeting with him regarding his appeal, in particular he was upset that his appeal had not been answered and the paperwork error that was referenced and perhaps discussed with Counsel Dockter. Shumate also remembered at the Parks in Focus meeting last October at Makoshika State Park, she had a discussion with Clint and Deb Thomas (Hell Creek Marina Owners) which Mr. Gustafson was also present for, and it was discussed that a meeting might be beneficial. She will get copies of the email she found; the email is addressed to a number of people from Ms. Shumate, but it is not addressed to Mr. Gustafson; the email stated "per our conversation, I spoke with the Governor's office and the Director this past week and we proposed holding a face-to-face meeting prior to the Director's response to your second appeal. We are committed to working with you to resolve outstanding issues. Unfortunately, I don't have James Gustafson's email so please pass email correspondence to him, so he is also included." There are three proposed dates listed in the email. As she understands it, a meeting on this subject never did get put together or occur. There were other meetings involving Hell Creek and other meetings involving other parties, but nothing related to Mr. Gustafson's appeal or nothing he was there for.

Gustafson stated he went to Ms. Shumate because he wanted to know what was going on; he heard rumors that construction was about to commence, and she had no clue about what he was talking about; she called Mr. Reilly into the office and it was quite apparent that she had been left in the dark. At the conclusion of the meeting he asked if she would contact him and let him know the status from the meeting and the status of the construction. She promised that she would contact him, and he is still waiting for the phone call. There was never any call or discussion and that is what precipitated the temporary restraining order. The second piece of information you received, to his knowledge had nothing to do with the appeal process. It had to do with a proposal from the Friends of Hell Creek put forward through

the Governor's office to State Parks; the people that were going to be at that meeting were someone from State Parks, he assumes Tom Reilly, Milt Datsopoulos (an attorney for the Thomases), Chris Gallus, someone from the Governor's office and he was asked to attend. He traveled back from hunting in Hell Creek, Montana, to Helena for a meeting that never took place. He turned back around to go hunting and the meeting was rescheduled. He was going to ride with Mr. Thomas to the meeting and that evening he received a phone call from Chris Gallus stating that Tom Reilly had requested that Mr. Gustafson not be allowed at the meeting. This had nothing to do with appeal; it had to do with a bunch of other stuff. They had a second meeting that Mr. Gallus wanted his input and wanted him to attend the meeting and again Tom Reilly specifically asked that he not be in attendance. They had a third meeting in Lewistown (these are the meetings that he is aware of and had nothing to do with the appeal) which had to do with alleged violations the Thomases had and he "crashed" that meeting.

Chair Grove asked Mr. Gustafson to speak only to the meetings that are relevant to the appeal.

Gustafson stated what he is speaking to is to make sure that everybody knows that the meetings that are being suggested have nothing to do with the appeal, so they shouldn't be presented as evidence.

Chair Grove asked if there was any further documentation from the Director's office.

Dockter reported there is not anymore documents from the Director's office.

Chair Grove stated this is the time where the Board will start their deliberations. Wants to reiterate about the deliberation; there are three components that need to be addressed and would like to formulate the deliberations around those three questions. Would first like to discuss the compliance piece, then the invalid or incomplete information and then the arbitrary and capricious component. The Board is speaking specifically to the upgrade of the fish cleaning system and the replacement of the water cistern; those are the components we are asked to address today.

Vice-Chair Moe asked if the Board can take any one of the criteria as a basis for their discussion?

Chair Grove stated certainly.

Vice-Chair Moe stated she would like to start with the second criteria that deals with whether or not the Department based its decision on invalid or incomplete information. She does not find anything in the record or the testimony today that causes her to find the information invalid or incomplete. She has been satisfied with the answers that she has received. While you will always find people that will debate whether a particular decision might have gone one way or another, she feels they provided ample information especially through the EA and that the Department had done due diligence to explore the issue and she didn't find any of that refuted or called in question in a substantive way.

Chair Grove asked if any other members have comments on the criteria piece related to invalid or incomplete information.

Vice-Chair Moe stated she would like to add one other statement; she was concerned about the one particular answer in the EA that asked "is this likely to cause controversy" because there were a number of things in the public comment that seemed to indicate that. She was somewhat satisfied with the explanation that was no controversy about the environmental impact; she didn't find that the comments

centered on that, they centered primarily on the location and the effect on the concessionaire; she doesn't know and doesn't have a basis for comparison with other environmental impacts; that would be her only quibble with the evidence that was presented and it's really not enough to outweigh all of the other evidence.

Chair Grove asked if any other Board member to like to respond or add anything to the discussion?

Chair Grove asked to address the first question: Did the Department fail to comply with laws, rules or policies and procedures? What the Board is looking for today is there a demonstration of non-compliance by the petitioner that we feel would change this decision.

Vice-Chair Moe stated she sees three areas that are a concern to her while reading through the materials and in listening today. They are: 1. The notice for public comment and whether it was sufficient; she was satisfied that while one newspaper may have not printed it in a manner that was considered timely by some, that it did meet the requirement of the Department. 2. She is not satisfied with the conflict resolution element; there is one email from Beth Shumate which indicates an effort and some dates to follow-up, but the Board does not have any other follow-up; the petitioner says there was none; in the absence of documentation to the contrary, that's a problem for her because these are not just words on a page; if we are going to do conflict resolution or try to find alternatives outside of the appeals process, then those should be diligently followed and documented. 3. The third issue is the legal terms of the contract and whether the Department had the right to go into the ingress/egress issue; she thinks the plain language of the contract is clear that the Department does have that right for purposes of construction. With respect to the second component, she does have a concern.

Chair Grove asked Ms. Dockter with the issue that Vice-Chair Moe is raising is whether we complied with the language within the appeal process; that statement to her is separate from whether the Department complied with laws, rules, policy and procedures in doing the record of decision.

Dockter stated yes, that is true; it is still within the purview of the Board to look at whether or not the procedure that is being utilized is valid, however, the remand on that point would be for redoing that portion of it, not necessarily for the petition. What's before this Board is a decision of whether or not in making that decision, whether the Department followed rules, policies, procedures and laws, and that was prior to the appeals process. The question Vice-Chair Moe had was pertinent to that at the time the decision was made, what were the laws, rules, and policies. Subsequent to that, the appeals process came into play and the real arbiter of that would be a District Court; however, let's not wait for District Court to fix any errors, if there are some, we can do that today. The Board has to act as a Board, not just as one Board member. It has to be a Board decision before the Board has made any action on that point.

Chair Grove asked if the Board would have a two-part evaluation, whether the Department complied with all the rules and policies in making their decision and then separate whether the Boards thinks there was compliance with the appeal process. She was not aware the Board would necessarily rule on the appeal process.

Dockter stated that issue wasn't before this Board, but it is brought up by a Board member and is now part of the record and it is something that could be fixed, if it's a Board action, now rather than later if it's something the Board finds credible. This is not a matter that was brought before the Board, but as the Board attorney, to caution against leaving something on the record that could potentially be a matter

that will be taken up somewhere else, we should address that point. If there is any further discussion on this, we may actually close this as a matter of something we take and talk about because this could implicate litigation.

Paul Sihler, FWP Chief of Staff, stated he drafted the appeals policy in 1995 and it was drafted without any idea that there would be an appeal coming before the Board or the Department that involved litigation. The process says it should not be adversarial, litigation is necessarily adversarial. This appeal was not in a non-adversarial situation, this appeal is happening against litigants. The dispute resolution didn't anticipate that there would be litigation, and, in this instance, lawyers need to be involved. The period for non-adversarial things and for informal dispute resolutions was gone when the litigation started.

Chair Grove asked that the process has been at the regional level, division level and at the Department level and now it is at the Board level, so to her, that is quite a few steps in the process that weren't necessarily adversarial, and these qualify for our attempts to look at how this is being resolved. Does that make sense?

Dockter replied yes, she understands what Chair Grove is saying. If she could paraphrase what Chair Grove is saying is, the attempt at conflict resolution happened at each of these steps, in a hopefully non-adversarial way. That is the intent of the appeal process, as it is stated in the policy, it is intended not to be adversarial at those times. Mr. Sihler pointed out was that during all of those timeframes, litigation had already been filed. You heard Ms. Hawkaluk mention that there is a lawyer's obligation that when litigation is filed, it has to be attorney to attorney conversations, not attorney to Gustafson or Parks Board to Gustafson, it always has to include attorney to attorney unless both attorneys and the parties agree that doesn't need to happen. That obviously didn't happen in this circumstance. The important thing to keep in mind on this point here is that the conflict resolution portion of that appeals procedure is not a point that the Board was asked to consider, they were asked to consider whether or not the petitioner has raised its concerns in its petition regarding the project that is before the Board. Given that that's already now part of the record, she asks that we either have a conversation about that to address how we handle that, or the Board specifically handle that matter because she feels it is a matter of record now that could be taken up later.

Chair Grove stated that was her concern. We are talking about two separate things. The Board has been asked to see if the Department complied with the rules, policies and procedures in making the decision that is being appealed. The compliance with the appeal process is separate from that, so if the Board feels it needs to address the appeals process, that is a different conversation. Our first deliberation she thinks is if the Board feels that the Department complied with laws, rules, policies and procedures to get to the record of decision. Is that correct?

Dockter replied yes.

Member Stone stated it is her understanding, the appeal was on the Notice of Decision dated February 29, 2016. Mr. Gustafson noted that it's never been rescinded or reviewed/revised by the Board or had public comment. There is a second letter to Mr. Gustafson from Beth Shumate, Administrator of State Parks, saying because of Doug Habermann is no longer with the Department and there is a new State Parks Board, she is reviewing your appeal at the first level as the Montana State Parks Division

Administrator. Is the appeal still back to the first decision because there has been a second decision noted by Beth Shumate?

Chair Grove stated Beth Shumate's ruling was whether she agreed with the original decision; every action taken after that initial decision is in regard to that initial decision. At each level, they were asked to answer the same questions the Board is; at each level of review, they did the same thing the Board is doing. The policy is designed so it is basically is escalated up if they don't feel there was adequate resolution at each of those levels, they just keep asking the same questions to all of us.

Chair Grove asked Ms. Dockter if there was anything else, she would like to add.

Chair Grove asked Member Stone if her statement made sense.

Member Stone stated it did make sense, she's just not sure if the Parks Decision Notice filed by Beth Shumate follows the one filed by Doug Habermann.

Chair Grove stated her recollection and we can certainly look at Beth's questions, but basically at each level she felt they said the same thing. That they have complied and based their decision on valid information. She thinks they talk about the professional reviews that were held, the formal EA process, the public information pieces of those and they point out that this was not arbitrary and capricious because it's made for these reasons. We heard today that it is a public health and safety issue, which is fairly clear it is not arbitrary and capricious. Another thing that is important today is that this is a type of decision that the State Parks Division makes at various state parks across the state. This is what they do, they assure that when you show up at Hell Creek you have clean drinking water to drink. If you look at Director William's letter, she also reiterates the same things. There is a common thread between each level of the appeal.

Chair Grove stated she feels that the Board did not receive any information today that indicated there was failure to comply with the rules, laws policies and procedures in making the original Record of Decision. If anyone disagrees, then the Board should talk about that.

Vice-Chair Moe stated she agrees with Chair Grove, but, however she is not persuaded that the issue of conflict resolution is not part of our consideration today. It was brought up by the response to Ms. Shumate's response to the petitioner by Mr. Carr on September 19, 2018, which was responded to. It is not like she made this up, it is part of the record that has been provided to the Board. She doesn't see how the Board cannot consider that to be an issue in the process that the Board has to deal with.

Chair Grove explained, if you look at the policy in the Friends of Hell Creek tab, the policy states "the purpose of the policy is to establish procedures: 1. Provide opportunity for the public to appeal decisions made by the Department to improve FAS and state parks or 2. encourage the public to participate at the beginning of the decision making process and 3. resolve appeals at the lowest administrative level". She does agree with Vice-Chair Moe's statement that the Board may have an issue related to the appeals process, but she doesn't see noncompliance in making the original decision.

Chair Grove asked Ms. Dockter how can the Board address potential issues of management of this process? That is not what the Board has been asked to do today, even though there has been a lot of issues brought up in this process that has been outside the purview of what the Board has been asked to

do. As she said when she opened the meeting, the Board has been asked to look at two items, and whether decisions made to those two items meet the three criteria. This to her, is the first decision point and then if the Board believes there are additional issues that need to be address beyond that, that is separate than the ruling on the appeal.

Dockter stated everyone needs to set back and look at whole intent of this, which Chair Grove just tried to do. The purpose of this appeals procedure is to ensure that the petitioner has a venue to actually try and address his concerns at each level in a way that wasn't effective prior to that with the Department. If today the Board's decision is to send this back to fix whatever perceived problems are in the appeals procedure, we will be starting over and be right back to where we are today with the exact same questions. If the thought that at some point below that there was not an opportunity to discuss issues, it is her opinion it has been cured for every step thereafter that was allowed in the appeals process because the intent was to allow at each step, one level higher, to address the substantive issues that are brought each step, each supervisor, each administrator, director and now the Board. She suggests even if there was not an opportunity for conflict resolution, (though she thinks there is still a question whether that is true), if there was not an opportunity at some point, there was an opportunity at the second and third part of the appeal and now before this Board. This is important to keep in mind in light of the purpose of this policy.

Chair Grove asked Ms. Dockter to give the Board some draft motions; feels this would highlight the decision points we have and the substance of those decisions; in the draft motions she has used the term "petition," so if she could also speak to what is the petition.

Dockter explained she has broken down the motions for consideration by the Parks Board regarding this appeal right now into three parts: 1. I move the Parks and Rec Board deny the petition in whole. The petition as it stands is a challenge of the decision by the Department to move forward with the construction on Hell Creek with regard to the cistern that would then affect the fish cleaning station as well. (the motion means the Board disagrees with the petitioner in the petition. 2. You can move the Parks and Rec Board remand the petition to the Department for further consideration about the entire petition, which would then require the Department to look at that again and decide whether or not there were any infirmities about that decision. That decision is limited to what the petition is challenging and that is the construction at Hell Creek State Park for the fish cleaning station upgrade of the potable water system. 3. you can move in parts - I move the Parks and Rec Board deny the petition in parts in regards to one portion of it and remand further consideration for your denial (which means you disagree with the petition on one part and you remand to the Department for further consideration on that part) and you agree with one part and grant that part. What it means if you grant the petition to the petitioner all together means it would go back to the Department, perhaps make another decision, it could mean the same decision is made and it comes back in the hopes that it doesn't end up through this appeals procedure again because the Board and the Legislature has already made the decision in the past to allow this construction project to go on. The only way the Board would disagree with that now and overturn your prior decision would be because something happened that is unlawful, invalid because it has incomplete information (you can see she is going back to the three criteria) or there is something arbitrary and capricious that the Department did that warrants reconsidering your previous decision to allow this project to move forward.

Chair Grove stated with the litigation also that Mr. Sihler already pointed out, is that will limit the ability the Board has in conflict resolution at the lower level at this point.

Dockter stated it limits it in the sense that the communication should be lawyer to lawyer, but there still can be reaching out to try and schedule those meetings and often courts require mediation and then the parties have to sit down. It is limited in the sense that when it refers to a non-adversarial situation, that's already not possible in this circumstance, but there is still an ability for us to try and reach out and work. What she saw in those emails was that there was an attempt to reach out and figure out some way to do that informal conflict resolution. Whether it happened or not, she didn't hear evidence of why.

Chair Grove stated as Ms. Dockter pointed out, there has been in effect at least three levels of conflict resolution already.

Dockter replied, at least three.

Chair Grove stated regional, the division, the Director and the Board is number four.

Dockter replied, yes.

Vice-Chair Moe stated the Board is not empowered here to engage in informal conflict resolution, the Board has been charged specifically with these three things and making these determinations. We represent the public and to say now that conflict resolution doesn't matter or that this person is getting his day in court for conflict resolution in front of the Board is just not the case. She thinks there are two good arguments why that shouldn't be a concern to the Board, and one would be because of the ongoing litigation that was precluded but it is unfortunate to hear that at this late date to not find it in any of the materials that were presented to the Board before and the second is that those efforts were made that these dates were followed up on. She's not saying that it didn't happen, but she is saying that she doesn't think that this is the fourth bite at the conflict resolution applicant for this particular petitioner. We are in the formal process now, that informal ship sailed long ago, and keep in mind that there was an awfully long time lag between the time that that person registered the appeal and there was any response whatsoever. The Department had an even greater obligation given that delay and Ms. Williams references that in her letter that given this paperwork error and longer timeframe that they needed to expedite it, but the petitioner's lawyer has described that as a week-long period of time before that opportunity vanished. This is a concern of hers, she can see there would be good arguments for it or it may actually have occurred, but she doesn't see it in the record. She thinks the Board is not a conflict resolution body.

Chair Grove asked Vice-Chair Moe if she agrees with the fact that the Board has not been asked to rule on that? The Board has been asked to rule whether the Board thinks the original decision, and the subsequent support of that original decision by the Department was based on these three things. The Board is not ruling on the process.

Vice-Chair Moe stated we, as a public and this agency have said if you have a complaint, here is what you are going to do about it, in any other venue if you mess up..... what is the solution of this, you appeal the appeal? That doesn't make sense. In any other process if you messed up it vacates the decision. She's not saying we did mess up, but what she is saying is this is part of what we are looking at today.

Chair Grove stated, but it was not part of the original decision. That is where she gets hung up. The Board has been asked to review whether the original decision was based on these three things. Vice-

Chair Moe is talking about how the process once the appeal started was managed. To her, these are very different things and the petition to the Board is not whether the appeal process was managed appropriately, the petition to the Board is: was the original decision based on evidence, in compliance, or was it arbitrary or capricious? To her, these are two separate conversations. She is going to direct the Board that we first decide what we are going to do about the petition, but if you are concerned about the management of the process, she thinks the Board needs to talk to their legal counsel and see if we can ask for further information down the road. If the Board feels there is a weakness in the processes, we need to address that. In her mind, the Board first need to address the question before us today and that is whether we think the original decision was meeting the three criteria that are required in the appeal process, and then if the Board wants to address concerns with the management of the appeal process, we need to do that separately.

Vice-Chair Moe stated she is not persuaded that is so.

Chair Grove asked Vice-Chair Moe what she recommends.

Chair Grove asked Ms. Dockter to speak to whether her statement was appropriate or not. Vice-Chair Moe is concerned that the appeal management be part of the Board's ruling today. What does that mean from a legal perspective if the Board does incorporate something like this? How do we resolve this?

Dockter explained the Board can still make a decision, there might be other Board members who have other considerations about what they think could go into the decision or not, that are not expressed here. The Board can still make a decision based upon the criteria one, two and three and allow that to move forward. She then asks that we have a conversation afterwards that would likely to be outside the public forum because she does think this conversation has the ability to affect litigation that we already know are filed on this very issue. She does think that asking what Chair Grove directed to go to the one, two and three, and make a decision and move forward, and then we can talk after that how we manage the other parts of it.

Chair Grove stated there are three very quiet Board members up at the table, don't just make it her and Vice-Chair Moe the clash of the Titans.

Member Lighthiser asked Member Stone to talk a little bit more about her experience and what she learned during her visit at Hell Creek State Park, so the rest of the Board can learn from that.

Member Stone stated she would be happy to. First of all, she has to say that the community down there is very pleased with the condition of the road; State Parks put quite a lot of money into the road from Jordan to Hell Creek and it's a pretty darn good gravel road now. The people are appreciative; they know they need the water system and fish cleaning station. The biggest concerns that were expressed to her was the loss of the ten or eleven acres, whatever it would take away from the concessionaire's lease for the fish cleaning station. She doesn't know if that's because she talked to friends of the Thomases or if that's the way the whole community feels or what. She doesn't know if there is an opportunity, it's probably too late and doesn't have to do with the Board's decision today but could we trade some of the State Park land for that land that we are using of his lease, could there be an exchange or something like that? This is part of ongoing discussions to try to resolve things with the public and not make things arbitrary about the whole situation.

Chair Grove thanked Member Stone for her comments.

Chair Grove asked Ms. Dockter what the legal implications of the Board are addressing things beyond the petition and would we be doing that if we include conflict resolution of the appeal process.

Dockter stated if the Board does not have the authority, it would not have the effect of law, like your decision might otherwise. So, if the Board lacks the authority to make a decision on some matter that's not before you, her argument would be that that is a void as a portion of the decision because the Board didn't have the authority, that's not what was before you at the time. That's generally speaking, there might be arguments otherwise, but the affect she thinks the Board could have is otherwise giving the impression that you do have the authority on matters that are not before you and that might give impressions otherwise and have ramifications otherwise especially when there is litigation filed already. That's one potential ramification. Does that answer your question Chair Grove? Now she is just surmising.

Chair Grove stated it did answer her question.

Member Stone stated her inclination at this point is we have one of the three motions to make. If the Board was to make a motion to approve the water system get done this year, Ms. Hawkaluk stated that they would maintain the fish cleaning station this summer even though it would be difficult and would take extra man power to do that, but they would do that for the summer. So, if we got the water system done this season and if we put it back to the Department to relook at the fish cleaning station and see if there are other alternatives there, they could report back to the Board at the next meeting.

Chair Grove explained in order to do what Member Stone is asking, the Board will have to conclude that the fish cleaning station did not comply with laws, the decision made was capricious and arbitrary and it was based on invalid or incomplete information.

Member Stone stated her biggest question in her mind or biggest part would be the ingress and egress. It says for construction, but does it allow us to take land out of service that the concessionaire would normally use?

Chair Grove stated again, that question wouldn't just be specific to the fish station, that would also be the question in regard to the water cistern. They are both connected; what the proposals from the firms was, is to separate those two systems, they are interrelated. The Board has not been asked to redesign the original decision. What the Board has been asked to do is how the original decision was made, and this includes both pieces of it. Maybe someone from the Department can respond, but she doesn't think we can make one change without the other.

Member Stone asked about the third option on the motion, isn't that what it means?

Chair Grove explained that means the Board can take certain parts of the petition, not certain parts of the project. We could say, question two for example, if we cannot come into agreement with what to do with the conflict of interest, we may separate that off. It is the three criterion the Board is addressing. The Board is not redesigning the project. The other option for the Board today if we can't come to some agreement on one of the three motions, is we could delay action until we go more information. The Board has until May 24, 2019 to make this decision. That means the Board will have to reconvene and

do the same public notice requirements and have another meeting. First, the Board has to decide if the Board feels like there is enough information to make a decision on whether we think the Department made the correct decision in the first place. That is basically what the Board has been asked to do. Ms. Dockter is there something you would like to add?

Dockter stated she was just reminded by Ms. Hawkaluk that the three criteria are an "or". So, if you find one against the Department in making your final decision, it could be adverse. It doesn't have to be one and two and three have to have been founded, it can just be one. She thinks that is how the Board has been conducting their deliberations, she just wanted to make that clear. She thinks that was a concern of Mr. Gustafson.

Chair Grove asked if Ms. Dockter was talking about the three appeal criteria.

Dockter stated yes, she was. It seems like that's how the Board was conducting their deliberations, taking them each one by one by one, but she just wanted to make that clarification for Mr. Gustafson's sake.

Member Lighthiser stated in her view she doesn't personally feel like she can make a decision she feels really good about. {inaudible} She really feels responsibility to local community and the public and she doesn't think it would be unreasonable to convene at Hell Creek; she would like to have the opportunity to go there herself and try to get a better sense of the situation on the ground and listen to the concerns, although she know that's not what the Board is deciding. She does have confidence in the Department that they followed the procedures as outlined in the documents. She wonders if there is an opportunity to pause, so that the Board can consider information either that's communication that happened in between all these steps in the process or whether that's not information that wasn't provided here. This process is really binding and difficult to have a conversation about. It could be a pretty simple problem to fix, maybe or maybe not because we are already down the road and construction has begun. She would just hate for the Board to make a decision and close the door on something that could have been a really good collaborative relationship with the concessionaire, Mr. Gustafson and the Board; would hate to make that decision prematurely if there is an opportunity to get more information and think through it a little bit more.

Chair Grove stated she is clarifying the Board is not designing a site here; there is no conversation with the concessionaire at this point. The Board will have plenty of opportunities to study the site plan and what is happening at Hell Creek. The Board is not going to go hold public meetings for example in regards of what needs to happen at Hell Creek; that has already happened; this conversation started in 2014. The Board is here to see if the Department adequately made a decision, and if you don't have enough information to feel like did that, that is a different conversation. The Board doesn't make that decision, we don't have the authority to design the water system and the fish cleaning station at Hell Creek. The Board's responsibility here and we are on a fairly significant time frame, is to vote on the petition in front of us, and she is going to say it again: the petition in front of us was the original decision compliant, based on valid information, or was it arbitrary and capricious. So far, she feels the discussion hasn't raised any trigger points on that.

Vice-Chair Moe stated she will again say, that she would be ready to make a motion at this point, but she feels strongly that the Board is responsible for ensuring that the process has been followed all the way up to the Board, and that creates kind of a cascading consideration by the time it gets to the Board.

She had indicated the area where she has a concern. Other than that, she agrees with Chair Grove that it is not our job as the Board to substitute our judgment for the judgment that was originally made. We are simply to verify that the judgment makes sense, based on accurate and credible evidence and that the process/rules that we set in place both before and after, in her view, have been followed. Otherwise there is really no point in having any rules about the appeal. That is where she is having the stumbling block and she recognizes that others may have a different point of view on that and that's fine, but it's a stumbler for her.

Chair Grove stated she agrees with Vice-Chair Moe. She thinks they are probably two separate decision points in her mind; would defer to legal counsel. Need to have a motion related to the petition in front of us and then I think we need to discuss about what we should do about the appeal process.

Vice-Chair Moe stated every other appeal she has been involved in any venue, if at a lower level you didn't follow your own rules, that's it. She's not saying the Department hasn't followed their rules, we just don't know {inaudible} or if there isn't a good reason for it, but she's not willing to say that's a separate thing because it really wastes all of our time here, if we are trying to kick that down the road.

Chair Grove asked Vice-Chair Moe if she is anticipating if something that could be remedied?

Vice-Chair Moe clarified that there are still things the Board does not know about what happened with that intermediate step.

Chair Grove stated in her mind, the remedies she sees are at the subsequent meetings that have been held since the appeal was filed. The remedy she sees in that kind of situation is more meetings held, but we have held meetings since that appeal was filed.

Vice-Chair Moe stated there haven't not been any informal meetings on the substance of the appeal as far as she knows and as far as the record indicates. {inaudible} effort to resolve the conflict. That was made impossible by litigation, maybe we just don't have it in the record.

Chair Grove asked Ms. Dockter is she has any recommendations on this.

Dockter suggested a possible way to handle this could be to suspend the Board's decision at this point, ask for briefing on that very point from both parties so the Board has the ability to get the information perhaps you feel you need on this point, and you take that issue up later on. The Board could even ask that it deal with it whether or not this is a part of the decision before the Board or not. The Board could ask for what you want in that documentation. It is just an option on trying to move the Board from this point on and in her zeal to try to protect the agency and the Board from litigation on this matter with further comments from the Board that might actually place us squarely in litigation, she suggests we move on from that conversation altogether and have it in either documentation instead of referring to a record that you believe is incomplete, perhaps we actually ask for that information. That is what she can think of to try and move this from this point.

Vice-Chair Moe stated maybe she will make a motion and see if it resonates.

Motion: Vice-Chair Moe motioned and Member Brown seconded that the Board postpone this decision until we have had briefings on the issue of conflict resolution steps, what actually did take

place, why or why not it did, or didn't, and what our responsibilities are with regard to protecting our appeals process – and we would need to have that within a week.

Chair Grove asked if there are any discussions.

Chair Grove asked someone to reread the motion, so we have it straight in our mind before we vote.

Vice-Chair Moe reread her motion.

Chair Grove ask Ms. Dockter how that factors into the Board's decision, will that clarify what that means if we incorporate this into our decision on the original Record of Decision.

Dockter explained it is her thought that the Board could take that and have that as part of the Boards discussion, at least then you will be able to say, I agree now that this isn't part of our discussion or I agree now that this is part of our discussion, and perhaps move from that point without that argument from both sides, you won't be able to adequately know whether or not you should take that into consideration in your discussion. She doesn't necessarily believe that the Board would have to move on that at all, but it is part of the record then and you can show that you've adequately considered it and made your decision thereafter.

Chair Grove asked, if we approve this today, if the Board has a future meeting, what does that look like? Do we have to go through this whole process again?

Dockter stated yes, the meeting would have to be noticed, have it in public, make sure there is a quorum, invite the public to comment.

Chair Grove meant if the Board will have to hear from the petitioner and the Department.

Dockter replied the Board would have already heard that through their writings, wouldn't necessarily have to hear from them, might be useful to ask some questions if you have some on their writing, but it certainly wouldn't be a requirement. The Board has fulfilled in her opinion on the appeals procedure the requirement to allow the petitioner an opportunity to be heard on the petition and that portion has been satisfied, you wouldn't have to allow that again, you'd be allowing that through writing instead of otherwise. Often times a court will do this, ask for a briefing afterward and they don't have the requirement for public hearings like the Board does but, they do take that in consideration in a final decision and just issue a final decision. As a corollary, often times that means you said your part on that specific matter. The Board has a requirement to make their decision in a public forum, so you would still have to do that.

Chair Grove asked if anyone else has any other questions or discussions on the motion.

Chair Grove asked for a vote on the motion, all in favor. Aye-Chair Grove, Vice-Chair Moe, Members Brown and Lighthiser. Nay-Member Stone.

Action on motion: Motion passed. 4-1

{inaudible}

Chair Grove stated the Board has to have the Record of Decision done to meet our legal responsibilities by May 24, 2019; would still have the option to do that by teleconference, would still not necessarily need to be here. So, based on that, does anyone have any recommended dates?

Vice-Chair Moe stated since we are two weeks out, she recommends we hold the meeting next week. Her understanding is that we would have this briefing and then we would vote on the issue in front of us and that would give time to issue the decision or do whatever needs to be done in that regard and give you another week to get that done timely.

Chair Grove asked what the public notice requirement is.

Dockter replied, we generally require 24-hours in advance but if it can be more than that, that would be great.

Chair Grove asked if there is a day next week that works.

Member Brown recommend May 17, 2019.

Member Lighthiser recommends later in the week.

Vice-Chair Moe asked how May 15, 2019 looked for people.

{inaudible}

Member Lighthiser stated the following Monday works for her.

{inaudible}

Chair Grove stated Monday would be fine. Asked Ms. Dockter that the written decision would have to be done by May 24, 2019. Is that correct and is she available May 20, 2019.

Dockter stated, yes, it is and yes, she is.

Chair Grove asked if there is a time of day that would work.

{inaudible}

Chair Grove stated the meeting will be held Monday, May 20, 2019 at 1:00 pm. She assumes the Board can meet at Helena Headquarters or call in. She suggests Helena Headquarters just because we have the screening capabilities if anyone wants to do an onsite call-in.

Dockter asked if she could ask a question for clarification. Vice-Chair Moe mentioned one week for the briefs to be done. She is assuming that is a week from today, May 17, 2019. That gives you precious little time to get that and considerate it, but we could commit in the agency to get it to you the day we receive it, perhaps through file transfer system or something like that so you could have it that day.

Chair Grove asked if that would work for everyone.

Chair Grove stated that resolves all the issues on the agenda. She does want to remind the Board of the June 20, 2019 meeting that will be held at MT WILD, have an extremely full agenda so be ready for a full day at least. Beth Shumate or herself will be getting in contact with Board members and have conversations of other topics we are going to need to address at that meeting.

Chair Grove stated if anyone doesn't have any other comments we will adjourn.

Chair Grove adjourned the meeting at 2:31 p.m.



Angie Grove, Chair



Martha Williams, Director