

CAPITOL REPORTERS (775) 882-5322

A P P E A R A N C E S

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ESQ.

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General

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ESQ.

The Commission:

For the Commission:

For NDEP:

For Comstock Residents
Association:

For Comstock Mining Inc.:

JIM GANS, Chairman
MARK TURNER, Member
TOM PORTA, Member

ROSEMARIE REYNOLDS,

JOHN WALKER,
Executive Secretary

CASSANDRA P. JOSEPH,

Deputy Attorney

JOHN L. MARSHALL,

Attorney at Law

CAROLYN L. MCINTOSH,

Attorney at Law
BRIAN HUTCHINS, ESQ.
Attorney at Law

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1 THURSDAY, FEBRUARY 16, 2012, 9:00 A.M.

2 ---oOo---

3 CHAIRMAN GANS: My name is Jim Gans and I'm
4 chairman of the State Environmental Commission.

Joining me

5 today are two members of the Commission, Mr. Mark

Turner and

6 Mr. Tom Porta. Many of you probably know Tom Porta.

He's

7 been around way too long.

8 For the record, this hearing is being

conducted

9 at 9:00 a.m. today, February 16th 2012, at the Nevada

is open

10 Department of Wildlife in Reno, Nevada. This hearing

11 to the public and written notice pursuant to NRS 233B

and 241

12 were provided to the affected parties. The agenda for

13 today's hearing was also posted and made available to

the

14 parties and the public. Today we'll be acting as an

appeal

15 panel for the hearing filed by the Comstock Residents

16 Association.

17 As way of background, on December 30, 2011,

the

18 Comstock Residents Association filed an appeal of

Reclamation

19 Permit Number 0315 issued by the Nevada Division of

20 Environmental Protection to Comstock Mining
Incorporated for
21 the Dayton Consolidated Exploration Project. The
project is
22 located on about 20 acres within the Carson River
Mercury
23 Superfund Site. With that as background, I would like
to
24 have us go around and do some introductions, so we'll
start
25 over here with the appellant.

John
Association,
with me

1 MR. MARSHALL: Good morning. My name is
2 Marshall and I represent the Comstock Residents
3 which if I slip and say CRA that's what I mean. And
4 is Gail Sherman, the secretary of CRA.

5 CHAIRMAN GANS: The state.

Joseph for
with me

6 MS. JOSEPH: Good morning. Cassandra
7 the Nevada Division of Environmental Protection. And
8 is my client. This is Mr. David Gaskin.

Hutchins.
at
practice.

9 MR. HUTCHINS: Good morning. I'm Brian
10 I'm an attorney in Carson City and I represent Comstock
11 Mining Company. And with me today is Carolyn McIntosh.
12 She's with the law firm of Patton Boggs in Denver. And
13 the pleasure of the chairman we would like to have a
14 preliminary matter of admission of Ms. McIntosh to

court

15 CHAIRMAN GANS: Up front we also have our
16 reporter. Introduce yourself, please.

with

17 THE COURT REPORTER: Yes. Christy Joyce
18 Capitol Reporters.

introduce

19 CHAIRMAN GANS: And I'd also like to

the
of you
keep me
the
of you

20 way back in the back by himself one of the members of
21 State Environmental Commission, Mr. Alan Coyner. Many
22 probably know Alan. He's here to keep me honest and
23 straight.
24 Okay. Before we start, I want to outline
25 format we'll be following today so there's no -- Most

that
reporter. I
given
repetitive
parties
is a
be
Tom
needs
there's any
Dayton
after
its
any
has been

1 already know this. I would advise anyone or everyone
2 today proceedings are being recorded by a court
3 would also like to remind you that all testimony is
4 under oath and that I may at my discretion limit
5 testimony and evidence. And since there's three
6 here, we don't want to do that in triplicate and that
7 sore point with me. So please, I ask all of you not to
8 repetitive as we go about this. Alan -- Excuse me.
9 Porta told me today he's only got one tie left and he
10 to get this done today.
11 We'll begin with public comment. If
12 member of the public that wants to speak about the
13 Consolidated Exploration Project generally or this case
14 specifically, you will have to hold your comments until
15 the panel has finished its deliberations and announced
16 decision. Please note that no action may be taken on
17 matter during public comment until the matter itself

Also, 18 included on an agenda as an item for possible action.
minutes 19 at my discretion I may limit public comment to five
period 20 per person. And we will have another public comment
21 at the end.
22 So is there anybody in the public or this
time? 23 audience that would like to make any comments at this
24 Yes, sir.
25 MR. ELSTON: I would, sir.

and
1 CHAIRMAN GANS: Please come forward. Name
2 address?

live in
3 MR. ELSTON: My name is Robert Elston. I
4 Silver City, Nevada. The post office box 500, 89428.
I'm a
5 professional archaeologist and I would like to alert
you to
6 the serious deficiencies in the sampling and analysis
plan.

I said
7 CHAIRMAN GANS: Excuse me. Excuse me. As
8 earlier, you cannot make comments generally about this
case
9 or specifically. That's not allowed by law.

10 MR. ELSTON: I see.

But
11 MS. REYNOLDS: You can do it at the end.
12 because we're here for a hearing. And of course,
13 Mr. Marshall can call you as a witness if that is
something
14 that he wishes to do.

15 MR. ELSTON: Okay.

16 MS. REYNOLDS: But because we're here for a
17 hearing --

up to
18 MR. ELSTON: I thought you were calling me
19 testify. Excuse me. I'm sorry.

general 20 CHAIRMAN GANS: This is public comment,
21 public only.
some 22 Anyone else? Okay. Seeing none, we have
23 preliminary matters in this case. Ms. Boggs(sic), I
So we 24 understand you wish to associate with legal counsel.
25 can take that now.

6

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Chairman. 1 MR. HUTCHINS: That's correct, Mr.

file 2 Again, Brian Hutchins with Comstock Mining. And I did

for 3 yesterday a motion to associate Ms. McIntosh as counsel

order 4 her appearance in this matter. She is a member of the

5 Colorado bar. The paperwork we filed I believe is in

And she 6 pursuant to the Supreme Court rules here in Nevada.

before 7 has the proper documentation and so forth to practice

before 8 this body. So I would move her admission to practice

9 you at this time.

this? 10 CHAIRMAN GANS: And we have a motion on

state 11 MEMBER PORTA: I think we need to ask the

12 and the appellant if they have an objection.

13 CHAIRMAN GANS: Mr. Marshall, of course you

have 14 objections; right?

15 MR. MARSHALL: No objection.

16 CHAIRMAN GANS: The state?

17 MS. JOSEPH: No objection.

18 CHAIRMAN GANS: Okay. Thank you. Now we

have a 19 motion for approval of this from the panel.

20 MEMBER PORTA: I move that Ms. McIntosh be
21 accepted to represent Comstock.

22 MEMBER TURNER: I'll second it.

those in

23 CHAIRMAN GANS: Motion and second. All
24 favor signify by aye.

25 (The vote was unanimously in favor of the motion)

1 CHAIRMAN GANS: Opposed? None. The motion
2 carries.

3 MR. HUTCHINS: Thank you, Mr. Chairman.

4 CHAIRMAN GANS: On January 13th, 2012, the
5 Division of Environmental Commission filed a motion to
6 dismiss and Comstock Mining Incorporated filed a
joinder to
7 the motion to dismiss on February 3rd 2012. The
appellant
8 filed its response to these motions on February 8th
2012. We
9 will hear first from NDEP and then Comstock Mining, who
is
10 the intervener. We will then hear from the appellant.

11 After hearing from all the parties, we will
then
12 move to deliberations by the panel members and make a
13 decision on this. So if we can begin with the state.

14 MS. JOSEPH: Thank you, Mr. Chairman and
15 commissioners. Also as another procedural preliminary
16 matter, we've got the Nevada Division of Environmental
17 Protection in addition to this motion to dismiss on the
first
18 appeal would like to make an oral motion to dismiss a
19 subsequent appeal that was filed with relation to this
20 permit. And I have a copy of that appeal. It is also
21 related to Reclamation Permit Number 0315. And because
we

this
22 are all here and I think it is properly agendized on
23 meeting's agenda, it makes most sense and would be most
24 efficient to handle that motion as well. So I would
like to
25 make that motion.

1 And finally, I would also like to make a
motion
2 to strike appellant's response, written response to the
3 written motion to dismiss of the first appeal on the
basis
4 that it goes way beyond the scope of what is in the
notice of
5 the first appeal as well as the issues that should be
6 addressed today. So with those additional matters, I'm
happy
7 to begin argument on the motion to dismiss with respect
to
8 the first appeal.

9 CHAIRMAN GANS: Okay. Let us comment.
First I
10 talked to you about the first two motions that you just
made.
11 My understanding from counsel is no we will not allow
the
12 first.

13 MS. REYNOLDS: No. There's some concerns
about
14 your second oral motion to dismiss the second appeal.
I
15 don't know that that has been properly agendized. They
have
16 had no notice that that appeal would be subject to a
17 proceeding today. So I do not -- And that's a notice
18 pursuant to 233B. So I don't believe that that is
something
19 that you can do.

20 MS. JOSEPH: If I may? The agenda, what it
21 refers to broadly is hearing regarding Reclamation
Permit
22 Number 0315. And the second notice of appeal
specifically
23 states that it's an appeal of Reclamation Permit 0315.
24 MS. REYNOLDS: It's not the agenda that I'm
25 talking about when I say there hasn't been notice. We
have

let
would
a
appeal
pursuant to

1 to do a 233B notice, a letter to all of the parties to
2 them know what we will be considering today. And I
3 have to look at the letter that we originally sent out
4 month ago. At that time they hadn't even filed an
5 notice. So I don't believe there has been notice
6 233B.

notice

7 MS. JOSEPH: Okay. So is the issue then
8 to the appellant and not to the public; is that right?

9 MS. REYNOLDS: Correct.

Marshall --

10 MS. JOSEPH: Okay. So if we have Mr.

it's
to

11 If we ask him whether he would object to -- I mean,
12 going to happen at some point. So if he doesn't object
13 having that motion heard orally.

14 MS. REYNOLDS: We would also have to have
15 concurrence by the intervener.

16 MS. MCINTOSH: We would concur.

I'm

17 MR. MARSHALL: I think this raises a larger
18 issue. Would it be all right if I remain seated while
19 arguing?

20 CHAIRMAN GANS: Yes.

or not 21 MR. MARSHALL: The larger issue is whether
they 22 these two appeals should be heard together. Because
is 23 really do relate to the same general issue. Our belief
honestly 24 that they really should be combined. And quite
only 25 we're ready to proceed today on the first appeal. We

and it's
SAP,
issued.
required
they
that
appeals
appeal
object to
grounds
this
it to
the --
the

1 filed the second appeal as a protective appeal of --
2 really focused more on the sampling analysis plan, the
3 which is obviously integral to the permit that was
4 We think it's better if we provide the notice that's
5 by law and hear both appeals at the same time because
6 really relate to the same issue. Unfortunately, what
7 means is that we would move this over to hear both
8 jointly.
9 I would oppose the motion to dismiss that
10 because, one, it hasn't been agendaized and we would
11 any lack of notice, particularly we don't have the
12 upon which they're going to make this notice or make
13 motion. I guess we'll hear it in a second if you allow
14 go forward. But more importantly, I think almost for
15 I think everyone agrees they relate to the same general
16 issue, right. The first appeal is on the issuance of
17 permit. We filed the second appeal when the SAP was

18 finalized. And so those two things do, they very much
relate
19 to each other because they are quite honestly have the
same
20 subject matter, how to do reclamation for this
exploration
21 permit.
22 So honestly, our reaction to the motion is
that
23 both of these appeals should be heard at the same time.
24 Unfortunately this was already noticed and we're going
to go
25 forward with this. So our position is that these two
appeals

1 should be combined. At that point they can make their
motion
2 to dismiss if they want to on the second appeal. We
can hear
3 all of this at the same time. Unfortunately, it's kind
of a
4 resource issue since you're already all here. But I
think
5 I've said enough.

6 We object to the motion. We didn't receive
7 notice. We didn't receive grounds on what their motion
is to
8 dismiss the second appeal. But if we want to combine
the
9 appeals, we think that's the best approach to move
forward
10 with both of these integrally-related matters.

11 CHAIRMAN GANS: Do you want to comment?

12 MS. JOSEPH: Well, I would suggest that, I
don't
13 want to belabor this point, but that there was proper
notice
14 in the sense that appellants in their response,
responsive
15 motion to the motion to dismiss dealt entirely with the
16 issues that were raised in the second filed appeal,
which was
17 relating to the SAP and the procedural issues relating
to the
18 SAP. So I think today we need to decide if we are
going to

19 preliminarily decide if we are going to address the
20 procedural issues relating to the SAP. And if we
aren't then
21 we need to very narrowly -- we need to narrow the
testimony
22 and the evidence that's going to be put forth today
away from
23 the SAP and keep it strictly on the reclamation permit.
24 Otherwise, if we want to go in to the
issues of
25 the SAP and the issues that are addressed in the second

would
after
1 appeal then I think that there was proper notice and I
2 be happy to renew the motion at the end of the day
3 we've heard the testimony.

would
that
evidence
Thank
4 But at this point I think the Commission
5 need to understand what the scope of the evidence is
6 we're going to hear today if there's going to be any
7 following argument on the first motion to dismiss.
8 you.

9 CHAIRMAN GANS: I think we've heard that,
10 Mr. Marshall, you essentially object to both?

11 MR. MARSHALL: When you say both.

--
12 CHAIRMAN GANS: Both -- Well, first of all

13 MR. MARSHALL: Yes, yes, yes.

have
14 CHAIRMAN GANS: That's what I heard. So we
15 an objection?

What
16 MR. MARSHALL: Yes. But I don't want to --
17 I don't what to do right now is complete or combine two
18 issues that I think need to be separated. One is their
19 motion to dismiss. The second one is the relevancy of
the

that 20 evidence before you today. And before you decide on
heard 21 second question, which is different, I would like to be
SAP. 22 on this issue of the process related to the SAP or the
23 So if I call you a sap, don't take me seriously.
like to 24 But that's a separate issue which I would
now as I 25 have, you know, I would like to argue on. But right

on the 1 take it is what we're hearing is the motion to dismiss
2 first filed appeal.

3 CHAIRMAN GANS: Is that your understanding?
4 We're going to have to take -- for the panel, we can't
just
5 mumbo jumbo this all up. We're going to take it step
by
6 step, so we want to take one issue at a time.

7 MS. JOSEPH: Okay. So in that sense then
why
8 don't we start with the first motion to dismiss on the
first
9 appeal.

10 CHAIRMAN GANS: Okay.

11 MS. JOSEPH: Okay. All right. Mr.
Chairman and
12 Commissioners, Comstock Residents Association, I'll
also
13 refer to them as CRA for ease, they've raised a host of
14 issues objecting to Reclamation Permit Number 0315.
And none
15 of those issues raised in the first appeal or any
appeal for
16 that matter, but we're focused on the first appeal
support
17 denying or modifying the reclamation permit. And
therefore,
18 NDEP submits that the Commission should dismiss that
appeal
19 as a matter of law.

scope of 20 Most of the issues raised go beyond the
21 the permit. This permit is a reclamation permit for
22 exploration. And it's important, I think, to
understand that 23 what this permit is allowing is exploration activities
on the 24 date and consolidated -- for the date and consolidated
25 project but it's not going beyond that. There are
limited

1 activities associated with an exploration permit.
2 Now, NDEP understands that because this
permit
3 relates to activities that are on land that's part of
the
4 Carson River Mercury Superfund Site, which sometimes I
will
5 refer to as CRMS, there's a heightened interest in the
6 issuance of this permit. But by the same token,
because this
7 permit involves land that is part of the CRMS site,
NDEP has
8 engaged in an in-depth analysis and taken extra
precautions
9 in allowing the limited activities that are allowed in
this
10 permit. The staff has done an in-depth analysis of all
of
11 the materials and all of the information they've
gathered.
12 Now, turning to the actual appeal notice,
it
13 becomes clear why this appeal should be dismissed
outright as
14 a matter of law. The first issue is that the appeal
notice
15 itself -- And if you want to take a look at the actual
appeal
16 notice, it's in the binder in front of you and it's
Exhibit
17 Number 10. That is the first appeal that was filed on

you
18 December 30th 2011. And looking at that appeal notice,
issues
19 will see that there is no proper notice of the actual
notice
20 being appealed. There are -- There's a spot on this
statutes.
21 where the appellant is to identify the specific
22 And under NAC 445.891 --
23 CHAIRMAN GANS: Are you sure it's 10?
24 MEMBER PORTA: It's 9. 10 is the permit,
in my
25 book anyway.

1 MS. JOSEPH: Is it?

2 CHAIRMAN GANS: Mine also.

3 MS. JOSEPH: It's 9 in your book?

4 MR. MARSHALL: I think on the list we
identified

5 them as 9 and 10 backwards, so should we have them just
6 switch them out?

7 MS. JOSEPH: Sure, we can just switch them.

8 That's fine. I think --

9 MR. MARSHALL: Would you mind in your
binder

10 taking out -- Their permit should be Number 9 and the

appeal

11 should be Number 10.

12 MS. JOSEPH: So those just got switched.

Sorry

13 about that. But if you take a look at -- So it is

Exhibit

14 10; correct?

15 MEMBER PORTA: Now it is.

all on

16 MS. JOSEPH: All right. Thank you. We're

17 the same page, I think. If you look at Exhibit 10, the

to

18 second page, there's a section where the appellant is

they

19 identify the specific statutes or regulations on which

20 assert that there's been error. And also NAC 445.891

particular 21 requires the appellant to provide "reference to
has 22 statutes." And here as you can see what the appellant
of the 23 done is basically listed virtually the entire section
hazardous 24 reclamation regulations as well as cited to air and
25 waste regulations. So very broad, very, very broad.

1 And what at a minimum if we do proceed with
2 evidence today, NDEP would argue that the appeal is
limited
3 to the specific arguments that are included in the
written
4 form of page one. And I will go through those now.
And with
5 respect to all of these arguments that are in the
written
6 form, the appellant has failed to identify any actual
legal
7 error. So they've got some complaints and the
complaints are
8 in here, but there's no identification of legal error
as to
9 why this reclamation permit should not have been issued
as a
10 matter of law. And there's simply no legal error.

11 The first argument appears to be
essentially that
12 NDEP should have gone further than what its reclamation
13 regulations direct by requiring Comstock Mining Inc. or
CMI
14 to sample all of the land associated with the project
before
15 the permit was issued. And that is simply
unprecedented.
16 The permit is again for exploration and it's on private
17 property. Now, there's no basis for NDEP to require
the
18 applicant to go in and sample all the land before the
permit

19 is issued.
20 Now, because some of the land is part of
the CRMS
21 site then there is -- there are extra precautions that
NDEP
22 did take. So what they did is they actually included
as a
23 condition to the permit a requirement that CMI would
have to
24 sample areas that are within that risk area before they
did
25 any exploration activities.

1 So actually what the appellant is asking is
2 somewhat included in the permit. They're asking -- I
think
3 the difference is that they're asking that every piece
of
4 land out there be sampled before there's -- before the
permit
5 is issued.

6 Well, every piece of land that is within
this
7 risk area of the CRMS will be sampled and must be
sampled as
8 a requirement of the permit before the exploration
activities
9 occur. But on land that is off of that risk area of
the CRMS
10 will not have to be sampled before exploration
activities
11 occur. But there's no authority for NDEP to require
the
12 applicant to sample that land. There's no basis for
it.

13 Now, the basis for them to sample it when
it is
14 within the risk area, and that's included with the
permit.

15 That's a condition, and the appellant -- Excuse me.
The
16 applicant understood that and is required now to do
that.

17 The second real issue addressed in the
first

NDEP 18 appeal, or the second complaint, I should say, is that
19 should have required the applicant to continue sampling
20 beyond the exploration of the permit. And there's
simply no 21 basis for that in the law. In fact, under NAC
519A.130, a 22 permit is valid for the life of the project. So as
long as 23 there are the activities that are permitted within the
permit 24 going on out on that property they will have to comply
with 25 the permit, they will have to do the sampling before
they can

no
the
however,
sample
activities.

1 do any activities within that risk area. And there's
2 basis to require them after the permit is terminated to
3 continue to sample that area. There's just no basis in
4 law for that. So NDEP cannot do that. They are,
5 requiring -- Again, NDEP is requiring the permittee to
6 anything, any materials within the risk area as long as
7 they're doing activities out there, exploration

8 The next argument can I think be
characterized or
required a
just
there.
laid out
took
to
material out
not

9 objection can be characterized as NDEP should have
10 management plan to address RCRA concerns. And there's
11 no dispute that RCRA doesn't apply to the material out
12 That's the stance that EPA took back in 1995 when it
13 the record of decision. And it's the position that EPA
14 just a week or so ago when its representative responded
15 some letters from some citizens saying that the
16 there is not hazardous, it's not hazardous waste. It's
17 defined as hazardous waste. And if it's not defined as

there's 18 hazardous waste then it doesn't fall under RCRA. And
a plan 19 no authority for NDEP to require the applicant to make
defined 20 for hazardous waste when the materials haven't been
21 as hazardous waste.

22 And Exhibit Number 18 in your binder is the
from 23 letter I was referring to. It's a February 7th letter
24 Mr. Michael Montgomery. And it talks about --

25 CHAIRMAN GANS: Are you referring to
something in

1 this binder?

2 MS. JOSEPH: Yes.

3 CHAIRMAN GANS: Number?

4 MS. JOSEPH: It's Exhibit Number 18, I
hope.

5 CHAIRMAN GANS: Yes.

6 MS. JOSEPH: Terrific. And it is where EPA
talks

7 about that is on the second page, the third full
paragraph.

8 So it very clearly states that these materials in that
area

9 are not, do not fall under the definition of hazardous
waste

10 and therefore are not governed by RCRA.

11 The fourth objection can loosely be
characterized

12 as NDEP should have required air and water permits
before

13 issuing this permit. And there's, again, no legal
basis for

14 NDEP's Bureau of Mining and Reclamation to require air
and

15 water permits. There are certain criteria within
statutes

16 that require an air or water permit. And those
criteria are

17 not -- do not exist in this -- in the circumstances of
this

18 permit.

Now, if 19 And this again is a reclamation permit.
them to 20 there is a change in circumstances that would require
those 21 get an air or water permit under the statutes, then
22 divisions or those bureaus of the, of NDEP would be
23 responsible. The bureau relating to air and the bureau
whatever 24 relating to water would then regulate and require
25 permits are necessary. But as it stands now, the

1 circumstances do not require air and water permits.
2 In addition, again, NDEP staff took
precautions
3 with respect to these kinds of issues and within the
permit
4 itself has required things like leaving a maximum of
five
5 drill holes uncovered. So it's not as if they're
oblivious
6 to these issues. They have taken note of them. They
have
7 included them and have gone and taken extra precautions
and
8 put those requirements in the permit. But in terms of
9 requiring a separate permit, there's simply not that
10 authority for purposes of this reclamation permit.
11 So those are really the objections the
appellant
12 has made in a nutshell in their first notice. I think
that
13 it's clear that NDEP staff considered the issues
related to
14 the permit in depth. They went through a long and
arduous
15 process and they took a lot of public comment and
addressed
16 all of those concerns. Because NDEP recognized that it
was
17 issuing a permit that involved land that was within the
18 superfund site they went and took the extra precautions
that

19 I've described to you.
20 But in sum, the CRA just has no legal basis
for
21 denying or modifying this permit and the Commission
should
22 find that because there is that lack of legal basis
that they
23 can dismiss this appeal as it stands as a matter of law
and
24 at that point we don't -- we actually don't need the
25 evidence. We don't need the witnesses to come up here
and

Thank
1 testify because it can be resolved as a matter of law.
2 you. Unless there are any questions.

with
3 MEMBER PORTA: Is there a bond associated
4 the reclamation permit?

And if
5 MS. JOSEPH: There is. There is a bond.
6 you look at Exhibit Number 19, that is the letter that
is
7 describing the bond and it's in the amount of \$106,936.

8 MEMBER PORTA: Thank you.
9 MS. JOSEPH: You're welcome.

10 MS. MCINTOSH: Thank you Mr. Chairman,
11 commissioners.

12 CHAIRMAN GANS: Name please.

of
13 MS. MCINTOSH: Carolyn McIntosh on behalf
14 Comstock Mining, Inc. And as intervener, we joined in
the
15 motion to dismiss for all the reasons that Ms. Joseph
has
16 already articulated but added a couple of additional
17 arguments and so I will simply address those.

18 Fundamentally, in order to appeal, the
rules of
19 the Commission state that any person aggrieved by the
20 issuance of a permit may appeal to the SEC. And the
SEC

case 21 rules do not define what aggrieved means. However, by
papers 22 law in Nevada that term is defined and we cited in our
versus 23 two cases, Web, the Web case and Esmeralda County
grievance 24 Wild, where the term aggrieved means a substantial
illegal 25 that includes the imposition of some injustice or

1 obligation or burden or the denial of some equitable or
legal
2 right. And the SEC rules require that form three
identify
3 the means by which the appellant is aggrieved.

4 As Ms. Joseph has identified, the form
three
5 completely fails to do so. This is an appeal of a
6 reclamation permit and the NDEP found that the
application
7 met all requirements for reclamation purposes, both
statutory
8 and regulatory. As Commissioner Porta pointed out,
there was
9 a bond as a prerequisite. The bond has been posted.

10 appellant made no challenge to the specifics of the
three
11 reclamation permit. They therefore cannot -- The form
they
12 doesn't show nor do any of their other papers show how
13 meet that definition of aggrieved.

14 If I can take that one step further,
because the
15 question of aggrieved goes to an issue of essentially
does
16 the appellant have standing to challenge this
particular
17 permit. And I presented the way the Supreme Court
looks at
18 that question of standing, which is germane here, and
that is

they're 19 that the appellant must establish that the injury
to be 20 complaining of falls within the zone of interest sought
they are 21 protected by the statutory provision whose violation
be 22 asserting has occurred. In other words, they have to
designed to 23 complaining about something that the permit was
doing 24 protect against or prevent. And they are simply not
25 that.

number
reclamation
stated any
1 As Ms. Joseph stated, they've identified a
2 of other issues but they're not germane to the
3 permit. Therefore, in this context they have not
4 basis for being aggrieved and are not therefore legally
5 before you.

what
6 In addition, it's kind of hard to determine
7 they're asking the Commission to do with respect to the
8 permit itself since they make no complaint about the
9 permit.

modified in
evidence
in
regulatory
met.
10 If they are asking for the permit to be denied or
11 any sense, they have not put forth before you any
12 that would provide a basis for you doing so. Moreover,
13 issuing the permit, NDEP has found that all the
14 requirements for reclamation permit purposes have been

-
NDEP and
the
have a
15 So any modification or certainly revocation or denial -
16 or -- Well, revocation of the permit would put both
17 Comstock in violation of the law. NDEP is obligated by
18 statute and regulation to issue a reclamation permit in
19 context of the exploration. Comstock is obligated to

19 reclamation permit. So to the extent that the
appellant is
20 asking for denial of the permit or revocation of it, it
21 would -- you would be making a decision to put both
NDEP and
22 the intervener in violation of the law. And for those
23 reasons we request that you move to dismiss this
appeal.
24 Thank you. Pleased to answer any questions.
25 CHAIRMAN GANS: Questions? I have a
question.

there are 1 Since you're on the subject of aggrieved, I notice
read and 2 two words been used throughout the paperwork that I
address that 3 those two words are health and safety. Will you
4 for me, please? That's not a grievance. That's not a
5 concern. I mean I'm sure it is where you're concerned.
But 6 it is mentioned.

7 MS. MCINTOSH: Well, I'm sorry, Mr. Chair.
8 Address it in what manner?

9 CHAIRMAN GANS: Well, they're saying that
their 10 health and safety is at risk here.

11 MS. MCINTOSH: Well, it is my understanding
that 12 they believe that their health and safety may be at
risk 13 because of the interplay between the reclamation and
the fact 14 that some of the exploration activities may occur
within a 15 risk zone identified by NDEP in association with the
16 superfund site.

17 But in kind of two parallel processes, one
being 18 the reclamation permit and the other being the
implementation 19 of superfund sampling and remediation if that's called
for,

20 public health and safety is protected as is the
environment.

21 And NDEP through two different agencies of NDEP have
made
22 those decisions.

23 Essentially in the superfund context, which
you

24 will no doubt get in to, but in the superfund context,
the

25 sampling and analysis plan was directed to be developed
by

a
the
any

1 the Bureau of Corrective Action. It has been, at least
2 portion of the sampling analysis plan that relates to
3 Dayton has been developed, was approved by NDEP and it
4 requires that sampling occur before any disturbing --
5 soil disturbance activities take place.

that
Comstock
whether
that
established by
sampling
to, the
the
goes

6 So in so doing, the Comstock will know and
7 understand, as will NDEP, as will the public. No one
8 understands whether there is mercury present in an area
9 might be disturbed and NDEP will make a decision or
10 in consultation with NDEP will make a decision as to
11 to avoid that area, to cover it or to remove it. But
12 would be -- there is a decision-making process
13 the LTSRP, also an exhibit here, but the long term
14 and remediation plan. The acronym is easier to refer
15 LTSRP. There's a process established by the LTSRP and
16 SAP where data is reported to NDEP and if there is any
17 mercury in elevated concentrations found, a dialogue
18 back and forth between the NDEP and Comstock so that a

effective 19 determination can be made as to the appropriate and
20 and protective way of addressing the presence of that
21 elevated mercury.

we're 22 The other aspect, the parallel process that
23 really before you on is the reclamation permit. And by
24 statute and regulation, the legislature and then NDEP
has
25 determined the best way or the appropriate way to
protect

1 public health and the environment by requiring
reclamation.
2 And so the permit itself actually establishes the means
for
3 the public health and the environment to be protected
through
4 reclamation post-exploration activity. And Comstock is
5 ready, willing and able to implement that.

6 CHAIRMAN GANS: I think we go on to the
appellant
7 now.

8 MR. MARSHALL: Thank you. I'm going to
stand up
9 to hopefully signify how important this is. You know,
I
10 think just before we kind of launch in to the technical
legal
11 arguments, I think everyone recognizes that we're
talking
12 about a superfund site here and I think it's the only
one in
13 Nevada. And it's one in which is smack in the middle
of a
14 couple residential communities and one in which there
is
15 going to be active exploration, which there is already
active
16 mining.

17 So what you have in front of you is I think
18 actually just taking aside a very interesting
intersection

19 between a whole bunch of different policies that come
20 together right in the middle here at the Comstock. And
not
21 only is it a superfund site, it is also a state
designated
22 historical landmark and a nationally designated
historic
23 landmark. So we have a combination of very important
public
24 policy considerations going on right here. We have
25 protection of the public from toxics. We have the
protection

opportunities,
policy,
Mining
So
purpose
promote
that
quote
the
about
residents
really
panel

1 of the historical resources and we have mining
2 which we know in the State of Nevada is an important
3 an issue in and of itself.

4 And it is clear under law that Comstock
5 Inc. or CMI to add to the acronym list, cannot explore
6 without a permit from the state. That's NRS 519A.180.
7 they can't go forward unless they have the reclamation
8 permit.

9 Now, to issue a reclamation permit, the
10 of that permit as stated by the NRS is to basically
11 proper reclamation. And there is a host of reasons why
12 is. And I think the Chair alluded to that. And as we
13 in our opposition brief, it's necessary to prevent the
14 undesirable and surface water conditions detriment to
15 collagen and to the general health, welfare -- Sorry
16 going too fast. Safety and property rights of the
17 of the state. So that kind of sets the context of
18 what is in front of the Commission, excuse me, the

19 today is whether or not the reclamation permit has
20 accomplished those objectives.

21 Now, let's kind of turn back to the motion
to
22 dismiss. And I'll first address the state's bases for
23 seeking to dismiss the appeal even before you hear
testimony
24 and get to the merits of these what I think are
critical
25 public policy issues. And then address the two
answerly

1 issues that CMI raised in their joinder.

2 So really the first issue has to do with
the
3 notice and the issues before you. And the principal
basis on
4 which the State is arguing that you should not hear
this
5 appeal is that there is no legal basis upon which for
you to
6 act, that the complaints of the residents in this
matter have
7 no basis in law.

8 And so I would like to just quickly go
through
9 the four claims that we kind of outlined in our brief
and
10 state why there is a legal basis. Now, at this point
we're
11 not arguing the merits of that basis, but whether or
not
12 there is a legal dispute for you to listen to testimony
and
13 then resolve, right. The state is saying don't even go
that
14 far, dismiss it right now. Now, at the same time
they're
15 arguing that, they're basically arguing the merits of
our
16 appeal. Well, the state went through some exhaustive
17 processes, they included various permit terms to
protect

there is 18 that, but that is an admission in and of itself that
19 a dispute here on whether or not the permit met the
20 requirements of law.

And that 21 Our first argument is a procedural one.

not 22 is that the permit, the process for the permitting did

That's our 23 include the SAP as subject to notice and comment.

24 first argument. And the state admits that in their own
25 motion to dismiss that -- Let me get the exact language
here,

with
SAP or
law
permit
have
for

1 that will be quoted on page four, that "CRA finds fault
2 NDEP's issuance of the permit prior to approval of the
3 related protection." So that procedural argument is
4 definitely right in front of you. Because the state
5 requires the issuance of not only a notice but a draft
6 and a draft reclamation plan for everyone to review and
7 the opportunity to comment on. That is the legal basis
8 that first argument.

may

9 Now, when we get through the testimony you
10 decide that, you know, was there, you know, should that
11 permit have included the SAP, draft SAP so everyone can
12 comment on it and then NDEP is required to respond.
13 the merits of that complaint.

That's

14 But the legal obligation, if we are
15 correct, is outlined in the process, both the NAC or particularly
16 the NAC in terms of how these permits need to be put out, the
17 information to be put out so the public can look at the
18 reclamation permit and determine whether or not it's
19 protective of public health and safety, their property

20 rights, et cetera. Okay. So that's the first claim.
So
21 there's a legal basis for that, which the state says is
one
22 of our complaints. I don't think there's anyone --
It's not
23 a mystery.
24 And before I go any further, all of these
claims
25 and I think as articulated by NDEP are all in front of
NDEP.

1 No one is surprised by these arguments. They were all
2 addressed in the process of going -- the appeals
process.

3 Excuse me. The permitting process. So these are not
new
4 arguments that we're making. It's just that there's a
5 disagreement over whether or not NDEP should have done
what
6 the citizens want or the way they did it. That's why
this is
7 in front of you.

8 The next argument that the appeal issue has
9 raised is this notion of sampling, when sampling should
have
10 occurred. The state says the sampling should have
11 occurred -- we're going to require sampling after
permit
12 issuance but before your exploration activities. The
13 residents say before you should have issued that permit
you
14 really needed to have site specific monitoring data.
Excuse
15 me. Not monitoring data. But site specific data
regarding
16 the presence of toxics as part of the information in
front of
17 you before you issue the permit. Not every where
where, you
18 know, the whole acreage that this thing, the
exploration

wanted 19 permit requires, but like they did after the fact, we
not we 20 that sampling before the fact to determine whether or
meaningful 21 could look at that sampling and hopefully provide
permit 22 comment to the decision makers on whether or not this
on 23 should be issued. Okay. That's a legal argument based
whether or 24 hopefully we're going to have testimony regarding
25 not that sampling should have occurred.

1 Now, the state takes the position that as a
2 matter of law they could not require that information
to be
3 submitted ahead of time. That's their argument, right,
so
4 you shouldn't hear this claim because as a matter of
law NDEP
5 was precluded from asking for that kind of information,
6 therefore this appeal basis should be dismissed.

7 We strongly disagree with that. The NDEP
may as
8 a matter of policy choose to ask for that evidence
after the
9 fact or they can require it before the fact as --
because in
10 order to have a complete application you have to show
your
11 program of -- your plan for reclamation, how it's going
to
12 protect all of these important public values. Now,
when we
13 get to debate the merits of that issue, we can have a
healthy
14 debate as to whether it should be required after or
before.
15 But NDEP had the legal authority to require that kind
of
16 information before they acted. So that issue is not
subject
17 to a motion to dismiss. We'll ultimately get to the
merits
18 and you can decide that.

authority 19 But in terms of whether or not NDEP had
20 to require that beforehand as part of the application
condition. 21 process, rather than after the fact as a permit
22 There is plenty of legal authority for that.
strong 23 The next basis is, excuse me, is we have
24 objections to the way in which the sampling was put
forward, 25 the sampling plan, and whether or not it required
examination

1 of all contamination locations. And then you go
through that
2 argument and I think that again is the merits of the
adequacy
3 of the permit necessary to protect these values that
are
4 articulated in the NRS.
5 So I think that really is -- that's not so
much
6 whether they should -- whether or not there's a legal
basis
7 for that because essentially it's the way in which the
8 sampling plan was put together. During the permitting
9 process the question was raised as to whether or not
the
10 sampling was going to include various archaeological
sites or
11 if those sites have been reviewed by NDEP. And there
was a
12 debate about that. And they basically said that's
going to
13 be part of the SAP coming out later. And we say no,
that was
14 raised during -- there's a comment made by one of the
NDEP
15 personnel in the public hearing so now we're going
present
16 that in front of you as to whether or not the SAP
process was
17 adequate. We're going to have a healthy debate as to
whether

18 or not that's part of this permit appeal. But in terms
of
19 their motion to dismiss on the legal basis for that is
20 whether or not there was an adequate protection of all
the
21 resources and public health and safety in terms of
whether or
22 not the scope of the sampling plan was adequate, okay.
23 Kind of the final basis that we have is the
24 ability to impose conditions to protect health and
safety.
25 Now, we kind of, we get in to this kind of through
whether or

1 not this is hazardous waste. But there is no debate on
2 whether or not this is toxic materials. There's no
debate
3 that mercury, arsenic, led are all present in this
superfund
4 site and that there is a substantial risk that these
toxic
5 materials will be released if -- during these
exploration and
6 reclamation activities.

7 Now, whether or not you call that hazardous
waste
8 under RCRA or toxic materials as any, you know, normal
9 citizen is looking at this and saying we want to be
sure that
10 they were not going to be harmed by the release of,
potential
11 release of these toxic materials is kind of irrelevant.
The
12 question that these citizens put to NDEP was whether or
not,
13 was asking them do we want conditions to protect air
and
14 water.

15 Now, let's talk about air for a moment.
There is
16 a criteria to get an actual permit. You have to get a
permit
17 if you disturb more than 20 acres of land. Now, NDEP,
the
18 response to NDEP was well, we're not going to require
an air

Really 19 permit because they're under, just under 20 acres.
brief is 20 the citizens' concern though as articulated in our
it's 21 you have air quality issues. Regardless of whether
air 22 19.75 acres or 20 acres, you still need to look at the
of 23 quality issues involved with this permit. That's part
24 your reclamation obligation under the statute. And you
that you 25 didn't require a permit so the citizens' position is

just
the
acres of
particularl
statutes are
take in
have

1 didn't look carefully at that air quality because you
2 used this 20-acre cutoff and you didn't really look at
3 air quality impacts associated with disturbing 19.75
4 land in a superfund site.

5 Now, we believe that under the NRS,
6 describing what the purposes of that reclamation
7 about, that provides the legal authority for NDEP to
8 to consideration air quality impacts and so it should
9 been addressed in the process.

10 Now, we can debate as to whether they took
11 of it and whether that was the right way, but in terms
12 this motion to dismiss, there's a legal basis and our
13 error that we claim is that you should have addressed
14 air quality issues by looking at the air quality
15 associated with the disturbance of 19.75 acres, not
16 say you don't need a permit.

17 So that's the basic argument that we had
18 regarding the merits of the motion to dismiss, whether
or not

19 there's a legal basis and whether or not we should
proceed to
20 the merits of those arguments.
21 Now I would just like to address quickly
the
22 CMI's additional arguments. The first one is standing,
and
23 the second one is remedy. I think the second one is
actually
24 easier. Actually they're both pretty easy to discard.
25 But let's start with the remedy question
first.

1 The issue as put forth by Ms. McIntosh is basically
that NDEP 2 was obligated to issue the permit. And by potentially
3 sending the permit back or revoking the permit somehow
that 4 puts NDEP and CMI in legal jeopardy. Well, NDEP was
not 5 obligated to issue the permit. NDEP was obligated to
act on 6 the application.

7 Now, we say that there was error and you
should 8 remand it to NDEP to address these specific issues that
we 9 talk about, whether or not there was public process,
adequate 10 public process on the SAP, whether or not there was
adequate 11 protection of air and water, whether or not there was
12 adequate range of sampling to protect the citizens.

13 Now, that specifically under the NAC under your own appeal
14 provisions you have the ability to correct those errors
if 15 you find that those are errors. So yes, you do have
the 16 authority to review this permit and to remand it back
to NDEP 17 to correct the legal errors that CRA has identified.

18 Now let's talk briefly about aggrieved and

critical 19 standing for a second. It is hard to imagine a more
with 20 place in which the citizenry of Nevada could interact
middle 21 their government when you have citizens living in the
forward 22 of a superfund site and you have an applicant coming
superfund 23 to seek permission to disturb material within that
24 site that has mercury, arsenic and lead in it.
substantial 25 I think as the Chair noted, there is

1 concerns here regarding public health and safety.

2 What CMI is arguing is that on the first,
on one

3 hand that those interests are not within the zone of
interest

4 that the reclamation statutes are to protect. We just
flatly

5 disagree. If you read those, the purpose of the
reclamation

6 sections in the NRS, the express purpose is to protect
public

7 health and safety. And we just flatly disagree that
somehow

8 that those interests of these citizens should not be
taken in

9 to account by NDEP. And we may disagree as to how
those

10 interests should be taken in to account. You notice
that the

11 state did not join in the standing, which I think is
telling,

12 because I think they agree as responsible government
part of

13 this permitting process is dedicated to whether or not
this

14 activity will have an adverse effect on these citizens.
So I

15 think this whole zone of interest argument is quite
honestly

16 a pretext for just getting rid of these complaints by,
17 legitimate complaints by these citizens.

they 18 Really, the more important question is are
here. 19 aggrieved by this action because that's the standard
of 20 And the cases that we've cited to you all really go off
looks at 21 the same notion of aggrieved, that the Supreme Court
to 22 of when deciding whether or not citizens have standing
the 23 challenge permits issued by governments. And in all of
at 24 cases decided by the Supreme Court in the last 15 years
25 least they've held that citizens have the ability to

they
because
sensical
middle
they
ability
to
you
was
the
1 challenge these permits that affect the land near where
2 live or right amongst where they live. And that is
3 these permits, and I think this is almost a common
4 argument, these permits have such a strong relationship
5 between the environment that citizens live in and the
6 potential impact that this type of activity within the
7 of a superfund site right next to their homes and where
8 recreate and where they live and work, they have the
9 to challenge or to ask questions of their government as
10 whether or not their interests are protected. And if
11 look at these cases, and fortunately or unfortunately I
12 one of the people litigating these cases, citizens have
13 ability to challenge government-issued permits on these
14 critical land use questions.

terms
is that
SAP,
injury
15 And the specific instances in this case in
16 of aggrievement are first for the procedural argument
17 process was denied then to comment meaningfully on the
18 which is a critical part of the permit. That's an

19 that they were denied.

20 Now let's talk about, specifically about
the

21 activities authorized by this permit, which is the

22 disruption -- disturbance of at least, you know, very
close

23 to 20 acres of land within a superfund site directly
adjacent

24 to where they live. And there is a distinct
possibility that

25 such activities may release toxic materials in to the
air and

that
1 water. That's why there's a sampling plan, right. And
2 threat of possible harm is very real, concrete and is
3 recognized by the state. And that's why I'm assuming
why
4 they didn't join in this motion to dismiss on this
basis.

5 So I think in this case in the context that
we
6 have here, these plaintiffs are aggrieved by the
issuance of
7 the permit and therefore have standing to bring this
appeal
8 before you. That's the end of my argument. If you
have any
9 questions, I'll be glad to answer them.

10 MEMBER TURNER: I have one question. The
11 conditions that created the superfund site as it is
today,
12 when did that happen?

13 MR. MARSHALL: Those were historic, so
those
14 basically happened -- The release of the mercury,
arsenic and
15 led happened, how many -- at least a hundred years ago
and
16 probably -- and within the last 50 to a hundred years.

17 MEMBER TURNER: Okay. And when was that
site
18 designated, the superfund site?

19 MS. SHERMAN: 1995.

20 MR. MARSHALL: 1995.

21 MEMBER TURNER: And how long have people
been

22 taking up residence in the superfund side?

23 MR. MARSHALL: I think the residents,
there's

24 been people in Nevada City -- Excuse me, Nevada City.
Silver

25 City and Gold Hill and Virginia City since they first

1 discovered gold and silver there.

2 MEMBER TURNER: And do you have any idea of
the
3 health and safety issues that those people have faced
4 throughout the time that they've been living there?

5 MR. MARSHALL: Probably the same ones in
terms of
6 the risk associated with arsenic and led and mercury.
Is
7 that your specific question?

8 MEMBER TURNER: Having been suffering
conditions
9 related to those materials present in those areas.

10 MR. MARSHALL: We would be glad to provide
11 evidence. But as I understand it, the potential for
risk of
12 exposure was one of the reasons why we had this whole
13 superfund designation and the long term sampling and
14 monitoring plans. So the whole purpose behind the
inclusion
15 of these conditions in the reclamation permit is
directly
16 related to the health and safety risks. Now, I don't
have
17 any available epidemiological studies regarding the
risk, but
18 I know there has been -- Hasn't there been?

19 MS. SHERMAN: There have been recently five
20 people in Gold Hill that have been diagnosed with
cancer. I

21 have three autoimmune disorders. I don't know if it's
22 attributable to the superfund site or not. But if we
want to
23 go person by person, we can discuss that.
24 MEMBER PORTA: I had one question. I want
to
25 make sure I read the permit correctly. That there was
no

was 1 mining or exploration activity allowed until the SAP
2 submitted to the Division and it was approved; is that
3 correct?
4 MR. MARSHALL: That is correct.
5 MEMBER PORTA: Okay.
6 CHAIRMAN GANS: I have a couple questions.
7 Counsel talked about Exhibit 19. I did not hear you
talk 8 about Exhibit 19. In Exhibit 19 the way I read it is
the EPA 9 doesn't really believe there is a hazardous problem.
In 10 fact, it's not even considered hazardous material.
Now, I 11 know you're using the word toxic with hazardous. In my
mind, 12 if it's toxic, it's hazardous. But EPS is not saying
that. 13 They're also addressing some things in there about the
way 14 we -- the way they see this problem being addressed and
it's 15 being addressed properly.
all, 16 To me, the EPA letter is not an end all do
letter 17 but it's very important. You rarely see that kind of
area 18 coming out of EPA region nine. I've been working this
19 for 40 years and I was surprised to see that letter.

20 MR. MARSHALL: I think that's Exhibit 18.

21 CHAIRMAN GANS: Is it 18?

22 MS. JOSEPH: Yes.

23 MR. MARSHALL: And I think that exhibit is
worth
24 your while reviewing carefully because it's actually
very
25 interesting what they say in there. And let me preface

1 before I go in to the kind of details of that letter by
2 saying that in this motion to dismiss the particular
issues
3 raised in that letter aren't -- they may or may not
support
4 the state in how they decided to address these issues.
But
5 they're not relevant to whether or not there is a legal
6 argument that we're going to make.

7 CHAIRMAN GANS: I agree.

8 MR. MARSHALL: You may consider that in
terms of
9 the substantive merits. But in terms of the motion to
10 dismiss, I don't think it's particularly relevant.

11 Now, your first point was about toxic
versus
12 hazardous waste, and I think this is a critical point
to talk
13 about. When EPA says these are not hazardous wastes,
they
14 mean as that term is used under RCRA. I'm going to
butcher
15 this. The Resource Conservation --

16 MS. MCINTOSH: And Recovery Act.

17 MR. MARSHALL: -- Recovery Act. That is a
18 definition that says okay, here are the classes of
toxic
19 materials that we're going to consider to be hazardous
under

says 20 RCRA. Now, there's a specific amendment to RCRA that
be 21 toxic materials from mining activities are not going to
consider 22 regulated under RCRA, therefore we're not going to
arsenic, 23 them hazardous waste. Now, that doesn't mean that
that 24 mercury and led are not hazardous. That only means
the 25 because, I'm going to put my editorial comment in here,

1 mining industry was strong enough to basically get
congress
2 to say we're going to regulate that under another
process,
3 not RCRA, those types of wastes are not going to be
addressed
4 under RCRA. Now, they're still identified, this is a
5 superfund site and the reason why it's a superfund site
is
6 because of the presence of these toxic materials. That
7 determination by the EPA that these are not RCRA
hazardous
8 wastes in no way, should be taken in no way as a
9 determination that these wastes, these toxic wastes are
not
10 hazardous. It's just they are not regulated under RCRA
11 because of a specific amendment relating to mining
wastes.

12 CHAIRMAN GANS: And EPA says that, do they
not?

13 MR. MARSHALL: Right. But that's I think
not a
14 judgment on their parts that these wastes are not
hazardous
15 to public health.

16 Now, let's -- I think the other interesting
thing
17 about this letter is that they basically say here's the
long
18 range -- I'm going to butcher all of these acronyms
myself --

But 19 the long range management plan strategy and the SAP.
talk 20 what's really important about that letter is how they
general 21 about mining and exploration activities. Because in
long 22 those things were not directly addressed within the
23 range plan. And the way that they say it should be
24 implemented is through the SAP. Okay. That's how the
the 25 sampling plan, you should do the sampling plan through

1 SAP. We believe that you should have, that an SAP is
2 necessary, okay, we firmly believe that, absolutely
3 necessary. But the issue is in this particular appeal
is
4 should the public have input on the preparation of that
SAP
5 in a meaningful and legal manner and whether or not the
scope
6 of that SAP as described by NDEP is appropriate.

7 Now, the public has an incredibly strong
interest
8 in how that procedure is used to develop that SAP and
its
9 eventual, how it looks, okay. And so those -- but
that's not
10 to say that -- We firmly agree that you have to in this
11 instance, and we think it should have been done ahead
of
12 time, but you have to for this permit require sampling
and
13 monitoring and analysis of the areas within the
superfund
14 site.

15 CHAIRMAN GANS: I have another question.
Is the
16 property we're talking about private or public?

17 MR. MARSHALL: The property covered by the
18 reclamation permit is private.

19 CHAIRMAN GANS: Second question on that.
Does

up all 20 the permit allow the mining company to go in and tear
going to 21 20 acres or are there just spot areas that they're
disturbance 22 be disturbing the land?
23 MR. MARSHALL: The permit authorizes
refer 24 in 19.75 acres of property within -- Do you mind if we
25 to this map?

1 MS. JOSEPH: Not at all.

2 MR. MARSHALL: This is a map of the actual

--

3 CHAIRMAN GANS: I'm familiar with the map.

We

4 looked at that.

5 MR. MARSHALL: Right. So it's that --

question.

6 CHAIRMAN GANS: That's really not my

7 My question is more to the point if you look at the
8 exploration, the permit, what the permit is allowing,
if you

9 look at the actual disturbance of the soil, is it 20
acres of

10 disturbance like taking a tractor out there and grading
off

11 20 acres or is it just spots, a quarter acre here and a
12 quarter acre there? I'm just curious your opinion on
that.

13 MR. MARSHALL: I'll answer directly. If
you look

14 at Exhibit 9, which is the permits, there is in there I
think

15 at page two a description of the disturbance activities
and

16 the amount of acres that each category -- so this is
the

17 19.75 is actual disturbance.

18 CHAIRMAN GANS: Which includes roads?

19 MR. MARSHALL: Yes, the construction of
roads.

20 CHAIRMAN GANS: Any other questions?

21 MEMBER TURNER: One more question if you
don't

22 mind. Can you describe what the nature of the
exploration

23 activities will be? Is it drilling? Is it potholing?
What

24 is it going to be?

25 MR. MARSHALL: As I understand it, it is
the

pads, 1 construction of access roads, the construction of drill
don't 2 the actual drilling, the construction of sumps. I
they're 3 think there is any -- they're not trenching in this,
accurate? 4 not exploring by trenching in this one; is that

5 MR. GASKIN: That's accurate.

6 MR. MARSHALL: So it's just, I think,
7 construction of roads, the drill pads, the super sumps,
8 these, I think, I can't remember the exact size but ten
feet
9 by 20 feet, something like that, pits that collect any
10 potential water that runs off. I think that's what
these
11 categories are on page two of the permit.

12 CHAIRMAN GANS: Thank you.

13 MS. JOSEPH: May I follow up with rebuttal
14 argument?

15 CHAIRMAN GANS: Hold on just a second.
You'll be
16 given your chance. I want to make sure the panel is
17 complete. Thank you very much.

18 MR. MARSHALL: Thank you.

19 CHAIRMAN GANS: We'll go back to the state.

20 MS. JOSEPH: All right. Sorry. I just
didn't
21 want you to move on.

22 MEMBER PORTA: To forget about you?
23 MS. JOSEPH: I wanted an opportunity to
respond
24 to a couple of the arguments made by counsel. And I
think
25 the first thing that's noteworthy is he's really
discussing a

SAP. So
address the
issue
whether or
addressed in
looking
indicate
to
are
wanted
about
other
what's
and

1 lot about the SAP and the procedural aspects of the
2 again, I think what we have is he doesn't want to
3 second appeal, yet that's exactly what he's doing. The
4 of the SAP and the procedural aspects of the SAP,
5 not the public should comment on them, were not
6 the first notice of appeal. They simply weren't.
7 If you look at that notice, again, we're
8 at Exhibit Number 10, there's nothing in there to
9 that they, that there was a grievance or any objection
10 that. So if we are going to talk about that then we
11 necessarily talking about a second appeal. So I just
12 to make that clear.
13 The next issue is when counsel was talking
14 the authority under this permit to require a host of
15 permits, clean air and water. And again, I think
16 important here is that we are looking at issuing a
17 reclamation permit under the NRS and NAC 519A section

Commission 18 those are regulations that were adopted by the
19 that dictate when and how a permit can and should be
issued.
20 And each of those were followed.
21 There are other regulations and NRS
statutes that
22 regulate the issuance of other permits. And those are
not
23 what's at issue in this permit. It's simply, for a
24 reclamation permit it's looking at the requirements
under
25 Section 519A, all of which were met, all of which were

They're 1 followed. And I don't think there's any dispute.
They're 2 not even disputing that those weren't followed.
other 3 simply arguing that you need to, you can look at these
permit or 4 issues and, you know, maybe there should be an air
this 5 a water permit. But under the reclamation statutes and
6 regulations, all of those were met with the issuance of
7 permit. So again, I think that counsel in CRA is going
8 beyond the scope of what the reclamation permit is.
the 9 Again, counsel was raising the adequacy of
ripe for 10 SAP and that is another issue that I don't think is
get in 11 today unless we are going to, unless we are going to
purposes 12 to the second appeal. There is -- What we have for
out 13 of this appeal is the specific arguments that were laid
about the 14 in the first appeal notice. And none of those talk
appeal 15 adequacy of the SAP. That is an issue for the second
16 if we were to get there today.
17 I think I heard counsel talk about, and I
think 18 essentially agree, that RCRA doesn't apply. I don't

19 there's any dispute that RCRA does not apply.
20 Finally, counsel raised some policy issues,
and I
21 think, you know, it's going to be hard to avoid policy
today
22 because this is a, you know, a project that's happening
in
23 the midst of a residential area. And I think what's
24 important to look at there is you've got this area
that's
25 been designated as a superfund site so what do you do
with

1 it? Do you just leave it? One thing that the
reclamation
2 permit does is it allows for clean up of that area.
That's
3 essentially what's going to happen when the applicant
goes
4 out and is looking to explore in these areas that are
in the
5 risk areas. They're having to do sampling which is
6 essentially going to provide valuable information to
know
7 exactly what's out there. And then once you know
what's out
8 there with that information before anything can be
disturbed
9 in terms of exploration, you've got to take mitigating
10 action. And then in the end you've got to reclaim it.
11 So all of that area that is within the
superfund
12 site by virtue of this permit will, that is disturbed
will be
13 ultimately cleaned up. So I think that that's an
important
14 aspect to look at too.
15 Otherwise, it sounds like what CRA is
asking is
16 to just put a fence up over these areas and, you know,
fence
17 them in and never touch them, just leave them. And I'm
not
18 sure that -- I'm not sure that that is within the
authority

land and 19 of the Reclamation Bureau to do that. It's private
considered and 20 there are remediating factors that have to be
options 21 taken in to consideration. But leaving the permit land
22 untouched I'm not sure that that's really one of the
23 for NDEP. If there are no questions, I am finished.

24 MEMBER PORTA: I have a couple questions.

25 MS. JOSEPH: Sure.

1 MEMBER PORTA: In the context of the
sampling and
2 analysis plan and reclamation permit -- the SAP, has it
been
3 required in other reclamation permits in the state that
would
4 issue in other parts of the state?

5 MS. JOSEPH: Has it been required in other
--

6 MEMBER PORTA: In other reclamation
permits.

7 MS. JOSEPH: It has not.

8 MEMBER PORTA: Okay. So this is a rather
unique
9 case where this plan is being required by the state as
a
10 result of a superfund site and the boundary delineation
of
11 that site?

12 MS. JOSEPH: That's correct.

13 MEMBER PORTA: Okay. And again, this
activity
14 for exploration was not allowed any type of disturbance
until
15 the division approved that plan?

16 MS. JOSEPH: That's correct.

17 MEMBER PORTA: And has that plan been
approved?

18 MS. JOSEPH: Yes, it has.

19 MEMBER PORTA: And my last question is with

permits 20 regard to reclamation in other states, are these
Nevada, 21 typical in all other states or are they unique to
22 reclamation permits and bonding per se?
to 23 MS. JOSEPH: I don't think they're unique
24 Nevada, although --
25 CHAIRMAN GANS: I didn't hear that.

the
of all
terms
beyond

1 MR. GASKIN: Dave Gaskin. I believe that
2 Nevada reclamation program is among the most stringent
3 of the ones in the United States. The requirements in
4 of physical reclamation and also bonding go above and
5 what you would see in typical states.

like

6 MEMBER PORTA: So other mining states, say
7 Colorado, do they have reclamation permits and bonding?

as I

8 MR. GASKIN: Yes, to varying degrees. But
9 said, I think our program is more stringent.

unique

10 MEMBER PORTA: So these aren't necessarily
11 to Nevada?

12 MR. GASKIN: True, yes, sir.

13 MEMBER PORTA: Thank you.

clarify

14 MS. MCINTOSH: Mr. Chair, I would like to
15 one point as well.

16 CHAIRMAN GANS: You'll have your time too.

17 MS. MCINTOSH: Thank you.

counsel

18 CHAIRMAN GANS: Certainly it looks like
19 agrees this is private property.

20 MS. JOSEPH: Correct.

21 CHAIRMAN GANS: And there are certain --
people
22 have certain rights to their private property. Is that
not
23 true?
24 MS. JOSEPH: That's true.
25 CHAIRMAN GANS: What could, if the mining
company

51

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this
and
they
mining
do with
of

1 wanted to own this property what could they do with
2 property since it's a superfund site? Could they go in
3 build a large residential development project? Could
4 put a hotel? Could they put something else other than
5 or exploration? What can't they do and what can they
6 this private land since it's a superfund site?

7 MS. JOSEPH: Well, by virtue of the record
8 decision that was issued in 1995 by the EPA when it was
9 designated as a superfund site, there were certain
10 limitations on -- It didn't prohibit activity within
11 the site. What it did is it said, if you're going to do
12 activity within that site you've got to follow these
13 precautions. And
14 indicated
15 these
16 there
17 were
commercial

11 site. What it did is it said, if you're going to do
12 within that site you've got to follow these
13 initially the studies that the EPA had done had
14 that really the only danger that was going to occur on
15 sites was for residential purposes. In other words,
16 was more concern for residential activity, people who
17 going be there for long periods of time versus

18 activity where people wouldn't be on the site, you
know, 24
19 hours a day or what not, or you wouldn't -- More
importantly,
20 some of the things they cited to is you wouldn't have
young
21 children actually on those sites eating dirt or things
like
22 that.
23 So the rod actually related more to
residential
24 activity or residential purposes I should say,
residential
25 purposes and not commercial purposes. So could they --
what

things 1 could they do. I mean, they could do any of those
2 that you suggested so long as they were following the
3 directives of the EPA through the rod and the
directives of 4 the EPA and the NDEP cooperatively through a couple of
5 different documents. One is the long term, I think
it's the 6 long term sampling and -- Let's see. LTSRP, long --
7 MS. MCINTOSH: Just LTRSP.
8 MR. MARSHALL: Long term sampling response
and 9 analysis plan.
10 MS. JOSEPH: Long term sampling response
and 11 analysis plan. Thank you. And so that document then
gets 12 more specific as to what has to be done to remediate
those 13 areas. So there's not any prohibition on, set
prohibition on 14 you can't do X, Y and Z on these properties. It's just
that 15 depending on what you want to do, you're going to do X,
Y and 16 Z to remediate.
17 CHAIRMAN GANS: So if they were to do
something 18 else and explore with this permit, they would have to
get 19 other permits, probably air, probably water --

20 MS. JOSEPH: Absolutely.

21 CHAIRMAN GANS: -- a whole array to be able
to

22 use their private property in a superfund site?

23 MS. JOSEPH: Absolutely.

24 MEMBER PORTA: One other question. In the
25 letter, Exhibit 18, EPA references five sites that were

areas. I
up by
that
19.75

1 cleaned up in Dayton and Silver City, residential
2 don't know if there were other areas that were cleaned
3 EPA. Were any of those clean-up areas within the area
4 we're talking about in this reclamation permit in this
5 acres?

6 MS. JOSEPH: I don't believe so.

7 MEMBER PORTA: So within that 19.75 EPA
8 determined that they were below clean-up levels?

think
that

9 MS. JOSEPH: Well, I don't know -- I just
10 it hadn't been -- If I understood your question right,
11 letter --

areas,
exceeding
asking

12 MEMBER PORTA: Yeah. Identifies clean-up
13 five residential areas in Dayton and Silver City
14 the mercury levels were cleaned up by EPA. And I'm
15 were any of those areas that they cleaned up within the
16 19.75?

within

17 MS. JOSEPH: I don't believe those were
18 this area.

19 MEMBER TURNER: Along with that, if these

they 20 exploration activities were to take place there and
site 21 would have to reclaim, could the conditions at that
that 22 actually be improved above what they are today through
23 reclamation process?
Because 24 MS. JOSEPH: They most likely would be.
to do 25 what happens is as the permittee goes in and is going

sample. 1 any activity on those risk areas, first they must
material is 2 Once those samples are taken through the SAP, the
And 3 analyzed and then it's determined what's out there.
and 4 depending on what is found and what levels are found
any 5 where exactly they're found, they have to take remedial
to 6 action before they can even, before there can even be
things. 7 drilling, before there can be any exploration they have
so you 8 take a new direction, which can include a host of
rid of 9 And this is kind of going beyond the scope. But just
to 10 understand, they would have to either excavate to get
do the 11 the material or they would cap it. So they would have
12 take a lot of other precautions before they could even
13 drilling.

14 And what this permit is essentially
allowing is 15 allowing them to go and find out what's out there under
the 16 management of NDEP. So NDEP will closely manage how
the 17 sampling is done. And then once the sampling is done
how

18 they're going to take care of what is found out there
before
19 they can do anything.
20 MEMBER TURNER: So if through the
exploration
21 process if were they to find contaminants or materials
that
22 are higher in level than the state would like to see,
they
23 could be responsible for mitigating that?
24 MS. JOSEPH: They will be responsible for
25 mitigating it if they want to do anything in those
areas.

they're
They're
--

1 CHAIRMAN GANS: But what you're saying is
2 not digging these holes to find toxic material.
3 digging these holes for gold and silver and as an aside

not
digging
to
first
will
what we
the
drill.

4 MS. JOSEPH: That's right. I mean they're
5 digging specifically to find the materials. They're
6 to find other materials. But before they can even dig
7 find the gold or whatever minerals are out there, they
8 need to sample. And as a result of that sampling we
9 know a lot more about what's out there. And based on
10 learn, they're going to have to do certain things if
11 levels show that they're too high before they can even

mine.

12 CHAIRMAN GANS: Or before they can even

13 MS. JOSEPH: Or certainly before they mine.

14 MEMBER TURNER: That's all. Thank you.

15 CHAIRMAN GANS: Okay.

16 MS. MCINTOSH: Thank you, Mr. Chair.

for the
17 CHAIRMAN GANS: Name again, please, just
18 record.

of 19 MS. MCINTOSH: Carolyn McIntosh on behalf
comment 20 Comstock. I first want to clarify or respond to a
suggesting 21 made by Mr. Marshall that Comstock was in no way
one's 22 that activities directly adjacent to one's home or in
But 23 general neighborhood are not of interest to a resident.
24 the SEC is not sitting as a land use planning board or
25 looking at local land use decisions.

is
trying to
appeal in
no
requirements
and

1 The item that is on appeal today before you
2 the reclamation permit. And the point that I was
3 make, perhaps inarticulately, was that CRA in its
4 form three didn't identify any problem that it had
5 specifically with the reclamation permit. So there's
6 issue within the bounds of reclamation permit
7 and 519A that they specifically identified challenge
8 thought was improper.

to
We're
individual
associated
recognizing

9 As a consequence, they don't have standing
10 bring this appeal to you about the 519A permit, 0315.
11 not at all, Comstock never stated that it was not
12 understanding and sympathetic to the fact that an
13 would have concerns about activities engaged in their
14 neighborhood. And Comstock has had open houses
15 with the sampling analysis plan, for example,
16 that the neighbors would have interest in those kind of
17 activities. So I just wanted to clarify that point.

will

18 And if I may speak to, a little bit to the
19 question of Commissioner Porta. And I believe that you

20 receive testimony about this. There's been a lot of
21 discussion already, however, that well, this property
is
22 within the superfund site. And that isn't really true.
We
23 don't know that yet. And the reason I say that is that
EPA
24 did not define the boundaries of the superfund site.
What
25 EPA did back in the 94-95 time frame when it remediated
those

were 1 five areas, it identified six locations, all of which
residential 2 residential, and the primary focus was indeed
subject 3 properties where they identified that residents were
levels, 4 to the potential risk of exposure of elevated mercury
residential 5 so they went in and did soil remediation in those
6 areas.

analysis 7 But they also conducted a health risk
entire 8 and identified that the exposure of concern at this
They 9 site is ingestion of fish with high mercury levels.
recognized 10 also said that with respect to the soils it was
mine 11 that there might be remaining mercury from historic
California 12 processing activities, mercury was imported from
might 13 as part of the mine processing activity. And so there
program 14 be concern about that, thus a land management kind of
15 was put in place, the LTSRP.

identify 16 And as part of that, what NDEP did was
17 zones of risk where there was risk that mercury may be
18 present. The red zones being the highest risk because

that 19 they're right in the river areas or in association with
20 historic mill tailings or mills.

being 21 Then the orange being moderate risk, yellow
22 no risk, green being EPA and NDEP agreeing that the
green 23 areas are definitely not within the superfund site and
are 24 out of the risk zone.

do and 25 So what the sampling and analysis plan can

1 will do is in areas that may be disturbed by the
exploration
2 activity, those discrete drilling holes and setting
pads, is
3 sample first, determine whether this particular area
should
4 be in the risk zone or not in the risk zone because is
5 mercury present or not. And that way the additional
6 information will be provided and the agencies will be
in a
7 better position to actually define the boundaries of
the
8 superfund site.

9 But to say that our activity right now or
10 Comstock's activity right now is within the superfund
site,
11 we can't say that, we don't know that. Some of it may
well
12 be within a risk boundary, but the sampling analysis
plan
13 will help us determine that.

14 MEMBER TURNER: So I think I heard you say
that
15 the true hazard of the mercury comes from ingesting
fish that
16 may be in the Carson River and Lahontan that accumulate
17 mercury in their tissue through the process, not
necessarily
18 someone grabbing a handful of dirt and putting it in
their
19 mouth, to use a crude type of comparison there.

risk 20 MS. MCINTOSH: That's correct. The health
just 21 analysis that EPA conducted stated essentially what you
also 22 summarized. They're precautionary though. The EPA
because 23 recognized that mercury may be present in soils and
24 of tailings and precipitation causing tailings to flow
25 downhill in to the river areas or just downgradient of

you
was
why it
disturbing

1 historic tailings or mill area. And tailings can be,
2 know, ground up and they can become airborne. So there
3 cautionary measure about dust. So that factors in to
4 would be of interest to the NDEP and why Comstock would
5 sample soils before it would engage in any soil
6 activity.

7 MEMBER TURNER: Thank you.

all

8 CHAIRMAN GANS: Okay. We have heard from
9 three counsel.

10 MR. MARSHALL: Would you mind if --

11 CHAIRMAN GANS: Yes. Go ahead.

- I
the
what
or
the

12 MR. MARSHALL: I just have a fairly short -
13 think what's, you know, we had a lot of testimony about
14 actual merits of the SAP and what it does and really
15 we're focused here is the motion to dismiss and whether
16 not the bases have been established for that motion to
17 dismiss as opposed to whether or not on the merits of
18 appeal whether it should be granted or what.

purposes

19 The key thing here is for, I think the

better 20 for which this appeal was brought is to get a much
permit 21 permit. We think that there are ways in which this
22 could be significantly improved through adequate public
responsibility of 23 involvement and a recognition of the true
better 24 NDEP. It's not to deny the permit. It's to get a
25 permit that's more protective of public health.

1 Second, that really the notice that we're
talking
2 about here on this motion to dismiss is whether or not
the
3 NDEP has adequate notice to proceed with the merits of
these
4 claims in this appeal. And as you can tell, we're
already
5 arguing the merits of the appeal. So everyone has
notice in
6 terms of whether or not this motion to dismiss should
be
7 granted. Everyone has notice here. The question is
whether
8 or not the merits of those appeal issues and that's
what you
9 should decide after you have the testimony, after you
have
10 the evidence before you and then proceed with that.
11 MEMBER PORTA: Excuse me, Mr. Marshall, but
you
12 brought up the point earlier that the reclamation
permit was
13 not adequate for health and safety. And I think a lot
of our
14 questions were pointed at the fact is this adequate for
15 health and safety. And I think we've had some
questions
16 answered here. You're saying that the permit should
not have
17 been issued. That's your point that it should be
denied or

is. 18 shouldn't have been issued and that's where the error
have 19 MR. MARSHALL: Yes. We think they should
that 20 required because of the procedural errors and the fact
safety. 21 they didn't do enough to protect public health and
which is 22 So we want it remanded to go back to allow the SAP,
23 a critical part of the permit to be subject to public
in a 24 comment, to have these concerns aired by the citizens
that 25 formal manner that's required by law and that we think

1 additionally there is errors in which the NDEP should
have
2 taken additional protective measures for let's say air
3 quality purposes for the amount of acreage disturbed.
Now,
4 that though is the merits of our appeal, not whether or
not
5 this motion to dismiss should be granted.

6 And the last issue that I just wanted to
quickly
7 correct --

8 CHAIRMAN GANS: Before you get off of that,
I
9 want to follow up. I appreciate counsel's advice about
10 making sure we understand is this the first notice or
the
11 second notice. I think it's very important here, okay.
12 Obviously when you started working on this you saw that
there
13 was an important need to issue that second notice. And
I
14 have to assume, you're a bright person and I noticed
that
15 right away and it kind of caught my eye. So I'm
wondering --

16 There's actually two appeals here.

17 MR. MARSHALL: That's correct.

18 CHAIRMAN GANS: And we're only working on
the
19 first one, okay.

20 MR. MARSHALL: Correct.

21 CHAIRMAN GANS: A motion to dismiss on the
first

22 one; is that correct?

23 MR. MARSHALL: That is correct.

24 CHAIRMAN GANS: So I almost agree that it
looks

25 like the state did what they're supposed to do in the
first

think 1 one. I don't know about the second one yet because I
because 2 that's interesting, the SAP is very interesting to me
about in 3 that really gets to the heart of what you're talking
4 my opinion.

as you 5 So I want to make sure that we only focus
whether 6 have advised on the first one and not the second one,
lay 7 it's merit or not. I mean we as a panel. This is a
maybe 8 panel. You're not addressing a judge here. We need
gravity 9 some extraneous stuff to make sure we understand the
supposed 10 of this whole thing. But I do want to do what we're
11 to be doing here and focus on this first.

particularly 12 MR. MARSHALL: Yes. And I think in
really 13 this first procedural section of our hearing today is
whether or 14 focus not on the merits of the first appeal but on
That's 15 not the state's motion to dismiss should be granted.
appeal. 16 the only thing before you right now on the first

ahead. 17 CHAIRMAN GANS: Okay. Now, excuse me. Go

18 I interrupted you. Do you have more?

I'm 19 MR. MARSHALL: That's it. Thank you. Oh,

20 sorry. Forgive me. The one thing, some
representations have

21 been made about what's within or without the superfund
site.

22 And this is Exhibit 12, which is the long term sampling

23 response plan. And on page four of that it goes
through the

24 properties, where the property is defined within the
CRMS

25 boundaries. And basically it's everything within Gold

site 1 Canyon's or associated flood plains, which is where the
2 is adjacent to downgradient or formal mill sites.

3 CHAIRMAN GANS: What page are you on, sir?

Exhibit 4 MR. MARSHALL: This is on page four of
5 12.

sampling 6 And it says under the goals of long term
7 response plan and then it talks about a property is
defined 8 to fall within the CRMS boundaries and thus be subject
to the 9 long term sampling response plan if, and then there are
six 10 categories. So that's what defines to some degree the
for 11 superfund site. So it's not as represented by counsel
12 CMI.

testimony 13 In addition, I think there was some
of the 14 regarding the major health risks. I think at the time
EPA 15 designation of the superfund site, the major risk that
downstream 16 identified was ingestion of fish from the Carson,
but 17 of the Carson River but also the ingestion of the dirt,
18 they didn't really address, which I think one of the

19 interesting things of why we're here now, this
intersection
20 between active mining and the superfund site. So all
of
21 those issues are wrapped up in how we address and
safely
22 assure that mining and exploration activity can go
forward
23 within a superfund site and is protective of public
health.
24 Thanks.
25 CHAIRMAN GANS: Okay. That brings us to
our job.

discuss 1 We've heard the testimony and I think we need to
what 2 among ourselves and the public what our thoughts are or
we've 3 we want to do with this motion to dismiss on the first
4 notice. I really want to make sure we all understand
5 got to narrow it to that and I appreciate counsel, both
6 counsels.

7 MEMBER PORTA: Which is the permit itself?

Any 8 CHAIRMAN GANS: Which is the permit itself.
9 comments or discussion, Mark?

may 10 MEMBER TURNER: I understand how people who
11 live in that region can have some concerns about being
12 exposed to contaminants that are present up in that
region 13 and the concerns for the health and safety of their
families.

the 14 But I also understand through working with NDEP both on
15 Commission here and my own job over the years that
they're

And 16 very thorough and they base their process on science.
17 everybody knows that mining has become much less
hazardous

this 18 probably as a direct result of what's taken place in

19 state. So I feel very strongly that NDEP has gone to
great
20 lengths to protect the people of Nevada, which is
probably
21 the primary and possibly the only reason for their
existence
22 in the first place and that they would not take this
matter
23 lightly especially in light of the fact that it has
been
24 designated a superfund site. I think that they would
have to
25 be extra cautious in allowing activities in such an
area.

public
they're
result of

1 Because if they allow an activity that does create a
2 health issue or harms people then to some extent,
3 responsible for what those people may suffer as a
4 that.

point is
to
listening to

5 So I think my personal feeling at this
6 that they have done a good job analyzing this. And not
7 discount the other side's concerns, but that's my basic
8 feeling at this point in the proceedings after
9 the testimony and having read the documents.

10 CHAIRMAN GANS: Okay.

panel,
dealing
that
done
what
whether or
And it
For

11 MS. REYNOLDS: I just want to caution the
12 you're not dealing with the merits here. You're
13 specifically with the motion to dismiss. I'm concerned
14 your comments go towards the merits of what NDEP has
15 here. You're looking specifically at whether or not
16 Comstock has put forward is a basis for an appeal
17 not you should hear those arguments in its entirety.
18 goes back to the four points that Mr. Marshall raised.

19 example, he mentioned that there was -- residents
didn't have
20 an opportunity to make comments on the sampling
analysis
21 plan.

22 MEMBER TURNER: Isn't the sampling analysis
plan
23 a part of the secondary appeal though?

24 MS. REYNOLDS: It's the second appeal. But
the
25 fact that this permit was issued without allowing them
--

first
first
second

1 MS. JOSEPH: But that wasn't raised in the
2 appeal notice. That was not an issue raised in the
3 appeal. That was an issue specifically raised in the
4 appeal.

anywhere

5 MS. MCINTOSH: The SAP is not mentioned
6 in form three.

said

7 CHAIRMAN GANS: Mr. Marshall, that's why I
8 that to you.

the

9 MR. MARSHALL: But I disagree that I think
10 state has recognized that the point of the fundamental
11 underlying concerns here as they state in their motion
12 dismiss that there was not the opportunity to comment
13 SAP during the approval process of this permit. And
14 permit specifically has a condition in it.

law?

15 CHAIRMAN GANS: And that is required by

16 MR. MARSHALL: I'm sorry.

17 CHAIRMAN GANS: Is that required by law?

you --

18 MR. MARSHALL: We believe it is, that if

is

19 if an -- what happened here, let's be clear about this,

20 they incorporated the SAP through a permit term in the
permit
21 that's before you. So permit special -- I think it's a
22 condition on page, I'm sorry, this is Exhibit 9 at page
five,
23 specific requirements. So this is a specific
requirement to
24 basically go out and prepare the SAP. And before you
do
25 anything, you have to have the SAP approved by NDEP.
Okay.

1 So that's in the permit that's before you today, that
permit
2 requirement.

3 Our argument is that SAP or a draft of it
should
4 have been made available at the same time as this
permit, so
5 that, the draft permit, so that the citizens could
comment on
6 whether or not that, this permit term and the SAP that
7 incorporated, that's incorporated in to this permit
should --
8 was adequate. That's our argument.

9 CHAIRMAN GANS: That's the argument of the
10 first --

11 MR. MARSHALL: That's our argument on the
first
12 appeal.

13 MEMBER PORTA: I disagree.

14 CHAIRMAN GANS: Me too.

15 MEMBER PORTA: I'll read verbatim here on
form
16 three. It says, "Although the reclamation permit
requires
17 that CMI develop a sampling analysis plan or SAP for
testing
18 of mine, waste and/or tailings disturbed by the
exploration
19 activity, this limitation on the material to be tested
does

20 not take in to account historic mercury deposits
occurred in
21 a broad range of setting due to the stockpiling of
mercury
22 prior to the use of disposal of mercury whenever it was
23 convenient to do so."
24 You're just arguing that the sampling plan
is not
25 covering this area. You're not arguing that the
sampling

1 plan wasn't a part of the permit and should have been
2 reviewed.

3 MR. MARSHALL: Well, I -- I'll give Mr.
Porta our
4 basic take on that. And we agree with the state as
they
5 characterize our notice of appeal that one of the
fundamental
6 underlying aspects of this was the procedural order in
which
7 things were done. And the key thing here is whether or
8 not -- I guess I would -- my advice is you are
basically, I
9 mean, if it's not included in that notice of appeal to
your
10 degree, it certainly was included in our notice. And
11 everybody was on notice of what that fundamental
objection
12 is, particularly because when the NDEP issued its
permit, it
13 specifically addressed this issue.

14 MEMBER PORTA: That may be the case, but
your
15 appeal goes to this point, not addressing that the SAP
wasn't
16 a part of the permit or should have been available for
public
17 comment. It does not say that in form three and that's
what
18 we have to decide on this dismissal case.

it is 19 MR. MARSHALL: In response to that, I think
20 the function --
been 21 MEMBER PORTA: I mean your intent may have
22 there, but I don't see the writing. I don't read that.
don't 23 MR. MARSHALL: The function, excuse me. I
24 want to interrupt.
25 MEMBER PORTA: No. That's fine. Go ahead.

three is 1 MR. MARSHALL: The function of that form
that 2 to put people on notice. That's the basic function of
3 form three of what the issues are.

4 CHAIRMAN GANS: I think it's more than
that.

5 MEMBER PORTA: There's specific
requirements in 6 here that you have to show where the state and very
7 specifically where they failed to meet statutory or
8 regulatory requirements. And I don't, you know, with
regard 9 to the SAP, the sampling analysis plan, I do not see
that in 10 this form and that's what we have to decide.

11 CHAIRMAN GANS: Yes.

12 MR. MARSHALL: I guess I would --

13 MEMBER PORTA: Do you disagree with that
that you 14 made the argument here that?

15 MR. MARSHALL: I would say that the form,
you 16 know, prepared by the citizens could have been a lot --
could 17 have been more specific, right, but the question is,
that I 18 think is legitimate one for you is whether or not NDEP,
for 19 the purposes of this hearing whether or not NDEP and
CMI knew

clear
20 of the claims that are being presented here. And it's
21 from NDEP's own motion to dismiss that they know of the
we're 22 issues that, particularly the procedural issue that
going 23 talking about. And it would not prejudice anyone from
the 24 forward here. And more than that, our opposition to
here. 25 motion to dismiss clearly sets forth the provisions

1 And quite honestly, if it's critical, if
this
2 Commission or this panel finds it critical that form
three
3 include these things, we would move that basically our
4 opposition to the motion to dismiss sets out the
specific
5 bases and the specific arguments that were all raised
in the
6 administrative appeal below.

7 So that's -- I think it's overly
formalistic to
8 say that you've got to have a specific reference in the
9 appeal even though everyone is on notice of the claim
and
10 those are -- everyone that -- no one is surprised by
these
11 arguments.

12 CHAIRMAN GANS: Mr. Marshall, we have this
form,
13 so we know we're addressing it. It can't be unclear.
And I
14 think that's why we put the form in in the first place.
So
15 it is specific, so we know what has happened here. I
think
16 to your credit you looked at this and you filed a
second
17 notice. And to me that's to your credit because it's
not in
18 there. And frankly, that's what I'm going to go on is
what I

19 read in there because that's where we started the whole
20 thing. The whole thing starts with form three. That's
the
21 basis of your appeal in our opinion. So I have, I have
a
22 challenge here trying to jump from there to where
you're
23 going. Not that you're wrong, but it's not there.

24 MR. MARSHALL: Well, I guess what I would
ask --

25 MEMBER PORTA: Well -- I'm sorry. And I
guess

the
safety
of
this
which
I'm

1 the last sentence in the appeal says, "The oversight by
2 SEC is needed to ensure global regulatory oversight of
3 and the safety of the public." And I think that's some
4 our questions that we were getting to with regard to
5 permit to address that specific thing in this motion to
6 dismiss. Does this permit protect the public safety,
7 was on form three? And from information I've heard,
8 leaning towards that this permit has done that.

say, I
that's
the
not the
notice
think
we've
action
appeal,

9 MR. MARSHALL: Okay. But I guess I would
10 would echo your counsel, Ms. Reynolds' comments, that
11 addressing the merits of the appeal, not whether or not
12 motion to dismiss, which is not addressing whether or
13 merits, but whether or not there has been identified a
14 or whether there's a legal basis. You know, somehow I
15 the argument of the state is that the arguments that
16 raised there's no possible legal basis for you to take
17 on those notices and therefore you should dismiss the

18 not whether or not there's a debate as to how NDEP
approached
19 it and you believe that their approach was adequate and
20 protective. That's the merits of the appeal, not the
motion
21 to dismiss.
22 MEMBER PORTA: But you made in your
arguments
23 they're required, the state is required by statute to
protect
24 health and safety and you appeal based on health and
safety.
25 And the motion to dismiss that you're arguing is that
it did

1 not. So that's what we in some small way have to --

2 MR. MARSHALL: No. I think I would say

3 we're arguing is that our claims have a legal basis and

4 you are able to then move forward to consider those

5 bases after you've heard testimony.

6 CHAIRMAN GANS: Yes.

7 MS. MCINTOSH: Mr. Chairman, to your point

8 whether the parties were put on fair notice of the

9 that would be discussed in the appeal, the contentions

10 NDEP that were joined by Comstock are that it did not

11 fair notice and that for one thing the CRA cited the

12 of 519A along with a smattering of air and water

13 But they also said that in form three on, in response

14 question number five that they would identify all other

15 objections identified in the written and oral comments

16 presented to NDEP prior to the public hearing and the

17 permit, which was a broad range of things in every

18 area and not specifically related to the permit, which

that what

that

legal

of

issues

of

provide

entirety

regulations.

to

draft

program

goes

notice of 19 back to the contention that we were not put on fair
and 20 any issue beyond the fourth square of the permit itself
21 no challenges to anything improper in the permit were
22 included.
That's 23 MR. MARSHALL: And if I just may quickly.
why we 24 why I do agree that that may be overly broad. That's
the 25 submitted in the motion to dismiss clearly articulating

the
surprised that
of
1 bases and the specific objections that were all part of
2 administrative record below and that nobody is
3 these are the issues that the CRA had with the issuance
4 the permit.

5 CHAIRMAN GANS: So are you saying --

appeal;
6 MEMBER PORTA: But that's in the second
7 correct?

issues
issuance of
8 MR. MARSHALL: No. Those -- All of these
9 were raised in the administrative process in the
10 this permit.

11 CHAIRMAN GANS: So are you saying that NDEP
12 ignored it?

whether
the
during
you.
13 MR. MARSHALL: No. I'm saying that they
14 considered it. For example, let's take the issue of
15 or not the SAP, a draft SAP should have been put out at
16 same time as the permit. That objection was raised
17 the approval process for the permit that's in front of

we'll give
18 Okay. And NDEP has said no, we're not going to --

we're
19 you a draft as a courtesy maybe some time later, but

this
issue
notice
that

20 not going to require it as part of public comment in
21 issuance of this permit. So that's directly, that's
22 three. Excuse me. I think issue three on their final
23 of appeal. So they deliberated it.
24 CHAIRMAN GANS: Right. And I asked you if
25 was legally required.

was. 1 MR. MARSHALL: And our answer is yes, it

and 2 CHAIRMAN GANS: So the state is saying no
3 you're saying yes?

fundamental 4 MR. MARSHALL: Right. And that's the
5 difference on the merits of the appeal. And that's
6 what we would like you to resolve.

issue for 7 MS. JOSEPH: I disagree that that is an
8 appeal this appeal. That is not stated in this appeal, in
9 to number one, which is why you filed a subsequent appeal
10 reviewed and talk about whether or not that SAP needed to be
11 permit gone through the public process in the same way that a
12 needs to.

and 13 So bringing it back to the issues that are
14 directly in this appeal, and if you walk through them,

that I 15 those are the ones that I tried to summarize the best

that NDEP 16 could, they essentially come to down to an argument

done 17 should have gone beyond the 519A regs and statutes and

water and 18 more in each of those cases through the air and the

19 the RCRA and also continued sampling beyond the
exploration
20 of the permit. Those are the specific requests,
objections
21 in the first appeal.
22 Now, the reason that you can dismiss it
outright
23 is because you can say none of these objections are
within
24 the 519A regs and statutes that we are required to
follow to
25 issue a reclamation permit. They raise a lot of other
issues

can look 1 that are not regarding a reclamation permit. So you
of 2 at this appeal and say none of those issues as a matter
issuing a 3 law relate to whether or would prevent NDEP from
4 reclamation permit.

back 5 CHAIRMAN GANS: Okay. I would like to get
By the 6 to the panel. Further discussion? Further comments?
motion. 7 panel members only. If not, I would entertain a

comment on 8 UNIDENTIFIED SPEAKER: Is there public
9 any of this?

10 CHAIRMAN GANS: (Nods no)

that 11 MEMBER PORTA: Again, my position is I feel
made 12 based on the language in form three that the state has
with 13 its argument that has issued the permit in accordance
overturn 14 NAC 519 regulations and I can find no reason to
15 that.

the 16 CHAIRMAN GANS: And I'm inclined to support
that I'm 17 motion to dismiss and -- I'm finding the same thing
18 inclined to support the motion to dismiss.

19 MEMBER TURNER: I think that the issues
raised by
20 the gentleman are more specific to the second appeal.
I
21 agree with you, Mr. Chairman.
22 CHAIRMAN GANS: So we need a motion.
23 MS. REYNOLDS: If I may, your motion is
just
24 simply you're either going to grant or deny the motion
to
25 dismiss.

20 us, a second motion.

21 MS. REYNOLDS: A second appeal.

22 CHAIRMAN GANS: A second appeal. So what
we

23 would like to do is talk about how we proceed from here
and

24 maybe get some dates from counsel for this appeal. I
would

25 like to ask the -- I would like to ask the panel if
they

1 would like to have briefings on this like we did on the
2 first?

3 MEMBER PORTA: Well, first of all, the
parties in
4 accordance with the 233B notice are not in agreement,
right;
5 is that correct?

6 MS. REYNOLDS: Right, Tom.

7 MEMBER PORTA: To proceed on the second
appeal
8 today so that's why we're going to the scheduling. So
I want
9 to make that clear.

10 CHAIRMAN GANS: Yes.

11 MS. JOSEPH: So NDEP and I think
interveners, you
12 know, believe that it was properly noticed. But are
you
13 objecting then that it was properly noticed?

14 MR. MARSHALL: Yes.

15 MEMBER PORTA: The public was noticed but
the
16 parties' notice was not -- Mr. Marshall is not in
agreement.

17 MS. JOSEPH: Right. I just heard him
earlier
18 argue that we were all on notice of all the issues.

19 MR. MARSHALL: Raising the first appeal.
But we

20 also disagree that your agenda is adequate for a second

21 appeal.

22 MS. JOSEPH: Okay.

23 CHAIRMAN GANS: You disagree?

24 MR. MARSHALL: We disagree. And we don't
waive

25 any notice obligations.

I was
know if
going
you're
the
the next
bit, it
this.
a
try to

1 CHAIRMAN GANS: So with that, back to what
2 saying, we need to look at some dates and I want to
3 the panel would like briefings on this.
4 MEMBER PORTA: Yes.
5 CHAIRMAN GANS: You would?
6 MEMBER PORTA: Yes, I would.
7 MEMBER TURNER: Please.
8 CHAIRMAN GANS: And so would I. So we're
9 to ask for briefings on the second appeal limited to 20
10 pages. And we need to set some dates. John, I think
11 going to have to work on that for us, some dates for
12 briefings to be submitted and also some dates to set
13 appeal hearing.
14 MR. WALKER: Just to intervene a little
15 would be important to select a month where both of the
16 parties can get together so we don't get too far out on
17 March, April, May, if we can look forward to working in
18 month area and then I can come back to the parties and
19 get a date in that month area.

counsel 20 MR. MARSHALL: Mr. Chairman, I think
21 working with John can probably come up with a briefing
22 schedule and a hearing date not too far out. March is
hearing 23 incredibly difficult for me. But April is, an April
24 with briefing before then is probably doable, but I
think the 25 easiest thing is for us to maybe -- if John has access
to

of
1 your calendars, I guess, we can all coordinate instead
2 trying to identify a date.

3 CHAIRMAN GANS: What about March?

4 MEMBER PORTA: End of March.

5 CHAIRMAN GANS: Mark, how are you for
April?

6 MEMBER TURNER: April is okay with me.

7 CHAIRMAN GANS: It's okay with myself,
John.

8 MS. JOSEPH: I will just note that there is
9 spring break where I'm going to be gone for a week in
April.

10 MR. WALKER: We can work around that.

11 MS. JOSEPH: Okay. Great. Thanks.

12 CHAIRMAN GANS: Counsel, does that sound
good to
13 you?

14 MS. MCINTOSH: Quite all right, yes.

15 CHAIRMAN GANS: So we will work with that.
And

16 John, you can send out the notices for the briefings
and get
17 a due date on that also.

18 MR. WALKER: The question is will we have
an
19 order setting out the dates for a briefing?

20 CHAIRMAN GANS: Yes.

do 21 MR. WALKER: I'll work with you and we can
22 that.
to 23 CHAIRMAN GANS: Any other matters that need
24 come before us before we adjourn?
conjunction 25 MS. MCINTOSH: Well, Mr. Chair, in

80

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appeal 1 with this do we need to -- do you view the second
that do 2 essentially as a continuation of the first appeal in
as 3 we need to have a second intervention or are we viewed
like to 4 parties to the second appeal already? How would you
5 proceed with that?
6 MS. REYNOLDS: We'll need a second request
7 intervene.
8 MR. MARSHALL: We have no objection to that
9 intervention.
10 MS. REYNOLDS: Right. We'll prepare a
formal -- 11 We can go with an oral request here and if the panel
can vote 12 on their request to intervene and the second appeal,
that 13 should take care of it.
14 MS. MCINTOSH: So may I do that right now?
I 15 would move that Comstock be allowed to intervene in the
16 second appeal.
17 CHAIRMAN GANS: Okay. That motion has to
come 18 from one of us.
19 MS. REYNOLDS: She moves.
20 CHAIRMAN GANS: Oh, can she?

the
there

21 MS. REYNOLDS: She's making a request to
22 panel. And then you ask the state and the appellant if
23 are any objections.
24 MS. JOSEPH: No objection.
25 MR. MARSHALL: No objection.

motion 1 MS. REYNOLDS: Okay. And now you need a
2 from the panel.

3 CHAIRMAN GANS: Okay. Motion.

McIntosh 4 MEMBER PORTA: I'll move to accept Ms.
5 and Mr. Hutchins' motion and since there's no objection
6 from
7 either the appellant or the state.

8 MEMBER TURNER: Second.

seconded. 9 CHAIRMAN GANS: It's been moved and
10 in
11 Any discussion on the motion? Hearing none, all those
12 favor signify by aye.

13 (The vote was unanimously in favor of the motion)

14 CHAIRMAN GANS: Opposed? None heard.

15 MS. MCINTOSH: Thank you.

16 CHAIRMAN GANS: If there's nothing else
17 from
18 counsel, we do have one item left and that is public
19 comment.
20 So now is the time that the public can come forth and
21 give
22 their comments.

Rosemarie, 23 One of the things I do want to ask,
24 can they now comment on this first appeal?

and I 25 MS. REYNOLDS: We've got a pending matter

the
21 don't -- I'm concerned about testimony that could sway
22 Commission because we don't want to be hearing evidence
in 23 related to the second appeal. So with that stipulation
24 mind, I think the public can come up and speak, but
just be 25 aware we may have to -- depending on what your comments
are,

1 we might have to cut you off just because we've got due
2 process issues in place because we do have this pending
3 second hearing.

4 CHAIRMAN GANS: Okay. With that
stipulation.

5 MR. HUTCHINS: Mr. Chairman, may I make a
quick
6 statement? We had a motion to associate counsel on the
first
7 matter and I would like to continue that matter over in
to
8 the new one in the intervention to have Ms. McIntosh be
9 associated in on that matter as well.

10 MS. REYNOLDS: That is a separate matter.

11 MS. JOSEPH: No objection.

12 MR. MARSHALL: We have no objection.

13 CHAIRMAN GANS: Another motion. Another
motion
14 for the second matter.

15 MEMBER PORTA: I would move to allow Ms.
McIntosh
16 to represent CMI as intervener in this process.

17 MEMBER TURNER: Second.

18 CHAIRMAN GANS: It's been moved and
seconded.

19 All those in favor signify by aye.

20 (The vote was unanimously in favor of the motion)

21 CHAIRMAN GANS: Opposed? Hearing none, the

22 motion passes.

23 MR. HUTCHINS: Thank you, Mr. Chairman.

24 CHAIRMAN GANS: So with that we will go to
the

25 public comment with the stipulation that we still have
a

1 matter before us. We would love to hear from you. And
2 please don't take offense if we have to cut you off if
you
3 travel in to that area that counsel has just mentioned.

4 So sir, if you could come forward and state
your
5 name and address for the record please.

6 MR. WAHRENBROCK: P.O. Box 246, Silver
City,
7 89428. A real quick point to start with is I find it
curious
8 that I have an opportunity to address the issues before
the
9 board now after the decision has already been made.

And I
10 would have thought when I came here this morning that I
would
11 have had an opportunity to address the board during the
time
12 that you were making the decision about the matter at
hand.

13 CHAIRMAN GANS: Sir, that's important.

14 MS. REYNOLDS: I can explain that. Do you
have a
15 copy of the agenda?

16 MR. WALKER: Yes. There's one on the table
over
17 there.

18 CHAIRMAN GANS: I understand your question.
It's
19 a logical question.

20 MR. WAHRENBROCK: Thank you.

21 MS. REYNOLDS: In the agenda --

22 CHAIRMAN GANS: We're speaking from a law
23 standpoint now, okay.

24 MR. WAHRENBROCK: Uh-huh.

25 MS. REYNOLDS: The second paragraph it
states,

1 "Prior to the commencement and conclusion of a
contested case
2 or a quasi-judicial proceeding that may affect the due
3 process rights of an individual, the SEC may refuse to
4 consider public comment."

5 And the case that the SEC heard today is a
6 contested case as a quasi-judicial proceeding. And
because
7 of the due process rights of the individuals involved,
that's
8 the reason why there's no public comment prior to the
SEC
9 reaching their decision.

10 MR. WAHRENBROCK: Curious.

11 CHAIRMAN GANS: Now, so you know, if
counsel,
12 because you say, "Well, what about my due process
rights? I
13 am affected," okay, counsel can use you as a witness
and then
14 you can put your so-called two cents worth in. But
seriously
15 under this type of a case that's the only way we can
allow
16 your testimony on the matters. John, does that make
sense to
17 you?

18 MR. MARSHALL: Well, it doesn't make sense
19 because at this point we are not able to call any
witnesses

merits. 20 because you dismissed the appeal before hearing the

21 CHAIRMAN GANS: Right, right. Exactly. So
be

22 careful. That's all I'm telling you.

23 MR. WAHRENBROCK: Yeah. I understand. I
wanted

24 to make that point because I learn something new every
day

25 and I guess this is what I learned for today as being

1 something new.

2 I'm a property owner and a resident. I
have

3 submitted my written comments and I won't read them all
4 verbatim.

5 My particular concern is historic
preservation

6 and cultural resources. And I believe that we brought
this

7 up under the initial testimony on the permit and it was
8 dismissed by the state, that they had no authority to
look at

9 the issues resolving the protection and the
preservation of

10 historic and cultural resources in regards to this
11 reclamation permit.

12 I feel that's in error. I think they do
have the

13 right to look at those. I think they have the
obligation to

14 look at those. In the initial rod on the superfund
site it

15 was mentioned as a responsibility to address adverse
effects

16 on historic properties and cultural resources.

17 Right now the CMI is out there plowing
roads,

18 putting up pads, drill pads, digging sumps. There has
been

19 no inventory as to whether or not there's a presence of

important 20 resources there, whether or not those resources are
district. 21 and significant to the integrity of the historic
historic 22 And we're discussing the Virginia City landmark,
was 23 national landmark. It's different. It's special. It
identified 24 identified prior to the superfund site. It was
is a 25 under the 1935 Act. It's extremely important. There

1 provision in the mining and the National Park System
2 Regulation Act, 16 US Code 1901 through 1912, which
3 specifically addresses mining activities and national
4 historic landmarks. And it provides for mitigation to
the
5 greatest extent possible of adverse affects. None of
that
6 has even been discussed. Not only has it not been
discussed,
7 we were told we couldn't discuss it because they were
8 prevented from doing it.

9 I contend that NDEP exists because of EPA.
EPA
10 is a federal action. This reclamation permit is in
essence a
11 federal activity and therefore Section 106 of the
Historic
12 Preservation Act and the Mining and National Parks Act
should
13 apply to this permit. And yet there has been no
14 consideration of those at all.

15 There was a lot of discussion about private
16 property rights. And you know, I own a house in a
historic
17 district and I have to ask somebody permission for what
color
18 I'm going to paint it. And yet this mining company is
going
19 to be allowed to, you know, tear up roads in the
country side

historic 20 and build pads and move and potentially destroy

activities. 21 resources without any kind of review of their

22 And with that I'll --

23 CHAIRMAN GANS: Thank you.

also 24 MR. ELSTON: Again, I'm Robert Elston. I'm

professional 25 a resident of Silver City, a property owner and

Great 1 archaeologist for over 40 years working here in the
2 Basin.

told 3 And I will just reiterate what Larry just
4 you. I have a letter here that addresses these, a lot
of 5 these issues. In particular the lack of a programatic
6 agreement between NDEP, the state historic preservation
7 office of BLM and the National Park Service. They know
that 8 they should be doing -- that they should have a
9 programatic agreement for dealing with the cultural resources in
10 the landmark, which coincides largely with the superfund
11 site. And in fact, they've done some preliminary talking to
the 12 SHPO, the state historic preservation office, about
13 this but nothing has ever happened.

14 And my point is that until they have a
15 programatic agreement about how to deal with cultural
16 permitting resources when they're doing this kind of work and
17 it that they are not meeting federal regulations that
oversee 18 the protection and preservation of cultural resources
in the

letter. 19 national landmark. So I would like to submit this

this at 20 And I'll leave you with that. Maybe we'll talk about

21 the next hearing. Thank you very much.

22 MR. EGGENBERGER: Hi. My name is Dan

quite 23 Eggenberger. I'm a resident of Virginia City and I'm

some 24 intimidated by this process. But I'd like to bring up

25 RCRA issues. There was a lot of mention today about

we do
silver.
pounds
I live
the way
Mercury
kind of
Superfund
they
are
was
evening meal
that
That's
1 hazardous waste, whether we call it toxic waste. What
2 know is that from 1859 to 1890s mercury and led were
3 substantially used in milling process of gold and
4 And according to NDEP statistics, there are 15 million
5 of missing mercury in our environment, the environment
6 in.
7 And there's been a lot of processes along
8 starting with the establishment of the Carson River
9 Superfund Site. And in the record of decision, which
10 codifies the law about the Carson River Mercury
11 Site, there are some agreements with EPA. One is that
12 did not anticipate large scale surface mining. They
13 looking at that right now. So the record of decision
14 basically if a six-year-old kid sits down to the
15 and has a cord of dirt with mercury in it and he does
16 for a protracted period of time he's going get sick.
17 the criteria.

1 we're looking at historic mine and mill tailings.

2 And Mr. Turner, you asked about if people
have
3 been living there a long time, since 1859, did they
4 experience health effects. A good question. They
probably
5 did. They were working with mercury, led, arsenic and
all
6 the other materials.

7 But these piles, these tailing piles were
stable.
8 They were at the bottom of Six Mile Canyon, they hadn't
been
9 moved. Basically the materials had stabilized.

10 So in 2000, Gold Spring, Plum and now
Comstock
11 Mining started a mining operation in two what then
became
12 patented mining claims and they moved the stuff. They
13 processed some of it. They built roads with others of
it.
14 They dumped it in to Gold Canyon drainage. So there's
an
15 argument.

16 I spent a conference call with EPA
yesterday with
17 Rebecca, their RCRA lawyer, and we discussed this. So
if
18 Comstock Mining has moved hazardous material, there's
no

So
don't
the
truck,
leach
process,

19 record of where they moved it or how they managed it.
20 what happens when you take hazardous material and you
21 keep it in a stream of containment, if they had gone to
22 state and they had said we're going to take a pile of
23 contaminated material, we're going to put it in a
24 we're going to cover it, we're going to take it to our
25 pad and we're going to control every aspect of that

fine. 1 it works. That's what they need to do now. It works

2 It works for everybody. They didn't do that.

the 3 When I first went to NDEP to ask them about

call 4 permitting process that Gold Spring, Plum, let's just

me the 5 them CMI, had gone through. Again, Paul Comba assured

process. 6 fact that they were working in a Carson River Mercury
7 Superfund Site had been factored in to the permit

Carson 8 So then I went and got the applications. I
9 looked at the permits. Not a single mention of the

2000 to 10 River Mercury Superfund Site in any permitting from
11 2010.

company 12 So now we have a situation where a mining

totally 13 has taken hazardous waste. They have managed it in a

They 14 uncontrolled manner. They don't know where it is.

they 15 don't know where they stored it. They don't know where

where 16 dumped it. They don't know what the chemicals of it,

argument. 17 that stuff is. And now there's -- so we have an

issue. 18 Is this a RCRA, Resource Conservation and Recovery Act

fellow 19 From my perspective, and unfortunately a
worked 20 who just wrote a memorandum, Paul Leimendorfer, who
laws 21 with NDEP for 20 or 30 years, wrote a lot of the mining
clearly 22 in the State of Nevada, from his perspective this is
the 23 a RCRA situation. So once it becomes a RCRA situation,
that the 24 state is not liking this because it's going to show
up. 25 state has completely screwed up here, majorly screwed

permits to
call, we
been
this
think

1 They've allowed a mining company with and without
2 move hazardous material, which we would like to not
3 would like to kind of call it toxic material that has
4 completely unregulated. So there's a huge issue with
5 RCRA. And there's testing going on now in -- And I
6 that's probably it. Thank you.

7 CHAIRMAN GANS: Thank you very much.

8 MR. EGGENBERGER: Thank you very much.

9 CHAIRMAN GANS: Thank you for coming.

heard?

10 Any other members of the public wish to be

Thank

11 Okay. Seeing none, we will close the appeal hearing.
12 you very much.

13 (Hearing was concluded at 11:34 a.m.)

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CAPITOL REPORTERS (775) 882-5322

1 STATE OF NEVADA)
) ss.
2 COUNTY OF WASHOE)

3

4 I, CHRISTY Y. JOYCE, Official Certified
Court

5 Reporter for the State of Nevada, Department of
Conservation

6 and Natural Resources, State Environmental Commission,
do

7 hereby certify:

8 That on Thursday, the 16th day of
February,

9 2012, I was present at the Department of Wildlife,
Reno,

10 Nevada, for the purpose of reporting in verbatim
stenotype

11 notes the within-entitled appeal hearing;

12 That the foregoing transcript,
consisting of

13 pages 1 through 92, inclusive, includes a full, true
and

14 correct transcription of my stenotype notes of said
appeal

15 hearing.

16

17 Dated at Reno, Nevada, this 7th day of
March,

18 2012.

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20

21



#625

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CHRISTY Y. JOYCE, CCR

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