DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
APRIL 23, 2021

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DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
APRIL 23, 2021
9:00 AM
DEQ ZOOM CONFERENCE

NOTE: Board members, the Board attorney, and secretary will be participating electronically. Interested persons, members of the public, and the media are welcome to attend via Zoom or telephonically. The Board will make reasonable accommodations for persons with disabilities who wish to participate in this meeting. Please contact the Board Secretary by e-mail at Regan.Sidner@mt.gov, no less than 24 hours prior to the meeting to advise her of the nature of the accommodation needed.

9:00 AM

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

1. The Board will vote on adopting the December 11, 2020, meeting minutes.

Public Comment.

2. The Board will vote on adopting the February 26, 2021, meeting minutes.

Public Comment.

B. Introduction to Presiding Hearing Officers from Agency Legal Services and Contracted Counsel

C. Discussion of Preference for Cases to be Assigned to Hearing Officers or for Judicial Decision Making to be made by the Board

D. Discussion of Disclosure of Board Members' Contact Information

Public Comment.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

a. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ**. On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC, filed a Notice of Appeal and Request for hearing with the Board.

i. **District Court Case:** This matter is before the District Court on judicial review following an intermediate agency ruling. DEQ began separate enforcement actions against Copper Ridge Development Corp. and Reflections at Copper Ridge, LLC, for violations of the Montana Water Quality Act. The enforcement actions were followed by separate administrative appeals. The cases were consolidated before a hearing examiner at Petitioners' request. Following an evidentiary ruling that would allow for the admission of certain photographs, Petitioners moved to separate the cases again because the evidence to be admitted pertained to only one Petitioner. The motion was denied. The hearing examiner also denied Petitioners' subsequent motion in limine. Petitioners then filed a petition for judicial review of the hearing examiner's intermediate rulings and named the BER and DEQ as Respondents. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was not a party to the underlying contested case hearing. The motion was briefed and argued on October 7, 2020. On March 17, 2021, Judge Harada denied BER's motion to dismiss. She determined that while BER is not a required party, it may be named as a party on judicial review. She has not yet issued a decision on the underlying petition for judicial review.

b. **In the matter of Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.** On November 25, 2020, the Board received a Notice of Appeal from Westmoreland Resources. At its December 2020 meeting, the Board assigned this case to former Hearing Examiner Sarah Clerget. The parties filed a Joint Motion for Stay on January 12, 2021 which was granted the same day. On January 20, 2021, Hearing Examiner Jeffrey Doud assumed jurisdiction of this matter. The parties filed a Joint Status Report on March 12, 2021 indicating that they are working toward settlement. The parties will file another Status report on or before April 12, 2021.

2. Non-enforcement cases assigned to the Hearings Examiner

a. **In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ**. At the Board's last meeting it voted to adopt the parties Stipulation and Request for Retention of Board Jurisdiction. The parties filed a Joint Status Report on November 2, 2020, and Alpine is to provide DEQ confirmation that the ambient ground water monitoring has been installed no later than April 20, 2021. On February 1, 2021, the parties confirmed the monitoring well was installed by Alpine's contractor. The parties will continue to update Hearing Examiner Simon, with the next schedule update due May 3, 2021.

b. **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.** On September 25, 2015, Westmoreland Resources, Inc. filed a notice of appeal and request for hearing and former Hearing Examiner Sarah Clerget assumed jurisdiction on September 8, 2017. The case was stayed pending a Montana Supreme Court decision, which was issued in September 2019. On April 24, 2020, the parties filed a Joint Motion for Stay indicating that they are working toward settlement of the case. That motion

was granted on April 28, 2020, and the case was stayed until July 24, 2020. The parties filed a Joint Motion to Continue Stay on July 24, 2020, and September 9, 2020, which was granted on July 29, 2020, and September 9, 2020. On September 30, 2020, the parties filed a "Joint Motion to Remand and Suspension of Proceedings." The BER granted that Motion on October 9, 2020, and issued its Order granting remand on November 16, 2020. The parties are to file a joint status report to the BER no later than June 30, 2021. Hearing Examiner Simon assumed jurisdiction of this matter on January 15, 2021.

c. **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.** A two-day hearing on this matter was held on December 3-4, 2018. Oral argument on the parties' proposed FOFCOLs was held on May 7, 2019, making it ripe for decision from the hearing examiner. On July 24, 2019, the First Judicial District Court had issued its Order on cross motions for summary judgment in Cause No. CDV 2017-641, a declaratory relief action brought in District Court challenging DEQ's issuance of MPDES Permit No. MT0030279. While the District Court action was limited to conditions of the MPDES Permit that were not at issue before the Board, the District Court Order vacated the entire Permit, thus affecting the status of this case. On September 13, 2019, DEQ and Montanore requested a stay of this case pending the outcome of any Supreme Court appeal of the District Court Order, which was granted on September 17, 2019. The parties cross-appealed the District Court's decision to the Supreme Court under Cause No. DA 19-0553. On November 17, 2020, the Supreme Court issued a decision vacating the permit and remanding the case to DEQ. On January 21, 2021, Hearing Examiner Andrew Cziok assumed jurisdiction of this matter. On January 22, 2021, the Parties filed a Joint Status Report which requested that the matter be dismissed with prejudice. Mr. Cziok dismissed this matter on February 1, 2021.

d. **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ**. On April 12, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contested case. On May 8, 2020, the parties filed a Joint Motion to Substitute, requesting that Navajo Transitional Energy Company, LLC replace Spring Creek Coal as a party, as it had replaced Spring Creek Coal as the permit holder. The motion to substitute was granted on May 13, 2020, and an Amended Scheduling Order was issued on May 12, 2020. On January 21, 2021, Hearing Examiner Andrew Cziok assumed jurisdiction of this contested case. The parties filed a Joint Motion for Remand and Suspension of Proceedings on March 17, 2021. Hearing Examiner Cziok granted that Motion, and the parties will file a status report in June.

e. **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

   i. **Contested Case:** August 18-21 the parties participated in the contested case hearing. The parties filed their Proposed Findings of Fact and Conclusions of Law are on December 18, 2020, with on February 5, 2021. On January 21, 2021, Hearing Examiner Andrew Cziok assumed jurisdiction of this contested case. Mr. Cziok is in the process of reviewing the record and will issue his Proposed Findings of Fact Conclusions of Law.

f. **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.** Between November 8, 2019, and November 29, 2019, the Board received fourteen appeals from various parties regarding the approval of Opencut Mining Permit No. 2949. On December 13, 2019, the Board consolidated for procedural purposes BER 2019-08 through 21 OC. Several parties were dismissed from the appeals and a Scheduling Order was issued on January 31, 2020. DEQ filed a Partial Motion for Summary Judgment on September 29, 2020. The remaining appellants filed a response on October 21, 2020, and DEQ filed a reply on November 4, 2020. Former Hearing Examiner Eckstein held Oral argument on DEQ's Partial Motion for Summary Judgment on February 11, 2021. Hearing Examiner Snowberger issued a "Notice of Substitution" on March 12, 2021, and will issue a decision on the DEQ's Motion for Summary Judgment.

g. **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-03 OC and BER 2019-05 OC**. Mining Permit No. C2011003F, BER 2019-03 OC and BER 2019-05 OC. On May 31, 2019, the BER appointed former Hearing Examiner Sarah Clerget to preside over the contested case for procedural purposes only. At the Board's August meeting, it voted to assign the case in its entirety to Ms. Clerget. The parties cross moved for partial summary judgment, and Westmoreland also filed a Motion to Dismiss. On November 24, 2020, Ms. Clerget issued an order denying Westmoreland's Motion to Dismiss, denying Conservation Groups' Motion for Partial Summary Judgment, and granting Westmoreland's and DEQ's Motions for Partial Summary Judgment. Ms. Clerget held a status conference on December 4, 2020, at which all parties could not agree to bring the motions decision before the Board. Therefore, the case will proceed to a hearing on the one remaining issue. Former Hearing Examiner Clerget issued an Amended Scheduling Order on January 14, 2021. Hearing Examiner Jeffrey Doud assumed jurisdiction on January 20, 2021. A three-day hearing is scheduled in this matter starting May 10, 2021.

h. **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).** In July 2019, MEIC and the Sierra Club filed a petition for judicial review of BER's decision to approve a permit to expand the Rosebud Mine. BER filed a motion to dismiss on the grounds that BER should not have been named in the petition since it was the deciding agency, not a party to the underlying contested case proceeding. Judge Bidegaray denied the motion on March 12, 2020. The Montana Supreme Court denied our petition for writ of supervisory control to have the Order reviewed before the case was fully decided by the District Court and remanded the case.

The petition for judicial review has been fully briefed, and the parties presented oral argument on December 16, 2020. Petitioners recently submitted supplemental authority, and the Respondents (other than BER) responded. The matter has been fully submitted, and we are just waiting for a decision from Judge Bidegary. Once a decision is issued, we will have an opportunity to appeal

the Order requiring the BER to remain in the case and will need to discuss how to proceed at that time.

i. **In the Matter of Notice of Appeal by Nicholas and Janet Savko, Regarding Floodplain Setbacks, Gallatin County, MT, BER 2020-03 SUB.** On October 9, 2020, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contested case. Ms. Clerget issued a Prehearing Order on November 10, 2020. On November 25, 2020, the parties requested a stay for 60 days. That request was granted on November 30, 2020. Former Hearing Examiner Benjamin Eckstein assumed jurisdiction of this case on January 15, 2021. The parties filed a Joint Motion to Dismiss on January 25, 2021, which was granted on January 29, 2021. This case has been dismissed.

j. **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.** On October 9, 2020, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contest case hearing. On November 10, 2020, Ms. Clerget issued a Prehearing Order. The parties filed a Stipulation to Stay Proceedings on November 13, 2020. Ms. Clerget stayed the proceedings on November 20, 2020. Hearing Examiner Andrew Cziok assumed jurisdiction on January 21, 2021. On February 11, 2021, the parties filed a Stipulated Motion to Extend Stay of Proceedings Pending Settlement Negotiations. Mr. Cziok issued an Order granting the stay on February 12, 2021. The parties will file either a settlement agreement by May 12, 2021, or a proposed schedule by May 26, 2021.

k. **In the Matter of Notice of Appeal by Woodrock, Inc., Regarding Permit Suspension Order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT, BER 2020-02 OC.** On October 9, 2020, the BER appointed former Hearing Examiner Sarah Clerget to preside over this contested case. Ms. Clerget issued a Prehearing Order on November 10, 2020. The order directed parties to file a notice of appearance by November 20, 2020, and a proposed schedule by December 1, 2020. The parties filed an Unopposed Motion to Stay the Proceedings on November 30, 2020; Ms. Clerget granted that motion the same day. On January 15, 2021, former Hearing Examiner Benjamin Eckstein assumed jurisdiction of this matter. The parties filed a Motion to Dismiss on January 26, 2021, which was granted two days later, on January 28, 2021.

l. **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920, BER 2019-07 WQ.** On November 25, 2020, DEQ and the City of Great Falls filed a "Stipulation for Final Agency Decision". At its December 2020 meeting, the Board approved the Stipulation and on January 5, 2021 issued a "Board Order for Final Agency Decision" resolving appeal issues No. 1, 3, 4, and 5. The parties continue to update Hearing Examiner Doud and anticipate having settlement documents before the Board at its June 2021 meeting.

m. **In the matter of the Notice of Appeal and Request for Hearing Regarding DEQ's Issuance of a Final Section 401 Water Quality Certification #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.** On January 4, 2021, the Northern Plains Resource Council and Sierra Club filed a "Notice of Appeal and Request for

Hearing." At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference has been scheduled for April 20, 2021.

n. **In the Matter Indigenous Environmental Network's and North Coast Rivers Alliance's Appeal of the Montana Department of Environmental Quality's Final Determination to Issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.** On February 1, 2021, the Indigenous Environmental Network and North Coast Rivers Alliance filed a "Notice of Appeal and Request for Hearing." At its February 2021 meeting the Board appointed Agency Legal Services as Hearing Examiner of this contested case. Katherine Orr was assigned as Hearing Examiner of this matter and on March 9, 2021, she issued an Order to Set Scheduling Conference. The scheduling conference was held on March 15, 2021, and the parties agreed to stay this matter until further indication the case should go forward pursuant to decisions made by the Federal government regarding the Keystone XL Pipeline Project. A Status Conference has been scheduled for April 20, 2021.

o. **In the Matter of Notice of Appeal and Request for Hearing Regarding DEQ's Approval of Riverside Contracting, Inc.'s Opencut Mining Permit #3234 (Arrow Creek Site), BER 2020-08 OC**. On December 23, 2020, Appellants filed a "Notice of Appeal and Request for Hearing." At its February 2021 meeting, the Board appointed Agency Legal Services as Hearing Examiner of this contested case. On March 12, 2021, Hearing Examiner Cziok issued a Prehearing Order to the parties. Riverside Contracting filed a Petition to Intervene on March 25, 2021. DEQ and the Appellants filed a Joint Proposed Schedule on March 26, 2021, the Petition to Intervene and the Proposed Schedule were granted on April 1, 2021. The parties are proceeding according to the Scheduling Order with discovery closing December 2021.

p. **In the Matter of Contest and Request for Hearing by Talen Montana, LLC Regarding the Selection of a Remedy and Setting of Financial Assurance for the Colstrip Steam Electric Station Units 1 & 2 by the Montana Department of Environmental Quality, BER 2020-07 MFSA/WQA.** On December 17, 2020, Talen Montana LLC filed a Request for Hearing and Protective Notice of Contest. The parties requested the proceeding be stayed pending completion of dispute resolution. That request was granted by former Board Chair Deveny on December 18, 2020. Katherine Orr was assigned as Hearing Examiner for this matter and issued an Order to Set Scheduling Conference on March 9, 2021. The parties filed a Joint Request to Continue Stay of BER Proceedings on March 18, 2021. Ms. Orr signed an Order Continuing Stay and Delaying Scheduling Conference Until Expiration of Stay Order on March 19, 2021. This matter will be stayed until DEQ Director's final decision following dispute resolution.

q. **In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.** On November 24, 2020, the Board received a Notice of Appeal from Western Sugar Cooperative. At its December meeting, the Board assigned this matter to former Hearing Examiner Clerget. Ms. Clerget issued a Prehearing Order on January 4, 2021. Hearing Examiner Andrew Cziok assumed jurisdiction of this matter on January 21, 2021. Mr. Cziok issued a Scheduling Order on March 16, 2021 and the parties are proceeding according to that order.

3. Contested Cases not assigned to a Hearing Examiner

a. **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ** – This matter has been stayed pending resolution of Montana Environmental Information Center and Sierra Club v. Montana DEQ and Western Energy Company (now on remand to the First Judicial District Court as Cause No. CDV 2012-1075). On September 10, 2019, the Montana Supreme Court reversed the First Judicial District Court on decisions of law and determined that DEQ properly interpreted rules implementing the Montana Water Quality Act (specifically ARM 17.30.637(4)). The Court recognized that DEQ has the flexibility to exempt ephemeral waters from certain water quality standards applicable to Class C-3 waters without BER reclassifying the waters. The Court also determined that DEQ lawfully permitted representative sampling of outfalls under Western Energy Company's MPDES permit. The Montana Supreme Court remanded the case back to the District Court for further proceedings to determine certain issues of material fact, specifically whether DEQ acted properly regarding a stretch of East Fork Armells Creek that is potentially impaired and intermittent, whether it is necessary for DEQ to adopt a TMDL for impaired segments of East Fork Armells Creek, and whether the representative monitoring selected by DEQ is factually supported. The parties are currently proceeding under a scheduling order and are briefing pretrial motions.

III. ACTION ITEMS

A. ACTION ON CONTESTED CASES

1. **In the matter of violations of the Water Quality Act by Reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.** On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC, filed a Notice of Appeal and Request for hearing with the Board.

a. **Contested Case:** On May 22, 2020, CR/REF filed a Motion for Summary Judgment. DEQ filed its opposition to Summary Judgment on June 5, 2020 and CR/REF filed its reply on June 19, 2020. On July 9, 2020, former Hearing Examiner Clerget held oral argument on CR/REFs Motion for Summary Judgement. On January 13, 2021, Hearing Examiner Doud assumed jurisdiction of this matter and issued "Second Owner Operator Proposed Findings of Fact

and Conclusions of Law" on February 22, 2021. The parties filed exceptions on March 15, 2021. The Board must now decide whether to accept or modify the proposed findings of fact conclusion of law.

2. **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC**. On July 22, 2020, Duane Murray filed a request for hearing with the Board. At its August 2020 meeting, the Board appointed former Hearing Examiner Sarah Clerget to preside over this contested case. On October 6, 2020, Ms. Clerget issued a Scheduling Order. On January 15, 2021, Hearing Examiner Simon issued a "Notice of Assumption of Jurisdiction". DEQ filed a Motion to Dismiss on March 19, 2021, which is fully briefed. On X date, Hearing Examiner Simon issued an Order Dismissing Action. The Board must now decide whether to accept or modify the Order as its' final agency action.

IV. BOARD COUNSEL UPDATE

Counsel for the Board will report on general Board business, procedural matters, and questions from Board Members.

V. GENERAL PUBLIC COMMENT

Under this item, members of the public may comment on any public matter within the jurisdiction of the Board that is not otherwise on the agenda for the meeting. Individual contested case proceedings are not public matters on which the public may comment.

VI. ADJOURNMENT

DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MINUTES

December 11, 2020

Call to Order

Chairperson Deveny called the meeting to order at 9:04 a.m.

Attendance

Board Members Present

By ZOOM: Chairperson Chris Deveny, David Lehnherr, Dexter Busby (phone), John DeArment, Jeremiah Lynch, Chris Tweeten
A quorum of the Board was present

Board Attorneys Present

Sarah Clerget, Attorney General's Office (AGO)

DEQ Personnel Present

Board Liaison: George Mathieus
Interim Board Secretary: Joyce Wittenberg
DEQ Legal: Angie Colamaria, Ed Hayes, Kirsten Bowers, Kurt Moser, Mark Lucas, Sarah Christofferson, Norm Mullen
Water Quality: Tim Davis, Galen Steffan, Jon Kenning, Myla Kelly, Lauren Sullivan, Mike Suplee
Air Quality Bureau: Dave Klemp, Julie Merkel, Liz Ulrich, Troy Burrows
Coal and Opencut: Ed Coleman

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting
Vicki Marquis (also for City of Great Falls), Matthew Dolphay (phone) – Holland and Hart/ Westmoreland Resources
William Geer (also for Hellgate Hunters and Anglers), Christopher Servheen, Alec Underwood – Montana Wildlife Federation
John Kilpatrick – US Geological Survey
Genny Hoyle, Gary Aitken Jr. (Chairman), Sue Ireland (Fish & Wildlife Director) – Kootenai Tribe of Idaho
Scott Spaulding – US Forest Service
Michael Jamison – National Parks Conservation Association
Jim Vashro – Flathead Wildlife, Inc.
Dave Hadden – Headwaters Montana
Colby Blair – Last Resort Outfitters
David Kassarah – Westmoreland Resources
Gregory Hoffman – US Army Corps of Engineers
Trevor Selch – Montana Fish, Wildlife and Parks
Shelly Fyant (Chairwoman), Stu Levit – Confederated Salish and Kootenai Tribes
Ayn Schmit, Tonya Fish – US Environmental Protection Agency
Lars Sander-Green, Randall Macnair, Eddie Petryshen – Wildsight Conservation
Garrett Visser – Idaho Wildlife Federation

Anne Fairbrother – Exponent, Inc.
David Blackburn – Kootenai Angler
Michael Ryan – British Columbia Environment
Jill Weitz – Salmon Beyond Borders
Dr. Rachel Malison – Monitoring Montana Waters at Flathead Lake Biological Station
Brad Smith, Ellie Hudson Heck – Idaho Conservation League
Duncan Stewart – Embassy of Canada
David Brooks, Clayton Elliot – Montana Trout Unlimited
Bob Steed – Idaho Department of Environmental Quality
Peggy Trank – Treasure State Resources Association
Travis Meyers – CDM Smith
Camille LeBlanc – Friends of Kootenay Lake Stewardship Society
Kendra Norwood – West Kootenay EcoSociety
Bill Hanlon – North American Board of Directors for Back Country Hunters and Anglers
Tim Lenihan – Kootenai Valley Trout Unlimited Club
Rodney Lance Veolia [*no affiliation identified*]
Erin Sexton [*no affiliation identified*]
Kristen Boyd [*no affiliation identified*]
John Bergenske [*no affiliation identified*]
John Avery [*no affiliation identified*]
Ryland Nelson [*no affiliation identified*]

I. ADMINISTRATIVE ITEMS

A. REVIEW AND APPROVE MINUTES

I.A.1 **October 9, 2020**

There was no Board discussion and no public comment.

Board Member Lynch moved to approve the October 9, 2020, meeting minutes. Chair Deveny seconded the motion, which passed unanimously.

I.A.2 **August 7, 2020**

Chair Deveny noted that the Board had previously requested revisions to the August 7, 2020, meeting minutes, and that the revisions were made.

There were no public comments.

Chair Deveny moved to approve the revised August 7, 2020, meeting minutes. Board Member DeArment seconded the motion, which passed unanimously.

I.A.3 **September 24, 2020**

There was no Board discussion and no public comment.

Board Member Lynch moved to approve the September 24, 2020, meeting minutes. Chair Deveny seconded the motion, which passed unanimously.

I.A.4 **October 29, 2020**

There was no Board discussion and no public comment.

Chair Deveny moved to approve the October 29, 2020, meeting minutes. Board Member Lehnherr seconded the motion, which passed unanimously.

B. REVIEW AND APPROVE 2021 MEETING SCHEDULE

I.B.1 **2021 Meeting Schedule**

There was no Board discussion and no public comment.

Board Member Lynch moved to approve the proposed 2021 meeting schedule of February 12, April 16, June 11, August 13, October 8, and December 10. Board Member DeArment seconded the motion, which passed unanimously.

II. BRIEFING ITEMS

A. CONTESTED CASE UPDATES

1. Enforcement cases assigned to the Hearing Examiner

II.A.1.a **In the matter of violations of the Water Quality Act by reflections at Copper Ridge, LLC, at Reflections at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105376), BER 2015-01 WQ and In the matter of violations of the Water Quality Act by Copper Ridge Development Corporation at Copper Ridge Subdivision, Billings, Yellowstone County (MTR105377), BER 2015-02 WQ.**

i. **Contested Case:** Ms. Clerget stated she has motions for summary judgement, a motion to strike, and a motion to take judicial notice pending before her and that she would issue decisions before the next meeting.

ii. **District Court case:** Chair Deveny provided an update stating that the Board filed a motion to dismiss on the grounds that the Board should not have been named in the Petition for Judicial Review. She noted oral argument has been held and a decision is pending from District Court.

II.A.1.b **In the matter of the notice of appeal by Duane Murray regarding the notice of violations and administrative compliance and penalty order (Docket No. SUB-18-01; ES#36-93-L1-78; FID 2568), BER 2020-01 OC.**

Ms. Clerget said she issued a scheduling order in this matter and the parties are proceeding according to that order.

2. Non-enforcement cases assigned to the Hearings Examiner

II.A.2.a **In the matter of the Notice of Appeal and Request for Hearing by Alpine Pacific Utilities Regarding Issuance of MPDES Permit No. MTX000164, BER 2019-06 WQ**.

Ms. Clerget said the Board has already taken action on the Stipulation and Request for Retention of Board jurisdiction and that she would notify the Board when Alpine provides confirmation that the ambient groundwater monitoring has been installed per the Stipulation.

II.A.2.b **In the matter of Westmoreland Resources, Inc.'s, appeal of final MPDES permit No. MT0021229 issued by DEQ for the Absaloka Mine in Hardin, Big Horn County, MT, BER 2015-06 WQ.**

Ms. Clerget said the parties are to file a joint status report by June 30, 2021.

II.A.2.c **In the matter of the notice of appeal and request for hearing by Montanore Minerals Corporation Regarding Issuance of MPDES Permit No. MT0030279, Libby, Montana, BER2017-03 WQ.**

Ms. Clerget said the Supreme Court issued a decision for this case on November 17 and the parties have until December 17 to file a joint status report indicating how they wish to proceed.

II.A.2.d **In the Matter of the Notice of Appeal and Request for Hearing by Spring Creek Coal, LLC Regarding Issuance of MPDES Permit No. MT0024619, BER 2019-02 WQ**.

Ms. Clerget said an Amended Scheduling Order was issued on May 12, 2020, and that the parties are proceeding according to that order, with discovery closing in January 2021.

II.A.2.e **An appeal in the matter of amendment application AM3, Signal Peak Energy LLC's Bull Mountain Coal Mine #1 Permit No. C1993017, BER 2016-07 SM.**

i. **District Court Case:**

Ms. Clerget said the District Court case went up to the Supreme Court and came back down and was remanded back to the Board.

ii. **Contested Case:**

Ms. Clerget said the parties participated in a four-day hearing. The parties have Proposed Findings of Fact and Conclusions of Law due December 18, 2020, with responses due February 5, 2021. Once responses are filed, Ms. Clerget will issue her proposed findings of facts and conclusion of law.

II.A.2.f **In the Matter of the Notice of Appeal by the Rippling Woods Homeowners Association, et al., Regarding Approval of Opencut Mining Permit No. 2949, Moudy Pit Site, Ravalli County, MT, BER 2019-08 through 21 OC.**

Ms. Clerget said oral argument is scheduled for January 2021 on DEQ's Partial Motion for Summary Judgement.

II.A.2.g **In the Matter of Notice of Appeal and Request for Hearing by Western Energy Company Regarding Approval of Surface Mining Permit No. C2011003F, BER 2019-03 OC and BER 2019-05 OC**.

Ms. Clerget said there were three partial motions for summary judgement and a motion to dismiss filed in the case. Ms. Clerget issued a decision on those motions on November 24. The Order dispensed of all issues, except for one, which will proceed to a hearing.

II.A.2.h **Montana Environmental Information Center, and Sierra Club v. Montana Department of Environmental Quality, Montana Board of Environmental Review, and Western Energy Co. (DV-2019-34, Rosebud County) (District Court).**

Chair Deveny said this case had been assigned to Amy Christensen and the matter is presently scheduled for oral argument in District Court on December 16. She noted that a Joint Motion to Strike exhibits that were attached to the Petitioner's Reply Brief was pending before the Court. The parties have asked the Court to rule on the Motion to Strike before proceeding to oral argument on the petition, but the Court has not yet ruled on that request.

II.A.2.i **In the Matter of Notice of Appeal by Nicholas and Janet Savko, Regarding Floodplain Setbacks, Gallatin County, MT, BER 2020-03 SUB.**

Ms. Clerget said she granted the parties' request for stay, and that the parties will file a proposed schedule or stipulation for dismissal by January 25, 2021.

II.A.2.j **In the Matter of Notice of Appeal by Signal Peak Energy LLC, Regarding Purporting to Rule on An Alleged Impairment of Water Rights Permit No. C1993017, Roundup, Musselshell County, MT, BER 2020-04 SM.**

Ms. Clerget said this case is stayed and the parties have until February 25, 2021, to file either a stipulation for dismissal or a schedule.

II.A.2.k **In the Matter of Notice of Appeal by Woodrock, Inc., Regarding Permit Suspension Order of Opencut Mining Permit No. 2677, Stipek Site, Dawson County, MT, BER 2020-02 OC.**

Ms. Clerget said she granted an Unopposed Motion to Stay on November 30 and the parties have until January 29, 2021, to file a stipulation or a proposed schedule.

3. Contested Cases Not Assigned to a Hearing Examiner

II.A.3.a **In the matter of the notice of appeal and request for hearing by Western Energy Company (WECO) regarding its MPDES Permit No. MT0023965 issued for WECO's Rosebud Mine in Colstrip, BER 2012-12 WQ**.

Ms. Bowers stated that the case went to the Montana Supreme Court and was remanded back to the District Court. Jurisdiction of the case has been assumed by Judge Abbot. Ms. Bowers stated DEQ and Westmoreland have renewed a Joint Motion to Stay the litigation. The Plaintiffs are opposed to the Motion. The Motion is awaiting decision from the Court.

III. ACTION ITEMS

A. Appeal, Amend, or Adopt Final Rules

III.A.1 **In the matter of final adoption of the proposed amendments to ARM 17.8.501, 504, 505, and 510 Air Quality Operation Fees for Registered Sources, to adequately fund the air quality portable registration program, as noticed in MAR 17-413.**

Ms. Ulrich reminded the Board that they approved initiation of the rulemaking at their August 7 meeting and that a public hearing was held September 25 and no additional comments were received. She requested the Board adopt the proposed amendments.

There were no public comments.

Board Member DeArment moved to approve the House Bill 521 and 311 Analyses and adopt the amended rules. Chair Deveny seconded the motion, which passed unanimously.

III.A.2 **In the matter of final adoption of proposed amendments of Administrative Rules of Montana (ARM) 17.30.602 and proposed NEW RULE I, pertaining to selenium standards for Lake Koocanusa and the Kootenai River.**

On behalf of DEQ, Director McGrath made opening statements in favor of the rulemaking, and Ms. Kelly and Ms. Sullivan provided a presentation supporting the rulemaking.

There was a brief discussion pertaining to some ex parte communications that occurred prior to the Board meeting. The materials from those communications were included in the Board packet for transparency.

The following attendees provided comment in support of the rulemaking: William Geer, Christopher Servheen, Greg Hoffman, Genny Hoyle, Dave Hadden, Colby Blair, Jim Vashro, Trevor Selch, Shelly Fyant, Stu Levit, Ayn Schmit, Michael Jamison, Lars Sander-Green, Garrett Visser, Eddie Petryshen, Sue Ireland, Jill Weitz, Rachel Malison, Brad Smith, David Brooks, Clayton Elliot, Erin Sexton, Randall Macnair, John Bergefske, Camille LeBlanc, Kendra Norwood, Bill Hanlon, Tim Lenihan, Ryland Nelson and Gary Aitken Jr.

Vicki Marquis and Anne Fairbrother provided comment in opposition of the rulemaking.

John Kilpatrick provided comment from a neutral position.

The Board held discussion on the rulemaking and asked questions of the presenters and commenters.

Board Member DeArment moved to adopt the proposed rules as amended, along with the House Bill 521 and 311 Analyses. Chair Deveny seconded the motion, which passed 5 to 1 with Board Member Busby dissenting.

B. New Contested Cases

III.B.1 **In the matter of notice of appeal and request for hearing by the Western Sugar Cooperative regarding its Montana Pollutant Discharge Elimination System Permit No. MT0000281 issued October 29, 2020, BER 2020-05 WQ.**

Chair Deveny moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Lehnherr seconded the motion, which passed unanimously.

III.B.2 **In the matter of Notice of Appeal and Request for Hearing by Westmoreland Resources, Inc. Regarding October 27, 2020 Notice of Violation and Administrative Compliance and Penalty Order, BER 2020-06 SM.**

Chair Deveny moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Tweeten seconded the motion, which passed unanimously.

C. Action on Contested Cases

III.C.1 **In the Matter of the Notice of Appeal and Request for Hearing by City of Great Falls Regarding Issuance of MPDES Permit No. MT0021920.**

The parties reached a settlement on all but one issue. Board Member Tweeten moved to approve the stipulation. Board Member Lynch seconded the motion, which passed unanimously.

IV. BOARD COUNSEL UPDATE

No update was provided.

V. GENERAL PUBLIC COMMENT

No public comment was offered.

VI. ADJOURNMENT

Chair Deveny moved to adjourn. Board Member Busby seconded the motion, which passed unanimously. The meeting adjourned at 12:39 p.m.

Board of Environmental Review December 11, 2020, minutes approved:

_____
STEVEN RUFFATTO
CHAIRPERSON
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

DEQ Montana Department of Environmental Quality

BOARD OF ENVIRONMENTAL REVIEW
MEETING MINUTES

FEBRUARY 26, 2021

Call to Order

Chairperson Ruffato called the meeting to order at 9:01 a.m.

Attendance

Board Members Present

By ZOOM: Chairman Ruffatto; Board Members Hillary Hanson, David Lehnherr, David Simpson, Jon Reiten, and Joseph Smith

A quorum of the Board was present.

Board Attorney(s) Present

Katherine Orr, Attorney General's Office, Department of Justice

DEQ Personnel Present

Board Liaison: George Mathieus
Board Secretary: Joyce Wittenberg (*interim*)
DEQ Legal: Angie Colamaria, Kirsten Bowers, Kurt Moser, Mark Lucas, Nick Whitaker, Sarah Christopherson, Sarah Clerget, Ed Hayes
Water Protection: Daryl Barton
Coal and Opencut: Ed Coleman, Chris Cronin, Alex Mackey
Public Policy: Moira Davin

Other Parties Present

Laurie Crutcher, Laurie Crutcher Court Reporting
Catherine Laughner – Montana Coal Board
Vicki Marquis (Holland and Hart) – Westmoreland Resources
Bronya Lechtman – Northern Plains Resource Council
Dave Kuzara – Westmoreland
Julie Griffin – Fort Peck
Mark Stermitz (Crowley Fleck Law Firm), Stacy Hill – Riverside Contracting
Martha Thomsen (Baker Botz), Rob Sterup – Talen Montana
Ryen Godwin [*no affiliation identified*]

I. MEMBER ORIENTATION

A. Onboarding Information for Incoming Members

I.A.1 **How the agency interacts with the Board**

Ms. Clerget provided information regarding the relationship between the Board and DEQ, and how they interact with each other.

I.A.2 **Legal duties and authority of the Board**

Ms. Orr and Ms. Clerget provided information regarding the purpose and responsibilities of the Board, including rulemaking, appeals, ex parte communications, and the Montana Administrative Procedures Act. Also discussed was ethics, open meetings and public participation, right to privacy versus right to know, and submitting materials to the BER.

I.A.3 **Administrative matters**

Ms. Wittenberg discussed the OSM and W-9 forms that are required to be completed by the Board members. She also provided information regarding Board honorariums and travel expense reimbursement, the Board meeting packets timeline, and Board member information on the BER website.

II. ACTION ITEMS

A. New Contested Cases

Ms. Colamaria explained that the Board must, according to rule, appoint a hearing examiner for the two Keystone Pipeline matters because they pertain to 401 Certification.

III.A.1 **In the matter of notice of contest and request for hearing by Talen Montana, LLC, regarding the selection of a remedy and setting of financial assurance for the Colstrip Steam Electric Station Units 1 & 2, BER 2020-07 MFSA/WQA.**

Board Member Lehnherr moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Hanson seconded the motion. The motion passed 5-1 with Board Member Simpson dissenting.

III.A.2 **In the matter of the Notice of Appeal and request for hearing regarding DEQ's approval of Riverside Contracting, Inc.'s Opencut Mining Permit #3234 (Arrow Creek Site) by multiple appellants, BER 2020-08 OC.**

Board Member Simpson moved to assign the case to Agency Legal Services' attorneys for all procedural and substantive matters. Board Member Lehnherr seconded the motion, which passed unanimously.

III.A.3 **In the matter of the notice of appeal and request for hearing (by "Conservation Groups") regarding DEQ's issuance of a final Section 401 Water Quality Certification, #MT4011079 to Transcanada Keystone Pipeline LP for the Keystone XL Pipeline Project, BER 2021-01 WQ.**

III.A.4 **In the matter of the Indigenous Environmental Network's and North Coast Rivers Alliance's appeal of the Montana Department of Environmental Quality's final determination to issue a 401 Water Quality Certification for the Keystone XL Pipeline, DEQ Application No. MT4011079, BER 2021-02 WQ.**

Chairman Ruffato moved to assign both Keystone cases to Agency Legal Services' attorneys for all procedural and substantive matters. Board member Simpson seconded the motion, which passed unanimously.

Board Member Lehnherr moved that the Board approve consolidation of the two Keystone Pipeline cases if the hearing examiner finds it appropriate. Board member Reiten seconded the motion, which passed unanimously.

V. GENERAL PUBLIC COMMENT

No public comment was offered.

VI. ADJOURNMENT

Chairman Ruffatto moved to adjourn. Board member Simpson seconded the motion, which passed unanimously. The meeting adjourned at 11:52 a.m.

Board of Environmental Review February 26, 2021, minutes approved:

_____
STEVEN RUFFATO
CHAIRMAN
BOARD OF ENVIRONMENTAL REVIEW

_____
DATE

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

HEARING EXAMINER'S SECOND PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER ON THE ISSUE OF OWNER/OPERATOR

TABLE OF CONTENTS

PROCEDURAL HISTORY

On April 17, 2015, Copper Ridge Development Corporation and Reflections at Copper Ridge, LLC (CR/REF) filed a Notice of Appeal and Request for Hearing with the Montana Board of Environmental Review (BER) based on the Administrative Compliance and Penalty Orders (AOs) issued by Department of Environmental Quality (DEQ). The AOs alleged four violations:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2)(f), and ARM 1 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

(JSF ¶ 16; AO.)

A hearings examiner was appointed to the contested case and a Scheduling Order was issued on May 26, 2015. After a short stay and subsequent issuance of a second Scheduling Order, CR/REF filed a Motion for Summary Judgment on January 25, 2017. DEQ filed a cross-motion for summary judgment on February 17, 2017. After both motions were fully briefed, the prior hearing examiner

Andres Haladay, issued an Order granting in part and denying in part both parties' Motions for Summary Judgment on August 1, 2017.

Sarah Clerget assumed jurisdiction of the case as the hearing examiner on September 8, 2017. On February 22, 2018, she denied CR/REF's motion to reconsider Mr. Haladay's summary judgment rulings and ruled on the parties' motions in limine. Thereafter, Hearing Examiner Clerget conducted a three-day hearing on February 26-28, 2018. Based on that hearing, Hearing Examiner Clerget issued her Proposed Findings of Fact and Conclusions of Law (FOFCOL) to the Board on July 16, 2018. CR/REF filed an exceptions brief to the Proposed FOFCOL and DEQ filed a response. This matter was fully briefed and before the BER at its meeting on December 7, 2018, as was a Motion to Strike from CR/REF relating to the exceptions briefing. At the December 7, 2018 meeting, the BER denied CR/REF's Motion to Strike and began oral argument and discussions on the issue of whether CR/REF were an owner/operator within the meaning of Mont. Code Ann. § 75-5-103(26). The BER lost its quorum before it could make further decisions at the December 7, 2018 meeting, however. The BER, therefore, requested additional briefing from the parties regarding the owner/operator issue and set a special meeting for February 8, 2019 to continue oral argument and discussions on the case. The parties each submitted additional briefs on the owner/operator issue on January 17, 2019.

At the February 8, 2019 special meeting, the BER clarified and interpreted the definition of "owner or operator" to mean someone "who owns, leases, operates, controls, or supervises a point source" (Mont. Code Ann. § 75-5-103(26)) "at the time of the discharge, as opposed to at some time in the past. . . ." (2/8/19 Tr. at 107:8-21, 114:5-115:14, 117:10-15, 119:13-21). Further, the Board found that the record was insufficient "to justify a finding either way" on whether CR/REF was an owner/operator at the time of the violations, and so the Board decided to:

> …vacate the proposed findings of fact, conclusions of law, and order that Hearing Examiner Clerget entered, and also part and parcel of that would be vacating Hearing Examiner Haladay's summary judgment order. And the grounds that I would propose the Board rely on in vacating those documents would be that we disagree with the Hearing Examiners' -- plural -- conclusion of law, that based on those factual considerations that Hearing Examiner Haladay mentioned, Copper Ridge and Reflections ought to be deemed to be the owner/operator of this project for purposes of the storm water discharges that are at issue in these notices of violation…. And that we then remand the matter to Hearing Examiner Clerget for further proceedings, consistent with what we think the proper interpretation of that statute is, to-wit, which is that the statutory definition of owner/operator speaks to the person who owns, operates, or supervises the project at the time that the offending storm water discharges take place.

(2/8/19 Tr. at 112:5-113:22, 117:10-15, 119:13-21.) The Board left it to the discretion of Hearing Examiner Clerget "to decide the scope of the proceedings on remand…as to whether the record needs to be reopened or not…." (2/8/19 Tr. at 115:15-117:15, 119:13-21.) Finally, the Board passed a motion:

> that on remand, the Board direct the Hearing Examiner to place on the Department the burden of persuasion with respect to those matters that are essential for them to prove in order to establish the violations that they claim under the appropriate legal standard that we previously adopted.

(2/8/19 Tr. at 131:2-12, 143:12-18.) The Board summarized the practical effect of all these holdings as follows:

> I think on remand, Sarah will determine whether the developer was an owner or operator. If Sarah decides not, then all of the rest of that stuff doesn't matter, because under the statute they didn't need to get a permit. If Sarah decides that they were an owner or operator, we haven't disturbed all of her findings and conclusions with respect to those other issues. Whether Violations 2, 3, and 4 actually occurred or not will come back in front of us with the owner or operator issue for our consideration later.

(2/8/19 Tr. at 137:10-21; see also 107:8-21.)

On remand, Hearing Examiner Clerget reviewed the available record, consulted with the parties, issued Orders holding that the record would be re-opened with respect to the owner/operator issue, and set a schedule for various procedural deadlines. Pursuant to the schedule, the parties exchanged supplemental discovery on April 12, 2019 and their proposed hearing exhibits on May 20, 2019. On May 2, 2019, CR/REF filed a *Motion in Limine* and, then, a second *Motion in Limine* on May 8, 2019. The Motions in Limine were fully briefed and Hearing Examiner Clerget allowed oral argument on them at the final pretrial conference on May 23, 2019. The parties jointly filed a Motion to Vacate the hearing and for additional discovery (in the event that the Motions in Limine

were denied). Hearing Examiner Clerget issued an Order granting in part CR/REF's *Motions in Limine* on June 4, 2019.

Of particular note, Hearing Examiner Clerget's order precluded the introduction of four photographs. Hearing Examiner Clerget noted that "this entire proceeding is bounded by" the statute, DEQ's notice to Copper Ridge and Reflections, DEQ's discovery responses, deposition testimony, prior testimony, and the Proposed Findings of Fact and Conclusions of Law that were not disturbed by the Board. 6/4/2019 Order on MIL, p.5.

> Additionally, the principles of equity and estoppel prevent DEQ from now – six years later, and after discovery, summary judgment briefing and decision, a hearing before the hearing examiner, proposed FOFCOLs and responses, a FOFCOL and exceptions briefing, oral argument before the BER, supplemental briefing on the owner/operator issue, and more argument before the BER – presenting an entirely new theory with entirely new evidence (which it apparently should have brought six years ago). DEQ is bound by its prior decision, actions and inactions.

Id. Hearing Examiner Clerget granted, in part, the motions in limine and ordered the following:

a) … DEQ will be bound by its prior testimony, including but not limited to its written discovery responses and Rule 30(b)(6) deposition responses.

b) DEQ will NOT be permitted to enter evidence concerning lots or construction activity … unless DEQ can show where it gave notice to CR/REF that such construction activity was at issue…

c) DEQ will NOT be permitted to use or enter any photographs that are not either publicly available or attached to the September 23, 2013 Violation

> Letter (Feb. 2018 Hearing Ex. 2), including but not limited to photos 1, 3, 4, and 5 attached to DEQ's Amended Supplemental Discovery Disclosure dated May 1…
>
> d) DEQ will NOT be permitted to use or enter documents, including maps, based upon, derived from, or created with information from the photographs excluded by (c), above.

Id., p.7.

Hearing Examiner Clerget, then, proceeded to hold a one-day evidentiary hearing on June 13, 2019, for the specific purpose of allowing the parties an opportunity to supplement the record with respect to the owner/operator issue. DEQ was represented by Kirsten Bowers and Ed Hayes, presented the testimony of Dan Freeland and Susan Bawden, and entered eleven exhibits. CR/REF was represented by Victoria Marquis, presented the testimony of Brian K. Anderson and Landy Leep, and entered twenty-five exhibits.

Hearing Examiner Clerget issued her Proposed Findings of Fact & Conclusions of Law to the BER on the Issue of Owner/Operator on July 8, 2019. Therein, she found that DEQ had failed to meet its burden of proof necessary to establish the violations set forth in its notice letters of September 23, 2013 and the AOs dated March 27, 2015.

This matter, then, came before the BER on August 9, 2019. During that hearing, DEQ argued that Hearing Examiner Clerget erred by excluding the four photos that were subject to her June 4, 2019 Order on Motion *in Limine*. Relying

on these photos, DEQ argued that they constituted evidence to support their allegations of violations in the Reflections subdivision.

After hearing the arguments of the parties, the BER concluded that Hearing Examiner Clerget:

> abused her discretion with regard to the four photographs excluded by the motion in limine, and that the matter be remanded back to the Hearing Examiner to take additional evidence regarding the photographs from DEQ and Copper Ridge and Reflections to include maps created from the photographs, and maps of the areas covered by the permits.

8/9/19 Bd. Tr. 222:8-15.

After the second remand, Hearing Examiner Clerget issued a scheduling order and discovery proceeded between the parties. CR/REF moved to separate the cases, which DEQ opposed. Hearing Examiner Clerget denied that motion. After the motion to separate was denied, the parties filed additional motions and briefs, three of which are pending as of the date of this FOFCOL.

This matter was then transferred to the undersigned on January 12, 2021. After reviewing the extensive docket, including the lengthy procedural history of this case, the undersigned submits the following proposed Second FOFCOL on the issue of whether CR/REF was an owner/operator, within the meaning of Mont. Code Ann. § 75-5-103(26), such that they 'owned, leased, operated, controlled, or supervised a point source' of 'storm water discharges associated with construction

activity' (per ARM 17.30.1102), requiring or violating permit coverage pursuant to ARM 17.30.1115, 17.30.1105, and Mont. Code Ann. § 75-5-605, *at the time of the alleged violations* in the AOs. Scheduling Order, p. 4 (February 19, 2019) (emphasis added).[1] This FOFCOL incorporates direction from the BER to consider the four previously excluded photographs, and determine whether they serve to fulfill DEQ's burden to establish, by a preponderance of the evidence, that CR/REF was an owner/operator who was, thereby, subject to the violations asserted by DEQ.

FINDINGS OF FACT

A. Background

1. *CR/REF are two subdivisions located in the City of Billings, Yellowstone County, Montana. Joint Stipulated Facts (JSF) ¶ 1.

2. A map of the CR/REF subdivisions, including the filings (a/k/a

[1] To the extent possible, the undersigned has written this proposed FOFCOL such that, if adopted, it could stand independently as the Final Board Order. Therefore, some facts found in the undersigned's original FOFCOL are repeated herein, but are marked with an asterisk (*) for easy identification. To the extent that the Board chooses to adopt this as its Final Board Order, therefore, no additional incorporation by reference should be necessary. If, however, the Board rejects this proposed FOFCOL, then the Board may need to return to the findings and conclusions in the Order on Summary Judgment, the original FOFCOL, the parties' original exceptions and supplemental owner/operator briefing, and the transcript of the Board's prior proceedings.

phases) of the different subdivisions appears at Ex. 47.

3. Copper Ridge indicated the pre-construction condition of the subdivision to be short pasture/grassland; at 90 % density in its Storm Water Pollution Prevention Plan (SWPPP) submitted with the Notice of Intent (NOI) to obtain General Permit coverage. (6/13/19 Tr. 32:24-33:5; Ex. 4, DEQ 000062.)

4. Reflections indicated the preconstruction condition of the subdivision to be short pasture/grassland at 90% density in its SWPPP. (Ex. 6, DEQ 000094; 6/13/19 Tr. 216:22-217:2.)

5. A bullet-pointed timeline, excerpted from and based on the findings of fact contained herein, is attached as Exhibit A.

6. *The City of Billings (City) is the owner and operator of a municipal separate storm sewer system (MS4). The City is authorized to discharge storm water to state waters under the MPDES General Permit for Storm Water Discharge Associated with Small Municipal Separate Storm Sewer Systems (General Permit No. MTR040000). The City's MS4 conveys storm water to state surface water through publicly owned storm water conveyance and drainage systems. The City's MS4 ultimately discharges storm water to the Yellowstone River, a state water. JSF ¶ 2.

7. *DEQ issues the MPDES General Permit for Storm Water Discharges Associated with Construction Activity (General Permit No. MTR100000). Unless

administratively extended, General Permit No. MTR 100000 is issued for five-year periods. Relevant to this matter, General Permit No. MTR100000 was effective January 1, 2013, through December 31, 2017. JSF ¶ 3.

8. Storm water from CR/REF subdivisions discharges to state surface waters, including Cove Ditch and the Yellowstone River, through overland flow and through the City's MS4. (2/26/18 Tr. 66:20; 148:11; Ex. 2, DEQ000038.)

9. The north end of the subdivision is upgradient from Cove Ditch and the southern portions of the subdivision, which were impacted by sediment. (6/13/19 Tr. 27:4, 28:11-13.)

10. *On March 26, 2013, the City contacted DEQ to request assistance in addressing noncompliance with storm water requirements at CR/REF. DEQ informed the City that construction activities at CR/REF were not covered by General Permit No. MTR100000. JSF ¶ 4.

B. Ownership and Construction Activity September to December 2013[2]

i. Ownership and Construction Activity Generally

11. DEQ and CR/REF provided warrantee deeds showing the dates that specific lots transferred out of CR/REF's ownership. (Exs. 39, 42, JJ-NN, OOO-RRR.)

2 As explained further below and in the original FOFCOL, and as found as a Conclusion of Law herein, the relevant time period for the alleged violations were September to December 2013, and October 21, 2014.

12. DEQ also made a visual representation using an aerial photograph of some of the lots CR/REF owned between September and December 2013. (Exs. 33, 34.)

13. DEQ did not retrieve ownership records and overlay them on aerial photos of the subdivisions until after the February 2019 remand from the Board. (6/13/19 Tr. 113:10-15; 146:3-6.)

14. The lots about which DEQ provided ownership information, from September to December 2013, were generally located in the northern part of the CR/REF subdivisions as follows:

a. One lot (Lot 7B) located in the first filing of Reflections (Ex. 39 at1; Ex. 34; Ex. 47 at 3.

b. Seven lots (including Lot 15) along Western Bluffs Blvd. located in the second filing of Reflections (Exs. 34, 47 at 3);

c. Twenty-one lots along Western Bluffs Blvd. and Reflections Circle, located in the third filing of Reflections (Exs. 34, 47 at 3);

d. Three lots located on Amelia Circle in the second filing of Copper Ridge. (Exs. 33, 47 at 1);

e. Four located along Lucky Penny Circle and Lucky Penny Lane, in the third filing of Copper Ridge (Exs. 33, 47 at 1);

f. Eleven lots located along Lucky Penny lane, in the fourth filing of Copper Ridge (Exs. 33, 47 at 1);

15. With the exception of one lot, DEQ did not provide ownership

information (or visual representations of ownership) regarding the southern portions of the CR/REF subdivisions, such as property located along Golden Acres Drive, or any properties located in the first filing of Copper Ridge. (Exs. 16, 23, 33, 34, 39, 42, 47.)

16. DEQ's evidence of construction activity between September and December of 2013 consisted of:

a. The testimony of DEQ Inspector, Dan Freeland, who inspected the CR/REF subdivisions on September 9, 2013 (6/13/19 Tr. 34:15-22) and took photographs (Ex. 16) and field notes (Ex. 15);

b. Two publicly-available aerial photographs: one from Google Earth, possibly taken on October 25, 2013 (Ex. 26), and one from the United States Department of Agriculture taken June 15, 2013 (Ex. 23). (6/13/19 Tr. 103:6-104:5; 124:21-125:20).

17. Landy Leep, Vice President and Manager at CR/REF confirmed that the land ownership information provided by DEQ (listed above) for the first, second and third filings of Reflections and the second, third, and fourth filings of Copper Ridge were accurate for September to December 2013. (6/13/19 Tr. 217:18-23, 222:12-17).

18. Mr. Leep gave the following additional testimony regarding CR/REF's ownership and construction activity from September to December 2013:

a. CR/REF owned one lot on Western Bluffs Blvd, did not own any lots located along Golden Acres Drive, and did not conduct any construction activity within the first filing of Reflections after July 9, 2008. (6/13/19 Tr. 166:612, 167:8-23, 169:11-170:16, 170:16-12,

207:9-12; Ex. III).

b. CR/REF did not conduct any construction activity at all in the second filing of the Reflections, including Lot 15 and lots located on Western Bluffs Boulevard and Reflections Circle, as the last construction activity was completed on June 14, 2013. (6/13/19 Tr. 166:6-12, 173:12-19, 176:7-8; 179:18-22; Exs. 34, 47, WW, XX, JJJ, NNN). The final plats for the second filing of the Reflections subdivision were executed in 2012, conveying the roads, rights-of-way and parkland to the City of Billings. (Ex. 40, p. 6.)

c. CR/REF did not conduct any construction activity at all in the third filing of Reflections including lots located on Western Bluffs Boulevard, as the last construction activity was completed on July 30, 2013. (6/13/19 Tr. 189:19-193:11; Exs. 34, 47 at 3, C, AAA, BBB, KKK, MMM, 40). The final plat for the third filing of the Reflections subdivision was signed by Mr. Leep on April 19, 2013, conveying the roads, rights-of-way, easements, and parkland to the City of Billings. (6/13/19 Tr. 194:15-22; Ex. 40, p. 8.)

d. CR/REF did not own any lots in the first filing of Copper Ridge (6/13/19 Tr. 2014:15-205:9);

e. CR/REF did not conduct any construction activity at all in the second filing of Copper Ridge including lots owned on Amelia Circle, as the last construction activity completed October 16, 2009. (6/13/19 Tr. 195:8-196:24, Exs. 33, 47 at 1, 50, A, SS, TT, UU). By final plat dated January 23, 2008, Copper Ridge conveyed the streets, parkland, and easements in the second filing of the Copper Ridge subdivision to the City of Billings. (6/13/19 Tr. 196:25-197:10; Ex. 44.)

f. CR/REF did not conduct any construction activity at all in the third filing of Copper Ridge, including lots owned on Lucky Penny Lane and Lucky Penny Circle. (6/13/19 Tr. 173:12-19, 181:10-22; Exs. WW, XX, JJJ, NNN, 33, 47 at 1). The final plats for the third and fourth filings of the Copper Ridge subdivision were executed in 2012, conveying the roads, rights-of-way, and parkland to the City of Billings. (6/13/19 Tr. 186:15-187:10; Ex. 44.)

g. Did not conduct any construction activity at all in the fourth filing of Copper Ridge, including lots owned on Lucky Penny Lane. (6/13/19 Tr. 173:12-19, 181:10-22; Exs. 33, 47 at 1, WW, XX, JJJ, NNN). The final plats for the third and fourth filings of the Copper Ridge subdivision were executed in 2012, conveying the roads, rights-of-way, and parkland to the City of Billings. (6/13/19 Tr. 186:15-187:10; Ex. 44.)

19. CR/REF provided correspondence with its contractors confirming the dates of substantial completion on their contracts, which ranged from July of 2008 to July 30, 2013 (i.e. all prior to September of 2013). (6/13/19 Tr. 166:6-176:8, 189:19-196:24; Exs. UU, AAA).

20. The contracted work corresponded to several MPDES permits issued by DEQ for the work described in the contracts. (Exs. 50, 51, A, B, C, WW, BBB).

21. CR/REF also provided corresponding Notices of Termination (NOT) from DEQ on the MPDES permits for the contracted work. (Exs. VV, ZZ, SS,)

22. The third filing of the Reflections subdivision, including the area in the "far north" of the Reflections subdivision, that Mr. Freeland allegedly visited during his September 9, 2013 inspection, was previously included in permit MTR104993, held by CMG Construction. (6/13/19 Tr. 42:21, 67:20-68:5; Exs. C, BBB.)

23. Permit MTR104993 was initiated by CMG Construction with a NOI dated April 18, 2013 and confirmed by DEQ on April 22, 2013. (Ex. C.)

24. The permit boundary area for Permit MTR104993 extended to include the entirety of the individual lots around Reflections Circle and a portion of Western Bluffs Boulevard. (6/13/19 Tr. 69:9-12; Ex. BBB.)

25. The BMPs for MTR104993 extended the entire width of the subdivision on the downgradient side. (6/13/19 Tr. 69:20-70:3; Ex. BBB.)

26. A NOT, certifying that the permitted area, including the third filing of the Reflections subdivision had reached final stabilization, was submitted by CMG Construction on February 19, 2014. (6/13/19 Tr. 70:4-71:3; Ex. ZZ.)

27. By letter dated March 24, 2014, DEQ confirmed that the MTR104993 permit area had "achieved 'Final Stabilization' as defined in the General Permit" and confirmed termination of permit MTR104993. (6/13/19 Tr. 71:4-23; Ex. AAA.)

28. Properties noted in DEQ's December 9, 2014 Violation Letter (Ex. 8) in the third Filing of the Reflection subdivision, including lots along Reflections Circle, remained covered by the CMG permit MTR104993 during September 23, 2013 through December 23, 2013. (Exs. C, BBB.)

29. The Amelia Circle area in the second filing of the Copper Ridge subdivision noted during the September 9, 2013 inspection was previously included in permit MTR102807, held by JTL Group Inc. (6/13/19 Tr. 62:14-25; Ex. 50, p. 13.)

30. Permit MTR102807 was initiated by JTL Group Inc. by a NOI signed on October 26, 2007. (Ex. A.)

31. A NOT, certifying that the permitted area, including the Amelia Circle area noted during the September 9, 2013 inspection, had reached final stabilization, was submitted by JTL Group and Knife River. DEQ received the NOT on October 16, 2009. (6/13/19 Tr. 63:3-64:9; Ex. SS.)

32. A letter from Knife River, received by DEQ on October 16, 2009, stated that the MTR102807 permit area, including the Amelia Circle area noted during the September 9, 2013 inspection, had "achieved the required 70% stabilization." (6/13/19 Tr. 64:10-65:18; Ex. TT.)

33. By letter dated October 19, 2009, DEQ confirmed that the MTR102807 permit area had "achieved 'Final Stabilization' as defined in the General Permit" and confirmed termination of permit MTR102807. (6/13/19 Tr. 65:19-67:9; Ex. UU.)

34. There was no reason for Copper Ridge or its contractors to do any construction in the second filing of the Copper Ridge subdivision after permit MTR102807 was terminated on October 16, 2009. (6/13/19 Tr. 196:5-12; Ex. SS.)

35. Copper Ridge did not contract for any construction activity after permit MTR102807 was terminated on October 16, 2009. (6/13/19 Tr. 196:13-15; Ex. SS.)

36. Neither side provided evidence of ownership or construction activity for filings after Reflections' third filing or Copper Ridge's fourth filing.

37. Mr. Leep testified that CR/REF can only conduct construction activity through its contractors, so once contracted work is complete, he is confident that there was no construction activity:

> "There would be nothing else to do. Once the contractors are done - we don't own tractors, we don't own tools - they take their equipment away. We have no way of doing additional work and there's no work to do, we're done. The streets are in; curbs are done, waterlines, sewer lines; the park is in, in this case. There is nothing else for us to construct."

(6/13/19 Tr. 170:6-16, *see also* 179:4-15, 180:16:1-21.)

38. Neither Copper Ridge nor Reflections were issued any homebuilding permits by the City in 2013 or 2014. (6/13/19 Tr. 97:10 -21.)

39. Neither Copper Ridge nor Reflections built homes in either subdivision. (2/27/18 Tr. 59:22-60:7, 61:4-7, 66:17-20.)

40. Mr. Leep further testified that he was confident there were no stockpiles of materials left on any of the lots CR/REF owned after the contracted construction activity was complete because it would not be in CR/REF's best interest to do so:

> Q. Mr. Leep, as the developer, would you allow a stockpile of material to remain on your property after this final inspection?
> A. No. At the time the subdivision -- there's a walk-through. There really is -- we don't allow home building before the final walk-through. There is no other construction activity other than what we've directed and that we

> supervise. And at that point at the walk-through, all the lots are graded appropriately, seeded for final stabilization, water and sewer is shown, the property's been shown, and all of the aprons; very clean, looking good.
> Q. Why wouldn't you allow a stockpile to remain after the final inspection?
> A. Well, my main job is to sell the lots, so the looks of the subdivision – I've got my "for sale" signs out there. It's got to look crisp and clean, and a leftover stockpile would not be allowed.
> …
> During our walk-throughs, we have to keep everything looking clean and professional, no leftover materials. That includes sewer pipes, water pipes, fire hydrants. Everything is cleaned up.

(6/13/19 Tr. 182:6-23, 191:8-17.)

41. DEQ has not alleged any permit violations on any of the previously terminated permits for the CR/REF contractors in the subdivisions. (Ex. 9 p. 10-16 (March 27, 2015); Ex. 10 p. 10-16 (March 27, 2015)- AOs by date and page.)

42. Mr. Freeland didn't see any issues with "the previously permitted areas." (6/13/19 Tr. 54:14-18; *see also* 34:9-14.)

ii. Freeland's Testimony and Photographs

43. Mr. Freeland testified generally that: "[t]here was active construction occurring throughout the facility site, construction activities including clearing, excavation, stockpiling, grading, and construction of single-family homes occurring…." (6/13/19 Tr. 18:7-10; Ex. 2). Mr. Freeland did not document (through photographs or notes) any specifics to support this general claim (in his subsequent letter on Sept. 23, 2013) that "clearing, excavation, stockpiling, [or] grading" was occurring throughout the cite. (6/13/19 Tr. 20:16-23; Ex. 2).

44. At the north end of the subdivision, Mr. Freeland observed bare ground, where grading appeared to have occurred and the lots were cleared of all vegetation. (6/13/19 Tr. 29:15-19.) Mr. Freeland could not confirm, however, that the lots he saw were owned by CR/REF, or when, how, why, or by whom they may have been cleared. (6/13/19 Tr. 29:4-19.)

45. Mr. Freeland, observed the City of Billings cleaning up sediment on Amelia Circle, and observed sediment and trash in storm drain inlets originating from Copper Ridge subdivision. (6/13/19 Tr. 31:2-8.)

46. Mr. Freeland did not observe active construction on the vacant lots in the subdivision and did not see equipment actively clearing the vacant lots. (6/13/19 Tr. 38:16-22.) Mr. Freeland could not recall seeing construction equipment on the vacant lots. (6/13/19 Tr. 38:23-39:1) ("There was some excavating, but I don't remember – I think they were on – I don't remember, I don't remember").

47. Mr. Freeland could not provide details about any specific construction activity or where it may have been occurring. (See, e.g. 6/13/19 Tr. 19:3-6; 19:15-24.) For example, Mr. Freeland testified:

> "Q. Thank you. Mr. Hayes asked you about the scope of the allegation, and you answered, I believe, consistent with your previous testimony that there were a whole range of homes under construction. And you've already said today that the streets in that area were already paved when you were there, correct?

A. Yes.
Q. You also testified that there were lots with nothing on them; is that correct?
A. Correct.
Q. What construction activity did you see on those lots?
A. That would be the clearing, the lack of vegetation.
Q. So did you see a piece of equipment actively clearing the lots?
A. No, they're -- not that I recall. But they had been -- they were devoid of vegetation, so something happened, I guess.
Q. Do you know what that "something" was?
A. Uh-uh [negative].
Q. Did you see equipment on those lots?
A. There was some excavating, but I don't remember -- I think they were on -- I don't remember, I don't remember.
Q. When you say "excavating," do you mean actively excavating? A piece of equipment was moving earth?
A. Yeah. It seemed like there was -- I know there was a lot of activity to the east, which was a different subdivision, but I -- there was other activity off to this subdivision, like digging a trench -- (gesturing.)
Q. Do you know where that was?
A. Not exactly. If these lots -- it could have been, but it's so long ago.
Q. Can you point to any photograph that was attached to Exhibit 2 that documented any of that excavating or trench digging that you're referring to?
A. No. I focused this on the discharge and the waste in the street. That's where I was focused.

(6/13/19 Tr. 38:2-39:17.)

48. Mr. Freeland testified about the route that he took through the subdivisions and where he took his photographs during his September 9, 2013 inspection, which formed the basis of the alleged violations. (6/13/19 Tr. 27:19-29:11, Ex. 16, Ex. 2.)

49. Mr. Freeland started at Golden Acres Drive, walking down to Cove Ditch, then returned to his vehicle and drove west onto Western Boulevard, to the north end of the subdivision, then west on Amelia Circle, then south through East Copper Ridge Loop, and then out the subdivision entrance. (6/13/19 Tr. 27:19-28:25.)

50. The general locations of the photographs that Mr. Freeland took are indicated on the map in Ex. 16 at 1.

51. All these photographs, and the path that Mr. Freeland described, are in the Southern portion, in the first and second filings of both subdivisions. (6/13/19 Tr. 27:19-29:11, Exs. 16, 47.)

52. Almost all of Mr. Freeland's photographs were on or around Golden Acres Drive, which is the most southerly road in the Reflections subdivision, first filing. (Ex. 16.)

53. Mr. Freeland testified that he took photographs in the location of lots 11, 12, and 13, Block 1, Reflections at Copper Ridge, third filing, during the September 9, 2013 inspection. (6/13/19 Tr. 88:19-20; Exs. 2, 16, and 47.)

54. Photograph 14 is the most northerly photograph (taken alone and far away from all the other photographs) and it depicts lots on Amelia circle which DEQ does not allege CR/REF owned. (Ex. 16.)

55. Mr. Freeland did not take any photographs or field notes regarding any of the lots for which DEQ provided ownership information in Ex. 33, which included a total of eighteen lots located along Lucky Penny lane and Amelia Circle, in the third and fourth filings of the Copper Ridge subdivision (Exs. 16, 15, 33, 42, 47 at 1.)

56. The only specific evidence of construction activity for lots owned by CR/REF along Lucky Penny lane and Amelia Circle, in the third and fourth filings of the Copper Ridge subdivision, were the two aerial photographs, one from Google Earth (Ex. 26) and one from the U.S. Department of Agriculture (Ex. 23).

iii. Aerial Photographs and Vegetative Cover

57. Exhibit 23 is an aerial photograph of the CR/REF subdivisions taken by the USDA Farm Services Agency on June 15, 2013. (6/13/19 Tr. 80:4-112:10-15; Ex. 23.)

58. Exhibit 33 is a map layer prepared by DEQ Enforcement Specialist, Susan Bawden, using ArcMap over the USDA base aerial photograph in Exhibit 23. Exhibit 33 shows lots owned by Copper Ridge as of the date of the initial violation letter on September 23, 2013. (6/13/19 Tr. 112:16-114:21; Ex. 33.)

59. Exhibit 34 is a map layer prepared by Ms. Bawden, using ArcMap over the USDA base aerial photograph in Exhibit 23. Exhibit 34 shows lots owned

by Reflections as of the date of the initial violation letter on September 23, 2013. (6/13/19 Tr. 122:7-19; Ex. 34.)

60. Exhibit 26 is a Google Earth aerial image of CR/REF subdivisions allegedly (according to Ex. 26) acquired by Google Earth on October 25, 2013. (6/13/19 Tr. 124:22-25; Ex. 26.)

61. Ms. Bawden testified that she had looked at the Google Maps aerial photograph (Ex. 26) before assessing penalties in this case in 2013 (2/27/18 Tr. 27:17-28:3), but DEQ did not obtain the USDA photograph (Ex. 23) until after the Board remanded the case, so it did not form part of DEQ's original assessment of violations (6/13/19 Tr. 146:3-148:25).

62. Prior to the February 2019 remand from the Board, DEQ had relied upon other aerial photos to try to prove the allegations in this enforcement action. Those other aerial photos, previously used by DEQ, do not depict the same area and they look different than Exhibit 23. (6/13/19 Tr. 146:3-151:21.)

63. At most, both aerial photographs show, through some lighter coloring, that there was limited vegetative cover on some lots owned by CR/REF in June and October of 2013. (Exs. 23, 26; 6/13/19 Tr. 131:7- 132:10).

64. The aerial photographs, on their own, do not show by a preponderance of the evidence that there was construction activity occurring on any lots owned by CR/REF.

65. CR/REF successfully challenged the accuracy of both of the aerial photographs, through cross examination (6/13/19 Tr. 140:13-148:25) and with the testimony of Mr. Leep, who testified that the photographs: 1) were not accurate to his memory and experience in the subdivisions from September to December 2013 (6/13/19 Tr. 164:17-166:3, 234:23-235:17); 2) were internally inconsistent (6/13/19 Tr. 235:1-17); and 3) were lacking in detail (6/13/19 Tr. 218:6-13).

66. Mr. Leep further testified that any ground appearing in the aerial photographs that was cleared, graded, or otherwise disturbed by his contractors—through other permitted activity (e.g. road and utility instillation)—was seeded and achieved the necessary 70% vegetative cover such that DEQ terminated the permits (and never alleged any violation of those permits). (6/13/19 Tr. 218:14-25) (cite exhibits for permits, NOTs, SWPPS).

67. CR/REF provided evidence, through testimony and cross examination, that the green areas of the aerial photographs are private lawns or Billings city park land, which are watered regularly, as opposed to vacant lots, which do not receive regular watering. (6/13/19 Tr. 165:20-166:3.)

68. Mr. Freeland confirmed there is no requirement, once DEQ terminates a permit, for a permittee to maintain or revegetate areas where seeding and vegetation have died (for example, due to lack of regular watering over a period of months or years, since a permit was terminated). (6/13/19 Tr. 53:9-54:18.)

iv. Lot 15

69. The only photograph that Mr. Freeland took during his September 9, 2013 inspection that arguably shows a portion of a lot owned by CR/REF was photograph 13 (Ex. 16 at 15).

70. Mr. Freeland testified that when he took photograph 13, he was "standing to the north of Lot 15 toward the bottom, and I would have been looking toward a southerly… looking south across the street at 15." (6/13/19 Tr. 25:18-21, *see also* 25:22-26:20, 241:4-9.)

71. CR/REF provided contrary testimony from Mr. Leep, however, that Lot 15 was not shown in photograph 13, and the location of the photograph was mislabeled on Ex. 16 (the map showing where Mr. Freeland's photographs were taken). (6/13/19 Tr. 160:18-161:12, 166:4-9; Ex. 16 at 1, 15.)

72. Mr. Freeland was not able to ascribe a street address to the location of photograph 13, but gave a GPS location, which he subsequently verified using the metadata on the photograph from his iPhone. (Ex. 15, 16 at 15; 6/13/19 Tr. 40:1-5, 42:7-13, 55:3-58:7, 238:1-9, 242:2-244:21.)

73. In 2015, during discovery, DEQ designated the addresses pictured in photograph 13 as 3028, 3030, and 3032 Western Bluffs Blvd. (6/13/19 Tr. 55:18-58:6; Ex. 16 at 15.)

74. DEQ did not present any evidence that CR/REF owned property at 3028, 3030, or 3032 Western Bluffs during the relevant time period between September 23, 2013 and December 23, 2013.

75. The property at 3028 Western Bluffs was conveyed from Reflections to a third party on March 29, 2013. (Ex. PPP.)

76. The property at 3030 Western Bluffs was conveyed from Reflections to a third party on July 9, 2013. (Ex. JJ.)

77. The property at 3032 Western Bluffs was conveyed from Reflections to a third party on May 21, 2013. (Ex. QQQ.)

78. The street address of Lot 15 is 3036 Western Bluffs Blvd. (6/13/19 Tr. 161:10-12.).

79. Lot 15, Block 3, of Reflections at Copper Ridge subdivision, second filing was owned by Reflections at the time of the September 9, 2013 inspection, and the September 23, 2013 and the November 8, 2013 Violation Letters. Lot 15, Block 3, of Reflections at Copper Ridge subdivision, second filing was owned by Reflections until conveyed by warranty deed on June 12, 2014. (Ex. 39 at 11.)

80. Mr. Freeland testified that he believed the photograph showed that there was "disturbed ground with no vegetative cover, there's stockpiling of material on the lot near the curb line, and then of course the track-out…" (6/13/19

Tr. 21:3-15, 26:13-16; see also 2/26/18 Tr. 76:14-19, 178:20-21; Ex. 16 at 15.)

81. Mr. Freeland also stated that he did not know where the property lines were; they were not marked; and the photograph does not show the homes that were being built on either side of Lot 15. (6/13/19 Tr. 238:17-239:10; Ex. 16 at 15.)

82. Mr. Freeland did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there. (6/13/19 Tr. 59:5-9; 18-20.)

83. It is unclear from the photograph and from Mr. Freeland's testimony whether there was any stockpiled material on Lot 15 or if there were, who placed it and when. (6/13/19 Tr. 94:2-8; Ex. 16 at 15.)

84. The portion of the lot shown in photograph 13, which may be Lot 15, is lacking in vegetative cover. (Ex. 16 at 15.)

85. Mr. Leep affirmatively testified that there was no construction activity occurring on Lot 15 from September to December 2013. (6/13/19 Tr. 166:10-12.)

86. CR/REF also provided evidence that the only construction activity conducted on Lot 15 was pursuant to Permit No. MTR 104590, and under contract with H.L. Ostermiller, for work was completed in 2012. (6/13/19 Tr. 49:2-19, 51:9-52:1, 55:10-14; Exs. YY, WW.)

87. Permit MTR104590 issued to H.L Ostermiller through a NOI dated June 15, 2012 provided permit coverage that included each individual lot, in its entirety, for the third and fourth filings of the Copper Ridge subdivision and for the second phase of the Reflections subdivision. The permit area includes all of lot 15, block 3 in the second phase of the Reflections subdivision – the area that DEQ alleges is shown in photograph 13. (6/13/19 Tr. 51:9-52:1; 55:10-14; Ex. YY.)

88. DEQ confirmed the termination of Permit MTR104590 on December 19, 2012, stating "[t]he reason for terminating this permit authorization is because the construction project site has achieved 'Final Stabilization' as defined in the General Permit, and all applicable fees have been paid." (6/13/19 Tr. 49:2-19; Ex. WW.)

C. Inspection September 9, 2013

89.*On September 7, 2013, there was a significant storm event in and around Billings, MT. (Ex. 14.)

90. *The following day, the Billings Gazette published a story about the effects of the storm that included some discussion of the conditions in the CR/REF subdivisions during and after the storm. (Ex. 14; 2/26/18 Tr. 50:25-53:03.)

91. *Based on the Gazette's report, DEQ compliance inspector Dan Freeland visited CR/REF to conduct an inspection. (2/26/18 Tr. 50:25-53:03.)

92. *Two days after the storm event, on September 9, 2013, Mr. Freeland conducted an inspection of the CR/REF subdivisions. JSF ¶ 6.

93. *During the September 9, 2013 inspection, Mr. Freeland observed and documented sediment tacking on the streets and concrete waste washed on to the ground. (2/26/18 Tr. 54:21-56:4, 73:10-19, 74:1-6, 74:14-20, 74:24-75:8, 173:16-20; Ex. 15; CR/REF Proposed Findings of Fact (CR) ¶ 16; DEQ ¶ 16.)

D. Correspondence September to December 2013

94. CR and REF were first notified of Montana Water Quality Act violations at the subdivisions by a Violation Letter, dated September 23, 2013, addressed to Copper Ridge Development Corporation. (6/13/19 Tr. 17:11-12; Ex. 2.)

95. *On September 23, 2013, DEQ sent Copper Ridge, through Gary Oakland, a letter. JSF ¶ 7; Ex. 2.

96. *The letter stated, "The Montana Department of Environmental Quality (DEQ) has determined Copper Ridge Development Corporation is in violation of the Montana Water Quality Act (WQA) at the Copper Ridge Subdivision and Reflections at Copper Ridge Subdivision located in Billings, Montana and is notifying Copper Ridge Development Corporation of a formal enforcement action." (2/26/18 Tr. 65:24–66:8; Ex. 2 at DEQ 000038 – DEQ 000040; DEQ ¶ 18; CR Resp ¶ 1.)

97. DEQ asserted that the "purpose of a violation letter is to identify any violations that were observed, to state any corrective actions that could be taken to remedy the violations, and identify where in the code or the rules that there was a violation that occurred." (6/13/19 Tr. 17:19-23.)

98. DEQ asserted that the factual basis of the alleged violations in this case are contained in the "six bullet points" on page 2 of the September 23, 2013 Violation Letter and that each bullet point sets forth "an independent factual basis for a violation." (6/13/19 Tr. 17:24-18:23; Ex. 2.)

99. The first bullet point on page 2 of the September 23, 2013 Violation Letter alleges that "[a]ctive construction is occurring throughout the facility site. Construction activities include clearing, excavation, stockpiling, grading, and construction of single-family homes." (Ex. 2, p. 2.)

100. DEQ "didn't have photographs specifically for the first bullet point" and none of the photographs attached to the September 23, 2013 Violation Letter were identified as supporting the allegation in the first bullet. (6/13/19 Tr. 20:16-21:2; 31:20-21) ("I didn't identify photos with the first issue – or first violation fact.").

101. DEQ presented no testimony addressing violations associated with the second, third, fifth and sixth bullets on page 2 of the September 23, 2013 Violation Letter.

102. DEQ testified that Photo 13 provided evidence of the fourth bullet point allegation of "sediment track-out onto impervious surfaces within areas of active construction" and as evidence of the sixth bullet point allegation of "sediment was built up near storm drains throughout the subdivision." (6/13/19 Tr. 21:3-15; *see also* 2/26/18 Tr. 1:76:14-19.)

103. *In a September 27, 2013 letter, CR/REF provided clarification to DEQ regarding ownership information and sought to distinguish the violations based on the separate subdivisions, Copper Ridge and Reflections. (Ex. 12; 2/26/18 Tr. 79:21-80:15, 83:8-83:16; CR ¶ 2; DEQ ¶¶ 20, 22.)

104. *In an October 8, 2013 letter responding to CR/REF's September 27, 2013 correspondence, Mr. Freeland explained that, based on his September 9, 2013 inspection, DEQ determined that the Copper Ridge Subdivisions were part of a greater common plan of development and one violation letter was adequate to address the violations at both subdivisions. (2/26/18 Tr. 80:19-81:24; Ex. O; DEQ ¶ 21; CR Resp. ¶ 1.)

105. *CR/REF responded with letter on October 29, 2013 regarding ownership and again sought to distinguish the violations based on the separate subdivisions. (Ex. 15; CR ¶ 2; DEQ ¶¶ 20, 22.)

106. *On November 8, 2013, DEQ issued another letter, which stated that violations at the CR were distinguishable from violations at REF. JSF ¶ 9.

107. *Within a timeframe acceptable to DEQ, Copper Ridge and Reflections at Copper Ridge each took the corrective action identified in the September 23, 2013 and November 8, 2013 letters from DEQ. JSF ¶ 10.

E. Permits (under protest) December 23, 2013

108. *On December 23, 2013, DEQ received NOI and SWPPPs from CR/REF (collectively, NOI package). (Exs. 3-6; JSF ¶ 8; 2/27/18 Tr. 59:9-21, 60:11-18.)

109. *On January 8, 2014, DEQ sent confirmation letters to Reflections issuing Permit No. MTR105376 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at Reflections, and to Copper Ridge issuing Permit No. MTR105377 authorizing coverage under General Permit No. MTR100000 for storm water discharges associated with construction activity at Copper Ridge. JSF ¶ 11.

110. *Permit No. MTR105376 and Permit No. MTR105377 were effective from the date DEQ received the NOI Package on December 23, 2013. (Ex. 3; Ex. 4; 2/26/18 Tr. 95:23-96:10.)

111. Permit No. MTR105376 was issued to "Reflections at Copper Ridge, LLC" (Ex. 5 at 1), for a total construction-related disturbance area of "14.9 acres" for construction activity involving "construction of new single-family homes and

the necessary landscaping to complete the first, second, and third filing of the Reflection [sic] at Copper Ridge subdivision." (Ex. 5 at 3.)

112. Permit No MTR105377 was issued to "Copper Ridge Subdivision" (Ex. 3 at 1) for a total disturbance area of "11.94 acres" (Ex. 3 at 3), for construction activity involving "new single-family homes and the necessary landscaping to complete the third and fourth filing of Copper Ridge subdivision. A material stockpiling area (containing the proposed concrete washout area) in the area of the sixth filing as well as five lots in the first filing that have not yet achieved final stabilization." (Ex. 3 at 3.)

113. CR/REF did not own any lots in the first filing of the Copper Ridge subdivision on December 23, 2014, and there is no evidence of what lots they owned in the sixth filing of Copper Ridge. (6/13/19 Tr. 204:15-205:9.)

114. CR/REF does not and has not engaged in any single-family homebuilding in the Copper Ridge or Reflections subdivisions. (6/13/19 Tr. 96:8-97:22.)

115. CR/REF obtained Permit No. MTR105376 and Permit No. MTR105377 under protest, based on their understanding that they had to, for activity they did not conduct, and (in the case of the first filing of Copper Ridge at least) for land they did not own. (6/13/19 Tr. 204:15-205:9.)

F. Inspection October 21, 2014

116. *On March 7, 2014, Mr. Freeland sent an email to inspection and enforcement employees of DEQ stating, "I did not get to a lot of the new construction at [CR]. But I did document and photograph a few lots under construction and in one case there was a berm around the site and sandbags. There was also a house under construction which had straw bales on the perimeter. Appears to be an effort to control runoff from the individual lots I observed." (Ex. V.)

117. *On October 21, 2014, DEQ conducted a scheduled inspection of CR/REF. (JSF ¶ 12; 2/26/18 Tr. 100:11-100:20, 105:24-106:3; Ex. 7 at DEQ 000113; Ex. 8 at DEQ 000125.)

118. *On December 9, 2014, DEQ sent CR/REF letters that notified CR/REF of the alleged MPDES Permit violations observed and documented by DEQ Inspectors during the October 21, 2014 inspection and requested corrective action to address the violations. (JSF ¶¶ 13, 14; Ex. 7; Ex. 8.)

119. *In December 2014, CR/REF requested an extension from DEQ in order to respond to DEQ's December 9, 2014 letter of violation and inspection report; DEQ granted the extension by letter dated December 23, 2014. (Ex. X.)

120. *On January 8, 2015, the CR/REF subdivisions submitted a letter with corrective action and updates to their SWPPP to DEQ. (Ex. Y.)

121. *Within a timeframe acceptable to DEQ, CR/REF each took the corrective action identified in the December 9, 2014 letters from DEQ and submitted an updated SWPPP to DEQ. JSF ¶15.

122. *DEQ acknowledged the responses by CR/REF to the violations at the subdivisions noted during the October 21, 2014 inspection and identified in the December 9, 2014 letters. (2/26/18 Tr. 112:7-120:8; Ex. 18; Ex.19; DEQ ¶ 30; CR Resp. ¶ 1.)

123. *CR/REF did not propose "corrective action plans" to address violations of the Montana Water Quality Act. (2/28/18 Tr. 119:11; DEQ ¶ 31, CR Resp. ¶ 1.)

124. *On February 6, 2015, DEQ sent CR an acknowledgment letter indicating receipt of CR's response letter of January 8, 2015. DEQ indicated that there was further compliance assistance needed and outlined three specific areas for improvement. (Ex. 18; 2/26/18 Tr. 65:24 – 66; Ex. 2 at DEQ 000038 – DEQ 000040.)

125. *On February 9, 2015, DEQ sent REF an acknowledgment letter indicating receipt of REF's response letter dated January 8, 2015. DEQ indicated that there was further compliance assistance needed, mainly paperwork errors to be corrected. (Ex. 19.)

126. *DEQ seeks penalties for the violations noted in the December 9, 2014 letter. (Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.)

127. *DEQ seeks penalties for the violations noted in the December 9, 2014 letter. (Ex. 9; Ex. 10; CR ¶ 11; DEQ ¶ 32.)

G. Owner/Operator October 21, 2014

128. DEQ entered no evidence regarding lots owned by CR/REF in October of 2014.

129. The undersigned asked Mr. Leep about lot addresses specifically noted in the December 9, 2014 inspection reports (Ex. 7 at 4-6; Ex. 8 at 5-6), but Mr. Leep was unsure of whether CR/REF owned the lots mentioned in October of 2014. (6/13/19 Tr. 207:23-212:22.)

130. Mr. Leep testified, that if there were construction activity going on during October of 2014, in the filings covered by Permit No. MTR105376 and Permit No. MTR105377, it was "highly unlikely" that he owned the lots on which the construction activity occurred, because the only active construction in October of 2014 in those areas was for homebuilding (which CR/REF does not do). (6/13/19 Tr. 209:1-18.)

H. AOs and Alleged Violations

131. *DEQ issued AOs on March 27, 2015, identifying four alleged violations of the Montana Water Quality Act at CR/REF:

(1) Violation of Administrative Rules of Montana (ARM) 17.30.1105 by conducting construction activities prior to submitting an NOI at Reflections at Copper Ridge and Copper Ridge subdivisions;

(2) Violation of § 75-5-605(2)(c), MCA by discharging storm water associated with construction activity without a discharge permit;

(3) Violation of § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f) by placing waste where it will cause pollution; and

(4) Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000.

(JSF ¶ 16; AO.)

132. Reflections was issued an AO on March 27, 2015, initiating formal enforcement action. See Exhibit 9, DEQ 000137. The AO notified Reflections that the DEQ Inspector "documented homes under construction and areas disturbed by associated construction activity such as cleared and graded areas, excavations, soil stockpiles, concrete washout area, and sediment tracking in streets." (Exhibit 9, DEQ 000144-145.)

133. Copper Ridge was issued an AO on March 27, 2015, initiating formal enforcement action. See Exhibit 10, DEQ 000167. The letter notified Copper Ridge that the DEQ Inspector "documented homes under construction and areas disturbed by associated construction activity such as cleared and graded areas,

excavations, soil stockpiles, concrete washout area, and sediment tracking in streets." (Exhibit 9, DEQ 000174-175.)

134. *At the hearing, DEQ agreed that the number of days of violation for Violation 2 could be adjusted down to 19 days based on the precipitation events noted in the most current National Oceanic and Atmospheric Administration (NOAA) weather service data. (Ex. 20; 2/28/18 Tr. 8:8-21, 17:6-10, 33:21-35:2; CR ¶ 32; DEQ ¶ 55.)

135. *The NOAA data shows eight days between September 23, 2013 and December 23, 2013 when there were precipitation events greater than 0.25 inches. (Ex. 20.)

136. *Each of the AOs assesses a penalty and has a penalty calculation worksheet attached. (2/26/18 Tr. 215:19-216:5; Ex. 9 at DEQ 000154 – 000155, DEQ 000157; Ex. 10 at DEQ 000184 – 000185, DEQ 000187; DEQ ¶ 34; CR Resp. ¶ 1).

I. Excluded Photos Offered by DEQ.

137. Following the BER's first remand of this matter on the owner/operator issue, DEQ disclosed four previously-undisclosed photographs, all of which were excluded pursuant to Hearing Examiner Clerget's order of June 4, 2019. (Order on Motions in Limine and Status Conference, June 4, 2019).

138. BER subsequently found that Hearing Examiner Clerget abused her discretion by excluding these four photographs. 8/9/19 Bd. Tr., 222:8-15.

139. Of the excluded photographs presented by DEQ, Photo 1 is identical to Photo 13, which has already been admitted in Exhibits 2 and 16. 2/26/18 Hrg. Tr., Vol. 1, 54:15-16; 150:12; 8/9/19 Bd. Tr., 156:17-25.

140. Since Photo 1 was already admitted into evidence, it is part of the record and was considered by Hearing Officer Clerget when issuing her FOFCOL on the owner/operator issue, and presumably not found to constitute sufficient evidence to decide this matter in favor of DEQ.

141. The other three excluded photographs, Photos 3, 4, and 5, depict areas that were, on September 9, 2013 at the time the photographs were taken, within the disturbance area of permit MTR104993, specifically near lots 11, 12 and 13 of the third filing of the Reflections subdivision. Ex. BBB (showing slope grading marks, indicating a material fill area on lots 10, 11, 12, 30, 31, 32, 33, and 34); 7/8/2019 Proposed Finding of Fact No. 53; 8/9/2019 Bd. Tr., 65:8–66:23; 209:16-20.

142. Permit MTR104993 allowed ground disturbance in "Material fill areas" within the third filing of the Reflections Subdivision. Id.

143. Photo 3 of the excluded photographs, also referred to by DEQ as Exhibit 240, was taken "facing east. Standing near 3069 Western Bluffs Blvd." (DEQ Disc. C, CR Photo Locations 2013 and Exhibit 240 (September 27, 2019)).

144. 3069 Western Bluffs Blvd. is lot 12 in the third filing of the Reflections Subdivision. Ex. 47.

145. Photo 4 of the excluded photographs, also referred to by DEQ as Exhibit 241, was taken "facing southeast. In front of 3071 Western Bluffs Blvd." Exhibit D to CR/REF's May 22, 2020 Motion for Summary Judgment.

146. 3071 Western Bluffs Blvd. is lot 13 in the third filing of the Reflections Subdivision. Ex. 47.

147. Photo 5 of the excluded photographs, also referred to by DEQ as Exhibit 239, was taken "facing south. Standing near 3070 Western Bluffs Blvd." Exhibit D to CR/REF's May 22, 2020 Motion for Summary Judgment.

148. 3070 Western Bluffs Blvd. is lot 32 in the third filing of the Reflections Subdivision. Ex. 47.

149. None of the excluded photographs depict areas within the Copper Ridge Subdivision. 6/13/2019 Hrg. Tr., 27-28.

DISCUSSION

A. Relevance on Remand

When the BER remanded this case on the owner/operator issue, it was clear that if CR/REF were found to be owner/operators, then the findings and conclusions in the Order on Summary Judgment and the FOFCOL would be undisturbed (i.e. before the BER for consideration). (2/8/19 Tr. at 137:10-21.) Therefore, the findings and conclusions in both the Summary Judgment Order and original FOFCOL limit the relevant evidence on remand. If CR/REF are found to be owner/operators, then the Board must return to the posture at the February 8, 2019 BER meeting, when it considered the findings and conclusions in the Summary Judgment Order and original FOFCOL. (If the Board were to reject those findings, then it would have remanded the entire case for rehearing anyway.)[3]

[3]Before the hearing on remand, DEQ attempted to enter a large amount of evidence that essentially supported an entirely new theory of the case. In the June 4, 2019 Order on Motions *in Limine* and the status conference on the same day, the undersigned specifically limited the evidence to be presented at the remand hearing. Order, June 4, 2019, at 4-8; 6/4/19 Tr. (forthcoming). The undersigned found that:

> this entire proceeding is bounded by the following things: Mont. Code Ann. § 75-5-617; the notice that DEQ gave to CR/REF of the alleged violations, as contained in DEQ's various correspondence with CR/REF from September 9, 2013 to March 27, 2015; DEQ's discovery responses, including its Rule 30(b)(6) deposition testimony, and its prior testimony in this litigation; the findings of fact and conclusions of law contained in the Summary Judgment Order and the Proposed FOFCOL that were not disturbed by the Board – i.e. everything other than the Summary Judgment findings concerning CR/REF's status as an owner/operator. Additionally, the principles of equity and estoppel prevent DEQ from now—six years later…—presenting an entirely new theory with entirely new evidence.... If it is true that CR/REF owned land in the subdivisions on which they engaged in construction activity, and DEQ gave CR/REF sufficient notice of those violations in its prior correspondence, then such evidence is properly before the undersigned (and the Board).

Order, June 4, 2019, at 5-6. The undersigned clarified the practical meaning of this holding during the status conference on June 4, 2019, with respect to each of the alleged violations alleged in the AOs and the findings contained in the Summary Judgment Order and Original Proposed FOFCOL.

The Summary Judgment Order and original FOFCOL made specific findings about the violation and penalty dates, which translated as follows for the remand hearing (as explained during the June 4, 2019 status conference):

1) Violation One: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order finding that DEQ provided insufficient notice of this violation would stand. If CR/REF were found not to be an owner/operator conducting construction activities, then they were not required to submit an NOI and could not have violated Admin. Rule 17.30.1105;

2) Violation Two: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding a violation of Mont. Code Ann. § 75-5-605(2)(c) by discharging storm water associated with construction activity without a discharge permit. The conclusion in the original FOFCOL regarding the appropriate penalty for this violation would also stand, such that there would be eight days of violation found, for eight days of precipitation events between September 23, 2013 (when CR/REF received notice from DEQ that they needed a permit) and December 23, 2013 (when CR/REF received permit coverage satisfactory to DEQ). If CR/REF were found not to be an owner/operator conducting construction activities, then they were not required to obtain permit coverage and therefore could not have violated Mont. Code Ann. § 75-5-605(2)(c);

3) Violation Three: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding that CR/REF placed waste, and the conclusions of the original FOFCOL would stand, finding that CR/REF "constructively" caused pollution by discharging storm water without a permit for eight days between September 23, 2013 and December 23, 2013, in violation of Mont. Code Ann. § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f). If CR/REF were found not to be an owner/operator, then they were not required to obtain permit coverage, and therefore could not have "constructively" caused pollution by discharging without a permit. Therefore, they could not have violated Mont. Code Ann. § 75-5-605(1)(a), MCA, ARM l 7.30.624(2Xf), and ARM l 7.30.629(2)(f).

4) Violation Four: if CR/REF were found to be an owner/operator, then the conclusion in the Summary Judgment Order would stand, finding a violation of Violation of § 75-5-605(1)(b), MCA by violating terms and conditions of General Permit No. MTR 100000. The conclusion in the original FOFCOL regarding the appropriate penalty for this violation would also stand, such that there would be one day of violation found, for the observations that DEQ inspectors made regarding a lack of BMPs in place on October 21, 2014.

(6/4/19 Tr. 11:25-12:6, 14:21-15:3, 16:20-17:13; *see also* JSF ¶ 16; AO.

Thus, the only time period relevant to the alleged violations—if CR/REF were found to be owner/operators—is September 23, 2013 (when CR/REF received notice from DEQ that they needed a permit) to December 23, 2013 (when CR/REF received permit coverage satisfactory to DEQ), and October 21, 2014 (when DEQ observed a lack of BMPs in place during its inspection), because those are "the time of the discharge[s]."4 (2/8/19 Tr. at 114:5-115:14, 117:10-15, 119:13-21.)"

B. Owner/Operator September to December 2013 and October 2014

On remand, DEQ's main theory of construction activity in the subdivisions appeared to be that CR/REF had cleared and graded the lots they owned, perhaps beyond what was allowed in prior permits. DEQ's best evidence of this was contained in photograph 13 from Dan Freeland, Mr. Freeland's testimony, and the

aerial photographs from Google Earth and the USDA. [5]

Photograph 13 was insufficient evidence of construction activity occurring on Lot 15 because, even if the photograph showed Lot 15 (which is questionable), at most it shows that there was bare ground near the road with little or no vegetative cover and some gravel of unknown origin (and uncertain exact location, with respect to Lot 15 specifically). DEQ terminated the prior road building permit, which covered Lot 15, and under which the ground around the road, shown in photo 13, would have been disturbed. This termination confirms the Reflection's subcontractor's signed statement that the property had been seeded and achieved 70% vegetative cover in June of 2013. It is reasonable that by September of 2013, without regular watering and after a major storm event, that vegetative cover could have died or been washed away.

Similarly, regarding the other lots that CR/REF owned throughout the subdivision, Mr. Freeland's testimony and the aerial photographs did not provide a preponderance of the evidence that CR/REF cleared or graded the lots they owned, or did so in the absence of, or in violation of, a permit. At most (giving DEQ the

5 It is questionable whether these photographs should have been admitted at all, as CR/REF did not get them prior to May of 2019, and it is unclear how exactly they factored into DEQs determination of alleged violations on 9/9/13 or 10/21/14. It seems likely that DEQ was justifying their violations after the fact with evidence not provided to CR/REF at the time of the violations (or during discovery, or SJ, or the original hearing). However, the photos are (were) publicly available documents at the time the violations were alleged, so they were admitted over CR/REFs objection. Ultimately, as shown below, they were unconvincing, so even if they were admitted in error, it does not change the ultimate outcome.

benefit of every doubt), the photographs showed some evidence (but not a preponderance) of ground areas lacking vegetation in June and October of 2013. Lacking vegetation, however, does not constitute proof by a preponderance of the evidence of construction activity. It certainly does not constitute proof by a preponderance of the evidence—especially when coupled with CR/REF's contrary evidence—that CR/REF was conducting construction activity on the lots they owned between September 23, 2013 and December 23, 2013 and on October 21, 2014.

There is no law (or at least, DEQ has pointed to none) that says an owner/operator of a lot must maintain 70% vegetative cover on lots in perpetuity, after permitted construction activity is completed. Even if vegetative cover did (without anyone to water or maintain it) disappear after some past construction activity ceased (and after DEQ terminated permits), that would not constitute proof of any of the violations alleged in the AO. In other words, even if there were a discharge of storm water over bare and vacant lots lacking vegetative cover between September and December 2013, that would not constitute a "discharge of storm water related to construction activity" as contemplated by the statutes and administrative rules, because there is no "construction activity" at the time of the discharge—there is only a discharge because the vegetation died where past construction activity occurred. Failing to maintain vegetation is neither a violation

alleged in this case, nor a discharge regulated by the MPDES permitting scheme. If it were, every farmer with a tilled and unplanted field would be guilty of discharging storm water without a permit.

The four previously-excluded photos do not change the calculus in this matter as they do not assist DEQ in meeting its burden, by a preponderance of the evidence, that either: 1) CR/REF was the "owner/operator of lots from which violations occurred; or 2) that any alleged violations occurred during a time when permit coverage existed. There is significant disagreement between the parties as to what "evidence" these photographs depict, and, given the ambiguity as to what these photographs actual depict, they cannot be given any substantial weight. Thus, without any weight being accorded these photographs, the prior FOFCOL on the owner/operator issue should remain undisturbed and presented to the BER for consideration because DEQ failed to carry its burden to prove that these photographs resolved the owner/operator issue or showed violations for which CR/REF was responsible.

CONCLUSIONS OF LAW

1. BER has jurisdiction to hear this matter pursuant to its authority under Mont. Code Ann. § 75-5-611(4)-(9), and the Montana Administrative Procedure Act, provided for in Title 2, chapter 4, part 6 (MAPA).

2. DEQ is authorized under Mont. Code Ann. § 75-5-211 to administer the provisions of the Montana Water Quality Act, Title 75, Chapter 5, Mont. Code Ann. ("WQA"). The permit program administered by DEQ is implemented through rules adopted by the BER. Mont. Code Ann. §§ 75-5-401 and 75-5-402.

3. DEQ treated CR and REF as separate violators under Mont. Code Ann. § 75-5-611 and initiated two separate enforcement actions in the above-captioned matters after considering evidence that each company is a separate legal entity, and each conducted separate development activities. Additionally, Copper Ridge and Reflections obtained separate permit authorizations and submitted separate SWPPPs covering development activities at their respective subdivisions. Based on the evidence presented at the hearing and summary judgment, Copper Ridge and Reflections are separate legal entities and therefore subject to separate penalties.

4. "Owner or operator" is defined as "a person who owns, leases, operates, controls, or supervises a point source" under Mont. Code Ann. § 75-5-103(26).

5. Owners and operators of construction sites that disturb equal to or greater than one acre of land must obtain National Pollutant Discharge Elimination System (NPDES) permit coverage. *See* 40 CFR §122.26(b)(15). The EPA has delegated its authority to administer the NPDES permit program within the State of

Montana to DEQ. Under that delegation, DEQ issues MPDES permits for "point source" discharges of pollutants to state waters including permits authorizing storm water discharges associated with construction activity. *See* Section 75-5-401, MCA, and Administrative Rules of Montana (Admin Rule) Title 17, chapter 30, subchapters 11, 12, and 13. Under Admin Rule 17.30.1105(1)(a), a person who discharges or proposes to discharge storm water from a point source associated with construction activity is required to obtain coverage under an MPDES general permit or an MPDES individual permit.

6. The permit program administered by DEQ is implemented through rules adopted by the BER. §§ 75-5-401 and 75-5-402, MCA.

7. The rules establish the system for issuing permits for point sources discharging pollutants into state waters and allow DEQ to administer the permit program to be compatible with the requirements of the Federal Clean Water Act. ARM 17.30.1301. The Clean Water Act prohibits the discharge of any pollutants into regulated surface waters -- permitted pollutant discharges are an exception to this mandate. 33 U.S.C. § 1311 (a).

8. DEQ requires MPDES permit coverage under a general or individual permit for discharges of storm water associated with construction activity. ARM 17.30.1105(1)(a). Upon submittal of an NOI, coverage under General Permit MTR100000 is available. Admin Rule 17.30.1115(4).

9. General Permit MTR100000 requires the permittee to identify sources of pollutants and implement and maintain best management practices (BMPs) to reduce the potential discharge of pollutants from the construction activities in the event of a storm. Exhibit 1, DEQ000005.

10. "Storm water discharge associated with construction activity" is defined as follows:

> a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of the rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

Admin Rule 17.30.1102(28).

11. "Final stabilization" is defined as follows:

> the time at which all soil-disturbing activities at a site have been completed and a vegetative cover has been established with a density of at least 70% of the pre-disturbance levels, or equivalent permanent, physical erosion reduction methods have been employed. Final stabilization using vegetation must be accomplished using seeding mixtures or forbs, grasses, and shrubs that are adapted to the conditions of the site. Establishment of a vegetative cover capable of providing erosion control equivalent to pre-existing conditions at the site will be considered final stabilization.

ARM 17.30.1102(5).

12. "Point source" is defined as "a discernible, confined, and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit,

well, discrete fissure, container, rolling stock, or vessel or other floating craft, from which pollutants are or may be discharged." Mont. Code Ann. § 75-5-103(29).

13. A person who discharges or propose to discharge storm water associated with construction activity shall submit a Notice of Intent (NOI) to be covered by the General Permit. ARM 17.30.1115(4). The NOI must be signed by the owner of the project or by the operator, or by both the owner and the operator if both have responsibility to ensure that daily project activities comply with the SWPPP and other general permit conditions.

14. An NOI must be completed on an NOI form developed by the department, in accordance with the requirements stated in the general permit, and must include the legal name and address of the operators, the facility name and address, the type of facility or discharges, and the receiving surface waters. Admin Rule 17.30.1115(2).

15. An NOI must be accompanied by a SWPPP, which must be completed in accordance with the requirements identified in the general permit, must be signed by all signatories to the NOI; and must require the identification and assessment of potential pollutant sources that could be exposed to storm water runoff, and must contain provisions to implement BMPs, in accordance with the general permit. Admin Rule 17.30.1115(3).

16. In this matter, DEQ had the burden of proving, by a preponderance of the evidence, that CR/REF were owners or operators within the meaning of Mont. Code Ann. §75-5-103(26), such that they were required by Admin. Rule 17.30.1105(1)(a), 17.30.115(a), and 17.30.1102(28) to obtain MPDES permit coverage for construction activity occurring at the time of the violations alleged by DEQ.

17. The relevant dates of the alleged violations (on which DEQ must prove CR/REF were owners or operators of construction activity) include September 23, 2013 to December 23, 2013, and October 21, 2014.

18. DEQ failed to provide evidence sufficient to show that CR/REF were owners or operators within the meaning of Mont. Code Ann. §75-5-103(26), such that they were required by Admin. Rule 17.30.1105(1)(a), 17.30.115(a), and 17.30.1102(28) to obtain MPDES permit coverage for any construction activity occurring from September 23, 2013 to December 23, 2013, or on October 21, 2014.

19. CR and REF are not the owners or operators within the meaning of Mont. Code Ann. § 75-5-103(26), because they did not own lots within the subdivisions at the time of the alleged violations in the AOs that were disturbed by "construction activity" or contained point sources of "storm water discharges associated with construction activity" (per Admin. Rule 17.30.1102(28)), requiring or

violating permit coverage pursuant to Admin. Rule 17.30.1115, 1730.1105, and Mont. Code Ann. § 75-5-605.

20. Because CR/REF were not owners or operators of construction activity requiring MDES permit coverage at the time of the alleged violations, CR/REF were not required to obtain permit coverage.

Violation One

21. DEQ did not provide adequate notice regarding its first alleged violation against CR/REF—a violation of Admin. Rule 17.30.1105—and therefore no violation of that Admin. Rule can be shown and DEQ cannot seek administrative penalties based on such a violation.

Violation Two

22. DEQ has failed to provide facts necessary to establish that CR/REF discharged storm water to state waters without a permit in violation of Mont. Code Ann. § 75-5-605(2)(c).

Violation Three

23. DEQ has failed to provide facts necessary to establish that CR/REF placed wastes where they will cause pollution of any state waters in violation of Mont. Code Ann. § 75-5-605(1)(a).

Violation Four

24. DEQ has failed to provide facts necessary to establish that CR/REF violated provisions contained within its general permit in violation of Mont. Code Ann. § 75-5-605(1)(b).

PROPOSED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, DEQ has failed to meet their burden of proof to establish the violations alleged in their notice letters of September 23, 2013, and the AOs dated March 27, 2015.

Therefore, IT IS ORDERED that Board has "determine[d] that a violation has not occurred" and therefore "declare[s] the department's notice void," pursuant to Mont. Code. Ann. § 75-5-611(6)(e). Judgment is entered in favor of CR/REF and this action is DISMISSED with prejudice.

DATED this 22nd day of February, 2021.

/s/Jeffrey M. Doud
Jeffrey M. Doud
Hearing Examiner
Agency Legal Services Bureau
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P.O. Box 201440
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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DATED: 2/22/21

/s/ Aleisha Kraske
Paralegal

9/9/13 DEQ conducts Inspection of the Copper Ridge Subdivisions. FOF 8

9/23/13 DEQ sends notice of violation letters to the Copper Ridge Subdivisions. FOF 10

9/27/13 Copper Ridge Subdivisions send letter to DEQ asking for subdivisions to be separated based on ownership information. FOF 12

10/8/13 DEQ responds to the Copper Ridge Subdivisions that collectively they are part of a greater common plan of development and therefore one letter addressing the violations at both subdivisions was adequate. FOF 14

10/29/13 Copper Ridge responds to DEQ contending they are separate entities and wish to have violations separated. FOF 12

11/8/13 DEQ issues two separate violation letters, one to Copper Ridge the other to Reflections at Copper Ridge. FOF 15

12/23/13 DEQ receives Copper Ridge Subdivisions' NOI package. FOF 17

1/8/14 DEQ sends confirmation letters to Copper Ridge and Reflections at Copper Ridge issuing permits. FOF 18

3/7/14 DEQ inspector Dan Freeland sends inspection and enforcement employees email regarding BMPs in place on some lots within Copper Ridge. FOF 19

10/21/14 Dan Freeland inspects the Copper Ridge Subdivisions. FOF 20

12/9/14 DEQ sends the Copper Ridge Subdivisions notice of violation letters. FOF 21

12/17/14 The Copper Ridge Subdivisions seek an extension of time in which to respond to DEQ's violation letter. FOF 23

12/23/14 DEQ grants the extension. FOF 23

1/8/15 The Copper Ridge Subdivisions provide written responses to DEQ regarding corrective action and update their SWPPP. FOF 24

2/6/15 DEQ sends Copper Ridge an acknowledgment letter indicating they received 1/8/15 response. DEQ indicates further compliance is needed and outlines 3 areas of concern. FOF 28

2/9/15 DEQ sends Reflections at Copper Ridge an acknowledgment letter indicating they received 1/8/15 response. DEQ indicates further compliance is needed and outlines 2 areas of concern. FOF 29

3/27/15 DEQ issues an Administrative Compliance and Penalty order to both Copper Ridge and Reflections at Copper Ridge. FOF. 31

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	**CASE NO. BER 2015-01 WQ**
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE, DEVELOPMENT CORPORTATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA. (MTR105377) [FID 2289, DOCKET NO. WQ-15-08]	**CASE NO. BER 2015-02 WQ**

ORDER ON EXCEPTIONS AND NOTICE OF SUBMITTAL

The undersigned has issued Proposed Findings of Fact, Conclusions of Law (Proposed Order). The Proposed Order has been served on the parties. Mont.

Code Ann. § 25-4-621 affords "each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision." *See* Mont. Admin. R. 1.3.223(1).

Mont. Code Ann. § 2-4-621(3) provides:

> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

The hearing examiner's Proposed Order is now before the Board of Environmental Review (BER), which constitutes the "officials who are to render the decision." Mont. Admin. R. 1.3.223 (1). The parties therefore have the opportunity to submit exceptions and make oral arguments before the BER concerning the hearing examiner's Proposed Order. Based on the Proposed Order, any exceptions, and any oral arguments presented, the BER will decide on the final agency action pursuant to the options stated in Mont. Code Ann. § 2-4-621 at its next scheduled meeting on **April 16, 2021**. If the parties request an extension of time for their exceptions briefs or responses, the BER will not decide on this case until (at the earliest) its meeting in June 2021.

IT HEREBY ORDERED:

1. Any party adversely affected by the Proposed Order will have until **March 15, 2021**, to file exceptions to the proposed order. If no party files exceptions this matter will be deemed submitted.

2. The parties will have until **March 29, 2021**, to file response briefs. If no party filed a response brief, this matter will be deemed submitted.

3. This matter will be submitted for final agency action and placed on the **April 16, 2021** agenda of the BER as an action item for final agency action.

4. The parties may present oral argument in person in front of the board at the April 16, 2021 meeting, or submit written statements in lieu of appearing and arguing in person. If a party chooses to submit a written statement rather than appear, it must be filed no later than **April 5, 2021**. Failing to appear in person or file a written statement will be deemed a waiver of the party's right to oral argument in front of the BER. The location, time, and agenda for the BER meeting, as well as the materials available to the BER members for review, will be available on the BER's website http://deq.mt.gov/DEQAdmin/ber at least one week in advance of the BER meeting. The parties are encouraged to regularly check the Board's website for any additional updates on the meeting.

5. Requests for extension will be entertained for good cause. If an extension is requested, this matter will be placed on a subsequent BER agenda and will not be submitted to the BER at its August meeting.

DATED this 23rd day of February, 2021.

/s/Jeffrey M. Doud
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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be mailed to:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORPORATION'S EXCEPTIONS TO HEARING EXAMINER'S SECOND PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER ON THE ISSUE OF OWNER/OPERATOR

In accordance with Hearing Examiner Doud's Order on Exceptions and Notice of Submittal, Copper Ridge Development Corporation ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") submit their exceptions to the Hearing Examiner's Second Proposed Findings of Fact & Conclusions of Law to the BER on the Issue of Owner/Operator ("2021 Proposed FOFCOL").[1]

PROCEDURAL HISTORY

1. The second complete paragraph on page 9 of the 2021 Proposed FOFCOL refers to "notice letters of September 23, 2013." This reference should be clarified to note that only one letter was issued on September 23, 2013, it was addressed to Copper Ridge and styled by DEQ as a "617 Letter of Violation." Ex. 2; *see also* Second Proposed FOFs 94 and 95 (referring to JSF ¶ 7). DEQ also sent letters regarding alleged violations to Copper Ridge on November 8, 2013 and December 9, 2014. Exs. 7 and 17. The November 8, 2013 letter described the same alleged violations as the September 23, 2013 letter and was again addressed to Copper Ridge. DEQ did not send Reflections the September 23, 2013 letter, the November 8, 2013 letter or any other letter alleging violations from September 2013. DEQ sent Reflections a letter on December 9, 2014, but that letter only alleged violations associated with the October 2014 inspection. Ex. 8.

[1] The latest Proposed FOFCOL is titled the "Second" Proposed FOFCOL; however, the document is actually the *third* proposed FOFCOL issued in these contested cases. The first Proposed FOFCOL was issued on July 16, 2018 ("2018 Proposed FOFCOL") and the second Proposed FOFCOL was issued July 8, 2019 ("2019 Proposed FOFCOL").

2. The second full paragraph on page 10 refers to the brief procedural history after the Board's August 9, 2019 remand. This paragraph should be expanded to include the complete history, including reference to Copper Ridge's and Reflections' April 9, 2020 motion in limine, which DEQ opposed and Hearing Examiner Clerget denied on June 9, 2020; DEQ's May 21, 2020 motion to amend the schedule, which was opposed by Copper Ridge and Reflections and denied by Hearing Examiner Clerget on June 4, 2020. Additionally, the three motions pending decision as of the date of the 2021 Proposed FOFCOL are all fully briefed and include Copper Ridge's and Reflections' motion for summary judgment (argued before Hearing Examiner Clerget on July 9, 2020),[2] Copper Ridge's and Reflections' motion to take judicial notice of fact, and Copper Ridge's and Reflections' motion to strike DEQ's affidavit. Copper Ridge and Reflections also filed a notice of supplemental authority on October 20, 2020, to which DEQ responded on November 2, 2020 and Copper Ridge and Reflections replied on November 11, 2020.

BOARD-ADOPTED FINDINGS OF FACT

The Board previously adopted Findings of Fact Nos. 1 through 42 during their August 9, 2019 meeting. The Board did so after hearing argument on DEQ's proffered exceptions to those first 42 Findings of Fact, after questioning the Parties

[2] DEQ offered no evidence in support of its opposition to summary judgment.

further and deliberating on the issues raised. *See* 08/09/19 Tr. 79-158. The Board's approval of those first 42 Findings of Fact has not been revised, revoked or negated. The 2021 Proposed FOFCOL includes those first 42 Findings of Fact, with non-substantive edits to revise formatting and correct typos.

Copper Ridge and Reflections again file no exceptions to any of the first 42 Findings of Fact. As a non-substantive clarification, Finding of Fact No. 10 refers to "CR/REF," apparently as the parties to the contested cases, when it appears more appropriate in the context of that finding to refer to the Copper Ridge and Reflections Subdivisions as the geographical locations. Neither Copper Ridge nor Reflections owned the totality of either subdivision; therefore, Copper Ridge and Reflections as the parties to these contested cases are distinct from the Copper Ridge Subdivision and the Reflections at Copper Ridge Subdivision. Should the Board wish to, the issue could be rectified by replacing the term "CR/REF" with the phrase "the Copper Ridge and Reflections at Copper Ridge Subdivisions" in Finding of Fact No. 10.

PREVIOUSLY PROPOSED FINDINGS OF FACT

Findings of Fact Nos. 43 – 136: No Exceptions. These findings are substantially the same as presented in the 2019 Proposed FOFCOL. Some formatting changes were made and the spelling of Mr. Freeland's name has been corrected throughout. Only Findings of Fact Nos. 43-53 were previously

considered by the Board and rejected during the August 9, 2019 meeting. 08/09/19 Tr. 163:10-22. Copper Ridge and Reflections again have no exceptions to Findings of Fact Nos. 43 – 136, but offer the following non-substantive issues for the Board's consideration:

- Finding of Fact No. 66 ends with a parenthetical stating "cite exhibits for permits, NOTs, SWPPS." To the extent that the finding is meant to cite the actual exhibits, those exhibits are:
  - For Copper Ridge Subdivision Phase 2, Permit MTR102807: SWPPP and Map at Exhibit 50, NOI at Exhibit A, NOT at Exhibit UU.
  - For Copper Ridge Subdivision Phases 3 and 4, Permit MTR104590: SWPPP at Exhibit 51, Map at Exhibit XX, NOI at Ex. B, NOT at Exhibit WW.
  - For Reflections Subdivision Phase 2, Permit 104590: SWPPP at Exhibit 51, Map at Exhibit YY, NOI at Exhibit B, NOT at Exhibit WW.
  - For Reflections Subdivision Phase 3, Permit 104993: SWPPP at Exhibit C, Mat at Exhibit BBB, NOI at Exhibit C, NOT at Exhibit AAA.

- Findings of Fact Nos. 91, 106, 116, and 117, like Finding of Fact No. 10 noted above, refer to "CR/REF," "CR" and "REF" as the parties to the contested cases when it seems they should more appropriately refer to the Copper Ridge and Reflections Subdivisions as the geographic places.

- Finding of Fact No. 131(3) appears to have a typo in the ARM citations. The citations should be ARM 17.30.624(2)(f) and ARM 17.30.629(2)(f). Exs. 9 and 10, ¶ 78.

NEWLY PROPOSED FINDINGS OF FACT

Findings of Fact Nos. 137 – 149 are newly offered in this 2021 Proposed FOFCOL. Copper Ridge and Reflections have no exceptions to Findings of Fact Nos. 137 – 149.

DISCUSSION

A. Relevance on Remand

Copper Ridge and Reflections note that they raised several exceptions and arguments to both the Order on Summary Judgment and the 2018 Proposed FOFCOL that were before the Board at the February 8, 2019 meeting. Should the Board return these contested cases to the posture they were in at the February 8, 2019 meeting, Copper Ridge and Reflections have several additional exceptions and arguments remaining to be heard at oral argument before the Board, followed by deliberation and decision by the Board. The "owner/operator" issue was but one of several issues before the Board at that time. The Board's decision to pursue the "owner/operator" issue did not exclude the several other issues raised by Copper Ridge and Reflections. Copper Ridge and Reflections have not and do not waive any of those remaining issues, exceptions and arguments. *See* Copper Ridge's and Reflections' *Exceptions to Hearing Examiner's Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law* (September 17, 2018).

Copper Ridge's and Reflections' arguments included the following issues, which have not yet been heard or decided by the Board and would be revived should the Board return these contested cases to the posture of February 8, 2019:

- DEQ failed to and cannot prove that Copper Ridge and Reflections are persons who discharged stormwater or that either placed or caused to be placed any wastes.
- DEQ failed to prove that any wastes caused pollution.
- DEQ failed to prove any subsequent days of violation.
- DEQ failed to prove that alleged violations 2 and 3 occurred at each subdivision.
- Section 75-5-617(2), MCA and ARM 17.30.2003(5) preclude assessment of penalties.
- ARM 17.30.2003(7) precludes assessment of penalties for alleged violations 3 and 4.
- Justice requires that penalties for alleged violations 2 and 3 be reduced to zero.
- The penalties should be reduced for good faith and cooperation.
- The penalties should be reduced in consideration of amounts voluntarily expended.

Additionally, should the Board return these contested cases to the posture of the February 8, 2019 meeting, Copper Ridge and Reflections argued a lack of competent substantial evidence supporting several of the 2018 Proposed Findings of Fact which are not at issue in this 2021 Proposed FOFCOL. Copper Ridge and Reflections also pointed out the need for additional Findings of Fact.

Regarding footnote 3 on page 44, Copper Ridge and Reflections only offer that the term "the undersigned" should be revised to refer to Hearing Examiner Clerget.

B. Owner/Operator September to December 2013 and October 2014

After the first remand, DEQ's theory of the case, as noted by Hearing Examiner Clerget, evolved and moved into the northern portion of the subdivisions. Specifically, DEQ's prosecution shifted to focus on the third phase of the Reflections Subdivision where DEQ alleged that three of the four previously undisclosed and previously excluded photographs were taken. The third phase/filing of the Reflections Subdivision was covered by an active construction stormwater permit until March 24, 2014. Therefore, the last sentence of the first partial paragraph on page 48 of the 2021 Proposed FOFCOL would be more accurate if it added the word "unpermitted" so that it stated "conducting *unpermitted* construction activity."

C. Copper Ridge's and Reflections' Objections to Procedural Orders

Copper Ridge and Reflections made two procedural motions during the second remand. Copper Ridge and Reflections first moved to separate the contested cases, then later filed a motion in limine specific to the second remand. Both motions were denied. Copper Ridge and Reflections object to both orders denying the motions.[3] Should the Board adopt the 2021 Proposed FOFCOL as

[3] In addition to this objection before the Board, Copper Ridge and Reflections have petitioned the District Court to review the orders pursuant to section 2-4-701, MCA, which allows immediate judicial review of a "preliminary, procedural, or intermediate agency action or ruling." *Copper Ridge Development Corp. v. Mont. Bd. of Env. Review*, Montana's Thirteenth Judicial District Court, Cause No. DV 20-0445, First Amended Petition for Judicial Review (filed June 22, 2020).

submitted by Hearing Examiner Doud, Copper Ridge's and Reflections' objections may be moot; however, they are offered here in an abundance of caution and to ensure that no objections or defenses are waived.

1. Order Denying Motion to Separate Cases.

Copper Ridge and Reflections object to Hearing Examiner Clerget's order denying their December 13, 2019 Motion to Separate the Cases. *See* Order Denying Motion to Separate Cases (February 21, 2020). As noted in briefing offered in support of the Motion to Separate the Cases, none of the four previously excluded photographs depicts anything in the Copper Ridge Subdivision. DEQ did not dispute this fact during briefing on the motion, nor did DEQ dispute this fact when Copper Ridge and Reflections raised it as an undisputed fact on summary judgment. *DEQ's Statement of Disputed, Undisputed, and Additional Facts Opposing Reflections at Copper Ridge, LLC's and Copper Ridge Development Corporation's Motion for Summary Judgment*, p. 11 (June 5, 2020).

Because the previously excluded photographs have nothing to do with Copper Ridge and because the second remand was limited to the previously excluded photographs, no additional evidence related to Copper Ridge may be brought in during in the second remand. Therefore, Copper Ridge should have been allowed to have its contested case separated from Reflections' contested case so that it could proceed more quickly and clearly toward justice.

In addition to arguments raised in briefing offered in support of the motion to separate the cases, the Order Denying the Motion to Separate Cases is wrong because it inappropriately places too much weight on what has become a term of art in this case – "Copper Ridge and Reflections." Order, pp. 3-4. Since the cases have been combined, both parties and both subdivisions have routinely been referred to collectively as either "Copper Ridge and Reflections," as "CR/REF" or sometimes interchangeably as either "Copper Ridge" or "Reflections." For example, during oral argument before the Board on August 9, 2019, Board Member Tweeten often referred to both subdivisions simply as "Copper Ridge." 08/09/19 Tr. 198:8-11. Board Member Lehnherr referred to the two subdivisions as one subdivision. 08/09/19 Tr. 207:14-19. Both are mistakes, but the imprecise language should not have altered the logical conclusion that the second remand has nothing to do with Copper Ridge; therefore, Copper Ridge's contested case should have been separated from Reflections' contested case.

2. Order Denying Motion in Limine.

Copper Ridge and Reflections object to Hearing Examiner Clerget's denial of their April 9, 2020 Motion in Limine. *See* Order Denying Motion in Limine (June 9, 2020). Based on the portions of the first Order on Motions in Limine that DEQ did not challenge and were not before the Board for consideration, those properly decided evidentiary limits should have been upheld for this second

remand. Contrary to the law of the case, Hearing Examiner Clerget waived those properly ruled and unchallenged limits by denying Copper Ridge's and Reflections' Motion in Limine. Specifically, the previous order established limits such that:

> a) … DEQ will be bound by its prior testimony, including but not limited to its written discovery responses and Rule 30(b)(6) deposition responses.
>
> b) DEQ will NOT be permitted to enter evidence concerning lots or construction activity within the Copper Ridge and Reflections subdivision unless DEQ can show where it gave notice to CR/REF that such construction activity was at issue…

6/4/2019 Order on MIL, p. 7. Those limits were never challenged by DEQ, never overruled by the Board and should have been applied to the second remand.

Additionally, Copper Ridge and Reflections offered limits based on the Board's direction for the remand and based on DEQ's statements and previous prosecution of the cases. DEQ's reliance upon the previously excluded photographs and the Board's stated concerns focused on the third filing/phase of the Reflections Subdivision. Based on that focus on the third filing/phase of Reflections and based on DEQ's previous theory of the case, which focused on the second filing/phase of Reflections, Copper Ridge and Reflections argued that DEQ should not be allowed to use the remand to backtrack and try to fill in any gaps in the testimony or evidence unrelated to the four previously excluded photographs, including evidence and testimony related to the second phase/filing of the

Reflections Subdivision. The limits opposed by DEQ and denied by the hearing examiner were that DEQ should be limited as follows:

> a) no additional evidence or testimony related to the Copper Ridge subdivision is allowed;
>
> b) no additional evidence or testimony related to Lot 15 in the Reflections subdivision is allowed; and
>
> c) no additional evidence or testimony relying on the June 2013 USDA and the October 2013 Google Earth aerial photos to support DEQ's claims related to vegetation and construction activity is allowed.

Copper Ridge and Reflections object to the Order Denying the Motion in Limine and stand on their previous briefing offered in support of the Motion in Limine for the second reman.

D. The Proposed Findings of Fact Support the Proposed Conclusions of Law and Order

Photos 3, 4, and 5 show lots 12, 13 and 32 in the third filing/phase of the Reflections Subdivision. 2021 Proposed FOFs 143 – 148. Those lots are within the permit area and even within the disturbance area of permit MTR104993, which was in effect at the time of DEQ's inspection. 2021 Proposed FOFs 23 – 27, 141. Thus, regardless of what is depicted in photos 3, 4, and 5 and regardless of any dispute about what the photos depict, their very location proves that they depict areas covered by an active, legal permit issued by DEQ. Therefore, the photos cannot show any unpermitted construction activity on any lots owned by Reflections. Reflections cannot be held liable for any of the alleged violations.

The previously excluded photos 1 and 2 cannot be interpreted as supporting any of the alleged violations without contradicting DEQ's previous sworn testimony. Most of the proposed findings have not changed between the 2019 Proposed FOFCOL and the 2021 Proposed FOFCOL. When it had the opportunity, DEQ did not object to most of the 2019 Proposed Findings of Fact regarding the second filing/phase of Reflections, where DEQ alleges photos 1 and 2 were taken.

For example, the 2019 Proposed Findings included Mr. Freeland's testimony that he "did not know where the property lines were," and that he "did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there." 2019/2021 Proposed FOFs 81, 82. In fact, Mr. Freeland "did not observe active construction on the vacant lots in the subdivision and did not see equipment actively clearing the vacant lots," he "could not recall seeing construction equipment on vacant lots," and "could not provide details about any specific construction activity or where it may have been occurring." 2019/2021 Proposed FOFs 46 and 47.

DEQ did not previously object to those findings based on any factual argument, rather DEQ offered argument based on the legal definition of "construction activity." DEQ Exceptions Br., p. 11 (July 22, 2019). Therefore, not even DEQ raised the possibility that the excluded photographs would or should

alter those factual findings. Those findings cannot support liability for the alleged violations because DEQ has failed to prove that any construction activity was occurring at the time of the alleged violations, let alone that either Copper Ridge or Reflections was the owner or operator of such construction activity.

At most, DEQ has tried to build liability on "bare ground." But the law requires more than bare ground to support an alleged WQA violation for which a penalty of up to $10,000 per day may be charged. The law requires a "point source" of the discharge. § 75-5-103(26), MCA (defining an "owner or operator" as "a person who owns, leases, operates, controls, or supervises a point source"). Here, the alleged point source is construction activity, which includes "clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area." ARM 17.30.1102(28).

"Clearing, grading and excavation" may result in bare ground, thus creating an area from which a discharge may originate; but so could a wildfire or a massive storm event with 2.10 inches of rain falling within 45 minutes, marble-sized hail, and wind gusts of up to 75 mph – which is exactly what happened at the Copper Ridge and Reflections subdivisions just prior to DEQ's inspection. 2021 Proposed FOFs 89 – 92. "Bare ground" alone cannot be a violation of the WQA because it is not a "point source" – it is not a "discernible, confined, and discrete conveyance." § 75-5-103(29), MCA. Thus, the law requires that DEQ must prove

more than just the existence of "bare ground" on lots owned by Copper Ridge or Reflections. DEQ cannot escape the legal requirement to prove that Copper Ridge and Reflections were owners or operators *of unpermitted construction activity* at the time of the alleged violations. The testimony and documentary evidence before this Board, as summarized in the 2021 Proposed Findings of Fact, affirm that DEQ cannot meet this burden.

CONCLUSIONS OF LAW

Copper Ridge and Reflections offer no exceptions to the Conclusions of Law.

PROPOSED ORDER

The Proposed Order should be modified to ensure it includes all of the notices that DEQ sent to Copper Ridge and Reflections regarding alleged violations, including the November 8, 2013 letter (Ex. 17) and the December 9, 2014 letters (Exs. 7 and 8).

CONCLUSION

DEQ did not rely on the excluded photographs when it issued the Administrative Compliance and Penalty Orders to Copper Ridge and Reflections in 2015, it should not be allowed to rely upon them now. But even if the excluded photographs are considered, they only show bare ground, which is not a "point source" as defined in the WQA. Even if bare ground could be considered a "point

source," the bare ground depicted in the previously-excluded photos was either already considered during the first remand or it shows legally permitted areas of the subdivisions. DEQ offered no evidence on summary judgment regarding the previously-excluded photos. The Parties had appropriate opportunity, during the second remand, to offer evidence for the Hearing Examiner's consideration. The Hearing Examiner is well-situated to consider that additional evidence, including the previously-excluded photographs, and has done so, as reflected in the 2021 Proposed Findings of Fact and Conclusions of Law. The previously-excluded photographs have been considered and incorporated into the 2021 Proposed Findings of Fact and Conclusions of Law, which should be adopted by the Board.

DATED this 15th day of March, 2021.

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CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following person by e-mail and United States mail, postage prepaid on the date herein.

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DATED this 15th day of March, 2021.

/s/ Victoria A. Marquis

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DEQ'S EXCEPTIONS TO HEARING EXAMINER'S SECOND PROPOSED FINDINGS OF FACT & CONCLUSIONS OF LAW TO THE BER ON THE ISSUE OF OWNER/OPERATOR

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, files its exceptions to the Hearing Examiner's Second Proposed Findings of Fact & Conclusions of Law to the BER on the Issue of Owner/Operator ("Second Proposed FOFCOL"), filed February 22, 2021, in the above-captioned matter.

I. DEQ's Exceptions to Procedural History

In summarizing the procedural history of the above-captioned cases, the Hearing Examiner entirely ignores the August 9, 2019 remand by the Board of Environmental Review (BER) to the Hearing Examiner to take further evidence. *See* August 9, 2019 Hearing Transcript at page 222. At its August 9, 2019 meeting, the BER considered exceptions filed by the parties regarding proposed Findings of Fact and Conclusions of Law entered on July 8, 2019, hereinafter "First Proposed FOFCOL." The Board then failed to pass a motion to approve the First Proposed FOFCOL and remanded the above-captioned cases back to the Hearing Examiner to take additional evidence regarding four excluded photographs, including maps created from the photographs, and maps of the areas covered by the permits and determine if the additional evidence changes the First Proposed FOFCOL. If the additional evidence was found not to change the First

Proposed FOFCOL, the Hearing Examiner was to submit a memo stating that conclusion to the BER. *See* August 9, 2019 Hearing Transcript at page 222.

The Board's concern arose from the Hearing Examiner's order granting Copper Ridge's (CR) and Reflections at Copper Ridge's (REF) motion in limine, which excluded four photographs offered by DEQ and precluded DEQ from entering any documents including maps that were derived from or based on the excluded photographs into evidence. *See* June 4, 2019 Order on Motion in Limine and the August 9, 2019 Hearing Transcript at page 169. The BER explained that"

> we did remand this to the Hearing Examiner for the purpose of taking additional evidence. And I think the Hearing Examiner recognized that by reopening the discovery, calling for a second disclosure of exhibits, and so on, and so forth. I think implicit in all of that is the understanding that somebody may come up with an exhibit that hasn't previously been considered for introduction. If the record were limited to the evidence that was already in, none of those procedural steps would have been necessary. So I think it's pretty clear to me that when the matter was remanded, it was understood by everybody that additional evidence might be required. In that respect, I think the arguments about unfair surprise and so forth are probably not as persuasive as they otherwise might be. The matter was disclosed some weeks ahead of the hearing. I think Copper Ridge had plenty of time to prepare a response. In fact they told us today that they know of additional evidence and additional witnesses that they would have offered had this material been admitted. So clearly I mean whatever might have been the case back last summer, at this point admitting the exhibits isn't going to cause them any undue prejudice. So that argument I think is to me not persuasive. And I'm not sure what else there is to the reasoning behind the order granting the motion in limine. I tend to think that these photographs should have been admitted, and the parties can make of them what they want. And they may not be found by the Hearing Examiner to be particularly probative, but they're certainly relevant, and I think they ought

to have been admitted. *See* August 9, 2019 Hearing Transcript at pages 178-79.

The BER then voted on a motion that the Hearing Examiner abused her discretion by excluding the four photographs and remanded this matter to the Hearing Examiner for further proceedings to take additional evidence with respect to the subject matter depicted by the four excluded photographs, determine the extent to which any of that is relevant to the contested issues in the above-captioned matters and report back to the BER whether the First Proposed FOFCOL needs to be changed, and if so, in what respect. *See* August 9, 2019 Hearing Transcript at pages 210-11.

The Second Proposed FOFCOL is summarily presented without considering the excluded photographs, whatever related evidence DEQ would have offered, and then whatever rebuttal evidence CR and REF may offer. The evidentiary record before the BER is not complete because there is additional relevant evidence with respect to the excluded photographs has not been presented. *See* August 9, 2019 Hearing Transcript at pages 214-15. This additional evidence should include maps created from the photographs. *See* August 9, 2019 Hearing Transcript at pages 220-21. In its final form, the BER's remand motion read as follows:

> [The Hearing Examiner A]bused her discretion with regard to the four photographs excluded by the motion in limine, and that the matter be remanded back to the Hearing Examiner to take additional evidence regarding the photographs from DEQ and Copper Ridge and Reflections to include maps created from the photographs, and maps of the areas covered by the permits, and determine, one, if the additional evidence changes the Findings of Fact and Conclusions of Law in the FOFCOL; two, if so, submit a modified FOFCOL; and three, if not, then submit a memo to that effect. Tr., p. 222.

The motion as modified passed unanimously. *See* August 9, 2019 Hearing Transcript at page 223.

The Second Proposed FOFCOL does not fulfill the BER's August 9, 2019 remand order. The Hearing Examiner must complete the record in the above-captioned cases by accepting the photographs excluded by the Hearing Examiner's June 4, 2019 Order on Motion in Limine, whatever additional evidence related to the general subject matter of the photographs that DEQ would have offered had the photographs been admitted; and then whatever rebuttal evidence Copper Ridge and Reflections has. Only after completing the record may the Hearing Examiner determine whether the additional evidence changes the First Proposed FOFCOL; if so, submit a modified Proposed FOFCOL; and, if not, submit a memo to that effect. *See* August 9, 2019 Hearing Transcript page 222.

The Second Proposed FOFCOL is submitted without any consideration of additional evidence related to the excluded photographs and without ruling on the

three pending motions before the Hearing Examiner. The Hearing Examiner cannot have incorporated "direction from the BER to consider the four previously excluded photographs, and determine whether they serve to fulfill DEQ's burden to establish, by a preponderance of the evidence, that CR/REF was an owner/operator who was, thereby, subject to the violations asserted by DEQ" because the four photographs, any evidence that may have been presented related to the four photographs, and maps based on the excluded photographs have not been made a part of the record of these contested cases and cannot have been properly considered by either the Hearing Examiner or the Board. *See* Second Proposed FOFCOL at page 11.

II. DEQ's Exceptions to Findings of Fact

DEQ does not object to Findings of Fact 1 through 5, except Finding of Fact 5 references a "bullet-pointed timeline," which was not attached to the Second Proposed FOFCOL. DEQ assumes the referenced bullet-pointed timeline is Exhibit A attached to the First Proposed FOFCOL. *See* Doc No. 110 Exhibit A to First Proposed FOFCOL. Exhibit A attached to the First Proposed FOFCOL summarizes event between September 9, 2013, the date DEQ inspected the subdivisions and March 27, 2015, the date DEQ issued Administrative Compliance

and Penalty Orders to Copper Ridge and Reflections at Copper Ridge for violations of the Montana Water Quality Act at the subdivisions.

DEQ does not object to Findings of Fact 6 through 17.

DEQ does not object to Finding of Fact 18 in that it summarizes Landy Leep's testimony at the June 13, 2019 hearing.

DEQ does not object to Findings of Fact 19 through 20.

DEQ does not object to Finding of Fact 21 with the following clarification: The Notices of Termination (NOT) only terminate permit coverage, not the "contracted work."

DEQ does not object to Finding of Fact 22 with the following clarification: The permitted area of disturbance authorized under MTR104993 is 3.5 acres not the total 8.27- acre third filing of the Reflections subdivision. *See* Exhibit C, page 3, Permit No. MTR 104993 for highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing.

DEQ does not object to Finding of Fact 23.

DEQ objects to Findings of Fact 24 - 25. This statement contradicts the evidence presented. *See* Exhibit C, page 3, Permit No. MTR 104993 for highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing. The permitted area of disturbance authorized under MTR104993 is 3.5

acres not the total 8.27- acre third filing of the Reflections subdivision. The BMPs described in the Storm Water Pollution Prevention Plan (SWPPP) associated with MTR104993 cover road and utility construction in the third filing of Reflections at Copper Ridge and not the "entire subdivision." *See* Transcript 6/13/2019 page 69, Line 3 – page 70, line 3; *See* Exhibit C, pages 15 - 27, describing BMPs to mitigate storm water discharges associated with road and utility construction in the third filing of Reflections at Copper Ridge.

DEQ does not object to Finding of Fact 26 - 27.

DEQ objects to Finding of Fact 28. See DEQ's objections to Findings of Fact 24 – 25.

DEQ does not object to Finding of Fact 29, with the following clarification: MTR102807 covered construction activities associated with road construction and utility installation and not construction activities on individual lots within the subdivisions. *See* Exhibit A, Permit No. MTR 102807, the permitted area of disturbance is 5.3 acres and does not extend to the total 17.7-acre site.

DEQ does not object to Finding of Fact 30 - 33.

DEQ objects to Finding of Fact 34. DEQ does not know whether "[t]here was no reason for Copper Ridge or its contractors to do any construction in the

second filing of the Copper Ridge subdivision after permit MTR102807 was terminated on October 16, 2009."

DEQ objects to Finding of Fact 35. DEQ does not know whether "Copper Ridge contracted for construction activity after permit MTR102807 was terminated on October 16, 2009," but Copper Ridge likely contracted for construction activity in later filings of the subdivisions.

DEQ does not object to Finding of Fact 36 - 42.

DEQ does not object to Finding of Fact 43 with the following clarification: Inspector Dan Freeland's photographs and field notes made contemporaneous to his inspection of the subdivisions on September 9, 2013, documented stockpiles on at least one lot (Lot 15) owned by CR and REF. Lot 15 is depicted on Photograph 13, attached to Exhibit 2. Inspector Freeland testified that he observed disturbed ground with no vegetative cover. In addition, he testified that Lot 15 contained a stockpile of material near the curb line and that vehicles had tracked sediment from the lot to the adjacent roadway. *See* Transcript 6/13/2019 pages 26, 38, 244, Exhibit 2 (violation letter with report of September 9, 2013 compliance inspection), Transcript 6/13/2019 page 28, Lines 6 – 16, page 42, Lines 20 – 25, and page 88, Lines 13 - 17.

DEQ does not object to Findings of Fact 44 – 45.

DEQ does not object to Finding of Fact 46 – 47 with the following clarification: The legal definition of "construction activity" is not confined to active construction. *See* ARM 17.30.1102(28): "Storm water discharge associated with construction activity" means a discharge of storm water from construction activities including clearing, grading, and excavation that result in the disturbance of equal to or greater than one acre of total land area. For purposes of these rules, construction activities include clearing, grading, excavation, stockpiling earth materials, and other placement or removal of earth material performed during construction projects. Construction activity includes the disturbance of less than one acre of total land area that is a part of a larger common plan of development or sale if the larger common plan will ultimately disturb one acre or more.

DEQ does not object to Finding of Fact 48 – 50.

DEQ objects to Finding of Fact 51. Inspector Freeland testified that he continued north around to the far north of the subdivision at the very top of the gradient and took some additional photos. *See* June 13, 2019 Transcript page 28/lines 11-16.

DEQ does not object to Finding of Fact 52 – 53.

DEQ objects to Finding of Fact 54. Photograph 14, in Exhibit 2 and 16, is not the most northerly photograph taken by Inspector Freeland during his

September 9, 2013 inspection of the subdivisions. The most northerly photographs taken would have been Photographs 3, 4, and 5, in DEQ's excluded Exhibit 36. *See* DEQ Exhibit 36, which has not been admitted in this matter, but is attached hereto for the BER's reference.

DEQ objects to Finding of Fact 55. Inspector Freeland testified he observed the city cleaning sediment in the street on Amelia Circle. *See* Transcript 6/13/2019 page 28, Lines 11-16, and Photograph 14, in Exhibit 2 and 16.

DEQ does not object to Finding of Fact 56 with the following clarification: The only specific evidence of construction activity for lots owned by CR/REF along Lucky Penny Lane and East Copper Ridge Loop, in the third and fourth filings of the Copper Ridge subdivision, were the two aerial photographs, one from Google Earth (Ex. 26) and one from the U.S. Department of Agriculture (Ex 23).

DEQ does not object to Finding of Fact 57 - 62.

DEQ objects to Finding of Fact 63. The aerial photographs show the difference between disturbed lots within the subdivisions with undisturbed areas adjacent to the subdivisions to the west and east, and the difference between cleared areas in the northern portion of the Reflections subdivision with the more developed southern portion of that subdivision. Likewise, the northern part of Copper Ridge must be compared with the southern, more developed part of that

subdivision. See Exhibit 23, page 2. DEQ presented the testimony of Susan Bawden. Ms. Bawden testified to her extensive work experience in reading aerial satellite images, and extensive education in Geographic Information Systems (GIS). Transcript 6/13/2019 pages 99 – 101. In relation to Exhibit 23, an aerial map of the subdivisions obtained by the USDA Farm Service Agency, Ms. Bawden testified that she could tell the difference between disturbed and undisturbed land by looking at the aerial map. Transcript 6/13/2019 page 112, Lines 10 – 15. Likewise, regarding Exhibit 26, a Google Earth image, acquired October 25, 2013, Ms. Bawden testified she could differentiate lots that were disturbed and lots that had been sodded. She specifically looked at the Reflections at Copper Ridge subdivision and pointed to two parcels in the northern part that had been sodded. In contrast, she testified that the area around them had not been sodded. She further characterized this area as having been cleared and then let go so that weeds had infested the area. Exhibit 26; Transcript 6/13/2019, page 131– page 132. Additionally, Exhibit 26 shows the difference between disturbed lots and undeveloped agricultural land to the south and east of the subdivisions. It should be noted that at the time CR and REF acquired the property that would become the subdivisions, the area consisted of short pasture grassland with a vegetative density cover of 90%. Transcript 6/13/2019, page 216 - 217. Mr. Leep

could provide no basis for his statement that Exhibit 23 was not an accurate depiction of the subdivisions. Transcript 6/13/2019 page 213, Line 25 – page 214, Line 20.

DEQ objects to Findings of Fact 64 - 65. See DEQ's objections to Finding of fact 63.

DEQ does not object to Finding of Fact 66 with the following clarification: The "other permitted activity" was for discharges associated with construction activity related to roads and did not cover construction activity on individual lots. *See* Exhibit B, Permit No. MTR 104590 issued for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance is 5.3 acres and does not extend to the total 21.8- acre site.

DEQ does not object to Finding of Fact 67 – 68 with the clarification stated above for Finding of Fact 66.

DEQ objects to Finding of Fact 69. Inspector Freeland also took Photograph 1 in DEQ Exhibit 36 during his September 9, 2013 inspection. Photograph 1 in Exhibit 36 also shows Lot 15. Exhibit 36 has not been entered in these proceedings and Photograph 1 in Exhibit 36 is one of the photographs that the BER

ordered the Hearing Examiner to take additional evidence on and further consider on remand. *See* DEQ Exhibit 36.

DEQ does not object to Finding of Fact 70 – 72.

DEQ objects to Finding of Fact 73. DEQ Inspector Dan Freeland clearly stated in the June 13, 2019 hearing that he did not ascribe an address to Lot 15 but identified Lot 15 through GPS. *See* June 13, 2019 Hearing Transcript page 55, lines 20-25.

DEQ does not object to Findings of Fact 74 – 80.

DEQ does not object to Finding of Fact 81 with the following clarification: Mr. Freeland testified Photograph 13 did not show "homes being built" on either side of Lot 15. Photograph 13 clearly shows a large gravel pile and a white house with a window behind the pile. *See* June 13, 2019 Hearing Transcript page 239, lines 5 -7, Photograph 13, Exhibit 2 and 16.

DEQ does not object to Findings of Fact 82.

DEQ objects to Finding of Fact 83. Photograph 13 clearly shows a large gravel pile. Mr. Freeland testified that it does not matter when the stockpile was placed on the lot. Stockpiling is construction activity that must be covered under an MPDES permit. *See* June 13, 2019 Hearing Transcript page 94, lines 2 – 8.

DEQ does not object to Findings of Fact 84 - 85.

DEQ objects to Finding of Fact 86 - 87. Permit No. MTR 104590 was issued for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance was 5.3 acres and did not extend to the total 21.8- acre site. Therefore, 16.42 acres of Phases 3 and 4 of Copper Ridge and Phase 2 of Reflections at Copper Ridge, including Lot 15, were not covered under MTR 104590.

DEQ does not object to Findings of Fact 88 – 100.

DEQ does not object to Finding of Fact 101 with the following clarification: No testimony addressing violations associated with the second, third, fifth and sixth bullets on page 2 of the September 23, 2013 Violation Letter was presented at the June 13, 2019 hearing because that hearing focused on sites Copper Ridge and Reflections owned on the date(s) of the alleged violations pursuant to the BER's remand order.

DEQ does not object to Findings of Fact 102 – 114.

DEQ objects to Finding of Fact 115. Copper Ridge and Reflections did not indicate they submitted the NOIs under protest until after the Administrative Orders issued in March 2015. MTR 105376 and 105377 were issued to REF and CR in December 2013. Nowhere, within the four corners of the permit

authorizations, does Copper Ridge or Reflections indicate they obtained permit coverage "under protest." See Exhibits 3 and 5.

DEQ does not object to Findings of Fact 116 - 127.

DEQ does not object to Finding of Fact 128 with the following clarification: The violations documented by DEQ during the October 21, 2014 inspection were violations of permit terms and conditions of MTR 105376 (issued to Reflections) and MTR 105377 (issued to Copper Ridge). As the permittees Copper Ridge and Reflections are responsible for compliance with their MPDES permits.

DEQ does not object to Findings of Fact 129 - 138.

DEQ objects to Finding of Fact 139 - 140. Photograph 2, not Photograph 1, in DEQ Exhibit 36 is identical to Photograph 13 in Exhibits 2 and 16.

DEQ objects to Finding of Fact 141. The four excluded Photographs are 1, 3, 4, and 5 in Exhibit 36. Photographs 3, 4, and 5 depict areas within Reflections at Copper Ridge subdivision, third filing. Permit No. MTR 104993 covered highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing. The permitted area of disturbance is 3.5 acres and does not extend to the total 8.27- acre site.

DEQ objects to Finding of Fact 142. The permitted area of disturbance is 3.5 acres and does not extend to the total 8.27- acre site. Material fill outside of the permitted disturbance area was not allowed.

DEQ does not object to Findings of Fact 143 - 149.

III. DEQ's Exceptions to Discussion

A. Relevance on Remand

The Hearing Examiner's June 4, 2019 Order on Motions in Limine and the related discussions during the status conference that same date fails to acknowledge the BER reversed the June 4, 2019 Order and determined the prior Hearing Examiner abused her discretion in granting the Order on Motions in Limine. The BER then remanded contested case numbers BER 2015-01 WQ and BER 2015-012 WQ "to take additional evidence regarding the photographs from DEQ and Copper Ridge and Reflections to include maps created from the photographs, and maps of the areas covered by the permits, and determine, one, if the additional evidence changes the Findings of Fact and Conclusions of Law in the FOFCOL; two, if so, submit a modified FOFCOL; and three, if not, then submit a memo to that effect. *See* August 9, 2019 Tr., p. 222. The Hearing Examiner has not properly considered the four excluded photographs and related evidence as directed by the BER.

B. Owner/Operator September to December 2013 and October 2014

DEQ's inspector, Dan Freeland, provided photographs and field notes contemporaneous to his inspection of the subdivisions on September 9, 2013, which documented stockpiles on Lot 15 owned by CR and REF. A stockpile is a potential pollutant source that could be exposed to storm water runoff and impact waters of the state. See ARM 17.30.1115(3). Lot 15 is depicted in both Photograph 13, attached to Exhibit 2, and in the excluded Photograph 1, attached to Exhibit 36. If the Hearing Examiner considered evidence on the excluded photographs, DEQ would have provided evidence that Lot 15 was properly identified and located.

Dan Freeland testified that Lot 15 had disturbed ground with no vegetative cover. In addition, he testified that Lot 15 contained a stockpile of material near the curb line and that vehicles had tracked sediment from the lot to the adjacent roadway. *See* Transcript 6/13/2019 pages 26, 38, 244. Mr. Freeland further testified that he went to the northern part of the subdivision where he observed lots owned by Reflections that had been graded and cleared of all vegetation. These lots were in addition to lots where houses were under construction. *See* Transcript 6/13/2019 page 29.

There is no evidence in the record that Copper Ridge and Reflections achieved 70% vegetative cover on disturbed areas in either subdivision outside the areas permitted for road construction and utility installation. See Exhibit A, Permit No. MTR 102807 for City subdivision street construction and water and sanitary sewer within Copper Ridge subdivision, the permitted area of disturbance is 5.3 acres and does not extend to the total 17.7-acre site; Exhibit B, Permit No. MTR 104590 for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance is 5.3 acres and does not extend to the total 21.8- acre site; and Exhibit C, Permit No. MTR 104993 for highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing, the permitted area of disturbance is 3.5 acres and does not extend to the total 8.27- acre site. Either Copper Ridge and Reflections left areas outside the permit boundaries undisturbed and maintained the existing 90% vegetative cover, which is not supported by the evidence in this case; or Copper Ridge and Reflections reseeded areas they claim they never disturbed, which is unlikely given the areas were to be developed as residential lots.

Land disturbed by agricultural and forestry activities is exempt from permitting requirements. The Hearing Examiner's comparison of land disturbed

by agricultural activity to land disturbed by construction activity is uninformed. ARM 17.30.1310(d).

The Hearing Examiner has preemptively determined that the four excluded photos do not change the outcome as to whether CR/REF were owner/operators of lots from which the alleged violations occurred. This finding is made without even properly identifying the four excluded photographs. Photograph 13, attached to Exhibit 2, is identical to Photograph 2 not Photograph 1 attached to Exhibit 36. Furthermore, the Hearing Examiner has considered no evidence the parties may have presented on the excluded photographs, including maps, as directed by the BER in its August 9, 2019 remand order. The Hearing Examiner is perpetuating the error committed by the prior Hearing Examiner by failing to consider relevant evidence and by constraining DEQ's ability to present relevant evidence pursuant to the BER's August 9, 2019 remand order.

IV. DEQ's Exceptions to Conclusions of Law

DEQ does not object to Conclusions of Law 1 through 17.

DEQ objects to Conclusions of Law 18 – 20. DEQ presented evidence that CR and REF owned lots within the subdivisions at the time of the violations and that the lots were disturbed by construction activity that was not covered by an MPDES permit. CR and REF eventually obtained permit coverage under

MTR105376 and MTR 105377 and, in doing so, held themselves out as owners or operators of construction activities at the subdivisions.

DEQ does not object to Conclusion of Law 21.

DEQ objects to Conclusions of Law 22 - 24. See DEQ's objections to Conclusions of Law 18 – 20.

CONCLUSION

The Board should set aside the legal conclusions in the second proposed FOFCOL that DEQ failed to prove by a preponderance of evidence that CR and REF were owners or operators of construction activity because the Hearing Examiner's conclusions fail to consider relevant evidence. The BER should consider the four erroneously excluded photographs and any related evidence as directed by its August 9, 2019 remand order.

DATED this 15th day of March, 2021,

/s/ *Kirsten H. Bowers*_____
KIRSTEN H. BOWERS
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that this 15th day of March, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments to all parties or their counsel of record as set forth below:

Victoria A. Marquis Holland & Hart, LLP 401 North 31st Street, Suite 1500 Billings, MT 59103-0639 vamarquis@hollandhart.com; aforney@hollandhart.com;	[ ] U.S. Mail, postage prepaid [x] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Joyce Wittenberg, Secretary Board of Environmental Review 1520 E. Sixth Avenue/P.O. Box 200901 Helena, MT 59620-0901 (406) 444-2544 jwittenberg@mt.gov	[ ] U.S. Mail, postage prepaid [x] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Jeffrey M. Doud, Esq., Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue/P.O. Box 201440 Helena, MT 59620-1440 (406) 444-5797 jdoud@mt.gov akraske@mt.gov	[ ] U.S. Mail, postage prepaid [x] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Chad Anderson, Section Supervisor Enforcement Division, DEQ 1520 E. Sixth Avenue/P.O. Box 200901 Helena, MT 59620-0901 (406) 444-2964 chada@mt.gov	[ ] U.S. Mail, postage prepaid [x] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery

/s/ Kirsten H. Bowers
Kirsten H. Bowers
MT-Department of Environmental Quality

Latitude and Longitude of Photos taken at REF and CR September 9, 2013

Photo No.	Latitude	Longitude
1	45.80167	-108.681666
2 (Also designated as photo 13, in Exhibits 2 and 16)	45.80200	-108.681500
3	45.80367	-108.681833
4	45.80383	-108.681500
5	45.80350	-108.681833
6 (Also designated as photos 14, in Exhibits 2 and 16)	45.80283	-108.684333

Page 3 / Photo 1

Page 2 / Photo 2 = Photo 13 / Exhibit 2

Page 4 / Photo 3

Page 5/ Photo 4

Page 6 / Photo 5

Page 7 / Photo 6 = Photo 14 / Exhibit 2

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Attorneys for DEQ

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE MONTANA WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA; AND	Case Nos. BER 2015-01 WQ
BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376 AND MTR105377) (FID 2288 AND 2289) [DOCKET NO. WQ-15-07 AND WQ-15-08].	BER 2015-02 WQ

DEQ'S RESPONSE TO REFLECTIONS AT COPPER RIDGES's and COPPER RIDGE's EXCEPTIONS TO HEARING EXAMINER'S SECOND PROPOSED FINDINGS OF FACT and CONCLUSIONS OF LAW TO THE BER ON THE ISSUE OF OWNER/OPERATOR

The Montana Department of Environmental Quality ("DEQ"), by and through undersigned counsel, files this response to Reflections at Copper Ridge, LLC's ("REF") and Copper Ridge Development Corporation's ("CR") Exceptions to the Hearing Examiner's Second Proposed Findings of Fact and Conclusions of Law to the BER on the Issue of Owner/Operator in BER 2015-01 WQ and BER 2015-02 WQ ("CR's and REF's Exceptions"). The Montana Administrative Procedures Act (MAPA) provides the following regarding the agency's adoption of a final decision in a contested case:

> When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision. § 2-4-621(1), MCA.
>
> The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. § 2-4-621(3), MCA.

CR and REF are not adversely affected by the Hearing Examiner's Second Proposed Findings of Fact and Conclusions of Law to the BER on the Issue of Owner/Operator ("Second Proposed FOFCOL") and the BER should

not consider CR's and REF's Exceptions. Section 2-4-621(1), MCA, *Brackman v. Board of Nursing*, 258 Mont. 200, 851 P.2d 1055, 1057 (1993). DEQ is the only party to these contested cases that is adversely affected by the Second Proposed FOFCOL because without taking evidence on the four excluded photographs, as directed by the BER's August 9, 2019 remand, the Hearing Examiner has "determined that a violation has not occurred and therefore declares the department's notice void." *See* Second Proposed FOFCOL, Doc. No. 170 at page 56.

The Hearing Examiner's Second Proposed FOFCOL on the issue of whether CR and REF are owners or operators should be rejected by the BER because the Hearing Examiner's findings of fact and conclusions of law rely on his determination that "the four previously-excluded photos do not change the calculus in this matter." *See* Second Proposed FOFCOL, Doc. No. 170 at page 49. This conclusion is not supported by substantial evidence in the record because the Hearing Examiner has not received the four excluded photographs into evidence and taken testimony on the photographs as directed by the BER's August 9, 2019 remand. *See* August 9, 2019 Hearing Transcript at page 222.

The BER's previous Hearing Examiner held two evidentiary hearings in this case and was directed by the Board to hold a third hearing to consider the

four excluded photographs and related testimony pursuant to the BER's August 9, 2019 remand order to determine whether CR and REF are owners and operators of construction activities at the subdivisions, and responsible for ensuring all phases of construction have MPDES permit coverage. The Second Proposed FOFCOL was issued by the current Hearing Examiner after reviewing a cold, incomplete record and without benefit of live testimony of witnesses. Under the contested case provisions of MAPA:

> If the person who conducted the hearing becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has read the record only if the demeanor of witnesses is considered immaterial by all parties. § 2-4-622(1)

DEQ does not agree that the demeanor of witnesses is immaterial in this case; the Hearing Examiner has not completed the record by taking physical or testimonial evidence on the four excluded photographs; and the BER should reject the Second Proposed FOFCOL and instruct the Hearing Examiner to take evidence on the four excluded photographs pursuant to the BER's August 9, 2019 remand order.

CR and REF are not adversely affected by the Second Proposed FOFCOL and considering CR's and REF's exceptions is outside the BER's authority under § 2-4-621(1), MCA to allow parties adversely affected to file exceptions to the Second Proposed FOFCOL. *Brackman*, 258 Mont. 200, 851

P.2d 1055. In the event the BER considers CR's and REF's exceptions, DEQ submits the following responses to CR's and REF's exceptions to the Second Proposed FOFCOL.

DEQ's RESPONSES TO CR'S AND REF'S EXCEPTIONS TO PROCEDURAL HISTORY

1. The September 23, 2013 Letter of Violation was addressed to Gary Oakland, Copper Ridge Development Corporation. See Exhibit 2. February 2018 Hearing Transcript Vol. I, 65:24 – 66:8. On November 8, 2013, in response to written requests from CR and REF, DEQ issued a second notice of violation that distinguished violations at the Copper Ridge Subdivision from violations at the Reflections at Copper Ridge subdivision. *Joint Stipulated Facts*, Fact No. 9; February 2018 Hearing Transcript, Vol. I, 85:2 – 92:18; Exhibit 17, Exhibit 2.

2. DEQ does not object to CR's and REF's expansion of the Hearing Examiner's summarized procedural history after the BER's August 9, 2019 remand with the following clarification: The BER determined that the previous Hearing Examiner abused her discretion in granting CR's and REF's motion in limine excluding consideration of the four photographs and related evidence. The plain language of the Board's remand, required the Hearing Examiner to take additional material evidence on the

owner/operator issue that was excluded by the Hearing Examiner's June 4, 2019 Order on Motions in Limine and evidence related to the photographs that the parties may have presented at the June 13, 2019 hearing if the scope of evidence had not been limited.

In their motion for summary judgment, CR and REF moved to proceed with the July 8, 2019 PFOFCOL without taking any additional evidence related to the excluded photographs, maps created from the photographs, and maps of the areas covered by the permits as mandated by the Board's August 9, 2019 remand. The BER's August 9, 2019 remand directed the Hearing Examiner to take and consider the additional relevant evidence related to the excluded photographs, maps, and permits, determine whether this additional evidence changes the PFOFCOL, and complete the record. CR's and REF's motion for summary judgment is pending, but summary judgment may only be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Mont. R. Civ. P.56(c)(3). *Mont. Envtl. Info. Cntr. v. Mont. Dep't of Envtl Quality*, 2019 MT 213, ¶18. The BER's August 9, 2019 remand order points to genuine issues of material fact concerning excluded evidence related to the four photographs.

DEQ's RESPONSES TO CR'S AND REF'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT

1. CR and REF offer minor corrections, but do not file exceptions to Proposed Findings of Fact 1 through 42.

2. CR and REF offer minor corrections and point to Exhibits for MPDES permit authorizations, NOTs, and SWPPPs in the record, but do not file exceptions to Proposed Findings of Fact 43 through 136.

3. CR and REF file no exceptions to Proposed Findings of Fact 137 - 149.

DEQ's RESPONSES TO CR'S AND REF'S EXCEPTIONS TO DISCUSSION

A. Relevance on Remand - CR and REF state no exceptions to the discussion related to "relevance on remand," but reserve their right to argue any remaining issues, exceptions, and arguments in their *Exceptions to Hearing Examiner's Order on Summary Judgment and Proposed Findings of Fact and Conclusions of Law* (September 17, 2018). In the Second Proposed FOFCOL the Hearing Examiner acknowledged the BER's February 8, 2019 remand order provided that if CR and REF were found to be owner/operators, the findings and conclusions in the Orders on Summary Judgement and the July 16, 2018 FOFCOL would be undisturbed and before

the BER for consideration of the remaining issues. The parties could then take up pending issues, exceptions, and arguments.

Conversely, the Hearing Examiner avoids the BER's August 9, 2019 remand order "to take additional evidence regarding the photographs from DEQ and Copper Ridge and Reflections to include maps created from the photographs, and maps of the areas covered by the permits, and determine, one, if the additional evidence changes the Findings of Fact and Conclusions of Law in the First Proposed FOFCOL on the issue of owner/operator (Doc. No. 111, July 8, 2019); two, if so, submit a modified Proposed FOFCOL on the issue of owner/operator; and three, if not, then submit a memo to that effect. *See* August 9, 2019 Tr., p. 222. The Hearing Examiner has not taken additional evidence regarding the four excluded photographs and related evidence in determining CR and REF are not owners or operators in the Second Proposed FOFCOL.

B. Owner/Operator September to December 2013 and October 2014 - CR and REF state no exceptions to the discussion related to "owner/operator September to December 2013 and October 2014," but request that the Hearing Examiner clarify CR and REF did not conduct unpermitted construction activity. DEQ assumes CR and REF assert they conducted construction activity, but only within the areas permitted for road

construction and utility installation. The evidence in the record demonstrates construction activity occurred outside the permit boundaries. *See* Exhibit A, Permit No. MTR 102807 for City subdivision street construction and water and sanitary sewer within Copper Ridge subdivision, the permitted area of disturbance is 5.3 acres and does not extend to the total 17.7-acre site; Exhibit B, Permit No. MTR 104590 for City subdivision street, water and sanitary sewer construction and related excavation work within Copper Ridge and Reflections at Copper Ridge subdivisions, the permitted area of disturbance is 5.3 acres and does not extend to the total 21.8- acre site; and Exhibit C, Permit No. MTR 104993 for highway, street, and utility construction within Reflections at Copper Ridge subdivision, third filing, the permitted area of disturbance is 3.5 acres and does not extend to the total 8.27- acre site.

C. DEQ's Responses to CR's and REF's Exceptions to Procedural Orders in the Contested Cases – CR and REF take exception to and argue that the Hearing Examiner wrongly denied its Motion to Separate Cases and its Motion in Limine. Further, CR and REF have petitioned the Thirteenth Judicial District Court to review the procedural orders pursuant to § 2-4-701, MCA. *Copper Ridge Development Corp. and Reflections at Copper Ridge, LLC v. Montana Board of Environmental Review and Montana Department*

of Environmental Quality (Cause No. DV 20-0445). CR's and REF's exceptions and arguments on the procedural motions and the related petition for judicial review are outside the scope of the Second PFOFCOL.

1. Order Denying Motion to Separate the Cases - Contested case numbers BER 2015-01-WQ and BER 2015-02-WQ were consolidated for the purpose of entering evidence upon motion of CR and REF and without objection by DEQ; and the two cases remained consolidated in these proceedings since February 26, 2018. The Hearing Examiner concluded BER's August 9, 2019 remand order does not close the evidence regarding Copper Ridge because in its remand order the BER stated:

> [The Hearing Examiner A]bused her discretion with regard to the four photographs excluded by the motion in limine, and that the matter be remanded back to the Hearing Examiner to take additional evidence regarding the photographs from DEQ and Copper Ridge and Reflections to include maps created from the photographs, and maps of the areas covered by the permits, and determine, one, if the additional evidence changes the Findings of Fact and Conclusions of Law in the FOFCOL; two, if so, submit a modified FOFCOL; and three, if not, then submit a memo to that effect. Tr., p. 222.

Based on this language, the Hearing Examiner found BER "ordered the undersigned to take additional evidence from DEQ and Copper Ridge and Reflections, not merely from DEQ and Reflections. This additional evidence also must include maps created from the photographs, and maps of the areas covered by the permits." *See* Order Denying Motion to Separate

the Cases, Doc. No. 130, page 4. This additional evidence can include maps of the areas covered by the permits that relate to CR, not just REF, so the Hearing Examiner determined that the cases remain consolidated for the purpose of entering the additional evidence required by the BER's August 9, 2019 remand.

2. Order Denying Motion in Limine – As with the Order Denying Motion to Separate Cases, the Hearing Examiner interpreted the BER's August 9, 2019 remand order and determined the BER ordered the Hearing Examiner to take additional evidence and "allow whatever additional evidence was related to the general subject matter of the four improperly excluded photographs." *See* Order Denying Motion in Limine, Doc. No. 162, page 6; August 9, 2019 Transcript, 214-215. The Hearing Examiner concluded she could not limit evidence in the hearing on remand so long as it could be tied to the four excluded photographs. The Hearing Examiner went on to say: "The Board was clear in its remand that the four photographs should have been admitted and considered, and the undersigned was clear in the Order Denying Motion to Separate Cases that evidence relating to CR would be permitted at the remand hearing." *See* Order Denying Motion in Limine, Doc. No. 162, page 7. The Hearing Examiner concluded BER directed all evidence related to the four excluded

photographs including maps of the areas covered by permits should be heard and considered on remand. *Id.* at 8.

D. DEQ's Responses to CR's and REF's Conclusions That the Proposed Findings of Fact Support the Proposed Conclusions of Law and Order – CR's and REF's attempts to explain how the four excluded photographs do not provide evidence that CR and REF conducted construction activity without MPDES permit coverage on lots they owned does not cure the defects in the Hearing Examiner's Second Proposed FOFCOL because the additional evidence related to the four excluded photographs including maps of the areas covered by permits has not been heard and considered on remand in accordance with BER's August 9, 2019 remand. The Hearing Examiner's findings of fact must be based exclusively on the evidence and on matters officially noticed on the record. Section 2-4-623(2), MCA. Each conclusion of law must be supported by authority or by a reasoned opinion. Section 2-4-623(3), MCA. The Hearing Examiner must comply with the mandate of §2-4-623, MCA, to issue "findings of fact accompanied by a concise and explicit statement of the underlying facts supporting the findings based exclusively on the evidence and supporting authority or reasoned opinion for each conclusion of law." *Baldridge v. Board of Trustees*, 264 Mont. 199, 206 (1994).

The Hearing Examiner's Second PFOFCOL falls short because he has not taken evidence related to the four excluded photographs including maps of the areas covered by permits and without benefit of this additional evidence has determined the excluded photographs should be given no weight and that they would not change the First PFOFCOL (July 8, 2019). The Hearing Examiner's determination regarding the four excluded photographs violates § 2-4-623, MCA, because it is conclusory without support of underlying facts and evidence in the record. *Id.* Second Proposed FOFCOL, page 49.

CR and REF offer no exceptions to the Conclusions of Law.

CONCLUSION

The Hearing Examiner has not completed the record on the owner/operator issue. The Board should set aside the findings of fact and legal conclusions in the second proposed FOFCOL on the issue of whether CR and REF are owners or operators of construction activity because the Hearing Examiner's conclusions were made without considering all relevant evidence. The BER should reject the Second Proposed FOFCOL and instruct the Hearing Examiner to take physical or testimonial evidence on the four excluded photographs pursuant to the August 9, 2019 remand order.

DATED this 24th day of March, 2021,

/s/ *Kirsten H. Bowers*
KIRSTEN H. BOWERS
Department of Environmental Quality

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March, 2021, I caused to be served a true and correct copy of the foregoing document and any attachments for BER 2015-01 WQ and BER 2015-02 WQ to all parties or their counsel of record as set forth below:

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORPORATION'S RESPONSE TO THE DEPARTMENT OF ENVIRONMENTAL QUALITY'S EXCEPTIONS

In accordance with Hearing Examiner Doud's Order on Exceptions and Notice of Submittal, Copper Ridge Development Corporation ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") submit this response to the Department of Environmental Quality's ("DEQ") exceptions to the Hearing Examiner's Second Proposed Findings of Fact & Conclusions of Law to the BER on the Issue of Owner/Operator ("2021 Proposed FOFCOL").

I. INTRODUCTION

Since the Board assigned these contested cases to a hearing examiner and did not hear the cases itself, the Board "may adopt the [Hearing Examiner's] proposal for decision as the [Board's] final order." Mont. Code Ann. § 2-4-621(3). When considering the proposed decision (the 2021 Proposed FOFCOL), the Board "may reject or modify the conclusions of law and interpretation of administrative rules." *Id*. However, the Board "may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon *competent substantial evidence* or that the proceedings on which the findings were based did not comply with essential requirements of law." *Id*. (emphasis added).

As a threshold manner, DEQ has not challenged any of the proposed findings based on a lack of "competent substantial evidence."[1] The term "substantial evidence" sounds weighty, but it is not: substantial evidence is anything "more than a mere scintilla of evidence" but less than a preponderance. *Peretti v. State*, 2016 MT 105, ¶¶ 17-18, 383 Mont. 340, 344-345, 372 P.3d 447, 450.[2] "Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion." *Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation*, 2016 MT 239, ¶ 27, 385 Mont. 33, 43, 380 P.3d 787, 794. The standard for the Board's review of the findings "is not whether there is evidence to support findings different from those made by the [Hearing Examiner], but whether substantial credible evidence supports the [Hearing Examiner's] findings." *Blaine Cnty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 211-212, 394 P.3d 159, 165.

One reason for the higher standard of review for factual findings is because "[a] hearing examiner, when one is used, is in the unique position of hearing and observing all testimony entered in the case." *Brackman v. Board of Nursing*,

[1] DEQ now clarifies, in its Response Brief filed early on March 25, that it alleges a lack of substantial evidence "because the Hearing Examiner has not received the four excluded photographs into evidence and taken testimony on the photographs as directed by the BER's August 9, 2019 remand." DEQ Response, p. 3. However, as confirmed by the pleadings and record in these cases, the previously excluded photographs have been submitted and considered. When DEQ had the opportunity (and the affirmative duty) to present additional evidence, it did not. *See Supra*, § II.C. below.

[2] Copies of all cases cited are attached (in alphabetical order) as **Exhibit A**.

258 Mont. 200, 851 P.2d 1055, 1058 (1993). When the Board is limited to "reviewing a cold record," as is the case here, "[t]he findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference." *Id*.[3]

DEQ's assertions of allegedly contradictory evidence are not sufficient to override the Hearing Examiner's proposed findings. DEQ must first prove to the Board that the findings offered by the Hearing Examiner in the 2021 Proposed FOFCOL are not supported by even a "scintilla of evidence." DEQ's exceptions have not met that high bar; therefore, the findings of fact may not be rejected or modified. Given the proposed findings, no other conclusions of law can logically be reached – the Hearing Examiner got it right when he concluded that "DEQ has failed to provide facts necessary to establish" any of the remaining violations alleged by DEQ. 2021 PFOFCOL, pp. 55-56.

II. PROCEDURAL HISTORY

Despite the fact that the 2021 Proposed FOFCOL devotes nearly two pages to describing the procedural history of this remand within the remand subsequent

[3] DEQ also cites *Brackman v. Board of Nursing* but for the erroneous premise that Copper Ridge's and Reflections' Exceptions should not be considered. *Brackman* does not support that premise. As the parties have already experienced in these cases, Proposed Findings and Conclusions may be presented, argued, and discussed such that the Board has questions significant enough to result in additional litigation – which adversely affects Copper Ridge and Reflections. Further, depending on how the Board rules on the 2021 Proposed FOFCOL, this round of briefing and argument may provide the only opportunity for Copper Ridge and Reflections to raise their arguments regarding the procedural motions they challenge (the February 21, 2020 Order Denying Motion to Separate Cases and the June 9, 2020 Order denying their Motion in Limine).

to the August 9, 2019 Board meeting, DEQ argues that "the Hearing Examiner entirely ignores the August 9, 2019 remand." DEQ Exceptions, p. 2. DEQ is wrong. The 2021 Proposed FOFCOL provides the procedural history, albeit without reference to all of the motions filed subsequent to the August 9, 2019 remand.[4]

A. Previous Exclusion of the Photos.

DEQ wrongly complains that the photos were excluded and not considered, but provides no history of the photos, including the reasons for their initial exclusion. DEQ failed to give Copper Ridge and Reflections notice of the photographs in its original 2013 notice letter. Ex. 2. DEQ failed to give notice of the photographs in its subsequent letters in November 2013 and December 2014. Exs. 7, 8, 17. DEQ acknowledged Copper Ridge's and Reflections' responses to the violations in 2014, but again failed to provide the photographs or notice of the photographs. Ex. O. DEQ failed to provide the photographs or any reference to the photographs in their Administrative Compliance Orders issued in 2015. Exs. 9, 10. Those Orders were limited to homebuilding activities, which were only occurring in the southern and middle portions of the Reflections subdivision, not in

[4] As noted in Copper Ridge and Reflections' Exceptions document, the complete post-remand procedural history includes a motion in limine, motion to amend the schedule, motion for summary judgment, motion to take judicial notice of fact, motion to strike, and notice of supplemental authority. Copper Ridge & Reflections Exceptions, p. 3.

the northern area where the three of the four previously-excluded photographs were taken. *Id*., ¶ 43.

Throughout discovery and summary judgment prior to the first evidentiary hearing, DEQ failed to provide the photographs. Even when posed with specific written requests to provide all evidence that supports its alleged violations, DEQ failed to produce the photographs. 05/23/19 Tr. 22:7-11 (During the pretrial conference and oral argument on the motions in limine, DEQ admitted that the photographs "were not produced during discovery."). When asked repeatedly during the Rule 30(b)(6) deposition of DEQ's representative to identify the evidence relied upon by DEQ to support its allegations, DEQ did not mention the photographs. Ex. CC (not admitted - Depo. C. Romanchewiecz), pp. 31, 55, 65, 71, 87, 89.

During the first evidentiary hearing, which lasted for three days, DEQ relied on an aerial photograph to pinpoint the locations of all of their photographs that show alleged violations. Ex. 16. That aerial photograph does not include any reference to the previously excluded photographs. It does not even show the area where the previously excluded photographs were taken.

DEQ did not provide the photographs until May 2019, after the Board's first remand and more than five years after DEQ provided notice of the alleged

violations. Relying on principles of equity and estoppel, Hearing Examiner Clerget ruled:

> DEQ will NOT be permitted to use or enter any photographs that are not either publicly available or attached to the September 23, 2013 Violation Letter (Feb. 2018 Hearing Ex. 2), including but not limited to photos 1, 3, 4, and 5.

June 4, 2019 Order on MIL, p. 7. Hence, the photographs were precluded based on DEQ's owns actions and inactions. As noted during the August 9, 2019 Board Meeting and by the Hearing Examiner, the previously excluded photographs are of questionable value and were offered by DEQ to support "an entirely new theory of the case." 2021 Proposed FOFCOL, p. 44, fn 3.

B. The Remand Within the Remand.

On page 3 of its Exceptions, DEQ provides a long box quote from Board Member Tweeten. But *after* that narration, Board Member Tweeten questioned DEQ at length about the photographs, even asking for an "offer of proof" to explain how the previously excluded photographs support the alleged violations. 08/09/19 Tr. 197:15-17. After that questioning and discussion, Board Member Tweeten walked back from his earlier statement (cited by DEQ in their Exceptions) and stated "Candidly I don't feel as strongly about it now as I did an hour ago." 08/09/19 Board Tr. 199:20-21. Nonetheless, during the remand to determine whether Copper Ridge and/or Reflections are/is an owner or operator,

the Board remanded the cases to the Hearing Examiner for consideration of the previously excluded photos.

The Board did not direct that a third hearing must be conducted, as alleged by DEQ. Rather, the Board remanded to the Hearing Examiner "to take additional evidence regarding the photographs." 08/09/19 Board Tr. 222:11-12. "Additional evidence" may be accepted and considered by the Hearing Examiner on summary judgment:

> A party seeking summary judgment has the burden of establishing a complete absence of any genuine factual issues. In light of the pleadings **and the evidence** before the court, there must be no material issue of fact remaining which would entitle a nonmoving party to recover. Once the movant has presented **evidence** to support his or her motion, the party opposing summary judgment must present **material and substantial evidence**, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact.

Howard v. Conlin Furniture No. 2, 272 Mont. 433, 436-437, 901 P.2d 116, 118-119 (1995) (Internal citations removed) (emphasis added).

Nothing in the remand negated summary judgment as a part of the remand within the remand. The Board did not direct the Hearing Examiner to depart from the normal rules of civil procedure and proceed directly to a hearing without the normal course of litigation, which includes the option for summary judgment.

C. Actions Before the Hearing Examiner During the Remand Within the Remand.

DEQ repeatedly alleges that the Hearing Examiner did not comply with the Board's remand and did not consider the photographs. DEQ Exceptions, pp. 4, 6,

17, 20, 21. However, the photographs were submitted as evidence when they were attached to Copper Ridge and Reflections' Statement of Undisputed Facts on Remand, in support of the motion for summary judgment. Stmt. Undisputed Facts, Ex. B (May 22, 2020).

Nothing in the summary judgment action negates consideration of the previously excluded photographs as evidence. Additionally, nothing about the summary judgment action was unfair or otherwise curtailed the evidence that DEQ could have presented.[5] DEQ could have offered testimony through affidavits. DEQ could have offered additional documentary evidence. But instead, DEQ did not offer *any* evidence.

The Hearing Examiner considered the photographs, as well as briefing and argument from DEQ and Copper Ridge and Reflections. The Hearing Examiner then provided thirteen new findings of fact, specific to the "Excluded Photos Offered by DEQ." 2021 PFOFCOL, pp. 41-43, 49.[6] Therefore, the previously excluded photos are now part of the evidentiary record, with specific factual findings based on the photos, which support the conclusions reached by the Hearing Examiner.

[5] DEQ does not allege that "the proceedings on which the findings were based did not comply with essential requirements of law." Mont. Code Ann. § 2-4-621(3).

[6] DEQ may complain that no Order on Summary Judgment exists, but no order is needed because the penultimate result of the Hearing Examiner's work is the 2021 Proposed FOFCOL, which includes facts found, conclusions reached, and a discussion. An order would likely be duplicative and unnecessary in this context.

Summary judgment provides an efficient method to reach judgment where there are no disputed facts and a party is entitled to judgment as a matter of law. In such cases, neither the judiciary nor the parties need expend the time, effort and resources required to proceed through a full trial or evidentiary hearing. Since an evidentiary hearing is necessary to determine facts, if there is no dispute about the facts, then summary judgment is appropriate is the moving party is entitled to judgment as a matter of law. *Morton v. M-W-M, Inc.*, 263 Mont. 245, 249, 868 P.2d 576, 579 (1994).

Upon filing of Copper Ridge's and Reflections' motion for summary judgment, DEQ, as the nonmoving party, had "an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice." *Id.; see also Spinler v. Allen*, 1999 MT 160, ¶ 15, 295 Mont. 139, 142, 983 P.2d 348, 351 ("the party opposing summary judgment must come forward with *substantial evidence* raising a genuine issue of material fact precluding summary judgment." (emphasis added)). Therefore, it is wrong for DEQ to complain that the "evidentiary record before the BER is not complete because there is additional relevant evidence with respect to the excluded photographs [that] has not been presented." DEQ Exceptions, p. 4. If any "additional relevant evidence" exists, it should have been

raised by DEQ in response to summary judgment. DEQ's failure to present such evidence is fatal to its argument.

There are no holes in the evidentiary record. The previously excluded photographs were presented by Copper Ridge and Reflections in the summary judgment action and were considered by the Hearing Examiner. If DEQ had additional evidence related to the photographs, such evidence should have been raised in response to summary judgment. DEQ's failure to raise any additional evidence during summary judgement precludes DEQ from now arguing that the evidentiary record is somehow incomplete.

III. DEQ'S EXCEPTIONS TO FINDINGS OF FACT

A. Previously-Adopted Findings of Fact Nos. 1 through 42.

The Board previously adopted Findings of Fact Nos. 1 through 42 during their August 9, 2019 meeting. The Board did so after hearing argument on DEQ's proffered exceptions to those first 42 Findings of Fact, after questioning the parties further and deliberating on the issues raised. *See* 08/09/19 Board Tr. 79-158. The Board's approval of those first 42 Findings of Fact has not been revised, revoked or negated. The 2021 Proposed FOFCOL includes those first 42 Findings of Fact, with non-substantive edits to revise formatting and correct typos.

DEQ's objections to the first 42 Findings of Fact have either (1) already been decided by the Board or (2) raise new issues that DEQ waived by not

bringing forward during the Board's previous consideration of the first 42 Findings of Fact. *Gibbs v. Altenhofen*, 2014 MT 200, ¶ 10, 376 Mont. 61, 330 P.3d 458.[7] Therefore, the Board's previous ruling on the first 42 Findings of Fact should be acknowledged without change. However, should the Board entertain DEQ's exceptions to the first 42 Findings of Fact, Copper Ridge and Reflections offer the following responses:

Finding of Fact Nos. 21 and 22. DEQ offers no objection, only clarifications; therefore, the findings should be adopted without modification. Further, the clarifications have nothing to do with the facts and are therefore not applicable. DEQ presents an erroneous interpretation of permit coverage and misrepresents the terms of the permits. For Finding of Fact No. 21, the "contracted work" *was* the permitted work, as confirmed by Finding of Fact No. 20, to which DEQ has not objected. Therefore, DEQ's clarification is wrong. For Finding of Fact No. 22, the permit at issue includes a "Total site area" of 8.27 acres, which DEQ admits is the third phase/filing of the Reflections Subdivision; therefore, the

[7] "The doctrine of claim preclusion (res judicata) bars the relitigation of a claim that a party has already had an opportunity to litigate or that the party *could have* litigated in the first action. Thus, a party may be precluded from litigating a matter that has never been litigated and that may involve valid rights to relief. The elements of claim preclusion are: (1) the parties or their privies are the same in the first and second actions; (2) the subject matter of the actions is the same; (3) the issues are the same in both actions, or are ones that could have been raised in the first action, and they relate to the same subject matter; (4) the capacities of the parties are the same in reference to the subject matter and the issues between them; and (5) a valid final judgment has been entered on the merits in the first action by a court of competent jurisdiction."

finding is correct in noting that the third filing "was previously included" in the permit. Ex. C.

Findings of Fact Nos. 24, 25, 28. DEQ offers the same objections it raised to these findings in the 2019 Proposed FOFCOL, which the Board has already considered and overruled. Further, DEQ only argues that different evidence should be considered, not that there is any lack of substantial evidence supporting the findings; therefore, the findings cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ has not argued, and cannot credibly argue, that the map provided at Exhibit BBB (attached for reference), which shows the permit boundary and BMPs,[8] has been misread or does not support the findings. DEQ's own witness, Mr. Dan Freeland, testified in accordance with the findings. 06/13/19 Hearing Tr. 69:9-12; 69:20-70:3.

Finding of Fact No. 29. DEQ offers no objection, only a clarification; therefore, the finding should be adopted without modification. Further, like DEQ's clarification to Finding of Fact No. 22, again DEQ offers a clarification that misses the mark and is not applicable. The permit at issue includes an "Estimate of the Total Area of the Site" of 17.70 acres, which is the second phase/filing of the

[8] BMPs are "Best Management Practices," defined in the General Permit as "schedule of activities, prohibition of practices, maintenance procedures, and other management practices to prevent or reduce the pollution of state surface waters." Ex. 1, p. 35.

Copper Ridge subdivision; therefore, the finding is correct in noting that the second filing "was previously included" in the permit. Ex. 50, p. 2.

Findings of Fact Nos. 34 and 25. DEQ failed to raise these objections when these findings were reviewed and accepted by the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. Further, DEQ's objections are based only on DEQ's lack of knowledge, which is irrelevant. The findings document the facts found by the Hearing Examiner after consideration of all evidence, including testimony offered by both parties at the hearings. Because the Hearing Examiner's findings are granted deference and because DEQ has not proven a lack of substantial evidence supporting the findings, the findings cannot be modified or rejected. *Brackman*, 258 Mont. 200; *Blaine Cnty*, ¶ 26.

B. Findings of Fact Previously Proposed but Not Adopted by the Board.

Finding of Fact No. 43. DEQ offers no objection, only clarification; therefore, the finding should be adopted without modification. DEQ's offered clarification, which was not raised when this finding was presented to the Board in 2019, offers additional findings that the Hearing Examiner did not propose. The Hearing Examiner heard and considered all of the evidence cited by DEQ, but specifically chose to propose the finding as written. The Hearing Examiner, could have, but specifically chose not to include all of DEQ's cited evidence. Because

the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. Therefore, DEQ's offered clarification should be rejected. Further, DEQ only argues that additional evidence should be included, not that there is any lack of substantial evidence supporting the finding; therefore, the findings cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ has not argued, and cannot credibly argue, that the testimony cited in the finding is incorrect because it consists of direct quotations from DEQ's own witness, Mr. Dan Freeland.

Findings of Fact Nos. 46 and 47. DEQ offers no objection, only clarification; therefore, the finding should be adopted without modification. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ has not argued, and cannot credibly argue, that the testimony cited in the finding is incorrect because it consists of direct quotations from DEQ's own witness, Mr. Dan Freeland, who stated (contrary to DEQ's argument presented now), that the construction activity he saw was "clearing, lack of vegetation." Finding of Fact No. 47.

Further, DEQ offers its interpretation of the term "construction activity," which is irrelevant to the findings and contrary to the Board's 2019 remand. DEQ argues that "construction activity is not confined to active construction" (DEQ's Exceptions, p. 10); but in the context of determining whether Copper Ridge and Reflections are owners or operators (which was the directive of the remand within the remand), the Board clarified that the legal definition of an owner or operator of construction activity is "the person who owns, operates, or supervises the project *at the time* that the offending storm water discharges take place." 02/08/19 Tr. 113:9-17 (Board Member Tweeten offering replacement motion, which was approved by the Board at 119:13-21).[9]

Finding of Fact No. 51. DEQ failed to raise any objection to this finding when it was before the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ only offers a different finding, based on the same testimony that the Hearing Examiner cited in this finding. *Compare* DEQ Exceptions, p. 10, citing page 28 of the hearing transcript, *with* Finding of Fact No. 51, citing page 27 through 29 of the hearing transcript.

[9] DEQ wrongly argues in their Response Brief that the Board's remand within the remand extends to "all phases of construction" within the subdivisions. No such direction is found in the Board's February 2018 remand regarding the owner or operator issue.

Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 54.[10] DEQ failed to object when this finding was before the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Notably, DEQ's failure to object to this finding in 2019 equates to DEQ's agreement, as recently as July 22, 2019 (the date of DEQ's previous exceptions), that the "most northerly photograph" taken by Mr. Freeland during the September 9, 2013 inspection "depicts lots on Amelia circle." Now, more than seven years after the inspection, DEQ asserts that additional photographs were taken in a wholly different area, even further north, that allegedly support the alleged violations. DEQ failed to provide notice of the photographs (indicating that they do not support the violations as they were alleged

[10] DEQ improperly attaches evidence, in the form of its *corrected* Exhibit 36, for the Board's consideration. The Board may not review just one piece of factual evidence when determining whether to modify or reject a finding. Instead, the law requires that the Board conduct a "review of the complete record." Mont. Code Ann. § 2-4-621(3). DEQ's improper *corrected* Exhibit 36 contains the four previously excluded photographs, but notably, it is not the same document that was presented to the Board in 2019. Previously, DEQ presented what they now call photo 2 to the Board as photo 1, arguing that it should have been admitted into evidence and arguing that it was not fairly considered. In this "corrected" version, DEQ has switched photo 1 and 2. DEQ later argues that the Hearing Examiner referred to the photos incorrectly (DEQ Exceptions, p. 20), but DEQ has erroneously switched the photos. *Compare* DEQ's corrected Exhibit 36 (attached to Exceptions) *with* **Exhibit B**, attached (DEQ's original Exhibit 36, attached to Response to Motion in Limine (May 20, 2019)).

in 2013), failed to produce the photographs, and failed to assert an objection to this finding until now; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10.

Further, the finding summarizes the Hearing Examiner's review of the photographs supporting this enforcement action. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 55. DEQ failed to raise any objection to this finding when it was before the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Further, DEQ's objection misses the mark and is not applicable because the finding is limited to "photographs and field notes." The Hearing Examiner considered all evidence and specifically crafted this finding based on the "photographs and field notes," not on any testimony. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 56. DEQ failed to raise this objection when this finding was before the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. The Hearing Examiner considered all evidence and specifically crafted this finding limited to "Lucky Penny Lane and Amelia Circle" and did not include "East Copper Ridge Loop." Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Findings of Fact No. 63-65. DEQ does not argue that there is a lack of substantial evidence supporting these findings; therefore, the findings cannot be modified or rejected. *Blaine Cnty*, ¶ 26. The Hearing Examiner considered all evidence, including the testimony cited by DEQ in its exceptions. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. DEQ's objections are nearly identical to the exceptions offered when these findings were before the Board in 2019; therefore, Copper Ridge and Reflections reference and incorporate herein (but do not re-state herein) their responses filed in

2019. *See* Copper Ridge and Reflections' 08/02/19 Response to Exceptions, pp. 12-14 (attached as **Exhibit C**).

Findings of Fact Nos. 66-68. DEQ offers no objections, only clarifications; therefore, the findings should be adopted without modification. DEQ does not argue that there is a lack of substantial evidence supporting the findings; therefore, the findings cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ erroneously alleges some unpermitted "construction activity on individual lots;" however, as confirmed in previous findings, DEQ offered no credible evidence of such construction activity. Further, the findings characterize and summarize witness testimony. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 69. DEQ failed to raise any objection when this finding was before the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. Notably, DEQ's failure to object in 2019 equates to DEQ's agreement, as recently as July 22, 2019 (the date of DEQ's previous exceptions), that the "only photograph that Mr. Freeland took during the September 9, 2013 inspection that arguably shows a portion of a lot owned by CR/REF was photograph 13." Now, more than six years after the inspection, DEQ

asserts that additional photographs were taken. DEQ failed to provide notice of the photographs, failed to produce the photographs, and failed to assert an objection to this finding until now; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10.

Further, the finding summarizes the Hearing Examiner's review of the evidence with respect to lots "owned by CR/REF." Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 73. DEQ does not argue that there is a lack of substantial evidence supporting this finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. The Hearing Examiner considered all evidence, including the testimony cited by DEQ in its exceptions. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. DEQ's objection is nearly identical to the exception offered when this finding was before the Board in 2019; therefore, Copper Ridge and Reflections reference and incorporate herein (but do not re-state herein) their response filed in 2019. *See* Ex. C, Copper Ridge and Reflections' 08/08/19 Response to Exceptions, p. 14.

Finding of Fact No. 81. DEQ offers no objection, only a clarification; therefore, the finding should be adopted without modification. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ's offered clarification is not applicable because it focuses on testimony regarding "homes being built" which is not encompassed in Finding of Fact No. 81. Further, the Hearing Examiner considered all evidence, including the testimony cited by DEQ in its exception. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200.

Finding of Fact No. 83. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Further, the Hearing Examiner considered all evidence, including the testimony cited by DEQ in its exception. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. DEQ's objection is nearly identical to the exception offered when this finding was before the Board in 2019; therefore, Copper Ridge and Reflections reference and

incorporate herein (but do not re-state herein) their response filed in 2019. *See* Ex. C, Copper Ridge and Reflections' 08/08/19 Response to Exceptions, p. 15.

Findings of Fact No. 86 and 87. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. DEQ's objection is nearly identical to the exception offered when this finding was before the Board in 2019; therefore, Copper Ridge and Reflections reference and incorporate herein (but do not re-state herein) their response filed in 2019. *See* Ex. C, Copper Ridge and Reflections' 08/08/19 Response to Exceptions, pp. 6-7, 16.

Finding of Fact No. 101. DEQ offers no objection, only a clarification; therefore, the finding should be adopted without modification. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. DEQ's offered clarification is especially troubling because it seems to presume that an additional hearing will occur during which DEQ may present additional evidence supporting DEQ's alleged violations. DEQ has already had two evidentiary hearings totaling four days in which to prove the violations. As noted in footnote 1 to both this 2021

Proposed FOFCOL and the 2019 Proposed FOFCOL, the proposal has been drafted to incorporate both hearings and to serve as the Board's final order in these contested cases. Any implication that an additional opportunity remains for DEQ to prove the violations is misguided. Six years is long enough, justice is not served by further delays or unnecessary remands.

Finding of Fact No. 115. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Because the Hearing Examiner "is in the unique position of hearing and observing all testimony entered in the case," the Hearing Examiner's findings "especially as to witness credibility, are therefore entitled to great deference." *Brackman*, 258 Mont. 200. DEQ's objection is nearly identical to the exception offered when this finding was before the Board in 2019; therefore, Copper Ridge and Reflections reference and incorporate herein (but do not re-state herein) their response filed in 2019. *See* Ex. C, Copper Ridge and Reflections' 08/08/19 Response to Exceptions, p. 16.

Finding of Fact No. 128. DEQ offers no objection, only a clarification; therefore, the finding should be adopted without modification. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26.

C. Newly Proposed Findings of Fact.

Findings of Fact Nos. 139-140. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Further, DEQ's objection is wrong. The finding states "Of the excluded photographs presented by DEQ…." As noted in footnote 3 above, the excluded photographs presented by DEQ to this Board in 2019 which precipitated the remand within the remand are not in the same order as the photographs DEQ now improperly attaches to its exceptions as a "corrected" exhibit. DEQ argued to this Board that Photo 1 should not have been excluded and that Photo 1 needed to be in evidence. DEQ now presents a different photo to the Board as Photo 1. *Compare* **Exhibit B** attached here (DEQ's Exhibit 36 presented to the Board in 2019) *with* DEQ Exhibit 36 attached to DEQ's 2021 Exceptions.

Finding of Fact No. 141. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be modified or rejected. *Blaine Cnty*, ¶ 26. Further, DEQ's objection misses the mark. Finding of Fact No. 141 finds that photos 3, 4, and 5 depict areas that were "within the disturbance area of permit MTR 104993." DEQ's exception offers nothing contrary to that finding.

Finding of Fact No. 142. DEQ does not argue that there is a lack of substantial evidence supporting the finding; therefore, the finding cannot be

modified or rejected. *Blaine Cnty*, ¶ 26. Further, DEQ's objection misses the mark. Finding of Fact No. 142 finds that the permit "allowed ground disturbance in 'Material fill areas.'" Therefore, material fill areas were permitted areas, by definition. DEQ's exception offers nothing contrary to that finding.

IV. DISCUSSION

A. Relevance on Remand

These contested cases are currently in a remand within a remand. Importantly, the Hearing Examiner has not lost sight of the subject of the original remand – whether either Copper Ridge or Reflections is an "owner or operator" within the legal meaning of those terms as interpreted by the Board during its February 8, 2019 meeting. Within that remand, the Board further remanded specifically "with regard to the four photographs excluded by the motion in limine." 08/09/19 Tr. 222:8-9. Thus, this remand within the remand is limited to the four previously excluded photographs in the context of whether or not they help prove that Copper Ridge and/or Reflections is an "owner or operator."

The full June 4, 2019 Order on Motion in Limine was not challenged by DEQ, nor was it completely overruled by the Board. Two important limitations remain in place:

> a) DEQ WILL be permitted to enter evidence of "clearing, excavation, stockpiling, grading, and construction of single-family homes" (September 23, 2013 Violation Letter, Ex. 2 at 2) that occurred on areas of the subdivisions owned by CR/REF at the time of

> the alleged violations. However, **DEQ will be bound by its prior testimony, including but not limited to its written discovery responses and Rule 30(b)(6) deposition responses**.
>
> b) DEQ will NOT be permitted to enter evidence concerning lots or construction activity within the Copper Ridge and Reflections subdivision **unless DEQ can show where it gave notice** to CR/REF that such construction activity was at issue in the written correspondence, including: DEQ's September 9, 2013 MPDES Compliance Inspection Report, September 23, 2013 Violation Letters, November 8, 2013 Violation letters, DEQ's October 21, 2014 Inspection, DEQ's December 9, 2014 Violation Letters, DEQ's February 6 and 9, 2015 acknowledgement letters, or the March 27, 2015 Administrative Compliance and Penalty Orders.

06/04/19 Order on MIL, p. 7 (emphasis added).

DEQ again erroneously asserts that the Hearing Examiner did not consider the four excluded photographs, but the plain text of the 2021 Proposed FOFCOL proves otherwise. 2021 Proposed FOFCOL, pp. 10-11, 41-43, 49.

B. Owner/Operator September to December 2013 and October 2014

1. Photos 1 and 2 Offer Nothing that Changes the Findings.

DEQ has had more than 7 years to prove their alleged violations. Lot 15, as admitted by DEQ, has always been part of their case. Ex. 2, photograph 13. DEQ has had nearly 6 years of litigation, including two summary judgment actions and two evidentiary hearings totaling four days, in which to meet their burden of proof with respect to lot 15. DEQ has not met its burden and, most recently, when offered the opportunity on summary judgment to "come forward with *substantial evidence* raising a genuine issue of material fact

precluding summary judgment," DEQ failed to offer any evidence whatsoever. *Spinler v. Allen*, 1999 MT 160, ¶ 15, 295 Mont. 139, 142, 983 P.2d 348, 351 (emphasis added). Even now, DEQ only provides cryptic references to "evidence that Lot 15 was properly identified and located." DEQ Exceptions, p. 18. Yet DEQ has had at least four opportunities to present that evidence and has failed to do so.

DEQ is again arguing, as it did during summary judgment, that its statements made in legal briefing and at oral argument regarding potential additional evidence should be enough for this tribunal to require a time- and labor-intensive hearing. But such statements cannot defeat summary judgment. *Koepplin v. Zortman Min., Inc.*, 267 Mont. 53, 61, 881 P.2d 1306, 1311 (1994) ("[C]onclusory and interpretive statements of material fact do not rise to the level of genuine issues of material fact required to defeat [a] motion for summary judgment.").

In *Koepplin*, Zortman Mining, Inc. moved for summary judgment on Koepplin's wrongful termination claim, offering evidence that it had properly terminated Koepplin based on his threatening phone calls to his supervisor and others. *Koepplin*, 267 Mont. at 56-57, 59. The facts regarding the telephone calls were **undisputed**. Koepplin's attorney responded by arguing that "Koepplin did

not intend this statement to be a threat" but Koepplin **cited no deposition or affidavit** for that assertion. *Koepplin*, 267 Mont. at 59. The Court held:

> Koepplin has not presented any evidence that there is an issue of material fact relating to his wrongful discharge claim. This Court has previously held that a party cannot create a disputed issue of material fact by putting his own interpretations and conclusions on an otherwise clear set of facts. *See, e.g., Sprunk v. First Bank Sys.* (1992), 252 Mont. 463, 466–67, 830 P.2d 103, 105. We conclude Koepplin's conclusory and interpretive statements of material fact do not rise to the level of genuine issues of material fact required to defeat Zortman's motion for summary judgment on Koepplin's claim for wrongful discharge.

Koepplin, 267 Mont. at 61.

Similarly, here, it is **undisputed** that Mr. Freeland "did not know where the property lines were," and that he "did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there." 2021 Proposed FOFCOL, Findings of Fact Nos. 81 and 81 (to which DEQ has not objected, see DEQ Exceptions p. 14). It is also **undisputed** that Mr. Freeland "did not observe active construction on the vacant lots in the subdivision and did not see equipment actively clearing the vacant lots," he "could not recall seeing construction equipment on vacant lots," and "could not provide details about any specific construction activity or where it may have been occurring." 2021 Proposed FOFCOL, Findings of Fact Nos. 46 and 47 (to which DEQ has not objected, see DEQ Exceptions, p. 10).

Here, as in *Koepplin*, a "clear set of facts" exists. DEQ cannot now, **without deposition or affidavit**, without any evidence at all, "put [its] own interpretations and conclusions on [that] otherwise clear set of facts" to defeat summary judgment or change the 2021 Proposed FOFCOL.

An additional important consideration here that was not at issue in *Koepplin*, is that Findings of Fact Nos. 46, 47, 81 and 82 are all based on direct testimony *from DEQ's witness*. Thus, none of DEQ's late and improperly offered photographs can be interpreted as supporting the alleged violations without contradicting DEQ's previous sworn testimony. DEQ has stated that Mr. Freeland took the excluded photographs during his September 2013 inspection. But Mr. Freeland has had literally hours of opportunity on the witness stand to explain everything he saw and all of the evidence he gathered with respect to lot 15.[11] That testimony was considered by the Hearing Examiner, who is best suited to judge the meaning and credibility of all of the evidence. *Brackman*, 258 Mont. 200. The Hearing Examiner has again considered that testimony, the evidence and argument presented on summary judgment, which included the excluded photographs. The Hearing Examiner has once again proposed several findings of fact about lot 15, based on Mr. Freeland's testimony, to which DEQ has not objected. There can be

[11] Even if DEQ persists in prosecuting any alleged violation on lot 15, DEQ has not yet, but would have to prove that any alleged unpermitted disturbance exceeds the permitting threshold of one acre or is part of a "larger common plan of development." ARM 17.30.1102(28); Ex. C, p. 1.

no more "clear[er] set of facts" than that. DEQ's cryptic statements about some mysterious, unpresented additional evidence do not alter that clear set of facts.

Further proof that the excluded photographs do not alter the "clear set of facts" is DEQ's Rule 30(b)(6) deposition testimony, which confirmed *multiple times* that the only evidence relied upon by DEQ to support its allegation that Copper Ridge and Reflections were "owners or operators" were the sign at the entrance to the subdivisions and DEQ's later search of Secretary of State records. Ex. CC (not admitted - Depo. C. Romanchewiecz), pp. 31, 55, 65, 71, 87, 89. DEQ's implication now, six years after they initiated this formal enforcement, that photographs not disclosed until 2019 somehow support their claim that Copper Ridge and Reflections are "owners or operators" in 2013 should be rejected.

2. Photos 3, 4, and 5 Cannot, and Do Not, Alter the Findings.

a. Photos 3, 4, and 5 are Irrelevant.

DEQ argues that Mr. Freeland "observed lots owned by Reflections" in the northern part of the subdivision "that had been graded and cleared of all vegetation." DEQ admits that those lots are in a different area than the lots where DEQ alleged violations based on homebuilding construction activities. DEQ Exceptions, p. 18. But DEQ's Administrative Compliance Orders only allege violations based on homebuilding activities. Exs. 9, 10, ¶ 43; Hearing Tr. 51:10-12 (May 23, 2019) (Hearing Examiner noting "I think the AO does limit it to

homebuilding activities."). Not only did DEQ's assertions after the first remand evolve into an entirely different geographical area (*Compare* photo locations presented in Ex. 16 *with* DEQ Exhibit 35), but DEQ also admits that its new assertions are not about homebuilding. The different locations and different activities now presented by DEQ equate to *different violations*. DEQ may not now prosecute different violations in these contested cases. DEQ has not provided proper notice of the alleged different violations to Copper Ridge and Reflections, nor has it amended its enforcement action.

b. DEQ's Theory of Disturbed Areas Beyond the Permit Area is Wrong as a Matter of Law.

DEQ's assumption that Copper Ridge and Reflections have "disturbed areas" that are "outside the areas permitted" is not supported by any evidence and is wrong by definition. DEQ Exceptions, p. 19. DEQ asserts that the permit only covers "disturbed areas," not the entire permitted "site" and that only street and utility construction are covered activities. Both assertions are contrary to the express terms of the permit.

First, the General Permit regulates construction activities and discharges from the "site" as evidenced by:

- Requirements to consider the "discharge potential to state surface waters from the **site**;" Ex. 1, p. 6.
- Clarification that "storm water which discharges into a drain inlet and/or storm sewer system from the **site** is regulated as a discharge to

state surface waters if the inlet or system itself ultimately discharges into a sate surface water." Ex. 1, p. 6.

- Requiring "**site** inspections" at the "construction activity **site**" to assess "**site** conditions" and look for "indications of potential pollutants leaving the **site** boundaries." Ex. 1, pp. 13-14.
- Requiring review and revision of BMPs if an unauthorized release or discharge occurs at the "**site**." Ex. 1, p. 15.
- Requiring a Storm Water Pollution Prevention Plan (SWPPP) that describes "**site** characteristics" and identifies maintenance procedures "implemented at the **site**." Ex. 1, p. 17.
- Requiring a "**site** description" that describes the "nature of the construction activity and what is being constructed" as well as a "description of all support activities and associated storm water discharges dedicated to the construction activity including but not limited to: material borrow areas, material fill areas, concrete or asphalt batch plants, equipment staging areas, access roads/corridors, material storage areas, and material crushing/recycling/processing areas." Ex. 1, p. 19.
- Requiring a description of the "total area of the **site**" as well as the area of the **site** "expected to undergo construction-related disturbance (including all construction-related support activities)." Ex. 1, p. 19.
- Requiring documentation of "BMPs which have been installed and implemented at the **site** to achieve the effluent limits." Ex. 1, p. 21.
- Requiring a "**site** map" that includes "**site** boundaries" and drainage patterns showing where stormwater will flow "onto, over, and from the **site** property." Ex. 1, p. 20.
- Requiring documentation of "the location and type of BMPs which have been installed and implemented at the **site** to achieve the effluent limits." Ex. 1, p. 21.

DEQ's assertion that the "site" is not the permitted area is wrong, as evidenced by the express terms of the permit cited above. Why else would the permit require inspections and BMPs throughout the entire site if the entire site is not regulated by the permit? There is no good reason. Contrary to DEQ's implication, the permitted area includes the entire "site." Here, the "site" is the third phase/filing of

the Reflections subdivision, including the entirety of all lots. 2021 Proposed FOFCOL, Findings of Fact Nos. 24, 25; Ex. C and Ex. BBB (attached for reference, showing site boundaries encompassing the entirety of all lots).

Second, the General Permit covers construction activities as well as "support activities." Ex. 1, p. 6. As noted above, the permit specifically includes "material fill areas" as an example of a "support activity" that is included in the permit coverage. Ex. 1, p. 19. Accordingly, the SWPPP for this specific permit includes "material fill areas" as part of the "support activities" and identifies those material fill areas as occurring on lots 10, 11, 12, 30, 31, 32, 33, and 34. Ex. C, p.10; Ex. BBB (attached for reference). Thus, in addition to the street and utility corridor (which extends onto a portion of each lot), those individual lots were part of the "disturbance area" covered by the General Permit.

There is no dispute that:

- Photo 3 was taken from the edge of lot 12 looking across Western Bluffs Boulevard and facing east.
- Photo 4 was taken from the edge of lot 13 looking across Western Bluffs Boulevard facing southeast.
- Photo 5 was taken from Western Bluffs Boulevard, facing south at lot 32.

2021 Proposed FOFCOL, Findings of Fact Nos. 143-148 (to which DEQ did not object, *see* DEQ Exceptions, p. 17).

Using that information while referring to the map provided with the permit (Ex. BBB, attached for reference), it is obvious that the photos depict areas in lots

32, 33 and 34. Since those three lots are included as "material fill areas" subject to permit coverage, any disturbance depicted in the photos is covered by the permit.

c. DEQ's Vegetation Theory Contradicts Its Earlier Testimony.

DEQ argues that the subdivisions either had to have 70% vegetative cover (the threshold for successful permit termination) or 90% vegetative cover (the pre-construction condition of the land). But there is no requirement that a landowner maintain either the 70% vegetative cover achieved for permit termination or the pre-existing 90% vegetative cover for any length of time beyond permit termination. Further, there is no requirement that a permittee maintain the pre-existing 90% vegetative cover in undisturbed areas during the construction project.

Two of the permits at issue in this case had been terminated by DEQ well before DEQ's September 2013 inspection. Therefore, there was no requirement for anyone to maintain any vegetation within those areas. The remaining, existing permit was still in effect, covering construction activities and support activities across the third phase/filing of the Reflections Subdivision. For that area, there was no requirement that any pre-existing condition of the undisturbed areas be maintained. *See* Exhibit SSS, filed with Motion to Take Judicial Notice of Fact and attached here for demonstrative purposes to show permit numbers, coverage dates and associated exhibits.

Rather than indicating any nefarious activity, any lack of vegetative cover throughout the subdivisions was most likely the result of the severe and significant storm event – 2.10 inches of rain falling in just 45 minutes, with marble-sized hail, and wind gusts of up to 75 mph – that occurred just two days prior to DEQ's inspection, in September, at the tail end of a long, hot, dry spell.

DEQ's "lack of vegetative cover" argument has no legal basis and factually, any lack of vegetative cover is linked to the storm rather than to any unpermitted construction activity.

V. CONCLUSIONS OF LAW

DEQ's objections to the Conclusions of Law only work if DEQ's objections to the findings of fact are accepted. As explained above, those objections cannot be sustained because they point to no lack of substantial credible evidence supporting the proposed findings. Therefore, the proposed findings may not be rejected or modified as proffered in DEQ's Exceptions.

DEQ only asserts that different facts should have been found, but the evidence does not support DEQ's assertions and the Hearing Examiner, who is best-suited to weigh the evidence and find the facts, has already considered DEQ's propositions and found otherwise. The Hearing Examiner's findings are afforded deference and DEQ offers no good or valid basis to reject or modify any of them. *Brackman*, 258 Mont. 200.

Curiously, DEQ offers the same argument it offered during the first summary judgment action regarding whether Copper Ridge and Reflections are owners or operators. Based on permits that DEQ made Copper Ridge and Reflections obtain as corrective actions to remedy these very alleged violations, DEQ argues that Copper Ridge and Reflections have "held themselves out as owners or operators." DEQ Exceptions, p. 21. But the Board already rejected that argument when it overruled the first Summary Judgment Order in February 2019. Therefore, DEQ offers no credible or viable reason to modify or change any conclusions of law.

VI. CONCLUSION

DEQ wrongly complains that the previously excluded photos have not been considered as required by the Board's remand within the remand. The very text of the 2021 Proposed FOFCOL proves DEQ wrong. The excluded photographs have been considered. They show nothing additional with respect to the Copper Ridge Subdivision. They show nothing that changes the findings with respect to Lot 15 in the Reflections Subdivision. Lot 15 has been part of this litigation since DEQ issued its Administrative Compliance Order in 2015 and extensive evidence and testimony have already been gathered with respect to lot 15. Nothing in the excluded photographs or DEQ's proffered exceptions overrides that extensive evidentiary record such that the findings can be rejected or modified. Regarding

the third phase/filing of the Reflections Subdivision (which is not part of the violations alleged by DEQ in its Administrative Compliance Order) at most, the excluded photos show permitted material fill areas. There is no evidence of any of the remaining alleged violations. DEQ's objections, clarifications and exceptions should be rejected by the Board.

DATED this 29th day of March, 2021.

/s/ Victoria A. Marquis

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ATTORNEYS FOR REFLECTIONS AT COPPER RIDGE, LLC AND COPPER RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following person by e-mail and United States mail, postage prepaid on the date herein.

Joyce Wittenberg Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue P.O. Box 200901 Helena, MT 59620-0901 JWittenberg@mt.gov	[ ] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
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DATED this 29th day of March, 2021.

/s/ Victoria A. Marquis

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Blaine Cnty. v. Stricker

Supreme Court of Montana

February 15, 2017, Submitted on Briefs; April 11, 2017, Decided

DA 16-0076

Reporter
2017 MT 80 *; 387 Mont. 202 **; 394 P.3d 159 ***; 2017 Mont. LEXIS 151 ****; 2017 WL 1326434

BLAINE COUNTY and HILL COUNTY, Petitioners, Appellees and Cross-Appellants, v. SUMMER STRICKER, Personal Representative of the Estate of ALLEN J. LONGSOLDIER, JR., Respondent and Appellant, and Cross-Appellee, and The MONTANA HUMAN RIGHTS COMMISSION, Respondent.

Subsequent History: Released for Publication: May 23, 2017.

Rehearing denied by *Blaine & Hill Co. v. Stricker, 2017 Mont. LEXIS 306 (Mont., May 23, 2017)*

Prior History: **[****1]** APPEAL FROM: District Court of the First Judicial District, In and For the County of Lewis And Clark, Cause No. BDV 13-574. Honorable Jeffrey M. Sherlock, Presiding Judge.

Blaine Cnty. v. Stricker, 2015 Mont. Dist. LEXIS 85 (Dec. 8, 2015)

Case Summary

Overview

HOLDINGS: [1]-A district court judge properly reversed and vacated the Human Rights Commission's decision to modify the hearing officer's findings of fact because those findings were supported by competent substantial evidence; based on the evidence before the hearing officer, a reasonable mind could accept that the counties' failures to provide the decedent with further medical treatment were not based on any discriminatory animus toward the decedent, which was the inquiry dictated by the Montana Administrative Procedure Act's standard of review under *Mont. Code Ann. § 2-4-621(3)*;[2]-Another district court judge incorrectly concluded that the first judge erred by reinstating the hearing officer's decision as the final agency decision.

Outcome

Judgment affirmed in part and reversed in part.

Counsel: For Appellant: Patrick F. Flaherty, Daniel J. Flaherty, Paul Gallardo, Attorneys at Law, Great Falls, Montana; Steven T. Potts, Steven T. Potts, PLLC, Great Falls, Montana.

For Appellees: Maureen H. Lennnon, Gregory L. Bonilla, MACo Defense Services, Helena, Montana; Mark F. Higgins, Ugrin, Alexander, Zadick & Higgins, P.C., Great Falls, Montana.

For Respondent Montana Human Rights Commission: Scott M. Stearns, Boone Karlberg, Missoula, Montana; Timothy Little, Special Assistant Attorney General, Department of Labor, Helena, Montana.

Judges: BETH BAKER. We concur: MIKE McGRATH, LAURIE McKINNON, MICHAEL E WHEAT, JIM RICE. Justice Beth Baker delivered the Opinion of the Court.

Opinion by: BETH BAKER

Opinion

[*160]** **[**203]** Justice Beth Baker delivered the Opinion of the Court.

[*P1] **[**204]** Allen Longsoldier, Jr.—an eighteen-year-old Native American—died tragically from delirium tremens, a result of alcohol withdrawal, while in custody at the Hill County Detention Center following his arrest by Blaine County authorities. Longsoldier's Estate, represented by Summer Stricker, brought **[****2]** this case before the Montana Human Rights Bureau alleging that Hill County and Blaine County discriminated against Longsoldier on the basis of race and disability. The Hearing Officer concluded that the Counties had not discriminated against Longsoldier. The Estate appealed to the Human Rights Commission, which found clear error in the Hearing Officer's findings and concluded that the Counties had discriminated against Longsoldier.

[*P2] **[***161]** The Counties petitioned the First Judicial District Court to review the Commission's final agency decision. Presiding Judge Jeffrey Sherlock reversed and vacated the Commission's decision and reinstated the Hearing Officer's order as the final agency decision. On the Estate's motion to alter or amend, Judge James Reynolds—who had assumed jurisdiction of the case following Judge Sherlock's retirement—concluded that Judge Sherlock had, as a matter of law, fashioned an improper remedy.

[*P3] Both parties appeal, raising multiple issues. We find the following issues dispositive:

> *1. Whether Judge Sherlock correctly concluded that the Commission improperly modified the Hearing Officer's findings.*
>
> *2. Whether Judge Reynolds correctly concluded that Judge Sherlock erred **[****3]** as a matter of law by reinstating the Hearing Officer's decision as the final agency decision.*

[*P4] We affirm Judge Sherlock's order and reverse Judge Reynolds's order.

PROCEDURAL AND FACTUAL BACKGROUND

[*P5] Longsoldier was an intelligent and talented young man who struggled with alcoholism and depression. He excelled at basketball and was trying to get into college at the time of his death. His alcohol abuse resulted in a number of juvenile court proceedings, which led to supervision by a deputy juvenile probation officer.

[*P6] In the fall of 2009, Longsoldier's probation officer tried to contact him in order to close his file. The probation officer was unable to get in touch with Longsoldier and eventually requested a "pick up and hold." A Blaine County sheriff's deputy arrested Longsoldier early on the morning of November 19, 2009. The deputy transported Longsoldier to the Hill County Detention Center, where Blaine County's adult **[**205]** prisoners are held pursuant to an agreement between the Counties.

[*P7] Longsoldier had been drinking heavily for several days prior to his arrest. He had not, however, been drinking immediately before his arrest and showed no signs of intoxication when he was brought to the **[****4]** detention center. Longsoldier did not receive a medical screening when booked into the detention center, contrary to the detention center's admissions policy. The detention center's daily log book indicates that Longsoldier appeared to have no issues—aside from not sleeping—for the first twenty-four hours of his incarceration. At 3:28 a.m. on November 20, 2009, however, the log book indicates that Longsoldier complained that he could not hold down water and that he asked to go to the hospital. Shortly after that, a fellow inmate observed Longsoldier exhibit behavior that suggested he was hallucinating. Longsoldier's condition continued to deteriorate. Various entries in the log book demonstrate that detention center officers recognized that Longsoldier was experiencing symptoms associated with "detoxing" or alcohol withdrawal. Witnesses testified that such symptoms are common among inmates who enter the detention center intoxicated and remain while their bodies process alcohol from their systems.

[*P8] During the late afternoon of November 21, 2009, Longsoldier began pounding on the door of his cell and acting increasingly violent. By this point he had not slept for nearly three days. At **[****5]** around 7:00 that evening, Longsoldier was taken to Northern Montana Hospital by a Blaine County sheriff's deputy. A doctor examined him and gave him several medications. The doctor did not diagnose Longsoldier with alcohol withdrawal syndrome. Longsoldier's condition

improved to the point that he could hold down water. The doctor ordered that Longsoldier be discharged with six Ativan tablets, prescribed for anxiety. The Hospital discharged Longsoldier with prescriptions for Cymbalta and Ativan, but did not provide the six Ativan tablets the doctor had ordered. The prescriptions were never filled. The daily log indicates that Longsoldier was back at the detention center around 9:00 p.m.

[*P9] Longsoldier's condition worsened shortly after he returned to the detention center. The log book reveals that over the course of the next several hours officers observed Longsoldier hallucinating, talking to himself, **[***162]** gagging, dry heaving, sweating, and pleading for help. By around 2:30 a.m. on November 22, 2009, Longsoldier's condition had deteriorated so substantially that a detention center officer called Blaine County authorities and informed them that they may need to take Longsoldier back to the **[****6]** Hospital. The Blaine County dispatcher then called the Hospital and spoke with a nurse. The nurse told the **[**206]** dispatcher that Longsoldier just needed to drink fluids and that he was "playing them." The nurse advised the dispatcher that Longsoldier was not physically ill and "just doesn't like being there." The Blaine County dispatcher relayed this information to the officer at the detention center, and told the officer that the Hospital said "there's nothing they could do for him."

[*P10] The log book entries for the next several hours indicate that Longsoldier continued to suffer from hallucinations, talk to himself, not eat, and not drink any water. An entry at 10:44 p.m. indicates that Longsoldier was shivering and non-responsive. Shortly thereafter, a detention center officer called an ambulance. The ambulance picked up Longsoldier just before midnight on November 22. Longsoldier died at the Hospital from delirium tremens at approximately 2:00 a.m. on November 23, 2009.

[*P11] In May 2010, the Estate filed a claim against the Counties and the Hospital with the Human Rights Bureau. The complaint alleged that the Counties and the Hospital discriminated against Longsoldier because of his race—Native **[****7]** American—and because of his disability—alcoholism. The Hospital settled with the Estate shortly before the contested case hearing. The Hearing Officer heard the claims against the Counties during a four-day hearing in September 2011. In April 2012, the Hearing Officer issued a thorough thirty-page decision. The Hearing Officer found:

> There is no evidence that [the Counties'] action or inactions, or the lack of either better information about alcohol withdrawal or any training or information about delirium tremens before November 2009, were the result of any discriminatory animus on the part of [the Counties] . . . toward either alcoholics or Native Americans.

The Hearing Officer concluded that the Counties did not illegally discriminate against Longsoldier due to his race or disability.

[*P12] Longsoldier's Estate appealed the Hearing Officer's decision to the Commission. The Commission held a hearing in July 2012 but the hearing was not recorded due to technical difficulties. At a second hearing in September 2012, the Commission considered its draft order to remand the case to the Hearing Officer. The Commission approved the remand order. It concluded:

> [T]he hearing officer misapprehended the effect **[****8]** of the evidence regarding the failure of law enforcement personnel of Hill and Blaine Counties to have the prescriptions issued to Longsoldier by the [Northern Montana Hospital] treating physician on Saturday, November 21, 2009, filled and the failure of Detention Center personnel to administer those medications, as directed by the **[**207]** doctor.

The Commission found that the Counties' failure to fill the prescriptions "manifest[ed] a discriminatory indifference to Longsoldier's medical needs based on his disability." On that basis, the Commission determined that two of the Hearing Officer's findings of fact were "clearly erroneous" and modified those findings. Neither the Hearing Officer nor the Commission found racial discrimination, and the Estate does not contest that ruling. The Commission remanded to the Hearing Officer to determine the appropriate relief.

[*P13] Upon remand, the Hearing Officer found the Counties liable to the Estate for $300,000 for the emotional distress Longsoldier suffered. All parties appealed the Hearing Officer's decision and the Commission conducted another hearing in July 2013. The Commission increased the award to $1,350,000 in its final agency decision.

[*P14] The Counties filed a **[****9]** petition for judicial review with the District Court. Because the Counties' petition alleged a variety of procedural errors, Judge Sherlock allowed the parties to engage in discovery regarding the alleged errors. In his order, Judge Sherlock concluded that numerous procedural defects, **[***163]** including several that the Commission acknowledged, required reversal of the final agency decision. Of particular concern, Judge Sherlock determined that the Commission applied an incorrect standard of review to the Hearing Officer's decision. Based on his conclusion that the Hearing Officer's findings were supported by substantial evidence, and given the nature of the procedural errors, Judge Sherlock concluded that the appropriate remedy was to reinstate the Hearing Officer's

decision as the final agency decision.

[*P15] The Estate filed a M. R. Civ. P. 59 motion to alter or amend Judge Sherlock's order. While that motion was pending, the Estate filed a notice of appeal with this Court. Judge Reynolds then assumed jurisdiction of the case following Judge Sherlock's retirement. Judge Reynolds concluded that Judge Sherlock correctly determined that the procedural errors justified reversing the Commission's order. Judge Reynolds **[****10]** concluded, however, that Judge Sherlock committed "a manifest error of law" by reinstating the Hearing Officer's decision as the final agency decision. Judge Reynolds thus granted the Estate's motion to alter or amend and remanded to the Commission for further proceedings. The Estate appeals Judge Sherlock's order and the Counties cross-appeal Judge Reynolds's order.

STANDARDS OF REVIEW

[*P16] The Montana Administrative Procedure Act (MAPA) governs **[**208]** actions brought before the Human Rights Commission. *Schmidt v. Cook, 2005 MT 53, ¶ 20, 326 Mont. 202, 108 P.3d 511*. The standard of judicial review of an agency decision under MAPA provides in pertinent part:

> (2) The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because:
>
> (a) the administrative findings, inferences, conclusions, or decisions are:
>
> (i) in violation of constitutional or statutory provisions;
>
> (ii) in excess of the statutory authority of the agency;
>
> (iii) made upon unlawful procedure;
>
> (iv) affected by other error of law;
>
> (v) clearly erroneous **[****11]** in view of the reliable, probative, and substantial evidence on the whole record;
>
> (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Section 2-4-704(2), MCA; *Schmidt, ¶ 20*. This standard of review applies to both the District Court's review of the agency's decision and this Court's subsequent review of the District Court's decision. *In re Transfer of Ownership & Location of Mont. All-Alcoholic Bevs. License No. 02-401-1287-001, 2007 MT 192, ¶ 6, 338 Mont. 363, 168 P.3d 68*.

[*P17] We generally review a district court's decision to grant or deny a motion to alter or amend for an abuse of discretion. *Arnone v. City of Bozeman, 2016 MT 184, ¶ 4, 384 Mont. 250, 376 P.3d 786*. Nevertheless, deference is not applied to a district court's conclusions of law, which are reviewed de novo to determine whether its interpretation of the law is correct. *Krutzfeldt Ranch, LLC v. Pinnacle Bank, 2012 MT 15, ¶ 13, 363 Mont. 366, 272 P.3d 635*.

DISCUSSION

[*P18] *1. Whether Judge Sherlock correctly concluded that the Commission improperly modified the Hearing Officer's findings.*

[*P19] Relying on *Schmidt* and *§ 2-4-621(3), MCA*, Judge Sherlock noted that, when reviewing hearing officer decisions, the Commission applies a standard of review different from the standard a reviewing court applies to the Commission's decisions. He observed that the Commission's remand order cited to a case that set forth an **[**209]** inapplicable standard of review. This Court, Judge Sherlock declared, has determined "that a final **[****12]** agency order cannot modify a hearing officer's findings unless it reviews the complete record and states with particularity in the order that the findings were not based on competent substantial evidence." (Citing *State Personnel [***164] Div. v. Child Support Investigators, 2002 MT 46, ¶ 25, 308 Mont. 365, 43 P.3d 305*.) Judge Sherlock then determined that the Commission never made a finding that the Hearing Officer's findings it modified were not based on substantial competent evidence. Thus, Judge Sherlock concluded that the Commission applied an incorrect standard of review to the Hearing Officer's decision. Upon examination of the full record, Judge Sherlock concluded that there was substantial credible evidence supporting the Hearing Officer's findings that the Counties did not discriminate against Longsoldier.

[*P20] Judge Sherlock proceeded to discuss a number of other procedural defects that contributed to his conclusion that the Commission's final agency decision must be reversed. First, he noted that due to technical problems the Commission kept no record of the first hearing. Although the Commission did hold another hearing to address the lack of a record, Judge Sherlock opined that the Commissioners did not discuss "the evidentiary defects that led them to alter the hearing officer's **[****13]** order or what evidence supported their modification of that order." Judge Sherlock next discussed a number of ex parte communications that occurred between the Commission and the Commission's attorney. He noted that the administrative rules required the attorney to limit her consultation with the Commission to points of law, but that

the attorney had commented on and inaccurately described certain factual matters in the record to a new Commissioner. The attorney also advised the Commissioner that the Commissioner did not need to review the entire record. Finally, Judge Sherlock addressed the fact that the damage award at which the Commission ultimately arrived was not discussed at any public meeting; rather, it was discussed between the attorney and one or more members of the Commission after the public meeting adjourned.

[*P21] Judge Sherlock concluded that "the cumulative weight of this series of procedural problems, from using the wrong standard of review in reviewing the hearing officer's decision, to all of the other procedural defects noted above, have the cumulative effect of requiring a reversal of the activities of the [Commission] in this case." In reversing and vacating the Commission's **[****14]** final agency decision, Judge Sherlock determined that the Commission's decision was "clearly erroneous in the view of the evidence in the whole record" and that it was "arbitrary **[**210]** and capricious in its rejection of the hearing officer's findings of fact." After reviewing the record evidence and considering all of the procedural defects and the Commission's discussions of the case, Judge Sherlock determined that the appropriate resolution of the judicial review was to reinstate the Hearing Officer's decision as the final agency decision. Relying on *Brackman v. Board of Nursing, 258 Mont. 200, 851 P.2d 1055 (1993)*, Judge Sherlock concluded that such a remedy would "set this case back to the place where it existed in the administrative process before any serious procedural errors had been made."

[*P22] On appeal, the Estate argues that the Hearing Officer's determination that there was no evidence of any discriminatory animus on the part of the Counties was a conclusion of law, not a finding of fact. The Estate therefore contends that the Commission did not apply the wrong standard of review in modifying those determinations because legal conclusions are reviewed for correctness. The Estate next contends that even if the Hearing Officer's determinations could **[****15]** be considered findings of fact, the Hearing Officer failed to address non-animus-based discrimination. Because the Hearing Officer failed to make such findings, the Estate alleges that under *Christie v. Dep't of Envtl. Quality, 2009 MT 364, 353 Mont. 227, 220 P.3d 405*, the Commission was entitled to make its own findings. Finally, the Estate contends that the Commission properly analyzed whether the Hearing Officer's findings were clearly erroneous; therefore, the Commission applied the correct standard of review.

[*P23] We first address the Estate's contention that the Hearing Officer's findings of fact numbers 114 and 115 were conclusions of law. Although there is no "rule or principle that will unerringly distinguish a factual finding from a legal conclusion," determining whether there is evidence of intent to discriminate **[***165]** is a "pure question of fact." *Pullman-Standard, Div. of Pullman v. Swint, 456 U.S. 273, 288, 102 S. Ct. 1781, 1789, 72 L. Ed. 2d 66 (1982)* (citation and internal quotes omitted). The Hearing Officer properly characterized these as findings of fact.

[*P24] Next, *Christie* does not support the Estate's position. In *Christie*, the hearing officer did not make findings that addressed the central issue of the case. *Christie, ¶ 28*. Here, in contrast, the Hearing Officer's findings on discrimination were findings on the issue at the heart of the Estate's human rights **[****16]** claim. Thus, our holding in *Christie* that the agency could make a finding of fact regarding the central issue where its hearing officer failed to do so is inapposite.

[*P25] **[**211]** Under MAPA, an agency may reject a hearing officer's findings of fact only if, upon review of the complete record, "the agency first determines that the findings 'were not based upon competent substantial evidence.'" *Moran v. Shotgun Willies, 270 Mont. 47, 51, 889 P.2d 1185, 1187 (1995)* (quoting *§ 2-4-621(3), MCA*); ***accord*** *State Pers. Div., ¶ 25* (relying on *§ 2-4-621(3), MCA*, to conclude that "[a]n agency in its final order may not reject or modify the hearing officer's findings of fact unless it first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence"); *Ulrich v. State ex rel. Board of Funeral Serv., 1998 MT 196, ¶ 14, 289 Mont. 407, 961 P.2d 126* (concluding that an agency "may reject the examiner's findings only if they are not based upon competent, substantial evidence" and abuses its discretion pursuant to *§ 2-4-704(2)(a)(vi), MCA*, if it "reject[s] the hearing examiner's findings in violation of *§ 2-4-621(3), MCA*").[1] Consequently, an agency's rejection or modification of a hearing officer's findings "cannot survive judicial review unless the court determines as a matter of law that the hearing examiner's findings are not supported by substantial evidence." **[****17]** *Schmidt, ¶ 31* (citing *Moran, 270 Mont. at 51, 889 P.2d at 1187*). An agency abuses its discretion if it

[1] *Core-Mark International, Inc. v. Montana Board of Livestock, 2014 MT 197, ¶ 19, 376 Mont. 25, 329 P.3d 1278*, cited by the Estate, misstates the standard of review an agency applies to a hearing officer's findings. The case cited in *Core-Mark*, however, correctly states the applicable standard of review prescribed by *§ 2-4-621(3), MCA*. *Ulrich, ¶ 14*. We also misstated the standard of review in *Montana Department of Transportation v. Montana Department of Labor & Industry, 2016 MT 282, ¶ 13, 385 Mont. 274, 384 P.3d 49*. We nevertheless applied the correct standard in our analysis. *Mont. Dept. of Transp., ¶ 24*.

modifies the findings of a hearing officer without first determining that the findings were not supported by substantial evidence. State Pers. Div., ¶ 26; Ulrich, ¶ 14; Moran, 270 Mont. at 50, 889 P.2d at 1187.

[*P26] A reviewing body's standard on review "is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings." Schmidt, ¶ 31. "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. It consists of more [than] a mere scintilla of evidence but may be less than a preponderance." State Pers. Div., ¶ 19. The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence. Welu [**212] v. Twin Hearts Smiling Horses, Inc., 2016 MT 347, ¶ 12, 386 Mont. 98, 386 P.3d 937.

[*P27] The Commission did not determine that the Hearing Officer's findings regarding discrimination were not based upon competent substantial evidence. Rather, the Commission concluded that the Hearing Officer "misapprehended the effect of the evidence" relating to discrimination based on disability and determined on that **[****18]** basis that the Hearing Officer's findings were "clearly erroneous." The Commission did not have the authority to modify the Hearing Officer's findings on that ground. Section 2-4-621(3), MCA; Schmidt, ¶ 31; State Pers. Div., ¶ 25; Ulrich, ¶ 14; Moran, 270 Mont. at 51, 889 P.2d at 1187. As a matter of law, the Commission applied the wrong standard of review; it therefore abused its discretion. State Pers. Div., ¶ 26; Ulrich, ¶ 14; Moran, 270 Mont. at 50, 889 P.2d at 1187.

[*P28] **[***166]** Based on his review of the record, Judge Sherlock determined that it contained substantial evidence to support the Hearing Officer's findings of fact. We agree. The evidence demonstrates that the Hospital's discharge instructions advised that Longsoldier should follow up with a medical provider in three to five days; the Hospital did not instruct the Counties on what to do if his condition worsened. Detention center staff appreciated that Longsoldier was experiencing alcohol withdrawal symptoms, but expected—consistent with their experience—that the symptoms would subside. And when they inquired further, they were told that Longsoldier was not ill and just didn't want to be in jail.

[*P29] The Commission emphasized the evidence that Longsoldier's prescriptions were not filled and that authorities from both Counties were aware **[****19]** of the fact that he was not given the medication prescribed. But this is a discrimination claim under the Human Rights Act, not a claim for negligence.[2] Under the Human Rights Act, it is a prohibited "discriminatory practice for the state or any of its political subdivisions . . . to refuse, withhold from, or deny to a person any . . . services . . . *because of* . . . physical or mental disability." Section 49-2-308(1), MCA (emphasis added). The Estate's discrimination claim therefore required it to demonstrate that the Counties failed to fill Longsoldier's prescriptions because he suffered from alcoholism. Albert v. City of Billings, 2012 MT 159, ¶ 27, 365 Mont. 454, 282 P.3d 704 (quoting Admin. R. M. 24.9.610(2)(a)(iii) and concluding that in order to **[**213]** establish a discrimination claim, a claimant is required to demonstrate that "he was 'treated differently because of membership in [the] protected class'").[3] The Commission did not point to any such evidence, nor does the Estate. In fact, the Commission did not modify the Hearing Officer's finding that the "substantial and credible evidence of record established that none of [the Counties' personnel] considered [Longsoldier's symptoms] to be a disabling or even life-threatening condition."

[*P30] The Hearing Officer concluded that Longsoldier **[****20]** suffered from a disability—alcoholism—and that he was denied a government service—medical care. The Hearing Officer concluded also that Longsoldier suffered terribly in the Counties' custody. Based on the evidence before the Hearing Officer, however, a reasonable mind could accept that the Counties' failures to provide Longsoldier with further medical treatment were not based on any discriminatory animus toward Longsoldier. That is the inquiry dictated by MAPA's standard of review. Section 2-4-621(3), MCA; State Pers. Div., ¶ 25; Ulrich, ¶ 14; Moran, 270 Mont. at 51, 889 P.2d at 1187.

[*P31] We conclude that the Commission lacked authority to modify the Hearing Officer's findings of fact because those findings were supported by competent substantial evidence. Accordingly, we hold that Judge Sherlock correctly concluded

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[2] Blaine County represents that the Estate has filed a separate negligence suit against the Counties in the Eighth Judicial District Court.

[3] Federal Courts construing the Americans with Disabilities Act—on which the Human Rights Act is modeled—similarly conclude that inadequate treatment for a disability does not establish a discrimination claim based upon disability. *E.g.*, Simmons v. Navajo Cnty., 609 F.3d 1011, 1021-22 (9th Cir. 2010) (concluding that a prisoner's estate failed to establish a claim under the ADA that the prison excluded the inmate from outdoor recreation because he suffered from depression); Bryant v. Madigan, 84 F.3d 246, 249 (7th Cir. 1996) (concluding that the ADA "would not be violated by a prison's simply failing to attend to the medical needs of its disabled prisoners").

that the Commission improperly modified the Hearing Officer's findings.

[*P32] *2. Whether Judge Reynolds correctly concluded that Judge Sherlock erred as a matter of law by reinstating the Hearing Officer's decision as the final agency decision.*

[*P33] Judge Reynolds concluded that Judge Sherlock "was correct in determining that procedural errors in this matter warranted a reversal of the [Commission's] order." Judge Reynolds noted that Judge Sherlock **[****21]** used a procedure this Court previously has approved when he reinstated the Hearing Officer's decision as the final agency decision. **[***167]** (Citing *Benjamin v. Anderson, 2005 MT 123, 327 Mont. 173, 112 P.3d 1039*; *Moran; Brackman.*) Judge Reynolds nevertheless determined **[**214]** that "the remedy fashioned by [Judge Sherlock] of adopting the hearing officer's decision . . . as the final agency decision improperly deprives [the Estate] of meaningful review of that decision as required by the Human Rights Act."

[*P34] Judge Reynolds opined that the Act "contemplates a multi-step administrative process for reviewing claims of alleged discrimination." He concluded that Judge Sherlock's remedy "short-circuits this review process" because it deprived the Estate of review by the Commission. Judge Reynolds held, "Such a remedy is a manifest error of law, and altering this remedy is necessary to prevent manifest injustice." Judge Reynolds granted the Estate's motion to alter or amend, in part, and remanded the case to the Commission to conduct a new review of the Hearing Officer's decision.

[*P35] The Estate asserts that Judge Reynolds correctly granted its motion to alter or amend. The Estate argues that *§ 49-2-505(5), MCA*, requires that the Commission, not a hearing officer, render a final agency decision. **[****22]** The Estate cites *Frasceli, Inc. v. State Department of Revenue, 235 Mont. 152, 766 P.2d 850 (1988)*, to support its position. The Estate claims further that *Benjamin, Moran*, and *Brackman* "are inapposite" for various reasons. Remanding the case to the Commission, the Estate contends, "simply sets the case back on the statutory track" required under the Human Rights Act and MAPA.

[*P36] As Judge Reynolds recognized, we have previously affirmed district court holdings that adopted a hearing officer's determination as the final agency decision. *Brackman, 258 Mont. at 209, 851 P.2d at 1060* (concluding that a district court did not err in ordering an agency to adopt the hearing officer's order in its entirety because the agency abused its discretion by rejecting the hearing officer's findings without finding that they were not supported by substantial evidence); *Moran, 270 Mont. at 53, 889 P.2d at 1188* (concluding that a district court did not err in ordering that the Commission adopt the hearing officer's findings and conclusions because the Commission's "legal conclusions concerning the sufficiency of the evidence to support the hearing examiner's findings were incorrect"); *Benjamin, ¶ 70* (affirming a district court's decision to re-impose the hearing examiner's award of damages because the Commission's reduction of the damages award was arbitrary). The Estate's **[****23]** attempt to distinguish these cases is unpersuasive. Similar to *Brackman* and *Moran*, here the Commission did not find that the Hearing Officer's findings were not supported by substantial evidence.

[*P37] The Estate's reliance on *Frasceli* also is unpersuasive. We did conclude in *Frasceli* that a district court abused its discretion by **[**215]** ordering the reinstatement of a hearing officer's proposed order. *Frasceli, 235 Mont. at 157, 766 P.2d at 853*. But the case is distinguishable. The hearing officer in *Frasceli* issued a proposed order awarding a beer and wine license to a business. *Frasceli, 235 Mont. at 153, 766 P.2d at 851*. Prior to issuing a final agency decision that reversed the hearing officer's order and awarded the license to a different business, the Director of the Department of Revenue made personal, unannounced visits to both businesses to inspect them. *Frasceli, 235 Mont. at 154, 766 P.2d at 850-51*. We affirmed the district court's conclusion that the Director's unannounced visits violated the business's due process rights because there was no way to know to what extent the Director's inspection impacted his final decision. *Frasceli, 235 Mont. at 157, 766 P.2d at 852*. We concluded that the Director's actions "violate[d] certain other safeguards built in" by MAPA. *Frasceli, 235 Mont. at 157, 766 P.2d at 852-53*. It was within this context that we concluded that the agency should "have an objective and detached **[****24]** officer review the record" rather than just reinstate the hearing officer's proposed order. *Frasceli, 235 Mont. at 157, 766 P.2d at 853*. *Brackman, Moran*, and *Benjamin* provide more apt authority here because all involved the agency's misapplication of the legal standards governing its review.

[*P38] We are unconvinced by the Estate's additional argument that *§ 49-2-505(5), MCA*, precludes adopting the Hearing Officer's **[***168]** decision as the final agency decision. The Estate is correct that *§ 49-2-505, MCA*, outlines the procedure a discrimination claim must follow from the contested case hearing to judicial review. In that context, *§ 49-2-505(5), MCA*, provides that if a party appeals the decision of a hearing officer, the Commission must hear the case within 120 days of the appeal. *Section 49-2-505(5), MCA*, provides further: "The commission may affirm, reject, or modify the decision in whole or in part. The commission shall render a final agency decision within 90 days of hearing the appeal." *Section 49-2-505(5), MCA*, thus prescribes certain timelines the Commission must follow once it receives

an appeal of a hearing officer's decision and outlines what the Commission may do with the decision after hearing the appeal.

[*P39] When we construe a statute, we do so by "reading and interpreting the statute as a whole, without isolating specific terms **[****25]** from the context in which they were used by the Legislature." *Mashek v. Dep't of Pub. Health & Human Servs., 2016 MT 86, ¶ 10, 383 Mont. 168, 369 P.3d 348* (citation and internal quotations omitted). The Estate interprets one phrase within one sentence out of three in *§ 49-2-505(5), MCA*, **[**216]** to mean that only the Commission can render a final agency decision. Such an interpretation isolates the specific terms—that the "commission shall render a final agency decision"—from the context in which they were used by the Legislature—the general procedure for appeal of the hearing officer's decision in a discrimination claim. The Estate's interpretation ignores that a hearing officer's decision can become final under certain circumstances, such as when no appeal is taken pursuant to *§ 49-2-505(3)(c), MCA*.

[*P40] Of course, MAPA also confers ultimate authority on the District Court. As discussed, the Act explicitly provides that the agency "may not reject or modify the [Hearing Officer's] findings of fact unless the agency first determines . . . that the findings of fact were not based upon competent substantial evidence." *Section 2-4-621(3), MCA*; *accord Schmidt, ¶ 31*; *State Pers. Div., ¶ 25*; *Moran, 270 Mont. at 51, 889 P.2d at 1187*. Judge Reynolds remanded the case because the Estate was deprived of "meaningful review." But that meaningful review already occurred. Based on his review of the **[****26]** complete evidentiary record, Judge Sherlock concluded that the Hearing Officer's findings of fact were supported by substantial evidence. Judge Reynolds's order did not alter or amend Judge Sherlock's conclusion. We have affirmed Judge Sherlock's conclusion. Opinion, ¶ 31. Accordingly, if the case were to be remanded to the Commission, the Commission could not determine that the findings of fact were not based upon substantial evidence; the Commission thus could not modify the Hearing Officer's findings that there was no evidence of discriminatory animus by the Counties. *See Fiscus v. Beartooth Elec. Coop., 180 Mont. 434, 437, 591 P.2d 196, 197 (1979)* (concluding that when we state in an opinion "a principle or rule of law necessary to the decision, such pronouncement becomes the law of the case, and must be adhered to throughout its subsequent progress") (citation and internal quotations omitted).

[*P41] Because the District Court conducted a complete review of the administrative record and properly applied the applicable standard of review to the Hearing Officer's decision, there is nothing further for the Commission to review. We hold that Judge Reynolds incorrectly concluded that Judge Sherlock erred as a matter of law by adopting the Hearing Officer's decision **[****27]** as the final agency decision.

CONCLUSION

We affirm Judge Sherlock's order reinstating the Hearing Officer's decision as the final agency decision. We reverse Judge Reynolds's order granting the Estate's motion to alter or amend Judge **[**217]** Sherlock's order. Finally, we acknowledge the heartbreaking truth that Allen Longsoldier, Jr.—a gifted young man—suffered horrendously while dying slowly from alcohol withdrawal syndrome. On this record, however, the Montana Human Rights Act is not a proper legal remedy for his suffering.

/s/ BETH BAKER

We concur:

/s/ MIKE McGRATH

[*169]** /s/ LAURIE McKINNON

/s/ MICHAEL E WHEAT

/s/ JIM RICE

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Brackman v. Board of Nursing

Supreme Court of Montana

April 1, 1993, Submitted on Briefs ; May 6, 1993, Decided

No. 92-573

Reporter
851 P.2d 1055 *; 1993 Mont. LEXIS 128 **; 258 Mont. 200; 50 Mont. St. Rep. 497

ALENE BRACKMAN, RN, License No. RN 06169; MARY MOUAT, RN, License No. RN 07358; DEBBIE RUGGLES, RN, License No. RN 17406; RUTH SASSER, RN, License No. RN 18738; VERNA VanDYNHOVEN, RN, License No. RN 18699; LYNN ZAVALNEY, RN, License No. RN 08577; Petitioners and Respondents, v. BOARD OF NURSING, an Administrative Agency of the Department of Commerce, State of Montana, Respondent and Appellant.

Subsequent History: Rehearing denied May 20, 1993. Released for Publication May 21, 1993.

Prior History: [**1] APPEAL FROM: District Court of the First Judicial District, In and for the County of Lewis and Clark, The Honorable Dorothy McCarter, Judge presiding.

Disposition: Affirmed.

Case Summary

Procedural Posture
Appellant Montana Board of Nursing sought review of a judgment from the District Court of the First Judicial District, In and for the County of Lewis and Clark (Montana), which reversed its decision putting respondent registered nurses on probation for storing unused drugs in a desk drawer and using them when they felt that it would have taken too long to obtain a prescription.

Overview

The Board's hearing examiner found that the charges of unprofessional conduct were not proven and should have been dismissed, and the Board rejected the examiner's findings of fact, conclusions of law, and recommended order. On appeal, the Board argued, inter alia, that the trial court erred in (1) ruling that it violated *Mont. Code Ann. § 2-4-621* by receiving and considering the prosecuting attorney's proposed findings; and (2) concluding that the its review of the examiner's proposed findings was impaired by its rejection of the examiner's opinion as to the credibility of conflicting witnesses. Upon review, the court found the Board's arguments without merit. In allowing the prosecuting attorney to file findings, conclusions, and a proposed order after the hearing examiner's findings, conclusions, and proposed order had been filed, the Board went beyond its authority under *Mont. Code Ann. § 2-4-621(1)* to allow parties adversely affected to file exceptions and present briefs and oral argument in response to the proposed decision. Further, the Board did not follow the procedure set forth in *Mont. Code Ann. § 2-4-621(3)* for modifying or rejecting the findings of the examiner.

Outcome

The court affirmed the judgment of the trial court.

Counsel: For Appellant: Robert J. Emmons; Emmons & Sullivan, Great Falls, Montana.

For Respondent: Gary L. Davis; Luxan & Murfitt, Helena, Montana.

Judges: Turnage, Harrison, Gray, Hunt, Sr., Trieweiler, Weber

Opinion by: J.A. TURNAGE

Opinion

[*1055] Chief Justice J.A. Turnage delivered the Opinion of the Court.

This is an appeal from an administrative action. The District Court for the First Judicial District, Lewis and Clark County, reversed the findings, conclusions, and order entered by the Board of Nursing and **[*1056]** ordered that the recommended findings, conclusions, and order of the Board's hearing examiner be adopted instead. The Board appeals. We affirm.

The issues are:

1. Did the District Court err in ruling that the Board violated *§ 2-4-621, MCA*, by receiving and considering the prosecuting attorney's proposed findings?

2. Did the court err in concluding that the Board's review of the hearing examiner's proposed findings was substantially impaired by the Board's rejection of the hearing examiner's opinion that Mary Mouat was more credible than Ellen Wirtz?

[2]** 3. Did the court err in concluding that the Board was biased and prejudiced so that it could not objectively determine the discipline for the nurses upon remand?

4. Did the court err in holding that the Board's rejection of the hearing examiner's findings was erroneous, arbitrary and capricious, and an abuse of discretion?

At the time relevant to this action, the registered nurses who appear here as petitioners were employed by St. Peter's Hospital, Helena, Montana, in its hospice program. As registered nurses practicing in Montana, their licenses were subject to regulation by the Board of Nursing. Title 37, Chapter 8, MCA.

In October 1990, Ellen Wirtz, a registered nurse who had resigned from the hospice program, filed a complaint with the Board charging that the hospice nurses were stockpiling painkilling medications, primarily morphine suppositories, received from families of deceased patients. It has not been alleged that the nurses were appropriating the drugs for their own personal use or personal gain. The drugs were stored in an unlocked desk drawer at the hospice office and were used when a nurse felt it would take too long to obtain a new prescription or to get a **[**3]** prescription filled for a hospice patient in need.

The complaint resulted in charges that the nurses' conduct was in violation of *§ 37-8-441(5), MCA*, and § 8.32.413(2), ARM. In response to the filing of the complaint, the nurses signed statements admitting their conduct. However, in her statement, Mary Mouat, the supervisor of the hospice program nurses, pointed out that they had ceased the practice and that the hospice program had initiated a new procedure for obtaining drugs in emergency situations. A supply of narcotic drugs had been placed in the hospice office in a lockbox, the contents of which were periodically audited by a pharmacist.

On April 15, 16, and 17, 1991, a public hearing was held on the complaint, before a hearing examiner appointed by the Board. The Board was represented at the hearing by counsel who assumed the role of prosecuting the complaint. The nurses were represented by privately-retained counsel. After the hearing, the nurses' attorneys submitted proposed findings of fact and conclusions of law and supporting briefs. The prosecuting attorney did not.

On April 30, the hearing examiner issued his findings of fact, conclusions of law, and a recommended **[**4]** order concluding that the substantive charges of unprofessional conduct were not proven and should be dismissed. He found that the nurses, with the exception of Verna VanDuynhoven, committed technical violations of law pertaining to record keeping and storage of narcotics. The hearing examiner recommended that all charges against VanDuynhoven be dismissed and that letters of reprimand be placed in the files of the other nurses for three years.

The Board met and agreed to individually review the

transcripts of the hearing before the hearing examiner. Different counsel was brought in to advise the Board. The attorney who had prosecuted the complaint and was normally the Board's counsel appeared on behalf of the Department of Commerce, the administrative arm of the Board.

At a subsequent meeting made open to the public, the Board rejected the hearing examiner's findings of fact, conclusions of law, and recommended order. It later issued its own findings, conclusions, and order, based on objections and proposed findings and conclusions filed directly with the Board by the attorney who had prosecuted **[*1057]** the complaint. The Board concluded that the nurses essentially committed every **[**5]** violation alleged in the complaint. It placed the licenses of the nurses on probation for terms ranging from three to five years, with certain education and reporting requirements. The Board's order also prohibited the nurses from supervising other nurses during their probation.

The nurses petitioned for judicial review of the Board's final order. The parties submitted briefs to the District Court, which then held a hearing on the petition for judicial review. The court reversed the findings, conclusions and final order of the Board. It remanded the matter and ordered the Board to adopt the findings, conclusions, and recommended order of the hearing examiner in their entirety. The Board appeals.

I

1. Did the District Court err in ruling that the Board violated *§ 2-4-621, MCA*, by receiving and considering the prosecuting attorney's proposed findings?

The District Court found that the Board acted improperly in receiving and considering the prosecuting attorney's proposed findings, conclusions, and order *after* the hearing examiner had submitted to the Board his findings, conclusions, and proposed order. The court found that, at that point in the proceedings, the parties **[**6]** were entitled to file only exceptions to the hearing examiner's decision. The court further found that it was required to maintain at that stage of the proceedings.

> by permitting [the prosecuting attorney] to file proposed findings after the hearing examiner had already issued his decision, the prosecuting arm of the Board was given an unfair advantage over the Nurses in the Board's review of the case. Moreover, by accepting and using [the prosecuting attorney's] proposed findings, the Board favored the prosecution and violated its neutrality which

The Board claims that no reason has been shown why it was permissible to file proposed findings with the hearing examiner but not with the Board. It asserts that, under *§ 2-4-614(1)(e), MCA*, proposed findings can be filed with the hearing examiner, the administrative agency, or both.

Section 2-4-614, MCA, provides:

(1) The record in a contested case shall include:

. . .

(e) proposed findings and exceptions[.]

Section 2-4-621, MCA, provides:

> (1) When in a contested case a majority of the officials of the agency who are to render the final decision have not heard the case, the decision, if adverse to a party to the proceeding **[**7]** other than the agency itself, may not be made until a proposal for decision is served upon the parties and an opportunity is afforded to each party adversely affected to file exceptions and present briefs and oral argument to the officials who are to render the decision.
>
> . . .
>
> (3) The agency may adopt the proposal for decision as the agency's final order. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the proposal for decision but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept or reduce the recommended penalty in a proposal for decision but may not increase it without a review of the complete record.

We agree with the District Court that *§ 2-4-614, MCA*, merely describes the contents of the record in a contested case. It does not provide that proposed findings may be filed at any point in **[**8]** an administrative proceeding.

Section 2-4-621, MCA, sets forth the procedure by which an agency may alter the **[*1058]** findings and conclusions of its finder of fact. The Board did not comply with that statute. In allowing the prosecuting attorney to file findings, conclusions, and a proposed order after the hearing examiner's findings, conclusions, and proposed order had been filed, the Board went beyond its authority under *§ 2-4-621(1), MCA*, to allow parties adversely affected to "file exceptions and present briefs and oral argument" in response to the proposed decision.

Further, the Board did not follow the procedure set forth in *§*

2-4-621(3), MCA, for modifying or rejecting the findings of its hearing examiner. In its deliberations, instead of focusing on whether the hearing examiner's findings were supported in the record, the Board focused on whether the prosecuting attorney's objections to the proposed findings were supported in the record. The Board then considered each of the prosecuting attorney's proposed findings, adopting them with minor modifications.

Notwithstanding the Board's position that the transcript demonstrates its reasons for rejecting the findings of the hearing **[**9]** examiner, § 2-4-621(3), MCA, requires that the agency's order state "with particularity" why such findings have been rejected. Instead of stating with particularity why each of the hearing examiner's findings was rejected, the Board's order stated only that the findings, conclusions, and recommended order of the hearing examiner "are rejected in their entirety."

A hearing examiner, when one is used, is in the unique position of hearing and observing all testimony entered in the case. In the present case, none of the Board members heard the evidence "live;" they were limited to reviewing a cold record. The findings of the hearing examiner, especially as to witness credibility, are therefore entitled to great deference. This is reflected in the procedural requirements which must be met under § 2-4-621, MCA, before a hearing examiner's findings may be rejected or modified. The failure of the Board to meet those requirements in this case is clear.

The Board cites the provision of § 2-4-623(4), MCA, that "if, in accordance with agency rules, a party submitted proposed findings of fact, the decision shall include a ruling upon each proposed finding." Because the prosecuting attorney's **[**10]** proposed findings were not submitted in accordance with the statutes governing proceedings before the Board as discussed above, this statute does not apply to his proposed findings. Therefore, there was no need for the Board to rule upon each of the prosecuting attorney's proposed findings.

We hold that the District Court did not err in ruling that the Board violated § 2-4-621, MCA, by receiving and considering the prosecuting attorney's proposed findings after the recommended findings, conclusions, and order of the hearing examiner were submitted.

II

Did the court err in concluding that the Board's review of the hearing examiner's proposed findings was substantially impaired by the Board's rejection of the hearing examiner's opinion that Mary Mouat was more credible than Ellen Wirtz?

At the hearing before the hearing examiner, the testimony of Ellen Wirtz, the former hospice nurse, conflicted in numerous respects with the testimony of Mary Mouat, the supervisor of the hospice nurses. The hearing examiner found that Wirtz's testimony was not credible. The District Court stated that the Board "failed to provide adequate grounds for rejecting the hearing examiner's determinations **[**11]** of credibility of Mary Mouat and Ellen Wirtz." As the District Court pointed out, the Board failed to determine whether there was substantial credible evidence to support two findings by the hearing examiner which provided specific examples of Wirtz's lack of credibility.

In objecting to the District Court's opinion on this issue, the Board relies upon the language of § 2-4-704(2), MCA, prohibiting a district court from substituting its judgment for "that of the agency as to the weight of the evidence on questions of fact." The Board asserts that this language **[*1059]** prohibits not only the District Court, but also the hearing examiner, from making any judgment that is binding on the Board as to the weight of Wirtz's or Mouat's testimony.

The Board misinterprets § 2-4-704(2), MCA. This relates back to the use of a hearing examiner by an administrative agency as discussed under Issue I. As stated under that issue, the credibility of a witness is best judged by one who has the opportunity to observe the demeanor of the witness in person. In this case, the hearing examiner definitely found that Mouat was a more credible witness than was Wirtz, and supported that finding. We have reviewed **[**12]** the record, as did the District Court. We hold that the District Court did not err in ruling that substantial credible evidence supports the findings of the hearing examiner concerning the credibility of Mouat and Wirtz.

The Board also argues that the District Court erred in stating that the hearing examiner's findings of fact and conclusions of law "were based in large part on the testimony and credibility of these two witnesses [Mouat and Wirtz]." Because the nurses admitted their conduct, a major focus of the hearing was the appropriate discipline to be imposed upon them. Whether they were being candid in their admissions was, of course, crucial to this determination. The primary challenge to the nurses' credibility was the testimony of Wirtz, and her testimony conflicted with Mouat's. We hold that the District Court did not err in ruling that the Board's review of the hearing examiner's proposed findings was substantially impaired by the Board's improper rejection of the hearing examiner's opinion as to the relative credibility of Mouat and Wirtz.

III

Did the court err in concluding that the Board was biased and prejudiced so that it could not objectively determine the

discipline **[**13]** for the nurses upon remand?

The District Court found that the Board violated its neutrality and impartiality and had become "irreparably tainted." The Board claims, however, that there is no factual or legal basis for the court to divest it of its legal duty to determine the discipline for the nurses.

The Board's perhaps unintentional bias against the position taken by its hearing examiner and in favor of the position taken by the prosecuting attorney, who was usually the Board's attorney is demonstrated by the improper procedure used by the Board, as discussed above. The District Court's decision not to remand the action to the Board for determination of discipline is further supported by the need for final resolution of this matter. As evidence of absence of bias on its part, the Board points out that it now has several new members who did not consider this matter the last time it was before the Board. But the new Board members would require time to study the record before the Board could meet and enter an order. The nurses have been under the cloud of this litigation long enough.

We have ruled that the findings and conclusions of the hearing examiner are supported by substantial **[**14]** evidence. The discipline recommended by the hearing examiner and adopted by the District Court is commensurate with those findings and conclusions. The discipline is also commensurate with the Board's discipline rulings in other cases between 1986 and 1991, as summarized by the Board in a document in the record before the hearing examiner. We hold that there was no error in the District Court's ruling that the hearing examiner's recommendations for discipline shall be adopted.

IV

Did the court err in holding that the Board's rejection of the hearing examiner's findings was erroneous, arbitrary and capricious, and an abuse of discretion?

The Board challenges several specific findings of the hearing examiner. It claims that the hearing examiner's finding that "the practice" was "stopped voluntarily" is error because Mouat was directed by her supervisor to see that "the practice" **[*1060]** stopped. The Board points out the contrast between the drug destruction record indicating that 158 doses of drugs were destroyed on June 7, 1990, and the hearing examiner's finding that "not a large number of suppositories" were placed in Mary Mouat's desk drawer. We note that "the practice" ceased **[**15]** prior to the initiation of these proceedings. Further, it is unclear from the record whether all the drugs destroyed on June 7, 1990, had been stored in Mouat's desk drawer, or whether some had just been received by the hospice program. At any rate, we conclude that neither of these semantic uncertainties are critical, in light of the entire record.

The Board also disputes the finding that Mary Mouat was a credible witness. The Board cites evidence that Mouat had forged Ruth Sasser's signature on a drug destruction record and that Mouat told Sasser to use her own judgment about retaining drugs, after having been directed to stop the practice. It also cites Mouat's testimony that all of the nurses participated in "the practice," which conflicted with VanDuynhoven's statement that she knew of "the practice," but did not participate. Again, in the context of the entire record, we conclude that the evidence cited by the Board, some of which is disputed, is not fatal to the finding that Mouat was credible.

The Board cites the following omissions from the findings: Wirtz testified that Mouat never told her to cease "the practice;" the hearing examiner did not account for the source **[**16]** of all the drugs in Mouat's desk drawer; Sasser kept two morphine suppositories in her nursing bag after being told not to; Lynn Zavalney took drugs from the drawer to a patient on the basis of financial need, not medical emergency; Alene Brackman admitted she did not tell Dr. Simms she was filling a prescription from the drawer; and VanDuynhoven knew there were drugs in the drawer. While it is true there was evidence on all of these points, findings are not required to be made on every point on which evidence is produced. We conclude that none of these points constitute significant omissions from the findings.

The District Court examined each of the findings of the hearing examiner, one by one, as the Board should have done, and determined that each was supported by substantial credible evidence in the record. Therefore, the court concluded that under *§ 2-4-621(3), MCA*, the hearing examiner's findings of fact should have been adopted by the Board.

Rejection of a hearing examiner's factual recommendations in violation of *§ 2-4-621(3), MCA*, constitutes an abuse of discretion within the meaning of *§ 2-4-704(2)(a)(vi), MCA*. *Brander v. Director, Dept. of Inst. (1991), 247 Mont. 302, 308, 806 P.2d 530, 533*. **[**17]** In this case, the Board abused its discretion by rejecting the hearing examiner's findings without following the procedure required pursuant to *§ 2-4-621(3), MCA*. We hold that the District Court did not err in holding that the Board's rejection of the hearing examiner's findings, conclusions, and proposed order constituted an abuse of discretion and violated *§ 2-4-704(2)(a)(vi), MCA*.

Affirmed.

J.A. Turnage, Chief Justice

We concur:

John Conway Harrison

Karla M. Gray

William E. Hunt, Sr.

Terry Trieweiler

Fred J. Weber, Justices

End of Document

Howard v. Conlin Furniture No. 2

Supreme Court of Montana

March 30, 1995, Submitted On Briefs ; August 21, 1995, Decided

No. 94-528

Reporter
272 Mont. 433 *; 901 P.2d 116 **; 1995 Mont. LEXIS 185 ***; 52 Mont. St. Rep. 814; 10 I.E.R. Cas. (BNA) 1642; 130 Lab. Cas. (CCH) P57,973

DEAN HOWARD, Plaintiff and Appellant, v. CONLIN FURNITURE NO. 2, INC., a Montana corporation,

Subsequent History: Released For Publication September 8, 1995.

Prior History: **[***1]** APPEAL FROM: District Court of the Thirteenth Judicial District, In and for the County of Yellowstone, The Honorable G. Todd Baugh, Judge presiding.

The former employee alleged that he had been wrongfully discharged, and the former employer filed a motion for summary judgment. The trial court granted the motion for summary judgment, and the former employee appealed. The court reversed and remanded, holding that the trial court erred in granting the motion for summary judgment. The court concluded that the former employee was discharged from employment within the meaning of *Mont. Code Ann. § 39-2-903(2)* and the Montana Wrongful Discharge from Employment Act. The court found that the former employee was informed that he was being terminated as a manager, was then offered a subordinate position among the sales staff he previously managed, and his refusal to accept an offer of a lesser position, at best, affected his duty to mitigate his damages. The court found that there was a genuine issue of material fact as to whether the former employee was terminated for good cause within the meaning of *§ 39-2-903(5)*.

Case Summary

Procedural Posture
Plaintiff former employee appealed a decision of the District Court of the Thirteenth Judicial District, In and for the County of Yellowstone (Montana), which granted defendant former employer's motion for summary judgment in the former employee's action for wrongful discharge from his employment.

Outcome
The court reversed the trial court's judgment granting the former employer's motion for summary judgment in the former employee's action for wrongful discharge.

Counsel: For Appellant: Michael G. Eiselein, Lynaugh, Fitzgerald, Eiselein & Eakin, Billings, Montana.

For Respondent: T. Thomas Singer, Moulton, Bellingham &

Overview

Mather, Billings, Montana.

Judges: Justice Terry N. Trieweiler delivered the opinion of the Court. We concur: WILLIAM E. HUNT, SR., JAMES C. NELSON, W. WILLIAM LEAPHART. Justice Karla M. Gray, dissenting. Chief Justice J.A. Turnage joins in the foregoing dissent of Justice Karla M. Gray. Justice Fred J. Weber dissents.

Opinion by: Terry N. Trieweiler

Opinion

[*435] **[**117]** Justice Terry N. Trieweiler delivered the opinion of the Court.

The plaintiff, Dean Howard, filed a complaint and an amended complaint in the District Court for the Thirteenth Judicial District in Yellowstone County in which he alleged that he had been wrongfully discharged from his employment by the defendant, Conlin Furniture No. 2, Inc. (Conlin). In response to Conlin's motion for summary judgment, the District Court concluded that Howard failed to raise genuine issues of material fact, and that Conlin was entitled to judgment dismissing **[***2]** Howard's complaint as a matter of law. Howard appeals from the District Court's order and judgment. We reverse the judgment of the District Court.

The issue on appeal is whether the District Court erred when it granted Conlin's motion for summary judgment.

[118]** *FACTUAL BACKGROUND*

Paul Gunville is the president of 16 Conlin furniture stores, including stores in Montana, each of which is individually incorporated. In 1990, Gunville recruited Dean Howard from Baers Furniture to work for Conlin's store in Billings. Howard began to work as Conlin's manager on September 4, 1990, and was paid a salary in the amount of $ 50,000 annually, plus a commission. On May 4, 1992, Gunville evaluated Howard's performance as manager to that date by concluding that: "Dean has brought strength in leadership and great management tools with an underlying desire to be and teach success. Dean will only get better as his experience in mdse. and general furniture business increases." He concluded by stating that Howard's potential for advancement in the company is "outstanding."

In late 1992, Gunville hired Robert Anderson from Rhodes Furniture Store in Atlanta, Georgia, to work as a district supervisor **[***3]** for four of his stores in Montana. Anderson began work in Billings in January 1993.

Anderson took over Gunville's role as Howard's supervisor.

Before Anderson left Atlanta, Doug Sahr, who also worked for Rhodes, asked Anderson to keep Sahr in mind for positions that might become available.

After Anderson began work for Conlin, he telephoned Sahr to determine whether he was interested in a position as a manager. Anderson testified that he may have telephoned Sahr in March 1993. Howard produced telephone records that indicated several telephone calls were made from the Conlin No. 2 store in Billings to Sahr's home **[*436]** telephone number, as well as to Rhodes Furniture Stores in Atlanta, in February and March 1993. During that same month, Anderson began to record written complaints regarding Howard's performance.

On May 20, 1993, Howard was terminated from his position as a store manager and then offered a sales position at a salary of $ 1000 per month, plus a commission opportunity. He was not first advised of the areas in which he was deficient and given an opportunity to improve his performance. Sahr replaced Howard shortly after Howard was terminated as manager.

On June 28, **[***4]** 1994, Conlin moved the District Court to dismiss Howard's complaint by summary judgment for the reasons that he was neither actually nor constructively discharged and that there were legitimate business reasons for his demotion. The District Court agreed. It held that Howard's rejection of the sales job was, at best, a constructive discharge, but that Howard failed to offer evidence that working conditions would have been intolerable. It also held that Conlin offered evidence of reasonable job related grounds for demotion, and that Howard's alleged reasons were conclusory and speculative.

DISCUSSION

Did the District Court err when it dismissed Howard's complaint by summary judgment?

This Court reviews an order granting summary judgment based on the same criteria applied by the district court pursuant to Rule 56, *M.R.Civ.P. Hagen v. Dow Chemical Co. (1993), 261 Mont. 487, 491, 863 P.2d 413, 416* (citing *Minnie*

v. City of Roundup (1993), 257 Mont. 429, 431, 849 P.2d 212, 214). Summary judgment is an extreme remedy and should not be granted if there is any genuine issue of material fact; a summary judgment procedure should never be substituted for a trial if a material factual controversy **[***5]** exists. Hagen, 863 P.2d at 416 (citing Rule 56(c), M.R.Civ.P.; Cereck v. Albertson's, Inc. (1981), 195 Mont. 409, 637 P.2d 509; Reaves v. Reinbold (1980), 189 Mont. 284, 615 P.2d 896).

A party seeking summary judgment has the burden of establishing a complete absence of any genuine factual issues. Hagen, 863 P.2d at 416 (citing D'Agostino v. Swanson (1990), 240 Mont. 435, 442, 784 P.2d 919, 924). In light of the pleadings and the evidence before the court, there must be no material issue of fact remaining which would entitle a nonmoving party to recover. Hagen, 863 P.2d at 416 (citing Marriage of Hoyt (1985), 215 Mont. 449, 454, 698 P.2d 418, 421). **[**119]** Once the movant has presented evidence to support his or her **[*437]** motion, the party opposing summary judgment must present material and substantial evidence, rather than mere conclusory or speculative statements, to raise a genuine issue of material fact. Hagen, 863 P.2d at 416 (citing B.M. by Berger v. State (1985), 215 Mont. 175, 179, 698 P.2d 399, 401). Finally, all reasonable inferences that might be drawn from the offered evidence should be drawn in favor of the party who opposed summary judgment. Hagen, 863 P.2d at 416 (citing Cereck, [***6] 637 P.2d at 511).

In its order, the District Court recognized that Howard alleged that he was discharged, or constructively discharged, from his employment. However, in its discussion, the court stated that the issue was whether Conlin created an intolerable employment situation within the meaning of § 39-2-903(1), MCA, when Conlin demoted Howard. The District Court concluded that Howard did not raise genuine issues of fact which would preclude summary judgment because Howard's support for the notion that his demotion was a pretext to hire Sahr consisted only of conclusory and speculative statements. Because Conlin supported its reasons for demoting Howard with several job-related incidents, the court concluded that the demotion could be based on reasonable job-related grounds and a logical relationship to the needs of the business. The court also stated that it considered Howard's claim for actual discharge to be marginal, at best, and focused its analysis on Howard's claim for constructive discharge.

Howard argues that the District Court erred because it focused on constructive discharge. Howard claims that Anderson admitted he was discharged from his position as store manager, **[***7]** which is not the equivalent of a voluntary termination because of an intolerable working condition.

Conlin contends that Howard was demoted, not discharged. Conlin also claims that we should affirm the District Court's decision because this Court has upheld a discharge motivated by legitimate business reasons when the plaintiff presents only conclusory allegations. *Finstad v. Montana Power Co. (1990), 241 Mont. 10, 29, 785 P.2d 1372, 1383.*

Section 39-2-904(2), MCA, states that a discharge is wrongful only if: "the discharge was not for good cause and the employee had completed the employer's probationary period of employment . . . ." The term "discharge" includes constructive discharge . . . and any other termination of employment, including resignation, elimination of the job, layoff for lack **[*438]** of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

Section 39-2-903(2), MCA. "Good cause" is defined as "reasonable job-related grounds for dismissal based on a failure to satisfac-torily perform job duties, disruption of the employer's operation, or other legitimate business reason." Section 39-2-903(5), MCA.

The **[***8]** first sub-issue we must decide is whether Howard was discharged, or merely demoted, following which he resigned. In that regard, the statement made by Anderson to the Billings Job Service in response to Howard's application for benefits, speaks for itself. He stated:

(1)
Dean Howard was discharged from the position of store manager on the date noted.

(2)
At that time he was offered a sales position at Conlin's. That offer was declined by Mr. Howard on 5/25/93.

This case does not involve a lateral transfer, nor a minor change in job description. This case involves absolute and final termination from a managerial position, followed by an offer of employment in a functionally different, and substantially inferior, position with the same employer. To hold, as Conlin suggests, that termination of employment in a position that pays over $ 50,000 per year, and subsequently offering a position which pays less than 25 percent of that amount, is not "a termination of employment" would ignore the plain language of the Act and allow circumvention of the Act's damage provisions which are based on wages at the time of termination. Section 39-2-905, MCA.

Howard **[***9]** was informed that he was being terminated as Conlin's manager. He **[**120]** was then offered a subordinate position among the sales staff he previously managed. His refusal to accept an offer of a lesser position, at

best, affects his duty to mitigate his damages. We conclude that when Howard was terminated from his managerial position, he was discharged from employment within the meaning of *§ 39-2-903(2), MCA*, of Montana's Wrongful Discharge From Employment Act.

The second sub-issue is whether Howard's termination was for good cause as a matter of law, or whether there was a factual issue to be decided.

The only formal evaluation of Howard's work as manager of the Conlin's Furniture Store was the evaluation done by the company's president on May 4, 1992. In that evaluation, Howard was given the **[*439]** highest possible rating for interest in his work, self-confidence, personal characteristics, personal relations, leadership, and customer service. With regard to customer service, his employer wrote "Dean writes the book here!". He was given above average ratings in practically every other area considered. As recently as March 4, 1993, two and one-half months before his termination, his direct supervisor, **[***10]** Anderson, testified that no thought had been given to his termination.

However, Anderson testified that from January 1993 until Howard's termination as manager, the following events occurred which demonstrated Howard's unsatisfactory performance of his job duties:

1. The warehouse he was responsible for was found to be in poor condition and disorderly;

2. He credited his account at the store with the value of a rug he had brought to the store from his own home;

3. He was absent an excessive amount of time;

4. He made a personnel decision regarding Connie Smith which caused dissatisfaction from other employees and ultimate payment to Smith of two weeks severance pay;

5. He gave inaccurate information to a customer who then, based on that information, traveled a long distance to the store without being able to accomplish the purpose of her trip;

[*440] 6. He loaned out a company vehicle which was damaged while being used by a third party;

7. A letter from a disgruntled employee complained of management performance; and

8. A claim for unpaid commissions was made by a salesperson after her termination from employment at Conlin.

In response to those allegations, Howard testified by **[***11]** deposition that:

1. He had trouble controlling the warehouse because its employees were underpaid and dissatisfied;

2. His Karastan rug was placed on the floor of the store by consignment openly and apparently consistent with past practices;

3. His absences from the store were related to store business;

4. His personnel decision which led to discontent among other employees was a good faith effort to retain an employee who threatened to go to work for a competitor;

5. The misinformation he gave to a long-distance customer was based on information obtained from an inventory sheet which was supposed to be current;

6. When he loaned the company vehicle for use by a third party, he acted consistent with the company's policy of assisting others for the purpose of public relations;

7. The critical letter from a former employee related to management in general and not him in particular; and

8. The commission payments which were the subject of a claim by a former employee were withheld with the approval of Anderson.

We conclude that these claims, denials, and counterclaims raise a factual issue as to whether Howard was terminated for good cause within the meaning of *§ 39-2-903(5), [***12] MCA*, of the Wrongful Discharge From Employment Act.

We held in *Guertin v. Moody's Market (1994), 265 Mont. 61, 874 P.2d 710*, that where an employee testified that she had **[**121]** been hard working and loyal and had not received previous complaints from her employer about her management capability; and where she denied that the reasons given by her employer for her termination were correct; there was an issue of fact regarding whether she was terminated for good cause. Likewise, here we conclude that reasonable persons could differ regarding inferences to be drawn from the deposition testimony and exhibits.

Therefore, the judgment of the District Court which dismissed plaintiff's amended complaint is reversed and this case is remanded for further proceedings consistent with this opinion.

/S/ TERRY N. TRIEWEILER

We concur:

/S/ WILLIAM E. HUNT, SR.

/S/ JAMES C. NELSON

/S/ W. WILLIAM LEAPHART

Dissent

Justice Karla M. Gray, dissenting.

I respectfully dissent from the Court's opinion. The Court resolves the issue before it on the basis of its conclusion that a demotion can be a "discharge," as opposed to a "constructive discharge," under § 39-2-903(2), MCA. I cannot agree.

[*13]** Section 39-2-903(2), MCA, provides in pertinent part:

> "Discharge" includes . . . any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

The plain meaning of the term "termination," as the word is used in the statute, is "ending;" thus, a "termination of employment" is an ending of employment. The other terms used in § 39-2-903(2), MCA, also connote an ending of employment. In each situation referenced--resignation, elimination of the job, layoff, and the like--the person's employment has ended. Therefore, I conclude that **[*441]** the statute means what it so clearly says: that a discharge means an ending of employment, nothing more and nothing less.

The Court equates a demotion, or a termination from a particular position with an offer of a different position, to a "termination of employment." The plain language of the statute does not support such a conclusion. Nor does the Court offer any authority or legal analysis which might support its conclusion. The reason is clear--analysis would be the undoing of the **[***14]** result the Court desires to reach in this regard.

Howard contends that two cases from the Michigan Court of Appeals support his position that the term "termination of employment" includes the term "demotion." The Court wisely does not rely on these cases, as neither supports its conclusion.

In the wrongful discharge case of Richards v. Detroit Free Press (Mich. App. 1988), 173 Mich. App. 256, 433 N.W.2d 320, the Michigan appellate court states flatly: "A demotion from one job to a lesser job is a discharge from the first job, and a demotion will support a wrongful discharge claim." Richards, 433 N.W.2d at 322. There are several insurmountable problems with attempting to use *Richards* as authority in the case presently before us. First, the Michigan court does not quote any controlling wrongful discharge statute such as the one at issue here; thus, no basis is provided on which we properly could reach the same conclusion. Second, the case to which the Michigan court cites in support of its statement, Sepanske v. Bendix Corporation (Mich. App. 1985), 147 Mich. App. 819, 384 N.W.2d 54, was inapposite to the *Richards* case. *Sepanske* was a breach of employment contract case, not a wrongful discharge case. Sepanske [***15] , 384 N.W.2d at 58-59. Moreover, the statement drawn from *Sepanske* in *Richards* simply does not appear, either directly or indirectly, in *Sepanske*. Finally, and most importantly, the Michigan Supreme Court remanded *Richards* to the Michigan Court of Appeals for reconsideration. *Richards v. Detroit Free Press (Mich. 1989), 433 Mich. 913, 448 N.W.2d 351.* Thus, the *Richards* decision is of no force and effect.

The Court suggests that Anderson's statement to the Billings Job Service "speaks for itself" with regard to the issue of whether Howard was discharged, or merely was demoted and then resigned. Anderson's statements that Howard was discharged from the position of store manager and offered a sales position on the same date do, indeed, speak for themselves; they do not, however, speak **[**122]** to the legal issue of whether a demotion is a "termination of employment" under § 39-2-903(2), MCA.

[*442] I would affirm the District Court's determination that a demotion is not a termination of employment and address the issue of constructive discharge on which, in large part, the District Court's summary judgment ruling was based. The Court having avoided that issue altogether by its unsupported conclusion, **[***16]** there is no point in my addressing it.

/S/ KARLA M. GRAY

Chief Justice J.A. Turnage joins in the foregoing dissent of Justice Karla M. Gray.

/S/ J. A. TURNAGE

Justice Fred J. Weber dissents as follows:

I dissent from the Court's opinion. In doing so, I join in the dissent of Justice Gray.

In addition to the points made by Justice Gray, I point out that the Wrongful Discharge From Employment Act, §§ 39-2-901 to 915, MCA, has additional pertinent provisions. Section 39-2-904, MCA, sets forth the key elements of wrongful discharge as follows:

39-2-904. Elements of wrongful discharge. A discharge is wrongful only if:

. . .

(2) the discharge was not for good cause . . .

As a result of the foregoing statute, we must first determine if a discharge was not for good cause. Good cause is defined as follows in *§ 39-2-903, MCA*:

(5) "Good cause" means reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. . . .

I emphasize here that good cause relates only to *dismissal* based on a failure to perform job duties, etc. Justice Gray points **[***17]** out that "termination" is an ending of employment. In the same way, the word "dismissal" is an ending of employment. I conclude this is an additional reason to join in the conclusion of Justice Gray that a discharge means an ending of employment, nothing more and nothing less. I would affirm the District Court's determination.

/S/ FRED J. WEBER

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Koepplin v. Zortman Mining

Supreme Court of Montana

May 26, 1994, Submitted On Briefs ; September 15, 1994, Decided

No. 93-646

Reporter
267 Mont. 53 *; 881 P.2d 1306 **; 1994 Mont. LEXIS 199 ***; 51 Mont. St. Rep. 880; 9 I.E.R. Cas. (BNA) 1636; 129 Lab. Cas. (CCH) P57,803

RONALD C. KOEPPLIN, Plaintiff and Appellant, v. ZORTMAN MINING, INC., a Montana Corporation, Defendant and Respondent.

Prior History: [*1]** APPEAL FROM: District Court of the Seventeenth Judicial District, In and for the County of Phillips, The Honorable Leonard H. Langen, Judge presiding.

Disposition: Affirmed.

After the former employee was suspended for sexual harassment and intimidation of his fellow employees, he called several of his supervisors and suggested they pack their bags for a "little trip to hell." The employer requested that the police be present at a meeting with the former employee the following work day where they told him that he was fired. At the meeting the police made the decision to frisk the former employee and after he left they decided to patrol the area as a precaution. The former employee claimed that he was not threatening anyone, but was just making use of his employer's "open door" policy, and that his termination did not comply with the employer's written personnel policy. The court affirmed the grant of summary judgment in favor of the employer, holding that a party could not create a disputed issue of material fact by putting his own interpretations and conclusions on an otherwise clear set of facts. The court held that the police officer's frisk was not an invasion of his privacy, and was not done at the direction of his employer. The court held that the employer had demonstrated a legitimate reason for the former employee's termination.

Case Summary

Procedural Posture
Plaintiff former employee appealed the judgment of the District Court of the Seventeenth Judicial District, In and for the County of Phillips (Montana), which granted defendant employer's motion for summary judgment in the former employee's claims for wrongful discharge under the Wrongful Discharge from Employment Act, invasion of privacy, and malice.

Outcome
The court affirmed the lower court's grant of summary judgment in favor of the employer in the former employee's claim for wrongful discharge, invasion of privacy, and malice.

Counsel: For Appellant: Jerrold L. Nye, Nye & Meyer, Billings, Montana.

Overview

For Respondent: Steven J. Lehman, Crowley, Haughey, Hanson, Toole & Dietrich, Billings, Montana; Thomas E. Hattersley, III, Gough, Shanahan, Johnson & Waterman, Helena, Montana.

Judges: FRED J. WEBER, We Concur: J. A. TURNAGE, TERRY N. TRIEWEILER, JAMES C. NELSON, WILLIAM E. HUNT, SR.

Opinion by: FRED J. WEBER

Opinion

[*55] **[**1307]** Justice Fred J. Weber delivered the Opinion of the Court.

Plaintiff Ronald C. Koepplin appeals the Memorandum Opinion and Order of the District Court of the Seventeenth Judicial District, Phillips County, which granted defendant's motion for summary judgment. We affirm.

The sole issue for review is whether the District Court erred in granting summary judgment in favor of the defendant on Koepplin's claims for wrongful discharge, invasion of privacy and malice.

Ronald C. Koepplin (Koepplin) worked for Zortman Mining, Inc. (Zortman) from October 1991 until his termination on February 17, 1993, when Zortman discharged Koepplin from his job as a haul truck driver. Koepplin had worked **[***2]** at the Zortman mine in other capacities dating back to 1986 when the mine was under other ownership.

Frank Green (Green) supervised Koepplin. In January of 1993, Green noticed there was tension and discord among crew members. Upon inquiry of crew members, Green was told that Koepplin had been verbally deriding and "downgrading" co-employees, intimidating them and throwing items on the lunch bus. On February 14, 1993, a female crew member reported to Green that she had experienced numerous incidents of egregious sexual harassment from Koepplin. Green transcribed the employee's oral statement onto an Employer Personal File Entry form on February 14, 1993 and called Mine Superintendent Clayton Krall (Krall) because of the seriousness of the complaint.

On February 15, 1993, Zortman management employees Green, Krall, George Lytle (Lytle), and Jim Geyer (Geyer) began to investigate the complaints against Koepplin. Their investigation included interviews with persons who had witnessed Koepplin's treatment of the female employee. These interviews indicated that there were more problems with Koepplin's conduct that the sexual harassment incidents.

As a result of the interviews, Koepplin **[***3]** was called into Lytle's office later that day to meet with Geyer, Krall and Lytle so that he could **[*56]** tell his side of the story involving the female employee and also his side of an incident involving a scuffle with another male employee. Koepplin denied the sexual harassment and termed the scuffle "calisthenics." Krall advised Koepplin in detail regarding the complaint from the female employee; Koepplin denied the sexual harassment. At the conclusion of the meeting, Koepplin was suspended pending further investigation of the complaint and was asked to return the morning of February 17, 1993 for another meeting with management. Koepplin was told specifically not to threaten or **[**1308]** intimidate anyone involved in the investigation.

Despite being told not to threaten or intimidate investigators, Koepplin made telephone calls to his supervisor (Green) and the three other mine managers (Krall, Lytle and Geyer) after 10:00 p.m. that same evening. Krall, Lytle and Geyer all testified they felt threatened by Koepplin's calls to them. Geyer testified that from the tone of voice and the words used, he felt threatened and believed that Koepplin was trying to intimidate him. Geyer immediately reported **[***4]** the threat to the Phillips County Sheriff.

The next day, after discovering Koepplin had similarly called other mine managers, Geyer provided the sheriff with information about these calls also. Geyer specifically reported Koepplin's intent to take Lytle on a "trip to hell." Koepplin testified in his deposition as follows:

> [By Mr. Hattersley] . . . As you left the meeting from George's office, when George, Jim, Clayton and you were there. You know what meeting I'm talking about, right, when they told you you were suspended. You know what meeting I'm talking about.
> A. Yes, sir.
> Q. You were also told that you were not to threaten or intimidate anyone involved in the investigation; isn't that right?
> A. Yes, sir.
> Q. Clearly told that, right?
> A. Yes, sir.
> Q. Who told you that?
> A. Jim Geyer.
> . . .

Q. Then you called George Lytle, didn't you?

A. Yes, sir.

Q. And you said to George, "Do you have a suitcase?"

A. I asked him.

Q. You asked him if he had a suitcase?

[*57]

A. Yes, sir.

Q. Why did you ask if he had a suitcase? What was your purpose in asking that?

A. Because he was going to need it.

[*5]**

Q. Why did you think he was going to need it? Did you tell him he was going to need it?

A. I asked him.

Q. You asked him if he had a suitcase?

A. Yes, sir.

Q. And you said the reason you asked is because you felt he was going to need it, right?

A. Best get 'er packed.

Q. And that's what you said to him, right?

A. Yes, sir.

Q. Why in your mind did you think that he needed a suitcase?

A. Because I do believe George Lytle is a lot of my problems here in this situation.

Q. But why would he need a suitcase if he's part of your problem in your view?

A. At one time earlier, I called George Lytle a court jester.

Q. But why did you think he was going to need a suitcase packed and why did you tell him that? In your mind, why did you tell him those things?

A. Because he's going to need it.

Q. Why was he going to need it from your standpoint?

A. For his little trip.

Q. What was his little trip going to be?

A. To hell.

Q. And that's what you told him, right?

A. Yes, sir.

Lytle, Krall and Geyer all felt that Koepplin's calls to them were threatening and intimidating **[***6]** **[**1309]** and all hung up on Koepplin. Koepplin testified he called the managers because he was concerned about his job and that he was not angry nor did he intend to threaten or intimidate anyone. Koepplin had also acted in a threatening and excitable manner during the meeting the previous day, according to testimony by management employees. The investigation conducted by mine management elicited information from other employees that **[*58]** they, too, were concerned with their safety and the safety of others because of Koepplin's threats.

Zortman's personnel policy provided for different "levels" of discipline, including termination if warranted by the serious nature of the circumstances involved. Because of Koepplin's most recent threats to management and his prior behavior as reported by co-employees and as noted in his personnel file, Zortman managers decided to terminate Koepplin's employment at the prearranged meeting on February 17, 1993.

Sheriff Eugene Peigneux was asked to be present at the meeting in order to keep the peace should Koepplin become violent. Sheriff Peigneux testified that he decided to frisk Koepplin when he arrived for the meeting. He further testified that this was his **[***7]** own independent decision based on his professional training and experience and that Zortman had not requested this be done. Koepplin testified that his feelings were not hurt by this conduct and that after he was frisked, he got a cup of coffee and asked the sheriff and the two deputies if they cared for a cup also. Sheriff Peigneux also decided to have one of his deputies patrol the Zortman area during his regular shift for the next few days in order to keep an eye on Koepplin.

After his termination, Koepplin brought this action for wrongful discharge, invasion of privacy and malice. Further facts are provided throughout this opinion.

Did the District Court err in granting summary judgment in favor of the defendant on Koepplin's claims for wrongful discharge, invasion of privacy and malice?

Our standard of review for an appeal of a district court's summary judgment decision is the same as that used by the district court under Rule 56(c), *M.R.Civ.P. Morton v. M-W-M, Inc. (1994), 263 Mont. 245, 249, 868 P.2d 576, 578*. Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to **[***8]** judgment as a matter of law. Rule 56(c), M.R.Civ.P. The party seeking summary judgment bears the burden to show the Court that it has met the standards set forth in Rule 56(c), M.R.Civ.P. *Morton, 868 P.2d at 579*. If the moving party has met this burden of proof, the nonmoving party has the burden of showing that a genuine issue of material fact exists or that the moving party is not entitled to judgment as a matter of law. *Morton, 868 P.2d at 579*. When raising the allegations that disputed issues of fact exist, the nonmoving party has an affirmative duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory **[*59]** or speculative statements will not suffice. *Morton, 868 P.2d at 579*.

WRONGFUL TERMINATION

Under the Wrongful Discharge from Employment Act (the Act), an employee who has completed the employer's probationary period has a valid ground for maintaining a cause of action against the employer if the employee's discharge was not for "good cause." *Section 39-2-904(2), MCA*. The Act defines **[***9]** "good cause" as "reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason." *Section 39-2-903(5), MCA*.

The issue in this case is whether Koepplin was properly terminated for disruption of the employer's operation or other legitimate business reason. A "legitimate business reason" is defined as "a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business." *Kestell v. Heritage Health Care Corp. (1993), 259 Mont. 518, 525, 858 P.2d 3, 7*. The District **[**1310]** Court emphasized disruption in the work place, noting that Zortman had the right to serve its own business interest as well, stating as follows:

> Koepplin's threat that he was going to send a supervisor on a trip to hell was shocking and outrageous, and no employer under Montana law has to tolerate threats and abuse of that nature. This threat by Koepplin was disruptive to the Zortman work place and gave Defendant good cause to discharge him from employment.
>
> In his Reply Brief, Koepplin's attorney **[***10]** argues that Koepplin did not intend this statement to be a threat. Koepplin's attorney cites no Deposition or Affidavit for this assertion. Without any basis in the factual record, the attorney for Koepplin has put his own interpretation on the statement arguing he can tell the jury that it was not a threat. Since Defendant has the right to serve its own legitimate business interest in discharging the Plaintiff, the proper focus of the inquiry should not be on whether Plaintiff's attorney characterizes this statement as a threat, but whether the statement was heard as a threat by George Lytle. George Lytle specifically testified he found the statement threatening.

Koepplin testified in his deposition that he called the managers because he was concerned about his job. He further stated he was not angry at the time, had consumed beer that evening and denied that his conversation with Lytle constituted a threat. He claims that he **[*60]** was making use of Zortman's "open door" policy and that his discharge from employment did not comply with the terms of Zortman's written personnel policy.

The undisputed facts which the District Court relied on center around Koepplin's telephone calls to **[***11]** Zortman managers on the night of February 15, 1993, particularly the call to Lytle. Both Krall and Geyer hung up on Koepplin and testified they interpreted the calls as threatening. Geyer called the Phillips County Sheriff after he hung up on Koepplin. The third call Koepplin made was to Lytle and the substance of that call is quoted above as testified to by Koepplin in his deposition. Earlier that day, Koepplin was specifically told not to threaten or intimidate any person involved with the investigation of the sexual harassment complaint.

Despite being warned not to threaten anyone involved in the investigation, Koepplin called Krall, Geyer, Lytle and Green after 10:00 p.m. that same evening. These four men were in attendance at the meeting when Koepplin was suspended. Koepplin's disingenuous contention that he was making use of the Zortman's "open door" policy is unconvincing. Koepplin knew that management was investigating the incidents. He had been suspended during the investigation and told to come back for another meeting two days later.

If there were matters of importance concerning the investigation, Koepplin would have had an opportunity to respond to them at a later time. **[***12]** Koepplin testified to no such concerns, he did not discuss them at the meeting when he was terminated and he did not raise them after his termination. An employer's "open door" policy does not exist for the purpose of allowing employees to threaten or otherwise intimidate management; it is used for the purpose of encouraging meaningful communication between employer and employee relating to the employer's operations.

Koepplin testified that his statements to Lytle--that he had best get his suitcase packed for his "little trip to hell"--were not threats. He did not testify what he intended by them. He merely testified that he was concerned about his job. Lytle testified he felt threatened by the conversation. We agree with the District Court that the proper emphasis here is whether the statements were heard as a threat by Lytle and not whether Koepplin's attorney characterizes them as a threat.

The District Court termed Koepplin's threats to Lytle as "shocking and outrageous" and stated that under Montana law, **[**1311]** no employer has to tolerate threats and abuse of that nature. Geyer's call to the **[*61]** sheriff after hanging up on Koepplin and his subsequent request for the sheriff's presence **[***13]** at Koepplin's termination reinforce Zortman's contention that Koepplin's statements were taken seriously. Zortman's personnel policy has three "levels" of disciplinary treatment which may apply according to the severity of the particular circumstances. It provides for immediate termination under certain enumerated

circumstances depending on the seriousness of the situation. We conclude that, in the overall context of this case, Koepplin's threat to send Lytle on a "little trip to hell" was at least insubordination which justified immediate termination under Zortman's personnel policy. We further conclude that the District Court properly characterized this conduct as disruptive to the work place and that Zortman had the right to serve its own legitimate business interest by discharging Koepplin under the circumstances of this case.

Moreover, Krall and Geyer both testified by deposition that Koepplin told them he would have his "mouthpiece" with him at the meeting and that it was the sort you would say "sir" to. Although Koepplin did not admit to these statements, he did admit that both Geyer and Krall hung up on him. It is further undisputed that Geyer called Sheriff Peigneux after **[***14]** hanging up on Koepplin. Koepplin has not presented any evidence that there is an issue of material fact relating to his wrongful discharge claim. This Court has previously held that a party cannot create a disputed issue of material fact by putting his own interpretations and conclusions on an otherwise clear set of facts. *See, e.g.*, *Sprunk v. First Bank Sys. (1992), 252 Mont. 463, 466-67, 830 P.2d 103, 105*. We conclude Koepplin's conclusory and interpretive statements of material fact do not rise to the level of genuine issues of material fact required to defeat Zortman's motion for summary judgment on Koepplin's claim for wrongful discharge.

INVASION OF PRIVACY

Koepplin contends that Zortman requested the Phillips County Sheriff's presence at the termination meeting and that the ensuing frisk was a violation of his right of privacy. He maintains that the sheriff's actions cannot be separated from Zortman's because Zortman had asked Sheriff Peigneux to be there.

Sheriff Peigneux and two deputies were present and frisked and searched Koepplin upon his arrival. They did not frisk Koepplin's wife who accompanied him to the meeting. The **[***15]** frisk and search lasted for less than two minutes, according to Koepplin's testimony. After the termination, one of the deputies was assigned to patrol the Zortman **[*62]** area exclusively for a few days because of the circumstances surrounding Koepplin's termination. Jim Geyer requested that Sheriff Peigneux be present at Koepplin's termination "to keep the peace." Sheriff Peigneux asked that the request and the reasons for asking for assistance be made in writing. Geyer provided a written request, giving details of the call he received as well as the calls received by Krall and Lytle. This was the only request made of the sheriff by any Zortman employee. The decisions to frisk Koepplin and to have a deputy patrol the Zortman area for a few days were made independently by Sheriff Peigneux based on his professional judgment.

The District Court found that the officers' search was not a substantial invasion of a legally protected interest, that Koepplin had provided no authority to support an invasion of privacy tort theory, and that the search of Koepplin was part of his being fired and could not be separated from the termination.

Koepplin cites *Johnson v. Supersave Markets, Inc. (1984), 211 Mont. 465, 686 P.2d 209*, **[***16]** for the premise that a person's right to liberty is legally protected from invasion and his emotional distress proximately caused thereby are recoverable damages for invasion of privacy. He maintains that *Johnson* held that the invasion of privacy itself could cause substantial emotional distress in and of itself. Koepplin's argument relates to a constitutional protection found in *Article II, Section 10 of the Montana Constitution* and involves **[**1312]** Sheriff Peigneux's independent decision to frisk and search him. We conclude there is no evidence that Zortman participated in the decision to frisk and search Koepplin nor has any agency relationship been established. Thus, there is no invasion of privacy proximately caused by Zortman's request for the sheriff "to keep the peace."

MALICE

As conceded in his brief, Koepplin has no independent claim for malice. Pursuant to our ruling on his claims for wrongful discharge and invasion of privacy, Koepplin has no cause of action for which damages for malice may be awarded.

We hold the District Court properly granted summary judgment in favor of the defendant on Koepplin's claims for wrongful discharge, invasion of privacy and malice.

Affirmed.

[*17]** FRED J. WEBER

We Concur:

J. A. TURNAGE

TERRY N. TRIEWEILER

JAMES C. NELSON

WILLIAM E. HUNT, SR.

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Morton v. M-W-M, Inc.

Supreme Court of Montana

December 22, 1993, Submitted on Briefs ; February 1, 1994, Decided

No. 93-443

Reporter
263 Mont. 245 *; 868 P.2d 576 **; 1994 Mont. LEXIS 13 ***; 51 Mont. St. Rep. 39; 9 I.E.R. Cas. (BNA) 373; 127 Lab. Cas. (CCH) P57,675

GINA L. MORTON, Plaintiff and Appellant, v. M-W-M, INC., a Montana corporation, Defendant and Respondent

Subsequent History: [*1]** Released for Publication February 22, 1994.

Prior History: Appeal from the District Court of Cascade County. Eighth Judicial District. Honorable John M. McCarvel, Judge.

Disposition: Reversed and remanded.

Case Summary

Procedural Posture

Plaintiff employee sought review of a judgment from the District Court of Cascade County (Montana), which granted defendant employer summary judgment in the employee's wrongful discharge action brought after the employee was fired for allegedly lying about a second job. The trial court held the employer had good cause the fire the employee, pursuant to *Mont. Code Ann. §§ 39-2-904(2)*, *39-2-903(5)* of the Wrongful Discharge from Employment Act.

Overview

The employee requested vacation for the purpose of attending to family needs while the employee's husband was in job training. Upon learning that the employee was working a second job during the vacation period, the employer fired the employee. Thereafter, the employee brought a wrongful discharge action against the employer. In granting the employer summary judgment, the trial court held the employer had good cause to fire the employee, pursuant to *Mont. Code Ann. §§ 39-2-904(2)*, *39-2-903(5)* of the Act. Upon review, the court held the issue to be determined was whether the firing had been justified by a legitimate business reason which was neither false, whimsical, arbitrary, or capricious, and which had some logical relationship to the employer's business needs. Because the record showed a genuine issue of fact and the parties had related widely divergent reasons for the employee's firing, the court held the trier of fact had been required to resolve the issue and determine whether the employee was fired for good cause.

Outcome

The court reversed a judgment granting the employer summary judgment in the employee's wrongful discharge action.

Counsel: For Plaintiff and Appellant: **John F. Lynch**, Lynch Law Firm, Great Falls.

For Defendant and Respondent: **Richard Dzivi** and **Tonja D. Schaff**, Richard Dzivi, P.C., Great Falls.

Judges: Chief Justice Turnage delivered the Opinion of the Court. Justices Harrison, Hunt, Nelson and Trieweiler concur.

Opinion by: TURNAGE

Opinion

[*247] **[**577]** Plaintiff Gina L. Morton (Morton) appeals from a decision of the Eighth Judicial District Court, Cascade County. The court entered summary judgment in favor of the defendant, M-W-M, Inc. (M-W-M), owner of Burger King Franchise No. 1666 in Great Falls, Montana, after concluding that there were no disputed issues of fact and that an agent at the company's franchise had good cause to terminate Morton's employment as an assistant manager. We reverse and remand.

The issues on appeal are rephrased as follows:

1. Whether the District Court erred by granting summary judgment to M-W-M after concluding there were no disputed issues of fact and concluding good cause existed for Morton's termination from the Burger King **[***2]** franchise;

2. Whether Morton mitigated any damages allegedly due her by working full-time at another job after her termination from Burger King.

Morton began employment with M-W-M's franchise, Burger King No. 1666, in Great Falls during September 1989. She worked her way up through the ranks in less than a year, earning an assistant manager position **[**578]** on May 18, 1990. Her written performance evaluations at Burger King were mostly exceptional with no less-than-satisfactory work traits mentioned. Her position at Burger King was part-time, and the unofficial policy there offered Morton a very flexible work schedule dependent in part on her husband's work schedule and the child-care needs of their family.

As a matter of unwritten policy, the general manager of Burger King No. 1666, Matt Blazicevich (Blazicevich), voluntarily agreed to schedule Morton for work according to her scheduling requests. Morton was the sole part-time assistant manager.

Vacation time offered by Burger King came in one of two forms: paid leave or unpaid time off. Frequently, employees would request unpaid time off by leaving a note with Blazicevich. He often would **[*248]** then voluntarily refrain from scheduling the employee **[***3]** according to the employee's request.

During April of 1992, Morton requested vacation time; Blazicevich responded that if Morton were to wait until May, she would be eligible for two weeks vacation. Paid leave vacation for managers at Burger King was offered at two weeks for two years of service, and Morton was nearing the second anniversary of the date she was promoted to assistant manager. On April 20, then, Morton left a note with Blazicevich requesting the first two weeks of May 1992, off for the purpose of attending to her family's needs while her husband was in job training. Her note further requested that she work the following shifts during May: Tuesday and Wednesday, the 19th and 20th; and Saturday and Sunday, the 30th and 31st. Blazicevich scheduled her accordingly. On the same day, April 20, 1992, Morton filled out an application to work a second job at the Black Angus restaurant.

Historically the Burger King franchise permitted moonlighting as long as the second job did not conflict with the Burger King work schedule and as long as the second job did not involve a Burger King competitor. Near the end of April 1992, Blazicevich learned from a neighbor that one of his Burger **[***4]** King employees was moonlighting at the Black Angus restaurant in Great Falls. Blazicevich went to the Black Angus on May 4, 1992; he saw Morton working. On the next day, when Morton went into Burger King to pick up her paycheck, Blazicevich terminated her employment without explanation. She initiated wrongful discharge proceedings.

M-W-M moved the court for summary judgment, stating that the following discrepancies enabled Blazicevich to terminate Morton for good cause: she did not make herself available for part-time work, she was working for a competitor of Burger King, and she was dishonest. M-W-M also alleged that Morton suffered no damages as a result of her termination from employment, because she was employed at the Black Angus.

Morton stated that she followed Burger King policy when

requesting and obtaining her vacation and that she originally requested vacation time to attend to her family's needs while her husband was in training. After obtaining the vacation time, she found a babysitter for her children and interviewed for the Black Angus job on April 30. She got the job and started work there on May 1st, 1992. Additionally, Morton contended that the Black Angus restaurant **[***5]** is not a competitor of Burger King.

[*249] The District Court granted summary judgment to M-W-M. Morton appeals.

ISSUE 1

Did the District Court err by granting summary judgment to M-W-M after concluding there were no disputed issues of fact and concluding good cause existed for Morton's termination from employment?

Our standard of review when considering an appeal from a summary judgment decision is the same as that which was faced by the district court under Rule 56, M.R.Civ.P. *Minnie v. City of Roundup (1993), 257 Mont. 429, 431, 849 P.2d 212, 214*. Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, M.R.Civ.P. Summary judgment is never a substitute for a **[**579]** trial on the merits. *Krieg v. Massey (1989), 239 Mont. 469, 471, 781 P.2d 277, 278*.

The party seeking summary judgment bears the burden to show the court that it has met the standards set forth in Rule 56, M.R.Civ.P. *D'Agostino v. Swanson (1990), 240 Mont. 435, 442, 784 P.2d 919, 924*. The court must review both the **[***6]** pleadings and the record before it in making its decision. *D'Agnostino v. Schapp (1988), 230 Mont. 59, 748 P.2d 466*, citing Rule 56(c), M.R.Civ.P. When examining the record, any factual inferences which can be drawn must be resolved in favor of the nonmoving party. *Krieg, 781 P.2d at 278*; *Cereck v. Albertsons, Inc. (1981), 195 Mont. 409, 637 P.2d 509*.

If the moving party has met its burden of proof, the nonmoving party has the burden of showing that a genuine issue of material fact exists or that the moving party is not entitled to judgment as a matter of law. *Krieg, 781 P.2d at 278*; *Rumph v. Dale Edwards, Inc. (1979), 183 Mont. 359, 600 P.2d 163*. The nonmoving party may not rely solely on the allegations stated in its pleadings. *Drug Fair Northwest v. Hooper Enterprises, Inc. (1987), 226 Mont. 31, 33, 733 P.2d 1285, 1287*. Instead, when raising the allegation that disputed issues of fact exist, the nonmoving party has an affirmative **[***7]** duty to respond by affidavits or other sworn testimony containing material facts that raise genuine issues; conclusory or speculative statements will not suffice. *Barich v. Ottenstror (1976), 170 Mont. 38, 42, 550 P.2d 395, 397*.

The summary judgment in the instant case is based on the lower court's findings of fact and conclusion that there were no disputed issues of fact. These findings and conclusion are not supported by the record. In order to articulate the disputed issues, we **[*250]** first examine the law surrounding Morton's wrongful discharge claim.

Under the Wrongful Discharge from Employment Act a valid ground for maintaining a cause of action against a former employer is when the employee's "discharge was not for good cause and the employee had completed the employer's probationary period of employment." *Section 39-2-904(2), MCA*. The act defines good cause as "reasonable job related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reasons." *Section 39-2-903(5), MCA*. Deposition testimony by Blazicevich and Morton establishes that Morton was **[***8]** not terminated for unsatisfactory performance and that she had passed her probationary period of employment. The issue, therefore, is whether Morton's termination was justified by a legitimate business reason.

This Court has previously defined legitimate business reason as "a reason that is neither false, whimsical, arbitrary or capricious, and it must have some logical relationship to the needs of the business." *Kestell v. Heritage Health Care Corp. (1993), 259 Mont. 518, 525, 858 P.2d 3, 7, 50 St.Rep. 919, 922*, citing *Buck v. Billings Montana Chevrolet, Inc. (1991), 248 Mont. 276, 281-82, 811 P.2d 537, 540*. As we stated in *Kestell, 858 P.2d at 7-8*:

> It is well settled in our pre-[wrongful discharge]Act cases that courts should not intrude in the day-to-day employment decisions of business owners. . . . An employer's legitimate right to exercise discretion over whom it will employ must be balanced, however, against the employee's equally legitimate right to secure employment. . . . The balance should favor an employee who presents evidence, and not mere speculation **[***9]** or denial, upon which a jury could determine that the reasons given for his termination were false, arbitrary or capricious, and unrelated to the needs of the business. [Citations omitted].

When considering M-W-M's motion for summary judgment, the court first entertained M-W-M's assertion that no disputed issues of fact existed. The court specifically asked counsel

for Morton whether any disputes of fact were involved in this case; Morton's counsel replied that there were none.

That reply was erroneous. The record before us is brief, consisting of various court filings and certain pieces of discovery including two depositions, one from Blazicevich and one from Morton. After reviewing the record, **[**580]** we conclude that contrary to the District Court's **[*251]** findings, material issues of fact exist, including whether Morton's vacation request was made according to Burger King policy; whether the Black Angus is a competitor of Burger King; and whether Morton misled her employer to obtain vacation time to work at a second job. The District Court's findings of fact relating to the above disputed issues are not supported by the record and are, therefore, clearly erroneous. See *Interstate Prod. Credit Ass'n v. DeSaye (1991), 250 Mont. 320, 820 P.2d 1285*.

[*10]** Where the record shows genuine issues of fact and the parties relate widely divergent reasons for Morton's termination, the trier of fact must resolve those issues and determine whether Morton was fired for good cause. See *Dare v. Montana Petroleum Marketing Co. (1984), 212 Mont. 274, 282, 687 P.2d 1015, 1019*. Here, each party argues the above disputed facts in each respective brief. We conclude that in this record there are material fact issues that cannot be disposed of by summary judgment and this issue is remanded for proceedings consistent with this opinion.

ISSUE 2

Did Morton mitigate any damages allegedly due her by working full-time at a restaurant after her termination from Burger King?

In its conclusions of law the District Court states:

> Plaintiff mitigated any damages she may have been entitled to if this Court would have found a wrongful discharge. Plaintiff is a full-time employee at the Black Angus Restaurant, earning more than she earned at Burger King No. 1666. Accordingly, even if Plaintiff was wrongfully discharged, she suffered no damages, rendering Defendant, M-W-M Inc., entitled to summary judgment.

The court **[***11]** failed to note, however, that Morton's second job at the Black Angus was presumably compatible in hours to the requirements of her first, part-time job at Burger King. We hold that the court's finding was clearly erroneous because Morton could have worked both jobs concurrently and the loss of earnings she suffered as a result of termination from Burger King are necessarily part of her wrongful discharge claim. On remand, the issue of mitigation of damages for appellant's loss of employment at M-W-M remains to be resolved.

Reversed and remanded.

End of Document

Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation

Supreme Court of Montana

August 10, 2016, Submitted on Briefs; September 27, 2016, Decided

DA 15-0612

Reporter
2016 MT 239 *; 385 Mont. 33 **; 380 P.3d 787 ***; 2016 Mont. LEXIS 884 ****

NORTHWESTERN CORPORATION, doing business as NORTHWESTERN ENERGY, Petitioner and Appellant, v. THE MONTANA DEPARTMENT OF PUBLIC SERVICE REGULATION, MONTANA PUBLIC SERVICE COMMISSION, Respondent and Appellee, NATURAL RESOURCES DEFENSE COUNCIL, HUMAN RESOURCE COUNCIL, DISTRICT XI, and MONTANA CONSUMER COUNSEL, Intervenors.

Subsequent History: Released for Publication September 27, 2016.

Prior History: **[****1]** APPEAL FROM: District Court of the Second Judicial District, In and For the County of Butte/Silver Bow, Cause No. DV-13-399. Honorable Brad Newman, Presiding Judge.

Northwestern Corp. v. Mont. Dep't of Pub. Serv. Regulation, 2016 Mont. LEXIS 752 (Mont., Aug. 10, 2016)

Case Summary

Overview

HOLDINGS: [1]-In deciding to disallow the outage costs incurred by the electric company when a generating station went offline, the Montana Public Service Commission was well within its authority under *Mont. Code Ann. § 69-8-210(1)* to determine whether those costs were "prudently incurred;" waiver of consequential damages on a first-of-its-kind regulation plant without extensive industry use supported the Commission's determination that the company's failure to identify risk ensured that incremental costs of replacement service would be incurred in the event of an outage, and was imprudent; [2]-The "free ridership" and "spillover" calculations adopted by the Commission were supported by substantial evidence; the Commission had substantial evidence to rely upon and it appropriately used its expertise to evaluate that evidence.

Outcome
Judgment affirmed.

Counsel: For Appellant: Al Brogan, NorthWestern Corporation d/b/a/ NorthWestern Energy, Helena, Montana.

For Appellee: Jason Brown, Jeremiah Langston, Justin Kraske, Montana Public Service Commission, Helena, Montana.

For Intervenors: Robert A. Nelson, Montana Consumer Counsel, Helena, Montana; Charles Magraw, Human Resource Council, District XI, Natural Resources Defense Council, Helena Montana.

Judges: JIM RICE. We concur: MIKE McGRATH, JAMES JEREMIAH SHEA, PATRICIA COTTER, MICHAEL E WHEAT. Justice Jim Rice delivered the Opinion of the Court.

Opinion by: Jim Rice

Opinion

[*789]** **[**34]** Justice Jim Rice delivered the Opinion of the Court.

[*P1] Appellants NorthWestern Corporation, doing business as NorthWestern Energy (NorthWestern), the Natural Resources Defense Council (NRDC), and Human Resources Council, District XI (HRC), appeal the decision of the Second Judicial District Court affirming the Final Order of the Montana Public Service Commission (Commission), which disallowed $1,419,427 in claimed excess electric regulation costs and adjusted energy efficiency savings calculations. **[****2]** We affirm, considering the following issues:

1. Did the Commission apply the correct legal standard in reviewing NorthWestern's claim for excess outage costs?

2. Were the "free ridership" and "spillover" calculations adopted by the Commission supported by substantial evidence?

FACTUAL AND PROCEDURAL BACKGROUND

[*P2] This matter involves a challenge to the Commission's Final Order in NorthWestern's 2011-2012 annual tracker filing.[1] Therein, NorthWestern requested, *inter alia*, a $1,419,427 increase in rates for **[**35]** unexpected electricity supply costs due to an outage at its Dave Gates Generating Station (DGGS), located near Anaconda.[2] As part of the proceeding, the Commission also ordered NorthWestern to present evidence for purposes of conducting a "true-up" to actual costs for lost revenues that had been previously estimated in NorthWestern's demand-side management (DSM) programs. Ultimately, the Commission (1) denied NorthWestern's request to include the DGGS outage costs in customer rates, and (2) rejected NorthWestern's expert's conclusion that the "free ridership" and "spillover" values of its DSM programs were perfectly offsetting, adopting instead the same expert's actual calculations used **[****3]** in a draft report.

DGGS Outage Costs

[*P3] In 2008, NorthWestern sought Commission approval to build the DGGS. The DGGS was intended to provide regulation and frequency response service in NorthWestern's service area. The Commission approved the project in 2009, and the DGGS commenced commercial operation on January 1, 2011.

[*P4] The DGGS was a first-of-its-kind facility that NorthWestern presented as having "the potential to be a model facility for the supply of regulation service." It consisted of three generation units made by Pratt & Whitney Power Systems, Inc. (PWPS) and was an application of a simple cycle natural gas turbine generator designed to increase or decrease generation (ramp) in response to variations in NorthWestern's load, "on a moment-by-moment basis." NorthWestern's General Manager of Generation testified that the plant had a "very unique" control mechanism and "early on we knew that the plant was going to have a very unique control application."

[*P5] NorthWestern was aware that **[****4]** the ramp capabilities of the DGGS were critical to its operation and that the DGGS was a first-of-its-kind application, stating:

> [The DGGS] is one of the first power plant installations to be built specifically for electrical transmission grid regulation duty. The design requirements for grid regulation are stringent since they require the plant to continually change load in a short time frame (seconds to minutes).

This load requirement was necessary because NorthWestern "anticipated variable operating conditions," largely due to wind generation variations, and the DGGS needed to be able to ramp up or **[**36]** down by at least 15 mega-watts (MW) per minute per unit to "offset the continuous variation between system generation and system load."

[*P6] The contract between NorthWestern and PWPS included a waiver of consequential damages, but NorthWestern purchased, **[***790]** with customer revenue, an extended warranty to cover the innovative technology. NorthWestern did not purchase or evaluate the feasibility of outage insurance in case the DGGS had an operational failure.

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[1] *In re NorthWestern Energy's 2011-2012 Electricity Supply Tracker*, Mont. Pub. Serv. Comm'n, Dkt. D2012.5.49, Order No. 7219h (Oct. 28, 2013).

[2] The DGGS was formerly called the Mill Creek Generating Station.

[*P7] On January 31, 2012, thirteen months after NorthWestern brought the DGGS online, it suffered a complete outage. Unit cycling had caused "thermal **[****5]** stresses" by going from a cold state to a very high temperature, damaging the rotating equipment. PWPS concluded the outage resulted from ramp rates "much greater" than anticipated, excessive temperatures, and cycle-related hardware failures. The Commission was unable to precisely examine the ramp data because NorthWestern failed to maintain minute-by-minute records.

[*P8] Pursuant to the extended warranty, PWPS repaired the damaged turbines at its cost, including removal, installation, and shipping costs. However, due to the waiver of consequential damages in the contract, PWPS was not obligated to cover the costs associated with purchasing replacement regulation service during the outage. On February 3, 2012, NorthWestern began purchasing replacement service from Powerex Corp. (Powerex) and Avista Corp. (Avista). PWPS took "extraordinary measures" to repair the DGGS as soon as possible. Individual generators were put back online as PWPS restored them and NorthWestern proportionally decreased its regulation service purchases accordingly. The DGGS was fully back online on May 1, 2012.

[*P9] During the outage, NorthWestern customers continued to pay the fixed costs for the operation of the DGGS **[****6]** ($6,742,625), including NorthWestern's usual rate of return, as well as the variable costs ($1,527,714) NorthWestern did not actually incur, but would have incurred had the plant been operational. However, the outage caused NorthWestern to incur an additional $1,419,427 in charges to Powerex and Avista for regulation service. NorthWestern requested reimbursement of these costs, arguing they were reasonably incurred because it obtained an extended warranty that covered all repairs, it purchased regulation service on the competitive market at 2011 rates, it structured its regulation market purchases to enable it to incrementally reduce the purchases as generators were repaired, and it had worked quickly to get the DGGS back online.

[*P10] The Montana Consumer Counsel (MCC) opposed reimbursement **[**37]** of the replacement service costs, contending that NorthWestern failed to undertake risk mitigation by failing to investigate whether outage insurance was available. The MCC offered the testimony of Dr. John Wilson:

> No. I don't fault the company for not procuring it [outage insurance]. What I think was imprudent was not looking into it, not evaluating it, not finding out whether it was available and what **[****7]** the cost would be for a plan like this. I think you have to do that before you make a determination as to whether you acquire it or not.

The MCC argued that evaluation of insurance was fundamental to risk management where the contract contained an exclusion for consequential damages:

> [T]he most imprudent thing that occurred here, is the failure of the company to take steps to protect itself against the outage, given the fact that they had this exclusion under the warranty, given the fact that they knew . . . that there were unknowns about this plant and where it was going to go and how it was going to operate.

[*P11] NorthWestern responded by providing evidence that in its experience it had never purchased replacement power insurance and, instead, always relied on the market for replacement power. NorthWestern's General Manager of Generation testified that after receiving inquiry from the Commission and the MCC regarding insurance, he "went and solicited input from other utilities . . . [a]nd they indicated that they simply do not get outage insurance because it is not economical to do so." NorthWestern put on evidence that outage insurance could be $1 million per year, thus potentially costing more **[****8]** than the replacement power itself, but acknowledged it did not "investigate or purchase insurance that might have covered the additional electricity supply costs."

[*P12] The Commission inquired into NorthWestern's operation of the DGGS through **[***791]** data requests and found that NorthWestern was aware the units needed to change load quickly, that quick response was critical, and that the units could experience unique thermal stresses due to ramping up and down. The outage was directly tied to "ramp rates 'much greater' than anticipated, excessive temperatures and cycle-related hardware failures," yet NorthWestern used software allowing excessive ramping and did not retain precise ramp rate data.

[*P13] The Commission determined that NorthWestern's management of the DGGS was not reasonable and that the excess regulation costs **[**38]** were not prudently incurred because NorthWestern (1) failed to prudently manage risks; and (2) did not "exhibit the level of situational awareness that the Commission would expect from a utility managing a one-of-its-kind power plant." The Commission reasoned:

> Given the warranty's exclusion of consequential damages and the uniqueness of DGGS, NorthWestern should have identified the **[****9]** risk of incurring replacement costs in the event of an outage. . . . [NorthWestern's] failure to identify risk ensured that incremental costs of replacement service would be incurred in the event of an

outage.

The Commission found that outage insurance was available and, even though it may not have been cost-effective, because NorthWestern failed to "evaluate the availability, price and terms of outage insurance," it "guaranteed that any incremental replacement costs would be unavoidable in the event of an outage." Citing both NorthWestern's failure to manage risk and reasonably operate the DGGS, the Commission denied NorthWestern's request to include the outage costs in customer rates.

DSM Program

[*P14] Fixed costs are those the utility will incur regardless of how much energy it actually sells to consumers. Utilities typically recover fixed costs through volume based charges built into customer rates. Consequently, there is no financial incentive for a utility to encourage energy efficiency because decreases in consumption would hamper the utility's recovery of its fixed costs. A lost revenue adjustment mechanism (LRAM) is designed to compensate a utility for the revenue lost due to the **[****10]** utility's energy efficiency efforts. In essence, it allows the utility to estimate and recover the revenue it lost due to energy efficiency efforts directly attributable to the utility, such as by DSM programs.

[*P15] In 2005, the Commission approved the use of a LRAM to account for revenue losses incurred as a result of NorthWestern's energy efficiency efforts, finding that "the lost revenue disincentive is real and puts at risk a full and complete ramp-up of cost-effective energy efficiency resource acquisition programs in the near-term." It authorized NorthWestern to include in rates an estimate of the income lost due to DSM programs with a requirement that, after the programs had been implemented, the "estimated lost . . . revenue amount must be trued-up based on actual program activity in [the given years] and again following a comprehensive program evaluation and independent verification of actual savings." This "true-up" ensures that **[**39]** NorthWestern is only including in rates the revenue lost from its DSM programs, and not from independent causes.

[*P16] Analysis of a DSM program includes examination of "free ridership" and "spillover." Free ridership occurs when a consumer takes advantage of **[****11]** a program incentive to install an energy efficient device, but would have installed the device with or without the incentive. As such, the utility did not effectuate the customer's usage reduction and is not entitled to recover the associated lost revenue. On the other side of the ledger, spillover occurs when a consumer does not respond to a DSM program incentive, but later chooses energy efficient products or practices as a result of the utility's general advocacy. As such, the utility is credited with the energy reduction it only indirectly induced, and can include those lost revenues in its LRAM.

[*P17] NorthWestern selected Nexant Energy Management Group (Nexant) to evaluate its DSM programs for its first true-up process in 2006-2007. Nexant measured free ridership and spillover and included them in its final assessment. The Commission adopted the Nexant assessment, concluding **[***792]** that it "satisfies the DSM program evaluation and savings verification requirements" the Commission had established.

[*P18] The next true-up of NorthWestern's DSM programs was presented in the subject proceeding. NorthWestern hired SBW Consulting (SBW), who partnered with Research into Action (RIA), to conduct the required **[****12]** independent, comprehensive true-up for the periods 2006-2007 to 2010-2011. In its draft report to NorthWestern, SBW included the values for free ridership and spillover it had calculated. The draft report concluded that NorthWestern was responsible for 79% of the energy efficiency savings it had estimated and included in customer rates through the LRAM.

[*P19] However, in its final report, SBW came to the conclusion that the values calculated for free ridership and spillover should not be used in the assessment of NorthWestern's DSM programs. The final report assumed that the two values, since they work in contradiction to each other, offset each other equally. In statistical terms, this offset was considered a 1.0 net-to-gross (NTG), meaning the net is no different than the gross savings. By completely offsetting spillover and free ridership values, SBW's final report concluded that NorthWestern was responsible for 87% of the energy efficiency savings it had previously **[**40]** estimated in the LRAM.[3] NorthWestern agreed that this difference in over-collected revenues ought to be refunded to NorthWestern ratepayers.

[*P20] During her testimony before the Commission, Dr. Marjorie McRae (Dr. McRae), the RIA researcher responsible for free ridership and spillover calculations, explained that when she met with NorthWestern to discuss the draft report, she had informed NorthWestern that she believed "we are not able, as a profession, to measure these accurately, and that the effects are offsetting." Dr. McRae testified that NorthWestern had advised her to revise the draft "according to [her] professional opinion." Thus, the final report utilized a 1.0

[3] NorthWestern had projected 309,336 megawatt-hours (MWh) of total energy savings. In **[****13]** its final report, SBW was able to verify 270,564 MWh in savings.

NTG value for comparison between the two values instead of using the actual values derived from the research. Dr. McRae affirmed that she had conducted the free ridership and spillover research using "national common practices, and best practices," and the actual data was "comparable to those found for similar programs conducted by other respected program evaluators." However, the SBW final report stated that there were problems with using the calculated free ridership and spillover calculations:

> [T]he economic analysis [should] use the value 1.0 for the net-to-gross ratio . . . [due to] known limitations **[****14]** to standard practices for the estimation of free ridership and spillover estimation—limitations that confound their effects and result in the overestimation of free ridership and the underestimation of spillover—and on current net-to-gross practices in 31 jurisdictions with active energy efficiency programs, many of which recognize that free ridership and spillover are offsetting phenomena.[4]

[*P21] Dr. McRae concluded that researchers cannot truly ascertain free ridership and spillover values, and opined **[****15]** the Commission should use **[**41]** a 1.0 NTG ratio that treats the numbers as if they perfectly offset each other. To support her conclusion, Dr. McRae cited various studies, one notably finding that thirteen regulatory jurisdictions used a 1.0 NTG, while two jurisdictions, Michigan and New York, used a 0.9 NTG.

[*P22] Under cross-examination, Dr. McRae admitted she cannot know what the actual values are due to the state of the science. "I **[***793]** would say that's [(measuring spillover and free ridership)] not possible with any methods that I know to know what they are." In response to questions from Commissioner Kavulla about whether there was data to support her conclusion that free ridership and spillover perfectly offset in a 1.0 NTG relationship, Dr. McRae admitted:

> If you take 1.0 as the null hypothesis that these effects are offsetting, then, I think the burden is—especially if you're going to be in a lost revenue calculation or something like that, I think the burden of proof is to say, no, these aren't offsetting. These savings would have happened anyway. . . . I don't think we have a way of saying that the null hypothesis is rejected, that it's anything other than what 1.0. And if you want to say **[****16]** for argument's sake it's [0].9, well, then for argument's sake why don't we say it's 1.1.

Commissioner Kavulla's asked: "why is the 1.0 rather than a [0].09 or a 1.1 the null hypothesis?" Dr. McRae concluded: "I think in the absence of any other information, you just assume that one is positive and one is a negative; they're offsetting. That's how I think of it."

[*P23] The Commission rejected Dr. McRae's conclusion that free ridership and spillover perfectly offset each other in a 1.0 NTG ratio and, instead, adopted the values she provided in her draft report. The Commission held that "[a]lthough free ridership and spillover may be difficult to estimate, the remedy is not to discard the only empirical data that attempts to ascertain those values." The Commission disagreed with Dr. McRae's conclusion that offsetting meant equal offsetting:

> Offsetting does not imply perfectly offsetting, and NorthWestern has not demonstrated that an NTG of 1.0 is more reasonable as a null hypothesis than an NTG of 0.9 or any other fixed relation of the effects of free ridership and spillover. Because SBW did not test the null hypothesis proposed by [Dr.] McRae, it cannot be supported.

Noting the Commission's duty to "approve **[****17]** an accurate level of savings and associated lost revenues," the Commission reasoned that Dr. McRae's conclusions were problematic because they forced the **[**42]** Commission to assume both that: (1) a fixed ratio (1.0 NTG) between free ridership and spillover was more accurate than actual measured numbers; and (2) 1.0 NTG was a better assumption than any other fixed value, for example, 0.9 NTG. Using the data from the draft report indicating a 0.908 NTG correlation between free ridership and spillover, the Commission lowered NorthWestern's true-up realization rate from 87% to 79%.

Procedural History

[*P24] NorthWestern appealed the Commission's order on both issues to the Montana Second Judicial District Court, Silver Bow County. The District Court affirmed the Commission's Final Order. NorthWestern, NRDC, and HRC appeal.

STANDARD OF REVIEW

[4] Specifically, Dr. McRae opined that while the free ridership and spillover numbers were reliable (they consistently returned similar results from similar data sets), the numbers were not valid because researchers are unsure what the research was actually measuring. For free ridership, Dr. McRae stated various biases were the core of the problem, notably asymmetric perceptions of gains versus losses, attribution errors, cognitive dissonance, and the inability to accurately report events and predict participants' behavior. For spillover, McRae noted difficulty identifying non-incentivized efficiency actions, estimating baseline energy usage, and showing a causal relation to an efficiency program.

[*P25] In an administrative appeal, we apply the same standards of review that the district court applies. *Whitehall Wind, LLC v. Mont. Pub. Serv. Comm'n, 2015 MT 119, ¶ 8, 379 Mont. 119, 347 P.3d 1273* (***Whitehall Wind II***); *Molnar v. Fox, 2013 MT 132, ¶ 17, 370 Mont. 238, 301 P.3d 824*. Administrative appeals are governed by *§ 2-4-704, MCA*. "A district court reviews an administrative decision in a contested case to determine whether the agency's findings of fact are clearly erroneous and whether its interpretation of the law is correct." **[****18]** *Whitehall Wind, LLC v. Mont. PSC, 2010 MT 2, ¶ 15, 355 Mont. 15, 223 P.3d 907* (***Whitehall Wind I***); *accord Molnar, ¶ 17* (conclusions of law are reviewed *de novo*). Judicial review of a final agency decision "must be confined to the record." *Section 2-4-704(1), MCA*; *Molnar, ¶ 17*.

[*P26] "The court may not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." *Section 2-4-704(2), MCA*; ***accord*** *Whitehall Wind II, ¶ 7*. "A finding of fact is clearly erroneous if it is not supported by substantial evidence in the record, if the fact-finder misapprehended the effect of the evidence, or if a review of the record leaves the court with a definite and firm conviction that a mistake has been made." *Williamson v. Mont. PSC, [***794] 2012 MT 32, ¶ 25, 364 Mont. 128, 272 P.3d 71*. "In reviewing findings of fact, the question is not whether there is evidence to support different findings, but whether competent substantial evidence supports the findings actually made." *Mayer v. Bd. of Psychologists, 2014 MT 85, ¶ 27, 374 Mont. 364, 321 P.3d 819*. The court may reverse or modify the agency decision if the "substantial rights" of the appellant were prejudiced because the administrative findings are "in excess of the statutory authority of the agency," "affected by error of other law," "clearly **[**43]** erroneous in view of the reliable, probative, and substantial evidence on the whole record," or "arbitrary or capricious or characterized by abuse **[****19]** of discretion or clearly unwarranted exercise of discretion." *Section 2-4-704(2)(a)(ii), (iv), (v), (vi), MCA*.

[*P27] "Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence." *Section 2-4-612(2), MCA*. "The agency's experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." *Section 2-4-612(7), MCA*. "Substantial evidence is evidence that a reasonable mind could accept as adequate to support a conclusion; evidence beyond a scintilla." *Mayer, ¶ 27* (internal quotations omitted). "Moreover, the court should give deference to an agency's evaluation of evidence insofar as the agency utilized its experience, technical competence, and specialized knowledge in making that evaluation." *Knowles v. State ex rel. Lindeen, 2009 MT 415, ¶ 21, 353 Mont. 507, 222 P.3d 595* (citing *§ 2-4-612(7), MCA*; *Johansen v. Dept. of Natural Res. and Conservation, 1998 MT 51, ¶ 29, 288 Mont. 39, 955 P.2d 653*).

DISCUSSION

[*P28] *1. Did the Commission use the correct legal standard in reviewing NorthWestern's claim for excess outage costs?*

[*P29] NorthWestern argues that the Commission used the incorrect legal standard when reviewing the outage costs associated with purchasing replacement regulation service during the DGGS outage. NorthWestern contends that "prudently incurred electricity supply costs," *§ 69-8-210(1), MCA*, is an objective, reasonable person standard, which in the context of utilities, **[****20]** is a "reasonable utility standard." NorthWestern notes that other jurisdictions consider such costs under a reasonable utility standard. Under this standard, NorthWestern argues that "prudently incurred" costs are those that a reasonable utility in NorthWestern's similar situation would have incurred, and argues that it acted as any other reasonable utility would have in the same situation.

[*P30] The Commission argues that "prudent" must be interpreted in light of the statutes and Commission rules referenced by the statute. The Commission does not dispute that the reasonable utility test is one factor to be considered, but argues that it is not the complete definition of "prudent." The Commission offers that it reviewed NorthWestern's actions to determine whether the electricity supply costs were prudent pursuant to *§ 69-8-210(1), MCA*, whether the assets purchased and **[**44]** owned by NorthWestern were managed reasonably under *§§ 69-8-419* and *-421, MCA*, and whether rates that included the outage charges would be excessive or confiscatory pursuant to *§ 69-3-201, MCA*. The Commission argues it applied the appropriate review and, under the facts in this case, made an appropriate determination that the costs were not prudently incurred because the plant **[****21]** was not reasonably managed, and that any rates that included those costs would not be reasonable.

[*P31] At issue in this case is the meaning of the word "prudent" in *§ 69-8-210(1), MCA*, which, as the parties note, is not defined by the Legislature. *Section 69-8-210(1), MCA*, reads in full:

> The commission shall establish an electricity cost recovery mechanism that allows a public utility to fully recover prudently incurred electricity supply costs,

> subject to the provisions of 69-8-419, 69-8-420, and commission rules. The commission may include other utility costs and expenses in the cost recovery mechanism if it determines that including additional costs and expenses is reasonable and in the public interest. The cost recovery mechanism **[***795]** must provide for prospective rate adjustments for cost differences resulting from cost changes, load changes, and the time value of money on the differences.

[*P32] *Section 69-8-210(1), MCA* reflects the full authority the Legislature granted to the Commission to review electricity supply costs. The Commission is an administrative agency created by statute. *Section 69-1-102, MCA*; *Schuster v. Northwestern Energy Co., 2013 MT 364, ¶ 9, 373 Mont. 54, 314 P.3d 650*. The Commission does not have judicial powers, *Schuster, ¶ 9*, *Williamson, ¶ 31*, and its jurisdiction is "limited to the regulation of rates and service as provided by the Montana **[****22]** statutes." *Billings v. Pub. Serv. Comm'n, 193 Mont. 358, 370, 631 P.2d 1295, 1303 (1981)*; *accord Great N. Utils. Co. v. Pub. Serv. Comm'n, 88 Mont. 180, 203, 293 P. 294, 298 (1930)* ("[T]he Commission is a creature of, owes its being to, and is clothed with such powers as are clearly conferred upon it by the statute."); *Mont. Power Co. v. Pub. Serv. Comm'n, 206 Mont. 359, 371, 671 P.2d 604, 611 (1983)*. As we noted in the cases following the deregulation of the Montana electrical industry, *see, e.g., Mont. Power Co. v Mont. PSC, 2001 MT 102, ¶ 46, 305 Mont. 260, 26 P.3d 91* ("[W]e observe that the Commission is statutorily charged with applying and enforcing the [deregulation] Act."), the Commission was specifically charged with carrying out the statutes in question: "[t]he commission *shall* establish an electricity cost recovery mechanism." *Section 69-8-210(1), MCA* (emphasis added). **[**45]** As such, the statute in question clearly confers authority on the Commission for this purpose.

[*P33] The meaning of "prudent" is largely self-evident. "Absent statutory definitions, the plain meaning of the words used controls." *City of Great Falls v. Mont. Dept. of Pub. Serv. Regulation, 2011 MT 144, ¶ 18, 361 Mont. 69, 254 P.3d 595*; *accord Williamson, ¶ 36*. The word has been applied in prior Commission decisions, which have used such terms for "prudent" as "marked by wisdom or judiciousness" or "circumspect or judicious in one's dealings" and its synonyms are "'careful,' cautious,' 'sensible,' 'practical,' 'discreet,' 'wise,' and 'farsighted.'" *In re Mont. Power Co.*, Mont. Pub. Serv. Comm'n, Docket D2001.10.144, Order No. 6382d 12 (June 21, 2002) (internal citations **[****23]** omitted). The Montana Legislature gave the Commission express latitude to determine if the given costs were prudent—careful, sensible, practical, discreet, wise, or farsighted or, more apt in the regulatory environment, avoiding unnecessary risks—through its own fact finding and administrative authority. Further, this analysis is undertaken in light of the statutory requirement that "prudently incurred electricity supply costs" must be determined "subject to the provisions of 69-8-419, 69-8-420, and commission rules." *Section 69-8-210(1), MCA*.[5]

[*P34] *Section 69-8-419, MCA*, governs the utility's duties for building and maintaining its "electricity supply resource" portfolio, including contracts for power generation or capacity, electricity plants owned or leased by the utility, customer load management, or any other means of providing reliable and adequate electricity service to customers. *Section 69-8-103(9), MCA* (defining "electricity supply resource"). The provision requires utilities to "plan for future electricity supply resource needs; manage a portfolio of electricity supply resources; and procure new electricity supply resources when needed." *Section 69-8-419, MCA*. The utility **[****24]** is required to conduct this planning in accordance with, *inter alia*, the following objectives: (1) "provide adequate and reliable electricity supply service at the lowest long-term total cost"; and (2) "identify and cost-effectively manage and mitigate risks related to its obligation to provide electricity supply service." *Section 69-8-419(2)(a), (c), MCA*. Thus, the utility must plan for future needs, manage its portfolio, and procure resources when necessary at the lowest long-term cost and, when doing so, identify and mitigate **[**46]** risks related to those obligations.

[*P35] **[***796]** Commission administrative rules also address prudent utility resource procurement. "Prudent electricity supply resource planning and procurement includes *evaluating, managing, and mitigating risks* associated with the inherent uncertainty of wholesale electricity markets and customer load." Admin. R. M. 38.5.8219(1) (2016) (emphasis added). The Commission has specifically identified sources of risk that, among others, may be evaluated: fuel prices and price volatility, environmental regulations and taxes, retail supply rates, supplier capabilities, construction costs, and *contract terms and conditions*. Admin. R. M. 38.5.8219(1) (emphasis added). The Commission's **[****25]** rules require that the "utility's strategy for managing and mitigating risks associated with the identified risk factors should be developed in the context of the goals and objectives of these guidelines and include an evaluation of relevant opportunity costs." Admin. R. M. 38.5.8219(2). Finally, prudence involves documenting and carrying out the resource procurement plans:

> The commission must allow a utility to recover all costs it prudently incurs to perform this function. Whether the costs a utility incurs are prudent is, in part, directly

[5] ***Section 69-8-420, MCA***, covers a utility's utility procurement plan, which are not directly at issue in this proceeding.

> related to whether its resource procurement process was conducted prudently. It is vital that a utility document its portfolio planning, management and electricity supply resource procurement activities to justify the prudence of its resource procurement decisions.

Admin. R. M. 38.5.8220(2).

[*P36] Considering these sources, we disagree with NorthWestern that the "reasonable utility standard"—i.e., what would a reasonable utility do in similar circumstances—is the appropriate interpretation of "prudent" or the appropriate inquiry under Montana law. The Montana Legislature used the term "prudent," not "reasonable utility," to describe how the Commission **[****26]** was to review electricity supply costs. Adopting NorthWestern's proposed standard would read a contradictory idea into the statute. If "prudent" was restricted to what a reasonable utility would do in similar circumstances, the Commission would be deprived of its own discretion to evaluate and determine whether the utility's actions were prudent. Tying the outcome to evidence of what other utilities did or would do would remove or reduce the discretion of the Commission to rely on its own expertise.

[*P37] In sum, *§ 69-8-210(1), MCA*, grants authority to the Commission to determine whether energy supply costs were prudently incurred—i.e., the utility's incurred costs were wise, judicious, or **[**47]** sought to avoid unnecessary risk—in light of the planning requirements set forth in *§ 69-8-419, MCA*, *§ 69-8-421, MCA*, and Commission rules, which specifically require risk analysis and mitigation, including an examination of the relevant contract terms. The Commission was correct to apply these standards.

[*P38] The remainder of NorthWestern's arguments challenging the Commission's decision assumes that the reasonable utility standard governs the outcome. Having rejected that view, we need not address all of NorthWestern's further arguments based thereon. **[****27]** In brief, and to the extent that the reasonable utility standard is an appropriate factor to consider, as the Commission did, the Commission's determination was supported by the record. The DGGS was a "one-of-a-kind" plant and the purchase and installation contract contained a provision that excluded consequential damages. Waiver of consequential damages on a first-of-its-kind regulation plant without extensive industry use supported the Commission's determination that NorthWestern's failure "to identify risk ensured that incremental costs of replacement service would be incurred in the event of an outage," and was imprudent. To defend its actions, NorthWestern asked other utilities—after the MCC and the Commission inquired into its risk mitigation efforts—about their insurance practices and presented evidence that those utilities did not purchase it. However, this is risk justification, not risk management.

[*P39] Even if it is accepted that insurance was cost-prohibitive and would not have been a viable alternative, the Commission also determined that NorthWestern did not reasonably manage the DGGS and that the outage **[***797]** costs were also imprudent for that reason.[6] NorthWestern was aware that **[****28]** the DGGS had "very unique" controls and was different from other plants. NorthWestern was also aware, as the Commission found:

> (1) "[T]he units need[ed] to change load rapidly" as measured in "MW change per minute," and that a single engine in operation could "ramp up or down at a rate of at least 15 MW per minute"; (2) "the ability to respond to demand within seconds" was critical to the operational mission of DGGS; and (3) the units could **[**48]** experience unique "thermal stresses," and that going "from a cold start to a very high temperature" can cause "a lot of distress within rotating equipment."

(Internal quotations in original.) The outage specifically resulted from these known factors. PWPS's investigation concluded "[o]ver temperatures resulted in reduction of material properties," "[h]igher motion resulted in higher stress on the affected parts," and "hardware failures are cycle related." NorthWestern admitted the ramp rate was "much greater" than NorthWestern had requested due to software configuration and NorthWestern had not installed anything to monitor the actual ramp data on a per-minute basis. In addition, NorthWestern cycled each unit frequently, which PWPS concluded was the cause of the hardware failures. **[****29]**

[*P40] The Commission did not commit clear error in finding that NorthWestern had failed to appropriately plan for and operate the DGGS. The Commission's decision to disallow the outage costs incurred by NorthWestern when the DGGS went offline was well within its authority to determine whether those costs were "prudently incurred." *Section 69-8-210(1), MCA*. Accordingly, the Commission's order regarding the outage costs is affirmed.

[*P41] *2. Were the "free ridership" and "spillover" calculations adopted by the Commission supported by substantial evidence?*

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[6] ***Section 69-8-421(9), MCA***, allows the Commission to "disallow rate recovery for the costs that result from the failure of a public utility to reasonably manage, dispatch, operate, maintain, or administer electricity supply resources in a manner consistent with *69-3-201*, ***69-8-419***, and commission rules."

[*P42] NRDC and HRC argue that the Commission erred when it adopted the free ridership and spillover values presented in Dr. McRae's draft report when she, as the only witness to testify on the subject, repudiated those very numbers in her testimony. This, they argue, was clearly erroneous because there is no evidence in the record supporting the use of those numbers.

[*P43] Citing problems with the methodology, **[****30]** the SBW final report concluded that the actual calculations for free ridership and spillover should not be used. SBW concluded that the best approach was to assume the numbers perfectly offset each other. Dr. McRae echoed this conclusion in her testimony before the Commission.

[*P44] However, NRDC and HRC are incorrect to argue that there was no testimony regarding actual free ridership and spillover calculations. When pressed on her conclusions, Dr. McRae hedged her testimony in several ways. First, Dr. McRae stated affirmatively that actual free ridership and spillover calculations were conducted using "national common practices, and best practices," and that the actual data derived was "comparable to those found for similar programs conducted by other respected program evaluators."

[*P45] **[**49]** Second, Dr. McRae testified her opinion of the state of the science is that she simply cannot know what the actual values are, including the 1.0 NTG she suggested the Commission adopt. "I would say that's not possible with any methods that I know to know what they [free ridership and spillover] are." Regarding whether there was actual, hard data to support her conclusion for a 1.0 NTG, Dr. McRae testified there **[****31]** was no way to prove or disprove her conclusion:

> If you take 1.0 as the null hypothesis that these effects are offsetting, then, I think the burden is—especially if you're going to be in a lost revenue calculation or something like that, I think the burden of proof is to say, no, these aren't offsetting. These savings would have happened anyway. . . . *I don't think we have a way of saying that* ***[***798]*** *the null hypothesis is rejected, that it's anything other than what 1.0. And if you want to say for argument's sake it's [0].9, well, then for argument's sake why don't we say it's 1.1.*

(Emphasis added.) When asked why 1.0 would be used instead of 0.9 or 1.1, Dr. McRae responded: "in the absence of any other information, you just assume one is positive and one is negative; they're offsetting. That's how I think of it."

[*P46] The Commission was faced with: (1) an expert's conclusion that one cannot know the precise spillover and free ridership numbers; and (2) testimony stating they could neither prove nor disprove that given hypothesis. The same expert provided a range of hypothetical values from 0.9 to 1.1 and provided anecdotal evidence of other states using a 0.9, while some used 1.0. Finally, the **[****32]** expert admitted the only hard research available in the proceeding was done according to best practices and was comparable with that done by other respected researchers.

[*P47] Our role is not to re-weigh the evidence, but rather, to determine if substantial evidence existed "and not whether, on the same evidence, [we] would have arrived at the same conclusion." *Johnson v. W. Transp., LLC, 2011 MT 13, ¶ 18, 359 Mont. 145, 247 P.3d 1094* (citing *Ward v. Johnson, 242 Mont. 225, 228, 790 P.2d 483, 485 (1990)*). We hold the Commission's facts were supported by substantial evidence. The actual data collected by Dr. McRae and SBW provided a 0.908 NTG, which falls in the range of hypothetical values provided by the expert. It is also in the range of values used by other commissions, as testified to by Dr. McRae. Dr. McRae admitted there was no actual, hard data to support her conclusion that the values perfectly offset each other. And, finally, the only hard data available was collected per best practices and was consistent with the research done by other **[**50]** respected firms.

[*P48] As an administrative agency, the Commission's "experience, technical competence, and specialized knowledge may be utilized in the evaluation of evidence." *Section 2-4-612(7), MCA*. The Commission had substantial evidence to rely upon and it appropriately used is expertise to evaluate that **[****33]** evidence. As such, the Commission's determination to adopt the calculated values for free ridership and spillover is affirmed.

[*P49] For the foregoing reasons, the Commission's Order No. 7219h is affirmed.

/s/ JIM RICE

We concur:

/s/ MIKE McGRATH

/s/ JAMES JEREMIAH SHEA

/s/ PATRICIA COTTER

/s/ MICHAEL E WHEAT

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Peretti v. Dep't of Revenue

Supreme Court of Montana

March 30, 2016, Submitted on Briefs; May 10, 2016, Decided; May 10, 2016, Filed

DA 15-0526

Reporter
2016 MT 105 *; 383 Mont. 340 **; 372 P.3d 447 ***; 2016 Mont. LEXIS 286 ****; 2016 WL 2689464

MICHAEL H. PERETTI and SHELLEY PERETTI, Petitioners and Appellees, v. STATE OF MONTANA, DEPARTMENT OF REVENUE, Respondent and Appellant.

Subsequent History: Released for Publication: May 26, 2016.

Prior History: [****1] APPEAL FROM: District Court of the Eleventh Judicial District, In and For the County of Flathead, Cause No. DV-13-1210A. Honorable Ted O. Lympus, Presiding Judge.

Case Summary

Overview

HOLDINGS: [1]-The district court erred when it reweighed the evidence and redetermined the credibility of witnesses contrary to *Mont. Code Ann. § 2-4-704* in reversing an order of the Montana State Tax Appeal Board concerning the valuation of real property under *Mont. Code Ann. § 15-8-111* because the Board adequately described evidence on which it relied in reaching its decision, explained why it could not rely upon the owners' evidence, and relied upon an appraisal by the Montana Department of Revenue that was presumed to be correct and was based upon a proven computer model that incorporated data on comparable sales; [2]-Upon reversing the district court and reinstating the Board's decision on the taxable valuation of the property, it was also necessary to reverse the district court's award of costs to the owners and its direction that the Department refund any taxes paid in protest.

Outcome

District court reversed; administrative decision reinstated.

Counsel: For Appellant: Amanda L. Myers, Special Assistant Attorney General, Montana, Department of Revenue, Helena, Montana.

For Appellees: Nathan G. Wagner, Datsopoulos, MacDonald & Lind, P.C., Missoula, Montana.

Judges: MIKE McGRATH. We Concur: MICHAEL E WHEAT, BETH BAKER, JAMES JEREMIAH SHEA, JIM RICE. Chief Justice Mike McGrath delivered the Opinion of the Court.

Opinion by: Mike McGrath

Opinion

[***448] [**341] Chief Justice Mike McGrath delivered the Opinion of the Court.

[*P1] The State of Montana, through the Department of Revenue (DOR), appeals from the District Court's Order and Rationale dated June 29, 2015. We reverse.

[*P2] We restate the issues on appeal as follows:

Issue one: Did the District Court err in reversing the order of the State Tax Appeal Board concerning the valuation of the property at issue?

Issue two: Did the District Court err in awarding administrative trial costs to the Taxpayers?

Issue three: Did the District Court err in ordering DOR to return all taxes paid under protest?

FACTUAL AND PROCEDURAL BACKGROUND

[*P3] This is a dispute between property owners Michael and Shelley [****2] Peretti and the DOR over the appraised value of their .461 acre residential lot with 159 feet of Flathead Lake frontage in Lakeside, Montana. DOR's original appraisal for the tax year 2012 was $1,356,201 for the land and $166,980 for the improvements. The Perettis appealed this valuation to the Flathead County Tax Appeal Board (County Board) in May 2012. They contended that the appraised value failed to account for a deterioration of market values and that DOR relied upon comparable sales from exclusively residential areas unlike the commercial location of the property at issue. The County Board heard the appeal in January 2013 and reduced the value of the land to $1,192,500 and the value of the improvements to $125,000.

[*P4] The Perettis appealed that decision to the State Tax Appeal Board ("STAB"), contending that the appraised value was still too high, requesting a reduction to $900,000 for the land and $60,000 for the improvements. STAB conducted an evidentiary hearing in September 2013.

[*P5] STAB heard this appeal pursuant to its statutory responsibilities, §§ 15-2-201 and -301, MCA. Montana law requires that property be assessed at 100% of its market value, which is the value at which it would change hands [****3] between a willing buyer and seller. Section 15-8-111, MCA. The relevant time for determining the market value of the property at issue here was as of July 1, 2008. Admin. R. M. 42.18.124(b).

[*P6] The Perettis presented the testimony of James Kelley, a licensed real estate appraiser. He described the land as residential property that was close to commercial properties and condo developments. He [**342] opined that this proximity diminished the value of the land for residential purposes and assumed that no purchaser would keep the existing improvements nor would a purchaser build a high-priced home so close to town. Kelly used only a few other comparable properties in his analysis, relying heavily upon the sales of two non-lakefront properties. He determined that prices had increased 13.5% per year during the valuation period, while also contending that prices had declined. He concluded that the land at issue should be valued at $960,000 and that the improvements had no value.

[*P7] The Perettis also presented the testimony of Edwin Berry, who had "math and physics credentials and experience in modeling land valuation computer software." He criticized the computer-based land pricing model that DOR used to determine property [****4] values. He opined that DOR's results were "demonstrably weak" because they relied on a formula that "produced an R2 of just 17.98% suggesting inaccurate value projections." STAB allowed the property owners to present Berry's testimony even though the Perettis had refused to provide any meaningful information about him or his testimony prior to hearing, despite requests that they do so.

[*P8] STAB allowed DOR to submit a post-hearing rebuttal to Berry from its Region 1 [***449] Manager, Scott Williams. Williams explained that Berry's opinions incorrectly assumed that DOR used a "single variable to create the linear regression" while it was clear that DOR used three variables. Further, Williams stated that the true R2 value was 83.33%, indicating a reliable formula. Williams was unable to determine any reason for some of Berry's calculations except that they "steadily lowered the valuation in his clients favor."

[*P9] DOR appraiser Dan Lapan explained the agency's computer-assisted land valuation program, which in this case gathered information on 29 waterfront land sales that had occurred "in the neighborhood" since the last appraisal. The result showed a "$9,801 average front foot value for lakefront property." [****5] He also discussed two other sales of lakefront property proximate to commercial areas that maintained values of over $9000 per front foot. He opined that the information DOR relied upon showed that proximity to commercial property did not reduce lakefront property values, and that lakefront values had not fallen since the valuation date (June 1, 2008). Lapan also produced photos of one of the comparable properties heavily relied upon by Kelley, showing that it was "steep [and] boulder-covered" and not at all comparable to the "flat and easily built-upon"

property at issue.

[*P10] STAB issued its findings of fact and conclusions of law on **[**343]** November 1, 2013. STAB concluded that while DOR's appraisal is presumed to be correct, the Department bears a burden to provide "documented evidence to support its assessed values." STAB found that DOR's explanation of its "comprehensive computer assisted data" that included 29 comparable sales was "more persuasive than the three comparable sales used by Mr. Kelley." STAB found that the Perettis presented no evidence to support their contention that the location of the property had a negative effect on its value. STAB found that DOR's evidence was "generally **[****6]** more persuasive" than the owners' evidence as to value. STAB further found that Kelley's reliance upon post-valuation date sales was not allowed by Montana law and that his assumptions that the existing buildings had no value were subjective assessments of what a future buyer might do. STAB concluded by finding that Kelley's testimony was limited and subjective and was "less credible" than the evidence presented by DOR.

[*P11] STAB found that Mr. Berry "completely misunderstood" the DOR computer model and that his criticisms were "not accurate." STAB found that Berry "discarded sale and trending data points until he got the result he sought," which was a lower value for the property. STAB found that Berry "misinterpreted" the reliability of the DOR system, and that his "critique of the DOR valuation model [was not] credible."

[*P12] STAB upheld the County Board's determination of the value of the property. The Perettis petitioned for judicial review in November 2013. The parties completed briefing in July 2014, and the District Court entered its order reversing the STAB decision on July 1, 2015. The District Court disagreed with STAB's weighing of the evidence and its determinations of witness credibility. **[****7]** The District Court determined that the methodology of the DOR "resulted in a severely skewed assessment" of the value of the property, and that Mr. Lapan's testimony was not credible or persuasive as to important issues. The District Court similarly determined that Mr. Williams' testimony was not credible regarding important issues that he covered in his testimony.

[*P13] The District Court concluded that STAB committed clear error by finding that DOR's valuation of the property was more persuasive than Mr. Kelley's valuation. The District Court evaluated and weighed the testimony from the STAB hearing and found that the County Board property value upheld by STAB was clearly erroneous. The District Court ordered STAB to accept the $960,000 valuation from Mr. Kelley's testimony, and ordered DOR to return any taxes that the Perettis paid under protest.

[344] STANDARD OF REVIEW**

[*P14] This is an appeal from a decision of a district court conducting judicial review of a decision of the State Tax Appeal Board concerning a Department of Revenue appraisal **[***450]** of real property for property tax purposes. In such cases the appraisal reached by the Montana Department of Revenue is presumed to be correct, and the burden **[****8]** is upon the taxpayer to overcome this presumption, *Farmers Union Central Exchange v. DOR, 272 Mont. 471, 476, 901 P.2d 561, 564 (1995)*. Courts should not act as an authority on tax matters because tax appeal boards "are particularly suited for settling disputes over the appropriate valuation of a given piece of property, and the judiciary cannot interfere with that function." *DOR v. Grouse Mtn. Development, 218 Mont. 353, 355, 707 P.2d 1113, 1115 (1985)*.

[*P15] The role of a district court conducting judicial review of an administrative decision is limited to a review "confined to the record" of the agency, and the court does not act as a trier of the facts. *Section 2-4-704(1), MCA*; *Mercer v. McGee, 2008 MT 374, ¶ 22, 346 Mont. 484, 197 P.3d 961*. A district court should review a STAB decision to determine whether the Board's findings of fact are clearly erroneous and whether its conclusions of law are correct. A finding of fact is clearly erroneous if it is not supported by substantial evidence; if the trier of fact misapprehended the effect of the evidence; or if a review of the record leaves the court with the "definite and firm conviction" that a mistake has been made. We apply these same standards when reviewing the district court's decision on appeal. *Robinson v. DOR, 2012 MT 145, ¶ 10, 365 Mont. 336, 281 P.3d 218*. A district court may not substitute its judgment for the judgment of STAB as to the weight of factual evidence, *§ 2-4-704(2), MCA*; may not engage in a "wholesale substitution" of its opinion for **[****9]** the opinion of the agency, *O'Neill v. DOR, 2002 MT 130, ¶¶ 22-23, 310 Mont. 148, 49 P.3d 43*; and may not re-weigh the evidence on questions of fact, *Benjamin v. Anderson, 2005 MT 123, ¶ 37, 327 Mont. 173, 112 P.3d 1039*. "Assessment formulations" by STAB should be upheld unless there is a clear showing of an abuse of discretion. *O'Neill, ¶ 23*.

DISCUSSION

[*P16] *Issue one: Did the District Court err in reversing the order of the State Tax Appeal Board concerning the valuation of the property at issue*?

[*P17] It is clear that the District Court's decision rests upon a re-weighing of the evidence submitted at the STAB hearing, and a re- **[**345]** determination of the credibility of witnesses heard by STAB. While the District Court explains its decision in terms of whether the STAB decision was "clearly erroneous," it is clear that there was substantial evidence in the record to support STAB's decision. Under Montana law, a district court sitting in judicial review of a STAB decision may not re-weigh the evidence or re-determine witness credibility to achieve a different result. *Mercer, ¶¶ 21-22*; *Benjamin, ¶ 37*. Montana law "does not contemplate a wholesale substitution of the District Court's opinion for that of the agency." *O'Neill, ¶ 23*; *§ 2-4-704, MCA*.

[*P18] Administrative findings of fact may not be disturbed on judicial review if they are supported by substantial **[****10]** evidence in the record. Substantial evidence is more than a mere scintilla of evidence but may be less than a preponderance of the evidence when viewed in a light most favorable to the respondent. *Taylor v. State Fund, 275 Mont. 432, 440, 913 P.2d 1242, 1246 (1996)*; *Benjamin, ¶ 12*. Findings of fact can be based upon substantial evidence despite the fact that there was evidence that may have supported a different result. *Benjamin, ¶ 55*.

[*P19] The STAB adequately described the evidence that it relied upon in reaching its decision as well as describing why it could not rely upon the evidence produced by the Perettis. STAB found that DOR's appraisal was based upon a proven computer model that incorporated data on the verified sales of 29 other properties to reach the appraised valuation. The DOR appraisal, under established law, was presumed to be correct and the Perettis bore a substantial burden to disprove it. *Farmers, 272 Mont. at 476, 901 P.2d at 564*. Taxpayers have not demonstrated that STAB's determination of witness credibility was clearly erroneous. The District **[***451]** Court decision to reverse the STAB decision is therefore reversed.

[*P20] As to Issues two and three, because we reverse the District Court and reinstate the STAB decision on the taxable valuation of the Peretti property, we also reverse the **[****11]** District Court's award of costs to the Perettis and its direction that the DOR refund any taxes paid in protest.

CONCLUSION

[*P21] The District Court is reversed and its Order and Rationale is vacated. The STAB decision is reinstated.

/s/ MIKE McGRATH

We Concur:

/s/ MICHAEL E WHEAT

/s/ BETH BAKER

/s/ JAMES JEREMIAH SHEA

/s/ JIM RICE

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Spinler v. Allen

Supreme Court of Montana

March 25, 1999, Submitted on Briefs ; July 8, 1999, Decided

No. 98-654

Reporter
1999 MT 160 *; 295 Mont. 139 **; 983 P.2d 348 ***; 1999 Mont. LEXIS 172 ****; 56 Mont. St. Rep. 632

VICKEY JEAN SPINLER, Plaintiff and Appellant, v. MELANIE CAROL ALLEN, Defendant and Respondent.

Prior History: **[****1]** APPEAL FROM: District Court of the Eleventh Judicial District, In and for the County of Flathead, The Honorable Ted O. Lympus, Judge presiding.

Disposition: Affirmed.

defendant. On appeal, the court affirmed, holding that denying plaintiff's partial summary judgment motion was not an abuse of discretion because plaintiff failed to meet her burden of showing an absence of genuine issues of material fact regarding defendant's violation of the duty to yield the right-of-way, under *Mont. Code Ann. § 61-8-341*. Furthermore, exclusion of evidence that after the accident defendant was cited for failure to yield the right-of-way was not an abuse of discretion because there was no evidence that defendant pleaded guilty. In addition, the issue of admissibility of evidence regarding plaintiff's driving speed immediately preceding the accident was not preserved for review. Finally, refusing plaintiff's offered jury instruction to disregard evidence of plaintiff's speed was not an abuse of discretion because the jury was entitled to consider it in determining if plaintiff caused or contributed to the accident.

Case Summary

Procedural Posture
Plaintiff appealed the judgment from the 11th Judicial District Court, Flathead County (Montana), on a jury verdict for defendant in plaintiff's action to recover damages for injuries allegedly sustained in an automobile accident.

Outcome
The court affirmed a judgment for defendant in plaintiff's action to recover damages for injuries allegedly sustained in an automobile accident because the district court did not abuse its discretion in denying plaintiff's motion for summary judgment, in excluding evidence that defendant was cited for failure to yield, and in refusing to submit plaintiff's jury instruction to disregard evidence of plaintiff's speed.

Overview

Plaintiff sued defendant to recover damages for injuries allegedly sustained in an automobile accident alleging that defendant negligently failed to yield the right-of-way at a stop sign. Upon a jury verdict, judgment was entered for

Counsel: For Appellant: Robert G. Olson; Frisbee, Moore & Olson, Cut Bank, Montana.

For Respondent: Daniel W. Hileman; Kaufman, Vidal &

Hileman, Kalispell, Montana.

Judges: Justice Karla M. Gray delivered the Opinion of the Court. We concur: JAMES C. NELSON, W. WILLIAM LEAPHART, WILLIAM E. HUNT, SR., JIM REGNIER.

Opinion by: KARLA M. GRAY

Opinion

[140]** **[***350]** Justice Karla M. Gray delivered the Opinion of the Court.

[*P1] P1. Vickey Jean Spinler (Spinler) appeals from the judgment entered by the Eleventh Judicial District Court, Flathead County, on a jury verdict in favor of Melanie Carol Allen (Allen). We affirm.

[*P2] Spinler raises the following issues:

[*P3] 1. Did the District Court err in denying Spinler's motion for partial summary judgment on the issue of liability?

[*P4] 2. Did the District Court abuse its discretion in excluding evidence that Allen was cited for failure to yield the right-of-way after the accident?

[*P5] 3. Did the District Court abuse its discretion in allowing testimony regarding Spinler's driving speed [**2] immediately prior to the accident?**

[*P6] 4. Did the District Court abuse its discretion in refusing Spinler's offered instruction that the jury disregard evidence of the speed at which Spinler was driving prior to the accident?

BACKGROUND

[*P7] This case arose from a two-vehicle accident which occurred at the intersection of 1st Avenue East North (1st Avenue) and East Idaho Street (East Idaho) in Kalispell, Montana, at approximately 12:45 p.m. on August 6, 1992. East Idaho, also known as Highway 2, consists of two eastbound and two westbound lanes of traffic and a center [141] turn lane. 1st Avenue runs in a north-south direction and is controlled by stop signs where it intersects East Idaho.**

[*P8] Allen approached the intersection traveling south on 1st Avenue and stopped her truck at the stop sign with the westbound lanes of East Idaho nearest her. The westbound lanes were backed up, with cars stopped on both sides of the intersection, but space was left for a vehicle southbound on 1st Avenue to enter the intersection. Allen waited at the stop sign while a number of cars in the eastbound lanes of East Idaho drove past and then, seeing no other vehicles in the eastbound [**3] lanes, proceeded through the intersection. She crossed both westbound lanes, the center turn lane and the first of the eastbound lanes. Spinler was traveling in the outside eastbound lane of East Idaho and, as Allen crossed that lane, the left front of Spinler's vehicle collided with the passenger-side door of Allen's truck.**

[*P9] Spinler filed an action against Allen to recover damages for injuries she allegedly suffered as a result of the accident. Her complaint alleged that Allen had been negligent in failing to yield the right-of-way at the stop sign and that Allen's negligence was the cause of the accident. In her answer, Allen denied she had acted negligently and asserted that Spinler had been negligent. The parties conducted substantial discovery.

[*P10] Spinler subsequently moved for partial summary judgment on the issue of liability, asserting the absence of genuine issues of material fact regarding Allen having breached [*351] her *§ 61-8-341(1), MCA*, duty to yield the right-of-way and that the statutory violation constituted negligence as a matter of law. She further asserted the absence of genuine issues of material fact regarding her own negligence, contending that--as [****4] the favored driver under the right-of-way statute--she had the right to rely on Allen's compliance with the statute, she was not required to anticipate Allen's violation of the statute and the manner in which she operated her vehicle, including her driving speed, was not a proximate cause of the collision. Allen responded that there were genuine issues of material fact regarding which party had the duty, pursuant to *§ 61-8-341(1), MCA*, to yield the right-of-way and whether Spinler was negligent for speeding and failing to keep a proper lookout for other traffic.**

[*P11] The District Court concluded generally that genuine issues of material fact existed which precluded summary judgment and, specifically, that the deposition testimony of Spinler and her passenger, Tammy Waritz (Waritz), conflicted concerning Spinler's ability to see [142] the accident scene and Allen's approaching**

vehicle. It denied Spinler's motion accordingly.

[*P12] The case proceeded to trial. Spinler maintained that, as the driver on the through street, she had the primary right to proceed through the intersection and that Allen was negligent for violating her statutory duty to yield the right-of-way to oncoming [**5] traffic at the stop sign. Allen maintained that her statutory duty to yield never arose because, at the time she entered the intersection, Spinler was not close enough to constitute an immediate hazard. Allen further asserted that, once she entered the intersection, *§ 61-8-341(1), MCA*, imposed a duty on Spinler to yield the right-of-way, which Spinler failed to do. Finally, Allen argued that Spinler was negligent by speeding and not paying attention to the traffic around her. The jury found that Allen was not negligent. The District Court entered judgment on the verdict and Spinler appeals.**

DISCUSSION

[*P13] 1. Did the District Court err in denying Spinler's motion for partial summary judgment on the issue of liability?

[*P14] We review a district court's ruling on a motion for summary judgment de novo, applying the same criteria applied by the district court. *Montana Metal Buildings, Inc. v. Shapiro (1997), 283 Mont. 471, 474, 942 P.2d 694, 696* (citation omitted). In that regard,

> the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is **[****6]** no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> Rule 56(c), M.R.Civ.P.

[*P15] The party moving for summary judgment has the initial burden of establishing the absence of any genuine issue of material fact which would allow the nonmoving party to recover and entitlement to judgment as a matter of law. *Montana Metal Buildings, 283 Mont. at 474, 942 P.2d at 696*. If this burden is met, the party opposing summary judgment must come forward with substantial evidence raising a genuine issue of material fact precluding summary judgment. *Montana Metal Buildings, 283 Mont. at 474, 942 P.2d at 696*. "Material issues of fact are identified by looking to the substantive law which governs the claim." **McGinnis v. Hand,** *1999 MT 9, P6, 972 P.2d 1126, P6, 56 Mont. St. Rep. 39, P6*.

[*P16] [143] Summary judgment is an extreme remedy and should never be substituted for trial if a material factual controversy exists.** *Montana Metal Buildings, 283 Mont. at 474, 942 P.2d at 696*. Furthermore, reasonable inferences which might be drawn from the evidence presented should be drawn in favor of the nonmoving party. *Montana Metal Buildings [****7] , 283 Mont. at 474, 942 P.2d at 696*.

[*P17] As stated above, the District Court determined that a number of genuine issues of material fact existed, one of which arose from Spinler's and Waritz's conflicting deposition testimony as to whether Spinler could see the accident scene and Allen's oncoming [*352] vehicle. Spinler concedes the existence of this factual issue, but asserts that it is not material in light of the absence of genuine issues of material fact that Allen breached her *§ 61-8-341(1), MCA*, duty to yield to through traffic.** *Section 61-8-341(1), MCA*, **provides that**

> the driver of a vehicle shall stop [at a stop sign] at the entrance to a through highway and shall yield the right-of-way to other vehicles which have entered the intersection from said through highway or which are approaching so closely on said through highway as to constitute an immediate hazard, but said driver having so yielded may proceed and the drivers of all other vehicles approaching the intersection on said through highway shall yield the right-of-way to the vehicle so proceeding into or across the through highway.

[*P18] Spinler contends that, as the driver on the through street approaching the **[****8] intersection, she was the favored driver under the statute and Allen was required to yield the right-of-way to her. She further contends that the favored driver at an intersection has the right to rely on the disfavored driver's compliance with the traffic statute and is not required to anticipate a violation of the statute. On this basis, she argues that her ability to see the intersection and Allen's vehicle is not a material fact which would preclude summary judgment in her favor. She cites Roe v. Kornder-Owen *(1997), 282 Mont. 287, 937 P.2d 39*, in support of her argument and asserts that the facts of the present case are substantially similar to the facts in *Roe*.**

[*P19] In *Roe*, the plaintiff stopped at a stop sign controlling an intersection with a multi-lane through highway. The plaintiff observed the defendant's vehicle approximately one-half block away, approaching the intersection on the through highway. Determining that she had ample time to cross the intersection, the plaintiff proceeded forward and the two vehicles collided. *Roe, 282 Mont. at 289, 937 P.2d at 40-41*. **[**144]** The defendant

moved for summary judgment, arguing that the plaintiff, as the disfavored driver [****9] **at the intersection, had a statutory duty to yield the right-of-way to the defendant, failed to so yield and, consequently, was the negligent party. In response, the plaintiff argued that there were several genuine issues of material fact precluding summary judgment, including whether the defendant maintained an adequate lookout for oncoming traffic.** *Roe, 282 Mont. at 289, 937 P.2d at 41*.

[*P20] We affirmed the district court's grant of summary judgment to the defendant, holding that, based on the facts of the case, the plaintiff had failed her *§ 61-8-341, MCA*, **duty to yield the right-of-way to the defendant and was negligent as a matter of law.** *Roe, 282 Mont. at 292, 937 P.2d at 42-43*. In so holding, we stated that **the favored driver under the right-of-way statute has the right to assume that the disfavored driver will yield as required and is not negligent for failing to anticipate an injury which could only result from another's violation of the law.** *Roe, 282 Mont. at 292, 937 P.2d at 42*. In light of the plaintiff's clear violation of the right-of-way statute, we concluded that the issue of whether the defendant maintained an adequate lookout for oncoming traffic [****10] **was not sufficiently material to preclude summary judgment.** *Roe, 282 Mont. at 292, 937 P.2d at 42*.

[*P21] While Spinler correctly cites *Roe*'s general proposition that the favored driver at an intersection has the right to rely on the disfavored driver's compliance with the right-of-way statute, *Roe* does not support her argument here. We observe at the outset that Spinler fails to note our additional statements of law in *Roe* that the favored driver at an intersection cannot ignore obvious dangers by blindly relying on her right-of-way, but must maintain a proper lookout and use reasonable care. *Roe, 282 Mont. at 291-92, 937 P.2d at 42* **(citations omitted). The defendant's compliance with these rules of law was not material for purposes of summary judgment under the specific facts presented in *Roe*. The facts of the present case, however, are distinguishable from those in *Roe*.**

[*P22] In *Roe*, we essentially concluded, based on the plaintiff's testimony that the defendant's vehicle was only one-half block from the intersection when she attempted to cross, that the defendant was so close as to [***353] **constitute an immediate hazard, creating a duty on the** [****11] **plaintiff's part to yield the right-of-way. The plaintiff's failure to comply with this duty constituted negligence as a matter of law and made the issue of whether the defendant maintained an adequate lookout** [**145] **immaterial.** *Roe, 282 Mont. at 292, 937 P.2d at 42*. Unlike the defendant in *Roe*, however, Spinler has not presented any evidence regarding the location of her vehicle at the time Allen entered the intersection and, as a result, it cannot be determined as a matter of law that Allen's statutory duty to yield ever arose.

[*P23] In support of her motion, Spinler submitted her deposition, as well as the depositions of Waritz, her passenger, and Allen. Spinler testified in her deposition that she did not see Allen's vehicle until moments before the collision. Similarly, Allen testified that she did not see Spinler's vehicle until a couple of seconds before the impact. Waritz testified that she saw Allen's vehicle stopped at the stop sign at the intersection of 1st Avenue and East Idaho when Spinler's vehicle turned right onto East Idaho one block away from that intersection. Waritz then looked away and did not see Allen's vehicle again until several seconds before the collision.

[*P24] [**12] On the evidence submitted, it is clear that Allen stopped at the stop sign and yielded to other vehicles which had entered the intersection, as required by** *§ 61-8-341(1), MCA*. **The remaining question was whether Spinler's vehicle was "approaching so closely . . . as to constitute an immediate hazard . . . ." *See*** *§ 61-8-341(1), MCA*. **If so, the statute required Allen to yield and not enter the intersection; if not, however, Allen was entitled to proceed and Spinler was required to yield the right-of-way to Allen. *See*** *§ 61-8-341(1), MCA*.

[*P25] None of the three deponents testified to the location of Spinler's vehicle at the moment Allen proceeded into the intersection. Absent such evidence, Spinler cannot establish the absence of genuine issues of material fact that her vehicle was so close to the intersection as to constitute an immediate hazard, thereby creating a duty on Allen's part under *§ 61-8-341, MCA*, **to yield the right-of-way. As a result, it cannot be determined as a matter of law that Spinler was the favored driver and her argument that she had a right to rely on Allen's compliance with the statute fails. We conclude that Spinler failed to meet her** [****13] **burden of establishing the absence of genuine issues of material fact with regard to Allen's violation of the statutory duty to yield the right-of-way.**

[*P26] We hold that the District Court did not err in denying Spinler's motion for partial summary judgment on the issue of liability.

[*P27] 2. Did the District Court abuse its discretion in excluding evidence that Allen was cited for failure to yield the right-of-way after the accident?

[*P28] [146] Prior to trial, Allen moved in limine** to

exclude evidence that she received a citation for failure to yield the right-of-way, in violation of § 61-8-341, MCA, after the accident. She relied on Montana cases holding that evidence regarding the issuance of a criminal citation is inadmissible in a subsequent civil case. Spinler responded that Allen had pled guilty to the citation in Kalispell City Court (City Court) and cited to cases from other jurisdictions holding that, where a party has pled guilty to the cited offense, evidence of the citation is admissible in a civil proceeding. The District Court concluded that Spinler had not established that Allen actually pled guilty to the traffic offense of failure to yield the right-of-way **[****14]** and granted Allen's motion to exclude the evidence. Spinler asserts error.

[*P29] A district court's ruling on a motion in limine is an evidentiary ruling. *See* McGillen v. Plum Creek Timber Co., 1998 MT 193, PP35-36, 290 Mont. 264, 964 P.2d 18, PP35-36, 55 Mont. St. Rep. 808, PP35-36. A district court has broad discretion in determining whether evidence is relevant and admissible and we will not overturn its determination absent an abuse of that discretion. *McGillen*, P35.

[*P30] Spinler asserts on appeal, as she did in the District Court, that Allen pled guilty to the cited offense in City Court. From that premise, she urges us to conclude, as have courts in a number of other jurisdictions, [*354] that a guilty plea to a traffic offense is admissible in a civil proceeding.**

[*P31] We begin by reviewing the record to determine whether it establishes that Allen pled guilty to the traffic offense. Spinler submitted a copy of the citation charging Allen with failure to yield the right-of-way in violation of § 61-8-341, MCA, and requesting Allen to appear in the Kalispell City Court on August 12, 1992. Spinler also submitted a copy of the City Court criminal docket which reflected that Allen's [**15] appearance and arraignment date was August 17, 1992. Typed on the docket form under the heading "SENTENCE" is the following:**

FAIL TO YIELD THE RIGHT OF WAY - FINED $ 65.00

EXPIRED REGISTRATION - $ 40.00

TOTAL DUE - $ 105.00

The blank lines following the headings "Judgement Amount Received," "Receipt No." and "Date" are filled in and the form is signed by the City Judge. However, the portions of the docket reflecting "Rights given" and advisement of the rights to a trial and to plead guilty are left blank, and the signature line for "Defendant" is not signed. Nothing **[**147]** in the docket affirmatively indicates that Allen entered a guilty plea to the traffic offense. Moreover, Allen testified in her deposition that she appeared in City Court and paid the fine, but could not remember whether she entered a guilty plea.

[*P32] While the City Court record may suggest--via use of the terms "sentence," "fined" and "Judgement Amount Received"--that Allen pled guilty, it does not establish that she did so. Indeed, the blank lines following the advisements of the defendant's rights and the blank signature line make it equally likely, as the District Court determined, that Allen merely appeared [**16] in City Court and, essentially, forfeited bond in payment of the fine without contesting the merits of the citation. Based on the record before us, we agree with the District Court that Spinler failed to establish that Allen pled guilty in City Court to the offense of failure to yield the right-of-way. As a result, the premise underlying Spinler's argument fails and we need not consider cases from other jurisdictions holding that a guilty plea to a traffic offense is admissible in a civil proceeding.**

[*P33] We hold that the District Court did not abuse its discretion in excluding evidence that Allen was cited for failure to yield the right-of-way after the accident.

[*P34] 3. Did the District Court abuse its discretion in allowing testimony regarding Spinler's driving speed immediately prior to the accident?

[*P35] Spinler testified at trial regarding the severity of the impact with Allen's vehicle and the damage to her vehicle from the collision, stating "it was like I hit a brick wall going, like, 25." On cross-examination, Allen's counsel questioned Spinler about prior statements that, immediately before the collision, she was driving 30 or 35 miles per hour (m.p.h.), [**17] rather than only 25 m.p.h., which is the posted speed limit on East Idaho in the area where the collision occurred. Spinler objected to the line of questioning. The District Court overruled Spinler's objection and allowed the testimony. Spinler asserts error.**

[*P36] Allen argues that Spinler failed to preserve this issue for appeal because she did not specify the basis of her objection in the District Court. **In order to preserve an objection to the admission of evidence for appeal, the objecting party must make a timely and specific objection on the record.** Rule 103(a)(1), M.R.Evid.; **Kizer v. Semitool, Inc.** (1991), 251 Mont. 199, 207, 824 P.2d 229, 234. An objection to evidence is sufficiently specific if it is accompanied by a reasonably definite **[**148]** statement of the grounds for the objection. Kizer, 251 Mont. at 207, 824 P.2d at 234. The failure to make a timely and specific

objection constitutes a waiver of the claimed error on appeal. *Kizer, 251 Mont. at 207, 824 P.2d at 234*.

[*P37] When Spinler was questioned on cross-examination regarding her driving speed, her counsel stated "Your Honor, I would object" and requested the District Court to grant a continuing objection. [**18] Spinler's counsel did not state any basis for the objection. While Spinler asserts that she filed a pretrial motion in limine** seeking to **[***355]** exclude the speed evidence which set forth the grounds for her objection, the motion is not in the record, the pretrial order does not list the motion as a pending legal issue to be determined by the District Court and there is no record of Spinler requesting the court to rule on such a motion prior to trial.

[*P38] Spinler also asserts that she made a detailed statement of her objections to admitting evidence of her driving speed on the record the day after the testimony was admitted. That statement, however, reflects only that she requested the court to instruct the jury that her driving speed prior to the accident was not to be considered in determining liability, a separate issue addressed below. Spinler did not advance a basis for the earlier objection to admission of the evidence regarding her driving speed or ask the court to reconsider the admission of that evidence. In any event, stating the grounds for an evidentiary objection a day after the objection was made would not constitute a timely and specific objection.

[*P39] We conclude [**19] that Spinler failed to preserve for appeal the issue of the admissibility of evidence regarding her driving speed immediately prior to the accident.**

[*P40] 4. Did the District Court abuse its discretion in refusing Spinler's offered instruction that the jury disregard evidence of the speed at which Spinler was driving prior to the accident?

[*P41] During the settling of jury instructions, Spinler requested the District Court to instruct the jury that her driving speed immediately prior to the collision could not be considered as a substantial factor contributing as a cause of the collision. The District Court refused the instruction and Spinler asserts error.

[*P42] A district court has broad discretion in instructing the jury. Schumacher v. Stephens, *1998 MT 58, P21, 288 Mont. 115, 956 P.2d 76, P21* (citations omitted). Consequently, we will not reverse a **[**149]** district court's refusal of an offered jury instruction absent an abuse of that discretion. *Schumacher*, P21 (citations omitted).

[*P43] On cross-examination, Spinler was questioned regarding her deposition testimony that she was driving 30 m.p.h. immediately prior to the collision. In addition, [**20] Spinler's physical therapist testified that, when discussing the origin of her injuries, Spinler stated she was driving 30 or 35 m.p.h. prior to the collision. Spinler asserts Allen presented no evidence that the likelihood of a collision would have been reduced if Spinler had been traveling at the speed limit and cites *Roe* for the proposition that, absent evidence that a driver's excess speed caused or contributed to a collision, evidence of speed is not considered a substantial factor in determining negligence. As a result, Spinler urges, the jury should have been instructed that speed was not to be considered as a substantial factor in causing the collision.**

[*P44] In *Roe*, the defendant moved for summary judgment on the issue of liability, asserting the absence of genuine issues of material fact regarding her negligence. In opposition to the motion, the plaintiff attempted to raise a genuine issue of material fact regarding the defendant's negligence through expert testimony that the defendant was exceeding the posted speed limit by 2 to 4 m.p.h. prior to the accident. *Roe, 282 Mont. at 289-90, 937 P.2d at 41*. We affirmed the district court's grant of summary judgment, **[****21] concluding the plaintiff had failed to present evidence raising a genuine issue of material fact that the defendant's speed contributed as a cause of the collision.** *Roe, 282 Mont. at 293, 937 P.2d at 43*. As a result, even if the defendant exceeded the speed limit by 2 to 4 m.p.h., that fact was not material and did not satisfy the plaintiff's burden of raising a material factual issue. *Roe, 282 Mont. at 293, 937 P.2d at 43*.

[*P45] Our holding in *Roe* was specific to the facts of that case. *Roe, 282 Mont. at 294-95, 937 P.2d at 44*. There, the plaintiff testified that she first observed the defendant's vehicle one-half block away from the intersection where the collision occurred and that it did not appear to be exceeding the speed limit at that point. *Roe, 282 Mont. at 294, 937 P.2d at 44*. Furthermore, when the plaintiff first observed the defendant's vehicle, the vehicle already was close enough to the intersection to constitute an immediate **[***356]** hazard requiring the plaintiff to yield the right-of-way. Consequently, in the short distance from where the defendant was first observed by the plaintiff to the point where the accident occurred, a difference of 2 to 4 **[****22] m.p.h. may or may not have contributed as a cause of the collision.** *Roe, 282 Mont. at 295, 937 P.2d [**150] at 44*. We concluded, on those facts, that the defendant's traveling only 2 to 4 m.p.h. in excess of the posted speed limit was not material for summary judgment purposes. *Roe, 282 Mont. at 295, 937 P.2d at 44*.

[*P46] In the present case, however, there was no

evidence as to the location of Spinler's vehicle at the time Allen entered the intersection, thus creating an issue of fact regarding whether Spinler was close enough to the intersection to constitute an immediate hazard and impose a duty on Allen to yield the right-of-way. Furthermore, there was evidence that Spinler was traveling at least 5--and possibly 10--m.p.h. in excess of the speed limit, a speed greater than that at issue in *Roe*. The unknown distance traveled by Spinler's vehicle, combined with greater speed, clearly distinguishes the facts of this case from those in *Roe*. Indeed, the present case is more analogous to Sweet v. Edmonds *(1976), 171 Mont. 106, 555 P.2d 504*, a case we distinguished in *Roe*. *Roe, 282 Mont. at 293-94, 937 P.2d at 43*.

[*P47] In *Sweet*, the plaintiff stopped at [**23] a stop sign controlling an intersection with a four-lane through street. He looked in both directions for oncoming traffic, saw no cars and proceeded to make a right turn onto the through street.** The defendant's vehicle, which was traveling on the through street, collided with the plaintiff's vehicle. The defendant testified that he was traveling approximately 30 m.p.h. in a 25 m.p.h. speed zone and did not see the plaintiff's vehicle until a second before the collision. *Sweet, 171 Mont. at 107, 555 P.2d at 505*. At trial, the defendant moved for a directed verdict, arguing that the plaintiff was negligent for failing to yield the right-of-way and the evidence was insufficient to show that any negligence by the defendant caused the collision; the district court granted the motion. *Sweet, 171 Mont. at 107, 555 P.2d at 505*.

[*P48] On appeal, we concluded that, because neither party saw the other's vehicle prior to the collision and the defendant was speeding, it could not be determined as a matter of law that, when the plaintiff proceeded into the intersection, the defendant's vehicle was so close as to constitute an immediate hazard requiring the plaintiff to yield. As a [**24] result, the question of whether the plaintiff was negligent by failing to yield the right-of-way was a question for the jury.** *Sweet, 171 Mont. at 109, 555 P.2d at 506*. We also concluded that it was improper to direct a verdict on the basis that the plaintiff had failed to prove a causal connection between the defendant's acts and the collision. Rather, the evidence that the defendant was exceeding the speed **[**151]** limit and did not see the plaintiff's vehicle were factors which could have enabled the jury to reasonably find that the defendant's conduct was the proximate cause of the collision. *Sweet, 171 Mont. at 109-10, 555 P.2d at 506*.

[*P49] The facts of the present case are substantially similar to those in *Sweet*. Allen testified that she stopped at the stop sign, determined that there were no vehicles approaching and entered the intersection. Neither Spinler nor Allen saw the other's vehicle until moments before the collision and there was evidence that Spinler was exceeding the speed limit. Based on our holding in *Sweet*, we conclude that Spinler's speed prior to the collision was a factor the jury was entitled to consider in determining whether Spinler's [**25] actions caused or contributed to the collision.**

[*P50] We hold that the District Court did not abuse its discretion in refusing Spinler's offered instruction that the jury disregard evidence of the speed at which Spinler was driving prior to the accident.

[*P51] Affirmed.

/S/ KARLA M. GRAY

We concur:

/S/ JAMES C. NELSON

/S/ W. WILLIAM LEAPHART

/S/ WILLIAM E. HUNT, SR.

/S/ JIM REGNIER

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Sprunk v. First Bank Sys.

Supreme Court of Montana

March 5, 1992, Submitted ; April 27, 1992, Decided

No. 91-274

Reporter
252 Mont. 463 *; 830 P.2d 103 **; 1992 Mont. LEXIS 109 ***

WES SPRUNK, Plaintiff and Appellant, v. FIRST BANK SYSTEM, a registered bank holding company, Defendant and Respondent

Subsequent History: **[***1]** Released for Publication May 14, 1992.

Prior History: Appeal from the District Court of Missoula County. Fourth Judicial District. Honorable John S. Henson, Judge.

Disposition: Affirmed.

Overview
After the debtor refinanced his debt with a bank through a loan from the Small Business Administration (SBA), the SBA and the bank entered into an agreement to accept deeds in lieu of foreclosure on the debtor's real properties in order to discharge the debtor's indebtedness to the bank. Subsequently, the debtor brought an action against the bank that alleged that he was fraudulently induced into entering the agreement by the bank's misrepresentations. The trial court entered summary judgment in favor of the bank, which was affirmed on appeal. Subsequently, the bank holding company filed a motion for summary judgment, which was granted on separate and independent grounds as well the doctrine of res judicata, and the debtor sought review. On appeal, the court held that the matter was merely a dispute over factual interpretation and therefore the trial court properly determined that no genuine issues of material fact existed. The court held that the trial court did not err in determining that there was no agency or alter-ego relationship between the bank holding company and the bank nor that the bank holding company owed the debtor a fiduciary duty.

Case Summary

Procedural Posture
Appellant debtor sought review of the summary judgment of the Fourth Judicial District Court of Missoula County (Montana) in favor of respondent bank holding company after granting summary judgment in favor of a bank in the debtor's action that alleged bad faith breach of a fiduciary duty, actual fraud, and constructive fraud by the bank.

Outcome
The court affirmed the summary judgment in favor of the bank holding company pursuant to a summary judgment in favor of a bank in the debtor's tort action against the bank.

Counsel: For Appellant: **William A. Rossbach** argued,

Rossbach & Whiston, Missoula

For Respondent: **James A. Robischon** argued, Murphy, Robinson & Heckathorn, Kalispell; **George D. Goodrich**, Garlington, Lohn & Robinson, Missoula.

Judges: Justice Harrison delivered the Opinion of the Court. Chief Justice Turnage and Justices Gray, Weber and McDonough, and The Honorable Dorothy McCarter, District Judge, sitting for Justice Hunt, and The Honorable Peter Rapkoch, District Judge, sitting for Justice Trieweiler, concur.

Opinion by: HARRISON

Opinion

[*464] **[**104]** Wes Sprunk (Sprunk) appeals from an order of the Fourth Judicial District Court, Missoula County, Montana, which granted summary judgment in favor of First Bank System. This appeal stems from the same set of facts and circumstances stated in our opinion *Sprunk v. First Bank Western Montana Missoula & First Bank System (1987), 228 Mont. 168, 741 P.2d 766* (***Sprunk I***). We affirm.

[*465] The main issue is whether the District Court erred in **[***2]** granting respondent FBS's motion for summary judgment. This main issue is divided into three sub-issues as follows:

1. Whether the District Court erred in deciding that Sprunk had no cause of action against FBS when determining that First Bank Western Montana Missoula was not the agent, alter-ego or instrumentality of FBS?

2. Whether the District Court erred in determining that there was no fiduciary relationship or duty between Sprunk and FBS?

3. Whether the District Court erred in determining that Sprunk's claims are precluded by the doctrine of res judicata?

Sprunk owned an automobile dealership in Missoula that was backed financially by First Bank Western Montana Missoula (Bank), a subsidiary of First Bank System (FBS). During a downturn in the automobile industry in the early 1980's, Sprunk refinanced his debt with the Bank via a $ 500,000 guaranteed loan from the Small Business Administration (SBA). Later, Sprunk attempted to restructure the dealership by relocating to a smaller location and deeding over his prime real estate to the Bank. On May 27, 1982, Sprunk, the Bank and the SBA entered into an agreement to accept deeds in lieu of foreclosure on Sprunk's Missoula and **[***3]** Lake County real properties in order to discharge Sprunk's indebtedness to the Bank.

In *Sprunk I*, Sprunk alleged he entered into the agreement as a result of the Bank's fraudulent misrepresentations. He argued that the Bank pressured him into signing the agreement by overstating his debt and the losses it suffered due to liquidation. Sprunk's complaint alleged bad faith breach of a fiduciary duty, actual fraud and constructive fraud. The District Court granted the Bank's motion for summary judgment. Sprunk appealed and we affirmed. Subsequently, FBS filed a motion for summary judgment which was also granted by the District Court based on separate and independent grounds as well as the doctrine of res judicata. Sprunk now appeals that decision to this Court.

Summary judgment is proper when no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law. Rule 56(c), M.R.Civ.P.; also see *Cecil v. Cardinal Drilling Co. (1990), 244 Mont. 405, 409, 797 P.2d 232, 234*. The initial burden of proof is on the moving party to establish that no genuine issues of material fact exist. *Westmont Tractor Co. v. Continental I, [*466] Inc. (1986), 224 Mont. 516, 521, 731 P.2d 327, 330*. **[***4]** Once the moving party meets that burden, the burden shifts to the non-moving party to establish the existence of genuine issues of material fact. *Simmons v. Jenkins (1988), 230 Mont. 429, 432, 750 P.2d 1067, 1069*. We therefore confine our review on appeal to encompass only the determination of whether genuine issues of material fact exist that would require reversing the District Court's conclusion.

Sprunk asserts that the relationship between FBS and the Bank constituted an agency, alter-ego or instrumentality. Sprunk also contends that his dealings with the Bank, a wholly owned subsidiary of FBS, created a fiduciary relationship between Sprunk and FBS. Sprunk insists that due to the domination of FBS over the Bank, the Bank became an instrumentality of FBS which was used to commit fraud **[**105]** and bad faith. In support of these positions, Sprunk attaches to his brief a large appendix containing hundreds of pages of depositions, an annual report and other correspondence to illustrate actions that would amount to agency, alter-ego or instrumentality and the establishment of a fiduciary duty. The arguments are apparently meant **[***5]** to lead us to the conclusion that piercing the corporate veil is

appropriate and necessary to obtain relief from FBS, since the Bank was previously dismissed from the case. We are not persuaded and harken back to our task on appeal which is to determine whether genuine issues of material fact exist.

The determination of the existence of genuine issues of material fact is one that is not always easily ascertained. Important in the determination is whether the material facts are actually disputed by the parties or whether the parties simply interpret the facts differently. It is well established that when material facts are in dispute, summary judgment is not a proper remedy. *Kaiser v. Town of Whitehall (1986), 221 Mont. 322, 325, 718 P.2d 1341, 1342-43*. However, mere disagreement about the interpretation of a fact or facts does not amount to genuine issues of material fact.

After a careful review of the record in the case at bar, we conclude that Sprunk does not present any genuine issues of material fact. Instead, Sprunk recites facts with his own interpretations and conclusions that only carry the title of disputed issues of material **[***6]** fact, but do not amount to such. We previously said that the party opposing summary judgment "must set forth specific facts and cannot rely on speculative, fanciful, or conclusory statements." *Simmons v. Jenkins (1988), 230 Mont. 429, 432, 750 P.2d 1067, 1069* (citing cases). Mere conclusory statements do not rise to the level of genuine issues **[*467]** of material fact, and therefore, we conclude that the "material facts" set forth by Sprunk are only his rendition of the facts with his own interpretation.

For example, when addressing the fiduciary relationship issue, Sprunk indicates that there were substantial dealings between the Bank and himself. Then, Sprunk asserts that the Bank was the agent or alter-ego of FBS, creating a fiduciary duty between Sprunk and FBS, which FBS allegedly breached. FBS does not dispute the Bank's dealings with Sprunk but asserts that such dealings do not amount to agency or alter-ego or the alleged fiduciary duty claimed by Sprunk. The factual dealings are not in dispute; this is a prime example of a dispute over factual interpretation and one that is properly handled by the District Court in a summary **[***7]** judgment proceeding.

Further, we note that Sprunk regularly paraphrased and quoted various sources in his briefs which were not always accurate. For instance, when addressing the agency/alter-ego argument, Sprunk paraphrases an FBS official's testimony to mean that FBS would "force" subsidiary member banks to re-figure profit goals. In reality the FBS official's testimony reads:

> I have seen it happen where we [FBS] have asked them [subsidiary member banks] to look in the corners and go to the drawing boards and they come up with more. I have also been persuaded that, indeed they are right. They have done -- there is no more room, and we modify our [FBS] plan ultimately by that process.

Again, in support of the agency/alter-ego argument, Sprunk quotes an annual report to illustrate FBS's control over the Bank as follows:

> First Bank System has responsibility for the overall conduct, direction and performance of it subsidiaries. The corporation establishes goals, objectives and policies for the entire organization and monitors compliance with these policies.

This quote, by itself, appears to support Sprunk's conclusions but the next sentence qualifies the statement relied **[***8]** on by Sprunk.

> The Corporation provides capital funds to its subsidiaries as required and assists subsidiaries in liability management . . . . *The operational responsibilities of each* **[**106]** *subsidiary rest with its own officers and directors." [*Emphasis added.]

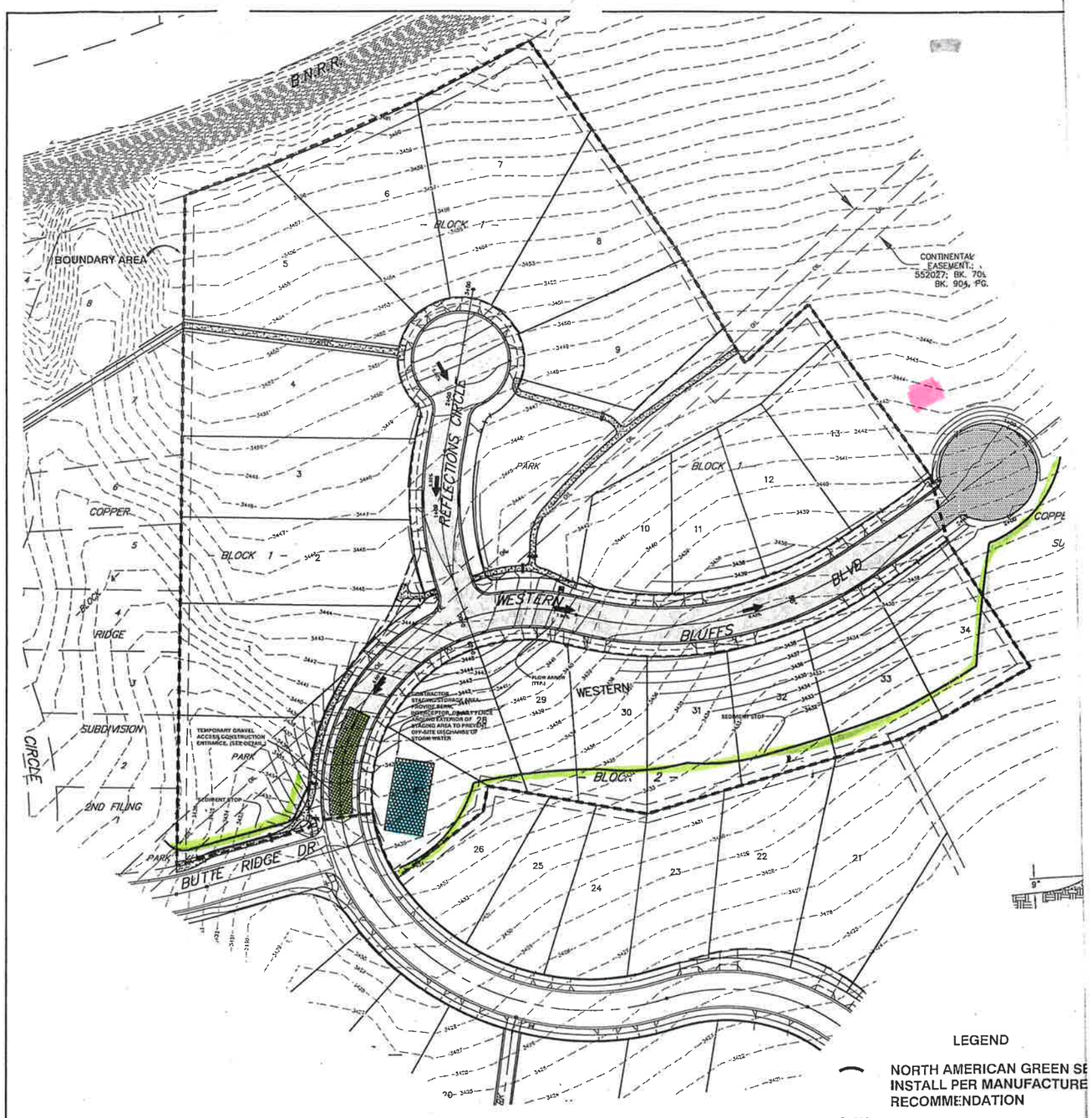
This type of mischaracterization and selective quotation is prevalent throughout Sprunk's briefs and we will not misconstrue them as genuine issues of material fact. The District Court properly determined that no genuine issues of material fact existed. Accordingly, the court did not err in determining that there was no **[*468]** agency or alter-ego relationship between FBS and the Bank nor did FBS owe Sprunk a fiduciary duty because of his dealings with the Bank.

Having decided the two previous issues, we find it unnecessary to address the issue of res judicata and dispose of that issue altogether. Failing to meet his burden, Sprunk cannot defeat the summary judgment granted in favor of FBS. We hold from the record that the uncontroverted facts indicate that the District Court properly found no fact issues, making summary judgment proper. Affirmed.

End of Document

Latitude and Longitude of Photos taken at REF and CR September 9, 2013

Photo No.	Latitude	Longitude
1	45.80167	-108.681666
2 (Also designated as photo 13, in exhibit's 2 and 16)	45.80200	-108.681500
3	45.80367	-108.681833
4	45.80383	-108.681500
5	45.80350	-108.681833
6 (Also designated as photo 14, in exhibit's 2 and 16)	45.80283	-108.684333



- swale/Berm
  Gravel Knockdown Pad
- material storage
- concrete washout

LEGEND

NORTH AMERICAN GREEN SE
INSTALL PER MANUFACTURE
RECOMMENDATION

0.4% → APPROX. FINISH SLOPE GRAD

SOILS: TREASURE (Tu & Tw)

TOTAL AREA = 8.27 ACRES

DISTURBED AREA = 3.00 ACRES

EROSION CONTROL GENERAL NOTES:

1. TO MINIMIZE EROSION AND STORM WATER DISCHARGE, USE THE BEST MANAGEMENT PRACTICES DESCRIBED HEREIN.
2. LIMIT DISTURBANCE OF EXISTING VEGETATION TO ONLY WHAT IS REQUIRED FOR CONSTRUCTION.
3. INSTALL TEMPORARY GRAVEL MAT AT ALL APPROACHES ENTERING OR EXITING THE SITE TO PREVENT MUD FROM BEING TRACKED ONTO CITY STREETS.
4. PROVIDE SILT FENCE AT ALL LOCATIONS WHERE EMBANKMENT SLOPES ADJACENT TO DRAINAGE CHANNELS MAY TRANSPORT SEDIMENTS AWAY FROM THE SITE.
5. PROVIDE A DIVERSION DITCH UPSLOPE OF ALL STORAGE STAGING AREAS AND CONSTRUCTION AREAS TO DIVERT STORMWATER AROUND DISTURBED AND STORAGE AREAS.

NORTH

50 25 0 50 100

SCALE: 1" = 50'

EXHIBIT BBB

NOT FOR CONSTRUCTION

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY COPPER RIDGE DEVELOPMENT CORPORATION AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105377) (FID 2289, DOCKET NO. WQ-15-08]	)	Case No. BER 2015-02-WQ

REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORP.'S RESPONSES TO DEQ'S EXCEPTIONS TO PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Copper Ridge Development Corp. ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") submit these Responses to the Department of Environmental Quality's ("DEQ's") Exceptions.

I. Procedural History

Although harmless error, the typo on page 4 could be corrected to cite to ARM17.30.624(2)(f).

Although the error is harmless, the text on page 7 could be corrected to note that it was a joint motion. DEQ is incorrect about it not being contingent on the Motions in Limine ruling. *See* Joint Motion, p.2.

II. Findings of Fact

DEQ has not argued that the proceedings failed to comply with the law, only that the findings "are not based upon substantial evidence." DEQ Exceptions, p.3.

The Board's "standard on review is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings." *Blaine Cty. v. Stricker*, 2017 MT 80, ¶ 26, 387 Mont. 202, 394 P.3d 159 (internal citations removed). "The evidence is viewed in the light most favorable to the prevailing party when determining whether findings are supported by substantial credible evidence." *Id*. The Board need not recreate the Hearing Examiner's analysis, which considered the

preponderance of the evidence (a more likely than not standard). Instead, the Board need only confirm that "substantial evidence" supports the Hearing Examiner's findings. Although the term "substantial evidence" seems weighty, it is not. Substantial evidence is "less than a preponderance" and "more than a mere scintilla of evidence." *Id*.

FOFs14-15

DEQ did not rely upon or refer to Lot 7B and has never asserted that any construction activity occurred on that lot. *See* Ex.2 (Violation Letters and Inspection), Ex.9,10 (Administrative Orders), DEQ's motion for summary judgment, DEQ's Proposed FOFCOL. Therefore, the absence of Lot 7B in FOF14 is harmless error. Nonetheless, Reflections would stipulate to a revised FOF14 (new text underlined):

> The lots about which DEQ provided ownership information, from September to December 2013, were generally located in the northern part of the CR/REF subdivisions as follows:…

Although the inconsistency between FOFs 14 and 15 is harmless error, Copper Ridge and Reflections would stipulate to a revised FOF15 (new text underlined, text to be omitted marked with ~~strikethrough~~):

> … regarding the southern portions of the CR/REF subdivisions, including ~~such as~~ property located along Golden Acres Drive~~,~~ or any properties located in ~~the first filing of Reflections, or~~ the first ~~or second~~ filing of Copper Ridge.

FOFs16(b), 60

Exhibit 23 included a certification of the date acquired. Ex.23, p.1. In contrast, Exhibit 26 is "a screenshot" of Ms. Bawden's computer and the image is created from "a variety of resources that they use to tile together their maps," with no certification. Trans.124:22-125:20. It is reasonable to conclude that it was "possibly taken" or was "allegedly … acquired by Google Earth" on October 25, 2013.

FOF17

Exhibits 33 and 34 were created to depict lot ownership. Trans.122:7-16; 154:13-16 ("This map was simply to show lots associated with the deeds I had, had gotten in – so that it was clear that this is where the lot boundaries were and this was the number of the lot."); 155:11-14 ("Again, the purpose of the map was to show, in clarity, the lots that were associated with the deeds […], be able to show the boundaries and the lot number clearly."). When responding to objections, DEQ stated, "This map goes to land ownership at the time." and "This piece shows ownership." Trans.117:19-21; 118:18.

Because Mr. Leep was present for DEQ's testimony and responses to objections, his responses to questions about Exhibits 33 and 34 reflect a reasonable

understanding that the questions were about the accuracy of the ownership portrayed in the exhibits.

Mr. Leep testified that the aerial photos were not accurate depictions of the subdivisions because they were "blotchy," did not reflect the vegetation present in the subdivisions, and did not even reflect the "black-topped" roads in the subdivisions. Trans.213: 25-214:24; FOF65. Mr. Leep's testimony, cited by DEQ, that the exhibits were accurate is therefore restricted to ownership.

Recognizing the issues noted above regarding FOF14-15, Copper Ridge and Reflections would stipulate to a revised FOF17 (inserted text underlined):

> Landy Leep, Vice President and Manager at CR/REF confirmed that the land ownership information provided by DEQ (listed above) for the first, second and third filings of Reflections and the second, third and fourth filings of Copper Ridge were accurate for September to December 2013.

FOF18

The Hearing Examiner accurately interpreted the regulations, statutes and Board Order, concluding that the elements to be proven on remand are: 1) owned, leased, operated, controlled, or supervised; 2) a point source of storm water discharges associated with construction activity; 3) at the time of the alleged violations. Proposed FOFCOL, p.8 (*citing* Scheduling Order, p.4); COL11. Both the regulatory definition of "construction activities" and the Board Order limit the

analysis to the time of the alleged violations. ARM17.30.1102(28); Feb. 2019 Board Trans. 113:14-17; 69:14-17; 97:13-18; 113:18-22.

Mr. Leep's testimony cited in FOF18 refers to "construction," "construction activity," and "construction work" between September and December 2013. Nothing indicates that Mr. Leep understood his terminology, which is broad, to be inconsistent with the definition of "construction activities" found in ARM17.30.1102(28).

FOFs19-21

When considered in conjunction with Mr. Leep's testimony and the exhibits cited in FOF18, the permits make clear that Reflections' and Copper Ridge's construction in the subdivisions was permitted and when it was complete (prior to September 2013), they had no reason, nor any means to conduct additional construction in the subdivisions. FOFs19, 34, 35, 37, 40, 85, 86, 130. Therefore, the permits are relevant.

DEQ's argument is contrary to their own documents and testimony, which agreed that the boundaries and the BMPs extended to include the entirety of the individual lots. FOFs24, 25, 87. DEQ has not presented evidence that the 'disturbance area' does not extend to the individual lots. DEQ has not and cannot present legal authority establishing that the permits are confined to the 'disturbance

area.' In fact, a permittee must provide the disturbance area and "the total area of the site." ARM17.30.1115. The "site" is "the land or water area where any facility or activity is physically located or conducted, including adjacent land used in connection with the facility or activity." Ex.1, p.36. The General Permit refers to "disturbance area" to determine permit applicability. *Id*., p.6. In contrast, the General Permit refers to "site" to determine compliance. *Id*., p.9 (requiring that a "site" must achieve final stabilization prior to permit termination); 14 (requiring inspections of "site conditions" and the "site perimeter"); 15 (requiring corrective actions if an unauthorized release or discharge "occurs at the site."); 17-26 (the SWPPP applies to the "site" and must include a "site description," "site map," and description of "all structural BMPs implemented at the site."). Additionally, "support activities," which may be "on or off the conventional construction project site" may be covered by the General Permit. *Id*., pp.6-7. Therefore, the permit is not restricted to the disturbance area as DEQ argues.

FOFs22, 24, 28

DEQ alleges some "construction activity later conducted by REF" without pointing to any evidence other than the homebuilding permits that were submitted under protest because DEQ required them as a corrective action, under threat of penalty. The findings do not incorrectly consolidate the road building and utility

installation with any other later construction because, as noted above regarding FOFs18-21, there was no later construction by Reflections or Copper Ridge and the previous permits covered the individual lots.

Just as it did in the now-overruled and remanded summary judgment action, DEQ is again relying upon permit documents filed under protest, *after the alleged violations*, and only because DEQ required the permits, under threat of penalty. Those permits cannot prove that either Copper Ridge or Reflections was the owner or operator of a point source of discharges *at the time of the alleged violations*.

FOF25

See FOFs 19-21 above.

FOF29

See FOFs22, 24, and 28 above.

FOF34, 35, 37, 38, and 39

See FOF18. DEQ's reliance on *Molokai* is wrong because here, permit coverage was obtained and later terminated by DEQ. Therefore, there is no continual violation at issue.

DEQ is wrong to assert that FOFs38 and 39, which prove that neither Reflections nor Copper Ridge built homes, rely on a definition of "construction

activity" inconsistent with the same rules cited in their enforcement action, which is based on homebuilding.

FOF40

DEQ fails to undermine FOF40 and only cites to evidence that may support different findings, which is not enough to modify or reject the finding. *Blaine Cty.*, ¶26.

Even so, several findings explain why Mr. Leep's testimony is more credible than Mr. Freeland's (FOFs44-47, 71-78, 81-83, 85-88), including the following, to which DEQ has not objected:

- "Mr. Freeland did not document (through photographs or notes) any specifics to support this general claim" that clearing, excavation, stockpiling, or grading was occurring throughout the site. FOF43.
- "Mr. Freeland was not able to ascribe a street address to the location of photograph 13." FOF72.
- Mr. Freeland "did not know where the property lines were; they were not marked; and the photograph does not show the homes that were being built on either side of Lot 15." FOF81.

- "Mr. Freeland did not see an excavator or a bulldozer or any heavy equipment in that area and there was no equipment operating there." FOF82.

DEQ presented no credible evidence contradicting Mr. Leep's testimony. Therefore, it is reasonable to rely on Mr. Leep's testimony.

FOF44

DEQ seeks to have Mr. Freeland's observations automatically imputed to land owned by Copper Ridge, but the evidence does not support that.
Mr. Freeland's testimony never affirmatively connected any construction activity to any lot owned by Reflections or Copper Ridge. FOF46-47. Mr. Freeland previously testified that he "didn't identify or write down specific lots" during his inspection. Feb. 2018 Trans. Vol. 1, 178:20 – 21; *see also* Feb. 2019 Board Trans.63:18-21 (confirming no effort to "pinpoint which lot was the source"). None of Mr. Freeland's testimony can be connected to a specific lot, let alone a specific lot owned by Reflections or Copper Ridge.

FOFs46 and 47

See FOF18. DEQ does not cite any evidence supporting the alleged "detailed descriptions of construction activity." Mr. Freeland only testified that he observed bare ground, sediment in the streets, and a stockpile of material (gravel)

placed at some unknown time. FOF44, 80; Trans. 94:2-8. None of those observations are of present-tense construction activity as required by ARM17.30.1102(28).

The testimony cited in FOFs46 and 47 is clear, there is no evidence of active construction. In contrast, Reflections presented evidence and testimony, including testimony from the City of Billings and Mr. Leep, and documents from DEQ, the City of Billings, and independent contractors, that it was not conducting any construction during the Inspection or during the timeframe September through December 2013. FOFs18b, 40, 85-88.

FOF54

DEQ provided no evidence that Copper Ridge owned any of the lots depicted in Photograph 14, none of which are vacant lots. Assuming that the location of Photograph 14 is correct,[1] and noting that it was taken facing south, Photograph 14 could not possibly depict lots 8, 9, or 10, because those lots are north of the alleged photo location. Exs.16, 2, 47.

[1] The location of photo 14, as provided on Exhibit 16, was disputed by Mr. Leep. Trans.162:1-163:11

FOF56

The citations provided by DEQ are only to general observations of areas with no vegetation and to cleanup of the paved streets, not to any "specific evidence" that would contradict this finding.

FOF63-65

DEQ's aerial photos were not produced until May 1, 2019 – nearly six years after this enforcement action was initiated. The photos were presented just to show ownership. *See* FOF17 above. "It is questionable whether these photographs should have been admitted at all." Proposed FOFCOL, p.42, fn 5; Order on MIL.

Even so, the Hearing Examiner did consider the vegetation levels depicted in the aerial photos, comparing the subdivisions to the surrounding area and found that, "At most, both aerial photographs show, through some lighter coloring, that there was limited vegetative cover on some lots owned by CR/REF in June and October of 2013." FOF63.

DEQ's own admissions confirm Mr. Leep's testimony that Exhibits 23, 33, and 34 do not accurately depict the status of the subdivisions in September – December 2013. Trans.152:2-15 (Ms. Bawden confirming that park areas in Exhibit 26, allegedly from October 2013, are not shown in Exhibit 23, from June 2013).

DEQ would have this Board rely on aerial photos taken by satellites hundreds of miles away to conclude that areas were "sodded" or "undisturbed" and that other areas were "disturbed" or "cleared and then let go so that weeds had infested the area." DEQ's Exceptions, pp.12, 13 (*citing* Ms. Bawden's testimony at Trans.112: 10-15; 131-132). It is not reasonable to conclude, from on aerial photo, whether an area was been "sodded" or whether it simply has some vegetation growing on it. Nor is it reasonable to conclude, from an aerial photo, whether an area has been "cleared" and has weeds or whether it simply has less vegetation or dead vegetation.

Ms. Bawden's interpretation of Exhibit 34, which was produced by magnifying Exhibit 23, was contrary to Mr. Freeland's on-the-ground observations. *Compare* Trans.142:8-144:1 (Ms. Bawden testifying that based on the aerial photos, the pavement ends within the subdivision, between lots 12 and 33) *with* Trans.38:5-8 (Mr. Freeland testifying that all of the streets were paved during his September 9, 2013 Inspection). Further, Ms. Bawden agreed that she could not see the curb lines delineating black-top pavement from areas that are "white, which would be indicative of a disturbed area." Trans.143:1-17. If the photo cannot be used reliably to differentiate paved from unpaved areas, it cannot

be used reliably to differentiate vegetated from non-vegetated areas on individual lots.

DEQ has not and cannot point to any testimony that the aerial photos show any active clearing, grading, excavating or stockpiling. The Hearing Examiner correctly found that the aerial photos do not show any construction activity on lots owned by Copper Ridge or Reflections.

FOF66

DEQ's implication that areas outside the permitted areas were disturbed is wrong. DEQ has not asserted a violation of the previous permits based on an unpermitted disturbance, Mr. Freeland testified that he "didn't see any issues with" the previously permitted work, and DEQ terminated the permits. Trans.54:14-18; *See also* FOF19-21.

FOF73

Mr. Freeland testified that Photo 13 and the photo produced by DEQ in 2015 depict the same pile of gravel and "were taken at different angles." Trans.56:8-19. Mr. Freeland confirms that the street addresses on the photo produced by DEQ in 2015 are "3028, 3030 and 3032 Western Bluffs." Trans.58:2-7. Mr. Freeland's use of GPS to locate where Photo 13 was taken is not contrary to this finding.

FOF83

DEQ has not objected to findings based on testimony that Mr. Freeland could not tell where the property lines were, and he agreed that property lines "weren't marked in any way." FOF81. DEQ has not objected to findings based on Mr. Freeland's testimony that "I think I just saw the stockpiling and bare ground. I don't think I saw equipment." FOF82. Mr. Freeland's testimony *is not clear*:

- "I'm assuming that that would be Lot 15. But again, with no markings, I don't know if this part toward the southern – or this corner of the photo would also be Lot 15 – (indicating.) I don't know that;"
- The location of lot 15 "would be my estimation."

Trans.244:9-21. Mr. Freeland also testified that he "wouldn't know" when the stockpile was placed. Trans.94:2-8.

DEQ cites no legal authority for its assertion that "it doesn't matter when the waste was placed or by whom." For liability and statute of limitation purposes, DEQ must determine when an alleged violation occurred and by whom. It is the placement of waste or the causing a waste to be placed that triggers a violation. §75-5-605(a), MCA. Therefore, the date of placement and the identity of the entity who placed the waste or caused the waste to be placed are necessary elements that must be proven.

FOF86-87

See FOFs19-21 above.

FOF115

Mr. Leep previously testified "We signed these basically under protest. There's one signature line, its preprinted. We had the feeling it was not up for discussion." Feb.2018 Trans., Vol. 2, 86:15-18. Indeed, submission of the permits was a corrective action required by DEQ, under threat of penalty. Ex.2, p.3. Mr. Leep confirmed that Copper Ridge and Reflections only obtained the permits because they "were told by Dan Freeland to do so" and that they did so "under protest." Trans.205:4-9.

FOF128

See FOFs22, 24, 28 above.

FOF130

See FOF18 above.

III. Discussion

1. No error was made in excluding the photographs because their admission would violate the Order on the Motions in Limine (to which DEQ has

not objected).[2] DEQ confirmed that it did not rely on the photographs to support the alleged violations. Trans.90:25-91:13. DEQ is wrong to assert that the inadmissible photographs "depicted construction activity on lots owned by CR and REF at the time of the violations." The photographs were not taken anywhere near the Copper Ridge subdivision. Trans.88:15-20 (Mr. Freeland testifying the location of the photos was near "Lots 11, 12, and 13 at Reflections."). That is on the east end, in the Third Filing of Reflections, where Mr. Freeland noted, "there was a lot of activity to the east, which was a *different* subdivision." Ex.47, Trans.39:5-9; *see also* Trans.112:13-14 (DEQ confirming "the Falcon Ridge Subdivision [is] to the east" of Reflections); Trans.131:5-6 (DEQ confirming active construction in Falcon Ridge).

The inadmissible photographs are of different alleged activity and are of different locations than the violations alleged in this action. The photographs did not serve as the basis for DEQ's enforcement action and were not part of the required notice to Copper Ridge and Reflections. §75-5-611(1)(b), MCA. DEQ admits that they were not produced until after the Board's remand. DEQ's characterization of the inadmissible photographs in unsupported and unlikely. FOF18c cites to multiple sources of evidence that Copper Ridge and Reflections

[2] DEQ wrongly asserts that Reflections and Copper Ridge "opened the door for introduction" of the photographs. Over Reflections and Copper Ridge's objections, to the extent that that any door was opened, the Hearing Examiner did allow testimony on the photographs. Trans.86:1-88:7.

did no construction in the Third Filing of Reflections during the relevant timeframe. The evidence supporting FOF18c remains uncontroverted. The inadmissible photographs were rightfully denied admission and DEQ's assertions are wrong.

2. See FOF18 above.

3. See FOFs19-20 above.

4. The Hearing Examiner does not make a specific finding that the vegetative cover died or washed away, but only reasoned that even if it did, that still "would not constitute proof of any of the violations alleged in the AO … because there is no construction activity *at the time of the discharge*" – a requirement of the governing statutes and regulations. Proposed FOFCOL, p.44 (emphasis added).

5. The Hearing Examiner's analogy is neither a finding nor a conclusion. It merely makes the point that, without more evidence, a stormwater discharge over bare land is not a violation of the Montana Water Quality Act. The additional evidence needed here was evidence of a construction activity at the time of the offending discharge. DEQ failed to present any evidence that Copper Ridge or Reflections engaged in any construction activity during the relevant timeframe.

CONCLUSION

The findings are supported by substantial evidence. The Board should approve the proposed findings and conclusions with no changes.

DATED this 2nd day of August, 2019.

/s/ Victoria A. Marquis

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ATTORNEYS FOR REFLECTIONS AT COPPER RIDGE, LLC AND COPPER RIDGE DEVELOPMENT CORP.

EXHIBIT C

CERTIFICATE OF MAILING

This is to certify that the foregoing was served on the following persons as noted below on the date herein.

Lindsay Ford Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue PO Box 200901 Helena, MT 59620-0901 Lindsay.Ford@mt.gov	[ ] Overnight Delivery [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Sarah Clerget Hearing Examiner, Agency Legal Services Bureau 1712 Ninth Avenue PO Box 201440 Helena, MT 59620-1440 sclerget@mt.gov	[ ] Overnight Delivery [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Aleisha Solem Paralegal to Sarah Clerget, Hearing Examiner ASolem@mt.gov	[ ] Overnight Delivery [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Kirsten Bowers Montana Dept. of Environmental Quality 1520 East Sixth Avenue PO Box 200901 Helena, Montana 59601-0901 kbowers@mt.gov sscherer@mt.gov	[X] U.S. Mail [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Edward Hayes Montana Dept. of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, Montana 59620-0901 ehayes@mt.gov	[X] U.S. Mail [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery

DATED this 2nd day of August, 2019.

/s/ Victoria A. Marquis

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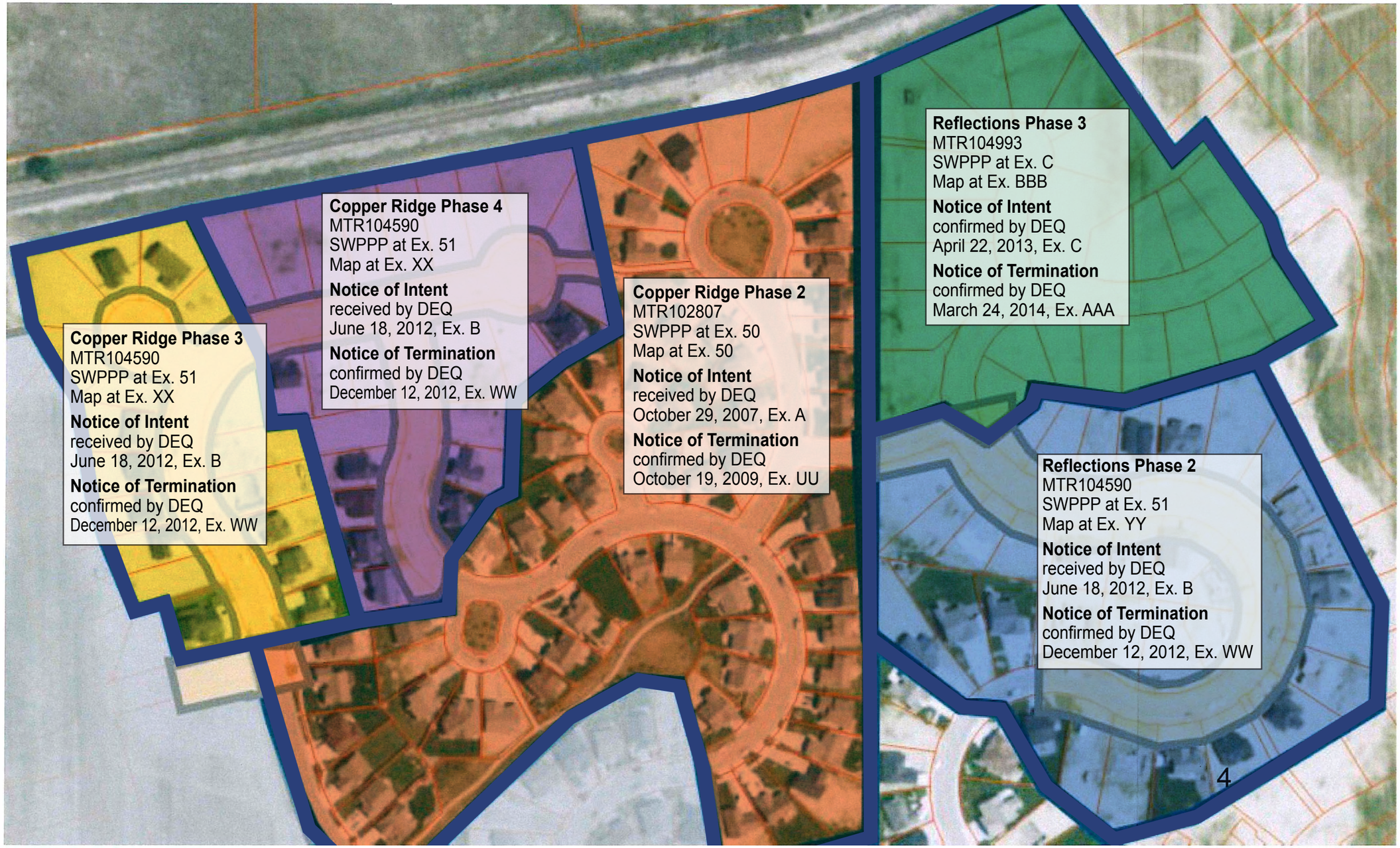
EXHIBIT C



DEQ Exhibit 31 - Page 1 of 1

EXHIBIT SSS

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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: VIOLATIONS OF THE WATER QUALITY ACT BY REFLECTIONS AT COPPER RIDGE, LLC AT REFLECTIONS AT COPPER RIDGE SUBDIVISION, BILLINGS, YELLOWSTONE COUNTY, MONTANA (MTR105376) [FID 2288, DOCKET NO. WQ-15-07]	)	Case No. BER 2015-01-WQ
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REFLECTIONS AT COPPER RIDGE, LLC'S AND COPPER RIDGE DEVELOPMENT CORPORATION'S NOTICE OF ERRATA

After filing its Response to DEQ's Exceptions, Copper Ridge Development Corporation ("Copper Ridge") and Reflections at Copper Ridge, LLC ("Reflections") noted a typographical error in the filing. On page 14 of the filed document, the paragraph heading for "Findings of Fact Nos. 34 and 25" should have been "Findings of Fact Nos. 34 and 35." The heading erroneously referred to Finding of Fact No. 25 instead of 35.

The error does not change the substance of the issues and arguments raised in the filing. The undersigned counsel apologizes for the error. A corrected copy of page 14 is attached hereto for the convenience of the Board and counsel.

DATED this 31st day of March, 2021.

/s/ Victoria A. Marquis

William W. Mercer
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401 North 31st Street
Suite 1500
P.O. Box 639
Billings, MT 59103-0639

ATTORNEYS FOR REFLECTIONS AT COPPER RIDGE, LLC AND COPPER RIDGE DEVELOPMENT CORP.

CERTIFICATE OF MAILING

This is to certify that the foregoing was mailed to the following person by e-mail and United States mail, postage prepaid on the date herein.

Joyce Wittenberg Secretary, Board of Environmental Review Department of Environmental Quality 1520 E. 6th Avenue P.O. Box 200901 Helena, MT 59620-0901 JWittenberg@mt.gov	[ ] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Jeffrey Doud Hearing Examiner Agency Legal Services Bureau 1712 Ninth Avenue P.O. Box 201440 Helena, MT 59620-1440 JDoud@mt.gov	[ ] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Aleisha Kraske Paralegal to Jeffrey Doud, Hearing Examiner akraske@mt.gov	[ ] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
Kirsten Bowers Montana Dept. of Environmental Quality 1520 East Sixth Avenue P.O. Box 200901 Helena, Montana 59601-0901 kbowers@mt.gov Catherine.Armstrong2@mt.gov	[X] U. S. Mail, postage prepaid [X] Electronic Mail [ ] Facsimile Transmission [ ] Personal Delivery
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DATED this 31st day of March, 2021.

/s/ Victoria A. Marquis

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Copper Ridge subdivision; therefore, the finding is correct in noting that the second filing "was previously included" in the permit. Ex. 50, p. 2.

Findings of Fact Nos. 34 and 35. DEQ failed to raise these objections when these findings were reviewed and accepted by the Board in 2019; therefore, DEQ is precluded from raising objections now. *Gibbs v. Altenhofen*, ¶ 10. Further, DEQ's objections are based only on DEQ's lack of knowledge, which is irrelevant. The findings document the facts found by the Hearing Examiner after consideration of all evidence, including testimony offered by both parties at the hearings. Because the Hearing Examiner's findings are granted deference and because DEQ has not proven a lack of substantial evidence supporting the findings, the findings cannot be modified or rejected. *Brackman*, 258 Mont. 200; *Blaine Cnty*, ¶ 26.

B. Findings of Fact Previously Proposed but Not Adopted by the Board.

Finding of Fact No. 43. DEQ offers no objection, only clarification; therefore, the finding should be adopted without modification. DEQ's offered clarification, which was not raised when this finding was presented to the Board in 2019, offers additional findings that the Hearing Examiner did not propose. The Hearing Examiner heard and considered all of the evidence cited by DEQ, but specifically chose to propose the finding as written. The Hearing Examiner, could have, but specifically chose not to include all of DEQ's cited evidence. Because

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: THE NOTICE OF APPEAL BY DUANE MURRAY REGARDING THE NOTICE OF VIOLATIONS AND ADMINISTRATIVE COMPLIANCE AND PENALTY ORDER (DOCKET NO. SUB-18-01; ES#36-93-L1-78; FID 2568)	**CASE NO. BER 2020-01 SUB**

PROPOSED ORDER GRANTING MOTION TO DISMISS

This matter came before the Hearing Examiner on the Department of Environment Quality's ("DEQ's") *Motion to Dismiss and Brief in Support*.

PROCEDURAL HISTORY

On July 22, 2020, Duane Murray ("Mr. Murray") filed a request for hearing with the Montana Board of Environmental Review ("BER") regarding the Department of Environmental Quality's ("DEQ") Notice of Violation and Administrative Compliance and Penalty Order. This appeal was numbered Case No. BER 2020-01 OC.

At its meeting on August 7, 2020, the BER assigned this case to a hearing examiner, Sarah Clerget, who issued a *Prescheduling Order* on September 9, 2020 setting forth detailed instructions regarding filing and service in this contested

case. On September 19, 2020, Mr. Murray filed a document titled *File a Pro Se Appearance* by emailing it to Ms. Clerget and the hearing assistant without providing a copy to counsel for DEQ, which did not comply with the service instructions in the *Prescheduling Order*.

Ms. Clerget issued an *Order* on September 23, 2020 ("September Order"), reminding Mr. Murray of the filing and service requirements as outlined in the Prescheduling Order and ordering Mr. Murray to email hearing assistant with any questions he may have on filing documents. The September Order directed Mr. Murray to include counsel for DEQ on any such email communications.

On October 6, 2020, Ms. Clerget issued a *Scheduling Order* to the parties which included dates for pre-trial exchanges and lay and expert witness disclosure. On January 15, 2021, the undersigned assumed jurisdiction of this matter as hearing examiner for the BER. On March 19, 2021, DEQ filed a *Motion to Dismiss and Brief in Support* requesting Mr. Murray's appeal be dismissed pursuant to Mont. R. Civ. P. 16(f) and 41(b) for failure to abide by the *Scheduling Order* and rules of procedure. DEQ Mot., at 3.

The undersigned issued an *Order to Show Cause* on March 23, 2021 directing Mr. Murray to "file and serve, no later than **April 2, 2021**, a response showing cause as to (a) why DEQ's Motion to Dismiss should not be deemed well-taken, and (b) why this matter should not be dismissed pursuant to Mont. R. Civ. P.

16(f) and 41(b).” Order to Show Cause, at 3.

On April 2, 2021, Mr. Murray contacted the hearing assistant via telephone to ascertain “what DEQ wants from me [Mr. Murray]?” He then emailed a document to the hearing assistant titled, “Order to Show Cause” which stated, “I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.”[1] This document was not submitted to the Hearing Examiner, DSutliff@mt.gov, or counsel for DEQ, and thus it did not comply with the filing and service instructions set forth in both the *Prescheduling Order* and the *September Order*.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Mr. Murray was warned in the *Prescheduling Order*, the September Order, and the *Order to Show Cause* that he must file *and serve* all pleadings on DEQ and that failure to comply could lead to dismissal. Although a *pro se* litigant is given a certain amount of latitude with respect to procedural oversights, Mr. Murray has already been given latitude following his non-compliant filing of the *File a Pro Se Appearance*, and “it is reasonable to expect all litigants, including those acting pro se, to adhere to procedural rules.” *Sun Mountain Sports, Inc. v. Gore*, 2004 MT 56, ¶ 28, 320 Mont. 196, 85 P.3d 1286 (quoting *Greenup v. Russell*, 2000 MT 154, ¶

[1] Mr. Murray’s filing was docketed but not served and is attached to this Order as Exhibit A.

15, 300 Mont. 136, 3 P.3d 124).

Additionally, the *Order to Show Cause* warned that Mr. Murray's response must provide both a legal analysis and a detailed factual explanation of good cause as to why he failed to follow the above orders. Mr. Murray's submission contains only factual explanations as to why he has not disclosed any documents or expert witnesses in this matter. It contained no legal analysis and no factual explanation as to why he has not disclosed the name and addresses of each individual likely to have discoverable facts he may use to support his claims or defenses, as outlined in the *Scheduling Order*.

Mr. Murray has failed to provide good cause for why he did not comply with the disclosure requirement in the *Scheduling Order*, he has not provided the information ordered in the *Order to Show Cause*, and he has repeatedly failed to follow the filing and service requirements in the *Prescheduling Order*.

The previous Hearing Examiner ordered that the Montana Rules of Civil Procedure applied to this proceeding, and neither party objected. Even when the Montana Rules of Civil Procedure do not explicitly govern per statute or administrative rule, "they may still serve as guidance for the agency and the parties." *Citizens Awareness Network v. Mont. Bd. of Envtl. Review*, 2010 MT 10, ¶ 20, 355 Mont. 60, 227 P.3d 583 (citing *Moen v. Peter Kiewit & Sons' Co.*, 201 Mont. 425, 434, 655 P.2d 482)).

Mont. R. Civ. P. 16(f)(1)(C) provides that sanctions, including those authorized by Rule 37(b)(2)(A)(ii)–(iv), may be imposed against a party who fails to obey a scheduling order. Mont. R. Civ. P. 41(b) also states that a defendant may move to dismiss an action based on the plaintiff's failure to comply with a court order. In this proceeding, as the party requesting the hearing, Mr. Murray is analogous to the plaintiff. As the responding party, DEQ is analogous to the defendant.

A sanction in the form of dismissing this proceeding is also available under Mont. R. Civ. P. 37(b)(2)(A)(v), which applies pursuant to ARM 17.4.101(1) and ARM 1.3.217(1). The failure to make the required initial disclosures is akin to a discovery issue because the purpose of both initial disclosure requirements and discovery is to facilitate the disclosure of relevant information between the parties.

Therefore, IT IS ORDERED:

1. DEQ's Motion to Dismiss is GRANTED pursuant to M. R. Civ. P. 16(f)(1)(C), 37(b)(2)(A)(v), and 41(b) for failure to comply with the Scheduling Order and the March 23, 2021 Order to Show Cause.

2. Mr. Murray's appeal is dismissed with prejudice.

This Proposed Order will go before the BER, which constitutes the "officials who are to render the decision." Mont. Admin. R. 1.3.223(1). The parties will have the opportunity to make oral argument before the BER concerning the

undersigned's Proposed Order. Based on the Proposed Order and any oral arguments presented, the BER will decide the final agency action pursuant to the options stated in Mont. Code. Ann. § 2-4-621 at its next scheduled meeting on April 23, 2021. The location, time, and agenda for the BER meeting, as well as the materials available to the BER members for review, will be available on the BER's website http://deq.mt.gov/DEQAdmin/ber at least one week in advance of the BER meeting. The parties are encouraged to regularly check the Board's website for any additional updates on the meeting.

DATED this 12th day of April, 2021.

/s/ Lindsey Simon
LINDSEY SIMON
Hearing Examiner
Agency Legal Services Bureau
1712 Ninth Avenue
P.O. Box 201440
Helena, MT 59620-1440

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing to be emailed to:

Joyce Wittenberg
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DATED: 4/12/21

/s/ Aleisha Kraske
Aleisha Kraske, Paralegal

TO: LINDSEY SIMON
Hearing Examiner
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From: Duane Murray
1568 US Highway 191 So
Malta MT 59538

RE: Case #. BER 202-01 SUB
IN THE MATTER OF: THE NOTICE OF APPEAL BY DUANE MURRAY REGARDING THE NOTICE OF VIOLATIONS AND ADMINISTRATIVE COMPLIANCE AND PENALTY ORDER (DOCKET NO. SUB-18-01; ES#36-93-L1-78; FID 2568)

Date: April 2, 2021

I did not exchange of initial disclosures. I did not have any future documents to disclose, nor expert witness to list.

I should not have to be a lawyer, nor should I have to hire a lawyer to file an appeal with a state agency.

Duane Murray