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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
August 11, 2023)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

August 11, 2023
9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
STACY AGUIRRE, and JEN RANKOSKY,

PREPARED BY: LAURIE CRUTCHER, RPR
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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: It's 9:00. At this
5 point other than myself I only see Board Member
6 Smith.

7 MS. MOISEY-SCHERER: Board member
8 Aguirre is joining, and I had promoted Board
9 Member Rankosky, but it tells me she's declined,
10 but I've allowed her to talk. I'm not sure what's
11 going on with the communication, but she's allowed
12 to talk.

13 CHAIR SIMPSON: Lee said he probably
14 wouldn't make it at all, and Julia may be late, so
15 I believe we have everyone who is going to be
16 joining us. Sandy, would you take roll, please.

17 MS. MOISEY-SCHERER: Yes, sir. Chairman
18 Simpson.

19 CHAIR SIMPSON: Here.

20 MS. MOISEY-SCHERER: Vice Chair Aguirre.

21 BOARD MEMBER AGUIRRE: Here.

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

24 BOARD MEMBER RANKOSKY: Here, but no
25 video for some reason.

1 MS. MOISEY-SCHERER: Board Member
2 Reiten.

3 BOARD MEMBER REITEN: Here.

4 MS. MOISEY-SCHERER: Board Member Smith.

5 BOARD MEMBER SMITH: Here.

6 MS. MOISEY-SCHERER: We have a quorum,
7 sir.

8 CHAIR SIMPSON: Thank you. Would you
9 please proceed with identifying those others on
10 the call, please.

11 MS. MOISEY-SCHERER: I will. I'm Sandy
12 Moisey-Scherer, I'm the Board secretary; Laurie
13 Crutcher, Board transcriptionist; Moira Davin,
14 DEQ; Terisa Oomens, Agency Legal Services; Angie
15 Colamaria, DEQ; Nick Whitaker, DEQ; Vicki Marquis,
16 Crowley Fleck; Bill Mercer, Holland and Hart;
17 Aaron Pettis, DEQ. And Andy, is that Andy Janes?
18 Andy, could you identify please?

19 (No response)

20 MS. MOISEY-SCHERER: Catherine
21 Armstrong, DEQ; Elena Hagen, Agency Legal
22 Services; Mae Vader, DEQ; Rachel Clark, DEQ; Ray
23 Stout, Kootenai Valley Record.

24 (Loryn Johnson, DEQ; Rachel Clark, DEQ;
25 Andy Mefford, PCA Montana; Terry Martin-Denning;

1 Jason Mohr, Montana Legislative Services also
2 present via Zoom)

3 CHAIR SIMPSON: Thank you, Sandy. The
4 first item on our agenda of course is review and
5 approve the minutes. Are there any comments or
6 corrections to the minutes from the June 9th
7 meeting?

8 (No response)

9 CHAIR SIMPSON: Is there a motion?

10 BOARD MEMBER AGUIRRE: I make a motion
11 that we approve the minutes from the June 9th,
12 2023 meeting.

13 BOARD MEMBER REITEN: I second that
14 motion.

15 CHAIR SIMPSON: A motion has been made
16 and seconded to approve the minutes from the June
17 9th meeting. All in favor say aye.

18 (Response)

19 CHAIR SIMPSON: Opposed.

20 (No response)

21 CHAIR SIMPSON: Motion carries. Thank
22 you. Briefing items. Terisa.

23 MS. OOMENS: Yes, I'm here.

24 CHAIR SIMPSON: I presume that there
25 have been no -- there's no new activity on these

1 cases that are in court -- MEIC, regarding Western
2 Energy Company, also Signal Peak. Anything new on
3 those?

4 MS. OOMENS: So the Signal Peak one,
5 they've extended the deadlines a little bit.
6 They're still working on finalizing those, but
7 because the Board filed a Notice of
8 Non-Participation in that case, what the deadlines
9 are doesn't really affect us.

10 CHAIR SIMPSON: I see. Okay. On Item
11 (c), this is the Montana DEQ versus BER, Teck, and
12 the Board of County Commissioners of Lincoln
13 County; also Montana Environmental Information
14 Center, et. al versus BER, Teck Coal, Limited, and
15 the Board of County Commissioners of Lincoln
16 County regarding the selenium rule.

17 There has been, since this update was
18 printed, there has been a joint motion by all
19 parties to stay the scheduling order pending the
20 resolution of questions currently before the
21 Court. That stay was granted yesterday. So that
22 is the only change there.

23 Non-enforcement cases. First of all,
24 are there any questions regarding that case from
25 the members of the Board?

1 (No response)

2 CHAIR SIMPSON: Since our last meeting,
3 of course, everyone has been notified, and it's
4 noted in the agenda here, that the Board has
5 retained outside Counsel, Dana Hupp of Worden
6 Thane, to represent the Board.

7 There is, one of the matters pending
8 before the Court is consolidation of these cases,
9 so we're assuming that probably will be granted,
10 and so these cases for the time being are being
11 considered together on our agenda.

12 Non-enforcement cases. Terisa, are
13 there any updates on any of these?

14 MS. OOMENS: The only update that I have
15 that is not one of the action items is in the
16 Sidney Sugars case. The parties have asked for a
17 stay, and that was recent, so I don't think it
18 made it into the agenda. It asks for a stay until
19 January.

20 Sidney Sugars is still working its way
21 through figuring out if someone is going to buy
22 the company, or how that's going to work. And so
23 they just asked for a stay for a little bit more
24 time to figure that out.

25 CHAIR SIMPSON: I see. Okay. Thank

1 you. Item (c), Rippling Woods Homeowners
2 Association, et al., I see a decision is pending
3 by the Hearing Examiner. Are we anticipating that
4 this case will be ripe for decision by our next
5 meeting?

6 MS. OOMENS: Yes. That's the goal.
7 I've talked to the Hearing Examiner, and she said
8 she anticipates having it on the December agenda.
9 Oh, sorry. That's not the next meeting. Maybe
10 the next meeting, definitely by December.

11 CHAIR SIMPSON: This case has multiple
12 petitioners, does it not?

13 MS. OOMENS: Correct. That's why it's
14 taking so long to work through the whole process.

15 CHAIR SIMPSON: Well, I noticed in my
16 review of the cases and their status recently that
17 there's been a lot of time gone into this, and I
18 presume that a lot of that has to do with the
19 multiple appellants.

20 MS. OOMENS: Correct. That's my
21 understanding.

22 CHAIR SIMPSON: Anything further on any
23 of these non-enforcement cases?

24 MS. OOMENS: Not that I'm aware of.

25 CHAIR SIMPSON: I have nothing either on

1 my notes. Any comments from the other Board
2 members, or questions on any of these
3 non-enforcement cases?

4 (No response)

5 CHAIR SIMPSON: Let's move on then to
6 cases not assigned to a Hearing Examiner. Teck
7 Coal, Limited, Board of County Commissioners, etc.
8 That's nothing -- That of course is being
9 contested by DEQ, et. al -- and MEIC et. al.
10 Excuse me. So nothing. We've already discussed
11 that.

12 Action items. Item III, Appeal and
13 Request for Hearing by Westmoreland Rosebud, LLC,
14 regarding the issuance of MPDES Permit No.
15 MT-0032042 in Colstrip.

16 This was the case where the parties have
17 entered into a settlement agreement, and are
18 proceeding with identifying or defining the water
19 quality and ephemeral drainages at the Rosebud
20 Mine. Mr. Mercer, can you bring us up to date, or
21 is there anything that you'd like to add to what's
22 in the agenda?

23 MR. MERCER: Thank you, Mr. Chairman.
24 Thank you. And you'll note that Ms. Bowers
25 provided an update to the Board that notes that

1 DEQ will finalize the quality assurance project
2 plan by the end of this month.

3 Westmoreland has provided comments, and
4 so obviously we will be reviewing what DEQ
5 completes by the end of the month, but I think at
6 this point that's what's happened pursuant to the
7 stipulation, and until the quality assurance plan
8 is completed, we won't have -- there's nothing
9 else that I would add at this point.

10 CHAIR SIMPSON: I don't recall that the
11 settlement agreement included a schedule; is that
12 correct?

13 MR. MERCER: It did set forth the plan
14 that needed to be done, what we needed to do in
15 conjunction with DEQ pursuant to the stipulation,
16 but you're right, there weren't specific timelines
17 in terms of exactly what would happen when. But I
18 think we have made good progress based upon the
19 stipulation at this point.

20 CHAIR SIMPSON: Okay. I guess that's
21 one thing that had crossed my mind, is whether or
22 not there should be a schedule or a projected
23 timeline. And I guess I'd be inclined to hold off
24 on any discussion along that line until we see the
25 QAPP at the next meeting.

1 MR. MERCER: Well, from our perspective,
2 Mr. Chairman, I think that's prudent.

3 CHAIR SIMPSON: Any other comments from
4 the Board on this matter?

5 (No response)

6 CHAIR SIMPSON: Thank you. Moving on,
7 Item (b). I believe we were going to get a status
8 update on this.

9 MS. MOISEY-SCHERER: Chairman Simpson,
10 Angie Colamaria has raised her hand.

11 CHAIR SIMPSON: Yes, Ms. Colamaria.

12 MS. COLAMARIA: Kirsten Bowers from DEQ
13 is the lead Counsel on this and is not here today,
14 but I can provide an update if that would be
15 helpful.

16 CHAIR SIMPSON: Okay. Thank you. Mr.
17 Mercer's hand is up as well. Are you involved in
18 this case also?

19 MR. MERCER: Yes. Thanks, Mr. Chairman.
20 We are, but I'll wait to hear Ms. Colamaria's
21 report, and if I've got anything to add, I'll jump
22 in then if that's acceptable to you.

23 CHAIR SIMPSON: That's great. Thank
24 you. Would you please proceed, Ms. Colamaria.

25 MS. COLAMARIA: Sure. The parties in

1 this case are working on a permit renewal under
2 the terms of our settlement agreement. In May DEQ
3 requested additional information regarding some
4 outfall conditions from Westmoreland to assist us
5 in drafting the permit -- the renewal of the
6 permit. Sorry -- under the terms of settlement
7 agreement.

8 Westmoreland responded in June of this
9 year. We're currently reviewing that response.
10 We may have additional requests or questions as is
11 normal. It may be necessary to update the
12 settlement agreement, and propose a revised time
13 frame to complete the permit renewal.

14 I think that's about it substantively,
15 but Bill would add whatever I missed.

16 MR. MERCER: That really is pretty
17 complete, Mr. Chairman. I think I would only add
18 that the Hearing Examiner did convene us, and we,
19 Ms. Bowers and I provided the update that you just
20 heard from Ms. Colamaria.

21 And I think the only thing I would add
22 is that we've had an initial conversation about
23 proposing additional time frame, additional
24 calendar pursuant to a stipulation, but we haven't
25 yet settled upon what those dates might look like.

1 But I think we may well be coming to you with that
2 additional proposal at the next meeting.

3 The only thing I guess I would add, too,
4 is although this matter is now pending at DEQ,
5 it's certainly possible that there would be
6 another permit appeal based upon what the final
7 terms are. We don't want to prejudge that at this
8 point.

9 But I think we had submitted the
10 responsive comments. We're going to wait for the
11 issuance of the permit. And depending on the
12 timing of that, it may or may not be necessary to
13 provide additional stipulation terms on timing to
14 the Board. But we'll have more clarity on that by
15 the time your next meeting occurs.

16 CHAIR SIMPSON: Okay. Thank you. I
17 guess I would observe that this case has been
18 going on since 2015, eight years. I would
19 encourage you to come to some resolution as to how
20 this case is going to proceed going forward. I
21 mean it seems like if we end up with a new appeal,
22 that would seem to start the clock all over again.

23 I've been more than a little concerned
24 about some of these cases that have been on our
25 docket for years. A normal contested case, going

1 back and reviewing some of the schedules, should
2 be 15 to 18 months, assuming no intervenors or
3 other matters.

4 Of course we encourage settlement
5 discussions, and hope a lot of these cases can be
6 settled before they come to the Board, but I'm
7 just asking the parties to try and keep this
8 moving forward so that it can be -- reach a
9 conclusion one way or another in the foreseeable
10 future. Any other comments from the Board?

11 (No response)

12 MR. MERCER: Mr. Chairman, this is Bill
13 Mercer. Can I state one additional thing on that?

14 CHAIR SIMPSON: Certainly.

15 MR. MERCER: Looking back at part of the
16 delay here, I think this is -- and I know you've
17 already had this in another matter this morning --
18 but I think some of the delay here was occasioned
19 by the fact that there was a pending District
20 Court case, that it made sense to put this
21 particular matter on hold while that case worked
22 its way through the judicial process.

23 And so I know when you look at that
24 timeline, it seems like it is a lengthy one, but
25 certainly some of that was the result of saying it

1 really made sense to wait to see what was going to
2 happen as part of a completely separate permit
3 challenge that was going to be relevant to the
4 resolution of this.

5 So I think that in part explains some of
6 the delay, but at this point, I think we've
7 submitted what -- we responded to the questions
8 that DEQ posed, and I think that we understand the
9 Board's interest in getting this resolved, so that
10 either the permit is final or there's an appeal
11 pursuant to what DEQ includes in the newly issued
12 permit.

13 CHAIR SIMPSON: Is that the Rosebud
14 case?

15 MR. MERCER: No. Oh, you mean that one
16 I'm saying --

17 CHAIR SIMPSON: The one we're waiting
18 on.

19 MR. MERCER: Well, at this point, no.
20 At this point we're not waiting on a decision.
21 But some of that delay, when you noted that the
22 appeal was docketed back in 2016, I think there
23 was a period of three years or thereabouts where
24 we were waiting for a Court decision, but that has
25 now been resolved, so that is no longer a basis

1 for --

2 CHAIR SIMPSON: Okay. I recall which
3 case you're talking about now. I'm sorry. I was
4 a little confused there for a minute. Okay. Go
5 ahead. I'm sorry, Mr. Mercer.

6 MR. MERCER: That really completes what
7 I wanted to say, Mr. Chairman.

8 CHAIR SIMPSON: Okay. Thank you very
9 much. We'll anticipate a status report at the
10 next meeting. Any other comments from the Board?

11 BOARD MEMBER AGUIRRE: Chairman Simpson,
12 I just want to echo your comments on the
13 timeliness of working through these matters, and
14 keeping them moving, because that is a shared
15 concern I think by several of the Board members
16 that these cases are not moving along very
17 quickly. And maybe that's not the exact right
18 word, "quickly," but many of them have been around
19 for a long time.

20 CHAIR SIMPSON: Thank you, Board Member
21 Aguirre. That's a subject we'll circle back to
22 later on in the meeting in more general terms, as
23 opposed to this specific case. Anything else?

24 (No response)

25 CHAIR SIMPSON: Okay. Let's proceed to

1 Item (c), request for hearing by Harry Richards,
2 Lincoln County. We are being asked to decide --
3 Well, it's up to us to decide whether to adopt the
4 Hearing Examiner's findings of fact, conclusions
5 of law, and summary judgment order, which was
6 included in our packet, and I presume everyone has
7 read.

8 I have had no request for any oral
9 argument, but I will ask if Mr. Richards is on the
10 call, or is anyone representing Mr. Richards would
11 like to address this.

12 MS. MOISEY-SCHERER: Chair Simpson, Nick
13 Whitaker of DEQ is asking to speak.

14 CHAIR SIMPSON: That was my next
15 question. Mr. Whitaker.

16 MR. WHITAKER: Good morning, Chair
17 Simpson, members of the Board. Yes, Nick
18 Whitaker, attorney for DEQ on this matter.

19 Actually earlier this week, DEQ had
20 requested that this matter be removed from the
21 action items for today's meeting, and extended out
22 until the October meeting in order to allow Mr.
23 Richards the opportunity to file exceptions to the
24 Hearing Examiner's proposed order as is required
25 in statute.

1 On Wednesday, the Hearing Examiner
2 issued an order setting out exceptions deadline,
3 and noting that this matter would be taken up at
4 the Board's -- or sent to the Board for
5 consideration at the October meeting. And so I
6 guess DEQ just requests that we not take up this
7 matter today in order to allow the exceptions
8 process to play out.

9 CHAIR SIMPSON: Okay. Ms. Oomens, does
10 this extension until the next meeting require a
11 vote from the Board?

12 MS. OOMENS: No. No, Chair, it does
13 not.

14 CHAIR SIMPSON: Okay. Thank you. Well,
15 in that case, we'll hold off on this item until
16 the next meeting.

17 Item (d), in the Matter of the Denial of
18 Opencut Permit 3115 for FirstMark Materials.
19 This, according to our agenda, stipulated
20 settlement agreement, motion -- excuse me --

21 "April 28th, the parties filed a
22 stipulated settlement agreement and a motion for
23 dismissal with prejudice, and on May 1, the
24 Hearing Examiner issued an order dismissing the
25 appeal. The Board will now decide whether to

1 adopt the Hearing Examiner's order."

2 I don't recall seeing that in our
3 package. Is that something we should have
4 received?

5 MS. OOMENS: It should have been in your
6 packet.

7 CHAIR SIMPSON: Did I miss something?

8 BOARD MEMBER AGUIRRE: I missed it, too,
9 so if we're erring, we're making the same error
10 for some reason.

11 CHAIR SIMPSON: The only item that was
12 covered in the packet I believe was the Richards
13 case.

14 BOARD MEMBER SMITH: For your
15 information on this, it's not much, but it's on
16 Page 141 of the PDF, or in the red numbers Page
17 140. It's right after the Richards case. There's
18 it looks like three or four pages on this, but
19 there's not really any information there other
20 than the motion for dismissal.

21 CHAIR SIMPSON: Page 140? Oh, there it
22 is, two lines.

23 BOARD MEMBER AGUIRRE: Thanks, Joe. I
24 missed that as well.

25 CHAIR SIMPSON: Should there have been a

1 copy of the settlement agreement here, or is there
2 one?

3 MS. OOMENS: I know there was a
4 settlement agreement that the parties entered
5 into. I can check and see if it's in our files.
6 The parties may have just requested a joint
7 dismissal without sending the settlement agreement
8 to the Hearing Examiner.

9 CHAIR SIMPSON: I guess that's what I
10 was looking for was a copy of the settlement
11 agreement.

12 MS. OOMENS: It looks like Ms. Marquis
13 may be able to answer some of our questions.

14 CHAIR SIMPSON: Ms. Marquis, you've got
15 your hand up. Maybe you can clarify here.

16 MS. MARQUIS: Good morning, Chair
17 Simpson, members of the Board. My name is Vicki
18 Marquis. I represent Croell. We were one of the
19 petitioners in the FirstMark matter.

20 Yes, there is a settlement stipulation,
21 and it was filed with the Board and with the
22 Hearing Examiner. And it was a pretty simple
23 stipulation, but we were able to reach an
24 agreement with DEQ on this matter, and so it
25 should be dismissed based on the agreement we

1 reached.

2 The agreement, the stipulated settlement
3 agreement was dated April 28th, 2023, and I
4 believe it was sent to -- I'm just looking at the
5 certificate of service -- it was sent to the BER
6 secretary, Liz Leman, Lee McKenna, and then all
7 the attorneys of record on the matter.

8 I'd be happy to describe the settlement
9 agreement to you, or if you would like to see a
10 copy, I think it can be probably be found in a
11 couple different places, and emailed out perhaps.

12 CHAIR SIMPSON: Would you describe it to
13 us, please.

14 MS. MARQUIS: Yes. Certainly. The
15 settlement agreement, it begins with simply a
16 narrative text describing sort of the procedure of
17 this and the timing of when it was appealed; and
18 the allegations filed by FirstMark and Croell; and
19 then DEQ's position notes that those are their
20 positions, but then also notes that FirstMark,
21 Croell, and the Department hereby agree as
22 follows, and I'll just read -- we've misnumbered
23 them. I apologize.

24 There are three points we agreed on.
25 The first is, "FirstMark and Croell will jointly

1 move for an order dismissing the appeal with
2 prejudice."

3 No. 2, "Croell's application is for the
4 same operation at the same location, and reliant
5 upon the same technical support information as the
6 Oscar's site permit application submitted by
7 FirstMark on April 19th and 20th, 2019."

8 And No. 3, which unfortunately is
9 misnumbered as No. 4, but it reads, "The
10 Department will process Croell's application in
11 accordance with all applicable statutory and
12 regulatory deadlines."

13 Dated 28th of April 2023, signed by
14 attorneys for Croell, MC Property Holdings as
15 agent for FirstMark, and the Montana Department of
16 Environmental Quality.

17 So essentially what happened was we
18 agreed that Croell would submit their application
19 for the permit for the same pit, at the same site
20 that was pending under the FirstMark application.

21 CHAIR SIMPSON: Okay. I believe I
22 recall this, but just for clarity, could you
23 summarize the initial point of disagreement that
24 was the subject of the petition.

25 MS. MARQUIS: Sure. There was a permit

1 application pending under FirstMark, this is for a
2 gravel pit operation, and it had been pending for
3 some time. There had been some back and forth and
4 a public hearing.

5 And on November 22nd, 2022, DEQ issued a
6 denial letter for the opencut mine permit. It's
7 permit No. 3115. And FirstMark alleged that that
8 denial was improper, and appealed that denial
9 letter to the Board, asking that the Board declare
10 the denial letter null and void, and then remand
11 it back to the Department to rescind the denial
12 letter, and process the application in accordance
13 with the Opencut Mining Act.

14 But the parties have agreed to leave
15 their positions as is, and just move forward with
16 a new application that Croell submitted, and DEQ
17 agreed to process that under the deadlines
18 provided in rule and in law, and that process is
19 moving forward as we speak.

20 So that's sort of crux of the
21 settlement. And I don't know if Lee McKenna is on
22 the phone, but I do want to note. I've tried to
23 fairly characterize it as it was laid out in the
24 settlement stipulation, but DEQ might have
25 additional or different views. But from our view,

1 that's sort of the crux of it.

2 CHAIR SIMPSON: Thank you. That was my
3 next question. Anybody from the Department have
4 anything to add? Ms. Colamaria.

5 MS. COLAMARIA: Thank you, Chair. This
6 is Angie Colamaria. I don't have anything
7 substantively to add to Ms. Marquis's summary. It
8 was correct.

9 Our main concern with the application as
10 it previously existed was the actual applicants
11 have switched, and we don't have flexibility in
12 the opencut laws to process it, as it's not the
13 applicant that's going to be running the
14 operation.

15 So the settlement agreement just kind of
16 resolves that issue. They agreed to submit a new
17 application, as Ms. Marquis said. They've
18 submitted a new application, and we're moving
19 forward with that.

20 CHAIR SIMPSON: Okay. Thank you very
21 much. Ms. Oomens, is there any reason why the
22 Board should not proceed with the issue at hand,
23 that is, approving or not approving the settlement
24 agreement?

25 MS. OOMENS: Unless one of the Board

1 members would like to review the settlement
2 agreement in writing, I believe you can proceed to
3 a vote.

4 BOARD MEMBER AGUIRRE: I would like to
5 make a motion that the settlement agreement and
6 adoption of the Hearing Examiner's order
7 dismissing appeal is approved. And if I've stated
8 that incorrectly, please correct me.

9 MS. OOMENS: No, I think that was
10 correct.

11 BOARD MEMBER SMITH: I'll second that
12 motion.

13 CHAIR SIMPSON: A motion has been made
14 and seconded to approve. Any further discussion
15 from the Board?

16 (No response)

17 CHAIR SIMPSON: Hearing none, all in
18 favor, say aye.

19 (Response)

20 CHAIR SIMPSON: Opposed.

21 (No response)

22 CHAIR SIMPSON: Motion carries. Thank
23 you.

24 I see we have two new contested cases.

25 A request for hearing by Dairy Subdivision,

1 Missoula County, having to do with a mixing zone
2 issue; and a request for hearing on the order of
3 revocation of a certified operator license in
4 Hysham. Is there a motion?

5 BOARD MEMBER REITEN: Mr. Chairman, I
6 would move that we send these to a Hearing
7 Examiner.

8 CHAIR SIMPSON: That would be Agency
9 Legal Services?

10 BOARD MEMBER REITEN: Yes.

11 CHAIR SIMPSON: Is there a second?

12 BOARD MEMBER SMITH: I'll second that.
13 The one thing I'll say is we've got very minimal
14 information provided on both of these. Maybe it's
15 just me being an engineer, and especially the
16 first case filed by PCI, it makes sense to me.

17 Both of these seem like pretty simple
18 cases. Maybe it warrants a discussion on whether
19 we -- I know we've had this discussion a lot --
20 but whether we review it as a Board. I think
21 probably a Hearing Examiner is the right decision
22 here, but both of these seem like pretty simple
23 cases to me.

24 CHAIR SIMPSON: The motion has been made
25 and seconded. Discussion.

1 BOARD MEMBER AGUIRRE: I agree with
2 Board Member Smith on the characterization of
3 these cases as being fairly straight forward, it
4 appears. And I was wondering as well if maybe
5 these should be cases that the Board hears instead
6 of going to a Hearing Examiner. And just
7 respectfully, I think that I will vote no, because
8 I believe it would be a more effective way for the
9 Board to hear these cases.

10 CHAIR SIMPSON: I guess I would suggest
11 that given that these cases appear to be -- and I
12 have to emphasize the word "appear" because
13 sometimes appearances can be deceiving -- but I
14 was going to suggest that these might be cases
15 that would be appropriate for suggesting the
16 informal proceedings process as opposed to
17 bringing them to the Board.

18 And the reason I say that is for the
19 Board to take on the matter of the initial
20 scheduling, meetings scheduling, and all of the
21 hearing responsibilities, and so on, is something
22 that would take up quite a bit of time. And
23 that's been done in the past. Yes. Ms. Aguirre.

24 BOARD MEMBER AGUIRRE: Would you explain
25 the informal process then?

1 CHAIR SIMPSON: Oh, boy. I spent so
2 much time on it I should be able to recite it in
3 my sleep, but it's been a little while now.

4 Basically it's an informal conference
5 that bypasses the hearing process, and sends the
6 decision directly to the Hearing Examiner, but
7 both parties have to waive the process, that is,
8 the contested case process is set in statute, but
9 there is a provision in the statute for an
10 informal process.

11 And a year or so ago the Board
12 essentially adopted the informal process, but
13 that's really kind of a gross overview of how it
14 works. It's meant to accelerate the process for
15 relatively -- it's only of any utility for a
16 straight forward case such as these appear to be.

17 But it's a matter of if this case is
18 assigned to a Hearing Examiner, then the Hearing
19 Examiner would give the parties an opportunity to
20 use the informal process, which essentially
21 consists of an informal conference by the parties
22 to state their positions, and from that point on
23 for the Hearing Examiner to propose a proposed
24 findings of fact and conclusions of law to the
25 Board to resolve the issue.

1 BOARD MEMBER AGUIRRE: I have one
2 remaining question, Chairman. If the Board
3 approves the motion as it stands, to go to a
4 Hearing Examiner, can the Board add a suggestion
5 that that be considered, or is that completely up
6 to the Hearing Examiner?

7 In other words, can we -- is it prudent
8 or appropriate to amend Chairman Reiten's motion
9 to suggest that they explore that informal
10 process?

11 And Chairman Reiten, I don't want to
12 change your motion. I'm just trying to figure
13 out, because I do like that opportunity for these
14 cases.

15 CHAIR SIMPSON: Well, initially when the
16 Board went through the process of providing some
17 definition to the informal process, the Board had
18 ordered that for each case the Hearing Examiner
19 offer that option to the parties, but for more
20 complex cases, it was --

21 To make a long story short, there were
22 no cases in which the parties opted for the
23 informal process. And I think the realization is
24 that most of the time -- again, depending on the
25 nature of the case -- but for some of the more

1 complex cases that come before the Board, it
2 really doesn't make sense.

3 In these it may make sense and it may
4 not, depending on the specifics. But yes, the
5 Board could direct the Hearing Examiner working
6 these cases to explain that informal process and
7 make it available to the parties. And yes, I
8 believe it would be appropriate to amend the
9 motion to make that clarification.

10 BOARD MEMBER REITEN: Mr. Chairman, I
11 would gladly amend that motion to do that.

12 CHAIR SIMPSON: Thank you, Board Member
13 Reiten. Second to that amendment?

14 BOARD MEMBER RANKOSKY: Second.

15 CHAIR SIMPSON: It's been moved and
16 seconded that these cases be assigned to ALS, and
17 that the Hearing Examiner or Examiners be directed
18 to make available to the parties the informal
19 procedures that were established by the Board.
20 Further discussion?

21 (No response)

22 CHAIR SIMPSON: All in favor.

23 (Response)

24 CHAIR SIMPSON: Opposed.

25 (No response)

1 CHAIR SIMPSON: Motion carries. Next
2 item, general public comment. Under this item,
3 members of the public may comment on any public
4 matter within the jurisdiction of the Board that's
5 not otherwise on the agenda other than contested
6 cases. Is there any public comment?

7 (No response)

8 CHAIR SIMPSON: Hearing none, we'll move
9 to on Item 6, the Board Chair update.

10 We had initially intended to -- I should
11 say considered making this meeting an in-person
12 meeting, and on consultation with Ms. Oomens on
13 what our agenda was going to look like, decided
14 not to do an in-person meeting, just because it
15 didn't make sense to me to have everyone travel to
16 Helena for a meeting that probably wouldn't take
17 more than an hour or so.

18 So I guess I suggest we take a look at
19 the October meeting. I've been anticipating that
20 the Rippling Woods case would be coming before us,
21 but it sounds that like that's iffy at this point
22 as well.

23 I guess what I would suggest is that we
24 follow the same line of thought, and that is that
25 depending on how the agenda turns out, considering

1 October for an in-person meeting, but we'll make
2 that decision a couple of weeks before if the
3 Board is in agreement with that.

4 (Nods heads)

5 CHAIR SIMPSON: I see heads nodding, so
6 I think we are okay there. I don't think we need
7 a motion for that.

8 Also in discussions with the Department
9 on budget matters, I'd gone back -- and I think I
10 mentioned I was going to do this at a previous
11 meeting -- went back and did an analysis of the
12 various cases that are in progress right now, in
13 terms of the hours that have been billed on them,
14 and projected hours going forward.

15 And one of the things that was apparent
16 from that analysis -- and Board Member Aguirre,
17 this I think addresses the question, or goes to
18 the question you brought up earlier about the time
19 that some of these cases have been taking.

20 On those cases that have had a lot of --
21 gone on for some period of time, and extensions,
22 although I think it is incumbent on the Board to
23 try to keep things moving as well as we can,
24 there's not a lot of time that goes into them. It
25 was a fraction of an hour here and a fraction of

1 an hour there, depending on what comes before the
2 Hearing Examiner.

3 But for those cases that are kind of in
4 some manner extended, it doesn't seem to be a
5 major expense because there are very few hours
6 expended. Just as a matter of general interest,
7 it appears that most of these cases, if they
8 follow the standard course, that is, without
9 interventions and so on, 80 to 100 hours of legal
10 time is about what we're looking at.

11 So it gives kind of a rule of thumb,
12 just in terms of legal cost, what each of these,
13 what each case means in terms of budget
14 considerations for the Department. That
15 translates to probably \$8,000 or \$10,000 per case,
16 but they can vary widely depending on the progress
17 of the case, or I should say the trajectory of the
18 case, and also whether or not it's settled. Of
19 course, if there's a settlement, then it takes a
20 lot less legal time.

21 That's just a matter of general
22 information I wanted to pass along to you. If you
23 have any interest in more of the specifics, I can
24 provide a spreadsheet, a copy of the spreadsheet
25 if you'd like. But it's just general background

1 information, but I wanted to mention that before
2 we adjourn.

3 BOARD MEMBER AGUIRRE: Chairman Simpson.

4 CHAIR SIMPSON: Any comments or
5 questions on that? Board Member Aguirre.

6 BOARD MEMBER AGUIRRE: Thank you for
7 that information. I think that's valuable. I
8 also wonder if that doesn't lend itself at some
9 point here in the near future to more discussion
10 about how those cases are worked in terms of the
11 length of time that, say, 80 to 100 hours is
12 spread out over, if there's any opportunity
13 potentially to look at how to --

14 I want to pick the right word.
15 "Expedite" isn't necessarily the right word.
16 "Efficiently" maybe isn't the right word. But
17 kind of a combination of that kind of thinking. I
18 mean I know that Board matters are one part of
19 people's efforts, but maybe there's some
20 opportunities, is what I'm wondering.

21 CHAIR SIMPSON: Well, sometimes it seems
22 that there are extensions approved that do
23 nothing, little more than prolong the process, and
24 generally joint requests for extensions by the
25 parties seem to be routinely approved.

1 So I think that raises a good point, and
2 perhaps what we ought to do is plan an agenda item
3 for our next meeting considering any guidance that
4 the Board might provide to Hearing Examiners on
5 justification for extensions.

6 It's kind of a fine line because
7 petitioners are entitled to due process, but on
8 the other hand, extensions, time extensions should
9 have some basis.

10 And so I guess I would ask our Counsel
11 Ms. Oomens to provide some guidance to the Board
12 on how we might try to tighten up the criteria for
13 awarding extensions, time extensions going
14 forward.

15 MS. OOMENS: Yes, I think that would be
16 a great agenda item for the next meeting to get
17 the Board's input as far as how they would like
18 the Hearing Examiners to -- not necessarily
19 conduct the hearing process, but what they would
20 like the Hearing Examiner to consider when
21 extensions specifically are requested.

22 CHAIR SIMPSON: Okay. Well, let's plan
23 on an agenda item for the next meeting. And
24 Terisa, let's get together here sometime in the
25 next few weeks to kind of outline what that might

1 look like.

2 MS. OOMENS: Okay.

3 CHAIR SIMPSON: Ms. Colamaria.

4 MS. COLAMARIA: Thank you, Mr. Chairman.
5 Will there be an opportunity for the parties that
6 regularly appear before the Board to have a chance
7 to comment on that discussion?

8 CHAIR SIMPSON: Well, certainly. This
9 is -- we're not talking about a rule. I think
10 we're talking about a general policy. But yes, I
11 think it would be appropriate to have Counsel for
12 both the Department and petitioners to comment on
13 that issue.

14 MS. COLAMARIA: Thank you, Mr. Chair.

15 BOARD MEMBER AGUIRRE: I think it's
16 important to clarify what you just said, Chairman
17 Simpson. We're not setting a policy. We're
18 talking about sort of -- I guess in my world it
19 would be termed "continual improvement."

20 CHAIR SIMPSON: Guidance.

21 BOARD MEMBER AGUIRRE: Guidance.

22 CHAIR SIMPSON: Guidance, policy. I'm
23 not even sure what the correct terminology is.
24 But we're certainly not talking about a Board rule
25 that would require a formal process, just some

1 discussion by the Board, and some policy guidance
2 as to what justification would be appropriate for
3 extensions of time, rather than just automatic
4 extensions.

5 BOARD MEMBER AGUIRRE: It's a
6 conversation which has never happened during my
7 time on the Board, and I think that it would be
8 valuable.

9 MS. COLAMARIA: I think it's a great
10 idea. I'm just thinking those of us who are
11 submitting those requests for extensions might be
12 able to give you some insight into the
13 justification, so it would help your conversation.

14 BOARD MEMBER AGUIRRE: That's awesome.

15 CHAIR SIMPSON: Any more discussion on
16 that topic?

17 BOARD MEMBER REITEN: Mr. Chairman, yes.
18 I think some generic examples of something like
19 that might be an interesting part of that process
20 for us to talk about, or just see some -- how it's
21 been done in the past. So that's all.

22 CHAIR SIMPSON: Okay. Thank you.
23 Anything further?

24 BOARD MEMBER AGUIRRE: I'd just like to
25 acknowledge I think that that's a good suggestion

1 by Chairman Reiten.

2 CHAIR SIMPSON: Okay. Thank you,
3 everyone. Anything further?

4 (No response)

5 CHAIR SIMPSON: Is there a motion to
6 adjourn.

7 BOARD MEMBER SMITH: So moved.

8 BOARD MEMBER REITEN: I'll second that.

9 CHAIR SIMPSON: It's been moved and
10 seconded to adjourn the meeting. Thank you very
11 much, everyone, and we'll convene again in
12 October.

13 BOARD MEMBER REITEN: Do we need to vote
14 on that?

15 CHAIR SIMPSON: Yes, we do. All in
16 favor say aye.

17 (Response)

18 CHAIR SIMPSON: Opposed.

19 (No response)

20 CHAIR SIMPSON: Thank you very much.

21 (The proceedings were concluded

22 at 10:02 a.m.)

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C E R T I F I C A T E

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STATE OF MONTANA)
: SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing -37- pages contain a true
record of the proceedings to the best of my
ability.

IN WITNESS WHEREOF, I have hereunto set my
hand and affixed my notarial seal this 18th day of
August, 2023.

/s/ Laurie Crutcher

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

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