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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
October 20, 2023)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 20, 2023, 2023
9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
JULIA ALTEMUS, STACY AGUIRRE,
and JENNIFER RANKOSKY

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC
lauriecrutcher@gmail.com

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 (Board Member Rankosky not present)

5 CHAIR SIMPSON: Good morning, everyone.
6 Let's bring the meeting to order. Sandy, would
7 you take the roll, please.

8 MS. MOISEY-SCHERER: Chairman Simpson.

9 CHAIR SIMPSON: Here.

10 MS. MOISEY-SCHERER: Vice Chair Aguirre.

11 BOARD MEMBER AGUIRRE: Here.

12 MS. MOISEY-SCHERER: Board Member
13 Altemus.

14 BOARD MEMBER ALTEMUS: Here.

15 MS. MOISEY-SCHERER: Board Member
16 Rankosky.

17 (No response)

18 MS. MOISEY-SCHERER: Board Member
19 Reiten.

20 BOARD MEMBER REITEN: Here.

21 MS. MOISEY-SCHERER: Board Member Smith.

22 BOARD MEMBER SMITH: Here.

23 MS. MOISEY-SCHERER: We have a quorum
24 with five.

25 CHAIR SIMPSON: Thank you, Sandy. Could

1 we also please for the record commit who else is
2 on the call.

3 MS. MOISEY-SCHERER: I have Laurie
4 Crutcher, our Court Reporter; I have Deputy
5 Director James Fehr; I have Board Counsel Terisa
6 Oomens; DEQ attorney Kurt Moser; Nick Whitaker,
7 DEQ; Vicki Marquis, Crowley Fleck; Bill Mercer,
8 Holland and Hart; Aaron Pettis, DEQ; Barbara
9 Chilcott, attorney; Elena Hagen, Agency Legal
10 Services; Elizabeth Torske, DEQ; Emily Lodman,
11 DEQ; Gabrielle Ostermayer; Jessica Wilkerson, DEQ;
12 Kaitlyn Whitfield, Agency Legal Services; Ryen
13 Godwin; and Sara Christophersen, DEQ.

14 * * * * *

15 (Also present via Zoom: Catherine Armstrong, DEQ;
16 Angie Colamaria, DEQ; Loryn Johnson, DEQ; Sonja
17 Nowakowski, DEQ; Ray Stout, Kootenai Valley
18 Record; Matthew Adams)

19 * * * * *

20 CHAIR SIMPSON: Thank you. The first
21 item on the agenda is review and approve the
22 minutes from previous meeting August 11th. Any
23 comments or corrections to the minutes from the
24 Board members?

25 (No response)

1 CHAIR SIMPSON: Hearing none, is there a
2 motion?

3 BOARD MEMBER AGUIRRE: I make a motion
4 to approve the minutes from the last meeting.

5 BOARD MEMBER REITEN: I'll second that.

6 CHAIR SIMPSON: A motion has been made
7 and seconded. Any further discussion?

8 (No response)

9 CHAIR SIMPSON: All in favor say aye.

10 (Response)

11 CHAIR SIMPSON: Opposed.

12 (No response)

13 CHAIR SIMPSON: Motion carries. Next is
14 briefing items. I don't really have any further
15 comment on these. Let's go through them page by
16 page from the agenda.

17 On the first page we start out with
18 cases in court. This is MEIC and the Sierra Club
19 versus DEQ having to do with Western Energy. That
20 I presume is still pending?

21 MS. OOMENS: That is correct.

22 CHAIR SIMPSON: Is that correct? Page
23 2. The second item has to do with Signal Peak.
24 That one is still, is in court and in process.

25 Third, DEQ versus Board of Environmental

1 Review, Teck Coal, the Board of County
2 Commissioners -- and MEIC, Clark Fork Coalition,
3 Idaho Conservation League, etc., versus the Board
4 of Environmental Review, Teck Coal, Limited, and
5 Board of County Commissioners, Lincoln County.

6 There's not been a lot happening on this
7 case pending action by the Judge on a couple of
8 matters that are highlighted in the last two
9 paragraphs. Any questions or comments there from
10 the Board?

11 (No response)

12 CHAIR SIMPSON: Moving on to
13 nonenforcement cases, anything on 2(a)?

14 (No response)

15 CHAIR SIMPSON: Still pending by the
16 Supreme Court. Anything further on Page 4?

17 (No response)

18 CHAIR SIMPSON: Page 5.

19 (No response)

20 CHAIR SIMPSON: The Alpine case is one
21 that has been going on for quite some time. I see
22 we have joint status report due in November.

23 And this next one, Rippling Woods
24 Homeowners Association, et al., regarding approval
25 of opencut mining 2949 Moudy Pit site. The

1 decision is pending by the Hearing Examiner, and
2 is expected before the 2023, December 2023 Board
3 meeting.

4 This I presume, at least according to
5 this scheduling, is something we'll be seeing in
6 December. It is the first of many -- it will be
7 first of several, I should say, open cut issues,
8 permit issues to come before the Board. And given
9 the number of plaintiffs in this case, I presume
10 that this will take some extensive discussion and
11 consideration by the Board at our next meeting.

12 Anything further on Page 6?

13 (No response)

14 CHAIR SIMPSON: Page 7.

15 (No response)

16 CHAIR SIMPSON: Page 8.

17 (No response)

18 CHAIR SIMPSON: Page 9.

19 (No response)

20 CHAIR SIMPSON: Page 10.

21 (No response)

22 CHAIR SIMPSON: Eleven.

23 (No response)

24 CHAIR SIMPSON: And twelve.

25 (No response)

1 CHAIR SIMPSON: Terisa, if there's
2 anything new on any of these, please speak up.

3 One comment I would make is that it
4 would be a lot easier for review if updates would
5 be provided to the Board at each meeting would be
6 indicated in bold type or in some fashion, so that
7 we can pick up more quickly on what the most
8 recent developments have been, rather than going
9 through the whole thing.

10 Some of these have been going on for a
11 very long time, and the amount of print here is
12 getting to be quite voluminous.

13 MS. OOMENS: Just a quick follow up
14 question then. I'm happy to change how the agenda
15 is set out as far as what's included, so if you
16 guys just want what has happened since the last
17 meeting to be included on the agenda, I'm happy to
18 do that. Would that be more helpful?

19 CHAIR SIMPSON: No. I guess from my
20 standpoint, it would be just be helpful to
21 highlight the new developments.

22 MS. OOMENS: So leave everything --

23 CHAIR SIMPSON: The history is
24 important, but if we could just highlight the
25 recent developments in these various cases, I

1 think it would be a little easier for us to track.
2 Do any other Board members have any comment on
3 that?

4 MS. OOMENS: So you want me to leave the
5 whole paragraph, but like you said, maybe just
6 bold what has happened since the last meeting; is
7 that correct?

8 CHAIR SIMPSON: Yes, if we could do
9 that, please.

10 MS. OOMENS: Yes, I can do that.

11 CHAIR SIMPSON: I appreciate it. Any
12 other further comments on any of these, Terisa?

13 MS. OOMENS: No. I will say in the
14 Sidney Sugars case, they do have a status report
15 that is due I believe November 1st, and I'm not
16 sure that made it into the agenda, but they are
17 still stayed. So they're just trying to figure
18 out what's going on with the company. But
19 everything else looks up to date.

20 CHAIR SIMPSON: Further comments or
21 questions from the Board on any of these briefing
22 items?

23 (No response)

24 CHAIR SIMPSON: Okay. Hearing none,
25 we'll move on to the action items under Roman

1 Numeral III. The first has to do with
2 Westmoreland Rosebud Mining and the settlement
3 agreement that was approved by the Board earlier
4 this year. The update is summarized in the
5 agenda.

6 Representatives from DEQ and from
7 Western Energy, would you care to summarize
8 briefly where we are on this, please, and what our
9 next milestone will be.

10 MR. MOSER: Mr. Chairman, can you hear
11 me? This is Kurt Moser from DEQ.

12 CHAIR SIMPSON: Yes. Thank you.

13 MR. MOSER: I am sitting in for Kirsten
14 Bowers today. I am not sure if Counsel for
15 Westmoreland is on the line. Is that your
16 understanding?

17 CHAIR SIMPSON: I believe Mr. Mercer is
18 here.

19 MR. MERCER: Good morning, Mr. Chairman.
20 I'm on the line.

21 MR. MOSER: Good morning, everyone. Mr.
22 Chairman, members of the Board. I think the
23 update that was provided is fairly brief, and
24 explains where we are in the process. We're
25 working through it in accordance with the

1 stipulation.

2 We're in the process of evaluating
3 existing data, and on or by October 30th, we'll
4 make a written determination whether EC and SAR
5 concentrations in the receiving waters exceed the
6 applicable water quality criteria, and if that's
7 the case, the update goes into further detail
8 about that.

9 And basically we're trying to determine
10 whether or not we need to develop nonanthropogenic
11 standards, and we would be developing a sampling
12 analysis plan, and we have some time limits set on
13 those, 45 days from our determination that
14 additional data would be required. And then the
15 company would be obtaining some additional data in
16 accordance with that sampling and analysis plan.

17 So it seems that we are on track. I
18 know, Mr. Mercer, if you'd like to go ahead and
19 add, feel free.

20 MR. MERCER: No. That summarizes it.
21 And in the update, the last paragraph on Page 15
22 really does contain everything that's happened
23 since the Board's last meeting.

24 CHAIR SIMPSON: Okay. Well, thank you
25 very much. I'm pleased to see that we're making

1 progress on this, and looking forward to hearing
2 what the existing data base looks like, and
3 whether you'll be moving forward with any further
4 sampling.

5 After as many years in operation as has
6 been the case at Rosebud, hopefully there's a
7 pretty good data base to work from, to start from.

8 Any other comments from the Board on
9 this?

10 (No response)

11 CHAIR SIMPSON: In the matter of
12 Westmoreland Resources, Inc.'s appeal of final
13 MPDES Permit MT0021229, the Absaloka Mine in
14 Hardin.

15 We were to receive a -- we had a brief
16 report in August on this, and follow up today.
17 Should I start with Mr. Mercer or someone from
18 DEQ, available to give us the updated status
19 report on this case. This is another one that's
20 been going on for quite some time. Eight years to
21 be exact.

22 MR. MOSER: Mr. Chairman, members of the
23 Board, this is Kurt Moser again sitting in for
24 Kirsten Bowers on this one as well.

25 I guess just in a brief sense -- and

1 please, Mr. Mercer, add along after I am done here
2 -- but as of right now, in October of this year
3 Westmoreland submitted additional information.
4 We're working through a permit renewal process
5 right now. I think we're currently working on it,
6 towards an agreement on certain time frames for
7 that, for the renewal of the MPDES permit. And
8 right now DEQ is evaluating the data that was
9 recently submitted by Westmoreland.

10 MR. MERCER: Mr. Chairman, I think what
11 I would add to Mr. Moser's summary there is that
12 -- Chairman, you are correct. We provided the
13 oral briefing in August, and we had at that time
14 noted that DEQ had posed additional questions with
15 respect to this matter, and we responded on, I
16 believe it was the 30th of June.

17 And at this point, I think that
18 submission is still pending with DEQ, and that we
19 really at this point, I think, we're dependent
20 upon DEQ acting upon what we submitted. So I
21 agree with Mr. Moser that the process is ongoing,
22 but at this point we think we have provided the
23 information that the agency sought, and we're
24 looking forward to working with them on any
25 questions that they have.

1 But I would say the status on this is
2 really unchanged from the time we briefed the
3 Board at the time of the last meeting.

4 CHAIR SIMPSON: Thank you, Mr. Moser.
5 Comments from the Board on this?

6 BOARD MEMBER AGUIRRE: Mr. Chairman, my
7 question is: Is there a time frame from DEQ as
8 far as the review of the information that's been
9 submitted in the process that you're going through
10 right now with the permit renewal?

11 MR. MOSER: Mr. Chairman, and members of
12 the Board. This is Kurt Moser again for DEQ. I
13 would say that other than working with
14 Westmoreland on this, and reviewing the
15 information, if there are -- I think we, DEQ, I
16 guess we'll have to work internally and come up
17 with some reasonable time frame that we could do
18 that for renewing the permit, but we are currently
19 reviewing information that we did receive from
20 them.

21 And I guess we have had some issues with
22 some internal staffing issues with our permits
23 related to coal permitting, so we are working
24 through that as well. But I guess we don't
25 necessarily have a firm timeline at this point.

1 BOARD MEMBER AGUIRRE: Thank you. Mr.
2 Chairman, can we request some sort of timeline? I
3 know there's challenges. I hear that and
4 acknowledge that. It seems like there should be
5 some sort of timeline placed on the review. I
6 mean there would be otherwise, if I'm not
7 mistaken, Mr. Moser.

8 MR. MOSER: Mr. Chairman, members of the
9 Board. I think we do have -- I guess it would be
10 possible to work with Westmoreland on that. I
11 mean if there are some, you know, I guess --
12 between the two parties could work towards
13 something in that area, trying to identify what
14 reasonable time frames could be. I don't know if
15 Mr. Mercer has any further comment on that or not.

16 MR. MERCER: Well, Mr. Chairman, and
17 members of the Board. Thank you, Mr. Moser. I
18 did talk to Ms. Bowers about this very topic a
19 couple of weeks ago, because my sense is that we
20 feel like we've supplied what the Department -- we
21 responded to questions the Department wanted to
22 hear from, but I think it's difficult to come up
23 with a time frame for the Board, at least as of
24 now.

25 And I can commit to continue

1 communication with Ms. Bowers to see if in advance
2 of your next meeting we can sketch a time frame,
3 but my conclusion from talking to her was that we
4 weren't in a position to present that sort of
5 thing to the Board presently because of sort of
6 the challenges, the staffing challenges that the
7 Department is facing.

8 So I think she and I would both like to
9 be able to propose a time frame to the Board, but
10 at least as of now, we didn't think that we were
11 in a position to do that. So I guess what I could
12 commit to, Mr. Chairman, is continued
13 communication with the Department through Ms.
14 Bowers to see if in December we could propose a
15 time table to the Board, but we just didn't think
16 we had the wherewithal to do that for your October
17 meeting.

18 CHAIR SIMPSON: Thank you, Mr. Mercer,
19 Mr. Moser. My understanding of this case is that
20 it has to do with an MPDES permit renewal; is that
21 correct?

22 MR. MERCER: Yes, Mr. Chairman.

23 CHAIR SIMPSON: Dating back to 2015.
24 Normal permit term on an MPDES permit I believe is
25 five years, and this has been going on for eight.

1 I don't know. It just seems to me that we ought
2 -- there ought to be some way to resolve this
3 case, rather than just have it drag on, which it's
4 done for quite a long time now.

5 Ms. Oomens, I see there was an order
6 setting status conference held on July 24th. Are
7 there any other deadlines in the Hearing
8 Examiner's schedule on this?

9 MS. OOMENS: There are not, other than
10 that they were going to bring deadlines to the
11 Board. I'm happy to set another status
12 conference, but my opinion would be that the
13 parties coming in front of the Board to give the
14 Board deadlines is probably more efficient, to
15 answer your questions. But I'm happy to set a
16 status conference just as a Hearing Examiner if
17 you would prefer that I do it that way.

18 CHAIR SIMPSON: Well, I would leave that
19 to your discretion, and certainly as Hearing
20 Examiner -- I guess where I'm going with this is I
21 would like to either find the basis for a
22 settlement here, or if there are issues in
23 dispute, to bring it before the Board, rather than
24 just kicking the can down the road. So we'll look
25 forward to the update in December, and see what's

1 happening. Any further comments from the Board?

2 (No response)

3 MR. MERCER: Mr. Chairman, can I just
4 weigh in on this before you move to the next
5 section?

6 CHAIR SIMPSON: Certainly, Mr. Mercer.

7 MR. MERCER: So Mr. Chairman, I think we
8 had a little bit of a back and forth about this at
9 the August meeting.

10 But you can see from the narrative that
11 at least part of the delay that was occasioned
12 here was waiting for resolution of a District
13 Court case by the Montana Supreme Court.

14 And so what Westmoreland has submitted
15 is a new application, so it's for issuance of a
16 renewal permit, but we believe that we have
17 submitted the application, and we believe we've
18 responded to the Department's questions.

19 And so at this point what the parties
20 are looking for is a determination by the agency,
21 which may or may not result in another appeal.
22 Obviously if Westmoreland doesn't take issue with
23 the terms of the permit, then I don't believe the
24 Board would see this matter again.

25 But it is on your agenda as a result of

1 that history, but what we're looking for is the
2 issuance of a permit, which may or may not require
3 any further action by the Board. So we'll
4 certainly commit to trying to get to the end of
5 the process as quickly as possible, but I think a
6 lot of that delay was the result of judicial
7 decisions that were going to drive what was going
8 to happen with respect to what DEQ would do with
9 the renewal application.

10 CHAIR SIMPSON: Well, understood. When
11 was that case decided by the Supreme Court?

12 MR. MERCER: I don't have that in front
13 of me, Mr. Chairman. We can --

14 CHAIR SIMPSON: The Western Energy case.

15 MR. MERCER: I don't know the date of
16 that. We could certainly provide that to you at
17 the time of the next hearing.

18 CHAIR SIMPSON: My point is it's been
19 some time ago, four or five years at least, I
20 believe.

21 MR. MERCER: There was a District Court
22 order, which then led to an appeal to the Supreme
23 Court. And so I don't have the dates of those two
24 in front of me, but I think that really had a lot
25 to do with the delay.

1 CHAIR SIMPSON: I understand that. I'm
2 not familiar with the details really in either
3 case, but I know there was a parallel issue there.
4 I think we've probably spent enough time on this
5 unless there's further comment from the Board.

6 MS. MOISEY-SCHERER: Chairman Simpson,
7 Board Member Aguirre had her hand up.

8 CHAIR SIMPSON: Board Member Aguirre.

9 BOARD MEMBER AGUIRRE: I was just going
10 to thank Mr. Moser and Mr. Mercer for providing
11 insight on the communication that's going on
12 between them. That was really all my questioning,
13 the point of my questioning, is just kind of how
14 is this moving along, because there are definitely
15 timelines in issuing especially now what is a new
16 permit application. So I just wanted to thank you
17 for providing more insight in the fact that you
18 guys are communicating.

19 CHAIR SIMPSON: Agreed. Thank you very
20 much. Anything further?

21 (No response)

22 CHAIR SIMPSON: Let's move on to Item
23 (c). This is the request for hearing by Harry
24 Richards, Lincoln County.

25 My understanding of this is that we had

1 this on our agenda for the last meeting. It was
2 deferred until this meeting to give Mr. Richards
3 an opportunity to file exceptions, which my
4 understanding is he did not do. I guess I would
5 ask for a recap from the Department. First of
6 all, I'd ask: Is Mr. Richards or anyone
7 representing Mr. Richards on the call?

8 (No response)

9 MS. MOISEY-SCHERER: Chairman Simpson,
10 he is not on the call.

11 CHAIR SIMPSON: Thank you. Could the
12 Department recap for us where we are on this. We
13 have a summary judgment decision before us, but I
14 would like to have a summary from the Department,
15 just to be sure we all have an understanding of
16 what the issues are.

17 MR. WHITAKER: Good morning, Chair
18 Simpson, members of the Board. This is Nick
19 Whitaker, I'm the attorney for the Department
20 representing DEQ on this matter.

21 Yes. So just to recap this case, this
22 stems from an administrative order issued by the
23 Department in March of 2022 for a hazardous waste
24 violation by Mr. Richards up in Lincoln County.
25 Mr. Richards filed a letter requesting a hearing

1 related to the order.

2 But when he initially filed, there was a
3 few letters he filed early on in the case, but he
4 hasn't really participated in the case since I
5 guess last October was his last filing in this
6 matter.

7 DEQ filed a summary judgment motion
8 earlier this year. Mr. Richards did not respond
9 to that motion, and the Hearing Examiner granted
10 DEQ's motion in July of this year.

11 As you know, Chair Simpson, the Board
12 had set this matter for oral argument at the
13 August hearing, but DEQ had filed a motion just
14 requesting to reset it to this hearing today, or
15 this meeting today, so that the statutory
16 exceptions process could be set out.

17 And that process played out over the
18 last two months. Neither party filed any
19 exception to the Hearing Examiner's summary
20 judgment order, and so DEQ is just requesting that
21 the Board today just adopt the Hearing Examiner's
22 summary judgment order as the final agency action
23 of the Board.

24 CHAIR SIMPSON: Any questions for Mr.
25 Whitaker from the Board?

1 MS. MOISEY-SCHERER: Board Member

2 Aguirre has her hand up.

3 CHAIR SIMPSON: Board Member Aguirre.

4 BOARD MEMBER AGUIRRE: Mr. Chairman, I
5 was just going to move to make a motion that we
6 grant DEQ's motion for summary judgment, and enter
7 a final order affirming DEQ's issuance of the
8 March 7th, 2022 order.

9 CHAIR SIMPSON: Is there a second?

10 BOARD MEMBER ALTEMUS: I'll second.

11 This is Julia Altemus.

12 CHAIR SIMPSON: It's been moved and
13 seconded to -- I'll take this language from our
14 agenda -- adopt the Hearing Examiner's proposed
15 findings of fact, conclusions of law, and summary
16 judgment order. Is that a correct statement,
17 Stacy?

18 BOARD MEMBER AGUIRRE: Yes. I took my
19 words out of the conclusion of the -- so yes.

20 CHAIR SIMPSON: Understood. I just
21 wanted to clarify for the record. Discussion? A
22 motion has been made and seconded.

23 (No response)

24 CHAIR SIMPSON: I guess this seems
25 fairly straight forward to me. I do have a couple

1 of questions just for information.

2 At one point in the record there was a
3 reference made to an examination or question of
4 whether any water courses had been affected by
5 this action. My question is: Did I miss it, or
6 was that -- I'm assuming that determination was
7 made. Were there any water courses affected by
8 this oil, waste oil?

9 MR. WHITAKER: Chair Simpson, members of
10 the Board, no. I believe that DEQ's initial
11 violation letter to Mr. Richards mentioned a
12 nearby water course of some sort, but the order
13 issued to Mr. Richards was just under the Montana
14 Hazardous Waste Act, and did not involve any water
15 quality violations.

16 CHAIR SIMPSON: Okay. Assuming that the
17 Board approves the motion, or votes to adopt the
18 motion, what's the next -- what happens next?

19 MR. WHITAKER: Chair Simpson, members of
20 the Board. DEQ hasn't made any determination on
21 if it would take any further action against Mr.
22 Richards. I'm assuming we would attempt to obtain
23 compliance with the order, as we've been trying to
24 do prior to the order, but then DEQ would just
25 have to decide internally if Mr. Richards does not

1 comply with the order, if it would take any
2 additional action against him. And at that point
3 it would just be a District Court case in the
4 judicial context.

5 CHAIR SIMPSON: Okay. The order is to
6 mitigate?

7 MR. WHITAKER: Yes.

8 CHAIR SIMPSON: By removing the affected
9 soil?

10 MR. WHITAKER: That's correct.

11 CHAIR SIMPSON: If I remember correctly,
12 this case goes back to '19, so it's four years
13 old, or it's been four years since the action
14 resulting in the violation notice occurred.

15 So I guess my question is, after this
16 amount of time, whether that has any impact or
17 affect on the Department's orders, and the
18 potential impacts of going in and disturbing the
19 soil to remove it at this date, whether that has a
20 potential negative impact or not.

21 MR. WHITAKER: Chair Simpson, members of
22 the Board, yes. DEQ has been up to visit the site
23 since the unlawful disposal occurred a couple
24 different times. I'm just trying to see when the
25 last inspection occurred, but it may have been a

1 year or two ago.

2 But yes, I think that's something our
3 enforcement program I guess would take into
4 account in looking at any cleanup here. Certainly
5 we're requesting Mr. Richards to have a qualified
6 person do this cleanup, and they would ideally
7 submit a plan to DEQ, and we'd review it and make
8 sure the cleanup is done in a way that's obviously
9 going to mitigate the environmental harm that's
10 been done out there.

11 CHAIR SIMPSON: Thank you, Mr. Whitaker.
12 Any further comments or discussion from the Board?

13 (No response)

14 CHAIR SIMPSON: Hearing none, a motion
15 has been made and seconded to adopt the Hearing
16 Examiner's proposed findings of fact, conclusions
17 of law, and summary judgment order in the Harry
18 Richards case. All in favor say aye.

19 (Response)

20 CHAIR SIMPSON: Opposed.

21 (No response)

22 CHAIR SIMPSON: Motion carries.

23 (Board Member Rankosky present via Zoom)

24 CHAIR SIMPSON: Next item, Item (d), in
25 the matter of the hearing request for exploration

1 license 00680, Butte Highlands site, five year
2 bond determination.

3 And I believe, according to our agenda
4 here, that the Hearing Examiner issued an order
5 granting a stay July 31st of this year. On
6 September 21st, the parties filed a joint
7 stipulation and motion to dismiss, which the
8 Hearing Examiner issued an order dismissing the
9 appeal with prejudice on September 27th, and the
10 Board is being asked to adopt the order dismissing
11 appeal with prejudice. Once again, could we have
12 a brief summary of the issue here.

13 MS. MARQUIS: Good morning, Mr. Chairman
14 and members of the Board. My name is Vicki
15 Marquis. I represent the Highlands Joint Venture.
16 I'm not sure if you wanted an update from the
17 parties or from the Hearing Examiner, so let me
18 know if you want me to wave off and wait until
19 someone else has updated you.

20 CHAIR SIMPSON: Terisa, you're the
21 Hearing Examiner on this, are you not?

22 MS. OOMENS: I am. I think it's more
23 appropriate to talk to the parties, but if you
24 would like me to go over it, I definitely can.

25 CHAIR SIMPSON: Well, in that case,

1 let's turn the floor over to you, Ms. Marquis, and
2 I presume somebody from the Department will speak.

3 MS. MARQUIS: Thank you, Mr. Chairman,
4 members of the Board. We were happy that we were
5 able to get this resolved as timely as we could.
6 We appreciate working with DEQ attorney Jessica
7 Wilkerson on this.

8 It seemed like it was one discrete
9 issue, but it really would have a big impact on
10 reclamation down the road, and the ability for our
11 client to get the highest value if they wanted to
12 sell the property later, and we were able to
13 resolve that through working through a reclamation
14 schedule with DEQ, and coming to an agreement
15 about future requests for the ability to retain
16 some infrastructure on the property.

17 So if you want, it's a settlement, so it
18 didn't get to -- they didn't get the affirmative
19 action that they wanted, but like all settlements,
20 it was a compromise, and this one was reasonable
21 and timely, and so we appreciate that. I'm happy
22 to answer whatever questions you might have.
23 Thank you.

24 CHAIR SIMPSON: Thank you, Ms. Marquis.
25 Comments from the Department on this?

1 MS. WILKERSON: Thank you, Chairman, and
2 the rest of the Board. This is Jessica Wilkerson,
3 and I'm an attorney with DEQ working on this case.
4 Yes, and I concur with what Vicki said as far as
5 the outcome of the settlement. The Department has
6 appreciated being able to work with the attorneys
7 on the other side, and come to an agreement about
8 this, and we feel assured that the bond is
9 sufficient, and that we can move forward with
10 reclamation, and there's no more action needed by
11 the Board at this time.

12 CHAIR SIMPSON: Thank you. Any
13 questions from the Board for either Ms. Marquis or
14 Ms. Wilkerson?

15 (No response)

16 CHAIR SIMPSON: Hearing none, is there a
17 motion?

18 BOARD MEMBER AGUIRRE: I can make it, if
19 you'd like, Mr. Chairman. I'll make a motion to
20 adopt the order dismissing the appeal with
21 prejudice.

22 CHAIR SIMPSON: Is there a second?

23 BOARD MEMBER SMITH: I'll second.

24 CHAIR SIMPSON: It's been moved and
25 seconded to adopt the order dismissing the appeal

1 with prejudice with regard to the Butte Highlands
2 case. Any discussion?

3 (No response)

4 CHAIR SIMPSON: I guess I would
5 compliment the parties on working to achieve a
6 settlement here quickly and efficiently.

7 MS. WILKERSON: Thank you, Chairman and
8 the Board.

9 CHAIR SIMPSON: Further discussion?

10 (No response)

11 CHAIR SIMPSON: All in favor, say aye.

12 (Response)

13 CHAIR SIMPSON: Opposed.

14 (No response)

15 CHAIR SIMPSON: Motion carries. Thank
16 you very much.

17 Moving on to Board discussion items. At
18 the last meeting we had a brief discussion
19 regarding granting of stays, and this had to do
20 with the observation that it seems like a number
21 of our cases seem to drag on for long periods of
22 time. Certainly from the Board's standpoint, I
23 think we need to recognize due process. So I have
24 asked Ms. Oomens to give us a briefing on this as
25 to what our options might be. Ms. Oomens.

1 MS. OOMENS: Before I start, Board
2 Member Altemus, did you have a question you wanted
3 me to answer initially?

4 BOARD MEMBER ALTEMUS: No. Actually I
5 thought we had skipped over something, but I'm
6 realizing that it was the tail end of the first
7 conversation. So I'm going to lower my hand.
8 Make sure we got to the cases not assigned to the
9 Hearing Examiner, but I think we did go through
10 those. Thank you.

11 MS. OOMENS: So as is evident -- go
12 ahead.

13 CHAIR SIMPSON: I'm sorry. I guess we
14 have no cases not yet assigned to a Hearing
15 Examiner. That's kind of unusual. Hooray.

16 MS. OOMENS: It is.

17 CHAIR SIMPSON: I'm sorry. Excuse me
18 for interrupting, Terisa.

19 MS. OOMENS: So as is evidenced by this
20 meeting and the previous one, the Board obviously
21 has a concern with getting these Hearing Examiner
22 cases through the process as quickly as possible.

23 I will also just as an initial note -- I
24 forgot to bring it up when we were talking about
25 the Hearing Examiner cases earlier -- at the last

1 meeting we had mentioned the informal MAPA
2 procedure that parties could waive their right to
3 the formal MAPA procedure, and take informal
4 instead.

5 In one of the cases in front of me, the
6 parties did discuss this, but I wanted to bring
7 this to the attention of the whole Board, that
8 when licenses for professions are involved,
9 informal MAPA procedure is not allowed under
10 statute. And so I just wanted that to kind of be
11 in the back of everyone's mind, that while
12 informal MAPA procedure is definitely something we
13 still tell the parties to consider, unfortunately
14 it's not an option for when licenses are revoked
15 or suspended.

16 But just as far as stays go, Hearing
17 Examiners are obviously authorized to regulate the
18 course of hearings, and while the Montana Rules of
19 Civil Procedure don't govern cases for MAPA, they
20 still serve as guidance, and so we look to the
21 Montana Rules of Civil Procedure for when stays
22 are granted, and those are usually granted for
23 good cause.

24 Good cause does not have a great
25 definition. It's just defined as a legally

1 sufficient reason. It's a pretty flexible
2 standard. Whether it's present will be dependent
3 on the totality of the facts and circumstances in
4 every case. So it's pretty hard to have an
5 overarching good cause standard, but it has also
6 been defined as a substantial reason, one that
7 affords a legal excuse.

8 So it's pretty discretionary to the
9 Hearing Examiners and the Board as to whether good
10 cause is met in each case, but one thing I will
11 note is that the main concern of the Hearing
12 Examiner and the Board is to ensure that all
13 parties are afforded the opportunity to respond,
14 and present evidence and arguments involving all
15 issues in the case, so especially when both
16 parties come to the Hearing Examiner requesting a
17 stay, it's hard to argue that all parties are not
18 being afforded the opportunity to respond and
19 address concerns when they're both agreeing to a
20 stay.

21 As far as cases, I did review all of the
22 BER cases that are currently active. It looks
23 like a total of 66 stays have been granted over
24 the course of all of those cases. Only two of
25 those have been opposed. So out of 64 stays, both

1 parties are agreeing to, again, kind of going back
2 what I was saying before. When both parties agree
3 it's hard to say that one party is being punished
4 by the stay.

5 There's been several different
6 reasonings for why the stays are requested. The
7 most common one is to accommodate the schedules of
8 the attorneys, especially the DEQ attorneys, when
9 they have multiple BER cases at one time,
10 sometimes it's those deadlines run into each
11 other, and so that's I think been the most common
12 reason for granting stays.

13 But the second is settlement
14 negotiations. And so just as evidenced by the
15 Butte Highlands today, offering parties that
16 opportunity for settlement is really saving the
17 Board time in the long run.

18 And I will just note also that as far as
19 a Hearing Examiner goes, when the case is stayed,
20 us Hearing Examiners are not putting in any work
21 or effort into that case. It's just kind of
22 sitting there for us.

23 So while the Board is definitely correct
24 in its desire to get the cases through the process
25 as quickly as possible, while they're stayed the

1 Board is not spending any money to keep on top of
2 the cases.

3 So with that, I'm happy to answer any
4 questions, but I do also think that the discussion
5 with especially DEQ and other parties that
6 frequent the BER process would be good to get
7 their input as well.

8 CHAIR SIMPSON: First of all, I've lost
9 my screen here. I have no idea how to get it back
10 without leaving the meeting. So if I get lost,
11 hopefully I'll be able to sign in again. I think
12 I clicked the wrong thing on my screen somewhere.

13 Anyway, any comments from the Board?
14 Further discussion on this matter?

15 (No response)

16 CHAIR SIMPSON: Comments, questions for
17 Terisa?

18 BOARD MEMBER AGUIRRE: I think that it
19 sounds like that there's partially some
20 perception, based on what you explained, Terisa,
21 it sounds like some of it might be a perception
22 concern, that, you know, like one of the cases has
23 been on the books for eight years, and that
24 somehow the stay or that process then keeps that
25 going forward.

1 But what I think I heard you say is that
2 it's more of a joint decision more often, the
3 stay, than it is the parties not agreeing to the
4 stay; is that correct?

5 MS. OOMENS: That's correct. So 64 out
6 of the 66 stays that I looked at, both parties
7 agreed to the stay.

8 BOARD MEMBER AGUIRRE: I think we, at
9 least myself as a Board member, is trying to just
10 figure out how to have more outcomes like the
11 Highlands JV outcome, versus eight years of a case
12 being around. I think that was kind of a driving
13 question for me as a Board member.

14 I don't know what we can do. If the
15 parties are in agreement about stays, then I don't
16 know what we can do about that. I mean the cases
17 are coming before us. I don't know, I'm just kind
18 of I guess talking out loud about what even my own
19 perception was of the length of the cases in terms
20 of the years that they've been around.

21 MS. OOMENS: I will say as a Hearing
22 Examiner, I definitely look at how many times
23 they've requested a stay for the same step in the
24 process. If we're in, let's say, the discovery
25 phase, and they've already requested one or two

1 stays, requesting another, or third, or fourth, it
2 just seems you'd better have a good reason for
3 requesting that many stays.

4 So frequently it's just one, maybe two
5 stays per step in the process, and so I guess the
6 reality of current litigation, not only in front
7 of BER, but just the court litigation process in
8 general, is a long process.

9 And so I think the Hearing Examiners and
10 the parties realize that the Board has an interest
11 in moving these cases along. I even had a party
12 bring that up in a recent hearing in front of me.
13 So they're aware that this is an interest of the
14 Board, and I think once everybody is under the
15 same understanding, hopefully that can get the
16 parties to resolve things quicker.

17 BOARD MEMBER AGUIRRE: Thanks for the
18 additional discussion, Terisa.

19 CHAIR SIMPSON: Thank you very much,
20 Terisa. I am back on finally. I guess I don't
21 know that there's anything to be done other than
22 to do what we've already done, and that's express
23 our concern about cases dragging on with repeated
24 extensions.

25 And it would just be something that

1 should be -- just to make the point that we'd like
2 the Hearing Examiners to be aware of the Board's
3 concern here, and to be critical when looking at
4 extensions. Does that seem reasonable?

5 MS. OOMENS: If that was directed at me,
6 yes.

7 CHAIR SIMPSON: Terisa.

8 MS. OOMENS: Yes, absolutely.

9 CHAIR SIMPSON: Yes. I'm asking the
10 question of both you and the Board, but I believe
11 that's where we are on this. Any other thoughts?

12 BOARD MEMBER ALTEMUS: Chairman Simpson,
13 this is Julia Altemus. I guess I would ask the
14 question. If we didn't grant those 60 some odd
15 stays, what would the outcome have been for those
16 cases? I mean giving them a little bit more time
17 may be beneficial, but I don't have a reference
18 point because we grant the stays. So Terisa, do
19 you have a sense of what would have happened to
20 those cases if the Board had not granted them?

21 MS. OOMENS: Well, it's hard to tell
22 because the reasoning for all of the stays is
23 different. But like I said, the biggest reason
24 for the parties requesting stays is for
25 accommodating their schedules.

1 And so in my opinion, without granting
2 those stays, you end up with pleadings that are
3 not adequately drafted, which in a lot of senses
4 can extend the process because the parties don't
5 address every argument they have up front, and so
6 then you have to address them as they go. And so
7 sometimes it can extend the process.

8 The second reason that they request
9 stays is settlement, and so without requesting
10 those stays, you get into the Hearing Examiners
11 deciding summary judgment or discovery disputes,
12 just for the parties to come to you and say, "Just
13 kidding. Here's our agreement."

14 So like I said, I understand, especially
15 as a practicing attorney as well, I understand a
16 request for a stay every now and then, but when
17 you request two, three, four stays in one portion
18 of the process, it just doesn't make any sense to
19 me. So it really depends on why they request the
20 stay, what the consequences would be if it's not
21 granted.

22 BOARD MEMBER ALTEMUS: Thanks, Terisa.
23 It just seems like even though it's a necessary
24 maybe evil, it is just something that probably is
25 better in the long run, I guess is my point.

1 MS. OOMENS: Yes, I would agree with
2 that.

3 BOARD MEMBER ALTEMUS: And hopefully if
4 you're keeping an eye on it, hopefully you're not
5 -- we are all apprised when someone is asking for
6 a stay for the third time for the same thing.

7 MS. OOMENS: Correct. Yes.

8 BOARD MEMBER ALTEMUS: Thank you.

9 CHAIR SIMPSON: Further discussion?

10 (No response)

11 CHAIR SIMPSON: Are we ready to move
12 along to the next topic?

13 (No response)

14 CHAIR SIMPSON: Item 2 under Board
15 discussion items, 2025 Legislature. Just a little
16 background on this.

17 A couple years ago, I guess it was the
18 fall of 2021, my first year on the Board, I had
19 had some discussions with Steve about frustration
20 with the lack of clarity in the statutes regarding
21 the authorities and responsibilities of the Board.
22 Those are scattered through a number of different
23 statutes, are sometimes inconsistent, and they're
24 -- I think in my own line of thinking, I think we
25 could improve some on the statutory definition of

1 what those responsibilities and authorities are.

2 Since that time, of course we're now
3 involved in a lawsuit with DEQ over just such a
4 point as to the Board's authority. Maybe I'm
5 being naive, but I'm hopeful that that will be
6 resolved before the next Legislature convenes.

7 But I have been approached by Board
8 members on several occasions asking that very
9 question as to what is our -- what is the extent
10 of our responsibility and authority.

11 My own feeling is that, as I've said, I
12 do believe that there should be a better
13 definition in the statutes, without expanding on
14 it, at least as I see it, expanding on what the
15 responsibilities of the Board ought to be.

16 So what I'm asking for is consideration
17 by the Board as to whether we want to go down that
18 road. I guess I've had brief discussion with
19 Board Member Altemus about this, Julia, being our
20 legislative expert.

21 So I'd open it up for discussion. Right
22 now I don't have anything specific in mind as far
23 as what language might look like, but I would
24 propose that we begin working on this, so that if
25 it appears we have something workable, we can have

1 it ready well before the next Legislature.

2 I've been down this road before on other
3 statutory changes, and I've found it's not
4 something you do overnight. It's not a wise thing
5 to do, to drop something in the hopper at the last
6 minute. It needs to be well thought out, and
7 involving the various, and including the various
8 parties that would be affected. And of course DEQ
9 is obviously an interested party, and I'm sure
10 there are others. So with that, I'll throw it
11 open to discussion, comments from the Board.

12 BOARD MEMBER ALTEMUS: Mr. Chair, this
13 is Board Member Altemus again. I don't have
14 anything specific that I would throw out here that
15 needs to be changed, but I will from like a higher
16 level look at it. I mean there is definitely --
17 If you look at the enabling legislation for the
18 Board, it's pretty innocuous. It's not very clear
19 to me. In two places it's not very clear.

20 But then if you look at other statutes
21 where the Board is mentioned, or where laws have
22 come into play, and the Board is mentioned,
23 there's a lot of code clutter when it comes to
24 references to the Board of Environmental Review.
25 So if nothing else, it would be nice to have a

1 deep dive into where all this is at in code, and
2 is there a way to put it in one specific place, or
3 are some of those references outdated.

4 I think a look at it would be
5 appropriate, before you even maybe think that
6 there might be something you want to change.
7 That's my perspective anyway. Thank you.

8 CHAIR SIMPSON: Thank you, Julia. I've
9 gone through and prepared a summary of what I
10 could find in the codes having to do with Board
11 authority. I think it could probably stand some
12 dusting off.

13 But this is something that, as I said, I
14 had prepared and discussed with Steve back a
15 couple years ago, but we decided at that time that
16 there really wasn't enough time to pull something
17 together that could be presented as a bill, which
18 is why I bring it up now. We've got more than a
19 year before the next Legislature, and I would hope
20 that by this time next year, if we're going to go
21 through with proposing a bill, that by this time
22 next year we would be pretty much ready to go.

23 BOARD MEMBER AGUIRRE: This is Board
24 Member Aguirre. We need to make sure that in the
25 summary that we're looking at, and what we're

1 looking at now, incorporates all the changes that
2 got made from this last legislative season,
3 because there was an announcement by Montana DEQ
4 to incorporate those changes with regard to the
5 Board into the rules. So we need to make sure we
6 have the most up-to-date perspective or summary of
7 the rules.

8 But I would agree that looking at it is
9 probably an important aspect of our work as a
10 Board, and so that we can be more clear on what
11 the role is.

12 CHAIR SIMPSON: Well, the 2021
13 Legislature of course transferred rulemaking
14 authority from the Board to the Department, and
15 I'm not sure that's an entirely bad thing. I
16 could see advantages to it from the Board's
17 standpoint. But I think that those changes have
18 increased -- for lack of a better word --
19 confusion and uncertainty as to just what the
20 Board's role is.

21 I am reading through the statutes, it's
22 no question that we as a quasi-judicial board, one
23 of our primary functions, or the primary function
24 I suppose, is contested cases, which is what we've
25 been focusing on almost entirely, but I believe

1 our authority extends beyond that.

2 It's unclear. Let's just say a lot of
3 the language is not all that clear as to the
4 intent, and that's where I think there's
5 definitely some smoothing out to be done. I'm
6 kind of dancing around the subject here. I'm not
7 ready to, without studying things a little
8 further, to propose what changes we might want to
9 consider, but I really do think that regardless of
10 which way this litigation with the Department
11 goes, there's a need for some cleanup here, and
12 some specificity in the statutes.

13 BOARD MEMBER SMITH: Chairman Simpson, I
14 would say I'm definitely in favor of looking at
15 this further. Since I've been on the Board, I
16 think we've been in a bit of flux, just because of
17 the changes that happened right before we came on
18 the Board with the changes in rulemaking
19 authority, and how that works. And I think just
20 taking a deep dive into what our real purpose is,
21 and then trying to define that better in statute
22 could benefit everybody for sure.

23 CHAIR SIMPSON: Thank you, Board Member
24 Smith. Any other comments?

25 BOARD MEMBER REITEN: Mr. Chairman, this

1 is Jon Reiten. And the rest of the board. I
2 agree. I think it's a good -- this is an
3 opportune time to take a look at the summaries
4 that you've put together, and any of that
5 information would really be helpful, just get us
6 up to speed. So I think it's a good idea.

7 CHAIR SIMPSON: Okay. I'm going to
8 propose a motion to direct the Chair to begin
9 developing this idea, with assistance from various
10 Board members, to summarize what we have in the
11 statutes right now, and to present ideas for
12 clarification. And of course, first of all, is
13 there a second?

14 BOARD MEMBER REITEN: I'll second that.

15 CHAIR SIMPSON: It's been moved and
16 seconded to direct the Chair to move ahead with
17 developing the information for a possible bill in
18 the next Legislature. I don't see any reason for
19 the Board to -- in fact, I think it would be a
20 mistake for the Board to do it in a vacuum. I
21 think it needs to be a public process. And I'm
22 sure there will be others with an interest in
23 Board authority and Board procedures. So further
24 discussion?

25 BOARD MEMBER ALTEMUS: Mr. Chair, that's

1 just what I was going to say. I just want to make
2 sure that we're really transparent. This has got
3 to be in the public eye, it's got to be public.
4 We can't be making decisions. So I'm glad you're
5 aware of that, and that we need to make sure that
6 we need to keep that in the forefront of our mind
7 as to how we do this and be transparent about it.
8 So that was my comment. Thank you.

9 CHAIR SIMPSON: Thank you. Further
10 discussion.

11 (No response)

12 CHAIR SIMPSON: All in favor, say aye.

13 (Response)

14 CHAIR SIMPSON: Anyone opposed?

15 (No response)

16 CHAIR SIMPSON: Motion carries. Thank
17 you very much.

18 General public comment. Under this item
19 members of the public may comment on any public
20 matter within the jurisdiction of the Board that
21 is not otherwise on the agenda. Do we have any
22 public comment?

23 (No response)

24 CHAIR SIMPSON: Hearing none, we'll move
25 on. Board Chair update. I don't really have

1 much. I think we've covered all of the matters
2 that I had in mind.

3 I would note that we have lost Board
4 Member Bruner. I think you're all aware of that.
5 Lee was appointed to be the Workers Compensation
6 Judge, Workman's Comp Judge. I believe that's
7 correct. Is that right, Sandy?

8 MS. MOISEY-SCHERER: Yes, sir, it is.

9 CHAIR SIMPSON: That's the way I
10 remember it. I don't have the notes right in
11 front of me. But anyway, so we're short one board
12 member right now, and awaiting the appointment of
13 the attorney member. Other than that, I have
14 nothing further that hasn't already been
15 discussed. Any other comments or questions before
16 we adjourn?

17 (No response)

18 CHAIR SIMPSON: Let me back up just a
19 minute. We had intended for the second meeting in
20 a row to potentially have this meeting as an
21 in-person meeting, and given the length of the
22 agenda it was pretty obvious that it really didn't
23 make a lot of sense to have everybody travel to
24 Helena for a meeting that so far has taken about
25 an hour and fifteen minutes.

1 Our December meeting is likely to be
2 another story, assuming that the Moudy Pit comes
3 before us. The reason I say that is that I
4 believe that this will be the first appeal of an
5 opencut permit decision to come before the Board
6 since significant changes were made in the
7 statute. Is that a correct statement, Terisa?

8 MS. OOMENS: That is correct.

9 CHAIR SIMPSON: So it may very well be
10 that it would be appropriate to have an in-person
11 meeting in December. Recognizing that weather
12 could be an issue, I guess we'll leave it open for
13 the time being, but it is just something to keep
14 in mind.

15 And I plan to take a look at the opencut
16 law as it stands right now as preparation for that
17 meeting, and I think it would be wise for all of
18 us to do so if you have the opportunity. So on
19 that note, is there a motion to adjourn?

20 BOARD MEMBER ALTEMUS: So moved.

21 BOARD MEMBER SMITH: Second.

22 CHAIR SIMPSON: It's been moved and
23 seconded to adjourn the meeting. Thank you very
24 much everybody. All in favor.

25 (Response)

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CHAIR SIMPSON: Opposed.

(No response)

CHAIR SIMPSON: Thank you very much.

See you next time.

(The proceedings were concluded

at 10:16 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 -49- 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 31st day of
October, 2023.

Laurie Crutcher

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

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