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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

BOARD MEETING)
FEBRUARY 16, 2024)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

February 16, 2024
9:00 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
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 CHAIR SIMPSON: We'll bring the meeting
5 to order. Sandy, would you take the roll, please.

6 MS. MOISEY-SCHERER: Chair Simpson.

7 CHAIR SIMPSON: Here.

8 MS. MOISEY-SCHERER: Vice Chair Aguirre.

9 VICE CHAIR AGUIRRE: Here.

10 MS. MOISEY-SCHERER: Board Member

11 Rankosky.

12 BOARD MEMBER RANKOSKY: Here.

13 MS. MOISEY-SCHERER: Board Member

14 Reiten.

15 BOARD MEMBER REITEN: Here.

16 MS. MOISEY-SCHERER: Board Member Smith.

17 BOARD MEMBER SMITH: Here.

18 MS. MOISEY-SCHERER: Board Member

19 Altemus said she was ill today.

20 CHAIR SIMPSON: Thank you, Sandy.

21 MS. MOISEY-SCHERER: We have a quorum.

22 CHAIR SIMPSON: Could we also review who
23 else is on the call.

24 MS. MOISEY-SCHERER: I'm Sandy

25 Moisey-Scherer, Board secretary. Deputy Director

1 James Fehr, Montana DEQ; Laurie Crutcher, Crutcher
2 Court Reporting; in Room 111 I have Kaitlin
3 Whitfield; Terisa Oomens, Agency Legal -- she's
4 also the Board Counsel; Kirsten Bowers, DEQ; Kurt
5 Moser, DEQ; Liz Leman, Agency Legal Services;
6 Sarah Bordelon; Sarah Christopherson, DEQ; Aaron
7 Pettis, DEQ; Aislinn Brown, Agency Legal Services;
8 Frank Tabish; Jeremiah Langston, DEQ; Madeline
9 VerWey, DEQ; Marlana Reichert; Marley Held-Wilson,
10 DEQ; Nancy Jacobsen; Robert Smith; Sam King, DEQ;
11 Todd Briggs; Vicki Marquis; and also John
12 Bloomquist.

13 * * * * *

14 (Moirra Davin, DEQ; Loryn Johnson, DEQ; Jennifer
15 Lint; Kevin Krogstad, DEQ; Emily Lodman, DEQ;
16 Elena Hagen also present)

17 * * * * *

18 CHAIR SIMPSON: Thank you, Sandy. What
19 I'd like to do this morning is to alter the --
20 shift around the agenda just a little bit, the
21 reason being that Vice Chair Aguirre needs to
22 leave at about 10:30 to 10:40.

23 So what we'll do is first approve the
24 minutes for the last meeting, and then move
25 immediately into the action items, because we do

1 have a case that we need to review and decide, and
2 then return to the review items toward the end of
3 the meeting.

4 So with that, are there any comments or
5 alterations to the minutes from the December 8th
6 meeting?

7 (No response)

8 CHAIR SIMPSON: Is there a motion?

9 BOARD MEMBER SMITH: So moved.

10 BOARD MEMBER RANKOSKY: Second.

11 CHAIR SIMPSON: It's been moved and
12 seconded to approve the minutes of the December
13 8th, 2023 meeting. All in favor, say aye.

14 (Response)

15 CHAIR SIMPSON: Opposed.

16 (No response)

17 CHAIR SIMPSON: Motion carries. Thank
18 you very much. Let's move along then to the
19 action items under Roman Numeral III.

20 The first is the matter of request for
21 hearing on order of revocation of certified
22 operator license, Case No. BER 2023-05 PWS. Could
23 someone from the Department review the status of
24 this and what we need to do.

25 MR. PETTIS: This is Aaron Pettis. Can

1 you hear me?

2 MS. MOISEY-SCHERER: Yes.

3 MR. PETTIS: I'm the attorney on this.
4 Mr. Deveny had initially requested, you know, had
5 initially appealed this matter. He had some
6 questions about it, and talked to the program, and
7 then ultimately decided that he did not want to
8 pursue this appeal, and so he asked to dismiss it.
9 That's where we are with it.

10 CHAIR SIMPSON: Ms. Oomens, any further
11 comment?

12 MS. OOMENS: (No response)

13 CHAIR SIMPSON: This appears to me to be
14 pretty straight forward. Is there any other
15 comment from -- I presume the party's not
16 represented this morning, Mr. Deveny?

17 MR. PETTIS: Mr. Chair, that's correct.
18 He's not represented.

19 CHAIR SIMPSON: Okay. Thank you very
20 much, Mr. Pettis. Okay. Is there a notice to
21 adopt the final agency action of dismissal on this
22 case?

23 VICE CHAIR AGUIRRE: Do we need to make
24 a motion?

25 MS. OOMENS: Isn't that what you're

1 looking for, Chair Simpson?

2 CHAIR SIMPSON: Yes, please.

3 VICE CHAIR AGUIRRE: My audio is having
4 a struggle today. I'll make a motion that we
5 adopt the Hearing Examiner's order of dismissal
6 without prejudice, and issue a final agency action
7 dismissing this matter.

8 BOARD MEMBER REITEN: I second that.

9 CHAIR SIMPSON: A motion has been made
10 and seconded to accept the agency action or the
11 order of dismissal. Any discussion?

12 (No response)

13 CHAIR SIMPSON: Hearing none, we'll
14 proceed with the vote. All in favor, say aye.

15 (Response)

16 CHAIR SIMPSON: Opposed.

17 (No response)

18 CHAIR SIMPSON: Motion carries.

19 * * * * *

20 (BER 2019-08 through 21 OC, Rippling Woods
21 Homeowners Association oral argument
22 transcript bound separately)

23 (9:13 a.m. to 10:23 a.m.)

24 * * * * *

25 CHAIR SIMPSON: Shall we back up to the

1 review items -- briefing items, I should say. Ms.
2 Oomens, would you please go through those.

3 MS. OOMENS: As you can tell from the
4 bolded, or lack thereof, bolded, a lot of the
5 cases haven't had a whole lot of movement since
6 the last meeting. I think a lot of them are in
7 the discovery phase, so the parties are handling
8 that outside of Hearing Examiner involvement.

9 The one that I will specifically point
10 out is the Signal Peak. They did have oral
11 argument with the Court yesterday, and so who
12 knows how long we'll be waiting for that decision.
13 But just so the Board is aware that they did have
14 oral argument, so we should be getting a decision
15 in the next couple of months.

16 I'm happy to answer any questions, but
17 otherwise I'll try not to bore you going through
18 each case individually.

19 CHAIR SIMPSON: Well, certainly. Where
20 was that case heard, the Signal Peak?

21 MS. OOMENS: I believe it was
22 Yellowstone County.

23 CHAIR SIMPSON: Yellowstone County.
24 Okay. Just leafing through here, I had a couple
25 of comments or questions. Nothing too extensive.

1 I guess I would comment in the DEQ
2 versus BER case having to do with the selenium
3 rule. Nothing has changed there. You'll notice
4 there's not an update in our agenda. We're still
5 waiting on some action from the Judge on
6 consolidation of the cases, and also the
7 counterclaims by Teck.

8 Item (d), Western Sugar Cooperative, it
9 appears -- I see here that the parties are
10 entering into a settlement agreement, and reading
11 through the motions here, I was just wondering,
12 Ms. Oomens, if that can be stated in English
13 rather than lawyer.

14 MS. OOMENS: Sure. Let me find where
15 you're at. In Item (e), is that what you're
16 talking about?

17 CHAIR SIMPSON: (d) is where I am right
18 now, but I think I had the same comment on another
19 one of these, but (d) is the one we're looking at
20 right now.

21 MS. OOMENS: So the parties, the motion
22 in limine is specifically what you're probably
23 focused on.

24 CHAIR SIMPSON: Yes. I understand that
25 has to do with excluding some matters from

1 argument, but you can maybe be a little bit more
2 clear in just what that does mean.

3 MS. OOMENS: No, you're correct. So
4 during -- the parties will enter motions for what
5 can and cannot be introduced into the hearing
6 specifically. This might apply to experts, what
7 experts can and cannot testify to, that kind of
8 thing.

9 CHAIR SIMPSON: I see. Okay. Moving
10 along as I leaf through this. I think with
11 respect to matter (f), Valley Garden Land and
12 Cattle regarding opencut mining permit No. 674, I
13 had the same question there as to what all of that
14 means.

15 MS. OOMENS: "The Hearing Examiner
16 issued an order continuing the hearing"?

17 CHAIR SIMPSON: At the top of Page 11.

18 MS. OOMENS: Oh, the motions in limine
19 is the same thing. I'm not sure specifically what
20 is going on in these cases, I'm not privy to the
21 actual details, but motions in limine, it looks
22 like the hearing was rescheduled, and so they're
23 filing motions again as to what can and cannot be
24 introduced as evidence at the hearing.

25 CHAIR SIMPSON: Okay. On the next item,

1 Item (g), hearing regarding Rosebud Mine Area B
2 Amendment 5. I guess this is a little confusing
3 to me because it appears that there are motions
4 for summary judgment by both parties, along with a
5 supplemental statements of disputed facts.

6 Again, my understanding of legal process
7 is pretty shallow, but my understanding of summary
8 judgment is that it's appropriate whenever there
9 is no disagreement as to the facts; am I incorrect
10 in that?

11 MS. OOMENS: So generally when you have
12 a summary judgment, there's some -- there may be
13 some dispute on the facts, but legally, even if
14 you take the other party's argument as completely
15 true, you would still win under the law. So
16 you're saying, "I don't agree to their facts, but
17 even if you took their facts as true, then we
18 still win under the law."

19 CHAIR SIMPSON: Understood. Okay.
20 Thank you very much.

21 MS. OOMENS: It looks like Sarah may
22 have some insight into that case specifically, if
23 you have a specific question.

24 CHAIR SIMPSON: No, that was my only
25 question.

1 MS. CHRISTOPHERSON: Chairman --

2 CHAIR SIMPSON: Sarah, you have your
3 hand up?

4 MS. CHRISTOPHERSON: Yes, just a quick
5 correction. On the dates there, it says that
6 Westmoreland filed its reply on January 21st,
7 2023. That was December 21st, the same as the
8 other party's. Just a quick correction.

9 MS. OOMENS: Thank you.

10 CHAIR SIMPSON: Thank you. Excuse me
11 for taking so much time leafing through here. Oh,
12 I did have a question on --

13 VICE CHAIR AGUIRRE: One quick question
14 on Item (g). What is the next, what's the timing
15 of the next step? To kind of follow up on your
16 question, Chairman Simpson.

17 MS. OOMENS: Sure. So the next step
18 would be --

19 CHAIR SIMPSON: Item (d)?

20 VICE CHAIR AGUIRRE: On Item (g) that
21 you were just asking about.

22 CHAIR SIMPSON: I'm sorry, Terisa. I
23 interrupted.

24 MS. OOMENS: No, that's okay. I believe
25 the next step would be a summary judgment order,

1 but it looks like maybe Sam King might have
2 something to add.

3 CHAIR SIMPSON: I saw your hand up, Mr.
4 King.

5 MR. KING: Yes. Good morning, Chairman.
6 Can you hear me?

7 CHAIR SIMPSON: Yes.

8 MR. KING: So all the parties have
9 submitted cross motions for summary judgment.
10 We're just waiting for an order from the Hearing
11 Examiner on those pending motions before -- to
12 determine whether this case is going to proceed to
13 a hearing, or whether the case will be resolved on
14 summary judgment.

15 VICE CHAIR AGUIRRE: So Mr. King, that
16 doesn't require any action by us?

17 MR. KING: That's correct.

18 VICE CHAIR AGUIRRE: Okay. Thank you
19 for clarifying.

20 CHAIR SIMPSON: Thank you. I did have a
21 comment on -- this is Item (b) under "Matters not
22 before a Hearing Examiner." This goes back to the
23 Westmoreland Rosebud Mining, LLC, regarding
24 issuance of MPDES Permit No. 0032042, Colstrip.

25 This is the one where they're attempting

1 to quantify the natural water quality in these
2 ephemeral drainages in the Rosebud Creek drainage.
3 And I see here, it says, "After determining that
4 additional data are required to properly develop
5 nonanthropogenic standards for EC and SAR for
6 receiving waters, DEQ and Westmoreland developed a
7 sampling analysis plan which specifies that site
8 visits for the purpose of sampling must occur
9 every month for twelve months."

10 The question I had is -- just my own
11 limited familiarity with the area -- but I believe
12 on the Rosebud Creek side of the divide is where
13 the Peabody Big Sky Mine was. The mine has been
14 closed, and I understand all bonds have been
15 released.

16 But I wanted to ask the parties -- if
17 anybody's on the call right now -- whether or not
18 you've looked at data that may have been collected
19 by the Big Sky Mine for drainages on that side of
20 the divide. Is there anyone on the call
21 representing Westmoreland? I don't believe there
22 is.

23 MS. BORDELON: Yes, Your Honor. This is
24 Sarah Bordelon. Although I'm not as familiar with
25 that question, I was wondering if Kirsten Bowers

1 -- because she was a little closer to the data --
2 is on the call.

3 MS. CHRISTOPHERSON: Kirsten is not on
4 the call, but this is Sarah Christopherson from
5 DEQ.

6 I don't have much knowledge about this
7 case either, but we will be looking at all
8 existing data. However, I'm not sure if we have
9 the Big Sky data currently.

10 MS. BORDELON: I believe before they got
11 to the sampling and analysis plan, there was a
12 survey of existing data, and I believe that
13 included the Big Sky, but I'm not certain. Would
14 you like us to follow up and provide an update to
15 the Board on that?

16 CHAIR SIMPSON: Yes, you could do that
17 for the next meeting, please.

18 MS. BORDELON: Sure.

19 CHAIR SIMPSON: The Big Sky Mine was in
20 operation for close to fifty years, and over that
21 time there would have been a lot of monitoring
22 data on that side of the divide, and potentially
23 some of it might be applicable to the questions
24 here as to the natural water quality in those
25 ephemeral drainages.

1 MS. BORDELON: We'll do that.

2 CHAIR SIMPSON: Okay. Thank you.

3 That's all I have. Anything further on the
4 briefing items?

5 (No response)

6 CHAIR SIMPSON: Hearing none, on to Item
7 IV, General Public Comment. Members of the public
8 may comment on any public matter within the
9 jurisdiction of the Board that's not otherwise on
10 the agenda for the meeting. Individual contested
11 case proceedings are not public matters in which
12 the public may comment. Is there any public
13 comment?

14 (No response)

15 CHAIR SIMPSON: Hearing none, we'll move
16 on to Item V, the Board Chair update. I don't
17 really have much to offer this morning. I guess I
18 would observe that given the weather, I'm relieved
19 that we didn't schedule an in-person meeting in
20 Helena. It's pretty snowy here this morning, and
21 I presume it is across the rest of the state as
22 well.

23 I did mention the status of the DEQ v.
24 BER case. We're still waiting there.

25 Also I hope to have something for the

1 next meeting on the matter of potentially
2 developing a bill for the next Legislature to more
3 clearly define the responsibilities and
4 authorities of the Board. I've been holding off
5 on that to give us an opportunity to gather a
6 little bit more information, but I think we'll
7 have something ready by the April meeting.

8 Also in April, Sandy, you had mentioned
9 to me that you might have a conflict there.

10 MS. MOISEY-SCHERER: I was able to work
11 it out. I don't anymore.

12 CHAIR SIMPSON: Okay. So we're okay
13 with the date. I don't recall what it is, but --

14 MS. MOISEY-SCHERER: I believe it's
15 April 19th.

16 CHAIR SIMPSON: I believe that's right.
17 Let me check my magic machine here. Yes, April
18 19th. I guess I would ask Legal Services if we
19 have anything on the burner for that meeting. It
20 doesn't appear from the briefing items that we do.

21 MS. OOMENS: So hopefully -- I'm
22 crossing my fingers and toes and everything I have
23 that we will have the remand of the Western Energy
24 case. They have had an order in that case from
25 the Supreme Court, so it's working its way down at

1 this point hopefully.

2 CHAIR SIMPSON: Oh, they have.

3 MS. OOMENS: Yes. They just issued the
4 order a little bit ago, and so it's working its
5 way down hopefully, so I'm hopeful that that will
6 be during the April meeting.

7 CHAIR SIMPSON: Okay. So with enough
8 lead time, we might be able to schedule something
9 the way of a status conference.

10 MS. OOMENS: Correct.

11 CHAIR SIMPSON: Okay. Very good.

12 That's all I have. Anything else for the good of
13 the order?

14 MS. OOMENS: Just as a curiosity
15 question. Do we have any update on filling the
16 attorney spot -- I'm sorry if I missed that -- on
17 the Board?

18 CHAIR SIMPSON: Sandy.

19 MS. MOISEY-SCHERER: Chair Simpson, I
20 have not heard anything back from the Governor's
21 Office on that. I did ask, but they have not come
22 back with any replacement.

23 CHAIR SIMPSON: Thank you. I had not
24 heard anything either, and thank you for the
25 reminder. I believe that wraps it up. Is there a

1 motion to adjourn?

2 VICE CHAIR AGUIRRE: I will make a
3 motion to adjourn.

4 BOARD MEMBER SMITH: Second.

5 CHAIR SIMPSON: Let the record show that
6 we're two minutes early, Stacy.

7 VICE CHAIR AGUIRRE: Thank you very
8 much, Chairman Simpson.

9 CHAIR SIMPSON: A motion has been made
10 and seconded to adjourn. All in favor, say aye.

11 (Response)

12 CHAIR SIMPSON: The meeting is
13 adjourned. Thank you very much, everyone.

14 (The proceedings were concluded
15 at 10:41 a.m.)

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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 - 18 - 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 19th day
of February, 2024.

Laurie Crutcher

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

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