

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In re: Appeal and Request) CASE NO.
For Hearing by MEIC and) BER 2019-05-SM
Sierra Club Regarding Approval)
of Surface Mining Permit)
No. C2011003F for Western)
Energy Company)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 24, 2025

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BEFORE CHAIRMAN DAVID SIMPSON,
VICE CHAIR STACY AGUIRRE,
BOARD MEMBERS JOSEPH SMITH, JULIA ALTEMUS,
and ALLAN PAYNE

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: The next is BER 2019-05
5 OC -- I believe that should be SM. How it got to
6 be opencut I don't know -- Western Energy Area F.

7 Of course the Board assumed jurisdiction
8 for this matter at our June meeting. And we may
9 retain the case or assign it to a Hearing
10 Examiner. The contested case has been -- was
11 conducted, and the parties have filed proposed
12 FOFCOLs and exceptions and responses. Findings of
13 fact and conclusions of law need to be prepared.

14 The recommendation in this case is that
15 all of the filings leading up to preparation of
16 the findings of fact and conclusions of law have
17 been filed. And I believe the most efficient way
18 to wrap up this case, get the final proposed
19 FOFCOL prepared, would be to assign it to a
20 Hearing Examiner. Is there a motion for
21 discussion?

22 MS. MOISEY-SCHERER: Chair Simpson, this
23 is Sandy. Sam King of DEQ has his hand up.

24 CHAIR SIMPSON: Mr. King.

25 MR. KING: Yes. Thank you, Board Member

1 Simpson, and Board members. Sam King for DEQ. If
2 I may just make a recommendation. I know Mr.
3 Yemington and Mr. Hernandez are also on the
4 meeting, so they may want to weigh in here as
5 well.

6 But my initial thought is this case is
7 pretty technical, and the proposed decision is
8 going to be I imagine quite lengthy. Some of the
9 issues were disposed of on summary judgment, and
10 the contested case hearing resolved or should
11 resolve the final issue regarding the status of
12 whether there's a stream, and whether it is
13 intermittent or ephemeral.

14 I don't want to necessarily take up Ms.
15 Hupp's time. I know she has her own practice.
16 But my thought was rather than assign this case to
17 a Hearing Examiner from DLI, it might be most
18 efficient to assign it to Ms. Hupp. Her workload
19 obviously takes precedence over that, but I think
20 it may be the most efficient way to get this case
21 resolved and moving forward. So just a thought,
22 just a recommendation. Open to hearing the other
23 parties' thoughts as well. Thanks.

24 CHAIR SIMPSON: Thank you, Sam.
25 Comments from Westmoreland? I'm sorry. Shiloh

1 Hernandez, you have your hand up.

2 MR. HERNANDEZ: Thank you, Chairman
3 Simpson, members of the Board. Can you hear me
4 all right?

5 CHAIR SIMPSON: Yes, I can.

6 MR. HERNANDEZ: I agree with what Mr.
7 King said. This case is pretty technical. At
8 this stage there's only one issue that's
9 remaining. I think the matter has been submitted
10 for decision since May 2024, so we are eager to
11 get a decision, at least a proposed decision in
12 this.

13 Given the material involved, I agree
14 with Mr. King that a Hearing Examiner is the best
15 way to go. As far as far as who that Hearing
16 Examiner is, I have no position. I certainly
17 respect Ms. Hupp's legal acumen and ability to do
18 this. I think that it probably should go to
19 whomever has the time to really dig into it.

20 CHAIR SIMPSON: Thank you. Mr.
21 Yemington.

22 MR. YEMINGTON: Chair Simpson, members
23 of the Board. Good morning. I certainly
24 appreciate the opportunity to present. Sam
25 Yemington on behalf of Westmoreland.

1 We share Counsel's presentation of the
2 case, and the status of the contested case. With
3 respect to how best this could move forward, we
4 respectfully join DEQ, and request that Ms. Hupp
5 be assigned as the Hearing Examiner. We think
6 that she has the appropriate qualifications, and
7 is consistent with the expertise component that
8 MAPA requires. So we think that is both the path
9 that would be of least resistance, and she's best
10 qualified to handle this. So again, we join the
11 folks at DEQ and MEIC in that request.

12 CHAIR SIMPSON: Thank you, Mr.
13 Yemington. I guess I probably ought to put the
14 question to Dana Hupp. What are your thoughts?

15 MS. HUPP: Chairman Simpson and Board
16 members. I am certainly happy to make the time to
17 take this project on this fall and winter if
18 that's the decision of the Board.

19 CHAIR SIMPSON: Thank you, Dana.
20 Discussion among the Board. First of all, is
21 there a motion that we can use as a basis for
22 discussion, whether to assign this to an outside
23 Hearing Examiner, or to retain jurisdiction and
24 have Board Counsel prepare the FOFCOL.

25 BOARD MEMBER PAYNE: I would make a

7
1 motion to assign it to a Hearings Officer, but my
2 motion would be that it wouldn't be Dana because
3 the Board is going to have to rely on her maybe to
4 give us independent legal advice with respect to
5 any decision that the Hearing Examiner comes up,
6 out of it, and I think if she's the Hearings
7 Officer, I just think that's a bad practice to
8 have the Board's Counsel be also a Hearing
9 Officer.

10 So my motion be just to -- I'd move that
11 the Board appoint a Hearings Examiner to hear this
12 case that has the requisite expertise to bring a
13 speedy resolution to the matter.

14 CHAIR SIMPSON: Is there a second to the
15 motion? Is there a second?

16 BOARD MEMBER ALTEMUS: I second the
17 motion so we can have discussion, I think more
18 discussion. So I'll go ahead and second that
19 motion.

20 CHAIR SIMPSON: Thank you, Julia.

21 BOARD MEMBER ALTEMUS: And then I do
22 have a question, if I may, Mr. Chair. So if it's
23 not Ms. Hupp, and we don't have AG's help any
24 more, who are our Hearing Examiners? I am even
25 confused as to who we have left.

1 CHAIR SIMPSON: Well, our alternative is
2 to assign it to the Department of Labor and
3 Industry, and they would pick the Hearing Examiner
4 that would pick up this case. That --

5 BOARD MEMBER ALTEMUS: Out of their
6 Department?

7 CHAIR SIMPSON: I'm sorry?

8 BOARD MEMBER ALTEMUS: Out of Labor?
9 Would the Hearing Examiner come from Labor?

10 CHAIR SIMPSON: Yes.

11 BOARD MEMBER ALTEMUS: Oh, interesting.

12 CHAIR SIMPSON: And there is, as we
13 discussed at the last meeting, there is a
14 Memorandum of Understanding between DEQ and DLI to
15 utilize their Hearings Examiners. And they
16 according -- (inaudible) -- when we were first
17 going through this process of evaluating
18 alternatives.

19 There are Hearings Examiners in that
20 group that have some natural resource background,
21 and that's really at this point all I know. We
22 have not up to this point assigned any cases to
23 Hearings Examiners at DLI. This would be our
24 first.

25 I guess another matter just for

1 consideration is that I had requested
2 authorization from the Governor's Office to retain
3 outside Hearings Examiners which initially would
4 have been Dana, and they declined to do that
5 because of cost. Of course outside Counsel is
6 considerably more costly than in-state Counsel,
7 government Counsel. But it really is the decision
8 of the Board which way to go on this.

9 BOARD MEMBER ALTEMUS: Mr. Chair, I see
10 Stacy also has her hand up, but may I make one
11 more comment?

12 CHAIR SIMPSON: Certainly.

13 BOARD MEMBER ALTEMUS: Thanks. You
14 know, this is a complicated case, and I'm not sure
15 that I'm comfortable sending this over to a
16 Hearing Examiner at DLI as our first test case to
17 see how it goes. So I think I would be more
18 comfortable. I do understand where Board Member
19 Payne is coming from. I certainly understand
20 that. But I just would be really hesitant to take
21 this on as the first one that we ask DLI to be a
22 Hearing Examiner for. So I guess I'm going to
23 have to vote against the motion, but anyway that's
24 what I'm thinking at this point. Thank you.

25 CHAIR SIMPSON: The other thing I think

1 we need to keep in mind here is that this case is
2 not at its beginning, it's near its end. And I
3 like you, like everybody else on the Board, I
4 spent quite a bit of time reading -- well, this
5 wasn't the one that we circulated. I'm sorry.

6 I have read through it. Yes, it is a
7 highly technical question. Having a background in
8 coal mining myself -- not at Colstrip -- I have a
9 number of questions that I think will be need to
10 be answered in order to have a valid FOFCOL. If
11 we assign it outside of the Board, then we lose
12 any opportunity to bring our backgrounds into this
13 case until it comes back before us.

14 Now, this was something I had intended
15 to mention earlier, and I'll kind of go off on a
16 tangent right now, because the question really is
17 pertinent here, and that is that the Board of
18 Environmental Review is not a court of law. It is
19 a citizen board that's been appointed by the
20 Governor to exercise -- essentially to handle the
21 administrative appeals of Department decisions.

22 And as a citizen Board, I think the
23 intent and our obligation as Board members is to
24 bring our background, diversity of background
25 knowledge -- as you recall, the law requires a

1 variety of backgrounds on this Board to bring to
2 bear on the various problems, questions that come
3 before us.

4 And so I think part of our, a
5 significant part of our responsibility here is to
6 bring our background knowledge to bear where
7 appropriate on the cases that come before us. At
8 the same time, we have to keep in mind that in
9 addition to -- as part of the administrative
10 review process, we need to be mindful that we're
11 building a record should the case be appealed to
12 the District Court.

13 And so even though our own authorities
14 may be limited to what is contained in the statute
15 that is at hand, there are quite often tangential
16 issues that come forward that really the Board
17 doesn't have authority to deal with.

18 The most significant, the best example
19 of that is what we see on the gravel pit case we
20 talked about earlier, Gallatin Gateway, where the
21 question there is a constitutional question that
22 was taken to the Court, and the Court ruled that
23 in order -- even though it is a constitutional
24 question, in order for it to be considered, the
25 petitioners have to take it through the

12
1 administrative process first, and establish a
2 valid claim.

3 So I guess just to summarize, we
4 certainly need to be mindful of the legal side of
5 things, but we need to have a handle on the
6 technical questions that are at issue in these
7 cases as well. So I guess -- Was there another
8 hand up before I started bloviating?

9 (No response)

10 CHAIR SIMPSON: Further discussion.

11 (No response)

12 CHAIR SIMPSON: A motion has been made
13 and seconded to assign this case to an outside
14 Hearing Examiner.

15 VICE CHAIR AGUIRRE: I had my hand up,
16 Chairman Simpson. This is Stacy. I was
17 essentially going to say the same thing that Julia
18 said. I think our previous discussion really
19 shows the value of this Board, and how we're
20 moving forward. How we're shifting how we're
21 moving forward I think is more beneficial to the
22 process, and the addition of Dana Hupp to the
23 equation as far as the legal representation for
24 the Board. And our movement forward with
25 retaining some of these cases I think really shows

13
1 the value of referring this case to Ms. Hupp.

2 And because this is a technical issue,
3 and it appears that there's really one remaining
4 technical issue that really needs to be focused on
5 to move this forward, I also feel like that
6 supports our shift in how we're handling stuff,
7 and also the movement forward of the value of that
8 shift. So for that reason I would need to vote
9 against the motion as well.

10 CHAIR SIMPSON: Thank you, Stacy.

11 Further discussion. Joe.

12 BOARD MEMBER SMITH: Yes, sir. I'm in
13 agreement with I think everyone on this. I
14 certainly hear Board Member Payne's concerns, but
15 given where we're at right now, I think that I
16 would be more in favor of giving this case to Ms.
17 Hupp.

18 What I would ask, though, is there any
19 way that we could get a list of potential Hearings
20 Examiners from DLI with their background and
21 qualifications for the future? Because I do think
22 Board Member Payne brings up a valid point, and it
23 would be nice to see who we could apply future
24 cases to for Hearings Examiners.

25 CHAIR SIMPSON: Valid question. Mr.

1 Fehr is on the call, isn't he? Deputy Director
2 Fehr.

3 DEPUTY DIRECTOR FEHR: Yes, I am.

4 CHAIR SIMPSON: Could you comment on
5 that, please.

6 DEPUTY DIRECTOR FEHR: I think we could
7 certainly make a request. I could step into that
8 and ask them for sure.

9 CHAIR SIMPSON: I thought it should be
10 fairly straight forward, but I wanted to pass that
11 on to the Department.

12 DEPUTY DIRECTOR FEHR: Yes, I will make
13 an ask.

14 CHAIR SIMPSON: Thank you very much.
15 We'll move forward with that. Further discussion?

16 BOARD MEMBER PAYNE: I've got a
17 question.

18 CHAIR SIMPSON: We've heard from all of
19 the -- Allan, did you --

20 BOARD MEMBER PAYNE: Yes.

21 CHAIR SIMPSON: Do you have further
22 comment?

23 BOARD MEMBER PAYNE: Chairman, you made
24 a comment that you had requested outside Counsel,
25 we would be able to use an outside Hearings

1 Examiner, and you told us that wasn't approved
2 because of fiscal issues.

3 So I guess then as we go forward with
4 Dana then, is that in contradiction to what --
5 Because she's not a member of the Department of
6 Labor and Industry, and I imagine her rate is
7 going to be higher than theirs for this. So could
8 you educate us exactly kind of what the limitation
9 was there?

10 CHAIR SIMPSON: Well, here's a
11 comparison. The cost at DLI is \$60 an hour. The
12 cost of -- Dana's hourly rate, she's charging us
13 \$250 an hour. That is substantially less than the
14 standard billing rate, so as a public service she
15 has offered the reduced rate for her service to
16 the Board. And the exact question you raised is
17 the one I'm turning over in my mind right now.

18 And I guess I would -- I'm inclined
19 myself to vote against the motion also, and the
20 reason is that this is a case that is very near
21 its conclusion. And I think as we move forward
22 and new cases are brought before us, it will be a
23 much easier decision to make as to where, and what
24 cases, and at what point to assign to DLI.

25 The only other alternative I can see is

1 to defer action on this until we can investigate
2 the background of the Hearings Examiners that
3 would be available at DLI. And these cases have
4 dragged on for so long right now, I'm very eager
5 to keep them moving forward and get them resolved
6 as quickly as we can. For whatever reason, this
7 is one of several cases that's really lagged, and
8 I would like to get it resolved as soon as
9 practically possible.

10 BOARD MEMBER PAYNE: Chairman, I'm with
11 you. If it's dragged on for this long, let's get
12 it resolved. If we can get the list of available
13 Hearings Examiners from the Department of Labor
14 and Industry for future reference, I'd rather make
15 a decision today one way or the other. So I
16 wouldn't want to defer it.

17 CHAIR SIMPSON: Further discussion?

18 (No response)

19 CHAIR SIMPSON: Thank you, Allan. A
20 motion has been made and seconded. Let me, before
21 I proceed, Board Member Payne, do you wish to keep
22 your motion in play --

23 BOARD MEMBER PAYNE: I do, but if
24 somebody wants to offer an amendment to change it
25 to what I think everybody is going to vote for,

1 they can certainly -- that's certainly available
2 to them.

3 CHAIR SIMPSON: I guess that's one
4 alternative. I think the cleanest way is probably
5 to proceed with the motion and see where it goes,
6 and then take action accordingly.

7 BOARD MEMBER PAYNE: Okay.

8 CHAIR SIMPSON: Any further discussion?

9 (No response)

10 CHAIR SIMPSON: Hearing none, a motion
11 has been made and seconded to assign Western
12 Energy Area F BER 2019-05 to an outside Hearing
13 Examiner. All in favor, say aye.

14 (Response)

15 CHAIR SIMPSON: Opposed.

16 (Response)

17 CHAIR SIMPSON: Let me back up. Sandy,
18 would you poll the Board, please.

19 MS. MOISEY-SCHERER: Chair Simpson.

20 CHAIR SIMPSON: Nay.

21 MS. MOISEY-SCHERER: Vice Chair Aguirre.

22 VICE CHAIR AGUIRRE: Nay.

23 MS. MOISEY-SCHERER: Board Member
24 Altemus.

25 BOARD MEMBER ALTEMUS: Nay.

1 MS. MOISEY-SCHERER: Board Member Payne.

2 BOARD MEMBER PAYNE: Aye.

3 MS. MOISEY-SCHERER: Board Member Smith.

4 BOARD MEMBER SMITH: Nay.

5 CHAIR SIMPSON: The vote was four
6 against, one for. Motion fails. Is there an
7 alternate motion?

8 BOARD MEMBER ALTEMUS: Mr. Chair, this
9 is Julia. I would move that we assign BER 2019-05
10 Western Energy to Ms. Hupp as our Hearing
11 Examiner.

12 VICE CHAIR AGUIRRE: I'll second the
13 motion.

14 CHAIR SIMPSON: A motion has been made
15 and seconded to assign this case to Ms. Hupp. I
16 guess there is a technical question here, and that
17 is if the Board retains jurisdiction in this case,
18 we're not really assigning it to a Hearing
19 Examiner, we're assigning it to Board Counsel, and
20 I think at least I think that's an important
21 distinction; that is, we've decided to handle it
22 internally.

23 Now, in the past, our past practice when
24 Terisa was representing the Board, she acted as
25 both Hearing Examiner on a number of cases and

1 Counsel to the Board, so that's essentially the
2 situation that we would have here. So as a
3 practical matter that's what would happen if the
4 Board retains jurisdiction.

5 BOARD MEMBER ALTEMUS: Would you like me
6 to amend my statement, saying Hearings Examiner --

7 CHAIR SIMPSON: You read my mind.

8 BOARD MEMBER ALTEMUS: -- I would like
9 to have Ms. Hupp as our Board Counsel retain that
10 case.

11 CHAIR SIMPSON: A motion has been made
12 for the Board to retain the case; is that what
13 you're saying, Julia?

14 BOARD MEMBER ALTEMUS: Yes, and have Ms.
15 Hupp be the -- I guess not Hearings Examiner, but
16 be our Board Counsel on that case.

17 VICE CHAIR AGUIRRE: I'll second the
18 motion.

19 CHAIR SIMPSON: A motion has been made
20 and seconded for the Board to retain jurisdiction
21 in this case, and for the FOFCOL to be prepared by
22 Board Counsel. Is that a fair statement of the
23 motion?

24 BOARD MEMBER ALTEMUS: Yes, thank you.

25 CHAIR SIMPSON: We have two hands up

1 here. Mr. Hernandez.

2 MR. HERNANDEZ: Thank you, Chairman
3 Simpson, members of the Board. I think Sam is
4 going to raise the same issue that I am, which is
5 just as litigants in this case, I think it would
6 be helpful to have clarity on this as far as what
7 the next steps would be. If the matter is
8 assigned to a Hearing Examiner, then the Hearing
9 Examiner would prepare proposed findings and
10 conclusions, that would be followed by exceptions
11 from the parties, whichever party was unsatisfied,
12 which would then go to the Board.

13 I think that method would be clear
14 because it's what's most clearly laid out in my
15 understanding of MAPA Section 2-4-621. I think
16 that if the Board retains jurisdiction and has Ms.
17 Hupp prepare a decision on behalf of the Board, it
18 muddies the water, because I think even in that
19 case there would have to be an opportunity for
20 objections and exceptions since the Board would
21 not have heard the entire contested case.

22 There was a trial on this a few years
23 back. I have to quit make it confusing. I would
24 just like to offer for the Board's consideration
25 that under MAPA Section 2-4-621(4), the matter can

1 be assigned to Ms. Hupp as a Hearing Examiner.

2 She can then prepare proposed findings and
3 conclusions, offer those to the Board, and then
4 she may retain her duties as the Board's attorney
5 without -- so long as the FOFCOL are done. So she
6 still would be able to have that dual role as the
7 Hearing Examiner but still provide advice to the
8 Board.

9 I think that's the clearest method under
10 the rules. And I'd love to hear Mr. King and Mr.
11 Yemington's position on it, but I think that that
12 would be the easiest path forward on this case,
13 because I share the interest of the Board in
14 resolving this in the clearest most face forward
15 manner possible. Thank you.

16 CHAIR SIMPSON: Thank you very much.
17 Mr. King.

18 MR. KING: Yes. Thank you, Board Chair.
19 I just echo Mr. Hernandez's position here. I
20 think it would make it confusing if technically
21 the Board was retaining jurisdiction. I also
22 think it would be odd because really the case has
23 been tried now at this point, in which the Board
24 was not privy to all of the facts and information
25 that has been developed up to this point.

1 So I think that I'm in agreement with
2 Mr. Hernandez that the cleanest route is to assign
3 Ms. Hupp as the Hearing Examiner, if that's the
4 route that the Board wants to go, and then the
5 parties will have an opportunity to brief
6 exceptions, similar to, for example, when Terisa
7 was Board Counsel as well. So that's my two
8 cents. Thank you.

9 CHAIR SIMPSON: Thank you, Sam. Mr.
10 Yemington.

11 MR. YEMINGTON: Chair Simpson, members
12 of the Board. We share DEQ and MEIC's
13 presentation. And with respect to MAPA and the
14 subsection referenced by Mr. Hernandez, we share
15 that interpretation. This process is contemplated
16 by MAPA, would allow Ms. Hupp to develop the
17 proposed FOFCOLs, present those to the Board, and
18 then participate in her role as BER Counsel.

19 So I think that may respond to Member
20 Payne's question with respect to her two roles in
21 reaching the finish line here. So again, we do
22 agree with the folks at MEIC and DEQ that this is
23 the best way to get to the finish line here, and
24 the one that is most clearly consistent with the
25 parties' expectations under MAPA.

1 CHAIR SIMPSON: Thank you. Just to be
2 sure I'm clear, is there a concern here about the
3 process of going through exceptions and responses?
4 And I would anticipate that would be part of the
5 process in any case.

6 MR. HERNANDEZ: If I may, Chair Simpson.

7 CHAIR SIMPSON: Mr. Hernandez. Well, I
8 see several hands up. Mr. Hernandez.

9 MR. HERNANDEZ: Just to respond to your
10 last question, Chairman Simpson, I think that I
11 agree with Mr. Yemington that it is just more
12 clearly in line with the provision of MAPA Section
13 Montana Code Annotated 2-4-621 to formally assign
14 it to the Hearing Examiner, have her prepare a
15 proposed FOFCOL, and allow exceptions.

16 If the Board were to retain
17 jurisdiction, and prepare a proposed order,
18 technically it might still have to go through the
19 exceptions process, but it would be a weird effort
20 to try to fit a square peg in a round hole. I
21 think that it would just be cleanest to officially
22 assign jurisdiction of the matter to Ms. Hupp if
23 she would take it as the Hearing Examiner.

24 So I don't think that if that weren't
25 the case that exceptions wouldn't be allowed. I

1 think it would be confusing, and not clearly in
2 line with MAPA, which is just a problem we could
3 avoid at this stage, if that makes sense. And I'm
4 happy to answer questions if anyone on the Board
5 wants to discuss. And I suspect that Counsel also
6 can help clarify if I said anything incorrect.

7 CHAIR SIMPSON: Thank you. I think what
8 we're talking about here is more a matter of
9 semantics than anything else. I think the process
10 will be the same. Board Member Payne.

11 BOARD MEMBER PAYNE: First off, just to
12 respond to Counsel's statements that -- I just
13 want to be clear. I didn't say that it would be
14 improper. I said it was my concern it's just not
15 the best practice. And I still don't think it's
16 the best practice. I think it subjects the -- on
17 appeal the Board can be subjected to collateral
18 attack that it wasn't exercising its independent
19 jurisdiction when its own Counsel is -- we're
20 inclined to follow our own attorney more so than
21 maybe another Hearing Examiner.

22 So at this point none of the parties are
23 objecting on that issue, so maybe in this
24 particular case it's not as big of an issue.

25 But I guess I have a question, which was

1 raised by Counsel about is rhetorical, is the
2 Board retaining jurisdiction. Is it better to say
3 retaining jurisdiction, or submitting it to a
4 Hearing Examiner?

5 As I understand from the discussion,
6 this matter has been -- there's been some
7 determinations prior in this matter. So has this
8 matter previously been referred out to a Hearing
9 Examiner?

10 CHAIR SIMPSON: Yes, this case was
11 assigned to Rob Cameron as an outside Hearing
12 Examiner and outside Counsel, and the case came
13 back to us when Mr. Cameron notified the Board
14 that because of health problems he would not be
15 able to continue.

16 BOARD MEMBER PAYNE: It may well then be
17 a matter of semantics, but sometimes semantics
18 matter.

19 CHAIR SIMPSON: That's my concern here.

20 BOARD MEMBER PAYNE: And maybe I'd offer
21 an amendment to the motion that we appoint Dana as
22 the successor Hearings Examiner, because even
23 though the Hearings Examiner has still -- we've
24 referred it to a Hearings Examiner, but still that
25 referral kind of technically I think is still out

1 there, we just have to -- unless the Board has
2 officially then said, "We want to retain that
3 jurisdiction."

4 So I think the proper motion is that we
5 nominate Dana as the subsequent or replacement
6 Hearing Examiner to replace Rob, and I would offer
7 that amendment to the motion.

8 CHAIR SIMPSON: There's been an
9 amendment offered to the motion to assign our
10 Board Counsel Dana Hupp as successor Hearing
11 Examiner. Is there a second to that motion?

12 VICE CHAIR AGUIRRE: I'll second the
13 motion.

14 CHAIR SIMPSON: A motion has been made
15 and seconded to amend the motion, so we're voting
16 now on amending the motion. We had another hand
17 up or two. Before we proceed to a vote, are there
18 any further comments from Counsel for the parties?

19 (No response)

20 CHAIR SIMPSON: We're voting on the
21 amendment to the motion. It's been moved and
22 seconded. All in favor, say aye.

23 (Response)

24 CHAIR SIMPSON: Motion carries, I
25 believe. Opposed.

1 (No response)

2 CHAIR SIMPSON: Motion carries. Is
3 there any further discussion on the amended
4 motion?

5 (No response)

6 CHAIR SIMPSON: The amended motion is
7 for the Board, if I understand correctly, is for
8 the Board to retain jurisdiction on this case, but
9 to assign the case to Board Counsel as successor
10 Hearing Examiner; is that an accurate statement,
11 or am I misunderstanding something?

12 BOARD MEMBER PAYNE: I think you might
13 be misunderstanding something. It's that the
14 Board as I understand -- My amended motion was
15 that we just -- didn't talk about retaining
16 jurisdiction, it was just that -- it had already
17 been referred out to a Hearing Examiner, so this
18 is just now that Hearing Examiner has resigned.

19 So this motion on the floor is then that
20 we just appoint Dana as the successor, keeping the
21 referral out, not necessarily keeping the
22 jurisdiction with the Board, so that when she
23 comes back, she will have the findings of fact and
24 conclusions of law, that then there will be
25 exceptions, and we would examine it like any other

1 Hearing Examiner matter.

2 VICE CHAIR AGUIRRE: When I made my
3 second, that is exactly how I understood the
4 amended motion to be and why I seconded it, as
5 Board Member Payne just outlined.

6 CHAIR SIMPSON: I'll tell you what my
7 concern is straight out, and that is as I
8 mentioned earlier, I had made the specific request
9 to the Governor's Office and was turned down, and
10 so I'm not sure I can support the motion. Further
11 discussion? Dana Hupp, you've got your hand up.
12 Please. I'm sorry. Please proceed.

13 MS. HUPP: Chairman Simpson, and Board
14 members, just a technicality. The Board did
15 already assume jurisdiction of this matter in
16 June, so to refer it to a Hearing Examiner, there
17 will need to be a formal referral to me as a
18 Hearing Examiner if that's how you decide to
19 proceed. So the Board currently has jurisdiction.

20 And Chair Simpson, and I perhaps can let
21 the parties address this, I think their concern is
22 that because there is already a factual record
23 that needs to be reviewed, if I'm reviewing it the
24 full Board isn't, and so I think that's why they
25 thought it would be more appropriate to have me

1 appointed to be the Hearing Examiner versus just
2 acting as Board Counsel. But I'd invite them to
3 comment on that, but I think that's substantively
4 what the concern is.

5 BOARD MEMBER PAYNE: That's exactly my
6 concern, because if it's not officially referred
7 out, then each member will have to go through the
8 entire record to review the case, and then to
9 vote, you know, before we can vote on it. And I'm
10 not -- that's probably -- I don't know.

11 I guess I'd ask Board Counsel this
12 question, but that may even include the material
13 that preceded all this, the prior matters, but I'm
14 not sure. But anyway, certainly the matters that,
15 you know, any of the material generated going
16 forward I think the Board members would be
17 required to review all of that before we could
18 vote to approve any of Dana's findings of fact and
19 conclusions of law.

20 CHAIR SIMPSON: Further discussion.

21 (No response)

22 CHAIR SIMPSON: Would you for the record
23 please state your motion again, amended motion.

24 BOARD MEMBER PAYNE: Well, the motion is
25 that the Board appoint Dana as the successor

1 Hearing Examiner to take this matter forward as
2 the Hearing Examiner. Now, that's what the motion
3 is.

4 CHAIR SIMPSON: The motion has been made
5 and seconded. Is there any further discussion?

6 (No response)

7 CHAIR SIMPSON: All in favor, say aye.

8 (Response)

9 CHAIR SIMPSON: Opposed.

10 BOARD MEMBER PAYNE: Nay.

11 CHAIR SIMPSON: Wait a minute. Would
12 you poll the Board, please, Sandy.

13 MS. MOISEY-SCHERER: Chair Simpson.

14 CHAIR SIMPSON: Nay.

15 MS. MOISEY-SCHERER: Vice Chair Aguirre.

16 VICE CHAIR AGUIRRE: Aye.

17 MS. MOISEY-SCHERER: Board Member

18 Altemus.

19 BOARD MEMBER ALTEMUS: Aye.

20 MS. MOISEY-SCHERER: Board Member Payne.

21 BOARD MEMBER PAYNE: Nay.

22 MS. MOISEY-SCHERER: Board Member Smith.

23 BOARD MEMBER SMITH: Aye.

24 CHAIR SIMPSON: The motion fails for
25 lack of a quorum, lack of a quorum vote.

1 BOARD MEMBER PAYNE: Point of order. Is
2 it the majority of the Board or majority of the
3 Board present that's required?

4 CHAIR SIMPSON: The majority of the
5 Board.

6 BOARD MEMBER ALTEMUS: Chairman Simpson,
7 maybe we can ask this of Deputy Fehr. But the
8 Legislature this past session changed that to the
9 majority of the Board present. So maybe Mr. Fehr
10 can comment on that or somebody from DEQ can
11 comment on that, but I was involved in those
12 hearings, and they changed that. They changed the
13 law. But somebody else can comment maybe legally.

14 DEPUTY DIRECTOR FEHR: I have to peek at
15 that time. I have an attorney online that can
16 answer that with DEQ.

17 CHAIR SIMPSON: I'm not aware of it if
18 it's happened.

19 DEPUTY DIRECTOR FEHR: I'll look at that
20 and see if I can pull it up.

21 BOARD MEMBER ALTEMUS: It was one of the
22 newer house members that brought that forward, and
23 actually the Lieutenant Governor came in and
24 supported it as well, but it did pass, I'm pretty
25 sure.

1 VICE CHAIR AGUIRRE: I remember seeing a
2 publication about it passing. I just don't have
3 the bill number.

4 BOARD MEMBER ALTEMUS: See if I have
5 that anywhere.

6 VICE CHAIR AGUIRRE: Right.

7 CHAIR SIMPSON: It's 10:30 more or less,
8 so why don't we take a ten minute break and then
9 resume. If someone could take a look at this, and
10 confirm one way or another whether we need a
11 majority of the Board or a majority of the Board
12 present, I think that would be very helpful.
13 Let's return at 10:40, please.

14 (Recess taken)

15 CHAIR SIMPSON: It's 10:41. Bring the
16 meeting back to order. Sandy, would you take roll
17 call, please.

18 MS. MOISEY-SCHERER: Chair Simpson.

19 CHAIR SIMPSON: Here.

20 MS. MOISEY-SCHERER: Vice Chair Aguirre.

21 VICE CHAIR AGUIRRE: Here.

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

24 BOARD MEMBER ALTEMUS: Here.

25 MS. MOISEY-SCHERER: Board Member Payne.

1 BOARD MEMBER PAYNE: Here.

2 MS. MOISEY-SCHERER: Board Member Smith.

3 BOARD MEMBER SMITH: Here.

4 MS. MOISEY-SCHERER: We have a quorum,
5 sir.

6 CHAIR SIMPSON: Thank you very much.
7 Has anybody -- I had one note from Mr. Fehr that
8 they hadn't been able to verify a change in the
9 law as it relates to Board votes. Has anybody had
10 any success with that? Apparently not? I know
11 Dana is looking as well. So Mr. Hernandez has his
12 hand up, as does Dana. Dana.

13 MS. HUPP: Chairman Simpson, if Mr.
14 Hernandez has found it, I was just going to report
15 I'm hoping to have an answer by the end of the
16 meeting, and so if the Board Members wanted to
17 defer and move on, but maybe Mr. Hernandez has
18 found the answer.

19 CHAIR SIMPSON: Mr. Hernandez.

20 MR. HERNANDEZ: Chairman Simpson, I
21 believe that the relevant provision is posted in
22 the chat. If anyone disagrees with me on that. I
23 think that's the controlling provisions of this
24 question.

25 CHAIR SIMPSON: So it's a majority of

1 the membership?

2 MS. MOISEY-SCHERER: Chair Simpson, this
3 is Sandy. In the webinar chat, Mr. Hernandez has
4 put the Montana Code Annotated citation. That's
5 in the webinar chat.

6 CHAIR SIMPSON: Say that again, please.

7 MS. MOISEY-SCHERER: In the webinar
8 chat, Mr. Hernandez has quoted Montana Code
9 Annotated 2-15-124. "A majority of the membership
10 constitutes a quorum to do business. A favorable
11 vote of at least a majority of the members in
12 attendance at a meeting at which a quorum is
13 present is required to adopt any resolution,
14 motion, or other decision unless otherwise
15 provided by law."

16 CHAIR SIMPSON: "Unless otherwise
17 provided by law."

18 MS. MOISEY-SCHERER: Mr. Yemington has
19 his hand up as well.

20 CHAIR SIMPSON: Mr. Yemington. Yes, Mr.
21 Yemington, please.

22 MR. YEMINGTON: Chairman Simpson,
23 members of the Board. I share Mr. Hernandez's
24 presentation of the law, and I would just further
25 note that that provision by my reading became

1 effective on May 1st of this year.

2 CHAIR SIMPSON: Okay. Just for the
3 record, could we read that provision again,
4 please.

5 MS. MOISEY-SCHERER: "A majority of the
6 membership constitutes a quorum to do business. A
7 favorable vote of at least a majority of the
8 members in attendance at a meeting at which a
9 quorum is present is required to adopt any
10 resolution, motion, or other decision unless
11 otherwise provided by law." Montana Code
12 Annotated 2-15-124.

13 CHAIR SIMPSON: I guess the only place I
14 can think of where there might be anything further
15 helpful in the law is the section having to do
16 with the formation and appointment of the Board
17 which I do not have in front of me. So I'm going
18 to suggest for now that we make a -- in fact I'll
19 make a motion that we table this matter and
20 revisit it at the end of the meeting, until
21 somebody has a chance to look that up.

22 VICE CHAIR AGUIRRE: Can you clarify
23 what you're trying to find, Chairman Simpson? It
24 seems like that statute is pretty clear.

25 CHAIR SIMPSON: What I'm trying to

1 clarify is we just had a vote of three to two.

2 Now we have a quorum because we have four members
3 present, a majority of the Board. And my
4 understanding up until this point is that we need
5 a majority vote of the Board, that is, four votes
6 in order to pass a motion.

7 We had a vote of three to two in favor
8 of the motion, which in that case would fail, but
9 it would pass if -- according to this latest
10 language that was read to us where a majority of
11 the members of the Board present. There's five of
12 us present, so three is a majority, and in that
13 case the motion would pass. So it makes a
14 difference whether the motion passes or fails.

15 VICE CHAIR AGUIRRE: Correct. However,
16 it seems like the guidance is clear, but you don't
17 feel like it's clear?

18 CHAIR SIMPSON: Well, it says also
19 "unless otherwise provided by law," and that's why
20 I think we ought to take a look at the enabling
21 legislation for the Board, just to be sure that
22 there isn't something there that specifies a
23 majority of the Board.

24 VICE CHAIR AGUIRRE: In the actual
25 Montana Code Annotated for the Board of

1 Environmental Review there's no discussion of that
2 vote. So if you're looking to that Montana Code
3 Annotated regulation for the Board, there isn't a
4 discussion of the vote, like the --

5 CHAIR SIMPSON: Are you looking at the
6 formation of the Board or the appointment of Board
7 members?

8 VICE CHAIR AGUIRRE: I'm looking at --

9 BOARD MEMBER PAYNE: I have a possible
10 resolution so we can move on. I'm willing to
11 change my vote, just because I think the reading
12 of the law is clear. So if we want to -- however
13 procedurally how to do that, I'm not exactly sure.
14 I think if we want to move for reconsideration of
15 the issue, I would vote for it, and then we could
16 move on with the four votes.

17 CHAIR SIMPSON: Is that a motion to
18 reconsider?

19 BOARD MEMBER PAYNE: But as voting
20 against it, I don't know if I can make that
21 motion. I think someone who voted for it has to
22 make that motion.

23 CHAIR SIMPSON: Mr. Hernandez, you have
24 your hand up.

25 MR. HERNANDEZ: Chairman Simpson,

1 members of the Board. I just wanted to offer to
2 respond to your question, Chairman Simpson, about
3 that enabling legislation creating the Board. I
4 can post that in the chat right now. It refers
5 the Board to the provision that I previously put
6 in the chat.

7 But just to move this conversation
8 forward and some clarity, if you wish, I can post
9 that provision in the webinar chat also.

10 CHAIR SIMPSON: Is there any guidance
11 there about a vote of the Board?

12 MR. HERNANDEZ: It directs the Board to
13 the provision that I already pointed to in here.
14 I'll put it in right now. But it says, Subsection
15 (4) says, "The Board is designated a
16 quasi-judicial Board for the purposes of
17 2-14-124," and 2-15-124 is a provision that says
18 that "a majority of the members present is
19 required to adopt a motion."

20 As Mr. Yemington noted, that's a
21 provision that's been in effect since May of this
22 year.

23 VICE CHAIR AGUIRRE: And that was the
24 provision, the exact provision that Mr. Hernandez
25 is speaking to that I was referencing as the --

1 unless --

2 CHAIR SIMPSON: That being the case, I
3 had stated that the motion had failed because it
4 did not reach the four vote threshold. That was
5 apparently in error, and so the motion passes on a
6 vote of three to two.

7 BOARD MEMBER PAYNE: I guess that's good
8 to know going forward just generally as well.

9 CHAIR SIMPSON: It certainly is. I'm
10 trying to think back as to whether we've had any
11 other votes that got into this situation after May
12 1st. I don't think so, but I don't know. I
13 hadn't expected to get hung up on this item for so
14 long, but it's been a productive discussion just
15 the same. Thank you everybody for your
16 contributions to it, and let's move on.

17 (The proceedings were concluded
18 at 10:52 a.m.)

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C E R T I F I C A T E

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 - 39 - 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 4th day of
November, 2025.



LAURIE CRUTCHER, RPR

Court Reporter - Notary Public

My commission expires

March 9, 2028.

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