

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

In the Matter of:) BER 2022-04 OC
Appeal and Request for Hearing)
by Valley Garden Land & Cattle)
LLC Regarding Issuance of)
Opencut Mining Permit #674,)
Amendment #3.)

TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)

October 24th, 2025

10:52 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR

COURT REPORTER, NOTARY PUBLIC

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A P P E A R A N C E S:

ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT OF
ENVIRONMENTAL QUALITY:

MS. LEE McKENNA, ESQ. (via Zoom)
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ATTORNEY APPEARING ON BEHALF OF VALLEY GARDEN:

MR. DAVID KIM WILSON, ESQ.
Attorneys at Law
Morrison, Sherwood, Wilson & Deola PLLP
401 North Last Chance Gulch
Helena, MT 59601

1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: The last one is BER
5 2022-04 OC, Valley Gardens Land and Cattle, LLC.
6 The Board assumed jurisdiction for this matter on
7 June 20th, 2025. The Board can decide to assign
8 this matter to a Hearing Examiner, or retain the
9 case, or retain it temporarily.

10 Status reports received from parties on
11 October 21st of 2025. The Board Chair and Counsel
12 had a status conference with the parties on
13 October 7th. The parties have agreed that the
14 stay on cross motions for summary judgment should
15 be lifted, with response briefs due on December
16 19th, 2025, and reply briefs due on January 30th,
17 2026.

18 The Board or Hearing Examiner will need
19 to issue an order lifting the stay on the pending
20 cross motions for summary judgment, and setting
21 forth the briefing schedule and a date for hearing
22 on the summary judgment motions.

23 I'm not quite sure what to say about
24 this case. I guess the most accurate thing I can
25 say about it is that it appears from my point of

1 view to have just gone off the rails. There are,
2 in addition to the motions for summary judgment,
3 there are five pending motions.

4 This was another one of Mr. Cameron's
5 cases, and Hearing Examiner Cameron had stayed the
6 motions for summary judgment. The parties agree
7 that we should proceed despite the fact that there
8 are a number of motions which have yet to be
9 resolved. I think it's a question of what, well,
10 what the Board decides, what we want to do with
11 it.

12 Again, this is another case where I feel
13 that it's languished far too long, and the most
14 expeditious way, I believe, despite the fact that
15 it's going to mean a lot of reading of the record
16 for the Board, is the Board retain this case, and
17 see it through the summary judgment process and
18 get it decided.

19 I guess I'd like to hear from the
20 parties on this. Is there somebody here
21 representing Valley Garden?

22 MR. WILSON: Mr. Chair, this is Kim
23 Wilson. I'm here representing Valley Garden. Can
24 you hear me?

25 CHAIR SIMPSON: Mr. Wilson, please

1 proceed.

2 MR. WILSON: As I understand, and I
3 think you expressed accurately kind of the state
4 of the case, and it sounds like your
5 recommendation is that the Board retain
6 jurisdiction over the case. I don't think we'd
7 have any objection to that.

8 Alternatively, in light of the
9 conversation that you just had on the previous
10 case, I think we, Valley Garden, would be also
11 amenable to Ms. Hupp being assigned as the Hearing
12 Examiner, if you were going to assign a Hearing
13 Examiner. I think we would be reluctant, Valley
14 Garden, to have it assigned to someone from DLI
15 without any particular environmental training.

16 So as to your first suggestion that the
17 Board keep it, we're fine with that.

18 CHAIR SIMPSON: Thank you, Mr. Wilson.
19 DEQ.

20 MS. McKENNA: Hi. This is Lee McKenna.
21 Can you hear me?

22 CHAIR SIMPSON: Yes.

23 MS. McKENNA: Sorry. I don't seem to be
24 on -- my camera doesn't seem to be on for some
25 reason.

1 MS. MOISEY-SCHERER: Lee, this is Sandy.
2 I just got your camera going and promoted you.

3 MS. McKENNA: I still don't think my
4 camera is on.

5 CHAIR SIMPSON: While we're looking for
6 that, Mr. Wilson, your hand is still up. Did you
7 have something further to say?

8 MR. WILSON: No, Mr. Chair. I can lower
9 it. Thank you.

10 CHAIR SIMPSON: Thank you.

11 MR. WILSON: Actually, Mr. Chair, if I
12 may add just one thing, and that's just for the
13 rest of the Board's benefit, that we had agreed to
14 proceed with the summary judgment briefing as
15 suggested by DEQ simply as a way to see if we can
16 kind of streamline and get this thing in front of
17 the Board more quickly, and so that's our
18 explanation for agreeing to do that and to follow
19 DEQ's recommendation on that.

20 CHAIR SIMPSON: Thank you, Mr. Wilson.
21 Ms. McKenna.

22 MS. McKENNA: Thank you.

23 CHAIR SIMPSON: Sorry to interrupt.
24 Please proceed.

25 MS. McKENNA: Thank you, Chairman

1 Simpson. I just wanted to start by saying that
2 there is an error in the materials that were
3 provided to the Board. It states that motions for
4 summary judgment have been fully briefed. They
5 have not been fully briefed, because Valley Garden
6 moved for a stay after the opening briefs were
7 filed in favor of completing the briefing for
8 motions for summary judgment, and those were
9 completed and we had a hearing in April of 2024.

10 So respectfully, Chairman Simpson, I
11 don't think that this case is really off the
12 rails. I think it's actually quite simple to --
13 well, maybe off the rails this particular minute
14 -- but I think it's very easy to get it back on
15 the rails and to get it resolved.

16 And I think that if I can explain what
17 the purpose of summary judgment is, then I can
18 explain how we can get this resolved in a really
19 expeditious manner.

20 So DEQ had asked that the stay on the
21 motions for summary judgment be lifted, and Valley
22 Garden agreed so that briefing on summary judgment
23 can be completed. And challenges to DEQ opencut
24 permits in the last few years have been resolved
25 on summary judgment, which made the motions in

1 limine moot, therefore unnecessary to consider.

2 And here's why, because the standard for
3 deciding summary judgment is that the adjudicator,
4 the person or the entity deciding the motion, must
5 only consider undisputed material facts. That
6 means that both sides agree on the facts, or the
7 evidence is clear that there is no question about
8 these facts.

9 And then the adjudicator applies the
10 appropriate law to the undisputed facts, and
11 that's why summary judgment has to be decided
12 first on the undisputed facts, because if DEQ wins
13 its motion for summary judgment -- which as recent
14 history shows is likely -- then the motions in
15 limine become moot.

16 So I just wanted to explain that
17 procedurally where we are, and how we can get this
18 resolved, because the motions in limine deal with
19 things that would be dealt with regarding evidence
20 at the hearing, but if the case is dismissed as a
21 matter of law in summary judgment, then we don't
22 have to worry about the motions in limine.

23 And because this case can and should be
24 decided in favor of DEQ on summary judgment,
25 summary judgment briefing should be resumed, the

1 hearing held, and then the summary judgment
2 motions should be decided before the motions in
3 limine.

4 So DEQ respectfully requests that the
5 Board lift the stay, and assign the case to Ms.
6 Hupp if that's possible. It's at the point where
7 an experienced attorney can and should be able to
8 resolve this very efficiently. I too worry if
9 this case gets assigned to someone at the Office
10 of Administrative Hearings at the Department of
11 Labor, that it will actually be less cost
12 effective than Ms. Hupp, because even though Ms.
13 Hupp charges more on an hourly basis, because of
14 her experience and because of her efficiency, I
15 think she could get this resolved very quickly,
16 whereas someone who is not familiar with the
17 Opencut Act would --

18 You know, I used to work -- for full
19 disclosure -- I used to work for the Department of
20 Labor, not in the Office of Administrative
21 Hearings, but I know that the Office of
22 Administrative Hearings judicial examiners, they
23 deal with unemployment insurance law, they deal
24 with wage and hour cases. They don't deal with
25 our cases.

1 And I think that it would be much more
2 cost effective to have Ms. Hupp decide the summary
3 judgment motions, and then she could efficiently
4 dispatch with the legal issues on the undisputed
5 facts, and if there's anything remaining for a
6 contested case -- which I don't believe would be
7 the case -- then the Board can have a contested
8 case hearing, and Ms. Hupp can be the Hearing
9 Examiner for that.

10 CHAIR SIMPSON: Thank you. Thank you,
11 Ms. McKenna. Dana, what are your thoughts? I
12 know you don't have enough to do.

13 MS. HUPP: Chairman Simpson and Board
14 members, again, I'm happy to take this on if
15 that's the wishes of the Board. So whatever the
16 Board's pleasure is, I'm happy to accommodate.

17 CHAIR SIMPSON: Thank you.

18 BOARD MEMBER PAYNE: If we're ready for
19 it, I'd propose a motion.

20 CHAIR SIMPSON: Further comments?

21 (No response)

22 CHAIR SIMPSON: I was just going to ask
23 for a motion, so please proceed.

24 BOARD MEMBER PAYNE: I would move that
25 the Board retain jurisdiction, we order the

1 briefing schedule on the summary judgment motions
2 to commence and complete, and then at the time
3 when those are complete that we consider this
4 matter at the next Board meeting after that, and
5 if necessary, we can decide at that point whether
6 or not the motions in limine need to be
7 adjudicated before, after, or during the summary
8 judgment motions. That's a long motion. Sorry.

9 CHAIR SIMPSON: Does your motion include
10 -- let me ask a question, Board Member Payne.
11 Does your motion include lifting the stay?

12 BOARD MEMBER PAYNE: Yes. I'll make it
13 succinct. My motion is that the Board assume
14 jurisdiction, to lift the stay, order the summary
15 judgment motions complete, and then consider the
16 case at its next meeting after the completion of
17 the summary judgment briefing.

18 CHAIR SIMPSON: Is there a second?

19 VICE CHAIR AGUIRRE: I'll second it.
20 However I think there needs to be one word changed
21 in there. We already assumed jurisdiction of the
22 case, so we would just need to say "retain
23 jurisdiction." Otherwise I second the motion with
24 that minor change.

25 BOARD MEMBER PAYNE: Agreed.

1 CHAIR SIMPSON: A motion has been made
2 and seconded. I think the Board members agree on
3 the wording of the motion. Discussion.

4 (No response)

5 CHAIR SIMPSON: Julia, any thoughts?

6 BOARD MEMBER ALTEMUS: I agree. Thanks,
7 though.

8 CHAIR SIMPSON: Joe.

9 BOARD MEMBER SMITH: The same. I'm in
10 agreement.

11 CHAIR SIMPSON: Anything further? As am
12 I. A motion has been made and seconded. All in
13 favor, say aye.

14 (Response)

15 CHAIR SIMPSON: Opposed.

16 (No response)

17 CHAIR SIMPSON: Motion carries
18 unanimously. Thank you very much.

19 (The proceedings were concluded
20 at 11:07 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 - 12 - 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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