1	BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
2	OF THE STATE OF MONTANA
3	
4	In the Matter of:) BER 2022-04 OC
5	Appeal and Request for Hearing)
6	by Valley Garden Land & Cattle)
7	LLC Regarding Issuance of)
8	Opencut Mining Permit #674,)
9	Amendment #3.
10	
11	TRANSCRIPT OF PROCEEDINGS (VIA ZOOM)
12	
13	October 24th, 2025
14	10:52 a.m.
15	
16	BEFORE CHAIRMAN DAVID SIMPSON,
17	VICE CHAIR STACY AGUIRRE,
18	BOARD MEMBERS JOSEPH SMITH,
19	JULIA ALTEMUS, and ALLAN PAYNE
20	
21	
22	PREPARED BY: LAURIE CRUTCHER, RPR
23	COURT REPORTER, NOTARY PUBLIC
24	lauriecrutcher@gmail.com
25	

1	APPEARANCES:
2	AMMODNEY ADDEADING ON DENAIT OF MUE DEDADMENT OF
3	ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY:
4	MS. LEE McKENNA, ESQ. (via Zoom) Special Assistant Attorney General
5	Montana Department of Environmental
6	Quality P.O. Box 200901
7	Helena, MT 59620-0901
8	ATTORNEY APPEARING ON BEHALF OF VALLEY GARDEN:
9	MR. DAVID KIM WILSON, ESQ. Attorneys at Law
10	Morrison, Sherwood, Wilson & Deola PLLP 401 North Last Chance Gulch
11	Helena, MT 59601
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WHEREUPON, the following proceedings were had:

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CHAIR SIMPSON: The last one is BER

2022-04 OC, Valley Gardens Land and Cattle, LLC.

The Board assumed jurisdiction for this matter on

June 20th, 2025. The Board can decide to assign

this matter to a Hearing Examiner, or retain the

case, or retain it temporarily.

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

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

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

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

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

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

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

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

CHAIR SIMPSON: Mr. Wilson, please

proceed.

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

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

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

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

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

CHAIR SIMPSON: Yes.

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

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

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

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

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

> Thank you. CHAIR SIMPSON:

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

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

> MS. McKENNA: Thank you.

CHAIR SIMPSON: Sorry to interrupt. Please proceed.

MS. McKENNA: Thank you, Chairman

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

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

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

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

limine moot, therefore unnecessary to consider.

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

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

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

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

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

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

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

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

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

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

CHAIR SIMPSON: Thank you.

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

CHAIR SIMPSON: Further comments?

(No response)

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

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

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

CHAIR SIMPSON: Does your motion include

-- let me ask a question, Board Member Payne.

Does your motion include lifting the stay?

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

CHAIR SIMPSON: Is there a second?

VICE CHAIR AGUIRRE: I'll second it.

However I think there needs to be one word changed in there. We already assumed jurisdiction of the case, so we would just need to say "retain jurisdiction." Otherwise I second the motion with that minor change.

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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13 CERTIFICATE 1 2 STATE OF MONTANA) : SS. 3 COUNTY OF LEWIS & CLARK 4 I, LAURIE CRUTCHER, RPR, Court Reporter, 5 Notary Public in and for the County of Lewis & 6 7 Clark, State of Montana, do hereby certify: That the proceedings were taken before me at 8 the time and place herein named; that the 9 10 proceedings were reported by me in shorthand and transcribed using computer-aided transcription, 11 12 and that the foregoing - 12 - pages contain a true 13 record of the proceedings to the best of my 14 ability. 15 IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 4th day of 16 17 November, 2025. Lami Centro 18 19 20 LAURIE CRUTCHER, RPR 21 Court Reporter - Notary Public 22 My commission expires March 9, 2028. 23 24

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