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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW  
OF THE STATE OF MONTANA

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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. )

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TRANSCRIPT OF PROCEEDINGS  
VIA ZOOM

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February 20, 2026  
9:47 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR  
COURT REPORTER, NOTARY PUBLIC  
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A P P E A R A N C E S:

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ATTORNEY APPEARING ON BEHALF OF THE DEPARTMENT OF ENVIRONMENTAL QUALITY:

MS. LEE MCKENNA, ESQ.  
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1           WHEREUPON, the following proceedings were  
2 had:

3                           \* \* \* \* \*

4           CHAIR SIMPSON: The next Item (c), in  
5 the Matter of the Appeal and Request for Hearing  
6 by Valley Garden Land and Cattle, LLC, regarding  
7 issuance of Opencut Mining Permit No. 674,  
8 Amendment No. 3, BER 2022-04 0C Opencut.

9           Summary judgment briefing is complete,  
10 and the Board needs to decide when we will  
11 schedule oral argument on summary judgment. Dana  
12 and I have discussed this, and feel we need to  
13 schedule a special meeting for this, with the  
14 suggested date of March 20th.

15           This is a case that has a long history  
16 and a lot of legal documents associated with it,  
17 and so what I would propose to do is to have Sandy  
18 send out the complete docket to the Board Members  
19 so you'll have time to review that before we meet  
20 to hear the parties.

21           And then at the same time I think Dana  
22 will give us some guidance in summary form in the  
23 interim as to what the legal issues are here that  
24 are before us, and that would be sent out the week  
25 prior to the meeting. So that's where we are on

1 that.

2 This is the other case that we inherited  
3 from Rob Cameron, and hopefully we can wrap up  
4 with summary judgment, but we'll just have to see  
5 how that goes. So that would be my question.  
6 Would March 20th be acceptable to the Board for a  
7 special meeting to hear Valley Garden summary  
8 judgment?

9 MS. McKENNA: Chair Simpson, may I be  
10 heard?

11 CHAIR SIMPSON: Yes, please.

12 MS. McKENNA: Lee McKenna, Counsel for  
13 DEQ. Chair Simpson, members of the Board. When  
14 would the Board like to schedule the site visit?

15 As the Board is aware, former Hearing  
16 Examiner Cameron issued an order for view of the  
17 DSL site on April 11th, 2024, and he did in fact  
18 view the site on April 15th, 2024 for the purpose  
19 of enabling him to familiarize himself with the  
20 DSL site, to better make an informed application  
21 of testimony and evidence in deciding the pretrial  
22 motions, and in the event of a contested case  
23 hearing, that as well.

24 So I would like to request that the  
25 Board honor former Hearing Officer Cameron's order

1 for a site visit, and schedule a site visit before  
2 deciding -- before hearing oral argument and  
3 deciding the motions for summary judgment.

4 We are honoring all the other orders in  
5 this case, and I don't see a reason why the Board  
6 would make an exception to honoring the order  
7 that's been in place for almost two years now.

8 CHAIR SIMPSON: So if I understand you  
9 correctly, at the time the order specified that  
10 the Hearing Examiner would make a site visit. So  
11 what we're asking now is that the Board make a  
12 site visit; is that correct?

13 MS. MCKENNA: If the Board chooses to  
14 retain jurisdiction to decide the motions for  
15 summary judgment. The person or entity, the body  
16 -- meaning the Board -- deciding the motions for  
17 summary judgment, the pretrial motions, I believe  
18 that under this order that they would then view  
19 the site for the purpose of enabling them to  
20 familiarize themselves with the site to better  
21 make an informed decision.

22 I mean I think that this is a search for  
23 truth, a search for the facts, and it shouldn't  
24 just be made on arguments of Counsel.

25 MR. WILSON: May I speak, Mr. Chair?

1 CHAIR SIMPSON: Please.

2 MS. MOISEY-SCHERER: Chair Simpson, that  
3 is David Wilson.

4 CHAIR SIMPSON: Yes.

5 MR. WILSON: Members of the Board, Chair  
6 Simpson. This is Kim Wilson representing Valley  
7 Garden. I think I have three comments in response  
8 to Ms. McKenna's request.

9 First, I don't think this Board is  
10 necessarily bound by prior rulings by the prior  
11 Hearing Examiner. Second, Mr. Cameron did in fact  
12 view the site already, and I understand that you  
13 folks have not.

14 But my third point is I don't think it  
15 is necessary, given the administrative record  
16 review nature of this case, and particularly given  
17 the fact that DEQ, when it issued this permit,  
18 itself did not inspect the site.

19 So we believe generally it's an  
20 unnecessary and potentially quite expensive, I  
21 would imagine, for all of you, exercise. We  
22 believe that this case can be resolved at summary  
23 judgment following a hearing on summary judgment,  
24 and we would urge the Board to go ahead with that.  
25 The March 20th date works for us.

1 MS. MCKENNA: May I respond to that?

2 CHAIR SIMPSON: Please.

3 MS. MCKENNA: DEQ did inspect the site  
4 through drone footage, which is infinitely  
5 superior, because we have trained scientists who  
6 are interpreting very sophisticated drone footage  
7 which takes measurements, and shows relationships  
8 that can't be seen by the naked eye.

9 And it's interpreted by opencut  
10 specialists. But because the Board is mostly  
11 composed of people who are not opencut  
12 specialists, I think it would be invaluable for  
13 the Board to actually visit the site. And Mr.  
14 Cameron in fact remarked that it was incredibly  
15 helpful while he was at the site. He said, "This  
16 is incredibly helpful. You can't understand it  
17 without being here."

18 And he was the former Hearing Examiner,  
19 he ordered this, and just because he went, he's  
20 not available any more, and so I think that in  
21 keeping with the order, the Board -- I would  
22 appreciate if the Board would schedule a site  
23 visit, so that we can honor the order.

24 BOARD MEMBER ALTEMUS: Chair Simpson,  
25 this is Board Member Altemus. I guess I'd have

1 two questions. One, can we see the drone footage?  
2 Because I do think that would be helpful. And  
3 two, I would think that the Hearings Examiner  
4 would have put his notes in the body of the whole  
5 issue that we could review as well.

6 MS. MCKENNA: He did not. I'm sorry to  
7 interrupt you. He did not make comments. There's  
8 no notes in the record that I'm aware of. They  
9 haven't been shared with Counsel.

10 And the orthophotos are available, but  
11 it's not like you're watching a movie. And so I  
12 think that the Hearing Examiner had those  
13 available to him, and he still felt that the site  
14 visit was invaluable.

15 BOARD MEMBER ALTEMUS: I would still  
16 like to see the drone footage, and make that  
17 decision on my own. But thank you.

18 MR. WILSON: May I speak, Mr. Chair?

19 CHAIR SIMPSON: Mr. Wilson.

20 MR. WILSON: Again, I dispute Ms.  
21 McKenna's characterization. The Hearing Examiner  
22 Rob Cameron did indeed order a site inspection or  
23 allow a site inspection by himself. That already  
24 happened, so that's not an order that carries over  
25 to you folks.

1 I think you folks independently can  
2 decide whether you want to do a site inspection.  
3 As I mentioned before, we would oppose that. We  
4 think it's an unnecessary expense given the  
5 extensive administrative record here, which  
6 includes photos, and maps, and Google Earth  
7 documents. But as a legal matter, I don't see how  
8 in any way you are bound by a procedural order  
9 that he issued that he already did.

10 CHAIR SIMPSON: Thank you, Mr. Wilson.  
11 Vice Chair Aguirre.

12 VICE CHAIR AGUIRRE: I agree with Ms.  
13 Altemus's assessment that the drone footage would  
14 be very valuable, and if it's not available in a  
15 format that this current Board can review, then it  
16 may be worthwhile to have new drone footage,  
17 because there is a case being made by Montana DEQ  
18 that that drone footage is very valuable.

19 And because the previous Hearing  
20 Examiner did go out there, but didn't put the  
21 notes in there, the drone footage could substitute  
22 I believe for a site visit. And again, Montana  
23 DEQ is making I believe a valid case that the  
24 drone footage is valuable, and hence Ms. Altemus's  
25 request to see the drone footage is prudent.

1 CHAIR SIMPSON: Thank you, Stacy. Dana,  
2 could I ask you to comment on this, please.

3 MS. HUPP: Chair Simpson and Board  
4 members, I am not aware of anything that would  
5 require you to do a site visit. Could a site  
6 visit be helpful to you? Potentially. What I  
7 would say is it's a potential option.

8 I know there's a desire to move this  
9 case forward, and I would offer the DEQ to comment  
10 on this option. You could hear the motions, your  
11 hearing in March would be limited to the cross  
12 motions for summary judgment; you could hear those  
13 in March; get the drone footage ahead of time; and  
14 then at that March hearing decide whether or not  
15 you think a site visit is necessary before you  
16 rule on those cross motions.

17 So I kind of see that as a middle  
18 ground, in that you would have the benefit of the  
19 drone footage, you could hear the oral argument,  
20 and then at that oral argument you could say,  
21 "Yes, you know what, we really do need to go out  
22 and see the site before we rule on those cross  
23 motions," or you could say, "We're comfortable  
24 moving forward at this point," and going ahead and  
25 ruling without the site visit.

1           So I see that kind of as a middle  
2 ground. This gives you an opportunity to get  
3 familiar with the parties' briefs and the issues  
4 being presented before you make a decision on the  
5 site visit.

6           VICE CHAIR AGUIRRE: Chair Simpson, the  
7 only comment on that is my comments were  
8 surrounding there not to be need for the site  
9 visit at all, and that the drone footage would be  
10 the valuable piece of viewing of the site, as  
11 Montana DEQ noted the value in that for things  
12 that you might miss when you're on the ground. So  
13 seeing it from that perspective is much more  
14 valuable, in my mind, than a site visit.

15           CHAIR SIMPSON: Ms. McKenna.

16           MS. MCKENNA: Yes. So the drone footage  
17 is not -- you need software in order to interpret  
18 all of the drone photos. May I share my screen?  
19 Because I think I can help clarify what we would  
20 be looking at.

21           The exhibits in DEQ's brief are based on  
22 the orthophotos from the drone footage. May I  
23 share my screen? I'd like to show you what I  
24 would be providing, which has already been  
25 provided to opposing Counsel in discovery. But I

1 basically want to show you what the orthophoto  
2 would look like.

3 CHAIR SIMPSON: Please.

4 (Share screen)

5 MS. MCKENNA: Can you see that?

6 CHAIR SIMPSON: Yes.

7 MS. MCKENNA: So this is the 3D  
8 orthophoto. And then the scientist can take  
9 measurements of the size then in relation to other  
10 things. So this is the 3D orthophoto, and then  
11 this is the two dimensional orthophoto of the  
12 site. And you can zoom in.

13 I mean without knowing how to operate  
14 the software, I think it would be difficult to  
15 provide the Board with this, because some people  
16 might be able to manipulate it other than -- and  
17 that's why we submitted photos. But these are the  
18 orthophotos upon which DEQ's exhibits were based,  
19 and then they allow the scientists to do different  
20 calculations and draw different things.

21 CHAIR SIMPSON: Thank you very much.  
22 Julia, did you have your hand up earlier? I'm  
23 sorry.

24 BOARD MEMBER ALTEMUS: Thank you, Mr.  
25 Chair. I was supporting Ms. Hupp's idea only

1 because if we're going to meet on the 20th of  
2 March, and we're trying to get there before March,  
3 it could be under three feet of snow, and it could  
4 be under ten feet of snow. I don't know.

5 But I do think in trying to expedite or  
6 at least move along so this doesn't drag out, I  
7 don't know that it's prudent to try to do a site  
8 visit before the 20th of March, and maybe Ms.  
9 Hupp's idea is a prudent way to go at this point.

10 CHAIR SIMPSON: Thank you, Julia.

11 Allan.

12 BOARD MEMBER PAYNE: I would agree with  
13 Mr. Wilson's comment that the Board is not bound  
14 by the order, and if we were, we'd certainly have  
15 the ability to amend the order as we're now  
16 sitting as in essence the Hearings Officer,  
17 sitting as the Board.

18 But this is kind of again an example  
19 where we're kind of asked to make a decision  
20 without having all the facts in front of us. I  
21 can't tell at this point if I would find a site  
22 visit, you know, helpful, because I don't know at  
23 all. I haven't seen the briefings and all the  
24 evidence.

25 What I would suggest is we go forward on

1 the March 20th, and if at the end of that -- I  
2 don't think we have to have a special motion, but  
3 during that hearing, if the majority of the Board  
4 members think a site visit would be helpful, or if  
5 the DEQ through their excellent Counsel could  
6 convince us that there was some important issue  
7 that we can't see in the evidence in front of us,  
8 that a site visit would be possible, then I think  
9 at that point we can say, "Yeah, now that we've  
10 seen all the evidence, let's go look at the site;"  
11 or we can say, "Oh, no, we don't really need to do  
12 it."

13 So I guess I would -- I don't know if  
14 there's a pending motion. If there isn't one, I  
15 would make one to go forward to have the meeting,  
16 to have the oral argument on the 20th of March,  
17 and to defer this decision for a site visit,  
18 depending on -- after we have reviewed all the  
19 documents and heard the arguments of Counsel.

20 CHAIR SIMPSON: Is there a second to the  
21 motion?

22 BOARD MEMBER ALTEMUS: I'll second.

23 CHAIR SIMPSON: A motion has been made  
24 and seconded to proceed with oral arguments on the  
25 20th of March. I guess any further comments,

1 discussion?

2 (No response)

3 CHAIR SIMPSON: I guess I'd like to  
4 offer that the package, you know, the docket is a  
5 long one with a lot of documents, but I did go  
6 through some of that just to get a little better  
7 idea of what this project was about, and there are  
8 aerial photos in there which I found very helpful.

9 And of course with my background in  
10 mining, I know what I'm looking at, so it's maybe  
11 a little easier for me than for some, but it  
12 really is pretty straight forward. I don't know  
13 that the drone footage would actually add  
14 anything, but the aerial photos give you an idea  
15 of the context, where it's located.

16 And if you want to go a little bit out  
17 of your way, you can go to Google Earth, and find  
18 it very easily. It's just north of Ennis. So  
19 anyway that's my comment on it. Further  
20 discussion.

21 (No response)

22 CHAIR SIMPSON: A motion has been made  
23 and seconded to proceed. All in favor, say aye.

24 (Response)

25 CHAIR SIMPSON: Opposed.

1 (No response)

2 CHAIR SIMPSON: I only heard four votes.  
3 Let's repeat the vote on that motion, please.  
4 Hopefully we'll get everybody. All in favor, say  
5 aye.

6 (Response)

7 CHAIR SIMPSON: Opposed.

8 (No response)

9 CHAIR SIMPSON: Hearing no opposition,  
10 the motion carries. Thank you, everyone. Let's  
11 finish the next item --

12 MR. WILSON: Mr. Chair.

13 CHAIR SIMPSON: Yes.

14 MR. WILSON: May I just ask a quick  
15 question here? This is Kim Wilson again for  
16 Valley Garden.

17 CHAIR SIMPSON: Yes.

18 MR. WILSON: On the 20th what time of  
19 day, and how much time are you planning on giving  
20 us?

21 CHAIR SIMPSON: We'll meet at 9:00 a.m.  
22 as we are today. I'll have to discuss with  
23 Counsel how much time we ought to allow, and we'll  
24 get an order out.

25 MR. WILSON: Okay. Thanks.

1 CHAIR SIMPSON: And I do think it would  
2 be useful to the Board Members to have the full  
3 docket rather than just cherry pick the filings,  
4 because then it will enable you to check, follow  
5 up on any references to other documents that might  
6 be of use to you.

7 So Sandy and I have discussed this, and  
8 she felt the best way to do that would be to send  
9 it out on a thumb drive, because it is a huge,  
10 huge file of documents.

11 We've got two more items here before we  
12 -- I'm sorry.

13 VICE CHAIR AGUIRRE: Can it be shared  
14 through the State system?

15 CHAIR SIMPSON: I'm sorry, Stacy?

16 VICE CHAIR AGUIRRE: Can it be shared  
17 through the State system, the FTP site or whatever  
18 it's called?

19 CHAIR SIMPSON: Sandy would have to  
20 answer that, but I think she feels the files are  
21 too big, based on our discussion earlier.

22 MS. MOISEY-SCHERER: Vice Chair Aguirre,  
23 this is Sandy. The files are very, very large,  
24 and even with compressing, I could not get them to  
25 -- within the State system. So if you're okay

1 with that.

2 VICE CHAIR AGUIRRE: Okay. Thank you.

3 MS. MOISEY-SCHERER: Thank you. I'll  
4 get working on that.

5 CHAIR SIMPSON: Thank you very much.

6 (The proceedings were concluded  
7 at 10:10 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 7th day of  
March, 2026.

*Laurie Crutcher*

\_\_\_\_\_  
LAURIE CRUTCHER, RPR  
Court Reporter - Notary Public  
My commission expires  
March 9, 2028.

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