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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 - ORAL ARGUMENT
BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
VIA ZOOM

March 20, 2026
9:00 a.m.

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

PREPARED BY: LAURIE CRUTCHER, RPR
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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:

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1 Persons attending:

2 Board Attorney Present:

3 Dana Hupp, Board Counsel

4 DEQ Personnel Present:

5 Board Secretary: Sandy Moisey Scherer

6 Board Liaison: Deputy Director James Fehr

7 DEQ Director Sonja Nowakowski

8 DEQ Legal: Catherine Armstrong, Amanda Galvan, Sam

9 King, Jeremiah Langston, Lee McKenna, Isabelle

10 Nebel, Kaitlin Whitfield

11 DEQ Air, Energy and Mining: Craig Henrikson, Emily

12 Lodman, Eric Merchant, Brian Schrage, Bo Wilkins

13 DEQ Communications: Mae Vader

14 Other Parties Present:

15 Pamela Garman, Vicki Marquis, and Morgan Pettit -

16 Crowley Fleck

17 Sarah Clerget, and MJ Salzman - Holland & Hart

18 Bruce Fleming

19 Alan Ringlein - A.M. Welles

20 Todd Briggs, Westmoreland

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: I apologize for the
5 delay. I've been having some connection
6 difficulties here. Hopefully we'll be able to
7 make it through the meeting okay.

8 Let's bring the meeting to order.
9 Sandy, would you please call the roll.

10 MS. MOISEY-SCHERER: Yes, sir. Chair
11 Simpson.

12 CHAIR SIMPSON: Here.

13 MS. MOISEY-SCHERER: Vice Chair Aguirre.

14 VICE CHAIR AGUIRRE: Here.

15 MS. MOISEY-SCHERER: Board Member Payne.

16 BOARD MEMBER PAYNE: Here.

17 MS. MOISEY-SCHERER: Board Member
18 Rankosky.

19 BOARD MEMBER RANKOSKY: Here.

20 MS. MOISEY-SCHERER: Board Member Smith.

21 BOARD MEMBER SMITH: Here.

22 MS. MOISEY-SCHERER: We have a quorum,
23 sir.

24 CHAIR SIMPSON: Thank you, Sandy. Julia
25 had notified us that she would not be

1 participating today. Anyway, welcome to the first
2 day of spring, everybody. First blue bird showed
3 up in my yard yesterday, so I guess it's official.

4 I guess before proceeding, could we also
5 go through who all is on the call aside from the
6 Board, please.

7 MS. MOISEY-SCHERER: Yes, sir. Laurie
8 Crutcher, Court Reporter; I'm Sandy
9 Moisey-Scherer, Board Secretary; Board Counsel,
10 Dana Hupp; Sarah Clerget; Lee McKenna, DEQ; Mae
11 Vader, DEQ; Kim Wilson; Vicki Marquis; Diane
12 Conradi; MJ Salzman; Bruce Fleming; Jeremiah
13 Langston; Deputy Director James Fehr; Alan
14 Ringlein; Amanda Galvan; Catherine Armstrong;
15 CB0515; Craig Henrikson; Emily Lodman; Isabelle
16 Nebel; Kaitlin Whitfield; Eric Merchant; Pamela
17 Garman; and Todd Briggs; also Morgan Pettit.

18 CHAIR SIMPSON: Okay. Thank you very
19 much, Sandy. It looks like we have a full house.
20 We're going to do a little shifting with the
21 agenda because Vice Chair Aguirre may have to
22 leave the meeting a little later on, so we wanted
23 to get started on the Valley Garden item just as
24 quickly as we can.

25 Before proceeding to that, I did want to

1 just say a word about the Montana Recycling case.
2 Remember we received a letter of petition on that,
3 that we considered at our last regular meeting. I
4 put that on the agenda because I wasn't quite sure
5 where we were going to be at this point.

6 I want to advise the Board that we had
7 scheduled an informal conference. Petitioner
8 notified us she was unable to attend, so we've
9 gone back forth a little bit on that.

10 (Chair Simpson not present)

11 VICE CHAIR AGUIRRE: Chairman Simpson's
12 video stopped. I'd like to make a suggestion.
13 It's possible that the add of the video is
14 affecting the connection.

15 MS. MOISEY-SCHERER: I'm waiting for the
16 Chair to reconnect.

17 (Off the record briefly)

18 (Chair Simpson present)

19 CHAIR SIMPSON: I apologize to everyone.
20 My internet is giving me fits, and I haven't been
21 able to join by phone because I haven't gotten the
22 information that I need to not be muted, let's put
23 it that way. So again, my apologies. I don't
24 quite know how to deal with this problem. Anyway,
25 as I had started to say earlier with regard to the

1 -- yes .

2 VICE CHAIR AGUIRRE: You may want to not
3 be on video because that affects the feed. It
4 affects the connection having your video on.

5 CHAIR SIMPSON: All right. Let me try
6 that. Once again, let's give this a try. As soon
7 as I get information on how to join by phone, I
8 will hopefully be able to get this problem to a
9 more manageable state.

10 Backing up again, with regard to the
11 Montana Recycling, I don't know how much of what I
12 started to say earlier was picked up.

13 But we had received just a couple of
14 days ago a couple of motions from the Montana
15 Recycling to, one, intervene in the case, and two,
16 to dismiss the action. We will not be able to
17 consider that because none of the Board has seen
18 the filings. They didn't come in to time to make
19 it into the agenda. So we're just going to defer
20 this whole thing until our regular meeting in
21 April, and we'll see where it stands by then.

22 Moving ahead, the next item on the
23 agenda was the findings of fact and conclusion of
24 law for the case we considered at our last
25 meeting. That was the Westmoreland Absaloka,

1 Minor Revision 311. That's been circulated to the
2 Board, and we wanted to discuss that. We'll defer
3 that until after the Valley Garden matter.

4 So let's proceed with Valley Garden oral
5 arguments this morning. Sorry I'm so flustered
6 here. I'm just having a hard time.

7 VICE CHAIR AGUIRRE: We can hear you
8 well, just so you know.

9 CHAIR SIMPSON: Thank you. Anyway, what
10 I'm looking for is my -- I've got everything on my
11 desk except for the agenda for the meeting.

12 VICE CHAIR AGUIRRE: Are you looking for
13 the outline of the arguments that we're going to
14 hear right now?

15 CHAIR SIMPSON: Let's proceed with oral
16 argument. We're going to do this in stages.
17 First we're going to talk about jurisdiction and
18 standing, and so I would call on Valley Garden to
19 lead off. And if I remember right, on these
20 matters, we're going try to just go through them
21 fairly quickly with ten minutes to make a
22 presentation, and then five minutes rebuttal.

23 VICE CHAIR AGUIRRE: Chairman Simpson.

24 MS. MCKENNA: This is Lee McKenna for
25 DEQ. The agenda says DEQ leads off.

1 VICE CHAIR AGUIRRE: Chairman Simpson,
2 this is Vice Chair Aguirre. DEQ is to lead in
3 this part of oral arguments.

4 CHAIR SIMPSON: DEQ is to lead as to
5 standing.

6 VICE CHAIR AGUIRRE: Jurisdiction and
7 standing.

8 CHAIR SIMPSON: I'm sorry I'm so
9 flustered. I'm so flustered by this internet
10 problem that I'm not really on the ball here.
11 But --

12 VICE CHAIR AGUIRRE: We can hear you
13 fine, so --

14 CHAIR SIMPSON: Let's go ahead and
15 proceed with oral argument on standing, the
16 question of jurisdiction and standing, and with
17 DEQ leading off on that.

18 MS. MCKENNA: Good morning. Mr. Chair,
19 members of the Board. I'm Lee McKenna. I'm
20 representing DEQ in this matter.

21 On issue one, jurisdiction, DEQ made a
22 motion to limit the scope of the hearing to the
23 Opencut Act. The BER's jurisdiction comes from
24 the Opencut Act, in 82-4-427 Subsection (1), and
25 it's limited to the Opencut Act.

1 Specifically the BER's jurisdiction in
2 this case is to decide challenges to permits or
3 permit amendments -- which is the situation here
4 -- under the Opencut Act, using the MAPA contested
5 case process in Title 2 Chapter 4 Part 6, which
6 creates the administrative record in the event of
7 judicial review. That's MAPA provision 2-4-614.

8 The Opencut Act does not confer the
9 Board with jurisdiction to decide or to interpret
10 DNRC's subsequent actions regarding DNRC's lease
11 for State Trust funds, which was made after DEQ's
12 permitting decision on May 24th, 2022. That's the
13 date of the permit, DEQ's permit.

14 It doesn't give the Board jurisdiction
15 to decide water right issues. DNRC has sole
16 jurisdiction under the Montana Water Use Act, and
17 it doesn't give the Board jurisdiction to decide
18 any issues under MEPA, the Montana Environmental
19 Policy Act.

20 After HB599 was enacted on May 14th,
21 2021, DEQ did not have any authority to obtain
22 information for things that HB599 specifically
23 removed. For example, surface and groundwater
24 protections for water quality and water quantity.
25 Water quality is separately regulated by DNRC

1 under the Montana Water Use Act, and DEQ can't
2 require such things as monitoring.

3 That's in HB599 which DEQ submitted as
4 an exhibit, Page 16, the stricken provisions on
5 82-4-434 (l) and (m).

6 Let's turn to issue two, standing.
7 Valley Garden doesn't have standing in this case
8 under the Open Cut Mining Act or any other law.
9 Standing is a threshold requirement. Plaintiff
10 must show that it has standing at each stage of
11 the litigation, not just at the beginning. We're
12 past the Complaint or the petition for appeal
13 stage. Now we're in the summary judgment stage.

14 Under Lujan versus Defenders of
15 Wildlife, which is a case from the US Supreme
16 Court, which is binding in Montana, Valley Garden
17 must support each element of the standing test
18 with the manner and degree of evidence required at
19 the successive stages of litigation.

20 So what does that mean? That means that
21 the burden to prove standing at summary judgment
22 is significantly higher. Plaintiff must show
23 through affidavit or other evidence that it has in
24 fact suffered an injury, a concrete injury. It is
25 not enough to rely on the Amended Complaint at the

1 summary judgment stage.

2 This is where we are now, the summary
3 judgment stage. They have produced no evidence.
4 Discovery has been completed. The parties have
5 exchanged all of the evidence that will be
6 exchanged. Valley Garden has produced not a
7 single shred of evidence of injury related to DEQ.

8 Merely alleging harm in a Complaint
9 allows Valley Garden to survive a motion to
10 dismiss at the beginning stage, but that's not
11 where we are now, and that's not enough to
12 continue this process at the summary judgment
13 stage.

14 There are two independent inquiries --
15 constitutional standing, and prudential standing.
16 Prudential standing has to do with the right to
17 assert the case, asserting the case on behalf of
18 yourself, and not asserting the rights of other
19 people. DEQ is focusing on constitutional
20 standing here.

21 There are several elements: Injury in
22 fact, concrete harm that is actual or imminent,
23 not conjectural or hypothetical. Valley Garden
24 doesn't have any harm caused by DEQ.

25 Causation, and for the reference, I'm

1 citing the standards that your Counsel cited in
2 her memo to the Board, so everybody can follow
3 along. I just want to cite to the page. This is
4 on Page 5 of your Counsel's memo to the Board.

5 So after injury in fact, Valley Garden
6 has to prove causation, a connection between
7 injury and the conduct complained of. Valley
8 Garden complains it didn't get notice from the
9 Applicant, and that DNRC -- not DEQ -- DNRC took
10 away 23.2 acres of its lease, and that DNRC didn't
11 permit DNRC's well. There's no connection to DEQ
12 here.

13 Redressability. Redressability is only
14 possible if there's injury. There's no injury in
15 this case, and Valley Garden's requested relief
16 would not solve anything. We don't even get to
17 redressability because there's injury and there's
18 no causation.

19 Redressability is the likelihood that
20 the requested relief will address the alleged
21 injury. The record clearly shows that Valley
22 Garden had actual notice which allowed it to
23 provide timely public comment twice, and request a
24 public hearing twice. The redressability against
25 DNRC's for leasing decisions, and DNRC has

1 properly obtained a certificate of exempt well,
2 onsite well.

3 No standing against DEQ. There's no
4 procedural injuries caused by DEQ. Any defects in
5 notice or A.M.Welles certification are not
6 attributable to DEQ, and A.M.Welles is solely
7 responsible for all public notice. That's in
8 82-4-432 Subsection (5). Applicant has sole
9 responsibility. A.M.Welles was solely responsible
10 for certifying it had the legal right to mine, and
11 that's in 82-4-432 Subsection (2) Subsection (a)
12 (v).

13 There's no economic injuries caused by
14 DEQ. Valley Garden's purpose is owning and
15 operating real estate. That's in Valley Garden's
16 Articles of Organization which are in Exhibit 11
17 to DEQ's brief in support of the motion for
18 summary judgment. Valley Gardens has not shown
19 any injuries to real estate.

20 Injuries regarding -- DNRC lease and
21 DNRC's well are claims against DNRC, not DEQ.
22 Valley Garden already litigated these issues
23 against DNRC in District Court, in the Fifth
24 Judicial District Court in front of Judge Berger.

25 The District Court did not invalidate

1 DNRC's lease to A.M.Welles. That's Order on
2 Plaintiffs Motion to Enter Judgment, Page 8,
3 Valley Garden versus DNRC and A.M.Welles, Cause
4 No. DV-29-2023-37, July 9th, 2025.

5 The issue on appeal for Protect the
6 Clearwater, Friends of the Jocko, which was cited
7 by Valley Garden in its response, is very
8 different and not relevant here. On District
9 Court review, open cut cases, which both the
10 Clearwater and Friends of the Jocko are,
11 Plaintiffs are attempting for the first time to
12 rise a constitutional challenge to the Opencut Act
13 that they failed to raise before the BER.

14 Plaintiffs in this case, Plaintiffs VG,
15 LLC, has not raised a constitutional challenge to
16 the Opencut Act here, so it's completely
17 different.

18 DEQ's motion in limine before the Board
19 today presents a completely different issue. The
20 Board's jurisdiction is clearly defined under
21 82-4-427(1), and is limited to determine whether
22 DEQ's decision to approve Amendment 3 to
23 A.M.Welles opencut permit met the minimum
24 requirements of the Opencut Act.

25 The Board does not have jurisdiction to

1 decide other issues, such as the Montana Water Use
2 Act, DNRC's management of State Trust lands, or
3 MEPA. The Board should not receive evidence or
4 argument on those issues, nor should the Board try
5 to interpret DNRC's actions which were made
6 outside of the DEQ permitting process.

7 Shupe v. Nisbet, 2014 Montana 6 is
8 distinguishable on its facts. In this case,
9 because DEQ had no duty to provide notice, DEQ did
10 not violate any procedural notice requirements.
11 In Shupe, the Custer County Commissioners failed
12 to provide adequate notice of a hearing that Shupe
13 was interested in.

14 The Court found, the Montana Supreme
15 Court, found that Shupe had standing against the
16 Commissioners because they had a duty to provide
17 notice and they did not, but that's not the
18 situation here.

19 Under the Opencut Act, applicant, not
20 DEQ, has sole responsibility for providing notice
21 -- 82-4-432 subsection (5). The statute says
22 within 15 days after the Department sends notice
23 of a complete application to the applicant, the
24 applicant shall provide public notice, according
25 to the provisions of Subsection (5) and Subsection

1 (6) .

2 Under 42-4-432(4)(d), DEQ's only
3 responsibility for notice was to post the complete
4 application on the Department's website, which it
5 did, and we know it did that, because in Ms.
6 Conradi's May 17th, 2020 public comment, which was
7 an email, the first comment -- she submitted two
8 public comments, the first one was an email, the
9 second one was a letter.

10 She states that she downloaded the
11 application -- pardon me. It was in a letter on
12 May 20th, 2022. She stated that she downloaded
13 the application from DEQ's website.

14 There's no redressability possible
15 against DEQ, the third prong of the constitutional
16 standing analysis. The standing analysis doesn't
17 reach redressability because there are no
18 procedural or economic injuries caused by DEQ,
19 because DEQ has no responsibility for public
20 notice, to the extent that Valley Garden is
21 alleging a procedural harm for not receiving
22 notice, it is not against DEQ.

23 And as we established earlier, there's
24 been no evidence, no affidavit, or anything else
25 that establishes that VG, LLC has an economic

1 injury. Thank you.

2 CHAIR SIMPSON: Thank you, Ms. McKenna.
3 Valley Garden, please.

4 MR. WILSON: Thank you, Kim Wilson with
5 Valley Garden, here today with Diane Conradi.

6 As you know, Valley Garden is a more
7 than 100 year old ranch in the Madison Valley.
8 It's owned by the McGee family. We welcome the
9 opportunity to resolve these issues straight
10 forwardly today.

11 Turning to this initial question of
12 jurisdiction and standing, Valley Garden generally
13 does not dispute the assertion that this Board has
14 jurisdiction, its jurisdiction is based in the
15 Opencut Act. However, as we noted in our brief,
16 in other recent gravel mining cases, DEQ has
17 argued at the judicial review level that "MAPA
18 provides the exclusive relief," unquote, for
19 constitutional challenges to the Opencut Act.

20 And of course, we've alleged in our
21 First Amended Notice of Appeal that several of our
22 claims are constitutionally based. While we don't
23 agree with DEQ's position in that case, that the
24 constitutional claims must be brought at the BER,
25 we're not ready to concede here that the BER's

1 jurisdiction would be as limited as DEQ is
2 asserting today, given that DEQ has taken a
3 different position in other cases.

4 In any event, this argument more broadly
5 by DEQ as its briefed this matter before, is that
6 the amended petition, quote, "improperly includes
7 allegations concerning constitutional provisions
8 and other laws," unquote, and DEQ has sought to
9 prevent Valley Garden from offering testimony,
10 evidence, or in any way referring to or making
11 claims under any constitutional provision,
12 statute, or rule, other than the Opencut Act.

13 The absurdity of the breadth of that
14 motion in limine, which I think ties into this
15 whole question of jurisdiction in terms of trying
16 to stifle any discussion of other laws, is highly
17 limited by the contrary position that they've
18 taken in other cases, as I've discussed, but also
19 by the fact that one of the central requirements
20 of the permit here is that the operator must
21 comply with all other state and federal laws and
22 regulations.

23 And I think you'll find that that's a
24 central issue here, where we are alleging that
25 because Welles or DEQ were not in compliance with

1 other federal or state, in this case State laws,
2 the permit should not have been issued as it was.

3 So we'll get to more discussion of that
4 when we get to the merits, but for the purposes of
5 this hearing, we believe that discussions of other
6 related laws certainly have bearing on your review
7 of the record and the decision at issue here.

8 The other question is the second
9 question related to jurisdiction is the passage of
10 House Bill 599. As we discussed in detail in our
11 response brief, while some specific language
12 relative to the protection of water quality and
13 other amenities has been removed by House Bill
14 599, the purpose and intent of the statute found
15 at 82-4-402, including the implementation of the
16 constitutional right to a clean and healthful
17 environment, and the goal to preserve natural
18 resources, and aid in the protection of wildlife
19 and other aquatic resources, was not amended.
20 That remained in the statute.

21 That constitutionally based
22 responsibility is carried over into the DEQ
23 Opencut Act application form that was submitted by
24 Welles. First, as I've mentioned, both the
25 permit, but also the application at AR-21 require

1 compliance with other state and federal laws,
2 which of course naturally includes environmental
3 laws.

4 The application form requires disclosure
5 of whether mining will intercept groundwater, or
6 occur within five feet of the high water table,
7 presumably also to protect those aquatic resources
8 that the statute is intended to protect.

9 Additionally in discussing asphalt and
10 concrete, the form discloses that, quote, "Asphalt
11 is considered to have a potential impact to water
12 quality," unquote, and then identifies several
13 potential mitigation measures.

14 Moreover, the statutory plan of
15 operations requires that waste be buried on site
16 in a manner that protects water quality, thus the
17 statute and regulations requirements concerning
18 water must be viewed through that lens.

19 Turning to standing. This matter has
20 been extensively briefed, and we believe settled
21 Montana law makes it a non-issue here. Indeed in
22 the companion MEPA case challenging the EA for
23 this permit, Judge Berger denied DEQ's motion to
24 dismiss on that very issue.

25 It's well established that standing has

1 three elements: Injury in fact, causation, and
2 redressability. DEQ's primary argument is that
3 Valley Garden lacks standing because it didn't
4 allege economic harm, but that's a dead end
5 distraction. For the sake of argument, even if
6 only economic harm was involved, was the criteria,
7 Valley Garden has alleged economic harm, here the
8 loss of lease ground that they have paid for.

9 That loss of the lease ground that they
10 have paid for, and that Judge Berger required DNRC
11 to compensate them for, came about because DEQ
12 issued this permit. So we have concrete evidence
13 of economic harm.

14 Ms. McKenna's focus on the type of
15 entity that Valley Garden is is a further
16 distraction. Obviously corporations have the same
17 rights in Montana and nationally as other persons.
18 Here plainly Valley Garden is a person who may
19 sue.

20 In this case the harm is primarily a
21 statutory one, and I refer you to the Heffernan
22 case, where the Court said the legislative branch
23 may enact statutes creating legal rights, the
24 invasion of which creates standing, even though no
25 injury would exist without the statute.

1 Instead standing exists where a
2 plaintiff alleges injury to interests protected by
3 statute, including procedural, environmental,
4 esthetic, or recreational interests. That's from
5 Park County Environmental Council Case, 2020
6 Montana 303, Paragraph 20.

7 In other words, whereas here
8 environmental values are at risk, the bar for
9 standing is relatively low. Montana law doesn't
10 require economic harm, nor does it impose special
11 standing burdens on a corporation.

12 And as I said, Judge Berger did find in
13 another case that the loss of the grazing lease
14 harmed Valley Garden, because in the DNRC case
15 that Judge Berger had, he found, "Furthermore the
16 DNRC must cease charging Valley Garden for the
17 acres it took from the grazing lease, and
18 reimburse Valley Garden what it has paid for said
19 acres." It, quote, "took those acres from the
20 grazing lease," unquote, because DEQ permitted the
21 expansion of the mine.

22 Now, Ms. McKenna has argued that DEQ has
23 no duty for public participation, that that's all
24 on A.M.Welles. That of course is not true. It's
25 ultimately DEQ who is responsible under the

1 statute, and more importantly under the
2 Constitution, to make sure that the public gets
3 notice and opportunity to be heard. And in this
4 case, we believe that it has an obligation under
5 82-4-422 to ensure that said notice was properly
6 done.

7 Accordingly, whereas here, as we've
8 alleged here, the Department approved a permit
9 application that was facially noncompliant with
10 the act. The injury is in the issuance of a
11 permit in violation of a statute.

12 In summary, the Opencut Act specifically
13 grants Valley Garden standing because it creates
14 the basis for an injury in fact. In terms of the
15 notice, 82-4-432(6)(a) requires the applicant to
16 provide notice to surface owners of land within a
17 half mile of the boundary. That in turn can
18 trigger the landowner's ability to request a
19 hearing pursuant to 82-4-432(9).

20 We've alleged that we did not -- that we
21 had that opportunity legally to have a hearing.
22 DEQ disagrees with that, and that's an issue
23 before you. But that's an allegation that
24 triggers our ability to have standing here.

25 Second, we've sufficiently alleged harm

1 in our petition, and backed up with facts in the
2 record that the grazing lease has been affected by
3 the expansion, that there's been no discussion of
4 any impacts to the Valley Garden water rights;
5 that the requirement of notice was not met here
6 and finally, as I said, there's economic harm in
7 the reduction of the grazing lease without
8 compensation.

9 As Judge Berger said in denying DEQ's
10 motion to dismiss standing, on standing in the
11 MEPA case, quote, "The Montana Supreme Court has
12 provided when a government agency fails to provide
13 the public with proper notice of a government
14 action, or denies the public a reasonable
15 opportunity to submit data, views, or argument,
16 the harm is concrete, though widely shared," and
17 then the Court goes on, "Therefore this Court
18 finds Valley Garden has standing," and it denied
19 the motion to dismiss.

20 Whether the hearing provision applies
21 and whether here Valley Garden was entitled to a
22 hearing is one of the legal issues that BER will
23 need to address, but there should be no doubt that
24 as the owner of the land that wholly surrounds the
25 mine site, and whose grazing lease has been

1 circumvented by DEQ approval here, and as a party
2 statutorily entitled to notice, Valley Garden has
3 standing. Thank you.

4 CHAIR SIMPSON: Miss --

5 MS. MCKENNA: Mr. Wilson mentions a lot
6 of things that had nothing to do with DEQ. Merely
7 mentioning the Constitution doesn't make it a
8 constitutional claim. The Legislature makes it
9 clear that the Opencut Act incorporates its
10 responsibilities under Article 2 Section 3 and
11 Article 9.

12 The Opencut Act, under the Opencut Act,
13 DEQ is not responsible for enforcing the laws.
14 The permit simply says the operator must abide by
15 other laws, but that means must abide by other
16 laws that are promulgated by other federal, state,
17 county, city requirements. That has nothing to do
18 with DEQ. DEQ doesn't enforce all of those
19 things, they're enforced by the entity that has
20 promulgated the laws. Mr. Wilson is attempting to
21 impose obligations on DEQ that simply don't exist.

22 As for 82-4-402, which is a provision,
23 Opencut Act, it's actually in the beginning. It's
24 the general purposes section in the beginning, and
25 it basically makes it clear that the Opencut Act

1 is a reclamation statute. That's what DEQ Opencut
2 focuses on when it's reviewing the application,
3 and its goal is to make sure that the reclamation
4 can be completed successfully, whether it's wet or
5 dry.

6 And that's the reason for inquiring
7 about the depth, the three feet of separation or
8 five feet of separation between the bottom of the
9 pit floor and water. So DEQ wants to make sure
10 that if the stated reclamation purpose is dry that
11 can be met. But other than that, HB599 eradicated
12 all of DEQ's ability to inquire about water
13 sources.

14 So 82-4-402 is in the beginning, which
15 is the intent, findings, and policies section,
16 where the Legislature states that it's mindful of
17 its constitutional obligations, it's not a
18 permitting provision. The permitting provisions
19 are 82-4-432, 82-4-433, which is the bonding
20 section, and 82-4-434, which is the reclamation
21 section.

22 So citing a general purposes and intent
23 policy to state that DEQ has a responsibility in
24 permitting to do something that HB599 clearly
25 eradicated is just simply not true, and it's not

1 legally binding.

2 There's no buried waste on sight, so
3 that argument goes nowhere.

4 Judge Berger decided a case under MEPA
5 applying provisions that relate to MEPA, and
6 particular postural standing situations under
7 MEPA, which has nothing to do with this case, and
8 is absolutely not binding. It's not even
9 persuasive on this Board. This Board makes its
10 own decisions as to whether Valley Garden has
11 standing under the Opencut Act.

12 The loss of lease. So DNRC's lease, as
13 I indicated earlier, is not an issue in this case
14 because DNRC's lease was issued on February 4th,
15 2022. A.M.Welles signed its certification stating
16 that it had the legal right to mine because it
17 submitted DNRC's lease dated February 4th, 2022,
18 with certification that A.M.Welles signed February
19 9th, 2022, submitted to DEQ in February 10th,
20 2022.

21 And then the Opencut Act permit was
22 issued on May 24th, 2022. During that entire
23 permitting review process from May 10th, 2022,
24 when DEQ received the application, to May 24th,
25 2022, there was simply no communications from DNRC

1 that its lease was invalid, or that there were any
2 restrictions.

3 And so Valley Garden's argument falls
4 very short here. No evidence of injury. They
5 can't just point to case language. Mr. Wilson
6 rattled off a lot of cases, but he still can't
7 point to actual injury.

8 Grazing lease was -- So DNRC, just to
9 address a point as to the injury that Valley
10 Garden allegedly suffered when their grazing lease
11 was taken -- and I briefed this, so it's in the
12 record -- the grazing lease specifically allows
13 that gravel to be -- allow DNRC to --

14 So the grazing lease and the gravel
15 lease are all part of the same quarter section,
16 same 160 acres. And so DNRC's -- Valley Garden's
17 grazing lease has a specific provision in
18 Paragraphs 15 "A" and "B," which says that DNRC at
19 any time may allocate lands to the gravel pit.

20 And the reason for doing that is because
21 DNRC is the manager of State Trust lands, and
22 their obligation is to make the most money for
23 State Trust lands. The gravel lease pays
24 royalties to DNRC for the State Trust land.
25 Valley Garden lease is just a flat rate. And so

1 because DNRC makes more money for the trust
2 through gravel operations, the gravel operator has
3 the first priority in DNRC's gravel lease.

4 Mr. Wilson is incorrect. The
5 Legislature clearly indicated that the applicant
6 is responsible for notice, not DEQ, and Mr. Wilson
7 is attempting to impose obligations on DEQ that
8 are outside the Opencut Act. DEQ has no
9 responsibility to provide notice provisions that
10 the Legislature clearly delegated to the
11 applicant. There's no extra responsibility for
12 DEQ to provide notice to the Valley Garden.

13 Mr. Wilson's claim that Valley Garden
14 wholly surrounds the site, that's not true either.
15 The DSL site where the opencut site is is
16 surrounded by State land -- MDT on the east next
17 to US Highway 287, it's DNRC on the west and the
18 north, and there's a small section, the southern
19 border, which borders Valley Garden land.

20 In sum, they have no procedural injury,
21 no procedural noticed injury against DEQ, because
22 the applicant is responsible for notice, and they
23 don't have any economic injury. Valley Garden
24 made two public comments, on May 17th and May
25 20th, and in each of those comments they requested

1 a public hearing.

2 No public hearing was possible because
3 the minimum threshold criteria was not met, and
4 that's why there was no public hearing. Thank
5 you.

6 CHAIR SIMPSON: Thank you, Ms. McKenna.
7 Questions from the Board?

8 VICE CHAIR AGUIRRE: Chair Simpson, I
9 have I guess what I'll call a procedural question
10 on where we go from here. Are we going to now as
11 a Board discuss these threshold issues of Board
12 jurisdiction and standing before we go any
13 further?

14 And the reason I'm asking that is
15 because as a board, if we don't feel that we have
16 jurisdiction and standing, then we will not be
17 proceeding with any of the remaining issues.

18 CHAIR SIMPSON: Vice Chair Aguirre, what
19 we had intended is to go through these in an
20 organized manner, then consider the case as a
21 whole. That is what we'd like to do is to -- if
22 the Board has any questions on the jurisdiction
23 and standing issues for the attorneys for the
24 Counsel for the parties, we should ask them now.

25 But I would like to go through the whole

1 list of items here to be discussed before we start
2 our Board discussions and deliberations. And it
3 may not seem to make any sense, but the question
4 of standing in particular is one that is open to
5 question.

6 I would like to go through the
7 technical, other technical and legal issues before
8 us here before we make a decision on jurisdiction
9 and standing. I know that doesn't seem to make
10 much sense, but I'll tell you straight out what
11 I'm concerned about is that if we were to dismiss
12 this on the basis of standing, I question what
13 would happen if it were appealed, and the Court
14 happened to disagree with what this Board has
15 decided. We're a quasi-judicial administrative
16 board. We're not a court of law. And I'm very --

17 (Chair Simpson not present)

18 BOARD MEMBER PAYNE: Did we lose the
19 Chairman?

20 VICE CHAIR AGUIRRE: Allan, I had my
21 hand raised as well, just because of the last
22 thing that the Chairman said. So I don't know if
23 I can jump in before you or --

24 BOARD MEMBER PAYNE: Go ahead. I just
25 don't know, did we lose the Chairman?

1 VICE CHAIR AGUIRRE: I don't know.

2 Dave, are you on?

3 (No response)

4 MS. MOISEY-SCHERER: It shows that he
5 has connection and he also has it via phone, but
6 he might be just be temporarily unavailable.

7 VICE CHAIR AGUIRRE: He dropped off, I
8 think.

9 BOARD MEMBER PAYNE: Maybe while we're
10 waiting for him to get back on, I just had a real
11 quick question of the Counsel with respect to this
12 particular quarter section. It's State owned,
13 initialled by DNRC. Is this also like a school
14 trust lands? Is this something that the proceeds
15 from grazing and gravel leases go the school
16 trust?

17 MS. McKENNA: That's exactly what it is,
18 yes. State Trust land. That's why there's the
19 State Trust responsibility to make the most money
20 for the State Trust lands. Yes.

21 BOARD MEMBER PAYNE: Is that your
22 understanding, too, Mr. Wilson?

23 MR. WILSON: Yes, and that's what the
24 case against the DNRC where we prevailed on the
25 issue of violation of State Trust lands. It's in

1 part based on that constitutional duty to the
2 Trust.

3 MS. MCKENNA: Partially prevailed.
4 That's not an accurate statement.

5 MS. CONRADI: I'd actually like to add a
6 bit about this trust responsibilities. The State
7 Trust responsibility --

8 MS. MCKENNA: There should only be one
9 Counsel arguing at a time. If Ms. Conradi is the
10 arguing Counsel, then she should be designated,
11 but it's my understanding Mr. Wilson is designated
12 to argue this hearing.

13 MS. CONRADI: I would like an opinion
14 from the Board on that, but Ms. McKenna's
15 statement regarding the State Trust duties --

16 (Indiscernible conversation

17 Interrupted by Court Reporter)

18 COURT REPORTER: Excuse me. We should
19 go off the record until the Chairman's back
20 because you'll have to repeat it all anyways, and
21 I can't take it down when you're talking at the
22 same time. So we need someone in charge. Thank
23 you.

24 VICE CHAIR AGUIRRE: This is Vice Chair
25 Aguirre. Until the Chairman gets back on, we need

1 not have any of these discussions, and then we can
2 proceed.

3 MS. MOISEY-SCHERER: Chair Simpson is
4 rejoining the meeting. It is just taking a
5 moment. He has now rejoined.

6 (Chair Simpson present)

7 VICE CHAIR AGUIRRE: Chair Simpson, this
8 is Vice Chair Aguirre. Can you hear me?

9 CHAIR SIMPSON: Go ahead. Well, let me
10 just state. My apologies to everyone. I'm just
11 struggling with this whole thing. My phone's not
12 working right, my computer's not working right,
13 and I cannot keep up with the meeting. And I
14 suggest we take a break right now, and see if we
15 can't get this problem fixed. Can we do that.
16 Ten minutes, please.

17 And then Sandy, if you and I can see if
18 we can figure out how to get me to participate on
19 the phone.

20 MS. MOISEY-SCHERER: I will give you a
21 call, sir.

22 CHAIR SIMPSON: Thank you.

23 (Recess taken)

24 CHAIR SIMPSON: Where were we when
25 everything fell apart, Sandy?

1 MS. MOISEY-SCHERER: There were two
2 hands that went up, Board Member Payne, and then
3 Vice Chair Aguirre.

4 CHAIR SIMPSON: Okay. Thank you.
5 Whenever you're ready, please go ahead and take
6 roll.

7 MS. MOISEY-SCHERER: I'll go ahead and
8 start the roll, sir. Chair Simpson.

9 CHAIR SIMPSON: Here.

10 MS. MOISEY-SCHERER: Vice Chair Aguirre.

11 VICE CHAIR AGUIRRE: Here.

12 MS. MOISEY-SCHERER: Board Member Payne.

13 BOARD MEMBER PAYNE: Here.

14 MS. MOISEY-SCHERER: Board Member
15 Rankosky.

16 BOARD MEMBER RANKOSKY: Here.

17 MS. MOISEY-SCHERER: Board Member Smith.

18 BOARD MEMBER SMITH: Here.

19 MS. MOISEY-SCHERER: We have a quorum,
20 sir.

21 CHAIR SIMPSON: Thank you, Sandy. Again
22 my apologies to everyone. I don't deal well with
23 electronic problems, as you can probably tell.
24 And again, I've lost my screen.

25 Stacy, you had asked a question as to

1 whether we were going to consider the standing
2 question alone before going forward as a threshold
3 issue. I would prefer not to. I would like to
4 settle this case on its merits, but I would like
5 to hear what the parties have to say on
6 everything, on the various topics that we've
7 outlined here, and then begin our Board
8 discussions.

9 VICE CHAIR AGUIRRE: Chairman Simpson,
10 I'd like to additionally provide, or add on to my
11 question about considering the threshold issues
12 first before we go forward. As I said, if we
13 don't have jurisdiction or standing, then we would
14 not be ruling on the remaining issues.

15 And you had made a comment that you were
16 concerned that there would be a possibility that
17 the Board may be sued. I am asking about the
18 process because I, too, am worried about that,
19 based on making a decision on this case when we
20 haven't talked about jurisdiction and standing. I
21 feel like that we're set up for getting sued.

22 CHAIR SIMPSON: On the question of
23 standing, I guess I'm not really comfortable with
24 the Board's authority on standing because we're
25 not a court of law, we're an administrative review

1 board, and I think we're obligated to consider
2 this case on its merits.

3 There may be others who would disagree
4 with me on that, but that is why I would like to
5 go ahead and go through the whole list of issues
6 in this case, and then have our Board discussions
7 and deliberations. But the parties have brought
8 up the question of standing, the State has brought
9 up the question of standing, and we were obligated
10 to hear the parties' arguments on it.

11 So I guess I would ask our Counsel Dana
12 Hupp. Dana, would you have anything to say on
13 this question? I know it's confusing.

14 MS. HUPP: Sure. I think the Board can
15 take votes now on jurisdiction and/or standing. I
16 understand why Chair Simpson wants to wait until
17 the end. I think, Vice Chair Aguirre,
18 particularly I think he believes that hearing
19 arguments on all the issues will provide some
20 context on the jurisdictional question, as I
21 believe both Counsel for DEQ and Valley Garden
22 argued --

23 It's not really whether or not the Board
24 has jurisdiction. I think everybody agrees that
25 the Board has jurisdiction. It's just to the

1 extent they have jurisdiction, or the scope of the
2 jurisdiction.

3 So I think Chair Simpson feels like,
4 particularly on issues related to hydrology, that
5 it may be beneficial for the Board to hear
6 argument on all of the issues, because it kind of
7 helps flesh out some of the concerns frankly that
8 DEQ has raised about the scope of the Board's
9 jurisdiction.

10 So ultimately, though, I do agree. I
11 think the Board is going to need to separately
12 vote on the issue of standing, jurisdiction, the
13 motion to limit the scope of the evidence, and the
14 other substantive issues, because when I prepare
15 draft findings of fact and conclusions of law,
16 obviously I'm going to need to get Board direction
17 on all of these issues.

18 So I don't know if that was helpful, or
19 if I could provide any more information, I'm happy
20 to do that.

21 CHAIR SIMPSON: That's very helpful,
22 Dana. Thank you. It puts things into a little
23 better perspective. I know this whole process is
24 more than a little bit awkward, but Vice Chair
25 Aguirre, does that answer your question?

1 VICE CHAIR AGUIRRE: It answers how you
2 want to approach it. I still question -- I still
3 question how we're going about this, because we
4 are -- we understand the parts, meaning
5 jurisdiction beyond the scope of the Opencut
6 Mining Act. We already started to have an
7 argument on that when you dropped off the phone,
8 so I think some of that kind of stuff starts to
9 play in.

10 So I don't agree with that, but I will
11 support that, and I appreciate the thought process
12 and the insight by Dana. I just don't agree.

13 CHAIR SIMPSON: Well, I thank you, and
14 thank you for your patience going forward here.

15 MS. MOISEY-SCHERER: Chair Simpson, this
16 is Sandy. Allan has his hand up.

17 CHAIR SIMPSON: Yes, I was just going to
18 call on him. Allan, did you have a question? I
19 know -- this is about where I lost my connection
20 completely, so please go forward.

21 BOARD MEMBER PAYNE: Chairman. I think
22 you had asked if any of the Board members had
23 questions based on the standing, jurisdiction, and
24 I guess also the notice issue, because that's been
25 touched on by Counsel in argument, and I just had

1 a few questions if that's all right.

2 CHAIR SIMPSON: If you would proceed,
3 please.

4 BOARD MEMBER PAYNE: I believe we've had
5 some arguments here on DEQ's challenge to Valley
6 Garden's standing to challenge its decisions, and
7 also on the summary judgment -- or excuse me --
8 the subject matter jurisdiction with respect to
9 the constitutional issues that Valley Garden has
10 raised; and also we've heard some arguments about
11 the notice issue that Valley Garden has raised.

12 And I guess I just have some questions
13 with respect to those. And I always think we just
14 have to be cognizant of what our subject matter
15 jurisdiction is, and here, do we have subject
16 matter jurisdiction with respect to the
17 constitutional issues.

18 And I had asked, while you were
19 off-line, I had asked a question of just the
20 Counsel, just to get a factual background whether
21 or not this was State School Trust lands, and I
22 believe both Counsel agreed that they were State
23 Trust lands. And I think there was going to be a
24 little argument about what the exact effect of
25 that was, but that's not really -- In my way of

1 thinking that's not really relevant here. I just
2 wanted to know if they were or not.

3 As a quasi-judicial agency, you know,
4 executive, member of the executive branch, our
5 powers with respect to declaring -- the
6 constitutional issues are pretty limited. Those
7 are generally reserved for the Courts to decide.
8 And I understand why Valley Garden maybe has
9 raised those, just to be sure, because their
10 position is that DEQ has kind of been -- hasn't
11 necessarily had a consistent position with respect
12 to that from one case to another before the Board.

13 But I guess I'd start with asking Mr.
14 Wilson if he believes, if his position here today
15 is that the Board has jurisdiction to I guess
16 declare that parts of the Opencut Act are
17 unconstitutional, if that's what he's asking the
18 Board to do, or if his -- exactly if he could
19 better define what those constitutional issues are
20 he's raised.

21 MR. WILSON: Mr. Chair, Mr. Payne, no.
22 We are not alleging in front of this Board that
23 provisions of the Opencut Act are
24 unconstitutional.

25 And the sole reason for kind of

1 reserving the issue of constitutionality, as I
2 said, was just simply the fact that in these other
3 cases, DEQ has taken the position at judicial
4 review that we should have raised the factual
5 constitutional issues during the BER review.

6 And so I'm just simply pointing out that
7 the Opencut Act -- which you do have jurisdiction
8 over -- is constitutionally based, it implements
9 the Constitution. We've alleged that there are
10 some constitutional infirmities. But you're
11 absolutely right, Mr. Payne, we're not seeking a
12 Board ruling on any constitutional issue today.

13 BOARD MEMBER PAYNE: Okay.

14 MS.McKENNA: May I just respond with
15 some law, just so that we preserve all of the
16 issues.

17 The City of Great Falls case which DEQ
18 briefed in its reply brief in response to Valley
19 Garden's response, the City of Great Falls case
20 that said under MAPA, the Montana Administrative
21 Procedures Act, that if there's a constitutional
22 challenge, it has to -- Valley Garden has to argue
23 those before the Board. That's the law in
24 Montana.

25 CHAIR SIMPSON: Would you repeat that,

1 please.

2 MS. MCKENNA: Sure.

3 CHAIR SIMPSON: This is Chair Simpson.
4 If you could repeat that, please.

5 MS. MCKENNA: So the City of Great Falls
6 case which DEQ cited in its briefing said that
7 under MAPA, the Montana Administrative Procedures
8 Act, that if there's a constitutional challenge,
9 it has to argue those before the Board.

10 And I again reiterate that if you looked
11 at the Amended Notice of Appeal and Request for
12 Hearing, there's no constitutional challenge
13 alleged. There's none. And so the Opencut Act is
14 the defining statute for this hearing.

15 BOARD MEMBER PAYNE: Mr. Chairman.
16 Under that Great Falls case, when you say there's
17 a constitutional issue -- I'm not familiar with
18 it. I'm sorry. I haven't read it. Were the
19 constitutional issues there that there was a
20 challenge to the constitutionality of the statute,
21 or exactly what was the constitutional issue that
22 the Court was addressing there?

23 MS. MCKENNA: It didn't involve a
24 constitutional issue. The citation is it was a
25 pure question of law. The citation is 2024

1 Montana 302, Paragraph 28 to 30. There's no -- so
2 this is from the case. "There is no pure question
3 of constitutional law. The jurisprudential
4 exception to --" "When there's no pure question of
5 constitutional law, the jurisprudential exception
6 to the adopted administrative remedy."

7 So meaning that they have to bring it up
8 before the Board, because this is the place where
9 the Board compiles the administrative record. And
10 that's under MAPA 2-4-714, and that is where --
11 this is where all of the arguments, and motions,
12 and briefing, and evidence comes in. And then on
13 District Court review, the Court reviews the
14 administrative record. So if it's not brought up
15 before the Board, it doesn't exist.

16 BOARD MEMBER PAYNE: My next question is
17 getting to the notice issue. Ms. McKenna, I
18 understand DEQ's position here is that the
19 Applicant had the obligation to provide the
20 notice, and the Applicant didn't -- If there was
21 any failure there, it was the Applicant's failure,
22 and there's no case against the DEQ. There's no
23 complaint here that really lies with the DEQ for
24 its failure to do something the Applicant should
25 have done; is that a fair summary?

1 MS. MCKENNA: That's correct. It's
2 82-4-432, it's the permitting provision,
3 Subsection (5), which clearly states, "Within 15
4 days after the Department sends notice of
5 completed application to the Applicant, the
6 Applicant shall provide public notice, which must
7 include," and then it lists provisions "A" through
8 "D." And then in Subsection (6), it says, "To
9 provide public notice, the Applicant shall," and
10 it lists the ways of the providing public notice.

11 So no, DEQ does not have any separate
12 obligation to provide public notice under the
13 Opencut Act, and there's no external obligation
14 imposed from any other source.

15 BOARD MEMBER PAYNE: What is the
16 Applicant's remedy -- excuse me. If somebody in
17 Valley Garden's position, what's their remedy if
18 the Applicant fails to provide that notice?

19 MS. MCKENNA: Well, there's three ways
20 that notice was provided, and so --

21 BOARD MEMBER PAYNE: The question is,
22 let's say each of those ways all fail. You're
23 raising this kind of procedural, you know, "It
24 wasn't our notice to give," and I understand that.
25 Just from Valley Garden's perspective, what do we

1 do about that? What is their remedy --

2 MS. McKENNA: Sorry. I didn't mean to
3 interrupt you. I think it depends on the facts of
4 the case.

5 So in this particular case, they had
6 actual notice, and they hired Ms. Conradi, and she
7 submitted two public comments. And so if they
8 didn't receive notice of any kind, and they didn't
9 timely appear and submit two public comments, and
10 they didn't request a hearing twice, that would be
11 a different situation, but that's not the
12 situation that we have here.

13 And the Board needs to decide this case
14 situation on its facts. Valley Garden had actual
15 notice.

16 BOARD MEMBER PAYNE: And I'll be asking
17 Mr. Wilson about some actual notice questions
18 here. But I think the Board has an obligation
19 always to provide people proper procedures, proper
20 channels for violations of statute that we have an
21 obligation to review DEQ's decisions on.

22 What I'm asking here is if there's a
23 violation of that statute by the Applicant, does
24 that ever get reviewed by anybody with respect to
25 this notice provision?

1 MS. MCKENNA: So if they didn't get
2 notice, that's a different situation, but even if
3 the notice was deficient, what I think you're
4 asking is even if the notice didn't exist, or
5 wasn't deficient, the standard that we need to
6 apply under the Liberty Cove case, which is in
7 your Counsel's appendix and standards, is that
8 Valley Garden had actual notice and participated,
9 and therefore it's harmless error.

10 DEQ doesn't have an -- the statute does
11 not -- restricts DEQ to what it's supposed to do,
12 and doesn't provide DEQ with the authority to
13 verify notice.

14 BOARD MEMBER PAYNE: So what we could
15 rule here with respect to the notice issues then
16 would be that because they got actual notice, we
17 don't have to get to the issue -- regardless of
18 who had the obligation to provide the notice, we
19 don't even have to get to that issue, and they got
20 actual --

21 MS. MCKENNA: That's correct.

22 BOARD MEMBER PAYNE: -- notice.

23 MS. MCKENNA: That's correct. Yes.

24 BOARD MEMBER PAYNE: And then leave the
25 issue as to -- if they didn't have actual notice,

1 how does that work for some other case where that
2 actually happens?

3 MS. MCKENNA: That's correct.

4 BOARD MEMBER PAYNE: Mr. Wilson, did
5 your client get actual notice?

6 MR. WILSON: My client got actual
7 notice, as we've pointed out in the briefing, via
8 a call from someone at DNRC. As we've also
9 pointed out DEQ's, or I guess it's Welles'
10 characterization of that call is not accurate.

11 But in any event, my client got actual
12 notice. We have alleged infirmities in the public
13 notice, which included the fact that there was no
14 discussion of the public notice of the storage of
15 off-site material, so we believe that that issue
16 is still ripe.

17 We got actual notice, and I will discuss
18 during the merits argument our public comment
19 letter, and the lack of response or action on that
20 from DEQ. But yes, Mr. Payne, we got actual
21 notice.

22 BOARD MEMBER PAYNE: Did Valley Garden
23 suffer any harm from the Applicant -- let's assume
24 the Applicant's notice was defective under the
25 statute. Did Valley Garden suffer any harm from

1 that failure to provide that procedural notice?

2 MR. WILSON: I would say, Mr. Payne,
3 that they did, even though they subsequently got
4 an informal notice, because they are a party that
5 was entitled to actual formal notice upfront.
6 They didn't get it at the time that they should
7 have gotten it.

8 The Board can do with that what it
9 wants, but we think this is one of many of the
10 infirmities here of how this permit was handled.
11 And I'll additionally deal with that during the
12 discussion on the merits.

13 BOARD MEMBER PAYNE: My last line of
14 questioning here is on the standing issue. Ms.
15 McKenna, it seems to me that Valley Garden -- you
16 know, you raised a good point with respect to the
17 lease, and I'll be asking Mr. Wilson about that.

18 But with respect to, you know, just
19 general standing, as I understand your argument is
20 that they haven't submitted -- at this point they
21 need to submit an affidavit or some actual
22 evidence to show that they have had, they've been
23 harmed by the granting of this permit, and they
24 haven't actually done that; is that correct?

25 MS. McKENNA: Correct. There's no

1 evidence.

2 BOARD MEMBER PAYNE: Mr. Wilson, what
3 about her point where she raises actually in the
4 grazing lease there's an exclusion for the actual
5 gravel extraction?

6 MR. WILSON: That is correct, but as we
7 pointed out, as Judge Berger found, DNRC, even
8 though they may have the right to do that, did not
9 compensate Valley Garden for that loss of grazing
10 acreage until well into this process.

11 So again, to the extent that economic
12 harm is required -- and we don't think it is for
13 this kind of procedural situation -- but even if
14 it is, we've alleged that as economic harm.

15 We think that under Heffernan, and Park
16 County, and MEIC versus DEQ, the standing in
17 environmental cases is a relatively low bar, and I
18 think that whereas here you've got a party whose
19 property essentially surrounds the mine, they're
20 the party who is entitled to notice, they're the
21 party that submitted detailed comments, including
22 allegations in their comments of how they're going
23 to be harmed. I don't see a Court in Montana not
24 giving us standing on this thing.

25 BOARD MEMBER PAYNE: Thank you. That's

1 all I have.

2 MR. WILSON: And certainly not Judge
3 Berger who was the Judge who would have that case.

4 BOARD MEMBER PAYNE: In the Judge
5 Berger, though, that was a MEPA case, correct?

6 MR. WILSON: Correct.

7 BOARD MEMBER PAYNE: The Legislature can
8 decide -- I mean the Legislature sets our
9 jurisdiction, and what -- I think that was one of
10 the DEQ's points, where they had pointed out that
11 it was a MEPA case, and standing under the Opencut
12 Act is different, particularly after HB599 became,
13 was passed.

14 Based on that, is that -- do you think
15 that Judge Berger's case still controls the
16 standing issue in this case?

17 MR. WILSON: I don't think it controls,
18 as Ms. McKenna -- I'll agree with her on that. It
19 doesn't control. But I think it certainly
20 suggests which way Judge Berger might rule on
21 standing overall, after seeing several of these
22 cases, and Valley Garden's involvement in these
23 cases for over three years.

24 BOARD MEMBER PAYNE: That's all I have.
25 Thank you.

1 CHAIR SIMPSON: (Inaudible)

2 MS.McKENNA: May I respond to that?

3 Thank you. So as I pointed out in my initial
4 opening, the DNRC lease which was the subject of a
5 suit in District Court, Judge Berger, that was
6 signed on February 4th, 2022, and so that decision
7 by Judge Berger had to do with, as Mr. Wilson just
8 admitted, that Valley Garden claimed harm by DNRC
9 under this February 4th, 2022 DNRC lease.

10 But what's before the Board today is the
11 May 24th, 2022 opencut permit that DEQ issued,
12 which is a completely different issue, and has
13 nothing to do with the DNRC lease. The DNRC lease
14 was submitted by the Applicant to show proof that
15 it had the legal right to mine, and to show proof
16 of landowner consultation.

17 BOARD MEMBER PAYNE: Thank you.

18 CHAIR SIMPSON: Thank you, Ms. McKenna.
19 Further questions from the Board on these two
20 questions?

21 (No response)

22 CHAIR SIMPSON: I have a question just
23 for clarification, and because of the way my
24 electronics have been working here, I'm not sure I
25 heard the whole story.

1 This is for Valley Garden, Mr. Wilson.
2 This mine has been in operation, as I understand
3 it, for nearly 50 years, this gravel pit, and what
4 we're dealing with here is an amendment to that
5 permit that adds 23 acres to the permit area, and
6 nine acres of mining.

7 My question is: What harm does this
8 addition of nine acres of mining in 23 acres of
9 permit area, what harm does this create for Valley
10 Garden vis-a-vis the existence of the mine there
11 for the last 50 years in the first place?

12 MR. WILSON: Right, Mr. Chair. Again,
13 to the extent that we would be required to show
14 economic harm -- and I don't think that's the case
15 -- but to the extent that we would be required to
16 show economic harm, the additional acreage was
17 part of the grazing lease of Valley Garden. They
18 lost the use of that. They lost -- It took years
19 after this process got going before they were
20 compensated for that loss of use. So that's
21 economic harm.

22 Procedurally it caused harm because DEQ
23 did not follow proper procedures, and Valley
24 Garden, we believe, has demonstrated that it is a
25 party that has standing to raise these procedural

1 questions, both by virtue of the law requiring
2 that they get notice, and in terms of just the
3 Valley Garden's involvement we believe gives them
4 standing to raise these issues.

5 CHAIR SIMPSON: I'm not clear at all as
6 to what harm the procedural questions may have
7 brought about. I understand that Valley Garden
8 did comment extensively on this during the course
9 of this permitting process; is that not right?

10 MR. WILSON: They commented at the end
11 of the process, first with a quick short email,
12 and then with a detailed letter.

13 CHAIR SIMPSON: Valley Garden knew that
14 this project was, or this permit amendment was in
15 process?

16 MR. WILSON: Right. By procedural, I'm
17 talking about DEQ's, our allegation is that DEQ
18 has failed to follow the law. And in making those
19 allegations, Mr. Chair, we are of course asserting
20 rights that are based both in statute and the
21 constitutional right to a clean and healthful
22 environment, and the constitutional right to
23 participate.

24 And so yes. Is there a harm as we lay
25 people understand it when the State may not have

1 followed procedures? I think the case law would
2 tell you that yes, that's sufficient for standing.

3 CHAIR SIMPSON: Thank you. I've lost my
4 screen again, but question for Ms. McKenna.

5 MS. MCKENNA: I just wanted to respond
6 to that. So as I've established repeatedly, under
7 82-4-432 Subsection (5), the Applicant has the
8 responsibility for providing notice, not DEQ. So
9 there's no standing against DEQ for notice. That
10 procedural allegation doesn't lie against DEQ
11 because it doesn't lie in the Opencut Act.

12 And secondly there's no -- the Opencut
13 Act incorporates the Legislature's constitutional
14 obligations, and what's the jurisdiction of the
15 Board today is to decide the Opencut Act under
16 82-4-427 Subsection (1). So there's no --

17 If they have a specific constitutional
18 argument, they didn't brief it, and just
19 mentioning it in the amended violation, to quote
20 the opening of Opencut Act 82-4-402, doesn't make
21 it a constitutional claim. There is no
22 constitutional claim pending before the Board.

23 CHAIR SIMPSON: Thank you, Ms. McKenna.
24 Ms. McKenna, I had a question for you. Were there
25 any other requests for public hearing or comments

1 from the community in the vicinity of Ennis other
2 than Valley Garden?

3 MS.McKENNA: No.

4 CHAIR SIMPSON: I'm trying to get a feel
5 for whether there was any public concern expressed
6 during the process.

7 MS.McKENNA: No. As the Chair has
8 correctly pointed out, this mine has been
9 permitted in its exact location since 1978. It
10 was amended twice. Amendment one was in 1997, I
11 believe, and amendment two was in 2000, so from
12 2000 to 2022, and then amendment three was in
13 2022.

14 It was published in the newspaper twice,
15 in the weekly newspaper, the Madisonian, so the
16 legal notice was in the newspaper for an entire
17 week, in case anyone wanted to comment. It was
18 also posted at the entrance and the exit right on
19 US Highway 287 where anyone driving from Ennis
20 north to go to Bozeman, let's say, or for any
21 other reason, could clearly see it. So it was
22 published to the community.

23 CHAIR SIMPSON: Thank you. That's all I
24 have for now. Are there any other questions from
25 the Board on jurisdiction and standing before we

1 proceed to admissibility?

2 (No response)

3 MS. MCKENNA: Sorry. I just want to
4 make it clear. It was published in the Madisonian
5 twice for two separate weeks, so May 17th and May
6 20th, not just once, but twice.

7 CHAIR SIMPSON: Public notice ran twice?

8 MS. MCKENNA: Yes, for a week long each
9 period.

10 CHAIR SIMPSON: Thank you. Let's move
11 along to the motion in limine which has to do with
12 limiting the scope of the hearing, and I believe
13 in this case it would be Valley Garden leading
14 off.

15 MR. WILSON: Yes, that's correct, Mr.
16 Chair. May I begin?

17 CHAIR SIMPSON: Please proceed.

18 MR. WILSON: I think this will be a
19 quick discussion, because I think now we are all
20 fairly close on this issue. I say that both in
21 terms of the decision that this Board had made in
22 the TMC case, but also having quickly reviewed Ms.
23 Hupp's memo.

24 I would like to just say here for the
25 record. We did not get notice, or did not -- we

1 were not provided a copy of the Board's memo
2 before today. And although I realize it was
3 apparently available online with the agenda, I
4 think that in these circumstances where there are
5 parties to an appeal, those parties prospectively
6 should be given copies of things like that.

7 But in any event, if you turn to Ms.
8 Hupp's analysis on Page 9, she says, "Based upon
9 our preliminary analysis, it appears the vast
10 majority of the testimony offered (with the
11 exception of DNRC employees' opinions that
12 A.M.Welles is good operator, and testimony drawn
13 from three pits dug by DEQ's expert after the
14 conclusion of permitting process) appears to be
15 either drawn from information compiled by DEQ in
16 the permitting process, or appears to explain the
17 DEQ's interpretation of its own rules," citing
18 Westmoreland.

19 Although I would quibble with -- I think
20 there are other documents or statements beyond
21 what she has listed. I think given this Board's
22 prior ruling in the TMC case, I think that Ms.
23 Hupp's analysis or assessment there is correct.

24 And frankly, because of Westmoreland,
25 that was part of our reason for agreeing to go

1 ahead and have this hearing on summary judgment
2 before or prior to any ruling on a motion in
3 limine.

4 And so with that I'm just going to say
5 that we are -- although, again, we disagree with
6 the scope, we think the scope is pretty well
7 established by your prior ruling, and now by Ms.
8 Hupp's assessment.

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

11 MS. MCKENNA: Thank you, Chairman, and
12 members of the Board. As Mr. Wilson said, I
13 believe that the Board's September 9th, 2024 order
14 on motion in limine in Permit No. 3462, which was
15 TMC, Inc. for the Black Pit, which is in Gallatin
16 County, the Board held, "Appropriate testimony may
17 include analysis by experts who were not part of
18 the permitting process. An expert witness is not
19 someone who is necessarily involved in the facts
20 underlying a case, and lack of involvement in the
21 actual permitting process does not determine the
22 expertise in reviewing, analyzing, or explaining
23 information on which other professionals at DEQ
24 relied."

25 "Analysis or explanation of the

1 information that was before DEQ is relevant and
2 appropriate. Evidence that ties back to the facts
3 in front of DEQ when it made its decision is
4 relevant, and the BER exercises its discretion to
5 accept it."

6 I would argue that the BER's previous
7 decision in 2024 for that TMC case is applicable
8 here.

9 I would also say that while I agree that
10 DNRC's comment will not be offered, that
11 A.M.Welles is a good operator will not be offered
12 if this were to proceed to a contested case
13 hearing. However, I think that if this proceeds
14 to a contested case hearing, Mr. Donahue is
15 allowed to testify. I believe the testimony drawn
16 from evidence that rebuts Mr. Donahue's testimony
17 would be admissible, and I would ask the Court to
18 conditionally admit it, and to determine whether
19 to admit it, to conditionally admit it, and then
20 reserve a ruling until it does its findings of
21 fact.

22 CHAIR SIMPSON: Thank you, Ms. McKenna.
23 Anything further, Mr. Wilson?

24 MR. WILSON: Mr. Chair, no, I don't
25 think I need to respond that. Obviously we, both

1 sides believe that this should not or need not go
2 to a contested case hearing, so the question Ms.
3 McKenna posed at the end there I don't think needs
4 resolution now. So we are comfortable with the
5 Board's -- we understand that the Board's position
6 as spelled out in the TMC case controls here, and
7 we're ready to move on to the merits.

8 CHAIR SIMPSON: Thank you very much.
9 That all seems pretty clear to me, but are there
10 any questions from the Board? I have none at this
11 point.

12 (No response)

13 CHAIR SIMPSON: Let's move forward to
14 completeness, and then take a break before going
15 into the questions of acceptability. On second
16 thought, let me -- excuse me for a second while I
17 review the outline here.

18 We had contemplated a ten minute break
19 at this point. Why don't we take ten minutes
20 right now, and then reconvene at 10:50.

21 (Recess taken)

22 CHAIR SIMPSON: Once again I apologize
23 to everybody for my being such a luddite. Sandy,
24 would you call the roll, please.

25 MS. MOISEY-SCHERER: Chair Simpson.

1 CHAIR SIMPSON: Here.

2 MS. MOISEY-SCHERER: Vice Chair Aguirre.

3 VICE CHAIR AGUIRRE: Here.

4 MS. MOISEY-SCHERER: Board Member Payne.

5 (No response)

6 MS. MOISEY-SCHERER: Board Member Payne.

7 (No response)

8 MS. MOISEY-SCHERER: Board Member Payne.

9 (No response)

10 MS. MOISEY-SCHERER: He's on the call

11 but he's still muted. Board Member Smith.

12 BOARD MEMBER SMITH: Here.

13 MS. MOISEY-SCHERER: Board Member Payne,

14 are you unmuted?

15 (No response)

16 MS. MOISEY-SCHERER: He's still muted,

17 sir.

18 VICE CHAIR AGUIRRE: Jen is on.

19 BOARD MEMBER RANKOSKY: I'm here, yes.

20 VICE CHAIR AGUIRRE: You haven't called

21 her yet.

22 CHAIR SIMPSON: Did you call Jen's name?

23 Is she here? Are you here, Jen?

24 BOARD MEMBER RANKOSKY: I am here, yes.

25 CHAIR SIMPSON: Right in front of me.

1 Sorry. What's Allan's status? Is he still muted?

2 MS. MOISEY-SCHERER: He's here but still
3 muted.

4 CHAIR SIMPSON: Let's proceed with the
5 completeness and acceptability topics. Valley
6 Garden, would you please lead off.

7 MR. WILSON: Yes, Mr. Chair.

8 CHAIR SIMPSON: I'm sorry. Go ahead.

9 MR. WILSON: Mr. Chair, my understanding
10 is that for the three topics listed under
11 subheading Roman III, we have 15 minutes. I have
12 planned my presentation accordingly. I have with
13 the Board's permission, or indulgence, I basically
14 would like to address completeness, followed by
15 acceptability, followed by the notice issues, if
16 that's okay with the Board, even though the Board
17 outline was slightly different than that.

18 CHAIR SIMPSON: That's fine.

19 (Board Member Payne present)

20 MR. WILSON: Thank you, Mr. Chair. This
21 is hopefully the end of an almost four year long
22 process from the issuance to this permit in May
23 2022. Despite the amount of motions practice over
24 almost four years in this case, this is a
25 challenge to a permit that DEQ took just a few

1 months total to review.

2 The permit generated by DEQ itself is
3 just one page, a boiler plate page, and I noticed
4 in the last hearing, the permit was issued without
5 DEQ inspecting or visiting the property.

6 At the outset, I want to point out to
7 the Board, and it's worth noting, that Valley
8 Garden comments, which are AR-69 through 79, which
9 were submitted five days before the permit was
10 issued, highlighted for DEQ most of the legal
11 infirmities that are now before this Board, and
12 include, No. 1, that the DEQ permit contemplates
13 uses, storage, and processing with off-site
14 material that are not allowed by the underlying
15 DNRC license, which you'll find that in the
16 record.

17 No. 2, that reliance of DEQ -- or excuse
18 me -- of Welles in this case, their reliance on an
19 unpermitted well, which we allege is unlawful or
20 was unlawful at the time. No. 3, improper notice
21 for failing to mention in the public notice the
22 processing and storage of off-site material. No.
23 4, the failure to provide Valley Garden itself
24 with proper notice. And No. 5, the issue of the
25 legal right to mine.

1 In other words, had DEQ paid attention
2 to this letter, and investigated these infirmities
3 as it was required to do under 82-4-422, we would
4 not be here today, or would likely not be here
5 today four years later.

6 We believe that the Board has in front
7 of it sufficient facts to fully resolve this case
8 on summary judgment after this hearing, and we
9 would oppose any efforts to prolong this matter
10 by, for instance, having BER inspect the site.

11 So turning to the adequacy of the
12 application and the completeness upfront, in our
13 initial briefing, we are argued that the
14 application was not complete. DEQ's response was
15 that it didn't have an obligation under the
16 completeness review process at 82-4-432(2) and
17 (4), to do any more under the completeness review
18 than what it did.

19 While it may be that we conflated to
20 some extent the completeness review requirements
21 with the acceptability requirements, there can be
22 no doubt that the application itself contained
23 inaccurate statutorily required information, and
24 therefore ultimately should not have been
25 approved; and as we argued in the last brief, I

1 believe, some of these issues were ones that DEQ
2 we believe should have caught on the completeness
3 review.

4 But in any event, I'm going to focus on
5 the acceptability requirements. And again, each
6 of these issues in turn, most of them were
7 identified by Valley Garden in its letter to DEQ
8 prior to the permit's issuance.

9 We've noted throughout that A.M.Welles
10 was operating using a well that was not permitted
11 at the time the application was approved by DEQ.
12 DEQ argues throughout, and they've argued today,
13 it had no obligation to assure that the well being
14 used was legal or compliant.

15 That ignores one of the fundamental
16 requirements of the permit, which is that the
17 operator has an obligation to "A," comply with any
18 other applicable federal or state regulations and
19 ordinances, and "B," obtain any other permits,
20 licenses, approvals required for any part of the
21 operations. And that's right there on the first
22 page of the record AR-1. And there's no doubt
23 that this mine will be using water, which this is
24 at AR-9 in the application.

25 So DEQ wants this Board to believe that

1 it has no obligation to ensure that Welles is
2 lawfully using the water that this permit requires
3 it to use. That laissez faire attitude ignores
4 DEQ's obligations under 422, which is to ensure
5 that the operation is lawful.

6 And as I've noted in the briefing in the
7 lawsuit against DNRC, one of the bases for the
8 Court's determination that DNRC had violated the
9 trust was the fact that it allowed this well to
10 operate for decades without a permit.

11 Most importantly for our purposes here
12 today, Welles' reliance on an illegal unpermitted
13 well was brought to the attention of DEQ before it
14 issued the permit in our comment letter, and that
15 was actually six months before the well actually
16 became permitted.

17 Once DEQ was put on notice that the mine
18 was using an illegal well, it had an affirmative
19 obligation under 422 to make investigations or
20 inspections that are considered necessary to
21 ensure compliance with the provisions of this
22 part.

23 It should have investigated. It clearly
24 didn't. Accordingly DEQ should never have issued
25 the permit in the first place, knowing as it did,

1 that the well was not using -- excuse me -- that
2 the well that the mining operation was dependent
3 on was illegal.

4 Second, I want to address the legal
5 right to mine question. We've alleged that they
6 didn't have the legal to mine the full 63 acres.
7 The legal right to mine requirement comes from
8 82-4-432(a)(v), which requires a statement in the
9 application that, quote, "The Applicant has the
10 right to mine the designated materials in the land
11 described."

12 DEQ requires that this information be
13 certified. At the time Welles signed these
14 certification, however, he didn't have the right
15 to mine the entire 63.2 acres that this challenged
16 permitted covers. Rather it only had the right to
17 mine on the already approved existing 40 acres.

18 It would not have the right to mine this
19 new acreage until a year later. Welles' February
20 9th, 2022 certification that they did have the
21 right to mine the designated materials that the
22 land described therefore was not correct, and this
23 inaccuracy should have been caught by DEQ.

24 In its response, DEQ relies on the
25 declaration of its employee Mr. Allison, and his

1 assertion that Welles did have the legal right to
2 mine the entire site. And Mr. Allison however is
3 not a lawyer, much less a judge, nor a member of
4 this Board, and his post hoc opinion doesn't fit
5 into the Westmoreland guidelines in any event.
6 Therefore his opinion is meaningless.

7 Second, DEQ relies on the landowner
8 consultation section, which is a separate section,
9 82-4-432(2)(b)(iv), while ignoring this legal
10 requirement of the right to mine.

11 Third, DEQ argues that the legal right
12 to mine comes, quote, "through the opencut
13 permit." They say that in their reply at Page 18.
14 That of course is entirely circular, and
15 untenable. If DEQ was giving them the legal right
16 to mine, why would the statute require Welles to
17 inform DEQ that they had the legal right to mine?

18 Finally, the DNRC letters in the record
19 make clear that until the MEPA process was
20 completed, Welles lacked the right to mine the
21 entire site. DEQ's attempt to argue that Welles
22 had permission to mine the whole area, but Welles
23 voluntarily agreed to wait, or there was waiting
24 because of this litigation is plainly belied by
25 the DNRC letters.

1 This issue for the Board is simple: Did
2 A.M.Welles have the right to mine to 63.2 acres at
3 the time the permit issued? The answer is clearly
4 no. Therefore, again, the permit for the full
5 acreage should not have been granted.

6 Turning to off-site materials. The
7 Valley Garden has argued that DEQ did not
8 sufficiently address the fact that Welles did not
9 have DNRC permission for processing off-site
10 materials. The issue comes up as well in the
11 adequacy of the notice, which I'll discuss in a
12 moment, and is now confirmed by the Fifth Judicial
13 District that off-site use has been unlawful.

14 That the site map shows this, which is
15 part of DEQ's response, doesn't obviate the fact
16 that this use was not allowed by the underlying
17 DNRC permit. Once again, this infirmity was
18 brought to DEQ's attention in our May 20th comment
19 letter at AR-69 and 71, but as noted, DEQ chose to
20 ignore these legitimate concerns and issued the
21 permit.

22 Turning to the groundwater issues, the
23 parties have extensively briefed our expert, Mr.
24 Donahue's opinions. In the briefing, I'm going to
25 be brief with this because I want to get to the

1 notice issues, but some highlights I would direct
2 you to. In his Opinion 4.3 Mr. Donahue opined
3 that Welles had not provided adequate hydrologic
4 information to show the water was legally and
5 physically available to support the gravel mining
6 operations.

7 He tied that opinion to the requirement
8 in 432 that there needs to be a determination of
9 whether the mine will affect ground or surface
10 water. Because the well is not legally operated
11 and because no well log was provided, the
12 Applicant neglected to provide the information
13 that verified that adequate water is available.

14 Mr. Chair, are you still able to hear?

15 (No response)

16 MS. MOISEY-SCHERER: Chair Simpson, are
17 you able to hear?

18 CHAIR SIMPSON: I can hear you, but I
19 lost Mr. Wilson there.

20 MR. WILSON: Can you hear me, Mr. Chair?

21 CHAIR SIMPSON: I can hear you now, but
22 I lost you there for a moment. I'm not sure why.

23 MR. WILSON: Do you happen to remember
24 what I was saying when you lost me?

25 CHAIR SIMPSON: You were talking about

1 right to mine, but I don't remember exactly where
2 you were.

3 MR. WILSON: I'll wrap that part up with
4 your permission, and then start again on the
5 groundwater data.

6 CHAIR SIMPSON: That sounds good.

7 MR. WILSON: So on the right to mine,
8 just to wrap it up, this infirmity was brought to
9 DEQ's attention by our comment letter at AR-69 and
10 71, but DEQ chose to ignore those concerns.

11 Turning to the inadequacy of the
12 groundwater data, the parties have extensively
13 briefed our expert's opinions, as well as the
14 DEQ's witnesses' opinions.

15 Some highlights: Mr. Donahue opined
16 that Welles had not provided adequate hydrologic
17 information to, quote, "show the water was legally
18 and physically available to support the mining
19 operations." He tied that opinion to the
20 requirements in 82-4-432(1)(b)(i), that there
21 needs to be a determination of whether the mine
22 will affect groundwater or surface water in order
23 to make the threshold determination of whether
24 this is a dryland permit or not. Because the well
25 was not legally operated, the Applicant neglected

1 to provide information to verify that adequate
2 water is available to support the gravel
3 operations.

4 And then in Opinions 4.1 and 4.2, his
5 focus was the accuracy of the information
6 submitted to address the permit application
7 requirements that the Applicant provide the
8 estimated seasonal high and seasonal low water
9 levels.

10 In his opinion, he criticized Welles for
11 using measurements from two Montana Bureau of
12 Mines wells which were not completed in the
13 shallow water table aquifer, and which do not
14 represent shallow groundwater levels. He also
15 noted that DEQ acknowledged that the seasonal high
16 and low numbers were inadvertently reversed. The
17 inaccuracy of this information also should have
18 been caught by DEQ and corrected by Welles prior
19 to the permit being issued.

20 In summary, DEQ did not have sufficient
21 information at the time to verify that Welles met
22 even the reduced requirements under HB599. DEQ
23 obviously disagrees with us, and that's one of the
24 factual issues before you.

25 Now, if I may, I'm going to just talk

1 about the notice issues for my remaining couple of
2 minutes. Valley Garden has argued that DEQ
3 violated the public participation requirements of
4 the Opencut Act in several ways. DEQ has
5 acknowledged that the form submitted to DEQ by
6 Welles showing what address they had sent the
7 notice to for Valley Garden was the wrong address
8 for Valley Garden.

9 DEQ claims in response that the
10 incorrect address was a typographical error, but
11 it cites Mr. Allison's declaration for that
12 proposition, but Mr. Allison was not the Welles
13 employee who filled that out, that's speculation
14 and hearsay.

15 We've also talked about the adequacy of
16 the notice to the public, and Mr. Payne and I
17 discussed that a little bit previously. 82-4-325
18 (a) through (c) sets forth the requirements for
19 the notice, including a description of the
20 facilities, and the duration of the activities.
21 The notice published and posted contained no
22 discussion of storage or processing of off-site
23 material, nor the duration of such activity.

24 It also contained an incorrect statement
25 that the public comment period was only open until

1 April 3rd, 2022, though public comment was open
2 until the end of the permitting process.

3 In terms of the meeting requirement, DEQ
4 and Valley Garden each have competing
5 interpretations of whether a public meeting was
6 required or triggered here. The only real
7 property owner affected is Valley Garden, as the
8 owner of 100 percent of real property within a
9 half a mile. As such, Valley Garden is we think
10 entitled to request a public meeting.

11 DEQ has taken the position that because
12 there were not at least ten other landowners, or
13 ten landowners total affected who could request a
14 meeting, the agency didn't have to have one. In
15 fact at AR-236, they discuss the fact that there's
16 no possibility of a public meeting, but that's a
17 misinterpretation of the law. We believe 100
18 percent ownership is in the hands of Valley
19 Garden. They should have had the ability to have
20 a meeting.

21 We briefed this fairly extensively, and
22 I would note that in our discussion of the
23 statutory interpretation which supports our
24 argument, DEQ failed to respond to those issues.

25 Now, DEQ tries to conflate the notice

1 provisions. There's a notice provision that
2 property owners within a half a mile, which is
3 432(6)(b); and then there's the (9)(a)(i)
4 requirement concerning 51 percent of real property
5 owners on which dwelling units exist to assert
6 that the dwelling units has to be within a half a
7 mile, but that's not what the statute says. The
8 statute simply requires that there be a property
9 within a half mile that has a dwelling unit on it.

10 DEQ's final two arguments are
11 essentially no harm, no foul. It argues that even
12 if Valley Garden didn't get the proper notice, it
13 got notice, and that it submitted comments. In
14 any event, regardless of how Valley Garden got the
15 notice, that notice did not include an accurate
16 description of the whole operation, including its
17 failure to give notice of the ongoing storage
18 processing and sale of off-site material.

19 As Valley Garden pointed out in its
20 response brief, even though Valley Garden pointed
21 out this infirmity in its comment letter at AR-77,
22 DEQ ignored this fact, went ahead and approved the
23 permit. While DEQ touts the fact that it takes
24 public comment until the permit is issued, the
25 flaw in that system is amply illustrated here.

1 Valley Garden sent a detailed 12 page
2 letter with numerous attachments on May 20th,
3 noting a host of valid issues that are now before
4 you four years later. Many of those issues could
5 have been cured had DEQ simply responded to the
6 comments, and incorporated appropriate changes
7 into the final decision, but because the staff
8 felt compelled to stick to the statutory
9 guidelines, the permit was issued with those
10 multiple infirmities.

11 In summary, Mr. Chair, we believe this
12 is your chance to demand accountability from this
13 agency for its actions in the way it issued this
14 permit, which we believe we've sufficiently
15 spelled out as being done unlawfully. With that,
16 I'll reserve whatever time I might have for a
17 short rebuttal.

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

20 MS. MCKENNA: Lee McKenna on behalf of
21 DEQ. I will present the arguments regarding
22 completeness, acceptability and notice in the
23 order that it's presented in Counsel's brief. And
24 so -- Board Counsel's brief. And so for
25 completeness, for the Board's reference that would

1 be Pages 9 through 12 of the Board Counsel's memo.

2 I think this will go a lot faster if I
3 have permission to share my screen. May I have
4 permission?

5 CHAIR SIMPSON: Yes. Please go ahead
6 and --

7 MS. MCKENNA: I am. I'm moving my
8 mouse. Sorry. Can you see that? I'm not sure.
9 I'm getting a pop-up that says "share oral
10 argument." Sandy, do I have to do something to
11 send it -- to share it?

12 MS. MOISEY-SCHERER: No, you should be
13 able to share your screen.

14 MS. MCKENNA: I'm pressing share, but
15 nothing's happening.

16 MS. MOISEY-SCHERER: Catherine, are you
17 available to assist?

18 (No response)

19 MS. MCKENNA: It says "add a name,
20 group, or email."

21 MS. MOISEY-SCHERER: I'm going to
22 promote Catherine to a panelist so she can share
23 her screen.

24 MS. MCKENNA: Why don't we take a break
25 just for a second so I can work with Catherine to

1 try to get this up. I think just it will save a
2 lot of time if I'm able to go through it.

3 CHAIR SIMPSON: Yes. Please go ahead.

4 MS. MCKENNA: If you could scroll down
5 to where it starts with completeness. It's about
6 ten or twelve pages in. Page 13, DEQ's required
7 statutory time frames. Thank you for your
8 patience.

9 So before I get into the nuts and bolts
10 of the argument, I'd like to give some background
11 information that I think is really critical for
12 the Board to understand in evaluating these
13 issues.

14 So the Opencut Act, particularly after
15 HBB599 was enacted on May 14th, 2021 -- which just
16 to tie everything together, A.M.Welles applied for
17 this permit. They were one of the first
18 applicants, first operators, to apply for an
19 amended permit after HB599 was passed.

20 And HB599 constituted a significant,
21 significant amendment of the previous Opencut Act,
22 and so it was not -- it was not something that the
23 operators were used to doing. So there was some
24 new options, and that explains why the standard
25 permit option was chosen.

1 So under the Opencut Act, after HB599,
2 the -- basically divided into two sections for DEQ
3 to do. So the completeness review, which the
4 Opencut Act requires DEQ to complete within five
5 working days, that's an extremely short time
6 period. The Opencut Program is an extremely busy
7 program. They have a lot of applications to
8 review.

9 And with that in mind, the Legislature
10 passed the statute which says DEQ has five working
11 days to review the submitted application for
12 completeness, and then notify the applicant
13 whether anything is missing, or if it's complete,
14 if the file's complete, then they send the notice
15 to the applicant, notice of completeness, and they
16 tell the applicant, "Okay. Now it's your turn to
17 do your bit here," which is -- it's not a bit,
18 it's a substantial commitment -- to provide public
19 notice.

20 So that happens, as your Counsel
21 noticed, in 82-4-432, and they list five
22 provisions that need to be in the file in order to
23 constitute completeness.

24 Under Romanette (i), the name of the
25 Applicant; number two, the type of operation to be

1 conducted; number three, the estimated volume of
2 overburden materials to be removed; number four,
3 the location of the proposed opencut operation by
4 legal description, accompanied by a map, showing
5 the location of proposed operation sufficient to
6 allow the public to locate the proposed site; and
7 number five, a statement that applicant has the
8 legal right to mine the designated materials in
9 the lands described.

10 So what practically happens during these
11 five working days is that an administrative
12 assistant reviews all of the documents in the file
13 to make sure that all of the documents in the file
14 are there, meaning that the name of the applicant
15 and the owner of the land has been identified, and
16 the type of operation has been identified, that
17 there's been a number for the estimated volume of
18 overburden, that the location is described and
19 there's a site map, and there's a statement that
20 the applicant has the legal right to mine the
21 designated materials on the land described.

22 And so where that legal right to mine
23 certification comes up, it's on the last page of
24 the application. And so on February 9th, 2022 Tim
25 Hokanson, who is the President of A.M.Welles, he

1 signed that he had the legal right to mine, and
2 that constitutes the certification for the legal
3 right to mine.

4 And then under Montana Code Annotated
5 82-4-432 Subsection (2)(a), the application is
6 accompanied by the following materials, and those
7 are listed one through Romanette (vii), and so
8 that's what the Administrative Assistant does.
9 She makes sure that all of the documents and all
10 the information that is required under the
11 completeness provision are in the file.

12 She's not an opencut scientist, and she
13 does not, within these five working days, make any
14 sort of determination as to the contents of the
15 documents, she just makes sure that the documents
16 are there.

17 So the next timeline that's important is
18 the acceptability timeline, and so where no public
19 -- so that's five working days, and then there's a
20 notice of completeness or a deficiency letter sent
21 out.

22 If the application is complete, and the
23 notice of completeness goes out, the next step for
24 DEQ is acceptability. So where no public meeting
25 is possible, as in this case, because the

1 threshold requirements of 82-4-432 Subsection
2 (9) (a) Romanette (ii) are not met, DEQ must inform
3 the applicant within thirty days of the notice of
4 completeness.

5 So in this case it was March 4th, 2022
6 when the notice of completeness went out from DEQ
7 to A.M.Welles. So that would make the earliest
8 date that DEQ could approve the application --
9 because there was no public meeting that was going
10 to occur, because the threshold requirements
11 weren't met -- that would make it April 3rd.

12 So that's why in subsequent notices that
13 the Applicant sent out, that's why there's an
14 April 3rd date, because this tight timeline of
15 thirty days that's required for DEQ to determine
16 acceptability is -- needs to be met.

17 So there's no deadline for the applicant
18 to respond to a deficiency letter, but DEQ must
19 review any submitted materials within ten days of
20 receiving the information back from the applicant.
21 So in other words, DEQ sends the deficiency
22 letter; the applicant takes its time; gets the
23 materials that DEQ requested; sends it back to
24 DEQ; triggers an immediate clock for DEQ to review
25 the submitted application materials again; and

1 make a determination as to whether the applicant
2 has satisfied sufficiency under the Opencut Act or
3 whether another deficiency letter applies.

4 As I said, under 824-4-432(9)(a)(ii), no
5 public meeting was possible because not a minimum
6 of ten landowners with on-site dwelling units
7 within half a mile of the proposed permit
8 boundaries. Next slide, please, Catherine.

9 So I just also want to give you a little
10 overview of the history of the DSL site. So it's
11 called the DSL site because under a previous
12 agency, which was called the Department of State
13 Lands, they originally issued the permit, and they
14 originally were responsible for the management of
15 State Trust lands, and at a certain point in time,
16 the DNRC and DEQ split responsibilities.

17 So 1978, the original opencut permit was
18 issued by the Department of State Lands, and the
19 15 permitted acres, DNRC's onsite well was drilled
20 at the site. The permitted floor was 35 feet
21 below the original ground surface.

22 In 1997, Amendment 1 occurred.
23 A.M. Welles became the permitted operator. They
24 had added five acres to the permitted acreage for
25 a total of 20 permitted acres. This is all on

1 State Trust lands.

2 2000, Amendment No. 2, A.M.Welles added
3 20 acres to the permitted acreage, for a total of
4 40 permitted acres. And then the current issue
5 before the Board, the 2022 Amendment 3
6 application, A.M.Welles added 23.2 acres to the
7 site, only nine of which could be mined, total
8 acreage 63.2 acres; no change to the plan of
9 operation or equipment.

10 The permitted pit floor was reduced to
11 20 feet. So back in 1978, it was 35 feet below
12 original ground surface, but it was never mined to
13 that, so the deepest it's ever been is 20 feet, so
14 for the last almost 50 years, the pit floor has
15 been at 20 feet, and that's what it is today, and
16 that's the permitted depth. Next slide.

17 So some facts about A.M.Welles. It's a
18 family run business. Alfred Hokanson originally
19 took over the opencut permit at the DSL site in
20 1997. Today his sons Tim and Keith are the
21 owners. The local office staff in Norris,
22 Montana, the Madison Valley, is nine people, are
23 all family, except Allen who started as a college
24 intern more than twenty years ago and never left.

25 A.M.Welles employs 60 people in the

1 Madison Valley in various jobs, office staff, mine
2 operators, truck drivers. The DSL site is an
3 important source of gravel for State highway
4 construction projects, county construction
5 projects, county and private dirt road
6 resurfacing, pavement projects for the Ennis
7 airport, and commercial and residential
8 construction projects.

9 A.M.Welles is very civic minded. They
10 donate gravel to fundraisers and silent auctions
11 for the fire department, Rotary Club, and school,
12 wherever they have grandchildren, in Madison,
13 Jefferson, and Broadwater Counties. Next slide,
14 please.

15 Facts about VG, LLC. It's a limited
16 liability corporation. VG, LLC purchased the
17 Valley Garden Ranch in December 2020. The Valley
18 Garden Ranch consists of more than 13,000 deeded
19 acres according to Montana Land Reliance. Valley
20 Garden is a for-profit limited liability
21 corporation, with principal place of business in
22 Dallas, Texas.

23 Valley Garden's purpose is owning and
24 operating real estate, and any other lawful
25 business for which limited liability companies may

1 be formed under the Montana Limited Liability Act.
2 That's under the Articles of Organization
3 11/30/2020.

4 So I want to make the point here that
5 the Plaintiff in this case is a limited liability
6 company, it's VG, LLC, Valley Garden Limited
7 Liability Corporation. It's not the Valley Garden
8 Ranch, which is just an assumed name. Next slide,
9 please.

10 After HB599, which was enacted in May
11 2022, two types of permits existed, the standard
12 permit, and then the newly created dryland permit.
13 The standard permit has open opencut provisions
14 82-4-432, (2) to (13), and requires more
15 information than would be required if the
16 applicant expected to affect water.

17 However, and I think there's some
18 confusion about this, because A.M.Welles did not
19 fill out the standard permit, which that is the
20 application, the form that they filled out,
21 because they expected to affect water. They
22 filled out the application even though they didn't
23 expect to affect water, and they -- a lot of
24 operators do that just because they want to submit
25 more information, and have more protections in

1 case they get sued.

2 So the DSL site is high and dry. It
3 does not affect groundwater. It does not affect
4 surface water. A.M.Welles has never encountered
5 groundwater at the site. And by not affecting
6 groundwater, what I mean is there's no interaction
7 between the pit floor and groundwater underneath.

8 It's undisputed that A.M.Welles uses
9 DNRC's onsite well, but that's governed by the
10 Montana Water Use Act, and has nothing to do with
11 this case, despite VG, LLC's contentions.

12 So this site is high and dry. It's
13 seventy -- As you can see from the maps that are
14 part of the record, there's multiple terraces
15 above the valley floor, and this is on terrace
16 three, I believe, which is 70 virtual feet, and at
17 least 960 feet away from the surface water in the
18 area that's already mined out, but it's 1280 feet
19 away at the amendment that's before the Board
20 today, the amended undisturbed acreage. And this
21 other type of permit that's available --

22 (Chair Simpson not present)

23 MS. MOISEY-SCHERER: Excuse me, Lee.

24 We've lost Chair Simpson. One moment.

25 (Off the record briefly)

1 (Chair Simpson present)

2 MS. MOISEY-SCHERER: We can hear you
3 now, sir. Hello? Can you hear us?

4 CHAIR SIMPSON: I can hear you. I have
5 no idea what's been going on. My phone just cut
6 out on me, and I couldn't reconnect, but it seems
7 like I'm back on. Sorry about that again.

8 MS. MCKENNA: May I proceed?

9 CHAIR SIMPSON: Please proceed. You
10 were talking about depth to water when everything
11 fell apart here.

12 MS. MCKENNA: Thank you. Yes. I was
13 talking about distance from water. So I'll show
14 you a slide in a minute that shows what I'm
15 talking about.

16 But basically of the 63.2 acres, the
17 southern most section is 960 feet away from
18 surface water at the already mined out area, but
19 the area of the amendment permit, that 23.2 acres
20 that will be added, that was added, as undisturbed
21 land, that's 1280 feet away from the nearest
22 surface water. I just wanted to point that out.

23 And then the other thing I just want to
24 mention. So there is the standard permit, which
25 was the one that A.M.Welles filled out, and then

1 there's the other option is the dryland permit,
2 which has minimal requirements, no public notice,
3 no detailed reclamation plan.

4 And A.M.Welles absolutely qualified for
5 that permit. They voluntarily chose to fill out
6 the standard permit, and they qualify for the
7 dryland permit today if they so opted. Next
8 slide, please.

9 As your Counsel has noted, the
10 requirements for DEQ's completeness review are
11 described in 82-4-432. I believe that should --
12 that's Subsection (4). And then it specifically
13 says DEQ has five working days to complete the
14 completeness review. Next slide.

15 So this is the slide that I was
16 referring to. This is from the drone footage.
17 This is an orthophoto that was prepared. The
18 arrow facing north indicates that the top is
19 north. And it shows two things. It shows the
20 horizontal distances to closest surface water, so
21 as I said, 960 feet away from the part, and at the
22 bottom it's already mined out, and then the
23 amendment at the top is 1280 feet away from the
24 nearest surface water.

25 And then just so the Board can have an

1 idea of when they get to the topic of the test
2 holes, TP1, TP2, and TP3 are the locations of the
3 three test holes in the nine mineable acres that
4 were proposed to be mined in this permit. So I
5 just wanted to show you where the test holes were
6 located when we get to that argument.

7 As you can see, the rest of the site is
8 all mined out, and so the test holes were in areas
9 that were undisturbed. Next slide, please.

10 So A.M.Welles satisfied all of the
11 requirements, they submitted all of the
12 documentation for completeness. An application is
13 complete if it contains the items listed in
14 Subsections (1) and (2), and your Counsel's
15 description of the items that are required is on
16 Page 10 of your Counsel's memo.

17 An application for an opencut permit or
18 amendment is on DEQ's application form. The
19 requirements are listed here on the slide.
20 They're the same as what your Counsel identified.
21 Next slide, please.

22 There were only three proposed changes
23 in this application, so from Amendment 2, which
24 was approved in 2000, there were only three
25 proposed changes for this Amendment 3. One was

1 the reclamation date would be extended to December
2 2042; two, 23.2 acres would be added to the
3 existing 40 acres; 23.2 acres would be added as
4 the entire amount, but of that amount, nine acres
5 would be mined, and the other 14.2 acres would be
6 used for berms, and to store the soil, and have
7 vegetation on top of it, which screens the site
8 from view, and it also stores the soil for
9 reclamation. There's eight inches of top soil
10 that is preserved.

11 And then the third thing, the third
12 change in this application was the maximum depth
13 of mining would be raised to the current depth of
14 20 feet below original ground surface, where it's
15 always been. It's just making it official on
16 paper. It was originally permitted to be 35 feet,
17 then raised to 25 feet, and then 20 feet with this
18 amendment. Next slide.

19 This is the chart that is included in my
20 briefing materials, but basically it shows exactly
21 what I just said, that the mine was originally
22 permitted in 1978. And this chart also shows
23 groundwater at 45 feet below ground surface, which
24 is what DEQ's records show.

25 So again, remember the pit floor is 20

1 feet below ground surface, and the groundwater,
2 according to DEQ's records, is shown at 45 feet
3 below ground surface, making it a minimum of 25
4 feet of distance between the pit floor and
5 groundwater.

6 And then the chart, the different
7 horizontal lines show the permitted depth. The
8 original permit was 1978; and the 10/12/2000 it
9 was 35 feet below ground surface; in 2000 it was
10 permitted to be 25 feet below ground surface; and
11 then in the present A.M.Welles has determined that
12 it doesn't need to go deeper than 20 feet, and it
13 just will maintain the 20 foot below ground
14 surface level that it has -- that the mine site
15 has always been. Next slide, please.

16 CHAIR SIMPSON: Ms. McKenna. We're
17 using up an awful lot of time here. I'm not sure
18 how much because of the time I was offline. But
19 just going to ask that we can speed things up,
20 please.

21 MS. MCKENNA: Okay. So the completeness
22 review was satisfied on March 4. The Opencut Act
23 doesn't require anything more than that. The
24 lease that was -- the issue in completeness is
25 whether A.M.Welles had the right to mine.

1 As I said, the lease, the DNRC lease
2 that was signed on February 4th, 2022, was
3 submitted with the application on -- and
4 certification on February 9th, 2022, and there's
5 no reason -- There's absolutely no documentation
6 from DNRC that the lease was not valid, or had any
7 restrictions on it. And so that's why A.M.Welles
8 correctly certified that it had the right to mine.

9 The typo in DEQ's form, 300 Turtle Creek
10 Boulevard, instead of 3000 Turtle Creek Boulevard,
11 that was just a communication between A.M.Welles
12 and DEQ, but it has no bearing on completeness
13 review, because the applicant separately provided
14 public notice to Valley Garden, and the Applicant
15 absolutely maintains they sent the letter to
16 Valley Garden.

17 Valley Garden says they didn't receive
18 it, but the statute doesn't require receipt, it
19 just requires the applicant to send it. Next
20 slide.

21 So February 4th was completeness.
22 February 9th was the certification. February
23 10th, DEQ receives the application. February 14th
24 DEQ notified that the -- that was an original,
25 initial deficiency letter. Next slide. Next

1 slide.

2 Sorry. The one I wanted to point out.
3 On the March 4th completeness notice that DEQ sent
4 to the Applicant, it did enclose the request for
5 public meeting form, which is AR-0058, but no
6 meeting was possible under 82-4-432(9)(a)(ii).

7 In any event, as we've already
8 established, Valley Garden had actual notice, and
9 requested a public meeting twice, but no meeting
10 was possible. Next slide.

11 The affidavit of -- the declaration of
12 Ben Kaluza explains the applicant's process for
13 providing public notice. As I said earlier, April
14 3rd would have been the earliest date that DEQ
15 could have approved the application. There's no
16 duty for the applicant to update that April 3rd
17 dates and post notice again. That's not
18 contemplated by the Opencut Act, nor is it
19 required.

20 On May 17th Diane Conradi sent an email
21 to DEQ, providing her first public comment, and
22 requested a meeting, and on May 20th, 2022, Diane
23 Conradi sent a twelve page letter with twelve
24 exhibits, again, to serve as public comment, based
25 on her downloading of the application, and again

1 she requested a public meeting. Next slide.

2 On May 24, 2022 DEQ approved Amendment 3
3 to A.M.Welles's opencut mining permit. So this is
4 a critical date. May 24th, 2022 was the date of
5 DEQ's action, DEQ's decision. And after this
6 date, on May 25th, the day after DNRC sent
7 A.M.Welles a letter, DNRC had not sent any
8 communications during the time that DEQ was
9 reviewing the opencut application. Then on May
10 23rd, DNRC sent A.M.Welles another letter. Next
11 slide.

12 So regarding notice, there's no
13 provision of the Opencut Act that requires the
14 applicant to explicitly state that it will import
15 offsite materials for concrete and asphalt
16 activities. 82-4-432(5) lists what is required,
17 those requirements were met.

18 As I said earlier, the typo was done --
19 it was on a form between the applicant and DEQ.
20 There's no relationship to the actual notice
21 provided. The public comment period, as I
22 explained, April 3rd, 2022 was the earliest that
23 it could have been approved. There's no duty to
24 update the date.

25 DEQ accepts public comment throughout

1 the application review process. Public meetings,
2 the form to request a public meeting is irrelevant
3 because no public meeting was possible. And
4 furthermore Valley Galley had its process. They
5 requested a public meeting in writing twice
6 without the form. Next.

7 So this is the letter -- Catherine, can
8 click on it and blow it up, please?

9 MS. ARMSTRONG: I'm not sure how to zoom
10 in. Sorry.

11 MS. MCKENNA: I hope you can see the
12 date. The date is May 25th, 2022, so it's the day
13 after DEQ completed its permit review, and issued
14 the permit on May 24rd, and it says, "The
15 Department was recently informed that the
16 amendment of DEQ opencut permit 674 was accepted
17 by Department of Environmental Quality."

18 And then DNRC goes on to talk to the
19 applicant about the DNRC lease, but it doesn't
20 revoke the lease, and I submit the document speaks
21 for itself, but Valley Garden, VG, LLC has
22 continually asserted that this letter appeared
23 during DEQ's review of the opencut application,
24 and that is just patently false, and the Board can
25 see that for itself. Next slide.

1 CHAIR SIMPSON: Ms. McKenna, can you
2 hear me?

3 MS. McKENNA: Yes.

4 CHAIR SIMPSON: If I could interrupt. I
5 think you've gone way beyond 15 minutes. Once
6 again, can we please speed this up so that we can
7 proceed.

8 MS. McKENNA: Yes. So as I said before,
9 Valley Garden requested two public comments, and
10 no meeting was -- submitted two public comments,
11 requested a hearing twice, and no meeting was
12 possible. Next slide.

13 A.M. Welles notice has provided
14 sufficient information, satisfied 432(5) and (6),
15 and that's in the declaration of Ben Kaluza, and
16 the operator's certification, which is AR-42.
17 Next slide.

18 And I should also note that each notice
19 that A.M. Welles provided contained a link to DEQ's
20 opencut site website, where the full application
21 was posted for review, and which Ms. Conradi in
22 fact downloaded and used as the basis for her
23 comments, and that's clearly stated in her letter.
24 Next slide.

25 The requirement is that the notice be

1 sent, not that the notice be received. The
2 envelope was not returned as undeliverable, and it
3 had the return address on it. It's also clear
4 that the information is required to be compiled
5 from Montana Cadastrals, and that's in --

6 The address information is required to
7 be obtained from Montana Cadastral, and as Ms.
8 Conradi's letter clearly states, it does not have
9 a suite, a floor, an apartment number, or anyone
10 to direct it to other than Valley Garden, Limited
11 Liability Corporation. Next.

12 Any error was harmless because Valley
13 Garden had actual notice. We already talked about
14 the Liberty Cove decision. Next slide.

15 We already talked about how no public
16 comment was possible. I urge the Board to read
17 the statute itself, 82-4-432(9)(a) Subsection
18 (ii). There needed to be a minimum of ten
19 property owners to even have a consideration as to
20 whether to vote on -- and there was ten property
21 owners on which occupied dwelling units exist,
22 wherever is greater, referring to the 51 percent.

23 51 percent would be 10.2 property
24 owners. There were not even one property owner
25 because Valley Garden doesn't have any occupied

1 dwelling units within the half mile of the permit
2 boundary. Next slide.

3 Criteria of public meeting was not met.
4 Next slide.

5 The application acceptable. The legal
6 right to mine was established by DNRC's lease.
7 There was no communication from DNRC during the
8 application review period that A.M.Welles did not
9 have the legal right to mine.

10 Furthermore, MEPA, which was what DNRC
11 said afterwards they need to complete, is a
12 procedural analysis, and has no regulatory
13 authority, and DNRC cannot withhold, deny, or
14 impose conditions on any permit or lease under
15 MEPA.

16 And the plan of operation, the three
17 test holes were dug for the nine mineable acres,
18 they satisfied the requirements, the topography
19 was exactly the same. DEQ had extensive records.
20 DEQ exercised its discretion under 17.24.218(1)(c)
21 that the three test holes were sufficient. Next
22 slide.

23 Offsite materials. It's clear in the
24 application. AR-16 and 17 as shown on the site
25 map. AR-26, the statute doesn't require that

1 offsite materials be posted in the public notice.
2 And the DEQ links to its website clearly has this
3 information and its application.

4 I also want to point out that there's
5 just one crusher. There's like not a crusher for
6 each material. Just one crusher, the crusher
7 crushes gravel, concrete, asphalt. And there's
8 less than 1,000 yards of combined asphalt and
9 concrete for the site, to avoid going into the
10 landfill, and recycling, people buy the product.

11 Next slide.

12 Concrete recycling. There's no bond.
13 The application form clearly says that it's
14 delivered to the site, so it clearly says, "Upon
15 deposit at the site." It's clear it doesn't come
16 from the site. So it's not that importation is
17 implied. It clearly states that there's notice in
18 the application.

19 There's a concrete stockpile area as
20 noted on the site map. Final reclamation has
21 detailed instructions in the application. Next
22 slide.

23 Concrete is bonded. \$20,000 bond -- The
24 asphalt is bonded, \$20,000 bond for asphalt
25 recycling, the maximum is 5,000 cubic yards.

1 There's clearly marked on the site map where it
2 is. The final reclamation requirements are
3 spelled out. No asphalt is buried on site.
4 That's in AR-16. Next slide.

5 No waste will be buried on site. Next
6 slide.

7 The application met the requirements of
8 the administrative rule, the depth of mining, the
9 seasonal high and seasonal low water table, the
10 two well logs. The well logs are important not
11 for the mine depth of the wells. They're
12 important to show where water is reached, and that
13 shows that these two wells, which are on the same
14 terrace, within the site, at 95 feet below
15 original ground surface. Next slide. Next slide.

16 There's no well log for DNRC's well
17 because it doesn't exist. Next slide.

18 DEQ did not approve A.M.Welles use of an
19 unpermitted well in its mining operation, and DNRC
20 alone is responsible for enforcing the Water Use
21 Act. There's no authority for DEQ after HB599 to
22 consider deterioration of water quantity or
23 quality.

24 And when DNRC realized that the onsite
25 well didn't have certificate of exempt well --

1 because it's not a permit -- it's an exemption to
2 the permitting requirement for ten acre feet up to
3 35 gallons per minute, and this site only is 5.5
4 acre feet, so less than 35 gallons per minute, so
5 it's an exception. Next slide.

6 The water resources data has been
7 provided. As I stated earlier, the only reason
8 that DEQ asks about water resources is to
9 determine whether reclamation can be wet or dry.
10 In this case, as I showed, with the site, with
11 depth to groundwater, there's more than 25 feet of
12 separation. Clearly dry reclamation can be
13 occurred, and that's it.

14 So with that conclusion, DEQ
15 respectfully asks that the Board approve this
16 permit because it met all the requirements.

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

19 MR. WILSON: Thank you, Mr. Chair. I
20 don't have much more to respond to in terms of the
21 timing of the DNRC limitation letter and the DEQ
22 permit. I think that illustrates amply how Valley
23 Garden is caught between two agencies here, both
24 of whom are pointing fingers in the other
25 direction.

1 The fact is then the day after the
2 permit was issued, it became clear that Welles did
3 not have permission to mine the full amount, and
4 again, that's something DEQ should have taken into
5 account.

6 Moreover, at the time the permit was
7 issued, and at the time the certification was done
8 by Mr. Hokanson, they did not have permission from
9 DNRC to -- legal permission to process offsite
10 material. So that continues to be an infirmity.

11 We believe that the other issues we've
12 raised as well, the fact that they were permitted
13 at a time when there was no DNRC well or valid
14 well. DEQ makes the argument that, "We don't have
15 to enforce the DNRC law," and yet central to this
16 mine is the ability, the need to use water.

17 And for the regulating agency to say,
18 "We have nothing to do with the regulation or use
19 of water at this mine site. That's another
20 agency's responsibility," I just think is an
21 interpretation of their authority that's extremely
22 skewed and limited; and that given both the nature
23 of the statute that they're working under, and
24 given the constitutional basis of the statute
25 they're working under, DEQ had certainly more of

1 an obligation than to sit on its hands, once the
2 significant facts regarding the infirmities here
3 were brought to their attention.

4 So again, the storage of offsite
5 material, the reliance on an unpermitted well, the
6 failure to give proper notice, these were all
7 brought to the Agency's attention by the Valley
8 Garden before the permit was issued. We think the
9 issuance of the permit in the face of those
10 infirmities was unlawful, and we would ask that
11 you rule in our favor on summary judgment.

12 I would reiterate the one thing we agree
13 with DEQ on is that this matter can be decided on
14 summary judgment. So with that, I'll pass.

15 CHAIR SIMPSON: Thank you, Mr. Wilson.

16 MS. MCKENNA: And so just to keep my
17 rebuttal short. The offsite materials are clearly
18 spelled out in the application. The concrete
19 section, and the concrete recycling and the
20 asphalt section, and in the bonding section, where
21 they posted a \$20,000 bond for recycling concrete
22 and storing it, and the site map shows the
23 locations of both of those activities.

24 The second thing is the well, that is
25 DNRC's property, State Trust lands, and water use

1 is regulated by DNRC. DNRC takes full
2 responsibility for the well. And the original
3 site was permitted back in 1978. There was
4 somehow either the paperwork didn't get done, or
5 it got lost.

6 But again, that has nothing to do with
7 DEQ. DNRC doesn't have a well log, they don't
8 have any records, and when they realized their
9 error, they immediately obtained a certificate of
10 exempt well, so it's currently permitted, and the
11 District Court Judge in the District Court case
12 said, "Yes, DNRC made a mistake, but they've
13 corrected their error, and it's a harmless error
14 at this point."

15 Notice of the failure and the notice --
16 Again, there's no proven, there's no proof that
17 the Applicant did not send the notice. That's in
18 dispute. That has nothing to do with DEQ. The
19 notice provisions clearly say the applicant has
20 responsibility for notice, and that is something
21 that Mr. Kaluza of A.M.Welles, he declared in his
22 declaration that he sent the notice, and as I said
23 before, the Cadastral information is vague, and
24 Valley Garden address is a huge corporate office
25 building in Dallas, Texas without any floor or

1 suite number, and anything could have happened to
2 that notice, but that doesn't mean that Valley
3 Garden didn't get it at the site, or didn't get it
4 at the corporation, or that A.M.Welles didn't send
5 it.

6 CHAIR SIMPSON: Thank you. Can you hear
7 me?

8 MS. MOISEY-SCHERER: Chair Simpson, this
9 is Sandy. We can hear you.

10 CHAIR SIMPSON: Okay. Thank you, Sandy.
11 Sandy, I got your note. Stacy, I understand that
12 you're going to leave the meeting at a quarter to
13 one.

14 VICE CHAIR AGUIRRE: That's correct,
15 Chairman.

16 CHAIR SIMPSON: Unless there are
17 objections, I would like to keep going and get
18 this wrapped up so that Stacy can participate in
19 the discussions and deliberations. Let's take a
20 few minutes for questions from the Board on the
21 presentations we just heard. Are there any
22 questions from the Board?

23 (No response)

24 CHAIR SIMPSON: Hearing none, I just
25 have one question, and it's a technical question.

1 This has to do with concrete and asphalt. Ms.
2 McKenna, was this part of the original permit
3 that's being amended here?

4 MS. MCKENNA: It's always been allowed
5 under the Opencut Act. It's always been part of
6 the permit. As I said before, there's only three
7 changes that this amendment had, which was adding
8 the 23.2 acres; it was raising the permitted depth
9 to 20 feet below original ground surface, where it
10 has been 25 feet originally; and then the third
11 thing is extending the reclamation date.

12 So everything else -- operations,
13 equipment, everything else, concrete and asphalt
14 recycling -- has always been part of the permit.

15 CHAIR SIMPSON: That was a question I've
16 all the way through this. There's been a lot of
17 back and forth over the asphalt and concrete. But
18 if it was a part of the original permit, it's not
19 -- the point that it's not something new that came
20 along with this amendment to add a few acres to
21 the permit.

22 MS. MCKENNA: No, it's not new to this
23 amendment.

24 CHAIR SIMPSON: Thank you very much.
25 There's an awful lot to get our arms around here,

1 and I know this has been a problem for me since we
2 started looking at this, and I'm a little bit
3 unsure as to how to start this discussion.

4 I guess before we entertain motions, I
5 would ask if there are any points that any of the
6 Board members would like to make, just in terms of
7 merit or lack of it. I guess I'd throw the
8 question to the Board as to -- What are your
9 thoughts at this point?

10 MS. MOISEY-SCHERER: Chair Simpson, this
11 is Sandy. Board Member Payne has his hand up.

12 CHAIR SIMPSON: Yes, thank you, Allan.
13 Yes. Allan, what are your thoughts?

14 BOARD MEMBER PAYNE: I think as we
15 deliberate, I would just remind the Board that
16 this is a summary judgment motion, and if it gets
17 to the point in our deliberations that we believe
18 there is some sort of factual issue that hasn't
19 been resolved, I think at that point we need to
20 send it to a hearing.

21 I'm not saying there is or there isn't,
22 because I want to hear everyone's ideas here, but
23 we're not really at this point -- and I think Dana
24 can correct me if she has something to say on this
25 -- but we're not really weighing the evidence in

1 any sort of way here.

2 I know both parties agreed it's proper
3 for summary judgment, but we also, if we think
4 there is a factual issue, we can send it to
5 hearing to resolve that factual issue. So I just
6 would like to just alert the Board members to
7 that. If there's any sort of -- it has to be a
8 genuine issue of material fact, and it's a real
9 issue, and it's material to our decision. But we
10 have that option, and we should just keep that in
11 mind as we go forward with our deliberations.

12 CHAIR SIMPSON: Thank you very much.
13 Anybody else?

14 (No response)

15 CHAIR SIMPSON: I guess I'd like to say
16 a few things before we entertain a motion. Like I
17 said, this is an awful lot to get one's arms
18 around, but you've got to break it up into its
19 component parts to make much sense out of it.

20 I guess one thing I'd like to point out
21 is that this permit amendment is something
22 different from what has been brought before this
23 Board in the past in two ways.

24 One is that this is not a new gravel
25 pit. Typically what comes before us are proposals

1 for new gravel pits which are being opposed by the
2 neighbors, and who generally join together as an
3 organization and environmental group to challenge
4 the action. That's point number one.

5 Second that ties into that is that in
6 most cases, the petitioners have been
7 environmental groups or local groups who are
8 challenging a permit essentially as a public
9 interest.

10 In this case, it's being challenged by a
11 neighbor, which is a business, that is, it's --
12 although a number of the arguments that have been
13 raised are environmental in nature, this is not
14 really a public interest question. This is a
15 question of whether or not there's any harm to
16 Valley Garden, and if so, what is the nature of
17 that harm.

18 And I guess that's kind of where I'm
19 kind of hung up here. As I've said so many times,
20 I'm not an attorney. I'm by training a scientist.
21 I'm much more interested in product than process,
22 and a lot of what we've been going back and forth
23 here is process, especially on the notice.

24 So just to start at the beginning here,
25 with respect to completeness, completeness is just

1 a checklist. It is a matter of whether the
2 particular items required by the statute and the
3 regulations are included. There is no review at
4 that point.

5 And this goes right to the question of
6 right to mine, and I believe the case has been
7 made that the right to mine is conferred by the
8 DNRC lease, which has been in force from beginning
9 to end here, carried over from the Department of
10 State Lands years ago.

11 With respect to notice and public
12 participation and so on, Valley Garden has alleged
13 harm resulting from process, errors in the
14 process. But I guess the bottom line in my mind
15 is: Was Valley Garden prevented from commenting
16 on this amendment by any of the alleged errors
17 that took place?

18 And since Valley Garden did submit
19 comments and make their opinions known, I'm just
20 not convinced that their rights to participate
21 were harmed in any way by some of the allegations
22 here, for example, the question of whether or not
23 the incorrect address caused a harm to Valley
24 Garden.

25 With respect to acceptability, I just

1 talked about legal right to mine. I think it's
2 clear that Welles has had a legal right to mine
3 from the beginning.

4 The question of the -- just going down
5 my list here -- test holes. This is an issue that
6 hasn't -- we've discussed it a little bit, but I
7 guess I'd make the point that the purpose of the
8 test holes is to determine the thickness of the
9 soil to be salvaged.

10 Since this operation has been going on
11 for so long, I think the Department had the
12 discretion to depart from the test hole for three
13 acres. It appears that sufficient test holes have
14 been established, and that the purpose of the test
15 holes has been achieved.

16 Storage and recycling of off-site
17 materials, I think I've already commented on that.
18 That's been as a part of this project or mine for
19 a long time, this gravel pit. There's really
20 nothing changed there.

21 And as far as the hydrologic questions,
22 this is one that under the House Bill 599 isn't
23 required to be addressed unless there's surface
24 water that's directly, or groundwater that's
25 directed affected by the mine.

1 But again, this pit has been operating
2 for a long time, the pit has been dry, and it's
3 not really a surprise because this gravel pit is
4 located on the top of a bluff above the -- and is
5 80 or 90 feet down to the flood plain of the
6 Madison River, so that any water in the gravel,
7 that occurs in the gravel that close to the
8 outcrop is going to drain out. Gravel is a
9 material that conducts water very readily.

10 I think that pretty much covers my first
11 impressions on this. As far as the -- I guess I
12 should say something about jurisdiction. It's
13 clear that Board's jurisdiction here is limited to
14 the Opencut Act.

15 The other statutes that are cited here,
16 whether it be having to do with water or the well,
17 for example, which was unpermitted, that is a DNRC
18 function, that's not a DEQ function, so it's
19 really immaterial to what we're doing here.

20 Looking through my notes here. I guess
21 those are my observations on this, and I'd invite
22 discussion on any of those points, or all of them,
23 from anybody else on the Board. Any other
24 thoughts or comments?

25 (No response)

1 CHAIR SIMPSON: Is there a motion?

2 BOARD MEMBER RANKOSKY: Stacy has her
3 hand up.

4 CHAIR SIMPSON: I'm sorry. Oh, Stacy.
5 Please go ahead.

6 VICE CHAIR AGUIRRE: I was just going to
7 add that based on what you said, Allan, and what
8 you said, Chairman Simpson, this case or this
9 process followed, to me, what gives regulatory
10 certainty to a permittee, an operator, and that's
11 critical for doing business for anybody.

12 And so to me, especially what Allan
13 said, to me, it appears that the regulatory
14 requirements were met, and there's regulatory
15 certainty for A.M.Welles to operate and
16 demonstrate compliance under the permit they were
17 issued.

18 So I guess I am a bit confused on where
19 we go with that, like with a motion. I guess to
20 add, I don't see that this needs to go to a
21 hearing. I think everybody is right that that
22 could be addressed today, but --

23 CHAIR SIMPSON: I guess I would observe
24 that I went through the filings pretty carefully,
25 and compared the issues that were raised by Valley

1 Garden with DEQ's responses in the briefing, and I
2 believe all of those questions have been
3 adequately addressed.

4 I'm not aware of any material
5 differences, material facts that would be in
6 dispute here. I think there's a general agreement
7 on the facts that are at issue. So I guess the --
8 we're going to proceed with a motion at this
9 point. I would --

10 VICE CHAIR AGUIRRE: Allan has his hand
11 up.

12 CHAIR SIMPSON: Allan, please. I'm
13 sorry. Go ahead.

14 BOARD MEMBER PAYNE: That's okay. We
15 started this with an examination of the standing,
16 and subject matter jurisdiction issue, and the
17 notice. And I think Stacy had raised an issue
18 about if we're going to rule on those issues, do
19 we reach the other issues.

20 And with respect to -- I think we want
21 to be as thorough as we can, and I would say even
22 if we decided there wasn't standing or notice, we
23 could give -- I don't think there's anything
24 improper us about giving -- even if we decided
25 that the petitioner here does not have standing, I

1 think we can still give an advisory ruling here
2 that the Court could take into effect, because the
3 effect if we said they don't have standing, and
4 the Court disagrees, they send it back to us, and
5 we have to do the whole examination again.

6 CHAIR SIMPSON: Exactly.

7 BOARD MEMBER PAYNE: But I think if we
8 gave the Court the information that, you know,
9 using our individual expertise and understanding
10 of this case, we still believe -- and if there was
11 standing, there would be, that we would or would
12 not rule in favor of the petitioner here.

13 So I would encourage us to maybe look at
14 -- even if there was a standing, or on the other
15 side, the notice issue that the petitioner raises,
16 they didn't get adequate notice, and if we find
17 that to be the case, then it would -- obviously
18 DEQ may appeal that, you know, it could end up in
19 District Court, and we'd still want to have a full
20 record for the Court to consider.

21 But I guess just on the standing issue.
22 I think something that the Chairman touched on.
23 This is not a brand new permit. This is an
24 amendment to a permit that's been there since
25 1978. And they -- that really goes to, I think,

1 the standing, and the harm that the petitioner
2 would be subject to, that would necessarily give
3 it standing.

4 If it was a brand new permit I might
5 look at it a little bit differently, but it's
6 something that's been going on since I was in high
7 school. I tell you, that's a long time ago. So I
8 don't think that they've really -- I think DEQ is
9 right.

10 At this point they can make their
11 allegations to get them by a motion to dismiss,
12 but with respect to the summary judgment motion,
13 they basically, the petitioner said, "Well, we're
14 giving you all the information we're going to give
15 you on the standing issue, and we think it's ready
16 for summary judgment."

17 And if this case, I look at it, I don't
18 think they've established their standing. If this
19 was not under the Opencut Act, if this was under
20 some other statute, they may well have standing,
21 but I think this particular statute here, I don't
22 think they have -- I don't think they've really
23 established standing, even --

24 But going on, I would echo the
25 Chairman's comments on the other thing. I think

1 the DEQ has given a good review of that. I
2 understand the petitioner is unhappy with that,
3 but I don't think that under the direction the
4 Legislature has given us in the form of Opencut
5 mining, in particular the recent amendments, the
6 House Bill 599 amendments, I think our hands are
7 tied in a lot of ways. So I guess those are just
8 my comments with respect to that.

9 And on notice, I think there may have
10 been some procedural issues, but kind of getting
11 down to the summary judgment motion, the statute
12 just says it has to be sent. The evidence we have
13 that it was sent is that the Applicant said they
14 had sent it. Petitioner said they never got it.
15 That is probably a factual issue that would have
16 to be resolved in a hearing.

17 That said, even if they didn't get it,
18 the actual prescribed notice, I don't think --
19 it's probably not a material issue of genuine
20 fact, because they actually had actual issue, and
21 I think that's probably sufficient in this case.
22 That's kind of how I'm looking at it, but I'm
23 certainly open to anybody's thoughts on any of
24 those issues.

25 CHAIR SIMPSON: Let me ask you a

1 question, Allan, and this has to do with standing.
2 And I guess I think there is an argument that
3 Valley Garden has standing because they have
4 alleged harm due to procedural errors. What are
5 your thoughts on that?

6 BOARD MEMBER PAYNE: They've alleged
7 harm, but at this point in the proceeding, they
8 have to give us some evidence of that harm, and I
9 think the evidence is that they weren't harmed at
10 all because they provided all the comments they
11 wanted. They claim their biggest harm is they
12 said, "Well, had we gotten notice, we would have
13 gotten a hearing."

14 But I think under this case DEQ's
15 argument is a better one, that the statute, you
16 know, their right to a hearing is limited by what
17 the statute says, and the statute talks about
18 occupied dwellings, and there weren't any here.

19 I think DEQ, it was in their discretion.
20 They could have given them one, and they just
21 chose not to. And I don't think under that we
22 have the authority to second guess that and say,
23 "Well, you should have," where the statute doesn't
24 require it.

25 So even though they've alleged some

1 procedural improprieties with respect to the
2 notice, I just don't think that is a factual
3 matter, and they have any harm from those
4 procedural -- those procedure will get them in
5 front of us, but it won't get -- in my view it's
6 not sufficient to give them standing to go to --
7 as to the substantive of the matter if there was
8 procedural harms haven't -- those procedural
9 errors didn't harm them.

10 CHAIR SIMPSON: That's been my question
11 from the beginning is where is, what is the harm
12 here, and the only harm I've seen is the
13 allegations that their grazing acreage was reduced
14 by 23 acres. That is not within the discretion of
15 the Department. That is a matter of the lease
16 itself with DNRC.

17 And besides that, this is a 13,000 acre
18 ranch, and I would much rather review this and
19 make a decision based on the merits as opposed to
20 standing. I don't know that we have agreement on
21 the Board as to standing, but I guess I'd just
22 like to set that aside, and based on the merits of
23 case itself, we can award summary judgment to DEQ,
24 we can award summary judgment to Valley Garden, or
25 we can deny summary judgment and send this to

1 hearing based on material facts that haven't been
2 addressed. And so that is where I believe we
3 stand. Is there further discussion or a motion?

4 (No response)

5 CHAIR SIMPSON: Is there a motion?

6 BOARD MEMBER PAYNE: I guess I would
7 make a motion that the Board approves the DEQ
8 permit, and that we ask Dana to draft an order
9 that is compliant with the discussions we've had
10 today.

11 VICE CHAIR AGUIRRE: I'll second that.

12 CHAIR SIMPSON: It's been moved and
13 seconded to -- I guess I'm not sure I understand
14 the motion.

15 VICE CHAIR AGUIRRE: Does it need to be
16 for summary judgment for --

17 CHAIR SIMPSON: Is your motion to award
18 summary judgment to DEQ? Is that what I'm
19 hearing?

20 BOARD MEMBER PAYNE: Yes.

21 CHAIR SIMPSON: So it's been moved
22 seconded to award summary judgment to DEQ and
23 sustain the permit. Is that an accurate statement
24 of your motion, Allan?

25 BOARD MEMBER PAYNE: Yes, it is.

1 CHAIR SIMPSON: Are you satisfied with
2 that with your second, Stacy?

3 VICE CHAIR AGUIRRE: Yes, I am.

4 CHAIR SIMPSON: So it's been moved and
5 seconded. Is there further discussion?

6 BOARD MEMBER PAYNE: I don't know.
7 Maybe we can hear Dana on this. But is it
8 appropriate at this point that we discuss the
9 specific bases of that approval? Even though
10 because -- about standing, and notice, and the
11 adequacy of the completeness issue. Do we need to
12 go issue by issue, or what directions would she
13 like from the Board?

14 MS. HUPP: Chairman Simpson and Board
15 Member Payne. If you vote to grant DEQ's motion
16 for summary judgment, then I would prepare an
17 order that aligns with their position on all of
18 those issues. So for example, on the issue of
19 standing, the DEQ has argued that Valley Garden
20 does not have standing. And I'll let Ms. McKenna
21 speak to this.

22 So basically I would envision that the
23 order would say that the Board's jurisdiction is
24 limited by the Opencut Mining Act, and that Valley
25 Garden does not have standing here. In fact I

1 probably would start with the fact that it doesn't
2 have standing. I probably wouldn't even have to
3 reach that jurisdictional issue.

4 So to answer your question, Board Member
5 Payne, I think it probably would be helpful
6 ultimately to go issue by issue. For example, we
7 could start with the question of -- A Board member
8 could move that it has subject matter jurisdiction
9 to hear Valley Garden's claims, but that to the
10 extent of those claims exceed the Opencut Mining
11 Act, the Board does not have jurisdiction, and
12 then we could move to the standing question, you
13 know, whether or not Valley Garden has standing.

14 And then the same thing with the motion
15 to limit the scope. We could address that issue.

16 So I do think it would be helpful to
17 march through those, because if you direct me to
18 prepare an order to basically grant DEQ's motion
19 for summary judgment, I would just do it in line
20 with what their arguments were.

21 BOARD MEMBER PAYNE: Thank you. That's
22 helpful. But I think the motion was that we would
23 grant them in line with the discussions we have
24 today, but rather maybe than having individual
25 motions with respect to each of the issues, we

1 could just have a discussion and a vote on those,
2 and then that will give you an idea about how the
3 Board rules on each of those motions, and then you
4 can write the order accordingly. Is that helpful
5 to you?

6 MS. HUPP: That's helpful.

7 BOARD MEMBER PAYNE: So Dana, why don't
8 you provide us the outline here. Let's go issue
9 by issue that you think we need to cover, and
10 let's have brief discussions and votes on each of
11 those, so that when this gets reviewed by a
12 District Court, they'll have a good basis to
13 understand what basis the Board ruled on.

14 MS. HUPP: Sure. So if you want to
15 start with jurisdiction, we could -- there could
16 be a motion to say that the Board has subject
17 matter jurisdiction to hear Valley Garden's claims
18 arising under the Opencut Mining Act, but not to
19 the extent that those claims exceed the scope of
20 the Opencut Mining Act.

21 So in other words, Valley Garden -- or
22 excuse me -- the Board has jurisdiction over
23 claims that are brought under the Opencut Mining
24 Act, but not claims that are outside of the
25 Opencut Mining Act.

1 BOARD MEMBER PAYNE: I would then make a
2 motion that, consistent with Dana's description,
3 that the Board, with respect to this petition, the
4 Board has subject matter jurisdiction for the
5 claims that arise under the Opencut Mining Act,
6 but does not have jurisdiction with respect to --
7 subject matter jurisdiction with respect to other
8 claims raised in the petition.

9 VICE CHAIR AGUIRRE: I'll second.

10 BOARD MEMBER PAYNE: Do we still --
11 David, are you still here?

12 CHAIR SIMPSON: Yes, I'm here. I'm
13 thinking a little bit. We had another motion on
14 the floor that we -- it's a point of order. We
15 had another motion on the floor to award summary
16 judgment to DEQ, and it was seconded. We never
17 voted on it.

18 Allan, I believe that was your motion.
19 Did you want to withdraw that and substitute this
20 motion?

21 BOARD MEMBER PAYNE: I was trying to
22 sort of avoid going through motion by motion, but
23 -- issue by issue of individual motions, but if
24 you think that's a better way to do that, we'll go
25 that way. And I will withdraw my original motion

1 and substitute this one with respect to the
2 subject matter jurisdiction I just described.

3 CHAIR SIMPSON: And I thought the way
4 you were proposing was that we go through it issue
5 by issue, and if we do that, we're going to be
6 here for another couple of hours. That's why I
7 had argued for --

8 BOARD MEMBER PAYNE: Unfortunately I
9 think we kind of have to do that, but --

10 MS. HUPP: If it's helpful, Chairman
11 Simpson, I can break it down I think into four
12 areas: Jurisdiction; standing; the evidentiary
13 issues; and then I think we could make one motion
14 as to completeness, notice, and acceptability.
15 But that's obviously up to the Board.

16 VICE CHAIR AGUIRRE: But do we still
17 need to have the summary judgment motion?

18 MS. HUPP: It's going to depend --

19 VICE CHAIR AGUIRRE: Why would we not
20 vote on the summary judgment motion that's already
21 been made, and have that supported by the other
22 motions?

23 MS. HUPP: Because it depends upon, for
24 example, if you vote to grant DEQ's motion for
25 summary judgment, that would mean that you're

1 voting to say that Valley Garden does not have
2 standing, and so then you would not be reaching
3 the merits.

4 So we could do that if that's your
5 intention, but if you're intending on -- if the
6 Board decides that Valley Garden does have
7 standing, then that's potentially problematic,
8 depending upon the Board members' various
9 positions on some of these issues.

10 CHAIR SIMPSON: Dana, that's where I'm
11 getting hung up on this, is that I feel that if we
12 rule in the Department's favor on standing, that
13 we won't get to the other issues, and I think it's
14 important to decide this case on the merits, and
15 the only way we can do that is to find that Valley
16 Garden does have standing, because I think under
17 the Opencut Act -- which was what I'm basing this
18 on -- that the language is general enough that I
19 think they do.

20 MS. HUPP: Chairman Simpson, you're
21 correct. If you grant DEQ's motion for summary
22 judgment outright, you would be finding that
23 Valley Garden does not have standing. So that's
24 why I'm thinking you guys maybe want to break this
25 into -- I think we could do it via four different

1 motions.

2 CHAIR SIMPSON: Okay. Let's proceed
3 then. We have, just to kind of clear the slate,
4 if we could -- Allan, if we could withdraw the
5 existing motion and start over again.

6 BOARD MEMBER PAYNE: Okay. Certainly.
7 I will withdraw all my, any and all pending
8 motions I have before the Board.

9 CHAIR SIMPSON: Stacy, withdraw your
10 second?

11 VICE CHAIR AGUIRRE: I withdraw my
12 second.

13 CHAIR SIMPSON: Thank you very much.
14 Now, let's proceed with the first motion. The
15 first motion has to do with jurisdiction, which I
16 think you've stated clearly. Would you go back to
17 that one, please, Allan.

18 BOARD MEMBER PAYNE: I move that the
19 Board find that it has subject matter jurisdiction
20 over the claims arising solely under the Opencut
21 Mining Act, and that it does not have jurisdiction
22 over the other issues raised in the Complaint.

23 VICE CHAIR AGUIRRE: I'll second.

24 CHAIR SIMPSON: It's been moved and
25 seconded that the Board has jurisdiction -- to

1 paraphrase -- only under the Opencut Act. Further
2 discussion.

3 (No response)

4 CHAIR SIMPSON: Roll call vote, please.

5 MS. MOISEY-SCHERER: Chair Simpson.

6 CHAIR SIMPSON: Aye.

7 MS. MOISEY-SCHERER: Vice Chair Aguirre.

8 VICE CHAIR AGUIRRE: Aye.

9 MS. MOISEY-SCHERER: Board Member Payne.

10 BOARD MEMBER PAYNE: Aye.

11 MS. MOISEY-SCHERER: Board Member

12 Rankosky.

13 BOARD MEMBER RANKOSKY: Aye.

14 MS. MOISEY-SCHERER: Board Member Smith.

15 BOARD MEMBER SMITH: Aye.

16 CHAIR SIMPSON: Motion carries. Thank
17 you very much. Now we entertain a motion on
18 standing.

19 BOARD MEMBER PAYNE: I don't want to hog
20 all the motions, so I'll let someone else make the
21 motion this time.

22 VICE CHAIR AGUIRRE: I think you have to
23 hog this motion.

24 BOARD MEMBER PAYNE: Okay. Then I will
25 move that the Board find that the Petitioner has

1 standing to raise the issues in its petition with
2 respect to the Opencut Mining Act.

3 VICE CHAIR AGUIRRE: I'll second.

4 CHAIR SIMPSON: Was there a second?

5 BOARD MEMBER SMITH: I think Stacy
6 seconded, but I'm happy to also.

7 CHAIR SIMPSON: Was there a second? I
8 didn't hear.

9 BOARD MEMBER SMITH: I'll second.

10 CHAIR SIMPSON: It's been moved and
11 seconded that the Board determines that the
12 Petitioner has standing with respect to the issues
13 having to do with the Opencut Mining Act. I think
14 that's a paraphrase. Further discussion.

15 (No response)

16 CHAIR SIMPSON: Roll call vote.

17 MS. MOISEY-SCHERER: Chair Simpson.

18 CHAIR SIMPSON: Aye.

19 MS. MOISEY-SCHERER: Vice Chair Aguirre.

20 VICE CHAIR AGUIRRE: Aye.

21 MS. MOISEY-SCHERER: Board Member Payne.

22 BOARD MEMBER PAYNE: No.

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

25 BOARD MEMBER RANKOSKY: Aye.

1 MS. MOISEY-SCHERER: Board Member Smith.

2 BOARD MEMBER SMITH: Aye.

3 CHAIR SIMPSON: Motion carries. Thank
4 you very much. Next motion. Dana, what would the
5 next motion be? Would that have to do with
6 completeness, or completeness and acceptability?

7 MS. HUPP: Chair Simpson and Board
8 members. My recommendation would be that you next
9 vote on the evidentiary question, and specifically
10 whether to move to conditionally admit the
11 evidence offered by both parties, and that the
12 Board will address to the extent necessary the
13 weight to be afforded to each piece of evidence in
14 the findings of fact and conclusions of law.

15 So in other words, you would just move
16 to conditionally admit the evidence, and then when
17 I prepare the findings of fact and conclusions of
18 law, we can assess, I can assess, and then put
19 into the findings of fact any evidence that would
20 be necessary as part of your order.

21 I don't anticipate, based upon Mr.
22 Wilson's argument, that there are going to be
23 concerns related to the evidence that are going to
24 be cited in your findings of fact and conclusions
25 of law, but --

1 CHAIR SIMPSON: I tend to agree with
2 that. This is a matter that, as has been pointed
3 out, we've ruled on at least once before, I think
4 twice, and it's based on, at least my
5 understanding, from the Supreme Court decision
6 that in an administrative hearing, all of the
7 relevant information should be considered, and I
8 guess it's a question of whether or not certain
9 evidence ties to the original permit decision.

10 But I guess --

11 VICE CHAIR AGUIRRE: Chairman Simpson.

12 CHAIR SIMPSON: Yes.

13 VICE CHAIR AGUIRRE: I apologize. I am
14 confused. When Board Member Payne made the
15 original motion to support DEQ's motion for
16 summary judgment, that means that we are accepting
17 DEQ's position on standing, and then --

18 CHAIR SIMPSON: That's would have been
19 the case, yes.

20 VICE CHAIR AGUIRRE: Here's my concern,
21 and it's making me want to change my vote, and
22 this is why I'm bringing it up, on the situation
23 with standing. When this moves beyond us, what
24 does that challenge to standing turn out to be,
25 when really what we wanted to do was approve DEQ's

1 motion for summary judgment?

2 I now feel confused, and I feel like I
3 voted -- I want to change my vote, and I don't
4 understand how that affects all the outcomes, the
5 input from the Board then, because that seems to
6 me like then there's a component that isn't in
7 support of summary judgment, or on the way to the
8 support of DEQ's motion for summary judgment.

9 And I'm not a lawyer, right, but I'm now
10 considering that I need to change my vote on that
11 standing.

12 CHAIR SIMPSON: I can see where there's
13 a point of confusion there, because I'm a little
14 confused on it, too, and I guess I ought to put
15 that question to Dana, and that is:

16 In deciding this matter, my
17 understanding was that if we made a decision to
18 award summary judgment in total to DEQ, that would
19 mean that the Board had agreed that Valley Garden
20 did not have standing. So can we still award
21 summary judgment on the merits if we determine, as
22 we just voted, that Valley Garden does in fact
23 have standing?

24 MS. HUPP: Chairman Simpson and Board
25 members. My position would be that if you decide

1 that Valley Garden does not have standing, which
2 is a threshold issue, then you would not reach the
3 remaining merit claims that Valley Garden has
4 brought.

5 So in other words, you would stop there,
6 because if they don't have standing to allege
7 those claims, then you don't get into the merits
8 of their claims.

9 CHAIR SIMPSON: That's right, and my
10 understanding is that we can still award summary
11 judgment on the merits, even though we have --
12 well, because we have determined that Valley
13 Garden does have standing, which I believe they
14 do.

15 VICE CHAIR AGUIRRE: Board Member Payne,
16 are you willing to explain your no vote?

17 BOARD MEMBER PAYNE: Yes. First off, to
18 get back -- I would happy to. To get to your
19 first question, there were a couple motions out
20 there, one of which was to just approve DEQ -- you
21 know, kind of we jumped to the end and saying we
22 approve their, approve the issuance of the order,
23 and grant them summary judgment.

24 But we withdrew that because we wanted
25 to go through each individual, and have votes on

1 each individual issue, and first one that came up
2 was the standing.

3 So I just don't believe under the
4 Opencut Act, it's been trimmed back, and I believe
5 in DEQ's position here that at the summary
6 judgment motion, they've got to come up with more
7 than just allegations of harm.

8 That said, I'm not unhappy that we're
9 going and we're getting into the issue, the meat
10 of issues here, so I think that's appropriate. I
11 just want to record my vote is I think that this
12 is kind of a unique situation, particularly given
13 that it's been going on since 1978, and we're not
14 talking about the harms of the overall gravel
15 extraction, but just the specific additional nine
16 acres that that are going to be here, was all I
17 was getting at. But I'm happy we're going to get
18 to the substantive issues, too.

19 VICE CHAIR AGUIRRE: Based on that, from
20 the beginning, I didn't believe that they had
21 standing. I went into today's meeting having done
22 the review that I've done believing that, agreeing
23 with DEQ that Valley Garden didn't have standing.

24 So I don't know how to procedurally
25 change my vote, but I definitely want to go on

1 record, and change my vote.

2 BOARD MEMBER RANKOSKY: I have a
3 question for Dana. Is it up to us decide if they
4 have standing? I mean is that -- I mean we
5 decided on the opencut that they didn't there, but
6 then for all the other issues, is it really our
7 role?

8 MS. HUPP: Chair Simpson and Board
9 Member Rankosky. Yes, it is your role to
10 determine whether or not they have standing.

11 CHAIR SIMPSON: So we're kind of in a
12 Catch-22 here. If we rule that they don't have
13 standing, then we don't get to the material
14 issues. Is that right, Dana?

15 VICE CHAIR AGUIRRE: That was my
16 original question.

17 BOARD MEMBER PAYNE: Stacy, eventually
18 DEQ -- At this point DEQ lost on that issue. We
19 can go back and revisit it, but that's just -- I'm
20 sure they will be raising that issue with -- you
21 know, if it gets appealed, then I'm sure they'll
22 be raising that issue with the District Court,
23 which ultimately will be deciding that issue one
24 way or the other.

25 VICE CHAIR AGUIRRE: Then I will keep my

1 vote as I put it forth. Thank you for the
2 discussion. I appreciate it.

3 CHAIR SIMPSON: Thank you, Allan, and
4 Stacy, and Dana, for sorting that out.

5 BOARD MEMBER RANKOSKY: Dana's hand is
6 up.

7 CHAIR SIMPSON: I'm sorry?

8 BOARD MEMBER RANKOSKY: Dana's hand is
9 up.

10 CHAIR SIMPSON: I lost my screen a long
11 time ago. Go ahead, Dana, please.

12 MS. HUPP: Sure. And I was just going
13 to move on to the next motion, if that's
14 appropriate, and provide a little bit more
15 context, Chair Simpson, Board members, if that's
16 helpful.

17 CHAIR SIMPSON: Just one more question
18 that I would like to ask with this question of
19 standing, and would it -- maybe we've just done it
20 by our vote. I don't know. But maybe it's just a
21 question of semantics.

22 And that is: Would it be cleaner,
23 rather than saying we find that Valley Garden has
24 standing, to dismiss DEQ's position that they do
25 not have standing? Potentially we're doing the

1 same thing, but does that make it easier for us to
2 get to the issues?

3 BOARD MEMBER PAYNE: Chairman, I think
4 our procedural here is going to be we're going to
5 take a number of votes here on these individual
6 issues, and Dana is going to put that all into an
7 order for us to consider at our next meeting.

8 CHAIR SIMPSON: Right.

9 BOARD MEMBER PAYNE: Then I think we can
10 trust her to put that, you know, distill our votes
11 here into an order that will make sense
12 procedurally with respect to cross motions for
13 summary judgment.

14 CHAIR SIMPSON: All right. Dana, what's
15 our next topic here?

16 MS. HUPP: Mr. Chairman, Board Members.
17 You will recall in addition to addressing the
18 motions for summary judgment that were pending,
19 also before you today is Valley Garden's motion to
20 limit the scope of testimony.

21 CHAIR SIMPSON: Right. That's where we
22 were.

23 MS. HUPP: So the reason why I would
24 suggest you address that next is because DEQ in
25 its brief cited to testimony that Valley Garden at

1 one time was objecting to.

2 So my preference would just be, if you
3 wanted to vote on that motion to limit the scope
4 of testimony, my recommendation would be is that
5 you conditionally admit that testimony at this
6 point, based upon the argument that was provided
7 earlier today, because at this point, there
8 doesn't appear to be controversy over the majority
9 of that testimony.

10 So if you conditionally admit all of the
11 testimony at this juncture, if there's specific
12 issues we need to address in that draft order, we
13 can do that. So the motion would be to
14 essentially deny Valley Garden's motion to limit
15 the scope of testimony, and to conditionally admit
16 that evidence at this point.

17 CHAIR SIMPSON: Well, then I will make
18 the motion to move to conditionally admit the
19 evidence offered by both parties, and that the
20 Board will address to the extent necessary the
21 weight afforded to each such evidence in findings
22 of fact and conclusions of law.

23 BOARD MEMBER SMITH: I'll second.

24 CHAIR SIMPSON: It's been moved and
25 seconded to conditionally admit the evidence

1 offered by both parties. Further discussion.

2 VICE CHAIR AGUIRRE: Do we not have to
3 deny the motion to limit the scope first, and then
4 conditionally admit the evidence?

5 BOARD MEMBER PAYNE: Stacy, I think the
6 way the motion is worded now, I think it's
7 probably -- because we are conditionally admitting
8 it, so that's a conditional denial, so I think
9 it's fine.

10 The only discussion I would have here --
11 I think it's a good motion -- is that when Dana is
12 drafting the order, I would just ask that she be
13 very cognizant of where there's disputes amongst
14 parties' about the admissibility, and to the
15 extent it will -- you know, there's evidence that
16 supports our findings that doesn't rely on that
17 disputed evidence, that that's what the draft
18 order look like, and not throw it in there unless
19 it's necessary.

20 And if you do that then be sure to bring
21 to our attention when we discuss the order at our
22 next meeting, so that we can then make any
23 additional findings we need to. But that's not a
24 motion, just a request for the drafter.

25 MS. HUPP: Chair Simpson, Board Member

1 Payne, you articulated that better than I have. I
2 don't anticipate you will need to rely upon any of
3 that disputed evidence in your order, but
4 certainly I will bring that to your attention if
5 that becomes the case.

6 CHAIR SIMPSON: That's my understanding
7 also. Where were we? Did we get a second on that
8 motion?

9 BOARD MEMBER PAYNE: Yes, we did.

10 CHAIR SIMPSON: Who seconded?

11 BOARD MEMBER SMITH: Joe.

12 CHAIR SIMPSON: It's been moved and
13 seconded to conditionally admit evidence offered
14 by both parties, conditionally admit evidence
15 offered by both parties. Once again, a roll call
16 vote, please.

17 MS. MOISEY-SCHERER: Chair Simpson.

18 CHAIR SIMPSON: Aye.

19 MS. MOISEY-SCHERER: Vice Chair Aguirre.

20 VICE CHAIR AGUIRRE: Aye.

21 MS. MOISEY-SCHERER: Board Member Payne.

22 BOARD MEMBER PAYNE: Aye.

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

25 BOARD MEMBER RANKOSKY: Aye.

1 MS. MOISEY-SCHERER: Board Member Smith.

2 BOARD MEMBER SMITH: Aye.

3 CHAIR SIMPSON: Motion carries. I
4 didn't quite hear. I just wanted to sure I heard
5 correctly. Board Member Rankosky, what was your
6 vote again?

7 BOARD MEMBER RANKOSKY: Aye.

8 CHAIR SIMPSON: Thank you. Thank you
9 very much.

10 VICE CHAIR AGUIRRE: Who seconded that?
11 Joe, did you second that?

12 BOARD MEMBER SMITH: Yes, I did.

13 VICE CHAIR AGUIRRE: Okay. Perfect.

14 CHAIR SIMPSON: Where do we go next,
15 Dana?

16 MS. HUPP: Chairman Simpson, Board
17 members, that is up to you. We could do one
18 motion that addresses completeness, notice, and
19 acceptability, or you could break those down. So
20 for example, you could move that A.M.Welles'
21 application was complete, that Valley Garden
22 received sufficient notice, and that the
23 application was acceptable, or you could break
24 those down into three individual motions.

25 BOARD MEMBER PAYNE: I think we've

1 discussed those enough. We can put them in one
2 motion, and our drafter can separate them out as
3 necessary. So I will make the motion that Dana
4 suggested, that we grant DEQ's summary judgment
5 motion with respect to the notice, completeness,
6 and the accuracy issues.

7 VICE CHAIR AGUIRRE: Do we have to use
8 the word acceptability, since that's how it
9 phrased?

10 CHAIR SIMPSON: I would suggest
11 substituting "acceptability" for "accuracy."

12 BOARD MEMBER PAYNE: I will make that
13 substitution in my motion, and then if I could get
14 a second on that then.

15 VICE CHAIR AGUIRRE: Second.

16 BOARD MEMBER RANKOSKY: Second.

17 CHAIR SIMPSON: It's been moved and
18 seconded for summary judgment to DEQ on the
19 matters of notice -- excuse me -- completeness,
20 notice and acceptability. Is that an accurate
21 statement?

22 BOARD MEMBER PAYNE: Yes.

23 CHAIR SIMPSON: Further discussion.

24 (No response)

25 CHAIR SIMPSON: Once again, roll call

1 vote, please.

2 MS. MOISEY-SCHERER: Chair Simpson.

3 CHAIR SIMPSON: Aye.

4 MS. MOISEY-SCHERER: Vice Chair Aguirre.

5 VICE CHAIR AGUIRRE: Aye.

6 MS. MOISEY-SCHERER: Board Member Payne.

7 BOARD MEMBER PAYNE: Aye.

8 MS. MOISEY-SCHERER: Board Member

9 Rankosky.

10 BOARD MEMBER RANKOSKY: Aye.

11 MS. MOISEY-SCHERER: Board Member Smith.

12 BOARD MEMBER SMITH: Aye.

13 CHAIR SIMPSON: Thank you. Motion
14 carries. Thank you everyone for your attention,
15 especially with all of the electronic problems
16 I've been having here. I believe that concludes
17 our process on the Valley Garden question.

18 The only other item remaining on our
19 agenda is the proposed, I should say draft FOFCOL
20 for the oral arguments that we had at the last
21 meeting on Westmoreland Absaloka. We've been at
22 this a long time. I guess I would ask the
23 question if you've all had a chance to read that,
24 and if anybody has any concerns, we probably ought
25 to defer that until the next meeting. If we're

1 ready to vote otherwise, we can go ahead and vote
2 on that, but I want to be sure that people have
3 seen that, and are comfortable that it accurately
4 reflects what we did at the last meeting. What
5 are your thoughts?

6 BOARD MEMBER SMITH: Chair Simpson,
7 first off, thank you for preparing that, and I've
8 reviewed it. I feel like it's accurate. I'm good
9 to approve it as written.

10 BOARD MEMBER PAYNE: I would make a
11 motion that we approve it as written.

12 CHAIR SIMPSON: It's been moved and
13 seconded that we approve as written the draft
14 findings of fact and conclusions of law for the
15 Westmoreland Absaloka Minor Revision 311 case that
16 we heard at the February 20th meeting. Further
17 discussion.

18 BOARD MEMBER SMITH: Just for the
19 record, Chair Simpson, Board Member Payne made the
20 motion. I don't think it was seconded, but I will
21 second.

22 CHAIR SIMPSON: Okay. I misunderstood.
23 So it has been moved and seconded that the draft
24 findings of fact and conclusions of law with
25 respect to Westmoreland Absaloka Minor Revision

1 311 be approved by the Board for finalization.

2 Further discussion. Questions?

3 (No response)

4 CHAIR SIMPSON: All in favor say aye.

5 (Response)

6 CHAIR SIMPSON: Motion carries. That
7 about does it. I believe we have a responsibility
8 to provide an opportunity, even though this is a
9 special meeting, provide an opportunity for public
10 comment on any matter within the jurisdiction of
11 the Board other than contested cases. Is there
12 any public comment?

13 (No response)

14 CHAIR SIMPSON: Hearing none, is there a
15 motion to adjourn?

16 BOARD MEMBER SMITH: So moved.

17 BOARD MEMBER RANKOSKY: Second.

18 CHAIR SIMPSON: It's been moved and
19 seconded to adjourn the meeting. Once again, any
20 discussion.

21 (No response)

22 CHAIR SIMPSON: Thank you very much
23 everyone. All in favor, say aye.

24 (Response)

25 CHAIR SIMPSON: The meeting is

1 concluded. Thank you very much.

2 (The proceedings were concluded

3 at 1:12 p.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 -149- 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 26th day of
March, 2026.

Laurie Crutcher

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

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