

BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

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IN THE MATTER OF:) CASE NO.
APPLICATION OF PAYNE LOGGING,) BER 2015-08 JV
INC., REQUESTING TO MOVE)
BOUNDARIES OF PAYNE LOGGING)
FACILITY IN LIBBY, LINCOLN)
COUNTY, MONTANA)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
December 9, 2016
11:20 a.m.

BEFORE CHAIRMAN JOAN MILES,
BOARD MEMBERS DR. ROBERT BYRON, ROY O'CONNOR;
and MARIETTA CANTY, CHRIS TWEETEN,
and MICHELE REINHART-LEVINE
(By telephone)

PREPARED BY: LAURIE CRUTCHER, RPR
COURT REPORTER, NOTARY PUBLIC

A P P E A R A N C E S

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PAYNE LOGGING:

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIRMAN MILES: We're going to turn now
5 to the Payne Logging discussion. And Ben, since
6 you are not going to be here after this, I'm going
7 to rely on you as much as possible today to tell
8 us what's going to happen here, the process.

9 MR. REED: Thank you, Madam Chair. From
10 a procedural standpoint, this matter was referred
11 to me as Hearings Officer. I'll give an
12 abbreviated version. The procedural history is
13 largely set out in my proposal for decision. The
14 parties have additionally set out the other
15 procedural and factual background that they
16 believe to be relevant.

17 But essentially, Payne filed its appeal.
18 The parties filed some motions among which were
19 the Department of Environmental Quality's motion
20 to dismiss, which I then reviewed and granted on
21 July 14th.

22 So subsequent to that, and as I referred
23 to, as I said before, under MAPA 2-4-621, when a
24 decision that's been made adverse to a party has
25 not been heard by the entire Board, then the

1 matter needs to be memorialized in a proposal for
2 decision as opposed to an actual decision, so that
3 the full Board can hear the matter.

4 A proposal for decision was duly sent to
5 the parties on the 14th of July, and the parties
6 filed their exceptions with the Board
7 subsequently. These were all posted by Ms. Houle
8 on the Department's website.

9 The matter is obviously on the agenda
10 now. I've advised the parties that they do have a
11 finite amount of time to set out their arguments.
12 I've asked Mr. Brown, who represents Payne
13 Logging, to go first. He'll make his presentation
14 first, followed by Mr. Jones from the Department
15 of Environmental Quality, after which the parties
16 will have a relatively brief period of time to
17 rebut any of the arguments with which they take
18 issue that the opposing Counsel has offered.

19 So with the Chair's permission, I would
20 ask Mr. Brown to approach the podium.

21 CHAIRMAN MILES: I do want to thank all
22 the parties for the very clear and concise briefs,
23 in putting forth your arguments, and we would like
24 to keep this to -- did you say ten minutes? Is
25 that what you've talked about with the parties?

1 MR. REED: Yes, Madam Chair. I've asked
2 the parties to limit their primary statements to
3 ten minutes, and then their rebuttal to five
4 minutes, but if they don't have ten minutes worth
5 of things to say, I'm comfortable that they won't.
6 And so yes.

7 MR. BROWN: Good morning, Madam Chair,
8 members of the Board. My name is Jim Brown, I'm a
9 private practice attorney who practices here in
10 Helena, Montana, and I'm representing Payne
11 Logging. Payne Logging is located in Libby,
12 Montana. And as Mr. Reed explained, and as I'm
13 sure you've read in the briefing, what we're
14 adjudicating right now is a boundary relocation
15 for a motor vehicle wrecking yard.

16 Before I go any further, I'd like to
17 note that I'm very sorry to see Mr. Reed flee the
18 country, and head to more comfortable environs.
19 Mr. Reed probably wouldn't claim this, but Mr.
20 Reed and I have been friends for many, many years.
21 We attended the University of Montana together,
22 and sat on ASUM, and I am sorry to see you go. As
23 much as I was glad to see you back, I'm sorry to
24 see you go, and hope to visit you. Good luck, Mr.
25 Reed.

1 Essentially the procedural posture --
2 and I never know really how much to present
3 legally in front of boards, because I know some of
4 you are attorneys, some of you are not, so I don't
5 want to belabor this -- but essentially where we
6 are as a matter of posture is we are challenging
7 the legal conclusions essentially of Mr. Reed in
8 his proposed order.

9 Where this is at procedurally is that
10 the Department filed a motion to dismiss which
11 essentially admits the factual allegations that
12 we've made about the process that was used to deny
13 Mr. Payne's license.

14 And I think the two operative facts that
15 I'd like to point out of these is that -- well,
16 three operative facts. Mr. Payne has an existing
17 wrecking yard. It has been in existence for many,
18 many decades. He was asked by the Department to
19 basically better shield his vehicles from public
20 view. As a result of that request, Mr. Payne
21 proposed a boundary readjustment, that I think all
22 parties would agree at this point in time, and it
23 is a factual statement adopted by the Hearing
24 Examiner, that if the boundary readjustment was
25 adopted, it would actually result in better

1 shielding vehicles from public view.

2 The Department sent that application to
3 the County Commissioners in Lincoln County. The
4 County Commissioners exercised what I would refer
5 to as their discretion under the statutory scheme
6 to review whether or not they would oppose that
7 boundary readjustment, i.e., the boundary
8 application.

9 It is undisputed at this point that Mr.
10 Payne never received notice from the County
11 Commissioners that they were going to hold a
12 public hearing on his application. Therefore he
13 did not attend the hearing. I would say that
14 that's a due process violation, but I did not
15 argue that in the administrative process. I'll
16 argue that in District Court if we choose to go
17 there.

18 And then it is undisputed that the
19 County passed a resolution opposing the boundary
20 readjustment, but they made no finding within the
21 resolution that the boundary readjustment would
22 impact the quality of life of the surrounding
23 landowners. In fact, there is no evidence on the
24 record that that's exactly the case, if the
25 application were approved, that the boundary

1 readjustment would impact the quality of life of
2 the adjoining landowners. In fact, based on the
3 application, readjustment would benefit the
4 public.

5 But based on the County's adoption of
6 the resolution, the Department denied the boundary
7 readjustment, and then of course under the
8 procedural scheme, Mr. Payne filed his appeal of
9 that decision within thirty days, and here we are.

10 We have asserted four legal errors
11 committed by Mr. Reed -- sorry, Mr. Reed -- that
12 we think requires the Board to reject the Hearing
13 Examiner's proposed order.

14 One is that, as you saw from my
15 briefing, Mr. Reed cited the wrong statute, so
16 that does need to be corrected. The question
17 there is whether that requires the Board to reject
18 the proposed decision, or whether you can order
19 the Hearing Examiner to modify the cite to the
20 correct statute.

21 The second one which I do think is a
22 reversible error on the part of Mr. Reed and the
23 Hearing Examiner is that he did not make a finding
24 on a legal issue that we asked him to make a legal
25 finding on. And I have requested that Mr. Reed

1 determine whether or not the application should
2 have been sent to the County in the first
3 instance. It is my belief that under the
4 statutory scheme, that the County only has the
5 right to weigh in on any new wrecking facility.

6 The facts show Mr. Payne's facility is
7 certainly not a new facility, it has been a long
8 existing facility, and all he was doing is
9 proposing to modify where the boundaries of his
10 wrecking yard was, not to expand the boundary or
11 to move the location, physical location of his
12 wrecking yard. And Mr. Reed did not make a
13 finding on that, which is a basis for this Board
14 to reject the proposed decision.

15 The more esoteric argument that the
16 lawyers I think on this Board will appreciate, is
17 that I believe that the Department's decision --
18 and remember, we're challenging the Department's
19 decision here, because the Department is the one
20 that ultimately made the denial. It wasn't the
21 County. The Department made the denial on the
22 County's decision.

23 I believe that under the statutory
24 scheme, the Department has to determine whether or
25 not the County decision is lawful in order for the

1 Department's decision to be lawful. I realize
2 this gets kind of confusing. But the Department's
3 decision is based on the County's decision, and
4 Mr. Reed determined that as soon as the County
5 passed the resolution opposing, the Department had
6 no discretion in reviewing the appropriateness of
7 the County's actions, and determining whether or
8 not to grant Mr. Payne's license.

9 I think that's legal error. The County
10 necessarily has to follow the statutory process.
11 My argument is that once they exercised the
12 statutory right -- which again I don't think they
13 even had to -- then they were required to make a
14 finding that Mr. Payne's boundary readjustment
15 would impact the quality of life of the
16 surrounding owners; and the second thing is that
17 they had to provide Mr. Payne notice that there
18 was going to be a public hearing, so that he could
19 actually speak on his own behalf.

20 Again, it is not disputed that neither
21 of those things happened, so I believe it was
22 error for Mr. Reed to determine that we could not
23 challenge the Department's order based on an error
24 of law by the County, which then the Department
25 based its decision on.

1 And the fourth error of law is I think
2 Mr. Reed's reading of the statute actually is
3 error because it reads out a provision of law,
4 namely MCA 75-10-515, which is the appeals
5 statute, and that statute basically gives Mr.
6 Payne or anybody aggrieved by a decision of the
7 Board the right to appeal that decision.

8 I believe Mr. Reed's reading of the
9 statutory scheme basically vitiates that statute
10 by saying that anytime the Department receives a
11 rejection or disapproval, that essentially Mr.
12 Reed's reading of the statute reads that out,
13 because what Mr. Reed's conclusion is is that once
14 the County acted on passing a resolution opposing
15 the boundary readjustment, then basically the
16 Department's hands are tied, and essentially that
17 means there is no review of whether or not the
18 County's actions were lawful.

19 And again, I need to make this clear.
20 It was the Department, not the County, who
21 rejected the application ultimately. So
22 therefore, it is my argument that as part of the
23 appeal, we are allowed to challenge the County's
24 actions and the lawfulness of the same as part of
25 that review; and Mr. Reed's reading of the statute

1 is that no, the County's actions are not part of
2 the review on appeal. The only thing on review is
3 whether or not the County passed the resolution
4 opposing it, and if it did, then basically the
5 case is over.

6 I don't agree with that statutory
7 reading. I think it reads the appeals process out
8 because effectively you have no appeal of the
9 County's decision.

10 So I would ask the Board to reject Mr.
11 Reed's proposed order, to send the order back to
12 Mr. Reed for clarification, "A," of the statute,
13 but "B," I believe the order should be rejected
14 because he failed to make a finding; and third, I
15 disagree with the legal conclusions of Mr. Reed,
16 and I believe that Mr. Reed's order can be
17 overturned on that basis, and once done so, I
18 would ask the Board to grant the relief set forth
19 in Mr. Payne's petition, which is basically to
20 grant the boundary readjustment.

21 So thank you. I'm happy to take any
22 questions when I come back up.

23 CHAIRMAN MILES: Mr. Brown, I would just
24 note that the proposed order that we received does
25 have the correct statutory citations in it, Title

1 75.

2 MR. BROWN: I wasn't aware of that.

3 CHAIRMAN MILES: I'm sure you raised
4 that issue --

5 MR. BROWN: I did, yes.

6 CHAIRMAN MILES: -- but by the time we
7 have received the proposed order, it is the
8 correct citation. Is there any questions of Mr.
9 Brown right now?

10 (No response)

11 CHAIRMAN MILES: I might have some
12 afterwards.

13 MR. BROWN: Sure. Happy to answer them.

14 MR. JONES: Madam Chair, members of the
15 Board, my name is Bradley Jones. I'm here on
16 behalf of the Montana Department of Environmental
17 Quality.

18 I guess as an initial matter, I'm
19 reluctant to attempt to explain areas of legal
20 procedure, but since Mr. Brown brought it up, I
21 feel like I need to correct just a couple of
22 things that I disagree with initially.

23 So in terms of undisputed facts, there
24 are a few facts that I will throw in here after
25 I've gone through sort of the statutory scheme,

1 but the idea that certain things in this case are
2 undisputed is simply not the case, in the
3 Department's opinion.

4 For legal purposes, in a motion to
5 dismiss, all well pleaded allegations are admitted
6 for the purposes of consideration for legal
7 issues, and that doesn't mean that the Department
8 of Environmental Quality agrees that the County
9 did or did not do certain things. Quite frankly,
10 the Department has not investigated this issue of
11 the County giving notice to certain people or
12 anything of the like. We have no opinion about
13 what the County did or did not do, for reasons
14 that will become clear as I move forward here.

15 And also -- and this is perhaps even a
16 more minor point -- the issue of using a term of
17 art of the record. There are things, there are
18 documents, of course, in the record, letters sent
19 by DEQ, that sort of thing, but there is no sort
20 of record in any official sense right now, so I
21 think that's a little bit of a misconstruction of
22 what's at issue.

23 But let's start with the basics of this
24 case, and with all respect to Mr. Brown's
25 argument, this case could not be simpler. I would

1 turn the Board's attention to -- and this was in
2 the pleadings, but I will go through it sort of
3 piece by piece.

4 The operative statute here is really not
5 at issue. It's 75-10-516. So if the Board will
6 indulge me, I will go through pretty quickly what
7 the elements of that statute are, since it is the
8 operative one.

9 So under Sub (1), if you're looking at
10 the statute, it says, "When an application for a
11 motor vehicle wrecking facility or motor vehicle
12 graveyard is filed with the Department, the
13 Department shall notify by mail." So initially
14 I'm going to say as a response to one thing Mr.
15 Brown said just on that element, it says, "When an
16 application for a motor vehicle wrecking
17 facility." It does not say anything about an
18 expansion or a moving of boundaries. This is the
19 operative statute regarding motor vehicle wrecking
20 facilities of any sort, and the way that the
21 Department must process them.

22 So moving on down, so we have Sub (1)
23 here. Now, within that category, we have A, B,
24 and C. These are the things that the Department
25 must do when that application comes in. So it is

1 under Sub (a). We have to notify each owner, the
2 adjoining property owners, of the proposed
3 facility giving notice. "B," we have to notify
4 the governing body of the County in which the
5 proposed facility is located. We give our notice
6 to the County, in this case Lincoln County. "C,"
7 we have to notify a newspaper of general
8 circulation in the area, and say, "Here is the
9 application we got. It's going to be within your
10 readership."

11 So now moving on to Sub (2) within the
12 statute, "Within thirty days of receipt of the
13 notification in Subsection (1)(b), the governing
14 body of the county may." So I'll come back to
15 that word "may" here shortly, but let's read on.

16 So under Sub (a) within two, "The county
17 may conduct a public hearing to determine whether
18 the proposed facility will significantly affect
19 the quality of life of adjoining landowners and
20 surrounding community," and "B," "Adopt a
21 resolution in support of or in opposition to the
22 location of the proposed facility, and transmit a
23 copy of the resolution to the Department."

24 So now moving on to Sub (3). "The
25 Department may not grant a license to a facility

1 that the governing body has opposed under
2 Subsection 2(b)." Now, this is the single
3 critical part of the statute. This is the one
4 thing that cannot be ignored, but we'll keep
5 moving.

6 Finally under Sub (4), again, this is
7 the Department's action, "In making the decision
8 to grant or deny a license application, the
9 Department shall consider the effect of the
10 proposed facility on adjoining landowners and land
11 uses."

12 Okay. So looking at the statute as a
13 whole, again, the primary thing here is what the
14 Department is required to do relative to what the
15 county does. Now under Sub (2), it says, "The
16 governing body of the county may." As I cited in
17 my brief, in the Department's brief, generally
18 speaking, you construe things according to their
19 common sense meaning. So "may" is permissive.
20 It's not "shall," it is "may." It is a different
21 deal.

22 But more importantly, we look to Sub (3)
23 within the statute, and it says as clearly as
24 could be possible, "The Department may not grant a
25 license to a facility that a governing body has

1 opposed under Sub (2) (b) ."

2 So you go back Sub (2) (b) and say, "What
3 does that say?" Well, if the county adopts a
4 resolution, so break it down into its constituent
5 parts, if the county adopts a resolution either in
6 support or in opposition to the facility, and --
7 the second part of this -- transmits a copy of
8 that resolution to the Department, the Department
9 may not grant a license to that facility, end of
10 story.

11 The Department is not required to do any
12 analysis to -- we neither have the authority, nor
13 the obligation to do any analysis as to whether
14 the County conducted a quality of life hearing,
15 whether they provided notice to landowners,
16 anything else.

17 It is pretty clear in this case that the
18 Applicants dispute, if you will, any potential
19 remedy they have is not against the Department of
20 Environmental Quality. Of course I'm not going to
21 attempt to go into the different remedies that
22 they have, but it is certainly not against DEQ.

23 And I would say by extension of that,
24 this Board's authority, much like this Board, is
25 in a sense administratively attached to the

1 Department of Environmental Quality, and so the
2 Board's authority comes from -- for each
3 individual type of environmental law, comes from
4 these statutes that govern that type of
5 environmental law.

6 Here we have junk vehicles, motor
7 vehicle wrecking facilities, so if DEQ has no
8 discretionary authority to adopt a resolution --
9 or excuse me -- to issue a permit, once we've
10 actually gotten that resolution from the county,
11 by extension this Board cannot do so either,
12 because this Board is equally limited by that
13 statute, just as DEQ is.

14 And so finally -- and I'm going to wrap
15 this up here -- I would note that since Mr. Brown
16 did bring up this issue of 75-10-515, the issue of
17 appeals, it is a core part of Montana statutory
18 law -- and this is cited in our brief -- that the
19 specific controls over the general. So simply
20 because there is a generalized appeal statute that
21 says you have to the right to appeal a denial, or
22 a revocation, or what have you, of a motor vehicle
23 facility, does not in any way change the more
24 specific statute that says the Department may not
25 grant a license when the County says no.

1 So that's the simple issue. I'm happy
2 to take any questions from the Board.

3 CHAIRMAN MILES: I do have one question,
4 Mr. Jones, and it's kind of going to that issue of
5 the contention that this only applies to new
6 facilities.

7 What happens on an annual basis with
8 wrecking facilities? Do they apply annually, or
9 is it renewed automatically provided they're in
10 compliance with the law? What happens on an
11 annual basis?

12 MR. JONES: Madam Chair, frankly I do
13 not have a full explanation of that. I do not
14 know the technical aspects of it, all of the
15 technical aspects.

16 My understanding is that one has to
17 renew their permit on a daily year, pay the fees,
18 etc. In this case, again I think the facts are a
19 little beside the point because this is a legal
20 issue, but this was about moving a boundary from
21 one place to another. And so once again, going
22 back to the statute, if there was --

23 Perhaps that would be a little bit more
24 of an issue if there were some specific element of
25 the statute about moving boundaries, etc., but the

1 statute simply says, "When an application for a
2 motor vehicle wrecking facility is filed with the
3 Department." Madam Chair --

4 CHAIRMAN MILES: I'm just trying to get
5 at whether the county at any given time could pass
6 a resolution. So you've got a wrecking facility
7 that is in operation, applies every year. At any
8 one of those times could the county pass a
9 resolution to not grant that license to an
10 existing facility?

11 MR. JONES: If as I'm saying, as I'm
12 sort of positing that it does, a moving of the
13 facility boundary is an application, which I think
14 it pretty clearly is from the statute, then that
15 changes what's going to trigger the county's
16 resolution. And again, I would hate to get into
17 the facts of this, but my understanding is that
18 this was quite a long saga in which the County was
19 involved before the County passed that resolution.

20 BOARD MEMBER REINHART-LEVINE: I've got
21 a question. Madam Chair, Mr. Jones, in the
22 Section 516 subpart (4), it says that, "In making
23 its decision to grant or deny a license
24 application, the Department shall consider the
25 effect of the proposed facility on adjoining

1 landowners and land uses," and I'm not quite
2 seeing that language in the Department's brief or
3 in the letter from Mr. Christensen with the Motor
4 Vehicle Recycling and Disposal Program to Mr.
5 Payne at Payne Logging.

6 Can you address Subpart (4), and whether
7 the Department has addressed the effect of the
8 proposed facility on adjoining landowners and land
9 uses.

10 MR. JONES: Certainly. Madam Chair, Ms.
11 Levine. The Department has not made any sort of
12 finding about the effect of the proposed facility
13 on adjoining landowners and land uses. Once
14 again, looking at the way the statute is written
15 -- and let's be honest. Sometimes statutes could
16 be perhaps written a little bit clearer, but
17 that's not what the legislature has given us to
18 work with.

19 And it is a core principle of Montana
20 law that administrative agencies -- this was in
21 my brief, the Core-Mark International case. I'm
22 quoting here -- "Administrative agencies may only
23 exercise the powers conferred upon them by the
24 Legislature."

25 So to answer Ms. Levine's questions, the

1 Department has not considered Sub (4) simply
2 because Sub (3) of 516 overrides everything. Once
3 again, looking at the way this is specifically
4 written, so under Sub (b), "The Department may not
5 grant a license to a facility that the governing
6 body has opposed under Subsection 2(b)."

7 So looking at 2(b), any issue of the
8 quality of life determination from the County
9 aspect, any issue of the Department considering
10 effects on adjoining landowners and land uses,
11 none of those things are in Sub (2)(b) It simply
12 has two parts.

13 The County has to adopt a resolution --
14 it doesn't say what that resolution must look
15 like, how it must go about being resolved, if you
16 will -- but simply says that the county, the
17 relevant county must adopt a resolution in support
18 of composition -- again, it doesn't say how that
19 must be supported or however -- to the location of
20 the proposed facility. In this case, obviously
21 this is the proposed -- this was a change of
22 location, a change in the facility because it was
23 a change of location -- and then transmit that
24 copy to the Department.

25 So the Department's inquiry is actually

1 extremely simple. As soon as we get that
2 resolution from the County, we do exactly what we
3 did here, which is we have to say -- as Mr.
4 Christensen did in his letter -- "Look. We have
5 no opinion what the County did or did not do. We
6 have no opinion about quality of life or adjoining
7 landowners. We got the resolution from the
8 County. We are constrained by the Legislature of
9 Montana to deny this," and that's exactly what we
10 did.

11 CHAIRMAN MILES: Chris, did you have a
12 question? I should have asked Michele if that
13 answered your question.

14 BOARD MEMBER REINHART-LEVINE: I'll
15 defer for now, Madam Chair. Thank you.

16 CHAIRMAN MILES: Chris, do you have a
17 question or a comment?

18 BOARD MEMBER TWEETEN: What effect,
19 Counsel, does Section 75-10-504 have on this case?
20 I haven't heard anybody discuss it in the oral
21 arguments.

22 MR. JONES: Madam Chair, Mr. Tweeten.
23 If you would give me a just a second to go find
24 that statute, I would appreciate it.

25 BOARD MEMBER TWEETEN: (Inaudible)

1 CHAIRMAN MILES: You're blinking out.

2 BOARD MEMBER TWEETEN: I can call back

3 -- (inaudible) --

4 CHAIRMAN MILES: I wonder if you should
5 try. We can't understand you.

6 BOARD MEMBER TWEETEN: While Mr. Jones
7 is looking, I'll go ahead and hang up and call
8 back in.

9 (Board member Tweeten not present)

10 CHAIRMAN MILES: Thank you. Was 504
11 addressed in somebody's brief?

12 MR. JONES: Madam Chair, members of the
13 Board, I do not believe it was brought up in the
14 brief. That will be my question to Mr. Tweeten
15 when he's able to get back on, is if there is some
16 specific element of this statute that he -- or
17 some particular applicability that he has issue
18 with.

19 CHAIRMAN MILES: Can you tell me what
20 page in your brief that's on, Mr. Brown?

21 MR. BROWN: Yes. It was in the reply
22 brief. I don't know if I have my reply brief.
23 May I come up and address that?

24 CHAIRMAN MILES: Sure.

25 MR. BROWN: Should we wait for Mr.

1 Tweeten?

2 CHAIRMAN MILES: Yes, we should. MCA
3 Section 75-10-504. I think it is on Page 7.

4 MR. BROWN: That's correct. I also
5 raised it in my list of exceptions as well.

6 (Board Member Tweeten present by telephone)

7 BOARD MEMBER TWEETEN: This is Chris.

8 CHAIRMAN MILES: Thanks, Chris. That
9 sounds good so far.

10 BOARD MEMBER TWEETEN: Is this better?

11 CHAIRMAN MILES: You're going out again.
12 I don't know what's going on.

13 BOARD MEMBER TWEETEN: (Inaudible)

14 CHAIRMAN MILES: We missed that
15 completely.

16 BOARD MEMBER TWEETEN: Is this better?

17 CHAIRMAN MILES: Yes.

18 BOARD MEMBER TWEETEN: I was on speaker
19 before, and now I'm not.

20 CHAIRMAN MILES: I think that's very
21 helpful. So your question was about Section 504?

22 BOARD MEMBER TWEETEN: Right, and for
23 the record, and for the benefit of anybody who
24 doesn't have that statute in front of them, the
25 second sentence of the statute says, "The

1 prohibition concerning approval of a new motor
2 vehicle wrecking facility or graveyard site does
3 not apply to a facility site that was licensed as
4 such at any time within the 18 months immediately
5 presiding the date an application is made for
6 licensure of such site."

7 What that appears to me to do is
8 possibly to grandfather any site that has been in
9 existence for more than 18 months prior to the
10 date they applied for licensure.

11 CHAIRMAN MILES: We don't have the full
12 statute in front of us. Do you have that in front
13 of you? And what is the title section of that
14 particular section?

15 BOARD MEMBER TWEETEN: 75-10-504, and
16 the head note is, "Shielding - New Facility." And
17 the sentence I just read, in my reading of it
18 anyway, says that the prohibition concerning
19 approval of a new wrecking facility does not apply
20 to a facility that was in business or licensed at
21 least within the 18 months immediately preceding
22 the application for the new license.

23 So I don't understand exactly how this
24 process works with respect to the difference
25 between new facilities and licensed facilities

1 applying for new licenses or modifications of
2 their licenses. So the whole thing is kind of
3 confusing to me in light of the statute, and I'm
4 hoping that Mr. Jones can help me with that.

5 MR. JONES: Madam Chair, members of the
6 Board, I would do my best, but as always, I would
7 start with the caveat that once again, perhaps
8 there are times when statutes could be a little
9 clearer or better coordinated with each other.

10 So I'm looking at the statute right now,
11 Mr. Tweeten, and I would note 75-10-504 does not
12 contain a reference to any other particular
13 statute. So again, you're not necessarily
14 referencing 75-10-516 in that sentence that's
15 causing you some heartburn there. It just says,
16 "The prohibition concerning approval of a new
17 motor vehicle wrecking facility does not apply,"
18 so it doesn't reference any particular statute, or
19 any particular process.

20 Again, frankly, members of the Board, I
21 think this is one of those things where we're sort
22 of getting into a perhaps dangerous territory when
23 we get into facts of some of this thing, because
24 it wasn't briefed, there weren't documents
25 included in the record about it.

1 Once again -- and I really hate to say
2 this, and I'm sure that Mr. Brown might dispute my
3 opinion on this -- but my understanding in this
4 particular case is that Mr. Payne had had quite a
5 few rounds with the County leading to this
6 resolution, whereby the shielding was falling
7 down, and there were issues with the neighbors and
8 that sort of thing. Mr. Payne did in fact have
9 numerous opportunities from both the Department
10 and the County to operate in a way that was within
11 compliance and in a way that the neighbors really
12 should not have had any issue, and yet he did not.

13 But again, that's where the facts start
14 to get dangerous, when I sort of posit things like
15 that without it being supported in the record
16 before you. But I would note that I'm looking at
17 the administrative rule right now for renewal of
18 license. It is Administrative Rules of Montana
19 17.50.205. And the first part, under Sub (1), it
20 says, "For licensed motor vehicle wrecking
21 facilities, renewal applications must be made on
22 form furnished by the Department."

23 In Sub (2) he says, "A motor vehicle
24 wrecking facility must be in compliance with or be
25 operating under a compliance plan that will assure

1 compliance with 75-10-501 through 75-10-542 --"
2 which seems to me to be the pretty comprehensive
3 junk vehicle statutes -- "and these rules prior to
4 receiving a renewed license."

5 So I think you could say that the
6 process starts over each time that someone, as in
7 this case, an applicant or a pre-existing junk
8 vehicle site owner, comes and wants to make an
9 either annually, or in this case it is even clear,
10 where one actually wants to completely overhaul
11 their facility, have an entirely new boundary
12 location, the Department is constrained by
13 Administrative Rules and by the statutes to make
14 sure that that junk vehicle operator is in
15 compliance with everything, including shielding,
16 and that was not the case here.

17 But once again, if I could, not to
18 belabor the point, but simply redirect things to
19 where I feel that the Board's analysis really
20 could stop, to make it the simplest, clearest
21 decision. Our statutes, of which the statutes
22 control even the ARMs, specifically point to if we
23 get a resolution from the County, when there is a
24 facility involved -- in this case it is
25 essentially a new facility, because it was a new

1 permanent boundary that was being requested.

2 When a new facility comes to the
3 Department, if the County passes that resolution
4 and says County opposes, that's really the end of
5 the story for the Department. We have to deny it
6 under our statute, or else we will be violating
7 our own laws.

8 BOARD MEMBER TWEETEN: Let me direct
9 your attention to that process. As I recall the
10 statute -- I have a copy of it in my hand here --
11 75-10-516 -- which I think we can agree is the
12 statute that contains the prohibition concerning
13 approval of a new motor vehicle wrecking facility
14 or graveyard site -- Subsection (2) is the
15 subsection that deals with the county's
16 obligation, and Subsection (2) says, "Within
17 thirty days of receipt of the notification
18 provided in Subsection (1)," and Subsection (1)
19 just says, "When the Department gets an
20 application, it needs to notify by mail the
21 following," and "B" there is the county.

22 "So within thirty days of the receipt of
23 that notification, the governing body of the
24 county may," and then there is a colon, and there
25 are two subsections. One says, "Conduct a public

1 hearing," and so on and so forth, and then there
2 is a semicolon, and the word "and," and then
3 Subsection (b) says, "Adopt a resolution in
4 support or opposition."

5 But doesn't the use of the word "and"
6 there suggest that the County opting into this
7 process is required to do both "A" and "B" before
8 it reaches its decision whether to support or
9 oppose?

10 MR. JONES: Madam Chair, Mr. Tweeten.
11 To be able to answer that question, Mr. Tweeten, I
12 would direct you, please, to the beginning of Sub
13 (2). "So within thirty days of receipt of the
14 notification, the governing body of the county
15 'may.'"

16 Now that "may" is absolutely operative
17 in this case. There are quite a few cases from
18 the Montana Supreme Court, one of which was in my
19 brief, and it is the Vanderhule v. Mukasey, so
20 2009 MT 20 case.

21 BOARD MEMBER TWEETEN: I was one of the
22 lawyers on that case. I'm real familiar with it.

23 MR. JONES: Well, I really have no
24 response to that.

25 BOARD MEMBER TWEETEN: I think I

1 understand the difference between "may" and "and,"
2 but you have this statute where the word "may"
3 ends up at the end of the first line of Subsection
4 (2), followed by a colon, and then you have two
5 further subsections (a) and (b) connected by the
6 word "and."

7 And my question is not whether the
8 County is obligated to weigh in -- which seems to
9 me to be the question controlled by the "may" in
10 the first line of Subsection (2). Clearly the use
11 of the word "may" there makes the County's
12 participation discretionary, and not mandatory.

13 But my question is whether the word
14 "and" between subsections (a) and (b) doesn't make
15 the county, once it opts to participate, comply
16 with both "A" and "B" before it makes its decision
17 with respect to support or opposition of the
18 application. Two questions there.

19 MR. JONES: Madam Chair, Mr. Tweeten.
20 In some sense -- I'm not trying to avoid your
21 question at all -- but in some sense I feel like
22 it is perhaps a question that I can't answer, or
23 would not appropriate for me to answer, in the
24 sense that to state the obvious here, DEQ has
25 absolutely no control over the county. So this

1 statute is directed obviously at what the county
2 must do, and what DEQ must do, but there is no
3 mechanism.

4 So in my opinion, again, that "may" is
5 controlling. And Mr. Tweeten, I do very much see
6 your point about how that's a conjunctive thing
7 with that "and" there. But simply put, DEQ has no
8 authority over the county commissioners. We never
9 have, we never could.

10 So in terms of the authority of this
11 Board, and the appropriateness of these sorts of
12 legal issues in front of the Board, I would have
13 to respectfully say it's my contention that this
14 is not the intent of the Legislature was to have
15 us -- by us, I mean the Department -- looking at
16 what the County did or did not do, and looking and
17 see whether that "and" is operative, and whether
18 the County, in addition to passing that
19 resolution, affected the quality of life, or did
20 the quality of life analysis, simply because as a
21 legal matter, we --

22 I mean what recourse would we have?
23 Even if we were given a statutory mandate to look
24 at what the County did or did not do or how they
25 conducted themselves, what legal recourse except

1 for -- I don't know -- maybe a mandamus action, or
2 a declaratory judgment action, or something, would
3 we have against the County to try to force them to
4 do something? And why would it make sense for the
5 Legislature to mandate that Department of
6 Environmental Quality be in that position?

7 So again, looking at the -- Again,
8 perhaps the statute could be clearer -- but
9 looking at the nature of the way the statute was
10 written, I think the intent of the Legislature
11 here was to say that, sure, that the DEQ, as the
12 environmental agency, is in the best position to
13 decide, okay, what's the environmental effects?
14 How do we mitigate environmental effects of people
15 gathering up junk vehicles, making sure they're
16 not leaking oil, leaking fluids, etc., there?

17 But really I think the intent of the
18 Legislature was to say that the county, the legal
19 government, is by far going to be most responsive
20 to what the locals want to see happen, and whether
21 a facility truly is appropriate for that location,
22 and whether or not local people are okay with it.
23 And so I think that they wanted the county to have
24 that power.

25 Frankly, if Mr. Payne has some issue

1 with what the County did, I'm certainly not going
2 suggest that he go to sue the County, but the
3 remedy is not against the Department of
4 Environmental Quality.

5 BOARD MEMBER TWEETEN: Let's explore
6 that for a second. In subsection (3), which is
7 the subsection on which the Department is relying
8 here, and basically placing its stamp of approval
9 on the County's opposition to the application, it
10 seems to me that -- and you can correct me if my
11 understanding of this is wrong -- but the
12 Department can't rely on Subsection (3) unless the
13 governing body has opposed under Subsection
14 (2) (b), and if Payne Logging is correct in saying
15 that in complying with 2 (b) the County first has
16 to hold a public hearing -- which I gather was not
17 done here -- and that it has to do both, is there
18 a valid resolution of opposition here? The County
19 has to comply with both sections of Subsection
20 (2). And can the Department rely on the County
21 decision -- (Inaudible)

22 CHAIRMAN MILES: Chris, we couldn't hear
23 the end of that. You left off at --

24 BOARD MEMBER TWEETEN: All right. So my
25 question was whether the Department could rely on

1 the County's resolution of opposition without
2 first determining that the County's resolution of
3 opposition is legally sufficient in that it has
4 complied with both subsections of Subsection (2),
5 which are joined together by the word "and." If
6 the County's resolution is invalid because it has
7 not complied with both "A" and "B," can the
8 Department still rely on that resolution to pass
9 along the denial of the application?

10 MR. JONES: Madam Chair, Mr. Tweeten, I
11 will do my best to answer that question, but as a
12 preliminary matter, I would say that the
13 Department does not agree that the County did not
14 hold a hearing. The Department doesn't know what
15 County did or did not do. The resolution was
16 passed. And I'll just throw these -- I think Mr.
17 Brown is not likely to dispute these dates, but
18 I'll throw in these key facts, to sort of give
19 this a timeline.

20 So on July 20th, 2015, DEQ receives the
21 application from Payne to modify the boundaries,
22 or the application for the new wrecking facility,
23 if you will, within a new boundary limit; so two,
24 DEQ gave notice to the County, as we're required
25 to under 516 Sub (b), so we give notice to Lincoln

1 County where it's located on August 28th, 2015.

2 And then on September 2nd, 2015, the Lincoln
3 County Commissioners adopt Resolution No. 947.
4 That resolution was I believe attached with at
5 least one of the briefs, along with Brady
6 Christensen from DEQ's denial letter.

7 So we get Resolution No. 947. We get
8 that resolution soon thereafter from the County.
9 Then on September 24th, 2015, DEQ denies Payne's
10 application specifically citing as the reason that
11 the County opposed.

12 So to answer Mr. Tweeten's question, I
13 think I would go back to my previous point, which
14 is to say factually speaking, we do not know what
15 the County did or did not do. DEQ was not invited
16 to that resolution, to that hearing. We never
17 deposed the County. We never really had any
18 knowledge whatsoever of what the County is doing.
19 I think we looked at it from the perspective of
20 what our statute says.

21 Again, as a general principle of Montana
22 law -- you see this cited in a hundred or more
23 Montana Supreme Court cases, I'm sure -- that it
24 is not the goal of a reviewing authority -- in
25 this case the Board is sort of a reviewing

1 authority -- or anyone looking at the sufficiency
2 of an agency decision -- or excuse me -- looking
3 at the nature of what a statute says to either
4 insert that which has been omitted, or to omit
5 that which has been inserted.

6 When a reviewing authority is looking at
7 a statute trying to figure out, hey, what does
8 this mean, you look at the plain language, and you
9 look at the most common sense meaning of those
10 words within it.

11 And so here, by far the clearest reading
12 that one could possibly do to give this statute
13 effect is to say no, DEQ is not responsible for
14 doing any sort of investigation. We're not
15 authorized. I mean I simply cannot imagine how we
16 are supposed to have any sort of leverage against
17 the County Commissioners to go sort of depose them
18 and say, "Hey, did you guys give notice? Did you
19 do this determination?," because under our
20 statutes, all it says is the Department may not
21 grant a license to a facility that a governing
22 body has opposed under Subsection (2) (b).

23 So Mr. Tweeten, I hope that answers your
24 question.

25 BOARD MEMBER TWEETEN: I guess it does,

1 but it seems to me you put -- and maybe I should
2 just save this for --

3 CHAIRMAN MILES: For discussion?

4 BOARD MEETING TWEETEN: I think I'll
5 just do that. Thank you, Mr. Jones. I'll want to
6 pose the same questions to Mr. Brown when he gets
7 up.

8 CHAIRMAN MILES: I think that we need to
9 give Mr. Brown a few minutes here since the
10 Department has had some time here. So a few
11 minutes for rebuttal, and then we'll undertake
12 discussion.

13 MR. BROWN: Mr. Tweeten, Mr. Brown at
14 the podium. I can answer I think your last
15 question, and before I do, let me raise an
16 objection, a strenuous objection at this point.

17 Mr. Jones has asserted facts that are
18 not in the record in this case. Many of these
19 facts as to my client's conduct of his wrecking
20 yard are prejudicial, not on the record, and I
21 object.

22 CHAIRMAN MILES: They are in the letter.
23 Some of it is in the letter sent to Payne Logging.

24 MR. BROWN: I would remind the Chair
25 that the procedural posture that we're dealing

1 with at this point in time is the legal challenges
2 that are being made to Mr. Reed's order. It is
3 not a rehash of the factual scenario. Mr. Reed
4 has made factual findings in this case that are
5 contained within the proposal for decisions.
6 Those are the operative facts before the Board at
7 this moment.

8 Now, the facts are as found by Mr. Reed,
9 and the reason the facts are as found by Mr. Reed,
10 as I would like to point out to Mr. Jones, is Mr.
11 Jones -- and the lawyers on this Board will
12 understand what this means --

13 Mr. Jones filed a motion to dismiss our
14 petition for review. By filing that as a
15 procedural matter, the Department has conceded or
16 admitted to all of the well pled factual
17 allegations that we have made. There is a reason
18 why the Department doesn't know the facts as to
19 what the County did or did not do is because we
20 didn't have a factual hearing on this. It was a
21 purely legal challenge by the Department, based
22 upon on the factual allegations made by my client.
23 Therefore there are no facts in dispute, the facts
24 as found by the Hearing Examiner based on the
25 procedural filings made by the Department. So

1 that's what this Board is dealing with.

2 Now, to answer Mr. Tweeten's question, I
3 agree it is our -- you're not making a position,
4 Mr. Tweeten, but let me just say -- it is Mr.
5 Payne's contention, legal contention, that under
6 the statutory scheme -- and I'll get back to my
7 objection that it shouldn't even have been sent to
8 the County in the first instance --

9 But if this is the applicable statutory
10 scheme, under that statute, once the County has
11 exercised its discretion to make a judgment on the
12 merits of a boundary change application, then it
13 is our position under that statute it is required
14 to make certain legal findings that are set forth
15 in the statute in order for the County's rejection
16 resolution to be legally binding on the
17 Department.

18 At this point in time, Mr. Reed has
19 found that Mr. Payne was not given direct notice
20 of the quote, "public hearing," so no
21 representative of Payne Logging was at the, quote,
22 "public hearing," and that the resolution adopted
23 by the County only states that there was unanimous
24 opposition and no proponents.

25 Mr. Reed has found that the resolution

1 did not make any kind of finding as to whether the
2 boundary readjustment would have an impact on the
3 adjoining landowners. That finding was not made
4 by the County. That's a matter of factual record
5 in this case.

6 It is our contention that once the
7 County exercised its right under the statute to
8 engage in this process, it had to follow the law
9 in order for the Department to be able to rely on
10 that County's action in order to deny the
11 application.

12 And I agree with Subsection (4) here,
13 too, does allow the Department to look as to
14 whether or not the proposed application would
15 benefit the public. I would remind you that under
16 -- The reason we're here was Mr. Payne was asked
17 to adjust his boundaries of his wrecking yard in
18 order to better shield his vehicles, in order to
19 benefit the public. And Mr. Reed found that in
20 his factual findings as well.

21 And so what you have is you have
22 findings made by the Hearing Examiner that are in
23 direct contravention to the County's opposition,
24 because the Hearing Examiner found that the better
25 shielding of the vehicles would benefit the

1 public.

2 So it is our contention that it was
3 legal error for Mr. Reed to find that the
4 Department was -- that there is no ability to
5 challenge the Department's denial because the
6 County acted in the way it did.

7 Now back to the 75-10-504. The legal
8 position of the Board right now is not to
9 determine whether or not that statute is
10 applicable at the point. Our challenge is that we
11 raised the contention to the Hearing Examiner that
12 it was never the Legislature's intent to subject
13 an existing facility to the County review process.
14 And we made two arguments in that regard in our
15 briefing.

16 One is we said that the clear language
17 of 75-10-504 basically exempts Payne Logging from
18 the County review process because they were a
19 licensed facility in the 18 months before; and
20 more importantly, because the Department raised in
21 its original briefing on the motion to dismiss the
22 Legislature's intent in including the counties as
23 part of this. We argued on our reply brief that,
24 okay, if the Department wants to get into the
25 legislative intent on including the counties in

1 the review process, then let's go look at the
2 legislative intent.

3 And I set forth in my briefing and in
4 the exceptions that the counties became part of
5 the review process during the 1991 Montana
6 legislative session. It's pretty interesting
7 history actually. If you go back and read the
8 testimony, it's pretty fascinating.

9 And you will see the discussion from the
10 sponsor, who was a legislator out of Whitefish,
11 was that Whitefish, and Bozeman, and some of the
12 growing cities in Montana at that time, were just
13 instituting their land use plans for their
14 counties, and what they were finding was that they
15 were running into trouble with wrecking yards and
16 that sort of thing, right, and wanted to have
17 control over these facilities going forward,
18 because obviously it would have an impact on the
19 quality of life as the number of residents in
20 Montana expanded.

21 You'll find that not only did the bill
22 sponsor state that the county review process would
23 not apply to any existing facility, you'll find
24 that the representative of the DEQ -- which I
25 don't think was called the DEQ at that point in

1 time. Mr. North? It might have had a different
2 name -- basically said that exact same thing, that
3 it was the Department's interpretation that any
4 licensed facility that was in existence would not
5 be subject to the county review process because
6 the intent of the legislation including the
7 counties in the process was to make sure that
8 these kind of uses of land were consistent with
9 their land use plans, to benefit the public.

10 And it's undisputed in this fact that
11 Mr. Payne has been existing or running his
12 existing facility for a number of years.

13 CHAIRMAN MILES: Mr. Brown, excuse me.
14 I appreciate the history -- and Michele
15 Reinhart-Levine knows this as well as I do -- that
16 the legislative history here is not really
17 relevant. It's the language that is in the
18 statute, and that oftentimes what a legislator
19 intends to propose in legislation is not at all
20 what comes out the other end. We're bound by
21 what's in the language here. So the history is
22 interesting, but it is not dispositive in this
23 case.

24 MR. BROWN: I don't necessarily agree
25 with that, because it is our position at this

1 point in time that Mr. Reed failed to make a
2 finding as to whether or not the license should be
3 sent to the County in the first instance, so that
4 is where it does become relevant. But you could
5 disagree in voting, but that's our contention.

6 I think really the question before the
7 Board at this point is first whether Mr. Reed made
8 any reversible error, but the second question is
9 whether or not -- the real question, and this I
10 will take to District Court -- is can one agency
11 rely and make its decision on the decision of
12 another agency when that first agency decision is
13 itself unlawful?

14 I think that's the question before the
15 Board, I think that's the legal question here, and
16 it is our contention that a decision that is void
17 ab initio, that's illegal from the start, cannot
18 serve as the legal basis for supporting a later
19 decision. So an unlawful decision cannot be the
20 basis for a lawful decision, and that's our
21 position. We believe that this case needs to be
22 remanded back to the Hearing Examiner at least to
23 make the findings as to whether 75-10-504 apply,
24 whether the County should have even been involved,
25 and it would be my preference that frankly the

1 application to change the boundary move forward.

2 You'll find that Mr. Payne made this
3 boundary readjustment at the request of the
4 Department. It is Exhibit C to our initial brief.
5 You'll find DEQ's letter in there. And that's our
6 position, and thank you for your time.

7 BOARD MEMBER O'CONNOR: I have a
8 question, Mr. Brown. I'm not a lawyer, but I'm
9 curious as to why you're going after the DEQ
10 rather than the County who seems to be the real
11 issue here.

12 MR. BROWN: Because the decision -- I
13 think this is a huge flaw in this process that
14 needs to be corrected.

15 But the ultimate decision as to whether
16 or not to license a wrecking yard is the
17 Department's decision. It is not the County's
18 decision. And so when the County made the
19 disapproval of the application, there is no
20 binding decision at this point as to Mr. Payne's
21 application, if you follow. Right? There is no
22 -- When they said no, that doesn't mean that the
23 application died at that point. The application
24 died at the point where the Department denied it,
25 and therefore we have to challenge the

1 Department's decision. It is like a Catch-22
2 situation. It is a crazy scheme. That I'll say.

3 CHAIRMAN MILES: Thank you. Further
4 discussion by the Board?

5 MR. JONES: Madam Chair, could I be
6 permitted to address a couple of quick points?

7 CHAIRMAN MILES: Okay.

8 MR. JONES: Madam Chair, members of the
9 Board. I would just like to note initially -- I
10 know this has been dragging on much longer than
11 anyone intended -- but I'd just like to take a
12 step back here, and I guess remind the Board and
13 remind all of us of what documents we're actually
14 dealing with, what we're considering here.

15 Mr. Brown raises what he calls a
16 strenuous objection to some things that I said
17 earlier, and perhaps that was a little bit too
18 far, which is why I tried to preface it by saying
19 I think it gets into very dangerous territory,
20 when you're on motion to dismiss a legal issue, to
21 start talking about factual things. And now in
22 light of Mr. Brown's objection, I really think we
23 need to clarify this.

24 What's in the record in front of the
25 Board right now is really just a couple of

1 exhibits. You have the proposal for decision from
2 the Hearing Examiner, and you have the -- correct
3 me if I'm wrong, Mr. Brown -- but we have the
4 denial letter from Mr. Christensen, and we have
5 the County's resolution.

6 So when Mr. Brown makes strenuous
7 objections to say, "Well, DEQ is trying to put
8 facts in the record that aren't there," Mr. Brown
9 was putting quite a few facts that aren't in the
10 record.

11 What's in front of the Board is exactly
12 what's in those two things: The denial letter,
13 etc., and so --

14 CHAIRMAN MILES: Excuse me. Ben, I
15 don't recall seeing the actual resolution from the
16 County.

17 MR. REED: I believe it was in the
18 initial appeal that was filed by Payne Logging; is
19 that correct, Mr. Brown?

20 MR. BROWN: Yes, it's attached to our
21 original brief.

22 CHAIRMAN MILES: We don't have that.

23 MR. REED: I think that's correct, Madam
24 Chair.

25 CHAIRMAN MILES: I just wanted to let

1 you know that. We've not seen that.

2 MR. JONES: Yes, Madam Chair. Thank you
3 for clarifying that. So just to take a step back
4 there. There is nothing in front of this Board
5 that would substantiate -- there were no
6 depositions taken in this case. There is nothing
7 at all to substantiate one way or another whether
8 the County did some sort of lawful or unlawful
9 action about whether they held a hearing or
10 whatever. All that's in front of the Board, and
11 all that we consider, and all that's appropriate
12 for me to say or Mr. Brown to say is what's in
13 those things that are in front of the Board.

14 And I would note -- which is the denial
15 letter. And I would note -- and this is in the
16 proposal for decision -- in terms of facts
17 asserted in the appeal that must be taken as true.
18 As Mr. Reed said in his proposal for decision,
19 "Facts asserted in the appeal must be taken as
20 true. However, the Hearing Examiner is under no
21 duty to take as a legal conclusion or allegations
22 that have no factual basis or are contrary to what
23 has already been adjudicated."

24 Members of the Board, nothing has been
25 adjudicated here. It is simply a question of

1 looking at the statute and saying, "Okay. What
2 does this say? What is DEQ supposed to do when
3 they get a resolution from the county? We're
4 supposed to deny the permit." Thank you.

5 CHAIRMAN MILES: Any discussion by the
6 Board?

7 BOARD MEMBER TWEETEN: This is Chris.
8 Can everybody hear me?

9 CHAIRMAN MILES: Yes.

10 BOARD MEMBER TWEETEN: Obviously from
11 the tenor of my questions, I think you can tell
12 I've got some problems with this statute that is
13 being applied by the Department and frankly by the
14 parties.

15 Principally I think the way the statute
16 is crafted may in fact violate MAPA, and may also
17 be a violation of the due process clause, because
18 assuming that there was no public notice, and an
19 opportunity for the public to comment, and an
20 opportunity for the County Commissioners to take
21 evidence -- which seems likely to me since, as I
22 recall the dates that were recited, the
23 Commissioners received the notice from the
24 Department late in August, and then within a
25 matter of days issued its decision to oppose the

1 application.

2 It seems unlikely that there was
3 extensive formal notice to the County, and an
4 opportunity for the County citizens to be heard,
5 particularly an opportunity for Payne to make its
6 arguments in front of the County Commissioners.
7 That doesn't show in the record as to whether that
8 was done or not.

9 So I think that there are certainly some
10 significant issues that Payne raises in this case
11 that are deserving of our attention, and my
12 inclination at this point, without having studied
13 the matter deeply, is that the statute requires
14 both a hearing before the County, and then a
15 County resolution of opposition before Subsection
16 (3) of 516 comes into play, and the Department is
17 allowed to rely on the County's opposition as a
18 ground to disapprove the application.

19 And unless it affirmatively appears in
20 the record that both of those have happened, I'm
21 not sure it is a good idea for us to be affirming
22 the decision, given the state of the record that's
23 in front of us now, because we don't know whether
24 that was done or not. It is not apparently clear
25 in the record as to exactly what happened in front

1 of the County Commissioners because none of that,
2 it seems that none of that has been put into
3 evidence.

4 CHAIRMAN MILES: Chris, I'm not sure
5 that we are the entity that's supposed to
6 determine whether that resolution was, as you
7 said, whether the whole process met the
8 requirements of the statute.

9 The Department received a resolution in
10 opposition, and I do believe this is a new
11 facility when you're talking about moving
12 boundaries. I don't buy the argument that it is
13 exempt from even consideration as to whether a
14 resolution even applies. But I'm not sure we're
15 the entity that can determine if the County did
16 the right process, and I guess I'm moving toward
17 the more simplistic thing, that the Department had
18 a resolution from the County, and the language is
19 very clear that they can't give a permit to the
20 new facility.

21 BOARD MEMBER TWEETEN: I think that
22 that's certainly an attractive option here, and
23 just kick the matter to the District Court, and
24 let the District Court sort all of this stuff out.

25 One of the problems I see with that,

1 though, is that the District Court under MAPA is
2 essentially bound by the state of the record that
3 was in front of -- I think our decision is the one
4 that's going to be in front of the Court for
5 consideration on judicial review of our decision,
6 and none of those facts are in the record at all.

7 So if the Court is willing to agree with
8 the view that if DEQ receives a resolution of
9 opposition, whether faulty or not, DEQ has no
10 choice but to deny the application, I guess that's
11 one thing; but where that leaves Payne I guess is
12 another question, because a writ of mandate -- or
13 a writ of prohibition is clearly delayed because
14 the action has already taken place, and you can't
15 ask for an injunctive order from the Court in the
16 nature of a writ of prohibition to stop the County
17 because the County has already acted and DEQ has
18 already acted.

19 A writ of mandate may be, I suppose,
20 might be the way to go. I suppose Payne could
21 have filed suit against the County immediately
22 after the resolution was adopted to oppose this,
23 but I don't think Payne knew that at that time,
24 that that was going to be their sole remedy here,
25 and there would not be any sort of remedy

1 available under MAPA once the County's resolution
2 was passed.

3 I just think it's a thorny problem.
4 Perhaps the District Court will look at all of
5 this, and send it back to DEQ with instructions to
6 remand it to the County, and let the County do
7 whatever the Court decides is necessary.

8 But I think if the Board were to lay out
9 particular concerns with the statute, and indicate
10 its intention to overturn what the Department
11 does, it certainly frames that issue up better for
12 the District Court to look at on review.

13 So I guess I'm leaning in favor of the
14 option of agreeing, at least in part, with some of
15 Payne's arguments, and remanding the case to DEQ
16 for consideration under the statute as properly
17 read, which means that the County has to hold a
18 public hearing with respect to the application,
19 and its position with respect to the application,
20 if the County wants its position to be given the
21 extensive deference that the statute requires DEQ
22 to give it.

23 Once the County makes a decision, there
24 should be some documentation in the record that
25 what the County did was legal before DEQ gets to

1 rely on it to deny the application. That's the
2 direction I'm leaning in anyway.

3 CHAIRMAN MILES: Michele, did I hear you
4 start to say something, or Marietta?

5 BOARD MEMBER REINHART-LEVINE: Madam
6 Chair, I do have some comments. I agree with Mr.
7 Tweeten and Mr. Brown regarding the statutory
8 construction, that the County may conduct a public
9 hearing to determine whether the facility will
10 significantly affect the quality of life of
11 adjoining landowners, and adopt a resolution.

12 I see that once the County goes down
13 that road, it has the duty to do both "A" and "B,"
14 and the Department can't grant a license to a
15 governing body that has opposed under Subsection
16 (2)(b), which is married to 2(a).

17 But I also think that the parties are
18 overlooking Subpart (4), and I don't think that
19 Subpart (3) gets DEQ off the hook for Subpart (4).
20 Subpart (4) is still mandatory, and there is no
21 escape valve to escape Subpart (4). It says, "In
22 making its decision, the Department shall consider
23 the effects of the proposed facility on adjoining
24 landowners and land usage."

25 Mr. Jones has admitted that the

1 Department has not done that, and it is clear from
2 Mr. Christensen's letter to Mr. Payne that the
3 Department has not considered the effects of the
4 proposed facility on adjoining landowners. The
5 letter from Mr. Christensen to Mr. Payne says that
6 the main reason for the denial or the termination
7 of the application was because the Commissioners
8 opposed the change until full compliance with the
9 motor vehicle regulations are achieved. There is
10 no findings regarding the impacts on adjoining
11 landowners or land uses.

12 So it would be my recommendation that we
13 deny the Department's 12(b)(6) motion to dismiss,
14 and remand to the Department to make the required
15 findings under the statute, which I don't think it
16 has done in regards to Subpart (3), or the
17 mandatory requirements of Subpart (4).

18 With that, I'll turn it back over to
19 you, Madam Chair. Thank you.

20 CHAIRMAN MILES: Further discussion?

21 BOARD MEMBER TWEETEN: Madam Chair, if I
22 might. This is Chris again. I'm not sure I read
23 the statute the same way that Ms. Reinhart-Levine
24 does frankly.

25 Subsection (3) is a prohibition on the

1 Department. It says just, "The Department may not
2 grant a license to a facility that the governing
3 body has opposed under Subsection (2)(b)." Four
4 says, "In making its decision to grant or deny a
5 license application --" and I read decision to
6 refer to a decision on the merits. "In making its
7 decision, the Department shall consider the effect
8 of the proposed facility."

9 Four is not, by its terms, applicable to
10 the County's review under two. It says, "In
11 making its decision, the Department shall
12 consider." But I'm not sure I can read that
13 statute to impose on the County a mandatory duty
14 to consider the effect on landowners.

15 Now, if the County votes to approve or
16 support the application, then certainly the
17 Department has to make the requisite finding under
18 four before it can itself approve the application.
19 I think that's the way these statutes fit
20 together, is that if the County opposes, then
21 assuming that the County has held a public
22 hearing, and that its consideration of the issue
23 is otherwise lawful, if the County opposes, then
24 the DEQ must rubber stamp that decision.

25 And I think the Legislature's intent

1 there was to place the discretion in the hands of
2 County Commissioners as opposed to DEQ, other
3 intention to the contrary, not appearing to me
4 from the statutes. But if the governing body
5 votes to approve, then I think DEQ's action under
6 Subsection (3) and (4) are triggered, and
7 particularly under (4), MAPA requires the
8 Department to have a hearing; and then I think the
9 Department has to take up the question basically
10 from the get go as to whether the Department finds
11 that the application meets those criteria.

12 I think the Department's review in that
13 case is a fail safe for situations in which the
14 operative facility moves for a license for an
15 expansion or a new license, I guess, in the first
16 instance, and the County decides it wants to
17 approve it. In that case DEQ would have to make
18 the further finding that there are no adverse
19 impacts on the adjoining landowners.

20 But if the County's decision is to
21 oppose, I think the Legislature pretty clearly
22 said, "DEQ, once the county's decision is to
23 oppose, you can't grant the license," and that it
24 seems to me that the Applicant's remedy is to sue
25 the County, and make the County stand behind its

1 decision to oppose.

2 So I think to me that's the way the
3 statute is supposed to work. So I'm not sure I
4 agree that under the circumstances of this case,
5 the County needs to conduct a hearing to make the
6 finding required under four, because I think the
7 statute is the record by three. So I'll just say
8 that --

9 CHAIRMAN MILES: I believe Michele
10 wasn't saying that the County needed to do that.
11 Michele, weren't you saying the State needed to do
12 that?

13 BOARD MEMBER REINHART-LEVINE: I'm not
14 saying that the County is supposed to do that.
15 The language of four is, "In making its decision
16 to grant or deny a license application, the
17 Department shall consider the effects of the
18 proposed facility on adjoining landowners and land
19 uses."

20 Here the Department has denied a license
21 application, so in order to deny it, it shall
22 consider those effects in its denial. I don't
23 think four is limited to only decisions where the
24 Department grants the application. I think the
25 Department is required to follow Subpart (4) even

1 in situations where Subpart (3) also applies.
2 There is nothing that says that if Subpart (3)
3 applies, that the Department can ignore Subpart
4 (4). That's not in the statute.

5 So I think that the Department has to
6 cover its bases, and it has to address three and
7 four, and it has to address four whether it grants
8 or denies the application. It has to consider
9 those effects, and it has not done so here, and I
10 think that it needs to to cover its bases.

11 BOARD MEMBER TWEETEN: Let me just,
12 Madam Chair --

13 CHAIRMAN MILES: I'd like to weigh in on
14 that, too, but go ahead.

15 BOARD MEMBER TWEETEN: I think actually
16 that Ms. Reinhart-Levine and I agree with respect
17 to what disposition of this the Board should make.
18 I agree that it needs to be remanded to DEQ for
19 further consideration, and I would certainly
20 concur in that disposition if it were voted by the
21 Board.

22 I might want to write a concurring
23 opinion with respect to the Board's disposition in
24 which I might explain a different reading of the
25 statutes, and how they to apply to achieve the

1 same result. But I think certainly Ms.
2 Reinhart-Levine and I will be voting the same way
3 with respect to the disposition. We just might
4 want to advance different grounds for that
5 decision.

6 CHAIRMAN MILES: I'm not sure that I
7 would agree, and respectfully disagree with what
8 Michele has talked about. I don't think that four
9 really comes into play if the County has passed a
10 resolution in opposition, and the statute is very
11 clear that DEQ cannot grant a license in that
12 case.

13 I guess the question for me is: Is
14 there error on the part of DEQ? That's really the
15 question in front of me. I don't see that there
16 is error on the part of DEQ, and I would be
17 inclined to dismiss this, and then let this go
18 back to the local level and, if you will, pursue
19 the issue there. That's my proposition.

20 MR. REED: Madam Chair, I just had one
21 comment, which is that -- and I would pose this as
22 a question to Mr. Tweeten because of his superior
23 knowledge of the case law.

24 I was looking through Montana case law,
25 and it seems to me that one of the extensions of

1 Payne's argument was that -- put it perhaps more
2 simply than Mr. Brown might put it -- what Payne
3 is asking is for the Department to be the arbiter
4 of whether the County's behavior was
5 constitutional or not, and I don't think that the
6 Department can stand in the shoes of the entity
7 that should be doing that, which I believe in
8 Montana should be the District Court Judge.

9 And so I think that under the current
10 statutory scheme, which might cause --

11 MR. JONES: Madam Chair, I'm going to
12 have to object. The Hearing Examiner should play
13 no role in consideration of his own order during
14 this process. Thank you.

15 MR. REED: I think that's probably
16 reasonable. But I would ask that if Mr. Tweeten
17 can explain that for the record, just to have a
18 little clarity.

19 CHAIRMAN MILES: Did you hear that,
20 Chris?

21 BOARD MEMBER TWEETEN: Yes, I did. I
22 think the final determiner or issue of
23 constitutional law is certainly the Montana
24 Supreme Court, or failing an appeal to that, then
25 the District Court would have that jurisdiction.

1 But I do think there is authority for
2 the proposition that under MAPA, an agency can in
3 the first instance talk about and consider whether
4 the Constitution provides for or allows the kind
5 of relief that the Applicant is asking for. So I
6 don't think there is a jurisdictional bar against
7 the consideration of constitutional issues by an
8 agency, but I think it's clear that an agency --

9 CHAIRMAN MILES: Chris, I'm sorry.
10 We're having a hard time hearing you. Just kind
11 of the last couple of sentences.

12 BOARD MEMBER TWEETEN: I agree with Ben
13 that the District Court has jurisdiction over
14 constitutional questions -- there's no doubt about
15 that -- but I think there is room under MAPA for
16 the agency to have some discretion about those
17 questions as well. Certainly those questions are
18 raised by the parties.

19 I think the Agency has an obligation to
20 weigh in with respect to those questions because
21 of the decision on appeal, then those would be
22 undecided issues; and I suppose short of a finding
23 that the agency has no jurisdiction whatsoever
24 over constitutional questions, I'm not sure that's
25 what the law is. I think the agency can certainly

1 consider them, but I think the Court's
2 determination will certainly govern over anything
3 that the Agency says about that. Is that better?

4 CHAIRMAN MILES: Yes, we got that.
5 Thank you.

6 I want to turn it -- Mr. O'Connor
7 indicated he wanted to comment.

8 BOARD MEMBER O'CONNOR: Yes, Madam
9 Chair. I just wanted to support your statement
10 there. It seems to me like we don't have anything
11 in front of us that tells us that the DEQ is
12 responsible for the decision the County made, and
13 then has to go back and review that decision. It
14 seems to me like that's more up to the Courts, the
15 District Court or something.

16 CHAIRMAN MILES: I think we need to wrap
17 this up. We either need a motion, or a decision
18 to defer action on this, and take some of these
19 items under consideration.

20 BOARD MEMBER TWEETEN: Madam Chair, let
21 me try a motion here.

22 I move that the Board reverse the
23 Department's decision, and remand this matter to
24 the Department for further consideration in light
25 of an opinion to be written that garners the

1 support of a majority of the Board.

2 CHAIRMAN MILES: I'm not sure I
3 understood that.

4 BOARD MEMBER TWEETEN: Let me tell you
5 what I'm suggesting. What I'm suggesting is that
6 the majority -- I'm asking the majority of the
7 Board to agree on the resolution that the matter
8 be remanded. And I think, as I said, Michele and
9 I agree on the fact that there should be a remand,
10 we just don't necessarily agree on what the
11 Department ought to do once it's remanded.

12 My suggestion, just to see where we all
13 stand, is to ask how many of the Board members now
14 are in favor of remanding to DEQ as opposed to
15 denying this appeal, and as the final decision of
16 the Board, letting them just head on to District
17 Court. I think those are the two choices we've
18 got in front of us in terms of the resolution
19 right now. We either remand to DEQ, or we affirm
20 DEQ's decision and let Payne take this into
21 another forum, if that's what Payne decides to do.

22 So I'm moving, as a sort of shot across
23 the bow here, a trial run, if you will, that we
24 take a vote amongst the members of the Board with
25 respect to the question of should this be

1 remanded; and if we get a majority of the members
2 present agreeing to a remand, then anybody on the
3 Board who wants to write some sort of suggested
4 disposition for the Board to make ought to be
5 encouraged to do so, and then we'll take those up
6 at the next meeting and decide what the majority
7 of the Board thinks the criteria should be on
8 remand.

9 I think it is awkward at least, if not
10 outright confusing, to suggest that we adopt both
11 a disposition and a rationale, based solely on the
12 discussions that we've had here without the
13 opportunity for the Board members to see anything
14 in writing other than Ben's proposed decision,
15 which I don't think is congruent with at least the
16 reasoning that Michele and I have with respect to
17 whether there should be a remand or not.

18 If the majority of Board members present
19 decide, no, we don't want to remand it, we'll just
20 confirm it. And Ben's draft is probably a pretty
21 good place for a final disposition by the Board.
22 Does that make more sense?

23 CHAIRMAN MILES: I'm just not sure how
24 we do a vote on this.

25 MR. REED: Madam Chair, I might suggest

1 that one option, one obvious option that Mr.
2 Tweeten didn't mention, is that since this is
3 simply my affirmation of the Department's motion
4 to dismiss, what could most easily happen is the
5 Board could simply reverse my proposed order or
6 disregard, move to disregard my proposed order,
7 and allow the matter to continue to hearing.

8 It seems to me that that way the Board
9 or the Hearings Officer in question could require
10 subsequent briefing and elucidation of the facts
11 from the parties, which might make the Board's way
12 forward in this a little bit more clear.

13 BOARD MEMBER TWEETEN: Madam Chair, I
14 would support that as well if it's a middle ground
15 that we can get a majority to agree on.

16 CHAIRMAN MILES: What would the motion
17 be?

18 BOARD MEMBER TWEETEN: The motion would
19 be to deny the -- We've got two motions in front
20 of us, as I understand. We've got a motion to
21 dismiss filed by the Department which Ben
22 recommends that we grant, but I understood that
23 there was a cross motion for summary judgment on
24 behalf of Payne. Am I wrong about that?

25 MR. BROWN: Judgment on the pleadings.

1 MR. REED: It is a motion for judgment
2 on the pleadings, 12-C.

3 BOARD MEMBER TWEETEN: So we would have
4 to act on both of those. Now, the judgment on the
5 pleadings is denied by the Department, as I
6 understand it then, because the Department granted
7 the motion to dismiss, or the Department dismissed
8 anyway.

9 MR. REED: Mr. Tweeten, I believe that
10 my proposed order denied Payne's motion for
11 judgment on the pleadings as moot, and granted the
12 Department's motion.

13 BOARD MEMBER TWEETEN: I see. Okay. So
14 what we would do then is reverse -- we would adopt
15 a motion to reverse -- or to decline to follow the
16 proposed decision, and set the matter for a more
17 detailed evidentiary hearing in front of the Board
18 or in front of the Hearing Examiner.

19 CHAIRMAN MILES: Is that your motion?

20 BOARD MEMBER TWEETEN: Sure. I'll
21 substitute that for my motion.

22 CHAIRMAN MILES: Is there a second?

23 BOARD MEMBER REINHART-LEVINE: This is
24 Michele. I second that motion.

25 CHAIRMAN MILES: Is there further

1 discussion?

2 (No response)

3 CHAIRMAN MILES: Would you just clarify
4 one more time, Chris. So that is rejecting the
5 proposal for decision, and moving this matter to a
6 full hearing before the Board?

7 BOARD MEMBER TWEETEN: Well, the
8 question then would be -- and we would probably
9 have to take this up in a second motion -- whether
10 to remand it to the Hearing Examiner for further
11 proceedings, or whether the Board wants to conduct
12 all of the future proceedings including the
13 hearing, if there is one, itself.

14 So I think what I would suggest is that
15 we remand it to the Hearing Examiner for the
16 purpose of conducting a hearing on all issues, and
17 then he can make a proposed decision -- I guess
18 Andres would make a proposed decision with respect
19 to the outcome after the matter was fully heard,
20 and then that would put the burden on the parties
21 to bring in front of the Hearing Examiner all
22 arguments and all evidence that may be relevant to
23 the outcome. If the party fails in its burden to
24 bring up something up, then it would be out of
25 luck with respect to the future proceedings in

1 front of the Board.

2 CHAIRMAN MILES: So that is two separate
3 motions, or do you want to just wrap that all into
4 one, that we reject the proposal --

5 BOARD MEMBER TWEETEN: Let me do that.
6 This is a second substitute motion. I move that
7 the Board reject the Hearing Examiner's proposed
8 decision. Second, I move that the Board remand
9 this matter to the Hearing Examiner for the
10 purposes of conducting future proceedings with
11 respect to all possible issues that the parties
12 may wish to raise with respect to the
13 appropriateness of the Department's action on the
14 application.

15 CHAIRMAN MILES: Is there a second?

16 BOARD MEMBER REINHART-LEVINE: Second.
17 This is Michele.

18 CHAIRMAN MILES: Is there any further
19 discussion?

20 (No response)

21 CHAIRMAN MILES: Since there is people
22 on the phone, Hillary, would you take a roll vote.

23 MS. HOULE: Absolutely, Madam Chair.
24 For the Board members participating on the phone,
25 can you please say your name, and which way you

1 are voting on Mr. Tweeten's motion. Then once
2 we're done with that, then I'll take roll from
3 Board members present. Thank you, Madam Chair.

4 So I'll start down the line with those
5 on the phone.

6 BOARD MEMBER REINHART-LEVINE: Hillary,
7 do you want to just call out our name?

8 MS. HOULE: That's what I was going to
9 do. Sorry, Michele. Ms. Canty, can you please
10 give me your vote.

11 BOARD MEMBER CANTY: This is Marietta.
12 I vote for Chris Tweeten's motion.

13 MS. HOULE: Ms. Reinhart-Levine, can you
14 please give me your vote.

15 BOARD MEMBER REINHART-LEVINE: I vote
16 aye.

17 MS. HOULE: Mr. Tweeten.

18 BOARD MEMBER TWEETEN: I vote yes, which
19 is both aye and for.

20 MS. HOULE: Thank you for the
21 clarification. Madam Chair.

22 CHAIRMAN MILES: With all due respect,
23 no.

24 MS. HOULE: Mr. O'Connor.

25 BOARD MEMBER O'CONNOR: I'll vote no as

1 well.

2 MS. HOULE: Dr. Byron.

3 BOARD MEMBER DR. BYRON: I'll vote aye.

4 CHAIRMAN MILES: The motion carries.

5 The matter is remanded to Mr. Haladay for further
6 proceedings. Thanks, everybody. I think we'd
7 better take a very short break. Thank you very
8 much for the discussion. That turned out to be a
9 little more complicated than we anticipated. Ten
10 minutes.

11 (The proceedings were concluded

12 at 12:55 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 - [] - 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 _____ day of _____, 2016.

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2020.

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