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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF TERMINATION BY)BER 2015-08JV
DEQ OF THE APPLICATION BY PAYNE)
LOGGING, INC.)

TRANSCRIPT OF PROCEEDINGS - ORAL ARGUMENT

Heard at Room 111 of the Metcalf Building
1520 East Sixth Avenue
Helena, Montana
February 9, 2018
9:26 a.m.

BEFORE CHAIR CHRIS DEVENY,
BOARD MEMBERS JOHN DEARMENT, DEXTER BUSBY,
HILLARY HANSON;
and CHRIS TWEETEN and TIM WARNER (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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Quality

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR DEVENY: All right. So we're
5 moving right along on our agenda. We have a
6 couple of contested cases today that the Board
7 needs to take action on, and as we have a
8 relatively new Board with the exception of one
9 person, I've asked Sarah to actually lead the
10 discussion and lead the meeting on this particular
11 hearing on this particular one to help me with
12 procedural things, so I can see how this is done;
13 and also then I'll be little bit more prepared
14 when we go to the next one.

15 MR. MATHEIUS: Madam Chair, due to the
16 Department's involvement in these, I'm just going
17 to excuse myself from the table, but I'll be in
18 the room.

19 CHAIR DEVENY: Okay. That's fine,
20 George.

21 MS. CLERGET: And what's the pleasure of
22 the Council on the timing? How long would you
23 like the parties to have?

24 CHAIR DEVENY: I'm thinking fifteen
25 minutes for oral arguments.

1 MS. CLERGET: So I will act as Hearing
2 Examiner essentially then for the purpose of the
3 oral arguments. The parties have fifteen minutes
4 apiece. If you want to reserve any for rebuttal,
5 you can do that. Aleisha will keep the time, and
6 she'll flag you when you get to five minutes
7 unless anybody would like something different.

8 So we'll start with Payne Logging. And
9 Board Members, just to remind you before we get
10 started that you have all of these materials in
11 the memo on your options in your packets. You may
12 proceed.

13 MR. BROWN: I will reserve five minutes
14 for rebuttal, if you would let me know.

15 Good morning, Madam Chair, members of
16 the Board. My name is Jim Brown. I'm a private
17 practice attorney in Helena, Montana, and I'm here
18 representing Payne Logging. I thought Mr. Payne
19 was going to be here this morning. He came to see
20 me yesterday. I don't know if he decided to go
21 back to Libby because of this weather or not.

22 Let me commend you all first for making
23 it here today in this weather. I appreciate your
24 attendance.

25 So this is the second time that this

1 matter has been before the Board. I think the
2 majority of you probably weren't on the Board when
3 this was heard in 2016. And at that time, the
4 Board remanded this matter back to the Hearing
5 Examiner to basically, I would in essence say,
6 rehear the case, and allow the parties to make
7 argument, and here we are before you again.

8 I don't know how many of you are
9 lawyers. Some of this is technical, and it is
10 hard to explain if you're not a lawyer. The
11 position that you are faced with is you're
12 determining whether or not the Hearing Examiner's
13 order should be upheld or revised or reversed.

14 And the Hearing Examiner awarded summary
15 judgment to the Department on our claims and their
16 assertions against our claims, and we believe that
17 the Hearing Examiner erred because we believe that
18 she misapplied the law, and we believe that she
19 misapplied the facts, the relevant facts. In
20 addition, we believe that she left out critical
21 findings that were important to our client's case.

22 I'm sure Sarah understands I'm not
23 criticizing her personally.

24 MS. CLERGET: I want to be clear. This
25 case was actually decided by Andres Haladay, and

1 not by me.

2 MR. BROWN: Thank you.

3 CHAIR DEVENY: That's why I've asked
4 Sarah to lead the meeting today. I don't feel
5 like there's a conflict in her doing that.

6 MR. BROWN: Perfect. Thank you. So
7 anyway, so what this matter is about is my client
8 owns a wrecking facility in Libby, Montana, and
9 he's had the facility since 2013. It was approved
10 and licensed. It had been run through the County
11 process, it had had an Environmental Assessment
12 performed on it, and it was operating.

13 In 2015, DEQ, through the County folks,
14 came in and found that there was some problems
15 with the facility, three problems. Two of those
16 problems have been corrected. One of those
17 problems was not corrected, and is still
18 apparently outstanding.

19 But essentially the concern was that Mr.
20 Payne was not properly shielding his vehicles from
21 public view. And you'll notice as Exhibit 1 to
22 our summary judgment motion, there was a
23 compliance plan submitted for Mr. Payne where Mr.
24 Payne agreed that he would submit an application
25 to the Department to modify the boundaries of his

1 wrecking yard, so that he could come into
2 compliance with the shielding requirements of
3 Montana law.

4 That application was sent to Lincoln
5 County Commissioners for action, and they did take
6 action, and they passed a resolution that
7 basically disapproved of the application on the
8 grounds that Mr. Payne wasn't meeting shielding
9 requirements.

10 So it is our assertion that it was error
11 for the DEQ to even send the application in the
12 first instance back to the County review after Mr.
13 Payne's facility had already gone through the
14 County review process, and had already been
15 approved.

16 And we believe it is error because
17 Montana law provides that when the issue of
18 shielding is at issue, and the facility has been
19 licensed for the eighteen months prior to the time
20 that the application is submitted, then in our
21 opinion the law reads that that does not have to
22 go to the County for a review.

23 So that was the first error that we
24 believe occurred here. We believe the law is
25 clear. Mr. Payne's facility was licensed for

1 eighteenth months prior to when that application was
2 made, and therefore because the issue involved the
3 shielding, that application should have just gone
4 to the DEQ for review and approval.

5 And we believe it would have been
6 approved because the compliance plan that was set
7 forth by the Department said that if my client
8 moves the boundaries of his facility, he's going
9 to be able to better shield his junk vehicles from
10 public view.

11 If you agree with the Hearing Examiner
12 that, no, the County -- that DEQ had the right to
13 send this application to the County, and the
14 County acted, we believe that the County committed
15 error in the process they used for acting on the
16 application; and because of that error, we believe
17 that DEQ's denial decision, which was based solely
18 on the County's decision, is therefore itself
19 error.

20 I know that seems sort of round about,
21 and I hope you're following me. But DEQ is the
22 one that makes the denial decision obviously
23 because the permitting is done through the DEQ.
24 But the County -- the DEQ acted on the County's
25 recommendation that the application not be

1 approved.

2 And we believe that if the applicable
3 statute is the one that goes through the County
4 process, then we believe that, again, legal error
5 occurred. And this is because if you read the
6 terms of the statute, basically what the statute
7 says is that the County has the discretion on
8 whether or not to act on the application -- it
9 doesn't have to, can just pass on it -- but if it
10 does act, we believe that the statute says the
11 County must hold a public hearing, and make
12 findings as part of its process that the
13 application would essentially have a negative
14 impact on surrounding landowners and the
15 community.

16 If you read the Resolution No. 947 that
17 was passed by the County, you'll see it doesn't
18 make that finding that it will have a negative
19 impact on surrounding landowners or the County,
20 and the reason we believe that is because it would
21 actually benefit, because Mr. Payne would actually
22 be able to better shield his vehicles.

23 But more critically, for purposes of the
24 summary judgment motion, which is why I was trying
25 to explain that, there is no evidence on the

1 record that Mr. Payne was ever given notice that
2 the County was going to hold this hearing on his
3 application, and therefore he never appeared.

4 And the proof of that, even though Mr.
5 Haladay said that the presumption is that they did
6 give him notice, but the proof of that is if you
7 read the County's Resolution No. 947, you'll
8 notice it says that all those appeared opposed the
9 application, and nobody appeared who supported the
10 application.

11 Well, presumably if Mr. Payne was given
12 notice and appeared, then he would have supported
13 his own application.

14 And we believe that that finding in and
15 of itself by Mr. Haladay, that if that's the
16 applicable statute, then a public -- because
17 Lincoln County held a public meeting, or was
18 required to hold a public meeting, and they didn't
19 give notice to the applicant, the person affected,
20 then that's not a public meeting; and therefore
21 the requirements of the statute haven't been met;
22 and therefore, the resolution passed by Lincoln
23 County isn't valid for purposes of upholding the
24 DEQ's denial. How do you like that?

25 MR. TWEETEN: Mr. Brown.

1 MR. BROWN: Yes.

2 MR. TWEETEN: This is Chris Tweeten.

3 Could I ask you a question?

4 MR. BROWN: You may.

5 MR. TWEETEN: I am a lawyer, by the way.

6 MR. BROWN: Yes, I know.

7 MR. TWEETEN: It seems to me that Mr.
8 Payne's failure to appear is evidence that he
9 didn't appear is not necessarily evidence that he
10 didn't get notice. You're asking us to assume
11 that if he had gotten notice, he absolutely would
12 have appeared, and that those two facts follow as
13 the night follows the day. But I don't see where
14 his failure to appear by itself proves anything
15 about whether he got notice.

16 MR. BROWN: I appreciate that question.
17 Let me answer it this way, since you are a lawyer
18 and understand my argument.

19 If you look at the summary judgment
20 motion, the Hearing Examiner said, "The
21 presumption under law is that he was given
22 notice." The fact that the resolution itself said
23 no one opposed the resolution undermines that
24 presumption of the Hearing Examiner.

25 Now, if you look at the exhibits in our

1 summary judgment brief, Mr. Tweeten, you'll notice
2 that I submitted an affidavit of Mr. Payne, and
3 Mr. Payne testifies, attests under oath, that he
4 was not given notice of that meeting.

5 And so therefore, the evidence before
6 the Hearing Examiner was that Mr. Payne was not
7 given notice of that meeting, and therefore the
8 burden shifted over to the Department to come
9 forth with proof on summary judgment to prove that
10 he was given notice; and they have never, in the
11 two years that this matter has been pending, they
12 have never come forth with any evidence to show
13 that he was given notice of the meeting. Did that
14 answer your question?

15 MR. TWEETEN: It does, but let me ask
16 you this. Did the Commissioners post an agenda
17 that contained information regarding their
18 intention to take action on this matter?

19 MR. BROWN: To the best that I can
20 answer that question, there is nothing in the
21 administrative record that indicates that. I
22 can't answer whether they did or didn't. I just
23 know that the administrative record is void of
24 that evidence.

25 MS. CLERGET: Mr. Brown, you have five

1 minutes remaining.

2 MR. TWEETEN: Thank you.

3 MR. BROWN: The final matter -- and I'll
4 make this quick -- and I know that this is a lot
5 of legalisticese -- but you understand the gist.

6 The final matter is that I believe the
7 Hearing Examiner erred by basically saying that,
8 yes, we as Mr. Payne have the right to come before
9 this Board and appeal the DEQ's denial of the
10 decision, because it was DEQ that made the
11 decision; but essentially what the Hearing
12 Examiner finds is that this Board has no authority
13 to basically review whether or not the County
14 acted in accordance with the legal requirements of
15 law in the making of its resolution.

16 And I think that's error in and of
17 itself, because essentially what that does is that
18 it puts the applicant in the position where the
19 applicant has no remedy for what would essentially
20 be a binding/non-binding decision of the County.
21 And if that's the case, then I believe it is legal
22 error for the Hearing Examiner to say, "Well,
23 that's the County's issue. We have no authority
24 to review it even though we have the authority to
25 review the denial decision." And I think that's

1 reversible error.

2 MR. TWEETEN: Mr. Brown.

3 MR. BROWN: Yes, Mr. Tweeten.

4 MR. TWEETEN: Mr. Brown, Chris Tweeten
5 again. Would not Mr. Payne have the opportunity
6 to file an action for an appropriate writ, such as
7 a writ of prohibition, to prevent the County from
8 proceeding with that decision, had Mr. Payne
9 believed that it was wrong, and there was no
10 appeal to BER?

11 MR. BROWN: You know, I've given that
12 point some thought, Mr. Tweeten, for two years,
13 and my response is this.

14 One is that under the terms, the very
15 terms of the statute that allows the County to
16 participate, the reality is that the County's
17 opposition resolution is not a binding and final
18 decision for purposes of a DEQ permit, if you
19 follow. So if you are going to go into court and
20 claim that the County erred in some way, I'm not
21 sure that you would even have standing or the
22 right for purposes of filing such a thing.

23 The other point I make to that is that,
24 as you know, under Montana law for appealing a
25 decision of DEQ, you essentially have I think it's

1 thirty days to file an appeal to this Board of the
2 denial decision. And the mechanics of filing a
3 District Court action, and then within the thirty
4 days getting a decision as to the challenge of
5 what the County's action was, you're filing dual
6 -- it is not practical because you're filing dual
7 actions.

8 Under the statute, if you would, as the
9 reading of the Hearing Examiner found, you would
10 have to file two lawsuits essentially in a thirty
11 day period, and that's impractical and a burden,
12 and I can't see how that comports with due
13 process, Mr. Tweeten.

14 MS. CLERGET: Mr. Brown, you have one
15 minute and 56 seconds remaining for rebuttal.
16 Let's hear from DEQ.

17 MR. JONES: If the Board would indulge
18 me for just a minute. I've asked Brady McCauley
19 (phonetic) to bring in a little exhibit that has
20 the statute here, so you guys can see what I'm
21 talking about.

22 Madam Chair, Members of the Board, my
23 name is Bradley Jones. I'm a staff attorney for
24 the Department of Environmental Quality here
25 representing the Department of Environmental

1 Quality. So I'd like to shift the narrative a
2 little bit, shift the focus here back where DEQ
3 argues it properly belongs.

4 Payne Logging's argument is quite
5 frankly full of red herrings, so let's go back to
6 the basics here of what the core facts are, and
7 what the governing statute is. These are core
8 facts. If I may ask, do members of the Board have
9 Lincoln County Resolution 947 in front of them?
10 Have you been able to view that? I have some
11 copies.

12 MS. CLERGET: Actually I'm not going to
13 allow additional evidence. It is in the briefing,
14 so they can read it in the briefing.

15 MR. BROWN: Correct, so it's not
16 additional, but it is available to the Board?
17 You're able to look?

18 MS. CLERGET: I prefer if they look at
19 what's in the briefing, if that's all right.

20 MR. JONES: Absolutely. As long as you
21 have Resolution 947 in front of you. So this is
22 the resolution that's at issue, and in front of
23 you is the statute that's at issue, 75-10-516.
24 Here's the relevant facts.

25 On July 20th, 2015, DEQ received an

1 application on the same form, the motor vehicle
2 wrecking facility form that the DEQ standardly
3 uses for Payne Logging's application.

4 Applications for --

5 Now, these are the same, the exact same
6 forms that are always used, regardless of what the
7 previous licensing history or previous licensing
8 holder. Whatever their history is with DEQ, we
9 always use the same form. That's what's the issue
10 in 75-10-516.

11 So on July 20th, 2015, we get the
12 application from Payne Logging. On July 30th,
13 2015, we notified landowners and the appropriate
14 County, Lincoln County. And this is where
15 Resolution 947 comes in.

16 If the Board is able to look at
17 Resolution 947, you will note Lincoln County
18 specifically cites 75-10-516, and says that they
19 held a public hearing, and you'll see this is
20 attested to by the Clerk and Recorder down here.
21 They held a public hearing on July 28th, 2015.
22 They adopted this resolution on September 2015.
23 You will note that the purpose of this resolution
24 is opposition to the Payne Logging motor vehicle
25 wrecking facility.

1 So let's look at the statute. If you
2 would, please at your convenience, direct your
3 attention to the statute there.

4 MS. CLERGET: For those who are on the
5 phone, we're looking at 75-10-516.

6 MR. JONES: And Sarah, if you don't
7 mind, I'll try to reserve a couple minutes for
8 rebuttal, but if I run over, so be it.

9 So when an application -- I'm reading
10 here -- when an application for a motor vehicle
11 wrecking facility -- again, it doesn't specify
12 what the kind, or what the previous licensing
13 history of the applicant is -- is filed with the
14 Department, the Department shall notify the
15 county, notify the adjoining landowners.

16 If you will skip now to Sub (2), "Within
17 thirty days of receipt of this notification, the
18 governing body of the county --" here Lincoln
19 County. That's not in dispute -- "may conduct a
20 hearing, a public hearing to determine whether the
21 proposed facility will significantly affect the
22 quality of life of the adjoining landowners and
23 the surrounding community, and adopt a resolution
24 in support of or opposition to the location of the
25 proposed facility, and transmit a copy of the

1 resolution to the Department."

2 Following Sub (3), "The Department may
3 not grant a license to a facility that a governing
4 body has opposed under Subsection (2)(b)." Please
5 note the distinction here. Sub (3), that
6 governing DEQ's conduct, specifically refers to
7 Sub (2)(b). That's the adopting the resolution
8 part.

9 So simply put -- and if you'll move down
10 to Sub (3) again. "The Department may not grant
11 --" it's very explicit here -- "may not grant --"
12 a prohibition -- "a facility, a license to a
13 facility that a governing body has opposed."

14 So it is pretty simple, and that's the
15 beautiful thing about this case. This is actually
16 quite simple, if you look at the real language of
17 the statute. As soon as DEQ gets that, gets that
18 resolution, we don't question Lincoln County's
19 conduct. I'm going to state the obvious here that
20 the Board is well aware of.

21 DEQ does not control Lincoln County.
22 That's an entirely separate branch of government.
23 A lot of Payne Logging's arguments, these
24 constitutional issues, these issues of whether a
25 public meeting was held, etc., these are all

1 beyond the ken of environmental laws that are
2 governed by our review here today, and are beyond
3 the ken of the Department's power.

4 We don't research whether Lincoln
5 County, you know, did they give the proper notice.
6 That's Lincoln County's business. From our
7 perspective, we get Resolution 947, it says it's
8 opposed, it looks valid on its face.

9 Coincidentally it even says that they held a
10 public hearing. So from our perspective, we may
11 not grant that license, and that's what happened
12 here.

13 So on December 24th, 2015, DEQ notified
14 Payne that it had terminated the application
15 requesting to move the boundaries of Payne's
16 facility due to denial at the County level. That
17 letter is also in your records.

18 So Madam Chair, members of the Board, it
19 is a core tenet of Montana law that one must first
20 look to the plain language of statute, and if the
21 law can be applied based upon the plainest
22 possible reading of the statute, then that's what
23 must be done.

24 So here a plain reading of the statute
25 indicates DEQ did exactly what we were supposed

1 to, and indeed, that was the only thing we could
2 have possibly done once we received Resolution
3 947.

4 I want to address the other element here
5 of Mr. Payne's contention, and that's the
6 applicability of 75-10-504. I do not have a
7 blowup of that unfortunately. But as noted by the
8 Hearing Examiner in his order, 75-10-504
9 specifically applies to shielding. It has two
10 sentences.

11 "A motor vehicle wrecking facility --"
12 I'm skipping around a little bit here in the
13 interests of time, but -- "a motor vehicle
14 wrecking facility may not be approved for a
15 license if a proposed facility cannot be shielded
16 from public view on the date that it is initially
17 established or proposed to the Department for
18 licensure."

19 "And the prohibition concerning approval
20 of a new motor vehicle wrecking facility --"
21 skipping a bit -- "that was licensed as such at
22 any time within the eighteen months immediately
23 preceding the date of an application is made for
24 licensure of such site."

25 As noted by the Hearing Examiner, I

1 think very well in his proposed order, this
2 statute is clearly about shielding. I grant you
3 it is not the clearest wording possible of the
4 statute, but clearly it is about shielding.

5 The issue of eighteen months -- The
6 statute was passed back in the 1970s. At that
7 point, it seems to me that the Legislature must
8 have had some concern about sort of easing these
9 things into the licensure process back in the
10 1970s.

11 But whatever it is, this involves
12 shielding, and as the Hearing Examiner properly
13 noted in his order, what's really at issue with
14 this case is Payne Logging applied for a new
15 footprint. Payne concedes that this is a brand
16 new footprint. It is a new use of land.

17 Now, clearly the intent of the
18 Legislature here throughout -- and you'll see this
19 throughout the motor vehicle wrecking statutes --
20 the Legislature was clearly very concerned about
21 local input. The Legislature believed that it was
22 much more appropriate for the county, for local
23 government, to say, "Look. Here's what we want
24 our community to look like. Here's the esthetic
25 look we want. Here's how we think land use

1 decisions should go."

2 And that's why -- what 75-10-516 has
3 done essentially is given a defacto veto power, a
4 first refusal, if you will, to the local
5 government to say, "We don't believe this is an
6 appropriate facility for its location. Therefore
7 we resolve against it."

8 So under this governing statute, the
9 remaining elements of this, for example, Sub (4),
10 the issue about the Department considering the
11 effect of the proposed facility on adjoining
12 landowners, all that stuff is -- does not come
13 into play unless the County either remains silent
14 on the issue of a proposed facility, or they
15 support it. But when the County opposes, DEQ may
16 not grant a license. So that's quite clear.

17 How much more time do I have?

18 MS. CLERGET: Six minutes and five
19 seconds.

20 MR. JONES: So once again, the issue of
21 Lincoln County's conduct without speculation,
22 without overstepping my bounds, it is quite clear
23 here -- and the Department has no position on this
24 one way or another -- but it's quite clear here
25 that Payne Logging's issue is with Lincoln County,

1 not with the DEQ.

2 The ambit of this Board, the ambit of
3 DEQ are those statutes contained within Title 75,
4 the environmental statutes. 75-10-716 addresses
5 conduct that's applicable to both the County and
6 to DEQ, but the orbit that the Board has -- the
7 world of review of the Board and of DEQ is solely
8 contained within Subsection (3) there. When we
9 get Resolution 947 we may not grant the license.

10 And also I would like to bring up a
11 couple of -- correct a couple of points that Payne
12 Logging made.

13 MS. CLERGET: You have five minutes.

14 MR. JONES: Thank you. A couple more
15 minutes.

16 The standard of review for this Board is
17 contained in 2-4-621, MCA. So the Board can
18 accept the Hearing Examiner's proposal
19 wholeheartedly, which DEQ advocates for. We
20 believe that's the proper thing to do.

21 But that the Board must make certain
22 findings. Those findings are contained in
23 2-4-621, if indeed the Board does want to review
24 the facts or the law of this case.

25 I know in briefing, Payne Logging has

1 suggested that there is a sort of an appellate
2 review, or that there is a -- that this is a
3 summary judgment review. Madam Chair, members of
4 the Board, summary judgment Rule 56 applied at the
5 Hearing Examiner stage. The Hearing Examiner
6 addressed that in his proposed order.

7 Now the level of review is solely
8 contained within 2-4-621, so I would direct the
9 Board to that statute, if the Board does in fact
10 intend to review the findings of fact, conclusion
11 of law. However, once again, DEQ would say the
12 Hearing Examiner's order should be accepted
13 wholeheartedly.

14 And finally, and this is a relatively
15 minor point, I suppose, but the Payne Logging, Mr.
16 Brown, mentioned something about contained in the
17 administrative record.

18 Administrative record is a term of art
19 that applies to District Court. The record in a
20 sense is in front of the Board here, but this
21 isn't an administrative record in the true sense.
22 The Board has all of the briefing, and has the
23 exhibits there, too.

24 So I'll reserve the balance of my time,
25 please.

1 MR. TWEETEN: Madam Chair, this is
2 Chris. Can I ask Counsel a question?

3 MS. CLERGET: Go ahead, Chris.

4 MR. TWEETEN: Counsel, what exactly is
5 Payne supposed to do then in this situation? If
6 Payne files a mandamus or a prohibition writ in
7 the District Court to try to overturn the County's
8 decision, its time for bringing this matter in
9 front of the Board continues to run.

10 And so is Payne supposed to file in two
11 different fora, and ask the District Court for
12 relief from the County's order, and also preserve
13 their right to challenge DEQ's decision by filing
14 exceptions in front of the Board at the same time?
15 Is that how Payne protects itself in this
16 situation?

17 MR. JONES: Madam Chair, Mr. Tweeten. I
18 want to be careful with my -- how I posit this,
19 because again we -- DEQ does not want to suggest
20 remedies that Mr. Payne may have against Lincoln
21 County. That's his business with Lincoln County.

22 But I would say, Mr. Tweeten, that
23 frankly I see no issue with whether it was now or
24 prior, or certainly that the much better time
25 would have been soon after or about the time that

1 Lincoln County was meeting and considering
2 Resolution 947, that if Payne wanted to challenge
3 Lincoln County, it could have done so then.

4 So whether -- But I don't see any issue
5 necessarily with filing in the BER and filing in
6 District Court as well, and then staying whatever
7 appropriate action, or asking the District Court
8 to consider whether or not this belongs in front
9 of the Board at the same time as asking this Board
10 if this should be in front of the Board.

11 So I personally don't see any issue, but
12 again, I'm not going to speculate, respectfully,
13 sir. I can't speculate on whether Mr. Payne's
14 remedy as against Lincoln County or any other
15 party should have been properly filed before or
16 may still be available.

17 Again, you're kind of getting into the
18 realm of public meeting laws and constitutional
19 issues, all sorts of things that are beyond the
20 orbit of the BER and beyond the orbit of DEQ.

21 CHAIR DEVENY: Chris, anything further?

22 MR. TWEETEN: No. Thank you.

23 MS. CLERGET: You have 1:57 remaining.

24 And from Payne, you have 1:56.

25 MR. BROWN: Madam Chair, members of the

1 Board, I take a bit of an issue with the opposing
2 Counsel's characterization that this is a red
3 herring. It is not a red herring. This involves
4 a licensing of an ongoing business, and property
5 rights. That's not a red herring.

6 And in answer to your question, Mr.
7 Tweeten, if I may, Montana statute provides a
8 remedy for appeal, and it is right within the DEQ
9 statute that says that the appeal of this shall
10 come to this Board. It is right in statute. And
11 I think that answers that question.

12 I take issue also with opposing
13 Counsel's reading of the law. Opposing Counsel
14 said, well, this is the controlling statute, and
15 he bases it on the theory that you have to read
16 the plain meanings of the words of the statute,
17 and this is it.

18 One of our exceptions with the Hearing
19 Examiner's order is that he violates one of the
20 fundamental tenets of statutory interpretation,
21 which is you have to read the entire statutory
22 scheme together.

23 And when you do, you realize that
24 75-10-504 is actually the applicable statute, not
25 this one, and the reason that is is because the

1 specific language of that statute controls the
2 more general language of this statute, and that
3 statute specifically states, "The prohibition
4 concerning approval of a new motor vehicle
5 wrecking facility or graveyard site does not apply
6 to a facility that was licensed as such at any
7 time withing eighteen months immediately preceding
8 the date an application is made for licensure of
9 such site."

10 It's uncontested that Mr. Payne's
11 facility was licensed eighteen months prior to the
12 time he filed this application, and there is no
13 contest that this involves shielding. And the
14 reason that is is because if you look at Exhibit 1
15 to our summary judgment motion, which --

16 MS. CLERGET: You're out of time, Mr.
17 Brown.

18 MR. BROWN: May I have thirty seconds?
19 If you look at Exhibit 1 to our summary judgment
20 motion, which is the DEQ compliance plan, you'll
21 see that they referenced the siting statute as the
22 reason that Mr. Payne is not complying with the
23 law; and if you look at the County's disapproval
24 resolution, they cite the shielding requirement.

25 This matter does involve shielding

1 despite the representations of the Department.

2 Thank you.

3 MS. CLERGET: DEQ, you can answer, and
4 since I gave Mr. Brown an additional thirty
5 seconds, you can have an additional thirty
6 seconds. That gives you whatever one minute 58
7 plus 30 seconds is.

8 MR. JONES: Thank you very much. Madam
9 Chair, members of the Board, I think the Hearing
10 Examiner addressed this quite well in Pages 8 and
11 9 of his proposed order.

12 And so as one sample of that, in
13 Paragraph 35 on Page 9 of the proposed order, the
14 Hearing Examiner says that, "While Payne may have
15 been attempting to comply with shielding
16 requirements --" and again, that's not been proven
17 out by the -- that's an allegation that's not been
18 proven out by the materials contained in your
19 packet here.

20 "He has already conceded that his
21 application went beyond mere shielding. He
22 expressly requested to add new land to the
23 boundaries of his motor vehicle wrecking facility.
24 This was a request separate and distinct from
25 shielding."

1 So if you'll move down to Sub (37).
2 "This statute concerns approval or licensing of a
3 facility that cannot be shielded from public
4 view."

5 The first sentence is a prohibition on
6 licensure for facilities that cannot be properly
7 shielded. This second sentence exempts from this
8 prohibition facilities that were licensed within
9 eighteen months immediately preceding an
10 application.

11 Then Payne seeks to take the second
12 sentence of the statute out of context to allow
13 him to apply for any site changes or modifications
14 to his license without having to submit to the
15 review process in Montana Code Annotated
16 75-10-516.

17 So I note that 75-10-504 does not
18 consider 75-10-516, it doesn't overrule it, it
19 doesn't even mention it. It just says out there
20 in the blue, you know, here is the shielding,
21 here's the shielding prohibitions, the shielding
22 issues. But 75-10-516 is clearly the licensure
23 statute.

24 And once again, as both a policy matter
25 and as the Legislature has proven from the plain

1 language here, the Legislature truly intended, it
2 believed that local government deserves to have
3 the right of first refusal in any motor vehicle
4 wrecking facility.

5 To take Mr. Payne's application, as the
6 Hearing Examiner found -- excuse me -- Mr. Payne's
7 interpretation, as the Hearing Examiner found on
8 Page 9 and 10 would totally take 504 out of
9 context, and would frustrate the intent of the
10 Legislature, which was to give the County its --

11 Lincoln County had its say here, and as
12 far as DEQ is concerned, once we got that
13 Resolution 947, we don't look any further. There
14 is no reason to believe it's not valid on its
15 face, so that's why we may not grant the license
16 once we get that resolution.

17 MS. CLERGET: Thirteen seconds
18 remaining. Good job.

19 MR. JONES: Are there any questions,
20 Madam Chair, members of the Board? If not, thank
21 you for your time.

22 MS. CLERGET: That concludes oral
23 arguments. You have the memo in front of you. I
24 would remind you that as per my memo, you have
25 three options at this point based on the oral

1 arguments you've just heard and the briefing
2 that's in your packet. I'll turn it back over to
3 you, Chris.

4 CHAIR DEVENY: Would you go over those
5 options for us, Sarah.

6 MS. CLERGET: Sure. So the three
7 options are listed on the second page of my memo
8 pursuant to 2-4-621 subsection (3).

9 The first is to accept the proposed
10 order in its entirety, and adopt it as the Board's
11 final order. The second is to accept the findings
12 of fact in the proposed order, but modify the
13 conclusions of law or interpretation of the
14 Administrative Rules.

15 The third option is to reject the
16 proposed order, review the entire record that was
17 before the Hearing Examiner, find that the
18 proposed order is not supported by substantial
19 evidence, and modify the findings of fact and
20 conclusions of law in the proposed order
21 accordingly.

22 This could mean a modified order
23 granting summary judgment, a modified order
24 denying summary judgment and ordering hearing, or
25 some combination of the two.

1 CHAIR DEVENY: Thank you. So the next
2 process is for the Board to have discussion then
3 on what we would do next.

4 MS. CLERGET: Yes.

5 CHAIR DEVENY: Let's have a discussion
6 on this. Do any members have any comments? Can
7 we ask questions of the parties as well?

8 MS. CLERGET: Yes.

9 CHAIR DEVENY: Board members.

10 MR. TWEETEN: Madam Chair, this is
11 Chris. First of all, can I ask Sarah a question?

12 MS. CLERGET: Go for it, Chris.

13 MR. TWEETEN: Sarah, if the Board were
14 to accept the Department's position that it lacks
15 jurisdiction to collaterally attack the County's
16 resolution of disapproval, would that be
17 dispositive of the entire matter?

18 MS. CLERGET: Yes.

19 MR. TWEETEN: Okay. Thanks.

20 CHAIR DEVENY: Would you explain what
21 that means for those of us who aren't attorneys.

22 MR. TWEETEN: Sure. Let me take a stab
23 at it here. Before --

24 UNKNOWN SPEAKER: The following
25 participant has entered the conference. No names

1 are available.

2 CHAIR DEVENY: Excuse me, Chris. Could
3 the person who just entered the meeting please
4 identify themselves.

5 (No response)

6 CHAIR DEVENY: I guess that's not going
7 to happen. Go ahead, Chris.

8 MR. TWEETEN: Before any tribunal,
9 whether it's an administrative agency or a court,
10 can proceed to the merits of any matter that
11 somebody tries to bring before it, that tribunal
12 has an obligation to assure itself that it has
13 jurisdiction. That's a fundamental principle of
14 law. It applies to, as I said, courts, it applies
15 to administrative agencies.

16 And then the tribunal -- and this
17 doesn't really matter -- but the tribunal then has
18 an obligation to assure at every point in the
19 proceedings that its jurisdiction continues to
20 exist.

21 So when this matter is brought before
22 BER -- and Mr. Haladay, in order to be thorough
23 with respect to his review, considered all issues
24 that had been raised by the parties, but the one
25 that I think is dispositive, as I just discussed

1 with Sarah, is that all -- As I understand it, all
2 of Payne's arguments rely on its assertion that
3 Resolution 947 is invalid because it was adopted
4 by the County without proper notice to Mr. Payne.

5 If that proposition is rejected, then I
6 think all of the rest of Payne's arguments fall
7 with it, because all of them depend on that
8 assertion. If 947 is valid, then all the rest of
9 their arguments I think go away, because the
10 statute is crystal clear, I think, that if the
11 County adopts such a resolution of disapproval,
12 DEQ has no choice but to deny based on the
13 County's opposition.

14 Now, I don't think -- and I think Mr.
15 Haladay's analysis of this is absolutely correct.
16 I don't think this Board has the authority, the
17 jurisdiction, to examine whether the County acted
18 properly or not in giving notice of the meeting in
19 which it intended to take up the matter of Mr.
20 Payne's application.

21 So if we can't rule on that -- and I
22 don't think we can -- then I think, as I said, all
23 the rest of Payne's arguments fall as a
24 consequence, and the Department needs to be
25 affirmed on this matter.

1 Mr. Payne can then take the matter to
2 court and challenge our analysis of our own
3 jurisdiction if he chooses to. That would be a
4 final agency decision under MAPA, and he would
5 have the authority to seek judicial review in the
6 Supreme Court.

7 So he's not left without remedy if it
8 turns out that we're wrong, and if the Court in
9 review finds that we do indeed have jurisdiction
10 to consider what Lincoln County did, then the
11 Court would remand the matter to us, and we would
12 have to decide that question, and then all of the
13 other questions that are raised that rely on it.

14 But at this point in the proceedings,
15 I'm pretty well convinced that we don't have
16 jurisdiction to -- it is called, in law the term
17 for this is a collateral attack. It is collateral
18 that in the sense that it comes from a direction
19 that's not directly linked with the action that
20 the County took. We're not a party in the matter
21 that was taken up by Lincoln County, so in that
22 sense, it is collateral. So I think the correct
23 terminology is collateral attack.

24 And as I observed in my discussion with
25 Counsel, there is no legal barrier to Mr. Payne's

1 going to District Court and challenging the
2 correctness of the County's decision. In my mind,
3 I don't think there is a problem with exhaustion
4 of remedies or anything like that, and would be
5 obligated to take up that question.

6 And I'm assuming that -- Well, I don't
7 know what the County's arguing. The County could
8 possibly try to convince the Court that there were
9 unexhausted administrative remedies, but that
10 reasoning becomes circular because if there is no
11 administrative remedy because we don't have
12 jurisdiction to overturn the County, then an
13 exhaustion argument wouldn't apply.

14 So in my mind, I think it's pretty clear
15 that the course that Mr. Payne should have taken
16 here is to file that action in the District Court
17 in Libby asking the Court to review the
18 correctness of the County's decision; and then as
19 appropriate, after DEQ makes its decision, lodge a
20 set of exceptions in front of the Board to
21 preserve his jurisdictional foothold in front of
22 the Board in the event that the District Court
23 finds that the resolution was in fact invalid.

24 I don't know if he's done that or not.
25 It is not in the record. So I have no way to know

1 one way or the other which remedies Mr. Payne
2 decided to pursue. But in my mind, I think it is
3 crystal clear that we don't have jurisdiction over
4 this matter. Our jurisdiction is limited by
5 statute to those things that the Legislature has
6 chosen to allow us to decide.

7 And we can decide things that come
8 through the administrative process in DEQ -- some
9 things, not all things, but some -- and that's
10 all. The Board doesn't have the jurisdiction in
11 matters like this to reach outside of the
12 administrative process, and start deciding whether
13 counties acted properly or not, so that's not a
14 power that the Legislature has given us.

15 So let me just say that I think -- and I
16 want to hear what the rest of the Board has to say
17 obviously -- but my inclination at this point is
18 to move that we adopt the Hearing Examiner's
19 findings of fact in total, and that we adopt his
20 reasoning with respect to the jurisdiction
21 question over the County's proceeding on
22 Resolution 947 as our decision in this case; and
23 then ask the Hearing Examiner to draft an order
24 accordingly for the Chair's signature.

25 CHAIR DEVENY: There is a motion before

1 the Board. Is there a second?

2 MR. DEARMENT: I'd second that motion.

3 CHAIR DEVENY: It has been seconded by
4 John Dearment. Hillary, I noticed you have your
5 hand up. Did you have some further discussion?

6 MS. HANSON: Yes. I'm in full agreement
7 with what was just said regarding the jurisdiction
8 piece of this.

9 The only thing I guess I want to bring
10 forward for discussion is what I feel like I heard
11 from the opposition was that there was two pieces
12 of this, the first one being should it have even
13 been sent to the County from the standpoint of is
14 this considered a new application.

15 And so I just -- my reading of it would
16 be it should have been, but I guess I feel like I
17 think that needs to be part of our discussion. I
18 don't think, based on what I heard from
19 opposition, it is just the jurisdictional issue.

20 CHAIR DEVENY: Thank you, Hillary. Any
21 further discussion from Board members?

22 MR. TWEETEN: Madam Chair, if I might,
23 just in response to what Hillary just said. That
24 I think is also an issue that Counsel could
25 litigate in the District Court on an action for an

1 appropriate writ to stop the County or reverse the
2 County's decision to adopt its resolution of
3 non-approval.

4 If in fact the resolution is invalid
5 because the County never had jurisdiction over it,
6 that's another matter that the District Court
7 could decide in that process.

8 So I agree with Hillary, and I guess I
9 would accept amendments to my motion to bring
10 forward those parts of the Hearing Examiner's
11 proposed findings of fact and conclusions of law
12 as well, and make it part of our final decision.

13 MR. BUSBY: I have a quick question for
14 Chris.

15 CHAIR DEVENY: Dexter.

16 MR. BUSBY: This is Dexter, Chris. If
17 we find this, and they do take it to District
18 Court, does he reserve his rights to come back on
19 appeal to DEQ or to this Board?

20 MR. TWEETEN: Dexter, I understand your
21 question, and it is a good question. As I said in
22 my discussion, I think because of the way the
23 statutes are set up, once DEQ made its final
24 decision, I think Payne would have to file
25 exceptions to that within the time period set by

1 MAPA in order to preserve its ability to bring the
2 matter in front of BER following the ruling of the
3 District Court.

4 So as Counsel for the Department said,
5 what would happen, or what should happen, I think,
6 is that he would file his action in the District
7 Court; DEQ's process, I assume, would proceed
8 while that matter was pending in the District
9 Court; DEQ would enter its final decision; and
10 within the time period allowed by law in order to
11 preserve his ability to bring the matter in front
12 of the Board after the Court ruled, he would have
13 to file a set of exceptions in front of the BER
14 within the time set by law; and then he could move
15 BER to stay the matter until the District Court's
16 decision is done.

17 We do that a lot, I think, in contested
18 cases. They'll bring a contested case, and there
19 will be some matter pending in District Court that
20 affects the outcome of the contested case, and we
21 sit on our heels and wait until all those other
22 matters are decided, and then we can take up the
23 matters that are left for BER to decide. That is
24 not an uncommon practice in front of BER.

25 So I don't think there is anything

1 unusual about suggesting that it be done in this
2 case as well. Does that answer your question,
3 Dexter?

4 MR. BUSBY: Yes, pretty much.

5 CHAIR DEVENY: Thank you for clarifying
6 that, Chris. Could we have a read back of what
7 the motion is before the Board? We've had quite a
8 bit of discussion. Chris, could you just repeat
9 it? It might be faster.

10 MR. TWEETEN: Madam Chair, I move that
11 the Board accept the Hearing Examiner's findings
12 of fact and conclusions of law in toto, and that
13 we accept as much of the conclusions of law -- and
14 I guess I would leave it up to our Counsel Sarah
15 to ferret out those provisions in the findings and
16 conclusions that fall under that category -- we
17 accept so much of the Hearing Examiner's
18 conclusions of law that deal with, first of all --
19 in response to Hillary's comments -- the question
20 of whether the County was an appropriate forum to
21 consider the siting aspect of this; and second
22 whether, assuming that was true, the Board has
23 jurisdiction to review the appropriateness of what
24 the County did in adopting Resolution 947.

25 CHAIR DEVENY: Thank you. There has

1 been a motion and a second. Is there any further
2 discussion from Board members before we vote?

3 (No response)

4 CHAIR DEVENY: Seeing none, I'd like to
5 take a vote on this. We'll do a voice vote at
6 first. If it is close, we'll do a hand vote. All
7 those in favor of the motion before the Board,
8 please signify by saying aye.

9 (Response)

10 CHAIR DEVENY: Any opposed?

11 (No response)

12 CHAIR DEVENY: None oppose. The motion
13 carries. I'd like to thank everybody for their
14 time with this. And I would really like to
15 encourage DEQ and their staff to work together
16 with Mr. Payne and Lincoln County to try to come
17 to some timely resolution of this, so we don't
18 have to have this before us again. Thank you.

19 I'm going to suggest we take a ten
20 minute break, and reconvene at about 10:35.

21 (Recess taken at 10:18 a.m.)

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C E R T I F I C A T E

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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 - 44 - 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 _____, 2018.

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

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