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BEFORE THE BOARD OF ENVIRONMENTAL REVIEW
OF THE STATE OF MONTANA

IN THE MATTER OF: LUKE PLOYHAR, FOR) Case No.
REVIEW OF DETERMINATION MADE BY) BER 2020-03HR
THE DEPARTMENT OF ENVIRONMENTAL)
QUALITY ON THE APPLICATION FOR)
EXPLORATION LICENSE #00860)

TRANSCRIPT OF PROCEEDINGS
REVIEW OF DETERMINATION (VIA ZOOM)

April 7, 2023
10:06 a.m.

BEFORE CHAIRMAN DAVID SIMPSON,
BOARD MEMBERS JON REITEN, JOSEPH SMITH,
JULIA ALTEMUS, STACY AGUIRRE, JEN RANKOSKY,
and LEE BRUNER

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1 WHEREUPON, the following proceedings were
2 had:

3 * * * * *

4 CHAIR SIMPSON: Thank you. Moving on.
5 The next matter, item on our agenda is the matter
6 of Luke Ployhar for review of determination made
7 by the Department of Environmental Quality on the
8 application for exploration license 00860, BER
9 Case 2022-03 HR. Are there -- Is Counsel here
10 representing the parties in this case?

11 MR. KETO: Yes. This is Kaden Keto,
12 attorney for Luke Ployhar.

13 CHAIR SIMPSON: Representing DEQ.

14 MR. KING: Yes. This is Sam King,
15 attorney for DEQ. I'm joined here with Jessica
16 Wilkerson, also attorney for DEQ.

17 MS. GALVAN: And Amanda --

18 CHAIR SIMPSON: Thank you. Intervenors.

19 MS. GALVAN: Amanda Galvan on behalf of
20 Intervenors, and with me is Tim Coulter on behalf
21 of Intervenor Fort Belknap Indian Community.

22 CHAIR SIMPSON: Okay. Did I miss
23 anybody?

24 (No response)

25 CHAIR SIMPSON: So I presume that

1 Counsel for the parties would like to make a
2 presentation to the Board as to their position. I
3 assume we've all read the background materials on
4 this. If we could start with DEQ, please. Let's
5 allow ten minutes. That should be sufficient.
6 Ten minutes per party.

7 MR. KING: Thank you, Mr. Chairman, and
8 good morning, and good morning Board Members.
9 Again, Sam King with the Department of
10 Environmental Quality.

11 As you know, we're here today because
12 this case has been removed from a contested case,
13 and we're wondering how best to now resolve this.

14 It's DEQ's position primarily that the
15 Board has discretion under 75-1-201(9), which this
16 request was made to the Board, that the Board can
17 choose not to review this Environmental
18 Assessment. It has the discretion to dismiss this
19 action in its entirety. That is what DEQ is
20 primarily requesting here.

21 In the event that the Board decides to
22 exercise its discretion, and issue an advisory
23 opinion, and review this case, then we're asking
24 that a simple procedure be applied that is
25 implicitly recognized within the statute of

1 75-1-201(9) .

2 And essentially what that review would
3 look like would just be a submission of the
4 Environmental Assessment, in which it was
5 determined that an EIS was going to be required,
6 as well as perhaps any public comment that was
7 submitted on that EA.

8 The plain statutory text contemplates
9 this simple review process. It states, "A project
10 sponsor may request a review of the significance
11 determination or recommendation made under
12 Subsection (8) by the appropriate board, if any."
13 That alone seems to clarify what kind of
14 procedures should be applied to this case.

15 As you also may know, when this case was
16 removed from the contested case docket, DEQ,
17 joined by Intervenors, filed a motion for
18 reconsideration and clarification.

19 The reason for that was because DEQ and
20 Intervenors apparently did not have an opportunity
21 to have their response considered to Mr. Ployhar's
22 response to DEQ's motion, in which Mr. Ployhar had
23 argued that even if this isn't a contested case,
24 the BER still has the authority to use contested
25 case procedures.

1 Although the motion for reconsideration
2 and clarification was ultimately denied, the
3 arguments that DEQ submits today are those same
4 arguments that it issued in its reply brief to Mr.
5 Ployhar's response brief on the contested case
6 removal.

7 Just to clarify what those positions
8 are, the first reason why contested case
9 procedures would be inappropriate here is because
10 contested case procedures cannot be divorced from
11 contested case proceeding. You cannot use a
12 procedure in a case in which that's not what the
13 case is.

14 Here the reason for removal of this
15 matter from a contested case proceeding was
16 because there are no issues, there is not a
17 determination of legal rights, duties, or
18 privileges. Therefore there is no binding
19 decision by the BER.

20 It fundamentally doesn't make sense to
21 impose contested case procedures here in which DEQ
22 and Intervenors would theoretically submit
23 discovery and/or have a hearing, when Mr. Ployhar
24 doesn't have any legal rights or interests in this
25 proceeding. Indeed the entire purpose of a MEPA

1 review is for DEQ to comply with its legal duties
2 to the State of Montana.

3 Secondly, it should be noted that there
4 is no language in MEPA requiring such procedures
5 in this circumstance. When the Legislature
6 intends for MAPA's trial type proceedings to
7 apply, it includes express language invoking those
8 procedures in statute.

9 There's a number of statutes where the
10 Board can refer to that would indicate this, for
11 example, Sections 75-5-611(4), 75-20-406(2),
12 76-4-126, and I'll spare you the rest. But
13 ultimately the BER can't look at this statute
14 75-1-201(9) and insert into the statute a
15 procedure that plainly doesn't exist.

16 Because the Legislature didn't include
17 it there, to read the statute that would include
18 this procedure into it would violate one of the
19 central tenets of statutory interpretation. You
20 can't read a statute and insert language that's
21 been omitted, or conversely omit language that's
22 been inserted.

23 The second reason why a contested case
24 procedure here would be inappropriate is because
25 the BER is a quasi-judicial body and a creature of

1 statute with only those powers specifically
2 conferred by the Legislature. So what the BER may
3 do and what it may not do is limited to whatever
4 the Legislature has explicitly contemplated and
5 granted that authority for.

6 So I have two points on this. First,
7 had a contested case procedure been used to
8 resolve these instances in a 75-1-201(9) review
9 process, the BER would have had to go through its
10 rulemaking procedures and adopt specific
11 procedures that would consider a contested case
12 procedure for that to actually be applicable here.

13 It hasn't done so, and nor can it do so
14 now, because since 2020 rulemaking authority and
15 existing rules under the jurisdiction of the BER
16 have since been transferred to DEQ. So
17 hypothetically, even if it had the authority to
18 create some sort of contested case procedure to
19 resolve this case, it would have first had to go
20 through that rulemaking process, and it hasn't
21 done so.

22 Second, even if it had gone through
23 that, arguably it would be contrary to the statute
24 for the reasons that I explained earlier. There
25 is no legal rights at issue in this case.

1 Therefore it's clearly inappropriate to impose
2 this contested case procedure on this
3 non-contested case proceeding.

4 Third, I would also just like to point
5 out that in Ployhar's petition for review, he
6 doesn't specify or request any specific procedures
7 that should be employed in this case.

8 And finally, to somehow subject the
9 parties to these would be a wholly waste of the
10 parties' time, this Board's time, the resources,
11 especially since the most that can come out of
12 this is there is no binding decision, it's simply
13 an advisory opinion. It's contemplated
14 specifically within that plain language of the
15 statute, so it fundamentally doesn't make sense to
16 impose that on the parties now.

17 So ultimately I just want to reiterate
18 that it's DEQ's position that this case just be
19 dismissed. The BER has the discretion to do so.

20 If it decides it wants to exercise that
21 discretion and review it, the plain language of
22 75-1-201(9) specifically contemplates for
23 reviewing the Environmental Assessment document
24 and any comments that were submitted thereon, and
25 can make an advisory recommendation whether DEQ

1 should have only done an EA or appropriately
2 determine that an EIS was required.

3 I don't have anything further at this
4 time, but I suspect either Ms. Galvan, or Mr.
5 Coulter, as well as Mr. Keto will want to be heard
6 on this as well. Thank you.

7 CHAIR SIMPSON: Thank you. Counsel for
8 Mr. Ployhar.

9 MR. KETO: Yes. Good morning. This is
10 Kaden Keto, attorney for Mr. Ployhar. I'm going
11 to be brief. I don't have a whole lot of argument
12 here, and frankly I don't really want to
13 relitigate the Hearing Examiner's order. There's
14 plenty of documents for us to review there.

15 And I do agree with DEQ that 75-1-201(9)
16 doesn't provide for exactly what the BER, what
17 this review in that statute should look like
18 procedurally. And when the DEQ says that Mr.
19 Ployhar doesn't provide a procedure that the
20 review should take, DEQ frankly doesn't really
21 either.

22 So I really -- what we want to do here
23 is just submit this review to the Board's
24 discretion. I frankly just think what when all --
25 we'll have the Board just review or discuss this,

1 provide their own -- pardon me.

2 I think the Board is in the best
3 position to decide what sort of procedure this
4 review should take, and what Mr. Ployhar's
5 position is is that in deciding how that review
6 should look, we just request that that review be
7 as expedient as possible, and also provide the
8 most information to the Board in making their
9 decision as possible.

10 Whether that includes a discovery
11 process, a briefing process, that looks like a
12 contested case proceeding, Mr. Ployhar does not
13 disagree with that. We're fine with it.

14 If it wants to be something that looks
15 more brief, a little closer to the review that DEQ
16 proposes, Mr. Ployhar doesn't disagree with that
17 either. So I guess our position is that we're
18 going to leave the decision on how the procedure
19 should look up to the Board. Thank you.

20 CHAIR SIMPSON: Thank you. Intervenors.

21 MS. GALVAN: Thank you, Chair Simpson,
22 and members of the Board. Amanda Galvan on behalf
23 of Intervenors. I also won't take too much time
24 because we agree with DEQ's position as outlined
25 today, so I won't repeat those arguments.

1 And what I will repeat is just that we,
2 too, ask that the Board just consider exercising
3 its discretion, and not issuing an advisory
4 opinion here, and instead dismissing this matter.

5 But like Mr. King noted, that if the
6 Board does prefer to issue an advisory opinion, we
7 just ask that the Board adopt the informal review
8 procedure that Mr. King suggested, which would
9 include just reviewing the decision, and the
10 underlying public comments related to that
11 decision.

12 I don't think I have really anything
13 else to add to Mr. King's presentation, so thank
14 you very much.

15 CHAIR SIMPSON: Thank you. Any further
16 comment from Counsel?

17 (No response)

18 CHAIR SIMPSON: Hearing none, if I
19 understand this correctly, the Board has two
20 decisions to make. And Counsel, Ms. Oomens,
21 please correct me if I'm wrong.

22 The first is to either approve or deny
23 the remand, deny the Hearing Examiner Leman's
24 order denying reconsideration and clarification.

25 And then second is the decision as to

1 whether or not we want to proceed down the road of
2 an informal, I guess I should say advisory role in
3 making this decision; and if we do decide in the
4 affirmative, what that procedure ought to be.

5 The question I have is in what order
6 should we consider these matters. I presume that
7 the first is the order itself. Would that be
8 correct, Ms. Oomens?

9 MS. OOMENS: Yes. This is in front of
10 the Board now instead of in front of the Hearing
11 Examiner.

12 CHAIR SIMPSON: Very good. Do we have
13 motion?

14 BOARD MEMBER AGUIRRE: Chairman Simpson,
15 I am confused. I'm confused on what action comes
16 first, and that didn't -- the little discussion
17 there did not help unconfuse me, didn't help with
18 my confusion.

19 CHAIR SIMPSON: Well, I'm not sure how
20 much I can help because I found this whole matter
21 to be confusing as well, but I will try.

22 We have before us an order prepared by
23 the Hearing Examiner to deny -- let me revise this
24 to be sure I've got it right.

25 Just to recap, the subject matter here

1 has to do with an exploration permit, that is, to
2 go out and drill a hole or holes, to explore in
3 the vicinity of the mine up there. What's the
4 name of the mine? I'm sorry. Zortman, up in the
5 Zortman area --

6 BOARD MEMBER AGUIRRE: My understanding
7 is that wasn't denied.

8 CHAIR SIMPSON: No, it has to do with
9 whether or not there is to be an Environmental
10 Impact Statement. The Department, in considering
11 that application, did an Environmental Assessment,
12 and in the Environment Assessment made the
13 determination that the EA in itself wasn't
14 sufficient, and that an Environmental Impact
15 Statement needed to be prepared.

16 Mr. Ployhar took exception to that
17 decision, and filed a petition with the Board to
18 consider that matter.

19 In going through the process, it came to
20 light that the Board really doesn't have
21 jurisdiction in that matter. Under the applicable
22 statutes, it's to be considered in District Court
23 or Federal Court, depending on the nature of the
24 action.

25 So our first action is to decide whether

1 or not to dismiss the petition. Does that make
2 sense? Am I correct, Ms. Oomens?

3 MS. OOMENS: Yes. So the Board can
4 decide whether or not it's going to dismiss the
5 petition. If it is not going to dismiss it, it
6 needs to set a schedule.

7 CHAIR SIMPSON: Thank you. So then the
8 question then becomes: Does the Board want to
9 elect to set a schedule for advisory -- an
10 advisory -- what's the word? I can't call it an
11 order because it's not an order.

12 MS. OOMENS: Advisory opinion?

13 CHAIR SIMPSON: -- (inaudible) --
14 advisory role in this -- I'm sorry.

15 MS. OOMENS: Advisory opinion.

16 CHAIR SIMPSON: -- advisory opinion --
17 thank you -- as to whether or not this
18 Environmental Impact Statement should be required
19 in this instance.

20 Obviously we don't have enough
21 information in front of us now to make that
22 determination because we haven't read, at least I
23 haven't read the Environmental Assessment. It
24 hasn't been made available to us.

25 So I believe our first order of business

1 is to decide whether or not to dismiss this
2 petition in favor of which essentially is ruling
3 in favor of DEQ in the matter, that is, DEQ has
4 pointed out that the Board doesn't have a role
5 here in making this decision other than an
6 advisory one.

7 BOARD MEMBER AGUIRRE: So I have one
8 more question prior to making a motion. If we
9 dismiss the -- if we dismiss the motion, that
10 means we are removing it from the contested case
11 cases, and then making a decision whether to even
12 be involved at all, either no involvement or some
13 kind of advisory involvement; is that correct?

14 CHAIR SIMPSON: That's correct, to the
15 best of my understanding.

16 BOARD MEMBER AGUIRRE: Okay. Is that
17 correct, Terisa?

18 MS. OOMENS: Yes.

19 BOARD MEMBER AGUIRRE: Okay. Then I'd
20 like to make a motion to dismiss the motion.

21 BOARD MEMBER REITEN: I'll second that.

22 CHAIR SIMPSON: A motion has been made
23 and seconded to dismiss the -- I think "petition"
24 is the word we're looking for there.

25 BOARD MEMBER AGUIRRE: Correct.

1 CHAIR SIMPSON: Ms. Oomens, is that
2 sufficient? Is that language sufficient to do
3 what we want to do?

4 MS. OOMENS: You can dismiss the
5 petition, yes.

6 CHAIR SIMPSON: Any further discussion?

7 BOARD MEMBER AGUIRRE: Do I need to
8 rephrase the motion then to -- okay. It's been
9 corrected. Okay.

10 CHAIR SIMPSON: I think we're okay.

11 BOARD MEMBER BRUNER: Can we dismiss the
12 petition without adopting the -- adopting or
13 rejecting the order issued by the Hearings
14 Examiner?

15 BOARD MEMBER AGUIRRE: Lee, you were
16 kind of going in and out sound-wise.

17 BOARD MEMBER BRUNER: Sorry. Well, I'll
18 blame it on the hardware, but it might be me.

19 My question is: Can we move to
20 dismissal of the matter without first ruling on
21 the -- either adopting or rejecting the order of
22 the Hearings Examiner? And I don't know the
23 answer to that question.

24 MS. OOMENS: I believe you can. If you
25 want to adopt the order from the Hearing Examiner,

1 you can, but she just remanded it back to you,
2 so --

3 BOARD MEMBER BRUNER: With that said, I
4 would like to second -- Did somebody second the
5 motion? If not, I would like to second it.

6 BOARD MEMBER ALTEMUS: Jon did. He
7 seconded it.

8 CHAIR SIMPSON: Jon seconded it.

9 BOARD MEMBER BRUNER: Sorry.

10 BOARD MEMBER ALTEMUS: That's okay.

11 CHAIR SIMPSON: Any further discussion?

12 All in favor say --

13 MR. KETO: Chairman, I just want to
14 clarify. Pardon me. Kaden Keto here. I just
15 want to be clear and get on the record here. Is
16 the Board dismissing Mr. Ployhar's application to
17 review the Environmental Assessment without
18 submittal of the Environmental Assessment to the
19 Board?

20 CHAIR SIMPSON: The matter of submittal
21 of the Environment Assessment to the Board will be
22 considered next. All we're doing is dismissing
23 the contested case.

24 MR. KETO: Thank you.

25 CHAIR SIMPSON: Further discussion or

1 questions?

2 (No response)

3 CHAIR SIMPSON: All in favor, signify by
4 saying aye.

5 (Response)

6 CHAIR SIMPSON: Opposed, nay.

7 (No response)

8 CHAIR SIMPSON: Motion carries.

9 Second, does the Board wish to
10 participate in this process by reviewing the EA
11 and issuing an advisory opinion? And if so, I
12 guess my question would be: What does that
13 accomplish?

14 BOARD MEMBER AGUIRRE: I'll -- Since I
15 made the motion to dismiss, my follow-up thought
16 is that we don't keep this matter before us. I'm
17 not sure if I'm saying that correctly or not, but
18 I don't see where our advisory role really fits
19 this situation. I'm open to hearing otherwise,
20 though.

21 BOARD MEMBER REITEN: Mr. Chairman, I
22 agree with Stacy on that. I don't think we need
23 to be involved.

24 BOARD MEMBER ALTEMUS: I don't think we
25 have --

1 CHAIR SIMPSON: I suppose I'll chime --
2 I'm sorry. Go ahead. Sorry to interrupt.

3 BOARD MEMBER ALTEMUS: I was going to
4 say I don't think we have a role under MEPA. I
5 just -- The Board doesn't have a role under MEPA,
6 so I would agree with that.

7 CHAIR SIMPSON: No, that's my
8 understanding as well, and I'm afraid that
9 reviewing the EA and assuming an advisory role
10 would do nothing but take a lot of time. So I'm
11 -- my own opinion is that there really isn't
12 anything to be gained by going down that road for
13 either the Board or the Appellant. Do I have a
14 motion?

15 BOARD MEMBER AGUIRRE: I'll make a
16 motion that the Board does not continue with this
17 matter as an action item.

18 BOARD MEMBER RANKOSKY: I'll second.

19 CHAIR SIMPSON: A motion has been made
20 and seconded. Any further discussion?

21 BOARD MEMBER AGUIRRE: If that motion
22 needs to be modified to be legally correct, I'm --
23 on the statement, I'm good with that.

24 CHAIR SIMPSON: Ms. Oomens.

25 MS. OOMENS: I think you're okay.

1 BOARD MEMBER AGUIRRE: Do you think it's
2 okay?

3 MS. OOMENS: I think it's fine.

4 BOARD MEMBER AGUIRRE: Okay. All right.
5 Thank you.

6 CHAIR SIMPSON: Hearing no further
7 discussion, all in favor, signify by saying aye.

8 (Response)

9 CHAIR SIMPSON: Opposed, nay.

10 (No response)

11 CHAIR SIMPSON: Motion carries.

12 (The proceedings were concluded
13 at 10:35 a.m.)

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STATE OF MONTANA)
 : SS.
COUNTY OF LEWIS & CLARK)

I, LAURIE CRUTCHER, RPR, Court Reporter,
Notary Public in and for the County of Lewis &
Clark, State of Montana, do hereby certify:

That the proceedings were taken before me at
the time and place herein named; that the
proceedings were reported by me in shorthand and
transcribed using computer-aided transcription,
and that the foregoing - 21 - 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 12th day of
April, 2023.

/s/: Laurie Crutcher

LAURIE CRUTCHER, RPR
Court Reporter - Notary Public
My commission expires
March 9, 2024.

| | | | | | | | | | |
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