

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

RICHARD H. OSTERGREN,)	DOCKET NO.:PT-1997-66,
C/O CITY DISPOSAL)	PT-1999-22R
BFI WASTE SYSTEMS,)	
Appellant,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	ORDER, OPPORTUNITY
-vs-)	FOR JUDICIAL REVIEW,
)	MOTION FOR DISMISSAL
THE DEPARTMENT OF REVENUE OF)	and SANCTIONS, ATTORNEYS'
THE STATE OF MONTANA,)	FEES AND COSTS
Appellant & Respondent.)	

The above-entitled appeals were heard November 27 through December 1, 2000, in the City of Helena, in accordance with an order of the State Tax Appeal Board of the State of Montana (the Board). The notices of the hearings were given as required by law. Attorneys C.W. Stocker and Jim Sites represented Richard H. Ostergren, c/o City Disposal, BFI Waste Systems (hereafter "BFI"). Tax Counsels Steve McCue and Dan Whyte represented the Department of Revenue (hereafter "DOR"). The appeals involve the valuation of a sanitary landfill located in Missoula County. Witnesses testified for both parties although not all provided an opinion of value. The duty of the Board is to determine the market value of

the property based on the preponderance of the evidence. The State of Montana defines "market value" as **MCA §15-8-111. Assessment - market value standard - exceptions.** (1) All taxable property must be assessed at 100% of its market value except as otherwise provided. (2)(a) Market value is a value at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having a reasonable knowledge of relevant facts.

BFI is the appellant in this proceeding and therefore has the burden of proof. It is true, as a general rule, that the appraisal of the Department of Revenue is presumed to be correct and that the taxpayer must overcome this presumption. The Department of Revenue should, however, bear a certain burden of providing documented evidence to support its assessed values. (Western Airlines, Inc., v. Catherine Michunovich et al., 149 Mont. 347, 428 P.2d 3, (1967)).

BFI, at the conclusion of the hearing on the market value, requested that STAB schedule a hearing on the issue of sanctions, attorneys' fees and costs sought by BFI. The hearing on the issue of sanctions, attorneys' fees and costs was argued on January 11th and 12th, 2000. On December 19, 2000 the Board ordered the parties submit a "Memorandum of Law" pertaining to the hearing on sanctions.

The majority finds the taxpayer satisfactorily supported its

position by presenting credible evidence and testimony to support its requested value. One member of the Board dissents from the majority's opinion.

With regards to sanctions, attorneys' fees and costs, it is the opinion of this Board that it lacks jurisdiction to award such expenses. The Board does have authority to conduct a fact finding hearing in order to establish a record.

FACTUAL BACKGROUND

1. Due, proper and sufficient notice was given of this matter, the hearing, and of the time and place of the hearing. All parties were afforded opportunity to present evidence, oral and documentary.

2. BFI appealed to the Missoula County Tax Appeal Board (hereafter MCTAB) on October 24, 1997, requesting a reduction in value to \$75,000 for the land and \$2,063,000 for the improvements, stating:

Appraised value in excess of market value. Appraisal method is incorrect for this type of property.

3. The MCTAB denied BFI's appeal on January 8, 1998, stating in summary:

"...the Board finds that the BFI land value shall be \$430,400 and the improvements' value shall be \$6,969,200 for a total appraised value of \$7,399,600. The effective valuation in 1997 for tax purposes is the phase-in value of \$5,760,642."

4. BFI appealed the MCTAB decision to STAB on January 21, 1998, stating:

The taxpayer believes that the county board failed to recognize the inadequacies of the valuation method employed by the department of revenue appraiser in both theory and content. The taxpayer believes the county board either misunderstood or misinterpreted much of the information supplied at the hearing resulting in an incorrect decision. Testimony at the hearing revealed that there are other land fills in Missoula County which were not valued by the same method as that employed on the appellant's property creating a serious question of equalization. A question exists as to whether these other landfills were valued at all.

For these reasons the appellant believes that the property in question has been grossly overvalued and requests a hearing with the State Tax appeal Board.

5. BFI appealed to the MCTAB on October 22, 1999, requesting a reduction in value to \$89,560 for the land and \$2,149,440 for the improvements, stating:

Property is valued excessively due to an incorrect valuation method and is valued excessively as compared to other income producing properties. Also, the notice is flawed and invalid due to the increase in the 1997 value.

6. The December 30, 1999 MCTAB decision modified the DOR's improvement value to \$9,870,257 and denied any reduction in value for the land. A seven-page decision is attached to the original appeal form.

7. BFI appealed the MCTAB decision to STAB on February 1, 2000, stating:

The approach to property valuation employed by the Department of Revenue greatly overstated market value. Taxpayer demonstrated to the county board that the application of a discounted cash flow analysis results in a legal property assessment of the landfill's market value, required under State law. Moreover, it appears that other landfills were valued differently by DOR resulting in unequalized values among comparable properties. Nor did the notice of assessment comply with rules or law relating to valuation phase-in.

8. At the hearing before this Board, the taxpayer and the DOR presented appraisals expressing opinions of value. These

appraisals are discussed in the taxpayer's and DOR's contentions below.

9. The Board has taken into consideration evidence and testimony presented in the Elton Campbell Ranches (hereafter ECR) appeal (PT-1997-47, PT-1997-48 and PT-1998-3R) argued before STAB. The Board's decision in ECR is currently pending before the First Judicial District, Cause #BDV 2000-690.

AGREED FACTS

The following facts are admitted, agreed to be true, and require no proof. Pre-hearing order dated November 30, 2000.

1. Appellant has exhausted its administrative remedies through the Missoula County Tax Appeal Board, allowing it to appeal the 1997 and 1999 assessments to the State Tax Appeal Board for its resolution of the matter.

2. The decision of STAB with regard to the 1997 assessment will affect the remainder of the current appraisal cycle under Sec.2.51.403, ARM.

3. Appellant has retained an independent expert appraiser for the valuation of the real property that forms the basis of this appeal and respondent, Department of Revenue, has relied on its staff to appraise the real property.

4. BFI owns and operates a sanitary landfill on the subject property. It has placed improvements on the land, for the purpose of operating the landfill.

5. The subject landfill property is located in Missoula County and identified by assessment code 0001706005, or geo-code #2200-09-2-01-01-0000.

6. The landfill operated on the real property is subject to regulation by the Department of Environmental Quality (hereafter DEQ).

7. The landfill, which forms the basis of this appeal, is classified as a Class II landfill by the DEQ.

8. Appellant seeks values for the subject property (1997) of \$2,138,000 (land and improvements) while respondent advocates in the same year for values of \$429,749 (land) and \$6,969,000 (improvements).

9. Appellant seeks values for the subject property (1999) of \$2,239,000 (land and improvements) while respondent advocates in the same year for values of \$429,749 (land) and \$10,370,251 (improvements).

ISSUES

1. Market value for the subject property for tax years 1997 and 1999.
2. The 1996 Value Before Reappraisal (VBR).
3. This Board's jurisdiction to conduct a hearing and grant sanctions, attorneys' fees and costs

TAXPAYER'S CONTENTIONS

Exhibit #1 is a "Summary Appraisal Report" performed by Jerry

R. Jones, MAI. Mr. Jones was presented as an expert witness. Mr. Jones's expertise in this matter applies to the valuation of landfill property. The value conclusion as determined by Mr. Jones for the subject property for January 1, 1997 is \$2,138,000 (page 1, exhibit). Summarized, exhibit #1 illustrates the following:

Scope of the Appraisal (pg. 1)

...My assignment was to estimate the market value of the fee simple interest of the underlying real property at the subject landfill based on the information provided by the on site manager of the facility, personnel at the BFI Missoula District office and Bureau of Business and Economic Research at the University of Missouri (sic) in Missoula, Montana.

The appraiser was provided with operating data for the facility for years 1995, 1996, and through July 1997. The remaining capacity and projected income were based on the past operating history of the property. The estimated future net income to the land has been discounted to a present value estimate which is considered to be the market value of the fee simple interest in the underlying real estate.

Legal Description (pg. 2)

The subject is legally described as the SEC09 TWN130N RGE190W W1/2 nw1/4, PT E1/2 NW1/4, PT NE 1/4 SW 1/4 PLAT C9-13-19 125 AC

Site Description and Analysis (pg. 2)

...The total area of the landfill is 141.16 acres of land. Approximately forty acres consists of closed landfill cells. The active area of the landfill consists of three cells containing a total area of approximately sixteen acres. The remaining permitted airspace as of January 1, 1997 was 9,553,047 cubic yards.

The site also includes a settling pond, leachate monitoring wells and methane gas probes, a perimeter fence, storage building, office and underground storage tank. The site is assumed to be in compliance with all applicable local, state and federal laws pertaining to the operation of a solid waste landfill.

Introduction (pg. 2)

The appraisal of a landfill requires a clear understanding of the scope of the assignment, appropriate definitions, terminology, and valuation. Before an appraiser can proceed with the valuation of a landfill, it is imperative that the appraiser consider the division between real property, tangible property, and intangibles which complete the going concern or business enterprise. The appraiser must be able to distinguish between real property versus going concern in the valuation of a landfill.

The last issue discussed in this section of the report pertains to fractional interest. The fractional interest discussion reveals the importance of allocating that portion of the income stream attributable only to the real property, excluding all intangibles.

Elements of the Estimate: (pg. 3)

The estimate of market value of the subject real property included interviewing landfill operators and participants in the landfill industry, collecting and analyzing available data pertaining to the sanitary landfill industry, identifying regional/local population and economic trends, and obtaining specific information pertaining to the subject site.

For data regarding the subject site, the appraiser reviewed historical volumes of waste and revenue and discussed the physical attributes of the site with the on site manager.

For information on the market tipping fee for the subject real property and anticipated market tipping fee escalation, historical data pertaining to the subject was analyzed and the historical fill rate for the years 1995 through mid 1997 were analyzed.

Comparable landfill leases were obtained by the appraiser. These leases represented lease rates which a passive landowner would lease real estate to a landfill operator for landfill activity and receive a percentage of the disposal fees. These lease rates are calculated as a percentage of effective gross revenues after a deduction for state and local fees.

Appraisal and Valuation Definitions (pg. 3)

Market Value –

The most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller, each acting prudently, knowledgeable and assuming the price is not affected by undue stimulus...

Going-Concern Value (pg. 3)

Going-concern value is defined by the Appraisal Institute's Appraisal of Real Estate, 11th Edition, 1996, page 26, as follows:

The value of a proven property operation. It includes the incremental value associated with the business concern, which is distinct from the value of the real estate only. Going-concern value includes an intangible enhancement of the value of an operating business enterprise which is produced by the assemblage of land, building, labor, equipment and marketing operation. This process creates an economically viable business that is expected to continue. Going-concern value refers to the total value of a property, including both real property and intangible personal property attributed to business value.

Going-concern appraisals are commonly conducted for hotels and motels, restaurants, bowling alleys, industrial enterprises, retail stores, shopping centers, and similar properties. For these types of property, the physical real estate assets are integral parts of an ongoing business. It may be difficult to separate the market value of the land and the building from the total value of the business, but such a division of realty and non-realty components of value is not impossible and is, in fact, often required by the federal regulations. Only qualified practitioners should undertake this kind of assignment, which must comply with appropriate USPAP standards.

Highest and Best Use (pg. 4)

Highest and best use is defined by the Appraisal Institute's The Appraisal of Real Estate, 11th Edition, 1996, page 50, as follows:

The reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible and results in the highest value.

Fee Simple Estate (pg. 4)

The real estate interest appraised is the fee simple estate as of the effective dates of the appraisal. The

Dictionary of Real Estate Appraisal, 2nd Edition, 1989, defines fee simple estate as follows:

Absolute ownership unencumbered by any other interest or estate; subject only to limitations of eminent domain, escheat, police power and taxation.

Leased Fee Estate (pg. 4)

The real estate interest appraised is the leased fee estate as of the effective date of the appraisal. The Dictionary of Real Estate Appraisal, 2nd Edition, 1989, defines leased fee estate as follows:

A leased fee estate is an ownership interest held by a landlord with the right of use and occupancy conveyed by lease to others; the rights of lessor (the leased fee owner) and leased fee are specific by contract terms contained within the lease.

Leasehold Estate (pg. 5)

The right to use and occupy real estate for a stated term and under certain conditions: conveyed by lease.

A positive leasehold estate is created when a lessee occupies real estate at a contract rate below the prevailing market rental rate. A negative leasehold estate is created when a lessee occupies real estate at a contract rental rate above the prevailing market rental rate. When a lessee occupies real estate at a contract rental the same as the prevailing market rental rate no leasehold estate exists in which case leased fee, leasehold and fee simple market value are synonymous.

Tangible and Intangible Assets (pg. 5)

USPAP, Standard Rule 1-2(e), is quite explicit in the binding requirement on appraisers to make this distinction between real property and other elements of the business.

In developing a real property appraisal, an appraiser must observe the following specific appraisal guidelines: (e) identify and consider the effect on value of any personal property, trade fixtures, or intangible items that are not real property but are included in the appraisal.

Real Estate – an identified parcel or tract of land including improvements, if any

Real Property – the interest, benefits and rights inherent in the ownership of real estate.

Personal Property – identifiable, portable, and tangible items which are considered by the general public as “personal”, e.g. furnishings, art work, antiques, collectable; all property that is not classified as real estate.

Business Assets – tangible and intangible resources other than personal property and real estate that are employed by a business enterprise in its operation.

Business Enterprise – the interests, benefits, and rights inherent in the ownership of a business enterprise or a part thereof including taxable real property, taxable tangible personal property and nontaxable intangible property and values.

DISCUSSION OF PERTINENT VALUATION ISSUES (pg. 6)

Real Property versus Going-Concern Issues:

... Some of the significant nontaxable intangible values which must be excluded from a going-concern or

business enterprise value include values associated with (i) franchise agreements and other contracts, (ii) management expertise, (iii) business reputation, (iv) competitive advantages associated with territorial exclusivity, and (v) the integration of collection business activities and transfer station business activities with landfill business activities.

... Trying to allocate the going-concern from the real property is very difficult. The total elements of the going-concern can only function with contracts, franchises, operator permits and operation agreements in place, which are intangibles. The most important element of the landfill as a business enterprise is the permit...

...Real estate appraisal theory indicates that the income to land is land rent (or royalty). Real estate appraisal theory also indicated that the net income from all elements of the going-concern, tangibles and intangibles, can be capitalized into a value indication of the going concern

...Real property is valued by capitalizing the net earnings a property owner would receive from renting the property. Going-concern value includes all the intangibles of the business enterprise and involves a capitalization at an appropriate rate of the net operating income (NOI).

VALUATION METHODOLOGY (pg. 10)

Valuation is based on the general and specific background experience, opinions of qualified, informed persons, consideration of all data gathered during the investigative phase of the appraisal, and analysis of all market data available to the appraiser. Three basic approaches to value are available to the appraiser: the Cost, Sales Comparison and the Income Approaches. Although each approach must be considered, each approach is not necessarily given equal consideration because the scarcity of reliable data may preclude the use of one or more approaches. In the final analysis, the approach(es) which reliably simulate the actions of market participants is (are) given primary consideration.

Cost Approach (pg. 11)

...Due to the difficulty in estimating depreciation and external obsolescence and the fact that a typical investor does not consider cost as a reliable measure of value the cost approach has been deleted from this report.

Sales Comparison (pg. 12)

This approach is based upon the principle that the value of a property tends to be set by the price at which comparable properties have recently sold or for which they can be acquired. This approach requires a detailed comparison of sales of similar properties with the subject. One of the main requisites, therefore, is that sufficient transactions of comparable properties be available to provide an accurate indicator of value and that accurate information regarding price, terms, property description and use be obtained through interview and observation. It also requires that the transfers be of the real property only. If the sale includes intangibles in any quantity, it will be difficult to abstract out the real property only.

The Sales Comparison Approach was judged not to be applicable to the valuation of the subject landfill. An investigation was made into sales of operating landfills in the marketplace. Elements of business enterprise value as well as value of state operating permits was inextricably mixed into the prices paid for these operating facilities. No separate allocation of the value of these components of the price was made in the transaction. Therefore, they could not be considered as evidence of value of the underlying real estate only. The Sales Comparison Approach has not been utilized in estimating the value of the subject property's real estate assets.

Income Approach (pg. 13)

This approach is based upon the theory that the value of property tends to be set by the market land rent attributable to the real property, sometimes referred to as a “royalty”. It is in effect the capitalization of expected future income attributable to the real estate into an estimate of the net present worth of the real estate. The Income Approach requires an estimate of net land rent, exclusive of all intangibles, selection of an appropriate capitalization rate, and the processing of the net land rent or royalty into an income stream which can be capitalized into a value estimate.

The value of the landfill declines as the permitted area of the void (airspace) diminishes in the landfill. Because a landfill’s value declines as the void fills, the use of direct capitalization or residual approaches to value cannot be used. To value a depleting asset by use of direct capitalization, which assumes a continuous income stream, would be contradictory to accepted appraisal theory. The estimated remaining economic life of the subject is in excess of fifteen years at the current fill rate. The proper income approach to utilize in estimating the value of the subject by the Income Approach is a discounted cash flow analysis.

The Discounted Cash Flow (DCF) analysis deducts all of the applicable expenses from the gross income to estimate the net income allocated only to the real property. This technique recognizes changes in the income stream and expenses to the real property and discounts the net cash flow to a present value estimate. The first step is to estimate total income for the landfill for each remaining year of the landfill’s life. The second step is to deduct all host fees and/or state fees to arrive at an effective gross income estimate to the operator. The resulting annual income increments are then multiplied by the contract, or agreed upon, royalty rate to arrive at the amount of annual income to the land (Lessor). The lessor’s income is then discounted at an appropriate discount rate to reflect the present worth (value) of the future income stream to the land owner.

Although former and closed landfills have been used for alternative uses such as golf course, industrial, mobile home park, the current and future closed landfill acreage at the subject can not be used for alternative uses for many years. Liability reasons including the risk of puncturing a cell liner, final cover (cap), gas collection or leachate systems are too high. The landfill, upon closing, will not provide material value as a potential alternative use. In fact, the subject’s current and future closed landfill acreage carries significant liability into the future, especially those sites that were not required to control the types of materials deposited which typically results in a negative value for landfill acreage.

Because there is typically no reversionary value associated with a closed landfill within the foreseeable future no residual land value estimate is added to the net present worth of the future income increments paid to the lessor. The total value of the real property is the present worth of the future income stream for the life of the landfill.

Valuation Methodology Analysis (pg. 14)

The income approach represents the only approach that provides sufficient data to estimate the property’s real property market value, excluding intangibles. Regardless of which estate (fee simple or leased fee) is analyzed, a market rent or royalty rate exists for the subject’s real property interest.

Introduction Income Approach (pg. 14)

The Income Approach to the market value of the real property is based on the premise that a relationship exists between the “royalty” or “land rent” income that a property is capable of producing and the

indicated value of that property resulting from processing the income stream to present value.

The valuation of the real property portion of the landfill includes the following primary steps:

1. Delineate and analyze the subject's market area emphasizing the factors such as location, and historical disposal levels.
2. Estimate the landfill's remaining capacity as of the date of value.
3. Estimate annual tonnage of the refuse disposed at the landfill during its estimate remaining life.
4. Study tipping fees in the market area. Estimate a market supported tipping fee within the subject's market.
5. Analyze historical, annual tipping fee escalations and pending regulatory requirements that will impact future tipping fee escalations.
6. Calculate the gross tipping fee revenue by multiplying the estimated market fee by the estimated annual tonnage.
7. Discount the estimated annual royalty income derived from the real property at a market rate, which reasonably reflects all the risks associated with the landfill operation.

Many assessor's offices and others have mistakenly capitalized the income to the going concern, which is significantly higher than the income to the real property component, and includes intangibles. Capitalizing the going concern income significantly and erroneously overstates the real property value. In summary, this value estimate reflects that revenue generated from the subject's market boundaries, market tipping fee, remaining capacity, annual tonnage, market royalty rate and also the discount rate, which appropriately reflect the risks associated with the landfill.

Most real estate is considered to have a long useful life, however, this is not the case with a landfill. With this type of property, not only is the fill likely to be completed in a relatively short time, but there are continuing obligations that burden the property for many years after the fill operation is completed and the fill is closed. At the completion of the fill, the land requires certain government mandated maintenance and monitoring and cannot be built on for a number of years, thus creating an ongoing liability.

The subject is used to dispose of solid waste, which involves all types of materials except toxic waste and radioactive material. Because the fill has a limited life, the appraisal process basically consists of estimating the present value of the income to be derived over the life of the landfill.

The first step in estimating the future income of the fill is to estimate the capacity of the landfill and the remaining economic life of the fill. The cost to customers, tipping fees, were taken from past and current operating history of the subject to project gross income to the fill.

Computations For The Discounted Cash Flow Analysis (pg. 15)

Fill Rate – The actual fill rate for the subject during the year 1995 was 620,196 cubic yards and the 1996 fill rate was 603,716 cubic yards. The fill rate through July 1997 was 375,469 cubic yards. This amount extended to a full twelve months is 643,661 cubic yards. However, this amount appears to be slightly high when compared to previous years. In 1995 and 1996 the monthly fill rate was lower in November and December than other months in the year. April through September are the months with the highest fill rates.

Therefore, to extend the fill rate for a full twelve months based on the first seven months of the year will have a tendency to overstate the annual fill rate. Based on the recent operating history of the landfill the estimated fill rate for 1997 is 625,000 cubic yards. When utilizing the discounted cash flow analysis the normal or typical fill rate must be utilized. A projected fill rate of 625,000 cubic yards per year

considered to be a typical operating year for the subject...

... After analysis of national trends, local population trends and discussing the subject and its waste shed with the landfill manager and the BFI regional controller it is my opinion that no escalation is warranted in the fill rate in the discounted cash flow analysis of the subject future income stream.

Gross Income Projections: (pg. 18) Gross income used in the DCF is based on actual income for the year in question, 1997. The gross income to the landfill for 1996 was \$3,669,947.51. This equates to an average per yard disposal fee of \$5.92. The 1996 income to the landfill was \$3,877,323.78, which equates to a disposal fee of \$6.43 per yard. The average disposal fee for the first seven months of 1997 was \$6.47 per ton (sic). In the following DCF a disposal fee of \$6.47 for the first year (1997) is utilized. This amount is escalated at a 3% annual rate for the remaining life of the landfill which is estimated at slightly over fifteen years. The remaining life is based on a remaining permitted capacity of 9,553,047 cubic yards of air space as of January 1, 1997. This amount divided by an annual fill rate estimated at 635,000 cubic yards annually results in a fifteen year remaining life for the landfill.

Royalty Rate Income Attributable to the Land: (pg. 18)

The royalty portion of the gross income indicates the real property value of the landfill when capitalized at an appropriate capitalization rate.

As discussed in the introduction to this report, it is critical to consider the division between real property, tangible personal property, and intangibles which create the "going concern" or "business enterprise". Also, the discussion concluded that the assessor is to value the real and tangible personal property, but not the intangibles involved in the "going concern" or "business enterprise".

An alternative to analyzing and deducting operating and business expenses is to use a hypothetical land lease or royalty agreement when estimating the income attributable to the land. Due to the up-front capital costs and the desire of many large landowners to retain ownership of their land, leasing between a landfill operator, as lessee, and a landowner, as lessor, is common practice...

The subject is an owner operated landfill with no lease or rental history. In order to estimate the value of the underlying real estate, leases of landfill sites were analyzed in an attempt to estimate an appropriate lease or royalty rate for the subject property. In terms of a value indicator, it can be a reliable way to estimate that portion of the value of a sanitary landfill that is attributable to the real estate as opposed to a going-concern.

The appraiser has obtained comparable land leases. Royalty rates (land rent) vary and the terms of the leases between private land owners and landfill operators are difficult to obtain. Landfill leases during the early to mid-1970's ranged from 20 to 30 percent of gross income. However, increasing environmental requirements and risk associated with post closure costs/liability have had a downward impact on the royalty rate...

...Based on the preceding discussion and lease data provided, it is my opinion that a 10% is an appropriate rate for the subject property. The terms of a typical lease include the lessee being responsible for acquiring permits, all start-up costs, real estate taxes, operating expenses, closure costs, and post closure maintenance costs. In Lease Number 7 the Lessor pays first year ad valorem taxes and the Lessee pays all additional taxes which arise as a result of improvements made by the lessee.

Discount Rate: (pg. 25)

Since the use of a discounted cash flow analysis (DCF) attempts to replicate the overall performance of the investment from its inception to its termination, the rate utilized as a discount factor must reflect the total yield to the equity position...

The discount rate utilized herein is essentially an anticipated IRR for the subject real property, as measured by the present worth of anticipated royalty payments...

A large component in the makeup of a discount rate is the amount of risk to the investor or property owner...

(pg. 27) The appraiser utilized a 20% discount factor in estimating the discounted present worth of the income to the land. The owner of the landfill must have the funds available to take corrective action in the event the subject landfill is found to be in violation of any one or a combination of applicable government regulations pertaining to landfills...

(pg. 30) In arriving at a discount rate for a typical real estate investment the potential for appreciation of the property and a sale of the property at the end of the investor holding period are both taken into consideration. However, in the case of a landfill, there is typically no residual value. A landfill is a depleting asset which carries an on going financial burden after the useful life of the fill has ended. Subsequent to final closure the property could be considered more of a liability than an asset due to on-going cost related to post closure monitoring and the fact that the former landfill can not be developed or constructed upon for several years after closure. There is no residual value in a landfill in most instances, therefore, the discount rate should reflect this factor.

A landfill differs from a real estate venture in that the wasting asset typically has no resale value. Therefore, with no sales proceeds at the end of the useful life of the landfill, the owner must recapture his capital over the life of the landfill. Investment capital may be recaptured gradually in annual income increments or it may be recaptured all or in part through resale of the property at the termination of the investment or through refinancing. Since there is no residual value for resale purposes and refinancing a landfill with no remaining capacity would not be possible, the only alternative for recapture is through annual increments of income.

Information provided to the appraiser by Mr. Douglas Main indicates that the 20% ~~royalty~~ rate is a reasonable and supportable rate to apply to the Lessor's interest in the subject. Mr. Main is national director of The Main Group and its three subsidiaries; Golf Valuation International, Resort International, and Landfill Valuation of America. The Main Group is located in Newport Beach, California. The information obtained from the Main Group pertaining to IRR's based on his experience in appraising, consulting, and negotiation's pertaining to various types of high risk income properties is summarized in the following:

<u>PROPERTY TYPE</u>	<u>TYPICAL DISCOUNT RATES</u>
Commercial – Industrial	11.0 to 14.0%
Hotel Properties	13.0 to 16.5%
Recreational (Golf Course)	12.0 to 20.0%
Mining and Mineral Property	15.0 to 25.0%
Master Planned Projects	18.0 to 35.0%

Taking into account the highly regulated nature of the waste management industry and the special purpose character of a sanitary landfill, the risk extending to the leased fee position will fall above similar rates of return for conventional types of real estate. Therefor, (sic) based on the preceding analysis and I have

estimated a before tax discount rate for the Royalty Rate method of estimating the value of the real property to be 20%.

In appraisal theory, the preferred method is to base a discount rate on reliable verified data. This assumes, however, that there is an active marketplace for comparable properties. Ideally, sales of other sanitary landfills should be used to abstract a discount rate. However, it is difficult to obtain sales of leased fee positions beneath landfill, and the appraiser has not been able to uncover such transactions if they have occurred.

The following page contains a discounted cash flow analysis for the Missoula landfill for the estimated remaining life of fifteen years beginning in 1997. This DCF represents the value of the Market Value to a passive landowner and a market lease or royalty rate for the property.

DISCOUNTED CASH FLOW								
PERIOD	YEAR 1	YEAR 2	YEAR 3	YEAR 4	YEAR 5	YEAR 6	YEAR 7	
FILL YARDS	625,000	625,000	625,000	625,000	625,000	625,000	625,000	625,000
GROSS INCOME	4,043,750	4,165,063	4,290,014	4,418,715	4,551,276	4,687,815	4,828,449	
RENTAL RATE 10%	404,375	416,506	429,001	441,871	455,128	468,781	482,845	
	20%							
DISCOUNT FACTORS	0.833333	0.694444	0.578704	0.482253	0.401878	0.334898	0.279082	
DISCOUNTED CASH FLOWS	336,979	289,240	248,265	213,094	182,906	156,994	134,753	
PERIOD	YEAR 8	YEAR 9	YEAR 10	YEAR 11	YEAR 12	YEAR 13	YEAR 14	YEAR 15
FILL YARDS	625,000	625,000	625,000	625,000	625,000	625,000	625,000	625,000
GROSS INCOME	4,973,302	5,122,502	5,276,177	5,434,462	5,597,496	5,765,421	5,938,383	6,116,535
RENTAL RATE 10%	497,330	512,250	527,618	543,446	559,750	576,542	593,838	611,653
DISCOUNT FACTORS	0.232568	.0193807	0.161506	.0134588	0.112157	0.093464	0.077887	0.064905
DISCOUNTED CASH FLOWS	115,663	99,278	85,213	73,141	62,780	53,886	46,252	39,700

CUMULATIVE PRESENT WORTH
OF CASH FLOWS – NOI

Rounded to \$2,138,000

RECONCILIATION AND FINAL VALUE ESTIMATE

As explained in the foregoing appraisal report the most prudent manner in which to estimate the market value of the underlying real property in a solid waste sanitary landfill operation is to estimate the income to the site under a lease from a landowner to an operator. The estimated remaining economic life of the landfill as of January 1, 1997 was approximately 15 years.

All data provided to the appraiser was analyzed and discussed thoroughly with BFI personnel. It is the appraiser's opinion that the income estimates, royalty rate and discount rate are appropriate for the valuation of the subject.

Based on the foregoing report, it is my opinion that the market value of real property portion of the subject landfill as of January 1, 19976 (sic) is as Follows:

\$2,138,000.000 (sic)

Taxpayer exhibit #2 is an appraisal made on the subject property in 1999 by Jerry Jones. The January 1, 1999 market value as stated on page 1 of the report is \$2,239,000.

Mr. Jones testified that the reason the 1999 market value is higher than the 1997 market value was due to taking into account a \$25,000 "host fee" as an expense and higher 1999 tipping fees.

The following page illustrates the DCF from the 1999 appraisal (pg. 34).

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	1	2	3	4	5	6	7
Year	1999	2000	2001	2002	2003	2004	2005
Fill Yards	625,000	625,000	625,000	625,000	625,000	625,000	625,000
Income @ 3% Yrly. Increase	\$4,406,250	\$4,538,438	\$4,674,591	\$4,814,829	\$4,959,274	\$5,108,052	\$5,261,293
Less Host Fee	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000

Effective Gross Revenue	\$4,380,250	\$4,513,438	\$4,649,591	\$4,789,829	\$4,934,274	\$5,083,052	\$5,236,293
Rental Rate @ 10%	\$438,025	\$451,344	\$464,959	\$478,983	\$493,427	\$508,305	\$523,629
Discount Factor – 20%	0.83333	0.69444	0.57870	0.48225	0.40188	0.33490	0.27908
Present Worth of Income	\$365,019	\$313,431	\$269,073	\$230,991	\$198,297	\$170,230	\$146,135
Accumulated Present Worth	\$365,019	\$678,450	\$947,523	\$1,178,514	\$1,376,812	\$1,547,042	\$1,693,178
	8	9	10	11	12	13	14
	2006	2007	2008	2009	2010	2010 (sic)	2012
	625,000	625,000	625,000	625,000	625,000	625,000	175,355
	\$5,419,132	\$5,581,706	\$5,749,157	\$5,921,632	\$6,099,281	\$6,282,259	\$1,815,479
	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000	\$25,000
	\$5,394,132	\$5,556,706	\$5,724,157	\$5,896,632	\$6,074,281	\$6,257,259	\$1,790,479
	\$539,413	\$555,671	\$572,416	\$589,663	\$607,428	\$625,726	\$179,048
	0.23257	0.19381	0.16151	0.13459	0.11216	0.09346	0.07789
	\$125,450	\$107,693	\$92,448	\$79,362	\$68,127	\$58,483	\$13,945
	\$1,818,628	\$1,926,321	\$2,018,769	\$2,098,130	\$2,166,258	\$2,224,740	\$2,238,686
		ROUNDED	\$2,239,000				

Exhibits #3 and #4 illustrate that the DOR has no intention of assessing intangibles. These exhibits are in reference to the ECR appeal (PT-1997-47, PT-1997-48 & PT-1998-3R).

Exhibits #5 and 5A consist of the transcript and exhibits of the hearing before the MCTAB for tax year 1999.

Exhibits #6 and #7 are pages from a landfill appraisal article authored by Robert J. Foreman.

Exhibit #8 is titled "Motion to exclude the expert testimony of James Fairbanks:" Emphasis to this exhibit includes the following:

...exclude the expert testimony of James Fairbanks pursuant to Rule 702 Montana Rules of Evidence.

...The taxpayer's property is appraised at \$10,800.00 as of January 1, 1997 by James Fairbanks as reflected in his Review Appraisal Report dated May 7, 1999. The assessment on the Taxpayer's property is grossly in excess of the amount allowed by law in Montana. Mr. Fairbanks' review appraisal and an testimony thereto, is not credible, does not meet the threshold standards for an Expert Witness as espoused by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 113 S. Ct. 2786, 125 L. Ed. 2d 469, 480 (1993) and this Board should exclude such testimony.

The standard applied to the admissibility of expert testimony in Montana is based on Rule 702, M.R. Evid which provides:

In scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

...the appraisal profession propounded standards to be followed by all appraisers. These ethical and professional standards are found in the Uniform Standards of Professional Appraisal Practice ("USPAP")...

Mr. Fairbanks is an employee of the DOR and an appraiser who assisted in the preparation of the Appraisal. Mr. Fairbanks admitted in a hearing before the Missoula County Tax Appeal Board held on January 10, 2000, that the standards of USPAP are the standards that "... guide us, all of us in the appraisal business." ... Mr. Fairbanks admitted that if his appraisal failed to meet the USPAP standards it would lose credibility...

By admission, the USPAP standards apply to the appraisal of properties by the DOR.

Further, this very Board, in its Findings of Fact and Conclusions of Law in ECR determined that, "While the Montana Code Annotated, Title 15, Taxation, and Administrative Rules of Montana, Title 42, Revenue, may be silent as to compliance with USPAP, the DOR appraisers and appraisals should be held to like standards".

In April of 2000, Mr. Fairbanks testified before this Board, in ECR, as to various deficiencies in his appraisal in this matter and that, in regard to this case, "...before that appeal reaches this board that report will be revisited to correct those". However this has not been done. Mr. Fairbanks conceded that corrections to his work were necessary "In order to make it USPAP compliant".

The failure to comply with the USPAP standards, or in the words of the Board, "like standards", hampers the credibility of Mr. Fairbanks to the point that he is not qualified to render an expert opinion of value in this case.

Mr. Fairbanks has previously admitted that he is not qualified. During a hearing on this matter before the Missoula Count (sic) Tax Appeal Board, on January 10, 2000, Mr. Fairbanks testified that "...you've admitted in a prior hearing that you are not an expert in landfill appraisal haven't you? MR.FAIRBANKS: yes."

The appraiser was not competent to make the Appraisal and is not qualified to testify regarding the appraisal of landfills. Without a fundamental or even cursory understanding of the intricacies of the

waste business, much less the appraisal standards required to value a waste business, Mr. Fairbanks could not accurately value the Taxpayer's property. As stated above, competency is a requirement under the USPAP guidelines.

Most importantly, the methodology employed by Mr. Fairbanks in the preparation of his appraisal has been rejected by this Board in ECR. Mr. Fairbanks has not performed any analysis based upon the methodology approved by the Board in ECR.

The proposed Expert testimony of James Fairbanks does (sic) comply with the standards espoused by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 113 S. Ct. 2786, 125 L. Ed. 2d 469, 480 (1993). Any testimony based upon this appraisal does not meet the standards for expert testimony required by Rule 702 M.R.E.

WHEREFORE, PREMISES CONSIDERED, Taxpayer requests the Board to enter an Order suppressing the testimony of James Fairbanks as an expert in this matter and the exclusion on any report prepared by him on behalf of the DOR.

Exhibits #9 and #10 are review appraisal documents prepared by the Montana Department of Commerce. These exhibits consist of a review of James Fairbanks appraisal review.

Exhibit #11 is the Rudy R. Robinson III, MAI review of James Fairbanks review report.

Exhibit #12 is a page from a document from the Montana Department of Environmental Quality (DEQ) that pertains to the Missoula BFI landfill.

Exhibit #13 is an undated and unsigned "Professional Personal Services Contract" between the State of Montana, Department of Revenue and Tom Stevens.

Exhibit #14 is a letter from the DOR to Tom Stevens, MAI dated August 1, 2000. The emphasis of the letter goes to Mr. Stevens testifying as an expert.

"The Department would like you to testify as an appraisal expert in this case." "...to prepare and attend the trial and to testify as an expert."

Exhibit #15 is a letter from the DOR to Tom Stevens, MAI, dated October 5, 2000. The emphasis of the letter is Mr. Stevens's role in assisting the DOR.

“As we discussed by telephone today, I enclose a copy of the State Tax Appeal Board's recent decision in Elton Campbell Ranches for your review and comment.”

“We need to evaluate what effect this decision has on our prospects in the upcoming trial in the above-referenced matter, and would appreciate your input...”

Exhibits #16, #17 and #18 consist of correspondence between DOR tax counsel, Roberta Cross Guns to Jim Sites, taxpayer counsel.

Exhibit #18 states in summary:

“Pursuant to the State Tax Appeal Board's scheduling order in this matter, we have enclosed the exhibits and a list of the witnesses the Department will rely upon in the hearing set for April 2000. I believe the exhibits are complete as of this date, but because discovery concerning information supplied by Mr. Gary Ritchie is still ongoing, the Department reserves the right to add additional exhibits before the hearing. Of course the Department will not add exhibits that are not connected to the ongoing discovery.”

DOR'S CONTENTIONS

For tax year 1997, the DOR appraised the subject landfill at a value of \$7,399,600. For tax year 1999, the DOR appraised the subject landfill at a value of \$10,800,000. (The Board notes a discrepancy in the record here. The \$10,800,000 DOR appraisal, dated May 7, 1999, references a date of valuation of January 1, 1996, which conflicts with testimony by Mr. Fairbanks concerning the date and intent of the 1999 appraisal. Mr. Fairbanks testified that the difference between the 1997 and 1999 appraisal was the addition of two cells, which were not reflected in the 1997 appraisal). DOR Exhibit I is the 1999 appraisal for the subject property.

The 1997 appraisal, prepared by former DOR appraiser Sue Hoell, adopted a cost approach to value. (DOR Exhibit H from the hearing before the Missoula County Tax Appeal Board on December 2, 1999). Summarized, this exhibit illustrates the following:

SUMMARY OF SALIENT FACTS AND CONCLUSIONS

Purpose of Appraisal	Market value
Property Rights Appraised	Unencumbered Fee Simple Interest
Value Indications:	
Cost Approach	\$7,399,600
Income Approach (18% cap rate)	\$7,137,650
Market Approach	N/A
Final Opinion of Value:	\$7,399,600
Date of Value Estimate:	January 1, 1996

COST APPROACH (pgs. 7, 8 & 9)

...For 1997, 56 acres are classified as commercial and valued based on sales of similar property. 85.16 acres are classified as agricultural and valued based on productivity for a total **land value** of

Land Value

1. Commercial land	+	\$427,000
2. Non-qualified Ag primary parcel	+	\$ 2,749
3. Non-qualified Ag secondary parcel	+	<u>\$ 636</u>
Total for land value	=	\$430,385

Improvement Value

1. 2,400 Sq. Ft. shop, RCNLD	+	\$ 26,140
2. Gate House, RCNLD	+	\$ 28,020
3. Asphalt paving, RCNLD	+	\$ 15,710
4. Fence, RCNLD	+	\$ 28,510

5. Concrete Wall, RCNLD	+	\$ 3,740
6. Underground fuel storage tank, RCNLD		<u>\$ 5,180</u>
Subtotal of pre-1995 improvements		\$107,300

The following replacement costs were estimated using 1994 summary of contractor bids from the Helena proposed landfill, and soil types The U.S. Dept. of Agriculture, Soil Survey of Missoula County. Area and depth of cells, linear feet of pipe, distance of earth movement, type of equipment used, cost of labor, were all estimated following failure of owner to provide us with requested actual data.

Excavation of the site for installation of the liners 16 acres with an average excavation depth of 18 ft equals 464,640 cubic yards. $464,640 \text{ c.y.} \times 7.80^7$	+	\$3,624,192
Cut, Fill, and Compacting of clay base estimated at 77,440 CY $\times 2.16^8$	+	\$ 167,270
High Density Polyethylene Drainage Netting estimated at 696,960 $\times .33$	+	\$ 229,996
Clay Leach Pad Liner estimated @ \$2.07/sq. ft. $\$2.07 \times 696,960^9$	+	\$1,442,707
Polyvinyl liner was estimated at .30 per sq ft installed. $.30 \times 696,960^{10}$	+	\$ 209,088
Methane Gas Extraction System PVC 6" installed including P. & O. $\$26.50/\text{lf} \times 11,300 =^{11}$	+	\$ 299,450
Leachate Collection Piping, Manholes, and Cleanouts	+	\$ 90,000
Gas Flare (Methane gas incineration system) with electric panel and feeder (estimate)¹²	+	\$ 60,000
Sewer line 5000 ft @ \$15.50/lin ft =¹³	+	\$ 51,500
Settling Pond (RCNLD) 43,560 sq ft @ \$2.92 / sq. ft.	+	\$ 127,195
Ground water testing wells 15 x \$1500	+	\$ 22,500
Building permits, legal fees, construction insurance, interest, licenses, operation permits	+	<u>\$ 500,000</u>
Subtotal 1995 Replacement costs		\$6,931,198
Estimated additional engineering and design costs for the 1995 improvements (10% of replacement costs)	+	\$ 693,120=
		\$7,624,318

According to Jim Leiter, site manager, the cells have a 10 year life as to fill capacity. It is anticipated that the cells and methane gas extraction system will continue to protect the ground and aquifer indefinitely as waste-to-energy or other uses continue to generate income. Nevertheless, depreciation at 10% is allowed for the improvements using the 10 year life suggested by Mr. Leiter, as it is possible that the cells will not continue to generate income after that time. (It is anticipated that new (sic) cells will not continue to generate income after that time. (It is anticipated that new cells will

7 R.S. Means Building Construction Cost Data, 1997. 75 H.P. Dozes for 300 ft haul of earth.

8 Richardson Engineering Services, INC., Richardson Rapid System, Site grading, Filling, and Compacting Elevating Scrapers, p. 8

9 Market evidence. See Beal Mountain Mining, Inc. Pollution Control Assets 1996 costs, Unit Cost Per Sq. Ft.

10 1996 Western Mine Engineering, Inc. Notebook

11 Ibid.

12 Marshall Valuation Service Section 62 p 3 Utility Piping, Drain & Sewer

13 Ibid, Section 62 p 6 Industrial Incinerators

replace the old. The cost of the new cells is accruing in the Reserves for Replacement category of expenses in the Income Approach. In the cost approach, new items are added to the Replacement Cost New column. Total depreciation changes as new improvement are added.

	-	\$ 762,432=
		\$6,861,886
Total Replacement cost new less depreciation plus land		<u>\$7,399,571</u>
Value Using the Cost Approach		\$7,399,600

INCOME APPROACH TO VALUE (pgs. 10-14)

The total value of land, improvements, and business factors is determined by dividing net income by the overall capitalization rate. For ad valorem purposes land value is separated from improvement value. The separation is purely for data entry purposes. Estimating value by the Income Approach reflects the thinking of a typical investor who bases his/her offering price on income from the total property.

The Missoula BFI operations include a collections arm as well as a landfill site operation. It is assumed the \$12 million expenditure on the landfill site was justified not only by income to the landfill site but also by income to the collections arm of the operation.

The subject landfill receives collected waste from most of Western Montana as well as three communities in Idaho. A typical residential fee for collection and dumping is \$143 per year. A typical commercial fee (including multi-family housing) would be \$500 per year. No information was provided as to allocation of income between collections and dumping. We used the tipping rate provided by MDEQ. The income derived by the method used ignores the income derived by the collections operation which could not be earned without the landfill site improvements. By ignoring the collections income attributable to the landfill site improvements, the owner is effectively receiving a discount under the income approach.

Source of Income and Expense Data

In April of 1997 we requested an itemized summary of the cost new of the improvements, a copy of the lease agreement between BFI and the land owner or a copy of the deed if BFI owns the land. We also requested real estate income and expenses information. The Property Tax representative sent us a one half page document showing Gross Business Income at \$3,869,820 and an annual “Royalty Rate” of 10% of gross income paid to the land owner. On that document, a lessor “uncoll accts” of 1% and lessor expense factor or (sic) 6% was applied to that 10% Royalty Rate payment. It is unclear why the lessor would have a credit loss of expenses associated with the net ground lease. No other cost or income data was provided to us by BFI. The on-site manager assisted us in our site reviews and provided technical information. He referred us to the Property tax representative for all financial data.

Because the BFI property tax representative did not provide the requested income and cost information, we made assumptions based on extensive research of trade journal articles referencing landfills, other landfills, and cost manuals. Any additional information made available by BFI will be considered in future appraisals.

Application of the “Royalty” fee paid to the land owner

Without a copy of the lease agreement between a land owner and BFI, it is assumed that document is an agreement for use of the land as a landfill in perpetuity in exchange for an annual fee paid to the land owner. The fee is not annual ground rent for the use of the land. It has been described as a “Royalty” fee. It is payment for the right to use the land in perpetuity and for the risk to the landowner of not knowing long the land will continue to produce income. It is for the taking of some of the value of the land and for the potential of liability assigned to the land owner.

The BFI property tax representative erroneously asserts that the real estate value can be estimated by applying a capitalization rate of 20% to the adjusted annual land Royalty payment. We disagree with his method. The Royalty fee does not have a clear relationship to market value of either the land and/or the real estate improvements in so far as measuring what a prudent buyer would pay for the developed landfill site.

It is assumed that the landowner would not finance for the lessee, the \$12 million of improvements to the land including the clay liners and methane gas extraction system. Hence the land Royalty fee could not be construed as payment for the use of those real estate improvements. It appears that those improvements were attached to the land by BFI several years after a royalty agreement would have been negotiated with the land owner.

Capitalization Rate

Capitalization rate is the relationship between net income and market value of an income producing property. A low capitalization rate means a prudent investor is likely to believe there is low risk and a durable income stream associated with the investment. He would therefore be willing to pay a higher price for the property than for a property perceived as high risk and with a very unpredictable income stream. Conversely a high capitalization rate indicates a perception of high risk of diminishing income resulting in a lower market value.

The owner’s Tax Representative justifies the cap rate of 20% by suggesting that all landfills are very high risk investment because some landfills have been closed down. Risk includes failure of the protective liners resulting in leachate or methane gas migration. The “model” appraisal provided by the representative suggests a capitalization rate of 18%. His reasoning for assuming a high risk is that some landfills have been closed when hazardous waste regulations were violated.

The subject landfill is state-of-the art. It is assumed that it meets EPA and state environmental requirements, is the only operation of its kind in the region, and it is unlikely that potential competitors would receive the necessary regulatory permits considering that the subject landfill is adequately meeting the needs of the community and is expected to continue doing so in the foreseeable future.

There is a solid and positive history of regulatory compliance by subject property. The risks perceived in the Tennessee landfill are very different for the Missoula landfill. The quality, condition, history, and markets associated with the Missoula landfill are very strong.

We believe that the subject landfill is a relatively safe investment and a capitalization rate of 12% would be acceptable to a prudent investor under current cost-of-capital (sic) conditions. A capitalization rate of

12% was recommended by Arthur E. Liddicoat, CAE, a published author on landfill valuations¹⁴ and also by Robert L. Foreman, MAI in the Encyclopedia of appraisal, a classic recognized authority produced by nine of the major professional Appraisal Organizations.¹⁵ Richard K. Ellsworth, also a published author on valuing Waste facilities, suggests a 10% capitalization rate for landfills.¹⁶

Methodology

The subject of the “model” appraisal provided by the Tax rep is one of one hundred and thirty-one Class 1 landfills in Tennessee. It serves a population of 15,043. Neither its size, risk, nor market conditions are comparable to the subject property. That appraisal deals only with the leased fee. The subject appraisal deals with the fee simple estate.

The sample appraisal suggested as a “model” by the representative was done at the request of the owners of that landfill. It has an appraisal date of January 1, 1995, a date that would be used if the purpose of the appraisal was to persuade a reader to minimize the value for property tax purposes. In fact both Waste Management and BFI representatives have used the appraisal for that purpose.

The “model” appraisal uses the Discounted Cash Flow method of valuation. The DCF is used by investors anticipating income from a property for a short term, often for a short term wasting asset. Use of this method to establish market value of a property with a very long foreseeable life would be neither practical nor valid. DCF requires forecasting income and expenses as well as capitalization rates. The Uniform Standards of Professional Appraisal Practice suggest that the validity of DCF value estimates is in question unless it is supported by other approaches to value.

The suggested “model” appraisal quotes Mr. Douglas Main of The Main Group, of which Landfill Valuation of America is a subsidiary. From that reference, the appraiser supports his discount rate of 18%. He further justifies it by commenting on the highly regulated nature of the waste management industry, the special purpose character, and the risk of failure of the improvements.

Because the perception of risk in this complex investment is somewhat subjective, we have given the subject the benefit of the doubt in assigning a high risk capitalization rate. By using the 18% rate, the estimated market value of the property is minimized for property tax purposes.

Market Expense and Intangibles Ratio

Research¹⁷ indicates a typical expense ratio for landfills is 46 – 50 percent. This includes the cost of professional management, ongoing engineering costs, all staff including administration and site labor, annualized capital (sic) expenses or reserves for replacement, licences (sic), permits, maintenance costs, insurance, bonding, and Intangibles. Intangibles are the economic advantage that is transferable upon sale. It is the exclusive or partly exclusive access to a market.

14 Liddicoat, Arthur E. CAE, Assessment Digest September-October 1993 pp.2-9

15 Encyclopedia of Appraisal, 1978, Edith J. Friedman, General Editor Prentice Hall, Inc. pp. 1077-1092

16 Ellsworth, Richard K. Valuing Waste-to-Energy Facilities, The Appraisal Journal, January 1997 pp 63.71

17 Ibid.

Income attributable to corporate name, existing contracts, existing permits and licenses, and existing labor force is a result of good administration. After administrators are paid, remaining income flows to investor/owners. It is that remaining income which is “Net Income”.

Gross income from land, and real estate improvements and intangibles:

Annual tonnage:		\$ 131,772
Tip fee at Gate/ton:	X	<u>\$ 19.50</u> ¹⁸
Gross Income		\$2,569,554

Estimated Expenses and income attributable to intangibles which are to be removed from Gross Income to arrive at net income.

(50% of total income) ¹⁹		\$1,284,777
Net Income from Real Estate land and Improvements only		\$1,284,777
Value using a capitalization rate of 18%:		\$7,137,650
Value using the Income Approach		\$7,137,650

Market Data Approach

. . . There is insufficient data found to support a market approach.

FINAL RECONCILIATION OF VALUE (pages 14 and 15)

The land value was based on sales of similar property for that portion of the property under commercial use. Because agricultural land is valued by productivity for ad valorem purposes, 85.16 acres were assigned value on that basis.

Public announcements by BFI listed the 1995 improvement costs at approximately \$12 Million. An attempt to reconstruct replacement costs without the aide (sic) of a summary of engineering specifications resulted in an estimated replacement Cost New of \$7,399,600. An estimated replacement cost necessarily is not as accurate as a replacement cost based on actual costs. Upon receiving the actual cost information, the Department will review this appraisal and make any necessary adjustments.

The Income Approach used numbers provided by the Montana Department of Environmental Quality as to Gate Rate and Annual Fill Rate. If the collection service were a separate company, the fee charged to them for dumping would be considered. In this case BFI provides both collection and reception of waste. Hence,

18 Rate provided by the Montana Department of Environmental Quality and supported by Rate schedule on landfill site indicating charges varying from \$8.00 minimum charge to \$28 for a typical truck load.

19 Foreman, Robert L., Appraisal of Sanitary Landfills, Encyclopedia of Real Estate Appraising

the published tipping fee was the only number available.

Income attributable to Intangibles and expenses were subtracted from Gross Income to arrive at Net Income. We used the capitalization rate suggested by BFI as there is a difference of opinion as to the risk associated with landfill investment.

Utilizing the best information available, the Income Approach indicated a value of \$7,137,650. The Cost Approach indicated a value of \$7,399,600. In estimating value of unusual or unique properties, the cost approach is generally felt to be the most valid approach.

The final estimate of value as of January 1, 1996 for subject property is

\$7,399,600

The DOR has relied on the cost approach to value in its initial appraisal from which the taxpayer appealed in 1997. The DOR testimony at the November-December 2000 hearing before this Board was that, as it received information concerning cost and income from the taxpayer, it attempted to revise its appraisal according. Thus, subsequent DOR appraisals were generated (Taxpayer's 23, 24 and 25 from the January 11-12, 2001 Motion for Sanctions hearing

Mr. Fairbanks performed an appraisal (Exhibit I) on the BFI landfill dated May 7, 1999. This appraisal is valuing what are identified as cells #4 and #5, which was constructed in 1998 and 1999 respectively. These cells were not included in the original appraisal (exhibit H). The final value is \$10,800,000, using the cost approach to value. Summarized, the report states the following:

BFI Book Value (page 2)

BFI Missoula provided a copy of their January 1, 1998 FIXED ASSETS PROPERTY LISTING (cost

and depreciation schedule) which detailed a *cost basis value* of recent year improvements in the amount of \$7,843,648.38. Although not addressing the costs involved in the development of Cells #4 and #5, the entries specific to Cell #1, #2 and #3 indicate an average 1993–1995 per square foot cost in the amount of \$7.28 (see addendum). This average cost is then applied to the area of Cells #4 and #5, resulting in a \$3,523,111 estimate. In addition, a representative share of 1993-1995 associated costs is calculated at 317,168 (adjustments for time were not made).

When added to the *cost basis value* (exclusive of land and earlier development investment) the following cost total results:

\$11,683,927

COST APPROACH (pages 3-6)

The cost approach estimates are affected by the following facts relating to the size and number of landfill cells, and the amount of earth moved in developing these cells:

A landfill requires continual new construction. While the appellant did not address anticipated new construction in its projection of cash flow, Missoula BFI began creation of Cells #4 and #5 in 1998 which according to a supplied plot plan involves approximately 4.16 and 6.9 acres, respectively. On April 8, 1999, BFI Controller Gary Richie was asked if management had considered acquiring available adjacent landholdings, as the current landholding became more completely involved in cell development. Mr. Richie acknowledged that such discussions had occurred.

On September 27, 1998, a Missoulian article detailed the construction start of an earthen berm to “hide” the Louisiana Pacific (LP) Corporation’s particleboard plant from neighboring residential areas and from Interstate 90.

The review appraiser confirmed that the construction material was coming from excavation work by BFI for the expansion of its landfills (two new cells) north of I-90. LP’s Environmental Manager Ellen Porter corroborated that BFI was assuming all costs (short of topsoil and grass) of the project being done by NELCON, Inc.

The crescent-shaped berm is 1700 feet long, 350 feet wide at its base (15 feet wide on top), and 65 feet high. The result is that 746,900 cubic yards of earth was transferred from BFI cell construction sites to the LP plant.

Land Value

The following land valuation discussion was provided BFI’s counsel:

The subject 125-acre tract is currently valued at \$429,749 for Ad Valorem tax purposes. The valuation rationale identifies 20 acres as primary site at \$20,000 per acre. A residual 36-acre portion involved in the landfill operation is valued at an “excess land” value of \$750 per acre. The remaining 69 acres is determined not to be involved in landfill cells, and is valued as non-qualified agricultural land at \$39.84 per acre.

20 Acres @ \$20,000	=	\$400,000
36 Acres @ \$750	=	27,000
69 Acres @ \$39.84	=	<u>2,749</u>
Total Land		\$429,749

In appraising the subject property, sales of comparable tracts were few. Most larger acreage tracts were found to be better-located and subject to uses of greater potential when compared to the BFI site. As a consequence, these tracts sold for substantially more. Most large tracts typically sold for \$2.00 per square foot (\$80,000-\$90,000 per acre), and more. The challenge then became, how to discount comparable sale indications to address the limitations of the subject land.

Only one comparable was available. On May 14, 1992, a 15.18 acre unimproved parcel in Section 5, less than a mile northwest from the subject sold for \$300,000. Like the subject, the sale parcel is on a steep hillside, north of Interstate 90, characterized with access and developability challenges.

$$\$300,000/15.18 \text{ acres} = \$19,763 \text{ per acre}$$

Improvements Cost Schedule

While Ms. Hoell's replacement costs using cost estimating manuals, a 1994 summary of contractor's bids from the Helena proposed landfill, soil types from the US Department of Agriculture and the Soil Survey of Missoula County are thought to be accurate, corrections are made to sizes and volumes as regards landfill cell size:

?? The 2400 sq ft shop has a Replacement Cost New Less Depreciation (RCNLD) cost of:	26,140
?? The Gate House has a RCNLD of:	28,020
?? Pavement RCNLD:	15,710
?? Fence RCNLD:	28,510
?? Concrete wall RCNLD:	3,740
?? Underground fuel storage tank RCNLD:	<u>5,180</u>
Subtotal of Pre-1995 Improvements	107,300

Documentation relating to the amount of excavation was not discovered among BFI's records. For purposes of the cost estimate, the amount of cubic yards relocated to the nearby LP plant in creating Cells #4 and #5 is divided by 40% (the newest cells' share of the total area involved in cell development) to address total landfill excavation.

Excavation of the site for installation of the liners:
1,867,250 c.y. X 4.68 (7.801 - 40% volume discount) = 8,738,730

Cut, Fill, and Compacting of clay base²
 Estimated at **311,208 CY** x 2.16 672,210

1 RS Mean Building Construction Cost Data, 1997. 75 H.P. Dozers for a 300 ft. haul of earth.

2 Richardson Engineering Service, Inc., Richardson Rapid System, Site Grading, Filling, and Compacting Elevating Scrapers p.8.

High Density Polyethylene Drainage Netting Estimate at 1,833,300 sq ft x .33	604,989
Leach Pad Liner Estimated @ \$2.07 / sq foot. ³ \$2.07 x 1,833,300 =	3,794,931
Polyvinyl liner estimated at .30 per Sq ft installed ⁴ .30 x 1,833,300 =	549,990
Methane Gas Extraction system PVC 6" installed including P.& O. ⁵ \$26.50/lf x 11,300 =	299,450
Leachate Collection Piping, Manholes, and Cleanouts	90,000
Gas Flare (Methane gas incineration system) with Electric panel and feeder (estimate) ⁶	60,000
Sewer line ⁷ 5000 ft @ \$15.50 /lin ft =	77,500
Settling Pond 43,560 sq ft @ \$2.92 / sq ft =	127,195
Ground water testing wells 15 x \$15000 =	22,500

3 Market evidence. See Beal Mountain Mining, Inc., Pollution Control Assets 1996 costs, Unit Cost Per Sq. Ft.

4 1996 Western Mine Engineering, Inc. Notebook

5 Ibid.

6 Marshall Valuation Service, 1995 Section 62 p 6 Industrial Incinerators

7 Marshall Valuation Service Section 62 p 3 Utility Piping, Drain & Sewer

Building permits, legal fees, construction insurance, Interest, licenses, operation permits	<u>500,000</u>
Subtotal:	15,537,495
Estimated additional engineering and design costs attributable to the replacement costs of the real estate improvements. (10% of replacement costs):	1,553,750
Total of estimate itemized replacement costs new:	17,091,245

Physical Depreciation:

The cost elements detailed above have an extremely long economic life. It's difficult to consider the excavation aspect of cell development to lose value over time, and it is anticipated that the cells' liners and methane gas extraction system will continue to protect the ground and aquifer indefinitely as waste-to-energy or other uses continue to generate income. Depreciation tables reflect no value loss until the fourth year in the maximum 70-year life column. Consequently, no adjustment to replacement cost new is made for the subject landfill.

Functional Obsolescence:

Most of the cost (and value) is in the cells. As discussed above, the BFI Missoula Landfill currently has five cells. According to the Tax Agent, each cell has a 15-year life. As landfill cells fill to capacity, their value diminishes.

In examining the management history of the subject landfill, new cell development is an on-going activity. It is assumed that a prudent planner would be constructing at least one or two new cells as existing cells reach capacity.

Therefore, functional obsolescence is measured by discounting completely, the value of two cells, or 40%.

Value loss from all causes: 17,091,245 X .4 =	<6,836,498>
Replacement Costs New less Depreciation	10,254,747
Pre-1995 improvements	107,300
Land Value	<u>429,749</u>
	\$10,791,796
Indicated Value by the Cost Approach:	\$10,800,000

INCOME APPROACH

An examination of the Discounted Cash Flow analysis is added in this review of Ms. Hoell's report. In addition, newly confirmed gross annual income figures provided by the taxpayer, impact the Direct Capitalization approach:

Discounted Cash Flow Analysis

In April of 1997 we requested an itemized summary of the cost new of the improvements, a copy of the lease agreement between BFI and the landowner or a copy of the deed if BFI owns the land. We also requested detailed real estate income and expenses information. The taxpayer did not furnish this information prior to the County Tax Appeal Board (CTAB) hearing.

During the November 20, 1997 Missoula CTAB hearing for the subject property, an appraisal prepared by BFI's property tax representative Jerry Jones was provided. Mr. Jones' report relied solely on a **discounted cash flow analysis (DCF)** income approach, based upon a beginning annual income of \$4,043,750, to which a 3% increase was annually added over a fifteen year period. A DCF analysis is typically used when uneven income streams are appraised. An example might involve a net operating stream for a period of say, five years, followed by a sale at the end of the period. Even considering that such is not the case with BFI's income stream, a DCF analysis is herein provided.

The taxpayer's appraiser provided a DCF analysis examining the landowner's position by discounting the annualized rent to 10% prior to applying the discount factors. This approach effectively defines his report as a LEASED FEE ESTATE appraisal, rather than a FEE SIMPLE appraisal report. As both the land and improvements to the land are owned by BFI, your reviewer's DCF example examines the income stream minus 50% expenses, times the factors for a period of twenty years (the remaining economic life estimate by BFI officials) in estimating a value for land and improvements.

The resultant Cumulative Present Worth of Cash Flows, as illustrated in the Addendum, indicates a value of:

\$11,333,000

Direct Capitalization Rate

Gross Income from land, and real estate improvements as provided in the taxpayer's appraisal report, and not included in Ms. Hoell's report:

Annual Fill Yards	625,000	
Gross Income	\$4,043,750	
Estimated Expenses are to be subtracted from Gross Income to arrive at Net income (50% of total income) ⁸		\$ 2,021,875
Net Income from Real Estate land and Improvements only		\$ 2,021,875

⁸ Foreman, Robert L., Appraisal of Sanitary Landfills, Encyclopedia of Real Estate Appraising

Value using a Capitalization Rate of 18%	\$11,232,639
Value using the Income Approach:	\$11,200,000

MARKET DATA APPROACH

The reviewer makes no changes to this portion of Ms. Hoell’s report.

There is insufficient data found to support a market approach.

CONCLUSION COMMENTS

Public announcements by BFI listed the 1995 improvement costs at approximately \$12 Million. An examination of Missoula BFI’s FIXED ASSET PROPERTY LISTING allows for a **BOOK VALUE** estimate of:

\$11,700,000®

The estimate of reconstructed replacement costs, absent the aide of a summary of engineering specifications resulted in a **depreciated Replacement Cost New of:**

\$10,800,000

A Discounted Cash Flow Analysis approach renders a total landfill value (not just a lessor’s position) of :

\$11,333,000

Income numbers provided by the taxpayer’s appraiser result in a value estimate using a **Direct Capitalization** Income Approach at:

\$11,200,000

Considering the assertions made by the taxpayer’s representative regarding the possibility of business, or “going concern value” represented in the income approaches to value, your reviewer places greater confidence in the cost approach to value.

The final estimate of value as of January 1, 1996 for subject property (based on currently developed improvements is amended to:

\$10,800,000

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Addendum

BFI Cell Construction Costs (Source: 1-6-98 BFI's Fixed Assts Property Listing)

Cell #	Year Built	Size/SF*	BFI Cost
		* Scaled from plot plan	
1	1993	151,200	\$945,468
2	1995	243,000	\$1,474,047
3	1995	344,250	\$2,958,555
Weighted Average per Sq. Ft.:			\$7.28
Cells not included in Property Listing			
4	1998	181,350	\$1,320,757
5	1998	302,400	\$2,202,354
	Total Size	1,222,200	
Value indicated by previous costs:			\$3,523,111
93-96 Cell Development Associated Costs:			\$792,921
Cells 4 & 5 Share (483,750/1,222,200 SF):			40%
			\$317,168
Total estimate for Cells #4 and #5:			\$3,840,279

DISCOUNTED CASH FLOW ANALYSIS/MISSOULA BFI LANDFILL							
Period	Year 1	Year 2	Year 3	Year 4	Year 5	Year 6	Year 7
Fill Yards	625,000	625,000	625,000	625,000	625,000	625,000	625,000
Gross Income (+3%/yr	4,043,750	4,165,063	4,290,014	4,418,715	4,551,276	4,687,815	4,828,449
NOI (50% Expenses	2,021,875	2,082,531	2,145,007	2,209,357	2,275,638	2,343,907	2,414,224
Discount Factors @20%	0.833333	0.6944444	0.578704	0.482253	0.401878	0.334898	0.279082
Discounted Cash Flows	1,684,895	1,446,202	1,241,324	1,065,469	914,529	784,970	673,767

Period	Year 8	Year 9	Year 10	Year 11	Year 12	Year 13	Year 14
Fill Yards	625,000	625,000	625,000	625,000	625,000	625,000	625,000
Gross Income (+3%/yr	4,973,302	5,122,502	5,276,177	5,434,462	5,597,496	5,765,421	5,938,383
NOI (50% Expenses	2,486,651	2,561,251	2,638,088	2,717,231	2,798,748	2,882,710	2,969,192
Discount Factors @20%	0.232568	0.193807	0.161506	0.134588	0.112157	0.093464	0.077887
Discounted Cash Flows	578,316	496,388	426,067	365,707	313,899	269,430	231,261

Period	Year 15	Year 16	Year 17	Year 18	Year 19	Year 20
Fill Yards	625,000	625,000	625,000	625,000	625,000	625,000
Gross Income (+3%/yr	6,116,535	6,300,031	6,489,032	6,683,703	6,884,214	7,090,740
NOI (50% Expenses	3,058,267	3,150,015	3,244,516	3,341,851	3,442,107	3,545,370
Discount Factors @20%	0.064905	0.054088	0.045073	0.037561	0.031301	0.026084
Discounted Cash Flows	198,497	170,378	146,240	125,523	107,741	92,477

Cumulative Present Worth of Cash Flows: **Rounded to : \$11,333,000**

The DOR contends that BFI's discounted cash flow (DCF) is incomplete in that it fails to capture all of the improvement value.

BOARD'S DISCUSSION

The Board's discussion will address three issues:

- ~~1.~~ Market value for the subject property for tax years 1997 and 1999.
- ~~2.~~ The 1996 Value Before Reappraisal (VBR).
- ~~3.~~ This Board's jurisdiction to conduct a hearing and grant sanctions, attorney's fees and costs

This Board does not consider DOR appraiser Jim Fairbanks an expert in landfill appraisal, but it is our position he can offer an opinion of value as an appraiser for the Montana Department of Revenue. It is also evident that the experts identified by the taxpayer in this appeal are the same that offered testimony in ECR. Their expertise in landfill appraisal clearly exceeds that of any DOR appraiser that offered testimony or opinions of value. This administrative body is the finder of fact, and therefore, must consider all evidence and testimony properly put before us. In *Dept. of Revenue v. Countryside Village, 205 Mont. 51, 64-65 (1983)*, the Court said, *The statutory procedures for the determination of tax protests must be followed, and in this case they require that STAB proceed to take evidence with respect to the individual protestors to determine if their individual properties have been overvalued in accordance with the criteria which we adopted from Maxwell v. Shivers (1965), 257 Iowa 575, 133 N.W.2d*

709, 711; *Department of Revenue v. State Tax Appeal Board*, 613 P.2d at 695. Based on that evidence, in protests over which STAB now has jurisdiction, it may affirm, modify or reverse the decision of the County Tax Appeal Boards. (emphasis added)

Blair v. Potter, 132 Mont. 176, 315 P.2d 177. Tax appeal boards are particularly suited for settling disputes over the appropriate valuation of a given piece of property or a particular improvement, and the judiciary cannot properly interfere with that function. (emphasis added)

Taxpayer's appraiser, Jerry Jones, was qualified by the Board as an expert in the area of appraisal of sanitary landfills in the ECR appeal; therefore, it was not necessary to establish his qualifications in the present appeal. Exhibit #1 (hereafter 1st appraisal) and Exhibit #2 (hereafter 2nd appraisal) show that Mr. Jones employed the income approach to establish market value. As previously stated in the taxpayers' contentions, the difference in market value between the two appraisals is a result of a host fee and higher tipping fees in 1999. This income approach is consistent with the method in ECR. The Board ruled in ECR that the taxpayer's appraisal did capture the market value of the land and what has been identified as compliance items, but not the value of the structural and on-site improvements. (ECR v. DOR, PT-1997-47, PT-1997-48 & PT-1998-3R) "...The structural improvements clearly have

value. At the end of the life of the landfill, a decision will be made as to the future use of these improvements. They could remain on the property, be sold and transferred to another location or simply dismantled. Based on the lease agreement, title of these improvements passes to the lessor if the improvements are left behind. This is not the case with the compliance items. The refuse encased must remain and be monitored for an extended period of time, therefore, it becomes a part of the land, and title for the land does not transfer. It is the opinion of the Board that if there is any value attributable to the compliance items, they have been recognized in the lease payment made to ECR.

The Board agrees with the DOR that the above-mentioned structural and site improvements have not been valued in the Jones appraisal..."

ECR and the DOR have appealed that decision to the District Court (Montana First Judicial Court, Lewis and Clark County, Elton Campbell Ranches, Inc. vs. Montana Department of Revenue, #BVD 2000-690) pursuant to SMCA 15-2-303, Judicial Review. As of the date of this opinion, the District Court has not issued a ruling.

Throughout the taxpayers' appraisals, the appraiser used the term "underlying real property" or "underlying real estate". In ECR the Board interpreted that to mean the land component and compliance items. In the immediate appeal, when asked the question

of what exactly Mr. Jones meant by using the terms "underlying real property" or "underlying real estate", he stated: "Well, the real property value - real estate is defined as, I'll answer this way, real estate is defined as an identifiable parcel of land and appurtenances thereto, or improvements. Real property, on the other hand, is all the inherent rights that goes with the ownership of real estate. And, in my interpretation, I'm using, maybe mingling both of these together. I think my assignment is to appraise the taxable real estate and improvements and all the interest that go with those two elements." (BFI transcript, page 26, lines 14-22, Vol. I)

Mr. Jones assignment can best be exemplified by his testimony: "That the most appropriate methodology to isolate the element that I was to appraise was the rent, or royalty method that I used in both cases. I did not use the sales comparison approach. I did consider all three approaches as required. However, the lack of sales - there are landfill sales out there, but I did not find the sale of the underlying real property element. These sales have been - primarily they're bought by one large landfill company from another, particularly containing a lot of stock transactions. There are too many unsimilar (sic) variables in one landfill to another. They would have to be adjusted for the location, the tipping fees, remaining life, the personal property, real property, the

differences in all these things in a landfill is just a list this long of things going on and on. To try and adjust for these would make you (sic) bottom number that you came out with just really impractical to start with because it was the sale of a going concern that owned real estate in both cases. And I am trying to isolate only the real estate and improvement portion of the landfill. So, therefore, I didn't feel that approach was applicable. The cost approach starts with the land value. Similar land values have a similar highest and best use. I did not find land sales of what I would call truly comparable vacant tracts of land that did sell in the market that's highest and best use were as landfill tracts. Secondly, you have to make sure that all of the applicable accrued depreciation, physical depreciation; functional and/or economic depreciation is taken from cost new of the improvements. In this case, the portion of this property that was actually creating this value, which was the active cell itself, the 16 acres, I believe it was, was some 60 to 70 percent depleted as of my date of my appraisal. Some 60 to 70 percent of the value was gone, so, therefore, depreciation is at such a point that it's really meaningless and the cost approach is most appropriate, the textbook tells us, in new or nearly new properties. And this is not a new or nearly new property." (BFI transcript, page 27, lines 14-22, Vol. I)

It is agreed that the subject is an owner occupied property. Mr. Jones in his appraisals valued the property by the method of discounting the present value of a lease of a landowner. Mr. Jones testified, "What I'm trying to isolate is the taxable portion of this piece of property, which is the real estate and the improvements. And that, in my opinion, is what a lease on a landfill does and all income producing properties, whether they're owner occupied or whether they are leased, are appraised at market value, what they will rent for in the open market and, if you'll allow me, I'll taken a couple of things right out of here, this is the Appraisal of Real Estate, the 11th Edition, which is a publication of the Appraisal Institute. Page 479 of the textbook says, "The valuation of fee simple interest in income producing real estate is based on the market rent the property is capable of generating. To value proposed projects without actual leases, properties leased at market rents and owner-occupied properties, only market rent estimates are used in the income capitalization approach. Rent for a vacant or owner-occupied, this is on page 489, rent for vacant or owner-occupied space is usually estimated at market rent levels. In fee simple valuations, all rentable (sic) space is assumed to be leased at market rent."

The DOR appraiser testified that he is not an expert in appraising landfills. It is the opinion of the Board that not

being an expert does not nullify the fact that they have an assignment and duty as provided by SMCA 15-6-101, 15-7-101 & 15-8-201.

It is undisputed that appraising property of this type is complex in nature, and the necessary data (i.e. income, cost and market) needed to appropriately establish the value is limited or at best difficult to obtain. This does not preclude the DOR appraisers from taking the necessary steps to educate themselves in order to competently appraise a complex property. It is clear to the Board that based on the number of times the DOR's appraised value was modified, the appraisers did not have sound appraisal data or the expertise. It is also evident that the DOR should have sought outside appraisal assistance. As discovered throughout the market value hearing and the sanctions hearing, there were a variety of DOR appraisals for tax year 1997 that were conducted:

Exhibit	Appraiser(s)	Type of Report	Date of Value	Date of Report	Cost Approach	Income Approach	Sales Comparison Approach	Final Value Determination
#23	Hoell & Lennington	Narrative	1/1/96	Unknown	\$6,832,049	\$6,723,734	NA	\$6,723,700
#24	Hoell & Lennington	Narrative	1/1/96	Unknown	\$6,832,049	\$6,829,228	NA	\$6,829,200
County Exhibit H	Hoell	Narrative	1/1/96	11/12/97	\$7,399,600	\$7,137,650	NA	\$7,399,600
#25	Hoell	Narrative	1/1/96	1/21/98	\$7,421,259	\$7,137,650	NA	\$7,421,259
I	Hoell – Appraiser/ Fairbanks - Reviewer	Review	1/1/96	5/7/99	\$10,800,000	\$11,333,000 & \$11,200,000	NA	\$10,800,000
H	Fairbanks	This document was marked as exhibit H but not admitted into the record as explained below.						

The DOR testified that as more information became available,

the value was modified to reflect this new information. This would suggest the appraisal of the landfill was continuously a work in progress.

DOR's exhibit H was presented to the Board and the taxpayer for the first time during the course of the hearing. The document was testified as an appraisal prepared by Jim Fairbanks. The taxpayer objected to the admission of this appraisal based on the grounds that it was never produced, therefore, the taxpayer never had an opportunity to review the document and depose the DOR. The DOR pointed out to the Board that STAB is not bound by the rules of civil procedure and taxpayers' counsel could question Mr. Fairbanks with respect to the document. The Board notes that we are not obligated by the rules of civil procedure, but the DOR had ample opportunity to make a motion to the Board to revise the exhibit list, therefore, any element of surprise would have been eliminated. The DOR indicated that they had no intention of surprising the taxpayer by presenting this appraisal for the first time during the course of the hearing, but that is exactly what took place. The Board denied the admission of the appraisal (Exhibit H) to become a part of the record. It is unfortunate for the DOR and this Board that the DOR did not exchange this document properly; it may in fact have bolstered their position of market value or answered questions the Board had with respect to their valuation. This Board does not have remand authority; therefore we

must base our decision on the appropriately submitted facts, evidence and testimony. **Dept. of Revenue v. Countryside Village, 205 Mont. 51, 64-65 (1983)** Appeals from the County Tax Appeal Board to STAB are governed by Section 15-2-301. The power of STAB in connection with any appeal under Section 15-2-301(4), MCA is to "affirm, reverse or modify any decision" of the County Tax Appeal Board. Although STAB is not a quasi-judicial board, as that term is defined in our statutes, we recognized in Department of Revenue v. Burlington Northern, Inc., (1976), 169 Mont. 202, 545 P.2d 1083 that it could exercise quasi-judicial functions. STAB, however, as an administrative agency, has no mandatory or injunctive powers over DOR, a separate administrative agency. As an administrative agency, STAB has no constitutional or statutory judicial power to remand a matter to the Department of Revenue for reappraisal. When an appeal is taken under Section 15-2-301, MCA, STAB may only affirm, reverse or modify the decision of the County Tax Appeal Board. (emphasis added)

As a point of interest, in ECR the value determined by the DOR kept declining as the appraisals were modified; and in the immediate appeal the value increased as noted below.

ECR
Original Assessment – \$16,145,878
Exhibit 19 - \$9,897,320
Exhibit E - \$4,007,542

BFI
Exhibit #23 - \$6,723,700
Exhibit #24 - \$6,829,200
Missoula CTAB H - \$7,399,600
Exhibit #25 - \$7,421,259

Exhibit I is identified as a review appraisal as stated on the cover page of the exhibit, "Review of an Appraisal Report for property known as MISSOULA BFI LANDFILL, Old Coalmine Road, Missoula, Montana, prepared by Sue Hoell". This report suggests that additional information was discovered; therefore, a new appraised value was rendered. The Dictionary of Real Estate Appraisal, 3rd Edition, defines "review appraiser" as, *An appraiser who examines the reports of other appraisers to determine whether their conclusions are consistent with the data reported and with other generally known information.* It is the opinion of the Board that Mr. Fairbanks' report does review and utilize information from Ms. Hoell's report, but his review exceeds the function of a review appraisal. In addition, his report has established a different opinion of value; therefore, this report is a new appraisal of the subject landfill and must stand on its own merits.

The Board notes that although the **Montana Code Annotated, Title 15, Taxation, and Administrative Rules of Montana, Title 42, Revenue**, may be silent as to compliance with USPAP (Uniform Standards of Professional Appraisal Practice), the DOR appraisers and appraisals should be held to like standards. Both Fairbanks and Hoell recognize this by the inclusion of USPAP in their respective reports.

In Mr. Fairbanks' appraisal the final value conclusion was

based on the cost approach to value. The following is a summarized breakdown of the values applied to the various components of the property as stated in the cost approach section of the report:

Land		
20 acres @ \$20,000/acre	\$ 400,000	
36 acres @ \$ 750/acre	\$ 27,000	
69 acres @ \$ 39.84/acre	<u>\$ 2,749</u>	
Total Land		\$ 429,749
Improvements		
Shop (depreciated)	\$ 26,140	
Gatehouse (depreciated)	\$ 28,020	
Pavement (depreciated)	\$ 15,710	
Fence (depreciated)	\$ 28,510	
Concrete wall (depreciated)	\$ 3,740	
Fuel storage tank (depreciated)	<u>\$ 5,180</u>	
Subtotal		\$ 107,300
Cell development		
Excavation	\$ 8,738,730	
Clay base	\$ 672,210	
Drainage netting	\$ 604,989	
Leach pad liner	\$ 3,794,931	
Polyvinyl liner	\$ 549,990	
Gas extraction	\$ 299,450	
Leachate collection	\$ 90,000	
Gas flare	\$ 60,000	
Sewer line	\$ 77,500	
Settling pond	\$ 127,195	
Testing wells	\$ 22,500	
Bldg permits, legal fees, etc.	<u>\$ 500,000</u>	
Subtotal	\$15,537,495	
Additional costs of engineering & design – 10%	\$ 1,553,750	
Total replacement cost new		\$17,091,245
Depreciation		
Physical depreciation	\$ 0	
Functional obsolescence – 40% (\$17,091,245 X .4)	<u>\$ 6,836,498</u>	
Total depreciation		<u>(\$ 6,836,489)</u>

Total Cost Approach Value \$10,791,796

The report indicates a depreciated value for the shop, gatehouse, pavement, fence, concrete wall, and fuel storage tanks of \$107,300. There is no discussion with respect to the age, quality of construction, condition, etc., which are of considerable importance when establishing the cost new and appropriate depreciation. There is no support in the report for the 40% functional obsolescence. The DOR did identify various cost manuals utilized to establish costs associated with the cell development, but not include copies of the applicable pages. Nor did the DOR offer them as exhibit(s). There is a significant difference in opinions of value, and for the DOR to rely on this method, all appropriate data should have been included. It is puzzling that the DOR could anticipate that a reasoned decision could be rendered without supporting documentation. The Department of Revenue should, however, bear a certain burden of providing documented evidence to support its assessed values. **(Western Airlines, Inc., v. Catherine Michunovich et al., 149 Mont. 347, 428 P.2d 3,(1967).**

It is understandable that if the DOR had difficulty obtaining cost data from BFI, the appraisal process can be very arduous. The Board has no reason to believe the DOR was not attempting to follow its mandate as stated in **§15-8-111, MCA. Assessment - market value standard - exceptions.** (1) All taxable property must be assessed at 100% of its market value except as otherwise provided.

In ECR, the Board opined that the taxpayers' method of appraisal had valued the land and compliance items, but excluded any structural and site improvements. After hearing further testimony, it is the opinion of the majority that the method employed by the taxpayer adequately values the entire property, land, compliance items and structural and site improvements.

The second point to be addressed by the Board is the issue of the VBR.

The property was appraised by the DOR in 1996 at the following values:

1996 Assessment Notice (5/7/96)	
12/16/99 Motion to Abate – exhibit C	
Land	\$2,810
Land	\$175,000
Improvements	\$79,500
Total Value	\$257,310

Statewide reappraisal occurred and the property was then valued as follows:

1997 Assessment Notice (8/31/97)		
Missoula CTAB exhibit #1 (97-28), page 58		
	1997	1996 (VBR)
Land	\$412,000	\$249,243
Improvements	\$6,969,200	\$5,032,470
Total	\$7,398,949	\$5,281,713

In 1995 the DOR discovered from a local newspaper article that BFI had invested approximately 12 million dollars in the landfill. This article prompted the DOR to review the appraised value of the property. It was testified that this investment occurred in 1995. Instead of appraising the expansion in 1996, the DOR waited until

statewide reappraisal was to be implemented in 1997. The DOR proceeded to assess this new property in 1997 pursuant to §15-8-601, MCA, Assessment revision. (1)(b), whenever the department discovers that any taxable property of any person has in any year escaped assessment, been erroneously assessed, or been omitted from taxation, the department may assess the property provided that the property is under the ownership or control of the same person who owned or controlled it at the time it escaped assessment, was erroneously assessed, or omitted from taxation. All revised assessments must be made within 10 years after the end of the calendar year in which the original assessment was or should have been made.

The intent of §15-8-601, MCA, is clear that the DOR has the ability to assess property left off the tax rolls. §15-8-601, MCA (3)(a) Notice of revised assessment pursuant to this section must be made by the department by postpaid letter addressed to the person interested within 10 days after the revised assessment has been made. The original 1997 assessment notice was not marked as revised; it was a product of reappraisal. Based on the language contained in §15-8-601, MCA, and the time the DOR discovered the property was not being properly assessed, the DOR should have revised the notice in 1996. In December of 1999, before the MCTAB hearing on the 1999 appeal, the DOR presented the taxpayer with a

1996 assessment notice. The original 1997 assessment notice clearly indicated that a change in the property occurred when the 1996 value increased from \$257,310 to \$5,281,713. The true market value for the property in 1996 is an unknown. BFI filed a "Motion To Abate" and on matters of STAB's jurisdiction with respect to the DOR revised values. This motion was thoroughly briefed and orally argued on May 24, 2000. On July 27, 2000, the Board denied the "Motion To Abate" and determined it does have jurisdiction to proceed with an appeal on the revised assessment. The Board has not taken testimony to establish if the DOR's evaluation of the VBR is accurate.

Should additional class four property added in 1995, discovered in November of 1995 and appraised in 1997 be phased-in at the original 1996 value (\$257,310) or a true 1996 market value, whatever that may be? It is the opinion of the Board that the DOR, even though they waited approximately a year to follow **§15-8-601, MCA, Assessment revision**, was within their legal mandate to assess escaped, erroneous or omitted property. The aforementioned discussion in no way defends any indication of a VBR, whatever that value may be.

The final point to be addressed is sanctions, attorneys' fees and costs. It is the opinion of the Board that granting sanctions, attorneys' fees and costs go beyond the jurisdiction of this Board. We have the authority to conduct a fact-finding hearing, and the

following discussion will address issues raised at the hearing conducted on January 11th and 12th, 2000.

Total costs being sought by BFI are \$368,193.15 to date. It is anticipated there could be additional costs of approximately \$105,000 in the event of future litigation (District and Supreme Court).

The first point with respect to sanctions is the 1997 market value determined by the DOR. The taxpayers availed themselves of the appeal system because they disputed the 1997 market value. It is BFI's decision as to how aggressively they wish to pursue and present their opinion of value. They retained the services of various appraisal experts to express opinions of value, complexity issues of landfill appraisal, review of DOR appraisals and rebuttal testimony. The Board is faced with valuation issues on a regular basis, and in no instance has sanctions been granted. The DOR appraiser was determined by this Board not to be an expert in landfill appraisal, but it was our opinion that as an employee of the Department, he could express an opinion of value. He must be prepared to defend that opinion when an appeal is filed pursuant to **§15-8-115, MCA**. As previously mentioned, the DOR appraisal(s) that were not admitted into the record possibly caused more harm to the Department's position than the taxpayer. The DOR is correct in that STAB lacks jurisdiction to do what the taxpayer is asking. Our jurisdiction rests with an appeal brought before us with respect to

value. A court of proficient jurisdiction may determine that costs should be awarded.

A second point raised by counsel was that this may have never continued this far if only the DOR had phased in the value at the 1996 market value determination of \$257,310. Pursuant to §15-7-111, MCA, the 1997 taxes would have been calculated based on a phase-in value of \$405,289 versus \$5,760,603:

	<u>Taxpayer Position</u>	<u>DOR's Position</u>
1997 reappraised value	\$7,398,949	\$7,398,949
1996 VBR	<u>\$ 257,310</u>	<u>\$5,727,167</u>
Difference	\$7,398,949	\$1,671,782
Difference	\$7,398,949	\$1,671,782
X 2%	<u>X 2%</u>	<u>X 2%</u>
Amount to be phased-in	\$ 147,979	\$ 33,436
1996 VBR	\$ 257,310	\$5,727,167
Amount to be phased-in	<u>\$ 147,979</u>	<u>\$ 33,436</u>
1997 phase-in value	\$ 405,289	\$5,760,603
Taxable percentage	\$ 16,280	\$ 221,738
1997 mill levy (estimated)	<u>500.00</u>	<u>500.00</u>
1997 taxes	\$ 8,140	\$ 110,869

The calculations listed above are not taken from an exhibit, but are included to illustrate the points made by the taxpayer. The tax statements for various tax years are identified as exhibit #30. Once again, it is entirely a management decision as to how an appellant proceeds. Here the taxpayer contends the VBR has not been applied appropriately, therefore causing great expense. The Board has not heard testimony with respect to the correct VBR. Therefore, we have no opinion as to costs associated with the VBR.

More importantly, there is a jurisdictional issue that has filed by BFI before the District Court.

A third issue is the unnecessary travel of Mr. Stocker to Helena to argue a Motion To Stay Proceedings. The following events took place leading up to this issue:

- ?? The matter of "Market Value" scheduled to be argued in Helena, beginning August 21, 2000.
- ?? July 10, 2000, BFI files "Motion To Continue Hearing" and "Memorandum In Support Of Motion To Continue Hearing". Included in the motion, BFI requests a hearing.
- ?? July 25, 2000, DOR files "Answer Brief Opposing Motion To Continue Hearing; DOR'S Motion To Strike".
- ?? July 26, 2000, the Board "Orders" that oral argument will take place in Helena on August 7, 2000.
- ?? August 7, 2000, the Board "Orders" the August 21 hearing be vacated and rescheduled at a later date.

While the above matters were taking place, counsel at the time for the DOR, Roberta Cross Guns, was indisposed for health reasons. She testified at the hearing on sanctions that she anticipated that she would be healthy enough to proceed with the scheduled hearing. Mr. McCue appeared at the August 7, 2000 hearing and joined the taxpayer in continuing the hearing. Mr. McCue indicated to the Board that it didn't seem possible that Ms. Cross Guns' health would permit to proceed with the hearing scheduled for the week of August 21, 2000. No prior notification was given to the Board or the taxpayer of the DOR's intention to join in the taxpayers' Motion To Continue. The Board and the taxpayer were apprised of this on August 7, 2000, just prior to the hearing, from co-counsel,

Mr. McCue. Ms. Cross Guns testified at the sanctions hearing that an upper management decision was made to join the taxpayers' motion that day based on concerns of her health. Mr. Stocker flew in from Texas to attend the hearing, only to discover that the DOR joined in the motion to continue. BFI contends the DOR knew prior to the hearing that they intended to join in the motion. BFI contends this unnecessary action by the DOR caused BFI considerable expense.

It is the opinion of the Board that the DOR could have made a decision sooner about joining in the motion, therefore avoiding unnecessary travel and expenses incurred by BFI. A court of proficient jurisdiction may determine that costs should be awarded.

A fourth point, Counsel for BFI and the DOR legal department had scheduled a meeting to discuss the possibility of settling the issue on October 24, 2000 in Helena. Counsel for BFI was under the impression that Dave Woodgerd; Chief Legal Counsel for the DOR had the final judgment authority in settlement negotiations. When BFI's counsel showed for the conference, they were informed that Mr. Woodgerd had another meeting, therefore would not be able to meet. Counsel for BFI contends this action by the DOR has caused additional costs to the taxpayer. It is unfortunate that parties did have the opportunity to meet, but there is nothing before the Board that a settlement would have reached. The impression the Board has is that neither party was willing to budge; therefore a hearing on market value was eminent. A court of proficient

jurisdiction may determine that costs should be awarded.

We informed the parties that STAB questioned our authority with respect to granting sanctions, attorneys' fees and costs. As previously stated, it is our opinion that we lack that jurisdiction to grant what BFI is asking, but did consider it necessary for a record to be created.

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ORDER

IT IS THEREFORE ORDERED by the State Tax Appeal Board of the State of Montana that the subject property shall be entered on the tax rolls of Missoula County by the appraisal office of that county for tax year 1997 and 1999 as follows:

<u>Tax Year</u>	<u>Land Value</u>	<u>Improvement Value</u>	<u>Total Market Value</u>
1997	\$75,000	\$2,063,000	\$2,138,000
1999	\$89,560	\$2,149,440	\$2,239,000

The agricultural land remains at the value as determined by the DOR. The appeals of the taxpayer are therefore granted and the decision of the Missoula County Tax Appeal Board is reversed.

Dated this 9th day of February 2001.

BY ORDER OF THE
STATE TAX APPEAL BOARD

(S E A L)

JAN BROWN, Member

JEREANN NELSON, Member

DISSENTING OPINION

Chairman Thornquist dissents from the majority opinion. This dissenting opinion only goes to the 1997 and 1999 market values. I agree with the majority's opinion on the VBR and sanctions.

From the evidence and testimony, it appears that the DOR made numerous attempts to obtain what they consider necessary data from

BFI and at the beginning of their appraisal process and were not given this information. As the appeal process went on, the DOR was able to obtain additional data to continuously update the market value. There is no question that a property of this type is complex and landfills are not frequently traded, therefore limiting the number of sources one would rely upon when appraising a landfill. Construction, especially cell development, appears to be an ongoing process, not only with the subject landfill, but with other landfills across the State of Montana. Cities and counties operate many landfills, and it seems reasonable that construction costs should be obtainable from other governmental agencies. There is no justifiable reason that, when relying on the cost approach to value, the costs of cell development could not be better supported in an appraisal report. There is no dispute that the DOR appraisal(s) conducted over the term of this appeal are insufficient in form and substance to consider them as a defensible indication of market value.

ECR was an appeal of first impression and this appeal, while BFI may be the second to be argued before this Board, still takes on that appearance. In ECR it was our opinion that the taxpayers' method of appraisal valued the land and what was deemed to be compliance items, but excluded any consideration for structural and on-site improvements. The majority and I have moved even farther apart in our opinions. It is not in dispute that the method of

valuing a lease is an appropriate appraisal method; it is my opinion that in the immediate appeal the taxpayers' appraiser is only valuing the land. Mr. Jones testified that he did not consider the cost approach as an appropriate method for a landfill. There were no comparable land sales that were permitted as a landfill; therefore, this portion of the cost approach would not be reliable.

The following discussion will be limited to analyzing ECR's lease since that entire lease is part of the record in ECR, and it was testified to be the most comparable when considering a rent to land income approach. ECR owns the land and leases to Waste Management (hereafter WM) and in return receives a percentage of income generated from the landfill operation. ECR's capital investment in the property is the land. ECR is recovering its investment through annual payments. Everything in the lease suggests that WM owns the improvements. WM also incurs all costs associated with cell development. Why would WM compensate the lessor (ECR) for assets not owned by ECR?

Neither party disputes that it is difficult to separate the value attributable to nonpossessory intangible assets (e.g., going concern value or business value) from that attributable to a possessory real property interest, especially when the business and property at issue are part of an operating business.

Mr. Jones testified that economic obsolescence exists because

the costs associated for the compliance items cannot be fully recovered. Nowhere in his reports was this quantified. Mr. Jones testified as follows:

Question: How – you said the compliance items – and I’m paraphrasing here – have not, or could not be, recovered, is that correct?

Answer: You don’t know that from, well, where that is taken into consideration is in the cost approach itself. It’s a deduction, a major deduction, external obsolescence, and in analyzing this cost approach, and like I said earlier, it was my opinion, after looking at significant factors in this landfill, I didn’t feel that there was adequate information available, adequate data out there, to give me a realistic, market-supported value indication by the cost approach. That would be where it would be seen, an actual number calculation for it. (Jones testimony, pg. 144-145, Vol. #1)

Question: But, you could have done that, if you had done a cost approach, is that correct?

Answer: Yes.

Question: And then identified the loss in value as a portion of it may be attributed to economic obsolescence, is that correct?

Answer: Right. That’s correct.

It appears from the testimony that economic obsolescence has a significant impact on valuing landfills, and if this were to be the case, it would be proper to attempt to quantify the amount.

The method used to value the property by Mr. Jones in his appraisal has been fully discussed. The discounted cash flows are illustrated on pages 16 and 17 of this opinion. Mr. Jones has considered 10% of the gross income for each year for fifteen years and discounted that income at 20%. Are we then to believe that the 90% of the income not considered is attributed to those items not

recognized as class 4 property? Mr. Jones states that he is valuing the underlying real estate by his method, therefore excluding those items that are non-taxable. The permit to operate as a landfill has been one of the many intangible components that have been discussed. It is my opinion that he has valued the permit in his approach. The income stream would not be present if it were not for the permit. Landfills have been litigated in a number of states, and the courts that have considered the issues that are being argued before this Board have reached varying conclusions. Gregg County Appraisal District v. Laidlaw Waste Systems, Inc., 907 S.W.2d 12; 1995 Tex. App. The Court reviewed a decision of the District Court.

... In a series of rulings, the trial court excluded any oral or written expert opinions by Norwood and Jones based upon the "Discounted Cash Flow Analysis," which was the appraisal methodology that utilized such matters as intangibles, government licenses and permits, income stream of the business of Laidlaw Texas, the landfill operation as a "going concern," the marketing, business acumen, and skills of Laidlaw Texas, and that focused on Laidlaw Texas as a going business concern rather than focusing upon the land itself. The trial court noted that it would be deceptive and speculative to try to "take out the intangibles," and then ruled that the appraisal testimony and reports would be excluded under Rule 403 of the TEXAS RULES OF CIVIL EVIDENCE in order to avoid confusion of the issues and to prevent the jury from being misled...

The "Leased Fee Approach," which was used by Jones in his second appraisal, is based upon the views expressed in the Land Appraisal Journal which stated: "An appraiser's obligation is clear. To the extent that business or going concern value exists, it should be recognized as a value separate and distinct from the value of the real property with which it is associated.... Common valuation errors and inclusion of business value may occur if the value of management and retail operations are not excluded when using the income... approach to value." G.R. KARVEL AND P.J. PATCHIN (MAI appraisers), Land Appraisal Journal, October Issue, 1992.

...the income used by the excluded appraisals was income which was generated not only by

the manner in which Laidlaw Texas used the land in question, but by the use of its capital, trucks, equipment, machinery, trained personnel, contracts, and business acumen in running the waste disposal enterprise. Neither of the excluded appraisal reports identifies what part of Laidlaw Texas' income is derived from the land and what part is attributable to the other assets. Though Norwood may have denied that his report included such business matters, the evidence offered at the bill of exceptions hearing shows that he used a methodology of appraisal that relied heavily on intangibles and the business income of Laidlaw Texas. The portions of the appraisals utilizing intangibles and business income would cause confusion to the trier of fact. Thus, the trial court properly excluded the appraisal evidence...

In that case the Court concluded that any evidentiary value from the appraisal was significantly outweighed by their harmful effect and by the risk of confusing the issues. The issues in this case may be similar to the present case, but offer little to no guidance.

In American Sheds, Inc., et al., v. County of Los Angeles, 66 Cal. App. 4th 384; 1998 Cal. App. 744,

...in a real property case, intangibles associated with the realty, such as zoning, permits and licenses, are not real property and may not be taxed as such. However, insofar as such intangibles affect real property's value, for example by enabling its profitable use, they may properly contribute to an assessment of fair market value...

...the board's valuation decision did not on its face violate these rules by including the permits in the property. Indeed, the purpose of the board's (and ASI's) royalty valuation method was to "capture" or impute to the property, only a percentage of the income realizable from the landfill, corresponding to the value of the property to its owner, when leased for landfill use to an operator...

The appraisal method addressed in the aforementioned case is the same that is used by Mr. Jones. ASI disputed the county assessment appeal board's application of a 20% royalty rate and a 12% discount rate. In the present appeal Mr. Jones used a 10% royalty rate and a 20% discount rate.

Waste Management of Wisconsin, Inc. v. Kenosha County Board of Review and Richard Ellison, 516 N.W. 2d 695, 1994 Wisc.

...Waste Management suggests that any assessment under the income approach must be based not on the owner's actual income but on the income the owner could generate by leasing the property to another operator. Only the use of such "rental" income, Waste Management argues, is allowable under the income approach and only rental income will exclude business value generated by the owner from an assessment of the underlying real estate...

...An assessor first determines the net annual income of the property. This figure is reached by deducting operating expenses from the property's gross income. The assessor also selects a capitalization rate by considering the discount and recapture rates suitable for such an investment as well as the applicable effective tax rate. Finally, the assessor applies a capitalization rate to the net annual income to yield the present value of the expected income stream over the life of the property...

In all the aforementioned cases, the method employed by Mr. Jones appears to be widely accepted. I dispute that he has valued all the real property.

In the various DOR appraisals that were presented as exhibits, the DOR attempted to do what the Court said in Waste Management of Wisconsin, Inc. v. Kenosha County Board of Review and Richard Ellison by considering all income to the property. The DOR appraisals fail by providing no factual support for a 50% expense factor (i.e. management, personal property, real estate taxes, etc). In addition, a discount factor of 20% is also unsupported, but is consistent with what Mr. Jones used in his analysis.

The DOR improperly attempted to present updated appraisals and, as previously discussed, they were not exchanged, therefore not admitted. These updated reports may have given support for the

market value and corrected the errors pointed out by the taxpayers' experts that reviewed the DOR's appraisals.

In conclusion, the taxpayer has adequately valued the land and has given no consideration to value attributable to the improvements, whether they are compliance, structural or site improvements; and the appraisals support that. There is insufficient evidence to make an appropriate decision with respect to the full market value of the BFI landfill. What then would the remedy be? The taxpayer clearly believes they have valued all real estate and the DOR's data is insufficient and unsupported to come to a final conclusion. I would have liked to been given the opportunity to review the data or to have given the DOR the opportunity to provide support for their income and cost approaches. This Board lacks remand authority; therefore, it may have been proper to leave the record open for a period of time and let the DOR supplement the record. The majority is convinced that the taxpayer presented sufficient evidence; therefore, it is not necessary at this point to proceed further.

GREGORY A. THORNQUIST (Chairman)

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CONCLUSIONS OF LAW

1. **§15-7-102, MCA**
2. The State Tax Appeal Board has jurisdiction over this matter. **§15-2-301 MCA.**
3. **§15-8-111, MCA. Assessment - market value standard - exceptions.** (1) All taxable property must be assessed at 100% of its market value except as otherwise provided.
4. **15-2-301, MCA, Appeal of county tax appeal board decisions.** (4) In connection with any appeal under this section, the state board is not bound by common law and statutory rules of evidence or rules of discovery and may affirm, reverse, or modify any decision.
5. It is true, as a general rule, that the appraisal of the Department of Revenue is presumed to be correct and that the taxpayer must overcome this presumption. The Department of Revenue should, however, bear a certain burden of providing documented evidence to support its assessed values. (**Western Airlines, Inc., v. Catherine Michunovich et al.**, 149 Mont. 347, 428 P.2d 3, (1967)).
6. Elton Campbell Ranches, Inc. v. DOR, PT-1997-47, PT-1997-48, PT-1998-3R.
7. The majority finds that the evidence presented supports it's finding that the value be modified.

NOTICE: You are entitled to judicial review of this Order in accordance with Section 15-2-303(2), MCA. Judicial review may be obtained by filing a petition in district court within 60 days following the service of this Order.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 9th day of February, 2001, the foregoing Order of the Board was served on the parties hereto by depositing a copy thereof in the U.S. Mails, postage prepaid, addressed to the parties as follows:

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