

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF JEFFERSON

FILED  
IN SUPERIOR COURT

2008 JUL -9 A 9:43

PORT LUDLOW VILLAGE COUNCIL, a )  
Washington Nonprofit Corporation; )  
PORT LUDLOW ASSOCIATES, LLC, a )  
Washington Limited Liability Company; )  
and SOUTH BAY COMMUNITY ASSOCIATION, )  
a Washington Nonprofit Corporation, )

Petitioners, )

vs. )

JEFFERSON COUNTY, a Washington )  
Municipal Corporation; acting through )  
its Department of Community Development )  
and Office of the Hearing Examiner; )  
POPE RESOURCES, a Delaware Limited )  
Partnership; and IRON MOUNTAIN QUARRY, )  
LLC, a Washington Limited Liability )  
Company, )

Respondents. )

Jefferson County  
Clerk's Office  
ORIGINAL

NO. 08-2-00142-2

SENT TO  
EXHIBIT  
CONTROL 7/9/08  
TCB

APPEAL HEARING  
TRANSCRIPT OF PROCEEDINGS

DATE OF PROCEEDINGS: March 14, 2008  
TRANSCRIBED BY: Laurel L. Hall (CSR No. 2277)

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1  
2 APPEARANCES:

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16 Department of Community Development  
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## IRON MOUNTAIN QUARRY APPEAL HEARING

FRIDAY, MARCH 14, 2008

4:57 p.m

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7 MR. CAUSSEAU: Good afternoon, ladies and gentlemen.  
8 We will convene the agenda for Friday, March 14, and consider  
9 the first of three matters that are scheduled for three  
10 o'clock, and that is a code interpretation appeal. The  
11 Appellant is Iron Mountain Quarry, and the appeal is of a  
12 Department of Community Development or County Development --  
13 Community Development Department decision on a request for  
14 code interpretation that was submitted by Iron Mountain  
15 Quarry. And that's solely what we're here to consider today,  
16 is the appeal.

17 And I want to read the request that Iron Mountain  
18 submitted to the County and then provide the County's -- a  
19 summary of the County's response, and then we will proceed  
20 with the hearing from there.

21 Iron Mountain submitted the request on November 30,  
22 2007, and it says "We request an interpretation of JCC  
23 240.20.240. Specifically, we request that the County confirm  
24 that the 10-acre restriction found in JCC 18.20.240(1)(a)  
25 applicable to new mineral resource uses outside of designated

2  
1 mineral resource lands does not apply where the applicant can  
2 demonstrate that the property falls within the nonconforming  
3 mineral use rights established under the Diminishing Asset  
4 Doctrine of McGuire versus City of University Place, May 2001,  
5 Washington Supreme Court case."

6           The County then issued a code interpretation which  
7 stated that in order to proceed with mining more than 10  
8 acres -- and you can correct me if I'm wrong -- but in order  
9 to mine more than 10 acres, the applicant would need to apply  
10 for a mineral resource land overlay and obtain a mineral  
11 resource land overlay. And the Appellant has appealed that  
12 decision of the County, the interpretation of the County of  
13 that section of the code.

14           So specifically we're here this afternoon to consider  
15 a legal argument, and that is whether or not the County  
16 improperly interpreted its code; and to the extent that, you  
17 know, we're talking about whether a mine should be expanded or  
18 impacts of mines or environmental impacts or those types of  
19 things are not relevant to today's hearing. The only thing  
20 we're going to consider today is whether the County legally  
21 interpreted its code. So the testimony will be restricted to  
22 that.

23           The way we're going to proceed this afternoon is we  
24 will first hear presentation from the County regarding the  
25 code interpretation, and then following the County's

2  
1 presentation we'll hear testimony from the Appellant; and then  
2 following that, if anyone desires to speak on the legal issues  
3 regarding the interpretation of the code section or the  
4 applicability of the Washington Supreme Court case, I'd be  
5 willing to hear that as well. But again, as far as testimony  
6 is concerned about the impacts of the mine or ecological  
7 impacts of the mine or whatever, that's not in front of us  
8 because we have no permit or no application at this point to  
9 expand the mine. So at any rate, that's the way we'll do it.

10 For the record, my name is Steve Causseaux. I'm the  
11 Jefferson County Hearings Examiner. I am an attorney in the  
12 private practice of law with the firm of McCarthy, Causseaux &  
13 Hurdelbrink, which is located at 902 South Tenth in Tacoma.

14 Then I'll just ask now if the County -- those of you  
15 in the County that are going to testify this afternoon, do you  
16 want to please stand and raise your right hands to be sworn?

17 (Whereupon, the witnesses were sworn.)

18 MR. CAUSSEAU: Okay. If you could just proceed by  
19 stating your name and position and then going ahead and  
20 presenting what testimony you'd like.

21 MS. FARFAN: Michelle Farfan, Associate Planner in  
22 Jefferson County Department of Community Development.

23 MR. CAUSSEAU: Okay. Can you maybe move the  
24 microphone a little bit closer there, because I can't -- I  
25 can --

2  
1 UNIDENTIFIED SPEAKER: It's not picking up too well.

2 MS. FARFAN: (Inaudible).

3 UNIDENTIFIED SPEAKER: It's plugged in.

4 MR. CAUSSEAUX: That helps.

5 UNIDENTIFIED SPEAKER: Does it go in down here in  
6 front?

7 UNIDENTIFIED SPEAKER: Yeah, it does. Thanks.

8 MR. CAUSSEAUX: Before Ms. Farfan starts, I would  
9 like to say that I did receive this morning, when I got to  
10 work anyway, an Appellant's brief, and I have marked that Log  
11 Item 46. I also received an e-mail from Bert Loomis, which I  
12 marked as Exhibit 47. If you'd like to review that, you can.  
13 Okay. So I've marked that Exhibit 47, Mr. Loomis.

14 UNIDENTIFIED SPEAKER: Excuse me, your Honor. We do  
15 have some preliminary -- we can handle part of our  
16 presentation, but we have some exhibit issues to clear up and  
17 submission of affidavits. But we can do that --

18 MR. CAUSSEAUX: Well, okay. We'll just do that at  
19 your point. Okay.

20 MS. FARFAN: I have additional log items for you to  
21 complete your file.

22 MR. CAUSSEAUX: Oh, okay. Well, maybe I should hold  
23 off marking them. Do you want to introduce those now, since  
24 you've already got them premarked, evidently.

25 MS. FARFAN: Yes. I believe you've got up through --

2  
1 MR. CAUSSEAU: 45 is the last --

2 MS. FARFAN: 45. So this is Log Items 46 through 61.

3 UNIDENTIFIED SPEAKER: 61?

3  
4 And we're caught up on all that, your Honor. We've  
5 received copies of those, and she's prepared a log, I presume,  
6 for the examiner as well.

7 MS. FARFAN: Yes.

8 MR. CAUSSEAU: All right. Then what I'll do is I'll  
9 mark the Appellant's brief. I don't think that's included in  
10 here.

11 UNIDENTIFIED SPEAKER: That has been marked, your  
12 Honor.

13 MR. CAUSSEAU: It has been?

14 UNIDENTIFIED SPEAKER: Yes, it has. That is 57, your  
15 Honor.

16 MS. FARFAN: Yeah --

17 MR. CAUSSEAU: Okay. And then what about Mr.  
18 Loomis' e-mail? Is it included?

19 MS. FARFAN: Yes, it is.

20 UNIDENTIFIED SPEAKER: Several times, and they're all  
21 in their log. I think there was an e-mail version and then a  
22 letter --

23 MR. CAUSSEAU: Okay. This was dated yesterday.

24 MS. FARFAN: Oh. No.

25 UNIDENTIFIED SPEAKER: Do we have that one?

3  
1 MS. FARFAN: No --

2 MR. CAUSSEAUX: All right.

3 MS. FARFAN: -- if it was dated yesterday.

4 MR. CAUSSEAUX: Then I'll -- it's dated Thursday,  
5 March 13. And I will -- I'll go ahead and mark that as Log  
6 Item 46.

7 UNIDENTIFIED SPEAKER: Well, your Honor, I think --

8 MR. CAUSSEAUX: Or, I'm sorry, 62.

9 UNIDENTIFIED SPEAKER: It would be 62, your Honor.

10 MR. CAUSSEAUX: Yeah.

11 UNIDENTIFIED SPEAKER: So we'll arrange to get copies  
12 of that and (inaudible).

13 MR. CAUSSEAUX: Okay. Yeah, we can run copies of  
14 that. Okay.

15 Ms. Farfan, do you want to go ahead and proceed?

16 MS. FARFAN: Yes. As the Examiner stated, this is an  
17 appeal of a code interpretation. The case number is MLA  
18 07-638 in zoning case ZON 07-0098.

19 I'm not sure how you prefer me to go over this. I  
20 haven't been before you. So do you want me to just read  
21 this --

22 MR. CAUSSEAUX: Well, I don't want you to read it.  
23 I -- you know, I'd just like for you to maybe, you know, just  
24 identify the issues and then staff's position.

25 MS. FARFAN: The position is -- from Jefferson County

3  
1 back in 1994, when the County first enacted its interim  
2 mineral land designation, the County required parcels for  
3 mining of 10 acres or greater to go through a mineral resource  
4 land overlay, and that's been consistent through the mineral  
5 resource land of '95. That was Log Item 45, page 9 of 16.  
6 The map was identified in the Jefferson County Comprehensive  
7 Plan.

8 The county comp plan also identifies requirements for  
9 classification of mineral resource lands consistent with the  
10 earlier codes, that they not be adjacent within a half mile of  
11 interim or urban growth areas, of which the Port Ludlow MPR,  
12 as it is known today, at one point in '94 was considered an  
13 interim urban growth area. So the protection standards that  
14 the County imposed for 10 acres or greater on mining was to --  
15 not to be inconsistent with adjacent uses.

16 The staff report identifies the applicable Jefferson  
17 County Comprehensive Plan and goals -- excuse me, the goals  
18 and policies referring to mineral land overlays and mineral  
19 land requirements. The benefit of having a mineral resource  
20 land overlay under the current code is to help protect those  
21 mineral resources from neighboring residential properties that  
22 may find that use incompatible. With a mineral resource land  
23 overlay, a proponent is allowed to do outright mining as a  
24 permitted yes use and would not require a conditional use  
25 permit.

3  
1 I've enclosed in the staff report the matrix out of  
2 the comprehensive plan, which is page 4 of 16 of the staff  
3 report, and then I gave the history of mining in Jefferson  
4 County. I -- you know, I don't know how repetitive you want  
5 me to be on that.

6 MR. CAUSSEAUX: Well, just what you'd like to  
7 emphasize.

8 MS. FARFAN: Well, basically, it was the Growth  
9 Management Act that required the counties to designate mineral  
10 resource lands, and Al Scalf was supposed to be here because  
11 he's very familiar with that and unfortunately had a family  
12 emergency, so I'm not as up to speed as he is on that. But  
13 the County had designated resource lands and was found by the  
14 Western Washington Growth Management Hearing Board that we  
15 didn't designate enough, and then we went back in to designate  
16 more of those.

17 So to be compliant with the Growth Management Act  
18 through our comprehensive plan, we identified these goals and  
19 policies which later became as a process through our Jefferson  
20 County Code or our Unified Development Code, which was adopted  
21 in December of 2000, later codified as Title 18 in the  
22 Jefferson County Code. So I guess that's it for this for now.

23 MR. CAUSSEAUX: Well, let me just ask a couple of  
24 things, then.

25 In response to the applicant's code interpretation,

3  
1 then, it's your interpretation that any -- that -- first of  
2 all, that their mine is not located -- or the area that they  
3 are looking to expand the mine is not located within a mineral  
4 resources overlay. Is that --

5 MS. FARFAN: That's correct.

6 MR. CAUSSEAU: Okay. And so what you're saying,  
7 then, is that JCC 18.20.240 says that since this would be a  
8 new area that they're going into that they would -- that they  
9 could not -- the mine could not exceed 10 acres. Is that --

10 MS. FARFAN: Yes.

4  
11 MR. CAUSSEAU: Okay. And so in order to -- and so  
12 they've said that that's not economically feasible or it won't  
13 work and they want to have more than 10 acres. Is that what  
14 I'm --

15 MS. FARFAN: Yes.

16 MR. CAUSSEAU: Correct me if I'm wrong. I'm trying  
17 to make sure I understand.

18 MS. FARFAN: I believe the area that Iron Mountain  
19 Quarry is looking at is 142 acres --

20 MR. CAUSSEAU: All right.

21 MS. FARFAN: -- that they're leasing from Pope  
22 Resources.

23 MR. CAUSSEAU: Okay. And that is not -- none of  
24 that is in a mineral resources overlay?

25 MS. FARFAN: No.

4  
1 MR. CAUSSEAU: Okay. And so what staff is saying is  
2 that in order to mine that area and disturb more than 10 acres  
3 at a time, you need to get a mineral resources overlay?

4 MS. FARFAN: Correct.

5 MR. CAUSSEAU: Okay. And so then -- I'm looking,  
6 then, at 18.15.040, which is the -- sets forth the uses which  
7 are allowed, and this is a -- the zoning of this is forest  
8 commercial. Is that --

9 MS. FARFAN: Commercial forest, yes.

10 MR. CAUSSEAU: Commercial forest, okay. And under  
11 the chart for commercial forest, it says that mineral  
12 extraction activities without MRL overlay is permitted  
13 outright.

14 MS. FARFAN: Right. But then if you go into Section  
15 18.20.240, (1)(b) identifies "The total disturbed area of  
16 mineral extraction, mining, and quarrying sites (excluding  
17 access roads) and any associated mineral processing activities  
18 shall not exceed 10 acres."

19 MR. CAUSSEAU: Okay. So this section here of the  
20 chart is limited, then, by 18.20.240?

21 MS. FARFAN: Yes.

22 MR. CAUSSEAU: What you've just read?

23 MS. FARFAN: Yes.

24 MR. CAUSSEAU: Okay. All right. Now, on -- you've  
25 also quoted in your staff report 18.20.240(2). It says "The

4  
1 following standards apply to all surface mining and  
2 reclamation activities."

3 Does that mean, then, that the applicant would need  
4 to comply with this even if they are a nonconforming use or  
5 even if they didn't have to get an MRO, or is this only  
6 applicable to mining that occurs in a mineral resource  
7 overlay?

8 MS. FARFAN: It applies to all mining -- mineral  
9 extraction and mining, quarrying activities.

10 MR. CAUSSEAUX: Okay. So regardless of whether --

11 MS. FARFAN: -- you have the MRO --

12 MR. CAUSSEAUX: -- they have to have an -- regardless  
13 of whether the ruling -- regardless of which way, they would  
14 still need to apply, or that they meet all of these standards  
15 that are set forth here in Subsection 2?

16 MS. FARFAN: Yes.

17 MR. CAUSSEAUX: Okay.

18 MS. FARFAN: (2)(a) through (h).

19 MR. CAUSSEAUX: Okay, yes. Now, is it staff's  
20 position that this mine is nonconforming or is it conforming?

21 MS. FARFAN: We haven't determined that at this  
22 point. Typically, when the County requests a proponent to  
23 identify a nonconforming use, we ask for documentation to  
24 support the use that's been going on since the code came into  
25 effect; and at this point we've only had the preapplication

4  
1 consultation in August of 2007. So we have not asked for  
2 documentation other than what was supplied to us in Log Item  
3 22.

4 MR. CAUSSEAU: Okay. So we don't have in front of  
5 us, then, this afternoon a decision or issue of whether or not  
6 we have a nonconforming use?

7 MS. FARFAN: No.

8 MR. CAUSSEAU: Okay. So -- all right. So --

9 MS. FARFAN: I think it's a part of the diminishing  
10 assets. Mr. Moxon may be headed that way.

11 MR. CAUSSEAU: Well, I guess what I'm trying to  
12 figure out is what the -- you know, is what we're looking at.  
13 I know we have the code interpretation, and then secondly I  
14 wanted to -- you know, do we also have an issue of -- I mean  
15 do -- it doesn't appear -- I mean, I don't know. Do we have  
16 an issue before us that needs resolution in this hearing about  
17 whether or not there's a nonconforming or conforming use?

18 MS. FARFAN: Um-hum.

19 MR. CAUSSEAU: Okay. So you want me to make that  
20 decision. Because I didn't see where staff had taken a  
21 position on that, and I think that's what you said --

22 MS. FARFAN: Well, yeah, we didn't. In speaking with  
23 the director and the planning manager, we didn't go that route  
24 as -- normally what happens, we would ask for documentation.  
25 We were under the impression from IMQ that they wanted to

4  
1 proceed with mining without an MRL overlay. They applied for  
2 the code interpretation in relation to the Diminishing Assets  
3 Doctrine. So we did not address the nonconforming aspect  
4 with --

5 MR. CAUSSEAU: You did not consider it relevant?

6 MS. FARFAN: No.

7 MR. CAUSSEAU: Okay. So regardless of whether it's  
8 conforming or nonconforming, if it's nonconforming, it would  
9 be under the Diminishing Assets Doctrine. If it's conforming,  
10 then I guess -- you know, then what?

11 MS. FARFAN: Under the code.

12 MR. CAUSSEAU: Well, I guess in either instance,  
13 whether it's conforming or nonconforming, we still have the  
14 issue of the MRO.

15 MS. FARFAN: Um-hum.

16 MR. CAUSSEAU: All right. I think I understand.  
17 Okay. Does the County have anything further?

18 MS. FARFAN: Not at this time.

19 MR. CAUSSEAU: Okay. Then we'll hear testimony from  
20 the Appellant.

5  
21 MR. MOXON: I think in the beginning, before we do  
22 that, I'd like to introduce an attorney in our office, Dale  
23 Johnson at GordonDerr. My name is Keith Moxon from the law  
24 firm of GordonDerr, and my client, Jim Burnette, of Iron  
25 Mountain Quarry is also here.

5  
1 We have a couple of housekeeping things to take care  
2 of, if we can get some things provided to you that we provided  
3 to the County for the record.

4 MR. CAUSSEAUX: Okay. Do you want to -- are any of  
5 you going to testify? Should I swear you in as a witness?

6 MR. MOXON: We should swear us all in because we're  
7 going to be possibly participating, all of us.

8 MR. CAUSSEAUX: All right.

9 (Whereupon, the witnesses were sworn.)

10 MR. CAUSSEAUX: Thank you. Yeah, you can either --  
11 we have a microphone here, which might be easier to pick up.

12 MR. JOHNSON: Okay.

13 MR. CAUSSEAUX: Could you just identify yourself for  
14 the record?

15 MR. JOHNSON: Yes. This is Dale Johnson. I'm an  
16 attorney with GordonDerr in Seattle, and I represent the  
17 Appellant, Iron Mountain Quarry.

18 Just by way of a housekeeping issue, the packet that  
19 you received from Appellants, I think you indicated you  
20 received it this morning?

21 MR. CAUSSEAUX: Well, it was just a letter.

22 MR. JOHNSON: Oh.

23 MR. CAUSSEAUX: Oh, wait. From -- oh, yes, your --

24 MR. JOHNSON: The Appellant's brief?

25 MR. CAUSSEAUX: I'm sorry. From Appellants, yes.

5  
1 MR. JOHNSON: There were some omissions from that  
2 packet that I would offer at this point which had previously  
3 been provided the County.

4 Exhibit B is the declaration of David Nius  
5 (phonetic).

6 Exhibit E2 -- or an attachment to Exhibit E2 is a map  
7 which is an attachment to the declaration of Mr. John Sell.

8 Exhibit H is the declaration of Mr. James Burnette.

9 And then we omitted a Tab F in your packet, so I  
10 provided that to you as well.

11 MR. CAUSSEAU: Okay. All right. I'll just go ahead  
12 and insert those into the proper places.

13 MR. MOXON: At the outset, I want to clarify,  
14 especially since --

15 MR. CAUSSEAU: Mr. Moxon, could you just identify  
16 yourself?

17 MR. MOXON: Sure. Keith Moxon, attorney at  
18 GordonDerr in Seattle, 2025 First Avenue, and I represent Iron  
19 Mountain Quarry, the Appellant.

20 Because there is substantial public interest for  
21 various reasons, and I think there is some confusion about  
22 what Iron Mountain is requesting and the nature of the relief  
23 sought, I wanted to use an item from a letter that was  
24 included in the packet, Item -- Log Item No. 60, and it's page  
25 4 of 43. And that was one that was just provided to us a few

5  
1 minutes ago. And I'm just going to read one sentence. It  
2 says, "The Applicant proposes to approve the Iron Mountain  
3 project through the code interpretation," and that's really a  
4 good summary of the misapprehension of what's being sought  
5 here.

6 There is no ability by this Appellant, no intent to  
7 circumvent any permit process whatsoever. This is a gateway  
8 issue before we even enter the permit process. Once we're in  
9 that permit process, we face environmental review, we face  
10 storm water review, compliance with all of the performance  
11 standards for mineral operations.

12 This is not even a permit -- threshold permit  
13 decision. This is before any threshold permit decision, and I  
14 wanted to use that statement to clarify that there's no  
15 jumping over any steps here whatsoever. We're talking about  
16 an interpretation that would decide which course we go  
17 through, but in any event, we will be going through a  
18 substantial permit process.

19 The subject of this appeal is whether Jefferson  
20 County is allowed to consider only its development code in  
21 determining an applicant's nonconforming mineral use rights.  
22 Can the County look only at its code, or does the County have  
23 to consider and apply the law of the State of Washington  
24 that's been established by the Washington Supreme Court, and  
25 that's the McGuire decision, University Place -- McGuire

5 1 versus University Place that was adopted -- that decision came  
2 out after the Unified Development Code provision that is at  
3 issue here was adopted. And we have a chronology to sort  
4 those time lines out, which I'll be introducing in a moment.

5 The record shows -- and just, in fact, Ms. Farfan's  
6 comments a few minutes ago suggest, confirm that the County  
7 has not recognized Iron Mountain as a nonconforming use and  
8 hasn't dealt with that issue whatsoever, which is kind of a  
9 surprising statement. They haven't determined at this point,  
10 Ms. Farfan says.

11 Well, we've probably submitted multiple times the  
12 volume of documentation on our nonconforming use right than  
13 Jefferson County has ever sought from any applicant to  
14 establish nonconforming use rights. We have a voluminous  
15 record, aerial photographs, declarations, substantial layers  
16 of proof of the fact of the nonconforming use right.

6 17 In fact, one important fact here is the area that is  
18 the subject of this expansion is part of 182-acre tract, and  
19 we've made that clear from a supplemental declaration from  
20 Pope Resources. There is a unit of property that's the use at  
21 this location. 40 acres of that is the existing Shine Quarry.  
22 142 acres is Iron Mountain's lease area. Within Iron  
23 Mountain's lease area is the original quarrying operations for  
24 Shine Quarry. Not at the present location, but within the  
25 area of our lease.

6  
1 Another misstatement that Ms. Farfan made is that our  
2 proposed expansion is only in Section 29. It's not. It's in  
3 both Section 30 and 29. The majority is in 29, but it butts  
4 up and includes a portion of Section 30. So there's some  
5 important factual discrepancies between -- in what the County  
6 had testified to.

7 What's unusual here is that nonconforming use rights  
8 are typically determined by previous use. But nonconforming  
9 mineral use rights are entitled to special protection under  
10 the Supreme Court's Diminishing Asset Doctrine. Because --  
11 although many nonconforming use rights of other types of  
12 activities can be determined by historical activities, those  
13 in mineral extraction cannot be determined based simply on  
14 past mineral extraction. Washington and other states have  
15 recognized that nonconforming mineral use rights are  
16 different, and they must be determined by looking at the area  
17 that was owned and intended to be used for mineral extraction.  
18 We've provided ample evidence of that.

19 The County has zero evidence on the other side except  
20 speculation that if this interpretation is granted, all of  
21 Pope Resources' property would be opened up for mining.  
22 That's ludicrous, because the only thing that gives us this  
23 opportunity to exercise our nonconforming mineral use rights  
24 is the existence of actual mining in the '70s on this property  
25 that was sustained through the year 2006. There is

6  
1 well-established, uncontroverted evidence of this lease  
2 area -- not the new Shine Quarry -- this lease area of Iron  
3 Mountain being used for mineral resource extraction back to  
4 the '70s before the County even considered mineral regulation.  
5 So limiting mineral use rights to an area that has been mined  
6 in the past would mean that you would never have grandfathered  
7 mineral use rights for these types of uses.

8           And quoting the McGuire decision, which sided with  
9 approval a Supreme Court of Illinois decision, the court said,  
10 "We think that in cases of a diminishing asset, the enterprise  
11 is using all that land which contains the particular asset and  
12 which constitutes an integral part of the operation,  
13 notwithstanding the fact that a particular portion may not yet  
14 be under actual excavation." The idea is that for an  
15 extraction operation, you have to determine the use rights in  
16 an area larger than the past excavation activities.

17           The court went on to say, "It's in the very nature of  
18 such business that reserve areas be maintained which are left  
19 vacant or devoted to incidental uses until they are needed."  
20 And that's exactly the scope of these mineral use rights.

21           Pope is not claiming that they have 72,000 acres of  
22 mineral use rights. They said very clearly in the  
23 supplemental affidavit we provided, their nonconforming use  
24 right claim is this 182-acre parcel, Shine plus Iron Mountain  
25 Quarry.

6  
1           These are rights that have to be determined on time  
2 horizons expanding into 50 years. That's the term the County  
3 uses for determining how to set aside mineral lands. So it  
4 isn't what Iron Mountain needs next year or in two years.  
5 These are 50-year reserves.

6           In fact, the County's own comprehensive plan  
7 regarding mineral lands recognizes nonconforming use rights of  
8 mineral resources, mineral uses that preceded the '95 mineral  
9 lands ordinance. In fact, you'll see this in their  
10 comprehensive plan at page 4-6 under the Natural Resource  
11 Conservation Element, mineral resources, "Uses" -- which  
12 they're referring here to mineral uses -- "legally established  
13 prior to ordinance adoption (i.e., May 25, 1995) are  
14 'grandfathered' with the right to continue as existing uses."  
15 That's exactly the case for the original Shine Quarry that's  
16 within the footprint of our lease, and that is the base of our  
17 lease from which we will continue to expand this nonconforming  
18 use.

19           I think it's important to establish a chronology of  
20 key events, and I have prepared -- and I think -- do we have  
21 that for the County as well -- I'm going to hand up to the  
22 examiner, if I may, and to the County a chronology -- I'm not  
23 going to go through all of this, but this will be a helpful  
24 time line. It's all supported by documents in the record. In  
25 fact, if it's useful to the Examiner, we can submit a

6  
1 supplemental copy of this that will tie it to all the log and  
2 exhibit references that are in the record.

3 But this starts with the 1970's mining operations at  
4 the subject location. It works its way down through the  
7 enactment of the GMA, the County's adoption of its first  
5 mineral lands ordinance, the Shine entry into a 40-acre lease  
6 with Pope, the interim mineral lands resource mapping in '98.

8 Under the date January 16, '01, that's the date the  
9 10-acre limit became effective. I think I heard Ms. Farfan  
10 say that that 10-acre limit was part of the 1994 mineral  
11 lands. It was not. The 10-acre limit on  
12 non-mineral-land-designated property took place in 2001.

13 Later in 2001, the Diminishing Asset Doctrine was  
14 established by the Washington Supreme Court in University  
15 Place versus McGuire.

16 In 2004, Jefferson County expanded the Shine --  
17 allowed the Shine Quarry expansion. It's fairly factually  
18 complicated, but I'm going to walk the Hearing Examiner  
19 through a bit of that history.

20 And then in 2006 Iron Mountain entered agreement for  
21 the Shine Quarry lease and so on, including the administrative  
22 sequence of activities in the recent months.

23 I would also draw the Hearing Examiner's attention to  
24 a couple of key exhibits that constitute this undisputed  
25 record before the Examiner.

7  
1           The first is in our -- attached to our brief. In  
2 that binder attached to our brief, there are exhibits, and  
3 there's a Tab A. And behind Tab A, that's a site map of the  
4 Iron Mountain Quarry lease area. There's a fold-out, 11 by 17  
5 map. There's a vicinity map in color. And in the left side  
6 of that exhibit, you see the existing Shine Quarry as that  
7 white area in the top center of the map. The Iron Mountain  
8 Quarry is sort of a reverse L-shape configuration around that,  
9 completely contiguous.

10           And if you look at the center of the page where  
11 there's a proposed processing/stockpile area in crosshatch,  
12 the lowest crosshatch there in the center, if you look in the  
13 white band just between that and the area up toward the upper  
14 right, you see those closely joined topographic lines. That  
15 is the area of the original Shine Quarry. On this map we  
16 haven't highlighted, but that's worth noting, that that is the  
17 location of the original Shine Quarry. It's in the footprint  
18 of our lease area. It's been there since 1970's. It's been  
19 in operation through 2006 as a support area for the Shine  
20 Quarry. This is an integrated complete unit of mineral  
21 resource activity.

22           The next documents I want to draw your attention  
23 to -- and this gets into an important issue with respect to  
24 the Shine Quarry and this part of that area. If you turn to  
25 Exhibit D, there are a series of fold-out aerial photographs.

7

1           The first is a 1972 aerial photograph, and if you see  
2 that sort of H-shape highway configuration, just to the upper  
3 left-hand -- this is undeveloped at this point, but if you use  
4 that as an orientation, that will show you where the -- to the  
5 top of that photograph kind of centered on that H -- does that  
6 make sense, what I'm talking about, that H location?

7           MR. CAUSSEAU: Um-hum.

8           MR. MOXON: That's the intersection that comes off  
9 104.

10           And if you turn to the next photograph, which is D2,  
11 you'll see in 1979 in our lease area, that's the original  
12 Shine Quarry lease. It's straight up from that H  
13 intersection. That's the original mineral resource activity  
14 in this unit, in this 182-acre unit. And Pope Resources has  
15 declared under oath that that is -- all of the 182 acres is  
16 the area intended, owned and intended to be mined, used for  
17 mineral resources activities.

18           The next photograph shows a 1981 further expansion of  
19 that original Shine Quarry. Now, this is not the new Shine  
20 Quarry. This is the original one in our footprint. That's  
21 1981.

22           The next photo is 1985. Surrounding all of that  
23 original Shine Quarry is land -- is timber harvesting around  
24 the -- basically within the footprint of the 142 acres.

25           Now, you'll see on this photograph in 1985 the

7 1 location of the new Shine Quarry. Up the road you'll see a  
2 cleared area, and that was sometime prior to the time of this  
3 photograph. They began, concurrently with the old Shine  
4 Quarry, to operate this new location.

5 Moving on to D5, a 1990 photograph, continued  
6 operation at the old Shine Quarry and ongoing operation at the  
7 new. This was part of a unit. Both were being operated.

8 1997, still activities, and we can provide you the  
9 originals that show -- you can see the structures and  
10 equipment stored, being used back and forth with the old Shine  
11 Quarry. The new Shine Quarry is becoming more dominant, but  
12 the old -- the previous Shine Quarry, the road is still in  
13 effect. You can see on the originals the materials being  
14 stored on the old Shine Quarry for the purposes of supporting  
15 the quarrying operations.

16 You can see that even better on the next photograph,  
17 D7, a 2003 photograph. You can even see the equipment stored  
18 on the site of the old Shine Quarry. The road is still  
19 maintained. It's been cleared. It's in active use. And the  
20 large Shine Quarry -- the new Shine Quarry is expanding.

21 The final photograph we have is taken in 2005. It  
22 still shows both operations, the old Shine Quarry diminished  
23 compared to the new Shine Quarry, but both are being used.  
24 And we have a clarification in the record from Mr. Burnette  
25 showing that even as late as 2006, the end of 2006, the old

1 Shine Quarry had materials, equipment, explosives being stored  
2 on it in support of the new Shine Quarry, still being operated  
3 as an integral unit.

4 Now, what's important here is that if you look in  
5 Exhibit F, I'm going to show you the mineral land designation  
6 adopted by the County. And the County did what was -- there's  
7 two maps. One is the whole portion of the mineral lands, and  
8 then the -- the one that's really more useful is the second  
9 one that's an enlargement, F2.

10 Jefferson County did what many counties did, although  
11 not all went through so many reenactments with the Growth  
12 Management Hearings Board. But they adopted, as a first cut,  
13 just to make sure they got some mineral lands designated,  
14 protected some of the existing. They said if we see permits  
15 from DNR, we're going to designate those to be mineral lands.

16 Apparently this 13 on the second map is intended to  
17 represent Shine, because if you go to the first page, it says  
18 13. It's got a permit number. It's got "Shine Quarry."  
19 Okay? That shading separates the section line between 29 and  
20 30. 13 is really not where the quarry is. It's in the shaded  
21 area next to it. But that's the designation. And this is  
22 important. And there is a map -- I think it's the one we've  
23 just handed up to you. It's Exhibit E in the packet we just  
24 handed up.

25 MR. CAUSSEAU: Yes.

8  
1 MR. MOXON: Is that the new --

2 MR. CAUSSEAU: Yes.

3 MR. MOXON: I'm going to try to tie these documents  
4 together. I realize it's somewhat complicated. And you might  
5 not have the color -- oh, you probably do have the colored one  
6 there.

7 MR. CAUSSEAU: Is it in here?

8 MR. MOXON: Yes, it is. It's the color 11 by 17 map.  
9 I hope it's in there.

10 MR. CAUSSEAU: Yes.

11 MR. MOXON: Okay. So if you -- I guess if we could  
12 try to orient this the same way -- the highway -- if you look  
13 at this map, the highway is to the left, and the north there  
14 is true north. We've been looking at some of these aerial  
15 photographs where the highway you see would be up on the left  
16 side of this photograph.

17 The important point here is I'm going to link up  
18 Exhibit F2 with this drawing, and that is -- the mineral land  
19 designation for Shine Quarry in 1995 was inclusive only of  
20 Section 30, which is the left-hand side of that white line.  
21 So that's the only mineral land designation that was  
22 designated in 1995. That covered a 20-acre permit that they  
23 had with DNR. That permit did not go outside of Section 30.  
24 And so you have a situation where their mineral land says only  
25 in Section 30, and that's clear on their map; and this drawing

8 1 shows you that even though this was taken in 2003 they were  
2 already beyond that. Their rights were really limited to  
3 Section 30 only. And that white line represents the boundary  
4 of the mineral land.

5 And why is that important? It's important because in  
6 2004 Shine came in and said we want to expand to 40 acres.  
7 And the County said, okay, here you go. And the sequence of  
8 that was they submit an application on May 28, 2004. This is  
9 all in the record. I think it's -- should be Log 4, I  
10 believe. All these documents are in Log 4. Shine comes in --  
11 remember, now, they have an operation that's already crossed  
12 over the line. They're already outside their mineral land,  
13 but they have a lease that says they can be only in Section  
14 30, and they have a mineral land designation that only covers  
15 Section 30, the left side of that white line.

16 Shine comes in in 2004, submits an application in May  
17 28, 2004, gets a determination within less than 30 days. June  
9 18 23, 2004, the County says your application is complete. On  
19 the same day they issue a permit to expand to 40 acres. What  
20 did they allow? They allowed Shine to expand into Section 29  
21 where there's no mineral land whatsoever, and they said we're  
22 doing this under the Diminishing Asset Doctrine.

23 Now, we look at that and we say, well, that makes  
24 sense. It's part of an existing mineral land area, and  
25 they're seeking to expand. But wait a minute. They don't

9

1 have a mineral land designation. The County apparently says,  
2 well, that doesn't matter because you don't need one if you're  
3 existing use, like we are. But they've never been able to  
4 explain to us why is Shine able to expand into a non-mineral  
5 land well in excess of 10 acres. And we've submitted an  
6 affidavit attached to this Exhibit E -- I believe it's with --  
7 isn't that Exhibit E?

8 UNIDENTIFIED SPEAKER: Yeah.

9 MR. MOXON: Mr. Sell, a civil engineer, has  
10 calculated the land area, and he's shown the land covered by  
11 the expansion. The County allowed, in this new drawing of  
12 their lease area, that they approved for expansion 15.2 acres  
13 of lease area in non-mineral lands. They went well over 10  
14 acres. Now, if that makes sense for Shine, it makes sense for  
15 us. And they -- if they applied the Diminishing Asset  
16 Doctrine, they say of course if you're not a new mineral  
17 resource use activity, which we aren't and neither was Shine,  
18 you don't go through this 10-acre limit. You're allowed to  
19 expand. It recognized the Diminishing Asset Doctrine.

20 That's the key puzzle here, is why does Shine have no  
21 problem -- they didn't even have to do a SEPA determination,  
22 there was no environmental review, there was no permit  
23 processing. They just were issued a storm water permit, and  
24 they said go mine. And it's a mystery to us why we aren't  
25 entitled to the same straightforward process, except we're

9  
1 saying we recognize we have to go through SEPA. We recognize  
2 we have to go through permitting processes. We realize we  
3 have environmental review, and we realize we have to meet  
4 these regulatory standards.

5 All we're saying is we enter the permit process the  
6 same way Shine did, which is if you have a nonconforming use,  
7 you proceed with your expansion despite the fact that you  
8 don't have mineral lands and you don't have to go get a  
9 mineral land designation.

10 So what's the code language that applies to this  
11 appeal? It is Section 18.20.240(1)(b). It applies only to  
12 new mineral extraction and mineral processing activities. And  
13 we set this out very clearly in our brief. We are not a new  
14 mineral resource extraction and mineral processing activity.  
15 We've been already longer than the current Shine operation.  
16 We've been here -- this operation on the lease area of Iron  
17 Mountain Quarry has been there since the 1970's. Shine wasn't  
18 even in operation that long.

19 This idea is reinforced by the fact that another  
20 provision of the County's code, 18.20.240(g) under the same  
21 section, specifically allows the expansion of existing gravel  
22 pits and surface mining operations. So the code itself  
23 recognizes that there's a way to grandfather in nonconforming  
24 uses. There's no question in this case, it's undisputed that  
25 mineral extraction and processing took place on this Iron

9  
1 Mountain lease area as far back as the 1970's.

2 Pope has submitted evidence that's undisputed that it  
3 owned and intended this for all of the 142 acres plus the 40  
4 acres of Shine. That's in Log 1. And the County has  
5 responded that, gee, if we recognize this nonconforming use  
6 right, then we'll have to allow mining on all 72,000 acres of  
7 Pope Resources' property. And our response to that is that's  
8 just sheer nonsense. There is no evidence that any land that  
9 doesn't have previous mineral use activities that doesn't have  
10 a clear supporting evidence of being used for mineral  
11 processing could ever been opened up for mining. And nothing  
12 is being opened up for mining. All we're saying is we get  
13 into the permit process without having to go through a  
14 comprehensive plan approval.

15 Why is that important? Because if you have a use  
16 right, you cannot be made to go through a discretionary permit  
17 approval. And the County of course can't say, well, of course  
18 we'll give you mineral resource land designation because they  
19 might not. And the very fact of that being a discretionary  
20 permit decision that they have the right to deny means that we  
21 are being denied our nonconforming use rights, and that's the  
22 rub.

10  
23 There is a -- you'll see in the record some  
24 submittals by people claiming that there's a Texas decision  
25 that shows the nonconforming use rights are set by the lease

10 1 and defined by the lease. It's a very strange case, but the  
2 facts are this. In San Antonio, Texas, the code said that  
3 even if you aren't using property for minerals, if you have a  
4 lease that shows you might in the future, you get to claim  
5 nonconforming use status. That's all that case stands for.  
6 It in no way says that the lease defines the limit of the  
7 mineral use activity.

8 McGuire clearly says how do you determine that?  
9 Evidence. And the evidence that the court in McGuire sought  
10 was evidence of the use of -- intent and ownership of the land  
11 owner. What's interesting in the McGuire case, that wasn't  
12 even the same person as the miner. This was an owner who had  
13 purchased this 1.4 acre parcel of property. Your Honor might  
14 have even been involved in that case for all I know. I don't  
15 know if that was the facts or not. But the 1.4 acres was  
16 being developed for a shopping center. So it didn't require  
17 that the original owner, the original landholder, the original  
18 mineral leaseholder, any of that be the claimant for the  
19 nonconforming use. It was just land that fit within the  
20 overall scheme of mining just like ours does.

21 So really the key issue is the County's  
22 interpretation of what's a new mineral use, and there is no  
23 explanation of that term in the County's code interpretation.  
24 They don't say anything about it. They don't even mention in  
25 the code interpretation itself or the staff report anything

10 1 about Washington Supreme Court law and what that means on  
2 their code interpretation. They're simply looking at their  
3 code and saying based on our code only, here's what we decide.  
4 And our contention is you can't do that. You have to look at  
5 what the law of the land is, what the Washington Supreme Court  
6 says is the rule for defining mineral uses, nonconforming  
7 mineral uses.

8           There seems to be a suggestion in the staff report,  
9 which is at Log 45, that says the County could rely on whether  
10 the mineral use is currently operating under an SM6. And  
11 that's a very strange argument, because it's like they're  
12 saying, well, if we see a mining operation like Shine had an  
13 SM6, then we would consider that to be a nonconforming use.  
14 What's bizarre about that is the SM6 is not a DNR permission.  
15 It is a county -- it's a DNR document that the County signs  
16 that says, here you go, we've given you permission to do the  
17 mineral activity in this property. So the County is saying  
18 once we sign that, then we have a DNR form that gives us  
19 permission to give the underlying land use -- it doesn't make  
20 any sense. The key point is that SM6 is a County-signed form  
21 of DNR that simply says we have given this mineral use  
22 permission to expand or to operate.

23           I've been through how the County handled the Shine  
24 expansion. We're not saying that was wrong. We're just  
25 saying if they're doing diminishing assets that way, we fit

10 1 that same pack pattern. Why are they saying in our case they  
2 don't see a Diminishing Asset Doctrine issue? We're entitled  
3 to the same rights.

4 In fact, when they granted that 40-acre expansion,  
5 that was a new expansion, just like ours is, in an area that  
6 hadn't been mined before, and there was no SM6 covering it.  
7 The only documents that they had from DNR was for 20 acres  
8 within Section 30. There's never been a basis that DNR said,  
9 okay, we've approved an expansion to Section 29. That doesn't  
10 exist anywhere in the record.

11 One might worry that if a code interpretation was  
12 granted that it would set in motion mineral activities in an  
13 area that wasn't suitable for it. That would be a problem.  
14 There's no argument from the County that this land is  
15 inappropriate for mineral use. There's no noncompliance with  
16 the standards for designating mineral lands. It's completely  
17 consistent with that. If it's our risk that we won't have  
18 some protection to the mineral resource land until we choose  
19 to obtain a mineral resource land designation, we acknowledge  
20 that's our risk, and we might not have some -- what the County  
21 perceives to be benefits of a designation. We're entitled to  
22 proceed with our nonconforming use rights without having to  
23 wait for the County to give us the go-ahead. And we're not  
24 talking about getting a permit. We're talking about  
25 recognition of our use rights. We agree we must comply with

11 1 SEPA, code and permit requirements for storm water, noise, air  
2 quality, et cetera.

3 Let me just finish up by saying the County hasn't  
4 provided any evidence that this code interpretation requiring  
5 protection of our mineral use rights under McGuire would run  
6 afoul of any comprehensive plan policy. In fact, the  
7 overriding policy in the comprehensive plan in Jefferson  
8 County is facilitate, preserve, and protect mineral uses, and  
9 we are not running afoul of that policy in any way. Nor is  
10 there any evidence that this would conflict with mineral use  
11 designation criteria, as I mentioned under Jefferson County  
12 Code 18.15.17.

13 So Iron Mountain Quarry requests that the Hearing  
14 Examiner direct the Community Development Department to apply  
15 the Diminishing Asset Doctrine to this proposal. We are in  
16 fact asking for that determination. For the County to close  
17 its eyes and say, oh, we didn't know they were giving us any  
18 evidence of nonconforming use is sheer baloney. I'm sorry.  
19 But that's been in their possession since May of 2007. We've  
20 submitted -- and it's all in the record. There are  
21 photographs, there are affidavits, there are maps, there  
22 are -- the record is -- I would warrant that that's more  
23 evidence than the County has ever sought from anybody in the  
24 history of Jefferson County to establish a nonconforming use.  
25 It applies to the 182-acre Pope parcel, not an acre more.

11 1 There is no evidence that any of this would open the door to  
2 anything on any 72,000 acres of mining despite what the  
3 planners would like to see on the headlines in the local  
4 paper.

5 We ask simply that the County be directed to apply  
6 its development code in a manner consistent with Washington  
7 laws established by the Washington Supreme Court. They've  
8 completely covered their eyes and closed their ears to that  
9 case law that directly applies here. In fact, the Hearing  
10 Examiner has an obligation under Section 18.05.085 of the  
11 Unified Development Code to apply case law as a matter that  
12 takes precedent over the code. There's a prescribed priority  
13 for legal authority that puts case law ahead of the  
14 development code.

15 If it's the County's position that its development  
16 code prevails over law established by the Washington Supreme  
17 Court, that position is erroneous and must be reversed, and we  
18 respectfully ask this Examiner -- or ask the Department of  
19 Community Development to recognize the Diminishing Asset  
20 Doctrine and make a determination that the nonconforming use  
21 criteria are met for this subject property.

22 Thank you.

23 MR. CAUSSEAU: So is it your opinion that you're  
24 asking me to -- I wouldn't say overturn, but just not  
25 follow -- in other words, I guess my question is, are you

11 1 saying that the Jefferson County code section, if applied,  
2 would require the mineral resource overlay, but that because  
3 of the Supreme Court decision that it does not?

4 MR. MOXON: They really aren't in conflict, your  
5 Honor, and the reason they aren't is because the code itself  
6 applies only to new mineral resource activities. And just  
7 like they did for the Shine Quarry, they recognized, look,  
8 where there's been mineral resource in this area, in the very  
9 tract that we're asking for this proposal to be accepted for  
10 permit review, there's clear evidence that this is not a new  
11 mineral use activity. So that section doesn't even apply.  
12 That's really how it harmonizes, a nonconforming -- it doesn't  
13 say anything about "and we mean nonconforming use." It -- we  
14 presumed when we saw that, we looked at it and said, well, we  
15 presume that they recognize Diminishing Asset Doctrine and  
16 they can't apply something to a new mineral activity that's in  
17 fact an existing nonconforming use. So they harmonize quite  
18 easily.

19 MR. CAUSSEAU: So you're kind of arguing the  
20 alternative, then. In the first place you're saying we are  
21 not a new mine. Therefore, this section doesn't apply. But  
22 even if you consider it a new mine, then McGuire would  
23 control, and that -- you know, they would -- the Doctrine of  
24 Diminishing Asset would apply?

25 MR. MOXON: Yes. And I guess if the County had come

11 1 up with a definition of new that would create trouble for  
2 us -- I guess I'm mostly saying I don't see that we're arguing  
3 this has to be treated in any way as a new mine; but even if  
4 it does, it has to be reconciled with the overarching  
5 requirement of the Washington Supreme Court that says for  
6 mineral uses you've got to treat them differently. And it  
7 isn't like we're saying we have just a statement from Pope  
8 saying we really want to use this for mine. This has been  
9 used consistently since 1979 for mineral resource activities.  
12 10 Not next door but on our tract. It's been nonstop. There  
11 hasn't been a break.

12 MR. CAUSSEAU: Thank you. Does the Appellant have  
13 anything further to present?

14 MR. MOXON: We have some replacement exhibits.  
15 There's a very important document, I think this October 12  
16 letter that we responded to the County's -- all the County's  
17 arguments about the history of Shine and such. That's  
18 available to you in a black and white, but we think it's much  
19 more useful as a colored red line. We'd like to provide a  
20 copy of that to the Examiner.

21 Are there other exhibits that we were going to put in  
22 that -- these are just simply better copies of the same  
23 documents.

24 MR. CAUSSEAU: Okay. So we could just substitute  
25 them, then.

12 1 MR. MOXON: That's right.

2 MR. CAUSSEAUX: Do you have them marked, which ones  
3 they are?

4 MR. MOXON: I do, yeah. They're Log 26.

5 MR. CAUSSEAUX: Okay. Thank you.

6 MR. MOXON: Oh, and there's -- you may have this,  
7 your Honor. This is the Natural Resource Conservation  
8 Element. I was quoting from that earlier regarding the  
9 grandfather -- do you have that? But is that the right --  
10 have you put that into the log?

11 MS. FARFAN: Yeah. It was --

12 MR. MOXON: Well, I put the whole thing in. You --  
13 I'm sure I put all 45 pages.

14 MR. CAUSSEAUX: Okay, which I don't see a number on  
15 this one. Which log item is that?

16 MR. MOXON: I'm sorry. This would be a new document.  
17 Since it's large -- she has a couple pages of this, but I want  
18 the whole section in there.

19 MR. CAUSSEAUX: Okay.

20 MR. MOXON: Would this be 63, then, your Honor?

21 MR. CAUSSEAUX: Yes. I think I marked Mr. Loomis'  
22 e-mail 62, and I think this next one, then, would be 63.

23 MR. MOXON: Okay. Thank you. Anything else?

24 MR. CAUSSEAUX: Oh, wait a minute. Wait a minute.  
25 You introduced a chronology. I think the chronology would be

12 1 63.

2 MR. MOXON: Sorry, your Honor. You're right.

3 MR. CAUSSEAUX: And then this Natural Resource  
4 Conservation Element would be 64.

5 MR. MOXON: Thank you. And we'll have one more which  
6 we've marked 65. This is just -- this is our marked-up  
7 version of 18.20.240, but it also includes the nonconforming  
8 use rights that are attached.

9 MR. CAUSSEAUX: Thank you.

10 MR. MOXON: And there's one part of that, if I may  
11 take a minute, your Honor. Under the nonconforming use  
12 provisions that follow this 10-acre requirement -- this is  
13 Section 18.20.260. It's the last two pages of that. The  
14 County says for nonconforming uses, you can expand up to 10  
15 percent with a Type 1 permit process; and if you go beyond 10  
16 percent, you have to have a conditional use permit. Well,  
17 even if Shine -- obviously the Diminishing Asset Doctrine  
18 overrides that for mineral lands where you have the state law  
19 saying you can't subject a nonconforming use like that to a  
20 permit process. And they didn't require that for Shine. For  
21 Shine, a 20-acre permit expanding more than 10 percent would  
22 have triggered a conditional use permit, and obviously they  
23 didn't require that for Shine Quarry. They went from 20 to 40  
24 acres without any permit.

25 So it seems clear to us the County really is in

1 fact -- no matter what they say, they are applying, correctly  
2 sometimes, the Diminishing Asset Doctrine by saying, okay,  
3 it's a mineral land, it's been there before, we see it, you  
4 get to expand within the area of intent of the mineral land.

5 MR. CAUSSEAUX: Anything further?

6 MR. MOXON: No. Thank you.

7 MR. CAUSSEAUX: Ms. Farfan, you had your hand up. Do  
8 you want to --

9 MS. FARFAN: Yeah. I'd like to clarify a few things.

10 Early on in Mr. Moxon's testimony, he referred to the  
11 mineral land section of the Jefferson County comp plan, which  
12 states, page 4-6, "The Natural Resource Lands Element and the  
13 Interim Mineral Lands Ordinance (09-0525-95) identify the  
14 extraction of sand, gravel, rock, and minerals as a permitted  
15 use." It further states, "However, a conditional use permit  
16 through a public hearing process is required for related  
17 activities such as rock crushing, asphalt mixing, and concrete  
18 batching."

19 The next point I wanted to clarify, the County's  
20 Interim Mineral Land Ordinance, 06-0705-94, Section 5, No. 2  
21 for properties that were to be classified -- or for owners  
22 that wanted to designate their mineral lands -- or their  
23 property as mineral lands, it had to be comprised of at least  
24 10 acres. So we did have a 10-acre minimum back in 1994,  
25 which had been carried through to our ordinances of today.

12 1 The next point is Shine Quarry has been in existence  
13 2 since 1989 through their DNR permitting. It also did get a  
3 SEPA review, which was done through the Department of Natural  
4 Resources, and that is Log Item 4, page 3 of 54. They issued  
5 a DNS.

6 And in Log Item -- the interim resource map here, Log  
7 Item 57, page 48, which identifies the blue areas from the  
8 county comp plan, my understanding when the County designated  
9 these mineral resource lands, the original permit that DNR  
10 issued for the Shine Quarry was only for 20 acres, although  
11 their lease had been for 40, but it was just the 20 acres. So  
12 the County had only addressed the 20-acre mining that was  
13 under that permit.

14 MR. CAUSSEAU: So essentially you're saying you  
15 don't believe the Shine -- the way the County handled the  
16 Shine expansion would be precedent for --

17 MS. FARFAN: No.

18 MR. CAUSSEAU: -- the way the County would be  
19 handling this?

20 MS. FARFAN: Right.

21 MR. CAUSSEAU: Okay. I would just ask if there's  
22 anyone present that wants to speak on the code interpretation  
23 issues that we have.

24 Okay. I need you to come forward here. I'll swear  
25 you in as a witness.

13 1 (Whereupon, the witness was sworn.)

2 MR. CAUSSEAU: Let's move -- can we move that out of  
3 the way?

4 I need you to state your name and address for me and  
5 spell your last name, please.

6 MR. MASON: Your Honor, my name is Jim Mason, P.O.  
7 Box 43, Aberdeen, Washington. I'm the -- M-a-s-o-n.

8 MR. CAUSSEAU: Thank you.

9 MR. MASON: I just thought you had it.

10 I'm the owner of Shine Quarry, and I just heard Moxon  
11 here say sheer baloney on the County. Now, I've been in  
12 business for 30 years. I owned companies in 15 different  
13 industries, and I just heard a bunch of sheer baloney here.  
14 And the point I wanted to clear up with you, sir -- already  
15 partially cleared up -- Shine Quarry began in 1989.

16 The mining that he's talking about that happened in  
17 the '70s was for a logging road. Shine Quarry has never  
18 operated in that area ever. And I -- they must know that.  
19 The mining that happened in that area was for a logging road.  
20 That is common. That's what you do in areas when you're going  
21 to log. You mine local rock for the road. And Pope  
22 Resources' 72,000 acres, any time they're going to have  
23 logging operations, they're going to mine in that area. So  
24 his argument opens up 72,000 acres because everywhere you log  
25 you're going to open up a small mine like that.

13 1 But I just wanted to create that separation, that  
2 disassociation that Shine Quarry never operated in that area.

3 He also stated that we don't have an SM6 for the  
4 entire 40 acres from the Department of Natural Resources.  
5 That's also untrue. We have an SM6 for the entire 40 acres.

6 Oh, he also testified that Shine Quarry received a  
7 permit in 30 days. It took a year, your Honor.

8 That's all I wanted to state.

9 MR. CAUSSEAU: Thank you, Mr. Mason. Sir?

10 (Whereupon, the witness was sworn.)

11 MR. ARMITAGE: I'm Dave Armitage. I reside at 141  
12 Mount Constance Way in Port Ludlow.

13 MR. CAUSSEAU: Could you spell your last name,  
14 please?

15 MR. ARMITAGE: A-r-m-i-t-a-g-e.

16 MR. CAUSSEAU: Thank you.

17 MR. ARMITAGE: The question I would have today is can  
18 a Diminishing Asset Doctrine be applied to land? And I guess  
19 my question goes back to what was the intent. And I would  
20 suggest that in 1967, when Pope initially started Port Ludlow,  
21 that they were out looking at a village of 6,000 dwellings.  
22 Over 35 years they've promoted Port Ludlow. The amenities,  
23 the trails and such are not -- within the MPR, they trail over  
24 Pope land, and Pope created the trails, and they're an  
25 important part of our community.

13 1 The Timberton Trail, which was formally established  
2 in 2001 but was in existence before then, extends through  
3 Sections 17, 20, and 29. And as I understand the McGuire  
4 doctrine, it's to conserve the rights of a landowner to  
5 economically take advantage of the diminishing assets on their  
6 land, and that the exception to that is if you can show that  
7 they abandoned the right.

8 And what I would submit for your consideration, that  
9 Pope in fact abandoned the right on those lands that abut the  
10 MPR because of the way they treated the MPR. They just -- you  
11 know, trails -- it's like they didn't consider a difference  
12 between the adjacent lands and the MPR. So the trails are  
13 contiguous within and out the MPR. And the Timberton Trail is  
14 just a matter of a couple thousand feet, if that, from the  
15 site that they're looking -- the Iron Mountain folks want.

16 And so it would be my contention that in fact that  
17 Pope for 35 years has promoted the community, and that was the  
18 intent of the use of the land. And if you start to mine it,  
19 you're going to destroy the trails, you're going to be  
20 destroying things, because, I mean, literally, they have to  
21 mine down 40 or 50 feet or whatever it is they drop down. And  
22 so I would submit to you that the diminishing asset -- Pope  
23 gave up that right in '67.

24 With that, if I may --

25 MR. CAUSSEAU: Thank you.

14 1 MR. ARMITAGE: -- I believe their site is part of a  
2 larger parcel of 420 acres.

3 MR. CAUSSEAU: Do you know what our next log number  
4 is?

5 Thank you, Mr. Armitage.

6 I think it's No. 66 that I'm going to mark Mr.  
7 Armitage's comments here, along with his map as Exhibit 66.

8 Does anyone else wish to speak?

9 Mr. Moxon, do you have anything further you want to  
10 add?

11 Rather than do that, I think, Ms. Farfan, I'll ask  
12 you first, but Mr. Moxon is the Appellant. Do you have  
13 anything further you want to add? No? Okay.

14 Mr. Moxon, do you have anything?

15 MR. MOXON: Well, with respect to Mr. Armitage's  
16 concern, I think he's probably right that -- depending on how  
17 Pope has used various parts of this land. If they'd  
18 established recreational trails, I would say they probably  
19 have abandoned -- I don't think any of his comments to be  
20 relevant to this 182-acre parcel, so I guess there's no reason  
21 to disagree with that.

22 Our comments about the SM6 for Pope -- or for the  
23 Shine Quarry -- and if anything was construed to the contrary,  
24 I didn't mean it. We've never said that Shine -- we call it  
25 the old Shine Quarry because this vicinity, you go out there

14 1 and you see there's a road sign that says "Shine Road." This  
2 is the Shine area. We certainly didn't mean that this  
3 operator, who I think has been there the last couple of years  
4 or more, was who operated the older Shine Quarry. We're  
5 calling it the Shine Quarry without any intent to ascribe that  
6 to him or his predecessor.

7 It isn't true that everywhere there are logs it's  
8 going to open up mining. Mining is regulated in Jefferson  
9 County. And our mining is going to be regulated. There is an  
10 exemption only, I think, for 3 acres and smaller mines under  
11 DNR, but everything else is heavily regulated, and it should  
12 be. And we're not saying we aren't a regulated activity.  
13 We're just saying we have to have our use rights recognized in  
14 accordance with the Washington Supreme Court.

15 When I said the SM6, I'm talking about the County  
16 relying on an SM6 before they approved his 2004 -- and I'll  
17 let the record stand for itself. We have a copy of their  
18 application. It was submitted, and one month later it was  
19 approved. So if it took them a year to get it ready, that's  
20 different. The County processed it in 30 days, and that's  
21 clearly the record under Log 4.

22 I would offer for -- and I guess this would be Log  
23 67, and I'll write on that. This is -- and if the County says  
24 they were relying on --

25 Do you have another copy of this?

14 1 MS. FARFAN: Yes.

2 MR. MOXON: And that's a fax received a few days ago  
3 from -- a copy we received from the County. The County  
4 received this from DNR a few days ago.

5 We asked for all the documents related to the  
6 County's reliance on the old permitting that they would have  
7 used in designating the Shine Quarry in 1995. We asked for  
8 all of that. We got one piece of paper -- well, two if you  
9 count the cover sheet that's relevant besides the 2004, 2007.  
10 Mr. Mason is right that the SM6 was granted. I believe it was  
11 granted in 2004, and then they got their SM9 in 2007.

12 This document shows -- and this is the only thing the  
13 County could have relied on in granting Shine. They're  
14 recognizing their 20-acre rights per Section 30. They didn't  
15 even have this until three days ago or March -- I guess they  
16 got it on the 7th. There was nothing in the county files to  
17 support a determination of what part of Shine Quarry should be  
18 designated mineral. They got this a few days ago -- a week  
19 ago today. It clearly confirms that they were only allowed to  
20 be in Section 30, and it clearly confirms that their rights  
21 were limited to 20 acres. And here they come in 2004 with no  
22 other paperwork to rely upon from DNR, as they suggest, and  
23 they grant Shine an expansion of 20 acres into Section 29  
24 without any mineral land. And we think that's the right  
25 result under Diminishing Asset Doctrine, but it can't be the

14 1 right result for one applicant and the wrong result for  
2 another, and we rest our case on that.

3 MR. CAUSSEAUX: Thank you. Mr. Armitage?

4 MR. ARMITAGE: Just in rebuttal, if I could.

5 MR. CAUSSEAUX: Wait, but we have to pick you up, so  
6 you're going to have to --

7 MR. ARMITAGE: As I understand the parcels, the 140  
8 acres or so that Iron Mountain wants is part of a larger  
9 parcel which is 420 acres. And if I understand McGuire, it  
10 applies to the whole or to none. And in -- if Pope gave up  
11 the right on part of the 420 acres, then it gave up the right  
12 on all of the 420 acres, if I understand McGuire correctly.

13 MR. CAUSSEAUX: Thank you. I will go ahead and take  
14 the matter under advisement at this time and will issue a  
15 written decision. Those of you that would like to receive a  
16 copy of that decision may do so by signing in with your name  
17 and address on our sign-up sheet here, and we will mail you a  
18 copy of the decision upon its preparation.

19 Mr. Moxon indicated in part of his presentation, he  
20 wondered if I had anything to do with McGuire, and that's the  
21 first time -- I mean, when you're a hearing examiner for a  
22 while, you have your own cases cited back in front of you --  
23 you know, to you as precedent; but this is the first time I've  
24 ever had one of mine that went to the Supreme Court cited back  
25 to me, so I guess there's a first for everything. But, yeah,

1 I was the examiner that issued the decision in McGuire.

2 Thank you very much, and we're now adjourned.

3 MR. MOXON: Thank you.

4 (Whereupon, at 6:06 p.m., the proceeding was  
5 concluded.)

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