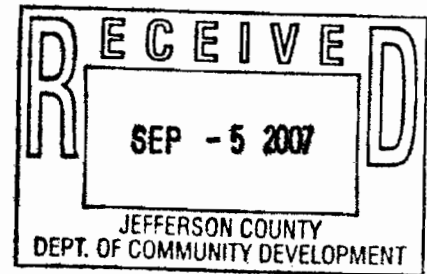


September 5, 2007



Mr. David W. Alvarez  
Jefferson County Prosecuting Attorneys Office  
P.O. Box 1220  
Port Townsend, WA 98368

RE: Iron Mountain Quarry – Proposed Mineral Resource Expansion

Dear Mr. Alvarez:

We represent Iron Mountain Quarry regarding the proposed expansion of mineral resource operations adjacent to and south and east of the existing Shine Quarry hard rock mining operation on the north side of SR 104, mostly in Sections 29 and 30, Township 28, Range 01 East, WM in Jefferson County. Iron Mountain Quarry has mineral lease rights to approximately 140 acres adjacent to and south and east of the existing Shine Quarry operation.<sup>1</sup>

Pope Resources is the owner of the property on which the existing Shine Quarry operation is located and is also the owner of the property on which Iron Mountain Quarry is proposing an expansion of hard rock quarry operations at this location. All of this property is designated Commercial Forest. Mineral extraction is a permitted use in the Commercial Forest designation in Jefferson County.

Under Ordinance #09-0525-95, effective June 5, 1995, the County designated the Shine Quarry site (DNR Permit # 70-012619) and 21 other sites operating under DNR surface mining permits, as "Interim Mineral Resource Lands." However, the County's MRL designation of the Shine Quarry site is ambiguous. The County's Interim Mineral Resource Lands map shows the County's assigned number for the Shine Quarry site (#13) in the southwest quarter of Section 29, but the blue shading on the map, apparently intended to portray the extent of the County's Interim Mineral Resource Lands designation, does not include any land in Section 29. A copy of the County's 1995/1998 Interim Mineral Resource Lands designation map is attached as **Exhibit B** (MRL map dated August 28, 1998). At the time of the 1995/1998 MRL designation, the Shine Quarry was operating in both Section 29 and 30, so the color shading of the MRL map is not an accurate representation of the then-existing mineral operations at the Shine Quarry location.

<sup>1</sup> IMQ's lease area is shown on the drawing prepared by Layton & Sell attached to IMQ's pre-application conference request form, attached as **Exhibit A**. IMQ's lease area is located on the north side of SR 104 about 4 miles west of the Hood Canal bridge. IMQ's lease area lies mostly within Section 29, T28N, R1E, W.M., but the lease area includes small portions of Sections 30, 31, and 32.

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A more significant problem with the County's 1995/1998 MRL designation is that it preceded and so did not take into consideration the effect of the Washington Supreme Court's 2001 decision in *McQuire v. City of University Place*, 144 Wn.2d 640, 30 P.3d 453 (2001), copy attached as **Exhibit C**, which adopted the diminishing asset doctrine as applied to mineral resource uses that preceded local mineral regulations. This diminishing asset doctrine establishes the rule in Washington for defining the geographic scope of mineral resource uses in existence prior to mineral resource regulations. The diminishing asset doctrine is controlling legal authority with respect to Jefferson County's regulation of mineral resource lands.

The Court in *McQuire* determined that the diminishing asset doctrine is applicable to mineral resource uses. Under this doctrine, the area of "use" for mineral excavation activities is properly extended to the "entire tract" intended for mineral use in the future. The area of mineral resource use cannot be arbitrarily limited to the then-existing footprint of mineral resource activities.

[C]ourts have observed that the very nature of the excavating business contemplates the use of land as a whole, not a use limited to a portion of the land already excavated. Such a diminishing-asset enterprise is "using" all of the land contained in a particular asset; as a practical matter it must begin digging at one spot and continue from there to the boundary of its land. The entire tract of a diminishing-assets operation must be regarded as a "lot" within the meaning of an ordinance which permits a nonconforming use to continue on "such lot," for to hold otherwise would be to deny the excavator his use.

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*McQuire*, 144 Wn.2d at 649-50 (quoting Robert M. Anderson, *American Law of Zoning* § 6.52, at 604-05 (3d ed.1986)).

The *McQuire* Court reviewed cases from a number of jurisdictions and concluded that the diminishing asset doctrine must be used in Washington to determine the scope of mineral resources uses existing at the time mineral resource regulations are enacted:

We agree with the overwhelming number of jurisdictions considering the issue. The proper scope of a lawful nonconforming use in an exhaustible resource is the whole parcel of land owned and intended to be used by the owner at the time the zoning ordinance was promulgated. We therefore adopt the doctrine of diminishing asset to determine the lawful scope of the nonconforming use in mining operations.

*Id.* at 651 (emphasis in original).

As applied to Jefferson County's interim designation of mineral resource lands, the ruling in *McQuire* means that the designation of existing mining operations in 1995/1998 should have been based on "the whole parcel of land owned and intended to be used by the owner" at the time of the interim mineral resource lands designation. The scope of the Shine Quarry mineral resource area owned and intended to be used by Pope Resources for mineral resource operations is clearly defined in a letter to Jefferson County from Pope Resources dated May 21, 2007, attached as **Exhibit D**. Pope Resources has confirmed that all of the area proposed to be leased to Iron Mountain Quarry (140 acres) is within an area of known mineral deposits that Pope

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Resources and its predecessor, Pope and Talbot, owned and intended to be used for hard rock mining from the time the first mining occurred at this location in the 1970's. In fact, the location of the original Shine Quarry mining site operated in the 1970's (south and east of the existing Shine Quarry) is entirely within the boundaries of IMQ's 140-acre lease area. See historical area photographs attached as **Exhibit E**.

On May 11, 2007, Mr. Jim Burnett, one of the principals of IMQ, and I met informally with Al Scalf to discuss a number of regulatory issues related to IMQ's proposal to expand quarry operations at this location. One of the topics of discussion was the extent of previous County permitting related to the Shine Quarry mineral resource area. After that meeting, we received and reviewed a copy of the County's file regarding the County's approval on June 23, 2004, of a proposed expansion of mineral operations at Shine Quarry from 20 to 40 acres (MLA04-00314). A copy of that approval is attached as **Exhibit F**. At the time of that approval in 2004, Shine Quarry had a 40 acre surface mine lease with Pope Resources - 20 acres in Section 30 and 20 acres in Section 29. A copy of Pope Resources' 1997 mineral lease for one portion of the Shine Quarry mineral resource area is included in Exhibit F. The County approved the Shine Quarry expansion in 2004 "based on the diminishing asset doctrine." Exhibit F, MLA04-00314, Finding No. 11. This finding confirms that in 2004 Jefferson County was aware of and applied the diminishing asset doctrine when approving mineral use expansions on Pope Resources property at this location.

Pursuant to a number of communications with Community Development staff after the meeting on May 11, 2007, IMQ submitted a request for a pre-application conference regarding IMQ's proposal, a copy of which is attached as Exhibit A. A pre-application conference was held on August 23, 2007. Jim Burnett, Pat Hughes, and I attended for IMQ. Al Scalf and Michelle Farfan attended for Jefferson County.

At this pre-application conference, Mr. Scalf and Ms. Farfan noted that JCC 18.20.240, if applicable to IMQ's proposal, would limit to ten acres the total area of mineral extraction, mining and quarry activities outside of an approved MRL overlay district designation. We explained IMQ's position that the diminishing asset doctrine adopted by the Washington Supreme Court in 2001 must be considered and applied by Jefferson County in regulating mineral resource activities. Our position is that the County's existing MRL designation and mineral resource regulations, if applied without consideration of the diminishing asset doctrine, would fail to protect the legal interests of Pope Resources and IMQ regarding proposed mineral resource uses at this location. The lawful scope of such mineral resource use rights protected under the diminishing asset doctrine includes all of the 140-acre lease area that is the subject of IMQ's proposal.

We believe that the County's current MRL designation and mineral resource regulations are unlawful, if applied in a manner that fails to protect the rights of Pope Resources and IMQ under the diminishing asset doctrine adopted by the Washington Supreme Court in 2001. In addition, the County's 1995/1998 interim MRL mapping is in error to the extent it fails to consider that the actual area of Shine Quarry mining operations at that time was in both Section 29 and Section 30, not just Section 30.

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We note that JCC 18.20.240(1) specifically applies to “all new mineral extraction and mineral processing activities located outside of an approved mineral resource land (MRL) overlay district designation” (emphasis added). IMQ’s proposal is not a new mineral extraction and mineral processing activity. It is a continuation and expansion of well-documented mineral extraction and mineral processing activities that have been occurring at this location since the 1970’s. Applying the “new mineral extraction and mineral processing activities” requirement of JCC 18.20.240(1) to IMQ’s expansion proposal would be in direct conflict with the diminishing asset doctrine adopted by Washington’s highest court in 2001. IMQ’s proposal is well within the scope of mineral resource uses protected by the diminishing asset doctrine, which cannot be extinguished by County mineral use regulations adopted prior to the 2001 *McQuire* decision.

Moreover, as Mr. Burnett explained at the pre-application conference, applying the County’s 10-acre rule in JCC 18.20.240(1)(b) to IMQ’s proposed mineral use expansion would have the effect of an outright prohibition on all of IMQ’s proposed mineral resource activities. A ten-acre limit is not feasible for any state-of-the art hard rock mineral operation and is wholly inadequate to accommodate the quarrying area, the processing area, the shop building and scale house areas, stockpiling areas, and storm water pond areas necessary for IMQ’s operations.

It is not acceptable for the County to respond that IMQ can simply seek an amendment to the Jefferson County Comprehensive Plan by proposing an amendment to expand the MRL designation for this hard rock mining area adjoining the Shine Quarry. First and foremost, IMQ should not be required to seek a Comprehensive Plan amendment to obtain the County’s approval of mineral use rights when the Washington Supreme Court has adopted a clear rule for determining mineral resource use rights in situations such as this. In effect, requiring a Comprehensive Plan amendment to expand an MRL designation would be an outright denial of IMQ’s and the landowner’s existing property rights to proceed with this mineral resource use. Requiring local discretionary approval as a pre-condition to IMQ’s exercising its mineral resource use rights in this case cannot be reconciled with the Washington Supreme Court’s clear mandate that the diminishing asset doctrine must be applied in such circumstances. IMQ’s right to expand mineral resource activities within its 140-acre lease area cannot be made subject to a discretionary County process premised on the County’s right to deny the expansion of the MRL designation. The Washington Supreme Court has determined that the scope of mineral use rights must be based on the diminishing asset doctrine, which requires reliance on the landowner’s control of the land and the landowner’s intent to use the property for mineral resource use activities.

Community Development staff has suggested that, unless clarification regarding the diminishing asset doctrine is provided by the County’s legal counsel, they will deny IMQ’s application for a storm water permit for the proposed mineral resource use and will require a Comprehensive Plan amendment to expand the 1995/1998 MRL designation at this location. As discussed above, such action by the County would constitute a denial of property rights protected by the diminishing asset doctrine. We believe the facts and the law support IMQ’s position that a Comprehensive Plan amendment is not required for IMQ to proceed with its proposal.

There is another compelling reason for not requiring a Comprehensive Plan amendment to expand the MRL designation at this location. Even if the County’s ten-acre limit rule in JCC 18.20.240(1)(b) applied to IMQ’s mineral resource proposal, it would first be necessary to

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determine the proper MRL designation boundaries for this mineral resource area, based on the requirements of the diminishing asset doctrine. A proper MRL designation would have to be consistent with Pope Resources' confirmation of the area it has owned and has intended to be used for hard rock mining since the 1970's. Under the diminishing asset doctrine, the result would be a corrected MRL designation area that would necessarily include all of IMQ's 140-acre lease area.

In further support of IMQ's position, we note that the County did not apply the 10-acre limit of JCC 18.20.240(1)(b) to the Shine Quarry mineral use expansion in 2004. Also, the County acknowledged that its approval of the Shine Quarry expansion in 2004 was based on the diminishing asset doctrine. We understand this to be confirmation of our position that Jefferson County's mineral resource regulations cannot be applied in a manner that over-rides the protection afforded to the landowner and lessee under the diminishing asset doctrine.

Community Development staff has requested that we seek clarification from you regarding the application of the diminishing asset doctrine to IMQ's proposal for expansion of mineral resource activities at this location. Community Development staff has acknowledged that Jefferson County's mineral resource use regulations have not been modified to address requirements of the diminishing asset doctrine. Community Development staff, IMQ and Pope Resources are requesting direction from you to regarding the processing of IMQ's mineral use proposal.

IMQ and Pope Resources request that you provide written clarification to Community Development staff that JCC 18.20.240(1) does not apply to IMQ's proposed expansion of mineral resource activities within IMQ's 140-acre lease area. Specifically, we request that you confirm that the ten-acre limit in JCC 18.20.240 does not apply to IMQ's mineral resource use proposal.

Alternatively, we request that you advise Community Development that the 1995/1998 interim MRL overlay district designation must be interpreted and applied as a matter of law to address the full scope of existing mineral resource activities consistent with the diminishing asset doctrine. For the Shine Quarry site, this would mean an interpretation and application of the existing interim MRL overlay district designation in a manner that would include all of IMQ's 140-acre lease area.

We recognize that Jefferson County has not deliberately chosen to disregard the Washington Supreme Court's adoption of the diminishing asset doctrine, but the County's mineral resource regulations do not adequately protect landowner and lessee rights in existing mineral resource areas in a manner that is consistent with the protections afforded by the diminishing asset doctrine.

My client would like to achieve a cooperative resolution of these mineral resources issues related to its mineral resource use proposal. We believe that is in the interest of IMQ, Pope Resources, and Jefferson County to address these issues without the expense and burden of litigation. However, my client is fully committed to the protection of its rights and interests

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regarding this mineral use proposal and would be compelled to vigorously pursue all avenues to seek relief from any adverse decision of the County in this matter.

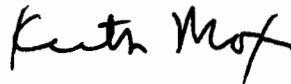
Finally, we want to clarify that our request to have Jefferson County apply the diminishing asset doctrine to IMQ's mineral resource use proposal is intended to confirm the right of Pope Resources and its lessees to continue mineral resource use operations in this area but is not intended to avoid permits and approvals necessary to comply with environmental requirements such as air quality, storm water management, and noise. IMQ is proposing to make a substantial investment in a state-of-the-art hard rock mining operation at this location, which will comply with all applicable state and local environmental standards. IMQ seeks to have a mineral use operation at this location that will be a model business enterprise and will be an example of a private/public partnership that protects the interests of the citizens of Jefferson County.

We appreciate Jefferson County's attention to our request for confirmation that the diminishing asset doctrine applies to the 140-acre mineral resource area that is the subject of IMQ's mineral resource use proposal.

Please feel free to contact me if you have any questions about this request. I would be happy to meet with you at your earliest convenience to discuss a resolution of these issues.

Very truly yours,

GORDONDERR LLP



Keith E. Moxon

KEM:TAD

Attachments

cc: Al Scalf (w/atts.)  
Michelle Farfan (w/atts.)

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