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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF JEFFERSON

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IRON MOUNTAIN QUARRY, LLC, a )  
Washington Limited Liability )  
Company, and POPE RESOURCES, a ) No. 10-2-00181-5  
Delaware Limited Partnership; )  
 )  
Petitioners, )  
 )  
v. )  
 )  
JEFFERSON COUNTY, a Washington )  
Municipal Corporation, acting )  
through its Department of )  
Community Development; and )  
STACIE L. HOSKINS, Planning )  
Manager, Jefferson County )  
Department of Community )  
Development; )  
 )  
Respondents. )

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VERBATIM REPORT OF PROCEEDINGS  
[Motion to Intervene]

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September 3, 2010

Honorable Anna M. Laurie  
Department No. 3  
Kitsap County Superior Court

**APPEARANCES**

Dale Johnson, for Petitioners  
Kenneth Harper, for Respondents  
Leslie A. Powers, for PLVC

CRYSTAL R. McAULIFFE, CCR  
OFFICIAL COURT REPORTER  
KITSAP COUNTY SUPERIOR COURT  
614 DIVISION STREET  
PORT ORCHARD, WA 98366  
(360) 337-7140

**MOTION TO INTERVENE****September 3, 2010****\* \* \* \* \***

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4 THE COURT: Iron Mountain Quarry versus  
5 Jefferson County.

6 Good afternoon, Counsel. I don't believe I  
7 know any of you, so I'm assuming one of you is Leslie  
8 Powers.

9 MR. POWERS: That would be me, Your Honor.

10 THE COURT: All right. Keith Moxon or Dale  
11 Johnson.

12 MR. JOHNSON: I'm Dale Johnson on behalf of  
13 petitioners.

14 THE COURT: Does that leave Kenneth Harper?

15 MR. HARPER: Correct, Your Honor.

16 THE COURT: Counsel, I think with what we've  
17 got here, it might be easier if you sat down there so  
18 you could pull out your books as needed.

19 Let me tell you where I think we need to go  
20 this afternoon. I've had a chance to read the  
21 materials that were submitted, but I will tell you I  
22 have not read every page of these materials. I've  
23 looked at them for the citations that you've given  
24 me, but -- well, this book I have read.

25 So what I've gotten and reviewed more

1 closely was the motion to intervene by the Port  
2 Ludlow Village, the memorandum of authorities and  
3 support of the motion to intervene. The declaration  
4 of Anthony Simpson who was the president of Port  
5 Ludlow Village Council. I wanted to say "club" but  
6 it is "council."

7 And then from Iron Mountain, I received a  
8 response to Port Ludlow Village Council's motion to  
9 intervene, the declaration of Dale Johnson, proposed  
10 orders from everyone.

11 And then from the PLVC, a reply brief of the  
12 intervener, a declaration of Leslie Powers and  
13 another proposed order.

14 From Mr. Harper and the County, basically I  
15 got a one-page thing that said they are okay with the  
16 intervention so long as the hearing date isn't  
17 changed, which is obviously something we need to  
18 address.

19 Now, there's some preliminary matters which  
20 seems like we need to address as well; and, that is,  
21 the motion to strike some of the materials that I  
22 received. And here's how I want to handle that.

23 Mr. Johnson, I know that was your motion.

24 MR. JOHNSON: Yes, Your Honor.

25 THE COURT: I'm going to consider those

1 materials for today's hearing. As I said, I have not  
2 read these things closely, but they do not, by my  
3 consideration today, supplement the official record  
4 of this case, which is set by court order. And I  
5 think we're all clever enough to make those  
6 distinctions, so that was my plan today.

7 What I would like to do is hear from each of  
8 you in turn about the merits of the proposals before  
9 me, and why or why not it's a good idea under the  
10 rules to let the Port Ludlow club come into the  
11 hearing.

12 Now, Mr. Powers, I'm going to start with  
13 you, and presumably end with you as well, so if you  
14 would like to make your pitch.

15 Now, I've read your materials, so I  
16 understand what you are saying. And as I read them,  
17 the concern is that your people have so much at stake  
18 in what's going on up there that they want to be part  
19 of each step of the process.

20 But I know it is more complicated than that,  
21 that's my nutshell version, but I want to be  
22 educated.

23 MR. POWERS: Your Honor, I would like to  
24 deal with -- before I get into the body of this, I  
25 would like to deal with some of the comments that



1 THE COURT: That's right. We're here.

2 It's --

3 MR. POWERS: The answer, however, to that,  
4 then, this goes to the -- to the remaining issues  
5 of -- other than timeliness, the answer to the  
6 petition was -- has only been filed September 1st.  
7 My client has not seen the answer, nor has he seen  
8 the record, nor has it seen the brief that was filed  
9 with the answer. So my client is without actual  
10 knowledge of the scope of Jefferson County's defense  
11 in this matter, and whether it is co-extensive with  
12 my client's interest, until it actually reviews that  
13 it -- they will not be in a position to know that.

14 So our filing was, in fact, protective  
15 because we felt that we were getting toward the  
16 hearing date and we wanted to make our position known  
17 to the court.

18 The authority for the proposition that  
19 timeliness or a delay is -- takes into account --  
20 takes into account the -- the -- all -- all of the  
21 factors of mandatory intervention or nondiscretionary  
22 intervention is set forth in the *Stallworth*  
23 [phonetic] case, and in the Supreme Court opinion in  
24 the *United Airlines versus McDonnell*. Both of them  
25 point to the fact that -- that the intervener also --

1 not only has to have notice of the fact of the  
2 litigation but also has to have notice that it's  
3 right -- that it has rights that are not being  
4 adequately advocated by the parties in the  
5 litigation.

6 There are some statements made in the brief  
7 that go to the identity of the -- Judge Verser's  
8 ruling. The ruling that we were -- to which we  
9 referred is the ruling on CUP attached, it has a copy  
10 Exhibit A and it does make reference to SEPA  
11 compliance.

12 I also want to identify one -- what I would  
13 consider to be a couple of procedural issues that  
14 would possibly be addressed by allowing the  
15 intervention.

16 In the first case, if there is no  
17 intervention because of this structure of the  
18 Jefferson County code, our -- the rights of my client  
19 to -- to appeal will be limited to a LUPA appeal with  
20 the issuance of the actual storm water permit if it  
21 issues at all.

22 That means that whatever the environmental  
23 compliance is, which we would then be appealing, will  
24 have gone through the cost that is associated with  
25 that compliance.

1           If we resolve the matter in -- as it has  
2           been suggested here in -- on September 20th, those  
3           costs may be ameliorated.

4           But until -- the next time when we would  
5           actually have a -- a judicial determination of  
6           whether or not the environmental compliance was  
7           adequate would be in response to a LUPA petition  
8           after the fact.

9           This is the same problem that IMQ has in  
10          this case. The cost will be incurred before a LUPA  
11          petition can actually apply to address whether they  
12          should have been incurred at all.

13          Our only other alternative remedy would be a  
14          writ for -- petition for writ of prohibition and  
15          that's somewhat cumbersome and has the opportunity of  
16          reaching conflicting results with whatever is reached  
17          in this case.

18          But what our preference is, is to  
19          participate in this case so we know what -- what the  
20          actual response of the court is going to be on -- on  
21          the issue of whether or not a determination of  
22          significance should have issued. Whether it should  
23          be continued or whether it should be -- whether it  
24          should be modified.

25          And if it is not continued, can it be

1 re-asserted at a later date in response to further  
2 information that the County may receive and has, in  
3 fact, received in response to the scoping notice.  
4 That said, my client is a not-for-profit corporation.  
5 It is the elective -- it is an elected body that  
6 represents the interest of the land owners and  
7 residence of Port Ludlow. It is -- it is -- it has  
8 been allowed an *ex officio* relationship with the  
9 County in terms of county -- county issues that  
10 directly affect Port Ludlow. And it has been  
11 recognized in several -- several court hearings,  
12 including the Judge Verser's decision on the CUP.

13 It's -- Port Ludlow is a master planned  
14 resort. The application for that was -- was  
15 presented -- was advocated by Pope Resources, the  
16 developer of Port Ludlow. And it was advocated to  
17 avoid the consequences of a Western Washington Growth  
18 Management Hearings Board decision, *Lumas versus Pope*  
19 *Resources* in Jefferson County, which was -- which was  
20 determined against Pope Resources and limited their  
21 lot size to five acres or quarter acre or less that  
22 would be appropriate in an urban growth area. This  
23 is a substitute for urban growth.

24 They could get more density with NPR 1679,  
25 that's what this was all about. To get that

1 classification, Pope Resources make commitments both  
2 to the community and to the county and also to the  
3 state that it would create a master plan resort.

4 Statutorily master plan resort requires a  
5 northerly setting and recreational amenities that are  
6 associated with it for a transient population, as  
7 well as for the population that actually lives in a  
8 resort area itself. That implicates -- implicates  
9 not only the master plan resort area but the area  
10 around it, and, specifically, it denies the right to  
11 develop urban growth around the area.

12 While this is not an urban growth matter, it  
13 certainly is consistent with urban use. It is an  
14 industrial -- it is an industrial site that would be  
15 located contiguous to the master plan resort. And  
16 the objection we would have to it would be the same  
17 thing as urban density and on the boundary of the  
18 resort statutorily improper.

19 That said I would like to go into the issue  
20 of why we think 24(a)(2) allows us -- should allow us  
21 to intervene.

22 It allows -- basically it allows an  
23 intervention on -- on four tests. First, timeliness,  
24 which I appear -- which appears to be -- to have been  
25 resolved.

1           Second, we have to have an interest in the  
2 subject matter of the litigation.

3           Third, the disposition of the subject matter  
4 in the litigation may impair one or more -- the  
5 intervener's rights.

6           And, fourth, we can't be adequately  
7 represented by either party in the litigation.

8           I think the -- the test is well set forth in  
9 *Columbia Gorge*, which I've cited, which both  
10 Mr. Johnson and I have cited as along with  
11 standard -- or *American Discount* as the controlling  
12 Washington authority in the area.

13           The *Columbia Gorge* case as well as *American*  
14 *Discount* take the position that 24(a) is to be  
15 liberally construed. It's -- it remains available at  
16 the discretion of the court even after judgment is  
17 entered.

18           Secondly, the account in *American Discount*  
19 controls. And if you look at the intervention that  
20 we proposed, we are not significantly untimely when  
21 you consider that we don't even know what the extent  
22 is to date of the County's defensive response to this  
23 litigation. And until we know that we are somewhat  
24 blind in the matter.

25           There has been no dispositive hearings in

1 this case and there's been no hearing on the merit.

2 *American Discount* identifies prejudice to  
3 the -- to the defendant as a situation where the  
4 defendant is exposed to additional -- additional  
5 liability, or additional damages as a result of  
6 allowing the intervention. And that would occur  
7 when -- for example, the statute of limitations would  
8 have cut off the intervener's rights, but for the  
9 relation back of the -- of the case in which the  
10 intervention occurred. Under those circumstances,  
11 *Columbia Gorge* would find that there was a prejudice.

12 In this case the -- they also -- *Columbia*  
13 *Gorge* also identified some other consideration that  
14 should be -- should be -- to which we should respond.

15 We have to identify a threatened interest --  
16 we need to identify the reason for the delay and we  
17 need to look at the adverse impact on the delay -- on  
18 the -- that the delay has caused.

19 The motion to intervene here as in *Columbia*  
20 *Gorge* is brought before judgment and it was brought  
21 before substantive action. There were no statute of  
22 limitation issues and there are none here.

23 There are no damage issues here. The  
24 intervention is -- is on behalf of the defendant  
25 county and the intervener seeks no damages.

1           We -- the Court in *Columbia Gorge* also  
2           considered prejudice. There is no -- as in *Columbia*  
3           *Gorge* there's no prejudice here. The court in  
4           *Columbia Gorge* relied on an eighth circuit case *Mille*  
5           *Lacs Band of Chippewa Indians versus Minnesota*, and  
6           it said that prejudice does not mean simply  
7           inconvenience or extra bother having an intervener it  
8           requires, nor does it mean simply litigation cost or  
9           delay but it requires substantive damages. There are  
10          none here.

11           *Columbia Gorge* also said that -- that the  
12          showing that we are required to make in terms of  
13          interest is not very -- is not very high.

14           The claim does not require a showing and --  
15          a measure, it only takes a minimal showing that  
16          interest may not be adequately represented. The  
17          question is whether the County in this case will make  
18          all of our arguments.

19           While we don't know that without seeing the  
20          County's response, it is reasonable to -- to assume  
21          that there may be arguments that the -- that Port  
22          Ludlow would -- the PLVC would make that the County  
23          would not. For example, the maintenance and issues  
24          that relate to the maintenance and the -- and the  
25          location and treatment of the trail system which

1 is -- lies within 600 yards or so of this pit.

2 In applying the authority, the Court in  
3 *Columbia Gorge* allowed the Yakima Nation to come in.  
4 They did not rely much -- much on the issue of  
5 whether or not there had been unreasonable delay.  
6 They relied more on the issue that there were no  
7 substantive rulings. There was no damage claim. And  
8 in there like here, the party intervener had been a  
9 party in the administrative actions below, and the  
10 position of the intervener was well-known to the  
11 parties in the case in May.

12 We think that we -- that we are -- we fall  
13 within the protection of *Columbia Gorge*. Like the  
14 Yakima Nation, PLVC claims no damages, it also  
15 participated below.

16 Second, the intervention is filed before  
17 judgment and before any dispositive rulings on  
18 dispositive motions.

19 Third, we are -- we're not claiming any  
20 right that's affected by the statute of limitations.

21 Fourth, PLVC has made a showing of a direct  
22 interest in maintaining the trail and an indirect  
23 interest as a representative body of Port Ludlow's  
24 residence. That showing should be sufficient to meet  
25 a minimum interest in the subject matter.

1           Finally -- or fifth, Jefferson County, I  
2 believe, will admit that -- that while the PLVC may  
3 share some issues with it, and I think this will be  
4 revealed in its answer, not all issues raised by the  
5 PLVC will be issues that are raised -- raised in  
6 defense by the County.

7           And, finally, related to that issue, the  
8 answer to the -- by the County was only filed two  
9 days ago. We have not had a chance to see it. And  
10 so we really can't -- we can't respond to whether or  
11 not the County is -- has a position extensive with  
12 ours.

13           Declarations of our -- PLVC's president  
14 shows that -- shows that IMQ's environmental  
15 responses are -- are inadequate in a number of ways.

16           First, the Washington State Department of  
17 Transportation filed a response to the scoping notice  
18 questioning Pope Resources' right to grant access to  
19 Highway 104 on the roadway now services the small pit  
20 that's located continuous to the expansion.

21           And as far as I know, the Department of  
22 Transportation's position remains the same that that  
23 access is denied. If it is denied, then the only  
24 other roadway system that's reasonably available is  
25 the roadway system on Highway 19, which brings the --

1 the trucking in and out to -- within two miles or so  
2 of the Oak Bay Road that is the entryway to Port  
3 Ludlow.

4 Second, the -- we believe and we've  
5 consulted with a mineral geologist who has looked at  
6 this information -- it's Dr. Finney who has looked at  
7 this information for us -- that the pit -- that the  
8 description of the market for the pit's products is  
9 not accurate -- not adequate. It is too large a pit  
10 to serve the county. It basically produced -- will  
11 produce at least half of the County's requirements at  
12 a time when there are several other pits that are  
13 available.

14 So our question was: Have they really  
15 described the market? Which also then raises the  
16 question of what their transportation has been  
17 adequately identified.

18 If the market is North Kitsap County and  
19 Jefferson County, it may not be an issue on Oak  
20 Bay -- as to the access of Oak Bay -- over Oak Bay  
21 Road that goes to our -- goes to the master plan  
22 resort.

23 On the other hand, if they are planning to  
24 barge this out of -- barge this to another market,  
25 say, either Seattle or California, that that's going

1 to likely go out on the -- on the dock that serves  
2 Mats Mats of the glacier has been improving.

3 So we think that -- we're not persuaded that  
4 the -- and we have said so that they adequately  
5 described the market or the transportation issues.

6 THE COURT: Mr. Powers, this isn't the only  
7 case I have this afternoon, so I'm going to ask you  
8 to in the next five minutes or so --

9 MR. POWERS: Sure. I'll move it along.

10 IMQ's treatment of dust noise and reasonable  
11 solutions doesn't take into consideration that they  
12 have not addressed the removal of the ridge barrier  
13 that would otherwise separate the quarry from Port  
14 Ludlow. The ridge was, at one point, to be left in  
15 place and now it is to be removed as part of the  
16 quarry operation.

17 The trail discussion, we believe, is  
18 inadequate because there is actually one of the  
19 parcels that the trail system has easements over is  
20 implicated by the -- by the quarry itself.

21 Finally, we don't think the hydrology and  
22 the geotech analysis is adequate since it doesn't  
23 independently investigate how the aquifers are  
24 perched or situated on the salt shield that they  
25 plan -- that they plan to quarry.

1           IMQ's response -- we think IMQ jumped the  
2           gun in filing this motion for cert. We think that  
3           they should have waited -- they should have responded  
4           to the scoping notice and waited to see what -- what  
5           the other responses were to develop a mitigation plan  
6           that might have allowed them to -- to reduce or  
7           eliminate the determination with significance. They  
8           chose not to do this and they chose to simply file  
9           their action.

10           And we think that they didn't exhaust either  
11           their administrative remedies nor have they made a  
12           real attempt to deal with the information that --  
13           much that we have filed here and much of which we  
14           already filed in the -- as a response to the scoping  
15           notice.

16           It is convenient for IMQ not to have the  
17           Port Ludlow as a participant in the discussions, and  
18           that, in effect, would happen if this determination  
19           of significance is enjoined and a modified  
20           determination of significance is substituted. We  
21           simply -- this is attached to a Type 1 permit. We  
22           will not be given notice beyond what our scoping  
23           comments are.

24           And we won't even be given notice when the  
25           storm water permit issues. We have to continue to

1       interrogate the county to find out what is happening  
2       with this.

3                 Unlike an EIS process where we would --  
4       there would be hearings on the interim portions of  
5       the plan, as well as on the environmental impact  
6       statement itself.

7                 We think that it is appropriate for us to  
8       intervene to make these arguments to the Court. And  
9       we would rather make them, in the interest of  
10      judicial economy when the court is -- when the Court  
11      is addressing IMQ's motion, which also asked the  
12      Court to provide -- to permanently bar or enjoin the  
13      County from issuing or continuing its determination  
14      of significance.

15                I think that in itself is inappropriate,  
16      because the determination of significance -- any  
17      determination is threshold in nature. There's no  
18      guarantee under quality lot that it be continued, or  
19      that anyone can rely on it. And it can be at the  
20      instance of the permit -- the punitive permit used  
21      removed, reduced, or modified.

22                So the argument that they -- that the IMQ is  
23      being unjustly deprived of a right, which is --  
24      underlies the *Sultan* case is simply not the case.  
25      The *Sultan* case never addressed these issues. It

1 never addressed whether there was anything else that  
2 could have been done, and it never -- and it found --  
3 parenthetically it found against the -- the petition  
4 for writ.

5 THE COURT: Mr. Powers, another minute.

6 MR. POWERS: That's all I have to say.

7 THE COURT: All right. Mr. Harper, what's  
8 the County's position, other than what you told me?

9 MR. HARPER: Your Honor, that's essentially  
10 it. We think IMQ requested writ made this  
11 intervention likely, maybe inevitable.

12 On the other hand, the County is very  
13 interested in seeing this case brought to a  
14 conclusion. We think it is in the best interest of  
15 the public and to have Your Honor rule on the writ  
16 request.

17 I think Mr. Powers is correct, the County's  
18 interest are somewhat different than PLVC's  
19 interests, because we don't have a position on the  
20 underlying project, on the underlying permit  
21 application. We're trying to see the SEPA process  
22 resume. So, to that, I have nothing to add.

23 Essentially, it is what I said in my court  
24 pleading. We regret this may lead to delay. We have  
25 no other opposition otherwise.

1 THE COURT: All right. Mr. Johnson.

2 MR. JOHNSON: Your Honor, I'll try to  
3 confine my remarks to the test under Civil Rule 24(a)  
4 for intervention as attempting it is to address  
5 PLVC's substantive arguments on the base this case,  
6 so I'll avoid?

7 Mr. Powers has set forth the test that the  
8 Court must use to assess the application for  
9 intervention on behalf of PLVC in this matter  
10 accurately.

11 I would ask the Court, however, to be  
12 reminded of the fact that it is assessing this  
13 request for intervention in the context of the very  
14 narrow issue that is presented for the Court's  
15 resolution on this constitutional writ of certiorari;  
16 and, that is, whether the County's determination of  
17 significance was arbitrary and capricious based upon  
18 the record before the County at the time that  
19 decision was made and the procedures or lack of  
20 procedures relating to the issuance of that decision.

21 That's important to remember, because under  
22 SEPA in the Jefferson County code, the point that  
23 decision was made, the Port Ludlow Village Council  
24 nor any other member of the public was a party to  
25 that transaction; that is, to the permit application

1 and the associated threshold determination.

2 Let me just touch on the four elements of  
3 the test.

4 First of all, timeliness. I heard the Court  
5 say you considered their motion to be timely. I  
6 didn't understand the Court to have concluded that  
7 they had satisfied the timeliness prong of the test  
8 and I would therefore like to address that.

9 As Mr. Powers noted, timeliness is measured  
10 by the opportunity to identify the threatened  
11 interest on the part of the applicant for  
12 intervention. The reason for the delay; and any  
13 adverse impact of the -- of the delayed intervention  
14 to the original parties; that is, IMQ or petitioners  
15 we also represent Pope Resources, and, obviously, the  
16 other party here is the County.

17 Now, as to adequacy of notice, IMQ provided  
18 members of the Port Ludlow community and members of  
19 the local press and many others with their  
20 application materials back in February.

21 Mr. Powers has acknowledged that they have  
22 known about this application essentially since it was  
23 filed.

24 Mr. Powers doesn't dispute that they have  
25 known about this constitutional writ of certiorari

1 since just shortly after it was filed in April.

2 And here we are a few days after we have  
3 filed our brief in this case, 4 or 5 days after  
4 Mr. Harper has filed his brief in this case, which  
5 clearly sets forth the County's defenses, and just a  
6 handful of court days before the hearing on the  
7 merits of the writ review, and -- and we're asked to  
8 allow this community organization to intervene. That  
9 delay and -- and I would just say, while the County  
10 and IMQ may not agree on much in this case, one thing  
11 we do agree on based on Mr. Harpers response to this  
12 request is delayed and not in the best interest of  
13 either my clients or in the interest of Jefferson  
14 County and its citizens in that Mr. Harper's lack of  
15 objection to the motion to intervene is -- is taken  
16 subject to the provision that there not be additional  
17 delay in this case.

18 It seems to me that there will be additional  
19 delay in this case if the inter -- if the applicants  
20 for intervention are allowed to intervene.

21 We simply aren't prepared to nor are we  
22 obligated to respond to what has been put before the  
23 Court on this motion to the extent it was in support  
24 of the motion to intervene. It is understandable the  
25 Court is considering that. But to the extent it is

1 intended to address the merits, there's simply no way  
2 we're going to be able to respond to those arguments  
3 before the hearing on -- that's scheduled for the  
4 20th of this month.

5 I would also note that -- a substantial  
6 ruling in this matter, in fact, has occurred. And  
7 that is the court's order; that is, the Jefferson  
8 County's court order to issue a writ of certiorari.  
9 Rather, in this case, that allows this court to  
10 continue with its review. That is the order. That  
11 is the ruling. That was the result of the  
12 stipulation between the County and the petitioners  
13 that set this case on track to resolution on the 20th  
14 of this month.

15 The limits of the administrative record have  
16 now been set. Although you don't recall meeting us,  
17 we were here once before on a discovery matter. So  
18 there have been discovery matters. You've entered a  
19 case schedule. We've adhered to that briefing,  
20 and five minutes before I received Mr. Harper's  
21 motion -- I'm sorry, response to our -- our  
22 substantive brief in this matter I received this  
23 document, which is Mr. Simpson's declaration with  
24 attachments, and it -- it cites -- it's filled with  
25 documents that are unrelated to the record that the

1 Court has already sanctioned in this matter. There  
2 are no citations to the -- to the record.

3 So, clearly, if we're going have to respond  
4 to this purported evidence, it's going to result in  
5 delay. And delay equals prejudice to my client, Your  
6 Honor. My client has an interest in concluding this  
7 matter and proceeding with its project, proceeding  
8 with the appropriate SEPA process. And the  
9 interveners have an interest in not allowing my  
10 client to do that. Intervention will result in  
11 delay, and that delay will result in prejudice to my  
12 client, and that's more than a matter of  
13 inconvenience.

14 IMQ would be further prejudiced by the  
15 speculative and unfounded allegations that are  
16 included in this submission to the Court and what  
17 presumably would be a submission and support of any  
18 briefing in the future.

19 So we just -- we just don't see how there's  
20 any way delay can be prevented. And because that  
21 delay will result in prejudice, this isn't a timely  
22 application for intervention.

23 Secondly, as a practical and legal matter,  
24 this -- the outcome of this writ review will not  
25 impair Port Ludlow Village Council's ability to

1 protect its asserted interest, which is another prong  
2 of the intervention test.

3 Again, the focus of this proceeding is on a  
4 very limited issue about the impropriety of the  
5 determination of significance that resulted from this  
6 transaction between the County and the petitioners.

7 Port Ludlow Village Council was not a party  
8 to that transaction. They had no right under SEPA or  
9 the Jefferson County code to be a party to that  
10 transaction. SEPA doesn't provide for an opportunity  
11 to -- for the applicant for intervention or any other  
12 member of the public to participate in the threshold  
13 determination process until that process is complete.

14 That's not to say that PLVC doesn't or  
15 shouldn't have a right to participate in the  
16 appropriate SEPA process. And they do, and they  
17 should. And my clients have never suggested  
18 otherwise, and don't believe that they should not  
19 have a right to participate as allowed by the  
20 Jefferson County code and state law, specifically  
21 SEPA.

22 Port Ludlow Village Council procedures  
23 interest relate to the SEPA process after the Court  
24 rules on this motion.

25 Just as they would have after the threshold

1 determination would have been made had we not had  
2 result to this court what the threshold determination  
3 should be.

4 And I note -- I noted in Mr. Powers'  
5 argument the cite to *Columbia Gorge* for the  
6 proposition that, quote, if the intervener could have  
7 participated in underlying administrative action, it  
8 has a right to act as a party in the resulting legal  
9 action. They didn't have a right to participate in  
10 the threshold determination. Their right to  
11 participate is after the threshold determination  
12 whether it is a positive determination or a negative  
13 determination.

14 Whether it is a DS that results in an EIS  
15 requirement, and the more robust procedural rights  
16 that the members of the public have or whether it is  
17 a DNS or an MDNS which results in, under the  
18 Jefferson County code, a 14-day notice and comment  
19 period. But that happens after the threshold  
20 determination is made, not before.

21 After the appropriate threshold  
22 determination is reached in this case, Port Ludlow  
23 Village Council will have the rights to review and  
24 comment that it would otherwise have afforded to it  
25 under SEPA and the Jefferson County code.

1 I also note that it appears, and this  
2 relates to my comment on timeliness on whether or  
3 not a substantial ruling has been made in this case,  
4 and it has, by virtue of the issuance of the writ of  
5 review that we've jumped the gun in this case.

6 Well, that -- that's water under the bridge,  
7 Your Honor. We're now here on briefing the merits of  
8 this case to the extent that Port Ludlow Village  
9 Council wants to come along now and challenge the  
10 issuance of the writ. They are late to the game and  
11 there's no -- there's no excuse for them to being  
12 that late to the game.

13 I would also note that they're not similarly  
14 situated with IMQ in that regard, because we have a  
15 specific interest in avoiding an Environmental Impact  
16 Statement in that process if it is not required under  
17 the law, and that's what *Sultan* was all about.  
18 *Sultan* said that the reason that an applicant can  
19 avail itself of the writ, the constitutional writ  
20 processes is because of the -- of the extreme cost  
21 and time associated with an EIS, if it is not  
22 justified.

23 PLVC doesn't suffer from similar  
24 consequences. If at the end of this process PLVC  
25 wants to challenge the outcome on the permit

1 application, including any of the SEPA process, it  
2 has a right to do so. And it is very clearly set  
3 forth in the statute that -- that it must wait until  
4 the final action on the permit application is made to  
5 bring the SEPA challenge.

6 That's when its opportunity to address  
7 either this SEPA issue or any others that might arise  
8 between now and the time the permit application is  
9 issued is allowed.

10 So, clearly, this -- the outcome of this  
11 case will put the applicants for intervention where  
12 they would be at the end of the threshold  
13 determination process. And win or lose, they will be  
14 accorded the rights they are due under the County  
15 code and state law.

16 I would just briefly note on the other two  
17 prongs of the test that the -- that they have --  
18 while Mr. Harper has alluded to some general  
19 differences in the interest between the County and  
20 the applicants for intervention as Mr. Powers has  
21 alluded to some general differences. At the end of  
22 the day, the interests at issue here is an interest  
23 in preserving the determination of significance, and  
24 there's been no showing that the County will not  
25 adequately defend that interest in this case.

1           And I don't -- again, this goes back to  
2           timeliness. Mr. Harper has filed and served his  
3           response to our substantive brief. Had the  
4           interveners chosen to timely file a motion to  
5           intervene, they would have been able to avail  
6           themselves of that. But neither petitioners nor the  
7           County should be prejudiced by their failure to do  
8           so.

9           And simply on the interest issue, without  
10          dwelling on the case law that you've -- you've  
11          already read, Your Honor, PLVC's interest in this  
12          matter simply don't justify intervention.

13          Certainly they are standing in a prior LUPA  
14          appeal doesn't confer status of them as a party in  
15          this case; and, secondly, as -- as noted in *American*  
16          *Discount*, the interest analysis is more nuance than  
17          simply saying we have an interest. It has to be  
18          weighed against the other parties; that is, the  
19          petitioner's and the County's interest and control in  
20          their own lawsuit, and sufficient resolution in the  
21          controversy. And that's not going to happen at this  
22          stage of the game if the interveners are allowed to  
23          intervene.

24          As far as judicial economy is concerned,  
25          again, these applicants for intervention have a right

1 to challenge the SEPA process as it applies to this  
2 permit application at a given point in time and that  
3 is when the final permit is issued.

4 Now, we hope it doesn't come to that. But  
5 that's what the law provides for and SEPA is very  
6 clear on that. As a result, intervention should be  
7 denied. PLVC has failed to meet all four prongs of  
8 the intervention test under 24(a) for intervention as  
9 a matter of right.

10 And it's important to note, again, while we  
11 can banter about case law what is apparent from the  
12 cases addressing analysis of a motion to intervene;  
13 that is, a fact-intensive inquiry, unique case, and  
14 this is a unique case. There aren't other cases on  
15 point out there. And the Court has discretion to  
16 deny the motion to intervene and it should deny the  
17 motion to intervene.

18 And, finally, Your Honor, I'm certain you  
19 want to take this up separately, dependent upon your  
20 ruling; and, that is, the issue of the motion to  
21 strike, the redundant and immaterial evidence that  
22 has been submitted, if, in fact, we're going to move  
23 forward.

24 THE COURT: Thank you.

25 Mr. Powers, I'll give you three more minutes

1 if you would like to respond.

2 MR. POWERS: I will attempt to do so within  
3 those time frames. First, I don't think the decision  
4 to issue the writ to permit this review constitutes a  
5 substantive decision on the merits of this case. It  
6 only allows Your Honor to review what the positions  
7 of the parties.

8 Second, because we're dealing with a  
9 threshold determination that is subject to  
10 modification as the process goes on, and  
11 because most, if not of the submissions that you have  
12 received from us have been over part of the  
13 submission of PLVC in response to the scoping notice,  
14 it seems unclear to me why the scoping notice and  
15 wasn't -- isn't -- and it's response isn't  
16 controlling in this case.

17 Threshold determination are only a part of  
18 the equation. There is no necessity that an EIS ever  
19 be ordered just because a determination of  
20 significance is ordered depending upon the response  
21 of the parties.

22 In this case the response of the party  
23 was to file, rather than to respond to the issues  
24 that were raised by the scoping of the response of  
25 the parties which we tried to avoid the results of

1 the scoping, and to file with the court -- file with  
2 Jefferson County on a writ of cert. That resulted in  
3 a truncated record.

4 The record that you -- that's before this  
5 court is largely the record of what IMQ submitted in  
6 response to the environmental questionnaire, and the  
7 few comments I think the County had on it. It  
8 doesn't include all of the other comments that are  
9 completely relevant to the question of whether an  
10 environmental impact statement should ultimately be  
11 required.

12 The only cost in this case is if -- if the  
13 environmental impact statement should be required and  
14 that can't be determined until after the analysis of  
15 the results of the scoping notice that the County  
16 has, in fact, sent and the responses that the  
17 County's received.

18 Notably absent were of meaningful response  
19 my IMQ on that, instead they filed with the court.  
20 And that is -- that does not seem to put them in a  
21 very good position to show that they have been --  
22 that the County has been arbitrary as to the ultimate  
23 decision which concerns them, which is not the  
24 determination of significance, but the scope of the  
25 environmental compliance to which they will be --

1       which they will be required to respond. They have  
2       not and can't show the determination of significance  
3       as being that important under *Quality Rock* none of  
4       these determinations are -- are -- can be relied on  
5       by any of the parties. And that -- that guidance  
6       by -- in *Quality Rock* seems to have been forgotten in  
7       this case.

8               I think the motion was premature because the  
9       petition was premature because it predated an actual  
10      opportunity to respond to the substantive issues in  
11      the case.

12             The determination is not -- the time  
13      division that the IMQ would urge to you to find is  
14      not the time sequence that is actually important.  
15      Determination -- we didn't -- we did, in fact, have  
16      no ability to respond before a determination was  
17      made.

18             THE COURT: Mr. Powers, I've got to  
19      interrupt you because I have a question that you need  
20      to answer and I don't know if you are going to get to  
21      it. This is a yes or no question.

22             Would you be ready for a hearing on  
23      September 20th?

24             MR. POWERS: Yes, with one qualification.  
25      If so, we would like to get the complete -- the

1       briefs of all the parties by the 10th and have the  
2       opportunity to file our brief in response to all of  
3       them on the 17th.  If that's so, yes, we will be  
4       prepared.

5               THE COURT:  I'm ready to rule on this motion  
6       to intervene.  And I think what we all need to keep  
7       in mind is what I am being asked to do by IMQ.

8               The question before me -- the question that  
9       will be before me on September 20th is whether the  
10       County acted arbitrary and capriciously in issuing  
11       the determination of significance and whether their  
12       process was proper.  That is a uniquely governmental  
13       process.  It is a threshold determination.  No public  
14       input is involved in that decision, and the facts  
15       pertaining to that process are particularly within  
16       the province of the County.

17               What I'm here today to decide is whether  
18       PLVC should intervene in that.  That analysis today,  
19       I believe, requires me to take a step backward and  
20       look at what Civil Rule 24 is intended to do.  Civil  
21       Rule 24 is intended to protect existing rights, not  
22       expand rights.

23               PLVC's motion to intervene is denied.  I am  
24       finding that IMQ's position stood far more persuasive  
25       than PLVC.  It is a narrow question before me and to

1 expand and hijack this writ of certiorari to allow  
2 the intervention of neighborhood groups, even ones  
3 with the quasi-official status of PLVC to expand the  
4 rights give to quality groups under SEPA, and I'm  
5 declining to do that.

6 In terms of the required qualifications for  
7 intervention, first, I'm going to find that despite  
8 the voluminous record presented to me the  
9 petitioners -- or the moving parties today failed in  
10 their burden to show that their interests are not  
11 adequately represented by the County. It is the  
12 County's decision that will be before me, and hearing  
13 from community groups despite their belief that they  
14 have an interest does not advance the claim.

15 This application may have been timely from  
16 the PLVC's standpoint, but it is certainly too little  
17 too late in terms of the overall process. And while  
18 I appreciate that PLVC could be ready to go on  
19 September 20th, it would be ludicrous of me to ask  
20 the other parties already in play to respond to 12  
21 more inches of material than that they have already  
22 had. The record has been set by court order and that  
23 will be the record reviewed.

24 Further, as Mr. Johnson explains, PLVC has a  
25 place in this process and they have the rights that

1 will be attached to whatever decision I make at the  
2 end, but not now, not with this.

3 I'm going to adopt the reasoning set out in  
4 the IMQ brief on the elements and the reasons that  
5 they have not been met. There will be no  
6 intervention. This case will go forward with the  
7 County and with IMQ to determine that.

8 Now, I've been provided with an original  
9 order denying that. It accurately reflects my oral  
10 ruling and I'm going to sign it.

11 Counsel Harper and Counsel Powers, if you  
12 would like to endorse it, you may, but I don't  
13 believe that's required of you.

14 MR. JOHNSON: May I approach, Your Honor?

15 THE COURT: Because of my ruling, I think  
16 that the motion to strike is mooted. We're at recess  
17 in this matter.

18

19

20 [Whereupon, the proceedings  
21 adjourned.]

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