No. 97910-3

(Court of Appeals No. 36334-1-III)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Petitioner,

v.

YAKIMA COUNTY, GRANITE NORTHWEST, INC., FRANK ROWLEY, and THE ROWLEY FAMILY TRUST,

Respondents.

PETITION FOR REVIEW

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INTRODUCTION

Washington law provides a 21-day statute of limitations for appealing local land use decisions and three starting points for that 21-day period depending on how a local government ends its administrative appeal process. Yakima County enacted a County code that mandates one of those three starting points apply to every appeal of a County land use decision. The Yakama Nation timely filed a land use appeal within the statute of limitations under County and Washington law. Now Yakima County argues that it can ignore its code requirement for how administrative appeals end, and to justify this it fabricates a tension between its own code and state law. The trial court rejected the County's arguments. The Court of Appeals reversed.

The Court of Appeals' decision conflicts with this Court's decision in *Habitat Watch v. Skagit Cty.*, 155 Wn.2d 397, 120 P.3d 56 (2005), on the issues of (1) when administrative appeals end under a codified local jurisdiction's process, (2) when land use decisions are issued, and (3) whether the earliest potential commencement of the 21-day limitations period must be accepted as the commencement of that limitations period. The Court of Appeals' decision also conflicts with this Court's long-standing precedent on canons of statutory construction and the axiomatic

requirement in Washington State that county governments are bound by codified law, including their own codes and ordinances.

The Court of Appeals' decision subverts the Land Use Petition Act ("LUPA") and this Court's precedent implementing it. It upends precedent on statutory construction and allows counties to ignore the plain language of their own county codes to their benefit. Given the importance of the public's ability to rely on a county code dictating statutes of limitations for land use appeals, the Court of Appeals' error raises an issue of substantial public interest that warrants review and correction by this Court.

IDENTITY OF PETITIONER

Petitioner is the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"), a federally recognized Native Nation pursuant to its inherent sovereignty and the Treaty with the Yakamas of June 9, 1855. Treaty with the Yakamas, U.S.-Yakama Nation, June 9, 1855, 12 Stat. 951.

COURT OF APPEALS DECISION

On October 29, 2019, the Court of Appeals, Division III, issued a decision reversing the trial court's denial of Respondents' partial motion to dismiss. The Yakama Nation seeks this Court's review of the October

29, 2019 decision. A copy of the decision is included in the Appendix at pages 3 through 23.

ISSUES PRESENTED FOR REVIEW

Where RCW 36.70C.040(4) provides three specific starting points for the 21-day statute of limitations, and where Yakima County codified one of those starting points to apply to all appeals of its land use decisions for purposes of Chapter 36.70C RCW, did the Court of Appeals err in overruling Yakima County Code and applying a different starting point for the statute of limitations to the Yakama Nation's appeal of a Yakima County land use decision?

STATEMENT OF THE CASE

The Confederated Tribes and Bands of the Yakama Nation is a sovereign, federally recognized Native Nation pursuant to the Treaty with the Yakamas of June 9, 1855. 12 Stat. 951. Since time immemorial, the Yakama Nation's ancestors lived in a fishing village at the confluence of the Yakima and Naches Rivers. CP at 33. Numerous recorded archaeological sites are associated with this village site, including a Yakama burial ground and a state-dedicated historical cemetery within Archaeological Site 45YA109. CP at 40-41.

Granite Northwest, Inc. is an international corporation that actively mines gravel within Archaeological Site 45YA109 without holding the

required state archaeological permit. CP at 33. Granite Northwest, Inc. applied to Yakima County for a conditional use permit to expand its gravel mining operation within Archaeological Site 45YA109. CP at 33-34. Despite the Yakama Nation's written objections, Yakima County conditionally issued the permit and a mitigated determination of non-significance under the State Environmental Policy Act. CP at 29.

The Yakama Nation timely appealed Yakima County's land use decision to the Yakima County Hearings Examiner. CP at 29. The Hearing Examiner modified the permit to require that a separate permit from the Washington State Department of Archaeology and Historic Preservation be obtained prior to mining activities in the expansion area, but otherwise affirmed Yakima County's issuance of the permit. CP at 30-31. The Yakama Nation timely appealed the Hearing Examiner's decision to the Board of County Commissioners and requested a closed record hearing. CP at 227-45.

The Board held a public meeting on April 10, 2018, where they rejected the Yakama Nation's closed record hearing request and verbally affirmed the Hearing Examiner's decision. CP at 25. The Board's written decision was not available to the Yakama Nation at the public meeting. On April 13, 2018, Yakima County provided the Yakama Nation with notice of the corresponding Board Resolution 131-2018. CP at 24.

Relying on the plain terms of YCC 16B.09.050(5) and its corresponding statute, RCW 36.70C.040(4)(a), the Yakama Nation filed a land use petition and complaint challenging Yakima County's final "written decision" on May 2, 2018—19 days later. CP at 22.

Defendants Yakima County, Granite Northwest, Inc., and the Rowley Family Trust filed a motion to dismiss the land use petition-related portion of the Yakama Nation's lawsuit. CP at 95-107. Defendants argued that the Yakama Nation filed its land use petition 22 days after the 21-day statute of limitations started to run under RCW 36.70C.040(4)(b). CP at 102. The Yakama Nation responded that Yakima County Code 16B.09.050(5) requires administrative land use appeals to terminate with a "final written decision for the purposes of Chapter 36.70C RCW" and the date when the 21-day statute of limitations commences for written decisions is calculated pursuant to RCW 36.70C.040(4)(a), not subsection (b). CP at 213-14. The Yakama Nation met the statute of limitations requirement under RCW 36.70C.040(4)(a). The trial court agreed, finding that the resolution the County issued must be a "written decision" for purposes of LUPA, that the "written decision" was not issued on April 10, but at the earliest on April 13, 2018, and held that the Yakama Nation timely filed its land use appeal. CP at 264-65.

Defendants appealed. On October 29, 2019, the Court of Appeals reversed the trial court. App. at 22. The Court of Appeals reasoned that the Yakima County Code's requirement that land use decisions terminate with a "final written decision" does not mean that the County must issue a "written decision" under RCW 36.70C.040(4)(a) to end its administrative appeals and start the 21-day limitations period. App. at 19-20. The Court of Appeals held that RCW 36.70C.040(4)(b) applies instead because the County chose to end its administrative appeal process with a resolution rather than a "written decision." App. at 18. The Yakama Nation respectfully seeks this Court's de novo review of that decision.

ARGUMENT

A. This Court Should Grant Review Because The Court Of Appeals Ruled in Conflict With Supreme Court Precedent.

Under RAP 13.4, this Court accepts review of an appeal from the Court of Appeals if the lower court's decision "is in conflict with a decision of the Supreme Court." In this matter the decision of the Court of Appeals conflicts with several of this Court's decisions and, indeed, it conflicts with this Court's long-standing precedent on LUPA specifically, and cannons of statutory interpretation and local jurisdictions' obligations to follow the laws of the state and their own ordinances generally.

1. **The decision below conflicts with this Court's ruling and analysis in *Habitat Watch v. Skagit County*.**

This case is about the point in time when Yakima County ends its administrative process for purposes of LUPA. Yakima County's code codifies that point in time. The County ends the administrative appeal process, under LUPA, with issuance of a "written decision":

> The Board's final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.

YCC 16B.09.050(5). That term of art, "written decision," is an unquestionable reference to LUPA. This codified administrative process therefore prescribes the issuance of "written decisions" as the specific terminating event for Yakima County's administrative appeals under LUPA. And, consequently, when that written decision is issued establishes the starting point for the 21-day limitations period to appeal the land use decision to the superior court.

Under *Habitat Watch v. Skagit Cty.*, this Court held that the purpose of LUPA is "timely judicial review" and that the 21-day deadline for appealing local land use decisions "is intended to prevent parties from delaying judicial review **at the conclusion of the local administrative process**." (emphasis added). *Habitat Watch*, 155 Wn.2d at 406-07. In this case, the Court of Appeals disregards the County's plain requirement

that its administrative process concludes with a "final written decision." This subverts this central tenet of LUPA appeal deadlines announced in *Habitat Watch*.

The *Habitat Watch* decision holds that the date a land use decision is issued dictates when the 21-day limitations period commences. *Id.* at 408. The question here then becomes, when is the written decision ending administrative appeals for purposes of LUPA in Yakima County issued? RCW 36.70C.040(4)(a) dictates "written decisions" are issued three days after mailing or on the date the local jurisdiction provides notice that the written decision is publicly available. Yakima County has expressly adopted "written decisions" under RCW 36.70C.040(4)(a) as the terminating point for its administrative process. If Yakima County did not issue a "written decision" in this case, then under Yakima County's code, there has been no "conclusion of the local administrative process." *Habitat Watch*, 155 Wn.2d at 406-07.

Here, the Court of Appeals ignored Yakima County's administrative appeal process and LUPA's provision on when written decisions are issued. The Court of Appeals' holding stands in direct contradiction to *Habitat Watch*, Yakima County's Code, LUPA, and LUPA's legislative purpose. Although the Board's relevant resolution in this case was verbally approved by vote on April 10, 2018, Yakima

County did not make any written decision publicly available until, at the earliest, an email was sent to the parties on April 13, 2018 transmitting the "final written decision" as required under YCC 16B.09.050(5). At that point, the County's local administrative process concluded. Yakama Nation filed its LUPA petition 19 days after issuance of that written decision, within the earliest possible deadline under RCW 36.70C.040(4)(a).[1]

This Court also indicated in *Habitat Watch* that it looks to the latest possible date under both LUPA and the local jurisdiction's administrative appeals process to determine whether a LUPA petition is timely. *Habitat Watch*, 155 Wn.2d at 409. The Yakama Nation contends that Yakima County cannot legally issue a resolution triggering RCW 36.70C.040(4)(b), rather than subpart (a), to terminate the administrative appeal process without violating its own ordinance on how this specific administrative process ends. But if the Court finds that there are two

[1] The Court of Appeals inaccurately characterizes both the superior court's holding and the Yakama Nation's arguments regarding what was the asserted "written decision" in this case. In its decision, the Court of Appeals claims without citation that Yakama Nation argued "Noelle Madera's letter on April 13, 2018 [sic] is the earliest written decision that could be considered to determine the date the limitation period began," and incorrectly claimed that the superior court "ruled that the April 13, 2018 letter constituted the written decision." App. at 10. In fact, the superior court expressly noted that the "**written decision is the resolution**" dated April 10, 2018, and issued at the earliest on April 13, 2018. App. at 72. The Yakama Nation has consistently maintained the same position and has never claimed that Ms. Madera's email is the written decision.

arguable commencement points for the 21-day limitations possible in this case, under *Habitat Watch*, this Court should look to the latest possible point commencement of that limitations period while still complying with the jurisdictional mandates of LUPA and synthesizing Yakima County's codified administrative process. The Court of Appeals, contrary to the analysis of this Court in *Habitat Watch,* decided the first date (April 10, 2018) must start the 21-day clock and not the latter date (April 13, 2018, or April 16, 2018—three days after "mailing"), which is the date required by Yakima County's code and LUPA.

The Court of Appeals' decision conflicts with this Court's interpretation of LUPA and its synthesis of LUPA with local jurisdictions' administrative appeals process as set forth in *Habitat Watch*.

2. The Court of Appeals erroneously characterized the decision in *Northshore Investors, LLC* as this Court's precedent.

The Court of Appeals incorrectly asserts that this Court authored the decision in *Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 301 P.3d 1049 (2013), *rev. denied* 178 Wn.2d 1015 (2013). At page 21 of its decision, the Court of Appeals asserts that in *Northshore Investors, LLC*, "our high court ruled that a city clerk's letter informing parties of the city council's written affirmation of a hearing examiner's decision did not constitute the final land use decision" and "[t]he Supreme

Court characterized the clerk's letter as a notice of the appeal decision and not a written decision." App. at 21.

Even if this Court had authored *Northshore Investors, LLC*, that decision does not conflict with the superior court's ruling in this matter. Here, Yakima County is required by its code to issue a "final written decision for purposes of Chapter 36.70C RCW." By contrast, in *Northshore Investors LLC*, the Court of Appeals, Division II, expressly held that the county code did not require a written decision. *Northshore Inv'rs, LLC*, 174 Wn. App. at 688 ("We hold that the [Tacoma Municipal Code] does not require the Council to issue written decisions.")

Further, the Court of Appeals' inaccurate analogy between that case and this one evinces the Court of Appeals' misconstruction of both the superior court's ruling and the Yakama Nation's argument in this case. Neither the Yakama Nation nor the superior court ever asserted that Noelle Madera's transmittal letter was a "written decision" for purposes of LUPA. *Supra* at FN2. Rather, the transmittal letter was a mailing of the Board's resolution, which under Yakima County's unambiguous code must be a "written decision" to terminate the administrative process for purposes of issuing a land use decision under LUPA.

3. The decision below impermissibly conflicts with this Court's long-held requirement that courts interpret county ordinances and codes consistent with accepted canons of statutory construction.

The Court of Appeals' ruling is incompatible with this Court's decisions applying canons of statutory construction to local ordinances. Specifically, the Court of Appeals' ruling threatens this Court's line of cases on interpreting unambiguous ordinances according to their plain meaning and contravenes this Court's acceptance of the canon of *expression unius est exclusion alterius*. By ignoring these canons, the Court of Appeals has rendered a provision of Yakima County's Code meaningless and superfluous, and thereby invites further government disregard for codified processes in Yakima County and beyond.

Local ordinances and codes are interpreted according to the rules of statutory construction. *Ford Motor Co. v. City of Seattle, Exec. Servs. Dep't*, 160 Wn.2d 32, 41, 156 P.3d 185, 189 (2007); *see also Ellensburg Cement Prod., Inc. v. Kittitas Cty.*, 179 Wn.2d 737, 317 P.3d 1037 (2014). "Statutory interpretation starts with the plain meaning of the language; the plain meaning controls if it is unambiguous." *Nissen v. Pierce Cty.*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015). "The 'plain meaning' rule includes not only the ordinary meaning of the words, but the underlying legislative purposes **and closely related statutes** to determine the proper meaning of

the statute." *Washington Pub. Ports Ass'n v. State, Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003)(emphasis added).

Cities and counties are generally afforded considerable deference in interpreting their own codes and ordinances. *Ford Motor Co.*, 160 Wn.2d at 41–42. But this deference does not permit counties to nullify or ignore the plain meaning of unambiguous codified language. *Ellensburg Cement Prod., Inc.*, 179 Wn.2d at 743 (because a phrase in ordinance was unambiguous, the court would not defer to the county's interpretation to the contrary). Further, deference does not overrule settled canons of construction, like the canon of *expressio unius est exclusio alterius*. *Ellensburg Cement Prod., Inc.*, 179 Wn.2d at 750. The principle of *expressio unius est exclusio alterius*, as embraced in this Court, provides that:

> Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius—specific inclusions exclude implication.

Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cty., 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

The ordinance here is plain on its face. Yakima County is not entitled to deference in interpreting the code's requirement for a "written

decision" to end the administrative process under LUPA to the point of meaninglessness. *Ellensburg Cement Prod., Inc.*, 179 Wn.2d at 743. Again, YCC 16B.09.050(5) provides a specific end point for administrative appeals in Yakima County under LUPA—i.e., the issuance of a "final written decision" by the County Board of Commissioners. Upon issuance of that written decision the 21-day limitations period for appeals to the superior court commences under RCW 36.70C.040(4).

The Court of Appeals justified its decision in part because the term "written decision" is not expressly defined in Yakima County's code. App. at 19. But the term "written decision" is in fact defined in this specific part of the code as applicable to the LUPA 21-day limitations period because the codified language requires a "written decision" as the "final administrative action **for the purposes of Chapter 36.70C RCW**." YCC 16B.09.050(5) (emphasis added). The 21-day limitations period and the commencement of that period for "written decisions" is, in turn, codified at RCW 36.70C.040(4)(a). The superior court correctly gave effect to both state and county authorities.

The Court of Appeals' decision hinges on an interpretation that renders YCC 16B.09.050(5) superfluous. It ignores the canon dictating that ordinances are to be interpreted according to their plain meaning and in light of "the underlying legislative purposes and closely related statutes to

determine the proper meaning of the statute," which undeniably links Yakima County Code's prescription of "written decisions" to the 21-day statute of limitations in LUPA. *Washington Pub. Ports Ass'n.*, 148 Wn.2d at 645. Because the County tied the term "written decision" in YCC 16B.09.050(5) to LUPA, the plain meaning of "written decision" is found in the meaning afforded to them in LUPA. Given this, the plain meaning of the "written decision" required by YCC 16B.09.050(5) is to prescribe (and provide the public with notice) of the specific end of the administrative appeal process "for the purposes" of LUPA. This plain meaning ties YCC 16B.09.050(5) directly to RCW 36.70C.040(4)(a). The Court of Appeals ignored this. This Court should not ratify such a decision threatening long-standing precedent with far-reaching applicability.

4. The decision below conflicts with this Court's requirement that counties comply with their own ordinances and codes.

Yakima County should not be able to violate its own ordinance-required process ending administrative appeals for purposes of LUPA. This Court has more than a century of precedent holding that counties are creatures of statute and, therefore, their power is limited to the powers delegated "in strict compliance" with the law. *State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 175, 385 P.3d 769 (2016), *as amended* (Feb. 8, 2017), *quoting Nw. Improvement Co. v. McNeil*, 100 Wn.2d 22, 28, 170

P. 338 (1918). This rule binds counties to strict compliance with both Washington statutes and their own codes and ordinances, along with the processes codified therein. *Ellensburg Cement Prod., Inc.*, 179 Wn.2d at 751–52 (reversing decision under county administrative process because process violated state statute); *Loveless v. Yantis*, 82 Wn.2d 754, 762, 513 P.2d 1023 (1973) (reversing county commissioner action that violated county's ordinance).

If Yakima County can ignore its prescription for a "written decision [as the] final administrative action for the purposes of Chapter 36.70C RCW," it can violate its own code again, and in different ways. The Court of Appeals' decision concludes that counties in this state may flout their own code and their own administrative appeal processes under LUPA. Further, Contrary to the Court of Appeals' reasoning that giving effect to the County's code would violate LUPA, requiring the County to follow its own code can be read in accord with LUPA. In fact, it must be read in accord with LUPA, and doing so requires a finding affirming the superior court's decision in this case. The Yakima County Superior Court synthesized and gave effect to the relevant provisions of both Yakima County's Code and LUPA to determine the earliest possible issuance date of the written decision, and properly denied Appellees' motion to dismiss.

Yakama Nation's 2018 LUPA petition was filed timely under both LUPA and the County's codified administrative appeal process.[2]

B. Discretionary Review Should Be Granted Because The Public Has A Substantial Interest In Being Able To Rely On The Plain Language Of A County Code.

Even in the absence of any conflict with decisions of this Court or the Court of Appeals, this Court may grant discretionary review of an appeal if the petition "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Rules of Appellate Procedure should be liberally interpreted "to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a).

The public must be able to rely on the plain language of county codes. County codes are construed according to the same plain language construction rules applicable to state statutes. *Ellensburg Cement Products, Inc.*, 179 Wn.2d at 743. Where a county code is unambiguous, this Court construes the code in accordance with its plain language. *Id.* Here, Washington law provides three starting points for the 21-day statute of limitations for appeals of a land use decision to a state superior court.

[2] This Petition for Review is not an exhaustive list of the Court of Appeals' errors identified by the Yakama Nation. If review is granted, the Yakama Nation intends to raise these additional errors, including the Court of Appeals incorrect analysis under *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 244–45, 821 P.2d 1204 (1992), of whether the County Board of Commissioners sat in a quasi-judicial capacity when issuing its written decision.

RCW 36.70C.040(4). Yakima County enacted YCC 16B.09.050(5) and in requiring a "final written decision" from the Board of Commissioners to end the County's administrative appeal process, the County selected one of those starting points for the 21-day statute of limitations for every appeal of a Yakima County land use decision. The Yakama Nation complied with the statute of limitations set forth in the plain language of YCC 16B.09.050(5) and corresponding requirements of RCW 36.70C.040(4)(a). The Court of Appeals erred in holding otherwise.

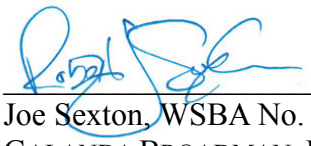
The public has a substantial interest in being able to rely on the plain language of county codes. This interest becomes critically important in the oft-litigated context of statutes of limitations under LUPA. *See, e.g., Durland v. San Juan County*, 182 Wn.2d 55 340, P.3d 191 (2014). LUPA's 21-day statute of limitations is both strict and not subject to equitable exceptions. *Id.* at 67. This Court "require[s] strict compliance with LUPA's bar against untimely or improperly served petitions." *Id.* Where the stakes—in this case the physical desecration of the Yakama Nation's ancestors—are so high, and the applicable rules are strictly applied, the public must be able to rely on the plain language of a county code and counties must not be permitted to ignore their codified processes. The Court of Appeals' error raises an issue of substantial public interest that warrants review.

CONCLUSION

The Yakama Nation respectfully requests that this petition for review be granted.

November 25, 2019

Respectfully submitted,



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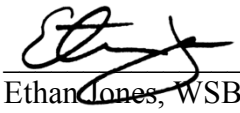

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CERTIFICATE OF SERVICE

Pursuant to the November 26, 2019 agreement of all parties to accept electronic service of process, on November 26, 2019 I electronically served a true and accurate copy of the foregoing document to the following:

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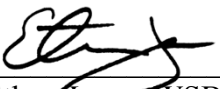
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: November 26, 2019 at Toppenish, WA



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No.

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APPENDIX

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CASE # 363341
Confederated Tribes and Bands of the Yakama Nation v. Yakima County
YAKIMA COUNTY SUPERIOR COURT No. 182015170

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any

petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (may also be filed electronically or if in paper format, only the original need be filed). RAP 13.4(a). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates each is due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment

c: **E-mail** Honorable Gayle M. Harthcock

FILED
OCTOBER 29, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Respondents, v. YAKIMA COUNTY; GRANITE NORTHWEST, INC.; FRANK ROWLEY; and ROWLEY FAMILY TRUST, Petitioners.	)	No. 36334-1-III UNPUBLISHED OPINION

FEARING, J. — Petitioners Granite Northwest and Yakima County appeal the superior court's ruling that adjudged Yakama Nation to have filed a LUPA petition timely. Because Yakama Nation challenges a quasi-judicial decision of the Yakima County Board of County Commissioners and because the adoption of a resolution by the board started the limitation period for filing the petition, we agree with petitioners and reverse the superior court's decision.

FACTS

Granite Northwest, Inc. operates a mine in Yakima County. On April 10, 2015 Granite Northwest submitted a request to Yakima County for a conditional use permit to expand its mining operation and filed an accompanying State Environmental Policy Act (SEPA) checklist for a type-II mining site.

The Confederate Tribes and Bands of the Yakama Nation (Yakama Nation) opposed the issuance of the permit. Yakama Nation alleged that the mining expansion would lie within its burial grounds and the expansion would negatively impact its ancestral and cultural resources. During the next two years, Yakama Nation and Yakima County addressed the Nation's concerns pertaining to the county's possible issuance of a conditional use permit and the corresponding SEPA determination.

On April 7, 2017, Yakima County issued Granite Northwest a conditional use permit with twenty-seven conditions. The conditions included a requirement to obtain permits from the Washington State Department of Ecology, the Department of Natural Resources, and the Department of Archaeology & Historic Preservation and to comply with all mitigation measures outlined in the county's mitigated determination of non-Significance (MDNS) under SEPA.

Also on April 7, 2017, Yakima County issued the MDNS. The mitigation measures under the determination included a condition that Granite Northwest will immediately cease work if it uncovers unanticipated archaeological or historic resources

or human remains and will notify Yakima County, the Washington State Department of Archaeology and Historic Preservation, and the Washington State Department of Natural Resources of its discovery. According to the MDNS, Yakima County reviewed the SEPA checklist along with other submitted materials and decided no Environmental Impact Statement (EIS) was required because the expanded mining would likely not pose a significant adverse impact to the environment as long as Granite Northwest fulfilled the specified measures to mitigate the potential harmful effects. Yakima County advised parties the final MDNS threshold determination was issued pursuant to WAC 197-11-340(2) and the SEPA threshold determination could be appealed to Yakima County Superior Court within twenty-one days.

Yakima County Code (YCC) 16B.09 required challenges to Yakima County's issuances of conditional use permits to be administratively appealed to a hearing examiner. The hearing examiner's final decision could be appealed to the Yakima County Board of County Commissioners. At that time, YCC 16B.09 did not allow for an administrative appeal for a SEPA/MDNS decision. Rather, a challenger would appeal a SEPA/MDNS decision to superior court. The former Yakima County code thus bifurcated the conditional use permit decisions from the SEPA determination even though both appeals might contain overlapping issues.

Yakima County informed the parties, in a letter approving the conditional use permit, that a party could administratively appeal issuance of the permit to the Yakima County hearing examiner by April 21, 2017 pursuant to section 16B.09 of the Yakima County Code. The letter further advised that the county code did not afford an administrative appeal for the SEPA determination, but a party could appeal the SEPA determination to Yakima County Superior Court within 21 days. Yakima County also advised parties in its MDNS letter that a party could appeal the county's SEPA threshold determination to Yakima County Superior Court within 21 days.

On April 21, 2017, Yakama Nation timely filed an administrative appeal, with the hearing examiner, of Yakima County's issuance of the conditional use permit to Granite Northwest. On April 28, 2017, Yakama Nation filed a land use petition in Yakima County Superior Court against Yakima County and Granite Northwest, which petition challenged the MDNS determination.

Yakama Nation notified Yakima County that bifurcation of the appeals process placed Yakama Nation in a dilemma. Yakama Nation needed to choose between filing a lawsuit challenging SEPA decisions before exhausting administrative remedies for the issuance of the conditional use permit or exhaust administrative remedies and fail to meet the filing deadline under SEPA. Yakama Nation argued Yakima County's appeals process violated RCW 43.21C.075(2)(a) and Washington law because the county's process bifurcated the appeal process and thereby forced an absurd result. In recognition

of this anomaly, the Yakima County Superior Court, on May 12, 2017, stayed the pending Land Use Petition Act (LUPA) action until Yakama Nation exhausted its administrative remedies for Yakima County's land use decision.

The Yakima County hearing examiner conducted an open record hearing. Thereafter, on January 29, 2018, the hearing examiner issued its decision. The hearing examiner ruled that it held subject matter jurisdiction to resolve substantive SEPA mitigation measure issues. The hearing examiner, however, ruled that it lacked subject matter jurisdiction over Yakima County's decision rejecting the need to prepare an EIS. The hearing examiner concluded that the procedural SEPA threshold determination is reserved for the superior court. The hearing examiner affirmed Yakima County's issuance of the conditional use permit and the county's SEPA/MDNS decision related to the permit. On February 13, 2018, Yakama Nation appealed the hearing examiner's decision to the Yakima County Board of County Commissioners and requested a closed record hearing.

On March 14, 2018, Yakima County Public Services employee Tommy Carroll e-mailed Granite Northwest and Yakama Nation to inform them that the Yakima County Board of County Commissioners had reviewed the papers filed with the hearing examiner and wished to schedule a public meeting to decide whether the board will affirm the hearing examiner's decision or conduct a closed record public hearing pursuant to YCC 16B.09.055(3). On April 10, 2018, at a public meeting, the board of county

commissioners adopted Resolution 131-2018, which read that the board received an administrative closed record appeal from Yakama Nation, reviewed the hearing examiner's open record appeal hearing and transcripts, affirmed the hearing examiner's decision, and denied Yakama Nation's appeal. The resolution read, in part:

> **WHEREAS,** SEP2015-00016 was appealed to Superior Court by the Yakama Nation and the [Selah Moxee Irrigation District]. All parties agreed to stay the Superior Court proceedings filed under the Land Use Petition Act (LUPA) relative to the SEPA MDNS threshold determination appeal until the conclusion of the administrative appeal; and
>
> . . . .
>
> **WHEREAS**, The Hearing Examiner issued his decision affirming the Granite Mining Site/Operation Expansion Final Conditional Use Permit Decision with language clarifications set forth in Section IV of his Decision and affirms the SEPA Final Mitigated Determination of Non-Significance related to said Conditional Use Permit which were both issued on April 7, 2017 and were designated as File Numbers PRJ2014-00216, CUP2015-00037 and SEP2015-00016; and
>
> **WHEREAS**, Yakima County received an administrative closed record appeal from the Yakama Nation on February 13, 2018, in accordance with Yakima County Code 16B.09; and
>
> **WHEREAS**, the record of the open record appeal hearing and transcripts were provided to the Board of County Commissioners (BOCC) for review in accordance with Yakima County Code 16B.09.055; and
>
> **WHEREAS**, at a public meeting with the BOCC on April 10, 2018, the BOCC decided to affirm the Hearing Examiner's decision in accordance with Yakima County Code 16B.09.055(3); and
>
> **NOW, THEREFORE**, the Decision of the Hearing Examiner in APL2017-00003 is affirmed. The appeal of the Yakama Nation (under APL2018-00001) is denied.
>
> **DONE** this 10th Day of April, 2018.

Clerk's Papers (CP) at 253-54.

On April 13, 2018, Yakima County Senior Project Planner Noelle Madera sent Yakama Nation an e-mail along with a letter she wrote and the Board's resolution. The remarks in the letter pertinent to this appeal are:

> Re: APL2018-00001: *Notice of Affirmation of Hearing Examiner's Decision*.
>
> . . . .
>
> On April 10, 2018, the Board of County Commissioner's (BOCC) *held* a public meeting in regards to your appeal (APL2018-00001) to decide whether to affirm the Hearing Examiner's decision or hold a closed record hearing. The BOCC unanimously *decided* to affirm the Hearing Examiner's decision and *signed* Resolution 131-2018, which is attached for your records. YCC 16B.09.050(1)(a) requires written notification of this decision. *At this point,* all administrative appeals have been exhausted.

CP at 252 (emphasis added).

PROCEDURE

On May 2, 2018, twenty-two days after passage of the April 10 Yakima County Board of County Commissioners resolution and nineteen days after Noelle Madera's April 13 letter, Yakama Nation served the parties and filed in Yakima Superior Court a new land use petition to appeal the board's final decision. This second LUPA action is the subject of this appeal.

Granite Northwest moved to dismiss the 2018 LUPA petition on the ground that Yakama Nation did not timely file that action under RCW 36.70C.040(4)(b). Granite Northwest argued that the court lacked jurisdiction to hear an untimely LUPA petition because the 21-day LUPA statute of limitations began to run on April 10, 2018, which is

the date the resolution passed and Yakama Nation filed its LUPA petition one day after the limitation period expired. According to Granite Northwest, the April 10, 2018 board of county commissioners' resolution, not the April 13, 2018 letter from the Yakima County planner, constituted the written decision for purposes of commencing the time to file a LUPA action. Granite Northwest also moved to dismiss the previously stayed 2017 LUPA action on the theory that the superior court stayed the action on the condition that Yakama Nation timely filed its administrative appeal to Yakima County's conditional use permit land use decision.

In response to the motion to dismiss the two actions, Yakama Nation argued that the Yakima County Board of County Commissioners did not act in a quasi-judicial capacity because the board refused Yakama Nation's request to hold a hearing and, therefore, RCW 37.70C.040(4)(b) did not apply. According to Yakama Nation, YCC 16B.09.050(5) terminated the administrative appeal process for a land use decision on a final written decision for purposes of LUPA. RCW 34.70C.040(4)(a) applied because Noelle Madera's letter on April 13, 2018 is the earliest written decision that could be considered to determine the date the limitation period began. Therefore, Yakama Nation insisted that it timely filed and served its LUPA petition.

The superior court ruled that the Yakima County Board of County Commissioners did *not* act in a quasi-judicial capacity. The court further ruled that the April 13, 2018 letter constituted the written decision that qualified as the final administrative action for

purposes of chapter 36.70C RCW. Because Yakama Nation timely filed its 2018 LUPA action, the court also refused to dismiss the 2017 action.

LAW AND ANALYSIS

This appeal concerns solely whether Yakama Nation timely filed its 2018 LUPA action. We do not comment on the validity of the 2017 action.

The land use petition act, chapter 36.70C RCW, governs our decision. LUPA is the exclusive means of judicial review of land use decisions. RCW 36.70C.030. RCW 36.70C.040 identifies the date on which the government issues its land use decision and announces the limitation period for filing the LUPA petition. The lengthy statute reads in pertinent part:

> (1) Proceedings for review under this chapter shall be commenced by filing a land use petition in superior court.
>
> (2) A land use petition is barred, and the court may not grant review, unless the petition is *timely filed* with the court and timely served on the following persons who shall be parties to the review of the land use petition:
>
> . . . .
>
> (3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section *within twenty-one days of the issuance of the land use decision*.
>
> (4) For the purposes of this section, *the date on which a land use decision is issued is:*
>
> *(a) Three days after a written decision is mailed* by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available;
>
> *(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution;* or

> (c) If neither (a) nor (b) of this subsection applies, the date the decision is entered into the public record.

(Emphasis added.) We do not know why the statute creates different times for beginning the running of the deadline for filing depending on whether a legislative body sits in a quasi-judicial role or other capacity.

RCW 36.70C.040, in the setting of our appeal, raises two discrete questions. First, did the Yakima County Board of County Commissioners sit in a quasi-judicial capacity when reviewing and resolving Yakama Nation's appeal from the hearing examiner's decision? Second, did Resolution 131-2018 constitute the "land use decision" for purposes of RCW 36.70C.040(4)(b)? If we answer both questions in the affirmative, the LUPA limitation period commenced to run on April 10. In turn, Yakama Nation missed the deadline for filing its petition when it filed on May 2, 2018, twenty-two days later. RCW 36.70C.040(4)(b). If we answer either question in the negative, Yakama Nation timely filed its 2018 petition. The limitation period started to flow on April 16, three days after planner Noelle Madera sent Yakama Nation the e-mail. RCW 36.70C.040(4)(a). The Nation then filed its petition within sixteen days. We first address whether the Yakima County Board of County Commissioners sat in a quasi-judicial capacity.

Quasi-Judicial Capacity

The term "quasi-judicial" connotes an executive or administrative body performing a judicial function by adjudicating facts. Courts generally enjoy broader review authority of decisions made by a legislative or administrative body sitting in a quasi-judicial capacity as opposed to law making or rule making functions of such bodies. The law demands more stringent procedural and substantive guarantees in quasi-judicial hearings. *Edwards v. City Council of City of Seattle*, 3 Wn. App. 665, 667, 479 P.2d 120 (1970). Uniquely, in this appeal, one of the parties benefited by these increased protections asks this court to decline characterizing the government entity's decision as quasi-judicial. Such a declination would permit avoidance of the limitation period, but would conversely adjudge the Yakima County Board of County Commissioners' decision to be legislative in nature and thereby nearly render the decision immune from review by a court.

The Washington Supreme Court, in *Raynes v. City of Leavenworth*, 118 Wn.2d 237, 821 P.2d 1204 (1992), heralded a four-part test for lower courts to apply when assessing whether a legislative body's action represents quasi-judicial or legislative conduct. The test asks (1) whether the court could have been charged with the duty at issue in the first instance, (2) whether the courts have historically performed such duties, (3) whether the action of the state or municipal body involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a

response to changing conditions through the enactment of a new general law of prospective application, and (4) whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. *Raynes v. City of Leavenworth*, 118 Wn.2d at 244-45 (1992). Quasi-judicial actions involve the application of current law to a factual circumstance, while a legislative action entails the policymaking role of a legislative body. *Raynes v. City of Leavenworth*, 118 Wn.2d at 245.

This court, twelve years before *Raynes v. City of Leavenworth*, more succinctly described the quasi-judicial function. When sitting in a quasi-judicial capacity, the government entity limits its review to facts presented by litigants; whereas, the entity acting in a legislative capacity listens to a broad array of facts to address a wide problem and issues a prospective decision for the public at large. *Edwards v. City Council of City of Seattle*, 3 Wn. App. at 667 (1970).

In applying the four-part test, we first study sections of the Yakima County Code that control the board of county commissioners' review of a hearing examiner's upholding of a conditional use permit. Yakima County Code 16B.09 authorizes the board of county commissioners to review administrative appeals from the hearing examiner's decision. The hearing examiner issued its final decision on January 29, 2018 after conducting an open record proceeding, gathering evidence, hearing argument, and performing an independent review. Yakama Nation timely filed its administrative appeal

of the hearing examiner's decision to the board of county commissioners. The board conducted a closed record appeal pursuant to YCC 16B.09.050 and former YCC 16B.09.055(2015) and reviewed the Nation's argument and the record provided from the hearing examiner. Under YCC 16B.09.050(3), the board must deny the appeal if the appellant fails to carry the burden to prove substantial evidence did not support the hearing examiner's decision. The Yakima County Board of County Commissioners disposed of the appeal at a public meeting pursuant to YCC 16B.09.050(1)-(3) and passed Resolution 131-2018 on April 10, 2018 to affirm the hearing examiner's decision and to deny Yakama Nation's appeal. The board's decision to affirm implies that the board determined that material and substantial evidence supported the hearing examiner's decision.

Part one of the four-part test in *Raynes v. City of Leavenworth* asks whether the superior court could have been charged with the duty at issue in the first instance. YCC 16B.09.050 and former YCC 16B.09.055 assigns the board of county commissioners with the duty to hear administrative appeals from the hearing examiner. The code does not assign the court with this duty. Nevertheless, the first prong of the test does not ask whether the court was in fact charged with the decision, but whether the court could have been assigned the task of rendering the decision on appeal from the hearing examiner. Assuming the Yakima County Code did not consign the duty of review to the board of county commissioners, the hearing examiner's decision would

have been the final decision of the county subject to review by the superior court under LUPA. RCW 36.70C.020 and .030.

Question two of the four-part test in *Raynes* asks whether the courts have historically performed such duties. Historically, the law permitted a superior court to review a municipality's land use decisions through a writ of certiorari. RCW 36.70C.030(1).

Part three of the *Raynes v. City of Leavenworth* four-part test asks whether the action of the municipal corporation involves application of existing law to past or present facts for the purpose of declaring or enforcing liability rather than a response to changing conditions through the enactment of a new general law of prospective application. In Yakama Nation's challenge to the hearing examiner's decision, the Yakima County Board of County Commissioners applied the existing law to the facts to render a decision. The board limited its review of facts to the facts presented by the parties to the appeal and only resolved the questions presented by the parties. The Board did not enact prospective legislation for the public.

Part four of the four-part test in *Raynes* asks whether the action more clearly resembles the ordinary business of courts, as opposed to those of legislators or administrators. Question four overlaps the content of question three. The Yakima County Board of County Commissioners performed in an administrative appellate review capacity when it applied existing law to the facts and passed a resolution to affirm the

decision of the hearing examiner. This act taken by the board resembles the ordinary business of a court as opposed to that of legislators or administrators. *Raynes v. City of Leavenworth*, 118 Wn.2d at 244-45 (1992).

Yakama Nation contends that, because the board of county commissioners refused to accept the Nation's closed record hearing request, the board must not have acted in a quasi-judicial capacity. We disagree. Despite not allowing oral argument from Yakama Nation during the April 10 hearing, the board of county commissioners functioned similar to that of a court. It reviewed the facts and the arguments presented by the parties before the hearing examiner. Courts, including this intermediate appellate court, often only review the record from the adjudicator below without any additional input from the parties. Such a process does not turn judicial review into a legislative act.

Yakama Nation emphasizes that the Yakima County Board of County Commissioners classified its April 10 gathering as a "public meeting" rather than a "public hearing." The Nation also highlights that the board chairman did not introduce its consideration of the appeal, on April 10, as a "hearing." We brand the Nation's distinction between a "hearing" and a "meeting" as a false alternative. Logic does not preclude a meeting from being a hearing and a hearing from being a meeting.

The quasi-judicial capacity factors announced in *Raynes v. City of Leavenworth* omit any reference to conducting a formal evidentiary hearing or affording oral argument. *Raynes* does not identify the label used by the government body for an assembly, during

which it decides an appeal, as a factor in classifying whether a decision springs from a quasi-judicial capacity function or a legislative role. Based on the four-part test in *Raynes*, we hold that the Yakima County Board of County Commissioners acted in a quasi-judicial capacity when it passed a resolution to affirm the hearing examiner's decision.

Issuance of the Land Use Decision

Because we hold that the Yakima County Board of County Commissioners acted in a quasi-judicial capacity, we must next determine how this holding impacts a ruling on when the board of county commissioners issued its land use decision. To repeat, the relevant portion of RCW 36.70C.040 reads:

> (3) The petition is timely if it is filed and served on all parties listed in subsection (2) of this section *within twenty-one days of the issuance of the land use decision*.
>
> (4) For the purposes of this section, *the date on which a land use decision is issued is:*
>
> . . . .
>
> *(b) If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution.*

(Emphasis added.) We reckon the answer straightforward. RCW 36.70C.040(4)(b) deems the date triggering the commencement of the twenty-one days to be the date the board of county commissioners passed the resolution. The board adopted Resolution 131-2018, which affirmed the hearing examiner's approval of Granite Northwest's conditional use permit, on April 10, 2018. Despite this answer, we review Yakama

Nation's arguments because of the importance of this appeal to the Nation.

Yakama Nation robustly relies on YCC 16B.09.050(5), which reads:

> The Board's final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.

Yakama Nation's argument assumes that the Yakima County Code takes precedence over the state LUPA and that YCC 16B.09.050(5) reads differently from RCW 36.70C.040. We reject both assumptions. Neither LUPA nor any case law permits a local ordinance or code to conflict with RCW 36.70C.040's language as to the day of activation of the twenty-one day limitation period. Anyway, YCC 16B.09.050(5) does not conflict with RCW 36.70C.040(3) and (4), because the county code section does not proclaim that the final written decision constitutes something other than the resolution of the board of county commissioners' affirming the land use decision. The county code does not define what constitutes the board's final written decision.

Yakama Nation concedes that Resolution 131-2018 constitutes the written decision for YCC 16B.09.050(5), if not for RCW 36.70C.040. Nevertheless, the Nation rejects the date of the adoption of the written decision as the initiating day for the limitation period. Yakama Nation may base its argument on the assumption that the Yakima County Board of County Commissioners acted in a legislative capacity, but the Nation's argument may also extend to the application of RCW 36.70C.040(4)(b), which assumes the board acted in a quasi-judicial capacity. The Nation argues that the earliest

date for issuance of the written decision would be April 13, 2018, the day when Yakima County mailed notice of the resolution and attached a copy of the resolution. Neither YCC 16B.09.050(5) nor RCW 36.70C.040(4)(b) declare the date of mailing the written resolution to be the commencement of the limitation period.

Yakama Nation may also contend that, even if the board of county commissioners sat in a quasi-judicial capacity, RCW 36.70C.040(4)(a), not (4)(b), controls because the Yakima County Code required the board to issue a written decision. The Nation focuses on the phrase "written decision" in RCW 36.70C.040(4)(a) and the Yakima County Code, which directs the board to issue a written decision. Although a resolution can be considered a written decision, we conclude RCW 36.70C.040(4)(b), not (4)(a), governs. The term "resolution" is narrower in scope than "written decision." A specific statute controls over a general statute. *State v. Conway*, 8 Wn. App. 2d 538, 547-48, 483 P.3d 1235 (2019).

As codified in RCW 36.70C.040(4)(b), when a legislative body, sitting in a quasi-judicial capacity, renders a land use decision by ordinance or resolution, the date of that decision is "the date the body passes the ordinance or resolution." *King's Way Foursquare Church v. Clallam County*, 128 Wn. App. 687, 691, 116 P.3d 1060 (2005). Representatives of Yakama Nation attended the April 10 board of county commissioners' meeting and knew the board adopted the resolution on that date. The April 13 e-mail confirmed the board adopted the resolution on April 10.

Planner Noelle Madera's April 13 e-mail read that: "At this point, all administrative appeals have been exhausted." CP at 252. The letter does not identify "this point" as April 13 or state that the "this point" constitutes the date that begins the twenty-one day period to file any LUPA petition. Madera does not identify her letter as the date of the resolution or decision. Regardless, Noelle Madera lacked any authority to issue a written decision.

We deem *Northshore Investors, LLC v. City of Tacoma*, 174 Wn. App. 678, 301 P.3d 1049 (2013) controlling. In *Northshore Investors*, our high court ruled that a city clerk's letter informing parties of the city council's written affirmation of a hearing examiner's decision did not constitute the final land use decision. The Supreme Court characterized the clerk's letter as a notice of the appeal decision and not a written decision. The court highlighted that no member of the city council signed the letter and the letter did not claim the clerk forwarded the city council decision at the behest of the council.

Washington appellate decisions sometimes refer to an untimely LUPA action as ridding the superior court of jurisdiction of the action. *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 900, 83 P.3d 433 (2004); *Overhulse Neighborhood Association v. Thurston County*, 94 Wn. App. 593, 597, 972 P.2d 470 (1999). We assume that these decisions reference subject matter jurisdiction rather than personal jurisdiction since the parties always have some connection to land located in the county.

The decisions rely on RCW 36.70C.040(2), which declares:

> A land use petition is *barred*, and the court *may not grant review*, unless the petition is timely filed with the court and timely served on the following persons who shall be parties to the review of the land use petition.

(Emphasis added.) The term "bar" connotes a heavy-handed rejection of a LUPA petition by the superior court, but the word does not impede the court's subject matter jurisdiction.

Based on *In re the Estate of Reugh*, ___ Wn. App. 2d ___, 447 P.3d 544, 560 (2019), *In re Marriage of McDermott*, 175 Wn. App. 467, 307 P.3d 717 (2013), and *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 258 P.3d 70 (2011), we question any conclusion that the superior court lacks jurisdiction. An untimely filing of a petition does not prevent the court from possessing subject matter jurisdiction. The untimely petition merely requires the court to dismiss the petition as untimely.

CONCLUSION

We reverse the superior court and dismiss Yakama Nation's LUPA petition. The Nation untimely filed the petition.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

Fearing, J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

Siddoway, J.

COURT OF APPEALS

OF THE STATE OF WASHINGTON

DIVISION III

36334-1-III

CONFEDERATED TRIBES AND BANDS OF YAKAMA NATION, Petitioner/Plaintiff, vs. YAKIMA COUNTY; GRANITE NORTHWEST, INC.; FRANK ROWLEY; and ROWLEY FAMILY TRUST, Respondent/Defendants.	) Yakima County) Superior Court) 17-2-01434-39) 18-2-01517-39

VERBATIM REPORT OF RECORDED PROCEEDINGS

HEARING BEFORE THE HONORABLE GAYLE HARTHCOCK

AUGUST 17, 2018

RECORDING TRANSCRIBED BY:

ELEANOR J. MITCHELL, RPR, CCR 3006

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MORNING SESSION; AUGUST 17, 2018

--oOo--

(Recording begins at 9:28 a.m.)

(Transcript begins at 9:28 a.m.)

THE CLERK: -- is now in session. The Honorable Gayle Harthcock presiding.

THE COURT: Okay. Good morning. Please be seated. Welcome to court.

I see a few familiar faces and a lot of unfamiliar faces. This is in the matter of *The Confederate Tribes and Bands of Yakama Nation v. Yakima County, Granite Northwest, Inc., and Frank Rowley*, and, in the other case, *and the Rowley Family Trust*, 17-2-1434-39 and 18-2-1517, dash, 39.

If the parties would introduce themselves, that would be helpful.

MR. JONES: Thank you, Your Honor. My name is Ethan Jones. I represent the Confederated Tribes and Bands of the Yakama Nation.

THE COURT: Thank you.

MR. SEXTON: Good morning. I'm Joe Sexton. I also represent the Yakama Nation.

THE COURT: Okay. Thank you.

MR. QUEHRN: Good morning, Your Honor. I'm Mark Quehrn. I represent Granite Northwest, Frank Rowley in Cause No. 17-2-0134, dash, 39, and Granite Northwest, Frank Rowley, and the Frank -- the Rowley Family Trust is an additional party in the second case.

THE COURT: Okay. And what is your --

MR. QUEHRN: And I'm joined by my colleague, Julie Wilson-McNerney.

THE COURT: Okay. Thank you. And what was your fir- -- your last name?

MR. QUEHRN: Quehrn.

THE COURT: How do you spell that?

MR. QUEHRN: Q-u-e-h-r-n.

THE COURT: Oh, okay. Yeah, I have seen it.

MR. QUEHRN: All right.

THE COURT: And?

MR. McILRATH: Yes, Your Honor. I'm Paul McIlrath, and I'm representing Yakima County in both cases.

THE COURT: Okay. All right. Well, we have a series of motions today. This is the initial hearing on the -- the '17 one -- I guess it's a SEPA appeal, and then the '18 one, which is the LUPA.

So where would you folks like to start?

MR. JONES: If -- if I may, Your Honor, the -- I -- I think that it makes sense for the Yakama Nation, as the plaintiff, slash, appellant to move forward with the Yakama Nation's motion to reverse and remand, and then move on to respondent's motion to dismiss, and then close it out with the motion for discovery and the scheduling order.

THE COURT: Okay. And I understand that the preassignment is not contested.

MR. JONES: Yes, Your Honor.

THE COURT: Okay.

Mr. Quehrn?

MR. QUEHRN: Your -- Your Honor, we -- we don't object to that. We -- we'd actually thought that the sequencing might have been more logical to hear the motion to dismiss first because if you'd rule on that, it's dispositive of --

THE COURT: Um-hmm.

MR. QUEHRN: -- the other matters.

THE COURT: [Unintelligible].

MR. QUEHRN: I think we would request, however, though, on -- in both of those motions, that we be allowed 30 minutes for combined presentation and rebuttal because we will be sharing our time with the County.

THE COURT: Sure.

Does that make sense to you? To have the motion to dismiss heard first, and then we can go from there?

MR. JONES: I -- I -- I think I -- I definitely understand the position. So I think that, as the appellant, we would still request that the Nation's motion be heard first, but we're certainly amenable to a different order.

THE COURT: It -- it doesn't matter to me.

MR. JONES: Okay. And -- and in terms of a -- in terms of timing, I understand the -- the local rules for motions in general, 10 minutes per side, and, for dispositive motions, 20 minutes per side --

THE COURT: Um-hmm.

MR. JONES: -- so I think we were thinking more in the 20-minute range as opposed to 30.

THE COURT: Okay. Well, we have half-day. So whatever it takes.

So let's do the -- the -- the motion to dismiss first. I think that makes the most sense as far as expediency. So...

And, Mr. Quehrn?

MR. QUEHRN: Good morning, Your Honor. Again, this is Mark Quehrn on behalf of Granite

Construction and Frank Rowley and the Rowley Family Trust. Granite's motions to dismiss in the 2018 LUPA petition and the 2017 LUPA petition rest on clear and unambiguous language of two statutes.

First, RCW 36.70C.040, which articulates the jurisdictional requisites for a LUPA petition; the Yakama Nation's 2018 LUPA petition does not comport with these requirements. It was not timely filed. The 2018 LUPA petition must, therefore, be dismissed with prejudice. The second controlling statute is the SEPA appeal statute, RCW 43.21C.075. This statute prohibits an orphaned judicial appeal of a SEPA threshold determination.

In other words, Your Honor, having failed to perfect that 2018 LUPA petition, and consolidate that appeal with the previous 2017 LUPA petition, the 27 LUPA [verbatim] -- the 2017 LUPA petition now stands as an independent cause of action. Unfortunately, SEPA precludes that, and therefore, that appeal must also be dismissed.

With that introduction, I would then like to turn to the specifics of the 2018 LUPA petition and the requisites of RCW 36.70C.040. In my presentation, I'm going to be making reference to several statutes, and what I would like to do, just as -- for sake of

everyone's reference is I made photocopies.

Could I hand them up, please?

THE COURT: Sure. That's fine.

Thank you.

MR. QUEHRN: And, actually, I'm sorry, I referred to these as statutes. The first one is a statute. The second is a copy of the county's appeal ordinance.

THE COURT: Um-hmm.

MR. QUEHRN: The third copy is a copy of the resolution that was passed by the Board of County Commissioners. And then the last two are statutes. And I'll just give counsel an opportunity to look at those to see if there are any concerns.

MR. JONES: No concerns, Your Honor.

MR. QUEHRN: Thank you.

So RCW 36.7- -- 70C- -- four -- .040 again articulates the requirements that must be satisfied in order for a land use petition to proceed in superior court. The relevant portion of this statute are subsections (3) [verbatim] and subsection (4)(b).

Subsection (3) provides: The petition is timely if it is filed and served on all parties listed in subsection (2) of the sat- -- of the statute within 21 days of the issuance of the decision.

The question, then, is: How do you determine when the -- the decision was issued? That is determined by subsection (4), which says [as read]: For purposes of this section, the date on which the land use decision is issued is determined by, in this instance, (b), if the land use decision was made by ordinance or resolution -- in this case, it was by resolution -- by a legislative body sitting in a quasi-judicial capacity, the date that the body passes the resolution is the date the decision was issued.

So how does this statute apply to the 2018 LUPA petition? It's really just an inquiry through the various sections of the statute. The first inquiry is: What land use decision did the Yakama Nation attempt to appeal?

The answer is set forth on the first page of their petition. They sought to appeal Resolution 131, which was the decision of the Board of County Commissioners affirming the hearing examiner's decision, which in turn affirmed the County's issuance of the CUP.

So the answer, for purpose of the statute, is R- -- Resolution 131 is, in fact, the land use decision because, for purposes of LUPA, it is, quote, a final determination by a local jurisdiction or body

with the highest levity of authority to make the determination, including those with the authority to appeal.

The next inquiry is: Who was the decision-maker? Resolution 131 was passed by the Yakima County Board of County Commissioners. They are a legislative body. That is not a fact in dispute.

The next inquiry is: In what capacity was this legislative body sitting when it made its land use decision? This appears to be an issue in dispute, and we should take a minute or two on this point. We submit that the Board of County Commissioners was sitting in a quasi-judicial capacity when it issued the decision.

In issuing Resolution 131, the Board was acting pursuant to the then-applicable provisions of Yakima County Code 16B.09.050, which defines procedures for closed-record decisions and appeals, and that -- a copy of that ordinance has been included in the package that I handed up.

Relevant to characterizing Board status as a quasi-judicial decision-maker is the simple question of: What was the Board doing? What was it required to do under the ordinance?

Well, the Board conducted a closed-record

appeal of the hearing examiner's decision. Pursuant to the ordinance, specifically 050(1)(a), the Board was authorized to, quote, affirm the hearing examiner's decision based on the review of the record below or deny the appeal.

The nature of the board's action did not depend upon whether the Board exercised its prerogative to take additional briefing or hear oral argument. Nor could the Board take further testimony at this time because it was a closed-record proceeding. In a closed-record proceeding, the Board sits as a court of appeals, not as a trial court.

Resolution 131 states on its face that the Board received and reviewed the record that was created below. Unlike legislative proceedings, the Board was not free to legislate. The Board was constrained by the ordinance, specifically 050(3)(b) says the Board may only, quote, grant or -- grant or grant the appeal with modifications if the applicant has carried its burden of proof and the Board finds that the recommendations or determinations of the hearing examiner is not supported by material and substantial evidence. In all other cases, the appeal shall be denied.

The Board denied this appeal, and, in so

doing, it determined the rights and obligations of specific parties -- Granite and the Yakama Nation -- in a contested case. The Board's action falls squarely under the statute -- state law definition of quasi-judicial actions of local decision-making bodies for -- for purposes of determining when the appearance of fairness doctrine applies and when the ex parte rule applies.

In the materials that I handed up, I've included that statute. It is RCW 42.36.020, which provides: The application of the appearance of fairness doctrine to local land use decisions shall be limited to the quasi-judicial actions of local decision-making bodies as defined in this section.

Quasi-judicial leg- -- quasi-judicial actions of local decision-making bodies are those activities of the legislative body -- in this case the Board of Commissioners -- planning commission, hearing examiners, zoning adjuster, board of adjustment, or other boards which determine the legal rights and duties of parties in a hearing or other contested case.

In deciding a closed-record appeal and determining the rights of Granite and Yakama Nation, the Board was sitting and acting in a quasi-judicial capacity.

The next inquiry is: What was the date of the issuance of the land use decision?

Again, the statute, .040(b) -- or .040(4)(b) -- 36.70C.040(4)(b) is clear. It says: Because the land use decision in this case was made by a legislative body acting in a quasi-judicial capacity and because the decision was made by resolution -- which it was -- the date of issuance of the land use decision was the date the body passed the resolution.

That date was April 10th. The resolution is dated April 10th. It was signed and executed on April 10th.

The next inquiry is: What date is 21 days after April 10th? That's May 1.

The next inquiry is: What was the date that the LUPA -- 2018 LUPA petition was filed and served by the Yakama Nation? That date was May 2nd, one day late, a fact that is not in dispute.

Then this brings us to our final inquiry with respect to the 2018 LU- -- LUPA petition: Does this Court have jurisdiction to entertain a LUPA petition that was not timely filed. The answer is no. That answer provided -- that answer is provided on the face of the statute and the cases that we have cited in our brief.

Yakama Nation's arguments in response to this motion respectfully are without merit. I think arguing that the other sections of the statute apply simply try to [verbatim] read the controlling statute as a nullity, which is not appropriate statutory interpretation.

The Yakama -- the Yakama Nation's attempt to characterize the Board's decision as a legislative rather than a quasi-judicial -- quasi-judicial action is also without the support of law. It ignores the statutory definition of quasi-judicial actions as the legislature provided in RCW 42.36.020. It relies on cases that are either inopposite or inapplic- -- inapplicable to this particular proceeding.

And, in fact, it ignores what the Board did. It sat as an appellant body and determined the rights and obligations of specific parties in a contested case. Ironically, were it a legislative determination as the Yakama Nation argues, then it is arguably not even appropriate before the court as a LUPA petition because it would be excluded under 36.70C.020(2)(a) as an application for a legislative approval.

In conclusion, Resolution 131 was a land use decision issued by a legislative body acting in a quasi-judicial capacity. It needed to be filed within

21 days of the date of the decision, which would have been May 1st; it was filed on May 2nd. It was -- the petition is time barred, and this Court has no jurisdiction to hear that appeal.

I would then like to turn to the 2017 LUPA petition and the controlling statute that is fatal to that particular appeal. That is the SEPA appeal statute, RCW 43.21C.075. This statute articulates two fundamental principles of law that govern judicial review of SEPA appeals, which, in this case, is the appeal of a county's decision not to require an environmental impact statement or its final MDNS.

These principles are: A petitioner cannot maintain a SEPA judicial appeal of a SEPA determination, the final DNS in this case, that is independent of a judicial appeal of the underlying governmental action, the CUP in this case.

Absent a consolidated judicial appeal of the underlying action, there is no cause of action or basis to maintain an orphaned SEPA appeal. And, again, here, I would call your attention to the language of the statute itself. RCW 43.21C.075, sub (1), the first sentence is pretty clear: Because a major purpose of this chapter is to continue environmental -- is -- is to continue environmental consider- -- combine, excuse

me, combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to the specific governmental action.

The last sentence of that section says [as read]: The State Environmental Act is not intended to create a cause of action unrelated to a specific governmental action.

And were there any doubt, the legislature resolved that when it -- it codified (6)(c), which says: Judicial review under this chapter shall, without exception, be of the government action, together with its accompanying environmental determination.

The fact that the Yakama Nation's appeal is now bifurcated and is now unsustainable is a problem of their own making. The Yakama Nation did file a lawsuit in 2017, the 2017 LUPA petition, to preserve their rights for a consolidated judicial appeal when they appealed the MDNS. The Yakama Nation then proceeded to exhaust its administrative remedies, as they're required to do by law, before they could appeal the CUP.

There was no confusion here. The Yakama Nation understood what it needed to do to perfect and bring a consolidated appeal, and I would refer you to

footnote 1 of their petition, which clearly states their understanding of the procedure and, quote: The Yakama Nation intends to move the Court to stay these proceedings -- meaning the 2017 petition -- pending the Yakama Nation's exhaustion of its administrative remedies.

On May 12, 2017, the Court stayed the proceeding to allow that to occur, and the Yakama Nation then proceeded to exhaust its administrative remedies, first to the hearing examiner, and then to the Board of County Commissioners.

At that point, the Yakama Nation only needed to file the 28 LUPA petition [verbatim] appealing the conditional use permit and move to consolidate the appeal with the 2017 appeal within 21 days and litigate a consolidated final DNS CUP appeal consistent with the requirements of both LUPA and SEPA.

The only obstacle to this for the Yakama Nation pursuing that strategy and that appeal was the failure to timely file the LUPA petition. That is not a fault or consequence of any county ordinance or any other things alleged by the Yakama. And, in fact, there is no way to consolidate SEPA claims and the 2017 LUPA petition as SEPA requires with a nonexistent appeal of the CUP.

So we submit that RCW 21C.075 [verbatim], the SEPA appeal statute, is dispositive of the 2017 LUPA petition: Judicial review under SEPA shall, without exception, be of the government action, together with the accompanying environmental determinations. And we cite in our briefs cases that support that interpretation of the statute.

The Yakama Nation doesn't appear to contest the fact that SEPA prohibits judicial review of orphan appeals. In their response, they make reference to the issues that were addressed by the examiner in terms of what's required for an administrative appeal as distinct from a judicial appeal.

And the examiner got that right, and I will quote from his ruling on the threshold motions at page 9: It is undisputed that the County is under no obligation to provide administrative SEPA appeals of any type of any land use permit decision.

The examiner cites the statute. He cites the controlling regulation. He cites case law. He cites Professor Settle's handbook on SEPA, and he cites the Washington State Department of Ecology SE- -- SEPA handbook for that very clear principle.

The County was under no obligation to provide an administrative appeal. They exercised that

prerogative legally and correctly. If consolidation were to occur, as SEPA requires, it was to occur in this court before you with an appropriately filed appeal of the Conditional Use Permit and the SEPA determination.

Just as the Court has no jurisdiction to hear the LUPA case because it was not timely filed, this Court cannot hear an orphaned SEPA appeal. RCW 43.21C.075 is strict, clear, unambiguous, and controlling.

SEPA does not require an independent cause -- or it does not provide for independent cause of action, and judicial review must be combined with review of the underlying action.

As a consequence of the Yakama Nation's failure to perfect its 2018 LUPA petition, the 2017 LUPA petition must also be dismissed for noncompliance with RCW 21C.075 [verbatim]. Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. McIlrath, I don't know if you want to jump in here or go to Mr. Jones.

MR. McILRATH: Your Honor, I would just state that Yakima County joins in with the argument of the Granite Northwest/Rowley respondents and add that -- confirm that the County's position is that the

appeal is untimely.

The County's -- the Board of County Commissioner's resolution clearly is a triggering event. The entry of that resolution, which was done in a public hearing, with notice to both the public and -- and the individuals that were involved by the decision, and our --

THE COURT: Can you clarify for me the -- you know, you -- you -- it -- it's referred to as a public meeting. And -- and you're referring to it as a public hearing.

Can you tell me what the nature of that hearing or meeting was other than just being on the -- the board's agenda that day?

MR. McILRATH: Actually, it was a special-set hearing --

THE COURT: Okay.

MR. McILRATH: -- that was --

THE COURT: I need to know more. Here's -- there's been no declaration that's told me -- or there -- I've got no transcript from that or anything. So --

MR. McILRATH: The resolu- --

THE COURT: I'm a little lost.

MR. McILRATH: The resolution was -- there

was, I believe -- and I wasn't at that --

THE COURT: Oh.

MR. McILRATH: -- hearing, but I understand that there was -- as a standard, the Board considered -- had considered the hearing examiner's -- it's -- it's done publicly. That's why we post it -- it's a public -- 'cause the Board only exists in the public realm when they come together.

And as a body, they have several roles: Legislative, executive, and the quasi-judicial.

THE COURT: Um-hmm.

MR. McILRATH: And this is a quasi-judicial proceeding where they give notice of a -- consideration of a closed-record hearing is probably the best.

I -- I, myself, at times, have been a little unclear on -- on that. But it's clear from our code statutes that are making a decision about whether to affirm, modify, or deny the hearing -- the appeal of the hearing examiner's --

THE COURT: Is argument --

MR. McILRATH: -- decision.

THE COURT: -- taken at that time?

MR. McILRATH: No argument is -- is made. 'Cause it is an appellant proceeding. The Board

considers whether to have a closed-record hearing where they would possibly consider allowing testimony. But in this case, they decided they would accept the decision, which did not allow -- or did not require them to schedule a closed-record hearing --

THE COURT: So --

MR. McILRATH: -- because they were accepting --

THE COURT: So they didn't taken any input from the parties at that --

MR. McILRATH: I -- I don't believe --

THE COURT: -- at that meeting.

MR. McILRATH: -- they would.

THE COURT: Okay.

MR. McILRATH: And so the question about the timing of the notice that was provided to them --

First off, the -- the codes that have been referenced by Mr. Quehrn are --

THE COURT: Um-hmm.

MR. McILRATH: -- very clear that it has to by -- the Board's action is a final decision, and that's our Yakima County Code provision 16B.09.050, paragraph (5). And the Board of Commissioners, in their Resolution 131 (2018), clearly stated that they were making a decision, and it was a final decision on

the date of the resolution, which was the 10th of April 2018.

And according to the Land Use Petition Act, all -- 36.70C, all appeals have to be done within 21 days. It's a timeline that's very strict. Courts, in many cases, have over- -- have refused to consider decisions that were beyond. And I believe it was Mr. Quehrn's and -- and Ms. McNeary-Wilson's[phonetic] brief that pointed to a case in Skagit County that was 15 minutes late after the auditor closed their office before they could receive the appeal, and that was too late 'cause it was -- under the 21 -- or beyond the 21 days.

And I -- I am sorry to say that this -- for -- for the Tribe's sake that this is one of those situations where the notice from Miss Noelle Madera[phonetic] -- who, by the way, is in the courtroom today, if the Court, for any reason, would wish to talk to her or question her -- and the notice she sent to them was a courtesy. It wasn't intended to be formal notice as provided for in our 16B.09.050.

THE COURT: So -- so let me ask, and I hate to be the hot bench here, but I do need to ask some questions.

So under 42.36.010, when it talks about a

quasi-judicial action, it says "in a hearing or other contested case proceedings," do you think that occurred here by the board's action at that meeting?

MR. McILRATH: Whether it was a contested case?

THE COURT: Whether it was a hearing or other contested case proceeding?

MR. McILRATH: I -- I believe it was a hearing in that it was a public session that they were holding at which a decision was being made.

THE COURT: It -- but do you think it was a hearing in the traditional judicial sense like we're having today? And this is a hearing in -- as far as I'm concerned.

MR. McILRATH: I -- I, myself would consider it a hearing. It's an opportunity for them to make a decision and --

But the hearing actually would be if they decide to hold a closed-record hearing. Now that clearly would be a hearing.

THE COURT: It clearly would be a hearing.

MR. McILRATH: Yeah.

THE COURT: Okay. All right. Anything else?

MR. McILRATH: No.

THE COURT: All right. Mr. Jones, Mr. Sexton, I don't know who'd like to address this particular issue from your standpoint for the Tribe's purposes.

MR. SEXTON: Thank you, Your Honor. Joe Sexton on behalf of Yakama Nation. Before I jump into my argument, I'd like to address the Court's question with respect to what occurred on April 10th.

I was at the meeting. But we submitted a number of exhibits in support of our response attached to the declaration of Mr. Jones, and at Exhibit C of that declaration, there is an email from Mr. Thomas Carroll -- Carroll on March 14, 2018, notifying the parties in this matter that: A few weeks ago, planning staff provided the clerk of the Board with a copy of the appeal record and hearing examiner decision for the board's review per YCC 16B.09.055, subsection (3). And it goes on to provide what the subsection says.

But for our purposes, Mr. Carroll goes on: The clerk notified us that the Board has reviewed the materials and would like us to schedule the public meeting.

In response to this email -- so that email was sent at 8:55 a.m. on March 14th.

THE COURT: This is the attachment

that's -- yeah.

MR. SEXTON: Yes.

THE COURT: I see the attachments.

MR. SEXTON: Okay. On exhibit -- on Exhibit D, Mr. Quehrn responds, and he says: To be clear, Granite understands that this is a public meeting -- meeting, underlined -- not a public hearing -- hearing, underlined -- at which the Board will decide whether to affirm the decision of the hearing examiner or to invite written memoranda of authorities and direct the clerk to schedule a closed-record public hearing, and that the Board will not take testimony from staff, the applicant, or the appellant at this meeting.

And so that's effectively what happened, Your Honor. It was an -- it was a -- it was a public -- public meeting. This matter was put on the agenda, as I'll get into, along with -- with other legislative items that -- and ministerial items that the -- the Board of Commissioners was deciding on that day.

But the issue on Granite's motion to dismiss, when -- when you drill down on it, is really whether or not the express words of the Yakima County's Code [verbatim] are to be given effect.

And I think it's notable that this wasn't

really touched on in either Mr. Quehrn's or --

THE COURT: It was not.

MR. SEXTON: -- Mr. McIlrath's provision -- or argument rather.

THE COURT: Well, in -- and in any of the briefing either --

MR. SEXTON: Well --

THE COURT: -- that I recall.

MR. SEXTON: And I think this is -- at least for our purposes, what we're making this argument on is because Yakima County has specifically prescribed in its ordinance -- and Mr. McIlrath referenced a number, but he -- he didn't quote from -- from the specific subparagraph.

But Yakima County has specifically prescribed in its ordinance how an administrative appeal is terminated for purposes of judicial appeals under LUPA. In other words, how does the clock start for the 21-day appeal period? And Yakima County terminates administrative appeals under LUPA with a written decision. In fact, under --

THE COURT: And where -- where are you?

MR. SEXTON: I'm on YCC 16B.09.050, subparagraph (b), which says the Board's final written decision -- not a final ordinance, not a final

resolution --

THE COURT: Okay. I can't --

MR. SEXTON: -- shall constitute --

THE COURT: So you're subsection -- .050, subsection --

MR. SEXTON: Yes.

THE COURT: You said B --

MR. SEXTON: I'm sorry. It's --

THE COURT: -- but under what?

MR. SEXTON: 16B.09.050, paragraph 5.

THE COURT: All right. Thank you.

Okay. I'm there.

MR. SEXTON: The Board's final written decision -- not an ordinance, not a resolution -- shall constitute a final administrative action for the purposes Chapter 36.70C RCW. That's LUPA.

So they chose the words "written decision": A written decision under LUPA is considered issued not on the date it was written, not on the date it was signed or voted on. It is issued under LUPA three days after mailing or, if it's not mailed, the day the notice is given that the resolution or the written decision is publicly available.

Because the County's final written decision under Yakima -- must be a written decision under Yakima

County's Code, and Yakama Nation filed its appeal within 21 days of the issuance of this written decision, which was April 13, 2018, at earliest, Yakama Nation's appeal is timely, and Granite's motion to dismiss must be denied.

Now, I know there's a question about quasi-judicial. We don't even need to get into that. Because if we're going to get into that, because sub- -- subsection (a) of -- of this provision under LUPA, under 36.70C.040, sub- -- subsection (4) applies because Yakima County has dictated that written decisions terminate administrative appeals.

But if we're going to get into Granite's argument that (b) applies, not (a), it's really -- it's -- the Board was not acting in a quasi-judicial capacity. They elected specifically not to act in a quasi-judicial capacity.

So then we go to (c). And (c) would be the catchall provision under 36,70.040, sub- -- subsection (4), which is, if you're not -- if you're not dealing with a written decision, if you're not dealing with an ordinance or a resolution by a body un- -- sitting in a quasi-judicial capacity, then the decision is considered issued when it is entered into the public record.

And here, the Board's decision affirming the hearing examiner was entered into the public record on April 17, 2018.

Mr. McIlrath indicated, in his argument, that entry of the resolution was done on April 10th. That's not correct. They voted on the resolution at the hearing.

We didn't get a copy of it. In fact, if you looked at the County's websites, and we submitted this in -- into -- in with our response brief, the minutes were approved on A- -- and signed on April 17th, and that's the first time really on the agenda item where this is listed that you see that the County Board of Commissioners upheld the hearing examiner's decision. That's April 17th.

Yakama Nation filed its twenty-eight -- 2018 land use petition 15 days later. Therefore, under subsection (c), the Nation's 2018 LUPA appeal is again timely.

Now, it's important that we start, at the outset, with the basic rules of statutory construction that I'm sure we're all basically familiar with. And in Washington, those rules apply with equal force and effect to municipal and county ordinances.

And the two rules I'd like to bring attention

to today is that, when the plain meaning of an ordinance is clear, it must be given effect. Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.

And the second rule is that ordinances must be interpreted and construed so that all language used is given effect with no portion rendered meaningless or superfluous.

Now, under LUPA, again, the date when a land use decision is issued depends on whether it is, one, a written decision; two, an ordinance or resolution by a legislative body sitting in a quasi-judicial capacity; or, three, any type of decision that doesn't fall under those first two categories.

And written decisions, as we noted, are issued either three days after mailing or, if not mailed, the date notice is provided that the decision is publicly available.

Knowing this framework and bearing it in mind for purposes of statutory construction, let's turn, again to Yakima County's ordinance to see what it has to say about the terminating event for administrative appeals under LUPA. It does not prescribe an ordinance

or resolution made final on the date it was signed as the event that marks the end of the administrative appeals process and, therefore, the beginning of the 21-day appeal period.

Again, under YCC 16B.09.050(5), the County has determined that, quote, the board's final written decision shall constitute a final administrative action for the purposes of Chapter 36.70C RCW.

And I think it's important to note, as Mr. Jones will get into, that the County has recently revisited the ordinance, and it specifically revisited this section of this ordinance to ensure compliance with state law.

So we presume that they looked at the section. They understood that LUPA -- in LUPA, in the section that this ordinance is referencing, the words "written decision" have -- have a specific meaning.

So the plain language here, in both LUPA and Yakima County's ordinance, is that the County administrative land use appeals are considered ended upon the issuance of a final written decision. And that written decision is considered issued, again, three days after mailing or on the date the notice is given that it is publicly available.

So this resolution may have been signed on

April 10th, and it may have taken the form of a resolution, but the end of Yakima County's administrative appeals process comes upon the issuance of the written decision. And the earliest date this could have been was when the County provided the written decision on April 13, 2018, in an electronic email from Ms. Madera and, assuming that it was made public -- publicly available on that date, that's the earliest date that you can start the 21-day LUPA appeal period.

Again, that would have been -- 21 days from April 13th is May 4th. Yakama Nation filed its 2018 lawsuit on May 2nd.

So, even if we ignore the plain language -- we don't need to get to this point, but -- RCW 3670C.040(4)(b) does not apply because, as we noted, the County was not sitting and chose- -- elected not to sit in a quasi-judicial capacity.

Washington's courts have provided a four-part test or a four-part -- four-factor analysis for determining when a local agency's action is quasi-judicial on the one hand or ministerial or legislative on the other.

And in *State v. Finch,* which we cited at 173 Wn.2d 7792, that court -- the -- the Washington

Supreme Court held that: Whether an action is quasi-judicial depends on whether the decision was adjudicatory in nature.

So the four-factor test: One, whether a court could have been charged with making the agency's decision; two, whether the action is one which historically has been performed by courts; three, whether the court involves the -- the action, excuse me, involves the application of existing law to past or present facts for the purpose of declaring or enforcing liability; and, four, whether the action resembles the ordinary business of courts as opposed to that of legislators or administrators.

On April 10, 2018, in response to Yakima Nation's notice of appeal, the Board considered the issue of this appeal on its public meeting agenda, which contained resemble number of other nonadjudicative issues. Under YCC 16B.09.050, the Board had a choice. As Mr. Quehrn noted, it could either simply affirm the hearing examiner's decision without accepting additional memoranda and hearing oral argument, which is what Granite requested in the email that we discussed earlier, or it could hold a closed-record quasi-judicial appellate hearing with oral argument, accept briefing, etc., as the Yakama

Nation requested.

The Board, in its discretion, rejected Yakama Nation's request for a closed-record appeal and instead simply affirmed the hearing examiner's decision through its final written decision.

In applying the four factors, the Board did not act in a quasi-judicial capacity when it issued its final decision. While courts might conceivably be charged with affirming or declining to affirm a hearing examiner's decision, this generally does not occur in courts without an appellate hearing where at least the record is established, considered, and legal argument is heard, and briefs are submitted. Here, the Board declied[phonetic] to -- declined to provide any sort of adjudicatory proceedings.

The sort of public hearing the Board held also does not resemble the ordinary business of the courts or actions historically performed by courts. Courts do not typically take public comment and prohibit lawyers from making argument and submitting legal briefing.

And although it could be argued that the Board applied existing law to past or present facts, the April 10th hearing admits no such substantive legal analysis.

So, again, we need to give -- in the first

instance, we need to give the plain language in LUPA and Yakima County's Code effect, which alone leads us to conclude that the decision here is written, so RCW 36.70C.040(4)(a)applies.

But, even if we ignore that, or we look past that, the subsection Granite relies on in its motion to dismiss is inapplicable because the Board of Commissioners elected not to sit in a quasi-judicial capacity on April 10th.

Now, this lists -- leaves us with subsection (c) -- again, the catchall provision, under RCW 36.70.040. That provides if neither (a) -- written decisions -- nor (b) -- ordinances or resolutions by a legislative body in a quasi-judicial capacity -- if neither (a) nor (b) applies, quote, the date the decision is entered into the public record is the date of the final land use decision for determining the commencement of the 21-day appeal period.

And the courts have told us decisions of the sort issued here are entered in the public record when the minutes from the meeting are made open to the public or the decision is otherwise memorialized so that it is publicly accessible.

Here, the Board's written decision was made a matter of public record on April 17, 2018. This is the

date when the minutes of the April 10th meeting showing the -- at least the existence of a final written decision were approved and uploaded, presumably, to Yakima County's website. Twenty-one days after this is May 8th. Accordingly, Yakama Nation's 2018 LUPA petition filed on May 2nd is timely under this provision.

Now, Granite talked about how the authorities are clear on this. And -- and, you know, the LUPA provision -- the 21-day limitation is a strict [verbatim]. But Granite relies principally on *Northshore Investors LLC v. The City of Tacoma* and *King's Way Foursquare Church v. Clallam County*.

And both of these cases, when you take a hard look at them, actually support Yakama Nation's position or at least there are significant distinguishing factors between those cases and the situation before this Court.

In *Northshore Investors*, the appellant there argued that Tacoma's ordinance required a written decision like we're arguing here. The Court found that the Tacoma Code contained no requirement that the city council in that case issue a written decision. In fact, the court held that, in the situation before the Tacoma municipal -- the Tacoma City Council, rather,

the Tacoma Municipal Code permitted an oral decision.

And the Court used the date of that oral's decision entry [verbatim] into the public record as the starting point for determining whether the appellant had met the LUPA 21-day filing deadline. The Court there undertook a thorough analysis to -- regarding when the oral decision was made public under subsection (c) of RCW 36.70C.040, Section (4).

In this case, Yakima County not only does not permit an oral final decision for purposes of administrative appeals, it expressly requires a written decision from the Board.

Granite also relies on *Northshore Investors* to call attention to Ms. Madera's notice, arguing that this notice is not a written decision, just as the notice of the oral decision in *Northshore* was not deemed a written decision from Tacoma City Council.

We actually agree with Granite on that point. Yakama Nation is not taking the podi- -- position that Ms. Madera's notice is a written decision. Rather, her notice is to execution of the mailing or, alternatively, the notice of public availability of the written decision under 36.70C.040(4)(a).

The distinction between here and *Northshore* is the notice in the Tacoma case didn't contain anything

written by the Tacoma City Council. This notice contained the resolution, which was the final written decision under 16B.09.050, subsection (5).

The *Clallam County* case likewise supports Yakama Nation's position. The issue there was whether the Board passed a resolution orally when it voted to affirm the hearing examiner on November 18, 2003, or rather on December 2, 2003, when it reduced its decision to a resolution by a legislative body sitting in a quasi-judicial capacity.

The Court held there that the decision was not final upon the Board's vote to affirm the hearing examiner's decision in November. They had a -- just like that -- this case here, they had a meeting, although they sat in a quasi-judicial capacity, and they voted to affirm the hearing examiner. Instead, it was final when the decision was reduced to writing and issues.

Unlike here, the Board in *Clallam County* was sitting again in a quasi-judicial capacity, but more importantly, unlike here, the Board in *Clallam County* at that time was not required to end its administrative appeal process under LUPA with a final written decision.

LUPA's 21-day limitation period is strict.

But no president[verbatim] -- no precedent requires this Court to find the shortest applicable start date for the 21-day deadline and apply that. Furthermore, there's no authority dictating that a resolution cannot be a written decision for purposes of RCW 36.70C.040(4), subsection (a), especially when a final written decision is prescribed expressly as the ending point of the administrative appeal for purposes of LUPA.

So when considering LUPA and the code together, along with the rules of statutory construction, it is clear that the decision here was a written decision as required by law, even if it took the form of a resolution. Because Yakama Nation timely filed its appeal of the Yakima county's final written decision, under LUPA, Granite's motion to dismiss must be denied.

Furthermore, because we now have acknowledgment from all parties that the administrative appeal framework under Yakima's -- County's old code required act- -- effectively a violation of the statutory linkage requirement, with respect to the 2017 lawsuit that the Yakama Nation filed, Granite's motion to dismiss actually highlights why the appropriate relief here, as Mr. Jones will discuss, is to grant

Yakama Nation's motion to remand so that the administrative process can finally advance in compliance with state law.

THE COURT: Okay.

MR. SEXTON: If the Court has no questions, that concludes my argument. Thank you for your time.

THE COURT: Thank you. Thank you.

Mr. Quehrn?

MR. McILRATH: Thank you, Your Honor. Just briefly, I'd like to respond to one of your questions and --

THE COURT: Sure.

MR. QUEHRN: -- a few of the points made by Mr. Sexton.

You asked the question, I think -- is was this a hearing or a meeting?

THE COURT: Um-hmm.

MR. QUEHRN: There's no question it was a public meeting.

THE COURT: Um-hmm.

MR. QUEHRN: That's reflected in the record. The question is, is whether there was a hearing or a meeting, does that change the fundamental function or the capacity within which the Board of

County Commissioners was sitting and acting.

And the answer is it does not, any more than making a judgment on the pleadings in this court would change the fundamental nature of what you do.

THE COURT: Um-hmm.

MR. QUEHRN: It was the prerogative of the Board of County Commissioners to take more argument, to -- to essentially take more briefing. This case was litigated in front of the hearing examiner for almost six months. There were two rounds of dispositive motions, and a very thorough and rel- -- well-written and well-documented final decision.

It's perfectly reasonable for a reviewing body to look at that and say, I have sufficient information to make my determination, which is what the Board of County Commissioners did. The fact that they did that in a meeting, as opposed to a hearing, doesn't change the fundamental nature of what they were charged to do and what they did.

And relative to the statute that I'm pointing to that is controlling, it says hearing or other contested case proceeding. It was an "other contested case proceeding" as allowed by ordinance.

Now, if the argument is somehow that didn't afford sufficient due process, then what should have

happened is that should have been appealed timely -- 21 days of the date of the resolution as the statute says -- and that issue could have been raised then. But to try to go retroactively back and change the nature of what the Board of County Commissioners was doing is just not accurate. They were sitting as a court of appeal.

The second question I wanted to address is: There's a lot of discussion of the ordinance and how the ordinance affects this case. The statute determines your jurisdiction, not the ordinance. I believe the ordinance is clear.

Again, I think Mr. McIlrath was correct in pointing to subsection (5): The board's final written decision shall constitute final administrative action.

The board's final administrative decision is in writing. It's a piece of paper. It's a resolution. It's in front of you. It's dated April 10th. It was passed April 10th. And the controlling statute says the date that resolution was passed was the date that decision was issued.

As to the four-point test, I would just encourage Your Honor to apply it to what happened here. It's interesting they rely on pre-LUPA cases primarily. *Finch*, in particular, is actually -- was applied -- the

appearance of fairness case, I think, was applied -- a document applied to prosecur- -- prosecutorial discretion in a criminal case.

It's one of the reasons why the legislature did what it did after years of litigation of what the appearance of fairness doctrine meant to what it applied to; they fixed that. And it applies to what's -- the definition that's in front of us in this case or another contested case proceeding.

This was not legislation. It can't be considered les- -- legislation. The Board wasn't free to take policy considerations into effect in making their decision. They weren't free to take additional testimony.

As I read from the record, they were limited to what was in front of them, and they had to conclude that a burden of proof hadn't been carried and that there was s- -- essentially substantial evidence to support the decision below. That is fundamentally and in essence a judicial, not a legislative determination.

And finally, I'm hesitating to go here because I think it concedes too much. I think the -- the controlling portion of the statute is -- which we've argued -- that basically treats this as a legislative body making a quasi-judicial determination. But even

if you go to see, this was entered into the record when they passed the ordinance.

Some clerk writing a letter didn't have to do anything to enter it into the public record. That's just -- that's a crazy argument, with all due respect.

It's fine that the notice letter went out, but the notice letter reads in the past tense. This happened then. The ordinance was passed on April 10th. That's when the final decision was made. And Yakama Nation was present at that.

I must admit: Missing the Statute of Lis- -- Limitations is very harsh. And in land use cases, the State of Limitations, we all lose sleep on them because they're short, and you have to figure out when it starts and when it ends. But I think, in this case, with all due respect to the Yakama Nation, the statute is clear: The Board of Coun- -- County Commissioners is a legislative body, they were acting in a quasi-judicial capacity, they issued their decision when they passed the resolution, and the 21 days ran on May 1st.

Thank you, Your Honor.

THE COURT: All right. Thank you. Anything else, Mr. McIlrath?

MR. McILRATH: No, Your Honor.

THE COURT: Okay.

Well, this is not an area that I'm terribly familiar with, and maybe you lost some sleep over this as -- and I've lost a little sleep over this as well.

And I did look at all these statutes. What I wasn't able to pull up was the -- the Yakima County Code because it had changed, and so I couldn't find the old code. So this is helpful information for me. So, yeah, it -- it is a harsh result, if that's the direction I go.

The concern I have is that, when I looked at the statutes, it says 36.70C.040, sub (4), subsection (b): If the land use decision is made by ordinance or resolution by a legislative body sitting in a quasi-judicial capacity, the date the body passes the ordinance or resolution is the -- the -- the beginning of the 21-day period.

And then I go to RCW 42.36.010, and it defines what a legislative body sitting in a judicial capacity would be, and it says: Quasi-judicial actions of local decision-making bodies are those actions of the legislative body -- it goes on and lists what those bodies might be -- which determine the legal rights, duties, or privileges of specific parties in a hearing or other contested case proceedings. And that's where

I kind of stop and catch myself.

That language, "in a hearing or other contested case proceedings," I don't even get to the -- the -- the code, because as far as I can tell, the -- the legislative body here made the determination that they would basically affirm without holding a hearing or other case proceeding.

And so this -- this statute basically embodies the four-part test as far as I can tell, as far as -- or it attempts to embody that. And I look at that, and -- and I say to myself, a hearing in -- in itself must be adjudicatory in order for them to be sitting in a -- in a quasi-judicial capacity.

So I'm not finding that that occurred here as a result of the Board option to -- to deny the -- the closed -- the co- -- the closed-record hearing. Subsection -- 16B.09.050, subsection (1) talks about -- subsection (a) of that says: The Board may decide to affirm the hearing examiner's decision based on its review of the written request and transcript without a public hearing.

And that's what they did here. They did not have a public hearing. And so they did not sit in a quasi-judicial capacity as far as this Court is concerned.

I also think that this -- that the County admits -- or there's an admission at least in the letter that was sent by Ms. Madera. She says that the County decided to -- whether to affirm or hold a closed-public -- or a closed-record hearing. The Board unanimously decided to affirm the hearing examiner's decision and sign this resolution, which is attached for your records.

She goes on to say: At this point, all administrative appeals have been -- been exhausted. So in a -- in a way, she's saying, when you receive the letter or this letter has been sent out -- it was sent out by email -- at this time, at this point, she says, all administrative appeals have been exhausted. That triggers the 21-day period as far as the Court's concerned, and that's consistent with that language in the code that says the Board's final written decisions -- and, in this case, the written decision is the resolution -- con- -- shall constitute a final administrative action for purposes of 36.70C RCW.

So I can go ahead and -- and walk through the four-step analyzation that the supreme court's still utilizing in these cases. I've seen an unpublished opinion that came out in March where they're still -- they're still relying it [verbatim].

But I don't think I even have to get there. My decision is that the appeal was made timely to the Court. So the motion is denied be- -- for those reasons.

So next issue?

MR. JONES: Thank you, Your Honor.

THE COURT: Oh, apparently we need to take a break. So we're going to take a five- to ten-minute break. So we'll come back, and we'll argue the motion for the plaintiffs.

THE CLERK: All rise. Court is now in recess.

(Break in recording from 10:24 a.m. to 10:32 a.m.; unintelligible discussion.)

THE CLERK: All rise. Superior court's back in session.

THE COURT: Please be seated.

All right. Next motion would be the motion to reverse and remand, I believe. Mr. Jones?

MR. JONES: Yes, Your Honor. Thank you.

Ethan Jones on behalf of the Confederated Tribes and Bands of the Yakama Nation, and I'll be arguing the Yakama Nation's motion to reverse and remand.

There are two issues that are primarily raised in the motion. The first is whether Yakima County erred in bifurcating appeals of its environmental decision on the one hand and its land use decision on the other between administrative and judicial forums.

The second issue is whether the hearing examiner subsequently erred in only linking half of the Yakama Nation's SEPA appeal with the underlying land use decision. And the answer to both of those is yes, Yakima County did err in -- in -- on both accounts.

And this all stems from application of the former Yakima County Code which allowed administrative appeals of project permit decisions but disallowed administrative appeals of any related SEPA threshold determinations.

So under county code, not state law, the County issued a final MDNS and a Conditional Use Permit that couldn't be appealed together. So the Yakama Nation was forced to appeal the final MDNS immediately to Yakima County Superior Court and separately appeal the land use decision administratively.

Yakima County's requirement to appeal the SEPA issues to state court clearly violates the statutory linkage requirement which is at the heart of this case. So the Court, in that 2017 lawsuit, stayed the

proceedings so that we could go and resolve those through the administrative process. And as Mr. Quehrn noted, there were rounds of dispositive motions, and the first dispositive motion that the Yakama Nation brought was on this issue.

But ultimately the hearing examiner determined that he was bound by the Yakima County Code, and he followed the Yakima County Code, which -- and in doing so said that bifurcation was proper under the code.

And he then tried to address the issue, though, in a subsequent round of dispositive motions. And in trying to address it, he allowed substantive SEPA arguments, but he didn't allow procedural SEPA arguments. So in essence what he did was he partially linked the SEPA issues and the land use appeals.

Now, the basic rule in Washington is that appeals of SEPA threshold determinations and the underlying governmental action must proceed together, linked in a simultaneous hearing before one appellate body. And that comes from RCW 43.21C.075, subsection (2)(a), which says, quote: Appeals under this chapter shall be of the governmental action together with its accompanying environmental determinations.

And that is unambiguous: Governmental action together with its accompanying environmental

determinations.

And that's been implemented through regulation at WAC 197-11-680, subsection (3)(v). And in that subsection, it says, quote [as read]: Except as provided in subsection (a)(vi), which is not applicable, the appeal shall consolidate any allowed appeals of procedural and substantive determinations under SEPA with a hearing on -- or appeal on the underlying governmental action in a single simultaneously hearing before one hearing body or officer.

And the Supreme Court has also announced this rule in *State ex rel. Friend & Rikalo Contractor v. Grays Harbor County*. The Washington State Supreme Court said, quote: The general rule in both administrative and judicial SEPA appeals is that they must combine review of SEPA issues with the related government action.

And one part that I just want to highlight there, because Granite argues that this rule only applies in a judicial context: The Washington State Supreme Court says that the rule applies in both administrative and judicial SEPA appeals. So it is clear, then, from these rules that SEPA appeals and appeals of the underlying governmental action must

proceed together, linked simultaneously before one hearing body or officer, and the rule doesn't provide for any sort of partial linkage of those -- those two disputes.

Yakima County didn't meet these requirements when it separated the appeals, and it said as much when it recently amended the Yakima County Code to fix the linkage issue.

On July 11, 2017, Mr. Thomas Carroll, Yakima County planner, said, quote: A number of years ago, in our attempt to adjust how SEPA appeals were conducted through Yakima County, we removed the Board of County Commissioner hearing process on SEPA appeals. By doing that, for Type 1 and Type 2 land use decisions, we effectively violated and became inconsistent with state law on how SEPA appeals need to be consolidated with the underlying land use appeal.

Any land use decision for Type 1, Type 2, would be appealed to the hearing examiner, and before the changes, the SEPA would also be consolidated with that appeal to the hearing examiner. When we made the changes, we sent the SEPA appeal to superior court, separating those two processes which ultimately was against state law and created a mess on how the hearing examiner was able to conduct the hearing on the

underlying land use decision without having an opportunity to hear the SEPA appeal as well.

So Yakima County has freely admitted that this appeal procedure that was forced on the Yakama Nation in this dispute was, quote, ultimately against state law, end quote.

Now, the Supreme Court case law also helps our understanding here. In Grays Harbor County, which I mentioned previously, that was where a property owner challenged a surface excavation permit and a SEPA determination for a neighboring mine.

And after the administrative review in that case and the judicial appeal, the superior court denied the appeal as untimely. So the issue, therefore, was one of timeliness, and ultimately the Court said that -- that the appeal was timely. But for our purposes, the relevant analysis is whether the appeal requirements violated the statutory linkage requirement.

So in that case, you had a county ordinance that required appellants to file a judicial appeal of the land use decision and, at the same time, an administrative appeal of the SEPA determination. So that's the same bifurcation issue that we have here, except the decisions are flipped.

So the fact that the decisions were flipped doesn't matter, though, and the reason that we know that is because it was this case where the Washington State Supreme Court said: The general rule, in both administrative and judicial SEPA appeals, is that they must combine reviews -- so "in both administrative" -- so they're including administrative appeals here -- is that they must combine review of SEPA issues with the related government action.

So the Supreme Court held that this violated the linkage requirement in Grays Harbor County, and that holding should be extended to this case.

The Washington State Supreme Court has also considered a similar issue in *Ellensburg Cement Products*, which is where Ellensburg Cement Products challenged Kittitas County's issuance of a conditional use permit to what appears to have been a business competitor.

Now, Kittitas County held administrative appeals for both the SEPA issues and for the land use determination, but what they did was they held them separately. So they held a separate closed-record hearing for the SEPA appeal, and a separate open-record hearing for the land use appeal.

So even though they happened simultaneously,

they didn't happen linked together before one hearing body or officer. And in our case, we haven't even had the chance to have an administrative hearing on both our SEPA and LUPA appeals.

So in summary, the County improperly bifurcated these appeals. The hearing examiner improperly partially linked the appeals, and Yakima County admits that this procedure violates state law.

So under RCW 36.70C.140, the Court is empowered to affirm the land use decision, reverse the land use decision, remand the land use decision for modification or further proceedings. And it's important to note that this statute doesn't limit when, in the proceeding, you have that authority.

The Court has that authority as it sits here today. Under RCW 36.70C.130, the Court may grant relief where the County engaged in unlawful procedure or failed to follow a prescribed process, as it has done here, and where the County relied on and inter- -- erroneous interpretation of the law.

Yakima County's and the hearing examiner's improper bifurcations represent both an unlawful procedure and in- -- and an erroneous interpretation of the law and should therefore be reversed and remanded so that Yakima County can proceed in accordance with

state law in this proceeding.

Now I'd like to briefly address some of the counterarguments that Granite raised in its -- in its response. So Granite argues that the Yakama Nation's requested relief isn't available at this initial hearing. And in making that argument, they rely specifically on *Worldwide Video of Washington v. City of Spokane*.

And in that case, the Court considered whether a party waived their collateral estoppel argument by failing to raise it. So they failed to raise an argument at the initial hearing, and the Court held that the argument wasn't waived because, when you look at the statute, that's not one of the arguments that is expressly waived if you don't raise it.

Now, waiver for failure to raise an argument at an initial hearing has no bearing on the Nation's ability to raise this dispute at the initial hearing [verbatim]. And in fact, RCW 36.70C.080 requires parties to note and -- quote, note all motions on jurisdictional and procedural issues for resolution at the initial hearing. And that is exactly what the Yakama Nation did with this motion.

Now, Granite also argues that Yakima County was not required to provide an administrative appeal

under SEPA as -- as they've raised already. And we agree that, in general, SEPA does not require counties to hold administrative SEPA appeals.

But the statutory linkage requirement dictates that, if an administrative appeal is allowed, an adminis= -- for a land use appeal, an administrative SEPA appeal must also be allowed, both of which would proceed together, linked simultaneously, before a hearing a body.

And we know this because of the rule from Grays Harbor County that the general rule, in both administrative and judicial SEPA appeals, is that they must combine review of SEPA issues with the related government action.

Next, Granite argues that, under *Town of Woodway v. Snohomish County*, it has a vested right to have its appeal heard under the -- the former Yakima County Code, not the corrected Yakima County Code that happened in 2017.

So *Town of Woodway* has a good discussion on the vest rights doctrine which, at common law, provides developers with certainty that their development projects will be processed under the regulations in effect at the time that a complete permit application is filed.

But Granite neglects to mention from that case is that the vested rights doctrine in Washington State is now statutory. It is not a matter of c- -- of common law. And the three statutes that are pointed to in that case: RCW 19.27.095(1) deals with building permits for structures, which we don't have here; RCW 58.17.033(1) deals with subdivision applications, which we don't have here; and RCW 36.70B.180 deals with development agreements, which we don't have here.

None of these subsections apply to Granite's conditional use permit applications. Granite has no vested right to have its application considered under the former Yakima County Code, and I do think that there is also an issue as far as whether the vested rights doctrine, to the extent it does even apply, could allow a county ordinance to survive that is clearly contrary to Washington State law as admitted by the County.

And then, finally, Yakima County argued in its response that it wasn't afforded sufficient time to respond to the motion. I would just note that Yakima County stipulated to the proposed briefing schedule. We didn't hear anything in terms of requesting additional time following that.

So for all of these reasons, the Yakama Nation

requests that the Court reverse and remand the County's final MDNS and land use decision for further proceedings in accordance with state law. Thank you, Your Honor.

THE COURT: Thank you.

And who is going to argue?

MS. WILSON-McNERNEY: I am, Your Honor.

THE COURT: Okay. And [unintelligible] --

MS. WILSON-McNERNEY: I am Julie Wilson-McNerney. I am appearing on behalf of Granite Northwest and Frank Rowley in the 2017 case and Granite Northwest, Frank Rowley, and the Rowley Family Trust in the 2018 case.

There are -- there are three reasons why the Yakama Nation's motion to reverse should be denied. First, the Yakama Nation's motion to reverse is premature, and it's beyond the scope of the LUPA initial hearing.

LUPA initial hearings are to address procedural and jurisdictional issues. They are not to reach the merits. And the issues that the Yakama Nation framed today for you are issues regarding the merits of this case, and it's simply not the time to hear those.

If this Court decides to hear the Yakama

Nation's arguments on the merits, this Court must still deny the Yakama Nation's -- Nation's argument. The County's appeal procedures fully comport with SEPA, and reversal and remand is not needed.

Finally, the relief that the Yakama Nation seeks is without basis in law. Most of the Yakama Nation's argument today glosses over the fact that what they argued in their brief was that this is a jurisdictional issue. They argued that because they failed to exhaust their administrative appeals, this Court does not have jurisdiction to hear and decide this case.

Yet, they ask that you reach the merits, reverse the County's CUP decision -- effectively send it back to the county planning department for reprocessing of the application -- and then to proceed through a new administrative appeals process under the county -- the new county code.

If the Court does not have jurisdiction to hear and decide this issue, the Court cannot reach the merits of the case and cannot reverse the decision that is being appealed.

So let me address the purpose of the LUPA initial hearing first. Only jurisdictional and procedural issues may be heard at the LUPA initial

hearing. RCW 36.70C.080 defines what constitutes preliminary matters. There are, in our case, two subsections that apply, subsection (3) and subsection (4).

The first is the untimely filing or service of the petition -- we've -- we've dealt with that issue already -- and then asking for an order that sets the date on which the record must be submitted; sets a briefing schedule; sets a discovery schedule, if discovery is to be allowed; and sets a date for the hearing or trial on the merits. That will be the next -- the next round of motions that are -- are heard.

Issues that fall outside of RCW 36.70C.080, subsection (3), are not subject to waiver if not raised in the initial hearing and should be heard at a later date. This is not the time or place to decide an issue on the merits without the certified record being before this Court and without the benefit of a briefing schedule that allows adequate time to address these issues. When the stipulation for the briefing schedule in this was discussed amongst the parties, there was no understanding that we would be seeing a -- a dispositive motion from the Yakama Nation on these issues.

So the Yakama -- the Yakama Nation is -- has not got a jurisdictional issue here. They are challenging the legality of the county's appeal procedures. They argue that this court lacks jurisdiction because they've not exhausted their administrative remedies. But they have.

RCW 43.21C.075, subsection (4) does require the exhaustion of procedures that are available to appellants. The Yakama Nation did exhaust the administrative appeals that were available below. And they admit this -- it -- that -- and they admit that their motion is dispositive at page 21 of their motion.

LUPA defines the procedure and the grounds upon which a Court may reverse or remand a land use decision, and the Yakama Nation bears the burden of proof on this issue.

First, RCW 36.70C.130, subsection (1), states that the Court must have reviewed the administrative record before a decision on the merits can be made. Then, the petitioner must meet their burden of proving one of the standards set forth in RCW 36.70C.130(1)(a) through (f), and this is the argument that you heard from them today.

This procedure just has not been followed yet. The challenged decision and the certified record are

not yet before this Court, and there's no basis yet to reverse or remand on the law or the facts. It's simply too early for this Court to reach dispositive -- to reach the dispositive issues.

However, if Your Honor decides to hear and decide the merits, the Yakama Nation motion still fails because the County's appeals ordinance was lawful. Yakima County is not required to provide an administrative appeal of a SEPA threshold determination. This is consistent across SEPA, the SEPA rules, case law and Ecology's SEPA guidance documents.

RCW 43.21C.075(3) says that the county does not need to provide administrative appeal of a SEPA threshold determination. So does WAC 197-11-680(3)(a). So does *Ellenburg[phonetic] Cement Products v. Kittitas County*, and so does Ecology's SEPA guidance document. The hearing examiner's decision also states this after a careful consideration and full briefing on the merits.

The Yakima -- Yakima County chose to exercise its option not to provide an administrative appeal of a SEPA threshold determination. Under the old code, YCC 16B.06.070, sub (1), explicitly stated that administrative appeals of threshold determinations on

Type 1 or Type 2 projects are not allowed.

We all agree that there's a SEPA consolidation rule, but we do not agree on when the SEPA consolidation rule applies or how it should be applied. Petitioners argue that the consolidation rule should be applied to administrative appeals to require local governments to provide administrative SEPA appeals.

The argument is contrary to the plain language of SEPA, and I'll quote from RCW 43.21C.075, subsection (3): If an agency has a procedure for appeals of agency environmental determinations made under this chapter, SEPA, such procedure shall consolidate an appeal of procedural issues and of substantive determinations made under this chapter with a hearing or appeal on the underlying governmental action by providing for a single, simultaneous hearing before one hearing officer.

And that is -- that is only triggered if the agency has a procedure for appeals of the threshold determination. Yakima County did not have that here.

The rule is clear on its face. If there is an administrative appeal to be provided, then it needs to be consolidated with the underlying governmental action. If there is no administrative appeal provided, then SEPA does not apply, RCW 43.21C.075,

subsection (c) does not apply, and there is no consolidation rule to be applied to the administrative appeals in this case.

This conclusion is consistent with the purpose for which the consolidation rule was created, and again, there -- the legislature left nothing to the imagination here. RCW 43.21C.075, subsection (1), states, and I quote: Because a major purpose of this chapter is to combine environmental considerations with public decisions, any appeal brought under this chapter shall be linked to a specific governmental action.

The State Environmental Policy Act provides a basis for challenging whether governmental action is in compliance with substantive and procedural provisions of this chapter. The State Environmental Policy Act is not intended to create a cause of action unrelated to a specific governmental action. The legislature was worried about standalone SEPA appeals going without the land use decision, not land use decisions going forward without the SEPA appeal.

If you have SEPA issues, you must raise them in connection with the appeal of the underlying action either at the administrative level, if SEPA appeals are allowed, or upon judicial rule -- review if and when you appeal the underlying action pursuant to

RCW 43.21C.075, subsection (6)(c), which states: Judicial review under this chapter shall, without exception, be of the governmental action together with its accompanying environmental determination.

There is no plain or even strained reading of the statute that says if an agency elects not to provide a SEPA administrative appeal, then any and all other appeals of the underlying action are rendered null and void. The statute does not say that, none of the cases say that, and it is not case law.

The Yakama Nation points to Grays Harbor and tries to wipe away the dis- -- the procedural posture and the factual situation of that case by saying that the fact that the County's decision to allow for a SEPA appeal but not a land use appeal, that -- it doesn't matter that it's flipped in this case.

But it does matter. The SEPA -- SEPA and the SEPA rules address what happens when an agency and local government agrees to adopt procedures for a SEPA appeal. It does not address the situation we have here where the County elected to offer an administrative appeal of the CUP decision but not the threshold determination.

And I think the -- that petitioners understand this rule. Why else would they have filed their

judicial appeal of the MDNS in 2017 and why would they have moved to stay their LUPA appeal pending the outcome of the administrative appeals process?

When they stayed their 2017 LUPA petition, they did so because they needed their administrative appeal of the CUP decision to be exhausted before their SEPA claim could be heard in superior court.

In a consolidated appeal before the superior court, which we still do not have, the Yakama Nation could have asked for discovery on the MDNS decision to the extent these issues were not fully developed in the open-record consideration of the CUP decision and provided that they have met the requirements of asking for discovery on LUPA, which Mr. Quehrn will address in the next round of motions.

Reversal and remand is not an appropriate remedy here. The Yakama Nation makes the strained argument that the Court does not have jurisdiction because the Nation has not exhausted an administrative appeal that was not available to it.

Because this Court doesn't have jurisdiction, they argue, the Court must reach the merits of the case, deny the permit, send the permit application back to the county to make a new permitting decision that can then be appealed under the county's new appeal

ordinance. Lack of jurisdiction means that this Court does not get to decide the merits of the case. It is not a legal ground to rule in favor of either party.

Petitioners have cited to no authority that holds that this Court can or should reverse a decision on a permit when the Court has juris- -- excuse me, no jurisdiction over the subject matter.

Additionally, if the CUP decision is reversed and remanded to the county planning department, this is a highly prejudicial decision for the applicant. Granite would be required to refile its permit application just because of an alleged problem with the county's administrative appeals process.

If the Court decides today just to remand and not to reverse, which is not quite what the petitioners have asked for, the new county ordinances the Yakama Nation cites would not apply to a second round of administrative appeals to the county's decision even if a second round of administrative appeals could be granted.

Laws are appri- -- applied prospectively, not retroactively. And when the county passed their new ordinance during the pendency of this appeal, the county indicated that it would not seek to apply the new ordinance to Granite's existing application.

Were the Court to remand the count- -- to the county hearing examiner for further proceedings, the same ordinance would apply. We would have to go and then we would be back here again in the same posture.

Granite and the Rowley and the Rowley Family Trust -- we did not write the county orgument[phonetic] -- the county ordinances. We followed them in good faith, and we've defended the county's permitting decision in good faith.

Granite does have -- the -- the principle of vested rights doctrine should be applied in determining whether to require Granite to go back and start over -- state the permitting process over because of an administrative appeals procedural change during the pendency of the Yakama Nation's appeal.

If the Court -- ultimately, if the Court finds that it does not have jurisdiction to hear the Nation's appeal, then the sole remedy is for this Court to dismiss for lack of jurisdiction and not the rea- -- reach the merits of this case.

Thank you.

THE COURT: All right. Thank you.

Mr. McIlrath?

MR. McILRATH: I'll -- I'll just be brief. Once again, I do join in with the arguments and support

the arguments that we made by Ms. Wilson-McNeary[phonetic] on all three matters. But in my briefing, I highlighted the concerns the Yakima County has about this -- the status of this as a preliminary hearing and a LUPA matter and being required to respond to arguments that go to the merits of the matter.

We only had five days to respond, effectively, to the notice -- I mean, to the arguments that were received in their motion. And before -- and it -- it -- that's not sufficient time to really respond to all the matters that were raised in the petitioner's briefing.

But I -- I also would point out that there many cases where SEPA and permit decisions are bifurcated. It isn't req- -- there isn't the requirement of mandatory joining at all -- in all situations. Many times, there's projects that are reviewed under SEPA, but the actual permits are issued at a very different time. And so that -- that's not so uncommon.

So that's my argument.

THE COURT: All right. Thank you.

Mr. Jones?

MR. JONES: Thank you, Your Honor.

So I -- I guess I -- I'll hit on that -- that last point first. So we went through a briefing process on this issue before the hearing examiner, and then -- and then we've gone through it again. And at no point has Granite or Yakima County raised these numerous examples of where this happens.

In fact, as far as we can all tell, I -- I'm not seeing anyone pointing to precedent that is exactly this situation. That's the reason why it's -- it's being addressed in the way that it is.

So Ms. Wilson-McNerney started with saying that the Nation's arguments here are premature. There are no issues of fact that have -- have been raised or exist. There's nothing that the record is going to change about the underlying facts. There's no dispute as to what the underlying facts are.

The certified record is -- is not going to have an impact on that. And, in fact, the -- the initial hearing -- the statute governing what should be raised says to bring all procedural and jurisdictional arguments here or they're waived, and we didn't want those to be waived. So -- so here we are.

I also would like to address the relief that's being requested. I think that there is a suggestion that Granite is going to have to go back and actually

resubmit everything and start from square one. That's not what the Yakama Nation has requested.

Yakima County has gone through a process where they issued a final MDNS. They issued the land use decision. All that the Yakama Nation is requesting is that those be reissued in accordance with state law, in accordance with the statutory linkage requirement. So this would not set Granite back to the very beginning of -- of the process that they had started.

I also -- at, I guess, the risk of being repetitive, it was raised again that the County is not required to provide this appeal, and, again, we've said we -- we understand that. But to the extent that, if an administrative appeal of a land use decision is provided, then the -- the accompanying SEPA appeal needs to be heard, too.

And that's under Grays Harbor County and the general rule, in both administrative and judicial appeals, that they must combine review of SEPA issues with the related underlying action.

I -- I also -- to the extent that this was a legal process that -- as Granite has argued, we have Yakima County on the record saying it wasn't. We have Yakima County changing its code, saying that this procedure was not legal. To -- to argue otherwise

in -- in this proceeding, I think, raises estoppel issues.

And I think that there is also a real question about how the Court in this proceeding is going to be moving forward and relying upon an administrative record where only half of the Nation's SEPA appeal has been developed. There's a whole half of the SEPA appeal that has not been heard, and the -- and the Yakama Nation has significant issues with -- with those procedural SEPA arguments.

So I guess I'll just close with saying that Yakima County has employed an unlawful procedure in this case. It has admitted that its procedure was unlawful and has amended the Yakima County Code as a result of that.

All that the Yakama Nation is asking that the Court send these decisions back to the County so that it can reissue them and proceed in accordance with state law. Thank you, Your Honor.

THE COURT: All right. Thank you.

And, Mr. Quehrn, I see you reaching for the microphone. Is there some last point --

MR. QUEHRN: Thank you, Your Honor.

THE COURT: -- that you'd like to make?

MR. QUEHRN: I just wanted to make to

clarifying point here. There's a reason why it's important that the record be before you before you make a decision: Yakama Nation has, several times now, referred to a statement that was made by a -- a county planner before the board of commissioners that had to do with considering an ordinance that's not part of the record of this proceeding.

THE COURT: I understand.

MR. QUEHRN: It's not properly before you.

And moreover, Mr. Carroll, very nice man, but he's not a lawyer and not entitled to give legal opinions on behalf of the County.

THE COURT: All right. Thank you.

Any response to that, just briefly?

MR. JONES: Yes, thank you.

RCW 36.70C.120, subsection (3), states that, quote [as read]: For land use decisions other than those described in subsection (1) of this section, which doesn't apply, the record for judicial review may be supplemented by evidence of material facts that were not made part of the local jurisdiction's record.

And when you look at sub- --

THE COURT: Doesn't that require permission of the Court to do that?

MR. JONES: I -- I don't remember -- I

don't recall actually seeing that in the statute.

MR. QUEHRN: Sub (5).

MR. JONES: So if you look at subsection (1), it says that the Nation -- that you have to have an opportunity consistent with due process to fully develop the factual record, which we would offer was not afforded here because half of the Nation's SEPA appeal was not allowed to be put before the hearing examiner and litigated.

And, further, this is a public record. RCW 5.44.040 provides that public records certified by the relevant officer shall be admitted into evidence. And if we look at the seal that is included on those minutes that are publicly available on the Yakima County's website, this certainly meets those requirements that's been attached as an exhibit to the Yakama Nation's declaration on this.

Thank you, Your Honor.

THE COURT: Thank you.

Well, this case is going to be preassigned. I just went back briefly to -- to look at the -- the -- LUPA petition. It seems to me this is one of the main issues and the most dispositive issue -- or one of the most dispositive issues that is going to be before that preassigned judge -- maybe me, maybe somebody else.

At this point, you've preserved the issue. I'm not going to meet the issue and decide that today. It's -- I think it's premature. I think we need -- do need to get the record, and everybody needs an opportunity -- a fair opportunity to be able to brief this. And I think the judicial officer needs to see that coming in from both sides once the record is certified and up here. So that motion is reserved.

So now we've got a motion to allow discovery and set a scheduling order. It looks like that's the last of the issues.

Are you ready to roll?

MR. JONES: Yes, Your Honor.

THE COURT: Okay.

MR. JONES: I'll -- I'll take the first crack at that one. Ethan Jones on behalf of the Confederated Tribes and Bands of the Yakama Nation.

The Yakama Nation is requesting additional discovery in this case. I think that we've discussed, *ad nauseam* at this point, the fact that procedural SEPA issues were not allowed to be heard before the hearing examiner.

So there are a number of issues at this point that have not been -- there's -- no discovery has been allowed on those issues. They weren't -- the hearing

examiner said they were not properly before the hearing examiner, before his administrative body. So what we would like to do is have discovery that is specific to those substantive -- or, excuse me, procedural SEPA issues that have not been addressed at all before the -- the hearing examiner.

And -- and then for the proposed schedule, we -- we took our -- we took our best shot at putting some dates together. We're certainly happy to talk about discussing how those dates fit for the opposing party as well as for the Court.

THE COURT: All right. In your briefing, I don't know that I saw that you were requesting that specifically. It was more generic than that.

Can you point me to where you were asking for that specifically in your briefing?

MR. JONES: So, Your Honor, it -- it is a general request for discovery. I -- I think that given the opposition that was received from the -- from the opposing side, I -- I'm clarifying the fact what we're looking for is additional discovery on those procedural SEPA issues that were not -- that were not subject to discovery.

And there are a few additional issues that were not allowed by the hearing examiner to be entered

into the record. The -- the record for this case was closed months before the -- the hearing examiner actually issued his decision. And in those subsequent months, there were a number of the factual issues that arose that bare heavily on the outcome of -- of this case, and no discovery was allowed on those issues.

And that was argued before the hearing examiner. It was noted and preserved for this appeal. So we are seeking additional discovery on those issues as well.

So -- so you're right, it was a -- a general request for discovery. The specifics we're looking for: The procedural SEPA issues and those issues following the November order where they closed the administrative record that arose subsequent to that and were not allowed to be included in the -- the hearing.

THE COURT: Can you be more specific?

MR. JONES: Yes, Your Honor.

So following the -- the closure, there was notice provided that a -- a landslide had occurred at the quarry in question. That landslide impacted far beyond the -- the permitting boundaries. So they -- the -- there was an exceeding of the scope of those permitting boundaries.

There was also, as I'm sure everyone's aware,

a -- a landslide on a very similar geological formation at just the ridge south, with the Rattlesnake Ridge landslide. Nothing has been put into the record on what has been learned from that landslide and the -- the effects and impacts in terms of this --

THE COURT: So you're looking for discovery from Granite regarding the Rattlesnake landslide?

MR. JONES: So --

THE COURT: Or the County? Or what are you -- I'm a little confused there.

MR. JONES: So we are looking for discovery from Granite on the issue of the landslide at the quarry.

THE COURT: At the Granite?

MR. JONES: Right. Correct.

THE COURT: Okay.

MR. JONES: There -- there is additional information that was not allowed to be included in the record. That's the -- the other landslide. But the -- for Granite, we are looking at the -- the landslide that occurred at that quarry.

There was also a notice of violation issued against Granite for -- by the Department of Archeology and Historic Preservation for land-disturbing

activities outside of their permit boundary within the exterior bounds of archeology site 45YA109.

And I understand that that -- that notice of violation has been assessed and settled at this point between the Department of Archeology and Historic Preservation and Granite. There's nothing in the record that discusses those issues.

So those -- those are the issues that we would be specifically seeking additional discovery on.

THE COURT: All right. Thank you.

MR. JONES: Thank you.

THE COURT: Mr. Quehrn?

MR. QUEHRN: Your Honor, Mark Quehrn on behalf of Granite, Frank Rowley and the Rowley Family Trust.

As you pointed out, discovery is not allowed in the context of a LUPA proceeding without the Court's permission. And this is because, in deciding the LUPA case, the superior court limits its review to the record that was before the decisionmaker at the time those decisions were made.

There are limited circumstances, however, where discovery can be allowed if an appropriate showing is made. Those circumstances are articulated in RCW 36.70C.120, (2) through (4).

As Your Honor noted, we couldn't really tell on the face of the request that was submitted by the Yakama Nation which of those circumstances or which of those exceptions applied. And I'm still not sure that any of the things I heard relate to any of those specific criteria.

Why is that important? It's particularly important because 36.70C.125 requires this Court to, quote, strictly limit discovery to what is necessary for equitable and timely review of the issues that warrant discovery. And, again, that ties back to the record that was before the decisionmaker at the time those decisions were made.

I don't believe that passing reference to those criteria is sufficient to carry the burden. If we're talking about landsid- -- landslides that occurred at some other quarry, that's totally irrelevant and has nothing to do with what was before the decisionmaker at the time the decisions were made.

Similarly, the alleged landslide that occurred at our quarry occurred after the fact. It's subject to jurisdiction of the Department of Natural Resources, has so been addressed. And as counsel mentioned, there was an issue associated with the Department of Archeology and Historical Preservation, which has also

been addressed.

Those occurred later. They had nothing to do with the SEPA determination or the conditional use permit that was made by the decisionmakers at the time. They are not part of the record that was before them, and they're not appropriately -- relate to any of these criteria for supplementation.

Beyond the entitlement question, however, there's also the question of need, and, in fact, the statute requires a specific showing of need. No such showing has been made. And in fact RCW, again, 125 [verbatim] says the Court shall not grant permission unless the party requesting makes a *prima facia* -- *prima facia*, excuse me, showing of need.

They'd made such showing. And actually to the contrary, the Yakama Nation has a full, wide-range discovery of all of the record related to both the conditional use permit and the MDNS before the hearing examiner. This included, although technically not discovery, two public records requests that they filed before the County even made those decisions. It also included about -- combined between Granite and the County, about 4,000 pages of documents that they requested and obtained from Granite and the County.

They had the opportunity to depose all of our

witnesses, and they had the opportunity to depose all of the County's witnesses. The scope of discovery afforded by the examiner included any and everything that could have had to do with the final MDNS. And as far as I can tell, that's the only thing that comes close to meeting any of the criteria that they have made passing reference to. And, again, I submit, as to that, they cannot and have not shown a need to undertake further discovery.

The bottom line is the Yakama Nation has failed to carry its burden of proof that it's entitled to discovery as to any issue with respect to any statutory crite- -- criteria. And beyond that, they have failed to show a need that they need to take any more discovery than they took through the expens- -- extensive and wide-range process that was afforded by the hearing examiner.

Let me briefly just touch on the other two issues. I -- I will just say that the case schedule that was submitted by the Yakama Nation is both inconsistent with the purpose of LUPA and meets -- does not meet specific statutory deadlines, and that can't be approved.

I would -- would actually like to have the opportunity to confer with the Yakama Nation and -- and

the County and see if we can come up with something that meets those requirements rather than forcing you to decide that from your position. If that -- needs to happen, that needs to happen, but I would just request that we meet the requirements of the statute.

And -- and finally, in our -- in our response, we address what I understood was a request for the Yakama Nation to have live testimony at a trial. And I think that's inconsistent with what LUPA provides or would -- would be appropriate in this case.

Thank you, Your Honor.

THE COURT: All right. Thank you.

Mr. McIlrath?

MR. McILRATH: Your Honor, I'm just going to rely on my argument in my brief in response to their motion at this time. And I -- I join in with the -- again, with the arguments that they make regarding the discovery request.

THE COURT: All right. Thank you.

Mr. Jones?

MR. JONES: Thank you, Your Honor.

I will just mention that one of the primary issues that the Yakama Nation is raising as a part of these disputes is that Yakima County didn't gather sufficient information, didn't rely on sufficient

information when it allowed the mining expansion or when it permitted the mine expansion within this archeology site.

I think that an unexpected landslide that exceeds the permit boundaries and directly impacts that archeology site is absolutely relevant information to whether the Yakima County, in the first instance, gathered sufficient information to -- to say that that archeological site is going to be protected from things exactly like this landslide, and that -- and that information was not allowed to be gathered or entered into the record.

And -- and in terms of the -- the full litigation, I -- we have a 2017 lawsuit here with a LUPA appeal on -- or, excuse me, a SEPA appeal that -- that was not allowed to be fully discussed or -- or briefed at all, frankly. There were no arguments allowed on those issues, and there was no discovery allowed on those issues.

So I think the Yakama Nation is entitled to the ability to develop a record on those procedural SEPA issues that were not previously argued or discussed. Thank you.

THE COURT: All right. Thank you.

Well, from the -- the briefing that was

actually supplied -- we've already talked about it -- it was -- this was cryptic. I didn't know what you were looking for. There was no declaration, that I could see, that supported any specific thing that's now being argued here in court.

So for those reasons, I am not allowed to grant permission unless the party requesting it makes a *prima facia* showing of need, and that had not been made from the briefing and -- and the declarations that have been filed.

So I -- I understand, in argument today, we're getting something different. But that's not something I can rely on. It's just argument. So for those reasons, the request is denied.

So with regard to the briefing schedule, we've got 45-day briefings -- or record requirement and then 60-day submission, record submission, and then 60 days after that for the hearing to be set.

I -- do -- do parties know how -- how long we're talking about? I mean, how many days you're...

MS. WILSON-McNERNEY: I believe in our response brief, we -- we calculated that, if -- if the scheduling order was entered today --

THE COURT: Oh, I calculated the dates.

MS. WILSON-McNERNEY: -- what 45 days --

THE COURT: No, what I'm wondering is how many days of trial or appeal hearing are you going to need?

MR. QUEHRN: Speaking for Granite, I actually believe this case should be decided on dispositive motions and hope that would be the case. I guess, at this point, maybe we could confer in terms of what we think the hearing would be.

THE COURT: Do you folks want to --

MR. QUEHRN: Yeah.

THE COURT: -- to do that today and get back to me? Or do you want to do that and just let the Court administrator's office know and come up with an agreed order?

MR. QUEHRN: I -- I would say this, Your Honor, I think if we follow that schedule strictly per calendar, we may have some things falling in Thanksgiving and some other times that could be sensitive to the parties here. So --

THE COURT: Um-hmm.

MR. QUEHRN: -- I would propose that, again, the parties confer, we look at the statutory deadlines and --

THE COURT: Yeah, I think the orders --

MR. QUEHRN: -- and make --

THE COURT: Order to submit the record, if you could move it out a bit, you're probably going to miss some of the holiday.

Yeah. So I'll let the parties confer.

Is there -- do you want to submit a generic order for purposes of the rulings I've made today? Or do you want to present at a later time? Anybody?

MR. JONES: Thank you, Your Honor. I think that I -- so, I guess, first, in terms of the dates being beyond the -- the 60 days that's -- that's provided, I -- I think what we were looking at is the complexity of the issues in the case and the -- I guess, the ability of the Court to provide for a longer time frame if good cause is shown.

THE COURT: Um-hmm.

MR. JONES: And so I think that's what we were relying on.

THE COURT: Sure.

MR. JONES: It's absent a showing of -- of good cause for a different date or a stipulation of the parties. So we're happy to confer.

THE COURT: Okay.

MR. JONES: We're happy to -- to do that.

THE COURT: That makes the most sense.

MR. JONES: So yes. We can do that.

THE COURT: Let's do that.

MR. JONES: Okay.

THE COURT: Okay. But my -- my question is I've made a number of rulings today. Did you want to submit a generic order today and just handwrite those out? Or did you want to submit a presentation with written findings or a written order?

MR. JONES: Presentation.

MR. QUEHRN: Yeah. I -- yes.

MS. WILSON-McNERNEY: We -- we had -- we had draft ord- -- draft proposed orders for the motion denying discovery and a ruling where hearing on the motion to reverse was delayed or -- or...

THE COURT: That's fine. Do you want to...

MS. WILSON-McNERNEY: I mean, we -- we -- we are happy --

THE COURT: Yeah.

MS. WILSON-McNERNEY: -- to share them with the Yakama Nation and see [unintelligible] --

THE COURT: Why don't I do this? Why don't I step off the bench, and you can go over what you've got and see what we can accomplish today.

And does somebody have an order of preassignment?

MS. WILSON-McNERNEY: Yes. Somewhere.

THE COURT: Okay. I'll step off the bench. I'll let you guys...

MS. WILSON-McNERNEY: Okay. Thank you.

MR. QUEHRN: Thank you.

THE CLERK: All rise. Court is now in recess.

(Break in recording from 11:25 a.m. to 11:33 a.m.; unintelligible discussion.)

THE CLERK: All rise. Superior court is back in session.

THE COURT: Thank you. Go ahead and be seated.

And I've got two orders up here.

Okay. Whoops. I've got the 16th, and it's the 17th.

Okay. As far as the other orders go, there's -- you're going to present?

MR. QUEHRN: Thank you, Your Honor. I think we have agreed that we would circulate --

THE COURT: Sure.

MR. QUEHRN: -- orders and come up with agreed language and then present them to you for your consideration.

THE COURT: Sure. That'd be fine.

MR. QUEHRN: Thank you.

THE COURT: Okay. Thank you very much.

MR. JONES: Thank you, Your Honor.

(Transcript ends at 11:34 a.m.)

(Recording ends at 11:34 a.m.)

* * * * *

TRANSCRIPTION CERTIFICATE

I, ELEANOR J. MITCHELL, the undersigned Certified Court Reporter in and for the State of Washington, do hereby certify:

That the foregoing transcript was transcribed under my direction; that the transcript is true and accurate to the best of my knowledge and ability to hear the audio; that I am not a relative or employee of any attorney or counsel employed by the parties hereto; nor am I financially interested in the event of the cause.

WITNESS MY HAND and DIGITAL SIGNATURE this 3rd day of January, 2019.

ELEANOR J. MITCHELL, RPR
Washington Certified Court Reporter, CCR 3006

YAKAMA NATION OFFICE OF LEGAL COUNSEL

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