



Amanda A. Bradley
720.460.4206

aab@ablawcolorado.com

September 1, 2016

VIA E-MAIL: Scott.Schultz@coag.gov
amy.eschberger@state.co.us

Scott Schultz, Esq.
Assistant Attorney General
Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203

Amy Eschberger
Environmental Protection Specialist
Colorado Division of Reclamation, Mining and Safety ("DRMS")
1313 Sherman Street, Room 215
Denver, CO 80203

RE: Application Permit No. M2016010/Response Transit Mix Concrete Co. Legal Analysis
Regarding Impact on Little Turkey Creek Road Easement

Mr. Schultz and Ms. Eschberger:

This letter follows the original Objection filed by our firm on April 18, 2016, on behalf of Cheryl L. Kimble, and is in response to the letter dated June 30, 2016, from Cory Rutz on behalf of the applicant, Transit Mix Concrete Co. (the "Applicant"). The issue described in these materials concerns the impact of the referenced application on the use of Little Turkey Creek Road pursuant to the easement confirmed by a 1968 El Paso County District Court Decree (attached to the Objection letter at Exhibit 2).

Introduction and Background

As further detailed in our April 18th Objection letter, Ms. Kimble and other property owners in the Eagles Nest subdivision are dominant estate owners of the private easement on Little Turkey Creek Road; the owner of the Hitch Rack Ranch property is the servient estate owner.

It is undisputed that Little Turkey Creek Road provides the sole means of access for the Eagles Nest subdivision, that Little Turkey Creek Road is within the statutory area defined as "affected land" where mining operations are proposed, and that the owners of the referenced easement will be affected by the proposed operation. See C.R.S. § 34-32.5-112. DRMS Rule 6.4.14 requires the Applicant provide evidence of its legal right to enter and conduct mining operations on all affected land. Nevertheless, the Applicant's response to this requirement is limited to the June 30th letter and a Memorandum of Lease with the State of Colorado executed on August 8, 2016. The Applicant has taken the position that the impact of the mining operations on use of Little Turkey Creek Road will not constitute an unreasonable interference and, therefore, does not implicate the Applicant's legal rights concerning the affected land.

It also is undisputed that Little Turkey Creek Road is a "permanent man-made structure" pursuant to the DRMS Rule 6.4.19. As such, Ms. Eschberger advised the Applicant:

Please note that roadways and above-ground or underground utilities (if present) within 200 feet of the proposed affected area are considered permanent man-made structures. In accordance with Rule 6.4.19, when mining operations will adversely affect the stability of any significant, valuable and permanent man-made structure located within 200 feet of the affected area, the applicant may either:

- (a) Provide a notarized agreement between the applicant and the person(s) having an interest in the structure, that the applicant is to provide compensation for any damage to the structure; or
- (b) Where such an agreement cannot be reached, the applicant shall provide an appropriate engineering evaluation that demonstrates that such structure shall not be damaged by activities occurring at the mining operation; or
- (c) Where such structure is a utility, the Applicant may supply a notarized letter, on utility letterhead from the owner(s) of the utility that the mining and reclamation activities, as proposed, will have "no negative effect" on their utility.

See May 27, 2016, Preliminary Review, p. 30. In response to this requirement, and as it pertains to Little Turkey Creek Road, the Applicant submitted an engineering evaluation dated August 19, 2016, that addresses the impact of the mining operations on that road. The Applicant acknowledges the road will be closed several times per week during the life of the mine for indeterminate amounts of time, and yet concludes that the mining operations will have no adverse impact on Little Turkey Creek Road. The Applicant also states that Little Turkey Creek Road will be realigned as part of these operations.

For the reasons set forth in the April 19th Objection, and further described herein, Ms. Kimble disagrees with the Applicant's analyses that (1) it has a legal right to close or realign Little Turkey Creek Road and (2) such closures and realignment do not adversely impact the dominant estate owners.

The Level of Impact Does Not Determine Whether a Legal Right Exists

DRMS Rule 6.4.14 requires that the Applicant:

Provide a description of the basis for legal right of entry to the site and to conduct mining and reclamation, for Owners of Record described in Rule 1.6.2(1)(e)(i). This may be a copy of access lease, deed, abstract of title, or a current tax receipt. A signed statement by the Landowner and acknowledged by a Notary Public stating that the Operator/Applicant has legal right to enter and mine is also acceptable.

The Applicant's mining operations will undoubtedly impact Little Turkey Creek Road – through road closures before, during, and after blasting, through the risks of rock falls and flooding, and in order to realign the road – yet the Applicant claims these impacts will not be unreasonable.

As a preliminary matter, the impact on the use of Little Turkey Creek Road is severely minimized in the June 30th letter. As to planned closures, the Applicant's July 28, 2016 letter states Little Turkey Creek Road will be "secured" before and after blasting, although the Applicant "does not plan to have any road closures longer than 30 minutes." According to the revised Blasting Plan, dated August 19, 2016,

Blasting will occur between the hours of 10:00 AM and 4:00 PM, not to exceed a maximum of 3 blasts per week. The Quarry manager will make every effort to schedule all blasts Monday through Friday, however, a weekend blast may be necessary from time to time to keep the quarry producing as necessary.

Of course, such closures will be longer than intended if the blasting does not proceed as planned, in which case the lead blaster can decide when – and whether – to re-open the road.

The August 19th evaluation of Little Turkey Creek Road also addresses other causes of road closures but dismisses its role in causing these impacts. For instance, rock falls are a natural occurrence and, therefore, the Applicant states its operations would not be the root cause of falls or resulting closures. "Should a rock fall occur, regardless of the cause, Transit Mix will have equipment available to clear rocks off the road." Similarly, the Applicant acknowledges that flooding is a common occurrence, the existing culverts are inadequate, and the road is minimally engineered, though states its mining operations "will not create a flooding problem."

Importantly, the only information from the August 19th evaluation regarding the Applicant's planned realignment of Little Turkey Creek Road states "Establishing the intersection requires realigning Little Turkey Creek Road for approximately 400 feet to remove unnecessary curves." The Applicant does not address the impact of this realignment at all.

The undisputed fact is the Applicant's mining operations will impact the affected land, including the dominant estate owners' use of Little Turkey Creek Road. The disagreement lies in whether the impact is permissible. Certainly, the Applicant's position – that because the impact may be less than permanent or even reasonable it necessarily has a legal right to conduct operations on the affected land – is contrary to the intent and requirements of the DRMS regulations, which requires that DRMS consider all impacts to affected land. Nonetheless, the impact of road closures is much more significant than the Applicant suggests.

Mining Operations Will Require Road Closures and Realignment of the Road and, Therefore, Violate the Easement Terms

The Applicant argues that the road closures are reasonable and, therefore, inherently permissible on behalf of the servient estate owner:

Accordingly, the appropriate analysis in determining whether the Mining Operations are permitted by the ROWs is not whether the Mining Operations will interfere with the rights granted by the ROWs, but rather whether such interference is unreasonable under the circumstances.

See June 30th letter from Cory Rutz, p. 3.

On the contrary, the reasonableness standard does not apply in this case, where the terms and location of the easement are specified by the 1968 El Paso County District Court Decree (attached to the April 18th Objection letter); in fact, whether the obstruction is temporary or permanently is inapposite. The Decree grants an easement for ingress and egress from Eagles Nest to Highway 115 and specifically describes the only permitted obstructions as (1) gates at three very specific locations on the easement, which may be locked only consent of the dominant estate owners, and (2) cattle guards, so long as they do not obstruct passage or travel on the road. The Decree does not permit realignment of the road. Moreover, the Decree states, "The easement herein established does not authorize any user thereof to deviate or depart from the right of way thereof onto the adjoining real property." Obviously, the dominant estate owners are not permitted to use a realigned road, even if the Applicant were authorized to do so by the Decree.

The reasonableness standard urged by Applicant only becomes a factor in cases where the grant did not specifically address obstructions, or a court determined that the language or intent was unclear. *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1241 (Colo. App.

1996) (“Second, if the reviewing court cannot determine the actual intentions of the parties with respect to the [servient owner’s] proposed use, the Court should refer to principles relating to reasonable use of the easement.”).¹ Similarly, in *Pickens v. Kemper*, the Colorado Court of Appeals confirmed:

If there is no express grant or description of the width, length, and location of an easement for ingress and egress, the practical location and use of a reasonable way may be determined by the intent of the grantor, or by the use of the grantee acquiesced in by the grantor at the time of the grant, or otherwise determined as sufficient by the behavior of the parties.... If, however, the width, length, and location of an easement for ingress and egress have been specifically and definitely set forth in the grant, the expressed terms thereof are controlling, and what is reasonable or necessary is not decisive.

847 P.2d 648, (Colo. App. 1993)(reversed on other grounds in *Lazy Dog*, supra). In that case, the Court of Appeals found that the servient estate owner had no right to obstruct the easement in a way that would prevent the dominant estate owner’s “free passage over any part of the granted right-of-way” even if the obstruction was not even located on the portion used for ingress and egress. See also *Riddell v. Ewell*, 929 P.2d 30, 31 (Colo. App. 1996) (when the terms of the easement are established in the grant, “the owner of an easement has the right to unobstructed passage over the entire area described in the grant”); *Lamb v. Wyoming Game and Fish Com’n*, 985 P.2d 433, 437-438 (Wy. 1999) (holding that placement of objects on an easement is not an appropriate use by the servient owner and “would give license to retake the easements in a piecemeal fashion”); *Jackson Hole Mountain Resort Corp. v. Alpenhof Lodge Associates*, 109 P.3d 555, 561 (Wy. 2005) (the balancing and reasonableness tests do not necessarily apply “in the context of a defined-area easement” and whether the obstruction is reasonable to the servient estate or unreasonably inconvenient to the dominant estate “is not the controlling factor where the ‘location, width, and length of the easement’ is specified.”)(citing *Lamb*, supra); *Carrier v. Lindquist*, 37 P.3d 1112, 1116 (Utah 2001) (“We believe that applying the reasonable necessity test to disputes over private easements would give a servient estate the power to obstruct an easement, and then extinguish or limit that easement, by claiming that the easement was not reasonably necessary for the easement holder to access his or her property.”); *J.S. Lang Engineering Co. v. Wilkins Potter Press*, 141 N.E. 501 (Mass. 1923) (even though temporary, obstructions prohibited by the terms of the grant must be removed).

¹ See also *Lazy Dog Ranch v. Telluray Ranch Corp.*, 923 P.2d 313, 317 (Colo. App. 1996) (noting locked gates are “usually considered an unreasonable burden, even if the easement holder is provided with keys; However, they are acceptable when the deed specifically provided for gates at the entrance and exit of the easement.”).

Mr. Schultz/Ms. Eschberger

September 1, 2016

Page 6

Here, the Applicant's closure and realignment of Little Turkey Creek Road in the manner described in the application – which are *not* permitted by the Decree – are impermissible expansions of the servient estate owner's rights. *See Riddell*, 929 P.2d at 32 (blocking access constituted impermissible expansion of the scope of the easement). The Decree does not permit the obstructions, closures, or realignments described in the application and, therefore, the Applicant has no legal right to conduct the operations on Little Turkey Creek Road.

Should you wish to discuss this issue in more detail, or have questions about the analysis herein, please let us know.

Very truly yours,

ALDERMAN BERNSTEIN LLC

A handwritten signature in blue ink, appearing to read "Amanda A. Bradley", with a stylized, flowing script.

Amanda A. Bradley

cc: Carrie Bernstein, Esq. (by e-mail)
Ms. Cheri Kimble (by e-mail)