

BEFORE THE MINED LAND RECLAMATION BOARD  
STATE OF COLORADO

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THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO  
"DRMS RULE 2.6 PRE-HEARING MOTION TO DENY APPLICATION FOR  
MINING PERMIT"

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IN THE MATTER OF THE APPLICATION OF TRANSIT MIX CONCRETE  
COMPANY FOR A 112 CONSTRUCTION MATERIALS RECLAMATION  
PERMIT, File No. M-2016-010

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The Division of Reclamation, Mining and Safety ("Division") submits its Response to "DRMS Rule 2.6 Pre-Hearing Motion to Deny Application For Mining Permit" submitted on behalf of Cheryl L. Kimble by Alderman Bernstein LLC, ("Motion") on October 5, 2016. The Division states as follows:

**I. Factual Background**

- 1) Ms. Cheryl Kimble is an objector to Transit Mix Concrete Company's ("Applicant") Permit Application M-2016-010 ("Application").
- 2) Ms. Cheryl Kimble is a Party to the hearing for the Permit Application currently set before the Mined Land Reclamation Board ("Board") October 26<sup>th</sup> and 27<sup>th</sup>, 2016.
- 3) Ms. Cheryl Kimble is the owner of two twenty acre lots (Lot 050 and Lot 079) within the Eagles Nest subdivision in El Paso County, Colorado.
- 4) The Warranty Deeds for Lot 050 and Lot 079 include a Decree from El Paso County District Court Civil Action No. 54701 ("Decree").
- 5) The Decree states Little Turkey Creek Road "is a private road appurtenant to the various tracts of real property" which must use the road for access.
- 6) The Decree states, "The owners of the servient estate may erect gates thereon and may by agreement lock one or more of them and may erect thereon signs" not obstructing travel thereon.

- 7) As owner of Lot 050 and Lot 079, Ms. Cheryl Kimble is a dominant estate owner of the easement over Little Turkey Creek.
- 8) Lots 050 and 079 benefit from the easement over Little Turkey Creek Road that runs with the land and are the dominate estate.
- 9) The burdened property of the Hitch Rack Ranch has a servient estate over the Little Turkey Creek Road easement.
- 10) Little Turkey Creek Road is within the Affected Land of the proposed Application.
- 11) Little Turkey Creek Road is a private road.
- 12) The Application proposes to realign a portion of the Little Turkey Creek Road.
- 13) The revised Blasting Plan from the Applicant dated August 19, 2016, states, "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." A typical length of time for a blast is less than 30 minutes. Although misfires rarely occur, in the event of a misfire, the access corridors may be secured for longer than 30 minutes.
- 14) The Application proposes the construction and installation of two crossings over and across Little Turkey Creek Road.

## **II. Legal Analysis**

- 15) "Affected land" means the surface of an area within the state where a mining operation is being or will be conducted, which surface is disturbed as a result of an operation. Affected lands include, but shall not be limited to, private ways, roads (except those roads excluded by this subsection (1)); land excavations; exploration sites; drill sites or workings; refuse banks or spoil piles; evaporation or settling ponds; work, parking, storage, or waste discharge areas; and areas in which structures, facilities, equipment, machines, tools, or other materials or property that result from or are used in such operations are situated." C.R.S. § 34-32.5-103(1).

- 16) Each Application form shall include the source of the applicant's legal right to enter and initiate a mining operation on the affected land. C.R.S. § 34-32.5-112(1)(C)(IV).
- 17) Rule 6.4.14 of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials requires an exhibit providing, "the source of the Applicant's legal right to enter and initiate a mining operation on the affected land."
- 18) The Division has not received the source of the Applicant's legal right to utilize Little Turkey Creek Road as proposed in the Application, i.e., initiate a mining operation on the affected land, specifically Little Turkey Creek Road.
- 19) The board or office shall not deny a permit except on one or more of the following grounds:

The proposed mining operation, the reclamation program or the proposed future use is contrary to the laws or regulations of this state or the United States, including but not limited to all federal, state, and local permits, licenses, and approvals, as applicable to the specific operation. C.R.S. § 34-32.5-115(4)(d).
- 20) An "easement" is defined by Black's Law Dictionary as, "An interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose; the land benefitting from an easement is called the dominant estate; the land burdened by an easement is called the servient estate. Unlike a lease or license, an easement may last forever, but it does not give the holder the right to possess, take from, improve, or sell the land."
- 21) The Division does not have the jurisdictional authority to determine whether the Application violates the terms of the Little Turkey Creek Road easement contained within the Decree.
- 22) The Division does not have the jurisdictional authority to determine whether the Application's proposed use of Little Turkey Creek Road is reasonable or whether the proposed use interferes with the dominant estate's easement or right of way.

#### IV. Conclusion

The Division respectfully requests the Board to condition an approval of the Application as follows:

- 23) Obtain and provide the Division and Board with the necessary legal right to initiate a mining operation on the Affected Land, specifically the legal right to use Little Turkey Creek Road as propped in the Application. The necessary legal right may be in the form of a:
  - a) Declaratory Judgment Order from an El Paso County District Court; or
  - b) Legally binding agreement with all of the owners of the dominant easement over Little Turkey Creek Road that the Applicant may use Little Turkey Creek Road as proposed in their Application; or
- 24) Modify Permit Application M-2016-010 in a manner by which the Division does not interpret the terms of the Little Turkey Creek Road easement contained within the 1968 El Paso County District Court Decree of Civil Action No. 54701.

Respectfully submitted to the Colorado Mined Land Reclamation Board on October 20th, 2016.

/s/ Scott Schultz  
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## CERTIFICATE OF SERVICE

I, Wallace H. Erickson, hereby certify that on this 20<sup>th</sup> day of October, 2016, I served **via electronic mail or regular mail** a true copy of the foregoing THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO "DRMS RULE 2.6 PRE-HEARING MOTION TO DENY APPLICATION FOR MINING PERMIT" addressed to the following:

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