



FW: Application Permit No. M2016010 - Cheryl L. Kimble's Response to Applicant's Petition for Reconsideration of the Mined Land Reclamation Board's Findings of Fact, Conclusions of Law, and Order

John Roberts <John.Roberts@coag.gov>

Tue, Jan 31, 2017 at 2:54 PM

To: Amy Eschberger <amy.eschberger@state.co.us>, Camie Mojar <camille.mojar@state.co.us>

An additional response to the petition for reconsideration.

From: Amanda Bradley [mailto:aab@ablawcolorado.com]

Sent: Tuesday, January 31, 2017 2:50 PM

To: John Roberts

Cc: Cutler, Norton (Perkins Coie) (NCutler@perkinscoie.com); Steve Mulliken (Mulliken@mullikenlaw.com); Jeff Fugate; Scott Schultz; Carrie Bernstein; 'pkos@norwestcorp.com'; 'bbaker@officesnax.us'; 'boatman452@gmail.com'; 'hiddenhavenranch@msn.com'; 'callecorvo@netzero.com'; 'jendivday@gmail.com'; 'troy.day@startmail.com'; 'warren@rosenbaumdean.com'; 'deckerfamily@q.com'; 'Thundercanyon1@gmail.com'; 'reece.m.eddy@pfizer.com'; 'tom@tlfels.net'; 'weldon.flaharty@parsons.com'; 'jenflaharty@earthlink.net'; 'johndebG@msn.com'; 'gardiner@mindspring.com'; 'urbanstrategies@msn.com'; 'mtnblondie@aol.com'; 'harpermartin@yahoo.com'; 'sara@harpercpa.com'; 'granbryson@comcast.net'; 'ejessup@tnc.org'; 'sue.pringle892@gmail.com'; 'gerryklein777@gmail.com'; 'gerry@gerryklein.com'; 'granbryson@comcast.net'; 'joe_rav@yahoo.com'; 'suziekoscove@outlook.com'; 'rlarsen@skywaypark.net'; 'newb3281@yahoo.com'; 'davelick@yahoo.com'; 'thundercanyon3190@gmail.com'; 'thundercanyon1@gmail.com'; 'gkmccowen@gmail.com'; 'jerrypaulmoore@icloud.com'; Steve Mulliken (Mulliken@mullikenlaw.com); Nani DeFelice (NDeFelice@mullikenlaw.com); 'cindy_m_newby@yahoo.com'; 'sue.pringle892@gmail.com'; 'kltrain7@gmail.com'; 'charles.reed.1946@gmail.com'; 'ncr.turkeycreek@gmail.com'; 'reinsmas@yahoo.com'; 'jkrison@earthlink.net'; 'cabinfever1151@gmail.com'; 'joeretired1980@gmail.com'; 'sheavesw@gmail.com'; 'bugs11335@gmail.com'; 'oak2106@gmail.com'; 'tina.swonger@wesellmore.net'; 'tina.swonger@remax.net'; 'drawer69@q.com'; 'vwekamp@gmail.com'; 'doug.wekamp@verizon.com'; 'julie@axiodesign.com'; 'rcwhead@aol.com'; 'chief115vfd@gmail.com'; 'yugo4health@gmail.com'; 'jkrigdon@earthlink.net'; 'anne@tlfels.net'; 'tom@tlfels.net'; 'c_mheer@yahoo.com'; 'mheer100@yahoo.com'; Adrian McCarthy (AMcCarthy@mullikenlaw.com); Cindy Bolton

Subject: Application Permit No. M2016010 - Cheryl L. Kimble's Response to Applicant's Petition for Reconsideration of the Mined Land Reclamation Board's Findings of Fact, Conclusions of Law, and Order

Mr. Roberts,

On behalf of the Objector Cheryl L. Kimble, please find attached the Response to Applicant's Petition for Reconsideration of the Mined Land Reclamation Board's Findings of Fact, Conclusions of Law, and Order.

AMANDA A. BRADLEY

ALDERMAN BERNSTEIN



Phone 720.460.4206 | Fax 720.293.4712

aab@ablawcolorado.com | www.aldermanbernstein.com



FINAL Response to Petition for Reconsideration .pdf
427K

COLORADO MINED LAND RECLAMATION BOARD c/o Mr. Jeff Graves, Pre-Hearing Conference Officer 1313 Sherman Street, Room 215 Denver, CO 80203	
Applicant: TRANSIT MIX CONCRETE CO. File No: M2016010	
Attorneys for Objector Cheryl L. Kimble: Carrie S. Bernstein, Atty Reg. # 34966 Amanda A. Bradley, Atty Reg. # 29489 ALDERMAN BERNSTEIN LLC 101 University Boulevard, Suite 350 Denver, Colorado 80206 Telephone: 720-460-4200 Fax: 720-293-4712 E-mail: csb@ablawcolorado.com ; aab@ablawcolorado.com	
<p style="text-align: center;">RESPONSE TO APPLICANT’S PETITION FOR RECONSIDERATION OF THE MINED LAND RECLAMATION BOARD’S FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER</p>	

Cheryl L. Kimble, by and through the undersigned counsel, hereby responds to the *Applicant’s Petition for Reconsideration of the Mined Land Reclamation Board’s Findings of Fact, Conclusions of Law, and Order* (the “Petition”) and requests that the Colorado Mined Land Reclamation Board (the “Board”) deny the Petition.

INTRODUCTION

Transit Mix Concrete Co. (the “Applicant”) submitted an application for a mining permit in early 2016. The application faced immediate opposition by more than 100 interested parties. The opposing parties – most of whom were not represented by counsel – worked together for months reviewing materials submitted by the Applicant and narrowing the scope of their concerns over the proposed mining operation. When, finally, the time came to present their side of the story to the Board at the formal hearing, the opponents were prepared with ample support for the positions they had asserted more than six months prior.

The Board’s decision was rendered verbally after two days of testimony and evidence; the written determination was issued on December 20, 2016. Having considered all of the evidence, the Board correctly acknowledged that the Applicant failed to comply with the requirements of the Colorado Land Reclamation Act for the Extraction of Construction

Materials, Article 32.5 of Title 34, C.R.S. (2016), as well as the Board's rules and regulations that govern mining applications and proposed operations.

Applicant argues in its Petition that the Board's findings were both improper and based upon surprise evidence presented for the first time at the hearing, although, ironically, Applicant submitted with the Petition new evidence and legal arguments in an effort to "meet [its] burden of proof." Petition, p. 1. In any case, Applicant's Petition demonstrates a fundamental misunderstanding of the Board's role and the approval process. In controversial matters such as this, the Division of Reclamation, Mining and Safety (the "Division") makes recommendations to the Board. The Board is not obligated to blindly accept such recommendation. Moreover, none of the arguments, testimony, or evidence presented at the hearing was new to the Applicant. The Applicant is simply perplexed that its application was not rubber stamped by the Board.

There is no cause to reconsider the Board's final determination, and the Petition should be denied.

BASES FOR THE BOARD'S RULING

The Board's findings are based upon three primary deficiencies in the application: (1) the Applicant failed to meet its burden to demonstrate that it has obtained the legal right of entry to initiate a mining operation on Little Turkey Creek Road; (2) the Applicant failed to demonstrate to the satisfaction of the Board that the impact of the proposed mining operation on the prevailing hydrologic balance of the proposed affected land and the surrounding area and on the quality and quantity of groundwater systems will be minimized; and (3) the Applicant failed to take into account, to the satisfaction of the Board, the safety and protection of wildlife at the proposed site.

Just as the parties did at the formal hearing, Ms. Kimble joins in and supports the response to the Petition submitted on behalf of the objector The Barbara Ingersoll Marital Trust ("Ingersoll"). In particular, Ms. Kimble joins in Ingersoll's response concerning the procedural deficiencies identified with respect to the Petition, such as failure to cite to the record, presentation of new evidence, and agency discretion. Ms. Kimble also joins in Ingersoll's response as it concerns the substantive support for bases (2) and (3), as identified above.

The following, then, will address Ms. Kimble's response to the Petition as it relates to the first basis above, regarding Applicant's legal right of entry.

ARGUMENT

A. Procedural Background Regarding Applicant's Legal Right of Entry

Division 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.

“Owners of record” is defined as “the owner or owners of a surface property interest shown on the records on the County Assessor as of the date of filing” and includes all owners of the surface and mineral rights of the affected land. Rules 1.1(34) and 1.6.2(1)(e)(i). Little Turkey Creek Road is part of the “site” and is affected land where the Applicant will conduct mining operations. The owners of the easement interest on Little Turkey Creek Road, including Ms. Kimble, are shown on the County records.

Clearly, the Applicant is required to prove it has a legal right to conduct mining operations on Little Turkey Creek Road and the consent of the dominant estate holders, including Ms. Kimble, is part of this requirement. As of the Division’s recommendation dated September 29, 2016, however, Applicant’s evidence in this regard was limited to (1) a letter dated June 30, 2016, from the Applicant’s legal counsel, Cory Rutz, and (2) a Memorandum of Lease with the State of Colorado executed on August 8, 2016.¹

Because Little Turkey Creek Road is a “permanent man-made structure” pursuant to Rule 6.4.19, and because the Applicant did not have an agreement with the owners of the easement, the Division also required the Applicant to submit “an appropriate engineering evaluation that demonstrates that such structure shall not be damaged by activities occurring at the mining operation.” See Division’s 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 that addressed the impact of the mining operations on that road. The Applicant acknowledged the road will be closed several times per week during the life of the mine for indeterminate amounts of time and that it will be realigned as part of the mining operations, and yet concludes that the mining operations will have no adverse impact on Little Turkey Creek Road.

In fact, the Applicant did not show it has a legal right during the course of its mining operations to utilize an access easement owned by Ms. Kimble and others. The Division opined that it lacked “sufficient jurisdictional authority to interpret specific conditions and rights of a private road easement contained within a District Court Decree.” Nevertheless, the Division recommended that the Board approve the application, stating “This recommendation is based on the Division’s determination that the Application satisfied the requirements of Section 34-32.5-115(4) of the Colorado Land Reclamation Act for the Extraction of Construction Materials, 34-32.5-101 et seq., C.R.S.”²

¹ See <http://drmsweblink.state.co.us/drmsweblink/0/doc/1143609/Page1.aspx?searchid=d4ed7dbb-4741-41f7-91b3-55bd33638199>.

² See Recommendation to Approve a 112c Permit Application with Objections dated September 29, 2016.

On October 20, 2016, the Division modified its prior recommendation and stated, “[t]he 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.” Further, the Division requested that the Board conditionally approve the Application pending (1) an order from the District Court concerning the Applicant’s legal right to use the easement or an agreement with the easement owners concerning use of Little Turkey Creek Road, or (2) a modified Application that does not require use of the easement.

Prior to the hearing, and in addition to the Objection filed with the Division on behalf of Ms. Kimble on April 18, 2016, the undersigned filed numerous motions, along with evidentiary and legal support for her position that the Applicant failed to prove it has the legal right to use, obstruct, and realign Little Turkey Creek Road. Nothing new was presented at the hearing in this regard.

The Board agreed with the Division and determined that the Applicant failed to show it has the legal right of entry to initiate a mining operation on Little Turkey Creek Road.

B. Applicant Failed to Prove its Legal Right to Use, Obstruct, or Realign Little Turkey Creek Road.

The following are undisputed facts relevant to Applicant’s legal right of entry: First, Little Turkey Creek Road is the sole means of access to property owned by Ms. Kimble and others pursuant to an easement confirmed by a 1968 El Paso County District Court Decree (the “Decree”). Second, 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. Third, the Applicant’s proposed operations involved the use, realignment, and obstruction of Little Turkey Creek Road for the life of the mine.

During the course of proceedings in this matter, the undersigned presented evidence and legal argument concerning the following points:

1. The Applicant bears the burden of proof regarding its legal right of entry, not the affected owners.
2. The consent of the servient owner does not satisfy the requirements of Rule 6.4.14. Little Turkey Creek Road is a private road that is a non-exclusive easement, meaning that the holders of the easement (the “dominant estate” holders such as Ms. Kimble) and the owner of the land burdened by the easement (the “servient estate” holder, Hitch Rack Ranch) both “have rights to use the property.” *City of Aurora v. ACJ P’ship*, 209 P.3d 1076, 1086 (Colo. 2009); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo.1998). The servient owner’s rights to use the burdened land are limited, however, by the nature and extent of the dominant estate holder’s rights. *City of Aurora*, 209 P.3d at 1086; *Bijou Irrigation Dist. v. Empire Club*, 804

P.2d 175, 183 (Colo.1991). The Applicant's use must be *consistent with* the rights of the dominant easement estate. *City of Aurora*, 209 P.3d at 1086; *Bijou Irrigation Dist.*, 804 P.2d at 183; *Lazy Dog Ranch*, 965 P.2d at 1238.

3. 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. See C.R.S. § 34-32.5-116(4)(c-d). In particular, the Applicant's closure and realignment of Little Turkey Creek Road in the manner described in its application are impermissible expansions of the servient estate owner's rights.³
4. The Applicant must use, realign, and obstruct Little Turkey Creek Road in connection with its mining operations. The reasonableness of the Applicant's use and interference with the easement is not the appropriate analysis when determining whether a legal right to use the road *exists*. Moreover, the reasonableness standard does not even 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 at Exhibit 1); in fact, whether the obstruction is temporary or permanently is inapposite.

Without any explanation for its untimely production, the Applicant submitted a 1909 mining patent four days prior to the formal hearing which it claimed provided a legal right to use Little Turkey Creek Road. The patent only describes a right to access certain property; it does not provide a legal right to use, let alone obstruct, Little Turkey Creek Road, and does not supersede the Decree establishing a specific easement. The simple fact that the servient estate holder may use the easement, as shown in the 1909 patent, does not mean such use may conflict with the dominant estate holder's rights in the manner proposed by the Applicant.

Now, in its Petition, the Applicant again submits new documentation that allegedly proves its legal right of entry. The lease between Applicant and the State of Colorado, submitted as Exhibit 1 to the Petition, was purportedly entered into as of April 14, 2016, however, it was not executed until sometime around June 16, 2016. Once again, the Applicant offers no explanation as to why this document was not provided in its Application or at the hearing, as it is not "new" and was certainly "known at the time of the hearing." Its consideration is not required by Rule 2.9.1(2).

Nevertheless, the lease specifically states it is "subject to... the rights of surface lessees and surface owners," which includes Ms. Kimble. The lease does not provide a legal right to use, obstruct, or realign Little Turkey Creek Road in the manner proscribed by the Application

³ 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."

and certainly does not supersede the 1968 Decree. In fact, none of the documents submitted by the Applicant at any point in this process proves this right. The Division and the Board were in agreement on this point and there simply is no reason to reconsider this finding.

C. Little Turkey Creek Road is Part of the Affected Land.

Also for the first time, the Applicant argues that Little Turkey Creek Road is not part of the “affected land” under Colorado law and, therefore, it need not prove it has a legal right to use, obstruct, or realign that road. The Division made this determination, yet the Applicant did not oppose or seek reconsideration until now.

Little Turkey Creek Road is within the statutory area defined as “affected land” where mining operations are proposed, and the owners of the easement will be affected by the proposed operations. *See* C.R.S. § 34-32.5-112. The application and hearing testimony made clear that Little Turkey Creek Road is not an “off-site” road, as Applicant now contends – it runs directly through the mining operations and Applicant has admitted it will use, obstruct, and realign the road. The engineering analysis submitted by Applicant’s engineers discusses these aspects of the operation in detail and Applicant cannot seriously contend anything to the contrary.

D. Consideration of a Compromise is Not Reconsideration of the Application

Finally, the Applicant urges some sort of compromise in an effort to obtain a conditional approval of its application pending a determination of Applicant’s legal right of entry by an El Paso County District Court. It is not possible to carve out from the application the mining operation’s impact on Little Turkey Creek Road. The Division and Board have spent many hours reviewing and considering the application submitted last year and the Board’s final determination is based upon that application. The Applicant’s proposal requires a new application, with a new mining schedule and blasting plan which no one has had an opportunity to review or consider.

Moreover, this new proposal is not appropriately posited in terms of a request to “reconsider” the matter and, should the Board be inclined to consider this option, Ms. Kimble requests an opportunity to present oral argument on the matter pursuant to Rule 2.9.3.

CONCLUSION

It is undisputed that the Applicant will use, obstruct, and realign Turkey Creek Road; yet it has not proven the right to do so. In fact, the Decree does not allow for such uses. The Board’s findings in this regard are supported both by the Division’s findings, the formal hearing record, and the repeated arguments submitted throughout this proceeding.

For these reasons, and pursuant to C.R.S. § 34-32.5-116(4), the Board’s determination was appropriate and should be upheld. The Applicant’s Petition should be denied.

DATED this 31st day of January, 2017.


Respectfully submitted,

ALDERMAN BERNSTEIN LLC

A handwritten signature in blue ink, appearing to read "Alvin Bradley". The signature is fluid and cursive, with the first name "Alvin" and last name "Bradley" clearly distinguishable.

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2017, a true and correct copy of the foregoing was emailed or placed in the United States mail, first class, postage prepaid, and properly addressed, to the parties listed on DRMS File No. M-2016-010; Hitch Rack Ranch Quarry Contact information for All parties (Rev: 10/9/2016)

By: 
Cindy Bolton