



Amanda A. Bradley
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December 20, 2017

VIA E-MAIL/HAND DELIVERY:

Amy Eschberger
Colorado Division of Reclamation, Mining and Safety
1313 Sherman Street, Room 215
Denver, CO 80203
amy.eschberger@state.co.us

RE: OBJECTION TO TRANSIT MIX CONCRETE CO.'S APPLICATION FOR PERMIT NO. M2017049
("2017 Application")

Ms. Eschberger:

As you know, our law firm represents Cheryl L. Kimble. Ms. Kimble objects to the referenced 2017 Application for the same reasons articulated in response to the application submitted by Transit Mix Concrete Co. ("Applicant") last year in Permit No. M2016010 dated Feb. 19, 2016 ("2016 Application"). The specific bases for Ms. Kimble's objections are set forth in the following documents, copies of which are attached and submitted for consideration in the pending application:

1. Objection letter submitted on behalf of Ms. Kimble on April 18, 2016 (<http://drmsweblink.state.co.us/drmsweblink/0/doc/1128674/Page1.aspx?searchid=f48d8620-8754-434b-ac02-1fbaab8d0dea>) (Exhibit 1)
2. Objection letters submitted by Cheryl L. Kimble on April 18, 2016 (<http://drmsweblink.state.co.us/drmsweblink/0/doc/1128676/Page1.aspx?searchid=f48d8620-8754-434b-ac02-1fbaab8d0dea>), and July 7, 2016 (Exhibit 2)
3. DRMS Rule 2.6 Pre-Hearing Motion to Deny Application for Mining Permit dated October 5, 2016 (Exhibit 3), and the Reply thereto dated October 24, 2016 (Exhibit 4)
4. DRMS's Response to "DRMS Rule 2.6 Pre-Hearing Motion to Deny Application for Mining Permit" dated October 20, 2016 (<http://drmsweblink.state.co.us/drmsweblink/0/doc/1153961/Electronic.aspx?searchid=41e5cdf-f8a1-47d3-b411-f5c5188d5ed1>) (Exhibit 5)

5. Mined Land Reclamation Board Findings of Fact, Conclusions of Law and Order dated December 22, 2016
(<http://drmsweblink.state.co.us/drmsweblink/0/doc/1171514/Page1.aspx?searchid=41e5cdff-f8a1-47d3-b411-f5c5188d5ed1>) (Exhibit 6)
6. Response to Applicant's Petition for Reconsideration of the Mined Land Reclamation Board's Findings of Fact, Conclusions of Law, and Order dated January 31, 2017
(<http://drmsweblink.state.co.us/drmsweblink/0/doc/1171328/Electronic.aspx?searchid=41e5cdff-f8a1-47d3-b411-f5c5188d5ed1>) (Exhibit 7)
7. Defendant Mined Land Reclamation Board's Answer Brief submitted on December 15, 2017, in *Transit Mix Concrete Co. v. Colorado Mined Land Reclamation Board et al.*, District Court, City and County of Denver, Case No. 2017CV00360, Division 275. (Exhibit 8)

As described in these materials, the only evidence Applicant submitted to the Division in the 2016 Application concerning its right to obstruct Little Turkey Creek Road were (1) an acknowledgment of a royalty agreement with the owner of Hitch Rack Ranch, RMBC Group, LLC, that purportedly allows the right to use Hitch Rack Ranch property for mining operations; (2) a letter dated June 30, 2016, from the Applicant's legal counsel; (3) a 1909 mining patent; and (4) a Memorandum of Lease with the State of Colorado executed on August 8, 2016. After reviewing these materials, both the Division and the Board determined that the Applicant failed to show that it has a legal right to enter and restrict the use of Little Turkey Creek Road, or that it is not necessary to obtain that right.

According to the 2017 Application, the Applicant intends to burden Little Turkey Creek Road in connection with its mining operations, however, the only evidence submitted by Applicant in this regard are (1) another acknowledgment of the royalty agreement with RMBC Group, LLC; (2) a letter dated September 29, 2017, from the Applicant's new legal counsel; (3) the 1909 mining permit; and (4) the Mining Lease described in the Memorandum of Lease submitted in the 2017 Application. **Nothing in the 2017 Application requires a different result than what was determined in response to the 2016 Application.**

The Board determined that, "absent a showing that [the Applicant] had acquired such rights from the easement owners, or that acquiring such rights was not legally required, the [2016] Application was incomplete." See item 7, above, at p. 27. For the same reasons, the Division should enter a finding that the 2017 Application is incomplete and dismiss with further review of the application.

Furthermore, this precise matter is at issue and pending in District Court proceedings. It would be inappropriate for the Division to review and issue determinations while that case is pending.

If you should have any questions, do not hesitate to contact me either by email or phone. If any further proceedings are set in this matter, please send any such notices and/or communications to both Ms. Kimble and me at the following addresses:

Cheryl L. Kimble
683 Grey Eagle Circle South
Colorado Springs, CO 80919

Amanda A. Bradley
Alderman Bernstein
101 University Boulevard, Suite 350
Denver, CO 80206

Very truly yours,

ALDERMAN BERNSTEIN LLC



Amanda A. Bradley

cc:

Congressman Doug Lamborn, U.S. House of Representatives, Colorado's First District, 1125 Kelly Johnson Blvd., #330, Colorado Springs, CO 80920

Senator Kevin Grantham, Colorado State Senator, District 2, 200 E. Colfax Avenue, Denver, CO 80203

Representative Lois Landgraf, Colorado State Representative, District 21, 200 E. Colfax Avenue, Denver, CO 80203

Board of County Commissioners, El Paso County, 200 South Cascade Avenue, Suite 100, Colorado Springs, CO 80903

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Carrie S. Bernstein
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April 18, 2016

VIA U.S. MAIL/HAND DELIVERY:

Amy Eschberger
Colorado Division of Reclamation, Mining and Safety
1313 Sherman Street, Room 215
Denver, CO 80203

RE: OBJECTION TO APPLICATION FOR PERMIT NO. M2016010

Ms. Eschberger:

Our law firm represents Cheryl L. Kimble. Ms. Kimble owns two twenty acre lots (Lot 050 and Lot 079) within the Eagles Nest development in El Paso County (the "Kimble Property"), adjacent to the property commonly referred to as Hitch Rack Ranch. We have reviewed the Reclamation and Mining Application submitted by Transit Mix Concrete Company, Permit No. M2016010, dated Feb. 19, 2016 ("Application"), which seeks a permit to conduct mining operations on the Hitch Rack Ranch, which is bisected by a private road commonly called Little Turkey Creek Road. Importantly, the Kimble Property can only be accessed by way of Little Turkey Creek Road, which runs through the Hitch Rack Ranch from Highway 115. A map designating the Kimble Property and Little Turkey Creek Road from Hwy. 115 through sections 15, 16 and 17 is attached as Exhibit 1. This letter is Ms. Kimble's formal objection to the Application.

History of the Kimble Property and Little Turkey Creek Road

The Kimble Property is part of the Eagles Nest subdivision. The Eagles Nest subdivision was initially created in the 1960s and was subdivided into 40 lots. The area now includes 36 lots. Ms. Kimble owns two of the lots within the Eagles Nest subdivision (Lot 050 and Lot 079). The only access to the Kimble Property, and in fact, all of the Eagles Nest subdivision, is from Highway 115 via Little Turkey Creek Road, that runs through the Hitch Rack Ranch and the proposed quarry operation.

In 1968, the El Paso County District Court ("Court") declared that Little Turkey Creek Road is a private road to provide the only means of ingress and egress to the properties within

the Eagles Nest subdivision, including the Kimble Property. A copy of the Decree declaring Little Turkey Creek Road a private road is attached as Exhibit 2. The Court issued the Decree at the conclusion of a legal proceeding brought by a prior owner of one of the lots within the Eagles Nest subdivision against the prior owner of Hitch Rack Ranch. A copy of the Amended Complaint is attached as Exhibit 3. All the property owners within the Eagles Nest subdivision were also included in that legal proceeding. As stated in the Decree, the private road commonly referred to as Little Turkey Creek Road, is an "easement appurtenant" that runs with the land, meaning that any conveyance of the properties either burdened or benefitted by the easement includes a conveyance of the private road easement and any and all of those properties are benefitted by this ingress and egress easement forever. Ms. Kimble's deed specifically includes the private road easement and demonstrates that the private road easement runs with the land. A copy of the Kimble property Deed is attached as Exhibit 4.

The Decree sets out the exact location of Little Turkey Creek Road, by providing a legal description of the center line of the road, and stating that the private road is 10 feet on each side of that center line. The Decree also sets out the dominant estate owners' rights and restrictions with regard to the use of Little Turkey Creek Road. Ms. Kimble and all of the property owners within the Eagles Nest subdivision are the dominant estate owners of the private road easement, and the owner of the Hitch Rack Ranch is the servient estate owner. The dominant estate owners: can use the private road for ingress and egress (page 4); cannot deviate from the private road onto other portions of the servient estate (page 15, paragraph 7); cannot increase the burden on the servient estate beyond that set forth in the Decree (page 4); and must be provided with keys or lock codes if the servient estate owner installs any or all of the permitted three gates across Little Turkey Creek Road.

The Decree also sets out the servient estate owner's rights and restrictions with regard to the use of Little Turkey Creek Road. For example, the servient estate owner: can erect and maintain three gates on Little Turkey Creek Road but keys or lock codes must be provided to the dominant estate holders (page 15, paragraph 4); can post a sign saying that Little Turkey Creek Road is a private road and that any person using such road and not having a right to use (as given in decree) is a trespasser (page 15, paragraph 5); and can erect cattle guards on Little Turkey Creek Road, but cannot obstruct passage or travel on such road (page 15, paragraph 4).

The current owner's proposed use of the Hitch Rack Ranch as a granite quarry includes significant blasting activities and denuding the area of its current vegetation (that stabilizes the terrain) on the servient estate. That change in use of the servient estate is prohibited under the clear language of the Decree because it restricts the unobstructed passage by way of Little Turkey Creek Road of the dominant estate holders to their properties. Ms. Kimble therefore vehemently objects to the approval of the Application.

Legal Analysis

Colorado law very clearly prohibits the servient estate holder (here the owners of Hitch Rack Ranch and its tenants) to change the use of the servient estate of the private road to facilitate the proposed granite quarry operation. Here, Little Turkey Creek Road is a private road that is a non-exclusive easement, meaning that the holders of the easement (aka dominant estate holders (Eagles Nest subdivision owners including Ms. Kimble)) and the owner of the land burdened by the easement (aka servient estate holder (Hitch Rack Ranch owner & its tenants)) both "have rights to use the property." *City of Aurora v. ACI P'ship*, 209 P.3d 1076, 1086 (Colo. 2009); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1238 (Colo.1998).

However, the servient owner's rights to use the burdened land are limited by the nature and extent of the easement-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 owner of the servient estate, the Hitch Rack Ranch owner in this case, retains only the right to use the non-exclusive easement for purposes that are consistent with the rights of the easement holder and that do not unreasonably interfere with the dominant 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. Clearly, Transit Mix Concrete Company's interference with the easement (Little Turkey Creek Road) to operate its granite quarry operation is inconsistent with the rights of the dominant estate holders set out in the Decree and unreasonably interferes with the dominant estates (the Kimble Property and all other properties within the Eagles Nest subdivision).

The Colorado Court of Appeals in *Riddell v. Ewell*, 929 P.2d 30, 31-32 (Colo. App. 1996) analyzed the respective rights of the dominant and servient estate holders with respect to an easement for ingress and egress. The Court stated: "Whenever there is ownership of property subject to an easement, there is a dichotomy of interests, both of which must be respected and kept in balance as nearly as possible." 929 P.2d at 31; *Hornsilver Circle, Ltd. v. Trope*, 904 P.2d 1353 (Colo.App.1995). On one hand, the Court stated that "if the width, length, and location of an easement for ingress and egress have been specifically and definitely set forth in the grant, the owner of an easement has the right to unobstructed passage over the entire area described in the grant." 929 P.2d at 31. In *Schold v. Sawyer*, 944 P.2d 683, 685 (Colo. App. 1997), the Colorado Court of Appeals stated that the servient estate holder "subject to a right-of-way may use the way for any lawful purpose, provided such use does not interfere with the right of passage resting in the owner of the easement."

The Application states that there will be closures of Little Turkey Creek Road during blasting operations for approximately 30 minutes if such blasting operations are successful. In the event that there are problems with the blasting, Little Turkey Creek Road would be closed indefinitely, and until it is safe for travel. First, such activities clearly violate the dominant estate holders' easement rights expressly set out in the Decree and constitute a breach of the court decree and breach of the private road easement. The Decree specifically states that the

servient estate holder cannot obstruct passage or travel on Little Turkey Creek Road (page 15, paragraph 4), but the proposed blasting operations and expected closures of Little Turkey Creek Road violate that express language.

Second, any blockage of Little Turkey Creek so that the dominant estate holders, including Ms. Kimble, cannot access their property via Little Turkey Creek Road also violates Colorado law. As the Colorado Court of Appeals stated in *Riddell v. Ewell*, the dominant estate holders, like Ms. Kimble, have “the right to unobstructed passage” over the entire ingress and egress easement at all times. See 929 P.2d at 31.

In addition, the quarry operation increases the risks of further blockage of Little Turkey Creek Road due to man-made disasters. There is an increased risk of landslides across Little Turkey Creek Road caused by the removal of inorganic materials (namely soil and rocks) and blasting operations. There is an increased risk of flooding across Little Turkey Creek Road caused by the removal of vegetation and organic materials that is necessary to prevent extensive flooding along and over Little Turkey Creek Road. This increased activity and use of Little Turkey Creek Road by the servient estate holder clearly interferes with the rights of the dominant estate holder, including Ms. Kimble, to use Little Turkey Creek Road.

Further, the dominant estate holders historically have fully maintained and improved Little Turkey Creek Road, without any assistance from the servient estate holder. Ms. Kimble and the other dominant estate holders have completed extensive repairs, especially after severe flooding, at a cost of close to \$100,000 over the past 10+ years. The servient estate holder has not contributed to the maintenance of Little Turkey Creek Road. The quarry operation likely will result in further erosion and damage to Little Turkey Creek Road, at a huge cost to Ms. Kimble and the other dominant estate holders. The Application does not include an explanation or description of if and how the servient estate holder will compensate the dominant estate holders for the impacts to Little Turkey Creek Road as a result of the change in use of the servient estate, Hitch Rack Ranch, into a granite quarry operation.

Importantly, there is no alternative access to the Kimble Property or other properties within the Eagles Nest subdivision. Any blockage or closures of Little Turkey Creek Road for any amount of time fully interferes with the only right of ingress and egress to the Kimble Property or any other property within in the Eagles Nest subdivision. The proposed activities on Hitch Rack Ranch and resulting impact to Little Turkey Creek Road, including closures, damage and increased maintenance unreasonably interferes with the dominant estate (the Kimble Property and all other properties within the Eagles Nest subdivision).

If the Application is granted and the quarry operation is allowed on the Hitch Rack Ranch (which is bisected by Little Turkey Creek Road), Ms. Kimble and other property owners within the Eagles Nest subdivision will almost certainly proceed with legal action both in El Paso

Alderman Bernstein
April 18, 2016
Page 5

County District Court and the administrative appeals venues. Granting the application clearly violates the express language in the Decree and long standing Colorado easement law. Ms. Kimble therefore vehemently objects to approval of the Application, and requests that the Colorado Division of Reclamation, Mining and Safety deny the Application.


If you should have any questions, do not hesitate to contact me either by email (csb@ablawcolorado.com) or phone (720-460-4203). If any further proceedings are set in this matter, please send any such notices and/or communications to both Ms. Kimble and me at the following addresses:

Cheryl L. Kimble
683 Grey Eagle Circle South
Colorado Springs, CO 80919

Carrie S. Bernstein
Alderman Bernstein
101 University Boulevard, Suite 350
Denver, CO 80206

Very truly yours,

ALDERMAN BERNSTEIN LLC



Carrie S. Bernstein

cc:

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Representative Lois Landgraf, Colorado State Representative, District 21, 200 E. Colfax Avenue, Denver, CO 80203

Board of County Commissioners, El Paso County, 200 South Cascade Avenue, Suite 100, Colorado Springs, CO 80903-2202

Exhibits to follow
with entire letter from
attorney Cheryl Kimble

Express



FedEx carbon-neutral
envelope shipping

ORIGIN ID: COSA (719) 210-9932
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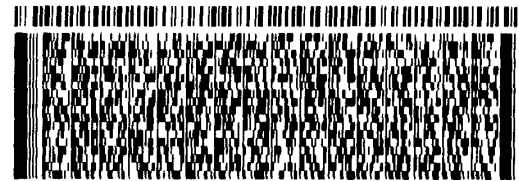
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TO **AMY ESCHBERGER**
CO.DIV OF RECLAMATION
1313 SHERMAN ST STE 215
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DENVER CO 80203

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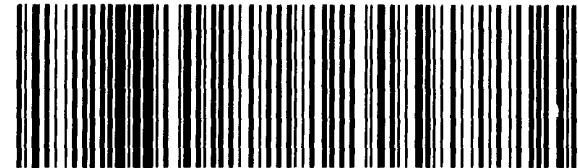
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AMT

Cheryl L. Kimble

(owner of affected properties, 4747 Little Turkey Creek Rd. and adjoining parcel 08-16-67, 7600000079 parcel, El Paso County Assessor)

Contact Information:

683 Grey Eagle Cir. S.

Colorado Springs, CO 80919

Phone: 719-210-9932

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RECEIVED

APR 18 2016

**DIVISION OF RECLAMATION
MINING AND SAFETY**

April 15, 2016

Colorado Division of Reclamation, Mining and Safety
1313 Sherman Street, Room 215
Denver, CO 80203

RE: Permit No. M2016010

Ms. Amy Eschberger;

In the matter of Permit No. M2016010 for Transit Mlx, currently before the Colorado Division of Reclamation, Mining and Safety, **I am an aggrieved party and an interested person per CRS 24-4-102. (3.5) (6.2)(11) seeking relief per CRS 24-4-102. (14) as follows.**

My potential damages fall into these categories addressed below:

- 1) Burden on Recorded Easement and Likely Road Damage
- 2) Damage to Wells/Property Value
- 3) Damage to wildlife and Habitat

Burden on Recorded Easement/ Road and Likely Road Damage

My attorney, Carrie S. Bernstein of Alderman/Bernstein is submitting a letter under separate cover on my behalf describing my legal objections concerning my recorded easement and likely damage to the road/easement over the affected land. This will impact a total 42 landowners representing 49 properties in Eagles Nest subdivision or Bauer Ranch subdivision. Nancy and Charles Reed have described concerns and objections with which I entirely agree concerning the easement and road. Jerry P. Moore has submitted concerns about hydrology, hydrogeology, and geotechnical issues directly applicable to potential damage and safety on the road with which I entirely agree. See Regulations/CRS cite below:

CRS Title 34-32.5-115 Action by board – appeals

(4) In the determination of whether the board or the office shall grant a permit to an operator, the applicant must comply with the requirements of this article and 24-4-105 (7), CRS. The board or office shall not deny any permit **except on one or more of the following grounds:**

(d) **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.

Per CRS 34-32.5-103. (1), Little Turkey Creek road and the recorded easement access (for ingress and egress) through the quarry in section 16 by the properties in sections 7, 8, 17, 9, and 4, constitute “affected land”. The application is to include private ways and roads by statute. Section C and D of the application do not acknowledge the existence of Little Turkey Creek Rd. through section 16 and beyond or address the “trespass” or burden on the recorded easement crossing section 16 on Little Turkey Creek Rd. The number of properties affected with “interested persons” is 36 in section 7, 8, and 17 known as Eagles Nest and 13 properties in sections 9 and 4 known as Bauer Ranch. This affects a total of 49 properties. I have two of those properties. Little Turkey Creek Rd. is the **ONLY** access to these properties.

Sections C and D of M2016010 indicate that access through section 16 will be prohibited during blasting and when there is a blasting error. This timeframe could be as short as a half hour or as long as long as a day. That constitutes a trespass on the recorded easement. Regarding Little Turkey Creek Rd. and the easement, there are several areas where the blasting impact could cause land and rock slides that are not addressed in the application. Also blasting is restricted from 100 feet from the Little Turkey Creek Stream and while the road is often by the stream, this is not always the case. Blasting could be on or very near the road. This should be studied by a geotechnical expert or a road engineer. The other impact to the easement and road is the flooding and erosion caused by the quarry removing vegetation and recontouring the land. The hydrology presented in the application is knowingly based on airport rainfall which is not representative of section 16. It appears 10 year impoundments are designed instead of hundred year. A study by Colorado Division of Water Resources hydrology and hydrogeologic experts is needed as a second opinion for the affects of the runoff on the road as well as into the stream which is near the road in section 16 especially since the quarry is predicted to be 50 or 55 years. That makes hundred year flooding very likely.

Damage to Wells/Property Value

Nancy and Charles Reed have described the issues of damage to wells and property value that I agree with entirely. William Sheaves has provided a list of parties and interested persons with properties and wells within 2 miles of the proposed quarry of which I am one. I agree entirely with his list based on my agreement with concerns and objections raised by Jerry P. Moore concerning hydrology, hydrogeology, and geotechnical issues. Also, my well’s (Permit No. 167875- -) permitted use was incorrectly stated in the application as “household” and is in fact “domestic” and is so listed in the well search for the Colorado Division of Water Resources.

Damage to Wildlife and Habitat

I agree entirely with the wildlife and other ecological assessments provided by Professor James Enderson and find that his assessment is consistent with my experience since 1991 to present for that

area. I also find my observations of the habitat of section 16 in my travels to and from my property for the last 25 years to be contrary to those in the application concerning trees and turkeys.

I, therefore, request party status in the matters of permit M2016010.

Sincerely,

A handwritten signature in black ink, appearing to read "Cheryl L. Kimble". The signature is fluid and cursive, with the first name "Cheryl" being more prominent and the last name "Kimble" following in a similar style.

Cheryl L. Kimble

cc:

Carrie S. Bernstein, 101 University Boulevard, Suite 350, Denver, CO 80206

Congressman Doug Lamborn, U.S. House of Representatives, Colorado's First District, 1125 Kelly Johnson Blvd., #330, Colorado Springs, CO 80920

Senator Kevin Grantham, Colorado State Senator, District 2, 200 E. Colfax Avenue, Denver, CO 80203

Representative Lois Landgraf, Colorado State Representative, District 21, 200 E. Colfax Avenue, Denver, CO 80203

Board of County Commissioners, El Paso County, 200 South Cascade Avenue, Suite 100, Colorado Springs, CO 80903

AME
WHE

Cheryl L. Kimble

(owner of affected properties, 4747 Little Turkey Creek Rd. and adjoining parcel 08-16-67, 7600000079 parcel, El Paso County Assessor)

Contact Information:

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JUL 07 2016

**DIVISION OF RECLAMATION
MINING & SAFETY**

July 6, 2016

Colorado Division of Reclamation, Mining and Safety
1313 Sherman Street, Room 215
Denver, CO 80203

RE: Permit No. M2016010

Ms. Amy Eschberger;

In the matter of Permit No. M2016010 for Transit Mix, currently before the Colorado Division of Reclamation, Mining and Safety, I am **already a party** with Carrie Bernstein of Alderman Bernstein as my attorney. I received a certified letter from Transit Mix, dated June 16th 2016, stating that the CDRMS had required that I be sent a copy of the public newspaper notice as a **property owner in Eagles Nest**. It further stated that I was allowed to submit further comments or objections to CDRMS by July 8th 2016 at 4 P.M.

In addition to the previous objections submitted by myself and my attorney, I have the following additional objections:

A substantive blasting plan was missing in the application. My concerns arise about the blasting and it's potential damage to Little Turkey Creek Rd. and to my properties in Eagles Nest to the West of the quarry. My properties are well within a one mile radius of the affected lands as is Little Turkey Creek Rd (from google earth likely about 0.4 mile).

- 1) The application indicates that the mining operation will not use Little Turkey Creek Rd., but how will they get to the points at which it will be blocked during blasting without using the road? Will they also use the road to patrol the affected lands? How will they block residents from ingress and egress for their property? How long, best case and worst case, will they block property owners? What other mining uses will they put the road to?
- 2) How will they maintain safety on Little Turkey Creek Rd. from rock slides in the several areas in and adjacent to the affected lands that are likely rock slide areas. How will they maintain safety if massive erosion occurs frequently because of removal of vegetation including

offsite damage 3.1.9(1) to the road beyond 200 feet of the affected lands. How will the stability of the road be maintained throughout the mining/reclamation phase and beyond especially if reclamation is done with less absorbent vegetation 6.4.3(e)? Making the road unstable, less useable, and unsafe is an ongoing half century plus burden to the easement owners. How will emergency services be provided when the road (only access) is blocked given there is no helicopter service possible.

- 3) No setbacks for the road were discussed in the diagrams or blasting plan to protect the stability of the road.
- 4) No safety zone for blasting was specified and it is documented that flyrock can travel a mile or more. What is the radius of the flyrock zone and the safety zone? What are the vibration standards and flyrock standards that must be met? Even using a ½ mile radius for safety, the road is always impacted and often homes including mine are at risk. Using a 1 mile radius is even more pervasive.
- 5) There is no evidence that a pre-blasting baseline will be made for properties within a mile radius of the affected lands concerning the structure and foundations of homes, the viability of existing or future wells, or the risk of flyrock. There is also no evidence that there will be monitoring of vibration or flyrock that will protect properties that are in the mile radius of affected lands. My home is highly subject to damage as it is made with styrofoam blocks filled with cement (basement and two stories). It will not do well with blasting vibrations. I also in the future may need to dig a deep well instead of the current shallow well.

Additionally, it appears from the DWR letter (dated April 21, 2016 from Caleb Foy, P.E.) to CDRMS that **no water detention facilities are allowed in the Fountain Creek Watershed without a permit** and must not cause material injury. **Deadman Creek is in the Fountain Creek Watershed** and there are two municipalities or quasi-municipalities relying on water from wells close to the affected lands. These are **Red Rock Valley Water and the City of Fountain** (which gets 30% of its summer water from wells on Keeton Road close to Red Rock Valley Water wells). Red Rock Valley Water supplies 83 homes and Fountain serves over 27,000 residents. As happened in the blasting of NORAD, the JL Ranch lost all water and it has never recovered. This is a concerning issue for all the water users including the almost 200 property owners within 2 miles like myself that could experience a similar situation with no feasible remedy. Was the city of Fountain contacted that it might experience de-watering or contamination with its wells?

I intend to remain a party.

Sincerely,



Cheryl L. Kimble

cc:

Carrie S. Bernstein, 101 University Boulevard, Suite 350, Denver, CO 80206

Congressman Doug Lamborn, U.S. House of Representatives, Colorado's First District, 1125 Kelly Johnson Blvd., #330, Colorado Springs, CO 80920

Senator Kevin Grantham, Colorado State Senator, District 2, 200 E. Colfax Avenue, Denver, CO 80203

Representative Lois Landgraf, Colorado State Representative, District 21, 200 E. Colfax Avenue, Denver, CO 80203

Board of County Commissioners, El Paso County, 200 South Cascade Avenue, Suite 100, Colorado Springs, CO 80903

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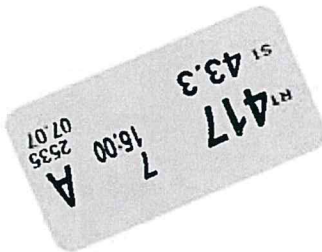


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JUL 07 2016

DIVISION OF RECLAMATION
MINING AND SAFETY



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SHIP DATE: 06 JUL 16
ACTWT: 0.10 LB
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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;">DRMS RULE 2.6 PRE-HEARING MOTION TO DENY APPLICATION FOR MINING PERMIT</p>	

Cheryl L. Kimble, by and through the undersigned counsel and pursuant to Rule 2.6 of the Colorado Mined Land Reclamation Board (the “Board”) Mineral Rules and Regulations (the “Rules”), submits the following pre-hearing motion and, for the reasons set forth herein, requests that the Board deny the referenced permit application (the “Application”) requested by Transit Mix Concrete Co. (the “Applicant”).

INTRODUCTION

Rule 6.4.14, the Applicant must prove it has a “legal right of entry” to property that will be used for the proposed mining and reclamation. Instead, the Division of Reclamation, Mining and Safety (the “Division”) recently held that a court must determine that the Applicant does ***not*** have such authority. Having no such determination here, 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.” See September 29, 2016, Recommendation to Approve a 112c Permit Application with Objections issued by the Division (the “Division Recommendation”).

In fact, the Applicant has not satisfied the statutory requirements. Because the Applicant has not and cannot 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 Application must be denied under the clear terms of the Division rules and Colorado law.

BACKGROUND

The issues raised in this motion concern the Applicant's proposed use, realignment, and obstruction of Little Turkey Creek Road, which 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.¹ 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 operations. See C.R.S. § 34-32.5-112.

Rule 6.4.14 requires the Applicant provide evidence of its legal right to enter and conduct mining operations on all affected land. Applicant's evidence in this regard is 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. See <http://drmsweblink.state.co.us/drmsweblink/0/doc/1143609/Page1.aspx?searchid=d4ed7dbb-4741-41f7-91b3-55bd33638199>, and attached Exhibit 2. Neither of these documents prove a legal right to use, re-align, or obstruct a private easement. Specifically, 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 Rule 6.4.19. As such, the Division 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

¹ This motion follows Ms. Kimble's Objection filed with the Division on April 18, 2016, the June 30, 2016, letter from Cory Rutz filed with the Division on behalf of the Applicant, and Ms. Kimble's September 1, 2016, response thereto, all of which are contained in the Division file and are attached hereto as Exhibits 1-3.

- (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 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 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 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.

**THE DIVISION ERRED IN REFUSING TO DETERMINE THE APPLICANT’S
LEGAL RIGHT TO ENTRY**

As stated above, the Division *must* determine the Applicant’s right to enter the property described in the Application. Specifically, 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.

Little Turkey Creek Road is part of the “site” where the Applicant will conduct mining operations. These operations include use of the road on a daily basis for mine traffic, road closures before, during, and after blasting, and the required realignment. *See e.g.* Division Recommendation, pp. 13-14. Failure to complete this requirement renders the Application incomplete.

The Division disregarded its statutory and regulatory obligations by refusing to require the Applicant “provide the basis for legal right to enter Little Turkey Creek Road,” let alone use, realign, and obstruct that easement. Specifically, the Division determined that the basis for legal right of entry would require an interpretation of “specific conditions and rights of a private road easement” that it was unwilling to conduct. Division Recommendation, p. 12. In spite of the requirement that the Applicant provide this proof, such as a deed or lease, the Division stated, “the Act does not provide the Division with sufficient jurisdictional authority to interpret specific

conditions and rights of a private road easement contained within a District Court Decree.”² The Division then states there are no grounds for denying the Application except if the operation is contrary to law. Division Recommendation, p. 12 (citing C.R.S. § 34-32.5-116(4)(d)). On the contrary, the Division must deny the mining permit if the Application is *incomplete*. C.R.S. § 34-32.5-116(4)(a).

Further, the Division changed the burden of proof in this regard by requiring the owners of the affected land to prove the Applicant has *no* right of legal entry. Division Recommendation, p. 12 (requiring “a Court’s determination that the application is contrary to a local permit or license...”). Of course, there is no statute or regulation that requires the true owner of affected property to prove the Applicant lacks a legal right of entry.

Finally, even if the Division was correct in abdicating its responsibility to require proof of legal right of entry, the Division clearly erred in finding the Applicant satisfied its statutory and regulatory requirements for obtaining a mining permit. If the Division lacks the authority to determine whether the Applicant has a legal right to do what is proposed on the affected land, the Division cannot possibly recommend approval of the mining permit. C.R.S. § 34-32.5-116(4)(a).

MINING OPERATIONS WILL REQUIRE ROAD CLOSURES 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 Exhibit 2, p. 3.

As stated above, this 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. 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

² Notably, the Division is represented by attorneys in the Natural Resources & Environment Section of the Colorado Office of the Attorney General, who have authority to provide legal counsel and representation to the Division.

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.”).³ 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*

³ 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.”).

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).

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. *See C.R.S. § 34-32.5-116(4)(c-d)*.

THE LEVEL OF IMPACT DOES NOT DETERMINE WHETHER A LEGAL RIGHT EXISTS

The Applicant has not proven any legal right to utilize, realign, or obstruct Little Turkey Creek Road, as it is a private easement. The Applicant only claims the impacts of its mining operation will not be unreasonable.

As a preliminary matter, the impact on Little Turkey Creek Road is severely minimized in the June 30th letter attached at Exhibit 2. As to planned closures, the Applicant stated Little Turkey Creek Road will be obstructed before and after blasting and, 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. In fact, the Division determined the road will be closed “for the length of time needed to successfully complete a blast,” which includes pre-blast activities and post-blast inspections. Division Recommendation, p. 10.

The Applicant 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

Division acknowledged that Little Turkey Creek road will be realigned, but somehow determined this realignment will not damage the existing road. Division Recommendation, p. 13. Furthermore, the Division acknowledged that the Applicant will use Little Turkey Creek Road as part of the mining operations, but apparently dismisses the impact of this use because the mine traffic will be limited to light vehicles. Division Recommendation, p. 14.

Nevertheless, the undisputed fact is the Applicant must use, realign, and obstruct Little Turkey Creek Road in connection with its mining operations. The disagreement lies in whether Applicant has the “legal right” to use, realign, and obstruct the road. The Applicant’s position – that, because the impact may be less than permanent or even reasonable, it has a legal right to conduct operations on the road – is contrary to the intent and requirements of the applicable regulations, which requires that Division and Board consider all impacts to affected land. Nonetheless, the impact of road closures is much more significant than the Applicant suggests.

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 Division’s recommendation means that the Applicant is exempt from the requirements of Rule 6.4.14 and puts the onus on the affected landowners to prove the Applicant has no legal right to use the property. Furthermore, the Division failed to take into account the obvious impacts of the mining operations on Little Turkey Creek Road, deferring to the Applicant’s opinion that the impact would be minimal and reasonable, which opinion is entirely irrelevant in light of the clear statutory requirements.

For these reasons, and pursuant to C.R.S. § 34-32.5-116(4), we request that the Board grant this motion and deny the referenced Application.

DATED this 5th day of October, 2016.

Respectfully submitted,

ALDERMAN BERNSTEIN LLC

A handwritten signature in blue ink, appearing to read "Amanda Bradley", is written over a horizontal line.

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	
REPLY TO APPLICANT'S RESPONSE TO DRMS RULE 2.6 PRE-HEARING MOTION TO DENY APPLICATION FOR MINING PERMIT	

Cheryl L. Kimble, by and through the undersigned counsel and pursuant to Rule 2.6 of the Colorado Mined Land Reclamation Board (the "Board") Mineral Rules and Regulations (the "Rules"), submits the following reply concerning the Pre-Hearing Motion submitted on October 5, 2016 (the "Motion").

INTRODUCTION

1. Rule 6.4.14 requires an applicant prove it has a "legal right of entry" to property that will be used for the proposed mining and reclamation, however, Transit Mix Concrete Co. (the "Applicant") did not show it has a legal right to utilize, let alone obstruct and reconfigure, an access easement owned by Ms. Kimble and others.

PROCEDURAL BACKGROUND

2. By letter dated September 29, 2016, the Division of Reclamation, Mining and Safety (the "Division") recommended that the Board approve the application (the "Application") submitted by Applicant, 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." See

Recommendation to Approve a 112c Permit Application with Objections (the "Division Recommendation").

3. On October 5, 2016, Ms. Kimble filed the Motion and requested the Board deny the referenced Application because, (1) without proof of a legal right of entry, the application is incomplete pursuant to C.R.S. § 34-32.5-116(4)(a), and (2) the Application violates the terms of Ms. Kimble's easement and may not be granted pursuant to C.R.S. § 34-32.5-116(4)(d).¹

4. The Draft Prehearing Order was issued on October 13, 2016, and acknowledged the Division's prior recommendation. Thereafter, two responses to the Motion were served on October 20, 2016, one from the Division and one on behalf of the Applicant.

5. On October 20, 2016, the Division issued a response to the Motion and modified its prior recommendation. The Division's recommendation now states, "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." See Division response, paragraph 18. Further, the Division now requests 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. See Division response, paragraphs 23-24.

6. Ms. Kimble agrees with the conclusion reached by the Division that the Applicant failed to show it has a legal right to use Little Turkey Creek Road and, therefore, has not satisfied the requirements of Rule 6.4.14. However, the Division's recommendation still requires that the parties proceed with a two-day Formal Hearing when the Application is incomplete. On October 21, 2016, Ms. Kimble filed with the Board a Motion to Vacate the Formal Hearing pending satisfaction of the Division's conditions.

ARGUMENT

7. In the meantime, Ms. Kimble wishes to address certain issues raised in the Applicant's response to the Motion.

A. Consent of Servient Owner is Insufficient

8. The Applicant wrongly alleges it need only obtain the approval of the *servient* estate in order to show it has the legal right to use Little Turkey Creek Road.

9. 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

¹ The Motion mistakenly cites to C.R.S. § 34-32.5-116, instead of -115.

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 1238.²

10. Furthermore, the 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.

11. Clearly, the Applicant is required to prove it has a legal right to use Little Turkey Creek Road and the consent of the dominant estate holders, including Ms. Kimble, is part of this requirement.

B. The Applicant Bears the Burden of Proof, Not the Objectors

12. The Applicant also alleges Ms. Kimble should have sought relief from the Court months ago regarding the use of Little Turkey Creek Road. On the contrary, it is not the owner’s burden to prove the Applicant has no right to use the affected land. Completion of the Application and satisfaction of the Division requirements are the Applicant’s obligation. Without proof of its right to use Little Turkey Creek Road, the Application must be denied.

² See also *Riddell v. Ewell*, 929 P.2d 30, 31-32 (Colo. App. 1996) (“Whenever there is ownership of property subject to an easement, there is a dichotomy of interests, both of which must be respected and kept in balance as nearly as possible.”); *Hornsilver Circle, Ltd. v. Trope*, 904 P.2d 1353 (Colo.App.1995); and *Schold v. Sawyer*, 944 P.2d 683, 685 (Colo. App. 1997) (the servient estate holder “subject to a right-of-way may use the way for any lawful purpose, provided such use does not interfere with the right of passage resting in the owner of the easement.”).

13. Moreover, a party's right to seek judicial review regarding matters at issue in this proceeding are limited by C.R.S. § 24-4-106 and C.R.C.P. 106. Ms. Kimble cannot seek judicial intervention until there is a final ruling from the Board.

C. The 1909 Patent is Inapposite

14. Finally, the Applicant produced a mining patent from 1909 which it claims provides a legal right to use Little Turkey Creek Road. Applicant offers no explanation as to why this document was not included with the Application. Most likely, however, it is because this patent appears only to describe a right to access certain property.

15. The patent does not provide a legal right to use, let alone obstruct, Little Turkey Creek Road and under no circumstances does it supersede the El Paso County District Court's 1968 decree establishing a specific easement. Further, as stated above, the simple fact that the servient estate holder may use the easement does not mean such use may be in conflict with the dominant estate holder's rights in the manner proposed by the Applicant. For the reasons set forth in the Motion, the Applicant's proposed use is not consistent with the dominant estate holders' rights and, in fact, is expressly prohibited by the easement terms.

D. Remaining Arguments

16. The remaining arguments presented by the Applicant relate to the reasonableness of the road obstructions which, for the reasons set forth in the Motion, are irrelevant.

17. Further, the Board should disregard the allegations contained in the response that are in direct contradiction to the Applicant's prior statements and those that were not previously asserted. For example, compare the following statements:

- a. In the August 19, 2016, Engineering Evaluation of LTC Road, p. 8, the Applicant stated "Quarry traffic on Little Turkey Creek Road will be limited to light vehicles (i.e. one-ton or less pick-up trucks) and generally for the purpose of securing the road before blasting occurs and inspecting the road following each blast." Now, the Applicant claims it "will not even use Little Turkey Creek Road for access to the Mining Operations" (Applicant response, p. 3).
- b. In the August 19, 2016, Engineering Evaluation of LTC Road, p. 9, the Applicant stated "Establishing the intersection *requires* realigning Little Turkey Creek Road for approximately 400 feet to remove unnecessary curves," (emphasis added). Now, the Applicant claims "realignment of Little Turkey Creek Road is not critical to the Application or the Mining Operations, but was a benefit that Transit Mix offered as a benefit to the Permittees" that now can be disregarded (Applicant response, p. 6, fn 2).

- c. Applicant now claims that it will permit the dominant estate holders' use of Little Turkey Creek Road or Applicant's own haul road in the case of emergencies.

18. Such inconsistencies should be disregarded entirely as the Division and Board must make a determination based upon the Application and the supporting data, not mere rhetoric.

WHEREFORE, for the reasons set forth in the Pre-Hearing Motion and in the Division's October 20, 2016, recommendation, Ms. Kimble requests that the Board deny the referenced Application.

DATED this 24th day of October, 2016.

Respectfully submitted,

ALDERMAN BERNSTEIN LLC



CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of October, 2016, 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).


/s/ Cindy Bolton

BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

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

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

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 26th and 27th, 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
Scott Schultz #38666
Assistant Attorney General
On behalf of the Division of Reclamation,
Mining and Safety
Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
(720) 508-6256
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CERTIFICATE OF SERVICE

I, Wallace H. Erickson, hereby certify that on this 20th 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:

Kenneth R. Baird
2335 Paseo Corta
Colorado Springs, CO 80926

Chris Burnell
Turkey Cañon Ranch Homeowners Association
15575 Henry Ride Heights
Colorado Springs, CO 80926

Elizabeth W. Dean
3131 Little Turkey Creek Road
Colorado Springs, CO 80926

Reece Eddy, Jr.
1285 Glenrock Drive
Colorado Springs, CO 80926

Jennifer K. Flaharty
1005 Glenrock Dr.
Colorado Springs, CO 80926

Ann Gerber
11680 Valle Verde Dr.
Colorado Springs, CO 80926

Mark Hodges
11440 Valle Verde Dr.
Colorado Springs, CO 80926

Richard C. and Yvonne Bredee Holden
2109 Woodburn St.
Colorado Springs, CO 80906

Ted D. Kerr
Red Rock Valley Estates Water District
11145 Calle Corvo
Colorado Springs, CO 80926

Jack and MaryAnn Koscove
15310 South Hwy 115

Colorado Springs, CO 80926
Chelsea Luttrall
2453 Gold Rush Drive, #4
Colorado Springs, CO 80906

Mark McClurg
Highlands of Turkey Cañon Ranch
Homeowners Association
15795 Phantom Canyon View
Colorado Springs, CO 80926

Lisa Pecoraro
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Colorado Springs, CO 80926

Joseph Salazar, Jr.
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And via Email to the following:

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Mike and Dee Yugovich
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 10/20/16
Signature and Date



COLORADO

Division of Reclamation,
Mining and Safety

Department of Natural Resources

1313 Sherman Street, Room 215
Denver, CO 80203

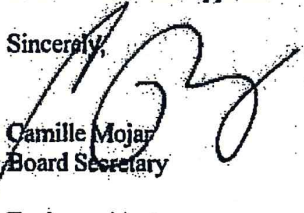
DATE: December 22, 2016

TO: Transit Mix Concrete Co.
ATTN: Andre LaRoche
444 E. Costilla St.
Colorado Springs, CO 80903

RE: Findings of Fact, Conclusions of Law and Order
Transit Mix Concrete Company
File No. M-2016--010

On December 20, 2016 the Mined Land Reclamation Board signed the enclosed Board Order for the above captioned operation. We strongly advise that you read this document carefully. The Board orders that applicant file no. M-2016-010 be DENIED.

Sincerely,


Camille Mojar
Board Secretary

Enclosure(s)

Certified Mail
7014-2120-0001-7869-7827

Cc's

Amy Eschberger
Wally Erickson
John Roberts
Scott Scultz



**BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO**

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

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

THIS MATTER came before the Mined Land Reclamation Board ("Board") on October 26 and 27, 2016 in Colorado Springs for a hearing to consider the application for a 112c construction materials reclamation permit filed by Transit Mix Concrete Company ("Applicant"), file number M-2016-010.

Amy Eschberger, Wally Erickson, Peter Hays, Tim Cazier, and Assistant Attorney General Scott Schultz appeared on behalf of the Division of Reclamation, Mining and Safety ("Division"). Norton Cutler, Esq. appeared on behalf of Applicant. Carrie Bernstein, Esq. and Amanda Bradley, Esq. appeared on behalf of Objector Cheryl Kimble. Steven Mulliken, Esq. appeared on behalf of Objector Ingersoll Trust. Fire Chief Hartmut Wright appeared on behalf of Objector Southwestern Highway 115 Fire Protection District. Objectors Nancy Reed, Gary K. (Kris) McCowen, Warren Dean, and Weldon Flaharty each appeared on his or her own behalf.

The Board, having considered the presentations, testimony, and evidence of the Division;¹ Applicant; and the objectors, and being otherwise fully informed of the facts in the matter, enters the following:

FINDINGS OF FACT

1. On March 8, 2016, the Applicant filed an application with the Division for a 112c reclamation permit under section 34-32.5-112, C.R.S. for a site known as the Hitch Rack Ranch Quarry in El Paso County, Colorado, file number M-2016-010 ("Application"). The Application proposed an operation to be located in section 16, Township 16 South, Range 67 West, 6th Principal Meridian on property known as Hitch Rack Ranch.

2. On March 9, 2016, the Division deemed the Application "complex" and extended the standard ninety-day decision deadline by sixty days, from June 6, 2016 to August 5, 2016, pursuant to Rule 1.4.1(7) of the Mineral Rules and

¹ The Division was advisory staff to the Board, not a party, in this proceeding.

Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials, 2 CCR 407-4 ("Rules").

3. During the public comment period, as mandated by Rule 1.7.1, the Division received one hundred eight comment and objection letters from individuals, organizations, and agencies. The public comment period closed on April 19, 2016.

4. On June 14, 2016, pursuant to Rule 1.6.2(1)(f), the Division required the Applicant to provide additional notice to the property owners at the Eagles Nest and Bauer Ranch subdivisions. During this second public comment period, which closed on July 8, 2016, the Division received nine written objection letters.

5. On June 30, 2016, the Division hosted an informal public meeting in Colorado Springs for the purpose of explaining the application review process, issues within the Board's jurisdiction, the prehearing conference, and formal Board hearing processes. Parties and interested persons were informed of the informal public meeting by written notice, provided on June 9, 2016.

6. The Division extended the Application recommendation deadline from August 5, 2016 to October 4, 2016 on the Applicant's request. The prehearing conference and Board hearing were rescheduled and properly noticed accordingly.

7. During the review period, the Division generated six adequacy letters between May 27, 2016 and September 23, 2016. The Applicant addressed all adequacy issues to the Division's satisfaction.

8. On September 29, 2016, the Division issued and served on all parties both a written recommendation to approve the Application over objections and a written rationale for that recommendation.

9. On October 5, 2016, the Board, through a prehearing officer, conducted a prehearing conference in Colorado Springs. The prehearing officer issued a draft prehearing order. Among other things, the draft prehearing order identified five categories of issues for the parties to present to the Board for consideration. At the hearing, the Board considered the draft prehearing order and invited amendments or adjustments to be proposed by the parties. No party objected to, or proposed amendments or adjustments to, the draft prehearing order. The Board adopted the draft prehearing order as the final prehearing order.

10. The Application described a proposed construction materials (granite) mining operation and on-site processing of mined materials, including crushing, screening, washing, and production of aggregate products. The proposed operation would be the fourth quarry in the foothills west of Colorado Highway 115 near

Colorado Springs (the others being the Menzer Quarry, the Red Canyon Quarry, and Table Mountain Quarry).

11. The permit boundary described in the Application included three large excavation areas with highwalls maintained in a benched configuration on 392.75 acres of affected lands. As described in the Application, the proposed operation would advance through six mining phases with reclamation occurring concurrently as the operation progresses. The Application proposed to reclaim the affected lands for wildlife habitat. The Division calculated the financial warranty for the operation through phase three to be \$3,857,842.00.

12. The proposed permit boundary included segments of Little Turkey Creek and Deadman Creek.

13. As proposed, the permit boundary included part of Little Turkey Creek Road, a private dirt road. Little Turkey Creek Road branches at a point east of the proposed permit boundary and both branches proceed through the proposed mining operation. One branch of Little Turkey Creek Road parallels Little Turkey Creek through the proposed mining area, while the other branch of Little Turkey Creek Road parallels Deadman Creek through the proposed mining area. Little Turkey Creek Road is the sole means of access for residents of the Eagles Nest subdivision.

14. The mining plan in the Application proposed to construct an access road for the mining operation, which road was proposed to cross Little Turkey Creek Road, Little Turkey Creek, and Deadman Creek. In response to the Division's third adequacy review letter, dated August 8, 2016, Applicant submitted an "Engineering Evaluation of Little Turkey Creek Road," signed and sealed by Paul Kos, PE of Norwest Corporation. The engineering evaluation stated that "the quarry design includes plans to build a separate access road so that no heavy equipment associated with the quarry will travel Little Turkey Creek Road." The engineering evaluation further stated, at pages 8-9:

Potential Problem: The quarry access roads will require an intersection on both the Little Turkey Creek and Deadman Creek segments of Little Turkey Creek Road. These intersections could impact the safety and ease of use of the road.

Solution: The intersection and crossing of Little Turkey Creek Road will be established during the initial quarry development and last through the life of the quarry. The intersection and crossing of Deadman Creek will be established once mining commences in the North Pit Extension area, and the intersection will be removed and reclaimed when mining and reclamation is finished in this area. ...

Both intersections will be at-grade crossings equipped with stop signs for mine traffic. Traffic on Little Turkey Creek Road will not be required to stop. Establishing the intersection requires realigning Little Turkey Creek Road for approximately 400 feet to remove unnecessary curves.

15. At the hearing, Robert Stabo ("Mr. Stabo") testified on behalf of the Applicant. Mr. Stabo stated that, under the proposed blasting plan in the Application, traffic will not be permitted through the quarry on Little Turkey Creek Road for a period of time. Amy Eschberger testified for the Division that the Applicant's blasting plan provided that: blasts may occur up to three times per week; prior to a blast, "access corridors will be secured for the length of time needed to successfully complete the blast;" a typical length of time for a blast is approximately thirty minutes, but that access corridors may be secured for a longer, unspecified, period in the event of a misfire. Segments of one or both branches of Little Turkey Creek Road into and through the mining operation constitute "access corridors."

16. At the hearing, Fire Chief Hartmut Wright ("Chief Wright") testified about the dangers of fly rock related to blasting, that approximately ninety percent of the residents near the proposed operation are more than fifty years of age, and about the importance of emergency vehicles having access through the quarry on Little Turkey Creek Road. Chief Wright further testified that the Front Range is an area of extreme fire danger, and that the area of the proposed operation presents a high potential that a fire would spread because it is in a box canyon.

17. RMBC Group, LLC is the owner of the Hitch Rack Ranch. At the hearing, the Applicant offered into evidence an "Owner's Acknowledgement," signed by RMBC Group, LLC on September 15, 2016, stating that pursuant to a royalty agreement between RMBC Group, LLC and the Applicant, that the Applicant "has the legal right to enter upon [Hitch Rack Ranch] for the purpose of mining operations and the extraction of construction aggregates." The Division testified that it has received the Owner's Acknowledgment. The Board admitted the Owner's Acknowledgement into evidence over objection by counsel for Objector Cheryl Kimble.

18. One or more residents of the Eagles Nest subdivision possess a non-exclusive easement on Little Turkey Creek Road. The residents of the Eagles Nest subdivision who possess the easement are the dominant estate owners of the Little Turkey Creek Road easement. Counsel for Objector Kimble testified that the dominant easement was in the records of the El Paso County Assessor's Office at the time that the Application was filed with the Division.

19. On October 5, 2016, Objector Cheryl Kimble submitted, through counsel, her DRMS Rule 2.6 Pre-Hearing Motion to Deny Application for Mining Permit ("Prehearing Motion"). On October 20, 2016, the Division submitted its response to the Prehearing Motion. In its response, the Division stated, in paragraph 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.

20. At the hearing, the Applicant testified that crossings of Little Turkey Creek Road, its planned improvements to the road, and closures of the road for blasting do not constitute an impermissible or unreasonable interference with the use of the easement.

21. As proposed in the Application, the Applicant's responses to adequacy letters from the Division, and based on evidence and testimony presented at the hearing, the Applicant planned to affect Little Turkey Creek Road through modification of the road (e.g., straightening the road and adding crossings) and temporary closures of the road for blasting.

22. The Applicant has not demonstrated that it has received, or is not legally required to receive, the conveyance of a legal right to enter and initiate a mining operation on Little Turkey Creek Road from the owners of the dominant easement on Little Turkey Creek Road. The Division testified that the adjudication of private property rights are outside the authority of the Division and the Board.

23. At the hearing, Timothy Crawford ("Mr. Crawford") of Bishop-Brogden Associates, Inc., testified on behalf of the Applicant. Mr. Crawford testified that three primary aquifers exist at or near the proposed mining site, including a fractured rock aquifer associated with Little Turkey Creek, perched on shallow hard rock systems, and sedimentary bedrock aquifers. Mr. Crawford opined that the proposed mining operation will not intercept groundwater, and have no impact on neighboring wells or nearby surface water or groundwater users. Mr. Crawford testified that Little Turkey Creek will buffer potential impacts to wells west of the proposed quarry. Mr. Crawford also testified that if impacts on surface water or groundwater are identified, then the Applicant will remedy such impacts. Mr. Crawford testified that evaluating groundwater resources is not an exact science, and that the magnitude of changes and consideration of available data is important.

24. At the hearing, Objector Ingersoll Trust presented testimony from various witnesses about groundwater concerns and potential impacts on

groundwater from the proposed mining operation, including Steve Mulliken, Jerry Moore, Ted Kerr, and Charles Norris.

25. Steve Mulliken ("Mr. Mulliken") testified that water to individual wells in the area originates from water held in fractured granite, not a large aquifer and that monitoring wells would be ineffective. Mr. Mulliken testified that the granite deposit that would be removed by the proposed mining operation is the water storage vessel and delivery system for small water deposits.

26. Jerry Moore ("Mr. Moore"), a retired exploration hydrologist, testified on behalf of Objector Ingersoll Trust that the fractured granite aquifer in the area of the proposed mining operation has a relatively small volume of water and is very sensitive to being recharged. Mr. Moore also testified that it is very difficult to accurately model fractured aquifers. Mr. Moore stated that surface water and groundwater flows are directed to the proposed affected area, and that the mining operation's removal of the granite will destroy the "pipeline" for the water and damage the current water recharge flow system.

27. At the hearing, Ted Kerr ("Mr. Kerr"), President of Red Rock Valley Estates Water District, testified on behalf of Objector Ingersoll Trust. Mr. Kerr testified that the District has never had a reliable water source; that any water, and particularly good water, is difficult to find; and that District residences have xeric landscaping, not lawns.

28. Charles Norris, Ph.D. ("Dr. Norris") with Geo-Hydro, Inc. testified at the hearing on behalf of Objector Ingersoll Trust. Dr. Norris testified that there is no indication of perched water in the area. Dr. Norris disputed the testimony on behalf of the Applicant regarding how the granite fracture system drains. Specifically, Dr. Norris testified that the Applicant modeled the area drainage on a sand pile, which drains much differently than a fractured granite system, such as the system located in the area of the proposed mining operation. Dr. Norris testified that the mining operation will drain water from the flanks of Little Turkey Creek, reduce the base flow (and possibly the perennial flow) of the creek, and reduce availability of water to wells in the valley. Dr. Norris opined that removing granite from the proposed mining area will destroy the pathways for water movement. Dr. Norris testified that the proposed quarry will absolutely impact water levels and that it is impossible to tell the impact on groundwater until after the groundwater system is already affected.

29. At the hearing, Steve Boyle ("Mr. Boyle") of BIO-Logic, Inc. testified on behalf of the Applicant. Mr. Boyle testified that BIO-Logic, Inc. mapped vegetation communities on the proposed mining site, performed a biological evaluation of the site, conducted a Mexican Spotted Owl Habitat Assessment (indicated by the

Division to have occurred on October 13, 2015), performed a Mexican Spotted Owl Survey Report (indicated by the Division to have occurred on June 24, 2016), and completed a Nesting Raptor Survey Report. Mr. Boyle testified that the evaluations at the site found no Mexican Spotted Owls, found no nesting raptors, found no Ute Ladies' Tresses habitat, and identified approximately one hundred fifty species likely to occur at the site.

30. Mr. Boyle testified at the hearing that the Mexican Spotted Owl is on the federal list of "threatened" species. Mr. Boyle further testified that the Mexican Spotted Owl is a small bird that is selective about where it nests, preferring old-growth conifer forests, rock cliffs, and canyons.

31. Mr. Boyle testified that the age of the conifers in the area make it a poor quality nesting habitat for Mexican Spotted Owl, but that one area at the site could constitute nesting habitat. Mr. Boyle testified that approximately 325 acres of suitable Mexican Spotted Owl foraging habitat would be impacted by the proposed mining operation. Mr. Boyle testified that foraging by Mexican Spotted Owl in the area of the proposed mining operation will not be possible until after completion of reclamation.

32. Mr. Boyle testified that the proposed mining operation would displace wildlife in the area, but that such impacts will be local and not regional.

33. John Sanderson, Ph.D. ("Dr. Sanderson") of The Nature Conservancy testified on behalf of Objector Ingersoll Trust. Dr. Sanderson testified that the proposed mining operation, as proposed in the Application, is in the heart of an area of very high biodiversity significance and that it abuts an established nature preserve that is more than one thousand six hundred acres in size. Dr. Sanderson testified and showed exhibits demonstrating that Hitch Rack Ranch is within a migratory corridor for animals including elk and mule deer between the Beaver Creek Wilderness Study Area to the west and Fort Carson to the east. Dr. Sanderson further testified that Hitch Rack Ranch is a critical connection point in a four-hundred-square-mile conservation landscape.

34. Dr. Sanderson testified that the proposed mining operation would be northeast of the Aiken Canyon Preserve. Dr. Sanderson testified that the Aiken Canyon Conservation Area includes habitat for wildlife such as black bear, mule deer, elk, mountain lions, bobcats, gray foxes, badgers, tuft-eared pine squirrels, and more than one hundred species of birds. Dr. Sanderson testified that while six hundred species of plants are located in the area, the reclamation plan of the proposed mining operation identifies only twenty-two plant species. Dr. Sanderson testified and presented an exhibit showing that wild turkeys inhabit the area, including an area within Hitch Rack Ranch near Little Turkey Creek.

35. Dr. Sanderson testified that the Mexican Spotted Owl has been listed as threatened since 1993 and that it requires old-growth conifer forests or rocky cliffs for nesting. Dr. Sanderson testified and presented an exhibit from the Mexican Spotted Owl Assessment performed by BIO-Logic, Inc. showing that Hitch Rack Ranch is entirely located in one of three Mexican Spotted Owl "Critical Habitats" west of Castle Rock, Colorado Springs, and Pueblo. Dr. Sanderson testified that "critical habitat" may include "areas that are not currently occupied by the species but will be needed for its recovery." Dr. Sanderson testified that the area from Cañon City to Colorado Springs is the best place in Colorado for Mexican Spotted Owl. Dr. Sanderson presented Figure 4 from the Mexican Spotted Owl Assessment performed by BIO-Logic, Inc., showing that the proposed mining site includes "fair" nesting habitat. Dr. Sanderson testified that the site of the proposed mining operation contains good quality foraging habitat, and possibly roosting habitat, for the Mexican Spotted Owl.

CONCLUSIONS OF LAW

36. The Board has jurisdiction over this matter pursuant to the Colorado Land Reclamation Act for the Extraction of Construction Materials, Article 32.5 of Title 34, C.R.S. (2016) ("Act").

37. Under section 34-32.5-115(4), C.R.S., "the applicant must comply with the requirements of this article and section 24-4-105(7), C.R.S."

38. Under Rule 1.4.1(10), the Applicant "has the burden of demonstrating that the application meets the minimum requirements of the Act, Rules, and Regulations."

39. Under Rule 2.8.1(1) and section 24-4-105(7), C.R.S., "the proponent of an order shall have the burden of proof." As the party initiating this matter by filing the Application, Applicant was the "proponent of an order" at the hearing and, therefore, has the burden to prove that the Application was consistent with applicable laws and rules, and should be approved by the Board.

40. In considering whether to grant a permit to an applicant, the Board "shall not deny a permit except on one or more of the following grounds," as relevant:

(a) The application is incomplete and the performance and financial warranties have not been provided.

....

(c) Any part of the proposed mining operation, the reclamation program, or the proposed future use is contrary to the laws or regulations of this article.

....

(g) The proposed reclamation plan does not conform to the requirements of section 34-32.5-116.

C.R.S. § 34-32.5-115(4) (2016).

41. The Applicant failed to meet its burden to show that the Application meets the minimum requirements of the Act, specifically, the requirement to show the source of the legal right to enter and initiate a mining operation on affected land set forth in section 34-32.5-112(1)(b)(IV), C.R.S. The Application proposed to realign a portion of Little Turkey Creek Road, close the road temporarily during mining operations, and to install crossings of the road. The Applicant's proposed impact on Little Turkey Road may affect the legal rights of the dominant estate owners of the easement on the road. Determination of the legal rights of the easement owners is outside the Board's jurisdiction. However, the Board is required to determine whether the Application shows that the Applicant has obtained from all owners of record a legal right to enter and initiate a mining operation. The Application failed to demonstrate to the satisfaction of members of the Board that the Applicant has obtained from all property owners, including dominant estate owners of the private road easement, a legal right to enter and initiate a mining operation on Little Turkey Creek Road.

42. "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," specifically including private ways and roads. C.R.S. § 34-32.5-103(1) (2016). Little Turkey Creek Road constituted "affected land" because of the manner of use, and intended modification, of the road as proposed in the Application.

43. Applicant has not demonstrated that it does not need to obtain a legal right of entry from the dominant estate holders. There exists a dispute regarding whether the servient estate holder has authority to grant the Applicant permission to alter Little Turkey Creek Road over the objection of the dominant estate holders. This dispute exists regardless of whether Applicant's proposed modifications and use of the road constitutes an impermissible or unreasonable interference with the dominant estate holders' use of the easement. This is a legal dispute regarding the respective property interests of the dominant and servient estate holders as granted by the easement. The Board does not have jurisdiction to resolve this legal dispute. Without resolution of this issue, however, Applicant cannot meet its burden to

demonstrate that it has obtained the legal right of entry to initiate a mining operation on Little Turkey Creek Road.

44. To the extent that the Applicant may be required by the Act and Rules to obtain and show a legal right to enter and initiate a mining operation on Little Turkey Creek Road from all property owners, including dominant estate holders, the Application is incomplete.

45. Section 34-32.5-116(4)(h), C.R.S. provides:

Reclamation plans and their implementation are required on all affected lands and shall conform to the following requirements:

(h) Disturbances to the prevailing hydrologic balance of the affected land and of the surrounding area and to the quality and quantity of water in surface and groundwater systems, both during and after the mining operation and during reclamation, shall be minimized. Nothing in this paragraph (h) shall be construed to allow the operator to avoid compliance with other statutory provisions governing well permits and augmentation requirements and replacement plans when applicable.

46. The Application 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.

47. By failing to demonstrate 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, the reclamation plan in the Application fails to conform to the requirement of section 34-32.5-116(4)(h), C.R.S.

48. Because the reclamation plan in the Application fails to conform to the requirement of section 34-32.5-116(4)(h), C.R.S., the Board may deny the Application in accordance with section 34-32.5-115(4)(g), C.R.S.

49. Rule 3.1.8(1) requires:

All aspects of the mining and reclamation plan shall take into account the safety and protection of wildlife on the mine site, at processing sites, and along all access roads to the mine site with special attention given to critical periods in the life cycle of those species which require special consideration (e.g., elk calving,

migration routes, peregrine falcon nesting, grouse strutting grounds).

50. Rule 6.4.8 requires an application for a 112 reclamation permit to provide, in Exhibit H, information about the wildlife in and around the proposed mining area, and states:

(1) In developing the wildlife information, the Operator/Applicant may wish to contact the local wildlife conservation officer. The Operator/Applicant shall include in this Exhibit, a description of the game and non-game resources on and in the vicinity of the application area, including:

(a) a description of the significant wildlife resources on the affected land;

(b) seasonal use of the area;

(c) the presence and estimated population of threatened or endangered species from either federal or state lists; and

(d) a description of the general effect during and after the proposed operation on the existing wildlife of the area, including but not limited to temporary and permanent loss of food and habitat, interference with migratory routes, and the general effect on the wildlife from increased human activity, including noise.

(2) The application may be reviewed and commented upon by the State of Colorado Division of Wildlife (DOW). If the DOW has comments, they must be provided prior to the end of the public comment period specified in Subsection 1.7.1(2)(a) to be considered by the Board and Office.

51. The Application failed to take into account, to the satisfaction of the Board, the safety and protection of wildlife at the proposed site, including without limitation, failing to take into account conservation of Mexican Spotted Owl foraging habitats and potential nesting habitats, and turkey production areas.

52. Because the Application failed to take into account the safety and protection of wildlife at the proposed site, the proposed mining operation failed to comply with Rule 3.1.8.

53. By failing to comply with Rule 3.1.8, the Application may be denied by the Board pursuant to section 34-32.5-115(4)(c), C.R.S.

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board hereby orders the Application DENIED.

DONE AND ORDERED this 20th day of December 2016.

FOR THE COLORADO MINED LAND
RECLAMATION BOARD

Jill Van Noord
Jill Van Noord, Vice Chair

NOTICE OF JUDICIAL REVIEW RIGHTS

This order becomes effective and final upon mailing. Any party adversely affected or aggrieved by agency action may commence an action for judicial review by filing a complaint with the district court within thirty-five (35) days after the effective date of this order, pursuant to section 24-4-106, C.R.S. (2016) and the Colorado Rules of Civil Procedure. In the event that a complaint for judicial review is filed, designations of record made in accordance with section 24-4-106(6), C.R.S. should be served on the Board at: 1313 Sherman Street, Room 215, Denver, CO 80203, Attention: Johnie Abad.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 22 day of December 2016 addressed as follows:

By Certified Mail to:
7014-2120-0001-7869-7827

Transit Mix Concrete Co.
ATTN: Andre LaRoche
444 E. Costilla St.
Colorado Springs, CO 80903

By United States Postal Mail to:

Mark McClurg
Highlands of Turkey Cañon Ranch
Homeowners Association
15795 Phantom Canyon View
Colorado Springs, CO 80926

William & Marion Baker
3375 Turkey Cañon Ranch Road
Colorado Springs, CO 80926

Chelsea Luttrall
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Division of Reclamation, Mining & Safety
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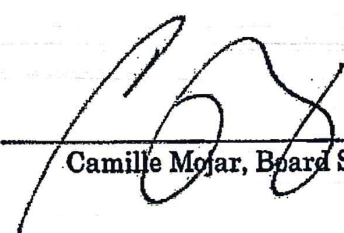
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Camille Mojar, Board Secretary

Transit Mix Concrete Co.
Hitch Rack Ranch Quarry/M-2016-010



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'; 'jkrisdon@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



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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 "Amanda Bradley". The signature is fluid and cursive, with the first name "Amanda" written in a larger, more prominent script than the last name "Bradley".

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

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, Colorado 80202	
TRANSIT MIX CONCRETE CO., Plaintiff v. COLORADO MINED LAND RECLAMATION BOARD et al., Defendants.	▲ COURT USE ONLY ▲
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<p style="text-align: center;">DEFENDANT MINED LAND RECLAMATION BOARD'S ANSWER BRIEF</p>	

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ISSUE FOR REVIEW

The Mined Land Reclamation Board (“Board”) properly denied the application for a reclamation permit filed by Transit Mix Concrete Co. (“Transit Mix”) based on substantial evidence in the record, in compliance with all statutory provisions and rules, and in proper exercise of the Board’s discretion.

STATEMENT OF THE CASE

Transit Mix filed an application for a reclamation permit under section 112 of the Colorado Mined Land Reclamation Act for the Extraction of Construction Materials, Article 32.5 of Title 34, C.R.S. (“Act”). In its application, Transit Mix proposed to mine and process granite, and transport material off-site. Following two full days of a hearing in Colorado Springs in which the Board received evidence and testimony on a number of issues concerning the proposed project, the Board denied Transit Mix’s application based on all of the evidence submitted and clearly articulated the bases for its denial. The Board’s order is consistent with law, amply supported by evidence in the record,

and bolstered by factual findings. Accordingly, the Court should affirm the Board's order.

I. Parties

A. Mined Land Reclamation Board

The Board is a seven-member citizen board responsible for enforcing the Act. C.R.S. § 34-32-105 (2016). The Act sets forth performance standards to be followed during and after mining operations to minimize, as much as practicable, the disruption from the operations and to provide for the establishment of plant cover, stabilization of soil, protection of water resources, or other measures appropriate for the subsequent beneficial use of the affected surface land. C.R.S. § 34-32-103(13) (2016). Further, the Board has promulgated rules to assist in enforcing the Act; the rules relevant to this matter are the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials, 2 C.C.R. 407-4 ("Rules").

The Board is charged with: reviewing mining and land reclamation issues in Colorado; developing standards for land

reclamation plans; conserving the state's natural resources; aiding in the protection of wildlife and aquatic resources; and protecting and promoting the health, safety, and welfare of the people of Colorado.

C.R.S. §§ 34-32-102(1) -106 (2016). The General Assembly has vested the Board with "jurisdiction and authority over all persons and property" necessary to enforce the Act. C.R.S. § 34-32-105(4) (2016). The Board has broad discretion in mining and reclamation matters.

B. Division of Reclamation, Mining and Safety

The Division of Reclamation, Mining and Safety ("Division") is an administrative agency within the Department of Natural Resources. Like the Board, the Division has full power to carry out and administer the provisions of the Act. C.R.S. § 34-32-104 (2016). The Division assists the Board in carrying out the Board's statutory responsibilities. C.R.S. § 34-32-107(2) (2016). To accomplish its duties and responsibilities under the Act, the Division employs a wide range of experts in such fields as engineering, geochemistry, geology, hydrology, and wildlife. The Division, as delegated by the Board, is authorized to

review permit applications for compliance with the Act. In the proceeding at issue, the Division was staff to the Board.

II. Nature of the Case

Transit Mix filed an application for a reclamation permit with the Division for a granite mining and on-site processing operation in El Paso County (“Application”). R. pt. 216, at 8204.¹ The Division received more than 100 letters of objection to Transit Mix’s Application. On September 29, 2016, the Division recommended to the Board that the Application be approved. At the conclusion of a two-day evidentiary hearing in October 2016 and after considerable deliberation, the Board denied the Application. In this proceeding, Transit Mix seeks judicial review of the written Board order effective December 22, 2016, denying the Application (“Order”).

III. Course of Proceedings and Statement of Facts

On March 8, 2016, Transit Mix filed an Application seeking a 112c reclamation permit under section 34-32.5-112, C.R.S. for a site known

¹ The administrative record comprises 9,201 Bates-stamped pages including a hearing transcript, divided into 237 parts. Citations to the record herein are indicated by “R: pt. [part number(s)], at [page number(s)].”

as the Hitch Rack Ranch Quarry (“Hitch Rack”) in El Paso County. The Division deemed the Application “complex” and extended the decision deadline for the Division’s recommendation to August 5, 2016.

During the public comment period, which is required under Rule 1.7.1, the Division received 108 comment and objection letters. On June 14, 2016, the Division required Transit Mix to provide notice of the Application to the property owners in the Eagles Nest and Bauer Ranch subdivisions as possible interested parties. During this second public comment period, the Division received nine additional objection letters. The Division generated six adequacy letters, letters that specify areas in which the Application may have failed to comply with the Act or Rules. On September 29, 2016, the Division recommended the Board approve the Application and issued its rationale for that recommendation.

The Board and Division conducted a prehearing conference in Colorado Springs on October 5, 2016. The prehearing conference officer issued a draft prehearing order that, among other things, identified five broad categories of issues for the parties to present to the Board for consideration. At the hearing, the Board considered the draft

prehearing order and invited the parties to propose amendments or adjustments. No party, including Transit Mix, objected to the draft prehearing order. Accordingly, the Board adopted the draft prehearing order as the final prehearing order.

The Application described a proposed granite mining and on-site processing operation. Transit Mix's proposed operation would have been the fourth quarry in the relatively small area in the foothills west of Colorado Highway 115 near Colorado Springs. The Application described the proposed operation to constitute three large excavation areas on 392.75 acres. The proposed operation would have advanced through six mining phases with concurrent reclamation. The Division calculated the financial warranty for the proposed operation through three phases to be \$3,857,842.²

The proposed permit boundary would have included part of Little Turkey Creek Road, a private dirt road and the sole means of access for residents of the Eagles Nest subdivision. The proposed mining plan called for construction of an access road for the mining operation, which

² The purpose of the financial warranty is to guarantee the proper reclamation of the site in the event Transit Mix is unable or unwilling to fulfill its obligations to do so.

would cross Little Turkey Creek Road, Little Turkey Creek, and Deadman Creek. R. pt. 122, at 5384. As part of its proposal, Transit Mix planned to realign a large section of Little Turkey Creek Road, install road crossings, and close the road up to three times weekly for thirty minutes during blasting operations. R. pt. 166, at 6290-91; pt. 237 at 8730, *l.* 19-25.

The Application addressed several environmental impacts. Of particular importance at the hearing were the potential impacts on the hydrologic balance and wildlife. The Application encompassed within the permit boundary segments of Little Turkey Creek and Deadman Creek, as well as private residential wells. The Application planned various measures intended to minimize the project's impact on the hydrologic balance of the area. The parties presented voluminous evidence at the hearing on the hydrologic balance issue.

The proposed operation had the potential to impact wildlife in and near the site. Many species, including the Mexican Spotted Owl, turkey, elk, and deer, inhabit or migrate through the area. The Board

received voluminous testimony and evidence of the proposed operation's impact on wildlife and its habitat.

At the hearing in October 2016, the Division, Transit Mix, and many of the parties objecting to the Application ("objectors") fully participated, presenting testimony and offering documents into the record. The Board received testimony and considered evidence on the five categories of issues contained within the final prehearing order. At the conclusion of the second and final day of hearing, the Board deliberated, weighing the evidence on the issues and determined that, based on the substantial evidence in the record, the Application should be denied. Effective December 22, 2016, the Board issued a written order denying the Application ("Order"). R. pt. 79, at 4401, ¶¶ 41. The particular matter before the Court is Transit Mix's request for judicial review of the Order.

SUMMARY OF THE ARGUMENT

The Board's Order denying the Application was based on a full consideration of the evidence and testimony presented at the October 26-27, 2016 hearing. The Board found that the Application failed to:

(a) demonstrate to the Board's satisfaction that the proposed operation would minimize the impact on the prevailing hydrologic balance, including the quality and quantity of groundwater systems in the area; (b) adequately take into account, to the Board's satisfaction, the safety and protection of wildlife at the site; and (c) show that Transit Mix had a legal right to enter the proposed site and initiate a mining operation and, therefore, the Application was incomplete. R. pt. 79, at 4409, ¶¶ 41, 43; 4410, ¶¶ 44, 46; 4411, ¶¶ 51, 52.

Transit Mix argues, in various forms, that the Board denied the Application without factual findings and despite evidence that the company sustained its burden of proving that the Application met the minimum requirements of the Act and Rules. A review of the record and the Order will manifest that Transit Mix's arguments are incorrect. The Board denied the Application in proper exercise of its discretion and based on substantial evidence in the record. Accordingly, the Court must uphold and affirm the Board's December 22, 2016 Order in accordance with section 24-4-106(7), C.R.S.

ARGUMENT

I. The Order was based upon substantial evidence supported by the record.

A. Standard of Review

The Board disagrees with Transit Mix's statement of the standard of review to the extent that it is unduly limited. The Board agrees that the Colorado Administrative Procedure Act, Article 4 of Title 24, C.R.S. ("APA") sets forth the standard of review of agency action. Under that standard, a court must affirm agency action unless it is: arbitrary or capricious; a denial of statutory right; unconstitutional; in excess of statutory authority; not in accord with the APA; an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law. C.R.S. § 24-4-106(7), (11)(e) (2016).

Under the APA, the Court must examine the record in the light most favorable to the agency decision. *See* C.R.S. § 24-4-106(7) (2016); *Lawley v. Dep't of Higher Educ.*, 36 P.3d 1239, 1252 (Colo. 2001) ("In reviewing an administrative board's decision, we have emphasized two

key principles: (1) that all reasonable doubts as to the correctness of the administrative body's ruling must be resolved in its favor; and (2) that, unless an abuse of discretion is shown, the administrative determination will not be disturbed.”).

Administrative agency decisions are presumptively valid. *See, e.g., Colo. Div. of Ins. v. Auto-Owner's Ins. Co.*, 219 P.3d 371 (Colo. App. 2009), *Life Investors Ins. Co. of Am. v. Smith*, 833 P.2d 864 (Colo. App. 1992). The party challenging an agency's action bears the burden of overcoming the presumption that the agency's acts were proper. *See, e.g., Lieb v. Trimble*, 183 P.3d 702 (Colo. App. 2008).

The Board, as trier of fact at hearing, must weigh the evidence presented, resolve any conflicts, and make credibility determinations. *Colo. State Bd. of Nursing v. Lang*, 842 P.2d 1383 (Colo. App. 1992). A reviewing court may not reweigh evidence received by an agency, but must defer to the agency's findings and determinations that are supported by competent evidence. A reviewing court is not permitted to substitute its own judgment for that of an agency or modify or set aside an agency decision, even if inferences to be drawn from the evidence are

conflicting. *See, e.g., Microsemi Corp. of Colo. v. Broomfield Cnty. Bd. of Equalization*, 200 P.3d 1123 (Colo. App. 2008); *Stevinson Imports, Inc. v. City & Cnty. of Denver*, 143 P.3d 1099 (Colo. App. 2006); *Metro Moving & Storage Co. v. Gussert*, 914 P.2d 411 (Colo. App. 1995).

A reviewing court may not set aside an administrative agency's decision unless it is contrary to law or lacks substantial or competent evidence³ in the record as a whole supporting the agency decision. *See Rigmaiden v. Colo. Dept. of Health Care Policy & Fin.*, 155 P.3d 498 (Colo. App. 2006); *United Fin. Credit v. Colo. Collection Agency Bd.*, 892 P.2d 446, 448 (Colo. App. 1995) ("In order for a court to set aside an agency decision, it must find no competent evidence in the record as a whole which supports the agency's determination."). "Substantial evidence is probative evidence that would warrant a reasonable belief in the existence of facts supporting a particular finding, without regard to

³ In reviewing administrative action, "substantial evidence is the same as competent evidence." *United Fin. Credit*, 892 P.2d at 448; *see also Colo. Mun. League v. Mountain States Tel. & Tel. Co.*, 759 P.2d 40 (Colo. 1988). "No competent evidence" means that the agency decision "is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 527 (Colo. 2004).

the existence of contradictory testimony.” *Ward v. Dep’t of Natural Res.*, 216 P.3d 84, 94.(Colo. App. 2008).

Agency findings need not be express; rather, agency findings may be inferred from the facts. *Colorado Office of Consumer Counsel v. Publ. Utilities Comm’n*, 786 P.2d 1086 (Colo. 1990) (holding that, upon review of the record as a whole, the absence of specific findings did not warrant reversal); *Board of Assessment Appeals of State of Colo. v. Colo. Arlberg Club*, 762 P.2d 146 (Colo. 1988). An agency’s findings need not be explicit, but must only generally “apprise the parties and the reviewing court of the basis for its decision.” *Moya v. Colo. Ltd. Gaming Control Comm’n*, 870 P.2d 620, 624 (Colo. App. 1994). Provided that the record contains evidence supporting the agency decision, express findings on every point are not required. *Burns v. Bd. of Assessment Appeals of State of Colo.*, 820 P.2d 1175, 1177 (Colo. App. 1991).

B. Legal Analysis

An applicant for a 112 reclamation permit must submit detailed information about the proposed operation, including such things as how the applicant intends to conduct the mining operation and a plan for

reclaiming the land following the conclusion of mining activity. C.R.S. § 34-32.5-112 (2016). In the event the Division receives even one objection to a permit application, the Division issues a recommendation to the Board as to whether the application should be approved or denied, and schedules the application for a hearing by the Board. At such hearing, the Board is charged with determining whether the application complies with the Act. C.R.S. § 34-32.5-115(4) (2016).

The Board is empowered to deny a permit application on any one of seven grounds, including, as relevant to this matter, that an application is incomplete; that “any part of the proposed mining operation, the reclamation program, or the proposed future use is contrary” to the Act or Rules; and the proposed reclamation plan fails to “conform to the requirements of section 34-32.5-116,” which sets forth mining operator duties and what must be addressed in a reclamation plan. C.R.S. § 34-32.5-116(4)(a), (c), (g) (2016). The Board denied the Application on three separate and distinct bases, any one of which independently is sufficient for denial.

The record contains substantial evidence to support the Board's denial of the Application. Throughout the hearing, the Board received facts and information showing that Transit Mix:

- (a) failed to satisfy the Board that the reclamation plan for the proposed operation would minimize the impact on the prevailing hydrologic balance and groundwater systems in the area, as required by section 34-32.5-116(4)(h), C.R.S.; and
- (b) failed to comply with Rule 3.1.8 by not adequately taking into account, to the Board's satisfaction, the safety and protection of wildlife at the site; and
- (c) failed to demonstrate that it had obtained, or was not required to obtain, a legal right to enter from all property owners, specifically the owners of the dominant easement for Little Turkey Creek Road, and that without such information, the Application was incomplete.

Substantial evidence in the record supports the Board's findings, conclusions, and its order denying the Application. Therefore, the Court should uphold the Order.

1. The Applicant's reclamation plan did not demonstrate that the proposed operation would minimize the impact on the prevailing hydrologic balance and groundwater.

In considering whether to grant a reclamation permit, the Board evaluates a number of statutory factors, including whether the proposed reclamation plan complies with the requirements of the Act. C.R.S. § 34-

32.5-115(4)(g) (2016). Reclamation plans must comply with numerous requirements. As relevant here, every reclamation plan must show that:

[d]isturbances to the prevailing hydrologic balance of the affected land and of the surrounding area and to the quality and quantity of water in surface and groundwater systems, both during and after the mining operation and during reclamation, shall be minimized. Nothing in this paragraph (h) shall be construed to allow the operator to avoid compliance with other statutory provisions governing well permits and augmentation requirements and replacement plans when applicable.

C.R.S. § 34-32.5-116(4)(h) (2016).

Failure to show that disturbances to the hydrologic balance, surface water, and groundwater will be minimized at the affected land and of the surrounding area – during both the mining and reclamation stages of an operation – constitute grounds for denying a permit application. Transit Mix's Application failed to meet its statutory burden that the proposed operation would minimize disturbances to the hydrologic balance and groundwater of the affected land and of the surrounding area.

The record contains substantial evidence to support the Board's finding that Transit Mix failed to carry its burden of showing that its

proposed operation would minimize disturbances to the hydrologic balance, surface water, and groundwater. The Board received evidence and testimony from all parties concerning water issues at the site and in the surrounding area. Transit Mix had the burden to prove statutory compliance of the Application;⁴ the company simply failed to persuade the Board that its proposal would adequately protect water resources.

As discussed, the proposed mine site encompassed two drainages: Turkey Creek and Deadman's Creek. In addition, three aquifers exist at or near the proposed site – a fractured rock aquifer, an aquifer perched on shallow hard rocks, and sedimentary rock aquifers. R. pt. 237, at 8782. A witness for Transit Mix testified that, while they do not expect the operation to create issues with surface water and groundwater, problems could arise and, if so, Transit Mix would “fix[] the problem.” R. pt. 237, at 8792. Transit Mix's other witness on the issue of impacts on area water resources testified that while Transit Mix did not expect its operation to encounter groundwater, the company

⁴ C.R.S. § 24-4-105(7); Rules 1.4.1(10) and 2.8.1, 2 C.C.R. 407-4; R. pt. 79, at 4408, ¶¶ 37-39.

would monitor groundwater and surface water and, if an impact were discovered, Transit Mix would “install cisterns [and] haul water.” R. pt. 237, at 8806.

In contrast to Transit Mix’s position, the objectors to the Application showed that, under the operator’s plan, impacts to water resources would not be minimized, that the impact on groundwater is difficult or impossible to predict, and that the proposed operation could irreparably damage already scarce water pathways.

One witness for the objectors, exploration hydrologist Jerry Moore, described the hydrologic system in the area of the proposed operation as “fragile,” one in which the water supply is so limited that “it won’t take much of an interruption or interception of your groundwater to cause tremendous problems.” R. pt. 237, at 8815, *ll.* 2-8. The Board heard expert testimony that the fractured granite identified by Transit Mix is, “the primary[] conduit” of that limited groundwater down Turkey Creek Canyon, groundwater essential to recharging the aquifers below. R. pt. 237, at 8818 and 8819, *l.* 19. Testimony described the granite that Transit Mix proposed to remove as a “392-acre section of [the area’s]

hydrologic flow system,” the removal of which would interrupt groundwater flow. R. pt. 237, at 8821, *ll.* 24-25, and 8822.

The Board reviewed evidence suggesting that Transit Mix’s modeling of the granite aquifer was inaccurate. Charles Norris, a professional geologist, testified for the objectors, describing Transit Mix’s modeling as “the equivalent of a sandbox.” R. pt. 237, at 8819, *ll.* 21-22. Mr. Norris described the rock fractures that conduct water downgrade instead as:

a lot more like the plumbing in your house than they are a pile of sand. They’re discrete, highly conductive ways where water moves, and if someone comes into your house and takes a foot of pipe out of your plumbing from where your water comes into your bathroom and permanently removes that length of pipe, it doesn’t make any difference that the rest of the plumbing is in good shape. You can’t get any water across the gap, and that’s what the people in the sedimentary basin area are facing, is the disruption of the piping that gives them what little water they have.

R. pt. 237, at 8921, *ll.* 9-20. Mr. Norris opined that removal of the granite (*i.e.*, the water pipe) proposed to be mined by Transit Mix “permanently destroys the fractured granite groundwater passageways through that block of earth from east to west and is creating a perpetual

impairment to any restoration or healing of that system.” R. pt. 237, at 8921, *ll.* 4-8.

The Board considered evidence that it is virtually impossible to accurately predict the impact of removing a fractured granite aquifer because of the difficulty in accurately modeling the fractured system: “we cannot deterministically predict the specific impacts at a specific point in a fractured granite aquifer. You can never build the certainty of that fracture system enough to know that.” R. pt. 237, at 8928, *ll.* 8-12.

In addition to the substantial evidence concerning the importance of the granite aquifer, the Board received evidence indicating that Transit Mix failed to adequately evaluate all the water resources and, therefore, was not in a position to minimize disturbances to the hydrologic balance. As one example, the firm that Transit Mix retained to evaluate and respond to technical questions concerning water issues stated in a memorandum that “the ground water in the Deadman’s Creek drainage has not been specifically investigated.” R. pt. 131, at 5954.

The Board's Order contains ample and detailed factual findings to support its determination concerning the mining operation's impacts to water resources in the area. R. pt. 79, at 4405-06, ¶¶ 23-28. Further, the Order made specific legal conclusions on this issue. R. pt. 79, at 4410, ¶¶ 44-48. In short, the administrative record thoroughly supports the Board's decision, and the Order meticulously addressed Transit Mix's failure to demonstrate that its proposed operation would minimize disturbances to the hydrologic balance.

2. The Application's mining and reclamation plans failed to adequately take into account the safety and protection of wildlife and wildlife habitat.

Mining and reclamation plans in an application must comply with the Rules pursuant to section 34-32.5-115(4)(c), C.R.S. Rule 3.1.8 requires every operation to have mining and reclamation plans that:

take into account the safety and protection of wildlife on the mine site, at processing sites, and along all access roads to the mine site with special attention given to critical periods in the life cycle of those species which require special consideration (e.g., elk calving, migration routes, peregrine falcon nesting, grouse strutting grounds).

Rule 3.1.8(1), 2 C.C.R. 407-4.

In conjunction, Rule 6.4.8 details the information that a 112 reclamation permit application like the Application at issue here must contain. Information that must be submitted in the application includes:

- (1) a description of the game and non-game resources on and in the vicinity of the application area, including:
 - (a) a description of the significant wildlife resources on the affected land;
 - (b) seasonal use of the area;
 - (c) the presence and estimated population of threatened or endangered species from either federal or state lists; and
 - (d) a description of the general effect during and after the proposed operation on the existing wildlife of the area, including but not limited to temporary and permanent loss of food and habitat, interference with migratory routes, and the general effect on the wildlife from increased human activity, including noise.

Rule 6.4.8, 2 C.C.R. 407-4.

Reading the two rules in harmony leads to the conclusion that, in order to take the safety and protection of wildlife into account, an application must adequately detail all the wildlife in and around the site.

Substantial evidence in the record, taken as a whole, supports the Board's finding that Transit Mix failed to adequately take into account

the safety and protection of wildlife. A witness for Transit Mix, Steve Boyle of BIO-Logic, Inc., testified that, following an evaluation of the site, he found no Mexican Spotted Owls, no nesting raptors, and no endangered foliage species. R. pt. 237, at 8928, *ll.* 8-12. Mr. Boyle's testimony focused largely on the Mexican Spotted Owl (a threatened species), and its nesting habitat and foraging habitat requirements. R. pt. 237, at 8928, *ll.* 8-12. Mr. Boyle stated that the proposed mine site was, except for one area, generally poor nesting habitat for the bird. R. pt. 237, at 8928, *ll.* 8-12.

The Board received evidence and testimony showing that Transit Mix's evaluation of species in the area of the mine site was inadequate, and that its conclusions were incorrect about the area's suitability for Mexican Spotted Owl. The Director of Science for the Nature Conservancy, Dr. John Sanderson, testified at length on the area's wildlife resources, which demonstrated the inadequacy of Transit Mix's biological evaluation.

The Board considered evidence that several species use Hitch Rack Ranch specifically for habitat and migration, including elk, mule

deer, and wild turkey. R. pt. 65, 3738-39; pt. 237, at 8928, *ll.* 8-12. In addition, three nearby wildlife areas – including the Beaver Creek Wilderness Study Area, the Aiken Canyon Preserve, and the Aiken Canyon Conservation Area – include habitat for black bear, mountain lions, bobcats, foxes, badgers, tuft-eared pine squirrels, and over a hundred bird species. R. pt. 237, at 9069, *ll.* 7-10. Among the species that inhabit the proposed mining site, turkeys would have been severely impacted: the species requires special areas for reproduction; the proposed access road bisected turkey nesting areas. R. pt. 237, at 9069, *l.* 24 – 9070, *l.* 9. Transit Mix presented no information about how it proposed to protect these species, their habitats, and their migratory routes in and through the site. Further, the Application’s reclamation plan identified only 22 plant species, in contrast to the approximately 600 plant species found on-site. R. pt. 237, at 9069, *ll.* 11-21.

The record the Board considered shows that the essential focus of Transit Mix’s biological evaluation, the Mexican Spotted Owl, was likewise shortsighted. In fact, Transit Mix’s study actually was evidence that the area should be protection for the benefit of that

species. Hitch Rack Ranch is an important habitat for the Mexican Spotted Owl. R. pt. 66, at 3744. Further, as Transit Mix's Mexican Spotted Owl Assessment demonstrated, the proposed mining site would have been entirely located in one of only three Mexican Spotted Owl "Critical Habitats" west of Castle Rock, Colorado Springs, and Pueblo. R. pt. 66, at 3745; pt. 237, at 8928, *ll.* 8-12. As Dr. Sanderson testified, "critical habitat" may include "areas that are not currently occupied by the species but will be needed for its recovery." R. pt. 237, at 8928, *ll.* 8-12. Contrary to showing that Hitch Rack Ranch is unsuitable for Mexican Spotted Owl, BIO-Logic, Inc.'s assessment (in Figure 4) acknowledged that the proposed mining site included "fair" habitat. R. pt. 66, at 3746; pt. 237, at 8928, *ll.* 8-12.

The Board heard testimony that even areas that currently are less than suitable for the Mexican Spotted Owl must be protected. The Mexican Spotted Owl requires old growth forest (junipers, pine) for habitat. Dr. Sanderson called attention to the fact that old growth forests are not created overnight, that trees must be allowed to grow, and that removing them and replanting delays the creation of prime

habitat. The trees on Hitch Rack Ranch are estimated to be about 100 years old; leaving them to continue to grow will create “great habitat” for the Mexican Spotted Owl within 50 years. R. pt. 237, at 9073, *ll.* 15-20. Destroying the trees, even if they are replanted during reclamation, would “set [the] trees back a century.” R. pt. 237, at 9073, *l.* 23.

The Board based its determination concerning whether Transit Mix’s proposed operation would adequately protect wildlife and habitat on abundant findings, and made specific and reasonable conclusions. R. pt. 79, at 4406, ¶ 29 to 4408, ¶ 35; 4410, ¶ 49 to 4411, ¶ 53. The Board, intent on carrying out its statutory mandate, carefully weighed all of the evidence in its effort to reach a rational conclusion, as evidenced by the Board members’ extensive questions of the witnesses for Transit Mix and the objectors. R. pt. 237, at 9048-54; 9075-78. The administrative record supports the Board’s findings. The Board considered the record as a whole and reasonably exercised its discretion, finding that Transit Mix failed to demonstrate that its mining and reclamation plans adequately took into account the protection of wildlife and its habitat.

3. The Application failed to demonstrate that Transit Mix had a legal right to enter and operate a mining operation; accordingly, the Application was incomplete.

An application for a reclamation permit must include “[t]he 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) (2016). Transit Mix failed to show that it had obtained, or was not required to obtain, the right from the owners of the easement for Little Turkey Creek Road to enter the affected land, land which included the road. Absent a showing that Transit Mix had acquired such rights from the easement owners, or that acquiring such rights was not legally required, the Application was incomplete.

Property owners within the Eagles Nest subdivision have a dominant estate interest in the Little Turkey Creek Road easement. Transit Mix’s proposed mining operation would have significantly impacted Little Turkey Creek Road (and the easement interest of the dominant estate holders) in three ways: by constructing two crossings of Little Turkey Creek Road with an access road Transit Mix proposed to build; by closing Little Turkey Creek Road temporarily for blasting

throughout the life of the mining operation; and by permanently realigning approximately 400 feet of Little Turkey Creek Road.

The Act requires an applicant to demonstrate that it has legal rights to both (1) enter, and (2) initiate a mining operation on the affected land. C.R.S. § 34-32.5-112(1)(c)(IV) (2016). The Board correctly noted that it was uncertain whether the landowner of Hitch Rack Ranch had legal authority to allow Transit Mix to physically change and restrict the use of Little Turkey Creek Road (*i.e.*, unilaterally alter the easement and conduct a mining operation therein) without first obtaining that legal right from the dominant estate holders. R. pt. 79, at 4409, ¶ 43. The Board also accurately recognized that the legal issue was beyond its jurisdiction. *Id.*

Transit Mix failed to show the Board either that the company had authority to unilaterally impact the easement interests of the dominant estate holder, or that such authority was not necessary under the Act. R. pt. 79, at 4405, ¶ 22. Transit Mix had the burden of proving compliance with the Act and submitting a complete Application. C.R.S. § 24-4-105(7); Rules 1.4.1(10) and 2.8.1, 2 C.C.R. 407-4. Transit Mix

failed to sustain its burden, providing the Board with no evidence, testimony, or legal authority (*e.g.*, a court decree, court order, or even authorities such as those cited in its Opening Brief) purporting to show that it had a legal right to enter and unilaterally alter or restrict the use of Little Turkey Creek Road, or that it was not necessary to obtain that right. Transit Mix did not present any evidence on this question in its Application – even the Division, which thoroughly reviewed the Application for legal adequacy, tacitly acknowledged that the source of Transit Mix’s legal right to use Little Turkey Creek Road may be required but had not been submitted. R. pt. 79, at 4405, ¶ 19. Without evidence concerning Transit Mix’s legal right to enter and conduct a mining operation on the road, the Board had no alternative but to find the Application incomplete. R. pt. 79, at 4409, ¶ 43. Denial of the Application was appropriate under section 34-32.5-115(4), C.R.S. (2016).

CONCLUSION

The Board made its decision to deny the Application based on substantial evidence in the record and in compliance with the Act. The Board’s decision was reasonable and well within its discretion. Only

one basis was necessary to deny the Application; that the Board had had at minimum three distinct grounds evinces that the Board's decision to deny the Application was warranted. The Court should uphold and affirm the Board's December 22, 2016 Findings of Fact, Conclusions of Law, and Order.

Dated this 15th day of December 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 2017, a true and correct copy of the foregoing DEFENDANT MINED LAND RECLAMATION BOARD'S ANSWER BRIEF was served on all parties who have consented to electronic service via Colorado Courts E-Filing service.

Original duly signed and on file for review

/s/ Janet Price