

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: M2017049	
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	
MOTION TO VACATE FORMAL HEARING	

Cheryl L. Kimble, by and through the undersigned counsel, hereby requests that the Colorado Mined Land Reclamation Board (the “Board”) vacate the Formal Hearing scheduled to commence April 25, 2018. In support of this request, Ms. Kimble states as follows:

INTRODUCTION

1. Of primary importance to this request is the requirement in the Division of Reclamation, Mining and Safety (the “Division”) Rule 6.4.14 requiring Transit Mix Concrete Co. (“Applicant”) prove it has a “legal right to enter and initiate a mining operation on the affected land.” This means the Applicant must provide such evidence as it pertains to all “owners of record.” See Rule 6.4.14, Rule 6.3.7, Rule 1.6.2(1)(e), and C.R.S. § 34-32.5-112(1)(b)(IV).

2. As part of its mining operation, the Applicant will close a private easement multiple times every week for indeterminate amounts of time for the entire life of the mining operation. Under the Rules, the Applicant should have provided the Division with proof that it has the legal authority to do so.

3. Contrary to this requirement, however, the Applicant has not and cannot show that, during the course of its intended mining operations, it has a legal right to obstruct an access easement owned by Ms. Kimble and others known as Little Turkey Creek Road.

BACKGROUND

4. By way of background, the Applicant submitted an application in Permit No. M2016010 dated Feb. 19, 2016 (“2016 Application”) seeking approval of, essentially, the same mining plan as described in the current application.

5. 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 obstruct the use of Little Turkey Creek Road, or that it is not necessary to obtain that right.

6. On October 20, 2016, the Division issued a recommendation in response to the 2016 Application stating, “[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.” See Division response, paragraph 18. Further, the Division requested that the Board conditionally approve the 2016 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.

7. After a hearing on the 2016 Application, the Board made the following determination:

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 Applicant has not demonstrated that it does not need to obtain a legal right of entry from the dominant estate holders.

Mined Land Reclamation Board Findings of Fact, Conclusions of Law and Order dated December 22, 2016, at p. 9, ¶¶ 41 and 43.

8. For the same reasons, the Division should enter a finding that the Application received on October 5, 2017 (the “2017 Application”) is incomplete and discontinue further review of the application.

ARGUMENT

9. Nothing in the 2017 Application requires a different result than what was determined in response to the 2016 Application.

10. According to the 2017 Application, the Applicant again intends to obstruct 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) letters dated September 29, 2017, and March 9, 2018, 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 2016 Application.

11. All of these documents relate to the Applicant's ability to mine Hitch Rack Ranch; none of these documents pertain to the Applicant's ability to obstruct Little Turkey Creek Road.

12. As the Board previously determined, Little Turkey Creek Road is part of the "Affected Land" because of the Applicant's need to obstruct the road during its mining operations. Little Turkey Creek Road is not, as Applicant argues, an "off-site road" that is excluded from the affected land. *See* 2017 Application, Exhibit N, letter from Hogan Lovells, pp. 3-5 and 6-7. On the contrary, Little Turkey Creek Road is within or immediately adjacent to the mining operation. Rule 1.1(30). Moreover, the Applicant's mining operations will require obstruction of Little Turkey Creek Road in the same manner described in the 2016 Application – prior to, during, and after blasting occurs. *See* 2017 Application, Exhibit D, Blasting Plan, pp. 7, 11-15.

13. The Applicant also argues, once again, that the right to obstruct Little Turkey Creek Road is an inherent right pursuant to its Mining Lease that supersedes the rights of the dominant estate owners of Little Turkey Creek Road, including Ms. Kimble. *See* 2017 Application, Exhibit N, letter from Hogan Lovells, pp. 4-5 ("The accommodation doctrine provides an independent basis for the legal right of Transit Mix to enter and conduct mining operations"); p. 7 ("[the easement holders'] rights are limited to precluding unreasonable interference with the enjoyment of their easement rights of ingress and egress in the pursuit of mineral development."); *and* p. 9 (the Applicant has "the right to obstruct the roadway occasionally (for example, for blasting safety), consistent with the surface owner's 'rights of proprietorship' and the very limit [sic] rights of ingress and egress granted to the landowners using the easement.").

14. These issues were argued repeatedly in response to the 2016 Application. *See* DRMS Rule 2.6 Pre-Hearing Motion to Deny Application for Mining Permit dated October 5, 2016, and the Reply thereto dated October 24, 2016 (attached as Exhibits 3 and 4 to Ms. Kimble's Objection letter filed in this matter). The Division and Board rejected those arguments.

15. Importantly, and contrary to the Division's prior finding, the Applicant has not obtained (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) submitted a modified application that does not require use of Little Turkey Creek Road. Neither has the Applicant offered any other new evidence that proves its right to obstruct Little Turkey Creek Road in the manner described in the 2017 Application.

16. It goes without saying that the application process is expensive and time consuming for the Division, the Board, and the objectors. Unless and until the Applicant complies with the prior determinations of the Division and Board, the 2017 Application should be denied without further cost to the parties.

WHEREFORE, Ms. Kimble respectfully requests that the Board vacate the Formal Hearing.

DATED this 28th day of March, 2018.

Respectfully submitted,

ALDERMAN BERNSTEIN LLC

A handwritten signature in blue ink, appearing to read "Amanda A. Bradley". The signature is fluid and cursive, with a large loop at the end.

Amanda A. Bradley

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Please find the Motion to Vacate Formal Hearing, filed on behalf of Cheryl Kimble, attached hereto. In addition, five copies of this Motion have been filed with the Division, and an electronic version can be located on the Division's website at www.mining.state.co.us.

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