

STATE OF  
COLORADO

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**M-2017-049 Motions & Joinder for Filing**

1 message

**Nani DeFelice** <NDeFelice@mullikenlaw.com>

Fri, Mar 30, 2018 at 2:00 PM

To: "drms.temp@state.co.us" &lt;drms.temp@state.co.us&gt;

Cc: Steve Mulliken &lt;Mulliken@mullikenlaw.com&gt;, Adrian McCarthy &lt;AMcCarthy@mullikenlaw.com&gt;, Hilary Roland &lt;hroland@mullikenlaw.com&gt;

To Whom It May Concern:

Pursuant to the 3/19/2018 Order of Forrest Luke, attached for your filing and post on the division website, [www.mining.state.co.us](http://www.mining.state.co.us), please find:

1. Joinder to Motion to Vacate Formal Hearing;
2. Motion to Expedite Briefing Schedule for Dispositive Motion Regarding Jurisdiction; and
3. DRMS Rule 2.6 Pre-hearing Motion to Dismiss Application for Mining Permit for Lack of Jurisdiction.

Thank you for your attention and cooperation. If you have any questions or concerns, please do not hesitate to contact us.

Respectfully,

**Nani DeFelice, Paralegal**

Mulliken Weiner Berg &amp; Jolivet, P.C.

102 South Tejon, Suite 900

Colorado Springs, CO 80903

Tel (Direct): [719-559-6032](tel:719-559-6032)Tel (Main): [719-635-8750](tel:719-635-8750)Fax: [719-635-8706](tel:719-635-8706)Email: [ndefelice@mullikenlaw.com](mailto:ndefelice@mullikenlaw.com)Website: [www.mullikenlaw.com](http://www.mullikenlaw.com)

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**MODIFICATION DISCLAIMER:** Any modifications you make to any documents enclosed with this correspondence may change their legal significance, including their interpretation and enforceability. We are not responsible for any modifications made to these documents which have not been approved by our office. We encourage you to consult with us regarding any proposed changes to the attached documents.

3/30/2018

State.co.us Executive Branch Mail - M-2017-049 Motions & Joinder for Filing

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### 3 attachments



**Joinder to Motion to Vacate Formal Hearing.pdf**

45K



**Motion to Expedite Briefing Schedule for Dispositive Motion RE Jurisdiction.pdf**

181K



**Motion to Dismiss Applicant for Mining Permit for Lack of Jurisdiction.pdf**

161K

<b>COLORADO MINED LAND RECLAMATION BOARD</b> Pre-Hearing Conference Officer 1313 Sherman Street, Room 215 Denver, CO 80203	
<b>Applicant:</b> TRANSIT MIX CONCRETE CO.  <b>DRMS File No.</b> M-2017-049	
<u>Attorneys for Objector the Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008:</u> Steven K. Mulliken, Bar No. 16709 Hilary A. Roland, Bar No. 51574 MULLIKEN WEINER BERG & JOLIVET P.C. Alamo Corporate Center 102 South Tejon Street, Suite 900 Colorado Springs, CO 80903 Phone Number: (719) 635-8750 Fax Number: (719) 635-8706 E-Mail: mulliken@mullikenlaw.com	
<p style="text-align: center;"><b>JOINDER IN MOTION TO VACATE FORMAL HEARING</b></p>	

The Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008 (“Ingersoll”), by and through its attorneys, Mulliken Weiner Berg & Jolivet, PC, hereby adopts and joins in and incorporates by reference the Motion to Vacate Formal Hearing filed on March 28, 2018 by Cheryl L. Kimble.

Dated this 30<sup>th</sup> day of March, 2018.

MULLIKEN WEINER BERG & JOLIVET P.C.

*(A duly signed original on file at office of undersigned.)*

By:   
/s/ Steven K. Mulliken

Steven K. Mulliken, #16709

Hilary A. Roland, #51574

*Attorneys for Objector the Barbara Ingersoll Marital Trust  
established by the Amended and Restated Trust Agreement  
of the Harold C. Ingersoll Revocable Trust dated August  
11, 2008*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of March, 2018, a true and correct copy of the foregoing **JOINDER IN MOTION TO VACATE FORMAL HEARING** was served on the members of the Board. Electronic copies of the Motion will be served and made available to all interested parties via the Colorado Division of Reclamation Mining & Safety Reports and Data website: <http://drmsweblink.state.co.us/drmsweblink/search.aspx?dbid=0>

*(A duly signed original on file at office of undersigned.)*

/s/ Nani DeFelice

  
Nani DeFelice

<b>COLORADO MINED LAND RECLAMATION BOARD</b> Pre-Hearing Conference Officer 1313 Sherman Street, Room 215 Denver, CO 80203	
<b>Applicant:</b> TRANSIT MIX CONCRETE CO.  <b>DRMS File No.</b> M-2017-049	
<u>Attorneys for Objector the Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008:</u> Steven K. Mulliken, Bar No. 16709 Hilary A. Roland, Bar No. 51574 MULLIKEN WEINER BERG & JOLIVET P.C. Alamo Corporate Center 102 South Tejon Street, Suite 900 Colorado Springs, CO 80903 Phone Number: (719) 635-8750 Fax Number: (719) 635-8706 E-Mail: mulliken@mullikenlaw.com	
<p style="text-align: center;"><b>MOTION TO EXPEDITE BRIEFING SCHEDULE FOR DISPOSITIVE MOTION REGARDING JURISDICTION</b></p>	

The Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008 ("Ingersoll"), by and through its attorneys, Mulliken Weiner Berg & Jolivet, PC, and pursuant to Rule 2.6 of the Colorado Mined Land Reclamation Board (the "Board"), submits the following pre-hearing motion and, for the reasons set forth herein, respectfully requests that the Board expedite the briefing schedule for Ingersoll's Motion for Lack of Jurisdiction. In support of this request, Ingersoll states as follows:

1. In March 2016, Transit Mix Concrete Co. (“Transit Mix”) filed an application for a 112c reclamation permit (“First Application”) for a site known as Hitch Rack Ranch Quarry.
2. In December 2016, the Board denied the First Application.
3. In January 2017, Transit Mix filed a Complaint for Judicial Review of the Board’s denial of the First Application.
4. In November 2017, Transit Mix filed a second 112c reclamation permit (“Second Application”) for Hitch Rack Ranch Quarry.
5. The hearing for the Second Application is schedule for April 25-26, 2018. *See* Exhibit 3, Notice of Formal Board Hearing for Application for 112 Construction Materials Reclamation Permit.
6. Pre-hearing motions are due no later than two days after the Pre-hearing Conference. *See* Exhibit 1, Order Regarding Deadlines for and Service of Motions, Witness, and Exhibits Lists, and Exhibits. Responses to Motions are due within three days of the hearing. *Id.*
7. Ingersoll has filed a Pre-Hearing Motion to Dismiss the Second Application for lack of jurisdiction. The Board lacks jurisdiction to consider the Second Application while the First Application is under judicial review.
8. The Motion to Dismiss is dispositive. If the Motion is granted, there will be no need to proceed with the Formal Hearing for the Second Application.
9. Due to the briefing schedule, Ingersoll’s dispositive Motion to Dismiss will not be decided until days before the hearing on the Second Application. This will require the Board, Ingersoll, Transit Mix, and the objectors to spend time and money preparing for a hearing that may be vacated due to the Board’s lack of jurisdiction.

10. For efficiency and to save cost, Ingersoll requests an expedited briefing schedule.

WHEREFORE, for the reasons set forth in this Motion, Ingersoll requests that the Board order an expedited briefing schedule for Ingersoll's Motion to Dismiss Application for Mining Permit for Lack of Jurisdiction.

Dated this 30<sup>th</sup> day of March, 2018.

MULLIKEN WEINER BERG & JOLIVET P.C.

*(A duly signed original on file at office of undersigned.)*

By: */s/ Steven K. Mulliken*

Steven K. Mulliken, #16709

Hilary A. Roland, #51574

*Attorneys for Objector the Barbara Ingersoll Marital Trust  
established by the Amended and Restated Trust Agreement  
of the Harold C. Ingersoll Revocable Trust dated August  
11, 2008*

#### **CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of March, 2018, a true and correct copy of the foregoing **MOTION TO EXPEDITE BRIEFING SCHEDULE FOR DISPOSITIVE MOTION REGARDING JURISDICTION** was served on the members of the Board. Electronic copies of the Motion will be served and made available to all interested parties via the Colorado Division of Reclamation Mining & Safety Reports and Data website:  
<http://drmsweblink.state.co.us/drmsweblink/search.aspx?dbid=0>

*(A duly signed original on file at office of undersigned.)*

*/s/ Nani DeFelice*

Nani DeFelice

BEFORE THE MINED LAND RECLAMATION BOARD  
STATE OF COLORADO

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ORDER REGARDING DEADLINES FOR AND SERVICE OF MOTIONS,  
WITNESS AND EXHIBIT LISTS, AND EXHIBITS

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IN THE MATTER OF THE APPLICATION OF TRANSIT MIX CONCRETE  
COMPANY FOR A 112 CONSTRUCTION MATERIALS RECLAMATION PERMIT,  
File No. M-2017-049

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**BACKGROUND**

The application for a 112 Construction Materials Permit for the Hitch Rack Ranch Quarry was filed with the Division on November 9, 2017 by Transit Mix Concrete Co. (Applicant). The public comment period closed on December 21, 2017. The review period for the application is currently scheduled to close on March 30, 2018. Following filing, the Division received 568 letters of objection, 155 letters in support, and 4 comment letters from agencies.

**ORDER**

Rule 2.6 of the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials ("Rules") governs pre-hearing procedures, including the submission of motions, witness and exhibit lists, and exhibits. Rule 2.6(1) requires that motions must be received by the Board no later than two (2) days following the Pre-hearing Conference and any written responses must be received by the Board no later than three (3) days prior to the Board hearing. Rule 2.6(3) requires parties to provide to the Board thirteen (13) copies of all motions, witness and exhibit lists, and exhibits. Rule 2.6(3) also requires service of all filings on the parties as well as the Board.

Pursuant to Board Policy 70.2.1, the Board's hearing officer has the authority set forth in section 24-4-105(4), C.R.S. Pursuant thereto, the Board Chair is authorized to dispose of pleadings, issue orders controlling the subsequent course of the proceedings, and issue orders on procedural matters.

Board Chair Forrest Luke, having reviewed this Order, and being fully apprised of the issues, makes the following order to clarify and streamline the filing process and deadlines in this matter:

Filing Process: Any party to the Pre-Hearing Conference and the Formal Hearing to be held in this matter shall file with the Board five (5) copies of any motions,

**EXHIBIT 1**



witness or exhibit lists, and exhibits rather than the thirteen copies required by Rule 2.6(3).

Filing of documents with the Board and Division shall also be made electronically, by emailing electronic copies of all submissions to the Division at [drms.temp@state.co.us](mailto:drms.temp@state.co.us) no later than two (2) days after the Pre-hearing Conference. Responses to motions, if any, must be filed with the Board and Division within three (3) days of the hearing. All filings must be made by the close of business on the day they are due.

The Division shall post all filings for review by any party or the public at [www.mining.state.co.us](http://www.mining.state.co.us). The filings to be posted shall include: witness and exhibit lists; exhibits; motions; and responses to motions.

Service Process: Any party making any filing as described above shall provide written notice, to all parties, that a document has been filed with the Division. This notice shall be served on all other parties and describe the item filed and its location by referencing the Division's website for filings in this matter. Service shall be made by email for all parties for whom an email address is available, and by mail for all parties for whom no email address is available.

The Division shall make a list of all parties and their contact information available at [www.mining.state.co.us](http://www.mining.state.co.us) and through the Laserfiche system (under Permit No. M-2017-049), which can be accessed through the Division's website via the "Imaged Document Data" link under the "Reports and Data" menu.

DONE and ORDERED this 15th day of March 2018.

FOR THE COLORADO MINED LAND  
RECLAMATION BOARD

  
\_\_\_\_\_  
Forrest Luke, Chair

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 19th day of March 2018, a true and correct copy of the foregoing was emailed or placed in the U.S. Mail, first-class postage prepaid and properly addressed, to the parties listed on DRMS File No. M-2017-049; Hitch Rack Ranch Quarry Contact Information for All Parties (Rev: 3/9/2018).

/s/ Charles J. Kooyman  
Charles J. Kooyman  
Assistant Attorney General  
Attorney for the Mined Land Reclamation Board

<b>COLORADO MINED LAND RECLAMATION BOARD</b> Pre-Hearing Conference Officer 1313 Sherman Street, Room 215 Denver, CO 80203	
<b>Applicant:</b> TRANSIT MIX CONCRETE CO.  <b>DRMS File No.</b> M-2017-049	
<u>Attorneys for Objector the Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008:</u> Steven K. Mulliken, Bar No. 16709 Hilary A. Roland, Bar No. 51574 MULLIKEN WEINER BERG & JOLIVET P.C. Alamo Corporate Center 102 South Tejon Street, Suite 900 Colorado Springs, CO 80903 Phone Number: (719) 635-8750 Fax Number: (719) 635-8706 E-Mail: mulliken@mullikenlaw.com	
<p style="text-align: center;"><b>DRMS RULE 2.6 PRE-HEARING MOTION TO DISMISS APPLICATION FOR MINING PERMIT FOR LACK OF JURISDICTION</b></p>	

The Barbara Ingersoll Marital Trust established by the Amended and Restated Trust Agreement of the Harold C. Ingersoll Revocable Trust dated August 11, 2008 (“Ingersoll”), by and through its attorneys, Mulliken Weiner Berg & Jolivet, PC, and pursuant to Rule 2.6 of the Colorado Mined Land Reclamation Board (the “Board”), submits the following pre-hearing motion and, for the reasons set forth herein, respectfully requests that the Board dismiss the referenced permit application requested by Transit Mix Concrete Co (“Transit Mix”) for lack of jurisdiction. We are filing this Motion ahead of the currently scheduled April 25-26 hearing on this matter to avoid unnecessary waste of the Board’s time and resources. In support of this request, Ingersoll states as follows:

## **INTRODUCTION**

In March 2016, Transit Mix filed an application for a 112c reclamation permit for a site known as Hitch Rack Ranch Quarry, file number M-2016-010 (the “First Application”). On December 20, 2016, the Board issued an order denying the First Application (the “Order”). Transit Mix filed a Complaint for Judicial Review of the Order on January 26, 2017. With the appeal of the First Application still pending before the Denver County District Court, Transit Mix filed a revised application with the Board for a 112c reclamation permit on October 3, 2017, file number M-2017-049 (the “Second Application”).

## **THE BOARD DOES NOT HAVE JURISDICTIONAL AUTHORITY TO CONSIDER OR RULE ON TRANSIT MIX’S SECOND APPLICATION**

The Board does not have jurisdiction to consider Transit Mix’s Second Application because Transit Mix appealed the denial of the First Application. Transit Mix’s appeal divests the Board of jurisdiction with regard to substantive issues that are the subject of the appeal. Because the Second Application involves the same substantive issues as the First Application, the Board does not have jurisdiction and the Board should dismiss the Second Application.

It is well-settled under Colorado law that the filing of a notice of appeal divests jurisdiction from the lower court to decide matters involved in the appeal, and confers jurisdiction of the case on the appellate court. *Molitor v. Anderson*, 795 P.2d 266, 268 (Colo. 1990). The divestiture principle is essential to the efficient administration of appellate processes. *Molitor*, 795 P.2d at 268.

This principle applies equally to appeals of final decisions of administrative agencies. Administrative agencies are prohibited from changing, altering, or vacating orders while review proceedings are pending in the district court. *Colo. State Bd. of Med. Exam’rs v. Lopez-*

*Samayoa*, 887 P.2d 8, 14 (Colo. 1994) (holding that the Colorado State Board of Medical Examiners was without jurisdiction to issue a second order imposing additional discipline while the first order was under judicial review); *Colo. Anti-Discrimination Com. v. Cont'l Air Lines, Inc.*, 355 P.2d 83, 86 (Colo. 1960) (holding that an agency lacked jurisdiction to vacate an order that was under judicial review and therefore its action was void); *O'Bryant v. Pub. Utils. Com.*, 778 P.2d 648, 656 (Colo. 1989) (holding that an agency could not enter a settlement agreement that modified an order that was currently under judicial review).

Under the divestiture principle, agencies lack jurisdiction to change the substance of an order that is under judicial review. *See Lopez-Samayoa*, 887 P.2d at 15. An agency's power and authority over the matter must be suspended; that the court's jurisdiction over the subject matter must be complete and not interfered with or frustrated by concurrent actions taken by the administrative agency. *O'Bryant*, 778 P.2d at 656 (citing *Fischback & Moore of Alaska, Inc. v. Lynn*, 407 P.2d 174 (Alaska 1965) (overruled on other grounds by *City and Borough of Juneau v. Thibodeau*, 595 P.2d 626, 629 n.6 (Alaska 1979))). This prevents the agency and the reviewing court from simultaneously considering the same decision, and ensures the efficient administration of appeals. *See Lopez-Samayoa*, 887 P.2d at 14. Actions by courts or agencies that lack jurisdiction are void. *Id.*

Here, the Board does not have jurisdiction to consider the Second Application because the First Application is currently under judicial review. Transit Mix appealed the denial of the First Application and then submitted a Second Application. Both permit applications are proposing to engage in mining operations in substantially the same area and in the same manner. The Second Application is merely a temporary reduction in the size of the planned area to be affected by the mining, but it actually lists a proposed permitted acreage greater than the acreage

of the First Application. All of the area proposed to be affected by mining in the Second Application was included in the permit application for the First Application, which was denied by the Board and is currently under appeal. Because both applications propose to engage in mining operations in the same area, a decision on the Second Application would affect the substance of the Board's denial of the First Application. Granting the Second Application would effectively change the Board's Order on the First Application by granting substantially the same permit it previously denied. The Board lacks jurisdiction and may not change its order while the appeal is pending, therefore, the Second Application should be dismissed.

Divesting the agency of jurisdiction while its order is under review avoids the possibility of two irreconcilable judgments. Transit Mix could potentially receive approval of its Second Application from the Board, but lose its judicial appeal on the First Application. Because the Board's decision on the Second Application could conflict with the District Court's ruling the First Application, the Board is prohibited from considering the Second Application while the First Application is under review.

If the Board considers the Second Application, it will interfere with and frustrate the appeal process. The purpose of transferring jurisdiction of all subject matter related to the issue on appeal is to promote the efficient use of judicial resources. This in turn promotes the efficient use of the parties' resources, including the Board's resources. The filing of the Second Application concurrently with the judicial appeal of the First Application is an attempt to exhaust the objectors financially by forcing them to fight the same issues simultaneously on two fronts. This tactic results in an unnecessary drain on both judicial and agency resources.

Because the Board lacks jurisdiction, any decision it makes on the Second Application will be void. *See, Colo. Anti-Discrimination Com, 355 P.2d at 86.* To prevent the agency and

reviewing court from simultaneously considering the same decision and conserve judicial resources, the Board should dismiss Transit Mix's Second Application.

### **CONCLUSION**

The First Application and the Second Application clearly involve the same issues, the same physical location, and aim to achieve substantially the same result. Because the First Application is under judicial review, the Board does not have jurisdiction to make any decision with respect to the Second Application. Accordingly, for the reasons set forth above, Ingersoll respectfully requests that the Board dismiss the Second Application.

Dated this 30<sup>th</sup> day of March, 2018.

MULLIKEN WEINER BERG & JOLIVET P.C.

*(A duly signed original on file at office of undersigned.)*

By:  /s/ Steven K. Mulliken

Steven K. Mulliken, #16709

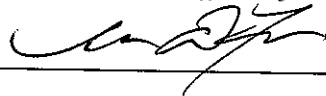
Hilary A. Roland, #51574

*Attorneys for Objector the Barbara Ingersoll Marital Trust  
established by the Amended and Restated Trust Agreement  
of the Harold C. Ingersoll Revocable Trust dated August  
11, 2008*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of March, 2018, a true and correct copy of the foregoing **DRMS RULE 2.6 PRE-HEARING MOTION TO DISMISS APPLICATION FOR MINING PERMIT** was served on the members of the Board. Electronic copies of the Motion will be served and made available to all interested parties via the Colorado Division of Reclamation Mining & Safety Reports and Data website:  
<http://drmsweblink.state.co.us/drmsweblink/search.aspx?dbid=0>

*(A duly signed original on file at office of undersigned.)*

/s/ Nani DeFelice 

Nani DeFelice