



---

## M-2017-049 / Transit Mix Concrete Co. Filing of Responses and Motion to Modify Draft Prehearing Order

---

O'Connell, Aaron J. <aaron.oconnell@hoganlovells.com>

Fri, Apr 20, 2018 at 4:08 PM

To: "drms.temp@state.co.us" <drms.temp@state.co.us>

Cc: "Anderson, Scot W." <scot.anderson@hoganlovells.com>, "Titus, Elizabeth H. \"Liz\"" <liz.titus@hoganlovells.com>

Attached please find the following documents for filing on behalf of Transit Mix Concrete Co., pursuant to the Mined Land Reclamation Board Order dated March 19, 2018:

1. Transit Mix's Response in Opposition to Ingersoll Trust's Motion to Dismiss Application for Mining Permit for Lack of Jurisdiction
2. Transit Mix's Response in Opposition to Ms. Kimble's Motion to Vacate Formal Hearing
3. Transit Mix's Motion Requesting Modification of Draft Prehearing Order

Thank you.

### Aaron O'Connell

Associate

---

#### Hogan Lovells US LLP

1601 Wewatta Street, Suite 900

Denver, CO 80202

Tel: +1 303 899 7300

Direct: +1 (303) 454 2517

Fax: +1 303 899 7333

Email: [aaron.oconnell@hoganlovells.com](mailto:aaron.oconnell@hoganlovells.com)

[www.hoganlovells.com](http://www.hoganlovells.com)

---

*Please consider the environment before printing this e-mail.*

---

#### About Hogan Lovells

Hogan Lovells is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP. For more information, see [www.hoganlovells.com](http://www.hoganlovells.com).

CONFIDENTIALITY. This email and any attachments are confidential, except where the email states it can be disclosed; it may also be privileged. If received in error, please do not disclose the contents to anyone, but notify the sender by return email and delete this email (and any attachments) from your system.

---

#### 3 attachments



Transit Mix\_s Response in Opposition to Ms. Kimble\_s Motion to Vacate Formal Hearing.PDF  
607K



Transit Mix\_s Motion Requesting Modification of Draft Prehearing Order.PDF  
14K



Transit Mix\_s Response to Ingersoll Trust\_s Motion.PDF  
2341K

BEFORE THE MINED LAND RECLAMATION BOARD  
STATE OF COLORADO

---

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

---

**TRANSIT MIX'S RESPONSE IN OPPOSITION  
TO MS. KIMBLE'S MOTION TO VACATE FORMAL HEARING**

---

Transit Mix Concrete Co. ("Transit Mix"), by and through the undersigned counsel, hereby submits this Response in Opposition to Cheryl L. Kimble's Motion to Vacate Formal Hearing, dated March 28, 2018, (the "Motion"). For the reasons set forth below, the Mined Land Reclamation Board (the "Board") should deny the Motion.

**INTRODUCTION**

In her Motion, Ms. Kimble argues that the Board should vacate the hearing because Transit Mix has failed to demonstrate that it has the "legal right to enter and initiate a mining operation on the affected land." *See* Motion ¶ 1. Primarily, Ms. Kimble asserts that the proposed quarry improperly interferes with her right to access and use Little Turkey Creek Road. *See id.* ¶¶ 9-13. In its April 3, 2018, Recommendation to Approve a 112c Permit Application with Objections, Transit Mix Concrete Co., Hitch Rack Ranch Quarry, File No. M-2017-049 (the "DRMS Recommendation"), the Colorado Division of Reclamation, Mining, and Safety ("DRMS" or "Division") considered and addressed the issues Ms. Kimble raises in her Motion. *See* Recommendation at 21-25. As to "legal right to enter," DRMS made following finding: "Little Turkey Creek Road is not affected land. Therefore, the Applicant is not required to include their source of the legal right to enter Little Turkey Creek Road." *Id.* at 23.

Nevertheless, Ms. Kimble argues that the formal hearing on this matter should be vacated. Ms. Kimble is wrong for two reasons. First, to the extent that this issue needs to be addressed at all, it should be done at the formal hearing on permit M-2017-049 (the “Formal Hearing”). There is simply no legal basis to vacate the hearing for a contested issue. Second, as found by DRMS, Transit Mix has in fact satisfied the regulatory requirements regarding legal right to enter. Therefore, Transit Mix respectfully requests that the Board deny the Motion.

## **ARGUMENT**

### **A. An Allegation that an Applicant Fails to Meet a Regulatory Requirement Should be Considered by the Board at the Formal Hearing.**

In her Motion, Ms. Kimble argues that Transit Mix has failed to meet certain regulatory requirements, and that is an issue to be resolved at the Formal Hearing. However, neither the Colorado Land Reclamation Act for the Extraction of Construction Materials (the “Construction Materials Act”) nor the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials (the “Construction Materials Regulations”) contemplate vacating a Formal Hearing. Indeed, the Construction Materials Act contemplates a formal hearing where the Board “for good cause shown” determines that a hearing is advisable. Colo. Rev. Stat. § 34-32.5-115(1). Where, as here, a party raises an objection to a permit application, to the extent the Board wishes to consider the issue, the Construction Materials Act and Construction Materials Regulations contemplate having that issue resolved at a Formal Hearing.

**B. In Fact, the Application Demonstrates that Transit Mix Does Meet Regulatory Requirements Related to the Legal Right to Enter and Initiate Mining Operations on Affected Land.**

Of greater significance, Transit Mix does in fact meet the relevant legal requirements. The Motion rests on a fundamentally flawed premise: “Nothing in the 2017 Application requires a different result than what was determined in response to the 2016 Application.” Motion ¶ 9.

The permit application before the Board is entirely different from the earlier and separate 2016 permit application. In the prior application, Little Turkey Creek Road would have passed through the quarry area. Little Turkey Creek Road would have been realigned, and would have been crossed by mine traffic. In that circumstance, the Board found that Little Turkey Creek was “affected land.” The Construction Materials Act defines “affected land” as “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” Colo. Rev. Stat. § 34-32.5-103(i). In the current application, the quarry is entirely south of Little Turkey Creek Road, and no mining operations will disturb the surface of Little Turkey Creek Road. Therefore, DRMS properly concluded that Little Turkey Creek Road is not “affected land.” This fact by itself requires a different result from what was determined in response to the 2016 Application.

Indeed, Transit Mix reconfigured the quarry to address precisely this issue. The Construction Materials Act requires an application to include “[t]he source of the applicant's legal right to enter and initiate a mining operation on the affected land.” Colo. Rev. Stat. § 34-32.5-112(i)(c)(IV) (emphasis added). Because Little Turkey Creek Road is not “affected land,” Transit Mix is not required to demonstrate that it has a legal right to enter Little Turkey Creek Road. At the prior hearing, Scott Schultz, Esq. of the Attorney General’s Office, speaking as counsel to the Division and staff to the Board, set forth three options to address the issues related

to Little Turkey Creek Road. One of those options was to modify the permit in a manner that “carves [Little Turkey Creek Road] out of the affected land.” Hearing Tr., Permit M-2016-010, at 47:20-21 (Oct. 26, 2016), attached hereto as Exhibit A. That is precisely what Transit Mix has done with the newly configured quarry design.

### CONCLUSION

The Motion includes several statements of fact and characterizations of the law that are either inaccurate or misleading. Most of these issues have already been addressed in Exhibit N to the Transit Mix permit application and the DRMS Recommendation. Any remaining issues can and should be addressed at the Formal Hearing. Transit Mix, therefore, respectfully requests that the Board deny the Motion because it rests on a faulty statements of fact and law, which cannot justify vacating the Formal Hearing.

WHEREFORE, for the reasons set forth above, Transit Mix respectfully requests that the Mined Land Reclamation Board deny Ms. Kimble’s Motion to Vacate Formal Hearing.

Respectfully submitted,

/s/ Elizabeth H. Titus

John W. Cook (#9670)

Scot W. Anderson (#17395)

Elizabeth H. Titus (#38070)

Hogan Lovells

Attorneys for Applicant Transit Mix Concrete Co.

1601 Wewatta Street #900

Denver, CO 80202

(303) 899-7300

## CERTIFICATE OF SERVICE

I hereby certify that on this this 20th day of April, 2018, five true and correct copies of the foregoing RESPONSE IN OPPOSITION TO MS. KIMBLE'S MOTION TO VACATE FORMAL HEARING were provided to the Division pursuant to the Mined Land Reclamation Board Order dated March 19, 2018, and written notice was provided to all parties included on the Revised Party List After Prehearing Conference; Hitch Rack Ranch Quarry, dated April 10, 2018, that this document was filed with the Division by reference to the Division's website for filing.

/s/ Helen R. Hyatt

Helen R. Hyatt

## **EXHIBIT A**

(Attached)

1 the 1968 decree.

2 We have an issue of the applicant saying  
3 it's reasonable; the objectors saying it's  
4 unreasonable. We don't believe that the Division has  
5 the jurisdiction to decide that issue. Instead we see  
6 it dealt with in another manner. The suggested path  
7 forward was a declaratory judgment order in the El Paso  
8 District Court.

9 MS. VAN NOORD: Just so you know, the  
10 Board has received it. I don't know if we have printed  
11 copies in front of us. So if you could refresh the  
12 Board a little bit, kind of the substance of that.

13 MR. SCHULTZ: Do you want to go over  
14 some of the facts?

15 MS. VAN NOORD: Yeah. I think that  
16 would be helpful just really quickly.

17 MR. SCHULTZ: Sure.

18 MR. ROBERTS: Mr. Schultz, before you  
19 do. If any of the Board members need a copy of the  
20 response that Mr. Schultz is talking about, we have  
21 copies.

22 MR. SCHULTZ: Some of the undisputed  
23 facts are that there are -- Little Turkey Creek Road  
24 has both dominant easements and servient easements in  
25 this situation. Ms. Kimble has the dominant estate.



1 The owners of the Hitch Rack Ranch possess the servient  
2 estate. It's not -- to me it's not as much an issue  
3 about right to enter as is the right to initiate mining  
4 on the affected lands.

5 The -- there's no dispute in fact that  
6 Little Turkey Creek Road is within the affected lands,  
7 and there's no dispute in fact that Ms. Kimble  
8 possesses a dominant easement over Little Turkey Creek  
9 Road.

10 Once we get into the issue about what is  
11 reasonable for the servient estate to do, such as  
12 realign the road or close the road for blasting, it's  
13 my position that the Division doesn't have jurisdiction  
14 to decide that and instead that's the El Paso District  
15 Court that must decide that issue.

16 And the -- some of them that  
17 Mr. Roberts stated have the statutory issue about not  
18 denying a permit except on one or more of the following  
19 grounds, 34-32.5-115(4)(d). And we have an issue about  
20 contrary to the laws or regulations of the state or the  
21 United States.

22 We have this question remaining about  
23 the proposed use by the applicant of Little Turkey  
24 Creek Road. The proposed applicant is the servient  
25 estate.

1                   Again it may seem trivial or -- or more  
2   important about the closing of the road from blasting,  
3   but it's my position that's not the jurisdiction of the  
4   Board to decide, to interpret what this 1968 decree  
5   states. Instead it's the -- it's a legal question that  
6   must be answered by someone other than the Board.

7                   And I'd also like to point out the  
8   conclusion of my motion, that there are several  
9   options, I think, that are a path forward. You can  
10   condition approval, and there's several ways to  
11   condition a possible approval.

12                   One is the obvious way of a declaratory  
13   judgment order from the El Paso County District Court.  
14   Second is a legally binding agreement with roughly the  
15   45 easement holders and the applicant over the dominant  
16   estate and the servient estate. Make sure they're all  
17   in agreement as to what can and can't be done.

18                   Third option is to have some sort of  
19   permit modification that somehow restricts Little  
20   Turkey Creek Road -- use of Little Turkey Creek Road,  
21   carves it out of the affected lands.

22                   MS. VAN NOORD: Can you remind me -- I'm  
23   looking at the rationale for the recommendation. Can  
24   you remind me what the Division based its initial  
25   recommendation on in finding that there was a legal