

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 INGERSOLL TRUST'S MOTION
TO DISMISS APPLICATION FOR MINING PERMIT FOR LACK OF JURISDICTION**

Transit Mix Concrete Co. ("Transit Mix"), by and through undersigned counsel, hereby submits this Response in Opposition to the Barbara Ingersoll Martial Trust's (the "Ingersoll Trust") Motion to Dismiss Application for Mining Permit for Lack of Personal Jurisdiction (the "Motion"). For the reasons set forth below, Transit Mix requests that the Mined Land Reclamation Board (the "Board") deny the Motion.

INTRODUCTION & BACKGROUND

In October of 2016, the Board denied Transit Mix's permit application for the operation of a quarry on a piece of private property in El Paso County known as the Hitch Rack Ranch ("Permit M-2016-010"). The Board denied Transit Mix's permit application pursuant to C.R.S. § 34-32.5.-115(4)(a) and 115(4)(c) because it deemed the application "incomplete" and because the application "didn't met the requirements of [the Board] rules." *See* Hearing Tr., Permit M-2016-010, at 295:12-24, 297:5-12 (Oct. 27, 2016), attached hereto as Exhibit A. Specifically, the Board found that the application failed to demonstrate three things: (1) "that [Transit Mix] has obtained the legal right of entry to initiate a mining operation on Little Turkey Creek Road," (2) "the impact of the proposed mining operation on the prevailing hydrologic balance . . . will be minimized;" and (3) that the application properly took into account "the safety and protection of wildlife at the proposed site, including without limitation, failing to take

into account conservation of Mexican Spotted Owl... and turkey production areas.” Board Findings of Fact, Conclusions of Law and Order, File No. M-2016-010 (Dec. 22, 2016) ¶¶ 43, 47, 51, attached here to as Exhibit B. In making this determination, the Board understood and contemplated that Transit Mix could file a new permit application addressing these issues. *See* Ex. A. at 299:9-10 (J. Roberts Esq. advising the Board that “your denial of application does not preclude future applications”). Believing that the Board erred, Transit Mix timely appealed the denial of Permit M-2016-010 by filing an action for judicial review on January 30, 2017 with the District Court (the “M-2016-010 Appeal” or “Appeal”).

Transit Mix submitted a new permit application in October of 2017 to conduct mining operations on the Hitch Rack Ranch, (“Permit M-2017-049”). Permit M-2017-049 is significantly different from Permit M-2016-010 and was designed to address and correct the deficiencies identified by the Board in Permit M-2016-010. For example, the new permit reconfigured the mine site to reduce the “affected area” from 392 acres to approximately 239 acres. *See* Colorado Division of Reclamation, Mining and Safety’s Recommendation to Approve Application, dated April 3, 2018 at 22. The mine disturbance will be located south of Little Turkey Creek and Little Turkey Creek Road, removing both the creek and road from the “affected land.” *Id.* at 21-23. The new permit application is based on new groundwater data and modeling, which demonstrate that “the quality and quantity of water in surface and groundwater systems both during and after the mining operation and during reclamation will be minimized, as required under C.R.S. 34-32.5-116(4)(h) and Rule 3.1.6.” *Id.* at 3-9. The new, smaller mine configuration, combined with new studies and information regarding the Mexican Spotted Owl and reclamation plan that focuses on wild turkey, demonstrate that Transit Mix has accounted for the safety and protection of wildlife as required by Board Rules 6.4.8 and 3.1.8. *Id.* at 15-20.

The Colorado Division of Reclamation, Mining and Safety (“DRMS” or the “Division”) evaluated the new permit over a period of 150 days and, on April 3, 2018, issued a recommendation to approve the permit. While Transit Mix is well within its rights to maintain the Appeal and pursue Permit M-2017-049, it recognizes that there can be only one active permit for the Hitch Rack Ranch. Therefore, it has moved the District Court to dismiss the M-2016-010 Appeal with prejudice.¹ See Motion for Voluntary Dismissal with Prejudice, filed April 19, 2018, attached hereto as Exhibit C. Despite its concern over the jurisdiction of the Board to consider Permit M-2017-049, the Ingersoll Trust objects to dismissal of the M-2016-010 Appeal. See Email from S. Mulliken to L. Titus, *et al.* (Apr. 16, 2018), attached hereto as Exhibit D.

Regardless, the Appeal does not divest this Board from considering the Permit M-2017-049. Permit M-2017-049 is a different permit and that specifically addresses each of the alleged failures of the prior application. Accordingly, the Board does not need to vacate, modify, or otherwise reconsider its order regarding Permit M-2016-010. And, Transit Mix does not make any such request. Rather, Transit Mix desires that the Board consider its new mine plan for completeness and compliance with the Board’s rules. Therefore, Transit Mix respectfully requests that the Board deny the Motion and consider for approval Permit M-2017-049.

ARGUMENT

The Ingersoll Trust’s Motion is based entirely on the legal premise that, as a result of the Appeal, the Board is divested of jurisdiction over Permit M-2016-010 and its order regarding the same. However, the Motion fails to demonstrate how the lack of jurisdiction over Permit M-2016-010 prevents the Board from considering a new and different application.

¹ Theoretically, dismissal of the M-2016-010 Appeal could have been accomplished prior to hearing on Permit M-2017-049 by stipulation of the parties pursuant to C.R.C.P. 41(a)(1). However, some of the defendants in that action, including the Ingersoll Trust, objected to voluntary dismissal. Therefore, Transit Mix’s request for dismissal will require consideration and action from the Court pursuant to C.R.C.P. 41(a)(2).

The cases cited in the Motion all make clear that, while an appeal of an agency order is pending, the agency may not modify the order that is the subject of the appeal. For example, in *Colorado State Board of Medical Examiners v. Lopez-Samayoa*, 887 P.2d 8 (Colo. 1994), the Colorado Supreme Court held that the Board of Medical Examiners was without jurisdiction to “substantively alter” a disciplinary order that was the subject of an action for judicial review. *Lopez-Samayoa*, 887 P.2d at 15. In that case, the Board of Medical Examiners had imposed various disciplinary conditions upon Dr. Lopez’s medial license, which Dr. Lopez appealed. *Id.* at 11-12. The appeal divested the board of jurisdiction over the disciplinary order. During the pendency of the appeal, and based on same conduct that was subject of the original disciplinary order, the Board of Medical Examiners issued a second order that imposed additional conditions upon the doctor’s license. The Court held that second order improperly attempted to substantially modify the first order. *Id.* at 15.

The holdings of *Colorado Anti-Discrimination Commission v. Continental Air Lines*, 355 P.2d 83 (Colo. 1960), and *O’Bryant v. Public Utilities Commission*, 778 P.2d 648 (Colo. 1989), are similar. In *Continental Air Lines*, the Court held that an appeal of the Commission’s order prevented it from vacating that order and issuing a new order regarding the same incident of alleged employment discrimination. 355 P.2d at 86. In *O’Bryant*, the Court held that the Public Utilities Commission erred when it attempted to modify an order by entering into a settlement agreement with a phone company without the participation of O’Bryant, who has sought judicial review of that very order. 778 P.2d 656.

Transit Mix’s submission of Permit M-2017-049 is not analogous to these cases. The Board’s consideration of Permit M-2017-049 does not require vacating or modifying the order regarding Permit M-2016-010 at all. Permit M-2017-049 removes Little Turkey Creek road from the “affected lands.” Therefore, the Board does not need to consider whether Transit Mix

obtained a legal right to enter and conduct mining operations on the road. Moreover, Permit M-2017-049 includes a new mine configuration and addition studies to specifically address the Board's concerns regarding hydrology and wildlife. Thus, unlike the Appeal (which challenged the Board's order), Permit M-2017-049 is premised upon remedying the shortcomings identified in the order and addresses them directly.

Finally, in an attempt to resolve this issue and demonstrate its commitment to Permit M-2017-049, Transit Mix has moved to dismiss the Appeal. The Board does not oppose this request. It is the Ingersoll Trust and other objectors who oppose the dismissal of the Appeal and direct the Board to consider the old permit application. Transit Mix, however, is committed to the new permit application and, respectfully requests that Board deny the Motion and consider Permit M-2017-049.

CONCLUSION

WHEREFORE, for the reason set forth herein, Transit Mix respectfully requests that the Board deny the Motion.

Respectfully submitted,

/s/ Elizabeth H. Titus 

John W. Cook (#9670)

Scot W. Anderson (#17395)

Elizabeth H. Titus (#38070)

Hogan Lovells US LLP
1601 Wewatta Street Suite 900
Denver, CO 80202
(303) 899-7300

Attorneys for Applicant Transit Mix Concrete
Co.

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 INGERSOLL TRUST'S MOTION TO DISMISS APPLICATION FOR MINING PERMIT FOR LACK OF JURISDICTION 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 clearly, would it be helpful if I made a motion to deny
2 the permit based on 4 -- Item 4(a) in 32 --
3 34-32.5-115(4) (a) as regards to being incomplete with
4 respect to wildlife delineation issues, and then that
5 way people can decide if there are other issues that
6 are critical enough to vote for denial and --

7 MR. SINGLETARY: I would second the
8 motion based on they didn't meet their burden, in my
9 opinion, on Number 1 and Number 3.

10 MS. VAN NOORD: So you --

11 MR. ROBERTS: Hold on. Mr. Singletary,
12 I think you're seconding a possible motion.

13 Were you making a motion?

14 MR. FISCHER: I'm just -- I'm just
15 asking if it would please the Chair if I made such a
16 motion, if -- if she thought that that would be an
17 advisable way forward here to basically get the action
18 moving in terms of where the Board stands on issues.

19 MR. ROBERTS: I understand. I'm going
20 to ask the Board chair not to respond to that. What
21 I'd like -- what we need to do is make a motion, not
22 ask whether the Board chair has an opinion about
23 whether a motion would be appropriate. If you have a
24 motion, please come with it.

25 MR. FISCHER: Okay. I move that the

1 Board deny the application under the 34-32 -- Title 34,
2 Article 32.5, section 115, subparen (a) -- subparen
3 (4), subparen (a) that the application was incomplete
4 with respect to the wildlife issue -- or just that the
5 permit application was incomplete.

6 MR. SINGLETARY: Second.

7 MS. VAN NOORD: Moved and seconded. Is
8 there any discussion?

9 MR. ROBERTS: The attorney has a
10 question.

11 MS. VAN NOORD: Go ahead.

12 MR. ROBERTS: Thank you. The motion on
13 the table is to deny under (4)(a) for the application
14 being incomplete, and what I understood from your
15 conversation and your comments earlier, Mr. Fischer, is
16 as to the wildlife issue, which I understand further to
17 be that the applicant did not meet its burden under
18 Rule 3.1.8. Is that accurate?

19 MR. FISCHER: Yes.

20 MR. ROBERTS: All right. And I would
21 ask -- sorry to press you, but I have to draft the
22 order in this case, so it helps me. Can you be more
23 specific about what was incomplete, what was not in
24 compliance with 3.1.8?

25 MR. FISCHER: As I stated before, I

1 believe that the evidence presented by both the
2 applicants and the objectors was credible, and I find
3 that the witness for the objectors provided evidence of
4 issues which the applicants had not identified.

5 And so in that regard I believe that the
6 applicants did not fully characterize or describe all
7 of the wildlife and conservation issues which were
8 ultimately brought forward by the witness for the
9 objectors.

10 MS. VAN NOORD: Would you like John to
11 also describe why he has seconded?

12 MR. ROBERTS: Since you asked, yes, I
13 would.

14 MR. SINGLETARY: Say that again.

15 MS. VAN NOORD: Would you provide
16 your -- why you are stating this is incomplete with
17 respect to Issues 1 and 3?

18 MR. SINGLETARY: I seconded
19 Mr. Fischer's motion based on I'm not satisfied with
20 the issue of ingress and egress or access, and
21 secondly, I feel like that the objectors gave me enough
22 explanation on why they certainly will be damaged in
23 their water -- in the hydrology that affects these
24 people here and the surrounding area.

25 MS. VAN NOORD: So it's been moved and

1 seconded, and we have a chance for further discussion.
2 I'd like to add that I agree with Randy with respect to
3 Issue Number 4 and also John with respect to Issue
4 Number 3 as to the hydrologic balance.

5 I want to maybe -- I would like to
6 propose an amendment to the motion. If we could also
7 add subsection C which states, Any part of the proposed
8 mining operation, the reclamation plan, or proposed
9 future use is contrary to the laws or regulations of
10 this article, because I believe -- because what we were
11 talking about is that it didn't meet the requirements
12 of our rules as far as we were concerned.

13 So I think stating that it's incomplete
14 but also stating it didn't meet what we thought -- what
15 we interpreted our rules to say.

16 Would you be open to that amendment to
17 your motion?

18 MR. FISCHER: Yes, I would agree to that
19 amendment.

20 MS. VAN NOORD: Would you second?

21 MR. SINGLETARY: I would.

22 MS. VAN NOORD: All right. Moved and
23 seconded. Is there any further discussion?

24 MR. ROBERTS: Madam Chair.

25 MS. VAN NOORD: Yeah.

1 MR. ROBERTS: Same question I asked of
2 Mr. Fischer. Can you clarify for me and probably for
3 the Board members in what way the Board believes the
4 application does not comply with the Board's statute
5 and regulations?

6 MS. VAN NOORD: I don't think I have
7 anything to add to what Mr. Fischer has said on the
8 wildlife. And as far as the hydrologic balance, there
9 was significant testimony that the effects may be more
10 than minimized; that there may be more than minimal
11 effects; and that there was not enough information to
12 make me feel comfortable that there were -- those
13 effects will be minimized.

14 MR. ROBERTS: Thank you.

15 MS. VAN NOORD: Forrest and Karin, would
16 you like to provide anything before we take a vote?

17 MS. UTTERBACK-NORMANN: I'm not sure I
18 can ask this question. I'm afraid to ask it and then
19 you say you can't ask that question.

20 MS. VAN NOORD: It might happen.

21 MS. UTTERBACK-NORMANN: Well, I don't
22 know how to get the answer. If this should -- the
23 Board should agree with the motion, does that mean that
24 this project can never come back before us again, or
25 can it come back with changes and adjustments if it

1 seems necessary if it wants to proceed on? I don't
2 know. Is it a one time you get and that's all you get?
3 Sorry.

4 MR. ROBERTS: Few things in life are one
5 time you get and that's all you get. My 48 years has
6 taught me that. But to answer your question, in
7 general there is a provision in the statute that allows
8 parties to seek reconsideration from the Board on any
9 decision it makes, and your denial of an application
10 does not preclude future applications.

11 MS. UTTERBACK-NORMANN: That answers my
12 question.

13 MS. VAN NOORD: Forrest?

14 MR. LUKE: I'll just add I disagree with
15 the proposal. I think that they met the standards in
16 all cases and that I think -- I guess that's all I have
17 to say. I think that the Division in every case felt
18 the burden of proof had been met, and just for the
19 record, that I just disagree with the motion.

20 MS. VAN NOORD: Okay. Any further
21 discussion?

22 Seeing none. All those in favor of the
23 motion say aye.

24 (The Board members cast their verbal
25 votes.)

EXHIBIT B

(Attached)

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.

(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.

EXHIBIT C

(Attached)

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202		DATE FILED: April 19, 2018 3:48 PM FILING ID: B7408A58C7F4F CASE NUMBER: 2017CV360
Plaintiff: TRANSIT MIX CONCRETE CO., v. Defendants: COLORADO MINED LAND RECLAMATION BOARD, et al.		▲ Court Use Only ▲
Attorneys for Plaintiff Transit Mix Concrete Co.: John W. Cook (#9670) Scot W. Anderson (#17395) Elizabeth H. Titus (#38070) Mark D. Gibson (#45349) HOGAN LOVELLS US LLP 1601 Wewatta Street, Suite 900 Denver, CO 80202 Tel.: (303) 899-7300 Fax: (303) 899-7333 E-mail: john.cook@hoganlovells.com scot.anderson@hoganlovells.com elizabeth.titus@hoganlovells.com mark.gibson@hoganlovells.com		Case No. 2017CV00360 Division 275
PLAINTIFF'S MOTION FOR VOLUNTARY DISMISSAL WITH PREJUDICE		

Pursuant to Rule 41(a)(2), Transit Mix Concrete Co. ("Transit Mix") hereby moves to dismiss this action for judicial review with prejudice. In support hereof, Transit Mix states as follows:

C.R.C.P. 121 § 1-15(8) Certification

Undersigned counsel has conferred with those defendants represented by counsel in this matter, which include Barbara Hughes, Judy Kline, Cheryl Kimble, the Colorado Mined Land

Reclamation Board (“MLRB”), Red Rock Valley Estates Neighborhood Association, the Highway 115 Citizens Advisory Committee, the Nature Conservancy, Red Rock Valley Estate Water District, Steven K. Mulliken as Co-trustee of the Ingersoll Trust (the “Ingersoll Trust”), Turkey Canon Ranch HOA (“TCRHOA”), Turkey Creek Conservation District, and Urban Strategies, Inc. (“Urban Strategies”) (collectively, the “Represented Parties”).

Counsel for the MLRB, TCRHOA, Urban Strategies, and the Nature Conservancy state that their clients do not oppose this motion. Counsel for the remaining Represented Parties oppose this motion.

BACKGROUND

In this action for judicial review, Transit Mix has requested that the Court reverse and remand this matter to the MLRB for further consideration of Transit Mix’s permit application to conduct mining operations. In October of 2016, the MLRB denied Transit Mix’s permit application for the operation of a quarry on a portion of a 1400 acre piece of private property in El Paso County known as the Hitch Rack Ranch (permit M-2016-010). The Board denied Transit Mix’s permit application for three reasons: (1) Transit Mix failed to demonstrate a “legal right to enter” and initiate mining operations on Little Turkey Creek Road; (2) Transit Mix failed to adequately demonstrate the project’s impact to the prevailing hydrologic balance; and (3) Transit Mix failed to take into account the safety and protection of wildlife. *See* Transit Mix’s Opening Br. at 9-10.

Transit Mix timely appealed the MLRB’s denial of permit M-2016-010 by filing this action for judicial review on January 30, 2017. *See* Transit Mix’s Complaint (filed in El Paso County Case No. 2017CV360). As required by C.R.S. § 24-4-106(4), Transit Mix included as

parties to this action every party to the underlying proceeding before the MLRB. *See* C.R.S. § 24-4-106(4) (“Every party to an agency action in a proceeding under section 24-4-105 not appealing as plaintiff in such action for judicial review shall be made a defendant....” (emphasis added)); *see also* 2 Colo. Code Regs. § 407-4:2.7¹ (“[A]ll parties to the Formal Board Hearing on a matter that do not file for judicial review are required by Section 24-4-106, C.R.S., to be named as defendants in any judicial review action.” (emphasis added)).

While this action has been pending, Transit Mix submitted a new permit application in November of 2017 to conduct mining operations on the Hitch Rack Ranch, permit M-2017-049 (the “New Permit Application”). The New Permit Application was tailored to address the concerns of the MLRB and objectors to permit M-2016-010. For example, the New Permit Application reconfigured the mine site to reduce the “affected area” from 392 acres to 239 acres. *See* Colorado Division of Reclamation, Mining and Safety’s Recommendation to Approve Application, dated April 3, 2018, attached hereto as Exhibit A at 22. The mine disturbance will be located south of Little Turkey Creek and Little Turkey Creek Road, removing both the creek and road from the “affected land.” *Id.* at 21-22. The New Permit Application is based on new groundwater data and modeling, which demonstrated that “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 will be minimized, as required under C.R.S. 34-32.5-116(4)(h) and Rule 3.1.6.” *Id.* at 3-10. The new, smaller mine configuration, combined with new studies conducted

¹ Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials.

by Transit Mix, demonstrate that Transit Mix has accounted for the safety and protection of wildlife as required by MLRB Rules 6.4.8 and 3.1.8. *Id.* at 15-20.

The Colorado Division of Reclamation, Mining and Safety (“DRMS”), which serves as staff to the MLRB, evaluated the New Permit Application over a period of 150 days and, on April 3, 2018, issued a recommendation to the MLRB to approve the permit over the numerous objections of various parties including many of the Defendants in this action. *See generally id.*

The MLRB will consider whether to ultimately approve or deny the New Permit Application at an adjudicatory hearing to be conducted on April 25-26, 2018, in Colorado Springs. While Transit Mix is well within its rights to maintain this appeal by right, it respectfully requests that the Court dismiss this matter with prejudice for reasons set forth below.

ARGUMENT

I. Transmit Mix Is Entitled to Dismissal Under Rule 41(a)(2).

“A plaintiff’s request for a voluntary dismissal under C.R.C.P. 41(a)(2) ‘generally should be granted unless a dismissal would result in legal prejudice to the defendant.’” *Sinclair Transportation Co. v. Sandberg*, 350 P.3d 915, 922 (Colo. App. 2014) (quoting *Powers v. Prof'l Rodeo Cowboys Ass'n*, 832 P.2d 1099, 1102 (Colo. App. 1992)). In determining whether Defendants would experience any legal prejudice, this Court should consider the following factors: “(1) the duplicative expense of a second litigation; (2) the extent to which the current suit has progressed, including the effort and expenses incurred by defendant in preparing for trial; (3) the adequacy of plaintiff’s explanation for the need to dismiss; (4) the plaintiff’s diligence in bringing the motion to dismiss; and (5) any ‘undue vexatiousness’ on plaintiff’s part.” *Id.* Transit Mix addresses each factor in turn below.

1. Defendants Will Not Be Subject to Duplicative Expense of a Second Litigation.

Transit Mix has requested dismissal of this action for judicial review with prejudice.

Accordingly, Defendants will not be subject to duplicative expense of a second litigation regarding permit M-2016-010. To the extent certain Defendants complain of inevitable litigation regarding the MLRB's decision on the New Permit Application, save for perhaps the MLRB, participation by the Defendants in any such litigation would be completely voluntary. Moreover, such litigation is likely to occur regardless of the outcome in this matter. Therefore, there is no prejudice to Defendants resulting from dismissal of this case.

Assuming the MLRB approves the New Permit Application, the Defendants, some of whom are parties to that agency action, may voluntarily chose to pursue judicial review of that decision. Conversely, if the MLRB denies the New Permit Application, Transit Mix would be entitled to seek judicial review of that decision. In that case, the MLRB (who does not oppose dismissal) would likely be obligated to defend its action. And, similar to this case, Transit Mix would be required to include parties to the agency proceeding as defendants. *See* C.R.S. § 24-4-106(4). However, nothing obligates those parties to participate in the action for judicial review. Just like the majority of the Defendants in this case, those parties would be free to rely on the MLRB to defend its decision. Or, like the Represented Parties, those parties may choose to actively participate.

Therefore, there is no prejudice to Defendants. There will not be duplicative litigation as this matter will be dismissed with prejudice. And, regardless of the outcome of the April 25-26 hearing on the New Permit Application, dismissal of this action will not affect the likely appeal of the MLRB's decision – whatever it may be.

2. Defendants Will Not Incur Trial Expenses.

The progression of this matter should not weigh against dismissal. Because this is an appeal, there is no trial in this case. Save for routine procedural motions, those Defendants that chose to fully participate in this appeal have each submitted a single substantive brief. The parties have not conducted discovery. The evidence in this case is entirely contained in the administrative record. While the matter is fully briefed, the parties have not expended the typical effort necessary to prepare a civil case for adjudication on the merits.

3. Dismissing this Action Will Preserve the Resources of All Parties.

If this matter is not dismissed and Transit Mix prevails, this matter will be remanded to the MLRB for further factual findings and proper application of the applicable legal standards. However, Transit Mix is committed to moving forward with the New Permit Application. Given that Transit Mix has recently received a recommendation for approval from the DMRS for the New Permit Application, Transit Mix does not desire to further expend the Court's, the MLRB's or the parties' resources considering the prior permit application. Moreover, Transit Mix believes that the New Permit Application addresses the concerns raised by the MLRB and the Defendants regarding the original application. While Transit Mix has the legal right to pursue this appeal and approval of the New Permit Application simultaneously, practically, there can be only one active mine plan for the Hitch Rack Ranch. Even if Transit Mix prevails in this appeal of the MLRB decision, Transit Mix would withdraw this permit application and go forward exclusively with the New Permit Application. By dismissing this action, Transit Mix is committed to mining operations as set forth in the New Permit Application, which is substantially different than permit M-2016-010. The New Permit Application is designed to

address the concerns of the objectors and the MLRB raised in the underlying agency proceeding. Allowing the parties, especially the MLRB, to consider only a single permit application is a sufficient reason to dismiss this case.

4. Transit Mix's Motion is Timely.

Transit Mix only recently learned, on April 3, 2018, that the DRMS recommended that the MLRB approve of the New Permit Application. *See* Ex. A. Upon gaining this recommendation from DRMS, Transit Mix judiciously considered the utility of maintaining this action while, at the same time, pursuing MLRB approval of its New Permit Application. Therefore, this motion is timely.

5. Transit Mix Has Not Acted in Bad Faith or with Vexatious Intent.

Transit Mix pursued this action for judicial review pursuant to Colorado Administrative Procedures Act and the MLRB Rules for the Extraction of Construction Materials – both of which require Transit Mix to name as defendants all of the parties to the underlying administrative proceeding. In doing so, Transit Mix has advanced arguments that are well-grounded in law and fact. More importantly, Transit Mix has a legal interest that it seeks to protect – a mining lease from the State of Colorado that allows for extraction of minerals from the Hitch Rack Ranch. When it filed this action, Transit Mix did so to protect that interest and for no other purpose. After careful consideration and substantial effort aimed at improving its mine plan, Transit Mix believes that the best way forward is to dismiss this action and preempt further consideration of permit M-2016-010 and move forward solely with the New Permit Application.

II. Defendants Are Entitled to Costs – But Not Attorneys’ Fees.

In responding to the undersigned’s request for conferral, some Defendants stated that, if the action was dismissed over their objection, Transit Mix should be required to reimburse the Defendants for attorneys’ fees and costs. Transit Mix concedes that dismissal of this action with prejudice entitles defendants to pursue an award of reasonable costs pursuant to C.R.C.P. 54 and C.R.C.P. 121 § 1-22. An award of attorneys’ fees, however, is not justified under applicable law.

When a suit dismissed under C.R.C.P. 41(a)(2), attorney fees may be awarded “only if the plaintiff’s case is dismissed without prejudice.” *FSDW, LLC v. First Nat. Bank*, 94 P.3d 1260, 1265 (Colo. App. 2004); *see also Groundwater Appropriators of S. Platte River Basin, Inc. v. City of Boulder*, 73 P.3d 22, 25 (Colo. 2003) (“The federal authorities interpreting the rule uniformly reject any construction that would authorize the imposition of attorney fees, in the absence of bad faith, upon dismissal with prejudice.”); *Brock v. Weidner*, 93 P.3d 576, 579 (Colo. App. 2004) (“Absent exceptional circumstances, such as repeated harassing suits by a plaintiff, a defendant may not recover attorney fees when a plaintiff obtains dismissal of an action with prejudice under [Rule 41(a)(2)]” (citing *AeroTech, Inc. v. Estes*, 110 F.3d 1523, 1528 (10th Cir.1997) (applying substantially similar federal counterpart to C.R.C.P. 41(a)(2)); 8 J.W. Moore, *Moore’s Federal Practice* ¶ 41.40[10][d] (2003); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2366 (1995)).

This is a straightforward action for judicial review of an agency decision taken pursuant to the Colorado Administrative Procedures Act and the MLRB Rules. While the number of defendants may be unusual, these parties were joined as mandated by statute and for no other reason. Save for the MLRB, who does not oppose this motion, the extent of the Defendants’

participation is entirely voluntary. Dismissal with prejudice ensures that this case will not be re-litigated. Simply, there is no reason to condition dismissal of this action upon an award of attorneys' fees. Therefore, Transit Mix requests that the Court deny any such request by a defendant.

CONCLUSION

WHEREFORE, for the reasons set forth above, Transit Mix respectfully requests that the court dismiss this action with prejudice and enter the proposed order submitted herewith.

Respectfully submitted,

/s/ Elizabeth H. Titus

John W. Cook (#9670)

Scot W. Anderson (#17395)

Elizabeth H. Titus (#38070)

Mark D. Gibson (#45349)

Attorneys for Plaintiff Transit Mix Concrete Co.

CERTIFICATE OF SERVICE

I certify that on April 19, 2018, I used the Colorado Courts E-File System to serve this document on all counsel of record.

/s/ Greg Apt

Greg Apt

EXHIBIT D

(Attached)

Titus, Elizabeth H. "Liz"

From: Steve Mulliken <Mulliken@mullikenlaw.com>
Sent: Monday, April 16, 2018 10:42 AM
To: Titus, Elizabeth H. "Liz"; Ochsenbein, Jeremy S.; John Roberts; conleypc@pcisys.net; graso@rasopc.com; Amanda Bradley (aab@ablawcolorado.com); csb@ablawcolorado.com; steveharrisco@gmail.com; Kerwin, Gregory J.; Dunn, Meghan H.; pandllc@comcast.net; Emory Allen; Murray Weiner; bwright@fwflegal.com; scott.schultz@coag.gov; charles.kooyman@coag.gov
Cc: Anderson, Scot W.; Cook, John W.; Adrian McCarthy
Subject: RE: Transit Mix v. MLRB - Conferral Regarding Motion to Withdrawal Action for Judicial Review

The Barbara Ingersoll Marital Trust objects to the Motion to Dismiss this case. Transit Mix chose to sue the MLRB and each of the objectors. The Ingersoll Marital Trust has, at great expense, answered the complaint and submitted its brief and this case is now fully briefed and pending decision. It was improper for Transit Mix to file the second application while the judicial challenge was pending, and it is the second application that should now be dismissed. Our client wants the issues raised by Transit Mix decided by the Court.

Thank you.

Steve

Steven K. Mulliken | Mulliken Weiner Berg & Jolivet, P.C. | 102 South Tejon Street, Suite 900, Colorado Springs, CO 80903 | Phone: 719.635.8750, ext. 101 | Fax: 719.635.8706 | Email: mulliken@mullikenlaw.com | www.mullikenlaw.com

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any U.S. Federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code or promoting, marketing or recommending to another party any transaction or matter addressed herein.

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.

CONFIDENTIALITY NOTICE: This e-mail transmission is information belonging to the sender and for the use of the intended recipient, and it may contain information that is confidential or legally privileged. The sender intends to preserve confidentiality. If you are not the intended recipient, your use or distribution of this transmission is STRICTLY PROHIBITED, and you are requested to immediately notify the sender by telephone at (719) 635 8750 or by return e-mail and delete the original transmission without reading or saving in any manner. Thank you.

From: Titus, Elizabeth H. "Liz" [mailto:liz.titus@hoganlovells.com]
Sent: Monday, April 16, 2018 10:15 AM
To: Ochsenbein, Jeremy S.; Steve Mulliken; John Roberts; conleypc@pcisys.net; graso@rasopc.com; Amanda Bradley (aab@ablawcolorado.com); csb@ablawcolorado.com; steveharrisco@gmail.com; Kerwin, Gregory J.; Dunn, Meghan H.; pandllc@comcast.net; Emory Allen; Murray Weiner; bwright@fwflegal.com; scott.schultz@coag.gov; charles.kooyman@coag.gov
Cc: Anderson, Scot W.; Cook, John W.; Adrian McCarthy
Subject: RE: Transit Mix v. MLRB - Conferral Regarding Motion to Withdrawal Action for Judicial Review

Counsel,

Just checking in on Transit Mix's request for conferral below. I believe I've heard definitively from the MLRB, TNC, Turkey Canon Ranch HOA, and Urban Strategies Inc. If you could please let me know your client's position, it would be greatly appreciated.

Thanks,
Liz

From: Ochsenbein, Jeremy S. [mailto:JOchsenbein@gibsondunn.com]
Sent: Monday, April 16, 2018 9:08 AM
To: Titus, Elizabeth H. "Liz"; Steve Mulliken; John Roberts; conleyipc@pcisys.net; graso@rasopc.com; Amanda Bradley (aab@ablawcolorado.com); csb@ablawcolorado.com; steveharrisco@gmail.com; Kerwin, Gregory J.; Dunn, Meghan H.; pandllc@comcast.net; Emory Allen; Murray Weiner; bwright@fwflegal.com; scott.schultz@coag.gov; charles.kooyman@coag.gov
Cc: Anderson, Scot W.; Cook, John W.
Subject: RE: Transit Mix v. MLRB - Conferral Regarding Motion to Withdrawal Action for Judicial Review

Liz,

TNC does not oppose this motion and believes that the action never should have been filed in the first place, let alone continued after Transit Mix filed a new application. TNC reserves the right to recover its costs and fees as a prevailing party.

Jeremy S. Ochsenbein

GIBSON DUNN

Gibson, Dunn & Crutcher LLP
1801 California Street, Denver, CO 80202-2642
Tel +1 303.298.5773 • Fax +1 303.313.2850
JOchsenbein@gibsondunn.com • www.gibsondunn.com

From: Titus, Elizabeth H. "Liz" <liz.titus@hoganlovells.com>
Sent: Friday, April 13, 2018 1:45 PM
To: Steve Mulliken <Mulliken@mullikenlaw.com>; Ochsenbein, Jeremy S. <JOchsenbein@gibsondunn.com>; John Roberts <John.Roberts@coag.gov>; conleyipc@pcisys.net; graso@rasopc.com; Amanda Bradley (aab@ablawcolorado.com) <aab@ablawcolorado.com>; csb@ablawcolorado.com; steveharrisco@gmail.com; Kerwin, Gregory J. <GKerwin@gibsondunn.com>; Dunn, Meghan H. <MDunn@gibsondunn.com>; pandllc@comcast.net; Emory Allen <eallen@mullikenlaw.com>; Murray Weiner <weiner@mullikenlaw.com>; bwright@fwflegal.com; scott.schultz@coag.gov; charles.kooyman@coag.gov
Cc: Anderson, Scot W. <scot.anderson@hoganlovells.com>; Cook, John W. <john.cook@hoganlovells.com>
Subject: Transit Mix v. MLRB - Conferral Regarding Motion to Withdrawal Action for Judicial Review

Counsel,

Transit Mix intends to move the court to dismiss the petition for judicial review pursuant to Rule 41. Please let me know your client's position on such motion.

Thanks,
Liz

Elizabeth Titus
Counsel

Hogan Lovells US LLP
1601 Wewatta Street, Suite 900
Denver, CO 80202

Tel: +1 303 899 7300
Direct: +1 303 454 2468
Fax: +1 303 899 7333
Email: liz.litus@hoganlovells.com
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.

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.

This message may contain confidential and privileged information. If it has been sent to you in error, please reply to advise the sender of the error and then immediately delete this message.
