

BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

IN THE MATTER OF
WHITE BANKS MINE (PERMIT NO. M-1999-042)

PETITION TO INTERVENE/PETITION FOR DECLARATORY ORDER

Wilderness Workshop, Information Network for Responsible Mining (INFORM), and Pitkin County hereby timely request that the Colorado Mined Land Reclamation Board (MLRB or Board) grant this Petition to Intervene in the above captioned matter under Rule 1.13.6(2) of the Board's Mineral Rules and Regulations for the Extraction of Construction Materials. In the alternative, the parties to this Petition timely request a Declaratory Order pursuant to Rule 2.5.

Petitioners are all directly and adversely affected or aggrieved by the White Banks Mine's long-standing inactive and unreclaimed status and Petitioners' conservation and environmental protection interests, and that of their members and constituents, are entitled to legal protection under the Act. As set forth in the attached filings contained in the Division of Reclamation Mining and Safety (DRMS or Division) files, members of these organizations and constituents of Pitkin County use and enjoy the federal public lands upon which the mine is located, and the surrounding lands and waters, for recreational, conservation, aesthetic, and other purposes, and those uses are impaired and degraded by the ongoing lack of reclamation. The relief sought in this Petition will remedy that impairment, at least in part. As such, Petitioners have demonstrated the requisite interest under the Colorado Land Reclamation Act for the Extraction of Construction Materials (Act) for party status in this proceeding.

In this proceeding, the Division has given notice of noncompliance with the permit to the operator through a Reason to Believe (RTB) letter dated August 13, 2020. Specifically, the Division asserts that the operator is in violation of the Colorado Land Reclamation Act for the Extraction of Construction Materials (Act), C.R.S. § 34-32.5-124(1) for failure to comply with the condition of the permit as a result of the operator's failure to maintain legal right of entry and failure to maintain proper mine permitting with the United States Forest Service (USFS).

Petitioners support the Division's RTB letter and the allegations of failure to comply with conditions of the permit. However, Petitioners contend further that a controversy exists as to whether the operator is in violation of the Act due to the failure to engage in any production for longer than ten (10) years. Under binding precedent established in *Information Network v. Colo. Mined Land*, 2019COA114, regardless of any findings related to the Division's most recent RTB letter, the Board lacks the authority to allow the permit to continue in effect due to the extended period of non-production. Because of the extended period of lack of production, the Act mandates that the Board order the permit terminated as a matter of law and order the operator to begin implementation of the final reclamation plan.

Background

This matter originally arose upon a February 20, 2020 Notice of Hearing sent by the Division to Mr. Robert Congdon, the operator of the White Banks Mine. The Notice of Hearing stated that the Division was requesting that the White Banks Mine Permit be placed in a second and final term of temporary cessation (TC), retroactive to November 21, 2018 and ending on November 21, 2023. As explained in the attached May 19, 2020 Objection filed by Wilderness Workshop and INFORM, the grant of any additional TC was contrary to the Act based on the lack of any production occurring at the mine in more than ten years. *See* § 34-32.5-103(11)(c) (“[i]n no case shall temporary cessation of production be continued for more than ten years without terminating the operation and fully complying with the reclamation requirements of this article.”); Construction Materials Rule 1.13.9. Pitkin County also filed the attached objection based on the same basic grounds on August 4, 2020. These objection letters and all attachments thereto are expressly incorporated herein.

Soon after receiving the Objection from Pitkin County, on August 10, 2020, the Division changed course and vacated the hearing based on the issues related to TC. The Division’s August 10, 2020 Notice to Vacate states that “[a]t this time, the Division is vacating the hearing of Temporary Cessation and will be pursuing other issues regarding failure to comply with conditions of a permit.” The August 13, 2020 RTB letter followed, setting this matter for a hearing on compliance with the terms of the permit related to right of access and sufficiency of USFS permitting.

The record demonstrates that the issues related to rights of access and sufficiency of the USFS permitting had been an issue at the Mine for some time. The Division’s Inspection Report for its October 22, 2019 inspection discusses these issues and identifies legal right of entry as a possible violation of the Act. No follow-up to this notice of possible violation appears in the record until the August 13, 2020 RTB letter.

Argument

Petitioners adopt and incorporate in full the attached May 19, 2020 and August 4, 2020 objection letters submitted by Petitioners. These documents set forth the interests of Petitioners and establish each Petitioner’s rights under the Act to participate as parties to this proceeding. The objection letters also set forth the relevant facts and legal standards applicable to the White Banks Mine and its failure to comply with the 10-year non-production limit.

Petitioners do support the Division’s position in the August 13, 2020 RTB letter that the Mine has failed to maintain compliance with its permit conditions. However, Petitioners contend that the failure of the Mine to engage in production activities renders any permission to conduct mining operations a legal nullity. As such, the provisions of the Act at § 34-32.5-124, upon which the Division based its RTB letter, are not adequate. Specifically, even if a violation of the terms of the permit is determined by the Board to exist, this section allows for the operator to attempt to remedy violations and arguably mandates a reinstatement of the permit by the Board upon such remedy. Any ability to remedy the violation and any reinstatement of the permit would be inconsistent with the Court of Appeals ruling in the *Inform* case that divests the Board

of any discretion to allow a permit to remain in effect once production has ceased for longer than 10 years. In short, as found by the Court of Appeals, given the long-term lack of production at the White Banks Mine, the Board has no discretion to allow the permit to remain effective for any purpose other than completing final reclamation.

Relief Requested

In this case, the record is uncontroverted that the White Banks Mine has exceeded the ten (10) year limit on nonproduction. As such, regardless of whether the operator has failed to comply with the terms of the permit, Petitioners request that the Board terminate the permit and require the operator commence reclamation of the mine site immediately in accordance with the Act and Rules.

Respectfully submitted this October 1, 2020 on behalf of all Petitioners,

/s/ Jeffrey C. Parsons

Jeffrey C. Parsons
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May 19, 2020

Mr. Russ Means
Minerals Program Director
Colorado Division of Reclamation, Mining & Safety
1313 Sherman Street
Room 215
Denver, Colorado 80203
Via email to: Russ.Means@state.co.us, Ginny.Brannon@state.co.us, Jeff.Fugate@state.co.us,
stephanie.mitchell@state.co.us, Dustin.Czapla@state.co.us, camille.mojar@state.co.us

Re: Objection to Extension of Temporary Cessation Status, White Banks Mine,
Permit No. M-1999-042

Dear Mr. Means,

We have reviewed the February 20, 2020 Notice of Hearing sent by the Division of Reclamation, Mining & Safety (DRMS) to Mr. Robert Congdon, the operator of the White Banks Mine (Permit No. M-1999-042), located in the Crystal River Valley south of Carbondale. The Notice of Hearing indicates that DRMS is requesting that the White Banks Mine Permit be placed in a second and final term of temporary cessation (TC), retroactive to November 21, 2018 and ending on November 21, 2023. As explained herein, we object to the grant of a second term of TC based on the lack of evidence of any production occurring at the mine in more than ten years. Rather, the available evidence demonstrates that no production has occurred in well over a decade. As such, DRMS and the Mined Land Reclamation Board (MLRB) should place the mine in final reclamation due to the extended period of nonproduction, in conformance with the Colorado Land Reclamation Act for the Extraction of Construction Materials (Construction Materials Reclamation Act), C.R.S. §§ 34-32.5-101, et seq.

I. Wilderness Workshop and INFORM are Adversely Affected or Aggrieved.

As a preliminary matter, Wilderness Workshop (WW) and INFORM are adversely affected or aggrieved parties in this case. WW's and INFORM's members use and enjoy the lands and waters at and adjacent to the White Banks Mine site and impacted lands and waters for recreational, aesthetic, scientific and conservation purposes. The types of interests the legislature meant to protect through the Construction Materials Reclamation Act "include, but are not limited to,

business, economic, aesthetic, governmental, recreational, or conservational interests.” C.R.S. § 34-32.5-103(1.5).

In this case, the Mine overlaps with important ecological, aesthetic, recreational, and conservational values that WW, INFORM, and their members have worked long to protect. Mining operations threaten those values. WW has long participated in decisions related to the operation of this Mine, including commenting and appealing the U.S. Forest Service’s permitting decisions. WW and INFORM members also live nearby the mine and are directly impacted by activities at the mine. For these reasons and more, WW, INFORM, and their members are adversely affected or aggrieved by the White Banks Mine and related operations there. These interests would best be served by an order from DRMS and the MLRB terminating mining at White Banks and demanding compliance with final reclamation requirements, as required by law.

II. Temporary Cessation is Unjustified Due to A Prolonged Period of Nonproduction.

Temporary cessation is defined as a period of nonproduction in the life of a mine. Info. Network for Responsible Mining v. Colo. Mined Land Reclamation Bd., 2019 COA 114, ¶ 13, 451 P.3d 1245, 1248 (July 2019) (citing Mined Land Reclamation Board Hardrock Rules 1.1(53) & 1.13.2, 2 Code Colo. Regs. 407-1); see also C.R.S. § 34-32-103(6)(a). The Colorado Court of Appeals recently confirmed that temporary cessation is a factual status that begins when production ceases on the site, regardless of any administrative status. Id. at ¶¶ 11, 13. The same court ordered termination of mining operations and compliance with reclamation standards at a mine where nonproduction (i.e., temporary cessation) had continued for more than ten years. Id. at ¶ 11; see also id., at ¶ 7 (quoting the MLRA (§ 34-32-103(6)(a)(III)): “[i]n no case shall temporary cessation of production be continued for more than ten years without terminating the operation and fully complying with the reclamation requirements of this article.”). The same statutory and regulatory requirements referenced by the Court of Appeals also apply to permits for construction materials. See § 34-32.5-103(11)(c); Construction Materials Rule 1.13.9.

WW and INFORM assert that the Construction Materials Reclamation Act provides no basis for any further periods of TC for the White Banks Mine and that the permit must be terminated, and final reclamation commenced. No production has occurred at the White Banks Mine in more than a decade. In fact, recent correspondence with the U.S. Forest Service confirms that the last production from White Banks occurred in 2003, approximately 17 years ago. See Exhibit 1 (U.S. Forest Service email correspondence dated February 28, 2020).

The DRMS electronic files also support a conclusion that no production has occurred for over ten years. The February 20, 2020 letter from DRMS noticing a hearing in this matter references annual reports submitted by the operator identifying August 2014 as the last reported date of production and seeks to base the TC period from this date. However, the file demonstrates that the activities in 2014 did not include production. Specifically, the operator’s annual report submitted in January 2015 states that the 2014 activities consisted entirely of the “removal of equipment” from the site. Indeed, the operator specifically crossed out the references to both “excavation” and “processing” from the report form.

Further, in a letter from the operator to DRMS dated August 16, 2013 protesting an increase in the surety amount, the operator states that: “The existing bond of approx. \$15,000 was recalculated less than three years ago and the conditions on site have not changed. There have been no additional

structures built and no surface activity has occurred other than one piece of equipment on a mobile trailer.” Thus, these statements push back any potential date of production at least to 2011. However, documents from that year demonstrate a lack of production going even further back. Specifically, a memo from DRMS to the Mined Land Reclamation Board dated June 30, 2011 includes an inspection report dated September 16, 2010. In that report, the DRMS notes that “Currently there are no underground activities taking place. What activities are taking place on the surface is site maintenance and clean -up.” A review of the remainder of the DRMS files also fails to provide any evidence of any recent production. As a result, the record demonstrates that no production has occurred for well beyond the ten-year limit.

III. Conclusion

Due to the prolonged period of nonproduction at the White Banks Mine, it would be contrary to the Construction Materials Reclamation Act and the Board’s Construction Materials Rules for DRMS or the Board to grant any further period of TC. Instead the DRMS and Board should terminate mining and require the operator to commence final reclamation.

Sincerely,

/s/Jeffrey C. Parsons

Jeffrey C. Parsons
Western Mining Action Project
Attorney for Wilderness Workshop and INFORM

Subject: FW: White Banks
Date: Friday, March 13, 2020 at 12:17:33 PM Mountain Daylight Time
From: Warner, Kevin -FS <kevin.warner@usda.gov>
To: Peter Hart <peter@wildernessworkshop.org>
Attachments: image005.png, image006.png, image007.png, image008.png, image009.png, image010.png, image011.png, image012.png

Peter- sorry, this got lost in my inbox. Please see Olivia's response below.

Cheers,



Kevin Warner
District Ranger
Forest Service
White River National Forest, Aspen-Sopris Ranger District

p: 970-404-3157
c: 970-948-3911
kevin.warner@usda.gov

620 Main Street
Carbondale, CO 81623
www.fs.fed.us



Caring for the land and serving people

From: Garcia, Olivia -FS <olivia.garcia@usda.gov>
Sent: Friday, February 28, 2020 8:02 AM
To: Warner, Kevin -FS <kevin.warner@usda.gov>
Cc: Fitzwilliams, Scott -FS <scott.fitzwilliams@usda.gov>
Subject: RE: White Banks

Good Morning Kevin,

Mr. Hart is correct. There has been no development (2011-2015) and no production activities at the White Banks mine from the current Operator since 2003.



Olivia Garcia
Environmental Engineer (AML Coordinator)

Forest Service
White River NF, Supervisor's Office

p: 970-945-3220
c: 970-274-8526
f: 970-945-3266
olivia.garcia@usda.gov

900 Grand Avenue
Glenwood Springs, CO 81601
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From: Warner, Kevin -FS
Sent: Thursday, February 27, 2020 5:50 PM
To: Garcia, Olivia -FS <olivia.garcia@usda.gov>
Cc: Fitzwilliams, Scott -FS <scott.fitzwilliams@usda.gov>
Subject: FW: White Banks

Olivia- can you confirm/deny the question(s) below?

Thanks,



Kevin Warner
District Ranger
Forest Service
White River National Forest, Aspen-Sopris Ranger District

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Caring for the land and serving people

From: Peter Hart <peter@wildernessworkshop.org>
Sent: Tuesday, February 25, 2020 12:06 PM
To: Warner, Kevin -FS <kevin.warner@usda.gov>
Cc: Fitzwilliams, Scott -FS <scott.fitzwilliams@usda.gov>
Subject: Re: White Banks

Kevin – I’m just trying to get back up to speed on the history/facts here. Looking back at the 2011 EA, it looks like there was no production at the mine between 2003 and 2011 (“Since 2003, no production has taken place at the mine. In 2007, a Quick Claim deed between Robert Congdon and the Mystic Eagle Quarry LLC transferred ownership of the White Banks Claims CMC#255401 through CMC#2254010. The new owners hired a contractor to begin cleanup efforts by removing a dilapidated camper trailer and solid waste left behind by the previous owner. The new owners also retained the services of a contractor to begin the survey work for the bypass road.” See https://www.fs.usda.gov/nfs/11558/www/nepa/75562_FSPLT2_056573.pdf), at 1). I don’t recall any development at the mine between 2011 and 2015 either, is that correct? So, really, there hasn’t been any production from this mine since at least 2003. Or am I mistaken?

Thanks,
Peter Hart

From: "Warner, Kevin -FS" <kevin.warner@usda.gov>
Date: Monday, February 24, 2020 at 5:44 PM
To: Peter Hart <peter@wildernessworkshop.org>
Cc: "Fitzwilliams, Scott -FS" <scott.fitzwilliams@usda.gov>
Subject: RE: White Banks

Peter,

You are correct. No development work took place from 2015 – 2019. We have a change in ownership, Mystic Eagle Quarry LLC to Snowmass Mining Company, and the FS is in the transition phase between operators. No mining activity is planned for this summer.

Hope that helps.

Cheers,



Kevin Warner
District Ranger
Forest Service
White River National Forest, Aspen-Sopris Ranger District

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c: 970-948-3911
kevin.warner@usda.gov

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Caring for the land and serving people

From: Peter Hart <peter@wildernessworkshop.org>
Sent: Monday, February 24, 2020 11:34 AM
To: Fitzwilliams, Scott -FS <scott.fitzwilliams@usda.gov>; Warner, Kevin -FS <kevin.warner@usda.gov>
Subject: White Banks

Kevin / Scott – Can you tell me what's been going on at the White Banks Mine? I know the USFS approved an operating plan for a development phase in 2015. I think that period was set to end on 2019. I'm curious what

happened during that phase, and what's going on now.

Thanks,

--

Peter Hart

Staff Attorney

Wilderness Workshop

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RECEIVED

AUG 07 2020

**DIVISION OF RECLAMATION
MINING AND SAFETY**

August 4, 2020

Mr. Russ Means
Minerals Program Director
Colorado Division of Reclamation, Mining & Safety
1313 Sherman Street, Room 215
Denver, Colorado 80203
Via email to: Russ.Means@state.co.us, Ginny.Brannon@state.co.us, Jeff.Fugate@state.co.us,
stephanie.mitchell@state.co.us, Dustin.Czapla@state.co.us, camille.mojar@state.co.us

Re: Objection to Extension of Temporary Cessation Status, White Banks Mine,
Permit No. M-1999-042

Dear Mr. Means,

Pitkin County has reviewed the February 20, 2020 Notice of Hearing sent by the Division of Reclamation, Mining & Safety (DRMS) to Mr. Robert Congdon, the operator of the White Banks Mine (Permit No. M-1999-042), located in the Crystal River Valley south of Carbondale. The Notice of Hearing indicates that DRMS is requesting that the White Banks Mine Permit be placed in a second and final term of temporary cessation (TC), retroactive to November 21, 2018 and ending on November 21, 2023. Pitkin County objects to the grant of a second term of TC based on the cessation of mining activity and any production or extraction of material in more than ten years. As such, DRMS and the Mined Land Reclamation Board (MLRB) should place the mine in final reclamation due to the period of nonproduction, in conformance with the Colorado Land Reclamation Act for the Extraction of Construction Materials (Construction Materials Reclamation Act), C.R.S. §§ 34-32.5-101, et seq.

I. Pitkin County's Concerns Related to the White Banks Mine

Pitkin County regulates the mining activity of White Banks Mine through our Land Use Code and those sections pertaining to extractive operations and mining. We have asserted various requirements upon the White Banks Mine in order to mitigate the off-site impacts of the mining operations. Principal among these impacts are the truck traffic utilizing State Highway 133 with an uncontrolled access onto the highway, the generation of noise and its impact on near-by residential properties, the degradation of water quality in Avalanche Creek and the Crystal River

and the impacts of all aspects of the mining operation on the resident herd of big horn sheep that frequent the slopes above the mine and utilize the area for winter range.

The mitigation requirements of the County's permit are dated and will become more so if the mine is allowed to remain dormant for a longer period of time. These enumerated impacts and others must have relevant mitigation requirements, timely ascertained in relation to the operation of the mine. Pitkin County's permit is tied to the State permits for this mining activity.

II. Temporary Cessation is Not Permitted Under Colorado Law Due to a Prolonged Period of Nonproduction.

Temporary cessation is defined as a period of nonproduction in the life of a mine. Info. Network for Responsible Mining v. Colo. Mined Land Reclamation Bd., 2019 COA 114, ¶ 13, 451 P.3d 1245, 1248 (July 2019) (citing Mined Land Reclamation Board Hardrock Rules 1.1(53) & 1.13.2, 2 Code Colo. Regs. 407-1); see also C.R.S. § 34-32-103(6)(a). The Colorado Court of Appeals recently confirmed that temporary cessation is a factual status that begins when production ceases on the site, regardless of any administrative status. Id. at ¶¶ 11, 13. The same court ordered termination of mining operations and compliance with reclamation standards at a mine where nonproduction (i.e., temporary cessation) had continued for more than ten years. Id. at ¶ 11; see also id., at ¶ 7 (quoting the MLRA (§ 34-32-103(6)(a)(III)): "[i]n no case shall temporary cessation of production be continued for more than ten years without terminating the operation and fully complying with the reclamation requirements of this article."). The same statutory and regulatory requirements referenced by the Court of Appeals also apply to permits for construction materials. See § 34-32.5-103(11)(c); Construction Materials Rule 1.13.9.

Pitkin County asserts that the Construction Materials Reclamation Act provides no basis for any further periods of TC for the White Banks Mine and that the permit must be terminated and final reclamation commenced. No production has occurred at the White Banks Mine in more than a decade. In fact, recent correspondence with the U.S. Forest Service confirms that the last production from White Banks occurred in 2003, approximately 17 years ago. See Exhibit 1 (U.S. Forest Service email correspondence dated February 28, 2020).

The DRMS electronic files also support a conclusion that no production has occurred for over ten years. The February 20, 2020 letter from DRMS noticing a hearing in this matter references annual reports submitted by the operator identifying August 2014 as the last reported date of production and seeks to base the TC period from this date. However, the file demonstrates that the activities in 2014 did not include production. Specifically, the operator's annual report submitted in January 2015 states that the 2014 activities consisted entirely of the "removal of equipment" from the site. Indeed, the operator specifically crossed out the references to both "excavation" and "processing" from the report form.

Further, in a letter from the operator to DRMS dated August 16, 2013 protesting an increase in the surety amount, the operator states that: "The existing bond of approx. \$15,000 was recalculated less than three years ago and the conditions on site have not changed. There have been no additional structures built and no surface activity has occurred other than one piece of

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III. Conclusion

Pitkin County requests that the Construction Materials Reclamation Act and the Board’s Construction Materials Rules for DRMS and the Statutory provisions cited be adhered to and the Board not grant any further period of TC. Instead the DRMS and Board should terminate mining and require the operator to commence final reclamation.

PITKIN COUNTY ATTORNEY’S OFFICE

Sincerely,

A handwritten signature in blue ink, appearing to be "J. J. [unclear]", is written over a faint circular stamp.

Pitkin County Attorney