



October 29, 2021

**Re: Rationale for Recommendation for Approval of a Construction Materials 112 Amendment Application (AM-09) with Objections, Albert Frei & Sons, Inc., Walstrum Quarry, File No. M-1983-033**

## **Introduction**

On October 29, 2021, the Division of Reclamation, Mining and Safety (Division/Office/ DRMS) issued its recommendation to approve the permit amendment application (AM-09) for the Walstrum Quarry, File No. M-1983-033, over public objection. This rationale document is intended to explain the process by which the Division arrived at its recommendation for approval over public objection and respond to the issues raised by the objecting party. The Division reserves the right to further supplement, amend, modify, or clarify this document and recommendation with additional details as necessary.<sup>1</sup>

## **Summary of the Review Process for the Amendment Application**

Albert Frei & Sons, Inc. (Frei/Applicant) submitted an 112c amendment application (AM-09) on April 20, 2021. The amendment application was deemed complete for the purposes of filing and review on May 11, 2021.

The permit amendment application proposes to add 464.17 acres to the existing 285.17 acre site. The land containing the proposed mining operation is owned by the Albert & Mary Jane Frei Irrevocable Trust and the AR and MJ Frei Limited Partnership. The site is located approximately 4 miles east of Idaho Springs, CO in Clear Creek County. The Applicant intends to mine granite for construction aggregate for industrial, commercial and residential uses. The site would consist of an expanded open pit quarry operation and the existing on-site facilities. The site manufacturing process would include the raw granitic material being blasted by use of explosives. The resulting fragmented rock would be hauled by truck to the on-site manufacturing plant to be made into construction material including fine and course aggregates. The permit boundary would be offset by at least 200 feet from the affected lands boundary. The offset area would consist of undisturbed land covered in natural vegetation. The proposed final Reclamation Plan would include four (4)

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<sup>1</sup> Herein, all references to the Act and Rules refer to the Colorado Land Reclamation Act for the Extraction of Construction Materials, 34-32.5-101 et seq., C.R.S. (the Act), and to the Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for the Extraction of Construction Materials (the Rules or Rule). Copy of the Act and Rules are available through the Division's web site at <https://drms.colorado.gov/>.



types of land uses; wildlife habitat, privately owned natural resource area, industrial/commercial development and developed water resources.

Pursuant to Section 34-32.5-112(9)(b), Rule 1.6.2(1)(d) and Rule 1.6.5, the Applicant published the required public notice for the amendment application once a week for four consecutive weeks beginning on May 19, 2021 with the last date of publication on June 9, 2021. The public comment period closed on June 29, 2021. The public notices were published in the Clear Creek Currant, a publication in general circulation in the vicinity of the mine. During the public comment period, the Division received one (1) written objection and one (1) comment from the individual and the agency listed below.

**Timely Letters of Objection:**

| <b>Person or Entity</b> | <b>Date Objection Received</b> |
|-------------------------|--------------------------------|
| Robert L. Young, Jr.    | June 28, 2021                  |

**Timely Commenting Agency:**

| <b>Agency</b>    | <b>Date Comment Received</b> |
|------------------|------------------------------|
| History Colorado | May 28, 2021                 |

**Untimely Letters of Objection:**

The individuals or entities listed in Attachment A failed to submit timely objections during the public comment period pursuant to Rule 1.7.1(2)(a), which closed on June 29, 2021. Therefore, pursuant to Rule 1.7.1(2)(a), the untimely objectors are not Parties to this matter, as that term is defined in Rule 1.1(38).

The Division forwarded copies of the objections and comments to the Applicant and scheduled the amendment application for a hearing before the Colorado Mined Land Reclamation Board (Board) and a Pre-hearing Conference. The Division provided notice of the scheduled Board hearing and Pre-hearing Conference to all parties and interested persons. Due to the timely objection, on the decision date the Division cannot make a decision on the application amendment, but rather a recommendation to the Board.

During the review period the Division generated six (6) adequacy letters. The Applicant addressed all adequacy issues to the Division's satisfaction. Therefore, on October 29, 2021, the Division determined the amendment application satisfied the requirements of C.R.S. § 34-32.5-115(4) and issued its recommendation to approve the amendment application over objections.

## **Issues Raised by the Objecting Party**

The timely objection received by the Division was categorized by the issues pertaining to the mining and reclamation activities potentially causing adverse effects on the 40 acre neighboring parcel owned by Robert Young, including; 1) an access easement concern, 2) the effect of mining and reclamation on the stability of structures and making the ground prone to slides, 3) the protection of utilities, 4) impact on hydrologic balance as it pertains to use of groundwater for a potential future well on Mr. Young's 40 acres, 5) mine waste handling and 6) non-Jurisdictional items raised by untimely objectors. These categories are listed below and titled with bold font.

### **Potential adverse effect on the 40 acre neighboring parcel owned by Robert Young**

The Applicant has proposed a 50-foot mining setback from the 40 acre parcel property line. Given the orientation of the geological features found within the proposed Mine Plan and the relative topography, the Division determined there is no potential to adversely affect the 40 acre neighboring parcel owned by Robert Young. All mining activities adjacent to the neighboring parcel will be conducted downslope and there is no possibility for surficial rock fall to occur from the proposed amendment application permit boundary to the 40 acre neighboring parcel owned by Robert Young. Additionally, the amendment application included a geotechnical slope stability report for the proposed Mine Plan. Multiple mined slopes were analyzed, two of which are adjacent to the 40 acre neighboring parcel owned by Robert Young. The geotechnical analysis for both mined slopes demonstrated the minimum Factors of Safety approved by the Board will be met or exceeded in accordance with Table 1 - Recommended Minimum Factors of Safety for Slope Stability Analyses for Operations and Reclamation within Section 30.4 of the Policies of the Mined Land Reclamation Board (MLRB), effective May 16, 2018. The Division finds the Applicant provided the required information in accordance with Rule 6.5 and C.R.S. § 34-32.5-116(4)(i).

#### **1) Access easement concern**

##### **a) The Division and Board lack authority to adjudicate private property disputes - including easement disputes:**

The Division and Board have broad powers to consider and adjudicate mining and reclamation matters, as well as to enforce the provisions of the Act. See generally, C.R.S. §34-32.5-104, and C.R.S. §34-32.5-107 (which refers to C.R.S. §34-32-107). Even with this broad statutory authority, the Division and Board lack the statutory authority to adjudicate private property disputes or rights. The Objector, Mr. Young, has raised a potential impact claim to an existing, non-exclusive, easement that is owned by the Applicant (or associates of Applicant) and is used by Mr. Young to access his land-locked 40-acre property. Specifically, Mr. Young is objecting to any future relocation of the access easement road. Because this objection seeks the Division and Board to adjudicate a private property dispute, it is outside the scope of authority and is properly resolved by a court. As explained below, this exact easement-relocation issue is the subject of current litigation, further justifying the Division's forbearance in considering this issue as part of this application process.

For additional background, there are 3 primary easements within the Walstrum Quarry - 2 utility easements for operation and maintenance of power and phone towers and lines, and 1 access easement owned by AFS holding and used by Mr. Young. All of the easements overlap to some degree. The access easements serve a 40-acre parcel which is land-locked by AFS holdings as indicated on the Pre-Mining Plan Map Exhibit C-2. Various entities associated with the Applicant own the estate under, on, or around the easements within the Walstrum Quarry. The easement road consists of the quarry entrance road, a rough two-track jeep road and a portion of an interior quarry haul road. The utilities were previously relocated in 2003 (Xcel) and 2008 (Qwest) by the Applicant without interruption of service. The access easements was relocated in 2015. The Applicant has maintained continuous access and use to all utility users (Verizon and Sprint operate and own the cell towers and Xcel Energy, Qwest and Century link own and serve utilities to the cell towers) and Mr. Young throughout the progression of the quarry operations.

Important and relevant to the Division's review and recommendation for approval of AM-09 over objection is that Mr. Young's main objection relates to *potential future* relocation of the access easement. The Applicant represents in AM-09 that access and utilities easements may be relocated. Mining Map Exhibit C-5, Note 4, "Existing utility and access easements may be relocated as a result of ongoing Quarry operations. Final locations to be determined in the future however utilities and access to utilities structures and property as granted in each respective easement will be maintained at all times. Some utility and access easements are shared among multiple entities and may overlap each other." However, and importantly, AM-09 does not approve any relocation of the access easement. And whether the access easement can legally be relocated is a matter for the court, not the Division.

Relocation of the access easement is the precise subject of litigation adjudicated in Adams County District Court, case No. 2018CV32000, in February 2020, and appealed by Mr. Young to the Colorado Court of Appeals, case No. 2020CA740. The legality of relocation of the access easement is a complicated legal issue that is outside the scope of the Division's authority; the adjudication of this private property dispute should be left to the Courts, where it is currently being considered. Although relocation of easements is discussed in AM-09, it does not approve any relocation of the easements, therefore the pending litigation does not inhibit or preclude the Division from moving forward with the consideration and recommended approval of this Amendment.

The Applicant has and will continue to provide access and utilities, as applicable, to all easement holders in accordance with the terms of each respective easement as noted on the Mining Map Exhibit C-5, Note 10, which provides: "...utilities and access to utilities, structures, and property as granted in each respective easement will be maintained at all times." The Applicant has made assurance to the Division during the adequacy review process that if or when relocation of the access road is needed as a result of ongoing quarry operations, the Applicant will follow the proper legal court process at such time to relocate the road. However, the Applicant is not seeking approval of a specific easement relocation plan in AM-09.

- b) The non-exclusive access easement is not a permanent man-made structure, therefore requirements of Rule 6.4.19 are not applicable:**

The Objector has asserted that the access easement used for purpose of ingress/egress to his 40-acre property is a “permanent man-made structure” requiring the Applicant to satisfy the requirement of Rule 6.4.19. Rule 6.4.19 requires an applicant whose “affected lands are within two hundred (200) feet of any significant, valuable, and permanent man-made structure,” to (a) provide a notarized damage compensation agreement or (b) provide an engineering evaluation. See, Rule 6.4.19 and §34-32.5-115(4)(e).

The non-exclusive access easement is not a “valuable, permanent man-made structure” as that term is defined in the Rules and implemented by the Division. Rule 1.1(52) defines a “Structure, Significant, Valuable and Permanent Man-made” as “a non-portable improvement to real property which has defined, current and recognizable value of an economic nature; generally including but not limited to: buildings, houses, barns, fences, above or below ground utilities, irrigation ditches, maintained or public roads, bridges, railroad tracks, cemeteries, communication antennas, pipelines, water wells, water storage structures, discharge and conveyance structures, etc.” As discussed above, this non-exclusive access easement is used by Mr. Young, but AFS holdings owns and maintains the access easement. Additionally, this access easement was relocated in 2015 to accommodate the progression of mining activity, but continuous access and use has been maintained. Prior relocation of the access easement indicates it is not a “permanent structure” or “non-portable improvement”, thus the requirements of Rule 6.4.19 are not applicable. See, *Chase v. COGCC*, 284 P.3d 161, 165 (Colo. App. 2012). (“[A]n agency’s interpretation of its own rule is entitled to great deference.”) *Chase v. COGCC*, 284 P.3d 161, 165 (Colo. App. 2012). Courts “will accept [an agency] interpretation if it has a reasonable basis in law and is warranted by the record.” *Maralex v. COGCC*, 428 P.3d 657 (2018).

Moreover, an easement is “a right conferred by grant, prescription or necessity authorizing one to do or maintain something on the land of another which, although a benefit to the land of the former, may be a burden on the land of the latter.” *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 1998). The *non-exclusive* access easement used by Mr. Young is not a permanent man-made structure owned by Mr. Young; the access easement and surrounding area is owned by the Applicant, or ASF holding an entity associated with the Applicant. “An Easement, regardless of the manner of its creation, does not carry any title to the land over which it is exercised, nor does it serve to dispossess the landowner.” *Id. See also, Matoush v. Lovingood*, 177 P.3d 1262, 1264-65 (Colo. 2008); (“An easement is an interest in property which, though distinct from an ownership interest in the land itself, nevertheless confers upon the holder of the easement an enforceable **right to use property of another for specific purposes.**”) (Emphasis added). As such, it is not required to be listed as a structure in the structure list on Exhibit C-4 of AM-09. Because the access easement is not a “valuable, permanent man-made structure” as that term is defined in the Rules, a damage compensation structure agreement from Mr. Young is not required, nor is an engineering evaluation on the access easement required.

The Division finds the Applicant provided the required information in accordance with Rule 6.4.4 - Exhibit D - Mining Plan.

## **2) Effect of mining and reclamation on the stability of structures and making the ground prone to slides**

The Applicant provided a geotechnical stability analysis as required by Section 6.5 of the Act and Rules. The geotechnical stability exhibit analyzed six (6) critical slopes from the proposed Mine Plan. The slopes were modeled using site specific rock and soil properties determined by laboratory and field testing. The results of the geotechnical stability analysis for the six (6) critical slopes demonstrated the minimum Factors of Safety approved by the Board will be met or exceeded in accordance with Table 1 - Recommended Minimum Factors of Safety for Slope Stability Analyses for Operations and Reclamation within Section 30.4 of the Policies of the Mined Land Reclamation Board (MLRB), effective May 16, 2018. These results indicate a stable slope which will not be prone to failure or slides.

The potential for rock fall and slides from mining activities, including blasting, potentially impacting the buffer area along the south and east side of the amendment area affecting Clear Creek and/or US Highway 6 was addressed by the Applicant by committing to four actions. The Applicant will conduct additional controlled blasting techniques within fifty (50) feet of the affected area line, inspect and remove loose rocks from the lands within fifty (50) feet downslope of the extraction limit, continue to cooperate with CDOT to access and mitigate rockfall along the amendment area boundary and install a seismic monitor in the amendment area to monitor blasting vibration levels.

Currently, two (2) structures and one (1) road are located on the 40 acre parcel owned by Mr. Young. The structures are cell towers owned by Verizon and Sprint. The towers are located approximately 350 feet north of the amendment application permit boundary. The Applicant demonstrated through their proposed mine plan and geotechnical stability analysis that areas outside of the affected land shall be protected from slides or damage. Therefore, the proposed mining activity would not affect the stability of the structures. Additionally, the Applicant committed to performing additional controlled blasting techniques within fifty (50) feet of the affected boundary line with blasts designed to minimize vibration in order to protect the structures and areas outside of the affected land from damage. The Division finds the Applicant provided the required information in accordance with Rule 6.5 and C.R.S. § 34-32.5-116(4)(i).

## **3) Protection of utilities**

There are two (2) existing utilities and utility easements though the existing quarry and a parcel of land included in the amendment application. The utilities include an electrical line and fiber optic line owned by Public Service Company of Colorado (Xcel) and Qwest Corporation, respectively. The utilities serve the 40 acre parcel owned by Mr. Young. The Applicant, or AFS holdings, owns the land under, on and around the utility easements. The utilities and associated easements may be relocated as a result of on-going quarry operations. The Applicant committed to providing utilities to the 40 acre parcel at all times. The utilities were previously relocated in 2003 (Xcel) and 2008 (Qwest) by the Applicant without interruption of service. The Applicant obtained structure agreements from both utility owners for the amendment application. The Division finds the

Applicant provided the required information in accordance with Rule 6.4.19 - Permanent Man-made Structures and C.R.S. § 34-32.5-115(4)(e).

**4) Impact on hydrologic balance as it pertains to use of groundwater for a potential, future well on Mr. Young's 40 acres**

Based on a review by the Division of the Division of Water Resources well permit records, there is not currently a well located on the 40 acre parcel owned by Mr. Young. Because a well does not exist on the property, the issue of potential impacts to a future well is not ripe for consideration.

The 40 acre parcel varies in elevation from approximately 7,800 feet above mean sea level (amsl) to 8,200 feet amsl and is located at an elevation higher than the proposed mining activities. The Applicant advanced a total of five (5) boreholes to quantify rock properties with several of the borings advanced to the proposed amendment application pit floor. During drilling it was noted there was no apparent groundwater flow, although drilling fluids may have obscured the presence of groundwater. A review of the boring logs for fractures and possible conduits to convey groundwater flow was conducted by the Applicant. The review found there was minimal fracturing with apertures varying from 0 to 5 mm in width with no noted fractures actively producing groundwater. Mining in similar material in the current mining areas has not encountered groundwater. Seeps expressing in the current mining areas cannot readily be measured and water rarely reaches the pit floor due to limited flow.

There are no groundwater wells in the amendment area, but if a well were to be advanced it would need to reach the level of Clear Creek to encounter a reliable supply of groundwater. The elevation of Clear Creek is 7,200 feet amsl and located approximately 250 feet from the nearest amendment application affected land boundary. A well would have to be 600 to 1,000 feet deep to potentially encounter groundwater. The proposed mining in the amendment area would remain 25 to 350 feet above Clear Creek thus not affecting potential groundwater.

The Division finds impacts to groundwater quantity in and adjacent to the proposed affected land will be minimized in accordance with Rule 3.1.6. The Division finds the Applicant provided the information required for Exhibit G - Water Information, in accordance with Rule 6.4.7 and C.R.S. § 34-32.5-116(4)(h).

**5) Mine waste handling**

The mine waste (fines) generated from the proposed amendment area will be placed in the approved Gilpin County storage facility and on-site in the location of the current quarry floor.

In July 2007, the Board approved the Applicant's request for a declaratory order exempting the fines storage facility activities located in Gilpin County from the requirement of obtaining a reclamation permit. By granting this exemption, the Board determined that the storage facility did not constitute "affected land", exempting it from regulation under the Act and Rules and removing it from DRMS/MLRB jurisdiction. The area is covered under a Special Use Review permit issued by

Gilpin County, and has been and continues to be regulated by Gilpin County. The future fines storage is planned for the on-site storage area located on the floor of the existing quarry. The on-site storage area will consist of a mined depression in the quarry floor surrounded by competent rock on all sides.

The Applicant is making changes to the quarry operations to reduce the need for fines storage by utilizing the fines as a construction aggregate for asphalt, concrete and as a growth medium on the reclaimed quarry benches. Additionally, the Applicant expects the granite in the amendment area to produce half of the amount of fines compared to the existing quarry due to the geology of the rock. The Division finds the Applicant provided the required information in accordance with Rule 6.4.4 - Exhibit D - Mining Plan.

## **6) Non-Jurisdictional Items raised by Untimely Objectors**

The Division received untimely objections from forty-six (46) individual and entities which raised numerous non-jurisdictional concerns. Because the objections were received after the close of the June 29, 2021 comment period, they are not part of this administrative record. However, for the benefit of the Board and the interested public, the Division is including a discussion of non-jurisdictional issues raised, set forth briefly below. In these proceedings, the Division's jurisdiction is limited to enforcement of the specific requirements of the Act and Rules. The Division considers all timely submitted objections and comments in its review, but can address only the issues directly related to the specific requirements of an amendment application as stated in the Act and Rules.

### **a. Concerns regarding air quality, noise, and truck traffic**

The Act and Rules do not specifically address traffic, traffic safety and road impacts for roads located outside of a permitted mining operation. These issues are under the jurisdiction of Clear Creek County and the Colorado Department of Transportation. These issues should be addressed through the permitting processes of Clear Creek County and the Colorado Department of Transportation.

The Act and Rules do not specifically address impacts to air quality and noise levels. The issue of air quality is under the jurisdiction of Clear Creek County and the Air Pollution Control Division (APCD) of the Colorado Department of Public Health and Environment (CDPHE). The Applicant has obtained an Air Pollution Emissions Notice (APEN) and Construction Air Permit from the CDPHE. The issues of noise levels is typically addressed at the local government level and not at the State government level. These issues should be addressed through the Clear Creek County permitting process.

### **b. Gilpin County fines storage facility**

In July 11, 2007, the Board approved the Applicant's request for a declaratory order exempting the fines storage facility activities located in Gilpin County from the requirement of obtaining a reclamation permit. As discussed above, by granting this exemption, the Board determined that the



storage facility did not constitute “affected land”, exempting it from regulation under the Act and Rules and removing it from DRMS/MLRB jurisdiction. The area is covered under a Special Use Review permit issued by Gilpin County, and has been and continues to be regulated by Gilpin County.

## Conclusion

After conducting a thorough technical review of the application, as outlined in part in the discussion above, on October 29, 2021, the Division determined the amendment application satisfied the requirements of the Act and Rules, and specifically C.R.S. § 34-32.5-115(4), and issued its recommendation to approve the Construction Materials 112 amendment application for the Walstrum Quarry (AM-09), File No. M-1983-033.

## Attachment A

| Person or Entity       | Date Comment Received |
|------------------------|-----------------------|
| Gil Folsom             | August 6, 2021        |
| Carol Scardello-Folsom | August 6, 2021        |
| Tim Preister           | August 10, 2021       |
| Mary Preister          | August 10, 2021       |
| Dennis Fast            | August 10, 2021       |
| Martie Fast            | August 10, 2021       |
| Dannel Agar            | August 10, 2021       |
| Lynn Agar              | August 10, 2021       |
| Ed Dentry              | August 10, 2021       |
| Suzan Dentry           | August 10, 2021       |
| Ted Johnson            | August 10, 2021       |
| Debbie Johnson         | August 10, 2021       |
| Dylan Domaille         | August 10, 2021       |
| Monica Miller-Domaille | August 10, 2021       |
| Tom Ripley             | August 10, 2021       |
| Kaye Ripley            | August 10, 2021       |
| Marith Reheis          | August 10, 2021       |
| Jan Lowe               | August 10, 2021       |
| David R. Kinnard, M.D. | August 10, 2021       |
| Sheila Carlon          | August 10, 2021       |
| Michael McSchaefer     | August 10, 2021       |
| Meghan McSchaefer      | August 10, 2021       |
| Bob DiMaria            | August 10, 2021       |
| Jeanine DiMaria        | August 10, 2021       |
| Carrie Preister        | August 10, 2021       |
| Alexander Bazewicz     | August 10, 2021       |
| Stanley Gale           | August 10, 2021       |

|                        |                 |
|------------------------|-----------------|
| Nancy Gale             | August 10, 2021 |
| Richard A. Pershall    | August 10, 2021 |
| Suzanne A. Pershall    | August 10, 2021 |
| Bobby Costeldia        | August 10, 2021 |
| Terri Costeldia        | August 10, 2021 |
| Edrie Hostetler        | August 10, 2021 |
| Karen Pavek            | August 10, 2021 |
| Gary Pavek             | August 10, 2021 |
| Gil Folsom             | August 10, 2021 |
| Carol Scardello-Folsom | August 10, 2021 |
| Margi Kaspari          | August 13, 2021 |
| Tony Kaspari           | August 13, 2021 |
| Tim Preister           | August 13, 2021 |
| Mary Preister          | August 13, 2021 |
| Lynn Agar              | August 13, 2021 |
| Debbie Johnson         | August 13, 2021 |
| Sheila Carlon          | August 13, 2021 |
| Jefferson County       | August 22, 2021 |
| City of Idaho Spring   | August 28, 2021 |