STATE OF COLORADO

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Objection re: Kirtright Pit – File No. M-1986-123, Coulson Excavating Company, Inc. Amendment (AM-1) Kirtright Pit Amendment

Kent Naughton <knaughton@witwerlaw.com> Sat, Mar 29, 2025 at 3:50 PM
To: "Patrick.Lennberg@state.co.us" <Patrick.Lennberg@state.co.us>, Linda O'Brien <lindabatesobrien@gmail.com>, Dan Giroux <dangiroux@terramax.us>

Patrick,

Please see the attached objection.

Thanks,

Kent Naughton

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March 28, 2025

Mr. Patrick Lennberg
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Re: Kirtright Pit – File No. M-1986-123, Coulson Excavating Company, Inc.
Amendment (AM-1)
Kirtright Pit Amendment

Submitted via e-mail and FedEx.

Dear Mr. Lennberg:

I write on behalf of Linda and Kevin O'Brien, both individually and as trustees of The O'Brien Living Trust (collectively "the O'Briens"), to object to the Kirtright Pit Amendment more specifically identified above, which has been submitted by Coulson Excavating Company, Inc. ("Coulson").[1]

OBRIEN OBJECTIONS AND COMMENTS

1. Background and Preface.

In August of 2024, the O'Briens, along with many other interested parties, objected to Coulson's previously-proposed amendment to the Kirtright Pit permit. In their objection letter, the O'Briens noted that it had then "been more than ten months since the DRMS Board, following a

1 As used herein, the term "Plan" refers to all Kirtright Pit Amendment application materials, as amended and supplemented.

hearing, ordered Coulson to submit, 'within 90 days of the effective date of [its] Order' an amendment application." August 2, 2024, O'Brien Objection Letter, citing DRMS Files, Nov. 27, 2023, Findings of Fact, Conclusions of Law, and Order. Now, we are now one year and four months away from the 2023 DRMS Order. Now, Coulson has submitted yet another proposed amendment.

This most-recent proposed amendment reflects a tacit admission of the indefensibility of Coulson's prior plan, and represents a correction of some of the more obvious deficiencies therein. This is some degree of progress, but it clearly should not have come at such a high cost. When reviewing the latest Plan, O'Briens would urge DRMS to keep in mind Coulson's long history of failing to comply with DRMS rules, directives, deadlines, and orders, as is reflected in many of the 270-plus file entries in the DRMS Laserfiche Weblink records for this permit going back over 38 years.

2. *Coulson never satisfactorily completed reclamation on O'Brien property.*

In the limited areas where the Plan indicates that it will engage in revegetation and reseeding, Coulson proposes a reclamation plan that is relatively robust. For these areas, the plan calls for seeding of alfalfa and three types of native grasses, all supported by topsoil replacement, fertilizing, and weed management. In a contrast that is clearly inequitable, however, Coulson proposes to simply declare itself finished with reclamation on O'Brien property, having never completed anything remotely comparable to what Coulson proposes for revegetation in other areas. In their prior objections, the O'Briens described in some detail how prior revegetation and reseeding efforts were inadequate. Rather than leaving the O'Briens with properly-established grass, suitable for use as pastureland as it was before mining, revegetation efforts were minimal at best and left the O'Briens much worse off, dealing with inadequate revegetation and many areas of poorly-draining swampland. As detailed in their prior objections, DRMS records support the conclusion that Coulson never actually adequately complied with any approved reclamation plans.

In addition, as described in August 2024 objection letters submitted by Linda O'Brien and the O'Briens' engineer, Dan Giroux, unfinished and improper reclamation efforts have long forced the O'Briens to live with mosquito-breeding-ground mudflats instead of properly-functioning ponds and grasslands. Most of the objections and concerns described in detail by Mr. Giroux remain today. The O'Briens and Mr. Giroux continue to have serious concerns about the viability and reliability of the proposed ponds on O'Brien property, particularly with regard to visual, odor, and health nuisance considerations. Mr. Giroux continues to believe that a supplementary water supply would need to be delivered to these ponds in some manner to ensure the proper functioning of the ponds as actual ponds. In addition, the concerns and objections that Mr. Giroux previously raised regarding Big Thompson overbank flooding, and post-flooding evacuations remain unchanged today—as do his comments about floodplain impact confirmations and clearances. The O'Briens also object because the current slopes on the sides of the ponds is much too steep.

Coulson's proposal calls for all slopes to be no steeper than 3:1, which is consistent with DRMS Rule 3.1.5(7). But many of the slopes of the ponds left on O'Brien property are much steeper than 3:1, and thus do not comply with this rule. In addition, Coulson's latest plan calls for filling and regrading of a connecting ditch from the west Kirtright property to the O'Brien property boundary, but specifics of these plans are inadequate to ensure that O'Brien's property will not be negatively impacted by this activity.

With respect to post-flood draining and evacuation, Coulson admits that its proposed final grade of O'Brien land is lower than it was in 1986, yet Coulson is no longer offering any drainage-improvement features. This is both unacceptable and an indication that proper reclamation of O'Brien lands has not been completed. Coulson has complained that U.S. Fish and Wildlife considerations regarding Preble's Meadow Jumping Mice are prohibitive. But these complaints should not be accepted as a valid excuse. Coulson has previously demonstrated an ability to get similar approvals from the U.S. Fish and Wildlife Service when it related to their underdrains at the Stroh Pit. See ¶ 15, February 28, 2025, Response to DRMS Adequacy Review (describing how Coulson secured Section 404 permitting for Stroh Pit underdrains).

Finally, Coulson's failure to adequately complete reclamation of O'Brien property is demonstrated by its refusal to comply with DRMS directives regarding about 25 dump trucks full of topsoil near Lacy Lane and the O'Brien's property boundary. As the O'Briens noted previously, in an Inspection Report dated February 15, 2022, DRMS Staff noted that Coulson's actions in dumping about 25 dump trucks full of topsoil near Lacy Lane was not consistent with the existing reclamation plan and must be either removed or incorporated into the surrounding landscape. Presumably, at least some of this topsoil should have been used for better revegetation efforts on O'Brien property. Coulson's latest filings do not dispute the fact that it never complied with DRMS's directives regarding this topsoil. Instead, Coulson simply attempts to blame Randy Kirtright. But it was Coulson that had the DRMS permit; Coulson that was required to ensure the proper handling of this topsoil; and Coulson that DRMS directed to take remedial action. DRMS should not now reward Coulson's blatant disregard of its directives by approving Coulson's current Plan, which would effectively relieve Coulson of any responsibility to deal appropriately with the piles topsoil. And, as previously noted by the O'Briens, if Coulson is required to appropriately deal with the piles of topsoil, then Coulson must comply with Rule 6.3.12 with respect to structures owned by significantly more homeowners.

3. The Plan should not be approved until water rights issues and bonding concerns have been satisfactorily resolved.

Water rights issues and related concerns about bonding adequacy , continue to be of serious concern to the O'Briens. As an initial matter, Coulson's latest submissions admit that they currently do not have the required substitute water supply plan (SWSP) because their previous

SWSP expired in 2024. This is far from a mere technicality, since it is not clear that Coulson will be able to get approval for another SWSP. C.R.S. § 37-92-308 provides as follows:

> If a [SWSP] applicant requests a renewal of a plan that would extend the plan **past three years** from the initial date of approval, the applicant shall demonstrate to the state engineer that the delay in obtaining a water court decree is justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant.
>
> If a [SWSP] applicant requests renewal of a plan that would extend the plan **past five years from** the initial date of approval, the applicant shall demonstrate to the water judge in the applicable water division that the delay in obtaining a decree has been justifiable and that not being able to continue operating under a substitute water supply plan until a decree is entered will cause undue hardship to the applicant.

(emphasis added). DRMS files indicate that in a letter dated August 5, 2015, DRMS pointed out that Coulson had failed to comply with DRMS Rule 3.1.3's requirement of completing reclamation in five years, and that the State Engineer had extended CEC's deadline to file an augmentation plan to December 31, 2015. In keeping with its long-demonstrated pattern of noncompliance, Coulson did not comply with this deadline. It did, however, file a SWSP in 2019. Given the age of Coulson's SWSP, it is far from certain that it will be able to obtain an extension under C.R.S. § 37-92-308.

The O'Briens also continue to object with respect to the bonding currently in place and the supposed security pledged to ensure adequate water rights. As described in their prior objections, Coulson previously avoided an increase of its bond to nearly $5 Million by purportedly dedicating 6.84 shares of Hill & Brush Ditch Company stock to support the SWSP that was then in place. While Coulson tries to respond to the concerns previously-raised by the O'Briens, Coulson's response is inadequate to demonstrate that either DRMS or DWR have a perfected security interest. And a perfected security interest could be of critical importance if an adversarial foreclosure of this water stock becomes necessary in the future. Under the UCC, as adopted in Colorado, a security interest in a "certificated security" like water stock is properly perfected by physical possession of the water stock certificate. *See* C.R.S. § 4-9-314(c)(2)(a) (perfection by "possession of the security certificate"); *see also* C.R.S. § 4-9-328 (perfection by control has priority over perfection without control). In addition, ditch companies are notorious for demanding the *original* stock certificate prior to recognizing any attempted transfers on the official books of the ditch company. Coulson's response on this issue is evasive and does not clarify who has physical possession of the original stock certificate. Coulson merely claims that Ken Coulson is the one who dedicated the stock to his company, Coulson Excavating. But this does nothing to demonstrate

that either DRMS or DWR has an adequately perfected security interest in case an adversarial foreclosure becomes necessary.

The O'Briens also continue to believe that additional scrutiny is warranted with respect to Coulson's claims regarding the pre-1981 nature of the ponds in the Southwest part of the permit area. It is far from certain that these ponds will qualify as pre-1981 ponds, or that Coulson's claims of the facts surrounding these ponds can be believed. The truth is that these ponds have undergone various changes in the last few decades, which the O'Briens can attest to. Larimer County Aerial imagery provides additional evidence, indicating that, at least in 2014, most of these ponds were almost completely filled in. Moreover, a water court may not credit Coulson's attempts to blame Randy Kirtright for modifications of these ponds. The court may not accept this claim as credible. The court might also determine that the identity of the pond-filler is not particularly relevant to a determination of whether the ponds qualify for the pre-1981 exemption. Thus, the size of the bond should cover the real possibility a water court decree cannot be obtained without either devoting more water rights to the augmentation plan, lining the ponds, or filling in the ponds. Any of these options would involve significant additional expense.

On a similar note, Coulson's claims regarding the ease in which it anticipates achieving court approval in the near future are worthy of significant DRMS skepticism. If Coulson owns such an abundance of water rights, as it claims, then why has it still not achieved a court-approved augmentation plan more than a decade and a half after it claims that reclamation was otherwise complete?

Finally, Coulson's latest Plan indicates that, if it cannot achieve Court approval of an augmentation plan, Coulson will resort to a clay liner for three large ponds as an alternative plan. At a minimum, the current bonding should be adjusted to account for the costs that would be incurred under such an alternative.

4. Additional Comments and Objections.

Coulson's Plan also appears to be inadequate because the single e-mail that they attach from a U.S. Fish and Wildlife Service official regarding a "request for an extension" fails to demonstrate that Coulson's Plan is fully authorized. The Plan calls for Coulson to use a bulldozer to take soil from an area that is within the 300-foot buffer zone, but outside of the Preble's Meadow Jumping Mouse variance area and use it to backfill Pond 1. Specifically, Exhibit C-1 depicts two areas: one that depicts the "existing" variance to the 300-foot buffer area, and another that is within the existing 300-foot buffer area, yet will nonetheless be bulldozed. The single e-mail that Coulson submits as purported authorization appears to merely grant an extension of the 1-year deadline mentioned in DRMS's Adequacy Review, ¶ 15. It does not appear to be an expansion of the variance area to cover the entirety of the area that Coulson intends to bulldoze. DRMS should require Coulson to submit additional proof that the U.S. Fish and Wildlife Service has approved

an expansion of the variance area beyond what is depicted on Exhibit C-1 as the "existing" permit variance area.

With respect to a right to enter O'Brien property, Coulson spends considerable time arguing disputed legal issues. But these arguments are misplaced. First, since the Plan does not call for any activity on O'Brien property, it is unclear why Coulson is arguing disputed legal conclusions at this point in these filings. Second, even if Coulson's arguments were undisputed, O'Brien understands that DRMS has long interpreted its own rules to require a signed right to enter the property from *current* landowners. O'Brien requests that DRMS continue this policy. Third, while O'Brien does not believe this is the proper venue to make legal arguments regarding the existence of, or the limitations upon, Coulson's legal rights with respect to O'Brien property, DRMS should clearly understand that these issues are disputed. For example, it is far from clear that Coulson is the successor to whatever easement rights may have been granted to Zenas McCoy under the 1930 deed attached by Coulson—which deed appears to be unsigned. Coulson's arguments also falsely characterize Virgil Kirtright as the owner of the relevant property when he signed the original mining agreement. In truth, the deed Coulson relies upon clearly indicates that Virgil Kirtright was merely one of four tenant-in-common owners. Coulson also falsely asserts that when Linda O'Brien first received title, her deed "specifically provides that her title is subject to 'easements, covenants, restrictions and reservations of record, or in use, if any.'" But this language merely reflects a limitation upon the grantor's warranty. It does not limit the extent of the title that Ms. O'Brien received—only her ability to sue the grantor upon the warranty. This, of course, is not an exhaustive list of all of the issues with Coulson's legal arguments on this point, but these examples should adequately demonstrate that these issues are complex, seriously contested, and not suitable for resolution by DRMS.

With respect to Coulson's proposed partial release of certain lands along the highway and Lacy Lane, the O'Briens offer the following comments. First, Coulson's claim that no mining activity ever occurred in any of the released areas is not totally accurate. All sorts of mining equipment was driven back and forth across Lacy Lane for years through the area that is proposed for release. As described above, the O'Briens object to Coulson's Plan in part because it does not deal with the area that currently includes piles of topsoil that Coulson never dealt with properly. If the requested partial release is granted, it should be clear that Coulson will not be allowed to utilize Lacy Lane for any mining or reclamation activities on any areas that remain within the permit boundaries. In addition, while the O'Briens do not necessarily object to the proposed release with respect to the immediate surroundings of the O'Brien house, the proposed release may make it more difficult to adequately protect the house from flooding, yet it should be clear that Coulson's duties with regard to flood protection will not be diminished as a result of the proposed release.

Finally, please note that nothing contained herein shall be considered a waiver of any kind whatsoever, and the O'Briens reserve all rights to supplement or modify as future circumstances and developments warrant.

Yours very truly,

WITWER, OLDENBURG,
BARRY & GROOM, LLP

Kent Naughton