

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No.: 1:18-cv-02453-RBJ

ROCK & RAIL LLC, a Colorado limited liability company, Plaintiff/Counterclaim Defendant,  
v.

INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a Colorado nonprofit  
corporation, et al., Defendants/Counterclaim Plaintiffs.

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**DEFENDANTS' REPLY RE: MOTION FOR PARTIAL SUMMARY JUDGMENT**

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Rock & Rail's ("R&R") Response [ECF 82] confirms that its concrete batch plant combines rail-delivered aggregate with numerous other truck-delivered ingredients to make a new product—concrete mix—which is then combined with water at the Facility to manufacture concrete. While it is black letter law that ICCTA preemption does not apply to manufacturing, R&R attempts to muddy the waters by overstating the holdings in *Del Grosso v. STB*, 804 F.3d 110 (1st Cir. 2015) ("*Del Grosso I*"), and *Del Grosso v. STB*, 898 F.3d 139 (1st Cir. 2018) ("*Del Grosso II*"). Regardless, the undisputed evidence confirms that the concrete batch plant only "facilitates" the production of concrete—a separate manufacturing process that is not integrally related to rail transportation. The Neighborhood Defendants are entitled to summary judgment and a declaration that R&R's continued operation of the concrete batch plant is illegal.

**REPLY REGARDING UNDISPUTED MATERIAL FACTS**

1. R&R's Response does not dispute paragraphs 1-5, 8, 10, 13, 15-16, 20-21 of the Neighborhood Defendants' "Undisputed Material Facts" ("UMF") [ECF 82, p. 7-9]. Each of those facts may now be deemed admitted. Fed. R. Civ. P. 56(e)(2).

2. R&R does not dispute that "[b]etween November 2018 and May 31, 2019, Rock & Rail **manufactured** more than 67,570 cubic yards of concrete using the Facility's concrete

batch plant” and that all of this concrete was sold directly to R&R’s parent company, non-railroad Martin Marietta. [ECF 80, UMF 21 (emphasis added).] Moreover, R&R concedes that: (i) the \$5.5 million batch plant is used for the “production” of concrete; (ii) the batch plant is capable of producing 288 cubic yards of concrete per hour and has the ability to produce hundreds (if not thousands) of custom types of concrete; and (iii) all of the Facility’s other industrial operations do not “support any rail delivery or unloading operations.” [ECF 80, UMF Nos. 2, 3, 8, 15, 20.]

3. R&R disputes UMF 6 by arguing that the Facility is *now* exempt from County law. [ECF 82, at 7.] But this claim is non-responsive to UMF 6, which states that following the Court of Appeals’ decision, the Martin Marietta-owned Facility was illegal under County zoning law.

4. R&R objects to the characterization in UMF 9 that the rail unloading operations are “physically separate” from the concrete manufacturing operations at the Facility. [ECF 82, at 7.] But R&R does not object to Ex. A-11, which demonstrates the physical separation of the rail unloading operations (in the southeast) and concrete batch plant operations (in the northwest). Moreover, R&R cannot dispute that its own employees testified that rail-delivered aggregate used in concrete production is piled and stored before it is then loaded into trucks and transported across the Facility used to make concrete. [ECF 80, 5-6, Exs. A-12 & A-13.]

5. R&R broadly objects to UMF 11 but still concedes that storage of rail-delivered aggregate is dependent on the “weather, season, and demand” for concrete (*i.e.*, not the demand for aggregate). [ECF 82, at 7-8.] R&R also concedes that all of the rail-delivered aggregate is first loaded into haul trucks<sup>1</sup> and “[t]here is nothing about this aggregate or the rail deliveries that

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<sup>1</sup> R&R’s Response suggests for the first time that this *might* change in the future because, according to a newly produced affidavit, the Facility “is designed to include a second conveyor system that will weigh and move aggregate directly from an arriving train to stockpiles at the batching

are made to the Facility that require that the raw aggregate be kept onsite and processed through the batch plant rather than being hauled offsite by truck . . . . Indeed, nothing about the aggregate changes during rail transit prior to its delivery to the Facility.” [ECF 80, at 6.]

6. As to UMF Nos. 12 and 18, R&R confirms that the Facility will continue to manufacture “special mix design” concrete which does not use any rail-delivered ingredients. [ECF 82, at 8.] R&R does not deny that “50 percent of the ingredients used to manufacture concrete at the Facility arrive at the Facility by truck (and not by train)” and that “Rock & Rail produces concrete based on the needs of its customers and stockpiles aggregate so that it can manufacture concrete on days when it is not receiving aggregate by train.” [ECF 80, at 9.]

7. R&R objects to the “inference” in UMF 14 but does not dispute that all of the Facility’s ready-mix employees previously worked for Martin Marietta and that all of Martin Marietta’s Northern Colorado batch plants are supplied by truck-delivered aggregate. [*Compare* ECF 80, at 7, *with* ECF 82, at 8.]

8. With respect to UMF 17, R&R admits that the Facility will continue to manufacture “special mix design” concrete which does not use any rail-delivered materials. [ECF 82, at 8.] R&R also does not dispute that “[o]f the materials used to make concrete (aggregate, sand, river rock, pea gravel, fly ash, cement, additives, and water), only [some of] the aggregate arrives at the Facility by rail.” [ECF 80, at 8-9.]

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equipment.” [ECF 82, at 3.] This self-serving testimony is contradicted by R&R’s own site plan (Depo. Ex. 52 (attached as **Ex. 1-A**)) and should be disregarded as an attempt to create a sham issue of fact. *See Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir. 1986). Moreover, self-serving speculation about what R&R *might* do in the future is insufficient to create a genuine issue of material fact and should be ignored. *Chung v. El Paso Sch. Dist. #11*, No. 14-CV-01520-KLM, 2015 WL 4456204, at \*3 (D. Colo. July 21, 2015).

9. R&R’s objection to UMF 19 is premised on its newly unearthed claim<sup>2</sup> that the Facility’s concrete manufacturing process is not completed until the mix produced by the Facility’s concrete batch plant undergoes additional mixing in Martin Marietta’s ready-mix concrete trucks. [*Id.* at 5.] However, R&R confirms that the concrete batch plant makes a new product (“concrete mix” [*see id.* at 5-6, 8, 17]) and that the manufacturing of concrete begins at the Facility when water is added to cement either in the concrete batch plant (in the case of so-called “shrink-mix” concrete) or in a ready-mix truck at the Facility (in the case of so-called “truck-mixed” concrete<sup>3</sup>) before the loaded ready-mix trucks then proceed to the Facility’s quality control area (*i.e.*, slump test pit). [*See id.* at 5.] R&R’s own employees have testified that once water is added to a batch of concrete, the process of manufacturing concrete cannot be undone:

Q: Once you add all the ingredients together, including water, you’re going to end up with concrete one way or another?

A: Yes. Sure hope so.

Q: Is there any way to take the water out of the mix?

A: No.

Q: Can you reverse the process once it’s started?

A: No.

(Excerpts of Dec. 19, 2019 Depo. of D. Ensrud, at 62:13-64:16 (attached as **Ex. 1-C**); *see also*

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<sup>2</sup> The primary focus of R&R’s Response is the newly disclosed testimony of David Hagerman regarding concrete manufacturing, including a detailed discussion of the “series of chemical reactions” underlying this manufacturing process. [ECF 82, Ex. 1, at 3-4.] To the extent that Mr. Hagerman’s testimony goes beyond the ken of the typical juror, his claims must be ignored as undisclosed, inadmissible expert testimony. *Ulibarri v. City & County of Denver*, 742 F. Supp. 2d 1192, 1210 (D. Colo. 2010). During discovery, R&R’s counsel confirmed that “few people are” experts in the chemistry of making concrete. (Excerpts of Depo. of M. Allen, at 87:12-88:1 (attached as **Ex. 1-B**.) R&R never disclosed Mr. Hagerman under Rule 26(a)(2) (or even under Rule 26(a)(1) for that matter), and his proffered expert opinions must therefore be ignored.

<sup>3</sup> ASTM C94 confirms that even in the case of “truck-mixed concrete,” “[t]he start of mixing shall be when all the materials have been loaded in the mixer”—in other words, while the truck is still at the Facility. [ECF 82, Ex. 4, § 12.5.]

Excerpts of Dec. 12, 2019 Depo. of M. Carmona, at 27:1-29:20 (attached as **Ex. 1-D**.) Bad batches of concrete are immediately dumped on the ground at the Facility, where they harden into concrete for clean-up and further processing by R&R employees. (Ex. 1-C, at 67:11-70:10.)

10. ASTM C94 (Ex. 4 to R&R's Response) confirms that R&R is a "manufacturer" who "produces ready-mix concrete." [ECF 82, Ex. 4, § 1.2.]

11. R&R does not dispute that its own putative expert—a lawyer with more than four decades of experience with and/or before the ICC and the STB—cannot identify a single instance where a concrete batch plant fell within the scope of ICCTA preemption. [ECF 80, at 16-17.]<sup>4</sup>

### **ARGUMENT**

1. It Is Undisputed that R&R's Concrete Batch Plant Manufactures a New Product Which Is Not Integrally Related to Rail Transportation.

The Tenth Circuit has confirmed that "transportation" under the ICCTA "does not encompass everything touching on railroads" and only precludes "state or local regulation of matters directly regulated by the [STB]." *Emerson v. Kan. City S. Ry. Co.*, 503 F.3d 1126, 1129-30 (10th Cir. 2007). Consistent with this rationale, the STB has long held that "manufacturing activities and facilities not integrally related to the provision of interstate rail service are not subject to [the STB's] jurisdiction or subject to federal preemption." *Borough of Riverdale—Petition for Declaratory Order—The New York Susquehanna & W. Ry. Corp.*, STB No. 33466, 1999 WL

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<sup>4</sup> Given the undisputed nature of R&R's concrete manufacturing operation, the Neighborhood Defendants' Motion does not rely upon expert testimony. Nevertheless, R&R's Response cherry-picks snippets from the deposition of Michael Allen to suggest that he agrees with R&R's claim that the concrete batch plant is somehow part of "the Facility's transloading process." [ECF 82, at 4-5.] During his deposition, Mr. Allen repeatedly rejected this suggestion: "[The ingredients of concrete] could certainly be loaded into the truck. However, you have just created a new product which has nothing to do with the rail transportation." (Ex. 1-B, at 92:15-22; *see also id.* at 106:01-107:20, 114:11-19.)

715272, at \*7 (Sept. 9, 1999); *see also New England Transrail, LLC, d/b/a Wilmington & Woburn Terminal Railway—Construction, Acquisition and Operation Exemption—In Wilmington and Woburn, MA*, STB No. 34797, 2007 WL 1989841, at \*6 (June 29, 2007) (shredding debris not covered by ICCTA preemption because “manufacturing and commercial transactions that occur on property owned by a railroad that are not part of or integral to the provision of rail service are not embraced within the term ‘transportation’”); *Town of Milford, MA – Petition for Declaratory Order*, STB No. 34444, 2004 WL 1802301, at \*2 (Aug. 11, 2004) (no STB jurisdiction over “steel fabrication activities” including cutting and welding of rail-delivered steel).

Without addressing any of this directly applicable jurisprudence, R&R argues that the First Circuit’s *Del Grosso* decisions did not limit ICCTA preemption to only activities necessary for rail transportation. But this narrow reading is itself directly contradicted by *Del Grosso I*, which expressly acknowledges that ICCTA preemption did not extend to the shredding of debris in *New England Transrail* because shredding “was **not necessary** to load the debris into railcars.” 804 F.3d at 119 (emphasis added). Thus, *Del Grosso I* draws a sharp distinction between shredding and the packaging activities that were found to fall within ICCTA preemption in *New England Transrail* because “baling and wrapping was **necessary** to transload the waste from trucks to railcars.” *Id.* at 120. *Del Grosso I* specifically rejected the underlying STB decision because it only considered the purported “cost efficiency” created by shredding and failed to relate this non-rail activity to the physical movement of passengers or property by rail. *Id.* at 119.<sup>5</sup>

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<sup>5</sup> Following remand, *Del Grosso II* expressly noted that there was evidence that the contested activities were “absolutely essential to the physical transfer of the pellets from rail-hopper cars to the trucks provided by distributors.” 898 F.3d at 145. While the *Del Grosso II* decision does not speak strictly in terms of what is and is not “necessary” for rail transportation, the sum and substance of *Del Grosso II* is that screening, vacuuming, repelletizing, bagging, palletizing, and

R&R’s entire defense, therefore, hinges on characterizing the Facility’s \$5.5 million concrete batch plant as nothing more than a “loading process.” [ECF 82, at 14.] Despite this novel characterization, it is undisputed that R&R uses the Facility to create new products—first “concrete mix” and then concrete—completely independent of any rail deliveries to the Facility. R&R’s Response confirms that the concrete batch plant has and will continue to manufacture concrete using aggregate that is delivered to the site by truck and then combined with other ingredients which are also brought to the site by truck. Even when R&R uses rail-delivered aggregate to make concrete, that aggregate is: (1) first loaded into haul trucks and moved across the site; (2) combined with other truck-delivered ingredients to make concrete mix; and (3) subject to a chemical reaction whereby water and cement irreversibly form a bonding agent that results in a new product. Train to truck transloading of aggregate is *always* completed before some rail-delivered aggregate is moved to supply the concrete batch plant. The rail-delivered aggregate that does not supply the batch plant is loaded into the same haul trucks and immediately removed from the Facility to supply other Martin Marietta concrete batch plants.<sup>6</sup>

R&R argues that the concrete batch plant does not engage in manufacturing because the process of making concrete is not completed until further mixing occurs in ready-mix trucks.

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shrink-wrapping pellets “facilitated” rail transportation because bulk delivery of wood pellets by rail is impossible without those non-manufacturing activities at the delivery point. *See id.*

<sup>6</sup> Contrary to R&R’s claim, the Neighborhood Defendants are not advocating for a “one-move” rule. [ECF 82, at 16.] Rather, the fact that every piece of un-processed aggregate is loaded into a haul truck before it is either removed from the Facility or moved to supply the batch plant underscores the reality that the batch plant does not support any of the rail transportation operations at the Facility. Before any aggregate reaches the batch plant, it has already been loaded into a truck that is capable of (and quite often does) remove rail-delivered aggregate off of the site. Unlike the distributors in *Del Grosso II*, *see* 898 F.3d at 148, R&R’s only customer (Martin Marietta) can and does receive un-processed aggregate that is trucked out of the Facility.

Tellingly, R&R does not provide any legal support for its suggestion that non-rail manufacturing does not occur until the creation of a new product is completed. Moreover, such a claim ignores the testimony of R&R's employees which confirms that once water is added to cement at the Facility, a chemical reaction is triggered which will irreversibly result in concrete. R&R claims that "[t]he Facility's batching equipment no more 'makes' concrete than pouring flour, milk, sugar, and eggs into a bowl 'makes' a cookie." But even under that analogy, the concrete batch plant has already made a new product (cookie dough), and like the eggs in cookie dough, it is impossible to remove the aggregate once it has been combined with cement and water to make concrete. In fact, once the newly created concrete mix is combined with water at the Facility, the more apt analogy is that of placing cookie dough into a hot oven: once you close the oven door, the irreversible process of baking cookies has been set in motion. Notwithstanding R&R's creative spin on the undisputed evidence, the \$5.5 million concrete batch plant is used to manufacture concrete—as confirmed by Martin Marietta [ECF 80, at 4, 8], CDPHE [*id.*, Ex. A-18], ASTM [ECF 82, Ex. 4], and R&R itself [*see* ECF 80, UMF 21].

R&R seeks to escape this unavoidable conclusion by pivoting to an alternative theory that the concrete batch plant is merely used to "load" aggregate into ready-mix trucks. In so doing, however, R&R ignores that this "loading" activity involves much more than loading. It is undisputed that aggregate is only loaded into ready-mix trucks *after* it is mixed with truck-delivered sand, river rock, pea gravel, fly ash, cement, and/or additives. In total, these non-aggregate products account for 50 percent of what R&R loads into ready-mix trucks. R&R also fails to explain why such "loading" activity necessarily involves the addition of water (either in the batch plant or in the trucks at the Facility) to trigger a chemical reaction, which sets in motion



the irreversible process of manufacturing concrete.

In an effort to obscure what the concrete batch plant actually does, R&R suggests that because the concrete batch plant is used in the process of loading ready-mix trucks (full of concrete mix or concrete—not aggregate), “there is no need to otherwise justify its use.” [ECF 82, at 15.] But this reasoning is completely circular. The *only* reason for loading aggregate into a ready-mix truck is if the aggregate has first been combined with other ingredients to start the process of making concrete. Contrary to R&R’s unsupported claim, this is not “incidental processing.” [ECF 82, at 12.] This is a specialized industrial process operated by experienced non-rail employees that is intended to manufacture hundreds (if not thousands) of types of concrete.

Even under R&R’s narrow reading of the *Del Grosso* cases, the Response fails to articulate how the operation of an industrial concrete batch plant “facilitates” the transportation of aggregate by rail. Instead, R&R’s arguments have much more in common with the slippery slope that the Tenth Circuit expressly warned against in *Emerson*. See *Emerson*, 503 F.3d at 1132 (“If the ICCTA preempts a claim stemming from improperly dumped railroad ties, it is not a stretch to say that the Railroad could dispose of a dilapidated engine in the middle of Main Street—a cheap way to be rid of an unwanted rail car. After all, in this hypothetical, as in this case, the Railroad is merely disposing of unneeded railroad equipment in a cost-conscious fashion.”). It is undoubtedly more cost-effective for R&R to manufacture concrete at the Facility. But under the ICCTA, this rationale is insufficient to preempt local zoning law.

2. Because ICCTA Preemption Does Not Apply to Manufacturing, This Court Can and Should Confirm the Rights of the Parties and Enjoin R&R’s Unlawful Activities.

R&R contends that even if the Court determines that the concrete batch plant is beyond the scope of ICCTA preemption, this Court is powerless to declare the concrete batch plant illegal

under local zoning law. This argument ignores the fact that the entirety of the Facility was previously determined to be unlawful under local zoning law by the Colorado Court of Appeals. [ECF 80, Ex. A-6.] Weld County has similarly confirmed that if ICCTA preemption does not apply, the concrete batch plant is illegal under the Facility’s agricultural zoning. [ECF 80, Ex. A-7, at 165:4-8.] The Neighborhood Defendants’ first counterclaim expressly asks this Court to declare that the Facility’s non-rail improvements are not subject to ICCTA preemption *and* therefore that “Rock & Rail’s non-rail improvements are in violation of state and local law.” [ECF 16, at 21-22.] Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 empower this Court to “declare the rights and other legal relations” of the parties. Here, the Colorado Court of Appeals and Weld County have both confirmed that if ICCTA preemption does not apply, the concrete batch plant violates Weld County zoning law. Accordingly, if the Court determines that ICCTA preemption does not apply, the Court can and should prohibit R&R’s ongoing unlawful industrial operations.

Respectfully submitted this 13th day of March 2020.


s/Mark E. Lacis  
 Mark E. Lacis ([mlacis@irelandstapleton.com](mailto:mlacis@irelandstapleton.com))  
 James R. Silvestro ([jsilvestro@irelandstapleton.com](mailto:jsilvestro@irelandstapleton.com))  
 IRELAND STAPLETON PRYOR & PASCOE, PC  
 717 17<sup>th</sup> Street, Denver, CO 80202, Suite 2800  
 Telephone: (303) 628-3622

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of March, 2020, I electronically filed the foregoing Reply with the Clerk of Court using the CM/ECF system which will send notification to:

Brian J. Connolly ([bconnolly@ottenjohnson.com](mailto:bconnolly@ottenjohnson.com))  
 Bill E. Kyriagis ([bkyriagis@ottenjohnson.com](mailto:bkyriagis@ottenjohnson.com))  
 H. Wayne Phears ([Wayne.phears@martinmarietta.com](mailto:Wayne.phears@martinmarietta.com))

/s/ Mark E. Lacis  
 Mark E. Lacis



**TETRA TECH**

1900 South Street, Suite 14  
Longmont, Colorado 80501  
Phone: (303) 772-5282 Fax: (303) 772-7039  
www.tetrattech.com

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Project No.: 133-24097-10002  
Designed By: FJM  
Drawn By: LAW  
Checked By: PTH

MARK DATE DESCRIPTION  
1 1/2016 FINAL

MARTIN MARIETTA  
DEVELOPMENT  
BUILDING PERMIT

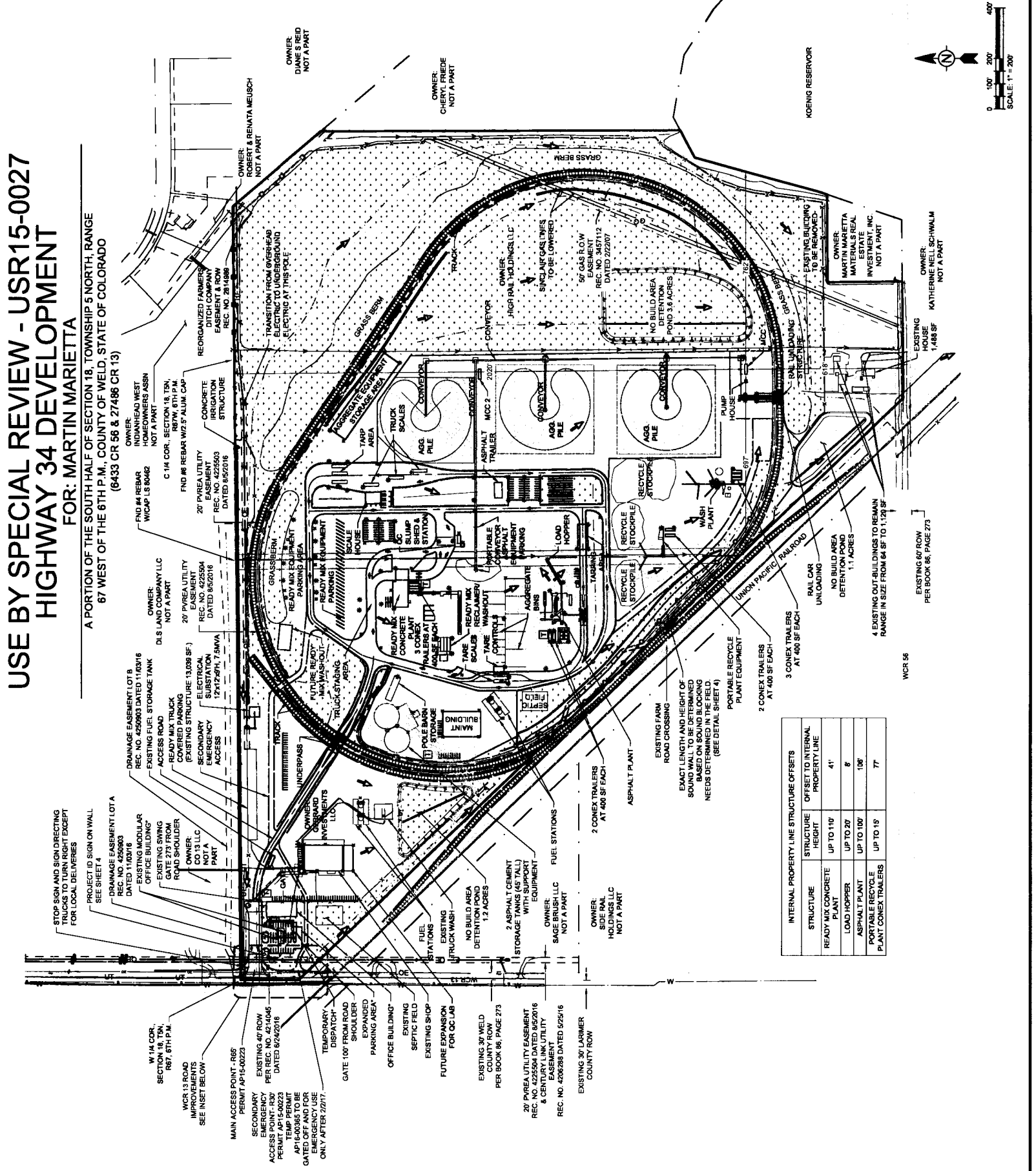
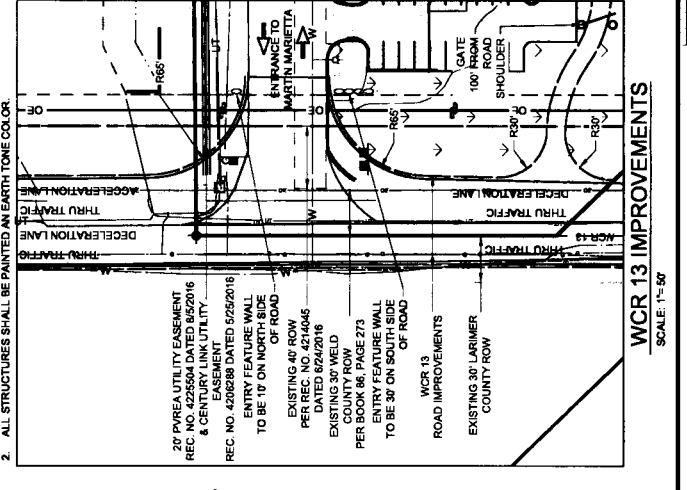
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**LEGEND:**

- EXISTING OVERHEAD ELECTRIC
- EXISTING UNDERGROUND TELEPHONE
- EXISTING CONTOURS (1" INT.)
- EXISTING GAS PIPELINE
- EXISTING UNDERGROUND ELECTRIC
- EXISTING RIGHT-OF-WAY LINE
- EXISTING WATER LINE
- EXISTING PARCEL
- EXISTING FENCE
- EXISTING FENCE TO BE REMOVED
- PROPOSED BLACK CHAIN LINK FENCE
- PROPOSED OVERHEAD ELECTRIC LINE
- PROPOSED UNDERGROUND ELECTRIC LINE
- PROPOSED DECORATIVE WALL (80' LONG MINIMUM)
- PROPOSED SOUND WALL
- ENTRY FEATURE WALL
- USR BOUNDARY
- PROPOSED DRAINAGE SWALE
- SECTION LINE
- EXISTING ASPHALT
- EXISTING RAILROAD TRACK
- PROPOSED RAILROAD TRACK
- PROPOSED PAVEMENT
- GRASS
- PROPOSED GRAVEL ROAD
- PROPOSED GRAVEL AREA
- OPERATIONAL LIGHT FIXTURE
- SECURITY LIGHT FIXTURE
- POWER POLE
- TRAFFIC CIRCULATION ARROW
- TRASH ENCLOSURE
- DRAINAGE FLOW

**NOTES:**

- \* THE EXISTING MODULAR OFFICE BUILDINGS AND TEMPORARY DISPATCH TO BE REMOVED UPON CONSTRUCTION OF THE NEW OFFICE BUILDING AND EXPANDED PARKING LOT.
- ALL STRUCTURES SHALL BE PAINTED AN EARTH TONE COLOR.



**EXHIBIT 1-A**  
18-CV-02453-RBJ

August 11, 2019  
AGRIEN BLANDO REPORTING  
12-11-19

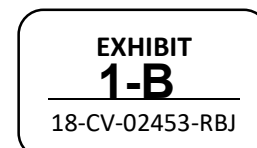
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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

ROCK & RAIL, LLC, a : CIVIL ACTION NO.  
Colorado limited liability 1:18-cv-02453-RBJ  
company, :  
Plaintiff/Counterclaim  
Defendant, :  
  
v. :  
MOTHERLOVE HERBAL COMPANY, :  
a Colorado corporation, :  
INDIANHEAD WEST HOMEOWNER'S :  
ASSOCIATION, INC., a :  
Colorado nonprofit :  
corporation, ROCKIN S RANCH :  
LLC, a Colorado limited :  
company, JOHN CUMMINGS, :  
an individual, DAVID :  
KISKER, an individual, :  
WOLFGANG DIRKS, an :  
individual, and JAMES :  
PIRAINO, an individual, :  
Defendants/Counterclaim :  
Plaintiffs. :

Tuesday, January 21, 2020

Washington, D.C.



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PROCEEDINGS

(Exhibit 91, Expert report of Michael E. Allen, was marked for identification.)

(Exhibit 92, Expert report of Michael E. Allen, was marked for identification.)

\*\*\*\*\*

MICHAEL EDWIN ALLEN,

having been called as a witness on behalf of the Defendant/Counterclaim Plaintiff Rock & Rail and having been first duly affirmed, was examined and testified as follows:

EXAMINATION BY

MR. PHEARS:

MR. PHEARS: This will be the deposition of Michael Allen taken for purposes of discovery and all other purposes allowed by law.

Q. Would you state your name for the record, please?

A. Michael Edwin Allen.

1 Q. The one marked -- well, it says  
2 "Exhibit C" in the lower right-hand corner.

3 A. Yes.

4 Q. That looks like it was taken from  
5 the air, doesn't it?

6 A. Or possibly helicopter.

7 Q. Your report appears to draw a  
8 distinction based on the fact that only some of the  
9 materials used in making concrete are delivered to  
10 the site by rail. Is that a fair statement?

11 A. Yes.

12 Q. And tell me what you -- what your  
13 knowledge is of concrete plant operations.

14 A. I am not an expert in the chemistry  
15 of manufacturing of concrete.

16 Q. Few people are. I once had an  
17 expert in concrete tell me that -- I asked him  
18 something about how many different ways concrete  
19 could crack, and he said, "How long do you have for  
20 me to tell you," and I said, "I got all day," and  
21 he said, "Let's take that." That's my war story.  
22 I will say for the day because I'm sure there will

1 be others.

2 Do you remember the question?

3 A. Yes. What I know about the  
4 operation of a concrete plant is first you need the  
5 raw materials which are the cement itself, and  
6 that's where I break down on knowing the precise  
7 chemistry. But that is a reactive material which  
8 will react to moisture.

9 Then you have various other fillers,  
10 components that are put in there: sand, gravel,  
11 larger aggregate, fly ash. Sometimes it's a  
12 filler, broken glass, you name it, depending on  
13 what the concrete is going to be used for.

14 Q. Isn't it true that the precise  
15 ingredients will vary depending on the mix design?

16 A. Yes.

17 Q. And the basic mix for concrete is  
18 fine aggregate -- sand -- coarse aggregate, a  
19 cementitious material and water?

20 A. My non-chemist's lay understanding,  
21 yes.

22 Q. And your report seems to say that

1 of truck that it could be loaded into?

2 A. Could you clarify, do you mean limit  
3 by size or by type?

4 Q. Type.

5 A. No.

6 Q. Do you know what transit mix is?

7 A. Yes.

8 Q. What is it?

9 A. Transit mix is concrete where the  
10 components have been loaded into a truck, including  
11 the water, and mixed in. Usually in a big  
12 conical-shaped drum on the back of the truck.

13 Q. Like we've all seen on the road?

14 A. Yes.

15 Q. Is there any reason a transload  
16 operation could not be used to put all the  
17 ingredients into a transit mix truck and send it  
18 out the door?

19 A. They could certainly be loaded into  
20 the truck. However, you have just created a new  
21 product, which has nothing to do with the rail  
22 transportation.



1 Q. Can you understand why a company  
2 might want as a part of its business plan to bring  
3 coarse aggregate and other materials on site and  
4 make concrete, why a railroad might want to do  
5 that?

6 A. I can understand why a company might  
7 want to be doing something that would legally make  
8 it a profit, yes.

9 Q. And do you understand that the  
10 coarse aggregate and the fine aggregate are  
11 relatively low value for common products?

12 A. Yes.

13 Q. Does that impact the feasibility of  
14 shipping them?

15 A. Absolutely.

16 Q. And do you understand that combined  
17 into a mix for concrete they're a higher value  
18 product?

19 A. Yes.

20 Q. Can you understand then that a  
21 railroad might find it desirable to have those  
22 products mixed into a higher value product?

1 A. Yes.

2 Q. And is that a desire that ICCTA  
3 takes into account?

4 A. I don't believe so.

5 Q. Why not?

6 A. Because that mixture into the higher  
7 value product is no longer rail transportation.  
8 That is a different line of business.

9 Q. But that's just the conclusion,  
10 isn't it? That's not how you get there?

11 A. That is my conclusion, yes.

12 Q. So how do you get there? If ICCTA  
13 would like to see railroads more competitive by  
14 enabling them to mix materials to make a higher  
15 value product, why shouldn't ICCTA apply?

16 MR. SILVESTRO: Object to the  
17 form.

18 A. Again, because ICCTA applies to  
19 railroad transportation. It doesn't apply to other  
20 forms of business.

21 Q. If you learn that there were other  
22 railroads that operated concrete plants on their

1 seen anything indicating that it expands beyond the  
2 basic core.

3 Q. Well, certainly the evolution to  
4 transloading is one of the ways that operations has  
5 evolved; correct?

6 A. Yes.

7 MR. PHEARS: Let's take a short  
8 break.

9 (Recess)

10 BY MR. PHEARS:

11 Q. So if a train pulls up next to the  
12 batch plant and it conveys aggregate cement  
13 directly into the batch plant and the batch plant  
14 drops it into a truck, would you agree with me that  
15 that's a transloading operation?

16 A. No.

17 Q. Why not?

18 A. The batch plant is manufacturing the  
19 product out of materials that were delivered to it.

20 Q. Let me take the phrase "batch plant"  
21 out, and let's suppose it conveys it up into the  
22 hoppers. A mixture truck, drum truck pulls up

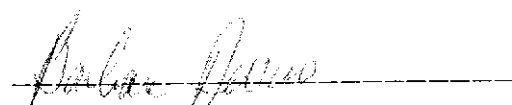
1 DISTRICT OF COLUMBIA: SS

2 I, Barbara Moore, a Registered Court Reporter  
3 of the District of Columbia, do hereby certify that  
4 these proceedings took place before me at the time  
5 and place herein set out, and the proceedings were  
6 recorded stenographically by me and this transcript  
7 is a true record of the proceedings.

8  
9 I further certify that I am not of counsel to  
10 any of the parties, nor an employee of counsel nor  
11 related to any of the parties, nor in any way  
12 interested in the outcome of this action.

13  
14 

15  
16 \_\_\_\_\_  
17 BARBARA MOORE, CRR, RMR

18  
19  \_\_\_\_\_

20 My Commission Expires:

21 July 31, 2023

22

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:18-cv-02453-RBJ

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DEPOSITION OF DANIEL ENSRUD

December 19, 2019

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ROCK & RAIL, LLC, a Colorado limited liability  
company,

Plaintiff/Counterclaim Defendant,

v.

MOTHERLOVE HERBAL COMPANY, a Colorado corporation;  
INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a  
Colorado nonprofit corporation; ROCKIN S. RANCH,  
LLC, a Colorado limited liability company; JOHN  
CUMMINGS, an individual; DAVID KISKER, an  
individual; GARY OPLINGER, an individual; WOLFGANG  
DIRKS, an individual; and JAMES PIRAINO, an  
individual,

Defendants/Counterclaim Plaintiffs.

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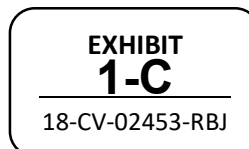
APPEARANCES:

OTTEN, JOHNSON, ROBINSON, NEFF  
& RAGONETTI, P.C.

By Bill E. Kyriagis, Esq.  
950 17th Street, Suite 1600  
Denver, Colorado 80202  
Appearing on behalf of Plaintiff

IRELAND STAPLETON PRYOR & PASCOE, P.C.

By James R. Silvestro, Esq.  
717 17th Street, Suite 2800  
Denver, Colorado 80202  
Appearing on behalf of Defendants



1 P R O C E E D I N G S

2 \* \* \* \*

3 DANIEL ENSRUD,

4 having been first duly sworn to state the truth,

5 testified as follows:

6 EXAMINATION

7 BY MR. SILVESTRO:

8 Q Good morning, Mr. Ensrud.

9 A Morning.

10 Q Could you please state your full name  
11 and spell you last name for the record.

12 A Daniel Ensrud, E-N-S-R-U-D.

13 Q Ensrud?

14 A Ensrud.

15 Q Got it. And what's your date of  
16 birth, Mr. Ensrud?

17 A April 9, 1970.

18 Q What's your home address?

19 A 5100 Ronald Regan Boulevard, Apartment  
20 C-109, Johnstown, Colorado, 80534.

21 Q And where do you work?

22 A I work -- you mean the city? In  
23 Johnstown.

24 Q Well, sort of like what location. Do  
25 you know the address? That would be great.

1 point?

2 A Water, yes.

3 Q That's one of the things that the  
4 computer parcels out?

5 A Yes.

6 Q What's the most difficult part about  
7 making concrete?

8 A I don't know. I don't think there's  
9 anything difficult about it.

10 Q Is that because you've been doing it  
11 for so long?

12 A Yeah.

13 Q Once you add the water to the cement  
14 are you going to end up with concrete?

15 A Not without rocks, not without  
16 aggregate.

17 Q So I guess my point is, there is some  
18 sort of, like, phase change that happens? Whether  
19 it's a chemical reaction, I don't actually know.  
20 But the thing that's taking a pile of ingredients  
21 and turning it into concrete, my understanding is  
22 the water and cement is binding everything together.

23 A Not in my level. It's not until you  
24 pour it on the ground that the chemical reaction  
25 starts, and it starts to harden.

1 Q Why do you say that?

2 A I don't have anything to do with that.

3 I mix it all together. I make all the dry  
4 ingredients wet with water and mix it all up. It  
5 doesn't start a chemical reaction for some time.

6 Q How do you know that?

7 A Because I've been in the business for  
8 a long time. It doesn't start hardening -- I don't  
9 know what it does, to be honest with you. I don't  
10 know what the hell it does.

11 Q That's fair. Do you know why it  
12 doesn't start hardening until --

13 A No, I don't.

14 Q Do you have any special chemistry  
15 knowledge about how all that stuff works?

16 A No.

17 Q So why is that you think it's when  
18 it's put on the ground that the process really  
19 starts to work?

20 A It's not on the ground, it's just a  
21 time thing. It's timed. It doesn't start getting  
22 hard right away. That's all.

23 Q How long does it take?

24 A I don't know. It varies.

25 Q What's the shortest amount of time it



1 can take before it rights gets hard?

2 A Four hours.

3 Q And what's the longest?

4 A Six hours.

5 Q Once you add all the ingredients  
6 together, including water, you're going to end up  
7 with concrete one way or the other?

8 A Yes. Sure hope so.

9 Q Is there any way to take the water out  
10 of the mix?

11 A All of the water, no.

12 Q Can you reverse the process once it's  
13 started?

14 A No.

15 Q Do you ever make a bad batch?

16 A Yes.

17 Q What do you do when you have a bad  
18 batch?

19 A Depends on what's wrong.

20 Q What types of problems do you run  
21 into?

22 A Sometimes we get what's called a  
23 slump, which is how wet the concrete is. Sometimes  
24 we make it too wet. So we will add dry ingredients  
25 into it, leave the water out, dry it up.

1 percentage of the liquid into it, create the  
2 microscopic bubbles, millions and billions and  
3 billions of microscopic bubbles inside the concrete.

4 Q What is the liquid, do you know?

5 A I don't.

6 Q It's not water?

7 A It's not water, no.

8 Q How about high air content?

9 A Most of the time we can get that out  
10 just by revolving the drum longer and slower.

11 Q Do you ever have a batch that can't be  
12 fixed?

13 A Yes.

14 Q What happens then?

15 A We dump it.

16 Q Where is it dumped?

17 A Same place I told you earlier, in the  
18 dump pile out on the south side of the property.

19 Q So it will go into a ready mix truck  
20 and they just drive over there and just dump it?

21 A Uh-huh.

22 Q Can they do it right away, or do they  
23 have to wait a while?

24 A No, they can do it right away.

25 Q It's stiff enough that it, sort of,

1 piles, at least?

2 A We don't dump it in a big pile.

3 Q How do you do it?

4 A We don't want it to get hard in a big  
5 pile. So we just dump it in long rows so we can  
6 break it up the next day when it's hardened.

7 Q And so it just, sort of, spills out on  
8 the ground?

9 A No, it doesn't just spill out on the  
10 ground. We make rows. I mean, you can't see the  
11 visual, right, but we make wind rows of concrete.

12 Q Windrows?

13 A We make rows of concrete so that we  
14 can break them up.

15 Q Sorry, did you say windrows?

16 A Yeah. That's a farmer terminology, I  
17 guess.

18 Q If you're planting carrots, you're  
19 going to end with little undulations in your field.

20 A Yes.

21 Q How often does that happen?

22 A Not very often.

23 Q And what's the process, to break it up  
24 the next day?

25 A Yes.

1 Q What's that process?

2 A Scoop it up with the loader, put it in  
3 piles.

4 Q Is it still sort of brittle?

5 A Yes.

6 Q Is that always in the same place at  
7 the site?

8 A Yes.

9 Q If you flip to page 9 of Exhibit 48,  
10 can you point out where that is on the site?

11 A Right here (indicating).

12 Q Just sort of in front of the recycling  
13 pile?

14 A Where we dump it, yes. Uh-huh.  
15 That's our recycling pile.

16 Q And so there's just dirt ground that  
17 you can make piles on?

18 A Yes.

19 Q Who does that process when you have a  
20 bad batch?

21 A Who does what process?

22 Q Well, each step of it, I guess. So  
23 who lays it out in rows?

24 A The truck driver.

25 Q Does anyone need to help him with

1 that?

2 A No.

3 Q And then who breaks it up and piles it  
4 the next day?

5 A Tim, or whoever was in our loader at  
6 the time, the backup loader --

7 Q Danny does that --

8 A So the loader operator is who does it.

9 Q On your crew?

10 A Yes.

11 MR. SILVESTRO: What time is it?

12 MR. KYRIAGIS: 10:25.

13 MR. SILVESTRO: Let's take a break.

14 (A recess was taken on 10:25 a.m.  
15 until 1:28 a.m.)

16 Q (By Mr. Silvestro) Mr. Ensrud, you  
17 understand you're still under oath?

18 A Yes.

19 Q So you were, sort of, walking through  
20 the process of making concrete at the plant. And I  
21 brought us off into a tangent about bad batches.  
22 But you had all the ingredients weighed up, mixed in  
23 the drum at the plant. Then what happens?

24 A Then I transfer it from my drum into a  
25 ready mix truck.

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CERTIFICATE

STATE OF COLORADO )  
 )ss.  
CITY AND COUNTY OF DENVER )

I, Angela Smith, Professional Reporter and Notary Public for the State of Colorado, do hereby certify that previous to the commencement of the examination, the deponent was duly sworn by me to testify to the truth in relation to the matters in controversy between the said parties.

I further certify that this deposition was taken in shorthand by me at the time and place herein set forth; that it was reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not an attorney nor counsel nor in any way connected with any attorney or counsel for any of the parties to said action or otherwise interested in its event.

IN WITNESS WHEREOF, I hereunto affix my signature this 7th day of January, 2020.

My commission expires January 22, 2023.

\_\_\_\_\_  
Angela Smith, Professional Reporter  
216 - 16th Street, Suite 600  
Denver, Colorado 80202

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:18-cv-02453-RBJ

---

DEPOSITION OF MIGUEL CARMONA

December 12, 2019

---

ROCK & RAIL, LLC, a Colorado limited liability  
company,

Plaintiff/Counterclaim Defendant,

v.

MOTHERLOVE HERBAL COMPANY, a Colorado corporation;  
INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a  
Colorado nonprofit corporation; ROCKIN S. RANCH,  
LLC, a Colorado limited liability company; JOHN  
CUMMINGS, an individual; DAVID KISKER, an  
individual; GARY OPLINGER, an individual; WOLFGANG  
DIRKS, an individual; and JAMES PIRAINO, an  
individual,

Defendants/Counterclaim Plaintiffs.

---

APPEARANCES:

OTTEN, JOHNSON, ROBINSON, NEFF  
& RAGONETTI, P.C.

By Bill E. Kyriagis, Esq.  
950 17th Street, Suite 1600  
Denver, Colorado 80202  
Appearing on behalf of Plaintiff

IRELAND STAPLETON PRYOR & PASCOE, P.C.

By Mark E. Laxis, Esq.  
James R. Silvestro, Esq.  
717 17th Street, Suite 2800  
Denver, Colorado 80202  
Appearing on behalf of Defendants

EXHIBIT  
**1-D**

18-CV-02453-RBJ

P R O C E E D I N G S

\* \* \* \*

MIGUEL CARMONA,

having been first duly sworn to state the whole truth, testified as follows:

EXAMINATION

BY MR. LACIS:

Q Good afternoon.

A Good afternoon.

Q Will you please state and spell your full name for the record, please.

A Miguel Carmona.

Q Can you spell that, please.

A M-I-G-U-E-L C-A-R-M-O-N-A.

Q Mr. Carmona, we just met this afternoon. My name is Mark Lacis. I'm counsel for the Defendants.

What is your date of birth, sir?

A November 3, 1966.

MR. KYRIAGIS: Real quick, Mark, I just want to put this on the record, because I know it won't be requested. English is his second language. I think his English is pretty good, but just for maybe a slightly heightened issue with just understanding certain things.



1 Q Okay. So let's talk about the drum  
2 mix first. When you add water to the cement and to  
3 the aggregate, the sand, the fly ash, how long do  
4 you have before the concrete will harden?

5 A I don't know.

6 Q When you mix a batch of drum mix  
7 concrete, how long do you have until it sets?

8 A Don't know. They're all different.

9 Q Do you have a general understanding of  
10 how long a typical batch of drum mix concrete will  
11 last before it hardens?

12 A Three to four hours, I would say.

13 Q How about truck mix?

14 A The same.

15 Q Same. Is there any difference in the  
16 ingredients between drum mix and truck mix?

17 A No.

18 Q Have you ever had to, essentially,  
19 abort a batch because something went wrong with it?

20 A Yes.

21 Q What would cause something like that  
22 to occur?

23 A Water valve was stuck open,  
24 maintenance breakdown, equipment breakdown.

25 Q What would you do with the ingredients

1 that you've added to the batch at that point in  
2 time? Do you have to throw it out?

3 A Yes.

4 Q You can't reuse the ingredients in  
5 that batch?

6 A No.

7 Q Why is that?

8 A Because they're for that batch that  
9 we're making, not for another batch.

10 Q Once you add water to a batch of  
11 concrete, there's no turning back? You can't undo  
12 that process, because the water starts the binding  
13 with the cement?

14 A Yes.

15 Q Do you know why that is?

16 A No.

17 Q Does adding water cause some sort of  
18 reaction to the cement?

19 A Makes it wetter.

20 Q Fair enough. Do you know the term  
21 "hydraulic cement"?

22 A No.

23 Q Have you ever heard the "portland  
24 cement"?

25 A Yes.

1 Q What is portland cement?

2 A The powder that we get to make  
3 concrete.

4 Q Is there any other type of cement that  
5 you're familiar with?

6 A No.

7 Q Do you know if there's heat generated  
8 when you add water to cement?

9 A Yes. We put hot water now in the  
10 wintertime.

11 Q Is there any heat generated by the  
12 process of mixing the concrete?

13 A Yes. It gets hot.

14 Q And not just from the hot water, but  
15 from the actual process of mixing?

16 A Yes.

17 Q Do you know why that is?

18 A No.

19 Q It just gets hot?

20 A Yes.

21 Q How hot does the concrete mixture get?

22 A I don't know.

23 Q After you've mixed a batch of  
24 concrete, how do you transport that ready mix  
25 concrete?

CERTIFICATE

STATE OF COLORADO )  
 )ss.  
CITY AND COUNTY OF DENVER )

I, Angela Smith, Professional Reporter and Notary Public for the State of Colorado, do hereby certify that previous to the commencement of the examination, the deponent was duly sworn by me to testify to the truth in relation to the matters in controversy between the said parties.

I further certify that this deposition was taken in shorthand by me at the time and place herein set forth; that it was reduced to typewritten form; that the foregoing is a true transcript of the questions asked, testimony given, and proceedings had.

I further certify that I am not an attorney nor counsel nor in any way connected with any attorney or counsel for any of the parties to said action or otherwise interested in its event.

IN WITNESS WHEREOF, I hereunto affix my signature this 30th day of December 2019.

My commission expires January 22, 2023.

---

Angela Smith, Professional Reporter  
216 - 16th Street, Suite 600  
Denver, Colorado 80202