

STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT COURT

FILED
12th JUDICIAL DISTRICT COURT
Lincoln County
1/13/2022 4:39 PM
AUDREY HUKARI
CLERK OF THE COURT
Dakota D Crane

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,

Plaintiffs,

v.

Cause No. D-1226-CV-2021-00261

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,

Defendants.

**PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION
AND MEMORANDUM IN SUPPORT**

Plaintiffs James A. Miller and Sarah L. and Joshua C. Botkin (“Plaintiffs”) move for a preliminary injunction preventing defendants Roper Investments, LLC and Roper Construction, Inc. (collectively “Roper”) from constructing or operating, or taking any future action to obtain regulatory authority to construct and operate, a concrete batch plant on certain lots in Lincoln County, New Mexico, in violation of deed restrictions that burden Roper’s lots and benefit Plaintiffs’ lots.

Introduction

1. Plaintiffs file this Motion for injunctive relief based on defendant Roper’s continued violations of deed restrictions burdening Roper’s real property and benefitting Plaintiffs’ adjoining real property. Pursuant to a uniform deed restriction shared commonly by Plaintiffs and Roper, any use on lots owned by Plaintiffs and Roper is expressly prohibited “which by its nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners.”

2. Despite this prohibition, which runs with and burdens the lots of Roper and Plaintiffs, Roper has filed an application with the New Mexico Environment Department (the “NMED”) seeking to obtain an air quality permit authorizing the construction of a concrete batch plant on lots owned by Roper and burdened by the restriction. The proposed plant, by virtue of its deleterious attributes, including noise, air emissions, increased traffic, and proposed hours of operation, constitutes a nuisance, both objectively and as perceived by Plaintiffs, who are entitled to enforce the restriction.

3. The predecessor owners of the lots currently owned by Plaintiffs and Roper created a permanent restriction burdening and benefitting the real property, and intended, through the language of the restriction, to ensure that the covenant would run with the land, binding all successors who acquired the property. Significantly, Frank Reed and Ellen Bramblett, along with their adult children, Sadie Reed Cartwright and Lance Kuykendall, Plaintiffs’ and Roper’s successors-in-interest, executed deeds among themselves as part of a master plan that expressly provided limitations and restrictions on the use of the properties as follows:

Uses: The property may be used for any Legal Purpose, save and except the following, which shall not be allowed

- A. Salvage, scrap metal, or “junk” operations of any kind.
- B. Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals.
- C. Sexually oriented businesses.
- D. Any use which its nature (whether, noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners.

See Exhibit A, Deed containing restriction for Tract 1 and Tracts 4A-1 and 4B; Exhibit B, Deed containing restriction for Tract 2; Exhibit C, Deed containing restriction for Tract 3; Exhibit D, Deed containing restriction for Tract 4 (collectively “Reed and Bramblett Deeds”).

4. Mr. Reed and Ms. Bramblett, along with their adult children, as grantors, intended the deed restriction to be permanent and to run with the land. As Mr. Reed explains in his affidavit, a concrete batch plant clearly falls within the type of use he and Ms. Bramblett intended to prohibit, based on noise, hours of operation, and other deleterious effects on the quiet and peaceful habitation of adjoining land owners. *See* Reed Affidavit attached as Exhibit E.

5. Subsequent to the conveyances creating the use restrictions, Mr. Reed and Ms. Bramblett conveyed the tracts burdened by the deed restrictions. The current owners of four (4) of those tracts are Plaintiffs and Defendant Roper. Plaintiff James A. Miller acquired Tract 1, Plaintiffs Sarah L. and Joshua C. Botkin acquired Tract 3A, and Defendant Roper acquired Tracts 4A-1 and 4B. The five (5) tracts subject to the deed restriction are described on Exhibits A, B, C, and D. The Reed and Bramblett Deeds contain no mechanism for any subsequent lot owner to unilaterally create variances from or to remove the restrictions, and the restrictions therefore benefit and burden each lot in perpetuity. Consequently, each divided tract remains subject to the restrictions set forth in the Reed and Bramblett Deeds, which, as a matter of law, run with the land.

6. Notably, Roper had actual knowledge of the deed restriction *before* purchasing Tracts 4A-1 and 4B and even sought to unilaterally remove the restriction before closing his purchase. When informed by the title company that the removal could not be accomplished absent the agreement of all lot owners subject to the restriction, Roper replied, “Let’s just go ahead and close.” *See* email chain from Alliance Abstract Title, LLC, attached as Exhibit F.

7. In direct contravention of the deed restriction, Roper has embarked on a scheme designed to abrogate the restriction by seeking an air quality permit authorizing the construction of a concrete batch plant on Tracts 4A-1 and 4B. The concrete batch plant will cause deleterious effects on the quality of life of the Plaintiffs, as adjoining lot owners entitled to the protection of

the restriction, due to numerous adverse factors, including the creation of noise levels that exceed the United States Environmental Protection Agency's ("U.S. EPA's") Human Health Guidelines for Noise Levels and increase the current ambient background noise levels by more than 200%. These deleterious and unhealthy noise levels will be exacerbated by Roper's proposed hours of operations, again in contravention of the deed restriction, which begin at 3:00 a.m. during many months of the year.

8. On December 11 and 12, 2021, SWCA Environmental Consultants ("SWCA") performed a noise assessment to determine the impacts of Roper's proposed concrete batch plant on four (4) nearby noise sensitive areas ("NSA"). The objective of the noise assessment was to measure the existing ambient conditions to characterize the current noise levels at nearby NSAs and to calculate the likely impacts from the proposed concrete batch plant on adjoining properties. *See* Affidavit of Carlos Ituarte-Villareal and SWCA Noise Assessment, attached as Exhibit G, ¶ 5.

9. SWCA obtained ambient noise levels at four (4) monitoring locations: (1) NSA 1, located approximately 458 feet west of the proposed concrete batch plant, on Tract 3A owned by Plaintiffs Sarah and Joshua Botkin; (2) NSA 2, a residence located approximately 3,271 feet to the north-northeast of the proposed project (significantly farther than the distance to Plaintiffs' properties); (3) NSA 3, located approximately 3,623 feet to the east-northeast of the proposed concrete batch plant (significantly farther than the distance to either of Plaintiffs' properties); and (4) NSA 4, located approximately 829 feet to the south of the proposed batch plant (a similar distance from the proposed concrete batch plant to Plaintiff Miller's property). *See* Affidavit of Carlos Ituarte-Villareal and SWCA Noise Assessment, attached as Exhibit G, ¶ 6.

10. The U.S. EPA has developed an index to assess noise impacts from a variety of sources on residential receptors. Currently, the U.S. EPA identifies a level of 55 decibels (“dBA”) outdoors in residential areas as the maximum noise levels to ensure no adverse effects on public health and welfare. Noise levels above the 55 dBA threshold will produce adverse effects on public health and welfare. The U.S. EPA has also developed criteria to estimate an individual’s perception to increases in sound. Based on that criteria, an average person will perceive an increase of 200%, or a doubling, of the existing sound with an increase of 10 dBA from a noise source. *See* Affidavit of Carlos Ituarte-Villareal and SWCA Noise Assessment, attached as Exhibit G, ¶¶ 10, 12.

11. As explained in the Affidavit of Mr. Ituarte-Villarreal of SWCA, attached as Exhibit G, noise levels from concrete batch plants and their associated equipment are cataloged in the FHWA-Construction Noise Handbook – 9.1, RSNM Default Noise Emission Reference Levels and Usage Factors. These noise levels are accepted within the industry and by the U.S. EPA to determine accurate noise impacts from noises at a referenced distance of 50’. The noise levels from a single concrete batch plant assume one operational plant, two concrete mixing trucks, and one front-end loader as potential noise sources. Additionally, the center of the proposed concrete batch plant area is used as the baseline from which distances to and noise levels experienced by the NSAs are measured. Given that noise generating activities will likely be occurring away from the center of the proposed concrete batch plant, all calculated noise impacts are conservative and likely underestimate the actual impacts to adjoining properties. *See* Ituarte-Villarreal Affidavit, Exhibit G, ¶ 9.

12. Based on the use of the customary noise emission reference levels for the proposed concrete batch plant, the SWCA report determined that noise levels at NSA 1 (Plaintiffs Botkins’

property) would increase by 14.6 decibels from 46.0 decibels to equal 60.6 decibels. This results in more than the doubling of perceived noise at the property owned by Plaintiffs Sarah L. and Joshua C. Botkin. Additionally, Plaintiffs will experience a noise level of over 10 decibels greater than 55 dBA, the maximum level at which the U.S. EPA has determined that no adverse effects on public health or welfare will occur. *See* Affidavit of Carlos Ituarte-Villareal and SWCA Noise Assessment, attached as Exhibit G, ¶¶ 11-12.

13. Moreover, even properties significantly more distant from the proposed concrete batch plant than Plaintiffs' properties will experience a significant increase in noise levels. For instance, NSA 2, located approximately 3,271' to the north-northeast of the proposed concrete batch plant, will experience more than a doubling of noise levels from 29.8 dBA to 43.6 dBA. Similarly, NSA 3, located approximately 3,623' to the east-northeast of the proposed concrete batch plant, will experience similar increases of 9.6 dBA. NSA 4, a residence located 829' to the south of the project and farther from the proposed concrete batch plant the lots owned by Plaintiffs, will experience noise levels of 60.7 dBA, again in excess of U.S. EPA maximum levels of 55 dBA to achieve protection of public health and the environment. *See* Affidavit of Carlos Ituarte-Villareal and SWCA Noise Assessment, attached as Exhibit G, ¶¶ 6, 11, 12.

14. The occurrence of these deleterious and harmful noise levels will be exacerbated by Roper's proposed hours of operation. For many months out of the year, Roper's permit application claims an entitlement to operate beginning at 3:00 a.m., using concrete mixing trucks, a front-end loader, and the proposed concrete batch plant itself as noise sources. During the evening hours, ambient background noise levels are significantly lower, and it can be reasonably expected that the adverse impacts will be perceived, at the lots subject to the deed restriction, more than double the current noise levels at these locations.

Standard for Preliminary Injunction

The object of “[a] preliminary injunction is to preserve the *status quo* pending the litigation on the merits. This is quite different from finally determining the cause itself.” *Insure New Mexico, LLC v. McGonigle*, 2000-NMCA-018, ¶ 9, 128 N.M. 611. The *status quo* “is the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing.” *Todd v. RWI Acquisition, LLC*, No. 212-CV-00114 MCAGBW, 2012 WL 12882371, at *6 (D.N.M. June 1, 2012) (citing *Schrier v. University of Colorado*, 427 F.3d 1253, 1260 (10th Cir. 2005)) (non-precedential). In order to obtain a preliminary injunction to preserve the *status quo*, a plaintiff need not prove his or her case, but instead only show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction is not adverse to the public’s interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. See *LaBalbo v. Hymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314.

Injunctive Relief to Enforce Deed Restrictions

When a plaintiff seeks injunctive relief to enforce a restrictive covenant, the “general rule...is that a party need not prove damages” in order to obtain the injunction. *Cafeteria Operators, L.P. v. Coronado-Santa Fe Associates, L.P.*, 1998-NMCA-005, ¶ 18, 124 N.M. 440. This rule is applicable even where a party seeks a *mandatory* injunction, requiring removal of an offending building. *Id.* New Mexico has long followed the rule that “[w]here one enters into a restrictive covenant and then breaches it, he will be enjoined, irrespective of the amount of damage caused by his breach, and even if there appears to be no particular damage.” *Wilcox v. Timberon Protective Ass’n*, 1990-NMCA-137, ¶ 35, 111 N.M. 478 (abrogated on other grounds as stated in *Agua Fria Save the Open Space Ass’n v. Rowe*, 2011-NMCA-054, ¶ 22, 149 N.M. 812). Thus,

“mere breach” is “sufficient grounds for granting an injunction[.]” *Id.* “A servitude may be enforced by any appropriate remedy or combination of remedies, which may include declaratory judgment, compensatory damages, punitive damages, nominal damages, *injunctions*, restitution, and imposition of liens.” *Restatement (Third) of Property (Servitudes)* § 8.3(1) (2000) (emphasis added).

ARGUMENT

I. There is a Substantial Likelihood That Plaintiffs Will Prevail on Their Claims to Enforce the Deed Restriction

Based on controlling law, there is no doubt that Plaintiffs will ultimately prevail on their claims seeking to enforce the deed restriction. By its permanent language, the deed restriction runs with the land and binds all subsequent grantees, including defendant Roper. Second, the disruptive noise and hours of operation proposed by Roper are precisely the type of activities the deed restriction, by its plain language, seeks to prevent. Finally, the assessment conducted by SWCA establishes that the noise levels generated from Roper’s proposed operations will exceed the U.S. EPA’s recommended levels to preserve public health and will cause a more than doubling of the perceived levels from ambient background conditions.

A. As a Matter of Law, the Deed Restrictions Run With the Land.

New Mexico law is well developed that deed restrictions run with the land and bind all subsequent grantees, absent very narrow circumstances which are not present here. Those circumstances include language in the deed evincing an intent that the restrictions terminate after a designated period of time, or where the grantor has reserved the right to except the grantee from the use restriction. However, where the language of the restriction evinces a “permanent nature of the situation to be produced by the performance of the covenant,” restrictions are deemed

permanent and will run with the land. *See Lexpro Corporation v. Snyder Enterprises, Inc.*, 1983-NMSC-073, ¶ 12, 100 N.M. 389 (quoting 5 R. Powell, *The Law of Real Property* ¶ 673[2]).

In the present circumstances, there is no language qualifying the duration of the restriction or creating any exceptions to its imposition on subsequent grantees. To the contrary, the restriction plainly states that “any use which by its nature (whether noise, odor, hours of operation, etc.)” is prohibited that “would be considered a nuisance to adjoining owners.” Moreover, the permanent nature of the restriction is underscored by the fact that the grantors, Mr. Reed and Ms. Bramblett, did not effectuate a transfer of title to the property through the deeds governing Tract 4 and, subsequently to Tracts 1, 4A-1 and 4B. Instead, they executed the deed to themselves, as grantees, for the sole purpose of imposing the restrictions on all of those lots. In addition, the deed containing the restriction burdening Tract 3 was recorded just days before the tract was conveyed to the Botkin plaintiffs. Thus, there is no conceivable reason to have executed these instruments, except to effectuate the grantors’ intention to impose the use restriction in perpetuity.

While this conclusion is self-evident from the language of the deed itself, it is also corroborated by the Affidavit of Mr. Reed, who confirms that the sole purpose of the deed was to impose use restrictions and to maintain peaceful and quiet enjoyment for all subsequent landowners. *See* Affidavit of Frank Reed, Exhibit E. Indeed, the added context provided by Mr. Reed’s testimony makes the permanent nature of the restrictions overwhelming:

Contextual understanding is necessary to construe restrictive covenants in a manner consistent with the intent and expectation of the parties. Thus, extrinsic evidence is admissible to explain or clarify, but not to vary or contradict, a restrictive covenant's terms. To hold otherwise would be to relegate to judicial divination the determinative issues of many ... disputes.

Aqua Fria Save the Open Space Ass’n, 2011-NMCA-054, ¶ 21 (quotations and citation omitted).

Given the language in the Reed and Bramblett Deeds, together with Mr. Reed’s affirmations in his

affidavit, there is no question that the use restriction is permanent in nature, thereby barring any activity which may be considered a nuisance to adjoining owners. As a result, the deed restriction runs with the land and binds all subsequent grantees, including defendant Roper, in perpetuity.

Mr. Reed affirms that the proposed concrete batch plant fits precisely within the type of activity he and Ms. Bramblett intended to prevent. The noise generated by the plant, together with the excessive hours of operation, are plainly the type of deleterious uses the restrictions are designed to prevent. Moreover, in addition to violating the plain language of the restriction, the excessive and harmful noise generated from the proposed concrete batch plant are, in and of themselves, appropriate as commonly recognized bases for the issuance of a preliminary injunction.

B. A Concrete Batch Plant in this Primarily Residential and Rural Locality would be a Nuisance to Adjoining Owners

Excessive and harmful noise, as a non-physical invasion of the right to quiet use and enjoyment, is properly enjoined through a nuisance action. *See Padilla v. Lawrence*, 1984-NMCA-064, ¶ 26, 101 N.M. 556 (“Where there is no physical invasion of property, as with intangible intrusions such as noise and odor, the cause of action is for nuisance rather than for trespass.”). The quantum of noise necessary to successfully sustain a nuisance action is highly dependent on the pre-existing nature of the locality. *See Restatement (2d) Torts § 831 Gravity vs. Utility – Conduct Unsuitable to Locality, Comment B* (“There are suitable and unsuitable places for carrying on all lawful activities and sound public policy demands that people carry them on in suitable places so as to avoid as much of the conflict between incompatible interests as possible.”). This well-known aspect of nuisance law also explains the phrasing used in the restrictions, which prohibits uses which “would be a nuisance to adjoining owners.” Both the deed restrictions and general principles of the tort of nuisance therefore require an examination of whether the noise

created by the proposed concrete plant would be inconsonant with pre-existing land uses in the locality.

In this case, the locality is primarily residential and rural. A map showing the concentration of residential homes in the area is attached as Exhibit H; the exhibit demonstrates that the location of the proposed plant is surrounded by numerous residential homes, a few non-industrial or very light industrial businesses, national forest, and designated wilderness areas. There is no heavy industry within or around the Village of Alto. Moreover, a recently passed Lincoln County Resolution recognizes these facts, stating that “the areas surrounding the proposed site of Roper’s CBP is virtually exclusively residential and is comprised of several organized neighborhood associations...the residential neighborhoods...are scenic, quiet, and peaceful[.]” Exhibit I, Resolution. Finally, the noise study discussed above conclusively demonstrates that the locality is a quiet, residential area – even the areas directly abutting N.M. 220.

The primarily residential and rural nature of the locality renders the proposed concrete batch plant an undeniable nuisance completely unsuited to the locality. Even a slight increase in noise, especially when combined with hours of operation, inconsistent with residential homes constitutes a nuisance in such an area:

A erects and starts to operate a tavern and dancehall on a lakeshore lot in a district solely occupied by summer residences. A runs his establishment at night, but closes before midnight and takes all practicable precautions to prevent rowdyism, unnecessary noise, etc. Nevertheless, the lights and noise from the large number of automobiles coming and going, the laughter, talking and music, and the other unavoidable noises from the establishment, seriously interfere with B, C and D in the quiet enjoyment of their adjacent residences. A's dancehall is unreasonable.

Restatement (2d) Torts § 831 Gravity vs. Utility – Conduct Unsuitable to Locality, Illustration 2.

In this case, the impact of the increased noise levels will be not only unreasonable but will in fact negatively impact the health of the neighboring landowners. The negative impact on human health makes Plaintiffs' claim overwhelming – as shown by the illustration above, nuisances are regularly maintained for far less intrusive increases in ambient noise levels. *See also, Bates v. Quality Ready-Mix Co.*, 154 N.W.2d 852, 857 (Iowa 1967) (“Noises may be of such a character and intensity as to so unreasonably interfere with the comfort and enjoyment of private property as to constitute a nuisance, and, in such cases, injury to health of the complaining party need not be shown.”).

II. An Injunction is Necessary to Avoid Irreparable Harm

Injuries are deemed irreparable if there is no adequate remedy at law; for instance, an injunction is warranted when the movant cannot be adequately compensated by damages, or damages cannot be measured within a certain pecuniary standard. In the current circumstances, the impairment on the quality of life sustained by Plaintiffs renders damages inadequate, particularly because real property interests, deemed unique as a matter of law, will be impaired by Roper's anticipated operations. Accordingly, the character of the interests to be protected militates strongly in favor of injunctive relief. *See Cafeteria Operators, LP v. Coronado-Santa Fe Associates, LP, et al.*, 1998-NMCA-005, ¶ 19, 124 N.M. 440 (particularities related to real property are relevant when considering the character of interests to be protected).

While the deleterious effects on the rights of Plaintiffs to secure and maintain quiet enjoyment of their property interests are sufficient to constitute irreparable harm, such a determination is not necessary to enforce a breach of a restrictive covenant through injunctive relief. New Mexico law provides that, with respect to a covenant or deed restriction, “the mere breach affords sufficient grounds for granting an injunction and is not necessary to prove that the

injury will be irreparable.” *Wilcox*, 1990-NMCA-137, ¶ 35. This result is particularly compelling where the plaintiff seeks relief from an anticipatory nuisance, or seeks forbearance from a prospective breach of a deed restriction or covenant. *See* Restatement (Second) of Contracts § 357[b] (1981) (injunction appropriate that seeks forbearance from a duty that is contrary to an agreement or servitude); *Cafeteria Operators, LP*, 1998-NMCA-005, ¶ 19; *Gonzalez v. Whittaker*, 1982-NMCA-050, ¶ 20, 97 N.M. 710 (noting the propriety of an anticipatory injunction before a nuisance is created); *Cover v. Apex-Albuquerque Phoenix EXP*, 1963-NMSC-051, ¶ 5, 72 N.M. 4 (“... it is well settled that the court in equity may enjoy the threatened or anticipated nuisance, public or private, where it clearly appears that a nuisance will necessarily result in the contemplated act or thing which is sought to enjoin.”) (quoted authority omitted).

In the current circumstances, Plaintiffs seek enforcement of an unambiguous deed restriction through a preliminary injunction, which is the appropriate – and only meaningful – remedy to compel forbearance by Roper and compliance with a deed restriction of which he had actual knowledge prior to acquiring the property. The grantors in this instance, Mr. Reed, Ms. Bramblett and their adult children, clearly intended to secure the peaceful and quiet enjoyment of the divided property in perpetuity. Moreover, an award of damages could not possibly return the parties to the *status quo* and prevent the impairment of quiet enjoyment caused by Roper’s intended hours of operation and the substantial noise generated from the facility. These are precisely the deleterious activities that the deed restrictions are designed to prevent.

Thus, the issue of establishing irreparable harm is largely academic given that Plaintiffs seek an anticipatory injunction, as opposed to removal of an existing concrete batch plant, in order to enforce the plain meaning of the deed restriction. *See Whittaker*, 1982-NMCA-050, ¶ 22 (recognizing propriety of “anticipatory injunction before a nuisance is created”). Notwithstanding

this well-settled legal principle, the irreparable harm to Plaintiffs is easily demonstrated. As established by the SWCA noise assessment, the noise levels created by Roper's impermissible use will be more than double the ambient background levels currently existing at Plaintiffs' property. These levels, clearly a "nuisance to adjoining lot owners," in contravention of the restriction, far exceed U.S. EPA's allowances for noise levels in a domestic and rural setting that are necessary to protect human health. There is no method to compensate Plaintiffs for this loss of quiet use and enjoyment by the nuisance that will be created through defendant Roper's proposed operations. Accordingly, the establishment of irreparable harm – although not necessary to enforce a deed restriction – militates strongly in favor of the issuance of the anticipatory injunction.

III. The Balance of Equities Clearly Favor Plaintiffs, and the Requested Injunction is Not Adverse to the Public Interest

The balance of equities favors issuance of the preliminary injunction in order to prevent an anticipatory nuisance. Defendant Roper has no protectible interest in seeking to abrogate a restrictive covenant which runs with the land. On the contrary, the public interest in enforcing property rights far outweighs Roper's illegitimate interest in seeking to abrogate those rights. *See Aragon v. Brown*, 2003-NMCA-126, ¶ 12, 134 N.M. 459 ("The public policy in New Mexico is to uphold the valuable property right of all the lot owners to establish standards they deem appropriate, the concomitant right of all of the lot owners ... to rely on those standards, and the reciprocal obligation to comply with those standards when one acquires a lot with notice, actual or constructive, of the standards."); *Appel v. Presley Companies*, 1991-NMSC-026, ¶ 4, 111 N.M. 464 ("This court has recognized the importance of enforcing protective covenants where the clear language of the covenants, as well as the surrounding circumstances, indicates an intent to restrict use of land."). Moreover, the illegitimacy and inequity of Roper's actions is underscored by his

actual knowledge of the deed restriction and his ineffectual attempts to remove those restrictions prior to purchasing Tracts 4A-1 and 4B.

Finally, in the context of enforcement of a deed restriction, the public interest is deemed served by that enforcement, without the necessity of balancing the interests of the parties, because citizens have a right to rely on covenants and restriction when purchasing real property. As a result, the restrictions imposed by the Reed and Bramblett deed – for the sole purpose of preventing deleterious uses on the property – should be honored as consistent with the public interest.

WHEREFORE, Plaintiffs respectfully request that the Court issue a preliminary injunction preventing defendant Roper from constructing and operating, or taking any action seeking to construct or operate, the proposed concrete batch plant on Tracts 4A-1 and 4B and that such injunction remain effective until the merits are determined and a permanent injunction issued.

Respectfully submitted,

HINKLE SHANOR LLP

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2022, I caused a true and correct copy of the foregoing *Motion for Preliminary Injunction and Memorandum in Support* to be filed with the Court's electronic filing system, causing notice of the filing to be sent to all counsel of record via electronic mail, as well as a copy sent via email to:

Shelly L. Dalrymple
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/s/ Thomas M. Hnasko

Thomas M. Hnasko

SV FILE 140258-172



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eRecorded

This Correction Special Warranty Deed is being re-recorded to correct an incorrect legal description and in correction of, substitution for and in lieu of that certain Special Warranty Deed filed of record in the Lincoln County Records on July 18, 2019 in Book 2019 at Page 3746 (2 pages).

CORRECTION SPECIAL WARRANTY DEED

FRANK REED and ELLEN BRAMBLETT, husband and wife, as joint tenants, for consideration paid, grant to ROBERT F. REED and ELLEN E. BRAMBLETT, Trustees of the FRANK REED AND ELLEN BRAMBLETT TRUST under Trust Agreement dated July 9, 2019, as may be amended, whose address is 108 Walkabout Loop, Ruidoso, New Mexico 88345, and any successor trustee, the following described real estate in Lincoln County, New Mexico, together with all improvements thereon and all easements appurtenant thereto:

Tract 1, being a tract of land within the NW/4NE/4, lying North of NM 220, Section 27, Township 10 South Range 13 East, N.M.P.M., Lincoln County, New Mexico, as shown by the Boundary Survey Replat Family Claim of Exemption Plat filed for record in the Office of the County Clerk of Lincoln County, New Mexico, May 23, 2012, in Cabinet J, Slide No. 739;

and

REED TRACT 4A-1, within the NW/4 NE/4 of Section 27, Township 10 South, Range 13 East, N.M.P.M., Lincoln County, New Mexico, as shown by the Boundary Survey Replat of Tract 3 and Tract 4A, filed in the office of the County Clerk of Lincoln County, New Mexico, June 25, 2018, in Book C-K, page 266;

and

Tract 4B, within the NW/4 NE/4 of Section 27, Township 10 South, Range 13 East, N.M.P.M., Lincoln County, New Mexico, as shown by the Boundary Survey Replat and Grant of Easement in Tract 3 and Tract 4, filed in the office of the County Clerk of Lincoln County, New Mexico, December 31, 2014, in Book C-J, page 1062;

SUBJECT TO all restrictions, reservations, easements and rights-of-way of record;

EXHIBIT A

AND FURTHER SUBJECT TO the following LIMITATIONS AND RESTRICTIONS:

1. **GENERAL RESTRICTIONS:** All of the property shall be owned, held, encumbered, leased, used, occupied and enjoyed subject to the Declaration and following limitations and restrictions:
2. **USES:** The property may be used for any legal purpose, save and except the following which shall not be allowed:
 - a. Salvage, scrap metal, or "junk" operations of any kind;
 - b. Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals;
 - c. Sexually oriented businesses;
 - d. And other use which, by it's nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners.
3. **IMPROVEMENTS:** All improvements to the property shall be done in a professional and workmanlike manner and any residence on the property shall be constructed on site from the ground up;

with special warranty covenants.

EXECUTED this 30th day of August, 2019.


FRANK REED


ELLEN BRAMBLETT

8/30/2019

4:00:43 PM

STATE OF NEW MEXICO)
COUNTY OF LINCOLN) SS.


This instrument was acknowledged before me on the 30th day of August, 2019 by **FRANK REED** and **ELLEN BRAMBLETT**, husband and wife, as joint tenants.

My Commission Expires:

6/12/2023

After recording, Return to:
Mark W. Taylor & Associates, P.C.
P.O. Box 898
Roswell, NM 83202-0898

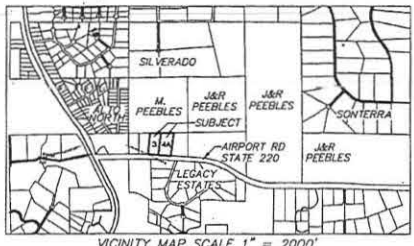
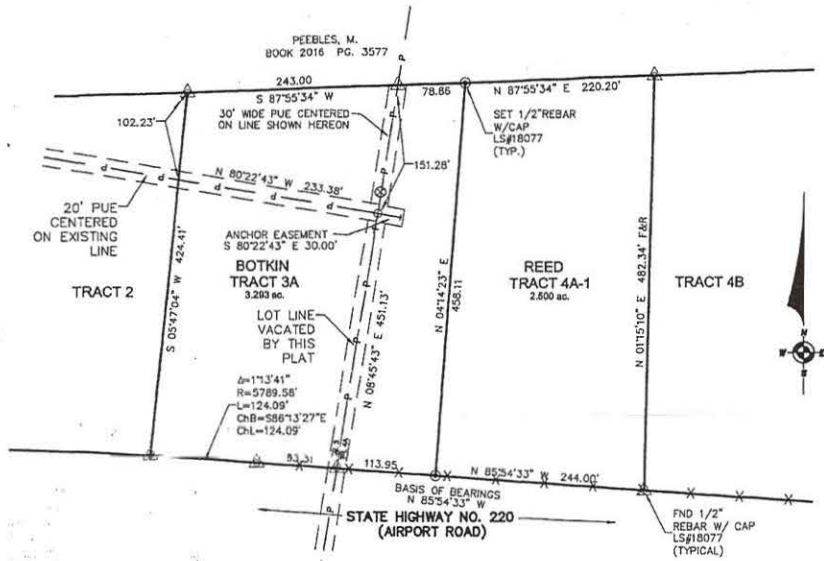



Notary Public
OFFICIAL SEAL
Mike Seelbach

NOTARY PUBLIC-State of New Mexico
My Commission Expires 6/12/2023

W:\Reed, Frank & Bramblett, Ellen.4576\Deed, Lincoln, Tract 1 & 4, Sec 27, T10S, R13E, CORRECTION, Final. wpd

BOUNDARY SURVEY REPLAT
TRACT 3 AND TRACT 4A,
WITHIN THE NW/4 NE/4 OF SECTION 27,
TOWNSHIP 10 SOUTH, RANGE 13 EAST, N.M.P.M.,
LINCOLN COUNTY, NEW MEXICO



FLOOD CERTIFICATE:
 THESE TRACTS ARE LOCATED OUT OF A SPECIAL FLOOD HAZARD AREA, AS SHOWN ON THE LINCOLN COUNTY FEMA FLOOD MAPS DATED NOVEMBER 16, 2011.

APPROVAL BY UTILITY COMPANIES: NOTE: AN EASEMENT IS RESERVED FOR ALL OVERHEAD/UNDERGROUND PUBLIC UTILITIES ON THE LANDS PLATTED HEREON. THIS EASEMENT INCLUDES THE RIGHT OF INGRESS AND EGRESS ACROSS THE OWNER'S PROPERTY CONTAINING THE EASEMENT FOR REPAIR OR REPLACEMENT OF UTILITIES OR APPURTENANCES, THERETO.

	TDS		TITLE	5/2/18	DATE
	WINDSTREAM COMMUNICATIONS		OPT	5/15/18	DATE
	OTERO COUNTY ELECTRIC COOPERATIVE		STAKING SURVEYORS	5/15/18	DATE
	ZIA NATURAL GAS COMPANY		MTR	5/15/2018	DATE

APPROVAL BY LIEN HOLDER OF TRACT 3
 LIEN HOLDER: Marla Romero
 NAME AND TITLE: MARLA ROMERO, A/P
 DATE: 5-17-2018

PUE = PUBLIC UTILITY EASEMENT

D.T. COLLINS & ASSOCIATES P.C.
 SURVEYING, MAPPING
 1042 MECHEM DR. 575-258-5272
 RUIDOSO, LINCOLN COUNTY, NEW MEXICO

SCALE: 1"=100'
 DATE: 04-03-18
 DRAWN BY: EEC
 CHECKED BY: EEC
 JOB NO: 18-625
 SHEET 1 OF 1

SURVEYOR'S CERTIFICATE
 I, ERIC E. COLLINS, NEW MEXICO PROFESSIONAL SURVEYOR NUMBER 18077, DO HEREBY CERTIFY THAT THIS BOUNDARY SURVEY REPLAT AND THE ACTUAL SURVEY ON THE GROUND UPON WHICH IT IS BASED WERE PERFORMED BY ME OR UNDER MY DIRECT SUPERVISION; THAT I AM RESPONSIBLE FOR THIS SURVEY; THAT THIS SURVEY MEETS THE MINIMUM STANDARDS FOR SURVEYING IN NEW MEXICO; AND THAT THIS IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

ERIC E. COLLINS, N.M.P.S. NO. 18077

AFFIDAVIT
 STATE OF NEW MEXICO) SS
 COUNTY OF LINCOLN) SS

KNOW ALL MEN BY THESE PRESENTS THAT FRANK REED, A SINGLE MAN AND ELLEN BRAMBLETT, A SINGLE WOMAN, AS JOINT TENANTS, ARE THE RECORD OWNERS AND PROPRIETORS OF TRACT 4A WITHIN THE NW/4 NE/4 SECTION 27, TOWNSHIP 10 SOUTH, RANGE 13 EAST, N.M.P.M., LINCOLN COUNTY, NEW MEXICO, AS SHOWN BY THE BOUNDARY SURVEY REPLAT FILED IN THE OFFICE OF THE COUNTY CLERK AND EX-OFFICIO RECORDER OF LINCOLN COUNTY, NEW MEXICO ON DECEMBER 31, 2014, IN BOOK C-1, PAGE 1062.

AND THAT JOSHUA C. BOTKIN AND SARAH L. BOTKIN, HUSBAND AND WIFE, AS JOINT TENANTS, ARE THE RECORD OWNERS AND PROPRIETORS OF TRACT 3 WITHIN THE NW/4 NE/4 SECTION 27, TOWNSHIP 10 SOUTH, RANGE 13 EAST, N.M.P.M., LINCOLN COUNTY, NEW MEXICO, AS SHOWN BY THE BOUNDARY SURVEY REPLAT FAMILY CLAIM OF EXEMPTION FILED IN THE OFFICE OF THE COUNTY CLERK AND EX-OFFICIO RECORDER OF LINCOLN COUNTY, NEW MEXICO ON MAY 23, 2012, IN BOOK C-4, PAGE 739.

BY THE FILING OF THIS PLAT SAID OWNERS AND PROPRIETORS DO HEREBY CAUSE SAID TRACTS TO BE REPLATTED AS SHOWN HEREON. THIS PLAT WAS PREPARED WITH THE FREE CONSENT AND IN ACCORDANCE WITH THE DESIRES OF THE UNDERSIGNED OWNERS THEREOF.

CLAIM OF EXEMPTION
 WE, FRANK REED, ELLEN BRAMBLETT, JOSHUA C. BOTKIN AND SARAH L. BOTKIN, CLAIM AN EXEMPTION FROM THE REQUIREMENTS OF THE NEW MEXICO SUBDIVISION ACT AND THE LINCOLN COUNTY, NEW MEXICO, SUBDIVISION REGULATIONS FOR THE FOLLOWING REASON: WE CERTIFY THAT THIS TRANSACTION INVOLVES:

THE DIVISION OF LAND RESULTING ONLY IN THE ALTERATION OF PARCEL BOUNDARIES WHERE PARCELS ARE ALTERED FOR THE PURPOSE OF INCREASING OR REDUCING THE SIZE OF CONTIGUOUS PARCELS AND WHERE THE NUMBER OF PARCELS IS NOT INCREASED.

FRANK REED

ELLEN BRAMBLETT

JOSHUA C. BOTKIN

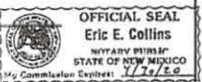
SARAH L. BOTKIN

ACKNOWLEDGMENT
 STATE OF NEW MEXICO) SS
 COUNTY OF LINCOLN) SS

THIS INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 19th DAY OF April, 2018, BY FRANK REED, A SINGLE MAN.

MY COMMISSION EXPIRES: 4/30/20

NOTARY PUBLIC

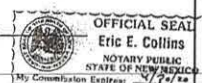


ACKNOWLEDGMENT
 STATE OF NEW MEXICO) SS
 COUNTY OF LINCOLN) SS

THIS INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 17th DAY OF April, 2018, BY ELLEN BRAMBLETT, A SINGLE WOMAN.

MY COMMISSION EXPIRES: 4/30/20

NOTARY PUBLIC

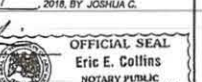


ACKNOWLEDGMENT
 STATE OF NEW MEXICO) SS
 COUNTY OF LINCOLN) SS

THIS INSTRUMENT WAS ACKNOWLEDGED BEFORE ME THIS 25th DAY OF April, 2018, BY JOSHUA C. BOTKIN AND SARAH L. BOTKIN, HUSBAND AND WIFE AS JOINT TENANTS.

MY COMMISSION EXPIRES: 4/30/20

NOTARY PUBLIC



APPROVAL BY LINCOLN COUNTY
 APPROVED BY SUMMARY PROCEDURE BY LINCOLN COUNTY THIS 19th DAY OF JUNE, 2018.

NITA TAYLOR, COUNTY MANAGER

SAMANTHA MENDEZ, PLANNING DIRECTOR

TAX CERTIFICATE
 THE LINCOLN COUNTY ASSESSOR'S OFFICE CERTIFIES THAT TAXES ARE PAID THROUGH THE CURRENT TAXABLE YEAR FOR PARCELS(S) SHOWN ON THIS PLAT.

LINCOLN COUNTY ASSESSOR

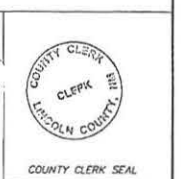
6/19/18
 DATE

INDEXING INFORMATION FOR COUNTY CLERK

REED/BOTKIN	N/A - SEE PLAT
OWNER OF PROPERTY	SUBDIVISION
27	1 10 S
SECTION	R 13 E
	TOWNSHIP
	RANGE
	N.M.P.M.

UPC NUMBERS:
 TRACT 3: 4-072-059-329-027
 TRACT 4A: 4-072-059-357-029

LINCOLN COUNTY-IT
 RECORDS & SUBORDS. CLERK
 201803516
 Book C-4: Page 266
 1 of 3
 04-25-2018 01:30:15 PM



QUITCLAIM DEED

EXHIBIT B

Sadie Reed Cartwright, joined pro-forma by Michael Justin Cartwright, her husband, for consideration paid, quitclaims to Frank Reed, a single man and Ellen Bramblett, a single woman, as joint tenants, whose address is: 136 Corrida De Rio, Alto, New Mexico 88312, the following described real estate in Lincoln County, New Mexico:

Tract 2, being a tract of land within the NW/4NE/4, lying North of NM 220, Section 27, Township 10 South, Range 13 East, N.M.P.M., Lincoln County, New Mexico, as shown by the Boundary Survey Replat Family Claim of Exemption filed for record in the Office of the County Clerk of Lincoln County, New Mexico, May 23, 2012, in Cabinet J. Slide No. 739;

TOGETHER WITH all improvements;

SUBJECT TO easements reservations and restrictions of record;

AND FURTHER SUBJECT TO the following LIMITATIONS AND RESTRICTIONS:

- 1. GENERAL RESTRICTIONS: All of the property shall be owned, held, encumbered, leased, used, occupied and enjoyed subject to the Declaration and following limitations and restrictions:
2. USES: The Property may be used for any Legal Purpose, save and except the following, which shall not be allowed:
A. Salvage, scrap metal, or "junk" operations of any kind;
B. Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals;
C. Sexually oriented businesses;
D. Any other use which, by it's nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners.
3. Improvements: All improvements to the property shall be done in a professional and workmanlike manner and any residence on the property shall be constructed on site from the ground up;

Witness our hand(s) and seals(s) this 21 day of May, 2014.

Sadie Reed Cartwright signature and name

Michael Justin Cartwright signature and name

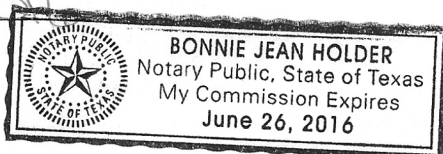
STATE OF TEXAS)
COUNTY OF Tom Green)

This instrument was acknowledged before me this 21 day of May, 2014, by Sadie Reed Cartwright and Michael Justin Cartwright.

My Commission Expires:

06-26-2016

(seal)



Bonnie Jean Holder signature and name, Notary Public, LINCOLN COUNTY, NM stamp

LINCOLN COUNTY-NM
RHONDA B BURROWS, CLERK
201402913
Book 2014 Page 2913
1 of 1
05/27/2014 02:00:38 PM

QUITCLAIM DEED

EXHIBIT C

Lance Kuykendall, joined pro-forma by Laurel Lee Wolters Kuykendall, his wife, for consideration paid, quitclaims to Frank Reed, a single man and Ellen Bramblett, a single woman, as joint tenants, whose address is: 136 Corrida De Rio, Alto, New Mexico 88312, the following described real estate in Lincoln County, New Mexico:

Tract 3, being a tract of land within the NW/4NE/4, lying North of NM 220, Section 27, Township 10 South, Range 13 East, N.M.P.M., Lincoln County, New Mexico, as shown by the Boundary Survey Replat Family Claim of Exemption filed for record in the Office of the County Clerk of Lincoln County, New Mexico, May 23, 2012, in Cabinet J. Slide No. 739;

TOGETHER WITH all improvements;

SUBJECT TO easements reservations and restrictions of record;

AND FURTHER SUBJECT TO the following LIMITATIONS AND RESTRICTIONS:

- 1. GENERAL RESTRICTIONS: All of the property shall be owned, held, encumbered, leased, used, occupied and enjoyed subject to the Declaration and following limitations and restrictions:
2. USES: The Property may be used for any Legal Purpose, save and except the following, which shall not be allowed:
A. Salvage, scrap metal, or "junk" operations of any kind;
B. Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals;
C. Sexually oriented businesses;
D. Any other use which, by it's nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners.
3. Improvements: All improvements to the property shall be done in a professional and workmanlike manner and any residence on the property shall be constructed on site from the ground up;

Witness our hand(s) and seals(s) this 18 day of May, 2014.

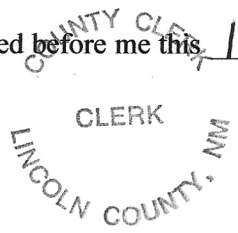
[Signature of Lance Kuykendall]
Lance Kuykendall

[Signature of Laurel Lee Wolters Kuykendall]
Laurel Lee Wolters Kuykendall

STATE OF NEW MEXICO)
)
COUNTY OF LINCOLN)

This instrument was acknowledged before me this 18th day of May, 2014, by Lance Kuykendall and Laurel Lee Wolters Kuykendall.

My Commission Expires:
4/11/2015



[Signature of Tamara L. Bruyere]
Notary Public

(seal)

LINCOLN COUNTY - NM
RHONDA B BURROWS, CLERK
201402914
Book 2014 Page 2914
1 of 1
05/27/2014 02:01:55 PM



EXHIBIT D

QUITCLAIM DEED

Frank Reed, a single man and Ellen Bramblett, a single woman, for consideration paid, quitclaims to Frank Reed, a single man and Ellen Bramblett, a single woman, as joint tenants, whose address is 136 Corrida De Rio, Alto, New Mexico 88312, the following described real estate in Lincoln County, New Mexico:

Tract 4, being a tract of land within the NW/4NE/4, lying North of NM 220, Section 27, Township 10 South, Range 13 East, N M P M, Lincoln County, New Mexico, as shown by the Boundary Survey Keplat Family Claim of Exemption filed for record in the Office of the County Clerk of Lincoln County, New Mexico, May 23, 2012, in Cabinet J, Slide No 739,


TOGETHER WITH all improvements,

SUBJECT TO easements reservations and restrictions of record;

AND FURTHER SUBJECT TO the following LIMITATIONS AND RESTRICTIONS

- 1 **GENERAL RESTRICTIONS.** All of the property shall be owned, held, encumbered, leased, used, occupied and enjoyed subject to the Declaration and following limitations and restrictions.
- 2 **USES.** The Property may be used for any Legal Purpose, save and except the following, which shall not be allowed.
 - A Salvage, scrap metal, or "junk" operations of any kind,
 - B Swine, poultry, or other livestock operations which deal in the commercial feeding, raising or slaughter of animals,
 - C Sexually oriented businesses,
 - D Any other use which, by it's nature (whether noise, odor, hours of operation, etc.) would be a nuisance to adjoining owners
- 3 **Improvements.** All improvements to the property shall be done in a professional and workmanlike manner and any residence on the property shall be constructed on site from the ground up,

Witness our hand(s) and seals(s) this 23RD day of May, 2014.



Frank Reed




Ellen Bramblett

STATE OF NEW MEXICO)
) SS
COUNTY OF LINCOLN)

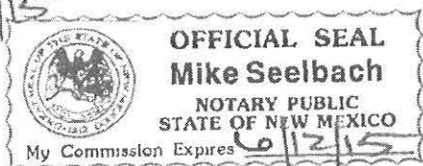
This instrument was acknowledged before me this 23RD day of May, 2014, by Frank Reed and Ellen Bramblett

My Commission Expires 6/12/15



Notary Public

(seal)



LINCOLN COUNTY - NM
RHONDA B BURROHS, CLERK
201402915
Book 2014 Page 2915
1 of 1
05/27/2014 02:02:20 PM

STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT COURT

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,

Plaintiffs,

v.

Cause No. D-1226-CV-2021-00261

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,

Defendants.

AFFIDAVIT OF FRANK REED

STATE OF NEW MEXICO)
) ss.
COUNTY OF LINCOLN)

Frank Reed, being first duly sworn, deposes and states as follows:

1. I am over the age of 18 and am competent to make this Affidavit. The matters set forth are true based on my personal knowledge.
2. During 2011, my wife and I acquired property in Alto, New Mexico. In preparation for dividing the property into five lots to distribute to our children, our family executed deeds which imposed certain restrictions on the use of the property.
3. The purpose of imposing the use restrictions was to mutually benefit and burden the properties in order to protect the owners of the five lots from any future uses which would negatively affect the land, including salvage operations, slaughterhouses, sexually oriented businesses, heavy industrial uses, or any other use which would be noisy or otherwise cause a nuisance to adjoining owners based on hours of operation or other factors.

EXHIBIT E

4. The restrictions were put in place to preserve the rural, residential/light commercial, and scenic character of the neighborhood.

5. We intended these use restrictions to be permanent in nature and that all subsequent owners of the lots would have to abide by them, particularly to assure future prospective purchasers that any of the empty properties would be developed consistent with the existing, residential/light commercial uses of the adjoining properties thereby ensuring a reasonable degree of environmental stability.

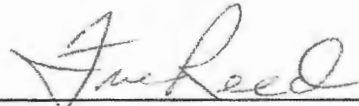
6. To this end, we did not retain the right to abrogate the deed restrictions under any circumstances and in fact subjected our own lot to the deed restrictions prior to selling the property.

7. We understand that Roper Construction, Inc. and Roper Investments, LLC desire to build a concrete batch plant on Tracts 4A-1 and 4B, two of the lots subject to the restrictions. A concrete batch plant is the type of activity we intended to prevent by the restrictions. A concrete batch plant, based on our judgment, is not the highest and best use of that property and will cause the type of negative effects to adjoining properties that we intended to prevent by the use restrictions.

8. We also understand that Roper intends to operate the concrete batch plant for many hours during the day, sometimes beginning operations as early as 3:00 a.m. and continuing until 9 p.m. The noise created by the batch plant, together with the hours of operation, are precisely the negative effects to adjoining lot owners that we intended to prevent by the restrictions.

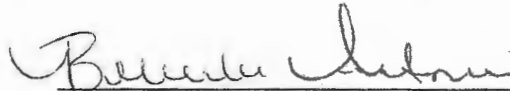
9. We also intended that subsequent owners of any of the lots would be able to rely on these restrictions and would be able to enforce the restrictions in Court to prevent any such heavy industrial uses on the adjoining lots, including the concrete batch plant proposed by Roper.

FURTHER AFFIANT SAYETH NAUGHT.



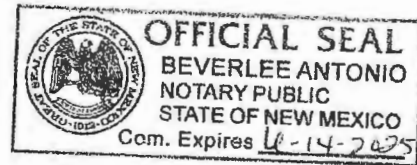
Frank Reed

SUBSCRIBED AND SWORN TO before me on January 7th, 2022, by Frank Reed.



Notary Public

My Commission Expires: 6-14-2025



From: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>
Sent: Friday, March 5, 2021 4:12 PM
To: ryan roper-nm.com <ryan@roper-nm.com>
Cc: Melanie <mjp1692@gmail.com>
Subject: RE: Purchase

Cashiers Check to Alliance Abstract Title LLC

Thanks I will put you down for 11:00

Vickie

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: ryan roper-nm.com <ryan@roper-nm.com>
Sent: Friday, March 5, 2021 4:10 PM
To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>
Cc: Melanie <mjp1692@gmail.com>
Subject: Re: Purchase

Vickie

Let's just go ahead and close. 11:00 is fine. Please send me payoff amount and it needs to be made out to Alliance correct? Thanks

RYAN ROPER

EXHIBIT F

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>
Sent: Friday, March 5, 2021 4:43:42 PM
To: ryan roper-nm.com <ryan@roper-nm.com>
Cc: Melanie <mjp1692@gmail.com>
Subject: RE: Purchase

Ryan,

I have a 10:00 already scheduled that is a loan, so it will take about an hour, so either 11:00 or after will work, and I am sending you a copy of the plat, I found out when researching the deed where Frank Reed put these restrictions into place.... The restrictions affect the 2 lots you are buying and 3 more to the left. I am sending you a copy of the county map that shows the owners names on each lot. So a document would have to be drawn up stating that you or the seller, if you do not want to close because of this, will have to sign along with the other 3 lot owners. So let me know if you want to close without removing the restriction, or if you do not want to close and have the seller work on this?

Thanks

Vickie

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: ryan roper-nm.com <ryan@roper-nm.com>
Sent: Friday, March 5, 2021 12:37 PM
To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>
Subject: Re: Purchase

We are available Monday 10:30 or later.

RYAN ROPER

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Sent: Thursday, March 4, 2021 4:38:46 PM

To: ryan [roper-nm.com](mailto:ryan@roper-nm.com) <ryan@roper-nm.com>

Subject: RE: Purchase

Ok, let me know what time would be good for the both of you to sign, and yes she does.

Also I needed to talk with you about what you had said about "changing some of the restrictions"?

Vickie

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: ryan [roper-nm.com](mailto:ryan@roper-nm.com) <ryan@roper-nm.com>

Sent: Thursday, March 4, 2021 4:14 PM

To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Subject: Re: Purchase

Sorry I'll be out of town tomorrow. Can do it Monday anytime I think. Does Brooke have to sign also?

RYAN ROPER

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Sent: Thursday, March 4, 2021 8:31:40 AM

To: ryan [roper-nm.com](mailto:ryan@roper-nm.com) <ryan@roper-nm.com>

Subject: RE: Purchase

What time can you close tomorrow?

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: ryan [roper-nm.com](mailto:ryan@roper-nm.com) <ryan@roper-nm.com>

Sent: Wednesday, March 3, 2021 8:31 PM

To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Subject: Re: Purchase

Vickie

Where are we at on this I need to close ASAP. Thanks

RYAN ROPER

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Sent: Tuesday, February 23, 2021 11:24:54 AM

To: ryan [roper-nm.com](mailto:ryan@roper-nm.com) <ryan@roper-nm.com>

Subject: RE: Purchase

OK, let me find out how and when I can get the sellers closed, then I will email you

Thanks

Vickie Caudill

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: Ryan Roper <ryan@roper-nm.com>

Sent: Tuesday, February 23, 2021 11:00 AM

To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>

Subject: RE: Purchase

I can close pretty much anytime this week. I think I have a 9:00 meeting on both Wednesday and Thursday.

RYAN ROPER

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: [Vickie Caudill](#)
Sent: Tuesday, February 23, 2021 10:47 AM
To: [Ryan Roper](#)
Subject: RE: Purchase

Awesome! I will have this looked over and when would you like to close?

Thanks

Vickie

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net

From: Ryan Roper <ryan@roper-nm.com>
Sent: Tuesday, February 23, 2021 10:40 AM
To: Vickie Caudill <vickie.caudill@allianceabstracttitle.net>
Subject: RE: Purchase

Vickie,

Please find the attached operating agreement.

Thanks,

RYAN ROPER

ROPER CONSTRUCTION, INC.

PO BOX 969

ALTO, NM 88312

575-973-0440

From: [Vickie Caudill](#)

Sent: Tuesday, February 23, 2021 9:20 AM

To: mjp1692@gmail.com

Cc: ryan@roper-nm.com

Subject: Purchase

Good morning!

I am working on the sale/purchase and before we can close I will need the operating agreement for your LLC's so I can see who actually needs to sign for the companies.

And I am assuming everyone wants to close this week?

Thank you so much!

Vickie Caudill

Alliance Abstract Title LLC

1096 Mechem, Suite 101

Ruidoso, NM 88345

575-258-3600

Vickie.Caudill@AllianceAbstractTitle.net



Virus-free. www.avg.com

STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT COURT

JAMES A. MILLER and
SARAH L. and JOSHUA C. BOTKIN,

Plaintiffs,

v.

Cause No. D-1226-CV-2021-00261

ROPER INVESTMENTS, LLC and
ROPER CONSTRUCTION, INC.,

Defendants.

AFFIDAVIT OF CARLOS ITUARTE VILLARREAL

STATE OF TEXAS)
) ss.
COUNTY OF EL PASO)

Carlos Ituarte Villarreal, being first duly sworn, deposes and states as follows:

1. I am over the age of 18 and am competent to make this Affidavit. The matters set forth are true based on my personal knowledge. I am an air quality and modeling specialist/engineer with SWCA Environmental Consultants (“SWCA”) in El Paso, Texas. I provide permitting, modeling, engineering and compliance services for the electrical generation, industrial and oil and gas businesses. As part of my modeling, I perform noise assessments and surveys and am familiar with accepted methodologies for performing those assessments and surveys. I have performed approximately 25 noise assessments during my career. My curriculum vitae is attached to my Affidavit as Exhibit “A.”

2. In 2015, I received a Ph.D. in Environmental Science and Engineering from the University of Texas at El Paso. I received a Master of Science degree in Industrial Engineering from the University of El Paso in 2011, and I received a Bachelor of Science degree in Industrial Engineering from the Instituto Tecnológico de Parral in Mexico in 2008.

EXHIBIT G

3. Prior to my employment with SWCA in 2013, I worked as an air quality engineer for El Paso Electric Company. My duties included regulatory compliance evaluations, reporting emissions data, and developing, improving and maintaining testing programs to demonstrate compliance with regulatory and permit requirements.

4. Counsel for Plaintiffs retained SWCA to perform a noise assessment to determine the potential noise impacts of a concrete batch plant proposed by Roper Construction, Inc. in Alto, New Mexico. The property on which the concrete batch plant is proposed, known as Tracts 4A-1 and 4B, is subject to certain deed restrictions which are shared commonly by other neighboring tracts, including tracts owned by the Plaintiffs (Tracts 1 and 3A). A map identifying the location of Tracts 4A-1 and 4B, owned by Roper, and the adjoining tracts owned by Plaintiffs (Tracts 1 and Tract 3A), is attached to my Affidavit as Exhibit "B."

5. Under my supervision and direction, employees of SWCA performed the noise assessment on December 11 and December 12, 2021, to determine the background or existing ambient noise levels at four nearby noise-sensitive areas ("NSA"). The NSAs are identified on Exhibit "C" attached to my Affidavit. The SWCA Noise Assessment (without attachments) is attached to my Affidavit as Exhibit "D."

6. NSA 1 is located west of the proposed concrete batch plant, on Tract 3A owned by Plaintiffs Sarah L. and Joshua C. Botkin. Tract 1, owned by Plaintiff James A. Miller, is located west of Tract 3A, approximately 458 feet from the proposed concrete batch plant. NSA 4 is located approximately 829 feet to the south of the proposed concrete batch plant location, almost twice the distance from the proposed concrete batch plant location as Tract 1 owned by Plaintiff James A. Miller. NSA 2 is located approximately 3,271 feet to the north-northeast of the proposed batch plant location, significantly farther away from the proposed concrete batch plant location than either of the Plaintiffs' properties. NSA 3 is located approximately 3,623 feet to the east-northeast

of the proposed concrete batch plant location, also considerably farther from the proposed concrete batch plant location than either of the tracts owned by Plaintiffs. *See* Exhibit “C.”

7. The first task in a noise assessment is to determine the existing ambient sound level at each of the NSAs. Ambient sound level is defined as the composite of all noise from sources near and far, or, alternatively, the normal or existing level of environmental noise at a given location. In measuring the existing environmental noise, we expressed units in decibels (dB), which is a unit of measurement that describes the amplitude of sound. After determining the dB at a particular location, we then employed an A-weighted equivalent sound level for a 1-hour period (L_{eq}). The L_{eq} represents the value of an equivalent, steady sound level which, in a stated time period and at a stated location, has the same A-weighted sound energy as the time-varying sound. Additionally, we calculate an A-weighted cumulative noise exposure sound level from all events over a full 24 hours, which is known as a day-night sound level (L_{dn}). This weighting imposes an additional 10 dBs of equivalent sound level during nighttime hours (10:00 p.m. – 7:00 a.m.) to account for human perceptions in sound sensitivity during the evening hours.

8. The results of the survey demonstrated that the current A-weighted equivalent ambient or background noise levels (L_{eq}) are 46.0 dBA at NSA 1, located on the property owned by the Plaintiffs Sarah and Joshua Botkin and close to the property owned by Plaintiff James A. Miller. The current A-weighted equivalent ambient or background noise levels (L_{eq}) at NSA 2 are 29.8 dBA, 33.4 dBA at NSA 3, and 45.5 dBA at NSA 4.

9. In order to determine the operational noise impacts from the proposed concrete batch plant, we used customary calculations for specific industrial activities that are accepted by the U.S. Environmental Protection Agency (“U.S. EPA”) as appropriate standards to assess noise impacts from a variety of sources, including concrete batch plants. In particular, noise levels for concrete batch plants and their associated equipment are available from the FHWA-Construction

Noise Handbook – 29.1 RCNM Default Noise Emissions Levels and Usage of Factors. A single concrete batch plant, two concrete mixing trucks and one front-end loader were assumed as potential noise sources during operation. Notably, our assessment selected the center of the proposed concrete batch plant project as the baseline from which distances to the NSAs were measured; it is likely, however, that noise-generating activities would occur farther away from the center and that the calculated noise impacts assessed by SWCA are therefore conservative and likely underestimate the actual noise impacts.

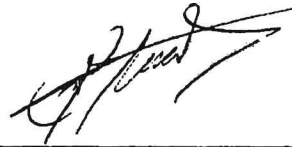
10. The U.S. EPA identifies a day-night sound level (L_{dn}) of no more than 55 dBA outdoors in residential areas as the maximum level below which no adverse effects on human health and welfare are expected to occur. Stated alternatively, noise levels over the 55 dBA L_{dn} threshold are expected to cause adverse effects on human health and the environment.

11. Using standard attenuation calculations and data relied upon by the U.S. EPA to determine noise levels from a concrete batch plant, the SWCA assessment calculated that the operational noise impacts from the proposed concrete batch plant would result in increases of noise levels over A-weighted equivalent current ambient conditions (L_{eq}) of 14.6 dBA at NSA 1 (located on Tract 3A owned by Plaintiffs Sarah and Joshua Botkin), 13.8 dBA at NSA 2, 9.6 dBA at NSA 3, and 10.3 dBA at NSA 4. This increase results in a day-night sound level noise levels of 65.4 dBA at NSA 1, 48.5 dBA at NSA 2, 48.0 dBA at NSA 3, and 60.7 dBA at NSA 4.

12. At the properties owned by Plaintiffs, the noise levels generated by the proposed concrete batch plant would cause exceedances of the U.S. EPA's maximum of 55 dBA L_{dn} outdoors in residential areas, and a more than doubling of the environmental noises currently perceived at those properties. Consequently, based on U.S. EPA accepted protocols, the noise levels created by the proposed concrete batch plant will cause impermissible adverse effects on

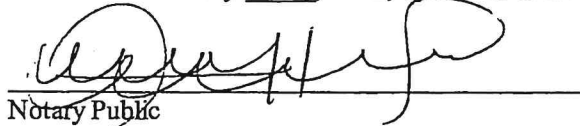
public health and the environment at the properties adjacent to or proximate to the proposed concrete batch plant location.

FURTHER AFFIANT SAYETH NAUGHT.



CARLOS ITUARTE VILLARREAL

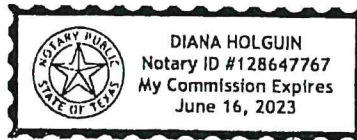
SUBSCRIBED AND SWORN TO before me on January 13, 2022, by Carlos Ituarte Villarreal.



Notary Public

My Commission Expires:

6/16/2023



CARLOS ITUARTE VILLARREAL, PH.D., AIR QUALITY AND MODELING SPECIALIST

Mr. Ituarte-Villarreal is an environmental specialist with significant experience in the areas of atmospheric dispersion modeling, fate and transport, emissions inventory, air quality permitting, and environmental compliance and engineering. Mr. Ituarte-Villarreal is an engineer with knowledge in electric generation in both renewable and tradition energy sectors, specialized in wind farm siting and sizing. Carlos holds a PhD in Environmental Science and Engineering and a MS in Industrial Engineering and has more than 10 years of experience in electric utility environmental and regulatory compliance.

YEARS OF EXPERIENCE

10

EXPERTISE

Engineering and Modeling
Emissions Inventory
Noise Impact Assessment
Wind Turbine Siting
Environmental Permitting
Environmental Impact Assessment

EDUCATION

Ph.D., Environmental Science & Engineering, Energy Science & Engineering; The University of Texas at El Paso; El Paso, Texas; 2015

M.S., Industrial Engineering; The University of Texas at El Paso; El Paso, Texas; 2010

B.S., Industrial Engineering; Instituto Tecnológico de Parral; Mexico; 2008

TRAININGS

Lean Manufacturing, TMAC
AERMOD Air Dispersion Modeling, Lakes Environmental

MEMBERSHIPS

Institute of Industrial Engineers (IIE)
American Wind Energy Association (AWEA)
Alpha Pi Mu honor society for Industrial and Systems Engineering

AWARDS

UTEP M.S.I.E. - Outstanding Student Award

LANGUAGES

Spanish– native language
English–high proficiency

RELATED WORK EXPERIENCE

SWCA Environmental Consultants (Aug 2013 – Present)

Air Quality and Modeling Specialist/Engineer

Provide permitting, modeling, engineering and compliance services to electric generation, industrial and oil & gas sectors.

El Paso Electric Company (Jan 2012 – August 2013)

Air Quality Engineer - Intern

Minimized regulatory compliance risk by analyzing, validating, and reporting CEMS emissions data. Maintained, developed, and improved environmental compliance tools, monitoring, sampling, and testing programs to demonstrate compliance with regulatory and permit limits.

EPA-UTEP Border Air Quality Internship Program (Jan 2012 – Dec 2012)

Intern

One year internship and education program to improve community air quality and public health and promote environmental justice.

The University of Texas at El Paso (May 2011 – Aug 2013)

Teaching Assistant

Collaborated on curriculum and exam development, met with students upon request, and graded all written work, including final exam papers.

The University of Texas at El Paso (Jan 2011 – May 2011)

Research Associate

Developed bio-inspired evolutionary algorithms for solving the renewable power integration problem.

The University of Texas at El Paso (Jun 2009 – Dec 2010)

Research Assistant

Conducted literature reviews, collection and analysis of data, preparation of materials for submission to granting agencies.

TEACHING EXPERIENCE

The University of Texas at El Paso (May 2011 – Aug 2013)

Teaching Assistant – to Professor Jose Espiritu

Production and Inventory Control
Reliability and Maintainability
Statistical Quality Control

PUBLICATIONS

Ph.D. Dissertation

Ituarte-Villarreal, Carlos M, "Wind farm optimization using evolutionary algorithms" (2015). ETD Collection for University of Texas, El Paso. AAI10000762.

Selected Publications

Espiritu, Jose F. and Carlos M. Ituarte-Villarreal. "Wind Farm Layout Optimization Using a Viral Systems Algorithm." IJAEC vol.4, no.4 (2013), pp.27-40.

Lopez, Nicolas and Carlos M. Ituarte-Villarreal. "Evolutionary Agent Based Microstorage Management for a Hybrid Power System." Complex Adaptive Systems (2012), pp. 350-355

Ituarte-Villarreal, Carlos M et al. "A viral system optimization algorithm to solve the wind farm layout problem considering reliability." IIE Annual Conference. Proceedings, 2012.

Ituarte-Villarreal, Carlos M et al. "Using the Monkey Algorithm for hybrid power systems optimization". Procedia Computer Science 12 (2012), pp.344-349

Ituarte-Villarreal, Carlos M et al. "Optimization of wind turbine placement using a viral based optimization algorithm". Procedia Computer Science 6 (2011), pp. 469-474

Ituarte-Villarreal, Carlos M et al. "GALORA: A New Genetic Algorithm for the Level of Repair Analysis Problem" IIE Annual Conference. Proceedings, 1 (2011).

SELECTED PRESENTATIONS AND ABSTRACTS

Carlos M. Ituarte-Villarreal. Wind Farm Design Optimization: A Viral Approach. AWEA Wind Resource & Project Energy Assessment Seminar New Orleans, LA. September 16-17, 2015

Carlos M. Ituarte-Villarreal and Jose F. Espiritu. Considering Wind-Wake and Reliability as Multi-State System. Industrial Engineering Research Conference. San Juan, Puerto Rico. May 18-22, 2013

Carlos M. Ituarte-Villarreal, Nicolas Lopez, Heidi A. Taboada and Jose F. Espiritu. (2013). Wind Farm Layout Optimization Considering Multiple-Objectives. Industrial Engineering Research Conference. San Juan, Puerto Rico. May 18-22, 2013.

Nicolas Lopez, Carlos M. Ituarte-Villarreal and Jose F. Espiritu. Evolutionary Agent Based Microstorage Management for a Hybrid Power System. Complex Adaptive Systems Conference. Washington D.C. November 14-16, 2012

Carlos M. Ituarte-Villarreal, Nicolas Lopez and Jose F. Espiritu. (2012). Using the Monkey Algorithm for Hybrid Power Systems Optimization. Complex Adaptive Systems Conference. Washington D.C. November 14-16, 2012

Carlos M. Ituarte-Villarreal and Jose F. Espiritu. A Viral Systems Algorithm Implementation to Optimize the Layout of a Wind Farm Considering Reliability. In Proceedings of the Industrial Engineering Research Conference. Orlando, Florida. May 19-23, 2012

Carlos Ituarte-Villarreal, Nicolas Lopez and Jose F. Espiritu. Hybrid Power Systems Optimization using the Monkey Algorithm. Annual Industrial Engineering Research Conference and Expo. Orlando, Florida. May 19-23, 2012.

Carlos Ituarte-Villarreal, Claudia S. Valles and Jose F. Espiritu. Optimal Siting of Wind Turbines Using Viral Systems Algorithm. In Proceedings of the 2nd Southwest Energy Science and Engineering Symposium. El Paso, TX. March 24, 2012.

Carlos M. Ituarte-Villarreal and Jose F. Espiritu. Optimization of wind turbine placement using a viral based optimization algorithm. In Proceedings of the Complex Adaptive Systems Conference. Chicago, Illinois. October 31- November 2, 2011

Carlos M. Ituarte-Villarreal and Jose F. Espiritu. A Decision Support System for the Level of Repair Analysis Problem. In Proceedings of the 41st International Conference on Computers & Industrial Engineering (CIE 41). Los Angeles, California. October 23-26, 2011

Carlos M. Ituarte-Villarreal and Jose F. Espiritu. Wind turbine placement in a wind farm using a viral based optimization algorithm. In Proceedings of the 41st International Conference on Computers & Industrial Engineering (CIE 41). Los Angeles, California. October 23-26, 2011

Carlos Ituarte-Villarreal and Jose F. Espiritu. A Solution Method for the Constrained Level of Repair Analysis Problem. Institute for Operations Research and Management Science Conference, Austin, Texas. November 2010

Carlos Ituarte-Villarreal, Jose F. Espiritu, Heidi A. Taboada & Oswaldo Aguirre. Level of Repair Analysis Modeling Using Genetic Algorithms. Institute for Operations Research and Management Science Conference, San Diego, California. October 2009.

RELATED PROJECT EXPERIENCE

Air Quality Services; El Paso, El Paso County, Texas. SWCA provided in-house Air Quality compliance services for four power generation facilities in El Paso County, Texas and Dona Ana County, New Mexico. *Role: Environmental Specialist. Provided specific services as they relate to the day-to-day monitoring, record keeping and reporting. Prepared State emissions inventories and GHG emissions inventories for CY2012, CY2013, CY2014 and CY2015. Provided additional support for permit compliance matters and the review and analysis of permit conditions.*

Mitchell County Power Facility Environmental Permitting; Mitchell County, Texas. SWCA conducted natural and cultural resource surveys of approximately 300 acres in Mitchell County, Texas, for compliance in preparation for a proposed power plant facility. *Role: Environmental Specialist. Assisted with screening level modeling and later with the preparation of an updated Air Quality Analysis to demonstrate compliance with all applicable ambient air quality standards.*

Air Quality Permitting; Cherokee County, Texas. SWCA provide air permitting services for a number of projects in Cherokee County, Texas including the preparation of a PSD permit application for a combined-cycle electric generating station. *Role: Air Quality and Modeling Specialist. Lead the preparation of an air dispersion modeling analysis and modeling result analysis in support of the PSD permit application to demonstrate compliance with applicable state and federal standards.*

Air Permitting Assistance; El Paso, El Paso County, Texas. SWCA prepared an application to obtain a Texas Commission of Environmental Quality Air Quality Standard Permit for pollution control projects in El Paso County, Texas. *Role: Air Quality Specialist. Responsible for writing the methodology section for the duct burner replacement application calculations. Performed a detailed emissions calculation for the existing and replacement duct burner system.*

Williamson County Power Project-Environmental Permitting; Williamson County, Texas. SWCA prepared a PSD permit for a new natural gas-fired power plant. *Role: Air Quality and Modeling Specialist. Assisted with the preparation of Emission calculations and report documentation. Provided modeling services for an initial screening simulation of a set of operating scenarios, and the subsequent refined model to consider terrain elevations and meteorological data.*

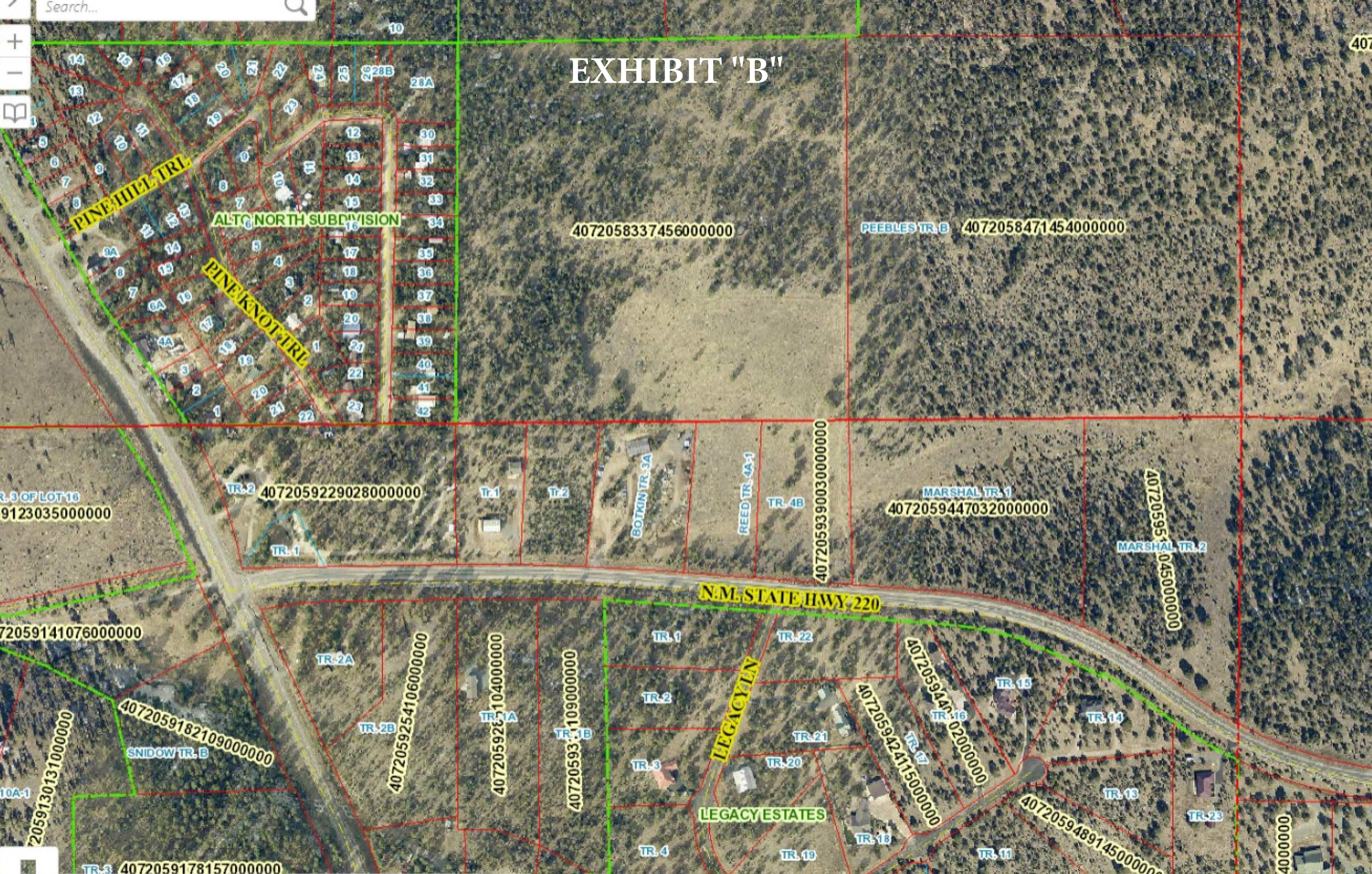
Environmental Planning and Compliance Service; Multiple Counties, CA. SWCA provided planning and permitting support for a dynamic reactive power support facility and associated 230-kilovolt (kV) transmission line near Alpine, CA. Services included routing and siting support; alternatives analysis; cultural, biological, and paleontological surveys; preparation of a Proponent's Environmental Assessment (PEA); and discretionary environmental permitting support. *Role: Environmental Specialist. Served as a noise and air quality analyst preparing the noise and air quality impact analysis sections using sophisticated sound and air dispersion modeling techniques along with software-based modeling programs.*

Sand Plant Expansion Air Permitting; Winkler County, Texas. SWCA prepared a TCEQ new source review permit amendment application to authorize a significant expansion to a sand washing, drying, sizing, and storage facility in Winkler County, Texas. The project included air dispersion modeling for five criteria pollutants and one toxic air pollutant. SWCA prepared a complete set of emission calculations that included over 100 emission points. *Role: Air Quality and Modeling Specialist. Assisted in the preparation of an air dispersion modeling analysis in support of the permit amendment application.*

Pipeline Expansion Project Environmental Services; Cochise County, Arizona. SWCA prepared an Air Quality and Noise Resource Report (Resource Report 9) addressing the air quality and noise resources associated with this proposed Expansion Project. *Role: Environmental Specialist. Responsible for the preparation of the baseline noise analysis and of the noise impact assessment modeling. Provided assistance in the preparation of an air dispersion impact analysis in order to demonstrate that this project will not cause an exceedance of the any National Ambient Air Quality Standards.*



EXHIBIT "B"



407205833745600000

PEEBLES TR. B 407205847145400000

ALTO NORTH SUBDIVISION

PINEHILL TR

PINEBLVD TR

TR-2 407205922902800000

R. 3 OF LOT 16
912303500000

MARSHAL TR. 1
407205944703200000

407205951045000000
MARSHAL TR. 2

NM STATE HWY 220

LEGACY LN

LEGACY ESTATES

407205918210900000
SNIDOW TR. B

407205925410600000

407205926110400000

407205931109000000

407205942411500000

407205948914500000

TR-3 407205917815700000

4000000

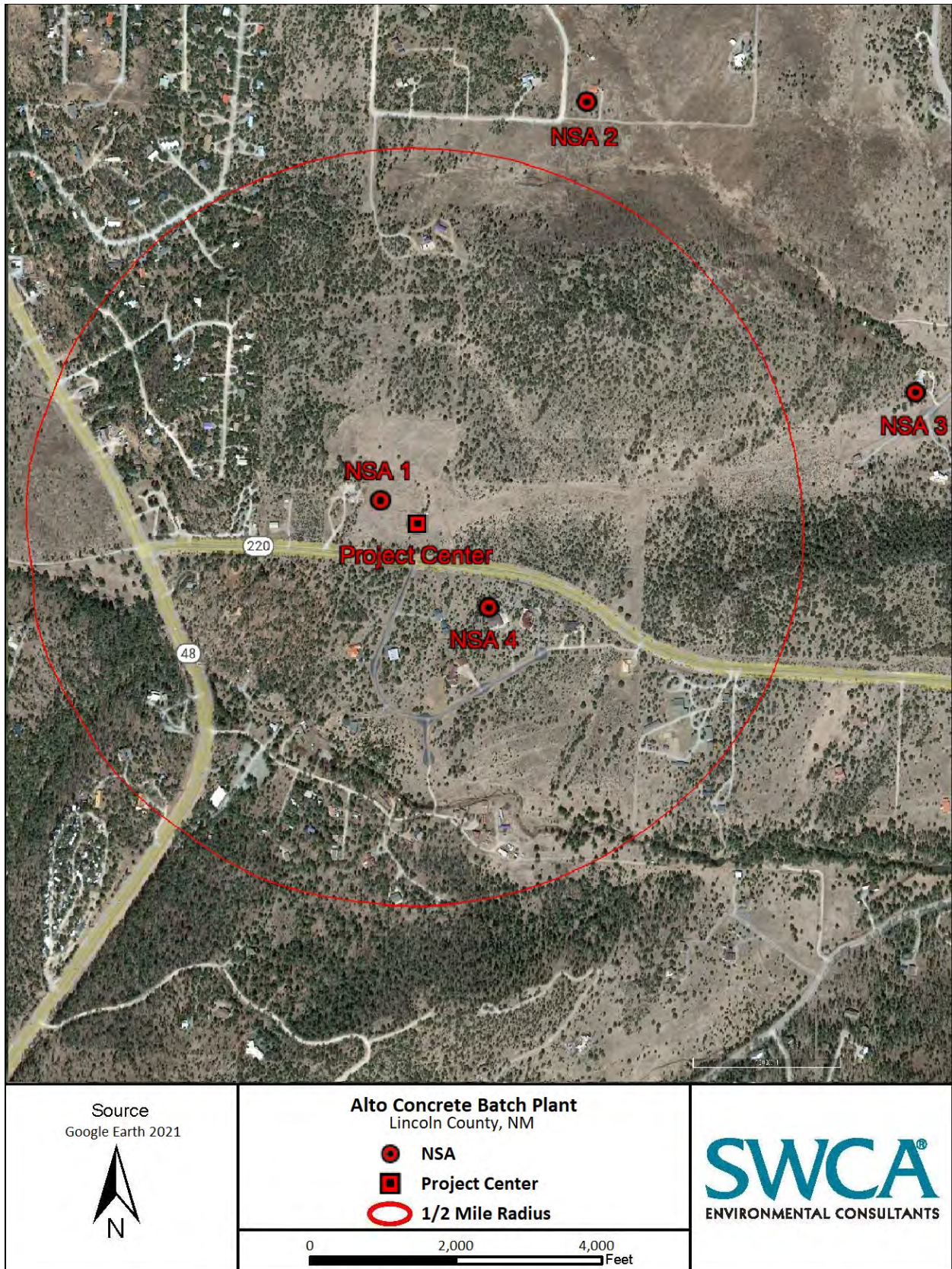
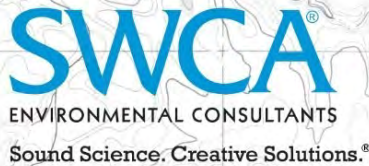


Figure 1. Local Area Map – Alto Concrete Batch Plant

EXHIBIT "D"



2201 Brookhollow Plaza Drive, Suite 400
Arlington, Texas 76006
Tel 817.394.6506
www.SWCA.com

TECHNICAL MEMORANDUM

To: Hinkle Law Firm
Santa Fe, NM 87504

From: SWCA Environmental Consultants

Date: January 7, 2022

Re: **Hinkle Law Firm, Alto Concrete Batch Plant Noise Survey and Impact Assessment**

Introduction

The Hinkle Law Firm has contracted SWCA Environmental Consultants (SWCA) to perform a noise assessment to determine the potential noise impacts of a concrete batch plant (the Project) being proposed by Roper Construction Inc. in Alto, New Mexico. A noise survey was performed between December 11, 2021 and December 12, 2021 to determine the existing noise levels four nearby Noise Sensitive Areas (NSAs). Currently, the site of the proposed concrete batch plant consists of an empty lot neighboring residential properties.

The objective of the noise assessment was to measure the existing ambient conditions to characterize the current noise levels at nearby NSAs and to calculate the potential impact from the Project. Ambient noise levels were measured at four monitoring locations: 1) at a nursery, denoted NSA 1, located approximately 458 feet to the west of the Project, 2) at a residence, denoted NSA 2, located approximately 3,271 feet to the north-northeast of the Project, 3) at a residence, denoted NSA 3, located approximately 3,623 feet to the east-northeast of the Project, and 4) at a residence, denoted NSA 4, located approximately 829 feet to the southeast of the Project.

Additionally, one monitoring location in Carrizozo, NM was selected due to its proximity to a nearby concrete batch plant operated by Roper Construction Inc. A residential property neighboring this concrete batch plant was used as a location from which operational noise from the concrete batch plant could be obtained.

The results of the survey indicated the current day-night ambient noise level (L_{dn}) is 50.4 dBA at NSA 1, 36.2 dBA at NSA 2, 39.8 dBA at NSA 3 and 51.9 dBA at NSA 4. The A-weighted equivalent noise levels (L_{eq}) are 46.0 dBA at NSA 1, 29.8 dBA at NSA 2, 33.4 dBA at NSA 3 and 45.5 dBA at NSA 4. Measurements taken near the existing concrete batch plant recorded an L_{dn} of 52.7 dBA and an L_{eq} of 47.6 dBA. It was determined that noise data collected near the existing concrete batch plant was inadequate to predict potential impacts from the Project. Published literature values were used in place of calculated noise levels based on collected data to assess impacts the are likely to occur from the Project.

Operational impacts from the proposed concrete batch plant were determined using standard attenuation calculations. The estimated L_{dn} attributable to the Project was 65.2 dBA at NSA 1, 48.2 dBA at NSA 2, 47.3 dBA at NSA 3 and 60.1 dBA at NSA 4. This results in increases over ambient conditions of 15 dBA L_{dn} at NSA 1, 12.2 dBA L_{dn} at NSA 2, 8.2 dBA L_{dn} at NSA 3 and 8.8 dBA L_{dn} at NSA 4. The estimated L_{eq} attributable to the Project was 61.7 dBA at NSA 1, 44.7 dBA at NSA 2, 43.8 dBA at NSA 3 and 56.6 dBA at NSA 4. This results in increases over ambient conditions of 14.6 dBA L_{eq} at NSA 1, 13.8 dBA L_{eq} at NSA 2, 9.6 dBA L_{eq} at NSA 3 and 10.3 dBA L_{eq} at NSA 4.

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1.0 GENERAL INFORMATION ON NOISE AND SOUND

This section provides a brief overview of noise fundamentals, noise assessment components, examples of sound levels from a variety of sources, and the regulatory setting regarding applicable noise level standards.

Definition of Acoustical Terms

The following acoustical terms are used throughout this analysis:

- Ambient sound level is defined as the composite of noise from all sources near and far, the normal or existing level of environmental noise at a given location.
- Decibel (dB) is the physical unit commonly used to measure sound levels. Technically, a dB is a unit of measurement that describes the amplitude of sound equal to 20 times the base 10 logarithm of the ratio of the reference pressure to the sound of pressure, which is 20 micropascals (μPa). For example, on the decibel scale, the quietest audible sound (perceived near total silence) is 0 dB. A sound 10 times more powerful is 10 dB. A sound 100 times more powerful than near total silence is 20 dB. In acoustics, sound levels represented in dB express the true unweighted noise level.
- Sound measurement is further refined by using a decibel “A-weighted” sound level (dBA) scale that more closely measures how a person perceives different frequencies of sound; the A-weighting reflects the sensitivity of the ear to low or moderate sound levels.
- Equivalent noise level (L_{eq}) is the energy average A-weighted noise level during the measurement period.
- The root-mean-squared maximum noise level (L_{max}) characterizes the maximum noise level as defined by the loudest single noise event over the measurement period.
- Day-night sound level (L_{dn}) is the A-weighted equivalent sound level for a 24-hour period with an additional 10 dB weighting imposed on the equivalent sound levels occurring during night-time hours (10 p.m. to 7 a.m.).

Sound Levels of Representative Sounds and Noises

Neither Lincoln County nor New Mexico have codified noise standards. Based on the absence of codified or promulgated noise standards for Lincoln County or New Mexico as a whole, we are relying on a U.S. Environmental Protection Agency (EPA) index to assess noise impacts from a variety of sources on residential receptors. The EPA identifies an L_{dn} of 55 dBA outdoors in residential areas as the maximum levels below which no effects on public health and welfare occur due to interference with speech or other activities (EPA 1974). Over this 55 dBA threshold, it can be expected that adverse effects on public health and welfare may occur.

Noise levels in a quiet rural area at night are typically between 32 and 35 dBA. Quiet urban night-time noise levels range from 40 to 50 dBA. Noise levels during the day in a noisy urban area are frequently as high as 70 to 80 dBA. Noise levels above 110 dBA become intolerable; levels higher than 80 dBA over continuous periods can result in hearing loss. Levels above 70 dBA tend to be associated with task interference. Levels between 50 and 55 dBA are associated with raised voices in a normal conversation. Constant noises tend to be less noticeable than irregular or periodic noises.

Table 1 provides criteria that have been used to estimate an individual’s perception to increases in sound. In general, an average person perceives an increase of 3 dBA or less as barely perceptible. An increase of 10 dBA is perceived as a doubling of the sound.

Table 1. Average Human Ability to Perceive Changes in Sound Levels

Increase in Sound Level (dBA)	Human Perception of Sound
2–3	Barely perceptible
5	Readily noticeable
10	Doubling of the sound
20	Dramatic change

Source: Bolt Beranek and Newman, Inc. (1973)

Noise Assessment Components

A noise assessment is based on the following components: a sound-generating source, a medium through which the source transmits, the pathways taken by these sounds, and an evaluation of the proximity to NSAs. Soundscapes are affected by the following factors:

- **Source.** The sources of sound are any generators of small back-and-forth motions (i.e., motions that transfer their motional energy to the transmission path where it is propagated). The acoustic characteristics of the sources are very important. Sources must generate sound of sufficient strength, approximate pitch, and duration so that the sound may be perceived and can cause adverse effects, compared with the natural ambient sounds.
- **“Transmission path” or medium.** The “transmission path” or medium for sound or noise is most often the atmosphere (i.e., air). For the noise to be transmitted, the transmission path must support the free propagation of the small vibratory motions that make up the sound. Atmospheric conditions (e.g., wind speed and direction, temperature, humidity, precipitation) influence the attenuation of sound. Barriers and/or discontinuities (e.g., existing structures, topography, foliage, ground cover, etc.) that attenuate the flow of sound may compromise the path. For example, sound will travel very well across reflective surfaces such as water and pavement but can attenuate across rough surfaces (e.g., grass, loose soil).
- **Proximity to NSAs.** An NSA is defined as a location where a state of quietness is a basis for use or where excessive noise interferes with the normal use of the location. Typical NSAs include residential areas, parks, and wilderness areas, but also include passive parks and monuments, schools, hospitals, churches, and libraries.

2.0 MEASUREMENT LOCATIONS

SWCA performed an ambient noise survey near the Project site between December 11, 2021 and December 12, 2021. The Project is in Lincoln County, within the town of Alto New Mexico. Attachment 1 shows photos of the monitoring locations at the NSAs, as well as at the existing concrete batch plant located in Carrizozo, New Mexico. The Project site is in a mountainous region with fields and forests. The Project site is located on Airport Road, approximately 0.3 miles east of Billy the Kid Trail. Some other sources of noise contributions came from roads, dogs, other animals and trees rustling. Four monitoring locations were selected to provide existing ambient noise levels at the NSAs around the Project location. The specific placement of the sound level meters was mainly determined by environmental and logistical constraints, and the location of the closest NSAs for which property access could be arranged.

NSA 1 is a nursery located roughly 458 feet west of center of the Project and includes a greenhouse and a house under construction. During the site visit the nursery was closed. Moderate traffic on Airport Road was observed, which contributed to the measured background noise levels. This location was selected for a long-term measurement for which 24 hours of valid data was collected.

NSA 2 is located roughly 3,271 feet to the north-northeast of the center of the Project. This NSA consists of a residential building. The location was quiet, with very little road noise being heard in the distance. No disturbances were observed that would have contributed to an elevated noise level. This location was selected for a short-term measurement for which approximately 20 minutes of valid data was collected.

NSA 3 is located approximately 3,623 feet to the east-northeast of the center of the Project. This NSA consists of a residential building. The location was quiet, with very little road noise being heard in the distance. Dogs could be heard barking occasionally in the distance. No other disturbances were observed that would have contributed to an elevated noise level. This location was selected for a short-term measurement for which approximately 20 minutes of valid data was collected.

NSA 4 is located approximately 829 feet to the southeast of the center of the project. This NSA consists of a residential building. The monitoring location was approximately 230 feet from Airport Road, which could be clearly heard and contributed to measured background noise levels. No other disturbances were observed that would have contributed to an elevated noise level. This location was selected for a short-term measurement for which approximately 20 minutes of valid data was collected.

Additionally, a residence located in Carrizozo, New Mexico was selected due to its proximity to an existing concrete batch plant operated by Roper Construction, Inc. This residence shares a property boundary with the existing concrete batch plant and is located approximately 930 feet from the equipment at the concrete batch plant. This location was selected for long-term measurements to determine actual noise levels generated by the plant. Despite more than 24 hours of valid data being collected, this data was insufficient to determine the noise levels of the plant, as it was not observed to be operational for much of the duration of the survey. Additionally, road noise impacted noise levels at the property, making it difficult to determine what noise would be attributable solely to the plant during periods of operation. As a result, this data was not used in this analysis.

Figure 1 depicts the location of the Project and identifies NSAs at which noise measurements were taken near the Project. Figure 2 depicts the location of the existing concrete batch plant in Carrizozo as well as the location at which measurements were taken nearby.

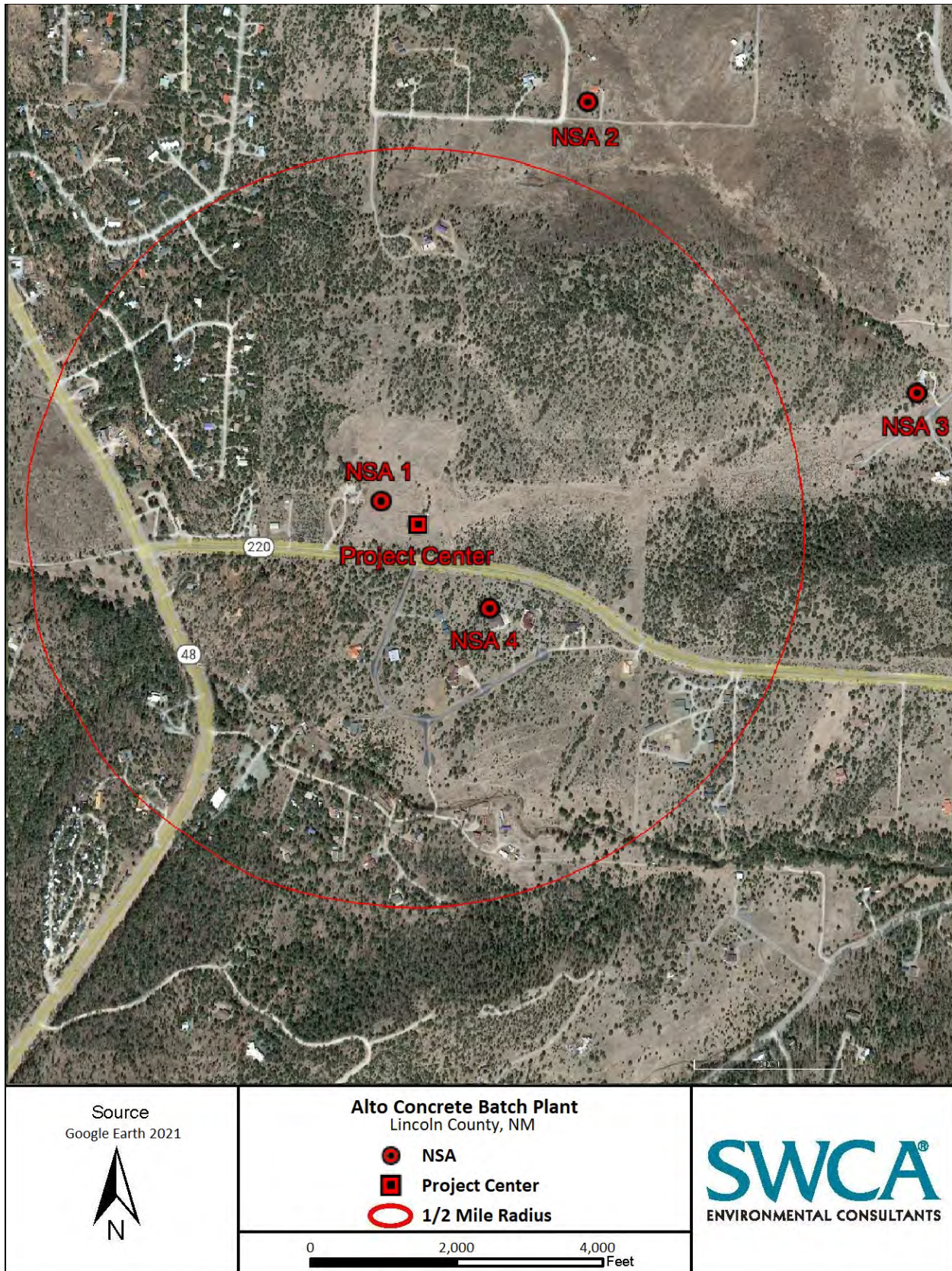


Figure 1. Local Area Map – Alto Concrete Batch Plant



Figure 2. Local Area Map – Carrizozo Concrete Batch Plant

3.0 INSTRUMENT DESCRIPTION

Noise measurements were collected using two (2) Larson Davis Precision Integrating Sound Level Meter Model 831C meeting the requirements of the American National Standards Institute (ANSI), two (2) PCB PRM831 preamplifier and two (2) PCB 377B02 free-field microphones as described in Table 2.

The microphone was fitted with an environmental windscreen and bird spikes and set upon a tripod at a height of 5 feet above ground and located as far from the influence of vertical reflective sources as possible. All cables were secured to prevent any sounds due to wire movement. All clocks associated with the sound measurement were synchronized using the Larson Davis G4 LD Utility software.

Table 2. Instrumentation Used for this Survey

Monitoring Location	Sound Level Meter	Preamplifier	1/2" free-field microphone
NSA 1	Larson Davis 831C (S/N 0010739)	PRM 831 (S/N 58504)	377B02 (S/N 311602)
NSA 2	Larson Davis 831C (S/N 0010739)	PRM 831 (S/N 58504)	377B02 (S/N 311602)
NSA 3	Larson Davis 831C (S/N 0010739)	PRM 831 (S/N 58504)	377B02 (S/N 311602)
NSA 4	Larson Davis 831C (S/N 0010739)	PRM 831 (S/N 58504)	377B02 (S/N 311602)
Carrizozo, NM Batch Plant	Larson Davis 831C (S/N 0010737)	PRM831 (S/N 58503)	377B02 (S/N 311601)

4.0 CALIBRATION CHECKS

The sound level meter was calibrated at the beginning and end of each measurement period using a Larson Davis Model CAL200 Precision Acoustic Calibrator. The Larson Davis CAL200 emits a 1 kHz tone at 114 dB against which the response can be checked. The calibrator has been designed for both field and laboratory use and the accuracy has been calibrated to a reference traceable to the National Institute of Standards and Technology (NIST). Instrument calibration certificates for the Larson Davis 831 sound level meters, the microphone, and the Larson Davis CAL200 calibrator are included in Attachment 2.

As recommended by Larson Davis, when using a free-field microphone, the pressure level at the microphone diaphragm will be slightly different. Thus, a free field correction of -0.12 dB was applied to the 114.0 dB tone. Thus, the calibration level was set to 113.88dB.

Both Larson Davis 831 models showed a response of less than the normal error of 0.50 dB. The results for the calibrations are shown in Table 3.

Table 3. Pre- and Post-Instrument Response Checks

Monitoring Location	Test	Sound Level	Response	Error ¹
NSA 1	Pre-Test	114 dB (113.88 dB)	113.80 dB	0.00
	Post-Test	114 dB (113.88 dB)	113.70 dB	-0.18
NSA 2	Pre-Test	114 dB (113.88 dB)	113.89 dB	0.01
	Post-Test	114 dB (113.88 dB)	113.97 dB	0.09
NSA 3	Pre-Test	114 dB (113.88 dB)	113.96 dB	0.08
	Post-Test	114 dB (113.88 dB)	113.93 dB	0.05
NSA 4	Pre-Test	114 dB (113.88 dB)	113.93	0.05
	Post-Test	114 dB (113.88 dB)	113.90	0.02
Carrizozo, NM Batch Plant	Pre-Test	114 dB (113.88 dB)	113.99 dB	0.11
	Post-Test	114 dB (113.88 dB)	113.76 dB	-0.12

¹ Calibration error indicates the absolute difference between the values measured by the instrument and the tone emitted by the acoustic calibrator.

5.0 METEOROLOGICAL DATA

Noise data collected during the survey were validated against weather data from the weather station KSRR at the Sierra Blanca Regional Airport, located approximately 7.5 northeast of the proposed location of the Project in Alto, New Mexico. Hourly weather information is presented in Attachment 3. Survey weather conditions are presented in Table 4.

Table 4. Weather Conditions for November 19, 2019 and November 20, 2019

Weather Station	Monitoring Start	Monitoring End	Wind Speed (mph)		Temperature (°F)		Humidity (% relative humidity)	
			Range	Avg.	Range	Avg.	Range	Avg.
KSRR	12/11/2021 12:40	11/20/2019 18:35	0-20	7.3	25-55	37.2	14-56	29

The ASTM Standard Guide for Measurement of Outdoor A-Weighted Sound Levels (ASTM E1014-12) specifies that data should not be used when steady wind speeds exceed 20 kilometers per hour (km/hr) (12.4 mph). Average wind speeds exceeded this threshold for two monitoring hours at NSA 1. This data was removed from the analysis.

6.0 EXISTING NOISE LEVELS

This section discusses the existing noise levels near the Project location at the NSAs. The sound level meters were programmed to sample and store A-weighted sound data including L_{eq} and L_{dn} values and audio recordings. Long-term measurements at NSA 1 and the monitoring location near the Carrizozo concrete batch plant were recorded in 1-minute and 1-hour intervals. Both long-term measurements yielded 24 hours of valid data.

Short-term measurements were taken at NSAs 2, 3 and 4. The sound meter was set to a slow response. Because only measurements corresponding to daytime hours were collected at these three locations, calculation of L_{dn} values assumed nighttime noise levels equal to what was measured during daytime hours. This is a conservative approach that likely overestimates ambient background noise levels and minimizes impacts due to the Project, as nighttime noise levels are typically lower than daytime levels. Long-term measurements at NSA 1 that included nighttime hours confirmed that there were no environmental occurrences during nighttime hours that would have contributed to a higher noise level being measured than during daytime hours. The L_{dn} for NSA 1 was calculated using collected data, and no daytime measurements were extrapolated to nighttime hours.

Observed sources of background noise that contributed to the existing sound level at the monitoring locations included road traffic, dogs and trees rustling. No data were excluded from the results due to noise-contributing sources were determined to not be representative of the ambient soundscape, but only due to increased wind conditions. Field data sheets were completed during the survey and are provided in Attachment 4. Table 5 summarizes the ambient sound measurements collected.

Table 5. Summary of Ambient Sound Measurements

Source	Monitoring Start	Monitoring End	Monitoring Duration	Measured Noise Levels			
				L_d	L_n	L_{eq}	L_{dn}^1
NSA 1	12/11/2021 10:41:03	12/12/2021 16:07:39	29:26:36	46.8	43.3	46.0	50.4
NSA 2	12/12/2021 17:22:52	12/12/2021 17:42:54	0:20:02	29.8	29.8	29.8	36.2
NSA 3	12/12/2021 18:14:59	12/12/2021 18:35:24	0:20:25	33.4	33.4	33.4	39.8
NSA 4	12/12/2021 16:28:56	12/12/2021 16:51:25	0:22:29	45.5	45.5	45.5	51.9
Carrizozo Concrete Batch Plant	12/11/2021 13:19:44	12/13/2021 13:33:51	48:14:07	47.7	45.9	47.6	52.7

¹ L_{dn} was calculated for NSAs 2 through 4 assuming L_d was representative of L_n . The L_{dn} was calculated using the following formula:

$$L_{dn} = 10 \log_{10} \left(\frac{15}{24} 10^{\frac{L_d}{10}} + \frac{9}{24} 10^{\frac{L_n+10}{10}} \right)$$

7.0 OPERATIONAL IMPACTS

This analysis estimates the noise levels due to operation of the Project. Based on information provided in the NSR Minor Source Permit Application for Roper Construction, Inc.'s Alto Concrete Batch Plant, potential noise sources at the site would consist of a concrete batch plant, concrete mixer trucks and a front-end loader. The NSR Minor Source Permit Application for Roper Construction, Inc.'s Alto Concrete Batch Plant is provided as Attachment 6.

It was determined that operational noise measured at the existing concrete batch plant in Carrizozo could not adequately predict noise from the Project, as the plant was observed to be inoperable for the majority of the recording. During periods of activity, other noise sources could potentially obscure the noise attributable to operations at the facility. As a result, noise levels for concrete batch plants and their associated equipment were obtained from the FHWA -Construction Noise Handbook - Table 9.1 RCNM Default Noise Emission Reference Levels and Usage Factors for the purposes of the noise impact assessment. These noise levels are provided as sound pressure levels at a reference distance of 50 feet. A single concrete batch plant, two concrete mixing trucks, and one front-end loader were used as the potential noise sources. The center of the project area was selected as the baseline from which distances to the NSAs were measured. It is likely that noise generating activities would be occurring away from the center, meaning that calculated noise impacts assessed in this report are conservative and likely underestimate the actual impacts. A site layout indicating the point from which noise generating activities were assumed to originate that was obtained from the NSR Minor Source Permit Application for Roper Construction, Inc.'s Alto Concrete Batch Plant can be seen in Figure 3.

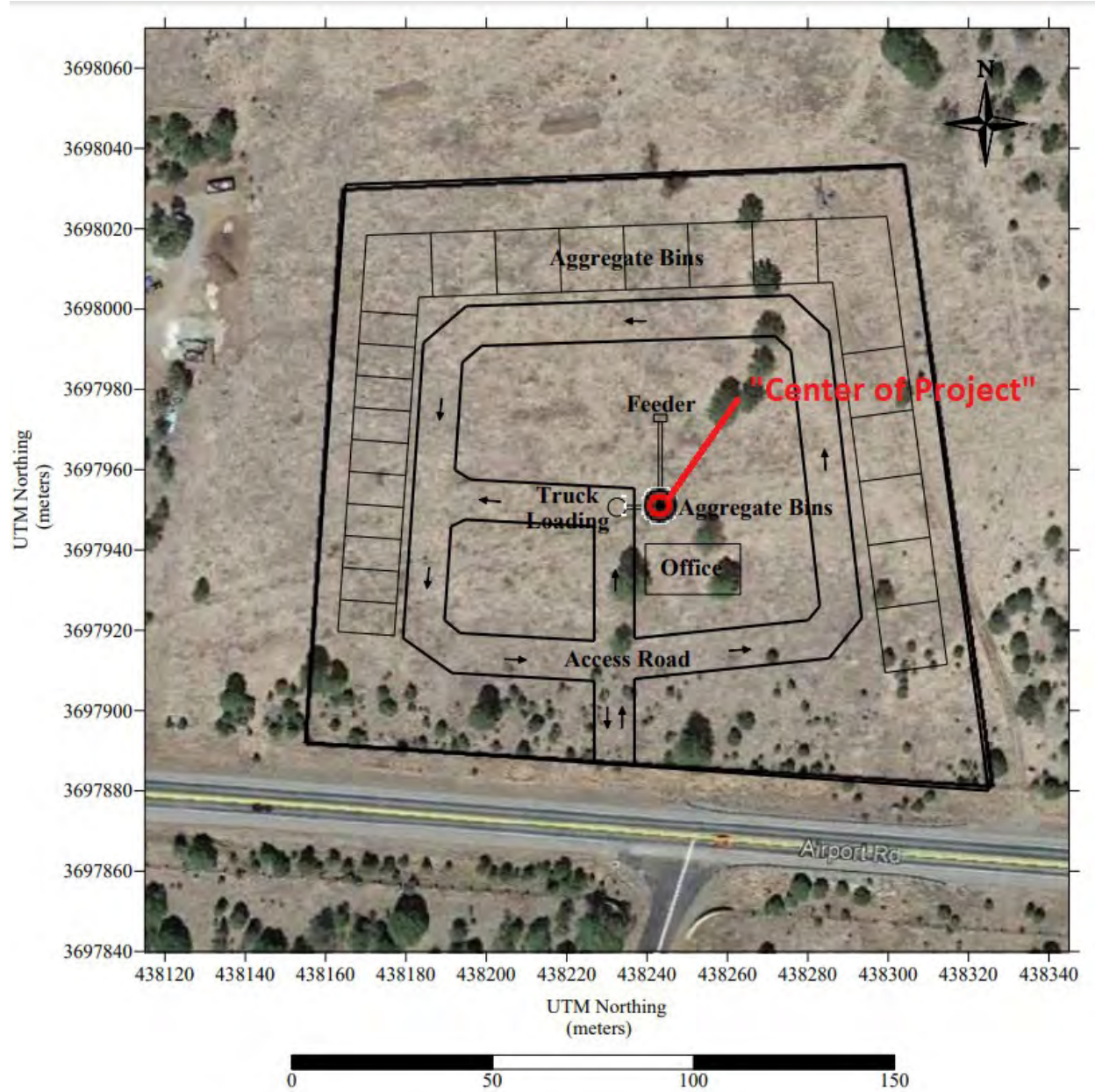


Figure 3. Site Layout for the Alto Concrete Batch Plant

Table 6 summarizes the noise levels Factors of the noise generating equipment obtained from the FHWA - Construction Noise Handbook - Table 9.1 RCNM Default Noise Emission Reference Levels and Usage that were used to estimate the noise impacts from the operation of the Project.

Table 6. Noise Generating Equipment Noise Levels

Description	Quantity	Acoustical Usage Factor ¹	Noise Level Reference Distance ¹	Sound Pressure Level @ reference distance ¹
		%/hr.	(feet)	(dBA)
Concrete Batch Plant	1	15	50	83
Concrete Mixer Trucks	2	40	50	79
Front End Loader	1	40	50	79

Noise impacts were estimated by calculating the noise contribution from each piece of equipment separately and adding them logarithmically at the NSA. Table 7 shows the potential impact from each source at the NSAs. The L_{dn} is being considered in addition to the L_{eq} , as Roper Construction, Inc. has indicated in the NSR Minor Source Permit Application for Roper Construction, Inc.'s Alto Concrete Batch Plant that it intends on operating during nighttime hours with workdays having the possibility of starting at 3AM and ending at 9PM. Operational noise impacts from the Project do not include ambient noise levels at the NSA. Noise impact calculations can be found in Attachment 5.

Table 7. Operational Impacts of the Project at NSAs

Location	Distance (feet)	Operational Noise Impact at NSA (L_{eq})	Operational Noise Impact at NSA (L_{dn})
NSA 1	458	61.7	65.2
NSA 2	3,271	44.7	48.2
NSA 3	3,623	43.8	47.3
NSA 4	829	56.6	60.1

The analysis also calculated the Project’s noise level and projected increase above existing ambient noise levels at each NSA. Noise levels from each piece of equipment was added logarithmically to determine the Project’s overall noise impact. The overall Project noise was then added to the ambient levels to determine the potential noise increase experienced by the NSA. Table 8 shows the calculated noise levels at each NSA and the potential increase due to the Project equipment.

Table 8. Calculated Operational Noise Impacts

Receiver Name (Location)	Measured Ambient Sound Level (dBA)		Estimated Sound Level of Project Equipment (dBA)		Project Equipment plus Ambient Noise (dBA)		Potential Noise Increase due to Project Equipment (dBA)	
	L _{eq}	L _{dn}	L _{eq}	L _{dn}	L _{eq}	L _{dn}	L _{eq}	L _{dn}
NSA 1	46.0	50.4	61.7	65.2	60.6	65.4	14.6	15.0
NSA 2	29.8	36.2	44.7	48.2	43.6	48.5	13.8	12.2
NSA 3	33.4	39.8	43.8	47.3	43.0	48.0	9.6	8.2
NSA 4	45.5	51.9	56.6	60.1	55.8	60.7	10.3	8.8

As provided in Table 8, increases in noise at the NSAs range between 9.6 dBA L_{eq} at NSA 3 and 14.6 dBA L_{eq} at NSA 1, and 9.6 dBA L_{dn} at NSA 3 and 15.0 dBA L_{dn} at NSA 1. These noise levels represent what would be perceived as an approximate doubling of noise at the NSAs. The L_{dn} at both NSA 1 and NSA 4 are in excess of the 55 dBA standard established by the EPA that is considered to be the maximum level below which no effects on public health and welfare occur due to interference with speech or other activity (EPA 1974). As a result, it can be expected that this project may have adverse effects on public health and welfare at NSA 1 and 4. Additionally, actual noise levels are likely to exceed what has been estimated here, as the potential for equipment to operate in greater quantities as well as in closer proximity to the NSAs is possible.

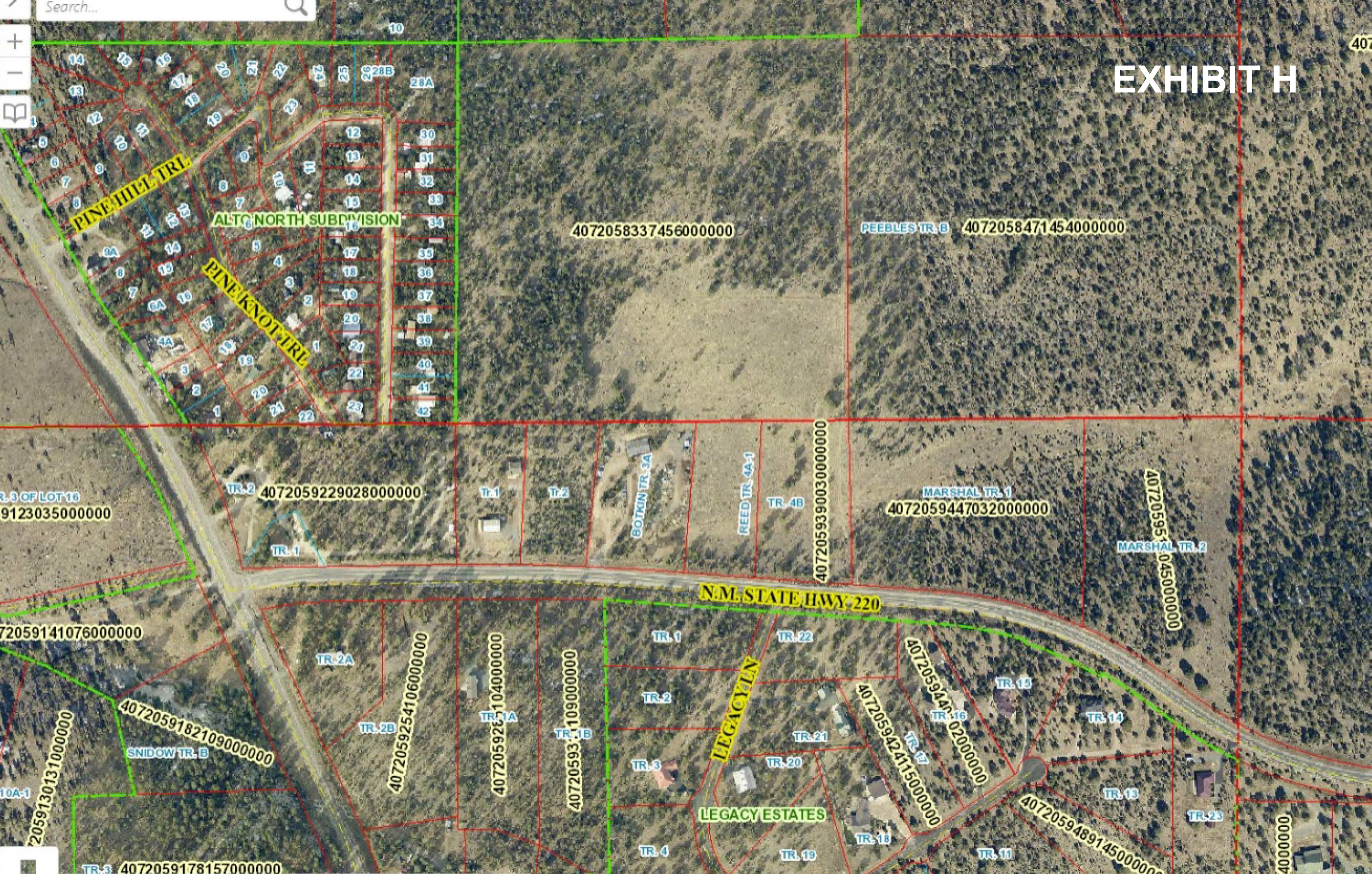
8.0 LITERATURE CITED

Bolt Beranek and Newman, Inc. 1973. *Fundamentals and Abatement of Highway Traffic Noise*. Report Number PB-222-703. U.S. Department of Transportation, Federal Highway Administration.

U.S. Environmental Protection Agency (EPA). 1974. *Information on Levels of Environmental Noise Requisite to Protect Public Health and Welfare with an Adequate Margin of Safety*. Available at: http://www.nonoise.org/library/levels/levels.htm#levelsof_ Accessed December 20, 2021.



EXHIBIT H



407205833745600000

PEEBLES TR. B 407205847145400000

ALTO NORTH SUBDIVISION

PINEHILL TRIL

PINEBROOK TRIL

R. 3 OF LOT 16
912303500000

TR-2 407205922902800000

TR-1

TR-2

BOTKIN TR. 3A

REED TR. 4A-1

TR. 4B

40720593900300000000

MARSHAL TR. 1
407205944703200000

MARSHAL TR. 2

407205951045000000

N.M. STATE HWY 220

407205914107600000

TR-2A

407205925410600000

407205926110400000

407205931109000000

TR. 1

TR. 2

TR. 3

TR. 4

TR. 22

LEGACY LN

TR. 20

TR. 19

TR. 21

TR. 18

407205942411500000

407205944702000000

TR. 15

TR. 11

TR. 14

TR. 13

TR. 23

407205948914500000

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407205913013100000

407205918210900000
SNIDOW TR. B

TR-3 407205917815700000

**COUNTY OF LINCOLN
RESOLUTION NO. 2021-24**

**A CONCRETE BATCH PLANT, IF CONSTRUCTED AND OPERATED ALONG
NM HIGHWAY 220, COULD POSE A NUISANCE TO SURROUNDING PROPERTY
OWNERS**

WHEREAS, under NMSA 1978, Section 30-8-1, a nuisance consists of creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: (A) injurious to public health, safety, morals or welfare; or, (B) interferes with the exercise and enjoyment of public rights, including the right to use public property; and

WHEREAS, NMSA 1978, Section 3-18-17 permits a county to adopt an ordinance defining a nuisance; and

WHEREAS, Roper Construction Inc. (“Roper”) is proposing to construct and operate a concrete batch plant (“CBP”) on NM 220 near the intersection of NM 220 and NM 48; and

WHEREAS, the Application for an Air Quality Permit submitted by Roper to the New Mexico Environment Department (“NMED”) reveals that Roper’s proposed CBP will be a source of Hazardous Air Pollutants (“HAP”); and

WHEREAS, Roper claims that its CBP will be a “minor” source, i.e., less than 10 tpy of any single HAP, only by virtue of Roper’s proposed intent to implement certain controls designed to reduce HAP emissions; and

WHEREAS, the Board has been informed that the fugitive dust emissions from the handling sources at Roper’s CBP must be controlled by adding water sprays to the exit of the aggregate/sand feed hopper to obtain control efficiencies and, without adequate water to implement these controls, the proposed CBP would be a “major” source of HAP because it would emit more than 10 tpy of one or more hazardous air pollutants; and

WHEREAS, the Board has been informed that the Application for an Air Quality Permit submitted by Roper to the NMED does not identify a suitable source of water to obtain control efficiencies; and

WHEREAS, NM 220 and NM 48, including at the intersection of those two highways, are designated a “Scenic Byway” under federal laws and regulations and, together, are known as the “Billy the Kid Scenic Byway”; and

WHEREAS, the White Mountains are critical habitat for at least five (5) listed threatened or endangered species: Red-breasted Nuthatches, Townsend’s Solitaire, Clark’s Nutcrackers, Northern Three-toed Woodpeckers, and Golden Crowned Kinglets; and

EXHIBIT I

WHEREAS, the Lincoln National Forest is home to at least four (4) listed endangered species: the Mexican Spotted Owl, New Mexico Meadow Jumping Mouse; Checkerspot Butterfly, and Sacramento Mountain Salamander; and

WHEREAS, the application Roper submitted to the NMED for the CBP does not address the potential impact to the critical habitat for the species found in the White Mountain Wilderness Area and Lincoln National Forest identified as endangered or threatened; and

WHEREAS, the Fort Stanton Snowy River Cave National Conservation Area, located approximately five (5) miles from Roper's proposed CBP, was established in 2009 to protect, conserve, and enhance the unique and nationally important Snowy River Cave system, which is the second longest cave in New Mexico, the 14th largest cave in the United States, the 62nd longest cave in the world, and the largest cave managed by the Bureau of Land Management; and

WHEREAS, the application Roper submitted to the NMED for the CBP does not address the potential impact to the ecosystem of the Fort Stanton Snowy River Cave National Conservation Area, including the various hiking and equestrian trails and campgrounds within the Conservation Area; and

WHEREAS, the application Roper submitted to the NMED for the CBP does not disclose the presence of the Mount View Christian Camp, a church school located approximately 0.2 miles from the proposed CBP site, at which students attend year-around; and

WHEREAS, the application Roper submitted to the NMED for the CBP does not address the potential for runoff contamination from the plant to nearby surface waters, including the Rio Bonito and Little Creek; and

WHEREAS, the area surrounding the proposed site of Roper's CBP is virtually exclusively residential and is comprised of several organized neighborhood and neighborhood associations; and

WHEREAS, the residential neighborhoods surrounding the proposed site of Roper's CBP are scenic, quiet, and peaceful, and enjoy unimpeded views of the well-recognized beauty of the mountains located in the White Mountain Wilderness Area, including Sierra Blanca Peak, southern New Mexico's highest peak; and

WHEREAS, the Board finds that a CBP at the proposed location may impair the quiet enjoyment of the citizens of Lincoln County living in this area by creating a deleterious effect on the visual and other aesthetic amenities that are prevalent in the area and which formed a substantial reason for the residents to purchase lots and live in the area; and

WHEREAS, the Board finds that emissions of HAP from the CBP proposed by Roper, the construction of a CBP in this scenic residential area, the lack of consideration of potential impact to the threatened and endangered species found in the White Mountain Wilderness Area and Lincoln National Forest, the lack of consideration of the potential impact to the Fort Stanton Snowy River Cave ecosystem, the lack of consideration of the potential contamination of the nearby

surface waters, accompanied by the excessive traffic from large trucks, including cement mixer trucks and water tanker trucks, on the Billy the Kid Scenic Byway, and the potential impact to the Mountain View Christian Camp, may be injurious to public health, safety, welfare, and quality of life of the residents of Lincoln County and may interfere with the exercise and enjoyment of public rights and, accordingly, may be considered a nuisance to surrounding property owners; and

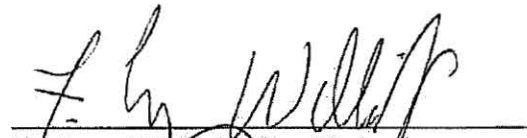
WHEREAS, the Board further finds that the existence of such a potential nuisance would likely result in visual and environmental blight, and unhealthy, unsafe and devaluing conditions; and


NOW THEREFORE, BE IT RESOLVED by the Board of County Commissioners of the County of Lincoln, New Mexico that the proposed CBP, if constructed along NM Highway 220 could be considered a nuisance to surrounding property owners.


PASSED, APPROVED AND ADOPTED this 19th day of October, 2021.

**BOARD OF COUNTY COMMISSIONERS
LINCOLN COUNTY, NEW MEXICO**


Thomas F. Stewart, Chair



Dr. Lynn Willard, Vice-Chair


Elaine Allen, Member


Jon Crunk, Member


Todd Proctor, Member

ATTEST:


Whitney Whitaker, Clerk

