BEFORE THE MINED LAND RECLAMATION BOARD

SNOWCAP COAL COMPANY, INC.'S RESPONSE TO FONTANARI MOTION TO DISMISS FOR LACK OF JURISDICTION

IN THE MATTER OF OBJECTIONS CONCERNING TECHNICAL REVISION NO. 69 TO PERMIT NO. C-1981-041

PERMITEE: SNOWCAP COAL COMPANY, INC.

Permittee, Snowcap Coal Company, Inc., a Delaware Corporation ("Snowcap"), provides the following response to the *Motion to Dismiss for Lack of Jurisdiction* by Objector Fontanari Family Revocable Trust ("Fontanari") as follows:

I. INTRODUCTION

Colorado law is clear that the Mined Land Reclamation Board (the "MLRB") has jurisdiction and is required to hold an expeditious hearing for any person who may be adversely affected by a proposed technical revision to a permit. *See* C.R.S. § 34-33-116(4). Nonetheless, Fontanari seeks dismissal of the technical revision scheduled to be heard by the MLRB on May 24th and 25th on the premise that the MLRB has been rendered an "incompetent tribunal" because Fontanari attempts to interject issues that are irrelevant, not before the MLRB in this proceeding, and beyond the MLRB's statutory authority. No principle of law either requires or permits the result demanded by Fontanari.

The arguments of Fontanari's counsel seek to interject issues that are both irrelevant to and outside of the scope of this statutorily mandated proceeding, and in several instances beyond the MLRB's jurisdiction. Those arguments include allegations that (1) Fontanari has suffered subsidence damages, unrelated to the hydrologic communication issue documented in the Boulay Report (the "Subsidence Claims"); (2) that the Permit should be amended to incorporate the Fontanari Repair Plan to address the Subsidence Claims (the "Fontanari Plan"); (3) that Fontanari's consent is required for approval of TR-69 (the "Consent Claims); and (4) that Snowcap and MLRB may be liable to Fontanari for damages or "takings" associated with the approval of TR-69 ("Damages and Takings Claims").

All of Fontanari's arguments reflect a fundamental misunderstanding of the statutory structure of the Colorado Surface Coal Mining Reclamation Act, C.R.S. § 34-33-101, *et seq*. (the "Act"), the Regulations of the Colorado Mined Land Reclamation Board for Coal Mining, 2 CCR 407-2 (the "Coal Rules"), and Snowcap's obligations under the Permit, including any "commitments" contained in MR-82. Moreover, the alleged "Factual Background" discussed by

Fontanari in the Motion is both disputed by Snowcap and in large part irrelevant to MLRB's review of the TR-69 Proposed Decision.

As discussed below, the law requires that the MLRB must complete its statutory duty to hold the hearing on TR-69. Conversely, no principle of law permits dismissal as a result of Fontanari's attempt to interject irrelevant or extra jurisdictional issues. Fontanari must pursue its Subsidence Claims and the Fontanari Plan, to the extent they may even be addressed, as provided for by the Act and the Coal Rules. Similarly, rather than making its allegations concerning Damages and Takings Claims, and the Consent Claims in this proceeding, which are beyond MLRB's jurisdiction to address, Fontanari must seek out the appropriate adjudicatory body with sufficient jurisdiction. Accordingly, the Motion to Dismiss must be denied.

III. ARGUMENT

A. The MLRB is the only body with jurisdiction to hear objections to TR-69, and it is required to complete its statutorily mandated duty under C.R.S. § 34-33-116.

The Colorado General Assembly has vested the MLRB with sole authority and obligation to review objections to DRMS's proposed decision on TR-69 in an expeditious manner. *See* C.R.S. § 34-33-116(4). Fontanari has not pointed to any other provisions of law that permit the MLRB to avoid its statutorily imposed obligation.

Fontanari, by incomplete and out-of-context citations to disparate provisions of the Act, addressed more fully below, asserts that the sole purpose of that legislation is to benefit the surface land owner.[1] However, Fontanari alleges due process violations because of manufactured inconsistencies with the statutory procedures prescribed by the General Assembly and the rights allegedly granted a landowner under the Act.

Specifically, Fontanari both concedes and takes issue with the fact that the Act does not permit an objector, like Fontanari, to propose alternative "technical revisions" to those proposed by the permittee or DRMS. *See, e.g.,* C.R.S. § 34-33-116(1).[2] Fontanari then asserts that those perceived deficiencies and inconsistencies within the statute; paired with Fontanari's Subsidence Claims, the Fontanari Plan, the Consent Claims, and the Damage and Takings Claims all render

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[1] C.R.S. § 34-33-102 sets forth a broad legislative declaration indicating purposes beyond those intimated by Fontanari; moreover, it is the later sections of the statute itself which define the extent that the General Assembly wished to extend protections to landowners.

[2] As set forth in Snowcap's Pre-Hearing Statement, the "Fontanari Plan" is beyond the scope of the Board's authority in this proceeding, in that it would constitute a Permit Revision subject to C.R.S. § 34-33-115, which may only be proposed by the Permittee or DRMS, *see* C.R.S. § 34-33-115(1)(a) and (3), and must be completed in accordance with certain statutory procedures, including notice of the proposed Revision. *See* C.R.S. § 34-33-118. Consideration of the Fontanari Plan, and its sweeping concepts, without compliance with the Act, would deprive others of due process, and their rights under the Act. Similarly, Fontanari's demand that money be extracted from Snowcap as part of the "Fontanari Plan" is also without any statutory basis and beyond MLRB's authority to consider.

the MLRB an "incompetent tribunal." Fontanari therefore demands that the MLRB, rather than fulfilling its statutory duty under C.R.S. § 34-33-116, dismiss the TR-69 application entirely. MLRB is not permitted to abdicate its responsibilities as proposed by Fontanari.

In sum, Fontanari is asking the MLRB to determine that the Act violates due process standards. An administrative agency has no authority to determine whether the acts of the legislature are constitutional, or otherwise in violation of the law. *See Horrell v. Dep't of Admin*., 861 P.2d 1194, 1198 (Colo. 1993). Even a claim that a statute under which an agency is proceeding is unconstitutional will not clothe the judiciary with power to interfere with or control such department in advance of its taking final action on the matter, rather, the question of constitutionality is a matter to be raised by writ of error after the executive has performed its function. *Colorado State Bd. of Med. Examiners v. Dist. Court In & For El Paso Cty*., 138 Colo. 227, 233, 331 P.2d 502, 506 (1958). Therefore, MLRB is prohibited from making the due process violation determinations requested by Fontanari as a basis for dismissing TR-69.

Based on the foregoing, even if there were due process problems with the procedures required by the Act, as alleged by Fontanari, the MLRB has no choice but to comply with its statute, and complete the mandated proceeding. Problems with statutory provisions are for the General Assembly or the Courts to address.

B. Fontanari Misrepresents the Obligations of a Permittee under the Act.

Fontanari misrepresents the nature and extent of Snowcap's obligations under the Act. The Act only imposes obligations on a permittee to restore or reclaim surface lands in specific circumstances. Those circumstances are limited to (1) reclamation of lands disturbed by surface coal mining activities, in this case areas disturbed by surface operation and facilities associated with the underground mine, to a condition defined by the Permit ("Surface Disturbed Lands"), *see* C.R.S. § 34-33-111(1)(b)(I); (c) and (d), and C.R.S. § 34-33-120(b); and (2) repair of lands and/or compensation of landowner when subsidence has cause material damage to residential structures or non-commercial buildings. *See* C.R.S. § 34-33-121(2)(a).

Citing to C.R.S. § 34-33-111(1)(b)(I); (c) and (d), and C.R.S. § 34-33-120(b), Fontanari argues for the general proposition that a coal permit operator is either to restore the surface lands to allow the land uses which occurred pre-mining, or if not possible, to restore the surface to a condition that would allow other land uses that can be reasonably employed on the surface. *See* Motion at 7. A review of those provisions finds that C.R.S. § 34-33-111(1)(b)(I); (c) and (d), and C.R.S. § 34-33-120(b) <u>are only applicable to Surface Disturbed Lands</u>. Evidence at the Formal Hearing will show that under the Permit, the approved post mining use of the Surface Disturbed Lands is <u>wildlife habitat</u>. Therefore, there is no requirement that Snowcap reclaim those lands to facilitate the uses other than wildlife habitat.

Fontanari also alleges that Snowcap has responsibilities concerning subsidence on lands on which no surface coal mining operations have occurred, but which overly underground mine

workings ("Undermined Lands").[3] Tracts 70 and 71, owned by Fontanari, are predominantly Undermined Lands for which there is no associated reclamation obligation under the Permit, including the portions where the hydrologic communication identified in the Boulay Report occurred.

Section 34-33-121, C.R.S., is the exclusive provision of the Act addressing MLRB's authority to address the surface effects of underground coal mining, and authorizes the MLRB to promulgate rules, consistent with that section, to address those effects, including subsidence. *See* C.R.S. § 34-33-121(1). The General Assembly has limited the circumstances where the MLRB may require an operator to either repair lands or compensate a landowner as a result of subsidence damage to instances where material damage has occurred to any occupied residential dwelling and related structures and any non-commercial building. *See* C.R.S. § 34-33-121(2)(a). The Act does not permit MLRB to either require repair of subsidence or require compensation for subsidence damage in any other circumstances.

State agencies, like the MLRB, may only promulgate rules within their statutory authority and any such rule issued by an agency in excess of that authority is void. C.R.S. § 24-4-103(8). Moreover, just because the rule is not contrary to the specific provisions of a statute, it may not be deemed to be within the statutory authority and jurisdiction. *Id.* A regulation may not modify or contravene an existing statute, and any regulation that is inconsistent with or contrary to a statute is void. *Miller International, Inc. v. State*, 646 P.2d 341 (Colo. 1982).

Fontanari relies on Section 4.20.3(2)(a) of the Coal Rules, suggesting that subsidence damages to "renewable resource lands" must be restored or repaired. As a preliminary matter, Fontanari's lands have never been categorized by DRMS or MLRB as "renewable resource lands." Section 4.20.3(2)(a) of the Coal Rules, however, is beyond the MLRB's statutory authority. The only times the Act contemplates that the MLRB may consider and address "renewable resource lands" is either (1) in designation of lands as unsuitable for certain types of surface coal mining activities under C.R.S. § 34-33-126, or (2) in the identification of such lands pursuant to a data inventory contemplated by C.R.S. § 34-33-130.

The decision of the General Assembly not to include "renewable resource lands" within the lands for which subsidence repair may be required or compensated for under C.R.S. § 34-33-121 was an explicit statement of legislative intent limiting the MLRB's authority concerning those lands for which such actions may be required. *See Romer v. Bd. of County Comm'rs of County of Pueblo*, 956 P.2d 566, 567 (Colo.1998) (absence of specific provisions or language in a statute "is not an error or omission, but a statement of legislative intent").

In the absence of statutory authority, Section 4.20.3(2)(a) of the Coal Rules is a void rule. *See* C.R.S. § 24-4-103(8); s*ee also Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n,* 758 P.2d 164, 172 (Colo.1988) (No deference to agency interpretation where that

[3] Evidence at the Formal Hearing will show that Fontanari Tract #70 and 71 at the time of the Application for the Permit were identified as abandoned agricultural land.

interpretation is contrary to constitutional and statutory law); C.R.S. § 24–4–106(7) (providing that courts "*shall* hold unlawful and set aside" any agency action that is "contrary to law" (emphasis added)). In summary, the Act does not provide the broad rights and protections to the surface owner asserted by Fontanari with respect to Tracts 70 and 71. Therefore, Fontanari's argument that the statutory procedures provided by Act fail to adequately protect those interests is without foundation.

C. Fontanari cannot deprive the MLRB of jurisdiction to hear and make a determination on a Technical Revision pursuant to C.R.S. § 34-33-116 by attempting to interject issues that are irrelevant, not properly before the MLRB in this proceeding, or beyond the MLRB's statutory jurisdiction.

Fontanari, based in its specious interpretation of the Act, argues that MLRB's lack of the authority to resolve Fontanari's Subsidence Claims, the Damage and Takings Claims, the Consent Claims, and to consider the Fontanari Plan, subverts both due process and the purposes of the Act and renders the MLRB an "incompetent tribunal" allegedly violating Fontanari's "due process" rights. Fontanari is wrong as a matter of law on all counts.

Due process, at its most basic level, "requires that the agency give notice and afford a hearing to affected individuals." *Douglas Cty. Bd. of Comm'rs v. Pub. Utilities Comm'n of State of Colo.,* 829 P.2d 1303, 1310 (Colo. 1992). "[I]n the arena of administrative law, courts will not intervene until a petitioner has exhausted all available administrative remedies . . . This is so even if the statute under which the administrator is operating is unconstitutional, or the plaintiff alleges there has been a due process violation during the administrative procedure." *Crow v. Penrose-St. Francis Healthcare Sys*., 169 P.3d 158, 164 (Colo. 2007) (Internal citations omitted). There is no doubt that Fontanari is being afforded sufficient due process, e.g., notice and an opportunity for hearing, on the limited matters that may be addressed by the MLRB at the Formal Hearing.

Here, MLRB's authority is limited to its review of the TR-69 Application and its determination regarding whether TR-69 in fact complies with the Permit, as modified by MR-82. It is axiomatic that the MLRB has the authority to interpret orders concerning compliance with the Permit. *See, e.g.,* C.R.S. §§ 34-33-123, 124, 125. Moreover, reviewing Courts will "consider and defer to an agency's interpretation of its own enabling statute and [of] regulations the agency has promulgated." *Bd. of Cnty. Comm'rs v. Colo. Pub. Utils. Comm'n,* 157 P.3d 1083, 1088 (Colo.2007).[4] An agency is required to follow its own regulations in order to comport with principles of due process; that is, the public is entitled to know the manner in which an agency will render a decision and the factors the agency will consider. *Rags Over the Arkansas River, Inc. v. Colorado Parks & Wildlife Bd*., 360 P.3d 186, 191, *as modified on denial of reh'g* (Mar. 26, 2015), *cert. denied* (Colo. Oct. 26, 2015). So long as MLRB limits the scope of the Formal

[4] Of course, such deference will not be warranted where the agency's interpretation is contrary to constitutional and statutory law. *See, e.g., Three Bells Ranch Assocs. v. Cache La Poudre Water Users Ass'n,* 758 P.2d 164, 172 (Colo.1988); *see also* § 24–4–106(7), C.R.S. (2013) (providing that courts "*shall* hold unlawful and set aside" any agency action that is "contrary to law" (emphasis added)).

Hearing to the matters identified in the Proposed Pre-Hearing Order[5], and complies with the Act and the Coal Rules, then it is acting within its authority and the requirements of due process.

Contrary to Fontanari's argument, no principle of law requires that an administrative agency be able to resolve all of a party's claims, including those beyond its jurisdiction, when completing otherwise statutorily assigned duties. The cases cited by Fontanari's counsel are inapposite, and standing for the uncontroversial proposition that when an adjudicatory body acts, the matter must be within its jurisdiction, or the action is otherwise void.[6] S*ee Tulip Investments, LLC v. State ex rel. Suthers,* 340 P.3d 1126, 1133 (Colo. 2015); *People v. Sandoval*, 383 P.3d 92, 101 (Colo. App. 2016). Rather, the law is clear that the agency is entitled to decide those matters within its jurisdiction. *See In Matter of Water Rights*, 361 P.3d 392, 396 (Colo. 2015) (holding agency has initial jurisdiction to resolve matter within its authority, notwithstanding claims that matter and claims are within exclusive jurisdiction of Water Court).

To the extent Fontanari wishes to pursue claims or issues either not properly before the MLRB or beyond MLRB's limited jurisdiction, it must either (1) pursue the appropriate procedures under the Act and Coal Rules, to the extent they might be within its jurisdiction, or (2) seek an adjudicatory body, a District Court perhaps, with sufficient jurisdiction to address its claims. Fontanari's failure to either effectively place claims before the MLRB, or to find the "Courthouse door" provides no basis for dismissal of TR-69.

IV. CONCLUSION

Based on the foregoing, Snowcap respectfully requests that the Motion to Dismiss be denied and be determined to be frivolous and groundless.

DATED this 10th day of May, 2017.

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[5] It is Snowcap's position that consideration of and adoption of any part of the Fontanari Plan would in fact deprive persons affected by those alternative reclamation requirements of due process under law, as there would have been no notice thereof or any opportunity for a hearing.

[6] Subject matter jurisdiction involves a court's power to resolve a dispute in which it renders judgment. A court has subject matter jurisdiction if "the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority." *Horton v. Suthers,* 43 P.3d 611, 615 (Colo.2002) (quoting *Paine, Webber, Jackson & Curtis, Inc. v. Adams,* 718 P.2d 508, 513 (Colo.1986)). Absent explicit legislative limitation, Colorado courts have unrestricted and sweeping jurisdiction. *In re A.W.*, 637 P.2d 366, 373–74 (Colo. 1981). These concepts apply to the authority of an administrative agency as well. *See generally Wilson v. Town of Avon,* 749 P.2d 990, 992 (Colo.App.1987). Administrative agencies' authority extends only so far as "determined and limited by the statutes by which they are created." *Colo. Div. of Emp't & Training, Dep't of Labor & Emp't v. Indus. Comm'n,* 665 P.2d 631, 633 (Colo.App.1983). The statutes that define an agency's authority are jurisdictional. *Speer v. Kourlis,* 935 P.2d 43, 48 (Colo.App.1996).

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CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May 2017, a true and correct copy of SNOWCAP COAL COMPANY, INC.'S RESPONSE TO FONTANARI MOTION TO DISMISS FOR LACK OF JURISDICTION was emailed, as follows:

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