

SNOWCAP COAL COMPANY, INC.'S RESPONSE TO FONTANARI MOTION IN LIMINE (DEED AND PURCHASE AGREEMENT)

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 in Limine and to Strike Contract Documents by Objector Fontanari Family Revocable Trust* (“Fontanari”) as follows:

I. Relevant Background

1. Snowcap submitted its application for a technical revision of Permit No. C-1981-041 (the “Permit”) on September 27, 2016, pursuant to C.R.S. § 34-33-116 and 2 CCR 407-2-2.08.4(2)(“TR-69”). That application proposes a repair and reclamation plan for the known hydrologic communication identified in the July 1, 2014 Boulay Report to DRMS (“Boulay Report”). This submission was in partial satisfaction of the requirements of Minor Revision No. 82 (“MR-82”). The repair and reclamation plan now proposed by Snowcap in TR-69 will take place on a single property currently owned by Fontanari, hereinafter “Tract #71.”
2. Fontanari has objected to Snowcap’s investigations and the TR-69 Application. Fontanari’s objections include allegations that Snowcap and MLRB are prohibited from undertaking the repair and reclamation actions described in TR-69 without making compensation to Fontanari under Article II, § 15 of the Colorado Constitution. *See* Fontanari’s October 27, 2016 “*Response to Snowcap Hydrologic Communication Repair Plan*” at p. 11; and Fontanari’s February 16, 2017 “*Comments to Proposed Decision Approving Snowcap Repair Plan, Demand for Evidentiary Administrative Hearing before ALJ, and Description of Hearing Issues*” at p. 11, para. 10; *see also* *Motion in Limine* at p. 4.
3. On November 4, 2016, DRMS provided Snowcap with its preliminary adequacy review comments concerning TR-69.
4. Among the comments made by DRMS was a request that Snowcap “[p]lease provide a letter from the landowner stating that they concur with the proposed reclamation plan for this hydrologic repair (Rule 2.05.5(1)(b)).”

5. Snowcap responded to those comments asserting that the cited rule did not require that the landowner “concur” with TR-69. Snowcap, nonetheless, provided documentation concerning its easement rights to perform any reclamation obligations under the Permit, including requirements that might be required by DRMS in the future, and various covenants made by Fontanari granting Snowcap such rights, which survived closing, as part of its response on December 6, 2016. Those materials included copies of (1) Contract for the Sale and Purchase of Real Estate between Snowcap and Rudolph and Ethel Fontanari dated July 21, 2003 (“Purchase Agreement”); and (2) Special Warranty Deed dated December 15, 2003, and recorded in the records of the Mesa County Clerk and Recorder on December 22, 2003 at Reception No. 2168754 (the “SWD”). Copies of each document were appended to the *Motion in Limine*.
6. Fontanari has objected to Snowcap’s submittal of the Purchase Agreement and the SWD as part of its response to DRMS, and now seeks to preclude the submission of those documents into evidence at the MLRB hearing on TR-69 set for May 24 and 24, 2017 (“Formal Hearing”).

II. Argument

A Legal Standards

C.R.S. § 24-4-105(7) requires the MLRB to apply the rules of evidence and requirements of proof, to the extent practicable, with those of civil non-jury cases in the district courts.

The Colorado Rules of Evidence govern the admissibility of evidence and testimony. *People v. Martinez*, 74 P.3d 316, 323 (Colo. 2003) (citing *Masters v. People*, 58 P.3d 979, 988 (Colo. 2002); *People v. Shreck*, 22 P. 3d 68 (Colo. 2001). “Under 402, all relevant evidence is admissible, except as provided by constitution, rule, or statute, and irrelevant evidence is not admissible.” *People v. Ramirez*, 155 P.3d 371 (Colo. 2007); *see also* CRE 402. “Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Ramirez*, 155 P.3d at 378; CRE 401.

B. The Purchase Agreement and SWD are Evidence of Snowcap’s Right of Entry to complete its Proposed Repair and Reclamation Obligations under TR-69, as required by Statute and the Coal Rules.

Fontanari’s demand that the SWD and the Purchase Agreement be stricken from the record and precluded from introduction at the Formal Hearing is contrary to the requirements of the Act and the Coal Rules. Snowcap, as the person seeking revisions to its permit to undertake reclamation operations is required to provide a statement concerning:

“[T]hose documents upon which the applicant bases such legal right to enter and commence surface coal mining operations on the area affected and whether that right is the subject of pending court litigation; except that nothing in this article

shall be construed as vesting in the board or office the jurisdiction to adjudicate property rights disputes.”

C.R.S. § 34-33-110(j); *see also* C.R.S. § 34-33-114(2)(f)(II) (requiring submittal of evidence of right to extract coal by surface methods); 2 CCR 407-2-2.03.6(2).

The SWD and the Purchase Agreement are documents that are required by statute to be part of Snowcap’s application, and must be considered by DRMS and MLRB in its review of TR-69. The General Assembly has addressed the jurisdictional concern raised by Fontanari by providing that MLRB’s consideration of those documents shall not constitute an adjudication of property rights disputes. *See, e.g.*, C.R.S. § 34-33-110(j). Snowcap’s rights under the SWD and the Purchase Agreement are not the subject of pending court litigation. Fontanari’s objection is without basis and is resolved by the terms of the statute itself.

C. The Purchase Agreement is Relevant and Admissible Evidence If the MLRB Considers Fontanari’s Claims Regarding Subsidence not associated with the Hydrologic Communication Identified in the Boulay Report.

Fontanari has made numerous allegations concerning surface subsidence unassociated with the hydrologic communication observed in the July 1, 2014 Boulay Report, including but not limited to, depressions on Tract #71 and other Fontanari lands, whether those depressions are related to collapse of room and pillar caverns, whether Snowcap refused to investigate those alleged subsidence issues, whether DRMS should have required Snowcap to investigate subsidence as a condition of MR-82, and finally, whether Fontanari’s water rights have been adversely affected by subsidence, and the cost of repairs for such alleged injuries (together hereinafter the “Subsidence Claims”).

The Subsidence Claims are both irrelevant and beyond the scope of the Formal Hearing, because they are unrelated to the hydrologic communication identified in the Boulay Report. Fontanari’s Subsidence Claims seek to impose liability on Snowcap under different statutory provisions and rules.¹ This view is consistent with the Proposed Pre-Hearing Order dated May 1, 2015 prepared by the MLRB’s pre-hearing officer and general counsel (the “Pre-Hearing Order”). The Subsidence Claims are not properly before the MLRB in its review of TR-69 pursuant to C.R.S. § 34-33-116, nor has Fontanari taken the steps necessary under the Colorado Surface Coal Mining Reclamation Act, C.R.S. § 34-33-101, *et seq.*, (the “Act”) to place those allegations before the MLRB, to the extent they may be recognized under C.R.S. § 34-33-121.

Although the Subsidence Claims are beyond the scope of the Formal Hearing, Fontanari has reserved the right to argue to the MLRB that the Subsidence Claims should be heard. If the MLRB determines to accept evidence on and consider the Subsidence Claims, then the covenants and waivers of rights made by Fontanari in the Purchase Agreement are relevant admissible

¹ It is Snowcap’s position that the only situation in which the MLRB may require a permittee to repair or compensate for damage associated with the surface effects of subsidence is defined in C.R.S. § 34-33-121(2)(a)(II), with respect to damage to occupied residential dwellings or noncommercial buildings. None of those conditions have been asserted by Fontanari.

evidence for the purpose of demonstrating that Fontanari has waived all right to make such claims in any forum.

The law is clear that persons may contract away their right to petition the government or to make specific types of claims. *Krystkowiak v. W.O. Brisben Companies, Inc.*, 90 P.3d 859, 866 (Colo. 2004) (discussing the ability of persons to contract away their First Amendment right to petition the government); *USI Properties E., Inc. v. Simpson*, 938 P.2d 168, 173 (Colo. 1997) (holding that a party may stipulate away valuable rights); *see also City of Englewood v. Burlington Ditch, Reservoir & Land Co.*, 235 P.3d 1061, 1068 (Colo. 2010) (discussing ability of water rights holder to contract away, right to “call”, which is one of the “sticks in the bundle” comprising the water right); *Walton v. Indus. Comm’n of State*, 738 P.2d 66, 67 (Colo. App. 1987) (holding that due process rights may be waived).

Here, the Purchase Agreement provides at Section 13.A as follows:

A. Purchaser [Fontanari] acknowledges that prior to the date of closing it will have had the opportunity to inspect the Premises, observed its physical characteristics, and existing conditions, and conduct such investigations and study of the Premises as it deems necessary for acquiring the Premises for Purchaser’s intended use. In the event that Purchaser closes the purchase of the Premises, Purchaser agrees that:

1) **The act of closing shall constitute a waiver and release of any and all objections to or claims with respect to any and all physical characteristics and existing conditions on the Premises,’ and**

2) **That the Premises is being sold and conveyed to, and purchased and accepted by Purchaser in its present condition, “AS-IS, WHERE IS” and with all faults, and Purchaser hereby assumes the risk that adverse past, present, and future physical characteristics may not have been revealed by its inspection or investigation.**

Purchase Agreement at p. 4 (Bold Added). Paragraph 22 of that document provides that the Purchaser’s covenants survive closing.

If the MLRB received evidence on the Subsidence Claims, then the Purchase Agreement becomes relevant regarding whether Fontanari has contracted away any right to raise the Subsidence Claims before MLRB, or in any other forum. *See* CRE 401 and 402.

D. The Purchase Agreement and SWD are Relevant and Admissible Evidence If the MLRB Considers Fontanari’s Claims Regarding Alleged Damage to Fontanari’s Property.

A second category of allegations on which Fontanari seeks to present evidence during the Formal Hearing is the following:

The scope and financial character of permanent injuries to Fontanari lands damaged by the Snowcap Repair Plan, including, but not limited to: (a) the lost value of basaltic minerals prohibited from extraction after installation of the “grout plugs” in Fontanari Tract #71 as proposed by Snowcap Coal; (b) the lost arability of lands after installation of the “grout plugs”; and, (c) diminution in or destruction of the value of water rights in the Martin Crawford Ditch as a result of the inability to irrigate lands in Tract#71 and all other lands owned by Fontanari.

(hereinafter the “Damage Allegations”). Again, it is Snowcaps’s position, consistent with the Pre-Hearing Order, that the Damage Allegations are beyond the permissible scope of the Formal Hearing on TR-69. The Act does not permit the MLRB to award damages in a hearing under C.R.S. § 34-33-116, or any other form of hearing, for the types of damages alleged by Fontanari. Rather it is the MLRB’s purpose to insure that the conditions and actions required by the Permit are complied with, and that the requirements of the Act are satisfied.

To the extent the MLRB permits testimony on the Damage Allegations, which it should not, those allegations make the SWD and Purchase Agreement relevant admissible evidence. In order for Fontanari to suffer injuries on Tract #71 from the actions proposed by TR-69, the nature and extent of Fontanari’s interest in that parcel of land, and any appurtenant water rights must be established. A party’s interest in real property is both defined and limited by grant in vesting deed, particularly where the grantor retains reservations. *See O'Brien v. Vill. Land Co.*, 794 P.2d 246, 251 (Colo. 1990) (The purpose of a granting clause is “to define and designate the estate conveyed.”); *see also Owens v. Tergeson*, 363 P.3d 826, 832 (Colo. App. 2015) (Holding that a habendum clause may also describe the nature of the interest conveyed; “a habendum clause may define, explain, or qualify the premises described in a granting clause.”). Therefore the SWD is relevant to, and necessary for the purposes of establishing the extent of Fontanari’s interest in Tract #71.

“An easement may be created by reservation in a deed conveying the servient or burdened property to another.” *Bolinger v. Neal*, 259 P.3d 1259, 1264 (Colo.App.2010). The SWD demonstrates that Fontanari took title to Tract #71, and any appurtenant water rights, subject to and encumbered by the following reserved easement in Snowcap:

Grantor [Snowcap] is in the process of reclaiming the herein described land (the "Premises") in accordance with its obligations under Permit No. C-81-041 (the "Permit"), issued by the Colorado Division of Minerals and Geology ("DMG") pursuant to the Colorado Surface Coal Mining Reclamation Act, C.R.S. 34-33-101, et. seq. (the "Act") and associated regulations. Grantor therefore EXCEPTS AND RESERVES under Grantor, and its successors and assigns, an easement on, over and upon the Premises, together with the right of direct and immediate access in, on, under, over and through the Premises, and the right to use the Premises, in any reasonable fashion, all for the sole and exclusive purpose of performing **Grantor's reclamation and monitoring obligations under the Permit, the Act, as such obligations now exist or may later be modified.** Grantor further EXCEPTS AND RESERVES, and Grantee [Fontanari] hereby grants to Grantor, the right of ingress and egress to and from the Premises over

and through any adjacent lands owned by Grantee, to the extent that Grantee now or hereafter has any interest in such adjacent lands. **Without limitation, Grantor EXCEPTS AND RESERVES all rights necessary to perform all reclamation and monitoring activities which are specified in the Permit or that may otherwise be required by the DMG or other governmental agencies which have or may subsequently obtain jurisdiction over such activities, including the right to bring all equipment, supplies, and personnel onto the Premises which may be necessary or convenient to perform such reclamation and monitoring activities. Grantor agrees, in conducting operations on and accessing the Premises and adjacent property, Grantor shall use existing roads, gates, facilities and improvements whenever practical, and shall have the right to construct and use new facilities and improvements as may be necessary or convenient for its reclamation and monitoring obligations.** Upon expiration and/or termination of its reclamation obligations and release of any and all bonds applicable thereto by DMG, Grantor shall remove all of its equipment and materials from the Premises and shall restore the same in accordance with applicable requirements in or consistent with the Permit, as it may be revised from time to time, or the Act and its implementing regulations.

See SWD at 3-4.

Should the MLRB permit Fontanari to present testimony on the Damage Claims, the SWD is relevant evidence concerning the extent of both Snowcap's and Fontanari's interest in Tract #71, and demonstrates that Fontanari's rights are subject to SCC's reserved right to access and use that property for any activities necessary to meet its then-existing, or later modified, reclamation obligations under the Permit, including TR-69 if approved.

E. The SWD is Relevant and Admissible Evidence if the MLRB Considers Fontanari's Claims Regarding Alleged "Takings".

Akin to his damage allegations, Fontanari also alleges that that Snowcap and MLRB are prohibited from undertaking the repair and reclamation actions described in TR-69 without making compensation to Fontanari under Article II, § 15 of the Colorado Constitution, an issue expressly raised by Fontanari in the *Motion in limine* (hereinafter the "Takings Compensation Allegation"). See *Motion in Limine* at p. 4; see also Fontanari's October 27, 2016 "*Response to Snowcap Hydrologic Communication Repair Plan*" at p. 11; and Fontanari's February 16, 2017 "*Comments to Proposed Decision Approving Snowcap Repair Plan, Demand for Evidentiary Administrative Hearing before ALJ, and Description of Hearing Issues*" at p. 11, para. 10. Again, no part of the Act permits MLRB to consider claims under Article II, § 15 of the Colorado Constitution, and it is Snowcap's position that MLRB may not address or otherwise consider these allegations during the Formal Hearing on a technical revision. Rather, if Fontanari believes it has such a colorable claim, after the MLRB's approval of TR-69, it should pursue such a claim in the appropriate venue.

If the MLRB decides to consider evidence on the Takings Compensation Allegation, then again the SWD and the Purchase Agreement are relevant. In order to be compensable the

damage to the property must affect some right or interest which the landowner enjoys and which is not shared or enjoyed by the public generally. *Troiano v. Colorado Dep't of Highways*, 170 Colo. 484, 494, 463 P.2d 448, 452 (1969). “[W]here the land is thus already burdened by . . . an easement when a purchaser acquires title, he takes that land in that condition when he acquires title and is confined to damages for subsequent takings.” *Upper Eagle Valley Sanitation Dist. v. Carnie*, 634 P.2d 1008, 1009 (Colo. App. 1981). This requires consideration of the extent of Fontanari’s property interests in Tract #71. The actions Snowcap proposes to take pursuant to TR-69 are within the scope of activities permitted by the reserved easement set forth in the SWD. Therefore, the SWD is relevant to demonstrating that Fontanari has never enjoyed a right or interest in Tract #71 free from repair or reclamation actions required of Snowcap under its Permit, including future modifications of the Permit.

F. The SWD is Relevant and Admissible Evidence if the MLRB Considers Fontanari’s Claims Regarding (Whether Fontanari’s Consent is Required for MLRB to Approve TR-69.

Finally, Fontanari asserts in the *Motion in Limine* that its consent to the TR-69 of Permit No. C-1981-041, is a necessary predicate to the MLRB’s approval of TR-69 (hereinafter the “Consent Allegation”). See *Motion in Limine* at 3. The Consent Allegation assumes that Fontanari’s consent is necessary for MLRB approval of TR-69, or for Snowcap to take the actions contemplated by TR-69. SCC disputes both premises. As noted above, MLRB is required to consider Snowcap’s basis for its claimed right of entry to conduct mining or reclamation operations, however, it is precluded from resolving or determining property disputes.

Fontanari’s own arguments again render the SWD relevant, as it defines the extent of Fontanari’s property rights, and the limits thereof. Here, the SWD is relevant because it demonstrates that Fontanari, by accepting title to Tract #71, took title subject to Snowcap’s reserved easement right to conduct any and all repair or reclamation actions required of Snowcap under the Permit, including future modifications of the Permit by DRMS and MLRB. In effect, the SWD demonstrates that “consent” to TR-69, as a future modification of Snowcap’s obligations under the Permit, was given at the time Fontanari took title to Tract #71.

III. CONCLUSION

Based on the foregoing, Snowcap respectfully requests that the *Motion in Limine* be denied, or in the alternative limited on an issue by issue basis depending on the testimony that Fontanari is allowed to present.

DATED this 10^h day of May, 2017.

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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 IN LIMINE (DEED AND PURCHASE AGREEMENT) was emailed, as follows:

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/s/ John P. Justus

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