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May 11, 2017

Ms. Camille Mojar
MLRB Executive Secretary
Colorado Mined Land Reclamation Board
1313 Sherman St., suite 215
Denver, CO 80203

RE: Permit Holder: Snowcap Coal Company
Permit: C-1918-041
Docket: TR-69

HAND DELIVERED

Dear Ms. Mojar:

Enclosed for filing in the above-entitled matter please find an original and 16 copies of the Request for Leave to File Motion to Strike and Motion to Strike False Representations of Record, submitted on behalf of Objectors Rudy and Ethel Carol Fontanari, co-trustees of the Fontanari Family Revocable Trust.

Also enclosed herewith is an extra copy of this letter, which I would appreciate your office receipting for me. As always, your cooperation and assistance in this matter will be greatly appreciated.

Yours truly,



James A. Beckwith

Enclosures

RECEIVED

MAY 11 2017

DIVISION OF RECLAMATION
MINING AND SAFETY

FONTANARI REQUEST FOR LEAVE TO FILE MOTION TO STRIKE AND MOTION TO STRIKE FALSE REPRESENTATION OF RECORD

IN THE MATTER OF THE APPLICATION OF SNOWCAP COAL COMPANY FOR A TECHNICAL REVISION NO. 69 (File No. C-1981-041) AND OBJECTIONS THERETO BY FONTANARI FAMILY REVOCABLE TRUST

COME NOW Rudy and Carol Fontanari, Trustees of the Fontanari Family Revocable Trust ("Fontanari", collectively), by and through counsel of record, and for its Request for Leave to File Motion to Strike and Motion to Strike the False Representation of Record made by Snowcap Coal Company in its Response to Motion in Liming, states and avers as follows:

Request for Leave

Pursuant to the Pre-Hearing Conference Order, all motions were to be filed on or before April 24, 2017. The factual grounds for the Motion to Strike, however, did not occur until Wednesday, May 10th, when Snowcap filed its Response to Motion in Liming. Snowcap's false representations of the record attempt to hold Fontana and its counsel in a false, and adverse, light before the Board. To preserve the correct record as well as to protect itself from these misrepresentations, Fontana requests leave of this Board to submit its Motion to Strike.

Motion to Strike / False Statements

Statements to the court are excludable under C.R.E. Rule 403 when they are unfairly prejudicial. *People v. Galang* 382 P.3d. 1241, 1246 (Colo. App. 2016) SEE: *Masters v. People* 58 P.3d. 979, 1001 (Colo. 2002) (defining prejudicial as an undue influence to suggest that a decision be made on an improper basis, such as sympathy, hatred, contempt or retribution.) Add to the grounds for exclusion the fact that the alleged evidence or statements are false.

In its Response to Motion in Limine, Snowcap Coal ("Snowcap") states that Mr. Beckwith, Fontanari's counsel, had claimed liability by Snowcap under Article II, §15, Colorado constitution. Snowcap's counsel cited three specific representations. Examination of these citations, however, reveals the claim to be utterly false.

Motion in Limine, Pg. 4 [**Exhibit A**] The statement made specifically referenced this Board, as a public entity subject to Article II, §15, Colorado constitution. There is virtually no reference, in any manner, to Snowcap Coal. As a private entity, Snowcap is not subject to the constitutional provision.

Comments to Proposed Decision, Pg. 11, Para. 10; Comments to Repair Plan, Pg. 11 [**Exhibits B and C**] In each of these documents, there is virtually no reference to the

constitutional provision. There is not even a reference to the legal grounds upon which liability would be predicated (even though common law doctrines do apply to Snowcap). Thus, Snowcap cannot honestly argue to this Board that it “interpreted” these statements as referring to the constitutional provision.

This is not the first time Snowcap has made false representations in this proceeding. In its April 24th Motion for Extension (Rebuttal Statement), Snowcap asserted that Fontanari had violated Colorado Rules of Discovery by failing to provide Snowcap of copies of the Withers and Walter Environmental reports. As this Board knows, however, none of the parties were entitled to discovery and, in fact, none of the parties have ever engaged in discovery. Fontanari had, in fact, timely provided the Withers and Walter reports (dated April 10th and 11th) in compliance with Rules 2.6 and 2.7, Minerals Rules.

In that same motion, Snowcap asserted that Fontanari had failed to comply with some uncited and unknown “duty” to provide expert reports at the time of submitting comments to Snowcap’s various reports and repair plans or DRMS’ Proposed Decision. However, this Board’s statutes and rules do not require any expert reports as part of public comments to a permit holder’s attempt to amend a permit.

All parties have a duty to fairly and accurately cite the record of these proceedings. All parties have a duty to avoid placing the other party in a false light based on statements the other party has not, in fact, made. Snowcap has not complied with this duty, causing Fontanari to defend against misrepresentations lest this Board view Fontanari in a false light. This is demeaning to the integrity and dignity of these proceedings. Snowcap’s false representations must be stricken from the record.

WHEREFORE, AND FOR THE FOREGOING REASONS, Rudy and Ethel Carol Fontanari, co-trustees of the Fontanari Family Revocable Trust pray for an Order of this Board striking from the record the false representations made by Snowcap Coal Company in its Response to Motion in Limine and cited in this motion, together with such other and further relief as this Board deems appropriate in the circumstances.

DATED: May 11, 2016



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CERTIFICATE OF MAILING/ TRANSMISSION

I, the undersigned person, do hereby certify that on this 11th day of May 2017, I deposited a copy of the foregoing document in the U.S. Postal Service, first class mail, postage prepaid, and addressed to the following OR I transmitted a copy of the foregoing to the following persons at the registered e-filing address for same:

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Mr. James A. Beckwith, A.R. #2295

proposed Repair Plan. Citing C.R.S. §34-33-115, and other statutes in its Pre-Hearing Statement, Snowcap has asserted that a private landowner has no right to request permit revisions to adopt the landowner's proposed reclamation and repair plans. Snowcap argues that only the permit holder and the Board have such powers)

However, Article II, §15, Colorado Constitution requires the Board (a public entity) to provide due process and just compensation when either taking or damaging private property for public use. The Board, of course, only acts in promotion of the public, not private, interest. C.R.S. 34-32-102; 34-33-102 "Taking or damaging" private property refers to differing duties and rights: each requiring due process and compensation. *State Dep't of Health v. The Mill*, 809 P.2d 434, 440 (Colo. 1991) (holding that inverse condemnation is not the "exclusive remedy for a taking"); *SRB v. Board of Cty. Comm'rs, Larimer Cty.*, 601 P.2d 1081 (Colo. App. 1979) (article II, section 15 "is not limited in application to condemnation proceedings"). Since these are duties arising under the constitution, government immunity has been waived and the Colorado Governmental Immunity Act (C.R.S. 24-10-101, *Et. Seq.*) does not apply.

When the private landowner objects to the proposed reclamation (e.g., because the proposed action is futile in relation to the underlying problems caused by mining subsidence), then this Board may not "cram down" the proposed reclamation without compliance with Article II, §15, cited above. Thus, the determination of consent becomes a critical process for the Board.

The issue of Fontanari's consent, or lack of consent, is based upon documents which constitute contractual agreements. Inclusion of the Purchase and Sale Agreement (and its companion Special Warranty Deed) declares an unmistakable intent by DRMS (or the "Office") and Snowcap to have this Board interpret those documents to conclude that Fontanari gave pre-existing consent. As a counter, Fontanari not only asserts that same agreement (establishing that

5. Whether there exist on Fontanari Tract #71 surface subsidence depressions, and, if so, whether those depressions are related to the collapse of room and pillar caverns in the South Portal Mine.

6. Whether there exist surface subsidence depressions, sinkholes and subsurface damages on Fontanari lands other than Tract #71 and, if so, whether those depressions are related to the collapse of room and pillar caverns in the South Portal Mine.

7. Whether Snowcap Coal Company had actual or inquiry knowledge of surface and subsurface subsidence conditions on Fontanari lands other than Tract #71 and, if so, the reasons, if any, why Snowcap Coal Company refused to investigate, report and propose repair of the same.

8. Whether Snowcap Coal Company's refusal to repair other subsidence damages on Fontanari tracts other than Tract #71 was knowing, willful and deliberate.

9. Whether DRMS personnel know or reasonably should have known after inspection, of subsidence damage, both surface and sub-surface, on Fontanari land tracts other than Tract #71 and the reasons, if any, why DRMS has refused to enforce against Snowcap Coal Company the December 21, 2015, "Commitments" as a condition of Permit C-1981-041.

10. 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) 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 inability to irrigate lands in Tract #71 and all other lands owned by Fontanari.

11. An accurate layout of the sub-surface rooms, pillars and caverns of the South Portal Mine during operation thereof by Powderhorn Coal Company and Snowcap Coal Company (both of which were managed by Mr. James E. Stover).

12. Whether sound science and engineering principles support the "grout plug" reclamation and repair plan proposed by Snowcap Coal.

13. Whether there is competent evidence supporting a DRMS decision to approve the Snowcap Repair Plant, together with a reliability that such repair plan will, in fact, produce the results claimed by Snowcap and its consultants.

14. The impact, if any, of the Snowcap Repair Plan upon existing water pipelines and other installations made by the Ute Water Conservancy District and whether Snowcap's Repair Plan properly protects such installations from present or future injury resulting from Snowcap's excavations and repairs, as set forth in the November 16, 2016, correspondence from Ute Water District.

provide a wider hole at the surface than at the bottom. Snowcap will then lay a thick slab of grout into the hole to act as a “plug”. This plug will then be covered with the excavated topsoil. Further, Snowcap proposes to install a concrete slab over the “shaft” in the Carey Pond and to cover that slab with surface soil.

Snowcap nowhere explains why it rejects HBET’s proposal. Snowcap nowhere advised DRMS why general excavation is more productive of a result than HBET’s proposal. Certainly, Snowcap cannot claim that installing a grout cap on the air ventilation shaft will prevent the loss of surface water. Snowcap admits that the air shaft is not the hydrologic communication between surface water and the collapsed mine caverns below.

(F) Snowcap’s Proposal Results In Confiscation of Valuable Mineral Deposits For Which Snowcap Is Legally Obligated To Compensate

In Fall, 2015, Fontanari and Public Service Company negotiated additional easements for installation of high voltage lines within Fontanari Tracts 70 and 71. Both Fontanari and Carey hold extraction permits from DRMS and Mesa County [Mesa County CUP #35-01 and 34-01] to extract basaltic materials from their respective properties. To illustrate the deposits to PSCo, Fontanari dug two test pits, each 25+ feet in depth. [Appendix P] Snowcap incorrectly refers to these pits as “shafts” but correctly notes that Fontanari has filled, compacted and covered the pits. Notably, the basaltic material excavated around the Carey Pond pit remained on the surface and was patently obvious and visible to Snowcap in September, 2015.

Additionally, Fontanari hired a local driller to make ten bores to determine the apparent depths of the basaltic materials along the route of the proposed easement. This was the driller to which Mr. Berry referred in his April Report. [Pg. A14-14-2] The bores showed the presence of the basaltic material to depths of 50+ feet before hitting the underlying sandstone. Fontanari also retained Mr. John Garr, P.G., of Salt Lake City, UT, to inspect, review and opine on the quality and quantities of the basaltic material. The basaltic material is high-grade: weighing 168 lbs per cubic foot. It is quite valuable as there are few sources local to Mesa, Garfield and Delta Counties.

Snowcap’s Repair Plan to the air shaft [Pg. 14-34] the Carey Pond [Pg. 14-35] and the area 50 ft. northwesterly of the Air Shaft [Fig. 14-17] would cause permanent loss of the basaltic materials not only underlying these locations but also within a lateral support area for these areas. Whether overlain with grout or with a concrete slab, Fontanari and Carey would not be able to extract valuable minerals.

Snowcap makes no provision for the payment of the losses to be sustained by Fontanari and Carey should the repair plan be approved. The dollar amount of the losses would be magnified if Snowcap was also required to make repairs to Tract 70. The sinkholes and surface depressions found in Tract 70 (and documented to DRMS on 5.6.2016) lie in the area of the bores made in Fall, 2015. Perhaps, for this reason, Snowcap has consistently and repeatedly refused to study *all* lands owned by Fontanari and Carey. Snowcap’s refusal to address these