

BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO
MOTION IN LIMINE AND TO STRIKE CONTRACT DOCUMENTS BY
OBJECTOR FONTANARI FAMILY REVOCABLE TRUST

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

The Division of Reclamation, Mining and Safety ("Division") submits its Response to Motion In Limine and to Strike Contract Documents by Objector Fontanari Family Revocable Trust. A matter involving Snowcap Coal Company, Inc. ("Snowcap") has been set for consideration by the Mined Land Reclamation Board ("Board") at its formal hearing scheduled for May 24th and 25th, 2017. The Division states as follows:

I. Factual Background

- 1) Snowcap's Application for Technical Revision 69 to Permit Number C-1981-041 proposes actions in which it must access property owned by the Fontanari Family Revocable Trust.
- 2) On July 21, 2003, a Contract for the Sale and Purchase of Real Estate ("Contract") between the Fontanaris and Snowcap Coal Company was signed. Paragraph 25 of the Contract states, "Seller will reserve an easement and Purchaser agrees to grant to Seller and its successors and assigns, 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 Purchaser's reclamation and monitoring obligations under the Permit..."
- 3) Paragraph 13 of the Contract (Purchaser's Indemnity) states, "In the event 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 of the Premises, including, without limitation, any hazardous materials, hazardous substances, contaminants, pollutants, or asbestos containing materials, in, at, on, under or related to the Premises; and 2) That the Premises is being sold and conveyed to, and purchased and accepted by

Purchaser in its present conditions. “AS-IS, WHERE IS” and with all faults, and Purchaser hereby assumes the risk that adverse past, present, and future physical characteristics and conditions may not have been revealed by its inspection or investigation.”

- 4) A Special Warranty Deed dated December 16, 2003, states on page four, “Grantor EXCEPTS AND RESERVES all rights necessary to perform all reclamation and monitoring activities which are specified in the Permit...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.”

II. Legal Definitions

- 5) Technical revision means a minor change, including incidental boundary revisions, to the terms of requirements of a permit issued under this article, which change shall no cause a significant alteration in the operator’s reclamation plan. C.R.S. § 34-33-103(27); Colorado’s Surface Coal Mining Reclamation Act (“Act”).
- 6) During the term of the permit, the permittee may submit an application for a technical revision of the permit to the office. C.R.S. § 34-33-116(1).
- 7) Upon the basis of a complete permit application, including a reclamation plan, or revision or renewal thereof, as required by this article... the office shall process the permit application and issue a proposed decision granting or denying the permit... **Permit approval or denial.** C.R.S. § 34-33-114(1).
- 8) No application for a permit or for a revision of an existing permit shall be approved unless the application affirmative demonstrates and the office or board finds in writing, on the basis of the information set forth in the application or from information otherwise available which will be documented in the decision and made available to the applicant, that: *The applicant has demonstrated that reclamation as required by this article can be accomplished under the reclamation plan contained in the permit application.* **Permit approval or denial.** C.R.S. § 34-33-114(2)(b); (italics added).
- 9) The permit application shall include the following: the area of land within the permit area upon which the *applicant has the legal right to enter* and commence surface coal operations and a statement of those 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. **Application for permit.** C.R.S. § 34-33-110(2)(j); (italics added).

10) An application for a technical revision of a permit shall contain: An identification of the permit by permit number or other appropriate reference which is the subject of the technical revision; a specific description of the requested change in the terms of the permit; and *such other information as may be necessary for the office to properly evaluate the technical revision.* **Technical revision of permit.** C.R.S. § 34-33-116(2); (italics added).

11) Rule 2.03.6(2) **Right of Entry and Operation Information** states, “Where the private mineral estate to be mined has been severed from the private surface estate...the application shall also provide, for lands to be affected within the permit area: (a) a copy of the written consent of the surface owner to the extraction of coal by surface mining methods; or (b) a copy of the document of conveyance that expressly grants or reserves the right to extract the coal by surface mining methods.

12) “Surface coal mining operations” means: Activities conducted on the surface of lands in connection with a surface coal mine or activities subject to the requirements of section 34-33-121 which involve surface operations and surface impacts incident to an underground coal mine. C.R.S. § 34-33-103(26)(a).

III. Legal Analysis

13) As Snowcap’s Application for Technical Revision 69 proposes actions in which it must enter property owned by the Fontanari Family Revocable Trust, Snowcap has an obligation under the Act to provide the Division with information that affirmatively demonstrates that the proposed reclamation can be accomplished, i.e., that Snowcap has the legal right to enter the property in which it proposes to reclaim.

14) The Contract states that Snowcap has an easement over the Fontanari Family Revocable Trust’s property to perform reclamation obligations under Permit Number C-1981-041.

15) The Contract provides the Division with information that affirmatively demonstrates that Snowcap’s proposed reclamation can be accomplished, i.e., that Snowcap has the legal right to enter the property owned by the Fontanari Family Revocable Trust to perform reclamation under the Permit.

16) In order to comply with the Act, the Contract documents must remain part of the record associated with Permit number C-1981-041 as they are necessary

for Snowcap to affirmatively demonstrate that they have the legal right to enter the property now owned by the Fontanari Family Revocable Trust in order to conduct their proposed reclamation.

- 17) The Contract documents in the record were necessary for the Division to properly evaluate Snowcap's Application for Technical Revision 69.

IV. Conclusion

The Division respectfully requests that the Board deny Fontanari's "Motion In Limine and to Strike Contract Documents by Objector Fontanari Family Revocable Trust" on its face.

Respectfully submitted to the Colorado Mined Land Reclamation Board on May 10th, 2017.

/s/ Scott Schultz
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Assistant Attorney General
Attorney for the Division of Reclamation,
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Certificate of Service

I, Scott Schultz, hereby certify that on this 10th day of May, 2017, I served **via electronic mail or regular mail** a true copy of the foregoing THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO MOTION IN LIMINE AND TO STRIKE CONTRACT DOCUMENTS BY OBJECTOR FONTANARI FAMILY REVOCABLE TRUST, addressed to the following:

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