

BEFORE THE MINED LAND RECLAMATION BOARD  
STATE OF COLORADO

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THE DIVISION OF RECLAMATION, MINING AND SAFETY'S RESPONSE TO  
MOTION TO DISMISS FOR LACK OF JURISDICTION BY OBJECTOR  
FONTANARI FAMILY REVOCABLE TRUST

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**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**

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The Division of Reclamation, Mining and Safety ("Division") submits its Response to Motion to Dismiss for Lack of Jurisdiction 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 24<sup>th</sup> and 25<sup>th</sup>, 2017. The Division states as follows:

**I. Colorado's Surface Coal Mining Reclamation Act Provides The  
Mined Land Reclamation Board With Subject Matter Jurisdiction Over the  
Objections and Demand For a Hearing Made By the Fontanari Family  
Revocable Trust Regarding the Division's Proposed Decision to Approve  
Snowcap's Application for Technical Revision Number 69.**

- 1) Colorado's Surface Coal Mining Reclamation Act ("Act") provides the Fontanari Family Revocable Trust with both due process and judicial review of the Division's Proposed Decision. The specific portions of the Act providing the Fontanari Family Revocable Trust with due process and judicial review are titled: Permit Application Decisions of the Office – Appeals (C.R.S. § 34-33-119) and Judicial Review (C.R.S. § 34-33-128).
- 2) The Act also provides the MLRB with subject matter jurisdiction over the Division's Proposed Decision to Approve Snowcap's Application for Technical Revision Number 69 in the portion titled "Technical Revision of Permit" (C.R.S. § 34-33-116).
- 3) In promulgating the Act, Colorado's General Assembly specifically tasked the MLRB with being the finder of fact in matters of coal permit application decisions. The Act also states that the MLRB is the jurisdiction in which the record is compiled. C.R.S. § 34-33-128(2).

- 4) Through the Act, Colorado's General Assembly provided the MLRB with the necessary tools to be the finder of fact and conduct hearings. In permit application decisions in which a formal hearing is requested,  
"the board may administer oaths, subpoena witnesses or written or printed materials, and take evidence including, but not limited to, site inspections of the land to be affected...A verbatim record of each formal hearing required by this section shall be made, and a transcript shall be made available on request..."  
C.R.S. § 34-33-119(8).
- 5) The MLRB is a competent tribunal and the only finder of fact in matters of coal permit application decisions.
- 6) The baseless claim made by counsel for the Fontanari Family Revocable Trust that the MLRB is an "incompetent tribunal" is without merit and any legal basis.

**II. The Act Provides The Fontanari Family Revocable Trust With Due Process in "Permit Application Decisions of the Office – Appeals" (C.R.S. § 34-33-119)**

- 7) Black's Law Dictionary defines "Due Process" as the conduct of legal proceedings according to established rules and principals for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.
- 8) The applicant or any person with an interest which is or may be adversely affected may request a hearing by the Board. The request for a hearing must be received in writing by the Division with 10 days after such publication and shall contain a brief and plain statement of facts which indicate the requestor may be adversely affected, and briefly summarize the issues to be raised by the requestor at the hearing. If properly requested under the provisions of this subsection, a hearing shall be held at the next regularly scheduled Board meeting and a final decision shall be made at that hearing and become immediately effective with notice of the decision being mailed to the permittee. Regulations of the Colorado Mined Land Reclamation Board for Coal Mining, 2 C.C.R. 407-2, Rule 2.08.4(6)(b)(iii); *see also* C.R.S. § 34-33-119(4).
- 9) If any applicant or any person with an interest which is or may be adversely affected who has participated in the administrative proceedings as an objector is aggrieved by the decision of the board or if the office fails to act within the time limits specified in this article, such applicant or person shall

have the right to appeal in accordance with section 34-33-128. C.R.S. § 34-33-119(9).

- 10) The Act provides the Fontanari Family Revocable Trust with established rules and principals for the protection and enforcement of their private rights, including notice and the right to a fair hearing before the MLRB.
- 11) The Act provides the MLRB with the power and authority to make a Final Decision regarding Snowcap's Application for Technical Revision Number 69.
- 12) The Act and Rules do not violate the due process rights of the Fontanari Family Revocable Trust.

### **III. The Act Provides the Fontanari Family Revocable Trust With Judicial Review of a Final Decision made by the MLRB (C.R.S. § 34-33-128)**

- 13) Any order or decision issued by the board...shall be subject to judicial review on or before thirty days after the date of such order or decision in accordance with subsection (2) of this section in the district court of this state for the district in which the surface coal mining operation is located. C.R.S. § 34-33-128(1).
- 14) The court shall hear such petition or complaint solely on the record made before the board. The findings of the board, of supported by substantial evidence on the record considered as a whole, shall be conclusive. The court may affirm, vacate, or modify any order or decision or may remand the proceedings to the board for such further action as it may direct. C.R.S. § 34-33-128(2).
- 15) The Act provides the Fontanari Family Revocable Trust with judicial review by a District Court for decisions made by the MLRB.

### **IV. The Act Provides the MLRB with Subject Matter Jurisdiction Over Matters Involving a Technical Revision of a Permit (C.R.S. § 34-33-116)**

- 16) 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).
- 17) 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).

18) Within sixty days after the filing of a complete application for a technical revision, the office shall issue a proposed decision approving or denying the application in whole or in part. A written copy of such decision shall be promptly provided to the permittee and shall be published once in a newspaper of general circulation in the locality of the affected surface coal mining operation. Any requests for a hearing regarding the proposed decision of the office must be received in writing by the office within ten days after such publication. If no request for a hearing is received within such ten-day period, the proposed decision of the office shall immediately become final. C.R.S. § 33-4-33-116(5).

19) The Act provides the MLRB with subject matter jurisdiction over the Fontanari Family Revocable Trust's objection and demand for a hearing regarding Snowcap's Application for Technical Revision Number 69 of Permit Number C-1981-041.

**V. The MLRB's Jurisdiction and Authority Over Permitting, Reclamation, and Bonding Activities Is Dictated by the Plain Language of the Act (C.R.S. § 34-33-113 and § 34-33-125)**

20) "Permit" means a permit to conduct surface coal mining and reclamation operations. C.R.S. § 34-33-103(16).

21) "Permittee" means a person holding a permit. C.R.S. § 34-33-103(20).

22) "Operator" means any person engaged in surface coal mining and reclamation operations... C.R.S. § 34-33-103(14).

23) "Reclamation plan" means a plan submitted by an applicant under this article which sets forth a plan for reclamation of the proposed surface coal mining operations pursuant to section 34-33-111. C.R.S. § 34-33-103(23).

24) "Surface coal mining and reclamation operations" means surface coal mining operations and all activities necessary and incident to the reclamation of such operations. C.R.S. § 34-33-103(25).

25) The amount of the bond shall be sufficient to assure the completion of the reclamation plan if the work had to be performed by the board in the event of forfeiture... C.R.S. § 34-33-113(1).

26) Liability under the bond shall be for the duration of the surface coal mining and reclamation operations and for a period coincident with the operator's responsibility for revegetation requirements. C.R.S. § 34-33-113(2).

- 27) The amount of the bond or deposit required and the terms of each acceptance of the applicant's bond shall be adjusted by the office from time to time for good cause as affected land acreages are increased or decreased or when the cost of future reclamation changes. C.R.S. § 34-33-113(5).
- 28) The permittee may file a request with the office for the release of all or part of a performance bond. C.R.S. § 34-33-113(1).
- 29) Snowcap is the permittee for the reclamation bond held in Permit Number C-1981-041.
- 30) Snowcap is the operator under Permit Number C-1981-041.
- 31) Snowcap's reclamation plan is contained within Permit Number C-1981-041.
- 32) The Fontanari Family Revocable Trust is not a permittee to Permit Number C-1981-041.
- 33) The Fontanari Family Revocable Trust is not an operator under the Act.
- 34) The Fontanari Family Revocable Trust is not an applicant to Permit Number C-1981-041.
- 35) The documents submitted to the Division by counsel for the Fontanari Family Revocable Trust and referred to by counsel for the Fontanari Family Revocable Trust as the "Fontanari Repair Plan" contradict the plain language of the bonding and reclamation provisions contained within the Act.

## **VI. Conclusion**

Given the plain language of Colorado's Surface Coal Mining Reclamation Act, the Division respectfully requests that the Board deny Fontanari's "Motion to Dismiss for Lack of Jurisdiction by Objector Fontanari Family Revocable Trust" on its face.

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

/s/ Scott Schultz  
Scott Schultz #38666  
Assistant Attorney General  
Attorney for the Division of Reclamation,  
Mining and Safety

### Certificate of Service

I, Scott Schultz, hereby certify that on this 10<sup>th</sup> 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 TO DISMISS FOR LACK OF JURISIDCTION BY OBJECTOR FONTANARI FAMILY REVOCABLE TRUST, addressed to the following:

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