



COLORADO
**Division of Reclamation,
Mining and Safety**
Department of Natural Resources

September 26, 2019

Rudolph Fontanari
3316 E ¾ Road, Rt. 1
Clifton, CO 81520

Re: Findings of Fact, Conclusions of Law, and Order, Rudolph Fontanari
File No. M-1999-076, MV-2019-023

On September 26, 2019 the Mined Land Reclamation Board signed the enclosed Board Order for the above captioned operation. We strongly advise that you read this document carefully since it may contain deadlines for corrective actions, civil penalties, cease and desist orders or other actions that may require your immediate attention to avoid future board actions.

Sincerely,



Camille Mojar
Board Administrator

Enclosure(s)

Certified Mail

7018 2290 0001 8923 1588

cc:

Amy Yeldell
Travis Marshall
Jeff Fugate
Scott Schultz
Charles Kooyman
John R. Henderson, P.C.



BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

Notice of Violation No. MV-2019-023

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

**IN THE MATTER OF A POSSIBLE VIOLATION BY RUDOLPH FONTANARI,
CEASE AND DESIST ORDER, CORRECTIVE ACTIONS, AND CIVIL
PENALTIES FOR FAILING TO COMPLY WITH THE CONDITIONS OF A
BOARD ORDER, PERMIT, OR REGULATION, File No. M-1996-076**

THIS MATTER came before the Mined Land Reclamation Board ("Board") on August 21, 2019 in Denver, Colorado to consider the possible violation by Rudolph Fontanari ("Operator"), cease and desist order, corrective actions, and civil penalties for failing to comply with the conditions of a Board order, permit, or regulation, file number M-1996-076. Amy Yeldell, Lucas West, Clayton Wein, Travis Marshall, and Assistant Attorney General Scott Schultz appeared on behalf of the Division of Reclamation, Mining and Safety ("Division"). Rudolph Fontanari and Trevor Gross appeared on behalf of Operator.

The Board, having considered the materials presented and having been otherwise fully informed of the facts in the matter, enters the following:

FINDINGS OF FACT

1. Operator holds a 112c permit for a 141.92-acre gravel-basalt operation. The site, known as Western Slope Flagstone Quarry No. 2, is located in Section 35, Township 10 South, Range 98 West, 6th Principal Meridian, in Mesa County. Approximately 26 acres are currently disturbed by mining.

2. The application for the the 112c permit for this site lists Rudolph Fontanari as the name to be used on the permit and "sole proprietorship" as the type of organization.

3. The reclamation plan for the site identifies the post-mining use to be "non-irrigated range land" and does not call for irrigation during reclamation. Exhibit G to the permit also states that no ground water is present on the site and that dewatering will thus not be necessary. Exhibit G to the permit also states that any water used for dust suppression will come from water trucks.

4. On August 6, 2018, the Division conducted a routine inspection of the site. During that inspection, the Division observed what appeared to be the installation of water conveyance lines. According to the Division, Operator stated at that time that the Ute Water District was installing a buried irrigation line through

the permit area. In the inspection report, the Division encouraged Operator to “have the Ute Water District reclaim affected areas so they do not become the landowner/mining operation[']s responsibility in the future.”

5. On July 9, 2019, the Division was notified that water was being applied to the site and that there were impacts to lands outside the permitted area.

6. The Division conducted the first of several inspections on the afternoon of July 9, 2019. This inspection was done jointly with the Colorado Division of Water Resources. Between July 9 and August 16, 2019, the Division conducted a total of nineteen inspections of the site.

7. During the July 9, 2019 inspection, the Division, for the first time, witnessed the water distribution conveyance system in use. Two pits in the northern portion of affected areas within the permitted boundaries were filled with water, which appeared to be entering the pits via the contact point between the soil and bedrock. The pits had never been observed with water in previous Division inspections. An approximately fifteen-foot portion of the highwall of one of the pits had collapsed as a result of the inundation. Due to the porosity of the soil on the site, the Division concluded that it was highly probable that water was moving between the two pits through connectivity rather than surface flows. The inspection also indicated that there were multiple areas within ditches through which water had been run where water “disappeared” under the surface of the ground, leaving holes of various sizes.

8. On July 12, 2019, the Division issued an “in field” cease and desist order prohibiting water application within the permitted area. The Division also issued a Reason to Believe a Violation Exists letter that same day. The Reason to Believe a Violation Exists letter informed Operator that the Division had observed water flowing into and being retained in the permitted area in violation of the conditions of the permit. The letter also informed Operator that the matter had been set for a hearing before the Board at its August 21, 2019 meeting.

9. The Division’s cumulative inspection report for July 15 to July 23, 2019 documents Operator’s dewatering of the pits and the drying of the area after Operator ceased irrigation. The Division also observed cracks in the surface of the ground that it stated indicated the flooding may have destabilized the ground and put it at risk of geotechnical failure. The Division measured and observed the cracks to monitor for increased instability and monitored the decreasing levels of water in the pits.

10. The Division’s cumulative inspection report for July 24 to August 5, 2019 indicated that the pits continued to dry out, with both dry by July 31. During

this period, the Division did not observe any new cracks in the ground or additional surface disturbance impacts. Several of the previously observed sink holes had been filled in. During this period, the Division observed instances of leaking risers, which resulted in some additional water flowing through the permitted area.

11. At the August 21, 2019 hearing, the Division presented testimony regarding the conditions at the site, including the application of water to the permitted area, retention of water in the pits, and transmission of that water to areas that caused offsite damage.

12. Clayton Wein testified regarding the geologic makeup of the site. The top layer of materials, which is also the layer to be mined, consists of low density and uncompacted materials held together with a matrix of fine-grained silts and clays. This layer is approximately thirty-one feet thick and extends to a Wingate sandstone cap rock layer which acts as an aquatard that prevents water from flowing through it. This same sandstone cap rock layer dips to the northeast at two to five degrees. The top layers of uncompacted materials are hydrocompactive soils that are prone to collapse, settlement, and voids when excessive water is applied to the soil. Given the nature of the geography, the large amounts of water applied to the permit area would cause subsidence in the top, hydrocompactive layers and then flow to the northeast along the sandstone cap rock layer.

13. Mr. Wein also testified that Snowcap Coal, which owns the coal mine under the permitted area, provides monthly discharge monitoring reports to the Division and had reported no increase in the discharge rate from the mine during July and August. This indicates that water applied to the permitted area by Operator was not permeating the sandstone cap rock or moving into the coal mine through subsidence.

14. The Division also presented testimony regarding the water retained in the pits as a result of Operator's application of water to the permitted area. As early as July 3, 2019, the northwest pit was observed to be overtopping with water that flowed offsite. The water retained in the pits was not from existing groundwater or the result of a stormwater event. This conclusion is supported by the fact that no groundwater is present on the site and no rainfall was recorded at nearby weather stations. Further supporting the conclusion is the fact that after the initial inspection, Operator began pumping the water out of the pits. After Operator took these steps, no more water accumulated in the pits.

15. However, given the quantity of water applied to the permitted area by Operator's flood irrigation, estimated by the Division to total between 400 to 500 gallons per minute while Operator was running water from 2 to 3 risers, significant damage occurred when the water flowed out of the site area. The hillside above

Interstate Highway 70 ("I-70"), directly to the northeast of the permit area, was saturated and inundated with water. This caused significant rockfall danger, and I-70 was closed several times so that the Colorado Department of Transportation could conduct rockfall mitigation. Following Operator's dewatering of the pits, the seepage of water on the hillside above I-70 significantly decreased and eventually ceased.

16. The Division also presented testimony regarding the state of plants in the permitted area to address Operator's assertion that the irrigation was intended for agricultural purposes. In particular, there were no indications that any sort of reclamation had been done in the irrigated fields in the permitted area. Rather, the fields where the water conveyances were installed were filled with invasive weeds, including Russian thistle and Cheatgrass.

17. Though Operator claimed materials in the permit referenced irrigation, the Division presented testimony that those refer to irrigation of "existing pastures." But the land within the permit boundaries was not pasture; it was weed-filled range land than had not been irrigated at any point when the permit was approved.

18. Ms. Yeldell also testified for the Division that Mr. Fontanari had represented to her during the Division's 2018 inspection that the installation of water pipes within the edge of the permit boundary was being done by the Ute Water District, not Operator. That representation was false because Operator had used that water line as part of the irrigation system used to inundate the permitted area with water.

19. At the hearing, the Operator presented testimony through Mr. Fontanari and Mr. Gross. Operator acknowledged that he had constructed a water conveyance system in the permitted area, including risers designed for use in sprinkler-based irrigation, and a series of ditches intended to convey water from the risers across the area for flood irrigation. Operator argued that the irrigation was "agricultural activity" rather than a mining activity covered by the permit or the law.

20. Mr. Fontanari testified that no mining had occurred in the area at issue for 12-14 years.

21. Mr. Fontanari testified that shortly after beginning the flood irrigation, he heard water from the irrigation ditches he had dug falling at least eighty feet from the surface into a "cave" he alleges was caused by Snowcap Coal's past subsurface mining activities. Mr. Fontanari stated that this and other subsidences on the surface led to a subterranean "cave" left by the coal mining and

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that both the water in the site's pits and that left the permitted area were all caused by this subterranean "cave," which Mr. Fontanari claimed filled up with water from his flood irrigation.

22. Mr. Fontanari testified that the risers installed by Operator were designed to be used for sprinkler irrigation, which he stated does not cause subsidence or problems with existing subsidence. Mr. Fontanari testified that, despite knowing that flood irrigation would flow into any subsidence, he nonetheless utilized flood irrigation. Mr. Fontanari stated that he dug ditches and flooded the areas because installing sprinklers was expensive. Mr. Fontanari testified that he knew where repairs made by Snowcap Coal to a previous subsidence were and that he had dug flood irrigation ditches in line with the site of the repair. Mr. Fontanari stated that he did not intend to flood the Snowcap Coal repairs.

23. Mr. Fontanari also stated that the area had been irrigated historically but admitted that the areas within the permitted boundaries had not been irrigated within his lifetime. Mr. Fontanari testified that he was irrigating land within the permitted boundaries to grow native grasses to crowd out Cheatgrass.

24. Operator argued that if the penalty sought exceeded \$15,000, they were required to hire an attorney. Mr. Fontanari also stated that, despite his permit application, he was not a sole proprietor.

CONCLUSIONS OF LAW

25. The Board has jurisdiction over this matter pursuant to the Colorado Land Reclamation Act for the Extraction of Construction Materials, Article 32.5 of Title 34, C.R.S. (2018) ("Act").

26. Sections 34-32.5-124(1), C.R.S. requires compliance with Board orders, permits, and regulations. Operator has failed to comply with the approved mining and reclamation plans in the Permit. Accordingly, the Operator has violated section 34-32.5-124(1), C.R.S.

27. Pursuant to section 34-32.5-124(2), C.R.S., the Board may issue a cease and desist order when it finds that an operator has failed to comply with any provision of the Act, a permit or regulation. The Operator has violated section 34-32.5-124(1), C.R.S.

28. Section 34-32.5-124(7), C.R.S. provides for a civil penalty of not less than \$100 per day nor more than \$1,000 per day for each day during which an operator violates or fails to comply with the conditions of an order, permit, or

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regulation. Here, the Board may assess a civil penalty of \$4,300 to \$43,000, for 43 days of violation (from the date of the Reason to Believe a Violation Exists notice to the Board's August 21, 2019 hearing).

ORDER

Based on the foregoing findings of fact and conclusions of law, the Board finds the Operator in violation of section 34-32.5-124, C.R.S. for failing to comply with the conditions of the permit.

The Operator shall CEASE AND DESIST any application of water within the permit boundary, with the exception of water that may be applied with water trucks pursuant to the approved mine plan for dust suppression to the affected lands.

The Board ORDERS the following corrective actions:

1. Within thirty days of the effective date of the Board's August 21, 2019 hearing, the Operator shall submit a written plan and gain approval for the removal of all water distribution lines, risers and grade ditches used to convey water within the permit boundary;
2. By November 1, 2019, reseed all lands within the permit boundary, affected by the water conveyance system, with the seed mix in the approved reclamation plan; and
3. Submit a financial warranty increase in the amount of \$172,184 for a total bond amount of \$260,435.00 to be held to cover the cost of reclamation of the affected lands disturbed by the installation of the water conveyance system within the permit area and inflationary costs to the current bond within 60 days of the date of the Board's August 21, 2019 hearing.

The Board imposes a CIVIL PENALTY for 43 days of violation at \$1000 per day for a total civil penalty of \$43,000.00, with none of the penalty suspended. The \$43,000.00 in civil penalties is due and payable within 30 days of the effective date of this Order. Failure to submit any due and unpaid civil penalties shall result in immediate submittal of such penalties to State collections.

DONE AND ORDERED this 26th day of September 2019.

FOR THE COLORADO MINED LAND
RECLAMATION BOARD

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Forrest Luke, Chair

NOTICE OF APPEAL RIGHTS

This order becomes effective and final upon mailing. Any party adversely affected or aggrieved by agency action may commence an action for judicial review by filing a complaint with the district court within thirty-five (35) days after the effective date of this order, pursuant to section 24-4-106, C.R.S. (2018) and the Colorado Rules of Civil Procedure. In the event that a complaint for judicial review is filed, designations of record made in accordance with section 24-4-106(6), C.R.S. should be served on the Board at: 1313 Sherman Street, Room 215, Denver, CO 80203, Attention: Camie Mojar

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER upon all parties herein by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 26th day of September 2019 addressed as follows:

By certified mail:

7018 2290 0001 8923 1588

Rudolph Fontanari
3316 E ¾ Road, Rt. 1
Clifton, CO 81520

John Richard Henderson
Law Office of John R. Henderson, P.C.
308 E. Simpson Street, Suite 103
Lafayette, CO 80026

By electronic mail to:

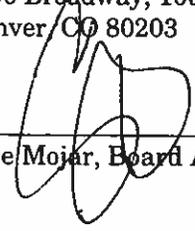
Amy Yeldell
Division of Reclamation, Mining & Safety
101 South 3rd, Suite 301
Grand Junction, CO 81501

Travis Marshall
Division of Reclamation, Mining & Safety
101 South 3rd, Suite 301
Grand Junction, CO 81501

Charles J. Kooyman
Assistant Attorney General
Office of the Attorney General
1300 Broadway, 8th Floor
Denver, CO 80203

Jeff Fugate
First Assistant Attorney General
Department of Law
Natural Resources Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th floor
Denver, CO 80203

Scott Schultz
Assistant Attorney General
Department of Law
Natural Resources Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th floor
Denver, CO 80203



Camille Mojar, Board Administrator

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