

**BEFORE THE MINED LAND RECLAMATION BOARD**

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**IN THE MATTER OF THE HEARING BEFORE THE MINED LAND RECLAMATION  
BOARD ON AUGUST 21, 2019**

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**MOTION/PETITION FOR RE-CONSIDERATION OF BOARD ORDER OF AUGUST  
21, 2019, MAILED SEPTEMBER 26, 2019; FOR STAY OF CORRECTIVE  
ENFORCEMENT ACTIONS; FOR STAY OF CIVIL PENALTIES; FOR STAY OF  
BOND INCREASE AND FOR DECLARATORY JUDGMENT; AND RENEWED  
REQUEST TO RE-OPEN THE HEARING RECORD AND FOR HEARING ON BOND  
INCREASE**

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COMES NOW Western Slope Flagstone, LLC, Western Slope Flagstone, a sole proprietorship (WSF or “Western Slope”), and Rudy Fontanari (“Fontanari”) holders of Permit M-1996-076 (Permit) and Rudy Fontanari, Operator, (together “Fontanari”) by and through counsel of record, John R. Henderson, Law Offices of John R. Henderson, P.C. and pursuant to Construction Materials Rules 2.5 and 2.9 moves and petitions the Board: for re-consideration of its Orders issued at the Board meeting of August 21, 2019 (signed and mailed September 26, 2019); for a stay of the Orders; for a Stay of the Civil Penalties; for a stay of bond increase; for a Declaratory Order concerning decreed water rights; for a renewed request to re-open the hearing record; and for a hearing on the Bond Increase. Fontanari requests oral argument on these issues. As grounds therefore, Fontanari states as follows:

**CURRENTLY PENDING MOTIONS**

1. On September 19, 2019, Fontanari moved and petitioned the Board to Re-open the hearing record for presentation of Defense case. As grounds, Fontanari asserted that the

denial and lack of representation by legal counsel after due and specific request to be represented necessitated reopening the proceedings. Fontanari also moved for a stay of certain actions pending completion of the re-opened hearing. Fontanari incorporates the Motion to Re-Open here together with its exhibits. Fontanari believes that the pending Motion to Re-Open is directly relevant to the Motion filed here and is integral to its consideration. Fontanari therefore renews its request here the hearing record be reopened for presentation of defense case.

2. Fontanari has moved and petitioned the Board for a modification of certain corrective action dates required in the Board's Order. Specifically, these include the date for having an approved corrective action plan, and, the date for carrying out that corrective action plan. That motion is also incorporated here by reference. Fontanari believes that this motion should be heard with that made here both on the merits, and to prevent conflicts in dates as to when actions are required to be taken.

### **ARGUMENT**

#### **A. THE CONSTRUCTION MATERIAL RULES ALLOW RECONSIDERATION OF A BOARD ORDER WHERE NEW AND RELEVANT FACTS BECOME KNOWN.**

3. Construction Materials Rule 2.9 provides for a petition for reconsideration of its decisions. Such petitions must set forth, "a clear and thorough explanation of the grounds justifying reconsideration, including, but not limited to new and relevant facts that were not known at the time of the hearing and the explanation why the facts were not known at the time of the hearing." As the Rule is suggestive, and not restrictive, the Board is permitted to reconsider and reopen a Board proceeding under circumstances necessary, including where the underlying Board proceeding failed to comply with fundamental principles of due process.

#### **B. NEW AND RELEVANT FACTS HAVE BECOME KNOWN THAT FONTANARI COULD NOT PRESENT AT THE HEARING BECAUSE HE WAS DEPRIVED OF COUNSEL.**

4. As noted in the Motion to Re-Open, Fontanari, through counsel, had stated that he could not be present on August 21, and explained carefully to the Division's counsel, Scott Schultz, that Fontanari was searching for substitute counsel. Mr. Schultz was further informed that, just days before the hearing, that new counsel had been located and was being interviewed, but could not be present and prepared for the August 21 hearing. Despite this information, the Division opposed a continuance to the September 26 meeting.

5. Fontanari made his intent to have legal representation clear both before and during the hearing. Fontanari stated clearly that he requested representation if the Division was seeking civil penalties in excess of \$15,000. (September 26 Order at 24). In fact, the Division sought Civil Penalties of \$57,000, and the Order imposed penalties of \$43,000, a six figure bond increase, and, ordered the removal of an irrigation system believed to have cost in excess of \$100,000.

6. Construction Materials Rule 2.8.1 (1) provides the right of any party present to present oral testimony, documentary evidence, rebuttal evidence and to cross-examine witnesses. *Any party not attending forfeits its party status and all of its rights and privileges.*

7. Construction Materials Rule 2.8.1 (2) further provides for the general applicability of the rules of evidence, and providing further for objections, the applicability of the rules of privilege, the exclusion of unduly repetitious evidence, and for the introduction of original documents. *See* Rule 2.8.1 (2) (a)-(d).

8. The matters concerned in Rule 2.8 generally involve the exercise of legal and lawyerly skills in the context of a full evidentiary hearing. At that hearing, the Division was represented through the attorney general, who examined expert and lay witnesses, presented

complicated and detailed factual and legal argument, and over 300 pages of documents in two Division submittals to the Board.

9. In light of the Division's opposition to the request for a continuance, Mr. Fontanari appeared for himself. He an elderly gentleman in his late seventies, a high school graduate, and worked as a coal miner for sixty years. His son-in-law Trevor Grosse, a computer specialist, accompanied Mr. Fontanari to the hearing. Stated differently, Messrs. Fontanari and Grosse are not lawyers, nor are they sophisticated in matters of agency board actions, procedures rules of evidence, or legal argument Fontanari's presence was compelled by the July 12 Reason to Believe Letter and the Construction Materials Rules. Compelled to appear, while aware of his own limits, Fontanari requested representation by counsel prior to the hearing, at the hearing, and now, as the basis for this motion for reconsideration. In that request, he has never waived.

10. As a result, and due to lack of knowledge, expertise, and experience in legal proceedings, Fontanari was deprived of the right to effectively present oral and documentary evidence, to make objections, to conduct cross examination of State witnesses, and to challenge documentary evidence and exhibits.

11. The Colorado Land Reclamation Act for the Extraction of Construction Materials ("Act") must be applied consistent with Colorado's APA. Due process requires the assistance of counsel in complicated and weighty proceedings, especially where retained counsel could not be present, and, a continuance was requested for new counsel to be retained and to appear, all made clear to Division's counsel.

**C. NEW OR RELEVANT FACTS THAT WERE NOT KNOWN OR ALLOWED TO BE PRESENTED AT THE HEARING.**

12. Fontanari believes that multiple key facts were either not known, or, allowed to be presented at the hearing, in major part due to the lack of legal representation to conduct

examination and cross examination, to present expert testimony, to challenge exhibits, and to make proper objections. These include, but are not limited to:

13. Evidence concerning adjudicated irrigation water rights held by Fontanari, the areas allowed to be irrigated by those rights, and historic irrigation practices, including evidence concerning "historic pastures" and the correct interpretation of Exhibit G to the Permit.

14. The testimony of the water superintendent of the State of Colorado who supervised the diversion and use of water in the applicable division, and who had direct knowledge of the Fontanari construction and diversions, both as to timing and dates, but also as to the priority of water rights enjoyed by Fontanari, their historic use and use on the permit lands at issue;

15. Development of an irrigation plan under professional supervision and expert control which included areas inside of the permit area, including expert testimony;

16. The conduct and supervision of the implementation of the irrigation plan developed by the expert;

17. Whether Operator had a good faith belief that irrigation was allowed within the permit area pursuant to Exhibit G to the permit;

18. The conduct of seeding of the area which was ultimately placed under irrigation;

19. Lay and expert testimony regarding rockfall mitigation efforts by DOT, including testimony as to whether blasting, air bag removal and the use of heavy equipment to remove large rocks was, or was not, related to the Fontanari irrigation, or even related in any way, including testimony of rockfall mitigation in this area going back many years.

20. Whether any of the pictures used by Division in presenting its case were rocks affected by Fontanari irrigation practices, or, simply rocks removed to increase safety in the area after years of similar rockfalls unrelated to irrigation;

21. Evidence contrary to Division testimony which appeared to blame Fontanari's irrigation for all or most of the I-70 rockfall, and which appeared to include rock masses removed by blasting or mechanically distant from any discharge point for Fontanari irrigation water;

22. Testimony from a surveyor as to the relative elevations of points discussed in The Division testimony, including the alleged discharge point on the cliff face, the elevation of the ponds created in the test pits and areas within the irrigation field;

23. Lay testimony challenging the assertion by Division that it was lied to concerning Fontanari's irrigation plans within the permit area;

24. Lay testimony challenging Division's assertion that it first became aware of the Fontanari construction on August 6, 2018 and that Fontanari misled them as to it being construction by Ute Water;

25. Expert hydrological testimony disputing in whole or part the Division's assertions regarding the direction and flow of waters from irrigation and the sandstone cap being a total water barrier;

26. Expert geologic and soils testimony challenging in whole or part the Division's assertions that voids were created by hydro-compactive soils and were unrelated to coal mine subsidence, and challenging the Division's assertion that the sandstone caprock was a complete barrier to water flow;

27. Testimony concerning the date when Fontanari voluntarily ceased irrigation within the permit area, which, with evidence described above and below, would be directly relevant to the imposition of major civil penalties on Fontanari;
28. Lay testimony concerning Fontanari's challenge to the Division's assertion that he intended to "prove a point" with Snowcap coal by irrigating lands within the permit area;
29. Testimony concerning the discharge monitoring reports of Snowcap and challenges to the accuracy of the reported data;
30. Testimony regarding Fontanari's knowledge of the actual amount of water applied to the irrigated area within the permit boundaries as related to the expert prepared irrigation plan;
31. Expert testimony concerning the plants, both beneficial and weeds, in the irrigated areas within the permit area;
32. Lay testimony concerning the seeding applications by Fontanari prior to irrigation of the areas within the permit boundary; content of those applications; the intent behind the applications and supervision of the applications;
33. Testimony concerning the existence of historical pastures within the permit boundaries, historical irrigation within those areas, and water rights decrees for those areas;
34. Testimony by Fontanari regarding where mining has occurred in the permit area, and, when, and that the areas irrigated were not being reclaimed, having never been mined, other than the nearby test pits.
35. Testimony by Fontanari regarding the costs of the installation of the irrigation system, and why, due to that cost, sprinklers were not immediately installed.

36. Testimony by Fontanari and others concerning the subsidence repairs by Snowcap within the permit area, including, but not limited to, a lack of intent to flood those areas with irrigation water;

37. Testimony to resolve the issue of the party or parties named in the 112 Permit, and whether or not a corporate party is involved, which remains unclear from the record.

38. Testimony by Mr. Beckwith as a witness to the events described in the Order, and his efforts to insist upon representation of Fontanari at the Board hearing, and, his request for a continuance, and, as to the availability of new counsel for the September 2019 hearing.

39. Testimony by Mr. Beckwith regarding the legal right of Fontanari to irrigate in this area, and Fontanari's basis for believing that irrigation of un-mined areas was permitted by the terms of his conversion 112 permit;

40. Testimony by Mr. Beckwith as to statements purported to be made by him to Division employees and others, and as to claims that he was an "associate" of Mr. Fontanari.

41. Lay testimony by Fontanari and others as to his lack of intent to incidentally drain water into the test pits within the permit area.

42. Testimony by Division witnesses on cross examination, which cannot be fully illuminated at this time, since the witnesses were not cross examined by Mr. Fontanari and Mr. Grosse, who were incapable of such cross examination.

**D. EXPLANATION AS TO WHY FACTS WERE NOT KNOWN AT THE TIME OF THE HEARING.**

43. Fontanari incorporates here by reference the entirety of his Motion to Re-Open, with exhibits, including correspondence between Mr. Beckwith and counsel for Division where Mr. Beckwith made it clear that he could not be present, and requesting a continuance.



44. Mr. Beckwith had represented Mr. Fontanari and the operation for several years and had assembled thousands of pages of documents relevant to the operation and to the issues raised in in Reason to Believe letter issued by Division on July 12, 2019.

45. Mr. Beckwith was assembling document sets and pleadings relevant to the Reason to Believe letter and the resulting Board Hearing, but made it clear he could not enter an appearance as he could not be present on August 21-22.

46. As noted in the Motion to Re-Open, Mr. Beckwith informed counsel that he could not be present, and that he and Mr. Fontanari were searching for substitute counsel, and, had located counsel who could be prepared and present at the September meeting. Division opposed the continuance through counsel.

47. The Board was not informed of the prior requests for representation, although the correspondence between Beckwith and Division counsel went on for more than a month.

48. The Board was left with the impression that the first request for representation by counsel was made by Fontanari and Grosse at the hearing; in reality, that request simply book-ended the prior written requests through Beckwith, never revealed to the Board.

49. As a result, Fontanari was left unrepresented by legal counsel to present documentary and oral evidence, to cross examine witnesses, to confront and cross examine State experts and to present the opinion testimony of experts for Fontanari, including rebuttal evidence.

50. Fontanari was denied his due process rights, including his right to be represented pursuant to the Administrative Procedures Act, and rights embodied in the Construction Materials Rules.

51. The civil penalties assessed were excessive under the circumstances presented, including the inability of Fontanari to present the defense case, thereby heightening the severe nature of the due process violation.

52. A bond increase was not originally on the enforcement agenda. Just days prior to the hearing, Division sent Fontanari's son-in-law, Mr. Grosse, a supplemental document packet containing Division's rationale for a major performance bond increase, attaching dozens of pages of calculations and estimates. (Fontanari does not receive e mail; instead, e mails are printed and manually relayed by Grosse). The bond increase was then proposed by Division and passed by the Board; Fontanari was surprised by the presentation and the increase, and had no substantive chance to respond or to challenge the increase.

#### **SPECIAL REASON FOR RE-CONSIDERATION AS TO BOND INCREASE**

53. There was insufficient (or, no) time to forward the estimates for professional evaluation of the calculations and estimates by Division, no time to review them, and no chance to prepare or present contrary evidence or expert opinion concerning the reclamation cost estimates.

54. Construction Materials Rule 4.2.1(2) prescribes the method and procedure for increasing the financial warranty. The Office or Board may review the adequacy of the warranty at any time. Operator has sixty days within which to post additional warranty. If Operator disagrees, the Office *shall schedule* the matter for a hearing before the Board.

55. Here, the increase notice was issued by Division; although not on the Board agenda, an increase was part of the proposed Order urged by Division, prior to Operator having a chance to evaluate the proposed increase, to disagree with the proposed increase, or to prepare expert testimony to challenge the increase in a hearing. The method used to increase the financial

warranty deprived Operator of its due process rights and subverted the intent of the Construction Materials Rules. Operator must be afforded an opportunity to disagree, and, if it does, to prepare expert testimony, and to request a hearing before the Board, which it does. On this ground alone, the Order should be reconsidered. *See Spears Free Clinic & Hosp. for Poor Children v. State Bd. of Health*, 220 P.2d 872, 876 (Colo. 1950) (holding the only matters an administrative board may consider are those included in the notice on which the hearing is based); *see also* C.R.S. § 24-4-105(2)(a) (“Any person entitled to notice of a hearing shall be given timely notice of the time, place, *and nature thereof*, the legal authority and jurisdiction under which it is to be held, *and the matters of fact and law to be asserted.*”) (emphasis added));

#### **PETITION FOR DECLARATORY ORDER**

56. Construction Materials Rule 2.5 governs a petition for declaratory order.

57. Fontanari is a person who is or may be directly or adversely affected by the Order dated September 26, 2019 by reason of its potential effect upon his decreed water rights for irrigation. Fontanari and/or Western Slope Flagstone and/or Western Slope Flagstone LLC appear to be the permittee(s) and Operator here.

58. Fontanari’s address is as follows:

Rudolph Fontanari

3316 E ¾ Road, Rt. 1

Clifton, CO 81520

The address of counsel for Fontanari is included at the bottom of this pleading.

59. Fontanari is the owner of decreed water rights, including rights for irrigation of lands within the permit area.

60. By its Order requiring Fontanari to remove irrigation infrastructure and facilities, and to reclaim them, such Order could be construed to either order or require the abandonment of water rights within the meaning of Colorado law.

61. Issues concerning the administration of water rights within Colorado is within the purview of the Office of the State Engineer (“SEO”) and all matters concerning the adjudication, use and quantification of water rights, including their abandonment, lies within the exclusive jurisdiction of the Colorado Water Courts. The Act generally applicable is the “Water Rights Determination and Administration Act” and its amendments.

62. The issue raised in the Board’s hearing of August 21, 2019 and as fully contained in its Order dated September 26, 2019 (the “Order”) concerns whether irrigation by Fontanari within the permit area violates specific terms of his 112 Permit.

63. Without a declaratory order, there will exist controversy and uncertainty as to whether Fontanari is being ordered to abandon, in whole or part, decreed water rights.

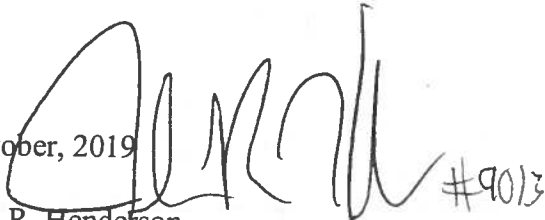
64. Such uncertainty or controversy could be eliminated by an appropriate declaratory order that the Board is not either ordering or decreeing the abandonment of water rights owned by Fontanari, and that any corrective actions being ordered in a final Board Order are not an instruction or command that Fontanari abandon decreed water rights.

**WHEREFORE** Fontanari petitions for the following relief from the Board:

- A. For a re-opening of the record of the August 21, 2019 Board hearing for the presentation of the defense case and all appropriate rebuttal;
- B. To set a pre-hearing conference with appropriate time for preparation to define the issues, witnesses and exhibits for the re-opened hearing and hearing record and for the appointment of a hearing officer;

- C. For re-consideration of the Board Order of September 26, 2019, including, but not limited to, the civil penalties and Bond increase until completion of the hearing record and re-consideration by the Board based on a complete record;
- D. For a hearing concerning the Bond Increase for the presentation of the Fontanari case;
- E. For a Stay of Corrective Actions, Civil Penalties and Bond Increase pending completion of the hearing record;
- F. For re-consideration of the civil penalties assessed and for re-consideration of the civil penalties assessed after completion of the hearing record;
- G. For a declaratory order regarding the non-order of an abandonment of decreed water rights;
- H. For such other and further relief as may be just and proper under the circumstances.

SIGNED AND SUBMITTED this 8<sup>TH</sup> day of October, 2019

 #9013  
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### CERTIFICATE OF MAILING/ TRANSMISSION

I, the undersigned person, do hereby certify that on this 8th day of October, 2019, 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:

Amy Yeldell  
Division of Reclamation, Mining & Safety  
1313 Sherman Street, Room 215 Denver,  
CO 80203

By US Mail and electronic mail to:

Charles J. Kooyman  
Senior Assistant Attorney General  
Department of Law  
Business and Licensing Section  
Ralph L. Carr Colorado Judicial  
Center  
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By US mail to:

Colorado Mined Land Reclamation Board  
c/o Camie Mojar  
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A handwritten signature in dark ink, appearing to be 'CM', is written over a horizontal line.