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**DIVISION OF RECLAMATION
MINING AND SAFETY**

Permit M-1996-076 / Board Resolution and Order of August 21, 2019

BEFORE THE MINED LAND RECLAMATION BOARD

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

**MOTION/PETITION TO STAY BOARD DECISION OF NOVEMBER 13, 2019 AND TO
RE-SCHEDULE ORAL ARGUMENT FOR DECEMBER BOARD MEETING DUE TO
UNAVAILABILITY OF COUNSEL, LACK OF NOTICE; REQUEST FOR
CLARIFICATION AS TO MOTIONS HEARD ON NOVEMBER 13, 2019**

COMES NOW Western Slope Flagstone (WSF or "Western Slope") and Rudy Fontanari ("Fontanari") holders of Permit M-1996-076 (Permit) and Rudy Fontanari, Operator, by and through counsel of record, John R. Henderson, Law Offices of John R. Henderson, P.C. and moves/petitions the Board for a Stay of its Decision on certain Fontanari Motions and a DRMS Motion pending oral argument to be set at the December Board Meeting, as grounds therefore Fontanari states as follows:

1. The Board convened on November 13, 2019. The November meeting date was set 7-10 days earlier than the prior 3 Board meetings. At the time the hearing was convened, counsel was in a Boulder auto repair shop with 3 winter driving systems disabled. Fontanari was in Palisade; to reach Denver, he must leave Palisade by 4am in the morning in good weather conditions. Neither counsel nor Operator had received Notice that the pending motions had been placed on the agenda, despite multiple opportunities to inform counsel and operator, which might have allowed other arrangements to be made, or, a timely motion for continuance filed.

2. Neither counsel nor Fontanari were given notice due pursuant to Construction Materials Rules 2.5.4 (g) or, 2.2.1(a)(i), depriving Fontanari of his due process rights. Any notice given was inadequate under the circumstances. See, Sections 8-10 below.
3. Also pending on November 13, but unclear as to whether it was set for hearing, was a Motion to Strike all Motions filed by DRMS; this Motion was filed on November 4, forty-five (45) days after Fontanari's original Motion to Re-Open was filed on September 19, 2019. DRMS's Motion to Strike was extensive, as was the effort to respond to it; Fontanari's Response to the Motion to Strike was filed on the afternoon of November 12, 2019, after a major effort.
4. Thus, as of November 12 there were three Fontanari motions pending, as outlined in Fontanari's Response to Motion to Strike. There was one DRMS motion pending; further pending was Fontanari's Request to Consolidate all Motions and to place them on the Board agenda to avoid any implication that any of the motions were deemed denied by inaction (None of the Fontanari motions were placed on the September agenda (Motion to Re-Open), or, the October agenda (All 3 Motions), creating this risk).
5. Fontanari's Response to the Motion to Strike all Motions was filed on the afternoon of November 12. A copy of the Fontanari Response was e-mailed to the attorney for the Board, 2 attorneys for DRMS, two employees of DRMS and the Board Secretary (Six state representatives or employees) (See, Exhibit A attached) None responded to inform Fontanari or counsel that some or all or some of the outstanding Motions, including the DRMS motion and Fontanari Response, had been placed on the Agenda set for hearing in only 18 hours.

6. During or just before the hearing, a call was received on counsel's office phone apparently stating that the hearing was about to start. Counsel was not in the office. No one was in the office; counsel was 12 miles away at a car dealership, but, did have his cell phone with him. Counsel was eventually shuttled back to his office, and the call was not found on the message machine until after the hearing.
7. Fontanari's Response of November 12 was not "late filed" or, "last minute"; Fontanari was responding to a DRMS Motion of approximately 15 pages, which it did within 5 ½ business days; the intent of Fontanari was that its rapid filing would allow adequate time for the distribution and review of its Response by the Board, as it contained important argument and caselaw. The filing, including the cover e-mail to six state actors afforded a unique opportunity to inform Fontanari and counsel that their motions (or, at least some of them) were set for hearing the next morning. The opportunity was not taken, and Fontanari and counsel had no reasonable or adequate notice of the hearing.
8. Construction Materials Rule 2.2.1 (a) provides the requirements for Notice of regular board meetings. Rule 2.2.1 (a)(i) requires mailing to, "...Operators whose Permit(s) or operation(s) may be the specific subject of consideration at the meeting." The Board orders being appealed by the Motion/Petition for Reconsideration included multiple orders, requirements, civil fines and bond increase, all related to Fontanari's Permit and operations. No mailed Notice was received by Fontanari or counsel.
9. Fontanari's Motion to Reconsider, timely filed October 8, 2019, also included a Petition for Declaratory Judgment, directed at specific water rights and water rights administration issues impacted by the Board's September 26 order. Construction Materials Rule 2.5.4 governs the procedure for consideration of such Petition.

Pursuant to Rule 2.5.4 (g), such a petition may be set for hearing “upon due notice to Petitioner”. Further, “The notice to the Petitioner setting such hearing shall set forth, to the extent known, the factual or other matters into which the Board intends to inquire”.

No such Notice was received either by Fontanari or counsel.

10. To ignore the specific requirements for Notice, and, to fail to give Fontanari and counsel reasonable notice would deprive Fontanari of his due process rights guaranteed by both the US and Colorado Constitutions.

11. Request for Clarification

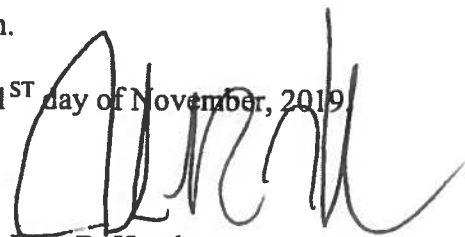
- a.) Fontanari requests clarification from the Board as to which Motions and Petitions were heard by the Board on November 13, 2019 so that any applicable periods for appeal, if necessary, can be accurately determined.
- b.) Fontanari specifically requests clarification as to whether his Petition to Re-Open (and for other relief) filed on September 19, 2019 (7 days prior to the August 21, 2019 Order becoming final with mailing on September 26, 2019), was heard or considered on November 13, 2019, or whether no action was taken and the Motion deemed denied 60 days after September 19. A transcript of the hearing has been ordered, but is not yet available.
- c.) Fontanari believes that these matters can be clarified at the December Board meeting without impacting the filing of timely appeals, if necessary.

WHEREFORE, Fontanari seeks the following relief:

- a. For a stay of the Board’s decisions taken regarding certain Fontanari motions on November 13, 2019 pending consideration of oral arguments by Fontanari and DRMS;

- b. For a re-scheduling of oral arguments by Fontanari and DRMS at the December 11, 2019 regular Board Meeting;
- c. For clarification as to which Fontanari and other Motions were acted on on November 13;
- d. For such other and further relief as may be required to allow adequate time for the consideration of the Motions and oral argument before finalizing the Board's decisions thereon.

SIGNED AND SUBMITTED this 21ST day of November, 2019.



John R. Henderson
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720-971-7063

CERTIFICATE OF MAILING/ TRANSMISSION

I, the undersigned person, do hereby certify that on this 21st day of November, 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
1300 Broadway, 8th floor
Denver, CO 80203

By US Mail and electronic mail to:

Michael Cunningham
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By US Mail and electronic mail to:

Jeff Fugate
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Denver, CO 80203

By US mail and electronic mail to:

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

By US mail to:

Colorado Mined Land Reclamation Board
c/o Camie Mojar
1313 Sherman Street, Room 215 Denver,
CO 80203

A handwritten signature in dark ink, appearing to be 'JNL', is written above a horizontal line.

Exhibit A to Motion

John Henderson <jrhcolaw@comcast.net>

11/12/2019 3:05 PM

M-1996-076 Fontanari's Response to DRMS Motion to Strike All Motions

To charles.kooyman@coag.gov • Camille Mojar <camille.mojar@state.co.us> •
Scott Schultz <scott.schultz@coag.gov> • Jeff Fugate <jeff.fugate@coag.gov> • amy.yeldell@state.co.us •
Michael Cunningham - DNR <michaela.cunningham@state.co.us> Blind copy tgrosse@juno.com •
Kendra Beckwith <kbeckwith@messner.com> • Tanner Walls <twalls@messner.com> •
James Beckwith <ithamer47@gmail.com>

All:

Attached please find Fontanari's Response to the DRMS's Motion to Strike All Motions filed on November 4.

We have requested that all Fontanari Motions be administratively combined effective today and set for hearing on the November Board Agenda.

With regards,

John Henderson
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- Response of Fontanari to Motion to Strike All Motions.pdf (820 KB)