

BEFORE THE MINED LAND RECLAMATION BOARD
STATE OF COLORADO

DIVISION'S MOTION TO STRIKE FONTANARI'S "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 FOR HEARING ON BOND INCREASE" AND "MOTION/PETITION TO RE-OPEN RECORD FOR PRESENTATION OF DEFENSE CASE BY WESTERN SLOPE FLAGSTONE, LLC-RUDY FONTANARI, FOR SCHEDULING OF PRE-HEARING CONFERENCE AND FOR STAY OF REQUIRED CORRECTIVE ACTIONS, BOND INCREASE AND ASSESSMENT OF CIVIL PENALTIES DUE TO LACK OF REPRESENTATION BY LEGAL COUNSEL" FOR FAILURE TO MEET THE REQUIREMENT OF RULE 2.9.1(2) AND FOR FAILURE TO STATE A CLAIM

**IN THE MATTER OF RUDOLPH FONTANARI; Permit No. M-1996-076;
Violation No. MV-2019-023**

The Division of Reclamation, Mining and Safety ("Division") submits its Motion to Strike Rudolph Fontanari's ("Fontanari" or "Operator") "Motion for Re-consideration of Board Order..." and "Motion/Petition to Re-Open Record..." ("Motions"). The Division requests that the Mined Land Reclamation Board ("Board" or "MLRB") strike Fontanari's Motions for the failure to meet the requirements of Construction Materials Rule ("Rule") 2.9.1(2) and for failure to state a claim and states as follows:

- I. Fontanari's Claims Signed By Attorney Henderson "COMES NOW Western Slope Flagstone, LLC... holders of Permit M-1996-076" is Not Grounded in Fact and is an Intentional Misrepresentation**
- 1) "Western Slope Flagstone, LLC" has never held an MLRB Permit.
 - 2) "Western Slope Flagstone, LLC" is not even referenced in Permit M-1996-076.
 - 3) The permit holder for Permit M-1996-076 is "Rudolph Fontanari, dba WESTERN SLOPE FLAGSTONE, a sole proprietorship." MLRB Packet pgs. 99 and 354-355.

- 4) Black's Law Dictionary defines "sole proprietorship" as a business in which one person owns all the assets, owes all of the liabilities and operates in his or her personal capacity."
- 5) The Division's July 12, 2019, Inspection Report included within the administrative record for Violation No. MV-2019-23 contains pictures of the mine identification sign for "Western Slope Flagstone" illustrating the absurdity of Fontanari's misrepresentation of fact that "Western Slope Flagstone, LLC is a holder of MLRB Permit M-1996-076." MLRB Packet pgs. 414-415.
- 6) On Thursday August 22nd, Mr. Henderson emailed the Division and MLRB's counsel, stating "I have been retained to represent Rudy Fontanari and Western Slope Flagstone." Attachment A.
- 7) Colorado Rule of Civil Procedure 11, Signing of Pleadings, (a) Obligations of Parties and Attorneys:

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name...*The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... If a pleading is signed in violation of this Rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee...* Reasonable expenses, including a reasonable attorney's fee, shall not be assessed if, after filing, a voluntary dismissal or withdrawal is filed as to any claim, action or defense, within a reasonable time after the attorney or party filing the pleading knew, or reasonably should have known, that he would not prevail on said claim, action, or defense.

- 8) Colorado Rule of Civil Procedure 11 imposes the following independent duties on an attorney or litigant who signs a pleading:
(1) Before a pleading is filed there must be a reasonable inquiry into the facts and the law; (2) based on this investigation the signer

must reasonable believe that the pleading is well grounded in fact; (3) the legal theory asserted in the pleading must be based on existing legal principles or a good faith argument for the modification of existing law; and (4) the pleading must not be filed for the purpose of causing delay, harassment, or an increase in the cost of litigation. *Maul v. Shaw*, 843 P.2d 139 (Colo. App. 1992).

- 9) On October 7, counsel for the Division informed Mr. Henderson that “Western Slope Flagstone, LLC” was not a holder of Permit M-1996-076 via email.

II. Rudolph Fontanari was Afforded Ample Due Process by the MRLB at the August 21st Hearing

- 10) The August 21, 2019, enforcement hearing before the MLRB involving Permit No. M-1996-076 and violation No. MV-2019-023 fully complied with all the fundamental principles of due process.
- 11) On July 12, 2019, Fontanari and his “normal business attorney” Jim Beckwith were provided notice of the August 22nd enforcement hearing set before the MLRB.
- 12) The Administrative Procedures Act clearly provides for persons to appear on their own behalf for administrative hearings. One of the few legal citations contained within Fontanari’s Motions is C.R.S. § 24-4-105(9) which states:

Any party, or the agent, servant, or employee of any party, permitted or compelled to testify or to submit data or evidence shall be entitled to the benefit of legal counsel of his or her own choosing and at his or her own expense, *but a person may appear on their own behalf*. An attorney who is a witness may not act as counsel for the party calling the attorney as a witness.
- 13) There is no legal basis for the argument that a sole proprietorship (such as Western Slope Flagstone) or a person (such as Rudolph Fontanari) must be represented by legal counsel in an enforcement hearing before the MLRB involving civil penalties.
- 14) There is no factual basis to the claim that “Fontanari made his intent to have legal representation clear both before and during the hearing.”
- 15) Mr. Fontanari did not request a continuance of the August 21, 2019, enforcement matter with the MLRB.

- 16) Fontanari chose to represent himself before the MLRB without the assistance of an attorney (*Pro se*).
- 17) The administrative record and transcripts clearly illustrate that the MLRB in no way denied Fontanari the right to counsel.
- 18) In choosing to appear *Pro se* for the August 21st MLRB Hearing, Fontanari did not deprive himself of his due process rights.

III. *Pro se* Litigants are Held to the Same Legal Standards as Attorneys -- Otherwise, Ignorance is Unjustly Rewarded

- 19) The Colorado Supreme Court stated, “A litigant is permitted to present his own case, but, in so doing, should be restricted to the same rules of evidence and procedure as is required of those qualified to practice law before our courts; otherwise, ignorance is unjustly rewarded.” *Knapp v. Fleming et al.*, 127 Colo. 414, 415 (1953).
- 20) *Pro se* parties are “bound by the same rules of civil procedure as attorneys licensed to practice law.” *Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 572 (Colo. 2009).
- 21) *Pro se* parties are presumed to have knowledge of the applicable statutes, rules, and laws and must accept the consequences of their own mistakes and errors. *Manka v. Martin*, 200 Colo. 260, 267, (Colo. 1980).
- 22) The United States Supreme Court stated, “While we have insisted that the pleadings *prepared by prisoners who do not have access to counsel* be liberally construed ... we have never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.” *McNeil v. United States*, 113 S.Ct. 1980, 1984 (1993).
- 23) Fontanari’s claim, “Due process requires the assistance of counsel in complicated and weighty proceedings, especially where retained counsel could not be present” is without any factual basis and is contrary to well established law.
- 24) Fontanari’s claim that “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” is without any factual basis and is contrary to well established law.

IV. Fontanari's Claim that "retained counsel could not be present" for the August 21st MLRB Hearing is a Misrepresentation of Fact

- 25) On Thursday August 22, 2019, Mr. Henderson emailed the Division and the Board's counsel stating "The operator spoke with me the prior evening and I instructed them to ask for a continuance until the September meeting if civil penalties were being sought." Attachment A.
- 26) On Wednesday August 21, 2019, at 10:37 a.m. Mr. Henderson emailed "Permit M-1992-117-CMC's Motion to Reconsider or Reduce Civil Penalty," to the Division and other interested persons, instead of choosing to attend Fontanari's scheduled enforcement hearing before the MLRB. Attachment B.
- 27) Emails from Mr. Henderson himself illustrate that "retained counsel" was available for the August 21st MLRB hearing, but simply chose not to attend.

V. No Attorney Entered an Appearance On Behalf of Fontanari With the MLRB for the August 21st MLRB Hearing

- 28) When an attorney wants to appear on behalf of a litigant in an MLRB matter, the first thing to be done by such attorney is to file an entry of appearance with the MLRB, requesting the MLRB to enter the counsel's appearance on behalf of the litigant. An entry of appearance should state the full name of the attorney, his/her identification number, name of the law firm in which he/she works, full address to which communications are to be made, and should be signed by the attorney.
- 29) Mr. Beckwith emailed Division counsel on Friday August 16, 2019, (blind carbon copying his daughter Kendra Beckwith, an attorney with Messner Reeves LLP) stating "we have continued our search for appropriate counsel. We have not found an attorney who is available for September 25 or 26, and is familiar with MLRB. It is up to Western Slope Flagstone to retain and get matters prepp'd. I, or the new counsel, will keep you posted, although I will NOT enter an appearance as I am simply not available." See Fontanari's Exhibit A-13.
- 30) Mr. Beckwith never informed the MLRB that he was unavailable for the August 21st hearing due to his choice to attend a "three-day mock trial in a Garfield County case" instead. See Attachment A.
- 31) Mr. Beckwith has never entered an appearance in this matter.
- 32) Mr. Henderson never entered an appearance for the August 21st MLRB hearing.

VI. Fontanari's Motion for Reconsideration/Petition Does NOT Set Forth New and Relevant Facts That Were Not Known at the Time of the Hearing

33) Fontanari does not have cause for seeking reconsideration of Board decisions until the requirements prescribed in Construction Materials Rule 2.9.1(2) are met:

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 such facts were not known at the time of the hearing.

34) Fontanari's Motion for Reconsideration does not contain any "new and relevant facts that were not known at the time of the hearing."

35) Simply stating, "New and relevant facts have become known that Fontanari could not present at the hearing because he was deprived of counsel," without any legal or factual basis does not constitute cause for seeking reconsideration of Board decisions.

36) Paragraphs 13-42 of Fontanari's Motion contain numerous alleged facts that were known at the time of the hearing. If relevant and accurate, paragraphs 13-42 of Fontanari's Motion could have been presented by Fontanari as they were known by Fontanari at the time of the hearing.

37) Fontanari's Motion for Reconsideration does not contain any grounds for justifying reconsideration of the Board's Findings of Fact, Conclusions of Law, and Order for Violation No. MV-2019-023.

38) As a result of Fontanari's Motions failure to meet the initial threshold requirements of Reconsideration of Board Decisions pursuant to Construction Materials Rule 2.9, Fontanari does not have cause to seek reconsideration of Board Decisions.

VII. Fontanari's Petition Fails to Meet the Minimum Requirements of Rule 2.5 Declaratory Orders, Petition Submission

39) Rule 2.5.1 Cause for Seeking a Declaratory Order - Any person who is or may be directly and adversely affected or aggrieved and whose interests are entitled to legal protection under the Act may petition the Board for

declaratory order to terminate controversies or to remove uncertainties as to the applicability to the Petitioner of any statutory provision of or any rule or order of the Board.

- 40) Fontanari's Petition fails to satisfy the Petition Submission requirement of the Construction Materials Rules 2.5.2.
- 41) Rule 2.5.2 (b) requires a Petition to set forth the statute, rule or order to which the petition relates.
- 42) Rule 2.5.2 (c) requires a Petition to set forth a concise statement of all of the facts necessary to show the nature of the controversy or uncertainty and the manner in which the statute, rule or order in question applies or potentially applies to the Petitioner.

VIII. Conclusion

The Division respectfully requests that the Board strike Fontanari's Motion for Reconsideration based on the Motion's failure to comply with Rule 2.9.1(2). The Division respectfully requests that the Board deny the petition based solely on the written submittals pursuant to Rule 2.9.3 – Consideration of Petition.

The Division respectfully requests that the Board strike Fontanari's Petition for a Declaratory Order due to the failure to meet the minimum requirements of Rule 2.5.2 (b) and (c).

The Division respectfully requests that the Board strike Fontanari's Motion/Petition to Re-Open Record for it fails to state a valid legal claim.

Respectfully submitted to the Colorado Mined Land Reclamation Board on November 4, 2019.

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

Certificate of Service

I, Linda Miller, hereby certify that on this 4th day of November, 2019, I served **via electronic mail or regular mail** a true copy of the foregoing DIVISION'S MOTION TO STRIKE FONTANARI'S "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 FOR HEARING ON BOND INCREASE" AND "MOTION/PETITION TO RE-OPEN RECORD FOR PRESENTATION OF DEFENSE CASE BY WESTERN SLOPE FLAGSTONE, LLC-RUDY FONTANARI, FOR SCHEDULING OF PRE-HEARING CONFERENCE AND FOR STAY OF REQUIRED CORRECTIVE ACTIONS, BOND INCREASE AND ASSESSMENT OF CIVIL PENALTIES DUE TO LACK OF REPRESENTATION BY LEGAL COUNSEL" FOR FAILURE TO MEET THE REQUIREMENT OF RULE 2.9.1(2) AND FOR FAILURE TO STATE A CLAIM, addressed to the following:

John Henderson, counsel for Rudolph Fontanari, jrhc law@comcast.net

Camille Mojar, MLRB Secretary, camille.mojar@state.co.us

Charles Kooyman, AGO for MLRB, Charles.kooyman@coag.gov

Russ Means, DRMS, russ.means@state.co.us

Amy Yeldell, DRMS, amy.yeldell@state.co.us

Lucas West, DRMS, lucas.west@state.co.us

Travis Marshall, DRMS, travis.marshall@state.co.us

Jeff Fugate, AGO for DRMS, jeff.fugate@coag.gov

/s/ Linda Miller November 4, 2019
Signature and date

From: [John Henderson](#)
To: [Scott Schultz](#); [Jeff Fugate](#); [Charles Kooyman](#)
Subject: Western Slope Flagstone-Rudy Fontonari
Date: Thursday, August 22, 2019 4:00:56 PM

Gentlemen:

I have been retained to represent Rudy Fontonari and Western Slope Flagstone.

First, I would like to request a pre--execution copy of the Order approved yesterday by the Board.

Second, I would like to order a transcript of yesterday's hearing on the Western Flagstone agenda item. Please give me the current order contact information.

Third, I need a copy of the State's power point presentation. Should I request this directly from Amy Yelldell, or do you have easy access to it?

I must indicate concern about Flagstone's representation at the hearing yesterday. Their normal business attorney was engaged in a three-day mock trial in a Garfield County case; the operator spoke with me the prior evening and I instructed them to ask for a continuance until the September meeting if civil penalties were being sought. I was told that this was done. True? I had placed a phone call to Amy the day prior to the hearing while she was in the Denver office.

Fourth, I am at a loss as to why the initial cease and desist order was issued with regard to mining and shipping activity on-site when the alleged violation was irrigation of un-mined lands. I need to clarify whether the cease and desist remains in place with regard to mining activities.

I look forward to hearing from you soon.

Regards,

John Henderson

John Richard Henderson
Law Office of John R. Henderson, P.C.
308 E. Simpson Street, Suite 103
Lafayette, CO 80026
Office: 720.512.2953
Cell: 720.971.7063
<https://landwaterlaw.co>
jrhcolaw@comcast.net

ATTACHMENT B

From: **John Henderson** <jrhcolaw@comcast.net>
Date: Wed, Aug 21, 2019 at 10:42 AM
Subject: Permit M-1992-117-CMC's Motion to Reconsider or Reduce Civil Penalty
To: Jeff Fugate <Jeff.Fugate@coag.gov>, Scott Schultz <Scott.Schultz@coag.gov>, Cunningham - DNR, Michael <michaela.cunningham@state.co.us>, Cyndi Kennedy <ctk@kennedylawyer.com>, Mark Steen <goldtontine@gmail.com>, Mike Bynum (mike@bzrez.com) <mike@bzrez.com>, <amy.eschberger@state.co.us>, Camille Mojar <camille.mojar@state.co.us>, John Ramsey <john@flyredtail.com>

All:

Attached is a pdf of the Motion filed by CMC today to reconsider or reduce the civil penalty assessed by the Board on June 26. Hard copies were mailed to all of the State parties today.

We were left somewhat uncertain of the precise deadline for our Motion given the busted mailing to Robinson on August 6. Still, we believe that you will find the Motion to be succinct and straightforward.

CMC is working on its adequacy response which we propose to have to Division in timely fashion.

With regards,

John R. Henderson, on behalf himself and Cyndi Kennedy, for CMC

John Richard Henderson
Law Office of John R. Henderson, P.C.
308 E. Simpson Street, Suite 103
Lafayette, CO 80026
Office: 720.512.2953
Cell: 720.971.7063
<https://landwaterlaw.co>
jrhcolaw@comcast.net

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 RE-OPEN RECORD FOR PRESENTATION OF DEFENSE
CASE BY WESTERN SLOPE FLAGSTONE, LLC-RUDY FONTANARI, FOR
SCHEDULING OF PRE-HEARING CONFERENCE AND FOR A STAY OF REQUIRED
CORRECTIVE ACTIONS, BOND INCREASE AND ASSESSMENT OF CIVIL
PENALTIES DUE TO LACK OF REPRESENTATION BY LEGAL COUNSEL**

COMES NOW Western Slope Flagstone, LLC, (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 to Re-open the Hearing Record for Presentation of Defense Case, to Schedule a Pre-Hearing Conference and for a Stay of Required Corrective Actions, Bond Increase and Civil Penalties Due to Lack of Representation of Permittee, Operator and witnesses by Legal Counsel. As grounds therefore, Western Slope Flagstone, LLC and Fontanari state as follows:

1. Mr. James Beckwith, Attorney at Law, has functioned as the attorney for Rudy Fontanari and Western Slope Flagstone, LLC for approximately 5 years.
2. In this matter, the Cease and Desist Order, Reason to Believe Letter and July 12 Inspection Report were e-mailed to Beckwith as an “FYI” by Scott Schultz, AG for the Division (“Schultz”) on July 12, 2019 (Exhibit A at 1). On July 13, Beckwith contacted Scott Schultz identifying himself as an attorney. (Exhibit A at 2).

3. There were additional e mails with Schultz on July 14 (Exhibit A at 3), July 22, 2019 (Exhibit A at 5), August 6, 2019 (Exhibit A at 10) August 7, 2019 (Exhibit A at 6), August 8, 2019 (Exhibit A at 7), August 12, 2019 (Exhibit A at 10), August 14, 2019 (Exhibit A at 8), August 14, 2019 (Exhibit A at 9). Attorney Beckwith also identified himself to CDOT on July 31, 2019 (Exhibit A at 4), and provided information to them on a flash drive, including a key report. On all occasions Beckwith was identified as the attorney for Western Slope and Fontanari.
4. Beckwith, with instructed by Schultz and Division, filed a request for a partial lifting of the Cease and Desist Order. (Exhibit A at 14) On August 14, Division denied Beckwith's request for a partial lifting of the Cease and Desist Order (Exhibit A at 9), which decision was relayed by Schultz to Beckwith.
5. Beckwith made an initial inquiry on August 12 as to whether the alleged violations could be settled (Exhibit A-9, second sheet) On August 14, 2019, Attorney Beckwith made a second inquiry as to whether the DRMS matters could be settled (Exhibit A at 11).
6. On August 14, Beckwith informed Schultz that he was unavailable for either of the August or September Board meeting dates, and informed Schultz that he had begun a search for another qualified attorney. Beckwith also cited C.R.CS. 13-1-127 (2) requiring that Western States Flagstone and Fontanari be represented by counsel. Beckwith inquired about a continuance to the October meeting dates. (Exhibit A at 12).
7. Schultz informed Beckwith that Division objected to a continuance of this matter (Exhibit A at 12)
8. On August 16, 2019, Beckwith noted again that he was unavailable on the hearing dates scheduled, and that he had located an attorney who was available for the September 25 or

26, 2019 Board meeting dates. Beckwith noted that he could not enter an appearance himself as he knew that he could not be present for the August hearing dates. (Exhibit A at 13), and had begun a search for an experienced attorney, and, found one, available in September.

9. At the Hearing on August 21, 2019, Western Slope Flagstone, LLC appeared through Rudy Fontanari, a lifelong miner, with 60 years in mining a related occupations and businesses. (Transcript at p. 102, lines 1-11) He is the owner of Western Slope Flagstone LLC (Transcript at p.37, lines 6-8). Fontanari is a senior citizen, and many years beyond, and not a lawyer. Fontanari brought with him his son-in-law, Trevor Grosse (Transcript at p.37), who is not an officer, owner or operator; Grosse is a computer analyst and programmer, not a lawyer. Had they not appeared, Western Slope and Fontanari would have been in violation of the order to be present and would have likely lost party status. Hard Rock Rule 2.8.1 (1). Beckwith had already made clear the request that counsel be present in multiple exchanges with Division's attorney.
10. At the hearing, Fontanari and Grosse were confronted with a full blown administrative case, with 61 power point slides, a 300-plus page Division submittal to the Board, expert testimony on multiple points, and oral argument proposing penalties as high as \$57,000.00 (\$43,000 was ultimately assessed). In addition, the Board ordered a six figure bond increase and the imposition of corrective actions including the removal and reclamation of pipelines, furrows and other features that had been installed at a cost of in excess of \$100,000. Fontanari and Western Slope had no prior notice of the proposed

bond increase, or the calculations underlying it, with no opportunity to present contrary evidence through expert or lay testimony.

11. Western Slope and Fontanari were confronted with purported and actual expert testimony concerning geology, geo-hydrology, soils chemistry, hydrology and slope failure.
12. Fontanari himself was subjected to a long cross-examination by Attorney Schultz for the Division. (Transcript at pp. 52-80.)
13. Fontanari is and was unfamiliar with administrative procedure and the laws of evidence and was incapable of presenting expert testimony or presenting testimony from other witnesses, and, in cross-examining witnesses and experts. The right to examine and cross examine, and to register objections to evidence, are provided for in the Administrative Procedures Act and Hard Rock Rules; the Rules of Evidence of the District Courts are intended to govern proceedings, subject to the somewhat discretionary standards established in the Hard Rock Rules. Fontanari and Grosse are not skilled legal professionals, and have no familiarity with these concepts, rules and procedures. Grosse was not equipped or capable of making evidentiary objections or objecting to questions posed by Mr. Schultz to Mr. Fontanari. His expertise is computers, and being a good son-in-law, not legal proceedings.
14. No mention was made by Division or the responsible Assistant Attorney General of the lengthy correspondence with Beckwith; that Beckwith could not be present; that Western Slope Flagstone and Fontanari were requesting legal representation, or that Beckwith had successfully located an attorney able to appear at the September Board meeting.
15. At the hearing, references to Mr. Beckwith, who appeared at the permit site, was referred to as an "associate" or Mr. Fontanari's (Transcript at 17, lines 14-24). Mr. Beckwith's

statements are cited by Division at several points in the transcript, essentially making him a witness for the Division (See, Transcript at p. 17, and Index under "Beckwith"), with no mention that he was functioning as the permittee's attorney.

16. At the hearing, Grosse also requested the right to have an attorney present (Transcript at p. 111, lines 6-17), and named the statute (already cited by Beckwith to Schultz, but being unable to provide a citation) to the Board's attorney (Transcript at p. 111, lines 10-17). Mr. Schultz, representing Division, already had the citation, from Beckwith, but did not volunteer it.
17. Mr. Fontanari, when asked by Mr. Schultz whether "a corporation was involved", or whether he was a sole proprietor, replied "I am not the sole provider [proprietor]" (Transcript at p. 111, lines 18-24). No one apparently heard him, and Board Member Luke closed the testimony. Western Slope Flagstone, LLC is a Colorado limited liability company in good standing (Exhibit C). The status of Western Slope Flagstone, LLC is unclear from the hearing record, other than Fontanari's statement that he is President.
18. The procedure, including failure to allow representation by counsel, was fundamentally unfair to Western Slope and Fontanari, and a violation of their civil and due process rights. Beckwith had specifically requested the right to have counsel present, and had specifically inquired of Mr. Schultz as to what civil penalties were being requested (Exhibit A at 6) Fontanari has been unable to locate any response.
19. Colorado statute is generally prohibitory of the representation of closely held entities before administrative agencies where the amount at issue is in excess of \$15,000 exclusive of certain items, *and* the officer presents the agency satisfactory evidence of

written authority. C.R.S. 13-1-127 (2). These are dual requirements. These are in addition to the right to legal counsel enjoyed by entities, persons and witnesses.

20. In addition, the Administrative Procedures Act, under which the Hard Rock Rules were developed, are highly protective of the right to have counsel present. This includes parties and employees of parties permitted or compelled to testify or to present data or evidence. This statement is made twice in the statutory provision, indicating that it is of substantial importance. C.R.S. 24-4-105 (9). A request to have counsel present must always be taken seriously; here there were at minimum three such requests.
21. Mr. Beckwith, in addition to medical procedures cited to Division and counsel, is an expert witness in a major road trial; as such, he has been and will be involved in a mock trial and the actual trial before the court in Glenwood, Colorado. He was unavailable for the August and September hearings, and remains so.
22. The proper course here is to re-open the evidentiary record for the presentation of Western Slopes and Fontanari's case, including lay and expert witnesses and rebuttal testimony anticipated from Division.
23. Western Slope and Fontanari request that this matter be scheduled for a pre-hearing conference to define the issues remaining before the Board and to allocate and schedule lay and expert testimony from multiple witnesses. A pre-hearing conference between the parties would streamline and shorten the testimony before the Board to accomplish the efficiency objectives contained in the Hard Rock Rules.
24. Documents and reports in the file of Beckwith have been transferred to the undersigned by Mr. Beckwith, consisting of some four thousand pages of correspondence, reports and expert reports and maps related to the operation. These are being reviewed, copied and

indexed in anticipation of segregating important evidentiary documents for the hearing. The Operator, Permit Holder and their chosen counsel have a legal right to adequate time to prepare.

25. Re-opening of the hearing record would not be prejudicial to the Division or the Board's interests, as the Western Flagstone Quarry remains under a Cease and Desist, as later modified by Division to allow certain production and transportation operations. The irrigation operations and facilities within the permit area remain under Cease and Desist.
26. Re-opening the hearing record under the circumstances presented would protect the integrity of any final decision of the Board.

WHEREFORE, Western Slope Flagstone, LLC and Rudy Fontanari request the following relief:

- (A) For a re-opening of the hearing record for the presentation of the defense case and Division rebuttal;
- (B) For a pre-hearing conference to achieve the objectives stated in the Hard Rock Rules;
- (C) For a stay of the corrective actions ordered on August 21, 2019, and for a further stay of civil penalties and bond increase until the defense case is heard and a final decision rendered by the Board; the cease and desist as to irrigation activities within the permit area to remain in place.
- (D) For a prompt re-scheduling of the re-opened hearing allowing adequate and suitable time for new counsel to prepare.

SIGNED AND SUBMITTED this 19TH day of September, 2019



John R. Henderson
Law Offices of John R. Henderson, PC
308 E. Simpson St.-Suite 103
Lafayette, CO 80026
jrhcolaw@comcast.net
720-971-7063

CERTIFICATE OF MAILING/ TRANSMISSION

I, the undersigned person, do hereby certify that on this 19th day of September, 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
Division of Reclamation, Mining
and Safety

1313 Sherman Street, Room 215
Denver, CO 80203

By US Mail and electronic mail
to:

Jeff Fugate
First Assistant Attorney General
Colorado Department of Law
Natural Resources Section
Ralph L. Carr Colorado Judicial
Center
1300 Broadway, 10th Floor
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, likely of Camie Mojar, is written over a horizontal line. The signature is stylized, with the first letter being a large 'C' and the last letter being a large 'M'.

BEFORE THE MINED LAND RECLAMATION BOARD

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

**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**

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.

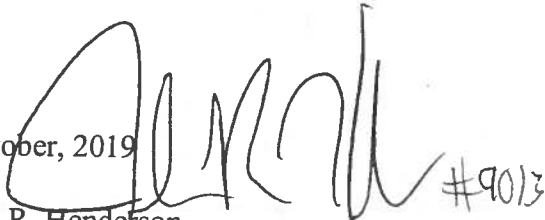
64. Such uncertainty or controversy could be eliminated by an appropriate declaratory order that the Board is not either ordering or decreeing the abandonment of water rights owned by Fontanari, and that any corrective actions being ordered in a final Board Order are not an instruction or command that 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 8TH day of October, 2019

 #9013
John R. Henderson
Law Offices of John R. Henderson, PC
308 E. Simpson St.-Suite 103
Lafayette, CO 80026
jrhcolaw@comcast.net
720-971-7063

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
1300 Broadway, 8th floor
Denver, CO 80203

By US Mail and electronic mail to:

Michael Cunningham
Division of Reclamation, Mining and
Safety
1313 Sherman Street, Room 215
Denver, CO 80203

By US Mail and electronic mail to:

Jeff Fugate
First Assistant Attorney General
Colorado Department of Law
Natural Resources Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
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, consisting of a stylized 'C' followed by a vertical line and a small flourish, positioned above a horizontal line.

EXHIBIT A

A-1 THROUGH A-14

CORRESPONDENCE BETWEEN BECKWITH AND S. SCHULTZ

EXHIBIT A-1



James Beckwith <ithamer47@gmail.com>

FW: Important notifications regarding Western Slope Flagstone Quarry No 2, M1996076

5 messages

Scott Schultz <Scott.Schultz@coag.gov>

Fri, Jul 12, 2019 at 12:40 PM

To: "ithamer47@gmail.com" <ithamer47@gmail.com>, "Kendra Beckwith (kbeckwith@messner.com)" <kbeckwith@messner.com>

FYI

From: Means - DNR, Russ <russ.means@state.co.us>

Sent: Friday, July 12, 2019 12:23 PM

To: tgrosse@juno.com

Cc: Scott Schultz <Scott.Schultz@coag.gov>

Subject: Important notifications regarding Western Slope Flagstone Quarry No 2, M1996076

To whom it may concern,

Please find attached three documents in regard to the above-referenced DRMS permitted site.

- 1) A Cease and Desist Order
- 2) A reason to Believe a violation letter
- 3) An inspection report

Any questions should be directed to the Attorney General's Office:

Scott Schultz

scott.schultz@coag.gov

Assistant Attorney General
Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203

720-508-6256

Regards

Russ Means

Minerals Program Director

Division of Reclamation, Mining and Safety

EXHIBIT A-2

9/12/2019

Gmail - Fontanari / Gravel Permit



James Beckwith <ithamer47@gmail.com>

Fontanari / Gravel Permit

1 message

James Beckwith <ithamer47@gmail.com>

Sat, Jul 13, 2019 at 4:11 PM

To: Scott Schultz <Scott.Schultz@coag.gov>, Kathy Young <Kathy.Young@coag.gov>

Bcc: t grosse <TGrosse@juno.com>, Ken Walter <ken@thewaltergroup.com>

Scott:

I'm a little confused, and perhaps you can help me. The Yeldell Inspection Report states that "Any retained water within the pits must be pumped out within 72 hours". This appears to be based upon Ms. Yeldell's conclusion that the irrigation and collection of water is part of the mining operation. The C&D says that Rudy is prohibited from entering the site (permit area) to conduct any mining operations. While we disagree that the irrigation is a mining operation, we wish to cooperate with you. If we do the pumping, will Mr. Means conclude we have violated the C&D?

We will use a pump and hose to draw water from the west pond (east pond is dry, at last view on 7.12), then run the water down a barrow ditch on the west side of the road, releasing water into the natural defile shown on the attached aerial photo made June 27th. The water then enters the drainage channel built by Powderhorn Coal located in the North Decline area.

Is this plan acceptable to you? (I would ask Ms. Yeldell, but your e-mail says to contact you - made more difficult because it is a weekend)

I have also copied AAG Kathy Young on this e-mail as she, undoubtedly, is as interested as you and I.

Jim

--

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433



Lot70062819_Orthomosaic_export_FriJun28211907.235188 - Copy 1.jpg
19606K

EXHIBIT A-3

9/12/2019

Gmail - Fontanari / C&D Order and Inspection Report



James Beckwith <ithamer47@gmail.com>

Fontanari / C&D Order and Inspection Report

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>
Bcc: t grosse <TGrosse@juno.com>

Sun, Jul 14, 2019 at 6:42 AM

Scott:

CRS 34-32.5-124 / Service of C&D: Though we are cooperating with you, I must note that the C&D is not currently effective. Our cooperation is not a waiver of the statute: which requires personal service or service by certified mailing upon, here, Rudy Fontanari. Neither service has occurred, and Mr. Fontanari is not waiving the statutory requirements. Kendra and I, of course, are not registered agents for service.

C&D Order: Beginning July 15th, the Town of Palisade and Mesa County will be doing work on the intersection of Rapid Creek Road and CSH 6 & 24. They have contracted to purchase rip rap from Western Slope Flagstone to be delivered "in the latter half of July, 2019" (No Further Details Known). The rip rap is stored at the quarry, having already been mined. It would be a hardship on Fontanari not to sell it, and a hardship on Mesa County who would have to pay higher transport costs to get the material elsewhere.

Does this sale fall within or without the C&D? If within, may we nonetheless load and transport it out as a variance from the Order? Please advise.

Inspection Report: We are ready to begin pumping out the west pond. We need clarification from you that we will not violate the C&D Order's ban on "mining operations". Recent view of the pond, however, suggests it may well be dry (or nearly so) by Monday. Do you wish us to hold off? Please advise.

Jim

--

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

EXHIBIT A-4



James Beckwith <ithamer47@gmail.com>

23277 I-70 Rockfall mitigation

2 messages

Killerud - CDOT, Douglas <douglas.killerud@state.co.us>
To: tgrosse@juno.com, ithamer47@gmail.com

Wed, Jul 31, 2019 at 10:35 AM

Gentlemen,

At the table this morning, when I asked Mr. Fontanari to sign, I neglected to point out the box to check identifying him as the land owner. I checked the box to clarify and have attached the scanned version of the form I will have in my file, and the crew supervisor will have in his possession when activity commences.

Thank you,
Doug

--



Douglas R. Killerud
Acquisition/Relocation Supervisor
Region 3 Right-of-Way

P 970.683.6238 | C 970.261-9435 | F 970.683.6227
douglas.killerud@state.co.us | www.codot.gov | www.cotrip.org
222 S. 6th Street, Room 317, Grand Junction, CO 81501

This message may contain confidential information and is intended only for individual(s) named. If you are not the intended recipient, you are not authorized to disseminate, distribute, or copy this email. Please notify the sender immediately if you have received this email by mistake and delete this email from your system. Thank you.

FullyExecutedPTE.pdf
230K

James Beckwith <ithamer47@gmail.com>
To: "Killerud - CDOT, Douglas" <douglas.killerud@state.co.us>
Cc: tgrosse <tgrosse@juno.com>

Wed, Jul 31, 2019 at 5:20 PM

Thank you, Doug.

Jim
[Quoted text hidden]

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

9/12/2019

Gmail - I-70 Rockfall Fontanari Stevens' Appraisal



James Beckwith <ithamer47@gmail.com>

I-70 Rockfall Fontanari Stevens' Appraisal

3 messages

Killerud - CDOT, Douglas <douglas.killerud@state.co.us>
To: ithamer47@gmail.com

Wed, Jul 31, 2019 at 9:41 AM

Dear Mr. Beckwith,
Thank you for this report on the flash drive. Would you like me to return the drive to you, now that I have completed my down load?

Kind regards,
Doug

--



Douglas R. Killerud
Acquisition/Relocation Supervisor
Region 3 Right-of-Way

P 970.683.6238 | C 970.261-9435 | F 970.683.6227
douglas.killerud@state.co.us | www.codot.gov | www.cotrip.org
222 S. 6th Street, Room 317, Grand Junction, CO 81501

This message may contain confidential information and is intended only for individual(s) named. If you are not the intended recipient, you are not authorized to disseminate, distribute, or copy this email. Please notify the sender immediately if you have received this email by mistake and delete this email from your system. Thank you.

James Beckwith <ithamer47@gmail.com>
To: "Killerud - CDOT, Douglas" <douglas.killerud@state.co.us>

Wed, Jul 31, 2019 at 5:19 PM

Doug:

The name is simply "Jim". You do not need to return the flash drive. It was good meeting with you this morning. We look forward to working with CDOT.

Jim
[Quoted text hidden]

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

Killerud - CDOT, Douglas <douglas.killerud@state.co.us>
To: James Beckwith <ithamer47@gmail.com>

Thu, Aug 1, 2019 at 7:51 AM

9/12/2019

Gmail - I-70 Rockfall Fontanari Stevens' Appraisal

Thanks, Jim!

[Quoted text hidden]

EXHIBIT A-5



James Beckwith <ithamer47@gmail.com>

Fontanari / Water Incident of 7.21.19

4 messages

James Beckwith <ithamer47@gmail.com>

Mon, Jul 22, 2019 at 10:19 AM

To: Kathy Young <Kathy.Young@coag.gov>, Scott Schultz <Scott.Schultz@coag.gov>, ben.krause@state.co.us
Bcc: t_grosse <TGrosse@juno.com>

Kathy, Scott and Ben:

I was advised this morning of an incident involving Rudy Fontanari's irrigation water on Tract 70 Plateau, and am making this report to you both.

On Saturday, July 20th, Rudy worked on the Tract 70 Plateau area. He left at 2:30 PM, and noted that no water was running anywhere on Tract 70. The pressure in the main trunk line had been reduced. By agreement with Ben Krause, Water Commissioner, Rudy has not irrigated the area since July 10th at 11:00 AM.

At 8:00 AM, Sunday morning (7.21.19), CDOT called Trevor Grosse to advise that water was running over the western side of the Tract 70 Plateau. The water was NOT running over the North Cliff Face. Rudy was in church and Trevor interrupted the service to notify Rudy. Rudy and Brett Fontanari got to the Plateau at approximately 10:30 AM.

He found that the cap on Water Station #1 (WS #1) had been removed, allowing water to run from the upright pipe. This cap is secured by various means, including the installation of horizontal screws. I do not have a photo of WS #1 but am attaching a photo of End Drain: the northern end of the trunk line. It is capped off in the same manner as WS #1. From the aerial photo sent you on 7.14.19, you will note that WS #1 does not have any lateral running from it: indicating that Rudy did not intend any irrigation from that WS.

A search of the area surrounding WS #1 failed to reveal the cap. Clearly, the cap was not "blown off" its mounting by the pressure of water in the trunk line. Someone removed the screws; removed the cap; and took the cap with them.

Rudy then went down to the CDOT crews along I-70; saw that water had run over the western side but no rocks had been dislodged. Rudy spoke with a CDOT employee and learned that CDOT had seen the water at 10:00 PM the night before (7.19.19), but failed to notify anyone until Sunday morning. Rudy agreed to meet a CDOT person at 1:00 PM, but that person never showed for the meeting.

Jim

--
James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433



0603191710.jpg
3244K

James Beckwith <ithamer47@gmail.com>
To: t_grosse <TGrosse@juno.com>

Mon, Aug 5, 2019 at 9:32 AM

EXHIBIT A-6

9/12/2019

Gmail - Western Slope Flagstone



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>
Bcc: t grosse <TGrosse@juno.com>

Wed, Aug 7, 2019 at 6:26 PM

Scott:

What is the civil penalty that DRMS is seeking against Western Slope Flagstone? I don't mean the range (which can be determined from the statute) but the actual fine.

Jim

--
James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

EXHIBIT A-7

9/12/2019

Gmail - Western Slope Flagstone



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>

Thu, Aug 8, 2019 at 10:56 AM

Scott:

Rudy Fontanari would like to resolve this matter by settlement. What is DRMS Staff seeking from the C&D? What settlement would be acceptable to DRMS Staff? Please advise.

Jim

--
James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

EXHIBIT A-8

9/12/2019

Gmail - Western Slope Flagstone

<amy.yeldell@state.co.us>

Subject: Re: Western Slope Flagstone

Scott, Russ & Amy:

[Quoted text hidden]

[Quoted text hidden]



FONTANARI REQ 4 VARIANCECLARIFY.pdf
762K

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>

Wed, Aug 14, 2019 at 12:07 PM

Scott:

I appreciate your response and explanation. I have prepared a formal request to be made to the Board. At this time, several customers have desired the materials, but we have declined any sales due to the pending C&D order.

Jim

[Quoted text hidden]

EXHIBIT A-9

9/12/2019

Gmail - Western Slope Flagstone

Denver, CO 80202

303.534.9344 direct | 303.623.1800 main

303.623.0552 fax

kbeckwith@messner.com

messner.com

[Quoted text hidden]

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>

To: Kendra Beckwith <kbeckwith@messner.com>

Mon, Aug 12, 2019 at 2:13 PM

Kendra:

I am aware of the rule and statutory definition and do not intend to argue about the sales from the standpoint of "mining activity". My argument is simply that prohibiting the sale of already-mined materials harms seller and buyer without resolving the core issue which is water.

Dad

[Quoted text hidden]

Scott Schultz <Scott.Schultz@coag.gov>

To: "ithamer47@gmail.com" <ithamer47@gmail.com>

Wed, Aug 14, 2019 at 11:48 AM

Jim,

The request attached to this email is denied. The Division believes any variance from the cease and desist order issued is a decision that should be made by the Mined Land Reclamation Board. At this time, the Division's position is that any sale of stockpiled construction materials from the Rapid Creek Quarry would be in violation of the cease and desist order, and subject to further enforcement action.

Sincerely,
Scott Schultz
Assistant Attorney General
Colorado Dept. of Law

Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
phone = (720) 508-6256
scott.schultz@coag.gov

From: James Beckwith <ithamer47@gmail.com>

Sent: Wednesday, August 7, 2019 10:20 AM

To: Scott Schultz <Scott.Schultz@coag.gov>

Cc: Means - DNR, Russ (<russ.means@state.co.us>); Yeldell - DNR, Amy

Given the posture of your client's enforcement matter, your client should properly prepare to make his request for a variance to the cease and desist order to the Mined Land Reclamation Board at the August 21st hearing. Please be advised that my clients will be internally discussing your client's request and will formally respond in the near future.

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>

Mon, Aug 12, 2019 at 3:18 AM

To: Scott Schultz <Scott.Schultz@coag.gov>

Cc: "Means - DNR, Russ (russ.means@state.co.us)" <russ.means@state.co.us>, "Yeldell - DNR, Amy" <amy.yeldell@state.co.us>

Bcc: Kendra Beckwith <kbeckwith@messner.com>

Scott:

Thank you for your response. I understand your position on the scope of "mining operation". A formal request to the Board will be prepared for submission at the August 21st hearing.

Nonetheless, my other question remains pending. What is Staff seeking in the C&D matter and what potential is there for settlement?

Jim

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>

Mon, Aug 12, 2019 at 3:18 AM

To: Kendra Beckwith <kbeckwith@messner.com>

See the e-mail below.

Dad

----- Forwarded message -----

From: **Scott Schultz** <Scott.Schultz@coag.gov>

Date: Sun, Aug 11, 2019 at 10:43 PM

Subject: RE: Western Slope Flagstone

To: **James Beckwith** <ithamer47@gmail.com>

[Quoted text hidden]

[Quoted text hidden]

[Quoted text hidden]

Kendra Beckwith <kbeckwith@messner.com>

Mon, Aug 12, 2019 at 5:26 AM

To: James Beckwith <ithamer47@gmail.com>

Do not further respond to anything until I can review stuff.

*Sent from my mobile device. Please forgive typos, omitted words, and errors inherent in technological communication undertaken on an impossibly small virtual keyboard.

Kendra N. Beckwith

Partner

Messner Reeves LLP

kbeckwith@messner.com

303.534.9344

EXHIBIT A-10



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

16 messages

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>

Tue, Aug 6, 2019 at 3:46 PM

Scott:

We have a customer who wishes to purchase 1-2 loads of rip rap. The rip rap is simply stockpiled at our pit, having already been mined and processed. We do not believe this is prohibited under the Cease & Desist Order, which prohibits "mining activity": i.e., excavation, extraction, etc. We do not wish to run afoul of the C&D. Please confirm we can sell.

Jim

--
James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

Scott Schultz <Scott.Schultz@coag.gov>
To: James Beckwith <ithamer47@gmail.com>

Tue, Aug 6, 2019 at 4:49 PM

Cc: "Means - DNR, Russ (russ.means@state.co.us)" <russ.means@state.co.us>, "Yeldell - DNR, Amy" <amy.yeldell@state.co.us>

Jim,

Please have your client make a formal request with the Division of Reclamation, Mining, and Safety and include as much information and detail as possible. In addition, reference the associated permit # with your formal request.

Sincerely,
Scott Schultz
Assistant Attorney General
Colorado Dept. of Law

Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
phone = (720) 508-6256
scott.schultz@coag.gov

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>

Tue, Aug 6, 2019 at 5:17 PM

EXHIBIT A-11

9/12/2019

Gmail - Western Slope Flagstone



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>

Wed, Aug 14, 2019 at 12:35 PM

Scott:

Any word on what it will take to settle the matter with DRMS?

Jim

--
James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

EXHIBIT A-12

9/12/2019

Gmail - Western Slope Flagstone



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

6 messages

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>
Bcc: t grosse <TGrosse@juno.com>

Wed, Aug 14, 2019 at 3:08 PM

Scott:

I am not available for either the August or the September hearing dates for MLRB. I have spoken with several attorneys but each has had a problem with case load or scheduling conflicts. One is available for the Board's meetings on October 23 and 24.

Western Slope is an LLC and, so far as I am informed, DRMS is seeking greater than \$15,000 in civil penalties. Under those circumstances, CRS 13-1-127(2) prohibits Western Slope Flagstone from representing itself through Rudy. WSF must be represented by counsel.

What is the DRMS position if WSF requests a continuance to the October dates?

Jim

--

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

Scott Schultz <Scott.Schultz@coag.gov>
To: James Beckwith <ithamer47@gmail.com>

Thu, Aug 15, 2019 at 2:52 PM

DRMS objects to a continuance of this matter.

Sincerely,
Scott Schultz
Assistant Attorney General
Colorado Dept. of Law
Natural Resources & Environment Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 7th Floor
Denver, CO 80203
phone = (720) 508-6256
scott.schultz@coag.gov

9/12/2019

Gmail - Western Slope Flagstone



James Beckwith <ithamer47@gmail.com>

Western Slope Flagstone

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>
Bcc: t grosse <TGrosse@juno.com>

Wed, Aug 14, 2019 at 3:08 PM

Scott:

I am not available for either the August or the September hearing dates for MLRB. I have spoken with several attorneys but each has had a problem with case load or scheduling conflicts. One is available for the Board's meetings on October 23 and 24.

Western Slope is an LLC and, so far as I am informed, DRMS is seeking greater than \$15,000 in civil penalties. Under those circumstances, CRS 13-1-127(2) prohibits Western Slope Flagstone from representing itself through Rudy. WSF must be represented by counsel.

What is the DRMS position if WSF requests a continuance to the October dates?

Jim

--

James A. Beckwith
Attorney at Law
5460 Ward Road, Suite 120
Arvada, CO 80002
303-883-4433

EXHIBIT A-13

9/12/2019

Gmail - Western Slope Flagstone

From: James Beckwith <ithamer47@gmail.com>
Sent: Wednesday, August 14, 2019 3:08 PM
To: Scott Schultz
Subject: Western Slope Flagstone

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>
To: Scott Schultz <Scott.Schultz@coag.gov>
Bcc: Kendra Beckwith <kbeckwith@messner.com>

Fri, Aug 16, 2019 at 10:26 AM

Scott:

Sorry not to respond yesterday. I was in a long mediation and medical exams.

I appreciate Staff's position. It is lengthy but counsel availability is what it is. We have continued our search for appropriate counsel. We have now found an attorney who is available for September 25 or 26, and is familiar with MLRB. It is up to Western Slope Flagstone to retain and get matters prepped. I, or the new counsel, will keep you posted, although I will NOT enter an appearance as I am simply not available.

Do you have a feel for what it will take to resolve the matter?

Jim

[Quoted text hidden]

EXHIBIT A-14

9/12/2019

Gmail - Western Slope Flagstone

Cc: Means - DNR, Russ (russ.means@state.co.us) <russ.means@state.co.us>, Yeldell - DNR, Amy <amy.yeldell@state.co.us>

[Quoted text hidden]

[Quoted text hidden]

James Beckwith <ithamer47@gmail.com>

Wed, Aug 7, 2019 at 10:20 AM

To: Scott Schultz <Scott.Schultz@coag.gov>

Cc: "Means - DNR, Russ (russ.means@state.co.us)" <russ.means@state.co.us>, "Yeldell - DNR, Amy" <amy.yeldell@state.co.us>

Bcc: t grosse <TGrosse@juno.com>, John Buchanan <jbuchanan@tbvs.net>

Scott, Russ & Amy:

Attached please find the formal request, signed by Rudy Fontanari, for either a clarification of the Cease & Desist Order or, as may be applicable, a variance therefrom allowing the sale of stockpiled construction materials from the Rapid Creek Quarry. It is formatted in letter form, to match the Cease and Desist Order received by Rudy. While I drafted the letter, I have had Rudy sign it rather than myself. I am not presently entering my appearance as I am not available to appear either August 21-22 or the week of September 23rd: the two weeks the Board has regular meetings.

It is our hope that you can allow us to sell the stockpiled materials. These stockpiled construction materials do not appear to be at issue between DRMS and Rudy. Their sale by Rudy and use by contractors/customers is important for all.

I will deliver a hard copy to the MLRB office at Noon today. Should you have any questions, do not hesitate to contact me.

Jim

[Quoted text hidden]

 FONTANARI REQ 4 VARIANCE:CLARIFY.pdf
762K

James Beckwith <ithamer47@gmail.com>

Wed, Aug 7, 2019 at 2:12 PM

To: Scott Schultz <Scott.Schultz@coag.gov>

Cc: "Means - DNR, Russ (russ.means@state.co.us)" <russ.means@state.co.us>, "Yeldell - DNR, Amy" <amy.yeldell@state.co.us>

Scott, Russ & Amy:

The hard copies (original + 2) of Mr. Fontanari's request were filed with the DRMS Front Counter at 1313 Sherman, Suite 215 at 12:20 this afternoon.

Jim

On Tue, Aug 6, 2019 at 4:49 PM Scott Schultz <Scott.Schultz@coag.gov> wrote:

[Quoted text hidden]

[Quoted text hidden]

Scott Schultz <Scott.Schultz@coag.gov>

Sun, Aug 11, 2019 at 10:43 PM

To: James Beckwith <ithamer47@gmail.com>

Cc: "Means - DNR, Russ (russ.means@state.co.us)" <russ.means@state.co.us>, "Yeldell - DNR, Amy" <amy.yeldell@state.co.us>

Jim,

The Cease and Desist Order is applicable to stockpiled construction materials. I do not agree with your interpretation that the statutory definition of "mining operation" does not include the sale of stockpiled construction materials.

EXHIBIT B

EXCERPTS FROM HEARING TRANSCRIPT

MINED LAND RECLAMATION BOARD

August 21, 2019

Rudolph Fontanari

File Number M-1996-076

1313 Sherman Street
Room 318
Denver, Colorado 80203

Javernick & Stenstrom, LLC

3131 South Vaughn Way, Suite 224, Aurora, Colorado 80014 (720) 449-0329 FAX (720) 449-0334

1 APPEARANCES:

2 For the Mined Land Reclamation Board:

CHARLES J. KOOYMAN, ESQ.

3 First Assistant Attorney General

Department of Law

4 Business and Licensing Section

1300 Broadway

5 Eighth Floor

Denver, Colorado 80203

6 For the Division of Reclamation Mining and Safety:

7 SCOTT SCHULTZ, ESQ.

First Assistant Attorney General

8 Department of Law

Natural Resources & Environment Section

9 1300 Broadway

Tenth Floor

10 Denver, Colorado 80203

11 Also Present:

Camille Mojar

12 Russ Means

Ginny Brannon

13 Rudolph Fontanari

Trevor Grosse

14 Travis Marshall

Clayton Wein

15 Lucas West

1 (The board meeting was called to order on
2 Wednesday, August 21, 2019, at approximately 9:00 a.m. The
3 following members were present: Forrest Luke-Chairperson,
4 Nell Wareham-Morris, John Singletary, Lauren Duncan, and
5 Jill Van Noor.)

P R O C E E D I N G S

(Further proceedings were had but are not reported herein.)

MR. LUKE: Item Number 8, enforcement hearing, Rudolph Fontanari, File Number M-1996-076.

All those who plan to testify in this hearing, please rise.

(An oath was administered, and all participants swore to tell the truth.)

MR. LUKE: Go ahead.

MS. YELDELL: All right. Good morning, Members of the Board, members and public.

My name is Amy Yeldell, and this is an enforcement hearing regarding the Western Slope Flagstone Quarry Number 2 operated by Rudolph Fontanari, which is Permit Number M-1996-076.

Other specialists that helped on this process also are Lucas West, Clayton Wein, Travis Marshall. They helped on this presentation as well.

So the nature of this hearing is for consideration for failure to comply with the conditions of a permit pursuant to C.R.S. 34-32.4-124(1).

The Division, after an inspection, issued an in-the-field cease and desist order on July 12th of 2019. The cease and desist order was in direct response to

1 The two blue polygons in the north are the pits
2 that became inundated as the result of applying water in
3 the permit boundaries.

4 Towards the bottom right, in yellow and blue, is
5 what we refer to as east water distribution line. And in
6 this area there are approximately 2,115 linear feet of
7 water distribution lines and 13 half riser heads and
8 installed within the permit boundary.

9 On the east line, there are no ditches or valves
10 presently located onsite.

11 Some key observations from the July 11th, 2019,
12 inspection were that seeps on the north face of the mesa
13 were observed. Eastbound I-70 right-lane closure began at
14 that time. The ditches were observed to be wet. Beckwith
15 stated that the ditches are in rotation every three days.

16 DRMS observed Beckwith getting out of a vehicle
17 and going over to the pipeline diversion ditch. This is
18 the first contact that the Division has had with either
19 Mr. Fontanari or Mr. Beckwith onsite.

20 MR. LUKE: Who is Mr. Beckwith? I'm sorry.

21 MS. YELDELL: He's an associate of
22 Mr. Fontanari.

23 And then Mr. Beckwith also presented the
24 Division with a crack on the north end of the mesa for us
25 to document.

1 of the way, and then reopen. And then I believe it was at
2 least two full-blown planned closures.

3 MR. LUKE: Thank you.

4 MR. GROSSE: I'm Trevor Grosse, the son-in-law
5 of the Operator.

6 MR. FONTANARI: Rudolph Fontanari. I'm the
7 owner of Western Slope Flagstone and also the irrigated
8 property that we are looking at here today.

9 MR. GROSSE: I have a prepared statement,
10 because I get flustered speaking in public, in front of
11 people, so I'm going to read it. I will try to make it
12 brief.

13 At issue in this proceeding is a small land
14 area, approximately 200-by-200 feet or so, situated within
15 the permit area that lies between Water Station Number 3
16 and 4, as we refer to them.

17 This area was recently the target of a
18 reclamation effort due to subsidence features and was
19 regarded as repaired by Clayton Wein of the Division.

20 Wein or Wein?

21 MR. WEIN: Wein.

22 MR. GROSSE: Sorry.

23 Water stations are numbered from the
24 northernmost, Number 1 to Number 8 at the south. Other
25 water station exist further to the south. They are clearly

1 MR. GROSSE: It's always been Rapid
2 Creek and --

3 MR. SINGLETARY: You have adjudicated water
4 rights to that?

5 MR. GROSSE: Yes, we do.

6 And over the last couple of years, we have
7 noticed that less and less water seems to be coming out of
8 that ditch. So we thought, well, we don't want all that
9 water to get wasted, so we have the ditch to try and
10 eliminate as much waste as we could.

11 MR. LUKE: Okay. Any other questions?
12 Thank you.

13 MR. SCHULTZ: Mr. Chair, I would like a chance
14 to have a cross-examination.

15 MR. LUKE: Okay.

16 MR. SCHULTZ: My name is Scott Schultz, with
17 the Colorado Attorney General's Office. I represent the
18 Division of Reclamation, Mining and Safety.

19 Good afternoon, Mr. Fontanari. How are you
20 today?

21 MR. FONTANARI: I'm doing well.

22 MS. MOJAR: Hey, Scott, can you use the
23 microphone, please?

24 MR. SCHULTZ: Okay. Mr. Fontanari, you talked a
25 little bit about the irrigation system on your permitted

1 site.

2 What did you plant on the permitted site that
3 is -- deals with this irrigation system?

4 MR. FONTANARI: On three and four?

5 MR. SCHULTZ: On dealing with -- if I may pull
6 this closer.

7 MS. DUNCAN: Just for clarification, each riser
8 is a number so --

9 MR. GROSSE: Yeah. One is at the north, and
10 eight is at the southernmost that's still inside the
11 permit. Nine and onward are outside the permit area. So
12 one through eight are in the permit area, for north and
13 south.

14 MR. FONTANARI: These risers are 200 feet
15 apart.

16 MR. SCHULTZ: So, Mr. Fontanari, what did you
17 plant on this site?

18 MR. FONTANARI: Three and four?

19 MR. SCHULTZ: Anywhere that this map depicts.

20 MR. FONTANARI: On 13 and 14, just wildflowers,
21 wild seed for livestock and birds.

22 MR. SCHULTZ: You planted the wild seeds?

23 MR. FONTANARI: Yes.

24 MR. SCHULTZ: When?

25 MR. FONTANARI: Oh, it was probably the 4th of

1 July, right around that area. It's up now about 10, 12
2 inches high. On Station 13 and 14, the farthest ones
3 south.

4 MR. SCHULTZ: Sure.

5 So this map is dated June 26th, 2019.

6 And there is water in the pit, correct?

7 MR. FONTANARI: Looks like it, yes.

8 MR. SCHULTZ: So you planted, you said, on the
9 4th of July.

10 When did you start watering this site?

11 MR. FONTANARI: After the cease and desist
12 order.

13 MR. SCHULTZ: When did you start? When did you
14 start watering the site?

15 MR. FONTANARI: I started the 1st of July. I'm
16 not for sure when the second time was.

17 MR. SCHULTZ: So even though this is a map
18 that's dated June 26th, 2019, you are stating you did not
19 water prior to June -- July 1st?

20 MR. FONTANARI: No.

21 MR. SCHULTZ: What are you stating?

22 MR. FONTANARI: I checked the map. I just
23 started three days before we had the first subsidence.

24 MR. SCHULTZ: So what day was that?

25 MR. FONTANARI: Well --

1 MR. GROSSE: Let's try to --

2 MR. FONTANARI: -- the 9th is the day that CDOT
3 called. So we had already irrigated about seven days
4 before that on the north end.

5 MR. SCHULTZ: So where did that water come from
6 in the pit?

7 MR. FONTANARI: I don't know. I didn't put it
8 there. My calendar that I got recorded, I started
9 irrigating, and the water subbed out of the hillside. It
10 didn't run over the bank. It subbed out from the cliff.

11 MR. SCHULTZ: Do you know what the approximate
12 amount of water was that was applied at this site?

13 MR. FONTANARI: I have a 2-inch valve on each
14 one of these stations. So Stations 3 was running 2 inches,
15 and Station 4 was running 2 inches.

16 MR. SCHULTZ: Do you believe that the
17 Division's rough calculation of 125 gallons per minute to
18 one riser is accurate?

19 MR. FONTANARI: I never measured it. I just
20 put enough water on that I could handle and keep it going
21 across the land.

22 MR. SCHULTZ: And you were --

23 MR. FONTANARI: Yes.

24 MR. SCHULTZ: -- running about three -- three
25 or four risers at one time?

1 MR. FONTANARI: Four at the most.

2 MR. SCHULTZ: Okay. When did you install this
3 water system?

4 MR. FONTANARI: I've been working on it for two
5 years. 2017 I started it with Ute Water. It's roughly a
6 mile. And then I come back in 2018 and finished it up with
7 another 4,500 feet.

8 MR. SCHULTZ: So -- it's a question for either
9 of you.

10 So you said a professional engineer tells you
11 when and where to irrigate; is that correct?

12 MR. FONTANARI: Yes.

13 MR. SCHULTZ: Who is that professional engineer?

14 MR. FONTANARI: Dave Fox.

15 MR. SCHULTZ: Did he write a report?

16 MR. FONTANARI: Yes.

17 MR. SCHULTZ: Do you have that report?

18 MR. FONTANARI: Not with us.

19 MR. SCHULTZ: When is that report dated?

20 MR. FONTANARI: Just last year.

21 MR. SCHULTZ: Have you provided that to DRMS?

22 MR. FONTANARI: No.

23 MR. SCHULTZ: Have you provided that to DWR?

24 MR. GROSSE: I think they've met, I think, with
25 the DWR people. He's known Ben Krause for years. And so

1 he knows those people and coordinates with to make sure
2 we're not abusing water or using it or wasting it or
3 anything like that.

4 MR. SCHULTZ: Sure, sure.

5 MR. GROSSE: I don't know that he provided it to
6 DWR, but he worked there for many years. He knows the
7 rules. He's familiar with it.

8 MR. SCHULTZ: Fair to say you don't know
9 whether you provided this report to anyone?

10 MR. GROSSE: That's correct, because we hired
11 Dave Fox to provide the information, to us. So we didn't
12 have a reason to provide it to someone else.

13 MR. SCHULTZ: You knew of this issue from DRMS,
14 the cease and desist order, and the alleged violations on
15 July 12th, correct?

16 MR. GROSSE: Correct.

17 MR. SCHULTZ: That would be something valuable
18 to provide to the Division or to the board, correct?

19 MR. FONTANARI: We wasn't even informed of the
20 cease and desist. I wasn't even informed when Amy come on
21 the site. This inspection was done without me even being
22 around. I was on the site irrigating when this inspection
23 was done with Tonya and Amy. It wasn't done with me. I
24 didn't know anything about this violation until I got it
25 the 12th.

1 MR. GROSSE: I would have said that, rather
2 than trying to hide this information, we thought this would
3 be the appropriate forum to -- to talk about what kind of
4 -- what kind of professional assistance we had in planning
5 water distribution over that area. I think this is that
6 forum.

7 MR. SCHULTZ: You didn't bother to bring that
8 document today?

9 MR. GROSSE: We didn't bring it, no.

10 MR. SCHULTZ: Didn't bother to provide that
11 document to DRMS in the over -- over a month that you've
12 had since you have known this issue existed?

13 MR. GROSSE: No.

14 MR. SCHULTZ: Describe a little bit of your
15 active mining on this site. You talked about active mining
16 when you --

17 MR. FONTANARI: We didn't do any on this site.
18 Station 3 and 4 are the only ones that have done any
19 mining, Powderhorn Coal or Snowcap Coal Company.

20 MR. SCHULTZ: There is a pit here, correct?

21 MR. FONTANARI: Oh, that -- that was done 12
22 years ago, or 14.

23 MR. SCHULTZ: Okay. So there's been no active
24 mining for 12 to 14 years?

25 MR. FONTANARI: Correct.

1 MR. SCHULTZ: Okay.

2 MR. FONTANARI: And that pit has been dry until
3 we started irrigating over the subsidence, and our water
4 disappeared. The next thing we seen, it's coming out on
5 the bank of the pit.

6 MR. SCHULTZ: Okay. I want to go back to that
7 point a little bit.

8 You stated, again, that you didn't start
9 irrigating until July 2nd, 2019?

10 MR. FONTANARI: On three and four, yes.

11 MR. SCHULTZ: On Riser 3 and 4 on this?

12 MR. FONTANARI: Yeah. They're at the bottom.

13 MR. SCHULTZ: Okay. And this document, this
14 exhibit, this map was created on June 26th.

15 How did the water in the pit get there?

16 MR. FONTANARI: I can't say that for sure, you
17 know. And I would have to look at my calendar and make
18 sure the exact day I started irrigating.

19 MR. SCHULTZ: Okay.

20 MR. FONTANARI: But right now, as far as I can
21 figure, it was around the 2nd of July.

22 MR. SCHULTZ: You didn't bring your irrigation
23 calendar with you today?

24 MR. FONTANARI: No.

25 I moved the water every three days, just like

1 Dave Fox said.

2 MR. SCHULTZ: So you are saying you watered this
3 site roughly from July 2nd to July 12th?

4 MR. FONTANARI: We shut the water off on the
5 9th.

6 MR. SCHULTZ: The 9th?

7 MR. FONTANARI: As soon as CDOT called,
8 immediately I went and shut the water off.

9 MR. SCHULTZ: Going back to a statement you
10 talked about a little bit earlier, about the repairs by --
11 made by Snowcap Coal Company.

12 You are aware that the Division requested
13 Snowcap Coal to make some repairs at the site, correct?

14 MR. FONTANARI: Yes.

15 MR. SCHULTZ: You were aware of the specific
16 locations where these repairs were made, correct?

17 MR. FONTANARI: Yes.

18 MR. SCHULTZ: Looking at this exhibit, if you
19 would look at the red dots on the exhibit.

20 Are those a fair locating marker of the repairs
21 made by Snowcap Coal?

22 You can stand up, if you want.

23 MR. FONTANARI: They were marked by flags on
24 the map, yes.

25 MS. DUNCAN: Can you indicate those flags to us

1 too, please?

2 MR. FONTANARI: (Indicated.) It looks like
3 there's three markers right here marking the repairs.

4 Three and four, if you come up here, these two
5 repairs here are to the north.

6 I don't know what these square markers are. Are
7 they pillars that was left in the coal mine?

8 MR. SCHULTZ: I'm not -- I can't speak to
9 exactly what those are. But I do know that the red dots
10 are to indicate the repaired areas made by Snowcap.

11 MR. FONTANARI: Now, three, four is right down
12 here (indicated). And you can see about five or six
13 repairs here made right above -- well, the detention pond
14 is down below.

15 I don't know. Three and four, my indication is
16 right above the detention pond. So how this detention pond
17 got down below when three and four is up here, and it's
18 plainly marked three and four?

19 MR. SCHULTZ: Mr. Fontanari, is it fair to say
20 that those red DOTS are an accurate location of where
21 Snowcap made their repairs?

22 MR. FONTANARI: No, I can't say for sure. We've
23 got them recorded.

24 MR. SCHULTZ: You do have them recorded?

25 MR. GROSSE: I believe Clayton Wein has GPS

1 locations on some 50.

2 MR. SCHULTZ: I'm asking about your knowledge
3 of where the repairs were made.

4 You knew where the repairs were made?

5 MR. FONTANARI: I've seen the logs, and I've
6 seen the subsidence when they located them, yes.

7 MR. SCHULTZ: When did you dig these ditches?

8 MR. FONTANARI: I dug the ditches when I was
9 getting ready to irrigate, from each location, each drain.
10 Three and four, I took a ditch from that.

11 MR. SCHULTZ: When, though? Approximately when?
12 Two months ago? Two weeks ago?

13 MR. FONTANARI: Back in June.

14 MR. SCHULTZ: June of this year?

15 MR. FONTANARI: Yeah.

16 MR. SCHULTZ: And the markers were still
17 present for the repair?

18 MR. FONTANARI: Oh, yes.

19 MR. SCHULTZ: So what was the -- what's the
20 design of these ditches?

21 MR. FONTANARI: I -- I had to dig the ditch to
22 grade so the water would flow.

23 MR. SCHULTZ: Flow to what?

24 MR. FONTANARI: Downhill. Water doesn't run
25 uphill.

1 MR. SCHULTZ: What's downhill that you were
2 seeking this water to go to?

3 MR. FONTANARI: East.

4 MR. SCHULTZ: I know. What are you directing
5 the water to?

6 MR. FONTANARI: Well, all the area that has the
7 vegetation on it, my intent was to irrigate it.

8 MR. SCHULTZ: Okay.

9 MR. FONTANARI: Not to run it into a retention
10 pond, but to irrigation the surface water.

11 MR. SCHULTZ: Fair to say that the ditches you
12 dug are pretty close to all of the repairs?

13 MR. FONTANARI: If they're right in line with
14 one of the outlets, yes.

15 MR. SCHULTZ: Okay.

16 MR. FONTANARI: Every 200 feet, I took off from
17 the outlets with a backhoe. I put a level on the backhoe
18 so I could dig a quarter bubble to the east, and sometimes
19 the surface varied. It started uphill. So I had to turn
20 and keep the bubble a quarter inch downhill.

21 None of these ditches was dug with the
22 intentions to run water to where the stakes were for the
23 subsidence.

24 MR. SCHULTZ: What was the intent of Ditch 4?

25 MR. FONTANARI: To get the water across the

1 land.

2 MR. SCHULTZ: Okay.

3 MR. FONTANARI: Why irrigate -- you got to help
4 push it in the direction you want it to go.

5 MR. SCHULTZ: So this -- so your method of
6 irrigation you say is flood irrigation?

7 MR. FONTANARI: Yes.

8 MR. SCHULTZ: You talked a little bit about
9 historic irrigation.

10 When's the last time you believe this area was
11 irrigated?

12 MR. FONTANARI: I wasn't here back in this --
13 this farm goes back to 1990 -- or 1890 and 1880. This is
14 the oldest -- one of the oldest farms in the valley. The
15 guy that homesteaded this, George Crawford, he bought this
16 property from the United States government. He owned the
17 surface, and he also owned the coal rights.

18 And in the early 1900s, he split the coal rights
19 off to a separate company, which back then I think was CF&I
20 Coal. And they had coal certificates that showed ownership
21 of the coal. And he kept the surface rights, which is
22 recorded in the courthouse in Junction, roughly 400 acres.

23 MR. SCHULTZ: Now, you have been showing what
24 you call subsidence features to the coal program for
25 several years, correct?

1 MR. FONTANARI: Yeah, brought it to their
2 attention.

3 MR. SCHULTZ: When did you start bringing it to
4 their attention?

5 MR. FONTANARI: About 1987, '88.

6 MR. SCHULTZ: What was the purpose of showing
7 these, what you call subsidence features, to the coal
8 program?

9 MR. FONTANARI: Hoping they take care of them so
10 I wouldn't be losing all my -- my irrigation water in the
11 -- in their main ditch coming down from Rapid Creek. These
12 subsidence go from up to Rapid Creek.

13 MR. SCHULTZ: But you just said you started
14 irrigating this site on July 2nd of this year?

15 MR. FONTANARI: Yes.

16 MR. SCHULTZ: You haven't irrigated before?

17 MR. FONTANARI: Oh, yeah.

18 MR. SCHULTZ: You have?

19 MR. FONTANARI: Sure.

20 MR. SCHULTZ: When?

21 MR. FONTANARI: Well, I irrigated for Robert Orr
22 from about '85 on up to '90, and then I purchased the
23 property myself.

24 MR. SCHULTZ: Describe your statement that you
25 had made in your presentation that you flooded out the coal

1 mine a few years ago.

2 MR. FONTANARI: The second time, yes.

3 MR. SCHULTZ: Could you -- could you explain on
4 that a little bit?

5 MR. FONTANARI: I went on a walk through with
6 Jim Stover and Tonya, two neighbors, the Minded Land
7 Reclamation. And I asked Jim Stover -- there was two drill
8 holes that was left unplugged, and I asked him about taking
9 care of the drill holes, and he said he would. And I asked
10 him about taking care of the subsidence, and they said no.
11 And I explain to him how it got the subsidence.

12 They trespassed on the neighbor's property,
13 Warren Reeves. They stole Warren Reeves' coal. And when
14 he wouldn't sell the coal rights to the company, he backed
15 out and pulled the pillars and caved the area in. And
16 after he caved it in, Robert Orr, that had owned the parcel
17 that was caved in on, filed a lawsuit on them for damage.

18 And a week before it went to court -- at that
19 time it was GX that owned the mine -- GX come to Robert Orr
20 and the attorney and offered to settle out of court. And
21 they settled for \$75,000 out of court, due to the
22 subsidence.

23 And same area that I was irrigating for Robert
24 at that time flooded the mine, which was north of the one
25 they paid the subsidence for.

1 MR. SCHULTZ: How about the second time? Let's
2 jump ahead to the second time that involved TR69.

3 MR. FONTANARI: Yes. What about it?

4 MR. SCHULTZ: What was your intent at that
5 point?

6 MR. FONTANARI: My intent was to make the coal
7 company take care of the subsidence. And they said no.
8 How -- how are you going to prove it? Are you going to
9 sink a 100-foot shaft and go down there and survey out the
10 trespass?

11 Jim Stover knew I didn't have the right to sink
12 a 100-foot shaft, because the property was permitted with
13 the coal mine, not with me.

14 So irrigation water, anytime you go to irrigate
15 it, will go down the subsidence, and it disappears. And
16 after three weeks, they knew I was irrigating on top.
17 After three weeks, Dan Aranda (phonetic) come out from
18 Mined Land and took a look at the situation.

19 And he said, Rudy, how much water are you
20 running? And I said 2.6 feet per second. He said, How
21 long you been running? I said, Three weeks. He took his
22 calculator out and calculated 2.6 feet per second, times 60
23 minutes, times 24 hours, times three weeks.

24 And he looked up, and he said, Do you have any
25 idea how much water is coming down these subsidence? And I

1 said, No. He said over 200 feet -- 200-acre feet. And he
2 said it's starting to seep out the portal. This portal was
3 all supposed to drain down to the sump. The water wasn't
4 supposed to come back up and in the portal. When they
5 closed the portal, they were supposed to drain all the
6 water to the sump, which is down north.

7 In fact, this sump comes right underneath the
8 caved area that CDOT was working on. The water is right on
9 the floor of the coal mine, right along I-70.

10 So it's not only taking water from the top, the
11 fill in the cave is setting on water -- in water. And it
12 shows on the map that it is in water. And the map was
13 drawn by Jim Stover.

14 MR. SCHULTZ: So it's your contention that that
15 the water seeping off the hillside, the cliff side that we
16 saw in the videos, is a result of subsidence features by
17 Snowcap?

18 MR. FONTANARI: Yes, yes, definitely. They're
19 not by Snowcap, they are by Powderhorn Coal.

20 MR. GROSSE: It was previously Snowcap.

21 MR. SCHULTZ: Would you agree that the water
22 applied that was seen coming off the cliff sides was as a
23 result of your irrigation system?

24 MR. FONTANARI: We had no idea at first. This
25 formation dips to the east 3 to 5 percent, to the

1 northeast. Normally the water would have all went to the
2 northeast. The cave is what turned the water back towards
3 the cliff that started to settle out through the shale
4 formation.

5 MR. SCHULTZ: You knew about this cave prior to
6 July 2nd, correct?

7 MR. FONTANARI: Sure. And told it to Jim
8 Stover. That's why they come up and covered the
9 subsidence, you know.

10 Jim Stover is a mining engineer. He ought to
11 know better than to pull the pillars, and state laws says
12 that, if you do, you are responsible. I didn't pull the
13 pillars. I didn't cave it in.

14 MR. SCHULTZ: So it's your contention that --
15 on Mr. Wein's PowerPoint, he noted several points where
16 there was evidence of collapsible soils as a result of the
17 water.

18 Is it your contention that that is the fault of
19 Snowcap?

20 MR. FONTANARI: Sure, sure.

21 MR. SCHULTZ: On July 11th you met with
22 Mr. Wein at the site, correct?

23 MR. FONTANARI: I think so.

24 MR. SCHULTZ: And Mr. Beckwith was present as
25 well?

1 MR. FONTANARI: He's been present several times.

2 MR. SCHULTZ: What's Mr. Beckwith's involvement
3 in irrigating this site?

4 MR. FONTANARI: He was overseeing it. He
5 insisted on Dave Fox to make sure that we followed the
6 regulations on the time at the irrigating and to move it
7 every three days, and we did.

8 MR. SCHULTZ: Did he -- did he operate the
9 irrigation system, Mr. Beckwith?

10 MR. FONTANARI: No, I did.

11 MR. SCHULTZ: You operated -- you operated it?

12 MR. FONTANARI: The reason I operated this on
13 200-foot centers, with the pressure that we had, was for
14 what they call big-gun sprinklers. These big sprinklers
15 will sprinkle out 100 foot in diameter. So by putting
16 these stations 200 feet apart, these sprinklers will
17 overlap one another.

18 And these sprinklers will also bridge
19 subsidence. Otherwise you irrigate or sprinkle for two,
20 four hours, whatever it takes for the water to sub in 4
21 inches, and then you move it. And that kind of water
22 doesn't cause damage down in the mine. It doesn't cause
23 damage out on the highway, because you are limited to an
24 amount, and you are bridging the subsidence.

25 Flood irrigation -- if you can't get the water

1 across a subsidence, it's going to go down the hole,
2 straight down the hole. And it will follow the least
3 resistance.

4 MR. SCHULTZ: So was it your intent, in this
5 water-irrigation system, to make communications with the
6 old abandoned coal mine?

7 MR. FONTANARI: No, no. My intention was to
8 irrigate the surface.

9 MR. LUKE: But you are aware of these -- of
10 these what you call subsidence features, correct?

11 MR. FONTANARI: When I started piping this
12 water down two years ago, these subsidence wasn't recorded.
13 There was one big one and a couple little ones that showed.
14 But the 35 that's recorded now, I didn't know anything
15 about them when I started. But I did know there was
16 subsidence everywhere you looked, but I didn't record them.
17 But they were recorded within the last year.

18 MR. SCHULTZ: By -- by you and your associates?

19 MR. FONTANARI: By Mined Reclamation.

20 MR. SCHULTZ: But they were provided that
21 information from you?

22 MR. FONTANARI: No, no. We all got together,
23 and we walked the land across, side to side, and whoever
24 found a subsidence called attention to everybody, and it
25 was mapped and recorded. There was a stake drove there.

1 MR. SCHULTZ: Right. And you were aware of
2 these locations?

3 MR. FONTANARI: Sure.

4 MR. SCHULTZ: Going back to that July 11th
5 inspection with Mr. -- Mr. Wein, Mr. Beckwith was present,
6 correct?

7 At that point water was already expressing
8 itself from the cliffs?

9 MR. FONTANARI: July 11th, yeah. It was shut
10 off.

11 When you have a saturated cave, even though they
12 shut the water off, it takes time to percolate out of that
13 cave and material before the water levels wore down below
14 the cliff where it was leaking out.

15 MR. SCHULTZ: So these -- these pits that were
16 inundated as well, it takes time for that water to --

17 MR. FONTANARI: It was pressing out of there
18 too.

19 MR. SCHULTZ: Right.

20 MR. FONTANARI: Yes.

21 MR. SCHULTZ: So on July 11th you met with
22 Mr. Wein, and you and Mr. Beckwith showed him several
23 subsidence features that you had recently noticed, correct?

24 MR. FONTANARI: I don't recall being with that
25 inspection. I was onsite. I was taking care of the

1 irrigation and seeding the parcel to the south. But I
2 don't recall being with Mr. Beckwith or Mr. Wein on this
3 situation, at that time, July 11th.

4 MR. SCHULTZ: You're familiar with your -- your
5 permit application that was issued in 1997, correct? There
6 is a 110 -- a 110c permit at that time?

7 MR. FONTANARI: Yes.

8 MR. SCHULTZ: And then you converted that to a
9 112c in 2004, correct?

10 MR. FONTANARI: Yes.

11 MR. SCHULTZ: In that exhibit -- or in that
12 permit application, you submitted exhibits, Exhibit G that
13 Mr. Grosse referred to, water information, correct?

14 MR. FONTANARI: What was the exhibit about?

15 MR. GROSSE: Are we looking at the same one?

16 MR. SCHULTZ: Well, there's two.

17 MR. GROSSE: We found that out afterwards.

18 MR. SCHULTZ: Yeah.

19 My question is --

20 MR. GROSSE: Yours is worded -- yours is worded
21 differently than the one that we brought with us today.
22 But they both allude to the fact -- but they both allude to
23 the fact that we intend to irrigate on -- on areas that are
24 clearly within the permitted areas.

25 MR. SCHULTZ: So you're familiar with the permit

1 process with DRMS, correct?

2 When you get a conversion, the materials you
3 submit is now your -- is your permit. It's no longer the
4 old permit, correct?

5 MR. FONTANARI: Well, the new permit took over
6 everything that was on the 110. We just added the acreage
7 to increase the 110 to 144 acres, something like that.

8 MR. SCHULTZ: So just for the board's
9 reference, it's on page 182 that we are looking at, Exhibit
10 G. There is also an Exhibit G on page 305, but I'm going
11 to stick to page 182 for now.

12 So in Exhibit G, in the fourth paragraph, it
13 states, "Irrigation water will be used to irrigate
14 unaffected future phases, which will then affect materials
15 to be mined, screened, and crushed," correct?

16 MR. FONTANARI: That's what it says.

17 MR. SCHULTZ: And it's -- it's your contention
18 that this gives you the ability to do what you did from
19 July 2nd to July 9th?

20 MR. FONTANARI: Yes.

21 Our adjudicated water rights was issued way back
22 in the early 1900s, and it goes with the land. The
23 irrigation water isn't separated off the land.

24 MR. GROSSE: Until we find out that there's
25 rocks coming down on the interstate. Obviously, none of us

1 want that, so we stopped.

2 MR. SCHULTZ: Right.

3 So you earlier testified that there has been no
4 active mining activity at the site for 12 to 14 years?

5 MR. FONTANARI: Up on three and four, yes.

6 MR. SCHULTZ: Okay. Right at this exhibit that
7 we're looking at, correct?

8 MR. FONTANARI: At the Water Station 3 and 4.

9 MR. SCHULTZ: Okay.

10 MR. FONTANARI: So the water -- the water pit,
11 down below, that's -- we wasn't planning on irrigating
12 that. It just happened to be that the water went through
13 the cave and started coming out on the cliff above the
14 water pit. It wasn't our intentions to put water in that
15 pit.

16 MR. SCHULTZ: So that Exhibit G is from your
17 110c permit, which was, essentially, converted in 2004,
18 correct?

19 MR. FONTANARI: Correct.

20 MR. SCHULTZ: I want you to take a look at the
21 second Exhibit G, which is 305 in the board's packet.

22 MR. GROSSE: Move over here.

23 MR. FONTANARI: It says that irrigation water
24 will be used to irrigate the existing pastures until mining
25 begins.

1 MR. SCHULTZ: Right.

2 MR. FONTANARI: And we haven't done no mining.
3 The only one that done any mining was Snowcap Coal Company.

4 MR. SCHULTZ: You've done no mining at this
5 site?

6 MR. FONTANARI: Not on three and four, no.

7 MR. SCHULTZ: What was the point of converting
8 this from a 110c to a 112c in 2005?

9 MR. FONTANARI: Well, to protect the resources
10 from housing, development. Otherwise, to protect these
11 resources until they could be utilized.

12 MR. SCHULTZ: If I could take a look at that
13 exhibit again.

14 In the fifth paragraph, both -- in both Exhibit
15 Gs, you were required to use water trucks for dust
16 suppression, correct?

17 MR. FONTANARI: Yes.

18 MR. SCHULTZ: So none of this irrigation was
19 done for dust suppression. It's allowed in your permit?

20 MR. FONTANARI: For dust control?

21 MR. SCHULTZ: Right.

22 MR. FONTANARI: The irrigation water?

23 MR. SCHULTZ: Right.

24 MR. FONTANARI: It wasn't in that -- the water
25 truck filed it at the irrigation ditch.

1 MR. SCHULTZ: I know. I'm just -- I'm asking
2 you a question.

3 You understand that this, this area, is not to
4 be irrigated for dust suppression? Instead water trucks
5 are to be used.

6 MR. FONTANARI: We never have -- we have used
7 water trucks when we are hauling down the haul road for
8 dust control.

9 MR. SCHULTZ: Did you review any of your
10 mining-permit materials prior to irrigating on July 2nd?

11 MR. FONTANARI: I knew about them. I didn't
12 take them out and read them.

13 MR. SCHULTZ: Just generally knew?

14 MR. FONTANARI: Yeah. I knew that -- I know
15 the land is adjudicated water rights. The water rights
16 aren't going to be separated from the land, and they are
17 mainly for agriculture and irrigation.

18 MR. SCHULTZ: So after looking at this exhibit
19 again, which you brought to the Division's attention this
20 morning, that was for the old permit. You see this is
21 their new permit.

22 Would you agree that Exhibit -- this exhibit is
23 your -- is that a copy of it?

24 MR. GROSSE: I've got -- I've got the old 110.
25 It's identified as the old 110. I don't know for sure. I

1 just -- this is the one I brought.

2 MR. SCHULTZ: But you also have a copy of the
3 112 conversion with you as well?

4 MR. GROSSE: Nope.

5 MR. SCHULTZ: Where did that come from?

6 MR. GROSSE: The -- oh, are you referring to
7 this (indicated)?

8 MR. SCHULTZ: I'm referring to the -- the
9 exhibit that you -- right.

10 MR. GROSSE: Yes. I'm aware of that. I got
11 that off the Laserfiche Web site, the Web site.

12 MR. SCHULTZ: So you were aware that there was
13 an old Exhibit G to the old permit, the 110c, correct?

14 MR. GROSSE: I was not made aware of that until
15 I got here and talked to Travis.

16 MR. SCHULTZ: But you had both in your
17 possession?

18 MR. GROSSE: Perhaps Rudy did. I did not.

19 MR. SCHULTZ: Rudy brought the new Exhibit G to
20 the court?

21 MR. GROSSE: Or Travis Marshall did. I brought
22 this one (indicated).

23 MR. SCHULTZ: And the other -- the other one
24 came from?

25 MR. GROSSE: Your hand. Here, you can have it

1 back.

2 We have here a failure to communicate.

3 MR. SCHULTZ: What I am saying is: You also
4 had the new exhibit. You had the exhibit of the current
5 permit in your possession?

6 MR. GROSSE: I had asked Amy, Amy Yeldell, if
7 there was a way of getting a current -- current version of
8 our permit, and she said, No. The only way is to go into
9 Laserfiche. So when I went into Laserfiche, this is what I
10 found.

11 Apparently there is a newer, bigger, more
12 up-to-date one. Perhaps Rudy has it. But in preparing for
13 today, I did not have it. I did not get it. This is what
14 I found.

15 MR. SCHULTZ: So is it your contention that this
16 irrigating system was used for irrigating what you call
17 native grasses?

18 MR. FONTANARI: Orchard, hay, and irrigating
19 hemp right now. Whatever you plant, the water has to be
20 used to irrigate it.

21 MR. SCHULTZ: So it was not for the purpose of
22 what you now say is pre-wetting material to be mined?

23 MR. FONTANARI: When it subs in the ground, it
24 pre-wets everything to 30 foot. And it does control the
25 dust, because there's moisture in it. Otherwise, this

1 deposit is dry.

2 MR. SCHULTZ: And you have no other -- there's
3 been no active mining on the site for 12 or 14 years,
4 correct?

5 MR. FONTANARI: Not on three and four, no.

6 MR. SCHULTZ: I have no further questions at
7 this time.

8 Thank you.

9 MR. LUKE: Thank you.

10 I guess I have a question.

11 You talked about the fact that the risers were
12 set up to use sprinkler irrigation, that that would go
13 across the subsidence areas.

14 Why, then, did you go ahead and do flood
15 irrigation instead?

16 MR. FONTANARI: Well, to set up this site with a
17 sprinkler system, you are looking at 130,000. I've already
18 put in roughly \$800,000 on getting the water down and
19 protecting it from losing it on the subsidence up above.

20 So we just finished up this pipeline last fall,
21 about the first of October. And the first thing, we teared
22 the old hay field and reseeded it, and we also cleared 13
23 and 14 and broadcasted it by hand.

24 The lower end to the north, Number 3 station,
25 Number 4, before we done anything there, we were going to

1 MR. FONTANARI: My background?

2 MS. DUNCAN: Yeah.

3 MR. FONTANARI: I've been in mining all my
4 life. I've had over 60 years mining, farming, and
5 pipelining. Several big jobs I've had. I've done
6 explosives through the Panama Canal, very large canal.
7 I've worked the Eisenhower Tunnel for three years. I've
8 worked in Arkansas running the molds for six years.

9 MS. DUNCAN: That's good work.

10 MR. FONTANARI: I spent ten years on Rapid Coal
11 Mine.

12 MS. DUNCAN: Okay. It just sounds like 120
13 gallons per minute is a heck of a lot of water per riser
14 for this area. And I just wondered where your comfort
15 level is with that.

16 MR. FONTANARI: Well, the discharge meter down
17 by the interstate takes water out of this whole area. It's
18 less than 300 gallons a minute, and it's not -- it's not
19 accurate. It was over -- over a thousand gallons, several
20 thousand gallons, going out of this mine every hour, and
21 it's not going through the meter. It's going through your
22 gravel bed underneath the interstate highway.

23 MR. GROSSE: Admittedly, it sounds like a lot
24 of water, but we are relying quite a bit on Dave Fox, who
25 is a certified engineer, a P.E. And he said that you need

1 that hill, and they probably will long after I'm dead and
2 gone. We don't want to exacerbate that. We want Snowcap
3 to fix the problem. Obviously, the last repair that was
4 done in March didn't fix anything.

5 MR. LUKE: Okay. Thank you.

6 MR. GROSSE: We've also been advised that if you
7 -- if the board collectively feels that we are in error,
8 that a penalty in excess of 15,000 requires us to hire an
9 attorney.

10 MR. KOOYMAN: Do you have a citation for that?

11 MR. GROSSE: Attorney Beckwith who is --

12 MR. KOOYMAN: A citation?

13 MR. GROSSE: I will get one.

14 MR. KOOYMAN: Please do.

15 MR. GROSSE: Sometimes I pull these out off the
16 top of my head. But we retained one last night just in
17 case.

18 MR. SCHULTZ: I understand that Mr. Fontanari
19 is a sole proprietor, this Operator. There is no
20 corporation involved.

21 MR. FONTANARI: I'm not the sole provider.

22 MR. LUKE: Thank you.

23 At this point we will close testimony and
24 deliberate as a board.

25 MS. VAN NOORD: It's helpful for me to think

| | | | | |
|---|---|---|--|--|
| 37:17 38:1,3 38:13,18 39:13 39:17,23 40:9 40:16 41:12,15 41:18,20 43:7 44:13 45:10,12 48:7 50:8,10 51:1,6,22 53:11,12 54:1 58:5 63:6 64:10 66:15,23 68:8 77:3 84:8 89:14 90:21,24 91:1 92:8 93:24 94:1 95:9,20 96:6 99:11 101:13 102:14,17 106:1 108:3 109:16 112:16 112:24 116:20 117:17 areas 11:7 12:19 13:2,4,13 16:22 19:11,11 19:14 20:13,13 27:23 28:9 32:5 41:19,22 41:24 61:10 73:23,24 80:13 84:7 87:7 90:5 94:3 98:22 99:7 101:8 argument 50:19 99:24 arid 13:1 21:20 28:12,16 88:20 arid-adaptive 28:18 Arkansas 102:8 arrow 23:6 asked 45:25 46:1 47:6 49:11 66:7,8,9 79:6 113:17 asking 49:13 62:2 77:1 | 103:6 assert 100:18 assess 117:21 assessed 35:21 assessment 19:14 26:22 assigned 96:4 assistance 58:4 Assistant 2:3,7 associate 17:21 associated 100:7 115:11 associates 71:18 106:17 107:19 108:4,20 assumption 90:7 attention 18:20 38:6 65:2,4 71:24 77:19 107:2 109:25 attorney 2:3,7 52:17 66:20 111:9,11 attorneys 106:17 119:12 August 1:11 3:2 12:21,22 14:13 35:18 40:18 117:22 available 20:19 average 21:3 aware 12:5 14:23,24 60:12 60:15 71:9 72:1 78:10,12 78:14 85:17 aye 118:10 B babying 88:21 back 7:15,16 9:17,17 14:25 16:16 21:8 25:25 27:3 30:4 32:16 42:16 43:19 45:20 49:7 | 50:2 51:19 56:6 59:6 60:9 62:13 64:12,13 64:19 68:4 69:2 72:4 74:21 79:1 81:24 95:18 96:24 99:1 105:3 backed 66:14 background 5:3 5:15 7:7 18:9 83:21 89:4 101:25 102:1 backhoe 43:18 46:14 63:17,17 backups 32:15 32:16 ballast 7:12 10:10 bank 43:20 55:10 59:5 barred 40:7 barriers 32:7,20 base 7:12 9:1 10:19 92:3 based 35:24 105:20 109:3 basically 9:16 12:20 49:10 84:18 bear 10:3 40:25 Beckwith 17:14 17:16,19,20,23 24:20 69:24 70:9 72:5,22 73:2 111:11 Beckwith's 70:2 becoming 12:5 bed 102:22 bedrock 13:25 19:16 20:6 22:21 23:8,19 48:21 49:6 51:2 began 17:13 31:20 39:7 | begins 75:25 88:3 behavior 108:23 108:25 belief 33:17 believe 8:21 14:19 16:9 36:15 37:1 55:16 61:25 64:10 85:21 91:13 96:5 97:17 109:2 112:10 Ben 39:24 45:24 45:25,25 56:25 beneath 92:16 beneficial 88:16 113:16 Beque 6:1 berm 86:24 87:1 best 10:4 better 10:11 69:11 beyond 43:8 82:25 85:15 biannual 84:14 big 48:8 49:6 51:3,4 70:14 71:13 81:23 94:24 102:5 103:1 110:6 big-gun 70:14 bigger 20:14 79:11 94:3 binders 83:5 birds 53:21 bit 38:7 40:13 40:25 52:25 58:14 59:7 60:10 64:8 66:4 87:20 93:6 97:11 102:24 115:25 black 45:2 blasted 36:18,19 blasting 36:18 blatant 116:7 | block 47:15 99:2 blue 17:1,4 87:12 board 1:8 2:2 3:1 4:12 8:20 10:13 15:12 18:19 23:10 26:17 27:8,19 28:23 33:24 34:5,13 35:3 35:11,13,18,20 35:24 40:21 57:18 83:8 88:1 89:4,25 96:12 101:20 107:8 108:9,17 109:2 111:7,24 112:7 116:6 117:4 118:1,2 118:11,13 board's 74:8 75:21 104:12 117:3 Bob 98:13 bond 5:17,18 24:5 34:24 35:3 82:5,6 83:17 101:21 101:21 117:14 117:18 book 47:6,10 border 21:11 bore 93:15 bother 58:7,10 bottom 17:4 42:25 47:17,20 59:12 83:7 87:13,17 92:23 96:23 101:15 109:16 bought 64:15 boulder 32:6,18 32:19 boulders 11:1 20:2 32:24 110:4 boundaries |
|---|---|---|--|--|

1 board order. Where corrective actions are not completed by
2 the corrective action date specified in the board order --
3 sorry. Failure to timely submit any due and unpaid civil
4 penalties shall result in immediate submittal of such
5 penalties to State collections.

6 MR. LUKE: Is there a second?

7 MR. SINGLETARY: I'll second.

8 MR. LUKE: Moved and seconded.

9 Is there any further discussion?

10 All those in favor say aye.

11 (All board members were in favor of the motion.)

12 MR. LUKE: Opposed?

13 (No board member opposed the motion.)

14 (Further proceedings were had but are not
15 reported herein.)
16
17
18
19
20
21
22
23
24
25

1 REPORTER'S CERTIFICATE

2 I, Elissa Steen, Registered Professional
3 Reporter and Notary Public in and for the State of
4 Colorado, do hereby certify that said proceedings were was
5 taken in shorthand by me at the time and place hereinabove
6 set forth and was thereafter reduced to typewritten form
7 under my supervision, as per the foregoing transcript; that
8 the same is a full, true, and correct transcription of my
9 shorthand notes then and there taken.

10 I further certify that I am not related to,
11 employed by, nor of counsel for any of the parties or
12 attorneys herein, nor otherwise interested in the event of
13 the within action.

14 My commission expires July 27, 2022; and I have
15 hereunto set my hand September 11, 2019.

16
17
18
19 Registered Professional Reporter
20 and
21 Notary Public
22
23
24
25

EXHIBIT C

CORPORATE STATUS OF WESTERN SLOPE FLAGSTONE, LLC



Colorado Secretary of State
Date and Time: 01/21/2005 04:47 PM
Entity Id: 20051033969
Document number: 20051033969

Document Processing Fee
If document is on paper: \$50.00
If document is filed electronically: \$.99

Fees are subject to change.
For electronic filing and to obtain
copies of filed documents visit
www.sos.state.co.us

Deliver paper documents to:
Colorado Secretary of State
Business Division
1560 Broadway, Suite 200
Denver, CO 80202-5169

Paper documents must be typed or machine printed.

ABOVE SPACE FOR OFFICE USE ONLY

Articles of Organization

filed pursuant to 7-90-301, et seq. and §7-80-204 of the Colorado Revised Statutes (C.R.S.)

1. Entity name:

Western Slope Flagstone LLC

(The name of a limited liability company must contain the term or abbreviation "limited liability company", "Ltd. liability company", "limited liability co.", "Ltd. liability co.", "limited", "llc", "l.l.c.", or "Ltd." §7-90-601, C.R.S.)

2. Use of Restricted Words *(if any of these terms are contained in an entity name, true name of an entity, trade name or trademark stated in this document, make the applicable selection):*

- ☐ "bank" or "trust" or any derivative thereof
☐ "credit union" ☐ "savings and loan"
☐ "insurance", "casualty", "mutual", or "surety"

3. Principal office street address:

3316 E-3/4 Road

(Street name and number)

Clifton

(City)

CO

(State)

81520

(Postal/Zip Code)

United States

(Province – if applicable)

(Country – if not US)

4. Principal office mailing address
(if different from above):

(Street name and number or Post Office Box information)

(City)

(State)

(Postal/Zip Code)

(Province – if applicable)

(Country – if not US)

5. Registered agent name (if an individual):

Fontanari

(Last)

Rudolph

(First)

n/a

(Middle)

(Suffix)

OR (if a business organization):

6. The person identified above as registered agent has consented to being so appointed.

7. Registered agent street address:

3316 E-3/4 Road

(Street name and number)

Clifton

CO

81520

8. Registered agent mailing address
(if different from above):

(City) (State) (Postal/Zip Code)

(Street name and number or Post Office Box information)

(City) (State) (Postal/Zip Code)

(Province – if applicable) (Country – if not US)

9. Name(s) and mailing address(es)
of person(s) forming the limited
liability company:

(if an individual):

Fontanari Rudolph
(Last) (First) (Middle) (Suffix)

OR (if a business organization):

3316 E-3/4 Road
(Street name and number or Post Office Box information)
Clifton CO 81520
(City) (State) (Postal/Zip Code)
United States
(Province – if applicable) (Country – if not US)

(if an individual)

(Last) (First) (Middle) (Suffix)

OR (if a business organization)

(Street name and number or Post Office Box information)

(City) (State) (Postal/Zip Code)
United States
(Province – if applicable) (Country – if not US)

(if an individual)

(Last) (First) (Middle) (Suffix)

OR (if a business organization)

(Street name and number or Post Office Box information)

(City) (State) (Postal/Zip Code)
United States
(Province – if applicable) (Country – if not US)

(If more than three persons are forming the limited liability company, mark this box ☐ and include an attachment stating the true names and mailing addresses of all additional persons forming the limited liability company)

10. The management of the limited liability company is vested in managers ☒ **OR** is vested in the members ☐.

11. There is at least one member of the limited liability company.

12. (Optional) Delayed effective date: 02/01/2005 08:00 AM
(mm/dd/yyyy)

13. Additional information may be included pursuant to other organic statutes such as title 12, C.R.S. If applicable, mark this box ☐ and include an attachment stating the additional information.

Notice:

Causing this document to be delivered to the secretary of state for filing shall constitute the affirmation or acknowledgment of each individual causing such delivery, under penalties of perjury, that the document is the individual's act and deed, or that the individual in good faith believes the document is the act and deed of the person on whose behalf the individual is causing the document to be delivered for filing, taken in conformity with the requirements of part 3 of article 90 of title 7, C.R.S., the constituent documents, and the organic statutes, and that the individual in good faith believes the facts stated in the document are true and the document complies with the requirements of that Part, the constituent documents, and the organic statutes.

This perjury notice applies to each individual who causes this document to be delivered to the secretary of state, whether or not such individual is named in the document as one who has caused it to be delivered.

14. Name(s) and address(es) of the individual(s) causing the document to be delivered for filing:

| | | | |
|--|------------------------|--------------------------------------|-------------------------|
| Zink | James | Martin | |
| <small>(Last)</small> | <small>(First)</small> | <small>(Middle)</small> | <small>(Suffix)</small> |
| <u>3612 G Road</u> | | | |
| <small>(Street name and number or Post Office Box information)</small> | | | |
| <hr/> | | | |
| Palisade | CO | 81526 | |
| <small>(City)</small> | <small>(State)</small> | <small>(Postal/Zip Code)</small> | |
| <u>United States</u> | | | |
| <small>(Province – if applicable)</small> | | <small>(Country – if not US)</small> | |

(The document need not state the true name and address of more than one individual. However, if you wish to state the name and address of any additional individuals causing the document to be delivered for filing, mark this box ☐ and include an attachment stating the name and address of such individuals.)

Disclaimer:

This form, and any related instructions, are not intended to provide legal, business or tax advice, and are offered as a public service without representation or warranty. While this form is believed to satisfy minimum legal requirements as of its revision date, compliance with applicable law, as the same may be amended from time to time, remains the responsibility of the user of this form. Questions should be addressed to the user's attorney.

OFFICE OF THE SECRETARY OF STATE
OF THE STATE OF COLORADO

CERTIFICATE OF FACT OF GOOD STANDING

I, Jena Griswold, as the Secretary of State of the State of Colorado, hereby certify that, according to the records of this office,

Western Slope Flagstone LLC

is a

Limited Liability Company

formed or registered on 02/01/2005 under the law of Colorado, has complied with all applicable requirements of this office, and is in good standing with this office. This entity has been assigned entity identification number 20051033969 .

This certificate reflects facts established or disclosed by documents delivered to this office on paper through 08/28/2019 that have been posted, and by documents delivered to this office electronically through 08/29/2019 @ 10:28:27 .

I have affixed hereto the Great Seal of the State of Colorado and duly generated, executed, and issued this official certificate at Denver, Colorado on 08/29/2019 @ 10:28:27 in accordance with applicable law. This certificate is assigned Confirmation Number 11771933 .



Jena Griswold

Secretary of State of the State of Colorado

*****End of Certificate*****

Notice: A certificate issued electronically from the Colorado Secretary of State's Web site is fully and immediately valid and effective. However, as an option, the issuance and validity of a certificate obtained electronically may be established by visiting the Validate a Certificate page of the Secretary of State's Web site, <http://www.sos.state.co.us/biz/CertificateSearchCriteria.do> entering the certificate's confirmation number displayed on the certificate, and following the instructions displayed. Confirming the issuance of a certificate is merely optional and is not necessary to the valid and effective issuance of a certificate. For more information, visit our Web site, <http://www.sos.state.co.us/> click "Businesses, trademarks, trade names" and select "Frequently Asked Questions."

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

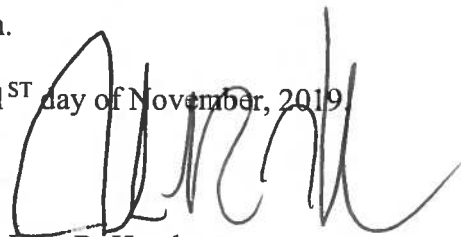
- a.) Fontanari requests clarification from the Board as to which Motions and Petitions were heard by the Board on November 13, 2019 so that any applicable periods for appeal, if necessary, can be accurately determined.
- b.) Fontanari specifically requests clarification as to whether his Petition to 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
Law Offices of John R. Henderson, PC
308 E. Simpson St.-Suite 103
Lafayette, CO 80026
jrhcolaw@comcast.net
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
Division of Reclamation, Mining and
Safety
1313 Sherman Street, Room 215
Denver, CO 80203

By US Mail and electronic mail to:

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



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
John Richard Henderson
Law Office of John R. Henderson, P.C.
308 E. Simpson Street, Suite 103
Lafayette, CO 80026
Office: 720.512.2953
Cell: 720.971.7063
<https://landwaterlaw.co>
jrhcolaw@comcast.net

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