DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 --- POWERTECH (USA) INC., A SOUTH DAKOTA CORPORATION, Plaintiff, v. STATE OF COLORADO MINED LAND RECLAMATION BOARD, Defendant; and Defendant-Intervenor(s): COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY; SHEEP MOUNTAIN ALLIANCE.	▲ **COURT USE ONLY** ▲
ATTORNEYS FOR DEFENDANT JOHN W. SUTHERS, Attorney General JEFF M. FUGATE, First Assistant Attorney General Reg. # 37679 MARI DEMINSKI, Assistant Attorney General Reg. # 34582 1525 Sherman Street, 7th Floor Denver, CO 80203 Telephone: (303) 866-5532 FAX: (303) 866-3558 E-Mail: Jeff.fugate@state.co.us; Mari.deminski@state.co.us	Case No. 2010 CV 8615 Ctrm.: 215

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT

Defendant, the Colorado Mined Land Reclamation Board ("Board"), by and through its undersigned counsel, files this response to Plaintiff's motion for entry of judgment filed on October 1, 2012. As discussed below, Plaintiff's Motion should be denied because 1) an order signed by Judge Habas dated July 13, 2012 exists in this matter, rendering Plaintiff's motion and request moot and 2) Plaintiff's motion is unjustifiably

late and appears to be a clever administrative maneuver to resurrect expired post-trial motion and appeal time periods.

BACKGROUND

1. On July 13, 2012 Denver District Court Judge Christina M. Habas issued an Order in case number 2010 CV 8615, a judicial review of a state agency rulemaking. The Order was properly e-filed and e-served on all parties via LexisNexis File & Serve at 9:31 a.m. on July 13, 2012. Although the parties were e-served a copy of an unsigned Order, on July 13, 2012 Plaintiff was unquestionably on notice that the Court had affirmed the Board's rulemaking action and dismissed Plaintiff's complaint.

2. Judge Habas retired on July 13, 2012, therefore, her signing and issuance of this Order was likely one of her last duties as a Judge.

3. The Order e-filed and e-served on the Plaintiff is clearly dispositive of all claims alleged by Plaintiff and unequivocally finds that the Board's rulemaking actions were proper. The conclusion to the Order states the final judgment: "Powertech has failed to meet its burden in establishing the allegations contained in its complaint. Accordingly, this Court AFFIRMS the MLRB action, and this case is DISMISSED." Order page 5. In addition, the Order concludes with the statement "[a]ppropriate costs shall be awarded upon proper filing", relief that can only be awarded upon entry of a final judgment. Clearly the Order was intended to be a final judgment as it disposes of the entirety of Plaintiff's claims on the merits and allows for post-trial relief.

4. The LexisNexis File & Serve docket sheet indicates that a paper copy of the Order was filed with the clerk at 8:00 a.m. on July 13, 2012. The clerical notations recorded on the docket state "Case Closed-Case Dismissed" indicating that the Court regarded the Order as final and the matter resolved.

5. Upon e-service of the Order on July 13, 2012 Plaintiff was on notice that it was unsuccessful at the district court level and that the clock was running on its ability to timely seek the relief available in C.R.C.P Rule 59 and C.A.R. Rule 4(a).

6. Based on the July 13, 2012 Order date, Plaintiff had 14 days, until July 27, 2012, to file motions for post-trial relief pursuant to C.R.C.P Rule 59 and 45 days, until August 27, 2012, to file its notice of intent to seek appellate review with the district court pursuant to C.A.R. Rule 4(a). Plaintiff made no attempt to file any post-trial motions nor did Plaintiff file a notice of intent to appeal.

7. On August 28, 2012, one day after Plaintiff's notice of appeal time period had expired, Plaintiff's counsel, *for the first time*, contacted undersigned counsel and raised the contention that the Order served on the Parties was not signed and, therefore, not final or effective according to C.R.C.P. Rule 58(a). Plaintiff's counsel provided no

reason or justification regarding the significant and unreasonable 46-day delay in raising this issue with undersigned counsel.

8. Based on the conflicting information of the contention raised by Plaintiff that the Order was not signed and the fact that the filing docket clearly indicated a paper document was filed and entry of judgment was noted by the clerk on July 13, on August 29, 2012 undersigned counsel's legal assistant contacted the general civil court file clerk.[1] The inquiry was to determine if a signed copy of the order existed in the file and was erroneously not e-served. A request for a certified copy of the signed Order was made.

9. By e-mail dated September 6, 2012 undersigned counsel contacted Plaintiff's counsel to inform him that the Board would not join in a motion requesting that the Order be signed with a new effective date as it appeared from the docket that the Court regarded the Order as final and the matter closed. Plaintiff's counsel was informed that the Board regarded the Order as final and effective and that Plaintiff could file an appropriate motion and the Board would file a timely response.

10. On September 11, 2012 undersigned counsel received, by regular mail, a copy of the July 13, 2012 order signed by Judge Christina M. Habas. The signed Order is attached as Exhibit A.

11. Undersigned counsel erroneously assumed that a copy of the signed Order had also been mailed to all of the parties to this matter. It was beleived that, based on receipt of the signed Order, Plaintiff's contention regarding the finality and effectiveness of the Order had been resolved and the issue dropped. This mis-assumption was based, in large part, on the non-response from Plaintiff to the September 6 e-mail and the fact that Plaintiff had not yet filed a motion presenting this issue to the Court for resolution.

12. On October 1, 2012, 80-days after the July 13 Order was e-filed and e-served on Plaintiff, Plaintiff filed its Motion for entry of judgment requesting that the Order be signed. The Motion fails to provide any reason or justification regarding the significant delay in raising this issue with the Court. Undersigned counsel immediately contacted Plaintiff's counsel on October 2, 2012 to provide a copy of the signed Order and to discuss the Motion in light of the signed order.

ARGUMENT AND REQUEST

13. A judgment is regarded as final when it disposes of the entire litigation on the merits. *See Driscoll v. District Court*, 870 P.2d 1250, 1252 (Colo. 1994). However,

[1] The request for a copy of the signed order was made to the general clerk of court help desk because, at the time of the inquiry, the case had been dismissed and closed and was no longer assigned to a Judge, therefore, the location of the file was unknown. Plaintiff's counsel indicated that he made a similar request.

the entry of a final order or judgment is a purely ministerial act. *See Joslin Dry Goods Co. v. Villa Italia, Ltd.*, 539 P.2d 137, 139 (1975). Both C.R.C.P. Rule 58(a) and C.R.C.P. Rule 79(a) state that the entry of a judgment or order is effective upon notation in the register of actions. *See Hebron v. District Court*, 558 P.2d 997, 998 (1977). Therefore, for purposes of filing a timely motion under C.R.C.P. Rule 59, a judgment or order is entered upon notation in the register of actions. *See City & County of Denver v. Just*, 487 P.2d 367, 371(1971) (refers to the register of actions as a "judgment docket"). As to appeals of a district court order, the timeliness of a civil appeal is governed by C.A.R. Rule 4(a) not C.R.C.P. Rule 58(a). *See Moore & Co. v. Williams*, 672 P.2d 999, 1001 (Colo. 1983). The fact that Plaintiff was served with an unsigned Order does not mean that the Order is not final or effective. Both the Colorado Rules of Civil Procedure and Colorado caselaw establish a clear court administrative process regarding when an order is both final and effective.

14. Plaintiff missed the time period in which to seek post trial relief under C.R.C.P. Rule 59 or seek appeal of the district court ruling under C.A.R. Rule 4(a) and is now attempting a clever administrative maneuver to resurrect the expired time periods. This Court should not allow Plaintiff to successfully circumvent clear filing deadlines by claiming its hands were tied because the Order they received was not signed. It is disingenuous for Plaintiff to claim injury when Plaintiff could have, or better *should have*, sought to resolve this issue much sooner than October 1, 2012.

15. Quite simply, regardless of whether the Order was signed or unsigned, Plaintiff should have quickly taken necessary action to remedy this issue by either filing a timely motion pursuant to C.R.C.P. Rule 59 or by filing a motion with the Court regarding the finality of the Order. Instead, Plaintiff took no action, waited until after the appeals time period had run to raise the issue with Defendants, and then waited even longer to formally raise the issue with the Court . To date, Plaintiff has failed to provide any justification or explanation regarding the significant delay in raising this issue.

16. Upon making a simple request of the general clerk of court undersigned counsel obtained a copy of the signed Order from the file. The LexisNexis filing docket indicated that a copy of the Order had been filed in paper format on July 13, 2012, followed by a clear notation that the case was "closed" and "dismissed". It is unclear the efforts made by Plaintiff to verify the existence of the signed Order prior to filing its Motion. However, the fact that the clerk did not attach a signed copy of the Order to the service documents does not negate the Order's finality or effectiveness under C.R.C.P. Rule 58(a).

17. Plaintiff asserts in its Motion that it cannot "appeal the Order under C.A.R. 4(a)" because the relief under that rule is "available to Plaintiff only upon a valid entry of judgment". Motion at 2. The Rule states the contrary. C.A.R. 4(a) states: "If notice of entry of judgment, decree, or order is transmitted to the parties by mail or E-Service, the time for filing the notice of appeal shall commence from the date of the

mailing or E-Service of the notice." Notice of the Order was e-served on Plaintiff on July 13, 2012. Therefore, pursuant to C.A.R. Rule 4(a), Plaintiff was required to file its notice of intent to appeal with the district court no later than August 27, 2012. The clerk's failure to serve the signed Order on Plaintiff does not relieve Plaintiff of its obligation to comply with statutory filing time periods set forth in Rule 4(a). *See Furlong v. Gardner,* 956 P.2d 545 (Colo. 1998) (The trial judge's failure to sign the minute order does not prevent the court of appeals from considering the appeal).

18. Ultimately, the discussion regarding the finality and effectiveness of the unsigned Order served on Plaintiff is unnecessary because a signed order exists. Plaintiff's request, as raised in its Motion, is moot because the Order is signed and dated July 13, 2012. Therefore, Plaintiff's Motion and request that the Court sign the order and effect a new entry date must be denied.

19. The Order in this matter signed by Judge Habas is dated July 13, 2012. This signature date appears to be supported by clerk's administrative record notations entered on the docket July 13, 2012. The Order is a final judgment effective July 13, 2012. Therefore, Plaintiff's appeal options under C.R.C.P. Rule 59 and C.A.R. Rule 4(a)have expired.

WHEREFORE, based on the information and arguments presented above, Defendant respectfully requests that the Court deny or dismiss Plaintiff's Motion for Entry of Judgment as moot because a final Order signed by Judge Christina M. Habas dated July 13, 2012 already exists in this matter and is effective as of July 13, 2012, the date it was signed.

Dated this 22nd day of October, 2012.

Respectfully submitted,

JOHN W. SUTHERS
Attorney General
Filed pursuant to C.R.C.P. Rule 121 § 1-26.
A duly signed original is on file with the Office of the Attorney General for the State of Colorado

/s/Jeff M. Fugate

JEFF M. FUGATE #37679
First Assistant Attorney General
Natural Resources and Environment Section
Attorney for Mined Land Reclamation Board

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR ENTRY OF JUDGMENT upon all parties herein by LexisNexis File and Serve or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 22nd day of October, 2012 addressed as follows:

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Filed pursuant to C.R.C.P. Rule 121 § 1-26.
A duly signed original is on file with the Office of the Attorney General for the State of Colorado.

/s/ Christine Batman

Christine Batman