

FILED

OCT 09 2014

SECRETARY, BOARD OF
OIL, GAS & MINING

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

UTAH DIVISION OF OIL, GAS &
MINING,

Petitioner,

vs.

HIDDEN SPLENDOR RESOURCES,
INC.,

Respondent.

**HIDDEN SPLENDOR RESOURCES, INC.'S
MOTION TO DISMISS NOTICE OF
AGENCY ACTION**

Docket No. 2014-037

Cause No. ACT/007-020-(04)

Hidden Splendor Resources, Inc. (“Hidden Splendor” or “HSR”), the permittee of Mine Permit No. ACT/007/020, through its attorneys, Snell & Wilmer L.L.P., and pursuant to Utah Code § 63G-4-201(2) (LexisNexis 2014) and R641-105-300 (2014), hereby responds to the Utah Division of Oil, Gas & Mining’s (the “Division”) purported Notice of Agency Action before the Board of Oil, Gas and Mining (“Board”) seeking forfeiture of the reclamation surety for the Horizon Mine, Carbon County, Utah.¹ For the reasons set forth below, Hidden Splendor respectfully MOVES the Board to DISMISS the Notice of Agency Action.

I. THE NOTICE OF AGENCY ACTION SHOULD BE DISMISSED

Under the Utah Rules of Civil Procedure, a case must be dismissed if the tribunal lacks subject matter jurisdiction over the case, or if the party initiating the case fails to state a claim upon which relief can be granted. Utah R. Civ. P. 12(b)(1),(6). The Board may consider and rule upon motions to dismiss by applying the standards of Rule 12(b). Utah Code § 63G-4-

¹ Formal hearings under the Coal Program are conducted according to the Utah Administrative Procedures Act. Utah Code § 40-10-6.7(2)(a)(i). A party to a Notice of Agency Action leading to a formal adjudication has 30 days to submit its response, unless federal law requires or permits a shorter time. Utah Code § 63G-4-201(2)(a)(vi). No federal law compels or permits a shorter response time.

102(4)(b). In the sections below, HSR first argues under Rule 12(b)(1) that the Board lacks jurisdiction to adjudicate a Notice of Agency Action issued by the Division, and then argues under Rule 12(b)(6) that the facts alleged by the Division do not justify a Board Order granting the Division's requested relief.

A. **The Board Is Without Jurisdiction² To Adjudicate The Division's Notice Of Agency Action**

HSR disputes the Division's statement of the Board's jurisdiction. The Board, as an administrative agency of the State of Utah, only has jurisdiction to exercise those powers expressly granted or clearly implied by the authorizing statute or rule. *Basin Flying Service v. Public Service Commission*, 531 P.2d 1303, 1305 (Utah 1975). The Board has authority to initiate an adjudicative proceeding by issuing a Notice of Agency Action, signed by its presiding officer, and by properly serving the Notice on persons whose interests may be affected, specifically including the surety. Utah Code § 63G-4-201(2)(a)-(b). The Notice must set forth the legal authority for the proceeding, identify those who will appear on behalf of the agency, and identify the questions to be decided. *Id.* "A Notice of Agency Action shall be in writing and shall be signed on behalf of the Board if the proceedings are commenced by the Board; or by or on behalf of the Division Director if the proceedings are commenced by the Division." Utah Admin. Code R641-104-131. Nothing in the Utah Administrative Procedures Act ("UAPA") or the Board's rules suggests that the Division may initiate proceedings on behalf of the Board, or vice-versa. Finally, and specific to bond forfeiture, a Notice must be provided to the surety, setting forth the reasons for forfeiture, the amount to be forfeited, and the conditions under which forfeiture may be avoided. Utah Admin. Code R645-301-880.910-912.

² HSR disputes the Division's broad view of the Board's sources of jurisdiction for this matter. The Division's citations to the Utah Oil and Gas Conservation Act and Mined Land Reclamation Act (Title 40, Chapter 6 and 8 of the Utah Code) as sources of Board jurisdiction are irrelevant. The Division and Board may only enforce those provisions of state law that have been submitted to and approved by the Office of Surface Mining as part of its approved state program. The cited portions of chapters 6 and 8 are not part of the program approved by OSM.

In this matter, the Division, by Notice of Agency Action signed by its counsel, purports to initiate a bond forfeiture proceeding before the Board. The Division lacks authority under UAPA and the Board's rules to issue such a notice on the Board's behalf, and the Board is without jurisdiction over a Notice of Agency Action before the Division. Without authority to act, the only option remaining for the Board is to dismiss.

Other procedural defects render the Division's Notice ultra vires. The Division's Notice is deficient because it fails to include required information: It does not identify who will appear or provide information on behalf of the Division, state what questions are to be decided, or provide notice of the proceedings to the surety. Rather, the Division closes its Notice with a list of the relief its expects the Board will grant, including permit revocation, forfeiture of "all interest" in real estate worth more than \$400,000, and the right to take over reclamation from the mine operator.

The bond forfeiture cannot proceed before the Board because no notice at all has been provided to the surety. It appears from the Deed of Trust that the surety who should be notified is the Trustee, Metro National Title. See Utah Code § 57-1-19(4) "Trustee means a person to whom title to real property is conveyed by trust deed"; § 57-1-23 (Trustee is given the power of sale upon breach of an obligation for which the property is security.)³ Further, the Notice does not indicate that either HSR or the surety has received the written statement from the Division, required by R645-301-880.910, providing notice of a determination to forfeit the bond and of the reasons for the forfeiture. No information has been provided on conditions under which forfeiture may be avoided, nor has the surety been provided an opportunity to complete reclamation allegedly left incomplete by HSR.⁴

³ For this reason the Division's third Request for Action cannot be granted, because the Trustee, not the Division as Beneficiary, holds the power of sale over the property.

⁴ To the extent that the Division alleges it, HSR disputes that it is neglecting its reclamation obligations.

Because the Division has omitted so much required information, and bypassed required steps, the mine operator must struggle to determine what is required by the Board as a result of the Division's faulty Notice of Agency Action. The failure of the Division to issue a Notice of Agency Action in accordance with the powers granted under UAPA renders the Division's Notice ultra vires, deprives the Board of jurisdiction, and requires dismissal.

B. The Division's Request For Bond Forfeiture Should Be Dismissed For Failure To State A Claim Upon Which Relief Can be Granted.

Under Rule 12(b)(6) of the Rules of Civil Procedure, an action must be dismissed if the facts alleged, if taken to be true, fail to add up to all of the legal elements required for the tribunal to grant the requested relief. See St. Benedict's Dev. Co. v. St. Benedict's Hosp., 811 P.2d 194 (Utah 1991). The Division may take the actions specified in the rules to forfeit all or part of a reclamation bond in three circumstances: When "an operator refuses or is unable to conduct reclamation of an unabated violation, if the terms of the permit are not met, or if the operator defaults on the conditions under which the bond was accepted. . . ." Utah Admin. Code R645-301-880-910. As a fourth prerequisite to bond forfeiture, the Division's cooperative agreement with the Office of Surface Mining, Reclamation and Enforcement ("OSM") requires concurrence from OSM. 30 C.F.R. § 944.30, Art. IX(C).

The Division's Notice does not allege that any of these conditions has occurred. While the Division claims that the operator has failed to update plans and prove its ability to perform, it does not specifically allege that HSR is not proceeding with reclamation, and stops short of identifying any unabated violation requiring reclamation that HSR is unable or unwilling to reclaim. Nor does the Division's Notice identify any term of the mine permit or condition of bond acceptance it alleges to be unmet. Finally, the Notice is silent regarding whether OSM concurs in the requested bond forfeiture. In short, the Division fails to plead any non-conclusory

facts which, when taken as true, would justify forfeiture of any part of the reclamation bond.

The Board must dismiss the Notice.

II. THE REQUEST FOR TERMINATION OF THE HORIZON MINE PERMIT SHOULD BE DISMISSED BECAUSE THE FACTS SET FORTH IN THE NOTICE DO NOT JUSTIFY THAT ACTION

As with the request for bond forfeiture, the request for permit termination should be dismissed according to Rule 12(b)(6) because all of the facts alleged, when taken as true, fail to show that permit termination is warranted. In addition, the failure to follow the procedure set forth in the Board's rules renders the Notice of Agency Action *ultra vires*, depriving the Board of jurisdiction and requiring dismissal under Rule 12(b)(1). The Utah Coal Program provides that the Board may issue to a mine operator an Order to Show Cause why its permit should not be terminated if, on the basis of an inspection, the Division determines that a pattern of violations exists, and that the pattern is the result of an unwarranted failure by the operator to comply with the requirements of the Coal Program. Utah Code § 40-10-22(1)(d). Notices and orders related to permit terminations must set forth "*with reasonable specificity* the nature of the violation and the remedial action required . . ." along with time periods for abatement and descriptions of the permit area to which the notice applies. Utah Code § 40-10-22(1)(e) (emphasis supplied).

In this case, the Notice sets forth only conclusory, non-specific allegations of the statutory elements for permit termination. Consequently, the Division is not entitled to seek a Show-Cause Order, much less the Order of Permit Termination it prematurely requests.

The Division's Notice does not allege that its Notice is based upon an inspection, does not indicate that a show-cause order has issued, does not allege that a pattern of violations exists or has existed, and does not identify facts that would show that the violations (amounting to only \$5000 in all) are the result of an unwarranted failure of HSR to comply. Indeed, the Division's Notice shows the opposite—that HSR has continued to meet with the Division and attempted to comply under difficult circumstances. Even taking all allegations contained in the Notice to be

true, as is required for a Rule 12(b)(6) motion to dismiss, the facts alleged do not meet the criteria to terminate a permit, and therefore the Notice should be dismissed for failing to state a claim upon which the requested relief can be granted.

The termination request is also procedurally deficient. As already stated, the Division has omitted to seek, or serve, an Order to Show Cause. Other required elements are missing as well. The Notice fails to set forth “with reasonable specificity the nature of the violation and the remedial action required . . .” along with time periods for abatement and descriptions of the permit area to which the notice applies. Utah Code § 40-10-22(1)(e). The Notice does not specifically identify any of the alleged violations by date or number, or indicate what abatement action was required or taken. It does not provide specific information regarding what abatement action is now required to avoid termination. The Division’s request for permit termination should be dismissed for failure to comply with the statutory requirements of the Coal Program.⁵

CONCLUSION AND REQUESTED RELIEF

The Division has rushed to judgment regarding the alleged failure to reclaim the Horizon Mine. An objective examination of the facts alleged in the Division’s Notice of Agency Action confirms this conclusion. The Division provides irrelevant detail regarding bankruptcy proceedings and loss of federal leases, while giving little attention to the reasons that it believes that the mine site will not be reclaimed without bond forfeiture. Importantly, the facts recited by the Division show that Mr. Walker on behalf of HSR, continues to meet with the Division regarding the Reclamation Plan. HSR is proceeding with reclamation of the site according to the approved plan. Even accepting every allegation in the Notice to be true, the facts alleged do not

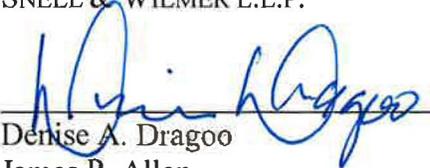
⁵ Under other circumstances, it may be acceptable for the Division to couch its Notice in the general and conclusory terms it has employed in this case, and then offer the specific information into evidence at the hearing. HSR believes that the statutory requirement for “reasonable specificity” precludes such a practice, and requires such details to be provided with the Notice.

support either permit termination or bond forfeiture. The Notice is defective on its face and must be dismissed.

The Notice must also be dismissed because it is procedurally deficient. As explained above, the Board lacks jurisdiction over a Notice of Agency Action issued by the Division. Essential steps, required by the Board's rules, have not been taken. The surety has not been notified, OSM's concurrence has not been obtained, the questions to be addressed at hearing have not been identified, and the facts supporting permit termination have not been specifically described. HSR should not be required to attempt to defend its mine permit and real property in such a poorly-defined proceeding. The Notice of Agency Action must be dismissed.

Respectfully submitted this 9th day of October, 2014.

SNELL & WILMER L.L.P.



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **HIDDEN SPLENDOR RESOURCES, INC.'S MOTION TO DISMISS NOTICE OF AGENCY ACTION** was sent via U.S. Mail, postage prepaid, this 9th day of October, 2014, to the following:

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