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**FILED**

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**SECRETARY, BOARD OF  
OIL, GAS & MINING**

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

UTAH CHAPTER OF THE SIERRA	)	
CLUB et al.,	)	
	)	
Petitioners,	)	<b>OPPOSITION OF PETITIONERS UTAH</b>
	)	<b>CHAPTER OF SIERRA CLUB ET AL. TO</b>
v.	)	<b>ALTON COAL DEVELOPMENT, LLC'S</b>
	)	<b>REQUEST FOR RECONSIDERATION</b>
UTAH DIV. OF OIL, GAS & MINING,	)	
	)	Docket No. 2009-019
Respondent,	)	Cause No. C/025/005
	)	
ALTON COAL DEVELOPMENT, LLC,	)	
and KANE COUNTY, UTAH,	)	
	)	
Respondents/Intervenors.	)	

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## INTRODUCTION

In a thorough Order issued on March 27, 2013, after extensive briefing and argument, this Board concluded that a permittee may not recover attorney fees from another person in a matter arising under Utah's Coal Mining and Reclamation Act (UCMRA) without proving that the other person acted in bad faith. The Board held that it had adopted Rule B-15, setting forth a "bad-faith" standard, and that this rule remains in effect today despite its inadvertent omission from the administrative code. In an additional, independent holding, the Board exercised its discretion to retain the bad-faith attorney fee standard, in light of the statutory purposes of UCMRA and the federal law prohibiting states from amending their coal programs without approval from the Office of Surface Mining. Both of these rulings are well-grounded in the factual record and the governing law.

In its Request for Reconsideration, Alton Coal Development, LLC (Alton), raises no new arguments that the Board has not already considered and rejected. Alton has not demonstrated that the Board's Order is "unlawful, unreasonable, or unfair," as the Board's standard for rehearing requires. Utah Admin. Code R641-110-200. The Board should therefore deny Alton's Request for Reconsideration.

## ANALYSIS

### **I. The Board Properly Concluded that Rule B-15 Remains in Effect**

The Board correctly held that Rule B-15 remains in effect, despite the rule's inadvertent omission from the administrative code. As the Board held, Rule B-15 does not violate the mandates of the Utah Administrative Rulemaking Act (UARA), for two reasons. First, Rule B-15's adoption predated UARA's enactment. *See* Decision and Order on the Legal Standard Governing Fee Petitions (Order) at 5 (Mar. 27, 2013). Second, Rule B-15 is not subject to UARA's annual reauthorization requirement because it falls under the exception for rules

“explicitly mandated by a federal law or regulation.” *Id.* (quoting Utah Code Ann. § 63G-3-502(2)(b)(i)). Alton does not challenge these rulings.

Instead, Alton points to an evidentiary provision of UARA, which states that the “code shall be received by all the judges, public officers, commissions, and departments of the state government as evidence of the administrative law of the state of Utah . . . .” Utah Code Ann. § 63G-3-701. Alton claims that because Rule B-15 does not appear in the administrative code, this evidentiary provision renders the rule invalid. But the evidentiary provision Alton cites does not state that any rule omitted from the administrative code is not valid law. Rather, the evidentiary provision requires courts to take judicial notice of the code as *evidence*. *See id.* Here, while the administrative code may be evidence, there is other evidence of Rule B-15’s adoption and continuing validity, including the public records of this Board’s proceedings, as well as the records of the Office of Surface Mining’s conditional approval of Utah’s coal program. It is the job of the Board to weigh that evidence and reach a judgment. The Board did so, and properly found that the evidence shows that the Board adopted and never repealed Rule B-15. *See Order at 3-5.*

As the Board has already found, the omission of Rule B-15 from official compilations of the Board’s Rules of Practice and Procedure apparently resulted from “inadvertent administrative oversight.” *Order at 4-5.* According to the very treatise cited by Alton, “[w]here a valid and operative provision is omitted from a code through oversight, . . . it may continue in effect, even in the face of a provision in the code declaring all prior laws repealed.” 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 28:8 (7th ed. 2009). The treatise cites a Utah Supreme Court case, *Orton v. Adams*, 21 Utah 2d 245, 247, 444 P.2d 62, 63 (1968). There, the Court held that while a particular statutory section “is not [to] be found in the Utah

Code Annotated at the present time,” it “is still the law of this state. The reason why the compilers of our code failed to include that part of the section in the most recent codification of our laws was doubtless due to an oversight . . . .” *Id.* Likewise, the Board here properly held that Rule B-15 remains in effect, despite its inadvertent omission from the administrative code. Order at 4-5.

Alton cites no authority in support of its argument that the Board should have placed the burden on Petitioners to prove that Rule B-15 had *not* been repealed, rather than on Alton to prove that the rule *had* been repealed. In fact, the opposite is true: Alton, as the party seeking attorney fees, bears the burden of proof. *See Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (“[T]he fee applicant bears the burden of establishing entitlement to an award . . . .”); *Mares v. Credit Bureau of Raton*, 801 F.2d 1197, 1201 (10th Cir. 1986) (same). In any event, the Board established at its February 27 hearing that *no party* had found evidence of any attempt to repeal Rule B-15 before it disappeared inexplicably from the official compilation of the Board’s Rules of Practice and Procedure. *See* Order at 4-5; Hearing Tr. at 60, 65, 73-75 (Feb. 27, 2013). The transcripts of the Board’s hearings, during the fourteen-month interval between when the Board adopted Rule B-15 and the time that the rule no longer appeared in the published compilation, are a matter of public record. Alton identified no vote by the Board to repeal Rule B-15, and Petitioners found none either. Given the undisputed evidence that the Board adopted Rule B-15, and in the absence of any evidence of a vote to repeal that rule, the Board was correct to find that the rule had not been repealed, and remains in effect. *See Orton*, 21 Utah 2d at 247.

## **II. The Board Properly Ruled that Rule B-15 Was Not Impliedly Repealed**

The Board has already rejected Alton’s argument that Utah *impliedly repealed* Rule B-15—that is, that Utah repealed the rule without explicitly saying it was doing so. *See* Order at 6 n.2. The Board correctly rejected this argument. As the Utah Supreme Court has admonished,

“[i]t is axiomatic that implied repeals are not favored and occur only if there is a manifest inconsistency or conflict between the earlier and the later statute.” *State v. Sorensen*, 617 P.2d 333, 336 (Utah 1980). There is no such inconsistency or conflict here: the Board has never adopted a standard *other* than bad faith for deciding attorney fee applications filed by coal mining permittees.

Nonetheless, Alton once again argues that Utah impliedly repealed Rule B-15 when it revised its substantive coal program rules in 1989. As the Board is aware, two sets of rules govern Utah’s coal mining program: the substantive coal program rules (now at R645) and the Board’s Rules of Practice and Procedure (now at R641). The correspondence once again cited by Alton shows that Utah sought approval from the Office of Surface Mining to replace its existing set of substantive coal program rules with a new set of substantive rules. The Office granted that approval. But this revision of the substantive coal program rules could not have repealed Rule B-15, because Rule B-15 was *not codified in those substantive rules*. Rule B-15 was instead part of the Board’s separate Rules of Practice and Procedure, which apply of their own force. The record shows that, as far as the Office of Surface Mining was concerned, the revision to Utah’s substantive coal program rules left the Board’s Rules of Practice and Procedure, including Rule B-15, unchanged. *See* Surreply Br. of Pet’rs at 5 (Feb. 22, 2013) (citing 60 Fed. Reg. 21,435, 21,436 (May 2, 1995) (explaining that the Office had “previously approved, in Utah’s original program,” the Board’s Rules of Practice and Procedure, which included Rule B-15)).

In rehashing its implied repeal argument, Alton relies on a treatise section that does not apply here. The treatise section explains that when a legislature replaces various, scattered enactments with a single, unified code that covers the entire field of regulation, then the code repeals and replaces the previous enactments. *See* 1A Singer & Singer, *supra*, § 28:13. That is

not what happened here. Utah revised its program by replacing an *existing* set of substantive coal program rules with a new set of substantive rules. It did not gather together in a single location a set of rules that had previously existed only in scattered enactments. There was no need to do so, because the rules composing Utah’s coal program were *already* collected—in not one, but two sets of rules that have governed the program ever since it was approved: the substantive coal program rules and the Board’s Rules of Practice and Procedure. Moreover, as explained above, Utah only replaced its substantive coal program rules in 1989, not the Rules of Practice and Procedure.

As the Board has already recognized, even if the Board *had* repealed Rule B-15 (and it did not), the repeal could not have taken effect as part of “Utah’s approved, federally-delegated coal program without the Secretary’s approval.” Order at 6 (citing 30 C.F.R. § 732.17(g)). Alton has offered no evidence that any such approval was ever sought or received. The Code of Federal Regulations reflects that no such approval was ever granted, and the Office of Surface Mining has confirmed that it never approved a repeal of Rule B-15. *See* 30 C.F.R. § 944.15 (listing all approved amendments to Utah’s state program); Division’s Mem. Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees (Division Br.), Ex. B, at 1 (Feb. 19, 2013).

For these reasons, the Board correctly held that Rule B-15 was not impliedly repealed when Utah recodified its substantive coal program rules.

### **III. The Board Properly Exercised Its Discretion to Ensure that Utah Retains Primacy over Its Coal Program**

As a second, independent ground for its decision, the Board exercised its discretion to maintain the bad-faith attorney fee standard. Order at 6-7. In exercising its discretion, the Board properly considered its obligation to “assure exclusive jurisdiction over nonfederal lands and

cooperative jurisdiction over federal lands in regard to regulation of coal mining and reclamation operations.” Utah Code Ann. § 40-10-2(1). Contrary to Alton’s present argument, the Board’s concern about maintaining Utah’s primacy over its coal mining program was not “rooted in improper speculation.” Request for Reconsideration at 5 (Apr. 16, 2013).

The Board is not powerless to protect Utah’s primacy until, as Alton suggests, the federal government actually launches formal proceedings to assert federal control over coal mining regulation in Utah. The Board’s duty is to “assure” that the State retains primacy, and the Board has the “necessary authority” to implement UCMRA in a manner that achieves that goal. Utah Code Ann. § 40-10-2(1). One does not “assure” primacy by waiting to take protective measures until the federal government initiates formal enforcement proceedings.

The threat to Utah’s primacy is far from speculative. Utah’s primacy over coal mining regulation could never have been obtained if Utah allowed fees to be awarded to a permittee from another person without proof of bad faith. As the Board found, the Secretary of the Interior’s conditional approval of Utah’s coal mining program in 1981 “was based on a finding that ‘the state’s amended regulations, UMC/SMC 900(b)(ix), which adopt the Board’s Rules of Practice and Procedure,’ and ‘contain amendments to Rule B-15[,] meet the federal requirements for discovery, intervention, and award of attorney fees.’” Order at 4 (citing 46 Fed. Reg. 5899, 5910 (Jan. 21, 1981)). Moreover, there is ample evidence that this remains the Office of Surface Mining’s position. On February 15, 2013, that Office wrote to the Division, confirming that the federal government considers the “UMC/SMC 900(b)(ix) standards and criteria for the award of costs and expenses to be part of the approved State program and expect[s] the State to adhere to those standards and criteria.” Division Br., Ex. B, at 1. The Office of Surface Mining warned that it “may impose Federal enforcement” if the language in Rule B-15 is not “effectively

implemented.” *Id.* at 1-2. The Board properly took action to avoid putting the State’s primacy in jeopardy, declining to adopt an alternative fee standard never approved by the Secretary.

The cases Alton cites do not apply here, because they address agency actions not supported by evidence. *See Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1166 (10th Cir. 2002), *as modified on reh’g*, 319 F.3d 1207 (10th Cir. 2003) (rejecting agency’s argument about the potential costs of a project as “pure speculation because there is no cost methodology . . . contained in the record”); *IMC Kalium Carlsbad, Inc. v. Interior Bd. of Land Appeals*, 206 F.3d 1003, 1011 (10th Cir. 2000) (upholding reversal of a decision by the Bureau of Land Management, where the Bureau’s conclusion relied on “speculation” and “conjecture”). Here, the evidence is more than sufficient to support the Board’s decision. The Board properly exercised its discretion to maintain the bad-faith attorney fee standard to assure state primacy.

#### **IV. The Board Properly Rejected Alton’s Request that It Apply a “Frivolous” Standard**

The Board properly rejected Alton’s argument that the Board should apply a “frivolous” standard, rather than a “bad-faith” standard, for awarding fees to a permittee under Utah Code Ann. § 40-10-22(3)(e). Utah Supreme Court precedent establishes that when an attorney fee statute provides that a court “may” award fees, but lacks a specific standard, the court in “exercising the discretion bestowed by the ‘may’ language” should “look to the policies underlying” the statute. *Buzas Baseball, Inc. v. Salt Lake Trappers, Inc.*, 925 P.2d 941, 953 & n.10 (Utah 1996); *see Bilanzich v. Lonetti*, 2007 UT 26, ¶ 17, 160 P.3d 1041, 1046 (Utah 2007). That is precisely what the Board did here. In its second, independent holding, the Board exercised its discretion to maintain the bad-faith attorney fee standard, to implement UCMRA’s first enumerated purpose of ensuring that the State has the “the necessary authority to assure exclusive jurisdiction” over coal mining regulation. Utah Code Ann. § 40-10-2(1); *see* Order at 6-7.

In renewing its argument that the Board should have adopted a “frivolous” standard, Alton once again relies on federal Clean Water Act cases, which are not relevant here, and misreads the only Utah case that it cites. In *World Peace Movement of America v. Newspaper Agency Corp.*, 879 P.2d 253 (Utah 1994), the Utah Supreme Court did not hold that courts *must* apply a “frivolous” standard whenever an attorney fee statute is silent as to the standard to be applied. Rather, the Court considered the legislative history and purpose of the statute at issue *in that case* and concluded that a “frivolous” standard would best serve that history and purpose. *Id.* at 260-61. Likewise, here, the Board properly concluded that the bad-faith standard best serves the purposes of UCMRA.

**V. The Division’s Intention to Republish Rule B-15 Does Not Bear on Its Continuing Validity**

There is no contradiction between the Board’s conclusion that Rule B-15 remains in effect and the Division’s expression of its intention to ask the Board to “take such action as is necessary . . . to reinstate and publish the rules in the Utah Administrative Code.” Division Br., Ex. A, at 2. Like the Board, the Division has also concluded that Rule B-15 remains in effect, and the Division’s recognition of its own duty “to correct the inadvertent omission [of Rule B-15 from the published rules] by republishing it” is not inconsistent with that conclusion. Division Br. at 9. As the Utah Supreme Court has held, a law that is mistakenly omitted from the published code may still be “the law of this state.” *Orton*, 21 Utah 2d at 247. What the Division has proposed to do is simply to ensure that the text of Rule B-15 is once again published in the official compilation of the Board’s Rules of Practice and Procedure.

The cases cited by Alton do not apply here. In *R.O.A. General, Inc. v. Utah Department of Transportation*, 966 P.2d 840, 842 (Utah 1998), an agency violated its own rules. And in *Everett v. Baltimore Gas & Electric Co.*, 307 Md. 286, 304-05 (1986), *overruled by Coleman v.*

*Anne Arundel County Police Department*, 369 Md. 108 (2002), an agency attempted to enforce an “unwritten policy” without giving the public any notice of the policy. Here, the Board has not violated any rules, and Alton has not contested that the Board provided the required notice when it adopted Rule B-15 in 1980.

The Division’s intention to republish Rule B-15 has no bearing on the Board’s finding that the rule is still valid. The Board properly concluded that Rule B-15 remains in effect.

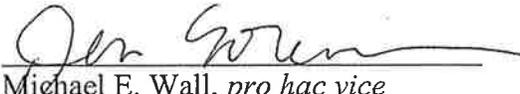
### CONCLUSION

Alton has not demonstrated that the Board’s March 27, 2013 Order was “unlawful, unreasonable, or unfair.” Petitioners respectfully request that the Board deny Alton’s Request for Reconsideration.

May 17, 2013

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 17<sup>th</sup> day of May, 2013 served a true and correct copy of the foregoing OPPOSITION OF PETITIONERS UTAH CHAPTER OF SIERRA CLUB ET AL. TO ALTON COAL DEVELOPMENT, LLC'S REQUEST FOR RECONSIDERATION upon all parties of record in this proceeding by e-mail attachment to the following addresses:

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