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

UTAH CHAPTER OF THE SIERRA CLUB, et
al,

Petitioners,

vs.

UTAH DIVISION OF OIL, GAS AND
MINING,

Respondents,

and

ALTON COAL DEVELOPMENT, LLC and
KANE COUNTY, UTAH,

Respondent-Intervenors.

**ORDER ON RECONSIDERATION
OF RULING CONCERNING LEGAL
STANDARD GOVERNING FEE
PETITIONS**

Docket No. 2009-019

Cause No. C/025/0005

This matter comes before the Board on Respondent Alton Coal Development's ("ACD") Request for Reconsideration of the Board's Order on the Legal Standard Governing Fee Petitions dated March 27, 2013 (the "Order").

The Board considered the following briefs in connection with the Motion:

- ACD's Request for Reconsideration dated April 16, 2013 ("ACD's Opening Brief");
- Opposition of Petitioners Utah Chapter of Sierra Club et al. to Alton Coal Development, LLC's Request for Reconsideration dated May 17, 2013 ("Petitioner's Brief");
- Division's Response to ACD's Request for Reconsideration dated May 17, 2013 ("Division's Brief");
- ACD's Reply Memorandum on Request for Reconsideration dated May 24, 2013 ("ACD's Reply Brief").

Having considered the above-referenced briefs¹, as well as the briefs initially filed in connection with the attorney's fees standard issue, the Board affirms its prior Order for the reasons discussed below.

I. While the status of Rule B-15, given the highly unusual history of its disappearance from published editions of the Utah Administrative Code, presents a complex question, the Board concludes that Rule B-15 remains in effect.

In its Order, the Board gave three independent reasons for continuing to apply the bad faith standard to a permittee's request for an award of attorney's fees. The first reason was the continued existence of Rule B-15 as a controlling regulation. In its Motion, ACD has focused upon this Rule B-15 issue more than the other two independent reasons given by the Board (discussed more fully in the sections below).

With respect to Rule B-15, the Board first noted in its Order that no evidence had been presented indicating that the Board itself had ever taken any action to repeal the rule, and this remains the case.² Rule B-15's disappearance from published compilations of the regulations in the early 1980s did not coincide with any Board action with respect to that rule. ACD in its Motion

¹ As noted in the Board's Order Regarding Briefing Schedule on Motion for Reconsideration of Attorney Fee Standard Ruling, the prior Order was an interlocutory, non-final order, and Section Section 63G-4-302 ("Reconsideration") and Utah Admin. Code R641-110-100 and -200 ("Rehearing") do not apply. Given the unique issues presented, however, and the fact that the prior Order is an interlocutory order subject to revision at any time, the Board as a discretionary matter elected to entertain the motion and revisit the issues addressed in the prior Order.

² It is important to note that the Board did not rule that it was ACD's burden to prove that Rule B-15 had been repealed. ACD is mistaken when it states that the Board "decid[ed] the matter based on Alton's purported inability to prove" that such a repeal occurred. ACD's Opening Brief at 3. The Board's decision on this point was not the product of any allocating of the burden to ACD. Instead, the Board simply noted that no evidence had been presented *by any party* showing that the Board ever took action to repeal Rule B-15. *See* Order at 4 (noting "*neither* party offered any evidence" of repeal); *id* at 4-5 ("none can show that the omission was anything other than inadvertent"); *id* at 5 (noting the "absence of any evidence suggesting the Board repealed B-15"). Even if, as ACD suggests, the Board should require affirmative proof that Rule B-15 had been

references rulemaking activity undertaken by the Board in approximately 1990-91 that ACD argues was intended to replace (and therefore repeal) a particular set of earlier rules (the UMC/SMC rules). It should first be noted that this 1991 action cannot explain the decade-earlier disappearance of Rule B-15 from the published code or demonstrate that such disappearance was intentional. ACD argues, however, that this action would nonetheless have had the effect of repealing Rule B-15 to the extent it still existed as of 1991. The 1991 Board action cited by ACD, however, did not purport to replace the set of procedural rules within which Rule B-15 was found, but a *different set of rules* (the substantive coal rules). ACD argues this problem is overcome by the fact that the replacement substantive coal rules *made reference to* the procedural rules which were by then missing Rule B-15, thereby sanctioning in some way Rule B-15's absence, or effecting its repeal. This suggestion of an indirect, implicit repeal does not provide sufficient grounds upon which to find that Rule B-15 was repealed by the Board. As noted in Petitioner's Brief, the Utah Supreme Court has held that "implied repeals are not favored and occur only if there is a manifest inconsistency or conflict between the earlier and the later statute." Petitioner's Brief at 4 (quoting *State v. Sorensen*, 617 P.2d 333, 336 (Utah 1980)). There is no such conflict here as the Board has never adopted any standard other than the bad faith standard. Ultimately, for the reasons discussed above and in the prior Order, the preponderance of the evidence presented demonstrates that the Board has never taken action to repeal Rule B-15.

It is true that regulations may nevertheless be repealed by operation of certain provisions of the Utah Administrative Rulemaking Act ("UARA") even without any affirmative action by the Board. ACD cites several UARA provisions it argues bears upon the continuing validity of Rule B-15. First, ACD argues that Rule B-15 was not promulgated pursuant to certain of UARA's

inadvertently omitted, the Board finds that the preponderance of the evidence demonstrates that Rule B-15's omission was indeed inadvertent.

procedures, ACD's Reply Brief on the Legal Standard Governing Fee Petitions at 3-4, but as noted in the Board's prior Order, Rule B-15's adoption predated UARA and would not have been governed by its requirements, Order at 5. ACD also argues that Rule B-15 no longer controls because it has not been annually reauthorized by the legislature as required by UARA. *Id.* (citing Utah Code Ann. § 63G-3-502(2)(a)). But, as discussed in the prior Order, UARA contains an exception preventing a rule's annual expiration if the rule is mandated by a federal law or regulation. *See* Order at 5 (discussing this issue and citing Utah Code Ann. § 63G-3-502(2)(a)).

ACD lastly notes that UARA provides that the current version of the Utah Administrative Code "shall be received by all the judges, public officers, commissions and departments of state government as evidence of the administrative law of the state of Utah." ACD's Opening Brief at 2 (citing Utah Code Ann. § 63G-3-701). As noted by Petitioners, however, this evidentiary provision of UARA does not state that any rule omitted from the code is invalid. Instead, it requires courts to take notice of the code as *evidence of* the administrative law of the state. In the present case, even taking this evidence into account, there is ample other evidence of Rule B-15's adoption, lack of repeal, and continuing validity. After considering this evidence, the Board finds that Rule B-15, despite its unexplained disappearance from published compilations of the rules, was never repealed and remains in effect.

For these reasons, the Board concludes that Rule B-15 was not repealed by operation of any provision of UARA.

ACD's arguments concerning the continued existence and validity of Rule B-15 under UARA are well taken, and the Board is sensitive to ACD's concern with the notion that an administrative rule which does not appear in the currently-published code can have continuing effect. The history of Rule B-15's adoption and subsequent disappearance from the published

Administrative Code compilations is unique and unusual, and the picture is made more complex by the subsequent rulemaking actions cited by ACD. For the reasons discussed above and in its prior Order, however, the Board finds that Rule B-15 was neither repealed by the Board, nor by operation of any provision of UARA, and that it therefore remains in effect.³

Even if the Board were to accept ACD's arguments concerning the status of Rule B-15, however, it would still have to apply the bad faith standard for reasons discussed in Point II, below.

II. Regardless of the status of Rule B-15, the Board is without delegated authority to award attorney's fees to a permittee under any standard other than the OSM-approved bad faith standard.

The Board is required to apply the bad faith standard in this matter for a reason independent of the status of Rule B-15 as part of the Utah Administrative Code. The State of Utah's ability to regulate the production of coal is a creature of federal delegation. 30 U.S.C. § 1253; *Utah Chapter of Sierra Club v. Bd. of Oil, Gas and Mining*, 2012 UT 73, ¶41, 289 P.3d 558 (Utah 2012). The Board has been delegated authority and jurisdiction to administer the coal program *as approved by* the federal Office of Surface Mining Reclamation and Enforcement ("OSM"). 30 C.F.R. § 732.13; 30 C.F.R. §732.17(g). The Utah coal program as initially approved contained the bad faith provision.⁴ Pursuant to the terms of the federal delegation of jurisdiction to the State of Utah, no

³ As noted above, the evidence supports a finding that Rule B-15 was omitted from published compilations of the code through oversight rather than by any action to repeal the rule. "Where 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). This treatise cites the Utah Supreme Court's ruling in *Orton v. Adams*, 44 P.2d 62, 63 (1968), which noted that although a particular provision "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.*

⁴ In fact, as noted by Petitioners, OSM initially denied the State of Utah's coal program submission for primacy in part because it failed to include the bad faith standard. OSM approved Utah's resubmission of the coal program after the bad faith standard was added. *See* Response

change to any provision of the coal program may be implemented by the State of Utah until and unless it has been approved by OSM. 30 C.F.R. §732.17(g); *Ohio River Valley Env'tl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 97 (4th Cir. 2006); *United States v. E&C Coal Co.*, 846 F.2d 247, 249 (4th Cir. 1988). The lack of such approval is a bar to the Board's ability to implement and apply any differing standards or provisions.

ACD does not argue that OSM approval isn't an absolute requirement.⁵ Instead, ACD argues that such approval in fact occurred in this case. ACD's Opening Brief at 3-4. For the reasons discussed in the briefs of the Petitioner and the Division and in the Board's prior Order, however, the Board finds that no such "approval" within the meaning of 30 C.F.R. § 732.17 (g) occurred. At most, the evidence shows that OSM approved sets of rules which *made reference to* the set of procedural rules from which Rule B-15 had gone missing, but did not approve any changes to those procedural rules themselves (and in particular, to the bad faith standard). This does not constitute "approval" of a change to the bad faith standard as required by 30 C.F.R. § 732.17(g). The lack of any approval by OSM of a change to the bad faith standard is made clear by the fact that none of the procedures required by law for such an approval were followed in this case. The regulations require that the State of Utah submit any proposed change to OSM for approval as an amendment. 30 C.F.R. § 732.17(g). The Board's records and the evidence submitted by the parties contain no indication of such a submission being made,⁶ and the Division states that it made no such submission, *see* February 13, 2013 letter from John Baza to Allen Klein, attached as

Brief of Petitioners Utah Chapter of Sierra Club et al. to ACD's Opening Brief on the Legal Standard Governing Fee Petitions at 5-8 and the materials cited therein.

⁵ ACD concedes that "OSM approval of Utah's rules is necessary." Alton Coal Development, LLC's Reply Brief on the Legal Standard Governing Fee Petitions at 5.

⁶ For the reasons discussed in Section I, above, the Board does not construe the early 1990s request for OSM approval of amendments to the substantive coal rules to be a request to amend and remove the bad faith standard set forth in the Board's procedural rules.

Exhibit A to Division's Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney's Fees. The regulations also require that OSM, in connection with any approval of such a proposed change, publish notice in the Federal Register and provide for a public comment period. 30 C.F.R. § 732.17(h)(1), (3), (7); *Ohio River Valley Envtl. Coal.*, 473 F.3d at 97 ("The Secretary may not approve a State program amendment without first soliciting and publicly disclosing the views of the public and relevant federal agencies . . ."). The evidence shows that this did not occur, and OSM for its part states that it never approved any change to the bad faith standard. See February 15, 2013 letter from Allen Klein to John Baza, attached as Exhibit C to Division's Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney's Fees. All amendments to Utah's coal program which have been approved by OSM are listed at 30 C.F.R. § 944.15, and no approval of an amendment to the bad faith standard is listed there.⁷ For these reasons, the Board finds that no OSM approval of any change to the approved bad faith standard occurred.⁸

It is important to note that this question of whether the bad faith *standard* is still a part of

⁷ These procedural requirements ensure that any change to the terms of the approved program be made deliberately and advisedly, and in a manner which provides clear notice to the public of what precisely is being changed. The specificity required by these regulations refutes ACD's suggestion that OSM need not be "affirmatively conscious of" the removal of the bad faith standard embodied in Rule B-15 when approving such change. ACD's Reply Brief at 3. The above-cited regulations do not leave room for unknowing or inadvertent approvals by OSM of changes to the terms of the coal program.

⁸ The requirement of OSM approval is clearly spelled out in the regulations and published decisions cited above. For this reason, there has been no lack of notice to ACD or any other party that the bad faith standard remains a controlling part of the approved Utah coal program, and its application raises no issues of "procedural fairness." ACD's Reply Brief at 5. While the Board is sensitive to issues of notice and fairness, the Board notes that all parties have been on notice that the bad faith standard was part of the Utah coal program as initially approved. All parties are on notice of the controlling regulations which specify that no change to the bad faith standard as part of the delegated coal program can take effect until approved by OSM. And all parties are on notice that no such approval was given. For these reasons, all have been on notice that the bad faith standard remains controlling.

the controlling, federally-delegated coal program is separate from the question of the status of *Rule B-15* as part of the Utah Administrative Code. Even if *Rule B-15* itself is no longer an operative part of the Utah Administrative Code, and even if it had been clearly and intentionally repealed by the Board,⁹ no change to the bad faith *standard* approved as part of the federally-delegated coal program can be implemented by this Board absent OSM approval.

For the reasons stated above, the Board is simply without power and delegated authority to award attorney's fees to ACD under any standard other than the bad faith standard approved by OSM, regardless of the present status of Rule B-15 as part of the Utah Administrative Code. Therefore, even if ACD's arguments under Point I above were accepted, the Board would be required to apply the bad faith standard in this case.

III. The Board chooses to apply the bad faith standard as an exercise of discretion.

The Board upholds its prior Order and applies the bad faith standard based upon a third, independent ground—adoption of that standard as an exercise of the Board's discretion.

Even if ACD's arguments concerning the repeal or removal of Rule B-15 and the bad faith standard were accepted, the Board would be left with only Section 22 of the Coal Act to guide it in awarding attorney's fees. Section 22, however, while it provides generally for an award of attorney's fees, specifies no standard. *See* Utah Code Ann. § 40-10-22(3)(e). For this reason, the Board would have to exercise its discretion to adopt and apply a standard in this case. ACD itself has recognized that the Board has such discretionary authority to apply a standard in the absence of any standard specified in the statute. *See* ACD's Opening Brief on the Legal Standard Governing Fee Petitions at 5 n.5 (arguing that the legislature's use of "deems proper" language in Utah Code

⁹ As the Division notes, "if an intentionally submitted amendment to a rule cannot take effect until approved, then any inadvertent change would also not 'take effect for purposes of a State program

Ann. § 40-10-22(3)(3) “commit[s] the matter to the Board’s discretion”).¹⁰ The Board exercises its discretion to apply the bad faith standard in this matter for two reasons.

First, the Board does so in order to follow the controlling law and abide by the terms of the federal delegation of authority under the coal program. As noted in the prior Order, “SMCRA and its implementing regulations require that the Board apply the provisions of the approved coal program and that changes be implemented only after approval by OSM.” Order at 7. ACD has characterized the Board’s reasoning on this point as “improper speculation” that primacy might be lost through OSM enforcement action if the Board failed to apply the bad faith standard. This is a misstatement of the Board’s Order. As noted by the Division, the prior Order does not state that the Board’s application of a bad faith standard is motivated by a specific threat of enforcement action by OSM. Division’s Brief at 9. The Board’s primary concern on this point is to follow the law and abide by the terms of the federal delegation. An attempt by the Board to implement an unapproved change to the bad faith standard would violate these mandates. This violation would be a certainty and would not be a matter of speculation. It is true that such a violation could expose the State of Utah to enforcement action, but the Board’s decision on this point is not based upon any calculation of the likelihood of any particular action being taken. The Board is simply following the law and the terms of the federal delegation of authority in applying the approved bad faith

until approved as an amendment.” Division’s Memorandum Regarding Status of the Utah Coal Program Rule Governing an Award of Attorney’s Fees at 7.

¹⁰ The case cited by ACD on this point is *World Peace Movement of America v. Newspaper Agency Corp.*, 879 P.2d 253 (Utah 1994). This case did not hold, as ACD seems to imply in its briefing on reconsideration, that courts *must* apply a “frivolous” standard whenever an attorney’s fee statute is silent on the standard to be applied. Instead, the *World Peace Movement* Court recognized that courts enjoy discretion in determining what standard to apply where, as here, the statute contains the word “may” or other language conferring such discretion. The *World Peace Movement* Court upheld the application of a “frivolous” standard in that particular case based upon an analysis of the legislative history and purpose of the statutory scheme at issue. For the reasons

standard as part of the Utah coal program. The fact that following the law will tend to “assure exclusive jurisdiction over nonfederal lands and cooperative jurisdiction over federal lands in regard to regulation of coal mining” only strengthens the conclusion that the law must be followed, regardless of the likelihood of OSM taking any particular enforcement action in response to a failure to do so. Utah Code Ann. § 40-10-2(1).

Second, the Board exercises its discretion to apply the bad faith standard in this matter because that standard furthers the statutory purpose of encouraging “public participation in the development, revision, and enforcement of rules, standards, reclamations, or programs established by the state under this chapter...” Utah Code Ann. § 40-10-2(4).

For the reasons set forth above as well as in the Board’s initial Order, the Board concludes that the bad faith standard governs requests by permittees for an award of attorney’s fees.

The Chairman’s signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

Issued this 16th day of September, 2013.

UTAH BOARD OF OIL, GAS & MINING



Ruland J. Gill, Chairman

discussed below, the Board concludes that application of the bad faith standard in this matter furthers the purposes of the Utah Coal Mining and Reclamation Act.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **ORDER ON RECONSIDERATION OF RULING CONCERNING LEGAL STANDARD GOVERNING FEE PETITIONS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 17th day of September, 2013, to the following:

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