

MAR 27 2013

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

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

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.

**DECISION AND ORDER ON THE  
LEGAL STANDARD GOVERNING  
FEE PETITIONS**

Docket No. 2009-019  
Cause No. C/025/0005

This cause came on regularly for hearing before the Board of Oil, Gas and Mining (the “Board”) on February 27, 2013, at 9:30 a.m., in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Chairman James T. Jensen, Vice-Chairman Ruland J. Gill, Jr., Jake Y. Harouny, Jean Semborski, Chris D. Hansen, Carl F. Kendall, and Kelly L. Payne.

Michael E. Wall, Sharon Buccino, Jennifer A. Sorensen, and Stephen H.M. Bloch appeared as counsel for Petitioners Utah Chapter of the Sierra Club, et al. (“Sierra Club”). Steven F. Alder, Assistant Attorney General, appeared on behalf of Respondent the Division of Oil, Gas and Mining (“Division”). Denise A. Dragoo, James P. Allen, and Bennett E. Bayer appeared as counsel on behalf of Respondent-Intervenor Alton Coal Development, LLC. (“ACD”). Kent

Burgraph represented Respondent-Intervenor Kane County, Utah and attended the hearing by telephone. Michael S. Johnson and Cameron B. Johnson, Assistant Attorneys General, represented the Board.

The Board heard oral argument on the legal questions addressed in the following briefs filed by the parties:

- ACD's Opening Brief on the Legal Standard Governing Fee Petitions ("ACD's Opening Brief");
- Response Brief of Petitioners Utah Chapter of the Sierra Club et al., to Alton Coal Development, LLC's Opening Brief on the Legal Standards Governing Fee Petitions;
- Division's Memorandum Regarding the Status of the Utah Coal Program Rules Governing an Award of Attorney Fees ("Division's Brief");
- ACD's Reply Brief on the Legal Standard Governing Fee Petitions ("ACD's Reply Brief");
- ACD's Memorandum of Supplemental Authority<sup>1</sup>;
- Petitioners Utah Chapter of Sierra Club et al., Opposition to ACD's Motion to Submit Memorandum of Supplemental Authority; and
- Division's Joinder in Petitioner's Opposition to Alton's Motion to File Supplemental Memorandum and Materials.

**NOW THEREFORE**, the Board, having considered the above-listed briefs and the oral arguments made by the parties at the hearing, and good cause appearing, hereby sets forth its reasoning in support of the ruling it announced at the hearing on February 27, 2013:

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<sup>1</sup> The Board granted ACD's opposed motion to submit its Memorandum of Supplemental Authority and considered the supplemental authorities cited therein in its deliberations.

## **I. A brief history of Rule B-15.**

The question briefed and argued to the Board concerns the appropriate standard to be applied by the Board in evaluating a permittee's request to collect fees from another party in a matter arising under Utah's Coal Mining and Reclamation Act ("UCMRA"). The parties disagree as to whether the Board must apply a bad faith standard or if Utah law only requires a showing by the permittee that another party's claims are frivolous, groundless, or unreasonable.

Before reviewing the merits of the parties' arguments, it is important to review the procedural history behind rule B-15, which lies at the heart of this dispute. The federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") allows a state to assume regulatory control of surface mining within the state if the state program adheres to certain "minimum national standards." *Utah Chapter of the Sierra Club v. Bd. Of Oil, Gas & Mining*, 2012 UT 73, ¶41, 289 P.3d 558 (Utah 2012). A state wishing to assume primacy to regulate surface coal mining operations on non-federal lands has to submit a proposed permanent program to the Secretary of the Interior ("Secretary") for approval. 30 U.S.C. § 1253. Once a state program is approved, "[a]ny proposed change to the laws or regulations that make up an approved State program must be submitted to the Secretary as a State program amendment." *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 94, 97 (4th Cir. 2006) (citing 30 C.F.R. § 732.17(g)). "No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment." 30 C.F.R. § 732.17(g). "[T]he State lacks the authority to implement the change until the Secretary approves it." *Ohio River Valley*, 473 F.3d at 97 (citing 30 C.F.R. § 732.17(g)).

At its November 19, 1980 hearing, this Board adopted a rule (designated "B-15") that governed when a permittee may recover attorney's fees and expenses from a challenging party.

The relevant text of B-15 states:

Appropriate costs and expenses including attorney's fees may be awarded . . . (d) To a permittee from any person where the permittee demonstrates that the person initiated a proceeding under section 40-10-22 of the Act or participated in such a proceeding in bad faith for the purpose of harassing or embarrassing the permittee.

In December, 1980, Utah then forwarded Rule B-15 to the federal Office of Surface Mining Reclamation and Enforcement ("OSM") for approval, as part of the submission of the state's program for approval. Utah explained that Rule B-15 "adopts the provisions for payment of Attorney fees set forth in 43 C.F.R. § 4.12, 90 [sic]-1296." The Secretary's conditional approval on January 21, 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." 46 Fed. Reg. 5899, 5910 (Jan. 21, 1981). Since then, this Board has never voted to repeal Rule B-15, nor has the Secretary authorized such an amendment.

Despite the absence of any repeal effort, Rule B-15 was apparently dropped from any and all published compilations of regulations after 1981. Thus the question presented to this Board is whether B-15's almost thirty year absence from any published compilation of regulations means that the Board does not have to apply the bad faith standard when a permittee seeks to recover attorney's fees under UCMRA. The Board determines that the bad faith standard originally embodied by Rule 15 remains a controlling provision of Utah's coal program.

**II. Neither party offered any evidence that the Board intended to repeal Rule B-15 or took any affirmative action in that regard.**

ACD argues that Rule B-15's bad faith standard is no longer the controlling standard, but offers no evidence that shows or implies this Board's intent to repeal that provision. While all parties point to instances of B-15's absence from published compilations of the rules, none can

show that the omission was anything other than inadvertent administrative oversight. In the absence of any evidence suggesting the Board repealed B-15, the Board concludes that the Rule remains in effect.

**III. Rule B-15 was not repealed by operation of the Utah Administrative Rulemaking Act.**

ACD argued that Rule B-15 was repealed, or expired and terminated, by operation of the Utah Administrative Rulemaking Act (“UARA”). The permittee relies on case law which holds that an agency’s rules are not valid if the agency failed to adhere to the rulemaking procedures as outlined in UARA. *Lane v. Indus. Comm’n*, 727 P.2d 206 (Utah 1986). ACD notes that Rule B-15 was not promulgated according to certain of UARA’s procedures. ACD’s Opening Brief at 4. Insofar as Rule B-15’s adoption and approval by OSM predated enactment of the statutory provisions mandating those procedures, however, such adoption and approval would not have been governed by those requirements.

ACD also argues that Rule B-15 is no longer controlling because it has not been annually reauthorized by the legislature as required by UARA. *See* Utah Code Ann. § 63G-3-502(2)(a). However, ACD’s argument fails to consider the UARA provision that prohibits a rule’s annual expiration “if the rule is explicitly mandated by a federal law or regulation....” Utah Code Ann. § 63G-3-502(2)(b)(i). Because SMCRA, a federal law, requires that the provisions of the approved state coal program be enforced and that amendments be implemented only following approval by OSM, the Board concludes that Rule B-15 could not have expired due to the UARA annual reauthorization provision.

**IV. Under 30 C.F.R. § 732.17, the procedures for OSM approval of amendments to a State’s regulatory program were not followed and OSM never approved any change to the bad faith standard in Rule B-15.**

Any amendment to a state's coal program requires OSM's approval. *See Ohio River Valley*, 473 F.3d at 97 ("the State lacks the authority to implement the change until the Secretary approves it."); 30 C.F.R. § 732.17(g) ("No such change to laws or regulations shall take effect for the purposes of a State program until approved as an amendment."). The Secretary has not approved the repeal of or amendments to Rule B-15 since the Rule was approved in January, 1981. *See* 30 C.F.R. § 944.15 (listing of all approved amendments to Utah's state program). Thus, even if Rule B-15 had been repealed by the Board or had terminated by operation of UARA, no changes to Rule B-15's bad faith standard could take effect as controlling provisions of Utah's approved, federally-delegated coal program without the Secretary's approval.<sup>2</sup>

**V. The Board exercises its discretion in this matter to maintain the bad faith standard.**

ACD argues that the Board has discretionary authority under UCMRA to award attorney's fees and costs at the end of an adjudicative proceeding. *See* ACD's Opening Brief at 5 n.5 (arguing that the legislature's use of "deems proper" language in U.C.A. § 40-10-22(3)(e) "commit[s] the matter to the Board's discretion"); ACD's Reply Brief at 17. ACD therefore argues that the Board as a matter of discretion may apply the fee petition standard it deems appropriate, and argues in this

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<sup>2</sup> ACD presented evidence that OSM during the late 1980s and the 1990s approved amendments to provisions of the Coal Act and regulations which each made reference to the body of the Board's R641 procedural rules. ACD argues that at the time of these approvals, published compilations of the Board's procedural rules did not include Rule B-15. ACD's Reply Brief at 4-7. The Board does not construe these or other OSM actions cited by ACD as an explicit or express approval of the removal of Rule B-15's bad faith standard from the Board's procedural rules. To the extent ACD suggests these actions constitute an indirect or implicit approval by OSM of the removal of the bad faith standard from the Board's procedural rules, the Board concludes that these actions were insufficient to demonstrate even an implied intention by OSM to approve the repeal of the bad faith standard. The Board notes that OSM has indicated in its February 15, 2012 letter, attached to the Division's Brief as Exhibit B, that it in fact did not approve any such repeal. In any event, there is no evidence that the requirements of 30 C.F.R. §732.17 for federal approvals of amendments to state programs were ever followed with respect to any repeal of the bad faith standard.

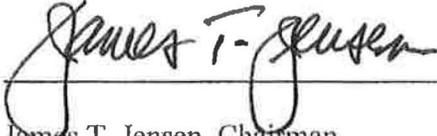
case that the Board apply a frivolous, groundless, or unreasonable standard. The Board is obligated to interpret and apply the UCMRA in a way that “assure[s] exclusive jurisdiction over nonfederal lands and cooperative jurisdiction over federal lands in regard to regulation of coal mining and reclamation operations as authorized pursuant to [SMCRA]...” Utah Code Ann. § 40-10-2(1). UCMRA also compels the Board to “assure that appropriate procedures are provided for public participation in the development, revision, and enforcement of rules, standards, reclamations, or programs established by the state under this chapter...” *Id.* at §2(4).

In addition to (and independent of) the reasons discussed in the preceding sections for applying the bad faith standard, the Board applies that standard as a matter of discretion under U.C.A. § 40-10-22(3)(e). The Board believes that its first obligation under UCMRA is to ensure that the State retains regulatory primacy over its coal program. 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. ACD cannot show any evidence to support a conclusion that the Board intentionally repealed the rule or the Secretary approved such repeal. There is no evidence that the public was given proper opportunity for notice and comment or that the required procedures for federal approval of any repeal of or amendment to the bad faith standard were followed. For the Board to attempt to implement an unapproved change to the coal program would jeopardize the state’s ability to retain control over its program. The Board is statutorily obligated to ensure that this does not happen. Therefore, the Board applies its discretion in this matter to retain the bad faith standard as articulated in Rule B-15.

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 27<sup>th</sup> day of March, 2013.

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



James T. Jensen, Chairman

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **DECISION AND ORDER ON THE LEGAL STANDARD GOVERNING FEE PETITIONS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed with postage prepaid, this 29th day of March, 2013, to the following:

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