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**FILED**

OCT 16 2014

SECRETARY, BOARD OF  
OIL, GAS & MINING

*Attorneys for Petitioners*

*Utah Chapter of the Sierra Club et al.*

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**IN THE UTAH SUPREME COURT**

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UTAH CHAPTER OF THE SIERRA  
CLUB, NATURAL RESOURCES  
DEFENSE COUNCIL, SOUTHERN  
UTAH WILDERNESS ALLIANCE, AND  
THE NATIONAL PARKS  
CONSERVATION ASSOCIATION

Petitioners,

v.

DIVISION OF OIL, GAS, & MINING  
DEPARTMENT OF NATURAL  
RESOURCES, STATE OF UTAH

Respondent,

**RULE 19 PETITION FOR WRIT OF  
EXTRAORDINARY RELIEF**

No. \_\_\_\_\_

Board of Oil, Gas and Mining  
Cause No. C/025/005

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Pursuant to Rule 65B of the Utah Rules of Civil Procedure, and in accordance with Rule 19 of the Utah Rules of Appellate Procedure, Petitioners (the Utah Chapter of the Sierra Club, the Natural Resources Defense Council, the Southern Utah Wilderness Alliance and the National Parks Conservation Association) petition this Court for extraordinary relief as follows.

## **I. PERSONS OR ASSOCIATIONS WHOSE INTEREST MAY BE AFFECTED**

1. Petitioners are nonprofit entities with an interest in ensuring compliance with state and federal laws and regulations governing coal mining.

2. Respondent Board of Oil, Mining and Gas (“the Board”) is an administrative agency. Relief is sought from the Board’s Order Concerning Renewed Motion for Leave to Conduct Discovery – Award of Fees and Cost, issued September 25, 2014. A copy of the Order accompanies this Petition.

3. Alton Coal Development (“Alton”) applied for Board approval to conduct coal mining operations in the State of Utah. Petitioners brought a Request for Agency Action with the Board to either modify or halt Alton’s requested permit. Petitioners’ challenge was ultimately rejected by the Board and this Court, and Alton subsequently sought attorney fees against Petitioners.

## **II. ISSUES PRESENTED AND RELIEF SOUGHT**

To seek an award of attorney fees against Petitioners, Alton has to show that Petitioners acted “in bad faith for the purpose of harassing or embarrassing the permittee [Alton].” Board Rule B-15. Alton sought intrusive discovery into Petitioners’ donors, advocacy, and litigation strategies, hoping to find what Alton admitted it did not then have, *i.e.*, evidence of an improper motive. Both Petitioners and the Utah Division of Oil, Gas and Mining pointed out to the Board that, under Rule B-15, subjective intent is immaterial unless objective bad faith (frivolousness) is first shown. Petitioners also noted that allowing such discovery into advocacy groups’ strategies, funding, etc.,

without that threshold showing poses significant federal and state constitutional concerns. Petitioners filed a motion to dismiss the attorney fee petition, arguing that, as a matter of law, Alton could not show that Petitioners' challenge to the permit was frivolous.

Under Rule B-15, the Board had a duty to correctly apply the law, *i.e.*, to first decide the dispositive legal issue presented in the motion to dismiss. Only if it found objective frivolousness (and therefore denied the motion to dismiss), should the Board have addressed Alton's request for discovery. The Board refused to rule on the motion to dismiss, however, and instead ruled (over a dissent) that Alton may conduct discovery into Petitioners' motives, communications, etc., regardless of whether Petitioners' challenge was objectively colorable.

As discussed further in the accompanying Memorandum of Points and Authorities, this Petition involves a single primary issue: Whether Board of Oil, Gas & Mining Rule B-15, which permits an award of attorney fees only when a petitioner acted in "bad faith for the purpose of harassing or embarrassing the permittee," requires a showing of both objective and subjective bad faith. If it does, as Petitioners and the Division contend, then a second issue is whether Alton made the required showing of frivolousness on the record. If not, the Board's decision to allow invasive, expensive, and constitutionally troublesome discovery was patently wrong and requires immediate correction.

Because the absence of frivolousness is apparent from the record and can be determined by the Court on the briefing, the relief sought by Petitioners is an order directing the Board to dismiss the Petition for Attorney Fees. Once the petition is dismissed, the Board's ruling on discovery will be moot.

### **III. FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES PRESENTED BY THE PETITION**

The foregoing section provides a general summary of the circumstances necessary to understand the narrow legal issues presented. The procedural background underlying the Petition is set forth in greater detail in the accompanying Memorandum of Points and Authorities.

### **IV. REASONS WHY NO OTHER PLAIN, SPEEDY OR ADEQUATE REMEDY EXISTS AND WHY THE WRIT SHOULD ISSUE**

Petitioners have no plain, speedy, and adequate remedy in the ordinary course of the law other than the issuance by this Court of an extraordinary writ. An appeal as of right is not available because the order authorizing discovery is not a final agency action under Utah Code §§ 78A-3-102(3)(e)(i) and 63G-4-401(1) and 3(a).<sup>1</sup> This Court has authority to oversee the acts of officials, courts and agencies under Rule 19, through an extraordinary writ, to ensure that they discharge their duties in a legal manner.

The Order Authorizing Discovery raises a narrow but significant legal issue of first impression that is properly reviewable by this Court. The standards governing whether fees should be awarded are tailored so as to avoid undue burden and intrusion on substantive rights of citizen participation and advocacy protected by the Utah Constitution and the United States Constitution. Imposition of these burdens and violations of these rights, cannot be undone.

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<sup>1</sup> The District Court lacks jurisdiction to review actions of certain specified agencies, one of which is the Board of Oil, Gas and Mining. *See* 78A-3-102 (Supreme Court “has appellate jurisdiction, including jurisdiction of interlocutory appeals,” over final Board actions).

Judicial and administrative economy would also be served in this case by resolving the dispositive legal issue now, before unnecessary proceedings and discovery are undertaken. The challenged order, by its very nature and wording, invites continuing disputes over discovery scope, and likely further requests for review by this Court. If, as Petitioners contend, the Order is predicated on a plainly incorrect reading of the law, these disputes can be avoided in their entirety.

Petitioners specifically seek from this Court a determination that Rule B-15 requires a threshold finding of objective frivolousness before any examination of subjective intent may occur. Because no further development of the record is required to make that determination, this Court is positioned to make a determination now that the Petitioners' Request for Agency Action was not frivolous. This will conclusively resolve all remaining issues related to this litigation.

**V. REASON WHY IT IS IMPRACTICAL TO FILE THE PETITION WITH THE DISTRICT COURT**

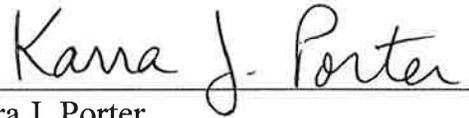
As noted above, this Court has exclusive appellate jurisdiction over decisions of the Board. U.C.A. 78A-3-102(3)(iv). Thus, the district court lacks any jurisdiction to consider this matter, either as a matter of final or nonfinal appellate review. Additionally, because Alton has alleged that this Court (implicitly) found Petitioners' challenge to be frivolous, the Court's own prior ruling in this case must be interpreted and, if necessary, clarified. Only the Court has the latter authority.

**VI. REASON WHY IT IS IMPRACTICAL TO FILE FOR INTERLOCUTORY REVIEW UNDER UTAH RULE OF APPELLATE PROCEDURE 5**

Interlocutory review under Utah Rule of Appellate Procedure 5 is not applicable to nonfinal administrative decisions.

DATED this 15th day of October, 2014.

CHRISTENSEN & JENSEN, P.C.

A handwritten signature in cursive script that reads "Karra J. Porter". The signature is written in black ink and is positioned above a horizontal line.

Karra J. Porter

Phillip E. Lowry, Jr.

*Attorneys for Petitioners Utah Chapter  
of the Sierra Club et al.*

## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2014, a true and correct copy of the foregoing **RULE 19 PETITION FOR WRIT OF EXTRAORDINARY RELIEF** was delivered via email to the following:

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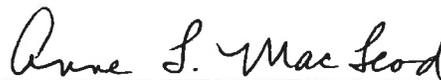
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Anne L. MacLeod, Secretary

**FILED**

SEP 25 2014

**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,  
SOUTHERN UTAH WILDERNESS  
ALLIANCE, NATURAL RESOURCES  
DEFENSE COUNCIL, and NATIONAL  
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC and  
KANE COUNTY, UTAH

Intervenors.

ORDER CONCERNING RENEWED  
MOTION FOR LEAVE TO CONDUCT  
DISCOVERY - AWARD OF FEES  
AND COSTS

Docket No. 2009-019

Cause No. C/025/0005

Pursuant to the Board's February 20, 2014 Interim Order Concerning Motion for Discovery, Alton Coal Development ("ACD") on March 5, 2014 filed a Petition for Award of Costs and Expenses (the "Petition"). In conjunction with the Petition, ACD filed a Renewed Motion for Leave to Conduct Discovery – Award of Fees and Costs (the "Discovery Motion"). Petitioners on April 4, 2014 filed a Motion to Dismiss Alton Coal Development's Petition for Award of Costs and Expenses ("Motion to Dismiss") as well as a Motion to Stay Discovery pending a decision on the Motion to Dismiss (the "Stay Motion"). The parties to date have filed various memoranda in connection with the Petition, Discovery Motion, Motion to Dismiss and Stay Motion. The Board, having read the above-referenced filings, hereby enters the following order concerning discovery. The ruling announced below was approved by a vote of six of seven

Board members. Board member Kelly L. Payne participated in all of the Board's deliberation sessions except one but has reviewed all pleadings and participated in the vote. Board member Payne did not support this ruling and has set forth a brief dissenting opinion below.

The parties disagree about whether an objective bad faith element is part of the controlling bad faith test applicable to the Petition. *See* Petitioners' Memorandum in Support of Motion to Dismiss ACD's Petition for Award of Costs and Expenses ("Petitioners' Brief") at 3-20 (arguing for inclusion of objective bad faith element); ACD's Memorandum in Opposition to Motion to Dismiss at 7-8 (arguing that controlling test includes only subjective bad faith element); Division's Memorandum in Response to Petitioners' Motion to Dismiss ("Division's Brief") at 2-5 (arguing that controlling test requires a showing of objective as well as subjective bad faith). All parties agree, however, that a subjective bad faith element forms a part of that test. *See* Petitioners' Brief at 3-9, 21-24; ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4; Division's Brief at 2-3, 11.

While Petitioner argues that discovery is not necessary with respect to, and would not inform, any part of the bad faith test, *see generally* Petitioners' Opposition to ACD's Renewed Motion for Leave to Conduct Discovery, the Board agrees with ACD and the Division that discovery would inform, and will be necessary to analyze, the subjective bad faith element. *See* ACD's Supplemental Memorandum in Support of its Renewed Motion for Leave to Conduct Discovery at 3-4 (requesting leave to conduct discovery regarding subjective bad faith); Division's Memorandum in Response to ACD's Renewed Motion for Leave to Conduct Discovery at 2-4 (arguing that discovery is appropriate with respect to subjective bad faith element). For this reason, the Board finds that good cause exists to permit discovery.

Given that good cause exists for discovery related to the subjective bad faith element that

all parties concede is part of the controlling test, the Board authorizes ACD to conduct discovery in accordance with the Utah Rules of Civil Procedure. Following discovery, the Board will decide all issues addressed in the above-referenced briefs concerning elements of the bad faith test beyond the subjective bad faith component, as well as application of that test to the facts of this case in light of any information gained through discovery. The Board will defer any ruling on arguments made in the Motion to Dismiss<sup>1</sup> until after discovery is complete and the Board can undertake a consideration of all disputed issues.<sup>2</sup>

Although the prior filings (including ACD's proposed discovery requests and Petitioners' briefs concerning issues of privilege, proportionality, and other matters) lay out the parties' primary disagreements about the appropriate scope of discovery, the Board will rule upon discovery disputes on an ongoing basis as discovery is conducted. Once discovery requests have been generated, Petitioners may renew the arguments made in prior briefing in connection with any objections it has to the discovery requests.

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

Dissenting Opinion of Board Member Payne – This Board member does not join the majority in approving discovery at this time. I would prefer the Board first resolve the issues raised in the Petitioners' pending Motion to Dismiss. Those issues include whether the "bad faith" test governing a permittee's petition for attorney's fees includes elements of both objective

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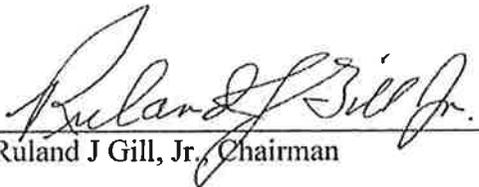
<sup>1</sup> The Board agrees with ACD that the Motion to Dismiss implicates matters beyond the sufficiency of the allegations of the fee petition, and raises questions of sufficiency of proof. *See* ACD's Memorandum in Opposition to Motion to Dismiss at 3-5. The Board will address the issues raised in the Motion to Dismiss after discovery is complete.

<sup>2</sup> As ACD argued, discovery may inform the objective bad faith analysis if such an analysis forms part of the test. *See* ACD's Reply Memorandum in Support of Renewed Motion for Discovery at 7-8. The Board will consider any evidence gathered through discovery bearing on objective bad faith when the Board considers all disputed issues following the discovery phase.

and subjective bad faith, whether any objective bad faith inquiry can be decided on the basis of the existing record, and if so, whether objective bad faith can be shown in connection with any of the subject claims. Depending upon the Board's resolution of these questions, discovery into subjective bad faith may not be necessary. This Board member believes that answering those questions now, rather than deferring them for later decision after discovery is complete, is the most logical and economical way to proceed. I would therefore not authorize discovery at this time.

Issued this 25<sup>th</sup> day of September, 2014.

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

  
Ruland J Gill, Jr., Chairman

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing **ORDER CONCERNING RENEWED MOTION FOR LEAVE TO CONDUCT DISCOVERY - AWARD OF FEES AND COSTS** for Docket No. 2009-019, Cause No. C/025/0005 to be mailed via E-mail, or First Class Mail, with postage prepaid, this 26th day of September, 2014, to the following:

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Handwritten signature of Julie Ann Carter in cursive script, written over a horizontal line.