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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, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondent, ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH, Respondent/Intervenors.	**REQUEST FOR RECONSIDERATION** Docket No. 2009-019 Cause No. C/025/005

Alton Coal Development, LLC ("**Alton**" or "**ACD**") pursuant to Utah Code § 63G-4-302 submits this Request for Reconsideration to the Utah Board of Oil, Gas and Mining ("**Board**") to reconsider and revise its Decision and Order on the Legal Standard Governing Fee Petitions, dated March 27, 2013, in the above-

captioned matter.[1] As set forth in the following sections, reconsideration is necessary because the Board erroneously ruled that former Board Rule B-15 remained in effect.

I. THE RECORD DOES NOT SUPPORT A FINDING OF CONTINUED APPLICABILITY OF RULE B-15.

The Board's Order erroneously relied upon the continued application of Rule B-15, a fee shifting rule not published in the administrative code,[2] even though the Board is required by the Utah Administrative Rulemaking Act ("**UARA**") to look to the current version of the administrative code as evidence of the applicable law.

UARA provides that the current version of the Utah Administrative Code, published by the Utah Division of Administrative Rules, "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 and as an authorized compilation of the administrative law of Utah." Utah Code § 63G-4-701. The Board's Order fails to address the mandate that the current version of the Utah Administrative Code is the enforceable law.

The Board compounded its error by reasoning that it must apply Rule B-15 in the absence of evidence that the rule had been intentionally repealed. Order at 4-5. However, given the absence of the disputed rule from the authorized compilation of administrative rules for the past thirty (30) years, it was

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[1] The Board has ruled in this matter that should there be any conflict between the deadline for seeking reconsideration provided in Utah Code § 63G-4-302 and Utah Administrative Code R641-110-100, 200, "the later of the two deadlines shall be available to any party moving to rehear this matter." Utah Chapter of Sierra Club v. Div'n Oil, Gas & Mining, Findings of Fact, Conclusions of Law and Final Order, Doc. No. 2009-019, Cause No. C/025/0005, Nov. 22, 2010, ¶ 298, at 55.

[2] The Board Order acknowledges that "Rule B-15, which previously governed fee shifting, was apparently dropped from any and all published compilations of regulations." Order at p. 4.

Petitioner's burden to prove that the rule was not repealed. The Board erred by requiring evidence of specific intent to repeal Rule B-15, and deciding the matter based on Alton's purported inability to prove that specific intent. Instead, the Board should have required Petitioners to prove that the omission of Rule B-15 was the result of a clerical error or otherwise unintended. In the absence of necessary proof, the Board unreasonably concluded that the rule at issue had been inadvertently omitted from previous compilations because "none can show that the omission was anything other than inadvertent administrative oversight." Board Order at 4–5.

II. AS A MATTER OF LAW, THE REPEAL AND COMPLETE REPLACEMENT OF THE COAL PROGRAM RULES REPEALED RULE B-15.

The Board's requirement for proof that Rule B-15 was intentionally repealed failed to recognize the legal significance of the complete replacement of the former UMC/SMC Rules with a new set of rules initially codified at R614 of the Administrative Code. Alton presented uncontroverted evidence (which the Board does not address in its Order) that Utah intended the new set of coal program rules to completely replace the earlier set. [3]

> Where an official code purports to cover the entire field of regulation, any prior law not included in the code is repealed. The fact of non-inclusion is sufficient to create the repeal and the law excluded need not be inconsistent with included material. Nor is it necessary that the code expressly repeal omitted materials. The repeal is an implied one resulting from the intent of the legislature to create a single, complete and exclusive body of law in substitution for all previous enactments.

[3] ACD's Memorandum of Supplemental Authority, pp. 2-4 (admitted by the Board and considered in the Board deliberations. Order, n. 1 at 2.)

1A Singer & Singer, Sutherland Statutory Construction § 28:13 (2009 New Ed.) (emphasis supplied).

Alton produced correspondence between Utah and the federal Office of Surface Mining ("**OSM**") which clearly proved that Utah intended its new rules to create a "single, complete and exclusive" body of law for the Utah Coal Program by the repeal of the previous regulatory scheme. In that correspondence, Utah took great care to advise OSM that it had completely repealed and replaced its former rules. Ltr. from Dianne Nielson to Robert Hagen dated Jan. 6, 1992 (Attachment 4 to Alton's Memorandum of Supplemental Authority) ("Utah has completed the administrative process to repeal the SMC/UMC rules, specifically R614-1A through R614-2Q . . . effective December 31, 1991").[4] OSM, for its part, recognized the complete repeal and replacement by return letters to Utah, and published its conclusions in the Federal Register. Attachments 4 and 6 to Alton's Memorandum of Supplemental Authority, where Utah asserts, and OSM confirms, that the new rules are intended to completely replace the older rules.) The Board Order fails to specifically address evidence provided by Alton that Utah had submitted, and OSM had approved, "a completely new set of rules which will replace those approved earlier. . . ." Office of Surface Mining, Final Rule: Approval of Amendment, 55 Fed. Reg. 13,773, 13,774 (April 12, 1990).

[4] The Board reaches an unreasonable conclusion that Rule B-15 survived this comprehensive repeal and replacement even though it was incorporated by reference into the SMC/UMC rules, and the referencing rule was repealed and replaced by a new rule incorporating the Board's revised rules of practice and procedure at R619. Utah repealed its rule (R614-2Q) that incorporated Rule B-15 into its Coal Program, and replaced it with a rule (R645-300-200) that did not incorporate Rule B-15.

III. THE THREAT OF OSM OVERSIGHT WAS AN IMPROPER BASIS FOR THE BOARD'S DECISION TO SET A BAD FAITH STANDARD.

The Board's concern that Utah's coal program primacy would be lost if it adopted anything other than a "bad-faith standard" was rooted in improper speculation. The Board's decision to adopt the bad faith standard on this basis was arbitrary and capricious, and therefore subject to reversal by the Utah Supreme Court if not corrected. Whether OSM would take the extreme measure of seeking to revoke Utah's program or even whether OSM would have found any alternative fee standard inadequate (such as the frivolous and unwarranted standard advocated by Alton) is premature and speculative unless and until OSM successfully brings an oversight action against the state under 30 C.F.R. § 733.

The concern relating to loss of state program primacy, offered as the basis for enacting the bad faith standard, is a remote and speculative reason that cannot support agency action. See Utahns for Better Transp. v. Utah Dept. of Transp., 305 F.3d 1152, 1166 (10th Cir. 2002) (rejecting speculative reasons for decision as arbitrary and capricious); IMC Kalium Carlsbad, Inc. v. Int. Bd. Land App., 206 F.3d 1003, 1011 (10th Cir. 2000) (Agency decision based upon speculation could not be upheld). Even if OSM were to proceed with the actions under 30 C.F.R. § 733, as the Division apparently fears, any real effect on state primacy is several administrative steps away, if it ever occurs.[5] And even in that event, the Board's reasoning is faulty because such an action would not necessarily preclude the

[5] OSM's rules and policies at 30 C.F.R. § 733 require notice to Utah of a possible violation, followed by Utah's response. If OSM finds Utah response inadequate, Utah can seek review by the Regional Director. Thereafter, an action to diminish or revoke Utah's primacy requires action by the OSM Director in Washington, D.C. That action, in turn is subject to review by the Interior Board of Land Appeals and judicial review in federal court.

"frivolous, unwarranted or unfounded" fee shifting standard applied by Utah courts. Before OSM initiates action challenging Utah's primacy, it would be required to demonstrate that any rule Utah adopted was less effective than a corresponding federal rule, and that the Board's adoption of a "frivolous" standard applicable under State law is itself arbitrary and capricious.[6]

IV. THE BOARD SHOULD ADOPT THE FRIVOLOUS, UNWARRANTED OR UNFOUNDED STANDARD EMPLOYED BY UTAH COURTS.

Utah's Supreme Court, in this matter, has emphasized that Utah law, not federal law, controls the Utah Coal Program. Utah Chap. Sierra Club v. Bd. of Oil, Gas & Mining, 2012 UT 73, ¶¶ 41–42. In Utah, when a statute is silent regarding the standard for awarding attorney's fees, fees will be awarded upon a showing that the action was frivolous or unwarranted. See World Peace Movement v. Newspaper Agency Corp., 879 P.2d 253, 261 (Utah 1994). The Tenth Circuit Court of Appeals, in affirming a Utah federal district court, similarly applied a standard incorporating the frivolous and unwarranted language in environmental litigation under the Clean Water Act. Browder v. City of Moab, 427 F.3d 717, 721 (10th Cir. 2005); see also Sierra Club v. Cripple Creek & Victor Gold Mining Co., 609 F. Supp.2d 943 (D .Colo. 2006) (employing the standard set forth in Browder). Rather than revive a long-dead, unpublished rule, the Board should have looked to relevant Utah case law to fashion an appropriate standard for awarding fee petitions.

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[6] The issue is clouded because the Division and OSM make the unfounded assumption that Utah's fee shifting rule must be identical to the federal rule to be considered "no less effective" than federal law. This lockstep approach is unjustified where the Board is following Utah law which controls the Utah Coal Program and a potential OSM enforcement action against Utah on those grounds would fail. Utah Chap. Sierra Club v. Bd. of Oil, Gas & Mining, 2012 UT 73, ¶¶ 41–42.

V. THE BOARD SHOULD REVERSE ITS CONCLUSION THAT RULE B-15 REMAINS APPLICABLE IN LIGHT OF THE DIVISION'S ADMISSION THAT IT HAS LAPSED.

The Board's decision is subject to reversal because it arbitrarily and capriciously determined that Rule B-15 remains in effect, even though the Division had advised OSM that it intended to "take such action as is necessary to reinstate and publish the rules in the Utah Administrative Code." Ltr. from John R. Baza to Al Klein, Regional Director, OSM at 2 (Feb. 13, 2013). This action includes initiating rulemaking procedures before this Board. While an agency is free to change its position, it must present a reasoned explanation for the deviation. It is contradictory, and therefore unreasonable, for the Board to entertain the Division's rulemaking effort while simultaneously holding that the rule in question remains in effect. See R.O.A. Gen., Inc., v. Utah Dep't. of Transp., 966 P 2d 840, 842 (Utah 1998). In addition, requiring the public to adhere to unpublished rules, (such as Rule B-15, which has been absent from every authorized compilation) has itself been reversed as arbitrary and capricious agency action. See Everett v. Baltimore Gas & Elec. Co., 513 A.2d 882, 892 (Md. 1986). The Board should reconsider and reverse or withdraw its legal conclusion that Rule B-15 remains in effect.

CONCLUSION

Alton submits this Request for Reconsideration because the Board Order, in its present form, would be rejected on appeal as arbitrary, capricious, and contrary to existing law. When presented with the complex question of whether to apply a long-unpublished fee shifting Rule B-15 that was part of a completely replaced code, the Board was obliged to turn to the existing, authoritative

compilation of Utah's administrative rules. The Board unfairly burdened Alton with proving that the disputed Rule B-15 had been repealed, without recognizing the legal significance of Utah's complete repeal and replacement of its rules.

RELIEF REQUESTED

Before seeking extraordinary relief in the Utah Supreme Court, Alton respectfully requests that the Board Reconsider its Order of March 27, 2013, and modify it as follows:

1. Find that Petitioners and the Division failed to prove that Rule B-15 remained in effect;

2. Find that the absence of Rule B-15 from the authorized compilation of the Utah Administrative Code, together with evidence showing that Utah intended to completely repeal and replace its existing rules with the rules now appearing the in code, demonstrates clearly and convincingly that Utah intended to repeal its existing rules including Rule B-15;

3. Apply a frivolous, groundless or unreasonable standard as set in Browder v. City of Moab, and in World Peace Movement v. Newspaper Agency Corp. to the award of attorneys' fees under Alton's fee petition.

RESPECTFULLY SUBMITTED this 16th day of April, 2013.

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing **REQUEST FOR RECONSIDERATION** were e-mailed on April 16, 2013, to the following:

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