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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**

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| UTAH CHAPTER OF THE SIERRA CLUB, et al,<br>Petitioners,<br>vs.<br>UTAH DIVISION OF OIL, GAS & MINING,<br>Respondent,<br>ALTON COAL DEVELOPMENT, LLC and KANE COUNTY, UTAH,<br>Respondent/Intervenors. | **DIVISION'S RESPONSE TO ACD'S REQUEST FOR RECONSIDERATION**<br><br>Docket No. 2009-019<br>Cause No. C/025/005 |

The Utah Division of Oil, Gas and Mining submits this Response to ACD's Request for Reconsideration of the Board's Decision of March 27, 2013. Although the Division has not taken a position regarding ACD's Petition for an Award of Attorney Fees, the Division has a substantial interest in eliminating uncertainty concerning the status of the rules governing an award of attorney fees under the Utah Coal Mining and Reclamation Act.

## ARGUMENT

### I. SINCE THE BOARD'S DECISION IS NOT A FINAL ORDER, A REQUEST FOR RECONSIDERATION IS NOT APPROPRIATE.

## A. The March 27th Board Order Fails to Qualify as "Final" Under Utah Law

A Request for Reconsideration is governed by Board Rule R641-110-200 Rehearing and Modification of Existing Orders; and by Section 302 of the Utah Administrative Procedures Act, Utah Code Ann., Title 63G, Chapter 4 ("UAPA"). Under the Board's Rule, "a person affected by a *final order* or decision may file a petition for rehearing." R641-110-100 (emphasis added). Under UAPA, the right to seek reconsideration is available if the order "would . . . constitute *final agency action* . . . ." Utah Code Ann. § 63G-4-302(1)(a) (emphasis added).

The term "Final Order" is not defined in the Board's rules or by UAPA, however the Utah Supreme Court has established a three part test to determine whether an agency decision qualifies as "final." All three of the following questions must be answered in the affirmative for an order to qualify as "final agency action":

> (1) Has administrative decision making reached a stage where judicial review will not disrupt the orderly process of adjudication?;
>
> (2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and
>
> (3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action?.

*Heber Light & Power Co. v. Utah Public Service Comm'n*, 2010 UT 27, ¶ 7, 231 P.3d 1203 (citing *Union Pacific R. R. Co. v. Utah State Tax Comm'n*, 2000 UT 40, ¶ 16, 999 P.2d 17).

When evaluated against these criteria the March 27th Order does not qualify as a final order because its fails to satisfy the second and third prongs of the foregoing test. Without question, the order is preliminary. Neither party's claims have been effectively dismissed not have their claims been resolved by the Order. Each party must still present the facts that support their claims to fees and the amount of the fees they claim. After each party has

presented its evidence, the Board will decide whether attorney fees will be awarded. Thus the March 27th Order does not establish legal obligations; it merely sets the stage for the Board to decide whether to award fees. As such it is a preparatory, procedural, and intermediate ruling and cannot be considered "final agency actions." *See Heber Light & Power Co. v. Utah Public Service Comm'n*, 2010 UT 27, ¶¶ 8-9, 231 P.3d 1203 (holding that agency action is not "final" unless it marks the end of the agency's decision making process). Moreover, the Board Order did not contain a section specifying that the parties could seek judicial review or reconsideration. This is a strong indication that the Board itself did not consider the Board Order as a complete resolution of the issues or the end of the agency's decision making process. *See id.* (noting that a factor in deciding whether agency action is final is if the order contains a "Notice of Appeal Rights" section specifying the parties' appeal options). Accordingly, the Board Order is not a "final order" eligible for reconsideration.

Admittedly, that legal conclusion that B-15 applies will make a substantial difference in the factual burdens and the potential outcome of the case, but legal rulings at the commencement of cases often have such an effect. The substantial effect of a ruling on the subsequent proceedings is not the test for finality. Rather the order must leave no issues unresolved . *Union Pacific R. R. Co. v. Utah State Tax Comm'n*, 2000 UT 40, ¶ 16, 999 P.2d 17); *Code v. Utah Dept. of Health* 133 P.3d 438 (2006) (For a judgment to be final it must be definite and unequivocal in finally disposing of the matter).

Even when seeking certification of an order for appeal under Rule 54 of the Utah Rules of Civil Procedure, the final order must be a final resolution of at least one of multiple claims. For certification there are three requirements: multiple claims; the order must be appealable except for the fact that there are other claims; and the trial court must determine

that there is no just reason for delay. *Powell v. Cannnon,* 179 P. 3d 799 (2008) In this matter there are separate claims for fees to separate parties, but it cannot be said that either claim alone is final for purposes of appeal.

**B. The Board Has Yet to Define "Bad Faith"**

The Board is selected for its expertise and charged by statute with responsibility for the interpretation and administration of the Coal Act and its rules. *See* Utah Code Ann. § 40-10-6 and *Utah Sierra Club v. Board*, supra. Rule B-15 and the bad faith standard it contains (although similar to the federal rule and the rule in other states) has not previously been applied in Utah. When the Board applies the rule to these claims it will likely clarify the meanings of terms in the rule that are pivotal in making an award determination. The Rule provides, among other things, that a permittee may be awarded costs and expenses including attorney's fees "where the permittee demonstrates that the person initiated a proceeding . . . or participated in such a proceeding *in bad faith for the purpose of harassing or embarrassing the permittee*." The Board must define this "bad faith" standard and then apply it to a set of facts before it is subject to reconsideration or judicial review.

Therefore, since the March 27th Board Order does not meet the requirements of a final order, neither the Utah Admin. Code R641-110-100 nor Utah Code Ann. § 63G-4-302 provides for a right of reconsideration.

**II. EVEN IF THE ORDER IS DEEMED FINAL, THE REQUEST DOES NOT SET FORTH GROUNDS THAT WARRANT RECONSIDERATION.**

Even if the Board finds that the March 27th Board Order is final or believes that it should consider the Request for other reasons, the Board should deny ACD's Request for Reconsideration since the Request fails to satisfy the Board's requirements to warrant reconsideration.

Utah Admin. Code R641-110-200 provides that "[a] petition for rehearing will set forth specifically the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence . . . ."

**A. ACD's Request Is Not Based On Newly Discovered Or Omitted Evidence.**

The Board's rule requires that when a petition for rehearing is based on newly discovered evidence or on evidence it alleges the Board failed to consider, the motion must include an abstract of evidence that it claims the Board failed to consider or an affidavit setting forth the nature and extent of newly discovered evidence. *See* Utah Admin. Code R641-110-200. ACD's petition does not allege newly discovered evidence and does not include the requisite affidavit. The Request alleges a failure to consider certain facts, but there is no abstract of omitted evidence. The alleged failures to consider the evidence, relate to facts that are contained in the record and were considered by the Board when deliberating the Order.

**B. ACD's Request Fails To Demonstrate That The Decision Is Unfair, Unreasonable Or Unlawful.**

The only remaining reason for granting rehearing under Rule R641-110-200 is that the decision is unlawful, unreasonable or unfair[1]. The five arguments presented in ACD's Request for Reconsideration all essentially claim that the Order is "unlawful". The arguments are: (I) "the record does not support a finding of continued applicability of Rule

[1] The UAPA does not set out similar pleading requirements or standards for allowing reconsideration and is silent as to the requisite findings. Since the provisions of the Board's Rule R641-110-200 are not inconsistent with UAPA they should apply to this request.

B-15" ; (II) "As a matter of law, the repeal and complete replacement of the Coal Program Rules repealed Rule B-15" ; (III) "the threat of OSM oversight action was an improper basis for the Board's decision to set a bad faith standard"; (IV) "the Board should adopt the frivolous, unwarranted or unfounded standard employed by Utah courts"; and (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 Division responds to each argument as follows:

**i. Rule B-15 Remains an Enforceable Rule as a Matter of Federal and State Law**

ACD argues that because Rule B-15 is not now printed in the Utah Administrative Code, Rule B-15 cannot apply in this case. ACD's argument ignores the federal requirement in SMCRA that any changes to approved rules must be submitted to OSM and be found consistent with SMCRA before the change can be effective. This point has been argued exhaustively, rejected by the Board, and does not need rehearing. (See March 27, 2013 Order at 3; citing *Ohio River Valley Envtl. Coal., Inc. v. Kempthorne*, 473 F.3d 994,97 (4th Cir. 2006) and 30 CFR §732.17(g))

ACD's argument also ignores Utah law. ACD argues that the general provision at Utah Code § 63G-4-701 that provides that rules published as part of the Administrative Code "shall be received . . . as evidence of the administrative law of Utah" should be interpreted to mean that the published rules *are* the administrative law in Utah, and since the rule is not in the administrative code it cannot be applied as a matter of Utah law. Such a strict interpretation of this section is not warranted. The UARA broadly defines a Rule as "a written statement that: (i) is explicitly or implicitly required by state or federal statute or other applicable law; (ii) implements or interprets a state or federal mandate; and applies to a class of persons or another agency." Utah Code § 63G-3-102(16)(a). This definition of a

rule does not limit the rules to the current published version of the Utah Administrative Code. Rule B-15 qualifies as a rule: it is "a written statement . . . explicitly or implicitly required by federal law that "implements or interprets a federal mandate". Furthermore an administrative decision is also a "rule" within the meaning of the Utah Administrative Rulemaking Act, see *Williams v. Public Service Com'n of Utah*, 720 P. 2d 773 (1986). Ultimately, the existence of a rule does not depend solely on its being part of the published Utah administrative code. The UARA does require that a rule eventually be adopted by complying with rulemaking procedures within 120 days of a final adjudicative decision (Utah Code § 63G-3-201(6)) or within 180 days of the effective date of a statute (Utah Code § 63G-3-301(13)). Nevertheless the Board correctly determined that Rule B-15 was and is required by federal law, was properly adopted, has not been rescinded and therefore is a rule as a matter of state law that remains applicable in this case.

ACD also claims that since the Rule B-15 has not been published in Utah's rules for over thirty years, the Petitioners (and Division) had the burden to prove the rule was *not* intentionally repealed. This 'adverse possession' approach to deciding the applicable law is offered without any supporting legal authority. Furthermore, the argument flies in the face of the federal statute and rules (30 CFR §732.17) that the Board has found apply to Rule B-15 and the Utah Rulemaking Act as just explained. Even a long established change in an approved program requirement (that is found to have occurred inadvertently or at the least without specific evidence of an intention to make that change) cannot be *presumed to have been intended, and approved*, and therefore effective *unless proven otherwise*. Regardless of the length of time involved, the Board cannot just ignore federal and state law and *presume* that the mandated steps of for approval of a change to that rule have been met.

Even if the Division and Sierra Club did have the burden of proof on this point, the exhaustive record presented to the Board demonstrated beyond any applicable standard of proof that *changes* to the attorney fee rule *were not approved.* The Board was provided: (1) the comprehensive analysis and publication of reasons in the Federal Register completed by OSM for each change in the Utah Coal Program that was approved; (2) the federal compilation or list of all approved changes to the state program since 1981 (codified at 30 CFR 944.15) which do not include a specific discussion of the change to the standards in Board Rules governing fees; (3) the absence of any Board hearings where notice had been given, where opportunity for comment was provided; and where action to amend its rules regarding attorney fees was taken; and (4) OSM's February 15, 2013 letter to the Division immediately prior to the hearing stating that in its opinion and based on review of its records, a rule change had never been approved. This substantial evidence satisfies any burden of proof the Division may have had with regard to ACD's "repeal by adverse possession" argument.

**ii. When the Mining Rules Were Combined, There Was No Intention To Repeal Any Rule in the Utah Coal Program**

ACD argues that approval of a "complete replacement" of the coal rules with a new version that did not contain the attorney fee rule is sufficient to comply with the federal requirements for approval. This argument was also fully briefed and argued and is directly addressed in the Order.[2] The alleged 'complete replacement' is acknowledged by ACD to have been for the purpose of changing from two sets of rules, (one for underground mining

[2] See Order, parts I. and IV. and f. n. 2, page 6 "To the extent that ACD suggests these actions [references to R641 rules in 1980s and 1990s amendments] constitute 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 an implied intention by OSM to approve the repeal of the bad faith standard." And " The secretary has not approved the repeal of or amendments to Rule

and one for surface mining) to a unified set. (Request at 4) Thus, this 'complete rewrite' was focused on the Coal Rules and not on a review of the attorney fees rules that reasonably were assumed to be contained in the Board rules that are only referenced in the Coal Rules. Once again, this idea of implied repeal and approval (like the argument concerning the burden of proof), ignores the specific findings required by federal law. This argument was presented and rejected by the Board and is not a basis for reconsideration.

**iii. The Board's Decision Was Not Based on Concern of OSM Oversight**

The Board Order does not state or imply that the basis of Board's decision to enact the "bad faith" standard in this case was motivated by a threat of oversight by OSM. ACD's assertion to the contrary is speculation and is not supported by the reasoning set forth in the Board Order or by any other evidence. In fact, ACD fails to point to any section of the Board Order that states the "bad faith" standard is being applied out of apprehension of OSM oversight. While the Division and the Board strive to satisfy the oversight agency's requirements and comply with federal law in order to maintain state primacy over the Utah Coal Program, fear of oversight is not the driving force behind the decision to apply the "bad faith" standard in this case.

**iv. ACD's Desire That a Different Standard Apply Is Not an Adequate Reason to Grant Reconsideration**

ACD argues that the Board should not have adopted the "bad faith" standard, but should have crafted a different standard. It argues that in enacting the "bad faith" standard, the Board "revive[d] a long-dead unpublished rule." Request at 6. First, the Division reiterates that Rule B-15 is not "long-dead" simply because it was not printed in the Administrative Code. Indeed, the Board held that Rule B-15 "*remains* in effect." Board

Order at 5. Second, the "bad faith" standard is reasonable. Reconsideration is not required simply because ACD is dissatisfied with the Board's conclusion.

### v. The Division Did Not Admit Rule B-15 Has Lapsed

ACD claims the Division's announced intention to pursue rulemaking in order to remedy the absence of the B-15 Rule in the published code is an admission by the Division that Rule B-15 is not in effect and that the Board is illegally applying a non-existent rule. This argument mischaracterizes the Division's position and intentions. The Board has ruled that the B-15 rule is in effect. The Division's decision regarding how to re-establish the rule as part of the published code does not effect that conclusion.

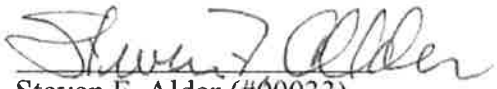
The case authorities cited by ACD to support their claim for rehearing, do not involve situations similar to the facts of this case and rather support the Division's argument that the correct action is to enforce the correctly adopted rule. In *R.A.O. Gen., Inc., v. Utah Dep't of Trans.*, 966 P. 2d 840 (Utah 1998), the court held that it was not legal for UDOT to rely on an unwritten policy when appointing persons other than the Director as a hearing examiner since their rules expressly required the Director to serve as hearing officer. This case is not applicable. Rule B-15 was properly adopted and remains necessary to comply with and interpret federal law. It was its *omission* from the published rules that occurred without compliance with the UARA. In *Everett v. Baltimore Gas & Elec. Co.,* 513 A. 2d 882 (Md 1986), the court refused to enforce a policy that had not been adopted by procedures that required notice of the change. This case is consistent with the Board's Order. The question before the Board was whether a rule that was properly adopted remains in effect when it has been inadvertently omitted from the published code. Since Rule B-15 was properly noticed

and adopted, it would be arbitrary and contrary to the rule stated in *R.A.O.* and *Everett* to apply a rule change that was the result of inadvertence.

## CONCLUSION

The Request for Reconsideration should be denied since the Order is not a final Order. If the Request is considered for other reasons, the Request fails to state any basis for finding that the Board's Order is unfair, unreasonable or unlawful and therefore requires reconsideration. The Order that the Rule B-15 remains effective was correctly found to be is required by federal law and is constitute with the definition of a rule under state law. It would be arbitrary to apply a rule that was inadvertently omitted without notice and opportunity for hearing and without approval of the change as required by federal law solely for the reason that it is in the published version of the Utah Administrative code.

SUBMITTED this 17th day of May, 2013.



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CERTIFICATE OF DELIVERY

The undersigned does herby certify that a true and correct copy of the foregoing DIVISION'S RESPONSE TO REQUEST FOR RECONSIDERATION was delivered to the following persons at the addresses shown this 17th day of May, 2013

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