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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

REQUEST OF THOMAS F. MILLER FOR AGENCY ACTION REGARDING THE DIVISION OF OIL, GAS, AND MINING'S ACTIONS CONCERNING THE VIPONT MINE, LOCATED IN SECTION 6 OF TOWNSHIP 14 NORTH, RANGE 17 WEST, SECTION 31 OF TOWNSHIP 15 NORTH, RANGE 17 WEST, AND SECTION 12, TOWNSHIP 14 NORTH, RANGE 18 WEST, IN BOX ELDER COUNTY, UTAH.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS REQUEST FOR AGENCY ACTION** **Docket No.: 2012-001** **Cause No.: S/003/ 035**

The Division of Oil, Gas, and Mining (Division) hereby files this Memorandum in Support of its Motion To Dismiss the above entitled Request for Agency Action (RAA). This Motion to Dismiss first asks the Board to require the Petitioner to amend the RAA to comply with the requirements for a Request as set forth in the Procedural Rules of the Board (Utah Administrative Code §R641-100-104-133.500, 133.600 and 133.700(2011)); and secondly, and in the alternative, this Motion ask the Board to dismiss the RAA to the extent that Petitioner seeks an award of monetary damages due to a lack of jurisdiction of the Board to grant the such relief.

ARGUMENT

I. THE REQUEST FOR AGENCY ACTION FAILS TO SATISFY THE REQUIREMENTS OF THE PROCEDURAL RULES OF THE BOARD.

Even making allowance for the fact that the Petitioner, Mr. Thomas F. Miller, is not an attorney and is allegedly making the claim on his own behalf, the RAA fails to meet the minimal requirements of the rules. The rules require that the RAA, (A) make clear the relief requested, (B) provide the facts and reasons in support of the Request, and (C) state the jurisdiction and legal authority of the Board to adjudicate the matter and provide the relief requested.

A. Failure to state the nature of the relief requested.

Most critical to the authority of the Board to adjudicate this mater, the Petitioner has failed to allege the nature of the relief requested as required by Utah Administrative Code § R641-100-104-133.600. It might be assumed that the Petitioner is asking for an award of damages, but that is never made explicit and is not clear. If the Petitioner is instead asking the Board to review actions by the Division alleged to have been made in violation of the Act and seeking other relief, then subject to objections as to timeliness of the claim, proof of a factual basis, and other defenses there may be grounds for the Board to hear the matter and authority to enter an Order remedying the alleged violation.

However, to the extent that the RAA is a claim for money damages against the State of Utah, the Board may be without jurisdiction to hear or decide the matter. The Petitioner must make clear the nature of the relief requested.

B. Failure to allege the legal authority and jurisdiction.

Petitioner is also required by Utah Administrative Code §R641-100-104-133.500 to set forth the legal authority and jurisdiction of the Board to take the action requested. The Petitioner has the burden to set forth the legal authority and jurisdiction of the Board to hear and adjudicate its claim including any claim for monetary damages. If the Petitioner claims that he does seek an award of money damages, the Division would argue that such a claim is outside of the jurisdiction of the Board and the matter should be dismissed. Even if the Petitioner concedes that this the nature of his claim, the Board should require the RAA to be amended since the Petitioner has the burden of setting out the jurisdictional basis for the RAA.

C. Failure to state the facts and reasons for the claim.

The Petitioner has failed to allege the facts and reasons upon which a claim might be based as required by Utah Administrative Code §R641-100-104-133.700. The RAA very succinctly claims Mr. Miller was damaged by reclamation work that the Division authorized. The RAA fails to state what action the Division took, and why the Petitioner believes the damages were the result of this action. The RAA fails to allege in what manner the Division's action was contrary the Act and applicable regulations.

The Request alleges that the Division unlawfully approved an NOI to Cadence Resources dated March 20, 2003. The Request fails to explain why this action was unlawful. According to the Division's records, although Cadence filed an annual report for the year 2003 as operator, the applicable NOI for the Vipont Mine during that period had been filed by Celebration Mining Company on March 23, 1995 by Jerry Stacey, as

PE and Vice President of Operations. The Request fails to explain how this allegedly invalid NOI, would invalidate the Reclamation Bond submitted by Aurora Oil and Gas as the successor company to Cadence Resources on December 7, 2006. The RAA fails to state when, how or why the approval of the NOI was improper and how this resulted in the alleged damages. Although there may be some liberality given the RAA is too vague to permit the Division to prepare a meaningful response.

II. THE BOARD IS WITHOUT JURISDICTION TO DETERMINE AND AWARD MONETARTY DAMAGES AGAINST THE STATE OF UTAH.

In the event the Board determines not to require the Petitioner to amend his RAA or in the event the Petitioner makes clear that he intends to seek an award of monetary damages, the Board should dismiss the RAA for lack of jurisdiction.

The Board's jurisdiction is limited to that conferred by statute. This is a basic principle of administrative law was repeated by the Utah Court in *Willliams v. Public Service Comm'n of Utah*, 754 P. 2d 41 (1988) as follows: "In determining whether the PSC acted reasonably in limiting its jurisdiction . . ., this Court is guided by the principle that where a " ' specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned.' "[citations omitted]". The Court in *Williams* went on to explain that an agency "can only assert those [powers] which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it. . . . [citations omitted] To ensure that the administrative powers of the PSC are not

overextended, 'any reasonable doubt of the existence of any power must be resolved against the exercise thereof.' [citations omitted]".

The Board of Oil, Gas and Mining was established by Utah Code § 40-6-4(2011). The provisions of this section set out the membership, terms of board members, and other administrative matters and provides that the Board is the policy making body for the Division. This section does not address jurisdiction (Utah Code §40-6-4(1)). Utah Code §§ 40-8-5(1)(a) (2011) grants the Board jurisdiction and authority to enforce the Utah Mined Land Reclamation Act. Utah Code §§ 40-8-6 (2011) delineates the Board's powers, functions and duties. These include rulemaking, holding hearings, issuing emergency orders, and "to do all other things and take such other actions within the purposes of this act as may be necessary to enforce its provisions." (Utah Code § 40-8-6(4)2011)) However, it is important that even this rather broad grant of a general power is limited to those acts "necessary to the purposes of the act". The purposes of the Act are set out in Utah Code § 40-8-3 and are limited to "provid[ing] that . . . all mining in the state shall include plans for reclamation of the land affected." There are not provisions in the Act to be enforced that addresses damages to an owner or operator as a result of reclamation or otherwise. There is no provision in the statutes granting the Board power to regulate mineral mining that includes determining or granting damages against the State for alleged improper acts by the Division.

By comparison, the grant of jurisdiction to the district courts by the Utah Constitution (Article 8, Section 5), and by general jurisdictional statute (Utah Code §§ 78A-5-101 and 102) includes "all matters civil and criminal not excepted by the

Constitution, and not prohibited . . . " Contrary to the grant of power to the Board, the jurisdiction of the district courts is broadly interpreted. The district courts are to be "open to all litigants for the redress of grievances, or the enforcement of rights." *Brady v. McGonagle*, 195 P. 188 (1921) Thus, the correct interpretation of these statues governing the jurisdiction for these adjudicative forums demonstrates the intent of the legislature for such claims to be filed with the district court.

In addition, the right of a state to avoid liability for certain acts by its agents is one of the rights most carefully protected by governments and is the basis of the doctrine of sovereign immunity. Utah Code § 63G-7-201(2011) provides that employees are immune from suit for any injury that results from the exercise of a government function. It would be all the more improper to imply from the general powers of the Board to enforce the Mined Land Reclamation Act, that the Act also granted the Board the power to make a determination of liability for monetary damages. The waiver of this right cannot be implied. *Greene v. Utah Transit Authority*, 37 P. 3d. 1156 (2001). Jurisdiction to hear and decide such a question should also not be implied from a the limited jurisdiction of the Board to enforce the Act.

CONCLUSION

The Division should not be placed in a position of having to respond to all possible claims that Petitioner's broad and sparse allegations might encompass. Most importantly, Mr. Miller is required by the rules to set forth the nature of the relief requested, the legal authority and jurisdiction and the facts and reasons for his claim. In

addition, if the claim can go forward, Mr. Miller must set forth the facts and reasons with sufficient specificity that the Division can respond with some clarity. The Division asks that the Board either dismiss the RAA without prejudice or in the alternative permit the Petitioner to file an Amended Request for Agency Action that satisfies the requirements of the rules and that if he fails to do so that the matter be dismissed.

To the extent that the Petitioner clarifies his claim or the Board interprets the RAA as seeking a monetary judgment against the State of Utah for the alleged improper actions of the Division, the Board should dismiss the RAA for lack of jurisdiction. The Board has limited powers as conferred by its statutes and those powers do not include authority or jurisdiction to adjudicate such claims or to grant a monetary judgment against the State of Utah.

Respectfully submitted this 10th day of January, 2012.

UTAH DIVISION OF OIL, GAS, AND MINING

Steven F. Alder
Assistant Utah Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on January 11th, 2012, a true and correct copy of the foregoing Memorandum in Support of Motion to Dismiss the Request for Agency Action was sent to the following by the method indicated.

By hand delivery to:

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By United States Mail, First Class Postage to:

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