

Haley Sousa (No. 14333)  
 Charles A. Lyons (No. 17583)  
 Assistant Attorneys General  
 Sean D. Reyes (No. 7969)  
 Utah Attorney General  
 1594 W. North Temple, Suite 300  
 Salt Lake City, Utah 84116  
 Tel: (801) 538-7227  
*Attorneys for Utah Division of Oil, Gas and Mining*

<b>BEFORE THE BOARD OF OIL, GAS AND MINING          DEPARTMENT OF NATURAL RESOURCES          STATE OF UTAH</b>	
In the matter of the Request for Agency Action of <b>TREE FARM, LLC</b> for a declaratory ruling regarding (1) the completeness of Tree Farm’s NOI-SMO S/035/0053; and (2) the sufficiency of Tree Farm’s proposed reclamation surety.	<b>DIVISION’S RESPONSE IN          OPPOSITION TO PETITIONER’S          REQUEST FOR AGENCY ACTION</b>  <b>Docket No. 2022-002          Cause No. S/035/0053</b>

The Division of Oil, Gas and Mining (“Division”) respectfully submits this Response in Opposition to Tree Farm, LLC’s (“Petitioner”) Request for Agency Action (“RAA”). The Division respectfully requests the Board of Oil, Gas and Mining (“Board”) deny Petitioner’s RAA for a declaratory ruling because: 1) Petitioner seeks to circumvent the purpose of the Utah Mined Land Reclamation Act (the “Act”); 2) the site is subject to a pending Notice of Intention to Conduct Large Mining Operations (“Large Mine NOI”) and mining operations may not be double permitted both under a Large Mine NOI and a Notice of Intention to Conduct Small Mining Operations (“Small Mine NOI”); 3) the Division is necessarily authorized to approve or deny Small Mine NOIs; and 4) Petitioner has not submitted a complete Small Mine NOI and its proposed reclamation surety is insufficient. The Division requests the Board affirm the Division’s decision to deny the Small Mine NOI.

## **I. Background and Procedural History**

On November 12, 2021, Petitioner submitted both a Small Mine NOI (Petitioner's Exhibit A) and a Large Mine NOI (Division's Exhibit 1) simultaneously. The Division immediately began processing both applications and on November 18, 2021 the Division provided a letter to Petitioner identifying several deficiencies in the Small Mine NOI ("Deficiency Letter"). *See* Petitioner's Exhibit C. The Division identified the same deficiencies and many others while reviewing Petitioner's Large Mine NOI.<sup>1</sup> Because both NOIs contained similar or identical deficiencies, and because Petitioner's intent to commence large mining operations is clear, the Division determined it should deny the Small Mine NOI and instead focus its attention on the Large Mine NOI in the interest of administrative efficiency and in furtherance of the Act's purposes. Therefore, the Division issued a denial of the Small Mine NOI on December 7, 2021. *See* Petitioner's Exhibit E. Shortly thereafter, Petitioner filed this RAA.

## **II. Petitioner Seeks to Circumvent Public Participation Requirements in the Act**

While the process for review of Small Mine NOIs and Large Mine NOIs is substantially similar, there are additional requirements for Large Mine NOIs mandated in the Act. Specifically, Large Mine NOIs are subject to a public comment component absent from the Small Mine NOI review process. Utah Code Ann. § 40-8-13(6)(b). By submitting a Large Mine NOI on the same day as a Small Mine NOI, Petitioner signaled clear intent to pursue large mining operations. Petitioner is effectively asking the Division to allow it to circumvent the public process required by the Act and to allow it to immediately begin disturbing the land under the Small Mine NOI, despite the possibility that Petitioner may not ultimately be allowed to mine

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<sup>1</sup> The Division completed its first review of the Large Mine NOI on December 15, 2021, identifying 94 deficiencies, available at <https://fs.ogm.utah.gov/FILES/MINERALS/PERMITS/035/M0350054/2021/Outgoing/12152021.pdf>

under a Large Mine NOI.<sup>2</sup> It appears the area sought to be permitted under the Small Mine NOI will primarily be used for facilities rather than active mining. If the Division issues a Small Mine NOI and allows Petitioner to disturb ground, but Petitioner is later unable to mine under a Large Mine NOI, the Division would be left overseeing reclamation of an area never actually subject to mining, in conflict with the intent of the Act.

Inter-agency coordination is required by the Act regardless of whether an operator is seeking a Small Mine NOI or a Large Mine NOI. Utah Code Ann. § 40-8-22. The Division has identified several federal, state and local stakeholders that either will be required to issue permits to Petitioner or who may wish to engage in the public comment period.<sup>3</sup> Indeed, the Division has already been contacted by officials with the Department of Environmental Quality to engage in pre-design meetings as part of the inter-agency coordination requirements.

In the interest of administrative efficiency and the desire not to duplicate efforts of multiple regulatory entities, the Division determined it should focus its efforts entirely on the Large Mine NOI, allowing for full public participation and inter-agency coordination prior to any land disturbance, as required by the Act. Proceeding with the Small Mine NOI prior to completing the review process for the Large Mine NOI would circumvent the legislature's requirement for public participation in the Large Mine NOI process.

### **III. Double Permitting of Sites is Not Authorized**

The Division has historically and consistently refused to double permit sites, whether it is two operators requesting distinct permits for a single site or whether it is a single operator

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<sup>2</sup> Petitioner will need several permits in order to mine under the Large Mine NOI, including but not limited to, water discharge permits, a fugitive dust permit, a storage tank permit, a conditional use permit, possibly a takings permit, among others. The denial of any one of these permits would preclude Petitioner from mining.

<sup>3</sup> Specifically, the Division identified at least three divisions within the Department of Environmental Quality, Salt Lake County, the United States Fish and Wildlife Service, MSHA, and UDOT at the very least. There may be others that the Division has not identified.

requesting two permits for a single site. This policy is necessary to meet the purpose of the Act to ensure that all mining in the state results in “reclamation of the land affected.” Utah Code Ann. § 40-8-3. The Act defines “reclamation” as “actions performed during or after mining operations to shape, stabilize, revegetate, or treat the land affected in order to achieve a safe, stable, ecological condition and use which will be consistent with local environmental conditions.” Utah Code Ann. § 40-8-4(28). If a parcel is subject to multiple permits, it unnecessarily complicates determining appropriate bonding amounts for the affected area within each permit and precludes the Division from releasing surety to an operator who has ceased mining if the land affected is covered under a different active permit.

The Act provides the Board with authority to revoke a permit and require mining operations within the permit area to cease. Utah Code Ann. § 40-8-16. However, if a permit area is subject to more than one permit, it is impossible to require operations to cease on one permit without ordering cessation on another permit that may be in full compliance with the Act – something the Act does not authorize the Division to do. As such, the Division has always interpreted the Act as allowing for a single permit for a single site. Allowing a site to be subject to multiple permits frustrates the purpose of the Act and makes administration of the Act likely impossible. Because Petitioner’s intent to engage in large mining operations is clear, the Division should only process the Large Mine NOI.

#### **IV. The Division Has the Authority to Refuse Approval of Small Mine NOIs**

Petitioner states the Division does not have the authority to deny a Small Mine NOI. Instead, Petitioner claims the Division only has authority to approve the form and amount of the surety. While the Division concedes that the statutory references relied on by Petitioner do suggest that the Division doesn’t have authority to deny a Small Mine NOI, the Division

nonetheless rejects this interpretation and requests the Board do the same. Reading the statute as Petitioner suggests would lead to the absurd result that the Division does not have *any* jurisdiction to regulate small mines in the state of Utah. Yet legislative intent clearly demonstrates the legislature expects the Division to enforce the Act on small mine operations.

*a. Absurdity Doctrine*

It is commonly noted that if the meaning of a statute can be determined by its plain language, then no other statutory interpretive tools are necessary. *LPI Servs. V. McGee*, 215 P.3d 135, 139 (Utah 2009). However, the Utah Supreme Court has noted if the plain language leads to absurd results, it is permissible to “read a statute contrary to its plain meaning.” *Bagley v. Bagley*, 387 P.3d 1000, 1010 (Utah 2016). While this absurdity doctrine is a “narrow and exacting standard,” it is appropriate here because “the operation of the plain language is so overwhelmingly absurd that no rational legislator could have intended the statute to operate in such a manner.” *Id.*

The absurdity doctrine “reforms unambiguous statutory language where that language would lead to an absurd result.”<sup>4</sup> *Id.* at 1009. When unambiguous language leads to an absurd result, the doctrine instructs to “first consult the express purpose of the statute or, absent a statement of statutory purpose, legislative history to ensure that an absurd result was not intended by the legislature before we apply the doctrine to reform a statute.” *Id.* at 1010.

In *Garfield County v. United States*, the Utah Supreme Court employed the absurdity doctrine to “reform” a statute to allow the text to be interpreted as a statute of limitation even though the plain language of the statute designated a statute of repose. *Garfield*, 424 P.3d 46

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<sup>4</sup> There are actually two interpretive tools related to absurdity that are often confused. The absurd consequences canon resolves ambiguity by choosing an interpretation that avoids an absurd result. This is different than the absurdity doctrine, which is applied where unambiguous statutory language leads to an absurd result.

(Utah 2017). The Court did so because if the plain language statute of repose was applied in R.S. 2477 cases, it would lead to the absurd result that “cut off the State’s ability to protect rights of way that accrued since 1866-despite the fact that no mechanism to defend such property interests had been created judicially or legislatively until 1972.” *Id.* at 58. The Utah Supreme Court noted that if the plain language were instead reformed to be interpreted as a statute of limitation, then the State would be able to defend its property interests and proceed with its cases.

*b. Legislative Intent*

The express purpose of the Act clearly shows legislative intent to allow the Division to enforce the Act on small mine operations. Utah Code Ann. § 40-8-3 states “the purpose of this act is to provide that . . . *all* mining in the state shall include plans for reclamation of the land” (*emphasis added*). Additionally, the “objectives” of the act are to 1) return the land to a stable condition capable of supporting future use; 2) minimize on and off-site environmental degradation; and 3) to minimize or prevent harm to the public safety or welfare. *See* Utah Code Ann. § 40-8-12. In order to ensure all mines are reclaimed and that all mining activity is conducted so as to reduce or prevent harm to the public, it is necessary for the Division to have inspection and enforcement authority over all mines in the state of Utah, including small mines.

If the Board adopts the interpretation put forward by Petitioner, it leads to the absurd result that the Board and Division have little or no jurisdiction over small mines. Many statutory provisions contained in the Act are only applicable only to “approved” NOIs and if the Division doesn’t have the ability to “approve” Small Mine NOIs, then the Division and the Board lack enforcement jurisdiction with respect to small mines.

Specifically, Petitioner’s interpretation means the Division lacks the authority to enter a small mine to inspect it (Utah Code Ann. § 40-8-17(2));<sup>5</sup> the Board and Division lack the authority to require small mine operators to post bond (Utah Code Ann. § 40-8-14(1)(a)<sup>6</sup> and § 10-8-16(2)(b));<sup>7</sup> the Board lacks the authority to require small mine operators to reclaim sites they may have either abandoned or expanded beyond the original NOI (Utah Code Ann. § 40-8-16(2)(a), (c));<sup>8</sup> the Board or Division lack the authority to require small mine operators to amend or revise their NOI in the event their mining operations change over time, even if the small mine operator increases its footprint from one acre to twenty (Utah Code Ann. § 40-8-18(1)(a));<sup>9</sup> the Division lacks the authority to require notification of commencement of operations or annual reporting (Utah Code Ann. § 40-8-15).<sup>10</sup>

Petitioner’s interpretation also has negative consequences for small mine operators because Petitioner’s interpretation means that small mine operators don’t have the ability to transfer their permits to other small mine operators without first fully reclaiming the site (Utah

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<sup>5</sup> “As a condition of consideration and **approval** of a notice of intention, each applicant or operator . . . shall permit members of the board, the division . . . at all reasonable times, to enter the affected land . . . to make inspections.”

<sup>6</sup> “After receiving notification that a notice of intention for mining operations has been **approved**, but prior to commencement of those operations, the operator shall provide surety to the division.”

<sup>7</sup> “**Approval** may be withdrawn in the event that the operator fails to provide and maintain surety as may be required under this chapter.”

<sup>8</sup> “(a) **Approval** may be withdrawn in the event that the operator substantially fails to perform reclamation or conduct mining operations so that the approved reclamation plan can be accomplished” and “(c) **Approval** may be withdrawn in the event that mining operations are continuously shut down.”

<sup>9</sup> “Since mining operations and related reclamation plans may need to be revised to accommodate changing conditions or new technology, an operator conducting mining operations under an **approved** notice of intention shall submit to the division a notice of intention when revising mining operations.”

<sup>10</sup> “(1) Within 30 days after commencement of mining operations under an **approved** notice of intention, the operator shall give notice of such commencement to the division. (2) At the end of each calendar year, unless waived by the division, each operator conducting mining operations under an **approved** notice of intention shall file an operations and progress report with the division on a form prescribed in the rules promulgated by the board.”

Code Ann. § 40-8-19).<sup>11</sup> Similarly, under Petitioner’s interpretation, small mine operators are not entitled to a permit that is valid for the life of the mine (Utah Code Ann. § 40-8-16(1)).<sup>12</sup>

Because each of the statutory provisions above are only applicable to “approved” NOIs, e.g. the Board may withdraw “approval” of an NOI when the operator fails to maintain adequate surety, the inability of the Division to “approve” Small Mine NOIs leads to the absurd result that the Division and the Board effectively lack substantial jurisdiction with respect to small mines. This interpretation also erodes the rights of small mine operators because only “approved” NOIs may be transferred, and the Division is only required to issue permits for the life of the mine to “approved” NOIs. Petitioner’s interpretation not only harms the Division’s administration of the Act, but also harms the rights of small mine operators.

*c. Legislative History*

Although the statutory purpose and objectives are clear that the Division must have full authority over small mines, there is also enlightening legislative history relevant to this case. The Act was first passed in 1975. At that time, the statute did not differentiate between small and large mines, although it did include an exemption for some mining operations.<sup>13</sup> The distinction between large and small mines was not created until an amendment in 1986, which added a definition for small mines and eliminated the exemption for some mining operations created under the 1975 Act. Then in 1987, the legislature again amended the statute to include the language Petitioner relies upon wherein it seemingly exempts small mine operators from receiving approval of their NOIs. If the intent of the legislature was to exempt small mines from

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<sup>11</sup> “Whenever an operator succeeds to the interest of another operator who holds an **approved** notice of intention or revision covering a mining operation, by sale, assignment, lease, or other means, the division may release the first operator from his responsibilities under his **approved** notice of intention.”

<sup>12</sup> “An **approved** notice of intention or approved revision of it remains valid for the life of the mining operation.”

<sup>13</sup> The threshold to be exempt from compliance with the Mined Land Reclamation Act was production of less than 500 tons of material per year or less than two acres was used in a 12 consecutive month period.

regulation, it would have done so in 1986 and 1987. Additionally, there have been several amendments since, including two in 2020 that altered the definition of “small mining operation.” The legislature could have again exempted small mines from all regulation in 2020 had they honestly intended small mines to be exempted from regulation.

*d. Reformed Language Conforms with Legislative Intent and Legislative History*

Provisions in the Act, when read together, produce results consistent with legislative intent to regulate small mines that do not lead to absurd results. Specifically, the Division has authority to deny a Small Mine NOI so long as the operator is given an opportunity for a hearing with the Board, which is happening here. Utah Code Ann. § 40-8-16 states:

*Approval of a notice of intention may not be refused, withheld, nor withdrawn by the division until the operator, who holds or has applied for such approval, has had an opportunity to request a hearing before the board, present evidence, cross-examine, and participate fully in the proceedings. Based on the record of the hearing, the board will issue an order concerning the refusal, withholding, or withdrawal of the notice of intention. If no hearing is requested, the division may refuse, withhold, or withdraw approval of a notice of intention.*

*(Emphasis added)*. This interpretation is supported by Utah Code Ann. § 40-8-13(4)(b) which states that upon reviewing a Small Mine NOI, the Division will notify the operator of any objections to the notice and either: 1) allow the operator to cure the objections; or 2) allow the operator to “obtain a ruling relative to the objections from the board.”

The Board is able to meet the intent of the legislature without prejudicing small mine operators and without leading to the absurd result that the Division and Board lack jurisdiction over small mines by reading the Act to allow the Division to deny a Small Mine NOI so long as the operator is afforded an opportunity for a hearing with the Board. This is the only interpretation that allows the Division to carry on with its statutory enforcement authority while still protecting the rights of small mine operators.

## V. Petitioner's Small Mine NOI is Incomplete

Petitioner is not entitled to a declaratory ruling that its Small Mine NOI is complete because the Division's initial review of the Small Mine NOI indicated it was incomplete. Petitioner posits that because the Division's Deficiency Letter identified some deficiencies, and because Petitioner responded to those deficiencies, that it must therefore have a complete Small Mine NOI. However, Petitioner fails to recognize that the review process for both Small Mine NOIs and Large Mine NOIs is iterative, i.e. the Division and applicant may have several back-and-forth communications prior to arriving at a complete NOI.

In this instance, the Division identified new deficiencies based on Petitioner's response to the Deficiency Letter. Specifically, Petitioner submitted deficient x-ray fluorescence ("XRF") data and must also submit a map showing the location of each XRF data point, the units of each element, the latest certificate of calibration, and the methodology used in data collection. Also, Petitioner made commitments in its November 24, 2021 letter that need to be incorporated into the Small Mine NOI. *See* Petitioner's Exhibit C. The Division also identified that Petitioner submitted bond unit costs using 2019 figures that must be updated to the current year, a deficiency that was not included in the Division's Deficiency Letter, but that nonetheless must be remedied prior to a determination that Petitioner's Small Mine NOI is complete.

There may be other deficiencies not yet identified. The deficiencies described above were identified prior to the Division ceasing review of the Small Mine NOI and the Division's review of the Small Mine NOI is unfinished. Regardless, the Division's initial review of Petitioner's Small Mine NOI indicated it is incomplete. Therefore, the Petitioner is not entitled to a declaratory ruling that it submitted a complete Small Mine NOI. If the Board agrees with

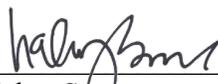
Petitioner that a Small Mine NOI is appropriate in this instance, Petitioner's Small Mine NOI must be remanded to the Division for further review.

## **VI. Conclusion**

The Division respectfully requests the Board uphold the Division's decision to deny Petitioner's Small Mine NOI. First, in submitting its Small Mine NOI at the same time as its Large Mine NOI, Petitioner is seeking to circumvent the purpose and intent of the Act. Second, the Division is not authorized to double permit a site and Petitioner has clearly shown its intention to pursue large mining operations. Therefore, the Division should only issue a single Large Mine NOI. Third, the Division necessarily has the authority to approve or deny a Small Mine NOI. Otherwise, the Division would lack most, if not all, jurisdiction over small mines in the state. Finally, Petitioner has failed to submit a complete Small Mine NOI and has not demonstrated the sufficiency of its reclamation surety. In the event the Board agrees with Petitioner that a Small Mine NOI is appropriate in this instance, Petitioner's Small Mine NOI must be remanded to the Division for further review.

Respectfully submitted this 10<sup>th</sup> day of January, 2022.

UTAH OFFICE OF THE ATTORNEY GENERAL



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Haley Sousa  
Charles A. Lyons  
Assistant Attorneys General  
1594 West North Temple, Suite 300  
Salt Lake City, Utah 84116-3154  
Tel: (801) 538-7227  
Email: [hsousa@agutah.gov](mailto:hsousa@agutah.gov)  
[calyons@agutah.gov](mailto:calyons@agutah.gov)

*Attorneys for the Division of Oil, Gas and Mining*

**CERTIFICATE OF SERVICE**

I hereby certify that, on this 10<sup>th</sup> day of January, 2022, I caused a true and correct copy of the foregoing **Division's Response In Opposition To Petitioner's Request For Agency Action** to be sent to the following:

By email:

Michael E. Begley  
*Assistant Attorney General representing the  
Board of Oil, Gas and Mining*  
[mbegley@agutah.gov](mailto:mbegley@agutah.gov)

Scott Baird  
Salt Lake County, Director of Public Works  
[scottbaird@slco.org](mailto:scottbaird@slco.org)

Stephen E.W. Hale  
Daniel A. Jensen  
Justin P. Matkin  
Kassidy J. Wallin  
*Attorney's representing Tree Farm, LLC*  
[shale@parrbrown.com](mailto:shale@parrbrown.com)  
[djensen@parrbrown.com](mailto:djensen@parrbrown.com)  
[jmatkin@parrbrown.com](mailto:jmatkin@parrbrown.com)  
[kwallin@parrbrown.com](mailto:kwallin@parrbrown.com)

Lupita McClenning, Director of Planning and  
Development  
Greater Salt Lake Municipal Services District  
Greg Baptist, Stormwater Inspection  
Supervisor  
[lmcclenning@msd.utah.gov](mailto:lmcclenning@msd.utah.gov)  
[gbaptist@msd.utah.gov](mailto:gbaptist@msd.utah.gov)

Rebecca Hotze  
Roger Kesterson  
United States Forest Service  
[rebecca.hotze@usda.gov](mailto:rebecca.hotze@usda.gov)  
[roger.kesterson@usda.gov](mailto:roger.kesterson@usda.gov)

Greg Sheehan  
Bureau of Land Management  
[blm ut so public room@blm.gov](mailto:blm_ut_so_public_room@blm.gov)

Rulon Harper  
c/o Amber Harper  
[amber@harpercompaniesinc.com](mailto:amber@harpercompaniesinc.com)

By mail:

Richards Family Partnership c/o Susan Trapp  
2313 E. Creek Rd.  
Cottonwood Hts, UT 84093 (address per  
Petitioner's Certificate of Service)

  
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# **Division's Exhibit 1**