

**BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH**

IN THE MATTER OF THE
REQUEST FOR AGENCY ACTION
OF TREE FARM, LLC 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

**COMBINED ORDER GRANTING
STIPULATION AND DENYING
MOTION FOR POLICY GUIDANCE**

INTRODUCTION

This matter presented novel procedural questions atypical to the usual processes associated with small and large mine permitting and administrative regulation.

In essence, there are three principle distinguishing features attributable to this matter: 1) **geography** – the proposed mine(s) and surface disturbance will occur in Parley's Canyon, Utah, which is immediately adjacent to the largest metropolitan area in Utah - Salt Lake City; 2) **timing** - the applicant filed documentation with the Division of Oil, Gas & Mining ("Division") requesting permits for conducting both a small and large mine operation – the simultaneous filing for both a small and large mine operation provided challenges to the Division and an opportunity for the Board

to re-evaluate the applicable statutes; and 3) **public safety** - the application processes commensurate with this matter generated significant public comment and opposition to the proposed mine(s) based on concerns over public health and safety – the Board is unaware of another matter that has generated that level of public concern or public interest.

Through this process, the Petitioner (Tree Farm, LLC) and the Division were able to reach an accord before the Board formally adjudicated the merits of this declaratory action. While the Board is appreciative of those efforts, the Board will take this opportunity to not only memorialize the Orders issued at the March 23, 2022, Public Hearing¹ but will also provide further guidance² by articulating its interpretation of the applicable statutory scheme as applied to this matter and/or any future analogous mining operation permit approval process.

FACTUAL AND PROCEDURAL BACKGROUND

On or about November 12, 2021, Tree Farm, LLC (“Tree Farm”) simultaneously filed a Notice of Intention (“NOI”) for a small mine³ and a NOI for a large mine⁴ regarding planned mining operations on privately owned acreage within Parley’s Canyon, Utah. The Division of Oil, Gas & Mining (“Division”) reviewed the NOIs

¹ The Board members at the March 23, 2022 Public Hearing included: Chris Hansen (Chair); Rich Borden (Vice Chair); Gordon Moon; LaVonne Garrison; Steve Church and Alan Walker. Board Member Selma Sierra was excused for personal reasons. The vote on the matters pending before the Board relevant to this cause was unanimous. The Board was represented by Michael Begley and Trevor Gruwell – both of whom are Assistant Attorney Generals.

² Per Utah statute, “[t]he board shall be the policy making body for the Division of Oil, Gas, and Mining.” Utah Code Ann. § 40-6-4(1)(b).

³ Tree Farm LLC, “Silver Mine,” S/035/0053.

⁴ Tree Farm LLC, “Silver Mine,” M/035/0054.

submitted by Tree Farm and denied the small mine NOI and continued to process the large mine NOI.

Tree Farm objected to the denial of the small mine NOI and filed a Request for Agency Action requesting a declaratory ruling from the Board of Oil, Gas & Mining (“Board”) that the Division’s denial of the small mine NOI was improper. Thereafter, several parties requested intervention⁵, which motions to intervene were granted by the Board.⁶ As discussed, significant public comment objecting to mining at the proposed location was also received.

The issue was fully briefed by the Division and Tree Farm and the matter was set to be presented to the Board during the February 2022 regularly scheduled public hearing. However, in evaluating the respective arguments advanced by Tree Farm, the Division and the Intervenors (“the Parties”), the Board elected to continue the matter and requested supplemental briefing from the Parties. The Board specified:

With respect to initial procedures under Utah Admin. Code R641-104, after careful consideration of the filings submitted by the parties in the above-captioned matter, the Board observed a gap in the briefing concerning how Utah Code Ann. § 40-8-7 should be interpreted, including but not limited to, how Utah Code Ann. § 40-8-7 fits into the overall structure of the Utah Mined Land Reclamation Act, and the potential interplay between Utah Code Ann. §§ 40-8-7 and 40-8-13.

See Combined Order Continuing Hearing and Requesting Supplemental Briefing (“Supplemental Briefing Order”), p. 1.

⁵ The parties requesting intervention included Millcreek City, Salt Lake City, Richards Family Partnership and Save our Canyons (collectively, “the Intervenors”).

⁶ *See* “Order Granting Intervention” dated February 11, 2022.

Continuing, the Board's Supplemental Briefing Order specifically stated: "[f]urther, the Board hereby ORDERS the parties to submit supplemental briefing specific to the respective powers and duties of the Division and Board based on the relief requested, the stated positions in opposition and Utah Code Ann. §§ 40-8-7 and 40-8-13." Supplemental Briefing Order, p. 2.

The impetus behind the Board's Supplemental Briefing Order was premised, in part, by Tree Farm's arguments suggesting:

The policy implemented by the State of Utah is to allow small mining operations to commence once a completed notice of intention for such operations has been submitted. Utah law does not contemplate an "approval" or "denial" by the Division as to a notice of intention. Rather, applicable Utah law provides for only a determination by the Division of the completeness of the notice of intention and a determination as to the sufficiency of the reclamation surety. Stated differently, there is no legal basis whatsoever for "denying" a properly complete notice of intention to commence small mining operations, as the Denial Letter purports to do, whether for "administrative efficiency" (as cited in the Denial Letter) or for any other reason.

See e.g., Tree Farm, Request for Agency Action ("RAA"), ¶ 18, pp. 4-5.

Despite Tree Farm's repeated assertions that the Division is limited to performing two ministerial functions regarding small mine NOI's, the record failed to present any arguments on the effect Utah Code Ann. § 40-8-7 has on these proceedings.

For reasons set forth below, the Board considers Utah Code Ann. § 40-8-7 to provide additional regulatory oversight on "all mining operations" conducted in Utah. As such, and despite Tree Farm's assertions to the contrary, depending on the issues

being presented, the Division is not limited to simply rubber-stamping small mine NOIs and/or the Division's scope of review on small mine NOIs is not limited to simply evaluating "completeness" and the "sufficiency of the reclamation surety."

ORIGINAL PARTIES FAILURE TO COMPLY WITH A BOARD ORDER

As noted above, on February 24, 2022, the Board issued its Supplemental Briefing Order which continued the proceedings to March 23, 2022 and directed supplemental briefing be submitted by the Parties. Despite the clear and unequivocal directives in the Supplemental Briefing Order, neither of the original Parties, Tree Farm and the Division, filed supplemental briefing on the relevant topic.⁷

Instead, on March 16, 2022, the original parties filed a Stipulated Motion to Dismiss ("Stipulated Motion"). The Stipulated Motion outlined that Tree Farm would no longer contest the Division's denial of the small mine NOI, Tree Farm would withdraw its previously filed large mine, and Tree Farm would re-file a small mine NOI. As part of the Stipulated Motion, the original Parties concluded that Tree Farm's RAA was now moot. This unilateral determination was done despite the fact the Stipulated Motion required Board review and approval.⁸

⁷ The record indicates that Intervenor Salt Lake City Corporation also failed to submit supplemental briefing and/or join in another submission by the other Intervenor.

⁸ In fact, the authority cited in support of the Stipulated Motion expressly requires a Board determination on the relief being requested. *See e.g.*, Stipulated Motion, p. 1 *citing* Rule 41(a)(2) of the Utah Rules of Civil Procedure ("[e]xcept as provided in paragraph (a)(1), an action may be dismissed at the plaintiff's request by court order only on terms the court considers proper." *See also* Stipulated Motion, p. 1 *citing* Utah Admin. Code R641-104-100.160 ("[m]otions may be submitted for the Board's decision on either written or oral argument and the filing of affidavits in support or contravention thereof may be permitted.")).

The Board reminds the original parties that it was not their determination to make as to whether the RAA was moot. Rather, under this matter's procedural history⁹, a determination of mootness occurs only after a Board action renders a matter or issue moot. Certainly, a premature determination of "mootness" by the original parties did not alleviate the preexisting requirement to comply with the Board's Supplemental Briefing Order. At an absolute minimum, under Utah law, if Tree Farm and/or the Division believed issues presented were moot, they had the burden of persuading the Board to make such a determination and did not otherwise have the authority to unilaterally decide mootness of the RAA and escape the requirements of the Board's Supplemental Briefing Order.¹⁰

The Board notifies the Parties that it expects and demands compliance with the Orders it issues.¹¹ If this situation occurs again, the Board intends on pursuing all avenues available to ensure compliance with the Board's regulatory authority.¹² Moreover, the Board reserves the right to assert any argument or defense in the future regarding non-compliance with a Board Order including, but not limited to, whether

⁹ Voluntary dismissal without Board action was unavailable to Tree Farm since responsive pleadings were filed and the Stipulated Motion was not signed by all the parties who appeared. *See e.g.*, Rule 41(a)(1)(A)(i) and Rule 41(a)(1)(A)(ii) of the Utah Rules of Civil Procedure.

¹⁰ *See generally*, *State v. Legg*, 2016 UT App 168, ¶ 9, 380 P.3d 360, 363, *aff'd*, 2018 UT 12, ¶ 9, 417 P.3d 592 ("The burden of persuading the court that an issue is moot lies with the party asserting mootness.") *Id.* (quoting *Salt Lake County v. Holliday Water Co.*, 2010 UT 45, ¶ 21, 234 P.3d 1105).

¹¹ The Board's rules also require ". . . representation at hearings before the Board will be by attorneys licensed to practice law in the state of Utah. . . ." Utah Admin. Code R641-102-200. This requirement is necessarily coupled with compliance with all rules of professional conduct including, but not limited to, complete candor to the tribunal and the requirement to disclose all controlling authority even if the authority is adverse to the client's position. *See* Utah R. Prof. Cond. 3.3(a)(2).

¹² *See e.g.*, Utah Code Ann. §§ 40-8-6(4) and Utah Code Ann. 40-8-9(1)(a).

there was a waiver and/or other preclusive effect resulting from failure to comply with specific directives contained in a Board Order.

STATUTORY ANALYSIS PROVIDED BY THE SUPPLEMENTAL BRIEFING

The majority of the Intervenors complied with the Supplemental Briefing Order. In the responsive submissions, the Intervenors largely confirmed the Board's interpretation of the operative statutes that are in play given the pertinent facts and issues presented in the matter *sub judice*.

Millcreek City accurately describes the general rules of statutory construction attributable to this matter.¹³ As referenced by Millcreek City, "Courts have 'repeatedly affirmed [a] commitment to interpreting statutes according to the 'plain' meaning of their text,' as that is the "best evidence of the legislature's intent." *S. Utah Valley Elec. Serv. Dist. v. Payson City*, 2021 UT 68, ¶ 20, 502 P.3d 272, 276. However, courts "do not interpret the 'plain meaning' of a statutory term in isolation," but against the "relevant context of the statute." *Id.* at ¶ 26. Further, the plain language of a statute is to be read "as a whole and interpret[ed] . . . in harmony with other statutes in the same chapter and related chapters." *State v. Harker*, 2010 UT 56, ¶ 12, 240 P.3d 780, 784.

Distilling Millcreek City and Save Our Canyons' arguments based on the referenced rules of statutory construction, it is clear Millcreek City and Save Our

¹³ Millcreek City's analysis, which the Board is referencing and incorporating herein, is contained in the Supplemental Brief of Intervenor Millcreek City, pp. 3-6. In addition, Save Our Canyons correctly filed a "Joinder in Millcreek City's Supplemental Brief."

Canyons interpret Utah Code Ann. §§ 40-8-7 and 40-8-13 as conferring broader regulatory authority to the Board and the Division well beyond the narrow interpretation of Utah Code Ann. 40-8-13 offered by Tree Farm.

Intervenor Richards Family Partnership also appropriately added to the analysis by referencing additional rules of statutory construction applicable to Tree Farm’s proposed mining operations.¹⁴ As cited by Richards Family Partnership, “[g]enerally, when interpreting statutes we seek to avoid interpretations “which render some part of a provision nonsensical or absurd.” *Marion Energy, Inc. v. KFJ Ranch P’ship*, 2011 UT 50, ¶ 26, 267 P.3d 863, 869. Similarly, Richards Family Partnership cites this rule of statutory construction, “we avoid any interpretation which renders parts or words in a statute inoperative or superfluous in order to give effect to every word of a statute.” *Monarrez v. Utah DOT*, 2016 UT 10, ¶ 11, 368 P.3d 846, 852.

Richards Family Partnership essentially joined the other parties submitting supplemental briefing, but also raised another issue:

Specifically, Utah Code Ann. § 40-8-7(1)(i) grants broad discretion and authority to both the Board and the Division to require “that mining operations be conducted to minimize or prevent hazards to public health and safety.” That authority applies to both small and large mine operations. Given the plethora of health and safety concerns that the proposed mining operation poses – as addressed by [Richards Family Partnership], the other Intervenor, and myriad public commentators – it is entirely appropriate for the Board and the Division to require Tree Farm to address those issues before Tree Farm begins mining operations.

¹⁴ Richards Family Partnership’s analysis, which the Board is referencing and incorporating herein, is contained in the Richards Family Partnership’s Brief per the Board’s Feb. 24, 2022 Order, pp. 2-3.

See Richards Family Partnership’s Brief per the Board’s Feb. 24, 2022 Order, p. 2.

The Board wishes to acknowledge and thank the Intervenors for their contributions in analyzing the issues presented in this matter. Moreover, the Board agrees with the points and authorities raised by the Intervenors.

THE BOARD’S INTERPRETATION OF THE INTERPLAY BETWEEN UTAH CODE ANN. § 40-8-7 AND UTAH CODE ANN. § 40-8-13.

Historically, most small mine operations in Utah were conducted in remote and rural areas with minimum interface with denser and more populated areas. Accordingly, these small mines were well suited to fall within a streamlined permitting process. The Board interprets the plain language of Utah Code Ann. § 40-8-13(5) – “[e]xcept for the form and the amount of surety, an approval of a notice of intention for small mining operations is not required” - to encapsulate the Legislature’s desire to expedite small mine permitting if the circumstances are appropriate.¹⁵

However, the Legislature also created additional mechanisms for regulatory oversight if the situation warrants. In particular, and after harmonizing the operative statutes within the Utah Mined Reclamation Act, if the Division determined the

¹⁵ See also Utah Code Ann. § 40-8-4(3)(b) (“an approved notice of intention is not required for small mining operations.”) and Utah Code Ann. § 40-8-13(d) (“the notice of intention for mining operations, other than small mining operations, shall include a plan for reclamation of the lands affected as required by rules promulgated by the board.”). However, even without harmonizing Utah Code Ann. § 40-8-13 with Utah Code Ann. § 40-8-7, § 40-8-13 contemplates a procedure whereby the operator must remove any “objections” to the notice of intention, including obtaining “a ruling relative to the objections to the board.” See *Id.*, (4)(b). The process contemplated under Utah Code Ann. § 40-8-13(4) is another factor militating against the narrow interpretation of the Division’s authority regarding small mine NOI’s advanced by Tree Farm.

situation called for broader review and approval, after receiving a small mine NOI, Utah Code Ann. § 40-8-7 authorizes the Division to file a Notice of Agency Action (“NOAA”) or similar filing regarding the proposed small mine NOI. Thereafter, following briefing and a hearing, the Board can evaluate and determine if the additional protections under Utah Code Ann. § 40-8-7 are warranted. The Board interprets the phrase “[t]he board and the division may require” under Utah Code Ann. § 40-8-7(1) to require the Board to agree with the concerns raised by the Division in the filed NOAA before imposing additional regulatory protections.

If the Board concurs with the Division, the additional regulatory requirements under Utah Code Ann. § 40-8-7 become available, including: (1) approval of mining operations, including small mine NOIs, be approved “before the mining operation commences or continues pursuant to Sections 40-8-13 and 40-8-23”¹⁶; (2) “for mining operations, including small mining operations, the furnishing and maintenance of reasonable surety to guarantee that the land affected is reclaimed according to approved plans consistent with on-site conditions”¹⁷; (3) “that the operator pay legally determined public liability and property damage claims resulting from the mining operations”¹⁸; and (4) that mining operations be conducted to minimize or prevent hazards to public health and safety.”¹⁹

¹⁶ Utah Code Ann. § 40-8-7(1)(a).

¹⁷ *Id.* at (1)(c).

¹⁸ *Id.* at (1)(e).

¹⁹ *Id.* at (1)(j).

With respect to public health and safety compliance, although the Board has expertise in environmental matters²⁰, the Board interprets this statutory provision as requiring the approval of any permit that may be required from sister regulatory agencies to be of record prior to the commencement of mining operations. For example, based on the record in this matter, to ensure that Utah Code Ann. § 40-8-7(1)(j) is complied with, even for the proposed small mine NOI, Tree Farm would be required to provide to the Board evidence and testimony that all necessary permits and approvals from at least the Utah Division of Air Quality (air), the Division of Water Quality, the Division of Water Resources and the Division of Water Rights (water) and a fire prevention and mitigation plan issued from the Division of Forestry, Fire and State Lands (fire) are obtained prior to mining operations being conducted.

In sum, the Board disagrees that the Division's interface with small mine NOIs is narrow and limited if the situation demands additional regulatory oversight. Based on the proximity of Tree Farm's proposed mining operations to the citizens of Salt Lake City, the additional protections contemplated by Utah Code Ann. § 40-8-7(1)(j) are likely warranted.

ISSUES WITH THE DIVISION'S MOTION FOR POLICY GUIDANCE

As was discussed at the Public Hearing, the Board was perplexed with this filing by the Division. As previously stated, the Board's confusion was exacerbated by

²⁰ The majority of the Board members have worked in some capacity with extractive industries and are knowledgeable regarding environmental permitting and regulation. In addition, at least one Board member is required to have specific knowledge in ecological and environmental matters. Utah Code Ann. § 40-6-(2)(c)(iii).

the fact the Division failed to comply with the Board's Supplemental Briefing Order. Perhaps if the Division would have performed that exercise, the statutory path forward contained in this Order would have crystallized. Since that procedure did not occur, the Board disagrees with several premises asserted within the Division's Motion including, for example:

The Act requires the Division provide approval of Large Mine NOIs, but arguably does not require approval for Small Mine NOIs. Additionally, the Act requires a detailed reclamation plan for Large Mine NOIs, but only a simple statement that the operator promises to reclaim for Small Mine NOIs, without specific information on how or when the reclamation will be conducted.

See Division's Motion for Policy Guidance, p. 3.

As previously noted, Utah Code Ann. § 40-8-7(1)(a) applies to "all mining operations" and if the situation warrants, approval from the Division before mining operations is authorized, even for small mine NOIs filed "pursuant to Section 40-8-13." *Id.* In addition, Utah Code Ann. § 40-8-7(1)(c) specifically authorizes the Division to impose a "reasonable surety to guarantee that the land affected is reclaimed according to approved plans consistent with the on-site conditions" and this level of additional protection is applicable to all mining operations "including small mining operations." *Id.*

In addition, the Board is loath to issue purely advisory opinions. If any additional procedural issues remain after the issuance of this Order and the guidance contained herein, the Division and/or the public are encouraged to contact their local representatives and/or open a legislative bill file. If any of the existing administrative

rules need to be revised, then stakeholder engagement should be obtained and the process under Utah’s Administrative Rulemaking Act should be followed. The Board is statutorily authorized to ensure that responsible mining operations occur in the state of Utah. The Board is not statutorily authorized to prevent mining operations based on seemingly speculative and/or arbitrary classifications.

ORDER

Based on the analysis contained herein, and for good cause shown, it is hereby **ORDERED**:

1. That Tree Farm and the Division’s Stipulated Motion to Dismiss is **GRANTED** with any evaluation of a re-submitted small mine NOI from Tree Farm be performed consistent with this opinion; and
2. That the Division’s Motion for Policy Guidance is **DENIED** based on the statutory interpretation contained in this Order and the regulatory checks and balances currently available within the existing statutory scheme.

DATED this 23rd day of May, 2022.

**STATE OF UTAH
BOARD OF OIL, GAS AND MINING**

By: 
Chris D. Hansen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of May, 2022, I caused a true and correct copy of the foregoing **COMBINED ORDER GRANTING STIPULATION AND DENYING MOTION FOR POLICY GUIDANCE** for **Docket No. 2022-002 Cause No. S/035/0053** to be mailed to the following:

Via Email:

Stephen E.W. Hale
Daniel A. Jensen
Justin P. Matkin
Kassidy J. Wallin
Parr Brown Gee & Loveless, P.C.
101 South 200 East, Suite 700
Salt Lake City, UT 84111
Email: shale@parrbrown.com
djensen@parrbrown.com
jmatkin@parrbrown.com
kwallin@parrbrown.com

Attorneys for Tree Farm, LLC

Haley Sousa
Utah Attorney General's Office
Natural Resources Division
1594 W. North Temple, Suite 300
Salt Lake City, UT 84116
Email: hsousa@agutah.gov
*Assistant Attorney General Representing
the Utah Division of Oil, Gas and Mining*

Scott Baird, Director
Public Works & Municipal Services
2001 S State Street N3-600
Salt Lake City, UT 84190-3050
Email: SBaird@SLCO.org

Petitioner:
Jesse Lassley
Tree Farm LLC
PO Box 711820
Salt Lake City, UT 84171
Email: jesse@L4development.com

Michael E. Begley
Utah Attorney General's Office
Natural Resources Division
1594 W. North Temple, Suite 300
Salt Lake City, UT 84116
Email: mbegley@agutah.gov
*Assistant Attorney General Representing
the Utah Board of Oil, Gas and Mining*

Lupita McClenning
Director of Planning & Development
Greater Salt Lake Municipal Services
District
2001 S State, #N 3-600
Salt Lake City, UT 84190
Email: LMcClenning@msd.utah.gov

Greg Baptist
Stormwater Inspection Supervisor
Greater Salt Lake Municipal Services
District
2001 S State, #N 3-600
Salt Lake City, UT 84190
Email: GBaptist@msd.utah.gov

Unknown Name, Respondent
Email: cargar08@comcast.net

H. Michael Keller
Tanner J. Bean
FABIAN VANCOTT
215 South State Street, Suite 1200
Salt Lake City, Utah 84111
Phone: 801-574-2622
Email: mkeller@fabianvancott.com
tbean@fabianvancott.com
Attorneys for City of Millcreek

Joan Entwistle, Respondent
6169 Snowview Dr.
Park City, UT
Email: joan.entwistle@gmail.com

Becky Burrage, Respondent
4599 Russell St
Holladay, UT 84117
Email: keithbecky@gmail.com

Craig Wallentine & the Wallentine Family,
Respondent
3627 Palisade Drive
Salt Lake City, UT 84109
Email: mountainstate10@gmail.com

Utah Chapter of Backcountry Hunters and
Anglers, Respondent
Caitlin Curry
Perry Hall
Email: caitlin.curry34@gmail.com
phallski@gmail.com

E. Russell Vetter
Laura Briefer
Salt Lake City Corporation
P.O. Box 145478
Salt Lake City, UT 84114-5478
Email: Rusty.Vetter@slcgov.com
Laura.Briefer@slcgov.com
Attorneys for Salt Lake City Corporation

Evan S. Strassberg
Steven J. Joffee
Michael Best & Friedrich, LLP
2750 E. Cottonwood Parkway, Suite 560
Cottonwood Heights, Utah 84121
Email: esstrassberg@michaelbest.com
sjoffee@michaelbest.com
Attorneys for Richards Family Partnership

Counsel for Save Our Canyons:

Janelle Eurick Bauer
Timothy Smith
Jones Waldo Holbrook & McDonough
170 S. Main Street, Suite 1400
Salt Lake City, Utah 84111
801-521-3200
Email: jbauer@joneswaldo.com
tsmith@joneswaldo.com
Attorneys for Save Our Canyons

Via U.S. First Class Mail:

To Immediately Adjacent Landowners:

United States of America
c/o Forest Service
857 W South Jordan Pkwy
South Jordan, UT 84095
(address per Salt Lake County tax records)

Richards Family Partnership
c/o Susan Trapp
2313 E. Creek Rd.
Cottonwood Hts, UT 84093
(address per Salt Lake County tax records)

United States of America
c/o BLM
440 W 200 S # 500
Salt Lake City, UT 84101
(address per Salt Lake County tax records)

Rulon Harper
6085 S Tolcate Woods Ln
Holladay, UT 84121
(address per Salt Lake County tax records)

/s/ Julie Ann Carter
