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| **DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO**<br>City and County Building<br>1437 Bannock Street<br>Denver, CO 80202 | |
| **Plaintiff/Appellant:** POWERTECH (USA) INC., a South Dakota Corporation;<br>v.<br>**Defendant/Appellee:** STATE OF COLORADO MINED LAND RECLAMATION BOARD;<br>and<br>**Defendant-Intervenors:**<br>COLORADOANS AGAINST RESOURCE DESTRUCTION; TALLAHASSEE AREA COMMUNITY, INC.; and SHEEP MOUNTAIN ALLIANCE. | ▲ **COURT USE ONLY** ▲ |
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| **PLAINTIFF/APPELLANT'S OPENING BRIEF** | |

## INTRODUCTION

This appeal concerns the new, amended Mineral Rules and Regulations of the Colorado Mined Land Reclamation Board for Hard Rock, Metal, and Designated Mining Operations, 2 CCR 407-1, adopted by the Mined Land Reclamation Board ("Board") on August 12, 2010 (effective September 30, 2010), following a formal public rulemaking process and hearing. The

amended rules were based on the proposed rules of the Division of Reclamation, Mining and Safety ("Division") and were occasioned by certain amendments to the Colorado Mined Land Reclamation Act, C.R.S. §§ 34-32-101 *et seq.* ("MLRA"), adopted by the Colorado General Assembly in 2008.

The Board's rulemaking authority derives from and is governed by the MLRA. Specifically, the MLRA provides that "[t]he board may adopt and promulgate reasonable rules and regulations respecting the administration of this article." C.R.S. § 34-32-108(1).

An underlying principle of the MLRA is that "the extraction of minerals and the reclamation of land affected by such extraction are both necessary and proper activities." C.R.S. § 34-32-102(1). Accordingly, through the MLRA, it was the general assembly's intention "to foster and encourage the development of an economically sound and stable mining and minerals industry and to encourage the orderly development of the state's natural resources…." *Id.* In this respect, the general assembly intended the MLRA "to require the development of a mineral land regulatory program in which the economic costs of reclamation measures utilized bear a reasonable relationship to the environmental benefits derived from such measures." C.R.S. § 34-32-102(2).

Along with the MLRA, the Board's rulemaking authority is defined by and subject to the Colorado State Administrative Procedure Act, C.R.S. §§ 24-4-101 *et seq.* ("APA"). Among other important requirements, the APA obligates an agency to notify the public of any rules being considered for promulgation and allow the public an opportunity to comment on the proposed rules. *See* C.R.S. § 24-4-103(4)(a).

The APA also imposes certain limits on what rules an agency may consider for adoption. In particular, the APA provides that "[n]o rule shall be issued except within the power delegated

to the agency and as authorized by law." C.R.S. § 24-4-103(8)(a). In that respect, the same APA provision explains: "A rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute." *Id.* Given the framework within which the Board must act, the legislature authorized the Board to "adopt and promulgate reasonable rules and regulations respecting the administration of this article," C.R.S. § 34-32-108, and the rules "shall be based on the record." C.R.S. § 24-4-103(4)(a).

As argued below, the Board's rulemaking failed to meet these MLRA and APA requirements in several respects. First, the Board failed to follow proper public notice and comment procedures in promulgating the amended rules. Second the Board lacked statutory authority to promulgate certain portions of the amended rules. Third, in promulgating the amended rules, the Board acted in a manner that was arbitrary and capricious, an abuse of discretion and not in accordance with law. Fourth, the Board adopted certain portions of the amended rules despite a lack of evidence in the record that such rules were necessary to protect the environment or that the presumed environmental benefits bore a reasonable relationship to the economic costs of compliance. For these reasons, the amended rules cannot be allowed to stand.

## ARGUMENT AND LAW

### I. The Board Failed to Comply With Rulemaking Procedures

As discussed above, the APA requires state agencies to provide adequate notice to the public of proposed rules to allow for public input and participation. *See* C.R.S. § 24-4-103(4)(a). The agency promulgating the rules must file with the Colorado Secretary of State "a draft of the proposed rule or the proposed amendment to an existing rule and a statement, in plain language,

concerning the subject matter or purpose of the proposed rule or amendment to the office of the executive director in the department of regulatory agencies." C.R.S. § 24-4-103(2.5)(a). The purpose of a public notice and comment period is to allow the public to evaluate and present comments on the final plan embodied in the proposed rules. *See Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency*, 824 F.2d 1258, 1284 (1st Cir. 1984).[1]

Deviations from proposed rules are not uncommon, "however, if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 547 (D.C. Cir. 1983). Therefore, while proposed rules are not presented to the Board on a take-it-or-leave-it basis, new or drastically altered rules cannot be proposed at the end of the rulemaking process without re-opening the process to public comment. As the APA states:

> Any proposed rule *or revised proposed rule* by an agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose, and the regulatory analysis required in subsection (4.5) of this section, shall be made available to any person at least five days prior to said hearing.

C.R.S. § 24-4-103(4)(a) (emphasis added).

[1] In discussing the APA, it is helpful to look to the federal Administrative Procedure Act (5 U.S.C.A. §§ 551-706 (2012)) ("Federal APA") for guidance. With respect to public notice and comment procedures, for example, Colorado's APA and the Federal APA have nearly identical language granting the public a forum to submit comments during rulemaking proceedings. The Federal APA requires that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C.A. 553(c) (2012). Similarly, Colorado's APA requires that "the agency shall hold a public hearing at which it shall afford interested persons an opportunity to submit written data, views, or arguments and to present the same orally unless the agency deems it unnecessary." C.R.S. § 24-4-103(4)(a). Because the provisions are virtually identical and the Colorado language parallels the federal language, Colorado courts "may consider federal precedent and other commentary on the federal counterpart." *Regular Route Common Carriers Conference of the Colorado Motor Carriers Ass'n. v. Public Util. Comm'n of the State of Colorado*, 761 P.2d 737, 748 (Colo. 1988). When a Colorado statute parallels the language in its federal counterpart "judicial authorities construing the federal counterpart are highly persuasive." *People v. Riley*, 708 P.2d 1359, 1363 (Colo. 1985).

A. Neither the Proposed Rule Nor the Notice of Rulemaking Provided Notice of Five New Issues that would be Considered by the Board for Inclusion in the Rules in the Middle of the Rulemaking Process

The rulemaking process in the present case commenced on January 26, 2010, when the Division submitted the necessary paperwork to the Colorado Secretary of State's office to open the process. (R000213, Exhibit A.) The Division submitted proposed rules with its notice of rulemaking, but the Board ultimately promulgated rules that were never noticed, provided for or subjected to public comment. Specifically, certain sections of the rules adopted by the Board were the result of a request made by Mike King, the hearing officer, in the middle of the rulemaking hearing with the parties. As discussed below, Mr. King asked the Division to submit "alternative and additional" language on specific issues that arose during the public comment period and the hearings involving the parties. Mr. King collectively invited the hearing participants to provide new additions or suggested provisions for incorporation into the rules, without regard to notice and comment or how the suggestions altered the proposed rules.

The public comment period ended on June 6, 2010, with a public hearing in Denver, Colorado. Following the public comment hearings, the hearing involving the parties occurred on July 13 and 14, 2010, and continued into August 12, 2010. During party testimony and argument on July 14, 2010, Mr. King requested "alternative and additional" language and comments (from the parties only) regarding issues that were not included in the proposed rules submitted to the Secretary of State's office. Despite lacking proper notice to the public and an opportunity for comment, and despite concerns raised by hearing participants, the Board considered and discussed these new issues, and additional issues, at the August 12, 2010 hearing as possible new additions to the proposed rules. Specifically, the Board, through Mr. King, requested "alternative and additional" language on the following issues:

1. Pit liners for drilling-related activities (including prospecting).
2. Providing copies and/or Notices of Intent to Conduct Prospecting to local governments (Proposed Rule 5).
3. The collection of baseline water quality information related to prospecting activities.
4. Regulation of de minimis amounts of uranium recovered incidental to in situ leach mining for other minerals (Proposed Rule 1.1(25)).[2]
5. A deadline for the Division receiving a written request regarding confidential information in Proposed Rule 1.3(4)(IV).

(R000037-41, Exhibit B.) The Board's request and subsequent Order came after the public comment period had closed and in the middle of the rulemaking hearings with the parties.[3] Such a late request prevented the public from participating in the consideration of these new rules and also prevented Plaintiffs from adequately soliciting input from other industry members and the mining industry or regulated community generally and to submit unified comments. The Colorado Mining Association expressed the same concern in its Response of the Colorado Mining Association to the Division's Proposed Additional Changes. (R000068-69, Exhibit C.) Mr. King's request for additional language without complying with the APA also denied Plaintiff the opportunity to determine how the new language and rules fit into the overall context of the MLRA. Thus, the entire process was flawed by this invitation for new language and should render the entire set of rules invalid.

The Board issued its Order for "alternative and additional" language on July 19, 2010. The Division was given until July 30, 2010, to submit proposed language as requested. The

[2] Although CMA submitted this issue for consideration in this "add on" process, CMA would be the first to acknowledge that any new add on should first be scrutinized and addressed through the public notice and comment period.

[3] While the public comment period may not be separate from the rulemaking process generally, procedurally, the general public is allowed a comment period, which in this case included public forums for the public to address the Board orally. The public's opportunity to submit comments closed after the final hearing on June 6, 2010, in Denver, Colorado. The Board then held hearings involving the parties before promulgating the final rules containing the new provisions that the public never had an opportunity to review and comment on.

remaining parties, including Plaintiff, were required to submit their own proposed language no later than August 6, 2010, for a hearing on August 12, 2010. This expedited schedule was particularly onerous in light of the fact that the issues for which the Board requested language were actually new rules that were not part of the proposed rules or the notice of rulemaking. Plaintiff had carefully planned its comments to address the proposed rules as noticed and not the entire universe of possible issues that could arise during the hearings. The APA was created to prevent such an ambush on the parties, including the regulated community, and the interested public.

The court in *Natural Resources Defense Council, Inc. v. United States Environmental Protection Agency* held that "[a]n agency can make even substantial changes from the proposed version, as long as the final changes are 'in character with the original scheme' and 'a logical outgrowth' of the notice and comment." *Natural Resources Defense Council, Inc.*, 824 F.2d at 1283. In the present case, the notice did not sufficiently apprise Plaintiffs of the possibility that the Board would consider any of the issues raised in the Board's Order requesting "alternative and additional" language, which were not included, or even inferred, in the proposed rules or the notice of rulemaking as required. Plaintiff expressly objected to this request for "alternative and additional" language at the hearing and in correspondence dated August 6, 2010. (*See* R000093-000100, at Exhibit D.)

The record contains an exchange between Mr. King and Mr. Fognani, attorney for Plaintiff, regarding Mr. King's request for "alternative and additional" language as follows:

> **Mr. Fognani**: As a point of order, have we reopened the rulemaking? I mean, is this - - is this now a new proposal, or how does it - - how do you plan to address it?
>
> **Mr. King**: The questions that I just raised and the language came from both the public testimony and testimony from the parties yesterday requesting that there [sic] modifications on these three issues. What I'm asking for is language for us to consider

> without prejudging whether we would adopt language on those three. But I think the record is more than complete to establish the basis for this board to consider those three issues.
>
> . . .
>
> **Mr. King**: Well, technically what we are considering are amendments to the rules, and so there wouldn't be an amendment to the amendment, there would be an adoption of a package of rules in August.

(R005827-28, at Exhibit E.) The APA is clear that "[r]ules, as finally adopted, shall be consistent with the subject matter as set forth in the notice of proposed rulemaking provided in subsection (11) of this section." C.R.S § 24-4-103(4)(c). Nevertheless, the Board accepted the Division's proposed additions, and adopted the subject matter into the rules.

B. Comments Expressing a Desire for New Rules Regarding Unnoticed Issues is Insufficient to Empower the Board to Promulgate Rules in Violation of the APA

In *Natural Resources Defense Council*, the Environmental Protection Agency ("EPA") promulgated ground water protection requirements, but "failed to provide adequate notice and opportunity for comment as required by the Administrative Procedures Act." *Natural Resources Defense Council, Inc.*, 824 F.2d at 1282. The addition of the individual ground water protection standards added to the final rule by EPA "were not part of the proposed rule." *Id.* at 1283. "The Agency argues that the latter two provisions were added in response to comments received during the comment period, and that the final rule is a logical outgrowth of the notice and comments received." *Id.* The court determined that the *individual ground water standards* were a logical outgrowth of the proposed rules, but was not convinced "that the Agency gave sufficient notice concerning any requirements that might be tied specifically into the protection for ground water." *Id.* at 1284. The determinative issue when deciding if additions to the rules require the agency to reopen the public comment period is whether the public commenters had a fair opportunity to present their concerns with respect to the final plan. *See Id.* In the *Natural*

*Resources Defense Council* case, the court held "since the concept of a separate rule setting limits on ground water was never presented to the public, nor were the final ground water protection requirements ever opened for public comment, we are convinced that given a new opportunity to comment, commenters would 'have their first occasion to offer new and different criticisms which the Agency might find convincing.'" *Id.* (quoting *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979)).

The holding in the *Natural Resources Defense Council* case is particularly instructive in the present case with respect to the unanticipated rules mandating pit liners, providing notices of intent to local governments and the collection of baseline water quality information related to prospecting activities. None of these issues was included or suggested in the proposed rules or in the notice of rulemaking, nor were the new rules a logical outgrowth of the proposed rules.

The notice of rulemaking must adequately inform the public and the parties of what will be considered as a final product. See *Id.* at 1284. In *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency* the court held that "[a]n agency notice must describe the range of alternatives being considered with reasonable specificity. Otherwise, interested parties will not know what to comment on, and notice will not lead to better-informed agency decision-making." *Small Refiner Lead Phase-Down Task Force v. United States Environmental Protection Agency*, 705 F.2d 506, 549 (D.C. Circuit 1983). The Division's own filing in the Secretary of State's Office recognizes this limitation on the Board's authority. In its Notice of Rulemaking, it stated: "[a]lternate Proposed Rules may only be considered by the Board if the subject matter of the Alternate Proposed Rules is consistent with and fits within the Subject Matter and Scope of the Proposed Rulemaking as set forth in this notice." (R000211, at Exhibit F.) Either the Board ignored its own limitations when issuing the Order for "alternate

and additional" language, or it arbitrarily held itself to a different standard than the stakeholders, public and parties. Either way, it had no authority to do so. The Board cannot simply ignore the APA when promulgating rules to implement legislation.

## II. The Board Lacked the Statutory Authority to Promulgate Certain Rules

The MLRA vests the board with the power to "adopt and promulgate reasonable rules and regulations respecting the administration of this article . . . and in conformity therewith." C.R.S. § 34-32-108. However, certain rules promulgated by the Board lacked any basis in the statute and, therefore, were promulgated without proper statutory authority and in violation of the MLRA's mandate. Under Colorado law, a rule adopted by a State agency without statutory authority is invalid. *See* C.R.S. § 24-4-106(7).

The Board lacked the statutory authority to promulgate the following rules: 1) pit liners; 2) collection of baseline water quality information related to prospecting activities; 3) public comments and appeal at the time of filing an NOI for prospecting operations; 4) public comment and appeal on transfer of mine; and 5) notice of NOI to local governments. These rules are therefore invalid.

### A. Pit Liners

As noted in Part I, above, the pit liner issue was not properly included in the proposed rules or the Division's notice of rulemaking to allow for proper public comment as required by the APA. However, in addition to not being properly noticed, the rule as promulgated has no basis or authority in the statute. The MLRA is silent with respect to pit liners and the Board based its decision to implement such a rule on public comments expressing an unsupported desire to add new regulations similar to those imposed on the oil and gas industry. Despite the Board's "feeling" that it had to act on this issue because of the public comments, it simply had

no statutory authority to do so. Any decisions related to pit liners for prospecting activities requires legislative intervention and not the unauthorized rulemaking by an administrative agency that occurred here.

B. Collection of Baseline Water Quality Information Related to Prospecting Activities

Although the legislature requires the determination of baseline water quality information before a reclamation permit can be issued by the Division, the legislature did not expand the requirement to the entirely separate activity of prospecting. In promulgating this rule with respect to prospecting activities, the Board failed to recognize or appreciate the significant differences between mining operations (which involve a reclamation permit) and prospecting activities (which do not).

Rule 6.4.21(9)(b) requires a *permit applicant* for an in situ leach mining operation to "design and conduct scientifically defensible groundwater, surface water and environmental baseline site characterization and monitoring plan for the proposed mining operation." (R006488, Exhibit G.) The rules specifically require these actions from a "permit applicant" – i.e., an entity that is applying for a reclamation permit allowing it to commence mining operations. The rules predating the additions and amendments requested by Mr. King defined a "Permittee" as "any person holding a mining Permit." (R000110, Exhibit H.) With the addition of a few key words, the Division dramatically, and inappropriately, increased the scope of the groundwater monitoring requirements. Although the rules arguably provide the Division discretion to determine when certain measures need to be taken to protect groundwater, the existing rules read as a whole provide that discretion at the time of permitting and not during prospecting.

To the lay person it may seem that the distinction between prospecting operations and mining operations is not important, but these are separate and distinct phases of the process involving exploration for, and then development of, mineral resources. The MLRA clearly separates the two phases and defines prospecting as "the act of searching for or investigating a mineral deposit." C.R.S. § 34-32-103(12). In contrast, the MLRA defines "mining operation" as "the development or extraction of a mineral from its natural occurrences on affected land." C.R.S. § 34-32-103(8). There is no evidence that the legislature intended to place the heavy financial burden of a baseline site characterization on a company *before* the company has even determined the existence of an economically viable resource. Such a burden is contrary to the MLRA's intent to further mining activity in Colorado and to take into account the financial implications of mining regulations.

Defendants did not present any evidence during the hearing, nor can they, that this rule is grounded in statutory authority and, thus, it is invalid.

C. Public Comments and Appeal at the Time of Filing an NOI for Prospecting Operations

There is no doubt that the MLRA now requires mining companies to designate certain information as confidential, subject to the Division requiring disclosure of the information, when presenting its Notice of Intent ("NOI") to engage in prospecting activities to the Division. However, the Board expanded on the applicable statutory language and promulgated a rule that gives *anyone* the opportunity to comment on and appeal the Division's determination that certain information in the NOI is confidential. The addition of the public comment and appeal opportunity at this preliminary stage drastically alters the fundamental structure of the MLRA, which previously provided for public involvement only at the permitting stage. In its amendments to the MLRA, the legislature did not contemplate, let alone call for, such dramatic

changes. Nevertheless, the Board took it upon itself to bootstrap the comment and appeal rights to preliminary matters and legislate in an area that the legislature itself avoided.

The fact that this rule was promulgated without proper statutory authority is evidenced in a letter submitted to the Board by four State legislators during the rulemaking. In their letter, these individuals ludicrously and arrogantly purport to express the "intent of the legislature" with respect to the statutes and "encourage the Board to strongly consider granting the public administrative review of prospecting…" even though "SB 08-228 *did not expressly provide for this opportunity*." (R003331, at Exhibit I) (emphasis added).

By all indications the Board afforded the legislators' letter great weight and authority because it added the letter to its rulemaking website under the "Regulatory Analysis" section rather than under public comments. (R000095, at Exhibit J.) Despite the letter being on Colorado General Assembly letterhead, it was not an official statement of the legislature. It was a statement of four legislators expressing their personal opinions and therefore should have been considered and treated as public comment (the period for which had ended on June 6, 2010), not an official codicil to the MLRA.

During the rulemaking process, Plaintiff objected to the legislators' letter and the improper interjection of personal opinion under the guise of "legislative intent" into the rulemaking process. The legislators' express admission that public review of prospecting activities was not part of the legislation should end the Court's inquiry into whether the Board had the proper legislative authority to promulgate this particular rule. It did not.

D. Public Comment and Appeal on Transfer of Mine

In addition to allowing public comment and a right to appeal for NOIs at the prospecting phase, the Board also promulgated a Rule 1.12.2(2) giving the public the opportunity to

comment and appeal when a producing mine operation is transferred to another entity. (R006378, Exhibit K.) This rule specifically targeted in situ leach mining operations unnecessarily and without proper statutory authority or justification. *Id.*

The legislature did not disturb the framework of the MLRA with unnecessary public comment and appeals for preliminary matters submitted to the Division or the Board, nor did it allow appeals of administrative matters such as mine transfers. Like the problem associated with allowing public comment and appeal at the NOI phase, allowing an appeal when a mine is transferred also confounds the structure of the MLRA, which already adequately covers required financial warranties and other assurances that a successor company will be an appropriate operator.

E. Notice of NOI to Local Governments

The rule that requires notice of an NOI to local governments *before* the NOI is submitted to the Division is not derived from any statutory authority and turns the rules on their head. Historically, a company would first file an NOI with the Division at the time it intended to undertake prospecting activities. Now, there is considerable risk to the company's investment by providing notice of its NOI to local governments first, particularly with the new legislation allowing public comment and appeals at the NOI stage. The rule subjects the company to unnecessary and potentially lengthy delays at the NOI stage simply because the Board requires notice to local governments which have no authority over the NOI or reclamation permitting process. The Board's decision to expand the NOI to require notice to local governments *before* filing it with the Division lacked any statutory authority and ignored the business realities of a mining company in the exploration and prospecting phases of mine development.

## III. Certain Rules as Promulgated Were Arbitrary and Capricious, an Abuse of Discretion or Otherwise Not in Accordance with Law.

The specific rules discussed herein evidence the Board's abuse of discretion as it promulgated rules that were not properly noticed and that lacked statutory authority. The Board ignored the requirements of the APA when it requested language for new rules and then promulgated them in a very short time-frame without proper notice and comment procedures. The APA specifically requires that:

> [a]ny proposed rule or revised proposed rule by an agency which is to be considered at the public hearing, together with a proposed statement of basis, specific statutory authority, purpose, and the regulatory analysis required in subsection (4.5) of this section, shall be made available to any person at least five days prior to said hearing.

C.R.S. § 24-4-103(4)(a). This requirement notwithstanding, the Board's order was addressed only to the parties and completely cut the public out of the process. Moreover, as discussed above, the Board took these actions without proper statutory authority. Assuming the role of the legislature, the Board simply ignored what the MLRA actually allowed or intended. Such actions were arbitrary and capricious, an abuse of discretion and contrary to law, thus rendering the rules invalid.

## IV. Certain Rules as Promulgated Were Not Supported by the Evidence.

As discussed above, the Board adopted rules regarding pit liners; public comment and appeal at the NOI stage and when a permit is transferred; the collection of baseline water quality information before prospecting; and providing NOI information to local governments. The Board adopted these rules despite a complete lack of evidence in the record showing that such rules were in fact necessary or warranted to promote any legitimate, identifiable purpose or objective such as protecting public health, safety or welfare or the environment. The

requirement that the rules have some basis in protecting individuals and the environment is found in the MLRA, which states "[i]t is the intent of the general assembly by the enactment of this article to conserve natural resources, to aid in the protection of wildlife and aquatic resources . . . and promote the health, safety, and general welfare of the people of this state." C.R.S. § 34-32-102(1). However, no one presented any scientific or technical evidence specific to in situ uranium mining to support the notion that there would be some threat to the environment or public health, safety or welfare without these regulations.

The rules relating to pit liners and baseline water quality information prior to prospecting were based on concerns expressed in public comments, but such concerns were never justified with any scientific or technical evidence that the processes the rules were designed to regulate indeed should be subject to these regulations. Both requirements represent significant economic impacts to regulated entities, but the Board nevertheless imposed these requirements with no verifiable scientific or technical evidence in the record suggesting that either requirement was necessary to protect public health or the environment. Likewise, there was no scientific or technical evidence to support the need for public comment periods during the NOI stage or when a mine is transferred to a new entity. Nor was there any such evidence supporting the requirement to provide NOI's to local governments before the Division.

In addition to considering protections for the public health and the environment, the MLRA exists to "foster and encourage the development of an economically sound and stable mining and minerals industry and to encourage the orderly development of the state's natural resources." C.R.S. § 34-32-102(1). The general assembly wanted to ensure that "the economic costs of reclamation measures utilized bear a reasonable relationship to the environmental benefits derived from such measures." C.R.S. § 34-32-102(2). Furthermore, "[i]t is also the

intent of the general assembly that consideration be given to the economic reasonableness of the action of the mined land reclamation board or the office." *Id.* As promulgated, the rules discussed above utterly ignore the required consideration of economic impacts on regulated entities. For these reasons the rules are invalid and contrary to law.

In short, the rules as adopted fail to honor the letter and spirit of the MLRA and serve only to deter in situ uranium development in Colorado without any commensurate and provable benefit to the environment or the citizens of Colorado.

## CONCLUSION

For the foregoing reasons, Plaintiff/Appellant respectfully requests that the Court invalidate the entire set of rules or invalidate the rules that were promulgated without proper notice to the public and an opportunity for hearing, without statutory authority, in an arbitrary and capricious manner and with no scientific or technical basis in the record demonstrating their need to protect public health or the environment.

Dated this 11th day of April 2012.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2012, a true and correct copy of the foregoing Plaintiff/Appellant's Opening Brief was filed with the Court and served via LexisNexis File & Serve™ upon the following:

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