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Denise A. Drago  
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February 9, 2018

**PRIVILEGED AND CONFIDENTIAL**

**VIA E-MAIL: idjambov@le.utah.gov**

Utah Representative Michael E. Noel  
c/o Ivan Djambov,  
Office of Legislative Fiscal Analyst

Re: Legislative Appropriation for Lawsuit Challenging California's Carbon Surcharge  
and Ban on Coal-Fired Electric Generation

Dear Representative Noel:

Per the request Ivan Djambov, Legislative Fiscal Analyst, enclosed please find an estimate of litigation fees and expenses of special counsel engaged to assist the State of Utah and the Utah coal industry with its challenge of unlawful restrictions on interstate coal-fired electric generation imposed by the California Air Resources Board ("CARB"). This estimate supports your appropriation request pending before the Utah State Legislature, Natural Resources, Agriculture, and Environmental Quality Appropriations subcommittee. See Attachment #1. We understand that is your intent to keep confidential the detailed budget and proposed litigation strategy set forth in this letter. See Attachment #2. In addition, pursuant to Utah Code Section 63G-2-309, we also ask that this information remain confidential and exempt from release to the public pursuant to Section 63G-2-305(2) of the Government Records Access and Management Act. This information is privileged and confidential attorney communication and release of this information to the public at this preliminary stage of the litigation would allow the potential defendant's an unfair advantage. This information is filed to supplement the record of the Office of Legislative Fiscal Analyst which is exempt from disclosure under Section 63G-2-305(30) and is further exempt under Section 63G-2-305(4), should this appropriation become subject to procurement proceedings.

Utah Representative Michael E. Noel  
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California's restrictions on coal-fired electricity generation stem from two legislative measures. California Senate Bill 1368 mandates an Energy Performance Standard ("EPS") that will effectively ban the importation of coal-fired electric generation from Utah as of 2027. California Assembly Bill 32 establishes a cap and trade program for CO<sub>2</sub> that has led to imposition of "carbon adders" in the wholesale electricity market ("Coal Tax"). These measures, as implemented by the State of California, impermissibly regulate interstate commerce and out-of-state CO<sub>2</sub> emissions. California's restrictions will be challenged in a complaint filed in federal district court in Utah. The complaint will allege violations of the dormant Commerce Clause and the Supremacy Clause of the United States Constitution. This litigation will help to protect Utah's resource decisions, independent power production and its coal mining industry. The attached letters of support for this litigation have been provided by the Utah Mining Association, Alton Coal Development, LLC, Bowie Resource Partners, LLC, Bronco Utah Operations, LLC, Barney Trucking, Inc. and Kane County, Utah. See Attachment #3. As set out in these letters, California's attempt to regulate interstate commerce and out of state carbon dioxide emissions is adversely affecting the economy of Utah and the coal industry which contributes more than \$800 million to the State in jobs, taxes and revenues from coal development.

The litigation budget proposes the costs and fees to bring an action in federal district court in Utah to challenge CARB and its regulations and policies resulting in: i) imposition of the Coal Tax and ii) the ban on coal-fired generation. The action would follow the precedent set in *North Dakota v. Heydinger*, 825 F.3d 912 (8<sup>th</sup> Cir. 2016) which overturned the ban on coal-fired generation imposed by Minnesota's Next Generation Energy Act. The budget addresses the cost of drafting and filing a complaint, investigating the filing of a motion for preliminary injunction, defense against anticipated motions in opposition, fact finding and discovery, retention of experts and preparation and argument of a motion for summary judgment. The budget does not include a trial on the merits or appeals. After a final ruling, following emerging legal precedent under 42 U.S.C. Section 1983, we would propose a separate budget to seek recovery of attorney fees in this matter from California.

We have assembled a team from the law firms who have successfully challenged Minnesota's ban on coal-fired generation and California attorneys who have litigated the California law and regulations at issue. Those costs are reflected in the proposed budget. Snell & Wilmer, LLP would serve as the anchor for this team, utilizing its offices in Salt Lake City and Los Angeles, California. See description of legal team, Attachment #4.

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Once the appropriation request is approved, we will work with the State to draft an engagement letter and move forward in bringing this action.

Very truly yours,

Snell & Wilmer



Denise A. Dragoo

DAD:al

cc: Ivan Djanbov;  
Sen. David P. Hinkins, Chair  
Rep. Stewart E. Barlow, Chair  
Rep. Scott H. Chew.

## **ATTACHMENT #1**



**Name:** Coal - Lawsuit Challenging California's War on Utah Coal

**Description:** California carbon emission offsets currently result in a \$28/ton adder for every ton of Utah coal used to generate electricity for export to California. After 2027, California entirely bans the import of coal-fired generation.

**Agency:** Natural Resources

**Purpose:** Benefits the State Mineral Fund and SITLA. Increases monies from Mineral Lease Account - protects Utah coal-fired generators from discrimination under the dormant commerce clause of U.S. Constitution.

**Funding Sources:**

<u>Fund Name</u>	<u>2018 (One time)</u>	<u>2019 (One time)</u>	<u>2019 (Ongoing)</u>	<u>Nonlapsing</u>
General Fund	\$2,000,000.00	\$0.00	\$0.00	false

**Contact:** Denise Dragoo - Michael Noel

**Contact Title:** Attorney Contact

**Organization:** Snell and Wilmer LLP Contact Phone: 801-257-1998

**Contact Email:** ddragoo@swlaw.com

**Requested committee:** Natural Resources, Agriculture, and Environmental Quality Appropriations Subcommittee

**Assigned committee:** Natural Resources, Agriculture, and Environmental Quality Appropriations Subcommittee

**Notes:**

**Intent Language:**

**Analyst:** Ivan D. Djambov

**Supporting Documents:** Noel - Coal - Lawsuit Challenging California's War on Utah Coal.pdf

**Status:** Meeting assigned: Natural Resources, Agriculture, and Environmental Quality Appropriations Subcommittee - 210 Senate Building - Feb 12, 2018, 4:00 PM

## **ATTACHMENT #2**

# **\*PROTECTED\*<sup>1</sup>**

## **Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

### **Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through Motion for Summary Judgment**

#### **SUMMARY**

Work Product/Service	Estimated Cost
Draft Complaint & Investigate Preliminary Injunctive Relief	\$137,800.00
Defend Against Motion to Dismiss	\$146,790.00
Fact Finding and Discovery	\$370,825.00
Expert Discovery	\$997,385.00
Prepare and Defend Motion for Summary Judgment	\$222,555.00
Expenses (Travel, copies, transcript fees, filing fees, document processing and production)	\$125,000.00
	\$2,000,355.00

#### **Estimated Length of Litigation**

Once an engagement letter is signed, the legal team will work with plaintiffs and experts to determine if preliminary injunctive relief is appropriate. Within seven to nine weeks of engagement, a complaint will be filed in the Federal District Court for the District of Utah. Proceedings to conduct discovery, briefing and argument to reach decision on the motion for summary judgment will likely take one to two years from the date the complaint is served. The legal team will provide a more detailed scope of work and schedule in connection with its engagement letter.

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<sup>1</sup> This document is protected from disclosure under the Government Records Access and Management Act, under Utah Code Ann. §63G-2-305(2),(4) and (30).

# **PROTECTED**

## **Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

### **Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through Motion for Summary Judgment**

#### **DRAFT COMPLAINT AND INVESTIGATE PRELIMINARY INJUNCTIVE RELIEF**

<b>Task</b>	<b>Time Keeper</b>	<b>Estimated Hours</b>	<b>Rate</b>	<b>Estimated Costs</b>
Legal Research	Partner	15	\$395.00	\$ 5,925.00
	Associate	125	\$295.00	\$ 36,875.00
Fact Investigation	Partner	45	\$395.00	\$ 17,775.00
	Associate	125	\$295.00	\$ 36,875.00
Drafting Complaint	Partner	10	\$590.00	\$5,900
	Partner	20	\$395.00	\$ 7,900.00
	Associate	90	\$295.00	\$ 26,550.00
<b>Subtotal</b>				<b>\$137,800.00</b>

#### **DEFEND AGAINST MOTION TO DISMISS**

<b>Task</b>	<b>Time Keeper</b>	<b>Estimated Hours</b>	<b>Rate</b>	<b>Estimated Costs</b>
Analyze motion				\$ 1,770.00
	Partner	3	\$590.00	
	Partner	10	\$395.00	\$ 3,950.00
	Associate	18	\$295.00	\$ 5,310.00
Legal Research	Partner	10	\$395.00	\$ 3,950.00
	Associate	100	\$295.00	\$ 29,500.00
Draft opposition	Partner	10	\$590.00	\$ 5,900.00
	Partner	30	\$395.00	\$ 11,850.00
	Associate	120	\$295.00	\$ 35,400.00
Analyze reply brief	Partner	7		\$ 4,130.00
			\$590.00	
	Partner	20	\$395.00	\$ 7,900.00

# **PROTECTED**

## **Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

### **Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through Motion for Summary Judgment**

	Associate	30	\$295.00	\$ 8,850.00
Oral argument preparation	Partner	2	\$590.00	\$ 1,180.00
	Partner	30	\$395.00	\$ 11,850.00
	Associate	30	\$295.00	\$ 8,850.00
Hearing	Partner	5	\$590.00	\$ 2,950.00
	Partner	5	\$395.00	\$ 1,975.00
	Associate	5	\$295.00	\$ 1,475.00
<b>Subtotal</b>				<b>\$146,790.00</b>

### **FACT FINDING AND DISCOVERY**

<b>Task</b>	<b>Time Keeper</b>	<b>Estimated Hours</b>	<b>Rate</b>	<b>Estimated Costs</b>
Initial Disclosures	Partner	5	\$395.00	\$ 1,975.00
	Associate	50	\$295.00	\$ 14,750.00
Prepare written discovery requests	Partner	15	\$395.00	\$ 5,925.00
	Associate	45	\$295.00	\$ 13,275.00
Prepare written discovery responses (includes document review and production)	Partner	30	\$395.00	\$ 11,850.00
	Associate	200	\$295.00	\$ 59,000.00
	Paralegal	20	\$195.00	\$ 3,900.00
Review and analyze documents produced by Plaintiff	Partner	50	\$395.00	\$ 19,750.00
	Associate	200	\$295.00	\$ 59,000.00



# **PROTECTED**

## **Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

### **Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through Motion for Summary Judgment**

Depositions (Assumes 10 total depositions)	Partner	300	\$395.00	\$ 118,500.00
	L. Brereton/ Associates	200	\$295.00	\$ 59,000.00
	Paralegal	20	\$195.00	\$ 3,900.00
<b>Subtotal</b>				<b>\$370,825.00</b>

#### **EXPERT DISCOVERY**

<b>Task</b>	<b>Time Keeper</b>	<b>Estimated Hours</b>	<b>Rate</b>	<b>Estimated Costs</b>
Draft expert disclosures and reports	Partner	100	\$395.00	\$ 39,500.00
	Associate	100	\$295.00	\$ 29,500.00
	Paralegal	20	\$195.00	\$ 3,900.00
Expert Depositions (assumes 10 total depositions)	Partner	150	\$395.00	\$ 59,250.00
	Associate	60	\$295.00	\$ 17,700.00
	Paralegal	13	\$195.00	\$ 2,535.00
Expert Fees (assumes we retain 3 testifying experts and other consulting experts averaging \$650/hour)	Experts	1,300	\$650.00	\$ 845,000.00
<b>Subtotal</b>				<b>\$997,385.00</b>

#### **MOTION FOR SUMMARY JUDGMENT**

<b>Task</b>	<b>Time Keeper</b>	<b>Estimated Hours</b>	<b>Rate</b>	<b>Estimated Costs</b>
Draft Motion for summary judgment				
	Partner	10	\$590.00	\$ 5,900.00
	Partner	65	\$395.00	\$ 25,675.00

# **PROTECTED**

## **Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

### **Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through Motion for Summary Judgment**

	Associate	220	\$295.00	\$ 64,900.00
Review/analyze cross-motion for summary judgment	Partner	12	\$395.00	\$ 4,740.00
	Associate	50	\$295.00	\$ 14,750.00
Draft opposition/reply				\$ 2,950.00
	Partner	5	\$590.00	
	Partner	60	\$395.00	\$ 23,700.00
	Associate	160	\$295.00	\$ 47,200.00
	Paralegal	10	\$195.00	\$ 1,950.00
Oral argument preparation	Partner	10	\$590.00	\$ 5,900.00
	Partner	30	\$395.00	\$ 11,850.00
	Associate	15	\$295.00	\$ 4,425.00
	Paralegal	7	\$195.00	\$ 1,365.00
Hearing	Partner	5	\$590.00	\$ 2,950.00
	Partner	5	\$370.00	\$ 1,850.00
	Associate	5	\$295.00	\$ 1,475.00
	Paralegal	5	\$195.00	\$ 975.00
<b>Subtotal \$</b>				<b>222,555.00</b>

#### **EXPENSES**

Travel, phone, copies, transcript fees, estimate of document processing and production				\$ 125,000.00
<b>Subtotal \$</b>				<b>125,000.00</b>

**TOTAL  
ESTIMATE\*:**

**\$ 2,000,355.00**

# **PROTECTED**

**Lawsuit Challenging California's Carbon Surcharge and Ban on Coal-Fired Electric Generation**

**Snell & Wilmer's Preliminary Estimate of Professional Fees and Expenses through  
Motion for Summary Judgment**

\*This estimate assumes case is filed and heard in United States District Court for the District of Utah and does not include any fees incurred for activities after oral argument, on cross-motions for summary judgment or appeals.

## **ATTACHMENT #3**

**Snell & Wilmer**  
L.L.P.  
LAW OFFICES

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TUCSON

November 29, 2016

**PRIVILEGED AND CONFIDENTIAL  
ATTORNEY WORK PRODUCT<sup>1</sup>**

Dr. Laura Nelson  
Energy Advisor and Executive Director  
Utah Governor's Office of Energy Development  
PO Box 14485, Salt Lake City, Utah 84114

Re: Lawsuit to Challenge California's Ban on Coal-Fired Power

Dear Dr. Nelson:

On behalf of Alton Coal Development, Inc. ("ACD") and Utah's coal mining industry, we request that the State of Utah consider a legal challenge to California's ban on coal-fired electric generation and carbon surcharge on interstate coal-fired generation. California's restrictions on coal fired generation significantly harm Utah, its coal mining industry, independent power producers and electric utility industry. California is undermining Utah's control of electric generation resource decisions and statewide environmental policy. The most visible casualty of California's ban on coal-fired generation is the Intermountain Power Project ("IPP"). More than 25% of coal mined in Utah supplies the IPP. California's restrictions will cause IPP to close or convert to natural gas by 2027. Even now, coal supply agreements for IPP are being reduced or eliminated. As a result, Utah is losing critical jobs in the coal mining and electric power industries as well as in support sectors. These impacts are disproportionately felt by rural economies in Utah.

California's restrictions on coal-fired electric generation stem from two pieces of state legislation enacted in 2006. California Senate Bill 1368 ("SB 1368") mandates an Energy Performance Standard ("EPS") that effectively bans the importation of coal-fired electric generation from Utah into California. California Assembly Bill 32 ("AB 32") establishes a cap

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<sup>1</sup> This letter is attorney work product prepared in anticipation of litigation and is exempt from public review under the Government Records Access and Management Act pursuant to Utah Code Ann. §63G-2-305(18).



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and trade program for CO<sub>2</sub> that has led to imposition of “carbon adders” and “carbon taxes” in the wholesale electricity market.<sup>2</sup>

Under the new Administration, the federal Clean Power Plan may pose less of a threat to coal-fired generation in Utah; however California’s restrictions will remain in place. As a consequence of California’s ban on coal-fired power generation Utah is facing the job losses stemming from power plant and coal mine closures throughout rural Utah. Most immediately, Utah is facing job losses tied to the reduction or termination of coal supply contracts servicing IPP. Further, California’s carbon surcharge on interstate electric generation precludes Utah power producers and utilities from participating in an open interstate wholesale electricity market.

We ask the State of Utah to undertake litigation to protect its own resource decisions, independent power production and coal mining industry. SB 1368 and AB32, as implemented by the State of California, impermissibly regulate interstate commerce and out-of-state CO<sub>2</sub> emissions. Given emerging legal precedent, California’s restrictions on coal-fired generation are vulnerable to challenge under the U.S. Constitution as violations of the dormant Commerce Clause and the Supremacy Clause.

**A. California’s Ban on Coal-fired Electric Generation Violates the Dormant Commerce Clause**

The Commerce Clause authorizes Congress to regulate commerce among the several States<sup>3</sup> and is interpreted to include a “dormant limitation” on the authority of the States to enact legislation affecting interstate commerce.<sup>4</sup> A state statute that discriminates against interstate commerce in favor of in-state commerce is a *per se* violation of this constitutional limitation.<sup>5</sup> Discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.<sup>6</sup>

Electricity is a basic element of interstate commerce and courts recognize that no State relies solely on its own resources in this respect. Here, however, California discriminates against

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<sup>2</sup> A challenge to California’s Cap & Trade Program brought by the California Chamber of Commerce and Morning Star Packing Company is pending before the California State Court of Appeal in the Third Appellate District and is scheduled for oral argument on January 24, 2017. *See* Docket No. C075930 Sacramento County No. 34201280001313CUWMGDS.

<sup>3</sup> U.S. Const. Art. I, §8, cl.3.

<sup>4</sup> *North Dakota v. Heydinger*, 825 F.3d 912, 919 (8th Cir. 2016) citing *Healy v. Beer Inst.*, 491 U.S. 324, 326 n.1 (1989).

<sup>5</sup> *Heydinger*, 825 F.3d at 919.

<sup>6</sup> *Oregon Waste Systems, Inc. v. Department of Environmental Quality of State of Or.*, 511 U.S. 93, 99 (1994).

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electricity imported into the state. SB1368 and implementing rules, violate the dormant Commerce Clause. SB 1368 precludes any load serving entity (“LSE”)<sup>7</sup> or publically owned electric utility (“POU”) from entering into “a long-term financial commitment” investing in a baseload resource<sup>8</sup> that does not comply with GHG performance standards set at 1,100 lbs CO<sub>2</sub>/MWh.<sup>9</sup> Coal fired baseload generation using the most efficient technology can only reduce emissions to 1,400 lbs CO<sub>2</sub>/MWh.<sup>10</sup> California’s EPS set at 1,100 lbs CO<sub>2</sub>/MWh therefore precludes any “long-term investment” in coal-fired generation. There is no coal-fired electric generation sited in California or active coal mines located in that state. Consequently SB1368 and the stringent EPS only affect out-of-state electric generators and coal producers.

SB 1368 also creates an unfair benefit for in-state electric producers. Low cost, coal-fired electric generation sourced out-of-state cannot be sold to California LSEs and POUs through bilateral contracts or power purchase agreements. Unable to purchase affordable energy out-of-state, many LSEs and POUs are turning to more costly renewable and natural gas-fired generation sited in California. Whereas just a few years ago, constructing a natural gas fired power plant in California was cost-prohibitive. Now, four natural gas fired baseload units sited in California are in some stage of permitting.

**B. California’s Restrictions On Coal-fired Generation Are Pre-empted Under the Federal Power Act**

The doctrine of preemption, rooted in the Supremacy Clause<sup>11</sup>, “unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.”<sup>12</sup> The Federal Power Act (“FPA”), grants to the Federal Energy Regulatory Commission (“FERC”), exclusive jurisdiction over “the transmission of electric energy in interstate commerce” and “the sale of electric energy at wholesale in interstate commerce.”<sup>13</sup>

**1. California’s Coal Ban is Preempted by FPA**

Most recently, in *North Dakota v. Heydinger*, 8th Circuit Court, in separate opinions, over turned the State of Minnesota’s ban on coal-fired electricity imports to serve end-users in Minnesota. In his concurring decision, Judge Murphy posited that Minnesota’s statute banning

<sup>7</sup> Cal. Public Utility Code Sec. 8340(e) defines a load serving entity as “every electrical corporation, electric service provider, or community choice aggregator serving end-use customers in the state.”

<sup>8</sup> California Public Utility Code Sec. 8340-8341 d

<sup>9</sup> California, Article This standard may change by rule adopted by the California Energy Commission.

<sup>10</sup> <http://www.c2es.org/federal/executive/epa/ghg-standards-for-new-power-plants>.

<sup>11</sup> U.S. Const. art. VI, cl. 2.

<sup>12</sup> *Gonzales v. Rauch*, 545 U.S. 1, 29 (2005).

<sup>13</sup> 16 U.S.C. §824(b)(1).



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out-of-state imports of coal-fired electricity was preempted by the FPA.<sup>14</sup> Judge Murphy held that “transactions covered by the power purchase agreement provisions (which are contracts for 50 megawatts or more of capacity) are wholesale transactions...these agreements cover capacity on the national electricity grid and are thus made in interstate commerce.”<sup>15</sup> Judge Murphy concluded that because FERC has exclusive jurisdiction with respect to capacity markets, Minnesota’s ban on certain capacity contracts, including LSE power purchase agreements with out-of-state coal-fired generators, “directly conflicts with FERC’s jurisdiction” and “is preempted by the FPA.”<sup>16</sup>

Following *Heydinger*, California’s ban on coal-fired electric generation imports should also be preempted. Under SB 1368, utilities are prohibited from entering into “a long-term financial commitment” or power purchase contracts, investing in a baseload resource<sup>17</sup> that does not comply with GHG performance standards. SB 1368 prohibits power purchase contracts sourced by coal-fired generation, and therefore bans wholesale sales of electric energy in interstate commerce. California’s restriction on interstate sales of coal-fired generation is preempted by the FPA.

**2. California’s Cap and Trade Rules Impose Illegal Carbon Adders that are Preempted by the FPA.**

FERC’s jurisdiction extends to any rule or practice “affecting wholesale electricity rates”<sup>18</sup> and to “all rates and charges made, **demand**ed, or received by any public utility for or in connection with” interstate transmissions or wholesale sales—as well as “all rules and regulations affecting or pertaining to such rates or charges”—must be “just and reasonable.”<sup>19</sup>

Proponents maintain that state restrictions of electricity imports do not violate FPA because wholesale rates are not directly affected. They argue that compliance obligations imposed under cap and trade “might affect the business incentives and portfolio choices that LSEs or FJDs make in their wholesale purchasing decisions” but do not directly mandate wholesale purchase prices.”<sup>20</sup>

<sup>14</sup> *North Dakota v. Heydinger*, 825 F.3d at 926 (Judge Murphy concurring in part and concurring in judgment).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> California Public Utility Code Sec. 8340-8341 d

<sup>18</sup> *FERC v. Electric Power Supply Ass’n*, --U.S.--, 136 S. Ct. 760, 767, 193 L.Ed.2d 661 (2016).

<sup>19</sup> 16 U.S.C. § 824d(a).

<sup>20</sup> See *Legal Issues in Regulating Imports in State and Regional Cap and Trade Programs*, Columbia Law School Center for Climate Change Law, Erin Parlar, Michael Babakitis, and Shelley Welton, October 2012, at page 45.

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In practice, however, California's cap and trade regulations *do* impact wholesale rates. California mandates that sellers of coal-fired electric generation include a "carbon adder" when they bid into wholesale energy markets selling to California LSEs and POUs. Although this "adder" is not part of the purchase price, it is used to "price-out" coal-fired generation. The "adder" is set high enough to make coal-fired generation the most expensive option for California LSEs and POUs. Buyers serving California LSEs or POUs see prohibitively high prices for coal-fired generation, and are forced to select lower cost renewable or gas-fired generation bids on the market.

There are two bases to challenge the "carbon adder" under the FPA. First, the "adder" imposed by the State impacts wholesale rates. Although the "adder" may be an artificial price constraint, its purpose is to inflate the rate demanded by coal-fired generators in the wholesale electricity market. Only FERC has the jurisdiction to impose or approve adders at the wholesale level. California's regulations overstep state jurisdiction under the FPA.

Second, the "adder" is unjust and unreasonable because it bears no relation to the cost of electricity purchased and consumed in the California market. State imposed compliance adders tied to carbon emissions restrictions on out-of-state generation amount to an average of \$15.94 per CO<sub>2</sub> (metric ton)/MWH.<sup>21</sup> The CO<sub>2</sub> adder therefore violates the most basic tenant of the FPA, that of ensuring just and reasonable wholesale rates.

### C. Recovery of Attorney Fees

The State of Utah may be able to recover its attorney fees expended to successfully challenge California's ban on coal-fired electric generation and its unlawful "adders." Under 42 U.S.C. §1988(b), a prevailing party may, in an action or proceeding to enforce a provision of 42 U.S.C. §1983, be allowed to recover reasonable attorneys' fees. Section 1983 expressly provides that any person who uses any statute, ordinance or regulation to deprive a person of any Constitutional right, privilege or immunity "shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress"<sup>22</sup>

The §1983 remedy broadly encompasses violations of federal statutory as well as constitutional laws.<sup>23</sup> This includes actions brought under the Commerce Clause.<sup>24</sup> The U.S. Supreme Court has often described the Commerce Clause as conferring a 'right' to engage in

<sup>21</sup> See

[http://www.waterboards.ca.gov/water\\_issues/programs/ocean/cwa316/docs/energy\\_comp/irp\\_2012\\_1.pdf](http://www.waterboards.ca.gov/water_issues/programs/ocean/cwa316/docs/energy_comp/irp_2012_1.pdf)

<sup>22</sup> 42 U.S.C. § 1983

<sup>23</sup> *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980)

<sup>24</sup> See *Dennis v. Higgins*, 498 U.S. 439,446 (1991)



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interstate trade free from restrictive state regulation<sup>25</sup> acknowledging that, “engaging in interstate commerce is a right of constitutional stature.”<sup>26</sup>

The plaintiffs in *North Dakota v. Heydinger*, were awarded attorney fees against Minnesota under 42 U.S.C. §1988(b) to redress a violation of their right to engage in interstate trade.<sup>27</sup> Plaintiffs successfully argued that their lawsuit to enjoin Minnesota’s ban on coal-fired electric imports under the Next Generation Energy Act (“NGEA”)<sup>28</sup> constituted an action within the scope of 42 U.S.C. §1983. The federal district court agreed and awarded attorneys’ fees to the State and private plaintiffs.<sup>29</sup>

Similarly, a successful action by the State of Utah challenging California’s cap and trade program and restrictions on the import of coal-fired power generation, is a violation of interstate commerce which may qualify for recovery of attorneys’ fees under 42 U.S.C. §1988(b).

In sum, on behalf of the Utah coal industry, we ask the State to file an action to enjoin SB 1368 and AB32 which, as implemented by California, impermissibly burden interstate commerce and are otherwise preempted by the FPA. A one-page summary of this request is attached for your convenience. Please let us know if you have questions or wish to discuss our request.

Very truly yours,

Snell & Wilmer



Denise A. Dragoo

cc: Rob Simmons, Deputy Director, Office of Energy Development  
Michael Green, Esq.

DAD:mkm

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<sup>25</sup> *Id.* at 448.

<sup>26</sup> *Id.*

<sup>27</sup> *North Dakota v. Heydinger*, 2016 WL 5661926 (September 29, 2016).

<sup>28</sup> Minn. Stat. § 216H.03, subd. 3(2)–(3))

<sup>29</sup> *See D.C. Inc. v. Missouri*, 627 F.3d 698, 700 (8th Cir. 2010) (“when a district court grants relief on a state law claim in order to avoid a constitutional issue, it may award attorneys’ fees if the constitutional claim was substantial and both the constitutional and state-law claims arose out of a ‘common nucleus of operative fact.’”)



## **Litigation Challenging California's Ban on Coal-Fired Power**

The Utah coal industry urges the State of Utah undertake litigation to challenge California's ban on coal-fired electric generation. In 2006, California enacted SB 1368 and AB 32, which essentially bans coal-fired electric generation and imposes financial penalties on California entities purchasing coal-fired generation from out-of-state. Intermountain Power Project, consuming approximately 25% of coal mined in Utah, faces eminent closure or conversion to natural gas by 2027. California's restrictions cause job loss in Utah's coal mining and power industries and compromises Utah's control over its electric resources. Utah coal mines serving IPP and coal-fired power plants serving California are at risk.

### **A. California's Ban on Coal-fired Electric Generation Violates the Dormant Commerce Clause**

SB 1368, limits emissions from electric generation to at or below 1,100 lbs CO<sub>2</sub>/MWH. This limit precludes any Load Serving Entity or Public Utility in California from purchasing coal-fired generation. The restriction applies to imports of electricity purchased from coal-fired generators sited outside of California. The U.S. Supreme Court and the 8th Circuit have found that this type of outright ban on coal-fired imports violates the dormant Commerce Clause.

### **B. California's Restrictions On Coal-fired Generation Are Pre-empted Under the Federal Power Act ("FPA")**

#### **1. California's Coal Ban is Preempted by FPA**

SB 1368 bans Load Serving Entities and Public Utilities in California from entering into wholesale power purchase agreements with coal-fired generators. The FPA precludes States from regulating wholesale rates. Power purchase agreements between generators and Load Serving Entities are wholesale contracts under FERC's jurisdiction. California's ban on interstate wholesale power purchase agreements is, therefore, preempted by federal law.

#### **2. California's Cap and Trade Rules Impose Illegal Carbon Adders that are Preempted by the FPA.**

Coal-fired generation from outside of California is subject to a carbon adder making this source of electricity far more expensive than any other option. The adder artificially increases the price to discourage California utilities from purchasing coal-fired generation. Some \$15.94 per CO<sub>2</sub> metric ton/MWH is added to the cost of out of state generation from this source. The carbon adder is a direct manipulation on wholesale prices subject to FERC's exclusive jurisdiction and is preempted under the FPA.

### **C. Recovery of Attorney Fees as an Action under 42 U.S.C. Section 1983.**

The federal court recently awarded North Dakota attorney fees in its lawsuit to enjoin Minnesota's ban on coal-fired electric imports under 42 U.S.C. §1988(b).



January 24, 2017

The Honorable Gary R. Herbert  
Governor of Utah  
Utah State Capitol Complex  
P.O. Box 142220  
Salt Lake City, Utah 84114-2220

Dear Governor Herbert,

On behalf of the Utah Mining Association ("UMA") and Utah's coal mining industry, we urge you to challenge California's unilateral attack on Utah coal mining and coal-fired electric generation. In 2006, California passed two pieces of legislation, California Senate Bill 1368 ("SB 1368") and California Assembly Bill 32 ("AB 32"), with the purpose of eliminating coal-fired generation. Together, the two bills effectively ban California utilities from purchasing, importing, or investing in coal-fired generation sited outside that state, and impose a "carbon rider" or carbon tax on any electric generation purchased from out of state generators. California's restrictions under SB 1368 and AB 32 impermissibly regulate interstate commerce and out-of-state carbon dioxide emissions. Moreover, California's war on coal directly impacts jobs and industry in Utah.

The most visible casualty of California's actions is the Intermountain Power Project ("IPP"). More than 25% of coal mined in Utah supplies IPP. California's restrictions, however, are forcing IPP to close or to convert to natural gas. As a result, Utah is losing critical jobs in coal mining and electric power industries as well as in support sectors. The closure of coal mines and the shuttering of coal-fired plants disproportionately impact rural economies and small towns in Utah.

In addition to direct impacts on Utah's coal mining industry and communities, California's war on coal threatens economic growth in Utah. Through a commitment to "least cost and lowest risk" energy choices, Utah has historically benefited from the most affordable electric rates in the nation. With increased system integration and memberships in ISOs, electric utilities like PacifiCorp will be forced to make resource decisions subject to California's unreasonable and overreaching environmental regulations. All electricity generated out-of-state is subject to California's cap and trade program. Already, a "carbon adder" is imposed on all non-California generators participating in the CAISO Energy Imbalance Market. Electricity generators sited outside California are subject to a "carbon adder" with the purposes of pricing out cheaper fossil fueled energy from the California market. As a result, carbon dioxide generated in Utah is effectively taxed in California.

To be competitive in California, utilities and independent power producers are turning away from inexpensive electricity sited in Utah and Wyoming, and investing in renewable resources or natural gas facilities sited in California. As more coal-fired plants are retired, and fossil fuel fired units are ramped down in favor of intermittent and perceived zero emissions energy sources, electricity costs increase for the entire western market.

California's restrictions on coal-fired generation are poised to significantly harm Utah. Moreover, California's overreaching ban on coal short circuits environmental policies and regulations made by Utah lawmakers for the purpose of protecting Utah's residents and businesses. We ask that the State of Utah file an action to enjoin SB 1368 and AB 32 and protect Utah residents, industry and the State's sovereignty.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Mark D. Compton', with a stylized flourish at the end.

Mark D. Compton  
UMA President



## KANE COUNTY COMMISSION

Dirk Clayson, Jim Matson, Lamont Smith  
76 North Main  
Kanab, Utah 84741  
(435) 644-4901



February 6, 2017

The Honorable Gary R. Herbert  
Governor of Utah  
Utah State Capitol Complex  
PO Box 142220  
Salt Lake City, UT 84114-2220

**Re: California's Attempts to Regulate Interstate Commerce and Out-of-State Carbon Dioxide Emissions and its Effects on Utah's Coal Mining Industry**

Dear Governor Herbert:

The Kane County Commission is writing you in support of the Utah Mining Association's (UMA) position stated in its January 24, 2017 letter to you (enclosed).

The letter references two California Bills (SB 1368 and AB 32) which impose a "carbon rider" (carbon tax) on electricity generated by coal-fired plants situated outside of California. These Bills will ultimately will ban California utilities from "purchasing, importing, or investing" in electricity produced by coal-fired generating plants situated outside of California.

California's carbon tax under AB 32 (cap and trade bill) places a significant "carbon surcharge" on Utah's coal-fired generation. Coal-fired generation from outside of California is subject to a carbon added in the California market making this source of electricity more expensive than other sources, such as renewables. Utah coal mines sell coal to IPP under long term coal supply agreements. Coal is burned at IPP and electricity is exported over a transmission line from Delta, Utah, to California for resale by Los Angeles Department of Water and Power and other California municipalities. Pursuant to AB 32, California utilities can offset their carbon emissions by purchasing emission offsets (or credits). An emission offset costs a utility approximately \$28.00 for every ton of coal burned to generate electricity sited in Utah. The emission credit can be translated back to a cost per ton of coal mined.

Per the UMA letter, 25% of the coal mined in Utah supplies the Intermountain Power Project (IPP) located near Delta, Utah. Our understanding is that 87% of the electricity generated by IPP goes to California. The California restrictions will cause IPP to either convert its generating station to natural gas-fired, or California will cease purchasing electricity from IPP

**Kane County Commission**

76 N. Main St., Kanab, Utah 84741

*Come to Kane County, Where anything is Possible!*

by 2027, which would likely force the closure of the plant if it couldn't find other customers. Either action will result in the loss of many coal mining, coal-fired generating station, and related support jobs. The loss of these jobs will disproportionately affect the economies of rural Utah, including Kane County. Most, if not all of the coal mined at the Coal Hollow Mine is sent to the IPP plant. We are unaware if Alton Coal Development has any other customers should IPP convert to natural gas or close its operation.

California's "war on coal" directly affects Kane County. As we're sure you are aware, the Alton Coal Development's Coal Hollow Mine (mine) is situated entirely in Kane County. On average, the current price that Alton Coal receives FOB Mine, is approximately \$37.00 per ton. The carbon surcharge of \$28.00 per ton increases the cost to \$65.00 per ton, essentially pricing Alton Coal, and other mines that supply IPP out of the market.

At full production level, the Alton Coal Mine anticipates 160 employees (100 at the mine site, and 60 transporting the product). Average wages for both the miners and truck drivers are currently, \$21.00 per hour (\$30.75 with benefits, e.g., overtime, health and life insurance and paid vacation). It is estimated that about 50% of the mine and transportation employees will reside in Kane County, and the majority of the others will reside in surrounding communities outside of Kane County, all in rural Utah. Additionally, Kane County would benefit from its share of the 12.5% per ton royalty it would receive from mining of the federal coal.

In conclusion, we agree with the statement in UMA's letter, "California's restrictions under SB 1368 and AB 32 impermissibly regulate interstate commerce and out-of-state carbon dioxide emissions. Moreover, California's war on coal directly impacts jobs and industry in Utah." We agree with its recommendation "...that the State of Utah file an action to enjoin SB 1368 and AB 32 and protect Utah residents, industry and the State's sovereignty."

If we may be of further assistance please contact Byard Kershaw by phone at 435.644.3094 (H) or 602.478.9621 (C), or by email at northrimconsulting@@kanab.net (**or the commissioners??**)

Respectfully,



Dirk Clayson  
Chair, Kane County Commission

***Do you want all commissioners to sign individually?***

***Do you want to cc: Rep. Noel, Senator Okerlund – Also federal Cong. Stewart, Sens Hatch and Lee.***

Enclosure: 2pp (UMA letter)

**Kane County Commission**

76 N. Main St., Kanab, Utah 84741

*Come to Kane County, Where anything is Possible!*





Gene E. DiClaudio  
Chief Operating Officer  
225 North 5<sup>th</sup> Street, Suite 900  
Grand Junction, Colorado 81501  
Telephone (970) 263-5140  
gdiClaudio@bowlieresources.com

March 24, 2017

The Honorable Gary R. Herbert  
Governor of Utah  
Utah State Capitol Complex  
PO Box 142220  
Salt Lake City UT 84114-2220

*Re: Utah Mining Association's Request for Action related to California's Carbon Tax*

Dear Governor Herbert,

As you know, Canyon Fuel Company, LLC, a wholly-owned subsidiary of Bowie Resource Partners, LLC, is a long-time member of the Utah Mining Association ("UMA"). We write to express independent and additional support for UMA's January 24, 2017 request related to California's carbon regulation and its impact on Utah's coal industry.

We are the largest employer of Utah coal miners. We strive every day to be a good corporate citizen as we focus on our core values of worker safety, environmental stewardship, efficient production, and high-grade, clean coal at our three (3) Utah mines. We have made and continue to make significant financial and human investments in the State of Utah.

We urge the State to respond aggressively to California's unconstitutional attacks on Utah's economy. UMA has described succinctly California's impermissible regulation of interstate commerce and its impacts on Utah industry, Utah miners, and Utah's coal country.

We sincerely appreciate your support and your actions in favor of Utah's coal mining industry.

Sincerely Yours,

Gene DiClaudio  
Chief Operating Officer

cc: Mark Compton, UMA  
Chris Hansen, BRP



P.O.Box 527  
Emery, Utah 84522  
(435) 286-2447

March 6, 2017

The Honorable Gary R. Herbert  
Governor of Utah  
Utah State Capitol Complex  
P.O. Box 142220  
Salt Lake City, Utah 84114-2220

Dear Governor Herbert,

On behalf of the Utah Mining Association ("UMA") and Utah's coal mining industry, we urge you to challenge California's unilateral attack on Utah coal mining and coal-fired electric generation. In 2006, California passed two pieces of legislation, California Senate Bill 1368 ("SB 1368") and California Assembly Bill 32 ("AB 32"), with the purpose of eliminating coal-fired generation. Together, the two bills effectively ban California utilities from purchasing, importing, or investing in coal-fired generation sited outside that state, and impose a "carbon rider" or carbon tax on any electric generation purchased from out of state generators. California's restrictions under SB 1368 and AB 32 impermissibly regulate interstate commerce and out-of-state carbon dioxide emissions. Moreover, California's war on coal directly impacts jobs and industry in Utah.

The most visible casualty of California's actions is the Intermountain Power Project ("IPP"). More than 25% of coal mined in Utah supplies IPP. California's restrictions, however, are forcing IPP to close or to convert to natural gas. As a result, Utah is losing critical jobs in coal mining and electric power industries as well as in support sectors. The closure of coal mines and the shuttering of coal-fired plants disproportionately impact rural economies and small towns in Utah.

In addition to direct impacts on Utah's coal mining industry and communities, California's war on coal threatens economic growth in Utah. Through a commitment to "least cost and lowest risk" energy choices, Utah has historically benefited from the most affordable electric rates in the nation. With increased system integration and memberships in ISOs, electric utilities like PacifiCorp will be forced to make resource decisions subject to California's unreasonable and overreaching environmental regulations. All electricity generated out-of-state is subject to California's cap and trade program. Already, a "carbon adder" is imposed on all non-California generators participating in the CAISO Energy Imbalance Market. Electricity generators sited outside California are subject to a "carbon adder" with the purposes of pricing out cheaper fossil fueled energy from the California market. As a result, carbon dioxide generated in Utah is effectively taxed in California.

To be competitive in California, utilities and independent power producers are turning away from inexpensive electricity sited in Utah and Wyoming, and investing in renewable resources or natural gas facilities sited in California. As more coal-fired plants are retired, and fossil fuel fired units are ramped down in favor of intermittent and perceived zero emissions energy sources, electricity costs increase for the entire western market.

California's restrictions on coal-fired generation are poised to significantly harm Utah. Moreover, California's overreaching ban on coal short circuits environmental policies and regulations made by Utah lawmakers for the purpose of protecting Utah's residents and businesses. We ask that the State of Utah file an action to enjoin SB 1368 and AB 32 and protect Utah residents, industry and the State's sovereignty.

Sincerely,

A handwritten signature in dark ink, appearing to read "Dan R. Baker". The signature is fluid and cursive, with the first name "Dan" being the most prominent.

Dan R. Baker  
President & CEO  
Bronco Utah Operations, LLC





BARNEY TRUCKING, INC.  
235 S. SR 24  
SALINA, UT. 84654  
PH: 435-529-3701  
FAX: 435-529-7314

March 23, 2017

The Honorable Gary R. Herbert  
Governor of Utah  
Utah State Capitol Complex  
P.O. Box 142220  
Salt Lake City, Utah 84114-2220

Dear Governor Herbert,

On behalf of the Barney Trucking, we would like to echo the comments of the Utah Mining Association. We also urge you to challenge California's unilateral attack on Utah coal mining and coal-fired electric generation. In 2006, California passed two pieces of legislation, California Senate Bill 1368 ("SB 1368") and California Assembly Bill 32 ("AB 32"), with the purpose of eliminating coal-fired generation. Together, the two bills effectively ban California utilities from purchasing, importing, or investing in coal-fired generation sited outside that state, and impose a "carbon rider" or carbon tax on any electric generation purchased from out of state generators. California's restrictions under SB 1368 and AB 32 impermissibly regulate interstate commerce and out-of-state carbon dioxide emissions. Moreover, California's war on coal directly impacts jobs and industry in Utah.

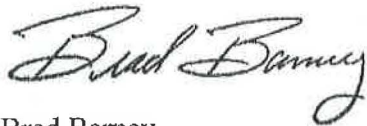
The most visible casualty of California's actions is the Intermountain Power Project ("IPP"). Our understanding is that 87% of the electricity generated by IPP goes to California. California's restrictions, however, are forcing IPP to close or to convert to natural gas. As a result, rural Utah will be losing critical jobs in coal mining and electric power industries as well as in support sectors. The closure of coal mines and the shuttering of coal-fired plants disproportionately impact rural economies and small towns in Utah.

Our company is located in rural Utah. We are one of the main employers in our county and the surrounding counties. We provide good paying jobs for our local communities that allow parents to be home every night and be active participants in their communities. We provide the opportunity for people to stay in rural communities and enjoy their adult years in our valleys. Our company currently employs over 200 people in the transportation of coal in rural Utah.

The drivers hauling coal earn on average more than \$50,000 per year. This does not even include the benefits paid for these employees such as health insurance, paid vacation and retirement contributions. These are needed and necessary jobs to keep our rural communities viable. These monies circulate throughout the communities keeping our local merchants in business selling food, clothing, recreational items and other numerous items. Our rural communities would dry up without the coal industry in Utah. We live in rural Utah because we love rural Utah. We have to have jobs in order to live here. Please protect our jobs.

We join the Utah Mining Association in asking you to fight for rural Utah. California's restrictions on coal-fired generation are poised to significantly harm rural Utah. Moreover, California's overreaching ban on coal short circuits environmental policies and regulations made by Utah lawmakers for the purpose of protecting Utah's residents and businesses. We ask that the State of Utah file an action to enjoin SB 1368 and AB 32 and protect Utah residents, industry and the State's sovereignty.

Sincerely,

A handwritten signature in cursive script that reads "Brad Barney". The signature is written in dark ink and is positioned above the printed name and title.

Brad Barney  
Barney Trucking

## **ATTACHMENT #4**

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Because not all solutions  
are black and white.™



**Legislative Appropriation for Lawsuit  
Challenging California's Carbon  
Surcharge and Ban on Coal-Fired  
Electric Generation**

*primary contact:*

Denise Dragoo

801.257.1998

[ddragoo@swlaw.com](mailto:ddragoo@swlaw.com)

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Understanding what makes *you* unique.®

Snell & Wilmer

## About Snell & Wilmer



### About Snell & Wilmer

**Founded:** 1938

**Geographic Reach:** More than 400 attorneys in nine locations across the western United States and in Mexico. Locations include Phoenix and Tucson, Arizona; Los Angeles and Orange County, California; Denver, Colorado; Los Cabos, Mexico; Las Vegas and Reno, Nevada; and Salt Lake City, Utah.

**Client Reach:** Regional, national and international. Clients include major national and multinational corporations, educational and research institutions, municipalities and government agencies, nonprofits, charitable organizations, industry executives and high-net-worth individuals.

#### **What Sets Us Apart:**

**External Focus:** At Snell & Wilmer, we recognize one straightforward fact: our clients care less about our internal workings and more about the degree to which we understand their business, their industry, and the trends and challenges that can affect their ability to minimize risk and maximize success. This strong external focus and the diverse experience of more than 400 attorneys enable us to help clients solve problems, achieve opportunities and deal efficiently and effectively with an ever-changing economic, business and legal landscape.

**Expansive Legal Experience; Flexible Approach:** Snell & Wilmer is organized into more than five dozen practice areas, so that clients have easy access to attorney skills and knowledge specific to a particular business and industry. Yet many businesses face legal issues that require cross-practice experience. We have the resources to build teams of attorneys from different practice areas and locations who can work together seamlessly to solve the most complex legal challenges.

**Earned Client Trust:** Central to any business is the desire to decrease expense and drive revenue. When dealing with legal matters that involve proprietary business information, trust between the client and our firm is paramount. Snell & Wilmer provides creative yet practical client-specific solutions. Professional integrity and fast response to client needs guide our interactions. In short, we work with clients in ways that are both personal and professional – ways that engender mutual trust and pave the way for successful outcomes.

## Attorney Bios



### Denise A. Dragoo

**Partner | Salt Lake City**

Tel. 801.257.1998

ddragoo@swlaw.com

Denise Dragoo's practice focuses on natural resources, coal law, water law, environmental law, mining law, public land law, issues affecting the oil and gas industry, mine safety and health law.

### Representative Litigation

- Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement, et al., 620 F.3d 1227 (10th Cir. Sept. 23, 2010) (affirming federal district court decision upholding federal mine permit)
- Southern Utah Wilderness Alliance, 163 IBLA 142, GFS (Min) 36 (2004)
- Jesse H. Knight, 155 IBLA 104, GFS (Min) 14 (2001)
- Lodestar Energy, Inc., 155 IBLA 286, GFS (Min) 21 (2001)
- White Oak Mining & Construction Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, decided December 30, 1998, IBLA 97-239
- East Jordan Irr. Co. v. Morgan, 860 P.2d 310 (Utah 1993)
- Hidden Valley Coal Co. v. Board of Oil, Gas and Mining, 866 P.2d 564 (Utah Ct. App. 1993)
- Jensen v. Dinehart, 645 P.2d 32 (Utah 1982)
- White Oak Mining and Construction Co., Inc. v. Office of Surface Mining Reclamation and Enforcement, decided February 4, 1997, 138 IBLA 109
- Ashley Creek Phosphate Co. v. John D. Archer, decided November 29, 1995, 134 IBLA 206
- PacifiCorp, dba PacifiCorp Electric Operations, Utah Power and Light Co., and Energy West Mining Co. v. Office of Surface Mining Reclamation and Enforcement, decided September 26, 1994, 131 IBLA 17
- Sunnyside Reclamation and Salvage, Inc., decided October 30, 1992, 124 IBLA 238
- Utah Power and Light Co., decided March 6, 1991, 118 IBLA 181
- Utah Power and Light Co., decided August 15, 1990, 115 IBLA 366
- Kaiser Coal Corp., decided August 5, 1988, 103 IBLA 312

### Education

- Washington University School of Law (LL.M., Environmental and Land Use Law, 1977)



- Howard Stamper Scholarship
- University of Utah College of Law (J.D., 1976)
  - Utah Bar and Gavel Society
  - Articles Editor, Journal of Contemporary Law
- University of Colorado (B.A., History, with honors, 1973)

## Professional Memberships & Activities

- State Bar of Utah
  - Judicial Conduct Commission, Past Chair and Member (1992-2002)
  - Natural Resources Section, Distinguished Lawyer (1996)
- Utah Board of Bar Commissioners, Commissioner (1991-2002)
- American Bar Association
  - SEER Section Leadership Council (2010-2016)
  - Public Lands Committee, Chair (1993-2001)
  - Mining Committee, Vice-Chair (1997-2000)
- American Bar Foundation, Fellow (1993-present)
- Women Lawyers of Utah, Inc. (1980-present)
  - Woman Lawyer of the Year (1997)
- Rocky Mountain Coal Mining Institute
  - President Elect (2011)
- Rocky Mountain Mineral Law Foundation
  - Trustee (1988-present)
  - Executive Committee (2002-2004)
- National Mining Association, Board Member
- Utah Mining Association, Board Member

## Representative Presentations & Publications

- "Utah's Coal Industry Receives Much Needed Regulatory Relief," Author, Utah Mining Focus (Volume VI, Issue 3)
- "The First 100 Days of the Trump Administration Delivers Much Needed Relief to the Coal Industry," Presenter, Rocky Mountain Coal Mining Institute Colorado/Utah 2017 Regional Meeting (May 18, 2017)
- "Infrastructure development: Utah takes a page from Trump policies," Author, The Enterprise - Utah's Business Journal (April 17, 2017)
- "The International Comparative Legal Guide to: Environment & Climate Change Law 2017," Co-Author of United States Chapter (April 2017)
- "EPA Must Consider Regulatory Impacts on Coal/Utility Industry Jobs and Plant Closure," Author, Utah Mining Focus (December 2016)
- "New Law Provides Incentives for Energy, Environmental Development," Co-Author, The Enterprise (June 8, 2015)

- "Utah's Infrastructure Tax Credit Should Help Expansion of Mining Projects in Urban and Rural Counties," Co-Author, Mining Focus (Volume IV, Issue 3)
- "Hydraulic Fracturing on Public Land: States Regulate While Feds Contemplate," Co-Author, Public Land and Resources Committee Newsletter, American Bar Association Section of Environment, Energy, and Resources, Volume 11, Issue 1 (August 2014)
- "Tighter Regulations Amid the Fracking Fray," Co-Author, The National Law Journal (November 4, 2013)
- "The Environmental Division," Feature Article, Mountain States Super Lawyers (July 2012)
- "New NEPA Challenges for Project Development on Public Lands," Author, Rocky Mt. Min. L. Fdn., 4B (2009)
- "Coal Mine Closure, Reclamation, and Financial Assurance Under the Surface Mine Control and Reclamation Act of 1977, Mine Closure, Financial Assurance, and Final Reclamation," Co-Author, Paper No. 7, Rocky Mt. Min. L. Fdn., 7-1 (2009)

## Professional Recognition & Awards

- The Best Lawyers in America®, Energy Law, Environmental Law, Environmental Litigation, Government Relations Practice, Mining Law, Natural Resources Law (2006-2018)
  - Salt Lake City Lawyer of the Year, Natural Resources Law (2017)
  - Salt Lake City Lawyer of the Year, Mining Law (2015)
  - Salt Lake City Lawyer of the Year, Government Relations Practice (2014)
- Chambers USA: America's Leading Lawyers for Business®, Energy & Natural Resources (2010-2017)
- Mountain States Super Lawyers®, Energy & Resources (2007-2017)
  - Top 50 Women (2013-2014, 2016-2017)
  - Top 40 Women (2007-2011)
- Lawdragon Top 3000 Leading Lawyers in America (2010-2011)
- Super Lawyers®, Energy & Resources - Business Edition (2011)
- Super Lawyers®, Energy & Resources - Corporate Counsel Edition (2009-2010)
- Utah's Legal Elite: Energy/Natural Resources (2009-2011, 2013-2018), Environmental (2012), Utah Business Magazine

## Community Involvement

- State Law Resources Board, Chair (2013-2014)
- Rocky Mountain Mineral Law Foundation, Trustee
  - Grants Committee, Chair
  - Special Institutes Committee, Member
- Mountain States Legal Foundation
  - Litigation Board, Past Chair, Member
- Rocky Mountain Coal Mining Institute, Immediate Past President
  - 100th Annual Meeting Program, President (2012)
  - Board Member

- Utah Museum of Natural History, Fundraising Committee
- Utah Law & Justice Center
  - Founding Board Member
- Alta Club, Board of Directors (2012-2015)
- Junior League of Salt Lake City
  - Community Outreach Board of Directors, Member
- Legal Aid Society
  - Board Member (1993-2005)
  - Chair (1999-2001)
  - "And Justice for All," Board Member (1998-2005)
- Salt Lake City Land Use Appeals Board (1996-2005)
- Salt Lake City Futures Commission (1996-1998)

## **Other Professional Experience**

- Van Cott, Bagley, Cornwall and McCarthy, Shareholder, Officer, Director
- Fabian and Clendenin, Shareholder, Director
- State of Utah, Department of Natural Resources, Special Assistant Attorney General

## **Bar Admissions**

- Utah

## **Court Admissions**

- Supreme Court of Utah
- United States District Court
- United States Court of Appeals, Federal Circuit
- United States Court of Appeals, Tenth Circuit



### Stewart O. Peay

**Partner | Salt Lake City**

Tel. 801.257.1527

speay@swlaw.com

Stewart Peay's practice is focused in general commercial litigation, including construction litigation, real estate and fraud related litigation, toxic tort defense and state procurement issues.

**General Commercial Litigation** Stewart has represented numerous clients in commercial disputes. This includes representing clients in numerous breach of contract, corporate governance, intellectual property and insurance coverage disputes. He has also represented numerous landlords in unlawful detainer and other lessor/lessee disputes.

**Construction Litigation** Stewart has represented and obtained positive outcomes for commercial owners, contractors and architects in disputes dealing with multi-million construction projects. These cases have included breach of contract, change order dispute, cardinal change, negligence, cumulative impact and delay claims, among others.

**Real Estate and Fraud Related Litigation** Stewart has represented and obtained positive outcomes for companies and professionals involved in the real estate and development industry that have been accused of fraud or breach of contract.

**Products Liability Defense** Stewart has represented numerous manufactures and land owners against claims related to asbestos exposure.

Stewart served as an officer in the Utah National Guard for 12 years. His service included a one year tour in Baghdad with the Iraq Survey Group during the Iraq War.

## Representative Matters

### General Commercial Litigation

- Represented numerous clients in commercial disputes, including representing clients in numerous breach of contract, corporate governance, intellectual property and insurance coverage disputes
- Represented numerous landlords in unlawful detainer and other lessor/lessee disputes



## Financial Services Litigation

- Represented a defendant who purchased a large lender that was sued for loaning money to an entity that was purportedly operating a Ponzi scheme
- Represented numerous mortgage servicers who have been sued by individuals claiming that trust deeds securing their mortgages are void because their mortgages were securitized

## Construction Litigation

- Represented commercial owners and contractors in disputes dealing with multi-million dollar construction projects, including breach of contract, cardinal change, negligence, cumulative impact and delay claims, among others
- Represented commercial owners and contractors in issues dealing with federal bidding and contracting standards

## Civil RICO and Governmental Investigations

- Represented several defendants against civil RICO claims, including defending a large title insurer against allegations of RICO and civil conspiracy, and a large holding company against allegations of securities fraud and related RICO violations
- Assisted clients who are being investigated by the SEC or the Utah State Securities Division
- Represented clients who are the subject of litigation brought by SEC receivers seeking the return of assets allegedly obtained through a Ponzi scheme

## Products Liability Defense

- Represented numerous manufactures and land owners against claims related to asbestos exposure

## Education

- J. Reuben Clark Law School, Brigham Young University (J.D., cum laude, 2002)
  - Associate Editor, Journal of Public Law
  - President, Federalist Society
- Brigham Young University (B.S., Economics, 1998)

## Languages

- Russian

## Professional Memberships & Activities

- Salt Lake County Bar Association

## **Representative Presentations & Publications**

- "Utah's Economic Loss Rule," Author, Snell & Wilmer Under Construction Newsletter (September 16, 2013)
- "The New Normal: Thirteen Realities and Issues that Lenders are Considering, and Borrowers Should Now Consider in Connection With Construction Financing," Co-Presenter, ABA Forum Owners & Lenders Division (Division 12) (August 11, 2010)
- "How to Avoid Five Common Errors in Pre-Litigation Investigations," Presenter, Mountain West Chapter of the Association of Corporate Counsel (June 24, 2008)

## **Professional Recognition & Awards**

- Mountain States Super Lawyers®, Rising Stars Edition, Business Litigation (2009-2013)
- Utah's Legal Elite: Civil Litigation, Utah Business Magazine (2011, 2014-2018)
- Chambers USA, America's Leading Lawyers for Business®, Litigation: General Commercial (2017)

## **Community Involvement**

- American Red Cross, Mountain Valley Chapter
  - Board of Directors
- Employer Support of the Guard and Reserve
  - Utah Committee Member

## **Other Professional Experience**

- Baker and McKenzie, Intern, Moscow, Russia

## **Military Service**

- Utah National Guard (1995-2008)
  - Captain, Iraq/Kuwait
  - Operation Iraqi Freedom (01/2003-05/2004)

## **Bar Admissions**

- Utah

## **Court Admissions**

- Supreme Court of Utah
- United States District Court, District of Utah



### **Elizabeth M. Brereton**

**Associate | Salt Lake City**

Tel. 801.257.1916

lbrereton@swlaw.com

Elizabeth Brereton's practice is concentrated in public utility regulation, energy and environmental law including issues surrounding public utility rate cases, energy resource procurement, nuclear generation and development, state and federal permitting, electric transmission regulation, state regulations affecting the oil and gas industry, and mineral development. She advises clients on the regulatory process, environmental liabilities, critical infrastructure security and developing internal compliance strategies. Elizabeth's background as a regulator, and her experience with regulatory agencies, allows her to help her clients navigate complex regulatory processes and develop effective litigation strategies. In addition, Elizabeth has a unique perspective on developing and implementing cyber security best practices due to her past focus on electric grid cyber security.

### **Education**

- Emory University School of Law (J.D., 2009)
- Wellesley College (B.A., Economics, 2003)

### **Professional Memberships & Activities**

- Commercial Real Estate Women Network, Utah Chapter (CREW Utah)
- Women Lawyers of Utah
- Salt Lake County Bar Association
- American Bar Association
- The Energy Bar Association
- Rocky Mountain Mineral Foundation

### **Representative Presentations & Publications**

- "Seeing The Light: State utility regulators finding their way to resolve the net metering debate," Author, Utah Business (March 2017)
- "Cybersecurity: A Mid-Year Update," Co-Presenter, Association of Corporate Counsel Mountain West Chapter Lunch and Learn (May 5, 2016)

- "Cyber Security: Are Four-Letter Words Enough?" Author, Public Utilities Fortnightly (October 2015)

## **Community Involvement**

- Junior League of Salt Lake City, Community Advisory Board
- Wellesley College Club, President (2016)
- March of Dimes, Utah Market Board (2016-present)

## **Other Professional Experience**

- Western Electric Coordinating Council, Enforcement Case Manager (2010-2014)
- Southern Alliance for Clean Energy (CACE), Student Attorney (Ad hoc Counsel) (2008-2010)
- Turner Environmental Law Clinic, Lead Student Attorney (2007-2009)
- U.S. House of Representatives, Legislative Intern for Congressman Jim Matheson (2007)
- State of Utah Department of Commerce, Division of Public Utilities, Utility Analyst (2004-2006)

## **Bar Admissions**

- Utah

## **Court Admissions**

- Supreme Court of Utah
- United States District Court, District of Utah





### Mark D. Johnson

**Partner | Los Angeles**

Tel. 213.929.2532

majohnson@swlaw.com

Mark Johnson is trial lawyer, arbitrator and mediator. He has lead or first chair experience in over 20 jury trials, bench trials and complex arbitrations concerning construction, energy, environmental, land use, oil and gas, products liability, eminent domain, real estate and toxic tort matters. Mark is Martindale-Hubbell® AV Preeminent® judicial and peer review rated and is a member of the American Arbitration Association's National Roster of Commercial Arbitrators. He has a degree in Petroleum Engineering. Prior to becoming a lawyer, Mark worked as an engineer for the California Division of Oil and Gas and Geothermal Resources.

### Representative Experience

#### Representative Matters

- Represented a metals processing company in a lawsuit alleging that the company was liable for over \$200 million under California False Claims Act for allegedly falsifying air emissions data to avoid AQMD fines and penalties.
- Represented a large chemical company in a lawsuit alleging that it was responsible for soil and groundwater contamination on property where it formerly operated.
- Represented a manufacturing company in a wrongful death lawsuit claiming that the company was responsible for exposures to asbestos which caused plaintiff's mesothelioma and resulting death.
- Represented a tenant in a jury trial with respect to claims by its landlord that the tenant was responsible for PCB and VOC soil and groundwater contamination at a manufacturing site. Represented a major oil company in a jury trial regarding claims that the company was responsible for the clean-up of gasoline and MTBE contamination of the soil and groundwater contamination of a former gasoline service station site, as well as the alleged lost profits from development of the site.
- Represented an oil and gas exploration and production company in a lawsuit alleging that its rights to certain oil and gas leases in Beverly Hills had terminated.
- Represented a property owner in a trial challenging permit conditions imposed on a proposed ocean front development by the California Coastal Commission.

## Published Decisions

- Shamsian v. Atlantic Richfield Company (2003) 107 Cal. App. 4th 967; establishing the statute of limitations for claims under Proposition 65

## Education

- Loyola Law School (J.D., 1987)
- University of Southern California (B.S. Petroleum Engineering, 1984)

## Professional Memberships & Activities

- American Bar Association
  - Section of Environment, Energy, and Resources
    - Water Quality and Wetlands Committee, Vice-Chair
  - Litigation Section
    - Construction Litigation Committee
      - Green Building and Renewable Energy Subcommittee, Co-Chair

## Representative Presentations & Publications

- "Keeping an Arbitrator on Track: A New California Case Demonstrates that Contractual Arbitration Provisions Can Be Drafted to Provide for Appellate Review of Errors or Fact of Law," Author, Under Construction (September 2017)
- "New Fed Policy Eliminates Ability of Settlement Options to Include Payments to Non-Party NGOs," Author, S&W Environmental, Natural Resources, Oil and Gas Law Blog (June 16, 2017)
- "Active Negligence or Willful Misconduct Does Not Preclude a General Contractor from Obtaining Indemnification from a Subcontractor," Author, Under Construction (June 2017)
- "New California Construction Laws for 2017," Co-Author, Under Construction (December 2016)
- "Construction Payment and Performance Bond Fundamentals," Speaker, Lorman Education Services Live Webinar (November 1, 2016)
- "My Project Changed - Is My EIR Still Valid: A New California Supreme Court Case Provides Guidance," Author, S&W Environmental, Natural Resources, Oil and Gas Law Blog (September 26, 2016)
- "CA Governor Signs Bill Requiring More Contractor Oversight After Fatal Balcony Collapse," Quoted, Construction Dive (September 19, 2016)
- "What Terms of Sale Control and Can I Get Prejudgment Interest on My California Construction Claim?" Author, Under Construction (September 2016)
- "Inside CA's First Step Toward New Regulations After the Berkeley Balcony Collapse," Quoted, Construction Dive (September 1, 2016)
- "Common Subcontractor Indemnification Provision Clauses and California Limitations Webinar," Presenter, Lorman Education Services (August 1, 2016)

- "How Contractors Can Use Mechanics' Liens to Avoid Getting 'Burned'," Quoted, Construction Dive (April 26, 2016)
- "Affordable Housing on the Hot Seat: Changing Regulations 'Force Developers to Be More Creative'," Quoted, Construction Dive (March 10, 2016)
- "Limitations on Indemnity Provisions in Construction Contracts in California," Author, Under Construction (March 2016)
- "The Dotted Line: How to Navigate 'The 3 Cs' of Construction Bonding," Quoted, Construction Dive (February 9, 2016)
- "It is Remedial or Removal - The Distinction is Critical in Determining the Statute of Limitations for Actions under CERCLA," Author, S&W Environmental, Natural Resources, Oil and Gas Law Blog (January 14, 2016)
- "Construction Payment and Performance Bond Fundamentals Webinar," Presenter, Lorman Education Services (November 16, 2015)
- "Surveying the Landscape: How to Conduct an Admissible Property Appraisal Survey," Speaker, Spring Litigation Conference of the Southern California Chapter of the Appraisal Institute, USC Campus, Los Angeles, CA (November 13, 2015)
- "EPA Methane Rules Cast Wide Net Over Oil, Gas Sector," Quoted, Law360 (August 18, 2015)
- "Construction Bonds and Subguard Insurance," Author, Under Construction (June 2015)

## **Professional Recognition & Awards**

- AV Preeminent® Peer Review Rating from Martindale-Hubbell®
- JD Supra®, Readers' Choice, Top Construction Author (2017)

## **Other Professional Experience**

- Alston & Bird, LLP, Partner (2012-2015)
- Manatt, Phelps & Phillips, LLP, Partner (1999-2012)

## **Bar Admissions**

- California

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## Legal Team Experts



### **Kurt Oneto, Partner**

**Nielsen Merksamer Parrinello Gross & Leoni LLP**

CALIFORNIA CHAMBER OF COMMERCE v. CALIFORNIA AIR RESOURCES BOARD

Case: S241948, Supreme Court of California

### **Thomas Boyd, Shareholder**

**Winthrop & Weinstine**

#### **TOM BOYD ARGUES CASE CHALLENGING MINNESOTA'S NEXT GENERATION ENERGY ACT**

*Thomas H. Boyd recently appeared in U.S. District Court in St. Paul, to argue that Minnesota's Next Generation Energy Act is unconstitutional.*

Thomas H. Boyd, shareholder in the Business & Commercial Litigation group, recently appeared in U.S. District Court in St. Paul, to argue that Minnesota's Next Generation Energy Act is unconstitutional. The hearing took place in a suit by the State of North Dakota and several utilities and other interests challenging the constitutionality of the statute, which prohibits purchases of coal-generated electricity from other states. Tom, who represents North Dakota and these utilities in the suit, argued the statute seeks to regulate generation activities and transactions that occur entirely outside of Minnesota. Moreover, "this is a resource-elimination statute." While many states have laws to encourage utilities' use of clean energy, "the difference between Minnesota's renewable energy law and laws in other states is that the other laws talk about diversifying electricity sources," whereas the NGEA seeks to entirely eliminate a form of generation from the interstate marketplace altogether. As such, the statute violates the Commerce Clause of the federal constitution, and it is also preempted by the Federal Power Act and the Clean Air Act.