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

LIVING RIVERS, Petitioner,  vs.  UTAH DIVISION OF OIL, GAS & MINING, Respondent,  RED LEAF RESOURCES, INC., Intervenor-Respondent.	<b>RED LEAF RESOURCES, INC.'S PREHEARING BRIEF</b>  Docket No. 2012-017  Cause No. M/047/0103
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Pursuant to Utah Admin. Code R641-108-600, the stipulation of the parties and the Board's Order regarding Prehearing Procedures, Intervenor-Respondent Red Leaf Resources, Inc. ("**RLR**" or "**Red Leaf**"), through its counsel of record, respectfully submits its Prehearing Brief concerning the Board's hearing to review the Division of Oil, Gas and Mining's ("**Division's**" or "**DOGM's**") decision to approve Red Leaf's notice of intent to commence large mining operations ("**NOI/LMO**"), which is governed by the Utah Mined Land Reclamation Act, Utah Code § 40-8-13.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

This Prehearing Brief provides a roadmap for the June 27, 2012 hearing before the Utah Board of Oil, Gas and Mining ("**Board**") and a summary of evidence to establish that:

(i) Petitioner has failed to demonstrate that Red Leaf did not meet all of the requirements of the DOGM rules for issuance of its NOI/LMO; and (ii) Petitioner has failed to meet its burden of proving that the Division's decision to approve the NOI/LMO falls outside the bounds of rational decision-making. Therefore, the Board should uphold the Division's final decision to approve Red Leaf's NOI/LMO.

### **SUMMARY OF THE FACTS AND HISTORY OF NOI/LMO DETERMINATION**

Red Leaf is the permittee of the Notice of Intent to Commence Large Mining Operations, Southwest No. 1 Project, approved by the Utah Division of Oil, Gas and Mining as Permit No. M/043/0103 ("NOI/LMO"). On October 20, 2011, DOGM published a Notice of Tentative Approval of the NOI/LMO in accordance with the Division's rules. On February 24, 2012, an Informal Conference was held by DOGM to address Petitioner's protest to DOGM's Tentative Approval of the NOI/LMO. On March 9, 2012, DOGM Director John Baza, Informal Conference Officer, issued Findings of Fact, Conclusions of Law and Order in Cause No. M/047/0103, determining that the Tentative Conditional Approval dated October 20, 2011, was final ("Final Order" or "Findings"). On March 19, 2012, Living Rivers filed a Request for Agency Action ("Request") seeking Board review of the Division's Final Order.

Pursuant to the Board Order Regarding Pre-Hearing Procedures, the parties have exchanged with each other a list of expert witnesses who will file an expert report with the Board and/or may be called at the June 27, 2012 hearing. The parties have filed with the Board experts reports authored by the previously identified experts.

### **BURDEN OF PROOF, STANDARD AND SCOPE OF REVIEW**

Applying the appropriate standard for this administrative review, the Board should find that DOGM had a rational basis for determining that the NOI/LMO met the requirements for

approval under the Utah Mined Land Reclamation Act, § 40-8-13 and implementing rules at R647-4, et seq.

### *Burden of Proof*

The general rule in administrative law is that the party bringing an action has the burden of proving its entitlement to the relief it seeks. *See* 2 Am. Jur. 2d Administrative Law § 355 (database updated May 2009). Because Living Rivers has petitioned the Board for a hearing, and seeks specific relief either denying or remanding the Division's approval of the NOI/LMO permit application, Petitioner must prove that the Division's reasons for approving the NOI/LMO were arbitrary and capricious, or that its factual findings were clearly erroneous. This entails both the burden of producing evidence to support their arguments, and the burden of persuading the Board that the preponderance of such evidence demonstrates that the NOI/LMO approval was improper.

### *Statutory Scheme for Decision Review*

The Board has jurisdiction to review the Petitioner's Request for Agency Action ("Request") in this matter pursuant to the Utah Mined Land Reclamation Act, § 40-8-6 and implementing rule, Utah Admin. Code R647-5-106(17), the Utah Administrative Procedures Act, § 63G-4-201, et seq. and the Board's rules of practice at Utah Admin. Code R641-100, et seq. In reviewing the reasons for Division's decision, the Board should not attempt to recreate the Division's careful and thorough review of the NOI/LMO. Rather, in most instances it should look for the rational basis in the Division's actions (akin to an arbitrary and capricious standard of judicial review) to determine whether there is a minimal "rational connection between the facts found and the choices made by the Division." *See Motor Vehicle Mfrs. Assn. v. State Farm Mutual Auto. Ins. Co.*, 46 U.S. 29, 42 (1983). The Utah courts likewise define the arbitrary and

capricious standard of review in administrative proceedings as a test of “reasonableness.” See *Sierra Club. v. Air Quality Board*, 2009 UT 76 ¶ 14; *Bourgeois v. Dept. Commerce*, 41 P.3d 461, 463 (Ut. Ct. App. 2002). The Division’s reasons for making its decision are admissible and form a core part of determining whether it acted appropriately in approving the NOI/LMO. In matters implicated by Petitioner’s Request for Agency Action where the Division was called upon to apply the law to the facts, the Board may affirm the Division’s decision to approve the NOI/LMO upon a finding that the Division’s decision was reasonable.

When conducting its hearings on the reasons for the Division’s permitting decision, the Board observes formal procedures consistent with the Utah Administrative Procedure Act (“UAPA”). Utah Admin. Code R647-5-101. The hearing should conform to the Board’s general rules of practice and procedure. Utah Admin. Code R641-108-1, et seq. Unless specifically adopted, the rule, formalities, and procedures of common civil litigation before the courts, embodied in the Utah Rules of Civil Procedure, are inapplicable to the Board’s hearings. See *Entre Nous Club v. Toronto*, 287 P.2d 670, 672 (Utah 1955); *Nelson v. Dep’t of Empl. Sec.*, 801 P.2d 158, 162-63 (Utah Ct. App. 1990); Utah Admin. Code R641-108-200 (the Board shall use the Utah Rules of Evidence as guidelines.)

It is common to refer to the Board’s review authority as a “de novo” review. The hearing in this matter is “de novo” in the sense that new evidence can be taken and weighed by the Board. See *Bradbury v. Div’n of Wildlife Resources*, 2002 UT App 417 (unpublished mem. decision) (indicating that “a de novo review is inherent in a formal hearing where the parties have the right to present evidence, argue, respond, and conduct cross-examination.”) It is also de novo in the sense that the Board has the same power to decide the ultimate issue as did the Division when they approved the NOI/LMO. The hearing before the Board is not a “trial de

novo” as that phrase is used in review of informal administrative adjudications in Utah because the Board is not called upon to re-evaluate all of the issues considered by the Division in approving the NOI/LMO, and the applicant is not required to again demonstrate that it has provided all the information and met all of the requirements necessary for approval. *See Cordova v. Blackstock*, 861 P.2d 449, 451 (Ut. Ct. App. 1993) (indicating that in trial de novo, the plaintiff would present its entire case in a new trial.) Rather, the Board is called upon to weigh the claims of error presented by petitioners, and to set aside the Division’s decision only if the preponderance of the evidence shows that some material finding of fact is incorrect, or some conclusion of law is in error. *See Utah Code § 63G-4-301(6)(c)* (indicating that the decision after review should contain findings of fact and conclusions of law directed at the Petitioner’s claims of error in the subordinate agency’s decision.)

#### *Scope of Review*

The Board is justified in according deference to the Division’s findings and conclusions in this hearing on the reasons for the decision. The Board is certainly empowered and qualified to decide detailed technical questions when required by statutes; however, the Division is responsible for initial review of the NOI/LMO, its conformity with legal standards, and for reaching a final decision that has full force and effect. Utah Code § 40-8-13. In this case, the Division issued Tentative Conditional Approval of the NOI/LMO, provided public notice of the decision and opportunity for comment. R647-4-116. The Division then held an informal conference to allow Petitioner to present further comment and issued the Findings, Conclusions and Order to support its final decision approving the NOI/LMO. Utah Code Ann. § 40-8-13; R647-4-116; R647-5-101, et seq. In recognition of the Division’s primary role in NOI/LMO review under the statutory scheme, and in the interest of avoiding duplicated effort and

conflicting interpretations, the Board should defer to the Division's Findings unless they are arbitrary and capricious, clearly erroneous, an abuse of discretion, or otherwise not in accordance with law.

Matters that were not raised by petitioners in the informal conference lie outside the scope of review before the Board. "It is axiomatic in our adversary system that a party must raise an objection in an earlier proceeding or waive its right to litigate the issue in subsequent proceedings." *Brinkerhoff v. Schwendiman*, 790 P.2d 587, 589 (Ut. Ct. App. 1990) (applying the rule explicitly to administrative hearings).

## ARGUMENT

RLR requests that the Board uphold the Division's Findings and Final Order. Contrary to the allegations of Living Rivers, RLR will present evidence that DOGM fully considered the ground water impacts of the Southwest No. 1 Mine as required by the Utah Mined Land Reclamation Program ("**Minerals Program**") and correctly found that the NOI/LMO met the program requirements. RLR will also demonstrate that the Division's decision to approve the NOI/LMO is properly conditioned upon DWQ's deliberations regarding a ground water discharge permit. Applying the appropriate standard for this administrative review, the Board should find that DOGM had a rational basis for determining that the NOI/LMO met the requirements for approval under the Utah Mined Land Reclamation Act, § 40-8-13 and implementing rules at R647-4, et seq.

### I. RLR'S NOI/LMO FULFILLS ALL REQUIREMENTS OF THE APPLICABLE DIVISION RULES AND REGULATIONS UNDER THE MINERALS PROGRAM

An NOI/LMO must meet all of the required elements of the Utah Mined Land Reclamation Act, § 40-8-13 and implementing rules at R647-4, et seq., including an approved

Operations Plan and Reclamation Plan. Living Rivers incorrectly claims that the NOI/LMO does not meet these requirements because it does not adequately identify and describe local ground water resources. Contrary to these allegations, the Division correctly determined that the NOI/LMO meets the requirements for approval. RLR will present evidence that RLR's NOI/LMO fulfills all of the requirements of the applicable Division rules and regulations under the Minerals Program.

RLR will show that the NOI/LMO is written to track the applicable sections of the Minerals Program rules which govern the NOI/LMO application and approval process. RLR Expert Report, Francis A. Amendola. Geologic and ground water resources are described in accordance with Minerals Program rules as follows:

1. NOI/LMO Chapter II, R647-4-105 Maps, Drawings and Photographs including:
  - a. Figure 13, Stratigraphic Density Log; Figure 14, Surface Water Resource Map; Figure 17, Overall Geology of Project Area
2. NOI/LMO Chapter III, R647-4-106 Operations Plan including:
  - a. 106.8 Depth of Ground Water, Extent of Overburden Material and Geologic Setting
3. NOI/LMO Chapter VI, R647-4-109, Impact Statement including:
  - a. 109.1 Projected Impacts to Surface and Ground Water Systems
4. NOI/LMO Appendices including:
  - a. Appendix I – Norwest Geotechnical Analysis; Appendix K – Water Management Strategy; Appendix N – Letter \_ GWDPA; Appendix R – Letter re BAS Analysis; and Appendix S – GWDPA

The allegations of Living Rivers focus particularly on the adequacy of information in the NOI/LMO to meet the requirements of R647-4-106(8) and R647-4-109(1). RLR's NOI/LMO complies with all applicable statutes, rules and regulations required for approval of the NOI/LMO under the Minerals Program. Contrary to the assertions of Living Rivers, the Utah Minerals Program does not require RLR to provide a Failure Modes and Effects Analysis or an adaptive management plan as a condition to obtaining an approved NOI/LMO. The Board should find that the NOI/LMO meets the requirements of the Mineral Program and that DOGM had a rational basis for approving the NOI/LMO.

**A. Depth to Ground Water**

An NOI/LMO must provide an adequate description of ground water resources to meet DOGM's requirements. *See* R647-4-106.8 (depth to ground water). Living Rivers asserts that the record does not contain a complete and accurate description of the depth to ground water as required under Utah Admin. R647-4-106.8. In fact, the record shows that Red Leaf's NOI/LMO provides an adequate description of ground water resources which meets DOGM's requirements. *See* NOI/LMO III.106.8, Depth to Ground Water at pp. 37-38.

RLR's evidence will show that contrary to Living Rivers' allegations, the NOI/LMO for the Southwest No. 1 Project provides an adequate description of ground water resources to meet the requirements of R647-4-106.8. *See* NOI/LMO III.106.8, Depth to Ground Water at pp. 37-38; RLR Expert Report, Robert J. Bayer. Living Rivers fails to prove that the description is either incomplete or inaccurate. In addition, ground water resources are fully described in RLR's ground water discharge permit application dated December 20, 2011 and incorporated into the NOI/LMO. *See* NOI/LMO Appendix S. The Division correctly found that RLR's NOI/LMO meets the requirements of R647-4-106(8) and R647-4-105. Findings, ¶¶ 35, 36.



The observed depth to ground water is consistent with published reports described in the NOI/LMO. *See* NOI/LMO, Appendix S. The administrative record shows that the Division considered the records of the State Engineer in reviewing the NOI/LMO application. The Division's Findings from the Informal Conference also establish that the Division confirmed the depth to ground water via a geologic map and U.S. Geological Survey ("USGS") report. Finding ¶ 35. The observed depth to ground water is consistent with data from other wells in the general area (set forth at Table 1, p. 18-19, Ground Water Discharge Permit Application), and with published reports described in the NOI/LMO and the Findings. *See* NOI/LMO, Appendix S. Finding, ¶ 35. The Division correctly found that this information satisfies the explicit requirements of R647-4-106(8). Findings, ¶ 35.

**B. Potential Impacts to Ground Water Resources**

RLR met the requirements of R647-4-109 by providing a narrative description of ground water impacts. *See* NOI/LMO IV.109.1: Projected Impacts to Surface and Ground Water Systems at pp. 40-42; RLR Expert Report, Robert J. Bayer. Living Rivers makes unfounded allegations that the Division's approval of the NOI/LMO was based on a "false assumption" that there will be no impacts to ground water as a result of the mine (Request at p. 10). RLR and the Division will provide evidence that the Division relied on no such assumption. The Division correctly found that this information satisfies the explicit requirements R647-4-109. Findings, ¶ 41.

The NOI/LMO confirms that records of nearby water wells retained by the Utah Division of Water Rights ("DWR") reflect two deep isolated water bearing strata at: (a) in a 1312 foot deep well at 475 feet (9gpm) and (b) in a 1360 foot deep well. Executive Summary dated October 5, 2011; NOI/LMO p. 38. Findings, ¶¶ 40, 41. In addition, RLR has drilled a 900-foot

deep well which produces 15 gallons of water per minute. RLR Expert Report, Robert J. Bayer. The Division further concludes that ground water is not susceptible to mining operations because it is isolated by several hundred feet of low permeability marlstone. Findings, ¶¶ 40, 41.

The Division appropriately considered data set forth in the NOI/LMO confirming that ground water is isolated from RLR's operations by several hundred feet of low permeability marlstone. *See* the NOI/LMO at p. 42. Findings ¶ 39. Living Rivers cites the NOI/LMO for the statement that the first porous unit occurs some 50-100 feet below the Mahogany zone. Actually, the NOI/LMO cites Holmes and Kimble regarding the occurrence of sandstone units comprising the top of the Douglas Creek Member of the Green River Formation. NOI/LMO at p. 42. However, the NOI/LMO also states that vertical permeability throughout the formation is restricted to jointing, an infrequent occurrence. *Id.* at 42.

RLR found no evidence of significant ground water resources in this area and Living Rivers presents no independent evidence in support of its allegations to the contrary. The Division's acceptance of RLR's description was reasonable because all of the hydrologic evidence, individually, supported the conclusion. Collectively, it leads reasonably to the conclusion that the ground water resource is adequately described as "insignificant." Living Rivers presented no contradictory evidence at the Informal Conference, and the Findings accept the NOI/LMO and other evidence as sufficient to support RLR's description. Findings ¶¶ 33-37, 50-54. Therefore, the Division's final decision approving the NOI/LMO should be upheld.

### **C. Parachute Creek and Douglas Creek Formations**

The Division appropriately found that the NOI/LMO contains an adequate analysis of the Parachute Creek and Douglas Creek members of the Green River Formation. *See* Hydrogeology Report, NOI/LMO, Appendix S, p. 13. Findings, ¶¶ 41, 33, 34, 35. Living Rivers expert Elliott

W. Lips incorrectly asserts that the presence of ground water in Parachute and Douglas Creeks cannot be ruled out. In response to Living Rivers' allegations, RLR will present evidence that only an insignificant amount of ground water was encountered in drilling its six exploration core holes. RLR Expert Report, Robert J. Bayer.

The Ground Water Application shows that water was encountered during drilling in one hole, RL-1, which is the southern-most hole drilled (Figure 6). The water occurrence occurred in the uppermost part of the drill hole and related to surficial factors involving weathering and local geomorphic conditions. Water flow into the borehole from this horizon ceased before the hole was completed. The results of RLR's exploration drilling are summarized in the NOI/LMO, and the full well logs are set forth at Figure 6 of the Ground Water Quality Discharge Application, Appendix S. RLR Expert Report, Robert J. Bayer. The record shows that the Division was aware of this information prior to issuing its final decision approving the NOI/LMO. Findings, ¶ 45.

The NOI/LMO reports no USGS-mapped springs issuing from these formations. Contrary to Living Rivers' allegations, the Division testified at the Informal Conference that a more detailed seep and spring inventory is not required by the Minerals Program rules and that the USGS maps of seeps and springs were acceptable. Findings, ¶ 36. In addition, RLR identifies water sources within a one-mile radius of the mine operations at Figure 3, Appendix S, ground water discharge permit application. This Application was part of the administrative record when the Final Order was entered. Findings, ¶¶ 44, 45.

Finally, the NOI/LMO provides a summary of nearby water wells on file with the Utah Division of Water Rights, Appendix S, p. 21. Findings, ¶ 45. Contrary to the allegations of

Living Rivers, the location of these wells is clearly identified in the State Engineer's data base for each water well. RLR Expert Report, Robert J. Bayer.

Based on the information in the record it was reasonable for the Division to conclude that the NOI/LMO meets the requirements of R647-4-106(8) and R645-4-109. At the hearing before the Board, Living Rivers will have the burden of proving that the Division's determination fell outside the bounds of rational decisionmaking. The Division acted reasonably and the Board should uphold the Division's final decision conditionally approving the NOI/LMO.

## **II. THE ECOSHALE™ IN-CAPSULE DESIGN WILL PREVENT CONTAMINATION OF LOCAL GROUND WATER RESOURCES**

The NOI/LMO adequately addressed the structural integrity of the EcoShale™ In-Capsule design to the satisfaction of the Division. NOI/LMO Chapter III, R647-4-106, Operations Plan, Figures 2, 7, 9, 11, 12; Appendix R. Living Rivers makes speculative and unsupported claims that the capsule method and reclamation is a new concept that has never been demonstrated at the scale RLR proposes in the NOI/LMO. Red Leaf will provide evidence that the application or proposed use of the bentonite amended soil ("BAS") dates back to the early 1980's at landfill, mining and waste remediation projects in New York, Wisconsin and Utah. RLR Expert Report, John Wallace. The technology is neither novel nor unproven, but the correct application for Red Leaf's project type and project setting. Living Rivers also asserts that the capsule design, particularly the BAS layer, will not prevent the migration of fluids from the ore. Living Rivers' assertions regarding the Eco-Shale Capsule design are at odds with the evidence in the record, and contradicted by the Division's Findings from the Informal Conference. Findings ¶¶ 39-41. At the hearing before the Board, Living Rivers will have the burden of proving that these Findings are incorrect.

The major elements of capsule design are also addressed in the ground water discharge permit application on file with DWQ. *See* §§ 11, 12, 13, Ground Water Discharge Permit, NOI/LMO, Appendix S, pp. 25-40; RLR Expert Report, John Wallace. Red Leaf confirmed in correspondence to the Division that this design will be further assured by RLR's proposed monitoring plan. RLR letter to the Division dated November 28, 2011. Moreover, RLR agreed to adhere to all reclamation requirements and revegetation requirements as indicated in its NOI/LMO and reclamation contract. *Id.*

RLR's Capsule Design employs a thick BAS containment system constructed in layers using a manufactured material. Living Rivers expert James Kuipers seeks to call into question evaluation of impacts to the BAS materials. At hearing, Red Leaf will rebut Mr. Kuipers' testimony with evidence that the capsule has been designed to incorporate appropriate design standards relative to side slope stability; i.e., high wall stability, and end and side wall design. RLR Expert Report, John Wallace. Slope designs have been developed using conservative material properties and acceptable factors of safety for both static and seismic design considerations. These acceptable levels of stability will assure that the BAS containment structural integrity is maintained through the operational life of the cells and beyond into its reclaimed life. The BAS uses selectively sized, processed barren oil shale, mechanically mixed and moisture conditioned in a controlled manner. The measured portions of the various components (crushed shale, bentonite, and site water) required to create this manufactured material have been extensively tested in the laboratory in the development of the mix design. Placement, compaction and ultimate performance of the BAS will be further demonstrated in the construction and testing of test fills prior to actual operational cell construction. *See* Quality Control Plan, GWDPA, NOI/LMO, Appendix S.

Living Rivers argues that the stability analysis of the mining process, operations and facility and evaluation of the backing wall stability is not adequately site-specific. Red Leaf expert Francis A. Amendola will testify that Norwest has studied the backing walls to support the capsules and reclamation of the Project site. *See* Norwest's Geotechnical Analysis dated April 21, 2011, Attachment I to the NOI/LMO; RLR Expert Report, Francis A. Amendola. The Norwest Analysis focused specifically on the stability of backing walls of the capsules. The Norwest Analysis evaluates bedrock strength and conditions within the capsule to confirm the adequacy of the design of the capsule wall. Norwest recommended that the effects of retorting on the backing wall and BAS be evaluated thoroughly as capsule design continued. RLR considered Norwest's recommendations in the design set forth in revisions to the NOI/LMO, submitted to the Division on September 22, 2011. The revised NOI/LMO addresses the issues raised in the Norwest Analysis dated April 21, 2011.

RLR's pre-production Construction Quality Control Plan specifies testing procedures for design and construction of the EcoShale<sup>TM</sup> In-Capsule Process. RLR Expert Report, John Wallace. NOI/LMO, Appendix S, § 12, pp. 33-35. Red Leaf addressed this plan at the Informal Conference. The Plan includes testing procedures for determining the integrity of the installed BAS layer to assure construction of the capsule shell at a hydraulic conductivity of  $10^{-7}$  cm/sec, a commitment of the NOI/LMO. As stated in RLR's application, and confirmed by the Division's Findings, the BAS layer will provide a seal such that the process capsule is "impermeable" and in compliance with RLR's NOI/LMO commitments. Finding, ¶ 41. RLR's Plan is also addressed in the DWQ ground water discharge permit application. NOI/LMO, Appendix S; Expert Report, John Wallace.

The DWQ has used the results of the Hydrologic Evaluation of Landfill Performance (“HELP”) modeling performed on behalf of RLR to assess the penetration of moisture. The HELP model was designed to assess how moisture moves into the cover of the capsules. The model inputs include vegetation as well as a foot of suitable growth medium 1-2 feet of regraded overburden and three feet of BAS. The application of this model is not a requirement of DOGM’s Minerals Program but was addressed during the Division’s informal hearing on the NOI/LMO. Living River’s witness Elliott Lips’ use of volume of water rather than rate of water movement through the BAS cap for the non-vegetated case is misleading because Red Leaf will not operate under the non-vegetated scenario due to its reclamation obligations under the NOI/LMO. The HELP model predicts a rate of water movement, based upon several factors including precipitation, evapotranspiration, estimated transmissivity of the BAS cap and the other layers of the cover system (vegetation, 1’ of soil, 2’ of suitable cover and 3’ of BAS). RLR Expert Report, Francis A. Amendola.

The model results Mr. Lips is referring to are those from the non-vegetated scenario from the Reclamation Cover Performance Modeling (HELP), in the GWDP. The base case is the case where the site is assumed to be revegetated and reclaimed as required under a permit issued by DOGM. It predicts water movement which can move downward, as well as upward in the cover system depending upon the amount of moisture (precipitation) received over time and the evapotranspiration removes water from the cover system. There could be less precipitation or higher evapotranspiration than the modeled values thereby reducing the rate of water movement. RLR Expert Report, Francis A. Amendola.

**I. THE FINAL NOI/LMO APPROVAL IS APPROPRIATELY CONDITIONED UPON THE DIVISION OF WATER QUALITY'S APPROVAL OF A GROUND WATER DISCHARGE PERMIT OR CONFIRMATION THAT IT IS UNNECESSARY**

As set forth in RLR's motion for partial summary decision, as a matter of law, the Division properly conditioned the NOI/LMO upon DWQ's further determination regarding the need for an approved GWPDA.<sup>1</sup> Living Rivers makes the blatantly incorrect assertion that there is no evidence in the record that "the Division factored in the DWQ's decision to require RLR to submit an application for a ground water discharge permit." Request at 11; note 1. Red Leaf will show that the allegation is both false and meaningless. Living Rivers cannot show that "factoring" the DWQ process with the DOGM permit decision would lead to a different outcome, or result in compliance with any legal requirement that would otherwise be evaded. Contrary to Living Rivers' allegations, the record shows that both DOGM and Red Leaf responded to DWQ's October 6, 2011 decision to require Red Leaf to submit an application for a ground water discharge permit. Red Leaf modified the NOI/LMO application on October 7, 2011 to reflect this request. Findings ¶ 30. A copy of the GWDPA is incorporated into the NOI/LMO as Appendix "S" and part of the application approval by the Division on March 9, 2012.

The Division acted well within its authority by conditioning the NOI/LMO upon DWQ's approval of a ground water discharge permit. The Minerals Program specifically provides that the NOI/LMO does not relieve the applicant of the obligation to comply with all applicable statutes, rules and regulations including those of the DEQ. Utah Code § 40-8-17(i); R647-1-102.3. Imposing such a condition, therefore, is within the discretion afforded to both the

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<sup>1</sup> This issue is addressed as a matter of law in Red Leaf's Motion for Partial Summary Decision and supporting memorandum filed the same date as this Pre-Hearing Brief.



Division and Board to administer the Minerals Program, and will be affirmed upon judicial review so long as the decision is reasonable. *See* Utah Code § 63G-4-403(4)(h); *Sierra Club v. Air Quality Bd.*, 2009 UT 76, 226 P.3d 719 at ¶ 14.

In this case, conditioning the NOI/LMO on DWQ's ground water discharge permitting decision is entirely reasonable. The permitting processes of the Division and DWQ are independent, with the DWQ process more focused on ground water quality. The Ground Water Protection Section of the Utah Division of Water Quality, as authorized by the Utah Water Quality Act, administers the state-mandated Utah Ground Water Quality Protection Program. Utah Code §19-5; Utah Admin. Code R317-6. The Utah program protects current and future beneficial uses of ground water. The primary purpose and focus of the Ground Water Quality Protection Program is the issuance and enforcement of ground water quality discharge permits to minimize impacts to ground water quality for facilities that may result in a discharge of pollutants directly or indirectly into ground water.

Because the Utah Ground Water Quality Protection Program is exclusively a state program, the DWQ is the appropriate authority to issue permits, take enforcement actions and implement ground water permitting for the Red Leaf Southwest No. 1 project. Living Rivers asserts that because the Red Leaf leases are located in "Indian Country" the U.S. Environmental Protection Agency (EPA) is the appropriate authority to issue permits. The Utah Ground Water Quality Protection Program is not a federal primacy program and has not been preempted by any comprehensive federal regulatory scheme. There is no counterpart federal ground water permitting program under the Federal Clean Water Act. Therefore DWQ has exclusive jurisdiction to issue a ground water discharge permit, should DWQ determine that a permit is required at the Southwest No. 1 Project site.

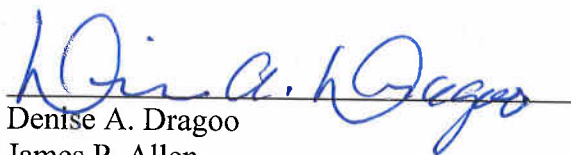
Living Rivers' complaint that the DWQ ground water permit discharge application was submitted after the Division's tentative decision is of no consequence. Prior to issuing a final decision on the NOI/LMO the Division provided Living Rivers will a full opportunity at an Informal Conference on February 24, 2012, to advise the Division of any issues or concerns, relative to the NOI/LMO that might warrant further investigation or review. As a separate permitting matter, Living Rivers has also met with DWQ and has provided DWQ with written comment on RLR's ground water discharge permit application which is pending with that agency. The DOGM has authority under the Minerals Program, independent from the authority of DWQ, to determine that ground water issues were properly addressed in the NOI/LMO and DOGM properly conditioned the NOI/LMO upon DWQ's independent determination regarding the need for a ground water discharge permit. The NOI/LMO should not be delayed pending DWQ's independent review of the ground water discharge permit.

### **CONCLUSION**

In sum, Red Leaf will present evidence at hearing that the Division correctly and reasonably determined that RLR's NOI/LMO application fulfills all of the requirements of the applicable Division rules and regulations under the Minerals Program. Living Rivers has the burden of proof to show that the Division's Findings of Fact are incorrect and that the Division's conclusions resting upon these findings are unreasonable, or that any conclusion of law is incorrect. Red Leaf believes that Living Rivers will fall short of this steep burden of proof and urges the Board to uphold the Division's final decision approving the NOI/LMO.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of June, 2012.

SNELL & WILMER



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**CERTIFICATE OF SERVICE**

I hereby certify that on the 11<sup>th</sup> day of June, 2012, a true and correct copy of the foregoing RED LEAF RESOURCES, INC.'S PREHEARING BRIEF LIMINE was served by e-mail and was mailed via U.S. mail, postage prepaid, to the following:

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