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

LIVING RIVERS, Petitioner,	<b>RED LEAF RESOURCES, INC.'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION</b>
vs.	Docket No. 2012-017
UTAH DIVISION OF OIL, GAS & MINING, Respondent,	Cause No. M/047/0103
RED LEAF RESOURCES, INC., Intervenor-Respondent.	

Intervenor-Respondent Red Leaf Resources, Inc. ("**RLR**" or "**Red Leaf**"), permittee of the Southwest No. 1 Mine, LM/04710103, through its attorneys, and pursuant to Utah Administrative Code R641-105-300 and Utah Code § 63G-4-102(4)(b), hereby moves for partial summary decision on the claim raised by Petitioner in its Request for Agency Action, filed with the Board of Oil, Gas and Mining ("**Board**") on March 19, 2012, that the Division did not have authority to condition final approval of Red Leaf's Notice of Intent to Commence Large Mining Operations for the Southwest No. 1 Project ("**NOI/LMO**") upon the approval of a groundwater discharge permit by the Utah Division of Water Quality ("**DWQ**").

Petitioner's Request for Agency Action disputes the Utah Division of Oil Gas and Mining's (the "**Division's**" or "**DOGM's**") decision to approve Red Leaf's NOI/LMO which is governed by the Utah Mined Land Reclamation Act, Utah Code Ann. § 40-8-13 ("**Minerals Program**"). Petitioner has set forth an objection that does not present any genuine issue of material fact requiring an evidentiary hearing, is without legal merit, and should be dismissed as a matter of law. As a result, Red Leaf moves for partial summary decision and requests that the Board dismiss the claim raised by the Petitioner that the Division erred in approving Red Leaf's permit application before the DWQ had approved a separate groundwater discharge permit.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. By letter dated October 6, 2011, DWQ requested RLR submit a groundwater discharge permit application for the Southwest No. 1 Mine.
2. On October 20, 2011, DOGM published a Notice of Tentative Approval of the NOI/LMO in accordance with the Division's rules, requiring RLR, thirty days prior to ground disturbance, to include in the mine plan a "groundwater discharge permit (including a permit by rule) from the Division of Water Quality or a letter saying a permit is not required."
3. By letter dated November 18, 2011, Living Rivers protested DOGM's Tentative Decision to approve the NOI/LMO based on alleged groundwater impacts of the Southwest No. 1 Mine ("**Protest**"). The Protest failed to acknowledge that DOGM's Tentative Approval was expressly conditioned upon DWQ's issuance of a groundwater discharge permit or DWQ's written confirmation that a permit is not required. Protest at p. 3.

4. On December 21, 2011 RLR submitted to DOGM the Utah Ground Water Discharge Permit Application which Red Leaf provided to the DWQ. On January 11, 2012, the DOGM incorporated the Groundwater Discharge Permit Application into the NOI/LMO as Appendix S. The Groundwater Discharge Permit Application is currently pending before the DWQ.

5. Initial responses to DWQ questions were reviewed and discussed in a meeting with DWQ on February 7, 2012. A follow-up meeting was held with DWQ to discuss responses to the Completeness Review comments dated February 10, 2012.

6. On February 24, 2012, an Informal Conference was held by DOGM to address Living Rivers' Protest to DOGM's Tentative Approval of the NOI/LMO.

7. 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: (i) the Tentative Conditional Approval dated October 20, 2011, was final; (ii) conditioning approval of the NOI/LMO on Condition #1 requiring that 30 days prior to ground disturbance, RLR provide to DOGM either a groundwater discharge permit or a letter from DWQ stating that a permit is not required; and (iii) reserving to DOGM enforcement and inspection rights to monitor the Southwest No. 1 Mine to ensure that groundwater is adequately protected in compliance with Condition #1 ("**Final Order**" or "**Findings**").

8. On March 19, 2012, Living Rivers filed a Request for Agency Action seeking Board review of the Division's Final Order.

## STANDARD FOR SUMMARY JUDGMENT

In a formal adjudication under the Utah Administrative Procedures Act (“UAPA”), the presiding officer(s) may dispose of a matter by summary judgment as that standard is set forth in the Utah Rules of Civil Procedure. Utah Code § 63G-4-102(4)(b); *see* Utah Admin. Code R641-100-500 (reserving all powers in UAPA to the Board). The Board may consider matters beyond the pleadings and summary judgment shall be rendered when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Utah R. Civ. P. 56(c). Indeed, a party opposing summary judgment may not rest on mere allegations or denials, but must provide affirmative proof in the form of affidavits or other actual evidence setting forth specific facts showing that there is a genuine issue to be resolved at trial. *Id.* at 56(e).

The Petitioner has, through the application and permitting process, and through this administrative proceeding, been afforded ample opportunity to ascertain, adduce, and set forth evidence supporting its claim. As Red Leaf will demonstrate herein, summary judgment is merited because the Petitioner has not, and indeed cannot, bring forth any evidence that would create a genuine issue as to any material fact. An evidentiary hearing is not required to resolve this issue and the Board should enter an order dismissing the claim.

Red Leaf will explain below that based on the undisputed facts known to Red Leaf, the Board should decide that no provision governing the Minerals Program has been violated by the Division appropriately conditioning approval of the NOI/LMO upon DWQ’s determination regarding the need for a groundwater discharge permit.

In opposing this Motion, it is Petitioner’s burden to bring forth relevant information that places material facts in dispute. Petitioner may only present evidence that is relevant or material.

See Utah Admin. Code R641-108-201; Utah Code § 63G-4-206(1)(b)(i). If the existence of the facts sought to be proved will have no bearing on disposition of a claim, the fact is irrelevant and the Petitioner is not entitled to present it through exhibits or testimony. For the reasons just discussed, Petitioner is obliged at this juncture to bring forth evidence in support of its claim, and cannot complain that adjudication of the issue on summary decision denies them a right to present evidence that is immaterial to resolving the issue.

### ARGUMENT

**I. THE BOARD SHOULD DISMISS PETITIONER'S CLAIM THAT THE DIVISION INAPPROPRIATELY CONDITIONED FINAL NOI APPROVAL UPON THE DIVISION OF WATER QUALITY'S APPROVAL OF A GROUNDWATER DISCHARGE PERMIT**

The Board should dismiss Petitioner's claim that the Division erred in approving Red Leaf's permit application before the DWQ approved a separate groundwater discharge permit. Petitioner has raised no genuine issue of material fact relating to the Division's decision to approve the NOI/LMO conditionally upon DWQ's deliberations regarding a groundwater discharge permit. By taking issue with the appropriateness of the Division conditioning the NOI/LMO upon DWQ's determination regarding the need for a groundwater discharge permit, Petitioner is presenting the Board with the classic causality dilemma of "which came first, the chicken or the egg?" No factual dispute exists around the timing of RLR's groundwater discharge permit application or the timing of the Division's approval of the NOI/LMO. The timing of the permitting decisions of both DWQ and the Division are not in dispute and do not violate any governing standard -- Petitioner takes issue with the relationship between the timing of the separate determinations. The authority of the Division to condition approval of the NOI/LMO upon DWQ's approval of a groundwater discharge permit is clear. The Division did,

in fact, use its authority to condition approval of the NOI/LMO upon DWQ's approval of a groundwater discharge permit. Petitioner has brought forth no specific facts showing that there is a genuine issue as to whether the Division violated any governing standard in conditioning the NOI/LMO upon DWQ's determination regarding the need for a groundwater discharge permit.

**A. No Dispute Exists Regarding the Authority of the Division to Condition the NOI on DWQ's Issuance of a Groundwater Discharge Permit.**

The Division acted well within its authority by conditioning the NOI/LMO upon DWQ's approval of a groundwater 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 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 upon DWQ's groundwater discharge permitting decision is entirely reasonable. This approach insures that both agencies act within their areas of authority and apply all statutory provisions. Further, conditioning the NOI/LMO upon DWQ's permit is consistent with the Memorandum of Understanding between DOGM and DWQ, dated September 1, 1999 ("MOU"). Consistent with the MOU, a pre-design conference was held in August, 2010, which included RLR, DWQ and DOGM. MOU, Article III.A. RLR believed, based on that meeting, that a groundwater discharge permit application was not required by DWQ. April 28th NOI/LMO at p. 33. However, in October, 2011, RLR was required to submit a groundwater permit discharge application. DWQ letter dated October 6, 2011. DWQ and

DOGMA are now coordinating their separate permitting responsibilities to avoid duplication. *See* MOU Article III.B.5. Consistent with the MOU, DWQ should keep DOGMA advised of notices regarding the groundwater discharge permit application and provide DOGMA with a copy of the final permit. MOU Article III.B.6. For its part, the Division has agreed to condition the NOI/LMO upon DWQ's permitting decision. Because this approach represents the Division's considered judgment in a technical issue, a deferential standard of review is appropriate. Under that standard, the Board should not disturb the Division's reasonable choice to condition the permit on DWQ's separate approval of a water quality permit or a letter stating that a permit is not needed. Summary decision on this issue should be rendered for Red Leaf, and the claim dismissed.

**B. Facts Surrounding the Timing of the Division's Approval of the NOI and RLR's Groundwater Discharge Permit Application are not in Dispute.**

The basic facts relating to the timing of the two permits are undisputed. Living Rivers only disputes whether the Division should have conditioned approval of the NOI upon the DWQ's approval of a groundwater discharge permit – not whether the timing and permitting decisions occurred as stated in the facts. Living Rivers' complaint that the DWQ groundwater 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 with a full opportunity at an Informal Conference in February, 2012, to advise the Division of any issues or concerns, relative to the NOI/LMO that might warrant further investigation or review. Living Rivers has also met with DWQ and has provided DWQ with written comment on RLR's groundwater discharge permit application. Living Rivers, through a

hearing on June 27th, now has an opportunity to fully explore the groundwater impacts of the NOI/LMO before the Board.

The Division properly conditioned the NOI upon DWQ's further determination regarding the need for an approved groundwater discharge permit application ("GWPDA"). 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 groundwater discharge permit." Request at 11; note 1. 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 groundwater discharge permit. Red Leaf modified the NOI/LMO application on October 7, 2011 to reflect this request. Findings ¶ 30. A copy of the GWPDA is incorporated into the NOI as Appendix "S" and part of the application approval by the Division on March 9, 2012.

**C. No Dispute Exists that the Division Conditioned the NOI/LMO on DWQ's Issuance of a Groundwater Discharge Permit.**

The Division specifically conditioned its permission to operate under the NOI/LMO upon the issuance of a groundwater discharge permit by the DWQ or a letter stating that a permit is not required. *See* Condition #1, Conditional Tentative Approval, dated October 20, 2011. On December 21, 2011, Red Leaf provided DOGM with a copy of the groundwater discharge application which it provided to DWQ. Findings ¶ 44. As noted by the Hearing Officer in the Informal Conference, this application was incorporated into the NOI/LMO as Appendix "S" prior to DOGM's final approval of the NOI/LMO. Findings ¶¶ 44-45. The Division's Final



Order dated March 9, 2012, is also explicitly conditioned upon DWQ's approval of a groundwater discharge permit or confirmation that a permit is unnecessary. Final Order ¶ 2. No question of fact exists as to the Division's approval of Red Leaf's permit application before the DWQ approved a separate groundwater discharge permit.

**II. PETITIONER CANNOT PREVAIL ON A CLAIM THAT THE DIVISION INAPPROPRIATELY CONDITIONED THE NOI ON DWQ'S ISSUANCE OF A GROUNDWATER DISCHARGE PERMIT WITH NO LEGAL AUTHORITY**

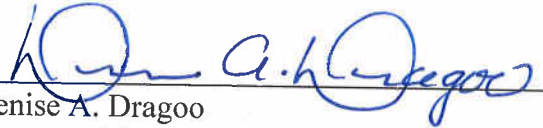
The Board should dismiss Petitioner's claims relating to the Division's decision to condition the NOI on DWQ's issuance of a groundwater discharge permit. Petitioner claims the Division has refused to defer a final decision on the NOI pending a complete review of Red Leaf's proposal by DWQ. No dispute exists around this fact. The Petitioner has given no indication as to why this fact is a violation of any rules governing the decision-making process of the Division. This Board's rules governing the Request for Agency Action require that the Request set forth the relief sought from the Board, and "the facts and reasons forming the basis for relief." Utah Admin. Code R641-104-133.600-133.700. Petitioner's claims relating to the Division's decision to condition the NOI on DWQ's issuance of a groundwater discharge permit should be dismissed as hopelessly vague, because Petitioner fails to state with any specificity exactly how the Division has been deficient by issuing a conditional approval.

**CONCLUSION**

For the foregoing reasons, Red Leaf's motion for partial summary decision should be granted, and the Board enter judgment for the Intervenor-Respondent, and dismiss Petitioner's claim that the Division inappropriately decided to condition the NOI on DWQ's issuance of a groundwater discharge permit.

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 MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION was served by e-mail and was mailed, via U.S. mail, postage prepaid, to the following:

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