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OGMCOAL - Fwd: Coal Hollow RqstForAgAction.pdf

From: April Abate
To: juhu@xmission.com; OGMCOAL@utah.gov
Date: 7/1/2010 12:03 PM
Subject: Fwd: Coal Hollow RqstForAgAction.pdf
Attachments: Coal Hollow RqstForAgAction.pdf; 2009-019_20091230_IntervenorsResponsetoRAA.OCR.pdf; 2009-019_20091229_PermitteesMemorandum.Scope.pdf; 2009-019_20091229_DivisionsMemorandum.Scope.OCR.pdf; April Abate.vcf; April Abate.vcf

Hello Ms. Hubbard,

You contacted my colleague, Steve Christensen about obtaining a copy of the SUWA protest document. I am sending you the initial REQUEST for AGENCY ACTION prepared by SUWA and the other conservation groups involved in the hearing. This document is the formal, legal response to contesting the permit decision. I have also included the legal responses from Alton Coal Company, Kane County, and us (the Division).

I hope this is the information you are looking for. If I can be of further assistance, please feel free to contact me.

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

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE,
NATURAL RESOURCES DEFENSE
COUNCIL, and
NATIONAL PARKS CONSERVATION
ASSOCIATION,

Docket No. 2009-019
Cause No. C/025/0005

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent.

**REQUEST FOR AGENCY ACTION
AND REQUEST FOR A HEARING BY
PETITIONERS UTAH CHAPTER OF THE SIERRA CLUB *et al.***

Utah Chapter of the Sierra Club ("Sierra Club"), Southern Utah Wilderness Alliance ("SUWA"), Natural Resources Defense Council ("NRDC"), and National Park Conservation

Association (“NPCA”)(collectively, “Petitioners”) file this Request for Agency Action to appeal the decision of the Division of Oil, Gas, and Mining (“Division”) approving the application of Alton Coal Development, LLC, (“ACD”) to conduct surface coal mining and reclamation operations in Coal Hollow. Petitioners respectfully request a hearing on the reasons for the decision.

As explained more fully below, the Division failed to follow applicable state law, including its own regulations, by failing to withhold approval of ACD’s inaccurate and incomplete permit application and by failing to conduct a cumulative hydrologic impact analysis that meets the applicable legal and scientific requirements for such studies. Accordingly, Petitioners urge the Board to vacate the Division’s approval of ACD’s permit application and enter an order denying it as inaccurate, incomplete, or both. Alternatively, Petitioners request that the Board vacate the approval decision and remand the matter to the Division to allow ACD to correct identified permit deficiencies, if it can.

I. LEGAL AUTHORITY, JURISDICTION AND STANDING

This Board has legal authority and jurisdiction to review approval of ACD’s permit application pursuant to Utah Code Ann. § 40-10-14(3) and UT ADC R645-300-200 *et. seq.* The Utah Chapter of the Sierra Club, SUWA, NRDC, and NPCA are interested parties in this action.

Sierra Club is a national nonprofit organization of approximately 1.3 million members and supporters dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Utah Chapter of Sierra Club has approximately 3,770 members. These members use and enjoy public lands in and throughout Utah,

including Bryce Canyon National Park. Sierra Club members use these lands for a variety of purposes, including: recreation, solitude, scientific study, and aesthetic appreciation. Sierra Club members also enjoy the Panguitch National Historic District.

SUWA is a non-profit environmental membership organization dedicated to the sensible management of public lands within the State of Utah, to the preservation and protection of plant and animal species, and to the preservation of Utah's remaining wild lands. SUWA has offices in Utah and in Washington, D.C. SUWA has members in all fifty states and several foreign countries. SUWA members use and enjoy public lands in and throughout Utah for a variety of purposes, including scientific study, recreation, hunting, aesthetic appreciation, and financial livelihood. SUWA members visit and recreate (*e.g.*, hunt, camp, bird, sightsee, and enjoy solitude) throughout the lands that are the subject of this request for agency action, including the Paunsaugunt Plateau, the city of Panguitch, Bryce Canyon National Park, and surrounding public lands. SUWA members also use and enjoy the Panguitch National Historic District. SUWA members have a substantial interest in resources affected by this matter, including night skies, air quality, water quality, and cultural historic sites. SUWA members also have a substantial interest in seeing that the Division complies with the terms and requirements of state law and its own regulations. SUWA brings this action on its own behalf and on behalf of its adversely affected members.

NRDC is a non-profit environmental membership organization with more than 500,000 members throughout the United States. Of these members, 3,014 reside in Utah. NRDC members use and enjoy public lands in and throughout Utah, including Bryce Canyon National Park and surrounding public lands. NRDC members use these lands for a variety of purposes, including: recreation, solitude, scientific study, and aesthetic appreciation. NRDC members also enjoy the Panguitch National Historic District. With its nationwide membership and a staff of lawyers,

scientists, and other environmental specialists, NRDC plays a leading role in a diverse range of land and wildlife management and resource development issues. Over the years, NRDC has participated in a number of court cases involving resource development issues, in Utah.

NPCA is a non-profit national organization whose primary mission is to address major threats facing the National Park System. NPCA is the leading voice of the American people in protecting and enhancing the National Park System and has more than 325,000 members throughout the United States, with over 2,000 in Utah. NPCA plays a crucial role in ensuring that America's national parks are protected in perpetuity by undertaking a variety of efforts, including: advocating for the parks and the National Park Service, educating decision-makers and the public about the importance of preserving the parks, lobbying members of Congress to uphold the laws that protect the parks and in support of new legislation to address threats to the parks, and assessing the health of the parks and park management to better inform NPCA's members and the general public about the state of the park system. NPCA members use and enjoy Bryce Canyon National Park and the surrounding public lands, as well as the Panguitch National Historic District for a variety of purposes, including recreation, sightseeing and aesthetic appreciation.

Each organization brings this action on its own behalf as well as on behalf of its members — persons with interests which are or may be adversely affected by the Division's approval of ACD's permit application. Utah Code Ann. § 40-10-14(3); UT ADC R645-300-211. Petitioners' members use the recreational, cultural/historic, aesthetic, water, air, and other environmental resources located within and adjacent to Alton, Coal Hollow, the Paunsaugunt Plateau, and Bryce Canyon National Park for stargazing, hiking, hunting, camping, viewing cultural resources, sightseeing, wildlife viewing, and enjoying the unique solitude of these undeveloped lands. Petitioners' members have and hope to continue to enjoy the resources of the Panguitch National Historic District. Certain of

petitioners' members live in the vicinity of the Panguitch National Historic District. The property value and other economic interests of these members will be adversely affected by the proposed mine. The Division's unlawful decision to approve proposed surface coal mining and reclamation operations in these largely untrammelled areas will have a direct adverse effect on these resources and on the interests of Petitioners' members. Each of the affected members of the Utah Chapter of the Sierra Club, SUWA, NRDC, and NPCA relies upon one or more of those organizations to bring actions such as this one to protect the member's potentially affected interests.

II. SUMMARY OF THE ARGUMENT

The Division acted arbitrarily, capriciously, and contrary to law in failing to withhold approval of ACD's inaccurate and incomplete permit application and in failing to conduct a cumulative hydrologic impact assessment ("CHIA") in accordance with the applicable requirements of law and good scientific practice. Despite the requirement that ACD accurately and completely characterize existing hydrologic conditions in the proposed permit and adjacent areas, ACD's permit application includes only scattershot data and superficial guesses and assumptions about the existing hydrologic regime. ACD's permit application also lacks adequate biological, cultural, and historical information with respect to both the permit and adjacent areas. For its part, the Division failed to perform a cumulative hydrologic impact assessment that (1) delimits the "cumulative impact area" of the proposed operation based on a scientifically sound determination of the area within which the probable hydrologic effects of the proposed operation may interact with the actual or likely effects of all other "anticipated mining," (2) reasonably defines material damage criteria for each potential adverse hydrologic impact that ACD identifies in its statement of probable hydrologic consequences ("PHC") or that the Division identified in its technical analysis, and (3) rationally concludes that ACD's proposed operation has been designed to prevent material damage outside the permit area.

Because the existing hydrology, fish and wildlife, cultural/historic resources, and other facets of ACD's proposed permit and adjacent areas are inadequately characterized and considered in the permit application, the Division cannot possibly fulfill its legal responsibility to protect the environment and the public from adverse impacts and ensure the area is returned to its properly reclaimed uses.

III. PROCEDURAL HISTORY

On June 27, 2006, Talon Resources, Inc. submitted a permit application for the Coal Hollow Mine. The Division determined that this application was incomplete and returned it on August 28, 2006. ACD then submitted a revised permit application for the Coal Hollow Mine on June 14, 2007. The Division deemed ACD's application complete on March 14, 2008. A technical review and public commenting period commenced following this completeness determination.¹ Petitioners filed comments on the permit on May 22, 2008. In addition, SUWA requested "Consulting Party Status" for cultural resource management. The Division did not respond to SUWA's request.

The Division convened an informal conference in Alton, Utah, on June 16, 2008, to receive additional written and oral comments on the mine and the proposed relocation of County Road 136. At this time the Director extended the informal conference written comment period to June 20, 2008. Twelve written comments were received, including a petition requesting further studies of natural and cultural resources in the adjacent area.²

The Division failed to issue a decision within 60 days of the conclusion of the informal conference. Instead, the Division continued to accept supplemental information from ACD and to

¹ Utah Division of Oil Gas and Mining, *Decision Document and Application Approval* (October 15, 2009) ("*Decision Document*") at 3.

² Priscilla Burton, *Technical Memorandum re Permit Application – Coal Hollow Mine*, Tasm ID # 3371 (October 15, 2009) at 1.

prepare its technical analysis. Following a September 15, 2009, meeting between ACD representatives and Utah Governor Gary Herbert, and without requesting public comment or convening an informal conference on the supplemental information and analyses supplied after the June 16, 2008, informal conference, the Division issued a decision document approving ACD's permit application on October 19, 2009.

V. STATEMENT OF FACTS

ACD's permit for the Coal Hollow Mine authorizes surface mining on 635.64 acres.³ The permit provides for the mining of private coal on private land. The permit authorizes ACD to mine 2,000,000 tons of coal per year for approximately three years. The mine will operate 24 hours per day, six days per week. In addition to the mining of private coal as authorized by the Division, ACD has applied to the Bureau of Land Management to lease federal coal on 3,600 acres of adjacent public land. BLM is currently preparing a draft Environmental Impact Statement related to ACD's federal lease application.⁴

The Coal Hollow Mine is located approximately 3 miles south of Alton, Utah, and within 10 miles of Bryce Canyon National Park. Bryce Canyon National Park is a series of natural amphitheaters extending more than 20 miles along the Paunsaugunt Plateau. Bryce Canyon became a National Monument by order of Warren Harding in 1923, and reached National Park status in 1928.⁵ The park has striking geological structures formed by wind and ice erosion, in glowing colors of red, white and orange. The unusual pinnacles, called hoodoos, crowd the rims of Bryce, and reach upwards at their highest to 9,000 feet. The park receives 1.5 million visitors annually, most of who travel on Highway 89 either coming to or from the park. The park has outstanding

³ *Decision Document*, Administrative Overview at 1.

⁴ *Decision Document*, *Technical Analysis* at 1.

⁵ National Park Service, U.S. Department of the Interior web site *available at* <http://www.nps.gov/brca/index.htm>

visual, recreational, and resource values that may be severely compromised if adjacent lands are opened to coal mining. Bryce Canyon National Park is the main visitor attraction to Garfield County, where tourism represents 60% of the economic base.⁶

Bryce Canyon and the surrounding lands support a vast diversity of plant and animal life. The park hosts more than 400 native plant species. Bryce Canyon is home to 175 different species of birds, 59 species of mammals, 11 species of reptiles and four species of amphibians.⁷ The park is part of the natural habitat of three species listed under the Endangered Species Act: the Utah Prairie Dog, the California Condor, and the Southwestern Willow Flycatcher. Sage grouse populate the lands outside the park near Alton, where the mine is proposed. Analysis done by Utah's Division of Wildlife Resources indicates that the mine will destroy the southernmost existing greater sage grouse lek rangewide.⁸

The area also has some of the country's best air quality, approaching 200 miles of visibility.⁹ It has a 7.4 magnitude night sky, making it one of the darkest in North America.¹⁰ Stargazers can see 7,500 stars on a moonless night, while in most areas fewer than 2,000 can be seen due to light and air pollution.¹¹ Every year Bryce Canyon hosts an Astronomy Festival that attracts thousands of visitors.

The National Park Service raised concerns about the impacts of the proposed Coal Hollow Mine on the night skies, water quality, wildlife and scenic values of Bryce Canyon National Park.

⁶ Letter from Eddie Lopez, Superintendent, Bryce Canyon National Park, to Keith Rigtrup, BLM Kanab Field Office (Feb. 23, 2007) [hereafter "NPS Comments"].

⁷ National Park Service website available at <http://www.nps.gov/brca/naturescience/reptiles.htm>

⁸ Letter from James F. Karpowitz, Utah Div. of Wildlife Resources to the Office of the Governor re. Federal Coal Lease Application Filed by Alton Coal Development LLC (Feb. 23, 2007).

⁹ National Park Service website available at <http://www.nps.gov/brca/historyculture/index.htm>

¹⁰ *Id.* at <http://www.nps.gov/brca/planyourvisit/astronomyprograms.htm>

¹¹ *Id.*

The National Forest Service also raised concerns regarding the need to protect the night sky quality and other aspects of air quality in the nearby Dixie National Forest.

As approved, ACD's permit provides for the transport of coal north from Alton along U.S. Highway 89, west along State Route 20 and south along Interstate 15. U.S. Highway 89 has been designated as "The Morman Pioneer Heritage Highway" and is the main artery for tourist travel between Bryce Canyon, Zion and Grand Canyon National Parks. The mine is expected to result in hundreds of double trailer coal truck trips per day. The coal trucks will travel directly through the Panguitch National Historic District. The Panguitch National Historic District was listed on the National Register of Historic Places in 2006. It contains early residences and commercial buildings from the late 19th century. The District includes the historic town plot of Panguitch, just slightly smaller than the current city limits. The District documents the history and development of Panguitch from an agricultural outpost to a growing city with tourism as a major part of its economic base.

Numerous concerns were raised regarding the mine's adverse effects on the Panguitch National Historic District. Both the National Park Service and the National Forest Service requested that analysis of the proposed mine include how the increased truck traffic would impact the city of Panguitch. In the words of the National Forest Service, "[i]ncreased traffic would have a negative impact on both residents, which include employees, and visitors to the area."¹² The National Park Service echoed these concerns.¹³ In addition, forty-seven members of the public attended the informal conference held by the Division on June 16, 2008, in Alton.¹⁴ Sixteen Panguitch business

¹² Letter from Donna Owens, District Ranger, Powell Ranger District, Dixie National Forest, to Mary Ann Wright, Associate Director, Mining, Division of Oil, Gas & Mining (May 9, 2008) (2008/Incoming/0048.pdf).

¹³ Letter from Eddie Lopez, Superintendent, Bryce Canyon National Park, to Keith Rigrup, BLM Kanab Field Office (Feb. 23, 2007).

¹⁴ *Decision Document*, Permitting Chronology, at 2.

and homeowners submitted comments to the Division raising concerns about the effects to the tourist industry and to their safety by the transportation of coal in the SR 89 corridor and through the Panguitch National Historic District.¹⁵

Despite the exacting scrutiny that ACD's permit application warranted, the Division approved the application even though it suffers from at least the following deficiencies:

(1) the permit application contains no baseline hydrologic data on surface water in Sink Valley Wash further south than approximately 1.5 miles from the permit area, even though the "cumulative impact area" that the Division formulated for the proposed operation extends approximately 4.5 miles downgradient from ACD's southernmost baseline monitoring point in Sink Valley Wash;

(2) similarly, the permit application contains no baseline hydrologic data on surface water in Kanab Creek downgradient of monitoring station "S-2", which is located approximately one-quarter mile below the confluence of Kanab Creek and Lower Robinson Creek, even though the "cumulative impact area" that the Division formulated for the proposed operation extends approximately 6.0 miles downgradient from that monitoring station;

(3) with respect to numerous surface water baseline monitoring sites, the permit application does not present data (other than "no flow" entries) for at least one season or for the full two-year period that the Division's established policy effectively requires absent a permit applicant's demonstration of special circumstances;¹⁶

(4) the permit application includes only one measurement at monitoring point "SW-4" – which is the sole monitoring site on Lower Robinson Creek upgradient of the proposed permit area

¹⁵ *Decision Document, Technical Analysis*, at 12.

¹⁶ Utah Department of Natural Resources, Division of Oil, Gas and Mining, *Coal Regulatory Program Guideline Tech-004* (2006) ("Tech-004") at 10 and Tables 1 and 2.

– even though Robinson Creek flows through the proposed permit area and thus will certainly be affected by proposed mining operations;

(5) the permit application includes only three complete data entries for surface water monitoring site “SW-6” – which is the only baseline monitoring site established for an area that would drain a significant portion of the mine disturbance;

(6) the permit application presents surface water baseline data for Sink Valley Wash downgradient of the proposed permit area from only one monitoring site – “SW-9” – which is located approximately 1.5 miles from the proposed permit boundary;

(7) the permit application does not contain (a) an identification of the specific locations of the potential discharge that ACD proposes to make into Lower Robinson Creek or Sink Valley Wash or (b) baseline data on the geomorphic characteristics of the stream channels of Lower Robinson Creek or Sink Valley Wash in the areas that ACD’s proposed discharge will potentially affect;

(8) the permit application contains no baseline ground water data for the portion of the Sink Valley drainage that lies more than approximately 1.5 miles downgradient from the permit area, even though the Division correctly determined that the entire Sink Valley drainage lies within the cumulative impact area for the proposed surface coal mining and reclamation operations;

(9) the permit application contains no baseline data for the ground water that ACD reports discharging from the saturated alluvial aquifer into the bed and banks of Lower Robinson Creek in or adjacent to the proposed permit area;

(10) the permit application contains no baseline data for ground water in the Kanab Creek drainage;

(11) the permit application contains no baseline data for ground water in the Dakota Formation in the proposed permit or adjacent areas;

(12) the permit application contains no baseline data on seasonal water quantity with respect to 23 of 33 water rights that are potentially affected by the proposed surface coal mining and reclamation operations;

(13) the permit application contains no baseline data on seasonal water quality with respect to 25 of 33 water rights that are potentially affected by the proposed surface coal mining and reclamation operations;

(14) the permit application contains no baseline data on seasonal water quantity with respect to 38 of the 54 hydrologic monitoring sites proposed for the operations and reclamation phases of ACD's proposed mine;

(15) the permit application contains no baseline data on seasonal water quality with respect to 45 of the 54 hydrologic monitoring sites proposed for the operations and reclamation phases of ACD's proposed mine;

(16) the permit application contains no baseline data on seasonal water quality with respect to 36 of the 44 springs, wells, and alluvial trenches that ACD uses to provide baseline ground water data with respect to the proposed mine;

(17) the permit application does not contain cross-sections and maps portraying seasonal differences of head in the alluvial aquifers in the proposed permit and adjacent areas;

(18) the permit does not contain logs showing lithologic characteristics, thickness, or location of ground water in the Dakota Formation, or chemical analysis of samples collected from the Dakota Formation;

(19) the permit application does not contain cross-sections and maps portraying seasonal differences of head in the Dakota Formation aquifer in the proposed permit and adjacent areas;

(20) the permit does not contain a probable hydrologic consequences determination that is based on baseline hydrologic and geologic information collected for the permit area or adjacent areas;

(21) the permit application does not characterize Sink Valley or certain other features in the proposed permit area as alluvial valley floors, despite the Division's 1986 and 1988 determinations that each of these areas is in fact an alluvial valley floor, nor does the permit application present data or analyses required in light of the existence of alluvial valley floors in the proposed permit and adjacent areas;

(22) the permit application does not contain hydrologic monitoring plans that describe how the data may be used to determine the impacts of the operation upon the hydrologic balance;

(23) the permit application does not contain an operations plan which describes remedial measures that ACD would undertake in the event that hydrologic monitoring data or other information indicate that ACD's operations have caused or contributed to material damage the hydrologic balance outside the permit area;

(24) the permit application does not contain data or analysis concerning the impact of ACD's usage of roads outside the permit area, including the impacts of coal truck traffic through the Panguitch National Historic District;

(25) the permit application does not contain any data on hydrology, cultural and historic resources, or other required areas of study with respect to the portion of the potential "affected area" involved in the haulage of coal by road from the proposed permit area to the proposed rail loading facility;

(26) the permit application does not contain an air quality monitoring program that provides sufficient data to evaluate the effectiveness of its fugitive dust control practices;

(27) the permit application does not contain any analysis of the mine's operations on the clarity of the night sky as seen from Bryce Canyon National Park and Dixie National Forest;

(28) the permit application does not contain documentation establishing that the Utah Division of Wildlife Resources ("UDWR") has approved ACD's fish and wildlife protection plan;

(29) the permit application does not include a specification of measures that ACD will undertake to monitor or limit road-kill of sage grouse or other wildlife;

(30) the Division's CHIA does not contain hydrologic data necessary to determine the area within which the probable hydrologic effects of ACD's proposed operations may interact with the actual or probable effects of all anticipated mining in the area;

(31) the Division's CHIA does not establish material damage criteria for each of the probable hydrologic consequences identified in ACD's PHC and the Division's technical analysis;
and

(32) the Division's CHIA does not include among the material damage criteria that it does establish all applicable Utah water quality standards.

V. ARGUMENTS AND BASES OF REQUEST FOR REVIEW

Without waiving any other arguments they may raise before the Board after a complete review of the certified administrative record, Petitioners principally argue that the Division wrongfully approved ACD's incomplete, inaccurate, and otherwise unlawful permit application in direct violation of UT ADC R645-300-133.100. With respect to numerous areas of required study, Petitioners further argue that the information or analyses that ACD presents in its permit application does not support conclusions that the Division made to support its approval of the application.

Finally, Petitioners argue that the Division unlawfully approved ACD's permit application without first performing a CHIA that fulfills the legal requirements of UT ADC R645-300-400 and the related regulations governing the CHIA process. Each error warrants an order of the Board vacating the Division's approval of ACD's permit and either directing the Division to deny the application or else remanding the matter to the Division to permit ACD and the Division to meet the applicable permitting requirements if they can.

A. Inaccuracy and Incompleteness of ACD's Permit Application

Each of the 32 examples of inaccuracy or incompleteness of ACD's permit application listed in the previous section of this request, standing alone, would warrant an order vacating the Division's approval decision. Collectively, however, the host of deficiencies in ACD's permit application make a perfect mockery of emphasis that the Surface Mining Control and Reclamation Act, 30 U.S.C. §§ 1201-1328 ("SMCRA") places on fully informed, scientifically sound pre-planning of surface coal mining and reclamation operations as the primary method of ensuring that such operations do not destroy the environment or impair the health and safety of the public as coal mining has done in the past.

In crafting SMCRA, Congress thoroughly reviewed environmental and social costs of past coal mining operations and found that:

Experience has shown that without a thorough and comprehensive data base presented with the permit application, and absent analysis and review by both the agency and by other affected parties based upon adequate data, [the judgment of regulators] has often traditionally reflected the economic interest in expanding a State's mining industry. **Valid environmental factors tend to receive short shrift.** To meet this problem, the bill delineates in detail the type of information required in permit applications in section 507 and 508 and the criteria for assessing the merits of the application in section 510.

H.R. Rep. 218, 95th Cong. 1st Sess. 91 (1977) (emphasis supplied); *see also* S. Rep. No. 128, 95th Cong. 1st Sess. 53, 75 (1977) (emphasizing the importance of pre-planning surface coal mining operations and stating that the information requirement now found at 30 U.S.C. § 1257(b) “is a key element of the operator’s affirmative demonstration that the environmental protection provisions of the Act can be met”). Congress especially emphasized its intent to protect water resources as part of the SMCRA permitting process. The House Report that accompanied the bill that became SMCRA noted that:

H.R. 2 requires that the operator make a determination of the probable hydrologic consequences of the proposed mining and reclamation operations. **It is intended that the data assembled with this assessment be included in the application** so that the regulatory authority, utilizing this and other information available, can assess the probable cumulative impacts of all anticipated mining in the area upon the hydrology and adjust its actions and recommendations accordingly.

H.R. Rep. No 218 at 113 (emphasis supplied). The House report goes on to make clear that:

It is intended that the data collection and resulting analysis **take place before** and continue throughout the mining and reclamation process, and be conducted in **sufficient detail so that accurate assessments of the impact of mining on the hydrologic setting of the area may be determined.**

Id. at 120 (emphasis supplied). In developing and obtaining approval of the Utah state regulatory program for implementing SMCRA, the Utah Legislature implicitly endorsed these Congressional findings and policies.

The fundamental requirement that the Division withhold approval of any permit application that is not both accurate and complete is the primary mechanism for achieving the environmental protection and enhancement of public safety that Congress and the Utah Legislature intended the coal regulatory program to ensure. The permit application deficiencies identified earlier in this request put the environment and the public at risk for at least the reasons set forth in the following paragraphs.

1. **Inaccurate or Incomplete Hydrologic Baseline Data.**

ACD's permit application does not contain the baseline data necessary to establish "seasonal quality and quantity of ground water" or "to demonstrate seasonal variation and water usage" with respect to surface water, as UT ADC R645-301-724.100 and 200 require. Nor does ACD's permit application contain information on the "approximate rates of discharge or usage and depth to the water in" the Dakota Formation strata that lie immediately below the coal that ACD proposes to mine, even though those strata are "potentially impacted" by ACD's proposed blasting and coal removal and thus are within the minimum scope of the baseline ground water descriptions that UT ADC R645-301-724.100 requires. In the absence of these essential components of baseline information, ACD's responses to all of the Utah program's hydrologic protection provisions are fatally flawed.

Utah's regulations require each permit applicant to characterize the surface water and ground water resources that exist within both the proposed "permit area" and the associated "adjacent area."

UT ADC R645-301-724.100 and -724.200. The applicant defines the proposed "permit area" by establishing the boundaries of the land that the applicant legally controls and proposes to use during the mining and reclamation process. UT ADC R645-100-200 ("*permit area*"). The "adjacent area" extends beyond the permit area to encompass all other land "where a resource or resources . . . are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations." UT ADC R645-100-200 ("*adjacent area*").

The Division has determined that, to be sufficient to demonstrate seasonal variation, a permit applicant should collect surface water quality and quantity data for each baseline monitoring station at least quarterly (that is, once in every three month period, with at least one month interval between sampling events) for a minimum of two years prior to permit approval. Tech-004 at 4

("quarterly sampling"), 10, and Tables 1 and 2. Although the Division's determination does not carry the mandatory force of a regulation or statute, it does establish a presumption concerning data sufficiency that a permit applicant may avoid only by documenting special geologic and hydrologic circumstances of the proposed permit and adjacent areas that warrant a less extensive baseline monitoring frequency or duration. ACD's permit application contains no such documentation, nor does it contain any other information suggesting that the proposed permit and adjacent areas may be accurately characterized on the basis of less baseline hydrologic information than any other surface coal mine in Utah.

ACD's permit application fails to meet the Tech-004 standards for baseline hydrologic data in at least two respects. First, for most surface water and ground water baseline monitoring stations, ACD has failed to present data collected quarterly over a minimum of two consecutive years. Second, for most surface water and groundwater baseline monitoring stations, ACD has failed to present data for each hydrologic season (*i.e.*, December-February, March-May, June-August, and September-November). ACD's specific shortcomings are more particularly described in the tables attached as Exhibits 1-5 to this request for agency decision.

Without more, the absence of baseline data necessary to demonstrate seasonal variation in quantity and quality of surface water and ground water in ACD's proposed permit and adjacent areas makes the Division's decision to approve the instant permit application unlawful pursuant to UT ADC R645-300-133.100. The defect is not a mere technicality, however. An incomplete set of hydrologic baseline data provides an incomplete and potentially erroneous picture of hydrologic conditions prior to the onset of mining operations. Without a reliably accurate and complete characterization of pre-mining conditions, neither the Division nor interested members of the public

will be able to detect fully, completely, or precisely the effects of mining on the hydrologic regime in the permit and adjacent areas.

This is especially so where baseline data are incomplete with respect to monitoring stations meant to characterize conditions upgradient or downgradient of the permit area in water resources that proposed mining operations will likely affect. Here, ACD's proposed operations will certainly affect Lower Robinson Creek, which flows through the permit area and into which ACD proposes to discharge surface water runoff from both disturbed and undisturbed areas. ACD's proposed operations will also certainly affect the Sink Valley drainage, into which ACD proposes to discharge surface water runoff from both disturbed and undisturbed areas. However, ACD has presented data from only one sampling event at the sole monitoring location on Lower Robinson Creek upgradient of the proposed mine. To make matters worse, ACD's data for the monitoring sites downgradient of the proposed mine is also incomplete. As a result, neither the Division nor the public will be able either to contrast operational monitoring data with a complete picture of pre-mining conditions or to detect the effects of ACD's mining on Lower Robinson Creek. In such circumstances, scientific determination of the actual effect of ACD's mining on Lower Robinson Creek will be impossible.

Similarly, the absence of complete baseline data for the Sink Valley drainage deprives the Division and the public of an accurate and complete picture of seasonal water quantity and quality down gradient of the proposed mine prior to the commencement of operations. An accurate and complete characterization of hydrologic conditions at these critical points is necessary to enable a meaningful, scientifically competent comparison of conditions before, during, and after mining in areas directly and immediately affected by ACD's operations. In failing to present a complete data set for these and other monitoring stations, ACD has deprived both the Division and the public of

essential information for detecting the actual effects of its operations on the hydrologic balance outside the permit area.

The litany of deficiencies in ACD's hydrologic monitoring extends far beyond the examples just discussed. Petitioners look forward to further amplifying the shortcomings identified in Exhibits 1-5 at the hearing on this request.

2. **Inaccurate Characterization of Alluvial Valley Aquifers**

On at least two prior occasions, the Division has determined that "Sections 19, 20, 29 and 30, T39S, R5W in Sink Valley constitute an Alluvial Valley Floor." See Memorandum to Kenneth E. May, Associate Director, Utah Division of Oil, Gas and Mining, from Richard V. Smith, Geologist dated October 13, 1988, at 2-3.¹⁷ In doing so, the Division expressly rejected the notion that a 1988 study by consultants to a previous permit applicant (referred to in the Division's permit approval documents as the "WET report") warranted reversal of the Division's initial positive alluvial valley floor determination. *Id.* Instead, the Division concluded that the WET report reinforced the positive initial determination that Sink Valley is an alluvial valley floor.

In approving ACD's application, the Division arbitrarily and capriciously reinterpreted the same data on the pertinent geologic and hydrologic factors to reach a contrary conclusion on Sink Valley's status as an alluvial valley floor. The Division identified no factual or scientific error in its prior positive alluvial valley floor determination, nor any new information that was unavailable to Division in 1988 (other than the personal impressions concerning the pertinent topography that different Division personnel apparently formed during walking tours of proposed permit area in 2008 and 2009).

¹⁷ Petitioners attach a copy of this memorandum as Exhibit 6 to this request for agency decision.

In 1988 the Division reviewed all of the pertinent data on Sink Valley's status as an alluvial valley floor and correctly made a positive determination. The opposite determination that the Division conjured in 2009 from the same data on geomorphology is an arbitrary, unsupported insult to the competence and good judgment of the Division personnel who carefully reviewed **both** the subsurface data and the pertinent topography before reaching the 1988 positive determinations.

Because the pertinent information, taken as a whole, amply establishes Sink Valley's status as an alluvial valley floor, ACD's contention to the contrary rendered its permit application fatally inaccurate. The Division's approval of that inaccuracy, based upon a capricious reassessment of the same pertinent information, is an error of law that the Petitioners urge the Board to reverse in the interest of maintaining good scientific practice in the mine permitting process.

Separately, although the Division acknowledged that Kanab Creek lies in an alluvial valley floor, the Division concluded that ACD's mining operations would not adversely affect the area, apparently because ACD does not propose to disturb the surface of the valley. However, Utah regulations require coal operators to preserve the essential hydrologic functions of any alluvial valley floor not within the permit area. UT ADC R645-302-324.110. Therefore, because the Division did not thoroughly and competently evaluate the potential of ACD's operations to alter the quality or quantity of water discharging from Lower Robinson Creek to the Kanab Creek alluvial valley floor, or the likely effects of such discharges on the essential hydrologic functions of that area during or after the proposed mining operations, the Division unlawfully approved ACD's permit without ensuring the protection of the Kanab Creek alluvial valley floor.

3. Inaccurate Determination of Probable Hydrologic Consequences

Utah's regulations provide that "[t]he PHC determination will be based on baseline hydrologic, geologic and other information collected for the permit application." UT ADC R645-

301-728.200. Where, as here, a permit applicant does not collect or present sufficient baseline hydrologic data to demonstrate seasonal variation in the quantity and quality of surface water or ground water, the applicant's determination of probable hydrologic consequences is inaccurate as a matter of law. This is so because without sufficient hydrologic baseline data, there is insufficient support for any of the conclusions that the permit applicant presents in its PHC. Moreover, the Division is left with no basis for discounting the likelihood of any potential adverse effect that the permit applicant has failed to identify or fully address.

4. Incomplete Hydrologic Monitoring Plans

ACD's hydrologic monitoring plans are fatally incomplete because neither the surface water plan nor the ground water plan describes how operational monitoring data may be used to determine the impacts of the operation upon the hydrologic balance, as UT ADC R645-301-731.211 and -731.221 require. Such descriptions are necessary not only to enable the public to participate meaningfully in the administration and enforcement of the Utah regulatory program but also to (a) implement the material damage criteria that a properly performed CHIA must formulate and (b) trigger the preventative and remedial measures of the permit applicant's hydrologic operations plan whenever appropriate.

Even if ACD's hydrologic monitoring plans contained adequate descriptions of how the data may be used – and those plans contain no such descriptions at all – the absence of adequate baseline hydrologic data would warrant complete reconsideration and reformulation of the plans once ACD cures those data deficiencies. Like the PHC, the hydrologic monitoring plans for a mining permit must be based upon hydrologic baseline data that presents an accurate and complete picture of the hydrologic regime prior to mining. UT ADC R645-301-733.211 and -733.221. Without such a picture, selections of monitoring stations, parameters, and frequencies are manifestly arbitrary and

capricious because they are not based on the information that Congress and the Utah Legislature meant the Division to consider in formulating surface water and ground water monitoring plans.

Finally, ACD's approved surface water monitoring plan is deficient because it does not include a station properly placed below the confluence of Kanab Creek and Sink Valley Wash. The Division's CHIA determines that the hydrologic impacts of ACD's proposed operations remain measurable to that confluence, and good scientific practice requires actual measurement of the combined effects at some point reasonably below the confluence.

5. Inaccurate or Incomplete Hydrologic Operation Plan

The fatal flaws in ACD's baseline hydrologic data, PHC, and hydrologic monitoring plans render the hydrologic operation plan presented in the permit application inaccurate, incomplete, or both. Hydrologic operation plans must be based on an applicant's PHC. UT ADC R645-301-731. Where, as here, the PHC is defective and unreliable as the result of insufficient baseline data, the hydrologic reclamation plan is not founded on full information and solid analysis as Congress and the Utah Legislature have required. Moreover, if a permit application fails to describe how operational monitoring data may be used to determine the hydrologic impact of the proposed mining operation, as is the case here, there are no established triggers for the preventative and remedial measures that each hydrologic operation plan must contain. *Id.* In sum, the deficiencies in the hydrologic protection sections of ACD's permit render the Division's approval entirely unlawful and dangerous to the environment and public health and safety.

6. Incomplete Proposal of Alternative Water Sources

Both ACD and the Division recognize that the proposed surface coal mining and reclamation operations may diminish or destroy protected water supplies. However, ACD fails to quantify the likely or potential losses. To make matters worse, ACD fails to quantify the maximum expected

production of water from the sole proposed replacement well it intends to use, which ACD apparently has yet to construct. In failing to provide data to support ACD's belief that production from its proposed replacement well will equal or exceed the volume of water that ACD may become obligated to replace over the life of its operations and potentially without limit thereafter, ACD has for this reason alone submitted an incomplete permit application that fails to meet the applicable regulatory standard. *See* UT ADC R645-301-727. The Division erred in approving ACD's permit application rather than requiring the necessary information on the planned water replacement option and additional information concerning how ACD intends to meet water replacement obligations greater than those that the planned replacement well may prove capable of meeting.

7. **Incomplete Cultural/Historic Resource Information**

The Division's regulations require each permit application to analyze potential adverse impacts from the proposed coal mining operations to "cultural and historic resources listed or eligible for listing in the National Register of Historic Places and known archaeological sites within the permit **and adjacent areas.**" UT ADC R645-301-411.140 (emphasis added). Utah Code 9-8-404(1) reinforces the Division's obligation to look beyond the immediate footprint of the permit area by requiring that "[b]efore . . . approving any undertaking, each agency shall take into account the effect of the . . . undertaking on any historic property." The term "effect" is understood in this context to include direct effects, indirect effects and cumulative effects. UT ADC R645-300-.133.600. *See also* 36 C.F.R. § 800.4.

ACD's permit application fails to include the required information regarding adjacent areas. In a May 8, 2008 Technical Memo, Division staff identified the failure of ACD's Cultural Resource Management Plan ("CRMP") to include "cultural resources such as the National Register of Historic

Places District in Panguitch.” ACD had focused “solely on archaeology.” In addition, ACD had failed to include potential transportation routes in its analysis.

Nothing in the permit files indicates that any of these issues have been addressed. The Utah State Historic Preservation Officer provided its concurrence on ACD’s CRMP and Data Recovery Plan on July 14, 2008. This concurrence was made in response to a request from the Division for concurrence on July 10, 2008. The concurrence was apparently based upon review of the May 23, 2008 CRMP provided by ACD. This plan, however, provides no analysis of adjacent areas as required by the Division’s regulations. There is no discussion of the effects of the proposed mining on the Panguitch National Historic District.

Panguitch was listed on the National Register of Historic Places on November 16, 2006. The district contains almost 400 contributing primary resources including early residences and commercial buildings from the late 19th century. The district documents the history and development of Panguitch from an agricultural outpost to a growing city with tourism as a major part of its economic base. The district contains a large number of original buildings constructed of locally-made red brick. Historic residences include a large number of individualistic Arts & Crafts bungalows.

The CRMP acknowledges that the “affected area” of the project includes the “reasonably foreseeable transportation route” for the coal. *Cultural Resource Management Plan* for ACD (May 23, 2008), at 3. The specified transportation route extends west from Alton on CR-10/ Cistern Road, north along US-89 through the Panguitch National Historic District. *Id.* Figure 3. Despite the plan’s explicit inclusion of the Panguitch National Historic District within the affected area of the project, the plan contains no analysis of the amount of truck traffic expected through the town or the effects of such traffic on the Historic District. The Division’s approval of the ACD permit application

without analysis of the impacts of the proposed mining on the Panguitch National Historic District was unlawful.

8. Incomplete Air Pollution Control Plan

ACD's permit application fails to include an air quality monitoring program which provides sufficient data to evaluate the effectiveness of its fugitive dust control practices in violation of UT ADC R645-301-420. ACD submitted its fugitive dust control plan on October 13, 2009. The plan relies on "EPA Method 9" for monitoring the effectiveness of the proposed fugitive dust controls. On its face, this method is designed for monitoring the opacity of plumes from stationary sources. See EPA, *Emission Measurement Technical Information Center Test Method-009* (October 25, 1990), Attachment 3 to *Fugitive Dust Control Plan for Coal Hollow Project*. The Division explicitly acknowledged that it "does not have the expertise to evaluate the use of method 9." Email from Priscilla Burton to Jon Black re. Fugitive Dust Plan (Oct. 13, 2009). The Division has unlawfully approved ACD's permit without first establishing the effectiveness of the air quality monitoring program for fugitive dust.

In addition, Alton's permit application fails to provide a fugitive dust control plan that addresses the impact of the proposed mining operations on the night sky as seen from Bryce Canyon National Park and the Dixie National Forest in violation of UT ADC R645-301-423.200. The clarity of the night sky is one of the most valuable environmental resources of the area affected by the proposed Alton mine. Both the National Park Service and the Forest Service raised concerns regarding the mine's potential impact on the night sky. Fugitive dust, as well as light pollution, degrade the quality of the night skies. In the words of the Forest Service, "Night sky quality is principally degraded by light pollution – emissions from outdoor lights that cause direct glare and reduce the contrast of the night sky – but atmospheric clarity as plays a role." Letter from Donna

Owens, District Ranger, Powell Ranger District, Dixie National Forest, to Mary Ann Wright, Associate Director, Mining, Division of Oil, Gas, & Mining (May 9, 2008).

The Division explicitly required Alton to “explain the equipment for lighting the 24 hour operation and the effect on the night sky as seen from Bryce Canyon National Park and the Dixie National Forest.” *See Decision Document, Technical Analysis* at 82. The Technical Analysis goes on to state that “the Applicant has not discussed the effect on the night sky as seen from Bryce Canyon N.P. and the Dixie N.F. Therefore, this deficiency remains and must be addressed prior to receiving a recommendation for approval.” *Id.* at 83. The Division unlawfully approved the Alton permit without first receiving and analyzing the requested information from ACD regarding the impact of the mine’s 24-hour operations on the night sky.

B. Inadequate and Improper CHIA

Properly performed, the CHIA for proposed surface coal mining and reclamation operations accomplishes at least three important things. First, the CHIA defines the area within which the hydrologic impacts of the proposed operation may interact with the impact of all other existing and anticipated mining. UT ADC R645-100-200 (“*Cumulative Impact Area*”). Importantly, anticipated mining includes “all operations required to meet diligent development requirements for leased federal coal for which there is actual mine development information available.” *Id.* Second, based on the applicant’s PHC and any independent analysis that the regulatory authority may undertake, the CHIA defines criteria that, if exceeded, would constitute “material damage” to the hydrologic balance in the cumulative impact area. These “material damage criteria” must guide formulation of the hydrologic monitoring plans for the proposed operation and trigger the preventative and remedial components of the hydrologic operation plan in the event that actual operations substantially threaten the hydrologic balance. Third, the CHIA must explain the regulatory

authority's reasoning for its determination whether the proposed operation has been designed to prevent material damage outside the permit area. UT ADC R645-300-133.400. In each respect, the Division's CHIA for ACD's proposed operations in Coal Hollow is fatally flawed.

To begin with, as a practical matter every CHIA is based upon the applicant's baseline hydrologic data and PHC. Where these are inaccurate or incomplete, as is the case here for reasons previously discussed, a CHIA can be properly done only if the regulatory authority on its own develops accurate and complete baseline data for the permit area (as well for the remainder of the cumulative impact area) and then makes its own, properly grounded, determination of the probable hydrologic consequences of the proposed mine. Although it is not the regulatory authority's responsibility to undertake this extra work, Utah regulations expressly forbid permit approval in the absence of complete information concerning the cumulative impact area (which by definition includes the permit area). UT ADC R645-301-725.300. Here the Division took no steps to cure the defects in ACD's permit application, but nonetheless unlawfully approved the application anyway.

Even if the hydrologic protection components of ACD's permit application were accurate and complete, which they are not, the Division's CHIA would fall short of applicable legal and scientific standards for at least three reasons. Petitioners discuss each in turn.

1. **Failure to Define the Cumulative Impact Area Correctly**

The Division's selection of the cumulative impact area for ACD's proposed mine suffers from at least two major flaws. First, in delimiting the cumulative impact area the Division did not discuss, and apparently did not consider, whether the area within which the hydrologic impact of ACD's proposed mine on **ground water** may interact with the ground water impacts of the anticipated mining on neighboring federal coal leases. Although it is possible that the cumulative impact area for ground water coincides precisely with the cumulative impact area for surface water,

that is frequently not the case. For example, although the topographical ridges that define Water Canyon and Swapp Hollow canyons may properly serve as cumulative impact area boundaries for surface water, neither ACD nor the Division provides any data or analysis that demonstrates the existence of a concurrent ground water divide beneath those ridges. At a minimum the pertinent regulations require the Division to acknowledge the potential that the cumulative impact areas for surface water and ground water often are different and then to justify the selection of a single cumulative impact area on the basis of hydrologic data and analysis of ground water interactions. The Division did not do that, and for that reason alone its selection of the cumulative impact area fails to meet the applicable legal standard or comply with good scientific practice.

Second, the Division delimited the southern (downgradient) boundary of the cumulative impact area at the confluence of Kanab Creek and Sink Valley Wash, based on a finding that “[t]he confluence of these drainages represents the most downstream point where any hydrological impacts can be measured.” This simply is not so. Assuming for the sake of argument that the confluence in question is the most downgradient point at which surface waters from the mined areas combine, accurate and complete measurement of the combined hydrologic impact must be made some distance downstream of the that confluence. This is especially important because that downstream measuring station, properly chosen, must be established as a surface water monitoring point during operations and reclamation activities.

In sum, the Division did not delimit the cumulative impact area for ACD’s proposed surface coal mining and reclamation operations according to the governing legal requirements or sound scientific practice. As a result, the Division failed to consider the full cumulative impact of the ACD mine and anticipated neighboring operations. Without more, this failure undermines the Division’s

remaining CHIA components and merits reversal of the decision to approve ACD's permit application.

2. Failure to Define Material Damage Criteria Properly

To determine whether ACD has designed the proposed Coal Hollow mine to prevent material damage to the hydrologic balance outside the permit area, as UT ADC R645-300-400 requires, the Division necessarily must define "material damage" in terms of discernable criteria. Although the Division recognized its responsibility to do this, the Division erred in failing to establish material damage criteria for each hydrologic concern identified either in the PHC or in the Division's own CHIA analysis.

The Division's CHIA establishes only two material damage criteria for surface waters: diminution of low flow and increased concentration of total dissolved solids ("TDS"). *CHIA* at 40. Although the Division acknowledges that the applicable Utah state water quality standard for TDS is 1,200 mg/L, the Division set the material damage criterion for this pollutant at 3,000 mg/L based on the observation that "TDS concentrations can exceed levels over 3,000 mg/L in the stream channels." *Id.* In doing so, the Division erred both as a matter of fact and as a matter of law.

Although ACD's baseline hydrologic data does contain a few TDS sampling results that approximate or exceed 3,000 mg/L, the pertinent overall values derived even from ACD's incomplete data set are well below the 1,200 mg/L water quality standard. Thus, as a matter of fact, the Division had no basis for setting the material damage criterion for TDS above the 1,200 mg/L Utah state water quality standard for that pollutant.

Even if there were a factual basis for the Division's action, the law prohibits regulatory authorities from implementing SMCRA in ways that conflict with the Federal Water Pollution Prevention and Control Act, 33 U.S.C. §§ 1251-1387 ("CWA"). 30 U.S.C. § 1292(a)(3). Utah's

state water quality standard for TDS concentration is an implementation of the CWA's program for identifying and rehabilitating water resources that are unacceptably polluted. *See* 33 U.S.C. § 1313. That aspect of the CWA precludes any SMCRA regulatory authority from setting material damage criteria in excess of any applicable water quality standard. Although OSM's regulations do not expressly define "material damage to the hydrologic balance outside the permit area," the preamble to OSM's CHIA regulations makes clear that all regulatory authorities must recognize water quality standards and effluent limitations established pursuant to the CWA as minimum fixed material damage criteria. 48 Fed. Reg. 43,973 col. 1 (Sept. 26, 1983) ("OSM has not established fixed criteria, except for those established under [30 C.F.R.] §§ 816.42 and 817.42 related to compliance with water-quality standards and effluent limitations"). Thus, as a matter of law, the Division had no authority to set the material damage criterion for TDS above the 1,200 mg/L Utah state water quality standard for that pollutant.¹⁸

Also with respect to surface water, the Division's CHIA fails to enumerate selenium and boron concentrations as hydrologic concerns, even though the Division's conditions of approval (a) require special handling with respect to materials that have potential to release those pollutants and (b) require monitoring of selenium concentrations in all surface water discharges through final bond release. Given the Division's obvious concern that water may become polluted with these contaminants, the Division was obligated to establish material damage criteria for them, at no less than the applicable Utah water quality standard for each. The Division erred in failing to meet that obligation.

¹⁸ Petitioners further contend that the Division erred in setting the material damage criterion for TDS in groundwater at the highest observed concentration rather than at the mean or median concentration shown in a competent set of hydrologic baseline data.

Similarly, the Division correctly recognized the potential that discharge of surface water from ACD's mine may result in substantially increased stream flows in Lower Robinson Creek, Kanab Creek, and other affected waterways. That concern required the Division to establish material damage criteria for increased stream flow or its physical effects on affected waterways. Again, the Division erred in failing to meet this requirement.

Although the CHIA recognized that interception of ground water by ACD's mining operation and diminution of downgradient water resources are potential areas of concern, *CHIA* at 32-33, the Division declined to establish material damage criteria with respect to these potential effects on ground water within the Dakota Formation. The Division contended that the Dakota Formation is a poor transmitter of ground water and plays an insignificant role in the pre-mining hydrologic balance. This assertion, however, is at odds with available hydrologic data. Moreover, as explained earlier in this request for agency action, those data are fatally incomplete. For all these reasons, the Division erred in failing to formulate material damage criteria with respect to the potential interception of ground water flow in the Dakota formation.

3. **Unsupported Determination That ACD's Mine Has Been Designed to Prevent Material Damage to the Hydrologic Balance Outside the Permit Area**

In light of all the deficiencies identified in ACD's presentation of hydrologic information and analysis and in the Division's identification of cumulative impact area and material damage criteria, the Division's determination that ACD's proposed mine has been designed to prevent material damage to the hydrologic balance outside the permit area is manifestly arbitrary, capricious, and otherwise inconsistent with law. The Division lacked the required baseline information to make a reasoned decision, and its preliminary work during the CHIA process erroneously narrowed and distorted its focus on the pertinent hydrologic issues. Moreover, it appears that the Division

performed its CHIA without collecting and documenting in the permit approval papers the necessary baseline data for the portions of the cumulative impact area that lie outside the proposed permit area. Petitioners therefore urge the Board to vacate the Division's decision on this ground and require the Division to re-perform the CHIA correctly after receiving adequate baseline data and complete hydrologic analysis from ACD.

C. Unlawful Waiver of Stream Buffer Zone Protection for Lower Robinson Creek

Based on a finding that ACD's surface coal mining and reclamation operations within 100 feet of Lower Robinson Creek will neither cause nor contribute to violation of applicable Utah or federal water quality standards and will not adversely affect the water quantity and quality or other environmental resources of Lower Robinson Creek, the Division waived the requirement to establish and maintain buffer zones for that stream. However, as explained more fully in previous sections of this request for agency action, ACD failed to present the necessary baseline data on pre-mining hydrologic conditions in Lower Robinson Creek, either above, within, or below the proposed permit area. Without a competent characterization of Lower Robinson Creek prior to mining, the Division had no rational basis on which to conclude that ACD's operations would not cause or contribute to violation of applicable water quality standards or would not adversely affect water quantity in that stream. Indeed, because ACD proposes to discharge significant quantities of water from mined areas into Lower Robinson Creek, there exists a very real potential for accelerated erosion of the downgradient stream channel and for damage to existing biological communities there. For at least these reasons, the Division's waiver of stream buffer zone protection for Lower Robinson Creek was arbitrary, capricious, and otherwise contrary to law.

D. Inadequate Protections for Sage Grouse

ACD's permit application fails to include adequate protections for sage grouse in violation of UT ADC R645-301-330. The Division's regulations require that each permit contain "a plan for protection of vegetation, fish, and wildlife resources throughout the life of the mine." UT ADC R645-301-330. The application must include "fish and wildlife information for the permit area **and adjacent areas.**" UT ADC R645-301-322 (emphasis supplied). Here, UDWR raised several deficiencies with ACD's proposed plan for the protection of sage grouse. Neil Perry, UDWR, *Comments re. Alton Coal Mine Mitigation Plan* (March 9, 2009). At least some of these deficiencies appear to remain unaddressed.

1. Failure to address road-kill

The deficiencies raised by UDWR included the failure to address the issue of road-kill. In the words of UDWR's biologist, "Coal haul trucks can have severe impacts to wildlife populations along highways. Specifically, the UDWR is concerned with impacts along the State Routes 89 and 20. The mitigation plan should include measures to efficiently monitor and remove road kill by haul trucks." *Id.* Utah's coal permit regulations explicitly require the inclusion of information in the fish and wildlife resource protection plan addressing "the location and operation of haul and access roads and support facilities." UT ADC R645-301-333. ACD's Sage-Grouse Habitat Mitigation Plan dated October 2009 makes no mention of steps taken to monitor or limit road-kill. The Division unlawfully approved ACD's permit without the information addressing road kill requested by UDWR.

2. Failure to protect local sage grouse population

UDWR also criticized the adequacy of the proposed mitigation measures for sage-grouse. In the words of UDWR's biologist, ACD is "digging up the 'current sage grouse habitat.'" *Id.*

UDWR's biologist described the situation as follows: "the local population of sage-grouse is vulnerable to elimination, the probability of extirpation would be greatly increased by mining activities proposed by the Coal Hollow Project." *Id.* While ACD submitted revisions to its sage-grouse mitigation plan in October 2009, nothing in the records available to date indicates that the revised plan was found sufficient by UDWR.

The permit regulations explicitly require the Oil, Gas and Mining Division to determine the scope and level of detail of fish and wildlife resource information "in consultation with state and federal agencies with responsibilities for fish and wildlife." UT ADC R645-301-322.100. The determination of the sufficiency of the information submitted to design the fish and wildlife protection and enhancement plan is also explicitly required to be made in consultation with state and federal agencies with responsibilities for fish and wildlife. *Id.* The Division unlawfully approved ACD's permit application without first consulting with UDWR regarding ACD's revised Sage-Grouse Habitat Mitigation Plan dated October 2009.

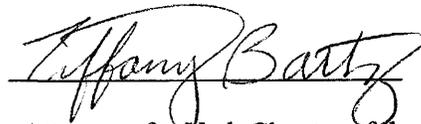
VI. CONCLUSIONS AND PRAYER FOR RELIEF

For the foregoing reasons, Petitioners respectfully request this Board determine that the Division failed to follow its own regulations in approving ACD's permit application for the Coal Hollow mine and accordingly to vacate the Division's approval of ACD's permit application and enter an order denying it as inaccurate, incomplete, or both. Alternatively, Petitioners request that the Board vacate the approval decision and remand the matter to the Division to allow ACD to correct identified permit deficiencies, if it can. Petitioners further request that this Board provide such other and further relief as may be appropriate.

Dated: November 18, 2009

Respectfully submitted,

By:



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EXHIBIT 1

Table 1
Coal Hollow
Surface Water Baseline Monitoring Sites
Dates of Data Collection

Water Monitoring Station	Spring 1987	Summer 1987	Fall 1987	Winter 1988	Spring 1988	Winter 1988	Spring 2005	Summer 2005	Fall 2005	Winter 2005	Spring 2006	Summer 2006	Fall 2006	Winter 2007	Spring 2007	Summer 2007	Fall 2007	Winter 2008	Spring 2008	Summer 2008	Fall 2008	Winter 2009	Spring 2009	
Kanab Creek Drainage																								
SW-1		7/1:8/3	9/4; 10/26; 11/13	12/6; 1/15; 2/20	3/17		5/27		9/25; 11/03		3/31; 5/30		9/7	12/30	3/29	6/22	9/29	12/30		6/18; 8/21				5/26
SW-2	5/27	7/7; 8/10	10/29	12/16; 1/13; 2/11	3/17		5/27		9/25; 11/03		5/30		9/7		3/29	6/22	9/29			6/18; 8/21				3/19; 5/25
SW-3		7/1; 8/3	9/4; 10/26; 11/13	12/16; 1/8; 2/20	3/17		5/27		9/25; 11/03		3/31; 5/30		9/7	12/21	3/29	6/22	9/29	12/30		6/18; 8/21				3/19; 5/25
Lamb Canal							5/27		9/25		5/30				3/29	6/22	9/29			6/18				5/25
Sink Valley Wash Drainage																								
SW-5							3/30				3/30				3/22									3/18; 3/19
SW-7																								
SW-8		7/6; 8/6	9/17; 10/28; 11/17	12/15; 1/13; 2/17	3/21		5/30	6/18; 8/12; 9/24; 11/04		9/7	12/20	3/29	6/22	9/29; 11/30						6/18; 8/21				3/19; 5/25
SW-9				10/29; 11/17	3/24		3/30								3/21									
SW-10		7/8; 8/10	9/14; 10/29; 11/17	12/16; 1/13	3/11						5/29			12/21	3/28	6/21	9/29			6/18; 8/20	9/25			3/19; 5/25
RID-1					2/11			11/4		1/8														
Lower Robinson Creek Drainage																								
SW-4							5/27																	
SW-5		8/10	9/14; 10/29; 11/18	2/11	3/17		5/30				5/30		9/7		3/29	6/22	9/30			6/18; 8/21				3/19; 5/25
SW-101							3/31				3/31				3/21					7/17; 8/20				3/18; 5/20
BLM-1																								

■ - NO DATA

Winter - December, January, and February
Spring - March, April, and May
Summer - June, July, and August
Fall - September, October, and November
(Reference: Western Regional Climate Center)

Dates of data collection retrieved from DOGM electronic data base on 1/11/09

EXHIBIT 2

Table 2a
Coal Hollow
Ground Water Baseline Monitoring Sites
Dates of Data Collection

Water Monitoring Station	Proposed Operational Monitoring	# Seasons Laboratory Quality Data	1987		1988		2005		2006		2007		2008		2009		
			Summer	Fall	Winter	Spring	Summer	Fall	Winter	Spring	Summer	Fall	Winter	Spring	Summer	Fall	Winter
SP-3	YES	4	7/7; 8/7	9/16; 10/31; 11/22	12/16; 1/5; 2/15	3/24											
SP-4	YES	4	7/1; 8/3	9/4													
SP-5	YES	0															
SP-6	YES	4															
SP-8	YES	4															
SP-14	YES	2															
SP-15	YES	0															
SP-16	YES	3															
SP-17	YES	0															
SP-18	YES	0															
SP-19	YES	0															
SP-20	YES	2															
SP-21	YES	0															
SP-22	YES	0															
SP-23	YES	0															
SP-24	YES	0															
SP-25	YES	0															
SP-26	YES	0															
SP-27	YES	0															
SP-28	YES	0															
SP-29	YES	0															
SP-30	YES	0															
SP-31	YES	0															
SP-32	YES	0															
SP-33	YES	4															
SP-34	YES	0															
SP-35	YES	0															
SP-36	YES	0															
SP-37	YES	4															

NO DATA
Not Seasonal Water Quality Data

Winter - December, January, and February
Spring - March, April, and May
Summer - June, July, and August
Fall - September, October, and November
(Reference: Western Regional Climate Center)

Notes:
1) Monitor stations from Appendix 7-1, Table 7-1.
2) Dates of data collection retrieved from DOGM electronic data base on 11/16/09

Table 2b
Coal Hollow
Ground Water Baseline Monitoring Sites
Dates of Data Collection

Water Monitoring Station	Proposed Operational Monitoring	# Seasons Laboratory Quality Data	Dates of Data Collection																
			Spring 2005	Summer 2005	Fall 2005	Winter 2006	Spring 2006	Summer 2006	Fall 2006	Winter 2007	Spring 2007	Summer 2007	Fall 2007	Winter 2008	Spring 2008	Summer 2008	Fall 2008	Winter 2009	Spring 2009
Y-102 (A5)	YES	4	5/27		9/24; 11/4	1/26	5/29		9/8	12/21	3/28	6/21	9/23	12/30	3/22	6/18; 8/21			3/20; 5/25
Y-45	YES	0			11/4		5/30		9/7	12/20	3/29	6/22	9/29; 11/30			6/18; 8/21			3/19; 5/25
Y-61	YES	4		8/12	11/4		3/31; 5/29		9/8	12/20	3/29	6/22	9/29	12/30	3/22	6/18; 8/21		12/31	3/19
Y-59	YES	0										6/22	9/29; 11/30		3/22	6/18; 8/21			3/19; 5/25
Y-63	YES	0		6/18	9/24; 11/3		3/30; 5/16		9/8	12/21	3/30	6/20	9/30	12/29	3/22	6/18; 8/21			3/18; 5/24
Y-36	YES	0		8/12	11/4		3/31; 5/29		9/7	12/21; 1/15	3/29	6/22	9/29	12/30	3/22	6/17; 8/20			3/18; 5/24
Y-38	YES	0		6/17	9/25; 11/3		3/30; 5/30		9/8	12/21	3/30	6/21	9/29; 11/27		3/22	6/18; 8/21			3/18; 5/25
Y-98 (A1)	YES	0	5/27		9/25; 11/4	1/25	5/29		9/8	12/21	3/28	6/21	9/29; 11/29		3/22	6/18; 8/20			3/17; 5/24
Y-99 (A2)	YES	0	5/25; 5/27		11/4		5/29		9/8	12/21	3/28	6/21	9/29; 11/29		3/22	6/18; 8/20			3/19; 5/25

Alluvial Trenches

SVT-01	0
SVT-02	0
SVT-03	0
SVT-04	0
SVT-05	0
SVT-06	0

4/21 - Quality data only, no flow or depth reported
 4/21 - Quality data only, no flow or depth reported
 4/21 - Quality data only, no flow or depth reported
 4/21 - Quality data only, no flow or depth reported

█ = NO DATA
 █ = Not Seasonal Water Quality Data

Notes:

- 1) Monitor stations from Appendix 7-1, Table 7-1.
- 2) Dates of data collection retrieved from DOGM electronic data base on 11/16/09

Winter - December, January, and February
 Spring - March, April, and May
 Summer - June, July, and August
 Fall - September, October, and November
 (Reference: Western Regional Climate Center)

EXHIBIT 3

Table 3
Coal Hollow
Operational and Reclamation Monitoring Sites
Dates of Data Collection

Water Monitoring Station	# Seasons Laboratory Quality Data	# Seasons									
		Winter 2007	Spring 2007	Summer 2007	Fall 2007	Winter 2008	Spring 2008	Summer 2008	Fall 2008	Winter 2009	Spring 2009
Wells											
C0-18	0	1/19		6/22	9/30; 11/27		3/22	6/17; 8/21			3/17; 5/25
C0-54	0	1/19		6/22	9/30; 11/27		3/22	6/17; 8/21		12/31	3/17; 5/25
C1-24	0	1/19; 2/1		6/22	9/29	12/30		6/18; 8/20			3/17; 5/24
C2-15	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20			3/17; 5/24
C2-28	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20			3/17; 5/24
C2-40	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20			3/17; 5/24
C3-15	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20			3/17; 5/24
C3-30	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20			3/17; 5/24
C3-40	0	2/1		6/21	9/30; 11/28		3/22	6/18; 8/20			3/17; 5/24
C4-15	0	1/31		6/21	9/30; 11/28		3/22	6/18; 8/20		12/31	3/17; 5/24
C4-30	0	1/31		6/21	9/30	12/30	3/22	6/18; 8/20		12/31	3/17; 5/24
C4-50	0	1/31		6/21	9/30	12/30	3/22	6/18; 8/20		12/31	3/17; 5/24
C5-130	0		3/29	6/22	9/29	12/30	3/22	6/18; 8/20		12/31	3/19; 5/25
C7-20	0	2/1		6/21	9/30; 11/28		3/22	6/17; 8/20		12/31	3/17; 5/24
C9-15	0	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 5/24
C9-25	0	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 5/24
C9-40	0	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 5/24
LR-45	1	1/19		6/22				6/17; 8/20			3/18; 5/25
LS-28	0	1/19	3/30	6/20	9/30	12/30	3/22	6/17; 8/20		12/30	3/18; 5/24
LS-60	0	1/19	3/30	6/20	9/30	12/30	3/22	6/17; 8/20		12/30	3/18; 5/24
LS-85	2		3/30	6/20	9/30		3/22	6/17; 8/20		12/31	3/18; 5/24
SS-15	0	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 5/24
SS-30	2	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 3/18; 5/24
SS-75	0	1/31		6/21	9/30	12/30	3/22	6/17; 8/20		12/31	3/17; 5/24
UR-70	1	1/19		6/22	9/29	12/29		6/18; 8/20			3/18; 5/25

 = NO DATA
 = Not Seasonal Water Quality Data

Notes:

- 1) Monitor stations from Appendix 7-1, Table 7-5 (only includes sites not evaluated in Baseline wells).
- 2) Dates of data collection retrieved from DOGM electronic data base on 11/16/09

Winter - December, January, and February
 Spring - March, April, and May
 Summer - June, July, and August
 Fall - September, October, and November
 (Reference: Western Regional Climate Center)

EXHIBIT 4

Table 4
Coal Hollow
Water Rights Baseline Data Collection

Water Right Number	ACD Monitoring Number(s)	Seasonal Baseline Data Provided to DOGM	
		Quantity	Quantity
Stream Reaches			
85-162	SW-2, SW-3	YES (SW-3)	YES (SW-3)
85-303	SW-2, SW-3	YES (SW-3)	YES (SW-3)
85-608	SW-4, SW-101	NO	NO
85-463	SW-4, SW-101	NO	NO
85-209	SW-4, SW-101	NO	NO
85-210	SW-4, SW-101	NO	NO
85-458	BLM-1, SW-5	NO	NO
85-211	BLM-1, SW-5	NO	NO
85-459	BLM-1, SW-5	NO	NO
85-393	BLM-1, SW-5	NO	NO
85-213	SVWOBS-1, SVWOBS-2	NO	NO
85-387	SVWOBS-1, SVWOBS-2	NO	NO
85-388	SVWOBS-2, SW-9	NO	NO
Surface Diversions			
85-366	SVWOBS-1, SVWOBS-2	NO	NO
85-367	SVWOBS-2, SW-9	NO	NO
85-368	SVWOBS-2, SW-9	NO	NO
85-365	SW-8, SW-9	YES (SW-8)	NO
85-369	SVWOBS-2, SW-9	NO	NO
85-370	SVWOBS-2, SW-9	NO	NO
85-371	SVWOBS-2, SW-9	NO	NO
85-372	SVWOBS-2, SW-9	NO	NO
85-356	SVWOBS-2, SP-33, SW-9	YES (SP-33)	YES (SP-33)
Springs			
85-214	SP-14	YES	NO
85-350	SP-16	NO	NO
85-373	SP-40	YES	YES
85-374	SP-19	NO	NO
85-351	SP-20	NO	NO
85-352	SP-22	NO	NO
85-215	SP-23	NO	NO
85-353	SP-8	YES	YES
85-375	SP-6	YES	YES
85-355	SP-33	YES	YES
85-1011	SP-33	YES	YES
		No = 23/33	No = 25/33

Water Rights Number and ACD Monitoring Numbers From Appendix 7-1, Table 7-12

EXHIBIT 5

Table 5
Coal Hollow
Operational and Reclamation Monitoring Sites

Site	Baseline Data (Seasonal, 2 yrs)	
	Quantity	Quantity
Streams		
BLM-1	NO	NO
RID-1	YES	NO
SW-2	NO	NO
SW-3	YES	YES
SW-4	NO	NO
SW-5	NO	NO
SW-6	NO	NO
SW-8	YES	NO
SW-9	NO	NO
SW-101	NO	NO
Springs		
Sorenson	YES	YES
SP-3	YES	YES
SP-4	YES	YES
SP-6	YES	YES
SP-8	YES	YES
SP-14	YES	NO
SP-16	NO	NO
SP-19	NO	NO
SP-20	NO	NO
SP-22	NO	NO
SP-23	NO	NO
SP-33	YES	YES
Wells		
Y-36	YES	NO
Y-38	YES	NO
Y-45	NO	NO
Y-61	YES	YES
Y-63	YES	NO
Y-98	YES	NO
Y-102	YES	YES
C0-18	NO	NO
C0-54	NO	NO
C1-24	NO	NO
C2-15	NO	NO
C2-28	NO	NO
C2-40	NO	NO
C3-15	NO	NO
C3-30	NO	NO
C3-40	NO	NO
C4-15	NO	NO
C4-30	NO	NO
C4-50	NO	NO
C5-130	NO	NO
C7-20	NO	NO
C9-15	NO	NO
C9-25	NO	NO
C9-40	NO	NO
LR-45	NO	NO
LS-28	NO	NO
LS-60	NO	NO
LS-85	NO	NO
SS-15	NO	NO
SS-30	NO	NO
SS-75	NO	NO
UR-70	NO	NO
	NO = 38/54	NO = 45/54

Hydrologic monitoring locations for operational and reclamation phase monitoring from Appendix 7-1, Table 7-5

EXHIBIT 6

0001



Norman H. Bangert
Governor
Dee C. Hansen
Executive Director
Dianne R. Nielson, Ph.D.
Division Director

State of Utah

DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING

355 West North Temple
3 Triad Center, Suite 350
Salt Lake City, Utah 84180-1203
801-538-5340

October 13, 1988

TO: Kenneth E. May, Associate Director
Lowell P. Braxton, Administrator
John J. Whitehead, Permit Supervisor

FROM: Richard V. Smith, Geologist *RVS*

RE: Review of Document Entitled "Geomorphological and Sedimentological Characteristics of Sink Valley, Kane County, Utah", Nevada Electric Investment Company, Alton Coal Project, PRO/025/003, Folder #2, Kane County, Utah

The applicant, under signature of a consultant, submitted the above-referenced document for Division review. The document was not formatted for insertion into the Permit Application Package (PAP) and accordingly, is not considered to constitute a formal submittal. However, this document may, in the future, be reformatted and formally submitted for insertion into the PAP.

Synopsis of Information Given in Submittal

The submittal provides supplementary information about Sink Valley topography and near surface stratigraphy. Nine topographic cross sections are presented in conjunction with 37 stratigraphic columns.

Stratigraphic columns were derived from 31 backhoe pits (approximately 12 feet deep) and seven outcrops along stream channels (9-21 feet of exposure). Variations in grain size, bedding and lithologic composition were identified for each column. Descriptions commonly indicate sediments are selectively sorted into clay/silt, sand or gravel units. The most prevalent lithology shown appears to be fine- to medium-grained sand.

Topographic cross sections indicate the presence of channels that are greater than 3.0 feet wide and 0.5 feet deep within Sink Valley.

Page 2
Memo to K. May, L. Braxton
and J. Whitehead
PRO/015/003
October 13, 1988

Division Determination of Sink Valley AVF

The Division utilized (ICR dated February 8, 1988) information published in U.S. Geological Survey and Utah Geological and Mineral Survey reports in conjunction with data presented in the 1982 and 1987 Permit Application Packages to positively determine, pursuant to SMC 785.19(c)(2)(i) and (ii), that Sections 19, 20, 29 and 30, T39S, R5W in Sink Valley constitute an Alluvial Valley Floor.

According to SMC 785.19(c)(2)(i) and (ii), a positive AVF determination requires Division identification of both the presence of unconsolidated stream-laid deposits holding streams and sufficient water to support agricultural activities.

The Division recognized the presence of unconsolidated stream-laid deposits holding streams by:

1. Identifying Sink Valley to be a topographic valley having channels with bankfull widths and depths that exceed 3.0 and 0.5 feet, respectively; and
2. Delineating the presence of flood plains within Sink Valley as evidenced by the occurrence of relatively smooth surfaces of land composed of alluvium.

Analysis of Information Given in Submittal

Backhoe pit and outcrop stratigraphic data indicate most of the near surface deposits are sand sized and have been selectively sorted. These data are most plausibly interpreted to represent evidence for a fluvial system acting as the dominant transport system. Deposition predominantly occurred within and adjacent to stream channels. Accordingly, it is appropriate to lithostratigraphically define and geologically map these deposits as alluvium.

Topographic cross sections also indicate the presence of relatively smooth land surfaces and channels exceeding 3.0 feet and 0.5 feet in width and depth within Sink Valley.

Page 3
Memo to K. May, L. Braxton
and J. Whitehead
PRO/015/003
October 13, 1988

Conclusion

Information concerning near surface lithologies, surface topography and the occurrence of channels allow further verification of the previously identified occurrence of unconsolidated stream-laid deposits holding streams within Sink Valley. Consequently, these data in conjunction with irrigation information reconfirm the Division's positive determination of an alluvial valley floor occurring within Sink Valley.

djh
cc: P. Grubaugh-Littig
J. Fricke
T. Munson
H. Sauer
B. Stettler
13A/13-15

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2009, I served a true and correct copy of
REQUEST FOR AGENCY ACTION AND REQUEST FOR A HEARING BY PETITIONERS
UTAH CHAPTER OF THE SIERRA CLUB *ET AL.* to each of the following persons via United
States first-class mail, postage pre-paid:

Denise Dragoo
Snell & Wilmer, LLP
15 West South Temple, Suite 1200
Salt Lake City, UT 84101

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Utah Assistant Attorney General
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FILED

DEC 30 2009

**SECRETARY, BOARD OF
OIL, GAS & MINING**

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

**SOUTHERN UTAH WILDERNESS
ALLIANCE, et at,**

Petitioners,

v.

**DIVISION OF OIL, GAS, &
MINING DEPARTMENT OF
NATURAL RESOURCES, STATE
OF UTAH,**

Respondent.

**INTERVENOR'S RESPONSE
TO PETITIONERS' REQUEST
FOR AGENCY ACTION AND
REQUEST FOR A HEARING**

Docket No. 2009-019

Cause No. C/025/0005

COMES NOW, Intervenor Kane County, by and through its counsel, William L. Bernard, Deputy Kane County Attorney, and hereby responds in opposition to the *Petitioners' Request for Agency Action and Request for a Hearing*, filed on or about

November 18, 2009 (hereinafter the “**Request**”) in the above-captioned matter. This response is based upon the following memorandum of points and authorities.

PROCEDURAL HISTORY/STATEMENT OF FACTS

1. On June 27, 2006, Talon Resources, Inc., submitted a permit application for the Coal Hollow Mine (the “**Mine**”)—a proposed surface coal mine located approximately three (3) miles south of the Town of Alton in Kane County, Utah, and alleged to be approximately ten (10) miles from the extreme southwest corner of Bryce Canyon National Park in Upper Sink Valley.
2. On August 28, 2006, the Board of the Division of Oil, Gas, and Mining (the “**Board**”) determined that the application was incomplete and returned it.
3. On June 14, 2007, Alton Coal Development, LLC (“**ACD**”) submitted a revised application (the “**Application**”) for the Mine.
4. On March 14, 2008, the Board deemed ACD’s application administratively complete and a technical review and public commenting period followed.
5. On May 22, 2008, the Utah Chapter of the Sierra Club (“**Sierra Club**”), the Southern Utah Wilderness Alliance (“**SUWA**”), the Natural Resources Defense Council (“**NRDC**”), and the National Park Conservation

Association (“NPCA”)(collectively, the “**Petitioners**”), filed comments on the permit.

6. On June 16, 2008, the Division convened an informal conference in Alton, Utah, to receive additional written and oral comments on the mine and the proposed relocation of County Road 136, and the informal conference written comment period was extended to June 20, 2008. A total of twelve (12) written comments were received, which included a petition requesting further studies of natural and cultural resources in the adjacent area.
7. On December 22, 2008, ACD provided a subsequent update to the Application.
8. On August 19, 2009, ACD provided a second subsequent update to the Application.
9. On October 8, 2009, ACD provided a third subsequent update to the Application.
10. On October 19, 2009, the Division issued a decision document approving ACD’s permit application. Utah Division of Oil Gas and Mining, *Decision Document and Application Approval* (October 19, 2009)(the “**Decision Document**”).
11. The Decision Document authorizes surface mining on 635.64 acres in

sections 19, 20, 29, and 30, T39S, R5W, SLM, and provides for the mining of 2,000,000 tons of *private* coal per year for approximately three (3) years on privately-owned land, operating twenty-four (24) hours per day, six (6) days per week, with all of the minerals leased by ACD from private owners.

12. ACD also has applied to the Bureau of Land Management (“BLM”) to lease federal coal on 3,600 acres of adjacent public land and has an interest in such federal property subject to the Lease by Application Process.
13. The Decision Document necessarily has a substantial impact on Kane County, including but not limited to the rights of Kane County citizens to travel on State highways for business purposes, Kane County’s tax base and assessments, its demographics, wage scale and employment opportunities.
14. The Mine will create jobs for approximately 100 full-time employees, 50 full-time truck drivers, and 10 full time transportation support employees, most of who will reside in Kane County.
15. On November 18, 2009, Petitioners filed their Request in this matter pursuant to UTAH ADMIN CODE R641.104.122 and R641.104.133, as an appeal of the Decision Document entered by the Division, arguing

specifically that (1) they maintain legal authority, jurisdiction and standing to file the Request; (2) the Division acted arbitrarily, capriciously, and contrary to law in failing to withhold approval of ACD's Application and in allegedly failing to conduct a cumulative hydrologic impact assessment ("CHIA"); and (3) ACD's Application is allegedly inaccurate and incomplete in thirty-two (32) different areas.

16. On December 8, 2009, ACD filed its *Respondent/Permittee's Response to Request for Hearing*, opposing each of the areas raised by Petitioner's in the Request.
17. On December 9, 2009, the matter came for a meeting before the Board, at which the parties stipulated to Kane County's intervention in these matters.
18. At that meeting, the Petitioners in this matter made it clear that they had filed unsupported allegations in an effort to obtain revocation of ACD's mining permits; for example, counsel for Sierra Club stated on the record that he did not have any of the data to support the allegations made in the Request.

I. THE MATTER SHOULD BE REVIEWED UNDER APPELLATE STANDARDS RATHER THAN REHEARING STANDARDS

UTAH ADMIN. CODE R641-110-100 governs the time for filing any petition for rehearing on a decision made by this Board, indicating that such petition “. . . must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought.” *Ibid.* UTAH ADMIN. CODE R641-110-500 provides that “[a] request for modification or amendment of an existing order of the Board will be treated as a new petition for purposes of these rules.” The Request in the instant matter was not filed pursuant to UTAH ADMIN. CODE R641-110-100, but was taken rather as an appeal to this Board from the Decision Document.

Conversely, when an appeal is taken from a decision of this Board and because this Board may reference the code of Federal Regulations, the time frame for filing is thirty (30) days from the entry of a decision from this Board. *See*, 30 C.F.R. §775.11(a) (“Within 30 days after an applicant or permittee is notified of the decision of the regulatory authority concerning an application for approval of exploration required under part 772 of this chapter, . . . the applicant, permittee, or any person with an interest which is or may be adversely affected may request a hearing on the reasons for the decision, in accordance with this section.”) Under 30 C.F.R. §775.11(b)(3) it indicates that “the hearing authority may administer oaths and affirmations, subpoena

witnesses and written or printed materials, compel attendance of witnesses or production of those materials, compel discovery, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining and reclamation operations carried on by the applicant in the general vicinity of the proposed operations.” *Ibid.*

Although the hearing authority maintains discretionary authority to take evidence at a hearing held on a petition filed under 30 C.F.R. §775.11(a), the evidence allowable pertains to items such as site inspections and other mining operations carried on by the applicant. It is not treated as a new petition as under the requests for modifications or amendments. The process through which an application is obtained through this Division allows for input from the community and others affected by the proposed permit during that time. *See, UTAH ADMIN. CODE R645-300-123, et. seq.* (“Any person having an interest which is or may be adversely affected the decision on the application. . .may request in writing that the Division hold an informal conference on the application for a permit. . .” If a permit is granted after all information is received and processed by this Division, an appeal can then be taken if an interested party chooses to do so. *See, 30 C.F.R. §775.11(a).*

On June 16, 2008, the Division convened an informal conference in Alton, Utah, to receive additional written and oral comments on the mine, and the informal

conference written comment period was extended to June 20, 2008. A total of twelve (12) written comments were received, which included a petition requesting further studies of natural and cultural resources in the adjacent area. This Division took all additional information received during this informal conference stage when entering the Decision Document.

The standard of review to thus be applied at this stage would be one of appellate review rather than rehearing. Although the reviewing authority has discretion to conduct discovery and a hearing with witnesses called, any information derived during this time should be limited to the four corners of the permitting process. Other interested parties, such as Petitioners in this matter, had the opportunity to present evidence to the Division during the informal conference procedures dictated under UTAH ADMIN. CODE R645-300-123, *et. seq.*, and have opted to file an appeal under 30 C.F.R. §775.11(a) from the Decision Document rather than for rehearing under UTAH ADMIN. CODE R641-110-100, and are thus limited to the four corners of the permitting process in their submissions to this Division rather than their Request being treated as a new petition for purposes of the rule under UTAH ADMIN. CODE R641-110-500.

II. ALL UNSUPPORTED ALLEGATIONS SHOULD BE STRICKEN.

Under UTAH CODE ANN. §40-8-2, it states as follows:

The Utah Legislature finds that:

- (1) A mining industry is essential to the economic and physical well-being of the state of Utah and the nation.
- (2) It is necessary to alter the surface of the earth to extract minerals required by our society, but this should be done in such a way as to minimize undesirable effects on the surroundings.
- (3) Mined land should be reclaimed so as to prevent conditions detrimental to the general safety and welfare of the citizens of the state and to provide for the subsequent use of the lands affected. . . At UTAH CODE ANN. §40-6-1, our Utah Legislature declared as follows:
It is declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of natural resources of oil and gas in the state of Utah in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas may be obtained and that the correlative rights of all owners may be fully protected; to provide exclusive state authority over oil and gas exploration and development as regulated under the provisions of this chapter; to encourage, authorize, and provide for voluntary agreements for cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas may be obtained within the state to the end that the land owners, the royalty owners, the producers, and the general public may realize and enjoy the greatest possible good from these vital natural resources.

Similarly, our United States Legislature has found and declared as follows:

- (a) Extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;
- (b) Coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;
- (c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;
- (d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.
- (e) surface mining and reclamation technology are now developed so that effective and reasonable regulation of surface coal mining operations by the States and by the Federal Government in accordance with the requirements of this chapter is an appropriate and necessary means to

minimize so far as practicable the adverse social, economic and environmental effects of such mining operations.

- (f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States; . . .
- (j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and
- (k) the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations. 30 U.S.C. §1201. In Utah, the Board of Oil, Gas and Mining was created to "... be the policy making body for the Division of Oil, Gas and Mining," with such Board consisting of two (2) knowledgeable members in mining matters, two (2) knowledgeable members in oil and gas matters, one (1) knowledgeable member in ecological and environmental matters, and one (1) private land owner who is knowledgeable about mineral or royalty interests. UTAH CODE ANN. §§40-6-4(1) and (2).

Under UTAH ADMIN. CODE R641-108-200 through -204, it states as follows:

- 200. The Board shall use as appropriate guides the Utah Rules of Evidence insofar as the same may be applicable and not inconsistent with these rules. Notwithstanding this, on its own motion or upon objections of the party, the Board:
- 201. May exclude evidence that is irrelevant, immaterial, or

unduly repetitious.

- 202. Shall exclude evidence privileged in the courts of Utah.
- 203. May receive documentary evidence in the form of a copy of excerpt if the copy or excerpt contains all pertinent portions of the original document.
- 204. May take official notice of any facts that could be judicially noticed under the Utah Rules of Evidence, of the record or other proceedings before the Board, and of technical or scientific facts within the Board's specialized knowledge.

UTAH ADMIN. CODE R641-108-300 allows for "[t]estimony presented to the Board in a hearing [to be] sworn testimony under oath or affirmation." UTAH ADMIN. CODE R641-108-900 allows discovery against another party upon motion of a party and for good cause shown ". . .as prescribed by and in the manner provided by the Utah Rules of Civil Procedure."

In the instant matter, Petitioners conceded through counsel at the December 9, 2009, hearing that they lacked the requisite supportive data with respect to their claims contained in the Request, indicating that they filed the Request with such knowledge in hopes of persuading this Division to revoke the permit already granted by the Division to ACD. Not only does this support sanctions in this matter, but clearly supports a finding by this Board that the allegations of the Request lack the requisite support by the proponent's own concession.

Given the codification by both the State and Federal governmental entities in this matter of the anticipated impact mining has upon the environment and the various agencies having had input during the promulgation of such legislative declarations, it is presumed that the regularity of the proceedings held by the Division in these matters ensure the upholding of such provisions. UT. R. EVID. 301(a), which applies to these proceedings in accordance with UTAH ADMIN. CODE R641-108-200, *supra*, indicates a “presumption of law” imposed upon “the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence.” Given the substantial requirements for the Application in this matter, and the discretion of the Division in determining the granting of permits for the purpose of coal mining, it is clear why the burden of proof at administrative hearings is “...on the party seeking to reverse the decision of the regulatory authority.” 30 C.F.R. §775.11(b)(5). “If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy.” UT. R. EVID. 301(b). “If evidence to rebut a presumption has not been admitted, the presumption will determine outcome on the issue. . .” *Id.*, Advisory Committee Note.

In essence, ACD undertook the extensive process of application through this Division as outlined by the UTAH ADMIN. CODE R645-300-100 through -223 and R 645-301-100 through -800 and was granted through the Decision Document the right

to coal extraction in the Mine. Petitioners did not bring any actual tangible evidence that would otherwise be admissible under the applicable Utah Rules of Evidence before this Board, but simply speculated, conjectured and outright admitted at the December 9, 2009, hearing, their lack of such evidence to support the allegations made in the Request. Absent tangible admissible evidence refuting this Division's Decision Document, the regularity of such determination should be presumed and control, resulting in dismissal of the Request in this matter.

Further, there was not a scintilla of evidence presented at the hearing to support Petitioner's Request. As a result all such allegations of Petitioners' should be stricken.

III. MOTION FOR SUMMARY JUDGMENT IS APPROPRIATE.

Summary judgment is proper " '... if the pleadings, depositions, answer to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" *McLarney v. Board of County Road Com'rs For County of Macomb*, 2005 WL 3008591, 4 (E.D.Mich.)(E.D.Mich.,2005). A fact is 'material' if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Wright ex. rel. Trust Co. v. Abbott Labs, Inc.*, 259 F.3d 1226, 1231-32 (10th Cir. 2001)(citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664,

670 (10th Cir 1998)). An issue of fact is “genuine” if “there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way.” *Adler, supra, at 670, citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)*. In attempting to meet that standard, a movant that does not bear the ultimate burden of persuasion at trial need not negate the other party’s claim; rather, the movant need simply point out to the court a lack of evidence for the other party on an essential element of that party’s claim. *Adams v. Am. Guar. & Liab. Ins. Co., 233 F.3d 1242, 1246 (10th Cir. 2000)*. The burden then shifts to the nonmoving party to set forth specific facts showing that there is a genuine issue for trial, and the party may not simply rest upon its pleadings to satisfy its burden. *Anderson, supra, 477 U.S. at 256; Eck v. Parke, Davis & C., 256 F.3d 1013, 1017 (10th Cir. 2001)*.

UTAH ADMIN. CODE R641-110-400 allows the Board to summarily deny a petition or the Request herein when modification or amendment is sought. ACD sets forth specific and precise arguments in their *Respondent/Permittee's Response to Request for Hearing* that entitle ACD to judgment as a matter of law and there are no additional substantial questions of facts. ACD has shown that they submitted sufficient hydrologic monitoring data, that an alluvial valley floor does not exist with the permit area, ACD statement of probable hydrologic consequences is acceptable,

the hydrologic monitoring plan is adequately described in the mining and reclamation plan, ACD provided all information necessary at this stage regarding replacement water sources, the Board properly found that ACD air pollution control plan is adequate, the Board's C.H.I.A. properly delineates the impact area for ground water resources, the Board properly identified material damage criteria in light of conditions prevailing at the site, the mine is properly designed, the Board properly found that conditions in lower Robinson Creek supported waiver of the stream buffer zone, the approved permit provides all of the protection for sage grouse and other wildlife.

ACD has met each of the criteria of the application process for the permit under UTAH ADMIN. CODE R645-300-100 through -223 and R 645-301-100 through -800. There has been no tangible or substantive evidence presented at all by the Petitioners as to any arbitrary or capricious actions by this Board in granting such permit. The Petitioners have failed to raise any issue of genuine material fact in their Request, and they have failed to present evidence to support their claims. *Wright, Adler, and Adams, supra.* They cannot rely on the Request alone. *Anderson, supra.* Therefore the Board should grant a motion for summary judgment on each of the points presented by ACD.

IV. FIFTH AMENDMENT TAKINGS LAW WOULD REQUIRE COMPENSATION IN THE EVENT THE PERMIT WAS DENIED.

The Takings Clause states, “private property [shall not] be taken for public use, without just compensation.” U.S. CONST. AMEND. V. Our Utah Constitution provides similarly that, “[p]rivate property shall not be taken or damaged for public use without just compensation.” UTAH CONST. ART. I § 22.

In *State ex rel. State Road Commission v. District Court*, the Court stated that “taking” is “any substantial interference with private property which destroys or materially lessens its value, or by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed.” *Ibid.*, 94 Utah 384, 78 P.2d 502, 506 (1937) (*quoting* *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah 201, 211, 77 P. 849, 852 (1904); *see* *Hampton v. State Road Comm'n*, 21 Utah 2d 342, 347, 445 P.2d 708, 711-12 (1968).)

If the permit is denied, a “taking” under the Fifth Amendment is implicated. Such would substantially affect the private property rights requiring just compensation.

“In Justice Holmes' storied but cryptic formulation, ‘while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.’ *Lingle, Governor of Hawaii, Et Al., v. Chevron U.S.A. Inc.*, 544 U.S. 528

(265) (2005) at 430 citing *Pennsylvania Coal Co v. Mahon*, 393 at 415 (1922).

V. A 1983 INVERSE CONDEMNATION WILL HAVE OCCURRED IF THE PERMIT IS DENIED.

“If private property is taken or damaged for public use absent formal use of Utah’s eminent domain power, a property owner may bring an inverse condemnation action under the state constitution to recover the value of the property.” *Gardner v. Board of County Com’rs of Wasatch County*, 2008 UT 6, ¶28, 178 P.3d 893, citing *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.3d 1241, 1243 (Utah 1990); *UTAH CONST. ART. I § 22*. As a result, and to avoid an unconstitutional taking, the Board should uphold its prior ruling.

VI. THE ALTON COAL DEVELOPMENT LEASEHOLD CONTRACTS ARE CONSTITUTIONALLY PROTECTED.

People have the right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a personal right. *Lynch v. Household Finance Corp.*, 405 U.S. 538,552 (1972).”

Even if this were properly viewed as an exercise within the State's police power, denial of the permit is not a proper exercise of that power. This is true because ACD seeks lawful utilization of its property. Contract rights at issue have also become independent property rights having additional protections. The Coal leaseholds are not just a contract. There are also evidence of accrued rights to action

enjoying y their own Constitutional protections and not subject to any acknowledged "police power" exception.

Echoing the point made in the *Pacific Mail Steamship* case, the Supreme Court elaborated in *Coombes v. Getz*, 285 U.S. 434,441-442 (1932) that "neither vested property rights nor the obligations of contracts of third persons may be destroyed or impaired. (Cites omitted.) It did not arise upon the Constitutional rule of law but upon the contractual liability created in pursuance of the contract. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth.

In more or less recent cases, the Supreme Court has expanded protected property rights to include even claims or entitlements. (See *Goldberg; v. Kelly*, 397 U.S. 254 (1970); *Bd. Of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) and *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).)

VII. DENYING ALTON COAL DEVELOPMENT THE PERMIT WOULD IMPAIR CONSTITUTIONALLY PROTECTED LEASEHOLD CONTRACTS

"A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing. . ." (*Fletcher v. Peck*, 6 Cranch 162 (1810).) Chief

Justice Marshall elaborated some nine years later. "What is the obligation of a contract, and what will impair it? It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract." (*Sturges v. Crowninshield*, 4 Wheat. 122 (1819).)

"The obligation of a contract consists in its binding force on the party who makes it. . . . There can be no other standard by which to ascertain the extent of either, than that which the terms of the contract indicate, according to their settled legal meaning; when it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce performance by the remedies then in force." (*McCracken v. Hayward*, 2 Howard 397,399 (1844).)

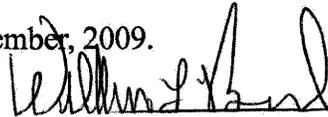
In the case at bar, we have documentary evidence of a valid lease, the **ACD** lease. The lease describes the obligation of the parties and the consideration involved with great specificity.

Because all the elements of contract are present in the coal lease, it must be concluded that it is a contract. This contract cannot be impaired without abridging the constitution. *Getz, supra.*

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, based upon the foregoing, Kane County respectfully requests that relief be afforded ACD as requested in their *Respondent/Permittee's Response to Request for Hearing*, that the Petitioners' Request be dismissed and ACD allowed to proceed under permit with the operation of the Coal Hollow Mine as authorized under the Decision Document in this matter.

Respectfully submitted this 23 day of December, 2009.



William L. Bernard
Attorney for Kane County

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Intervenor's Response to Petitioners' Request for Agency Action and Request for a Hearing* was sent via U.S. Mail, postage prepaid, this 23 day of December, 2009, to the following:

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

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

v.

DIVISION OF OIL, GAS, & MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC, and
KANE COUNTY, UTAH,

Respondent/Intervenors.

FILED

DEC 29 2009

SECRETARY, BOARD OF
OIL, GAS & MINING

**PERMITTEE'S MEMORANDUM ON
SCOPE OF REVIEW**

Docket No. 2009-019

Cause No. C/025/0005

Alton Coal Development, LLC (“Alton”) by and through counsel and pursuant to the Board’s Minute Entry dated December 17, 2009 submits this MEMORANDUM ON SCOPE OF REVIEW and related issues for the hearing in the above-captioned formal adjudicative proceeding before the Utah Board of Oil, Gas & Mining (“the Board”). Under the statutory scheme applicable to this hearing, the Board has discretionary authority to define the scope and course of these proceedings, and important practical considerations warrant a hearing closely focused on the Coal Hollow Mine permit application and the record of permit proceedings before the Utah Division of Oil, Gas and Mining (“Division”), including the State Decision Document and Application Approval dated October 15, 2009, proceedings from the informal conference on the permit, and documents submitted to and generated by the Division in the course of its technical review of the mine permit application.

STATEMENT OF FACTS

The permit application for the Coal Hollow Mine was submitted to the Division on June 27, 2006. After Alton revised the application and submitted additional information, the Division found the application to be administratively complete on March 14, 2008, and notice of the complete application was published in the Southern Utah News. Relevant state and federal agencies were also notified, as was the Southern Utah Wilderness Alliance (“SUWA”). The public notice provided for a period of public comment and opportunity to request an informal conference before the Division. Thirty-three comments were received before the comment period closed, and three parties requested an informal conference. Because the Governor’s Resource Development Coordinating Council had listed a later incorrect ending date for public

comment, the Division accepted comments and conference requests through May 22, 2008, when another 19 comments and three conference requests were received.

The Division's Director, John Baza, presided at an informal conference in the town of Alton Utah on June 16, 2008. Forty-seven members of the public attended, and twenty individuals made oral statements. SUWA submitted written comments but did not appear at the Alton conference. Following an extended period for written comments, the Director issued the Division's formal conference findings and order on July 18, 2008.

The Division initiated its technical review of the permit application upon finding the application to be administratively complete, and issued its first technical analysis of the application on September 2, 2008. Alton responded to the technical analysis providing the Division with additional and revised permit materials, on December 22, 2008. A second technical analysis requiring additional explanation and information was issued on April 20, 2009, and Alton responded with additional information. The Division's final technical analysis and findings that all permit application criteria were satisfied was issued on October 15, 2009. At the same time, the Division issued its Cumulative Hydrologic Impact Assessment ("CHIA") for the project, and approved the permit application. These decision documents are set forth in the State Decision Document and Application Approval dated October 15, 2009.

INTRODUCTION AND BACKGROUND OF STATUTORY SCHEME FOR PERMIT REVIEW

The permitting of surface coal mining on private lands in Utah under the Utah Coal Mining and Reclamation Act ("UCMRA") is the primary responsibility of the Division, subject to a hearing by the Board on the Division's final decision on a permit. See Utah Code Ann. §

40-10-14-(3) (“a hearing may be requested on the reasons for the final determination”). The Division has the lead responsibility to review a permit application, issue written findings on the permit and administer and enforce the conditions of the coal mining permit. Following review of the permit application, provision of an opportunity for public comment and an informal conference under Utah Code Ann. § 40-10-13 and entry if necessary findings, the Division may grant, deny or modify a permit. See Utah Code Ann. § 40-10-11(1)(a)(i), (“after a complete . . . application and plan is submitted to the division, as required by this Chapter and the public is notified and given an opportunity for hearing as required by § 40-10-13, the division shall grant, require modification of, or deny the permit application”); Utah Code Ann § 40-10-11(2) providing that the Division must make written findings that the application meets the UCMRA’s statutory criteria for approval. If an informal conference has been held, the Division is required to grant or deny the permit and state the reasons therefore within 60 days of the conference. Utah Code Ann. 40-10-14 (1). If the Division grants the permit, it is in full force and effect based on the Division’s approval without the need for further Board action. See Utah Code Ann. § 40-10-14(4). Once the Division acts on a permit application, if a hearing is timely requested, the Board is responsible for conducting a hearing “on the reasons for the final determination” by the Division and based on those reasons, granting or denying the permit in whole or in part.¹ Utah Code Ann. § 40-10-14(13). The Board does not substitute its judgment for that of the

¹ UCMRA is Utah’s statute implementing § 503 of the federal Surface Mining Control and Reclamation Act of 1977 (“SMCRA”), 30 U.S.C. § 1253. Pursuant to § 503 SMCRA, Utah has assumed primary responsibility from the federal government for regulating the surface effects of coal mining within the state. See 30 C.F.R. 730-733. In most cases, the Utah provisions mirror those of SMCRA.

Division, but rather conducts its hearing to review the Division's reasons for making its decision on the permit. Id.

When conducting its hearings on the reasons for the Division's permitting decision, the Board is instructed by the Legislature to observe formal adjudicatory procedures consistent with the Utah Administrative Procedure Act ("UAPA") and protect due process rights. Utah Code Ann. § 40-10-6.7(2). The hearing should conform to the Board's general rules of practice and procedure. Utah Code Ann. § 40-10-14(3). Unless specifically adopted, the rule, formalities, and procedures of common civil litigation before the courts 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).

The differences between the Division's and Board's roles in approving and reviewing a coal mining permit decision are also apparent from the amounts of time the Utah coal program allots to each entity to perform its tasks. The Division may take up to one year to review the permit application package, with time spent by the applicant in revising the permit application not counted against the Division's allotted time. R645-300-131.114. If an informal conference is requested on a permit application, the Division is required to issue findings granting or denying the permit within 60 days after the conference. Utah Code Ann. 40-10-14(1). If a hearing on the approved permit is requested before the Board, it must hold a hearing within 30 days, and issue its decision 30 days thereafter. Utah Code Ann. 40-10-14(3). Clearly, a volunteer board meeting Division with its full-time staff including both technical and clerical specialists. That is not what is envisioned by the Board's review of the Division's "reasons for

the final determination.” The Board does not start the permitting process anew, it merely determines whether the Division has acted according to the laws and regulations.

The statutory descriptions of the decision to be made by either the Division or Board on a permit application also illuminate their different fact-finding responsibilities. The Division is required to make its decision to grant, require modification of, or deny the permit application. Utah Code Ann. § 40-10-11(1)(a)(i). The Division’s authority to approve a permit is constrained to those permit applications that affirmatively demonstrate that all of the statutory criteria are satisfied. *Id.* at 40-10-11(2). Further, the Division is authorized to consider public comment and provide an opportunity for an informal conference on the permit application. Utah Code Ann. 40-10-13(2).

By contrast, if the Division approves a permit, the Board is authorized to hold a hearing on “the reasons for the final determination” by the Division. Utah Code. Ann. § 40-10-14(3). The Board, after its hearing, shall issue its decision “granting or denying the permit in whole or in part and stating the reasons.” Utah Code Ann. § 40-10-14(3). The Division is therefore charged with creating a written record documenting how the permit application provides the necessary information to demonstrate compliance with the statutory and regulatory standards. The Division issues a final determination and the approved permit then has full force and effect. If a hearing is requested after the Division has reached its final decision, the Board on review may grant or deny the permit, in whole or in part, but it is not empowered to require modification of the permit application. The Board need not document compliance with all of the regulatory criteria, as the Division must, but is only required to provide a written order stating the reasons for its action after the hearing. *Id.*

The Board's role under this statutory scheme is different from the hearings it conducts under the Utah Oil and Gas Conservation Act, Utah Code Ann. 40-6-1 et seq. For example, when conducting hearings on oil well spacing or pooling requests, the Board has the initial fact-finding responsibility, and the Division's role is to provide its analysis and recommendation to the Board. See Utah Code Ann. §§ 40-6-6, 40-6-6.5; 40-6-8. The Board and the Division receive the technical information supporting the request at the same time. In reaching a decision, the Board refers to criteria and standards specifically set forth in the Board's enabling legislation. Id. Presentation of detailed technical findings for the first time before a government agency is both expected and essential under these circumstances, and the Board hears the evidence as a primary fact finder. In contrast, the statutory scheme for coal mining permits requires the Division to perform initial fact-finding, take an active role in determining the contents of the permit application, provide an opportunity for public comment and hearing on the application and grant, deny or modify the permit. As an appellate-type body, reviewing the reasons for the Division's final determination, the Board, acting in a much shorter time frame, makes its decision after the permit is approved and application package is already assembled, revised, and evaluated.

ARGUMENT

I. THE BOARD SHOULD CONDUCT ITS HEARING BY FOCUSING CLOSELY ON THE PERMIT APPLICATION AND RELATED STUDIES AND DOCUMENTATION

The Board should regulate the course of the hearing as an administrative appellate review body to focus closely on the decision of the Division, together with whatever studies, public comments, and other information were available to and used by the Division to reach its decision

to grant the permit. This approach is dictated by the nature of the Board's role in the decision making scheme laid out in the UCMRA. The primary functions of gathering and evaluating the information on which the permitting decision rests belongs to the applicant and the Division, and the governing statutes and regulations provide ample time for that process, and opportunity for both the Division and the applicant to learn and address concerns of the public and potentially adversely-affected parties. See Utah Code Ann. §§ 40-10-11; 40-10-13; 40-10-14.

Reference to the procedures of ordinary civil litigation to discern scope of review is inapplicable in this administrative setting. The administrative process relies on the presentation of data by the applicant and sound technical analysis and decision-making, by the Division. The administrative record of this process is reflected in the approved permit application, the State Decision Document and Application Approval dated October 15, 2009 and related public comment and technical analysis. Because that data presentation, technical analysis and decision record represent the culmination of a long and detailed process, they are appropriately the core of the evidence before the Board on review of the decision. The exhibits and testimony admitted by the Board in its hearing should be closely related to that process, with deviations permitted only when the Board determines that the proffered evidence will be helpful in permitting the Board to discern "the reasons for the decision."

The Board's Orders dated August 9, 2007 and September 5, 2007 on the scope of review issued prior to its anticipated second substantive hearing for the Lila Canyon Mine Permit are

consistent with this approach.² After briefing by the parties (including SUWA, which argued for a narrow, on-the-record review) the Board examined the statutory scheme and concluded that a categorical bar to all evidence not contained in the Division's administrative record could not be justified under Utah law. The Board noted, however, that the consideration of what evidence to admit was a case-by-case determination, and concluded in light of the allegations of error advanced by SUWA, and the permit's unique administrative history, that some amount of additional documentary evidence beyond that compiled by the Division would be admissible.³ The Board further relied on Utah Admin. Code R641-108-900 which provides that "upon the motion of a party and for good cause shown, the Board may authorize such manner of discovery . . . provided by the Utah Rules of Civil Procedure." September 5, 2007, Order at 2. The Order further considered "good cause" as vesting the Board with broad discretion, citing *Jackson v. Kennecott Copper Corp.*, 495 P.2d 1254, 1255 (Utah 1972). *Id.* at 7. Therefore, in this matter, unless otherwise provided with "good cause," the Board should limit its review primarily to the approved permit application, the State Decision Document dated October 15, 2009, the Division's technical analysis of the permit and public comment on the application received by the Division.

This approach is not incompatible with UCMRA's due process requirement that the hearing provide an opportunity to examine any exhibits presented, and to cross-examine any

² *SUWA v. Division of Oil, Gas and Mining, et al.*, Docket No. 2007-015, Cause No. C/007/013-LCE07 (the parties reached settlement in this matter prior to hearing and the Orders were not ultimately applied). (Referred to herein as Lila II.)

³ Ultimately, only three types of evidence beyond the Division's record were produced and proffered: (1) expert witness testimony regarding the adequacy of the permit applications hydrological descriptions; (2) testimony of Division staff explaining their reasons for reaching certain required conclusions in reviewing the application; and (3)

witness. Utah Code Ann. § 40-10-6.7(b). This restatement of the requirements of due process does not mandate introduction of witnesses or exhibits, but merely assures parties of an opportunity to examine and confront whatever might be proffered. Similarly, the scope of review outlined above is not inconsistent with the Board's rule at R641-101-200 entitling a party to introduce evidence, examine witnesses and otherwise participate in the hearing. A close focus on the permit application and related documents merely assures that the scope of exhibits and testimony admitted matches the scope of the Board's role in reviewing the Division's extensive fact-finding and decision-making process already complete without unnecessarily and inefficiently recreating it.

In pointing out that UCMRA's statutory scheme contemplates Board review closely focused on the permit application package and decision documents, Alton does not propose a strict "on-the-record" review as adopted by the Board in the first hearing regarding the Lila Canyon Mine Permit.⁴ Nor does Alton propose the strict limits imposed on extra-record evidence that are applied by federal district courts reviewing agency action. The argument for a "closely-focused" scope of evidence (either admissible or discoverable) is rooted in a pragmatic assessment that the body of documentary evidence submitted to or prepared by the Division in the course of its analysis is sufficiently probative of the reasons for the Division's decision. To the extent that additional evidence (witness testimony, in particular) can assist the Board in

a search of staff members informal files and e-mails for information not contained in the Division's designated record.

⁴ *SUWA v. Division of Oil, Gas and Mining, et al.*, Findings of Fact, Conclusions of Law and Order, filed December 14, 2001, Docket No. 2001-027, Cause No. C/007/013-SR98(1).

understanding and evaluating the Division's reasons for approving the permit, that evidence should be admissible.

The Board should reject discovery requests or proffers of evidence that seek to recreate the extensive and lengthy data collection and analysis contained in the permit application and forming the basis for the Division's decision. If, as petitioners claim, the data presently available do not support the conclusions reached by the Division, that lack of support will be apparent as a missing connection between the facts found and the choices made under the standard of review proposed below. In that circumstance, Board could remand the permit to the division, which could then require Alton to supply, and the Division's technical staff to evaluate, the missing data. Through the public participation process available before the Division, SUWA could, if it chose, present its conflicting data and conclusions where they could be evaluated in the context of the entire permit application.

II. DISCOVERY AND INTRODUCTION OF NEW EVIDENCE, IF ANY, SHOULD BE PERMITTED ONLY IF NECESSARY TO EXPLAIN THE CONCLUSIONS AND ALLEGED ERRORS IN THE PERMIT APPLICATION AND RELATED MATERIALS CONSIDERED BY THE DIVISION

The Board should exercise its discretion to closely limit any discovery it allows to situations where: (i) the requesting party is able to demonstrate that the information sought can be obtained efficiently and quickly; (ii) it will help the Board to discern and evaluate the reasons for the Division's decision; and (iii) only on whether the Division acted arbitrarily and capriciously in reaching its decision. Discovery before administrative agencies is a matter of the agency's discretion, not a matter of right. *Petro-Hunt, LLC v. Dep't of Workforce Serv.*, 197 P.3d 107, 111-12 (Utah Ct. App. 2007) (noting that appellant could have challenged the agency's

denial of formal discovery as an abuse of discretion, but instead raised only a constitutional challenge). It is not a deprivation of due process, or a breach of fundamental fairness, to deny discovery in an administrative hearing even if the same discovery would be permitted in civil litigation. *Id.* at 112. The requirements of UAPA that formal adjudication should provide opportunity for discovery are satisfied when an agency provides for discovery in its rules. *Beaver County v. Utah State Tax Comm'n*, 916 P.2d 344, 353 (Utah 1996). This Board has provided that by rule that discovery is available only if the Board orders it upon a showing of “good cause.”⁵ Utah Admin. Code R. 641-108-900.

For the purpose of evaluating possible discovery requests, good cause is rooted in showing that the sought-after evidence will be helpful to the Board’s evaluation of the reasons for the decision. Further discovery requests that appear to duplicate information in the permit application or related documents, or seek to re-create the data collection and analysis already completed, are sufficiently outside the statutory scheme for this hearing that they should be denied. Alton will oppose, and the Board should deny, attempts to delay this proceeding by seeking to develop evidence through discovery that could as readily have been developed and presented in the Division’s public comment and informal conference process. The inquiry is not whether the Board would or would not act differently if it were to independently go through the entire permitting evaluation, rather, it is limited to whether the Division acted arbitrarily and capriciously in the manner that it approved the permit. Finally, the Board should weigh the

⁵ Note that Lila II did not attempt to define “good cause in this context because all parties had moved for some amount of discovery.”

efficiency and timeliness of its own hearing in ruling on discovery requests, and deny or limit those requests that will substantially delay a decision or unduly burden any party.

The Utah Supreme Court has found that substantially similar rules applied by an agency to limit discovery satisfy the requirements of due process of law even when the result is that no discovery is permitted. The agency adjudicating the *Petro-Hunt* matter cited above had provided, by rule, that formal discovery is only “rarely necessary” and would only be granted if five elements were present: (1) informal discovery methods were inadequate; (2) no less costly or intimidating method is available; (3) discovery would not be unduly burdensome; (4) it is necessary to allow the parties to properly prepare for a hearing; and (5) no unreasonable delay would result. *Petro-Hunt LLC*, 197 P.3d at 111-112. Like these examples, the discovery standards proposed above ensure that any requested discovery serve the legitimate purpose of aiding the Board’s inquiry and understanding of the issues without unnecessarily burdening parties or delaying a final decision.

The need for formal discovery is diminished by the availability of informal discovery as recognized in *Petro-Hunt*. The Division has made all of the incoming, internal, and outgoing documents connected to the permit application available to the public on the internet. As a government agency, the Division is also subject to the Government Records Access and Management Act (“GRAMA”) that compels release of most public records. Use of simple information requests, at least for documentary evidence, offers a more rapid means of obtaining information that for whatever reason is missing from the publicly-available materials, and the Board is justified in making the failure of these informal methods a prerequisite for obtaining a formal discovery order upon a showing of good cause.

III. THE BOARD SHOULD AFFIRM THE DIVISION'S FINDINGS AND CONCLUSIONS UNLESS THEY ARE ARBITRARY AND CAPRICIOUS OR CLEARLY ERRONEOUS

Among the questions left explicitly unanswered in the second Lila Canyon Mine permit hearing was what standards of review the Board should apply to the Division's findings and conclusions. August 9, 1997 Order at 14-15. Neither UCMRA nor UAPA specifies the degree of deference a reviewing agency should afford to the subordinate agency's decision, suggesting that the matter is committed to the reviewing agency's discretion. The statutory scheme for evaluating a coal mine permit application places responsibility for data collection and analysis early in the decision making process, with the Division taking active steps to assure complete and accurate information in the permit application. Therefore, the Board is justified in according deference to the Division's findings and conclusions in this hearing on the reasons for the decision. This Board is certainly empowered and qualified to decide detailed technical questions when required by statute (e.g. oil and gas well spacing, pooling, and unitization requests). However, the UCMRA makes the Division responsible for initial review of the permit application, its conformity with legal standards, and for reaching a final decision that has full force and effect. In recognition of the Division's detailed role 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.

The arbitrary and capricious standard of review is appropriate for this hearing and it gets to the heart of the Board's role in evaluating the reasons for the Division's decision. Review under this standard requires a searching inquiry into whether there is "a 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.*, 463 U.S. 29, 43 (1983). Utah courts likewise define the arbitrary and capricious standard of review in administrative proceeding as a test of “reasonableness.” *See Bourgeois v. Dept. of Commerce*, 41 P.3d 461, 463 (Utah Ct. App. 2002). There would be little reason to inquire into the Division’s reasons for its decision if the Board would thereafter substitute its judgment for that of the Division. The arbitrary and capricious standard is appropriate to this Board’s hearing on the reasons for the Division’s decision because it does not contemplate that the Board would re-evaluate the facts and reach a new, substitute decision. While deferential to the Division, the arbitrary and capricious standard is nevertheless rigorous: “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Alton respectfully recommends that the Board adopt an arbitrary and capricious standard of review to determine whether the Division’s reasons for its decision were rationally connected to the facts found.

IV. ALL BURDENS OF PROOF REST WITH PETITIONERS

Neither UCMRA nor UAPA specify which party, if any, bears the burden of proof in the Board’s hearing on the reasons for the Division’s decision granting the permit application. 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 the Sierra Club *et al.* have petitioned the Board for a hearing, and seek specific relief either denying or remanding the permit application, these parties must prove

that the Division's reasons for approving the permit were arbitrary and capricious, or that its factual findings were clearly erroneous.

While state law is silent as to burden of proof, the governing federal regulations under SMCRA, administered by the federal Office of Surface Mining, Reclamation, and Enforcement explicitly place the burden of proof on the petitioner seeking reversal. Under the Federal rules applicable to state-administered programs such as Utah's, when a hearing is requested "[t]he burden of proof at such hearings shall be on the party seeking to reverse the decision of the regulatory authority." 30 C.F.R. § 775.11(b)(5) (2008). Therefore, since Sierra Club *et al.* seeks reversal of the Division's decision, it must carry the burden of proving that the decision was arbitrary and capricious, clearly erroneous, or otherwise not in accordance with law.

RELIEF REQUESTED

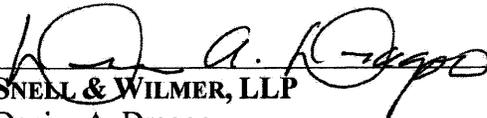
Alton Coal Development, as the holder of a valid permit for the Coal Hollow Project, and a party to this proceeding, respectfully requests that the Board enter an order setting forth the following guidelines and parameters for the hearing requested by the Sierra Club *et al.*:

1. Evidence admissible at the hearing will be closely focused on the permit application and other materials used or produced by the Division in the course of its review, including technical analyses, public comments, transcripts of informal conferences, and comments of other public agencies contained in the Division's record of its review.
2. Exceptions to #1, including discovery requests, will be permitted only on showing good cause in light of necessity, potential for delay, burden and expense, and value to Board's decision making task.

3. Pursuant to the statutory scheme of the Utah Coal Mining and Reclamation Act, the Board will affirm the Division's decision unless it is arbitrary and capricious, clearly erroneous, or otherwise not in accordance with law.

4. At the hearing, Petitioners have all burdens of proof, including burden of going forward with prima facie case, producing evidence, and the burden of persuading the Board.

RESPECTFULLY SUBMITTED this 29th day of December, 2009.


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James P. Allen

LANDRUM & SHOUSE LLP
Bennett E. Bayer (*Pro Hoc Vice*)

Attorneys for Alton Coal Development, LLC

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 2009, I mailed a true and correct copy of the foregoing PERMITTEE'S MEMORANDUM ON SCOPE OF REVIEW via e-mail and United States mail, postage prepaid, to the following:

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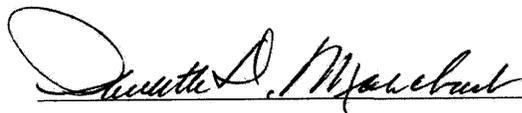
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FILED

DEC 29 2009

SECRETARY, BOARD OF
OIL, GAS & MINING

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

UTAH CHAPTER OF THE SIERRA CLUB,
SOUTHERN UTAH WILDERNESS
ALLIANCE, NATURAL RESOURCES
DEFENSE COUNCIL, and NATIONAL
PARKS CONSERVATION ASSOCIATION,

Petitioners,

DIVISION OF OIL, GAS AND MINING,

Respondent,

ALTON COAL DEVELOPMENT, LLC

Intervenors,

DIVISION'S MEMORANDUM
CONCERNING
SCOPE OF REVIEW, RECORD OF
DECISION, DISCOVERY AND
STANDARD OF REVIEW

Docket No. 2009-019
Cause No. C/025/0005

In response to the Board's Order as contained in its Minute Entry of December 17, 2009, the Division of Oil, Gas and Mining (Division) hereby submits the following memorandum of points and authorities as requested by the Board addressing: (1) the Board's scope of review when reviewing decisions to approve an application for a permit to conduct surface coal mining operations, (2) the record of the Division's decision subject to review, (3) the effect of the scope of review on the rights and nature of discovery, and (4) the standard of review to be applied in the formal adjudication of the above entitled Request for Agency Action.

SUMMARY OF DIVISION'S POSITION

The scope of the hearing should be limited to a review the "*reasons for the final determination*" (Utah code §40-10-14(3)) permitting an evidentiary hearing with opportunity to challenge and defend the Division's decision.

The decision that is subject to appeal is not limited to review of a formal 'record of decision' document. There is no advantage or basis in the rules for designating a record of decision prior to the hearing.

A limited right of discovery may be a necessary compliment to the statutory scheme of providing an opportunity for a formal evidentiary hearing.

Finally, the standard of review should limit the Board's inquiry to whether the Division's decision is in error based on a preponderance of the evidence recognizing that the Petitioners have the burden to show that the decisions is factually or legally wrong, and should allow a degree of deference to the decision in acknowledgment of the expertise of the Division.

DISCUSSION

Scope of Review. The statutorily designated scope of the hearing is to review the "*reasons for the final determination*" (Utah code §40-10-14(3)). Such a Board review requires an analysis of: (1) the information provided by the applicant, Alton Coal Development LLC (ACD) in its application and revisions, (2) the information the contained the Division's reviews and conclusions as they pertain to the requirements of the Coal Act, and (3) if the Board finds that other supplemental information is necessary (to determine if the information provided is sufficient, and if the conclusions are correct), then the scope of review should extend to the admission of that information. This is the same scope of review as the Board applied in the most

recent appeal by SUWA of the permit application for the Lila Canyon Mine (Lila II) (see August 13, 2007 Order, Attached as Exhibit 1), and the same scope of review that was applied by the Board in all other prior reviews of similar coal permitting issues as identified by the Board's August 2007 Order, with the exception of the first challenge by SUWA to the Lila Canyon Mine permit (Lila I). Hearings with this scope of review include SUWA's appeal of Andalex's Smokey Hollow Permit Application in 1996 (*In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review*, Docket No. 95-023, Cause No. PRO/025/02) and Castle Valley Special Service District's appeal of the revision of Co-op Mining Company's Bear Canyon Mine permit which was subsequently appealed and affirmed by the Utah Supreme Court (*Castle Valley Spec. Serv. Dist. v. Board of Oil, Gas, and Mining*, 938 P.2d 248, 253 (Utah 1996)).

The reasoning in the Lila II decision which integrated the requirements of the Utah Coal Act (Utah Code §§ 40-10-1 through 24), the Utah Administrative Procedures Act (Utah Code §§ 63G-4-101 through 601), and the Utah Judicial Code (Utah Code § 78A-3-102) is still sound. The plain meaning of these statutes requires that an evidentiary hearing be conducted with all parties having the right to call and cross examine witnesses and present evidence concerning the issues raised by Petitioners' challenge of the decision approving the permit application. The Coal Act mandates that "for the purposes of the hearing, the board may administer oaths, subpoena witnesses or written or printed materials, compel attendance of witnesses or production of the materials, and take evidence including, but not limited to a site inspection of the land to be affected" Utah Code § 40-10-14(5). The Utah Coal Act further provides that the hearings conducted by the Board are governed by the Utah Administrative Procedures Act which

defines formal adjudicative proceedings as allowing for testimony and documentary evidence for the purpose of obtaining a full disclosure of relevant facts. Utah Code § 63G-4-206(2009).

A significant reason for the Board's prior determination that the scope of review required more than an appellate type administrative review of the Division's decision is the fact that under Utah's scheme the Board's decision is appealed directly to the Utah Supreme Court. Thus this formal adjudicative hearing is the only opportunity to create a record for review and the only opportunity for opponents to present evidence and testimony and cross-examine witnesses. These due process needs were acknowledged as part of the rationale for allowing an evidentiary hearing to review the informal proceeding that results in an administrative decision. *Cordova v. Blackstock*, 861 P.2d 449 (Utah 1993).

The fact that the scope of review may require that the Board hear the evidence involved in both reaching the decision and evidence that is alleged to counter the finding, does not mean that the Board is to take upon itself the role of making the finding. Findings are required by statute and rule to be made by the Division. See for example Utah Admin. code R645-300133; and 645-302-321.100) The scope of the review for the Board hearing is not to repeat the application review process with the Petitioners allowed to pose as opposing applicants. Such a determination would go beyond "a review of the reasons for the [division's] final determination". The language in the statute providing that after the hearing the Board "shall issue . . . the written decision of the board granting, or denying the permit in whole or part and stating the reasons" (Utah code §40-10-14(3)) does not mean that the Board in "granting or denying the permit in whole or part" is to take the place of the Division in the myriad of ways the Division is required by the regulations to make judgments about the permit application. The Board is to review the

reasons for the final determination. (Utah code §40-10-14(3)) The Board may disagree and remand, reverse or modify the permit decision; or the Board may agree and grant the permit.

In the Federal system, coal mine permit appeals from decisions by the Office of Surface Mining and Reclamation and Enforcement (OSM) are heard by administrative law judges and ultimately reviewed by the Interior Board of Land Appeals (IBLA) or the Federal district court. *See* 43 C.F.R. § 4.1(b)(3) & 43 C.F.R. § 4.1360(a) (2009). The Code of Federal Regulations in Title 43. Subpart L of Title 43 provides special procedures for hearings and appeals by the IBLA under SMCRA. 43 C.F.R. § 4.1(b)(3). The scope of review for an approved permit on appeal is spelled out in the IBLA regulations and is limited to a consideration of whether the permit application “fails in some manner to comply with the applicable requirements of the Act [SMCRA] or the regulations, or that OSM should have imposed certain terms and conditions that were not imposed.” 43 C.F.R. 4.1366(a)(2). This language, together with the “review of the reasons for the final determination” language from SMCRA, limits the appellate scope in federal proceedings to a determination of whether the permit is supported by evidence and meets the applicable legal requirements.

The Board’s scope of review should follow the decision in *Lila II* and the federal rules and likewise be limited to an evidentiary inquiry into the reasons for the decision.

Record of Decision. The decision that is subject to appeal is not limited to a formal ‘record of decision’. Neither the Utah Coal Act nor SMCRA has a definition of, nor a requirement or procedure for the creation of, such a ‘record of decision’ document. Any attempt to define a ‘record of decision’ ultimately depends on questions of relevance and completeness. The Board is the ultimate gate-keeper over the admission of evidence relative to the decision

under review at the hearing and as such can determine the record of decision. To begin the review, there exists a public record kept by the Division that contains all of the correspondence between the applicant and the Division and others and records of the analysis regarding the application as part of the decision making process. This information is filed in the Public Information Center (PIC) and a CD containing electronic copies of these documents has already been provided to all parties. Information other than this may be sought by limited discovery and may be admitted if it is relevant to demonstrate error in the application or if it may demonstrate a bias, lack of consistency resulting in an arbitrary finding, or other error. Decisions about what may be included should depend on the context and scope of specific discovery requests, if any.

The prior appellate review decision, *Lila I*, despite the creation of a Bates Stamped 'Record of Decision' consisting of over 10,000 pages required exhaustive arguments over the rights of the parties to supplement the record to show bias through exhibits and witness testimony. See *In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review*, Docket No. 2001—027, Cause No. C/007/013-SR98(1) (*Lila I*). Nothing was made easier or clearer by creating and designating an "administrative record of decision." The purpose of the Board's hearing is to create a 'record of decision' that will be subject to judicial appellate review as set out by the requirements of the Coal Act, the Procedural Rules of the Board (R641), and the Utah Judicial Code.

In the Federal system, a record is created when a permit decision is appealed during the course of an evidentiary hearing. The record then includes all of the testimony and evidence submitted. At the IBLA level, after a hearing has been held, "the record" upon which the IBLA may base its decision includes "the transcript of testimony or summary of testimony and exhibits together with all papers and requests filed in the hearing," or, if a hearing has been held on an

appeal pursuant to instructions of the IBLA, “this record [i.e. the record of the hearing] shall be the sole basis for decision insofar as the referred issues of fact are involved except to the extent that official notice may be taken of a fact as provided...” 43 C.F.R. § 4.23 (2009).

There is no advantage or basis for designating a record of decision prior to the hearing.

Discovery. A limited right of discovery may be a necessary compliment to the statutory scheme of providing an opportunity for a formal evidentiary hearing to challenge and defend the Division’s decision. Given the scientific, technical and complex nature of the issues to be examined, there is a need to identify exhibits and witnesses in advance of the hearing, to disclose expert witnesses and expert reports or summaries, and to provide time to review the same. It may be reasonable for parties to have a limited right to take the deposition of anticipated adverse witnesses. Given the expansive nature of public access provided to the documents that consist of the decision making process, for the decision that is subject to challenge, there is a more limited need for, and less justification for, general ‘fishing expedition’ interrogatories and requests for admissions and production of documents.

In the Federal system, though generally permitted regarding matters relevant to the subject matter involved in the proceeding, discovery may be limited by an order upon motion and for good cause shown to protect a party from undue burden, expense, annoyance, embarrassment, or oppression. 43 C.F.R. § 4.1132. Such an order may provide that the discovery not be had; that the discovery may be had only on specified terms and conditions, including a designation of the time and place; that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; that certain matters not relevant may not be inquired into, or that the scope of discovery be limited to certain matters; or

that discovery be conducted with no one present except designated persons; or a trade secret or other confidential research, development, or commercial information may not be disclosed or be disclosed only in a designated way. *Id.*

Any discovery ruling by the Board should depend on the specific nature of the request and should be limited in light of the fact that this is an administrative hearing intended to provide an speedy and economical determination of all issues (Utah Admin. Code R641-100-300) and is subject to the limited scope of reviewing the reasons for the decision. The Board's discovery rulings are subject to review under an abuse of discretion standard. *See Petro-Hunt v. Dep't of Workforce Services*, 197 P.3d 107, 110 (Utah Ct. App. 2008).

Standard of Review. Finally, the standard of review should first acknowledge that the Petitioners have the burden of proving that the decision is in error by a preponderance of the evidence, and should allow a degree of deference to the decision in accordance with the expertise of the Division. Since the question under appeal is limited to whether the Decision was correct [Utah code §40-10-14(3)], and the burden is on "the party seeking to reverse the decision of the [Division]" to demonstrate error, (30 CFR §775.11(5) there is an inherent assumption that the decision should be upheld unless there is a preponderance of evidence to support a finding of error.

The interpretation of the Division and its expertise and practices in the administration of the regulations are to be afforded a degree of deference and should not be over-turned if they are reasonable and consistent with applicable rules and statutes. According this deference is consistent with the Federal practice of the IBLA. *See Harvey Catron Jo D. Molinary*, 134 IBLA 244 (1995) ("The Department [OSM] is entitled to rely on the reasoned analysis of its experts in

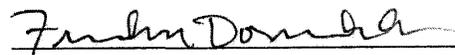
matters within the realm of their expertise.”); *see also Robert C. Salisbury*, 79 IBLA 370 (1984) (“The Board gives deference to BLM actions which are based on its expertise and which are taken pursuant to defined statutory authority where those actions are supportable.”). In the Federal system, decisions of any federal agency, including the OSM, are required to be supported by substantial evidence. 5 U.S.C.A. 556(d).

The Board should adopt a deferential standard for factual determinations and a non-deferential standard for legal determinations consistent with the practice of Utah appellate courts. *See e.g. Utah Chapter of the Sierra Club v. Utah Air Quality Bd.*, 2009 WL 4406250 (Utah 2009). Deference should also appropriately be applied to mixed questions of law and fact. *See Taylor v. Utah State Training School*, 775 P.2d 432, 433 (Utah Ct. App. 1989).

CONCLUSION

As stated, the scope of review is limited to an examination of the “reasons for the decision” as required by statute. This review by virtue of its limited inquiry does not require the Board to re-make the decision, only to uphold the decision as being consistent with the applicable rules and statutes. If the Board finds error it can remand or make its own determination, but in absence of a finding of error the decision is to uphold the Division’s decision.

Respectfully submitted this 29 day of December, 2009



Steven F. Alder, (Bar No #0033)
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Assistant Attorney General
Counsel for Division of Oil, Gas and Mining

CERTIFICATE OF MAILING

I hereby certify that I caused a true and correct copy of the foregoing DIVISION'S MEMORANDUM CONCERNING SCOPE OF REVIEW, RECORD OF DECISION, DISCOVERY AND STANDARD OF REVIEW to be mailed by first class mail, postage prepaid, the 30 day of December, 2009 to:

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Exhibit 1

FILED

AUG 13 2007

SECRETARY, BOARD OF
OIL, GAS & MINING

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

SOUTHERN UTAH WILDERNESS ALLIANCE,)	
)	
Petitioner,)	ORDER
)	
vs.)	
)	
DIVISION OF OIL, GAS & MINING,)	Docket No. 2007-015
)	Cause No. C/007/013-LCE07
Respondent,)	
)	
and)	
)	
UTAH AMERICAN ENERGY, INC.)	
)	
Respondent-Intervenor.)	

This cause came on regularly for hearing before the Board of Oil, Gas and Mining (the "Board") on June 27, 2007, at 10:00 a.m., in the Hearing Room of the Utah Department of Natural Resources at 1594 West North Temple Street, in Salt Lake City, Utah.

The following Board members were present and participated in the hearing: Acting Chairman Robert J. Bayer; Samuel C. Quigley; Jake Y. Harouny, Jean Semborski and Ruland J. Gill, Jr.

Stephen H.M. Bloch appeared as counsel for Petitioner Southern Utah Wilderness Alliance ("SUWA"). Steven F. Alder and James P. Allen, Assistant Attorneys General, appeared on behalf of Respondent the Division of Oil, Gas and Mining. Denise Dragoo appeared as counsel on behalf of Respondent-Intervenor UtahAmerican Energy, Inc. ("UEP"). Michael S.

Johnson and Stephen Schwendiman, Assistant Attorneys General, represented the Board.

The Board heard oral argument on the legal questions addressed in the following briefs filed by the parties:

- The Division's Memorandum Regarding Conduct of the Hearing ("Division's Opening Brief");
- Utah American Energy, Inc.'s Memorandum Regarding Standard of Review and Scope of Review ("UEI's Opening Brief");
- Petitioner Southern Utah Wilderness Alliance's Opening Brief On Scope of Review ("SUWA's Opening Brief");
- Division's Reply To Memorandum of Petitioner and Respondent-Intervenor Regarding Conduct of the Hearing (Division's Response Brief");
- Utah American Energy, Inc.'s Reply Brief to Petitioner's Opening Brief on Scope of Review and in Support of Intervenor-Respondent's Memorandum Regarding Standard of Review and Scope of Review; and
- Petitioner Southern Utah Wilderness Alliance's Response Brief on Scope of Review ("SUWA's Response Brief");

NOW THEREFORE, the Board, having considered the above-listed briefs and the oral arguments made by the parties at the hearing, and good cause appearing, hereby sets forth its reasoning in support of the ruling it issued in its Minute Entry dated July 12, 2007:

The question briefed and argued to the Board concerns the appropriate scope of evidence to be considered by the Board in this appeal. The parties disagree as to whether the Board should strictly limit its review to an informal record developed in the Division's administrative

process below, or whether the Board may consider additional evidence adduced at a formal evidentiary hearing as part of its review.

For its part, Petitioner SUWA contends that the Board should hear the present matter in a purely appellate capacity, limiting its review to a record of the Division's informal proceeding. SUWA Opening Brief at 1-2. The Division urges that the Board's review should proceed as a full evidentiary hearing on each contested issue and not be limited to the record developed in the Division's informal proceeding. Division's Opening Brief at 3-5. UEI urges that the Board's review should be limited to the record developed by the Division, albeit with supplemental evidence being taken pursuant to a liberal "good cause shown" standard. UEI's Opening Brief at 3-4. For the reasons stated below, in appeals under Section 14 of the Utah Coal Mining & Reclamation Act, the Board, while limiting its review to issues raised at the Division level, will not limit its review to an informal record, but rather will hold an evidentiary hearing at which new evidence may be offered as to each contested issue.

I. Law of the Case

SUWA cites the Board's October 12, 2001 and December 14, 2001 rulings in Docket No. 2001—027, Cause No. C/007/013-SR98(1) in which the Board stated it would hear a prior appeal pertaining to a permit for this same mine "in an appellate tribunal capacity with review limited to the Administrative Record as certified by the Division." SUWA contends that these prior pronouncements constitute the "law of the case" in this matter, and that the Board should only deviate from these rulings, and apply a different scope of review today, if "exceptional circumstances" are shown. SUWA's Opening Brief at 1-2.

The "law of the case" doctrine holds that "a decision made on an issue during one stage

of a case is binding on successive stages of the same litigation.” *Thurston v. Box Elder County*, 892 P.2d 1034, 1039 (Utah 1995). While this language from *Thurston*, relied on by SUWA, provides a statement of the general rule, *Thurston* drew certain distinctions concerning application of the doctrine which are important here. *Thurston* recognized several species of the “law of the case” doctrine. “One branch of the doctrine, often called the mandate rule, dictates that” a lower court must not “depart from the mandate” of a superior court. *Id.* at 1037-38. *Thurston* noted that the “mandate rule lacks the flexibility found in other branches of the law of the case,” and requires a court to follow a prior decision even if it believes “that the issue could have been better decided in another fashion.” *Id.* at 1038.

The present issue before the Board, however, does not involve application of the mandate rule, but rather the Board’s reconsideration of one of its *own* prior decisions. If the law of the case doctrine applies to the Board at all (see below), the present situation involves “a branch of the law of the case doctrine which is more flexible than the mandate rule.” *Id.* While *Thurston* and other cases cited by SUWA, such as *Gildea v. Guardian Title Company of Utah*, 31 P.3d 543 (Utah 2001), set forth certain criteria guiding a court’s decision whether to depart from its own prior decision in the judicial context¹, *Gildea* ultimately recognizes that courts “need not apply the doctrine to promote efficiency at the expense of the greater interest in preventing unjust results or unwise precedent.” *Gildea*, 31 P.3d at 546.

Citing a number of authorities, the Division argues that the doctrine is of questionable applicability in the administrative context. See Division’s Reply Brief at 2-4 and authorities

¹ Including the “exceptional circumstances” language quoted by SUWA. See *Thurston*, 892 P.2d at 1039; *Gildea*, 31 P.3d at 546.

cited therein. SUWA counters that *Salt Lake Citizen's Congress v. Mtn. States Tel. & Tel. Co.*, 846 P.2d 1245 (Utah 1995) indicates that the doctrine does apply to administrative tribunals. SUWA Response Brief at 2. Because *Salt Lake Citizen's Congress* involved the related but different doctrine of *res judicata*, however, it is unclear whether the law of the case doctrine applies in the administrative context. Even if it does, however, *Salt Lake Citizen's Congress* establishes that an administrative body may deviate from its own legal² rulings not where "exceptional circumstances" are shown as SUWA suggests, but rather, if a reasonable basis exists for doing so:

[These doctrines do] not mean, however, that a rule of law established in adjudication can never be changed by the agency that established it. Administrative agencies must, and do, have the power to overrule a prior decision when there is a reasonable basis for doing so. As this Court stated in *Reaveley v. Public Service Commission*, 20 Utah 2d 237, 241, 436 P.2d 797, 800 (1968), 'Certainly an administrative agency which has a duty to protect the public interest ought not be precluded from improving its collective mind should it find that a prior decision is not now in accordance with its present idea of what the public interest requires.'

Salt Lake Citizen's Congress, 846 P.2d at 1253.

In the present case, the Board's departure from its own prior decision to strictly limit its review in an appeal under Section 14 of the Coal Act to the Division's informal record is reasonable. This is true because, as discussed more fully below, such a scope of review is contrary to the statutes which control the Board and would preclude the development of a record adequate for purposes of judicial appellate review of the Board's decision.

The particular species of the law of the case doctrine which would be applicable to the present case strengthens this conclusion. *Thurston* observed that the doctrine, as it applies to a

² The legal (as opposed to factual) nature of the prior decision is relevant to this analysis, see

court's revisiting of its own prior decisions, is a practical doctrine rooted in "efficiency and consistency." *Thurston*, 892 P.2d at 1038. Here, the interests of efficiency and consistency do not outweigh the necessity of the Board engaging in the proper scope of review as mandated by law (see below).

The Board notes that the law of the case doctrine is applied with some flexibility depending upon the nature of the prior ruling at issue. See Division's Response Brief at 4 and cases cited therein. In the present case, the prior ruling pertaining to scope of review involved a purely procedural issue concerning the basic role, jurisdiction and function of the Board. It did not, as in *Thurston* or *Gildea*, involve a ruling concerning the rights or claims of any party, or the application of the law to any particular facts. *Salt Lake Citizen's Congress* is instructive on this point. There, the Court discussed the related doctrine of *res judicata* in an administrative context and contrasted administrative decisions which adjudicate particular rights or claims from those which announce legal rules or interpretations:

When an administrative agency is acting in a judicial capacity and resolves disputed *issues of fact* properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose.

Salt Lake Citizen's Congress, 846 P.2d at 1251, n.4 (emphasis added).

Res judicata applies when there has been a prior adjudication of a *factual issue* and an *application of a rule of law to those facts*. In other words, res judicata bars a second adjudication of the same *facts* under the same rule of law.

Id. at 1251 (emphasis added). *Salt Lake Citizen's Congress* recognized that the binding effect of announcements of the *law* (as opposed to the resolution of particular claims) involves the doctrine of *stare decises* rather than *res judicata*, and further recognized, as noted above, that an

below.

agency may deviate from its own prior announcement of the law “when there is a reasonable basis” for doing so. *Id.*

The Board is persuaded that the very general, procedural nature of the prior ruling concerning scope of review is such that the policy considerations favoring application of the law of the case doctrine have little if any force. The Board must conduct itself in accordance with the statutes and rules which create and govern it. The prior following of a *procedure* which conflicts with the controlling law, and which did not adjudicate the claims of any party or involve the application of law to any particular facts, does not become the “law of the case” such that the Board must persist in following that procedure. Indeed, *Salt Lake Citizen’s Congress* recognized that the “authority of state administrative agencies to establish legal rules is limited by the agency’s organic statute, statutes the agency administers, constitutional law, and the Utah Administrative Procedures Act (UAPA).” *Id.* at 1252, n.5. Because, as discussed below, the Board’s prior limiting of its scope of review to an informal record conflicts with its own organic statute, the Coal Act, as well as UAPA, the Board’s ruling on that issue could not have established any binding “law of the case” which conflicted with these laws.

Because the Board’s prior ruling pertaining to scope of review involved a purely legal, procedural issue concerning its own powers and duties, rather than the adjudication of any claims or facts, the Board holds that the law of the case doctrine does not apply to that particular ruling. In any event, for the reasons stated above, the Board concludes it has a “reasonable basis” for

deviating from its prior ruling even if the law of the case doctrine were to apply.³

II. Scope of Evidence Reviewed By Board In Appeal Under The Coal Act.

The provisions of the Utah Coal Mining & Reclamation Act (the "Coal Act")⁴, Utah Oil and Gas Conservation Act (the "Conservation Act")⁵, Utah Administrative Procedures Act ("UAPA")⁶, the Board's procedural rules, and Utah decisional law construing these statutory and regulatory provisions, all compel the conclusion that the Board, in conducting a "hearing" pursuant to Utah Code Ann. §40-10-14(3), does not limit its review to an informal record developed before the Division, but rather conducts a formal evidentiary hearing in which evidence is taken and an adequate record is developed for purposes of judicial appellate review.

A. The Coal Act.

SUWA filed the present appeal pursuant Section 14 of the Coal Act. Utah Code Ann. §40-10-14. Section 14 provides that the Board shall hold a "hearing" in reviewing the Division's

³ While the Board's present ruling deviates from that made in the case involving the earlier Lila Canyon permit matter, the Board notes that it is consistent with the Board's practice prior to that matter. Specifically, in SUWA's appeal of Andalex's Smokey Hollow Permit Application in 1996, see In the Matter of the Request by Petitioner Southern Utah Wilderness Alliance for Board Review, Docket No. 95-023, Cause No. PRO/025/02, and Castle Valley Special Service District's appeal of the Revision of Co-op Mining Company's Bear Canyon Mine permit, see In the Matter of the Request for Agency Action and Appeal of Division Determination to Approve Significant Revision, Docket No. 94-027, Cause No. ACT/-15/025, the Board held full evidentiary hearings involving witnesses and exhibits. In neither case did the Board limit its review to an informal administrative record. The Utah Supreme Court affirmed the Board's decision in the *Castle Valley* case, and although the issue of scope of review was not directly at issue, there were challenges that required the Court to review the nature of the Board's factual inquiry (i.e. a full evidentiary hearing), and the Court affirmed the Board's findings of fact based on the evidence adduced at that hearing. *Castle Valley Spec. Serv. Dist. v. Board of Oil, Gas and Mining*, 938 P.2d 248, 253 (Utah 1996).

⁴ Utah Code Ann. §40-10-1, *et seq.*

⁵ Utah Code Ann. §40-6-1, *et seq.*

⁶ Utah Code Ann. §63-46b-1, *et seq.*

action, and following such hearing, shall issue a decision “granting or denying the permit in whole or in part and stating the reasons.” *Id.* at §14(3). Section 6.7(2) of the Coal Act, in turn, clearly defines “hearings” for purposes of the Coal Act as “formal adjudicative proceedings” conducted pursuant to UAPA (which as discussed below, involve the taking of evidence). Section 14 of the Coal Act further states that for “purpose[s] of the hearing, the board may administer oaths, subpoena witnesses or written or printed materials, compel attendance of the witnesses or production of materials, and take evidence, including, but not limited to, site inspections of the land to be affected and other surface coal mining operations carried on by the applicant in the general vicinity of the proposed operation.” *Id.* at §14(5). This language clearly contemplates the taking of evidence and does not contemplate the Board merely reviewing an informal record.⁷ Section 14 further states the Board shall conduct the hearing “pursuant to the rules of practice and procedure of the board” (which as discussed below, also explicitly speak in terms of taking evidence).

The fact that Section 30 of the Coal Act, cited by UEI, is explicit in stating that an appeal of the Board’s decision to a reviewing appellate court “is not a trial de novo,” and is equally explicit in setting forth appellate-review standards for such an appeal, reinforces the conclusion that Section 14 does not contemplate an appellate-style, on the record review. If such was the intention of the legislature, one would have expected it to use similar language in Section 14 as it used in Section 30. It did not.

⁷ That Section 14 of the Coal Act contemplates the Division’s informal proceeding and decision being reviewed via a formal evidentiary hearing is reinforced in Section 14’s specification that if the Board fails to act on an appeal of Division action, the aggrieved party may seek a remedy in state district court. Utah Code Ann. §40-10-14(6)(b). UAPA, in turn, provides that district court review of informal agency action is conducted “by trial de novo.” Utah Code Ann. §63-46b-15.

The only language cited in support of the contention that the Coal Act contemplates an on the record, appellate-style review by the Board is the language of Section 14 which states that an aggrieved party may seek "a hearing on the reasons for the final determination." While the Board agrees that the phrase "on the reasons" indicates that the Board is to review the *issues* which were before the Division, it cannot read additional substantive provisions into that lone phrase to the effect that the Board's review shall be confined to an informal record, when such a reading directly contradicts the many explicit statements to the contrary found elsewhere in the Coal Act and other statutes discussed below.

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B. The Conservation Act.

The Utah Oil and Gas Conservation Act is the Board's organic act, setting forth the Board's creation, composition, jurisdiction and duties. *See* Utah Code Ann. §40-6-1 *et seq.* The Conservation Act establishes the Board as a lay legal Board comprised of members with special expertise in oil, gas and mining matters. *Id.* at §4(2). The Conservation Act states that the Board shall conduct its hearings in accordance with UAPA, *id.* at §40-6-10(1), and as noted below, the Board's rules specify that its hearings shall be "formal adjudicative proceedings" under UAPA, which involve the taking of evidence, *see* Utah Admin. Code R641-100-100.

C. The Board's procedural rules.

As noted above, the Coal Act specifies that "hearings" are to be conducted "pursuant to the rules of practice and procedure of the board." Utah Code Ann. §40-10-14(3). The Board's rules provide that hearings are "formal adjudicative proceedings," *see* Utah Admin. Code R641-100-100, governed by UAPA, *see* R641-100-500, in which all parties "will be entitled to introduce evidence, [and] examine and cross-examine witnesses," *see* R641-101-200, and which

shall be conducted “to obtain full disclosure of relevant facts,” *see* R641-108-100. The Board’s rules speak of receiving documentary evidence, *see* R641-108-200, receiving testimony, *see* R641-108-300, subpoenaing witnesses and documents, *see* R641-108-900, and permitting discovery, *see* R641-108-800. Again, these provisions contemplate formal evidentiary hearings where evidence is taken, and not proceedings which are limited to an informal record developed at the Division level.

That the Board’s statute and rules contemplate the Board holding formal evidentiary hearings, rather than acting in an appellate capacity, is consistent with the nature of the Board itself. As discussed above, the Board is constituted as a lay legal body with special technical expertise. It is contrary to the nature of the Board to expect it to sit as an appellate court where it applies legal principles to an existing record, rather than bringing its technical expertise to bear in the taking of evidence and making of findings based on that evidence.

D. UAPA.

As noted above, the Coal Act explicitly states that “hearings” conducted by the Board under the Coal Act’s appeal provision are “formal adjudicative proceedings” governed by UAPA. Utah Code Ann. §40-10-6.7(2)(a)(i). UAPA, in turn, defines formal adjudicative proceedings as hearings conducted “to obtain full disclosure of relevant facts,” in which the presiding officer will permit parties “to present evidence,” and in which “testimony” and “documentary evidence” will be received. Utah Code Ann. §63-46b-8(1). Again, this language clearly contemplates an evidentiary hearing not restricted to the Division’s informal record.

That informal agency action is to be reviewed via formal evidentiary hearings, rather than being reviewed on the informal record, is reinforced in Section 15 which specifies that judicial

review of “agency actions resulting from informal adjudicative proceedings” is to be conducted “by trial de novo.” *Id.* at §15. Although Section 15 applies to judicial (rather than administrative) review of informal agency action, as discussed below, Utah courts have recognized that UAPA’s scheme ensures that informal agency action is reviewed via a formal evidentiary hearing regardless of whether a court or superior agency is the reviewing body.

E. Cases construing UAPA.

Utah courts have recognized that UAPA’s statutory scheme ensures that informal agency action is reviewed by formal agency review (with the taking of evidence) or de novo review in district court, noting the policy considerations which underlie this scheme:

UAPA’s statutory scheme ensures that ‘each applicant has the opportunity to have a formal hearing before the agency, or a [trial] de novo by the district court.’ One reason for this statutory scheme is that appellate courts need a complete record in order to review adjudications. Formal proceedings ‘allow the opportunity for fuller discovery and fact finding, [and] are more likely to result in an adequate record for review.’ Thus UAPA vests jurisdiction to review *only formal* agency proceedings with the supreme court or court of appeals. Conversely, informal proceedings are less likely to result in an adequate record. The review of an informal agency proceeding by a new trial at the district court level ensures that an adequate record will be created. Only then can this state’s appellate courts properly review an informal administrative proceeding.

Cordova v. Blackstock, 861 P.2d 449, 451-52 (Utah 1993) (emphasis in original). Although *Cordova* involved *judicial* review of an informal agency proceeding under Section 15 of UAPA, courts have applied the same analysis in the context of formal *agency* review under Section 8 of UAPA, and have recognized that such review is not performed on the informal record, but rather by the taking of evidence:

The language in *Cordova* and section 63-46b-8 indicate 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. See Utah Code Ann. §63-46b-

8(1)(d). Furthermore, if the [reviewing] Board were limited to the 'initial hearing officer's findings of fact and conclusions of law,' as [appellant] argues, then the Board's decision would be incapable of appellate review because there would not be a complete record.

Bradbury v. Utah Division of Wildlife Res., 2002 WL 31770900 (Utah App.). As reflected in *Cordova* and *Bradbury*, UAPA ensures that informal agency action will be reviewed either through a formal evidentiary hearing before a reviewing agency tribunal (like this Board), or by de novo review in state district court. In neither case is the review limited to the informal record.

In addition to the need to develop a record adequate for purposes of judicial appellate review, courts have recognized that conducting a formal evidentiary hearing is necessary in reviewing informal agency action because it allows the reviewing tribunal "to consider and act on any deficiencies that might arise by nature of the informality of the agency hearing." *Cordova*, 861 P.2d at 452. See also, *Archer v. Board of State Lands and Forestry*, 907 P.2d 1142, 1145 (Utah 1995).⁸

Ultimately, there is no support in the Coal Act, UAPA, the Board's organic act, or any of the rules promulgated thereunder, for the proposition that the Board must assume the role of an appellate court, and strictly limit its review to an informal agency record, when it reviews a Division coal mine permitting decision. Such a procedure is not only contrary to the above-referenced statutes and rules, but would result in a scheme in which an informal agency decision

⁸ Problems pertaining to the development of an adequate record for review manifested themselves in the prior Lila Canyon permit matter cited by SUWA. In that matter, SUWA objected to the informal record certified by the Division as "manifestly incomplete," and, because SUWA and the Division could not agree on the contents or completeness of such informal record, SUWA sought discovery in order to ascertain whether additional documents existed which should have been included in the record. See discussion set forth in SUWA's Opening Brief at 5-6.

was then twice reviewed under appellate standards (first by the Board and then by the Supreme Court) without a formal evidentiary hearing having ever been conducted, a scheme UAPA was meant to eliminate⁹

The Board must give meaning to all of the statutory provisions governing it in a way which best harmonizes those provisions and is most consistent with the nature of the Board itself. As discussed above, the limiting of the Board's review in the present adjudication solely to the informal administrative record developed by the Division would violate many express statutory and regulatory provisions, would be contrary to the basic scheme established by UAPA, would not result in a record adequate for appellate judicial review, and would be inconsistent with the very nature of the Board as a formal adjudicatory body (rather than an appellate court). For these reasons, the Board will hold a formal adjudication in this matter in which it will review (1) the evidence which was made available to the Division during its permit review process, and (2) other relevant evidence and information not considered by the Division, in order to make its own findings of fact and conclusions of law concerning the legal and factual issues which were involved in the Division's decision. Based upon this evidence, the Board will issue a "written decision . . . granting or denying the permit in whole or in part." Utah Code Ann. §40-10-14(3).

This Order answers only the question briefed by the parties regarding whether the Board's review will be limited to the Division's informal administrative record or will also

⁹ See *Taylor v. Utah State Training School*, 775 P.2d 432, 433 n.1 (Utah App.1989) (noting "we have previously criticized this inefficient, two-tiered approach to judicial review of agency decisions, where first the district court and then an appellate court review an agency decision "on the record." The Utah Administrative Procedure Act wisely avoids this duplicative procedure.")

include additional relevant evidence adduced at a formal evidentiary hearing. It does not address questions pertaining to the "standard of review" the Board will apply to such evidence (i.e. what level of deference, if any, will be shown the Division's findings and ultimate decision). Those questions will have to be addressed by the parties in further submissions or at the hearing in this matter.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ENTERED this 9th day of August, 2007.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING


Robert J. Bayer, Acting Chairman

CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing ORDER via United States mail, postage prepaid, this 13 day of August, 2007, to the following:

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A handwritten signature in cursive script, appearing to read "Julie Carter", is written over a horizontal line.