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Living Rivers v. Utah Department of Natural Resources, Division of Oil, Gas, and Mining : Unknown

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

LIVING RIVERS,

Petitioner/Appellant,

v.

UTAH DEPARTMENT OF NATURAL
RESOURCES, DIVISION OF OIL, GAS AND
MINING,

Respondents/Appellees.

Case No. 20110242-CA

BRIEF OF INTERVENOR WESTWATER FARMS, LLC

On Appeal from the BOARD OF OIL, GAS AND MINING DEPARTMENT OF
NATURAL RESOURCES STATE OF UTAH

Docket No. 2010-029 --- Cause No. UIC-358.1

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JURISDICTION

This Court has jurisdiction under Utah Code Ann. § 78A-4-103(2)(j).

ISSUES PRESENTED AND STANDARDS OF REVIEW

1. Whether Appellant Living Rivers (“Living Rivers”) has met its burden of demonstrating that the Utah Board of Oil, Gas and Mining (the “Board”) failed to decide all of the issues requiring resolution prior to its issuance of the underground injection control (“UIC”) permit to Intervenor Westwater Farms, LLC (“Westwater Farms”). *See* Utah Administrative Procedures Act (“UAPA”), Utah Code Ann. § 63G-4-403(4)(c). Whether or not the Board decided all of the issues requiring resolution is a question of law reviewed for correctness. *Orchard Park Care Ctr. v. Dep’t of Health*, 2009 UT App 284, ¶ 8, 222 P.3d 64; *EAGALA, Inc. v. Dep’t of Workforce Servs.*, 2007 UT App 43, ¶ 7, 157 P.3d 334. Even if the Board failed to consider an issue it should have, Living Rivers must also show that it was “substantially prejudiced” by the Board’s failure to consider the issue. *See* Utah Code Ann. § 63G-4-403(4)(c); *Benson v. Peace Officer Standards and Training Council*, 2011 UT App 220, ¶¶ 22-23, 686 Utah Adv. Rep. 4; *EAGALA*, 2007 UT App 43, ¶¶ 11-14.

2. Whether Living Rivers has met its burden of demonstrating that the Board erred when it made certain factual determinations and thus decided to issue the UIC permit without monitoring conditions. As Living River’s concedes in its Brief, p. 3, under UAPA, the Board’s factual determinations are reviewed under a substantial evidence standard. *See* Utah Code Ann. § 63G-4-403(4)(g); *Martinez v. Media-Paymaster Plus, et al.*, 2007 UT 42, ¶ 24, 164 P.3d 384; *EAGALA*, 2007 UT App 43,

¶ 15. To successfully challenge a factual finding, Living Rivers must marshal all of the evidence supporting the finding and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Martinez*, 2007 UT 42, ¶ 17; *Grace Drilling Co. v. Board of Review of Indus. Comm'n*, 776 P.2d 63, 68 (Utah Ct. App. 1989); *see also* Utah R. App. P. 24(a)(9).

3. Whether Living Rivers has met its burden of demonstrating that the Board should have granted its Request for Rehearing and Modification of Existing Order, and in the Alternative, Request for Stay of the Order Issued on January 13, 2011 (“Request for Rehearing”). The Board’s decision in this regard is subject to an abuse of discretion standard, not a substantial evidence standard as incorrectly asserted by Living Rivers. Appell. Brf., p. 4. Westwater Farms is not aware of any Utah cases that have considered the appropriate standard of review with regard to the Board’s ability to reconsider its decisions under Utah Admin. Code R641-110-200. With regard to requests for reconsideration under UAPA in general (*see* Utah Code Ann. § 63G-4-302), this Court has applied an abuse of discretion standard. *See Salt Lake Donated Dental Services, Inc. v. Dep’t of Workforce Services*, 2011 UT App 7, ¶¶ 9-12, 246 P.3d 1206 (hereinafter “SLDDS”); *Grace Drilling*, 776 P.2d at 70. Similarly, with regard to a court’s reconsideration of its decisions, the appropriate and well-established standard of review is abuse of discretion. *See Tschaggeny v. Milbank Ins. Co.*, 2007 UT 37, ¶ 16, 163 P.3d 615; *Murdock v. Springville Mun. Corp.*, 1999 UT 39, ¶ 21, 982 P. 2d 65.

DETERMINATIVE STATUTES, REGULATIONS AND RULES

In accordance with Utah R. App. P. 24 (a)(6) the statutes, rules and regulations that Westwater Farms considers determinative and of central importance are cited below. The provisions themselves are included in the Addendum attached hereto.

42 U.S.C. § 300h(b)(1)(B)(i)

42 U.S.C. § 300h(d)(2)

Utah Code Ann. § 40-6-1

Utah Code Ann. § 40-6-5(5)

Utah Code Ann. § 63G-4-302(1)

Utah Code Ann. § 63G-4-403(4)

Utah Admin. Code R641-110-200

Utah Admin. Code R649-5-2

Utah Admin. Code R649-5-5

Utah R. App. P. 24(a)(9)

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION BELOW

1. Background on Produced Water, Existing Geology and the Proposed Injection Well

This case concerns the Board's approval of a UIC permit for the operation of a Class II underground injection well (also referred to as the "injection well"), located in Eastern Utah and owned by Westwater Farms. The UIC permit allows Westwater Farms to pump water down the well into a porous rock formation hundreds of feet below the

surface of the earth, where it will remain. In the recovery of subsurface oil and gas, water is a natural byproduct. AR 206 at p. 34.¹ There a number of ways to properly dispose of this “produced water”—including the injection of the water back into the earth. In order to legally remove oil and gas in the first place, operators must be able to properly dispose of the produced water. AR 206 at p. 32. Thus, produced water disposal is an essential part of the development of America’s oil and gas reserves. *Id.*² In this case, the produced water to be injected by Westwater Farms would all come from fields in Utah and Colorado—including the Uinta Basin. AR 206 at pp 20, 34-35, 46.

The produced water is non-potable. As explained below, *see infra*, pp. 23-25, in order for it to be safely returned to subsurface formations, there must be no danger that it will contaminate existing drinking water sources. In this case, Westwater Farm’s plan is to treat produced water for a number of different uses as recycled water—including agricultural uses. AR 206 at pp. 31-32, 39-41. Westwater Farms is currently building a state-of-the-art recycling facility on the same property as the site of the injection well. AR 206 at pp. 31-32. The recycled water resulting from this process will be very high quality water. *Id.* Injecting produced water back into the ground is not part of this

¹ Document No. 206 of the Administrative Record is the transcript of the December 8, 2011 hearing. The page numbers referenced are the individual pages of that transcript, which do not bear separate page numbers for purposes of the Administrative Record.

² As explained below, *see infra*, pp. 24, it is the declared public policy of the State of Utah to “authorize and 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. . . .” Utah Code Ann. § 40-6-1.

process. AR 206 at pp. 39-41, 42. But at this point, while it is building the recycling facility, Westwater Farms uses the injection well for produced water and may also use it later for brine. AR 206 at p. 31. Ultimately, once the treatment facility is up and running, Westwater Farms' intent is to use the injection well only as a "back-up" facility, in case Westwater Farms' regular treatment facility (for whatever reason) cannot be used to treat and recycle the produced water.³ AR 206 at pp. 31-32, 38, 42-43.

The injection well itself⁴ is located near the Harley Dome formation, northwest of I-70, not far from the Utah-Colorado border. AR 206 at pp. 22-23, 26, Hearing Exs. 1, 2 and 3.⁵ Westwater Farms owns the surface estate on the subject land. AR 206 at p. 24. The produced water will be injected into the Wingate sandstone formation at a depth range of approximately 1,342 to 1,631 feet below the surface. AR 206 at pp. 134-136, 139; Request for Agency Action, p. 3. The Wingate formation lies between the Kayenta (above) and Chinle (below) formations, which are both far less porous than the Wingate. AR 206 at pp. 133-34, 136-37; Hearing Ex. 8. These formations serve as "confining"

³ The Board considered the UIC permit on a stand alone basis; as if the rest of the treatment facility would not exist. AR 206 at pp. 38, 43.

⁴ The well was drilled in May, 2010. AR 206 at p. 118.

⁵ The exhibits admitted at the administrative hearing before the Board appear in the Administrative Record immediately after the transcript and do not bear separate page numbers for purposes of the Administrative Record. However, Exhibits 1-13 were submitted by Westwater Farms to the Board in advance of the hearing, and also appear in the Record at AR 18-65, where their pages are separately numbered.

layers, meaning that water in the Wingate formation will not flow to a different strata, unless the Wingate formation is fractured. AR 206 at pp. 114-15, 126.

Some water already exists in the Wingate formation. AR 206 at pp. 137-38. This “formation water” is very salty non-potable water. AR 206 at pp. 135, 137-38. The Wingate formation is not an underground source of drinking water (“USDW”). AR 206 at p. 151. Other than the Colorado River, discussed below, there are no sources of drinking water in the immediate area of the injection well. *Id.* The existing water pressure in the formation is very low and the Wingate formation water is draining, very slowly, downhill and northward towards the Uinta Basin. AR 206 at pp. 111, 124-25.

The Wingate formation, and the other strata in the area, are tilted downward to the north and northwest. AR 206 at p. 111; Hearing Ex. 7. The Colorado River lies southeast of the injection well, on the other side of I-70. AR 206 at Ex. 9. There is an outcrop of the Wingate formation at the Colorado River 5.8 miles from the head of the injection well. *Id.* The elevation of the Wingate formation at the outcrop on the river is about 800 feet higher than the elevation of the proposed injection itself. AR 206 at pp. 118-120; Rebuttal Ex. 2.⁶ Thus, the Colorado River lies approximately 6 miles away, and 800 feet uphill, from the proposed injection site. AR 206 at pp. 154-57, Rebuttal Ex. 3.

⁶ Despite the nomenclature, the “Rebuttal Exhibits” were submitted by Westwater Farms, not Living Rivers, at the hearing. These exhibits were intended to, and in fact do, help rebut some of the positions taken by Living Rivers in its paper filed the day before the hearing.

2. UIC Application Process

Westwater Farms originally filed its application for administrative approval of the UIC on May 26, 2009. AR 206 at Hearing Ex. 4, ¶ 3. The original application was amended and augmented with supplemental information filed with the Division of Oil, Gas and Mining (the “Division”) during the summer of 2010 (together with the original application, the “Application”). *Id.* Westwater Farms gave notice of the Application pursuant to the requirements of Utah Admin. Code R649-5-3. *See* AR 206 at Hearing Ex. 4, ¶ 4. It provided a copy of the Application to all operators, owners, and surface owners within a one-half mile radius of the injection well as required by Utah Admin. Code R649-5-2. *Id.* In August, 2010, the Division also published notice of the Application on the internet and in various periodicals. *Id.*

The Division received a number of responses to the application. The United States Department of the Interior, Bureau of Land Management (“BLM”) objected to the Application in a letter dated August 27, 2010. AR 206 at Hearing Ex. 5. The primary basis of the BLM’s objection was a concern that the injection well could adversely affect helium resources in the area. *Id.* Westwater Farms personnel met with BLM personnel and addressed their concerns. AR 206 at pp. 27-28. In a letter dated September 30, 2010, the BLM withdrew its objection and noted that:

[T]he Wingate Sandstone is sufficiently higher structurally, at the nearest Colorado River outcrop, relative to its position at the proposed injection well, to minimize the possibility of injection resulting in surface expression at the river.

AR 206 at p. 28; Hearing Ex. 5.⁷

The Division also received an advisory letter, dated September 15, 2010, from the United States Department of the Interior, Fish and Wildlife Service (“FWS”), which included a request for water analysis and a monitoring program with regard to the Colorado River. AR 206 at Hearing Ex. 6. Westwater Farms personnel met with FWS personnel and they agreed upon a baseline study and an ongoing monitoring program with regard to the Wingate formation outcrop at the river. AR 206 at pp. 29-30, Hearing Ex. 6. These efforts satisfied the concerns expressed by FWS. AR 206 at p. 29.

The Division received a response from Bill Love, an individual, who objected to the application through an undated letter. AR 206 at p. 26. Westwater Farms tried to contact Mr. Love, but was unable to do so. AR 206 at p. 33. Mr. Love did not respond to Westwater Farms’ formal Request for Agency Action, as discussed below, nor did he participate in any of the proceedings before the Board. AR 206 at p. 33.

The Division also received a response via an email dated September 3, 2010, from John Weisheit of Living Rivers. David Stewart, of Westwater Farms, met with Mr. Weisheit the Saturday after Thanksgiving, November 27, 2010, in Boulder, Colorado. AR

⁷ If sulfuric acid forms from bacteria in the produced water, there is a potential that the acid could render the nearby helium reservoir unusable, which is located in the Entrada formation. AR 206 at p. 27, Hearing Exs. 2, 5. However, the BLM’s concerns were resolved because 1) Westwater Farms will treat all the produced water, prior to injection, in order to remove all organics (the bacteria cannot survive without an organic food supply); and 2) the Kayenta formation serves as an appropriate “confining layer” such that the produced water injected into the Wingate formation cannot co-mingle with the helium reservoir in the Entrada formation. AR 206 at pp. 27-28, Hearing Ex. 5.

206 at p. 31. Mr. Stewart is the chief technical officer for an affiliate of Westwater Farms, and he has been very involved with the UIC permit, the injection well and the Westwater Farms recycling facility. AR 206 at pp. 18-19. Mr. Stewart met with Mr. Weisheit for about two hours that day; talked through the issue with him; and provided him with all the information he had on the UIC permit (and the associated conditional use permit from Grand County). AR 206 at p. 31.

3. Formal Adjudicative Proceedings before the Board

Based on the foregoing responses and objections, on October 18, 2010, Westwater Farms filed motions with the Board to convert its application for the UIC permit from an informal to a formal adjudicative proceeding, and to have the matter heard by the Board at its regularly scheduled hearing on December 8, 2010. AR 001-17. Westwater Farms sent notice of these requests to all concerned parties, including Living Rivers at the email address Mr. Weisheit had used to submit Living Rivers' objection. AR 014-16. The Board granted Westwater Farms' Motion to Convert Informal Adjudicative Proceeding on November 8, 2010 and sent notice to the affected parties, including Living Rivers at its post office box in Moab, Utah. AR 065-68. On November 8, 2010, the Division issued a Staff Memorandum summarizing the status of the Application and stating that it was ready to issue the permit, subject to consideration by the Board at the hearing. AR 069-71. The Staff Memorandum was sent to affected parties, including Living Rivers. AR 071. On November 9, 2010, the Board set the matter for hearing on December 8, 2010, and sent a notice to the affected parties, including Living Rivers. AR 072-75.

On November 24, 2010, counsel for Living Rivers appeared in the action before the Board and submitted a Motion to Continue, asking that the hearing be postponed to January 26, 2011. AR 077-81. According to the Motion to Continue, Living Rivers first contacted counsel to inquire about representing Living Rivers on November 22, 2010. AR 077. The stated reason for the continuance was to allow counsel more time to prepare and make arrangements to attend the hearing; no mention was made of the need for expert testimony. *Id.* Both the Division and Westwater Farms objected to the proposed continuance. AR 082-92. The Board denied Living Rivers' motion in an Order dated December 2, 2010, based on lack of good cause. AR 093-96

The evening before the hearing, Living Rivers submitted a written Request for Continuance or in the Alternative Request for Conditions to be Attached to the Issuance of the UIC Permit. AR 117-120, 206 at p. 9. In this request, Living Rivers raised a number of concerns, asked for conditions to be placed on the issuance of the UIC permit, and asked that the Board postpone the decision until "additional necessary data is generated sufficient to answer questions raised by this letter." AR 120. Other than a reference to a man named Jeffrey "Rock" Smith and his staff, however, Living Rivers did not specifically identify the data that was needed nor did it state that it was in the process of gathering data or other information. Living Rivers did not submit any documents or statements in conjunction with the request.

At the outset of the hearing on December 8, 2010, the Board addressed Living Rivers' request for continuance and denied it after hearing from the parties. AR 206 at p. 16. Thereafter, and as discussed in further detail below, Westwater Farms proceeded with its

case. *See generally* AR 206 at pp. 17-176. Westwater Farms was represented by counsel and called two witnesses. It also submitted a number of documents as evidence. AR 18-25, 206 at Hearing Exs. 1-13 and Rebuttal Exs. 1-3. Similarly, the Division was represented by counsel, submitted documents as evidence and called two witnesses. *See generally* AR 206 at pp. 176-193, Division Exs. 1-2. The Board admitted all of the documents submitted by Westwater Farms and the Division, and did not exclude any of the testimony of their witnesses. Living Rivers was represented by two attorneys, and Mr. Weisheit was also there. AR 206 at p. 6. Living Rivers did not offer any documents as evidence and it did not call any witnesses. AR 206 at p. 194.

During closing arguments, Living Rivers requested that the record be kept open for two weeks in case additional evidence was generated. AR 206 at pp. 195-96. When asked what that evidence might be, Living Rivers counsel indicated, for the first time, that he had been in contact with a geohydrologist over the lunch break and that he wanted to “explore with him” whether or not some of Westwater Farms’ evidence was “adequate.” AR 206 at p. 196:11-13. Living Rivers’ counsel stated that he also wanted to examine, with a geologist, issues related to fractures or fault lines in the area. AR 206 at p. 196. The Board denied Living Rivers’ request to keep the record open, and unanimously found that Westwater Farms met the requirements for approval of the UIC permit. The Board granted the Application with the condition that the injection pressure be set at 360 psi, subject to monitoring. AR 206 at pp. 198-200. The Board also noted the 20 day time period for requesting a reconsideration of its decision. AR 206 at p. 200.

4. Post-Hearing Proceedings before the Board

On December 21, 2010, in accordance with instructions from the Board, Westwater Farms submitted proposed Findings of Fact, Conclusions of Law and Order (the “proposed Findings and Order”). AR 139-140. Living Rivers objected to the proposed Findings and Order on January 3, 2011. AR 121-131. In this objection, Living Rivers did not mention any proposed expert testimony, nor did it submit any new evidence. Westwater Farms and the Division both responded to Living Rivers’ objection and argued that 1) the objection itself was untimely by five days, and 2) the distinct objections were unfounded. AR 132-145. The Board issued its Findings of Fact, Conclusions of Law and Order (the “Board’s Order”) on January 13, 2011 and adopted the proposed Findings and Order submitted by Westwater Farms. AR 146-159. (A copy of the Board’s Order is included in the Addendum to Living Rivers’ Brief.)

On February 1, 2011, Living Rivers submitted its Request for Rehearing and Modification of Existing Order, and in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (“Request for Rehearing”). AR 160-173. The basis of the Request for Rehearing was “additional information.” AR 161. However, the only additional information provided by Living Rivers was 1) a legal memorandum regarding the appellate process, 2) a legal memorandum submitted to the Grand County Council, and 3) a letter submitted to the County Council by Westwater Farms’ attorney. AR 169-173. In the Request for Rehearing, Living Rivers asserted that it had “sought and obtained” an expert witness, Professor Kip Solomon, who had purportedly indicated that additional questions needed to be examined and that it would be prudent to require underground monitoring of

the injection well. AR 161. Living Rivers did not submit any report or other documentation from Professor Solomon. Moreover, Living Rivers did not submit an affidavit, as required by Utah Admin. Code R641-110-200, setting forth the nature and extent of Professor Solomon's opinions or findings, their relevancy to the issues involved, and an explanation of why Living Rivers could not have discovered the evidence prior to the hearing.

Both Westwater Farms and the Division opposed the Request for Rehearing on various grounds—including that Living Rivers had failed to comply with Utah Admin. Code R641-110-200. AR 174-189. On February 22, 2011, the Board issued an Order Denying Motion for Rehearing (“Order Denying Rehearing”), in which it held that Living Rivers “has not complied with the Board’s rehearing rule or shown good cause.” AR 191. The Board also denied Living Rivers’ request for a thirty-day stay, and noted that Living Rivers had a new thirty-day period in which to file its appeal to the Supreme Court. AR 191-92. (A copy of the Order Denying Rehearing is included in the Addendum to Living Rivers’ Brief.)

On the same day, but after the Board issued its Order Denying Rehearing, Living Rivers submitted a Supplement to Request for Rehearing and Modification or Existing Order, and in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (“Living Rivers’ Supplement”). AR 195-205; *see also* Stipulation Concerning Briefing and Motion to Correct Record, dated July 15, 2011 (“Stipulation Concerning Briefing”) and filed with this Court. (A copy of the Stipulation Concerning Briefing is included in Westwater Farms’ Addendum.) The Living Rivers’ Supplement contains the “expert report” of Professor Solomon (the “Solomon Report”), which is labeled as “Confidential

Attorney Work Product Privilege.” AR 199-205. The Solomon Report does not contain a resume or other information regarding Professor Solomon’s qualifications, other than a seal indicating that he is a registered professional geologist in the state of Utah. AR 203.

B. ADDITIONAL ALLEGATIONS AND FACTS RELEVANT TO ISSUES PRESENTED ON APPEAL

In its Brief, Living Rivers identifies various issues and makes various allegations relating to the Board’s decision and the evidence presented to the Board. These issues and allegations are:

- The Board failed to evaluate public health and safety concerns. Appell. Br., pp. 1, 28.⁸
- The Board did not consider and should have required monitoring wells as a condition of the UIC permit. *Id.* at pp. 1, 26.
- The injection well “may initiate fractures through the overlying strata...” *Id.* at pp. 1, 26.
- Fluid from the injection well may migrate and enter the Colorado River. *Id.* at pp. 1, 26.
- Seepage from the injected fluid into the Colorado River may occur and may not be observed. *Id.* at pp. 26.
- The “modeling” conducted by Westwater Farms to confirm compatibility of the produced water with the formation water was inappropriate. *Id.* at p. 26.

⁸ In its Brief, Living Rivers does not directly identify what these “public health and safety concerns” are, although some of the issues and allegations it raises—as identified herein—could be characterized as such. The Court of Appeals should not consider any new or different alleged “public health and safety concerns” other than the issues and allegations specifically raised by Living Rivers in its opening Brief.

- Westwater Farm's witness David Allin lacked sufficient expertise on hydrology. *Id.* at p. 27.
- There is "contrary" evidence in the "whole record," that the Board improperly failed to consider. *Id.* at p. 28.

Contrary to Living Rivers' assertions, however, all of these issues and allegations were covered at the hearing before the Board, considered by the Board and addressed in the Board's Order.⁹ The only thing that was not considered by the Board was the Solomon Report, which Living Rivers submitted after the evidentiary record had been closed and after the Board had issued its Order Denying Rehearing. The following is a summary of the relevant evidence presented at the hearing, with reference to the Board's findings and conclusions as stated in the Board's Order.

In terms of public health and safety concerns,¹⁰ there are no USDW's at the site of the injection well, in the Wingate sandstone or in any of the other formations that were drilled in the well. AR 206 at pp. 132, 137, 151. There are no domestic water wells within the area of the well, and Westwater Farms' witness, David Allin, testified that there are no

⁹ Notably, Living Rivers has failed to specifically challenge any of the findings of fact or conclusions of law in the Board's Order. It has not identified any of the specific findings or conclusions anywhere in its Brief.

¹⁰ In its Statement of Facts, Living Rivers notes that it raised a concern that H₂S gas could result from the injection operations and possibly adversely affect the nearby helium deposit or migrate to the Colorado River. Appell. Br., p. 21. However, Living Rivers makes no mention of the H₂S gas or the helium deposit anywhere in its Argument or Statement of Issues. Nevertheless, Westwater Farms notes that the Board made specific findings of facts on these issues (AR 153) and there was substantial evidence presented at the hearing in support of those findings. AR 206 at pp. 27-28, 68-69, 167-68, Hearing Ex. 5.

geologic structures near the well that would allow the injected water to migrate to a USDW. AR 206 at pp. 142, 151. The Wingate sandstone, which is the only formation in which produced water will be injected, is “fabulous reservoir rock” according to Allin, and will make a good injection zone. AR 206 at pp. 136:8, 137-38. The formations above (Kayenta) and below (Chinle) the Wingate sandstone are sufficiently non-porous such that, if no fractures are induced, they will prevent any produced water that is injected into the well from migrating out of the Wingate. *Id.* at 126, 134, 136-38, 149. The Board made findings of fact on these issues in Paragraphs 12, 13, 14, 15, 17, 18 and 26 of the Board’s Order. AR 150-154.

With regard to fractures, the step-rate injection test performed by Westwater Farms demonstrated that an injection rate of approximately six barrels per minute, which translates into a surface pressure rate of 400 psi, could induce a fracture in the Wingate formation. AR 206 at pp. 146-47. Allin stated that the average operational rate of injection is estimated to be about 3.5 barrels per minute with a surface pressure limited to 360 psi, which is well below the fracture rate. AR 206 at pp. 125-26, 144-45, 183-84. Allin stated that the Wingate formation will remain competent under the stated injection pressures and rates, and that it would be “impossible” for fractures to develop such that the injected water could enter a fresh water aquifer or USDW. AR 206 at pp. 149-150, 150:2. Thus, Living River’s assertion that the only evidence presented in contravention

to the possibility of fractures was the lack “frac flow back water” is plainly incorrect.¹¹ Appell. Br., p. 26. The Board made findings of fact on these issues in Paragraphs 17, 21 and 26 of its Order. AR 152-154. The Board also imposed a maximum injection pressure of 360 psi as a condition to the UIC permit. AR 155, 206 at p. 198.

Westwater Farms presented extensive evidence demonstrating that the produced water injected into the well will not migrate through the Wingate formation to the Colorado River. First, the “physical tilt” of the formations dips northward, meaning that the injected water would flow “downhill” away from the Colorado River. AR 206 at pp. 110-11, 140, 140:8. The outcrops of the Wingate formation at the Colorado River are 800 feet higher than the injection level in the well. AR 206 at p. 153. Second, the existing “pressure gradient” in the Wingate formation decreases northward, away from the Colorado River, and the water will flow towards the lower pressure areas in the Uinta Basin. AR 206 at pp. 111, 140, 140:6-7. Third, the pressure of the existing formation water is so low that it would be “physically impossible” to build up enough pressure to push the water uphill to the Colorado River. AR 206 at pp. 153-54, 175, 175:18. Fourth, the distance from the injection well is so great, 5.8 miles, that even if the injected water did migrate towards the Colorado River, which it cannot do,¹² it could take “centuries”

¹¹ The issue of “frac flow back water” is not germane to the possibility that injection pressures might induce fractures in the Wingate sandstone. Moreover the testimony was conclusive that Westwater Farms does not intend to inject (untreated) frac water into the well. AR 206 at pp. 35-36, 59, 90-91.

¹² At the hearing, even counsel for Living Rivers admitted that “moving water uphill” is “impossible if not difficult.” AR 206 at p. 197:2-3.

for it to get there. AR 206 at p. 157, 157:7. The injected fluid is expected to move outward from the injection site through the Wingate formation, which is 337 vertical feet thick, at a “glacially slow rate.” AR 206 at pp. 164-65, 174, 174:10. The Board made findings of fact related to these issues in Paragraphs 17, 21 and 26 of its Order. AR 152-154.

As to monitoring wells, Allin testified that they would be “redundant” and would serve no “useful purpose.” AR 206 at pp. 158, 158:14,20.¹³ Allin stated that monitoring the seeps on the Wingate formation outcrops at the Colorado River, which is part of the program that Westwater Farms committed to with the FWS, would be sufficient. AR 206 at pp. 156-58. Even if the injected water migrated towards the Colorado River, which Allin said it would not and could not do, the water would first push air out of the seeps followed by unconfined fresh water from the existing pore space in the Wingate sandstone, which would be visible from monitoring the seeps. AR 206 at pp. 156-57.¹⁴

¹³ Living Rivers neglects to cite the testimony of Mr. Allin, who is Westwater Farm’s expert on this topic. Instead, Living Rivers refers to the testimony of Mr. Stewart and mischaracterizes it. Appell. Br., p. 26. Stewart testified that a well a quarter mile back from the outcrop and 100 feet down would not be a problem. AR 206 at p. 88. But the monitoring wells proposed by Living Rivers, both at the hearing and in the Solomon Report, are materially different from the well referenced by Mr. Stewart. AR 202, 206 at p. 88.

¹⁴ Living Rivers mischaracterized the testimony regarding inspection of the seeps. Appell. Br., at 26. In addition to inspection by Paul Stone and two BLM rangers, Allin stated that he had personally looked for seeps on the outcrops of Wingate sandstone and had seen none. AR 206 at p. 158. Living Rivers also failed to mention that, pursuant to Westwater Farms’ arrangement with FWS, it is going to conduct seep monitoring every six months for the next three years and annually after that. AR 206 at p. 29.

Although the Board did not make specific findings as to monitoring wells or seep monitoring, it made a finding of fact that the well and “proposed operations will confine the injection fluids to the injection intervals and will prevent pollution and damage to any USDW or other resources.” AR 154. It also found that approving the injection well and “the proposed injection operations, as introduced and adduced at the December 8, 2010 hearing in this Cause, is reasonable and in the public interest, and will prevent waste and will protect the correlative rights of all owners.” AR 155.

As to compatibility modeling, Westwater Farms provided its modeling analysis, and its expert witness, Mr. Stewart, explained the modeling and testing in detail. AR 206 at pp. 45-48, Rebuttal Ex. 1. He confirmed that the water samples used in the modeling were taken from a Westwater Farms pilot plant that treated produced water from the same fields as the produced water that is going to be injected into the injection well. AR 206 at pp. 46, 52-53, Rebuttal Ex. 1. The produced water will be tested, analyzed and treated before being injected. AR 206 at p. 47. With treatment, the produced water will be compatible with the formation water in the Wingate sandstone. AR 206 at pp. 47-48. The Board made findings of fact on these issues in Paragraph 20 of its Order. AR 152.

As to the expertise of Mr. Allin, a certified petroleum geologist, the Board heard testimony regarding his qualifications and experience, and heard Living Rivers’ counsel’s arguments regarding his alleged lack of expertise as a hydrologist. AR 206 at pp. 94-106. After recognizing Mr. Allin as an expert in geology and hydrology, the Board advised counsel for Living Rivers that he could still object to questions relating to specific areas of hydrology in which he felt Mr. Allin was not qualified. AR 206 at p. 106. But counsel

for Living Rivers did not raise objections to any of Mr. Allin's testimony or move to have any of it excluded. AR 206 at pp. 107-160.¹⁵ Moreover, Living Rivers has not raised Mr. Allin's expertise as a specific issue on this appeal.

The analysis and conclusions of Westwater Farms' witnesses were supported by the report of David Dillon, a petroleum engineer from Colorado, who evaluated the proposed injection well on behalf of a potential investor in the project. AR 206 at p. 148, Hearing Ex. 13. The Division supported the approval of the UIC permit and one of its witnesses, Christopher Kierst, Environmental Scientist, stated that he was not aware of any reason why Westwater Farms should be denied the UIC permit. AR 206 at pp. 178-181, Division Ex. 1. Mr. Kierst also confirmed that the Application submitted by Westwater Farms satisfied all the requirements of Utah Admin. Code R649-5-2. AR 206 at pp. 179-180, Division Ex. 2.

Finally, as to the alleged "evidence ... presented to the contrary," Appell. Br., p. 28, there was none. At the hearing, Living Rivers did not call any witnesses or submit any documents. The Board closed the record at the conclusion of the hearing. AR 206 at pp. 199-200. After the hearing Living Rivers did not submit any evidence either. In conjunction with its Request for Rehearing, Living Rivers submitted legal memoranda as

¹⁵ Living Rivers' claim that Mr. Allin did not provide any analysis to "formation water migration" is incorrect. Appell. Br., at p. 27. Mr. Allin testified about the existing "subnormal" pressure in the Wingate formation water; how that formation water is moving and will move; and how it would move if the injection well were operated. AR 206 at pp. 111, 123-25, 139, 149, 156-57. Mr. Allin also referenced a study he had done on an analogous aquifer in the Entrada sandstone formation. AR 206 at pp. 139-140, 166.

exhibits, which do not constitute evidence and which were not admitted as evidence by the Board anyway. As noted above, the Solomon Report was submitted after the record had been closed, and after the Board had issued its Order Denying Rehearing. As explained below, the Solomon Report does not constitute “evidence” or “contrary evidence,” that should be considered by this Court.

SUMMARY OF ARGUMENTS

The Division of Oil Gas and Mining (“DOGM”) regulates Class II injection wells, such as the injection well in question, in accordance with the federal Safe Drinking Water Act (“SDWA”) and state laws and regulations. With regard to the SDWA, a primary requirement is that the proposed injection well will not endanger drinking water resources. Living Rivers’ overarching contention is that Westwater Farms’ proposed injection well will endanger the Colorado River, and that therefore the Board should have required Westwater Farms to construct and implement monitoring wells as a condition to the approval of the injection well. In support of its position, Living Rivers offers no evidence. At the hearing, Living Rivers did not call any witnesses or present any documents. After the hearing, and after the Board had denied its Request for Rehearing, Living Rivers belatedly submitted the Solomon Report, which purports to counter some of the voluminous evidence presented by Westwater Farms and the Division. Westwater Farms’ evidence demonstrates that the operation of the injection well will not endanger the Colorado River or any other sources of drinking water. Living Rivers’ contentions lack merit in all regards.

First, Living Rivers incorrectly contends that the Board failed to consider certain issues that required resolution when it approved the UIC permit without requiring monitoring wells. However, nothing in any of the federal or state laws or regulations—including the SDWA and Utah Admin. Code R649-5-1 *et seq.*—requires the Board to consider monitoring wells. Nevertheless, the Board did consider this issue (and all the issues related to it) and properly concluded that the UIC permit should be issued without monitoring wells as a condition.

Second, Living Rivers incorrectly contends that the Board's various factual findings—regarding the lack of a risk to the Colorado River or any other source of drinking water—are not supported by substantial evidence. But Living Rivers has failed to marshal the evidence in support of the Board's findings, and therefore this Court should presume that the findings are supported by substantial evidence. Even if the Court undertakes its own review of the record, however, it should conclude that the Board's findings were supported by substantial evidence. The evidence submitted by Westwater Farms and the Division is competent and overwhelming. Living Rivers submitted no contradictory evidence—including the Solomon Report, which is not “evidence” and should not be considered by this Court.

Third, Living Rivers incorrectly contends that the Board erred in denying its Request for Rehearing. However, the Board did not abuse its discretion in this regard. Living Rivers' Request for Rehearing plainly did not comply with the Board's administrative rules, and Living Rivers failed to show good cause for a rehearing, stay or any other relief. Indeed, the record demonstrates that Living Rivers had plenty of notice

and ample opportunity to present evidence in support of its position, but it failed to do so. Living Rivers has failed to provide any explanation for its untimely submission of the Solomon Report, and its request for a remand to the Board is improper.

The Court should find that Living Rivers has failed to meet carry its burden with regard to each issue it has identified. The Court should affirm the Board's Order and the Order Denying Rehearing.

ARGUMENT

I. LIVING RIVERS HAS NOT MET ITS BURDEN OF SHOWING THAT THE BOARD FAILED TO CONSIDER ALL ISSUES REQUIRING RESOLUTION

A. Regulatory Background

The underground injection of produced water is governed by the SDWA. *See generally* 42 U.S.C. § 300f-300h. The SDWA is administered by the United States Environmental Protection Agency, ("EPA"), unless the EPA has delegated its authority to regulate UIC Class II injection wells to a state, which it has with regard to Utah. *See* 40 C.F.R. § 147.2251. The SDWA requires, among other things, that state regulatory programs require the applicant to show that "the underground injection will not endanger drinking water sources." 42 U.S.C. § 300h(b)(1)(B)(i). Such injection "endangers drinking water sources if [it] may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant . . . or may otherwise adversely affect the health of persons." 42 U.S.C. § 300h(d)(2).

Pursuant to Utah Code Ann. § 40-6-5(5), the Board has exclusive jurisdiction over Class II injection wells as defined by the EPA. DOGM has adopted regulations governing Class II injection wells at Utah Admin. Code R649-5-1 through R649-5-7. An applicant must meet a number of requirements in order to get approval for a UIC under Utah's regulatory scheme. *See* Utah Admin. Code R649-5-2. In accordance with the SDWA, DOGM's regulations provide that:

1. Injection wells shall be completed, equipped, operated, and maintained in a manner that *will prevent pollution and damage to any USDW, or other resources and will confine injected fluids to the interval approved.*

Utah Admin. Code R649-5-2 (emphasis added). Furthermore, the application for a UIC shall include:

2.9. Evidence and data to support a finding that the proposed injection well *will not initiate fractures through the overlying strata or a confining interval that could enable the injected fluid or formation fluid to enter any fresh water strata.*

Id. (emphasis added.)

A Class II injection well includes a well which injects fluids “which are brought to the surface in connection with conventional oil or natural gas production ...” 40 C.F.R. § 146.5(b)(1). In this case, there is no dispute that the injection well is a Class II injection well, and is subject to the regulatory requirements described above.

Balancing the concern for the preservation of freshwater resources is Utah's declared public policy in favor of developing and operating oil and gas properties so as to maximize the ultimate recovery of these resources. Utah Code Ann. § 40-6-1.

Specifically, the legislature has declared that it is in the public interest to

... to authorize and to provide for the operation 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.

Id. (emphasis added). By enabling oil and gas producers in Utah to legally dispose of their produced water, Westwater Farms' proposed injection well will help increase the greater ultimate recovery of oil and gas in Utah.

B. Living Rivers Has Not Shown that the Board Failed to Consider an Issue that Required Resolution

As stated above, Utah Admin. Code R649-5-2 includes a number of requirements that an applicant must meet—and therefore that the Board must consider—in order to have a UIC application approved. Living Rivers claims that the Board “failed to evaluate public health and safety concerns in determining whether certain conditions be attached [to the issuance of the UIC permit], including the installation of monitoring wells...” Appell. Br., at p. 1. Living Rivers does not specifically identify these health and safety concerns. Nevertheless, all of the issues identified and argued by Living Rivers in its Brief, pp. 24-29, relate to the possibility that the operations of the injection well could contaminate the Colorado River. *See supra*, pp. 14-15. Indeed, of all the requirements in Utah Admin. Code R649-5-2, the only one referenced by Living Rivers is subsection 1, cited above, which relates to this same issue.¹⁶ Living Rivers has not identified any other

¹⁶ The Colorado River is not a USDW because it is not “underground.” However, Westwater Farms does not dispute that the Colorado River is a drinking water source; that it is a valuable resource that must be protected; and that its contamination would adversely affect public health.

health and safety concerns or any other requirements of R649-5-2 that allegedly were not considered.

Living Rivers' contention that the Board failed to resolve "health and safety" concerns related to the potential contamination of the Colorado River is incorrect. In the Board's Order, ¶ 22 (AR 153), it made the following finding directly on point:

... it is unlikely that either the injected fluids or formation fluids will reach the exposures of the Wingate in the Westwater Canyon area because of the lateral and vertical separation between the Subject Well and the outcrops, as well as the details of the local and regional geologic setting and the nature of the injection operations.

With regard to the potential contamination of drinking water sources in general, the Board also found that:

- The Kayenta Formation ("Kayenta"), which directly overlies the Wingate, will act as the hydrologic boundary (confining layer) above the injection intervals, and the Chinle Formation ("Chinle"), which underlies the Wingate, will act as the hydrologic boundary below the injection intervals.
- Both the Kayenta and Chinle are competent hydrologic barriers, and therefore, comprise upper and lower hydrologic seals to the aquifer in the Wingate.
- The Wingate is not currently, nor is it ever expected to be, an underground source of drinking water ("USDW"). The Cedar Mountain, Morrison, Summerville, Entrada, Kayenta, and Chinle Formations in the vicinity of the Subject Well also are not USDW.
- There are no geologic structures near the Subject Well that will allow the injected fluids to migrate to an USDW.
- The Wingate is competent to contain the injected fluids and prevent migration to any USDW, and [] it will remain competent under the injection pressures and operations.

- The proposed injection well and pressures will not initiate or cause fractures in the Wingate or the confining intervals that would allow the injected fluids or formation fluids to enter a fresh water aquifer or USDW.
- There are no wells within a half-mile radius of the Subject Well that would provide a conduit that would allow the injected or formation fluids to migrate up or down a wellbore and enter improper intervals, such as a fresh water aquifer.
- There are no fresh water aquifers within a half-mile radius of the Subject Well.
- The Subject Well and proposed operations will confine the injection fluids to the injection intervals and will prevent pollution and damage to any USDW or other resources.

AR 150-52 (Board's Order, ¶¶ 14, 15, 17 and 18).

Clearly the Board considered the health and safety issues associated with the possibility that the injection well could contaminate the Colorado River and found that it will not. The Board properly considered and resolved the issues with regard to Utah Admin. Code R649-5-2(1) and the SDWA. Living Rivers' contention to the contrary should be rejected by the Court.

Living Rivers also incorrectly contends that the Board failed consider and resolve the issue of whether monitoring wells should have been required as part of the approval of the UIC permit. But this issue was not required to be resolved by the Board. Living Rivers incorrectly relies on Utah Admin. Code R649-5-5(3.3), (Appell. Br., pp. 24-25), which provides, with regard to the testing and monitoring of injection wells, that "other test procedures or devices such as tracer surveys, temperature logs or noise logs may be required by the division on a case-by-case basis." (emphasis added). This regulation does not mandate that the Board to consider and resolve whether devices such as monitoring

wells should be required. Instead, the requirement of such devices is discretionary. Nothing in Utah's statutes or regulations or the SDWA itself requires the Board to consider and resolve the potential requirement of monitoring wells. Living Rivers' argument in this regard fails for this reason alone.

Nevertheless, the Board considered and resolved the issue of monitoring wells. Living Rivers argued repeatedly that monitoring wells should be required as a condition to the approval of the UIC permit prior to, during and after the hearing. *See e.g.* AR 206 at pp. 7, 196-97. Both of Westwater Farms' witnesses testified regarding monitoring wells, with Mr. Stewart being cross-examined by Living Rivers' counsel on this issue. AR 206 at p. 88. Division witnesses Christopher Kierst testified that he did not feel that any conditions (other than the maximum injection pressure being 360 psi) were necessary. AR 206 at pp. 180, 183, 190. The Board heard all of this testimony and argument, and did not exclude any of it. By not requiring monitoring wells, the Board made an implicit finding that they were not necessary. Indeed, in its findings of fact, the Board referenced the proposed operations of the injection well, including Westwater Farm's testing (AR 152-55, Board's Order, ¶¶ 17, 20, 23, 26, Conclusions of Law, ¶ 6), and the only condition it imposed was the maximum injection pressure of 360 psi. Thus, even though the Board was not required to consider the propriety of monitoring wells, it did consider this issue and implicitly found that they were not necessary.¹⁷

¹⁷ Living Rivers' incorrect claim that monitoring wells were not considered by the Board is really just a masked challenge to the Board's implied finding of fact that monitoring

C. Living Rivers Has Failed to Show Substantial Prejudice

In cases where a party alleges that the state agency did not decide all issues requiring resolution, Utah Code Ann. § 63G-4-403(4)(c), provides that party must show that it was “substantially prejudiced” by the failure. This Court has upheld agency decisions that did not resolve mandatory issues because the appellant did not show that, even if the issue had been considered, it would have been resolved in its favor. *Benson*, 2011 UT App 220, ¶ 22-23 (where the petitioner failed to show that he would have prevailed on his “disparate impact” theory, even if the Peace Officer Standards and Training Council had considered it); *EAGALA*, 2007 UT App 43, ¶7 (where the petitioner failed to show that an administrative law judge’s improper failure to admit certain documents as evidence, even if this issue had been considered by the Workforce Appeals Board, would have resulted in a different outcome).

In this case, as explained above, the Board resolved all of the issues that required resolution. However, even if this Court concludes that the Board should have made an express finding on the issue of monitoring wells, which it should not do, Living Rivers has failed to show that the Board would or should have imposed monitoring wells as a condition. The evidence before the Board, with regard to monitoring wells, was that they would be “redundant” and a “waste of resources.” The evidence showed that it is physically impossible for the injected water to migrate six miles uphill so as to seep into

wells were not necessary. As explained herein, Living Rivers has failed to show that this finding was not supported by substantial evidence.

the Colorado River. But even if this impossibility were to occur, monitoring of the seeps along the Colorado River would provide evidence of formation water migration before the produced water would reach the river. Thus, the evidence showed that there is no need for monitoring wells. *See supra*, pp. 14-21. Living Rivers offered no contrary evidence. The document filed by Living Rivers the day before the hearing does not constitute evidence, and neither do Living Rivers' counsels' arguments. As explained herein, the Solomon Report was not considered by the Board and should not be considered by this Court. Since Living Rivers did not provide the Board with any evidence that monitoring wells were necessary, it has not met its burden under Utah Code Ann. § 63G-4-403(4)(c) of showing "substantial prejudice."

II. LIVING RIVERS HAS FAILED TO MEET ITS BURDEN OF SHOWING THAT THE BOARD'S DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Living Rivers has Failed to Marshal the Evidence and Therefore the Court Should Presume that Board's Findings Are Supported by Substantial Evidence

Living Rivers incorrectly contends that there was substantial evidence in the record showing that the injection well would initiate fractures in the overlying strata or enable injected or formation fluid to enter the Colorado River. Appell. Br., pp. 2-3. These are factual issues, and Living Rivers concedes that the standard of review is one of "substantial evidence." *Id.* at p. 3. In order to properly challenge such factual findings, Living Rivers was required to "marshal all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence." *Martinez*, 2007 UT 42,

¶ 17, citing *Grace Drilling*, 776 P.2d at 68; accord Utah R. App. P. 24(a)(9) (“A party challenging a fact finding must first marshal all record evidence that supports the challenged finding.”).

Marshaling requires appellant’s counsel to “construct the evidence supporting the adversary’s position, and then ‘ferret out a fatal flaw in the evidence.’” *Martinez*, 2007 UT 42, ¶ 17 (citations omitted). Marshaling the evidence is a heavy burden. *Blocker v. Morkel*, 2008 UT App 452, * 3. A party “may not simply cite to the evidence which supports his or her position and hope to prevail.” *Utah County and State of Utah v. Butler*, 2008 UT 12, ¶ 11, 179 P.3d 775. Instead, a party should present “in comprehensive and fastidious order, every scrap of competent evidence introduced [below] which supports the very findings [it] resists.” *Blocker*, 2008 UT App 452, citing *West Valley City v. Majestic Investment Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). The marshaling requirement helps ensure that the factual findings of an agency are overturned only when lacking in substantial evidence. *Martinez*, 2007 UT 42, ¶ 17.

If a party challenging factual findings fails to marshal the evidence, the reviewing court may, in its discretion, presume that the findings in question are supported by substantial evidence and decline to review them further. *Blocker*, 2008 UT App 452, citing *Martinez*, 2007 UT 42, ¶ 19. On the other hand, even if a party fails to marshal the evidence, the reviewing court “retains the discretion to consider independently the whole record and determine if the decision below has adequate factual support.” *Martinez*, 2007 UT 42, ¶ 20.

In this case, Living Rivers has failed to marshal the evidence that supports the factual findings it challenges. Instead, Living Rivers simply cites to the “concerns” it raised and its criticisms of the evidence submitted by Westwater Farms and the Division. Appell. Br., pp. 21, 25-26. Living Rivers also cites extensively to the Solomon Report (Appell. Br., pp., 22, 27-28) which, as explained below does not constitute evidence, much less substantial evidence. Living Rivers makes no attempt to present or summarize the extensive testimony from Westwater Farms’ witnesses, David Stewart and David Allin; it does not even refer to the testimony of Division Witnesses Christopher Kierst and Brad Hill; and it does not cite to any of the various exhibits offered as evidence by Westwater Farms and the Division, and admitted by the Board. Significantly, Living Rivers has not attempted to explain why the evidence submitted by Westwater Farms and the Division is insufficient, nor has it identified any “fatal flaws” in that evidence. The evidence presented by Westwater Farms and the Division was extensive, competent technical, substantial, and persuasive. Under these circumstances, Living Rivers’ failure to marshal the evidence is egregious. This Court should therefore presume that the Board’s factual findings were supported by substantial evidence, which they were, and decline to review these factual findings further.

B. The Board’s Findings Are Supported by Substantial Evidence

If this Court undertakes an analysis of the evidenced supporting the Board’s findings—despite the fact that Living Rivers has failed to marshal that evidence—it should find that the findings are supported by substantial evidence. Under UAPA, “substantial evidence is more than a mere scintilla of evidence ... though ‘something less

than the weight of the evidence.” *Grace Drilling*, 776 P.2d at 68 (citations omitted); *see also Martinez*, 2007 UT 42, ¶ 35. “Substantial evidence is ‘such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.’” *Id.* (citations omitted). The reviewing court must review the “whole record” and consider “evidence in support of the administrative finding, as well as evidence that detracts from the finding.” *Id.* at ¶ 36; *see also Grace Drilling*, 776 P.2d at 68. In undertaking such a review, the court “will not substitute its judgment as between two reasonably conflicting views, even though [it] may have come to a different conclusion had the case come before [it] for de novo review.” *Grace Drilling*, 776 P.2d at 68. “It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inference.” *Id.* (citations omitted). If “more than a scintilla of the evidence supports the conclusion, then the [] ruling should remain intact.” *Martinez*, 2007 UT 42, ¶ 37.

1. The Solomon Report Should Not Be Considered by this Court

In arguing that the Board’s findings are not supported by substantial evidence in the “whole record,” Living Rivers relies heavily on the Solomon Report. Appell. Br., pp. 22, 23, 27-28. Although this document is contained in the administrative record, it is not

“evidence” that this Court should review in determining whether Living Rivers has shown that the Board’s findings lacked substantial evidence.¹⁸

This case is similar to *SLDDS*, 2011 UT App 7, ¶ 12, where this Court stated, “we do not consider [] untimely affidavits in determining whether the Board’s decision was supported by substantial evidence.” In *SLDDS*, the employer lost an unemployment hearing before an ALJ. It appealed that ruling and alleged a new ground for termination: the employee lied on his resume. In that appeal, the Board of Workforce Services (the “WS Board”) also ruled in favor of the employee. Then, in conjunction with a request for reconsideration, the employer filed three affidavits supporting its contention that the employee had lied on his resume. The WS Board denied the request for reconsideration without comment. *SLDDS*, 2011 UT App 7, ¶¶ 9-11.¹⁹

In *SLDDS*, this Court noted that the untimely affidavits were before the Board on the request for reconsideration and were part of the administrative record. *Id.* at ¶ 12, note 3. This Court held, however, that “the mere fact that affidavits were attached to a

¹⁸ Westwater Farms disagrees strongly with both the analyses and conclusions contained in the Solomon Report, which it regards as unfounded and fatally flawed. However, because the Solomon Report was not considered by the Board and should not be considered by this Court, Westwater Farms does not believe it is necessary or proper for it to present a response to this report at this time.

¹⁹ The WS Board has a rule that new evidence will not be considered, absent unusual or extraordinary circumstances, if it was reasonably available and accessible at the time of the hearing before the ALJ. In *SLDDS*, the evidence was clearly available to the employee at the time it filed its appeal to the WS Board, yet was submitted in conjunction with its request for reconsideration, three weeks after the WS Board ruled. *SLDDS*, 2011 UT App 7, ¶¶ 10-11. The Court of Appeals held that the Board did not abuse its discretion in denying the request for reconsideration. *Id.* at ¶ 12.

denied request for reconsideration and thus found their way into the Board's file and in turn into the record on appeal does not establish that the Board did, or was required to, consider them in its just cause calculus." *Id.* Otherwise, this Court observed, "the question of admissibility [would be placed] in the hands of the individual parties. *Id.*, referring to *State v. Bredehoft*, 966 P.2d 285, 290 (Utah Ct. App. 1989). Thus, the Court did not consider the untimely affidavits in its substantial evidence analysis. *Id.* at ¶¶ 13-17.

This case presents an even stronger argument in favor of the non-consideration of untimely information submitted to a state agency. Unlike the WS Board in SLDDS, the Board in this case did not even have the information in question before it when it issued its Order Denying Rehearing. Living Rivers filed the Solomon Report on the same day, but after, the Board issued its Order Denying Rehearing. *See* Stipulation Concerning Briefing, p. 3. Thus, the Solomon Report was not, and could not have been, considered by the Board in rendering its decision to approve the Application for the UIC. Moreover, the Solomon report was never admitted as "evidence" by the Board—unlike all of the information submitted by Westwater Farms and the Division, which the Board properly admitted as evidence. The fact that the Solomon Report is in the administrative record is of no moment. Under these circumstances, this Court should not consider the Solomon Report as part of its substantial evidence analysis.

2. The Board's Findings Are Supported by Substantial Evidence

The Board's findings with regard to the injection wells' potential impact on the Colorado River and other sources of drinking water are supported by substantial evidence. As demonstrated by Westwater Farms in its Statement of the Case, *supra*, pp. 3-21, both Westwater Farms and the Division provided hours of oral testimony and over a dozen exhibits to show that the Application for the UIC should be approved. All of this information was admitted as evidence by the Board. Contrary to Living Rivers' contentions, this evidence clearly demonstrated that (1) the produced water to be injected into the injection well will be treated so that it is compatible with the formation water; (2) the proposed operation of the injection well will not create fractures in the Wingate formation or the other overlying formations; (3) the Kayenta and Chinle formations create confining barriers that will prevent the migration of the injected (or formation) water to other strata; (4) there are no geologic features in the area that will allow for such migration; (5) due to differing elevations, the distance and the low subsurface pressure, it is physically impossible for the produced water injected into the well to flow 5.8 miles uphill through the Wingate formation and thereby contaminate the Colorado River; and (6) there are no other sources of drinking water or USDW's in the area. *See* Statement of the Case, *supra*, pp. 3-6, 14-21. This evidence further supported the Board's decision that no monitoring wells were needed, which was the uncontroverted testimony of Westwater Farms' expert, David Allin.²⁰

²⁰ As explained above, *see supra*, note 13, David Stewart's testimony about a shallow monitoring well near the Colorado River should not be construed by the Court as supporting Living Rivers' position regarding monitoring wells. Even if it were so

Clearly, the evidence presented by Westwater Farms and the Division constitutes far more than a scintilla. On the other hand, Living Rivers submitted no evidence at all. Living Rivers' counsels' arguments and concerns do not constitute evidence and neither does the Solomon Report. Under the circumstances, it was certainly reasonable for the Board to approve the UIC permit without requiring monitoring wells as a condition. The Court should hold that the Board's findings were supported by substantial evidence.

III. THE BOARD'S DENIAL OF LIVING RIVERS' REQUEST FOR REHEARING WAS NOT AN ABUSE OF DISCRETION

Utah Code Ann. § 63G-4-302(1)(a), allows an agency to reconsider final orders, if a petition is filed within twenty days of the date of the order specifying the ground(s) for relief. The Board's regulations further specify what such a petition must contain:

A petition for rehearing will set forth specifically the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. *If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.*

construed, however, that testimony was flatly contradicted by Mr. Allin, who said that monitoring wells were unnecessary. The Board heard the testimony of both witnesses, and it clearly relied on the unequivocal testimony of Mr. Allin. In so doing the Board properly weighed the testimony and reached a conclusion based on substantial evidence. Even if this Court believes it might have reached a different conclusion, it is precluded from substituting its judgment for that of the Board or "reweighing" the evidence presented to the Board. *See Martinez*, 2007 UT 42, ¶¶ 38-39; *Grace Drilling*, 776 P.2d at 68.

Utah Admin Code R641-110-200 (emphasis added). In this case, the Board denied Living Rivers' Request for Rehearing because it failed to comply with R641-110-200 and it failed to show good cause. AR 190-92.

Under UAPA, appellate courts review an agency's denial of a motion to reconsider under an abuse of discretion standard. *See SLDDS*, 2011 UT App 7, ¶ 12; *Grace Drilling*, 776 P.2d at 70. In *SLDDS*, this Court cited case law which observes that if a party were free to "reshape its case" by filing new material within twenty days after a final decision, "the administrative process might never end." *SLDDS*, 2011 UT App 7, ¶ 12, citing *Western Water, LLC v. Olds*, 2008 UT 18, ¶ 31, 184 P.3d 578. In *SLDDS*, 2011 UT App at ¶¶ 9-12, this Court held that the WS Board did not abuse its discretion when it denied a motion to reconsider that included three new affidavits. A finding that the Board abused its discretion in this case would clearly contradict the holding and result in *SLDDS*. Similarly, in *Grace Drilling*, 776 P.2d at 70, this Court stated "we do not believe that granting parties *three* bites at the apple is consonant with efficient administrative procedure." (Emphasis in original). This Court noted that subsequent consideration of drug tests that should have been submitted by the employer at the unemployment hearing would have deprived the employee of "the opportunity to rebut or cross-examine." *Id.*

Appellate courts also review trial courts' denials of motions to reconsider under an abuse of discretion standard. *Tschaggeny*, 2007 UT 37, ¶ 16; *see also Murdock*, 1999 UT 39, ¶ 21 (applying abuse of discretion standard of review to trial court's denial of a motion to reconsider summary judgment based on alleged newly discovered evidence).

“Under this standard, the trial court's ruling may be overturned only ‘if there is no reasonable basis for the decision.’” *Id.*, citing *Langeland v. Monarch Motors*, 952 P.2d 1058, 1061 (Utah 1998).

In this case, the Board did not abuse its discretion in denying Living Rivers’ Request for Rehearing. As observed by the Board in the Order Denying Rehearing, Living Rivers failed to comply with Utah Admin. Code R641-110-200 in a number of respects. AR 190-192. The Board was correct in this regard. First, Living Rivers’ Request for Rehearing was not accompanied by an affidavit. Second, although Living Rivers made reference to a report from Professor Solomon in its request, it did not set forth the nature and extent of Professor Solomon’s analyses and conclusions; and their relevancy to the issues before the Board. Third, Living Rivers provided no explanation for why it could not have discovered and provided Professor’s Solomon’s testimony prior to the hearing. AR 160-62. Because Living Rivers’ Request for Rehearing plainly did not comply with R641-110-200, it was not an abuse of discretion for the Board to deny the request.

Furthermore, Living River’s Request for Rehearing was not supported by good cause. As Westwater Farms’ Statement of the Case, *supra*, pp. 7-14, makes clear, Living Rivers had ample opportunity to obtain the Solomon Report (or similar evidence) in a timely fashion, but failed to do so. Living Rivers was aware of Westwater Farms’ proposed injection well no later than September 3, 2010, which is the date it objected to the Application for UIC. In mid October, 2010, Living Rivers received Westwater Farms’ papers proposing a formal adjudication by the Board and requesting a hearing on

December 8, 2010. Then, in early November, 2010, Living Rivers received numerous documents from the Division and the Board providing it with further information about the Application and setting the December 8, 2010 hearing. David Stewart, of Westwater Farms personally met with Mr. Weisheit over the Thanksgiving holiday to discuss the proposed injection well. Nevertheless, at the hearing on December 8, 2011, Living Rivers presented no evidence—in the form of expert testimony or otherwise—regarding its concern that the operation of the proposed injection well might endanger the Colorado River. Indeed, counsel for Living Rivers admitted that his first contact with Professor Solomon was during the lunch break of the hearing—over three months after Living Rivers filed its objection to the injection well.

Moreover, although Living Rivers repeatedly asked for continuances and/or to keep the record open, these requests were unfounded. For example, in its first request, Living Rivers asked for more time so its counsel could prepare for the hearing. But it provided no specifics as to why counsel needed more time to prepare, nor did it mention the possibility of expert testimony. As another example, during the hearing Living Rivers again asked for a continuance but provided insufficient specifics about what new information or evidence it was trying to present. Instead, counsel for Living Rivers stated that he wanted more time to “explore” issues about why Westwater Farms’ evidence might be insufficient. Even in the Request for Rehearing itself, Living Rivers failed to provide the Solomon Report, and provided no explanation for why it did not do so, or why it could not have done so at the hearing. Living Rivers has never demonstrated good

cause for the repeated delays it has sought to impose on the administrative process in this case.

The Solomon Report was finally submitted on February 22, 2011—over five months after Living Rivers’ objection on September 3, 2010. Notably, at the hearing on December 8, 2010, Living Rivers’ counsel asked for an additional two weeks to supplement the record with possible additional evidence. In fact, the Solomon Report was submitted approximately ten weeks later, after the Board had denied the Request for Rehearing. Living Rivers’ delay in presenting information to the Board was unreasonable. In its opening Brief Living Rivers fails to provide any explanation for this unreasonable delay in submitting the Solomon Report, and it is too late to do so now.

Finally, Living Rivers’ request to have this Court remand the matter to the Board for consideration of the Solomon Report (and perhaps other untimely evidence) should be denied. Such a remand would be improper, unfair and result in a third bite at the apple for Living Rivers. Westwater Farms would be severely prejudiced if it had to re-try this case all over again after having properly submitted, prepared and presented its evidence back in December, 2010. A remand would also result in considerable additional time and expense for the Division and the Board. Living Rivers had ample time and opportunity to properly prepare and present its case before the Board. A remand of this case to the Board is unwarranted and unnecessary.

CONCLUSION

For the reasons stated herein, the Court should hold that Living Rivers has failed to carry its burden on any of the issues it has presented for appeal. The Court should affirm the Board's Order and its Order Denying Rehearing.

DATED this 5th day of August, 2011.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY



Thomas W. Clawson

Thomas R. Barton

Attorneys for Intervenor Westwater Farms, LLC

Certificate of Service

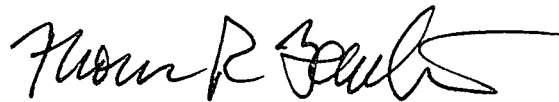
I, Thomas R. Barton, certify that on August 5th, 2011 I served two copies of the attached **BRIEF OF INTERVENOR WESTWATER FARMS, LLC** upon the following by mailing to them by first class mail with sufficient postage prepaid to the following addresses:

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A handwritten signature in black ink, appearing to read "Thomas R. Barton", with a long horizontal flourish extending to the right.

Thomas R. Barton, Attorney of Record

4838-5262-0298, v. 1

WESTWATER FARMS' ADDENDUM

1. Stipulation Concerning Briefing and Motion to Correct Record, dated July 15, 2011
2. 42 U.S.C. § 300h
3. Utah Code Ann. § 40-6-1
4. Utah Code Ann. § 40-6-5(5)
5. Utah Code Ann. § 63G-4-302(1)
6. Utah Code Ann. § 63G-4-403(4)
7. Utah Admin. Code R641-110-200
8. Utah Admin. Code R649-5-1 through R649-5-7
9. Utah R. App. P. 24(a)(9)

JUL 15 2011

IN THE UTAH COURT OF APPEALS

LIVING RIVERS,

Petitioner/Appellant,

vs.

UTAH DEPARTMENT OF NATURAL
RESOURCES, BOARD OF OIL, GAS AND
MINING and DIVISION OF OIL, GAS AND
MINING,

Respondents/Appellees,

and

WESTWATER FARMS, LLC,

Intervenor/Appellees.

Appeal No. 20110242 CA

Agency Decision Nos.:

Docket No. 2010-029,

Cause NO. UIC-358.1

STIPULATION CONCERNING BRIEFING AND
MOTION TO CORRECT RECORD

PETITION FOR REVIEW OF DECISION AND ORDERS FROM
THE UTAH DEPARTMENT OF NATURAL RESOURCES,
BOARD OF OIL, GAS AND MINING

Agency Decision Nos.: Docket No. 2010-029, Cause No. UIC 358.1

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Attorneys for Intervenor/Appellee

Appellant Living Rivers , Appellees Board of Oil, Gas and Mining and Division of Oil, Gas and Mining, and Intervenor WestWater Farms, LLC stipulate as follows:

In the proceedings below, three filings were made with the Board of Oil, Gas and Mining (the “Board”) on February 22, 2011. Although each of these documents bears a date stamp, the date stamp does not indicate the time of day the filings were made. The sequence of the February 22, 2011 filings is something Appellees wish to reference in their brief. The parties therefore clarify the record by stipulating that the three documents were filed in the following order:

1. The Division’s Memorandum in Opposition to Living Rivers’ Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for Stay of the Order Issued on January 13, 2011 was filed with the Board on the morning of February 22, 2011;
2. The Board’s Order Denying Motion for Rehearing was issued and filed just before noon on February 22, 2011;
3. Living Rivers’ Supplement to Request for Rehearing and Modification of Existing Order, And in the Alternative Request for a Stay of the Order Issued on January 13, 2011 was filed on the afternoon of February 22, 2011.

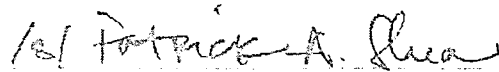
Pursuant to Rule 26(a) of the Utah Rules of Appellate Procedure, the parties have also agreed to extend by fourteen (14) days the due date for the Appellees’ briefs in this matter.

Additionally, the parties wish to apprise the Court of an error in the record. The

Administrative Record Index correctly reflects the existence of two hearing transcripts (corresponding to the Board's December 8, 2010 and February 23, 2011 hearings). Due to a clerical error, two copies of the December 8, 2010 transcript were included in the paginated record (as R.206 and R.207), and the February 23, 2011 transcript was omitted. The parties agree that the February 23, 2011 transcript is necessary for a complete record and hereby move this Court to permit correction of the record by substituting the copy of the transcript from the February 23, 2011 Board hearing attached hereto as Exhibit A for the duplicate copy of the December 8, 2010 transcript found in the record at R.207.

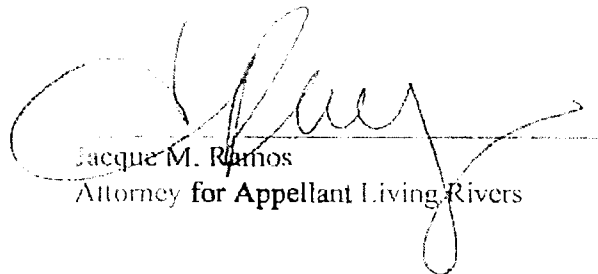
Dated this 15th day of July, 2011.

PATRICK A. SHEA, P.C.


Patrick A. Shea
Attorney for Appellant Living Rivers

Dated this 15th day of July, 2011.

J. RAMOS LAW FIRM, P.L.L.C.


Jacquie M. Ramos
Attorney for Appellant Living Rivers

Dated this 15th day of July, 2011.

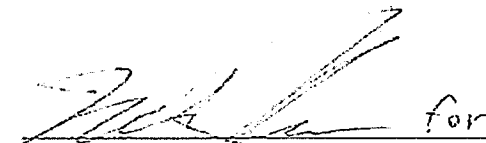
MARK L. SHURTLEFF
Utah Attorney General



Michael S. Johnson
Emily E. Lewis
Assistant Attorneys General
Attorneys for Appellees Utah Board of Oil,
Gas and Mining and Utah Division of Oil, Gas
and Mining

Dated this 15th day of July, 2011.

VAN COTT, BAGLEY, CORNWALL &
McCARTHY

 for

Thomas W. Clawson
Thomas R. Barton
Attorneys for Intervenor Westwater
Farms, LLC

CERTIFICATE OF MAILING

I hereby certify that on the 18th day of July, 2011, I sent via U.S. Mail, first class, postage prepaid, the foregoing STIPULATION to each of the following:

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RETAMCO Operating, Inc.
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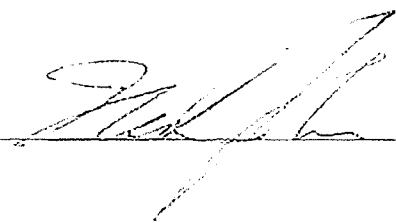


EXHIBIT A

1 BEFORE THE BOARD OF OIL, GAS AND MINING

2 DEPARTMENT OF NATURAL RESOURCES

3 IN AND FOR THE STATE OF UTAH

4
5 IN THE MATTER OF THE APPLICATION OF
6 WESTWATER FARMS, LLC, FOR ADMINISTRATIVE
7 APPROVAL OF THE HARLEY DOME 1 SWD WELL
8 LOCATED IN SECTION 10, TOWNSHIP 19 SOUTH,
9 RANGE 25 EAST, 81M, GRAND COUNTY, UTAH,
10 AS A CLASS II INJECTION WELL

11 DOCKET NO. 2010-029 CAUSE NO. UIC-350.1

12
13 TAKEN AT: Department of Natural Resources
14 1594 West North Temple, Room 1040
15 Salt Lake City, Utah

16 DATE: Thursday, February 24, 2011

17 TIME: 9:07 a.m. to 9:08 a.m.

18 REPORTED BY: Michelle Mallonee, RPR

19
20 ATKINSON-BAKER COURT REPORTERS
21 500 N. Brand Blvd., Third Floor
22 Los Angeles, CA 91203
23 (818) 551-7300

24 JOB #A9101015
25

APPEARANCES

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Douglas E. Johnson, Chairman
Ruland J. Gill, Jr.
Jake Y. Harouny (Excused)
James T. Jensen
Kelly L. Payne
Samuel C. Quigley (Excused)
Jean Semborski

DIVISION OF OIL, GAS AND MINING:

John R. Baza, Director
Dana Dean, Associate Director, Mining
John C. Rogers, Associate Director, Oil and Gas
Jim Springer, Public Information Officer
Steve Schneider, Administrative Policy Coordinator
Julie Ann Carter, Secretary to the Board

ASSISTANT ATTORNEYS GENERAL:

Steven F. Alder - Division Attorney
Emily Lewis - Division Attorney
Michael S. Johnson - Board Attorney

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1 Docket No. 2010-029 Cause No. UIC-358.1
2 Thursday, February 24, 2011
3 (The proceedings began at 9:07 a.m. a.m.)
4 CHAIRMAN JOHNSON: Agenda Item No. 3 was heard
5 yesterday.
6 Agenda Item No. 4, Docket No. 2011 -- excuse me.
7 Steve, are you prepared to do that?
8 MR. SCHNEIDER: Yes, but we are awaiting counsel
9 to return.
10 CHAIRMAN JOHNSON: Okay. All right. So we'll
11 come back to that.
12 Item No. 7, Docket No. 2010-029 Cause No.
13 UIC-358.1 - In the Matter of the Application of WESTWATER
14 FARMS, LLC, for Administrative Approval of the Harley
15 Dome 1 SWD Well Located in Section 10, Township 10 South,
16 Range 25 East, SLM, Grand County, Utah, as a Class II
17 Injection Well.
18 In this matter, there was a request for
19 rehearing by petitioner, Living Rivers. And on or about
20 Tuesday of this week, the 22nd, the Board issued an order
21 denying the request for rehearing.
22 So since Steve is still gone, Ms. Lewis, are you
23 prepared for Summit Energy?
24 MS. LEWIS: We are, yes. Did we want to wait
25 for the...

1 CHAIRMAN JOHNSON: Oh, are you ready to go? You
2 can help Steve?
3 MS. LEWIS: I can help Steve. I'm going to
4 represent Summit.
5 Can we make just a quick motion on the Westwater
6 Farms application?
7 CHAIRMAN JOHNSON: Please.
8 MS. LEWIS: We just would like to put a verbal
9 motion to strike any additional testimony submitted by
10 Westwater Farms, considering the Board's record is
11 already closed on the matter.
12 CHAIRMAN JOHNSON: Would someone like to make
13 that motion.
14 You made the motion.
15 MS. LEWIS: I made the motion.
16 CHAIRMAN JOHNSON: Oh, great. The motion been
17 made.
18 Any discussion?
19 All those in favor say "aye."
20 THE BOARD MEMBERS: Aye.
21 {All Board members answered in the affirmative.}
22 CHAIRMAN JOHNSON: Is anyone opposed?
23 Okay. Thank you.
24 {The matter was concluded at 9:09 a.m.}
25

CERTIFICATE

State of Utah)
ss.
County of Salt Lake)

I, Michelle Mallonee, a Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

that the proceedings of said matter was reported by me in stenotype and thereafter transcribed into type-written form;

that the same constitutes a true and correct transcription of said proceedings so taken and transcribed.

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action, and that I am not interested in the event thereof.

Michelle Mallonee, RPR, CSR

U.S. Code

[main page](#) [faq](#) [index](#) [search](#)



TITLE 42 > CHAPTER 6A > SUBCHAPTER XII > Part C > § 300h

§ 300h. Regulations for State programs

(a) Publication of proposed regulations; promulgation; amendments; public hearings; administrative consultations

(1) The Administrator shall publish proposed regulations for State underground injection control programs within 180 days after December 16, 1974. Within 180 days after publication of such proposed regulations, he shall promulgate such regulations with such modifications as he deems appropriate. Any regulation under this subsection may be amended from time to time.

(2) Any regulation under this section shall be proposed and promulgated in accordance with section 553 of title 5 (relating to rulemaking), except that the Administrator shall provide opportunity for public hearing prior to promulgation of such regulations. In proposing and promulgating regulations under this section the Administrator shall consult with the Secretary, the National Drinking Water Advisory Council, and other appropriate Federal entities and with interested State entities.

(b) Minimum requirements; restrictions

(1) Regulations under subsection (a) of this section for State underground injection programs shall contain minimum requirements for effective programs to prevent underground injection which endangers drinking water sources within the meaning of subsection (d)(2) of this section. Such regulations shall require that a State program, in order to be approved under section 300h-1 of this title—

(A) shall prohibit, effective on the date on which the applicable underground injection control program takes effect, any underground injection in such State which is not authorized by a permit issued by the State (except that the regulations may permit a State to authorize underground injection by rule);

(B) shall require

(i) in the case of a program which provides for authorization of underground injection by permit, that the applicant for the permit to inject must satisfy the State that the underground injection will not endanger drinking water sources, and

(ii) in the case of a program which provides for such an authorization by rule, that no rule may be promulgated which authorizes any underground injection which endangers drinking water sources;

(C) shall include inspection, monitoring, recordkeeping, and reporting requirements; and

(D) shall apply

(i) as prescribed by section 300j-6 (b) ⁽¹⁾ of this title, to underground injections by Federal agencies, and

(ii) to underground injections by any other person whether or not occurring on property owned or leased by the United States.

(2) Regulations of the Administrator under this section for State underground injection control programs may not prescribe requirements which interfere with or impede—

(A) the underground injection of brine or other fluids which are brought to the surface in connection with oil or natural gas production or natural gas storage operations, or

(B) any underground injection for the secondary or tertiary recovery of oil or natural gas,

unless such requirements are essential to assure that underground sources of drinking water will not be endangered by such injection.

(3)

(A) The regulations of the Administrator under this section shall permit or provide for consideration of varying geologic, hydrological, or historical conditions in different States and in different areas within a State.

(B)

(i) In prescribing regulations under this section the Administrator shall, to the extent feasible, avoid promulgation of requirements which would unnecessarily disrupt State underground injection control programs which are in effect and being enforced in a substantial number of States.

(ii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed to disrupt a State underground injection control program only if it would be infeasible to comply with both such regulation and the State underground injection control program.

(iii) For the purpose of this subparagraph, a regulation prescribed by the Administrator under this section shall be deemed unnecessary only if, without such regulation, underground sources of drinking water will not be endangered by an underground injection.

(C) Nothing in this section shall be construed to alter or affect the duty to assure that underground sources of drinking water will not be endangered by any underground injection.

(c) Temporary permits; notice and hearing

(1) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section) temporary permits for underground injection which may be effective until the expiration of four years after December 16, 1974, if—

(A) the Administrator finds that the State has demonstrated that it is unable and could not reasonably have been able to process all permit applications within the time available;

(B) the Administrator determines the adverse effect on the environment of such temporary permits is not unwarranted;

(C) such temporary permits will be issued only with respect to injection wells in operation on the date on which such State's permit program approved under this part first takes effect and for which there was inadequate time to process its permit application; and

(D) the Administrator determines the temporary permits require the use of adequate safeguards established by rules adopted by him.

(2) The Administrator may, upon application of the Governor of a State which authorizes underground injection by means of permits, authorize such State to issue (without regard to subsection (b)(1)(B)(i) of this section), but after reasonable notice and hearing, one or more temporary permits each of which is applicable to a particular injection well and to the underground injection of a particular fluid and which may be effective until the expiration of four years after December 16, 1974, if the State finds, on the record of such hearing—

(A) that technology (or other means) to permit safe injection of the fluid in accordance with the applicable underground injection control program is not generally available (taking costs into consideration);

(B) that injection of the fluid would be less harmful to health than the use of other available means of disposing of waste or producing the desired product; and

(C) that available technology or other means have been employed (and will be employed) to reduce the volume and toxicity of the fluid and to minimize the potentially adverse effect of the injection on the public health.

(d) "Underground injection" defined; underground injection endangerment of drinking water sources

For purposes of this part:

(1) **Underground injection.**— The term "underground injection"—

(A) means the subsurface emplacement of fluids by well injection; and

(B) excludes—

(i) the underground injection of natural gas for purposes of storage; and

(ii) the underground injection of fluids or propping agents (other than diesel fuels) pursuant to hydraulic fracturing operations related to oil, gas, or geothermal production activities.

(2) Underground injection endangers drinking water sources if such injection may result in the presence in underground water which supplies or can reasonably be expected to supply any public water system of any contaminant, and if the presence of such contaminant may result in such system's not complying with any national primary drinking water regulation or may otherwise adversely affect the health of persons.

[1] See References in Text note below.

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[Title 40](#) Mines and Mining

[Chapter 6](#) Board and Division of Oil, Gas, and Mining

[Section 1](#) Declaration of public interest.

40-6-1. Declaration of public interest.

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.

Enacted by Chapter 205, 1983 General Session

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Title 40 Mines and Mining

Chapter
6 Board and Division of Oil, Gas, and Mining

Section
5 Jurisdiction of board -- Rules.

40-6-5. Jurisdiction of board -- Rules.

(1) The board has jurisdiction over all persons and property necessary to enforce this chapter. The board shall enact rules in accordance with the Utah Administrative Rulemaking Act.

(2) The board shall adopt rules and make orders as necessary to administer the following provisions:

(a) Ownership of all facilities for the production, storage, treatment, transportation, refining, or processing of oil and gas shall be identified.

(b) Well logs, directional surveys, and reports on well location, drilling, and production shall be made and filed with the division. Logs of wells marked "confidential" shall be kept confidential for one year after the date on which the log is required to be filed, unless the operator gives written permission to release the log at an earlier date. Production reports shall be:

(i) filed monthly;

(ii) accurate; and

(iii) in a form that reasonably serves the needs of state agencies and private fee owners.

(c) Monthly reports from gas processing plants shall be filed with the division.

(d) Wells shall be drilled, cased, operated, and plugged in such manner as to prevent:

(i) the escape of oil, gas, or water out of the reservoir in which they are found into another formation;

(ii) the detrimental intrusion of water into an oil or gas reservoir;

(iii) the pollution of fresh water supplies by oil, gas, or salt water;

(iv) blowouts;

(v) cavings;

(vi) seepages; and

(vii) fires.

(e) The drilling of wells shall not commence without an adequate and approved supply of water as required by Title 73, Chapter 3. This provision is not intended to impose any additional legal requirements, but to assure that existing legal requirements concerning the use of water have been met prior to the commencement of drilling.

(f) The operator shall furnish a reasonable performance bond or other good and sufficient surety, conditioned for the performance of the duty to:

(i) plug each dry or abandoned well;

(ii) repair each well causing waste or pollution; and

(iii) maintain and restore the well site.

(g) Production from wells shall be separated into oil and gas and measured by means and upon standards that will be prescribed by the board and will reflect current industry standards.

(h) Crude oil obtained from any reserve pit, disposal pond or pit, or similar facility, and any

accumulation of nonmerchandise waste crude oil shall be treated and processed, as prescribed by the board.

(i) Any person who produces, sells, purchases, acquires, stores, transports, refines, or processes oil or gas or injects fluids for cycling, pressure maintenance, secondary or enhanced recovery, or salt water disposal in this state shall maintain complete and accurate records of the quantities produced, sold, purchased, acquired, stored, transported, refined, processed, or injected for a period of at least six years. The records shall be available for examination by the board or its agents at any reasonable time. Rules enacted to administer this subsection shall be consistent with applicable federal requirements.

(j) Any person with an interest in a lease shall be notified when all or part of that interest in the lease is sold or transferred.

(3) The board has the authority to regulate:

(a) all operations for and related to the production of oil or gas including:

(i) drilling, testing, equipping, completing, operating, producing, and plugging of wells; and
(ii) reclamation of sites;

(b) the spacing and location of wells;

(c) operations to increase ultimate recovery, such as:

(i) cycling of gas;
(ii) the maintenance of pressure; and
(iii) the introduction of gas, water, or other substances into a reservoir;
(d) the disposal of salt water and oil-field wastes;
(e) the underground and surface storage of oil, gas, or products; and
(f) the flaring of gas from an oil well.

(4) For the purposes of administering this chapter, the board may designate:

(a) wells as:

(i) oil wells; or
(ii) gas wells; and

(b) pools as:

(i) oil pools; or
(ii) gas pools.

(5) The board has exclusive jurisdiction over:

(a) class II injection wells, as defined by the federal Environmental Protection Agency or any successor agency; and

(b) pits and ponds in relation to these injection wells.

(6) The board has jurisdiction:

(a) to hear any questions regarding multiple mineral development conflicts with oil and gas operations if there:

(i) is potential injury to other mineral deposits on the same lands; or
(ii) are simultaneous or concurrent operations conducted by other mineral owners or lessees affecting the same lands; and

(b) to enter its order or rule with respect to those questions.

(7) The board has enforcement powers with respect to operators of minerals other than oil and gas as are set forth in Section 40-6-11, for the sole purpose of enforcing multiple mineral development issues.

Amended by Chapter 62, 1988 General Session

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General Government

63G

Chapter

4

Administrative Procedures Act

Section

302

Agency review -- Reconsideration.

63G-4-302. Agency review -- Reconsideration.

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section **63G-4-301** is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be mailed to each party by the person making the request.

(3) (a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Renumbered and Amended by Chapter 382, 2008 General Session

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4

Administrative Procedures Act

Section

403

Judicial review -- Formal adjudicative proceedings.

63G-4-403. Judicial review -- Formal adjudicative proceedings.

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Renumbered and Amended by Chapter 382, 2008 General Session
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NOTE: For a list of rules that have been made effective since July 1, 2011, please see the codification segue page.

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Rule R641-110. Rehearing and Modification of Existing Orders.

As in effect on July 1, 2011

Table of Contents

- R641-110-100. Time for filing.
- R641-110-200. Contents of Petition.
- R641-110-300. Response to Petition.
- R641-110-400. Action on the Petition.
- R641-110-500. Modification of Existing Orders.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

R641-110-100. Time for filing.

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing 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. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

R641-110-200. Contents of Petition.

A petition for rehearing will set forth specifically the particulars in which it is claimed the Board's order or decision is unlawful, unreasonable, or unfair. If the petition is based upon a claim that the Board failed to consider certain evidence, it will include an abstract of that evidence. If the petition is based upon newly discovered evidence, then the petition will be accompanied by an affidavit setting forth the nature and extent of such evidence, its relevancy to the issues involved, and a statement that the party could not, with reasonable diligence, have discovered the evidence prior to the hearing.

R641-110-300. Response to Petition.

All other parties to the proceeding upon which a rehearing is sought may file a response to the petition at any time prior to the hearing at which the petition will be considered by the Board. Such responses will be served on the petitioner at or before the hearing.

R641-110-400. Action on the Petition.

The Board will act upon the petition for a rehearing at its next regularly scheduled meeting following the date of its filing. If no action is taken by the Board within such time, the petition will be deemed to be denied. The Board may set a time for a hearing on said petition or may summarily grant or deny the petition.

R641-110-500. Modification of Existing Orders.

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.

KEY

administrative procedure

Date of Enactment or Last Substantive Amendment

1988

Notice of Continuation

November 5, 2007

Authorizing, Implemented, or Interpreted Law

40-6-1 et seq.

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Rule R649-5. Underground Injection Control of Recovery Operations and Class II Injection Wells.

As in effect on July 1, 2011

Table of Contents

- R649-5-1. Requirements for Injection of Fluids Into Reservoirs.
- R649-5-2. Requirements for Class II Injection Wells Including Water Disposal, Storage and Enhanced Recovery Wells.
- R649-5-3. Noticing and Approval of Injection Wells.
- R649-5-4. Aquifer Exemption.
- R649-5-5. Testing and Monitoring of Injection Wells.
- R649-5-6. Duration of Approval for Injection Wells.
- R649-5-7. Unit or Cooperative Development or Operation.
- KEY
- Date of Enactment or Last Substantive Amendment
- Notice of Continuation
- Authorizing, Implemented, or Interpreted Law

R649-5-1. Requirements for Injection of Fluids Into Reservoirs.

1. Operations to increase ultimate recovery, such as cycling of gas, the maintenance of pressure, the introduction of gas, water or other substances into a reservoir for the purpose of secondary or other enhanced recovery or for storage and the injection of water into any formation for the purpose of water disposal shall be permitted only by order of the board after notice and hearing.

2. A petition for authority for the injection of gas, liquefied petroleum gas, air, water, or any other medium into any formation for any reason, including but not necessarily limited to the establishment of or the expansion of waterflood projects, enhanced recovery projects, and pressure maintenance projects shall contain:

2.1. The name and address of the operator of the project.

2.2. A plat showing the area involved and identifying all wells, including all proposed injection wells, in the project area and within one-half mile radius of the project area.

2.3. A full description of the particular operation for which approval is requested.

2.4. A description of the pools from which the identified wells are producing or have produced.

- 2.5. The names, description and depth of the pool or pools to be affected.
- 2.6. A copy of a log of a representative well completed in the pool.
- 2.7. A statement as to the type of fluid to be used for injection, its source and the estimated amounts to be injected daily.
- 2.8. A list of all operators or owners and surface owners within a one-half mile radius of the proposed project.
- 2.9. An affidavit certifying that said operators or owners and surface owners within a one-half mile radius have been provided a copy of the petition for injection.
- 2.10. Any additional information the board may determine is necessary to adequately review the petition.
3. Applications as required by R649-5-2 for injection wells that are located within the project area, may be submitted for board consideration and approval with the request for authorization of the recovery project.
4. Established recovery projects may be expanded and additional wells placed on injection only upon authority from the board after notice and hearing or by administrative approval.
5. If the proposed injection interval can be classified as an USDW, approval of the project is subject to the requirements of R649-5-4.

R649-5-2. Requirements for Class II Injection Wells Including Water Disposal, Storage and Enhanced Recovery Wells.

1. Injection wells shall be completed, equipped, operated, and maintained in a manner that will prevent pollution and damage to any USDW, or other resources and will confine injected fluids to the interval approved.
2. The application for an injection well shall include a properly completed UIC Form 1 and the following:
 - 2.1. A plat showing the location of the injection well, all abandoned or active wells within a one-half mile radius of the proposed well, and the surface owner and the operator of any lands or producing leases, respectively, within a one-half mile radius of the proposed injection well.
 - 2.2. Copies of electrical or radioactive logs, including gamma ray logs, for the proposed well run prior to the installation of casing and indicating resistivity, spontaneous potential, caliper, and porosity.
 - 2.3. A copy of a cement bond or comparable log run for the proposed injection well after casing was set and cemented.
 - 2.4. Copies of logs already on file with the division should be referenced, but need not be refiled.
 - 2.5. A description of the casing or proposed casing program of the injection well and of the proposed method for testing the casing before use of the well.
 - 2.6. A statement as to the type of fluid to be used for injection, its source and estimated amounts to be injected daily.
 - 2.7. Standard laboratory analyses of:
 - 2.7.1. The fluid to be injected,
 - 2.7.2. The fluid in the formation into which the fluid is being injected, and
 - 2.7.3. The compatibility of the fluids.
 - 2.8. The proposed average and maximum injection pressures.

2.9. Evidence and data to support a finding that the proposed injection well will not initiate fractures through the overlying strata or a confining interval that could enable the injected fluid or formation fluid to enter any fresh water strata.

2.10. Appropriate geological data on the injection interval with confining beds clearly labeled,

2.10.1. Nearby Underground Sources of Drinking Water, including the geologic formation name,

2.10.2. Lithologic descriptions, thicknesses, depths, water quality, and lateral extent;

2.10.3. Information relative to geologic structure near the proposed well that may effect the conveyance and/or storage of the injected fluids.

2.11. A review of the mechanical condition of each well within a one-half mile radius of the proposed injection well to assure that no conduit exists that could enable fluids to migrate up or down the wellbore and enter improper intervals.

2.12. An affidavit certifying that a copy of the application has been provided to all operators, owners, and surface owners within a one-half mile radius of the proposed injection well.

2.13. Any other additional information that the board or division may determine is necessary to adequately review the application.

3. Applications for injection wells that are within a recovery project area will be considered for approval:

3.1. Pursuant to R649-5-1-3.

3.2. Subsequent to board approval of a recovery project pursuant to R649-5-1-1.

4. Approval of an injection well is subject to the requirements of R649-5-4, if the proposed injection interval can be classified as an USDW.

5. In addition to the requirements of this section, the provisions of R649-3-1, R649-3-4, R649-3-24, R649-3-32, and R649-8-1 and R649-10 shall apply to all Class II injection wells.

R649-5-3. Noticing and Approval of Injection Wells.

1. Applications for injection wells submitted pursuant to R649-5-1-3 shall be noticed in conformance with the procedural rules of the board as part of the hearing for the recovery project. Any person desiring to object to approval of such an application for an injection well shall file the objection in conformance with the procedural rules of the board.

2. The receipt of a complete and technically adequate application, other than an application submitted pursuant to R649-5-3-1, shall be considered as a request for agency action by the Division and shall be published in a daily newspaper of general circulation in the city and county of Salt Lake and in a newspaper of general circulation in the county where the proposed well is located. A copy of the notice of agency action shall also be sent to all parties including government agencies. The notice of agency action shall contain at least the following information:

2.1. The applicant's name, business address, and telephone number.

2.2. The location of the proposed well.

2.3. A description of proposed operation.

3. If no written objection to the application for administrative approval of an injection well is received by the division within 15 days after publication of the notice of agency action, or an aquifer exemption is not required in accordance with R649-5-

4, and a board hearing is not otherwise required, the application may be considered and approved administratively.

4. If a written objection to an application for administrative approval of an injection well is received by the division within 15 days after publication of the notice of application, or if a hearing is required by these rules or deemed advisable by the director, the application shall be set for notice and hearing by the board.

5. The director shall have the authority to grant an exception to the hearing requirements of R649-5-1.1 for conversion to injection of additional wells that constitute a modification or expansion of an authorized project provided that any such well is necessary to develop or maintain thorough and efficient recovery operations for any authorized project and provided that no objection is received pursuant to R649-5-3-3.

6. The director shall have authority to grant an exception to the hearing requirements of R649-5-1-1 for water disposal wells provided disposal is into a formation or interval that is not currently nor anticipated to be an underground source of drinking water and provided that no objection is received pursuant to R649-5-3-3.

R649-5-4. Aquifer Exemption.

1. The board may, after notice and hearing and subject to the EPA approval, authorize the exemption of certain aquifers from classification as an USDW based upon the following findings:

1.1. The aquifer does not currently serve as a source of drinking water.

1.2. The aquifer cannot now and will not in the future serve as a source of drinking water for any of the following reasons:

1.2.1. The aquifer is mineral, hydrocarbon or geothermal energy producing, or it can be demonstrated by the applicant as part of a permit application for a Class II well operation, to contain minerals or hydrocarbons that, considering their quantity and location, are expected to be commercially producible.

1.2.2. The aquifer is situated at a depth or location that makes recovery of water for drinking water purposes economically or technologically impractical.

1.2.3. The aquifer is contaminated to the extent that it would be economically or technologically impractical to render water from the aquifer fit for human consumption.

1.2.4. The aquifer is located above a Class III well mining area subject to subsidence or catastrophic collapse.

1.3. The total dissolved solids content of the water from the aquifer is more than 3,000 and less than 10,000 mg/l, and the aquifer is not reasonably expected to be used as a source of fresh or potable water.

2. Interested parties desiring to have an aquifer exempted from classification as a USDW, shall submit to the division an application that includes sufficient data to justify the proposal. The division shall consider the application and if appropriate, will advise the applicant to submit a request to the board for an aquifer exemption.

R649-5-5. Testing and Monitoring of Injection Wells.

1. Before operating a new injection well, the casing shall be tested to a pressure not less than the maximum authorized injection pressure, or to a pressure of 300 psi, whichever is greater.

2. Before operating an existing well newly converted to an injection well, the casing outside the tubing shall be tested to a pressure not less than the maximum

authorized injection pressure, or to a pressure of 1,000 psi, whichever is lesser, provided that each well shall be tested to a minimum pressure of 300 psi.

3. In order to demonstrate continuing mechanical integrity after commencement of injection operations, all injection wells shall be pressure tested or monitored as follows:

3.1. Pressure Test. The casing-tubing annulus above the packer shall be pressure tested not less than once each five years to a pressure equal to the maximum authorized injection pressure or to a pressure of 1,000 psi, whichever is lesser, provided that no test pressure shall be less than 300 psi. A report documenting the test results shall be submitted to the division.

3.2. Monitoring. If approved by the director, and in lieu of the pressure testing requirement, the operator may monitor the pressure of the casing-tubing annulus monthly during actual injection operations and report the results to the division.

3.3. Other test procedures or devices such as tracer surveys, temperature logs or noise logs may be required by the division on a case-by-case basis.

3.4. The operator shall sample and analyze the fluids injected in each disposal well or enhanced recovery project at sufficiently frequent time intervals to yield data representative of fluid characteristics, and no less frequently than every year.

3.5. The operator shall submit a copy of the fluid analysis to the division with the Annual Fluid Injection Report, UIC Form 4.

R649-5-6. Duration of Approval for Injection Wells.

1. Approvals or orders authorizing injection wells shall be valid for the life of the well, unless revoked by the board for just cause, after notice and hearing.

2. An approval may be administratively amended if:

2.1. There is a substantial change of conditions in the injection well operation.

2.2. There are substantial changes to the information originally furnished.

2.3. Information as to the permitted operation indicates that an USDW is no longer being protected.

R649-5-7. Unit or Cooperative Development or Operation.

Any person desiring to obtain the benefits of Section 40-6-7(1) insofar as the same relates to any method of unit or cooperative development or operation of a field or pool or a part of either, shall file a Request for Agency Action and a copy of such agreement with the board for approval after notice and hearing.

KEY

oil and gas law

Date of Enactment or Last Substantive Amendment

June 2, 1998

Notice of Continuation

March 7, 2007

Authorizing, Implemented, or Interpreted Law

40-6-1 et seq.

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Rule 24. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under appropriate headings and in the order indicated:

(a)(1) A complete list of all parties to the proceeding in the court or agency whose judgment or order is sought to be reviewed, except where the caption of the case on appeal contains the names of all such parties. The list should be set out on a separate page which appears immediately inside the cover.

(a)(2) A table of contents, including the contents of the addendum, with page references.

(a)(3) A table of authorities with cases alphabetically arranged and with parallel citations, rules, statutes and other authorities cited, with references to the pages of the brief where they are cited.

(a)(4) A brief statement showing the jurisdiction of the appellate court.

(a)(5) A statement of the issues presented for review, including for each issue: the standard of appellate review with supporting authority; and

(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or

(a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court.

(a)(6) Constitutional provisions, statutes, ordinances, rules, and regulations whose interpretation is determinative of the appeal or of central importance to the appeal shall be set out verbatim with the appropriate citation. If the pertinent part of the provision is lengthy, the citation alone will suffice, and the provision shall be set forth in an addendum to the brief under paragraph (11) of this rule.

(a)(7) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. A statement of the facts relevant to the issues presented for review shall follow. All statements of fact and references to the proceedings below shall be supported by citations to the record in accordance with paragraph (e) of this rule.

(a)(8) Summary of arguments. The summary of arguments, suitably paragraphed, shall be a succinct condensation of the arguments actually made in the body of the brief. It shall not be a mere repetition of the heading under which the argument is arranged.

(a)(9) An argument. The argument shall contain the contentions and reasons of the appellant with respect to the issues presented, including the grounds for reviewing any issue not preserved in the trial court, with citations to the authorities, statutes, and parts of the record relied on. A party challenging a fact finding must first marshal all record evidence that supports the challenged finding. A party seeking to recover attorney's fees incurred on appeal shall state the request explicitly and set forth the legal basis for such an award.

(a)(10) A short conclusion stating the precise relief sought.

(a)(11) An addendum to the brief or a statement that no addendum is necessary under this paragraph. The addendum shall be bound as part of the brief unless doing so makes the brief

unreasonably thick. If the addendum is bound separately, the addendum shall contain a table of contents. The addendum shall contain a copy of:

(a)(11)(A) any constitutional provision, statute, rule, or regulation of central importance cited in the brief but not reproduced verbatim in the brief;

(a)(11)(B) in cases being reviewed on certiorari, a copy of the Court of Appeals opinion; in all cases any court opinion of central importance to the appeal but not available to the court as part of a regularly published reporter service; and

(a)(11)(C) those parts of the record on appeal that are of central importance to the determination of the appeal, such as the challenged instructions, findings of fact and conclusions of law, memorandum decision, the transcript of the court's oral decision, or the contract or document subject to construction.

(b) Brief of the appellee. The brief of the appellee shall conform to the requirements of paragraph (a) of this rule, except that the appellee need not include:

(b)(1) a statement of the issues or of the case unless the appellee is dissatisfied with the statement of the appellant; or

(b)(2) an addendum, except to provide material not included in the addendum of the appellant. The appellee may refer to the addendum of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the appellee, and if the appellee has cross-appealed, the appellee may file a brief in reply to the response of the appellant to the issues presented by the cross-appeal. Reply briefs shall be limited to answering any new matter set forth in the opposing brief. The content of the reply brief shall conform to the requirements of paragraphs (a)(2), (3), (9), and (10) of this rule. No further briefs may be filed except with leave of the appellate court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such designations as "appellant" and "appellee." It promotes clarity to use the designations used in the lower court or in the agency proceedings, or the actual names of parties, or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. References shall be made to the pages of the original record as paginated pursuant to Rule 11(b) or to pages of any statement of the evidence or proceedings or agreed statement prepared pursuant to Rule 11(f) or 11(g). References to pages of published depositions or transcripts shall identify the sequential number of the cover page of each volume as marked by the clerk on the bottom right corner and each separately numbered page(s) referred to within the deposition or transcript as marked by the transcriber. References to exhibits shall be made to the exhibit numbers. If reference is made to evidence the admissibility of which is in controversy, reference shall be made to the pages of the record at which the evidence was identified, offered, and received or rejected.

(f) Length of briefs. Except by permission of the court, principal briefs shall not exceed 50 pages, and reply briefs shall not exceed 25 pages, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, or portions of the record as required by paragraph (a) of this rule. In cases involving cross-

appeals, paragraph (g) of this rule sets forth the length of briefs.

(g) Briefs in cases involving cross-appeals. If a cross-appeal is filed, the party first filing a notice of appeal shall be deemed the appellant, unless the parties otherwise agree or the court otherwise orders. Each party shall be entitled to file two briefs. No brief shall exceed 50 pages, and no party's briefs shall in combination exceed 75 pages.

(g)(1) The appellant shall file a Brief of Appellant, which shall present the issues raised in the appeal.

(g)(2) The appellee shall then file one brief, entitled Brief of Appellee and Cross-Appellant, which shall respond to the issues raised in the Brief of Appellant and present the issues raised in the cross-appeal.

(g)(3) The appellant shall then file one brief, entitled Reply Brief of Appellant and Brief of Cross-Appellee, which shall reply to the Brief of Appellee and respond to the Brief of Cross-Appellant.

(g)(4) The appellee may then file a Reply Brief of Cross-Appellant, which shall reply to the Brief of Cross-Appellee.

(h) Permission for over length brief. While such motions are disfavored, the court for good cause shown may upon motion permit a party to file a brief that exceeds the limitations of this rule. The motion shall state with specificity the issues to be briefed, the number of additional pages requested, and the good cause for granting the motion. A motion filed at least seven days before the date the brief is due or seeking five or fewer additional pages need not be accompanied by a copy of the brief. A motion filed less than seven days before the date the brief is due and seeking more than 5 additional pages shall be accompanied by a copy of the draft brief for in camera inspection. If the motion is granted, any responding party is entitled to an equal number of additional pages without further order of the court. Whether the motion is granted or denied, the draft brief will be destroyed by the court.

(i) Briefs in cases involving multiple appellants or appellees. In cases involving more than one appellant or appellee, including cases consolidated for purposes of the appeal, any number of either may join in a single brief, and any appellant or appellee may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

(j) Citation of supplemental authorities. When pertinent and significant authorities come to the attention of a party after that party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the appellate court, by letter setting forth the citations. An original letter and nine copies shall be filed in the Supreme Court. An original letter and seven copies shall be filed in the Court of Appeals. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall state the reasons for the supplemental citations. The body of the letter must not exceed 350 words. Any response shall be made within 7 days of filing and shall be similarly limited.

(k) Requirements and sanctions. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings and free from burdensome, irrelevant, immaterial or scandalous matters. Briefs which are not in compliance may be disregarded or stricken, on motion or sua sponte by the court, and the court may assess attorney fees against the offending lawyer.

Advisory Committee Notes

Rule 24(a)(9) now reflects what Utah appellate courts have long held. See *In re Beesley*, 883 P.2d 1343, 1349 (Utah 1994); *Newmeyer v. Newmeyer*, 745 P.2d 1276, 1278 (Utah 1987). "To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. 'Attorneys must extricate themselves from the client's shoes and fully assume the adversary's position. In order to properly discharge the marshalling duty..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists.'" *ONEIDA/SLIC, v. ONEIDA Cold Storage and Warehouse, Inc.*, 872 P.2d 1051, 1052-53 (Utah App. 1994) (alteration in original) (quoting *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991)). See also *State ex rel. M.S. v. Salata*, 806 P.2d 1216, 1218 (Utah App. 1991); *Bell v. Elder*, 782 P.2d 545, 547 (Utah App. 1989); *State v. Moore*, 802 P.2d 732, 738-39 (Utah App. 1990).

The brief must contain for each issue raised on appeal, a statement of the applicable standard of review and citation of supporting authority.