

2011

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

Utah Court of Appeals

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**IN THE COURT OF APPEALS
STATE OF UTAH**

LIVING RIVERS,

Petitioner/Appellant,
vs.

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

Respondent/Appellees.

Appeal No. 20110242 CA

Agency Decision Nos.: Docket No.
2010-029, Cause No. UIC-35

BRIEF OF THE APPELLANT

**PETITION FOR REVIEW OF DECISIONS AND ORDERS FROM
THE UTAH DEPARTMENT OF NATURAL RESOURCES
DIVISION OF OIL, GAS AND MINING
Agency Decision Nos.: Docket No. 2010-0219, Cause No. UIC 358**

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UTAH APPELLATE COURTS

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JURISDICTIONAL STATEMENT

This is a petition for review of Findings of Fact, Conclusions of Law, and Order, dated January 13, 2011, and Order Denying Motion for Rehearing dated February 22, 2011, of the Utah Department of Natural Resources, Division of Oil, Gas and Mining. A timely Petition for Review was filed March 17, 2011. The Court of Appeals has jurisdiction pursuant to Utah Code Ann. § 78A-4-103(2). This case has been transferred to the Utah Court of Appeals by the Supreme Court pursuant to Utah Code Ann. § 78A-3-102(4). No party made a timely objection to the transfer. A timely Docketing Statement was filed on April 7, 2011. This case was not referred to the Court's mediation program.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

I. Whether the Utah Board of Oil, Gas, and Mining failed to decide all of the issues requiring resolution prior to issuance of the Underground Injection Control (UIC) permit when it failed to evaluate public health and safety concerns in determining whether certain conditions be attached and incorporated to the issuance of the UIC permit for the Harley Dome #1 SWD Well located in the NW1/4 NE1/4 of Section 10, Township 19 South, Range 25 East, S.L.M., Grand County, Utah (hereinafter "Well"), including installation of monitoring wells between the injection well and the Colorado River.

Determinative law: U.C.A. §§ 40-6-1, 40-6-5; U.C.A. §§ 63G-4-401, 63G-4-403, 63G-4-404, 63G-4-405; U.A.C. Rules R649-5-1, R649-5-2, R649-5-3, R649-5-4, R649-5-5, R649-5-6.

Standard of Review: Whether the Utah Board of Oil, Gas and Mining decided all of the issues requiring resolution are a question of law reviewed for correctness. *Orchard Park Care Ctr. V. Dep't of Health*, 2009 UT App 284, ¶ 8; *EAGALA, Inc. v. Department of Workforce Servs.* 2007 UT App. 43, ¶ 7.

Citation to record showing issue preserved in administrative proceeding: Appellant preserved this issue by raising and arguing the same in their December 7, 2010, request for continuance or alternatively that certain conditions be attached and incorporated to the issuance of the UIC permit for the Well. Administrative Record Index (hereinafter "AR") at 0117 – 0120. Also the issue was raised at the December 8, 2010, hearing before the Board of Oil, Gas and Mining. AR 0117, AR 0206 at pp. 7:7 - 9:1, 72:9 – 73:8, 196:24 – 197:25. Additionally, on February 1, 2011, Living Rivers filed a Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (hereinafter "Motion for Rehearing"). AR 0160 – 0171.

II. Whether the Utah Board of Oil, Gas and Mining decision granting the UIC Permit without proposed monitoring conditions was an abuse of discretion in light of the whole record demonstrating substantial evidence and data that supports a finding

that the proposed injection well may initiate fractures through the overlying strata or enable the injected fluid or formation fluid to enter the Colorado River.

Determinative law: U.C.A. §§ 40-6-1, 40-6-5; U.C.A. §§ 63G-4-401, 63G-4-403, 63G-4-404, 63G-4-405; U.A.C. Rules R649-5-1, R649-5-2, R649-5-3, R649-5-4, R649-5-5, R649-5-6

Standard of Review: An agency's findings are reviewed under a substantial evidence standard. *Martinez v. Media-Paymaster Plus, et al.*, 2007 UT 42, 164 P.3d 384 (Utah 2007).

Citation to record showing issue preserved in administrative proceeding: Appellant preserved this issue by raising and arguing the same in their December 7, 2010, request for continuance or alternatively that certain conditions be attached and incorporated to the issuance of the UIC permit for the Well. Administrative Record Index (hereinafter "AR") at 0117 – 0120. Also the issue was raised at the December 8, 2010, hearing before the Board of Oil, Gas and Mining. AR 0117, AR 0206 at pp. 7:7 - 9:1, 72:9 – 73:8, 196:24 – 197:25. Additionally, on February 1, 2011, Living Rivers filed a Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (hereinafter "Motion for Rehearing"). AR 0160 – 0171.

III. Whether the Utah Board of Oil, Gas and Mining decision denying Living River's Request for Reconsideration and in the Alternative Request for a Stay of the Order Issued on January 13, 2011, that presented new evidence through expert

testimony that supports a finding that the proposed injection well may initiate fractures through the overlying strata or enable the injected fluid or formation fluid to enter the Colorado River was error and an abuse of discretion.

Determinative law: U.C.A. §§ 40-6-1, 40-6-5; U.C.A. §§ 63G-4-401, 63G-4-403, 63G-4-404, 63G-4-405; U.A.C. Rules R649-5-1, R649-5-2, R649-5-3, R649-5-4, R649-5-5, R649-5-6

Standard of Review: An agency's findings are reviewed under a substantial evidence standard. *Martinez v. Media-Paymaster Plus, et al.*, 2007 UT 42, 164 P.3d 384 (Utah 2007).

Citation to record showing issue preserved in administrative proceeding: On February 1, 2011, Living Rivers filed a Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (hereinafter "Motion for Rehearing"). AR 0160 – 0171.

DETERMINATIVE STATUTORY, ORDINANCES, AND RULES.

Utah Code Annotated Section 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.

Utah Code Annotated Section 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 nonmerchantable 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.

Utah Code Annotated Section 63G-4-401. Judicial review -- Exhaustion of administrative remedies:

(1) A party aggrieved may obtain judicial review of final agency action, except in actions where judicial review is expressly prohibited by statute.

(2) A party may seek judicial review only after exhausting all administrative remedies available, except that:

(a) a party seeking judicial review need not exhaust administrative remedies if this chapter or any other statute states that exhaustion is

not required;

(b) the court may relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies if:

(i) the administrative remedies are inadequate; or

(ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion.

(3) (a) A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under Subsection 63G-4-302(3)(b).

(b) The petition shall name the agency and all other appropriate parties as respondents and shall meet the form requirements specified in this chapter.

Utah Code Annotated Section 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.

Utah Code Annotated Section 63G-4-404. Judicial review -- Type of relief:

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

Utah Code Annotated Section 63G-4-405. Judicial review -- Stay and other temporary remedies pending final disposition:

(1) Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, according to the agency's rules.

(2) Parties shall petition the agency for a stay or other temporary remedies unless extraordinary circumstances require immediate judicial intervention.

(3) If the agency denies a stay or denies other temporary remedies requested by a party, the agency's order of denial shall be mailed to all parties and shall specify the reasons why the stay or other temporary remedy was not granted.

(4) If the agency has denied a stay or other temporary remedy to protect the public health, safety, or welfare against a substantial threat, the court may not grant a stay or other temporary remedy unless it finds that:

- (a) the agency violated its own rules in denying the stay; or

(b) (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;

(ii) the party seeking judicial review will suffer irreparable injury without immediate relief;

(iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; and

(iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

Utah Oil and Gas Conservation Rule 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.

STATEMENT OF CASE

At the administrative hearing and process below before the Board of Oil, Gas and Mining, Petitioner/Appellant submitted substantial evidence and data that supports a finding that the proposed injection well may cause damage to other resources and cause formation fluid to enter the Colorado River. Notwithstanding this evidence and requested reasonable monitoring conditions to be placed on the UIC permit to prevent such pollution or damage, The Board of Oil, Gas and Mining erred and abused its discretion when it failed to consider the evidence and when it approved the UIC permit to WestWater without specific monitoring well conditions. The Board of Oil, Gas and Mining is specifically mandated to ensure that injection wells are 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 Oil and Gas Conservation Rule R649-5-2(1). Failing to consider and impose those conditions was an abuse of discretion.

STATEMENT OF FACTS

On May 26, 2009, Westwater Farms, LLC (hereinafter “Westwater”) filed an application for administrative approval by the Utah Division of Oil, Gas, and Mining (hereinafter “Division”), as a Class II underground injection well for Harley Dome #1 SWD Well located in the NW1/4 NE1/4 of Section 10, Township 19 South, Range 25 East, S.L.M., Grand County, Utah (hereinafter “Well”). Administrative Record Index (hereinafter “AR”) at 0017 – 0022. The location of the well is approximately five miles from the Colorado River, which is a primary source of drinking water and a designated critical habitat. *Id.*; see also, AR 0023 – 0024 ¶ 3. The Well is to be utilized for the disposal of “produced” water generated from oil and gas production in Uintah Basin, Paradox Basin, the San Rafael Swell, Book Cliff areas, and sources in Piceance Basin in western Colorado. *Id.*; see also, AR 0026 ¶ 15, AR 0206 at pp. 34:18 – 35:1. “Produced water” is considered an industrial waste.

Approximately one year later, during the summer of 2010, Westwater amended and augmented its application for the UIC before the Division. Following publication of the notice of the augmented application, on August 27, 2010, September 3, 2010, and September 7, 2010, the United States Department of the Interior, Bureau of Land Management (hereinafter “BLM”); Appellant, Living Rivers (by and through John Weisheit) and Bill Love, respectively, filed objections to Westwater’s application with the Division. Administrative Record Index (hereinafter “AR”) at 0024 ¶ 5, 0036, 0070, AR 0206 at pp. 25:2 – 30:11. Additionally, on September 15, 2010, the United States Department of Interior, Fish and Wildlife Service (hereinafter “Fish &

Wildlife”) filed a cautionary letter with the Division outlining specific possible negative environmental impacts the injection well poses on the water quality in Westwater Canyon and Upper Colorado River, including possible seepage of the produced water into the Colorado River. AR at 0040 – 0041, AR 0206 at pp. 25:2 – 30:11.

Based on the protests, Westwater filed its Request for Agency Action and a Motion to Convert Informal Adjudicative Proceeding to a formal proceeding before the Utah Board of Oil, Gas and Mining (hereinafter “Board”).¹ AR at 0001 – 0016. On November 8, 2010, the Division converted the proceeding from informal to formal and a December 8, 2010, hearing before the Board was scheduled. AR at 0066, 0072 – 0076.

On November 24, 2010, Living Rivers filed its Motion to Continue Hearing on Notice of Agency’s Action that was subsequently opposed by Westwater and subsequently denied by the Board on December 2, 2010, for failure to demonstrate “good cause.” AR 0077 – 0096. On December 7, 2010, Living Rivers, again requested for continuance or alternatively requested certain conditions be attached and incorporated to the issuance of the UIC permit for the Well, including installation of three monitoring wells (east, southeast, and south) between the injection well and the Colorado River prior to Westwater’s injection operations commencement. AR at 0117 – 0120.

At the December 8, 2010, hearing Appellant, Living Rivers, raised its continuance motion and request for placement of conditions based on several concerns and deficiencies in Westwater's evidence supporting its application, including that the injected fluid will migrate upwards against the dip of the Wingate to the southeast to an outcrop of the Wingate located in canyons carved by the Colorado River near Westwater Canyon, approximately 5.8 miles from the Well. AR 0117, AR 0206 at pp. 7:7 - 9:1. Additionally, Living Rivers, raised the issue that H₂S gas could be generated within the Wingate injection intervals in connection with the injection operations, and that the H₂S gas could migrate into and thereby adversely affect a deposit of helium located in the Entrada to the northwest or migrate to the southeast to the exposures of the Wingate in the Westwater Canyon area. AR 0206 at pp. 72:9 – 73:8. Living Rivers further suggested that as a condition to the UIC permit that monitoring wells be placed between the injection well and the Colorado River. AR 0206 at pp. 196:24 – 197:25. The same day, the Board denied Living River's motion for continuance and voted unanimously that the petitioner had met its procedural requirements for approval of the UIC Well and made no mention or analysis of the public concerns raised by Living Rivers or requested conditions on the UIC permit. AR 0206 at p. 198:22 – 198:25. Subsequently, the proposed Findings of Fact, Conclusions of Law, and Order was submitted by Westwater and after reviewing the

¹ The BLM and Fish and Wildlife subsequently withdrew their objections prior to the December 8, 2010, hearing before the Board. AR 0038, 0040 – 0041.

Living Rivers objections thereto, the Board entered Westwater's proposed Findings of Fact, Conclusions of Law, and Order on January 13, 2011. AR 0121 – 0159.

On February 1, 2011, Living Rivers filed a Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 (hereinafter "Motion for Rehearing"). AR 0160 – 0171. In its Motion for Rehearing, Living Rivers, states that it has sought and obtained an expert witness, Kip Solomon, who "[h]as indicated that there are additional questions that need to be examined before the public safety and welfare for the citizens of Grand County and the State of Utah can be properly protected" and supports the proposed monitoring wells conditions to be placed on the permit. AR 0161. Westwater and the Division filed oppositional memoranda to Living River's Motion for Rehearing arguing, in part, that Living Rivers did not provide a proper basis for rehearing and/or was deficient on February 17, 2011 and February 22, 2011, respectively. AR 0174 – 0189. On February 22, 2011, Living Rivers filed a Supplement to its Motion for Rehearing, providing Professor Kip Solomon's, Chairman of the Department of Geology, University of Utah, expert report that expresses his research, investigation and concerns that the build-up of fluid pressure as a result of an injection of produced water at the Well could reverse the regional hydraulic gradient and cause existing Wingate Formation water to discharge into the Colorado River and supported monitoring well conditions to be placed on the UIC permit. AR 0195 – 0205, The Board denied the Motion for Rehearing the same day, February 22, 2011, on the grounds that Living Rivers failed to comply with the

Board's rehearing rule and failed to show good cause supporting a rehearing. AR 0190 - 0194.

SUMMARY OF ARGUMENT

Appellant Living Rivers, believes that the Board of Oil, Gas and Mining abused its discretion when it approved the UIC permit to WestWater without specific monitoring well conditions in light of the whole record and request for rehearing demonstrating substantial evidence and data that supports a finding that the proposed injection well may cause formation fluid to enter the Colorado River. The Board of Oil, Gas and Mining is specifically mandated to ensure that injection wells are 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 Oil and Gas Conservation Rule R649-5-2(1). Failing to consider and impose those conditions was an abuse of discretion. Accordingly, Living Rivers respectfully request this court to set aside the Board of Oil, Gas and Mining order issuing the UIC permit to Westwater without Living River's requested monitoring conditions and order the Board of Oil, Gas, Mining to exercise its discretion as required by law to properly and fully hear and evaluate evidence and data supporting a finding that the proposed injection well may cause formation fluid to enter the Colorado River or other damage to other resources.

ARGUMENT

I. THE UTAH BOARD OF OIL, GAS, AND MINING FAILED TO IMPOSE CERTAIN CONDITIONS TO WESTWATER'S UIC PERMIT WHEN EVIDENCE OF A SIGNIFICANT RISK TO THE HEALTH OF PERSONS WAS AT ISSUE.

In 1982, pursuant to 40 C.F.R. § 147.2251, the program for Class II injection wells in the State of Utah, “[i]s the program administered by the Utah Department of Natural Resources, Division of Oil, Gas, and Mining, approved by EPA pursuant to section 1425 of the SDWA.” 40 C.F.R. § 147.2251. The requirements for the Class II wells are governed by applicable federal regulations, Utah Code Annotated, 1953, section 40-6-1 through 40-6-19, as amended, and the Utah Oil and Gas Conservation General Rules R649-5-1 through R649-5-7. *Id.*; *see also, Pud No. 1 v. Wash. Dep't of Ecology*, 511 U.S. 700, 712 (1994)(stating that state law may place restrictions or limitations in compliance with applicable federal regulations).

For all Class II injection wells, they must be constructed to be separated from any underground sources of drinking water by a confining zone that is free of known open faults or fractures and to ensure that “[w]ell injection will not result in the movement of fluids into an underground source of drinking water [USDW] so as to create a significant risk to the health of persons.” 40 C.F.R. 146.22. Utah regulations specifically require that, “[i]njection 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 Oil and Gas Conservation Rule R649-5-2(1)(emphasis added). To ensure the integrity of

the well and to eliminate, prevent, or reduce the possible pollution or contamination, *other test procedures or devices* may be required by the division. Utah Oil and Gas Conservation Rule R649-5-5(3.3).

A. THE UTAH BOARD OF OIL, GAS AND MINING DECISION GRANTING THE UIC PERMIT AND DENYING MOTION FOR REHEARING WITHOUT PROPOSED MONITORING CONDITIONS WAS AN ABUSE OF DISCRETION IN LIGHT OF THE WHOLE RECORD DEMONSTRATING SUBSTANTIAL EVIDENCE AND DATA THAT SUPPORTS A FINDING THAT THE PROPOSED INJECTION WELL MAY INITIATE FRACTURES THROUGH THE OVERLYING STRATA OR ENABLE THE INJECTED FLUID OR FORMATION FLUID TO ENTER THE COLORADO RIVER

On December 7, 2010, Living Rivers, presented several concerns and issues related to WestWater's proposed UIC permit operations. One of the concerns raised on December 7, 2010, was that "[t]he bedding planes to the south are fractured by the Uncompahgre Uplift creating the possibility that a pressurized aquifer (360 psi) could seep through these fractures and enter the Colorado River." AR 0119. "[T]he canyon cutting off the Colorado River has removed considerable amounts of overburden and it is reasonable to assume that the waste water would migrate toward the Colorado River, since the density pressure at the gorge is lower than the overburden pressures to the north." AR 0119. Additionally, Living Rivers raised the issues that "sandstones with high transmissivity also occur above Westwater Ranger Station, and actually have a closer proximity to the injection well than Westwater Canyon[,]" as well as "[s]ome of these porous sandstones extend below the surface of the Colorado River and,

consequently, any seep below the level of the river's surface" that may occur would likely not be observed. AR 0119 – 0120.

Although the Board of Oil, Gas and Mining recognized at the hearing that it's main concern at the hearing for approving the permit application was "[t]hat they don't have the environmental contamination and the leaching issue" assuming that the state of art facility is non-existent or doesn't work, the Board did not consider or evaluate the concerns of seepage, migration of formation waters, or that the injection operations may initiate fractures through the overlying strata either at the hearing or in Living River's request for rehearing. AR 0206 at pp. 38:15 – 38:22, 43:9 – 43:14. Furthermore, even in light of testimony from Mr. Stewart, WestWater's expert, that three monitoring wells as a condition would not be a problem, the Board still did not consider them as a pertinent safety precaution. AR 0206 at p. 88:1 – 88:16.

Rather, evidence presented was based on "modeling" that the injection fluid was compatible with the formation water if an appropriate and effective "sequestering agent" was generated at some time in the future. AR 0206, pp. 46:6 – 47:6, 47:24 – 48:2. Living Rivers raised the concern that "modeling" was inappropriate evidence and lacked foundation to prove compatibility. AR 0206 at pp. 50:11 – 50:21, 51:21 – 51:25. Additionally, the only evidence presented in contravention to the possibility of fractures was that "frac flow back water" was not to be injected. AR 0206 at p. 59:4 – 59:13. Additionally, the only evidence presented to confirm and monitor that there are no seeps was based on a casual inspection from Paul Stone associated with WestWater, and two BLM rangers. AR 0206 at pp. 78:24 – 82:6.

David L. Allin, a petroleum geologist, whom Living Rivers objected to as a hydrology expert based on his lack of education and expertise in the operations of the injection well proffered blanket testimony that the injected produced water would not migrate or travel to contaminate the Colorado River, but no analysis to formation water migration. AR 0206 at pp. 99:7 – 103:3, 103:4 – 175:2. WestWater did not provide any expert testimony from a certified hydrologist. *Id.* Rather the Board on its own initiative qualified Mr. Allin as an expert in hydrology on the grounds that “there’s very little difference at the end” because you first have to become a geologist. AR 0206 p. 104:17 – 106:17.

Moreover, on February 22, 2011, Living Rivers, submitted an expert report of D. Kip Solomon, Ph.D., PG, setting forth his conclusions and recommendations to ensure the prevention of pollution or contamination of other resources, including the Colorado River, by the utilization of the injection well by WestWater. AR 0199 – 0205. In his review and analysis, Dr. Solomon finds that “[t]he slope of the simulated potentiometric surface is towards the [Colorado] river for most of the cross section as a result of the injection” and “[w]hen the higher hydraulic diffusivity value is utilized . . . the existing Wingate Formation fluid would begin discharging into the Colorado River.” AR 0202. This supported and illustrates his concern “that the buildup of fluid pressure as a result of an injection could reverse the regional hydraulic gradient and cause existing Wingate Formation water to discharge into the Colorado River.” AR 0202. This propagation of fluid pressure may reverse what currently appears to be northward moving regional groundwater flow. *Id.* Dr. Solomon then offers

Colorado River from Wingate Formation Water discharging into the Colorado River as a result of the injection operation. AR 0202 – 0203.

The Board of Oil, Gas and Mining summarily and without any consideration of the proposed expert testimony, issued its opinion denying Motion for Rehearing in an abuse of discretion. Where evidence is presented to the contrary, the Board abused its discretion by failing to consider and evaluate the potential, significant risks to the health of persons and to the Colorado River. Utah Oil and Gas Conservation Rule R649-5-2(1) (“[i]njection 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.” emphasis added).

CONCLUSION

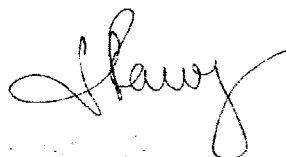
Based on the foregoing, Appellant Living Rivers, believes that the Board of Oil, Gas and Mining abused its discretion when it approved the UIC permit to WestWater without specific monitoring well conditions in light of the whole record and request for rehearing demonstrating substantial evidence and data that supports a finding that the proposed injection well may cause formation fluid to enter the Colorado River. The Board of Oil, Gas and Mining is specifically mandated to ensure that injection wells are 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 Oil and Gas Conservation Rule R649-5-2(1). Failing to consider and impose those conditions was an abuse of

discretion. Accordingly, Living Rivers respectfully request this court to set aside the Board of Oil, Gas and Mining order issuing the UIC permit to Westwater without Living River's requested monitoring conditions and order the Board of Oil, Gas, Mining to exercise its discretion as required by law to properly and fully hear and evaluate evidence and data supporting a finding that the proposed injection well may cause formation fluid to enter the Colorado River or other damage to other resources.

Respectfully submitted this 14th day of June 2011.



Patrick A. Shea
Patrick A. Shea, P.C.



Jacque M. Ramos
J. Ramos Law Firm P.L.L.C

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June 2011, I caused true and correct copies of the BRIEF OF APPELLANT to be mailed via first class mail postage prepaid to the following:

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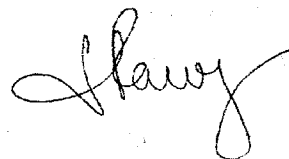
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ADDENDUM

EXHIBIT 1

EXHIBIT 1

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, SLM, GRAND COUNTY, UTAH,
10 AS A CLASS II INJECTION WELL.

11
12 -----
13 DOCKET NO. 2010-029 CAUSE NO. UIC-358.1
14 -----

15 TAKEN AT: Department of Natural Resources
16 1594 West North Temple, Room 1040
17 Salt Lake City, Utah

18 DATE: Wednesday, December 8, 2010

19 TIME: 10:42 a.m. to 4:38 p.m.

20 REPORTED BY: Michelle Mallonee, RPR

21
22 ATKINSON BAKER COURT REPORTING
23 JOB #A403309
24
25

1 APPEARANCES

2
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6 Jake Y. Harouny
7 James T. Jensen
8 Kelly L. Payne
9 Samuel C. Quigley
10 Jean Semborski (Excused)

11 DIVISION OF OIL, GAS AND MINING:

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13 Dana Dean, Associate Director, Mining
14 John Rogers, Associate Director, Oil and Gas
15 Jim Springer, Public Information Officer
16 Steve Schneider, Administrative Policy Coordinator
17 Julie Ann Carter, Secretary to the Board

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21 Emily Lewis - Division Attorney
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1 CHAIRMAN JOHNSON: Thank you, Mr. Shea.

2 Is there anyone else present who would like to
3 address the Board regarding this matter? Seeing no one.

4 MR. JENSEN: Given that they've got a hearing on
5 tonight, why don't we take ten minutes and then caucus
6 and see whether we're inclined to reach a decision or
7 take it under advisement.

8 CHAIRMAN JOHNSON: Okay. Let's take a
9 ten-minute break.

10 And Mr. Clawson, I believe you have the next
11 matter, also.

12 MR. CLAWSON: It should be very short.

13 CHAIRMAN JOHNSON: It's just a report.

14 MR. CLAWSON: But I have to tell you about
15 something, too. But it will be very short, about five,
16 ten minutes.

17 CHAIRMAN JOHNSON: Then we will be hearing the
18 Wolverine matter after that. So let's take a ten-minute
19 break.

20 (A break was taken from 4:24 p.m. to 4:35 p.m.)

21 CHAIRMAN JOHNSON: Let's go back on the record.

22 Regarding the Westwater Farms request, the Board
23 feels unanimously that the petitioner has met its
24 requirements for approval of the UIC well. The injection
25 pressure should be set at 360 psi, subject to monitoring.

1 And in accordance with Board rules, if any
2 parties would like the decision by the Board
3 reconsidered, they have 20 days in which to do so.
4 So Mr. Clawson, would you please prepare the
5 Order?
6 MR. CLAWSON: I'd be glad to, Mr. Chairman.
7 The rules provide that I should have the Order
8 prepared within five business days after this hearing.
9 And I think it's pretty obvious I've got kind of a lot to
10 do. So I'd appreciate if there would be a little bit
11 more time for that.
12 CHAIRMAN JOHNSON: Mr. Shea would probably be
13 agreeable to you taking 20 days.
14 MR. SHEA: I'd be happy with that.
15 MR. JOHNSON: The 20 days runs from the written,
16 signed Order.
17 CHAIRMAN JOHNSON: That's 20 days from the
18 signed Order, Mr. Shea.
19 MR. SHEA: Yes, I understand that. And if Mr.
20 Clawson would like my help, I'm more than happy to...
21 MR. CLAWSON: Sure.
22 CHAIRMAN JOHNSON: Thank you very much.
23 MR. SHEA: In that time period, is the
24 administrative record open?
25 CHAIRMAN JOHNSON: No. The record is closed.

1 The record is closed.

2 If you would like our decision on the Order
3 reconsidered, you'll have 20 days from the date it's
4 signed to have that reconsidered.

5 MR. SHEA: I understand.

6 CHAIRMAN JOHNSON: Thank you.

7 (The matter was concluded at 4:38 p.m.)

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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 typewritten 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

EXHIBIT 2

FILED

JAN 13 2011

BEFORE THE BOARD OF OIL, GAS AND MINING

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

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

**IN THE MATTER OF THE)
APPLICATION OF WESTWATER)
FARMS, LLC FOR ADMINISTRATIVE)
APPROVAL OF THE HARLEY DOME)
1 SWD WELL LOCATED IN SECTION)
10, TOWNSHIP 19 SOUTH, RANGE 25)
EAST, S.L.M., GRAND COUNTY,)
UTAH, AS A CLASS II INJECTION)
WELL)**

**FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER**

Docket No. 2010-029

Cause No. UIC-358.1

This Cause came on regularly for hearing before the Utah Board of Oil, Gas, and Mining (the "Board") on Wednesday, December 8, 2010, at the hour of 9:00 a.m. in the Auditorium of the Department of Natural Resources, 1594 West North Temple, Salt Lake City, Utah. The following Board members were present and participated at the hearing: Douglas E. Johnson, Chairman, Samuel C. Quigley, Jake Y. Harouty, Ruland J. Gill, Jr., Kelly L. Payne, and James T. Jensen. John R. Baza, Director, and John Rogers, Associate Director--Oil and Gas, were present for the Utah Division of Oil, Gas and Mining (the "Division"). The Board was represented by Michael S. Johnson, Assistant Attorney General.

The petitioner, Westwater Farms, LLC, was represented by Thomas W. Clawson of Van Cott, Bagley, Cornwall & McCarthy, and David R. Stewart, Environmental Engineer, and David L. Allin, Geologist, testified on behalf of the petitioner.

The Division was represented by Emily Lewis, Assistant Attorney General, and Christopher J. Kierst, UIC Permitting Specialist, and Brad Hill, Permitting Manager and Geologist,

testified on behalf of the Division. The Division filed its Staff Memorandum to the Board on November 8, 2010.

Respondent Living Rivers was represented by Patrick A. Shea and Jacque M. Ramos. On November 24, 2010, along with a Notice of Appearance, Living Rivers filed a Motion to Continue Hearing on Notice of Agency's Action. By Order dated December 2, 2010, the Board denied Living River's motion. By letter dated December 7, 2010, and by motion made at the December 8, 2010 hearing, Living Rivers again requested that the hearing be continued, or in the alternative, that certain conditions be attached and incorporated into the UIC permit for the Subject Well (as defined herein) ("Living River's Second Motion to Continue").

No other persons or parties appeared at or participated in the hearing.

The Board, having fully considered the testimony adduced and the exhibits received into evidence at the December 8, 2010 hearing, being fully advised, and good cause appearing, hereby makes the following findings of fact, conclusions of law, and order:

FINDINGS OF FACT

1. Westwater Farms, LLC ("Westwater") originally filed its application for administrative approval of the Harley Dome #1 SWD Well located in the NW¼NE¼ of Section 10, Township 19 South, Range 25 East, S.L.M., Grand County, Utah (the "Subject Well" and "Subject Lands," respectively) as a Class II underground injection well for the disposal of produced water on May 26, 2009. Westwater provided a copy of the application to all operators, owners, and surface owners within a one-half mile radius of the Subject Well as required by Rule R649-5-2(12), Utah Administrative Code ("U.A.C.").

2. Westwater's original application was amended and augmented with supplemental information filed with the Division during the summer of 2010 (together with the

original application, the "Application"). On August 23, 2010 and pursuant to Rule 649-5-3(2), U.A.C., the Division published notice of the Application in the Salt Lake Tribune, Deseret News, newspapers of general circulation in Salt Lake City and Salt Lake County. Notice also was published on the website utahlegals.com. In addition, on August 26, 2010, the Division published notice of the Application in the Moab Times-Independent, a newspaper of general circulation in Emery, Grand, and San Juan Counties.

3. Following publication of the notice of the Application, the Division received a letter dated August 27, 2010, from the United States Department of the Interior, Bureau of Land Management ("BLM") objecting to the Application, and another undated letter (received by the Division on September 7, 2010) from Bill Love, an individual, also objecting to the Application. The Division also received an objection to the Application by email dated September 3, 2010, from John Weisheit on behalf of Living Rivers. The Division also received an advisory letter dated September 15, 2010, which included a request for water analysis and monitoring program, from the United States Department of the Interior, Fish and Wildlife Service ("FWS"). The BLM withdrew its objection by letter dated September 30, 2010.

4. Based on the protests filed in this Cause and pursuant to Rule R649-5-3(4), U.A.C., Westwater filed its Request for Agency Action (the "Request") and a Motion to Convert Informal Adjudicative Proceeding in accordance with Rule R649-10-1(2), U.A.C. The stated purpose of the Request was to set the matter for hearing by the Board at the Board's regularly scheduled hearing on December 8, 2010. By Order dated November 8, 2010, the Division converted the proceeding to a formal proceeding.

5. Notices of the time, place, and purposes of the Board's regularly scheduled December 8, 2010 hearing were mailed to all interested parties by first-class mail, postage prepaid,

and were duly published in the Salt Lake Tribune, Deseret Morning News, and the Moab Times Independent pursuant to the requirements of Rule R641-106-100, U.A.C. Copies of the Request were mailed or emailed by Westwater to all interested parties, including Living Rivers, Bill Love, and the FWS, pursuant to Rule R641-104-135, U.A.C.

6. Westwater is a Utah limited liability company in good standing, having its principal place of business in Cisco, Utah. Westwater is qualified to do and is doing business in Utah.

7. Westwater owns fee simple title to the lands upon which the Subject Well is located. Westwater owns all of the Subject Lands except a triangular-shaped parcel located in the southeast corner of subject Section 10, which is owned by Mid-America Pipeline Company, as depicted on Exhibit 3, which was introduced and admitted at the hearing.

8. Besides Westwater, the surface owners within a one-half mile radius of the Subject Well include the United States of America, State of Utah, and Mid-America Pipeline Company. Grand County and the Federal Highway Administration own the surface rights, based on rights-of-way or easements, to old Highway 6 & 50 and Interstate 70, respectively. The subject federal public lands are administered by the BLM, and the Utah State lands are administered by the Utah School and Institutional Trust Lands Administration ("SITLA").

9. Portions of the oil and gas minerals in the lands embraced within the Subject Lands and within a one-half mile radius of the Subject Well are subject to United States of America Oil and Gas Leases Nos. UTU-70176 and UTU-82619, and Utah State Mineral Lease No. ML-49255. The other oil and gas minerals are unleased. As of September 9, 2010, Shiprock Helium, LLC owned the leasehold rights under UTU-70176, and Petro Resource Corp. owned the leasehold rights under UTU-82619. Retamco Operating, Inc. owns the leasehold rights under ML-49255.

The federal oil and gas leases are administered by the BLM, and the Utah State minerals are administered by SITLA.

10. The Application for Permit to Drill ("APD") for the Subject Well was filed with the Division on June 1, 2009, and the APD was approved by the Division on December 1, 2009. The Subject Well was spud on May 13, 2010, and completed as an injection well on July 13, 2010.

11. Westwater will operate the Subject Well and the proposed injection operations.

12. The formation to be approved by the Board for water injection disposal operations is the Wingate Sandstone Formation ("Wingate"). In the vicinity of the Subject Lands, the Wingate is an aeolian sandstone deposit approximately 337 feet thick. The Wingate is a porous reservoir and is capable of accepting the volume of produced water proposed to be injected by Westwater.

13. The entire stratigraphic interval of the Wingate between 1,342 feet to 1,679 feet is proposed to be used for injection purposes accessed through casing perforations made in the Subject Well between 1,344 feet to 1,631 feet. Those intervals are mechanically isolated from the formations above and below the Wingate.

14. 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. The Kayenta is approximately 199 feet thick in the vicinity of the Subject Well and is a resistant, impervious formation composed of interbedded shale and sandstone layers with high clay content. Water

salinity samples taken from the Subject Well show that the Kayenta acts as a hydrologic barrier between the Wingate and the Entrada Sandstone Formation, which directly overlies the Kayenta. The Chinle is approximately 138 feet thick at the nearest control point in a plugged and abandoned oil and gas test well located 1.1 miles to the northwest of the Subject Well. The Chinle is a coastal plain shale deposit which demonstrates practically no permeability due to its high clay content. Both the Kayenta and Chinle are competent hydrologic barriers, and therefore, comprise upper and lower hydrologic seals to the aquifer in the Wingate.

15. 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.

16. The following wells have been drilled and/or completed within a one-half mile radius of the Subject Well:

- a. Elizondo Water Well situated in the NW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in June 1965.
- b. Lansdale Government #5 Well situated in the NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in March 1968.
- c. Lansdale Government #10-31-A Well situated in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Section 10, Township 19 South, Range 25 East. The well did not penetrate the Wingate and was plugged and abandoned in August 1975.

17. Westwater's evidence demonstrated that (i) there are no geologic structures near the Subject Well that will allow the injected fluids to migrate to an USDW; (ii) the Wingate is competent to contain the injected fluids and prevent migration to any USDW, and that it will remain competent under the injection pressures and operations; (iii) 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; and (iv) 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.

18. There are no fresh water aquifers within a half-mile radius of the Subject Well.

19. The water to be injected into the Subject Well will come from oil and gas producing wells in the Uintah Basin, Paradox Basin, the San Rafael-Swell and Book Cliff areas, including the Greater Cisco Field in Utah, and sources in the Piceance Basin in western Colorado. There is a need for produced water disposal facilities for these producing basins.

20. The produced water to be injected into the Subject Well will be tested and treated before it is injected to be certain that it is compatible with the formation water in the Wingate.

21. Westwater will inject approximately 6,500 barrels of produced water per day into the Subject Well at an average injection pressure of 330 pounds per square inch ("psi") with a maximum injection pressure of 360 psi. The maximum pressure is based on the results of step-rate

injection tests run in the Subject Well on July 13, 2010 following installation of the final injection mechanical equipment.

22. The Wingate in the vicinity of the Subject Well is part of a structural anticline that plunges to the northwest creating northerly structural dips at the position of the Subject Well. Respondent Living Rivers expressed its concerns that the injected fluids will migrate upwards against the dip of the Wingate to the southeast to an outcrop of the Wingate located in the canyons carved by the Colorado River near Westwater Canyon, approximately 5.8 miles from the Subject Well. The surface exposures of the Wingate in the Westwater Canyon area are approximately 800 feet higher in elevation than the top of the Wingate in the Subject Well. Westwater's evidence demonstrated that 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.

23. Living Rivers also expressed its concerns that H₂S gas could be generated within the Wingate injection intervals in connection with the injection operations, and that the H₂S gas could migrate into and thereby adversely affect a deposit of helium located in the Entrada to the northwest or migrate to the southeast to the exposures of the Wingate in the Westwater Canyon area. Westwater's evidence demonstrated that its operations will remove organic matter from the produced water and treat the water with biocide and sequestering agents before it is injected into the Subject Well to prevent the formation of H₂S gas in the Wingate reservoir, and that it will test the water in the Wingate to be certain that no H₂S gas is being generated in the reservoir.

24. The bond posted with the Division by Westwater is adequate for the purposes of the Subject Well.

25. The Division expressed its support for Westwater's Request at the hearing.

26. The Subject Well is suitable for approval as a Class II injection well and the proposed injection operations are suitable for approval as produced water disposal operations. 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.

27. The Board voted unanimously to approve Westwater's Application and Request for Agency Action.

CONCLUSIONS OF LAW

1. Due and regular notice of the time, place, and purposes of the Board's regularly scheduled December 8, 2010 hearing was given to all interested parties in the form and manner and within the time required by law and the rules and regulations of the Board. Due and regular notice of the filing of the Request was given to all interested parties in the form and manner required by law and the rules and regulations of the Board.

2. The Board has exclusive jurisdiction of the parties and subject matter of this Request for Agency Action, and has the power and authority to make and issue the order herein set forth pursuant to Section 40-6-5(5)(a) of the Utah Code Annotated and Rules R649-5-1 and R649-5-3(4), U.A.C.

3. Good cause appears to authorize underground water disposal operations for produced water utilizing the Subject Well as proposed.

4. Westwater's Application meets all applicable statutory and administrative requirements for the approval of the Subject Well as a Class II injection well.

5. Westwater has sustained its burden of proof, demonstrated good cause, and satisfied all legal requirements for granting Westwater's Request for Agency Action.

6. Approving the Subject Well as a Class II injection well, and approving 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.

ORDER

Based upon Westwater's Request for Agency Action, the testimony and evidence submitted and entered at the December 8, 2010 hearing, and the findings of fact and conclusions of law as stated above, it is therefore ordered that:

1. The Application of Westwater Farms, LLC for approval of the Harley Dome #1 Well as a Class II UIC injection well is approved and Westwater Farms, LLC's Request for Agency Action is granted.
2. The underground injection of produced water into the Wingate Sandstone Formation beneath the Subject Lands for produced water disposal purposes is hereby authorized.
3. The injection pressure in the Harley Dome #1 Well may reach, but not exceed, 360 pounds per square inch.
4. Living River's Second Motion to Continue is denied.
5. Pursuant to U.A.C. Rule R641 and Utah Code Ann. §§ 63G-4-204 to -208, the Board has considered and decided this matter as a formal adjudication.
5. This Findings of Fact, Conclusions of Law, and Order ("Order") is based exclusively on evidence of record in the adjudicative proceeding or on facts officially noted, and constitutes the signed written order stating the Board's decision and the reasons for the decision, all as required by the Utah Administrative Procedures Act, Utah Code Ann. § 63G-4-208 and U.A.C. Rule R641-109.

6. Notice re Right to Seek Judicial Review by the Utah Supreme Court or to

Request Board Reconsideration: The Board hereby notifies all parties in interest that they have the right to seek judicial review of this final Board Order in this formal adjudication by filing a timely appeal with the Utah Supreme Court within 30 days after the date that this Order is issued. Utah Code Ann. §§ 63G-4-401(3)(a) and -403. As an alternative to seeking immediate judicial review, and not as a prerequisite to seeking judicial review, the Board also hereby notifies parties that they may elect to request that the Board reconsider this Order, which constitutes a final agency action of the Board. Utah Code Ann. § 63G-4-302. The Utah Administrative Procedures Act provides:

(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 sent by mail 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.

Id. The Board also hereby notifies the parties that Utah Administrative Code Rule R641-110-100, which is part of a group of Board rules entitled, "Rehearing and Modification of Existing Orders," states:

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.

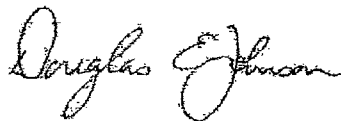
Id. See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. If there is any conflict between the deadline in Utah Code Ann § 63G-4-302 and the deadline in Utah Administrative Code R641-110-100 for moving to rehear this matter, the Board hereby rules that the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the party may still seek judicial review of the Order by perfecting a timely appeal with the Utah Supreme Court within 30 days thereafter.

7. The Board retains continuing jurisdiction over all the parties and over the subject matter of this Cause, except to the extent said jurisdiction may be divested by the filing of a timely appeal to seek judicial review of this Order by the Utah Supreme Court.

8. For all purposes, the Chairman's signature on a faxed copy of this Order shall be deemed the equivalent of a signed original.

DATED this 13 day of January, 2011.

STATE OF UTAH
BOARD OF OIL, GAS AND MINING



By _____
Douglas E. Johnson, Chairman

4819-1630-6952, v. i

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER for Docket No. 2010-029, Cause No. UIC-358.1 to be mailed with postage prepaid, this 18th day of January, 2011, to the following:

Thomas W. Clawson
Van Cott, Bagley, Cornwall & McCarthy
36 South State Street, Suite 1900
Salt Lake City, UT 84111

Westwater Farms, LLC
% Tom Warnes
PO Box 23358
Silverthorne, CO 80498

Michael S. Johnson
Assistant Attorneys General
Utah Board of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116
[Via Email]

Steven F. Alder
Fred Donaldson
Assistant Attorneys General
Utah Division of Oil, Gas & Mining
1594 West North Temple, Suite 300
Salt Lake City, UT 84116
[Via Email]

Grand County
Road Department
125 East Center
Moab, UT 84532

United States Bureau of Land Management
Moab Field Office
82 East Dogwood
Moab, UT 84532

Federal Highway Administration
2520 West 4700 South, Suite 9-A
Salt Lake City, UT 84118-1847

Mid-America Pipeline Company
PO Box 4324
Houston, TX 77210

Utah School and Institutional Trust Lands
Administration
675 East 500 South, Suite 500
Salt Lake City, UT 84102-2818

Petro Resrc Corp.
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Houston, TX 77056

RMOC Holdings, LLC
921 East Belleview Avenue
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[Undeliverable]

Shiprock Helium, LLC
P.O. Box 51166
Amarillo, TX 79159

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Red Lodge, MT 59068-0790

Living Rivers
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Moab, UT 84532

Bill Love
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Moab, UT 84532

United States Fish and Wildlife Service
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Utah Field Office
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Jacque M. Ramos
J. Ramos Law Firm
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Julie Ann Carter

EXHIBIT 3

EXHIBIT 3

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

FILED

FEB 22 2011

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

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IN THE MATTER OF THE
APPLICATION OF WESTWATER
FARMS, LLC FOR ADMINISTRATIVE
APPROVAL OF THE HARLEY DOME 1
SWD WELL LOCATED IN SECTION 10,
TOWNSHIP 19 SOUTH, RANGE 25
EAST, SLM, GRAND COUNTY, UTAH,
AS A CLASS II INJECTION WELL.

ORDER DENYING MOTION FOR
REHEARING

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

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An evidentiary hearing was held on December 8, 2010, and on January 13, 2011, the Board issued its Findings of Fact, Conclusions of Law and Order in the above-captioned matter. On February 1, 2011, Respondent Living Rivers filed a Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 ("Motion for Rehearing"). On February 17, 2011, Petitioner Westwater Farms, LLC filed a Memorandum in Opposition to Living Rivers' Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 ("Opposition Memorandum"). On February 22, 2011, the Division of Oil, Gas and Mining filed a Memorandum in Opposition to Living Rivers' Request for Rehearing and Modification of Existing Order, And in the Alternative, Request for a Stay of the Order Issued on January 13, 2011 ("Division's Memorandum").

NOW THEREFORE, the Board, having considered the above-listed briefs, and good cause appearing, hereby denies the Motion for Rehearing.

Utah Admin. Code R641-110-200 states:

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.

In its Motion for Rehearing, Living Rivers states that it has now sought and obtained an expert witness who has opined in preliminary discussions with Living Rivers that additional questions should be examined by this Board. Motion for Rehearing at 2, ¶3. Because Living Rivers' Motion for Rehearing is based upon newly discovered evidence, the Board's rehearing rule requires that Living Rivers file an accompanying affidavit setting forth the nature and extent of the new evidence, its relevancy to the issues involved, and a statement that Living Rivers could not, with reasonable diligence, have discovered the evidence prior to the hearing. Living Rivers has not submitted the required affidavit or otherwise addressed why the expert testimony it now wishes to present could not have been presented at the December 8, 2010 hearing in this matter. For this and other reasons noted in the Opposition Memorandum and Division's Memorandum, the Board finds that Living Rivers has not complied with the Board's rehearing rule or shown good cause for the Board to grant the Motion for Rehearing.

Living Rivers has requested that in the event the Board denies its request for a new hearing, that the Board stay its decision for a period of at least thirty days to permit Living Rivers to appeal the Board's decision to the Utah Supreme Court. The Motion for Rehearing does not address why a stay of the Board's order is necessary (other than to permit Living Rivers thirty days to prepare its appeal). As noted in the Board's January 13, 2011 Order in paragraph 6 on page 12, the Board's denial of Living Rivers Motion for Rehearing starts a new thirty-day

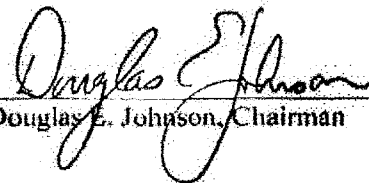
period within which Living Rivers may appeal the Board's decision to the Supreme Court. For these reasons, the Board denies Living Rivers' request for a stay of its decision.

For the reasons discussed above, the Motion for Rehearing is denied.

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

Issued this 22 day of February, 2011

UTAH BOARD OF OIL, GAS & MINING



Douglas E. Johnson, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing ORDER DENYING MOTION FOR REHEARING to be mailed with postage prepaid, this 22 day of February, 2011, to the following:

Thomas W. Clawson
Van Cott, Bagley, Cornwall & McCarthy
36 South State Street, Suite 1900
Salt Lake City, UT 84111

Westwater Farms, LLC
% Tom Warnes
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Michael S. Johnson
Assistant Attorneys General
Utah Board of Oil, Gas & Mining
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Steven F. Alder
Fred Donaldson
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Grand County
Road Department
125 East Center
Moab, UT 84532

United States Bureau of Land Management
Moab Field Office
82 East Dogwood
Moab, UT 84532

Federal Highway Administration
2520 West 4700 South, Suite 9-A
Salt Lake City, UT 84118-1847

Mid-America Pipeline Company
PO Box 4324
Houston, TX 77210

Utah School and Institutional Trust Lands
Administration
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Salt Lake City, UT 84102-2818

Petro Resrc Corp.
777 Post Oak Blvd, Suite 910
Houston, TX 77056

RMOC Holdings, LLC
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[Undeliverable]

Shiprock Helium, LLC
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Amarillo, TX 79159

Retamco Operating, Inc.
Attn: Joe Glennon
P.O. Box 790
Red Lodge, MT 59068-0790

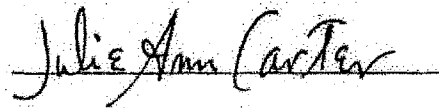
Living Rivers
John Weisheit
PO Box 466
Moab, UT 84532

Bill Love
2871 East Bench Road
Moab, UT 84532

United States Fish and Wildlife Service
Attn: Larry Crist
Utah Field Office
2369 West Orton Circle, Suite 50
West Valley City, UT 84119

Jacque M. Ramos
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Salt Lake City, Utah 84106

Patrick A. Shea
Attorney for Living Rivers
215 South State St. Suite 200
Salt Lake City, Utah 84111

A handwritten signature in cursive script, reading "Julie Ann Carter", written over a horizontal line.