Denise A. Dragoo, Utah State Bar No. 0908
James P. Allen, Utah State Bar No. 11195
Stewart O. Peay, Utah State Bar No. 9584
15 West South Temple, Suite 1200
Salt Lake City, Utah 84101
Telephone: (801) 257-1900
Facsimile: (801) 257-1800
Snell & Wilmer L.L.P.

Attorneys for Red Leaf Resources, Inc.

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

LIVING RIVERS, Petitioner, vs. UTAH DIVISION OF OIL, GAS & MINING, Respondent, RED LEAF RESOURCES, INC., Intervenor-Respondent.	**RED LEAF RESOURCES, INC.'S PREHEARING REPLY BRIEF** Docket No. 2012-017 Cause No. M/047/0103

Pursuant to Utah Admin. Code R641-108-600, the stipulation of the parties and the Board's Order regarding Prehearing Procedures, Intervenor-Respondent Red Leaf Resources, Inc. ("**RLR**" or "**Red Leaf**"), through its counsel of record, respectfully submits its Reply Brief addressing issues raised by Living Rivers concerning the Board's hearing to review the Division of Oil, Gas and Mining's ("**Division's**" or "**DOGM's**") decision to approve Red Leaf's notice of intent to commence large mining operations ("**NOI/LMO**").

ARGUMENT

In its Prehearing Brief Living, Rivers has grossly mischaracterized the allocation of burdens of proof in this hearing. In addition, they have improperly and inconsistently proposed

adoption of judicial appellate standards of review. The following discussion explains these errors.

I. NONE OF LIVING RIVERS' BURDENS OF PROOF CAN BE SHIFTED TO EITHER THE DIVISION OR RED LEAF

Living Rivers relies upon a strained interpretation of the Utah Supreme Court's decision in *Harken Southwest Corp. v. Board of Oil, Gas & Mining* to propose a novel shared burden of proof for the Board's hearing. *See* 920 P.2d 1176, 1182 (Utah 1996). There is no reason to assume, as Living Rivers has, that any party to a contested proceeding may be a "proponent of a contested fact" that must be proven by a preponderance of the evidence. In this matter, only Living Rivers has contested any facts regarding the approved NOI/LMO by placing them before the Board in a Request for Agency Action ("Request"). At hearing, Red Leaf will contest many, if not all, of Living Rivers' factual assertions set forth in the Request. At the same time, Red Leaf does not contest any fact set forth in the NOI/LMO, or the Division's decision approving the permit and is under no burden of proof as to such matters before the Board. It is safe to assume that the Division will not contest any of the facts it relied upon or set forth in its approval of the NOI/LMO.[1] *See* March 9, 2012 Findings of Fact, Conclusions of Law and Order. At the hearing, Living Rivers will have the burden of producing evidence that shows that the Division's approval was in error, and the burden of persuading the Board that its evidence proves the existence of facts that demonstrate the Division's purported error in approving the NOI/LMO.

Living Rivers proposes an even less tenable "disappearing" burden of proof for any claim that alleges an absence of evidence supporting a conclusion reached by the Division. Petitioner's

[1] The authority relied upon by the *Harken* Court for its "proponent of a contested fact" dictum clarifies that the dictum applies to a situation where opposing parties offer not merely opposite, but alternative facts to support their positions. *See Koesling v. Basamakis*, 539 P.2d 1043, 1045-46 (Utah 1975) (noting that defendant successfully opposed plaintiff's claims based on existence of a partnership by proving that the business was a joint venture and not a partnership.)

Prehearing Brief 6-7 (June 11, 2012). Under Living Rivers' strained reading of the *Harken* case, it need only allege a lack of supporting evidence for a particular issue in order to shift the entire burden of proof onto its opponent. *Id.* Arguably, proving a negative proposition is difficult, but the substantial evidence standard relied upon by Petitioners illustrates exactly how a protestant must approach the task. A party who asserts that the evidence is insufficient to support a factual finding must marshal the evidence. This requires the Petitioner, in a thorough and scrupulous fashion, to place before the Board every scrap of evidence in the record that tends to support the position it opposes, and then explain why this array of record evidence is legally insufficient. *See, e.g. West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Ut. Ct. App. 1991). The marshaling duty cannot be shifted, *Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 799-800 (Utah 1991) (noting that the duty to marshal evidence must be met by "the one challenging the verdict"), and "applies when a party challenges a court's or an agency's factual findings, regardless of the standard of review at issue." *Martinez v. Media Paymaster Plus/Church of Jesus Christ of Latter-day Saints and Labor Comm'n*, 2007 UT 42, ¶ 17 n. 3. Therefore, if Living Rivers contends that a particular factual finding is unsupported, it must first construct an array of all of the evidence in the record that could conceivably support the proposition, and then destroy that support, one element at a time. Living Rivers cannot, by its mere assertion, deflect this obligation onto either the Division or Red Leaf.

II. EVALUATING THE DIVISION'S APPROVAL UNDER A STANDARD OF "REASONABLENESS" DOES NOT LIMIT THE BOARD TO EVIDENCE APPEARING IN THE RECORD AT THE TIME OF THE DIVISION'S DECISION

In its prehearing brief Red Leaf demonstrated that the Board should consider the Division's decision to approve the NOI/LMO in light of its reasonableness, adopting a standard

of review "akin to" the arbitrary and capricious standard of appellate judicial review. RLR Prehearing Brief at 4 (June 11, 2012); *see Sierra Club v. Air Quality Bd.,* 2009 UT 76, ¶ 14. However, Petitioners have incorrectly proposed the wholesale adoption of the judicial appellate standard from the Utah Administrative Procedures Act ("**UAPA**") into this agency hearing, including an arbitrary and capricious standard. Therefore, Red Leaf hastens to clarify its position regarding the standard of review in this proceeding.

First, there is no legal mandate that would compel the Board to adopt the UAPA standards regarding judicial review for this administrative hearing. *See* Utah Code § 63G-4-403(4)(h)(iv) (identifying arbitrary and capricious decision-making as a basis for judicial reversal.) Living Rivers points the Board to Utah Code Ann. 40-6-10(1) (a) which requires the Board to comply with UAPA, but then applies the wrong standard under UAPA. Formal adjudicative proceedings in this matter are governed by Utah Code § 63G-4-206 which sets no specific standard. As a practical matter, however, the Board's decision in this matter boils down to the reasonableness of the Division's application of the statutes and rules governing the Minerals Program to the facts presented by Red Leaf's NOI/LMO. On judicial review, the courts express this concept as "a reasonable connection between the facts found and the choices made" and identify it as the foundation of arbitrary and capricious review. *See Bourgeous v. Dept. Commerce*, 41 P.3d 461, 463 (Ut. Ct. App. 2002).

This similarity does not support importing into this proceeding all aspects of the arbitrary and capricious standard of judicial review. It would be inappropriate to limit evidence in the Board's hearing to that which was presented to the Division and placed in its record as of March 9, 2012, the date of the NOI/LMO approval. Such an "on-the-record" review by the Board is incompatible with the informal nature of the proceedings before the Division. *See S. Utah*

Wilderness Alliance v. Bd. Of State Lands & Forestry, 830 P.2d 233, 235–36 (Utah 1992) (observing that informal proceedings are unlikely to produce an adequate and reliable record for review by an appellate court.) On the other hand, a formal administrative adjudication, such as the Board's hearing in this matter, affords the parties an opportunity to present evidence, argue, respond, and conduct cross-examination. These procedures would serve little purpose if all permissible evidence were already in the record subject to the standards of appellate judicial review. The Board is fully empowered to decide, whether the NOI/LMO has been appropriately approved, based on both the Division record and all evidence presented to the Board at hearing. Limiting the evidence to a "snapshot" as of the date of the Division's decision is not required by UAPA, even if other aspects of arbitrary and capricious review are appropriate.

III. THE CONTROLLING STATUTE AND RELEVANT POLICY ARGUMENTS SUPPORT THE DIVISION'S APPROVAL OF THE NOI/LMO, IN ADVANCE OF AND CONDITIONED UPON REVIEW OF A GROUNDWATER DISCHARGE PERMIT APPLICATION

Red Leaf demonstrated in its Motion for Summary Decision that the Division was not required to delay issuance of the NOI/LMO until the Utah Department of Environmental Quality, Division of Water Quality ("**DWQ**"), renders its decision on Red Leaf's application for a Groundwater Discharge Permit (the "**discharge permit**"). Red Leaf revisits the topic in this brief primarily to respond to Petitioners' apparent policy arguments imploring the Board to withdraw the NOI/LMO approval until DWQ acts.

In its Motion, Red Leaf demonstrated that no legal authority compels the result that Living Rivers demands. Indeed, the Utah Mined Land Reclamation Act ("**UMLRA**") recognizes that "[Utah's] mining industry is essential to the economic and physical well-being of the state of Utah and the nation." Utah Code § 40-8-2(1). UMLRA specifically disclaims any intent by the

Legislature to impose burdensome, overlapping regulations. *Id.* at § 40-8-5(2)(b) (noting that UMLRA includes provisions that are intended to "minimize the need for operators and prospective operators to comply with duplicative, overlapping, or conflicting requirements" of federal and local laws, including political subdivisions of the state.) Indeed, other agencies with subject matter jurisdiction over Red Leaf's application are not precluded by the Act from imposing conditions on their permits that are consistent with UMLRA. *Id.* at § 40-8-5(1)(c). It follows that the Division, in approving the NOI/LMO, can also impose conditions that are consistent with other agencies' lawful requirements. Finally, approval of the NOI/LMO, even without the conditions regarding DWQ's discharge permit, would not relieve Red Leaf from an obligation to both the Division and DWQ to comply with any subsequent water quality permits. *Id.* at § 40-8-17(1) "The approval of a notice of intention shall not relieve the operator from responsibility to comply with all other applicable statutes, rules, regulations, and ordinances, including but not limited to, those applying to safety, air and water pollution, and public liability and property damage" (emphasis supplied.) Withholding approval of the NOI/LMO pending compliance with other statutes, as Living Rivers demands, is inconsistent with the statutory scheme set forth in UMLRA that contemplates approval of an NOI/LMO, conditioned on compliance with other regulations, but free of overlapping and burdensome regulatory requirements.

Further, Living Rivers does not allege that some important groundwater impact will be left unexamined by the Division's approval of the NOI/LMO prior to DWQ's determination regarding a discharge permit. To the contrary, Living Rivers asserts that the DWQ's review will involve "substantially more scrutiny" based upon a "more detailed" process description presented to "qualified staff engineers." Petitioner's Prehearing Brief at 13–14, 21, 23–24

(June 11, 2012). The Division has recognized the valuable contribution of DWQ by conditioning initiation of operations under the NOI/LMO upon Red Leaf's securing an appropriate ground water discharge permit, or demonstrating that DWQ will not require one. While Red Leaf did not believe that a ground water discharge permit was necessary for the Project, it has complied with DWQ's demand by submitting an application, cooperating with DWQ in its review, and agreeing not to initiate operations under the NOI/LMO until the discharge permit is granted, or determined to be unnecessary. Completely halting the Division's review and approval of the NOI/LMO as Living Rivers demands, to resume it only after DWQ's decision, serves no proper public purpose. To the contrary, it would require exactly the kind of duplicative, overlapping process the Legislature intended to avoid. Further, denying the operator the benefit of the Division's decision to approve the NOI/LMO, would deprive the State of industry that is essential to its well-being. In light of the underlying legislative intent of UMLRA, and the anticipated thorough review by DWQ, there is no legal or practical merit in withholding the mining permit altogether rather than conditioning the NOI/LMO on the DWQ decision.

CONCLUSION

Living Rivers has proposed a strained and unsupported scheme for allocating the burden of proof in the upcoming hearing. The only lawful procedure is to require Living Rivers to prove every factual contention in makes, including its false assertions that certain Division findings are entirely without evidentiary support. While Red Leaf is pleased to make its experts available to assist the Board in its fact-finding, it does so only to oppose the factual assertions of Petitioners, and assumes no affirmative burdens of proof. As to the substantive issues raised by Petitioners, this Reply focuses on the issue surrounding the timing of the NOI/LMO approval vis-à-vis DWQ's discharge permit review. No valid public policy is served by adopting the delay tactic

proposed by Petitioners. With respect to other substantive issues raised in its Motion for Summary Decision and Motion in Limine, Red Leaf has identified key failings in Living Rivers' challenge to approval of the NOI/LMO that should be addressed in oral argument prior to hearing. In its Prehearing Brief, Red Leaf set forth the legal bases supporting the Division's approval of the NOI/LMO. Red Leaf requests the Board to uphold the Division's decision and confirm final approval of the NOI/LMO conditioned upon a determination by DWQ regarding the need for a ground water discharge permit.

RESPECTFULLY SUBMITTED this 20th day of June, 2012.

SNELL & WILMER

Denise A. Dragoo
James P. Allen
Stewart O. Peay
Attorneys for Red Leaf Resources, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2012, a true and correct copy of the foregoing RED LEAF RESOURCES, INC.'S PREHEARING REPLY BRIEF was served by e-mail and was mailed via U.S. mail, postage prepaid, to the following:

Joro Walker
Charles R. Dubuc
Western Resource Advocates
150 South 600 East, Suite 2A
Salt Lake City, Utah 84102

Steven F. Alder
Emily Lewis
Assistants Attorney General
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

Michael S. Johnson
Assistant Attorney General
Counsel for the Board of Oil, Gas and Mining
1594 West North Temple, Suite 300
Salt Lake City, Utah 84116

Julie McKenzie