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Utah Chapter of the Sierra Club, et al v. Utah Division of Oil, Gas and Mining, Utah Board of Oil, Gas and Mining, Alton Coal Development, LLC, and Kane County, Utah : Brief of Appellee

Utah Court of Appeals

IN THE UTAH SUPREME COURT

UTAH CHAPTER OF THE SIERRA CLUB, et al, Petitioners and Appellants, vs. UTAH DIVISION OF OIL, GAS & MINING, UTAH BOARD OF OIL, GAS & MINING, Respondents and Appellees, ALTON COAL DEVELOPMENT, LLC, and KANE COUNTY, UTAH, Respondent/Intervenors and Appellees.	Appeal No. 20100969-SC Agency Docket No. 2009-019 Cause No. C/025/0005

BRIEF OF RESPONDENT-APPELLEES

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vs.

UTAH DIVISION OF OIL, GAS & MINING, UTAH BOARD OF OIL, GAS & MINING,

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CHIA:	Cumulative Hydrologic Impact Assessment
EIS:	Environmental Impact Statement
OSM:	Office of Surface Mining, Reclamation and Enforcement
PHC:	Probable Hydrologic Consequences
PHDI:	Palmer Hydrologic Drought Index
SHPO:	State Historic Preservation Officer
SMCRA:	Surface Mining Control and Reclamation Act of 1977
TDS:	Total Dissolved Solids
UAPA:	Utah Administrative Procedures Act
UCMRA:	Utah Coal Mining and Reclamation Act

Respondents/Intervenors-Appellees Alton Coal Development, LLC ("**Alton**"), the permittee of Coal Hollow Mine Permit No. C/025/0005 ("**Mine Permit**"), and Kane County, a political subdivision of the State of Utah, through its attorneys pursuant to Rule 24(b) of the Utah Rules of Appellate Procedure submit this joint brief in opposition to the opening brief of Petitioners/Appellants Utah Chapter of the Sierra Club, Southern Utah Wilderness Alliance, Natural Resources Defense Council, and National Park Conservation Association (collectively, "**Petitioners**") filed July 1, 2011.[1] The Decision of the Board upholding the mine permit should be affirmed for the reasons set forth herein.

JURISDICTION

This Court has jurisdiction under Utah Code sections 40-10-14(6)(a), 40-10-30(3), and 63G-4-403(1).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

This case involves the approval of a permit to mine coal on private land in Kane County, Utah, issued by the Utah Division of Oil, Gas and Mining (the "Division") and upheld over Petitioners' challenge by the Utah Board of Oil, Gas and Mining (the "Board"). The dispute involves the measures taken by the State and Alton to identify and evaluate two types of resources subject to possible effects from coal mining: cultural and historic resources[2] and water resources. Petitioners' appeal of the Board's decision asks the Supreme Court to determine (1) whether the permit applicant, Alton, provided sufficient information concerning these resources to the Division in support of its

[1] Counsel for Kane County has authorized filing this joint brief on the County's behalf.
[2] In this context "cultural and historic resources" is a term of art that refers broadly to prehistoric objects, structures, and sites as well as those of lesser antiquity.

application for a surface coal mining permit; (2) whether the Division adequately documented its reasons for approving the permit; and (3) whether the Board provided adequate findings and conclusions in its decision to uphold the Division's permit approval.

Judicial review of the Board's decisions regarding permits for coal mining operations is governed by section 30 of the Utah Coal Mining and Reclamation Act ("UCMRA") and by the Utah Administrative Procedures Act ("UAPA"). See Utah Code §§ 40-10-14, 40-10-30, 63G-4-403.

The language of UCMRA vests considerable discretion in the Board to apply its provisions, with explicit grants of discretion that warrants significant deference to the Board's decisions upon judicial review. See LPI Services v. McGee, 2009 UT 41, 215 P.3d 135 at ¶ 8. For example, the Board's interpretations and applications of law under UCMRA are to be set aside only if "clearly erroneous." Utah Code § 40-10-30(3)(e). UCMRA's statement of legislative purpose includes explicit grants of discretion to the Board and Division. See § 40-10-2(1) (Intent to grant "necessary authority" to assure exclusive jurisdiction over coal mining on state and private land); § 40-10-2(6) (Board should exercise the "full reach of state constitutional powers" to regulate coal mining). The Board's powers and functions under UCMRA further evidence intent to allow broad discretion, including discretion in promulgating rules, establishing standards and procedures, employing technical and legal staff, and "[doing] all things and [taking] such other actions retroactively or otherwise within the purposes of this chapter as may be necessary to enforce [UCMRA's] provisions." § 40-10-6. The Legislature specified that the Board be composed of citizens with specific expertise, further evidencing intent to

vest considerable discretion therein. See § 40-6-4(2) (members to be individually "knowledgeable" in mining, environmental, oil and gas, or royalty interest matters). Accordingly, on judicial review, the Board's interpretations of UMCRA and its own rules, together with the Board's applications of the statute and rules to the facts, should be affirmed unless the Board has abused its discretion by interpreting or applying the law in an unreasonable and irrational manner. Sierra Club v. Air Quality Bd., 2009 UT 76, 226 P.3d 719 at ¶ 14.

Issue 1: Did the Board err in concluding that the permit application contained the required information regarding cultural and historic resources in the Coal Hollow Mine's "adjacent area"?

Standard of Review: Whether the Division evaluated the mine's effects on cultural and historic resources in the adjacent area is a question of fact, which the Court reviews under a substantial evidence standard of review. Utah Code §§ 40-10-30(3)(f), 63G-4-403(4)(g). Whether the Board properly found that the Division completed its required consultation with the State Historic Preservation Officer ("SHPO") is a question of law, which the Court reviews for correctness. Utah Code § 63G-4-403(4)(d). Whether the Board correctly agreed with the Division that historic resources in the Town of Panguitch, some 30 miles from the mine, lay beyond its jurisdiction is a question of law, which the Court reviews for correctness. Id.; see Assoc. Gen. Contr. v. Bd. of Oil, Gas & Mining, 2001 UT 112, 38 P.3d 291 at ¶ 18 (applying rational basis review when the Board interprets the operative provisions of law it administers).

Issue 2: Did the Board err in concluding that the Division's permit approval was based on an adequate Cumulative Hydrologic Impact Assessment?

Standard of Review: The Board's conclusion that the Division's Cumulative Hydrologic Impact Assessment ("CHIA") adequately demonstrated that the mine had been designed to prevent hydrologic damage involves the Board's application of law to the facts in a technical area specifically implicating the agency's expertise. Assoc. Gen. Contr. at ¶¶ 18–19. As discussed above, the Board and Division operate under explicit grants of discretion pursuant to UCMRA. In addition to these explicit grants, policy factors support affording particular deference to this determination as an implicit grant of discretion. See Mandell v. Tax Comm'n, 2008 UT 34, 186 P.3d 335 at ¶ 12. First, the Board found that the facts analyzed by the Division are complex, dealing with the interplay of surface and groundwater with the topography and geology of the area. (R. 5613–14 ¶ 158.) Second, the Board's Final Order makes it apparent that the relative expertise, credibility, and depth of understanding of the witnesses on this topic played a significant role in its decision. (R. 5612–16 ¶¶ 148–51, 173.) Third, the Board's statutory role as Utah's expert authority in this area, together with the mandate that judicial review shall not constitute a trial *de novo*, strongly evidences a legislative intent to vest considerable discretion in the Board. See Utah Code §§ 40-6-4(2) (expertise of Board members), 40-10-30(3) (judicial review). An intermediate standard of review affording significant deference to the Board's decision is appropriate, under which the Board's decision should be upheld unless it exceeds the bounds of reasonableness, even if this Court might reach a different conclusion based on its own analysis.

The Board's Order concluding that UCMRA and the Board's rules do not require designation of "material damage criteria" in a CHIA presents questions of interpretation of agency-specific statutes and regulations. This Court reviews those interpretations

under an intermediate standard of review, setting aside the agency's interpretations only if they are unreasonable or irrational. Sierra Club at ¶ 14.

Issue 3: Did the Board err in finding that Alton's hydrologic monitoring plan for the mine adequately describes how data will be used to determine the mine's effects on the hydrologic balance.

Standard of Review: The sufficiency of the hydrologic monitoring plan presents a mixed question of law and fact involving the Division's and Board's application of law to the facts under an explicit grant of discretion. LPI Services at ¶¶ 7–8. The Legislature has explicitly placed the contents, procedures and requirements for permit application materials, including the monitoring plan, within the Division's and Board's discretion. See § 40-10-6(4) (powers, functions, and duties include establishing procedures and requirements for permit applications). Accordingly, significant deference is appropriate in determining the sufficiency of the monitoring plan, and the decision should not be disturbed so long as it has a rational basis.

DETERMINATIVE PROVISIONS

The following determinative provisions are set forth verbatim at Addendum 1-7.

Utah Code § 9-8-301, 302, 404 (historic preservation)

Utah Code § 40-10-2 (exclusive jurisdiction)

Utah Code § 40-10-3(20) (coal mining operations)

Utah Code § 40-10-6(4) (Division's authority to set procedure)

Utah Code § 40-10-10(2)(c)(i)(B),(C) (baseline data), (CHIA)

Utah Code § 40-10-11(2)(c) (CHIA)

Utah Code § 40-10-30(4) (standard for judicial review)

Utah Admin. Code R645-301-411.140, 141.1, 142, 144 (cultural resource rules)

Utah Admin. Code R645-301-724 (baseline data)

Utah Admin. Code R645-301-729.100 (CHIA)

Utah Admin. Code R645-301-731.200, 211, 212, 220, 221, 222 (monitoring data, plan)

Utah Admin. Code R645-100-200 (adjacent area), (coal mining operations)

30 U.S.C. § 1211(c)(1) (state programs)

30 U.S.C. § 1253 (exclusive jurisdiction)

30 C.F.R. § 733 (federal oversight)

30 C.F.R. § 944.10 (approval of Utah program)

STATEMENT OF THE CASE

Petitioners' complaint in this case is about the paperwork that necessarily accompanies the State of Utah's review of the application for the mining permit for the Coal Hollow Mine. It is, at best, only tangentially about the environmental impacts of the mine itself. Petitioners ask the Court to set aside the permit approval and instruct the State to demand further information from the applicant, conduct further analysis of the information, and prepare even more detailed paperwork explaining its reasons for approving the permit application.

Alton, the permittee and mine operator respectfully requests that the Court deny Petitioners' appeal. During an extensive hearing before the Board, Petitioners failed to prove any error or deficiency in the Division's approval of the Mine Permit, nor did they demonstrate any actual or threatened harm to the environment. The Division's approval, in turn, was based on its own thorough review of the eight-volume permit application, spanning a review period of almost two years, including ample opportunity for public review and comment. The thorough vetting required the applicant to identify all resources, cultural, hydrologic, or otherwise, of significance both within its permit area, and near the mine when an effect on the resource was likely.

In this appeal, as before the Board, Petitioners failed to prove, or even attempt to prove, that any resource in or near the mine had been overlooked. Petitioners did not prove, or attempt to prove, that the effect on any identified resource had been miscalculated. In contrast, the record contains ample evidence of the reasoning supporting the Division's and Board's appropriate choices regarding the resources and impacts requiring assessment, and how to assess those impacts.

Petitioners' case relies on their own unsupported theories of law, which they allege to be mandated by non-binding federal interpretive materials. There is simply no basis for substituting Petitioners' strained readings of these non-binding materials for the clear provisions of Utah's Coal Program. Utah is a primacy state for coal mine regulation, meaning that it is authorized to administer its own regulatory program over coal mining, subject to federal oversight, but not federal control. In every issue raised by Petitioners, the provisions of Utah's program set forth the appropriate legal standards and this Court need look no further than their unambiguous provisions. Because the Division and Board faithfully observed these standards, and applied them to the facts in a reasonable manner, the approval of the mine permit should be upheld.

I. NATURE OF THE CASE AND COURSE OF PROCEEDINGS

Petitioners appeal under the UCMRA and UAPA. Utah Code §§ 40-10-30(1); 63G-4-403. They challenge the order of the Board upholding the decision of the Division granting to Alton a surface coal mining permit for the Coal Hollow Mine. Pursuant to UCMRA, the Division is responsible for reviewing coal mining permit applications, receiving public comment, and determining the adequacy of applications. Utah Code §§ 40-10-6, 11, 13. To obtain the approval necessary to conduct surface coal mining operations Alton first submitted its multiple volume permit application to the Division for review in 2007. (R. Hrg. Ex. D1 at \2009\OUTGOING\10192009\0001.pdf, setting forth the chronology of the permit application. Addendum 12.) This mine is located on 635 acres of private land approximately three miles south of Alton, Utah. (R. 5593 ¶¶ 37–39.) This application was supported by years of baseline water data and an extensive analysis of the mine's impact on fish and wildlife, topsoil and subsoil, hydrology,

vegetation and air quality. (R. Hrg. Ex. D8 (Technical Analysis evaluating Alton's submissions in each of these areas. The entire Permit Application appears in Hrg. Ex. D1 at /Coal Hollow/MRP.) After Alton submitted additional application materials, the Division found the application to be complete and began its technical review in 2008. (R. Hrg. Ex. D1 at \2009\OUTGOING\10192009\0001.pdf.) The Division held an informal conference in the Town of Alton on June 16, 2008, to receive additional public comment and accepted follow-up written comments thereafter. Id. The Division's technical staff completed its review and issued its Technical Analysis explaining its findings supporting approval of the application on October 19, 2009. The Division approved the Mine Permit at that time. Id.

Pursuant to the UCMRA and rules promulgated by the Board, Petitioners sought the Board's review of the Division's determination, through a Request for Agency Action and Request for a Hearing. See Utah Code Ann. § 40-10-14; Utah Admin. Code R645-300-200. (R. 1.) Petitioners alleged that the Division overlooked at least thirty-two deficiencies in Alton's permit application. (R. 10-14.) By the time the Board held hearings on the matter, Petitioners had narrowed the focus of their allegations to seventeen issues. (R. 1409.)

The Board hearing began as a formal adjudication on December 8, 2009. After considering various pre-hearing motions and providing opportunity for discovery, the Board heard testimony over several days in April and June, of 2010. (R. 5585.) It then accepted final post-hearing briefs and closed the record in this matter on June 23, 2010. (R. 5585. Transcripts of the hearings are at R. 5876-85.) An interim order announcing its decision was entered by the Board on August 3, 2010. (R. 5454. Addendum 13.) At

the Board's request, Alton and the Division filed proposed findings of fact and conclusions of law on October 6, 2010.[3] (R. 5490.) The Board received Petitioner's objections to the proposed findings of fact and conclusions of law and entered a final order on November 22, 2010. (R. 5585. Addendum 11.) The Final Order upholds the Division's decision and grants the Mine Permit to Alton. (R. 5638.) Petitioners appealed that order and sought a stay which was denied by the Board and this Court. (R. 5553, 5675.) On appeal, Petitioners now focus on three issues—whether the Division adequately analyzed the mine's potential impact on cultural and historical resources in the area adjacent to the mine; whether the Board erred in concluding that the Division's CHIA satisfied the requirements of the Utah Coal Program and the Board's rules; and whether the Board erred in concluding that Alton's Hydrologic Monitoring Plan is adequate under the Board's rules. (Petr's Br. at 1-3.)

II. STATEMENT OF FACTS

The Coal Hollow Mine is located in Kane County, Utah. Its permit area consists of 635.64 acres of private land in Sink Valley, approximately three miles south of the town of Alton. All of the coal included in the permit area is privately owned and leased to Alton. Production of coal from the mine began in December 2010 under the permit at issue in this appeal.[4]

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[3] In their Addendum accompanying their Opening Brief, Petitioners mistakenly identify these proposed findings as the Board's Final Order. The Final Order, with Findings and Conclusions as adopted by the Board, is at R. 5585. (Addendum 11.)

[4] Separate from the permit at issue here, Alton has applied for a federal coal lease from the U.S. Department of the Interior, Bureau of Land Management which is preparing an environmental impact statement ("EIS") for that action. If the federal government offers the coal for competitive leasing, and if Alton submits the winning bid, Alton may file a new permit application with the Division to develop nearby federal coal deposits. This

Both Kane County and the Town of Alton have expressed support for the mine, recognizing the importance of mining to its economic vitality. The Kane County General Plan states that "[t]he mining industry makes up an important part of the property tax base of the County, and its payroll and expenditures for supplies are important to the economic stability of the County."

With that background, Alton sets forth the specific factual background relevant to the issues on appeal.

A. The Coal Hollow Mine Will Not Have An Adverse Impact on Cultural and Historic Resources Outside the Permit Area

The Division has responsibility to protect historic and prehistoric properties eligible for listing on the National Register of Historic Places from the effects of mining, whether or not the property is actually listed. Utah Code §§ 9-8-302(10), 404(1)(a)(i). There are no known prehistoric structures, rock art, or human remains in the Sink Valley area where the Coal Hollow Mine is located. (R. Hrg. Ex. D11, D17, D19.) However, a series of resource inventories commissioned by Alton concluded that the Sink Valley in and near the mine site was the prehistoric location of summer campsites supporting hunting or food-gathering activities. Id. Consistent with this conclusion, the "historic properties" identified in the inventories consisted of fire-cracked rocks, chips from tool making, projectile points, or potsherds, lying on the ground singly or in groups. Id. Certain of these sites were deemed eligible for listing on the National Register of Historic Places under Criterion "D" which indicates any degree of potential for recovering information about history or prehistory. (R. Hrg. Ex. D16 at 20–27. Addendum 14.) For

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federal action (and its accompanying EIS) is not at issue in these proceedings involving the permit for a mine located on private lands.

any eligible site that would be disturbed by mining operations, the Division approved a data recovery and mitigation plan to assure that the site's potential to yield information would be preserved. (See, e.g., R. Hrg. Ex. D14.)

Separate from these properties located at or near the mine site, the Panguitch National Historic District consists of architecturally-significant historic, institutional, commercial, and residential buildings abutting U.S. Highway 89. (R. Hrg. Ex. D16 at 26.) The District is approximately 30 miles from the mine site. (R. 5603 ¶¶ 94–96.) Coal trucks will likely pass through the Town en route to the mine's customers. Id. As with any public road, the trucks will share the highway with other commercial traffic now making use of that road. Id.

B. The Coal Hollow Mine Was Designed To Prevent Material Damage to the Hydrologic Balance

The area in and around the Coal Hollow Mine contains very few water resources. Lower Robinson Creek, one of two surface water features, crosses the northwest corner of the permit area, flowing from northeast to southwest until it reaches Kanab Creek about a mile west of the mine. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, App. 7-1. Addendum 15.) It is ephemeral in most of its reach.[5] Id. The majority of the mine area lies southeast of Lower Robinson Creek within the drainage of Sink Valley Wash, which is ephemeral until it reaches Kanab Creek approximately six miles south of the permit area. Id. There are no rivers, lakes, or perennial streams in the mine area. Id.

[5] An ephemeral stream is usually dry, flowing only in response to precipitation or snowmelt.

There are no significant aquifers in the strata around and immediately beneath the mine. Id. A small amount of groundwater originates on the slopes of the Paunsaugunt Plateau east of the mine and makes its way through unconsolidated sediments into the eastern part of Sink Valley where the mine is located. Id. This shallow alluvial groundwater percolates westward until it is forced to the surface in a cluster of seeps and springs by a buried ridge of impermeable rock. Id. Under most circumstances, this water evaporates without reaching Sink Valley Wash or Kanab Creek. Id.

In considering how the mine could affect these water resources, Alton identified the potential for mining operations to interact with shallow alluvial groundwater as the probable hydrologic consequence ("**PHC**") of mining, and described three mechanisms by which that might occur. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf at 7-24 through 7-44. Addendum 16.) The mine was designed to avoid these effects by first, reducing the eastward extent of the mine pits and second, by providing a contingency plan for installing impermeable barriers if groundwater flows increase. Id. Potential degradation of surface water (originating on the mine site as storm runoff) is prevented because the mine design includes impoundments where all runoff will be captured and evaporated. Id. Finally, the mining operations are designed to quickly backfill mined areas with low-permeability fill materials to eliminate any adverse impact related to post-mining migration of groundwater. Id.

C. Alton Coal's Hydrologic Monitoring Plan Is Effective and Thorough

During mining operations, Alton is under an obligation to continuously monitor surface water and ground water. Utah Admin. Code R645-301-731.200. To meet this responsibility, Alton Coal developed a robust hydrologic monitoring plan. (R. Hrg. Ex.

D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-57 though 7-59, Tables 7-4 through 7-7B. Addendum 16.) Depending on the source, these monitoring obligations are either monthly or quarterly. Id. By monitoring water conditions at the various stations set forth in the plan and approved by the Division, and by comparing those monitoring results with the data obtained through the various methodologies described in the permit application, Alton and the Division can detect whether mining operations are causing a negative impact on water quantity or quality.

Alton specified 54 monitoring sites spread throughout the permit area and adjacent area. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, Table 7-5, DWG.7-10.pdf.) Among other monitoring sites, Lower Robinson Creek will be monitored both above and below the permit area. Id. Sink Valley Wash, though normally dry, will nevertheless be monitored immediately below the permit area and at a location further downstream within its main drainage area. Id. Eight different springs originating in the shallow alluvial groundwater system will be monitored, as will three springs elsewhere in Sink Valley. Id. Alton will also monitor nineteen wells to assess changes in groundwater levels. Id.

In addition to continuously comparing newly-obtained water data to pre-mining conditions, Alton's permit application sets forth a number of scientific methodologies that, combined with its reporting obligations, will provide for adequate detection of changes in water quality caused by mining operations. Alton used each of these methods to assess the pre-mining baseline hydrologic data in preparing its permit application. While not mandatory, these methods may be employed by the hydrologist to help

determine the mine's hydrologic effects from the monitoring data collected during and after mining.

First, Stiff Diagrams may be used to evaluate the potential source and path of contaminants in groundwater. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, at 7-7, 7-8, 7-13 and Appx 7-1, Fig. 14.) Second, degradation of water quality in areas down-gradient from the permit area may be detected by applying graphical techniques described in the application to specific conductance measurements obtained through operational monitoring. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf at 7-7, DWG. 7-5.pdf.) Third, the Palmer Hydrologic Drought Index ("**PHDI**") may be used to determine whether changes in water quantity are the result of natural climatic changes or the result of other influences such as mining. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, App. 7-1 p. 7.) Fourth, Alton provided a detailed discussion of the geochemistry of the solutes in surface and groundwater which may, if needed, allow the user to evaluate how specific and identified water quality parameters may change as a result of mining activities. Id. at 13-15. Fifth, Alton has stated in the permit application that increases in magnesium, sulfate, total dissolved solids, or certain other ions in diverted alluvial groundwater would be indicative of excessive and unanticipated interaction between groundwater and the Tropic Shale. Id. at 37. Sixth, Alton has identified the typical flow rates and water depths of the wells and water rights in the permit area to facilitate comparison of baseline data with current information collected via the monitoring plan. Id. at Table 7-12.

Based on the foregoing facts—and the completeness of Alton's application in all other regards—both the Division and the Board granted Alton the permit to operate the Coal Hollow Mine.

SUMMARY OF THE ARGUMENT

Petitioners' arguments on appeal fall into two categories. First, they urge the Court to ignore Utah's legal primacy in coal mining regulation by substituting non-binding federal interpretive positions for the standards laid out in Utah statutes and rules governing hydrologic assessment and monitoring. Second, Petitioners' invite the Court to substitute its judgment for the rational choices made by the Division and Board in determining what type of criteria, how much detail, and which particular locations must be a part of the water-resource documentation accompanying a permit application. Even if the Court were so inclined, the invitation is incompatible with the appropriate standard of review.

Before the Board, Alton identified the relevant legal standards appearing in the Utah Coal Program[6] that controlled Petitioners' claims related to cultural resources and hydrology. The Board found that Petitioners had not demonstrated that these legal standards had been violated by the Division's permit approval. Even on appeal, Petitioners decline to directly challenge the Board's reasons and merely ask to impose their own interpretation of the applicable law.

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[6] The "Utah Coal Program" consists of the Utah Coal Mining and Reclamation Act found at chapter 10 of Title 40 of the Utah Code, and the rules promulgated by the Board pursuant to its authority under the Act found at Title 645 of the Utah Administrative Rules.

ARGUMENT

III. THE BOARD DID NOT ERR IN CONCLUDING THAT THE DIVISION GAVE ADEQUATE CONSIDERATION TO CULTURAL AND HISTORIC RESOURCES

To assure that the Division could meet its historic preservation responsibilities, Alton commissioned a series of cultural resource inventories of the area where the mine would be located. (R. Hrg. Ex. D11, D17, D19. Addendum 14.) Together, these surveys examined a total of 3,977 acres including the entire 635-acre private parcel comprising the permit area in this matter.[7] (R. Hrg. Ex. D16 at 20–27.) The surveys located 91 sites deemed eligible for inclusion on the National Register of Historic Places. Id. The vast majority consisted of "lithic scatters," groups of small artifacts, or prehistoric campsites not apparent except through searching. No prehistoric structures were found Id.

Once the nature and location of these resources were known, the Division prepared its list of sites that would be affected by the proposed mining, and sent the list to the State Historic Preservation Officer ("SHPO") for concurrence, which he provided. (R. Hrg. Ex. D12. Addendum 17.) All of these sites were located either wholly or partly within the permit boundaries. Id. For sites that could not be avoided in the mining plan, Alton prepared mitigation and data recovery plans which also received SHPO concurrence. (R. Hrg. Ex. D14.) These data recovery and mitigation operations were completed before the sites were disturbed by mining.

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[7] The Division did not require and Alton did not obtain a Cultural Resource Inventory covering any locations in the Town of Panguitch. The Division determined that considering historic properties at such a distance from the mine exceeded its jurisdiction over "coal mining and reclamation operations" as defined at R645-100-200.

The Board found that the Division had properly accounted for all cultural resources that would be affected by the proposed operations. (R. 5595–5603.) The following sections explain that (1) substantial evidence supports the finding that all affected sites within or adjacent to the mine permit area were considered; (2) substantial evidence also supports the finding that the SHPO provided necessary concurrence with the Division; and (3) the Board did not commit legal error by determining that the Utah Coal Program did not mandate evaluation of historic resources in the Town of Panguitch. The first two issues apply the Board's definition of the term "adjacent area" while the third also implicates the definition of "coal mining and reclamation operations."

A. Substantial evidence supports the Board's finding that the Division considered effects on cultural resources in both the permit area and adjacent area.

The record before the Board shows that the Division fulfilled its responsibility to evaluate cultural and historic resources in the permit and adjacent area that would be affected by the mine operations. Under Utah's historic preservation statute the Division must "take into account" the project's effects on any historic property and provide a written evaluation of the effect on such property to the SHPO. Utah Code § 9-8-404(1)(a). An historic property is any site or structure that is eligible for listing on the National Register of Historic Places. § 9-8-302(10). In the parlance of the Utah Coal Program, these historic properties are known as "cultural and historic resources." See Utah Admin. Code R645-301-411.140. The Division, and not the SHPO, is responsible for all final determinations regarding resources that are affected by the mining operations. Utah Code § 9-8-404(1)(a)(i). (R. Hrg. Ex. D13 (letter from SHPO to Division).)

The Board's rules for permit approval set forth the means by which the Division will fulfill this responsibility when approving a coal mine permit. First, the permit applicant must supply maps that clearly show, inter alia, "the locations of any cultural or historic resources . . . and known archaeological sites within the permit and adjacent areas." R645-301-411.141.1 (emphasis supplied). Second, the applicant must "present evidence of clearances by the SHPO." R645-301-411.142. Third, for every site that may be adversely affected, the plan must describe how effects will be prevented or mitigated, as the Division requires. R645-301-411.142, 411.144. Significantly, while the required maps must show the locations of the affected resources, there is no separate requirement to depict the boundaries of the permit or adjacent areas on such a map.

As mentioned, accounting for cultural resources is not confined to the "permit area" but applies equally to the "adjacent area." R645-301-411.141.1. "Permit area" and "adjacent area" are terms of art for purposes of the Utah Coal Program. "Permit area" means the area that must be bonded and reclaimed, corresponding to where mining operations will disturb the surface. R645-100-200.

> "Adjacent area" means the area outside the permit area where a resource or resources, determined according to the context in which adjacent area is used, are or reasonably could be expected to be adversely impacted by proposed coal mining and reclamation operations, including probable impacts from underground workings.

Id. The adjacent area extends no further than the reach of coal mining operations that might affect it and necessarily depends on the nature of the anticipated effects. Accordingly, if an historic property is unlikely to be affected by coal mining operations, it is located outside the adjacent area by definition, and need not be depicted on any map.

The Board found that every site lying beyond the permit boundaries and likely to be affected by mining was evaluated by the Division and cleared by the SHPO. (R. 5600–5601 ¶¶ 74–83.) Substantial evidence supports the Board's finding. Alton provided the Division with maps depicting every eligible site discovered in its cultural resource inventories, whether or not any effect was expected. (R. Hrg. Ex. D11 at 3; D16 at 4; D17 at 4; D19 at 4. Addendum 14.) Alton provided a map of all sites it expected to affect, from which the Division created the list it provided to SHPO. (R. Hrg. Ex. D11 at 3, R. Hrg. Ex. D12. Addendum 17.) These actions satisfy the plain language of the rules to account for sites in the permit and adjacent areas. See R645-301-411.141.1.

The list of sites evaluated by the Division included those located entirely within the permit boundary, and all sites that were located on both sides of the permit boundary. Under the definitions, this latter group of sites is located in both the permit area and adjacent area. Daron Haddock, the Division's permitting supervisor, testified that these sites located in the adjacent area on the permit boundary were evaluated for eligibility and effect. (R. 5880 at 187:17–190:16; R. 5881 at 314:25–315:5, 317:15–318:3. Addendum 18.) His uncontroverted testimony before the Board established the rationale used by the Division to determine whether sites would be affected. He explained that the Division concluded that any site located entirely beyond the permit boundary was unlikely to be adversely impacted. (R. 5880 at 201:15–202:14.) Because surface disturbance is the only expected means of adverse impact, and because surface disturbance must be confined to the permit area, sites located some distance from the permit area are not subject to any foreseeable effect of "coal mining and reclamation operations." (R. 5880 at 203:2–12, 205:2–206:1.) His testimony disclosed that the

Division considered off-permit adverse effects to cultural resources from stormwater drainage or blowing dust to be unlikely. (R. 5881 at 274:6–275:20, 329:8–17.) Petitioners offered no evidence on the likelihood of adverse impacts to any cultural or historic site. The Board summarized this information in ten separate findings of fact which are not challenged by Petitioners on appeal. (R. 5600–01 ¶¶ 74-83.)

It is undisputed that the Division ultimately evaluated the mine's effects on 17 sites, and the SHPO ultimately concurred with the Division's evaluation. It is undisputed that this exchange included every affected site within the permit area. It is also undisputed that the evaluation included every additional affected site, regardless of its location. Because some of these sites were located, at least partially, in an area beyond the permit boundaries, they are evidence of consideration of sites in the adjacent area. Accordingly, the Board's factual finding should not be disturbed.

Petitioners' challenge to the Board's factual finding number 89 is oblique at best.[8] Rather than identifying cultural resources in the adjacent area that were omitted from proper Division-SHPO consultation, or from the required maps and narratives, they complain only that the Board gave the Division a "pass" on delineating the borders of what it considered to be the adjacent area.[9] The Division's responsibility, however, is to

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[8] The Board identifies paragraph 89 of its Final Order as a legal conclusion rather than a factual finding. Petitioners challenge none of the Board's factual findings on this issue set forth in the Final Order paragraphs 74 through 83. Accordingly, the Board's factual findings should not be disturbed.

[9] The Board articulated a rational basis for rejecting this argument: "Ultimately, the Board can find no fault in the approach followed by the Division . . . . There may be other methods that could have been employed that would have yielded a plottable line or shape on a map [to indicate the adjacent area] but such methods would not have resulted in the inclusion of any additional sites in the Division's determination of eligibility and effect,

evaluate resources, not draw lines on a map, and the record supports the Board's finding that every cultural or historic resource located where it might be affected by the mine operations was evaluated and identified to the SHPO. Whether the Division identified an adjacent area separate and apart from the resources that might be affected is quite simply beside the point. Petitioners' semantic argument is no answer to the substantial evidence that all sites in the adjacent area were identified on maps as required, and also received proper evaluation by the Division. The Board's findings of fact, therefore, should not be disturbed.

B. Substantial evidence supports the Board's finding that the Division obtained the required concurrence from the SHPO regarding cultural resources in both the permit area and adjacent area.

Petitioners seek additional mileage from their semantic argument regarding the "adjacent area" by applying it to the requirement that the SHPO concur with the Division's determinations regarding how the mine operations will affect cultural or historic sites. The Board's rule requires that the permit application shall include evidence of the necessary SHPO clearances. R645-301-411.142. Petitioners fail to explain why the SHPO clearances appearing in the record fail to support the findings they challenge. More fundamental, while Petitioners challenge the Board's finding 81 and 83, they fail to come to terms with number 82, wherein the Board explains why the evidence in the record supports its conclusion. (R. 5601 ¶ 82.) The Board could not have been clearer: "The evidence did not establish that any site located wholly outside the permit area reasonably can be expected to be adversely impacted by coal mining and reclamation

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would not ultimately have affected the analysis of the issue, and are not mandated by the applicable rules." (R. 5458–59. Addendum 13.)

operations. The evidence did not establish that any site other than those identified by the Division can reasonably be expected to be adversely impacted by coal mining and reclamation operations." Id. In other words, Petitioners simply failed to prove any shortcoming in the evaluation of historic properties in the area adjacent to the mine.

The Division's evaluations and corresponding SHPO concurrences appear in the record as hearing exhibits D12, D13, D15, D21, and D22. (Addendum 17.) These documents are substantial evidence supporting the Board's factual finding that all known eligible sites (regardless of location) were evaluated by the Division and cleared by the SHPO.

Petitioners misapply the law by arguing that the SHPO concurrence did not extend to an area beyond the permit boundary, regardless of whether eligible sites were identified and evaluated.[10] The nexus of the SHPO's authority is only to the affected resources, and he is without jurisdiction to regulate how any particular tract or parcel of land may or may not be used. See, e.g., Utah Code § 9-8-301(3) (declaring the Legislature's intent to balance historic preservation with the lawful and beneficial use of lands and natural resources); § 9-8-404(1)(a) (limiting scope of evaluation and SHPO concurrence to "historic properties.") So long as the affected historic properties are adequately accounted for by the Division and SHPO, they have fulfilled their mandate.

Simply put, the pertinent definition requires concurrence from the SHPO only for those sites "that may be adversely affected by the proposed coal mining and reclamation operations." R645-301-411.142. Inasmuch as there were no sites beyond those reported

[10] Petitioners' argument on this point (Petr's Br. at 17) defies logic. If the Division evaluated a "site" it must also have evaluated the area where the site was located.

to the SHPO that may be "adversely affected", there was no need to obtain SHPO concurrence for sites located at any distance beyond the reach of these effects. The Board's finding of fact at Paragraph 75 (not challenged by Petitioners) clearly sets out the whole scenario:

> The Division was by these surveys adequately apprised of the historic sites that had been identified and their location relative to the permit boundary and was able to identify a subset of the identified sites that reasonable could be expected to be adversely impacted by coal mining and reclamation operations. These sites were either within the permit area or partially within the permit area. Some of these sites barely touched the permit boundary and some extended from 220 to 1000 feet beyond the permit boundary.

(R. 5600 ¶ 75.) Demand for evaluation and concurrence of an area, whether or not historic properties in that area are affected, imposes an unrealistic and unsupported burden on the applicant and Division, and expands the jurisdiction of the SHPO well beyond its statutory role. Accordingly, the evidence of evaluation and concurrence of all eligible sites likely to be affected, regardless of location, must serve as substantial evidence supporting the challenged findings of fact.

C. The Board did not err in refusing to require evidence of SHPO concurrences related to the Panguitch National Historic District

While all "mining and reclamation operations" are strictly confined to the permit area at the mine site, Alton indicated in the permit application that it planned to load coal from the mine in trucks that would transport it to its destination on the public highways. A likely (though not certain) transportation route is on U.S. Highway 89 through the town of Panguitch, about 30 road miles from the mine. The plan calls for use of covered hopper semi-trailer trucks. Although concerns were raised in public comments about the

truck's effects on Panguitch's historic structures, the Division determined that it lacked jurisdiction to regulate commercial truck traffic on a public highway. (R. Hrg. Ex. D8 at 100.)

No provision of the Utah Coal Program mandates consideration of the mine's effects on a distant town, when the only "effect" is transportation of coal by common carrier on a public highway. The Division's power to regulate mining operations is limited to the permit area and the adjacent area, and the town of Panguitch lies within neither of these. It is undisputed that Panguitch is outside the permit area. Whether its historic resources lie within an adjacent area depends on whether they may reasonably be expected to be affected by coal mining and reclamation operations. See R645-100-200 (definition of "adjacent area"). The Board found, as a matter of law, that the anticipated truck transportation was not a "coal mining and reclamation operation" as that term is defined in Utah's Coal Program. The term "Coal Mining and Reclamation Operations" means

> (a) activities conducted on the surface of lands in connection with a surface coal mine or, subject to the requirements of Section 40-10-18 of the Act, surface coal mining and reclamation operations and surface impacts incident to an underground coal mine. . . . Such activities include all activities necessary and incidental to the reclamation of the operations, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining; the use of explosives and blasting; in-situ distillation; or retorting, leaching, or other chemical or physical processing; and the cleaning, concentrating, or other processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site. . . . ; and (b) the areas upon which the activities described under part (a) of this definition occur or where such activities disturb the natural land surface. These areas will also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of those activities and for haulage and excavation, workings, impoundments, dams, ventilation

> shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or material on the surface, resulting from or incident to those activities.

Utah Admin. Code R645-100-200; Utah Code § 40-10-3(20). Mining operations under the definition are limited to activities that include or precede loading the coal for interstate commerce. Construing the parallel federal definition, the United States District Court for the Western District of Virginia concluded that use of public highways even if incidental to mine access or haulage was not a coal mining operation and refused to require that public roads be considered part of the "permit area" and regulated by the agency. Harman Mining Corp. v. Office of Surface Mining, 659 F.Supp. 806, 811 (W.D.Va., 1987). The court's logic is persuasive, noting that the "literal reading" advanced by plaintiffs would lead to the absurd result of pulling interstate highways into the mine's permit area. Id. The Board found the Harman court's reasoning persuasive. (R. 1055–56, 5459–61.) The Board and Division properly declined to assert regulatory jurisdiction over common-carrier truck traffic on a public highway a considerable distance from the mine site because they found that the rules defining "adjacent area" and "coal mining operations" did not support such regulation. Accordingly, the Board found that the Town of Panguitch, including its historic district, lay outside the mine's adjacent area. Petitioners have shown no legal error in this determination.

Petitioners do not directly challenge the Board's conclusion of law that the commercial trucking operations complained of fall outside the definition of "coal mining and reclamation operations." (See R. 5605 ¶ 106.) Instead, they assert that the permit is fatally flawed because Alton and the Division failed to get the SHPO to "buy off" on the

determination that commercial trucking through Panguitch falls outside the ambit of "coal mining and reclamation operations." The argument fails because, without a resource that will be affected by coal mining and reclamation operations, there is no state agency "undertaking" within the meaning of the SHPO's jurisdictional statute.[11] See Utah Code § 9-8-404(1). Without a state undertaking, the SHPO is without jurisdiction to comment on any resource. Accordingly, there is no legal flaw in the Division's treatment of the Panguitch National Historic District, and no reason to disturb its decision to grant the permit.

IV. THE BOARD DID NOT ERR IN CONCLUDING THAT THE CHIA WAS ADEQUATE

The Coal Hollow Mine is located on private land in an area with few significant water sources. The nearest perennial stream, Kanab Creek, is about a mile west of the mine. Lower Robinson Creek is the only surface water resource at the mine site.[12] A dry wash through most of its length, the creek gains a small amount of water in and below the permit area from seepage which usually reaches Kanab Creek. The groundwater resources are equally meager. A limited system of shallow groundwater enters the area from the east and emerges at a smattering of springs near the mine's eastern edge. Both surface water and groundwater resources are known to be degraded in quality if they have contact with the Tropic Shale, the naturally-occurring layer of rock lying just above the

[11] A more comprehensive review of cultural resources is being prepared in connection with the federal lease application. (R. Hrg. Ex. D16 at 1. Addendum 14.).
[12] There is no "Upper Robinson Creek."

coal seam. (See R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, App. 7-1. Addendum 15.)

Among other measures, the mine has been designed to prevent damage to the water resources outside its boundaries by diverting groundwater before it reaches the mine site and by re-routing the channel of Lower Robinson Creek around the mine. Possible contamination of surface water from stormwater runoff exposed to the Tropic Shale will be avoided by capturing any water on the mine site in impoundments, rather than letting it flow offsite. The mining plan includes contingencies for installing impermeable barriers should large flows of groundwater appear in the mine pits. All of these features, described in detail in the permit application, form a reasonable basis to conclude that the mine has been designed to prevent damage to the hydrologic balance. Id. at pp. 7-51 through 7-104. (Addendum 16.)

Here, the Mine Permit is entirely located on private land where Utah statutes and regulations are the operative and governing law. Petitioners erroneously frame their CHIA argument as a matter of law, claiming that the Utah State agencies were bound, as a matter of law, to conform their CHIA analysis to mere guidance and interpretations issued by the federal Office of Surface Mining (OSM). Under SMCRA, Utah is a primacy state that retains "exclusive jurisdiction over nonfederal lands" in the regulation of surface mining operations. Utah Code § 40-10-2 (stating that the purpose of UCMRA is to "grant to the Board and Division of Oil, Gas and Mining the necessary authority to assure exclusive jurisdiction over non-federal lands"); Castle Valley Spec. Serv. Dist. v. Bd. of Oil, Gas & Mining, 938 P.2d 248, 251–52 (Utah 1997).

The federal Surface Mining Control and Reclamation Act of 1977 ("SMCRA") authorizes the Secretary of Interior, through the OSM, to review and approve or disapprove state regulatory programs for controlling surface mining operations. 30 U.S.C. § 1211(c)(1) (2006). Upon the approval of a State program, section 503 of SMCRA (30 U.S.C. § 1253) grants the State exclusive jurisdiction for the regulation of surface coal mining and reclamation operations on non-federal lands within such State. See Pa. Fedn. of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310, 318 (3d Cir. Pa. 2002); Haydo v. Amerikohl Mining, Inc., 830 F.2d 494, 437 (3rd Cir. 1987); West Virginia Highlands Conservancy v. Huffman, 588 F. Supp.2d 678 (N.D. W.Va. 2009), aff'd, 625 F.3d 159 (4th Cir. 2009). State programs, consisting of state statutes and regulations, are the operative and governing law in primacy states. Ohio Valley Envtl. Coalition, Inc. v. Apogee Coal Co., LLC, 555 F. Supp. 2d 640, 643 (S.D. W. Va. 2008); see 30 U.S.C. § 1253.

The Secretary of the Interior first approved the Utah state regulatory program on January 21, 1981, giving Utah exclusive jurisdiction over the regulation of surface coal mining and reclamation operations on non-federal lands. 30 C.F.R. § 944.10 (2010). Petitioners' reliance on federal authorities fails because "[e]xclusive, in other words, means just that – 'exclusive.' It does not mean 'parallel' or 'concurrent.'" Pa. Fedn. of Sportsmen's Clubs, 297 F.3d at 318. Either federal law or state law regulates coal mining activity in state, but not both simultaneously. Bragg v. W. Va. Coal Ass'n, 248 F.3d 275, 289 (4th Cir. 2001); see 30 U.S.C. §§ 1253(a), 1254(a). Utah retains "exclusive jurisdiction over nonfederal lands" for the regulation of surface coal mining and reclamation operations on private lands within the State. Utah Code § 40-10-2.

Under UCMRA, the Division must prepare a Cumulative Hydrologic Impact Assessment ("CHIA") that assesses the "probable cumulative impact" of the proposed mine when combined with any existing coal mines and all anticipated mines in the area.[13] Utah Code §§ 40-10-10(2)(c)(i)(C), 40-10-11(2)(c). The CHIA is prepared based upon the applicant's statement of the probable hydrologic consequences of mining and its measurements of the water resources in the permit and adjacent areas. § 40-10-(2)(c)(i). The permit's approval must include a finding, based on the CHIA, that the mine has been designed to prevent material damage to the hydrologic balance outside the permit area. § 40-10-11(2)(c). The Board's rules require that the CHIA shall be "sufficient to determine, for purposes of permit approval whether the proposed coal mining and reclamation operation has been designed to prevent material damage to the hydrologic balance outside the permit area." Utah Admin. Code R645-301-729.100 (2010).

In the case before the Board, Petitioners did not challenge any of these things. Instead, they rooted their opposition in a mere belief that, in addition to the statutory and regulatory standards just set forth, every CHIA must set forth so-called "material damage criteria" for each parameter included in the water monitoring plan. Petitioners urged the Board to reject threshold standards established by the Division and articulated in the CHIA. They asserted that these standards were an inferior type of criterion because they triggered inquiry into whether material damage had occurred, rather than mandating the

[13] In this case, the mine is the first in the area and there are no other mines existing or anticipated. See Utah Admin. Code R645-100-200 (limiting the definition of "cumulative impact area" to mines existing, permitted, or applied for.)

conclusion that it already had.[14] Petitioners offered neither statute nor rule in support of their position, relying instead on a pastiche of federal agency interpretive materials. On appeal, Petitioners challenge the rational basis for the Board's acceptance of the CHIA with its flexible material damage criteria rather than the rigid criteria they demanded, and complain that the Board erred as a matter of law in upholding the Division's CHIA without rigid material damage criteria.

Applying the correct legal standard for determining whether the CHIA is adequate, the Board agreed with the Division that the mine had been designed to prevent material damage to the hydrologic balance, and that the CHIA contained sufficient information and analysis to serve that purpose. (R. 5611–15 ¶¶ 137, 163–65.) The Board also found that the circumstances supported using flexible criteria and setting them at the levels the Division had chosen, (R. 5611–12 ¶¶ 140–46.) As a matter of law, the Board declined to construe its rule to require a CHIA to also set forth rigid material damage criteria as demanded by Petitioners. (R. 5615 ¶ 167.)

The following sections explain that (1) the Board properly declined to set aside the permit based upon this purported flaw in the CHIA because it determined that the CHIA satisfied the relevant statutory standards; (2) The Board did not err in not declining to construe the statute to require designating rigid material damage criteria rather than

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[14] For simplicity in this brief, Alton will refer to the material damage criteria designated by the Division in the CHIA as "flexible" material damage criteria, because they set a trigger for further inquiry into whether material damage was imminent. Alton will refer to the type of material damage criteria advocated by Petitioners as "rigid" criteria because they would trigger a conclusion that material damage had already occurred.

flexible criteria; and (3) substantial evidence supports the Board's findings regarding the mine's design relative to the hydrologic balance.

A. The Board did not abuse its discretion by upholding the Division's finding that the mine was designed to prevent material damage to water resources

To be adequate, a CHIA must be sufficient to determine if the proposed mine has been designed to prevent material damage to the hydrologic balance outside the permit area. R645-301-729.100. Because the Board is applying its own rule to the facts before it, in a technical area squarely within its expertise, the Board is in a better position than this Court to determine whether the CHIA is sufficient, and the Court should defer to the Board's rational decision.

The record contains a rational basis supporting the Board's conclusion that the CHIA, containing flexible material damage criteria corresponding to the probable hydrologic consequences, was adequate to determine whether the mine had been designed to prevent damage to the hydrologic balance. This rational basis is adequately expressed in the Board's Interim and Final Orders, and is apparent within the CHIA document itself. (See R. 5464–66 (Addendum 13) (Interim Order); R. 5610–17 (Addendum 11) (Final Order); R. at Hrg. Ex. D23 (CHIA)).

The Board found that the mine had been designed to prevent hydrologic damage, and found that the CHIA disclosed an adequate technical basis for that factual finding. (R. 5611–16 ¶¶ 138, 145–47, 162–65, 172–74.) A key point in that rational basis was the Division's concern, expressed in the CHIA, that runoff from the mine site, if not controlled, could degrade surface water quality in the form of higher levels of total dissolved solids ("TDS"). (R. Hrg. Ex. D23 at 28–30, 40.) Accordingly, the mine was

designed to capture all runoff within the mine site, resulting in zero discharge, at any level of TDS, to the hydrologic balance beyond the permit area. (R. 5613 ¶ 152; R. 5883 at 750:10–23. Addendum 11, 19.) Petitioners' expert witness on this subject testified that he had no basis to question the efficacy of this measure at preventing material damage because he had not evaluated either the mine's design or the site's hydrogeology. (R.5883 at 718:2–20, 738:1–7. Addendum 20.) The Board rationally concluded based on the uncontroverted evidence before it that no discharge would occur from the site. (R. 5613 at ¶ 152.) It agreed with the Division that the mine had been designed to prevent damage outside the permit area manifesting itself as increased TDS attributable to mine discharges. (R. 5613 at ¶ 153.) This conclusion is fully rational in light of the mine's zero-discharge design, and providing rigid material damage criteria (either in the CHIA or the Board's findings of fact) would have added nothing to the required analysis. Under the appropriate rational basis standard of review Petitioners' challenge must fail.

Petitioners' argument is based in a theory that only rigid material damage criteria can contribute to a rational basis for finding the mine to be properly designed. They offer neither statute nor rule in support of that position, and the Board found that the Petitioners' challenge to the CHIA, which was framed in different terms before the Board than on appeal, evidenced nothing more than a difference of opinion among technical experts.[15] (R. 5616 ¶ 173.) Petitioners' hydrology expert failed to persuade the Board

[15] At the hearing, Petitioners' framed their CHIA issues differently, complaining (1) that the CHIA failed to set a damage criterion for each monitored parameter, and (2) that the material damage criterion for TDS had been set at an inappropriate level in light of Utah water quality standards. (See R. 1410–11 ¶¶ 10–11)(Petitioners' designation of issues to be heard). While they now fault the Board, in the abstract, for making less than exacting findings and conclusions regarding site-specific material damage criteria, Petitioners are

that the Division's CHIA fell short of sound scientific practice. The Board made it abundantly plain in its Orders that it relied more heavily on evidence presented by the Division's and Alton's experts, finding Petitioners' expert neither helpful nor convincing. (R. 5612–16 ¶¶ 149–51, 157–58, 172–73.) There is no basis for the Court to disturb that reasonable conclusion.

B. The Board did not err in concluding that "material damage criteria" triggering enforcement action need not be included in this CHIA

Petitioners also frame their CHIA argument as a matter of law, claiming that the State of Utah is bound, as a matter of law, to conform its CHIA analysis to guidance and interpretations issued by the federal Office of Surface Mining, Reclamation and Enforcement ("OSM"). This argument misrepresents the statutory scheme. OSM is responsible for evaluating proposed state programs for consistency, and has oversight powers should state programs fall short. Because OSM has approved Utah's program, Utah has exclusive jurisdiction over coal mining in the state. See 30 U.S.C. § 1253(a); 30 C.F.R. § 944.10. Because Utah has attained primacy, its state program, consisting of Utah statute and regulations, is the operative and governing law in Utah. Castle Valley Spec. Serv. Dist. v. Bd. of Oil, Gas & Mining, 938 P.2d 248, 251–52 (Utah 1997); see 30 U.S.C. § 1253 (2006). Parallel provisions of SMCRA and OSM's regulations accordingly "drop out" for purposes of regulation within the state. See Bragg v. W. Va. Coal Assn., 248 F.3d 275, 289 (4th Cir. 2001).

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entitled to findings of fact and conclusions of law only on issues in which they sought the Board's decision.

1. The plain language of the Utah statute and rules does not require that a CHIA include material damage criteria

The CHIA is adequate with or without rigid material damage criteria because no statute or rule requires the Division to identify such criteria in the document. Under the Utah Coal Program UCMRA defines the CHIA's purpose, and the Board's rule provides a standard for determining adequacy. See Utah Code § 40-10-11(2)(c) (purpose); Utah Admin. Code R645-301-729.100 (standard). The plain language of neither gives any indication that the CHIA is inadequate without Petitioners' suggested rigid material damage criteria. Id. As Petitioners note, "material damage to the hydrologic balance" is not a defined term in statute or rule. There is also no definition for what constitutes a proper material damage criterion, which is not surprising because no statute or rule mentions such criteria. Petitioners' argument that such criteria are required "as a matter of law" accordingly fails because the plain language of no statute or rule can fairly be read to incorporate the requirement.

2. In light of appellants' failure to show that the law is ambiguous, their resort to federal interpretive materials in an attempt to show noncompliance with state law is improper

Petitioners urge this Court to look beyond the plain language of statute or rule and substitute statements appearing in federal interpretive materials for the binding provisions of the Utah Coal Program. There is no justification for doing so. This Court has consistently refrained from turning to such materials unless the plain language of the operative law is ambiguous. T-Mobile USA Inc. v. Tax Comm'n, 2011 UT 28, 254 P.3d 752 at ¶ 21 ("If the plain language is unambiguous, we do not look to other interpretive tools.") In this instance, both statute and rule indicate that a CHIA is adequate for

purposes of permit approval if it is sufficient to determine whether the mine has been designed to prevent hydrologic damage. Utah Code § 40-10-11(2)(c); Utah Admin. Code R645-301-729.100.

There are as many ways to satisfy this standard as there are ways to design a mine, but the standard itself is unambiguous—sufficiency is determined by the CHIA's utility in evaluating the mine's design. For purposes of this Court's review, facts appearing unchallenged in the record provide the necessary information to determine that the plain language has been satisfied without resort to any interpretive material. In short, because the agency was able to make a reasonable determination, based on the CHIA, that the mine was properly designed, the legal inquiry is at an end based on the rule's plain language.

The authorities cited by Petitioners do not mandate enforcing either the Federal Register interpretation of the federal OSM rule or the federal draft CHIA guidance as standards for determining the sufficiency of the CHIA document. These authorities go no further than to address the degree of consistency between corresponding federal and state statutes or rules. See Brown v. Red River Coal Co., 373 S.E.2d 609, 610 (Va. Ct. App. 1988) (statutes); Schultz v. Consol. Coal. Co., 475 S.E.2d 467, 475–76 (W.Va. 1996) (regulations). Neither speaks to the binding effect of federal agency positions set forth in either the Federal Register or draft guidance documents as Petitioners assert in this appeal. In any event, both decisions are called into serious question by the Fourth Circuit's decision in Bragg that approval of a state coal regulatory program effectively sidelines federal regulation unless and until the Secretary elects to formally exercise his oversight authority and require the state program's modification or relinquishment.

Bragg, 248 F.3d at 289, see 30 C.F.R. § 733 (setting procedures for reasserting federal jurisdiction in primacy states).

Petitioners also vastly overstate the "mandate" for material damage criteria purportedly set forth by OSM in the Federal Register. In the most recent Federal Register material cited by Petitioners, OSM acknowledges that its CHIA regulations do not unequivocally mandate establishment of material damage criteria: "OSM stated in the Preamble to the 1983 hydrology regulations at page 43973 that 'OSM agrees that the [state] regulatory authorities should establish criteria to measure material damage for the purposes of the CHIAs.' However, the CHIA regulation does not mandate that States do so. . . . Further, in the 25 years since the hydrology rules were revised OSM has not put States on notice . . . of an obligation to establish material damage criteria." Office of Surface Mining, West Virginia Regulatory Program, 73 Fed. Reg. 78,970, 78,974 (Dec. 24, 2008) (Addendum 8). Responding to specific comments that West Virginia's proposed rules were defective for failing to establish criteria for determining damage to the hydrologic balance, OSM was unequivocal: "[The commenter] vastly overstates the Federal mandate. No such mandate is contained in SMCRA or the Federal regulations . . . ." Id. at 78,977. While encouraging "some type of damage threshold and impact measures" (Id. at 78,974) OSM has consistently left the exact form and effect of these thresholds within the ambit of state discretion and flexibility. See, e.g., 48 Fed. Reg. 43,955, 43,973 (Sep. 26, 1983) (Addendum 9). In light of the Federal agency's own denial of a firm mandate, and its consistent deference to state flexibility in this area, there is no reason "as a matter of law" to disturb the Division's reasonable decision to employ flexible criteria for evaluating possible material damage in the CHIA.

Petitioners' reliance on OSM's draft guidelines in this appeal is equally flawed. At the hearing below, Petitioners' expert acknowledged that in the 25 years since OSM prepared the draft, no final version has been published. (R. 5883 at 711:3-23.) The draft guidelines themselves expressly disclaim any regulatory mandate:

> These suggestions and procedures should be considered guidelines and not standards. The regulatory authority is not required to use this material. This is an advisory document and should not be construed as being regulatory in any way. There are no limits or conditions specified except those contained in the Act itself and in the promulgated Federal regulations and approved State programs.

(R. Hrg. Ex. D26 at 1. Addendum 21.) Accordingly, there is no legal basis for importing the "suggestions" of these materials as legally-binding standards for Utah permits.[16]

There is no basis for enforcing mere suggestions appearing in interpretive materials "as a matter of law." First, Petitioners have not shown that resort to the Federal Register or draft guidelines is needed because of ambiguity in the applicable plain language of any statute or rule. The plain language is sufficient for this Court's determination because the Board set forth a rational basis for finding its requirement to be satisfied. Second, the Federal Register materials cited by Petitioners stop well short of mandating the rigid material damage criteria Petitioners demand, permitting case-by-case and state-by-state flexibility. Finally, the draft guidelines relied upon expressly disclaim any binding regulatory purpose. For these reasons, the interpretive materials proposed by Petitioners should be disregarded.

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[16] To the extent that OSM's Draft Guidance is relevant, Alton notes that the Board found the Division's use of flexible material damage criteria, under these circumstances, to be consistent with the Guidance. (R. 5613–14 at ¶ 158.)

V. THE BOARD DID NOT ERR IN CONCLUDING THAT THE HYDROLOGIC MONITORING PLAN WAS ADEQUATE

As mentioned above, the actual water resources in and around the Coal Hollow Mine are not extensive. The Mine has been designed with effective measures that prevent up-gradient water resources from being diminished if they enter the mine, and prevent water from leaving the mine and mingling with down-gradient resources. In addition, the Operations Plan sets forth remedial or preventive measures triggered by observations that water is entering and interacting with the site. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-24 through 7-34, 7-73 through 7-100. Addendum 16.) Finally, Alton's monitoring plan is extensive, especially for a mine of this size. The monitoring plan sets forth no fewer than 54 locations in and around the one-square-mile mine site where water resources are measured four time each year, with the results promptly provided to the Division (and the public) for review. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-57 though 7-59, Tables 7-4 through 7-7B.)

Under the Utah Coal Program, an applicant for a coal mining permit must satisfy two distinct data collection duties with respect to water resources: First, the applicant must obtain and submit adequate baseline data documenting the state of hydrologic resources before they are disturbed by any mining. Utah Admin. Code R645-301-724; Utah Code § 40-10-10(2)(c)(i)(B). Second, the operator must collect hydrologic data at regular intervals so long as mining operations continue. R645-301-731.200. The operator is required, as part of the permit application, to state its plans for collecting and

evaluating this monitoring data so that the regulatory agency can be reasonably assured that impacts to the hydrologic balance can be assessed. R645-301-731.211, 731.221.

Petitioners fault Alton's permit application in three ways concerning the monitoring plan: First, they seek remand so that the applicant can reorganize its water-monitoring information, contained in several locations throughout the permit application, under a single heading. Second, they complain that the plan is devoid of required information describing how data collected pursuant to the plan will be analyzed in order to draw conclusions about possible hydrologic impacts from mining. Third, with respect to Lower Robinson Creek, they assert that the Board's decision inadequately explains why it did not order the plan modified to address their concerns.

A. The Board did not err by relying on information found under other headings in the mining and reclamation plan, or in other parts of the permit application package to determine that the manner of using monitoring data was adequately described

The first complaint may be quickly dispatched because the Division and Board have been granted statutory discretion by the Legislature "to establish procedures and requirements for the preparation, submission, approval, denial, termination, and modification of applications for coal mining and reclamation permits . . . ." Utah Code § 40-10-6(4). Accordingly, the manner in which material appearing in a permit application shall be organized is explicitly committed to the Division's and Board's discretion.[17] The Board found the plans to be adequate, even though some monitoring-

[17] Given that the rules at issue indicate that the monitoring plan shall be based on the PHC determination and "all baseline hydrologic, geologic, and other information in the permit application" it seems particularly irrational to insist that the applicant confine permissible descriptions of how these data will work together only to the monitoring plan heading. See Utah Admin. Code R645-301-731.212, 731.222.

related information appeared in different portions of the total permit application package. (R. 5617–19 ¶¶ 176–81.) While Petitioners may complain about the convenience of this approach, or its accessibility to the layman, it is not disputed that the material is within the permit application package and there is nothing unreasonable or irrational about the manner in which it is set forth. Therefore, the Board's determination must stand.

B. The Board did not err by finding the description of how hydrologic monitoring data may be used to be adequate

Petitioners' second complaint is that the permit application fails to provide essential descriptions of how hydrologic monitoring data will be employed to detect the mine's impacts. The rules governing collection of surface and ground-water data both include a requirement for information describing how the data "may be used." Utah Admin. Code R645-301-731.211, 731.222. While Petitioners style their argument as a question of fact, there is really no factual dispute. The Board was not called upon to decide whether particular language did, or did not appear in the permit application, but rather was asked to determine whether language indisputably contained within the permit application (or elsewhere in the record) met the requirement of the applicable rule. This presents a question involving the application of law to the facts, where the Board and Division act under an explicit grant of discretion, and an intermediate deferential standard of review is appropriate.

Petitioners' scorn for the Division's and Alton's reliance on an implicit understanding of how monitoring data should be used, rooted in either the monitoring plan's language or the regulations, is unrealistic and unfair.[18] The monitoring plan

[18] Even if OSM's Preamble to its 1982 proposed rule were binding on the Board, Petitioners make too much of its call for a "narrative" describing how the monitoring data

speaks clearly and separately of pre-mining baseline data and post-mining monitoring data, and includes discussion of why post-mining monitoring sites were chosen to facilitate comparison. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-57 through 7-59 (Addendum 16); R. 5619 at ¶ 185.) There is nothing unreasonable or irrational in relying on the implication, therefore, that the monitoring plan would compare these "before" and "after" data sets in order to assess possible impacts. The structure of the hydrologic data collection rules makes the implication even more reasonable, because they require collection of these "before" and "after" data sets. Cp. R645-301-724 with R645-301-731.200. It is not unreasonable for an operator, preparing a monitoring plan, to do as Alton did, matching up postmining monitoring data yet to be collected with pre-mining baseline data already in hand, and leave the regulated public or informed citizen to infer the obvious—that the mine's impacts will be detected by comparing these data.

The same is true of the mine's identification in the plan of a specific monitoring point as a source of "background" data. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-58.) The clear implication is that this point serves as an upstream, unaffected "control" against which related groundwater sites that are identified in the plan closer to the mine and possibly affected, will be compared. The manner of using these two sets of monitoring data to detect impacts is clear from the

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may be used, because the rule was not promulgated as OSM proposed. OSM dropped the requirement for a "narrative" from its final rule promulgated the following year. Cp. 47 Fed. Reg. 27,727 (Jun. 25, 1982) with 48 Fed. Reg. 43,987 (Sep. 26, 1983) (Addendum 9, 10). The applicable Utah rules track with the language of OSM's final rules. Utah Admin Code. R645-301-731.211, 731.222.

designation of a "background" data site. While reducing that understanding to an extended narrative might educate the neophyte, it is not unreasonable for the Board to refrain from imposing either burden on Alton.[19]

Finally, the permit application describes specific data analysis methods that can be applied, primarily to assist the hydrologist in differentiating the mine's effects from those due to drought or other climatic conditions. The methods indisputably describe how the hydrologic monitoring data may be used. The Palmer Hydrologic Drought Index, for example, is identified in the permit application and in the CHIA as a tool that may be used for analysis of monitoring data. Its application to the Coal Hollow project is described in the permit application. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, App. 7-1 p. 7.) Stiff Diagrams, which graphically interpret water quality data, also identified in the permit application, are used to trace possible sources of groundwater contamination. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, at 7-7, 7-8, 7-13 and Appx 7-1, p. 13 and Fig. 14.) The utility of such a data-analysis tool in a mining application is obvious. As with the other tools and methods identified in the permit application, these are accepted data-analysis tools and techniques used by hydrologists to discriminate between natural and mining effects on water resources.[20] Petitioners' complaint to this Court that Alton failed to alert the

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[19] Petitioners did not present a witness on this issue, relying upon cross examination of the Division's hydrologist. (R. 5882 at 484:4-7.) The Board found that Petitioners had failed to meet their burden of proving error in the Division's permit approval based on this issue. (R. 5618 ¶ 182.)

[20] Alton thoroughly discussed the application all of these tools in its pleadings to the Board, and the Board relied on Alton's discussion in reaching its decision. (See R. 5467–68 (Addendum 11) (Board's Order); R. 5202–14 (Addendum 22) (Alton's Brief).)

Division, in its monitoring plan, that it would apply the same interpretive tools to postmining hydrology data, as it did to pre-mining data, is not justified by the Utah Coal Program and credits the reader with neither expertise nor common sense.

Reference to the PHC determination is further substantial evidence of how the Board could reasonably conclude that information in the Permit Application outside the monitoring plan augments the description of monitoring-data usage. (R. 5619 ¶ 185.) The PHC determination describes "short-term diminution in discharge rates from some seeps and springs in Sink Valley" as the only significant adverse hydrologic effect that might manifest itself during mining. (R. Hrg. Ex. D1 at \Coal_Hollow\MRP\Coal Hollow 025005\Volume 7.pdf, p. 7-24 (emphasis supplied)). "Diminution in discharge rates" is reasonably detected when the "after" flow measurements are less than the "before" measurements at seeps and springs in Sink Valley. Accordingly, this statement in the PHC makes explicit what is implied elsewhere in the permit application and tells the reader exactly what to look for in the monitoring data as it is collected. It is substantial evidence that supports the Board's finding on this issue.

Petitioners' argument that the monitoring plan is inadequate because it fails to describe how monitoring data will be used to detect the unlikely effects of mining is off the mark.[21] (Petr's Br. 46.) Because the monitoring plans, by rule, must be based upon the determination of probable hydrologic consequences, it is inconsistent to complain, as

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[21] Even if relevant, Petitioners' "Exhibit A," appearing as item 26 in volume II of their Addendum, is inappropriate. The exhibit appears to have been prepared solely for this appeal, and is not a part of the record before the Board. Because it purports to address a disputed issue of fact but does not appear in the record below, it should be disregarded by the Court pursuant to Utah Code §40-10-30(4) and Utah Rule of Appellate Procedure 24(k).

Petitioners do, that the plan fails to adequately address improbable consequences. See Utah Admin. Code R645-301-731.211, 731.221. Petitioners offered no challenge below to Alton's identification of probable hydrologic consequences. Accordingly, uncontested evidence in the record shows that the monitoring plan is based on the probable hydrologic consequences, and describes how the probable consequence to alluvial groundwater will be detected if it occurs. As a matter of law, Petitioners' claim based on improbable consequences fails to demonstrate that the plans are inadequate to describe data usage because no requirement exists to employ monitoring data to detect possible but unlikely effects.

Petitioners' complaint that descriptions are lacking of how identified data-analysis tools will be used clearly illustrates that this is not a question of whether the description is provided in the plan, but rather what level of detail and elucidation is sufficient to obtain permit approval. Petitioners failed to present any factual evidence to the Board regarding the efficacy of the PHDI, Stiff Diagrams, geochemical analyses, or other techniques (lumped by Petitioners under the heading of "related documents") to analyze monitoring data. Despite their failure, they now ask the Supreme Court, under the guise of substantial evidence review, to determine whether these hydrological tools and geochemical techniques were properly recognized by the Board as "descriptions of how the data may be used." Having declined to provide evidence below regarding these methods, or their alleged shortcomings, Petitioners are unable on appeal to point to any part of the record supporting their claims regarding the unsuitability of these methods. Accordingly, the decision of the Board must stand.

C. The Board's Orders adequately disclose its reasons for finding the monitoring plan to be adequate

The Board's Orders in this matter adequately disclose a rational basis for upholding the permit approval based upon the water monitoring plan as submitted by Alton. The Board did not object to Alton's reliance on documents other than the mining and reclamation plan, or references to material within the mining plan but outside the hydrologic monitoring plan subsection, to provide information regarding use of monitoring data. (R. 5617–19 ¶¶ 180, 181, 185.) The Board also did not object to reliance upon inferences drawn from the monitoring plan, or from the regulations, to supplement the basic information regarding data usage. (R. 5617 ¶ 180.) The Board indicated its belief that the challenge to the adequacy of the monitoring plan implicated a question of degree, which leaves the question of how much detail on data usage would suffice to the Division's and Board's discretion. (R. 5466 (Observing in its interim order that "[t]he disagreement between the parties on this issue boils down to how explicit, specific and detailed the description must be to satisfy the . . . rule."); R. 5618 ¶ 183 (final order)). At Petitioner's urging, the Board analyzed the Alton monitoring plan in terms suggested by a U.S. Department of the Interior administrative law judge evaluating a permit (under the Federal program for Tennessee, which has relinquished primacy) against a similar challenge and found that Alton's plan provided the key elements the ALJ had found lacking in Tennessee. (R. 5467 (noting that the Alton plan describes "what each monitoring site is designed to monitor as well as the monitoring protocols to be used at each monitoring site")). Therefore, while the Board felt that an optional higher level of detail could have been supplied, there exists a rational basis apparent in the

Board's Orders for concluding, as it did, that the Alton plan met the minimum requirements, including a description of how the data may be used. The Board's decision should not be disturbed.

D. The Board did not err by finding the hydrologic monitoring plan for Lower Robinson Creek to be adequate

Surface-water monitoring data, whether pre- or postmining (i.e. baseline or operational monitoring) must be "sufficient to demonstrate seasonal variation and water usage" and otherwise adequate to obtain the necessary data to assure protection of the hydrologic balance. R645-301-724.200, 731.220. The monitoring plan is to be based in the PHC statement and geologic, hydrologic and other information in the permit application considered in light of the approved postmining land uses. R645-301-731.221. No Utah (or federal) statute or rule mandates particular criteria for the number and location of sampling points or monitoring stations the applicant will employ to accomplish this task.

At hearing Petitioners attempted to demonstrate that the plan for collecting baseline and monitoring data on Lower Robinson Creek was inadequate because it failed to sample this stream at the exact point where it crossed the permit boundaries. The Board found that the preponderance of evidence, consisting of expert testimony, did not establish any deficiency in this regard. (R. 5629–31 ¶¶ 240–244, 251–259.) The testimony before the Board showed that gains or losses to the Creek between the sample points and the permit boundaries were insignificant.[22] (R. 5885 at 1218:6–20; 1219:3-24.

[22] It is not true that Petitioners' experts' testimony regarding "intervening hydrologic influences" went undisputed. (See Petr's Br. at 48.) Alton's expert testified that these tributaries were inconsequential because they drained a "dry hillside." (R. 5885 at

Addendum 19.) Even though Petitioners' expert offered his legal interpretation that the rules require locating sample points at permit boundaries, he did not know whether any monitoring plan he had ever participated in actually did so. (R. 5885 at 1163:21–1165:1. Addendum 23.) As with the CHIA issue, the Board determined that this issue presented nothing more than a difference of opinion among experts. (R. 5628 ¶ 238.) The Board was not persuaded by Petitioners' expert, and found Alton's and the Division's experts to be more reliable and credible. (R. 5628–29 ¶¶ 239–42.) The record therefore contains substantial evidence that additional monitoring points on Lower Robinson Creek are unnecessary.

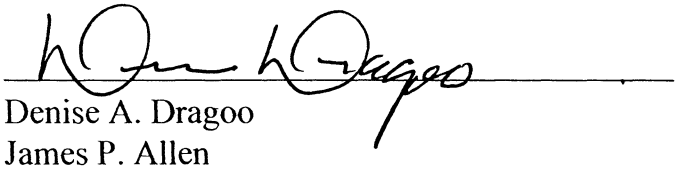
On appeal Petitioners brush aside their own substantive evidentiary failure and fault the Board on procedural grounds for failing to identify those portions of the monitoring plan that account for the purportedly "missing" monitoring stations. This repackaged argument merely begs the question which Petitioners failed to prove below, viz., whether there was a need, through additional sampling points or otherwise, to account for the location of the upstream and downstream monitoring points relative to the permit boundaries. Because the Board found that no such imperative existed, its order cannot now be faulted for failing to identify how the monitoring plan accounts for the distance. The Board articulated a rational basis for finding the monitoring plan adequate, and Petitioners do not directly challenge that basis. The decision should be affirmed.

1211:3–22. Addendum 19.) The Board found Petitioners' expert less reliable on this point. (R. 5629–29 ¶ 239.)

CONCLUSION

The Petitioners have demonstrated no error in the State's decision to grant the Coal Hollow Mine Permit, nor have they demonstrated to this Court any fault in the process by which the decision was made. The cultural resources in the area adjacent to the Mine were properly taken into account, the CHIA was prepared according to the appropriate legal standard, and the permit application contained adequate information regarding water-resource monitoring. Most important, Petitioners have shown no flaw in the rational basis for the Board's decision to uphold the permit. Petitioner's desire or opinion that Utah should perform its tasks differently, i.e. to suit the Petitioners' standards, is not the criterion for determining the sufficiency of the actions taken by the Division and the Board. The Board had sound, logical reasons for finding the CHIA and monitoring plans adequate, for declining to assert jurisdiction over a public road in a distant town, and for finding the adjacent cultural resources to be properly accounted for within its evaluation. In each case, the Board exercised its lawful discretion within reasonable bounds in light of all the facts and circumstances. Most importantly, Petitioners have identified no cultural and hydrologic resources that are subject to adverse effects as a result of the Mine's operations. Instead, their challenge to the permit, including this appeal, presents questions of how much information, and what type of analysis, must appear in the paperwork accompanying the approval. These issues are squarely within the discretion of the Division and Board, and their reasonable findings and conclusions should not be disturbed. The record shows that resources, plans and effects were all adequately disclosed, with sound reasons for the choices made. Nothing more is required, and the Board's decision should be affirmed.

DATED this 21ST day of September, 2011.



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