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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN RE: WATER QUALITY RULES	)	
AND REGULATIONS, CHAPTER 1,	)	Docket No. 06-3819
SURFACE WATER QUALITY	)	
(CHAPTER 1, APPENDIX H)	)	

COMMENTS OF MERIT ENERGY COMPANY

COMES NOW Merit Energy Company, by and through its counsel, Sundahl, Powers, Kapp & Martin, and respectfully submits the following comments to the Environmental Quality Council in the above-captioned matter. Merit appreciates the opportunity to submit comments on this important matter. For the reasons set forth below, Merit is opposed to Proposed Appendix H of the Water Quality Rules and Regulations, Chapter 1, Agricultural Use Protection.

Merit Energy Company holds NPDES and WYPDES permits in the Powder River Basin for CBM produced water. Merit also has a major production facility at Hamilton Dome in the Big Horn Basin that produces roughly 270,000 barrels of water each day. This water has been extensively put to beneficial use for both livestock and irrigation and provides economic benefits for Hot Springs County, as well as environmental benefits for Wyoming's wildlife. As such, it is imperative, in order to protect both the economy and the agricultural interests of this state, that the continued discharge of produced water be fully considered and protected. The proposed Agricultural Use Protection language jeopardizes the continued discharge of produced water in this state and all but bans any future discharges. Indeed, though it purports to be a necessary addition to Chapter 1 in order to protect agricultural uses, as a practical matter, Proposed

Appendix H will likely result in the cessation of produced water discharges and in turn, a net loss to the agriculture industry and the economy of Wyoming.

ARGUMENT

A. Proposed Appendix H Cannot Be Properly Adopted as a Rule at this Time

Merit has been following the development of this issue since the outset and is very concerned about the recent changes that have been encouraged by the Department of Environmental Quality. Namely, DEQ has determined, literally at the eleventh hour, that rather than proceeding with the adoption of the Agriculture Use Protection language as a policy, as it was developed for nearly two years, they wish to adopt it as a rule. This is not only contrary to the position that has been expressed since the policy was first presented for public comment, but would result in an inflexible and overly stringent approach to the permitting process, which by statute, is to be flexible and adaptive. For these reasons, Merit is opposed to the adoption of the Ag Use Protection language as a rule.

Throughout its development, including solicitation of public comment and recommendations from the Water and Waste Advisory Board, the proposed language of Chapter 1, Appendix H, was not considered as a rule. Rather, it has always been treated as a policy. Indeed, at the Advisory Board meeting on October 18, 2006, the issue of rule versus policy was brought up and discussed briefly. There, DEQ reiterated its position that they were merely proposing a policy to be used in guiding internal decisions of the Department when engaged in the permitting process. The Board responded favorably to this characterization and proceeded to consider the merits without further discussion. *See Minutes*. In December 2006, the DEQ did an about face, completely reversing its prior position and promoting Appendix H as a rule. Though the Board's recommendation to the Environmental Quality Council was to approve the Ag Use

Protection Policy, as amended to include the higher default limits for EC and SAR as proposed by Kevin Harvey, it was never considered as a rule and was not proposed as such for public comment.

On February 5, 2007, the Water and Waste Advisory Board again met to discuss the Agricultural Use Protection language. However, despite allowing public comment on the matter, the DEQ arbitrarily limited comments to the issue of whether the language should be continued as a policy or as a rule. Indeed, DEQ clearly indicated in its public notice that it would not consider comments as to the substantive issues of the proposed rule, but only with respect to the policy versus rule analysis. Following the public comments, the Water and Waste Advisory Board voted unanimously to recommend the Agricultural Use Protection language as a policy. Nevertheless, it appears that DEQ has chosen to ignore the Board's recommendation and proceed with the Chapter 1 rulemaking including Appendix H as a rule. Not only is this contrary to the recommendation of the statutorily created advisory board's recommendation, it is an improper attempt at rulemaking. As the public has not been given the proper opportunity to comment on the Ag Use Protection language as a rule, adoption of the language as such would violate the Wyoming Environmental Quality Act and the Wyoming Administrative Procedure Act.

Pursuant to W.S. § 35-11-114(b), the Water and Waste Advisory Board has the responsibility to "recommend to the council through the administrator and director the adoption of rules, regulations and standards to implement and carry out the provisions and purposes of the act." This role is reiterated by W.S. § 35-11-302(a), which details that the administrator of Water Quality Division cannot recommend to the Director of DEQ any rule, regulation, standard or permit system without first consulting with the Advisory Board. There is also very clear direction as to what the Board must consider in making its recommendations. Under W.S. § 35-

11-302(a)(vi), "the advisory board shall consider all facts and circumstances bearing upon the reasonableness of the pollution involved." This includes certain factors such as the practicability and the economic reasonableness of the regulation. The Board did not properly fulfill these responsibilities in the present case. Appendix H was never properly noticed and open for public comment as a rule, and any attempt to adopt it as such would be contrary to statute. The nature and effect of proposed Appendix H has completely changed by virtue of DEQ's decision to pursue it as a rule. Merit objects to the attempts by DEQ to avoid the requirements of the EQA and the WAPA by changing its position at this late date. Merit respectfully requests that the Council deny these attempts, and remand Appendix H to DEQ for proper rulemaking as a proposed rule, together with all its substantive portions.

Merit Energy Company is strongly opposed to the adoption of the Ag Use Protection language as a rule. The language in Proposed Appendix H is so vague and ambiguous that it precludes any attempt at consistent interpretation and application as a rule. In addition, its application is so completely shrouded by the Department's discretion that it is impossible to assess its full impact if adopted. Implementation of the recommendations of Appendix H as a rule would jeopardize the flexibility of the permitting process and would result in an overly restrictive regulatory scheme. Indeed, DEQ has recognized and even championed the importance of flexibility in this area in the comments it made to the Advisory Board. Adoption of Appendix H as a rule would require the Department to implement the language on a statewide basis and would not permit them to address different circumstances of agricultural use protection on a more localized, or specialized, level. Rather than protecting agricultural use, such an approach would be detrimental and would run afoul of the statutory powers of the DEQ. By

statute, the Administrator of Water Quality is to make recommendations to the Director as to how to address differing circumstances and areas of the state within the regulatory framework.

> (a) The administrators of the air quality, land quality and water quality divisions, under the control and supervision of the director, shall enforce and administer this act and the rules, regulations and standards promulgated hereunder. Each administrator shall have the following powers:
>
> ... (ix) To recommend to the director, after consultation with the appropriate advisory board, that any rule, regulation or standard or any amendment adopted hereunder may differ in its terms and provisions as between particular types, characteristics, quantities, conditions and circumstances of air, water or land pollution and its duration, as between particular air, water and land pollution services and as between particular areas of the state;

W.S. § 35-11-110(a)(ix). Adoption of the Ag Use Protection language as a rule would curtail this important power and would unnecessarily limit the Department's ability to apply the principles it contains in a flexible and effective manner. Considering the amount of time and effort that has been expended in promoting Appendix H as a policy, and in light of the inflexible and overly stringent effects it would have as a rule, it makes no sense to adopt it as a rule.

Merit wishes to reiterate that by encouraging the adoption of Appendix H as a policy and not a rule, it does not in any way waive any of its opposition to the Ag Use Protection language. Merit continues to oppose the changes and expansion of Chapter 1 Section 20 in its current form. However, faced with choosing the better of two evils, Merit Energy Company recommends that any attempt to apply Appendix H as a rule be summarily rejected. The Water and Waste Advisory Board has recommended that the Agricultural Use Protection language be pursued as a policy. In the alternative, the Board recognized that attempts to pursue the language as a rule should be subjected to a full notice and comment rulemaking period as such. It behooves this Council and the DEQ to seriously consider and apply the recommendations of the Board. Not only does adoption of the language as a rule divest the DEQ of the flexibility necessary to adapt

its principles to the various circumstances of the state, but the rulemaking provisions of the EQA and the WAPA have not been properly followed and any such rule would not be enforceable. For the reasons set out herein, Merit Energy Company respectfully requests that DEQ's proposal to adopt Appendix H as a rule be denied.

B. Existing and Historic Discharges are not Adequately Protected

As noted, Merit opposes the adoption of the Proposed Appendix H as a rule. In addition, there are specific issues created by the proposed language to which Merit is opposed regardless of the policy/rule distinction. One such issue is the attempt to provide for the continued use of existing discharges. While Merit desires that existing discharges be allowed to continue, the proposed language does not adequately provide such protection. The proposed language purports to protect historic discharges.

> Effluent limits on historic discharges of produced water will not be affected by this Appendix in relation to the protection of agricultural uses. Where discharges have been occurring for many years, the permitted quality of those discharges shall be considered to the "background" conditions and be fully protective of the agricultural uses that have developed around them. Therefore, it is not necessary to modify those discharges in order to achieve the goal of no measurable decrease in crop or livestock production. It would only be necessary to maintain the existing quality of the discharge. It is important to note, however, that effluent limits on historic discharges may be made where the quality of the discharge is shown to constitute a hazard to humans, livestock or wildlife.

Proposed Appendix H, pg H-2, lines 20-23. While this language appears, on its face, to be protective of historic discharges, the language is vague and may not be sufficiently protective. For example, nowhere is the term "historic discharges" defined. It is questionable at best how long a discharge must be in existence before it would be considered "historic." It is conceivable, indeed likely, that some discharges will be put to beneficial use immediately, thus developing agricultural uses around them as conceived in the language. However, when does a discharge become "historic" and subject to the protections of this section? Also questionable is the effluent

limits on historic discharges. How does one establish what the water quality of a historic discharge is? Does it mean average water quality over the life of the discharge? If so, then by definition one half of the discharge in the future will not meet the effluent limits.

One could also argue that the effluent limits on the historic discharge should be the best water quality, or perhaps the worst, over the life of the discharge. Suffice to say that the proposed language is open to wide interpretation and is far from clear. This section is also unclear with respect to the agricultural uses that will be protected. For example, one could argue that the historic discharges will only be considered protective of the specific uses that have utilized the water. If one were to commence a different agricultural use of the water, they could conceivably insist on more stringent effluent limitations. The attempt to provide some clarity and security for existing, "historic discharges," while a vitally important component of the Agricultural Use Protection language, falls short of being effective. Merit suggests that the language be modified in order to avoid the ambiguity that exists. For example, the term "historic discharge" needs to be clearly defined. Merit would propose a definition that would encompass existing discharges where the water has been put to beneficial use in agriculture regardless of the duration. In this way, the proposed policy will indeed serve to protect those existing uses. The language should also make clear that effluent limits on historic discharges will be considered as "background" regardless of the specific agricultural uses that have been developed, or may develop around it in the future. If such changes to the language are not adopted, it is clear that the effect of the proposed policy will be detrimental to historic discharges and the important agricultural uses that have been developed in reliance on the produced water. In other words, the practical effect of the substantive terms found in the policy will render the admirable goal of preserving historic discharges meaningless.

C. Protection of Naturally Irrigated Lands is Unnecessary and Ill Advised

One of the stated goals of the proposed policy is to "ensure that pre-existing irrigated crop production will not be diminished as a result of the lowering of water quality." Appendix H, H-3, Lines 12-13. While this is merely a restatement of the Chapter 1 Section 20 purpose, the proposed policy goes well beyond simply protecting pre-existing irrigated crop production and significantly expands the scope of irrigated lands. Such an expansion is neither necessary nor helpful. The practical application of the terms of the policy will result in a finding that nearly every drainage in the state contains significant portions of naturally irrigated lands. Naturally irrigated land is so broadly defined in the proposal that it would be nearly impossible to find, by either landowner testimony or infrared photography, land that does not meet the definition. The result is clear, nearly all drainages in the state will be subject to the proposed effluent limits, whether there was pre-existing artificial irrigation or not. Naturally irrigated lands have flourished in Wyoming under the current regulatory framework and there is no need to add this new protection. It makes no sense to burden the proposed regulation with this unwieldy language when the real concern, existing artificially irrigated lands, can be adequately protected without it.

Put simply, the proposed language is overbroad with respect to its definition of irrigated land that qualifies for protection. With respect to "naturally irrigated lands," the policy's overarching intent is to protect irrigation water quality where there is "a substantial acreage of naturally sub-irrigated pasture within a stream floodplain." H-2, lines 9-10. However, the policy's more detailed discussion of coverage of "naturally irrigated lands" is highly ambiguous, referring first to areas along stream channels that have "enhanced vegetative production due to periodic natural flooding or sub-irrigation," but also to lands "on which the combination of

stream flow and channel geometry provides for enhanced productivity of agriculturally significant plants." H-4, lines 1-5. Does "vegetative production" refer to growth of any plant, including noxious plants or those that supplant native vegetation, or only to plants that are in some unspecified way "productive?" How will DEQ determine whether plants that would receive discharged water are "agriculturally significant?" If a discharge will promote the growth of livestock forage plants that will supplant native plants, will the discharge be deemed to enhance or to decrease crop or livestock production?

Thus, while the rule may be aimed at the particular goal of protecting areas that comprise "a substantial acreage of naturally sub-irrigated pasture within a stream floodplain," the specific provisions that attempt to define naturally irrigated lands are not tailored to this objective. Instead, they speak in broad and ambiguous terms of "vegetative production" that, apparently, would include ungrazed bottomlands, ungrazable wetlands, and areas of native plants that are inferior as forage. Moreover, the plain meaning of the term "pasture" does not include vegetation within a stream channel; rather it appears clearly to mean grazed vegetation in the floodplain. This language is unnecessary and serves only to confuse the protection of artificially irrigated lands. Merit respectfully asks the Council to remove the confusing and ambiguous language referring to naturally irrigated lands from the Agriculture Use Protection document.

D. The Policy Could Allow a Single Landowner to Unconstitutionally Control the Entire Drainage

It is well established that any water found within a natural stream is property of the state. Further, it is undisputed that the state exercises an easement to flow waters down the natural streams. Despite these recognized and established principles, the proposed policy purports to vest the authority in individual landowners to prevent the flow of produced water in natural streams. DEQ admits that the policy as written would grant the authority of one landowner on

the drainage to prevent the discharge even if every other owner on the drainage requested the water. This is completely contrary to the Constitution and Wyoming Statutes and must not be permitted.

"The water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Wyoming Constitution, Article 1, Section 31. This is true regardless of the source of the water, whether it be rainfall or other precipitation, snowmelt, seepage, irrigation waste, sewage, pumped groundwater, or any other source. *Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764 (Wyo. 1925); *Fuss v. Franks*, 610 P.2d 17(Wyo. 1980); *Bower v. Big Horn Canal Assc.*, 307 P.2d 593 (Wyo. 1957). Recent Wyoming decisions reiterate these principles and confirm that produced water in a natural stream is also property of the state. "Water legally placed in natural watercourses, even water produced from CBM, is water belonging to the state." *Decision Letter* dated October 11, 2005, *Williams Production RMT Company v. William P. Maycock, II*, Campbell County Civil Action No. 26099, Sixth Judicial District Court, a copy of which is attached hereto as **"Exhibit A."**

In addition to having a property right in the waters, the state also has a right of way for its waters to flow through natural watercourses. *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961). This is an important right and is critical to the effectiveness of the prior appropriation system. "Such a right of way is essential to our system of prior appropriation. Water users can count on water flowing down watercourses to diversion points only because the state has such an easement. The state's easement applies to all of its water in watercourses, whether from CBM development or otherwise." Decision Letter at pg. 5. The *Maycock* decision also stated that "the state's easement for its water flowing down watercourses necessarily extends to the normal

carrying capacity of the watercourse, and extends to all seasons. Any other rule would negate development and us of water." *Id.* These are well-established principles of Wyoming law and have been applied for over one hundred years of water law.

The proposed Agricultural Use Protection document ignores these recognized principles of law and is internally opposed. On the one hand, the proposed language purports to grant landowners the right to accept water that does not meet the proposed water quality limits. Such a right is important, as it would allow produced waters to be legally discharged, thus becoming waters of the state subject to the easement to flow in the watercourse. On the other hand, the proposed language also vests power in a single landowner to preclude any discharges that do not meet the effluent limits. Vesting such broad rights in an individual landowner will completely negate the purpose of the proposed policy, namely, to protect agricultural uses. If one owner can prevent the flow of water, which would otherwise be beneficially used in the drainage, then the public policy of protecting agricultural uses will be thwarted.

Finally, this Council is statutorily precluded from acting in a manner that would restrict the state's rights in any way. Pursuant to W.S. § 35-11-102, the policy and purpose of the EQA includes: "to preserve and exercise the primary responsibilities and rights of the state of Wyoming; [and] to retain for the state the control over its air, land and water[.]" Therefore, DEQ and this Council should not be encouraging a rule or policy that concedes that a downstream landowner has the authority to dictate the parameters governing the flow of a stream through his property. As long as the flow does not exceed the scope of the state's easement to flow its waters, individual landowners cannot interfere with that right. Nor should DEQ be permitted to enforce a rule that jeopardizes the state's important rights and powers in this regard.

E. DEQ's Recommended Tier 1 Default Effluent Limits Are Unsupported

Merit is aware of disagreement between the DEQ and the Water and Waste Advisory Board with respect to the default effluent limits of Tier 1 in the proposed policy. Indeed, the dispute is acknowledged in the current draft of the Agricultural Use Protection document, which sets forth the differing default effluent limits under Tier 1. Merit is opposed to the more conservative limits proposed by DEQ. It is illogical to impose effluent limits as a default when such limits are impossible to achieve. In application, such restrictive defaults render Tier 1 meaningless in its entirety. Inability to attain the default limits leads to the logical conclusion that Tier 2 will become the *de facto* default. The scientific evidence in the record clearly demonstrates that the default limits recommended by the Water and Waste Advisory Board are more applicable and scientifically supported. Merit requests that the default effluent limits proposed by the DEQ be rejected.

CONCLUSION

Merit Energy Company is opposed to any attempt to apply the Agricultural Use Protection document as a rule. It has long been advanced as a policy and any attempt to apply its terms in the form of a rule would run afoul of the Wyoming Administrative Procedure Act and the Environmental Quality Act. Further, even if this Council should choose to follow the recommendation of the Water and Waste Advisory Board and adopt the proposed document as a policy, Merit is opposed to the language in its current draft. While the document purports to allow the continued discharge of historic discharges, its terms are ambiguous and unclear. In addition, the proposed protection of naturally irrigated lands is cumbersome, unhelpful, and completely contrary to the stated purpose of protecting agricultural uses. The proposed document is also contrary to law in that it vests the authority in individual landowners to control

the flow of the state's water in natural watercourses. Finally, the DEQ's proposed default effluent limits for Tier 1 are overly conservative, not supported by valid scientific evidence, and would render the Tier 1 option meaningless. For the reasons stated above, Merit Energy Company respectfully requests that the Council refuse to adopt the Agricultural Use Protection document in its current draft.

DATED this 14th day of February, 2007.

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EXHIBIT
A

RE: *Williams Production RMT Company v. William P. Maycock, II*
Campbell County Civil Action No. 26099
DECISION LETTER

Dear Counsel:

Plaintiff (Williams) is a mineral production company. It holds leases or operating rights for minerals in Campbell County, Wyoming. Defendant (Maycock) owns the surface of the land where those minerals are. Williams filed a claim in this case seeking to condemn rights of way across Maycock's land for access to leases and well-sites.

Williams proposes to develop coal-bed methane under Maycock's surface, and under adjacent lands. To produce coal-bed methane Williams must first pump water out of coal seams. Williams filed a second claim seeking to condemn a right of way across Maycock's property for the discharge of that water across the surface of Maycock's ranch.

After filing the condemnation claims, Williams filed 2 motions for partial summary judgment. Those motions essentially ask for declaratory relief establishing that in certain circumstances, Williams need not condemn rights of way because rights of way or rights of access already exist.

The parties are well aware of the applicable standard of review. The Court will not repeat the standard in this decision.

Access to Leases and Well-sites/Unit Access. The portions of the Maycock ranch relevant to this issue were homesteaded under the U.S. Stock Raising Homestead Acts. The Maycock ranch (the portion applicable to this claim) includes lands patented under approximately 30 different patents. Each of those patents reserved certain minerals to the U.S. Government, using the following language (or substantially similar language):

> Excepting and reserving, however, to the United States all the coal and other minerals in the land so entered and patented, together with the right to prospect for, mine, and remove the same pursuant to (statute).

Maycock claims that the U.S. reservation of minerals in each patent includes the right to enter the surface of each particular patented tract only to develop the minerals under that tract. Consequently, where Williams seeks to place a well on patented tract C, but needs to cross tracts A and B to get to Tract C, Maycock claims that the U.S. did not reserve a right to cross tracts A and B for the development of minerals under tract C.

The leases of U.S. government reserved minerals under the Maycock Ranch have all been committed to a "Unit" known as the Carr Draw Federal Unit. (The unit area also contains non-U.S. leased minerals and mineral leases not committed to the unit. Those tracts are beyond the scope of this decision). The Carr Draw Unit Agreement establishes that production of minerals from one tract in the unit is considered to be production from all other tracts. Williams seeks partial summary judgment establishing that as a matter of law, the government's reservation of access for production of its minerals applies to all lands within the unit.

The United States reserved a right of access for exploration, production and transportation of minerals when it reserved minerals under the Stock Raising Homestead Act.[1] That right of way exists only within each patented tract for the minerals within the area of that patent. The language in the patents clearly reserves only the minerals "in the land so entered and patented," and reserves a right of way within the patented land for production of "the same" minerals. No right of way is reserved in these patents for access to minerals within adjoining lands.

If the minerals in question were not committed to the Carr Draw unit, there would be no further issue. In that case, Williams would have to condemn rights of way across tracts without actual production. However, there is no issue of fact that the minerals reserved

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[1] Even if the patents did not reserve such a right, a right of reasonable access across the surface for production of underlying minerals is implied. The implied right is essentially the same as the specific right described in the patent reservations.

by the U.S. Government underlying Maycock's ranch, and the associated leases, have been committed to the unit. The unit agreement for the Carr Draw unit establishes that production on one part of the unit constitutes production on all of the land within the unit. Production from one place within the unit is shared by all mineral owners within the unit.

Pooling or unit agreements are favored because they encourage orderly development, efficiency, and conservation. The Carr Draw unit agreement sets out these reasons as foundations for the unit. Minerals under a particular tract may be most efficiently produced by drilling elsewhere in the unit. It is entirely logical that the access easement for production of minerals underlying a tract applies to production that occurs at some other location within the unit. It is illogical to recognize unitized production, but to deny that the right of access for production does not extend across the unit.

Other states recognize that when minerals are in a unit, the production is shared and the right of access for exploration, production and transportation also is shared across the unit. Oklahoma holds that "a unit operator has the right to use any surface within the unit for the purpose of efficiently carrying out the approved unit plan, so long as such use is reasonable and not unduly burdensome as to any particular surface area. *Nelson v. Texaco*, 525 P.2d 1236, 1266 (Ok. Ct. App. 1974). Texas has held that the "surface easement of reasonable use extends to the surface of the pooled or unitized area." *Property Owners of Leisure Land, Inc. V. Woolf & Magee, Inc.*, 786 S.W. 2d 757, 760 (Tex App-Tyler 1990). New Mexico recently stated

> ...a mineral lessee's implied surface right of reasonable ingress and egress to reach a well located inside the production unit that the lessee is operating pursuant to a pooling agreement extends across lease boundaries within the unit to the surface of the entire area subject to the arrangement, regardless of where within the unit production is taking place.
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> *Kysar v. Amoco Prod. Co.*, 93 P.3d 1272, 1282 (N.M. 2004).

Maycock strenuously objects to access across patent boundaries, claiming that "the Court is being asked to grant Williams sweeping authority." The undisputed facts, however, are that Maycock always had record notice that the government reserved the minerals in question. The owner of those minerals leased them, and consented that they could be developed within a unit. The lessee of the minerals has the right to reasonably use the surface for development of the minerals within the Carr Draw unit. Reasonable use of the surface to develop severed minerals is not "sweeping" new authority, but well established law.

Maycock objects that the Carr Draw unit was established voluntarily, and was not mandated by the Wyoming Oil and Gas Conservation Commission. Maycock also objects that the Carr Draw unit is far larger than many other units. The Court finds no reason why unit principles should apply only to mandatory units, and not to voluntary ones, or to small units and not to large ones. The same principles of efficiency apply. Production on one part of a unit is considered production on all of the unit, whether it is voluntary or mandatory, small or large.

Maycock also claims that the Carr Draw unit agreement permits mineral owners to withdraw, destroying the unit. The unit agreement indicates otherwise. Mineral owners once committed to the unit can delay full participation, but they cannot withdraw.

The Court finds that there is no issue of material fact on this issue, and that Williams is entitled to judgment as a matter of law. William may utilize land over U.S. reserved minerals within the Carr Draw unit in a reasonable manner for development of any of those minerals, without limitation by patent or lease boundaries. Mr. Palma should prepare an order to this effect and obtain approval as to form.

Water Discharge. Williams wants to produce methane gas contained within coal deposits in the Carr Draw unit. This gas is commonly referred to as coal bed methane, or CBM. To produce CBM one must first remove water from the coal deposits to "depressurize" the formation. Williams proposes to pump water from the coal beds and discharge that water into drainages called Barber Creek and South Prong Barber Creek.

In this motion for partial summary judgment Williams asks the Court to hold that, as a matter of law, water pumped from coal beds and discharged into Barber Creek and South Prong Barber Creek is water belonging to the State of Wyoming and subject to the State's easement for transportation of its water within natural watercourses. If that is the case, Williams need not condemn rights of way across Maycock to transport the water from CBM operations. Maycock disagrees that CBM water is water belonging to the state. Maycock also asserts that Barber Creek and South Prong Barber Creek are not natural watercourses, and that neither the State nor Williams have an easement to transport water down these drainages.

Article 1, Section 31 of the Wyoming Constitution states that "the water of all natural streams, springs, lakes or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Any water within a natural stream belongs to the state, whatever the source of that water. The water may come from rainfall, snowmelt, seepage, irrigation waste, sewage, pumped groundwater, collection of rain by pavement, or any other source. *See, e.g., Wyoming Hereford Ranch v. Hammond Packing Co.*, 236 P. 764 (Wyo. 1925); *Fuss v. Franks*, 610 P.2d. 17

(Wyo. 1980); *Bower v. Big Horn Canal Association*, 307 P.2d 593 (Wyo. 1957). Water legally placed in natural watercourses, even water produced from CBM, is water belonging to the state.

Maycock argues that only "natural" surface water in watercourses is water belonging to the state. He calls CBM water "artificially produced," and argues that only "naturally flowing" waters belong to the state and are entitled to an easement when running down a watercourse. Maycock fails to present any logic or case law to support such a contention.

Wyoming statutes support the conclusion that CBM water in a watercourse is water of the State. W.S. §41-3-903 identifies "by-product water" as "water which has not been put to prior beneficial use, and which is a by-product of some non water-related economic activity and has been developed only as a result of such activity." CBM water clearly fits under this statutory definition of by-product water. W.S. §41-3-904 provides that once by-product water is not readily identifiable and has "commingled with the waters of any ... watercourse" it may be appropriated just as any other water of the state.

The state has a right of way for its waters to flow through watercourses. *Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961). Such a right of way is essential to our system of prior appropriation. Water users can count on water flowing down watercourses to diversion points only because the state has such an easement. The state's easement applies to all of its water in watercourses, whether from CBM development or otherwise.

The state's easement for its water flowing down watercourses necessarily extends to the normal carrying capacity of the watercourse, and extends to all seasons. Any other rule would negate development and use of water. Although this rule has not been considered directly in Wyoming, other states have clearly recognized it. *See, e.g. Smith v. King Creek Grazing Association*, 671 P.2d 1107 (ID Ct. App. 1983); *Phillips v. Burke*, 284 P.2d 809 (Cal. Ct. App. 1955); *Ambrosio v. Perl-Mack Construction Co.*, 351 P.2d 803 (Colo. 1960).

One of Maycock's primary arguments against the introduction of CBM water into Barber Creek is that the water will be of poor quality. He characterizes the water as "wastewater," "poor quality," "unnatural mineral development water,"and "potentially harmful." He argues that the nature of his ranch will change if additional water flows down Barber Creek. The quality of the water is not an issue before this Court. The issue here is only whether the water, if legally discharged into Barber Creek, is water belonging to the state and subject to the state's right of way.

This decision recognizes that, as a matter of law, CBM water is water belonging to the state once that water is legally placed in a watercourse. Williams argues that the undisputed facts show that Barber Creek and South Prong Barber Creek are watercourses. "A water course is a stream of water flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water." *State v. Hibler*, 44 P.2d 1005, 1009 (Wyo. 1935). A watercourse may have intermittent water flow. *Scott v. Swartz*, 522 P.2d 151 (Wyo. 1974). However, whether the frequency and amount of flow, or other characteristics of a drainage are sufficient to constitute a watercourse, is generally a difficult question of fact. *State v. Hiber*, 44 P.2d 1005 (Wyo. 1935).

Issues of fact remain on the issue of whether Barber Creek and South Prong Barber Creek are watercourses. Maycock claims that there are "a number of areas" where these drainages are "large flat meadow areas with no defined creek bed, banks or channel." He claims that they have "often gone years with no flowing water at all." Williams presents evidence indicating that Barber Creek and South Prong Barber Creek were created by water flow and have stream beds and banks in all but 2 locations. Whether Barber Creek and South Prong Barber Creek are watercourses are issues of fact to be resolved at trial.

Because issues of fact remain on whether Barber Creek and South Prong Barber Creek are watercourses, summary judgment on the issue of water trespass must be denied. Mr. Wendtland should prepare an order to this effect and obtain approval as to form.

Sincerely,

Keith G. Kautz
District Judge

KGK/km