

**FILED**

**JUL 29 2011**

*Jim Ruby, Executive Secretary  
Environmental Quality Council*

**BEFORE THE  
ENVIRONMENTAL QUALITY COUNCIL  
STATE OF WYOMING**

**IN THE MATTER OF THE OBJECTION )  
TO THE MINE PERMIT OF )  
LOST CREEK ISR, LLC, TFN 4 6/268 )**

Docket No. 11-4803

**LOST CREEK ISR'S RESPONSE TO WYOMING OUTDOOR COUNSEL'S  
AMENDED WRITTEN OBJECTIONS AND PREHEARING STATEMENT**

Pursuant to Chapter II, § 1(a) of the Wyoming Department of Environmental Quality Rules of Practice and Procedure, applicant Lost Creek ISR, LLC ("Lost Creek") respectfully submits this Response to Petitioner Wyoming Outdoor Council's ("Petitioner") Amended Written Objections ("Amended Objections") and Prehearing Statement, and in support thereof states as follows:

**BACKGROUND**

This proceeding was initiated upon the Environmental Quality Council's (the "Council") receipt of Petitioner's written objections to Lost Creek's Application on June 24, 2011. District 2 staff of the Wyoming Department of Environmental Quality's (the "Department") Land Quality Division (the "Land Division") deemed Lost Creek's Application technically complete and ready for public notice on February 16, 2011, and thereafter published the first of four public notices on May 4, 2011 (such notices, collectively, the "Notice"). After submitting its initial list of objections and immediately preceding the initial prehearing conference held on July 6, 2011, petitioner filed its Amended Objections that set forth the issues presently before the Council.

**STANDARD OF REVIEW**

As noticed, this hearing is to be conducted pursuant to the Department's Practice and Procedure regulations and the relevant provisions of the Wyoming Environmental Quality Act (the "Act") and the Wyoming Administrative Procedure Act ("APA"). In accordance with those authorities and the standards that are applied by courts when reviewing administrative actions, the initial burden of demonstrating that any such action is arbitrary or illegal, or is otherwise not supported by substantial evidence in the record, rests upon the petitioner. See Knight v. Env't'l Quality Council, 805 P.2d 268, 273 (Wyo. 1991); Grams v. Env't'l Quality Council, 730 P.2d 784, 786 (Wyo. 1986); In the Matter of the Objection to the Small Mine Permit of McMurry Ready Mix Co., TFN 5 3/143, ¶ 46, EQC Docket No. 10-4803 (Mar. 10, 2011) (hereinafter "McMurry Ready Mix"); see also W.S.A. § 16-3-114(c) (standards of review under the APA). This burden requires that the petitioner not only clearly present the question being raised, but also place evidence in the record that will sustain the petitioner's position by at least a preponderance of the evidence. See Wyo. Bancorporation v. Bonham, 527 P.2d 432, 439 (Wyo. 1974); see also In the Matter of the Objection to the Mine Permit of Croell Redi-Mix, Inc., TFN 5 6/072, at 9, EQC Docket No. 09-4806 (Mar. 12, 2010). Courts will extend deference to the specialized knowledge, experience and technical expertise of the administrative agency that made the decision being challenged – in this case, the Land and Water Divisions and the

Wyoming Game & Fish Department ("WGFD") – and will not disturb an agency's decision unless it is demonstrated to be clearly contrary to the overwhelming weight of the evidence on the record. See Joe Johnson Co. v. Wyo. State Bd. of Control, 857 P.2d 312, 314 (Wyo. 1993).

### SUMMARY OF ARGUMENT

A permit to mine sought under article 4 of the Act must be granted if the applicant demonstrates that the application complies with the requirements of the Act and all applicable federal and state law. See W.S.A. § 35-11-406(m); see also In the Matter of the Objection to the Small Mine Permit of Western Wyo. Constr. Co., TFN 4 4/267, at 2, EQC Docket No. 06-4802 (Nov. 30, 2006) ("Wyoming Construction"); McMurry Ready Mix, ¶ 45. Permit applications can only be denied based upon one or more of the criteria enumerated in the statute. See W.S.A. §§ 35-11-406(m)(i) through (xvi); see also Wyoming Construction, at 2-3. Petitioner's Amended Objections consist entirely of conclusory statements of law and fact, and make no effort to properly plead the legal issues presented for consideration by the Council. With the sole exception of reference to Executive Order 2011-5 ("Order 2011-5"), the Amended Objections fail to cite or set forth any state or federal statutory or regulatory bases or standards to support Petitioner's allegations.

What *is* clear from Petitioner's designation of witnesses and exhibits, however, is that Petitioner has designated none of its own lay or expert witnesses that are competent to testify on any issue set forth in the Amended Objections. The sole exception is the designation of lay witnesses and exhibits relating only to the fifth, sixth, and seventh amended objections regarding sage grouse (the "Sage Grouse Objections"). Petitioner has designated no exhibits outside of those already contained within the Application to support its first through fourth amended objections.

Moreover, Petitioner's Sage Grouse Objections as pleaded relate only to the Department's compliance with the terms of Order 2011-5, and not to any issues regarding the past activities of the Governor's Sage Grouse Implementation Team or the efficacy of Order 2011-5 itself. The jurisdiction of the Council in contested cases is limited to determining all issues that arise "under the laws, rules, regulations, standards or orders issued or administered by the department or its . . . divisions." W.S.A. § 35-11-112(a). Order 2011-5 was issued not under any of those legal authorities, but pursuant to the power and authority vested in the Governor by the Constitution of the State of Wyoming. Petitioner's designation of witnesses and exhibits suggest that Petitioner intends to invite the litigation of issues relating to Order 2011-5 that would be improper for the Council to consider. The Council's consideration of evidence must be limited to that which is competent and which is directly related to the Department's compliance with the terms of Order 2011-5, as reflected in the terms and commitments set forth in the Application.

### CONTESTED ISSUES

1. Whether the Water Division's reclassification of the HJ Horizon of the Battle Spring Formation from Class IV (Industrial) to Class V (Mineral Commercial) is "justified" based upon the inclusion within the reclassified region of an area encompassing the next  $\frac{1}{4}$   $\frac{1}{4}$  section surrounding the commercially producible mineral zone.

**Lost Creek's position.** On April 26, 2011, the Land Division approved the Statement of Basis for the Water Division's proposed reclassification of groundwater within and immediately surrounding the mine units to Class V (Mineral Commercial) groundwater. The Water Division submitted the Statement of Basis to U.S. Environmental Protection Agency ("EPA") Region 8 staff for review on April 28, 2011. Pursuant to the 1983 Memorandum of Agreement ("MOA") between the Water Division and EPA Region 8, EPA is required to review the Water Division's submission for consistency with federal groundwater classification regulations.

Following that review, on June 8, 2011, EPA submitted an interim written response to the Water Division, indicating that it could not "at this time" approve the requested reclassification boundary. EPA requested that Lost Creek submit additional information in order to demonstrate that any area outside the area of mineralization that is included within the reclassification boundary is commercially mineable and/or integral to fully mine the ore body.

Since receiving EPA's request, Lost Creek and Department officials have met with EPA staff on two occasions in order to understand and fully address EPA's concerns. EPA requested that Lost Creek develop a science-based method for establishing an aquifer reclassification boundary that extends beyond the mineral production zone. Lost Creek's consultant, Petrotek, has developed such an approach and refined the exemption boundary. Lost Creek, the Department, and the EPA have reached an agreement in principle on the boundary concept developed by Petrotek.

Petitioner has presented no legal or factual basis to support its vague objection that the reclassification is not "justified," and Lost Creek denies Petitioner's second amended objection. The Statement of Basis sets forth in great detail the justification for the aquifer reclassification and, as determined by the Water Division, the aquifer reclassification meets the State's requirements for reclassification. The methodology, analysis, and accompanying maps and figures developed by Petrotek in the ongoing discussions with the EPA will further demonstrate that the modified boundary meets all federal requirements for an aquifer exemption in accordance with EPA regulations.

Petitioner appears to have designated no independent witnesses and no exhibits outside of those already contained within the Application to support its first amended objection that the aquifer reclassification boundary is "not justified." On the basis of the evidence that Lost Creek will present at the hearing, the modified reclassification boundary is in fact fully justified and was developed in accordance with both state and federal law. Accordingly, without evidence to contravene that which is already in the record and that which will be offered by Lost Creek, Petitioner's first amended objection has been addressed and should be denied.

2. Whether the Water Division's reclassification of the HJ Horizon of the Battle Spring Formation from Class IV (Industrial) to Class V (Mineral Commercial) is "justified" based upon the inclusion within the reclassified region of an area outside the monitoring well perimeter.

**Lost Creek's position.** In response to Petitioner's second amended objection, Lost Creek incorporates the position stated in response to Contested Issue No. 1 above as if fully set forth herein. Petitioner's second amended objection to the aquifer reclassification boundary – that

extending the boundary beyond the monitoring well boundary is unjustified – also lacks merit and Lost Creek denies same. Neither state nor federal regulations require Lost Creek to arbitrarily set the reclassification boundary at the monitoring well ring. By contrast, Lost Creek has established a science-based methodology that supports a modified boundary for the reclassified area and fully comports with state and federal law.

Lost Creek will present evidence to demonstrate that it would be practically and technically infeasible for Lost Creek to undertake its planned operations with the reclassification boundary established in the manner advocated by Petitioner. That same evidence will demonstrate that the limitation advocated by Petitioner would, in the event of certain potential excursions, result in an automatic violation of state and federal law by allowing contaminants to migrate beyond the reclassified aquifer boundary prior to detection by the monitoring wells.

Petitioner appears to have designated no independent witnesses and no exhibits outside of those already contained within the Application to support its second amended objection that establishing an aquifer reclassification boundary beyond the monitoring well perimeter is "not justified." On the basis of the evidence that Lost Creek will present at the hearing, the modified reclassification boundary is in fact fully justified and was developed in accordance with both state and federal law. Accordingly, without evidence to contravene that which is already in the record and that which will be offered by Lost Creek, Petitioner's second amended objection should be denied.

3. Whether, based upon the presence of a geologic fault line transecting the mining area, the mining permit includes adequate precautions to prevent lixiviant and associated minerals and contaminants from contaminating groundwater outside of the mineral zone and associated cone of depression for the mining operations.

**Lost Creek's position.** As the evidence will demonstrate at the hearing, Lost Creek has extensively studied and characterized the fault, the Application includes binding commitments that are adequate to prevent groundwater contamination outside of the production horizon, and Lost Creek therefore denies Petitioner's third amended objection.

Lost Creek will present extensive evidence on the Lost Creek Fault, a northeast-southwest fault that is located within the Mine Unit 1 production area (the "Fault"). The geologic and hydrologic properties of the Fault have already been determined through a series of aquifer pumping tests and subsurface geophysics collected from boreholes. The borehole geophysics indicate that the Fault has a maximum displacement of 80 feet on the east side and 40 feet on the west side with the southern block being downthrown. A minor sub-parallel "splinter" or "splay" fault splits to the south from the main Fault near the center of Mine Unit 1. The splinter fault trends roughly east-west, and the greatest distance between the main Fault and the splinter fault is about 200 feet. Displacement along the splinter fault is about 14 feet along its western portion, increasing to about 28 feet farther to the east before losing identity about 2,000 feet east of the split from the main Fault. The downthrown block is to the north, which creates a small, localized graben feature between the main Fault and the splinter fault. Both the main Fault and the splinter fault extend vertically through all the horizons of interest. Close spaced drilling indicates that the angle of the Fault is relatively high angle, approximately 85 degrees.

Lost Creek recognizes that within some areas of Mine Unit 1, the production horizon is positioned across from the overlying or underlying horizons due to the structure of the Fault. Lost Creek and the Land Division have extensively examined these areas to characterize how the aquifer will respond to production near the Fault and to ensure that a monitoring strategy to detect excursions into these juxtaposed horizons is in place prior to the start of mining operations.

The aquifer pumping tests reveal that the Fault is a substantial barrier to ground water flow, likely due to the smearing of clay material along the Fault face. Each of these aquifer pumping tests exposed the Fault to greater pressure than will be experienced during operations. Despite this increased pressure, the Fault continued to act as a substantial barrier to flow. The functioning of the Fault as a barrier to flow, in conjunction with several operational controls and monitoring, will ensure the mining solutions stay within the production horizon.

Moreover, Lost Creek has committed, after considerable consultation with the Land Division, to install one observation well, in addition to several existing monitor wells, along the Fault to ensure proper monitoring. Each of the observation and monitor wells will be monitored a minimum of twice per month during operations. More importantly, as per standard industry practice, a hydraulic bleed will be maintained during operations to ensure mining solutions remain within the pattern area. A hydraulic bleed is created by always removing more water from the horizon than is replaced back into the formation. This causes an area of low pressure that surrounding water flows toward. The hydraulic bleed is the primary defense against mining solutions moving vertically up or down the Fault. Lost Creek has also committed in the Application that it will not install mining patterns across the fault zone.

Petitioner appears to have designated no independent witnesses and no exhibits outside of those already contained within the Application to support its third amended objection that the Application contains inadequate precautions regarding the Fault. On the basis of the evidence that Lost Creek will present at the hearing, the Fault has been fully and adequately characterized and the Application contains multiple commitments relating to the prevention of contaminant migration. Accordingly, without evidence to contravene that which is already in the record and that which will be offered by Lost Creek, Petitioner's third amended objection should be denied.

4. Whether the mining permit includes adequate precautions concerning the location and proper abandonment of old in situ, oil and gas, and water wells.

**Lost Creek's position.** Lost Creek interprets Petitioner's fourth amended objection to relate to exploratory bore holes associated with exploration drilling for uranium that has occurred within the Lost Creek Permit to Mine Area since the late 1960s. These historic bore holes were plugged and abandoned in accordance with state regulations that were in place at the time.

Lost Creek has conducted extensive aquifer pumping tests that have revealed limited hydrologic communication between the production horizon and the overlying and underlying aquifers. The results of those tests demonstrate that the magnitude of drawdown is greater than 10:1, whereby if a pumping test reduced the pressure in the production aquifer by 10 feet, the corresponding reduction in pressure in the overlying or underlying aquifer was less than 1 foot on average. The broad nature of the drawdown response seems to indicate that the

communication is the result of regional thinning of overlying and underlying aquitards. The large pressure differentials induced during the pump test resulted in a negligible amount of water moving from the overlying and overlying aquifers through the confining units into the production zone. The communication does not appear to be due to a point source such as an improperly abandoned bore hole.

To ensure the historic bore holes are not a source of communication, the Application includes commitments whereby Lost Creek will attempt to locate and ensure the proper abandonment of historic bore holes located within the monitor well ring of the first mine unit before beginning operations. Lost Creek has already located 43% of the historic bore holes within Mine Unit 1 and 90% of those within Mine Unit 2, and will continue searching for the remaining historic bore holes until all reasonable methods to locate historic bore holes have been exhausted. Additionally, Lost Creek has agreed to perform additional aquifer pumping tests prior to production to determine if the plugging efforts have resulted in any change in the degree of communication between the production horizon and the overlying and underlying aquifers. Throughout production and restoration operations, Lost Creek will continue to monitor the overlying and underlying aquifers for unexpected drawdown that would indicate communication related to an historic bore hole and respond as necessary to locate and plug the hole.

Petitioner appears to have designated no independent witnesses and no exhibits outside of those already contained within the Application to support its fourth amended objection that the Application contains inadequate precautions regarding these historic bore holes. On the basis of the evidence that Lost Creek will present at the hearing, Petitioner's concerns regarding the historic bore holes have been fully and adequately characterized and the Application contains multiple commitments relating to the additional aquifer pump tests and ongoing location and re-abandonment of historic bore holes. Accordingly, without evidence to contravene that which is already in the record and that which will be offered by Lost Creek, Petitioner's fourth amended objection should be denied.

5. Petitioner's fifth, sixth, and seventh amended objections relate to whether the Application violates the terms of Order 2011-5 by authorizing mining activity within sage grouse core habitat, whether the Application violates Specific Stipulation 2(c) of Order 2011-5, and whether certain stipulations recited in Order 2011-5 should be incorporated into the Application.

**Lost Creek's position.** Petitioner's fifth amended objection that the location of mining activities within sage grouse core habitat violates the terms of Order 2011-5 ignores the plain language of Order 2011-5, and Lost Creek denies same. New development or land uses are permitted within core population areas and may be authorized or conducted when it is demonstrated that the activity in question will not cause declines in sage grouse populations. Order 2011-5 provides that development that is conducted consistently with the stipulations set forth in Attachment B to Order 2011-5 will be deemed to be sufficient to demonstrate that the activity will not cause population declines.

Petitioner presents no legal or factual basis to support the sixth amended objection that the disturbance contemplated by the Project violates Specific Stipulation 2(c) of Order 2011-5, and Lost Creek specifically denies same. Lost Creek has demonstrated to the Department and WGFD and will present evidence that Project disturbances are well within the standards set forth

in Stipulation 2(c), and WGFD has confirmed that the Project is consistent with the requirements outlined in Order 2011-5.

Petitioner's seventh amended objection generally alleges that "it does not appear" that the Application complies with the General Stipulations of Order 2011-5 "in all respects." Although counsel for the parties have discussed stipulating to a modified objection that sets forth Petitioner's objections based upon the General Stipulations with more specificity, at this time counsel for Petitioner has not responded to a stipulation drafted and presented by Lost Creek. As pleaded, Lost Creek denies the allegations in Petitioner's seventh amended objection.

The mine plan for the Project was designed prior to the adoption of the initial sage grouse Executive Order 2008-2, which was executed by Governor Freudenthal in August, 2008. Thereafter, as the general and specific stipulations were incorporated into the framework of successive executive orders in 2010 and 2011, Lost Creek continued to work with WGFD in order to obtain a determination that the Project complies with all applicable laws. In coordination with WGFD, Lost Creek performed a disturbance analysis for the Project using both the Project Impact Analysis Area ("PIAA") methodology under the predecessor Executive Order 2010-4 and the Density/Disturbance Calculation Tool ("DDCT") that is prescribed by Attachment B to Order 2011-5. Using the most conservative assumptions, Lost Creek incorporated as part of the disturbed area those apparent disturbances that could not practically be identified as either manmade or naturally occurring, and also included as disturbed those undisturbed areas that were nevertheless located in between and proximate to known areas of disturbance. As the evidence will demonstrate, the Project falls well below the 5% surface disturbance threshold defined by General Stipulation No. 1, as well as the average of one mining development site per square mile as defined by Specific Stipulation No. 2(c).

Respectfully submitted this 29th day of July, 2011.

FOR APPLICANT LOST CREEK ISR, LLC



MaryBeth K. Jones, Wyo. State Bar No. 6-3456  
Michelle C. Kales, Colo. Reg. No. 35223  
Bret A. Fox, Colo. Reg. No. 36723  
Brownstein Hyatt Farber Schreck, LLP  
410 17th Street, Suite 2200  
Denver, CO 80202

**CERTIFICATE OF SERVICE**

I hereby certify that on this 29th day of July, 2011, a true and correct copy of **LOST CREEK ISR'S RESPONSE TO WYOMING OUTDOOR COUNSEL'S AMENDED WRITTEN OBJECTIONS AND PREHEARING STATEMENT** was filed by electronic mail to *kim.waring@wyo.gov* and served by electronic mail and U.S. Mail, postage prepaid, to the following:

John Corra, Director  
DEQ  
Herschler Building  
122 West 25<sup>th</sup> Street  
Cheyenne, WY 82002  
*john.corra@wyo.gov*

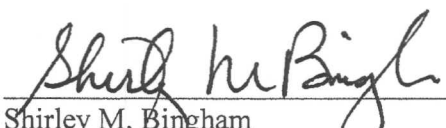
Steve Jones  
Wyoming Outdoor Council  
262 Lincoln Street  
Lander, WY 82520  
*steve@wyomingoutdoorcouncil.org*

Nancy Nuttbrock, Administrator  
DEQ Land Quality Division  
Herschler Building  
122 West 25<sup>th</sup> Street  
Cheyenne, WY 82002  
*nancy.nuttbrock@wyo.gov*

Penne A. Goplerud, General Counsel  
Ur-Energy USA Inc.  
10758 West Centennial Road  
Littleton, CO 80127  
*penne.goplerud@ur-energyusa.com*

Luke Esch, Assistant Attorney General  
Wyoming Attorney General's Office  
123 Capitol Building  
Cheyenne, WY 82002  
*lesch@state.wy.us*

John Cash  
VP Regulatory Affairs, Exploration and  
Geology  
Ur-Energy USA Inc.  
5880 Enterprise Drive, Suite 200  
Casper, WY 82609

  
\_\_\_\_\_  
Shirley M. Bingham