

FILED

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

Jim Ruby, Executive Secretary
Environmental Quality Council

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

Docket No. 11-4803

CLOSING ARGUMENT OF WYOMING OUTDOOR COUNCIL

Comes now the Wyoming Outdoor Council, by and through its attorney, Steve Jones, and for its closing argument in the above-entitled matter, hereby presents the following:

Wyoming Outdoor Council filed a protest to the In Situ Mining Permit that was issued by the Wyoming Department Environmental Quality, Land Quality Division to Lost Creek LLC on June 24, 2011. Wyoming Outdoor Council filed its amended written objections on July 6, 2011. Under the Wyoming Environmental Quality Act, a hearing in the matter is required to be held within 20 days. Wyo. Stat. Ann. 35-11-406(m). The company in this case agreed to a small extension of time, and the hearing on the mining permit was held on August 3 and 4, 2011, in Rock Springs, Wyoming.

Wyoming Outdoor Council raised four issues in its written objections in this matter. Those objections centered around the following issues:

1. Whether the proposed aquifer reclassification, from class IV (mineral commercial) to class V. (industrial) that accompanied the mining permit met the requirements of state and federal law.
1. Whether the in situ Mining permit issued by the land quality division satisfied the requirements of Executive Order 2011--5 on A Greater Sage Grouse Core Area Protections.
3. Whether the permit adequately protected against the possibility of migration of contaminated fluids via old drill holes that had not been properly plugged and abandoned.
4. Whether the permit adequately protected against the possibility of migration of contaminated fluids along the fault lines that transect the mineral zones within the permit area.

AQUIFER RECLASSIFICATION

During the opening statement of the Department of Environmental Quality, Land Quality Division, (DEQ) Assistant Attorney General Luke Esch stated that the state did agree with Wyoming Outdoor Council in one respect. That "one respect" was the aquifer

reclassification objections that Wyoming Outdoor Council had made to the Lost Creek in situ Mining permit. The company also made similar assertions in its opening statement

Thus, unbeknownst to Wyoming Outdoor Council, the other parties, DEQ and Lost Creek ISR, LLC ("the company") came to an agreement, or at least, an understanding, concerning a new boundary for the aquifer that must be reclassified in order for the in situ mining to go forward. Basically, the aquifer that is reclassified as Class V (Mineral Commercial) is classified as such because it will be a sacrifice zone -- whose water quality will not be returned to its original class of use. This area, therefore, should be as restrictive as possible, while still allowing the in situ mining to go forward.

The original aquifer reclassification area, as proposed by the company, and as allowed by the DEQ/LQD, was far too large and encompassed almost the entire might permit area. It to the next quarter section beyond the mineral zone and was completely unacceptable, from an environmental protection perspective. However, the new area suggested by both the company and DEQ/LQD, restricts the aquifer reclassification to an area that extends only 120 feet beyond the monitor well ring.

This new proposal, as laid out by the company and by DEQ/LQD, is acceptable to Wyoming Outdoor Council. Wyoming Outdoor Council will not object to this proposal so long as the extent of the reclassified aquifer will not extend beyond 120 feet outside the monitor well ring. Wyoming Outdoor Council therefore encourages the Environmental Quality Council to modify the in situ mining permit in this regard. This new aquifer reclassification boundary should satisfy the requirements of federal law, as well as state law. While the company was somewhat cautious, in its presentation, about this proposed amendment to the mining permit, and was not willing to completely commit to this new (proposed) boundary, Wyoming Outdoor Council urges the Environmental Quality Council to adopt this proposed aquifer reclassification as part of the permit, so long as the boundary does not extend more than 120 feet outside the monitor well ring. The company may prefer to wait for federal approval, by the EPA. But considering its insistence on having an early, rushed hearing in this matter and having that matter heard without delay, it is puzzling that it would now want the Environmental Quality Council to wait upon a decision of the EPA with regard to this aquifer reclassification. (At the federal level this is referred to as an "aquifer exemption.") Wyoming Outdoor Council does not object to this as a general matter, but if "more evidence" is needed at a later time on this matter, then this should open the matter up for presentation of evidence for all purposes, not just for the convenience of only one party.

SAGE GROUSE PROTECTIONS

The Lost Creek in situ mine permit is located in the middle of sage grouse core habitat. This means it is subject to the requirements of Governor Mead's Executive Order 2011-5. Officially, the DEQ/LQD has not made a decision with regard to whether the mining plan meets the requirements of Executive Order 2011-5. This is because the mining permit decision was made before the issuance of the order. But the Wyoming Game and Fish

Department issued a letter to the DEQ/LQD, on August 1, 2011, (introduced as Lost Creek Exhibit 22) that gave its imprimatur to the company's wildlife plan, including protections for sage grouse. But, in fact, the wildlife plan for the Lost Creek mine is not adequate, and does not comply with the dictates of Executive Order 2011-5 (hereinafter "EO 2011-5").

All agencies of the state of Wyoming, including the DEQ/LQD, are required to comply with the order in their permitting activities. This means, in practice, that the mining permit plan must comply with the requirements of EO 2011-5.

The permit plan violates EO 2011-5 in several specific ways:

1. The surface occupancy general stipulation, Para. 2, page 9 of EO 2011-5.

This provision requires that there shall be no surface occupancy (NSO) within .6 miles of the perimeter of any occupied sage grouse lek. This paragraph is quite specific in that it mentions roads as a type of "surface occupancy." Nevertheless, despite this clear requirement, the mining plan contains plans for two access roads to the mining permit site. But both of these roads are in clear violation of this provision of EO 2011-5.

2. The transportation general stipulation, Para. 4, page 9, of EO 2011-5.

This provision requires that "main roads used to transport production and/or waste products" cannot be located within 1.9 miles of occupied sage grouse leks. There can be no question that this provision has also been violated. The requirement that all roads cannot be closer than .6 miles from an occupied sage grouse lek is also repeated in this provision. Both access roads to the mine permit site violate this provision of EO 2011-5.

3. The overhead lines general stipulation, Para. 5, page 9, of EO 2011-5.

This provision is also quite clear: Lines are to be buried "when possible." No evidence was presented on the part of the company or the state that burying the lines in this case was not "possible." There are at least four sets of new lines that are to be constructed within the mine permit area to supply power to underground injection well sites. For the company to not agree to bury the power lines, when there appears to be no impediment to doing so, and where no testimony was provided indicated why burying of the lines would not be possible, this is a clear instance of failure to comply with EO 2011-5. As the testimony of Sophie Osborn demonstrated, these overhead lines (as well as fences, buildings and other structures) will be utilized by ravens and raptors, providing greater access for these avian species to predate upon sage-grouse eggs, chicks and adults. While perch deterrents are somewhat effective in preventing ravens and raptors from using overhead lines, as Ms. Osborn testified, they are only partially effective, not completely effective. This is why compliance with this provision of EO 2011-5 is so important.

More broadly, it is important for the Environmental Quality Council, as it makes its decision in this case, be aware of the purpose of EO 2011-5. The State of Wyoming wants to see this EO implemented fully, and for good reason. The EO 2011-5 is replete with whereas clauses (see pages 1 and 2 of the EO) that make it clear that the State of Wyoming seeks to preclude the listing of the sage grouse as a threatened or endangered species under the Endangered Species Act, since federal jurisdiction and the regulations that would be invoked as part of such a listing could impose severe restrictions on mineral and natural resource development in Wyoming. There is a strong desire to avoid having the sage grouse listed as a threatened or endangered species. In fact, core population areas are "not to be altered for at least five years." See Para. 1, page 2, EO 2011-5. Furthermore in Para. 3, page 3, there is a specific statement that new development or land uses within Core Population areas should be "authorized or conducted **only when it can be demonstrated** that the activity will not cause declines in sage grouse populations." [emphasis added]

The company has not demonstrated that its in situ mining permit and other development activities will not cause declines in sage-grouse populations. There must be such a showing, according to Para. 3, page 3 of the EO 2011-5. As the testimony of both Sophie Osborn and Vicki Herren demonstrated, in fact, current research shows the opposite: that the new infrastructure planned for the Lost Creek mine site will cause declines to sage-grouse populations. Furthermore, the company has provided inadequate mitigation measures to address likely declines in sage-grouse populations.

Testimony and evidence produced by the State does not negate this overriding concern. The testimony of Scott Gamo, (who is a Wyoming Game and Fish official, but not an expert on sage grouse habitat or conservation) made it clear that there is an incomplete analysis of the potential adverse impacts of the project on sage-grouse and sage grouse habitat. This thereby invalidates any endorsement the WGFD may have given to the project and the mining permit. The following deficiencies should be noted concerning the State's testimony and evidence, with regard to the State's case in this matter:

1. While the WGFD examined density and disturbance criteria for the planned development, it nevertheless failed to adequately evaluate the impact of proximate proposed roads. This does not square with the EO 2011-5 (as outlined above) nor does it square with scientific research, which as Sophie Osborn testified, will lead to declines in sage-grouse populations.
2. While the WGFD considered, according to Scott Gamo, the potential visual disturbance of proposed roads, it failed to provide any analysis of other road-related impacts that can contribute to grouse declines such as 1) traffic volume, 2) noise impacts, 3) vehicle-grouse collisions, 4) dust impacts on vegetation, and potential impacts from synanthropic predators (i.e., predators that live near and benefit from an association with humans).

Mr. Gamo's testimony was particularly questionable in this regard, since under cross-examination, Mr. Gamo basically stated that he was ignoring the only data that was

available on visual impacts to adjacent leks, the Line-of-Sight analyses found in Figures Op-A6-3a, -3b, -3c, -3d, and -3e. These figures showed visibility regimes from each lek near the Lost Creek mine permit site at the 1 meter and 2 meter levels. But he rejected this data since, he said, he had never seen a sage grouse that was 1 meter or 2 meters in height. But this was the only data available!

If he did not believe the company's data for line-of-sight visibility from certain leks was good data -- shouldn't he have asked the company to collect good, reliable data before the project was allowed to go forward? The WGFD in its letter of August 1, 2011, said the two access roads should be allowed to be a part of the Lost Creek mining plan, even though they violated the terms of EO 2011-5, since the "existing roads" were "blocked from view to the leks by topography." That was the sole reason provided by WGFD for allowing the roads to be so close to existing leks, in violation of Para. 2, page 9, of EO 2011-5. See Exhibit Lost Creek 22. This reasoning is not credible and should be rejected. Mr. Gamo basically said, under cross-examination, that sage grouse can't see over the sagebrush in the leks, since they are not taller than sagebrush, and therefore they could not see anything happening on a road that was only a mile away. This is not credible and is not supported by the only data that is available on the issue of visibility. See Figures Op-A6-3a, -3b, -3c, -3d, and -3e. That data shows, as to all leks surveyed close to the access roads, that there are many points from which humans, objects and vehicles can be seen from all the leks.

3. In addition, the WGFD failed to evaluate the adverse impacts of raven populations which research has shown can increase in response to energy development and subsequently adversely impact grouse reproduction and productivity.
4. The WGFD failed to address the potential impacts of proposed fences or suggest the use of deterrent devices (perch deterrents or bird diverters) to protect sage grouse.
5. The WGFD failed to analyze the potential impact of proposed power lines.
6. The WGFD failed to analyze the potential efficacy of proposed mitigation measures.

It was extremely disappointing to see that the WGFD relied heavily on alleged "loopholes" in ED 2011-5, that, it was argued, allowed the mine permit plan to go forward in the face of glaring violations of EO 2011-5. The WGFD's reliance on these alleged exceptions (e.g., Para. 18 on p. 4 of the EO) sets a dangerous precedent in this case -- it being one of the first in situ uranium mines in a Core Sage Grouse Area to come under the requirements of EO 2011-5, or earlier EOs. Going forward, if exceptions to the clear requirements of this EO are allowed, it will be difficult not to accord similar exceptions to other companies that apply for mining or other mineral development permits.

The WGFD also demonstrated, through Scott Gamo's testimony, an excessive reliance on an adaptive management response, in the event of sage-grouse population declines occurring after project development has begun. As the testimony of Sophie Osborn and

Vicki Herren demonstrated, this is very problematic given the fact that development impacts on sage grouse populations typically are not seen until (on average) three to four years post-development. Three years after Lost Creek LLC begins development will be approximately 2015. (The company cannot begin operations on this project until at least 2012, since it has yet to obtain approval from the Bureau of Land Management for its operations to commence on federal BLM lands, and a federal Environmental Impact Statement has yet to be written for this site.) Yet the U.S. Fish and Wildlife Service will be reviewing the status of sage grouse to make a final determination on whether or not it warrants a listing by 2015. Thus, there would be no time within which to develop adaptive management mitigation measures -- which would not be implemented until 2015, if not later. But the decision on listing the species would have already been made. (It is also worth noting that EO 2011-5 remains in effect only until August 18, 2015.)

What the WGFD has apparently failed to realize, apparently (based upon Scott Gamo's testimony -- the only wildlife witness called by the State) Wyoming's sage grouse core area strategy will **only** succeed if it adheres to provisions outlined in the Governor's EO 2011-5. The scientific research on which the provisions of EO 2011-5 are based and the overall conservation strategy is based, supports full implementation of EO 2011-5. Failure to follow the provisions of EO 2011-5 will cause the sage grouse conservation strategy to fail. Invoking loosely-worded loopholes, like Para. 18, page 4 of EO 2011-5, in order to justify substantial violations of the EO will cause the conservation strategy to fail. Full implementation of the EO may put a halt to further sage grouse declines in Wyoming. Failure to fully implement the EO will surely cause the strategy to fail and will lead to a listing of the sage grouse as endangered, in all likelihood. The testimony of Vicki Herren and Sophie Osborn makes this abundantly clear. Their advice -- which is clearly well-informed advice based upon a thorough familiarity with sage grouse conservation and the extant literature on the subject, should be followed.

The USFWS will ultimately determine whether or not the greater sage-grouse merits listing under the Endangered Species Act. It has said that it will only view the core area strategy as outlined in the EO 2011-5 as an adequate regulatory mechanism for maintaining viable populations of greater sage-grouse, if State, Federal, and private landowners *all* adequately implement this EO. Furthermore it has said that implementation of the EO must be based on the best available science and it has encouraged the State and project proponents to consider *all* alternatives that minimize or remove impacts to the sagebrush ecosystem on which the sage-grouse depends. Should the project proceed as proposed, implementation of the EO will be severely compromised, peer-reviewed scientific research will be ignored, and appropriate alternatives to reduce impacts to grouse (such as building only one access road instead of two) will be disregarded.

The Environmental Quality Council should remember that a listing of the greater sage-grouse under the ESA would impact all future development projects in Wyoming where there is any sage grouse habitat (whether in core areas or not) and have a severe adverse impact on energy development in Wyoming (whether it is oil and gas or mining, or new transmission lines, etc.). Accommodating this company's alleged project needs (which

were not justified by any evidence presented at the hearing -- even under any alleged loopholes of EO 2011-5), and violating specific provisions of EO 2011-5 is not justified and is not worth such a risk.

In light of the testimony that was presented by Vicki Herren and Sophie Osborn, it is obvious that the permit should be modified in very specific ways that would make the Lost Creek in situ mine come into compliance with EO 2011-5. The permit should be modified to require the following:

1. No use of either the east access road or the west access road. Testimony revealed at the hearing that the west access road is only a two-track, little more than 10 feet wide, with no construction, blading grading, gravel, crown or ditch. It will be simple to reclaim and considering its proximity to sage grouse leks (Discover 1, Discover 2 and South Discover), this should be done. The east access road is not much better, and while it is bladed has no other construction, grading, gravel, crown or ditch. It too can be easily reclaimed and considering its proximity to the Crooked Well lek, and the Green Ridge Satellite and Green Ridge leks, it too should be put to bed and not allowed to be used by the company. To allow these roads to be the main roads to be used for this mine, when they are so close to active sage grouse leks cannot be considered to be consistent with EO 2011-5.

2. All electric transmission lines to various Underground Injection Control reinjection wells for the mining site should be buried. There was nothing presented by the company or by the state that justified overhead lines. There will have to be a pipeline put in to all of these locations in order to transfer the uranium wastes to the wells to be reinjected. A buried electrical line could be put in place right next to the pipeline -- without additional environmental disturbance.

3. In order to insure compliance with Para. 4, page 9 of EO 2011-5, a new road should be put into the center of the mine site, coming in from the southeast, as Vicki Herren showed in her testimony. This route would utilize existing two-tracks for most of the distance, although some disturbance of new ground might be needed (depending on the exact route) for only a short distance -- perhaps one or two miles or so. But the terrific advantage that this approach to the site has is this: It does not come within 1.9 miles of any lek. (It should be noted here that while Scott Gamo stated that this Para. 4, page 9 of EO 2011-5, was not intended to apply to in situ mining operations, he could offer no substantiation to back up his assertion. The fact is that in situ mines have "main roads used to transport production and/or waste products" just as other mineral development projects do. He could offer no definition of "main roads" that showed that in situ mine roads did not come under the definition.)

In the alternative, should the Environmental Quality Council conclude it would prefer to allow an access road as outlined in the mining plan, then and in that event, it should, at a maximum, only allow one access road to be utilized, and not two. The late and untimely excuse offered by the company was that Sweetwater County was requiring the company to have two avenues of ingress and egress to the site for emergency purposes. But this

assertion is highly suspicious, since it is not found in the administrative record in any respect. There is no documentation provided from Sweetwater County to support such an allegation. And under cross examination, the company's witness, Mr. Cash, revealed that there was no county ordinance that required two roads, and at best, it was merely a request of the county. No state statute or county ordinance was referred to by the company to substantiate this claim.

PROTECTION OF AQUIFERS

The evidence presented by Mark Moxley, the District II Supervisor for DEQ/LQD, revealed that the DEQ/LQD has been concerned for sometime regarding whether adequate protections had been taken to protect underground aquifers above and below the mineral zone from contamination. The principal concern is one of migrating fluids from the mineral zone that will be mined using lixivients to other aquifers containing much better quality water. Given the profusion of abandoned drill holes in the mining area, there will not be complete assurance that this will not happen.

The plan of the company is to begin a search for drill holes, and plug as many as it can find in the first mining unit. Wyoming Outdoor Council believes this should extend to all mining units, not just the first one. Secondly, the company maintains that it will then constantly test for the possibility of migrating fluids during the mining of the first Mine Unit. If no excursions are observed to other aquifers, then efforts to plug and abandon as well as monitor for excursions in the later mine units will be abandoned. under the assumption that there is no need for such precautions. Wyoming Outdoor Council contends that these precautions should be taken throughout the mining project, and not just with respect to the first mining unit.

Finally, with respect to the possibility that the geologic fault that transects the mineral zone area, it is clear that there is some movement, albeit minimal, along the fault. But more tests are warranted, it should be remembered that over the life of this mine, movement along this fault is possible and while it may not show up in one brief test, it needs to be carefully monitored, since earthquakes do occur and faults do shift over time.

SUMMARY

In summary, the Wyoming Outdoor Council asks the environmental Quality Council to modify the Lost Creek In Situ Mining Permit, referenced above, as outlined in this Closing Argument, to include:

- A. Designation of a Class V (Mineral Commercial) groundwater of the State zone for this mining permit that extends no more than 120 feet beyond the monitor well ring established in the mining plan.
- B. Require the full implementation of Executive Order 2011-5, to include compliance with specific provision of the said order, including complying with no surface occupancy

provisions, transportation stipulations, and overhead line stipulations.


C. Require that the mining permittee locate and properly plug and abandon all wells (other than those in use) in the mining permit area. Require further that the fault running through the mineral zone be carefully monitored throughout all phases of mining operations and reclamation.

D. Require the further modification of the mining permit so that the permit meets the **goal** of the Executive Order 2011-5 with respect to sage grouse core habitat protections, as set forth in that order.

E. Modify the permit to fully comply with state and federal law.

F. Grant such other and further relief as the Environmental Quality Council may deem just and equitable.

Dated this 26th day of August, 2011.


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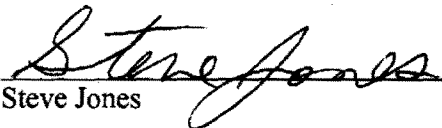
CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing Wyoming Outdoor Council's Closing Argument, by placing a copy of the same in the U.S. mail, postage prepaid, on the 26th day of August, 2011, and by forwarding to them an electronic version of the same, addressed to the following:

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