

FILED

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Terri A. Lorenzon, Director
Environmental Quality Council

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

IN THE MATTER OF THE APPEAL)
OF 4W RANCH, OBJECTION)
NPDES PERMITS NOS.) Docket No. 04-3801
WY0051217, WY0051233 &)
WY0051373)

BILL BARRETT CORPORATION MOTION FOR SUMMARY JUDGMENT

Bill Barrett Corporation (“BBC”) moves for summary judgment in the appeal of Major Robert L. Harshbarger and Jean Sherwin Harshbarger (the “Harshbargers”), filed by letter on June 2, 2004. In support of its Motion for Summary Judgment, BBC states as follows:

The Harshbargers contest the issuance of BBC Permit Nos. WY0051217 and WY0051233. The Harshbargers contend that the permits were granted in violation of Chapter 1 of the Water Quality Rules and Regulations. They assert that discharge under the permits will lead to a “measurable decrease” in crop or livestock production on the 4W Ranch, will not protect existing uses, will degrade the aesthetic character of the Cheyenne River, and will injure property rights, particularly the Harshbargers’ irrigation water rights. The Harshbargers have failed to assert a single fact, however, in support of their assertions. Indeed, there is no dispute that water discharged under the contested permits never reaches the 4W Ranch and has yet to cause any impact. The Harshbargers’ concern is with speculative future harm from all CBM development, not just BBC’s, and their concerns are properly addressed in a petition for rulemaking, not as an appeal of BBC’s permits, which comply with applicable law. Therefore, the

Harshbargers have no standing to appeal the DEQ's decision to issue the permit and summary judgment should be granted to BBC.

I. Standard of Review

Summary judgment is proper when there is no genuine issue as to any material fact, and the prevailing party is entitled to judgment as a matter of law. *Lee v. LLP Mortgage Limited*, 74 P.3d 152, 157 (Wyo. 2003). A genuine issue of material fact exists when a disputed fact, if proven, would have the effect of establishing or refuting an essential element of an asserted cause of action or defense. *Phillips v. Toner*, 133 P.3d 987 (Wyo. 2006).

Summary judgment serves the purpose of eliminating formal trials where only questions of law are involved. *Rino v. Mead*, 55 P.3d 13, 17 (Wyo. 2002)(citations omitted). A summary judgment proceeding allows for a prompt disposition of actions in the early stages of lawsuits, permitting an end to unfounded claims and avoiding the heavy expense of a full-fledged trial to both the litigants and the already overburdened judicial machinery of the state. *Bluejacket v. Carney*, 550 P.2d 494 (Wyo. 1976).

II. There is No Dispute that Discharge Under Bill Barrett Company's Permits has Not Impacted the 4W Ranch.

Water discharged under Permit No. WY0051217 ("Palm Tree Project") flows into Pine Tree Draw, Ninemile Creek, Simmons Draw, and unnamed ephemeral tributaries, all tributary to Antelope Creek. The water is then put to beneficial use by Mr. Jerry Moore in a center pivot irrigation system. The water that is not consumed in irrigation percolates into the channel bed and does not flow beyond Mr. Moore's property or the boundary of the Plan of Development for the Palm Tree Project, which

is approximately 69 stream miles upstream of the 4W Ranch. *See* Affidavit of Paul McElvery, attached as Exhibit 1.

Water discharged under Permit No. WY0051233 (“Big Porcupine Project”) discharges into Porcupine Creek, Boss Draw and unnamed ephemeral tributaries, all tributary to Antelope Creek. All outfalls are upstream of the Antelope Coal Mine where the discharge is collected in large mine collection reservoirs and used by the mine for dust suppression and other mine operations. *Id.*

Mr. Harshbarger admitted in his deposition that discharge under the Palm Tree and Big Porcupine discharge permits does not reach the 4W Ranch and has yet to impact his crops. Deposition of Mr. Harshbarger, at 70, 119, attached as Exhibit 2. When asked by Mr. Sundahl, representing Merit Energy, whether he could agree that CBM water produced upstream was not increasing the flow in the Cheyenne River at the 4W Ranch, Mr. Harshbarger responded:

A. At this point in time, no.

Q. And we can’t -- and you agree with me also that the water produced from these three NPDES permits in dispute doesn’t get to your property on the surface that you know of?

A. That’s correct.

...

Q. Also, can we agree that you don’t have any evidence there’s been any reduced yield for any of your crops because of any of the water that has been produced by these three NPDES permits? True also?

...

It hasn’t affected your production with any of your crops or the use of your property?

A. Yeah.

Id. at 69-70. Mr. Harshbarger further clarified that there is no current impact from BBC discharges to the 4W Ranch:

Q. You have no evidence that any water produced from the permits has affected any hay or crop production. I think you've already told us the answer to that is no, you have no evidence, correct?

A. That's correct, yeah.

Harshbarger Depo, at 118. Further, Mr. Harshbarger, has not alleged and has no evidence that BBC has exceeded any permit limitations imposed by the DEQ. *Id.* at 71, 118.

The Harshbargers' concerns are global and apply to all CBM development, not just the particular permits in issue. *Id.* at 124.

Q. So you just want to express your concerns and be heard?

A. Yes.

Q. You're not suggesting that any of these three permits should be singled out differently from the others, other CBM, and treated differently, are you?

A. I am not, no.

Id. The only reason these particular permits have been appealed, as Mr. Harshbarger explained, "I got on the Internet and started watching the applications, and yours was the first three that came up." *Id.* at 125. This appeal is not about whether BBC's permits are sufficiently protective of agricultural uses. The Harshbargers' purpose in bringing the appeal is solely to provide a forum to voice their concerns to the Council.

Well, the whole ideal -- and I didn't -- is basically I was hoping to be able to sit down -- I was hoping to be -- I thought it would be a two- or three-hour thing. I would present some of these papers and documents and what we had discussed today and let -- just voice our concerns. [to the Council].

Id. at 117.

The Harshbargers allege only speculative future harm that may or may not occur if DEQ continues to issue discharge permits for CBM development in the Cheyenne

River hydrographic basin. *Id.* at 104-105. There is no dispute that discharges from the Palm Tree Project and Big Porcupine Project do not reach the 4W Ranch and have not caused any impact.

The Harshbargers have asserted five claims in their appeal letter: (1) that the permits violate Wyoming Water Quality Rules and Regulations, Chapter 1, Section 20 by causing a “measurable decrease” to crop or livestock production; (2) that the permits violate Chapter 1, Section 8(a), which requires that permits for new sources of pollution protect existing uses; (3) that the permits violate Chapter 1 standards for “esthetic [sic] degradation;” (4) that the permits violate their own requirement that no property rights be injured; and (5) that the permits violate Wyoming law by injuring the irrigation water rights of the 4W Ranch. Each one of these contentions depends on one crucial, and absent, fact—that water discharged under the contested permits reaches the 4W Ranch. Without the application of CBM water, there can be no effect, no measurable decrease, no impact to aesthetics, and no infringement on existing water rights. The Harshbargers have candidly admitted that the water discharged under the permits at issue does not reach the 4W Ranch and that there is no impact to crop production. There are no questions of material fact in dispute on the Harshbargers’ claims, and summary judgment should be granted to BBC, to prevent the unnecessary time and expense in preparing for a hearing on the appeal.

Further, the Harshbargers have no standing to bring their claims before this Council. To demonstrate standing before a judicial body in Wyoming, plaintiffs must demonstrate a tangible interest. *Sinclair Oil Corp., v. Wyoming Public Service Comm'n,*

63 P.3d 887, 894 (Wyo. 2003). Plaintiffs must allege more than speculation of possible injury. “[P]leadings must be something more than an ingenious academic exercise in the conceivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not the he can imagine circumstances in which he could be affected by the agency’s actions.” *Id.* (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973)). The Harshbargers have failed to allege more than speculative injury and their claims should be dismissed for lack of standing.

This does not mean that the Harshbargers have no forum to voice their concerns and present their views to the Council. If the Harshbargers believe that there is evidence to support changes to the Water Quality Rules and Regulations applicable to all discharge permits, they should petition the Council for rule-making in accordance with the Wyoming Administrative Procedures Act, WYO. STAT. ANN. § 16-3-106, and DEQ’s Rules and Regulations, Ch. III, Section 2. An appeal of an individual permit is not the proper forum to decide whether global changes should be made to permit limitations for the protection of agricultural uses and property rights.

III. Conclusion

There are no issues of any material fact concerning whether BBC’s discharges have impacted the 4W Ranch and BBC is entitled to judgment on all claims as a matter of law.

WHEREFORE, BBC respectfully requests that the Council grant summary judgment to BBC on the claims brought by the Harshbargers.

DATED August 18, 2006.



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CERTIFICATE OF SERVICE

I certify that on August 18, 2006, a copy of the foregoing document was filed with the Environmental Quality Council, and served on the following by:

- U.S. Mail, postage prepaid
- Hand Delivery
- Fax
- Electronic Service by LexisNexis File & Serve

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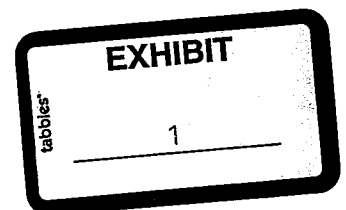
AFFIDAVIT OF PAUL MCELVERY

I, Paul McElvery, being first duly sworn upon my oath, state as follows:

1. My name is Paul McElvery. I am over the age of 21 and am competent to testify to the matters I state in this Affidavit. I give this Affidavit based on personal knowledge. I reserve the right to supplement my testimony in future proceedings.

2. I am currently a Water Resources Engineer with Bill Barrett Corporation. I directly oversee all water discharged by Bill Barrett Corporation in the Powder River Basin. As such, I am aware of the water management plan for the Palm Tree Project and Big Porcupine Project.

3. The water discharged under Permit No. WY0051217 (Palm Tree Project) flows into Pine Tree Draw, Ninemile Creek, Simmons Draw, and unnamed ephemeral tributaries, all tributary to Antelope Creek. The water is then put to beneficial use by Mr. Jerry Moore in a center pivot irrigation system. The water that is not consumed in irrigation does not flow beyond Mr. Moore's property, or outside the Plan of Development boundary for the Palm Tree Project, which is approximately 69 stream miles upstream of the 4W Ranch.



4. Water discharged under Permit No. WY0051233 (Big Porcupine Project) discharges into Porcupine Creek, Boss Draw and unnamed ephemeral tributaries, all tributary to Antelope Creek. All outfalls are upstream of the Antelope Coal Mine where the discharge is collected in large mine collection reservoirs and used by the mine for dust suppression and other mine operations.

FURTHER AFFIANT SAYETH NOT.

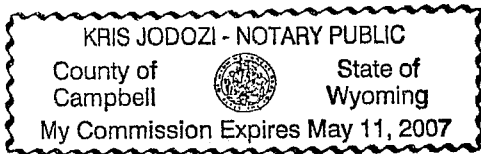
DATED this 16 day of August, 2006.

Paul McElvery
Paul McElvery

STATE OF WYOMING)
COUNTY OF Campbell) ss.

The foregoing Affidavit was signed and sworn to before me this 15 day of August, 2006, by Paul McElvery, for Bill Barrett Corporation.

Witness my hand and official seal.



Kris Jodozi
Notary Public

My commission expires: May 11, 2007.

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1 Q. (BY MR. SUNDAHL) No irrigation?
 2 A. Yeah.
 3 Q. In '04, '03 when you said you only got about 30
 4 bales out of the Unk's Pasture, how were you stacking up
 5 with the rest of your stuff? Why were you getting such low
 6 production? Because of no rain?
 7 A. Yeah, uh-huh.
 8 Q. But you did divert water from --
 9 MS. HARSHBARGER: If there had been any.
 10 Q. (BY MR. SUNDAHL) Wasn't there any water then
 11 either?
 12 A. I'm trying to remember. We have Boy Scouts that
 13 come every five years. They were here in 2002, and the
 14 river flooded -- they were here in June, and the river
 15 flooded for about, oh, ten days then.
 16 I think that's when the events -- I think that was
 17 one of the events -- no, I did not have the dam in at that
 18 time, 2002. But I put the dam in 2003, and there was a
 19 flood event that -- there was a flood event in 2003 that
 20 took the dam out.
 21 Q. And didn't get any water on your pastures?
 22 A. Yeah. It put water into the ditch and everything,
 23 but there was not -- there was not enough to push it out
 24 to -- yeah.
 25 Q. And in 2004 no water?

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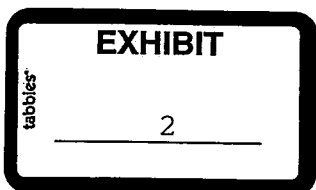
1 A. No.
 2 Q. And in 2005 you said --
 3 A. Yeah.
 4 Q. -- there was no water -- no, there was good water.
 5 No? Which was it?
 6 A. 2005.
 7 MS. HARSHBARGER: Rain.
 8 MR. SUNDAHL: You had good rain?
 9 MS. HARSHBARGER: It wasn't irrigated.
 10 Q. (BY MR. SUNDAHL) It wasn't because of any
 11 irrigation?
 12 A. Yeah.
 13 Q. Because you didn't have the dam in 2005?
 14 A. Yeah. I had the dam in 2005, yes, I did. But
 15 it --
 16 Q. There was no water in the Cheyenne River?
 17 MS. HARSHBARGER: Correct.
 18 A. It flooded on the 17th of June, but it blew the dam
 19 is what I'm trying to say.
 20 Q. (BY MR. SUNDAHL) And nothing got on your property?
 21 A. Yeah, correct.
 22 Q. Well, is there any way -- can you tell us whether
 23 or not CBM water from my client, Merit Energy, or Bill
 24 Barrett permits even reaches your property? Apparently, it
 25 hasn't in these earlier years. Do you know or have any

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1 evidence that it ever gets here?
 2 A. On the surface -- I've got to say doubtful. But my
 3 concern, our problems, is in the ground water below the
 4 surface.
 5 Q. Let's do -- let's talk about those in two separate
 6 ways. First of all, would you agree with me if I said that
 7 the water produced from all three of these NPDES permits
 8 that are in this lawsuit, this litigation, do not even reach
 9 your property through surface water?
 10 A. Boy, that's a tough -- how can we validate that --
 11 Q. You don't have any evidence that it does, do you?
 12 A. No.
 13 Q. But you said that's not -- and so the water in the
 14 Cheyenne River during the periods that it flows isn't
 15 causing you any harm. If you can get it on your property,
 16 you want it, right?
 17 A. Not necessarily. It depends on the quality and
 18 what we know now versus what we didn't know three years ago
 19 and so forth is a big difference as far as our education
 20 with this problem.
 21 This whole water -- like this flow last June. More
 22 than likely it came down Antelope Creek, but did it come out
 23 of Porcupine Creek or somewhere else.
 24 So that's the problem we're having as far as -- and
 25 then specifically to these three -- with all of the

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1 production that's up there, specifically those three -- I
 2 cannot say yes, that was Merit water coming down from the
 3 stream.
 4 Q. And let's just talk -- first of all, let's clean
 5 out the things that we can all agree on right off the bat.
 6 I think one of them is that CBM water being produced
 7 upstream on any of these drainages isn't increasing the
 8 amount of flow that comes across your ranch in the Cheyenne
 9 River, true?
 10 A. At this point in time, no.
 11 Q. And we can't -- and you agree with me also that the
 12 water produced from these three NPDES permits in dispute
 13 doesn't get to your property on the surface that you know
 14 of?
 15 A. That's correct.
 16 MS. HARSHBARGER: That water that's being
 17 produced now?
 18 MR. SUNDAHL: Right.
 19 Q. (BY MR. SUNDAHL) Also, can we agree that you don't
 20 have any evidence there's been any reduced yield for any of
 21 your crops because of any of the water that has been
 22 produced by these three NPDES permits? True also?
 23 A. Can I ask one question before I answer?
 24 Q. Yes. I want to make sure I'm getting your story
 25 completely.



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1 A. Did these three units start producing in 2004?
 2 Q. Ours started in 2005 actually.
 3 A. Well, probably about --
 4 MS. REIMER: 2004.
 5 A. So then the answer is correct.
 6 Q. (BY MR. SUNDAHL) It hasn't affected your
 7 production with any of your crops or the use of your
 8 property?
 9 A. Yeah.
 10 Q. Now, help me understand what your complaint is then
 11 about the surface water, if any. Or is that your complaint
 12 really?
 13 A. That would be part of the complaint.
 14 Q. Tell me what your theory would be if it doesn't get
 15 to you and doesn't affect your yield and doesn't affect your
 16 production and it hasn't caused you any damage.
 17 MS. HARSHBARGER: It hasn't yet.
 18 Q. (BY MR. SUNDAHL) But you agree it hasn't caused
 19 you any damage at all so far, correct?
 20 A. To this date, yeah.
 21 Q. So then help me understand what point you are
 22 trying to bring up with the Environmental Quality Council?
 23 What is your concern then about these three permits?
 24 A. I think our concern is more with the limits that
 25 the DEQ has put on any of CBM production in the state of

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1 Wyoming in relation that the EC at the outflow of 2000 is
 2 too high.
 3 Q. What should it have been?
 4 A. Well, I think it should be 1,300 maximum.
 5 Q. Let me make sure I understand this. You're saying
 6 that you want to make a point that all CBM production from
 7 all wells, any one, should have an EC limit that is --
 8 A. Less than 2,000.
 9 Q. Less than 2,000?
 10 A. Yep.
 11 Q. Do you know whether or not the EC measurements for
 12 any of our waters and any of our permits exceeds that at any
 13 time in 2000?
 14 A. If it does, I hope they shut you down.
 15 Q. But do you have any evidence that it has ever
 16 exceeded?
 17 A. No.
 18 Q. So one of your concerns is EC?
 19 A. Yes, yeah.
 20 Q. Is there another constituent you're concerned
 21 about?
 22 A. Also the SAR.
 23 Q. Is that -- is that concern you have about SAR also
 24 a global concern that you think should apply to all of CBM
 25 wells regardless of whether it causes you any damage or not?

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1 A. Correct, yeah.
 2 Q. What do you think the SAR limits --
 3 A. Well, the limits now are ten. SAR raised them to
 4 ten. The complexity of soil chemistry is just so -- it's so
 5 complex. It's just so complex that the -- but the biggest
 6 problem is that a one-day measurement of any of these
 7 things, SAR or EC, is well within the limits that DEQ has
 8 established for the Cheyenne River and the drainages.
 9 Q. The limits they've established here for our permit
 10 is the same as they've done elsewhere?
 11 A. Yes. The thing of it is that has always bothered
 12 me is that these over time build up.
 13 Q. What builds up?
 14 A. An EC at 2,000, which is the maximum limit that
 15 you -- that the producers can -- the CBM producers can
 16 charge. One acre-foot, one acre-foot of 2,000 EC is
 17 3,400 pounds of salt.
 18 Q. Where did you get that information?
 19 A. I've got it from various documents here that are in
 20 the -- many of them are in the discovery that I've given.
 21 An EC of 1,300 --
 22 Q. Are you talking about an acre-foot of water?
 23 A. Acre-foot of water is 2,200 pounds of salt. I
 24 don't know how I can get people to visualize because when we
 25 buy salt for our livestock, we buy it by the pallet.

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1 It's a little over a ton, which is sold -- so can
 2 you picture taking off into 50 acres that gets irrigated,
 3 and for every acre I place a pallet of salt that's going to
 4 go to that ground at 1,300. At 2,000 EC --
 5 (Interruption at door.)
 6 (Discussion off the record.)
 7 A. So that's what I'm trying to get people to
 8 visualize. Would you purposely go out for every
 9 acre-foot -- let's say -- again, I can't say, but do I put
 10 that 48 hours -- do I put an acre-foot of water on to that
 11 field each year?
 12 This accumulates over the years and over time.
 13 This is what studies, particularly out of Montana State
 14 University, have shown that these -- this accumulates into
 15 the soil. So not only does your soil EC -- and there's a
 16 difference -- there's a distinct difference between the
 17 irrigation water EC, and soil EC, and your plants. Soil EC
 18 is what affects your plants.
 19 Now, if I'm recalling correctly, a discharge like
 20 the outflow of 1,300, an EC of 1,300, would -- if you put it
 21 directly -- if I had an outflow directly on my ranch, put
 22 that right out, then that would elevate the soil EC to
 23 2,000, which they claim is a threshold for alfalfa.
 24 So again, I get different -- I get different
 25 readings on what is a threshold for alfalfa. I get a

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1 A. Canyon Coal Seam. There were several million --
 2 it's in my other -- okay. Anyway, yeah, estimated total
 3 discharge of Canyon Coal Seam to Antelope Creek or alluvium
 4 is 125 acre-feet per year. Estimated discharge from the
 5 Anderson to the alluvium is 129 acre-feet per year.
 6 So we have -- that was basically what the source
 7 for the ground water prior to CBM. But now CBM is adding to
 8 that. It doesn't give you anything on the quality of those
 9 waters, but there are statements made by several -- well,
 10 Phillips in particular.
 11 And I think probably Merit and Barrett and so forth
 12 and most of the others mostly are saying that the quality of
 13 the Cheyenne River water is poorer than what the quality of
 14 the CBM water that will be discharged into it. In the
 15 ground water this is true. I'm sure.
 16 One of the things of that well test, that EC on
 17 that well test there -- in this document here -- and I don't
 18 know the complete source of that, and that's another
 19 reason I have to go -- they've got Bob Harshbarger Sample,
 20 4,600 umhos.
 21 Q. Can I see it?
 22 A. Sure. I have no idea who did it or where they did
 23 it.
 24 Q. Somebody's been trespassing you think?
 25 A. More than likely not because we probably -- but

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1 anyway --
 2 Q. What is the source of this document? Where does it
 3 come from?
 4 A. I got this packet from Carol Nichols. I told her
 5 to find everything she could, and I would be back to pick
 6 things up. It was in a packet that Carol Nichols had. I
 7 studied them by the NRCS. It was with this here. I don't
 8 know. I think those -- if you notice the title, it just
 9 says notes, alluvium notes.
 10 Q. We don't know who the author is?
 11 A. Right, yeah.
 12 Q. Here's one, and I can't tell what it says. It
 13 looks like there's a paper from 1954 showing that if I'm
 14 reading this correctly -- I don't know if it could be you if
 15 it's 1954. But it shows that alluvial sampling has an AC of
 16 between 1,410 and 4,370. Average is about 3,000.
 17 But I don't know the date of that. I don't know if
 18 it's in 1954. How did you come into possession of this
 19 document that you marked as Exhibit 31?
 20 A. Through the Weston County Conservation District.
 21 Q. From this Carol Nichols?
 22 A. Yes, uh-huh, yeah. So I take that down to Lusk.
 23 Lusk is in Niobrara County. They're five steps ahead of
 24 Weston County on a lot of this data.
 25 Q. Then you've got a soil geology evaluation from '03

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1 from the Cheyenne Watershed done by somebody in Gillette.
 2 A. Yes. He was with the NRCS, and I understand he's
 3 in South Dakota somewhere now. But anyway, can I kind of
 4 talk while you look at that? One of the forms that they
 5 have in that alluvium notes and so forth is the rate of
 6 travel of the surface -- of the ground water.
 7 As your CBM product water enters into the soil, it
 8 becomes ground water. It can have a rate of travel of 5,000
 9 foot per day. So it's just a little bit less than a mile,
 10 so I use that to calculate how long it would take -- I took
 11 my direct mileage off of my map to the nearest -- to the
 12 nearest Barrett one and to the Merit one and also the Pine
 13 (sic) Tree one.
 14 Anyway, it was 25, 20 miles, something like that to
 15 the Barrett one. Then I added 50 percent to compensate for
 16 stream mileage. I added 50 percent to it. So it came up --
 17 off the top of my head here, it came -- that would take
 18 about a month for the CBM water at the nearest one, the
 19 Barrett one. It would take about a month for that water,
 20 that ground water, to get into our alluvium.
 21 So our theory is that over time with all these
 22 salts even though the alluvium salts may be very high, the
 23 CBM water will not be diluting that over time, but will be
 24 adding to it. In spite of it being ground water with the
 25 cottonwoods and other plants that you have in the streambed

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1 and so forth, there is a discharge of water through the
 2 trees. There's discharge of water through other means and
 3 so forth.
 4 The plants themselves utilize pure water. So
 5 they're -- they're drinking them, so to speak. They're
 6 putting the salt aside and drinking pure water. So this
 7 over a period of time concentrates the salt levels and so
 8 forth.
 9 So what we're saying -- and over a period of time
 10 CBM-produced water will increase whatever's down there, and
 11 does this water come to the surface at different points in
 12 these pools we see along the river or not? We really -- I
 13 don't have enough data or study or knowledge to know that.
 14 Q. You don't have any evidence that any of that is
 15 causing any damage at your ranch at this time?
 16 A. No, not yet. I don't know where I can -- who to
 17 get or what to get. I was hoping that maybe we could get
 18 somebody at the university to study these things. They're
 19 all tied up studying things and to get somebody to come who
 20 would have the knowledge and know which way to go.
 21 So we're sort of at a loss there to give you hard
 22 evidence that they're affecting. We can only speculate.
 23 Then with the drought years we've had, we know the water
 24 table is down. Is the water table down because Antelope
 25 Coal Company particularly on the Antelope Creek -- at one

1 the EC modification?
 2 A. The EC and SAR.
 3 Q. What do you want the SAR to be? I couldn't see
 4 that in any of your stuff.
 5 A. I would think what little bit I've studied on the
 6 SAR -- SAR and ECs sort of go hand in hand along with pH.
 7 So the thing that I'm looking at -- and this is not only the
 8 three of you, but the -- is any CBM water coming down that I
 9 would use for irrigation?
 10 As you can see by the soil tests that we've done,
 11 we have a very unusual soil, a low SAR, a low EC, and a low
 12 pH, 7.14. So anything that is above that that we irrigate
 13 with that has a higher EC, SAR, or pH will degrade the level
 14 of soil we have right now.
 15 Q. Well, in one of your ECs is 2,400 --
 16 A. Yes.
 17 Q. -- on your soil test. Are you saying it's okay to
 18 have 2,400 for an EC?
 19 A. That soil test is up the Runway Meadow, which I
 20 probably increased by using ground water to irrigate with.
 21 That was one of the learning curves that we learned. Over
 22 Unk's Meadow where we have flood irrigated with storm runoff
 23 water --
 24 Q. Are you saying that any water that has a higher SAR
 25 than any SAR test that you have had on your property should

1 there, and we don't have enough water flow that I can
 2 contain and divert up to leach these soils. So any elevated
 3 SARs or ECs over time are going to build up the levels of
 4 the salts and of what we have in the soils right at this
 5 point in time.
 6 Again, not pulling them out of here right now, but
 7 there is quite a few documents from different universities
 8 and so forth that are saying much about -- not how I'm
 9 saying it, but over -- that these waters -- use of these
 10 waters particularly for irrigation over time increase
 11 substantially the levels of salt and SAR in the soils.
 12 Again, different soils have different reactions.
 13 But the fact that what we have -- and we listen to what the
 14 irrigators downstream have been doing over the years also
 15 where they only pump the water if it's muddy.
 16 Our experience with our Runway Meadow and the loss
 17 of production there without any scientific test of what we
 18 have observed over the years seems to verify that it builds
 19 up over time and eventually be at the point where Unk's
 20 Meadow will not be productive if we put too much salt in
 21 there, if we have an EC of 1,300.
 22 That's 22 pounds of salt per acre-foot of water
 23 that we put on there. So each time I irrigate if I have an
 24 elevated -- if it has a CBM footprint on it, on the limits
 25 that the DEQ proposes or has, that's what their limits are,

1 not be allowed anywhere for CBM water? Is that what you're
 2 saying?
 3 A. If it's a -- the complexity of the chemistry of the
 4 waters and their chemical reactions with the soil are so
 5 complex that I've only -- that I got the surface of the
 6 thing and Section 48 says there should be no -- what's the
 7 words, that there shouldn't be no degradation of water uses
 8 or words to that effect.
 9 So if we bring in waters that have higher -- even
 10 though that's what the DEQ says is allowable, it's our
 11 opinion that they are not protecting what we have right now,
 12 and they're supposed to protect what our current use is.
 13 Q. Is that the theme basically you have all the way
 14 through this?
 15 A. Yes.
 16 Q. For everything?
 17 A. Yes, uh-huh.
 18 Q. That you don't want any SAR or any EC that is
 19 higher than what you have now?
 20 A. Well, if I knew -- and if I had the amount of
 21 water, either rainwater or even low quality of CBM water
 22 that was low enough, say, within the current limits, then I
 23 could put enough water. And then I could leach that soil of
 24 the salts, and we could use it.
 25 But we don't get enough rainwater to leach out of

1 why every time we irrigate with that much, we're increasing
 2 the three hazards of the meadow there.
 3 Q. What else do you want the Environmental Quality
 4 Council to do, if anything?
 5 A. Well, the whole ideal -- and I didn't -- is
 6 basically I was hoping to be able to sit down -- I was
 7 hoping to be -- I thought it would be a two- or three-hour
 8 thing. I would present some of these papers and documents
 9 and what we had discussed today and let -- just voice our
 10 concerns.
 11 Apparently, within the whole Powder River Basin the
 12 whole thing we pull in Montana and so forth, South Dakota,
 13 and everything, there's a lot more concerns than just the 4W
 14 Ranch. Oh, boy, there's something on the tip of my tongue.
 15 Oh, yes. My thoughts and our thoughts are that one
 16 of the options that we have with the CBM water is
 17 reinjection, and I certainly alluded to that in some of my
 18 comments.
 19 Q. Down into the aquifer?
 20 A. You get the darn -- you get different stories and
 21 different technical things, why you can and why you cannot
 22 and so forth. But I think reinjection to some aquifer is a
 23 viable way to handle the CBM water.
 24 Q. Do you know how many aquifers there are that
 25 underlies your property and where they're located?

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1 A. No, I sure don't.
 2 Q. I submitted some requests for production and
 3 requests for admissions to you --
 4 A. Yes.
 5 Q. -- some time ago. I thought maybe we could really
 6 quickly run through those and get answers for those. First
 7 thing I asked you to admit is that you have no evidence that
 8 any water produced from Merit Energy -- and I'm going to
 9 broaden this now to include all three of the permits in this
 10 case -- admit that the water from these permits do not reach
 11 your lands.
 12 You have no evidence that they do. I think you
 13 told me that, correct?
 14 A. Right.
 15 MS. HARSHBARGER: He has no evidence that
 16 they do, but he has no evidence that they don't because of
 17 the underwater streams.
 18 Q. (BY MR. SUNDAHL) The second thing I asked you was
 19 do you admit that you have no evidence that any produced
 20 water from any of these permits violated any of the limits
 21 or discharge of the permit. Do you agree that's true?
 22 A. I got my copy here.
 23 Q. Is that a yes?
 24 A. No, we have no evidence.
 25 Q. Then the third one was whether you have any

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1 evidence that any of the three permits in this case violate
 2 even the more stringent limits that you suggested to us
 3 today.
 4 A. We don't have any evidence, no.
 5 Q. And the fourth one was admit -- and I'll ask
 6 whether both Merit and Bill Barrett have complied as far as
 7 you know with their permit requirements?
 8 A. Well, I'm not privy to the samples.
 9 Q. You're not aware of any evidence that there has
 10 been a lack of compliance. That's all I'm trying to find
 11 out. Is that true? You have to respond audibly.
 12 A. I shook my head yes.
 13 Q. You have no evidence that any water produced from
 14 the permits have affected any hay or crop production. I
 15 think you've already told us the answer to that is no, you
 16 have no evidence, correct?
 17 A. That's correct, yeah.
 18 Q. And you don't have any soil reports other than your
 19 Exhibit 5. That's the one you showed us.
 20 A. I was going to admit that Phillips soil test, yeah.
 21 Q. You're going to supplement that by adding that in
 22 there?
 23 A. Yeah.
 24 Q. And you admit you have no evidence of any changes
 25 in the river chemistry of the Cheyenne River because of any

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1 of these three permits?
 2 A. I need further study -- and all I got from this
 3 here --
 4 Q. That draft, Exhibit 32.
 5 A. There's several appendices that I did not get
 6 because of the volume and so forth. So I need -- I would
 7 like to look at those.
 8 Q. Then if we go to the request to produce documents,
 9 if you have that handy. You've now given us today all water
 10 testing you've done?
 11 A. Correct.
 12 Q. From any wells, and from any water from the
 13 Cheyenne River, 1 and 2?
 14 A. Correct.
 15 Q. You've given us the soil reports, all of them that
 16 you had?
 17 A. Correct.
 18 Q. You've given us the raw information, which was that
 19 fax letter that you had?
 20 A. Yeah.
 21 Q. And you've given us verbally the production
 22 records, and I think you told us there hasn't been any
 23 change in production for the last five growing seasons that
 24 would be potentially attributable to the water being --
 25 A. That's correct.

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1 Q. -- produced from the permits. Am I right in that?
 2 A. That's correct.
 3 Q. I don't want to have you go through this again if
 4 we don't need to. Have you done any testing on the crops
 5 itself?
 6 THE DEPONENT: We never have, have we?
 7 A. You mean as far as the protein levels?
 8 Q. (BY MR. SUNDAHL) That kind of stuff that you
 9 sometimes see with alfalfa.
 10 A. If we see the cows eating it, why -- well, we know
 11 the cows like millet better than alfalfa. They really like
 12 the crested wheat and alfalfa mixed grass.
 13 Q. Do you have a cow/calf operation?
 14 A. Yes, uh-huh.
 15 MR. SUNDAHL: I don't have any other
 16 questions. Have I got everything marked as evidence that we
 17 need to in this -- when we were passing things around?
 18 MR. BARRASH: If you want to take that one
 19 for the reporter, the top one, yeah. Well, unless you want
 20 to refer to it while we're doing it.
 21 Q. (BY MR. SUNDAHL) Sir, I want to make sure -- I
 22 want you to tell me your concerns. And I -- if there's
 23 something we haven't talked about yet, please --
 24 MS. HARSHBARGER: One of my concerns -- and
 25 of course, it doesn't apply just to you three, you know.

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1 It's the sheer amount of water that is proposed to be put
 2 down this river, which would perhaps cause it to run more of
 3 the year.
 4 Now, it seems like it would be a good thing. But
 5 we've had water. One year we've had water in the river, and
 6 that is not a good thing. You can't cross it with anything.
 7 You fall through the pickup. The horses and cows won't
 8 touch it. And I say no way do I want water in that river
 9 that I'm used to dry 12 months out of the year.
 10 MR. SUNDAHL: So far that hasn't been a
 11 problem.
 12 MS. HARSHBARGER: You see all those dots on
 13 there, and you think, wow, that's really bad. Then, of
 14 course, so if all of these permits are granted, they're
 15 running all this water downriver, and we get all the way
 16 down there, all year, then pretty quick I know the CBM water
 17 does not last forever. Then it dries up, and we're back to
 18 square one. But has it left all these chemicals and stuff
 19 laying around?
 20 MR. SUNDAHL: I don't know. Let me ask you,
 21 Mrs. Harshbarger, you haven't actually been sworn. But if
 22 you had been sworn to tell the truth, all the things you
 23 would have said, you wouldn't have said them any
 24 differently, would you?
 25 MS. HARSHBARGER: No.

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1 MR. SUNDAHL: You're telling the truth now.
 2 Now, here's another question: Have you agreed with
 3 everything your husband has said?
 4 MS. HARSHBARGER: Most of the time. I
 5 thought he was a little mild. I would have gotten a lot
 6 rougher with you.
 7 MR. SUNDAHL: Would you really?
 8 MS. HARSHBARGER: I'll tell you what I said.
 9 This is a bunch of crap. All we want is to be left alone to
 10 do what we've done and not have to worry about potential
 11 dangers. Where's that Wyoming Water Law?
 12 MR. SUNDAHL: Did my wife do that book? She
 13 might have.
 14 MS. HARSHBARGER: She probably did.
 15 THE DEPONENT: The other thing is we're not
 16 against energy development. This country needs it. And nor
 17 are we -- we're not environmentalists to the point of
 18 extremes.
 19 So I mentioned some people a while ago that we
 20 feel were a productive part of this society. And I don't
 21 know why neither one of us haven't retired yet, but we have
 22 no intention of retiring.
 23 Q. (BY MR. SUNDAHL) I understand that.
 24 A. But I don't know where -- but anyway, Barrett and
 25 the Wyoming Outdoor Council came to agreement this past

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1 spring on their effluent limits and the quantity of water
 2 that they produced. And I'm sort of asked is this
 3 acceptable to me, to us. And I said no, not really. I
 4 still want to go before the Environmental Quality Council.
 5 Q. So you just want to express your concerns and be
 6 heard?
 7 A. Yes.
 8 Q. You're not suggesting that any of these three
 9 permits should be singled out differently from the others,
 10 other CBM, and treated differently, are you?
 11 A. I am not, no. As a matter of fact, I got a half
 12 dozen letters of comments on new permits that I've written.
 13 And of course, I got back the same thing from DEQ, but I
 14 never appealed any more of them because I already had these
 15 three.
 16 And I thought isn't this far enough, if I can get
 17 heard before the council, then -- so it's not -- it's the
 18 overall big picture that these three permits, the ones I've
 19 picked out, I guess.
 20 Q. Gee, I wish you would have picked some others.
 21 A. You know, when the Phillips -- when the DEQ turned
 22 down Phillips --
 23 Q. Yeah.
 24 A. They were talking SAR 17, and they were talking
 25 2,500, something like that or so forth. When that was

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1 turned down, every irrigator on the Cheyenne River sighed a
 2 big sigh of relief and then sat back and didn't do anything.
 3 And then I got on the Internet and started watching
 4 the applications, and yours was the first three that came
 5 up. So that was -- so I wrote my comments, and I wrote the
 6 comments. And then appealed these three, and I wrote
 7 additional comments and so forth.
 8 Because we both feel strongly there's such a
 9 potential -- there's such a potential of damage,
 10 environmental damage. It's an unknown. It's an unknown.
 11 You folks don't know the answers. We don't know the
 12 answers. We might escape with it, but we hear so many
 13 stories up in Campbell County.
 14 We hear good stories, and we hear bad stories. We
 15 have such a love affair with the 4W Ranch and what it means
 16 and what the future holds for it, and I just don't want to
 17 see the Cheyenne River Basin ecology or environmental or
 18 whatever damaged any more.
 19 It's one of the few areas in the whole state that
 20 has -- that hasn't been changed by man since the Texas trail
 21 came up, and they started ranching this country. So it's a
 22 very unique area of people coming up -- when I first come
 23 out here in 1960, a friend told me when you get up there
 24 you're going to shake your head and say I'm not going to see
 25 a deer or an antelope. It's just bare ground, and you won't