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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL STATE OF WYOMING

IN THE MATTER OF THE APPEAL OF 4W RANCH, OBJECTION NPDES PERMITS NOS. WY0051217, WY0051233 & WY0051373

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Docket No. 04-3801

BILL BARRETT CORPORATION MOTION FOR SUMMARY JUDGMENT

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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 threehour 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.

Jessaken

Hadassah Reimer Jack D. Palma HOLLAND & HART, LLP 2515 Warren Ave., Suite 450 Cheyenne, WY 82001 (307) 778-4200 (307) 778-8175 (fax)

Attorneys for Permittee Bill Barrett Corporation

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

Michael Barrash Senior Assistant Attorney General DEQ/Water Quality Division 123 Capitol Building Cheyenne, WY 82002

John Sundahl Sundahl, Powers, Kapp & Martin 1725 Carey Avenue P.O. Box 328 Cheyenne, WY 82003-0328 Robert L. Harshbarger Jean Sherwin Harshbarger 4W Ranch, 1162 Lynch Road Newcastle, WY 82701

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NPDES PERMITS NOS.)
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Docket No. 04-3801

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.

	EXHIBIT	
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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 <u>August</u>, 2006.

Paul McElvery

STATE OF WYOMING) COUNTY OF Compbell

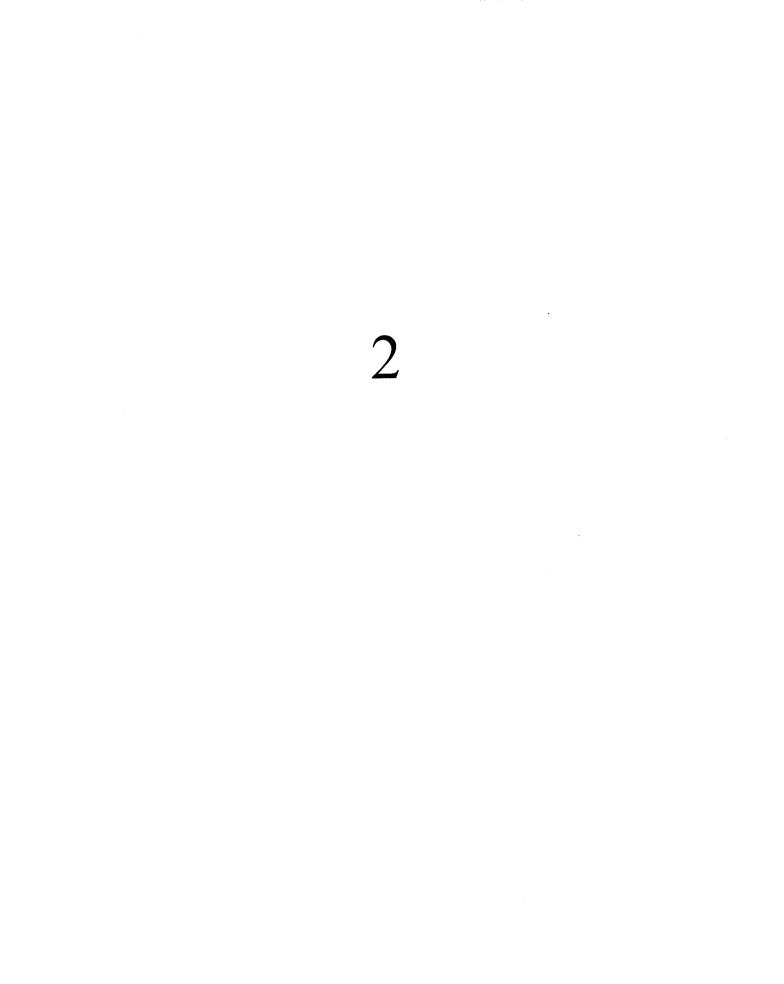
SS.

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

Witness my hand and official seal.

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5	KRIS JODO	ZI - NOTA	RY PUBLIC 👌
3	County of Campbell		State of Wyoming
ł	My Commissio	n Expires	May 11, 2007

My commission expires: _



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1	Page 66		Page 68
1	Q. (BY MR. SUNDAHL) No irrigation?	1	evidence that it ever gets here?
2	A. Yeah.	2	A. On the surface I've got to say doubtful. But my
3	Q. In '04, '03 when you said you only got about 30	3	concern, our problems, is in the ground water below the
4	bales out of the Unk's Pasture, how were you stacking up	4	surface.
5	with the rest of your stuff? Why were you getting such low	5	Q. Let's do let's talk about those in two separate
6	production? Because of no rain?	6	ways. First of all, would you agree with me if I said that
7	A. Yeah, uh-huh.	7	the water produced from all three of these NPDES permits
8	Q. But you did divert water from	8	that are in this lawsuit, this litigation, do not even reach
9	MS. HARSHBARGER: If there had been any.	9	your property through surface water?
10	Q. (BY MR. SUNDAHL) Wasn't there any water then	10	A. Boy, that's a tough how can we validate that
11	either?	11	Q. You don't have any evidence that it does, do you?
12	A. I'm trying to remember. We have Boy Scouts that	12	A. No.
13	come every five years. They were here in 2002, and the	13	Q. But you said that's not and so the water in the
14	river flooded they were here in June, and the river	14	Cheyenne River during the periods that it flows isn't
15	flooded for about, oh, ten days then.	15	causing you any harm. If you can get it on your property,
16	I think that's when the events I think that was	16	you want it, right?
17	one of the events no, I did not have the dam in at that	17	A. Not necessarily. It depends on the quality and
18	time, 2002. But I put the dam in 2003, and there was a	18	what we know now versus what we didn't know three years ago
19	flood event that there was a flood event in 2003 that	19	and so forth is a big difference as far as our education
20	took the dam out.		with this problem.
21	Q. And didn't get any water on your pastures?	21	This whole water like this flow last June. More
22	A. Yeah. It put water into the ditch and everything,	22	than likely it came down Antelope Creek, but did it come out
23	but there was not there was not enough to push it out	23	of Porcupine Creek or somewhere else.
	to yeah.	24	So that's the problem we're having as far as and
25	Q. And in 2004 no water?	25	then specifically to these three with all of the
	Page 67		Page 69
1	A. No.	1	production that's up there, specifically those three I
2	Q. And in 2005 you said	2	cannot say yes, that was Merit water coming down from the
3	A. Yeah.	3	stream.
4	Q there was no water no, there was good water.	4	Q. And let's just talk first of all, let's clean
5	No? Which was it?	5	out the things that we can all agree on right off the bat.
6	A. 2005.	6	I think one of them is that CDN water heing produced
7		6	I think one of them is that CBM water being produced
'	MS. HARSHBARGER: Rain.	7	upstream on any of these drainages isn't increasing the
8	MR. SUNDAHL: You had good rain?	1	upstream on any of these drainages isn't increasing the amount of flow that comes across your ranch in the Cheyenne
	MR. SUNDAHL: You had good rain? MS. HARSHBARGER: It wasn't irrigated.	7	upstream on any of these drainages isn't increasing the amount of flow that comes across your ranch in the Cheyenne River, true?
8 9 10	MR. SUNDAHL: You had good rain? MS. HARSHBARGER: It wasn't irrigated. Q. (BY MR. SUNDAHL) It wasn't because of any	7 8 9 10	upstream on any of these drainages isn't increasing the amount of flow that comes across your ranch in the Cheyenne River, true? A. At this point in time, no.
8 9 10 11	MR. SUNDAHL: You had good rain? MS. HARSHBARGER: It wasn't irrigated. Q. (BY MR. SUNDAHL) It wasn't because of any irrigation?	7 8 9 10 11	upstream on any of these drainages isn't increasing the amount of flow that comes across your ranch in the Cheyenne River, true? A. At this point in time, no. Q. And we can't and you agree with me also that the
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8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	MR. SUNDAHL: You had good rain? MS. HARSHBARGER: It wasn't irrigated. Q. (BY MR. SUNDAHL) It wasn't because of any irrigation? A. Yeah. Q. Because you didn't have the dam in 2005? A. Yeah. I had the dam in 2005, yes, I did. But it Q. There was no water in the Cheyenne River? MS. HARSHBARGER: Correct. A. It flooded on the 17th of June, but it blew the dam is what I'm trying to say. Q. (BY MR. SUNDAHL) And nothing got on your property? A. Yeah, correct. Q. Well, is there any way can you tell us whether or not CBM water from my client, Merit Energy, or Bill Barrett permits even reaches your property? Apparently, it	7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22	 upstream on any of these drainages isn't increasing the amount of flow that comes across your ranch in the Cheyenne River, true? 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. MS. HARSHBARGER: That water that's being produced now? MR. SUNDAHL: Right. Q. (BY MR. SUNDAHL) Also, can we agree that you don 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? A. Can I ask one question before I answer? Q. Yes. I want to make sure I'm getting your story

EXHIBIT 2

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Page 70 Page 72 1 A. Did these three units start producing in 2004? 1 A. Correct, yeah. 2 Q. What do you think the SAR limits – 3 3 A. Well, probably about – 3 A. Well, probably about – 3 A. Well, the finit now are ten. SAR raised them to its a set set shale about themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil themistry is just so – its so ten. The complexity of soil the complexity of soil these themistry is just so – its so ten. The complexity of soil these themistry is just so – its so ten. The complexity of soil these over time build up. 1 A. That would be part of the complaint. It is that an act approximation of its is the maximum limit that the producers can – the CBM producers can in formation? 1 Q. (BY MR, SUNDAHL) But you argre it hasn't caused the maximum limit that the producers can ex-foot of water? 2 1 Q. (BY MR, SUNDAHL) But you argre it hasn't cause the modify about an acre-foot of water? 3 A. The discover is paylou conserts here that are in the discovery? 2 Q. What should it have been? A. The fus alithery on and cass far correct? A. Pre get if				
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25 wells regardless of whether it causes you any damage or not? 25 readings on what is a threshold for alfalfa. I get a	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 9 20 21 22 23	 Wyoming in relation that the EC at the outflow of 2000 is too high. Q. What should it have been? A. Well, I think it should be 1,300 maximum. Q. Let me make sure I understand this. You're saying that you want to make a point that all CBM production from all wells, any one, should have an EC limit that is A. Less than 2,000. Q. Less than 2,000? A. Yep. Q. Do you know whether or not the EC measurements for any of our waters and any of our permits exceeds that at any time in 2000? A. If it does, I hope they shut you down. Q. But do you have any evidence that it has ever exceeded? A. No. Q. So one of your concerns is EC? A. Yes, yeah. Q. Is there another constituent you're concerned about? A. Also the SAR. Q. Is that is that concern you have about SAR also 	2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 200 21 22 23	It's a little over a ton, which is sold so can you picture taking off into 50 acres that gets irrigated, and for every acre I place a pallet of salt that's going to go to that ground at 1,300. At 2,000 EC (Interruption at door.) (Discussion off the record.) A. So that's what I'm trying to get people to visualize. Would you purposely go out for every acre-foot let's say again, I can't say, but do I put that 48 hours do I put an acre-foot of water on to that field each year? This accumulates over the years and over time. This is what studies, particularly out of Montana State University, have shown that these this accumulates into the soil. So not only does your soil EC and there's a difference there's a distinct difference between the irrigation water EC, and soil EC, and your plants. Soil EC is what affects your plants. Now, if I'm recalling correctly, a discharge like the outflow of 1,300, an EC of 1,300, would if you put it directly if I had an outflow directly on my ranch, put that right out, then that would elevate the soil EC to 2,000, which they claim is a threshold for alfalfa.
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19 (Pages 70 to 73)

	D 100		Demo 104
1	Page 102		Page 104
1	A. Canyon Coal Seam. There were several million	1	from the Cheyenne Watershed done by somebody in Gillette.
2	it's in my other okay. Anyway, yeah, estimated total	2	A. Yes. He was with the NCRS, and I understand he's
3	discharge of Canyon Coal Seam to Antelope Creek or alluvium	3	in South Dakota somewhere now. But anyway, can I kind of
4	is 125 acre-feet per year. Estimated discharge from the	4	talk while you look at that? One of the forms that they
5	Anderson to the alluvium is 129 acre-feet per year.	5	have in that alluvium notes and so forth is the rate of
6	So we have that was basically what the source	6	travel of the surface of the ground water.
7	for the ground water prior to CBM. But now CBM is adding to	7	As your CBM product water enters into the soil, it
8	that. It doesn't give you anything on the quality of those	8	becomes ground water. It can have a rate of travel of 5,000
9	waters, but there are statements made by several well,	9	foot per day. So it's just a little bit less than a mile,
10	Phillips in particular.	10	so I use that to calculate how long it would take I took
11	And I think probably Merit and Barrett and so forth	11	my direct mileage off of my map to the nearest to the
12	and most of the others mostly are saying that the quality of	12	nearest Barrett one and to the Merit one and also the Pine
13	the Cheyenne River water is poorer than what the quality of	13	(sic) Tree one.
14	the CBM water that will be discharged into it. In the	14	Anyway, it was 25, 20 miles, something like that to
15	ground water this is true. I'm sure.	15	the Barrett one. Then I added 50 percent to compensate for
16	One of the things of that well test, that EC on	16	stream mileage. I added 50 percent to it. So it came up
17	that well test there in this document here and I don't	17	off the top of my head here, it came that would take
18	know the complete source of that, and that's another	18	about a month for the CBM water at the nearest one, the
19	reason I have to go they've got Bob Harshbarger Sample,	19	Barrett one. It would take about a month for that water,
20	4,600 umhos.	20	that ground water, to get into our alluvium.
21	Q. Can I see it?	21	So our theory is that over time with all these
22	A. Sure. I have no idea who did it or where they did	22	salts even though the alluvium salts may be very high, the
	it.	23	CBM water will not be diluting that over time, but will be
24	Q. Somebody's been trespassing you think?	24	adding to it. In spite of it being ground water with the
25	A. More than likely not because we probably but	25	cottonwoods and other plants that you have in the streambed
1	Page 103	l	Page 105
			rage 105
1	anyway	1	and so forth, there is a discharge of water through the
1 2	anyway Q. What is the source of this document? Where does it	2	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and
	anyway Q. What is the source of this document? Where does it come from?	ł .	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and so forth.
2	anyway Q. What is the source of this document? Where does it come from? A. I got this packet from Carol Nichols. I told her	2	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and so forth. The plants themselves utilize pure water. So
2 3	anywayQ. What is the source of this document? Where does it come from?A. I got this packet from Carol Nichols. I told her to find everything she could, and I would be back to pick	2 3 4 5	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and so forth. The plants themselves utilize pure water. So they're they're drinking them, so to speak. They're
2 3 4	anywayQ. What is the source of this document? Where does it come from?A. I got this packet from Carol Nichols. I told her to find everything she could, and I would be back to pick things up. It was in a packet that Carol Nichols had. I	2 3 4	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and so forth. The plants themselves utilize pure water. So they're they're drinking them, so to speak. They're putting the salt aside and drinking pure water. So this
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2 3 4 5 6 7 8 9 10	 anyway Q. What is the source of this document? Where does it come from? A. I got this packet from Carol Nichols. I told her to find everything she could, and I would be back to pick things up. It was in a packet that Carol Nichols had. I studied them by the NRCS. It was with this here. I don't know. I think those if you notice the title, it just says notes, alluvium notes. Q. We don't know who the author is? 	2 3 4 5 6 7 8 9 10	and so forth, there is a discharge of water through the trees. There's discharge of water through other means and so forth. The plants themselves utilize pure water. So they're they're drinking them, so to speak. They're putting the salt aside and drinking pure water. So this over a period of time concentrates the salt levels and so forth. So what we're saying and over a period of time CBM-produced water will increase whatever's down there, and
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4W Ranch

	Page 114		Page 116
1 th	e EC modification?	1	there, and we don't have enough water flow that I can
2	A. The EC and SAR.	2	contain and divert up to leach these soils. So any elevated
3	Q. What do you want the SAR to be? I couldn't see	3	SARs or ECs over time are going to build up the levels of
	at in any of your stuff.		the salts and of what we have in the soils right at this
5	A. I would think what little bit I've studied on the		point in time.
	AR SAR and ECs sort of go hand in hand along with pH.	6	Again, not pulling them out of here right now, but
	o the thing that I'm looking at and this is not only the	7	there is quite a few documents from different universities
	ree of you, but the is any CBM water coming down that I	8	and so forth that are saying much about not how I'm
	ould use for irrigation?	9	saying it, but over that these waters use of these
10	As you can see by the soil tests that we've done,	10	waters particularly for irrigation over time increase
	have a very unusual soil, a low SAR, a low EC, and a low	11	substantially the levels of salt and SAR in the soils.
	H, 7.14. So anything that is above that that we irrigate	12	Again, different soils have different reactions.
	ith that has a higher EC, SAR, or pH will degrade the level	13	But the fact that what we have and we listen to what the
	f soil we have right now.	14	irrigators downstream have been doing over the years also
15	Q. Well, in one of your ECs is 2,400	15	where they only pump the water if it's muddy.
16	A. Yes.	16	Our experience with our Runway Meadow and the loss
17	Q on your soil test. Are you saying it's okay to	17	of production there without any scientific test of what we
	ave 2,400 for an EC?	18	have observed over the years seems to verify that it builds
19	A. That soil test is up the Runway Meadow, which I	19	up over time and eventually be at the point where Unk's
	robably increased by using ground water to irrigate with.	20	Meadow will not be productive if we put too much salt in
	hat was one of the learning curves that we learned. Over	21	there, if we have an EC of 1,300.
	Jnk's Meadow where we have flood irrigated with storm runoff	22	That's 22 pounds of salt per acre-foot of water
	/ater	23	that we put on there. So each time I irrigate if I have an
24	Q. Are you saying that any water that has a higher SAR	24	elevated if it has a CBM footprint on it, on the limits
	han any SAR test that you have had on your property should	25	that the DEQ proposes or has, that's what their limits are,
	Page 115		Page 117
1 n	tot be allowed anywhere for CBM water? Is that what you're	1	why every time we irrigate with that much, we're increasing
1	aying?	2	the three hazards of the meadow there.
3	A. If it's a the complexity of the chemistry of the	3	Q. What else do you want the Environmental Quality
	vaters and their chemical reactions with the soil are so	4	Council to do, if anything?
	complex that I've only that I got the surface of the	5	A. Well, the whole ideal and I didn't is
	hing and Section 48 says there should be no what's the	6	basically I was hoping to be able to sit down I was
	words, that there shouldn't be no degradation of water uses	7	hoping to be I thought it would be a two- or three-hour
	or words to that effect.	8	thing. I would present some of these papers and documents
9	So if we bring in waters that have higher even	9	and what we had discussed today and let just voice our
£	hough that's what the DEQ says is allowable, it's our	10	concerns.
	ppinion that they are not protecting what we have right now,	11	Apparently, within the whole Powder River Basin the
	and they're supposed to protect what our current use is.	12	whole thing we pull in Montana and so forth, South Dakota,
13	Q. Is that the theme basically you have all the way	13	and everything, there's a lot more concerns than just the 4W
	hrough this?	14	Ranch. Oh, boy, there's something on the tip of my tongue.
15	A. Yes.	15	Oh, yes. My thoughts and our thoughts are that one
16	Q. For everything?	16	of the options that we have with the CBM water is
17	A. Yes, uh-huh.	17	reinjection, and I certainly alluded to that in some of my
18	Q. That you don't want any SAR or any EC that is	18	comments.
1	higher than what you have now?	19	Q. Down into the aquifer?
20	A. Well, if I knew and if I had the amount of	20	A. You get the darn you get different stories and
	water, either rainwater or even low quality of CBM water	21	different technical things, why you can and why you cannot
	that was low enough, say, within the current limits, then I	22	and so forth. But I think reinjection to some aquifer is a
	could put enough water. And then I could leach that soil of	23	viable way to handle the CBM water.
	the salts, and we could use it.	24	Q. Do you know how many aquifers there are that
25	But we don't get enough rainwater to leach out of	25	underlies your property and where they're located?
<u> </u>			ขน และกระจะทะและเลของระบบสามาร์การสมบัติสามาร์การสมบัติสามาร์การสมบัติสามาร์การสมบัติสามาร์การสมบัติสามาร์การส -

30 (Pages 114 to 117)

	Page 118		Page 120
1	A. No, I sure don't.	1	of these three permits?
2	Q. I submitted some requests for production and	2	A. I need further study and all I got from this
3	requests for admissions to you	3	here
4	A. Yes.	4	Q. That draft, Exhibit 32.
5	Q some time ago. I thought maybe we could really	5	A. There's several appendices that I did not get
6	quickly run through those and get answers for those. First	6	because of the volume and so forth. So I need I would
7	thing I asked you to admit is that you have no evidence that	7	like to look at those.
8	any water produced from Merit Energy and I'm going to	8	Q. Then if we go to the request to produce documents,
9	broaden this now to include all three of the permits in this	9	if you have that handy. You've now given us today all water
10	case admit that the water from these permits do not reach	10	testing you've done?
11	your lands.	11	A. Correct.
12	You have no evidence that they do. I think you	12	Q. From any wells, and from any water from the
13	told me that, correct?	13	Cheyenne River, 1 and 2?
14	A. Right.	14	A. Correct.
15	MS. HARSHBARGER: He has no evidence that	15	Q. You've given us the soil reports, all of them that
16	they do, but he has no evidence that they don't because of		you had?
17	the underwater streams.	17	A. Correct.
18	Q. (BY MR. SUNDAHL) The second thing I asked you was	18	Q. You've given us the raw information, which was that
	do you admit that you have no evidence that any produced	19	fax letter that you had?
19	water from any of these permits violated any of the limits	20	A. Yeah.
20		20	Q. And you've given us verbally the production
21	or discharge of the permit. Do you agree that's true?	22	
22	A. I got my copy here.		records, and I think you told us there hasn't been any
23	Q. Is that a yes?	23	change in production for the last five growing seasons that
24	A. No, we have no evidence.	24 25	would be potentially attributable to the water being A. That's correct.
25	Q. Then the third one was whether you have any	25	A. That's correct.
	Page 119	1	Page 121
1	evidence that any of the three permits in this case violate	1	Q produced from the permits. Am I right in that?
12		1 2	Q produced from the permits. Am I right in that?A. That's correct.
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4W Ranch

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2 3 4 5 6 7	It's the sheer amount of water that is proposed to be put down this river, which would perhaps cause it to run more of the year. Now, it seems like it would be a good thing. But we've had water. One year we've had water in the river, and that is not a good thing. You can't cross it with anything. You fall through the pickup. The horses and cows won't touch it. And I say no way do I want water in that river	2 3 4 5	 spring on their effluent limits and the quantity of water that they produced. And I'm sort of asked is this acceptable to me, to us. And I said no, not really. I still want to go before the Environmental Quality Council. Q. So you just want to express your concerns and be heard? A. Yes. Q. You're not suggesting that any of these three
1	that I'm used to dry 12 months out of the year.	9	permits should be singled out differently from the others,
10 11	MR. SUNDAHL: So far that hasn't been a	10 11	other CBM, and treated differently, are you? A. I am not, no. As a matter of fact, I got a half
12 13 14	problem. MS. HARSHBARGER: You see all those dots on there, and you think, wow, that's really bad. Then, of course, so if all of these permits are granted, they're running all this water downriver, and we get all the way	12 13 14	dozen letters of comments on new permits that I've written. And of course, I got back the same thing from DEQ, but I never appealed any more of them because I already had these three.
16	down there, all year, then pretty quick I know the CBM water	16	And I thought isn't this far enough, if I can get
18	does not last forever. Then it dries up, and we're back to square one. But has it left all these chemicals and stuff	17 18	heard before the council, then so it's not it's the overall big picture that these three permits, the ones I've
19 20	laying around? MR. SUNDAHL: I don't know. Let me ask you,	19 20	picked out, I guess. Q. Gee, I wish you would have picked some others.
21	Mrs. Harshbarger, you haven't actually been sworn. But if you had been sworn to tell the truth, all the things you	21 21 22	A. You know, when the Phillips when the DEQ turned down Phillips
	would have said, you wouldn't have said them any	23	Q. Yeah.
24 25	differently, would you? MS. HARSHBARGER: No.	24 25	A. They were talking SAR 17, and they were talking 2,500, something like that or so forth. When that was
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1 2 3 4 5 6 7 8	MR. SUNDAHL: You're telling the truth now. Now, here's another question: Have you agreed with everything your husband has said? MS. HARSHBARGER: Most of the time. I thought he was a little mild. I would have gotten a lot rougher with you. MR. SUNDAHL: Would you really? MS. HARSHBARGER: I'll tell you what I said.	1 2 4 5 6 7 8	turned down, every irrigator on the Cheyenne River sighed a big sigh of relief and then sat back and didn't do anything. And then I got on the Internet and started watching the applications, and yours was the first three that came up. So that was so I wrote my comments, and I wrote the comments. And then appealed these three, and I wrote additional comments and so forth. Because we both feel strongly there's such a
9 10	This is a bunch of crap. All we want is to be left alone to do what we've done and not have to worry about potential	9 10	potential there's such a potential of damage, environmental damage. It's an unknown. It's an unknown.
11	dangers. Where's that Wyoming Water Law?	11	You folks don't know the answers. We don't know the
12	MR. SUNDAHL: Did my wife do that book? She	12	answers. We might escape with it, but we hear so many
13 14	might have. MS. HARSHBARGER: She probably did.	13 14	stories up in Campbell County. We hear good stories, and we hear bad stories. We
15	THE DEPONENT: The other thing is we're not	15	have such a love affair with the 4W Ranch and what it means
16	against energy development. This country needs it. And nor	16	and what the future holds for it, and I just don't want to
17 18	are we we're not environmentalists to the point of extremes.	17	see the Cheyenne River Basin ecology or environmental or whatever damaged any more.
19	So I mentioned some people a while ago that we	19	It's one of the few areas in the whole state that
20	feel were a productive part of this society. And I don't	20	has that hasn't been changed by man since the Texas trail
21	know why neither one of us haven't retired yet, but we have	21	came up, and they started ranching this country. So it's a
22	no intention of retiring. Q. (BY MR. SUNDAHL) I understand that.	22	very unique area of people coming up when I first come out here in 1960, a friend told me when you get up there
		23	out here in 1900, a menu tolu me when you get up there
23 24		24	you're going to shake your head and say I'm not going to see

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