

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

FEB 25 2005

Terri A. Lorenzon, Director
Environmental Quality Council

IN THE MATTER OF THE APPEAL AND REVIEW OF)
THE DECISION REGARDING THE RECLASSIFICATION)
OF EIGHT MAIN STREAM DRAINAGES TO POWDER)
RIVER AND OTHER TRIBUTARIES IN THE)
POWDER RIVER BASIN, DATED DECEMBER 22, 2004)

PETITION FOR REVIEW, NOTICE OF APPEAL
AND REQUEST FOR CONTESTED CASE HEARING

THIS PETITION is a petition for review and notice of appeal to that certain decision made by John Wagner, Administrator of Wyoming Department of Environmental Quality, Water Quality Division, dated December 22, 2004, and signed on December 27, 2004, reclassifying eight main stream drainages to the Powder River. A copy of the decision is attached hereto as **Appendix "A"**. This notice of appeal is timely filed pursuant to Chapter I, Section 16 of the Rules of Practice and Procedure of the Department of Environmental Quality.

Parties

The parties to this appeal are the landowners who own lands within the drainages identified as follows:

Adami Ranch LLC
P.O. Drawer G
Buffalo, Wyoming 82834

Cat Creek Land Company LLC
414 North Burritt
Buffalo, Wyoming 82834

Tear Drop Cattle Company LLC
10030 Bridger Canyon Road
Bozeman, Montana 59715

Indian Creek Land Company LLC
975 U.S. Highway 16 East
Buffalo, Wyoming 82834

Camino Ranch Limited Partnership
29259 Old Highway 87
Buffalo, Wyoming 82834

Simon J. Iberlin and Bette L. Iberlin
414 North Burritt
Buffalo, Wyoming 82834

Falxa Land Company, Inc.
12 Chesley Avenue
Newtonville, Massachusetts 02460

Cato Crazy Woman Ranch LLC
782 Soldier Creek Road
Sheridan, Wyoming 82801

These property owners represent the majority of the property owners along Cat Creek and the South Fork of Four Mile Creek and the main stem of Four Mile Creek below the confluence of the current discharge from Lance Petroleum just downstream from the confluence of Whisky Draw with South Fork as well as the majority of Timber Draw, a tributary of Crazy Woman Creek. Each property owner is aggrieved by the action of DEQ in downgrading the water courses running through their respective properties by the potential loss of aquatic life.

Appearances

The above property owners are represented in this matter by Dennis M. Kirven of Kirven and Kirven, P.C., 104 Fort Street, P.O. Box 640, Buffalo, Wyoming, 82834; Phone: (307) 684-2248; Fax: (307) 684-2242.

Reasons for Appeal

The reasons for this appeal are stated as follows:

1. ALL OF THE SURFACE WATER IN THE WATERSHED SYSTEM IS NOT ATTRIBUTABLE TO PREVIOUSLY PERMITTED DISCHARGE COALBED METHANE WATER.

The decision incorrectly assumes or concludes that all of the water in the watershed system is only attributable to permitted discharge coalbed methane water. This is incorrect based on the Affidavits of Steven M. Adami and Simon J. Iberlin attached hereto and the historical use of this area by the agricultural community for livestock production which has miraculously survived for 70 years without the production of coalbed methane water. The conclusion that the only water in the system is attributable to coalbed methane discharge water is unwarranted and not based on credible evidence.

Even though this study area has sustained and severe drought for nearly five years, naturally occurring springs have been producing water at the Pelloux Spring in Indian Creek and on the South Fork of Four Mile Creek at the confluence of Goble Draw and on the North Fork of Four Mile Creek and on Timber Draw.

The inadequacy of the study has led to faulty conclusions. This is no more apparent than in the response to the public comments by DEQ. DEQ's response to the comment by the United States Fish and Wildlife Service was as follows:

[United States Fish and Wildlife Service] : "South Fork of Four Mile Creek above Whiskey Draw - Based on the field survey only one wetland was identified and located just below the confluence of Goble Draw. Below the impoundment berm there was standing water with cattails and rush. Aquatic life is likely present and should be protected."

DEQ Response: "The South Fork of Fourmile Creek and Whiskey Draw are naturally ephemeral drainages. The wetland area is a direct result of a stock

impoundment....”

“Response to Public Comments Regarding the Reclassification of: Multiple Drainages Tributary to the Powder River, Crazy Woman Creek and Four Mile Creek”, WDEQ/WQD, December, 2004, p. 3.

The Use Attainability Analysis (“UAA”) study provided as follows:

The only wetland area identified was located just below the confluence of Goble Draw with the South Fork (Wetland 129). An impoundment at the confluence of these drainages was completely dry with upland vegetation, however the area below the impoundment contained standing water. This wetland extends a distance of some 500 feet.

Id. at 2-12.

It is completely illogical that a dry impoundment would cause a water seepage for 500 feet. This is a naturally occurring spring as testified to by Simon J. Iberlin who has been on the property for more than 70 years. (See Iberlin Affidavit, **Appendix “B”**)

This water source has been known to exist for decades by local ranchers and pioneers who used the watering spot for trailing livestock in travels across this country. To suggest that this is a result of an impoundment constructed some five years ago is unscientific and illogical. How is the standing water in the wetland area created by a dry impoundment? The same faulty argument is employed in discussion of the Indian Creek Reservoir and Pelloux Spring. (See Adami Affidavit, **Appendix “C”**)

The UAA never interviewed one landowner concerning the historic use or supply of water in the drainages. Its conclusion is not supported by historical data or by current data available.

2. ALL OF THE AQUATIC RESOURCES THAT CURRENTLY EXIST WITHIN CAT CREEK WATERSHEDS ARE NOT DIRECTLY ATTRIBUTABLE TO PERMITTED DISCHARGE WATER.

As indicated above, the UAA misrepresents the historical supply of water down these watersheds and further erroneously concludes that two dry impoundments, the Iberlin Reservoir and the Indian Creek Reservoir, are resulting in wetlands which the testimony of individual landowners are that the wetlands existed long before the reservoir sites and provided a dependable supply of water.

The conclusion that aquatic resources exist as a result of those water supplies is defective. If a UAA was to be conducted, it would have to take into account the historical use of the water and the possibility that these wetlands were not produced by coalbed methane discharge water which the study does not do. The UAA was clearly generated by the applicant, Kennedy Oil, and is not balanced in its approach to previous uses of the property and DEQ has an obligation to obtain balanced and fair information regarding the supply of water and use of the water on the premises.

3. REMOVING THE SOURCE OF POLLUTION WOULD NOT CAUSE MORE ENVIRONMENTAL DAMAGE THAN LEAVING IT IN PLACE AND WOULD VIOLATE THE PURPOSE AND INTENT OF THE CLEAN WATER ACT.

The premise of the UAA and the decision of the DEQ is that a steady stream of polluted water is more beneficial than the intermittent non-polluted water supplies. This is contrary to the purpose and intent of the Clean Water Act and certainly does not examine the historical uses of the entire watershed for all other non-aquatic uses as well as aquatic uses. It is tantamount to saying that the current uses would not survive without CBM discharge water. Such a statement foregoes hundreds of years of recorded history

regarding the uses of the property by recreationalists, agricultural users, hunters, wildlife, and for that matter, the existing aquatic life that has exists by reason of the springs on the property. The landowners who have used the property on a daily basis do not want the discharge water, find that it is detrimental to their lands, that it causes erosion, it endangers the aquatic life, the micro-invertebrates, the aquatic invertebrates and amphibians, likely to present in these drainages. The decision further does not put specific limitations on the quality of the water which will be discharged onto the lands because there is no lower classification of water under the guidelines of the DEQ. Studies have shown that the discharged water only produces deposits of sediments, such as chlorides, and these elevated concentrations of pollutants dissolved in the water could easily affect aquatic life and even wildlife.

Failure to protect the aquatic life is in violation of the Clean Water Act and should not be permitted.

4. OTHER USES WILL NOT BE LOST IF THE COALBED METHANE DISCHARGES ARE DISCONTINUED.

There is adequate historical data, none of which was enclosed in the UAA, which shows the use of the watershed for other purposes such as wildlife, livestock, recreation and viewshed are not endangered by a discontinuance of the discharge of coalbed methane water into these watersheds. These watersheds have existed for a number of years with those uses having been made with a sustaining yield to all the activities. In addition to the discharge water, coalbed methane brings other disruptions to uses which will likely reduce a number of these uses rather than increase those uses.

5. INADEQUATE NOTICE TO LANDOWNERS VIOLATES DUE PROCESS AND THE UNITED STATES CONSTITUTION AND THE WYOMING CONSTITUTION.

DEQ has adequate records of the landowners in the area impacted by their decision. No individual notice was sent to any landowner and if the notice was published at all, it was published in the Casper Star Tribune. That notice was inadequate and did not provide due process to individual landowners, particularly where the address and location of the owners is known and no individual notice is made.

Request for Hearing

The above parties hereby petition and request a contested case hearing before the Environmental Quality Council on the decision of John Wagner, Administrator of Wyoming Department of Environmental Quality, Water Quality Division, dated December 22, 2004, and signed December 27, 2004.

DATED this 24th day of February, 2005.

KIRVEN and KIRVEN, P.C.:

By 
DENNIS M. KIRVEN, Attorney for
Petitioners
P.O. Box 640
Buffalo, Wyoming 82834
Phone: (307) 684-2248

CERTIFICATE OF SERVICE

I, **DENNIS M. KIRVEN**, of Kirven and Kirven, P.C., attorneys for Petitioners, certify that I served a true and correct copy of the foregoing "Petition for Review and Notice of Appeal" as follows:

Terri A. Lorenzon
Environmental Quality Council
Herschler Building, Room 1714
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Fax: (307) 777-6134

- U.S. Mail
- Facsimile
- Federal Express
- Hand Delivery

Mr. John Wagner
Department of Environmental Quality
Water Quality Division
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Cheyenne, Wyoming 82002
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- U.S. Mail
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on the 24th day of February, 2005.


DENNIS M. KIRVEN