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Jim Ruby, Executive Secretary
Environmental Quality Council

Counsel for Lance Oil and Gas Company, Inc.

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

**IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC. FROM
WYPDES PERMIT NO. WY0049697**

Docket No. 08-3802

**LANCE OIL AND GAS COMPANY'S MEMORANDUM IN SUPPORT OF ITS
MOTION TO RETURN INADVERTENTLY PRODUCED ATTORNEY-CLIENT
PRIVILEGED MATERIAL**

COMES NOW Lance Oil and Gas, Inc. ("Lance") acting by and through its attorney, Speight, McCue & Crank, and files its Memorandum In Support of Its Motion to Return Inadvertently Produced Attorney-Client Privileged Material.

Preservation of the attorney-client privilege is essential to the effective operation of the American system of justice. The Wyoming Supreme Court has long recognized this fact and has further held that for the "[legal] system to properly function the attorney-client privilege must be protected." *Arnold v. Mountain West Farm Bureau Mut. Ins. Co., Inc.*, 707 P.2d 161, 165 (Wyo. 1985); *Thomas v. Harrison*, Wyo., 634 P.2d 328 (Wyo. 1981). "As Justice Raper said in his concurring opinion, encroachment upon the attorney-client privilege 'would discourage honesty by a client to his attorney and intrude upon the right of privacy between a lawyer and his client.'" *Id.* (quoting *Thomas*, 634 P.2d at 334). Clabaugh Ranch, Inc. ("Clabaugh") would have the hearing officer

disregard the long history of protecting the attorney-client privilege in Wyoming and allow the inadvertently disclosed document to be used as evidence in this case.

RELEVANT FACTS

As stated fully in Lance's Motion to Return Inadvertently Produced Attorney-Client Privileged Material ("Motion"), counsel for Lance inadvertently produced attorney-client privileged documents, Bates stamp number LANCE-02614 to LANCE-02620 on October 15, 2008. Counsel for Lance learned of the inadvertent disclosure of the privileged document on June 17, 2009 when counsel for Clabaugh attempted to use the privileged documents during a deposition. Counsel for Lance immediately objected to the introduction of the privileged documents as a deposition exhibit and stated that they had been inadvertently produced. Further, counsel for Lance moved to strike any question asked of the deponent with regard to the privileged document. (Depo. Transcript of Jason Smith, June 17, 2009, pp. 86-92, a redacted version of which is attached hereto and incorporated herein as Exhibit 1). After discussions with counsel for Lance failed to lead to the return of the inadvertently produced privileged documents, counsel for Lance filed the Motion on July 31, 2009.

STANDARD OF REVIEW

"The party asserting the attorney-client privilege has the burden of proving that the privilege is warranted under the circumstances and has not been waived." *Wyoming v. U.S. Dept. of Agr.*, 239 F.Supp.2d 1219, 1229 (D. Wyo. 2002) (*vac'd* by *Wyoming v. U.S. Dept. of Agr.*, 414 F.3d 1207 (10th Cir. 2005)). Lance must prove that the documents over which it is claiming an attorney-client privilege: 1) fall within said privilege; 2) and that the privilege has not been waived. Any document that is not privileged, or for which the privilege has been waived, is discoverable. Wyo. R. Civ. P. 26(b)(1)

DISCUSSION

ATTORNEY-CLIENT PRIVILEGE

The documents at issue in the Motion clearly fall with the attorney-client privilege as articulated by the Wyoming Supreme Court, as well as courts in other jurisdictions. For the attorney-client privilege to apply, (1) legal advice must be sought (2) from a professional legal advisor in his capacity as such, and (3) the communications relating to that purpose (4) must be made in confidence (5) by [or to] the client.” *Memry Corp. v. Kentucky Oil Technology, N.V.*, 2007 WL 39373, p. 2 (N.D. Cal. 2007) (citing *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1492 (9th Cir. 1989).

As a preliminary matter, Clabaugh argues that the inadvertently produced e-mail chain was not attorney-client privileged communication because it was not included within the privilege log that Lance withheld from production in this case. (Clabaugh’s Response, filed August 7, 2009). However, a copy of the e-mail that contained the exact same attorney-client privileged communication and the same recipients as LANCE-02614 to LANCE -02620 was listed in the privilege log. (Privilege Log attached hereto and incorporated herein as Exhibit 2). This occurred because multiple copies of the attorney-client privileged communications were produced in hard copy by Lance to Lance’s counsel, and one was inadvertently produced. (Affidavit of Patrick J. Crank, attached hereto and incorporated herein as Exhibit 3). The e-mail referred to in item 2 of the privilege log, Bates stamp LANCE-02559 to LANCE-02566, is an identical copy of the attorney-client advice inadvertently produced at LANCE-02614 to LANCE-02620. Therefore, it cannot be argued that Lance did not believe that the communications contained within the inadvertently produced documents were protected by the attorney client privilege.¹

¹ The United States District Court for the Southern District of Florida has found that production of an attorney-client privileged e-mail was “unquestionably inadvertent”, when two

It is apparent on the face of the documents for which the attorney-client privilege is being asserted that this e-mail chain falls squarely within that privilege. Mark Ruppert, of Holland & Hart, LLC was Lance's attorney during the renewal process for WYPDES Permit No. WY0049697, was providing legal advice and guidance to senior employees of Lance and Anadarko. This e-mail chain was intended to be a free flow of ideas between an attorney and his clients. The communication concerned the very subject matter that the attorney was hired to advise Lance on. The communication was intended to be confidential and was not intended for a broader audience. As a matter of fact, Mr. Ruppert asks the recipients of the e-mails to be careful who they forward the e-mails to so that the e-mails do not become discoverable. The candid communications contained within this e-mail chain are the essence of that which the attorney-client privilege protects so that the American legal system may operate properly. *Arnold*, 707 P.2d at 165; *Thomas*, 634 P.2d at 334.

WAIVER

The decision to waive the attorney-client privilege belongs solely to the client, and cannot be waived by any other party. *Teniente v. State*, 169 P.3d 512, 528 (Wyo. 2007); (citing *Bennett v. State*, 794 P.2d 879, 883 (Wyo. 1990)). "A waiver is the *intentional* relinquishing of a known right." *Metz Beverage Co. v. Wyoming Beverages, Inc.*, 39 P.3d 1051, 1059 (Wyo. 2002) (emphasis added) (discussing the intentional disclosure of attorney client privileged communication by a client during deposition testimony); *Lingle State Bank of Lingle v. Podolak*, 740 P.2d 392, 396 (Wyo. 1987).

copies of the same email were identified on the defendant's privilege log, although two additional copies of the e-mail evaded the defendant's notice prior to their production to the plaintiff. *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 2009 WL 982449, 8 (S.D. Fla. 2009)

Clabaugh argues that Lance waived the attorney-client privilege covering the documents in two separate and distinct ways. First, Clabaugh asserts that the attorney-client privilege covering the e-mail string was waived when the e-mails were forwarded to Jason Driscoll, an employee of CBM Associates, who was functioning as an agent of Lance for the renewal of WYPDES Permit No. WY0049697. Second, Clabaugh argues that the inadvertent production of the privileged document to Clabaugh through discovery was a waiver of the attorney-client privilege. Both of these arguments lack merit.

Unfortunately, there is scant Wyoming case law on whether production to an agent waives the attorney-client privilege, and also whether inadvertent production of an attorney-client privileged document during the discovery process also serves as a waiver of the privilege. The cases cited by Clabaugh are so factually dissimilar from the present situation as to render them completely useless to resolve the issue before the hearing officer.

First, *Dobbins v. State*, 483 P.2d 255 (Wyo. 1971) involves a comment made in open court between a defendant and his attorney that was overheard by a third party. In that instance, the Court held that the defendant had waived the attorney client privilege through his action. *Id.* at 261. Unlike the confidential communication in this instance, in *Dobbins*, the confidential communication was overheard by a third party who was not an agent of the defendant, the communication was made in a forum where the defendant had no reasonable expectation of privacy, and the confidential communication was not inadvertently produced during the discovery process. *Id.* Due to the factual disparities, *Dobbins* is no help in resolving the questions before the hearing officer.

Even less enlightening is *Figuly v. City of Douglas*, 853 F.Supp. 381 (D. Wyo. 1994), a Judge Brimmer opinion cited by Clabaugh for the proposition that the attorney-client privilege is lost if the confidential communication is

disclosed to a third-party, whether the disclosure was intentional or inadvertent. *Id.* at 388, n.3. While this language from *Figuly* is clearly dicta, it is also readily distinguishable from the current situation. First, Judge Brimmer did not need to determine whether the alleged privileged document was actually covered by the attorney-client privilege or not. Also, the disclosure was made by the plaintiff prior to any litigation, and was not first made during the discovery process. *Id.* In fact it appears that the alleged confidential document was placed in the plaintiff's employee personnel file before he filed suit for wrongful discharge, and before he was even fired. *Id.*

The case from Wyoming that appears to be most on point is *Thomas v. Harrison*, 634 P.2d 328 (Wyo. 1981). In *Thomas*, the Court held that information furnished to a medical insurer acting as an agent of the attorney defending the defendant physician against a medical malpractice claim was not discoverable. *Id.* So applying the logic of *Thomas* to the current situation, disclosure to an agent of a party of attorney-client privileged information would also not be discoverable in Wyoming.

Agent Relationship Established

“Generally, disclosure to third parties waives the attorney-client privilege, but there is an exception for independent contractors and other third parties who are functional equivalents of employees.” *Memry Corp.*, 2007 WL 39373, p. 2; *Stewart v. Kempthorne*, 2007 WL 1655791, 2 (D.Utah 2007). Courts have held that “ ‘a detailed factual showing’ is needed to show that a third party is a representative of the client, or functionally equivalent to the corporation's employee, thus including that third party within the protection of the attorney-client privilege.” *Memry Corp.*, 2007 WL 39373, p.2 (citing *Energy Capital Corp. v. U.S.*, 45 Fed. Cl. 481, 492 (2000)). “Courts consider the policy behind corporate attorney-client privilege determinations, as enunciated by the Supreme Court in *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66

L.Ed.2d 584 (1981).” *Id.* (citing *In re Bieter Co.*, 16 F.3d 929 (8th Cir.1994); *Admiral Ins.*, 881 F.2d at 1493).

It appears that the two seminal cases on whether attorney-client privilege is waived by disclosure to a third-party agent or independent contractor are *In re Bieter Co.*, 16 F.3d 929 (8th Cir.1994) and *Energy Capital Corp.*, 45 Fed. Cl. 481 (2000).² Both the Eighth Circuit in *Bieter* and the Federal Circuit in *Energy Capital* held that “[t]he crux of the matter, then, is whether an independent contractor can be a representative of the client for purposes of applying the attorney-client privilege.” *In re Bieter Co.*, 16 F.3d at 936, *Energy Capital Corp.*, 45 Fed. Cl. at 489. To help illustrate its analysis, the Eighth Circuit in *Bieter* described a common situation involving an independent contractor as an agent for the purposes of retaining the attorney-client privilege:

[A]n accountant, who though an independent contractor, performs regular accounting services for a corporation over many years. As the accountant, he has an insider's knowledge of the corporation's operations that few people even on the corporation's payroll have. Assume he represents the corporation at an IRS audit. Finally, assume that a tax indictment issues against the corporation and that an attorney is retained. Clearly, the accountant has knowledge of extraordinary importance to the attorney's investigation of the tax matter. And, equally clearly, the logic of *Upjohn* commands that the mere fact that the accountant was not an employee of the corporation should not preclude application of the privilege. There is no reason to differentiate between an accountant-employee and a regularly retained outside accountant when both occupy the same extremely sensitive and continuing position as financial adviser, reviewer, and agent: both possess information of equal importance to the lawyer.

A literalistic extension of the privilege only to persons on the corporation's payroll would invariably prevent a corporation's

² See also *Markwest Hydrocarbon, Inc. v. Liberty Mutual Ins. Co.*, WL 1106105, (D.Colo. 2007) and *Steele v. First Nat. Bank of Wichita*, 1992 WL 123818 (D.Kan. 1992) for the proposition that disclosure of attorney-client privileged documents to a third-party acting as an agent of the client does not waive the privilege and does not render the privileged documents discoverable.

attorney from engaging in a confidential discussion with a corporation's regular independent accountant, no matter how important the accountant's information would be to the attorney.

Id. at 937, quoting John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U.L.Rev. 443, 498 (1982); *Energy Capital Corp.*, 45 Fed. Cl. at 489. The *Bieter* Court explicitly recognized that in today's business environment, the attorney client privilege must be extended to those who act as agents or independent contractors on the very subject that the privileged communications touch upon and that communication to the agent or independent contractor does not destroy the attorney-client privilege. *In re Bieter Co.*, 16 F.3d at 939-40.

The Federal Circuit in *Energy Capital* quoted with approval from a treatise written by Paul R. Rice titled *Attorney-Client Privilege in the United States* § 4:19 (1993): "When, however, those third parties have an established working relationship with the corporate client that is similar to that of regular employees, they should be treated like regular employees [for purposes of the attorney-client privilege]." *Id.* at 4-68; *Energy Capital Corp.*, 45 Fed. Cl. at 490. The *Energy Capital* Court goes on to quote Rice:

There is little justification for distinguishing between 'permanent' employees who communicate with counsel on matters that are within the scope of their employment, and 'temporary' employees (outside agents) who provide the same services to the corporation, often with the same continuity of employment, ... and whose communications are equally important to the legal services that counsel renders to the corporate client.

* * *

A corporate attorney-client privilege faithful to *Upjohn* would protect communications of those persons (otherwise qualifying) who, either when they are speaking or after they have acquired their information: (1) possess decision making responsibility regarding the matter about which legal help is sought, (2) are implicated in the chain of command relevant to the subject matter of the legal services, or (3) are personally responsible for or

involved in the activity that might lead to liability for the corporation.

Id. at 4-70 & 4-71.

After discussing Rice and citing with approval from the dissent of another Federal Circuit Court decision³, the *Energy Capital* Court adopted the rule from *Bieter* that a person may share information received from its attorney with third parties acting as agents or independent contractors and not waive the attorney-client privilege that would otherwise exempt that information from discovery.

The *Energy Capital* Court went on to find that “a detailed factual showing is necessary to establish the relationship between the client and a third party that is sought to be included within the protection of the attorney-client privilege.” *Id.* at 491. The party claiming the privilege and seeking to establish the third-party agent relationship can do so by submitting affidavits to establish the relationship. *Id.* (citing *In re Bieter Co.*, 16 F.3d at 929).

In this instance, Lance has submitted the affidavit of Tim Kalus, Environmental and Regulatory Supervisor for Lance, and Anadarko Petroleum Corporation, to show that Jason Driscoll has been acting as an agent of Lance and Anadarko for the purposes of preparing new permits, modifications and renewals for coal bed methane wells and has done so for four or five years. (Affidavit of Tim Kalus, attached hereto and incorporated herein as Exhibit 4).

³ *Dorf & Stanton Communications, Inc. v. Molson Breweries*, 100 F.3d 919, 927 (Newman, J. dissenting):

“It is well established that communications between the lawyer and agents of the client, concerning the client's legal interests as necessary and reasonable to the agency function, do not destroy the privileged nature of such communications.”...“Communications concerning the client's legal and litigation interests as relevant to the agency's function are no less privileged than if the exchanges were directly between attorney and client.” *Id.*

Energy Capital Corp., 45 Fed. Cl at 491.

Driscoll has always been privy to attorney-client privileged information and in fact this information was crucial so that he could efficiently and effectively perform his duties as an agent of Lance. *Id.* Driscoll was also working on as an agent of Lance for the renewal of WYPDES Permit No. WY0049697. Driscoll needed the information contained within the privileged documents in order to effectively perform his duties for Lance and Anadarko. *Id.* This situation presents the classic situation where an agent of a corporation is indistinguishable from an employee of that same corporation for the purposes of protecting the attorney-client privilege that shields the documents in question from discovery in this case.

Inadvertent Disclosure

We now turn to the question of whether the inadvertent production of attorney-client privileged documents during the discovery phase of a legal proceeding waived the privilege. Again, there is little Wyoming case law to guide us on this issue. However, historically courts have relied on one of three approaches to determine whether inadvertently produced attorney client privileged waived the privilege:

[T]he objective approach, the subjective approach and the intermediate approach. Under the objective approach, any disclosure, regardless of intent, constitutes a waiver. The subjective approach is inapposite to the objective approach; an inadvertent disclosure does not ever constitute a waiver due to the lack of intent to waive the privilege. Finally, the intermediate approach is factor-based and requires the Court to balance said factors. The factors to be considered are: 1) the reasonableness of precaution taken in view of the extent of document production; 2) the number of inadvertent disclosures; 3) the magnitude of the disclosure; 4) any measures taken to mitigate the damage of the disclosures; and 5) the overriding interests of justice.

Grain v. Trinity Health, Mercy Health Services, Inc., 2009 WL 1868543, 5 (E.D.Mich. 2009). The Tenth Circuit has never held what approach was appropriate in this circuit. *Jones v. Eagle-North Hills Shopping Centre, L.P.*, 239

F.R.D. 684, 685 (E.D.Okla. 2007). However, the district courts within the Tenth Circuit appear to overwhelmingly apply the intermediate approach. See *Jones*, 239 F.R.D. 684; *Palgut v. City Of Colorado Springs*, 2007 WL 1238730, p.2 (D.Colo.,2007); *Steele v. First Nat. Bank of Wichita* 1992 WL 123818, p.2 (D.Kan. 1992).

Further, as of September 2008, the “intermediate approach” to determine whether an inadvertent disclosure waives the attorney-client privilege has now been included in the Federal Rules of Evidence as Rule 502(b).⁴ *Kumar v. Hilton Hotels Corp.*, 2009 WL 1683479, (W.D.Tenn. 2009); *Preferred Care Partners Holding Corp.*, No. 08-20424-CIV, 2009 WL 982449, at p.4.⁵

The “Explanatory Note” to F.R.E. 502(b) discusses the major purposes behind the new rule. One purpose was to respond to the widespread fear that one inadvertent disclosure could lead to subject matter waiver for all protected and privileged communications or information. *Explanatory Note*, November 28,

⁴ Federal Rules of Evidence Rule 502, states:

(b) Inadvertent disclosure.--When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if:

- (1) the disclosure is inadvertent;
- (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
- (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Federal Rule of Civil Procedure 26(b)(5)(B) states:

(B) Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

⁵ Wyoming has not yet adopted an equivalent to F.R.E. 502(b).

2007, F.R.E. 508(b). The drafters of the new rule found this concern “especially troubling” in the age of electronic discovery. *Id.* The other purpose behind the new rule was to resolve the conflict between courts as to what approach should be used to determine whether an inadvertent production waived the attorney-client privilege. The rule opts for the middle ground. *Id.* In support of adopting this approach, the explanatory note states:

Cases such as *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985) and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332 (N.D.Cal. 1985), set out a multi-factor test for determining whether inadvertent disclosure is a waiver. The stated factors (none of which is dispositive) are the reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness. The rule does not explicitly codify that test, because it is really a set of non-determinative guidelines that vary from case to case. The rule is flexible enough to accommodate any of those listed factors. Other considerations bearing on the reasonableness of a producing party's efforts include the number of documents to be reviewed and the time constraints for production.

* * *

The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.

Id.

Applying F.R.E. 502(b) and the other factors articulated by courts for the “intermediate approach” it is clear that Lance took reasonable steps to prevent the inadvertent production of the privileged documents and after the inadvertent production was discovered, Lance took reasonable steps to rectify the error. (See Exhibit 3). Given the reasonable steps taken by Lance, the attorney-client privilege was not waived and the privileged e-mail chain is not discoverable.

Counsel for Lance personally reviewed almost 7,000 pages of documents for attorney-client privileged information before they were produced to Clabaugh. (Exhibit 3). Extensive time was spent by the undersigned and his legal support staff in screening the documents, preparing the privilege log, and producing the documents. Another copy of the e-mail which contains the identical attorney-client privileged communication was withheld as attorney-client privileged information as listed on Lance's privilege log. (See Exhibit 3, LANCE-02559 to LANCE-02566 produced in a confidential appendix to the hearing officer; see also *Preferred Care Partners Holding Corp.*, 2009 WL 982449, 8 (S.D. Fla. 2009)). Upon identifying this e-mail chain as attorney client privileged documents during a deposition on June 17, 2009, counsel for Lance immediately identified the document as an inadvertent production, and moved to strike any question asked that dealt with the document. *Preferred Care Partners Holding Corp.*, 2009 WL 982449, 12 (S.D.Fla. 2009) (holding that defendant's counsel took a "reasonable step to rectify the error" when he promptly alerted opposing counsel to an inadvertent production of attorney-client privileged documents upon noticing a reference to the inadvertently produced documents in a motion for sanctions filed by opposing counsel). Counsel for Lance negotiated in good faith with counsel for Clabaugh for the return of the inadvertently produced privileged documents. After these negotiations failed, counsel for Lance filed the Motion on July 31, 2009.

It is apparent that reasonable steps were taken to prevent the production of the privileged documents. Once the inadvertent production was identified, counsel for Lance immediately took reasonable steps to rectify the error. Since these measures were taken, it cannot be argued that the inadvertent production of this privileged e-mail chain waived the attorney-client privilege.

CONCLUSION

Given the manner in which businesses rely on agents and independent contractors, it is likely that the Wyoming Supreme Court would follow the trail blazed by the federal courts and find that the attorney-client privilege extends

to agents or independent contractors of a client who are functionally employees for the purposes of the subject matter of the privileged communication.

Further, in this day of voluminous discovery productions, inadvertent productions of attorney-client privileged documents will only become more prevalent. *Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 232 (D.Md. 2005). The federal courts have adopted an approach under F.R.E. 502(b) that weighs the precautions taken to prevent an inadvertent production and remedial steps taken to rectify the error after it is discovered, to determine whether the inadvertent discovery was so unreasonable that it should serve as a waiver of the asserted privilege. It is reasonable to assume that the Wyoming Supreme Court would adopt such an approach if presented with a similar scenario. The policy considerations for such an approach are numerous, and favor neither party to a dispute.

The communication contained within Bate stamped documents LANCE-02614 to LANCE-02620 are protected by the attorney-client privilege. That privilege was not waived when the privileged communications were sent to an agent of Lance, Jason Driscoll. Finally, the inadvertent production of the privileged documents in this case did not waive the privilege because Lance took reasonable steps to prevent the production, and reasonable steps to rectify the error once it was discovered.

WHEREFORE, Lances prays that the hearing officer grant the relief as requested in the Motion to Return Inadvertently Produced Attorney-Client Privileged Material.

Lance further asserts that review of the actual attorney client privileged document by the Environmental Quality Council ("EQC") will prevent the EQC from being fair and impartial decision makers in this matter. For this reason, Lance urges the hearing officer to review the document in question and advise the EQC whether such document is, in fact, an attorney-client privileged

communication. The actual document cannot be viewed by the EQC and to do so will fatally affect the EQC's ability to hear this matter.

DATED this 11th day of August, 2009.

SPEIGHT, McCUE & CRANK, P.C.



By: _____

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ATTORNEY FOR LANCE OIL AND GAS
COMPANY, INC.

CERTIFICATE OF SERVICE

This is to certify that on the 11th day of August, 2009, a true and correct copy of the foregoing was served upon counsel as follows:

| | | |
|---|-------|-----------------|
| Director, Department of Environmental Quality | [X] | U.S. Mail |
| 122 West 25 th Street | [] | Federal Express |
| Herschler Building, Room 174 | [] | Fax |
| Cheyenne, WY 82002 | [] | Hand Delivered |
| | [] | E-Mail |

| | | |
|-----------------------------------|-------|-----------------|
| John Burbridge | [X] | U.S. Mail |
| Wyoming Attorney General's Office | [] | Federal Express |
| 123 Capitol Building | [] | Fax |
| Cheyenne, WY 82002 | [] | Hand Delivered |
| | [] | E-Mail |

| | | |
|---------------------|-------|-----------------|
| Tom C. Toner | [X] | U.S. Mail |
| Yonkee & Toner, LLP | [] | Federal Express |
| P.O. Box 6288 | [] | Fax |
| Sheridan, WY 82801 | [] | Hand Delivered |
| | [] | E-Mail |



A handwritten signature in blue ink, appearing to read 'T. C. Toner', is written over a horizontal line.

PJC:ch

EXHIBIT 1

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BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
OF THE STATE OF WYOMING

IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC., Docket No. 08-3802
FROM WYPDES PERMIT NO.
WY0049697

DEPOSITION OF JASON THOMAS
Taken on behalf of Petitioner

8:04 a.m., Wednesday
June 17, 2009

PURSUANT TO NOTICE, the deposition of JASON THOMAS
was taken in accordance with the applicable Wyoming Rules of
Civil Procedure at the Yellowstone Room, 122 West 25th
Street, Cheyenne, Wyoming, before Margie R. Dauster,
Registered Professional Reporter, Certified Realtime
Reporter, and a Notary Public.

1 May, and June of 2008, correct?

2 A. Yes.

3 Q. And they show in April that that outfall was
4 discharging at 829, and in May at 1,480, and in June at
5 1,090, correct?

6 A. Yes.

7 Q. So that's all below the Tier 1 analysis that you
8 did for the Petro-Canada permit on Wild Horse Creek of
9 1,500, isn't it?

10 A. Yes.

11 MR. CRANK: Object to the form of the
12 question. You can answer if you can.

13 Q. (BY MR. TONER) So would you conclude that Lance is
14 able to treat the water coming out of Outfall Number 13 so
15 that they could meet a Tier 1 analysis on Wild Horse Creek?

16 MR. CRANK: Object as to the form of the
17 question. You can answer if you can.

18 A. Would I conclude that they could?

19 Q. (BY MR. TONER) Yes. And have.

20 A. Well, based on this data, I would find that
21 indisputable.

22 (Deposition Exhibit Number 20 was
23 marked for identification.)

24 Q. (BY MR. TONER) Next I'll hand you a document
25 that's marked as Exhibit 20. This is a document that Lance

1 produced in response to request for production of documents.

2 And about the second full paragraph in this email,
3 it says -- this is an email from Mark Ruppert of Holland &
4 Hart relating to the Clabaugh letter and the Echeta Road
5 Permit Renewal WY0049697.

6 It says: [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]

*Redacted
8/11/09
PJC.*

20 Now, did you review that --

21 MR. CRANK: Stop, stop, stop. I'm going to
22 object to all of this as attorney/client privilege that was,
23 apparently, inadvertently produced, Tom.

24 MR. TONER: Oh, I don't think so, because it's
25 an email from Stephens to Jason Driscoll. Jason Driscoll is

1 a consultant with coalbed methane management. So I don't
2 think you inadvertently produced that.

3 MR. CRANK: And it contains specific legal
4 advice given by Mark Ruppert of Holland & Hart that was
5 representing Lance at the time in reviewing this proposed
6 permit. This is all attorney/client privileged, and I
7 object to any question of any witness with regard to this
8 attorney/client privileged information.

9 MR. TONER: Well, it's not attorney/client
10 privileged if it was disclosed to somebody who was not a
11 client. Jason Driscoll is not a client of Mr. Ruppert.
12 Jason Driscoll is an employee of a consultant of Lance. And
13 this email comes -- is an email sent from David Stephens of
14 Anadarko to Jason Driscoll.

15 MR. CRANK: Well, and disclosure of attorney/
16 client privileged information to an agent of the client does
17 not result in waiver of the privilege.

18 MR. TONER: Well, I can't believe he can be
19 categorized as an agent. They're independent consultants
20 that are hired --

21 MR. CRANK: I assume hired by Lance to
22 evaluate this particular permit. And in that connection,
23 they were given attorney/client privileged advice which does
24 not waive the privilege.

25 MR. TONER: Well, I think it does waive it,

1 and I'm going to proceed to ask questions on it. Because I
2 think it has been waived because it was disclosed to an
3 outside third party, or we would never have received it.

4 MR. CRANK: Well, for purposes of the record,
5 this was an inadvertent disclosure. I move to strike both
6 the last question -- I move to strike any question that's
7 asked with regard to this document.

8 You know, if I were representing this witness, I
9 would -- I would direct him not to answer any questions with
10 regard to this, but I guess --

11 MR. BURBRIDGE: I don't know -- I don't know
12 how he can answer questions with regard to this. I mean,
13 this isn't --

14 MR. TONER: Well, I'm going to ask the
15 questions. If you're going to direct him not to answer --
16 you're just going to have to do it, I'm afraid, John,
17 because I don't think you have a valid basis for doing that.
18 It refers to consultations they've had with Jason. It
19 refers to strategy. It refers to criticism of Jason as to
20 whether or not he backs up his permits. And I want to know
21 whether they've been consulting with him about these
22 permits.

23 So I'll give you a minute if you want to visit with
24 Jason about it. I'm not going to rush you on making a
25 decision.

1 MR. BURBRIDGE: Can we take five minutes?

2 MR. TONER: Sure. Absolutely.

3 (Deposition proceedings recessed
4 10:42 a.m. to 10:48 a.m.)

5 MR. TONER: If you're going to direct him not
6 to answer any questions about that, that's okay. Then we'll
7 just have to file a motion. But there's no point --

8 MR. BURBRIDGE: Yeah, I am. You know, I am
9 not aware of the circumstances of this disclosure, but it
10 certainly appears to be attorney/client privileged
11 information to me as well.

12 I, quite frankly, am uncomfortable with having
13 Jason answer questions regarding these conversations. He
14 doesn't have knowledge as to what these people were saying
15 about what he was doing, and so I -- I'm going to ask him
16 not to answer questions with regard to this until we get
17 some idea as to how we can use this in this deposition going
18 forward.

19 MR. TONER: So I just want to be real clear.
20 You're directing him not to answer any questions about
21 Exhibit 20?

22 MR. BURBRIDGE: Yes.

23 MR. TONER: Okay.

24 MR. CRANK: And for purposes of the record, I
25 want to put on that Exhibit 20 that has been produced by

1 Mr. Toner contains -- the first page of this exhibit
2 contains an email from Mark Ruppert at Holland & Hart to Tim
3 Kalus, Richard Waters -- Tim Kalus is one of their
4 environmental -- one of Lance's environmental employees;
5 Dave Stephens, the same; and Richard Waters who was
6 corporate counsel at that time.

7 It contains specific legal advice by Mr. Ruppert to
8 agents and representatives of Lance Oil & Gas and Anadarko
9 Petroleum Company that Mr. Ruppert is giving to them during
10 the course of his attorney/client relationship with Lance
11 Oil & Gas and Anadarko.

12 This document was produced by Lance in discovery in
13 this matter. But I would point out that we also produced a
14 discovery (sic) log at the time -- at the same time of our
15 response to written requests for production by Mr. Clabaugh
16 and Mr. Toner.

17 And Item Number 2 on that discovery log, which was
18 Bates stamped Lance 0255922566, is -- and the general
19 subject matter was identified as legal review of permit
20 renewal. And it is this very document that is incorporated
21 into Exhibit 20. Such as Mr. Toner received this, the
22 discovery of this attorney/client privilege information was
23 inadvertent, and I object to any questioning of any witness
24 with regard to documents which show legal advice given to
25 Lance Oil & Gas or Anadarko Petroleum by their attorney at

1 the time, Mark Ruppert. And that would be my objection for
2 purposes of the record.

3 MR. TONER: Well, I'll just make this brief,
4 since we're not going to argue it here. Number one, I never
5 received any discovery log that you referred to. And,
6 number two, this document was sent by an employee of
7 Anadarko to Jason Driscoll, who is not an employee of
8 Anadarko, who works for a consultant of Anadarko.

9 The document was disclosed to a nonclient and,
10 therefore, the attorney/client privileged is waived. But I
11 understand I'm not to ask any questions about it, so I'll
12 honor that until I can file a motion to compel answers to
13 the questions.

14 MR. CRANK: And if I said discovery log, Tom,
15 it's a privilege log.

16 MR. TONER: Well, I never received a privilege
17 log either.

18 MR. CRANK: You received a privilege log.

19 MR. TONER: No. You showed me a certificate
20 of service, but you never served a privilege log on me.
21 There's no privilege log in anything I've ever received.
22 And, by the way, the Bates stamp numbers there do not match
23 the Bates stamp number on this document, Exhibit 20, that
24 you just read.

25 MR. CRANK: And that's absolutely explainable,

EXHIBIT 2

Lance Oil and Gas Company, Inc.'s Documents Privilege Log:
Clabaugh Ranch, Inc.'s Request for Production of Documents

| No. | Bates | Document Type | General Subject Matter | Date | Author | Recipient | Copied To | Privilege Type* | Basis for Privilege Description |
|-----|----------------------|---------------|---|------------|----------------|----------------|---|-----------------|---------------------------------|
| 1 | LANCE-01182 to 01185 | Email string | Legal review of draft WYPDES permit | 02/04/2008 | Jason Driscoll | Tim Kalus | Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff** | A/C | Attorney Client Communication |
| 2 | LANCE-02559 to 02566 | Email string | Legal review of permit renewal | 08/13/2007 | Tim Kalus | Jason Driscoll | Mark Rupert; Richard Waters; Dave Stephens; Matt J. Micheli; Mike Coder | A/C | Attorney Client Communication |
| 3 | LANCE-02621 to 02622 | Email string | Communication regarding recent correspondence from Clabaugh/Toner | 08/13/2007 | Tim Kalus | Jason Driscoll | Richard Waters; Dave Stephens; "Mruppert@hollandandhart.com"; Mike Coder | A/C | Attorney Client Communication |
| 4 | LANCE-02623 | Email string | Communication regarding permit modifications | 05/23/2007 | Dave Stephens | Jason Driscoll | Mark Rupert; Richard Waters; Dave Stephens; Brooke Bell; "MRuppert@hollandandhart.com"; "mmicheli@hollandandhart.com" | A/C | Attorney Client Communication |

* By the designation "A/C", Lance Oil & Gas Company, Inc. asserts that the document is protected by the attorney-client; by the designation "W/P", Lance Oil & Gas Company, Inc. asserts that the document is protected by the work product doctrine.

** The portions of the email string that contain attorney client privileged communications are contained within other emails in the email string. The attorney client information contained in the email string has not been waived by disclosure to an outside third party.

| No. | Bates | Document Type | General Subject Matter | Date | Author | Recipient | Copied To | Privilege Type* | Basis for Privilege Description |
|-----|----------------------|---------------|--|------------|-----------|----------------|--|-----------------|---------------------------------|
| 5 | LANCE-02625 | Email string | Communication concerning responses to Clabaugh/Toner | 08/13/2007 | Tim Kalus | Jason Driscoll | Richard Waters; Matt J. Micheli; Mark Ruppert; Dave Stephens; Matt Coder | A/C | Attorney Client Communication |
| 6 | LANCE-02630 to 02632 | Email string | Legal review of draft WYPDES permit | 02/01/2008 | Tim Kalus | Jason Driscoll | Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff | A/C | Attorney Client Communication |
| 7 | LANCE-02661 to 02663 | Email string | Legal review of draft WYPDES permit | 02/04/2008 | Tim Kalus | Jason Driscoll | Mark Ruppert; Dave Stephens; Richard Waters; Matt J. Micheli; John Burbridge; Tom Toner; Dena Egenhoff | A/C | Attorney Client Communication |

* By the designation "A/C", Lance Oil & Gas Company, Inc. asserts that the document is protected by the attorney-client; by the designation "W/P", Lance Oil & Gas Company, Inc asserts that the document is protected by the work product doctrine.

** The portions of the email string that contain attorney client privileged communications are contained within other emails in the email string. The attorney client information contained in the email string has not been waived by disclosure to an outside third party.

EXHIBIT 3

Patrick J. Crank
Speight, McCue & Crank, P.C.
2515 Warren Avenue, Suite 505
Cheyenne, WY 82001
Phone: (307) 634-2994
Fax: (307) 635-7155

Counsel for Lance Oil and Gas Company, Inc.

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

**IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC. FROM
WYPDES PERMIT NO. WY0049697**

Docket No. 08-3802

AFFIDAVIT OF PATRICK J. CRANK

Patrick J. Crank, having been duly sworn, hereby states and alleges as follows:

1. Your Affiant personally reviewed all 6,866 pages of documents received from Lance Oil and Gas Company, Inc. in this matter for attorney-client privileged documents.
2. Your Affiant spent approximately two days reviewing the documents received from Lance Oil and Gas Company, Inc. for attorney-client privilege documents.
3. Attorney-client privileged documents were flagged and noted by your Affiant to be included on the privilege log. All un-flagged documents were produced.
4. After your Affiant's review of said documents, your Affiant's legal assistant spent 8 hours organizing, printing, and Bates stamping the documents to be produced to opposing counsel. Based on your Affiant's notes on the flagged documents, your Affiant's legal assistant placed the indicated documents on the privilege log that was produced to opposing counsel.

5. Your Affiant reviewed the privilege log prior to the production of the documents and privilege log to opposing counsel.
6. At the time of the document production, your Affiant reasonably believed that all attorney-client privileged documents had been located and properly removed from the documents produced and recorded on the privilege log.
7. In response to the requests for production of Clabaugh Ranch, Inc. 6,844 pages of documents were produced and 22 pages of attorney-client privileged documents were recorded on the privilege log.
8. Inadvertently produced within this voluminous production was an attorney-client privileged e-mail chain bearing the Bates stamp numbers LANCE-02614 to LANCE-02620.
9. This inadvertent production occurred either because your Affiant missed the attorney-client privileged e-mail chain upon his review or your Affiant's legal assistant missed the flagged document in her preparations of the documents for production.
10. LANCE-02614 to LANCE-02620 is an e-mail chain that contains exactly the same attorney-client privileged e-mail as the e-mail chain at LANCE-02559 to LANCE-02566 which was properly included on the privilege log of documents not produced to opposing counsel.
11. Your Affiant had no permission from Lance Oil and Gas Company to waive the attorney client privilege that existed with regard to LANCE-02614 to LANCE-02620 and did not intentionally produce the document. Any claim that LANCE-02614 to LANCE-02620 was intentionally produced because the attorney-client privilege had been waived by sharing the e-mail with Jason Driscoll is patently false. LANCE-02614 to LANCE-02620 was inadvertently produced and based on your Affiant's knowledge of attorney-client privilege, this document is still privileged.
12. Your Affiant became aware that LANCE-02614 to LANCE-02620 had been inadvertently produced when it was presented as an exhibit at the June 17, 2009, deposition of Jason Thomas by counsel for Clabaugh Ranch, Inc., Tom Toner.
13. Immediately upon identifying these e-mail chains as attorney-client privileged documents during the June 17, 2009, deposition of Jason Thomas, your Affiant stated to Mr. Toner that these documents had been inadvertently

produced. Further, your Affiant moved to strike any question asked of Mr. Thomas with regard to this document.

14. After negotiations with Mr. Toner failed to resolve how the inadvertently produced documents would be dealt with, your Affiant filed *Lance Oil and Gas Company's Motion to Return Inadvertently Produced Attorney-Client Privileged Material* on July 31, 2009.

FURTHER YOUR AFFIANT SAITH NOT.

Dated this 11th day of August, 2009.

Patrick J. Crank.

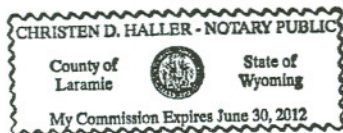
STATE OF WYOMING)
) ss
COUNTY OF LARAMIE)

I, Patrick J. Crank, being duly sworn, depose and say as follows: I have read the foregoing **Affidavit of Patrick J. Crank.**, know the contents thereof, and that the facts set forth therein are true to the best of my knowledge, belief, and information.

Patrick J. Crank

SUBSCRIBED and sworn to before me, a Notary Public, by Patrick J. Crank on this 11th day of August, 2009.

Witness my hand and official seal.



Christen D Haller
Notary Public

My Commission Expires: 6/30/2012

EXHIBIT 4

Patrick J. Crank
Speight, McCue & Crank, P.C.
2515 Warren Avenue, Suite 505
Cheyenne, WY 82001
Phone: (307) 634-2994
Fax: (307) 635-7155

Counsel for Lance Oil and Gas Company, Inc.

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

**IN THE MATTER OF THE APPEAL
OF CLABAUGH RANCH, INC. FROM
WYPDES PERMIT NO. WY0049697**

Docket No. 08-3802

AFFIDAVIT OF TIM KALUS

Tim Kalus, having been duly sworn, hereby states and alleges as follows:

1. Your Affiant is an Environmental and Regulatory Supervisor for Anadarko Petroleum Corporation, and its subsidiary Lance Oil and Gas Company, Inc. in Gillette, Wyoming.
2. Jason Driscoll is an Environmental Specialist with Intertech Environmental and Engineering, Inc, a subsidiary of CBM Associates, Inc. in Laramie, Wyoming.
3. Jason Driscoll has been acting as an agent of Anadarko Petroleum Corporation and its subsidiary Lance Oil and Gas Company, Inc for the past 4 to 5 years.
4. Jason Driscoll works with your Affiant and other employees of Anadarko Petroleum Corporation, and its subsidiary Lance Oil and Gas Company, Inc. in preparing new permits, modifications, and renewals.
5. Jason Driscoll's duties with regard to preparing new permits, modifications, and renewals include reviewing current requirements to confirm that the drafted permit meets those requirements and that no changes had taken effect that would apply to the permit, draft the application, put together maps, update tables with latitude and longitude information for outfalls, water quality information, and include a summary of any exceedance with permit renewals.
6. There are no employees of Anadarko Petroleum Corporation or its subsidiary Lance Oil and Gas Company who perform the same duties of Jason Driscoll regarding new permits, modifications, and renewals.

7. Jason Driscoll, as an agent, has always been privy to attorney-client privileged information relating to new permits, modifications, and renewals.

8. Jason Driscoll was acting as agent of Anadarko Petroleum Corporation, and its subsidiary Lance Oil and Gas Company, Inc. specifically for the renewal of WYPDES Permit No. WY0049697.

9. Jason Driscoll required the attorney-client privileged information contained within Bates stamped documents LANCE-02614 to LANCE-02620 to effectively perform his duties as agent for Anadarko Petroleum Corporation and its subsidiary Lance Oil and Gas Company, Inc.

10. By providing the aforementioned attorney-client privileged information to their agent, Jason Driscoll, Anadarko Petroleum Corporation and its subsidiary Lance Oil and Gas Company, Inc. in no way intended to waive the attorney-client privilege.

FURTHER YOUR AFFIANT SAITH NOT.

Dated this 11th day of August, 2009.



Tim Kalus.

STATE OF Wyoming)
) ss
COUNTY OF Campbell)

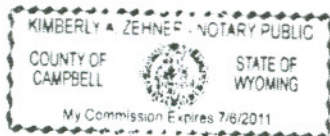
I, Tim Kalus, being duly sworn, depose and say as follows: I have read the foregoing **Affidavit of Tim Kalus.**, know the contents thereof, and that the facts set forth therein are true to the best of my knowledge, belief, and information.



Tim Kalus

11 SUBSCRIBED and sworn to before me, a Notary Public, by Tim Kalus on this day of August, 2009.

Witness my hand and official seal.



Kimberly A. Zehner
Notary Public

My Commission Expires: 7-6-2011