

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

JAN 14 2011

Jim Ruby, Executive Secretary
Environmental Quality Council

IN THE MATTER OF THE PETITION)
OF BIODIVERSITY CONSERVATION)
ALLIANCE FOR DESIGNATION) DOCKET NO. 09-1103
OF AN AREA KNOWN AS SAND CREEK)
AS VERY RARE OR UNCOMMON)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER came before the Environmental Quality Council (EQC) on October 26, 27 and 28, 2010 for an evidentiary hearing. All proceedings were recorded electronically and reported by a court reporter. Council members present at the hearing included Presiding Officer David Searle, Tim Flitner, Dennis Boal, Tom Coverdale and Cathy Guschewsky; Dr. Fred Ogden was present by phone for portions of the hearing. Council staff present included Jim Ruby, Joe Girardin and Kim Waring.

Parties included the Petitioner, represented by Eric Molvar; Crook County, represented by Joseph Baron; and Mineral Hill LLP, and Bronco Creek Exploration, Inc., represented by Daniel Frank, Black Hills Forest Resource Association was represented by Carson Engelskirger. Other parties included the Wyoming Farm Bureau, represented by Brett Moline; the Spearfish Canyon Preservation Trust, represented by Lynn Namminga; W.W. Thompson and Sons, represented by Hugh Thompson; Haiar Enterprises represented by Keith Haiar; the Wyoming Stockgrowers Association represented by Jim Magagna, and Black Hills Regional Multiple Use Coalition

represented by Tom Troxel. Nancy Hilding appeared on behalf of the Prairie Hills chapter of the Audubon Society and on her own behalf. Stefani Braun, Ogden Driskill, Nels Smith, Kevin Lind, Luke and Karen Mortimer, Kim Norby, Richard Garrett, and Wendy Roth appeared on their own behalves. Rodney Lang appeared on behalf of the University of Wyoming with respect only to the University's motion to quash a witness subpoena. (Tr. Vol. II, pp. 24-36).

PROCEDURAL BACKGROUND

On August 12, 2009 the Petitioner filed a petition to designate various lands in Crook County, Wyoming as very rare or uncommon pursuant to WYO. STAT. ANN. § 35-11-112(a)(v). On October 5, 2009 Mineral Hill LLP filed a Motion to Strike and to Dismiss the Petition. On May 13, 2010 the EQC heard arguments on Mineral Hill's Motion to Dismiss and denied it. On July 8, 2010, the EQC voted at a hearing held in Crook County, Wyoming to accept the Petition for further consideration pursuant to WYO. STAT. ANN. § 35-11-112(a)(i). On September 26, 2010, the Wyoming Farm Bureau filed a Motion to Continue the Hearing; this motion was denied October 6, 2010 by the presiding officer. On October 8, 2010, Bronco Creek Exploration Inc filed an Objection and Motion for Contested Case proceeding pursuant to EQC Rules, Ch. 7, §5(b). On October 15, 2010 the presiding officer held a prehearing conference including all known parties.

Public notice of the evidentiary hearing was published in the Sundance Times and in the Casper Star Tribune for four consecutive weeks prior to its commencement. Notice of the hearing and a copy of the petition were served by certified mail on all

surface and mineral owners with interests in the land listed in the Petition as being located within the area proposed for designation (petition area). Notice of this hearing was also served by first class U.S. Mail to all surface owners of land listed in the Petition as being contiguous to the petition area, and to the Crook County Commissioners, the Wyoming Attorney General's Office and the Wyoming Governor's Office. The EQC conducted a tour of the petition area on October 26, 2010, and all parties were invited, but not required, to attend.

Testifying on behalf of the Petitioner were: Hollis Marriott, Paul Mavrakis, Gary Beauvais, Walter Fertig, Matthew Stefanich, Sam Mortimer, Nancy Hilding, Jeff Kessler and Eric Molvar,

Testifying on their own behalf in support of the petition was: Richard Fort, Kevin Lind, Stefani Braun, Nancy Hilding on behalf of Prairie Hills Audubon, and on her own behalf, Wendy Roth, Luke Mortimer, Kim Norby, Karen Mortimer and Richard Garrett.

Testifying on behalf of Mineral Hill LLP and Bronco Creek Exploration were: Dr. Jim Johnson, Keith Haiar, David Johnson, Tom Troxel, and Jim Magagna.

Testifying on their own behalf in opposition to the petition were: Ogden Driskill, Nels Smith, Representative Mark Semlek, Hugh Thompson, Aaron Thompson, John Green, Tom Troxel on behalf of the Black Hills Regional Multiple Use Coalition, and Brett Moline on behalf of the Wyoming Farm Bureau.

At the conclusion of the evidentiary hearing, the evidence was closed and the EQC took the matter under consideration. After deliberation on October 28, 2010, the EQC decided to deny the petition on a vote of five to one.

JURISDICTION

Pursuant to WYO. STAT. ANN. § 35-11-112(a)(v). the EQC shall: (v) Designate at the earliest date and to the extent possible those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value. When areas of privately owned lands are to be considered for such designation, the council shall give notice to the record owner and hold hearing thereon, within a county in which the area, or major portion thereof, to be so designated is located, in accordance with the Wyoming Administrative Procedure Act. The EQC is required to hear and determine all cases or issues arising under the laws, rules, regulations, standards or orders issued or administered by the department or its air quality, land quality, solid and hazardous waste management or water quality divisions.” Wyo. Stat. § 35-11-112(a). EQC rules applicable to these proceedings are Ch. VII “Designation of Areas Pursuant to W.S. . § 35-11-112(a)(v).

ISSUES AND CONTENTIONS

The petition alleged ten grounds in support of designating the petition area as very rare or uncommon. These were:

- (1) That the petition area includes over 4,000 acres of mule deer crucial winter range.:
- (2) That the petition area includes seven rare vegetation types.
- (3) That the area supports a population of the finescale dace, unusual in Wyoming,.
- (4) That noncoal mining in the petition area could harm the Blue Ribbon, Class 1 trout fishery directly downstream on Sand Creek.
- (5) That numerous "fragile lands" are present in the petition area and it represents a concentration of ecological features.

(6) That an upstream (southern) portion of Sand Creek and Dugout Gulch contains botanical areas and late successional forest landscape.

(7) That a portion of Sand Creek is designated as a Class 1 stream by the Department of Environmental Quality

(8) That the area contains surface geological features including water sink and rise features .

(9) That numerous unique scenic values are present in the area.

(10) That historic values, such as the Cement Ridge historic fire lookout, are present in the area.

The sole issue in this case was whether the evidence showed that the petition area is very rare or uncommon and has particular historical, archaeological, wildlife, surface geological, botanical or scenic value such that it should be designated “rare or uncommon” pursuant to Wyo. Stat. § 35-11-112(a) and Ch. 7, EQC rules pertaining to designation of areas pursuant to that statute.

FINDINGS OF FACT

1. The Petitioner averred, and none of the parties contested, that the surface owner of the petition area is the United States of America, that the proposed petition area boundaries excluded privately owned lands, and that the total acreage of the proposed petition area was approximately 17,000 acres. (Petition).

2. Testifying on behalf of the Petitioner were: Hollis Marriott, Paul Mavrakis, Gary Beauvais, Walter Fertig, Matthew Stefanich, Sam Mortimer, Nancy Hilding, Jeff Kessler and Eric Molvar, (Tr. Vol. II).

3. Testifying on behalf of Mineral Hill LLP and Bronco Creek Exploration were: Dr. Jim Johnson, Keith Haiar, David Johnson, Tom Troxel, and Jim Magagna (Tr. Vol. III).

4. The testimony with respect to the botanical and wildlife values offered by the expert witnesses called by the Petitioner, as well as that of the experts called by those in opposition to the petition, demonstrated that the area is supportive of a wide variety of plant communities, mule deer and trout. However, none of the evidence presented by these experts support the conclusion that the area should be designated as very rare or uncommon in the context of Wyoming. (Tr. Vol. II and III),

5. Of the 80 plants averred to be very rare or uncommon , the evidence only clearly demonstrated that five of those plants are rare within the political boundary of Wyoming. The evidence failed to delineate where these five plant species are located within the proposed petition area. The evidence did not show that any of these five plants, if left unprotected , could become extinct or extirpated. (Tr. Vols. II and III,).

6. The Cement Ridge fire lookout is one of 12 lookouts located within Wyoming.

7. The Petitioner's own evidence showed, that while the petition area provides crucial winter range for mule deer, there are numerous other locations throughout Wyoming which provide crucial winter range for mule deer. (Tr. Vol. II, pp. 176-179). The same is true of finescale dace. (Tr. Vol. II, pp. 60-65, 83, 84, Ex. J.)

8. Petitioner's evidence, and that of those testifying in support of the petition, failed to demonstrate that the petition area should be designated as proposed as many of

the same characteristics found in the proposed petition area, though special, may also be found elsewhere in Wyoming.

9. Petitioner's evidence, and that of those testifying in support of the petition, failed to demonstrate that the area proposed for designation meet the criteria established in applicable EQC Rules at Ch. VII, § 11 which establish criteria for designation of areas as "very rare" or "uncommon" for any of the ten reasons averred in the Petition.

CONCLUSIONS OF LAW

1. To the extent that any of the foregoing Findings of Fact may also constitute Conclusions of Law, they are hereby incorporated as such.

2. The Petitioner bears the burden but failed to show by a preponderance of the evidence that any of the historical, archaeological, wildlife, surface geological, botanical or scenic values found in the petition area are "very rare or uncommon" within the meaning of Wyo. Stat. § 35-11-112(a)(v).

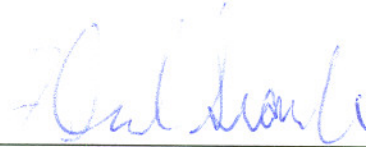
3. EQC Rules at Ch. VII, § 11 establish criteria for designation of areas. The EQC finds that it is unable, on the evidence before it, to make an initial finding that the area at issue possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value pursuant to Ch. VII, § 11 (b).

ORDER

The Petitioner failed to meet its burden of proof that the area proposed for designation should be designated as “very rare or uncommon” pursuant to 35-11-112

(a) (v).

WHEREFORE, the petition is DENIED .



F. David Searle, Presiding Officer
Environmental Quality Council
122 West 25th Street, Rm. 1714
Herschler Building
Cheyenne, WY 82002

CERTIFICATE OF SERVICE

I, Kim Waring, certify that at Cheyenne, Wyoming, on the 14th day of January, 2011, I served a copy of the foregoing FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER by electronic email.

Nancy Hilding
6300 West Elm
Black Hawk, SD 57718
605-787-6779
nhilshat@rapidnet.com

Daniel Frank
519 East 18th St.
Cheyenne, WY 82001
T: 307-432-0520
F: 307-632-0159
frank@tribcsp.com

Sen. Charles Townsend
Senate District #1
PO Box 760
Newcastle, Wyo. 82701
Business phone 307-746-2487
Home Phone 307-746-2342
ctown@wyoming.com

Rep. Mark Semlek
msemlek@wyoming.com

Brett Moline
Wyoming Farm Bureau
bmoline@wyfb.org

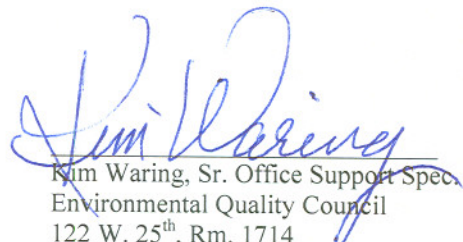
Joseph M. Baron
309 Cleveland
Crook County Courthouse
P.O. Box 397
Sundance WY 82729
T: 307-283-1090
F: 307-283-1091
Joeb@crookcounty.wy.gov

Tom Troxel, Exec. Secretary
Black Hills Regional Multiple Use Coalition
2218 Jackson Blvd., Ste. 10
P.O. Box 9496
Rapid City, SD 57709
605-341-0875
605-341-8651(fax)
t_troxel@hills.net

Erik Molvar
Biodiversity Conservation Alliance
P.O. Box 1512
Laramie WY 82073
erik@voiceforthewild.org

Jim Magagna
Executive Vice President
Wyoming Stock Growers Association
307-638-3942 Office
307-630-6800 Cell
jim@wysga.org

Carson Engelskirger
Black Hills Forest Resource Association
2218 Jackson Blvd – Suite 10
Rapid City, SD 57702
605-341-0875
605-341-8651 (fax)
cengelskirger@hills.net


Kim Waring, Sr. Office Support Spec.
Environmental Quality Council
122 W. 25th, Rm. 1714
Herschler Bldg.
Cheyenne, WY 82002
Phone: 307-777-7170
kwarin@wyo.gov