BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

In the Matter of the Petition of Biodiversity Conservation Alliance For Designation of "Adobe Town" as Very Rare and Uncommon	))))	EQC Docket No. 07-1101 **COMMENTS OF OIL AND GAS OPERATORS**

The undersigned oil and gas companies[1] ("Operators") hold valid and existing mineral leases within and adjacent to the area proposed for a "Very Rare and Uncommon" designation by the Biodiversity Conservation Alliance ("BCA") in the above-captioned petition ("Petition") and submit these comments opposing the designation. The Operators incorporate by reference their initial comments to the Petition filed on June 21, 2007. In addition, the Operators, individually and collectively, intend to submit additional comments and/or provide oral testimony tailored to specific issues at the hearing. However, in accordance with the EQC's request that written comments be submitted in advance of the hearing, if possible, the following comments are submitted to provide background for the hearing. In addition, where relevant, footnotes have been included to answer questions raised by EQC members at the Council's August 29th meeting.

I. Operators' Interest in these Proceedings:

The Operators hold federal leases to develop gas within the area proposed for rare and uncommon designation outside the Adobe Town Wilderness Study Area ("WSA"). Contrary to BCA's representations that the area has little or no potential for commercial gas recovery, the Operators are actively pursuing projects and investing millions of

[1] The following operators have joined in these comments: Anadarko Petroleum Corporation, Questar Exploration and Production Company, Samson Oil and Gas, and Yates Petroleum Corporation.

dollars into these leases to develop the commercial gas resources which are present in the area. BCA's Petition here is a thinly veiled attempt to thwart mineral development under the Operators' valid leases.

BCA and other non-governmental groups have opposed the gas industry's efforts to develop the gas resources both in the proposed rare and uncommon designation area and in adjacent areas at every opportunity. They routinely oppose exploratory and production activities and file appeals of BLM planning decisions and project approvals with the BLM State Director and the Interior Board of Land Appeals ("IBLA") attempting to stop development or exploratory activities from occurring in Southcentral Wyoming. These appeals have been largely unsuccessful, yet each appeal consumes substantial industry and BLM time and resources to defend. BCA's attempts to impede development in Wyoming have become so redundant that the IBLA recently took the unusual step of chastising BCA and the Wyoming Outdoor Council for repeatedly reciting arguments that have previously been rejected by the IBLA and the Federal Courts. In a recent decision involving BLM gas lease sales in the same BLM planning area encompassing this R&U Petition, the IBLA wrote:

> While we understand and appreciate appellants' commitment to their cause and view, they cannot continue to raise the same unsuccessful arguments as if the Board and Federal courts had never considered and ruled on them and expect to prevail. More than once, we have warned that "the right of review provided by this Board is not intended to be a circular promenade in which the parties simply repeat their steps."

Wyoming Outdoor Council, Biodiversity Conservation Alliance, 172 IBLA 289, 294, September 20, 2007 (emphasis added). As discussed more fully below, BCA's Petition in this case is yet another attempt, albeit in a different forum, to take another lap on the circular promenade. The Operators urge the EQC to reject Petitioners' efforts to

"forum shop" in this venue by attempting to use the rare and uncommon process for a purpose never intended under the Environmental Quality Act (EQA). As discussed more fully below, neither the EQC venue, nor the rare and uncommon designation process, were intended to be used for BCA's objective—preventing mineral development.

I. Operators' Request for No Designation and Summary of Rationale for Operators' Position:

The Operators' request that the EQC decline to bestow a designation of very rare and uncommon on any area within the Petition. The legal basis for the Operators' position can be summarized as follows:

a. The policy and purpose of the EQA does not support a designation on the grounds proposed by BCA.

b. The proposed lands, both within and outside of the WSA are fully and adequately protected under federal law and development activities on the lands are subject to rigorous environmental scrutiny and conditions to protect resource values, including those identified in BCA's Petition.

c. The proposed area does not qualify for rare and uncommon designation under the standards set forth in the EQA and Chapter 7 of the EQC's Rules.

d. The fact that the proposed area encompasses almost exclusively BLM administered land would render any state designation ineffectual and impossible to administer, since the BLM has plenary authority to administer federal lands and the State role in administration of the lands is subordinate to the federal role.

e. The term "very rare and uncommon" under the statute is vague and amorphous and cannot be implemented in a manner that is not inherently arbitrary and capricious.

II. Specific Comments and Arguments:

a. The EQA policy and purpose does not support the requested designation:

The EQC should decline to exercise its discretionary authority to designate the area within the Petition as very rare and uncommon because the proposed designation

does not comport with the statutory intent. Therefore, even if the EQC were to determine that some of the lands in the Petition possess values that may otherwise qualify as "very rare and uncommon," any designation of such lands should be denied if it is inconsistent with the statutory intent and purposes for such a designation. A review of the EQA's statutory framework demonstrates that a designation in this case would not be consistent with legislative intent.

One express purpose of the EQA is to "retain for the state the control over its air, land and water and to secure cooperation between agencies of the state ...and the federal government in carrying out these objectives." W.S. § 35-11-102 (emphasis added). Granting a rare and uncommon designation over the proposed area, which is principally federally owned land, would not advance the goal of "retain[ing] for the state the control" over resources in the state. In fact, because of how federal land planning decisions are made, it would detract from that goal because the state would have no control over how such a designation may be used in the federal planning process for decisions wholly unrelated to non-coal mining applications, which are the sole focus of the rare and uncommon provisions.

The rare and uncommon directive of W.S. § 35-11-112(a)(v) provides that designations are to be made "to the extent possible". Although it may be possible to make such a designation, the operators urge the EQC to consider whether it would be practicable to make a designation that would carry out the statutory intent. As the Chapter 7 regulations implementing the statute expressly recognize, the intent is to limit the use of a designation to the issuance of non-coal mining permits under W.S. 35-11-406(m). None of the statutes pertaining to air, water or coal reference rare and

uncommon designations. Thus, the legislature has made it clear that the use of a rare and uncommon designation is limited to DEQ Land Quality decisions relating to the issuance of non-coal mining permits.

The Chapter 7 regulations likewise expressly state that "the scope of these rules is limited to areas sought to be designated for purposes related to the permit approval and denial process contained in W.S. § 35-11-406(m) for noncoal mining operations." Moreover, oil and gas permitting decisions, which are within the purview of the Oil and Gas Conservation Commission, are expressly *excluded* from the reach of the EQA. W.S. § 35-11-1104(a)(iii).

Notwithstanding the very limited scope of the rare and uncommon provisions intended under the EQA, if a designation were to be made in this instance, the State would have no control over how that designation may be used in other contexts. The most foreseeable context, which is evident from the repeated statements of the Petitioner, is the use of a state designation to attempt to narrow the BLM's options when it considers applications for oil and gas operations on federal lands.[2]

In particular, BCA is on record as stating: "Rare or Uncommon status would underscore the special values of Adobe Town with a state designation and show the Bureau of Land management that they should protect all of Adobe Town from

[2] Petitioners' exhibits reveal their principal agenda is related to stopping oil and gas development on federal lands. See, e.g. Attachment 6, p. 14 ("Unprotected lands open to full-scale oil and gas development extend almost to the base of the Skull Creek Rim... if the lands below the cliffs were converted to a gas field, the public would lose its opportunity to enjoy a wilderness experience atop the rims."); Attachment 7, p. 19 ("A proposed gas project...would turn 50,000 acres of proposed wilderness on the eastern flank of Adobe Town into an industrialized gas field."); Attachment 8, p. 24 ("...the Red Desert is under siege; oil and gas drilling is threatening to overtake Adobe Town."); Attachment 12 ("Eric Molvar of Biodiversity said the group submitted 400 pages of documentation asking the Rawlins BLM office to give additional protection from oil and gas drilling to the spectacular rock formations in Adobe Town west of Baggs." ... "The group [Biodiversity] quotes Bart Koehler of the Wilderness Society as saying ... "once the oil industry thunders across the landscape, the wilderness is gone forever.") Attachment 13 (Eric Molvar quoted as saying: "The BLM proposes over 500 miles of roads and 361 well sites, and they fail to locate any of them; all we know is that they'll be somewhere out there on 233,000 acres of public land, in plain view of Adobe Town.").

industrialization through their Great Divide Resource Management Plan." Biodiversity Broadcast, E-mail Newsletter, February 2007 (emphasis added). www.voiceforthewild.org/general/enews/enfeb07.html. More recently, in an Internet release BCA candidly stated to its supporters that: "[T]his protective designation [very rare and uncommon] would send a strong message that Adobe Town needs to be prioritized for conservation and public enjoyment, not industrial use, and might help convince the BLM to do its part to prevent future oil and gas leasing there." October 9, 2007 BCA Urgent Adobe Town Public Hearing Alert, (emphasis added). http://www.voiceforthewild.org/general/alerts/a9September2007.html. Similarly, in a September 16, 2007 Casper Star-Tribune article, the paper's environmental reporter attributes the following statement to BCA's Carmi McLean: "She said the purpose of the resolution [very rare and uncommon designation] would be to extend some protection for the areas outside the heart of Adobe Town with the hope that the U.S. Bureau of Land Management would recognize the special character of the area and pull back on further energy development in the area.

From these statements, it is clear that the Petitioners recognize that the State does not play a role in the decision making process for oil and gas development on federal lands. Instead, the Petitioners seek to use the rare and uncommon designation process as a tool to exert influence over BLM planning decisions on federal land. While the Operators would argue forcefully against a misuse of any rare and uncommon designation in the BLM planning processes and point out the limited application of the designation under State law, the Petitioners would likely point out provisions of federal regulations suggesting the BLM should consider corresponding state or local land use

plans, and attempt to coerce the BLM to restrict development on the basis of the State's designation. How the BLM would respond to these assertions is currently unknown, but they certainly provide another avenue of argument for Petitioners, which was never intended under the EQA. It is for this reason that a designation would, in application, contradict the policy of Section 102 of the EQA by reducing the ability of the State to control planning decisions related to oil and gas within the State, because it could not control how the federal government may use a non-coal mining designation in the oil and gas context.[3]

In sum, because the Petition is being advanced for a purpose unrelated to the legislative intent behind the rare and uncommon statute and which in fact contradicts the intent of the EQA, the EQC should decline to designate any area within the proposed boundary as very rare and uncommon.

b. The Lands Proposed for Very Rare and Uncommon Designation Are Fully and Adequately Protected under Federal Laws:

i. The Resource Management Plans ("RMP") covering the Petition area fully and adequately protect resource values.

A multi-layer land management, planning and approval process governs the development of natural resources on federal lands. A host of federal laws, including the National Environmental Policy Act ("NEPA"), Federal Land Policy and Management Act (FLPMA), the Endangered Species Act ("ESA"), and the Historic Preservation Act,

[3] Councilman Boal asked what the practical effect of a designation would be on oil and gas operations. Based on their own statements, it is without question that BCA would attempt to use provisions of federal regulations to advance an argument that the BLM has to limit oil and gas development based on a State rare and uncommon designation. How the BLM would respond to these assertions is unknown.

among others, all come into play when the BLM reviews proposed activities on federal lands.

With respect to the area covered by the Petition, the lands fall into two BLM districts (Rawlins and Rock Springs) and as a result the provisions of two Resource Management Plans ("RMPs") guide activities on federal lands within the area proposed for designation. The Green River RMP covers the Western and Northern portions of the area. The Great Divide or Rawlins RMP covers the Western portion of the area. Both of these management plans prohibit resource development, including mining and oil and gas activities, within the 85,000 acre WSA. See p. 34 of excerpts of Green River Resource Area Resource Management Plan and Final EIS, attached as Exhibit 1, and the Rawlins/Great Divide RMP, attached as Exhibit 2. For all lands outside of the WSA, the RMPs establish management *objectives* based on key environmental values and establish management *actions* to ensure attainment of those values. See Exhibit 1, pp. 18-48, Exhibit 2, pp. 3-45.

Both of the RMPs were adopted by the BLM following full NEPA review, including preparation of EIS's prior to adoption of the plans. The Great Divide RMP is currently under revision and an EIS is being prepared to update the RMP. The EIS process began in 2002 and multiple opportunities for public participation have occurred throughout the process. The EIS process is comprehensively evaluating all of the resource values to be considered by the EQC in considering a rare and uncommon designation, such as special management designations, resource issues, special status species management, air, water quality, vegetation, recreation, visual, cultural and

paleontological resources. See Notice of BLM's Revision to Rawlins RMP, attached as Exhibit 3.

In addition to public participation, the BLM extended Cooperating Agency status to several local governments, counties, conservation districts and state agencies as cooperating agencies, based on their special expertise or jurisdiction.[4] As Cooperating Agencies these entities are entitled to participate with the BLM in the analysis and development of the EIS, and are entitled to have their views considered and incorporated in the process.

Although the final EIS and revised RMP for the Rawlins district are not yet available, the BLM has released its Draft EIS, which contains a "Preferred Alternative" discussing environmental values within the RMP area which will be protected while mineral development proceeds.[5] The DEIS preferred alternative makes clear that the existing Adobe Town WSA is closed to mineral development, but areas outside of the WSA are open to mineral development so long as it is conducted consistent with the management objectives outlined in the RMP and federal law. See Rawlins RMP DEIS, Executive Summary.

ii. Petitioners have been unsuccessful in obtaining expanded protections for their Petition area under the BLM's planning process.

Petitioners have been participants in the Rawlins RMP revisions virtually since public comments were first taken. During this process, Petitioners submitted to the BLM

[4] Cooperating Agencies included the State of Wyoming Governor's Office, Sweetwater and Carbon Counties, local conservation districts, the State Historic Preservation Office, Wyoming Game and Fish, the Office of State Lands and Investments and the EPA. See Rawlins Resource Management Plan DEIS, Chapter 5, p. 2, on line at: http://www.blm.gov/rmp/wy/rawlins/documents/DEIS/10_Rawlins%20DEIS_Chapter%205_6.pdf

[5] Currently these resources are protected under the existing RMP, adopted in 1990.

a request to expand the current Adobe Town WSA to include all of the lands the Petitioners now seek to have the EQC designate as rare and uncommon. The BLM has declined to expand the WSA or to prohibit oil and gas development in the area. In the DEIS for the Rawlins RMP, the BLM likewise decided not to expand the current WSA to include the lands the Petitioners sought to have included within an expanded WSA. Rawlins RMP DEIS, Chapter 2, p. 2-4.

The BLM's decision not to expand the Adobe Town WSA is supported by the analysis in the DEIS and federal law. In addition, as BLM pointed out in the Green River RMP, an alternative that would eliminate mineral development from the public lands "would be contrary to BLM policy, that, except for congressional withdrawals, public lands shall remain open and available for mineral exploration unless doing otherwise is clearly in the national interest (May 24, 1987). In addition, this would be directly contrary to the BLM multiple use management mandate in FLPMA." See, Exhibit 1, p. 17.

The RMP's adopted by the BLM are finalized only after rigorous multi-year analysis in collaboration with Cooperating Agencies and after affording multiple opportunities for public comment. The draft EIS for the Green River RMP was released for review in 1992 and the final plan was not adopted until 1996. The current revision of the Rawlins RMP began in 2002 and is only now nearing completion. BLM expects the final EIS and Record of Decision to be issued later this year or sometime early next year.

In light of these multi-year planning efforts involving detailed study and analysis, multiple stakeholders and participation by Cooperating Agencies, the Operators urge the EQC to proceed cautiously, given the potential for a State designation made in a much

more abbreviated process to conflict with determinations of the federal land agency responsible for managing the lands.[6]

c. Petitioners Fail to Demonstrate that the Lands Within their Proposed Very Rare and Uncommon Boundaries Qualify for Designation as Very Rare and Uncommon:

Section 11 of the EQC's Chapter 7 Rules prescribe a two step process for determining whether lands may be considered for designation as very rare and uncommon. The first step involves a determination of "whether the area possesses particular historical, archaeological, wildlife, surface geological, botanical or scenic value." Section 11(b) (emphasis added). In making this initial determination, "the Council shall consider the significance and the weight of all specifically identified factors that are set forth in these criteria." Id. (emphasis added). Thus, it is clear that the regulations recognize that possession of a single attribute, in and of itself, does not compel a finding that an area is eligible for designation. Instead, a determination of eligibility must be made considering and weighing all of the specific factors identified in the regulation.[7]

The presence and significance of the values to be considered by the EQC have been thoroughly analyzed in the BLM planning process and NEPA documents. Importantly, the BLM has determined, with respect to all lands outside the WSA which are open to mineral development and exploration, that the values present in those areas

[6] Councilman Boal asked whether a designation by the EQC would interfere with BLM planning efforts. As indicated by the Petitioners' own statements, their intent is to use a designation to interfere with and change the results of the BLM's ongoing RMP revision. ("Rare or Uncommon status would underscore the special values of Adobe Town with a state designation and show the Bureau of Land management that they should protect all of Adobe Town from industrialization **through their Great Divide Resource Management Plan**." Biodiversity Broadcast, E-mail Newsletter, February 2007 (emphasis added)).

[7] Given the very broad parameters of the directive in Section 11 and the susceptibility of the criteria to different interpretation by individual council members, this provision calls into question whether the regulations are sufficiently objective and concrete to allow for effective judicial review or avoid a determination that they are inherently arbitrary and capricious.

do not rise to a level of significance requiring special land designations under federal law, and has further concluded that site specific and commonly employed mitigation requirements are sufficient to protect resource values and provide for multiple uses of the land.

For example, the 2004 Desolation Flats Project EIS approved a gas exploration and development project involving up to 385 wells over a 20 year period on 233,000 acres.[8] The multi-year EIS encompassed most of Petitioners' proposed boundaries on the East side of the WSA, as well as some of the lands within Petitioners' proposed boundaries on the North and South sides of the WSA.[9] A map showing the Desolation Flats Project in relation to the Petitioner's proposed boundary attached as Exhibit 4.

Petitioners participated throughout the Desolation Flats EIS process and submitted extensive comments opposing the project. In fact, BCA and other conservation groups filed a 77 page comment letter in response to the Draft EIS. The BLM responded to all comments prior to issuing the Final EIS. After the Record of Decision ("ROD") was entered which authorized the proposed action to proceed, BCA filed an appeal with the IBLA challenging the BLM's decision and asking that the project be stayed pending IBLA's review. The IBLA rejected the stay request, finding that BCA had not shown they were likely to prevail on the merits of their appeal. See Exhibit 5, IBLA Decision, p. 3. Now, having failed to succeed before the BLM and failing in their appeal to the

[8] The complete Desolation Flats EIS and Record of Decision cited here are available on line through the BLM web site and citations in this document may be found within the documents located at: http://www.blm.gov/wy/st/en/info/NEPA/rfodocs/desflats.html

[9] The boundary of the approved Desolation Flats project encompasses virtually all of Petitioners' proposed area on the Eastern side of the WSA, and includes portions of Township 16 Range 96 in the Northern portion of the proposed area and portions of Township 13North Range 96 West in the Southern portion of the proposed area.

IBLA requesting a stay, BCA is asking the EQC to render a decision contradicting the findings of the BLM's multi-year EIS process.

Much of the analysis in the Desolation Flats EIS and other BLM planning documents covering the Petitioners' proposed area address the existence and significance of the same values the EQC is called upon to evaluate in the context of a rare and uncommon designation. In particular, the Desolation Flats Final EIS ("DFEIS") determined the following with respect to the some of the values relevant to assessing a rare and uncommon designation under Chapter 7 of the EQC's rules:

Historical, Prehistorical and Archaeological Values:

The Desolation Flats EIS addressed cultural and archaeological resources and found that "impacts to known cultural properties would not be significant with implementation of the Proposed Action or alternatives." Desolation Flats EIS, Section 2.11. The DFEIS further concluded that "potential impacts to known and anticipated cultural resources can be alleviated through appropriate mitigation measures." Id. Moreover, the BLM concluded that "[s]tandard inventory and recordation procedures conducted in conjunction with actions would protect most cultural resources from significant damage and would increase the database of known cultural properties." Desolation Flats EIS, page 3-5. The findings and mitigation measures in the FEIS do not support a conclusion that cultural resources within the Desolation Flats area are particularly remarkable, or rare and uncommon, in contrast to other areas of the State. Similarly, with regard to paleontological resources, the FEIS found that:

> No significant impacts to important surface resources or other geologic resources would occur under the Proposed Action. Mitigation measures discussed in Chapters 2 and 4 should reduce potential impacts to geologic/paleontologic resources.

> Beneficial impacts under the action alternatives include the unanticipated discovery of previously unknown fossil resources within the project area. The potential beneficial impact to fossil resources is not precisely known because field survey of the project area has not been conducted.

Desolation Flats EIS, p. 1-4. As with archaeological resources in the Desolation Flats area, BLM's review did not reveal anything suggesting that the area possessed very rare or uncommon geologic or paleontologic values.

A separate BLM project review completed in 2006, known as the Cherokee West 3D Seismic Project, encompassed all of the area South of the WSA within the Petitioners' proposed designation area and some of the area within the WSA.[10] A map of the project area is attached as Exhibit 6. The Cherokee West project was a seismic exploration project undertaken by gas lessees to evaluate gas reserves in the area. (The area within the Adobe Town WSA was for placement of cable and geophones by foot traffic only, which was necessary to collect data on the area South of the WSA boundary.) The BLM approved the project after conducting an Environmental Assessment and making a Finding of No Significant Impact resulting from the project. BCA appealed the project approval to the IBLA, again raising numerous objections and requested a stay of the decision. The IBLA directed the parties to meet and negotiate over how to address possible impacts of the project on potential paleontological resources that may occur in the area prior to the project proceeding. The companies subsequently hired a paleontologist to conduct a survey of the area prior to proceeding with the project, which the IBLA agreed was satisfactory to resolve the possible impacts to paleontological resources. BCA continued to object, but the IBLA declined to stay the

[10] The NEPA documents for the Cherokee West project are on line at http://www.blm.gov/wy/st/en/info/NEPA/rfodocs/cherokeewest.html.

case after the paleontological issue had been resolved. IBLA Decision, 2006-43, WYW-030-05-EA-173, May 1, 2006.

Wildlife Values:

To be eligible for consideration as a rare and uncommon area on the basis of wildlife values, an area must exhibit particular values as enumerated in Section 11(d) of the Chapter 7 Regulations. The Desolation Flats EIS clearly establishes that those values are not present to any significant degree in the area covered by the EIS, and in fact the wildlife resources are less significant than those found in areas outside of BCA's proposed area. In particular, there are no irreplaceable fish or wildlife habitats, no preserves or easements established for protection of wildlife, no Class I fisheries, no designated critical habitat for threatened or endangered species, and no high priority habitat for migratory birds of high federal interest.

With respect to bald eagles, a species particularly noted by Petitioners, the Biological Assessment conducted for the project noted that most bald eagle use is outside of the Desolation Flats area and along the Little Snake River.[11] The assessment also "revealed that no active bald eagle nests occurred within the DFPA or a 2-mile buffer. No known winter roost sites are located within the DFPA or a 2-mile buffer." The Biological Assessment concludes that bald eagles use the area only "occasionally." Desolation Flats EIS Appendix I, Biological Assessment, p. I-8, I-12. Similarly, mountain plovers and prairie dogs, while present within minimal discrete locations in the project boundary, were not present to such a degree to warrant protections beyond the mitigation measures

[11] The Biological Assessment reviewed potential effects of the project on sensitive plant and threatened and endangered species. The assessment was based on on-site surveys, meetings with state and federal wildlife specialists, interviews with wildlife specialists and interested persons, and available literature review. See Desolation Flats EIS, Appendix I.

adopted in the Record of Decision and the document concluded that those species were unlikely to be affected by the development.[12] See generally, Desolation Flats EIS, Appendix I.

Although there are some minimal areas of crucial habitat for deer and antelope that extend into the area, they are slight in comparison to adjacent lands outside of the proposed boundary. See, Desolation Flats Record of Decision, Appendix E. Similarly, while there is minimal sage grouse presence within the project area, it is scant in comparison to other areas in the region outside Petitioners' proposed boundaries. In addition, based on a 2000 inventory, there were no raptor colonies identified within the project area. Appendix E, p. E-4. BLM determined that with the prescribed mitigation measures, impacts to wildlife would not be significant.

Scenic Values

In BCA's extensive comments on the Desolation Flats EIS, they argued that visual impacts would occur within the portion of the project in the Monument Valley checkerboard area. BLM's response to these comments recognized that although impacts would occur in that area, they would be subject to mitigation and did not require a prohibition on facilities in that area. BLM also pointed out that fee lands were beyond BLM's jurisdiction in this area:

> **Comment 150-12c:** Visual resources in the MVMA would be impacted by the proposed project.
>
> **Response:** The EIS recognizes that visual impacts would occur on public lands within this area. However, any visual intrusion from approved activities located on public lands would be subject to the acceptable plan criteria outlined in Appendix A as well as be designed to blend into and retain the existing character of the landscape to the extent possible.

[12] The Biological Assessment also found the project would not affect any plant species that is threatened, endangered or proposed for listing.

> **Comment 150-12d:** The checkerboard status of surface ownership does not abrogate the BLM's responsibility to maintain the MVMA visual resources standards. The fact of private inholdings is therefore irrelevant to the protective measures required under the GRRMP.
>
> **Response:** The BLM disagrees with the contention that private in holdings are irrelevant. The BLM is mandated to provide for ingress to privately held lands and minerals. Additionally, the decisions in the Green River Resource Management Plan apply only to public lands and minerals administered by the BLM.

Desolation Flats EIS, Page 5-50.

The Cherokee West project also evaluated plant, wildlife and threatened and endangered species concerns in that project area. For sensitive plants, the EA found there was only "limited potential" for any sensitive plant species to occur within the area, and that only one sensitive plant species had been documented within a 100 mile area of the project. Cherokee West EA, at p. 39. The EA further concluded there were no threatened or endangered plants known to occur within the project area. Id. 39-40.

With regard to sensitive, threatened or endangered species, the Cherokee West EA similarly showed unremarkable results. The EA concluded that certain sensitive species are "potentially present" within the area, but noted the only documented presence of sensitive species in the area were limited to "one burrowing owl nest, six ferruginous hawk nests and one sage grouse lek within the entire Wyoming portion of the Cherokee West project boundary." EA, pp. 41-43. It is unknown whether these occurrences are within the Petitioners' proposed boundary, but in any event, the limited presence of these species does not rise to a level of significance to support a rare and uncommon designation for the area.

As for threatened or endangered species, the EA observed that within the Wyoming portion of the Cherokee West project, the Rawlins Field Office of BLM had a "No Effect" determination for threatened and endangered species within the project area. The EA noted that there was not habitat for threatened or endangered species within the project area, and therefore the project would have no effect on threatened or endangered species. Cherokee West EA, p. 46.

With respect to crucial wildlife habitat, BCA points out that a portion of their proposed Southern extension to the WSA contains crucial mule deer habitat. However, what they fail to point out is that the portion of mule deer habitat within their proposed boundary represents only a very small portion of the habitat that occurs contiguous to but outside of their boundary.

Another recent BLM study is also instructive. Petitioners have urged the BLM to designate an area they refer to as the Powder Rim Juniper Woodland as an "Area of Critical Environmental Concern" ("ACEC") in the ongoing Rawlins RMP revisions.[13] A portion of that area lies within the Southern portion of the Petitioners' proposed boundary in Township 13N, Range 96W. The BLM has extensively studied the area for ACEC criteria, including the wildlife habitat characteristics. In August, 2007 the BLM released its updated analysis of the area, and concluded that it did not meet the "importance" criteria of the ACEC analysis. BLM found that the area did not have more than locally significant qualities compared to similar resources, and did not have qualities or circumstances making it "fragile, sensitive, rare, irreplaceable, exemplary, unique,

[13] An ACEC designation is made by BLM for areas where special management attention is needed to protect important and relevant values, including significant historic, cultural, or scenic values; fish or wildlife resources, including threatened and endangered species; or natural hazards. See, Exhibit 7, Evaluation of Relevance and Importance Criteria for Existing and Proposed ACECs, Rawlins Field Office.

endangered, threatened, or vulnerable to adverse change." See, August, 2007 ACEC Proposal Evaluation Report, pp. 48, 49, excerpts attached as Exhibit 7.[14] With regard to big game species, the ACEC Evaluation noted that the "area provides no unique or special habitat requirements that are not currently found elsewhere within the vicinity of the Powder Rim." Id. The ACEC Evaluation also found that "only 21 of the 1,923 ferruginous hawk nests within the entire field office have been identified in the Powder Rim area. This area provides no unique or special habitat requirements that are not found elsewhere." Id.[15]

Assessment of the "Initial Finding" Criteria of Chapter 7, Section 11:

Given these findings, which are based on the BLM's thorough study and scientific evaluation, the areas proposed by Petitioners do not warrant protection as very rare and uncommon, as the majority of the areas fail to qualify under the first step of the analysis under Section 11 of the regulations. When both the significance and the weight of all specifically identified factors under Section 11 are considered within the areas where the BLM has analyzed resource values outside of the WSA, the areas do not possess the requisite uniqueness to satisfy the "initial finding" required under Section 11(b).

Regarding historical, prehistorical or archaeological values to be examined under Section 11(c), Petitioners cite only one historic literature reference--the King exploration of the 40th Parallel. While the descriptions cited by Petitioners describe in some detail the eroded landscape features within the core of Adobe Town and the Skull Creek Rim, areas within the WSA, one would expect that notable geologic features would be

[14] The entire ACEC Report can be reviewed at: athttp://www.blm.gov/rmp/wy/rawlins/documents/RevisedDraft_ACEC_Proposal_Report080807.pdf

[15] Only a small portion of the Petitioners' designated area lies within the Powder Rim area, making it likely that the number of nests within the proposed area is considerably smaller than the 19 known to be in the Powder Rim area.

described in a formal Report of Geologic Exploration conducted as part of a mapping expedition. Aside from the King Report, no other historic literature is cited. Moreover, with the exception of a limited reference to Haystack Mountain in the King Report, no other areas within the Petitioners' boundary are prominently cited in historic literature.

Similarly, to the extent that the areas outside the WSA contain artifacts or other features significant in the history or prehistory of the state, the BLM analysis reveals they are not particularly unique or remarkable when compared with other areas of the state. For example, there are numerous areas within Southcentral and Southwestern Wyoming outside of the Petitioners' boundary where the archaeological record traces human occupation back 12,000 years.

Under the various criteria in Section 11(d) for wildlife, the summary of BLM's thorough analysis reveals that the area proposed by Petitioners would not qualify for designation on the basis of wildlife values. While it may be argued that the area would meet a limited number of the wildlife criteria, when the values are weighed in comparison to other areas of the State or region, the values are not rare and uncommon. The BLM's documentation similarly reveals that the proposed area fails to qualify for consideration as rare and uncommon based on botanical values as identified in Section 11(d).

With regard to geologic resources under Section 11(e), the Petitioners have pointed heavily to the Adobe Town and Skull Creek core area, which contains the geologic formations highlighted in their exhibits and cited literature. These features are not common to the majority of the 180,000 acres the Petitioners have proposed and cannot be reasonably extended to the areas outside the Adobe Town core. While

Petitioners argue that the Haystacks should be viewed as possessing the same geologic values, Petitioners have not asked for a designation covering any of the fee portion of the checkerboard encompassing the Haystacks, which would render any designation in that area suspect.

With regard to paleontology, Petitioners cite references to BLM publications that areas outside of the WSA may possess some paleontological resources, just as in many other areas of the State. However, RMPs and project NEPA documents address protection of these resources using standard mitigation and survey methods routinely employed by the BLM for protection of resources.

There are paleontological resources within the WSA, and it is these resources that Petitioners' references cite. The BLM's Wilderness Recommendation acknowledged valuable paleontological resources within the WSA. See Exibit 8, Wyoming Statewide Wilderness Study Report, Wilderness Study Area Specific Recommendations, pp. 187-188. It was in part because of these values that the BLM recommended designation of wilderness on 10,900 acres of the WSA in 1991. The map of the proposed wilderness in the BLM's wilderness report reveals that the BLM recommended wilderness protection on the areas that encompass the core of the Adobe Town and Skull Creek rims. The determination that paleontological values exist within the WSA, (and which occur predominantly at outcrops) cannot reasonably be extended to the 180,000 acre area proposed by Petitioners. The geology is different in areas away from the Adobe Town core and, as BLM has recognized, the paleontological resources that may be present in other areas are sufficiently addressed through commonly utilized BLM mitigation and inventorying methods.

For purposes of assessing scenic value under Section 11(g), there are three criteria for the EQC to evaluate, two of which are subjective. The only objective criteria is whether the area includes lands within or adjacent to a National Wild and Scenic River or National Scenic Byway. The Petitioners proposed area fits neither of these criteria. With regard to whether the area has been the subject of "substantial artistic attention" is a subjective assessment. The information attached to the Petition and provided by Petitioners in their original presentation to the EQC focuses principally on the Adobe Town Core area and Skull Creek Rim. Notably, however, nearly all of the publications attached to the petition appear to credit BCA for photos or commentary in the various articles. In addition, whether the area has "substantial aesthetic value" is a subjective criteria which can vary widely between council members and the public. As a legal matter, a rare and uncommon designation made on the basis of solely subjective criteria would be inherently arbitrary and capricious.

Assessment of the "Very Rare and Uncomon Finding Criteria of Section 11(h):

Should the EQC find that any of the area proposed for designation meets the "initial finding" requirements of Section 11, it must then take the second step and determine whether the area is "very rare and uncommon" under Section 11(h). There are three considerations cited in the regulations. The first two considerations are similar and involve a determination of whether the area exhibits values that are very rare and uncommon "when compared with other areas of the state or a region therein", or which contain values "seldom found within the state or a region therein." An evaluation of these criteria dictates that any areas outside the WSA should be excluded from

consideration based on the extensive scientific and technical information revealed in BLM reviews.

It is significant that none of the areas outside the WSA have been designated by the BLM as ACECs. Under BLM criteria, for an area to qualify as an ACEC, "requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern, especially compared to any similar resource, or qualities or circumstances that make it fragile, sensitive, rare, irreplaceable, exemplary, unique, endangered, threatened, or vulnerable to adverse change." See Exhibit 7.

BLM specifically evaluated all lands within the Rawlins Field Office and none of the lands within the Petitioners' proposed area have received ACEC designation. As part of the BLM's review, it analyzed the Powder Rim Juniper Woodland, which covers a portion of the Southern end of Petitioners' proposed boundary. As previously discussed, BLM's conclusion was that the area did not meet the "importance" criteria under the ACEC analysis. Id.

Similarly, in the Rock Springs Office, BLM has not designated any of Petitioners' areas as ACECs. BLM is evaluating the Monument Valley Management Area, which encompasses the Northern portion of Petitioners' area for ACEC values, but has not designated the area as an ACEC. In addition, designation of an ACEC in the Monument Valley area would be administratively difficult given the checkerboard land ownership.

The third consideration under Section 11(h)(iii) is significant in that it requires the EQC to consider whether rare and uncommon "values known or suspected to be declining which, if left unprotected, could become extinct or extirpated." With respect to virtually all of the lands in the Petition, there is no question that the lands are fully

protected under federal law. The documents cited in these comments reveal that the lands are subject to a high degree of scrutiny and regulation, especially when they are being considered for industrial development. As a practical matter, the manner in which the very limited State lands proposed for designation are interspersed within federal lands, any development of those lands would likely proceed in the same manner as adjacent federal lands since any development would proceed in accordance with federal land use plans. In short, there is not a risk that the lands proposed for designation will "left unprotected" since they are already fully protected.[16]

Lands within the Adobe Town WSA are fully protected under existing federal land use plans and withdrawals. The WSA lands are off limits to mining and other industrial activities, including oil and gas development. The BLM's Wilderness Report states that the Adobe Town WSA "area was withdrawn from mining location by Executive Order 5327, April 23, 1930." Exhibit 8, Wilderness Study Report, p. 191. There is no need to impose an incremental and redundant State regulation on top of the protections already afforded to the WSA lands, especially when they have been off limits to non-coal mining entry for almost eighty years. As a result, to the extent that the EQC may otherwise find lands within the WSA to be susceptible to a very rare and uncommon designation, it should decline to do so on the basis that the lands are subject to plenary federal control and fully protected under federal law, and off limits to industrial development under longstanding existing federal planning decisions.

[16] As to State lands within the Petitioners' proposed boundaries, as the October 15, 2007 comments submitted by the Director of the Office of State Lands and Investments makes clear, those lands are also subject to lease protective conditions to ensure resource values are protected. See October 15, 2007 comments of Lynne Boomgaarden, Director, Office of State Lands and Investments.

d. The predominance of federal land within the proposed area would make a designation ineffectual and impracticable to administer in the non-coal mining context because of preemption considerations.

The fact that the Petition encompasses predominantly federal land, and no private fee land, makes a designation impracticable for the State to effectively enforce or administer. The federal government has plenary authority over mining activities on federal lands and inconsistent state laws or requirements will be preempted by federal law. Thus, if the state were to designate any portion of the petitioned area as rare and uncommon, and then sought to prevent mining over the objections of the BLM, the rare and uncommon designation would be preempted. The U.S. Supreme Court has articulated the following preemption standards:

> State law can be pre-empted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 581, 107 S.Ct. 1419, 94 L.Ed.2d 577 (1987). In *South Dakota Min. Ass'n, Inc. v. Lawrence County,* 155 F.3d 1005, *1009 (C.A.8 (S.D.),1998), the Eighth Circuit addressed a case in which a local ordinance was adopted purporting to prohibit mining in Spearfish Canyon, which is predominantly federal land open to mining under federal law. The Court found the local ordinance to be preempted by federal law, holding that:

> A local government cannot prohibit a lawful use of the sovereign's land that the superior sovereign itself permits and encourages. To do so offends both the Property Clause and the Supremacy Clause of the federal Constitution.

South Dakota Min. Ass'n, Inc. v. Lawrence County, 155 F.3d 1005, *1011 (C.A.8 (S.D.),1998). While it is true that in this case a rare and uncommon designation would not necessarily result in a mining permit being denied, legal precedent would require that any State restrictions placed upon mining be consistent with the requirements of the BLM in approving mining on the relevant federal lands. That being the case, there is little, if anything, to be gained by a rare and uncommon designation since the BLM would have to concur with any restrictions imposed by the State on mining activities conducted on federal lands.

The DEQ Land Quality Division ("LQD") and the BLM have an MOU in place to govern the management of locatable minerals on public lands. *Management of Surface Mining & Exploration for Locatable Minerals on Public Lands*, 2003. Under the MOU, both BLM and LQD undertake their respective reviews, and coordinate on the issuance of their respective mining approvals. However, the MOU begins with the premise that "[u]nder the Federal mining laws (see 43 CFR 3809.5 for a definition), a person has a statutory right to go upon open (unappropriated and unreserved) Public lands to locate a mining claim and develop the locatable mineral resources." MOU page 1. The MOU further states that with the right to mine comes a "responsibility to prevent unnecessary or undue degradation of the Public lands and to provide for reclamation...." Id. Under the MOU, the BLM retains responsibility over review of the federal Plan of Operation, which is the federal approval process for mining activities on federal lands. In addition, investigation of cultural resources and paleontological values are conducted by the BLM if those values are determined to be present, as are reviews related to endangered species.

Thus, while the LQD and BLM coordinate their respective permitting schemes, the BLM retains oversight to ensure that the requirements of federal law are observed.

With regard to lands in the UP Land Grant or "checkerboard" area, granting a designation as requested in the Petition would lead to the absurd result of having every other section of land designated as rare and uncommon. Such a designation would be futile and impossible to effectively administer. In addition, a determination based solely on land ownership within the checkerboard area would be arbitrary and capricious.

e. The Term "Very Rare and Uncommon" is Too Vague and Amorphous to be Susceptible of Consistent and Predictable Application, and Is Therefore Not Capable of Being Applied in a Manner that is not Inherently Arbitrary and Capricious as a Matter of Law.

In *Matter of Bessemer Mtn.*, 856 P.2d 450 (Wyo. 1993), the Wyoming Supreme Court held that the term "very rare and uncommon" is too vague to permit judicial review in the absence of guiding regulatory standards. The Court directed the EQC to promulgate regulations establishing criteria by which the EQC could make very rare and uncommon decisions in the future. The EQC subsequently adopted the Chapter 7 regulations to implement the phrase, which did, in some respects, narrow the subjective nature of the term and provided some guidance for future decisions. However, despite the establishment of some criteria, many of the determinations required to be made under the regulations still invite a great degree of subjective assessment and are, as a practical matter, impossible to pin down with objective criteria.

For example, by requiring the EQC to consider "significance and weight" of factors under Section 11, without determining which factors are entitled to more weight or significance than others, or without establishing when the factors rise to a significance sufficient to qualify for "very rare and uncommon" distinction, the regulations leave too

much to unbounded agency interpretation. Similarly, requiring the EQC to determine whether an area has "substantial aesthetic value" and whether the value would be "apparent to a reasonable person" is not capable of objective assessment on judicial review. Other areas of the regulations likewise require application of very vague and conclusory criteria. The difficulty may lie with the fact that the regulatory criteria to evaluate a designation on judicial review may not be possible to adopt given the breadth and vagueness of the term "very rare and uncommon" as used in the EQA. In that case, any determination as to a rare and uncommon designation is inherently arbitrary and capricious under applicable legal standards.

III. Conclusion:

In light of the foregoing analysis, the Operators urge the EQC to deny the Petition and decline to designate any area within the Petitioners' proposed boundary as very rare and uncommon. The fact that Petitioners have not demonstrated that the 180,000 acres of land they have requested are susceptible of a rare and uncommon designation, coupled with the fact that they have already exhaustively pursued their agenda with the BLM and are only seeking a second bite at the apple through this proceeding, dictates that the petition should be denied. In addition, even to the extent that the EQC may determine that some of the lands may qualify as very rare and uncommon, the Operators urge the EQC to exercise its discretion to not designate such lands, on the basis that they are

already fully protected under federal law and an overlapping State designation would only serve to burden the administration of these lands with an incremental, redundant, and potentially conflicting designation.

RESPECTFULLY SUBMITTED this 17th day of October, 2007.

FOR THE OPERATORS:

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