BEFORE THE ENVIRONMENTAL QUALITY COUNCIL

STATE OF WYOMING

A PETITION TO THE ENVIRONMENTAL QUALITY COUNCIL FOR DESIGNATION OF AN AREA KNOWN AS SAND CREEK AS RARE OR UNCOMMON	))))	EQC Docket No. 09-1102

MOTION TO DISMISS FOR LACK OF JURISDICTION

COMES NOW, Bronco Creek Exploration Inc. (hereinafter referred to as Bronco Creek), an Arizona Corporation, owner of mineral rights within the area proposed for designation as very rare or uncommon, by and through its undersigned counsel, hereby submits its Motion to Dismiss for Lack of Jurisdiction. In support of its motion Bronco Creek Exploration Inc., hereby submit the following:

I. INTRODUCTION

The Environmental Quality Council's (hereinafter referred to as Council) authority under the Environmental Quality Act (hereinafter referred to as EQA) to designate an area as very rare or uncommon, pursuant to Wyo. Stat. § 35-11-112(a)(v), on federal land is in clear violation of federal statutes and federal policies. Additionally, the Environmental Quality Council is without authority to manage federal land and uses, pursuant to Wyo. Stat. Ann. § 35-11-406 (m)(iv). Since, these laws are in direct conflict with federal laws and policies they are pre-empted and the Council lacks jurisdiction and authority to designate federal lands as very rare or uncommon. Any further exercise of this authority would be unconstitutional on the basis that such laws have been pre-empted by federal legislation and are in violation of the Supremacy Clause and Property Clause of the United States Constitution.

II. ARGUMENT

A. *The Environmental Quality Council lacks authority to designate federal lands as very rare or uncommon.*

The Council's authority under the Environmental Quality Act to designate an area as very rare or uncommon on federal lands is in clear violation of federal statutes and policies. Since these provisions of state law are in direct conflict with federal laws and policies, they are pre-empted by federal legislation. Therefore, the Council lacks any jurisdiction or authority to designate federal lands as very rare or uncommon. Any exercise of the Council's authority under the above state laws is unconstitutional because they violate the Supremacy Clause and Property Clause of the U.S. Constitution.

Federal Mining Interests Generally

Bronco Creek has a federally recognized property interest in the area proposed for designation and therefore the State lacks authority to take any management action that would deprive Bronco Creek its rights. Under the federal Mining Act of 1872, a private citizen may enter federal lands to explore for mineral deposits. *California Coastal Comm'n v. Granite Rock,* 480 U.S. 572, 575, 107 S. Ct 1419, 94 L.Ed.2d 577 (1987). Once persons have perfected the claim by complying with the statutory requirements and properly staking the claim, they 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations' although the United States retains title to the land. *Id.,* Citing 30 U.S.C. § 26. "The holder of a perfected mining claim may secure a patent to the land by complying with the requirements of the Mining Act and regulations promulgated their under..." *Id.* at 575-576. Once

an individual has been issued a patent, legal title to the land passes to the holder of the patent. *Id.* at 576. The rights that accrue to owners of valid unpatented mining claims on public lands filed pursuant to the 1872 Mining Law, including the right of possession and enjoyment of both the surface and the subsurface, are rights that are enforceable against both third parties and the United States. *Bixler v. Oro Management, LLC.,* 2004 WY 29, ¶ 17, 86 P.3d 843, 849 (Wyo. 2004). Bronco Creek holds a real federal property interest in the minerals on federal land. Therefore, the Council is without authority to designate uses on federal land.

The Council Lacks Jurisdiction to Designate Federal Lands

The Wyoming Legislature has stated that one of the purposes of the EQA is to "plan the development, use, reclamation, preservation and enchantment of the air, land and water resources of the state." *Wyo. Stat. Ann. § 35-11-102 (West 2009).* Under the EQA, the legislature gave the Council the authority to designate "**areas of the state** which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value." *Wyo. Stat. Ann. § 35-11-112(a)(v)(West 2009).* Additionally, the EQA gives the Council the authority to deny a mining permit, other than a surface coal mining permit, if the proposed mining permit irreparably harms, destroys or materially impairs any area designated as rare or uncommon. *Wyo. Stat. Ann. § 35-11-406 (m)(iv)(West 2009).* Although the legislature granted these powers to the Council, the legislature lacked the authority to do so.

In exercising powers conferred upon it by Wyo. Stat. § 35-11-112(a)(v) on federal lands, the Council's actions are in direct conflict with federal law and policy. Therefore, the Council is preempted from any further exercise of these powers on federal lands. In addition the Council lacks authority to deny a federal mining claimant or patentee a mining permit based upon the land being designated as very rare or uncommon. In other words, both Sections 35-11-

406(m)(iv) and 35-11-112(a)(v) are without legal force on federal lands, and have been preempted by federal legislation:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. *California Coastal Comm'n v. Granite Rock,* 480 U.S. 572, 581, 107 S. Ct 1419, 94 L.Ed.2d 577 (1987).

The *Property Clause* of the U.S. Constitution states that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const., Art. IV, § 3, cl. 2. The *Property Clause* gives Congress plenary power to legislate the use of federal lands. *Carden v. Kelly,* 175 F.Supp.2d 1318, 1323 (2001). The *Property Clause* is a grant of power over federal property. *Kleppe v. New Mexico,* 426 U.S. 529, 537-538, 96 S.Ct. 2285 (1976). The States may enforce their criminal and civil laws on federal lands, but if the state laws conflict with valid legislation that has been passed pursuant to the *Property Clause* "the state law must recede." *Carden,* 175 F.Supp.2d at 1323. The *Property Clause* empowers Congress to exercise jurisdiction over federal land if Congress chooses. *Wyoming v. United States,* 279 F.3d 1214, 1226 (2002). State jurisdiction over federal land does not extend to any action that is inconsistent with the full power of the United States to protect its lands, **to control their use,** and to **prescribe in what manner** other may acquire rights in federal land. *Id.*(emphasis added). So, under the Supremacy Clause, when Congress enacts federal legislation, the policies and objectives of that legislation override any state laws, policies, or objectives that conflict with it. *Id.* Otherwise, the public domain of the U.S. would be at the mercy of the states. *Kleppe,* 426 U.S. at 543.

The Petition asks the Council to subvert and extinguish vested mineral rights in federal lands by arbitrarily designating such lands as very rare or uncommon. The management and

development of federal land is under the jurisdiction of the federal government. Any state laws that conflict or attempt to manage federal land is in direct conflict with federal legislation and thus is preempted. Therefore, the Council does not have the authority to designate federal lands as very rare or uncommon. The intended effect of a very rare or uncommon designation on federal lands is for the state to manage specific uses of federal land, and the practical effect of such a designation is to eliminate development on federal land. Both the intended and practical effects of a very rare and uncommon designation violate federal legislation and policy, which promotes the multiple use of federal land. The Council is expressly preempted from exercising any authority to designate designating federal lands as very rare or uncommon, and thus should dismiss the Petition.

State law is preempted when: (1) Congress evidences an intent to occupy a given field, and a state law fails within that field, or; (2) Congress has not entirely displaced state regulation over the matter in question, but state law actually conflicts with federal law. *Carden,* 175 F.Supp.2d at 1323. An actual conflict exists between state and federal law 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." *Id.* at 1323-1324. "Whether a state law stands as an obstacle to the accomplishment of Congress's objectives is determined by examining the federal statute and identifying its purposes and intended effects." *Id.* at 1324.

Congress has enacted legislation respecting federal land that preempts the Council from designating federal lands as very rare or uncommon. Under the Federal Land Policy and Management Act (FLPMA), Congress declared that is the policy of the U.S. to: (1) retain ownership of public lands; (2) have Congress to exercise its constitutional authority to withdraw or otherwise designate or dedicate federal lands for specified purposes and to delineate the extent

to which the executive branch may withdraw lands without legislative action; (3) establish by law goals and objectives to serve as guidelines for public land use planning, providing that multiple use and sustained yield are the basis for management unless otherwise specified by law; (4) manage the public lands in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values and, where appropriate, preserve and protect certain public lands in their natural condition, provide food and habitat for fish and wildlife and domestic animals, and provide for outdoor recreation and human occupancy and use; (4) establish by statute uniform procedures for any disposal of public land, acquisition of non-federal land for public purposes, and the exchange of such lands, requiring each disposal, acquisition, and exchange to be consistent with the prescribed mission of the department or agency involved, and reserving to the Congress review of disposals in excess of a specified acreage; (5) promptly develop regulations and plans for the protection of public land areas of critical environmental concern; and (6) manage the public lands in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands including implementation of the Mining and Minerals Policy Act of 1970 as it pertains to the public lands. 43 U.S.C.S. § 1701.

The policies contained in FLPMA explicitly state that the management, protection and disposal/withdrawal of federal lands is vested in the federal government and not with the state. Additionally, while the Mining of Act of 1872 originally expressed no legislative intent, Congress declared its intent to retain and manage the surface resources of located unpatented mining claims when it passed the Multiple Use Mining Act. *California Coastal,* 480 U.S. at 582. The Bureau of Land Management (BLM) is responsible for managing the mineral resources on federal lands and the USFS (under the Secretary of Agriculture) is responsible for the

management of surface impacts of mining on federal lands. *Id.* at 585. Both FLPMA and the National Forest Management Act pre-empt the "extension of state land plans onto unpatented mining claims in national forest lands." *Id.*

State regulations are permissible on federal lands only to the extent they are not inconsistent with or in conflict with the United States. *Brubaker v. Board of County Comm'rs, El Paso County,* 652 P.2d 1050, 1058 (Colo. 1982). However, not all state regulation of mining claims is permissible, and state laws prohibiting activities authorized under federal mining laws are not permissible. *South Dakota Mining Ass'n v. Lawrence County,* 977 F.Supp 1396, 1403 (D.S.D. 1997). State laws that impose reasonable requirements upon the use of federal lands are permissible when directed at environmental concerns; however, the state may not deny the federal use. *See, Id.* "The federal Government has authorized a specific use of federal lands, and [the state] cannot prohibit that use, either temporarily or permanently, in an attempt to substitute its judgment for that of Congress." *Id.* Thus the Council lacks the authority to designate an area on federal lands as very rare or uncommon or to deny mining permits on federal land on the basis of a very rare or uncommon designation. In designating federal lands very rare or uncommon, the Council circumvents federal legislation and renders the federal process for obtaining mineral rights meaningless.

Designation Results in State Management and Planning on Federal Lands

While a state may not determine basic uses or determine use planning, it is allowed to provide environmental regulation to the extent that it does not mandate or prohibit particular uses of federal lands. *See, California Coastal,* 480 U.S. at 596. Environmental regulation may not prohibit or mandate particular uses of land but may require damage to the environment be kept within prescribed limits of air, water, noise and other pollution standards. *Id.* Environmental

regulation and land use planning are distinct unless environmental regulation overlaps and becomes so severe that a particular land use becomes commercially impracticable. *See, Id.* The Council is preempted from imposing environmental regulations that have the potential of prohibiting certain uses of federal land or rendering them commercially impracticable.

The federal government is responsible for the planning and management of uses on federal land. "FLPMA established substantive land management criteria for public land, required the Department to engage in land use planning, and preserved withdrawals and classifications already in effect. Section 202 of the Act, which concerns classifications, directs the Secretary of the Interior to develop and employ 'land use plans,' to establish the use to which tracts and areas of **federal lands** may be put." *National Wildlife Federation v. Burford,* 835 F.2d 305, 319 (C.A.D.C. 1987). If the Council designates federal land as very rare or uncommon, the state is determining which uses are allowed on the federal land. This is planning and management of federal lands, and the state is specifically preempted from doing so under FLPMA. As stated by the legislature, the intent of the EQA is to **plan the development and use of land.** Wyo. Stat. Ann. § 35-11-102(West 2009)(emphasis added). Under Wyoming law the Council has the authority to deny mining permits in areas it has designated as very rare or uncommon. *Wyo. Stat. Ann. § 35-11-406(m)(iv).* The policies set forth in Wyo. Stat. § 35-11-102 and §35-11-406 directly conflict with the stated intent, laws, and policies of Congress to vest management and planning of federal lands in the federal government and to promote multiple use of federal lands.

The designation of federal lands as very rare or uncommon is not environmental regulation because the designation prescribes which uses are allowed on federal land and the how the surface of federal land is to be managed—both of which are clearly management and

planning. Both the intended and practical effects of the designation regulate actual uses and interests on federal land.

The Petition is a deliberate effort to subvert federal law and affect an unconstitutional taking of vested property rights in federal lands. The Council's authority to designate an area on federal land as very rare or uncommon is a clear violation of the Congressional policies stated in FLPMA and is an unconstitutional violation of both the Property Clause and the Supremacy Clause of the U.S. Constitution.

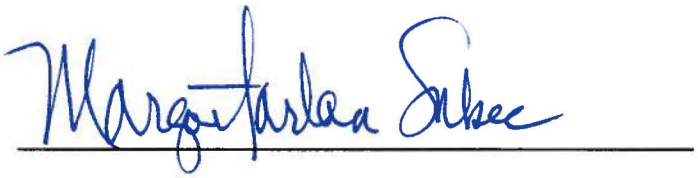
In addition, Congress has provided legislation establishing a process by which areas on federal land may be withdrawn from development or designated as wilderness. Under the Wilderness Act, Congress created a process to designate federal lands for preservation. *16 U.S.C.S. § 1131 et seq.* Under FLPMA, Congress established the authority and procedures for the withdrawal and disposition of federal lands. *43 U.S.C.S. § 1711 et seq.* This evidences clear congressional intent for management and planning of federal lands to be retained by the federal government. Wyo. Stat. §35-11-112(a)(v) and §35-11-406(m)(iv) stand as obstacles to Congressional intent, law, and policies and are therefore in actual conflict with federal legislation. Thus, these state statutes are pre-empted and the Council lacks jurisdictional authority to designate federal lands as very rare or uncommon.

III. CONCLUSION

Because the Council lacks the authority to designate areas on federal land as very rare or uncommon and to regulate and manage uses on federal land, the Petition asks the Council to take an action that will violate federal laws, policies, and constitutional provisions. To avoid a clear violation of both the U.S. Constitution and federal law, the Council must desist from any further exercise of its unlawful authority and immediately dismiss the Petition.

WHEREFORE, the undersigned hereby respectfully requests that the Council determine that it does not have jurisdiction to hear this petition on the basis that it is pre-empted by federal law and dismiss this Petition.

DATED this 14th day of July, 2009.



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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was served by electronic mail this 14th day of July, 2009, addressed as follows:

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I certify that a true and correct copy of the foregoing was served by electronic mail and postal mail this 14th day of July, 2009, addressed as follows:

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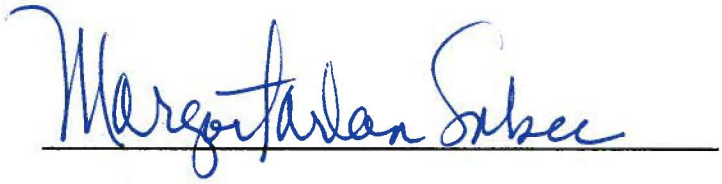

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