

BEFORE THE ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

FILED

SEP 10 1993

Terri A. Lorenzon, Attorney
Environmental Quality Council

In the Matter of the)	
Permit Application of)	Docket No. 2373-92
RISSLER & McMURRY CO.,)	
TFN 2 6/247)	

**DEPARTMENT OF ENVIRONMENTAL QUALITY'S
MEMORANDUM ON RULEMAKING AND
LANDOWNER CONSENT**

The Department of Environmental Quality, Land Quality Division, by and through the office of the attorney general, pursuant to the Council's order during the motions hearing on August 25, 1993, submits the following memorandum addressing the following issues:

- a. Whether there is a conflict between the Council's responsibility to hold a timely hearing in this matter and its responsibility to immediately begin rulemaking to satisfy the Supreme Court's mandate on Rare and Uncommon Designations.
- b. If there is a conflict, how it should be resolved.
- c. Whether the Protestant's Motion to Dismiss/Motion for Summary Judgment should be granted, because the applicant cannot get landowner consent from the State Public Lands Office.

THERE IS NO CONFLICT BETWEEN THE COUNCIL'S RESPONSIBILITIES, AND THE COUNCIL MUST HOLD A TIMELY HEARING IN THIS MATTER AND, PARALLEL TO THAT PROCEEDING, INITIATE RULEMAKING FOR RARE AND UNCOMMON DESIGNATIONS.

The Council should proceed with the hearing in this matter and, at the same time, initiate rulemaking for Rare and Uncommon Designations. The two mandates are related only because of the Bessemer Mountain designation, which is no more. Considering the Council's duty to proceed with both actions, it is prudent, if not

necessary to proceed with both at the same time in parallel, but unrelated proceedings.

The Council cannot justify delay on either, unless completing one is a prerequisite of completing the other. The Protestants interpret the Supreme Court's decision in *Rissler & McMurry v. Environmental Quality Council*, Slip Op. No. 92-226 (Wyo. 1993), as stating that the Council must reconsider the Petition For a Rare and Uncommon Designation for the Bessemer Mountain under the new rules before the hearing on the permit in question. The Supreme Court's opinion on this issue is vague, at best. The Council's duty to promulgate rules is clear in the opinion and the statutes. The Council's duty to consider Petitions is clear in the statutes. However, the Court did not specify that the Council could not consider the permit application until it had considered a new Petition under new rules. Absent clear direction, the Council is bound to carry out its statutory duty to hold a hearing as soon as possible.

The hearing in this matter must go forward as soon as possible. If a person objects to a permit application pursuant to W.S. 35-11-406(k), that statute requires the Council to hold a hearing within twenty days after the final date for filing objections unless the parties stipulate to a different schedule. Since no party has stipulated to a different schedule in this case, the requirement stands. There is some question concerning whether the hearing must begin and end within that twenty days. Regardless, it is clear that the intent of the statute is to provide for a quick hearing on these matters. It is clearly contrary to that intent to delay this hearing until the Council has promulgated rules, received a Petition for a Rare and Uncommon Designation, and determined whether this site qualifies.

Likewise, it is clear the Council must promulgate rules for Rare and Uncommon Designations as soon as possible. W.S. 35-11-112(a)(v) requires the Council to make these designations as soon as possible. The Wyoming Supreme Court has mandated that the Council promulgate rules for such designations. W.S. 35-11-112(a)(i) requires the Council to promulgate rules necessary for the administration of the

Environmental Quality Act, after recommendation from the DEQ. There is no rational basis for delaying this process. Therefore, the Council should begin rulemaking carefully and deliberately, but expediently.

If the Council agrees with the Protestants, the decision would undermine the purpose of the twenty day deadline in W.S. 35-11-406(k). Once a person has filed a permit application, if a protestant wants to stay the hearing but cannot get the other parties to agree, it need only file a Petition For a Rare and Uncommon Designation to delay the hearing. In such a situation, the requirement that the parties stipulate to a continuance and the requirement that a hearing be held within twenty days would both be rendered meaningless. The Council should not construe a statute in a manner which would nullify its operation, if it is susceptible of another interpretation. *McGuire v. McGuire*, 608 P.2d 1278 (Wyo. 1980).

THE COUNCIL SHOULD DENY PROTESTANT'S MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT, BECAUSE THE SUMMARY JUDGMENT PROCEDURE DOES NOT APPLY IN THIS CASE.

The Protestants filed a Motion to Dismiss, arguing that the application in question is incomplete because the applicant lacks landowner consent to mine the lands in question. They argue that the lands have been leased from the State and, under that lease, the applicant cannot mine limestone. They also appear to challenge the validity of the lease.

As noted by the Council during the motions hearing, the Motion converted to a Motion for Summary Judgment, because the Protestants attached exhibits to their Motion. *See, Wyoming Insurance Dept. v. Sierra Life Ins. Co.*, 599 P.2d 1360 (Wyo. 1979); *Amrein v. Wyoming Livestock Board*, 851 P.2d 769 (Wyo. 1993). Under these circumstances, the responding parties must be given the opportunity to respond to the new documents. *Id.* at 772. The DEQ is prepared to present evidence of what it reviewed to determine that the applicant has landowner consent. That evidence is a written consent from the State Land Office. *See* Attachment.

Before the Council considers the substance of this Motion, it should consider whether the summary judgment procedure applies in this case. The Council can decide cases with a summary judgment, under the right circumstances. In *Jackson v. State ex rel. Worker's Comp.*, 786 P.2d 874 (Wyo. 1990), the Wyoming Supreme Court held that administrative agencies can determine cases by summary judgment. However, the agency must have authority to do so. *Id.* at 878, 879.

This Motion is apparently authorized under DEQ Rules of Practice and Procedure, Chapter II, Section 14. That rule states that the Wyoming Rules of Civil Procedure apply when not inconsistent with state law and Council rules. The DEQ knows of no state law or Council rule which is inconsistent with W.R.C.P. 12 or 56. Therefore, these rules apply.


W.S. 35-11-112(a)(i) authorizes the Council to promulgate this rule. The statute does not expressly authorize the Council to promulgate the rule applying the rules of civil procedure. The lack of express language is not fatal. When considering proper delegations of authority, the courts do not expect lawmakers to address by statute every specific matter concerning government agencies' functions and duties. *Mourning v. Family Publications Service*, 411 U.S. 356 (1973). This rule is presumed valid and has the full force and effect of law, until successfully challenged. *Baker v. Snohomish County*, 841 P.2d 1321 (Wash.App.Div.1 1992); *State Bd of Medical Exam. v. Slonim*, 844 P.2d 1207 (Colo.App. 1992).

The *Jackson* Court also held that there must be no disputed facts to use the summary judgment procedure. *Id.* at 879, citing *Walker v. Karpan*, 726 P.2d 82 (Wyo. 1986). The agency can use summary judgment only when its "sole task is to determine questions of law or public policy." *Jackson*, 786 P.2d at 879. These cases apparently create a standard for summary judgments in administrative proceedings which differs from the standard for civil proceedings. Pursuant to W.R.C.P. 56, summary judgment may be granted when there is no genuine issue as to any material fact.

In *Jackson* and *Walker*, the Supreme Court held there must be no disputed facts. Since the Court is undoubtedly aware of the standard set forth in W.R.C.P. 56, one can only conclude that the Court intentionally created a different standard for administrative tribunals.

The Protestants have raised several factual issues in this case. While the Council may have the authority to determine cases by summary judgment, that procedure should not apply to this case, since there are disputed factual questions. Therefore, the Council should proceed with a hearing to hear all factual and legal issues.

DATED September 9, 1993.



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CERTIFICATE OF SERVICE

I, Thomas A. Roan, do hereby certify that I transmitted a true and correct copy of the foregoing **DEPARTMENT OF ENVIRONMENTAL QUALITY'S MEMORANDUM ON RULEMAKING AND LANDOWNER CONSENT** by placing the same in the United States mail, postage prepaid, on September 9, 1993, addressed to the following:

Christopher H. Hawks, Director
Lawyers and Advocates for Wyoming
P.O. Box 548
Jackson, WY 83001

Don Rissler
Central Wyoming Law Associates, P.C.
P.O. Box 1783
Riverton, WY 82501


Thomas A. Roan
Senior Assistant Attorney General

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SURFACE LANDOWNERS'S CONSENT

Terri A. Lorenzon, Attorney
Environmental Quality Council

I, Wyo. State Land & Farm Loan Office, CERTIFY that I hold surface rights on certain lands on which The Wyoming State Land and Farm Loan Office holds mineral estate rights, on the following lands:

E $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 16, T. 32 N., R. 81 W. 6 P.M.

W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, Section 16, T. 32 N., R. 81 W. 6 P.M.

W $\frac{1}{2}$ SW $\frac{1}{4}$, Section 16, T. 32 N., R. 81 W. 6 P.M.

Portions of the NW $\frac{1}{4}$, Section 16, T. 32 N., R. 81 W. 6 P.M.

I have examined the mining plans and reclamation plan prepared by Rissler & McMurry Co. in compliance with the Wyoming ENVIRONMENTAL QUALITY ACT of 1973 as amended, and do hereby approve said plans, and give my consent to enter and carry out said mining and reclamation programs on said lands as proposed therein.

Dated this 18 day of December, 1991.

Howard M. [Signature]
Surface Landowner

Witness:



LAND QUALITY DIVISION
RECEIVED DEC 13 1991
STEP 2 - 1/147 PERMIT