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The Wyoming Supreme Court's April 1982 term was a very important one for Wyoming administrative law. In this article the author examines several administrative law decisions from that term. The article offers practical and theoretical help to the practitioner who would understand the significance of these decisions.

ADMINISTRATIVE LAW, WYOMING STYLE

*Jackson B. Battle**

The April, 1982, term was an unusually active one for the Wyoming Supreme Court in administrative law. In fact, the file which I started four years ago for significant new Wyoming administrative law decisions nearly doubled in size between the first of May and the end of September, 1982. I can only assume that this is some indication of the increasing amount of administrative practice in the state. Bureaucracy has finally sunk its roots in Wyoming, lawyers are learning how to live with it, and the supreme court is increasingly called upon to resolve conflicts in its implementation. If the past term's decisions are any indication, we can expect a few growing pains as this field of law matures in our state.

I have collected six¹ significant administrative law decisions from this last term. Two are relatively uncom-

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1. The court's decision in *Thomson v. Wyoming In-Stream Flow Comm.*, 651 P.2d 778 (Wyo. 1982), could be counted as a seventh, but I have not—primarily because it treats a very narrow, albeit very important, subject: the proper procedures for exercise of the Secretary of State's authority regarding a voter initiative and the proper scope of judicial review thereof. The in-depth analysis that this case deserves will be left to another author or, at least, another day.

plicated, their results predictable, their holdings straightforward, and their implications on practice clear.² The remainder, however, are not so easily digested; and it is these four with which this article is concerned.

ROCKY MOUNTAIN OIL & GAS ASSOCIATION V. STATE

Probably the most significant decision of the April term is one that moved me to write "Incredible" across the top of my advance sheet when I first read it, because it didn't jibe with the "black letter" law of judicial review as I had come to view (and teach) it. But, as with a distressingly large number of legal issues which I confront, my first impression was not the one remaining after more

2. In *Wyoming State Dep't of Educ. v. Barber*, 649 P.2d 681 (Wyo. 1982), the court was given the opportunity to approve of an agency's utilization of an independent hearing officer to preside at a contested case before it for decision. First, the court held that a law professor who contracted with the State Board of Education was an "employee" entitled to preside under section 9-4-112(a) of the APA. *Id.* at 687-88. It then went on to approve, over a due process challenge, the procedure whereby the board did not actually preside, but based its decision on the full record made before the hearing officer, assisted by his recommended decision—thereby recognizing in Wyoming the long-standing "general rule" established by *Morgan v. United States*, 298 U.S. 468 (1936). *Id.* at 688. The only debatable part of the decision was the part objected to by Justice Rooney in his special concurrence: the majority's holding that the State Board of Education (as opposed to the State Superintendent of Public Instruction) had statutory authority to decide certification disputes. *Id.* at 691-92 (Rooney, J., specially concurring). The supreme court has had problems before with state agencies assuming adjudicative authority when they have none. See *McNeill v. Park County School Dist. No. 1*, 635 P.2d 818 (Wyo. 1981). Because the court now has pending before it another case again raising this issue, *Brasel & Sims Constr. Co. v. State Highway Comm'n*, No. 5678 (Wyo. argued 1982), discussion should await this further look at the problem.

State v. Fremont Energy Corp. 651 P.2d 802 (Wyo. 1982) was an easy case which gave the supreme court the opportunity to expound on general principles of "exhaustion of administrative remedies" and "primary jurisdiction"—both of which it covered nicely—while rejecting an attempt to invoke either of these doctrines. The district court had declined to exercise its jurisdiction to hear a civil action brought by the State against Fremont Energy Corporation for monetary penalties and injunctive relief based on alleged violations of the Wyoming Environmental Quality Act and regulations promulgated thereunder. Its basis for dismissing the action was that Fremont Energy was first entitled to a hearing before the Environmental Quality Council. The supreme court reversed, holding that it was improper to apply either the exhaustion doctrine or primary jurisdiction in the face of an express statutory provision making it clear that the Department of Environmental Quality could choose the enforcement method which it deemed best. "Nothing in this section [providing, in part, for a hearing before the Council] shall be interpreted to in any way limit or contravene any other remedy available under this act, nor shall this section be interpreted as a condition precedent to any other enforcement action under this act." WYO. STAT. § 35-11-701(d) (1977 & Supp. 1981). Although this unanimous decision could have been short and sweet, it is long and well-reasoned and should provide ample guidance for future, more applicable, invocations of these two doctrines.

serious thought and research on the subject. So now I'm in the happy position of being able to agree with the supreme court — if it means what I think it does — as to both law and policy.

In *Rocky Mountain Oil and Gas Association v. State*³ (*RMOGA*), a number of oil and gas producers in the state sought to challenge rules promulgated by the Environmental Quality Council regulating, among other things, certain subsurface discharges of oil-field wastes into groundwater. Because some seventy-one days had elapsed, however, after the final adoption of the rules, they were unable to petition for review within the thirty-day period provided both by Rule 12.04 of the Wyoming Rules of Appellate Procedure and by section 35-11-1001(a) of the Wyoming Environmental Quality Act. Instead, they filed an original action in district court for declaratory and injunctive relief, contending that the Council had exceeded its statutory authority — its “jurisdiction” — in promulgating rules governing such disposal of oil-field wastes and had assumed powers exclusively granted to the Wyoming Oil and Gas Conservation Commission. The district court dismissed the complaint, holding that the action was barred by sovereign immunity, and also finding that the declaratory judgment action was “in the nature of a petition for review” and, as such, was barred by the thirty-day limitations period. The supreme court disagreed on both scores and reversed.

On the sovereign immunity issue, the court employed some fairly clumsy sleight of hand⁴ to overrule, in effect, the most objectionable part of its 1975 holding in *Retail Clerks Local 187 AFL-CIO v. University of Wyoming*:⁵ that actions for declaratory relief were barred along with actions for injunctive relief and damages against state

3. 645 P.2d 1163 (Wyo. 1982).

4. The court's reasoning was that *Retail Clerks* was distinguishable in that there the plaintiffs had asked for an injunction and damages *as well as* a declaratory judgment (although the court had expressly ruled against the prayer for declaratory relief) and that, in any event, the limited waivers of immunity for tort and contract claims in the Wyoming Governmental Claims Act “fortified” the waiver of immunity in declaratory judgment actions. 645 P.2d at 1166.

5. 531 P.2d 884 (Wyo. 1975).

agencies.⁶ Henceforth, actions against the state for declaratory judgment⁷ would no longer be barred by the doctrine when the only issue was one of construction or validity of a statute or constitutional provision.⁸

Lifting the sovereign immunity barrier, however, did not end the matter. The "general rule"⁹ in administrative law is that forms of review such as actions for declaratory and injunctive relief are not available when adequate specific statutory procedures are provided for judicial review of a particular sort of agency action.¹⁰ Moreover, even if such "nonstatutory" review remains available, it would seem reasonable to limit its availability to the thirty-day period provided in the Wyoming Environmental Quality Act¹¹ and in the Wyoming Rules of Appellate Procedure governing petitions for review of administrative action.¹²

Without even a nod to the general rule of the exclusiveness of statutory review or a reply to Chief Justice Rose's dissent arguing for application of the thirty-day deadline,¹³

6. *Id.* at 886-87. Also barred were actions against their employees, when the relief sought would result in imposing contractual liabilities on the state. *Id.* at 887.

7. It would seem that the same reasoning would support actions for injunctive relief, mandamus, and prohibition (where otherwise appropriate remedies) against state agencies when no danger of monetary liability exists.

8. See the emphasis on this limitation in *Rocky Mountain Oil and Gas Ass'n v. State*, 645 P.2d at 1165-66 (Wyo. 1982). This suggests that declaratory judgment actions can be used to review administrative action only as to "pure questions of law" and cannot be used as a substitute for a petition for review or to otherwise challenge agency findings or procedural defects. See *infra* notes 58-64 and accompanying text.

9. See B. SCHWARTZ, ADMINISTRATIVE LAW § 145, at 432-35 (1976) [hereinafter cited as B. SCHWARTZ]; *infra* notes 41-52 and accompanying text.

10. Section 35-11-1001(a) of the Wyoming Statutes expresses a specific procedure for judicial review of agency action under the Wyoming Environmental Quality Act:

Any aggrieved party under this act, any person who filed a complaint on which a hearing was denied, and any person who has been denied a variance or permit under this act, may obtain judicial review by filing a petition for review within thirty (30) days after entry of the order or other final action complained of pursuant to the provisions of the Wyoming Administrative Procedure Act [§§ 9-4-101 to 9-4-115].

WYO. STAT. § 35-11-1001(a) (1977).

11. WYO. STAT. § 35-11-1001(a) (1977).

12. WYO. R. APP. P. 12.04.

13. Although Chief Justice Rose agreed with the majority that the doctrine of sovereign immunity was inapplicable, he would have held that the late filing of RMOGA's declaratory judgment action required dismissal for lack of jurisdiction. He did not treat a petition for review pursuant to section 35-11-1001 or Rule 12 as the exclusive form for review; but he did view their

the majority immediately turned to the particular scheme expressed by Wyoming rules and statutes. And here the message was clear. Rule 12.12 of the Wyoming Rules of Appellate Procedure,¹⁴ section 1-37-102 of the Uniform Declaratory Judgments Act,¹⁵ and Rule 57 of the Wyoming Rules of Civil Procedure¹⁶ all state, in one form or another, that the existence of another adequate remedy, such as petition for review, does not preclude declaratory judgment relief. These express directions were enough for the supreme court.¹⁷ Declaratory relief would be available notwithstanding any specific statutory review procedure or time limitations thereon — subject again, however, to the court's limitation of the relief to challenges concerning "the validity and constitutionality of agency regulations" or "the con-

thirty-day limitations periods as jurisdictional prerequisites to declaratory relief. See 645 P.2d at 1169-74 (Rose, C.J., dissenting). His reasoning was as follows: (1) the Declaratory Judgments Act is not itself jurisdictional, but only provides an additional remedy when jurisdiction otherwise exists; (2) both Rule 12.04 and section 35-11-1001 contain thirty-day filing periods; (3) such statutory filing periods are jurisdictional; therefore, (4) Rule 12.12 must be construed to permit actions for declaratory relief, and other such "independent action," to be brought only as substitutes for a petition for review within the thirty-day filing period. *Id.* (As discussed *infra*, in notes 34-35 and accompanying text, the leap in this syllogism is the assumption that section 35-11-1001 and Rule 12 are the only jurisdictional grounds for the declaratory judgment action.)

The Chief Justice included a justiciability or "ripeness" objection and joined in Justice Thomas's dissenting view that RMOGA failed to exhaust its administrative remedy of petitioning the Council for amendment or repeal of the rule pursuant to section 9-4-106 of the Wyoming Administrative Procedure Act. See 645 P.2d at 1174-76 (Thomas, J., dissenting).

14. The relief, review, or redress available in suits for injunction against agency action or enforcement thereof, in actions for recovery of money, in actions for a declaratory judgment of rights, status, or legal relations based on administrative action or inaction, in actions for mandamus to compel administrative action, and in applications for writs of certiorari and prohibition to review or prevent administrative action shall be available by independent action notwithstanding any petition for review filed.
WYO. R. APP. P. 12.12.
15. Courts of record within their respective jurisdictions may declare rights, status and other legal relations whether or not further relief is or could be claimed. No proceeding is open to objection on the ground that a declaratory judgment or decree is prayed for.
WYO. STAT. § 1-37-102 (1977).
16. The procedure for obtaining a declaratory judgment pursuant to sections 3-5801 to 3-5816 inclusive of W.C.S. 1945 [§§ 1-37-101 to 1-37-115], shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.
WYO. R. CIV. P. 57.
17. *Rocky Mountain Oil and Gas Ass'n v. State*, 645 P.2d at 1167-69 (Wyo. 1982).

stitutionality or interpretation of a statute upon which the administrative action is, or is to be, based."¹⁸

As so limited, this is desirable law. Insulating administrative rules from attack after a brief and exclusive period for judicial review does have the virtue of creating stability and predictability in regulation. But its price is possible governance by a rule which the agency had no authority to make. This cost may be acceptable in the federal system, or even in an especially large state system, where the alternative is subjecting rules to diverse challenges, and diverse holdings as to their legality, in dozens of different trial courts, which are reviewed by intermediate appellate courts without obligation to follow one another, and without the possibility of resolution of but a few such conflicts each year by the highest court. Where such serious threats to the uniformity and predictability of regulation are at stake, it is understandable to want a rule which provides that any specific statutory review procedure is exclusive. In Wyoming, however, with fewer rules, fewer challenges, fewer trial courts, no intermediate appellate courts, and a supreme court able to expeditiously resolve any conflicting lower court decisions and correct any bad law made in the trial courts, the threats to uniformity are simply not great enough to pay the price of *ultra vires* regulation.

Also, where notice of proposed rulemaking and final promulgation of rules is published in something akin to the Federal Register,¹⁹ a restricted review period is more tolerable. Potentially concerned persons then at least have available the means of spotting an adverse rule before it is too late to challenge it. In Wyoming, however, it is quite possible that final rules could pass without notice by affected interests until applied to them.²⁰

18. *Id.* at 1168.

19. In the federal system, notice of proposed rulemaking is required by 5 U.S.C. § 553(b) (1976) to be published in the Federal Register. 5 U.S.C. § 552 (a) (1) (D) (1976), likewise, requires that final rules be published there. The Federal Register is published daily, Monday through Friday; and, although certainly not on everyone's breakfast table, it is at least scanned routinely by trade, business, professional, and other organization which alert their members to proposed and final rules affecting their interests.

20. Section 9-4-103(a) (i) of the Wyoming Administrative Procedure Act does

Had this decision gone the other way, the spectre would arise of sanctions being imposed on, or licenses denied to, parties who had received no real opportunity to contest the rules being applied as lacking statutory authority, or even constitutionality. Courts generally will allow the statutory authority — i.e., the “jurisdiction” — of agency rules to be challenged in civil and criminal enforcement actions, in licensing proceedings and reviews thereof, and in other contexts in which the rules are applied, so long as no express statutory provisions exist making direct review the exclusive means of challenge.²¹ In Wyoming, however, the availability of such collateral attack is not assured — despite Chief Justice Rose’s seeming assumption that it is.²² This is be-

provide for mailing of advanced notice of proposed rulemaking “to all persons making timely requests of the agency” for such notice of its rulemaking proceedings, and this is effective at least for organized, well-represented interests. But there is no comparable requirement for distribution of rules to affected persons and interests upon promulgation. The only requirement is that of section 9-4-104(a) for filing adopted rules with the Secretary of State (the County Clerk for local rules), WYO. STAT. § 9-4-104(a) (1977 & Supp. 1982), who then compiles them and makes them available for public inspection, WYO. STAT. §§ 9-4-104(a) and 105 (a) (Supp. 1982), [revising the compilation “at least once every two (2) years,” WYO. STAT. § 9-4-105 (a) (Supp. 1982)]. This system is still much like those in most states, which have been criticized for their inaccessibility:

The situation in them, where a lawyer may still have to dig out the relevant regulations himself at the state capital, is a modern version of Caligula’s method of writing his laws in very small letters and hanging them up on high pillars, “the more effectively to ensnare the people.”

B. SCHWARTZ, *supra* note 9, at § 63, at 179.

21. See B. SCHWARTZ, *supra* note 9, at §§ 193-94; DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 23.07 (1958 & Supp. 1970) [hereinafter cited as DAVIS].

As an example of a civil action in which the defendant was allowed to challenge the regulation being applied, see *United States v. McCrillis*, 200 F.2d 884 (1st Cir. 1952). For the opposite result in a civil penalty action in light of an express statutory preclusion of review except by certain procedures, see *United States v. Southern Ry. Co.*, 380 F.2d 49 (4th Cir. 1967).

For the same difference in results in criminal enforcement actions, depending on whether or not the statutory review route is expressly made exclusive, compare *McKart v. United States*, 395 U.S. 185 (1969), with *Yakus v. United States*, 321 U.S. 414 (1944). Subsequent qualifications on both these cases, however, should be noted. In *McGee v. United States*, 402 U.S. 479 (1971), *McKart* was limited to challenges not involving the application of agency expertise to the resolution of underlying issues of fact. In *Adamo Wrecking Co. v. United States*, 434 U.S. 275 (1978), *Yakus* was not applied to insulate an EPA-promulgated emission standard from attack in a criminal enforcement action, as seemingly required by statute, when the defense was that the regulation the defendant was charged with criminally violating was not an “emission standard” at all.

The essence of the general rule is expressed in the last sentence of section 703 of the federal Administrative Procedure Act: “Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil and criminal proceedings for judicial enforcement.” 5 U.S.C. § 703 (1976).

22. “I am simply saying that, in these circumstances, under § 9-4-114, review cannot now become available until the challenged regulation is applied to

cause quite recently the Wyoming Supreme Court may have held that it is not.

In *Wyoming Board of Equalization v. State*,²³ the court held that, in a hearing before the board on appeal of a tax assessment, the taxpayer could not challenge the validity of the particular valuation rule there being applied, but could only challenge the *application* of the rule to him. Arguably, the holding can be limited to a construction of the particular statutory provision for a hearing which was there in issue. Arguably, it can be read to hold only that mandamus cannot compel the board to hear a collateral attack on its rule so long as an "adequate remedy at law" — there an unexpired period for petitioning for direct judicial review — remains available. And, arguably, it can be read merely to bar a collateral attack in the administrative agency but to permit such a challenge to be raised in the *court* reviewing the agency's application of the rule. This last limiting construction, however, seems to fly in the face of the first sentence in Rule 12.09 of the Wyoming Rules of Appellate Procedure,²⁴ the consistent holdings of Wyoming cases,²⁵ and the general principle of administrative law that a reviewing court may not consider issues not raised before the agency.²⁶

So long as the possibility remains that *Wyoming Board of Equalization v. State* will be construed to bar challenge to a rule in proceedings in which it is applied, every presumption should be against finding that a particular statutory direct review procedure and limitations period is exclusive.²⁷ Certainly the clearest expression of legislative

the appellants, at which time the appellants may utilize whatever defenses are available under the law." 645 P.2d at 1174 (Rose, C.J., dissenting).

23. 637 P.2d 248, 252 (Wyo. 1981).

24. "The review . . . shall be confined to the record as supplemented . . . and to the issues raised before the agency." WYO. R. APP. P. 12.09 (emphasis added).

25. See In the Matter of N. Laramie Land Co., 605 P.2d 367, 373 (Wyo. 1980); Wyoming Bancorp. v. Bonham, 527 P.2d 432, 439 (Wyo. 1974).

26. See DAVIS, *supra* note 21, at § 20.06 (1958 & Supp. 1970, 1976). Here Davis's conclusion, based on the cases which he discusses, is that the general rule that a reviewing court may not consider issues not raised before the agency is sometimes not applied to a claim that the agency patently acted beyond its jurisdiction.

27. However, the legislature may, of course, expressly provide that a particular review procedure and limitations period is exclusive. The *RMOGA* decision contains no indication to the contrary, and the power given to the supreme

intent should be required before a statutory scheme is so interpreted.

But the statutory scheme in Wyoming indicates quite the contrary intent. Looking first at the specific authorization for judicial review involved in *RMOGA*, section 35-11-1001 of the Wyoming Environmental Quality Act,²⁸ one finds no language suggesting that its procedure or thirty-day time limit is exclusive.²⁹ Turning to the Wyoming APA itself, the only section in the APA pertaining to judicial review, section 9-4-114, merely entitles aggrieved and affected persons to "judicial review."³⁰ It does not speak in terms of "petition for review," or any particular form of review, or set any time limit for review. Such details are seemingly left to the Wyoming Supreme Court under the authority granted it by section 9-4-114(b) "to adopt rules governing review," even to the extent of "supersed[ing] existing statutory provisions."

court by section 9-4-114(b) of the Wyoming Administrative Procedure Act to adopt rules governing review provides only that such rules "may supersede existing statutory provisions" (emphasis added). The author is aware of no existing statutory provisions expressly creating an exclusive procedure and time limit for judicial review.

28. WYO. STAT. § 35-11-1001(a) (1977). See *supra* note 10.

29. Again, the absence of any indication of exclusiveness of statutory review seems to be uniformly typical of Wyoming judicial review statutes.

30. The relevant subsections of section 9-4-114 are (a) and (b):

(a) Subject to the requirement that administrative remedies be exhausted and in the absence of any statutory or common-law provision precluding or limiting judicial review, any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action or inaction, or any person affected in fact by a rule adopted by an agency, is entitled to judicial review in the district court for the county in which such administrative action or inaction was taken, or in which any real property affected by such administrative action or inaction is located, or in the event no real property is involved, in the district court for the county in which the party aggrieved or adversely affected by the administrative action or inaction resides or has its principal place of business. The procedure to be followed in such proceeding before the district court shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming supreme court.

(b) The supreme court's authority to adopt rules governing review from agencies to the district courts shall include but not be limited to authority to determine the content of the record upon review; the pleadings to be filed; the time and manner for filing the pleadings, records and other documents; and the extent to which supplemental testimony and evidence may be taken or considered by the district court. The rules adopted by the supreme court under this provision may supersede existing statutory provisions.

WYO. STAT § 9-4-114(a) and (b) (1977).

These rules promulgated by the supreme court, Rules 12.01-12 of the Wyoming Rules of Appellate Procedure, read together, establish no exclusive form of review. If Rule 12.03³¹ is read in isolation, it could be construed to make a review of agency action; but such an interpretation is rebutted by Rule 12.12, which expressly preserves declaratory judgment and other independent actions "notwithstanding any petition for review filed."³² In view of this express preservation of other remedies, the thirty-day time limit in Rule 12.04³³ must be read to apply only as it reads: to petitions for review — not to independent actions.

If such other forms of action are "independent" of review under Rule 12, then presumed they must have an independent jurisdictional base. Chief Justice Rose is correct when he says that the Uniform Declaratory Judgments Act is not jurisdictional. But section 9-4-114 does not confer jurisdiction³⁴ for judicial review of agency action only through petitions for review. Indeed, its very language simply declares that judicial review is available unless pre-

31. The proceedings for judicial review under Rule 12, W.R.A.P., shall be instituted by filing a petition for review in the district court having venue. No other pleading shall be necessary, either by petitioner or by the agency or by any other party. All appeals from administrative agencies and all proceedings for trials de novo reviewing administrative action shall be governed by this rule.

No summons shall be necessary. Copies of the petition shall be served without unnecessary delay upon the agency and the parties in accordance with Rule 5, W.R.C.P.

WYO. R. APP. P. 12.03.

32. WYO. R. APP. P. 12.12. See *supra* note 14.

33. In a contested case, or in a noncontested case where a statute places a time limit on appeal, the petition for review shall be filed within thirty (30) days after written, certified notice to all parties of the final decision of the agency or denial of the petition for a rehearing, or, if a rehearing is held, within thirty (30) days after written, certified notice to all parties of the decision thereon, except that upon a showing of excusable neglect based upon the failure of a party to learn of the decision or action, the district court may extend the time for filing the petition for review not exceeding thirty (30) days from the expiration of the original time herein prescribed. Concurrently with the filing of the petition, the appellant shall order and arrange for the payment of a transcript of the evidence necessary for the appeal, and written evidence of the compliance with this requirement shall be served upon the agency and all parties as provided in Rule 5, W.R.C.P.

WYO. R. APP. P. 12.04.

34. Section 9-4-114 of the Wyoming Administrative Procedure Act is jurisdictional. *United States Steel Corp. v. Wyoming Envtl. Quality Council*, 575 P.2d 749, 750-51 (Wyo. 1978).

cluded by law. This has the effect of opening agency action to review under any otherwise existing jurisdictional authority; and, by virtue of article 5, section 10, of the Wyoming Constitution, state district courts have general original jurisdiction "of all causes both at law and equity" — now including declaratory judgment actions.³⁵ With the court's removal of sovereign immunity from actions for declaratory judgment, such actions may be brought against state agencies for acting beyond their jurisdiction.

This somewhat detailed analysis simply reinforces my agreement with the majority on the supreme court. It is also nice that what little direct precedent exists on point in Wyoming is supportive of the holding. In *School Districts Nos. 2, 3, 6, 9, and 10 v. Cook*,³⁶ plaintiffs challenged an order of the county superintendent of schools consolidating school districts, by filing an original action for declaratory and injunctive relief in the district court instead of (initially) pursuing their statutory remedy of appeal.³⁷ The supreme court held that the existence of the statutory remedy did not preclude the action for declaratory relief.³⁸ In *Mitchell v. Simpson*³⁹ the court (without discussing the issue, which was raised) allowed a collateral attack on the jurisdiction of the Wyoming Oil and Gas Conservation Commission to enter a pooling order after the thirty-day period for petitioning for review had run.⁴⁰

35. The district court shall have original jurisdiction of all causes both at law and in equity and in all criminal cases, of all matters of probate and insolvency and of such special cases and proceedings as are not otherwise provided for. The district court shall also have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court; and said court shall have the power of naturalization and to issue papers therefor. They shall have such appellate jurisdiction in cases arising in justices' and other inferior courts in their respective counties as may be prescribed by law. Said courts and their judges shall have power to issue writs of mandamus, quo warranto, review, certiorari, prohibition, injunction and writs of habeas corpus, on petition by or on behalf of any person in actual custody in their respective districts.

WYO. CONST. art. 5, § 10.

36. 424 P.2d 751 (Wyo. 1967).

37. Now WYO. STAT. § 21-6-115 (1977), which provides for judicial review pursuant to the provisions of the APA.

38. 424 P.2d at 755.

39. 493 P.2d 399 (Wyo. 1972).

40. But the court then proceeded to decide the "jurisdictional" question adversely to the plaintiff. *Id.* at 401-02.

Thus, in Wyoming, law as well as policy supports the decision of the court in *RMOGA*. But attorneys who practice in the federal system and in other states should be aware that this decision may put Wyoming out of line with the "general" federal rule and probably that in the majority of other states — when (as in *RMOGA*) there is a specific statutory review route.

In the federal system, where the APA itself provides no particular form of review,⁴¹ in the absence of a special statutory review proceeding, a declaratory judgment action or any other "applicable form of legal action" is available (without any limitations period).⁴² Under such circumstances, therefore, the Wyoming and federal law would be the same. When a federal statute exists, however, which is similar to section 35-11-1001 of the Wyoming Environmental Quality Act, section 703 of the federal Administrative Procedure Act⁴³ seems to require the opposite result: if an adequate special statutory review procedure exists, it is exclusive. Some federal courts⁴⁴ and commentators⁴⁵ appear

41. Indeed, in the federal system the APA itself has been interpreted not to be jurisdictional. *Califano v. Sanders*, 430 U.S. 99 (1977).

42. The first sentence in 5 U.S.C. § 703 (1976) contains the controlling provision:

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction.

See the application of the general presumption of availability of judicial review of federal rules, in the absence of statutory review procedures, by actions for declaratory and injunctive relief in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 139-49 (1967).

43. See 5 U.S.C. § 703 (1976); *Supra* note 42.

44. See *Independent Cosmetic Mfrs. and Distribs. v. HEW*, 574 F.2d 553, 554-55 (D.C. Cir. 1978) (challenge to FDA labeling requirement, outside the statutory form and period for review, was barred where no "patent violation of agency authority" and not "damaging beyond the capability of the statutory procedure to correct"). See also *Investment Co. Inst. v. Board of the Fed. Reserve Sys.*, 551 F.2d 1270, 1279-80 (D.C. Cir. 1977) ("even where Congress has not expressly conferred exclusive jurisdiction, a special review statute vesting jurisdiction in a particular court cuts off other courts' original jurisdiction in all cases covered by the special statute").

45. Consider the unequivocal discussion of the subject in B. SCHWARTZ, *ADMINISTRATIVE LAW* (1976):

§ 145. *Exclusiveness of Statutory Review*

Statutory review provisions are specific permissions by the legislature for judicial review; they provide a legislative answer in the affirmative to the question of availability of review. There is, however, a basic corollary to the existence of statutory review provisions: they take over the field so far as review is concerned.

to take this restriction seriously. As Davis makes apparent in his treatise, however, most federal courts actually do not apply the rule woodenly.⁴⁶ The majority of federal cases in which nonstatutory review is barred involve legislation expressly making the specified review procedures exclusive.⁴⁷ Occasionally, when the hardship of restricting access to the judicial system seems especially severe, federal courts will ignore even express statutory requirements for exclusive review procedures.⁴⁸ The problem for the practitioner, of

The statutory road to review becomes the only road. The statutory review provisions must be followed exactly in any review proceeding. This means that the review action must be brought:

- (1) in the court specified in the statute;
- (2) within the time specified in the statute; and
- (3) in the form specified in the statute.

REVIEWING COURTS

... If a court provides that the review action is to be brought in a specified court, the statutory direction must be followed.

STATUTES OF LIMITATIONS

Statutory review provisions commonly contain time limits during which review actions must be brought. These time limits must be strictly observed; actions which are not filed within the time specified must be dismissed, no matter how strong a case they may present on the merits. In these cases the legislature has permitted review but has recognized that agencies must know that, after a reasonable time, their decisions and other acts are free from legal danger. What constitutes a reasonable time is for the legislature to decide. ... Even though they may feel that the time allowed is very short, the courts enforce even such a time limit without question.

FORMS OF ACTION

If there is statutory provision for review, the review action must be brought in the form of action specified by the legislature. Here, too, the legislative discretion is very broad. If the statute provides that review shall be obtained by filing a petition for review, by an injunction suit, by a proceeding in the nature of certiorari, by an action for mandamus, or by any other form of action—in all these cases the legislative will must be respected; the review actions must be brought only in the forms specified.

CAVEAT

The rule that statutory review provisions must be followed strictly is subject to a caveat: the provisions in question must be adequate in enabling review to be obtained. The caveat is, however, more a matter of theory than practice. ... In actual practice the courts have not found inadequacy in any statutory review provisions. ...

46. DAVIS, *supra* note 21, at §§ 23.03-23.04 (1958 & Supp. 1970, 1976, 1982).
47. *See, e.g.*, *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977); *B.F. Goodrich Co. v. Northwest Indus., Inc.*, 424 F.2d 1349 (3d Cir. 1970); *Kornfield v. HEW*, 307 F. Supp. 839 (S.D.N.Y. 1969).
48. The United States Supreme Court seems particularly prone to bend the rule when presented with a "hard" case. In *Oestereich v. Selective Serv. Sys. Local Bd. No. 11, Cheyenne, Wyo.*, 393 U.S. 233 (1968), the plaintiff was allowed to challenge revocation of his draft exemption by an action for injunctive relief, despite a statutory provision expressly barring judicial review except as a defense to a criminal prosecution. In *Rusk v. Cort*, 369 U.S. 367 (1962), the Court held that a statutory provision for review "in habeas corpus proceedings and not otherwise" did not bar a civil action challenging the Secretary of State's determination that a person had forfeited his citizenship. *Id.* at 379.

course, is in trying to divine when the rule will be applied and when it won't. My best advice is to assume in the federal system that statutory review is exclusive, follow that route if within the limitations period, but, if the statutory period has run, file for declaratory and injunctive relief and cite decisions such as those at notes 47 and 48 *supra* in support.

In other states, the result depends — at least in large part — on the particular form of the state APA. In those jurisdictions which have adopted section 7 of the Revised Model Act,⁴⁹ nothing short of express preclusion of review in favor of a special statutory procedure should bar challenge through the APA-sanctioned means of declaratory relief. On the other hand, when the state APA provides no form of review, and leaves those affected by agency action to whatever remedies are available,⁵⁰ special statutory review procedures are usually deemed exclusive.⁵¹ If you find yourself in a jurisdiction with an APA and rules of appellate procedure similar to Wyoming's,⁵² you might want to argue that *RMOGA* should be followed. Otherwise, you are simply going to have to wind your way through that state's own peculiar review procedures. My warning, however, is not to be surprised if declaratory relief is unavailable after a statutory limitations period has passed.

49. Section 7 of the Revised Model State Administrative Procedure Act provides:

SECTION 7. [*Declaratory Judgment of Validity or Applicability of Rules.*] The validity or applicability of a rule may be determined in an action for declaratory judgment in the [District Court of . . . County], if it is alleged that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the plaintiff. The agency shall be made a party to the action. A declaratory judgment may be rendered whether or not the plaintiff has requested the agency to pass upon the validity or applicability of the rule in question.

REV. MODEL STATE ADMIN. PROCEDURE ACT § 7 (1961).

50. All too often, a challenger is still confronted with the present-day derivatives of the prerogative writs—certiorari, prohibition, and mandamus—and the task of deciding at his peril which writ is appropriate. In more enlightened jurisdictions, actions for injunctive and/or declaratory relief are recognized as all-purpose remedies for agency action. See DAVIS, *supra* note 21, at §§ 24.01-24.07 (1958 & Supp. 1970).
51. See, e.g., *City of Superior v. Committee on Water Pollution*, 56 N.W.2d 501 (Wis. 1953); *Pittsburgh Outdoor Advertising Co. v. City of Clairton*, 133 A.2d 542 (Pa. 1957).
52. The author at this writing has found no such jurisdiction.

So, if you practice primarily in Wyoming, consider yourself fortunate — at least in this respect. Our simplified all-purpose procedure for judicial review of agency action — petition for review within thirty days — has just been made even less hazardous than before, since now you are not completely foreclosed from review if you miss the thirty-day deadline. Nevertheless, a few nuances in procedures for obtaining judicial review remain — so a quick run through the various avenues of relief might be helpful.

First, under the *RMOGA* holding, persons adversely affected by state and local agency rules can now bring declaratory judgment actions challenging the rules after expiration of the thirty-day limitations period in Rule 12.04.⁵³ The reasoning used by the court to support the availability of declaratory relief should also allow actions for injunctive relief (as well as mandamus or prohibition, where applicable) against threatened application of a rule. The court's treatment of the sovereign immunity defense, however, only applies on its face to declaratory judgment actions; it is possible that *Retail Clerks*⁵⁴ still operates as a bar to actions against state agencies for relief other than declaratory. Fortunately, such a restriction is largely irrelevant. When the defendant is a state agency, it is difficult to imagine a declaratory judgment being flouted. Declaratory relief should, therefore, be sufficient.

Nothing in the *RMOGA* opinion suggests any time limit on declaratory actions against rulemaking. Like constitutional challenges to statutes, "jurisdictional" challenges to rulemaking should lie whenever a justiciable controversy exists.⁵⁵ I suppose that it is conceivable that the eight⁵⁶ or

53. At least such challenges may be brought when no statutory limitations period is expressly made exclusive. If there is a statutory provision for exclusiveness, the application of *RMOGA* in such a context is debatable.

54. *Retail Clerks Local 187 AFL-CIO v. University of Wyo.*, 531 P.2d 884 (Wyo. 1975).

55. Such as surely was the case in *RMOGA*, despite the chief justice's opinion to the contrary. See *Rocky Mountain Oil and Gas Ass'n v. State*, 645 P.2d at 1174 (Rose, C.J., dissenting). Basically, whenever a person's activities are threatened by government regulation—in this case subjected to permitting requirements—a challenge to the rules upon which the restrictions are based should be ripe for adjudication.

56. "Within eight (8) years, an action . . . [u]pon a liability created by statute other than a forfeiture or penalty." WYO. STAT. § 1-3-105(a) (ii) (B) (1977).

four⁵⁷ year statute of limitations could be applied; but a new period should begin to run with each application of the rule — rather than only with its promulgation — making any such limitations period largely insignificant.

A declaratory judgment action, however, is not the equivalent of a petition for review. The court's holding in *RMOGA* was expressly, and properly, limited to complaints concerning "the validity and construction of agency regulations" or "the constitutionality or interpretation of a statute upon which the administrative action is, or is to be, based."⁵⁸ This means that only pure questions of law as to the agency's "jurisdiction" — both constitutional and statutory — can be raised in this manner. Litigants should not be allowed to use such out-of-time⁵⁹ declaratory relief as a substitute for direct review of the record, the evidentiary bases for the findings, or the observance of proper procedures.⁶⁰ The only issue before the court should be: given the agency's statement of reasons for adopting the rule,⁶¹ and conclusively presuming support for those reasons in the record, is the rule within the scope of the agency's statutory and constitutional authority?

Besides having the force of reason and the court's own language behind it, this reading of *RMOGA* is supported by statements by the court in two previous cases. In *Mitchell v. Simpson*, although the court allowed an independent action attacking the jurisdiction of the Oil and Gas Conservation

57. "Within four (4) years, an action for . . . [a]n injury to the rights of the plaintiff, not arising on contract and not herein enumerated." WYO. STAT. § 1-3-105(a) (iv) (C) (1977).

58. 645 P.2d at 1168. See also *Id.* at 1165 (similar limits to the court's holding concerning sovereign immunity).

59. Declaratory judgment actions brought *within* the thirty-day review period should entitle a plaintiff to the full range of review available under section 9-4-114(c) of the Administrative Procedure Act. WYO. R. CIV. P. 72.1(c), the predecessor to WYO. R. APP. P. 12, used to say as much; and Rule 12 should be interpreted accordingly.

60. Note, however, that section 9-4-103(c) of the Wyoming Administrative Procedure Act allows challenges to compliance with the rulemaking *procedures* of that section to be brought within two years of the effective date of the rule; so, within this two-year period, such procedural attacks should lie.

61. A concise statement of the principal reasons for adoption of a rule is required by *Tri-State Generation and Transmission Ass'n v. Environmental Quality Council*, 590 P.2d 1324 (Wyo. 1979).

Commission to issue a particular pooling order, it told the plaintiff that any contention that the Commission was "arbitrary in its finding" was a matter that he could raise only by petition for review "and not by a collateral attack."⁶² In *School Districts Nos. 2, 3, 6, 9, and 10 v. Cook*, the court permitted a declaratory judgment action where "there was no dispute as to the facts . . . and all that remained to be done was draw the legal conclusion."⁶³ The court, however, pointedly went on to warn the plaintiffs: "Of course, litigants should bear in mind that resort to this remedy or to a common-law remedy is narrow in scope and does not afford the more complete review ordinarily offered by a statutory appeal. . . ."⁶⁴ Attorneys are well advised, therefore, not to miss the thirty-day deadline for petitioning for review.⁶⁵ An unwaivering line of cases in the state hold that timely filing of a petition for review is mandatory and jurisdictional, and many a petition for review has been dismissed on this basis.⁶⁶

Also, until the Wyoming Supreme Court says differently, counsel is well advised not to assume that *RMOGA* applies to licensing and other contested case proceedings, such as benefits determinations and employment dismissals. Although the legal analysis used by the court would support the same availability of declaratory relief to challenge the jurisdiction of an agency to decide a particular contested case,⁶⁷ different policy considerations are involved;⁶⁸ and

62. 493 P.2d at 402.

63. 424 P.2d at 755.

64. *Id.* In this light, the court's preceding statement that "the courts are always open to correct arbitrary, capricious, or fraudulent action taken by an administrative official or board" should be read to refer to action which is arbitrary and capricious purely as a matter of law, but not solely because of absence of evidentiary support in the record.

65. Notice that the unusual wording of Rule 12.04 of the Wyoming Rules of Appellate Procedure (*supra* note 33) seems to convert all statutory periods for review to thirty days. If so literally construed, this appears to be within the power given the court by section 9-4-114 of the Administrative Procedure Act to adopt rules which "may supersede existing statutory provisions." (emphasis added).

66. See, e.g., *Stagner v. Wyoming State Tax Comm'n*, 642 P.2d 1296 (Wyo. 1982); *Department of Revenue and Taxation v. Irvine*, 589 P.2d 1295, 1301-02 (Wyo. 1979); *Snell v. Ruppert*, 541 P.2d 1042, 1048 (Wyo. 1975); *Curtis v. Center Realty Co.*, 502 P.2d 365, 367 (Wyo. 1972).

67. The strongest sort of case for expanded availability of judicial review is a case like *McNeil v. Park County School Dist. No. 1*, 635 P.2d 818 (Wyo. 1981), in which the Commissioner of Labor, without any statutory authority, assumed the power to adjudicate teachers' claims against their employer for money withheld from their paychecks.

the court might not be willing to so extend *RMOGA*. If you miss a thirty-day petitioning deadline, however, you should attempt to challenge the order through a declaratory judgment action, argue that *RMOGA* applies, and make some more law on the subject.

Finally, as discussed earlier,⁶⁹ until the meaning of *Wyoming Board of Equalization v. State*⁷⁰ is cleared up, affected interests cannot be assured that they will be allowed to challenge the jurisdiction for rules when they are applied in enforcement, licensing, or other agency regulatory proceedings. In this situation, as soon as a proceeding is initiated in which a jurisdictionally vulnerable rule is to be applied, counsel should file an independent action in court for declaratory judgment upon it. At least then the client will be protected against having his challenge barred.

So, some uncertainty still exists as to the proper means of challenging agency action in Wyoming; but it is certainly no more uncertain than it was before *RMOGA*. And, at least now the penalty for inadvertance or utilization of the wrong review procedure has been considerably reduced. This is, I believe, an appropriate step toward further disencumbering our already simplified procedures for judicial review of agency action.

WHITE V. BOARD OF TRUSTEES

In contrast with the Wyoming Supreme Court's independent stance in *RMOGA*, in *White v. Board of Trustees*⁷¹ the court placed itself squarely in line with the "general rule" of administrative law, even to the extent of ignoring its own most recent precedent on point. At issue was the adequacy of notice for a hearing on a contested case. The circumstances of the case provide a good illustration of how the doctrine of "actual notice" can prevail over severe defects

68. One significant difference is the usual absence of any danger of lack of notice.

69. See *supra* notes 21-26 and accompanying text.

70. 637 P.2d 248 (Wyo. 1981).

71. 648 P.2d 528 (Wyo. 1982).

in the formal notice of a hearing — even if the actual notice does not come until the hearing itself.

Dr. John White was an assistant professor of music at Western Wyoming Community College in Rock Springs. He was under an employment contract with the college (and, therefore, possessed a constitutionally protected property interest in his job) when the president of the college served him with notice of the administration's recommendation to the Board of Trustees that his contract immediately be terminated. This notice included advice concerning his rights to a hearing, as well as to a statement of reasons for the proposed termination and a list of witnesses against him.⁷² Following Dr. White's request for a hearing and for notice of reasons for the proposed termination, the college president responded by providing him with a general allegation of cause for the termination,⁷³ as well as an itemized list of specific violations charged against him — possession of open containers of alcohol in the dorm, serving the same to a student in his room, quarreling with his colleagues and college staff, not paying his rent, using profane language, and failing to cooperate with a fire drill.⁷⁴ The final item on the list of charges, however, was somewhat vague: "7. Soliciting and participating in relationships with students in a manner which is violative of generally accepted community standards." When White persisted with a forthright written request for a "description of relationships disallowed that I have allegedly violated," it became apparent

72. Except perhaps for its technical defect in failing to recite legal authority under which the hearing was to be held, the notice first sent to White—reproduced in the decision, *Id.* at 530—provides a good model for an initial notice of termination from governmental employment.

73. *Id.* at 530-31. This general allegation basically tracked those portions of White's contract which he was allowed to have breached: his duty to comply with all college rules and regulations and his obligation to refrain from conduct detrimental to the best interests of the college and to his position. As discussed by the court, breach of this latter condition by engaging in immoral conduct is ample "cause" for termination, whether express in the contract or implied. *Id.* at 537-40.

74. *Id.* at 531. Attached to this written notice of reasons were, *inter alia*, copies of three published college "policies" concerning the use of drugs and alcohol: two prohibiting student usage on college property and at college sponsored or supervised functions, and another prohibiting staff use of drugs or alcohol "on school premises." No reference was made to what specific charges these policies related; but it would seem logical that they related to the only specified charge dealing with alcohol consumption—the one concerning possession of an open container in the residence hall.

that the college president was indeed using a euphemism.⁷⁵ The president's response was to transmit to White a copy of a written statement by a male student accusing White of inviting him to dinner in his residence hall room, and there serving him alcoholic drinks and attempting to seduce him.⁷⁶ A few days later White made a written request for still further clarification,⁷⁷ but no indication exists that the president of the college responded.

So, Dr. White seemed to have a lot to worry about when he showed up for his hearing — but at least it seemed that the college had given him fair warning of every pellet in the shotgun they intended to fire at him.⁷⁸ In opening statement, however, counsel for the college revealed that a substantial part of his case was to be based on the testimony of four students concerning White's participation in the use of marijuana and alcohol with the student members of his rock band on road trips. True to that promise, the first four witnesses called by the college did testify in detail to such conduct on band road trips.⁷⁹ When the first of these witnesses began to testify concerning these actions, counsel for Dr. White made an objection to any testimony concerning conduct not covered by the notice of reasons,⁸⁰ as well as any

75. *Id.* at 532. Omitted from the supreme court's discussion, but obvious from the briefs, is the fact that it had already been indicated to Dr. White that a charge of homosexual solicitation of students was a precipitating cause for the termination. It had been emphasized by the college president in asking for his resignation prior to the formal notice of proposed termination, and it had been indicated by copies of letters from White to a male student given to White along with the detailed notice of reasons. Brief of Appellees at 4-5, *White v. Board of Trustees*, 648 P.2d 528 (Wyo. 1982).

76. 648 P.2d at 532. In response to White's request, the president also enclosed statements by two other persons, neither of which had anything to do with any sort of relationships with students (or drugs, alcohol, sex, or the rock band which he instructed). *Id.*

77. White wrote the president asking for "all the evidence against me" and repeating his request for a description of the college policy regarding student/teacher relationships. *Id.*

78. Apparently feeling adequately prepared to deal with the charges of which he had been given notice, neither White nor his attorney made a pre-hearing request for a list of witnesses against him. Before the start of the hearing, after the names of the college's witnesses were read into the record, White's counsel did take the opportunity to interview three of them. *Id.* at 533.

79. *Id.* at 533-34. This testimony was followed by the introduction of evidence as to White's homosexual conduct and other charges covered by the notice of reasons furnished before the hearing. *Id.* at 534.

80. *Id.* at 533-34. The Court characterized this as a "half-hearted objection to the subject matter" which did not include a complaint that conduct on the band trips was not included in charge 7. *Id.* at 534. The excerpts from the record included in the brief in support of appellant's petition for rehearing,

evidence of actions occurring after the date such detailed notice was furnished. He did not, however, in so many words, claim surprise, move to strike the testimony, or go so far as to move for a continuance, either when the testimony was introduced or at the close of the state's case. In presenting his own case, neither White nor any of his witnesses denied such use of alcohol and marijuana on the band's road trips; indeed, on cross examination, most band members called by White to testify confirmed that this behavior had occurred while under White's "supervision." Apparently Dr. White's primary defense was that such use of drugs and alcohol by college and high school youth in the Rock Springs area was the accepted "community standard" and that, in any event, it was not his job to police against such actions by his band members on trips. At the close of all the evidence, White's counsel again argued the absence of pre-hearing notice that his client's relationships with students on band trips would be in issue; but he still failed to move for a continuance to allow him to meet the charge. When the Board of Trustees made their written findings of fact, all of the findings that supported their legal conclusion of cause for dismissal dealt with White's misconduct in participating in the use of alcohol and marijuana with his students on the rock band road trips.

Not surprisingly, Dr. White's major complaint on judicial review was lack of fair notice of the charges against him.⁸¹ Although the supreme court acknowledged that White was entitled to protection both by procedural due process and by the contested case provisions of the Wyoming APA,⁸²

however, indicate that a quite strenuous continuing objection to this evidence was registered at this point in the proceedings. Brief in Support of Appellant's Petition for Rehearing at 4, *White v. Board of Trustees*, 648 P.2d 528 (Wyo. 1982).

81. The District Court of Sweetwater County denied relief.

82. Therefore, section 9-4-107(a) and (b) of the Wyoming Administrative Procedure Act applies:

(a) *Notice to be given; service of notice.*—In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice served personally or by mail. Where the indispensable and necessary parties are composed of a large class, the notice shall be served upon a reasonable number thereof as representatives of the class or by giving notice by publication in the manner specified by the rules or an order of the agency.

(b) *Statement in notice.*—The notice shall include a statement of:

(i) The time, place and nature of the hearing;

it found neither of any avail to him. What both required was fundamentally fair notice of the issues involved. Based upon the "totality" of *all* the circumstances prior to, and in the course of, his hearing, the court concluded that "appellant received adequate notice of what he was expected to defend against and was not subjected to surprise."⁸³ In one paragraph, the majority seemed to take the questionable position that Dr. White received adequate *pre-hearing* notice when the college furnished him with copies of its policies concerning the use of alcohol and drugs⁸⁴ and thereby put him on "inquiry" as to any alcohol and drug-related conduct which might be brought up in the hearing.⁸⁵ This, plus the court's emphasis on the availability of discovery procedures,⁸⁶ could be read to shift to the administratively accused the burden of discovering the factual allegations against him upon merely being apprised of the general rules being invoked. Most of the court's reasoning, however, is based on the more solid proposition that, despite any absence of adequate *pre-hearing* notice, no prejudice against Dr. White was shown where he did not indicate that he was caught off guard and "surprised" by the college's change of tack, where he made no motion for a continuance nor demonstrated a need for one, and where he proceeded to try the case as if

(ii) The legal authority and jurisdiction under which the hearing is to be held;

(iii) The particular sections of the statutes and rules involved;

(iv) A short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a more definite and detailed statement shall be furnished.

WYO. STAT. § 9-45-107 (a) and (b) (1977).

83. 648 P.2d at 535.

84. See *supra* note 74.

85. 648 P.2d at 536-37. It is, perhaps, instructive that the two cases which the court cited for this notion of "inquiry" notice have nothing whatsoever to do with advance notice of the matters at issue in an administrative hearing. *Stagner v. Wyoming State Tax Comm'n*, 642 P.2d 1296 (Wyo. 1982), concerned the adequacy of notice of a final agency decision that starts the thirty-day period running for petitioning for judicial review. *Rodin v. State, ex rel. Cheyenne*, 417 P.2d 180 (Wyo. 1966), was even further off point; it held that the holder of a municipal bond redeemable after a certain date was put on inquiry and, therefore, was on notice to determine whether a call for redemption was made.

86. By essentially incorporating the rules for discovery in civil cases from the Rules of Civil Procedure, Wyoming has adopted some of the most liberal discovery provisions of any APA in the country, state or federal. See section 9-4-107(g) and (h) of the Wyoming Administrative Procedure Act.

such evidence of his misconduct with students was not disputed.⁸⁷ As so viewed, the decision is but a harsh application of a "general rule" of administrative law: actual notice can come at any time, up to and including at the hearing itself, and it is incumbent upon the parties to protect themselves against any prejudice caused by such informality by moving for a continuance to enable them to meet the new matter.

The dissenting opinion by Chief Justice Rose⁸⁸ is, however, much closer to the mark established by recent Wyoming cases. In the chief justice's opinion, a violation of procedural due process occurred when, despite Dr. White's persistent efforts to obtain clarification of the charges, he was not apprised of the factual allegations against him *before* the hearing, but, indeed, was misled to believe that the "student relationship" charge pertained to quite another matter. The chief justice did not address the strongest part of the majority opinion, that based on the absence of a showing of prejudice and the failure to move for a continuance. He confined his attack instead to its weakest part — the idea that notice is provided when the other party merely has been placed on "inquiry;" but, as so limited, his view is nicely supported by his own opinions for the court in the two most recent Wyoming cases on point.

In *Powell v. Board of Trustees of Crook County School District No. 1*,⁸⁹ the court reversed the termination of a public school teacher because, in part, he was dismissed upon a finding that he was "unable to control the conduct of his students," while the allegation in his notice closest to this subject only accused him of "failure to follow district policy" regarding student discipline. This the *Powell* majority

87. The court analogized this to trying issues not raised by the pleadings by implied consent of the parties, as provided for in civil trials by Rule 15(b) of the Wyoming Rules of Civil Procedure. 648 P.2d at 537. This rule also states that, if objections are raised to evidence outside the pleadings, the court shall freely allow the pleadings to be amended to conform to the evidence unless the objecting party demonstrates that the admission of such evidence would prejudice his case, in which case the court may grant a continuance to allow him to meet the new evidence. The policy behind Rule 15(b) does seem quite applicable to administrative hearings, and the issue should be similarly handled in the two contexts.

88. 648 P.2d at 540-43 (Rose, C.J., dissenting).

89. 550 P.2d 1112, 1113-17 (Wyo. 1976).

treated as inadequately precise to comply with due process or the requirements of section 9-4-107(a) and (b) of the Wyoming Administrative Procedure Act.

The same term, with Rose again writing for the majority, in *Board of Trustees, Laramie County School District No. 1 v. Spiegel*,⁹⁰ the court similarly found a violation of both due process and section 9-4-107(a) and (b) in the school board's denial of the affected teacher's timely motion for a more detailed and definite statement than the board's quite general allegations that his teaching philosophy had been "in conflict with that of the administration" and that he did not "have the ability to work harmoniously and cooperatively" with them. As Justice Rose pointed out in his *White* dissent, the court in *Spiegel* distinguished that case from its upholding of an equally general formal notice of charges in *Jergeson v. Board of Trustees of School District No. 7*⁹¹ because there the accused teacher had failed to request a more specific or detailed statement from the administration.

If the *White* majority had been particularly concerned with rationalizing its result with Wyoming precedent, it could have differed with Justice Rose and refused to treat either of Dr. White's requests for clarification of the "student relationships" charge as a motion for a more definite statement under section 9-4-107(b), which would make *Spiegel* rather than *Jergeson* applicable. I suppose that the court could even have viewed the college's response as adequately detailed, given its view at that time of the case against Dr. White (which changed by the time the hearing rolled around). Or it could simply have held that the failure to respond accurately was error, but not *prejudicial* error in light of Dr. White's failure to move for a continuance to protect himself at the hearing. The majority, however, chose not to make any such fine distinctions. Indeed, it did not even mention *Powell* or *Spiegel*, and only very briefly discussed *Jergeson* to support its point that a general charge

90. 549 P.2d 1161, 1170-72 (Wyo. 1976).

91. 476 P.2d 481, 485 (Wyo. 1970).

“opening up a range of incidents” was sufficient when discovery procedures were available.⁹²

Perhaps tellingly, for substantive support for its holding the court relied almost⁹³ exclusively upon decisions from the federal system.⁹⁴ These and other federal cases have established the “general rule” that, despite deficiencies in an agency’s formal notice, and sometimes even its failure to respond to a motion to particularize, no subsequent challenge is permitted to consideration of issues actually litigated if there was actual notice and adequate opportunity to cure any surprise. Such “actual” notice may come when evidence on matters not previously noticed is introduced at the hearing. If the affected party is surprised, he is entitled to a continuance; if he moves for one and it is denied, he may claim prejudice on appeal. But, if he elects to proceed without requesting a continuance, and the prejudice to him is not markedly evident in the record, he has little chance of persuading a federal court to find reversible error.⁹⁵

Dr. White’s argument, however, was not simply that he was not given advance notice of charges raised for the first time at his hearing; his complaint was that the college actually *mised* him, by its responses to his specific requests for clarification, into believing that no other factual issues would be involved in his case. Even federal courts do not hesitate to reverse when convinced that, neither before nor during the hearing, was the accused actually apprised of the charges which ultimately formed the basis for the

92. 648 P.2d at 536.

93. *Id.* Besides its one-sentence discussion of *Jergeson*, the only other Wyoming cases cited on the notice question were *Glenn v. Board of County Comm’rs*, 440 P.2d 1 (Wyo. 1968), for its simple dicta that fair notice of the issues was required and the *Stagner* and *Rodin* decisions which, as explained in note 85 *supra*, were hardly on point at all.

94. 648 P.2d at 536-37 (citing *Kuhn v. Civil Aeronautics Bd.*, 183 F.2d 839 (D.C. Cir. 1950); *Montana Power Co. v. Federal Power Comm’n*, 185 F.2d 491 (D.C. Cir. 1950)). The court also cited decisions from other states which involved applications of their equivalents of Rule 15(b) of the Wyoming Rules of Civil Procedure to allow admission of evidence outside the pleadings in civil cases.

95. See discussion and cases cited in B. SCHWARTZ, *supra* note 9, at § 97; 1 DAVIS, *supra* note 21, at §§ 8.04-8.05 (1958 & Supp. 1970, 1976); 3 DAVIS, *supra* note 21, at § 14.11 (2d ed. 1980).

agency decision.⁹⁶ Although Dr. White's problem was not exactly of this nature, the fact that the Wyoming Supreme Court chose not to analogize his case to those in this category may indicate how committed it now is to applying the general rule — even, perhaps, to a harsh result. On the other hand, the decision may just show how the court can depart from its own precedent on procedure when it has little sympathy for an appellant on the merits.

If the latter point of view is correct, then, in a more "appealing" case, the court may return to the pattern of the *Powell* and *Spiegel* decisions and hold agencies to a greater responsibility for substance and accuracy in their pre-hearing notices than this case would indicate. For this reason alone, agency counsel would be unwise to take *White* as an invitation to sloppiness, vagueness, or indifference in drafting notices to affected parties. Even if this decision represents the "new" Wyoming law on the subject, as we should assume that it does, agencies will henceforth pay a price for any lack of concern with pre-hearing notice — the complications of discovery, the interruptions of continuances, and the delays of both. This is due to the messages clearly conveyed by this case to counsel for private parties.

Most obviously, the decision means that counsel cannot count on getting administrative decisions overturned on appeal due to gaps in whatever notice and "more definite" statements are furnished prior to the hearing. From another perspective, this means that private counsel interested in being fully prepared to meet the government's case should not rely exclusively on the formal notice received. The burden is quite clearly on the defending party — both to prepare his case and to preserve error on appeal — to use all the means at his disposal to ferret out the details of the case against him, and his attorney must act accordingly:

96. Typically, the agency is reversed if, after complaining of certain violations in its notice and presenting its case on such charges at the hearing, it then bases its decision on other grounds. See, e.g., *NLRB v. Johnson*, 322 F.2d 216 (6th Cir. 1963); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2d Cir. 1966); *L & M Indus., Inc. v. Kenter*, 458 F.2d 968 (2d Cir. 1972).

1. He should move, and move repeatedly if necessary, for a more definite and detailed statement under section 9-4-107(b) of the Wyoming Administrative Procedure Act.⁹⁷

2. He must utilize, to the extent the size of the case justifies it, the civil discovery procedures incorporated by section 9-4-107(g) and (h), and go to court if necessary to force compliance.

3. He should at least obtain, well in advance of the hearing, a list of witnesses whom the agency plans to call and determine the nature of their proposed testimony.

4. Above all, if evidence on an issue of which his client had no prior notice is introduced at the hearing, he must make a forceful⁹⁸ objection right then on the basis of surprise, state for the record the prejudice caused by the surprise, and move for a continuance for the time needed to adequately prepare to meet the new evidence. If the motion is not granted then, he should renew it at the end of the state's case and again, if necessary, at the close of all the evidence. Private counsel simply cannot afford to be in such a hurry to conclude the hearing that he waives his client's claim of prejudice from surprise.⁹⁹

In essence, counsel to a party to a contested case proceeding must treat it just as seriously as a civil action in court — because the consequences are usually every bit as great.

CITY OF EVANSTON V. WHIRL INN

Another important administrative law decision written by Justice Raper,¹⁰⁰ and one which did not even prompt a

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97. If such a motion is denied, or inaccurately responded to, to the client's prejudice, it is then possible to argue that *Spiegel* applies rather than *White*.
98. As counsel for Dr. White suggested in his brief, perhaps an attorney should now "bring with him to the hearing a large club with which to beat on the table or on the Chairman when counsel wishes to emphasize his objections." Brief in Support of Appellant's Petition for Rehearing, *supra* note 80, at 4.
99. If Wyoming follows the federal rule, a motion for a continuance (and a request for a subpoena) is similarly required to protect a party's rights to confrontation and cross-examination when hearsay evidence is admitted against him in an administrative hearing. See *Richardson v. Perales*, 402 U.S. 389 (1971).
100. Along with *White v. Board of Trustees*, discussed above in text, and *State v. Fremont Energy Corp.*, summarized above in note 2.

dissent by Chief Justice Rose,¹⁰¹ is *City of Evanston v. Whirl Inn*.¹⁰² In this case, the Evanston city council, after a relatively informal hearing on renewal of Whirl Inn's retail liquor license, decided to restrict its license to allow the sale of alcoholic beverages from only its drive-up window,¹⁰³ effectively shutting down its lounge and disco. On appeal, the district court conducted a trial "de novo," with an advisory jury, following which it reversed the city's decision and ordered the license renewed in full without the limitations. The city appealed to the supreme court, complaining that the trial court erred in holding that the council acted arbitrarily and capriciously in restricting the license, that the court exceeded the proper scope and standard of review in reaching such a decision, and that the court was incorrect in concluding that the holder of a retail liquor license had a property or liberty interest in its renewal entitling the holder to procedural due process before the license could be diminished.¹⁰⁴ Rejecting the first two of these contentions, the supreme court affirmed the district court without the necessity of considering the due process issue. On its way to this result, the supreme court made some interesting and significant law.

In considering the effect of the statutory provision for trial de novo upon appeal of a refusal to renew a liquor license,¹⁰⁵ the court's first step was to severely limit the

101. Chief Justice Rose did, of course, dissent in *RMOGA* and *White*. On the other hand, he wrote the opinion for the court in *Wyoming State Dep't of Educ. v. Barber*, summarized above in note 2.

102. 647 P.2d 1378 (Wyo. 1982).

103. Both parties, in their briefs, stated that the city, conceding a mistake, actually meant also to permit sales inside the liquor store itself, but still not in the much larger lounge and disco areas. Brief of Appellant at 7, *City of Evanston v. Whirl Inn*, 647 P.2d 1378 (Wyo. 1982); Brief of Appellee at 9, *City of Evanston v. Whirl Inn*, 647 P.2d 1378 (Wyo. 1982).

104. Other issues of little significance to administrative law were also raised by the appellant and summarily disposed of by the supreme court. See 647 P.2d at 1387-89.

105. Upon an appeal the person applying for a license and claiming renewal preference shall be named as plaintiff, with the licensing authority named as defendant. During the pendency of an appeal, a renewal license denied by a licensing authority shall not be granted to any other applicant. Upon notice of appeal the clerk shall transmit to the clerk of the district court a certified copy of the application, of each protest if any, and of the minutes recording the decision appealed from. *The appeal shall be heard as a trial de novo with evidence taken and other proceedings had as in the trial of civil actions.* The court may accept and consider as part

statute's applicability. Without any explanation or citation to authority,¹⁰⁶ it stated: "With the adoption of the Wyoming Administrative Procedure Act (WAPA) in 1965, the trial de novo provisions were replaced and all judicial review of an administrative agency's action was required to be conducted in accord with what is now § 9-4-114(c), W.S. 1977, Cum. Supp. 1982."¹⁰⁷ The court, however, went on to explain that, since 1979, the governing body of a city or town has not been an "agency" under the Wyoming APA.¹⁰⁸ Therefore, trial de novo under section 12-4-104(f) was still required on appeal of a city council's adverse decision on the renewal of a liquor license.¹⁰⁹ Precedent and separation of powers principles, however, were applied by the court to mean that, although the reviewing court had to conduct a *trial de novo*, it was not to make a *decision de novo*, but was instead to defer to the agency's decision unless, based on the record and the evidence admitted in court, that decision was found to be "arbitrary" or "capricious" or "an abuse of discretion."¹¹⁰ In addressing the city's challenge to the lower court's finding that the city council did act in such an arbitrary and capricious manner, the supreme court first confined its power to review such a finding by the trial court by treating it as a "finding of fact." Its review so confined, the court then concluded that there was sufficient evidence to sustain the trial court's finding of arbitrariness and unreasonableness.¹¹¹ At this point, the supreme court had provided Whirl Inn with a complete victory in retaining its license, and, therefore, deemed it unnecessary to reach the administrative due process issue raised.¹¹²

of the record certified documents forwarded to the court by the clerk of the licensing authority. The case shall be heard promptly and the procedure shall conform to the Wyoming Rules of Civil Procedure unless other procedures are provided for or required.

WYO. STAT. § 12-4-104(f) (1977) (emphasis added).

106. The only reference at all was by footnote to section 9-4-114(c), the subsection of the judicial review section of the APA which expresses the standards and limited scope for judicial review of agency action. See 647 P.2d at 1384 n.6.

107. 647 P.2d at 1384.

108. See Wyo. STAT. § 9-4-101(b) (i) (1977 & Supp. 1982).

109. 647 P.2d at 1385.

110. *Id.* at 1382-84, 1385-86.

111. *Id.* at 1386-87.

112. *Id.* at 1387.

As one can imagine, a good deal of hard reasoning and some significant implications lie between the lines of this simplified summary of the decision. A more detailed inspection of each of the major holdings is, therefore, in order.

The holding of greatest consequence to Wyoming practice may well be the one sentence in which the court states that all statutory provisions for review of agency action by trials de novo have been replaced by the judicial review provisions of the Wyoming APA. Since the court made this statement while in the process of analyzing the proper application of a trial de novo requirement to a body no longer subject to the APA, it is perhaps understandable that it would not choose to elaborate upon the matter. It seems odd, however, that it failed even to cite the prior Wyoming decision in which this issue had been analyzed and decided: *City of Casper v. Regan*.¹¹³

At issue in the *City of Casper* case was the propriety of de novo review of a decision by the city's Civil Service Commission to discharge a fire department employee.¹¹⁴ Section 15.1-294 of the Wyoming Statutes at that time expressly provided for review of such commission termination decisions by "trial de novo" in the district court. The Wyoming APA had, however, apparently¹¹⁵ become effective prior to the commencement of the proceedings; and, to the court, this made all the difference. It engaged in a precise and literal reading of section 9-4-114 of the Administrative Procedure Act and the predecessor to Rule 12 of the Wyo-

113. 433 P.2d 834 (Wyo. 1967).

114. As the court discussed in *Whirl Inn*, at that time the Wyoming APA applied on its face to such city commissions. As also there discussed, now the APA does not apply to "the governing body of a city or town." 647 P.2d at 1384-85. Wyo. STAT. § 9-4-101(b) (i) (1977 & Supp. 1982) (emphasis added). This seems to leave the APA applicable to action by any municipal commission, or other city agency, other than the "governing body"—i.e., the city council—*itself*. Perhaps in recognition of this remaining application of the APA to city commissions, the statutory provision at issue in *City of Casper* was amended in 1980 to expressly provide for limited APA review rather than trial de novo. See Wyo. STAT. § 5-5-113 (1977).

115. The court did not discuss, as it did in *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, 464 P.2d 533, 542 (Wyo. 1970), whether or not there were "pending proceedings," making the APA inapplicable; therefore, one should assume that there were not.

ming Rules of Appellate Procedure,¹¹⁶ to conclude that the statutory requirement for trial de novo had been preempted and that the lower court had erred in not following the restricted procedures and limited scope of review provided in the APA and the Rule.

Reading the last sentence of section 9-4-114(a), in *City of Casper* the court noted its mandate that the procedure to be followed by a district court in reviewing agency action "shall be in accordance with rules heretofore or hereinafter adopted by the Wyoming Supreme Court." Section 9-4-114(b) followed with an express statement that "[t]he rules adopted by the supreme court under this provision may supercede existing statutory provisions." That the supreme court had fully exercised this preemptive power was clearly evidenced by the third sentence in Rule 12.03: "All appeals from administrative agencies and all proceedings for trials de novo reviewing administrative action shall be governed by this rule." Rule 12.09 states that the court's review is to be limited to a determination of the matters specified in section 9-4-114(c). Rules 12.07 and 12.08 strictly limit the circumstances under which new evidence may be received by the reviewing court, and no exception is made for circumstances in which previously there existed a right to trial de novo. Upon reading these provisions of the APA and Rule 12 in logical sequence, the result was clear: preexisting statutory rights to trial de novo were replaced by the limited judicial review on the record specified in section 9-4-114(c).

Perhaps the APA and Rule 12 could have been read differently than in *City of Casper*.¹¹⁷ Perhaps the general

116. Section 9-4-114 has been amended since the *City of Casper* case was decided, but in no respect relevant to the decision or this analysis.

The supreme court's rules governing judicial review of agency action were at that time contained in Rule 72.1 of the Wyoming Rules of Civil Procedure. In 1978, all provisions of Rule 72.1 relevant to this discussion were transferred *verbatim* to various paragraphs in Wyo. R. APP. P. 12.01-12.12.

In the interest of clarity, the court's reading of subsections (c), (g), (h), and (i) of old Rule 72.1 in *City of Casper* will be treated as construction of Wyo. R. APP. P. 12.03, 12.07, 12.08, and 12.09.

117. *E.g.*, Rule 12.03 could be read to distinguish between "appeals" and trials de novo and merely provide for both to be initiated by petitions for review, with Rules 12.07, 12.08, and 12.09 only applying to appeals (admittedly a strained construction).

repealing clause which accompanied passage of the Wyoming APA gave no clear indication of such legislative intent.¹¹⁸ Nevertheless, the construction given these provisions by the court in *City of Casper* is abundantly reasonable and provides a much more solid basis for this rule of state law than the one-sentence statement in *Whirl Inn* would indicate.

Inferential support for this rule can be found in the fact that when the Wyoming Legislature amended section 9-4-114(c) in 1979 to track the scope of review in the federal APA, 5 U.S.C. § 706, it took everything from the federal rule *except* paragraph 2(F), directing the federal reviewing court to vacate agency action found to be "unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court." Perhaps also indicative of the different legislative approach in Wyoming was the absence, from the outset, in the Wyoming APA of anything similar to the recognition of trials de novo found in section 554(a)(1) of the federal Administrative Procedure Act or the preference for special statutory judicial review procedures contained in section 703 thereof.¹¹⁹ (This opposite rule in the federal system should be remembered by counsel when practicing in that jurisdiction.)

118. 1965 Wyo. Sess. Laws Ch. 108, § 17 (annotation to § 9-4-115 of the Wyoming APA), reads:

All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed, but this repeal does not affect pending proceedings. Provided, however, to the extent not inconsistent herewith existing procedures provided for by statute shall be deemed preserved and the procedures provided for by this act shall be in addition and supplementary thereto.

In *Wheatland Irrigation Dist. v. Pioneer Canal Co.*, the court interpreted the "pending proceedings" exception in the repealing clause to require statutory trial de novo review of a Board of Control abandonment proceeding already underway when the APA became effective on January 1, 1966. 464 P.2d at 542.

The court stated, however, that the decision would "make little contribution to the body of law of this state for the reason it is inconceivable that the Administrative Procedure Act . . . would not now be applicable to any agency proceeding." Although this statement reaffirms the *City of Casper* holding, it should be noted that the specific statute in issue in *Wheatland Irrigation District* was repealed in 1973 to be replaced by provisions not expressly providing for trials de novo from Board decisions in water rights abandonment proceedings. See WYO. STAT. §§ 41-3-401 to -402 (1977).

119. See the first sentence of 5 U.S.C. § 703 (1976) (reproduced in note 42 above).

Given the large number of statutes still on the books which call for review by trial de novo¹²⁰ — expressly or by use of language to the same effect — it is, as a matter of policy, desirable that such a disordered and unpredictable array of instances of special judicial attention be abolished in favor of the single, deferential form and standard of review under the APA. I am convinced, now that I have read *City of Casper*, that this is what the supreme court intended when it adopted the predecessor to Rule 12. I would feel better, however, if the court had reaffirmed this holding with a little more fanfare in *Whirl Inn*. The danger, of course, is that counsel will not be aware of this holding, will be involved in one of the sixteen or so proceedings for which trial de novo is ostensibly provided on review, will read the relevant statute, and will not take seriously his participation at the agency level, relying to his detriment on the opportunity to make his case in the reviewing court.

120. See WYO. STAT. § 12-4-104(f) (1977) (appeal from denial of liquor license renewal); WYO. STAT. §§ 36-2-206, 208 and 210 (1977) (appeal from decision by Board of Land Commissioners); WYO. STAT. § 30-5-113(b), (e) (1977) (appeal of rule, order, or decision of the Oil and Gas Conservation Commission); WYO. STAT. § 31-7-133 (1977) (review of decisions of the Motor Vehicle Division regarding drivers' licenses); WYO. STAT. § 39-1-306 (1977) (review of any order of the Board of Equalization); WYO. STAT. § 17-1-1001 (1977) (review of Secretary of State's failure to approve any documents under the Wyoming Business Corporation Act or revocation of authority of foreign corporations to transact business); WYO. STAT. § 30-2-312 (1977) (appeals from the decisions of the State Inspector of Mines regarding adoption of rules); WYO. STAT. § 30-3-411 (1977) (appeals from the State Inspector of Coal Mines from decisions regarding the adoption of rules); WYO. STAT. § 30-4-207 (1977) (appeals from orders of the State Inspector of Mines); WYO. STAT. § 33-16-312 (1977) (appeals from decisions of the State Board of Embalming regarding the revocation or suspension of funeral directors' and undertakers' licenses); WYO. STAT. § 33-23-110(d) (1977) (appeals from decisions of the Board of Examiners in Optometry regarding the revocation, suspension, or refusal to renew licenses); WYO. STAT. § 33-25-112(d) (1977) (appeals from decisions of the Board of Physical Therapy regarding the denial, suspension, or revocation of licenses); WYO. STAT. § 33-27-109(d) (1977) (appeals from the Board of Psychologist Examiners' decisions regarding the suspension or revocation of licenses); WYO. STAT. § 35-2-107 (1977) (review of all decisions of the State Department of Public Health regarding licensing of hospitals and related institutions); WYO. STAT. § 41-8-119 (1977) (appeal from orders of the Boards of Directors of Watershed Improvement Districts).

Two statutes are worded in terms requiring the procedures on appeal to be "the same as that provided by law in the cases of appeals from a justice court to the district court." WYO. STAT. § 33-10-111 (1977) (appeals from the decisions of the Board of Chiropractic Examiners regarding the refusal, revocation, or suspension of licenses); WYO. STAT. § 41-4-406 (1977) (appeals from decisions of the Board of Control). When, in 1975, new rules of civil and criminal procedure for justice of peace courts took effect, in them were provisions eliminating the preexisting rights to trial de novo on appeal to district courts. See WYO. R. CRIM. P. J. C. 23; WYO. R. CIV. P. J. C. 7.

Or, the district judge and opposing counsel may make the same assumption as to the availability of de novo review, and a decision may be made only to be reversed by the supreme court for failure to adhere to the APA and Rule 12. In either case, this remains an undesirable trap for the unwary. Many significant decisions by agencies with very substantial powers — e.g., the Board of Land Commissioners, the Oil and Gas Conservation Commission, the Board of Equalization, and the licensing boards for many professions¹²¹ — are, on the faces of their particular statutes, subject to de novo review. The best solution would be for the legislature, assuming it agrees with the supreme court as to policy, to amend each and every existing statutory provision for trial de novo, or anything similar, to provide for “review pursuant to the Wyoming APA, Section 9-4-114, and Rule 12, Wyo. R. App. P.”¹²² On the other hand, the Wyoming Legislature might well decide — in a few or all of the existing cases — that it does indeed prefer review to be by trial de novo. In this event, the legislature certainly should have the authority to override the court’s rulemaking and interpretation of section 9-4-114, and expressly insist upon de novo review in whatever instances it wishes.¹²³

121. See *supra* note 22.

122. In the absence of such legislative action, I hope that this article comes to the attention of every Wyoming lawyer.

123. The stickiest issue which can arise under the *City of Casper* and *Whirl Inn* holdings is the effect of section 9-4-114 and Rule 12 on statutory provisions for trial de novo enacted after the APA and the predecessor to Rule 12 became effective (on January 1 and March 21, 1966, respectively), but which do not expressly override the APA or the appellate rule. Only two statutes presenting this problem have come to the author’s attention: WYO. STAT. § 31-7-133 (1977) (review of decisions of the Motor Vehicle Division of the State Tax Commission regarding driver’s licenses), and WYO. STAT. § 39-1-306 (1977) (review of any order issued by the Board of Equalization — or its alter ego, the State Tax Commission). It is unclear whether this last-mentioned law controls or another 1973 version of the same which does not provide for a trial de novo. See WYO. STAT. § 39-1-306 (1977 & Supp. 1982); *Dept. of Revenue and Taxation v. Irvine*, 589 P.2d 1295, 1300 n.6 (Wyo. 1979).

The problem was not addressed in *Irvine*, but it may well arise. Its resolution should turn on the always difficult question of legislative intent. To avoid what is often a futile inquiry, the court could simply apply the rules of statutory construction that the later statute prevails over the earlier and that specific legislation controls over the more general. Application of either rule would seem to favor giving effect to the statutory provisions for de novo review. Such a result would be consistent with a literal reading of the last sentence in section 9-4-114(b): “The rules adopted by the supreme court under this provision may supercede existing statutory provisions.” WYO. STAT. § 9-4-114(b) (1977) (emphasis added).

Hopefully, however, the legislature will see the wisdom of limited judicial review and a single form of action and refrain from this latter course.

All of the preceding analysis of APA preemption of statutory de novo review was, of course, irrelevant to the court's decision in *Whirl Inn*, because, since 1979, city councils have not been "agencies" whose actions are subject to the APA. The statutory provision in section 12-4-104(f) of the Wyoming Statutes for trial de novo upon appeal of the denial of renewal of a liquor license, therefore, was still applicable. The court made clear, however, that, despite the language of the statute,¹²⁴ this was not to be a *decision de novo*. An unwavering line of Wyoming case law¹²⁵ had established the proposition that, although the district court was to admit new evidence and otherwise conduct a "trial," when presented with such a statutory provision for de novo review, it was not to make an independent decision. Instead the court was to consider all the evidence, both that introduced at trial and that contained in the administrative record, in order to decide whether the licensing authority acted illegally or arbitrarily, whether it abused its discretion, and whether its decision was procured by fraud.¹²⁶

This construction the court, as it had indicated occasionally in the past, held to be mandated by the separation of powers doctrine embodied in article 2, section 1, of the Wyoming Constitution.¹²⁷ Although such an application of the separation of powers doctrine is not without precedent,¹²⁸

124. See *supra* note 105.

125. The court relied primarily on *Howard v. Lindmier*, 67 Wyo. 78, 214 P.2d 737 (1950), but also cited *L. L. Sheep Co. v. Potter*, 67 Wyo. 348, 224 P.2d 496 (1950). It could have gone on and cited other such cases, standing for the same proposition, also involving de novo review of decisions of the Board of Land Commissioners, e.g.: *Rayburne v. Queen*, 78 Wyo. 359, 326 P.2d 1108 (1958); *Banzhaf v. Swan Co.*, 60 Wyo. 201, 148 P.2d 225 (1944); *Miller v. Hurley*, 37 Wyo. 344, 262 P.2d 238 (1927); *Cooper v. McCormick*, 10 Wyo. 379, 69 P. 301 (1902).

The same holding has been consistently expressed when statutes providing for trials de novo from decisions of other state agencies have been involved (prior to passage of the APA, of course)—e.g., the Board of Equalization in *J. Ray McDermott & Co. v. Hudson*, 348 P.2d 73 (Wyo. 1960).

126. *City of Evanston v. Whirl Inn*, 647 P.2d at 1384-86 (Wyo. 1982).

127. *Id.*

128. See 2 AM.JUR.2d *Administrative Law* §§ 579, 613 (1962).

it is somewhat curious; and why the court invoked it when it could have based its holding solely on statutory construction is not altogether clear. Regardless of its basis, this application of the statute does put the district court in the position of performing a hybrid function and certainly gives it an unusual perspective on the council's decision: the reviewing court determines whether the council acted arbitrarily or abused its discretion in light of all kinds of evidence that may never have been brought to the council's attention. It is difficult to see how this helps to preserve the separation of powers, but perhaps the court feels that it strikes some sort of a happy medium between limited review confined to the record and an actual trial and judgment *de novo*. In any event, the Wyoming Supreme Court has followed this approach for a half century in one context or another, so its application to this context is hardly startling.

So far as I can tell, however, the impact of this aspect of the decision is presently confined to its precise context: judicial review initiated by an aggrieved applicant for renewal of a liquor license.¹²⁹ This is because section 12-4-104(f) is the only existing statutory provision that I have found which gives a right to trial *de novo* from the decision of an administrative body which is not an "agency" under the Wyoming APA¹³⁰ — in this case "the governing body of a city or town." In this particular context, therefore, it could be said that city councils had greater discretion before they were exempted from the APA.

As to the precise standard of review to be applied by the trial court, the supreme court was not terribly precise. The statement in the opinion probably destined to be most often quoted on the point is "when an appeal from an administrative agency is heard as a trial *de novo* in district court, the only issues that the court may properly consider are whether the agency acted illegally or arbitrarily exercised its discretion or whether the agency's action was procured

129. If the reasoning used in note 123 *supra* is adopted, this hybrid form of review would also be required (by separation of powers) for post-APA statutes providing for *de novo* review.

130. Wyo. STAT. § 9-4-114(b) (i) (1977 & Supp. 1982).

by fraud.”¹³¹ The court seemed to equate the often-used phrase “abuse of discretion” with arbitrary exercise of discretion, and, apparently feeling that it was helpful, went on to quote from the attempt in *Howard v. Lindmier* to define abuse of discretion: “wrong and unreasonable.”¹³² Elsewhere in *Howard v. Lindmier*, that court had stated that abuse of discretion should be found if the reviewing court determined that the agency “might not reasonably, under the same set of facts [including those proven in court], have come to a different conclusion.”¹³³ This, of course, sounds suspiciously like the “substantial evidence” standard of review. Indeed, in *Rayburne v. Queen* this statement in *Howard* was explained to mean just that:

This is another way of saying that the findings of the board if supported by substantial evidence should be approved by the court on the trial de novo, and we think that such substantial evidence may consist of competent testimony either (a) taken before the board and properly preserved or (b) adduced in the trial before the court. . . .¹³⁴

In sum, all this verbiage seems to add up to virtually the same standards for judicial review provided in section 9-4-114(c) (ii) of the Wyoming Administrative Procedure Act. In fact, the court seemed to say as much when it equated the pre- and post-APA standards for review of agency decisions subject to statutory provisions for trial de novo, saying that the biggest change made by the APA “was not in the issues presented to the reviewing court,” but “in what evidence the reviewing court could consider on appeal.”¹³⁵

Of course, the introduction of new evidence at trial can substantially affect the application of the standard of review. When an agency decision is being reviewed *on the record*,

131. 647 P.2d at 1385-86 (Wyo. 1982).

132. *Id.* at 1386 (quoting *Howard v. Lindmier*, 67 Wyo. 78, 214 P.2d 737, 740 (1950)).

133. *Howard v. Lindmier*, 214 P.2d at 739 (1950).

134. 326 P.2d at 1109 (1958).

135. *City of Evanston v. Whirl Inn*, 647 P.2d at 1384 (Wyo. 1982).

even the substantial evidence rule¹³⁶ is interpreted not to require very "substantial" evidence at all to support a decision.¹³⁷ On the other hand, when the court's perspective is enhanced by all the relevant evidence that the parties might see fit to introduce at trial,¹³⁸ it seems quite likely that, as a practical matter, the court's review will become quite a bit less deferential. Indeed from the description of the proceedings below by the supreme court¹³⁹ and in the briefs on appeal,¹⁴⁰ the strong showing made in the trial court by Whirl Inn, and the emphasis which the judge placed on the evidence brought before him and his advisory jury, it is easy to see how the tape-recorded — but untranscribed¹⁴¹ — record before the city council could have come to seem "insubstantial" by comparison.

As if such an enhanced perspective did not give the "reviewing" court enough independence, the supreme court held that its conclusion that the city's action was unreasonable and arbitrary and, therefore, an abuse of discretion was a *finding of fact* not to be disturbed if supported by "sufficient evidence." "The judgment of the district court must be sustained unless it was clearly erroneous or contrary to the great weight of the evidence."¹⁴² The court acknowledged its oft-repeated statement that in its review of a district court decision on appeal from an administrative agency, "the deference owed the fact finder's determination of fact belongs to the administrative agency, not to the district court."¹⁴³ Here it decided, however, that what was normally

136. In theory (although probably not in application), the substantial evidence rule justifies somewhat less deference than the general "arbitrary and capricious" standard of review. See B. SCHWARTZ, *supra* note 9, at §§ 210, 215.

137. "By substantial evidence' we are referring to relevant evidence which a reasonable mind might accept as supporting the agency's conclusion, although it means more than a mere scintilla of evidence." Wyoming State Dep't of Educ. v. Barber, 649 P.2d 681, 689 (Wyo. 1982).

138. The court, in fact, held that the Wyoming Rules of Evidence, particularly Rule 402, providing for admission of all relevant evidence (not otherwise barred by statute or rule), were applicable to such trials de novo. See City of Evanston v. Whirl Inn, 647 P.2d at 1388 (Wyo. 1982).

139. *Id.* at 1386-87.

140. Briefs of Appellant and Appellee, *supra* note 103.

141. See 647 P.2d at 1381-82 n.3, 4.

142. *Id.* at 1386.

143. *Id.* (quoting Wyoming Pub. Serv. Comm'n v. Hopkins, 602 P.2d 374, 377 (Wyo. 1979)).

a question of law — the correct application of the standard of review — was a question of fact when the district court sat not as an appellate court, but as a *trial* court. After giving such deference to the trial judge's conclusion, it was hardly surprising that the supreme court affirmed.

Thus, the supreme court has given the district courts a version of the old "first-the-bad-news-now-the-good-news" routine. The power to make a *decision* de novo, first seemingly taken from the trial court by the supreme court's application of the doctrine of separation of powers, was reinvigorated, although in an unaccustomed form, through the court's invitation to the trial court to judge the council's decision as it sees fit — so long as it casts its conclusion in the language of limited review and has some reasonable basis for its finding.

In light of this opinion, how should counsel represent an applicant for renewal of a liquor license? Quite obviously, the answer depends on who is the licensing authority: the city or the county. If it is the county, the licensee must take his very best shot in the renewal hearing before the county commissioners,¹⁴⁴ because the *City of Casper* holding, reiterated in *Whirl Inn*, confines him to judicial review on the record under the restricted standards of the APA. Indeed, since it is a "contested case,"¹⁴⁵ he will have no opportunity to introduce additional evidence in court.¹⁴⁶ On the other hand, the fact that it is a contested case entitles the renewal

144. His counsel should ask for a continuance if unanticipated opposition surfaces in order to prepare fully to meet the challenge. See discussion of this critical point in analysis of the *White* case herein.

145. "'Contested case' means a proceeding including but not restricted to rate-making, price fixing and licensing, in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." WYO. STAT. § 9-4-101(b) (ii) (1977). A proceeding involving renewal of a liquor license by the county certainly fits this definition. Section 12-4-104(c) of the Wyoming Statutes gives a renewal applicant a "preference right;" and subsections (a) and (b) to this section require this legal right to be determined after a hearing. WYO. STAT. § 12-4-104 (a), (b) and (c) (1977). See *Glenn v. Board of County Comm'rs*, 440 P.2d 1 (1968).

146. Except "in cases involving fraud or involving misconduct of some person engaged in the administration of the law affecting the decision." WYO. R. APP. P. 12.08.

Rule 12.07 of the Wyoming Rules of Appellate Procedure allows the court to take evidence on required matter not preserved by the agency and of which there is no record.

applicant to the full rights of adversarial participation at the agency level protected by sections 9-4-107 through 113 of the Wyoming Administrative Procedure Act. The message is to utilize these APA provisions to the fullest extent a given case will justify.¹⁴⁷

When the *city* is the licensing authority, however, counsel for the renewal applicant can afford to save some of his energy for the *de novo* review his client is entitled to if he loses. Indeed, because the APA and, therefore, its contested case provisions do not apply, he will have no procedural rights before the city council that are not required by procedural due process,¹⁴⁸ beyond those few contained in the liquor licensing statutes¹⁴⁹ and whatever procedures are afforded by the council itself. If the license is not renewed, the trial *de novo* should be taken just as seriously as any other trial — by *all* parties. Counsel for the city obviously cannot rely on the record below to sustain the council's decision.¹⁵⁰ Attorneys for all parties should assume that the trial judge is going to be more strongly influenced by what he hears in court than by what is on the record. He is re-

147. The same advice, of course, applies whenever a statutory right to *de novo* review has been preempted by the APA. See *supra* note 120.

148. Although the court seems to assume that the council hearing can be quite informal, *City of Evanston v. Whirl Inn*, 647 P.2d at 1385 (Wyo. 1982), it is the author's opinion that the "preference right" conferred on renewal applicants by section 12-4-104(c) is a "property" right under the "entitlement" analysis of federal constitutional law. See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978); *Matthews v. Eldridge*, 424 U.S. 319 (1976); *Goss v. Lopez*, 419 U.S. 565 (1975); *Board of Regents v. Roth*, 408 U.S. 564 (1972). It must be noted, however, that in *Whirl Inn* the court expressly refused to decide the "property right question," 647 P.2d at 1378, and that it was also avoided in the only other case before the Wyoming Supreme Court to raise the issue, *Whitesides v. Council of Cheyenne*, 78 Wyo. 80, 319 P.2d 520 (Wyo. 1957). The Wyoming Supreme Court, of course, has the power to construe the statute either to confer or not to confer a property right, *Bishop v. Wood*, 426 U.S. 341 (1976); and, until it has spoken, the question is up in the air.

Assuming that a property right in a renewal exists, the remaining question would be "what process is due." Using the three-part balancing test applied by the United States Supreme Court in such cases as *Memphis Light, Gas and Water Div. v. Craft* and *Matthews v. Eldridge*, it is the author's opinion that the process a renewal applicant is due before a city council should approximate the basic procedures required for a "contested case."

149. Basically, these consist of public notice of the renewal hearing, holding of the hearing at least thirty days prior to the expiration date of the present license, and requiring certain findings by the council if the renewal is denied. See WYO. STAT. § 12-4-104(a) and (b) (1977).

150. But he should have ensured that the entire hearing before the city council was recorded and transcribed for the appeal.

quired to apply the standard of limited review discussed above; but, because his decision is treated by the supreme court as a factfinding, each counsel is well advised to approach the trial as if he must convince the judge of the merits of his position — because this may, as a practical matter, be true.

WALKER V. BOARD OF COUNTY COMMISSIONERS

Saved until last for discussion is the first significant administrative law decision of the April, 1982, term.¹⁵¹ Perhaps the supreme court was not fully in shape so early in the season and — like other Wyoming teams on occasion — still needed to get a few kinks out.¹⁵² Whatever the reason, the court's opinion in *Walker v. Board of County Commissioners* does merit a critical examination.

This controversy was introduced into the administrative system when both the Walkers and the Gustafsons applied for newly-available retail liquor licenses for their competing businesses in the small incorporated community of Centennial in Albany County. Following a consolidated hearing on the two permit applications,¹⁵³ the Board of County Commissioners decided to issue only one license and to issue it to the Gustafsons.¹⁵⁴ The Walkers petitioned the district court to review both the denial of their application and the granting of that of their competitor. The district court sustained the decision of the county commissioners, holding that neither procedural due process nor the “contested case” require-

151. *Walker v. Board of County Comm'rs*, 644 P.2d 772 (Wyo. 1982).

152. Certainly, any difference in quality should not reflect adversely on the author of the *Walker* opinion; Justice Rooney also wrote one of the best-reasoned administrative law decisions of the term, *Rocky Mountain Oil and Gas Ass'n v. State*, 645 P.2d 1163 (Wyo. 1982), discussed above.

153. This is the preferred (if not the required) procedure where, as a practical matter, two or more pending applications are mutually exclusive. See *Ashbacher Radio Corp. v. FCC*, 326 U.S. 327 (1945); *Pollack v. Simonson*, 350 F.2d 740 (D.C. Cir. 1965).

154. After an initial, relatively informal, hearing and decision adverse to the Walkers, the Board of County Commissioners, pursuant to their “Rules of Practice” granted the Walkers’ request for a hearing in accordance with the contested case procedures of the APA. Following this hearing, the Board entered findings of fact and conclusions of law which resulted in again denying Walkers’ application and issuing the license to the Gustafsons. 644 P.2d at 776; Brief of Appellants at 9-11, *Walker v. Board of County Comm'rs*, 644 P.2d 772 (Wyo. 1982); Brief of Appellees (Gustafsons) at 7, *Walker v. Board of County Comm'rs*, 644 P.2d 772 (Wyo. 1982).

ments of the Wyoming APA applied to the commissioners' action on the applications for initial licenses and that, in any event, the Walkers had no right of appeal to the court from either the denial of their application or the granting of the Gustafsons'. The Walkers appealed to the Wyoming Supreme Court, which affirmed the lower court's decision.¹⁵⁵

The supreme court's opinion can be described most charitably and succinctly as holding that, because an aggrieved applicant for an initial liquor license has no right of appeal from its denial, a competitor-applicant whose only complaint on appeal is that the license should have been issued instead to him has no standing to appeal. Unfortunately, the majority's opinion is not so brief and restricted. On its way to this result, the court felt the need to survey virtually all the various circumstances in which liquor licensing cases can arise and be appealed.¹⁵⁶ Not surprisingly, within this dicta lies the trouble. Although, in the context of county licensing, the court correctly held (1) that an applicant denied an initial liquor license has no right of appeal,¹⁵⁷ (2) that a liquor licensee denied renewal of his license has a right of appeal,¹⁵⁸ and (3) that people residing in the vicinity of the proposed license and residents of the affected county have the right to participate in renewal and initial licensing hearings conducted according to the APA and to appeal in order to protect their "welfare" and "desires"¹⁵⁹ — it left the *incorrect* impression that (1) a renewal

155. An unrelated issue in the case concerned the issuance of a dance hall license to the Gustafsons. First the district court and then the supreme court held that this issue had become moot when the dance hall license was not renewed. 644 P.2d at 773-74.

156. *Id.* at 774-75.

157. *Id.* at 775. WYO. STAT. § 12-4-104(e) (1977) provides:

An applicant for a renewal license or permit may appeal to the district court from an adverse decision by the licensing authority. No applicant for a new license shall have a right of appeal from the decision of the licensing authority denying an application.

158. 644 P.2d at 775; WYO. STAT. § 12-4-104(e) (1977). Of course, as held in *Whirl Inn*, the scope of the appellate review depends on whether the city or the county is the licensing authority: if it is the city, then review is "modified de novo;" if the county, then "on the record" pursuant to the APA. See *supra* notes 113-40 and accompanying text.

159. 644 P.2d at 775. The court reached this conclusion from a combined reading of section 9-4-114(a) of the Administrative Procedure Act, which affords judicial review to "any person aggrieved or adversely affected in fact by a final decision of an agency in a contested case, or by other agency action

applicant would not himself have the protection of the APA at his hearing and (2) that neither would an initial applicant.¹⁶⁰

Fortunately, the first of these incorrect impressions was counteracted by other — but better — dicta in the subsequent case of *City of Evanston v. Whirl Inn*.¹⁶¹ There, in distinguishing between city and county liquor license renewals, the court not only held that the judicial review provisions of the APA applied to county, but not city, renewal decisions; it also implied that the contested case procedural protections applied as well.¹⁶² The correct assumption had also been made previously in the case of *Glenn v. Board of County Commissioners*, in which the court noted that, on appeal from denial of renewal of a liquor license, “the parties agree, and properly so, that the proceeding was a ‘con-

or inaction,” and the following portion of section 12-4-104(b) which lists the criteria for issuing or renewing a liquor license:

A license or permit shall not be issued, renewed or transferred if the licensing authority finds from evidence presented at the hearing:

(i) The welfare of the people residing in the vicinity of the proposed license or permit premises shall be adversely and seriously affected;

(ii) The purpose of this title shall not be carried out by the issuance, renewal or transfer of the license or permit;

(iii) The number, type and location of existing licenses or permits meet the needs of the vicinity under consideration;

(iv) The desires of the residents of the county, city or town will not be met or satisfied by the issuance, renewal or transfer of the license or permit; or

(v) Any other reasonable restrictions or standards which may be imposed by the licensing authority shall not be carried out by the issuance, renewal or transfer of the license or permit.

WYO. STAT. § 12-4-104(b) (1977).

160. 644 P.2d at 775. The court also discussed the alternative procedures, judicial and administrative, for revocation or suspension of a liquor license; but these are relatively straightforward and were not even peripherally in issue in the case. See WYO. STAT. §§ 12-7-201(b), 12-8-101, and 12-7-201(d) (1977).

161. 647 P.2d 1378 (Wyo. 1982).

162. As a result, judicial review of liquor-licensing decisions by the governing bodies of cities and towns, as opposed to those by counties, is no longer governed by the WAPA. . . .

...
We should also note that not only does Evanston's exception from the WAPA alter the standards on judicial review, it also frees the city from certain procedural requirements in its decision making. . . . We do not question the legislative wisdom in providing the appeal procedure it has, even though, as it now stands, liquor decisions by cities and counties are, for purposes of administrative procedure, treated differently.

Id. at 1385.

tested case,' as that term is defined in [§9-4-101(b)(ii) of the APA]"¹⁶³

The answer, however, to the question of whether or not the contested case procedures of the APA apply to county liquor license renewals can best be given by looking to the APA itself. The Board of County Commissioners is clearly an "agency."¹⁶⁴ A contested case includes licensing "in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing."¹⁶⁵ Moreover, any *licensing* decision is expressly subject to contested case procedures whenever a hearing is first required.¹⁶⁶ The statute governing liquor licensing expressly requires a hearing to precede a renewal decision (or, for that matter, a decision on an initial application),¹⁶⁷ and it goes on to create a "preference right" in a renewal at the same location.¹⁶⁸ These statutory provisions in the APA and the state liquor laws, read together, can only result in the contested case procedures of the APA applying to all hearings by a Board of County Commissioners on renewal of a liquor license — regardless of the outcome, and regardless of who, if anyone, appeals.¹⁶⁹

Turning to liquor license renewal decisions by a *city*, however, the procedural protections afforded at the hearing may well depend on who is asking for them.¹⁷⁰ As suggested earlier,¹⁷¹ the owner or holder of the preexisting license should have a "property" interest in renewal at the same location which will entitle him to procedural protections approaching those afforded by the contested case provisions

163. 440 P.2d 1, 3 (Wyo. 1968).

164. WYO. STAT. § 9-4-101(b)(i) (1977 & Supp. 1982).

165. WYO. STAT. § 9-4-101(b)(ii) (1977 & Supp. 1982).

166. "Notice; hearing.—When the grant, denial, suspension, or renewal of a license is required by law to be preceded by notice and an opportunity for hearing the provisions of this act [§§ 9-4-101 to 9-4-115] concerning contested cases apply." WYO. STAT. § 9-4-113(a) (1977).

167. WYO. STAT. § 12-4-104(a) and (b) (1977).

168. WYO. STAT. § 12-4-104(c) (1977).

169. Any adversely affected party—whether a licensee whose renewal is denied or a resident aggrieved at its reissuance—will get the same sort of judicial review: "on the record" pursuant to section 9-4-114 of the Administrative Procedure Act. WYO. STAT. § 9-4-114 (1977).

170. Bear in mind, since a city council is not an "agency," no one can invoke the APA. See *supra* note 114.

171. See *supra* note 148.

of the APA. If the licensee, however, does not assert his procedural rights, it is doubtful that anyone else can. Certainly the interests of people residing in the vicinity of the licensed premises, although sufficient to give them standing,¹⁷² would not rise to the level of "property" interests entitling them to procedural due process. If the renewal applicant, the one "entitled" to due process, obtains certain procedural protections, then the same procedures should apply to all parties to the hearing; but if he does not, then no one else should be heard to complain.¹⁷³

As to an application for an initial license before the county commissioners, which was the situation in *Walker*, it is correct that the availability of any judicial review would seem dependent on the outcome.¹⁷⁴ The contested case procedures of the Wyoming APA, however, should apply at the hearing regardless of the outcome (and the consequent availability of judicial review). Even though the court was correct some twenty-five years ago in *Whitesides v. Council of City of Cheyenne*,¹⁷⁵ in refusing to find a property interest in an initial application, this does not end the matter under the APA. The absence of a property right may well preclude an initial licensing from being a "contested case" under the definition in section 9-4-101(b)(ii),¹⁷⁶ but this does not prevent the contested case procedures of the APA from applying. This is because section 9-4-113(a) of the Admin-

172. See *infra* notes 184-190 and accompanying text.

173. Procedures on appeal would also seem to vary with the identity of the appellee. If the denied renewal applicant appeals, he is entitled to the sort of trial de novo described in *Whirl Inn*. If an adversely-affected resident wishes judicial review, he can only attempt to utilize the general jurisdiction given the district courts by article 5, section 10, of the Wyoming Constitution and file an original action for declaratory and injunctive relief against the city for, e.g., acting outside the scope of its statutory authority.

174. That is, pursuant to the express terms of section 12-4-104(e), a losing applicant will be entitled to no judicial review of his denial. See *supra* note 157 and discussion of the denial of Walkers' application in the opinion, 644 P.2d at 774. A county resident aggrieved by the issuance of an initial license, however, would be entitled to judicial review under the general grant thereof in section 9-4-114(a) of the Administrative Procedure Act. See this holding in the *Walker* opinion, 644 P.2d at 775, and the discussion in *United States Steel Corp. v. Wyoming Env'tl. Quality Council*, 575 P.2d 749, 750-51 (Wyo. 1978).

175. 78 Wyo. 80, 319 P.2d 520, 522-23 (1957).

176. Notice, however, that, on a literal reading, the definition of contested case includes "privileges" as well as "rights" required by law to be determined after a hearing. See WYO. STAT. § 9-4-101(b)(ii) (1977).

istrative Procedure Act requires contested case procedures to be followed whenever the "grant" or the "denial," as well as the renewal, of a license is required to be preceded by notice and an opportunity for a hearing.¹⁷⁷ As mentioned before, section 12-4-104 of the Wyoming Statutes quite expressly requires notice and an opportunity for a hearing to precede the grant or denial of an initial license. The right to a contested case hearing, therefore, does not depend on the right to appeal. This is as it should be. Otherwise, county commissioners would be in the position of not knowing whether to afford contested case procedures until they knew which way they were going to decide the application.¹⁷⁸ Dicta in the *Walker* opinion indicative of this absurd conclusion¹⁷⁹ should be ignored. True, a person whose initial application was denied without proper procedures being followed would have no remedy; but this does not mean that he had no procedural right under the APA.

When an application for an initial liquor license is filed with the *city*, the situation is obviously quite different. Without the application of the APA and without any protection from procedural due process, the only procedures¹⁸⁰ — required for anyone — the applicant or affected neighbors — are those few specified in the liquor licensing statutes¹⁸¹ and whatever procedures are adopted by the city council itself. Again, an aggrieved applicant is statutorily barred from appealing a denial,¹⁸² while a city resident

177. See *supra* note 157.

178. "Let the jury consider the verdict," the King said, for about the twentieth time that day.

"No, no!" said the Queen. "Sentence first—verdict afterwards."

"Stuff and nonsense!" said Alice loudly. "The idea of having the sentence first!"

L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 187.

179. 644 P.2d at 775.

180. The applicant may, for what it's worth, have the minimal protection against irrationality afforded by *substantive* due process and equal protection. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955); *New Orleans v. Dukes*, 427 U.S. 297 (1976). This may have been what the Wyoming Supreme Court had in mind in *Whitesides* when it left open the possibility of recourse to the courts to correct arbitrary and capricious exercise of even initial licensing authority. See 319 P.2d at 525-26.

181. See *supra* note 149.

182. See *supra* note 174.

adversely affected by the issuance of an initial license may bring a lawsuit in district court.¹⁸³

In sum, therefore, the court's dicta in *Walker* concerning the procedural rights of applicants for renewal and initial issuance of liquor licenses was at best unhelpful — and at worst wrong.

On the other hand, the court was correct in characterizing the precise issue on appeal as whether the Walkers had standing to challenge the issuance of the license to the Gustafsons by asserting the interests of "residents" of the vicinity or the county in their "welfare" or their "desires."¹⁸⁴ The court did not, however, decide this standing issue simply by looking to the face of the Walkers' petition for review and/or the position expressed in their brief on appeal. Instead the court seemed to look behind the Walkers' representation of their position and determine what it felt to be their real interest:

In applying for a similar license very near the place for which Gustafsons were granted a license, the Walkers impliedly acknowledged that a license at that location was not contrary to the desires of the residents of the county and would not have an adverse and serious effect upon the welfare of the people residing in the vicinity.¹⁸⁵

Such a "waiver" approach, apparently based on the court's view of the Walkers' "true" position before the county commissioners, is not entirely satisfying.¹⁸⁶

183. See *supra* note 173.

184. See *supra* note 159; 644 P.2d at 775.

185. 644 P.2d at 777.

186. In a special concurrence, Justice Thomas, joined by Chief Justice Rose, voiced his disagreement with any suggestion by the majority that the Walkers' standing was inhibited by their competing application for a license. They "would limit the scope of the review to those objections or issues which were presented at the hearing." *Walker v. Board of County Comm'rs*, 644 P.2d at 777 (Wyo. 1982) (Thomas, J., concurring). So stated this merely seems to correctly apply Rule 12.09 of the Wyoming Rules of Appellate Procedure. Justice Thomas went on, however, to explain his concurrence by emphasizing that the Walkers *themselves* made no objection or protest at the administrative level to the Gustafsons' application for a liquor license; this he viewed as a "waiver" of all grounds for review. *Id.* at 778. This may be an unreasonably strict requirement. Rule 12.09 is worded in the passive voice, and it should be construed to allow appellate

An unsuccessful applicant should not be able to avoid a statutory bar to appeal of a denial of his application by portraying it as an appeal of the successful applicant's license, following a consolidated hearing. On the other hand, if — even in part — the losing applicant had also taken the position of an adversely affected resident who would suffer (apart from his loss of liquor business) from the issuance of the license to his competitor, he should have standing to assert his “welfare” and “desire” interests upon judicial review.¹⁸⁷ Under the modern relaxed approach to standing in administrative law, a petitioner need only allege injury to one interest within the “zone of interests” protected by the law which he is invoking in his behalf [here the criteria for liquor licensing in section 12-4-104(b)] in order to have standing in court.¹⁸⁸

The court, however, obviously chose not to recognize the “resident welfare” interest asserted by the Walkers. How it knew that the Walkers' concern for the welfare of persons residing in the vicinity of the Gustafsons' premises (including themselves?) was “purported” and that they did not come into court with “clean hands” is not clear on the face of the opinion.¹⁸⁹ In any event, the court's holding was not that an applicant could never have standing, as an affected resident of the vicinity, to challenge the application of his competitor — only that, in the circumstances of this case, it did not attribute such a dual position to the Walkers.¹⁹⁰

review to cover any issue raised before the agency by any participant in an administrative proceeding (so long as the party seeking judicial review asserts a colorable interest in the issue on appeal).

187. Judging solely from the portrayal of hearing testimony in Walkers' brief on appeal to the supreme court, it appears that the Walkers did voice several complaints as residents of the vicinity of the Gustafsons' bar and night club: *e.g.*, in order to sleep in their home just across the highway from the Gustafsons' premises, they were forced on occasion to leave their bedroom and try to sleep in the living room. See Brief of Appellants, *supra* note 154, at 5, 6, 7, 25, 26. Such evidence in the record was apparently overcome in the court's opinion by other evidence of the Walkers' “actual” position.

188. See *Duke Power Co. v. Carolina Env'tl. Study Group*, 438 U.S. 59 (1978); *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973); *Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

189. 644 P.2d at 776.

190. Although § 12-4-104(e), *supra*, denies the right of appeal to an applicant for a new license only from a decision denying his application, the status in which such applicant places himself by the application will normally preclude him from standing to contest the issuance to another of the license for which he applied. Certainly, *the circumstances in this case* makes such so.

Id. (emphasis added).

CONCLUSION

Despite the loose language in *Walker*, the April, 1982, term of the Wyoming Supreme Court, everything considered, was a good one for administrative law. The decisions discussed in this article provide precedent for the predictability, cohesiveness, and political neutrality so necessary for effective implementation of any branch of the law — but so often lacking in the administrative area. If the lower courts and lawyers in the state will adhere to the supreme court's example; will take the time to familiarize themselves with the basic principles of the Wyoming Administrative Procedure Act, as fleshed out by these opinions; and will not distort the law to reach the desired result in a particular case — then all of us will benefit. Certainly the author and his students will, for it is far easier to teach and learn decisions of this overall quality.