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Administrative Law - An Uncommonly Rare Decision - The Wyoming Surpeme Court Orders Agency Rulemaking - In the Matter of Bessemer Mountain, Rissler & (and) McMurry Co. v. Environmental Quality Council

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ADMINISTRATIVE LAW - An Uncommonly Rare Decision—The Wyoming Supreme Court Orders Agency Rulemaking. In the Matter of Bessemer Mountain, Rissler & McMurry Co. v. Environmental Quality Council, 856 P.2d 450 (Wyo. 1993).

Nothosaur. Hardly a name that stirs emotion. Yet fossils of this prehistoric marine reptile from the Early Triassic Period played a role in a present-day controversy. All of the known North American specimens of the Nothosaur come from an area in central Wyoming known as Bessemer Mountain.[1] Rissler and McMurry Company (Rissler) operates a small limestone mine on Bessemer Mountain on a state school land lease.[2] Rissler wanted to expand the mine and sought a permit from the Wyoming Department of Environmental Quality (DEQ).[3]

In response to Rissler's plans, a group known as the "Friends of Bessemer Mountain" filed a petition with the Wyoming Environmental Quality Council (EQC).[4] The petition requested that the EQC designate Bessemer Mountain as "very rare or uncommon" pursuant to Wyoming Statute § 35-11-112(a)(v).[5] This designation would allow the DEQ to deny Rissler's mining plans if mining would irreparably damage the area.[6]

The EQC scheduled and published notice of a hearing on the matter.[7] Concerned that the DEQ might deny its mining permit application, Rissler objected to the hearing.[8] Rissler argued that the EQC should make

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1. Principal Statement of Reasons, *In the Matter of a Petition to Designate Bessemer as Rare and Uncommon* (filed with Wyo. Secretary of State, Aug. 4, 1992) *appended to* Brief of Petitioner, In the Matter of Bessemer Mtn., Rissler & McMurry Co. v. Environmental Quality Council, 856 P.2d 450 (Wyo. 1993) (No. 92-226) [hereinafter Brief of Petitioner]. Rissler is the Petitioner, the Environmental Quality Council (EQC) is the Respondent.

2. In the Matter of Bessemer Mtn., Rissler & McMurry Co. v. Environmental Quality Council, 856 P.2d 450, 451 (Wyo. 1993) [hereinafter *Bessemer*]. Although WYO. STAT. § 35-11-406 (1988 & Supp. 1993) requires mines to have a DEQ permit, WYO. STAT. § 35-11-401(e)(vi) (1988) exempts mines smaller than ten acres from permit requirements. Rissler's existing mine was smaller than ten acres. Brief of Petitioner, *supra* note 1 at 5.

3. Brief of Petitioner, *supra* note 1 at 5. Rissler sought a permit pursuant to WYO. STAT. § 35-11-406.

4. Brief of Petitioner, *supra* note 1 at 2.

5. Brief of Petitioner, *supra* note 1 at 2-3. WYO. STAT. § 35-11-112(a)(v) (1988 & Supp. 1993) provides that the EQC shall designate "those areas of the state which are very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value."

6. WYO. STAT. § 35-11-406(m)(iv) provides that the DEQ may deny a permit [i]f: "the proposed mining operation would irreparably harm, destroy, or materially impair any area that has been designated by the council a rare or uncommon area . . . "

7. Brief of Petitioner, *supra* note 1 at 5.

8. Brief of Petitioner, *supra* note 1 at 5. Rissler objected in a letter to the EQC on April 9, 1992.

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rules for the rare or uncommon statute, because it was too ambiguous standing alone.[9]

On April 23 and 24, 1992, the EQC held a hearing on the petition requesting the rare or uncommon designation.[10] Many people spoke in favor of the designation. Rissler's counsel was the only person who spoke against the designation.[11] Immediately after the hearing the EQC designated Bessemer Mountain as "very rare and uncommon."[12]

On September 2, 1992, Rissler filed a petition in Wyoming state district court for review of the designation.[13] Rissler and the EQC agreed that in the interest of efficiency, the matter should be certified to the Wyoming Supreme Court.[14] The supreme court directly addressed only one issue—whether the rare or uncommon designation was arbitrary or capricious.[15]

In a 5-0 decision, the court ruled that the Bessemer Mountain designation was arbitrary *and* capricious because the rare or uncommon statute was "amorphous."[16] The court reversed the EQC designation, remanded the matter, and ordered the EQC to make rules clarifying the rare or uncommon statute.[17]

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9. Brief of Petitioner, *supra* note 1 at 5. Rissler filed a formal written comment to the petition on April 13, 1992, which addressed the criteria listed in the rare or uncommon statute. Rissler also objected because: (1) the EQC had not scheduled a contested case hearing allegedly required by WYO. STAT. §§ 16-3-101 to -112 (1990 & Supp. 1993); (2) it did not have a copy of the citizen petition; and (3) the EQC listed paleontology—the Nothosaur fossils—as a unique feature of Bessemer Mountain, a subject not listed in the rare or uncommon statute. *Id.*

10. *Bessemer*, 856 P.2d at 451.

11. Brief of Respondent at 3, In the Matter of Bessemer Mtn., Rissler & McMurry Co. v. Environmental Quality Council, 856 P.2d 450 (Wyo. 1993) (No. 92-226) [hereinafter Brief of Respondent].

12. Brief of Petitioner, *supra* note 1 at 4. The EQC designated nine sections of land encompassing the mountain, including the section containing Rissler's mine. On August 7, 1992, the EQC filed a "Principal Statement of Reasons" for the designation with the Secretary of State. *Id.* at 7. NOTE: The EQC designated the lands as "very rare *and* uncommon." This note uses "rare or uncommon," as listed in the statute, and drops "very."

13. Brief of Respondent, *supra* note 11 at 2. Rissler filed the petition with Judge Spangler in the Second Judicial Court. *Id.* at 4.

14. Brief of Respondent, *supra* note 11 at 2. The district court judge granted a joint motion to certify on September 28, 1992. Wyoming Rule of Appellate Procedure 12.09 provides for interlocutory appeal to the supreme court if constitutional, novel, or important local/state-wide questions are raised.

15. *Bessemer*, 856 P.2d at 451. The issues certified were whether the EQC's actions: (1) were arbitrary, capricious, or an abuse of discretion; (2) violated Rissler's due process and equal protection rights; (3) were in excess of its statutory jurisdiction; (4) violated state law and administrative procedure; and (5) were supported by substantial evidence. *Id.*

16. *Id.*

17. *Id.* at 455.

The primary issue discussed in this casenote is whether the *Bessemer* court properly ordered the EQC to make rules to augment the rare or uncommon statute. The casenote discusses required rulemaking jurisprudence from Wyoming, federal, and other state courts. It illustrates how the *Bessemer* court departed from Wyoming precedent, as well as law from other jurisdictions. The casenote also criticizes the court for inexplicably changing the method of review of administrative agency action. Additionally, the casenote is critical of the court's policy rationale, and discusses how the court unnecessarily intruded on EQC discretion. The casenote concludes that court-ordered rulemaking is appropriate in certain circumstances, but that the *Bessemer* case did not present any such circumstances. Nonetheless, the casenote acknowledges that *Bessemer* might serve as an important precedent in Wyoming administrative law.

BACKGROUND

The Wyoming Environmental Quality Act

The rare or uncommon statute is part of the Wyoming Environmental Quality Act[18] (EQA) enacted in 1973 to preserve and enhance the air, land, and water resources of the state.[19] Because the EQA is an environmental protection statute, the Wyoming Supreme Court usually construes it liberally.[20]

The Wyoming Department of Environmental Quality (DEQ) administers the EQA.[21] The Wyoming Environmental Quality Council (EQC) is the hearing examiner for the DEQ. Thus, the EQC hears all cases arising under the EQA and DEQ regulations.[22] The EQC has broad discretion. For instance, the EQC has the power to grant variances to EQA requirements,[23] and has ultimate control over DEQ rules, permits, and orders.[24] Additionally, the EQC has rulemaking authority.[25] Generally, the EQC

18. WYO. STAT. §§ 35-11-101 to -1428 (1988 & Supp. 1993).

19. WYO. STAT. § 35-11-102.

20. *See* People v. Platte Pipe Line Co., 649 P.2d 208, 212 (Wyo. 1982); Universal Equip. Co. v. State, 839 P.2d 967, 970 (Wyo. 1992).

21. WYO. STAT. § 35-11-104 (1988 & Supp. 1993).

22. WYO. STAT. § 35-11-112.

23. *See* WYO. STAT. § 35-11-601(a) (1988 & Supp. 1993), which gives the EQC power to grant variances because of (b) impracticality; (c) excess cost; (d) non-existent technology; or (e) hardship.

24. *See* WYO. STAT. § 35-11-112(c), which provides that the EQC may: "[a]pprove, disapprove, repeal, modify or suspend any rule, regulation, standard or order of the director or any division administrator; . . . [o]rder that any permit, license, . . . or variance be granted, denied, suspended, revoked or modified."

25. WYO. STAT. § 35-11-112(a)(i). The EQC must consult with the DEQ director and administrators when promulgating rules. *Id.*

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has discretion to decide whether rules are necessary, but several EQA statutes specifically require the EQC to make rules.[26]

Under the EQA rare or uncommon statute, the EQC may designate areas of Wyoming which are "very rare or uncommon and have particular historical, archaeological, wildlife, surface geological, botanical or scenic value."[27] The EQC uses the designation sparingly.[28] *Bessemer* was the first challenge to a designation to come before the Wyoming Supreme Court.[29]

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26. *See, e.g.*, WYO. STAT. § 35-11-503(a)(iii) (1988 & Supp. 1993) (EQC must make rules to guide the solid waste disposal site selection process); WYO. STAT. § 35-11-202 (1988 & Supp. 1993) (rules required to define ambient air and emission control standards); WYO. STAT. § 35-11-402 (1988 & Supp. 1993) (rules required for land quality reclamation standards).

27. WYO. STAT. § 35-11-112(a)(v).

28. [NOTE: The "unique and irreplaceable" statute preceded the rare or uncommon statute, and provided that the EQC shall "designate . . . those areas of the state which are of a unique and irreplaceable, historical, archaeological, scenic, or natural value."] Areas of Wyoming so designated include:

(1) January 25, 1974. An EQC Resolution designating as unique and irreplaceable those areas of Wyoming including Wyoming Recreation Commission Inventory of Historical Places, U.S. Department of Interior National Register of Historical Places, National and State parks, National and State wildlife refuges, National Trails, National Wilderness Areas, Wild & Scenic Rivers, National and State Recreation Areas, monuments, forts, museums, ranger stations, petroglyph sites, dams, depots, and sites listed by the University of Wyoming Department of Archaeology, the Wyoming Recreation Commission, and the Wyoming Archives and Historical Department.

(2) October 25, 1974. An EQC Resolution designating as unique and irreplaceable approximately 19,000 acres in Sheridan and Johnson Counties near Storey.

(3) October 25, 1974. An EQC Resolution designating as unique and irreplaceable 920 acres in Johnson County.

(4) December 9, 1977. An EQC resolution designating as unique and irreplaceable an area in Natrona County known as Jackson Canyon.

Memorandum from Terri A. Lorenzon, EQC Attorney and Administrator, to EQC Members, *Review of Designations Under the Environmental Quality Act* (April 23, 1991) (on file with the EQC in Cheyenne, WY).

29. In the *Meeteetse Preservation Organization* case (MPO), the MPO petitioned the EQC to designate an area of the Upper Wood River drainage near the old mining town of Kirwin as unique and irreplaceable. AMAX, Inc. was considering opening a copper mine in the Kirwin area. During the case, the Legislature amended the statute to the "rare or uncommon" form. The EQC designated the area as rare or uncommon. AMAX filed suit. Judge Joseph Maier of the Fifth Judicial District Court remanded the case to the EQC for determination under the language of the new rare or uncommon statute. Before the EQC acted again, the parties (including the MPO, EQC, and AMAX) stipulated to a dismissal. Thereafter, the copper market fell, AMAX gave up its mining plans, and the MPO never re-petitioned for a new designation. Memorandum from T. Lorenzon, *supra* note 28.

Importantly, however, the dismissal stipulation required the EQC to "attempt to" make rules defining the rare or uncommon statute. AMAX, Inc., v. Environmental Quality Council, Civ. Action No. 10751 (5th Jud. Dist. Ct., Park County, filed in the EQC office in Cheyenne, WY, on Feb. 23, 1982).

R.E. Sundin, a past DEQ director, investigated the possibility of rules, and decided that rules would be "glib assertions." He recommended that the EQC conclude that rules could not be promulgated. Memorandum from R.E. Sundin, DEQ Director, to the EQC, *Promulgation of Statewide Standards for W.S. 35-11-112(a)(v)* (January 28, 1981) (on file with the EQC in Cheyenne, WY).

The EQC agreed with Sundin, and decided to substitute detailed fact findings for rules when designating lands in the future. *Bessemer* is the first case since MPO where the EQC used the designation. Interview with Terri Lorenzon, EQC Attorney and Administrator, in Cheyenne, WY (Oct. 18, 1993).

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Required Rules & Adjudication Versus Rulemaking

Administrative agencies use two types of proceedings to administer statutes: rulemaking and adjudication. Rulemaking is an agency action that creates a regulation designed to implement, interpret, and prescribe a statute or policy.[30] Thus, rulemaking is the process of making rules that apply prospectively to all concerned persons. Adjudication is the process of resolving disputes between an agency and a particular party.[31] Orders resolving the matter ensue from adjudications.[32]

Under the Wyoming Administrative Procedure Act[33] (WAPA) the EQC treats citizen petitions for designation of lands as rare or uncommon as petitions for rulemaking.[34] Thus, the *Bessemer* designation hearing was a rulemaking proceeding.[35] The Wyoming Supreme Court reviews EQC actions under authority from WAPA and can set aside agency action which is arbitrary or capricious.[36]

Wyoming Precedent

Judicial review of administrative agency action by the Wyoming Supreme Court is commonplace, but the Wyoming Supreme Court has dealt with the issue of required rulemaking on few occasions. Typically, the court defers to agency discretion on whether rules are needed for an agency to administer a statute, or whether the agency can employ case-by-case adjudication.[37] The court has explained its deference as an unwillingness to remove agency flexibility to deal with special problems.[38]

For example, in *Town of Torrington v. Environmental Quality Council,*[39] the Wyoming Supreme Court held that the EQC need not create rules

30. WYO. STAT. § 16-3-101.

31. In Wyoming an adjudication is called a contested case. *See* WYO. STAT. § 16-3-101(b)(ii), which defines a contested case as "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."

32. *See* Federal Administrative Procedure Act, 5 U.S.C. § 551(6)-(7) (1988) [hereinafter APA].

33. WYO. STAT. §§ 16-3-101 to -115 (1990).

34. *See* Brief of Petitioner, *supra* note 1 at 2-3, referring to WYO. STAT. § 16-3-106.

35. Brief of Petitioner, *supra* note 1 at 2-3. Thus, the issue in *Bessemer* was whether the EQC needed rules to validate its action pursuant to the rare or uncommon statute.

36. WYO. STAT. § 16-3-114(c)(ii)(A). This statute also authorizes courts to set aside action which is: "(B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority or limitations or lacking statutory right; (D) without observance of procedure required by law; or (E) unsupported by substantial evidence in a case reviewed on the record of an agency hearing . . . "

37. *See infra* notes 39-42 and accompanying text.

38. Town of Torrington v. Environmental Quality Council, 557 P.2d 1143, 1146 (Wyo. 1976).

39. 557 P.2d 1143 (Wyo. 1976).

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to guide the selection of solid waste disposal sites. Although the town cited a statute requiring the EQC to promulgate rules,[40] the court ruled that disposal sites must be selected on a case-by-case basis. Therefore, rules were not necessary.[41] The court ruled that the EQC had the expertise and discretion to decide whether rules were necessary.[42]

In *Thomson v. Wyoming In-Stream Flow Committee*[43] the court ruled that the Wyoming Secretary of State need not promulgate rules to guide the signature verification process in petitions for statewide ballot initiatives.[44] The court held that a clear statutory directive is enforceable—without rules—by an agency in accordance with its plain meaning.[45]

Federal Precedent

Federal courts usually defer to agency discretion on whether rules are necessary. While federal administrative law and the federal Administrative Procedure Act[46] (APA) differ from state administrative law, there are some analogies.[47]

Undoubtedly the most important federal case addressing the required rulemaking issue is *Securities & Exchange Commission v. Chenery Corp.*[48] In *Chenery*, the United States Supreme Court held that the choice to proceed by general rule or by individual ad hoc adjudication should be left to agency discretion.[49] Justice Murphy explained that to insist upon one form of action over the other is "to exalt form over necessity."[50] Although almost fifty years old, *Chenery* is still cited by courts deferring to agency discretion on the rulemaking issue.[51]

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40. WYO. STAT. § 35-502.12(a) (1957) provided: "The council shall: . . . (i) [p]romulgate rules and regulations necessary for the administration of this act . . . "

41. 557 P.2d at 1146.

42. *Id.*

43. 651 P.2d 778 (Wyo. 1982).

44. The Wyoming Constitution established the initiative and referendum process. It states that "additional procedures may be prescribed by law." WYO. CONST. art. III § 52 (f). WYO. STAT. § 22-24-101(a)(iii) (1977) required initiative petitions to contain signatures equaling at least fifteen percent of the number of voters in the last general election and resident in at least two-thirds of the counties of the State.

45. 651 P.2d at 791. *Contra*, Jergeson v. Bd. of Trustees of Sch. Dist. No. 7, 476 P.2d 481, 483-84 (Wyo. 1970) (where the court noted that some statutes require rulemaking, and suggested that it would direct an agency to comply upon request by an interested party). *See infra* note 107.

46. Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

47. Arthur E. Bonfield, *Chairman's Message*, 40 ADMIN. L. REV. III at iv-v (1988).

48. 332 U.S. 194 (1947).

49. *Id.* at 203.

50. *Id.* at 202.

51. *See, e.g.*, Nunez-Pena v. Immigration & Naturalization Serv., 956 F.2d 223, 225 (10th Cir. 1992) (where the court upheld the I.N.S.'s choice to create a policy through adjudication—rather

The Supreme Court substantiated *Chenery* in *NLRB v. Bell Aerospace Co.*[52] In *Bell*, the Court explained that a problem facing an agency "may be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule."[53] The Court noted, however, that there may be situations where adjudication without rules would be an abuse of discretion or a violation of the APA.[54] Unfortunately, the Court has not crafted a definitive test delineating when rules are required.[55]

Accordingly, without any standard test, the federal courts have struggled with the issue. Nonetheless, three general situations emerge in which courts have required agencies to make rules. The first situation occurs when an agency charged with dispensing tangible economic benefits uses ad hoc adjudication to determine eligibility for those benefits. In *Morton v. Ruiz*,[56] the United States Supreme Court, on due process grounds, ordered the Bureau of Indian Affairs to promulgate rules describing eligibility requirements for general assistance benefits.[57]

Significantly, a prominent commentator noted that the fundamentals and details of the *Ruiz* opinion are not in accord with traditional understanding of administrative law.[58] Furthermore, courts that follow *Ruiz* normally apply it only in cases involving distribution of economic benefits.[59]

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than rulemaking—that forced potential deportees to show "unusual or outstanding equities" to avoid deportation); Nevada Power Co. v. Watt, 711 F.2d 913, 927 (10th Cir. 1983) (where the Dept. of Interior was free to choose between rulemaking and adjudication when setting application costs for utility rights-of-way).

52. 416 U.S. 267 (1974).

53. *Id.* at 293 (quoting *Chenery*, 332 U.S. at 203).

54. 416 U.S. at 294.

55. Richard K. Berg, *Re-examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. II 149, 155 (1986).

56. 415 U.S. 199 (1974).

57. *Id.* at 231.

58. KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.27, at 140 (2d. ed. 1979). Davis found three basic problems with *Ruiz*: First, the Court stated that "[t]he power of an administrative agency to administer a . . . program necessarily requires the . . . making of rules to fill any gap left . . . by Congress." 415 U.S. at 231. Davis called this overbroad, against congressional intent, and an abrupt change from past understanding. Davis noted that the National Labor Relations Board (NLRB) issued only three substantive rules in four decades. *Id.* § 7.27 at 143.

Second, Davis criticized the Court's suggestion that agency policy is ineffective unless embodied as a legislative-type rule. *See* 415 U.S. at 231-36. Davis said this comment "pulls one way and common sense pulls the other way." *Id.* §7.27 at 145.

Third, Davis criticized the Court's comment that the federal APA forbids "unpublished ad hoc determinations." 415 U.S. at 232. Davis noted that the APA does not forbid unpublished ad hoc determinations. *Id.* §7.27 at 153.

59. ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 3.2, at 74. (1993). *See also* Holmes v. New York City Hous. Auth., 398 F.2d 262 (2d. Cir. 1968) (agency violated an applicant's due process rights without rules to guide allocation of public housing); White v. Roughton, 530 F.2d 750 (7th Cir. 1976) (the court suggested that the agency develop written eligibility standards for a township assistance program; the lack of rules violated the applicant's due

The second situation in which federal courts occasionally require rulemaking occurs when an agency uses an adjudication to fashion a new policy or law of potential general applicability. For instance, in *Ford Motor Co. v. Federal Trade Commission*[60] the agency used an adjudicatory proceeding to announce a new policy regarding the repossession and resale of autos.[61] In *Ford Motor*, the Ninth Circuit Court ruled that if an agency changes past policies and establishes a rule of widespread application, it must do so through formal rulemaking.[62]

Significantly, other federal courts and some commentators criticize *Ford Motor's* proposition that an agency cannot change existing law through adjudication.[63] Indeed, the Ninth Circuit retreated from *Ford Motor* when it held that an agency can announce new policies and clarify uncertain areas of the law by adjudication.[64]

The third situation where courts order rulemaking is when an agency fails to make rules as required by statute. In *Environmental Defense Fund v. Ruckelshaus*[65] the court ordered the Secretary of Agriculture to promulgate rules regarding agency treatment of citizen petitions requesting suspension of pesticide registrations. A federal statute required agency rules regarding pesticide registration and public input.[66]

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process rights); Baker-Chaput v. Cammett, 406 F. Supp. 1134 (D.N.H. 1976) (where the court ordered the state welfare administrator to make rules to guide dispersal of benefits).

60. 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982).

61. *Id.* at 1008-09. After selling repossessed autos, the dealer credited the defaulting debtor only the wholesale value of the vehicle, keeping any surplus. The dealer also charged the debtor for overhead and refurbishing costs. These practices were common throughout the auto industry and the FTC had not previously proscribed them. In the *Ford Motor* adjudication, the FTC ruled that the practices violated a section of the Federal Trade Commission Act, 15 U.S.C. § 45 (1988) (unfair methods of competition).

62. *Id.* at 1009. *See also* Patel v. Immigration and Naturalization Serv., 638 F.2d 1199 (9th Cir. 1980) (I.N.S. ruling reversed because I.N.S. used adjudication to announce a new requirement for permanent immigration); First Bancorporation v. Bd. of Governors, 728 F.2d 434 (10th Cir. 1984) (where the Federal Reserve Board improperly used adjudication to announce a broad policy regarding the interest rate treatment of NOW accounts).

63. Nevada Power Co. v. Watt, 711 F.2d 913, 927 (10th Cir. 1983); Colo. Dep't of Social Serv. v. Dep't of Health & Human Serv., 585 F. Supp. 522, 525 (D. Colo. 1984). *See also* Berg *supra* note 55 at 155 (the *Ford Motor* proposition is "so broad as to be demonstrably untenable under established case law.")

64. Montgomery Ward & Co. v. Fed. Trade Comm'n, 691 F.2d 1322, 1328 (9th Cir. 1982). *See also* Sheet Metal Workers Int'l Ass'n v. NLRB, 716 F.2d 1249 (9th Cir. 1983) (agency can announce new remedy for previously proscribed conduct through adjudication); City of Anaheim v. FERC, 723 F.2d 656, 659 (9th Cir. 1984) (adjudication proper to fine-tune an existing rule).

65. 439 F.2d 584 (D.C. Cir. 1971) [hereinafter *Ruckelshaus*].

66. The court cited sections of the Federal Insecticide, Fungicide, and Rodenticide Act which are now superseded. 7 U.S.C. § 135(b) (1964) *superseded by* Act of Oct. 21, 1972, P.L. 92-516, 86 Stat. 975 (current version at 7 U.S.C. §§ 136-136y (1988)). Additionally, the Secretary failed to provide any reason for denying the citizen petition; this probably was as important to the holding as the lack of rules. *Ruckelshaus*, 439 F.2d at 596.

In conclusion, federal courts generally defer to agency discretion on whether to proceed by rulemaking or adjudication. While there are three general situations in which federal courts have ordered rulemaking, court-ordered rulemaking is often criticized by other courts and commentators.

Precedent from Other States

State administrative law addressing the required rulemaking issue varies by jurisdiction. For example, the Florida Legislature recently enacted a statute announcing "rulemaking is not a matter of agency discretion."[67] Conversely, some state courts defer almost entirely to agency discretion between rulemaking and adjudication. These courts allow agencies to announce new policy or law through adjudication.[68] Thus, few generalizations are possible. Nonetheless, discussion of authority from other states sheds light on the *Bessemer* decision.

Some courts have crafted explicit, detailed tests for determining whether court-ordered rulemaking is appropriate. For example, in *Metromedia, Inc. v. Director, Division of Taxation*,[69] the New Jersey Supreme Court held that an agency should proceed through rulemaking instead of adjudication if most of the following characteristics are present:

> It [agency action] . . . (1) is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group; (2) is intended to be

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See also Mtn. States Legal Found. v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980). In *Andrus* the court ordered the Secretaries of Agriculture and Interior to make rules for withdrawal of public lands from consideration for oil and gas leasing. The United States Forest Service (USFS) was considering the lands in question for inclusion in the National Wilderness system. The USFS delayed action on the lease applications until the Wilderness status was clear. The court deemed the inaction a "withdrawal" under §1702(j) of the Federal Land Policy and Management Act, 43 U.S.C. §§1701-64 (FLPMA). FLPMA § 1740 required the agencies to promulgate rules guiding the withdrawal of lands. 499 F. Supp. at 395-97.

The *Bessemer* court cited Mtn. States Legal Found. v. Hodel, 668 F.Supp. 1466 (D. Wyo. 1987) for the proposition that an agency must promulgate rules when agency action is legislative or substantive. *Bessemer*, 856 P.2d at 453. *Hodel* was similar to *Andrus*, where the USFS again delayed action on oil and gas lease applications. During the pendency of *Hodel*, the USFS agreed to promulgate rules, so the court did not have to order rulemaking.

In Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988), the court criticized *Andrus* and *Hodel* for reasoning that inaction on lease applications amounted to a FLPMA withdrawal.

67. *See* Eric T. Olsen, *Required Rulemaking Under Florida's APA: An Analysis of "Feasible" and "Practicable,"* 67 FLA. B.J. VII 62 (July/Aug. 1993) (citing § 120.535 of the Florida Administrative Procedure Act, 1991 Fla. Laws ch. 191).

68. *See* Am. Fed'n State, County, & Mun. Employees Council 25 v. Wayne County, 393 N.W.2d 889, 894 (Mich. Ct. App. 1986).

69. 478 A.2d 742 (N.J. 1984).

> applied generally and uniformly to all similarly situated persons; (3) is designed to operate only in future cases . . . ; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.[70]

New Jersey courts also use the test to describe the circumstances where rules are needed to validate agency actions that cannot be properly characterized as rulemaking or adjudication (such as the *Bessemer* case).[71] The *Metromedia* test typifies treatment of the required rulemaking issue in state courts which occasionally require agency rulemaking.[72]

Besides the factors listed above, legislative intent is important in determining whether an agency must make rules to administer a statute. For instance, in *Trebesch v. Employment Division*,[73] an Oregon court listed the factors it examined when determining whether the legislature implicitly intended for an agency to make rules defining a vague statutory phrase. The court examined the: (1) character of the statutory term, (2) breadth of agency tasks, (3) agency organizational structure, and (4) scope of agency responsibility such as fact finding, interpretation, application of law, and policy development.[74]

In conclusion, most state courts are in accord with federal treatment of the required rulemaking issue. Agencies normally are free to choose between rulemaking and adjudication. Thus, case-by-case adjudication of a statutory scheme without rules is proper as long as due process is maintained, no new broad policies or laws are announced, and statutory rulemaking requirements are met.

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70. *Id.* at 751.

71. *In re* Paterson Counseling Ctr., 567 A.2d 282, 285 (N.J. Super. Ct. App. Div. 1989). *See supra* note 35.

72. *See generally In re* Hibbing Taconite Co., 431 N.W.2d 885 (Minn. Ct. App. 1988) (agency has discretion to choose between rulemaking and adjudication, but rules are required when specific facts are not being applied to specific parties); Forelaws on Bd. v. Energy Facility Siting Council, 760 P.2d 212 (Or. 1988) (rulemaking is required if the agency sets policy and the statute at issue is broad); Sears, Roebuck, & Co. v. Baca, 682 P.2d 11 (Colo. 1984) (agency must use rules to guide disbursements from worker's compensation fund to employers).

73. 710 P.2d 136 (Or. 1985).

74. *Id.* at 139-40. *See infra* note 133 and accompanying text for application of the *Trebesch* test to *Bessemer*.

Policy Considerations

Finally, policy considerations factor into the required rulemaking issue. Generally, rulemaking is not inherently superior to adjudication as an agency decision-making tool.[75] Each method has advantages and limitations. The circumstances of each situation dictate which method is preferable.[76]

Case-by-case adjudication allows for in-depth exploration of fact issues. It also helps resolve narrow policy issues concerning a limited number of parties.[77] Further, adjudication generally provides more procedural protection than rulemaking to the party most immediately affected by an agency action.[78]

Although rulemaking is time-consuming, agencies prefer it over adjudication when facing an issue with potentially broad impact and application. First, the formal notice and comment requirements of rulemaking allow for input from non-parties, who would have no opportunity to comment during an adjudication.[79] Second, this input comes without the argument and trial-like atmosphere of an adjudication.[80] Finally, once a rule is established and published, the need for case-by-case adjudication is eliminated. Issues often can be resolved in a near-summary manner, increasing the efficiency of agency action.[81]

In conclusion, both rulemaking and adjudication have a place in administrative law. The argument that the agency is best-equipped to decide whether rules are necessary carries the day in most courts.[82] Furthermore, while some people express concern about agencies acting without rules, judicial review protects interested parties. Courts can restrain agencies that act unlawfully or unreasonably, without intruding on overall agency power.[83] Rulemaking might be preferable in many situations, but adjudication is necessary when a problem cannot be resolved by a general rule.[84]

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75. Berg, *supra* note 55, at 162.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 163.

80. *Id.*

81. *Id.* As Berg put it, "rulemaking has advantages to an agency which knows where it wants to go and is in a hurry to get there." *Id.* at 178.

82. *See Chenery* and *Bell supra*, notes 48-54 and accompanying text.

83. *See* WAPA—WYO. STAT. §§ 16-3-114, -115; federal APA—5 U.S.C. § 706 (both authorizing judicial review of agency action).

84. NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974), *supra* note 53 and accompanying text.

PRINCIPAL CASE

In *Bessemer* the Wyoming Supreme Court considered whether the EQC acted arbitrarily or capriciously in designating Bessemer Mountain as rare or uncommon. The court held that without rules, the rare or uncommon statute was too amorphous to permit judicial review.[85] Thus, any such designation was inherently arbitrary *and* capricious.[86] The court reversed the designation, remanded the case, and ordered the EQC to make rules to supplement the rare or uncommon statute.[87]

The Court's Reasoning

Justice Thomas wrote the *Bessemer* opinion. He started by highlighting a dialogue from the EQC hearing, where an EQC member expressed concern that the EQC did not have any standards defining "scenic."[88] An unidentified speaker at the hearing noted that he had unsuccessfully tried to define the word; he felt that scenic was "in the eye of the beholder."[89] Justice Thomas agreed, and said the same comment applied to the phrase "rare or uncommon."[90] Thus, he concluded that without defining rules, any rare or uncommon designation was inherently arbitrary *and* capricious.[91] He noted that the WAPA required the court to set aside arbitrary or capricious agency action.[92]

Before the court ordered the EQC to make rules to augment the rare or uncommon statute, however, it first determined whether the EQC had rulemaking authority.[93] The court found EQC rulemaking authority in two areas. First, rulemaking in accordance with the *federal*[94] APA is necessary when agency action is substantive or legislative, as opposed to interpretive.[95] The second source for EQC rulemaking

85. *Bessemer*, 856 P.2d at 451.

86. *Id.*

87. *Id.* at 455.

88. *Id.* at 452. "Scenic" is one of the criteria in the rare or uncommon statute. The EQC member was concerned that, without standards, the EQC would be criticized for acting arbitrarily. An attorney favoring the designation conceded that affected persons would complain that the statute was too indefinite. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 453.

92. *Id.* (citing WYO. STAT. § 16-3-114(c)(ii)(A) (1990)).

93. *Id.* at 453.

94. It is unclear why the court cited the *federal* APA instead of the WAPA. *See infra* note 115 and accompanying text.

95. *Bessemer*, 856 P.2d at 453 (quoting Mtn. States Legal Found. v. Hodel, 668 F. Supp. 1466, 1475 (D. Wyo. 1987)). A substantive or legislative action affects individual rights and obligations. *Hodel*, 668 F. Supp. at 1475.

authority originated in an EQA section which provides that the EQC shall "promulgate rules and regulations necessary for the administration of this act."[96] Thus, the EQC had rulemaking authority. In fact, the court reasoned that the word "shall" evinced an express legislative intent that the EQC promulgate rules clarifying the rare or uncommon statute.[97]

Next, the court discussed the policy benefits of rulemaking. The court explained that the legislature cannot write statutes with language detailed enough for effective day-to-day administration.[98] Instead, the statute provides the general framework, objectives, and policy. The legislature authorizes an administrative agency to enhance the statute with rules.[99]

Court Authority To Order Rulemaking

With the necessity for rules and EQC rulemaking power established, the court then found authority for court-ordered rulemaking. The court cited Professor Davis' treatise which suggested court-ordered rulemaking was becoming common.[100] The court found case law cited by Davis "persuasive," but did not discuss how those cases applied to the Bessemer Mountain situation.[101] Instead, the court distinguished the mandatory authority cited by the EQC.

The EQC cited *Town of Torrington v. Environmental Quality Council,*[102] in which the Wyoming Supreme Court stated that requiring rules for every agency matter would restrict agency functioning.[103] To distinguish *Torrington*, the *Bessemer* court cited a limitation in

96. *Bessemer,* 856 P.2d at 453 (quoting WYO. STAT. § 35-11-112(a)(i)).

97. *Id.* at 454. The court felt that "shall" was mandatory. *See infra* note 127 and accompanying text for further discussion.

98. *Id.* The court explained that the legislature cannot reasonably anticipate the various circumstances that arise in administration of a statute. A statute is constitutionally sufficient if it describes the general policy, the administering agency, and the boundaries of agency authority. *Id.* (citing 1 AM. JUR. 2d *Administrative Law* § 111 at 911 (1962)).

99. *Bessemer,* 856 P.2d at 455.

100. *Id.* at 454 (citing DAVIS, *supra* note 58, § 7.26 at 128). Davis explained:

> The law may be in the early stages of a massive movement toward judicially required rulemaking that will reduce discretion that is unguided by rules or precedents. Under the new law, agencies that use systems of precedents are still generally free to choose between adjudication and rulemaking, but agencies without systems of precedents may be judicially required to use their rulemaking power to provide guiding standards.

101. *Bessemer,* 856 P.2d at 454. *See infra* note 120 and accompanying text (discussing the DAVIS cases).

102. 557 P.2d 1143 (Wyo. 1976).

103. *Id.* at 1145.

Torrington which noted that rulemaking sometimes might be necessary.[104] Additionally, the court noted that the EQA required the EQC to promulgate rules, but that no such statutory requirement existed in *Torrington*.[105]

In closing, the court cited *Jergeson v. Board of Trustees of School District No. 7*.[106] In dictum, the *Jergeson* court called attention to statutory rulemaking requirements, and warned that it would direct an agency to make rules upon request by an interested person.[107] In *Bessemer*, the court fulfilled its earlier promise and ordered the EQC to make rules listing the standards for designating lands as rare or uncommon.[108]

ANALYSIS

The Wyoming Supreme Court broke new ground when it ordered the EQC to make rules.[109] Unfortunately, the *Bessemer* ruling has four basic problems. First, it departs from Wyoming precedent, and is not in accord with other courts that have ordered administrative agencies to make rules. Second, from a policy standpoint, the ruling unnecessarily intrudes on agency discretion. Third, the court inexplicably departed from its past methods of reviewing agency action. Finally, the court's interpretation of the rare or uncommon statute is unpersuasive.

Court-Ordered Rules—Rulemaking Versus Adjudication

Bessemer was not a rulemaking versus adjudication case per se. Rather, the case involved the need for rules to guide a rulemaking proceeding.[110] Nonetheless, case law from Wyoming and other jurisdictions

104. *Bessemer*, 856 P.2d at 455 (citing *Torrington*, 557 P.2d at 1146 (Wyo. 1976)). The court also distinguished Thomson v. Wyoming In-Stream Flow Comm., 651 P.2d 778 (Wyo. 1982) in which it held that a statute with a clear directive and plain meaning needed no rules. The *Bessemer* court held that the rare or uncommon statute had no plain meaning to forego the need for rules. *Bessemer*, 856 P.2d at 455.

105. *Bessemer*, 856 P.2d at 455 (referring to WYO. STAT. § 35-11-112(a)). Note: a statute cited in *Torrington* (WYO. STAT. § 35-502.12 (1957)) contained the *same* language as § 35-11-112(a). *See infra* note 127 and accompanying text.

106. 476 P.2d 481 (Wyo. 1970).

107. *Bessemer*, 856 P.2d at 455 (citing *Jergeson*, 476 P.2d at 483-84). Note: In *Jergeson*, WYO. STAT. § 9-276.20(a)(1) (1957) required the agency to make procedural rules. But the court did not order rulemaking because the plaintiff did not prove that the lack of rules prejudiced him. The *Bessemer* court did not discuss whether the lack of rules prejudiced Rissler.

108. *Bessemer*, 856 P.2d at 455.

109. *Bessemer* is the first case in which the Wyoming Supreme Court ordered an administrative agency to make rules.

110. A rare or uncommon designation hearing is considered a rulemaking proceeding under the WAPA. *See supra* note 35 and accompanying text.

addressing the choice between rulemaking and adjudication shed light on *Bessemer*.[111]

Wyoming Precedent

As an initial matter, the court confused EQC rulemaking authority with a rulemaking duty. While the EQA does require rulemaking, it does so only as is "necessary" to administer the act.[112] Prior to *Bessemer*, the court recognized the EQC's discretion to decide whether rules were necessary.[113] *Bessemer* is thus a clear departure from past treatment of the required rulemaking issue by the Wyoming Supreme Court.[114]

Moreover, the court's reliance on *Mountain States Legal Foundation v. Hodel*[115] was inappropriate. *Hodel* held that an agency must make rules if the agency action is substantive or legislative.[116] *Hodel*, however, is a *federal* case decided under the *federal* APA. Thus, it is only persuasive authority, and the reasoning behind it is tenuous.[117]

Finally, in light of express rulemaking requirements in other EQA statutes,[118] the *Bessemer* court's holding that the legislature expressly intended for the EQC to make rules for the rare or uncommon statute is unconvincing. The Legislature amended the rare or uncommon statute during litigation focusing on the lack of rules.[119] Yet, the legislature did not expressly require EQC rulemaking as it had in other EQA statutes.

Federal Precedent

The *Bessemer* court relied on federal cases cited in the Davis treatise as persuasive authority for court-imposed rulemaking.[120] *Bessemer*, however, is not analogous to any of the three categories of cases in which federal courts have ordered agency rulemaking.[121] The

111. *See supra* text accompanying note 71 (rulemaking versus adjudication discussion germane to cases where agency action cannot be characterized as rulemaking or adjudication.)

112. WYO. STAT. § 35-11-112(a). *See supra* notes 96, 97 and accompanying text (where this section is described).

113. *See Torrington supra* note 42 and accompanying text.

114. In addition to *Torrington supra note* 42, *see Thomson* note 43 and *Jergeson* note 107 and text accompanying each.

115. 668 F. Supp. 1466 (D. Wyo. 1987).

116. *See supra* note 95.

117. The *Hodel* case was roundly criticized in a later case involving similar issues—Bob Marshall Alliance v. Hodel, 852 F.2d 1223 (9th Cir. 1988). *See supra* note 66.

118. *See supra* note 26.

119. *See supra* note 29.

120. Bessemer, 856 P.2d at 454. *See supra* note 100 and accompanying text.

121. *See supra* BACKGROUND section of this note.

Davis treatise cited the first category of such cases—cases involving ad hoc agency determinations of eligibility for tangible economic benefits. For instance, in *Ruiz*[122] the Court ruled that adjudication without rules violated the due process rights of applicants. The rare or uncommon designation, *in and of itself*, does not substantially affect the rights of any party. The DEQ can deny a mine permit in an area designated as rare or uncommon.[123] However, the DEQ can deny permits for a host of other reasons, such as water pollution, public health, reclamation concerns, and written objections.[124] The *Bessemer* court failed to distinguish between the due process problems in *Ruiz* and the relatively innocuous rare or uncommon designation.

Nor is *Bessemer* analogous to the second category of federal cases in which courts have ordered rulemaking—cases in which an agency used adjudication to announce a new policy or law applicable to a broad class of regulated parties, as in *Ford Motor*.[125] By definition, this rare or uncommon designation is limited to Bessemer Mountain.

Finally, *Bessemer* is not analogous to the third category of federal cases in which courts have ordered rulemaking—cases like *Ruckelshaus*[126] in which the court ordered rulemaking because the agency violated a statutory directive to make rules. In fact, the EQC acted pursuant to a statute—the EQA. The *Bessemer* court's ruling that the EQC disregarded a statutory directive to make rules contradicts a prior ruling. The statutory language that purportedly required rulemaking in *Bessemer* was identical to statutory language that the *Torrington* court held *did not* require rulemaking.[127] Since the waste disposal site selection process in *Torrington* required case-by-case adjudication, then surely the designation of rare or uncommon areas requires individual adjudication.[128]

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122. Morton v. Ruiz, 415 U.S. 199 (1974). *See supra* notes 56-58.

123. *See supra* note 6.

124. WYO. STAT. § 35-11-406(m) (1988 & Supp 1993) (listing thirteen factors that could lead to denial of a permit).

125. Ford Motor Co. v. Fed. Trade Comm'n, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). *See supra* notes 61, 62 and accompanying text.

126. Environmental Defense Fund v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971). *See supra* note 65 and accompanying text.

127. *See supra* notes 40, 97 and accompanying text. The statute, WYO. STAT. § 35-11-112(a), applies to the entire EQA, not just the rare or uncommon statute. Section 35-11-112 is titled "Powers and Duties of the Environmental Quality Council," and contains the rare or uncommon statute, as well as other language describing general EQC powers and duties.

128. After all, characteristics identifying suitable conditions for waste disposal sites (soil type, geological features, threat to groundwater, proximity to towns, etc.) could be quantified with relative ease. Ideal waste disposal sites possess the same general characteristics. On the other hand, rare or uncommon areas are not always likely to possess similar characteristics. While one area might be historical and scenic, another area might have little historic and scenic value.

Precedent from Other States

Not only is *Bessemer* in conflict with federal cases, but it does not correspond with other state court decisions regarding agency rulemaking obligations. For example, a New Jersey court crafted a test to determine whether to order rulemaking.[129] Use of the test as an illustration exposes the problems with *Bessemer*. The Bessemer Mountain rare or uncommon designation does not: (1) apply to a wide segment of regulated parties, (2) apply generally to all similarly situated persons, (3) apply in future designations, (4) prescribe a legal standard not reasonably inferable from the statute, or (5) reflect a new policy or a material change from past agency position.[130] While the designation does interpret the law,[131] the New Jersey court required that most of the six test criteria be met before it would order rulemaking.[132]

Additionally, an Oregon court described the factors a court should consider when determining whether rulemaking is needed to define vague statutory language.[133] Assuming that statutory language is vague, a court should examine agency duties, organization, and responsibility. The broader the agency duties, powers, and responsibilities, the more deference a court should accord the agency.[134] The EQA gives the EQC sweeping power to issue licenses and variances and to revoke or modify rules, orders, and permits.[135] The *Bessemer* court failed to recognize the scope and importance of EQC duties, organization, and power. Given the broad discretion the legislature has conferred to the EQC, the court should not have concluded that the legislature intended that the EQC make rules for the rare or uncommon statute.

Policy of Rulemaking

The *Bessemer* court cited policy concerns as justification for ordering EQC rulemaking. The court referred to a massive movement towards

129. Metromedia, Inc. v. Director, Div. of Taxation, 478 A.2d 742 (N.J. 1984). *See supra* note 70 and accompanying text.

130. Rissler argued that consideration of paleontology (Nothosaur fossils) by the EQC was a new policy outside the scope of the statute. The EQC asserted that paleontology was properly considered as a "surface geological" factor. *See supra* note 9.

131. (An element in the *Metromedia* test.) Nonetheless, it could be argued that virtually everything an agency does is an interpretation of a rule, policy, or law.

132. *Metromedia*, *supra* note 69 at 751.

133. Trebesch v. Employment Div., 710 P.2d 136 (Or. 1985). *See supra* note 73 and accompanying text.

134. *Trebesch*, 710 P.2d at 139-40.

135. WYO. STAT. § 35-11-112(c). *See supra* note 24.

judicially required rulemaking.[136] In fact, court-ordered rulemaking is often criticized.[137] Most courts still defer to agency discretion to choose between rulemaking and adjudication.[138] While rules are desirable in many instances, *Bessemer* is not such a case. Rules for the rare or uncommon statute will have little utility.

Years before the *Bessemer* case, the EQC considered making rules for the rare or uncommon statute. The EQC decided that rules would be pointless.[139] Nevertheless, now the EQC must make rules. Notably, the draft rules proposed by the EQC pursuant to the *Bessemer* ruling came under heavy fire from many citizens and industry groups for being too broad. Indeed, some people claimed that the entire state of Wyoming could be designated as rare or uncommon under the draft rules.[140] While an exhaustive list of characteristics might describe some rare or uncommon lands, some items undoubtedly will be overlooked. Furthermore, if the characteristics present in a certain area fall within the rules, affected parties will have limited opportunity to challenge a designation. Thus, parties like Rissler will have less procedural protection.[141]

Arbitrary or Capricious Review Method

The *Bessemer* decision suffers a further flaw in that the court departed without explanation from established methods of review. The WAPA required the court to review the administrative record to determine whether the agency action was arbitrary or capricious.[142] Previously, when reviewing agency action, the court focused on whether the facts supported the decision.[143]

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136. *See supra* note 100.

137. *See supra* note 63.

138. *See supra* note 63.

139. *See supra* note 29.

140. Hugh Jackson, *EQC Approves Revised 'Rare or Uncommon' Rules*, CASPER STAR TRIB., Dec. 16, 1993 at A1. While the rare or uncommon statute has a possible affect only on non-coal mine permits, the agricultural, oil & gas, and public utility industries criticized the draft rules as being too expansive. In response, the EQC expressly excluded the agricultural and oil & gas industries from the operation of the rules. *Id* at A10.

141. *See supra* notes 78, 81 and accompanying text.

142. WYO. STAT. § 16-3-114(c) (1990) provides: "the court shall review the whole record or those parts of it cited by a party and due account shall be taken of the rule of prejudicial error. The reviewing court shall . . . [h]old unlawful and set aside agency action, findings, and conclusions found to be . . . [a]rbitrary, capricious . . . "

143. *See, e.g.*, Palmer v. Crook County Sch. Dist. No. 1, 785 P.2d 1160, 1162 (Wyo. 1990) (where the court stated: "in determining whether an agency decision is arbitrary [or] capricious, . . . a court must review the record taken as a whole and ascertain whether the decision is supported by the evidence . . . in the record."). *See also* State *ex rel.* Worker's Compensation v. Brown, 805 P.2d 830 (Wyo. 1991); Union Telephone Co. v. Wyo. Pub. Serv. Comm'n, 821 P.2d 550 (Wyo. 1991).

In *Bessemer*, however, the court referred to the administrative record only once—when it examined a discourse at the designation hearing.[144] The court never mentioned the EQC's "Statement of Reasons" for the designation,[145] nor discussed whether the EQC acted with adequate information.[146] Thus, it ignored a clear statutory directive and established review methods.[147]

The Rare or Uncommon Statute

Finally, the *Bessemer* court erred in ruling that the rare or uncommon statute is too "amorphous" to permit judicial review.[148] Arguably, it is not amorphous.[149] The statute requires designated lands to: (1) have particular wildlife, scenic, historical, archaeological, surface geological, or botanical value, and (2) be rare or uncommon.

Surely, the EQC has the technical expertise to determine whether the land has particular wildlife, scenic, historical, archaeological, surface geological, or botanical value. Although "scenic" is a subjective term, most reasonable persons could decide whether land is "scenic." Indeed, the *Bessemer* court exposed the shortcomings of its ruling when it pointed out the difficulty of defining "scenic."[150] If, as the court suggested, "scenic" is in the eye of the beholder, then rules defining "scenic" are not possible.

Nor is the phrase "rare or uncommon" necessarily amorphous. "Rare" and "uncommon" are quantitative concepts. Each land area designated as rare or uncommon is, by definition, likely to possess characteristics not common to other areas. Thus, the EQC could determine if the land in question is rare or uncommon after: (1) an evidentiary hearing, and (2) comparing the characteristics of the candidate land with those of other lands. The *Bessemer* ruling removes the EQC's discretion to make a quantitative comparison. Given the prior liberal interpretation of the EQA by the court, this ruling is perplexing.[151]

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144. *See supra* note 88 and accompanying text.

145. *See supra* note 12.

146. *See supra* note 29 (where the EQC's decision to substitute detailed fact findings for rules is discussed).

147. WYO. STAT. § 16-3-114(c), *supra* note 142 and *Palmer*, 785 P.2d 1160, *supra* note 143.

148. *Bessemer*, 856 P.2d at 451.

149. WEBSTER'S NEW COLLEGIATE DICTIONARY 38 (4th ed. 1977) defines "amorphous" as: having no definite form; shapeless; being without definite character; unclassifiable.

150. *See supra* note 89 and accompanying text.

151. *See supra* note 20 and accompanying text.

CONCLUSION

The *Bessemer* decision marked a departure from past treatment of the required rulemaking issue by the Wyoming Supreme Court.[152] *Bessemer* is the first case in which the Wyoming Supreme Court has ordered an agency to make rules.[153] Unfortunately, the court did not adequately explain why it did not follow its precedents. Furthermore, the facts of *Bessemer* are not in accord with cases from other jurisdictions in which courts have ordered rulemaking.[154]

Additionally, the policy rationale offered by the court is not convincing.[155] While rules protect the rights of parties facing all-powerful agencies, rules for the rare or uncommon statute offer little protection. Indeed, rules might limit procedural protection. For if the characteristics of an area fall within the rules, affected parties will have limited opportunity to challenge a designation.[156]

The real issue behind the entire the Bessemer Mountain controversy was the utility and desirability of the rare or uncommon statute itself, not the lack of rules.[157] Obviously the court could not discuss the merit of the statute, but it should have realized that rules would be of little value.

Finally, the *Bessemer* court inexplicably digressed from established methods of reviewing agency action. It did not examine the entire administrative record or focus on whether the agency action was supported by the facts.[158] Furthermore, the court abandoned its usual liberal construction of the Wyoming Environmental Quality Act.[159]

Bessemer was not the case for the court to embark on the journey of judicially-imposed rulemaking. The court should have waited until a case with a compelling need for court-ordered rulemaking presented itself. Nonetheless, what is done is done. The EQC has made rules.[160] Whether the rules will have any real utility or enjoy public support remains to be seen. Whether *Bessemer* was simply a warning to agencies to be more

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152. *See supra* notes 113, 114 and accompanying text.

153. On occasion, the court suggested that an agency make rules (*see e.g., Jergeson, supra* note 45).

154. *See supra* notes 56 to 66 and accompanying text.

155. *See supra* note 98 and accompanying text.

156. *See supra* notes 78, 81 and accompanying text.

157. The whole *Bessemer* controversy prompted one Wyoming legislator to promise a review of the rare or uncommon statute in the Legislature. Hugh Jackson, *'Rare or Uncommon' Scope Limited—Paseneaux Promises Effort to Change Law,* CASPER STAR TRIB., Dec. 15, 1993 at A1.

158. *See supra* note 143.

159. *See supra* note 20.

160. *See* Hugh Jackson, *supra* note 140.

specific or a signal of a propensity towards judicially-required rulemaking in Wyoming is unclear. *Bessemer* could fade away to the dusty solace of a bookshelf, but with its potential value as precedent, it might be too sweet for lawyers and the courts to resist.

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