

1996

Administrative Law: Rulemaking and Contested Case Practice in Wyoming

Nancy D. Freudenthal

Roger C. Fransen

Follow this and additional works at: https://scholarship.law.uwyo.edu/land_water

Recommended Citation

Freudenthal, Nancy D. and Fransen, Roger C. (1996) "Administrative Law: Rulemaking and Contested Case Practice in Wyoming," *Land & Water Law Review*: Vol. 31 : Iss. 2 , pp. 685 - 712.

Available at: https://scholarship.law.uwyo.edu/land_water/vol31/iss2/19

This Special Section is brought to you for free and open access by Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Land & Water Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

Administrative Law: Rulemaking and Contested Case Practice in Wyoming

*Nancy D. Freudenthal and Roger C. Fransen**

In addition to its namesake function of managing the day-to-day conduct of the business of governing, the executive branch of state government also functions as its own legislature and judiciary. Agencies promulgate rules that have the force and effect of law, much like the legislature enacts laws, and agencies hear and decide contested cases in which parties pursue claims and defenses in trial-type proceedings, much like the courts hear and decide the cases before them. These quasi-legislative and quasi-judicial functions give rise to the unique body of Wyoming law that is the subject of this article.

Most practitioners encounter Wyoming agencies only when their client faces, or expects to face a dispute with a state governmental entity. Either the agency has done something, proposes to do something, or has failed to do something which aggrieves the client. The objective of this article is to offer some practical pointers in administrative procedure to successfully resolve such agency disputes. The article is divided into three parts, one offering some general observations concerning administrative agencies, a second dealing with rulemaking procedure, and the third discussing contested cases.¹

* Mr. Fransen is a 1983 graduate of the University of Wyoming College of Law. He is former director of the Wyoming Office of Administrative Hearings. Prior to his appointment to that position he served on governor Mike Sullivan's staff and as a senior assistant attorney general in the Wyoming Attorney General's Office. Mr. Fransen is presently in private practice in Cheyenne, Wyoming.

Ms. Freudenthal is a 1980 graduate of the University of Wyoming College of Law. She is former chairman of the Wyoming State Board of Equalization. Prior to her appointment to that position she was attorney for intergovernmental affairs on the staff of governor Herschler and governor Sullivan. Ms. Freudenthal is presently with the firm of Davis & Cannon in Cheyenne, Wyoming.

1. "Contested case" means a proceeding including but not limited 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 but excludes designations under WYO. STAT. § 9-2-1022(h)(i) (1977). WYO. STAT. § 16-3-101(b)(ii) (Supp. 1995).

GENERAL OBSERVATIONS

Three Principles

Lawyers would be well advised to follow three general principles when disputes arise with agencies:

First: Deal with the agency at the outset.

Second: Use the easiest, most legitimate procedure to succeed at the lowest level in the agency.

Third: Don't assume client problems can be simply "fixed" through agency connections.

The first two principles run counter-intuitive with many lawyers who are trained to place value on court procedures. Many agency procedures seem second class, poorly defined, and filled with bureaucratic mystery. Some lawyers react to this by choosing complicated procedures (those most resembling civil litigation), and aim their case to "win on appeal." Another reaction is to try to slip something through an agency as a political fix. Finally, some lawyers hope to bypass the agency altogether and go directly to court.

These reactions can be counterproductive. The attorney who demands a hearing and then argues for the benefit of an appellate court often escalates the dispute and frustrates the agency.

The attorney who attempts to "fix" problems through personal or political contacts will risk insulting conscientious agency personnel. Any success by this route is almost assuredly short-term.²

The approach whereby attorneys attempt to bypass an agency and go directly to court has some advantages for certain cases. It should not be considered, however, without first reading *Rocky Mountain Oil and Gas Ass'n v. State*,³ for a discussion of the availability of declaratory judgment

2. This point was brought home most recently in the factual history of Thunder Basin Coal Co. v. State Bd. of Equalization, 896 P.2d 1336 (Wyo. 1995) and Amax Coal Co. v. State Bd. of Equalization, 896 P.2d 1329 (Wyo. 1995). Both companies "negotiated" their initial coal values with staff of the Department of Revenue. These negotiated values were later questioned and increased following audit. The Wyoming Supreme Court rejected lengthy arguments by both companies and concluded the companies had waived certain procedural rights. The decision of the State Board of Equalization was affirmed. See also Amoco Prod. Co. v. State Bd. of Equalization, 797 P.2d 552 (Wyo. 1990), wherein the court concluded, "[i]f, in fact, the statute was not being enforced as the legislature intended, the Department acted properly when it corrected that oversight." 797 P.2d at 555.

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

relief, as well as *Union Pacific Resources Co. v. State*,⁴ for a discussion of the doctrines of exhaustion and primary jurisdiction.⁵

Agencies - Creatures of Law

Once resigned to agency procedures, the attorney must understand that agencies are "creatures of law."⁶ As such, they don't exist to accomplish the desires of individuals. They exist only "to accomplish details of governmental activities that the legislature is not able to accomplish."⁷

This leads to a significant limitation. "As a creature of the legislature, an administrative agency has limited powers and can do no more than it is statutorily authorized to do."⁸ In short, agencies possess power only "because of delegation from the legislature."⁹ An important limit on delegation is the existence of "appropriate [reasonable] standards" which confine the exercise of power.¹⁰ If there is a reasonable doubt about agency power and authority, "the statute will be construed as not granting that power."¹¹

Consequently, at the initial stages of a dispute, agency statutes should be carefully reviewed to determine the genesis of agency authority. Agency rules, including rules of procedure, also should be reviewed to understand how the agency interprets its delegation from the legislature.

4. 839 P.2d 356 (Wyo. 1992).

5. The doctrines of primary jurisdiction and exhaustion of administrative remedies were addressed in *People v. Fremont Energy Corp.*, 651 P.2d 802, 810-11 (Wyo. 1982) (quoting *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-64 (1956) (citations omitted)):

The doctrine of primary jurisdiction, like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. "Exhaustion" applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. "Primary jurisdiction," on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

6. *Kerr-McGee Corp. v. Wyoming Oil and Gas Conservation Comm'n*, 903 P.2d 537 (Wyo. 1995).

7. *Id.* at 540. See also WYO. STAT. §§ 28-1-115 to -116 (Supp. 1995), which provides for agency plans and establishes a prohibition against funding a state program, function or activity not included in an annual state agency plan. WYO. STAT. § 28-1-115(b) (Supp. 1995).

8. *Tri-County Tel. Ass'n, Inc. v. Wyoming Pub. Serv. Comm'n*, 910 P.2d 1359, 1361 (Wyo. 1996).

9. *Kerr-McGee Corp.*, 903 P.2d at 541 (Wyo. 1995) (citing BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 1.6 (2d ed. 1984)).

10. *Id.* (citing MORRIS D. FORKOSCH, A TREATISE ON ADMINISTRATIVE LAW § 68 (1956)).

11. *Tri-County Tel.*, 910 P.2d at 1361.

Any agency decisions involving similar facts or interpretations of the law in question can be requested and reviewed. Finally, agency guidelines or manuals, if they exist and have a bearing on the dispute, should be obtained. One must remember, however, guidelines are not legally binding and do not have the force of law if they have not been adopted by the state agency in compliance with the Wyoming Administrative Procedure Act (WAPA).¹²

Often a dispute involves a sense by the client that he or she has “not been heard” on a particularly important issue. The requirement of an opportunity to be heard lies at the heart of agency procedure. This “opportunity to be heard” is often visualized in the context of contested case proceedings. Rulemaking, however, should also be considered as presenting a more flexible, less adversarial procedure to afford this “opportunity to be heard.”

RULEMAKING

Legislator-for-a-Day

Rulemaking is involved whenever the legislature gives an agency the power “to act in a legislative capacity and supplement the statute by filling in the details or making the law.”¹³ When considered in this context, rulemaking presents an exciting power, and one not belonging entirely to agencies. Any interested person can become a “legislator-for-a-day,” so to speak, and write an agency rule for adoption.¹⁴ Attorneys should, therefore, consider the opportunity to use rulemaking to resolve client problems by filling in the details or making the law.

What is a “Rule”?

The WAPA provides a definition of “rule,” and thereby both describes and limits this term. In interpreting this definition, however, the Wyoming Supreme Court makes it clear the WAPA does not require every rule be promulgated pursuant to rulemaking requirements. This

12. WYO. STAT. §§ 16-3-101 to -115 (1977 & Supp. 1995); *Matter of GP*, 679 P.2d 976, 997 (Wyo. 1984); *AT&T v. State*, 768 P.2d 580 (Wyo. 1989).

13. In the *Matter of a Petition to Designate Bessemer Mt. as Rare and Uncommon: Rissler & McMurry v. Environmental Quality Council*, 856 P.2d 450, 453 (Wyo. 1993) [hereinafter cited as *Bessemer Mt.*].

14. This assumes the law is sufficiently broad or otherwise consistent with the proposed rule. Any interested person can propose the repeal or amendment of a rule as well. See *infra* notes 69-75 and accompanying text.

point was addressed in *Wheeler v. State*,¹⁵ wherein the supreme court ruled an agency's failure to adopt a method of testing as a rule did not invalidate the test results. *Pathfinder Mines v. State Bd. of Equalization*¹⁶ reiterates this point: "This court has not previously required that a valuation system adaptation and pricing mechanisms within the Department require promulgation by the regularized rule processes of the WAPA, Wyoming Statute section 16-3-102(b), as long as statutory and constitutional rights to protest and contest are afforded to the taxpayer."¹⁷

When Are Rules Required?

One important mandate for rules under the WAPA is the requirement for an agency to adopt, as a "rule," its rules of practice and procedure governing the conduct of contested cases. If an agency fails to adopt rules of contested case procedure, its decisions and orders are invalid.¹⁸

Separate from the statutory requirement for rules of procedure, the supreme court has required rulemaking when an agency proposes to take action which is "substantive or legislative, as opposed to interpretive."¹⁹ This rather vague mandate has been interpreted to require a rule when "statutory direction" lacks "plain meaning without promulgation of a rule that sets the . . . standards" for agency enforcement purposes.²⁰ Or, stated another way, the court expects agencies to make general policy by rules²¹ rather than in the context of adjudications and orders "too amorphous to permit judicial review."²² For a more comprehensive discussion of this "good government" concept behind rulemaking, consider: "[W]ritten standards enable the decisionmaking body . . . to make its decisions by rule of law rather than for subjective or ad hominem reasons The danger of inconsistent, subjective

15. *Wheeler v. State*, 705 P.2d 861, 865 (Wyo. 1985).

16. 766 P.2d 531 (Wyo. 1988).

17. *Id.* at 535. See also *Amoco Prod. Co. v. State Bd. of Equalization*, 899 P.2d 855 (Wyo. 1995).

18. See *Yeik v. Dep't of Revenue and Taxation*, 595 P.2d 965, 968 (Wyo. 1979). But cf. *Holly Sugar v. State Bd. of Equalization*, 839 P.2d 959, 967 (Wyo. 1992) (summarily rejecting appellant's claim that it was denied due process on account of the county board's failure to adopt rules of procedure).

19. *Bessemer Mt.*, 856 P.2d at 453.

20. *Id.* at 455.

21. *Wyoming Mining Ass'n v. State*, 748 P.2d 718 (Wyo. 1988). However, court decisions seem inconsistent on the requirement to promulgate a rule. See *Pathfinder Mines v. State Bd. of Equalization*, 766 P.2d 531 (Wyo. 1988) (seeming to suggest the court will not require a rule to set policy, even if required by law, where the agency is essentially acting to reverse an old policy which is inconsistent with law and not established by rule).

22. *Bessemer Mt.*, 856 P.2d at 453.

tive and ad hominem decision making is minimized by the deliberate adoption of written, published policy standards applicable alike to all applicants."²³

Why Have Rules?

The most important advantage of a "rule" is that rulemaking, when properly done, brings finality to issues and consistency to actions. This principle is captured by the statement that "[r]ules and regulations adopted pursuant to statutory authority and when properly promulgated have the force and effect of law."²⁴ This advantage is expanded further by the court's recognition that an agency has the ability to interpret its rules, with such interpretation afforded deference by the court. "We have also held that we will defer to an administrative agency's construction of its rules unless such construction is clearly erroneous or inconsistent with the plain meaning of the rules." [Citations omitted.]²⁵ "If an ambiguous statute has been construed by an agency charged with administering it, we will accord deference to, but are not bound by, that construction. After all, the final construction of an ambiguous statute is a question for the court."²⁶

When Won't a Court Defer to Rules?

There are two exceptions to the proposition that a court will generally defer to an agency rule construing law. First, a court will not accord any deference to a regulation which interprets law by an agency which lacks any distinctive expertise to construe the statute in question.²⁷

Further, and more importantly, a court will not defer to an agency which does not follow its own rules. Because rules have the force of law, an agency must follow its rules or suffer the potential that its actions will be declared arbitrary and capricious. This principle is articulated in *Keslar v. Police Civil Service Comm'n*,²⁸ and reaffirmed in *Roberts v. Lincoln County*

23. *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n*, 517 P.2d 289, 293 (Or. Ct. App. 1973).

24. *Yeik*, 595 P.2d at 968; *Doidge v. Board of Charities and Reform*, 789 P.2d 880, 883 (Wyo. 1990).

25. *Doidge*, 789 P.2d at 884.

26. *Wyoming Dep't of Transp. v. International Union of Operating Eng'rs*, 908 P.2d 970, 972 (1995).

27. *Id.* The court referred to the Wyoming Public Records Act, WYO. STAT. § 16-4-201 to -205 (1977 & Supp. 1995), as the subject of the interpretive regulation. *International Union*, 908 P.2d at 972.

28. 665 P.2d 937 (Wyo. 1983).

School Dist. No. One,²⁹ *State ex rel. Wyoming Workers' Compensation Div. v. Brown*,³⁰ and the following discussion in *Bowen v. State*.³¹

Underlying our often repeated statement that “[i]n determining whether the action of an agency is arbitrary, capricious, or an abuse of discretion, the court ascertains whether the decision is supported by the record,” [citations omitted] is the assumption that an agency will abide by the rules it promulgates. The failure of an agency to abide by its rules is per se arbitrary and capricious.³²

Can Agencies Misuse the Power of Rules?

When a statute grants rulemaking authority, the agency should exercise this power carefully. An agency should avoid using rules to predetermine issues which should be considered on a case-by-case basis and only after consideration of particular circumstances.³³ agencies may also inadvertently add provisions in a rule which limit or expand their governing statute. If this occurs, neither a court nor an administrative tribunal³⁴ should feel shackled by the agency's rule. This principle was recognized in *Bowen*,³⁵ wherein the court struck down regulations expanding provisions for license revocation, by refusing “to enlarge, stretch, expand, or extend a statute to matters which do not fall within its express provisions.”³⁶

The agency also may not use rulemaking to “cure” a constitutional issue present in the law. This issue was present in the recent case,

29. 676 P.2d 577, 580 (Wyo. 1984).

30. 805 P.2d 830, 835 (Wyo. 1991).

31. 900 P.2d. 1140 (Wyo. 1995).

32. *Id.* at 1142 (quoting *State ex rel. Wyoming Workers' Compensation Div. v. Brown*, 805 P.2d 830, 835 (Wyo. 1991)). As an aside, while the court expects agencies to be aware of and follow their adopted rules, in some limited situations the court will not invalidate all actions inconsistent with rules. In *Roberts*, the court allowed a violation of a regulation designed primarily for the benefit of the school (as opposed to the aggrieved party), referencing:

Most courts which have allowed departures [from regulations] have based their conclusions on findings that the regulation which was violated was intended to govern internal agency procedures rather than to protect any interest of the objecting party.

Roberts, 676 P.2d at 580 (citing 87 HARV. L. REV. 629, *Violations by Agencies of Their Own Regulations*) (citations omitted).

33. See *Marathon Oil Co. v. Pan American Petroleum Corp.*, 473 P.2d 575, 577 (Wyo. 1970). See also 2 AM. JUR. 2D *Administrative Law* § 229 (1994).

34. See *State v. Ramsey*, 839 P.2d 936 (Wyo. 1992). In *Ramsey*, a rule promulgated by the Workers' Compensation Division was disregarded by the hearing officer. The court held, “[i]t follows that the rule preclusion adopted by the Workers' Compensation Division lacks required statutory justification to create the prohibition by rule when not authorized by statutory limitation.” *Id.* at 940.

35. 900 P.2d. 1140 (Wyo. 1995).

36. *Id.* at 1143 (citing *Wyrulec Company v. Schutt*, 866 P.2d 756, 759 (Wyo. 1993)).

Allhusen v. State,³⁷ which discusses and employs the test established in *Johnson v. State Hearing Examiner's Office*³⁸ for analyzing state constitution equal protection claims. The court in *Allhusen* found the mandatory licensure provisions for mental health professionals (and related provisions) unconstitutional as contrary to guarantees of equal protection, uniform operation of laws and special legislation. An effort was made by the agency to resolve the statutory problems through rulemaking. The court held this action was not sufficient, as "the regulations were not consistent with the act and cannot avoid the constitutional shortfall."³⁹

How Can the Public Write Rules?

One important advantage to rulemaking is it provides an opportunity for private parties to "write agency policy."⁴⁰ Either through the rulemaking petition process⁴¹ or the public comment process,⁴² anyone can write agency policy in the form of a rule⁴³ and advocate its adoption to the agency.

The public can also force an agency to be responsive to comments offered by requesting the reasons why a particular comment or consideration was not accepted.⁴⁴ As recognized by the Wyoming Supreme Court, the "reasons for requiring a concise statement of the principal reasons for overruling the consideration urged against the adoption of a rule are to assure that the agency considered arguments made at the public hearing and to facilitate review."⁴⁵

Finally, participation in agency rulemaking is a good way to cultivate contacts with agency personnel. As a less adversarial proceeding, agency personnel are usually more friendly, open, and receptive to constructive proposals and compromise offered throughout the rulemaking process.

37. 898 P.2d 878 (Wyo. 1995).

38. 838 P.2d 158 (Wyo. 1992).

39. *Allhusen*, 898 P.2d at 890.

40. *Bessemer Mt.*, 856 P.2d at 453.

41. WYO. STAT. § 16-3-106 (1977) authorizes any interested person to petition an agency requesting the promulgation, amendment or repeal of any rule. If the petition is accepted, the agency initiates rulemaking proceedings in accordance with WYO. STAT. § 16-3-103 (Supp. 1995). See *infra* notes 69-75 and accompanying text.

42. WYO. STAT. § 16-2-103(a)(ii) (Supp. 1995).

43. Any rewrite proposed during the public comment process should be consistent with law and with the notice of rulemaking. Otherwise, the proposed rule does not fall within the public notice requirements of WYO. STAT. § 16-3-103(a)(i) (Supp. 1995).

44. WYO. STAT. § 16-3-103(a)(ii) (Supp. 1995).

45. *Tri-State G & T Ass'n v. Environmental Quality Council*, 590 P.2d 1324, 1328 (Wyo. 1979).

Problems With Rulemaking to Resolve Disputes

When evaluating rulemaking as a dispute resolution method, there are some disadvantages which should be evaluated. First, rules have prospective application only, taking effect when filed with the secretary of state.⁴⁶ A rule, therefore, cannot be used to reverse an adverse action previously taken by an agency.

Second, rules have general application to all persons similarly situated. If the dispute with an agency is very fact-specific or involves a disagreement on the facts, rulemaking is not advised.

Rulemaking also can become political with the involvement of the governor in rule adoption,⁴⁷ as well as the Legislative Management Council⁴⁸ under their rule review provisions.⁴⁹ This can be positive, or negative, depending on the politics involved. Even the Wyoming Supreme Court has weighed this consideration, and declined to require rulemaking where "the requirement will cause him [the governor] to become a direct administrative participant in the tax collection process."⁵⁰

Further, the "culture" of a particular agency may not support using rulemaking to resolve disputes.⁵¹ Simply put, some agencies do not like rules. They may believe rulemaking is overdone, and they often oppose the loss of flexibility if policy is actually written down. Finally, some agencies fear the costs of administering more and more rules. If this culture is encountered, any draft proposed rules offered by petition or in the form of public comment, should be simple, flexible, and integrated within a current set of rules.

46. WYO. STAT. § 16-3-104 (1977).

47. WYO. STAT. § 16-3-103(d) (Supp. 1995).

48. The Legislative Management Council is composed of the president, vice president, majority and minority floor leaders or their respective designees of the senate plus two other senators selected at large, and the speaker, speaker pro tempore, majority and minority floor leaders or their respective designees of the house plus two other house members selected at large. These twelve members select one additional member at large from the house of which the chairman of the management council is not a member. WYO. STAT. § 28-8-102(a) (Supp. 1995). The Management Council directs activities of the legislative service office as well as establishes priorities for specific studies or service. WYO. STAT. §§ 28-8-101 to -114 (1977 & Supp. 1995). The Management Council examines administrative rules and regulations to determine if they properly implement legislative intent, are within the scope of delegated authority, and are lawfully adopted. WYO. STAT. § 28-9-102(a)(i) (Supp. 1995).

49. WYO. STAT. §§ 28-9-101 to -108 (1977).

50. *Pathfinder Mines v. State Bd. of Equalization*, 766 P.2d 531, 536 (Wyo. 1988).

51. Such a "culture" was encountered within the Wyoming Department of Revenue, during Ms. Freudenthal's tenure as chairman of the Wyoming Tax Commission and Wyoming State Board of Equalization.

In contrast with contested case procedures discussed below, rulemaking is a relatively simple process managed entirely by the agency, as generally described in Wyoming Statute section 16-3-103. The general rulemaking process is outlined in Appendix A, "Rulemaking Guide."

However, the time needed for rule adoption is often a major consideration. The most significant statutory time considerations involve the forty-five day notice of proposed rule,⁵² and the sixty-day period after adoption, for filing the rule with the secretary of state.⁵³ The most significant non-statutory time considerations involve the time taken by the agency in rule drafting; the scheduling of a hearing (if not done when the rule notice is first published); and the delay between the hearing and the agency decision.

Non-Statutory Procedural Requirements

While the WAPA sets out the basic procedural requirements, it is important to note two non-statutory requirements, one imposed by the executive branch and the other imposed by the Wyoming Supreme Court.

By Executive Order 1981-12,⁵⁴ *ex parte* rules are applied to both contested cases as well as rulemaking and other legislative-type processes. For contested cases, *ex parte* prohibitions apply as soon as a case is filed. The more simplified nature of rulemaking, however, brings fewer limitations governing *ex parte* contacts. For rulemaking, *ex parte* limits apply only after notice of rulemaking is issued.⁵⁵ This allows substantial latitude for contacts during the crucial, early rule development phase. After notice of rulemaking is issued and the *ex parte* limits begin, the requirements for documenting *ex parte* contacts are less onerous than those applicable to contested cases, provided the contact occurs before the end of the public comment period.⁵⁶

The supreme court has imposed a non-statutory procedural duty for agencies in the rule development process. When a rule is drafted an agency must also draft a "statement of principal reasons" for adoption of the rule.⁵⁷ The agency statement of reasons serves two key

52. WYO. STAT. § 16-3-103(a)(i) (Supp. 1995).

53. WYO. STAT. § 16-3-104(a) (1977). *See also* Secretary of State's Rules on Rules for State Agencies (prescribing the format for final state agency rules and certifications that must accompany rules submitted for filing in that office).

54. This order remains in effect. Telephone Interview with Cynthia Lummis in the Office of governor Geringer (January 8, 1996).

55. Exec. Order 1981-12 § 2.a.

56. Exec. Order 1981-12 § 1 governs contested case proceedings. Exec. Order 1981-12 § 2 governs rulemaking or other legislative-type proceedings.

57. *Tri-State G & T*, 590 P.2d at 1331.

objectives. First, the statement of reasons, as the functional equivalent of a statement of the rule's basis and purpose, will "allow the courts to see whether an agency has carried out an essentially legislative task in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of generally applicable rules."⁵⁸ Second, the statement of reasons will provide the court a "way to determine if the agency considered the relevant factors or if the decision is rational."⁵⁹

The statement of reasons, therefore, effectively becomes a supplemental document, much like the preamble to rules in the Federal Register. It can explain: the agency's understanding of its statutory mandate; the objective(s) of the rule; the competing objective(s), if any, which were not adopted by the agency (and reasons therefore); the factual basis underlying the rule; and the supporting reasons for the rule.

If done carefully, the statement of reasons can also become a shield to defend the rule against attack. As noted by the court:

Once the principal reasons for adoption are supplied, the courts are required to make a searching and careful inquiry into the facts. The ultimate standard of review is, however, a narrow one. The courts are not empowered to substitute their judgment for that of the agency. Nor, in Wyoming, are the courts empowered to review an agency's rule-making decision to determine if it is supported by substantial evidence. This type of review is limited to contested-case situations.⁶⁰

Can the Procedure Be Avoided?

As previously noted, rulemaking is a relatively simple process compared to contested case proceedings. Sometimes, however, rulemaking will simply take too long to address the problem or issue. If this is the case, emergency rulemaking⁶¹ may present a solution.

By emergency rulemaking the agency may avoid many of the WAPA procedural steps required for regular rules. Emergency rules are unique in that they may be adopted without following the WAPA procedures of

58. *Id.* at 1330 (citations omitted).

59. *Id.* at 1331.

60. *Id.* (citations omitted).

61. WYO. STAT. § 16-3-103(b) (Supp. 1995). Some agencies routinely update their "notice of intent" mailing list. Consequently, it may be advisable to annually request inclusion on the list. This list should not be confused with the agency's rule subscription list, which comprises a mailing list of all entities desiring copies of the adopted rules.

notice of intent to adopt and opportunity for comment.⁶² Emergency rules are effective immediately when filed with the secretary of state and with the Legislative Service Office.⁶³ However, they are effective for only 120 days.⁶⁴ The governor must specifically concur with the agency finding that an emergency exists for the rule to be effective.⁶⁵ Rule review of an emergency rule by the Legislative Management Council is not required.⁶⁶

With the exception of emergency rules, the basic rulemaking steps cannot be overlooked without penalty. The governor may only approve a rule which "has been adopted in compliance with the procedural requirements of this act [WAPA]."⁶⁷ Further, validity of rules may be contested for noncompliance with the WAPA procedures, provided the proceeding is brought within two years from the effective date of the rule.⁶⁸

How to Avoid Bad Rules

The safest way to have (and keep) a good set of rules is to monitor the process. The practitioner should identify the rules of interest to clients and make an annual⁶⁹ request for inclusion on those agencies' mailing lists.⁷⁰ Any interested person may also review rulemaking notices for all agencies in the secretary of state's office.⁷¹

The easiest way to obtain a "good" rule is to actually write it for the agency. Petitions for rulemaking under Wyoming Statute 16-3-106 can be considered as a means to place a draft rule before an agency. The agency may have rules of procedure for petitions.⁷² If the agency has no procedural rules for petitions, Wyoming Statute 16-3-106 generally describes the material which can be submitted with the petition. Unfortunately, the law does not prescribe any specific time within which the agency must act on the petition, (other than "as soon as practicable").⁷³ Further, the agency's decision to deny the petition is final and not subject to judicial review.⁷⁴

62. WYO. STAT. § 16-3-103(b) (Supp. 1995).

63. WYO. STAT. § 16-3-104(b)(ii) (1977).

64. WYO. STAT. § 16-3-103(b) (Supp. 1995).

65. WYO. STAT. § 16-3-104(a)(ii) (1977).

66. WYO. STAT. § 28-9-108 (1977).

67. WYO. STAT. § 16-3-103(d)(iii) (Supp. 1995).

68. WYO. STAT. § 16-3-103(c) (Supp. 1995).

69. This will protect against those agencies which purge their "notice" list on an annual basis.

70. WYO. STAT. § 16-3-103(a)(i) (Supp. 1995). Be sure to request inclusion on the list for advance notice of all rulemaking. This is usually a different list from that maintained for copies of rules.

71. WYO. STAT. § 16-3-103(g) (Supp. 1995).

72. See e.g., Chapter 1, § 7, General Procedures of the Wyoming Department of Revenue.

73. WYO. STAT. § 16-3-106 (1977).

74. *Id.*; U.S. Steel Corp. v. Environmental Quality Council, 575 P.2d 749 (Wyo. 1978).

The petition process is usually not available if the agency is already in rulemaking on the particular subject. Once a rulemaking proposal is initiated by an agency, interested persons should submit specific, written comments on the rule. To assure these comments are fairly considered, a request can be made for a statement by the agency of the reasons for overruling the consideration urged in the comment.⁷⁵ Participation in any scheduled public hearing can be an important safeguard as well.

What Can be Done About a Bad Rule?

Once a rule is adopted by an agency, the governor may be urged to disapprove it for any of the reasons identified in Wyoming Statute § 16-3-103(e)(i)-(iii). This list is not, however, all inclusive. The governor, as chief officer of the executive branch, may be receptive to policy and political arguments against a rule.

The Legislative Management Council may also be receptive to disapproval of a rule for the reasons identified in Wyoming Statute sections 28-9-102(a)(i) and 28-9-104(c)(i)-(iii).⁷⁶ Such action could persuade the governor to direct the amendment or rescission of a rule. The Management Council may also advance introduction of a legislative order to prohibit implementation or enforcement of the rule.⁷⁷

Rules are subject to judicial review under Wyoming Statute section 16-3-114 and Wyoming Rules of Appellate Procedure Rule 12. Rules are also subject to declaratory judgment action.⁷⁸ The following are viable issues for consideration in any judicial forum to review a rule:

1. Were the minimum procedural requirements afforded?⁷⁹ In other words, was the party afforded a reasonable opportunity to submit its data, views, and arguments? On this point, the court has noted:

[A]bsent constitutional constraints or extremely compelling circumstances, administrative agencies are free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their duties. The determination of when extra procedural devices should be employed lies primarily within the discretion of the agencies, not the courts.⁸⁰

75. WYO. STAT. § 16-3-103(a)(ii)(D) (Supp. 1995).

76. Management Council disapproval alone will not affect the implementation of a rule. Implementation or enforcement of the rule may be prohibited only by approval, each house voting separately, of a legislative order. WYO. STAT. § 28-9-107(c) (1977).

77. WYO. STAT. §§ 28-9-106 to -107 (1977).

78. Rocky Mountain Oil & Gas Ass'n v. State, 645 P.2d 1163 (Wyo. 1982).

79. WYO. STAT. §§ 16-3-103(c) (Supp. 1995) and 16-3-114(c)(ii)(D) (1977).

80. *Tri-State G & T*, 590 P.2d at 1331-32.

2. Did the agency fully consider arguments made at the public hearing against adoption of a rule?⁸¹
3. Was the agency's action arbitrary, capricious, or characterized by an abuse of discretion?⁸² The term "arbitrary" has been generally defined as "willful and unreasoning action, without consideration and regard for the facts and circumstances presented, and without adequate determining principle."⁸³
4. Is the rule outside the confines of the statutory guidelines articulated by the legislature?⁸⁴

Why Care About Rulemaking?

Agency rules have the force and effect of law and the courts will often defer to an agency's interpretation of its rules. Additionally, a rule, once promulgated and given effect becomes part of the "institution" within the agency and will often be more difficult to modify over time. Rulemaking is often overlooked until it is too late to influence the content of rules as finally adopted by the promulgating agency. Practitioners should take time to advise their clients about rulemaking and their opportunities to influence the process. There truly is no easier way to become a "legislator-for-a-day."

CONTESTED CASES

In this section, we give a brief overview of the nature of contested case proceedings, including an examination of some recent case law. Recent cases treat a great many issues that are unique to specific areas of law, such as workers' compensation or taxation. However, it is not possible to review the substantive law in those areas in the space of this article. Our focus therefore is upon broader concepts and cases that, we believe, have importance in administrative proceedings generally.

An agency acts as a quasi-judicial authority in contested case proceedings. A contested case arises when an agency undertakes action that must be accompanied by an opportunity for a hearing before the agency.⁸⁵

81. *Id.* at 1330.

82. *Id.* at 1332; WYO. STAT. § 16-3-114(c)(ii)(A) (1977).

83. *Tri-State G & T*, 590 P.2d at 1330 (citing *In re West Laramie, Wyo.* 457 P.2d 498, 502 (Wyo. 1969)). See also *Marathon Oil Co. v. Pan American Petroleum Corp.*, 473 P.2d 575, 577 (Wyo. 1970).

84. *Tri-County Tel.*, 910 P.2d at 1361 (citing WYO. STAT. § 16-3-114(c)(ii)(C) (1977)).

85. WYO. STAT. § 16-3-101(b)(ii) (Supp. 1995).

The right to a hearing may arise as a consequence of constitutional due process requirements, statute or agency rule; but the right to a hearing is not created by the WAPA.⁸⁶

The Wyoming Administrative Procedure Act, as its name implies, prescribes procedures to be followed in contested case hearings generally. The WAPA mandates a trial-type hearing with discovery available (with exceptions) as provided in the Wyoming Rules of Civil Procedure.⁸⁷ The WAPA also requires each agency to promulgate rules of practice and procedure for contested cases.⁸⁸ While individual agency rules must be consistent with the WAPA, there are no uniform agency rules of procedure and it is therefore necessary (or at least wise) to consult the rules of practice promulgated by the agency before which a particular contested case will be heard.

The rules of evidence applicable in courts do not apply in administrative hearings. Only "irrelevant, immaterial or unduly repetitious evidence" must be excluded.⁸⁹

Parties should, if they are unfamiliar with the practices of a particular agency, determine who will preside at hearing, who will make the final agency decision and whether or not a recommended decision will be entered. The WAPA contemplates the use of hearing examiners who are not the final decision maker and provides for entry of recommended decisions, but does not require them.⁹⁰ If the final decision maker is not present at hearing, counsel may wish to request entry of a recommended decision since, in these cases, the final decision maker will not have observed the demeanor of the hearing participants and may benefit from the hearing examiner's judgments in that regard. This is especially important since the final decision maker is entitled to make his own judgments concerning witness testimony, even though he was not present at the hearing and did not have an opportunity to observe the witnesses.⁹¹

86. *Carlson v. Bratton*, 681 P.2d 1333, 1338 (1984).

87. WYO. STAT. § 16-3-107(g) (Supp. 1995) and § 16-3-108 (1977).

88. WYO. STAT. § 16-3-102(a)(I) (1977).

89. WYO. STAT. § 16-3-108(a) (1977).

90. WYO. STAT. § 16-3-109 (1977) and § 16-3-112(b)(viii) (1977).

91. *City of Casper v. Department of Employment*, 851 P.2d 1 (Wyo. 1993).

Agency Authority

It is axiomatic that an agency's authority is strictly defined by statute.⁹² The nature and limits of agency authority are such that it is necessary in many instances to ensure that the agency is in fact the correct forum in which to seek a particular remedy. In some cases, such as a contest involving discharge of a state employee, the appropriate agency will have exclusive authority to initially decide the matters at issue.⁹³ In other cases, such as a contract dispute which the agency has no clear statutory authority to decide, a proceeding before the agency will prove to be a wasted effort.⁹⁴ Agencies are not competent to pass upon constitutional issues.⁹⁵

As a general rule, agencies do not have authority to enforce their own orders and an action to enforce an agency ruling should be commenced in the appropriate court and not in the agency.⁹⁶ When an action is commenced to enforce an agency order, the enforcement proceeding does not provide an opportunity to challenge the underlying agency order.⁹⁷ Disputes regarding a settlement agreement entered in a contested case are properly resolved by an action in district court rather than by a subsequent contested case hearing.⁹⁸ Consistent with this general lack of enforcement authority, the failure of a party or witness to obey an agency subpoena must be remedied in the district court.⁹⁹

Burden of Proof and Standard of Proof

In all contested administrative proceedings, it is wise to make an initial review to determine which party will have the burden of proof and

92. *Kerr-McGee Corp. v. Wyoming Oil and Gas Conservation Comm'n*, 903 P.2d 537 (Wyo. 1995).

93. *Glover v. State*, 860 P.2d 1169 (Wyo. 1993).

94. *Brasel & Simms Constr. Co. v. Wyoming Highway Comm'n*, 655 P.2d 265 (Wyo. 1982); *Preferred Energy Properties v. State Bd. of Equalization*, 890 P.2d 1110 (Wyo. 1995); *Kerr-McGee Corp. v. Wyoming Oil and Gas Conservation Comm'n*, 903 P.2d 537 (Wyo. 1995).

95. *Mekss v. Wyoming Girls' School*, 813 P.2d 185, 193 (Wyo. 1991) *cert. denied*, 502 U.S. 1032 (1992).

96. So far as the authors have been able to discover, no administrative agency in Wyoming has contempt power and there is therefore no administrative mechanism by which an agency can force compliance with its orders.

97. *Joelson v. City of Casper*, 676 P.2d 570 (Wyo. 1984).

98. *Wyoming Bd. of Certified Pub. Accountants v. Christensen*, 800 P.2d 853, 856 (Wyo. 1990); *but see Union Tel. Co., Inc. v. Wyoming Pub. Serv. Comm'n*, 907 P.2d 340 (Wyo. 1995).

99. WYO. STAT. § 16-3-107(f) (Supp. 1995). Agencies do have authority to impose sanctions, including dismissal, on a party who fails to make discovery. WYO. STAT. § 16-3-107(g) (Supp. 1995); WYO. R. CIV. P. 37.

which standard of proof will apply. This may be difficult since procedures in the agency may confuse the issue and specific statutory and rule provisions may allocate the burden differently than might be expected in any given case. Applying the usual rule that the party with the affirmative on an issue has the burden of proof does not always yield a correct result.¹⁰⁰

When the Board of Control is asked to review a decision of the state engineer denying requested regulation of a water well, the petitioner is not required to meet the usual appellate burden to establish a lack of sufficient evidence to support the decision of the state engineer. Rather, he is a party to a *de novo* contested case proceeding before the Board and bears the usual burden of a party in such cases. That is, he must prove his case by a preponderance of the evidence.¹⁰¹

In a proceeding to revoke a professional license, the agency complainant bears the burden to show by clear and convincing evidence that the revocation is appropriate.¹⁰² The fact that the licensee may be identified as the contestant or the petitioner by virtue of having requested a hearing following notice of the agency's intent to revoke should be of no consequence in determining which party bears the burden of proof.

Under Wyoming Statute section 35-11-409, however, when the director of the Department of Environmental Quality determines that there has been a willful violation of the Environmental Quality Act he can issue an order requiring the mine operator to show cause why his permit to mine should not be suspended or revoked. If a hearing is requested before the Environmental Quality Council, "[u]pon failure of the operator to show cause why the permit should not be suspended or revoked, the council shall suspend or revoke the permit."¹⁰³ It thus appears that, the permittee, not the agency, has the burden of proof on the question whether or not a willful violation of the Environmental Quality Act has occurred.

In most cases, the burden of proof will lie with the applicant for a license, permit or government-provided benefits.¹⁰⁴ Conversely, the agency will ordinarily have the burden of proof in actions to revoke a

100. While this seems to be a fair statement of the rule in Wyoming, it may be safer to say only that this is the party with the burden of production. 2 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 10.7 (3d ed. 1994).

101. Willadsen v. Christopoulos, 731 P.2d 1181, 1184 (Wyo. 1987).

102. Devous v. Wyoming State Bd. of Medical Examiners, 845 P.2d 408, 416 (Wyo. 1993).

103. WYO. STAT. § 35-11-409 (1977).

104. Willadsen, 731 P.2d 1181 (party seeking regulation has burden of proof); Wyoming Steel & Fab, Inc., 882 P.2d 873 (applicant for workers' compensation benefits has burden of proof); WYO. STAT. § 35-11-802 (1977) (applicant for permit under Environmental Quality Act has burden of proof).

license or permit or to terminate benefits.¹⁰⁵ In either kind of case, the burden of proof should not shift, regardless of agency proceedings prior to the contested case hearing. While the burden of proof should remain with the same party throughout a proceeding, the burden of production may shift.¹⁰⁶

Affirmative defenses may be raised in administrative hearings and, in those circumstances, the party asserting the affirmative defense will have the burden of proof with respect to that issue. In workers' compensation cases, for example, an affirmative defense is created by Wyoming Statute section 27-14-407, which bars payment of benefits if the employee engages in injurious practices that tend to impede or retard his return to full health. The party asserting that benefits should be barred has the burden of proof on that issue.¹⁰⁷

To add to the confusion, the administrative hearing process is sufficiently flexible to accommodate varying orders of presentation while allowing all parties a full opportunity to present their evidence.¹⁰⁸ The hearing authority will usually have discretion to allow the party with the burden of proof to go second, if doing so facilitates conduct of an orderly hearing. This may happen when an individual is the party with the burden of proof and an agency has indicated its intention to deny a request or application from the individual. Particularly if the agency failed to clearly state its reasons for denying a request or application, it may be helpful to have the agency go first to explain its reasons for the denial. Reordering the presentations of the parties should not affect allocation of the burden of proof and the parties should ensure that the record reflects that the reordering of presentations is being done for convenience only.

The flexibility that is one of the great advantages in administrative hearings derives from a lack of rigid procedural requirements. This lack of hard and fast rules of procedure comes with a price, however, in that the parties often cannot rely on procedural rules as a ready vehicle for defining their case. It is of particular importance for counsel to take the initiative in administrative proceedings to identify issues and to recognize his burden to prove or to go forward on the issues.

105. *Devous*, 845 P.2d 408, *Britton v. Halliburton Services*, 895 P.2d 45, 48 (Wyo. 1995).

106. *Casper Iron and Metal, Inc. v. Unemployment Ins. Comm'n*, 845 P.2d 387 (Wyo. 1993). This is a confusing decision no matter how carefully it is read. We believe that, reduced to its essentials, the case says that the party making an objection may be required to go first at hearing on the objection, regardless who has the ultimate burden of proof on the issues.

107. WYO. STAT. § 27-14-407 (1977); *Matter of Meredith*, 743 P.2d 874, 876 (Wyo. 1987); *Corman v. State ex rel. Wyoming Workers' Compensation Div.*, 909 P.2d 966 (Wyo. 1996).

108. The WAPA does not specify any order of presentation of evidence.

Collateral Estoppel and Res Judicata

Collateral estoppel¹⁰⁹ and res judicata apply to preclude relitigation, even in subsequent court actions, of issues and claims that have been the subject of contested case proceedings.¹¹⁰ *Slavens v. Board of County Commissioners*¹¹¹ and *Kahrs v. Board of Trustees*¹¹² were both wrongful termination cases in which an administrative hearing was held and the contested terminations were affirmed. In *Slavens*, the administrative decision was upheld by the district court but not appealed to the Wyoming Supreme Court.¹¹³ In *Kahrs*, no appeal was taken from the Board of Trustees's decision in the administrative proceeding.¹¹⁴ In both cases, the terminated employees brought independent actions in district court based upon various tort and contract claims. The Wyoming Supreme Court subsequently ruled that the independent actions were barred because the propriety of the terminations had been finally established through the administrative hearing process.¹¹⁵

The result in *Slavens* and *Kahrs* is troubling because, in both cases, the court barred claims that the administrative hearing authorities could not properly decide and that might have had merit regardless of the administrative decision. For instance, Slavens had been charged with criminal misconduct in connection with the events leading to termination of his employment. The criminal charges were ultimately dismissed upon the prosecutor's motion and Slavens alleged that he had been the victim of malicious prosecution.¹¹⁶ Likewise, Kahrs alleged at least one tort claim that could have had merit regardless whether her termination was proper.¹¹⁷

109. Promissory estoppel and equitable estoppel are quite different concepts from collateral estoppel and ordinarily will not operate to prevent an agency from taking an action that is otherwise proper. *Big Piney Oil & Gas Co. v. Wyoming Oil and Gas Conservation Comm'n*, 715 P.2d 557 (Wyo. 1986); *State Highway Comm'n v. Sheridan-Johnson Rural Electrification Ass'n*, 784 P.2d 588 (Wyo. 1989). The exceptions in Wyoming appear to be cases in which an individual is prevented from receiving a state-provided benefit for which he qualifies but that he has been denied as a result of his reliance on agency representations or advice. *State ex rel. Wyoming Workers' Compensation Div. v. Rivera*, 796 P.2d 447, 450 (Wyo. 1990). The result in *Rivera* is essentially to allow equitable tolling of a statutory time limitation. In similar cases, litigants might do as well to argue that a time limit should be tolled as to argue that an agency should be estopped.

110. *Stockdale v. Transystems Services, Inc.* 908 P.2d 980 (Wyo. 1995). In *Joelson*, 676 P.2d 570 (Wyo. 1984), the Wyoming Supreme Court held that res judicata and collateral estoppel applied even though nothing in the court's decision indicates that there was ever a trial-type hearing or an opportunity for such a hearing.

111. *Slavens v. Board of County Comm'rs*, 854 P.2d 683 (Wyo. 1993).

112. *Kahrs v. Board of Trustees*, 901 P.2d 404 (Wyo. 1995).

113. *Slavens*, 845 P.2d at 685.

114. *Kahrs*, 901 P.2d at 405.

115. *Id.* at 406; *Slavens*, 845 P.2d at 687.

116. *Slavens*, 845 P.2d at 684-85.

117. *Kahrs*, 901 P.2d at 405.

While one may speculate that the tort claims made by Slavens and Kahrs were actually dismissed because they lacked merit on the facts, or were pleaded in such a way that they could not survive independent of the wrongful termination claims, that is not made clear in the supreme court's decisions. In *Kahrs*, the supreme court simply says, "Her [Kahrs'] failure to seek judicial review of the board's decision prohibited her from instituting any subsequent action in the matter."¹¹⁸

In its most recent decision in this area, the supreme court reaffirmed the holdings in *Slavens* and *Kahrs* in the face of a broad attack on the fairness and constitutionality of the administrative hearing and appeals processes.¹¹⁹ The court, especially in *Slavens* and *Kahrs*, has applied the doctrines of collateral estoppel and res judicata in a way that is, on its face, surprisingly broad. The finality that attaches to the result in contested case hearings is strongly underscored by the result in these cases.

Challenging Agency Findings After Hearing

The supreme court has also made clear that, as to factual issues decided at the administrative level, an appellant seeking to modify the factual determinations of the administrative hearing authority faces a heavy burden. In *Wyoming Steel & Fab, Inc. v. Robles*¹²⁰, a workers' compensation claimant was denied benefits following an administrative hearing when the hearing examiner found that Robles had failed to prove by a preponderance of the evidence that his injury was work related.¹²¹ The district court reversed, finding there was sufficient evidence in the record to support a conclusion that the injury was work related.¹²²

The supreme court held that the district court had erred by reweighing the evidence and substituting its judgment for that of the hearing examiner. In reaching its decision, the court stated its standard of review in especially strong terms.

Our standard for reviewing findings of fact made in an administrative worker's compensation hearing is well settled. If, after examining the entire record, we find substantial evidence to support the agency's finding, we will not substitute our own judgment for that of the agency. In addition, we examine only the

118. *Id.* at 407.

119. *Davis v. State*, 910 P.2d 555 (Wyo. 1996).

120. 82 P.2d 873 (Wyo. 1994).

121. *Id.*

122. *Id.* at 876.

evidence which favors the prevailing party, allowing every favorable inference, while omitting consideration of any conflicting evidence. [Citations omitted.]¹²³

This standard of review is, for practical purposes, the same as that applied when reviewing decisions of the district courts to determine whether they are supported by substantial evidence.¹²⁴

A party wishing to present new evidence following a contested case hearing will have a difficult burden to meet in order to establish his right to do so. In *Harris v. Sinclair Trucking*,¹²⁵ a workers' compensation claimant was awarded benefits following an administrative hearing. The employer appealed, arguing that it had new evidence the court should allow it to present. The district court remanded the case to allow the employer to present additional evidence and the hearing examiner, after receiving the new evidence, reversed his earlier ruling and denied benefits. Harris appealed and the supreme court reinstated the original award of benefits, finding that the district court had erred in allowing the employer to present new evidence.¹²⁶

In *Harris*, the supreme court interpreted Rule 12.08 of the Wyoming Rules of Appellate Procedure to create a strict standard for determining when new evidence can properly be presented after a hearing has been held and an appeal taken. The court held that the new evidence must be material in the sense that it "has legal significance; would control legal relations of parties; outcome of litigation depends upon it; would determine controversy; constitutes a part of cause of action or defense; establishes or refutes an essential element of a claim or defense."¹²⁷ The court additionally required the party wishing to present new evidence to demonstrate that there was good cause to present additional evidence.¹²⁸

Preserving Issues for Decision

Challenges to agency action must be presented in the right forum and at the right time, if they are to be decided at all. Issues not raised for disposition by the agency may not be raised later on appeal to the district court.¹²⁹ Parties should therefore be prepared to raise all important issues

123. *Id.*

124. *Cf. Denhart v. Arrow Sprinklers, Inc.*, 705 P.2d 846, 851 (Wyo. 1985).

125. *Harris v. Sinclair Trucking*, 900 P.2d 1163 (Wyo. 1995).

126. *Id.* at 1167.

127. *Id.* at 1166.

128. *Id.*

129. *Trout v. Wyoming Oil and Gas Conservation Comm'n*, 721 P.2d 1047 (Wyo. 1986).

in the administrative hearing and to fully litigate all issues the agency is authorized to decide.

While failure to raise an issue in an agency hearing will bar consideration of the issue on appeal, the failure to utilize the administrative hearing process to raise and litigate claims may also bar a party from thereafter obtaining a remedy in either the agency or the district court. In *Glover v. State*,¹³⁰ the supreme court held that a state employee cannot bring a wrongful discharge action absent exhaustion of the administrative process established for challenging the propriety of his discharge.¹³¹ Glover's employment with the State of Wyoming was terminated and Glover filed an action in district court, seeking to bypass the administrative review process established by the state's personnel rules. The action was dismissed and, on appeal, the supreme court ruled the administrative review process was exclusive and, because Glover had failed to pursue that remedy, he was barred from claiming the termination of his employment was improper.¹³² The result in this case was particularly harsh in that Glover was not only denied a remedy in the courts, he was denied an administrative remedy as well because he had failed to timely pursue the exclusive administrative remedy.

Taxpayers in *Amax Coal West, Inc. v. State Bd. of Equalization*¹³³ and *Thunder Basin Coal Co. v. State Bd. of Equalization*¹³⁴ also found themselves without a remedy. The Department of Revenue assessed certain taxes for the years 1986 and 1987 using a particular formula to value the coal production subject to tax. Amax and Thunder Basin, having no quarrel with the amount of the tax assessed, did not contest the original assessment and no hearing was held regarding that assessment. In 1990, an audit was performed which resulted in an amendment to the 1986 and 1987 assessments, increasing the taxes due for those years. The taxpayers requested a hearing before the State Board of Equalization and argued that the formula used to establish the taxable value of the coal produced was flawed and should not have been applied as it was.

The Board of Equalization refused to visit the valuation formula and, on appeal, the Wyoming Supreme Court affirmed. The court held that by failing to contest the original assessment within the statutory deadline for initiating such a contest, Amax and Thunder Basin had knowingly waived their right to challenge the formula. While the court analyzed the issues in

130. 860 P.2d 1169 (Wyo. 1993).

131. *Id.* at 1174.

132. *Id.*

133. 896 P.2d 1329 (Wyo. 1995).

134. 896 P.2d 1336 (Wyo. 1995).

Amax and *Thunder Basin* only in terms of waiver, application of the rule in *Glover* would also preclude the taxpayers from pursuing a remedy in any collateral proceeding.

The result in *Amax* and *Thunder Basin* appears likely to encourage what may be characterized as "protective" litigation. Even though a taxpayer may find the total of a given assessment acceptable, he may be encouraged to litigate so as to avoid the possibility that his efforts to challenge a future assessment would be barred by acceptance of the current assessment.

In any event, the lessons of *Glover*, *Amax*, and *Thunder Basin* are clear. First, know what administrative remedies are available and do not lightly forego them. Second, analyze every agency action carefully, even those which appear acceptable on their face, to ensure that a timely challenge is made to agency conduct that may be improper.

The evidentiary hearing in a contested case should be treated with all of the importance of an evidentiary hearing in the courts. It will be the only sure opportunity the parties will have to present their fact case and to raise the legal issues upon which they believe they can prevail. Parties may be forever barred from litigating issues because they were not raised in the contested case proceeding.

A Case Analysis

Finally, one recent supreme court decision deserves mention because it illustrates some of the complexity that may arise in a contested case hearing. Oil producers may qualify for an excise tax exemption for production from tertiary recovery projects.¹³⁵ While the Department of Revenue and the State Board of Equalization generally have authority over tax matters, tertiary recovery projects must be approved by the Wyoming Oil and Gas Conservation Commission.

In *Kerr-McGee v. Wyoming Oil and Gas Conservation Comm'n*,¹³⁶ Kerr-McGee sought approval for a tertiary recovery project from the Wyoming Oil and Gas Conservation Commission (OGCC). The Wyoming Department of Revenue participated in the proceeding as a party and

135. WYO. STAT. § 39-6-302(j) (1977). Tertiary recovery projects are projects undertaken to enhance the recovery of oil from fields that have been depleted to the point that the flow of oil to well bores from natural pressure and water flooding is no longer adequate for continued production from existing wells. Typically, tertiary recovery involves the injection of a gas such as carbon dioxide into the producing formation to increase pressures and move oil into well bores where it can be pumped to the surface.

136. 903 P.2d 537 (Wyo. 1995).

argued that the OGCC should rule that the project did not qualify for the statutory tax exemption.¹³⁷

At the close of the hearing, the OGCC agreed to authorize the project but withheld judgment on the tax exemption, intending to seek the advice of the Attorney General concerning application of the tax exemption before it decided whether to grant the exemption. The Attorney General declined to offer an opinion on the matter and, ultimately, the OGCC approved the project but ruled that the project did not qualify for the tax exemption.¹³⁸

On appeal, the supreme court reversed the OGCC ruling as to the tax exemption, holding the OGCC was without authority to rule on that issue. The supreme court determined that the Department of Revenue and the State Board of Equalization were the proper agencies to consider and determine whether the project should qualify for the tax exemption.

The court also advised that, had the Attorney General provided the guidance requested by the OGCC, that would have constituted a violation of separation of powers.¹³⁹ This is a novel application of the separation of powers doctrine which, although not dispositive in this case, is nevertheless worth noting for the principle it supports. If nothing else, the court in *Kerr-McGee* has indicated its disapproval of the Attorney General providing agency decision makers with advice that would tend to dictate the result in a contested case proceeding. This is consistent with the court's previously expressed disapproval of the Attorney General taking on the dual roles of prosecutor and advisor to the agency decision maker in contested cases.¹⁴⁰

Kerr-McGee is additionally of interest because we find one state agency intervening in a proceeding before an unrelated state agency in the absence of any statutory procedures requiring or allowing intervention by the second agency. In many cases, procedures established by statute require that state agencies appear as parties to proceedings before separate agencies. The Workers' Compensation Division regularly appears as a party in proceedings before the Office of Administrative

137. *Id.* at 539. While burden of proof and production were not an issue in this case, it is interesting to consider those questions as they relate to the Department's motion. With respect to the motion, should the Department be required 1) to prove the project did not qualify, 2) to only go forward on the issue and make a prima facie showing, or 3) neither? The best answer is probably neither. The taxpayer will ordinarily be required to go forward on the issue and to prove that his project is exempt.

138. *Id.*

139. *Id.* at 545.

140. *State Transp. Comm'n of Wyo. v. Ford*, 844 P.2d 496 (Wyo. 1992).

Hearings and the Department of Revenue regularly appears as a party in proceedings before the State Board of Equalization. In these cases, one agency is statutorily situated as the hearing authority and the other as a party to the proceeding.¹⁴¹

However, when one state agency appears as a party in a proceeding before another agency in the absence of clear statutory procedures dictating a proceeding of that nature, counsel for a private entity party should be exceedingly wary of the situation in which he finds himself. Given that the presiding agency will typically have the opportunity to participate as a party through its staff, one might reasonably question the necessity and propriety of a second agency intervening in the proceeding, also on behalf of the state. If nothing else, the state's interest should be "adequately represented"¹⁴² by the involvement of a single agency. If the intervenor agency asserts some interest different from that of the original agency party, it is well to inquire whether the intervenor agency (as in *Kerr-McGee*) or, perhaps, no agency at all has the authority to grant the relief sought by the intervenor agency.

Kerr-McGee demonstrates that it may indeed be necessary to address such threshold issues as the proper role of state agencies in the hearing process. Just as importantly, the case also demonstrates that the agencies themselves may fail to properly identify their role in the process.

Kerr-McGee also points up the importance of contested case jurisdiction as a consideration in drafting legislation. By adopting statutes that establish jurisdiction over closely related issues in separate agencies, the legislature has forced oil producers like *Kerr-McGee* to seek rulings from two agencies and, possibly, to present essentially the same evidence in two contested case hearings in order to obtain the regulatory approvals it wishes to have before going forward with its project.

CONCLUSION

Administrative rules and contested case hearings tend to be treated by many as a lesser cousin to statutes and trials. However, recent Wyoming case law suggests that the courts are willing to treat the result in properly conducted administrative proceedings with a degree of deference that cannot be readily distinguished from that accorded other legal proceedings. For those directly affected by rules that have the force and

141. WYO. STAT. § 9-2-2202 (1977); WYO. STAT. § 27-14-602 (Supp. 1995) and WYO. STAT. § 39-1-304(a) (Supp. 1995).

142. FED. R. CIV. P. 24(a).

effect of law or a decision in a contested case that cannot be attacked in a collateral proceeding, the importance of administrative proceedings cannot be overstated. Attorneys practicing before administrative agencies must put forth the same level of care and effort as would be devoted to winning at trial or influencing legislation, if the client's interests are to be fully protected.

APPENDIX A

Rulemaking - A Procedural Guide

1. Agency determines need and legal basis for rule. (Rulemaking petition under W.S. § 16-3-106 may have been received.) Agency prepares draft rule.
2. Agency submits draft rule and draft statement of reasons to governor, with copy to Attorney General (AG).¹⁴³
3. 45-day public notice, sent to AG, Secretary of State, Legislative Service Office (LSO), persons on mailing list, and newspaper (if desired). Rule may not be included with the notice.¹⁴⁴ Regulatory and licensing boards and commissions must also publish notice in any newsletter or electronic medium commonly used to communicate with interested entities.¹⁴⁵ Ex parte limit begins under Executive Order 1981-12.
4. Public hearing (if requested or if scheduled automatically). Can be held no earlier than 45-days after the notice is given or published under #3.¹⁴⁶
5. Public comment period closes at time and date established by the agency.
6. Decision to adopt, revise or table rule at regular or special meeting of agency.¹⁴⁷ Ex parte limit ends.
7. Within 10 days of adoption, agency submits rule to LSO. LSO staff reviews rule and prepares a report for Legislative Management Council.¹⁴⁸
8. Within 30 days of adoption and if requested, agency issues statement for overruling a comment or consideration.¹⁴⁹
9. Final rule, statement of reasons and signed certification page are delivered to AG.¹⁵⁰

143. See WYO. STAT. § 16-3-102(c) (1977) and *Tri-State G & T Ass'n v. Environmental Quality Council*, 590 P.2d 1324 (Wyo. 1979).

144. WYO. STAT. § 16-3-103(a) (Supp. 1995).

145. WYO. STAT. § 16-3-103(e) (Supp. 1995).

146. WYO. STAT. § 16-3-103(a)(ii) (Supp. 1995).

147. See WYO. STAT. §§ 16-4-401 to -407 (1977 & Supp. 1995).

148. WYO. STAT. § 28-9-103 (1977) and § 28-9-104 (1977).

149. WYO. STAT. § 16-3-103(a)(ii)(D) (Supp. 1995).

150. Interview with Loretta Valdez, Wyoming Attorney General's Office (March 12, 1996).

10. AG submits rule package with advice to governor.¹⁵¹
11. governor acts on rule, either returning the rule to the agency (disapproved) or filing the rule with the Secretary of State (approved). Must be within 60 days of adoption #6.¹⁵²
12. Within 10 days of filing, notice of adoption is mailed to persons on mailing list.¹⁵³
13. Legislative Management Council sends agency notice of meeting on rules. Considers LSO report at meeting.¹⁵⁴
14. Management Council recommendations for approval, amendment or rescission are provided to governor and agency within 5 days of the meeting.¹⁵⁵
15. Within 15 days of receiving council's recommendation (amendment or rescission), governor either orders the rule be amended or rescinded in accord with council's recommendation, or file with the council written objections to the recommendation.¹⁵⁶
16. Council may introduce legislation in next legislative session following rule review to obtain legislative order to prohibit implementation or enforcement of objectionable rule.¹⁵⁷

151. *Id.*

152. WYO. STAT. § 16-3-102(b) (1977), § 16-3-103(d) (Supp. 1995), and § 16-3-104 (1977).

153. WYO. STAT. § 16-3-104 (1977).

154. WYO. STAT. § 28-9-104 (1977).

155. WYO. STAT. § 28-9-106(a) (1977).

156. WYO. STAT. § 28-9-106(b) (1977).

157. WYO. STAT. § 28-9-107 (1977).