

NOV 8 2007

The State of Wyoming  
First Judicial District

EDWARD L. GRANT  
JUDGE



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LARAMIE COUNTY COURTHOUSE  
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November 5, 2007

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Re: Powder River Basin Resource Council, et al. v. Freudenthal  
Docket No. 169-944

Dear Counsel:

After consideration of the briefs and argument, it is the opinion of the Court that Respondent's Motion to Dismiss must be granted. The reason is that in the rulemaking context, the office of governor is not an "agency" because it has no rulemaking authority or function and to disapprove proposed rules the office does not take administrative action or inaction as contemplated by the Administrative Procedures Act, § 16-3-114. Therefore, there is no statutory right of a party to seek judicial review of the disapproval. The Court is without subject matter jurisdiction.

The parties skillfully articulate several arguments. It is the view of the Court, however, that the question before it in the motion is resolved by exegesis of the Administrative Procedure Act. Issues of standing, separation of powers and others need not be addressed.

Petitioner's most compelling argument is that "agency" is defined as including any "officer" and that therefore the governor as an officer of the State is an agency. The reasoning is plausible as far as it goes but cannot stand when the Act is considered in its entirety. Respondent cites authority for, and petitioner agrees with, the proposition that the provisions of the Act must be read *in pari materia*. To apply it here is to see that while the Act does not so state, it assumes that for a governmental subdivision to propose rules as prescribed by the Act, the entity has been delegated rulemaking authority which the DEQ clearly has (Wyo. Stat. Ann. § 35-11-112(a)(i)). The office of governor has no such authority.

Analogy may be drawn with the governor's authority related to legislation. That the governor has the prerogative to veto legislation does not equate to legislative authority in that office. Similarly, the legislatively conferred prerogative to veto proposed rules does not equate to rulemaking authority. It is true that each part of the statute must be given effect if possible. Under the APA's definition of each "officer" as an agency, the definition applies to an officer who exercises rulemaking authority. In the context of this dispute, the governor does not.

As Respondent argues, to ascribe rulemaking authority to the governor by virtue of the veto power would be to require absurd duplication of notice, hearing and other procedural requirements. Another example is § 16-3-103(b) prohibition against agency promulgation of emergency rules absent the governor's concurrence in the declaration of emergency. The Act would have no reason to require the governor as an agency to seek concurrence of the governor in the declaration of emergency.

These examples are representative of the textual and contextual impossibility to read the Act to include the governor as an agency for rulemaking purposes. Closely related to the Act relative to rulemaking is the Administrative Regulation Review Act §§ 28-9-101 through 28-9-108. The statute provides for legislative review of administrative regulations. It corroborates that "officer" means one with rulemaking authority.

Section 28-9-101(a)(i) of the Review Act repeats the definition of "agency" as ". . . any . . . officer or employee . . ." and adopts the APA definition of "rule". Section 28-9-102 defines the duties and powers of the legislative management council to "(a) examine the administrative rules and regulations of any agency to determine if they properly implement legislative intent, are within the scope of delegated authority and are lawfully adopted." As is true of the APA, the Administrative Regulation Review Act can be read to apply only to rules made by an entity to which the legislature has delegated rulemaking authority. It coincides with § 16-3-103(d) of the APA requirement

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that the governor report to the management council within 15 days his “. . . disapproval of any rule or portion thereof . . . .”

Taken together the APA and the ARRA evince a legislative purpose to impose detailed procedural requirements for the exercise of delegated rulemaking authority, provide for legislative oversight of agency rulemaking and to give the governor the final authority as head of the executive department to allow agency rules to become law or to decline to do so. The statutes do not give a party the right to judicial review of the governor's exercise of that authority. I've entered the order a copy of which is attached.

Very truly yours,

A handwritten signature in black ink, appearing to read 'E. Grant', with a horizontal line extending to the right.

Edward L. Grant  
District Judge

ELG/laa

IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT  
STATE OF WYOMING, COUNTY OF LARAMIE  
DOCKET NO. 169-944

POWDER RIVER BASIN )  
RESOURCE COUNCIL, et al., )  
 )  
Petitioners, )  
 )  
v. )  
 )  
DAVE FREUDENTHAL, )  
 )  
Respondent. )

**FILED**

NOV 06 2007

GERRIE E. BISHOP  
CLERK OF THE DISTRICT COURT

ORDER GRANTING MOTION TO DISMISS

For reasons stated in the Court's letter decision, it is

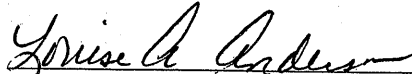
ORDERED that the Petition for Judicial Review is dismissed with prejudice.

DATED this 5<sup>th</sup> day of November, 2007.

  
EDWARD L. GRANT  
DISTRICT JUDGE

cc: Kate Fox/J. Mark Stewart - *m*  
Hon. Bruce Salzburg/Martin Hardsocg/Kristen Dolan - *m*  
Brent Kunz - *m*

I hereby certify that I distributed a true and correct copy of the foregoing this 6  
day of November, 2007, as indicated. (M-mail, B-box in Clerk's  
Office, H-hand delivery; F-facsimile transmission.)

  
Deputy Clerk/Judicial Assistant