

BEFORE THE
ENVIRONMENTAL QUALITY COUNCIL
STATE OF WYOMING

IN THE MATTER OF A PETITION TO DESIGNATE)
PORTIONS OF BESSEMER MOUNTAIN, NATRONA)
COUNTY AS RARE OR UNCOMMON)

**FINAL ORDER DESIGNATING PORTIONS OF AN AREA KNOWN AS BESSEMER
MOUNTAIN AS RARE OR UNCOMMON**

On February 17 and 18, 1994, the Environmental Quality Council (the Council) held a hearing on a Petition to Designate nine sections of land generally described as "Bessemer Mountain" as "very rare or uncommon with particular historical, archaeological, wildlife, surface geological, botanical or scenic value." See 35-11-112(a)(v), W.S. 1977, As Amended. At a public meeting on April 13, 1994, the Council voted to designate the Bessemer Mountain area described in the Petition as very rare or uncommon and as having particular historical and surface geological value.

The Petition to Designate (the Petition) was filed with the Council on January 24, 1991 by a group known as the Friends of Bessemer Mountain. The Council voted to proceed with a formal hearing on the petition at a public meeting held on April 25, 1991. After public notice was given, the Council held a hearing on the Petition on April 23 and 24, 1992. At the close of that hearing the Council voted to designate the Bessemer Mountain area as very rare or uncommon and as having particular scenic, historical, surface geological, and wildlife values. The Council filed a written statement of reasons for its decision on August 4, 1992.

Rissler & McMurry Inc. appealed the Council's decision designating Bessemer Mountain to the District Court, Seventh Judicial District. That case was certified to the Wyoming Supreme Court and the Supreme Court issued its decision on July 15, 1993. The Supreme Court remanded the case to the Council for development of rules setting forth the criteria for rare or uncommon designations and reconsideration of the Petition under the regulations that were to be adopted.

The Council voted to adopt rules for the designation of lands as very rare or uncommon on December 15, 1993. These rules were effective on February 14, 1994. The new rules are contained in Chapters III and VII of the DEQ Rules of Practice and Procedure. (referred to as Chapter III or Chapter VII) The Friends of Bessemer Mountain (the Petitioner) filed a supplemental petition on January 3, 1993 which complied with the new rules, and they proceeded to meet the requirements for notice set forth in Chapters III and VII.

The record of the Council's consideration of the Petition includes the records of proceedings from the date of the filing of the Petition in January 1991 through this document. The Statement of Reasons issued by the Council on August 4, 1992 is incorporated into this document except where noted herein, and it is attached as Appendix A.

Present at the hearing on February 17 and 18, 1994 were Vincent R. Lee, Hearing Examiner, Harold L. Bergman, Kim D. Cannon, Fred H. Carr, John C. Darrington, John N. Morris, and Craig D. Thompson, members of the Council. Also present was Terri A. Lorenzon, attorney for the Council, Roger Shaffer, Administrator/LQD, Tom Roan & Jane Caton of the Attorney General's Office, Bill Hogg, Deanna Hill, Patrick Baumann & Rick Chancellor of Land Quality Division/DEQ, Opal McInroy, Stan McInroy, Joanne Storey, Cathy Killean, Jim Meining, Hugh Jackson of the Casper Star-Tribune, John Schiffer, Joan Carr, Betty Stroock, Harold Josendal, Steve Gnagy, Ethel Roy, Jerry Nelson, Jay Whiting, Amber Travsky, Brad Clow, Jim Kubina, Craig Sundell, Mike Cassity, Mardie Robinson, Mark Whitmarsh, Linda Burkhart, Rodney Stalkup, Melissa Drake, Anna Moore, Amy Gieske, Mr. Shockey, and other persons whose names are on the list but are indecipherable.

Having read all written comments, having considered the comments made at the hearing in February of 1994, having reviewed the record from the proceedings held on this Petition in April of 1992, the Council finds and concludes as follows.

PRELIMINARY MATTERS

1. Section 35-11-112(a)(v) of the Environmental Quality Act (the Act) states that the Council "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." (emphasis supplied) For ease of reference in this document, these designations

are described only as “rare or uncommon designations” or “designations” without further reference to the specific values that are required.

2. The Petition sought designation of Sections 8, 9, 10, 15, 16, 17, 20, 21 and 22 of T32N, R81W, 6th PM, Natrona County.

3. Chapter VII, Section 6. specifies the required contents of a petition to designate. The Petition, as supplemented, contains the information required by Section 6. In particular, the Petition included a list of the names and addresses of the surface and mineral owners whose lands are included within the area proposed for designation, a description of the ownership interest of each surface and mineral owner, and a legal description of the lands in which each person has an interest.

4. Chapter VII, Section 7. specifies the procedure for giving notice of a Council hearing on a petition to designate. The Petitioner in this case met the notice requirements of Section 7. Notice was published in a newspaper with statewide circulation and with general circulation in the Bessemer Mountain vicinity for 4 consecutive weeks. Notice was mailed by certified mail to all surface and mineral owners whose lands and/or mineral interests are included within the area proposed for designation.

5. The hearing held on February 17-18, 1994 was open to the public, and written comments from those who did not attend the hearing were accepted. All persons wishing to speak to the issue of the designation were given that opportunity at the hearing.

6. On February 8, 1994, Donald J. Rissler, an attorney representing Rissler & McMurry Inc. filed an objection to the hearing on the Petition arguing that his client, a lessee of mineral rights in Section 16 of the Bessemer Mountain area, had not received notice as required by the rules. The record contains a receipt for certified mail signed by Mr. Neil McMurry of Rissler & McMurry Inc., the lessee. This receipt was for the mailing of notice by the Petitioner. In addition, Mr. Rissler was present in person at a September 17, 1993 Council meeting and he was a participant at that time in the scheduling of the hearing for February 17-18, 1994. Notice was also provided by publication. Mr. Rissler’s argument that notice was faulty was not substantiated.

7. Mr. Rissler also objected to the proceedings on the basis that the Council member serving as hearing examiner for the designation hearing is biased and should not have conducted the hearing. Mr. Rissler’s objection identified Council member Kim Cannon as the hearing examiner. In fact, Mr. Cannon had never served as the hearing examiner in the designation proceedings regarding Bessemer Mountain. Mr. Vince Lee was the hearing examiner.

8. Mr. Cannon responded to Mr. Rissler’s allegations at the hearing. He stated he did not know of a reason why he could not or should not participate in the designation case. The Council takes administrative notice of the record in a separate, but related, contested case, In The Matter of a Mining Permit Application of Rissler & McMurry Company, TFN 2 6/247, Docket No. 2373-92. Representing Rissler & McMurry Inc. in Docket No.2373-92, Mr. Rissler filed a Motion to Voir Dire the Council members. That Motion was heard by the full Council at a hearing held on June 24, 1993 in Casper, Wyoming. During the discussion of the Motion, the Council members individually stated that there was no reason they could not sit on the case, Mr. Rissler was given an opportunity to present evidence to support his Motion. Mr. Rissler did not present any evidence of conflicts of interest, bias, or prejudice, and an order denying the Motion was entered by the Council on August 18, 1993.

9. Mr. Rissler’s objection alleged that designation of the Bessemer Mountain area would be a taking in violation of the U.S. and Wyoming Constitutions. In the Council’s hearing in April of 1992, Mr. Rissler stated that “a mere designation itself would not be a taking”. Don Rissler did not provide arguments or authority for his new position.

10. Mr. Rissler’s objection alleged that his client’s procedural and due process rights were violated by the procedures used for this hearing. Mr. Rissler had the opportunity, under the rules in effect prior to February 14, 1994 and the rules in effect after February 14, 1994, to request the use of contested case procedures in the designation hearings. In his objection, Mr. Rissler did not ask for contested case procedures.

11. At the hearing, the Petitioner was prepared to use contested case procedures, and the Council inquired whether a representative of Rissler & McMurry was present to indicate whether they wanted to participate in the hearing as a party to a contested case. No response was given.

12. Mr. Rissler’s objection stated that the new rules for designations written as a section of Chapter III and a new Chapter VII were not effective as they had not been filed in the Secretary of State’s Office and had not been made available to the public. As previously stated, the rules were filed with the Secretary of State on February 14, 1994, and copies were made available to the public prior to February 14, with the caution that the rules were not yet effective.

13. Mr. Rissler alleged that the Council was acting without authority in holding the hearing and the Council was using “its new rules to act upon his client’s mine permit application”. Mr. Rissler did not provide arguments or authority to support his allegation that the Council was using the designation to delay his client’s mine permit application. In fact, the Petition was originally filed on January 21, 1991, almost a year prior to the filing of Mr. Rissler’s small mine permit application on December 18, 1991.

14. Mr. Rissler alleged that the Council's new rules were flawed. These arguments should be made in conjunction with proceedings regarding the promulgation of the rules. The rules are effective and the public has a right to challenge the rules through the state court system.

15. The objection filed by Mr. Rissler contains a number of allegations not individually addressed by this order. These arguments were not supported by argument or authority. Mr. Rissler had notice of the hearing, and he had the opportunity to attend the hearing and enter his comments into the record. He filed his motion one week before the hearing, when he had known of the dates for the hearing since September 1993. Mr. Rissler had ample time to prepare and submit arguments to support his contentions. As Mr. Rissler did not seek any relief from the Council, his objections are considered by the Council as a public comment in opposition to the designation.

16. In response to Mr. Rissler's allegations, Mr. Lee inquired of the audience whether a representative of Rissler & McMurry would like to address the objections filed by Mr. Rissler. No one in the audience replied to the Hearing Examiner's inquiry. Mr. Lee ruled that no reason had been given for excluding Mr. Cannon from participation in the case and as Mr. Rissler's other allegations were also unsubstantiated, the Council would proceed with the hearing.

EVALUATION OF CRITERIA FOR PARTICULAR VALUES

1. Chapter VII, Section 11 provides for a two tier evaluation process. The Council shall first "determine whether the area is eligible for designation by virtue of the existence of one or more of the particular values specified in the statute."

2. The Council makes the following findings based on the evidence presented concerning historic value.

a. At the hearing, the Petitioners presented Dr. Michael Cassity as a witness. Dr. Cassity has a Ph.D. in American History, and he has published extensively on topics in American social history, Wyoming history, and American race relations. His publications include 2 books on American race relations, 1 book on a study of a midwestern community's development from a frontier setting to the 19th century, and a book on Wyoming history.

b. Dr. Cassity testified to the historical value of the Bessemer Mountain area and the historic significance of Bessemer Mountain as one of two Red Buttes at this location. A written historical evaluation of the site was entered into the record. This written report contains an extensive review of historic records including published diaries, letters, reports, and journals referring to the Oregon Trail, the Red Butte(s), the fur trade in this area, and related topics. The references are documented in a bibliography included in the written report submitted by Dr. Cassity.

c. The historical record reflects that the Red Buttes were famous before the Oregon Trail because of the activity connected with the fur trade that took place in the area. The Red Buttes were an important landmark for those traveling through the West. The testimony reflects that in the 1840's, 1850's, and part of the 1860's between 330,000 and 500,000 people traveled the Oregon Trail. In 1850 over 50,000 people traveled through Wyoming on the Oregon Trail. Although not all people on the Oregon Trail were destined for Oregon and not all of the people traveled through Wyoming, Dr. Cassity stated that in three fourths of the diaries and journals he examined, people mentioned the Red Buttes.

d. The Council's statement of reasons for its designation decision in 1992, contains an extensive discussion of the historic journals, including a quotation from F. V. Hayden's The Preliminary Report of the United States Geological Survey of Wyoming (1872). See Appendix A, attached to this order.

e. A significant aspect of the history of the Bessemer Mountain area is the scenic beauty of the Red Buttes. Although the Council, at the conclusion of its 1994 hearing, did not conclude that this area should be designated for its rare or uncommon scenic beauty, they did find that the scenic value of the area is an inextricable part of its historic value. As part of the migration and exploration of the West, the Red Buttes were depicted by artists such as William H. Jackson. The testimony was that the descriptions of the Red Buttes in historic diaries and journals include frequent references to the aesthetic appeal of the area. In the historic writings about the Red Buttes there is a permanent record of the profound effect the scenic beauty of the area had on the variety of people who traveled through this area.

f. Testimony in the 1992 hearing reflect that buildings important to the migration through this area once existed, however, the Red Buttes are the primary features that have historic significance in relation to the Oregon and Mormon Trails.

g. The unrefuted evidence in the record is that Bessemer Mountain is one of the most significant landmarks on the Oregon Trail, and it has particular historic value to the state.

3. The Council makes the following findings based on the evidence presented concerning surface geological value.

a. The Petitioner presented the testimony of Craig Sundell. Mr. Sundell was concluding his work on a bachelors degree in geology and zoology at the University of Wyoming. Mr. Sundell has extensive experience collecting and studying fossils in Wyoming. He has worked and studied with numerous professional geologists, and he has specimens in repose in prominent museums throughout the world.

b. Mr. Sundell testified concerning the rare Nothosaur specimens found at Bessemer Mountain, and he reviewed the scientific literature discussing these specimens. The specimens of Nothosaur discovered in America have been found in the Alcovia Limestone of the Crow Mountain formation at Bessemer Mountain. Mr. Sundell testified at the 1992 Council hearing on the Petition. Mr. Sundell's opinion regarding the significance of the Nothosaur fossils was not refuted by other witnesses or documentary evidence.

c. Since 1992, Rissler & McMurry has asserted that the Nothosaur fossils are not properly considered by the Council as the statutory designation language does not include paleontological values. All witnesses appearing before the Council who were educated and trained in geology and those familiar with university science curriculums have testified that paleontology is a branch of surface geology. Mr. Rissler has never presented any documentation or testimony to the contrary to support this argument. Therefore, the Council continues to find that paleontology is appropriately considered as a branch of surface geology under Chapter VII, Section 11(e).

d. The Petitioner presented the testimony of Betty Stroock as a witness. Ms. Stroock is concluding her work on a Ph.D. in geology and Environmental and Natural Resources at the University of Wyoming. She has studied geology and engineering at the University of Colorado at Boulder and at the University of Cambridge in England. Ms. Stroock's dissertation involved structural geology and the interpretation of subsurface hydrology and geochemistry. Ms. Stroock has experience in evaluation of the paleontology of the Bessemer Mountain area and with education in geology and zoology.

e. Ms. Stroock testified to the geologic structure of Bessemer Mountain, the subsurface geology of the Bessemer Mountain area, and the subsurface hydrology of the Speas Spring. Ms. Stroock reviewed the literature on the geology of this area and she examined core samples taken from the area around Speas Spring. In the opinion of Ms. Stroock, Bessemer Mountain has geologic features with unusual or substantial recreational, aesthetic, or scientific value. A combination of geologic forces comes together at Bessemer Mountain and Speas Spring to make the area unusual or uncommon.

f. Ms. Stroock testified that the paleontological deposits at Bessemer Mountain are a significant find. Her conclusion was that the deposits should be preserved and special precautions should be taken should the area ever be disturbed.

g. The Bessemer Mountain area contains significant paleontological resources.

h. Testimony received from Ms. Stroock and those who testified to the wildlife value of Bessemer Mountain emphasized the value of a unique spring known as Speas Spring or the Goose Egg Spring. This spring flows at a constant rate of 16 cfs and at a constant temperature of 60 degrees Fahrenheit. The flow of the spring, the quality of the water, and the temperature make this spring unique in Wyoming. This spring is the source of water for Wyoming's largest fish hatchery and thus is vitally important to the wildlife of Wyoming.

i. The source of Speas Spring is deep within the geology of Bessemer Mountain and thus is properly considered when evaluating the surface geological value of this area. The Council finds that this spring is a critical aspect of the unique surface geological formations and faults of Bessemer Mountain.

j. The Council finds that the Bessemer Mountain area has particular surface geological value to the state.

4. The Council makes the following findings based on the evidence presented concerning wildlife value.

a. The Petitioner presented Amber Travsky as a witness. Ms. Travsky holds a master's degree in wildlife biology from the University of Wyoming. A curriculum vitae for Ms. Travsky was submitted and this document summarizes her work and publications.

b. Ms. Travsky studied the wildlife in the Bessemer Mountain area and she testified to the wildlife values at Bessemer Mountain. As stated in the Council's 1992 Statement of Reasons, wildlife is abundant at Bessemer Mountain and federal agencies have determined that portions of the area under consideration here should be managed to protect wildlife. Land use restrictions limit disturbances to bald eagles feeding along the North Platte River and to allow for recreation and wildlife habitat improvements. The Bureau of Land Management has determined that the area along the Platte River is a bald eagle concentration area, and the bald eagle is listed as an endangered species.

c. Ms. Travsky testified that 87 species of wildlife had been observed in the township that includes the Bessemer Mountain area, and the habitat present indicates that up to 351 species of wildlife may be present in the township. She concluded that the diversity of habitat is uncommon in Wyoming. This habitat includes open water of a river nature, open water of a pond nature, a marsh area associated with the pond, sagebrush grass lands, short grass prairie, riparian area associated with the Platter River, dense sagebrush, rock outcrops, and cliff habitat.

d. Ms. Travsky testified a roost for bald eagles is present in the area under consideration for designation, and she found the habitat to be crucial for species of wildlife important to the state. In particular, Ms. Travsky noted the importance of wetland habitat in the area. She also applied the definition of fragile lands contained in Chapter VII, Section 4.(c) and concluded that mining activity could cause damage both to the habitat in the area and the wildlife.

e. Ms. Travsky concluded that the Bessemer Mountain area includes lands that are designated critical habitat for threatened or endangered species, includes a cliff nesting site for a merlin falcon, and includes lands that may serve as habitat for migratory birds of high federal interest as a number these bird species have been observed in the are.

f. The nine sections considered for designation include a section of the North Platter River that has been designated as a Class I fishery.

g. Steve Gnagy, the Superintendent of the Speas Fish Hatchery testified to the importance of Speas Spring to the state. This fish hatchery is dependent on the springs in its annual production of 150,000-170,000 pounds of fish per year. He testified that the temperature, the rate of flow, and the chemistry of the water make it ideally suited for rearing fish.

h. The Bessemer Mountain area is eligible for designation based on its particular wildlife value.

5. The Council makes the following findings based on the evidence presented concerning botanical value.

a. Discussion of the botanical values in the Bessemer Mountain area focused on the wildlife habitat value of the site. Although the vegetation in this area is varied and is important as wildlife habitat, the area does not contain critical habitat for endangered or threatened plant species, rare vegetation types, or plant species and habitat determined to be crucial or vital for the resident wildlife species.

b. The evidence does not support a finding that botanical features of this area meet the criteria set forth in Chapter VII, Section 11(e), and the Bessemer Mountain area is not, therefore, eligible for designation based on its particular botanical value.

6. The Council makes the following findings based on the evidence presented concerning archeological value.

a. The criteria by which archaeological value is judged in Chapter VII, Section 11 is the same criteria used to evaluate historical value. The evidence does not support a finding that archaeological features of this area meet the criteria set forth in Chapter VII, and Bessemer Mountain is not, therefore, eligible for designation based on its particular archaeological value.

7. The Council makes the following findings based on the evidence presented concerning scenic value.

a. The Bessemer Mountain area has substantial aesthetic value and that value would be apparent to a reasonable person. The testimony clearly established that the people who have seen this area throughout history have found this area to be beautiful.

b. The Red Buttes and the area surrounding Bessemer Mountain have been the subject of numerous photographs, postcards, paintings, poets, and writers since the migration over the historic trails in the area.

c.. Under the criteria set forth in Chapter VII, Section 11(g), the Council finds that the area is eligible for designation based on its particular scenic value.

8. The Council finds that the nine sections of Natrona County under consideration in this case are eligible for designation by virtue of the existence of particular historical, surface geological, scenic, and wildlife values.

CONCLUSION

1. Chapter VII, Section 11(h) provides that an “area shall be designated if it is eligible for designation” due to the presence of one or more of the particular values described in the statute and rules and the area is very rare or uncommon.

2. The Council unanimously concludes that the Bessemer Mountain area exhibits historical and surface geological values that are very rare or uncommon when compared with other areas of the state or region.

3. The Council unanimously concludes that the Bessemer Mountain area contains historical and surface geological values that are seldom found within the state.

4. The Council unanimously concludes that the Bessemer Mountain area contains historical and surface geological values which, if left unprotected, could become extinct.

5. A majority of the Council concludes that although the Bessemer Mountain area exhibits particular scenic and wildlife values, these values are not present to a rare or uncommon degree.

ORDER

It is hereby ordered that Sections 8,9,10,15,16,17,20,21, and 22 of T32N, R81W, 6th PM, Natrona County are designated as very rare or uncommon.

Dated this _____ day of July, 1994.

VINCENT R. LEE
Hearing Examiner