

8-1-2012

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Recommended Citation

William L. Corbett, *Montana Administrative Law Practice: 41 Years After the Enactment of the Montana Administrative Procedure Act*, 73 Mont. L. Rev. (2013).

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MONTANA ADMINISTRATIVE LAW PRACTICE: 41 YEARS AFTER THE ENACTMENT OF THE MONTANA ADMINISTRATIVE PROCEDURE ACT

William L. Corbett*

I. INTRODUCTION

The Montana Administrative Procedure Act (“MAPA”),¹ enacted in 1971, was intended to simplify, unify, and clarify administrative practice in Montana. The MAPA is “loosely” based² on the 1961 Revised Model State Administrative Procedure Act (“the Model Act”).³ The Model Act was, in turn, loosely patterned after the federal Administrative Procedure Act (“APA”), enacted in 1946.⁴ The Model Act was revised in 1981, and, again in 2010.⁵ Yet, no analysis has followed these recent revisions. The last comprehensive analyses of the MAPA were in 1977⁶ and 1980.⁷ The purpose of this article is to provide a comprehensive update.

In a 1977 article, former University of Montana School of Law Professor John McCrory⁸ noted that the MAPA focuses on three aspects of administrative law and procedure: agency rulemaking, agency adjudication, and judicial review of agency decisions.⁹ This article is principally organized to

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1. Mont. Code Ann. §§ 2–4–101 to 2–4–711 (2011). The purpose of the Montana Administrative Procedure Act is to:

- (a) generally give notice to the public of governmental action and to provide for public participation in that action;
- (b) establish general uniformity and due process safeguards in agency rulemaking, legislative review of rules, and contested case proceedings;
- (c) establish standards for judicial review of agency rules and final agency decisions; and
- (d) provide the executive and judicial branches of government with statutory directives.

Mont. Code Ann. § 2–4–101(2).

2. John P. McCrory, *Montana Administrative Procedures Study Part I: Report of Study on Montana Administrative Procedures & Proposal for a Montana Administrative Procedure Act* 4, 110 (unpublished legislative study 1970) (copy on file with Mansfield Lib., U. of Mont., Missoula).

3. *Id.* at 9.

4. 5 U.S.C. §§ 551–559, 701–706 (2006).

5. Rev. Model St. Admin. Proc. Act (2010) (available at <http://www.uniformlaws.org/Act.aspx?title=State%20Administrative%20Procedure%20Act,%20Revised%20Mode>).

6. John P. McCrory, *Administrative Procedures in Montana: A View after Four Years with the Montana Administrative Procedure Act*, 38 Mont. L. Rev. 1 (1977).

7. *Montana Administrative Procedure Manual* (Roger Tippy, ed., St. Bar of Mont. 1980).

8. Professor McCrory is a former University of Montana Law Professor and the author of a two-part report on the proposed Administrative Procedure Act.

9. McCrory, *supra* n. 6 at 4.

addresses these topics. Where appropriate, the article also compares the MAPA with the federal APA so that readers familiar with the APA may draw comparisons.

General administrative procedure acts, like the MAPA, provide directives in the absence of specific procedural directives in individual agency enabling or authorizing statutes.¹⁰ A legislative body may include procedures specific to an agency, or agency action, in the legislation that creates the agency. Agency enabling or authorization legislation may contain all the procedures necessary for the agency to act and may address all that needs to be known about judicial review of such actions. Specific legislative procedural directives contained in agency-authorizing legislation take precedence over procedural directives in general administrative procedure acts.¹¹ Indeed, it is fair to think of general administrative procedure acts, such as the MAPA, as providing generic, default administrative procedures that apply only in the absence of specific procedures in the agency's authorizing or enabling legislation.¹² Thus, for example, any agency procedures contained in the Montana Clean Air Act take precedence over similar or conflicting procedures contained in MAPA.¹³

II. DEFINING AN AGENCY UNDER THE MAPA

One of the most confusing aspects of the MAPA is the definition of the word "agency." To qualify as a MAPA "agency," a governmental entity must satisfy three criteria. The entity must: (1) be an instrumentality of state government, as opposed to a state subdivision government; (2) not be

10. Richard J. Pierce, Jr., *Administrative Law Treatise* vol. I, § 1.1, 2 (4th ed., Aspen Law & Bus. 2002). A statute enacted by a legislative body that creates or authorizes an agency to act is the agency's enabling or authorizing statute. Such a statute authorizes the agency to perform certain prescribed functions, and it may also establish the procedures that the agency is to use in enacting the procedures that entities that come before the agency are to use, as well as provisions for judicial review of agency decisions. However, the legislative body that creates and authorizes the agency may not provide procedural standards or for judicial review. The purpose of administrative procedure acts is to fill that procedural vacuum. *Id.*

11. *Pickens v. Shelton-Thompson*, 3 P.3d 603, 606 (Mont. 2000) ("Where a statute provides different procedural requirements for judicial review of decisions from a specified agency, however, the requirements of the specific statute prevail over the provisions of the MAPA.") (citing *Trustees, Carbon County Sch. v. Spivey*, 805 P.2d 61, 63 (Mont. 1991) (citing *Dept. of Revenue v. Davidson Cattle Co.*, 620 P.2d 1232, 1234 (Mont. 1980))).

12. The reason a legislative body may not provide procedural standards in the authorizing or enabling legislation may be due to the fact that they did not think to do so, they specifically intended the default procedures of the MAPA to apply, or they wanted to avoid a possible legislative controversy surrounding any attempt to draft specific procedures, etc.

13. *State v. Vainio*, 35 P.3d 948, 953 (Mont. 2001) (when the legislature authorizes an agency to adopt rules, but does not direct a specific rule-making procedure, the procedure mandated by MAPA applies whether the authorizing statute refers to MAPA or MAPA rule-making).

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specifically exempt from MAPA coverage; and (3) have the authority to make rules, determine contested cases, or enter into contracts.¹⁴

A. *A MAPA Agency is an Instrumentality of the Montana State Government*

The definition of a MAPA agency is confusing because MAPA's definition provision incorporates but limits the "agency" definition from the Montana Public Participation in Governmental Operations Act ("Public Participation Act"). The Public Participation Act defines an agency as "any board, bureau, commission, department, authority, or officer of the *state or local* government."¹⁵ MAPA adopted that definition except for the term "local government." Thus, MAPA applies to state boards, bureaus, commissions, departments, authorities, and officers, but it does not apply to Montana state subdivision agencies. For example, MAPA applies to the State Superintendent of Public Instruction but not to county superintendents of public instruction or to local school boards.

In 1982, the Montana Supreme Court misread the definition of a MAPA "agency" and determined that the Montana State Superintendent of Public Instruction and county superintendents of public instruction were both MAPA agencies.¹⁶ It made this mistake by noting that MAPA, in part, defines agency pursuant to the Public Participation Act, but the Court failed to limit the definition to such instrumentalities of the *state* government. The legislature responded. During the 1985 legislative session, MAPA was amended to provide that a MAPA agency does not include "a school district, a unit of local government, or any other political subdivision of the state."¹⁷ This amendment clarified the existing MAPA definition of an agency; MAPA applies only to agencies of the *state* government.

Simply because the Montana State Legislature authorizes the creation of an agency does not make the agency a state MAPA agency, however.¹⁸ In a case shortly after the enactment of the MAPA, for example, the Montana Supreme Court was asked to determine whether a metropolitan police commission created by the state legislature was a MAPA agency.¹⁹ The Court determined, "[t]hough city police commissions are creations of state

14. Mont. Code Ann. § 2-4-102(2)(a) (providing that a MAPA agency is an agency, as defined in § 2-3-102, of a state government, except that it does not apply to the state board of pardons and parole; youth penal institution; Montana university system; public works; and the public service commission).

15. *Id.* at § 2-3-102(1) (emphasis added).

16. *Yanzick v. Bd. of Trustees of Sch. Dist. No. 23*, 641 P.2d 431, 436 (Mont. 1982).

17. Mont. Code Ann. § 2-4-102(2)(b).

18. *Miskovich v. City of Helena*, 551 P.2d 995, 997 (Mont. 1976).

19. *Id.*

statute, they are obviously entities of municipal government.”²⁰ It noted that it is the city that appoints the commissioners and determines their compensation, and it is the duty of the commission to oversee the hiring and discipline of municipal police officers, who are municipal employees.²¹ Thus, the commission was not a MAPA agency.

On occasion, it may be difficult to determine whether an agency is an instrumentality of the state of Montana or, alternatively, some subdivision of the state. Critical factors in making this distinction are: who appoints officers (a state official or city/county official²²), who elects the officers (state-wide or local electorate), the agency’s source of funding, and the extent of the agency’s jurisdiction.

B. State Instrumentalities Exempt from the MAPA

Some instrumentalities of the Montana state government are specifically exempted from MAPA coverage, so the second step in defining a MAPA agency is determining whether an exception applies. Consequently, a MAPA agency is an instrumentality of state government but not all such entities are MAPA agencies.

The first group of exemptions²³ includes the legislature,²⁴ the judiciary,²⁵ the governor,²⁶ and the state military.²⁷ The second group of exemptions includes: the state board of pardons and parole;²⁸ the supervision and administration of a penal institution; the board of regents and the Montana university system; the financing, construction, and maintenance of public

20. *Id.*

21. *Id.*

22. *Id.*

23. Mont. Code Ann. § 2–3–102(1)(a)–(d). The Public Participation Act excludes certain state government entities, including the legislature, the judiciary, the governor, and the state military, from its definition of an agency. *Id.* at § 2–4–102(2)(a). These exemptions have been incorporated into the MAPA definition of agency through its incorporation of the definition from the Public Participation Act.

24. *Id.* at § 2–3–102(1)(a). The exemption for the legislature covers “the legislature and any branch, committee, or officer thereof.” *Id.*

25. *Id.* at § 2–3–102(1)(b). The judicial exemption reaches “the judicial branches and any committee or officer thereof.” *Id.*

26. Mont. Code Ann. § 2–3–102(1)(c). The governor is excluded except to the extent that the governor has been designated as a member of a specific agency. Mont. Const. art. X, § 4; *see also* Mont. Code Ann. § 77–1–201(2). For example, the governor is designated as a member and president of the State Lands Board. The State Lands Board is a MAPA agency even though the governor is a member of that Board. *Id.* at § 2–3–102(1)(c).

27. Mont. Code Ann. § 2–3–102(1)(d). The military establishment exemption covers “state military establishment and agencies concerned with civil defense and recovery from hostile attack.” *Id.*

28. *Id.* at § 2–4–102(2)(a)(i). The State Board of Pardons and Parole is subject to certain provisions of MAPA and its rules must be published in the Administrative Rules of Montana. *Id.*

works; one function of the public service commission;²⁹ and “a school district, unit of local government, or any other political subdivision of the state.”³⁰

C. A MAPA Agency Must Make Rules, Determine Contested Cases, or Enter into Contracts

The final criterion in defining a MAPA agency is that such an entity must be “authorized by law to *make rules, determine contested cases, or enter into contracts.*”³¹ But the MAPA does not specifically authorize an agency to make rules, determine contested cases, or enter into contracts.³² An agency has such authority only if it was so authorized by the legislature or the Montana Constitution. Although the legislature creates and authorizes most state agencies, some state agencies were created by the Montana Constitution—e.g., the Montana State Lands Board.³³ Logically, then, a MAPA agency is a state entity that the state legislature or the state constitution authorizes to make rules,³⁴ determine contested cases,³⁵ or enter into contracts,³⁶ unless otherwise specifically exempted. Thus, the question then is what constitutes those activities.

29. *Id.* at § 2–4–102(2)(a)(i)–(v). This group of exemptions is referenced as MAPA exceptions to the definition of an “agency” in MAPA itself.

30. *Id.* at § 2–4–102(2)(b).

31. Mont. Code Ann. § 2–3–102(1) (emphasis added); *see* Mont. Atty. Gen. Op. 46–1, 1995 WL 111234 (Feb. 23, 1995). The Board of Directors of the Montana self-insurers guaranty fund is a MAPA agency because it is a public organization with a public purpose and because it has statutory authority to adopt public rules and enter into public contracts.

32. *See e.g. Mont. Socy. of Anesthesiologists v. Mont. Bd. of Nursing*, 171 P.3d 704, 713 (Mont. 2007) (administrative agencies have only those powers specifically conferred upon them by the legislature); *Bradco Supply Co. v. Larsen*, 598 P.2d 596, 598 (Mont. 1979) (MAPA does not confer authority on an agency to adopt rules); *Fallon Co. v. State*, 223 P.3d 886, 890 (Mont. 2009); Mont. Code Ann. § 2–4–301 (“Except [for the MAPA authority given to the secretary of state and the attorney general to adopt a set of uniform model rules], nothing in this [Act] confers authority upon or augments the authority of any state agency to adopt, administer, or enforce any rule.”).

33. Mont. Const. art. X, § 4. While the Montana Constitution creates and authorizes the State Lands Board, the Constitution also states that the Board’s authority is in large part dependent on state legislative action—the Board may act “under such regulations and restrictions as may be provided by law.” *Id.*

34. *See e.g. Mont. Code Ann. § 30–10–1008* (authorizing the Montana Securities Commissioner to “adopt rules regarding the department’s [particular] processes”).

35. *See e.g. id.* at § 9–31–406 (authorizing the Montana Board of Personnel Appeals decide unfair labor practice complaints in public sector union-management disputes).

36. *See e.g. id.* at §§ 60–4–102 to 60–4–103 (authorizing Department of Transportation or acquire land for highway purposes).

1. Authorization for an Agency to Enter into Contracts

Many Montana state agencies fit the bill. The State Land Board³⁷ and the Montana Highway Department³⁸ are obvious examples, but many lesser known entities are also so authorized.³⁹

2. Authorization for an Agency to Make Rules and Determine Contested Cases

The MAPA defines both “rules”⁴⁰ and “contested cases.”⁴¹ Those definitions provide a means of distinguishing between these two administrative actions. However, the MAPA definitions tend to distinguish rules from contested cases only if the reader already knows the salient differences. Consequently, closer analysis is required.

a. Authority to Make Rules

The MAPA defines a “rule” as “each agency regulation, standard, or statement of *general applicability* that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency . . . [including] the amendment or repeal of a prior rule.”⁴² Notably, this definition is almost identical to that of the Model

37. The State Land Board is authorized to “direct, control, lease, exchange and sell school lands . . . under such regulations and ratifications as may be provided by law. Mont. Const. art X, § 4.

38. The Montana Highway Department is authorized to “acquire by purchase . . . lands or other real property . . . reasonably necessary for present or future highway purposes.” Mont. Code Ann. § 60-4-102.

39. *E.g.* the Montana Board of Horseracing is authorized to “hire racing officials,” incur costs, charges, and expenses, and enter into contracts for simulcast races. *See* Mont. Code Ann. §§ 23-4-201(6), 23-4-102(2).

40. *Id.* at § 2-4-102(11)(2).

41. *Id.* at § 2-4-102(4).

42. *Id.* at § 2-4-102(11)(a) (emphasis added). The definition specifically excludes:

- (i) statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide accounting, budgeting and human resource system;
- (ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;
- (iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the rule is indicated to the public by means of signs or signals;
- (iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; or
- (v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in ARM.

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Act⁴³ and the federal APA.⁴⁴

The operative phrase of this definition is “statement of general applicability.” Agency rulemaking involves the agency’s prospective⁴⁵ interpretation of its authorizing or enabling statute—the legislature’s grant of authority to the agency—in the form of substantive or procedural statements applicable to all, or to a specific class of persons or entities,⁴⁶ within its jurisdiction. These prospective statements are often referred to as “quasi-legislative” agency actions because, when engaged in rulemaking, the agency acts much like a legislative body—articulating prospective standards of general applicability to all persons or to a specific class of persons.

When such rule statements are consistent with the agency’s authorizing legislation and legislative intent, the rule effectively becomes an extension of the legislation and is enforceable to the same extent as if the legislature had included the rule language in the statute itself.⁴⁷ An illustration is helpful. If an environmental agency with the legislative authority to make rules establishes a specific permissible emission rate, that rule carries the full force and effect of law as long as it is consistent with legislative intent. The resulting emission rate rule is prospective and applicable only to entities within the agency’s jurisdiction, or a specified class of such entities.

Mont. Code Ann. § 2–4–102(11)(b)(i)–(v).

43. Model St. Admin. P. Act § 1 (Natl. Conf. Commrs. Unif. St. Laws 1961).

44. 5 U.S.C. § 551(4) (2006).

45. A well-accepted way to identify agency rules (quasi-legislative) decisions is that they, like legislative action itself, are prospective standards that apply to all persons or an acceptably defined class of persons. The MAPA definition of a rule incorporates the second concept—applying to all persons or an acceptably defined class of persons—by using the language “statement of general applicability.” The first concept, that rules are “prospective” is also well-accepted. Compare *Bowen v. Georgetown U. Hosp.*, 488 U.S. 204, 208 (1988) (agency rules do not apply retroactively) with *West-Mont Community Care, Inc. v. Bd. of Health & Envtl. Sci.*, 703 P.2d 850, 852 (Mont. 1985) (quoting *Castles v. State ex rel. Mont. Dept. of Highways*, 609 P.2d 1223, 1225 (Mont. 1980)) (retro application of an agency rule is impermissible only if it “takes away or impairs vested rights acquired under existing laws or creates new obligations or poses new duties in respect to transactions already past.”); accord *Brockie v. Omo Constr., Inc.*, 887 P.2d 167, 171 (Mont. 1994).

46. A rule may be of general applicability even if it is of immediate concern only to a single person or small group, provided that the form of the rule is general and others who fall within the regulated category in the future will come within its coverage. See e.g. *Anaconda Co. v. Ruckelhaus*, 482 F.2d 1301 (10th Cir. 1973).

47. See *Bick v. Mont. Dept. of Just., Div. of Motor Veh.*, 730 P.2d 418, 420–421 (Mont. 1986) (citing Mont. Code Ann. § 2–4–305(6) (1985) to establish that no rule is valid unless consistent and not in conflict with the statute).

Agency rulemaking does not trigger constitutional due process.⁴⁸ MAPA,⁴⁹ the Public Participation Act,⁵⁰ the Model Act,⁵¹ and the APA⁵² all provide the public the right of notice and participation, but those are statutory, not constitutional mandates. Constitutional due process notice and hearing rights are not triggered by agency rulemaking.⁵³ Indeed, the basic distinction between quasi-legislative processes, like rulemaking, and quasi-judicial processes, like contested cases, is that, constitutionally, the former requires no notice and hearing, whereas the latter requires both notice and hearing.

b. Authority to Decide Contested Cases

When an agency is not acting like a legislative body (promulgating standards of “general applicability” for the future), but rather acting like a civil or criminal court (adjudicating past fact, and/or interpreting and applying law to fact based on a closed⁵⁴ hearing record) the agency is acting quasi-judicially.⁵⁵ Like the judicial counterpart, an administrative agency is required to comply with constitutional due process if the agency proceeding could result in a taking of liberty and/or property.⁵⁶

48. See *Minn. St. Bd. for Community Colleges v. Knight*, 465 U.S. 271, 283–287 (1984) (citing *Bi-Metallic Inv. Co. v. Colo.*, 239 U.S. 441, 445 (1991) for the proposition that agency quasi-legislative determinations are not subject to Constitutional due process); *Bowen*, 488 U.S. at 208 (unlike the authority of Congress to make a statute retroactive, administrative agency rules only operate prospectively); but see *West-Mont Community Care Inc.*, 703 P.2d at 852 (in a case decided only one year after *Bowen*, the Montana Supreme Court, not citing *Bowen*, held that agency rules apply retroactively).

49. Mont. Code Ann. § 2–4–302.

50. *Id.* at § 2–3–111.

51. Model State Adm. Procedure Act § 3–103 to 104.

52. 5 U.S.C. § 553(b)–(c).

53. *Knight*, 465 U.S. at 283–287 (1984) (citing *Bi-Metallic Investment Co.*, 239 U.S. at 445).

54. A judicial (criminal or civil) hearing is a “closed” hearing. Finding of facts are to be made based only on evidence presented or disclosed during the hearing and the opposing party is afforded the opportunity to rebut.

55. The Compiler’s Comments for MAPA uses the term “trial-type” as a means of generally describing the hearing procedures and process of a contested case hearing.

56. Like its judicial counterpart, if the result of such an administrative proceeding will result in a taking of liberty or property (administrative agencies may take only liberty or property), constitutional due process is triggered, and normally the party would be entitled to a hearing that satisfies due process. There are situations where there is no right to an administrative hearing even though the matter in controversy involves quasi-judicial rather than quasi-legislative fact determinations. These situations involve determinations of fact by (1) inspections, (2) tests, and (3) elections. The APA specifically exempts situations involving fact determinations by these processes from hearing requirements. 5 U.S.C. § 554(a)(3) (specifically exempting inspections, tests, and elections from hearing requirements). Indeed, constitutional due process may be satisfied in the absence of an administrative hearing when fact determinations are appropriately made by these methods. *Conn. Light & Power Co. v. Norwalk*, 425 A.2d 576, 581 (Conn. 1979) (when administrative quasi-judicial fact-finding “requires technical or professional expertise,” then that fact-finding “may appropriately depend upon inspections, examinations or testing rather than upon an adversary hearing”). For example, the most appropriate method for an ad-

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Under the MAPA, if the agency is acting quasi-judicially, and hearing is required “by law” (by statute, constitutional due process, or possibly common law)⁵⁷ the proceeding is a “contested case.”

The Attorney General’s Model Rules explain that a contested case involves “an agency determination that affects the rights or responsibilities of a specifically named party.”⁵⁸ A contested case, unlike prospective rulemaking, involves an inquiry as to past facts. Contested cases include a finding of fact, a determination of the applicable law, application of that law to facts, and a judgment.

Based on the above analysis, it is generally fairly simple to distinguish between a MAPA rulemaking and a contested case proceeding.⁵⁹ However, the following two Montana cases demonstrate when the distinction is less clear.

In *Johansen v. State*,⁶⁰ the respondent, the Department of Natural Resources and Conservation, leased agricultural land to petitioner Johansen. Johansen failed to pay the rent on the land, and the Department cancelled the lease. A Department representative met with Johansen, but the Department alleged that this meeting did not constitute a “contested case” proceeding. The Department also argued that no “contested case” hearing was required by statute or constitutional due process prior to the cancellation of the lease. Johansen alleged that he had properly mailed the rent check to the Department, and argued that such a fact dispute had to be resolved via a contested case proceeding.⁶¹

ministrative agency to determine whether a particular cut of meat is prime or choice is to grant a hearing or have a qualified inspector perform an inspection. Similarly, the most appropriate method for a governmental entity to determine the qualification of an applicant to receive a barber’s license is through a hearing or a test, or, perhaps even more appropriate, graduation from a state licensed school. Finally, when the issue before the agency is whether a majority of employees want a particular union to represent them in collective bargaining with their employer, the best method is to hold an evidentiary hearing or conduct an election. *Nye v. Dept. of Livestock*, 639 P.2d 498, 501 (Mont. 1982) (citing Mont. Code Ann. tit. 2 ch. 4 (compiler’s comments)) (a hearing is “required by law” if a hearing is required by (1) the agency-enabling/authorizing legislation, or (2) constitutional due process); see also *Johansen v. State*, 955 P.2d 653, 658 (Mont. 1998).

57. McCrory, *supra* n. 2 at 51–52 (the definition of contested case is “broadly phrased to include all proceedings in which the basic concepts of due process should be applied to protect private rights and the public interest”).

58. Admin. R. Mont. § 1.3.211 (2011).

59. Pierce, Jr., *supra* n. 10, at 302–303; 5 U.S.C.A. § 551(5), (7) (West 2011). For those familiar with federal agency practice under the APA, quasi-judicial proceedings are called adjudications. Under the APA, adjudication may be formal or informal. If a specific agency-authorizing or enabling statute directs that an adjudicatory hearing be “on the record,” the APA directs that the hearing conform to a formal trial-type process. Indeed, even if a specific agency-authorizing or enabling statute does not require that an adjudicatory hearing be “on the record,” but congressional intent for a formal hearing is otherwise expressed or judicially determined, the hearing is to be a formal trial-type hearing.

60. *Johansen*, 955 P.2d 653.

61. *Id.* at 655–657.

Certainly, the cancelling of the lease was a quasi-judicial determination—a decision unique to Johansen based on his individual facts and circumstances (whether he had properly mailed the rent check)—but the Montana Supreme Court concluded that a contested case hearing, on the question of fact, was not required before the cancellation. The Court said that state statutory law authorized the Department to terminate the lease for failure to pay the rent and that the statute did not require the Department to hold a “hearing” before doing so. Indeed, statutory law did not require any hearing, either before or after the cancellation.⁶²

Having lost the argument for “hearing” required by statute, Johansen then argued that a “hearing” was required by constitutional due process. The Court disagreed and said that *if* due process required a hearing,⁶³ then a MAPA contested case hearing was required. But, the Court said Johansen cited no legal authority or analysis for the proposition that he had been deprived of liberty or property without due process, and that it was not the Court’s “job to conduct legal research on his behalf, to guess as to his precise position, or to develop legal analysis that may lend support to that position.”⁶⁴ Thus, because no hearing was “required by law,” (by statute or constitutional provision) Johansen was not entitled to a MAPA trial-type, contested case hearing before the termination of the lease. Of course, the agency made a finding of fact, i.e., that Johansen did not make a timely rent payment, but the prerequisite for that finding was not a contested case hearing, the finding was instead based on agency information obtained informally from Johansen and agency staff.

In *Dupuis v. Board of Trustees, Ronan School District No. 30*,⁶⁵ the Polson School District Board of Trustees held a public hearing (where members of the public were invited to comment) on whether to continue to use the “Chief” and “Maiden” mascots and retain the use of certain Native American symbols on the gymnasium floor. At the conclusion of the hearing, the Board decided that it would not change its policy permitting such uses.⁶⁶ The school board’s process was much like a legislative hearing to determine the need for legislation, in that the school board was seeking public comment on a matter of community interest.

The petitioner, an American Indian, appealed the school board’s decision to the county superintendent of schools. The county superintendent accepted jurisdiction of the matter despite the school district’s challenge of

62. *Id.* at 658.

63. The action of the Department, cancellation of the lease, was quasi-judicial and a persuasive argument could be made that the lease cancellation resulted in a “taking” of property (the leasehold).

64. *Johansen*, 955 P.2d at 658.

65. *Dupuis v. Bd. of Trustees, Ronan Sch. Dist. No. 30*, 128 P.3d 1010 (Mont. 2006).

66. *Id.* at 1011.

his power to do so, and the school district appealed the superintendent's acceptance of jurisdiction to the Montana State Superintendent of Public Instruction.⁶⁷

By Montana statute, a county superintendent has appellate jurisdiction over a school board decision only if the decision was made after a "contested case" hearing.⁶⁸ The State Superintendent concluded that the county superintendent had no jurisdiction. That order was affirmed by state district court and the Montana Supreme Court.⁶⁹

The *Dupuis* Court's decision was grounded in the fact that the school board's decision was not the product of a contested case hearing.⁷⁰ It reasoned that a mere disagreement with a school district does not automatically entitle an aggrieved party to a contested case hearing to resolve the disagreement, and that the hearing was quasi-legislative in nature and only an effort by the board to receive public comment.⁷¹ Because the jurisdiction of the county superintendent is limited to contested cases and the board hearing was quasi-legislative, the county superintendent had no appellate jurisdiction.⁷²

Johansen and *Dupuis* illustrate the basic distinction between quasi-judicial matters and quasi-legislative matters. Quasi-legislative hearings are for the purpose of establishing prospective standards for everyone within the agency's jurisdiction, or an appropriate subgroup, whereas, quasi-judicial decisions are intended to adjudicate past-fact, like a court case. They also illustrate that for a quasi-judicial matter to rise to the status of a contested case, a fact-finding hearing must be required by statutory law, constitutional due process, or possibly common law. The fact that an agency makes an important decision relative to a petitioner does not necessarily mean that the agency must conduct a contested case hearing. In addition, nor does the fact that the agency conducts a legislative-type hearing, mean that the hearing is a contested case hearing.

67. Because MAPA only applies to agencies of the state government (not to agencies of subdivisions of the state, such as counties, municipalities, transportation/school/irrigation districts, it was not until this matter reached the State Superintendent of Public Instruction that MAPA was even applicable. See Mont. Code Ann. § 2-4-102(2).

68. *Dupuis*, 128 P.3d at 1011-1012.

69. *Id.* at 1012. The Court concluded that the petitioner may have a remedy concerning her constitutional claims, but such claims must be brought before the Montana Human Rights Commission. *Id.* at 1013-1014.

70. *Id.* at 1013.

71. *Id.*

72. *Id.* at 1012.

III. THE MAPA'S RULE AND CONTESTED CASE PROCEDURES

The next two parts of this article discuss rulemaking procedures and contested case procedures. The discussion is, for the most part, based on two applicable portions of the MAPA. In addition to its specific procedural provisions, the MAPA directs the Montana Secretary of State, with respect to rules, and the Montana Attorney General, with respect to rules and contested cases, to prepare model rules and practice forms to assist state agencies, law practitioners, and the public in understanding the dictates of the Act.⁷³ Because the Secretary of State publishes state agency administrative rules, that office is required to publish model rules and forms regarding state agency rules. The Attorney General is responsible for compiling model rules and forms on contested case and declaratory judgment procedures. The model rules and forms may be accessed at the respective official's website.⁷⁴ The rulemaking and contested case procedures portions of the article cite the MAPA, as well as model rules, forms and templates.

A. *The MAPA's Rulemaking Procedure*

As discussed above, MAPA agency rulemaking is a quasi-legislative process in which the agency formulates a "regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy" (substantive or procedural) including the "amendment or repeal of a prior rule."⁷⁵ Because the MAPA agency rulemaking procedure is not applicable to all agency rules, it is important to recognize the various types of MAPA rules. Additionally, before considering the specifics of MAPA rulemaking, it is important to note that if the Legislature included specific rulemaking procedures in the enabling or authorizing legislation of a particular agency, those procedures prevail over the generic MAPA rulemaking procedures.⁷⁶

73. Mont. Code Ann. § 2-4-202(1); McCrory, *supra* n. 2, at 31-40.

74. Mont. Sec. of State, *ARM Templates*, <http://www.armtemplates.com> (accessed June 22, 2012).

75. Mont. Code Ann. § 2-4-102(11)(a) (emphasis added); *see also* Admin. R. Mont. § 1.3.307 (exceptions to the definition of a rule should be construed narrowly); *Vainio*, 35 P.3d at 953 (an administrative policy does not have the full force and effect of law absent the agency proceeding with and complying with rulemaking); *N.W. Airlines, Inc. v. State Tax App. Bd.*, 720 P.2d 676, 678 (Mont. 1986) (an administrative decision by an agency employee qualified as a rule, and to be valid, the agency was required to engage in and complete a rulemaking procedure).

76. *See Pickens v. Shelton-Thompson*, 3 P.3d 603, 606 (Mont. 2000); *see also Schneeman v. Dept. of Lab. & Indus.*, 848 P.2d 504, 506 (Mont. 1993), *overruled on other grounds*, *Slater v. Empl. Sec. Div. of Dept. of Lab. & Indus.*, 676 P.2d 220, 222 (Mont. 1984).

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1. Types of MAPA Rules

The MAPA defines “substantive” agency rules as: legislative and adjective/procedural. Legislative rulemaking authority must be expressly authorized by the Legislature.⁷⁷ To engage in legislative rulemaking, an agency must have express rulemaking authority delegated to it by the Legislature.⁷⁸ This authority is conferred by the agency’s enabling or authorizing legislation; the MAPA itself does not confer upon agencies rulemaking authority.⁷⁹

To determine whether a particular agency has this authority, “one must look at the statute creating [the agency].”⁸⁰ This legislative authority may be stated in a variety of ways, but the grant must be clear, specific, and express. If the agency has been provided with such legislative authority, has procedurally complied with the MAPA rulemaking requirements,⁸¹ and has properly implemented or interpreted its legislative authority,⁸² the agency’s rule has the full force and effect of law.⁸³ Courts determine whether an agency rule is consistent with legislative intent by comparing the rule with the intent of the legislature.⁸⁴

77. Mont. Code Ann. § 2–4–102 (13)(a); *see also generally In re DNRC*, 740 P.2d 1096 (Mont. 1987); Admin. R. Mont. § 1.3.307(3); Mont. Code Ann. § 2–4–102(13)(a) (“legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid”); *see* Mont. Atty. Gen. Op. 35–8 (Feb. 8, 1973) (a state plan prepared by an MAPA agency pursuant to federal law is a rule and must be adopted consistent with MAPA rulemaking procedure).

78. Mont. Code Ann. § 2–4–305(3); *see also Mont. Socy. of Anesthesiologists*, 171 P.3d at 713 (agencies have legislative rulemaking authority only if specifically conferred by the legislature); *Fallon Co.*, 223 P.3d at 888; *id.* at 891–892 (Rice, J., dissenting) (citing *Darby Spar, Ltd. v. Dept. of Revenue*, 705 P.2d 111, 113 (Mont. 1985) for the proposition that legislative inaction was indicative of intent).

79. *Bradco Supply Co.*, 598 P.2d at 598 (“MAPA alone does not confer authority to adopt rules. The MAPA merely outlines the correct procedure an agency must use once the agency has been granted statutory power to adopt rules.”).

80. *Id.*

81. *Rosebud Co. v. Dept. of Revenue*, 849 P.2d 177, 180 (Mont. 1993) (agency rule was invalid for failure to follow proper rulemaking procedure).

82. *See State ex rel. Swart v. Casne*, 564 P.2d 983, 986 (Mont. 1977), *overruled on other grounds, Trustees of Ind. U. v. Buxbaum*, 69 P.3d 663 (Mont. 2003); *see also Garsjo v. Dept. of Lab. & Indus.*, 562 P.2d 473, 475 (Mont. 1977) (administrative rules must be consistent and not conflict with an agency’s authorizing or enabling legislative directive).

83. Mont. Code Ann. § 2–4–506(1) (a rule may be declared invalid if it is found that impairs with the legal rights of the plaintiff).

84. *Mont. Dept. of Revenue v. United Parcel Serv., Inc.*, 830 P.2d 1259, 1264 (Mont. 1992) (agency rule that conflicts with authorizing or enabling legislation is invalid); *Bd. of Barbers v. Big Sky College of Barber-Styling, Inc.*, 626 P.2d 1269, 1271 (Mont. 1981) (an agency rule that is more stringent than statute is invalid); *accord Taylor v. Taylor*, 899 P.2d 523, 526 (Mont. 1995) (an administrative rule that is more stringent than statute is invalid); *Michels v. Dept. of Soc. & Rehab. Servs.*, 609 P.2d 271, 273 (Mont. 1980) (a rule in conflict with the statute from which it derives is without effect; a statute cannot be changed by administrative rule; a rule may not engraft additional requirements on a statute that were not envisioned by the legislature).

Alternatively, an adjective or interpretive rule is either an agency interpretative statement, made under express legislative authority but absent the MAPA procedural rulemaking requirements, or made under implied legislative authority, even if made in accord with MAPA rulemaking requirements.⁸⁵ Adjective or interpretive rules do not have the full force and effect of law, but if they are consistent with legislative intent, they may be persuasive to a court on judicial review.⁸⁶

The third type of agency rules are statements describing the agency's organization and procedures.⁸⁷ MAPA procedural notice and hearing requirements do not apply to these rules.⁸⁸ A fourth and fifth type of agency rules, emergency and temporary rules, are also not subject to the MAPA procedural requirements for a rulemaking. Emergency rules address an imminent peril to public health, safety, or welfare.⁸⁹ Temporary rules implement a statute or statutory amendment that becomes effective prior to October 1 of a given year and is effective only until October 1 of the year of adoption.⁹⁰ These rules have the full force and effect of law.

2. MAPA Rulemaking Procedure

Generally, rulemaking procedures will include an agency *notice* to the public of the proposed rule—either publication of the proposed rule itself, or publication of at least sufficient information about the proposed rule for the public to be able to take an informed position—and the opportunity for the public to *comment* on the agency proposal. This notice and comment procedure is at the heart of all rulemaking, whether provided in the specific

85. Mont. Code Ann. § 2-4-102(13)(b); Admin. R. Mont. § 1.3.307(2) (“Interpretive rules are statements issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”).

86. See Mont. Atty. Gen. Op. 39-18 (June 4, 1981) (MAPA agency was given statutory authority to adopt interpretative rules, such rules do not have the force of law, and a reviewing court may give the rules that legal authority if persuaded that the rules are consistent with legislative intent, but may substitute its judgment for that of the agency). See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986) (while not controlling upon the courts by reason of their authority, agency guidelines or interpretations, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance).

87. Mont. Code Ann. § 2-4-201.

88. *Id.* at § 2-4-201(1); see also Admin. R. Mont. § 1.3.305(1).

89. Mont. Code Ann. § 2-4-303(1)(a). But, an agency engaged in emergency rulemaking must file a notice with the appropriate legislative administrative rule review committee. *Id.*; see also Admin. R. Mont. § 1.3.313(1)(a)(ii); Admin. R. Mont. Templates 313a, 313b. For examples of emergency rules, see *State ex rel. Dept. of Soc. & Rehab. Serv. v. Cole*, 538 P.2d 1031, 1032 (Mont. 1975) (the failure of the legislature to fully fund the agency, requiring it to make adjustments such as cutting programs, to live within its budget, justified agency emergency rulemaking); but see Mont. Atty. Gen. Op. 42-62 (Feb. 5, 1988) (while an emergency situation is reason to engage in emergency rulemaking, the agency should rely on regular MAPA where it could foresee a coming problem).

90. Mont. Code Ann. § 2-4-303(2); see also Admin. R. Mont. Templates 313c, 313d.

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agency's enabling or authorizing legislation or in the MAPA. For those familiar with federal agency notice and comment rulemaking, MAPA rulemaking is much the same. Indeed, even apart from MAPA and the specific requirements that may be included in an agency's specific enabling or authorizing legislation, the Montana Public Participation Act⁹¹ and the Montana Constitution⁹² require agency notice⁹³ and the opportunity for public participation and comment.⁹⁴ In the context of MAPA rulemaking, the MAPA procedure fulfills the Montana constitutional and Public Participation Act mandates for citizen participation.⁹⁵ The next two subsections concern the specific MAPA requirements for Notice and Comment rulemaking.

i. Notice

The MAPA includes various notice requirements for administrative rulemaking.⁹⁶ The first notice is to the state legislator who was the "primary bill sponsor" of the agency's authorizing or enabling legislation. That notice must be given when the agency first begins to work on the substantive content and wording of the proposed rule.⁹⁷ The purpose of contacting the primary bill sponsor is to obtain his or her comments, inform the legislator of the known dates of each step of the rulemaking process, and to notify the legislator of times for commenting on the proposed rules.⁹⁸

The next step in the rulemaking process is for the agency to draft the proposed rule. Because the standards for statutory construction are also ap-

91. Mont. Code Ann. tit. 2, ch. 3. The Act, based on Mont. Const. art. II, § 8 (right of participation), requires all agencies of the state and local government to provide notice to the public and public participation in all "agency decisions that are of significant interest to the public," not including contested cases or other agency adjudications. Mont. Code Ann. § 2-3-103(1)(a)-(b).

92. Mont. Const. art. II, § 8.

93. Mont. Code Ann. §§ 2-3-104 to 2-3-107 (notice provisions).

94. *Id.* at § 2-3-111 (implementing the Montana constitutional right of citizen participation in government).

95. Mont. Atty. Gen. Op. 38-69 (Feb. 28, 1980).

96. Admin. R. Mont. §§ 1.3.307(4)(b), 1.3.309; Admin. R. Mont. Templates 309a.

97. Mont. Code Ann. § 2-4-302(2)(d)(i) (actual attempt to contact the primary bill sponsor is required). The statute provides: When an agency begins to work on the substantive content and the wording of a proposal notice for a rule that initially implements legislation, the agency shall contact, as provided in subsection (8), the legislator who was the primary sponsor of the legislation to:

- (A) obtain the legislator's comments;
- (B) inform the legislator of the known dates by which each step of the rulemaking process must be completed; and
- (C) provide the legislator with information about the time periods during which the legislator may comment on the proposed rules, including the opportunity to provide comment to the appropriate administrative rule review committee. *Id.*

98. Mont. Code Ann. § 2-4-302(2)(d)(i).

plicable to the interpretation of administrative rules,⁹⁹ agency rule drafters must be knowledgeable of these standards.¹⁰⁰ Other than the standards of statutory construction and the few specific standards referenced in the MAPA,¹⁰¹ rule drafters are generally free to draft with the knowledge that resulting rules will be interpreted according to their plain language.¹⁰²

Once the proposed rule is drafted, the agency must give notice to the public and specific entities and individuals of its proposal. The notice must provide:

- the substance of the intended action or description of the subjects and issues involved;¹⁰³
- citations to the specific authorizing or enabling legislation granting the agency rulemaking authority; and;¹⁰⁴
- citations to the specific statutes the agency rule(s) will address;¹⁰⁵
- a description of any policy of a governing board or commission being implemented;¹⁰⁶
- a statement of reasonable necessity for the rule;¹⁰⁷
- confirmation that the legislative bill sponsor has been contacted;¹⁰⁸
- specific notice regarding monetary amounts to be paid or received;¹⁰⁹
- an explanation of how a person or group with a special or continuing interest in a subject may be placed on the list of interested persons who in the future will receive actual notice of rulemakings;¹¹⁰

99. *State v. Frickey*, 136 P.3d 558, 562 (Mont. 2006).

100. See generally Bill Drafting Manual 2010 (Mont. Legis. Servs. Div. 2010) (available at <http://leg.mt.gov/content/Publications/2010-bill-drafting-manual.pdf>) (manual published biennially for each legislative session by the Legislative Services Division).

101. The specific rule drafting standards in the MAPA provide that rules may not unnecessarily repeat statutory language, and statutory language that is repeated must be identified as such. Mont. Code Ann. § 2-4-305(2). Also, a rule may adopt by reference any model code, federal regulation, or other agency rule, “if publication of the full language would be unduly cumbersome.” *Id.* at § 2-4-307(1)(a)–(b).

102. See e.g. *Tuttle v. Dept. of Just.*, 167 P.3d 864, 867 (Mont. 2007).

103. Mont. Code Ann. § 2-4-302(1)(a).

104. *Id.* at § 2-4-305(3).

105. *Id.*

106. *Id.* at § 2-4-305(4).

107. *Id.* at § 2-4-305(6)(b). The operative question is why the agency believes the rulemaking necessary, and “a statement that merely explains what the rule provides is not a statement of the reasonable necessity of the rule.” *Id.* Compare *Bd. of Barbers*, 626 P.2d at 1270 (a rule must be reasonably necessary to effectuate the purpose of the statute) with *Mont. Socy. of Anesthesiologists*, 171 P.3d at 715 (even though the agency did not fully comply with the requirement for a statement of necessity, the public was placed on sufficient notice to effectively participate in the rulemaking).

108. Mont. Code Ann. § 2-4-302(1)(b).

109. *Id.* at § 2-4-302(1)(c)(i)–(ii) (proposals to adopt, increase, or decrease a fee or other monetary amount a person shall pay or will receive must include the estimate, if known, of the cumulative amount for all persons of the proposed increase, decrease, or new amount, and the estimated number of persons affected).

110. *Id.* at § 2-4-302(2)(a)(iii).

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- notice of a public hearing if a public hearing will be held, and if a public hearing is not planned, the notice must state the legal basis that would compel such a hearing;¹¹¹ and
- notice of the opportunity to submit written comments on the agency rule proposal.¹¹²

The Montana Secretary of State has published rule templates containing these requirements.¹¹³

The public notice must be published in the Montana Administrative Register¹¹⁴ and in any state electronic access system or other electronic communications system available to the public.¹¹⁵ Actual notice is to be given to those listed on the agency's "interested persons list" and to any professional trade or industrial group or member who has filed a request with the appropriate legislative administrative rule review committee,¹¹⁶ and the legislative primary bill sponsor.¹¹⁷ Also, a specific agency statute may require actual notice to an advisory council.

An agency may use an amended notice to correct deficiencies in citations of authority, statutes implemented, or to amend the statement of reasonable necessity.¹¹⁸ If such an amendment alters the statement of reasonable necessity, the agency must allow additional time for oral or written comments.¹¹⁹ Generally, an agency must complete its rulemaking action on the matter specified in the original notice no later than six months from the date of the notice.¹²⁰ If the administrative rule review committee for the agency gives a written objection to a proposed notice, the agency is restricted in adopting a final rule.¹²¹ Every MAPA agency is to appoint a "qualified person" to assure all notices are properly made.¹²²

111. *Id.* at § 2-4-302(4).

112. *Id.*

113. *See* Admin. R. Mont. Templates 309(a)-(c).

114. Mont. Code Ann. §§ 2-4-302(2)(a)(i), 2-4-306(1), and 2-4-312(1). For those familiar with the Federal Register, the Montana Register is similar, except for its frequency of publication.

115. *Id.* at § 2-4-302(2)(c).

116. *Id.* at § 2-4-302(2)(a)(i).

117. *Id.* at § 2-4-302(2)(d)(i).

118. *Id.* at § 2-4-305(8)(a); *see also* Admin. R. Mont. Templates 309d.

119. Mont. Code Ann. § 2-4-305(8)(c); *see also* Admin. R. Mont. Templates 309e.

120. Mont. Code Ann. § 2-4-302(3). Failure to complete the rulemaking within the six months invalidates the proposed notice and requires the agency to start anew. *Id.* at § 2-4-302(6). Unless, within the six months, the agency publishes an amended or supplemental notice. *Id.* at § 2-4-305(7).

121. *Id.* at § 2-4-305(9).

122. *Id.* at § 2-4-110(1).

ii. Possibility of a Public Hearing

A MAPA agency is required to hold an oral rulemaking hearing if the proposed rule involves a matter of “significant interest to the public”¹²³ or such a hearing is otherwise required by law. The agency must also hold a hearing at the request of any of the following four groups: (a) the lesser of 10 percent or 25 of the people who will be directly affected by the agency proposal, (b) “a governmental subdivision or agency,” (c) the appropriate legislative rule committee, or (d) “an association having [at least] 25 members who will be directly affected.”¹²⁴ If a hearing is to be held, the agency must by notice¹²⁵ set a date, time, and place.¹²⁶ The MAPA provides that the hearing is legislative in type.¹²⁷ If no public hearing is held, public comment is made in writing and is addressed only to the agency.¹²⁸

iii. Agency Consideration of Comments and Final Adoption

Once the agency has gathered comments, oral and written, it must fully consider them before drafting a final rule.¹²⁹ If an agency adopts a rule that is inconsistent with some comments, the adoption notice must include the agency’s rationale for doing so.¹³⁰ Additionally, the agency must justify any substantial differences between the rule as proposed and as adopted.¹³¹ Failure to fully consider public comments and to state the principal reasons for not adopting an approach presented will invalidate the rule.¹³² The final rule adoption notice must be published within six months of the publication of the proposed rulemaking notice¹³³ and must contain an order of such adoption.¹³⁴ The final rule is considered adopted as of the date it is filed

123. *Id.* at § 2–4–302(4). A matter of “significant interest to the public” means agency actions “[known] to be of widespread citizen interest . . . [including] issues involving substantial fiscal impact to or controversy involving a particular class or group of individuals.” Mont. Code Ann. § 2–4–102(12).

124. *Id.* at § 2–4–302(4).

125. *Id.*

126. *Id.* at § 2–4–302(1)(a). A hearing date may be continued for cause. *Id.* at § 2–4–302(5).

127. The purpose of the hearing is to allow the public to provide information, comment, and argument on the rule proposal. The formal trial-type contested case procedures need not be followed. *Id.* at § 2–4–302(5). The presiding officer is required to read or summarize the rule proposal from the notice, read the “Notice of Function of Administrative Rule Review Committee,” and inform those at the hearing of the right to have their names placed on the agency’s interested person list (if on the list, in future rulemakings the person would be given actual notice). Admin. R. Mont. § 1.3.311(2)(c).

128. See Admin. R. Mont. Templates 309b (notice when no public hearing is contemplated).

129. Mont. Code Ann. § 2–4–305(1)(a).

130. *Id.* at § 2–4–305(1)(b)(ii).

131. *Id.* at § 2–4–305(1)(b)(i); see also Admin. R. Mont. Templates 312a–312c, 312g.

132. *Patterson v. Dept. of Revenue*, 557 P.2d 798, 805 (Mont. 1976).

133. Mont. Code Ann. § 2–4–305(7) (if the agency amends the proposed rule notice, the six months is determined from the date of the last notice).

134. Admin. R. Mont. § 1.3.312(2)(a)(iv); see also Admin. R. Mont. Templates 312g.

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with the Secretary of State,¹³⁵ and it generally becomes effective the day after publication in the Administrative Register.¹³⁶

If the agency decides not to adopt a final rule, no notice is required,¹³⁷ but the agency may publish a notice stating its intent.¹³⁸ Once the adoption notice is published, the agency may correct technical or clerical errors.¹³⁹

In addition to the above rulemaking requirements, each agency must, at least biennially, review its rules to determine whether any new rule should be adopted or any existing rule should be modified or repealed.¹⁴⁰ Finally, while the agency usually initiates rulemaking, a person may also petition an agency for the adoption, amendment, or repeal of a rule.¹⁴¹

3. Legislative Review of Rules and Agency Economic Impact Statements

Often in the discussion of administrative law little is said of the continuing role that the legislature plays in guiding the operation of an agency. Legislative committees conduct oversight hearings to review agency operations and decision making. Through the appropriation process, the legislature controls the amount of money an agency receives, and may direct agency dollars into and away from certain agency activities. The MAPA does not address the above activities, but it addresses and provides for legislative action regarding agency rulemaking and requires economic impact statements for proposed agency rules.

i. Legislative Review of Rules

The Montana Legislature, like Congress, divides legislative subjects into specific legislative committees.¹⁴² The MAPA provides legislative committees with jurisdiction to review agency-proposed rules.¹⁴³ The MAPA also allows legislative committees to make written recommendations to the agency regarding the adoption, amendment, or rejection of such

135. Mont. Code Ann. § 2-4-306(1).

136. For exceptions, see Mont. Code Ann. § 2-4-306(4).

137. *Id.* at § 2-4-305(7) (if notice is not given, the rule proposal becomes invalid after six months).

138. Admin. R. Mont. § 1.3.312(5).

139. See Admin. R. Mont. Templates 312f.

140. Mont. Code Ann. § 2-4-314.

141. *Id.* at § 2-4-315 (the agency is required to either deny the petition in writing or initiate rulemaking within 60 days, no hearing is required); *Com. Cause of Mont. v. Argenbright*, 917 P.2d 425, 429 (Mont. 1996) (holding that an agency has discretion to deny a petition for adoption of a particular rule but not to summarily deny a petition seeking to invoke an agency's "obligation to engage in mandatory rulemaking") (emphasis in original); Admin. R. Mont. § 1.3.308; Admin. R. Mont. Templates 308(a).

142. The appropriate legislative committee is determined by both the legislature's rules and Montana statute. See Mont. Code Ann. §§ 5-5-201 to 5-5-215; see also *id.* at § 2-4-102(1).

143. *Id.* at § 2-4-402(1).

rules;¹⁴⁴ to obtain agency rulemaking records;¹⁴⁵ to submit oral or written comments to the agency in any rulemaking procedure;¹⁴⁶ to require agency compliance with MAPA rulemaking procedures;¹⁴⁷ and to institute, intervene in, or otherwise participate in any judicial agency proceeding involving the MAPA.¹⁴⁸ The legislative committee may object to the rule,¹⁴⁹ in which case the agency must respond, and the legislative committee's objection significantly impacts the agency's burden of proof on judicial review of any such rule.¹⁵⁰ If the objection is not resolved, the committee may publish its objection and the agency's response along with the final rule.¹⁵¹ A published legislative committee objection requires the agency, in any judicial review proceeding, to prove that the rule was adopted in substantial compliance with MAPA rulemaking procedures.¹⁵² Failing in that burden may result in the court imposing costs and attorney fees against the agency.

The legislative committee may also poll the entire legislature to determine whether a proposed rule is consistent with legislative intent.¹⁵³ Finally, the legislature may repeal any MAPA rule.¹⁵⁴ But failure of the legislature or any legislative review committee to object to a rule is inadmissible in a court proceeding regarding the validity of the rule.¹⁵⁵

ii. *Economic Impact Statements*

A legislative administrative rule review committee may, prior to final agency action,¹⁵⁶ require an agency to prepare an economic impact statement, or the committee may contract with a third-party to prepare a cost estimate, regarding a proposed rule (excluding emergency or temporary

144. *Id.* at §§ 2-4-402(2), 2-4-411.

145. *Id.* at § 2-4-402(2)(a) ("The appropriate administrative rule review committee may request and obtain an agency's rulemaking records for the purpose of reviewing compliance with 2-4-305.").

146. *Id.* at § 2-4-402(2)(b) ("The appropriate administrative rule review committee may . . . prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing.").

147. Mont. Code Ann. § 2-4-402(2)(c) ("The appropriate administrative rule review committee may . . . require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305.").

148. *Id.* at § 2-4-402.

149. *Id.* at § 2-4-406(1).

150. *Id.* at § 2-4-406(1)-(2).

151. *Id.* at § 2-4-406(3).

152. *Id.* at § 2-4-406(4).

153. Mont. Code Ann. §§ 2-4-403 to 2-4-404.

154. *Id.* at § 2-4-412(1).

155. *Id.* at § 4-4-412(4); *but see Dept. of Health & Envtl. Sci. v. Lincoln Co.*, 584 P.2d 1293, 1295 (Mont. 1978) (the fact that the legislature did not object to the agency rule or amend the underlying legislation for three legislative sessions is evidence that the rule is consistent with legislative intent), *overruled on other grounds*, *Buxbaum*, 69 P.3d at 674.

156. Mont. Code Ann. § 42-4-405(3).

rules¹⁵⁷).¹⁵⁸ The MAPA imposes a number of requirements for such an impact statement.¹⁵⁹ The committee alone must determine the sufficiency of the agency's statement.¹⁶⁰ A final agency rule is not subject to challenge on judicial review as a result of the accuracy or adequacy of the impact statement.¹⁶¹

The authority of the legislature to propose, amend or reject agency rules and to institute or intervene in any judicial review of an agency rule, allows the legislature to assure that agency rules conform with its intent. Additionally, the legislative authority to assure that an agency is aware of the relative cost-benefit of any proposed rule provides a valuable control on unnecessary or inappropriate agency overreaching.

B. The MAPA Contested Case Hearing

1. The Formal Contested Case Hearing

As noted above, a MAPA contested case is a quasi-judicial agency proceeding as contrasted with quasi-legislative actions such as rulemaking, in which a hearing is "required by law." Though, not every quasi-judicial matter requires a contested hearing. Absent a statutory or constitutional requirement for an agency "hearing," a MAPA agency proceeding is not a contested case hearing.¹⁶² The hallmark of a contested case is that the po-

157. *Id.* at § 2-4-405(5).

158. *Id.* at § 2-4-405(1).

159. *Id.* at § 2-4-405(2)(a)-(h), which provides that the requested statement must include:

- (a) a description of the classes of persons who will be affected by the proposed rule . . . ;
- (b) a description of the probable economic impact of the proposed rule upon affected classes of persons . . . ;
- (c) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenue;
- (d) an analysis comparing the costs and benefits of the proposed rule to the costs and benefits of inaction;
- (e) an analysis that determines whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule;
- (f) an analysis of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (g) a determination as to whether the proposed rule represents an efficient allocation of public and private resources; and
- (h) a quantification or description of the data upon which subsections (2)(a) through (2)(g) are based and an explanation of how the data was gathered.

160. *Id.* at § 2-4-405(4).

161. *Id.* at § 2-4-405(6).

162. *Roos v. Kircher Pub. Sch. Bd. Of Trustees*, 86 P.3d 39, 41 (Mont. 2004) (the appellant did "not allege any violation of state statute that grants an administrative hearing or a constitutionally protected interest" that triggers a due process hearing).

tential party aggrieved by any agency action is entitled to a “trial-type” hearing.

i. The Contested Case Hearing Process

In general, the MAPA contested case pre-hearing and hearing process mirrors a judicial civil bench trial. Consequently, it is often said that the contested case process requires a “trial-type” hearing.¹⁶³ However, as in a civil trial, no hearing is required if there are no material issues of fact in dispute—the matter may be disposed of on a motion for summary judgment or motion to dismiss.¹⁶⁴

ii. Notice of the MAPA Hearing and Discovery

In contrast to a judicial civil matter where the process commences with the moving party’s complaint, the administrative contested case process commences with a written agency notice¹⁶⁵ coupled with service of process.¹⁶⁶ While a citizen complaint to the agency may result in an agency to issue a notice, it is the agency notice that initiates the contested case proceeding.

In addition to the specifics required of the agency “notice,”¹⁶⁷ it must sufficiently convey the issues to be defended¹⁶⁸ because the constitutional right of notice is the same whether in an administrative proceeding or in a court.¹⁶⁹ The MAPA also provides that the recipient of an agency notice may apply to the agency for a more definite and detailed statement.¹⁷⁰

As in a judicial civil proceeding, an agency-contested party is entitled to discovery consistent with the Montana Rules of Civil Procedure.¹⁷¹ Additionally, the MAPA authorizes the agency to issue subpoenas, including

163. McCrory, *supra* n. 2, at 51–52 (a “contested case” is one in which a determination of legal rights, duties or privileges must be made after an opportunity for a “trial-type” hearing).

164. *In re Peila*, 815 P.2d 139, 144 (Mont. 1991) (“[D]ue process does not require development of facts through an evidentiary hearing when there are no material factual issues in dispute.”). *See also Anaconda School Dist. v. Whealan*, 263 P.3d 1258, 1262 (Mont. 2012) (summary judgment is permissible in a contested case).

165. Mont. Code Ann. § 2–4–603.

166. Admin. R. Mont. § 1.3.232 (unless otherwise provide by law and the Administrative Rules of Montana, “all motions and pleadings must be served in accordance with the Montana Rules of Civil Procedure”).

167. *Supra* nn. 96–122 on notice requirements.

168. *Bd. of Trustees of Billings Sch. Dist. No. 2 v. State*, 604 P.2d 778, 780 (Mont. 1979).

169. *Klundert v. State*, 712 P.2d 776, 779 (Mont. 1986).

170. Admin. R. Mont. § 1.3.216.

171. *Id.* at § 1.3.217 (Montana Rules of Civil Procedure 26–37 apply, excluding rules 27, 37(b)(1), and 37(b)(2)(D)); *see also* Mont. Code Ann. § 2–4–602.

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subpoenas *duces tecum*.¹⁷² The advantage of an agency subpoena is that discovery is limited to contested case parties, whereas an agency subpoena may reach well beyond the parties, their proposed witnesses, and the specific subject matter of any contested case. The reach of an agency-issued subpoena is commensurate with the agency's jurisdiction.

iii. *The Hearing*

In a MAPA contested case proceeding, issues of fact are determined as the result of a "trial-type" hearing or through informal disposition. The trial-type hearing is the default process unless the parties stipulate to informal disposition.

As previously noted, a formal MAPA contested case hearing resembles a judicial bench trial of a civil matter. The MAPA provides that the agency may conduct the contested case hearing itself or, more likely, may appoint an agency member or a hearings examiner.¹⁷³ In federal administrative law, an "administrative law judge" occupies what MAPA calls a "hearings examiner." The agency must appoint a hearings examiner with "due regard to the expertise required for the particular matter but need not be an attorney."¹⁷⁴ A hearings examiner may be disqualified for "personal bias, lack of independence, disqualification by law, or other disqualification."¹⁷⁵

Whoever conducts the agency hearing is accorded broad authority to do so.¹⁷⁶ As in the case with any civil proceeding, the party asserting the claim or initiating the action has the burden of proof¹⁷⁷ and is afforded the opportunity to "respond and present evidence and argument on all issues involved."¹⁷⁸ This includes the right to "conduct cross-examinations . . . [and] the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence."¹⁷⁹ The hearing must be transcribed,¹⁸⁰ and, in the event of judicial review, the agency must present the complete administrative record to the court.¹⁸¹ The

172. Mont. Code Ann. § 2-4-104; *see also* Admin. R. Mont. § 1.3.230 (compliance may be compelled via a district court order).

173. Mont. Code Ann. § 2-4-611; *see also* Admin. R. Mont. § 1.3.218(1).

174. Mont. Code Ann. § 2-4-611(1).

175. *Id.* at § 2-4-611(4); *see also In re Sorini*, 717 P.2d 7, 9 (Mont. 1986).

176. Mont. Code Ann. § 2-4-611(3).

177. *Mont. Env'tl. Info. Ctr. v. Dept. of Env'tl. Quality*, 112 P.3d 964, 967 (Mont. 2005).

178. Mont. Code Ann. § 2-4-612(1).

179. *Id.* at § 2-4-612(5).

180. *Id.* at § 2-4-614; *State ex rel Bd. of Personnel Apps. v. Dist. Ct.*, 556 P.2d 1238, 1239 (Mont. 1976) (if the administrative hearing was tape recorded, a reviewing court could order that a printed transcript of the recordings be made).

181. Mont. Code Ann. § 2-4-704; *see also Owens v. Dept. of Revenue*, 130 P.3d 1256, 1258 (Mont. 2006) (agency must forward the complete contested case record to the reviewing court).

MAPA also provides that if a contested case does not involve a disputed issue of material fact, parties may jointly stipulate in writing to waive contested case proceedings¹⁸² and may directly petition the district court for judicial review pursuant to the MAPA contested case judicial review provisions.¹⁸³

iv. Evidence in the Formal Contested Case Hearing

Except as provided by statute relating directly to the agency,¹⁸⁴ in the contested case hearing, the presiding officer must apply the common law and statutory rules of evidence.¹⁸⁵ However, because the administrative case is heard without a jury, the rules of evidence and admissibility are more relaxed than in a civil or criminal jury trial. Consistent with the rules for a civil trial, a reviewing court will not reverse a lower tribunal's alleged errors regarding the admission of evidence "absent an abuse of discretion."¹⁸⁶ In the event of an abuse of discretion, for the "error to be the basis for a new trial, it must be so significant as to materially affect the substantial rights of the complaining party."¹⁸⁷ And, when the lower tribunal is a judicial bench trial judge, "there is a presumption that the trial judge has disregarded all inadmissible evidence in reaching his decision."¹⁸⁸ Because a contested case decision must have written findings and conclusions,¹⁸⁹ the careful administrative hearings examiner need not rely on such a presumption.

It is well settled that exclusionary rules of evidence are generally more relaxed in an administrative proceeding than in a civil jury trial.¹⁹⁰ The

182. Mont. Code Ann. § 2-4-603(1)(a).

183. *Id.* at §§ 2-4-603(3), 2-4-702(2)(b) (the judicial review petition must contain an agreed statement of facts and a statement of the legal issues or contentions of the parties upon which the court, together with the additions it may consider necessary to fully present the issues, may make its decision).

184. The Montana Board of Personnel Appeals is an example of a MAPA agency that does not have to apply the common law and statutory rules of evidence because its authorizing/enabling legislation specifically provides: "In a hearing, the board is not bound by the rules of evidence prevailing in the courts." *Id.* at § 39-3-406(2).

185. Mont. Code Ann. § 2-4-612(2) ("Except as otherwise provided by statute relating directly to an agency, agencies shall be bound by common law and statutory rules of evidence.") The Model Rules provide: "Unless otherwise provided by statute, all evidence introduced in a contested case hearing shall be received and evaluated in conformance with common law and statutory rules of evidence." Admin. R. Mont. § 1.3.221; *see also Pannoni v. Bd. of Trustees*, 90 P.3d 438, 451 (Mont. 2004).

186. *Peschke v. Carroll College*, 929 P.2d 874, 881 (Mont. 1996).

187. *Id.*

188. *In re Moyer*, 567 P.2d 47, 49 (Mont. 1977) (stating that when a district court is hearing a case without a jury, "there is a presumption that the trial judge has disregarded all inadmissible evidence in reaching his decision." The Court then said there is nothing in the record to "rebut this presumption.").

189. *See infra* nn. 213-218.

190. *See* Kenneth Culp Davis, *Administrative Law Text*, § 14.03, (3rd Ed. West 1973).

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administrative hearings examiner, like the civil bench trial judge,¹⁹¹ routinely reviews or otherwise learns the substance of proposed evidence well before it is offered. Even if the administrative hearings examiner admits evidence that would be otherwise inadmissible, there is no prejudicial error if the evidence is not relied upon in making fact-findings.¹⁹² As the Court has noted: “Often the hearing examiner in a formal contested case hearing will admit the evidence and will consider the weight to be given to such evidence when preparing findings and conclusions from all the evidence.”¹⁹³

Indeed, on questions of admissibility, a hearings examiner has a greater risk of reversal by excluding evidence rather than including evidence in the hearing record. This does not mean that inadmissible evidence should be relied upon in making findings of fact, but if the proposed evidence does not appear in the record, the reviewing tribunal will not have the evidence to consider issues of admissibility and weight. Indeed, it is often advised that, when in doubt, the person conducting the hearing, should conditionally admit the evidence and, in the quiet of preparing a written proposed decision, decide the ultimate question—whether to rely on evidence that was the subject of an objection.¹⁹⁴

Certainly, rules of evidence should not be allowed to atrophy into a disregard of due process of law and fundamental individual rights.¹⁹⁵ But

191. It has long been settled that an appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. *Builders Steel Co. v. Commissioner of Internal Revenue*, 179 F.2d 377 (8th Cir. 1950). See 2B W. Barron & A. Holtzoff, *Federal Practice and Procedure Sec. 972* (Wright ed. 1961). Professor Wright tells us that “[t]he attitude now governing has been strongly stated by Judge Sanborn: ‘In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not.’” *Id.* at 268.

192. See *Kauffman v. Dept. of Com.*, 746 P.2d 103, 106 (Mont. 1987) (indicating there was no prejudice where the hearings examiner admitted an exhibit over objection but thereafter rejected the exhibit in making findings of fact); see also *In re Moyer*, 567 P.2d at 49 (in a civil bench trial the Montana Supreme Court has stated that there is a presumption that the trial judge sitting without a jury has disregarded all inadmissible evidence in reaching his decision).

193. *In re Renewal of Teaching Certificate of Thompson*, 893 P.2d 301, 305 (Mont. 1995).

194. *Multi-Med. Convalescent v. N.L.R.B.*, 550 F.2d 974, 977 (4th Cir. 1977) (“In a nonjury trial, whether in the district court or before an administrative law judge, little harm can result from the reception of evidence that could perhaps be excluded. This is so because the judge, trial or administrative, is presumably competent to screen out and disregard what she thinks she should not have heard, or to discount it for practical and sensible reasons. On the other hand, to exclude that which is competent and relevant by mechanistic application of an exclusionary rule is exceedingly dangerous to the administrative or trial process and may well result in vacating the judgment or order on procedural due process grounds.”); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 380 (2d Cir. 1945).

195. *Hert v. J.J. Newberry Co.*, 504 p.2d 656, 661 (Mont. 1978) (while the rules of evidence are more relaxed in administrative proceedings than in a court of law, these rules will not be relaxed to the point where due process of law and fundamental rights are disregarded).

this is not the situation in the typical case, where the hearings examiner admits evidence over objection and thereafter does not rely on it in making findings of fact. Indeed, the best way for a hearings examiner to handle evidence admitted over objection, but thereafter not relied upon, is to specifically state that the evidence was disregarded in making the fact-findings.¹⁹⁶ If the hearings examiner admits and relies on improper evidence over an objection, the reviewing court will reverse¹⁹⁷ if such reliance “materially affect[s] the substantial rights of the complaining party.”¹⁹⁸

The MAPA includes several more specific evidentiary provisions. Documents may be received in the form of copies or excerpts if the original is not readily available.¹⁹⁹ Testimony is to be under “oath or affirmation.”²⁰⁰ Objections to evidentiary offers may be made and shall be noted in the record.²⁰¹ Notice may be taken of generally recognized technical or scientific facts within the agency’s specialized knowledge,²⁰² and the agency may use its experience, technical competence, and specialized knowledge in the evaluation of evidence.²⁰³ Finally, as a means of expediting the hearing when the interests of the parties will not be substantially prejudiced, “any part of the evidence may be received in written form.”²⁰⁴

196. *Kauffman*, 746 P.2d at 106 (there is no prejudice where the hearings examiner admitted an exhibit over objection but thereafter rejected the exhibit in making findings of fact).

197. *In re Thompson*, 893 P.2d at 305 (the Court reversed when the hearing examiner improperly relied on testimony of an expert concerning the behavior of victims of sexual abuse, and when the evidence was properly disregarded, there was not sufficient evidence to support the finding).

198. *Peschke*, 929 P.2d at 881.

199. But upon request, a party is to be given the “opportunity to compare the copy with the original.” Mont. Code Ann. § 2–4–612(3).

200. *Id.* at § 2–4–612(4).

201. *Id.* at § 2–4–612(2).

202. *Hert*, 584 P.2d at 662 (citing Fed. R. Evid. 201(a)–(b)) (a judicially noticed fact must be one not subject to reasonable dispute); *see also Miller v. Frasure*, 871 P.2d 1302, 1309 (Mont. 1994) (regarding medical records in workers’ compensation trials); *see also* Mont. Code Ann. § 2–4–612(6) (regarding official notice, “[p]arties shall be notified either before or during the hearing or by reference in preliminary reports or otherwise of the material noticed, including any staff memoranda or data. They shall be afforded an opportunity to contest the material so noticed.”).

203. Mont. Code Ann. § 2–4–612(7). For an excellent case discussing and distinguishing between the use of agency specialized knowledge as evidence and the evaluation of evidence, *see Banks v. Schweiker*, 654 F.2d 637, 641 (9th Cir. 1981) (citing *McCormick, Law of Evid.* § 333, at 771 (2nd ed. 1972)) (distinguishing the use of agency specialized knowledge as evidence and the evaluation of evidence; when an agency relies on its expertise and specialized knowledge as evidence, it must place that information in the record as matters officially noticed and provide the opponent of the evidence “an opportunity to present information ‘which might bear upon the propriety of noticing the fact, or upon the truth of the matter to be noticed.’”).

204. Mont. Code Ann. § 2–4–612(2); *see Johnson v. Bd. of Trustees*, 771 P.2d 137, 142 (Mont. 1989) (consideration of transcripts and videotaped testimony taken during school board hearing was admissible because it expedited the disposition of the issue without substantial prejudice to the teacher).

2. *The Initial and Final Agency Decisions*

i. *The Proposed Decision*

Although an agency may conduct its own contested case hearings,²⁰⁵ agencies often appoint a hearings examiner to do so. Indeed, for agencies with multi-member boards or commissions, it may be impracticable for the entire body to conduct a contested case hearing. Even agencies with a single administrator, such as a commissioner, may not have anyone qualified to conduct a contested case hearing. In such a situation, the agency can appoint a hearings examiner from within or outside the agency.²⁰⁶ If the agency appoints a hearings examiner to conduct the hearing and the agency was not present during the hearing, the hearings examiner is required to prepare a written proposed decision for the agency, which the agency may review before issuing a final decision.²⁰⁷ An agency member who conducts the hearing may participate in the formulation of the agency's final order, provided that the hearings officer has completed his or her duties.²⁰⁸ If, in accord with agency rules, a party submits proposed findings of fact, the decision must include a ruling upon each proposed finding.²⁰⁹ The hearings examiner's proposed decision must include findings of fact, conclusions of law, and reasoning.²¹⁰ If the hearings examiner becomes unavailable to the agency, proposed findings of fact may be prepared by a person who has

205. Mont. Code Ann. § 2-4-611(1) (indicating that “[a]n agency may appoint hearing examiners for the conduct of hearings in contested cases.”).

206. *Id.* at § 2-4-611(2) (“An agency may elect to request a hearing examiner from its legal assistance program, if any, within the attorney general’s office or from another agency. If the request is honored, the time, date, and place of the hearing must be set by the agency, with the concurrence of the legal assistance program or the other agency.”).

207. However, there are circumstances when inter-agency review by a higher authority requires a more formal process. *See e.g. Mont. Env'tl. Info. Ctr.*, 112 P.3d at 969 (the Court held that the Board of Environmental Review applied the wrong standard of review, when reviewing Department of Environmental Quality’s action. The Board was directed by § 75-2-211(10) to hold a hearing pursuant to the contested case provision of MAPA on a review of the Department’s decision. In such a review the Board was to hold a hearing and make findings of fact and conclusions of law. It was not merely to determine whether the Department’s decision was arbitrary, capricious or represented an abuse of discretion. The Court notes that in some internal administrative appeals the appellate tribunal is not to conduct a hearing but to review the existing record “applying a standard of review substantially similar to that applied by a district court in judicial review of a contested case under § 2-4-704(2)(a).” It notes that this latter standard of review is the type the superintendent of public instruction performs in reviewing a decision of a county superintendent).

208. Mont. Code Ann. § 2-4-621(4).

209. Mont. Code Ann. § 2-4-623(2), (4); *see Mont. Wilderness Assn. v. Bd. of Nat. Resources & Conserv.*, 648 P.2d 734, 742 (Mont. 1982) (a separate and express ruling on each proposed finding of fact is not required as long as the agency’s decision and order are clear); *see also Consumer Counsel v. P.S.C. & Mont. Power Co.*, 541 P.2d 770, 774 (Mont. 1975) (express ruling on each proposed finding is not necessary where the agency’s decision and order on a party’s proposal is clear).

210. Mont. Code Ann. § 2-4-621(2).

read the record only if all parties consider the demeanor of witnesses immaterial.²¹¹ Alternatively, if witness demeanor is material to the decision and is disputed by the parties, a new hearing must have to be held.

ii. The Final Decision

When a majority of the officials in the agency that is to render a final decision have not heard the evidence, (i.e. appointed a hearings examiner), and if the final decision is adverse to a party to the proceeding, other than the agency itself, a final agency decision may not be made until a proposed decision is served upon the parties. Before a final agency decision may be issued, each party is afforded the opportunity to file exceptions, supported by briefs and oral argument to the final decision maker(s).²¹² Additionally, a party may submit proposed findings of fact, and the agency must specifically rule on the proposals.²¹³

A final agency decision must be in writing.²¹⁴ The agency may adopt, reject, or modify the proposed decision, especially regarding conclusions and applications of law, including the interpretation and application of the agency's rules.²¹⁵ But the agency may not reject or modify the findings of fact unless it determines from the complete record and states with particularity in the order that the findings were based on insufficient evidence or legally flawed proceedings.²¹⁶ Finally, the agency may accept or reduce the recommended penalty of the proposed decision but may not increase it without a review of the complete record.²¹⁷

The agency's final decision has stricter formatting requirements than the hearing examiner's proposed decision,²¹⁸ but those requirements may be

211. *Id.* at § 2–4–622.

212. *Id.* at §§ 2–4–621(1), 2–4–622(2).

213. *Id.* at § 2–4–623(4).

214. *Id.* at § 4–2–623(1)(b).

215. *Id.* at §§ 2–4–621(3), 2–4–622(2); *see also In re Sorini*, 717 P.2d at 10 (the agency is not required to specifically rule on the exceptions).

216. Mont. Code Ann. § 2–4–621(3); *see also Ulrich v. State*, 961 P.2d 126, 129 (Mont. 1998) (an agency commits an abuse of discretion if it rejects a hearings examiner's findings of fact without stating with particularity that the findings are not based upon competent, substantial evidence); *Moran v. Shotgun Willies, Inc.*, 889 P.2d 1185, 1187–1188 (Mont. 1995) (reversing the Montana Human Rights Commission's reversal of its hearing officer's findings of fact where the initial finding was based on credibility and the person who hears the testimony is best positioned to make credibility findings); *State Personnel Div., Dept. of Admin. v. Child Support Investigators*, 43 P.3d 305, 316 (Mont. 2002) (Board of Personnel Appeals was not bound by its hearing officer's conclusions of law or the State Personnel Division's interpretation of its rules and practices). As to hearing examiner's proposed order, *see also City of Billings v. State Human Rights Comm.*, 681 P.2d 33, 37 (Mont. 1984) (regarding hearing examiner's proposed order) and *State By and Through Dept. of Social & Rehab. Serv. v. Shodair Hosp.*, 902 P.2d 21, 24 (Mont. 1995).

217. Mont. Code Ann. § 2–4–621(3).

218. *Id.* at § 2–4–623(1)(a).

somewhat relaxed so long as the final decision is sufficiently clear.²¹⁹ If the proposed decision does satisfy the formatting requirements applicable to a final decision, the agency may merely adopt the hearings examiners' proposed decision as written.²²⁰ The agency must notify parties of any final decision and must provide a copy of the decision or order at a party's request.²²¹ More commonly, the agency simply includes a copy of the final decision and order with the notice. Every MAPA agency must index and make available for public inspection all final decisions and orders, including any declaratory rulings.²²² Except for those with actual notice or disclosure, no such decision, order, or ruling is valid until it has been made available for public inspection.²²³ Consequently, prior agency-contested case decisions are available and may be consulted in preparing for litigation.²²⁴ As a general rule, the agency's final decision must issue within 90 days.²²⁵

iii. *The Informal Disposition*

Contested case parties may agree in writing to waive the formal contested case process and proceed under the MAPA informal case process,²²⁶ except in professional or occupational licensure cases,²²⁷ or where otherwise precluded by law. Additionally, some Montana State agencies are directed by statute to use the MAPA informal hearing process.²²⁸ The informal proceeding provides for the possibility of:

- an informal pre-hearing conference;²²⁹
- a hearing before the agency or hearings examiner;²³⁰

219. *Mont. Wilderness Assn.*, 648 P.2d at 750 (“While each finding is not immediately followed by the supporting underlying facts, when the findings and decision are viewed as a whole, it will be seen that the findings are adequately factually supported.”); *Bd. of Trustees, Clinton Sch. Dist. No. 32 v. Bd. of Trustees, Bonner Sch. Dist. No. 14*, 719 P.2d 1240, 1242–1243 (Mont. 1986) (while a final decision is to have findings of fact, where the court found the record to support the agency's findings, it affirmed the agency).

220. Mont. Code Ann. § 2–4–621(3).

221. *Id.* at § 2–4–623(5).

222. *Id.* at § 2–4–623(6).

223. *Id.*

224. Frequently, prior agency contested case decisions may be obtained from the agency's website.

225. Mont. Code Ann. § 2–4–623(1)(a).

226. *Id.* at § 2–4–603(2) (stating in part: “Except as otherwise provided, parties to a contested case may jointly waive in writing a formal proceeding under this part.”).

227. *Id.* at § 2–4–603(2) (stating in part: “Parties to contested case proceedings held under Title 37 [which exclusively involves professions and occupations] or another provision relating to licensure to pursue a profession or occupation may not waive formal [contested case] proceedings.”).

228. *Id.* at § 2–2–136(1)(c) (an example of Montana Ethics Code proceedings before the Commissioner of Political Practices, providing for informal contested case hearings).

229. Admin. R. Mont. § 1.3.215(3) (providing that the pre-hearing conference may be used “to define issues, determine witnesses and agree upon stipulations.”).

230. Mont. Code Ann. § 2–4–604(1)(a).

- the presentation of written and oral evidence, under oath,²³¹ in opposition to the agency's action or refusal to act;²³²
- a written challenge to the "grounds upon which the agency has chosen to act or not to act;"²³³ and
- any other "written or oral evidence relating to the subject of the contested case."²³⁴

An agency must base its decision in an informal hearing on the record, and the record must consist of:

- proper agency notice to the party or counsel;²³⁵
- the reason(s) that the party or counsel opposed the agency action or inaction;²³⁶
- evidence offered by the party(s) and considered by the agency;²³⁷
- party objections and agency rulings on the objections;²³⁸
- any matters placed on the record concerning any *ex parte* communications by the decision maker;²³⁹
- the recording of any hearing held;²⁴⁰
- a statement of the evidence received and considered;²⁴¹
- all rules of privilege are applicable to the informal proceeding;²⁴² the agency may observe a more relaxed standard regarding the admissibility of evidence, including the consideration of hearsay;²⁴³
- party objections; and
- the basis for the agency's decision.²⁴⁴

231. *Id.* at § 2-4-604(4).

232. *Id.* at § 2-4-604(1)(a)(i).

233. *Id.* at § 2-4-604(1)(a)(ii).

234. *Id.* at § 2-4-604(1)(a)(iii) (providing that the opportunity to present "other written or oral evidence relating to the contested case").

235. *Id.* at § 2-4-604(2)(a) (providing that the record of the informal contested case proceeding must contain "the notice . . . and summary of grounds of the opposition").

236. Mont. Code Ann. § 2-4-604(2)(a) (providing that the record of the informal contested case proceeding must contain a "summary of grounds of the opposition").

237. *Id.* at § 2-4-604(2)(b), (e) (providing that the record of the informal contested case proceeding must contain the "evidence offered or considered," that the record must contain the "written or oral statement of the parties or other person," that the requirement that the record contain the "written or oral statement of the parties or other person" appears to be contained in the broader requirement that the record contain the "evidence offered or considered," and that the assumption is that "statements" by "parties or other persons" would be presented at the hearing as "evidence").

238. *Id.* at § 2-4-604(2)(c) (stating the record of the informal contested case proceeding must contain "objections and rulings on the objections").

239. *Id.* at § 2-4-604(2)(d) (stating the record of the informal contested case proceeding must contain "all matters placed on the record after *ex parte* communications pursuant to 2-4-613 [the MAPA *ex parte* communications provision]").

240. *Id.* at § 2-4-604(2)(e) (providing the record of the informal contested case proceeding must contain "a recording of any hearing held").

241. *Id.* at § 2-4-604(2)(e) (providing that the record of the informal contested case proceeding must contain a recording of any hearing "together with a statement of the substance of the evidence received or considered").

242. Mont. Code Ann. § 2-4-604(3).

243. *Id.* at § 2-4-604(4).

244. *Id.* at § 2-4-604(2)(a) (stating the record of the informal contested case proceeding must contain a "summary of grounds of the opposition").

IV. AGENCY DECLARATIONS ON RULES AND ORDERS

The MAPA requires agencies to have a rule to provide for the filing and prompt dispositions of petitions for declaratory rulings as to “the applicability of any statutory provision or of any rule or order of the agency.”²⁴⁵ The Attorney General’s Model Administrative Rules implement this provision.²⁴⁶ This provision allows a person to question whether a MAPA agency would potentially challenge an action of the person or entity, or to determine the potential entitlement of any government benefit which the agency may grant or withhold. Consequently, if a client’s rights and obligations under agency law are unclear, counsel need only file an action for declaratory judgment with the agency to obtain a ruling. This will answer the question of how an agency would respond before the client acts. An agency’s declaratory ruling is binding between the agency and the petitioner. The ruling, or agency’s failure to rule, is subject to judicial review in the same manner as a contested case.²⁴⁷ An agency’s declaratory ruling is not prerequisite for seeking judicial review of an agency rule.

V. THE METHOD FOR OBTAINING JUDICIAL REVIEW OF AGENCY ACTIONS

A. *The MAPA Judicial Review Provisions*

The MAPA judicial review provisions—which apply only in the absence of specific judicial review language in a particular agency’s authorizing or enabling legislation—are found in two places in the Act. The MAPA agency rules are reviewed pursuant to Montana Code Annotated §§ 2–4–305(6) and 506. The MAPA contested cases²⁴⁸ are reviewed under Montana Code Annotated §§ 2–4–701 through 711. Agency decisions other than rules or contested cases are reviewed under general statutory or common law. Such decisions generally involve quasi-judicial matters not contested cases because a hearing is neither required by statute or constitutional due process. An example of which is *Johansen*.²⁴⁹ Courts also rely on common law and general statutory law to review non-MAPA agency quasi-judicial and quasi-legislative decisions.

245. *Id.* at § 2–4–501.

246. See Admin. R. Mont. § 1.3.226–1.3.229 (providing agency declaratory agency rule language and a practice form to assist in drafting an appropriate motion for an agency declaratory judgment).

247. Mont. Code Ann. § 2–4–501.

248. A contested case is a quasi-judicial proceeding where a hearing is required by law, i.e., the agency-authorizing statute requires a “hearing” or a hearing is required by Constitutional due process.

249. See *supra* nn. 60–64.

1. Review of MAPA Agency Rules

The MAPA agency rules are subject to judicial review in an action for declaratory judgment.²⁵⁰ Venue for such an action is generally the judicial district in which the plaintiff resides, has a principal place of business, or in which the agency maintains its principal office.²⁵¹ The 30-day limitation for petitioning for judicial review of a contested case is not applicable to a MAPA petition for declaratory judgment review of an agency rule.²⁵² While the issue of standing normally appears when petitioner seeks judicial review of an agency quasi-judicial decision, it also may arise in the context of a challenge to an agency rule.²⁵³

2. Review of MAPA Contested Cases

i. Initiating Judicial Review—Petition, Timing, Content, Venue, Service, Stay of Agency Order, and Agency Transmittal of Record

Under the MAPA, except under narrow circumstances,²⁵⁴ judicial review²⁵⁵ of a contested case²⁵⁶ is initiated by filing a “petition” in Montana district court²⁵⁷ “within 30 days after service of the final written decision²⁵⁸

250. Mont. Code Ann. § 2–4–506(1)–(2) (a Montana district court may declare a MAPA agency rule invalid or inapplicable).

251. Mont. Code Ann. § 2–4–506(4); *see Missoula City-Co. Air Pollution Control Bd. v. Bd. of Envtl. Rev.*, 937 P.2d 463, 469 (Mont. 1997).

252. *Missoula City-Co. Air Pollution Control Bd.*, 937 P.2d at 469 (amended petition filed three months after adoption of the rule was found timely).

253. *Id.* at 466–468.

254. Mont. Air Quality Act (Mont. Code Ann. §§ 75–2–211, 75–2–213 (now reserved)) and Workers’ Compensation Classification review Committee determinations which are reviewed by the Workers’ Compensation Court. *Id.* at § 33–16–1012(2)(c).

255. *In re Marriage of Davis*, 921 P.2d 275, 276–277 (Mont. 1996) (judicial review is for the purpose of having a court reverse an agency quasi-judicial decision, not for seeking damages from the agency or the government for the actions of the agency); *Walch v. Univ. of Mont.*, 716 P.2d 640 (Mont. 1986) (if the agency’s orders are not self-enforcing, and the agency is authorized to bring a court action for enforcement under its authorizing or enabling statute, the judicial proceeding for enforcement is governed by the authorizing or enabling statute and not MAPA).

256. *In re Application of Galt*, 644 P.2d 1019, 1021 (Mont. 1982) (illustrating that judicial review of agency rules and quasi-judicial matters which are not MAPA contested cases are not subject to MAPA; a Montana Public Service Commission certificate issuing process is not a contested case, and hence MAPA judicial review does not apply); *see also Selon v. Bd. of Personnel Appeals*, 634 P.2d 646, 648 (Mont. 1982).

257. Mont. Code Ann. § 2–4–702(2)(c) (if the petition for review is filed pursuant to § 33–16–1012(2)(c), the Workers’ Compensation Court rather than a district court has jurisdiction).

258. *See Weber v. Pub. Employees Ret. Bd.*, 890 P.2d 1296, 1299 (Mont. 1995) (a petition for judicial review within 30 days of the written agency decision is timely); *MCA Telecomm. Corp. v. Dept. of Pub. Serv. Reg.*, 858 P.2d 364, 366–367 (1993) (when service of the agency decision is made by email, Rule 6(e) of the Mont. R. Civ. P. provides that an additional 3 days must be added from the date of the agency decision to seek judicial review); *accord Molnar v. Mont. Pub. Serv. Comm’n.*, 177 P.3d 1048,

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of the agency, or if a rehearing is requested, within 30 days after the written decision is rendered.”²⁵⁹ This filing deadline is jurisdictional, and failure to seek judicial review in the time provided by statute makes such an appeal ineffective for any purpose.²⁶⁰ The petition must include a concise statement of the basis for jurisdiction and venue, a statement of the manner in which the petitioner is aggrieved, the grounds upon which the petitioner contends to be entitled to relief, and the relief sought.²⁶¹

Generally,²⁶² except when provided by the specific agency enabling or authorizing statute, venue for the petition is the district court for the county where the petitioner resides or its principal place of business or where the agency maintains its principal office.²⁶³ A petition filed in an improper venue does not, however, deprive that district court of jurisdiction to review the matter.²⁶⁴

The petition must be served upon the agency and all parties of record.²⁶⁵ A petitioner must serve the petition as prescribed by the Montana Rules of Civil Procedure unless a statute specifically provides otherwise.²⁶⁶ Unless provided by statute, a petition for review does not stay the agency order.²⁶⁷ But the agency or the reviewing court may stay the agency's order on terms that it considers proper, following notice to all parties and oppor-

1051–1052 (Mont. 2008); compare with *In re Support of McGurran*, 983 P.2d 968, 971–972 (Mont. 1999).

259. Mont. Code Ann. § 2–4–702(2)(a); *In re McGurran*, 983 P.2d 968, 972) (the 30-day deadline is not extended under Rule 60(b), Mont. R. Civ. P. pursuant to “excusable neglect” to timely file). But if the agency does not have the authority to entertain rehearing, the 30-day period commences on the date of the written decision. *Bradco Supply Co.*, 598 P.2d at 599.

260. *In re McGurran*, 983 P.2d 968. The petition must contain a concise statement of the facts upon which jurisdiction (Mont. Code Ann. § 2–4–701(1)(a) and venue (Mont. Code Ann. § 2–4–702(2)(a) are based, a statement of the manner in which the petitioner is aggrieved, and the ground or grounds specified in Mont. Code Ann. § 2–4–704(2) [appropriate standard of review] upon which the petitioner contends to be entitled to relief, and the relief demanded (demands for relief may be in the alternative). Mont. Code Ann. § 2–4–702(2)(b).

261. Mont. Code Ann. § 2–4–702(2)(b).

262. *Id.* at § 2–4–702(2)(d).

263. *Id.* at § 2–4–702(2). For a non-MAPA agency, county agency venue is the county where the plaintiff resides. *State ex. rel. Hendrickson v. Gallatin Co.*, 526 P.2d 354, 356–357 (Mont. 1974).

264. *In re McGurran*, 49 P.3d 626, 630 (Mont. 2002).

265. Mont. Code Ann. § 2–4–702(2)(a). See also *Pickens*, 3 P.3d at 606 (proper service of a petition for judicial review is a threshold requirement for the district court to obtain jurisdiction, and a petition for judicial review may be properly served by mailing copies to the agency and other parties—there is no requirement that a summons be issued and served); see also *In re McGurran*, 70 P.3d at 736 (Mont. 2003). Where the agency is merely an umpiring entity, it is not an indispensable party. *Young v. Great Falls*, 632 P.2d 1111, 1113 (Mont. 1981). But see *In re Protests to the Application for Transfer of Ownership of Mont. Retail On-Premises Consumption Beer/Wine License*, 196 P.3d 1233, 1236 (Mont. 2008); *Hilands Golf Club v. Ashmore*, 922 P.2d 469, 474 (Mont. 1996).

266. *Hilands Golf Club*, 922 P.2d at 473. When service is made by mail, Rule 6(e) of the Montana Rules of Civil Procedure provides that an additional 3 days must be added to the time for taking action.

267. Mont. Code Ann. § 2–4–702(3).

tunity for hearing.²⁶⁸ To issue such a stay without notice, the agency or reviewing court must follow the statutes for issuing a preliminary injunction without notice.²⁶⁹ A district court may also issue a stay of an administrative order.²⁷⁰

Within 30 days after service, or further time if allowed by the court, the agency must transmit to the reviewing court the whole record of the proceeding under review.²⁷¹ Upon stipulation of the parties, the record transmitted may be shortened to only the relevant portions. The court may thereafter require or permit correction or additions to the record.²⁷² Judicial review of an issue of fact cannot take place without a transcript of testimony from the original hearing.²⁷³

ii. Judicial Review of Non-MAPA Quasi-Judicial Proceedings, Rules, and Other Decisions (Non-MAPA State Agencies and State Subdivision Agencies)

Non-MAPA agency decisions are not subject to review under MAPA. Unless the authorizing or enabling legislation for the non-MAPA agency provides for judicial review and the method for obtaining such review, a party seeking review must rely on Montana's Uniform Declaratory Judgments Act,²⁷⁴ writ of mandamus,²⁷⁵ writ of certiorari,²⁷⁶ or writ of prohibition.²⁷⁷ While these methods of review provide an opportunity, they may not substitute for a review procedure provided by the MAPA or those contained in the agency's particular enabling or authorizing statute.²⁷⁸ When

268. *Id.*

269. *Id.* (referencing Mont. Code Ann. §§ 27-19-315 to 27-19-317, which deal with the issuance of preliminary injunctions without notice).

270. *Brackman v. Bd. of Nursing*, 820 P.2d 1314, 1316 (Mont. 1991).

271. *See Owens*, 130 P.3d at 1258 (failure of the agency to submit the entire administrative record on judicial review resulted in court remanding the agency decision).

272. Mont. Code Ann. § 2-4-702(4).

273. *See In re Unfair Labor Practice No. 38-80*, 720 P.2d 1181, 1183 (Mont. 1986).

274. Mont. Code Ann. §§ 27-8-101 to 27-8-313. The Act provides, "Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations . . ." *Id.* at § 27-8-201. Or where "a judgment or decree will terminate the controversy or remove an uncertainty," *id.* at § 27-8-205 "further relief based upon a declaratory judgment or decree may be granted (injunctive) relief whenever necessary or proper." *Id.* at § 27-8-208.

275. *Id.* at § 27-26-102. *See also Barnes v. Town of Belgrade*, 524 P.2d 1112, 1113 (Mont. 1974) (mandamus will compel the performance of a clear legal duty not involving discretion, and it will lie to compel the proper exercise of discretion. An arbitrary or capricious action by an agency is an abuse of discretion.).

276. Mont. Code Ann. §§ 27-25-101 to 27-25-305 (certiorari).

277. *Id.* at §§ 27-27-101 to 27-27-104 (prohibition).

278. *In re Dewar*, 548 P.2d 149, 154 (Mont. 1976) (mandamus not available where there is an alternative plain, speedy, and adequate remedy in the ordinary course of law). The Montana Code Annotated specifically provides that mandamus must be issued when certiorari, and prohibition are not available where there is another "plain, speedy, and adequate remedy." Mont. Code Ann. § 27-26-102

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available, writs of mandamus and prohibition are often used because they permit the recovery of attorney fees.²⁷⁹ Writs of certiorari and prohibition serve a limited review function because they only address administrative actions in excess of jurisdiction.²⁸⁰ Both writs are available only for review of agency quasi-judicial decisions involving exercises of discretion.²⁸¹ Consequently, non-MAPA agency rules and other non-quasi-judicial matters are not reviewable with either certiorari or prohibition.

B. Roadblocks to Judicial Review

Judicial review of agency decisions in contested cases is available only after the appellant has exhausted all administrative remedies available within the agency and is aggrieved by a final written agency decision.²⁸² Additionally, the Montana Supreme Court has held that judicial review is available only for issues that are ripe and only for persons with standing to seek access to the judiciary.²⁸³

1. Exhaustion and Finality

Three principles underlie exhaustion and finality: (1) the limited judicial review of administrative decisions strengthens the administrative process by encouraging the full presentation of evidence at the initial administrative hearing; (2) judicial economy requires court recognition of the expertise of administrative agencies in the field of their responsibility; and (3) limited judicial review is necessary to determine that a fair procedure was used, that questions of law were properly decided, and that the decision of the administrative body was properly supported by evidence.²⁸⁴

(mandamus); Mont. Code Ann. § 27–25–102 (certiorari); Mont. Code Ann. § 27–27–101 to 27–27–104 (prohibition). See *Stowe v. Bd. of Administration of Pub. Employees Ret. Div.*, 564 P.2d 167, 171 (Mont. 1977) (holding that mandamus was the proper remedy because the board acted in contravention of a statutory requirement); *Malta Irrigation Dist. v. Int. Bd. of Health & Envtl. Sci.*, 729 P.2d 1323, 1327 (Mont. 1986) (affirming the denial of prohibition due to alternative remedy).

279. See *Kadillak v. Anaconda Co.*, 602 P.2d 147, 157 (Mont. 1979) (mandamus); *State ex rel. Taylor v. Dist. Ct. of Eleventh Jud. Dist.*, 310 P.2d 779, 782 (Mont. 1957) (prohibition).

280. Mont. Code Ann. § 27–25–102 (certiorari); §§ 27–27–101 to 27–27–104 (prohibition); see also *In re Dewar*, 548 P.2d at 153.

281. Mont. Code Ann. §§ 27–25–102(2), 27–27–101; see e.g. *Malta Irrigation Dist.*, 729 P.2d at 1326. Quasi-judicial decisions involving discretion is one in which the decision maker is, by law, accorded discretion to decide a matter based on a determination of fact. A non-discretionary matter, i.e., a ministerial decision, occurs when the law directs the decision maker's decision, e.g., everyone who submits a rabies certificate and \$5.00 shall be issued a dog license.

282. Mont. Code Ann. § 2–4–702(1)(a).

283. *Mont. Power Co. v. Mont. Pub. Serv. Commn.*, 26 P.3d 91, 95 (Mont. 2011). The prerequisites for judicial review are also applicable to non-MAPA agency judicial review. *Id.*

284. *Vita-Rich Dairy, Inc. v. Dept. of Bus. Reg.*, 553 P.2d 980, 982–983 (Mont. 1976).

2. Exhaustion of Administrative Remedies

Generally, if a statute allows an agency to grant relief, the petitioner must seek relief from that agency before turning to the courts.²⁸⁵ Issues not raised to the agency generally cannot be raised for the first time on judicial review.²⁸⁶ Generally, evidence not presented to the agency cannot be considered by a reviewing court.²⁸⁷ Judicial review is limited to agency decisions, and does not permit the court to substitute its own judgment for that of the agency's. Fact determinations are for the agency and, absent exceptional circumstances, a reviewing court cannot hold a fact-finding hearing.²⁸⁸

The exhaustion doctrine serves at least three functions. First, it protects agency authority, allowing the agency to act on a matter that the legislature has given it primary decisional power.²⁸⁹ Second, it promotes admin-

285. Mont. Code Ann. § 2–4–702(1)(a); see also *Lincoln Co. v. Sanders Co.*, 862 P.2d 1133, 1138 (Mont. 1993); *Barnicoat v. Commr. of Dept. of Lab. & Indus.*, 653 P.2d 498, 500 (Mont. 1982); but see *Taylor v. Dept. of Fish, Wildlife & Parks*, 666 P.2d 1228, 1232 (Mont. 1983) (where the court action is based on an original claim for relief, not a matter within the jurisdiction of the agency, exhaustion is not required); *Keller v. Dept. of Revenue*, 597 P.2d 736, 739 (Mont. 1979) (non-parties to the administrative action need not exhaust before seeking judicial review); *Nader v. Allegheny Airlines*, 426 U.S. 290, 303–304 (1976) (a court, in a properly filed civil matter, may stay the proceeding, and direct the parties to an administrative agency, who also has jurisdiction, to obtain the specialized or expert perspective of the agency under the doctrine of primary jurisdiction).

286. Mont. Code Ann. § 2–4–702(1)(b) (“A party who proceeds before an agency under the terms of a particular statute may not be precluded from questioning the validity of that statute on judicial review, but the party may not raise any other question not raised before the agency unless it is shown to the satisfaction of the court that there was good cause for failure to raise the question before the agency.”).

287. *Ostergren v. Dept. of Revenue*, 85 P.3d 738, 741 (Mont. 2004); compare *Wheelsmith Fabrication Inc. v. Mont. Dept. of Labor & Indus.*, 993 P.2d 713, 715 (Mont. 2000) and *Schneeman*, 848 P.2d at 506–508 with *O’Neill v. Dept. of Revenue*, 739 P.2d 456, 458–459 (Mont. 1987) (allowing reviewing court to supplement the agency record under an agency specific statute). A reviewing court may look outside the agency record:

- (1) to ensure that the agency considered all relevant factors and explained its decision,
- (2) when it appears that the agency has relied on documents or materials not included in the administrative record,
- (3) when necessary to explain technical terms or complex subject matter involved in agency action, and
- (4) when there is a strong showing of bad faith or improper behavior by the agency.

Rock Creek Alliance v. U.S. Fish & Wildlife Serv., 390 F. Supp. 2d 993, 999 (D. Mont. 2005) (Applying the APA).

288. See Mont. Code Ann. § 2–4–704 (judicial review is to be confined to the record made at the agency level, but in the event of alleged irregularities in agency procedure not shown in the record “proof of the irregularities may be taken in the court.”). In federal administrative law, there is authority that a reviewing court may hear evidence when the agency fact finding procedures are inadequate, and when issues not raised before the agency are raised in a proceeding to enforce a non-adjudicatory [non-quasi-judicial] agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

289. *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (exhaustion concerns apply with particular force when the action under review involves exercise of the agency’s discretionary power or when the agency proceedings in question allow the agency to apply its special expertise).

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istrative and judicial efficiency by allowing an agency to correct its own errors without judicial interference.²⁹⁰ Third, by allowing the agency to complete its processes, exhaustion guarantees a more complete administrative record for judicial review.²⁹¹

There are, however, four situations when exhaustion of an administrative remedy is not required. These exceptions involve matters that courts do not consider to be within the expertise of an administrative agency. Indeed, courts believe that these issues are within their providence, and include: facial challenges to agency jurisdiction;²⁹² facial challenges to the constitutionality of the agency-enabling or authorizing legislation;²⁹³ an issue proposing purely a legal question,²⁹⁴ including a challenge to the validity of the statute that served as the basis for the agency action;²⁹⁵ and when recourse to an agency will be futile or the available administrative remedies are inadequate.²⁹⁶

Regarding the final issue, the mere possibility of an adverse administrative decision does not constitute futility or inadequacy of the administrative remedy.²⁹⁷ In the first three situations, if the legal issue involves fact-finding or is a mixed question of fact and law, agency exhaustion is required prior to judicial review.²⁹⁸ Because a purpose of an administrative agency is to gather and apply specialized knowledge and expertise to a

290. *Shoemaker v. Denke*, 84 P.3d 4, 7–8 (Mont. 2004); *Barnicoat*, 653 P.2d at 500 (petitioner failed to utilize agency rehearing and appeal processes provided by statute and therefore failed to exhaust agency remedies).

291. See *Qwest Corp. v. Dept. of Public Serv. Reg.*, 174 P.3d 496, 501 (Mont. 2007) (“Judicial appraisal of agency action stands on surer footing when it takes place in the context of a specific factual record. . . . Certainly both the District Court and this Court would benefit from further factual development of the issues presented.”).

292. *Paulson v. Flathead Conserv. Dist.*, 91 P.3d 569, 575 (Mont. 2004) (a court may question and reverse an agency’s determination of jurisdiction when: “(1) the agency’s jurisdiction is plainly lacking; (2) clear evidence exists that requiring a party to exhaust its remedies will result in irreparable injury; [and] (3) and the agency’s special expertise will be of no help on the question of jurisdiction.”).

293. *Larson v. State*, 534 P.2d 854, 858 (Mont. 1975) (when a constitutional charge is made to the statute on its face there is no need for agency fact finding or the application of specialized agency understanding).

294. *Shoemaker*, 84 P.3d at 8; *Taylor*, 666 P.2d at 1232. Like with jurisdictional and constitutional challenges, a court should not intervene absent exhaustion, unless the legal issue can be resolved without fact finding. Where the legal issue involves the agency’s special expertise the court should initially defer to the agency. See e.g. *Roadway Express Inc. v. Kingsley*, 179 A.2d 729, 731 (N.J. 1962) (when the agency has specialized or expert knowledge, a court should initially defer to the agency, and review the agency ruling, if necessary, after exhaustion).

295. Mont. Code Ann § 2–4–702(1)(b).

296. *Mt. Water Co. v. Mont. Dept. of Pub. Serv. Reg.*, 110 P.3d 20, 22 (Mont. 2005).

297. *Id.*

298. *City of Billings Police Dept. v. Owen*, 127 P.3d 1044, 1048 (Mont. 2006) (mixed questions of law and fact); *Shoemaker*, 84 P.3d at 9 (questions of both law and fact regarding a constitutional issue).

given problem or dispute, courts should not intervene prematurely when administrative informed judgment is important to decision making.²⁹⁹

3. *Final Agency Action*

Courts may review only final agency decisions. An order is final “when it imposes an obligation, denies a right, or fixes some legal relationship as a consummation of the administrative process.”³⁰⁰ This standard allows agencies at the lowest level to make decisions that might be reviewed and reversed by higher ranking agency officials, without fear that preliminary, procedural, or intermediate decisions will be subject to court intervention before the agency makes its final decision.³⁰¹ The typical MAPA contested-case procedure illustrates this rule. To move the case to hearing, the agency or its appointed hearings officer may need to rule on procedure, evidence, discovery, or motions, etc. These rulings are not subject to immediate judicial review because they do not represent final agency actions. Indeed, the hearings officer’s proposed decision is not a final agency action—it is merely a proposal, which may or may not be adopted by the agency. Once the agency acts on the proposed decision, however, it has made a final agency decision, and the case is ready for judicial review, along with the preliminary, procedural, or intermediate decisions of the hearings officer and the agency which led to the final decision.

The final agency decision rule is not absolute, however. If a final agency action will not provide an opportunity for judicial review, then a preliminary, procedural, or intermediate agency action is subject to judicial review.³⁰² Additionally, if the appellant will suffer significant or irreparable harm from a preliminary, procedural, or intermediate agency action judicial review is appropriate.³⁰³ However, immediate judicial review is not available if the allegation of harm is merely speculation that further agency action may take place and if it takes place, it may have legal consequences.³⁰⁴ The alleged harm must be clear and immediate. Alternatively,

299. *Cf. Owen*, 127 P.3d at 1048 (issue of law); *Shoemaker*, 84 P.3d at 9 (issue of law); *Taylor*, 666 P.2d at 1232 (issue of law); *Brisendine v. St. Dept. of Com., Bd. of Dentistry*, 833 P.2d 1019, 1021–1022 (Mont. 1992) (constitutional issue).

300. *N. Plains Resource Council v. Bd. of Natl. Resources & Conserv.*, 594 P.2d 297, 307 (Mont. 1979).

301. *Id.* at 306; *see also Franklin v. Mass.*, 505 U.S. 788, 796–797 (1992); *Dalton v. Specter*, 511 U.S. 462, 469–470 (1994) (preliminary decisions by the Secretary of Commerce were not final because the President of the United States made the final decision).

302. *See e.g. Qwest Corp.*, 174 P.3d at 502 (“When an agency has not adjudicated the issues raised on appeal, there is no final agency action upon which a district court can assume jurisdiction.”)

303. *See e.g. id.*

304. *Id.*

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if an agency fails to provide fundamental fairness and due process, immediate judicial review is appropriate.³⁰⁵

4. Ripeness

The legal doctrine of ripeness is not specifically addressed in the MAPA, but the Montana Supreme Court has relied on the doctrine as a basis for rejecting judicial review in MAPA cases. Ripeness is grounded in the Article III, “case and controversy” provision of the United States Constitution that prohibits federal courts from deciding abstract or theoretical disputes or rendering advisory opinions. The underlying principle of ripeness as applied to administrative law is that agency action becomes clearer as it is implemented, and a reviewing court will be more informed by waiting to see the impact of that action on a challenging party.³⁰⁶ Consequently, to decide if an issue is ripe for judicial review, the reviewing court must consider whether: (1) delayed review would cause hardship to the appellant, (2) immediate review would inappropriately interfere with further administrative action, and (3) the court would benefit from further factual development of the issues presented by allowing additional agency action.³⁰⁷

In *Qwest Corporation v. Department of Public Service Regulation*, the Public Service Commission (“PSC”) ordered Qwest to submit rate information and Qwest sought reconsideration.³⁰⁸ The PSC denied the request, and Qwest sought judicial review. On the same day, the PSC filed a complaint in district court seeking to compel Qwest to comply with its order and requesting fines and penalties against Qwest for its failure to supply the information. The district court determined that the issues were ripe for review and after the district court ruled in favor of Qwest, the PSC appealed.³⁰⁹

The Montana Supreme Court reversed, concluding that Qwest would not suffer any hardship, because it was obligated to submit the information, and what the PSC “might” do with information was not currently an appropriate matter for judicial review. The Court said that an agency action is not ripe “if no legal consequences, rights or duties flow from an agency’s actions because those actions are merely a step that could lead to a recommended change of the status quo,” even if that change is serious and may have severe consequences.³¹⁰ The Court said that the PSC had a number of options regarding what to do with the requested information. But the Court

305. *Wilson v. Dept. of Pub. Serv. Reg.*, 858 P.2d 368, 371 (Mont. 1993).

306. *Qwest Corp.*, 174 P.3d at 500.

307. *Id.*

308. *Id.* at 499.

309. *Id.*

310. *Id.* at 500–501 (internal citations omitted).

refused to speculate on the future agency action or deny the agency the opportunity to apply its expertise. Finally, the Court noted that there was no “specific factual record” before it, and “[j]udicial appraisal of agency action stands on surer footing when it takes place in the context of a specific factual record.”³¹¹

5. *Standing*

The issue of legal standing presents not whether an issue is appropriate for judicial review but whether the petitioner is an appropriate person or entity to raise the issue. Generally, standing is not a problem because the agency order will be directed at a particular party. In such a situation, the aggrieved party is the appropriate person or entity to raise the issue and has standing for judicial review.³¹² But often an agency decision will have an impact on those who are not parties to the administrative proceeding, yet those non-parties seek judicial review. This situation involves standing as a constitutional doctrine. The other situation occurs when either a party or non-party seeks judicial review of an agency action but the issue raised is not cognizable under the agency’s authorizing or enabling statute. This second situation involves standing vis-à-vis the particular statute.

Standing is an extremely complicated and multi-faceted issue of law, and exhaustive coverage is beyond the scope of this article. But because standing issues continue to arise in administrative judicial review, it is worth brief consideration here.

i. Standing as a Constitutional Doctrine

The first portion of standing is based on the Article III³¹³ constitutional directive that authorizes courts to hear and resolve only “cases” and “controversies.”³¹⁴ Because courts may only address actual cases and controversies, the United States Supreme Court and the Montana Supreme Court have developed standards to determine whether a matter brought to it for consideration is an actual “case” or “controversy.” Without addressing all of these constitutional standards, it is clear that for a court to address a matter, the person bringing the action must have suffered an “injury” that

311. *Id.* (internal citations omitted).

312. Mont. Code Ann. § 2–4–702(1)(a).

313. Article III of the United States Constitution creates and authorizes the Federal Courts as a branch of the federal government and determines the jurisdiction of those courts.

314. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992).

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was “caused” by the challenged action, and the challenged action can be “redressed” by a favorable decision of the court.³¹⁵

A cognizable “injury” must be concrete, particularized, and present a past, or imminent harm. The injury must not only have occurred or be imminent to the person bringing the action, but the injury must be unique or particularized to that person. Normally, the parties to the original administrative action are persons or entities who have or will suffer a concrete, particularized, and past, present, or imminent harm. However, often administrative actions have ripple effects. For example, an agency decision regarding the methods for containing and transferring gasoline by service stations may result in the increased cost of gasoline at the pump. But this cost is probably not sufficient injury to give a general member of the public standing to seek judicial review of the agency action. For standing, the person or entity³¹⁶ bringing the action must be able to demonstrate that her injury was in some way particular to her, of a kind or magnitude not suffered by the public at-large.³¹⁷

The causation element requires proving that the agency action was the cause-in-fact of the petitioner’s injury; there must be a causal connection between the asserted unlawful conduct and the alleged injury.³¹⁸

Redressability demands that the relief requested will address the alleged harm. The test requires that if the agency acts as petitioner requests,

315. In federal court: “First, plaintiff must have suffered an ‘injury-in-fact’—an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) ‘actual or imminent, not ‘conjectural’ or ‘hypothetical.’ Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be ‘fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.’ . . . Third, it must be likely, as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Id.* at 560–561 (internal citations omitted). In Montana state court: “To establish standing . . . the complaining party must (1) clearly allege past, present, or threatened injury . . . and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party. [However,] persons who fail to allege any personal interest or injury, beyond that common interest of all citizens and taxpayers, lack standing. [Thus, the] injury alleged must be personal to the plaintiff as distinguished from the community in general . . . [and] result in a ‘concrete adverseness’ personal to the party staking a claim in the outcome.” *Fleenor v. Darby Sch. Dist.*, 128 P.3d 1048, 1050 (Mont. 2006).

316. An association of individuals, whether composed of people or other interest groups, has standing to assert injury to the association itself and to represent the interests or injuries of its members. To have standing to sue on behalf of members at least one of the members must have standing to sue, the interest of the members the organization seeks to protect must be germane to the purpose of the organization, and neither the claim asserted nor the relief requested must require the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Advert. Commn.*, 432 U.S. 333, 343 (1977); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000); *Intl. Union v. Brock*, 477 U.S. 274, 281–282 (1986).

317. See *Fleenor*, 128 P.3d at 1050; see also *Bd. of Trustees, Cut Bank Pub. Schs. v. Cut Bank Pioneer Press*, 160 P.3d 482, 485 (Mont. 2007).

318. *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984).

the agency will remedy the alleged injury.³¹⁹ Typically, if the plaintiff's injury was caused by the challenged action of the defendant, the injury is fairly traceable to the defendant and the requested judicial relief will address the injury.³²⁰

ii. Standing as a Matter of Statutory Interpretation

Apart from Article III constitutional considerations, a person seeking judicial review of an administrative decision based on an alleged statute violation must demonstrate that the interest asserted is recognized by the statute itself.³²¹ Since legislative bodies have the power to create legally cognizable rights and interests by enactments of law, they have the power to determine the nature and extent of the interests created or protected. In this context, "statutory" standing asks whether a plaintiff's cause of action or claim for relief is recognizable by the statute and, thus, involves judicial determination of legislative intent. "Statutory" standing requires that the plaintiff's asserted interest fall within the "zone of interests" protected or regulated by the statute.

For example, in *Air Courier Conference v. Postal Workers Union*,³²² the Postal Workers Union brought a federal court suit challenging an action of the United States Postal Service.³²³ The United States Supreme Court considered whether the Union's asserted interest—protection of jobs—was recognized by the specific congressional enactment that formed the basis of the suit. The Court determined that the federal postal statute was not enacted to protect jobs and did not recognize an interest in job protection. Consequently, the Court held that the Union had no standing to bring the jobs issue.³²⁴

319. *Id.*

320. See *Bennett v. Spear*, 520 U.S. 154, 168–171 (1997) (the Bureau of Land Management water restrictions were fairly traceable to its biological opinion and a court order invalidating that opinion would make it "likely" the Bureau would eliminate the restriction); see also *Mass. v. Envtl. Protection Agency*, 549 U.S. 497, 523–525 (2007) (the Petitioner challenged the EPA's denial to regulate greenhouse gas emissions, but the Court determined that the emissions were fairly traceable to global warming because they make a meaningful contribution to such overall emissions and a reduction in the challenged emissions would slow the progress of global emission increases); but see *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40–46 (1976) (no substantial likelihood that a remedial order from the agency would result in plaintiff's recovery of the hospital treatment they desired).

321. See e.g. *Air Courier Conf. v. Postal Workers Union*, 498 U.S. 517, 519 (1991).

322. *Id.*

323. *Id.* at 520.

324. *Id.* at 530.

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iii. *Standing in a Quasi-Judicial Matter before an Administrative Agency*

On occasion, in an agency quasi-judicial administrative proceeding against a person or entity brought by another person or entity, the respondent will allege that the complainant does not have standing to bring the action. For example, assume a complainant brings a Montana state political practices complaint against a Montana politician. The matter is pending before the Montana Commissioner of Political Practices. Does the complainant have to satisfy the constitutional standing requirements to pursue the matter? The respondent, politician, alleges that the complainant does not live or work in the geographical area served by the politician and thus did not suffer a cognizable “injury” as a consequence of the alleged wrongful act or conduct, and thus does not have standing to bring the complaint.

While a significant legal issue is presented, it is not an issue of constitutional standing. The injury-in-fact, causation, and redressability issues arise from the constitutional limitation on the *judiciary* to hear only “cases and controversies.” There is no such constitutional limitation applicable to *administrative* proceedings. An agency’s authority to act is conferred by statute, and arises from a delegation by the legislature, not the Judiciary provision of the state or federal Constitutions.

The legal issue presented is not constitutional standing but rather whether the complaint states a claim for relief under the agency’s authorizing or enabling legislation. This question is very similar to the concern addressed by the zone-of-interests test discussed above—e.g., whether petitioner’s claim and this particular petitioner are recognized by the statute that creates the claim for relief. Thus, in the political practices hypothetical, the statutory interpretation issue is whether the authorizing or enabling legislation, under which the Commissioner may act, recognizes this particular claim and this particular complainant. If the statute provides that only persons residing and voting within a politician’s political district may bring such a complaint, then, assuming there are no other constitutional issues, the particular complainant residing and voting in another district would not be able to bring the complaint. Alternatively, if the statute provides that “any person” may bring a complaint, it would appear that the complainant satisfies the statutory standard.

C. *MAPA Scope of Judicial Review*

The scope of judicial review involves the determination of both when the reviewing court will grant discretion to an agency and the amount of discretion that will be accorded. Agency discretion has long been recog-

nized by the courts, and modern administrative statutes compel continued judicial discretion to agencies. Finally, as a matter of policy, discretion is necessary because courts do not have the ability, in either time or expertise, to review every administrative action *de novo*.

If courts had the resources to conduct *de novo* review of every administrative decision, there would be little reason to have administrative agencies.³²⁵ The Montana Supreme Court has reversed a district court because the lower court failed to appreciate its narrow and proper³²⁶ role on judicial review of an agency decision.³²⁷ The Court explained that the district court could have reversed or modified the agency decision if it was not supported by fact or law, or it could have remanded the case to the agency for additional proceedings, but it could not simply substitute its own analysis for that of the agency.³²⁸

A corollary issue, other than *when* the reviewing court will grant discretion and the *amount* of discretion accorded, is *what language* the reviewing court will use to express the discretion accorded. The legal terminology or language used to express discretion is confusing, somewhat inconsistent, and meaningful only in the context of its application.

Review of agency decisions generally involves factual or legal issues arising in two contexts: agency quasi-judicial decisions including contested cases and agency quasi-legislative rulemaking decisions. Quasi-judicial processes result in decisions or orders; quasi-legislative processes result in rules. The issue on judicial review may involve an agency's exercise of discretion in procedure or determination of policy.³²⁹ The key to understanding the scope of judicial review is determining *when* the reviewing court will defer to an agency decision or action, the *amount* of deference that will be accorded, and the proper *terminology* or *language* that the reviewing court will use to express the deference accorded. The final portion

325. It is generally recognized that agencies are created and authorized by the legislature for the following reasons: (1) to relieve the courts and the legislature from the sheer volume of work that would be necessary in the absence of such agencies, (2) to have decisions made by a body that specializes in such matters, and/or has staff expertise in making these decisions, (3) for agencies with national or state wide jurisdiction, to assure uniformity of decision making, (contrasted with the alternative of a patchwork of court decisions within the same geographical area), (4) to have a decision from a decision maker who is sympathetic to a particular cause or group (contrasted with the merely umpiring function of a court), (5) to continually supervise a particular subject area over time to assure uniformity and that its decisions remain current with changes in science, technology, economics and social norms, (6) to enable more direct public participation than would be possible if the public was required to deal with only the courts, legislature, or executive. See 73 C.J.S *Public Admin. Law and Proc.* § 12 (2012); 2 Am. Jur. 2d *Administrative Law* §§ 3–4 (2012).

326. Mont. Code Ann. § 2–4–704(2).

327. *O'Neill*, 49 P.3d at 47.

328. *Id.*

329. See *Mont. Socy. of Anesthesiologists*, 171 P.3d at 712 (an administrative board's interpretation of statutes which fall under its domain should be given deference) (dictum).

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of this article addresses the when judicial deference to agency decisions is appropriate, the appropriate amount of deference, and the terminology associated with judicial deference.

I. Scope of Review—MAPA Agency Rules

A reviewing court may invalidate a MAPA agency rule if it is not consistent with the agency authorizing or enabling legislation;³³⁰ it is not “reasonably necessary to effectuate the purpose of the statute;”³³¹ “its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the plaintiff;”³³² it was adopted with an “arbitrary or capricious disregard for the purpose of the authorizing statute;”³³³ or it was not “adopted in substantial compliance with” the MAPA rulemaking procedure.³³⁴

The above standards may be reduced to the following: A reviewing court will overrule an agency rule when the rule is not consistent with the agency authorizing or enabling legislation, e.g., there is an arbitrary or capricious disregard for the intent of the legislature, is contrary to other legal rights (common law, statutory or constitutional), the rule was not properly adopted pursuant to the MAPA rulemaking procedure, or the rule is not necessary to effect the purpose of the authorizing statute. While important, generally, the issue on appeal does not concern compliance with the MAPA rulemaking procedure or the necessity of the rule. Typically, the issue is whether the resulting rule is consistent with and not adopted in arbitrary and capricious disregard for the intent of the legislature.

To determine whether a rule is consistent with the underlying statute, the court must determine whether the rule was based on a consideration of the relevant factors intended by the legislature. If not, the agency has made a clear error of judgment.³³⁵ A rule is inconsistent with legislative intent if it engrafts requirements on the statute that was rejected or not contemplated by the legislature, or fails to address criteria that the legislature intended the agency to consider.³³⁶

330. Mont. Code Ann. § 2-4-305(6)(a).

331. *Id.* at § 2-4-305(6)(b).

332. *Id.* at § 2-4-506(1).

333. *Id.* at § 2-4-506(2); *see also Pennaco Energy, Inc. v. Mont. Bd. of Env'tl. Rev.*, 199 P.3d 191, 198 (Mont. 2008).

334. Mont. Code Ann. § 2-4-305(7) (“substantial compliance” is based on compliance with Mont. Code Ann. §§ 2-4-302 to 2-4-303, and 2-4-306).

335. *Clark Fork Coalition v. Mont. Dept. of Env'tl. Quality*, 197 P.3d 482, 486-487 (Mont. 2008).

336. *Bick v. Mont. Dept. of Just., Div. of Motor Veh.*, 730 P.2d 418, 421 (Mont. 1986). In the leading United States Supreme Court case, *Motor Vehicle Manufacturers Association v. State Farm Mutual Insurance Co.*, 463 U.S. 29, 43 (1983), on judicial review of an agency rule under “arbitrary and capricious” standard, the Court said the agency must examine the relevant data and articulate a satisfac-

Regarding the initial issue of what an agency rule means, a reviewing court will give the agency's interpretation of its own rule considerable deference.³³⁷ Indeed, if person or entity has a question regarding how an agency interprets one of its own rules, or will interpret a rule, counsel may seek a declaratory ruling from the agency, and the agency is compelled to respond.³³⁸

2. *Scope of Review—Agency Quasi-Judicial Decisions*

As a general rule, all MAPA and non-MAPA quasi-judicial agency decisions,³³⁹ both formal and informal, are subject to judicial review.³⁴⁰ Judicial review is based on the record from which the agency made its decision.³⁴¹ On review, the court studies the agency record to determine whether (1) the agency findings of fact are properly supported by the record evidence, (2) the agency interpretations of law are correct, (3) the agency properly applied law to fact, and (4) the agency has not abused its discretion on matters where the court accords the agency discretion.³⁴²

i. The Scope of Judicial Review of MAPA Contested Cases

The MAPA provides that in all contested cases:

tory explanation for its action including a "rational connection between the facts found and the choice made. In reviewing that explanation we must 'consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error judgment.' Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or its explanation is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." This standard is consistent with that of the Montana Court and it provides a more complete list of valid considerations for reviewing agency rules.

337. *Easy v. Mont. Dept. of Natl. Res. & Conserv.*, 752 P.2d 746, 748 (Mont. 1988).

338. Mont. Code Ann. § 2–4–501.

339. There are two types of administrative agencies that make quasi-judicial decisions: (1) Regulatory agencies—agencies that regulate some economic, political or social issue; and (2) Benefactor agencies—agencies that distribute government money or other benefits (the issues typically are who is entitled to benefits and, if entitled, what is the amount of entitlement).

340. *See Johansen*, 955 P.2d at 659 (The Court recognized that MAPA contested case decisions are subject to judicial review under Part 7, but also said: "Simply because an administrative decision is not a 'contested case,' however, does not mean that [the petitioner] has no avenue to seek review of the Department's decision." The court then reviewed its jurisprudence concerning its power to review non-MAPA administrative decisions.). However, under federal law some purely discretionary agency decisions are not reviewable.

341. Generally, reviewing courts do not take additional evidence but review the agency decision based on the record made by the agency. *But see Skyline Sportsmen's Ass'n. v. State Bd. of Land Commrs.*, 951 P.2d 29, 32 (Mont. 1997).

342. *E.g. Hughes v. Mont. Bd. of Medical Examiners*, 80 P.3d 415 (2003) (an agency "has wide latitude in deciding whether to reconsider a prior action.").

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- (2) The court may reverse or modify the agency decision if substantial rights of the appellant have been prejudiced because:
- (a) the agency findings, inferences, conclusions, or decisions are:
 - (i) in violation of constitutional or statutory provisions;
 - (ii) in excess of the statutory authority of the agency;
 - (iii) made upon unlawful procedure;
 - (iv) affected by other error of law;
 - (v) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record;
 - (vi) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
 - (b) findings of fact, upon issues essential to the decision, were not made although requested.³⁴³

The first four of the above standards address issues of law, while the remaining two standards address agency fact-finding. Of course, where an agency authorizing or enabling statute provides different standards of review, the procedural requirements of that statute prevail over MAPA contested case judicial review.³⁴⁴ In judicial review of a contested case, the court must determine whether the substantial rights of the appellant have been prejudiced because the agency exceeded its authority, abused its discretion, made clearly erroneous findings of fact, or interpreted the law incorrectly.³⁴⁵ While the court is to review both findings of fact and conclusions of law, it is not to substitute its judgment for that of the agency.³⁴⁶ Indeed, the Montana Supreme Court has recognized that courts should defer to an agency's decision where substantial agency expertise is involved.³⁴⁷

The MAPA informal contested case proceedings³⁴⁸ are subject to judicial review in the same manner as formal contested case proceedings.³⁴⁹

ii. Review of MAPA Agency Findings of Fact: Substitution of Judgment on Weight of Evidence, Remand for Additional Evidence

The reviewing court “may not substitute its judgment for that of an agency as to the weight of the evidence on questions of fact.”³⁵⁰ If a court concludes the agency fact-finding was inadequate for review, it may remand the matter to the agency for additional evidence and fact-finding.³⁵¹

343. Mont. Code Ann. § 2–4–704(2).

344. *Pickens*, 3 P.3d at 606.

345. *Marble*, 9 P.3d at 620.

346. *Great Falls Pub. Schs. v. Johnson*, 26 P.3d 734, 737 (Mont. 2001) (citing *Baldrige v. Bd. of Trustees, Rosebud Co. Sch. Dist. No. 19, Colstrip*, 870 P.2d 711, 714 (Mont. 1994)).

347. *Owens*, 172 P.3d at 1231.

348. Mont. Code Ann. § 2–4–604.

349. *Id.* at § 2–4–604(5).

350. *Id.* at § 2–4–704(2).

351. *Id.*

Additionally, if before the judicial review hearing, the reviewing court receives, via motion, an “application,” it may order the agency to receive additional evidence if it determines that the evidence is “material” and there is “good reason” for the failure to initially present it to the agency.³⁵² Upon receipt of the new evidence, the agency may modify its findings and decision, and file the new evidence and its modified decision to the reviewing court.³⁵³

iii. *Clear Error Test for Reviewing Fact*

Courts review MAPA agency findings of fact under the “clearly erroneous” standard.³⁵⁴ The clearly erroneous standard is the standard that federal and state courts use to review the findings of fact made by a trial court judge sitting without a jury.³⁵⁵ In *State Compensation Mutual Insurance Fund v. Lee Rost Logging*,³⁵⁶ the Montana Supreme Court, reviewing a Workers’ Compensation Court decision, said of the clearly erroneous test:

We adopt the following three-part test to determine if a finding is clearly erroneous. First, the Court will review the record to see if the findings are supported by substantial evidence. Second, if the findings are supported by substantial evidence, we will determine if the trial court has misapprehended the effect of evidence. Third, if substantial evidence exists and the effect of the evidence has not been misapprehended, the Court may still find that “[A]

352. *Id.* at § 2–4–703.

353. See *Wage Claim of Holbeck v. Stevi-West, Inc.*, 783 P.2d 391, 395 (Mont. 1989) (allegation that interested party witness was unavailable to attend administrative hearing is an insufficient reason for remand to agency for additional fact finding); *Pannoni*, 90 P.3d at 449–450 (Mont. 2004) (reports of new experts sought after the administrative hearing does not constitute “good reason” for remand). While not involving a MAPA state agency, and thus not subject to MAPA, in *Flathead Citizens for Quality Growth, Inc. v. Flathead Co. Bd. of Adjustment*, 175 P.3d 282, 294–295 (Mont. 2008), the Court states that a reviewing court may remand to the agency for additional and appropriate fact finding.

354. Some Montana agencies are governed by statutes that provide for review of agency fact-finding under the “substantial evidence” standard rather than the MAPA clearly erroneous standard. For example, the Montana Public Employee Collective Bargaining Act provides that on judicial review of a Board of Personnel Appeals decision, the court is to apply the “substantial evidence rule in reviewing the Board’s fact findings.” See Mont. Code Ann. § 39–31–409(4) (“The findings of the board with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.”). Despite the statutory language, in *Ekalaka Unified Bd. of Trustees v. Ekalaka Teachers’ Assn.*, 149 P.3d 902, 904 (Mont. 2006), the Court improperly applied the clearly erroneous standard in stating: “We review agency findings to determine whether they are clearly erroneous . . .” (citing Mont. Code Ann. § 2–4–704(2)); see also *Wolny v. City of Bozeman*, 30 P.3d 1085, 1088 (Mont. 2001) (in a judicial review of a Bozeman police commission decision, the Court stated scope of review is “substantial evidence” for questions of fact. Then, the Court stated that the district court should defer to the Commission’s findings of fact unless they are “clearly erroneous.” The Court incorrectly stated that judicial review is governed by MAPA. This appears to be inaccurate because the agency, the Bozeman police commission, is not an “agency of state government.”).

355. *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Kis v. Pifer*, 588 P.2d 514, 518 (Mont. 1978) (citing Mont. R. Civ. P. 52).

356. *State Comp. Mut. Ins. Fund v. Lee Rost Logging*, 827 P.2d 85 (Mont. 1992).

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finding is 'clearly erroneous' when, although there is evidence to support it, a review of the record leaves the court with the definite and firm conviction that a mistake has been committed."³⁵⁷

The Court later clarified that this interpretation of the clearly erroneous standard applies to the review of agency fact determinations in contested cases.³⁵⁸

The first part of the test asks whether there is a "substantial" amount of evidence, on the record as a whole, to support the agency finding of fact. The test examines both the quantity and quality of evidence.³⁵⁹ Substantial credible evidence is such evidence that a reasonable mind could accept as adequate to support a conclusion, even if it is contradicted by other evidence—somewhat less than a preponderance or inherently weak.³⁶⁰

If the "reasonable mind" standard is satisfied, the reviewing court then asks whether the agency misapprehended (did not understand) the effect of the evidence. The Montana Supreme Court cited two federal Court of Appeals cases for the "misapprehend the effect" standard. In one of those cases, *Narragansett Improvement Company v. United States*,³⁶¹ a civil bench trial, the First Circuit, after concluding that the trial judge did not understand the "import or effect" of the evidence, reversed the trial judge's findings of fact.³⁶²

Finally, if there is substantial evidence and the administrative fact-finder properly understood the effect of the evidence, a Montana reviewing court may nonetheless reverse if it is left with the definite and firm conviction that a mistake has been made.³⁶³ This overall test must be applied

357. *Lee Rost Logging*, 827 P.2d at 102 (quoting *Interstate Production Credit Ass'n of Great Falls v. DeSaye*, 820 P.2d 1285, 1287 (Mont. 1991) (internal citations omitted).

358. See e.g. *Synek v. St. Compen. Mut. Ins. Fund*, 900 P.2d 884, 886 (Mont. 1995).

359. While the term "substantial" is normally used to address quantity, when it is used as a standard of review, it speaks to both quantity and quality. Indeed, when the Montana Supreme Court directs the reviewing court to consider both the evidence that supports a finding as well as the evidence that does not do so, the process necessarily involves an element of quality consideration. See *Owens*, 172 P.3d at 1230.

360. See *Tinker v. Mont. State Fund*, 211 P.3d 194, 201 (Mont. 2009).

361. *Narragansett Improvement Co.*, 290 F.2d at 580–581.

362. The fact question before the trial judge was whether a contract, the contractor, or the landowner had the duty to perform certain work on a tract of land. The contract said the contractor was to "finish the job as of October 15, 1958." The original fact-finder treated the import of the October date only in relation to completion date of the project. The Court of Appeals disagreed; it said the "import" or "effect" of the October date was that the contractor took the project as of that date and agreed to perform all work necessary to complete the project, including the work in dispute.

363. *Interstate Prod. Credit Ass'n of Great Falls*, 820 P.2d at 1287 (quoting *U.S. Gypsum Co.*, 333 U.S. at 395). Alternatively, federal courts review federal agency findings of fact from trial-type hearings (akin to an MAPA contested case proceeding) under the "substantial evidence" standard. Applying the "substantial evidence" standard, the reviewing court is to view the whole record, considering both the evidence that supports the agency's findings and the evidence that runs contrary to those findings. Ultimately, agency findings are supported by substantial evidence if there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp.*, 340 U.S.

consistent with the MAPA requirement³⁶⁴ that a reviewing court is not to substitute its judgment for the agency's as to the overall "weight of the evidence."³⁶⁵ Regarding fact questions as to witness credibility and matters within the agency experience, technical competence, and specialized knowledge, a reviewing court is to defer to the person who heard the evidence on credibility and to the agency's technical competence and specialized knowledge when such deference is due.³⁶⁶

iv. Review of a MAPA Agency Contested Case Conclusions of Law—Interpretation and Application of Law to Fact

The Montana Supreme Court has held that agency conclusions of law are reviewed to determine if they are correct; whether the agency correctly interpreted the law³⁶⁷ and whether it correctly applied law to fact.³⁶⁸ In

at 477. In applying the "reasonable mind" standard, the reviewing court is not to substitute its judgment for that of the agency, particularly when the factual inquiry involves matters that the agency is "equipped or informed . . . by expertness which courts do not possess and therefore must respect. Nor does it mean that even as to matters not requiring expertise a court may displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." *Id.* at 488. The Court did conclude that federal courts should reverse a federal agency decision on fact "when the standard appears to have been misapprehended or grossly misapplied." *Id.* at 491. Compare this language with the second step of the Montana Supreme Court's definition of the "clear error" test. The Court also said that an agency finding of fact decision should be reversed when "the record . . . precludes the [agency's] decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Id.* at 490. Compare this statement with the Montana Supreme Court's third test under the MAPA clearly erroneous test.

364. Mont. Code Ann. § 2–4–704(2).

365. *Total Mechanical Heating & Air Conditioning v. Employee Relations Div. Uninsured Employment Fund*, 50 P.3d 108, 113 (Mont. 2002).

366. See e.g. *Knowles v. State ex rel. Lindeen*, 222 P.3d 595, 603 (Mont. 2009).

367. *Kalfell Ranch, Inc. v. Prairie Co. Coop. St. Grazing Dist.*, 15 P.3d 888, 891–892 (Mont. 2000); *Denke v. Shoemaker*, 198 P.3d 284, 294–295 (Mont. 2008). Alternatively, reviewing federal courts will give deference to federal agency interpretations of law when such deference is due. For example, deference will be given an agency's interpretation of law when "the agency has participated in the legislative activity resulting in its authorization." *Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910, 916 (3d Cir. 1981). The agency interpretation is "longstanding" and parties (and apparently Congress) have come to rely on the interpretation, or when the construction involves "a technical area . . . and Congress has specifically designated the agency as the primary source for the interpretation . . ." *Id.* at 915. Alternatively, there is no reason for deference when the issue falls outside the agency's expertise, (e.g., involves the interpretation of the Constitution, common law, matters that are the grist for the courts, or other similar areas of law). Accordingly, courts give agency interpretations deference when deference is due. But, when deference is not due, the court will decide the matter without according the agency's interpretation any deference. Finally, federal courts under *Chevron* deference will absolutely defer to agency interpretations of their authorizing or enabling legislation when the reviewing court determines that Congress did not indicate any intent on the matter. *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837, 842–844 (1984). Thereafter in *Stinson v. U.S.*, 508 U.S. 36, 44 (1993), the Supreme Court explained that "[u]nder *Chevron* . . . if a statute is unambiguous the statute governs; if, however, Congress' silence or ambiguity has 'left a gap for the agency to fill,' courts must defer to the agency's interpretation so long as it is 'a permissible construction of the statute.'"

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sum, this standard leaves little or no discretion to the agency on matters of law. But courts will defer to agency conclusions of law when deference is due. For example, when an agency's interpretation of a statute has stood unchallenged by the legislature for a considerable length of time, courts will regard that interpretation as having great importance in arriving at the proper construction.³⁶⁹ Additionally, a reviewing court may defer to agency conclusions where substantial agency expertise is involved.³⁷⁰

A court should defer when it determines that, based on comparative qualifications, the agency's informed judgment on a matter is better than its own. Federal courts have relied upon this principle in according deference when deference is due, but courts have also used this principle to withhold deference when the court concludes that it, rather than the agency, has the better perspective on the matter. In one such case,³⁷¹ the Second Circuit listed a number of reasons why not to defer to an agency, including: (1) when the agency is entirely an umpiring body devoid of legislative policy-making authority (such as the Montana Workers Compensation Court), (2) how the agency has gone about its job based on a series of short opinions on isolated facts which contain no in-depth study of the problem, (3) if the agency has little experience in the administration of the principle of law—having developed no great specialization or expertise, and (4) especially

368. *Hafner v. Dept. of Lab. & Indus.*, 929 P.2d 233, 236 (Mont. 1996). Alternatively, federal courts accord discretion to agency application of law to fact and, when appropriate, even to agency interpretations of law. Judge Friendly, speaking for the United States Court of Appeals for the Second Circuit, has said “there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term.” *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 49 (2d Cir. 1976) (citing United States Supreme Court cases). The court said “[l]eading cases support[] the view that great deference must be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis.” *Pittston Stevedoring Corp.*, 544 F.2d at 49 (citing several United States Supreme Court cases, including *Grey v. Powell*, 314 U.S. 402, 411–412 (1941)).

369. *Glendive Med. Ctr., Inc. v. Dept. of Pub. Health & Human Servs.*, 49 P.3d 560, 562 (Mont. 2002).

370. *Owens*, 172 P.3d at 1231; *see also Winchell*, 972 P.3d at 1135 (deference to agency expertise). In *Winchell*, the Court noted that deferral to agency expertise is not a review standard that “we apply in a contested case,” when reviewing for correctness. However, judicial recognition that when an agency has technical expertise, its interpretation of technical language may properly be considered and be compelling when a different interpretation is not mandated by clear conflicting statutory language. Recognition that an agency is not the exclusive repository of technical expertise (*see Intl. Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 566, n. 20 (1979)) does not mean that there is never judicial recognition of and deferral to agency technical expertise (*see Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566 (1980)). Moreover, it is questionable why the Montana Court would defer to agency's interpretations or applications of law in a non-MAPA contested case, yet defer to the same agency's interpretation or application in a non-contested case. It would appear that as to questions of law, whether the agency reached the right conclusion would depend more on what the conclusion was rather than the setting in which the conclusion was reached. The setting in which the conclusion of law was reached has little or nothing to do with deciding when to accord deference.

371. *Pittston Stevedoring Corp.*, 544 F.2d at 48–50.

where the understanding of the law depends on prior judicial decisions and legislative history matters that the court concludes it has greater competence.³⁷² Additional factors may include the extent to which the legislature has delegated policy-making authority to the agency, the court's impression of the quality of the particular agency and the thoroughness and expertness of the agency, the need or value of expertise for the matter under consideration, and whether lawmaking by the court is otherwise needed in the particular case.³⁷³ What is important to understand is that agency specialization and expertise is not an all-or-nothing concept. It need not and does not, exist every time it is asserted by agency counsel or the advocate for the prevailing party at the agency level. It is, however, a matter for fair consideration by a reviewing court, and matter opposing counsel may want to address to the court.

D. *Judicial Review of Non-MAPA Agency Quasi-Judicial Decisions*

In addition to judicial review of MAPA agency contested cases, the reader needs to be aware of the standards of judicial review applicable to Montana state and state subdivision agency non-contested case, quasi-judicial decisions. These situations are of four types: (1) Montana State MAPA agencies where a "hearing" is not required by law and the agency's authorizing/enabling legislation or constitutional due process does not require a hearing; (2) Montana State, non-MAPA agencies; (3) Montana State subdivision agencies—agencies of counties and municipalities, school districts, transportation districts, water districts, etc; and (4) any Montana (MAPA or non-MAPA) agency when its authorizing or enabling legislation specifies that a particular standard of review is to be used on judicial review.

Typically, the quasi-judicial agency process will involve agency fact-finding, but that activity will not be a result of a formal contested case hearing, but rather an informal hearing or an agency information gathering.

For example, in *Johansen*,³⁷⁴ the Montana Department of Natural Resources and Conservation leased land to Johansen, and Johansen was to pay rent for the land. This case involved a MAPA agency that was required to make a finding of fact (whether the rent had been timely paid), but was not required to conduct contested case hearing.

The Court characterized the case as one "where no hearing or other administrative procedure is provided for."³⁷⁵ The Court determined that in such a situation, the proper standard of review is whether the agency deci-

372. *Id.*

373. See Davis, *Administrative Law Text*, § 30.06, (3d ed., West 1973).

374. See discussion of *Johansen*, *supra* nn. 60–64.

375. *Johansen*, 955 P.2d at 653.

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sion is based upon any error of law is wholly unsupported by the evidence, or clearly arbitrary or capricious.³⁷⁶ Thereafter, in its decision, the Court stated that it would only overturn the agency's decision if it was "arbitrary, capricious, unlawful, or unsupported by substantial evidence."³⁷⁷ Note that while the specific language of these two review standards is somewhat different, the court treats them as the same.³⁷⁸

The ultimate question is whether the *Johansen* judicial review standard accords more or less discretion to the agency decision when compared with standards used in reviewing a "contested case."

1. Findings of Fact

It makes no sense that the Court would accord an agency more or less fact-finding discretion based solely on the formality of the agency fact-finding record. It certainly makes no sense that the Court would accord more discretion,³⁷⁹ under the arbitrary, capricious,³⁸⁰ substantial evidence standard, to agency fact-finding based on an informal fact-finding record, than when the agency conducts a trial-type contested case hearing. While the language or terminology used to articulate the appropriate standards of review are different, (clearly erroneous versus arbitrary, capricious, substantial evidence) ultimately the amount of discretion the Court accords an agency fact-finding remains the same. In reviewing agency fact-finding, in a quasi-judicial matter, the Court essentially reviews the agency fact-finding to determine if a reasonable mind could reach the factual conclusion,

376. *Id.* at 659.

377. See also *Mont. Envtl. Info. Ctr., Inc. v. Mont. Dept. of Transp.*, 994 P.2d 676, 678 (Mont. 2000); *Friends of the Wild Swan v. Dept. of Nat. Resources & Conserv.*, 6 P.3d 972, 976 (Mont. 2000). For review of a non-MAPA entity, see *Madison River R.V. Ltd. v. Ennis*, 994 P.2d 1098 (Mont. 2000).

378. In *North Fork Preservation Assn. v. Dept. of State Lands*, 778 P.2d 862, 871 (Mont. 1989), cited with approval in *Johansen*, the Montana Supreme Court analogized to *Overton Park*, 401 U.S. at 416, a leading United States Supreme Court case, involving judicial review of an agency informal quasi-judicial decision. The *Overton Park* Court used the "arbitrary and capricious" standard of review.

379. The Montana Supreme Court has said that it accords Montana State subdivision agencies more discretion on questions of fact.

380. The Montana Supreme Court has defined the "arbitrary and capricious" standard when applied to fact questions as: "reversal of the appealed ruling is not permitted merely because the record contains inconsistent evidence or evidence which might support a different result. Rather, the decision being challenged must appear to be random, unreasonable or seemingly unmotivated, based on the existing record." *Kiely Const., L.L.C. v. City of Red Lodge*, 57 P.3d 836, 851 (Mont. 2002). It is difficult to differentiate between this standard of review and the clearly erroneous standard. To ratchet critical thinking up to an even higher level, the Court has defined the "abuse of discretion" standard of review, when applied to fact questions, as the agency decision 'is so lacking in fact and foundation' that 'it is clearly unreasonable.'" *North 93 Neighbors, Inc. v. Board of County Commissioners of Flathead County*, 137 P.3d 557, 565 (Mont. 2006). Again, is there any real difference between this standard of review and the clearly erroneous standard, as defined? For those readers who are able to appreciate a practical difference in these standards, you are now ready for teaching law. As for me, I look forward to putting it my past.

whether the agency fact-finder understood the effect of the evidence, and even if the first two requirements are met, whether the Court is of the definite and firm conviction that a mistake has been made. Ultimately, without weighing the weight of the evidence, if the Court has a definite and firm conviction that a mistake has been made, it will reverse.³⁸¹ It would be helpful if the Court formally recognized that regardless of the review standard—clearly erroneous, substantial evidence, arbitrary capricious, or abuse of discretion—when it reviews a fact record it looks to see if a reasonable mind could reach the same conclusion as that of the agency, whether the agency fact-finder understood the evidence, and regardless of affirmative answers to the first two questions, whether it was of the definite and firm conclusion that a mistake had been made.

The real difference in reviewing agency fact-finding in the context of a formal trial-type record and an informal record is that a formal trial-type record is more concise, confined, and ultimately more factually accurate. With the formal trial-type record, the reviewing court has the hearing transcript and the exhibits,³⁸² whereas, when reviewing an informal agency fact-finding record, the court looks at the agency evidentiary in whatever form it takes. For example, in the *Johansen* case, where the State land lessee did not allegedly pay the rent on time, the record evidence was whatever was before the agency decision maker at the time he or she determined that the rent was not timely and cancelled the lease. All this information/evidence was probably contained in the agency's file.

When the agency information/evidentiary record is derived from other than a hearing, much less a trial-type hearing, often the record must be constructed for court review after the agency decision was made,³⁸³ and the exact content of that record may be in controversy. Regardless, the agency record on review is the exact factual record³⁸⁴ that was before the agency-decision-maker at the time of the decision. Thus, while the agency evidentiary record from a formal trial-type hearing when compared with an agency

381. It may be safe to conclude that, on any topic, when judges reach a "definite and firm conviction" that a mistake has been made, the determination of any subordinate tribunal is in great jeopardy.

382. Mont. Code Ann. § 2-4-702(4) (transmittal of the entire agency record to the reviewing court).

383. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971) (on judicial review of an agency decision based on other than a trial-type record, the Court remanded the case to the district court with instructions to direct the agency to present the whole record on which the agency decision was based—"the full administrative record that was before the Secretary at the time he made his decision."). The reviewing court may look outside the administrative record produced by the agency unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision. *Skyline Sportsmen's Assoc. v. State Board of Land Commissioners*, 951 P. 2d 29, 32 (Mont. 1997).

384. *Id.* It is appropriate for a reviewing court to look beyond the record submitted by the agency, and allow the submission of new evidence, to assure that agency submitted record is complete. *Id.*

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informal fact-gathering is much different, and clearly the formal record has more hallmarks of accuracy and is much easier for a reviewing court to work with, the nature of the record should not change the amount of fact-finding discretion that the court accords the agency.

2. *Conclusions of Law*

Regarding judicial review of non-MAPA agency, quasi-judicial decisions of agency conclusions of law, the Montana Court applies the same level of agency deference as it does in reviewing contested cases; the Court reviews for “correctness.”³⁸⁵ There certainly is no reason for the Court to accord an agency more discretion regarding its conclusions of law, solely on the basis that it has used an informal hearing process or accorded no hearing at all. The amount of discretion accorded an agency’s conclusions of law may not depend upon whether the conclusion was in the context of a formal or informal quasi-judicial proceeding.

E. Montana Supreme Court Review of a District Court’s Review of an Agency Decision

The judicial review standards discussed above, address the review standards used by both a Montana district court and the Montana Supreme Court.³⁸⁶ Assuming the district court applies the proper standard of review, and there is an appeal of the district court decision to the Montana Supreme Court, the higher court uses the same standard of review that the district court used. Alternatively, if the Supreme Court determines that the district court used an incorrect review standard, the higher court will either remand the decision back to the district courts with instructions to apply the proper standard of review, or it may apply the proper review standard and determine whether the agency decision is to be sustained or overruled.

VI. CONCLUSION

The uncertainty that accompanied MAPA at the time of its enactment in 1971 has been resolved. The Act works, appears to be universally ac-

385. See *Miskovich*, 551 P. at 998 (“the proper role of a court reviewing agency conclusions of law is to ascertain whether the rulings thereon were correct . . .”).

386. *Marble*, 9 P.3d at 620 (“A district court reviews an administrative decision in a contested case to determine whether the substantial right of the appellant have been prejudiced because the agency exceeded its authority, abused its discretion, made clearly erroneous findings of fact, or interpreted the law incorrectly. We employ the same standards when reviewing a district order affirming or reversing an administrative decision.”); *Skyline Sportsmen’s Assn.*, 951 P. 2d at 32 (In our review of “a district court’s review of an informal administrative decision, this Court follows the same standard as the district court, namely, does the record before the administrative body establish it acted arbitrarily, capriciously, or unlawfully.”)

cepted, and places the practice of administrative law in Montana on the same plain as that in other states. While judicial clarifications and development will continue, and some legislative modification may occur, practice under the MAPA will likely continue to be routine.