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Robert E. Sullivan

Dean, Montana State University School of Law

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The Case for an Administrative Procedure Act*

By ROBERT E. SULLIVAN†

The number of administrative agencies and the extent to which their regulation affects the business and private life of every citizen have increased tremendously in the last half century. This is as true of state governments as it is of the federal government, and is nowhere better illustrated than in Montana. There are presently in Montana more than seventy agencies in the executive branch with power either to promulgate regulations having the force of law or to exercise quasi-judicial functions, or both. That regulation by administrative agencies is a necessary part of twentieth century existence cannot be denied; no legislature and no existing system of courts could take their place. The difficulties arising from their operations today are chiefly due to the fact that, as has frequently been noted, administrative law, like Topsy, "just grew." In Montana, as elsewhere, new agencies have been created and new responsibilities delegated as the need arose, without any attempt to develop a uniform, systematic set of procedures. Existing Montana statutes are extremely inconsistent, both as to the extent and as to the manner in which they specify procedures for the exercise by administrative agencies of legislative and judicial functions and procedures for judicial review of agency actions. Violation of many administrative regulations is punishable by criminal penalties, or may subject the violator to forfeiture of the right to practice his profession or engage in his business. Yet lack of any centralized filing or system of publication of agency regulations makes it a practical impossibility for laymen subject to the regulations, or for their lawyers, to keep abreast of requirements affecting their rights, duties, or privileges.

Some twenty years ago the American Bar Association and the National Conference of Commissioners on State Laws became concerned with the need of state governments for legislation stating major principles for procedures of administrative agencies and for judicial review of their decisions. After prolonged and intensive study, in 1946 the Conference adopted, and the Bar Association approved, a Model State Administrative Procedure Act,¹ similar in many respects to the federal act² enacted by Congress in the same year.

*The author wishes to acknowledge his indebtedness to Miss Gwendolyn Folsom, Legal Research Assistant at Montana State University Law School, for her thorough research and collection of the existing Montana administrative agency procedural statutes.

†Dean of the Law School and Professor of Law, Montana State University. A.B. 1940, LL.B. 1946, University of Notre Dame. Commissioner, National Conference on Uniform State Laws. Member of the Montana, Ohio, and North Dakota Bars.

¹9C UNIFORM LAWS ANNOTATED 174 (1957).

A revision of the Model State Administrative Procedure Act will be considered for final adoption at the annual meeting of the Commissioners on Uniform State Laws in August, 1960. The Commissioners' committee which prepared the first tentative draft of the revision, submitted at the 1959 annual meeting, stated that a thorough study indicated no necessity for any fundamental changes in the theory and pattern of the Model Act. The amendments recommended consist, rather, of

The Model Act was not promulgated as a uniform act, but as a basic charter for the guidance of administrative agencies, which each state might adopt with the addition of some detail and with adjustment to the special statutory conditions peculiar to its own jurisdiction. It states fundamental principles of "common sense, justice, and fairness" for the agencies in their rule-making and adjudication,³ and a simple, uniform method of review of agency decisions by the courts. It also assures proper publicity for agency rules affecting the public. By 1958 about half of the states had enacted general legislation dealing with one or more of the three important subjects covered by the Model Act, and of these, eleven had enacted comprehensive legislation embodying the principles of the Model Act.

On the recommendation of the Montana Commissioners on Uniform State Laws, a proposed Administrative Procedure Act⁴ was introduced in the Montana Legislature in 1959 by Senator Dussault. It was comprised essentially of the Model Act, with some additions that have been found helpful in other jurisdictions, particularly Wisconsin and California, which were among the first states to adopt general statutes in this field. It was designed to assure both the protection of private rights and the promotion of public interests. Its enactment would fill a vital need in Montana by setting out in one place a basic statement to which both administrators and practitioners could turn for guidance. It should also result in net long-term financial savings. Efficiency in administrative operations would be increased. There would be less necessity to expend state funds in enforcing regulations if all rules were readily available so that persons subject to them were apprised of their duties. Protected, expensive court proceedings would be reduced.

Unfortunately, Senate Bill 179 was allowed to die in the Senate Judiciary Committee. It is hoped that the bill will be re-introduced and enacted by the Legislature in 1961. A summary of its provisions follows, with an indication of the effect which each would have on existing agency statutes.

TITLE I—GENERAL PROVISIONS

Title I of the bill contains definitions and provisions applicable to all agencies covered. "Agency" is defined in section 102 to include all regulatory boards, commissions, officers, and other authorities in the executive branch of the state government, whether or not having state-wide jurisdic-

procedural details designed to accomplish more effectively the objectives of the original act. Some of the recommended amendments are identical or substantially identical with provisions incorporated into the proposed Montana legislation, set forth in the appendix to the present article. Other principal changes proposed to be made in the Model Act are noted in footnotes to the proposed Montana act. References to the proposed revision of the Model Act are to the text as contained in the first tentative draft, and to the comments submitted therewith.

³Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. §§ 1001 to 1011 (1952).

⁴Commissioners' Prefatory Note, 9C UNIFORM LAWS ANNOTATED 177 (1957).

⁵S.B. 179, 36th Montana Legislative Assembly (1959) (hereinafter cited S.B. 179). This bill is set forth in full in the appendix to this article, with the exception of Title IV, containing detailed and specific amendments to existing administrative agency statutes, and Title V, dealing briefly with the construction and severability of the act.

tion, but excluding matters concerning the militia, education, prisons, and welfare.

All persons appearing before agencies are given the right to be represented by counsel.⁵ Of existing Montana statutes respecting administrative agencies, in only seventeen is this right specified. In many of these the requirement is applicable to only one or two of numerous adjudicatory functions exercised by the particular agency, or is specified as to some parties but not as to others.

Some Montana statutes providing for service of papers in agency proceedings do not state how such papers are to be served; section 104 of the bill provides that in such instances service shall be in the same manner as prescribed for civil court actions.

The bill requires agencies to act with reasonable promptness on applications for licenses,⁶ and provides that, except in cases of willfulness or danger to public health or safety, an agency may not suspend or revoke a license without affording the licensee an opportunity to show that he is complying with the law.⁷ It also provides for the continuation in effect of existing licenses pending determination by agencies on proper applications for renewal.⁸ Such provisions are already provided in some Montana agency statutes; they are inserted in the bill as a guide for agencies whose statutes do not cover these matters.

Agencies are given the power to issue declaratory rulings concerning the applicability of agency statutes and rules to particular persons or property, and brief procedural provisions respecting these rulings are set forth.⁹ These declaratory rulings are binding only if the agency so provides, and they may be altered or set aside by the courts, or by the agency with the consent of the petitioner.¹⁰ This provision is expected to encourage business enterprise by enabling parties to ascertain in advance of capital investments or other undertakings whether their proposed activities will be permitted. No comparable provisions have been found in any agency statutes.

The bill requires agencies to give prompt notice, with reasons, of denial of any applications or other requests in agency proceedings.¹¹ Some existing agency statutes so require as to some denials, but there is no such general requirement.

TITLE II—RULE MAKING

Under the definition in section 102, the term "rules" includes all agency rules and regulations of general application and future effect which affect the rights of or procedures available to the public, including rules fixing prices and rates. Agencies are specifically required to adopt

⁵S.B. 179, § 103.

⁶S.B. 179, § 105(a).

⁷S.B. 179, § 105(b).

⁸*Ibid.*

⁹S.B. 179, § 106.

¹⁰S.B. 179, § 106(a).

¹¹S.B. 179, § 107.

rules of practice and procedure.¹² The existing agency statutes seldom contain more than a bare skeleton of procedural requirements. Many of them authorize adoption of procedural regulations, and such authority is implied in any statutory grant of regulatory power; but very few Montana statutes specifically direct agencies to adopt procedural rules. Not many Montana agencies—even among those so directed—have in fact adopted rules of procedure.¹³ This results in uncertainty, confusion, and delay, constituting a hardship to private parties. It may also be a handicap to the agencies, since failure to state and follow a consistent, orderly procedure may result in court reversal of an agency decision on the grounds of inadequate procedure.

To assist agencies in promulgating their procedural rules, and also to reduce over-all expenses, the bill provides for preparation by the Attorney General of model rules of procedure appropriate for use by as many agencies as possible.¹⁴ Agencies may adopt all or part of these model rules by reference.

Further, so far as is deemed practicable, the agencies must supplement their rules with descriptive statements of their procedures, as an aid to public understanding of the regulatory process.¹⁵ No comparable provision has been found in existing agency statutes.

Prior to adoption, amendment, or repeal of any rule, an agency must file with the Secretary of State notice of its intended action and afford interested persons opportunity to submit their views.¹⁶ Exceptions are made of various types of rules for which such provision is unnecessary or impracticable. Some existing agency statutes require notice and hearing prior to adoption of rules, particularly respecting prices and rates, but the requirement is by no means common to all rules. The bill also provides for the use of informal conferences and committees as advisory aids in rule making,¹⁷ and gives some guides for drafting rules.¹⁸

Another provision authorizes adoption of emergency rules without notice, when necessary for the preservation of public health, safety, or welfare. Emergency rules become effective immediately on filing, but may not remain in effect longer than sixty days.¹⁹ During that time, of course, an agency may issue notice and proceed with promulgation of a permanent rule.

All rules adopted after the effective date of the act must be filed with the Secretary of State.²⁰ With some exceptions, rules become effective ten days after publication, or ten days after service if served on all persons subject to them.²¹ The Secretary of State must keep a permanent register

¹²S.B. 179, § 201 (a) (1).

¹³See text accompanying note 32 *infra*.

¹⁴S.B. 179, § 201 (a) (2).

¹⁵S.B. 179, § 201 (b).

¹⁶S.B. 179, § 201 (c).

¹⁷S.B. 179, § 201 (d).

¹⁸S.B. 179, § 201 (e).

¹⁹S.B. 179, § 202.

²⁰S.B. 179, § 203.

²¹*Ibid.*

of all rules, open to public inspection,²² and all rules previously adopted and remaining in effect must be similarly filed within six months after the effective date of the act.²³

An important feature of the bill is the publication by the Secretary of State of the Montana Administrative Code, which will contain the text of all currently effective agency rules. The code is to be supplemented annually, and to be revised at least every five years.²⁴ In addition, the Secretary of State must publish a monthly Administrative Register.²⁵ This will consist of two sections, one of which will contain the text of all rules filed during the preceding month and the other will contain all notices of proposed rule-making filed during the preceding month. Where an agency has served a notice of proposed rule-making on all persons who will be effected, or has otherwise published notice pursuant to specific statutory requirements, only a brief listing of the notice need be included in the register. To avoid unnecessary expense, the bill provides that a notice of adoption may be published in the code or register, in lieu of the full text of adopted rules, in the case of rules served on all persons subject to them and certain other specified types of rules; but all rules so excepted must be available on request and the notice of adoption must indicate where they may be inspected and how obtained.²⁶ Copies of or subscriptions to the code and register are to be furnished to the public at prices fixed to cover publication and mailing costs.²⁷ Copies will also be deposited with various officers, and one copy will be available for public reference in the office of each county clerk. It will also be possible to subscribe to those portions of the rules relating only to particular agencies.

A similar system of centralized filing, with more frequent publication, has been required for federal agency rules since 1935. Approximately half of the states now have provisions for centralized filing. Some of these require centralized publication, and others require each agency to publish its own rules. Obviously centralized publication of all rules is a more economical arrangement.

Adoption of these provisions for centralized filing and publication of rules will mean that for the first time Montanans subject to agency rules will be able to ascertain from one source what rules govern them. Some existing Montana agency statutes have provided that rules be published, but have not stated how or when.²⁸ Some have provided for newspaper

²²*Ibid.*

²³S.B. 179, § 204.

²⁴S.B. 179, § 205(a).

²⁵S.B. 179, § 205(b).

²⁶S.B. 179, § 205(c).

²⁷S.B. 179, § 206.

²⁸*E.g.*, State Board of Food Distributors, REVISED CODES OF MONTANA, 1947, § 27-306 (hereinafter cited R.C.M.); State Board of Pharmacy, R.C.M. 1947, § 66-1504. In some instances the statute authorizes the agency to determine the manner of publication: *e.g.*, the state-wide rules of the Fish and Game Commission, R.C.M. 1947, § 26-128; and the safety codes of the Industrial Accident Board, R.C.M. 1947, § 41-1703.

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publication, or for posting in public places;²⁹ and many have made no provision for publication. The statute respecting the Milk Control Board provides that filing and posting of rules in the board's main office for thirty days constitutes due notice of the rules.³⁰ Of Montana's seventy-odd regulatory agencies, in 1958 the rules of only eighteen were published and available.³¹ Some of these were only partial publications, and one agency had not supplemented or revised its rules in twelve years.³² Publication of rules in the code and register will not prevent their publication in pamphlet form or in newspapers where such provision is permitted by the agency statute and funds are available.

Any interested person may petition an agency for the adoption, amendment, or repeal of any rule, and the agency must act on the petition within a reasonable time.³³ It is also required to adopt rules governing the form of and procedures for handling such petition. While some agency statutes, notably those authorizing price or rate regulation, contain provisions on this subject, most of them do not.

Another provision requires that the courts shall take judicial notice of rules duly filed and published under the proposed act.³⁴ The Montana Supreme Court, in common with a minority of other state courts, has until recently refused to take judicial notice of administrative rules.³⁵ It is believed that the existence of an official centralized publication of agency rules will overcome judicial reluctance to take notice of rules.

The bill also provides for declaratory judgments by the district courts on the validity of rules;³⁶ in effect it applies to administrative rules the principles embodied in the Uniform Declaratory Judgment Act, which has been in effect in Montana for many years.³⁷ This provision does not affect existing provisions in agency statutes for judicial review of agency rules.³⁸

TITLE III — ADJUDICATION AND REVIEW

The provisions of this title apply to all "contested cases," *i.e.*, proceedings in which the legal rights, duties, or privileges of specific parties are

²⁹Some statutes require both newspaper publication and posting: *e.g.*, the horticultural pest rules of the Commissioner of Agriculture, R.C.M. 1947, § 3-1103; local fish and game rules, R.C.M. 1947, § 26-128. Some provide for newspaper publication, but provide that if no local paper is published, posting in a public place constitutes legal notice: *e.g.*, State Board of Health rules on water supplies, R.C.M. 1947, § 69-1303.

³⁰R.C.M. 1947, § 27-413.

³¹See SPEER, MONTANA STATE DOCUMENTS, A PRELIMINARY BIBLIOGRAPHY (Bureau of Government Research, Montana State University, July, 1958). See also Note, 19 MONT. L. REV. 43, 47 (1957).

³²SPEER, *op. cit.* *supra* note 31, at 54, Montana Trade Commission.

³³S.B. 179, § 207.

³⁴S.B. 179, § 208.

³⁵Williams v. Anaconda Copper Mining Co., 96 Mont. 204, 29 P.2d 649 (1934); State *ex rel.* Magelo v. Industrial Accident Board, 102 Mont. 455, 59 P.2d 785 (1936); State v. Andre, 101 Mont. 366, 54 P.2d 566 (1936). In 1955 the court stated it may take judicial notice of the rules and regulations of the Commissioner of Agriculture. Northern Montana Mustard Growers Co-operative v. Britton, 128 Mont. 553, 567, 280 P.2d 1078, 1085 (1955).

³⁶S.B. 179, § 209(a) and (b).

³⁷R.C.M. 1947, §§ 94-8901 to 8916.

³⁸S.B. 179, § 209(c).

required by law or constitutional right to be determined after opportunity for an agency hearing. It does not require a hearing where no right to hearing already exists, but provides that where there is such a right the hearing must conform to minimum fair procedures. Section 301 provides that parties be given at least ten days' notice of hearings, be informed of the issues to be considered, and be afforded opportunity to present evidence and argument, and requires that a complete official record be kept of all hearings and made available to the parties. To avoid unnecessary expense, however, the testimony need not be transcribed unless needed for rehearing or review. The section also provides for administration of oaths and taking of depositions, and permits informal settlement. Numerous Montana agency statutes already state these fundamentals, but there are many which omit all mention of one or more. These provisions will protect agencies as well as private parties, since courts are inclined to invalidate agency decisions rendered on the basis of inadequate hearings or incomplete records, even where the agency statute sets no standards.

Of existing Montana statutes authorizing agencies to issue subpoenas, only half a dozen state a positive right of parties other than the agency involved to obtain them. The new bill sets forth the right of any party to obtain subpoenas to compel the appearance of witnesses or the production of documents; and it also sets forth a method of enforcement of agency subpoenas to be used where no means of enforcement is prescribed by the agency statute.³⁹

In the conduct of hearings agencies are not to be bound by the technical rules of evidence governing the courts, but may admit probative evidence which reasonably prudent men would commonly accept.⁴⁰ All evidence admitted must be made a part of the record, however, and no other matter may be considered.⁴¹ Parties are given the right of cross-examination and the right to submit rebuttal evidence,⁴² and agencies are allowed to take official notice of facts of which courts take judicial notice, and also of facts within their specialized fields of knowledge.⁴³ Most existing Montana statutes set no standards for admission of evidence in agency hearings. One agency, the State Board of Nursing, is required to weigh the evidence by application of the rules of evidence in civil actions.⁴⁴ Some agencies are required to hold "formal" hearings,⁴⁵ and others are authorized or required to hold "informal" hearings,⁴⁶ which, in the absence of specification as to admission of evidence and incorporation in the record, might well lead to the assumption that these basic principles do not apply.

Where a hearing has not been held before the officials who are to render the final decision, section 304 provides that a decision adverse to

³⁹S.B. 179, § 302.

⁴⁰S.B. 179, § 303(1).

⁴¹S.B. 179, § 303(2).

⁴²S.B. 179, § 303(3).

⁴³S.B. 179, § 303(4).

⁴⁴R.C.M. 1947, § 66-1241.

⁴⁵*E.g.*, Public Service Commission, on complaints against public utilities, R.C.M. 1947, § 70-119; Investment Commissioner, R.C.M. 1947, § 66-2011.

⁴⁶*E.g.*, Commissioner of Agriculture, on refusal of produce wholesalers' licenses, R.C.M. 1947, § 84-3405; Industrial Accident Board, R.C.M. 1947, § 92-812.

some parties may not be made until a proposed decision is served on them and opportunity afforded to file exceptions and present argument to the deciding officials. This provision is designed to assure personal familiarity on the part of the responsible officials with the evidence in cases decided by them, and may be waived by stipulation. It will not conflict with existing statutes authorizing agencies to delegate hearing functions to members or agents.

Decisions and orders in contested cases are required to be in writing or stated in the record, must be served on the parties or their counsel, and must be available to public inspection.⁴⁷ If the decision is adverse to a party, it must be accompanied by findings of fact and conclusions of law and by a notice of any right of further consideration within the agency. These provisions are essentially the same as those already provided for the Oil and Gas Conservation Commission.⁴⁸ No inconsistent provisions have been found in other agency statutes, but most of them are silent on some or all of these points.

An important provision in the bill provides a uniform and exclusive method for judicial review of decisions in contested cases, which is applicable also to declaratory rulings by agencies.⁴⁹ Excepted are decisions where statutes preclude judicial review, decisions of the Industrial Accident Board, the Oil and Gas Conservation Commission, the Board of Railroad Commissioners, and decisions of the State Board of Equalization respecting taxes and license fees.⁵⁰ Decisions of the latter involving regulatory functions, such as licensing of public contractors, are not excepted. The exception of tax matters will also include decisions of the State Board of Forestry on fire protection assessments, since the statute governing that matter adopts by reference the judicial review provisions of the tax laws.

Failure to exhaust administrative remedies within the time fixed by agency statutes is a bar to review except for jurisdictional questions.⁵¹

Some Montana agency statutes do not mention judicial review; others mention the right of review but do not specify the means. Since there is no general provision in the Montana Code for appeals from agency decisions, in such instances proceeding must be by certiorari or other extraordinary remedy each of which has inherent limitations. Of the agency statutes specifying a method of review, the following table (which does not include tax matters) indicates the wide variety of modes of review provided:

- 9 specifically require trial de novo
- 1 provides trial de novo may be had on request of either party
- 7 are ambiguous but apparently contemplate trial de novo
- 3 provide for certiorari
- 2 provide for injunction
- 2 provide for injunction or certiorari

⁴⁷S.B. 179, § 305.

⁴⁸Except that the oil and gas statute contains no requirement of notice of further procedures available. R.C.M. 1947, § 60-133.

⁴⁹S.B. 179, § 306. This section is made applicable to declaratory rulings by § 106(a).

⁵⁰S.B. 179, § 306(a).

- 1 provides for application for order to show cause
- 6 provide for initiation of action by petition
- 3 provide for initiation of action by complaint
- 10 provide for initiation of action by filing notice of appeal with court and serving on agency and other parties
- 13 provide for initiation of action by filing or serving notice of appeal with the agency

Thus Montana statutes provide more different methods of review than do the federal statutes, of which it has been said: "No one can defend today our variegated scheme for judicial review of administrative action."⁵²

The time for initiation of proceedings also varies widely under existing procedural statutes, from ten days in some instances⁵³ to ninety days in others.⁵⁴ In some statutes the time runs from the date of the decision, and in some from the date of service. Others fix no time for initiation of review proceedings. This inconsistency will be eliminated by section 306(b), which provides that all review proceedings shall be instituted by filing a petition in the district court within thirty days after service of the agency decision. Some existing Montana agency statutes require that action be brought in particular courts; others do not specify. This same section provides that, if the agency statute does not make other provision, the petition may be filed in the district court for the county where the petitioner resides or has his principal place of business or where the agency maintains its principal office. Contents of the petition are briefly prescribed, and provision is made for service, issuance of summons, requirement of bond in the discretion of the court, and intervention.

The filing of a petition for review will not stay an agency decision, but either the agency or the court may order a stay.⁵⁵ Some agency statutes contain a similar provision; under others, including those providing for trial de novo, the institution of an appeal acts as an automatic stay of the agency order. A few prohibit or restrict any restraining order pending final decision on review.⁵⁶

Provision is also made for transmission of the entire record, a portion thereof, or an agreed statement of the case from the agency to the court of review.⁵⁷ The expense of the record is to be charged against the losing party except where statutes otherwise provide (as is done for the benefit of claimants before the Unemployment Compensation Commission⁵⁸).

Review by the court is to be confined to the record except in cases of alleged irregularity in agency procedure,⁵⁹ although the bill does provide for remand of the case to the agency for the taking of additional evidence

⁵²Landis, *Crucial Issues in Administrative Law*, 53 HARV. L. REV. 1077, 1090 (1940).

⁵³*E.g.*, Livestock Sanitary Board, orders respecting rendering and disposal plants, R.C.M. 1947, §§ 46-2403, -2404; respecting garbage feeders, R.C.M. 1947, §§ 46-2606, -2607.

⁵⁴*E.g.*, Public Service Commission, R.C.M. 1947, § 70-128.

⁵⁵S.B. 179, § 306(c).

⁵⁶*E.g.*, R.C.M. 1947, § 82-814, respecting orders of the State Apiarist.

⁵⁷S.B. 179, § 306(d).

⁵⁸R.C.M. 1947, § 87-142.

⁵⁹S.B. 179, § 306(f).

where proper.⁶⁰ Several existing agency statutes, in addition to those providing for trial de novo, permit introduction of additional evidence before the court. One (relating to the Livestock Commission) contains an absolute prohibition of introduction of any additional evidence.⁶¹ Others do not specify.

The scope of review provided is such that an agency's decision may be reversed or modified if in violation of constitutional provisions, in excess of statutory authority or jurisdiction, or arbitrary. The standard incorporated is the substantial evidence rule, under which the agency's findings as to facts are upheld unless unsupported by substantial evidence.⁶² One section permits the court to compel agency action unreasonably delayed.⁶³ A similar provision is contained in the statute governing the Oil and Gas Conservation Commission.⁶⁴

There is also a provision for a uniform method of appeal to the Montana Supreme Court from judgments of district courts under the act.⁶⁵ Appeal may be taken within sixty days after judgment. Some agency statutes fix a shorter time for appeal;⁶⁶ the general provision in the Code of Civil Procedure which would otherwise apply to most such cases provides a longer period.⁶⁷ The bill also provides that if the district court affirms the agency's decision, the latter is not stayed pending appeal except on order of the supreme court, except that any stay in effect at the time of filing appeal continues automatically for twenty days. If the district court reverses or modifies the agency's decision, the decision is stayed pending final determination on appeal unless the supreme court otherwise orders. Most of the agency statutes do not cover the question of stay on appeal to the supreme court. Under the general provisions of the Code of Civil Procedure otherwise applicable, in most cases an appeal would operate to stay the district court's judgment irrespective of whether it upheld or reversed the agency's decision.⁶⁸

Title IV of the bill consists of specific amendments to existing agency statutes to eliminate provisions inconsistent with the act. Most of these relate either to the publication of rules, the effective date of rules, or to the mode and scope of judicial review. Where agency statutes contain special additional procedural requirements not in conflict with the act, these are retained. No substantive changes are made. Any conflicting provisions allowed to remain in particular agency statutes will presumably govern over the general provisions of the Administrative Procedure Act. These will include the statute respecting the Board of Medical Examiners, which provides for a jury trial by physicians,⁶⁹ and the judicial

⁶⁰S.B. 179, § 306(e).

⁶¹R.C.M. 1947, § 46-917.

⁶²S.B. 179, § 306(g).

⁶³S.B. 179, § 306(h).

⁶⁴R.C.M. 1947, § 60-135.

⁶⁵S.B. 179, § 307.

⁶⁶*E.g.*, 20 days, judgment on order of Superintendent of Banks closing bank, R.C.M. 1947, § 5-1103; 30 days, judgment on order of Montana Trade Commission under Unfair Practices Act, R.C.M. 1947, § 51-113.

⁶⁷R.C.M. 1947, § 93-8004.

⁶⁸R.C.M. 1947, §§ 93-8006 to -8011, -8014.

⁶⁹R.C.M. 1947, § 66-1004.

review provisions of the statute respecting the Public Service Commission, which allows ninety days for institution of proceedings and permits introduction of additional evidence on stipulation.⁷⁰

In the case of three agencies, statutes are amended to specify the right of hearing prior to revocation of licenses; in all of these a constitutional right to hearing would probably exist, but the statutes do not clearly so provide.⁷¹ In the interest of greater uniformity a similar provision has been made as to revocation of beer and liquor licenses.⁷²

Title V of the bill consists of the so-called "housekeeping provisions" respecting construction and effect, severability, general repealer, and effective date. It contains a statement of an underlying principle of the proposed act: that it is intended to supplement and not to supersede additional requirements imposed by law. There is also a provision that no subsequent legislation shall operate to modify the act except by express provision.

APPENDIX — SENATE BILL NO. 179

TITLE 1—GENERAL PROVISIONS

Section 101. *Short title.* This act may be cited as the Administrative Procedure Act.

Section 102. *Definitions.* For the purpose of this Act:

(a) "Agency" means any board, commission, department, officer, or other authority of the State government, whether or not having state-wide jurisdiction, authorized by law to make rules or to determine the legal rights, duties, or privileges of specific parties, except those in the legislative or judicial branches, and except any such agencies to the extent that they are concerned with the militia, with admission to and management of educational, penal, or charitable institutions, with probation, parole, or pardons, or with public assistance.

(b) "Rule" includes every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal thereof, adopted by an agency, whether with or without prior hearing, to implement or make specific the law enforced or administered by it or to govern its organization or procedure, and includes the approval or prescription for the future of rates, wages, prices, facilities, services, or allowances therefor, but does not include regulations concerning only the internal management of the adopting agency or any other agency and not directly affecting the rights of or procedures available to the public. "Rule making" means any agency process for the adoption, amendment, or repeal of a rule.

(c) "Contest case" means a proceeding before an agency, in any matter other than rule making, in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after opportunity for an agency hearing. "Contested case" includes proceedings to determine whether an agency shall impose any form of penalty, including publication of reports that specific parties have violated statutes or rules, and includes licensing, but does not include proceedings in which agency decisions rest solely on inspections, tests, or elections. Except for the purpose of Section 306, "contested case" includes proceedings to determine whether an agency shall institute or recommend institution of court proceedings.

(d) "License" means the whole or part of any agency permit, certificate, approval, registration, charter, membership, authority, or other form of permission required by law. "Licensing" means any agency process respecting the grant, renewal, modification, limitation, suspension, revocation, or denial of a license.

(e) "Person" includes individuals, partnerships, corporations, associations, and public or private organizations of any character.

⁷⁰R.C.M. 1947, § 70-128.

⁷¹Commissioner of Agriculture, itinerant merchants, R.C.M. 1947, § 84-3010; Board of Osteopathic Examiners, R.C.M. 1947, § 66-1409; State Board of Equalization, public contractors, R.C.M. 1947, § 84-3510.

⁷²R.C.M. 1947, §§ 4-129, 135, 342, 425.

Section 103. *Appearance and representation.* Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel. In any agency proceeding every party shall be accorded the right to appear in person or by or with counsel.

Section 104. *Service.* Except where statutes otherwise specifically provide, service in all agency proceedings subject to the provisions of this Act, and in proceedings for the judicial review thereof, shall be as prescribed by this Code for service in civil actions.

Section 105. *Licenses.* (a) In any case in which application is made for a license, the agency, with due regard to the rights or privileges of all interested parties and adversely affected persons, shall with reasonable promptness set and complete any hearings or other proceedings required by law, make its decision, and notify the applicant and all other interested parties.

(b) Except in cases of willfulness or those in which public health or safety requires otherwise, no agency may suspend or revoke any license unless, prior to such suspension or revocation, the agency in writing brings to the attention of the licensee facts or conditions which may warrant such action and accords the licensee an opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application has been finally determined by the agency. This sub-section shall not apply:

(1) where the agency is required by statute to suspend, revoke, or refuse to renew a license, without exercising any discretion in the matter, on the basis of a court conviction or judgment; or

(2) where the suspension, revocation, or refusal to renew is based solely upon failure of the licensee to file timely reports or schedules, or to pay lawfully prescribed fees, or to furnish lawfully required bonds,⁷⁸ or to maintain insurance coverage as required by any statute or rule.

Section 106. *Petition for declaratory rulings by agencies.*⁷⁴ (a) On petition of any interested person, any agency may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it. A declaratory ruling, if issued after argument and stated to be binding, is binding between the agency and the petitioner on the state of facts alleged, unless it is altered or set aside by a court, or by the agency with the consent of the petitioner. Such a ruling is subject to judicial review in the manner provided in this Act for the review of decisions in contested cases.

(b) Petitions for declaratory rulings shall contain a reference to the rule or statute with respect to which the declaratory ruling is requested, a concise statement of facts describing the situation as to which the declaratory ruling is requested, and the reasons for the requested ruling.

(c) Within a reasonable time after receipt of a petition pursuant to this section, an agency shall either deny the petition in writing or schedule the matter for hearing and afford full opportunity for hearing to all interested parties. If the agency denies the petition, it shall promptly notify the petitioner of its decision, including a brief statement of the reasons therefor.

Section 107. *Denials.* Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding subject to this Act. Except (1) in affirming a prior denial or where the denial is self-explanatory, or (2) where Section 305 of this Act applies, such notice shall be accompanied by a simple statement of procedural or other grounds.

⁷⁸The italicized language was not contained in S.B. 179, but the Montana Commissioners recommend that it be inserted in the bill re-introduced in 1961.

⁷⁴One of the proposed changes in the Model State Administrative Procedure Act is the amendment of the corresponding section to read as follows: "Each agency shall provide by rule for the filing and prompt disposition of petitions for declaratory orders as to the applicability of any statutory provision or of any rule or order of the agency. Orders disposing of petitions in such cases shall have the same status as other agency orders." First Tentative Draft and Comments, Proposed Revision to the Model State Administrative Procedure Act, § 8 (1959) (hereinafter cited First Tentative Draft). The purpose of this change, as indicated in the comment, is to induce agencies to issue declaratory orders more frequently than they have done in the past, without requiring the issuance of a ruling whenever one is sought.

TITLE II—RULES

Section 201. *Adoption of rules.* In addition to other rule-making requirements imposed by law:

(a) (1) Each agency shall adopt rules governing the formal and informal procedures prescribed or authorized by this Act, and no person shall in any manner be required to resort to procedures not so adopted. Such rules shall include rules of practice before the agency, together with forms and instructions.

(2) The Attorney General shall prepare and file with the Secretary of State model rules of procedure appropriate for use by as many agencies as possible. Any agency may adopt all or part of the model rules by reference. Notice of such adoption shall be filed and the model rules or parts thereof shall become effective as to the adopting agency in the manner provided by Section 203 of this Act. No agency shall adopt, amend, or repeal the model rules or any part thereof unless it otherwise complies with the provisions of this section. The provisions of this Act relating to publication and distribution of rules shall apply to the model rules, except that the full text need not be published more than once if publication is made of reference to each adoption by an agency of all or part of the model rules, and in the case of partial adoption by an agency, to the specific rules or parts thereof adopted.

(b)⁷⁵ To assist interested persons dealing with it, each agency shall so far as deemed practicable supplement its rules with descriptive statements of its procedures.

(c)⁷⁶ Prior to the adoption of any rule authorized by law, or the amendment or repeal thereof, the adopting agency shall file written notice of its intended action with the Secretary of State and afford interested persons opportunity to submit data or views orally or in writing. The notice shall include (1) reference to the authority under which the rule is proposed; (2) either the text or substance of the proposed rule or a description of the subjects and issues involved; and (3) the place and time for hearing or for submission of written data or views, which shall in no case be less than ten days after publication of the notice as provided in Section 205 of this Act, or ten days after other publication if a different method of publication is prescribed by statute, or ten days after service if the notice is served on all persons who will be subject to the proposed rule. This subsection shall not apply to:

(1) rules adopted as emergency rules pursuant to Section 202 of this Act;

(2) statements of policy or interpretation;

(3) rules designed solely to bring the language of an existing rule into conformity with a statute changed or adopted since the adoption of the rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement.

(4) rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(5) rules governing hunting and fishing.

(d) An agency may use informal conferences and consultations as means of obtaining the viewpoints and advice of interested persons with respect to contemplated rule making. Each agency may also appoint committees of experts or interested persons or representatives of the general public to advise it with respect to any contemplated rule making. The powers of such committees shall be advisory only.

(e) Rules shall not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting that language, the reference shall clearly indicate that portion

⁷⁵One of the proposed amendments to the Model Act would make this provision mandatory as in the federal act, rather than discretionary. First Tentative Draft § 2(a). Some objections to the proposal were made at the 1959 session of the Commissioners, however, on the ground that it would require unnecessary filing for some state agencies.

⁷⁶One of the proposed amendments to the Model State Administrative Procedure Act would require an agency to grant an oral hearing if requested by 25 affected persons, or by an association representative of a farm, labor, business, or professional group whose members would be affected by the proposed rule. It would also require an agency, upon adoption of a rule, on request of an interested person, to issue a concise statement of the principal reasons for and against its adoption, incorporating the agency's reasons for over-ruling objections to the adoption. First Tentative Draft § 3. As to the second requirement, compare S.B. 179, § 107.

of the language which is statutory and the portion which is the amplification of that language. Each rule shall include a citation of the authority pursuant to which it, or any part thereof, is adopted and, if an amendment, a reference to the original rule.

Section 202. *Emergency rules.*⁷⁷ If an agency finds that immediate adoption of a rule is necessary for the preservation of the public health, safety, or welfare, the agency may adopt such a rule without notice as an emergency rule. The agency's finding and a brief statement of the reasons for its finding shall be incorporated in the rule. The agency shall file the rule as provided in Section 203 of this Act, and shall take such other steps as may be feasible to make the rule known to persons who will be affected by it. An emergency rule becomes effective immediately on filing, or on such date as is specified in the rule, but may not remain in effect longer than sixty days.

Section 203. *Filing and effective date of rule.*⁷⁸ Each agency shall file with the Secretary of State a certified copy of each rule adopted by it subsequent to the effective date of this Act. Each such rule shall become effective ten days after publication thereof, or publication of notice of adoption thereof, as provided in Section 205 of this Act, except:

- (1) Rules as to which a later date is required by statute or specified in the rule;
- (2) Rules served upon all persons subject thereto, which may be made effective ten days after such service;
- (3) Emergency rules adopted pursuant to Section 202 of this Act;
- (4) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs and signals, which may be made effective immediately on filing;
- (5) Rules designed solely to bring the language of an existing rule into conformity with a statute changed or adopted since the adoption of the rule, to bring the language of an existing rule into conformity with a controlling judicial decision, or to comply with a federal requirement, which may be made effective immediately on filing;
- (6) Rules governing hunting and fishing, which may be made effective immediately on filing.

The Secretary of State is authorized to prescribe rules governing the format, style, and arrangement of rules filed with him, and may refuse to accept for filing any rule that is not in substantial compliance with such rules. He shall keep a permanent register of rules filed with him, which shall be open to public inspection, and shall furnish certified copies of any rule on request of any person, on payment of cost.

Section 204. *Filing of existing rules.* On or before December 1, 1959, each agency shall file with the Secretary of State a certified copy of each rule adopted by it on or before the effective date of this Act and remaining in effect. Any rule not so filed shall be deemed to have been abrogated by the agency and shall be void and of no effect.

Section 205. *Publication of rules and notices.*—(a) The Secretary of State shall, as soon as practicable after the effective date of this Act, compile, index, and publish in bound form the text of all rules adopted by each agency and remaining in effect. This compilation shall be entitled the "Montana Administrative Code" (hereinafter referred to as the Code), shall be revised as often as necessary and at least once every five years, and shall be supplemented by a cumulative annual supplement in pocket part form.

(b) The Secretary of State shall publish a monthly bulletin, to be entitled the "Montana Administrative Register" (hereinafter referred to as the Register), in which he shall set forth the text of all rules filed during the preceding month, excluding rules in effect on the effective date of this Act. Each issue of the Register shall also contain a notice section in which shall be published the text of all notices of proposed rule-making filed during the preceding month, except that if an agency certifies that it has served a notice on all persons who will be subject

⁷⁷One of the proposed amendments to the Model Act provides that any extensions of emergency rules must be made in compliance with the procedures applicable to non-emergency rules. First Tentative Draft § 3(3).

⁷⁸The proposed revision of the Model Act contains a similar provision as to public inspection. First Tentative Draft § 4. In addition it contains a specific requirement that agencies make available for public inspection all rules "and all other written statements of policy or interpretations formulated, adopted, or used" by them in the discharge of their functions. First Tentative Draft § 2.

to a proposed rule, or that it has otherwise made publication of a notice pursuant to specific statutory requirements, the notice may be published in abbreviated form.

(c) The Secretary of State, with the approval of the adopting agency, may omit the following rules from the Code or the Register, or from both of them, if such rules are made available in printed or processed form on application to the adopting agency, and if the publication from which they are omitted contains a notice stating the general subject matter of the rules so omitted and stating where such rules may be inspected and how copies may be obtained:

(1) Rules relating to the use of public works, including streets and highways, when the substance of such rules is indicated to the public by means of signs or signals;

(2) Rules and standards established by the federal government or by technical societies or organizations of recognized national standing, incorporated by reference in an agency's rules without reproduction in full, where the rules or standards so incorporated are of limited public interest;

(3) Rules which an agency certifies it has served upon all persons subject thereto;

(4) Rules governing hunting and fishing.

Section 206. *Distribution of rules.* The Secretary of State shall distribute copies of each issue of the Code and Register without charge as follows:

Each agency filing rules under this Act, 1 copy

Attorney General, 1 copy

Clerk of each court of record of this State, 1 copy

Clerk of United States District Court for the District of Montana, 1 copy

Clerk of United States Court of Appeals for the Ninth Circuit, 1 copy

Each county attorney of this State, 1 copy

Each county clerk of this State, for use of county officials and the public, 1 copy

State Law Library, 1 copy

State Historical Society, 1 copy

Each unit of the University of Montana, 1 copy

Law Library of Montana State University, 1 copy

Secretary of Senate of this State, 1 copy

Chief Clerk of House of Representatives of this State, 1 copy

Library of Congress, 1 copy

State Law Library, for such exchanges as it may establish with libraries of other states, not to exceed 50 copies

Law Library of Montana State University, for such exchanges as it may establish with institutions of higher education in other states, not to exceed 50 copies. He shall make copies of or subscriptions to the Code and Register available to other persons at prices fixed to cover publication and mailing costs, and shall distribute copies of the notice section of the Register without charge to any person on request.

Any agency may arrange to obtain reprints of portions of the Code or Register containing its rules and distribute them at cost, or at less than cost if otherwise so authorized.

Section 207. *Petition for adoption of rules.*⁷⁹ Any interested person may petition an agency requesting the promulgation, amendment, or repeal of any rule. Within a reasonable time after the receipt of such a petition, an agency shall either deny the petition in writing, with a brief statement of its reasons for the denial, or proceed with the requested rule making. Each agency shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

Section 208. *Judicial notice of rules.*—The courts shall take judicial notice of any rule duly filed and published under the provisions of this Act.

Section 209. *Declaratory judgment on validity of rules.*—(a) The validity of any rule may be determined upon petition for a declaratory judgment thereon, when it appears that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner. The petition shall be addressed to the district court for the county in which the petitioner resides or has his principal place of business, or in which the agency maintains its principal office. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question.

⁷⁹One of the proposed changes in the Model Act would require action on such a petition within thirty days instead of "within a reasonable time." First Tentative Draft § 6.

(b)⁸⁰ The court shall declare the rule invalid if it finds that it violates constitutional provisions or exceeds the statutory authority of the agency or was adopted without compliance with statutory rule-making procedures.

(c) This section is in addition to and not in substitution for remedies otherwise available.

TITLE III — CONTESTED CASES

Section 301. *Contested cases; notice, hearing, record.*⁸¹—In any contested case all parties shall be afforded an opportunity for hearing after reasonable notice, which shall in no case be less than ten days. The notice shall state the time, place and issues involved, but if, by reason of the nature of the proceeding, the issues cannot be fully stated in advance of the hearing, or if subsequent amendment of the issues is necessary, they shall be fully stated as soon as practicable, and opportunity shall be afforded all parties to present oral and documentary evidence, briefs, and oral argument with respect thereto. Any agency officer authorized to hold or participate in the holding of hearings may administer oaths or affirmations and take depositions in contested cases. In each contested case the agency shall prepare an official record, which shall include the testimony and exhibits and all pleadings and other documents filed by parties or by the agency, but it shall not be necessary to transcribe shorthand notes or sound recordings unless requested for purposes of rehearing or court review. The agency shall furnish copies of the transcript of record to any party on payment of a uniform charge fixed by the agency or otherwise prescribed by law. Informal disposition may also be made of any contested case by stipulation, agreed settlement, consent order, or default. Each agency shall adopt appropriate rules of procedure for notice and hearing in contested cases.

Section 302. *Subpoenas.* (a) Agencies authorized by law to issue subpoenas, including subpoenas duces tecum, shall issue such subpoenas to any party to a contested case upon request and, to the extent required by agency rule, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Witness fees and mileage shall be the same as provided for witnesses in the district courts, and except as otherwise provided by law shall be paid by the party at whose request the subpoena was issued.

(b) Except where a different method of enforcement is prescribed by statute: In case of failure or refusal on the part of any person to comply with an agency subpoena, or in case of the refusal of any witness to testify as to any material matter regarding which he may be interrogated, any district court in this State, upon good cause shown by the application of the agency, may issue a warrant of attachment for such person and if after hearing the court finds his failure or refusal to be unjustified, compel him to comply with such subpoena, and to attend before the agency and produce any subpoenaed records, books, and documents for examination, and to give his testimony. Such court shall have the power to punish for contempt as in the case of disobedience to a like subpoena issued by the court, or for refusal to testify therein.

Section 303. *Rules of evidence; official notice.*—In contested cases:

(1)⁸² Agencies shall not be bound by common law or statutory rules of evidence. They may admit and give probative effect to evidence which possesses probative value commonly accepted by reasonably prudent men in the conduct of their affairs. They shall give effect to the rules of privilege recognized by law. They may exclude incompetent, irrelevant, immaterial, and unduly repetitious evidence.

⁸⁰A proposed amendment to the corresponding section of the Model Act would add to subsection (b), after the word "constitutional," the words "or statutory." First Tentative Draft § 7.

⁸¹The proposed revision of the Model State Administrative Procedure Act would add to the corresponding provision a requirement that the notice of hearing include a statement of the legal authority and jurisdiction under which the hearing is to be held and of the particular sections of the statutes and rules involved, and "an explicit statement in plain language of the matters of fact asserted." First Tentative Draft § 9. It would also spell out in greater detail the contents of the record, including among other documents a statement of matters officially noticed, offers of proof and rulings thereon, the report of the officer who presided at the hearing, and staff memoranda submitted to agency members. *Ibid.*

⁸²The proposed revision of the Model State Administrative Procedure Act would amend the corresponding provision so as to require, rather than merely permit, agencies to exclude irrelevant and immaterial evidence, and to require agencies to follow, so far as practicable, the rules of evidence applied in non-jury civil cases. However, when necessary to ascertain facts affecting the substantial rights of the parties, agencies would be permitted to receive and consider evidence not ad-

Hearsay evidence may be admitted for the purpose of supplementing or explaining any direct evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(2) All evidence, including records and documents in the possession of the agency of which it desires to avail itself, shall be offered and made a part of the record in the case, and no other factual information or evidence may be considered in the determination of the case. Documentary evidence may be received in the form of copies or excerpts, or by incorporation by reference.

(3)⁸⁸ Every party shall have the right of cross-examination of witnesses, which shall include 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, and shall have the right to submit rebuttal evidence.

(4) Agencies may take notice of judicially cognizable facts and in addition may take notice of general, technical, or scientific facts within their specialized knowledge. Parties shall be notified either before or during hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed. Agencies may utilize their experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to them.

Section 304. *Examination of evidence by agency.*⁸⁴ Whenever in a contested case a majority of the officials of the agency who are to render the final decision have not heard or read the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file ex-

missible under such rules, if possessing probative value commonly accepted by reasonably prudent men in the conduct of their affairs. First Tentative Draft § 10. The comment to the proposed section contains the following statement:

It is difficult to provide any single standard which is suitable for all agencies, in all circumstances. A review of State legislation in this area reveals wide departures from the standards of the present Model Act. The departures are in all directions—some, in the direction of permitting the agencies to receive any testimonial offer; others, in the direction of limiting them to common law rules of evidence. The proposed language represents a compromise that owes much to the suggestions of the Hoover Commission Task Force and to provisions in the California, Michigan, North Dakota, Virginia, and Wisconsin statutes.

⁸⁸The Model State Administrative Procedure Act as originally promulgated merely provided "the right of cross-examination of witnesses who testify," and the right to submit rebuttal evidence. 9C UNIFORM LAWS ANNOTATED § 9(3), at 182. The proposed revision of the Model Act provides as follows: "Every party shall have the right to conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence." First Tentative Draft § 10(3). The comment to the proposed section indicates it is intended to make the right of cross-examination more explicit, by language similar to that in the federal act.

⁸⁴The proposed revision of the Model State Administrative Procedure Act would change the corresponding provision by substituting "the officials" for the phrase "a majority of the officials," in both places where this language occurs. First Tentative Draft § 11. The comment to the proposed revision indicates that the words "a majority of" have apparently caused concern to several state legislatures; and that it is believed the suggested language will make sure that each agency member participating in a decision is personally informed as to the facts of the case. This change would facilitate the delegation of decision-making powers to a panel where it is not practicable for each member of the agency to participate actively in each case.

The proposed revision also requires the proposal for decision to contain "a statement of reasons" and to include a "determination of each issue of fact or law necessary to the proposed decision." First Tentative Draft § 11. The comment indicates this change is intended to sharpen and clarify the description of the proposed decision.

The proposed revision would also insert a statement of the fundamental principles concerning separation of functions, a subject as to which the Model Act has heretofore been silent:

"No member or employee of an agency participating in the decision of a contested case shall (1) consult any person on any issue of fact except

ceptions and present argument to a majority of the officials who are to render the decision, who shall personally consider the whole record or such portion thereof as may be cited by the parties. The parties may by written stipulation waive compliance with this section.

Section 305. *Decisions and orders.* Every decision and order rendered by an agency in a contested case shall be in writing or stated in the record and shall be served forthwith on each party or his attorney of record. *Except as otherwise specifically provided by statute,*⁶⁵ every agency shall index and make available to public inspection all decisions and orders in contested cases. If such decision or order is adverse to a party to the proceeding, it shall be accompanied by findings of fact and conclusions of law. The findings of fact shall consist of a concise statement of the conclusions upon each contested issue of fact. If a statute or rule affords a right of or right to request rehearing, reconsideration, or appeal within the agency, the decision or order shall also be accompanied by a notice of such right and of the time limits thereon.

Section 306. *Judicial review of contested cases.*—(a) *Right of review.*⁶⁶ Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, is entitled to judicial review thereof under this Act, and no other statutory, equitable, or common law mode of review shall be available herefor except to the extent that the decision may be reviewed in civil or criminal proceedings for the enforcement thereof. This section shall not apply to decisions as to which statutes preclude judicial review, to decisions of the Industrial Accident Board, the Oil and Gas Conservation Commission, or the Board of Railroad Commissioners, or to decisions of the State Board of Equalization relating to taxes or license fees.

Where a statute or rule requires or permits an application for a hearing or other method of review by an agency, and an application for such rehearing or review is made, no decision of such agency shall be final as to the party applying therefor until such rehearing or review is had or denied. If under the terms of a statute governing procedure before an agency a decision has become final because of failure to file any document in the nature of objections, protests, petition for hearing or application for agency review within the time allowed by such statute, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the agency over the person or subject matter.

A party who proceeded before an agency under the terms of a particular statute shall not be precluded from questioning the validity of that statute on judicial review, but such party may not raise any other question not raised before the agency unless allowed by the court upon due cause shown.

upon notice and opportunity for all parties to participate, save to the extent required for the disposition of *ex parte* matters authorized by law; (2) be responsible to or subject to the supervision or direction of any other agency member or employee engaged in the performance of investigatory or prosecuting functions for the agency in such case." First Tentative Draft § 13.

There is no corresponding provision in the proposed Montana legislation.

⁶⁵The italicized language was not contained in S.B. 179. The Montana Commissioners recommend that it be inserted in the bill re-introduced in 1961 to cover such matters as corporation license tax and income tax cases, as to which existing statutes prohibit public disclosure.

The proposed revision of the Model State Administrative Procedure Act would amend this section by requiring that findings of fact be stated separately from conclusions of law, and by providing that "findings of ultimate facts shall be accompanied by a concise and explicit statement of the basic facts relied on in support thereof." First Tentative Draft § 12. The comment indicates that the general intent is to require the degree of explicitness imposed by such decisions as *Saginaw Broadcasting Co. v. Federal Communications Commission*, 96 F.2d 554 (D.C. Cir.), *cert. denied* 305 U.S. 613 (1938).

The proposed revision of the Model Act would also add a new provision requiring the agency, if any party to the proceeding has submitted proposed findings of fact, to incorporate in its decision a ruling on each such proposed finding. First Tentative Draft § 12.

This provision reflects a similar one in the federal act.

⁶⁶The proposed revision of the Model Act would provide a right of judicial review of "a preliminary ruling of such nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief," as well as of a preliminary order. First Tentative Draft § 14(1).

(b) *Institution of review proceedings.* Proceedings for review shall be instituted by filing a petition in the district court within thirty days after the service of the final decision of the agency. Except where statutes otherwise provide, the petition shall be filed in the district court for the county where the petitioner resides or has his principal place of business, or where the agency maintains its principal office. The petition shall include a concise statement of the facts upon which jurisdiction and venue are based, facts showing that the petitioner is aggrieved, and the ground or grounds specified in subsection (g) of this section upon which petitioner contends he is entitled to relief. The petition shall demand the relief to which petitioner believes he is entitled, which demand may be in the alternative. Copies of the petition shall be served upon the agency and all other parties of record, and summons shall issue as in other civil actions. The court, in its discretion, may require petitioner to execute a bond with sufficient sureties, in such amount and upon such conditions as the court may direct, or to file a deposit in lieu thereof. The court, in its discretion, may permit other interested persons to intervene.

(c) *Stay.* The filing of the petition shall not stay enforcement of the agency decision; but the agency may do so, or the reviewing court may order a stay upon such terms as it deems proper.

(d) *Record on review.* Within thirty days after service of the petition, or within such further time as the court may allow, the agency shall transmit to the reviewing court the original or a certified copy of the record of the proceeding under review. The record shall consist of (1) the entire official record as specified in Section 301 of this Act, or (2) such portions thereof as the agency and the parties may stipulate, or (3) a statement of the case agreed to by the agency and the parties. The court may require or permit subsequent corrections or additions to the record when deemed desirable. The expense of preparing and filing the record shall be taxed as a part of the costs and charged against the losing party, except where statutes otherwise specifically provide and except that any party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional expense caused by such refusal.

(e) *Additional evidence.* If, before the date set for hearing, application is made to the court for leave to present additional evidence to the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings and decision by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) *Mode of review.* The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony thereon may be taken in the court. The court shall, upon request, hear oral argument and receive written briefs.

(g) *Scope of review.*⁸⁷ The court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) in violation of constitutional provisions; or
- (2) in excess of the statutory authority or jurisdiction of the agency; or
- (3) made upon unlawful procedure; or
- (4) affected by other error of law; or
- (5) unsupported by competent, material, and substantial evidence in view of the entire record as submitted; or
- (6) arbitrary or capricious or in abuse of discretion.

(h) *Unreasonable delay.* Unreasonable delay on the part of any agency in deciding a contested case shall be grounds for an order of the court compelling action by the agency or removing the case to the court for decision.

⁸⁷The proposed revision of the Model Act would change the corresponding provision in three respects. Subdivision (1) would be changed to read: "in violation of constitutional or statutory provisions." Subdivision (5) would be revised, following the recommendation of the Hoover Commission Task Force, to substitute for the substantial evidence rule the clearly erroneous rule: "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." Subdivision (6) would be amended to read "arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." First Tentative Draft

Section 307. *Appeals.* An aggrieved party may secure a review of any final judgment of the district court under this Act by appeal to the Supreme Court within sixty days after entry of the judgment. Such appeal shall be taken in the manner provided by law for appeals from the district court in other civil cases. If appeal is taken from a judgment of the district court affirming an agency decision, the agency decision shall not be stayed except upon the order of the Supreme Court, except that, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for twenty days from the filing of the notice. If appeal is taken from a judgment of the district court reversing or modifying an agency decision, the agency decision shall be stayed pending final determination of the appeal unless the Supreme Court otherwise orders.

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