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ADMINISTRATIVE LAW

Randall A. Snyder

INTRODUCTION

Only a few cases each year are appealed to the Montana Supreme Court in administrative law and procedure, but the number of such cases increases each year as administrative regulations and hearings expand in frequency and complexity. In 1979 seven significant cases were decided, the most important in the area of major facility siting. This survey reviews and summarizes the holdings of these cases in three subject areas: (1) procedural requirements within administrative agencies, (2) scope of judicial review of agency decisions, and (3) education.

I. DUE PROCESS WITHIN AGENCY ADJUDICATIONS

A. *Notice and Hearing*

The Montana Administrative Procedure Act (MAPA)[1] requires written notice to interested persons before an agency can issue a ruling.[2] Similarly, out-of-state automobile franchisors must give the State Department of Business Regulation thirty days notice of intent to terminate a franchise with a Montana dealer.[3] The department, in turn, must notify the franchisee, who then has fifteen days to object and demand a hearing.[4] The supreme court ruled in *State ex rel. Billings Chrysler-Plymouth v. Department of Business Regulation* that absent notice by the department to the franchisee, (1) no termination of the franchise agreement can be made and (2) the fifteen day objection period is tolled until such notice is actually received.[5]

MAPA also provides for notice and hearing in licensing proceedings, a special kind of "contested case."[6] Not every party, however, is entitled to a hearing. In 1975 the Anaconda Company obtained a mining activities permit from the Bureau of State Lands authorizing waste dumping. Three months later, several Butte citi-

1. MONTANA CODE ANNOTATED [hereinafter cited as MCA] §§ 2-4-101 through -711 (1979).
2. MCA § 2-4-302(1) (1979).
3. MCA § 61-4-205(1) (1979).
4. MCA § 61-4-206(1) (1979).
5. __ Mont. __, __ P.2d __, 36 St. Rptr. 151, 155 (1979) (actual knowledge by franchisee insufficient). The court reasoned that this followed the legislative intent of protecting Montana auto dealers. *Id.* Justice Harrison, joined by Chief Justice Haswell, dissented on the grounds that actual knowledge was sufficient. *Id.* at __, __ P.2d __, 36 St. Rptr. at 157.
6. MCA §§ 2-4-601(1), -631(1) (1979). *See also* MCA § 2-4-102(4) (1979).

zens sued to enjoin the dumping, alleging they were denied their right of notice and opportunity to be heard under Montana's Public Participation Statute[7] and MAPA.[8] The district court granted an injunction and hearing. The supreme court, however, reversed both orders in *Kadillak v. Anaconda Co.*,[9] holding that public objections must be made within thirty days of the agency's decision as required by statute.[10] The court also ruled that because no hearing was otherwise "*required by law,*"[11] the licensing was not a contested case under MAPA. Thus, neither the participation statute nor MAPA afforded the public an opportunity for notice and hearing.[12]

The right to a hearing was also denied to the State Tax Appeal Board (STAB) after the Board of Personnel Appeals ordered STAB to reclassify the wage scale of one of its employees.[13] The employee was granted a reclassification under ordinary grievance procedures.[14] STAB demanded the right to object in a formal hearing before the Board of Personnel Appeals. In *State Tax Appeal Board v. Board of Personnel Appeals* the supreme court denied STAB's demand,[15] offering two reasons. First, if a hearing were granted the Department of Administration, not STAB, would represent the state's interest.[16] Thus, STAB lacked standing. Second, STAB was neither admitted as a party, nor entitled to a hearing as a matter of right under MAPA.[17] Again, the court concluded, STAB was not a proper party.[18]

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7. MCA § 2-3-103(1) (1979) provides:

> Each agency shall develop procedures for permitting and encouraging the public to participate in agency decisions that are of significant interest to the public. The procedures shall assure adequate notice and assist public participation before a final agency action is taken that is of significant interest to the public.

See also MCA § 2-3-111 (1979).

8. MCA §§ 2-4-102(4), -601 (1979).

9. — Mont. —, 602 P.2d 147 (1979).

10. *Id.* at —, 602 P.2d at 155, *citing* MCA § 2-3-114 (1979).

11. *Id.* at —, 602 P.2d at 155 (court's emphasis); MCA § 2-4-102(4) (1979). The license was issued pursuant to the Hard Rock Mining Act, MCA §§ 82-4-337 *et seq.* (1979), which, at the time of application did not require notice and hearing. *See* REVISED CODES OF MONTANA (1947) § 82-4228. The act was amended by 1977 Mont. Laws ch. 427 to require notice and opportunity to be heard. MCA § 82-4-337(1)(b)(ii) (1979).

12. Kadillak, — Mont. —, 602 P.2d at 155.

13. State Tax Appeal Bd. v. Montana Bd. of Personnel Appeals, — Mont. —, 593 P.2d 747, 749 (1979), *citing* MCA § 2-18-1012 (1979).

14. Administrative Rules of Montana [hereinafter cited as A.R.M.] § 24-26.403 (1976); MCA §§ 2-18-1012 through -1013 (1979).

15. — Mont. —, 593 P.2d at 750.

16. Specifically, the Classification Bureau, Personnel Division, Department of Administration. A.R.M. § 2-2.1 - 0100(2)(i)(1) (1976).

17. State Tax Appeal Bd., — Mont. —, 593 P.2d at 750, *citing* MCA § 2-4-102 (1979).

18. *Id.*

In each of these cases the court applied a literal interpretation of MAPA and other relevant statutes. There is no general right to notice and hearing unless expressly required by statute. If statutes expressly require notice, time limitations for objections will not expire until formal notice is actually received. State agencies should take particular note of *State Tax Appeal Board,* as it now appears that no agency has standing to challenge wage reclassifications of its employees.

B. *Right to Cross-Examination*

MAPA expressly authorizes cross-examination of witnesses in administrative hearings.[19] In its first interpretation of this statutory right, the Montana Supreme Court held that the right to cross-examination in administrative hearings is not absolute.[20] A unique situation arose during certification hearings for Colstrip Units Three and Four under the Major Facilities Siting Act (Siting Act).[21] The utilities[22] applied for construction permits in 1973. After numerous delays, hearings commenced in 1975 before the Board of Natural Resources and Conservation (BNR). In the second month of hearings only four witnesses had testified because all four opponents[23] cross-examined each witness by separate counsel. Because of this delay and the fact that all of the opponents substantially agreed on strategy,[24] the hearings examiner limited testimony and cross-examination. First, he ruled that all testimony would be re-

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19. MCA § 2-4-612(5) (1979).

20. Northern Plains Resource Council v. Board of Natural Resources and Conservation, __ Mont. __, 594 P.2d 297, 318 (1979).

21. MCA §§ 75-20-101 through -1105 (1979).

22. Montana Power Co., Puget Sound, Power and Light, Portland General Electric Co., Washington Water Power Co., and Pacific Power and Light Co. (hereinafter the "utilities").

23. Northern Plains Resource Council, Northern Cheyenne Tribe, Inc., Board of Health and Environmental Sciences, and Board of Natural Resources and Conservation (hereinafter the "opponents").

24. The hearings examiner observed:

> [T]hroughout these proceedings . . . all the attorneys from the opponents' side have been in and out of the conference room, sharing exhibits, passing notes, conferring between examinations, and if there's a question one forgot to ask, he confers and the next guy asks it, and I've never heard of a proceeding [sic] where you take the side of an opponent to an application and you cross-examine the other opponent's witnesses.

Northern Plains, __ Mont. __, 594 P.2d at 313. The court replied:

> [W]hen it came time to submit . . . proposed findings of fact and conclusions of law . . . the four main opponents submitted joint pleadings — not separate ones, each pleading being signed by the four separate counsel representing each main opponent.

Id. at __, 594 P.2d at 312-13.

ceived in writing and all party-opponents would have only six hours to cross-examine each witness. Second, he ruled that no party-opponent would be allowed to cross-examine the witnesses of any other party-opponent absent an affirmative showing of prejudice. With one exception,[25] none of the opponents specifically requested additional time or permission to cross-examine another's witnesses. On appeal to the supreme court in *Northern Plains Resource Council v. Board of Natural Resources and Conservation,*[26] the hearings examiner's rulings were challenged as a denial of the statutory and constitutional right of cross-examination.

In that case, the court upheld each of the examiner's rulings[27] for the following reasons. First, practical necessity dictated the rulings: "We find the hearings examiner was literally forced to institute a ruling restricting the examination of witnesses, and this he did with fairness and dispatch."[28] Next, the court looked to MAPA in conjunction with provisions of the Siting Act, noting that, under OMAPA, a "party shall have the right to conduct cross-examinations *required for a full and true disclosure of the facts,*"[29] while under the Siting Act, "the [B]oard [of Natural Resources] may make rules designed to exclude repetitive, redundant, or irrelevant testimony."[30] This reading suggests reasonable limitations on cross-examination.

Third, the supreme court reviewed the nature of cross-examination, citing the statutory definition:

> [Cross-examination is] the examination of the same witness, upon the same matter, *by the adverse party.*[31] It is obvious that the term 'adverse party' was not included in the statute for any other reason but to narrow the scope of cross-examination to the adverse party. The Montana Supreme Court . . . in enunciating the general rule that cross-examination is a matter of right, limits such cross-examination to witnesses of the opposing or adverse

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25. Attorneys for Northern Plains Resource Council were allowed to cross-examine Board of Health witnesses as to water-related aspects of the case. The Board of Health indicated that the project would meet all applicable state and federal water pollution standards. With this position, Northern Plains Resource Council did not agree. Northern Plains, __ Mont. __, 594 P.2d at 313.

26. __ Mont. __, 594 P.2d 297.

27. *Id.* at __, 594 P.2d at 318.

28. *Id.* This is standard cost-benefit analysis, where the advantages of a trial-type procedure are outweighed by the disadvantages. 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 12:1 (2d ed. 1978).

29. MCA § 2-4-612(5) (1979); Northern Plains, __ Mont. __, 594 P.2d at 315 (court's emphasis).

30. MCA § 75-20-222(3) (1979); Northern Plains, __ Mont. __, 594 P.2d at 314.

31. MCA § 26-1-101(1) (1979).

party.[32]

Finally, the court looked to federal case law[33] for authority that statutory rights of cross-examination are not unlimited "particularly in a proceeding which has become so gargantuan . . . ."[34] The Montana court, however, cautiously concluded:

> [T]he procedures followed in the hearings should not be used as a model for future hearings before the various state boards and agencies. We suggest . . . that prior to any hearing, a state board or agency should issue an order setting the procedural guidelines to be followed rather than delegating the entire responsibility to the hearings examiner.[35]

This ruling will affect subsequent hearings under the Siting Act. The decision provides entirely new authority for Montana agencies to place reasonable limitations on testimony. Such practical limitations will likely occur more frequently as administrative hearings become longer. *Northern Plains,* then, represents the emerging rule of law as to limitations.[36]

II. Judicial Review of Agency Decisions

A. *Compliance with Statutes*

MAPA provides that an agency must act consistently with its statutory authorization.[37] An agency cannot promulgate regulations which exceed or are inconsistent with legislative guidelines. While the Montana Supreme Court has always adhered to this rule[38] before 1979, it had never struck down administrative regulations as excessive or inconsistent. In *Bell v. Department of Licensing* the court voided a Montana Board of Barbers regulation requiring instructors to take a competency examination.[39] MCA §§ 37-30-404(1) and 402 (1979) only require ten years experience and a char-

32. Northern Plains, __ Mont. __, 594 P.2d at 315 (court's emphasis)(citations omitted).

33. National Nutritional Foods Ass'n v. Food & Drug Admin., 504 F.2d 761 (2d Cir. 1974), *cert. denied* 420 U.S. 946 (1975) (rule-making proceedings). *Accord,* 1 Davis, Administrative Law Treatise § 6:20 (2d ed. 1978).

34. Northern Plains, __ Mont. __, 594 P.2d at 316.

35. *Id.* at __, 594 P.2d at 318.

36. *See also* National Nutritional Foods, Inc., 504 F.2d 761; American Public Gas Ass'n v. Federal Power Comm., 498 F.2d 718 (D.C. Cir. 1974).

37. *See* MCA § 2-4-702(1) (1979).

38. State *ex rel.* Swarte v. Casne, __ Mont. __, 564 P.2d 983 (1977). *See,* prior to MAPA , Milk Control Bd. v. Community Creamery Co., 139 Mont. 523, 366 P.2d 151 (1961); State *ex rel.* Anderson v. State Bd. of Equalization, 133 Mont. 8, 319 P.2d 221 (1958).

39. __ Mont. __, 594 P.2d 331, 332 (1979). *See* A.R.M. § 40-3.18(6) - S18030(2)(e) (1976).

acter examination for a barber to qualify as an instructor. The court struck down the regulation as "engrafting additional requirements not envisioned by the legislature."[40] The decision should serve as a warning to other professional licensing agencies that administrative requirements not found in the statutes may be void.

B. Contested Cases, Final Orders, and Exhaustion

MAPA[41] and *United States National Bank v. Department of Revenue*[42] both require an agency to issue a final order before the administrative action is subject to judicial review. That is, a litigant must exhaust administrative remedies before proceeding to court.[43] Montana case law, however, has developed two exceptions to this rule, both of which apply to proceedings before the State Tax Appeal Board. There, hearings are subject to judicial review before a final order where either (1) the petitioner was not a party to a prior adverse agency ruling and had no notice of it[44] or (2) the "principle of appraisal" poses purely a legal or constitutional issue.[45] The supreme court applied both of these exceptions in *Keller v. Department of Revenue,* where, prior to a final agency ruling, the court remanded the proceeding to district court for a full hearing on the merits.[46] *Keller* appears to expand the exceptions to the exhaustion rule before STAB. Here, the petitioners were not only aware of the prior adverse ruling,[47] but they had sent representa-

40. Bell, __ Mont. __, 594 P.2d at 333. Title 37 of the MONTANA CODE ANNOTATED lists the licensing requirements for all professionals practicing in Montana. Virtually every chapter provides for a knowledge and proficiency examination to be administered by the appropriate agency. An additional examination for *instructors,* however, is not uniformly required. MCA §§ 37-30-100 through -501 (1979) (licensing of barbers) (emphasis added), for example, makes no provision for a competence exam of instructors. Similarly, a barber school must obtain a permit to operate, but it need only have a "person in charge with ten years experience." MCA § 37-30-404(1) (1979). Other professionals are more stringently regulated. *Compare* chapter 31, where teachers of cosmotology must pass a competence examination to be licensed, and where a cosmotology school must have a licensed teacher in supervision of no more than 25 students at all times. MCA §§ 37-31-305, -311 (1979). As no such requirements exist for barbers, the regulations examined in *Bell* are clearly invalid.

41. MCA § 2-4-702(1) (1979).

42. __ Mont. __, 573 P.2d 188 (1977).

43. *See generally* State *ex rel.* Jones v. Giles, 168 Mont. 130, 541 P.2d 355 (1975).

44. State *ex rel.* Sletten Constr. Co. v. Great Falls, 163 Mont. 130, 541 P.2d 1149 (1973).

45. Larson v. State, 163 Mont. 449, 534 P.2d 854 (1975). A "fundamentally wrong principle of appraisal" is a Department of Revenue or Tax Appeal Board decision which is not an assessment, but is labeled by the court as an "interpretation of law which must be made by the judiciary." Keller v. Department of Revenue, __ Mont. __, 597 P.2d 736, 739 (1979).

46. __ Mont. __, 597 P.2d at 740.

47. The city of Great Falls devised a plan to implement the Montana Economic and Land Development Act, REVISED CODES OF MONTANA (1947) §§ 84-7505 through -7520. This act was repealed by 1977 Mont. Laws, ch. 582 § 20. Petitioners in *Keller* relied on the Great

tives to testify at the original hearing. The court held, nonetheless, that "party status" is not conferred on all those appearing before STAB to testify, nor did petitioners become parties merely by requesting reconsideration of the prior ruling once it was made.[48] Finally, the court repeated its exception that STAB cannot review appraisals requiring legal and constitutional interpretation.[49]

The final orders and exhaustion rule was also considered in *Northern Plains.*[50] Under the Siting Act, two administrative agencies must independently certify proposed facilities. The Board of Natural Resources has the major responsibility of issuing certification upon a proper showing of environmental compatibility and public need.[51] Additionally, the Board of Health and Environmental Sciences (Board of Health) has the *exclusive* authority for determining compatibility with state and federal pollution standards.[52] BNR must rely on the Board of Health's order to complete its own certification. Since the Board of Health's determination is only an intermediate step in the overall certification, a question raised in *Northern Plains* is whether the Board of Health's decision is reviewable in court immediately.

In *Northern Plains* the court held yes—it is final for all purposes, including judicial review.[53] Further, since MAPA requires all final orders to be challenged within thirty days,[54] Colstrip Three and Four opponents were precluded from both a district court challenge and supreme court appeal once BNR issued *its* final order.[55] The Montana court reasoned from § 75-20-301(2)(h) of the Siting Act,[56] that because the Board of Health's decision was conclusive as to substantive determinations of air and water quality, it was

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Falls plan before the State Department of Revenue notified the city or petitioners that no one would be subject to favorable tax treatment under the act. Petitioners first sought relief before the Department of Revenue and then in district court, which ordered them to exhaust their administrative remedies before the State Tax Appeal Board.

48. Keller, — Mont. —, 597 P.2d at 739.

49. *Id.* at —, 597 P.2d at 740.

50. *See* note 59 and accompanying discussion *infra.*

51. *See* MCA § 75-20-201 (1979).

52. MCA § 75-20-301(2)(h) (1979) provides for certification when the "duly authorized agencies have certified that the proposed facility will not violate state and federally established standards and implementation plans. . . ." The Board of Health was the only agency to review Colstrip Three and Four under state and federal pollution standards. The Montana court held that "the Board of Health is the duly authorized state air and water quality agency in this case." Northern Plains, — Mont. —, 594 P.2d at 306.

53. Northern Plains, — Mont. —, 594 P.2d at 306-07.

54. MCA § 2-4-702(2)(a) (1979).

55. Northern Plains, — Mont. —, 594 P.2d at 306 (emphasis added). The Board of Health order was issued on November 21, 1975, and the BNR's certification was given on July 22, 1976 long after the thirty-day statutory period.

56. *See* note 52 *supra.*

"[a]ccordingly . . . not a preliminary or interlocutory order. It was final for all purposes."[57] Justice Harrison, writing for the majority, also argued that the *nature* rather than the chronology of the order is controlling. Citing *Fidelity Television, Inc. v. Federal Communications Commission,*[58] the court reasoned that an order " 'is final for purposes of judicial review when it impose[s] an obligation, den[ies] a right, or fix[es] some legal obligation as a consummation of the administrative process.' "[59] Accordingly, the Montana court ruled:

> We find that the Board of Health's certification was not conditioned upon anything yet to be resolved by the later order of the Board of Natural Resources. The remaining administrative procedures were not concerned with air and water quality certification. . . . The Board of Health's order was final and conclusive. . . . [It was] the consummation of the administrative process within that particular agency.[60]

Northern Plains adopts the general rule regarding final orders.[61] Notwithstanding judicial review of the administrative process, a decision by an agency *within* the process is final for both procedural and substantive purposes. Since this rule is tied to the particular language of the Siting Act,[62] it may be distinguishable in other situations. Subsequent litigants under the Siting Act should be watchful of intermediate agency rulings so as not to lose their rights of challenge and appeal.[63]

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57. Northern Plains, — Mont. —, 594 P.2d at 306.

58. 502 F.2d 443 (D.C. Cir. 1974).

59. *Id.* at 448; Northern Plains, — Mont. —, 594 P.2d at 307. Federal case law regarding finality of intermediate administrative orders deals exclusively with orders within a single agency. Thus, the issue is subdelegation of authority, and reviewability of a prior order within the agency before a final decision is issued. *See* 1 DAVIS, ADMINISTRATIVE LAW TREATISE §§ 3:16, 17, 18 (2d ed. 1978). Neither Fidelity, 502 F.2d 443, nor Goodman v. Public Service Comm., 467 F.2d 375 (D.C. Cir. 1972), provide specific authority for the position that an intermediate order *from a separate agency* is final for judicial review. From the language of these cases cited in *Northern Plains* the decision appears technically warranted, *see* quotation accompanying note 62 *infra,* however, the ruling contravenes the policy of exhaustion. *See* note 63 *infra.*

60. Northern Plains, — Mont. —, 594 P.2d at 307.

61. *See* Fidelity Television, 502 F.2d 443.

62. MCA § 75-20-301(2)(h) (1979). *See also* note 52 *supra.*

63. The holding on final orders appeared to ignore the rationale for exhausting administrative remedies. The purpose of exhaustion is to preclude the judiciary from unduly thwarting or interrupting the administrative process. *See generally* Vita Rich Dairy Inc. v. Department of Business Regulation, 170 Mont. 341, 553 P.2d 980 (1976). The Montana court cites *Goodman,* yet in that case "[t]here was no possible disruption of the administrative process, there was nothing else for the commission to do." 502 F.2d at 443. The hearings examiner and the supreme court noted the length of the proceedings and approved limitations on testimony, *see* note 28 and accompanying discussion *supra,* yet the court ruled the intermediate Board of Health order final and subject to judicial review. This can only dis-

C. *Sufficiency of Fact-Findings*

In issuing any ruling in a quasi-judicial capacity, administrative agencies must submit findings of fact and conclusions of law.[64] Typically, a reviewing court will give deference to an agency's findings and conclusions,[65] overturning an administrative decision only when it violates statutory or constitutional provisions, or is not supported by substantial evidence.[66]

Again in *Northern Plains* the Montana Supreme Court offered its first interpretation of the provisions of the Siting Act requiring the Board of Natural Resources to list a multitude of fact findings.[67] Three factual issues were appealed to the court. On the first, the supreme court deferred to BNR's technical expertise, and upheld the agency's decision on approving a method of sulfur dioxide removal.[68] On the second two issues, however, the court scrutinized the findings and supporting evidence in light of the Siting Act's language, "minimum adverse environmental impact."[69] Regarding choice of coal, method of generation, and location of transmission line corridor the supreme court remanded the case for more particular findings,[70] insisting upon

> statutory findings on conclusions that the facilities will meet the 'minimum adverse environmental impact' test of the siting act . . . accompanied by a precise and explicit statement of the underlying findings . . . .[71]

The court further held, in light of alternative transmission line corridors, that

> [t]he Board of Natural Resources made no findings, for example,

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rupt and delay the process by imposing an intermediate district court challenge and supreme court appeal, adding at least two years to the certification process. Under identical statutes, *see* HAW. REV. STAT. 91-14(a) (1976), the Hawaii Supreme Court held, "[A] final order means an order ending the proceedings, leaving nothing further to be accomplished." Gealon v. Keala, __ Haw. __, 591 P.2d 921, 926 (1979). Finally, the court overlooked the conditional nature of the Board of Health's order. *See* Northern Plains, __ Mont. __, 594 P.2d at 301. *Contrast* National Automatic Laundry Council v. Schultz, 443 F.2d 689 (D.C. Cir. 1971): "This presumption [of finality] could be negatived if the agency [identified its] actions as tentative and subject to reconsideration." *Id.* at 701.

64. MCA § 2-4-623(1), (2) (1979).

65. *See* Montana Power Co. v. Environmental Protection Agency, 429 F. Supp. 683 (D. Mont. 1977).

66. MCA § 2-4-704 (1979); Western Bank v. Banking Bd., __ Mont. __, 570 P.2d 1115 (1977); Vita-Rich Dairy v. Department of Business Regulation, 170 Mont. 341, 533 P.2d 980 (1976).

67. *See* MCA §§ 75-20-301, -303, -503 (1979).

68. Northern Plains, __ Mont. __, 594 P.2d at 308.

69. MCA § 75-20-301(2)(c) (1979).

70. Northern Plains, __ Mont. __, 594 P.2d at 318.

71. *Id.* at __, 594 P.2d at 310.

as to whether the economic detriment, if any, in terms of depreciated land values and effect on business and commerce, caused by the taking of 430 miles of double right-of-way across the state of Montana versus the utilization of existing railroad right-of-way satisfied the minimum impact test.[72]

Having remanded on these particular fact-issues, the supreme court nonetheless affirmed the general conclusion by BNR that the facilities would meet the minimum adverse impact test.[73]

D. Legislative Changes in Facility Siting

The 1979 Montana Legislature amended the Siting Act by shortening time requirements and deadlines for proceedings,[74] adding new time requirements,[75] and streamlining adjudication procedures.[76] The most significant new time requirement is the hearing examiner's duty to insure that the "time of the proceedings, from the date the [D]epartment [of Natural Resources] report is filed . . . until the recommended report and order of the hearing examiner is filed . . . does not exceed 9 calendar months . . . ."[77] Subsequent hearings under the Siting Act, including the hearing examiner's final conclusion, must all take place within nine months.[78]

A second statutory change codified the ruling in *Northern Plains* that the Department of Health and Environmental Sciences

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72. *Id.* at __, 594 P.2d at 311.

73. *Id.* at __, 594 P.2d at 312. The final appeal and affirmation of the Colstrip case is Board of Natural Resources and Conservation v. Northern Plains Resource Council, __ Mont. __, 601 P.2d 27 (1979). *See also* Northern Plains Resource Council v. Board of Health and Environmental Sciences, __ Mont. __, 603 P.2d 684 (1979).

74. The Department of Natural Resources now has twenty-two months in which to file its recommendation with BNR for certain facilities under MCA § 75-20-216(4) (1979), reduced from two years under MCA § 75-20-216 (1) (1978). Following the hearing before the Board of Natural Resources, BNR now has sixty days to make its final order under MCA § 75-20-301(1) (1979), reduced from ninety days under MCA 75-20-301(1) (1978).

75. The Department of Natural Resources must now approve an application within ninety days under MCA § 75-20-216(1) (1979), and the Department and Board of Health each have one year and six months respectively to file their individual recommendations and orders under MCA § 75-20-216(3) (1979).

76. For example, the Siting Act provides for joint hearings before a single examiner for Board of Health and Board of Natural Resources hearings. MCA §§ 75-20-216(2), -220(1) (1979). *See also* MCA § 75-20-220 (1979) (prehearing conference identifying witnesses, documents, issues, and other orders).

77. MCA § 75-20-220(10) (1979).

78. The Department of Natural Resources must schedule hearings to commence within one hundred twenty days of their recommendation. MCA § 75-20-218(1) (1979). The hearing examiner must file his recommendation to BNR within sixty days of the last day of hearings. MCA § 75-20-220(9) (1979). Curiously, both of these time restrictions fall within the nine-month period in MCA § 75-20-220(10) (1979), leaving only two months for hearings. Obviously, extensions will have to be approved by BNR to complete the hearing, the nine-month deadline appears overly restrictive.

and Board of Health are responsible for air and water quality ce rtification.[79] The statutory effect as to the finality of the Board of Health order was unchanged. Thus, the board's decision remains subject to immediate judicial review before the certification process is complete.[80]

Finally, the legislature in apparent anticipation of the *Northern Plains* rulings limiting cross-examination, gave the hearing examiner authority to waive "one or more rules of evidence . . . upon a showing of good cause by one or more of the parties to the hearing."[81] In *Northern Plains,* however, the hearing examiner alone could impose the limitations.[82] The statute now appears to require a party to the proceeding to initiate evidentiary limitations.

The 1979 amendments, while clearly intended to expedite certification, will not significantly shorten the process. The three years taken for Colstrip Three and Four certification did not greatly exceed the administrative time limitations subsequently imposed by the 1979 legislature.[83] Judicial review alone consumed an additional three years. Moreover, the 1979 amendments did not change the result of *Northern Plains* that *two* judicial challenges and appeals must follow administrative certification.[84] It is unlikely that any subsequent certifications will be completed in less than six years, the total time exhausted in processing Colstrip Three and Four.

III. EDUCATION

School boards in Montana function under the direction of the State Superintendent of Public Instruction, an administrative

79. MCA §§ 75-20-216(3), -301(2)(h) (1979).

80. Northern Plains, — Mont. —, 594 P.2d at 306-07. *See also* MCA § 75-20-216(3) (1979): "A decision by the department of health or board of health is subject to appellate review pursuant to the air and water quality statutes administered by the department of health and board of health."

81. MCA § 75-20-222(4) (1979).

82. — Mont. —, 594 P.2d at 313; notes 23-29 and accompanying discussion *supra.*

83. The Siting Act requires the Department of Natural Resources to file its recommendation within twenty-two months under MCA § 75-20-216(4) (1979) compared to twenty months consumed by the department on Colstrip Three and Four. Northern Plains, — Mont. —, 594 P.2d at 300. The Siting Act contemplates nine months from the department's recommendation to the date of the hearing examiner's recommendation under MCA § 75-20-220(10), while fourteen months was spent for the same period for Colstrip Three and Four, a large portion of which was procedural delay. Northern Plains, — Mont. —, 594 P.2d at 300-02. Finally, MCA § 75-20-220(9) (1979) requires the hearing examiner to file with BNR his recommendation within sixty days of the last day of hearings; BNR then has sixty days to prepare its final order. MCA § 75-20-301(1) (1979). Yet these orders required the same amount of time for Colstrip Three and Four—approximately one hundred and twenty days. Northern Plains, — Mont. —, 594 P.2d at 300-02.

84. *But see* MCA § 75-20-410 (1979) (pendency of judicial appeal does not stay operation of orders of Department of Natural Resources).

agency. In 1979 the supreme court decided an appeal from the superintendent's office following a district court challenge. In *Matter of "A" Family* the Montana court held that the state was required to pay for psychiatric counseling for "A", a severely emotionally disturbed child.[85] The case overrules *Doe v. Colburg*[86] and supersedes Montana regulations which prohibit state-funded psychotherapy for special education students.[87] The court first reasoned that federal law mandated such state funding, relying on the Federal Education of the Handicapped Act[88] and the federal definition of "education and related services" which includes psychological services.[89] The court next argued that while Montana regulations exclude state-funded psychotherapy, state regulations recognize that federal regulations are supreme if the two conflict.[90] Thus, the supreme court ruled that federal regulations controlled and the state was required to pay for "A's" services.[91] On a separate issue the court held that the superintendent was not a party to an administrative hearing at the state level and was bound to carry out the order of the superintendent's hearing officer.[92]

Judge Bennett, joined by Justice Harrison, dissented, contending that neither the federal act nor the federal regulations required Montana to pay for "A's" treatment.[93] Citing a portion of the federal act, he argued that Montana could make its own individual standards for special education at state expense, and that *Colburg* and Montana regulations expressly excluded psychiatric counseling at state expense.[94]

SUMMARY

The Supreme Court of Montana in 1979 indicated it is giving a literal interpretation to MAPA and other statutes governing administrative agencies. This is especially true regarding time limita-

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85. ___ Mont. ___, 602 P.2d 157 (1979).

86. 171 Mont. 97, 555 P.2d 753 (1976).

87. A.R.M. § 48-2.18(22) - S18430(2) (1976).

88. 20 U.S.C. §§ 1401 through 1461 (1976).

89. 45 C.F.R. §§ 121a.13(a), 9.13(b)(8) (1979). Arguably, psychiatric therapy is included in "psychological services;" however, the court noted only in passing that "psychological services" under federal regulations are limited to diagnosis and evaluation. *See* Matter of "A" Family, ___ Mont. ___, 602 P.2d at 165; 45 C.F.R. § 121a.13(a) (1979).

90. A.R.M. § 48-2.18(22) - S18430(2) (1976).

91. Matter of "A" Family, ___ Mont. ___, 602 P.2d at 166. The court distinguished *Colburg* on the grounds that the *Colburg* court did not consider the Federal Education of the Handicapped Act.

92. *Id.* at ___, 602 P.2d at 167.

93. *Id.* at ___, 602 P.2d at 168-69 (sitting in place of Justice Daly).

94. *Id.*, *citing Colburg,* 171 Mont. 97, 555 P.2d 753, *and* A.R.M. § 48-2.18(22) - S18430(2) (1976).

tions for judicial review. One of the most significant cases was *Northern Plains*, which issued new rulings under both MAPA and the Siting Act. The case brought Montana in accord with federal jurisdictions regarding finality of administrative orders,[95] and reasonable limitations on testimony and cross-examination. In checking BNR's justifications for fact-findings and conclusions, the court appeared to be consistent with the legislative intent of the Siting Act, given its complex and detailed requirements.[96] Finally, the court, in requiring Montana to pay for a child's psychiatric treatment, expanded Montana's financial role in special education. All of the administrative law rulings from 1979 are clear and should provide a useful aid to agencies and litigants in subsequent proceedings.

95. There are, however, persuasive reasons for a contrary holding. The most compelling reason is the fact that the Board of Health order contained no conclusion as to compliance with state and federal air pollution standards. Northern Plains, __ Mont. __, 594 P.2d at 301. Nonetheless, the court ruled the board's tentative certification "final for all purposes." *Id.* at __, 594 P.2d at 306-07. *See also* note 63 *supra*.

96. *See* MCA §§ 75-20-301, -303, -503 (1979).