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MONTANA SUPREME COURT SURVEY

SURVEY EDITOR'S NOTE

This issue of Volume 42 contains the annual Montana Supreme Court Survey in its entirety. The primary purpose of the survey is to present analysis, research and discussion of Montana Supreme Court decisions for 1980 which have significant impact on specific areas of law. Case selection was left to the discretion of the individual authors. A review of cases relating to estates and trusts provided little material of importance to the Montana practitioner and therefore was excluded. However, a comment on recent legislative changes in Montana probate law appears in another part of this issue.

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Bruce O. Bekkedahl

ADMINISTRATIVE LAW

INTRODUCTION

While the Montana Administrative Procedure Act (MAPA) has been in existence for nearly ten years, the process of interpreting and applying its provisions has barely begun. Few administrative law cases reach the Montana Supreme Court but those that do have an enormous impact on state agencies which in turn have an ever increasing impact on all Montana citizens. This survey will examine the cases decided during 1980 which have a direct effect on application of MAPA. It is not an attempt to deal with changes in substantive areas of administrative law. Rather, it will summarize and explain those cases which construe and apply MAPA.

I. PROCEDURAL REQUIREMENTS—NOTICE

In *Board of Trustees v. Board of Personnel Appeals*,[1] the

1. _ Mont. _, 604 P.2d 778 (1979).

Montana Supreme Court reaffirmed its liberal interpretation[2] of the notice provisions of MAPA.[3] Fair notice, the court held, is given where the pleadings state the statutory basis for the complaint and allege facts to support the charge.[4] In *Board of Trustees*, the Billings Educational Association (BEA) had filed a complaint with the Board of Personnel Appeals in which BEA alleged that the Billings school district had violated two subsections of the Collective Bargaining Act[5] by refusing to bargain. In its brief, BEA contended that the school district had coerced the teachers. After a hearing the examiner concluded that there had been a violation of the Collective Bargaining Act by the school district's failure to bargain, but the complaint failed to give the school district fair notice of the coercion charge. The Board of Personnel Appeals, however, concluded that coercion was present and so rendered its decision. The school district's petition for judicial review was denied by the district court.

In affirming the district court decision, the supreme court looked to the MAPA requirement that notice include "a short and plain statement of the matters asserted"[6] and found that fair notice had been given. Notice, the court held, is sufficient where under a liberal construction of the charging party's pleadings the charged party should have been aware of the issues it would have to defend.[7]

Although the court's attitude toward liberal construction of administrative pleadings had been announced previously,[8] the decision in *Board of Trustees* appears to go much further. The court did not address the fact that unlike the Montana Rules of Civil

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2. *See* text accompanying note 7 *infra*.
3. MONTANA CODE ANNOTATED [hereinafter cited as MCA] § 2-4-601 (1979).
4. Board of Trustees, _ Mont. _, 604 P.2d at 780.
5. MCA §§ 39-31-401(1), -401(5) (1979).
6. MCA § 2-4-601(2) (1979) states:

The notice must include:

(a) a statement of the time, place, and nature of the hearing;

(b) a statement of the legal authority and jurisdiction under which the hearing is to be held;

(c) a reference to the particular sections of the statutes and rules involved;

(d) a short and plain statement of the matters asserted. If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, thereafter, upon application, a more definite and detailed statement must be furnished.

(e) a statement that a formal proceeding may be waived pursuant to 2-4-603.

7. Board of Trustees, _ Mont. _, 604 P.2d at 780.
8. Western Bank of Billings v. Montana State Banking Bd., 174 Mont. 331, 335-36, 570 P.2d 1115, 1118 (1977).

Procedure,[9] MAPA sets forth what "notice" must include.[10] Under MAPA, a "short and plain statement of the matters asserted" is neither necessary nor sufficient for purposes of notice. It is unnecessary if "a statement of issues involved is furnished."[11] It is insufficient in that the statute requires at least four other separate statements.[12] Furthermore, when read in its entirety, the section prescribing a short and plain statement implies a detailed statement.[13]

Despite these statutory notice requirements it is apparent that the Montana Supreme Court will construe administrative pleadings broadly. Further, if the pleadings appear to give notice, the charged party, if in doubt, must affirmatively act to request a more definite statement. In light of *Board of Trustees,* the practitioner would be well advised to request a more definite statement each time pleadings do not present a statement of specific issues. In the case of a charging party, reliance on *Board of Trustees* in drafting pleadings should be limited in light of the particular MAPA requirements for notice.

II. Judicial Review—Contested Cases

A. *Service*

MCA § 2-4-702(2)(a) (1979) provides in relevent part:

> Proceedings for review shall be instituted by filing a petition in district court within 30 days after service of the final decision of the agency . . . . Copies of the petition shall be promptly served upon the agency and all parties of record.

In *Rierson v. State,*[14] the appellant, a retired highway patrolman, had filed a claim with the Board of Administration seeking additional retirement benefits. The appellant's claim had been prompted by a Board ruling stating that retirement allowances should never exceed one-half of a patrolman's salary regardless of the number of years of service. That ruling was different from the ruling in effect during nearly all of appellant's active duty as a patrolman. A hearing was held and relief was denied. A petition for

9. Mont. R. Civ. P. 8(a)(1).
10. MCA § 2-4-601(2) (1979). *See* note 6 *supra.*
11. MCA § 2-4-601(2)(d) (1979).
12. MCA §§ 2-4-601(2)(a) through -601(2)(e) (1979).
13. MCA § 2-4-601(2)(d) (1979) states: "If the agency or other party is unable to *state the matters in detail at the time notice is served,* the initial notice may be limited to a statement of the issues involved." (Emphasis added).
14. _ Mont. _, 614 P.2d 1020 (1980).

judicial review was filed within 30 days of notification of the agency's decision but a summons was never served. Sixteen months later an amended petition and summons were served on the agency. Both the original and amended petitions were dismissed with prejudice by the district court for failure to prosecute. Rierson appealed the district court's decision on the grounds that MCA § 2-4-102(2)(a) (1979) was unconstitutionally vague and violated his right to equal protection.

By a three to two majority the Montana Supreme Court affirmed the district court decision. The issue involved was whether service of copies of the petition "promptly" upon the agency[15] requires service sooner than the three-year time limit prescribed by Rule 41(e) of the Montana Rules of Civil Procedure. Here the majority ruled that "promptly" required service "within thirty days, or thereabouts, from the time the petition was filed" in district court.[16]

Justices Sheehy and Daly dissented. Noting that Rierson's petition for judicial review involved a tort claim against the agency[17] and a claim of deprivation of constitutional protection,[18] their dissent considered Rierson's petition for judicial review a "separate complaint on the tort and constitutional issues."[19] Since MAPA specifically provides that "other means of review" are not precluded by the judicial review provisions,[20] the dissenting justices objected to the majority decision which effectively cut off Rierson's right of action against the agency by enforcing a procedural requirement applicable only to judicial review of that agency's decision.

With the closeness of this decision and the addition of two new members to the Montana Supreme Court, the precedential value of *Rierson* may be questioned. However, this case contains at least two points worthy of note. First, upon filing a petition for judicial review copies of the petition should be served upon the agency and all other parties without delay. In the words of the majority, service within "thirty days, or thereabouts" should suffice. Second, if the basis of petitioner's appeal is a tort allegedly committed by the agency whose decision is being appealed, or if the

15. MCA § 2-4-702(2)(a) (1979).

16. Rierson, _ Mont. _, 614 P.2d at 1024.

17. Rierson had alleged promissory estoppel in regard to the retirement ruling he had worked under. Rierson, _ Mont. _, 614 P.2d at 1025 (Sheehy, J., dissenting).

18. Rierson had alleged deprivation of due process and equal protection by the agency. *Id.*

19. *Id.*

20. MCA § 2-4-702(1)(a) (1979).

agency's decision is allegedly unconstitutional, a separate action may be commenced. Justice Sheehy suggests a petition for writ of certiorari.[21] By utilizing a writ of certiorari the petitioner is not subject to the procedural requirements and time limits included in MAPA.

In order to obtain a writ of certiorari the petitioner must show, among other things, that the agency has exceeded its jurisdiction.[22] Agency determination of the constitutionality of its own decision or agency determination of its own tort liability would certainly be action in excess of its jurisdiction.[23] Of course, this alone does not satisfy all the elements necessary to obtain a writ of certiorari.[24] However, should a party find himself in a position such as that described in *Rierson*, application for a writ of certiorari would be a prudent course of action.[25]

B. *Venue*

MAPA provides that in petitions for judicial review of contested cases "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."[26] The party initiating the petition for judicial review appears to be in a position to select the appropriate district court from among the three possible forums. In *Montana Health Systems Agency, Inc. v. Montana Board of Health and Environmental Sciences*,[27] the Montana Supreme Court decided that the venue section of MAPA meant what it appeared to say.

The petitioner in *Montana Health Systems* brought his petition in Lewis and Clark County. Later, the Missoula hospital, on

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21. Rierson, _ Mont. _, 614 P.2d at 1025 (Sheehy, J., dissenting). Montana specifically provides for granting a writ of certiorari by "the Supreme Court or the district court . . . when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer and there is no appeal or in the judgment of the court, any plain, speedy and adequate remedy." MCA § 27-25-102(2) (1979).

22. *Id. See, e.g., In re* Dewar, 169 Mont. 437, 442, 548 P.2d 149, 153 (1976). The petitioner must also demonstrate lack of any plain, speedy and adequate remedy and observe the right of appeal. *Id.*

23. *See In re* Dewar, 169 Mont. 437, 548 P.2d 149 (1976).

24. *See* note 22 *supra*.

25. To date the Montana Supreme Court has ruled on the applicability of the writ of certiorari to an administrative decision in only one case. In *In re* Dewar, 169 Mont. 437, 444, 548 P.2d 149, 153 (1976), the court held that the writ of certiorari "is not proper where the proceedings to be reviewed are pending or undetermined." Thus, the court implied that once the proceeding was complete and a determination rendered the decision could be subject to the writ.

26. MCA § 2-4-702(2)(a) (1979).

27. _ Mont. _, 612 P.2d 1275 (1980).

whose behalf the respondent had issued a Certificate of Need, was allowed to intervene. The hospital moved for a change of venue citing the general venue provisions found at MCA §§ 25-2-105, -201 (1979).[28] The district court denied the motion citing the venue provision of MAPA, MCA § 2-4-702(2)(a) (1979), as controlling. On appeal, the supreme court held that MCA § 2-4-702(2)(a) (1979) controlled since it was specifically referred to by the statutory provision relating to venue for judicial review of decisions on applications for Certificates of Need.[29]

The court could have ruled that since judicial review of this decision was governed by MAPA, and since MAPA contains a specific venue provision, the general venue statutes were not controlling.[30] Nevertheless, the court went on to find a specific reference to the MAPA venue provisions in the statutes governing Certificates of Need. This rationale may encourage future litigants to argue that where the administrative agency's controlling statutes do not specifically refer to the venue provisions of MAPA the general venue statutes control.

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28. MCA § 25-2-105 (1979) provides:

> Actions against public officers or their agents. Actions against a public officer or person specifically appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial.

MCA § 25-2-201 (1979) provides:

> When change of venue required. The court or judge must, on motion, change the place of trial in the following cases:
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> (1) when the county designated in the complaint is not the proper county;
>
> (2) when there is reason to believe that an impartial trial cannot be had therein;
>
> (3) when the convenience of witnesses and the ends of justice would be promoted by the change.

29. Montana Health Systems, _ Mont. _, 612 P.2d at 1276, *citing* MCA § 50-5-306(4) (1979).

30. The court fails to mention its decision in State *ex rel.* Hendrickson v. Gallatin County, 165 Mont. 135, 526 P.2d 354 (1974). There, the court held that where a petition was brought to review the administrative proceedings of the Board of Social and Rehabilitative Appeals the proper statute to apply in determining venue was Revised Codes of Montana (1947) § 82-4216(2) [now MCA § 2-4-702(2)(a) (1979)] and not the general venue statute now found in MCA § 25-2-106 (1979). Hendrickson, 165 Mont. at 139, 526 P.2d at 357. Quite clearly *Hendrickson* stands for the proposition that in judicial review of administrative decisions covered by MAPA, MCA § 2-4-702(2)(a) (1979) controls. *See also* McCrory, *Administrative Procedures in Montana: A View After Four Years with the Montana Administrative Procedure Act*, 38 MONT. L. REV. 1, 19 (1977) [hereinafter cited as McCrory].

C. *Standard of Review*

The court's standard for review of contested cases is set forth at MCA § 2-4-704 (1979). Where a question of fact is presented, the court "may not substitute its judgment for that of the agency"[31] unless the findings are "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."[32] Where a question of law is presented, no such limitation is prescribed,[33] and it is generally conceded that the court may substitute its own judgment for that of the agency.[34] Thus, the court's first step in reviewing an administrative decision must be to determine which issues are questions of law and which are questions of fact. Often, however, the issue presented is a mixture of law and fact. In those cases the standard for review is not so readily apparent.

Standard Chemical Manufacturing Co. v. Employment Security Division[35] presented the Montana Supreme Court with a mixed issue of law and fact. In *Standard Chemical,* the issue on appeal was "whether respondent's salesmen might be deemed to stand in the relationship of 'employment' " as defined in Montana's statutes.[36] In order to decide the issue, the court had to both interpret the statutory definition of "employment"[37] and apply the facts of the case to the definition. Relying on a United States Supreme Court decision in a similar situation,[38] the Montana court determined that its reviewing function was limited and stated that "[w]here factual determinations are warranted by the record and have a reasonable basis in law, they are to be accepted."[39] Thus,

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31. MCA § 2-4-704(2) (1979).

32. MCA § 2-4-704(2) (1979) provides in relevant part that "the court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings . . . are: . . . (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record."

33. MCA § 2-4-704(2) (1979) provides in relevant part that "the court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative . . . conclusions . . . are: (a) in violation of constitutional or statutory provisions."

34. McCrory, *supra* note 30, at 20-22. *See generally* Sharp v. Hoerner Waldorf Corp., _ Mont. _, 584 P.2d 1298, 1301 (1978). For application of this principle in the federal context *see, e.g.,* Packard Motor Car Co. v. NLRB, 330 U.S. 485, 493 (1947).

35. _ Mont. _, 605 P.2d 610 (1980).

36. Standard Chemical, _ Mont. _, 605 P.2d at 613.

37. MCA § 39-51-203(4) (1979).

38. NLRB v. Hearst Publications, 332 U.S. 111 (1943). In *Hearst,* the Court deferred to the agency's application of the statute as having a "reasonable basis in law." *Id.* at 131. Nevertheless, the Court left no doubt that statutory interpretation was solely the court's province. *Id.* at 130-31.

39. Standard Chemical, _ Mont. _, 605 P.2d at 613.

the court chose to consider the issue an *application* of a statute and not strictly an *interpretation* of a statute. Having so decided, the court applied the MAPA standard for questions of fact—clearly erroneous in view of the reliable, probative, and substantial evidence on the record—and held that the district court had abused its discretion in reversing the agency's determination.[40]

Standard Chemical appears to be a clear signal from the Montana Supreme Court that agency decisions involving mixed questions of law and fact, to the extent the decision involves statutory application, shall be subject to the same standards of review as simple questions of fact.

In a subsequent case, *In re Shaw*,[41] the court considered the clearly erroneous test as it applied to pure questions of fact. In *Shaw*, the agency had made findings of fact which were subsequently affirmed by the district court. On appeal the supreme court affirmed both the agency's decision and the district court's ruling. Despite conflicting testimony the supreme court found "reliable and substantial evidence" in the record which supported the agency's findings.[42] Refusing to substitute its "judgment for that of the administrative body," the court applied the clearly erroneous standard and upheld the agency's decision.[43]

Eleven months after clarifying the standards for review in *Standard Chemical*, the court decided *Thornton v. Commission of the Department of Labor and Industry*.[44] As far as *Standard Chemical* went in clarifying the court's standards for review, *Thornton* goes an equal distance in muddling the issue. In *Thornton*, the court was faced with two specific issues involving statutory interpretation.[45] The first issue required an interpretation of MCA § 39-3-206 (1979)[46] while the second issue required an interpreta-

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40. *Id.* at _, 605 P.2d at 615-16.
41. _ Mont. _, 615 P.2d 910 (1980).
42. *Id.* at _, 615 P.2d at 915.
43. *Id.*
44. _ Mont. _, 621 P.2d 1062 (1980).
45. The issues as framed by the court were:
1. Did the District Court err in affirming the decision of the hearings examiner to assess a statutory penalty to the balance due at the time of the hearing rather than the amount due at the initiation proceeding?
2. Did the District Court err in affirming the decision of the hearings examiner refusing to award attorney fees to appellant at the administrative hearing level?
Thornton, _ Mont. _, 621 P.2d at 1064.
46. MCA § 39-3-206 (1979) provides that:
Penalty for failure to pay wages at times specified in law. Any employer, as such employer is defined in this part, who fails to pay any of his employees as provided in this part or violates any other provision of this part shall be guilty of a misdemeanor. A penalty shall also be assessed against and paid by such employer and

tion of MCA § 39-3-214 (1979).[47]

The court began its analysis by stating that "there exists a rebuttable presumption in favor of the decision of the agency and the burden of proof is on the party attacking it to show that it is erroneous."[48] The court then announced that it "may not substitute its judgment for that of the . . . agency as to the weight of evidence on questions of fact."[49] Finally, the court concluded that (1) the clearly erroneous test applied in *Thornton* and that (2) "a finding is 'clearly erroneous' when, although there is evidence to support it, a review of the entire record leaves the court with the definite and firm conviction that a mistake has been committed."[50] Having thus set the stage for reviewing a question of fact, the court began the process of interpreting the statutes involved. Statutory interpretation presents, by its very nature, a question of law.

Thornton appears to extend the clearly erroneous test to questions of law. The basis for such an extension is not found in MAPA[51] nor is it found in *Standard Chemical.* Statutory *interpre-*

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become due such employee as follows: a sum equivalent to the fixed amount of 5% of the wages due and unpaid shall be assessed for each day, except Sundays and legal holidays, upon which such failure continues after the day upon which such wages were due, except that such failure shall not be deemed to continue more than 20 days after the date such wages were due.

Appellant's contention was that the "District Court made a clear error of law in direct contravention of the statute." Thornton, _ Mont. _, 621 P.2d at 1064.

47. MCA § 39-3-214 (1979) provides that:

Court costs and attorneys' fees. (1) Whenever it is necessary for the employee to enter or maintain a suit at law for the recovery or collection of wages due as provided for by this part, a resulting judgment must include a reasonable attorney's fee in favor of the successful party, to be taxed as part of the costs in the case.

(2) Any judgment for the plaintiff in a proceeding pursuant to this part must include all costs reasonably incurred in connection with the proceeding, including attorneys' fees.

(3) If the proceeding is maintained by the commissioner, no court costs or fees are required of him nor is he required to furnish any bond or other security that might otherwise be required in connection with any phase of the proceeding.

Appellant contended that MCA § 39-3-214 (1979) mandated an award of attorney's fees to the successful party at the administrative and district court levels. Thornton, _ Mont. _, 621 P.2d at 1064.

48. Thornton, _ Mont. _, 621 P.2d at 1064-65. The court cites Partoll v. Anaconda Copper Mining Co., 122 Mont. 305, 203 P.2d 974 (1949) and Kerns v. Anaconda Copper Mining Co., 87 Mont. 546, 289 P. 563 (1930) as support for this proposition. Both *Partoll* and *Kerns* involved issues of fact.

49. Thornton, _ Mont. _, 621 P.2d at 1065, *citing* MCA § 2-4-704(2) *and* Robins v. Anaconda Aluminum Co., 175 Mont. 514, 575 P.2d 67 (1978) (question of fact regarding preexisting injuries).

50. Thornton, _ Mont. _, 621 P.2d at 1065, *citing* United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). In *United States Gypsum,* the Court applied this "clearly erroneous" test to the findings of the trial court while specifically noting that it could "of course, correct . . . errors of law." *Id.* at 394.

51. *See* note 33 *supra* and accompanying text.

tation in *Thornton* can and should be distinguished from statutory *application* in *Standard Chemical.* In *Thornton* there was no mixing of law and fact. *Thornton* merely required the court to interpret certain statutes pertaining to time of attachment of penalty and availability of attorneys' fees.

What the practitioner may glean from *Thornton* is unclear. It seems unlikely that the court intends to apply the clearly erroneous test to questions of law.[52] However, unless *Thornton* is distinguished in subsequent cases, petitions for judicial review of administrative decisions involving questions of law must give at least lip service to the clearly erroneous test.

D. *Review of Agency Rules*

MAPA provides two methods of testing the validity of an agency's rules in court.[53] First, an action for declaratory judgment may be initiated.[54] Each agency must provide rules for "filing and prompt disposition of petitions for declaratory rulings."[55] However, neither petitioning the agency nor an agency ruling is a condition precedent to filing for declaratory relief in district court.[56] If the declaratory judgment petition is filed with the agency, the agency's ruling will be "subject to judicial review in the same manner as decisions or orders in contested cases."[57]

Second, the party may appeal the decision of the agency in a contested case[58] as being in "excess of the statutory authority of the agency."[59] The party would then argue that the basis for a decision was an agency rule which was void *ab initio* under MAPA's requirements for validity.[60] Care must be taken to raise the issue of validity at the earliest opportunity.[61]

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52. If the court did intend such an application, the administrative agency is put in a position to interpret the law that not even the lower courts enjoy. *See, e.g.,* Sharp v. Hoerner Waldorf Corp., _ Mont. _, 584 P.2d 1298, 1301 (1978). *See also* note 34 *supra* and accompanying text.

53. Larson v. State, 166 Mont. 449, 534 P.2d 854 (1975) suggests a third method. In *Larson* taxpayers went directly into district court claiming that the State's use of rules for real property appraisal was unconstitutional. In affirming the district court's judgment the supreme court stated that there was no need for the appellants to exhaust administrative remedies before going directly to court since the agency could not pass on the constitutionality of the question. *Id.* at 457, 534 P.2d at 858.

54. MCA § 2-4-506 (1979).

55. MCA § 2-4-501 (1979).

56. MCA § 2-4-506(4) (1979).

57. MCA § 2-4-501 (1979).

58. MCA § 2-4-102(4) (1979).

59. MCA § 2-4-704(2)(b) (1979).

60. MCA § 2-4-305 (1979).

61. MCA § 2-4-702(1)(b) (1979) may preclude the issue from being raised in district

Michels v. Department of Social and Rehabilitative Services[62] presents a case which impliedly adopts the second method. In *Michels*, the indigent victim of an auto accident failed to apply for county medical benefits within the five days prescribed in a regulation promulgated by the State Welfare Department[63] and her application was denied. The district court ruled that the regulation was a valid exercise of the agency's power. The supreme court reversed, holding that the rule was "patently unreasonable" on its face and wrongfully deprived appellant of medical benefits.[64]

The court's rationale for invalidating the regulation was that the agency had promulgated a rule which was in conflict with the statute under which it had been enacted. The court relied on case law[65] but clearly could have looked to the validity requirements of MAPA[66] to declare the rule invalid *ab initio*.

E. *Sufficiency of Agency's Findings*

Where findings of fact essential to the decision are not made, although requested, the court may overturn the agency's decision.[67] In *In re Shaw*,[68] the supreme court applied MAPA to a situation where certain findngs of fact were not made and, on appeal, were claimed to be essential to the decision.[69] Refusing to upset the agency's decision, the court held that the appellant had not met his burden of showing that the finding in dispute was "so essential . . . that to omit it alters the outcome of the decision or prejudices appellants rights."[70]

III. Public Participation in Agency Operation

Although Montana's open meeting law is not included in MAPA, its application affects the operation of each administrative

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court where the issue was not raised before the agency.

62. _ Mont. _, 609 P.2d 271 (1980).

63. Administrative Rules of Montana [hereinafter cited as ARM] § 46-2.10(38)-S101950 [now codified at ARM § 46.9.501].

64. Michels, _ Mont. _, 609 P.2d at 274.

65. Bell v. Department of Licensing, _ Mont. _, 594 P.2d 331 (1979) (agency regulation declared invalid because it engrafted additional requirements on the controlling statute); State *ex rel.* Swart v. Casne, 172 Mont. 302, 564 P.2d 983 (1977) (agency regulation in direct conflict with controlling statute declared invalid).

66. MCA § 2-4-305(5) (1979) states that "no rule adopted is valid or effective unless consistent with and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

67. MCA § 2-4-704(2)(g) (1979).

68. _ Mont. _, 615 P.2d 910 (1980).

69. *Id.* at _, 615 P.2d at 915.

70. *Id.*

agency and recent developments deserve some comment.

MCA § 2-3-203(1) (1979) declares that "[a]ll meetings of public or governmental bodies, boards, bureaus, commissions, agencies of the state, or any political subdivision of the state or organizations or agencies supported in whole or in part by public funds or expending public funds shall be open to the public." The teeth in the open meeting law are contained in MCA § 2-3-213 (1979).[71] That section gives the district court the power to void meetings not complying with MCA § 2-3-203 (1979). These provisions were addressed and construed in *Board of Trustees, Huntley Project v. Board of County Commissioners.*[72]

In that case, two commissioners voted to approve a preliminary plat two days after holding a public meeting on that plat. Although two commissioners constituted a majority, the actual vote was taken by telephone without public notice or notice to the third commissioner. The board of trustees petitioned the district court for a writ of mandamus compelling the commissioners to void the meeting. The district court decided that the open meeting statute had indeed been violated but refused to nullify the actions of the commissioners.[73]

On appeal the supreme court held that the district court had "abused its discretion in finding an illegal meeting but failing to nullify the actions taken by the Yellowstone County Commissioners."[74] The court had little difficulty finding that the telephone vote taken by the commissioners constituted a "meeting" within the meaning of the open meeting law.[75] The court also disposed of respondents' contention that newspaper reports that a decision was to be made "today or tomorrow" satisfied the statutory notice requirements.[76] Presenting a more difficult question, however, was the interpretation of MCA § 2-3-213 (1979) particularly the portion declaring that the meeting "*may* be declared void by a district court having jurisdiction."[77] The district court had viewed this sec-

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71. MCA § 2-3-213 (1979) provides that "[a]ny decision made in violation of 2-3-203 may be declared void by a district court having jurisdiction. A suit to void any such decision must be commenced within 30 days of the decision."

72. _ Mont. _, 606 P.2d 1069 (1980).

73. The district court declared that the power to void the meeting was discretionary and refused to exercise that discretion. *Id.* at _, 606 P.2d at 1073.

74. *Id.* at _, 606 P.2d at 1075.

75. In fact the definitional section, MCA § 2-3-202 (1979), specifically includes "the convening of a quorum of the constituent membership of a public agency, whether corporal *or by means of electronic equipment,* to hear, discuss or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power." (Emphasis added).

76. Huntley Project, _ Mont. _, 606 P.2d at 1073.

77. Emphasis added.

tion as discretionary rather than mandatory. The supreme court held that unless the meeting was proved "legal" the district court must nullify the actions taken at the meeting.[78] Thus, the court appears to be saying that voiding an illegal meeting is not discretionary once the meeting is found to be illegal.[79]

Another issue in *Huntley Project* was whether mandamus was the proper remedy. The court agreed that mandamus would not "lie to correct or undo an act already performed."[80] Nevertheless, the court approved mandamus in this case because the meeting was void from the beginning. This ruling was tempered by the court's caveat that "[i]n the future . . . the suit should take the form of a simple petition to void an action or a petition for declaratory judgment."[81]

IV. CONCLUSION

These recent cases demonstrate that the court is continuing to give a literal interpretation to MAPA in most areas of application. However, in the wake of *Thornton* and *Standard Chemical* no clear standard for judicial review of issues of fact versus issues of law has emerged. Despite this single gray area, MAPA and its effect on Montana's agencies is becoming more defined.

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78. Huntley Project, _ Mont. _, 606 P.2d at 1074.

79. MCA § 2-3-213 (1979) clearly states that the district court "may" declare the meeting void. The holding here would appear to make the "may" a "shall." Nevertheless, a careful reading of the opinion will show that the court's major concern was for particular "disregard" of the open meeting law shown by the commissioners "in terms of notice and place and voting procedure." Huntley Project, _ Mont. _, 606 P.2d at 1074. Room has been left to distinguish a case where an attempt to comply with the open meeting laws was made but simply failed leaving the meeting technically illegal. In that event the "may" could conceivably be reinstated as discretionary.

80. Huntley Project, _ Mont. _, 606 P.2d at 1074, *citing* Kadillak v. Anaconda Co., _ Mont. _, 602 P.2d 147 (1979).

81. Huntley Project, _ Mont. _, 606 P.2d at 1075.