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The Wyoming Administrative Procedure Act

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LEGISLATIVE COMMENT

THE WYOMING ADMINISTRATIVE PROCEDURE ACT

Wyoming has recently adopted an Administrative Procedure Act[1] and pursuant to a delegation of authority contained in that Act the Wyoming Supreme Court has adopted Rules[2] providing for a uniform procedure for judicial review of state administrative action. The Act and Rules complement each other, employing generally the same definitions, and for convenience in exposition, they can together be considered as an integral scheme specifying minimum administrative procedures and providing for judicial review of administrative action.

The new Wyoming Administrative Procedure Act (hereinafter Wyoming Act) is based upon the Revised Model State Administrative Procedure Act (hereinafter Model Act)[3] although it makes a number of material departures from the Model Act. Both the Wyoming Act and the Model Act have much in common with the Federal Administrative Procedure Act (hereinafter APA).[4] The purpose of this article is to highlight the new Wyoming Act and to make meaningful comparisons among the three acts in order that those state court cases construing other acts based upon the Model Act[5] and the great body of Federal administrative law may serve as guidelines for construction of the Wyoming Act.

The administrative procedure acts pertain to administrative agencies. Procedure for adoption of substantive rules as well as requirements that agencies adopt rules of practice

1. WYO. STAT. §§ 9-276.19 -.33 (Supp. 1965). For background leading to the adoption of the Wyoming Act, see Bloomenthal, *Administrative Law in Wyoming—An Introduction and Preliminary Report*, 16 WYO. L.J. 191 (1962).
2. 1 LAND & WATER L. REV. 336 (1966).
3. 1961 HANDBOOK OF COMMISSIONERS ON UNIFORM STATE LAWS 206; 9C ULA 23 (Supp. 1965). (Hereinafter cited as MODEL ACT). For detailed critique of the Revised Model Act, see Bloomenthal, *Revised Model State Administrative Procedure Act—Reform or Retrogression?*, 1963 DUKE L.J. 593 (1963).
4. 60 Stat. 237 (1946), 5 U.S.C. §§ 1001-11 (1964) (hereinafter cited as APA).
5. Seven states (Hawaii, Maryland, Michigan, Missouri, Oregon, Washington, Wisconsin) have adopted acts based upon an earlier version of the Model Act, which was approved by the Commissioners on Uniform State Laws in 1944. Three states (Georgia, Oklahoma, Rhode Island) besides Wyoming have adopted acts based upon the 1961 Revised Model Act. See, 1964 HANDBOOK OF COMMISSIONERS ON UNIFORM STATE LAWS 370, Table VII.

and make them available for public inspection are set forth. The acts also contain provisions establishing minimum safeguards for the rights of individuals who must deal with agencies, particularly with respect to hearings conducted by such agencies.

Coverage of the acts is dependent upon their respective definitions of "agency." For the purposes of the Model Act, an agency is "each state (board; commission, department, or officer), other than the legislature or the courts, authorized by law to make rules or to determine contested cases."[6] Wyoming's Act uniquely broadens this definition to include "a county, a municipality or other political subdivision of the state. . ."[7] and accordingly is of concern to city and county attorneys and practitioners dealing with local agencies.

The origin of administrative agencies is statutory. Among the powers generally delegated to agencies are those of rule making and adjudication.[8] At the outset distinction must be made between these functions for each is subject to different procedural requirements under the administrative procedure acts.

I. RULE MAKING

The three acts define the term "rule" in much the same way.[9] The Wyoming and Model Acts define a "rule" as "each agency statement of general applicability that implements, interprets and prescribes law or policy, or describes the organization, procedures, or practice requirements of any agency," eliminating the troublesome inclusion of the word "particular" before "applicability" as in the APA.[10] The purposes of the provisions of the Wyoming Act dealing with

6. MODEL ACT § 1(1).
7. WYO. STAT. § 9-276.19(b)(1).
8. "[A]ction of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect." Philadelphia Co. v. SEC, 175 F.2d 808, 816 (D.C. Cir. 1948) *dismissed as moot* 337 U.S. 901 (1949). It is not always easy to differentiate between rule making and adjudication. But to the extent possible a distinction should be made in order to determine what type of protection must be afforded parties in proceedings. Further, the scope of judicial review will be dependent upon which type of administrative action is involved. For a Wyoming decision (handed down prior to adoption of the Wyoming Act) which draws a distinction between "contested" and "non-contested" cases see Chicago, Burlington & Quincy R.R. v. Bruch, 400 P.2d 494 (Wyo. 1965).
9. WYO. STAT. § 9-276.19(b)(7); MODEL ACT § 1(7).
10. APA § 1(c).

rule making are to require agencies to adopt rules of practice, to give interested persons a limited voice in the formulation of rules, and to provide for the systematic publication of rules.

A. Authority to Adopt Rules

The authority of an agency to adopt substantive rules is found in the statute setting up the agency.[11] In addition to having to comply with the procedural requirements of rule making established by the Act, the agency must remain within its legislatively delegated power.[12] If the powers delegated to the agency are sufficiently defined to satisfy the constitutional requirements,[13] agency action taken within the limitations prescribed by the legislature will generally have the force of law.[14] But if the agency takes action which is inappropriate or inconsistent with the statute which created the agency, the rule will be invalid.[15]

B. Notice of Proposed Rule Making

All three acts require that prior to a rule making proceeding, notice must be given of the intended action. The Wyoming and Model Acts stipulate that at least twenty days notice must be given prior to the proceeding.[16] The APA does not contain any express time limit. Notice of proceedings of Federal agencies must be published in the Federal Register,[17] and under the Model Act[18] notice must be given in the medium of publication appropriate for the adopting state. The Wyo-

11. For discussion of rule making in Wyoming prior to adoption of the Act see Note, 16 WYO. L.J. 255 (1962).
12. Ewing v. Gardner, 185 F.2d 781, 784 (6th Cir. 1950).
13. State courts are increasingly liberal in upholding delegations of power even without standards in both adjudicatory and rule making action. See DAVIS, ADMINISTRATIVE LAW TREATISE §§ 2.10, 2.11 (1958).
14. Sheridan-Wyoming Coal Co. v. Krug, 172 F.2d 283, 287 (D.C. Cir. 1949), *rev'd on other grounds* 338 U.S. 621 (1949). There is, however, a distinction between "legislative" and "interpretative" rules. Ordinarily an agency having power to adopt legislative rules can also adopt interpretative rules. The legislative rule is generally adopted pursuant to an express statutory delegation of power, and it has the force of law. DAVIS, *op. cit. supra* note 13, at § 5.03. Interpretative rules, which are statements as to what an agency thinks the statute means, lack force of law. Skindmore v. Swift & Co., 323 U.S. 134, 139-40 (1944). In Brown v. Quality Fin. Co., 145 S.E.2d 99, 100 (Ga. 1965), the court stated that an agency rule "if consistent with the provisions of the Act, would have the force and effect of law. Of course, a regulatory agency has no constitutional right to legislate."
15. Brannan v. Stark, 342 U.S. 451 (1952); Manhattan General Equip. Co. v. CIR, 297 U.S. 129 (1936).
16. WYO. STAT. § 9-276.21(a)(1); MODEL ACT § 3(a)(1).
17. APA § 4(a).
18. MODEL ACT § 3(a)(1).

ming Act requires only that notice be "mailed to the Attorney General and to all persons who have made timely requests of the agency for advanced notice of its rule making proceeding."[19] Under the Federal courts' interpretation of the notice requirement, publication in the Federal Register is sufficient notice to meet the requirement.[20] Under the Wyoming Act, failure of an agency to give notice to the Attorney General and to persons making timely request will probably invalidate an agency rule since the rule will not have been adopted in substantial compliance with adoption procedures required by the Wyoming Act.[21]

C. Oral Hearings and Arguments

Both the Wyoming Act and the Model Act require that the agency, prior to adoption, amendment or repeal of any rule, must afford interested persons the opportunity to present arguments, either written or oral.[22] Where the agency is considering the adoption of substantive rules, an oral hearing must be granted if twenty-five persons or a governmental subdivision, or an organization having at least twenty-five members request the oral hearing.[23] The APA, on the other hand, provides that the agency must afford parties the right to submit arguments in writing, but it leaves to the agency's discretion whether or not arguments may be presented orally.[24] In the context of rule making proceedings, "interested persons" should include any persons whom the rule, if adopted, will affect in any way.

D. Substantial Compliance Required

Both the Wyoming Act and the Model Act expressly state that rules which are not adopted in substantial compliance with the rule making requirements of the respective statutes are not valid.[25] The same requirement may be inferred from the APA.[26]

19. WYO. STAT. § 9-276.21(a)(1). The Model Act also requires that notice be mailed to persons having made timely request.
20. Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676, 684-85 (9th Cir. 1949).
21. WYO. STAT. § 9-276.21(c).
22. MODEL ACT § 3(a)(2); WYO. STAT. § 9-276.21(a)(2).
23. MODEL ACT § 3(a)(2); WYO. STAT. § 9-276.21(a)(2).
24. APA § 4(b); see also FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265 (1949).
25. WYO. STAT. § 9-276.21(c); MODEL ACT § 3(c).
26. APA §§ 3(a), 4.

E. Publication of Rules

In addition to the requirement of notice of intended action by the agency preliminary to rule making, the agency is required to make known the rules which it has promulgated. The APA requires publication in the Federal Register;[27] the Model Act requires publication or availability for public inspection.[28] "Public inspection," under the Wyoming Act, is accomplished by filing all rules with the Secretary of State.[29] "The Secretary's authenticated file stamp on a rule . . . shall raise a rebuttable presumption that the rule was adopted in compliance with all requirements. . . ."[30] According to the Secretary of State, thirty six of about forty agencies in Wyoming have filed rules adopted pursuant to the Wyoming Act and the others have made known their intention to file in the near future.[31]

Under all three acts, the agency action is invalid and ineffective against any person or party until publication requirements are met, except as to persons with actual knowledge of the action taken.[32]

F. Exceptions to the General Rule Making Requirements[33]

The Wyoming Act, as well as the APA, excepts from the general rule making requirements interpretative rules and

27. APA § 3(a)(3); see also, Kempe v. United States, 151 F.2d 680, 684 (8th Cir. 1945).
28. MODEL ACT § 2(b).
29. WYO. STAT. §§ 9-276.20(b), 9-276.22(a).
30. WYO. STAT. § 9-276.23(c).
31. There is no formal publication of these rules available. Although in some instances they may be obtained from the agencies themselves, for the most part the only place they may be obtained is at the office of the Secretary of State.
32. WYO. STAT. § 9-276.20(b); MODEL ACT § 2(b); APA § 3(a).
33. In addition to the exceptions discussed in the text, the following are excepted from general rule making requirements:

    (1) Both the Wyoming Act (§ 9-276.21(b)) and the Model Act (§ 3(b)) provide that if an agency finds that an emergency exists the requirement of prior notice to the rule making proceedings may be dispensed with, and the rule becomes effective immediately upon filing with the Secretary of State. (The Wyoming Act requires that the agency's finding of an emergency be concurred in by the Governor by written endorsement.) But a rule so adopted will be valid for only 120 days unless the same action is taken in compliance with the general rule making requirements of subsection (a)(1) of the above sections of both acts.

    Under the Model Act (§ 4(b)(2)) the agency is required to "take appropriate measures to make emergency rules known to persons who may be affected by them." The Wyoming Act does not require the agency to make known the substance of its emergency rules.

statements of general policy.[34] Interpretative rules are not readily distinguishable from legislative rules, but generally, interpretative rules are statements by an agency, which do not purport to be pursuant to a delegated power to adopt legislative rules, as to what the agency thinks a statute or regulation means. About all that can be said about interpretative rules here is that, if an attorney wishes to show that a particular rule which adversely affects his client was not adopted in substantial compliance with the Act, he should show that the rule does not come within the exclusion of the Act, and that the rule falls within the classification of legislative rule.

II. ADJUDICATION

Where the APA uses the term "adjudication," the Wyoming Act and the Model Act use the term "contested case."[35] A contested case under the Wyoming and Model Acts is one in which legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. In this context "by law" means by either statutory or constitutional provision.[36] The definition in-

Under the Wyoming Act (§ 9-276.22(b)(2)), "presently existing rules are and remain in effect, unless amended and repealed . . . ." by the emergency rule. This particular language of the Wyoming Act gives rise to the possibility that an agency may adopt an emergency rule which is in conflict with, but does not repeal or amend an existing rule. In such a case the existing rule would be superseded by implication, but only for 120 days.

(2) By virtue of their being excluded from the definition of "rule" under § 9-276.19(b)(7) of the Wyoming Act, the following are not subject to general rule making requirements: (A) statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public; (B) the decision of an agency whether or not to act on a petition to promulgate, amend or repeal a rule of the agency under Section 9-276.24; and (C) intra-agency memoranda.

(3) The APA excepts from rule making requirements "rules af agency organization, procedure or practice . . . ." (§ 4(a)). Both the Model Act (§ 1(7)) and the Wyoming Act (§ 9-276.19(b)(7)) provides that these agency actions are subject to rule making requirements. The Model Act requires an agency to "adopt as a rule a description of its organization . . . ." (§ 2(a)(1)) and "rules of practice . . . ." (§ 2(a)(2)). The Wyoming Act, on the other hand, only requires that an agency "adopt rules of practice . . . ." (§ 9-276.20(a)(1)).

(4) The Model Act excepts from rule making requirements "declaratory rulings" made by the agency (§ 1(7)).

34. WYO. STAT. § 9-276.21(a); APA § 4(a); see also, Gibson Wine Co. v. Snyder, 194 F.2d 329, 332 (D.C. Cir. 1952).

35. WYO. STAT. § 9-276.19(b)(2); MODEL ACT § 1(2); APA § 2(d). Also included in this definition under the Wyoming Act are rate-making, price fixing and licensing.

36. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950).

volves several questions, the most perplexing of which concerns the type of hearing to which the statute refers.[37]

As we have seen, the rights which an agency, under the administrative procedure statutes, must afford individuals prior to a rule making proceeding are notice of the proposed action and opportunity to present written or oral argument. Seldom is a person accorded the right to trial-type hearing.[38] In a contested case greater rights are provided.

A. Notice

Prior to any adjudicatory action taken by any administrative agency, every person who may be adversely affected must be given timely notice of the hearing.[39] The Wyoming Act provides that notice shall be served personally or by mail.[40] All three acts provide that notice shall include, (1) the time, place, and nature of the hearing, (2) the legal authority and jurisdiction under which the hearing is to be held, and (3) a statement of the matters asserted.[41] The Model Act and the Wyoming Act add a fourth requirement of a statement of the particular sections of the statutes and rules involved.[42] In order that a person be bound by the administrative action in

37. Most of the provisions of section 9-276.25 define the rights of parties in contested cases. Subpart (a) requiring that notice be given; (d) permitting subpoenas to be issued to persons designated by parties; (g) permitting discovery under the Wyoming Rules of Civil Procedure, to which the agency is subject under (h); (i) guaranteeing the opportunity to present evidence and argument on all issues involved; (j) requiring disposition of the case with reasonable dispatch; (m) setting forth what constitutes the record, and section 9-276.26(c) giving the right to cross-examine and confront opposing witnesses all add up to the hearing in a contested case.

38. Parties to a rule-making action may be granted a hearing under the provisions of § 9-276.21(a)(2) of the Wyoming Act, § 3(a)(2) of the MODEL ACT and § 4(b) of the APA. However, this right is not based upon constitutional grounds. See Londoner v. City & County of Denver, 210 U.S. 373 (1908), which holds that a hearing is required, and Bi-Metallic Inv. Co. v. State Board of Equalization, 239 U.S. 441 (1915) which holds that a hearing is unnecessary. The cases are distinguished on the basis of the fact that a few persons were exceptionally affected by the administrative decision in the former case and in the latter case a large number of persons were affected generally. See DAVIS, *op. cit. supra* note 13, at § 7.04.

39. WYO. STAT. § 9-276.25(a); MODEL ACT § 9(a); APA § 5(a); see also, Hunter v. Atchinson, T. & S.F. Ry., 188 F.2d 294, 300 (7th Cir. 1951), and United States v. McCrillis, 200 F.2d 884, 888 (1st Cir. 1953). The Wyoming Act provides in § 9-276.25(a) that "where the indispensable and necessary parties are composed of a large class, the notice shall be served upon a reasonable number thereof as representatives of the class or by giving notice by publication in the manner specified by the rules or an order of the agency."

40. WYO. STAT. § 9-276.25(a).

41. WYO. STAT. § 9-276.25(b); MODEL ACT § 9(b); APA § 5(a).

42. WYO. STAT. § 9-276.25(b); MODEL ACT § 9(b).

a contested case, he has a constitutional right to be given sufficient notice of the hearing.[43]

B. Subpoenas

Under the APA an agency may issue subpoenas authorized by law.[44] It may also issue its subpoenas to parties upon request and a showing of general relevance and reasonable scope.[45] In the event a subpoena is issued but not complied with the agency may apply to the court for enforcement.[46]

The Wyoming Act, unlike the APA and Model Act, authorizes administrative agencies to subpoena witnesses and require the production of documents, books, and papers and it provides a uniform subpoena enforcement procedure.[47] Consistent with general federal practice, a subpoena ordinarily may be enforced only by a court order upon application by the agency.[48] In the event the agency fails to apply to the court for an order of enforcement, a party may apply directly to the court for such an order. The Wyoming Act makes it mandatory for an agency to adopt as part of its rules of practice provisions for issuance of agency subpoenas to parties upon application.[49] The Model Act contains no provisions for or relating to the issuance of subpoenas.

C. Discovery

The most important innovations found in the Wyoming Act are its provisions providing for discovery generally to the same extent and in the same manner as under the Wyoming Rules of Civil Procedure.[50] The discovery provisions are applicable not only for discovery from a private party, but also to a limited extent for discovery against the agency.[51] In neither of the other Acts are such provisions to be found and the Federal Rules of Civil Procedure relating to discovery do not apply to administrative proceedings. In federal proceedings, the rules of the agency must be consulted to deter-

43. United States v. Wood, 61 F. Supp. 175 (D. Mass. 1945).
44. APA § 7(b)(2).
45. APA § 6(c).
46. APA § 6(c).
47. WYO. STAT. § 9-276.25(c).
48. WYO. STAT. § 9-276.25(c).
49. WYO. STAT. § 9-276.25(d).
50. WYO. STAT. § 9-276.25(g).
51. WYO. STAT. § 9-276.25(h).

mine whether discovery is permitted against that particular agency. Absent any permission in the agency rules, an individual is limited to using a hearing. The agency's subpoena power (if available) is to compel the appearance of witnesses at the hearing.[52]

Discovery from the agency is not pursuant to the Rules of Civil Procedure but rather by application to the agency. In Wyoming,[53] as under federal cases,[54] the agency is under no obligation to disclose confidential or privileged information, nor can any agency member be compelled to testify or give a deposition. In Wyoming, however, the party may, in the event the agency refuses to furnish information upon the party's written request, apply to the district court for an order compelling discovery.[55] Federal practice is to the contrary, and the decision as to whether the information requested is privileged may be left to the agency[56] unless the agency is a party to a civil proceeding in which event the Federal Rules of Civil Procedure are applicable.[57]

D. Right to Counsel

Both the Wyoming Act and the APA provide that, "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 . . . ."[58] And every *party* has the right to appear by or with counsel.[59]

E. Procedure

Under the Wyoming Act, the Model Act, and the APA, all parties have the right to respond and to present evidence and argument on the issues involved in the hearing.[60] The type of hearing required is not strictly prescribed by the statutes. The procedural rights of a party to a hearing may not necessarily be those of a litigant before a court, and the procedural rights of a party will vary depending upon the

52. APA § 6(c).
53. WYO. STAT. § 9-276.25(h).
54. Appeal of the SEC & Timbers, 226 F.2d 501 (6th Cir. 1955).
55. WYO. STAT. § 9-276.25(h).
56. Appeal of the SEC & Timbers, *supra* note 54, at 519.
57. United States v. Reynolds, 345 U.S. 1, 11 (1953).
58. WYO. STAT. § 9-276.25(i); APA § 6(a).
59. WYO. STAT. § 9-276.25(j); APA § 6(a).
60. WYO. STAT. § 9-276.25(i); MODEL ACT § 9(c); APA § 5(b).

nature of the agency action, but in a "contested case" the rights afforded must conform to the minimum standards prescribed by the Act.[61] The agency, by practicality as well as by statute, is bound to use dispatch in concluding matters before it.[62] But the party may insist upon his statutory and constitutional rights. The result in a contested case is likely to be a full scale trial-type hearing.[63] The procedural limitations placed upon an agency are those of "fair play"[64] due process under the Fourteenth Amendment,[65] and the statutory norms set by the legislature.[66]

All three acts provide that parties may "conduct cross-examinations required for a full and true disclosure of the facts. . . ."[67] This provision leaves with the agency some discretion as to whether or not to allow cross examination in certain cases. But discretion can not limit the right of a party guaranteed by the constitution in adjudicatory ("contested") cases.[68] The Supreme Court of the United States has held that confrontation is an essential incident of the right to a full hearing.[69]

Federal cases have cited the need for making administrative procedure simpler, less formal, and less technical than judicial procedure.[70] And it has been held that due process is afforded in an administrative proceeding if the losing party was given no less advantage than at common law.[71] But

61. At the outset of our discussion (see text *supra*, p. 498, and note 8 *supra* and accompanying text) it was pointed out that distinction between rule-making and adjudication has to be made because procedural rights are based upon that distinction. The Wyoming Act separates proceedings in cases of rule making from proceedings in contested cases. Some proceedings will clearly fall into one category or the other, but these categories often overlap. Where there is such an overlap, it becomes no longer satisfactory to say that a trial type hearing is required where the agency is acting as a court, but where the effect of the action is general and future in impact only, arguments will be permitted. See discussion in DAVIS, *op. cit. supra* note 13, at Ch. 7.
62. WYO. STAT. § 9-276.25(j).
63. See note 61 *supra*.
64. NLRB v. Newberry Lumber & Chem. Co., 123 F.2d 831, 838 (6th Cir. 1942).
65. Voigt v. Webb, 47 F. Supp. 743, 746-47 (E.D. Wash. 1942).
66. WYO. STAT. § 9-276.25(k). See also, Heitmeyer v. FCC, 95 F.2d 91, 100 (D.C. Cir. 1937) (convenience of administration not permitted to justify noncompliance with the law, or the substitute of fiat for adjudication).
67. WYO. STAT. § 9-276.26(c); MODEL ACT § 10(3); APA § 7(c).
68. Reilly v. Pinkus, 338 U.S. 269 (1949).
69. Morgan v. United States, 304 U.S. 1, 18 (1938). *But cf.* Bailey v. Richardson, 182 F.2d 46 (1950); Green v. McElroy, 360 U.S. 474 (1959).
70. Sherwood Bros. v. District of Columbia, 113 F.2d 162, 165 (D.C. Cir. 1940); Western Air Lines, Inc. v. CAB, 184 F.2d 545, 549-50 (9th Cir. 1950).
71. NLRB v. Biles Coleman Lumber Co., 98 F.2d 16, 18 (9th Cir. 1938).

standards of due process in administrative proceedings are not clearly defined and in the final analysis the type of hearing afforded parties to administrative proceedings will depend upon the balance achieved between efficient action by the agency and maximum safeguards for the rights of the party.

It is not imperative in every contested case that the proceedings reach the hearing stage. The Wyoming Act and the Model Act both provide that "unless precluded by law, informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default."[72] The APA provides for similar disposal of cases.[73]

F. Evidence

The Wyoming Act does not incorporate the Model Act provision that "the rules of evidence as applied in (non-jury) civil cases . . . shall be followed."[74] Nor are the common law exclusionary rules adopted. Wyoming merely provides that in contested cases irrelevant, immaterial or unduly repetitious evidence shall be excluded. And there is a requirement that all sanctions or orders be supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs.[75] There is no express requirement that there be a residuum of evidence which would be admitted in civil (non jury) cases upon which to base the decision.[76]

G. Privilege

Both the Model Act and the Wyoming Act provide that "agencies shall give effect to the rules of privilege recognized by law."[77] The APA is silent as to rules of privilege, but there is some indication that they will be followed in administrative proceedings.[78]

72. WYO. STAT. § 9-276.25(l); MODEL ACT § 9(d).
73. APA § 7(c).
74. MODEL ACT § 10(1).
75. WYO. STAT. § 9-276.26(a).
76. For discussion of the prior law in Wyoming which followed the residuum rule see Note, 16 WYO. L.J. 280, 286 (1962).
77. WYO. STAT. § 9-276.26(a); MODEL ACT § 10(1).
78. Jencks v. United States, 353 U.S. 657 (1957), applied to administrative agencies by Communist Party v. Subversive Activities Control Bd., 254 F.2d 314, 328 (D.C. Cir. 1958). See discussion of discovery under APA, text *supra* p. 505.

H. Official Notice

Both the Wyoming Act and the Model Act provide for notice of technical and scientific facts within the agency's specialized knowledge (but only if they are "generally recognized" under the Model Act) and of other judicially cognizable facts.[79] In addition the Wyoming Act is broader than the Model Act in that it permits the agency to take notice of "information, data, and material included within the agency's files."[80] Under both acts it is required that the parties be given notice of material facts noticed by the agency, "and they shall be afforded an opportunity to contest the facts noticed."[81] Under the Wyoming Act such notice must be given prior to the decision in a contested case. The APA does not expressly define official notice,[82] but there is no doubt that an agency may take official notice except where the facts noticed substantially affect the result and there is no opportunity for the parties to meet the facts noticed.[83] In all instances where notice is taken the APA requires that "any party shall on timely request be afforded an opportunity to show the contrary."[84]

I. Decisions in Contested Cases

Unlike the APA,[85] the Model Act and the Wyoming Act contain no provisions for the establishment of a class of trained semi-independent individuals whose sole responsibility is to preside over hearings in contested cases. In Wyoming, the presiding officer may be designated by the statute establishing the agency,[86] but he must be a member of the agency, a staff member or a member of the staff of another agency. The agency may, on the other hand, preside en banc.[87]

79. WYO. STAT. § 9-276.26(d); MODEL ACT § 10(4). See also, note 89 *infra.*
80. WYO. STAT. § 9-276.26(d).
81. WYO. STAT. § 9-276.26(d).
82. APA § 7(d).
83. When the facts are adjudicative, disputed and critical nothing less than submission through the evidence, subject to cross examination and rebuttal will normally suffice. United States v. Abilene & So. Ry., 265 U.S. 274, 288-89 (1924); Jay Burns Baking Co. v. Bryan, 264 U.S. 504, 517 (1924); Ohio Bell Tel. Co. v. Public Util. Comm'n., 324 U.S. 548, 562. See generally, DAVIS ADMINISTRATIVE LAW TREATISE § 15.10 (1958).
84. APA § 7(d).
85. APA § 11 requires appointment of qualified examiners to act as presiding officer over hearings (§ 7) and to prepare initial or recommended decisions (§ 8).
86. Note, 16 WYO. L.J. 267, 271 shows which Wyoming statutes make provisions for presiding officers.
87. WYO. STAT. § 9-276.30(b).

In deciding a contested case the Wyoming Act expressly requires the agency to consider the whole record (or any portion stipulated by the parties).[88] An initial or recommended decision is not required under the Wyoming Act, but the agency is left to decide whether it will require the person who presided over the hearing to prepare a recommended decision.[89] If a recommended decision is required, the parties must be given reasonable opportunity to file exceptions to the recommended decision.[90] All parties must be afforded an opportunity to file a brief with the agency and oral argument may be allowed in the discretion of the agency.[91]

In order to avoid possible mixing of prosecuting and decision making functions, the Model Act forbids any communication by the person charged with making the decision with any person or party in connection with any issue of fact and with any party in connection with any issue of law except upon notice and opportunity for all parties to participate.[92] The Model Act has been criticized for denying to an agency the use of its staff.[93] It is felt that this restriction denies to

88. WYO. STAT. § 9-276.27. The record in a contested case includes: "(1) all formal or informal notices, pleadings, motions, intermediate rulings; (2) evidence received or considered including matters officially noticed; (3) questions and offers of proof, objections and rulings thereon; (4) any proposed findings and exceptions thereto; (5) any opinion, findings, decision or order of the agency and any report by the officer presiding at the hearing." (§ 9-276.25(m)). The importance of including in the record matters judicially noticed by the agency is illustrated in Chicago, Burlington & Quincy R.R. v. Bruch, 400 P.2d 494, 497-98 (Wyo. 1965). In this case the court struck certain appendices of the appellee's (agency's) brief because they did not appear in the agency record sent to the district court on appeal. The court stated that it will not take judicial notice of matters "when they are advanced for the first time upon appeal to this court . . . . Although it is quite possible that certain of the material contained in the appendices to the brief may have been admissible in the hearing before the board by way of judicial notice, . . . the district court could not have based its determination of the correctness of the board's decision upon the assumption that the board had such knowledge or had such information before it."

89. The APA requires the hearing examiner to make an initial decision or in the alternative to turn the entire record over to the agency for initial decision, in which case the hearing officer must recommend a decision unless expediency requires omission of such procedure (§ 8). For Wyoming provision authorizing agency to direct preparation of a recommended decision, see WYO. STAT. § 9-276.30(b)(8).

90. WYO. STAT. § 9-276.27.

91. WYO. STAT. § 9-276.27.

92. APA requires separation of functions in adjudicatory actions (§ 5(c)). The Model Act provisions are found in § 13.

93. The Model Act provisions of section 13 forbidding expert consultations is criticized in DAVIS, ADMINISTRATIVE LAW CASES 586 (1965). Professor Davis points out that the "attitude of the Uniform Law Commissioners in section 13 was adopted by Congress in the 1952 amendments to the Communications Act. Experience showed that the attitude was not workable, and Congress repealed those amendments in 1961."

the decision making process the benefits of having the decision made by a group trained in a special area.[94] The Wyoming Act, while still outlawing consultation between those engaged in the task of presiding at the hearing, compiling, evaluating, analyzing the record, and preparing a decision and those engaged in the prosecution of the case,[95] permits agency members to utilize the special knowledge and experience of members of the agency staff not involved in the prosecution.[96] The Wyoming Act further permits consultation with staff members who were involved in the presentation of the case, so long as such persons do not have an adversary position.[97] Any agency (except county and municipal agencies and political subdivisions on the county and local level) "may request the office of the attorney general to furnish to the agency such personnel as may be necessary in order for the agency to properly investigate, prepare, present and prosecute the contested case before the agency. The attorney general upon the receipt of such request shall promptly comply with same ...."[98] The purpose of this provision is to permit agencies that have no staff or a small staff to comply with the separation of functions requirement of the Act.

The acts set forth specific matters which must be included in all final decisions. Findings of fact based exclusively on the evidence[99] and conclusions of law must be separately stated.[100] Copies of the decision and order must be given to

94. The institutional decision has been criticized for several reasons. The major criticism has been that it often results in the separation of the function of writing opinions from that of deciding the case. But it is argued in Bloomenthal, *Administrative Law in Wyoming—An Introduction and Preliminary Report*, 16 WYO. L.J. 191, 202 (1962) that the benefits of requiring the decision to be made and written by the same person are exaggerated.

95. WYO. STAT. § 9-276.29.

96. WYO. STAT. § 9-276.29.

97. WYO. STAT. § 9-276.29.

98. WYO. STAT. § 9-276.30(c).

99. WYO. STAT. § 9-276.25(p).

100. WYO. STAT. § 9-276.28. The Supreme Court of Oklahoma in Oklahoma Inspection Bureau v. State Board for Property and Casualty Rates, 406 P.2d 453, 456 (Okla. 1965) has said, "The statutory requirement that administrative boards make findings of fact in connection with their determination is far from a technicality and is a matter of substance." The Oklahoma requirement (OKLA. STAT. tit. 75, § 312 (Supp. 1963)) is substantially the same as § 9-276.28 of the Wyoming Act which requires that final decisions include findings of fact and conclusions of law separately stated, and that "findings of fact as set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

each party or his attorney.[101]

III. JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

A. Reviewable Administrative Action

The Wyoming Act enlarges the range of administrative action from which appeals may be taken to include not only decisions in contested cases but also any other agency action or inaction including rule making and actions which are neither rule making nor adjudication.[102] The Model Act is more restrictive. Although absolute right of appeal is provided from decisions in contested cases,[103] and review of rule making proceedings and rules is provided for by declaratory proceedings,[104] no provision is made to review administrative action which is neither a rule nor a contested case or to review the failure of an agency to act. Under the APA, only those actions which are made reviewable by statute or for which there is no other adequate remedy in any court are subject to judicial review.[105]

B. Standing

Under the Wyoming Act any person "aggrieved or adversely affected in fact" in any reviewable action or inaction is entitled to judicial review, subject to the preclusion of such right either by statute[106] or by common law, and subject also to the requirement that administrative remedies must be exhausted.[107] The APA affords a party who has suffered a "legal wrong" the right of judicial review except where statutes preclude judicial review or agency action is by law committed to agency discretion.[108]

Under the APA, under one construction of Section 10, only a person who has suffered a legal wrong has standing to obtain judicial review of administrative action.[109] Professor Davis would extend the standing provision to include any

101. WYO. STAT. § 9-276.28.
102. WYO. STAT. § 9-276.32(a).
103. MODEL ACT § 15(a).
104. MODEL ACT § 7.
105. APA § 10(c).
106. Air Line Dispatcher's Ass'n. v. National Mediation Bd., 189 F.2d 685, 688 (D.C. Cir. 1951) (Review not available where a statute as judicially interpreted precludes it).
107. WYO. STAT. § 9-276.32(a).
108. APA § 10(a).
109. DAVIS, *op. cit. supra* note 83, at § 22.04.

individuals who are affected in fact. He relies upon the legislative history of the APA to support his argument. The disputed section of the APA provides that "any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof."[110] It is Davis' contention that the limitation contained in the phrase, "within the meaning of any relevant statute," applies only to the word "aggrieved" and not to the phrase "adversely affected." It is contended in light of this construction that a person in an action which is not otherwise reviewable is permitted review if he is in fact adversely affected.[111]

The Wyoming Act resolves this difficulty of construction in the APA by entitling any person "aggrieved or adversely affected in fact" to judicial review.[112] The foregoing does not constitute a substantial change in Wyoming practice, since prior to the adoption of the Wyoming Act the Wyoming Supreme Court was liberal in allowing any person with a significant interest in fact to challenge agency action.[113]

C. Exhaustion of Administrative Remedies

Both the Wyoming Act and the APA require that the administrative remedies of the party be exhausted before a court will grant an appeal. In other words, review may be taken only from an administrative action which is final.[114] Under the APA the requirement that administrative remedies be exhausted means that the appropriate procedures prescribed by statute must be prosecuted to their proper conclusion prior to application for judicial review.[115] Further,

110. APA § 10(a).
111. DAVIS, *op. cit. supra* note 83, at § 22.02.
112. WYO. STAT. § 9-276.32(a).
113. Note, 16 WYO. L.J. 296 (1962).
114. WYO. STAT. § 9-276.32(a); APA § 10(c). Even though the Wyoming Act requires administrative exhaustion Wyoming Rule 72.1(c) expressly provides for the common law writ of prohibition. Davis points out that "the very essence of the writ of prohibition is to violate the modern doctrine requiring exhaustion of administrative remedies . . . for the purpose of prohibition is to prevent administrative action before it is taken." DAVIS, ADMINISTRATIVE LAW CASES 461 (1965).
115. Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767 (1947). *But see* Public Util. Comm'n. v. United Fuel & Gas Co., 317 U.S. 456, 469-70 (1942).

the rule of "exhaustion" applies where it is contended that the agency does not have jurisdiction[116] as well as where the agency action is allegedly erroneous.[117]

D. Procedure for Obtaining Review

Where the Model Act provides explicit rules of procedure to be followed in prosecuting an appeal from an agency only in contested cases, the Wyoming Act delegates to the Supreme Court the authority to promulgate such rules with respect to administrative action and inaction generally.[118]

The APA stipulates that the procedure for review is controlled by the statute creating the agency, or in the absence or inadequacy of such provisions by "any applicable form of legal action. . . ."[119] The APA also gives both the and the reviewing court the power to postpone the effective date of the agency action during pendancy of the review proceeding,[120] as do Wyoming's new rules of procedure.[121]

Procedure for appeal or review of administrative action is no longer found in the separate statutes establishing the different administrative agencies in Wyoming.[122] The appeal and review provisions of those statutes have been repealed and replaced by the new Wyoming Rules of Civil Procedure[123] which provide for commencing proceedings by filing a petition for review.[124]

The petition must be filed in the district court having venue within thirty days after the final decision of the agency or denial of a petition for rehearing.[125] The petition must show the jurisdiction and venue of the court and the grounds upon which petitioner contends he is entitled to relief.[126]

The Rules also provide in a contested case that concurrently with the filing of the petition for review the appellant

116. Gates v. Woods, 169 F.2d 440, 443 (9th Cir. 1948).
117. Johnson v. Nelson, 180 F.2d 386 (D.C. Cir. 1950), citing SEC v. Otis & Co., 338 U.S. 843 (1949).
118. WYO. STAT. § 9-276.32(b).
119. APA § 10(b).
120. APA § 10(d).
121. WYO. R. CIV. P. 72.1(e) (adopted 1965).
122. The procedure for obtaining review of federal agency decisions is set forth in the federal statute which created the agency or "in the absence or inadequacy thereof, (by) any applicable form of legal action . . . ." APA § 10(b).
123. WYO. R. CIV. P. 87, 72.1.
124. WYO. R. CIV. P. 72.1(c).
125. WYO. R. CIV. P. 72.1(d).
126. WYO. R. CIV. P. 72.1(f).

shall order and arrange for the payment of a transcript of the evidence and must serve upon the agency and all parties written evidence of his compliance with this requirement. Within thirty days after service of the petition the agency is to transmit to the reviewing court the record of the administrative proceeding.[127] To the extent the agency record is not in compliance with the requirements of the Wyoming Act relating to what constitutes the record of agency proceedings[128] the reviewing court may take evidence of the matter. The court may order the agency in contested cases to take additional evidence which was not presented in the agency proceeding, provided such additional evidence is material and there is a reasonable excuse for not having presented it in the agency proceeding, and further that application for leave to present such evidence is made before the date set for hearing the appeal. The agency may adhere to or modify its findings and decision after receiving such additional evidence. In all cases other than contested cases additional material evidence may be presented to the court.[129]

The new Rules apply to all statutory appeals from agencies and all proceedings[130] for statutory review of agency action.[131] While still permitting injunctive and declaratory actions and preserving the extraordinary remedies, the Rules should help attorneys avoid the pitfalls frequently encountered under the common law concerning the selection of an appropriate procedure for judicial review by providing that the petition for review may be utilized for the purpose of seeking relief through one of the traditional forms of procedure.

Hopefully, as a result of the simpler petition for review made available in all cases the extraordinary remedies in Wyoming will go the way of extraordinary remedies in the

127. WYO. R. CIV. P. 72.1(g).

128. WYO. R. CIV. P. 72.1(g). For what constitutes a record in a contested case, see text in note 88 *supra*.

129. WYO. R. CIV. P. 72.1(h).

130. The Wyoming Act makes a very significant change in this respect form the procedure set forth in Section 15(a) of the Model Act. Where the Model Act makes a distinction between the procedure for review of rule making actions and contested cases the Wyoming Act provides on procedure for review of both types of actions. WYO. STAT. § 9-276.32(a).

131. WYO. R. CIV. P. 72.1(c).

federal courts.[132] The crucial problems to which the attorney's attention may be directed will concern whether or not the agency action is reviewable, whether the question is ripe for review, the scope of the court's review and how far the court may go in modifying the agency decision, rather than which name to apply to the action for review.[133]

E. Scope of Review

The scope of judicial review in the APA and the Wyoming Act is based on a determination of whether or not: (1) the agency acted without or in excess of its powers; (2) the decision or other agency action is in conformity with the law; (3) the findings of fact in issue in a contested case are supported by substantial evidence, and (4) the decision or other agency action is arbitrary, capricious or characterized by abuse of discretion.[134] The scope of judicial review under

132. The body of federal administrative law seems to have relegated the extraordinary legal remedies to a position of secondary importance and the most often used and most effective procedures for review are the statutory and the equitable remedies. DAVIS, *op. cit. supra* note 83, at §§ 23.03, 23.10, 23.12. *But see* § 23.08. Under the statutory procedure for review equitable principles control and the court has equity powers even though the statute does not so provide. Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939); United States v. Morgan, 307 U.S. 183, 191 (1939).

133. The common law remedies available are the equitable and the extraordinary legal remedies, which as applied by state courts are mutually exclusive. The determination of which method of review is applicable is made on concepts of whether the agency action is judicial, nonjudicial, discretionary, or ministerial; and these concepts do not lend themselves to accurate definition. A party is put to the task of choosing which remedy is applicable to the decision appealed from, and if he makes the wrong choice his appeal will fail. Certiorari is the wrong method of reviewing nonjudicial action, Jarman v. Board of Review, 345 Ill. 248, 253-54, 178 N.E. 91, 93 (1931); mandamus will not reach discretionary action, State *ex. rel.* Marsh v. State Board of Land Comm'rs., 7 Wyo. 478, 53 Pac. 292 (1898), and since neither certiorari nor mandamus is good for an action which is both nonjudical and discretionary; the remedy is equitable, so that concepts such as irreparable injury are applicable even though such concepts would not affect certiorari or mandamus. DAVIS, ADMINISTRATIVE LAW TREATIES § 24.01 (1958). The result of such a system may be that the court becomes so taken with the technical procedural problems that the appeal fails to reach the merits of the case.

134. WYO. STAT. § 9-276.32(c); APA § 10(e). In Prete v. Parshley, 206 A.2d 521, 523-24 (R.I. 1965), the Rhode Island court stated "when an agency of state government is charged with the administration of some portion of the affairs thereof, it has the authority to determine facts concerning the matters that have been legislatively committed to its supervision or conrol. Judicial review of the decisions of such agencies is designed primarily to confine their activities to the jurisdiction conferred upon them by legislature . . . . We will . . . closely scrutinize the record for the purpose of ascertaining whether there appears (on the record) some legally competent evidence upon which the decision rests. We do this in order to determine whether the board, in exercising its fact-finding power on the basis of evidence that is legally incompetent as being without probative force, acted in excess of its jurisdiction." Rhode Island adopted the Model Act test which is "clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record." R.I. GEN. LAWS ANN. § 42-35-15(g)(5) (Supp. 1965).

the Model Act is also predicated upon these four bases with the notable exception that the Model Act use the "clearly erroneous rule" in place of the "substantial evidence rule."[135] The Wyoming Act stipulates one other basis which is not found in either of the other two acts—*i.e.*, (5) the decision or other agency action was procured by fraud—and the scope of judicial review under the Wyoming Act is *limited* to the determination of these five issues.[136]

Both the Model Act and the APA have three additional bases for judicial review; that the agency action was (A) in violation of a constitutional right, (B) made or taken on unlawful procedure, and (C) in excess of statutory jurisdiction.[137] While the Wyoming Act does not have explicit provision with regard to (A), (B), and (C) those provisions are reasonably inferred by (1) and (2) above.[138]

Under these bases, "review" may range from complete substitution of a court's judgment for that of the agency to no review at all depending upon the nature of the case and the court's characterization of the issues. Ordinarily the court will review and decide questions of law, but it will not question findings of fact if supported by substantial evidence.[139] With respect to hybrid situations involving mixed questions of law and fact federal courts have generally applied the "rational basis test," while the Wyoming Court has

135. MODEL ACT § 15(g)(5).
136. WYO. STAT. § 9-276.32(c).
137. APA § 10(e); MODEL ACT. § 15(g).
138. This inference is based upon the following conclusions: If an agency action is in violation of a constitutional right it is clearly not in conformity with the law. If the action is taken on unlawful procedure it is in violation of the law since it violates the rules of procedure as are required to be adopted by the Wyoming Act. Finally if the agency action is in excess of statutory jurisdiction, the action is clearly in excess of the agency's powers and not in conformity with the law.
139. "Evidence is 'substantial' if it is the kind of evidence a reasonable mind might accept as adequate to support a conclusion." John W. McGrath Corp. v. Hughes, 264 F.2d 314, 316 (2d Cir. 1959), *cert. denied*, 360 U.S. 931 (1959). When it becomes evident that an agency action is based upon substantial evidence the court may take no action of its own based upon evidentiary matters, since a court may not question the *wisdom* of the agency action. SEC v. Chenery Corp., 332 U.S. 194, 207 (1947). See also, DAVIS, *op. cit. supra* note 133, at § 29.02.

The Wyoming Supreme Court, in Chicago, Burlington & Quincy R.R. v. Bruch, 400 P.2d 494, 499 (Wyo. 1965), has said "courts cannot control the discretion of administrative tribunals when fairly and honestly exercised, although, of course, the record must disclose substantial evidence to support the board's decision." See note 89 *supra* where judicial notice of matters by agency not made a part of the record did not constitute substantial evidence.

generally talked about "arbitrary and capricious" or "abuse of discretion." In this context it is believed that the overall impact is comparable to the standard applied by the federal courts.[140]

CONCLUSION

It can be asserted that in the future even more of the ever increasing burdens of state and federal government will be delegated to administrative agencies in the form of powers not only to "legislate" within prescribed guidelines but also to enforce acts passed by the legislature as well as rules promulgated by the agency itself. On this premise the importance of the new Wyoming Administrative Procedure Act, taken in conjunction with Rule 72.1 of the Wyoming Rules of Civil Procedure, cannot be over emphasized from the standpoint of providing expanded rights and protection for parties to administrative proceedings, whether such proceedings are contested (adjudicative), rule making (legislative), or an action which cannot properly be placed in either of these classifications.

While the Wyoming Act makes some substantial changes in the Model Act, it is felt that there are sufficient basic similarities in the Wyoming Act and the Model Act, as well as in the Wyoming Act and the APA, that a proper reading and comparison of the pertinent sections of all three acts and a study of the case law under the Model Act and the APA—keeping in mind any substantive differences—will provide not only a "workable" approach to any administrative problem, but may also provide persuasive authority for the proper interpretation of the Wyoming Act.

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140. See Note, 16 WYO. L.J. 326 (1962).