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THE IDAHO ADMINISTRATIVE PROCEDURE ACT: A PRIMER FOR THE PRACTITIONER

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DALE D. GOBLE*

This article provides a comprehensive explanation and analysis of the Idaho Administrative Procedure Act (APA) adopted by the Idaho Legislature in 1992 and amended in 1993 before the original act's effective date of July 1, 1993. The APA is a new beginning. Idaho administrative law has been characterized too often by ad hoc procedures and unstructured judicial review. The new APA is intended to remedy these problems by creating a new and comprehensive statutory structure. It will dramatically affect the state's agencies; many will be required to completely revise their traditional way of doing business.

Because the Act is a new beginning, a thorough explanation is essential so that those affected by the Act — both the state's administrative agencies and the public they serve — will have a handy reference to the rights and obligations that the Act creates.

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I. INTRODUCTION

An administrative procedure act must specify the procedures administrative agencies are to use and must prescribe the degree of deference a reviewing court is to give to agency decisions on appeal. In its first role, an administrative procedure act is like a constitution.

It establishes the procedures an agency must employ to create statute-like general standards (rules) or to impose judgment-like directives and benefits (orders). By requiring agency decisionmakers to comply with procedural norms of openness and rationality, the act both creates procedural guarantees and limits agency discretion. In its second role, the act structures and confines judicial review by specifying standards for review of agency decisionmaking. This ensures that, while agency action is bounded by procedural and substantive law, the reviewing court does not intrude upon the responsibilities the legislature has delegated to the agency. Both roles reflect the conclusion that fair and open procedures, coupled with a requirement that decisionmakers provide reasons for their decisions, will produce better decisionmaking and better decisions.

While an administrative procedure act functions like a constitution in limiting agency discretion, it differs from a constitution because it confers no substantive authority. The new Idaho Administrative Procedure Act (APA)¹ merely prescribes the procedural limits on the exercise of authority delegated to an agency by another statute. That is, when a statute authorizes an agency to promulgate rules or decide contested cases, the APA specifies the procedures the agency must employ to exercise the delegated powers. But the APA does not itself authorize any agency to promulgate rules or to decide contested cases.² There are two corollaries of this point. First, the APA controls agency decisionmaking procedures only in the absence of more specific statutory requirements.³ For example, if the statute

1. Codified at IDAHO CODE §§ 67-5201 to -5292 (Supp. 1993). Hereinafter, all references to code sections are to the IDAHO CODE unless otherwise indicated.

2. An agency "has no authority other than that given to it by the legislature." *Washington Water Power Co. v. Kootenai Envtl. Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979); see *Hoppe v. Nichols*, 100 Idaho 133, 137, 594 P.2d 643, 647 (1979) (agency hearing was not a "contested case" because the agency lacked the statutory authority to enter orders); *Pumice Prods., Inc. v. Robison*, 79 Idaho 144, 147, 312 P.2d 1026, 1027 (1957) (regulation not authorized by statute is void); see also § 67-5231(1) ("Rules may be promulgated by an agency only when specifically authorized by statute."). The court thus misspoke in a recent case when it said that "[t]he adoption of the Administrative Procedure Act . . . in 1965, served as a general statutory grant of rulemaking authority to administrative agencies to promulgate rules." *Rhodes v. Industrial Comm'n*, 93 Idaho Sup. Ct. Rep. 1417, 1417 (1993). The 1965 APA codified procedures for rulemaking, but did not authorize agency rulemaking.

3. APA procedures apply only to the extent that they are not inconsistent with any procedural requirements in the statutes delegating the agency the authority to promulgate rules and decide contested cases. In this, the APA is like the common law: it is the background that is displaced by statutory law and which fills in any gaps left by specific statutory law. See, e.g., *Knight v.*

creating an agency requires it to hold a public hearing in all rulemakings, the agency is required to comply with that statute as well as the APA to the extent the APA is not inconsistent with the other statute. This basic principle is reflected in the statute's recurrent refrain: "unless prohibited by other provision of law."⁴ Second, the APA is a floor rather than a ceiling: it establishes the minimum procedures an agency must employ. The procedural rights it creates are, therefore, in addition to other statutory and constitutional rights.⁵

In addition to providing procedural guarantees and limiting agency discretion, the drafters of the new APA also sought to implement three broad policy goals: opening up the administrative process to increased public participation and scrutiny; regularizing agency proceedings; and encouraging the use of informal, simple procedures to the extent that informality and simplicity are consistent with fundamental notions of fairness.

First, the drafters of the APA sought to open up administrative decisionmaking by:

- *** requiring the Attorney General to promulgate standard rules of procedure to be used by most state agencies.⁶ This uniformity means that a person will no longer be required to learn a different set of rules for each agency;
- *** requiring publication of all proposed rulemakings in the *Idaho Administrative Bulletin*⁷ and requiring notice of the proposals to be published in newspapers throughout the state;⁸
- *** requiring the annual publication of an *Idaho Administrative Code* that will contain the official text of all rules;⁹

Department of Ins., 119 Idaho 591, 592-93, 808 P.2d 1336, 1337-38 (Ct. App. 1991) (de novo judicial review of agency action under separate statute).

4. The Act defines "provision of law" as "the whole or a part of the state or federal constitution, or of any state or federal: (a) statute; or (b) rule or decision of court." § 67-5201(14); *see also infra* notes 67-69 and accompanying text (discussing the term "provision of law").

5. *Cf. Mills v. Swanson*, 93 Idaho 279, 281, 460 P.2d 704, 706 (1969) ("[T]he legislature by the passage of the Administrative Procedure Act . . . did not intend to abolish those methods of review already in existence."); *see also Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 433, 546 P.2d 382, 388 (1976) (quoting *Mills*, 93 Idaho at 281, 460 P.2d at 706).

6. § 67-5206(2)-(5).

7. § 67-5203.

8. § 67-5221(2).

9. § 67-5204.

- *** expanding the opportunities for public comment¹⁰ and continuing to require agencies to consider that comment;¹¹
- *** providing greater opportunities for legislative comment during the rulemaking process;¹²
- *** requiring agencies to state the reasons for decisions on the content of rules;¹³
- *** requiring agencies to state the reasons for accepting or rejecting public and legislative comments on proposed rules;¹⁴
- *** requiring agencies to compile a more complete record of the information considered in a notice-and-comment rulemaking;¹⁵
- *** reducing variations among agency procedures for contested cases;¹⁶
- *** requiring agencies to index and make available the decision in any contested case that the agency proposes to rely upon in future cases;¹⁷
- *** requiring agencies to index and make available all agency guidance documents such as manuals, memoranda, policy statements, and legal interpretations;¹⁸
- *** authorizing judicial review of agency rulemakings, contested cases, and other actions taken pursuant to a statutory duty.¹⁹

Second, the Act regularizes agency proceedings by reducing the variety of procedures that agencies may employ and by restricting agency discretion:

- *** rulemakings are systematized by requiring agencies to comply with time schedules tied into the publication of the *Administrative Bulletin*;²⁰
- *** the wide variety of agency contested case procedures are reduced to four basic types and the procedures for each are specified;²¹

10. § 67-5222.

11. § 67-5224.

12. § 67-5223.

13. § 67-5224(2).

14. *Id.*

15. § 67-5225.

16. §§ 67-5242 to -5246.

17. § 67-5250(1).

18. § 67-5250(2).

19. § 67-5270.

20. §§ 67-5222 to -5224.

21. §§ 67-5242 to -5247.

- *** the Attorney General has promulgated a set of standard procedural rules that control the procedures before most agencies;²²
- *** the procedural requirements for judicial review and the standards applicable on review are specified in greater detail.²³

Finally, the Act seeks to retain simplicity and informality while ensuring that agency decisionmaking comports with fundamental notions of fairness. Idaho's administrative agencies range from fully professionalized larger agencies to small, citizen-staffed boards. The APA attempts to keep procedures as simple as possible both for the agency and the public. It encourages informal dispute resolution:

- *** through negotiated rulemakings in which all parties seek a consensus on the content of a rule;²⁴
- *** through informal resolution of contested cases.²⁵

The new APA thus significantly modernizes the procedures that govern the state's administrative agencies. It will require a dramatic change in the decisionmaking of many state agencies.

II. GENERAL PROVISIONS

The APA is divided into five parts. The first — §§ 67-5201 to 67-5207 — contains general provisions applicable to the remainder of the APA. This part also creates a new office, the Office of Administrative Rules Coordinator to oversee the publication of the *Administrative Bulletin* and the *Administrative Code*.

A. Section 67-5201: Definitions

Section 67-5201 contains a series of interlocking definitions that apply throughout the remainder of the Act. While definitions are always crucial to understanding a statute, this is particularly true under the APA because of the pervasiveness of terms such as "agency," "rule," and "order" in state government. The new definitions will require some agencies to rename the various types of documents they issue. For example, the Department of Fish and Game and the Public Utilities Commission will no longer be able to issue "rules"

22. § 67-5206.

23. §§ 67-5271 to -5279.

24. § 67-5220(2).

25. § 67-5241.

through "orders" because the documents to which these terms now refer are produced through mutually exclusive procedures.

1. "Agency"

One key to the Act's goal of procedural uniformity is the definition of "agency." The term is defined as "each state board, commission, department, or officer authorized by law to make rules or to determine contested cases."²⁶ Given the definitions of "rule"²⁷ and "contested case,"²⁸ all state entities that are empowered to affect an individual's legal rights, duties, or privileges fall within the definition and are covered by the Act. Given the broad policy goal of regularizing agency decisionmaking, and the fact that the APA's procedural restrictions apply only to "agencies," the courts should include any state entity exercising governmental authority as an "agency," thus bringing it within the confines of the Act.²⁹

While the definition is broad, it nonetheless excludes two general categories of governmental entities. First, in a surfeit of caution, the definition explicitly exempts "the legislative or judicial branches, executive officers listed in section 1, article IV, of the constitution of the state of Idaho in the exercise of powers derived directly and exclusively from the constitution, the state militia or the state board of correction."³⁰ Good grounds clearly exist for exempting both the legislature and the judiciary since each is bound by procedures unique to that branch of government. The exclusion of executive

26. § 67-5201(2).

27. "[T]he whole or a part of an agency statement of general applicability." § 67-5201(16).

28. "[A] proceeding which results in the issuance of an order." § 67-5201(6); "Order" means an agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons." § 67-5201(11).

29. For this reason, the decision in *Bott v. Idaho State Bldg. Auth.*, 122 Idaho 471, 479-80, 835 P.2d 1282, 1290-91 (1992), that the Idaho State Building Authority is not an "agency" is superceded by the new APA. The Authority is an "agency" under the APA's definition of that term because the legislature has empowered the Authority to "adopt and from time to time amend and repeal by-laws and rules and regulations . . . to carry into effect the powers and purposes of the authority and the conduct of its business." § 67-6409(e) (emphasis added).

30. § 67-5201(2). Article IV, § 1 of the Idaho Constitution provides in relevant part: "The executive department shall consist of a governor, lieutenant governor, secretary of state, state auditor, state treasurer, attorney general and superintendent of public instruction." IDAHO CONST. art. IV, § 1. On the exclusion of the State Board of Corrections, see *Carman v. State Comm'n of Pardons & Parole*, 119 Idaho 642, 809 P.2d 503 (1991).

officers exercising constitutional functions was arguably unnecessary since such officers are not "authorized by *law* to make rules or to determine contested cases" when acting exclusively within their constitutional powers.³¹ An explicit exclusion of such officers is, nonetheless, justifiable on at least two grounds. First, principles of separation of powers limit the legislature's authority to control the exercise of constitutional functions by officers in the other branches of government.³² Second, the functions constitutionally vested in executive officers are ordinarily political and thus subject to political rather than judicial scrutiny. Furthermore, the exclusion is a narrow one. It is limited to the officers themselves and does not include "the office of" such officers. For example, if the legislature places a governmental entity within "the office of the governor," it is an "agency" under the APA if it otherwise meets the definition by being authorized to promulgate rules or decide contested cases. Similarly, functions assigned directly to these officers by statute fall within the definition of "agency" to the extent that they authorize rulemaking or contested case proceedings.³³

The second exclusion is for agencies established by counties, municipalities, and other local governing bodies; only units at the *state* level of government are "agencies" under the APA's definition.³⁴ At the same time, the division of the APA into five parts was intended to facilitate the application of individual parts of the Act to local governing bodies when the legislature chooses to do so.³⁵ Thus, while local governmental agencies are not automatically covered by the APA, the Act has been structured to facilitate extension of its provisions to local decisionmakers.

Given the breadth of the definitions of the crucial terms and the narrow scope of the exclusions, all state executive entities — other than constitutional officers — empowered to take actions that affect the legal rights, duties, or other interests of members of the public

31. § 67-5201(2) (emphasis added).

32. "The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." IDAHO CONST. art. II, § 1.

33. See, e.g., *State ex rel. Andrus v. Click*, 97 Idaho 791, 804, 554 P.2d 969, 982 (1976).

34. "Agency" means each *state* board, commission, department or officer § 67-5201(2) (emphasis added).

35. E.g., § 67-6521(d) (local zoning decisions are subject to judicial review under APA).

are within the confines of the new APA.³⁶ The courts, therefore, should require all state agencies to comply with the APA except when it is *explicitly* made inapplicable and should narrowly construe exceptions to promote the Act's overriding goal of procedural uniformity among all state agencies.

2. "Agency Head"

"Agency head" is defined to mean the "individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of law."³⁷ This definition differentiates the "agency" as a unit that includes all employees from the "agency head" as the particular individuals with final legal authority for the decisions of that unit. The term is of primary importance in the contested case procedures where the agency head generally has final legal authority to issue an order.³⁸

Under the definition, different individuals or bodies within the same agency may be the "agency head" for different functions. If the legislature assigns certain functions to one officer and other functions to another, each is the agency head for the particular function for which the officer has final legal authority. For example, the Departments of Health and Welfare, Water Resources, and Fish and Game each have a director who is the agency head for some purposes, and boards or commissions that are the agency head for others.³⁹

3. "Agency Action," "Order," "Rule," "Contested Case," and "Rulemaking"

Section 67-5201 contains three definitions that divide the range of possible agency decisionmaking actions into three categories: "orders," "rules," and other "dut[ies] placed on [an agency] by law." This division is enumerated in the definition of "agency action" as

36. There is also a limited exclusion of the Public Utilities Commission and the Industrial Commission. These agencies are explicitly excluded from the APA's provisions on contested cases, § 67-5240, and judicial review of contested cases, § 67-5270(3). This exclusion was necessitated by the special constitutional status of these two agencies. See IDAHO CONST. art. V, § 9. The rulemaking provisions of the Act are, however, fully applicable to both agencies — which is consistent with the goal of procedural uniformity since exemptions are drawn as narrowly as possible.

37. § 67-5201(4).

38. See §§ 67-5243 to -5246; see also *infra* notes 245-47 and accompanying text (distinguishing "agency head," "presiding officer," and "hearing officer").

39. See §§ 39-104, -107 (Health & Welfare); §§ 36-101, -102 (Fish & Game); §§ 42-1701, -1732 (Water Resources).

- "(a) the whole or part of a rule or order;
- "(b) the failure to issue a rule or order; or
- "(c) the agency's performance of, or failure to perform, any duty placed on it by law."⁴⁰

The first two types of actions — orders and rules — are the more important because they are the two primary ways in which an agency can change legal rights and duties of individuals outside the agency. "Order" means "an agency action of *particular* applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more *specific* persons."⁴¹ A "rule," on the other hand, is "an agency statement of *general* applicability that has been promulgated in compliance with the provisions of" the APA "and that implements, interprets, or prescribes: (a) law or policy, or (b) the procedure or practice requirements of an agency."⁴² The distinction thus turns *primarily* on applicability: orders — like judicial decrees — affect identified parties; rules — like statutes — affect classes of persons.

The number of affected individuals is in itself not necessarily conclusive: a rule may apply to a class of one. For example, an environmental protection rule might apply to only a single plant if there were only one such plant in the state.⁴³ Similarly, as the Snake River adjudication is demonstrating, judicial decisionmaking may affect a large number of parties.

The distinction between adjudicative and legislative decision is central to the APA because it determines whether the agency is required to employ the "contested case"⁴⁴ procedures or may instead rely upon the less procedurally demanding "rulemaking"⁴⁵ requirements. Ultimately, of course, the distinction is bottomed on the one drawn by the United States Supreme Court in *Londoner v.*

40. § 67-5201(3). Two additional points should be noted. First, the principal effect of this broad definition of "agency action" is found in the Act's judicial review provisions. See § 67-5270. Second, "agency action" is defined to include the failure to act. § 67-5201(3)(b)-(c). An agency thus may not evade judicial review by simply doing nothing. See generally *infra* notes 410-11 and accompanying text (discussing judicial review of agency inaction).

41. § 67-5201(11) (emphasis added).

42. § 67-5201(16) (emphasis added).

43. *E.g.*, *Anaconda Co. v. Ruckelshaus*, 482 F.2d 1301, 1306 (10th Cir. 1973).

44. "Contested case" means a proceeding which results in the issuance of an order." § 67-5201(6). The contested case procedures are set out at §§ 67-5240 to -5255.

45. "Rulemaking" means the process for formulation, adoption, amendment or repeal of a rule." § 67-5201(17). The rulemaking procedures are contained in §§ 67-5220 to -5232.

*Denver*⁴⁶ and *Bi-Metallic Investment Co. v. State Board of Equalization*:⁴⁷ contested case procedures are constitutionally required only where a "small number of persons . . . [are] exceptionally affected . . . upon individual grounds";⁴⁸ rulemaking procedures, on the other hand, may be employed "[w]here a rule of conduct applies to more than a few people."⁴⁹ The distinction mirrors that between legislative and judicial decisionmaking. The Idaho APA restates this fundamental proposition — that the state may affect an individual on individual grounds only by providing that person with notice and an individualized hearing, but may affect classes of persons without such individualized hearings — in its definitions of "order" and "rule."

The definition of "rule" raises three additional points. First, an agency statement is a "rule" only if it has been promulgated in compliance with rulemaking procedures. That is, a "rule" is "an agency statement of general applicability *that has been promulgated in compliance with the provisions of this chapter.*"⁵⁰ As the comment to the definition notes, "[t]he limitation on agency statements that are 'rules' is procedural rather than substantive: an agency may promulgate a rule only by complying with the procedure set out in the Administrative Procedure Act."⁵¹ Thus, a statement by an agency — regardless of its appellation and even if it interprets law or prescribes policy — is not a "rule" unless it has been promulgated in compliance with the procedures set out in the APA.

The second and corollary point is that, if the statement is not a "rule," it does not have the force and effect of law.⁵² In other words,

46. 210 U.S. 373 (1908).

47. 239 U.S. 441 (1915).

48. *Id.* at 446; cf. *United States v. Florida E. Coast Ry.*, 410 U.S. 224, 244 (1973) ("The basic distinction between rulemaking and adjudication is illustrated by this Court's treatment of" *Londoner* and *Bi-Metallic*.).

49. *Bi-Metallic*, 239 U.S. at 445.

50. § 67-5201(16) (emphasis added).

51. § 67-5201 cmt. 16.

52. See, e.g., *Curr v. Curr*, 124 Idaho ___, 864 P.2d 132, 137 (1993); *Bingham Memorial Hosp. v. Idaho Dep't of Health & Welfare*, 108 Idaho 346, 347, 699 P.2d 1360, 1361 (1985) (per curiam); *Minidoka Memorial Hosp. v. Idaho Dep't of Health & Welfare*, 108 Idaho 344, 345-46, 699 P.2d 1358, 1359-60 (1985) (per curiam). Similarly, the four categories of statements specifically exempted from the Act's definition of "rule" do not have the force and effect of law on the general public. Those categories are:

(i) statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public; or

(ii) declaratory rulings issued pursuant to section 67-5232, Idaho Code; or

if the agency desires to adopt a "statement . . . that . . . prescribes . . . law,"⁵³ it must comply with the APA's rulemaking procedures: "If the agency has not complied with these requirements, it has not promulgated a 'rule' and the statement lacks the force and effect of law. If an agency wishes to impose legal obligations on a class of persons, it must promulgate a rule."⁵⁴ The benefit that an agency gains from complying with the procedures necessary to promulgate a rule is that the rule is an independently binding legal requirement. If an agency does not comply with the necessary procedures, it has not created a "rule"; if the agency attempts to apply a legal interpretation or a policy statement that has not been promulgated as a rule, the issue is not whether the person's conduct violated that statement, but whether the conduct violated the underlying statute.⁵⁵ As a result of these requirements, a large number of documents that agencies have traditionally given the force and effect of law will cease to have that status unless they are repromulgated as rules.⁵⁶

-
- (iii) intra-agency memoranda; or
 - (iv) any written statements given by an agency which pertain to an interpretation of a rule or to the documentation of compliance with a rule.

§ 67-5201(16)(b).

53. § 67-5201(16) (emphasis added).

54. § 67-5201 cmt. 16; *see also* Service Employees Int'l Union v. Idaho Dep't of Health & Welfare, 106 Idaho 756, 758-59, 683 P.2d 404, 406-07 (1984) (agency manual that had not been promulgated as a rule did not create legal rights or responsibilities).

55. *E.g.*, *Curr.*, 124 Idaho at ___, 864 P.2d at 137. (agency "letter of understanding" not promulgated as a rule "lends no support to the Commission's claimed authority".)

56. These two points can be clarified by looking at a recent Idaho Supreme Court case decided under the former APA. *Tomorrow's Hope, Inc. v. Idaho Dep't of Health & Welfare*, 124 Idaho ___, 864 P.2d 1130 (1993), involved a controversy over Medicare payments for mentally retarded individuals living in an intermediate care facility. *Id.* at ___, 864 P.2d at 1131-32. Under the Medicare program, payments for most services are computed as a percentage of the provider's total costs of providing the service. *Id.* The statute, however, requires certain costs — those "peculiar" to the care of mentally retarded individuals — to be fully reimbursed. *Id.* Thus, the more costs determined to be peculiar to caring for mentally retarded persons, the greater the payment the care provider receives. The agency had previously promulgated a rule defining the fully reimbursable costs to be the "direct care costs" of mentally retarded residents. *Id.* In response to requests for additional guidance from its auditors on what costs were properly "direct care costs," the agency issued a memorandum construing such costs to include only "hands-on" services. *Id.*

The care provider sought review of the agency's disallowance of certain costs that it believed were "direct care costs" under the rule; the agency contended, on the other hand, that they were not "hands-on" costs and thus were

It is crucial that courts require agencies to comply with the APA's procedural requirements when they seek to affect individuals. *An agency that attempts to enforce compliance with statements that it has not promulgated as a rule under the APA's rulemaking provisions should be assessed costs in any resulting judicial action* since the agency "acted without a reasonable basis in . . . law."⁵⁷

The third point that is implicit in the definition of "rule" is that an agency must comply with its own rules. Since validly promulgated rules have the force and effect of law, the agency like the public must comply with rules.⁵⁸ Thus, an agency may give its general statements of policy the force and effect of law only by promulgating them

not reimbursable. *Id.* The court viewed the issue to be whether the hands-on policy "amounted to a fundamental, significant change in [the] interpretation" of the statutory language or is "merely a refinement of, and is essentially consistent with," the agency's earlier amplification of the statutory language in its rule. *Id.* at ___, 864 P.2d at 1132. The court believed that this inquiry was controlling because "an interpretation of the statutory term 'peculiar'" could be accomplished only through a rulemaking, while an interpretation "of the regulatory term 'direct care costs'" would exempt from the requirement that it be adopted as a rule. *Id.* The court acknowledged that attempts to distinguish between "interpretations" and "redefinitions" created a "difficult problem," but concluded that this was the task assigned to the court by the former APA. *Id.* at ___, 864 P.2d at 1133.

Under the new APA, courts will not be required to engage in such chimerical searches. The hands-on policy is not a "rule" under the new APA's definition of the term because it was not promulgated in compliance with the Act's rulemaking procedures. The policy therefore does not have the force and effect of law and the issue before the court under the new APA would be whether the disputed cost items were "direct care costs" rather than whether they were "hands-on" costs. This would be the issue because the care provider is required to comply with the law — that is, the rule — rather than with the agency's interpretation of that law. Unlike the old APA as construed in *Tomorrow's Hope*, the hands-on policy will not be given the force and effect of law: it will merely be the agency's interpretation of what "direct care costs" means. While an agency's interpretation of its rules is entitled to deference from a reviewing court, the reviewing court must determine whether the agency's disallowance of the disputed costs was consistent with the *rule*. The crucial point is: the reviewing court's focus is shifted from distinguishing between "interpretations" and "redefinitions" to the type of question that courts have traditionally answered: are specific disputed cost items "direct care costs" within a statutory-type statement of general norms.

A final point: under the new APA the term "interpretive rule" is an oxymoron. There are interpretations and there are rules, but an agency statement is one or the other since an interpretation that is promulgated as a "rule" is a *rule*; and interpretations that are not promulgated as rules are only interpretations.

57. § 12-117(1). Courts should be particularly vigilant to prevent an agency from obtaining the legal benefits of promulgating rules without complying with the procedural requirements since such actions undercut the APA's safeguards.

58. *E.g.*, Hoppe v. Nichols, 100 Idaho 133, 137, 594 P.2d 643, 647 (1979).

in compliance with the APA's procedural requirements; when it does so, the rules are binding on both the public and the agency itself.⁵⁹

Agencies, of course, do many things in addition to promulgating rules and issuing orders. Some of these actions carry out duties imposed on the agency by a statutory or judicial mandate. When the agency complies or fails to comply with such a duty, its conduct is "agency action."⁶⁰ Extending judicial review to such agency actions is a significant change in the new APA. For example, the Department of Transportation is required by statute to adopt "a uniform system of traffic-control devices" that conform to federal standards⁶¹ and to ensure that such devices are installed where appropriate.⁶² If the Department failed to install a speed limit sign near a school playground, this would be an agency action because it would be a "failure to perform, [a] duty placed on it by law."⁶³ A reviewing court may, of course, conclude that the substantive law does not in fact require a speed limit sign and the agency would prevail on the merits. Nonetheless, the APA creates a procedural right to have a court review the merits of the agency's decision.⁶⁴

Stating the point from a different perspective: decisions that are totally discretionary, that involve no duty are not "agency actions" subject to judicial review. There are, however, few agency decisions

59. It is useful to remember three caveats to these principles. First, the APA confers no *substantive* authority on an agency. Thus, an agency must be delegated the power to promulgate rules by a statute other than the APA. See § 67-5231(1). Second, the APA also does not confer discretion on an agency: if a statute requires an agency to promulgate rules, the APA does not allow the agency to evade its statutory duty. The APA's definition of "rule," in other words, does not grant discretion to avoid rulemaking. Third, the APA's procedural requirements for rulemakings apply only to the extent that they are not inconsistent with any procedural requirements contained in the statute delegating the agency power to promulgate rules. See *infra* notes 67-69 and accompanying text. These three caveats are variations on two general principles: an agency is a creature of statute that possesses only the authority delegated to it by a statute and the APA is not a delegation of substantive authority.

60. § 67-5201(3)(c) ("'Agency action' means: . . . (c) an agency's performance of, or failure to perform, any duty placed on it by law.").

61. § 49-201(3).

62. § 49-201; *see also* Bingham v. Idaho Dep't of Transp., 117 Idaho 147, 150-51, 786 P.2d 538, 541-42 (1990) (implementation of statutory requirements not discretionary).

63. § 67-5201(3)(c).

64. As a comment to the APA states, the Act expands the range of agency decisions subject to judicial review. § 67-5201 cmt. 3. At the same time, "[i]t is important to distinguish between availability of review and likelihood of success on the merits. The Act limits the scope of judicial review rather than *precluding* review of agency actions." *Id.*

that are totally discretionary since statutes commonly hedge in administrative discretion by specifying standards or requiring findings. In such cases, the rationality of the agency's decision on the findings or other statutory limits will be subject to judicial review.

4. "Party" and "Person"

An additional pair of terms are related to the APA's distinction between adjudicative, record-based decisions and legislative, non-record-based decisions. Under the Act, a "party" is "each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party" in a contested case.⁶⁵ A "person," on the other hand, is "any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character."⁶⁶

5. "Provision of Law"

A phrase that recurs repeatedly in the APA is "other provision of law."⁶⁷ The Act defines the phrase broadly: " 'Provision of law' means the whole or a part of the state or federal constitution, or of any state or federal: (a) statute; or (b) rule or decision of court."⁶⁸ This reflects the basic proposition that the APA's provisions are applicable only in the absence of other legal requirements. Thus, if a statute requires that an agency's decisions be reviewed *de novo*, that requirement overrides the inconsistent provisions for appellate review in the APA.⁶⁹

65. § 67-5201(12). The Attorney General's Rules define eight categories of parties in addition to the agency: applicants, claimants, appellants, petitioners, complainants, respondents, protestants, and intervenors. See IDAHO R. ADMIN. P. 150-156, 93-1 IDAHO ADMIN. BULL. at 04-62 (to be codified at IDAPA 04.11.0100 to .0199). Under the numbering system for rules, Attorney General Rule 550 is IDAPA 04.11.01550 (emphasis added). Hereinafter, citations to the Attorney General's procedural rules will be to "IRAP ____." See IRAP 6.

66. § 67-5201(13). The Attorney General's Rules recognize that "persons" may potentially be interested in some types of agency proceedings even though they are not parties to the proceedings. See IRAP 158, 355.

67. See, e.g., §§ 67-5240, -5241, -5270, -5272, -5273, -5279.

68. § 67-5201(14).

69. E.g., Hart v. Stewart, 95 Idaho 781, 784, 519 P.2d 1171, 1174 (1974); Knight v. Department of Ins., 119 Idaho 591, 593, 808 P.2d 1336, 1338 (Ct. App. 1991).

B. Sections 67-5202 to 67-5205: Publication of Agency Rules

In 1980 the legislature amended the Administrative Procedure Act to ensure that agency rules would be generally available to the public.⁷⁰ The amendment required each agency to send copies of its rules to twenty-five designated libraries throughout the state. Anecdotal evidence that the system was not working was confirmed in a 1991 study by the Idaho State Library. The report found that the publication system "fails in its primary objective of providing broad public access to a complete, current, and uniform set of rules."⁷¹ The study found that the major problem was "the absence of any control,"⁷² which was traceable to the lack of a centralized administration or coordination of the distribution system.⁷³ The report concluded: "Any modification or major change in the distribution system should include some degree of centralized administration or coordination.... Merely tinkering with the existing system is short-sighted and will not ensure that the public has convenient access to complete, current, and uniform sets of rules."⁷⁴

Responding to the report's criticisms and recommendations, the new APA establishes a centralized publication system overseen by the new Office of Administrative Rules Coordinator.⁷⁵ The Rules Coordinator is responsible for the production of the two publications established by the Act, the *Idaho Administrative Bulletin*⁷⁶ and the *Idaho Administrative Code*.⁷⁷ The Coordinator is also responsible for ensuring uniformity in agency rules, and therefore is delegated

70. Act of Mar. 14, 1980, ch. 78, § 1, 1980 Idaho Sess. Laws 160 (formerly codified at § 67-5205) (requiring each agency to provide enumerated libraries with complete sets of rules); *see also* Williams v. State, 95 Idaho 5, 9, 501 P.2d 203, 207 (1972) ("[U]nless the administrative agency furnishes copies to each of the respective law libraries, its rules and regulations are without force and effect.").

71. Karin E. Ford & Carol A. Silvers, Idaho State Library, The Distribution to Idaho Libraries of Administrative Procedure Act Rules 5 (1991) (copy on file with Professor Dale D. Goble, University of Idaho College of Law).

72. *Id.*

73. Insufficient personnel and funds to keep the rules current also contributed to the problems. *Id.*

74. *Id.*

75. § 67-5202. The Rules Coordinator is located within the office of the State Auditor and is to be appointed by the Auditor "with the advice and consent of the senate." *Id.*

76. § 67-5203.

77. § 67-5204.

authority to promulgate rules establishing a uniform numbering, style, and format for agency rules.⁷⁸

The *Idaho Administrative Bulletin*, a publication modeled on the *Federal Register*, is to be published at least monthly.⁷⁹ The *Bulletin* will contain the various documents required for an agency rulemaking,⁸⁰ and its publication schedule is therefore tied into the time limits provided in the rulemaking provisions of the APA. For example, it is publication in the *Bulletin* that initiates the time limits applicable to the stages of a rulemaking.⁸¹ In addition to agency rulemaking documents, the *Bulletin* will contain "any legislative documents affecting a final agency rule" and "all proclamations and executive orders of the governor."⁸²

While the *Bulletin* will be the primary method of providing notice to the public of proposed rulemakings, the Rules Coordinator is also required to publish a brief notice of proposed rules in local newspapers.⁸³ The APA substantially expands the number of newspapers in which notice is to be published and increases the visibility of the notice by moving it out of the legal notices section. The newspaper notice directs interested persons to locations where the full text of the proposed rule can be found in the *Bulletin*.

The second new publication is the *Idaho Administrative Code*.⁸⁴ The *Code* is modelled on the *Code of Federal Regulations* and is to be an annual codification of all final agency rules, any legislative documents affecting such rules, and all gubernatorial proclamations and orders.⁸⁵ The *Code* will contain the text of all previously codified

78. §§ 67-5202, -5206(1).

79. The Rules Coordinator is also authorized to promulgate rules establishing publication schedules for the *Bulletin* and the *Code*. § 67-5206(1). The authority to do so is, however, limited by § 67-5203(1) which requires publication "not less frequently than the first Wednesday of each calendar month, but not more frequently than every other week." § 67-5203(1).

80. These documents may include a Notice of Intent to Promulgate a Rule, § 67-5220, Notice of a Proposed Rulemaking, § 67-5221, and Final Rule, § 67-5224. The information to be included in these documents is set out in the respective sections.

81. See §§ 67-5220 to -5228.

82. § 67-5203(4). This list is not exhaustive since the legislature may require additional classes of documents to be published in the *Bulletin*. On the other hand, matters internal to an agency or to the government are generally not to be published. Cf. § 67-5201(16) (defining "rule" to exclude "statements concerning only the internal management or internal personnel policies of an agency and not affecting private rights of the public or procedures available to the public").

83. § 67-5221(2).

84. § 67-5204.

85. § 67-5204(2).

rules that remain in effect as well as the text of all new final rules published in the *Bulletin* during the preceding year.⁸⁶

The new system should rectify distribution problems that plagued the previous system by making a complete set of rules available in each county law library.⁸⁷ Furthermore, since "[t]he text of all documents published in the bulletin shall be the official text of that document until the document has been published in the administrative code,"⁸⁸ an individual will be able to determine conclusively the content of the current permanent rules by examining the *Code*, a quarterly cumulative index, and no more than three months' *Bulletins*.⁸⁹

The new publication system is one of several provisions in the Act intended to prevent the creation of "secret law" and to provide greater certainty on the public's legal rights and responsibilities. There is nothing as injurious to the concept of the rule of law as a system that hides the law. The *Bulletin* and the *Code* will remove one possible source of inadvertent secrecy.⁹⁰

C. Section 67-5206: Promulgation of Rules Implementing the Administrative Procedure Act

The Idaho APA, like its federal counterpart, does not specify procedural minutiae such as a numbering system for agency rules, the format and content requirements for various filings, and the like. Leaving such matters to each agency, however, would have produced disparate requirements and frustrated the desired administrative

86. *Id.*

87. § 67-5205(2).

88. § 67-5203(5); *cf.* § 67-5204(3) ("The text of all documents published in the administrative code shall be the official text of that document.").

89. Section 67-5203(3) requires a cumulative index to the *Bulletin* to be published at least every three months. The only exception to these publication requirements is for "temporary rules," a limited category of rules that may take effect immediately upon their transmittal to the Rules Coordinator without awaiting their publication in the *Bulletin*. *See* § 67-5226(1) ("The agency may make the temporary rule immediately effective."). "Temporary rules shall be published in the first available issue of the bulletin." § 67-5226(3). *See generally infra* notes 150-57 and accompanying text (discussing temporary rules).

90. The secrecy was frequently inadvertent because the prior law, by denying legal effect to rules that were not available in enumerated libraries, created a strong incentive for agencies to comply with publication requirements. *See* Act of Mar. 14, 1980, ch. 78, § 1, 1980 Idaho Sess. Laws 160 (formerly codified at § 67-5205); Williams v. State, 95 Idaho 5, 9, 501 P.2d 203, 207 (1972). The designated libraries, however, often lacked sufficient staff to keep the rules current. *See supra* notes 71-74 and accompanying text.

uniformity. As a compromise, the Act delegates to the Rules Coordinator and the Attorney General the power to promulgate uniform rules to cover such matters. Thus, the Rules Coordinator is authorized to promulgate rules establishing a uniform numbering, style, and format for agency rules.⁹¹ The Attorney General is delegated broader responsibility to prepare a set of procedural rules for use by state agencies.⁹² The Attorney General's rules are to specify the more detailed standards, forms, and procedures necessary to implement the rulemaking and contested case procedures set out in the Act.⁹³

To further the goal of administrative uniformity, the Act provides that the Attorney General's rules will apply to "to all agencies that do not affirmatively promulgate alternative procedures."⁹⁴ Any agency desiring to adopt procedural rules different from those promulgated by the Attorney General must include in its rulemaking "a finding that states the reasons why the relevant portion of the attorney general's rules were inapplicable to the agency under the circumstances."⁹⁵ Furthermore, the Attorney General's rules are intended to establish the minimum procedural requirements. Agencies seeking to be excluded from coverage of the Attorney General's rules are expected to meet their minimum requirements. The mandate that an agency must affirmatively act to exempt itself from the Attorney General's rule was to encourage uniformity by enlisting the power of inertia.

The Attorney General's Rules of Procedure were promulgated on July 1, 1993, in the first edition of the *Idaho Administrative Bulletin*.⁹⁶

91. §§ 67-5202, -5206(1).

92. § 67-5206(2).

93. See §§ 67-5206(3)-(4) (specifying the subjects to be covered by the rules).

94. § 67-5206(5)(a).

95. § 67-5206(5)(b). The larger agencies that need specialized procedures have promulgated their own rules. They have, however, generally followed the Attorney General's Rules in format and content. See, e.g., IDAPA 31.01.01000 (Public Utilities Commission rules); IDAPA 37.01.01000 (Department of Water Resources rules).

96. 93-1 IDAHO ADMIN. BULL. at 04-62 (1993) (to be codified at IDAPA 04.11.0100 to .0199).

The Attorney General's Rules and the APA have been published in pamphlet form by the Attorney General and are available from the Office of the Attorney General, Statehouse, Boise, Idaho 83720. The cost is \$15 per copy.

III. DECISIONMAKING PROCEDURES

The second and third parts of the APA — §§ 67-5220 to 67-5232 and §§ 67-5240 to 67-5255 — specify the procedures that an agency must employ to take the two types of agency actions that affect the rights and duties of private individuals: promulgating rules and deciding contested cases.

A. Rules and Rulemaking

When an agency is engaged in rulemaking it is acting in a legislative capacity and the process constitutionally due does not include an individualized hearing.⁹⁷ The comparatively minimal due process requirements increase the importance of statutory procedures. These statutory procedures are contained in §§ 67-5220 to 67-5232.

1. Section 67-5220: Negotiated Rulemaking

One of the goals of the APA is to encourage the use of informal procedures. This goal is reflected in the authority delegated to agencies to publish a Notice of Intent to Promulgate Rules.⁹⁸ This notice — “a brief, nontechnical statement of the subject matter to be addressed in the proposed rulemaking”⁹⁹ — will alert potentially interested persons that an agency is considering promulgating rules before the agency has committed itself to specific language. Involving the interested public at an early stage is intended to “facilitate negotiated rulemaking.”¹⁰⁰

97. *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915). The Supreme Court stated:

Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals . . . without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.

Id.; see *supra* notes 44-49 and accompanying text (discussing the distinction between legislative and adjudicative decisions).

98. § 67-5220; see also IRAP 800, 810-15; cf. § 67-5241 & cmt. 3 (encouraging informal dispute resolution).

99. § 67-5220(1); see also IRAP 812 (specifying content of Notice of Intent to Promulgate Rules).

100. § 67-5220(2); see also IRAP 810 (stating a preference for negotiated

Negotiated rulemaking is a process that developed during the 1980s as an alternative to notice-and-comment rulemaking. The defining attribute of the procedure is the bringing together of representatives from the agency and the various groups of interested persons to "seek consensus on the content of a rule."¹⁰¹ The procedure allows participants to share information, expertise, and technical capabilities, thus encouraging an examination of factual assumptions and policy preferences. If the various persons achieve consensus on the content of the rule, it is likely to be easier to implement and less likely to face judicial challenge. Even if consensus is not achieved, the agency is likely to be much better informed of the issues and concerns of the various interests.¹⁰²

It is important to note that the negotiated rulemaking provisions are not mandatory; the APA encourages but does not require an agency to engage in negotiated rulemaking. Furthermore, the agency retains the final legal authority to determine the content of all rules.¹⁰³ This point has at least three corollaries. First, the agency is not obligated to propose any rule that comes out of a negotiated rulemaking. Since the agency retains full legal authority for all rulemaking proposals, it may accept or reject in whole or in part the outcome of the negotiation process. Second, agency actions relating to the creation, negotiations, and termination of the negotiating committee do not provide independent grounds for judicial review of any eventual agency action.¹⁰⁴ Third, a reviewing court is not to give a rule greater deference merely because it was the product of a negotiated rulemaking.

In addition to encouraging discussion between the agency and interested persons, a pre-rulemaking notice such as the Notice of Intent to Promulgate Rules offers several potential benefits even if the agency does not initiate a negotiated rulemaking. It is likely to save the agency time by alerting it to potential problems early in the decisionmaking process. As a result, the agency may avoid the need

rulemaking), 813-15 (procedures for negotiated rulemaking).

101. § 67-5220(2).

102. Another potential outcome is consensus on some but not all issues involved in a rulemaking — a result that helps to define the areas of disagreement. Cf. IRAP 814 (requiring a report to be sent to the agency on any consensus that develops).

103. See IRAP 815 ("The agency may accept in whole or in part or reject the consensus reached by the parties in publishing a proposed rule for notice and comment.").

104. See IRAP 811 ("The determination of the agency whether to use . . . negotiated rulemaking is not reviewable.").

to rewrite drastically and therefore, to re-propose the text of a proposed rule. Second, the notice will also facilitate public involvement since concerns can be presented to the agency before it has committed itself to particular language. The Notice of Intent to Promulgate Rules does not preclude an agency from seeking information and public comment by other methods such as informational meetings, workshops, and the like. In fact, the Notice of Intent to Promulgate Rules may be used to schedule such alternative procedures.

2. Sections 67-5221 to 67-5225 and Section 67-5227: Mandatory Notice-and-Comment Rulemaking Procedures

The promulgation of notice-and-comment rules involves four mandatory¹⁰⁵ steps:

- a. publication in the *Bulletin* of a notice containing the text and additional information on the proposed rule;¹⁰⁶
- b. concurrent notification of the legislature so that the Germane Joint Subcommittees have an opportunity to consider the proposal;¹⁰⁷
- c. opportunity for the public to comment on the proposal;¹⁰⁸
- d. publication in the *Bulletin* of the text of the final rule along with a statement of reasons for the rule.¹⁰⁹

a. Section 67-5221: Publication of a Notice of Proposed Rulemaking

Notice-and-comment rulemaking is initiated with the publication of a Notice of Proposed Rulemaking in the *Bulletin*.¹¹⁰ The APA requires the notice to contain three types of information.

105. The APA specifies that a final rule "is voidable unless adopted in substantial compliance with the requirements" of the Act. § 67-5231(1).

106. § 67-5221; *see also* IRAP 830 (requirements for Notice of Proposed Rulemaking).

107. § 67-5223.

108. § 67-5222; *see also* IRAP 832 (comments on proposed rulemaking).

109. § 67-5224; *see also* IRAP 835 (requirements for adoption of final rule).

The full text of the final rule need not be published if there are no "significant changes" between the proposed and final text. § 67-5224(3).

110. § 67-5221; *see also* IRAP 830 (requirements for Notice of Proposed Rulemaking). In addition to publication in the *Bulletin*, the APA requires the Rules Coordinator to publish an abbreviated notice of the proposed rulemaking in newspapers throughout the state. *See* § 67-5221(2).

(1) A statement of the authority for the rulemaking.¹¹¹ This is a double requirement: the agency must have been delegated both the authority to promulgate rules and the authority to regulate the type of conduct that the rule covers. While both delegations may be contained in the same statutory provision, the distinction between the two types of authority is crucial. The mere creation of an agency and the delegation of authority to it to regulate specified conduct does not in itself include the power to promulgate rules; that power must be specifically delegated to the agency.¹¹² In addition to the power to promulgate rules, the agency must have been granted the power to regulate conduct within a substantive area. Substantively, of course, an agency's rules may not exceed the scope of the discretion delegated to it.¹¹³

(2) A description of the content and purpose of the proposed rule, as well as its proposed text.¹¹⁴

(3) Information on the public's opportunity to comment on the proposal.¹¹⁵ The notice must include information on how to request

111. § 67-5221(1)(a).

112. *E.g.*, Pumice Prods., Inc. v. Robison, 79 Idaho 144, 147, 312 P.2d 1026, 1027 (1957). This is, of course, an example of the general principle that an agency is a creature of statute and has only those powers specifically granted to it. See *supra* note 2. An exception to this principle is the recognition that an agency has the implied authority to promulgate procedural rules. *See Monroe v. Chapman*, 105 Idaho 269, 270, 668 P.2d 1000, 1001 (1983).

Authority to promulgate rules may also be found in a combination of federal and state law. For example, federal statutes authorize the governor to designate a state agency to carry out federal programs. *See, e.g.*, Comprehensive Environmental Response, Compensation & Liability Act (CERCLA) § 107(f)(2)(B), 42 U.S.C. § 9607(f)(2)(B) (Supp. 1992); Child Care & Development Block Grant § 658D, 42 U.S.C. § 9858b(a) (Supp. 1992). In these circumstances, the delegation of authority to promulgate rules is to be found in the conjunction of the federal statute and gubernatorial designation. This follows from the definition of "provision of law" to include both state and federal law. *See* § 67-5201(14). When a state agency promulgates rules to implement a federal program, it is required to comply with the state APA to the fullest extent possible.

113. *E.g.*, Rhodes v. Industrial Comm'n, 93 Idaho Sup. Ct. Rep. 1417, 1418 (1993); Grayot v. Summers, 75 Idaho 125, 132, 269 P.2d 765, 768-69 (1954); Rawson v. Idaho State Bd. of Cosmetology, 107 Idaho 1037, 1040, 695 P.2d 422, 425 (Ct. App. 1985), *overruled on other grounds by* Golay v. Loomis, 118 Idaho 387, 391 n.3, 797 P.2d 95, 99 n.3 (1990); *see also infra* notes 465-74 and accompanying text (discussing judicial review of law-making function).

114. § 67-5221(1)(b)-(c).

115. § 67-5221(1)(d)-(g).

an oral presentation¹¹⁶ as well as how to submit written comments on the proposed rule.¹¹⁷

b. Section 67-5223: Legislative Notification of Proposed Rulemaking

In addition to increasing public participation in rulemakings, the APA also increases the opportunities for legislative participation. This is accomplished by requiring the agency to provide the Director of the Legislative Council with a copy of the Notice of the Proposed Rulemaking in conjunction with submission of the Notice to the Rules Coordinator for publication in the *Bulletin*.¹¹⁸ The Director is to analyze the proposal and refer it to the appropriate Germane Joint Subcommittee. The Subcommittee is empowered to acquire additional information on the proposed rule through two procedures. First, it may require the agency to prepare "an evaluation of the costs and benefits of the rule, including any health, safety, or welfare costs and benefits."¹¹⁹ Second, the Subcommittee may also hold a hearing on the proposed rule.¹²⁰ To facilitate acquisition and evaluation of additional information, the Subcommittee may require the agency to extend the public comment period to receive the Subcommittee's comments.¹²¹ The APA thus grants the Germane Joint Subcom-

116. § 67-5221(1)(f). Unless the agency has no discretion because it is complying with a controlling judicial order or the provisions of an amended state or federal statute, the agency is required to provide an opportunity to make an oral presentation on the proposed rule when it receives a request by twenty-five people, a political subdivision, or another agency. § 67-5222(2). The section specifies alternative methods of calculating the time limits for filing a petition for an oral presentation. *Id.* When the agency provides less than twenty-eight days for public comment, the petition must be filed within fourteen days after the notice is published. *Id.* When the agency provides more than twenty-eight days for public comment, the petition must be filed within fourteen days of the end of the comment period. *Id.*

117. § 67-5221(1)(e).

118. § 67-5223. The requirement of "concurrent notification" of the Director of Legislative Council does not require "simultaneous notification." Agencies, for example, may contract with the Administrative Rules Coordinator to provide notification when the Coordinator receives the rulemaking documents despite the fact that this might result in slight delays in notifying the legislature. Since the Rules Coordinator must receive the rules in advance of their publication in the *Bulletin*, relying on the Rules Coordinator to provide legislative notification will result in significantly expanded notice.

119. § 67-5223(3).

120. § 67-5223(2).

121. *Id.* The Subcommittee is required to notify the agency of its intent to hold a hearing within fourteen days of the publication of the Notice of Proposed

mittees broad power to bring additional public comment to the agency's attention. Ultimately, of course, the Subcommittee's power is political. Its comments and recommendations are not legally binding on the agency.

c. Section 67-5222: Opportunity for Comment on Proposed Rules

An agency is required to provide the public with an opportunity to comment on all proposed rules.¹²² This does not, however, require the agency to schedule an oral presentation¹²³ on each proposed rule. The opportunity for public comment on proposed rules is generally satisfied if the agency provides an opportunity to submit written comments.¹²⁴ The argument that the opportunity to make an oral presentation will lead to a fuller understanding of the presenter's concerns is particularly questionable in the case of complex or technical rulemakings. In general, written comments are not only less expensive and time consuming than are oral presentations, they are also a far clearer and more efficient method of presenting relevant "data, views, and arguments."¹²⁵ Concern that an agency may too easily brush aside written comments is better resolved by requiring the agency to demonstrate that it has considered fully all comments.¹²⁶ Thus, while an agency may provide one or more oral presentations in conjunction with any rulemaking, the APA requires it to do so only under three conditions: (1) when the agency receives a written request for an oral presentation from twenty-five persons, a political subdivision, or an another agency,¹²⁷ (2) when the agency is promulgating a *substantive* rule,¹²⁸ and (3) the agency has discretion on the content of the rule.¹²⁹

Rulemaking in the *Administrative Bulletin* or within fourteen days of the end of the comment period. *Id.*

122. § 67-5222.

123. The Act employs the term "oral presentation" to make explicit that it does not require a trial-type proceeding during the rulemaking. While an agency is, of course, free to employ such procedures if it chooses, the statute does not mandate such formality. Rather, it is presumed that the proceedings generally will be legislative rather than adjudicative in format. See IRAP 833.03 (procedures for oral presentations).

124. § 67-5222(1).

125. *Id.*

126. The APA seeks to ensure full consideration by requiring the agency to provide an explanation of its decision. See *infra* notes 133-41 and accompanying text (discussing publication of final rules).

127. § 67-5222(2); see also IRAP 833 (content requirements for petition for oral presentation).

128. § 67-5222(2).

At a minimum, an agency is required to provide the public with twenty-one days within which to comment on the proposed rule;¹³⁰ as with other time periods applicable in a rulemaking, the agency may extend the comment period. The period will automatically be extended by either a petition for an oral presentation¹³¹ or by a decision of the Germane Joint Subcommittee to hold a public hearing.¹³²

d. Section 67-5224: Publication of Final Rules

Following the close of the comment period, the agency is required to "consider fully all written and oral submissions."¹³³ Following this consideration, the final step in the rulemaking process is the publication of the text of the final rule in the *Bulletin*¹³⁴ along with "a concise explanatory statement" of "the reasons for adopting the final rule" and of "the reasons for any changes" between the proposed and final rule.¹³⁵

The requirement that the agency provide a concise explanatory statement imposes three obligations: the agency must give its reasons for adopting the final rule,¹³⁶ for rejecting comments on the proposed rule,¹³⁷ and for any changes to the text of the proposed

129. *Id.* The agency is not required to provide an opportunity for oral presentation when it has no discretion as to the substantive content of the proposed rule because the rule is being promulgated to comply with either "a controlling judicial decision or court order" or "the provisions of a statute or federal rule that has been amended since the adoption of the agency rule." *Id.*

130. § 67-5222(1); *see also* IRAP 832 (procedural requirements for comments).

131. § 67-5222(2). *But see supra* note 129.

132. § 67-5223(2).

133. § 67-5224(1).

134. The full text of the final rule need not be published when the Rules Coordinator agrees that there are no significant changes between the text of the proposed and final rules. § 67-5224(3). In such cases, only the changes — and a citation to the Notice of Proposed Rulemaking — need to be published.

135. § 67-5224(2); *see also* IRAP 835 (content requirements for statement to be published with final rule).

136. § 67-5224(2)(a).

137. The requirement that the agency provide reasons for rejecting comments is implicit in the requirement that the agency "consider fully all written and oral submissions," § 67-5224(1), and in the general idea of reasoned decisionmaking. This does not mean that the agency is required to respond to every comment. It is, however, required to respond to all significant issues. For example, when several comments raise the same point, the agency need not respond to each comment individually as long as it addresses the issue. *See* IRAP 835.01.a. If the agency fails to respond to comments that raise significant issues, it is likely to be held to have been arbitrary and capricious.

rule.¹³⁸ This requirement is perhaps the most significant change in the APA's notice-and-comment rulemaking provisions. It springs from the premise that decisionmaking is improved when the decision-maker is required to explain the reasons for the decision. The requirement is analogous to the provision in the federal APA requiring an agency, "[a]fter consideration" of the public comment, to provide a "concise general statement of [the rule's] basis and purpose."¹³⁹ Under the federal APA, the agency's statement "need not be an exhaustive, detailed account of every aspect of the rulemaking proceedings," but it must "indicate the major issues of policy that were raised in the proceedings and explain why the agency decided to respond to these issues as it did, particularly in light of the statutory objectives that the rule must serve."¹⁴⁰ The general point — and one that is applicable to rulemakings under the Idaho APA — is simply stated: an agency must explain why it chose to promulgate the rule. While this does not mean that the statement must discuss every item of fact or opinion contained in the public comments, the Idaho APA does require the agency to demonstrate that it considered the issues raised by the comments and that it had a rational reason for the conclusions it reached.¹⁴¹ Furthermore, since it is this statement of reasons rather than any *post hoc* rationalizations that is to provide the principled basis for judicial review of agency rulemakings, an agency that fails to offer such an explanation is likely to be held to have acted in an arbitrary and capricious manner.

e. Section 67-5227: Variance Between Proposed and Final Rules

The need for a statement of reasons is particularly pressing when the agency changes the text of a rule between the proposed and final rule. Recognition of this fact is reflected in the Act's provisions covering situations in which the content of the rule varies between the proposed and final rulemaking.¹⁴² These provisions seek to

138. § 67-5224(2)(b).

139. 5 U.S.C. § 553(c) (1992).

140. Independent U.S. Tank Owners Comm. v. Dole, 809 F.2d 847, 852 (D.C. Cir.), cert. denied, 484 U.S. 819 (1987); see, e.g., Motor Vehicle Mfrs. Assoc., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42-43 (1983); United States v. Garner, 767 F.2d 104, 116-18 (5th Cir. 1985); BENJAMIN W. MINTZ & NANCY G. MILLER, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, A GUIDE TO FEDERAL AGENCY RULEMAKING 264-72 (2d ed. 1991).

141. Cf. Holly Care Ctr. v. State Dep't of Employment, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986) (regulations "are invalid . . . which are not reasonably related to the purposes of the enabling legislation").

142. § 67-5227; see also IRAP 835.01.b (requiring explanation when final rule

balance the two purposes for publishing a Notice of Proposed Rulemaking. One is to provide *notice* of the agency's intent to take action potentially affecting certain interests. A second purpose is to *initiate public comment* on the proposal. Public participation would, however, be a hollow ritual if it could not affect the agency's decisionmaking. Since an agency would be unlikely to change its position if it were required to begin anew every time it did so, a requirement that the agency publish a new proposed rule when it sought to make any changes in the text of the original proposal would undermine the public participation goal.¹⁴³ At the same time, however, if an agency's final rule differs too greatly from its proposal, some persons may rightfully claim they had no notice that their interests were potentially affected by the rulemaking. The balance struck by the Act is to allow the agency to adopt a final rule that varies from the proposed rule as long as the final rule "is a logical outgrowth" of the proposed rule and the notice that accompanied the proposed rulemaking "reasonably notified" the public of the subject of the agency decisionmaking.¹⁴⁴

f. Section 67-5225: Rulemaking Record

The APA's mandate that an agency provide an explanation of its decision is reinforced by the additional requirement that the agency compile a "rulemaking record."¹⁴⁵ The record is to include public comments, written materials relied upon by the agency, and any materials prepared in conjunction with the rulemaking.¹⁴⁶ While the Act specifically notes that the record "need not constitute the exclusive basis" for an agency's decision or for judicial review of that decision,¹⁴⁷ requiring the agency to prepare the record does increase

differs from proposed rule).

143. *E.g.*, International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 632 n.51 (D.C. Cir. 1973) (noting "the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary").

144. § 67-5227; *see, e.g.*, Shell Oil Co. v. EPA, 950 F.2d 741, 750-52 (D.C. Cir. 1991); Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 546-47 (D.C. Cir. 1983); *see also* § 67-5227 cmt. (citing *Shell Oil Co.*, 950 F.2d at 750-52).

145. § 67-5225; *see also* IRAP 834 (content requirements for rulemaking record).

146. § 67-5225(2).

147. § 67-5225(3) & cmt. 3. Agencies are required to keep the record for one year after the effective date of the rule. § 67-5225(4). In the original drafts of the Act, there was a one-year statute of limitations on challenges to the validity of rules based on noncompliance with the Act's procedures. This was subsequently changed to a two-year limitation. § 67-5231(2). The requirement in subsection (4)

the procedural formality of the rulemaking process. It should also increase the rationality of agency decisionmaking by forcing agency decisionmakers to evaluate the bases of their decision and by increasing the thoroughness of judicial review of that decisionmaking.

g. Section 67-5224: Effective Dates

Rules generally become final twenty-one days after their publication in the *Bulletin*.¹⁴⁸ The Act, however, allows the agency to specify a different effective date.¹⁴⁹ This will allow an agency to delay the effectiveness of the rule or to provide a shorter period or even a retroactive effective date. The situations in which an agency can provide a retroactive effective date are limited by due process. When, however, the agency is conferring a benefit or removing a disability, correcting a mistake or complying with changes in governing law, there may be no good reason for delay and retroactivity is unlikely to pose constitutional problems.

3. Sections 67-5226 and 67-5228: Temporary Rules and Exemptions

While the overwhelming majority of rules will be promulgated under the mandatory notice-and-comment procedures, in some situations an agency may be required to act with greater speed. The APA recognizes three situations in which immediate action is permissible:¹⁵⁰ when it is "reasonably necessary" to protect public health, safety, or welfare;¹⁵¹ when compliance with deadlines contained in an amended statute or federal program requires the agency to

should have also been changed to the longer period. Agencies are, therefore, strongly advised to maintain the rulemaking record for two years, rather than the statutorily required one year.

148. § 67-5224(5).

149. *Id.*; see also IRAP 835.02 (requiring effective date to be published in *Bulletin*).

150. In addition to the three situations recognized in the APA itself, the legislature can also authorize an agency to employ the temporary rulemaking procedures. For example, the Fish and Game Commission is specifically empowered, "[w]henever it finds it necessary for the preservation, protection, or management of any wildlife of this state, by reason of any act of God or any other sudden or unexpected emergency, [to] declare by temporary rule the existence of such necessity, and the cause thereof" and close the affected areas to hunting or fishing. § 36-104(b)(3).

151. § 67-5226(1)(a).

employ an expedited procedure,¹⁵² and when the agency is conferring a benefit and there is no good reason to delay the effectiveness of the benefit for the period required to comply with notice-and-comment rulemaking.¹⁵³ In these situations, the agency may take expeditious action if it makes a finding that it is required to employ the expedited procedures and includes that finding and a supporting statement of the reasons in the rulemaking record.¹⁵⁴ When it complies with these requirements, the agency may promulgate the rule without complying with the notice-and-comment provisions and may make the rule immediately effective.¹⁵⁵

The primary procedural protection against abuse of these expedited procedures is the limited duration of temporary rules: a temporary rule is in force for only eighteen weeks.¹⁵⁶ If the agency has begun notice-and-comment proceedings to adopt a final rule, a temporary rule may be extended for an additional nine weeks.¹⁵⁷

The APA also allows an expedited procedure when an agency amends a final rule "to correct typographical errors, transcription errors, or clerical errors."¹⁵⁸ This provision will allow agencies to correct the types of nonsubstantive errors that inevitably occur. The check on potential abuse is the requirement that all changes be approved by the Rules Coordinator.¹⁵⁹

4. Section 67-5229: Incorporation by Reference

Modern regulation often involves highly technical areas in which several different governmental or private standard-setting organizations may be involved. Similarly, many social programs involve overlapping federal and state responsibilities. As a result, state agency rules often incorporate standards or requirements established by other entities. Where such standards or requirements are voluminous, the cost of republishing them verbatim in the agency's rules can be prohibitive. At the same time, however, it is important that

152. § 67-5226(1)(b).

153. § 67-5226(1)(c).

154. § 67-5226(1); *see also* IRAP 840 (requirements for promulgating temporary rules). The agency's finding is subject to judicial review because it is "agency action." *See* §§ 67-5201(3), -5270.

155. § 67-5226(1). The agency is required to give "such notice as is practicable," *id.*, and to publish the text of the rule and the finding supporting the use of the expedited procedures in the "first available" issue of the *Bulletin*. § 67-5226(3).

156. § 67-5226(2).

157. *Id.*

158. § 67-5228; *see also* IRAP 850 (provisions for correction of errors).

159. § 67-5228.

individuals whose conduct is regulated by the rules have notice of and access to the applicable legal requirements. The APA balances the goals of notice and economy by allowing the agency to incorporate such materials by reference but requiring the agency to make the incorporated material available to the public.¹⁶⁰ The Act requires the rule to state where the incorporated materials are available.¹⁶¹ If it is not generally available in documents such as the *Code of Federal Regulations*, the agency is also required to provide a copy of the materials to the state library and to the Rules Coordinator.¹⁶²

The APA explicitly provides that the incorporation is of the *particular* standards. Thus, if previously incorporated standards are changed, the agency is required to initiate a rulemaking if it wishes to incorporate changes to previously incorporated materials.¹⁶³ It will often be necessary, of course, only to change the date of the reference.

5. Sections 67-5230 and 67-5231: Initiating Agency Decisionmaking

The APA gives individuals the power to initiate agency action in two situations. First, an individual "may petition an agency requesting the adoption, amendment, or repeal of a rule."¹⁶⁴ While the agency is not obligated to initiate a rulemaking in response to a request, it must decide whether or not to do so within twenty-eight days.¹⁶⁵ If it decides not to begin a rulemaking, an agency must explain in writing its reasons for refusing to do so.¹⁶⁶ A decision not to begin a rulemaking is a final agency action¹⁶⁷ subject to judicial review.¹⁶⁸

The second method by which an individual can require an agency to make a decision is by petitioning it for a declaratory ruling on "the applicability of any statutory provision or of any rule administered by the agency."¹⁶⁹ Again, the agency's decision on the

160. § 67-5229(1).

161. § 67-5229(1)(a).

162. § 67-5229(1)(b).

163. § 67-5229(2).

164. § 67-5230; *see also* IRAP 820-822 (procedural and content requirements of petition and agency response).

165. § 67-5230(1)(a).

166. *Id.*

167. § 67-5230(2).

168. § 67-5270(2); *see also* § 67-5230 cmt. 2 (noting that the denial of a petition for adoption of rules "is a final agency action subject to judicial review").

169. § 67-5232(1).

request for a declaratory ruling is a final agency action¹⁷⁰ subject to judicial review.¹⁷¹

6. Section 67-5231: Penalty for Noncompliance with Procedural Requirements

A final rule that is adopted without "substantial compliance" with the rulemaking procedures is voidable.¹⁷² Rules are made "voidable" rather than "void" primarily because a judicial decree holding a rule invalid should not automatically require beneficiaries of the rule to return the benefits received. While the substantive validity of a rule may always be challenged,¹⁷³ the APA limits procedural challenges to actions brought within two years of the adoption of the rule.¹⁷⁴ The limitation is based not only on the traditional justifications for statutes of limitation, but also on the conclusion that the existence of the rule itself has provided sufficient notice after the passage of two years so that any procedural irregularities in its promulgation will have been rendered harmless. This reflects the fact that the section applies to *procedural* rather than *substantive* invalidity.

B. Rules versus Orders

When the legislature creates an agency to administer a program, it generally empowers the agency to make policy within limits established by the statute creating the agency.¹⁷⁵ To implement this policymaking power, agencies commonly are granted the authority both to promulgate rules and to decide contested cases. Stated more generally, the agency is delegated discretion on whether to formulate policy through the promulgation of regulations or through an adjudicatory, case-by-contested-case procedure. It may act, in other words, either like a legislative body or like a court. For example, the

170. § 67-5232(3).

171. § 67-5270(2).

172. § 67-5231(1); *cf.* § 67-5279(2) ("[T]he [reviewing] court shall affirm the agency action unless the court finds that the action was . . . (c) made upon unlawful procedure.").

173. *See* § 67-5273(1).

174. § 67-5231(2). The section requires only that the action be commenced within two years of the making of the rule. It does not require a final resolution of the challenge within that period. *See* § 67-5231 cmt. 4.

175. *E.g.*, Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 102 Idaho 744, 750, 639 P.2d 442, 448 (1981) (an agency has no jurisdiction beyond that specifically granted to it by statute); *see also supra* note 2 (discussing agencies' lack of inherent power).

director of Water Resources might promulgate a rule requiring a particular class of water users to measure the volume of water they divert. Alternatively, the director might issue an order in a contested case directing the parties to measure their diversions. In either situation, the director has made policy.¹⁷⁶ The choice of procedure, however, has significant consequences:¹⁷⁷ the pre-decisional notice, type of "hearing," mechanisms for decisionmaking, post-decisional notice, and scope of judicial review differ between a rulemaking and a contested case. These variations have differing effects on both individuals subject to the agency's authority and on the agency itself — differences that limit the agency's discretion in choosing a policymaking procedure.

1. Pre-Decisional Notice

The pre-decisional notice provided by rulemaking and contested case procedures differs in two significant ways. First, the persons who receive notice are different. In a rulemaking, the public is given notice of the proposal through publication in the *Bulletin*.¹⁷⁸ In a contested case, on the other hand, only the parties to the proceeding receive notice.¹⁷⁹ As a result, the participants in the agency decisionmaking process also differ: in a rulemaking, all potentially affected individuals have an opportunity to present their views and arguments on the proposal to the agency before a final decision is reached; in a contested case, frequently only the parties to the proceeding have an opportunity to present information and argument

176. Cf. *State ex rel. Griner v. Bunker Hill Co.*, 95 Idaho 840, 842-43, 521 P.2d 664, 666-67 (1974) (Inspector of Mines might either promulgate a rule requiring mine owners to allow a worker representative to accompany the inspector or might embody that requirement in an order addressed to a specific owner).

177. See 1 FRANK E. COOPER, STATE ADMINISTRATIVE LAW 177-85 (1965); Richard K. Berg, *Re-Examining Policy Procedures: The Choice Between Rulemaking and Adjudication*, 38 ADMIN. L. REV. 149 (1986); Arthur E. Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990); Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

178. § 67-5221; see also *supra* notes 110-17 and accompanying text (discussing Notice of Proposed Rulemaking). The difference in the persons who receive notice is reflected in the APA's definitions of "party" and "person." See § 67-5201(12)-(13); see also *supra* notes 65-66 and accompanying text (discussing terms "party" and "person").

179. § 67-5242(1).

to the decisionmaker. Rulemaking thus may provide better notice to the class of persons potentially affected by the new standard.

Second, the notice that initiates a contested case proceeding provides no notice that the agency may create a new legal standard in its decision of the case. Adjudication as a mechanism for making decisions is necessarily at least somewhat *ad hoc* and retroactive since it normally involves determining consequences for past conduct; rulemaking, on the other hand, is prospective in application. While retroactive lawmaking is unavoidable in the judicial system because courts generally have no alternative, agencies generally do have an alternative since they often can promulgate a rule that will provide prospective notice. The fundamental policy question is whether this difference between courts and agencies affects an agency's discretion to choose an adjudicatory decisionmaking procedure.

It is clear at least as a general principle that an agency is not prohibited by due process from creating new policy through a contested case.¹⁸⁰ The more difficult question is whether the notice/retroactive decisionmaking problem should lead agencies to rely upon rulemaking to formulate general policy. Although it might seem that it would always be preferable to announce new policy through rulemakings, it may not always be possible to do so. A policy question that arises in the context of a contested case must be decided by the agency; requiring it to stop the contested case and promulgate a rule will generally not be a suitable solution. Moreover, there often are reasons that justify continued reliance on a case-by-contested-case development: the agency may not have sufficient experience to be able to formulate statute-like standards before deciding an initial group of contested cases; or generalized standards may have no more than marginal utility because the area is one of highly disparate factual situations.¹⁸¹ In short, as is true generally of due process, the problem is one of balancing conflicting objectives.¹⁸²

The Idaho Supreme Court has found that the retroactive effect inherent in adjudicatory decisionmaking does impose some due process limits on the agency's authority to formulate policy within the confines of an individual contested case. For example, when a

180. *E.g.*, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 765-66 (1969). The Supreme Court has suggested that a different result might be required if the change imposed adverse consequences on those who relied on the prior policy or one in which fines or penalties were imposed. NLRB v. Bell Aerospace Co., 416 U.S. 267, 295 (1974); see also Ford Motor Co. v. FTC, 673 F.2d 1008, 1009-10 (9th Cir. 1981), cert. denied, 459 U.S. 999 (1982).

181. *E.g.*, Bell Aerospace Co., 416 U.S. at 294-95.

182. *E.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976).

statute authorizes a professional licensing agency to impose sanctions for "gross negligence" or "unprofessional conduct," the agency is required to promulgate rules clarifying its interpretation of those terms when it seeks to impose sanctions for conduct falling outside of the core conduct proscribed by the statute.¹⁸³ Thus, the court has held that a statute authorizing sanctions for "gross negligence" and "misconduct" did not provide constitutionally sufficient notice that "poor judgment" could lead to sanctions.¹⁸⁴ If the agency believed that poor judgment fell within the statutory terms, it was required to promulgate a regulation to that effect.¹⁸⁵ This notice requirement may also apply when an agency policy change imposes new liabilities on previously permissible conduct. For example, the court refused to allow the Idaho Public Utilities Commission to dismiss — rather than to return — a rate application the commission had found to be defective because it had not provided notice that defective applications could be dismissed.¹⁸⁶ The notice element of due process thus limits an agency's discretion to choose policymaking procedures.

2. Hearings and the Opportunity to Participate

As with notice, the type of hearing, the ability to participate, and the type of information presented to the agency decisionmaker varies markedly between a rulemaking and a contested case. As noted,¹⁸⁷ the "hearing" on a proposed rule may be restricted to written statements; even when an agency provides an opportunity for an oral presentation, the proceeding is likely to be modeled on the legislative hearing rather than on a trial. A contested case, on the other hand, is a proceeding based on the judicial hearing in which parties present evidence and examine witnesses. One result of these

183. Where the conduct falls within the core conduct of the statutory term or the agency relies on expert witnesses, additional regulations are unnecessary. See Krueger v. Board of Professional Discipline, 122 Idaho 577, 580-82, 836 P.2d 523, 526-28 (1992); Moosman v. Idaho Horse Racing Comm'n, 117 Idaho 949, 952-54, 793 P.2d 181, 184-86 (1990).

184. H & V Eng'g, Inc. v. Idaho State Bd. of Professional Eng'rs & Land Surveyors, 113 Idaho 646, 650-51, 747 P.2d 55, 59-60 (1987).

185. *Id.*; see also Rincover v. State Dep't of Finance, 124 Idaho ___, 866 P.2d 177 (1993) (statutory term "dishonest or unethical practices" failed to provide notice that obtaining loans from clients was prohibited); Tuma v. Board of Nursing, 100 Idaho 74, 79-80, 593 P.2d 711, 716-17 (1979) (statutory term "unprofessional conduct" did not provide notice that discussion of alternative therapies with patient was proscribed).

186. Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n, 98 Idaho 718, 720-24, 571 P.2d 1119, 1121-25 (1977).

187. See *supra* notes 122-32 and accompanying text.

differences is that the agency's ability to define the issues and to elicit information is greater in a rulemaking than in a contested case. In a rulemaking, for example, an agency may solicit the comments of persons who have expertise helpful to the decision or may employ the expert to produce a study. The agency's opportunity to do so in a contested case is far more limited.

The ability to participate in the oral presentation also is fundamentally different. While any interested person may present information and arguments to the decisionmaker in a rulemaking, generally only parties to the proceeding may participate in the contested case.¹⁸⁸ As a result, other persons who may be affected by the precedential effect of the agency's decision may have no method to bring their concerns to the attention of the decisionmaker. Furthermore, strategic concerns may prevent even the immediate parties to the contested case from asserting certain positions. A rulemaking proceeding thus is more likely to provide the agency with the full range of information and argument relevant to proposed policy.

Finally, the type of facts relevant in each proceeding is different. In Kenneth Culp Davis's terms, "legislative facts" are relevant in creating general policy while "adjudicative facts" are relevant in deciding individual liability based on past events:

Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts are roughly the kind of facts which help the tribunal decide questions of law and policy and discretion.¹⁸⁹

An agency that sets out to create a general legal standard ought to consider more general, legislative facts; facts about individual situations are relevant to general policy determinations primarily as examples.

188. Compare § 67-5201(12) ("'Party' means each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party") with § 67-5201(13) ("'Person' means any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character."). But see IRAP 355 (defining "public witness" and providing for witnesses not associated with any party to give testimony when allowed by the presiding officer).

189. 2 KENNETH C. DAVIS, ADMINISTRATIVE LAW TREATISE § 12.3, at 413 (2d ed. 1979).

At the same time, the breadth of rules may create problems of overinclusiveness that can inhibit desired behavior. Since the holding in a contested case is no broader than the facts that gave rise to the order, orders are less likely to be overinclusive. As a result, the slow, case-by-case evolution of policy through contested case proceedings is easier to modify. Policymaking through contested cases thus provides a significant amount of flexibility that may be advantageous when the full implications of a policy — and thus its potential problems — are difficult to foresee. Particularly in areas of highly disparate factual situations, the increased flexibility and the narrower scope of orders may be beneficial.¹⁹⁰

3. Post-Decisional Notice

Publication of the final rule in the *Bulletin* and its inclusion in the *Code* gives all persons notice of what the law requires; only the parties to the contested case, on the other hand, are given notice of the new standard. While the APA does ameliorate this post-decisional notice problem by requiring an agency to create an index of all orders upon which it intends to rely as precedent in subsequent contested cases,¹⁹¹ the degree of notice provided by an index in the agency offices is still less than the notice provided by publication in the *Bulletin* and the *Code*.

4. Scope of Judicial Review

The scope of judicial review of agency rulemakings differs from that applied to contested case decisions. There are two primary differences. First, the standard of review applicable to the agency's factual decisions differs: rulemakings are subjected to the arbitrary and capricious standard,¹⁹² while contested cases are reviewed under the substantial evidence standard.¹⁹³ Perhaps even more significantly, the decision record plays a distinctly different role in

190. NLRB v. Bell Aerospace Co., 416 U.S. 267, 294-95 (1974). *But see infra* notes 197-200 and accompanying text.

191. § 67-5250(1); *see also infra* notes 334-36 and accompanying text (discussing requirement that agency index all orders upon which it intends to rely).

192. § 67-5279(2)(d); *see* Holly Care Ctr. v. State Dep't of Employment, 110 Idaho 76, 78, 714 P.2d 45, 47 (1986).

193. § 67-5279(3)(d); *see* Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene, 99 Idaho 630, 633-35, 586 P.2d 1346, 1349-50 (1978); Department of Health & Welfare v. Sandoval, 113 Idaho 186, 189-90, 742 P.2d 992, 995-96 (Ct. App. 1987).

each situation. In a rulemaking, the agency is not required to base its decision solely on information contained in the record;¹⁹⁴ the decision in a contested case, on the other hand, must be based exclusively on the evidence presented or officially noticed during the hearing and preserved in the record.¹⁹⁵ The application by a reviewing court of the substantial evidence standard to a record created at a formal evidentiary hearing restrains the agency's decisionmaking more than does the application of the arbitrary and capricious standard to an open-ended "record."¹⁹⁶

5. Stare Decisis: Orders versus Rules

A final distinction between rules and orders is the legal effect of each. Only the parties to a contested case are bound by the order in that case.¹⁹⁷ Persons who were not parties are affected only to the extent that the agency is restrained by the doctrine of stare decisis. Significantly, the agency itself is far less restricted by its orders than by its rules. Validly promulgated rules have the force and effect of law and therefore bind not only the public but also the agency.¹⁹⁸ The agency may, on the other hand, distinguish or overrule an order in any subsequent contested case.¹⁹⁹ As a result, while persons subject to the agency's regulatory authority ignore those orders the agency chooses to index at their peril,²⁰⁰ the agency itself is far less restrained by the same orders.

194. §§ 67-5225(3), -5279(2) & cmt. 3.

195. §§ 67-5248(2), -5249(3), -5279(3) & cmt. 4.

196. Arguably, it is the requirement that a contested case be decided on the basis of a record created at a hearing that is the more important distinction. In fact, the distinctions between "substantial evidence" and "arbitrary or capricious" may be no more than differing verbal incantations of the more familiar "reasonableness." *Cf. Association of Data Processing Serv. Orgs. v. Board of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984) (Scalia, J.) ("[I]n their application to the requirement of factual support the substantial evidence test and the arbitrary or capricious test are one and the same.").

197. *Cf. § 67-5246(6)-(7)* (limitation on the effectiveness of final orders).

198. See, e.g., *Hoppe v. Nichols*, 100 Idaho 133, 137, 594 P.2d 643, 647 (1979) (an agency is bound by its rules); see also *supra* notes 58-59 and accompanying text. While the agency may amend or repeal its rules, it is required to go through a full, notice-and-comment rulemaking to do so. See § 67-5201(17) & cmt. 17.

199. For example, the Supreme Court of Idaho has said: "So long as regulatory bodies adequately explain their departure from prior rulings so that a reviewing court can determine that their decisions are not arbitrary or capricious, orders based upon positions substantially different than those taken in previous proceedings can be upheld." *Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n*, 97 Idaho 113, 119, 540 P.2d 775, 761 (1975).

200. See § 67-5250(1).

C. Orders and Contested Cases

The third part of the new APA — §§ 67-5240 to 67-5255 — contains the procedures for contested cases. The new APA's contested case provisions attend to a number of areas neither addressed nor contemplated by the old APA. It is the detail and the elaboration of the contested case provisions that are the essential elements of the new APA.

1. Section 67-5240: Introducing the Contested Case

Section 67-5240 provides that all proceedings by an agency — other than the Public Utilities Commission or the Industrial Commission — that may result in the issuance of an "order" are governed by the contested case provisions of the APA unless otherwise provided by law.²⁰¹ The section resolves several ambiguities present in the former APA.

First, the section makes it clear that any proceeding that may result in the issuance of an "order" is a contested case.²⁰² "Order" is defined by the Act as an "agency action of particular applicability that determines the legal rights, duties, privileges, immunities, or other legal interests of one (1) or more specific persons."²⁰³ Thus, it is the legal effect of the decision — whether it affects an enumerated interest — that determines whether the agency must conduct a contested case, not whether the legislature has provided by statute for a hearing.

The section also specifically excludes the Public Utilities Commission and the Industrial Commission from the APA's contested case provisions.²⁰⁴ These commissions were excluded because the acts establishing them provide more detailed procedural requirements that would be difficult to square with the APA's contested case

201. § 67-5240; see also *supra* notes 41-49 and accompanying text (discussing distinction between legislative and adjudicative decisionmaking).

202. The old APA had procedures for "contested cases." See Act of Mar. 29, 1965, ch. 273, § 9, 1965 Idaho Sess. Laws 701, 706 (formerly codified at § 67-5209 (1989)). It did not, however, define the term with the clarity of the current act. A "contested case" was defined as "a proceeding . . . in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." *Id.* § 1(2) (formerly codified at § 67-5201(2)). It was unclear if this meant that a proceeding that determined the legal rights, duties or privileges of an individual was not a "contested case" when the statute did not provide an opportunity for hearing.

203. § 67-5201(11).

204. § 67-5240.

procedures.²⁰⁵ The explicit exclusion for the Public Utilities Commission and the Industrial Commission obviates the need for the supreme court to fit together the detailed procedural requirements applicable to them with the APA.

2. Section 67-5241: Informal Disposition of Disputes

Most disputes between an agency and a person subject to its jurisdiction are resolved through informal methods rather than through contested case proceedings. The APA explicitly recognizes that “[i]nformal settlement of matters is to be encouraged.”²⁰⁶ The Act’s provisions on informal settlements — as well as the legislature’s encouragement of such settlements — is new. At the same time, such informal methods almost by definition elude cataloging. Nonetheless, the section recognizes two recurrent situations.

In the first situation, it is the agency that has the burden of initiating a contested case.²⁰⁷ For example, an agency may be informed of an apparent violation of its regulations. The agency may decline to initiate proceedings because a staff investigation determines that there was no violation.²⁰⁸ On the other hand, if the investigation produces evidence of a possible violation, the agency may informally resolve the problem with the apparent violator or may file a contested case. The regulation of holders of professional licenses is an example of this category of adjudicatory actions.

205. See §§ 72-701 to -737 (Industrial Commission procedures); §§ 61-601 to -642 (Public Utilities Commission procedures).

206. § 67-5241(1)(c); see also IRAP 100-102; cf. § 67-5220 & cmt. 3 (informal, negotiated rulemaking is encouraged by the Notice of Intent to Promulgate Rules).

207. See § 67-5241(1).

208. § 67-5241(1)(a). When an agency declines to initiate a contested case after it has been requested to do so, it must furnish a brief statement of the reasons for its decision to all persons involved unless the matter is an investigation performed by a law enforcement agency. § 67-5241(3); cf. § 9-337(5) (defining “law enforcement agency”).

The agency’s refusal to initiate a contested case would be final agency action that is subject to judicial review only if a statute imposed a duty on the agency. See § 67-5201(3)(c) (defining “agency action” to include “an agency’s performance of, or failure to perform, any duty placed on it by law”). Thus, an agency decision not to institute a contested case is likely to be essentially unreviewable discretion except when the legislature has specified criteria for initiating such actions. *Compare Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985) (creating a presumption of unreviewability of agency decisions not to take enforcement action) *with Dunlop v. Bachowski*, 421 U.S. 560, 566-68 (1975) (statute contained sufficient standards to rebut presumption of unreviewability).

The second generic situation arises when the burden of initiating the contested case is on the person subject to the agency's regulatory jurisdiction. For example, an agency may be informed of a possible violation, initiate an investigation, and, if it concludes that there are grounds to believe that a violation has occurred, issue the person a notice of violation. If the person does not initiate a contested case within a specified period, the notice of violation becomes conclusive without a contested case proceeding. Many environmental statutes incorporate this regulatory approach.²⁰⁹

The section also authorizes other informal methods for resolving disputes. For example, agencies are authorized to hold paper hearings instead of oral hearings if it will expedite the case "without substantially prejudicing the interests" of a party.²¹⁰ The statute also allows parties to negotiate, stipulate, settle, or use consent orders rather than go to hearing in a contested case.²¹¹ Similarly, when the parties can agree on the facts and it is only the law that remains in dispute, summary-judgment like procedures may be used.²¹² While encouraging the use of informal methods for resolving disputes, the APA explicitly prohibits the agency from abdicating its ultimate responsibility for the contested case; stipulated facts, for example, remain contingent until accepted by the agency.²¹³

Disposition of a dispute under any of these provisions is a "final agency action."²¹⁴ Even if the disposition does not result in the issuance of an order, it is subject to judicial review.²¹⁵

209. *E.g.*, § 39-108(3)(a) (administrative enforcement action involving notice of violation that triggers fifteen-day response period).

210. § 67-5241(1)(b); *cf.* § 67-5251(2) (provision for admission of evidence in written form).

211. § 67-5241(1)(c). For the first time, consent agreements and consent orders, common tools before a number of agencies, are given a statutory basis. See also IRAP 280 (provisions on consent agreements).

212. § 67-5241(1)(d).

213. The Attorney General's Rules provide that agencies are not bound by stipulations or settlements and may require further production of evidence to prove the facts underlying the stipulation or settlement "when one or more parties to a proceeding is not party to the settlement or when the settlement presents issues of significant implication for other persons." IRAP 612. By contrast, the agency may "summarily accept settlement of essentially private disputes that have no significant implications for administration of the law for persons other than the affected parties." *Id.*

214. § 67-5241(4). *But see supra* note 208.

215. See §§ 67-5270(2) (a person aggrieved by a final agency action other than an order), -5270(3) (a person aggrieved by an order). In either case, the person aggrieved must comply with the requirements of §§ 67-5271 through 67-5279.

3. Sections 67-5242 and 67-5251: Procedure at the Evidentiary Hearing

If the dispute cannot be settled informally, section 67-5242 of the APA contains the procedures to be employed in evidentiary hearings. As noted,²¹⁶ the Idaho APA does not specify procedural minutiae such as the format and content requirements for various filings, discovery rules, and the like. Instead, the Act delegates the Attorney General the power to promulgate uniform procedural rules for use by the majority of agencies.²¹⁷ This provision for a "model" set of agency rules is new.

a. Section 67-5242: Notice and Prehearing Procedures

The APA requires that all parties to a contested case be notified of the time, place, and nature of the hearing, the legal authority under which it is to be held, and a short and plain statement of the matters asserted or the issues involved.²¹⁸ The drafters of the APA recognized that the minimal statutory provisions would be supplemented by the Attorney General's procedural rules. These rules provided the procedures applicable to intervention,²¹⁹ prehearing

216. See *supra* notes 91-96 and accompanying text.

217. § 67-5206(2). Specifically, the Attorney General was directed to promulgate rules of procedure addressing:

- (a) form and content to be employed in giving notice of a contested case;
- (b) procedures and standards required for intervention in a contested case;
- (c) procedures for prehearing conferences;
- (d) format for pleadings, briefs, and motions;
- (e) the method by which service shall be made;
- (f) procedures for the issuance of subpoenas, discovery orders, and protective orders if authorized by other provisions of law;
- (g) qualifications for persons seeking to act as a hearing officer;
- (h) qualifications for persons seeking to act as a representative for parties to contested cases;
- (i) procedures to facilitate informal settlement of matters;
- (j) procedures for placing ex parte contacts on the record; and
- (k) such other provisions as may be necessary or useful.

§ 67-5206(4).

218. § 67-5242(1). The Attorney General's Rules supplement the statutory requirements. The Rules require the notice to include the name of the presiding officer. *See* IRAP 550. This requirement is important for the exercise of a party's right of disqualification of presiding officers under the APA. *See* § 67-5252; *see also infra* notes 245-56 and accompanying text.

219. § 67-5206(4)(b); *see also* IRAP 350-55.

conferences,²²⁰ pleadings, briefs, and motions,²²¹ service,²²² and subpoenas, discovery orders, and protective orders.²²³

220. § 67-5206(4)(c); *see also* IRAP 510-13.

221. § 67-5206(4)(d); *see also* IRAP 210, 220, 230, 240, 250, 260, 270, 280.

Several of the Attorney General's Rules were based on the rules applicable in district courts. *Compare* IRAP 210 with IRCP 7(a); *compare* IRAP 250 with IDAHO R. CIV. P. 24(a); *compare* IRAP 260 with IDAHO R. CIV. P. 7(6)(1).

222. § 67-5206(4)(e). There are two kinds of service addressed by the Attorney General's Rules: service by the agency itself upon the parties and service by the parties upon one another.

Unless otherwise provided by statute or rule, the agency may serve rules, notices, summonses, complaints, and orders by certified mail, return receipt requested, to a party's last known mailing address or by personal service. IRAP 55. The choice of service by mail or personal service in the document initiating a proceeding will often depend on the relationship between the agency and the person who is a party before the agency. Regulatory agencies with authority over persons holding licenses, permits, or certificates from the agency stand in a different relationship to the regulated entity than the trial courts do to the general public. Accordingly, it is common for these kinds of agencies to have rules providing for service by mail to persons under their regulatory authority without the necessity of personal service because those persons are subject to a statutory requirement of regulation and supervision by the agency. *E.g.*, Public Utilities Commission Rule of Procedure 16, IDAPA 31.01.01016 (1993). In instances like these, where there is a continuing relationship with a licensee, permittee, or certificate holder, it is appropriate for the agency to initiate a contested case against a licensee, permittee, or certificate holder by certified mail without personal service. Regardless of how a party is initially given notice of the agency's jurisdiction in a contested case, by mail or by personal service, the agency may serve subsequent documents on the party by mail. IRAP 55.

223. § 67-5206(4)(f). The APA does not authorize any agency to issue subpoenas, discovery orders, or protective orders; it merely authorizes the Attorney General to prescribe procedures for the use of such powers "if authorized by other provisions of law." *Id.* The legislature has not given subpoena and discovery powers to every agency, and the APA does not do so. Under the Attorney General's Rules, no party is entitled to engage in discovery unless some or all parties agree that they may conduct discovery between themselves or the party requesting discovery moves to compel discovery and the agency issues an order doing so. IRAP 521. The Rules require that an order compelling discovery be issued because most agencies do not have a statutory right of discovery. Agencies whose organic statutes provide for discovery may adopt rules contrary to the Attorney General's Rules. Regardless of the organic statute of the agency, however, the parties may always agree among themselves that discovery will be available. *Id.* Presumably, this agreement would be enforceable by the agency, particularly if one side had already provided information under the agreement and the other side then refused to comply. In general, the Rules recognize five types of discovery: depositions, production requests or written interrogatories, requests for admission, subpoenas, and statutory inspection, examination (including physical or mental examination) investigation, etc. IRAP 520.01.

b. Section 67-5242: Procedure at the Evidentiary Hearing

The goal of all contested case proceedings is "to assure that there is a full disclosure of all relevant facts and issues."²²⁴ The APA specifically obligates the presiding officer to conduct the evidentiary hearing to assure this objective is met by "afford[ing] all parties the opportunity to respond and present evidence and argument on all issues"²²⁵ and "including such cross-examination as may be necessary."²²⁶

The APA requires the presiding officer to create a record of the evidentiary hearing.²²⁷ A sound or video recording is sufficient; the agency need not create a stenographic record. All or a part of the hearing may be conducted by telephone, television, or other electronic means.²²⁸

c. Section 67-5251: Evidence and Official Notice

The drafters of the APA adopted the clear trend in Idaho case law²²⁹ and left the admission of evidence almost entirely to the discretion of the presiding officer.²³⁰ Thus, a presiding officer is authorized to exclude evidence that is irrelevant, unduly repetitious, excludable on constitutional or statutory grounds, or the subject of an evidentiary privilege provided by statute or recognized by courts.²³¹ The officer may also receive evidence in written form²³² and may

224. § 67-5242(3)(a); *see also* IRAP 157, 558; *cf.* § 67-5241(1)(b) (allowing paper hearings where this will not prejudice a party).

225. § 67-5242(3)(b); *see also* IRAP 157, 353.

226. § 67-5242(3)(a); *see also* IRAP 157, 558.

227. §§ 67-5242(3)(d), -5249(2)(e). The agency is required to record the hearing at its own expense. § 67-5242(3)(d).

228. § 67-5242(3)(e); *see also* IRAP 552, 650; *cf.* Dey v. Edward G. Smith & Assocs. Inc., 110 Idaho 946, 948, 719 P.2d 1206, 1208 (1986) (while a telephone conference call is a desirable method for holding hearings, the hearing must provide "a complete [and] orderly basis for the resolution of the dispute.").

229. *See, e.g.*, Hoyt v. Morrison-Knudsen Co., 100 Idaho 659, 660-61, 603 P.2d 993, 994-95 (1979) (approving admission of hearsay); Guillard v. Department of Employment, 100 Idaho 647, 650, 603 P.2d 981, 984 (1979) (endorsing the informality of evidentiary rules in agency proceedings); Thom v. Callahan, 97 Idaho 151, 156-57, 540 P.2d 1330, 1337-38 (1975) (permitting use of leading questions); State Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 533-34, 708 P.2d 935, 938-39 (Ct. App. 1985) (break in chain of custody of physical evidence does not preclude admission where other evidence establishes reliability).

230. *See* § 67-5251; *see also* IRAP 600-06.

231. § 67-5251(1); *see also* IRAP 600.

232. § 67-5251(2); *cf.* § 67-5241(1)(b) ("evidence . . . may be received in

accept copies of documentary evidence.²³³ The question to be decided if the admissibility of evidence is challenged is not whether the evidence is barred by an exclusionary rule such as hearsay, but whether it is reliable and probative: "All . . . evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs."²³⁴ This reflects the fact that most exclusionary rules are intended to insulate juries from prejudicial information — a rationale that has no application where the fact-finder is not a jury.

The APA also recognizes that an agency's experience, technical competence, and specialized knowledge may be used in the evaluation of evidence.²³⁵ This is an explicit statutory recognition that the agency's repeated exposure to a specialized subject matter is a source of specialized knowledge that is useful in evaluating evidence.

An agency's specialized knowledge also plays a role in determining what evidence the agency may notice. Official notice is broader than judicial notice; in addition to facts that can be judicially noticed, an agency may take official notice of "generally recognized technical or scientific facts within the agency's specialized knowledge."²³⁶ The potential unfairness of the broader power to notice facts is obviated by requiring the agency to notify the parties of the facts that it intends to notice. The agency is required to give notice that it is taking official notice as soon as practicable and must provide parties with "a timely and meaningful opportunity to contest and rebut the facts or material" noticed.²³⁷ As a practical matter, an agency that wishes to notice a matter that is debatable should provide notice of its intent to do so before the evidentiary hearing. If it does not do so, any party should be entitled to a continuance of the

written form if doing so will expedite the case without substantially prejudicing the interests of any party").

233. § 67-5251(3).

234. § 67-5251(1). The Attorney General's Rules provide:

Evidence should be taken by the agency to assist the parties' development of a record, not excluded to frustrate that development. The presiding officer at hearing is not bound by the Idaho Rules of Evidence. No informality in any proceeding or in the manner of taking testimony invalidates any order.

IRAP 600.

235. § 67-5251(5); *see also* IRAP 600.

236. § 67-5251(4)(b); *see also* IRAP 602. *See generally* Market St. Ry. v. Railroad Comm'n, 324 U.S. 548 (1945) (discussing official notice). Cf. State Dep't of Law Enforcement v. Engberg, 109 Idaho 530, 533, 708 P.2d 935, 938 (Ct. App. 1985) (permitting agency to take official notice of defendant's liquor license).

237. § 67-5251(4); *see also* IRAP 602.

hearing or to a second hearing at which its right "to contest and rebut" the officially noticed facts can be exercised.

Furthermore, when the agency proposes to take official notice of staff memoranda or data, a more stringent rule is applicable: "[A] responsible staff member shall be made available for cross-examination if any party so requests."²³⁸ This provision explicitly precludes the practice of developing a factual record by memorandum that is not made part of the record. Nevertheless, parties before an agency would be well advised to request a copy of all staff memoranda to be officially noticed long enough before the hearing to determine whether deposition or cross-examination of a staff witness is desired.

Finally, the difference between administrative and judicial proceedings is also highlighted in the APA's provisions granting the presiding officer the power to allow nonparties an opportunity to present statements in a contested case.²³⁹ In many situations, the public is keenly interested in the outcome of the administrative proceedings and may have a statutory right to testify at public hearings. While these "public witnesses"²⁴⁰ do not have parties' rights to examine witnesses or otherwise participate in the contested case, it is, nevertheless, often appropriate in an administrative proceeding to take the testimony of the public. For example, in many ratemaking or licensing decisions the public perception of the quality and value of the service is relevant to the ultimate decision before the agency. In such cases, the public witnesses may make written or oral statements and introduce exhibits. If the presiding officer admits the testimony of a public witness, the officer is required to give the parties an opportunity to rebut the testimony.²⁴¹

d. Section 67-5242: Procedures on Default of a Party

If a party fails to attend any stage of a contested case, the presiding officer may serve a notice of proposed default order on all parties.²⁴² The party who is proposed to be defaulted must petition the presiding officer within seven days after service of the proposed

238. § 67-5251(4).

239. § 61-5242(3)(c).

240. The Attorney General's Rules define "public witnesses" as "persons [who testify, but who are] not parties and not called by a party to testify at hearing." IRAP 355.

241. § 61-5242(3)(c).

242. § 67-5242(4); *see also* IRAP 700-702 (provisions on default orders).

order to request that the order be vacated.²⁴³ When a default order is issued, the presiding officer is to conduct further proceedings in the contested case without the participation of the defaulted party and must determine all issues in the adjudication, including those affecting the defaulted party.²⁴⁴

4. Sections 67-5252 and 67-5253: Securing an Unbiased Hearing

A fundamental tenet of due process is an unbiased decisionmaker. Section 67-5252 on disqualification of presiding officers and section 67-5253 on *ex parte* communications comprise the core of the APA's impartiality requirements. These sections are intended to ensure that the decisionmaker bases the order solely on the facts and arguments contained in the record created at the evidentiary hearing.

a. Section 67-5252: Disqualification of the Presiding Officer

The provisions on disqualification of the person assigned to preside over the evidentiary hearing in a contested case have been substantially changed. To appreciate the operation of the provisions on disqualifications, it is necessary to begin by distinguishing three terms: "presiding officer," "hearing officer," and "agency head." The "presiding officer" is the person who presides over the evidentiary hearing in the contested case proceeding.²⁴⁵ There are two kinds of presiding officers: a "hearing officer,"²⁴⁶ who is someone other than the agency head, and the "agency head" itself.²⁴⁷ Different

243. § 67-5242(4).

244. *Id.*

245. Section 67-5242(2) specifies that the presiding officer may be the agency head, one or more members of the agency head (where the agency head is a multi-member body), or a "hearing officer" employed by the agency. § 67-5242(2). Thus, as the term "presiding officer" is used in the APA, it includes both hearing officers and agency heads. Determination of the identity of the presiding officer as either a hearing officer or an agency head is important primarily because it determines whether the first order is a "final order" or not. See §§ 67-5243, -5246.

246. The APA authorizes the Attorney General to set qualifications of hearing officers. § 67-5206(4)(g). The rules specify that hearing officers may be employees of the agency or independent contractors, that hearing officers may but need not be attorneys, and that hearing officers who are not attorneys should ordinarily be persons with technical expertise or experience in issues before the agency. IRAP 410. The rules also provide that the appointment of a hearing officer is a matter of public record, available for inspection and copying. *Id.*

247. § 67-5242(2). The "agency head" is the "individual or body of individuals in whom the ultimate legal authority of the agency is vested by any provision of

disqualification rules potentially apply to these two categories of presiding officers.

Hearing officers may be disqualified from hearing a contested case without cause in two situations. First, each party has a right to one disqualification without the need to specify cause.²⁴⁸ The second and the most significant expansion of the right to disqualify potential hearing officers, however, is the provision allowing a party to assert a blanket disqualification of all agency employees.²⁴⁹ There is one exception to these broad rights to disqualify hearing officers without cause: when state or federal statutes or regulations require a decision to be rendered in a contested case within fourteen weeks of the date of the request of the hearing, there is no right of disqualification of a hearing officer without cause.²⁵⁰ This exception preserves the ability of agencies such as the Department of Health and Welfare to comply with the rigid federal guidelines for processing contested cases.

The APA also expands the types of "cause" that are sufficient to disqualify a presiding officer. Hearing officers may be disqualified not only for bias, prejudice, interest,²⁵¹ substantial prior involvement in the case other than as a presiding officer, or any other cause for

law." § 67-5201(4); *see supra* notes 37-39 and accompanying text (defining term "agency head"). When the agency head is a multi-member board or commission, the board or commission as a whole or an individual member or members of the board or commission may be a presiding officer. When the members of a multi-member board hear the case, the "presiding officer" is the panel rather than the specific individual who actually wields the gavel. § 67-5242(2); *see also* IRAP 414 (defining "presiding officer").

248. § 67-5252(1); *cf.* IRCP 40(d)(1)-(2) (the grounds for disqualification of a district judge or magistrate).

249. § 67-5252(2); *see also* IRAP 412 (disqualification of presiding officer).

250. § 67-5252(5).

251. § 67-5252(1). While the prohibition against biased, prejudiced, or interested decisionmaker should be broadly construed to preclude even the appearance of impropriety, the fact that an agency may perform more than a single function is not in itself a cause for disqualification. *Compare Manookian v. Blaine County*, 112 Idaho 697, 701, 735 P.2d 1008, 1012 (1987) (prohibition against interested decisionmakers "is essential because, under the Idaho Administrative Procedure Act, . . . the findings of fact of an administrative agency are subject to review only under the 'substantial evidence test' on appeal to a district court.") *with Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 801-02, 154 P.2d 156, 160 (1944) (the unemployment compensation act provides due process despite the combination of functions performed by the agency because the agency "has no personal interest in the controversy though its employees have made investigations and orders . . . The board is not in the true sense of the word an adversary.") (citations omitted). *See also Withrow v. Larkin*, 421 U.S. 35, 57 (1975) (holding that combination of functions in administrative agency does not violate due process).

which a judge may be disqualified, but also for "lack of professional knowledge in the subject matter of the contested case."²⁵² These rights of disqualification, particularly the right to disqualify all agency employees, are unusually broad and have no parallel in the federal or model state APAs.

The broad rights of disqualification of hearing officers do not always extend to the agency head. While presiding officers who are agency heads are subject to disqualification under the same provisions as hearing officers, the APA includes a "rule of necessity": when the disqualification of the agency head or a member of the agency head would result in an inability to decide a contested case, the person is not be disqualified and may decide the case. Rather than disqualifying the decisionmaker and precluding a decision, the APA requires the actions of the agency head to be treated as a conflict of interest under the Ethics in Government Act.²⁵³

The APA also sets out the procedure to be used by a party in exercising its right to disqualify a presiding officer. The right to disqualify all agency employees may be exercised without awaiting the designation of a presiding officer;²⁵⁴ indeed, this right should be exercised as soon as a party is notified that a contested case has been initiated. Other petitions for disqualification are to be filed within fourteen days of notification of the identity of the presiding officer or "promptly upon discovering facts establishing grounds for disqualification."²⁵⁵ Petitions are to be filed with the officer whose disqualification is sought; the officer is required to decide the petition in writing and to include in that decision a statement of facts and reasons.²⁵⁶

b. Section 67-5253: *Ex parte* Contacts

The APA prohibits parties in contested cases from communicating with the presiding officer in a contested case regarding the substance of the contested case, except upon notice and opportunity for all parties to participate in the communication.²⁵⁷ There are

252. § 67-5252(1). On the grounds for disqualification of a district judge or magistrate, see IRCP 40(d)(1)-(2).

253. § 67-5252(4). The Ethics in Government Act requires a decisionmaker to disclose fully any potential conflict of interest to the person who appointed the decisionmaker. See § 59-704(3).

254. § 67-5252(2).

255. *Id.* IRAP 550 requires the notice of hearing to include the name of the presiding officer.

256. § 67-5252(3).

257. § 67-5253; *see also* IRAP 417 (*ex parte* communications).

three exceptions to this prohibition on *ex parte* communication. The first is explicit: the prohibition does not apply to *ex parte* communications specifically authorized by statute.²⁵⁸

In considering the second and third exceptions, it is helpful to distinguish between procedure, law, and fact. The second exception is found in the section's prohibition on *ex parte* communications "regarding any substantive issue in the proceeding."²⁵⁹ The section thus does not prohibit communications on *procedural* matters. This exception was included to allow the presiding officer to answer a party's procedural questions. The Act's drafters were concerned that a blanket prohibition on *all ex parte* communications would cause problems particularly for *pro se* parties who may be unfamiliar with the agency procedures; under the language of the section, parties are free to contact the presiding officer to discuss procedural matters such as scheduling hearings, filing documents, requesting discovery, and the like.²⁶⁰

The third exception is also implicit in the section's language: it is a prohibition on communications only with a "party."²⁶¹ The term is to be broadly construed to include any person interested in the outcome of the contested case. It does not, however, include other members of the hearings panel or their administrative assistants.²⁶² This exception requires clarification because of the interaction of the prohibition on *ex parte* communications with other statutory provisions. Because a contested case is required to be decided solely on the basis of the factual record compiled at the hearing,²⁶³ the exception for communicating with non-parties is more restrictive than the terms alone might suggest. While the sheer variety of non-parties prevents reliance on simple rules, the distinction between "law" and "fact" does help to clarify the problem. Since the focus of concern is that the presiding officer's decision be based on the facts in the record, communications concerning the facts of a contested case are more stringently restricted than are discussions of the law. The situations form a continuum from the clearly permissible to the equally clearly impermissible. For example, when the presiding officer is a multi-member panel, discussions of factual and legal issues among panel members are entirely permissible. At the other

258. § 67-5253 (emphasis added).

259. *Id.* A "substantive issue" is a conjunction of legal and factual questions, and thus involves a blending of the law and fact categories.

260. See also IRAP 417 (*ex parte* communications).

261. § 67-5253.

262. See § 67-5253 cmt.

263. See §§ 67-5248(2), -5249(3), -5279(3) & cmt. 4.

extreme, *any* discussions with other agency personnel who are involved in the case are clearly impermissible. In situations falling between the extremes, presiding officers and reviewing courts should resolve specific questions bearing in mind that all factual communications are a serious threat to the integrity of the decision. In general, presiding officers and reviewing courts should err on the side of prohibiting or revealing²⁶⁴ *ex parte* communications.

5. Sections 67-5243 to 67-5247: The Variety of Orders

Idaho's APA creates a unique classification scheme of orders. It provides for four kinds of orders: recommended orders, preliminary orders, final orders, and emergency orders. The first three of these types of orders — recommended orders, preliminary orders, and final orders — are issued following the evidentiary hearing prescribed in §§ 67-5242 and 67-5251 and are described here. These orders differ only in the relationship between the "presiding officer" and the "agency head."

The first two kinds of orders — recommended orders and preliminary orders — are orders issued by a presiding officer who is someone other than the agency head.²⁶⁵ The distinction between recommended and preliminary orders is the degree of finality that is attached to each; if the order does not become final *until* it has been reviewed by the agency head, it is a "recommended order,"²⁶⁶ if the order becomes final *unless* a party seeks review of the order, the order is a "preliminary order."²⁶⁷

a. Section 67-5244: Recommended Orders

A recommended order cannot become a final order by itself; it can become the agency's final order only if it is formally adopted as such by the agency head.²⁶⁸ Instead, a recommended order

264. The Attorney General's Rules seek to ameliorate the problem by requiring a presiding officer to place any written *ex parte* communication into the record and to provide all parties with copies of the communication. IRAP 417. Oral communications should be treated similarly: a statement of the content of the communication should be placed in the record and all parties should be informed of the communication and allowed an opportunity to rebut it.

265. § 67-5243(1); *see also supra* notes 37-39 and 245-47 and accompanying text.

266. § 67-5243(1)(a).

267. *See* § 67-5243(1)(b) & cmt. 2. The order (or a document accompanying it) must identify the order as either a recommended or a preliminary order. § 67-5243(2); IRAP 720.02.a, 730.02.a.

268. § 67-5244; *see also* IRAP 720 (requirements of Recommended Orders).

automatically initiates an appellate-style administrative review.²⁶⁹ The recommended order, therefore, must include a briefing schedule for review of the order by the agency head or its designee.²⁷⁰ This type of contested case thus involves an evidentiary, trial-like hearing before a hearing officer who prepares the recommended order that is sent to all parties. A party may petition the hearing officer for reconsideration of the decision²⁷¹ or may object to it before the agency head and brief the issues involved.²⁷² After reviewing the recommended order, the agency head or its designee may issue a final order, remand the matter for an additional hearing before a presiding officer, or hold the additional hearing itself.²⁷³ If the agency head determines that oral argument would be of assistance in resolving the issues raised in the contested case, it may schedule one.²⁷⁴ In reviewing a recommended order, the agency head need not defer to the presiding officer's findings of fact; the APA explicitly provides that the agency head "shall exercise all the decision-making power that he would have had if the agency head had presided over the hearing."²⁷⁵ Finally, the APA requires the agency head to act on

269. § 67-5244 (specifying the procedures to be followed in the administrative review of recommended orders).

270. § 67-5244(1). The agency head may appoint someone to decide appeals of the hearing officer's recommended order. IRAP 720.01.

271. § 67-5243(3); *see also infra* notes 295-97 and accompanying text (discussing petitions for reconsideration).

272. § 67-5244(1); *see also* IRAP 720.02 (content requirements of recommended order). The appellate review may be performed by the agency head's designee. IRAP 720.01.

273. § 67-5244(2); *see also* IRAP 720.02.c (recommended order to include briefing schedule).

274. § 67-5244(1). The agency head is not required to provide oral argument; it may decide the issue solely on the basis of the record in the factual hearing, the recommended order prepared by the presiding officer, and the briefs prepared by the parties. *Id.*

275. § 67-5244(3) & cmt. 3. This provision codifies the conclusion of the case law construing the old APA. As the Idaho Supreme Court had noted: "The district court's perception that it was to review the Commission's reversal of the hearing officer constituted a fundamental misconception of the relationship between the hearing officer and the full Commission, and of its own function as a reviewing court." *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 259, 715 P.2d 927, 929 (1986). The commission's decision was not a reversal of the hearing officer, "the new decision effectively displaced the *proposed* decision of the hearing officer." *Id.* That decision became the final agency decision and the court was to review the final agency decision. *Id.*; *see also* *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985); *cf. Department of Health & Welfare v. Sandoval*, 113 Idaho 186, 190, 742 P.2d 992, 996 (Ct. App. 1987) ("[W]here credibility is crucial and where first-hand exposure to the witnesses may strongly affect the outcome, we think the [agency head] should not override the [presiding]

all recommended orders within eight weeks of the receipt of briefs or oral argument.²⁷⁶ This is one of several time limits that are included within the Act to ameliorate the recurrent claim that agencies frequently move too slowly; the time limits can be enforced judicially.²⁷⁷

The recommended order thus lacks any independent legal status; it is simply one of the documents that comprise the record before the decisionmaker.²⁷⁸

b. Section 67-5245: Preliminary Orders

Preliminary orders, unlike recommended orders, become a final order of the agency unless the agency head, on its own motion or upon petition of any party, agrees to review the preliminary order.²⁷⁹ The APA recognizes two alternatives: the preliminary order may be reviewable before the agency head or its designee at the request of any party to the contested case or administrative review of the preliminary order may be made entirely discretionary.²⁸⁰ The final alternative is most likely to be used by those agencies such as the Department of Health and Welfare that hear many contested cases annually. With such a caseload, it is unrealistic to provide review by the agency head as a matter of right. The APA therefore allows an agency head to delegate its entire authority to a presiding officer and thus to preclude any further, nondiscretionary administrative review.²⁸¹ Nonetheless, the crucial point is that, when a hearing officer issues a preliminary order, further administrative review is discretionary.

The APA requires the hearing officer, when issuing a preliminary order, to inform the parties that the order will become final "without further notice" and to include the steps that are necessary to seek administrative review of the order.²⁸² The Act itself specifies that review must be sought by filing a petition with the agency head

officer's impressions unless it makes a cogent explanation of its reasons for doing so. Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the [agency head's] statutory duty to supplement its decisions with findings of fact and conclusions of law.").

276. § 67-5244(2)(a).

277. The APA defines "agency action" to include "the failure to issue a rule or order." § 67-5201(3)(b). Agency action is reviewable. § 67-5270(2).

278. § 67-5249(2)(e); *see also Sandoval*, 113 Idaho at 190, 742 P.2d at 996.

279. § 67-5243(1)(b); *see also IRAP 730.01* (definition of "preliminary order").

280. *See* § 67-5245(2); *see also IRAP 730* (preliminary orders).

281. § 67-5245(2)(b).

282. § 67-5245(1); *see also IRAP 730.02.2* (notification language).

within fourteen days of the issuance of the preliminary order²⁸³ and that the petition for review must state the reason for which review is sought.²⁸⁴ If the agency head grants review, the procedure corresponds to that used to review recommended orders: the agency head is to establish a briefing schedule;²⁸⁵ oral argument is at the discretion of the agency head;²⁸⁶ the agency head exercises "all of the decision-making power that he would have had if the agency head had presided over the hearing;"²⁸⁷ and the agency head is required to act on all preliminary orders accepted for review within eight weeks of the receipt of briefs or oral argument.²⁸⁸

c. Section 67-5246: Final Orders

The last of the three alternative methods for issuing orders is for the agency head to be the presiding officer at the evidentiary hearing. In that case, the agency head issues a final order.²⁸⁹

Thus, there are four ways in which an order becomes a final order. First, when it is issued by the agency head acting as presiding officer.²⁹⁰ Second, when the agency head issues a final order following the mandatory review of a recommended order.²⁹¹ Third, when the period for petitioning for review of a preliminary order has run without a petition for review being filed and granted with the agency head.²⁹² Fourth, when discretionary review of a preliminary order has been granted and the agency head issues a final order.²⁹³ Each of these final orders is subject to judicial review.²⁹⁴

d. Sections 67-5243 and 67-5246: Petitions for Reconsideration

An important principle of administrative law is that the agency should be given the first opportunity to correct its possible errors. The APA's provisions for contested cases incorporate this principle by explicitly authorizing petitions for reconsideration. Regardless of the

283. § 67-5245(3).

284. § 67-5245(4).

285. § 67-5245(5).

286. *Id.*

287. § 67-5245(7) & cmt. 6. See generally *supra* § 67-5244(3) (same language in section covering recommended orders).

288. § 67-5245(6)(a).

289. § 67-5246(1); *see also* IRAP 740.

290. § 67-5246(1).

291. § 67-5246(2).

292. § 67-5246(3).

293. *Id.*

294. § 67-5270(3).

kind of order, the presiding officer has authority to entertain petitions for reconsideration of the order if the petition is filed within fourteen days of the issuance of the order.²⁹⁵ While the filing of a petition for reconsideration is not a prerequisite to administrative or judicial review of the order, the officer who issued the order will have greater familiarity with the factual and legal issues than will other potential decisionmakers. It is therefore far more efficient for all parties to have that officer reconsider the order, particularly when minor or technical problems arise.

A petition for reconsideration that is not acted upon within twenty-one days is presumed denied.²⁹⁶ It is not necessary, however, that the officer *decide* the issues presented by the petition within twenty-one days; it is only necessary that the petition be *accepted*, which can be accomplished through notification of the parties that the officer will reconsider the order.²⁹⁷

e. Section 67-5246: Effective Dates

The APA also specifies when orders become "effective." Unless a different date is stated in the final order, it becomes effective fourteen days after it is issued.²⁹⁸ Effectiveness — as well as other deadlines²⁹⁹ — is tolled if a petition for reconsideration has been filed.³⁰⁰

While the variety of orders might initially sound complex and confusing, the apparent complexity reflects variations on a simple theme: the evidentiary hearing may be presided over either by someone other than the agency head or by the agency head itself.³⁰¹

295. §§ 67-5243(3), -5246(4); *see also* IRAP 720.02.a, 730.02.a, 740.02.a. This provision reverses the holding in *Department of Employment v. St. Alphonsus Hosp.*, 96 Idaho 470, 472, 531 P.2d 232, 234 (1975) (holding that an agency without explicit statutory authorization to reconsider its orders was without jurisdiction to do so). While the APA does not confer additional *substantive* authority, it does authorize additional *procedural* powers. Cf. § 67-5226(1)(b)-(c) (temporary rules).

296. §§ 67-5243(3), -5246(4).

297. See Comments to Attorney General's Rules 710 through 789 ("Reconsideration can be granted by issuing an order that says, 'The petition for reconsideration is granted,' then proceeding to schedule further hearings, briefing, etc., on reconsideration.").

298. § 67-5246(5).

299. For example, the fourteen days within which a party must seek review of a preliminary order is tolled by the filing of a petition for reconsideration. § 67-5245(3).

300. § 67-5246(5).

301. § 67-5242(2); *see also supra* notes 245-47 and accompanying text (discus-

If the agency head presides over the reception of the evidence, the order that is issued at the end of the proceeding is a final order.³⁰² If the agency head does not preside over the reception of the evidence, the order that is issued by the officer who does hear the evidence either is subject only to discretionary review by the agency head and thus becomes final with the passage of time (a preliminary order)³⁰³ or is subject to mandatory review by the agency head and thus never becomes the final order (a recommended order).³⁰⁴ Within this basic framework, the Act's other provisions apply uniformly. For example, petitions for reconsideration always must be filed within fourteen days of the issuance of the order and always are deemed to have been denied if not acted upon within twenty-one days.³⁰⁵ The different results arise from the various types of orders:

1. If a petition for reconsideration is filed with the hearing officer within fourteen days of the issuance of a *recommended* order, the briefing schedule included with the order is tolled until either (a) twenty-one days passes without the presiding officer having responded to the petition or (b) the officer, having accepted it, resolves the issues it raises and issues a new recommended order with a new briefing schedule.³⁰⁶
2. If a petition for reconsideration is filed with the hearing officer within fourteen days of the issuance of a *preliminary* order, the time limit for filing a petition for review of the order with the agency head is tolled while the petition is pending or until it is resolved. If the petition for reconsideration has not been acted upon within twenty-one days, the time limit for filing the petition for review with the agency head begins to run.³⁰⁷
3. If a petition for reconsideration is filed with the agency head following the issuance of a *final* order, the effectiveness of the order is tolled for twenty-one days or, if the agency head accepts the petition, until the agency head issues a new final order.³⁰⁸ An agency head may, of course, accept a petition for reconsideration and summarily reaffirm its prior order.

sing procedures for disqualifying presiding officer).

302. § 67-5246(1).

303. § 67-5243(1)(b).

304. § 67-5243(1)(a). The agency head may, of course, adopt the hearing officer's recommended order as the final order.

305. §§ 67-5243(3), -5246(4).

306. §§ 67-5243(3), -5244.

307. §§ 67-5243(3), -5245(3).

308. § 67-5246(5).

f. Section 67-5247: Emergency Orders

In addition to the recommended, preliminary, and final orders that are issued after the development of an evidentiary record, the APA specifies procedures to be employed in emergency proceedings when the agency may issue an order to address a "situation involving an immediate danger to the public health, safety, or welfare requiring immediate agency action."³⁰⁹ In issuing an emergency order, the agency is to take "only such actions as are necessary to prevent or avoid the immediate danger."³¹⁰ The agency can issue the order without conducting a hearing, and the order is effective upon issuance.³¹¹ While the agency is required to include a "brief, reasoned statement to justify both the decision that an immediate danger exists and the decision to take the specific action,"³¹² the record before the agency (if there is one) need not constitute the exclusive basis for agency action or for judicial review of that action.³¹³ After issuing the emergency order, the agency is required to initiate the procedures that would have been required but for the immediate danger.³¹⁴

It has long been recognized that the government possesses the power to act summarily when there is an immediate danger to the public health, safety, or welfare.³¹⁵ For example, the director of the Department of Water Resources is empowered to issue an order requiring a cessation of activities that "involve an unreasonable risk of . . . damage to life or property or subsurface, surface, or atmospheric resources" from the construction or operation of a geothermal or injection well.³¹⁶ Quarantines and seizures of adulterated foods are other common examples of this power.³¹⁷ The APA provides the

309. § 67-5247(1).

310. *Id.*

311. § 67-5247(3).

312. § 67-5247(2). The agency's brief statement must explain (1) why the agency concluded that there was an emergency and (2) why it took the specific action. *Id.*

313. § 67-5247(5).

314. § 67-5247(4).

315. See, e.g., *Van Orden v. State Dep't of Health & Welfare*, 102 Idaho 663, 666-67, 637 P.2d 1159, 1162-63 (1981); *Porter v. City of Lewiston*, 41 Idaho 324, 335-36, 238 P. 1014, 1017 (1925), *appeal dismissed*, 270 U.S. 671 (1926). See generally *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (putrid chickens may be seized and destroyed before giving a hearing to their owner).

316. § 42-4010(d).

317. See, e.g., § 25-307 (quarantine of diseased cattle); § 37-118(d) (seizure of adulterated food); § 39-415 (public health quarantines).

procedures that an agency is to employ when it exercises emergency powers over an individual or an individual's property.

6. Section 67-5254: Actions Against Licensees

The APA specifically prohibits an agency from adversely affecting many types of licenses without giving the licensees notice and an opportunity for a contested case.³¹⁸ The statutory prohibition applies only to licenses of a continuing nature; it does not apply to licenses that expire by their own terms at the end of a specified period.³¹⁹ When the license is of a continuing nature and the licensee makes a timely and sufficient application for a renewal, the license does not expire until administrative and judicial review of the contested case has been exhausted.³²⁰

The protections accorded licensees are subject to two explicit limitations. First, an agency may take immediate action against a licensee if the agency is authorized to exercise emergency powers.³²¹ Second, an agency may promulgate rules that affect classes of licensees.³²² For example, an agency may promulgate a rule establishing a new standard for holding a license without being required to provide individualized contested cases for all licensees affected by the rule.³²³

The United States Supreme Court has recognized that licenses of a continuing nature are sufficiently akin to property to trigger due process requirements.³²⁴ While the Court has adopted a "flexible due process" approach,³²⁵ for the substantial majority of governmental programs only notice, an assurance of some degree of impartiality, and a statement of the reasons for the decision are required.³²⁶ The procedures specified in the contested case

318. § 67-5254. It should be noted that § 67-5254 does not create a different type of order but merely specifies that a certain class of individuals — licensees — are entitled to a contested case prior to certain types of agency actions.

319. *Id.*

320. § 67-5254(2).

321. § 67-5254(3)(a); *see also* § 67-5247 (emergency proceedings).

322. § 67-5254(3)(b).

323. *E.g.*, American Airlines, Inc. v. CAB, 359 F.2d 624, 628-29 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966); Air Line Pilots Ass'n v. Quesada, 276 F.2d 892, 895-96 (2d. Cir. 1960). *See generally* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (distinguishing between legislative and administrative process).

324. *E.g.*, Barry v. Barchi, 443 U.S. 55, 64-65 (1979); *see also* Perry v. Sindermann, 408 U.S. 593, 599-603 (1972); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972); Goldberg v. Kelly, 397 U.S. 254, 260-61 (1970).

325. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

326. *See, e.g.*, Paul R. Verkuil, *A Study of Informal Adjudication Procedures*,

provisions of the APA thus easily satisfy the constitutional requirements.

7. Section 67-5248: Required Contents of Orders

All orders, whether preliminary, recommended, final, or emergency, must be in writing³²⁷ and must contain two types of information. First, each order must contain a reasoned statement in support of the decision, including a concise and explicit statement of the underlying facts supporting the findings.³²⁸ Except for emergency orders, findings of fact must be based exclusively on the evidence in the record or on matters officially noticed.³²⁹ Second, the order must include a statement of the available procedures for seeking administrative or judicial review.³³⁰

8. Section 67-5249: Contested Case Record

To facilitate any subsequent administrative or judicial review of the order, the agency is required to maintain the official record of each contested case for at least six months after the expiration of the last date for judicial review.³³¹ The record must include all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings; evidence received or considered; a statement of matters officially noticed; offers of proof and objections and rulings; the record prepared by the presiding officer and any transcript of the record; staff memoranda or data submitted to the presiding officer; and any recommended order, preliminary order, final order, or order on reconsideration.³³² The APA specifies that this record is to be the agency record for judicial review of the order.³³³

43 U. CHI. L. REV. 739 (1976).

327. § 67-5248(1).

328. § 67-5248(1)(a).

329. § 67-5248(2). The requirement that a contested case be based solely on the evidence presented at the evidentiary hearing is, of course, the defining characteristic of the proceeding. See § 67-5249(3) & cmt.; cf. § 67-5279(3) (specifying scope of review when agency decision is required to be based on the record compiled at an evidentiary hearing).

330. § 67-5248(1)(b); see also IRAP 720.02.a, 730.02.a, 740.02.a (requiring order to identify whether it is preliminary, recommended, or final).

331. § 67-5249(1).

332. § 67-5249(2); see also IRAP 650 (specifying contents of record for decision in a contested case).

333. § 67-5275(1)(b).

9. Section 67-5250: Indexing Precedential Agency Orders and Guidance Documents

In the discussions and hearings that were involved in the drafting of the APA, a recurrent complaint was the difficulty in determining what the agency would rely upon in deciding a specific contested case. Numerous persons complained of "secret law" because agency orders from previous contested cases and agency guidance documents such as manuals, policy statements, and legal interpretations were not readily available. The drafters of the APA sought to rectify this problem by requiring an agency to index and make available those orders upon which it intends to rely.³³⁴ The index and the orders must be available to the public in the agency's main and regional offices.³³⁵ The requirement is self-executing: an agency is prohibited from relying upon an order as precedent in any subsequent contested case unless the order has been indexed and is available for public inspection.³³⁶

Agencies are also required to index and make their "guidance documents" available to the public.³³⁷ The term is broadly defined to include most documents "intended to guide agency actions affecting the rights or interests of persons outside the agency."³³⁸ Three points should be noted. First, "[t]he indexing of a guidance document does not give that document the force and effect of law or other precedential authority."³³⁹ Second, even though these documents do not have the force and effect of law, as a practical matter those subject to the agency's regulation may consider such documents to be more important than orders, rules, or statutes because they are the primary reference tools of the individuals actually doing the agency's work. This provision assures the public a right of access to these documents. Third, by requiring the documents to be indexed and made available to the public, the APA effectively binds the agency to comply with them since a reviewing court is unlikely to be persuaded that an agency behaved reasonably if it violates its own policy. The indexing requirements thus will operate to reduce an agency's ability

334. § 67-5250. To promote uniformity in indexing, the Administrative Rules Coordinator is required to "establish a uniform indexing system for agency orders." § 67-5206(1)(d).

335. § 67-5250(1).

336. *Id.*

337. § 67-5250(2).

338. *Id.*

339. *Id.* While this follows from the fact that the documents are neither rules nor orders, the APA explicitly states this point to avoid ambiguity.

to act arbitrarily by requiring it to reveal its operating policies to the public.

10. Section 67-5255: Declaratory Rulings

The final provision in the part of the APA concerned with contested cases gives any person a right to petition the agency for declaratory ruling on the applicability of any order issued by the agency.³⁴⁰ This provision is intended to ensure that an individual has an expeditious method for determining whether an agency order is applicable to the person. A petition for a declaratory ruling does not prevent the agency from initiating a contested case in the matter.³⁴¹ A declaratory ruling on the applicability of an order is a final agency action for purposes of judicial review.³⁴²

IV. JUDICIAL REVIEW

The fourth part of the APA — §§ 67-5270 to 67-5279 — contains the provisions governing judicial review of agency actions. The new APA contemplates several kinds of review of agency actions: traditional appellate review of contested cases based upon a record;³⁴³ review of substantive or procedural challenges to rules;³⁴⁴ declaratory judgments by the district court on the validity or applicability of agency rules;³⁴⁵ and review of an agency action that is neither order nor rule.³⁴⁶ The Act significantly expands both the individuals entitled to obtain review of agency actions and the number of agency actions subject to review under the APA. In the words of the leading study on the role of judicial review in administrative law, “[t]he availability of judicial review is the necessary condition, psychologically if not logically, for a system of administrative power which purports to be legitimate, or legally valid.”³⁴⁷ By expanding judicial review of agency actions, the new APA may contribute to an increased perception of the legitimacy of administrative agencies.

340. § 67-5255.

341. § 67-5255(2).

342. § 67-5255(3).

343. See §§ 67-5270(3), -5279(3).

344. See §§ 67-5231, -5270(2), -5279(2).

345. See § 67-5278.

346. See §§ 67-5270(2), -5279(2).

347. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965).

A. The Right to Judicial Review

Judicial review of agency action involves an amalgam of constitutional, statutory, and common law principles. While the focus of this article is on the APA and a thorough analysis of the non-statutory aspects of judicial review will not be presented, some discussion of the constitutional and common-law components is necessary to place the APA's provisions in context.

1. A Constitutional Note

Unlike the federal Constitution — which created a government possessing only those powers granted to it by the Constitution³⁴⁸ — "the State Constitution is a limitation, not a grant, of power."³⁴⁹ Thus, the state government has all powers not denied it by either the Idaho or the United States Constitutions. The court is to look to the state constitution to determine, not what it may do, but what it may not do — and the Idaho Constitution imposes few limits on the judicial power.³⁵⁰ For example, while the legislature has the power to prescribe the jurisdiction of the courts other than the supreme court,³⁵¹ it has an affirmative constitutional obligation to provide for

348. *E.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405-06 (1819).

349. Eberle v. Nielson, 78 Idaho 572, 578, 306 P.2d 1083, 1086 (1957); *see also* Diefendorf v. Gallet, 51 Idaho 619, 637, 10 P.2d 307, 314 (1932); Idaho Power & Light Co. v. Blomquist, 26 Idaho 222, 241, 141 P. 1083, 1088 (1914).

350. *See generally* Sunshine Mining Co. v. Allendale Mut. Ins. Co., 105 Idaho 133, 136, 666 P.2d 1144, 1147 (1983) ("[T]his Court has inherent power to render decisions regarding Idaho law."). The most thoughtful examination of the authority of the court to exercise all judicial power not prohibited to it is Justice Taylor's dissenting opinion in *In re Petition of Idaho State Fed'n of Labor*, 75 Idaho 367, 378, 272 P.2d 707, 714 (1954) (Taylor, J., dissenting) ("The judicial power' means all the judicial power and cannot be construed to mean only a part thereof. Nor can it mean all of the power, subject to reservations or restrictions nowhere expressed Accordingly the courts are free to exercise any power properly belonging to the judicial department, subject only to the limitations contained in the federal and state constitutions.").

351. Article V, § 2 of the Idaho Constitution provides:

The judicial power of the state shall be vested in a court for the trial of impeachments, a Supreme Court, district courts, and such other courts inferior to the Supreme Court as established by the legislature. The courts shall constitute a unified and integrated judicial system for administration and supervision by the Supreme Court. The jurisdiction of such inferior courts shall be as prescribed by the legislature.

IDAHO CONST. art. V, § 2. Similarly, article V, § 20 provides: "The district court shall have original jurisdiction in all cases, both at law and in equity, and such appellate jurisdiction as may be conferred by law." IDAHO CONST. art. V, § 20.

"a proper system of appeals."³⁵² As applied to administrative agencies, the court has held that the state constitution grants the legislature power to create boards that adjudicate due process interests, but due process requires judicial review of agency decisionmaking when a common law, statutory, or constitutional right is at stake.³⁵³

This does not mean, however, that the legislature is required to provide for *de novo* review of agency decisionmaking. Its power to determine "such appellate jurisdiction as may be conferred by law"³⁵⁴ authorizes the legislature to impose some limitations on judicial review of agency action by the district courts. For example, in *Swisher v. State Department of Environmental & Community Services*, the court held that, when a "statute provides that on appeal from [an agency] the district court may only affirm or set aside orders of the [agency] or remand the matter to the [agency], the district court has no jurisdiction to enter any other orders or take further evidence on matters not considered by the [agency]."³⁵⁵

Thus, the district court's appellate jurisdiction may be defined by statute. See *Swisher v. State Dep't of Envtl. & Community Servs.*, 98 Idaho 565, 567 n.1, 569 P.2d 910, 912 n.1 (1977).

352. IDAHO CONST. art. V, § 13. The section states: "The legislature shall have no power to deprive the judicial department of any power or jurisdiction which rightly pertains to it as a coordinate department of the government; but the legislature shall provide a proper system of appeals." *Id.* The supreme court has held that this section imposes "a mandatory duty for the legislature to afford a proper system of appeals to all courts below the Supreme Court." *State v. Finch*, 79 Idaho 275, 283, 315 P.2d 529, 533 (1957).

353. "It is clear in Idaho . . . that unless an appeal is provided from the decision of an administrative body to a court of law, due process has not been satisfied." *Graves v. Cogswell*, 97 Idaho 716, 717, 552 P.2d 224, 225 (1976); see also *Finch*, 79 Idaho at 283, 315 P.2d at 533; *Electors of Big Butte Area v. State Bd. of Educ.*, 78 Idaho 602, 610-11, 308 P.2d 225, 230-31 (1957); *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 801-03, 154 P.2d 156, 160-61 (1944); cf. *Fischer v. Sears, Roebuck & Co.*, 107 Idaho 197, 199-200, 687 P.2d 587, 599-600 (Ct. App. 1984) (when right is solely a creature of statute, claimant must comply with statutory provisions). When it is an agency action that affects a protected interest, the APA generally will provide standards governing the scope of this constitutionally mandated review. When the APA is inapplicable, the constitution itself prohibits arbitrary or irrational decisionmaking. E.g., *Electors of Big Butte Area*, 78 Idaho at 611-12, 308 P.2d at 230-31.

354. IDAHO CONST. art. V, § 20 ("The district court shall have . . . such appellate jurisdiction as may be conferred by law.").

355. 98 Idaho 565, 567 n.1, 569 P.2d 910, 912 n.1 (1977); see also *Intermountain Gas Co. v. Idaho Pub. Utils. Comm'n*, 97 Idaho 113, 129-30, 540 P.2d 775, 791-92 (1975). The sufficiency of the evidence is, of course, a question of law.

Although there obviously are boundary problems and areas of overlap among legislative, executive, and judicial powers,³⁵⁶ the passage of the APA has rendered the more difficult of questions moot, since its provisions on judicial review expand both the types of agency decisions that are subject to judicial review and the persons who may obtain review. As a result, there should be no due process problems in cases arising under the APA's review provisions because the legislature has created a system that more than satisfies the constitutional minima.

2. Section 67-5270: The Right of Judicial Review under the APA

Unlike the former APA — which provided for judicial review only of contested cases³⁵⁷ — the new APA provides for judicial review of *all* “agency actions,” a term the Act defines broadly to encompass deciding or failing to decide a contested case, issuing or failing to issue a rule, and acting or failing to act under a statutory duty.³⁵⁸ Thus, judicial review is now available not only of orders issued in contested cases, but also of rules and other agency decisions.³⁵⁹

Judicial review under the APA now includes agency actions other than the issuance of orders. The distinction between orders and other agency actions nevertheless has continuing relevance in relation to what individuals may obtain judicial review: although any *person* aggrieved by a final action other than an order is entitled to judicial review, only a *party* aggrieved by a final order is entitled to judicial review of the order under the APA.³⁶⁰

356. As the court has recognized, “[i]t is not always possible to draw a sharp line of distinction between legislative, judicial and executive powers or functions, nor does it appear necessary to the purpose of the constitutional separation of powers, to do so.” *Electors of Big Butte Area*, 78 Idaho at 607, 308 P.2d at 228.

357. Act of March 29, 1965, ch. 273, § 15, 1965 Idaho Sess. Laws 701, 709 (formerly codified at § 67-5215); *see also* Hoppe v. Nichols, 100 Idaho 133, 137, 594 P.2d 643, 647 (1979) (agency decision was not a “contested case” and therefore no judicial review was available).

358. § 67-5201(3); *see also* discussion *supra* part II.A.3 (discussion of terms “agency action,” “order,” “rule,” “contested case,” and “rulemaking”).

359. As the comments to the APA note: “It is important to distinguish between availability of review and likelihood of success on the merits. The Act limits the *scope* of judicial review rather than *precluding* review of agency actions.” § 67-5201 cmt. 3. The drafters of the Act chose to make most agency decisions reviewable, but to restrict the scope of judicial review.

360. §§ 67-5243(3), -5246(4). The APA defines “person” to mean “any individual, partnership, corporation, association, governmental subdivision or agency, or public or private organization or entity of any character.” § 67-5201(13);

B. Threshold Requirements for Judicial Review of Agency Actions

The right to judicial review of agency action has traditionally been conditioned upon satisfaction of several timing requirements. Along with the timing of review, the Idaho appellate courts appear to have added an issue: standing to obtain review. The various timing doctrines — exhaustion of administrative remedies, finality, primary jurisdiction, and ripeness — focus on whether review may be had at a particular time because the agency has not finished with the issue (exhaustion and finality), the matter should be decided by an agency before it is brought to a court (primary jurisdiction), or because the question is premature (ripeness).

1. Section 67-5270 and “Standing” to Obtain Judicial Review

Standing has been developed in the federal courts as a doctrine that determines the interests that may obtain judicial review of agency action under the United States Constitution. Since the 1970s, the United States Supreme Court has developed increasingly elaborate and manipulable variations on the idea that the federal courts have jurisdiction only to hear certain enumerated “cases and controversies.”³⁶¹ To ensure that this jurisdictional requirement is satisfied, the Court requires the type of concrete adverseness that comes when a person has suffered an “injury in fact, economic or otherwise” caused by the agency action.³⁶² The evolution of the doctrine has been almost universally condemned by commentators³⁶³ because the Court frequently manipulates the doctrine,

see also § 67-5270(2) (judicial review of agency action other than an order issued in a contested case). “Party,” on the other hand, is defined as “each person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party.” § 67-5201(12); see also § 67-5270(3) (right of judicial review of a contested case). The final clause ensures that a person who is denied intervention in a contested case may obtain judicial review to determine whether the agency properly denied the petition to intervene. See generally *supra* notes 65-66 and accompanying text (discussing terms “party” and “person”).

361. U.S. CONST. art. III, § 2 (“The judicial Power shall extend to” certain enumerated “cases” and “controversies”).

362. Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 152 (1970). The Court has consistently tied its standing jurisprudence to the jurisdictional requirements of Article III of the United States Constitution. See, e.g., Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2143-46 (1992); Warth v. Seldin, 422 U.S. 490, 498-99 (1975).

363. E.g., Abram Chayes, *Foreword, Public Litigation and the Burger Court*, 96 HARV. L. REV. 4 (1982); Gene R. Nichol, Jr., *Causation as a Standing Requirement: The Unprincipled Use of Judicial Restraint*, 69 KY. L.J. 185 (1980);

finding standing when it wishes to reach the substantive issues³⁶⁴ and a lack of standing when it does not.³⁶⁵

Surprisingly the Idaho courts appear to have adopted at least some of the federal jurisprudence on standing³⁶⁶ — with the same unpredictable and manipulable results.³⁶⁷ The court has as yet not provided a rationale for adopting the federal decisions, much less attempted to explain why a doctrine grounded on the limited grant of judicial power to the federal government is applicable in a court system without any corresponding limitation on jurisdiction. The Idaho courts are, after all, courts of general jurisdiction; the Idaho Constitution vests the "judicial power of the state" in the courts without limitation.³⁶⁸ Thus, if a case involves "judicial power" — as

Kenneth E. Scott, *Standing in the Supreme Court — A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Mark Tushnet, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977); Jonathan D. Varat, *Variable Justiciability and the Duke Power Case*, 58 TEX. L. REV. 273 (1980).

364. See *Lujan*, 112 S. Ct. 2130. Compare *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59 (1978) with *Allen v. Wright*, 468 U.S. 737 (1984) and *Simon v. Eastern Ky. Welfare Rights Org., Inc.*, 426 U.S. 26 (1976).

365. E.g., *Lujan*, 112 S. Ct. 2130; *Valley Forge College v. Americans United*, 454 U.S. 464 (1982); *Simon*, 426 U.S. 26.

366. See, e.g., *Idaho Schools for Equal Educ. Opportunity v. Evans*, 123 Idaho 573, 584-85, 850 P.2d 724, 735-36 (1993); *Alpert v. Boise Water Corp.*, 118 Idaho 136, 139-40, 795 P.2d 298, 301-02 (1990); *Miles v. Idaho Power Co.*, 116 Idaho 635, 640-42, 778 P.2d 757, 762-64 (1989); *Glengary-Gamlin Protective Ass'n v. Bird*, 106 Idaho 84, 87-89, 675 P.2d 344, 347-49 (Ct. App. 1984).

367. Compare *Miles*, 116 Idaho at 640-42, 778 P.2d at 762-64 (ratepayer has standing to sue utility because harm different than all state residents) and *Alpert*, 118 Idaho at 139-40, 795 P.2d at 301-02 (ratepayer has standing to sue city because harm different from all state residents even though harm identical to all city residents) with *Bopp v. City of Sandpoint*, 110 Idaho 488, 489-90, 716 P.2d 1260, 1261-62 (1986) (taxpayer and city resident has no standing to sue city for vacating street because harm no different than other city residents and taxpayers) and compare *Greer v. Lewiston Golf & Country Club, Inc.*, 81 Idaho 393, 397-98, 342 P.2d 719, 722 (1959) (taxpayer and city resident has no standing to sue city for disannexing golf course because harm no different from other city residents and taxpayers) with *Bentel v. County of Bannock*, 104 Idaho 130, 135-36, 656 P.2d 1383, 1388-89 (1983) (county residents have no standing to sue city despite particularized harm because not city residents).

368. IDAHO CONST. art. V, § 2; see *Sunshine Mining Co. v. Allendale Mut. Ins. Co.*, 105 Idaho 133, 666 P.2d 1144 (1983); *Eismann v. Miller*, 101 Idaho 692, 619 P.2d 1145 (1980); *State v. Griffith*, 97 Idaho 52, 539 P.2d 604 (1975).

contrasted with legislative³⁶⁹ or executive³⁷⁰ power — the court has jurisdiction to hear and decide the matter.³⁷¹

Fortunately, the APA has mooted the standing question in challenges to agency action. The APA's judicial review provisions confer standing to obtain judicial review on a broad range of persons representing a broad range of interests.³⁷² The Act provides: "A person *aggrieved* by final agency action other than an order in a contested case [or] a party *aggrieved* by a final order in a contested

369. IDAHO CONST. art. III, § 1.

370. See IDAHO CONST. art. IV, § 5 (vesting the "supreme executive power" in the governor; other powers are vested in other officers of the "executive department").

371. The type of problem that the uncritical acceptance of federal precedent creates is demonstrated in the court's recurrent statement that taxpayers lack standing. *E.g.*, *Alpert*, 118 Idaho at 139, 795 P.2d at 301; *Miles*, 116 Idaho at 642, 778 P.2d at 764; *Bopp*, 110 Idaho at 490, 716 P.2d at 1262. In addition to offering no reasons for the statement, the court has failed to acknowledge that taxpayers have often been held to have standing in the state courts. In *Nuckols v. Lyle*, 8 Idaho 589, 592, 70 P. 401, 401-02 (1902), for example, plaintiff contended that a contract entered into by the school board was void. When he sought an injunction, defendants argued that he "was not a proper party" to "commence the action." *Id.* The court specifically rejected the argument: "The complaint shows that he is a taxpayer of the county and school district; hence he could commence and prosecute this action." *Id.*; See *BERNARD SCHWARTZ, ADMINISTRATIVE LAW* § 8.15 (3d ed. 1991); see also, e.g., *Sanborn v. Pentland*, 35 Idaho 639, 643-44, 208 P. 401, 401 (1922) (taxpayer in highway district has standing to sue to recover monies paid to district commissioner); *Dunn v. Sharp*, 4 Idaho 98, 103-04, 35 P. 842, 844 (1894) (taxpayer has standing to challenge letting of contract to construct state wagon road); *Orr v. State Bd. of Equalization*, 3 Idaho 190, 193-94, 28 P. 416, 417 (1891) (taxpayer has standing to challenge legality of Board's action despite indeterminate effect).

Furthermore, to the extent that "judicial power" is informed by the powers of the King's Bench, it is clear that the judicial power was available to restrain illegal actions at the insistence of strangers through recourse to the prerogative writs of certiorari, prohibition, mandamus, and quo warranto. There is, in short, no historical basis for requiring any injury much less an injury that differs from that of other taxpayers. See *Raoul Berger, Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); *David Currie, Misunderstanding Standing*, 1981 SUP. CT. REV. 41; *Louis L. Jaffe, Standing to Secure Judicial Review: Public Actions*, 74 HARV. L. REV. 1265 (1961).

372. § 67-5270 cmt. 1; cf. 2 COOPER, *supra* note 177, at 536 (noting that the provision in the first model state APA upon which the current Idaho language is based is significantly different from the federal APA and "goes much further in conferring standing to appeal"); *id.* at 538 (noting that state courts construing the provisions "recognize standing to appeal on the part of any appellant who shows in fact that he is aggrieved by the administrative order"). The Court of Appeals *per curiam* decision in *Fox v. Board of County Comm'r's*, 114 Idaho 940, 942, 763 P.2d 313, 315 (Ct. App.), is incorrect in its unsupported assertion on the APA and standing, even under the former APA at issue in *Fox*.

case . . . is entitled to judicial review" under the APA if the person or the party "complies with the requirements of Sections 67-5271 through 67-5279."³⁷³ Thus, the APA establishes a minimal threshold for standing to obtain review of agency action other than an order: whether the person was "aggrieved" by the action. The court has previously defined "aggrieved" by a decision as "injuriously affected" by the decision.³⁷⁴ Thus, if a person has in fact been injured by the agency's decision, that person has standing to obtain judicial review of the decision.

2. Timing: Primary Jurisdiction, Exhaustion of Administrative Remedies, Finality, and Ripeness

The various doctrines that determine whether a person may obtain judicial relief *at a given point* in a proceeding arise from common concerns on the proper relationship between courts and agencies. The timing doctrines are not jurisdictional because they are not concerned with whether the petitioner is ever entitled to judicial review,³⁷⁵ but only with *when* review is available. The answer to this question is to be found in four overlapping doctrines: *primary jurisdiction* — a plaintiff who has filed a traditional lawsuit may be required to postpone that action while awaiting an agency's decision on some or all of the issues; *exhaustion of administrative remedies* — the petitioner must complete all administrative review before seeking judicial review; *finality* — the agency action must be a "final agency action" before an aggrieved person is entitled to judicial review of the

373. § 67-5270(2)-(3) (emphasis added). The Public Utilities Commission and the Industrial Commission are explicitly excluded from the Act's judicial review provisions. The final orders of these two commissions are excluded because their orders may be appealed directly to the Idaho Supreme Court. See IDAHO CONST. art. V, § 9 (providing for direct appeal of "orders" issued by the two commissions); § 67-5270(3) (excluding the Public Utilities Commission and the Industrial Commission from judicial review provisions of the APA). By implication from the specific exclusion in § 67-5270(3) and the silence in § 67-5720(2), it appears that rules or other agency actions of the two commissions are subject to review in district court. See also Rhodes v. Industrial Comm'n, 93 Idaho Sup. Ct. Rep. 1417, 1417 (1993) (allowing use of writ of prohibition to obtain review of Industrial Commission rulemaking).

374. § 67-5270 cmt. 1; Roosma v. Moots, 62 Idaho 450, 455, 112 P.2d 1000, 1002 (1941); see also *In re Blades*, 59 Idaho 682, 684, 86 P.2d 737, 738 (1939). This does not require injury to a legal interest.

375. E.g., Sierra Life Ins. Co. v. Granata, 99 Idaho 624, 627-29, 586 P.2d 1068, 1071-73 (1978) (failure to exhaust administrative remedies does not deprive court of jurisdiction); Grever v. Idaho Tel. Co., 94 Idaho 900, 902-03, 499 P.2d 1256, 1258-59 (1972) (doctrine of primary jurisdiction is not jurisdictional).

action; and, *ripeness* — the agency action, even if “final,” is nonetheless premature.

a. Primary Jurisdiction

In some circumstances a plaintiff who has filed a traditional lawsuit will be required to postpone that action while seeking an agency's decision on some or all of the matters at issue in the litigation. This is the doctrine of “primary jurisdiction,”³⁷⁶ a doctrine used by courts to assign initial decisionmaking in areas where agency and judicial jurisdiction to decide issues and disputes overlap. Thus, the doctrine applies only when a claim can originally be brought before either the court or an agency, and the moving party has chosen to bring the matter to the court. For example, in *Grever v. Idaho Telephone Co.*,³⁷⁷ the telephone company and plaintiff's predecessor had agreed to terminate service to a resort and hotel.³⁷⁸ After plaintiff purchased the resort, he requested restoration of the service.³⁷⁹ Defendant not only refused to restore service, it also removed the existing telephone line and facilities, and then demanded a \$3,000 hookup charge.³⁸⁰ Plaintiff brought an action in district court seeking a writ of mandate to compel the phone company to provide service.³⁸¹ The supreme court affirmed the district court's dismissal so that the matter could be brought before the public utilities commission:

In view of the fact that the Idaho Public Utilities Commission has been vested with jurisdiction to regulate and supervise public utilities in the state, it has been given power to “prescribe rules and regulations for the performance of any service or the *furnishing of any commodity supplied by a public utility,*” and it is the duty of the Commission to assure that adequate service is furnished. The Idaho Public Utilities Commission is the body that has primary jurisdiction in matters such as the case at bar and that the plaintiff must

376. See 2 COOPER, *supra* note 177, at 562-72; SCHWARTZ, *supra* note 371, at §§ 8.27-32; PETER L. STRAUSS, AN INTRODUCTION TO ADMINISTRATIVE JUSTICE IN THE UNITED STATES 235 (1989).

377. 94 Idaho 900, 499 P.2d 1256 (1972).

378. *Id.* at 901, 499 P.2d at 1257.

379. *Id.*

380. *Id.*

381. *Id.*

exhaust his administrative remedies before seeking judicial relief.³⁸²

The *Grever* court emphasized the expertise of the agency as the basis for its decision.³⁸³ The other primary rationale for the doctrine is to assure uniformity in the application of regulatory and ratemaking laws — a rationale relied on by the court in *Briggs v. Golden Valley Land & Cattle Co.*,³⁸⁴ where the supreme court instructed the district court to determine whether it should defer to the Idaho Department of Water Resources "to further the goal of uniformity of method of determination of underground water rights in all judicial and administrative hearings."³⁸⁵

The APA only indirectly interacts with the common-law doctrine of primary jurisdiction. Section 67-5278 authorizes any person to petition the district court for declaratory judgment on the validity or applicability of an agency rule.³⁸⁶ This provision was not intended to restrict the district court's authority under the doctrine of primary jurisdiction to defer action on the petition and await clarification of the issues by the agency.³⁸⁷

382. *Id.* at 902, 499 P.2d at 1258 (footnote omitted).

383. *Id.*; see also *Briggs v. Golden Valley Land & Cattle Co.*, 97 Idaho 427, 435 n.6, 546 P.2d 382, 390 n.6 (1976); *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 584-85, 513 P.2d 627, 636-37 (1973).

384. 97 Idaho 427, 546 P.2d 382 (1976).

385. *Id.* at 435-36 n.6, 546 P.2d at 390-91 n.6. Unfortunately, the court has been far from consistent in its application of the doctrine. Compare *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 696, 571 P.2d 753, 757 (1977) (construing contractual term "industry recognized practices" is for the court rather than the agency even though tariff affected) with *Alpert v. Boise Water Corp.*, 118 Idaho 136, 142-45, 795 P.2d 298, 304-07 (1990) (constitutionality of franchise fees charged by the city presented only legal issues that had no effect on the allocational aspects of the company's tariff structure). See also *Anderson v. Gailey*, 97 Idaho 813, 825, 555 P.2d 144, 156 (1976) (recognizing doctrine's potential applicability to tort action).

386. § 67-5278(1); cf. *Swisher v. State Dep't of Envtl. & Community Servs.*, 98 Idaho 565, 567 n.1, 569 P.2d 910, 912 n.1 (1977) (the legislature has the constitutional authority under article V, § 20 to specify the appellate jurisdiction of the district courts).

387. See § 67-5278 cmt. 1; see also *Idaho Mut. Benefit Ass'n v. Robison*, 65 Idaho 793, 803, 154 P.2d 156, 161 (1944) (district court had jurisdiction to determine facial constitutionality of statute but not to determine whether the statute applied to petitioner; jurisdiction to determine the applicability of the statute belonged in the first instance to the agency charged with administering the statute).

b. Section 67-5271 and Exhaustion of Administrative Remedies

Primary jurisdiction applies to claims that can originally be brought before either the court or an agency; the issue is whether the agency should be afforded the first opportunity to decide the issue. Exhaustion of administrative remedies, on the other hand, becomes an issue when an action was initially begun by or before an administrative agency and the petitioner seeks judicial relief before the administrative process has been finished.³⁸⁸ Primary jurisdiction thus is concerned with *initial* jurisdiction, while exhaustion focuses on when *review* of an agency action may be had. The net effect of the two doctrines is that an "administrative agency is entitled to the first and the next-to-last word."³⁸⁹

The fundamental principle that a person is required to comply with an agency's review procedures before seeking judicial relief is codified in the APA: "A person is not entitled to judicial review of an agency action until that person has exhausted all administrative remedies."³⁹⁰ The exhaustion doctrine is one of comity for allocating responsibilities between agencies and courts. It reflects two interrelated goals. The first is to protect agency autonomy by allowing it to develop a factual record, to apply its expertise to the facts and issues, to detect and correct errors in its decisions, and to determine policy issues; the second objective is to acknowledge the respective competence of agency and judicial decisionmakers by allowing the agency to develop fully the factual basis for appeal and

388. Labeling confusions do arise. For example, in *Fischer v. Sears, Roebuck & Co.*, 107 Idaho 197, 687 P.2d 587 (Ct. App. 1984), plaintiff had brought a claim under a state statute prohibiting age discrimination. *Id.* at 198, 687 P.2d at 588. The statute provided that a claim was to be filed with the Department of Labor and Industrial Services. *Id.* When plaintiff sought to initiate a claim in district court, the court of appeals held that the Department "was vested with the primary jurisdiction to determine age discrimination complaints." *Id.* at 199, 687 P.2d at 589. Since the claim could not be brought in the district court, the case did not involve a question of primary jurisdiction but instead one of statutory limits on the district court's appellate jurisdiction. *Id.* at 200, 687 P.2d at 590.

389. 2 COOPER, *supra* note 177, at 572; see 2 COOPER, *supra* note 177, at 572-85; SCHWARTZ, *supra* note 371, at §§ 8.33-40; STRAUSS, *supra* note 376, at 232-33.

390. § 67-5271(1).

to crystallize the legal issues involved.³⁹¹ The doctrine thus reflects a more general prohibition against piece-meal litigation.

Exhaustion becomes an issue in a case when an agency has initiated an action and the entity that is the object of the agency action seeks to obtain judicial review.³⁹² A classic example of the doctrine was presented in *Idaho Mutual Benefit Association v. Robison*.³⁹³ The case was a declaratory judgment action initiated by an insurance company that had been notified by the Industrial Accident Board that it would be required to pay unemployment compensation premiums on its agents.³⁹⁴ Petitioner sought a ruling that the Unemployment Compensation Act was facially unconstitutional and that, even if the Act were constitutional, it did not apply to the petitioner's agents.³⁹⁵ The Board claimed that the district court lacked jurisdiction over the case because the company had not exhausted the available administrative remedies.³⁹⁶ The supreme court disagreed, concluding that the facial constitutionality of the Act was properly a judicial question that could be decided in

391. E.g., Grever v. Idaho Tel. Co., 94 Idaho 900, 903-04, 499 P.2d 1256, 1259-60 (1972); Williams v. State, 95 Idaho 5, 8, 501 P.2d 203, 206 (1972); Pounds v. Denison, 115 Idaho 381, 384, 766 P.2d 1262, 1265 (Ct. App. 1988); Ashley v. Department of Health & Welfare, 108 Idaho 1, 2, 696 P.2d 353, 354 (Ct. App. 1985).

392. Several Idaho cases speak of either exhaustion or finality or both in the context of what should more accurately be called estoppel or *res judicata*/claim preclusion. Generally dismissal for a failure to exhaust administrative remedies simply requires the petitioner to return to the agency to pursue additional agency action. In some situations, however, the petitioner has delayed too long and is really seeking to attack the agency decision collaterally. For example, in *Henderson v. State*, 110 Idaho 308, 715 P.2d 978 (1986), plaintiff had been fired and did not appeal an intermediate agency decision upholding his dismissal. *Id.* at 309, 715 P.2d at 979. He then subsequently filed a tort action for wrongful discharge. *Id.* The court dismissed his claim, noting "Henderson had thirty days to appeal the decision of the personnel commission. He did not do so. As a result, the decision of the personnel commission became final . . . and the doctrine of *res judicata* applies to bar his claim for wrongful discharge." *Id.* at 310, 715 P.2d at 980 (footnote omitted); see also *Service Employees Int'l Union v. Idaho Dep't of Health & Welfare*, 106 Idaho 756, 761, 683 P.2d 404, 409 (1984); *V-1 Oil Co. v. County of Bannock*, 97 Idaho 807, 810, 554 P.2d 1304, 1307 (1976); *Franden v. Jonasson*, 95 Idaho 792, 793, 520 P.2d 247, 248 (1973); *Mosman v. Mathison*, 90 Idaho 76, 84-85, 408 P.2d 450, 454-55 (1965); *State v. Concrete Processors, Inc.*, 85 Idaho 277, 282, 379 P.2d 89, 91 (1963); *Peterson v. City of Pocatello*, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990); *Pounds*, 115 Idaho 381, 383, 766 P.2d 1262, 1264 (Ct. App. 1988).

393. 65 Idaho 793, 154 P.2d 156 (1944).

394. *Id.* at 797, 154 P.2d at 157-58.

395. *Id.* at 797, 154 P.2d at 158.

396. *Id.* at 797, 803, 154 P.2d at 158, 161.

the first instance by the court in a declaratory judgment action.³⁹⁷ The issues surrounding the application of the Act to the company, however, were properly for the Board. The district court lacked jurisdiction

to determine whether or not appellant or its agents were within the scope of the act, since [those issues] involve fact finding. In other words we hold that the district court had jurisdiction to construe the law and pass upon its constitutionality, but that it had no jurisdiction to investigate the facts, to make findings thereon or to determine the weight of the evidence or credibility of witnesses These were questions to be determined by the Industrial Accident Board in the first instance and are reviewable on appeal.³⁹⁸

As a general principle, once an agency begins an investigation or files a contested case, the other party is prohibited from obtaining judicial review of the agency's jurisdiction to initiate the proceeding.³⁹⁹ Similarly, where an application for benefits has been rejected, the applicant must exhaust the available agency appeals before seeking judicial relief.⁴⁰⁰

As the *Robison* case demonstrates, exhaustion is not required when the issue is a facial constitutional challenge to the agency. Because the exhaustion requirement can work a substantial hardship, the courts have created other exceptions:

Illustrative of the circumstances which require an exception to the exhaustion doctrine include: (1) where resort to administrative procedures would be futile; (2) where the aggrieved party is challenging the constitutionality of the agency's actions or the agency itself; or (3) where the aggrieved party has no notice of the initial administrative decision or no opportunity to exercise the administrative review procedures.⁴⁰¹

397. *Id.* at 803, 154 P.2d at 161.

398. *Id.* (citations omitted).

399. *E.g.*, *Sierra Life Ins. Co. v. Granata*, 99 Idaho 624, 627-29, 586 P.2d 1068, 1071-73 (1978); *Bohemian Breweries v. Koehler*, 80 Idaho 438, 446-47, 332 P.2d 875, 879-80 (1958).

400. *E.g.*, *Franden v. Jonasson*, 95 Idaho 792, 793, 520 P.2d 247, 248 (1973) (action to have real property taxes apportioned); *Williams v. State*, 95 Idaho 5, 8, 501 P.2d 203, 206 (1972) (application for relocation benefits).

401. *Peterson v. City of Pocatello*, 117 Idaho 234, 236, 786 P.2d 1136, 1138 (Ct. App. 1990); *see also Granata*, 99 Idaho at 629, 586 P.2d at 1073 (agency action threatens irreparable harm); *Williams*, 95 Idaho at 8, 501 P.2d at 206

This basic principle is also recognized in the APA, which does not require exhaustion when "review of the final agency action would not provide an adequate remedy."⁴⁰² Examples of preliminary agency actions that would not be subject to the exhaustion requirement include denials of motions to intervene or of requests for subpoenas.

c. Sections 67-5270, 67-5721, and Finality

A requirement that is closely related to exhaustion of administrative remedies is the general requirement that the agency action must be "final" before review is available.⁴⁰³ The essential idea of "finality" is simply stated in the APA: in creating the entitlement to judicial review of agency actions, the Act specifies that "[a] person aggrieved by *final* agency action . . . [and a] party aggrieved by a *final* agency order . . . is entitled to judicial review."⁴⁰⁴ The reason for the requirement of a final agency action is also simple: it is the conclusion of the proceedings that is important since many preliminary problems may be mooted by the agency's final decision.

Finality is only infrequently an issue since it generally will be apparent when the agency decision is only a preliminary decision.⁴⁰⁵ Sometimes, however, that is not the case. For example, in *South Fork Coalition v. Board of Commissioners*,⁴⁰⁶ the Coalition appealed a county commission decision to approve in principle the construction of a planned unit development in a zone designated for grazing.⁴⁰⁷ Petitioner argued that a residential development was inconsistent with the zone.⁴⁰⁸ The supreme court remanded the decision to the

(1972) (agency regulations not available as required); *Bohemian Breweries*, 80 Idaho at 446, 332 P.2d at 879-90 (agency facially violating applicable statute).

402. § 67-5271(2).

403. § 67-5270(2)-(3).

404. *Id.* See 2 COOPER, *supra* note 177, at 572-85, 588-95; STRAUSS, *supra* note 376, at 229-32.

405. The Attorney General's Rules further clarify the issue by requiring the finality of orders to be explicitly stated. *See* IRAP 720.02.a (notice required includes statement that a recommended order "will not become final without action of the agency head"); 730.02.a (notice required includes statement that a preliminary order "will become final without further action . . . unless any party petitions for reconsideration . . . or appeals"); 740.02.a-b (notice required includes statement that the order is a "final order" and that a party may appeal to district court); *see also* IRAP 750 (procedure for resolving orders not designated by the agency as recommended, preliminary, or final order).

406. 112 Idaho 89, 730 P.2d 1009 (1986).

407. *Id.* at 90, 730 P.2d at 1010 (Shepard, J., dissenting).

408. *Id.* at 91, 730 P.2d at 1011 (Shepard, J., dissenting).

commission because "approval in principle" was only a preliminary step to submission of a final development plan.⁴⁰⁹ As such it was not a final agency action subject to judicial review — even though the commission was unlikely to revisit its decision that a PUD was consistent with the zone.

Perhaps the most common situation in which finality issues arise is when an agency refuses or fails to act. When an agency is sued on the grounds that a statute requires it to do something, the most common response is that it has not as yet completed consideration of the matter and that there is, therefore, no final agency action to review.⁴¹⁰ The obvious dilemma is that inaction at some point effectively becomes a decision to deny. If there is to be meaningful judicial review of agency decisions, finality defenses must be set aside at some point. The APA recognizes this problem by specifically defining "agency action" to include "the failure to issue a rule or order . . . or failure to perform, any duty placed on [the agency] by law."⁴¹¹

d. Section 67-5278: Ripeness and the Availability of Declaratory Judgments on Rules

"Ripeness" is the timing doctrine that shares many attributes with standing: both seek to avoid litigation of abstract issues by withholding judicial review until the actual effects of an agency decision are known. Ripeness also overlaps with the federal constitutional requirements that litigation involve a "case or controversy" since the doctrine seeks to prevent the adjudication of abstract ideas by requiring concrete injury.⁴¹² As such, the applicability of the ripeness doctrine should be carefully scrutinized by the Idaho Supreme Court to determine whether the doctrine is in fact applicable in a court system of general jurisdiction.

The potential applicability of the doctrine to judicial review of agency action in Idaho is substantially reduced by the provisions of § 67-5278 authorizing the use of declaratory judgment actions to determine the "validity or applicability of a rule."⁴¹³ Any person

409. *Id.* at 90, 730 P.2d at 1010 (Shepard, J., dissenting).

410. *E.g.*, Idaho Falls Consol. Hosps., Inc. v. Board of County Comm'r's, 104 Idaho 628, 629, 661 P.2d 1227, 1228 (1983) (per curiam).

411. § 67-5201(3)(b)-(c). As with exhaustion, the finality requirement is also limited by the APA's provision allowing review of preliminary agency actions when "review of the final agency action would not provide an adequate remedy." § 67-5271(2).

412. *E.g.*, Eagle-Picher Indus. v. EPA, 759 F.2d 905, 915 (D.C. Cir. 1985); American Trucking Ass'n v. ICC, 747 F.2d 787, 789-90 (D.C. Cir. 1984).

413. § 67-5278(1). The section requires the agency to be made a party to the

may petition the district court for declaratory judgment on the validity or applicability of an agency rule that threatens to interfere with the legal rights or privileges of the petitioning party.⁴¹⁴ Since ripeness is most frequently an issue in cases involving pre-enforcement challenges to rules, the APA overrides much of the federal doctrine's traditional scope.

To the extent that ripeness remains a potentially viable limit on judicial review of agency action, the Idaho case law suggests a two-part test: whether the issues presented are suitable for judicial resolution without the additional facts that would be available if adjudication were delayed and whether delay will itself be beneficial or detrimental. In *Miles v. Idaho Power Co.*,⁴¹⁵ the district court dismissed petitioner's challenge to the constitutionality of the Swan Falls agreement on the ground that it was not ripe,⁴¹⁶ concluding that petitioner would suffer no harm until the public utilities commission acted on the agreement.⁴¹⁷ Since the actions of the commission were unknown, the case lacked the concreteness the court felt necessary to resolve the issues presented by the petition.⁴¹⁸ The supreme court disagreed, noting that "[d]eferring adjudication would add nothing material to the resolution of the legal issues presented, and it would, in fact, delay implementation of the agreement."⁴¹⁹

action. § 67-5278(2).

414. § 67-5278(1).

415. 116 Idaho 635, 778 P.2d 757 (1989).

416. *Id.* at 637, 778 P.2d at 759.

417. *Id.* at 642-43, 778 P.2d at 764-65.

418. *Id.*

419. *Id.* at 643, 778 P.2d at 765; see also *Idaho Falls Consol. Hosps., Inc. v. Board of County Comm'r's*, 104 Idaho 628, 629, 661 P.2d 1227, 1228 (1983) (per curiam) (agency policy statement arguably not ripe for review because its impact was uncertain).

In the federal courts, the question is whether the issues presented are "fit" for judicial determination — are they predominately legal or are additional facts necessary to flesh out the controversy? — and will delay impose "hardship" on the parties? See *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967); 2 COOPER, *supra* note 177, at 588; SCHWARTZ, *supra* note 371, at § 9.1; STRAUSS, *supra* note 376, at 233-34.

C. The How, When, Where, and What of Judicial Review

1. Section 67-5272: Form of Review

The APA explicitly authorizes two forms of review: a petition for review and a declaratory judgment.⁴²⁰ The Act is not intended to preclude other forms of review such as the common law prerogative writs of certiorari, mandamus, and prohibition.⁴²¹

2. Sections 67-5273 and 67-5274: Time for Filing Petition for Judicial Review and Stays of Agency Action

The time for filing a petition for review varies with the nature of the agency action that is to be reviewed.

A petition for review of the substance of a final rule may be filed at any time.⁴²² Procedural challenges to final rules, however, must be filed within two years of their effective date.⁴²³

A petition for review of an order must be filed within twenty-eight days of the issuance of the order or twenty-eight days after the decision on reconsideration of the order.⁴²⁴ A cross-petition for judicial review may be filed within fourteen days after a party is served with a copy of the notice and petition for review.⁴²⁵ The provision for cross-petitions is an important improvement; the old APA had no provision for responses to a petition. As a result, a party could wait until the last minute of the last day to petition for review. If the statute were strictly construed, all other parties would lose their right to cross-appeal because cross-petitions could not be filed in time.

420. § 67-5272.

421. While the utility and limits of these writs are beyond the scope of this article, it is important to note that the state courts — as courts of general jurisdiction — are the lineal descendants of the English common law courts. This includes the supervisory powers that the King's Bench exercised through the prerogative writs. *See* 2 COOPER, *supra* note 177, at 644-62.

422. § 67-5273(1); *cf.* Idaho Power Co. v. Idaho Pub. Utils. Comm'n, 102 Idaho 744, 749, 639 P.2d 442, 447 (1981) (failing to exhaust administrative remedies does not preclude subsequent attack on rulemaking).

423. *See* § 67-5273(1). Section 67-5231(2) imposes a two-year statute of limitations on challenges to the procedural regularity of a rulemaking. *See generally supra* notes 172-74 and accompanying text (discussing penalty for noncompliance with APA's procedural requirements).

424. § 67-5273(2). On petitions for reconsideration, see §§ 67-5243(3), -5246(4); *see also supra* notes 295-97 and accompanying text (discussing petitions for reconsideration).

425. § 67-5273(2).

A petition for judicial review of agency action that is neither a rule nor an order must be filed within twenty-eight days of the agency action.⁴²⁶ The time for filing a petition for judicial review is tolled during the petitioner's attempts to exhaust administrative remedies as long as the attempts are clearly not frivolous or repetitious.⁴²⁷ Cross-petitions for review may be filed within fourteen days of the filing of a petition for review.⁴²⁸

Although filing a petition for judicial review does not in and of itself stay the effectiveness or enforcement of the agency action, either the agency or the reviewing court may grant a stay.⁴²⁹ There are good reasons not to provide an automatic stay upon the filing of a petition for review. Some agency actions such as the seizure of adulterated food⁴³⁰ or the quarantine of diseased animals⁴³¹ are taken to protect the public health. If a person subject to such an order could stay the order simply by filing a petition for judicial review, the person would be able effectively to lift the seizure or quarantine, and there would be no way to protect the public health. Therefore, instead of an automatic stay of an agency action, each petition for a stay must be individually determined.

3. Section 67-5272: Venue

Once it has been determined that judicial review is available, the next question is: where? The APA has very broad venue provisions. Petitions for judicial review of all agency actions and petitions for declaratory rulings on validity or applicability of agency rules may be filed in the district court in one of up to four locations: the county in which the hearing was held, the county in which final agency action was taken, the county in which the aggrieved party resides, or the county in which the real or personal property that was the subject of the agency's action is located.⁴³²

There should be few problems in determining venue. Furthermore, given the purposes of the Act, the venue provisions should be liberally construed. For example, where hearings may be recessed and held in more than one county, any county in which a

426. § 67-5273(3).

427. *Id.*

428. *Id.*

429. § 67-5274; *see also* IRAP 780 (stays of orders).

430. § 37-118(d).

431. § 25-307.

432. § 67-5272; *see also* IRAP 791.01 (locations where parties may obtain judicial review); IRAP 860.01 (locations where persons may obtain judicial review).

hearing was held should be proper venue. The county in which final agency action is taken is not necessarily the county in which the agency's main office is located. Generally the county in which the record of the final agency action is filed is the county in which the final agency action was taken.

4. Sections 67-5225, 67-5249, 67-5275, and 67-5276: Agency Record for Judicial Review

The APA specifies in detail what is to be included in the agency record for review of the three enumerated types of "agency action": rules, orders, and statutorily imposed duties.⁴³³ It also allows the agency record to be supplemented after the conclusion of the hearing before the agency in a very limited range of situations.⁴³⁴

The agency record must be transmitted to the reviewing court within forty-two days after the court receives the petition for judicial review.⁴³⁵ The parties may stipulate to an abbreviated record; a party unreasonably refusing to so stipulate may be taxed by the court for the additional costs.⁴³⁶

a. Sections 67-5225 and 67-5275: The Record for Judicial Review of Rulemaking

In conjunction with the rulemaking procedures, the agency is required to compile a "rulemaking record"⁴³⁷ that is to be the agency record for judicial review.⁴³⁸ The record must include public comments, written materials relied upon by the agency, and any materials prepared in conjunction with the rulemaking.⁴³⁹ While the Act specifically provides that this record "need not constitute the exclusive basis" for the agency's decision or for judicial review of that decision,⁴⁴⁰ requiring the agency to prepare the record does increase the procedural formality of the rulemaking process. It is also intended to improve judicial review of agency decisionmaking by increasing the information necessarily presented to reviewing courts.

433. § 67-5201(3).

434. § 67-5276. The court may also require corrections to the record. § 67-5275(3).

435. § 67-5275(1).

436. § 67-5275(2).

437. § 67-5225.

438. § 67-5275(1)(a).

439. § 67-5225(2).

440. § 67-5225(3) & cmt. 3.

b. Sections 67-5249 and 67-5275: The Record for Judicial Review of Contested Cases

While the creation of a rulemaking record for judicial review marks a potentially significant change in administrative procedures, the record that must be created in the course of a contested case — and that is to be the exclusive basis for agency factfinding in such decisions⁴⁴¹ — is a familiar requirement. The record must include all notices of proceedings, pleadings, motions, briefs, petitions, and intermediate rulings; evidence received or considered; a statement of matters officially noticed; offers of proof and objections and rulings; the record prepared by the presiding officer and any transcript of the record; staff memoranda or data submitted to the presiding officer or the agency having connection with the consideration of the proceeding; and any recommended order, preliminary order, final order, or order on reconsideration.⁴⁴²

c. Section 67-5275: The Agency Record for Judicial Review of Other Agency Actions

To facilitate judicial review of agency actions other than rules and orders, the agency record for such appeals shall include "any agency documents expressing the agency action."⁴⁴³ This minimal statutory requirement reflects the variety of decisions encompassed within this category of agency actions and the difficulty in specifying what types of documents will be produced in conjunction with such a variety of decisions. Presumably, the record may include letters, memoranda, and other pre-decisional and all decision documents. Agencies should be careful to document the basis for their decisions. As the Idaho Supreme Court has recognized,

441. § 67-5248(2); see also § 67-5249(3) & cmt.; § 67-5279(3).

442. § 67-5249(2). The APA specifies that this record is to be the "agency record for judicial review" of the order. § 67-5275(1)(b). In addition to these statutory requirements, the court has specified in some detail what the record must include. One of the crucial functions that must be performed in reaching a decision is fact-finding. *Vernon v. Omark Indus.*, 113 Idaho 358, 359-60, 744 P.2d 86, 87-88 (1987); see also *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 37, 655 P.2d 926, 931 (1982); *Ellison v. Bunker Hill Co.*, 96 Idaho 317, 319, 528 P.2d 199, 201 (1974); *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 836, 521 P.2d 658, 660 (1974). The agency must also provide a reasoned explanation for discretionary decisions. E.g., *Davidson v. H. H. Keim Co.*, 110 Idaho 758, 759-60, 718 P.2d 1196, 1197-98 (1986).

443. § 67-5275(1)(c).

[t]o abide the notion that the Commission's order was *based* upon reasoned findings of fact would be treacherous to say the least. The findings were generated after the order in an attempt to justify the earlier conclusions. Findings which are created after a decision has been made and entered are not the "findings"

required by the APA since it is a basic rule of administrative law that *post hoc* rationalizations and litigation memoranda are entitled to far less deference than are contemporaneous records of the reasons for a decision.⁴⁴⁴

d. Section 67-5276: Supplementing the Agency Record

Ordinarily, the record on review is the record that was prepared by the agency during the course of its decisionmaking. Under two narrow circumstances, however, the reviewing court can order the agency record to be supplemented. The person seeking to supplement the record must petition the court for permission to present the additional evidence. If it is demonstrated to the court's satisfaction that the evidence is material, the court may order that the evidence be admitted under one of two procedures.

First, if there were good reasons for failure to present the evidence in the proceeding before the agency, the court can remand the matter to the agency to conduct additional factfinding.⁴⁴⁵ This procedure is intended to cover situations in which the reason for the failure to present the evidence is traceable to some excusable conduct of the petitioner. In such situations, there are at least three reasons why the matter should be returned to the agency. First, it recognizes the importance of the agency's expertise. If the evidence is material to the decision, the agency should have the first opportunity to evaluate the additional evidence and to modify its decision if the additional evidence warrants.⁴⁴⁶ Second, a remand to allow the agency to evaluate the evidence also means that the court will have the benefit of the agency's reasoning and examination of the evidence in reviewing the agency's subsequent order. Third, it conserves judicial resources. If the court were to hear the additional evidence

444. *Curr v. Curr*, 124 Idaho ___, 864 P.2d 132, 136-37 (1993); *see also* *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419-20 (1971); *Van Heukelom v. Pine Crest Psychiatric Ctr.*, 106 Idaho 898, 899-900, 684 P.2d 300, 301-02 (1984).

445. § 67-5276(1)(a).

446. § 67-5276(2).

and to determine that the evidence should significantly affect the agency's decision, the court would be required to remand the matter to the agency; remanding after a threshold showing of materiality and good cause avoids the more lengthy procedures.

Second, if it is alleged that there were procedural irregularities before the agency, the court may hear evidence on the allegations.⁴⁴⁷ This procedure is intended to cover those situations in which a party's failure to present the evidence is traceable to the agency's handling of the hearing. In such cases, the court should determine whether there were procedural irregularities and whether they rendered the agency's decision insufficiently supported. The court is not, however, empowered to hear the case *de novo*.⁴⁴⁸ The authority to take evidence on procedural irregularities serves as a valuable safeguard against the potential abuse of the administrative process.

D. Scope of Review: Sections 67-5277 to 67-5279

Judicial review of an agency action is an appellate function. Baldly stated, the court's role is to review the record created before the agency and determine whether the agency's decision was both reasonable and sufficiently explained. Before examining the scope of review to be applied to the various issues before a reviewing court, it is helpful to briefly examine the general principles applicable to judicial review of agency actions.

The central principle of judicial review of agency actions is that it is an *appellate* process.⁴⁴⁹ As such, judicial review is conducted by

447. § 67-5276(1)(b).

448. It is important to note that the scope of review in such cases is not changed by the presence of procedural irregularities. The APA explicitly includes a harmless error principle: "agency action shall be affirmed unless substantial rights of the appellant have been prejudiced." § 67-5279(4). Thus, if the agency's decision is still reasonable despite the procedural irregularities and the additional evidence, it should be affirmed by the reviewing court. Nor does the conclusion that the decision is unreasonable in light of the procedural irregularities and the additional evidence change the court's role in the overall decisionmaking process: if the court concludes that the decision is not supported by the evidence, the court is to remand to the agency for additional action. See *University of Utah Hosp. v. Board of County Comm'r's*, 113 Idaho 441, 446, 745 P.2d 1062, 1067 (Ct. App. 1987) (the existence of procedural irregularities does not allow the court to try the case *de novo*).

449. This fundamental point concerning the nature of judicial review is buttressed by provisions in three sections of the APA: § 67-5276, which requires the court to remand to the agency to take additional evidence on issues other than procedural irregularities in the agency's decision; § 67-5277, which specifies that

the court without a jury.⁴⁵⁰ Similarly, review of disputed issues of fact is not a *de novo* proceeding, but is to be confined to the record created by the agency.⁴⁵¹ Thus, the court is not to substitute its judgment for that of the agency as to the weight of the evidence on a question of fact.⁴⁵² Furthermore, if the reviewing court concludes that the agency's decision lacks sufficient support as a matter of law, the court is to set aside and remand the decision to the agency.⁴⁵³

A second important principle is that judicial review under the APA begins with a presumption of regularity: "the court shall affirm the agency action unless the court finds that the action was"⁴⁵⁴ Thus, to reverse the agency decision the reviewing court is required to conclude that the decision was

- "(a) in violation of constitutional or statutory provisions;
- "(b) in excess of the statutory authority of the agency;
- "(c) made upon unlawful procedure; or

judicial review is to be conducted without a jury and is to be based on the record prepared by the agency; and § 67-5279, which specifies that the court is not to reweigh the evidence on questions of fact.

450. § 67-5277. There is no constitutional right to a trial by jury in an administrative proceeding. *See, e.g., Brady v. Place*, 41 Idaho 747, 750-51, 242 P. 314, 315 (1925).

451. § 67-5277. "*De novo* review" is an oxymoron since it is not review but retrial and redetermination. There is no right to a *de novo* trial upon appeal from an administrative decision. *E.g., Hill v. Board of County Comm'rs*, 101 Idaho 850, 852, 623 P.2d 462, 464 (1981); *Brady*, 41 Idaho at 750-51, 242 P. at 315; *University of Utah Hosp.*, 113 Idaho at 446, 745 P.2d at 1067. The legislature may, of course, require *de novo* factfinding upon appeal from an agency decision. *See Hart v. Stewart*, 95 Idaho 781, 784, 519 P.2d 1171, 1174 (1974); *Knight v. Department of Ins.*, 119 Idaho 591, 593, 808 P.2d 1336, 1338 (Ct. App. 1991).

452. § 67-5279(1).

453. § 67-5279(2)-(3); *cf. Swisher v. State Dep't of Envtl. & Community Servs.*, 98 Idaho 565, 567 n.1, 569 P.2d 910, 912 n.1 (1977) ("[W]hen [a] statute provides that on appeal from [an agency] the district court may only affirm or set aside orders of the [agency] or remand the matter to the [agency], the district court has no jurisdiction to enter any other orders or take further evidence on matters not considered by the [agency].").

454. § 67-5279(2) (emphasis added). The provision covering record-based decisions is in essence identical: "[T]he court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are" § 67-5279(3) (emphasis added). The presumption of regularity that is codified in these APA provisions reflects the prior case law. *E.g., Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985) ("In Idaho, as in most states, there is a presumption of regularity in the performance of official duties," so the court will "presume that the Commission reviewed the tape recording of the hearing along with the rest of the record in reaching its decision" and the lack of a transcript was an insufficient basis to increase the rigor of the judicial review.).

"(d) arbitrary, capricious, or an abuse of discretion."⁴⁵⁵

The APA thus sets out a hierarchy of decisions for the reviewing court,⁴⁵⁶ beginning with the question of whether the agency acted within the scope of its constitutional and statutory authority. This inquiry must begin with a determination of that authority and the concomitant scope of the discretion accorded to the agency by the constitutional or statutory provisions at issue.

If the agency's action was constitutional and legal, the court must then determine if it followed the proper procedure in taking the challenged action.⁴⁵⁷ This requires a determination of the nature of the agency action as either an adjudicatory, record-based decision or a legislative, not-record-based decision; the procedural requirements imposed upon such actions by either the specific statute or the APA; and whether the agency has complied with those requirements.

Next the court is required to determine whether the factual bases of the agency's action satisfy the applicable scope of review.⁴⁵⁸ The standard to be applied varies with the nature of the agency action. If the decision is *legislative*, that is, if it is not required to be made solely on the basis of a record compiled at an evidentiary hearing, the question is whether the agency's findings of fact are "arbitrary or capricious."⁴⁵⁹ On the other hand, if the decision is *adjudicative*, that is, if it is required to be made on the record, the question is whether the agency's findings are "supported by substantial evidence on the record as a whole."⁴⁶⁰

Finally, the court must determine whether the agency's exercise of any discretion accorded to it was "arbitrary, capricious, or an abuse of discretion."⁴⁶¹

As this hierarchy of decisions demonstrates, one distinction is central to an understanding of judicial review of agency actions. This is the APA's division of agency actions into two categories: those that

455. § 67-5279(2). It is important to note that the standards applicable to record-based decisions are identical to those applicable to not-record-based decisions with the addition of "not supported by substantial evidence on the record as a whole." § 67-5279(3)(d). The distinction between review of factual decisions in record-based and not-record-based decisions is discussed at notes 475-84 and accompanying text *infra* (discussing judicial review of agency factfinding).

456. Cf. *Morgan v. Idaho Dep't of Health & Welfare*, 120 Idaho 6, 8-9, 813 P.2d 345, 347-48 (1991) (discussing judicial review of agency action under former APA).

457. See § 67-5279(2)(c), (3)(c).

458. See § 67-5279(2)(d), (3)(d).

459. § 67-5279(2)(d).

460. § 67-5279(3)(d).

461. See § 67-5279(2)(d), (3)(e).

are required to be made on the record and those that are not. Under the APA itself, orders are the only type of agency action required to be made "on the record."⁴⁶² The distinction between record-based *adjudicative* decisions and not-record-based *legislative* decisions determines the scope of review of the factfinding function. Factfinding in an adjudicative decision is reviewed under the "substantial evidence on the record as a whole" standard.⁴⁶³ Factfinding in a legislative decision is based on the "arbitrary [or] capricious" standard.⁴⁶⁴

1. Judicial Review and the Law-Declaring Function

For both an adjudicative (record-based) and a legislative (not-record-based) agency action, the court is to determine whether the agency action was "in violation of constitutional or statutory provisions, . . . in excess of the statutory authority of the agency [or] made upon unlawful procedure."⁴⁶⁵ This requires the court to determine *de novo* whether the agency's action was unconstitutional, or sub-

462. An order "must be based exclusively on the evidence in the record." § 67-5248(2); *see also* §§ 67-5249(3) & cmt., -5279(3) (requiring contested cases to be decided solely on the basis of the record compiled before the agency). The rulemaking record, on the other hand, "need not constitute the exclusive basis" for the agency's decision. § 67-5225(3) & cmt. 3. *See generally* § 67-5279 cmt. 1 (distinguishing between record-based and not-record-based decisions). The legislature might, of course, choose to require an agency to make a legislative decision based on the procedure required in a contested case. It apparently has not done so and there is ample reason to hope that it never will do so. *See Robert W. Hamilton, Rulemaking on a Record by the Food and Drug Administration*, 50 TEX. L. REV. 1132, 1143-45 (1972) (FDA proceeding to determine whether peanut butter should be 87% or 90% peanuts produced a transcript of 7,736 pages).

463. § 67-5279(3)(d).

464. § 67-5279(2)(d).

465. § 67-5279(2)(a)-(c) (not-record-based decisions); § 67-5279(3)(a)-(c) (record-based decisions). It is important to note that the question of whether the agency's decision was "made upon unlawful procedure" is a question of law. The correct judicial response to decisions "made upon unlawful procedure" is to remand to the agency to correct its procedural error. As the court noted in *Shokal*, "we can define no substantive error *to date* on the part of Water Resources. Thus, while reversal of the agency is inappropriate, the amended application is properly remanded for a new hearing to correct the procedural error." *Shokal v. Dunn*, 109 Idaho 330, 334, 707 P.2d 441, 445 (1985) (emphasis added). The crucial point is that a protestant is entitled to remand for a new hearing for procedural errors even when no substantive errors have been shown because it is through the hearing that the protestant has the opportunity to demonstrate that the agency's action has substantive problems. *See also Holly Care Ctr. v. State Dep't of Employment*, 110 Idaho 76, 78-79, 714 P.2d 45, 47-48 (1986) (agency choice of rule making rather than contested case procedure reversed).

stantively or procedurally *ultra vires*. If the reviewing court concludes that the agency's interpretation of the statute led it to act illegally, the court is to reverse and remand that decision to the agency for appropriate action.

It is important to distinguish these questions from another recurrent situation that arises from an agency's interpretation of a statute: to the extent that the statute accords the agency discretion, the issue increasingly becomes one of exercising the discretion granted to the agency by the legislature. Such discretionary decisions are reviewed under the "arbitrary, capricious, or an abuse of discretion" standard.⁴⁶⁶

The traditional analysis of "questions of law" tends to conflate these two separate and sequential functions. Separating them can help to clarify the process of judicial review by shifting the focus: while the court's law-declaring function requires it first to determine *de novo* if the agency interpretation is "in violation of . . . statutory provisions [or] excess of . . . statutory authority,"⁴⁶⁷ once it has determined that the agency's interpretation is not illegal, the applicable scope of review then becomes whether the agency's decision is "arbitrary, capricious, or an abuse of discretion."⁴⁶⁸

The distinction can be highlighted by comparing three possible cases. In the first, the reviewing court determines that the agency misconstrued the applicable statute and that it did not, therefore, have the authority to take the action that it took; the court reverses and remands to the agency to take appropriate action under the correct interpretation of the statute.⁴⁶⁹ On the other hand, when the

466. § 67-5279(2)(d) (not-record-based decisions); § 67-5279(3)(e) (record-based decisions); *see, e.g.*, J.R. Simplot Co. v. Idaho State Tax Comm'n, 120 Idaho 849, 853-55, 820 P.2d 1206, 1210-12 (1991); Kopp v. State, 100 Idaho 160, 163, 595 P.2d 309, 312 (1979); Idaho Pub. Utils. Comm'n v. V-1 Oil Co., 90 Idaho 415, 420, 412 P.2d 581, 586 (1966).

467. § 67-5279(2)(a)-(b) (not-record-based decisions); § 67-5279(3)(a)-(b) (record-based decisions).

468. § 67-5279(2)(d) (not-record-based decisions); § 67-5279(3)(e) (record-based decisions).

469. This was the situation in Pumice Prods., Inc. v. Robison, 79 Idaho 144, 312 P.2d 1026 (1957). The statute specified that the Commission of Labor "shall, when a question arises concerning representation of employees in a collective bargaining unit and when requested to do so by any employer or employees, determine the representatives thereof by taking a secret ballot of employees." *Id.* at 147, 312 P.2d at 1027. The Commissioner refused to hold an election despite a request from the employees of Pumice Products, relying upon a regulation he had promulgated that prohibited the holding of more than one election for a bargaining unit in any twelve month period. *Id.* at 146, 312 P.2d at 1027. The court, however, concluded that the statute was "plain and unambiguous . . . and does not

reviewing court determines that the agency's interpretation of the statute is permissible,⁴⁷⁰ it must also determine whether the agency's exercise of the implicitly delegated discretion was arbitrary, capricious, or an abuse of discretion. There are two possible conclusions to this second question: the agency either was or was not reasonable.⁴⁷¹

confer on the Commissioner of Labor any right to make a regulation or ruling in direct conflict with its terms." *Id.* at 147, 312 P.2d at 1027; *see also* Idaho Fair Share v. Idaho Pub. Utils. Comm'n, 113 Idaho 959, 961-62, 751 P.2d 107, 109-10 (1988); Ware v. Idaho State Tax Comm'n, 98 Idaho 477, 480-81, 567 P.2d 423, 425-26 (1977); Idaho Compensation Co. v. Hubbard, 70 Idaho 59, 62-63, 211 P.2d 413, 415 (1949).

470. The point can be stated either as one involving an ambiguous statute or as one involving the delegation of discretion to the agency. For example, if the statute is not ambiguous, the agency is required to comply with it. *See, e.g., Hubbard*, 70 Idaho 59, 62, 211 P.2d 413, 415. On the other hand, if the statute is ambiguous, the issue is whether the agency resolved the ambiguity in a reasonable way. *See, e.g., Kopp*, 100 Idaho 160, 163, 595 P.2d 309, 312.

471. In *Kopp*, the statute provided: "[T]he number of [liquor] licenses . . . issued for any city shall not exceed one (1) license for each one thousand five hundred (1,500) of population of said city . . . as established in the last preceding census, or any subsequent special census conducted by the United States bureau of the census." 100 Idaho at 162, 595 P.2d at 311. The agency interpreted the statute to allow retail liquor licenses to be issued on the basis of current population data from the census bureau. *Id.* A city resident challenged the issuance of an additional license based on a census bureau population estimate that was used by the federal government for revenue sharing purposes. *Id.* The resident argued that the term "special census" was defined by a federal statute that authorized local governments to purchase "special censuses" from the bureau. *Id.* at 164, 166, 595 P.2d at 313, 315. The court concluded that the statute was subject to varying interpretations and, given the deference to be accorded to an administrative construction of a statute, held that the agency's interpretation was a permissible one. *Id.* at 163, 595 P.2d at 312; *see also* Idaho Pub. Utils. Comm'n v. V-1 Oil Co., 90 Idaho 415, 420, 412 P.2d 581, 586 (1966); McCall v. Potlatch Forests, Inc., 69 Idaho 410, 413, 208 P.2d 799, 801 (1949).

Holly Care Ctr. v. State Dep't of Employment, 110 Idaho 76, 714 P.2d 45 (1986), can be understood as presenting the third alternative. The employer was late in paying its unemployment compensation tax and failed to include a tax increase in its payment when finally made. *Id.* at 77, 714 P.2d at 46. As a result, the employer was more than \$300 delinquent. *Id.* The Department imposed a penalty on the employer under a statute which provided in part that "delinquencies of a minor nature may be disregarded if a showing is made . . . that such covered employer has acted in good faith and that [the penalty] would be inequitable." *Id.* at 77 n.1, 714 P.2d at 46 n.1. The Department relied on a previously adopted rule specifying that delinquencies greater than \$20 were *per se* not "minor." *Id.* at 78, 714 P.2d at 47. The court reviewed the statute and concluded that, while it did grant the agency discretion to determine what was "minor," the agency's decision to define all delinquencies over \$20 as not-minor was arbitrary. *Id.* at 79, 714 P.2d at 48.

In each of these situations, the court is required independently to construe the statute — to declare the law — to determine whether the agency's action was within the authority the statute conferred on it. In the first situation, the court construed the statute and concluded that it was inconsistent with the agency's interpretation; the agency action therefore was *ultra vires*.⁴⁷² In the second situation, the court concluded that the statute was subject to differing interpretations and that the agency's resolution of the uncertainty was both permissible and reasonable.⁴⁷³ In the third case, the court concluded that, while the statute was subject to differing interpretations, the agency's interpretation was unreasonable.⁴⁷⁴

2. Judicial Review of Factfinding

The distinction between adjudicative (record-based) and legislative (not-record-based) decisions is important in determining the standard to be applied to agency factfinding. While judicial review of the factual predicates of adjudicative decisions employs the "substantial evidence" standard,⁴⁷⁵ judicial review of the factual bases of legislative decisions employs the "arbitrary or capricious" standard.⁴⁷⁶

Judicial review of adjudicative decisions requires the court to affirm the agency's factfinding unless it is "not supported by substantial evidence on the record as a whole."⁴⁷⁷ The thousands of words that are written annually on the meaning of "substantial evidence" may actually do more to confuse than to clarify. The best that can be hoped for is some corraling of the idea:⁴⁷⁸ substantial evidence means more than a mere scintilla, more than simply some

472. *E.g., Pumice Prods.*, 79 Idaho at 147, 312 P.2d at 1027.

473. *E.g., Kopp*, 100 Idaho at 162, 595 P.2d at 311.

474. *E.g., Holly Care Ctr.*, 110 Idaho at 79, 714 P.2d at 48.

475. § 67-5279(3)(d).

476. § 67-5279(2)(d).

477. § 67-5279(3)(d).

478. The leading Idaho cases on the topic are: *Pace v. Hymas*, 111 Idaho 581, 588-89, 726 P.2d 693, 700-01 (1986); *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 260-61, 715 P.2d 927, 930-31 (1986); *Local 1494 of Int'l Ass'n of Firefighters v. City of Coeur d'Alene*, 99 Idaho 630, 633-35, 586 P.2d 1346, 1349-51 (1978). The most extended discussion of the same language by the United States Supreme Court is in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). *Universal Camera* has been cited with approval in several Idaho cases. *E.g., Hunnicutt*, 110 Idaho at 260-61, 715 P.2d at 930-31; *Firefighters*, 99 Idaho at 633-35, 586 P.2d at 1349-51; *see also* § 67-5279 cmt. 4 (citing *Universal Camera*, 340 U.S. at 485).

evidence supporting the agency's decision. It does not mean, however, that the court is to engage in a *de novo* review or to substitute its judgment on the weight of the evidence for that of the agency. The standard has been likened to that applicable to motions for a directed verdict: if the evidence in the record would support a refusal to direct a verdict in a jury trial, the evidence is "substantial." Thus — to say the same thing yet again — the standard requires the reviewing court to consider all of the record and to determine on the basis of that record whether the agency's factfinding is reasonable.

The standard used to evaluate legislative actions is whether the agency's factual conclusions are "arbitrary or capricious."⁴⁷⁹ This requires the agency to "examine the relevant data and articulate a satisfactory explanation" for its factfinding.⁴⁸⁰ In short, the court is to examine the information before the agency and the explanations that the agency provides to determine whether there is a rational relationship between the evidence and the facts found.

479. § 67-5279(2)(d). The substantial evidence standard is inapplicable to such agency actions because they are not required to be made "on the record."

480. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Because the old APA provided for judicial review of only contested cases, the Idaho Supreme Court has only infrequently examined the arbitrary, capricious, or abuse of discretion standard. *See, e.g., In re Intermountain Gas Co.*, 77 Idaho 188, 200, 289 P.2d 933, 941 (1955) (reversing agency approval of a plan for distributing natural gas because it "rests upon speculation as to future possibilities"). The court has, however, addressed related issues in other contexts. The court, for example, has required the agency to specify the basis for its factual conclusions:

We cannot ascertain whether the commission simply did not believe the testimony of the claimant's doctors or her own testimony, or placed greater weight on the conflicting evidence, or believed the claimant's testimony, but applied a rule of law to reach its determination. It is not our function to guess the reasoning of the commission . . . To aid in appellate review, the commission must, when faced with contrasting factual allegations, find the facts, based upon the evidence it believes to be more credible. Here, the commission simply recited the conflicting evidence presented without resolving the factual conflicts. In short, the commission's findings and conclusions of law are incomplete and need to be expanded before we can properly exercise our appellate review function.

Vernon v. Omark Indus., 113 Idaho 358, 360, 744 P.2d 86, 88 (1987); *see also Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 37, 655 P.2d 926, 931 (1982); *Ellison v. Bunker Hill Co.*, 96 Idaho 317, 319, 528 P.2d 199, 201 (1974); *Nenoff v. Culligan Soft Water*, 95 Idaho 834, 836, 521 P.2d 658, 660 (1974). Similarly, the court has required the agency to explain its discretionary decisions. *E.g., Davidson v. H. H. Keim Co.*, 110 Idaho 758, 759-60, 718 P.2d 1196, 1197-98 (1986). Requirements for such explanations are now applicable to legislative as well as adjudicative decisions.

In addition to employing different standards of review, those standards are applied to different bodies of data. The "record" that is available to the reviewing court is significantly different in the two types of agency actions.⁴⁸¹

In reviewing adjudicative decisions, the court has a record that is to be the sole basis for the agency's factfinding; the reviewing court is required to subject that record to searching scrutiny to determine whether it provides substantial support for the agency's decision.⁴⁸² In reviewing legislative decisions, on the other hand, the record available to the reviewing "need not constitute the exclusive basis for agency action . . . or for judicial review thereof,"⁴⁸³ the issue in such cases is whether the agency has articulated a rational basis for its decision.⁴⁸⁴

3. Judicial Review of Judgment and Discretion

The problems involved in reviewing agency judgments and discretion are perhaps the most challenging aspect of judicial review:

481. The significant difference between the review of the two types of decisions is the nature of the "record." As then-judge Scalia noted,

When the arbitrary or capricious standard is performing the function of assuring factual support, there is no *substantive* difference between what it requires and what would be required by the substantial evidence test, since it is impossible to conceive of a "non-arbitrary" factual judgment supported only by evidence that is not substantial [T]he distinction between the substantial evidence test and the arbitrary or capricious test is "largely semantic" The distinctive function [of the substantial evidence standard] is to require substantial evidence to be found *within the record of the closed-record proceedings* to which it exclusively applies.

Association of Data Processing Serv. Orgs. v. Board of Governors of Fed. Reserve Sys., 745 F.2d 677, 683-84 (D.C. Cir. 1984); *see also supra* notes 192-96 and accompanying text (discussing differences in scope of judicial review of agency legislative and adjudicatory decisions).

482. *See, e.g.*, Department of Health & Welfare v. Sandoval, 113 Idaho 186, 190, 742 P.2d 992, 996 (Ct. App. 1987) ("[W]here credibility is crucial and where first-hand exposure to the witness may strongly affect the outcome, we think the [agency head] should not override the [presiding] officer's impressions unless it makes a cogent explanation of its reasons for doing so. Such an explanation is essential to meaningful judicial review, and it is a logical adjunct to the [agency head's] statutory duty to supplement its decisions with findings of fact and conclusions of law.").

483. § 67-5225(3).

484. *Cf.* Rhodes v. Industrial Comm'n, 93 Idaho Sup. Ct. Rep. 1417, 1418 (1993) (the issue is whether there is a "rational relationship" between the agency's statutory mandate and the regulations adopted).

On the one hand, court action must respect the statutory assignment of responsibility. The agency, not the court, has been directed to make judgments about whether a given road should be built, . . . or environmental protection rule adopted. Assuring that respect is not a simple task, since judges commonly share the passions of their community on such matters. On the other hand, the agencies' responsibility is intended to be constrained by procedures, by substantive law, by expectations of rationality and openness. Assuring the success of those constraints is a judicial task.⁴⁸⁵

The scope of review for exercises of judgment and discretion is whether the decision was "arbitrary, capricious, or an abuse of discretion."⁴⁸⁶ Part of this question was noted in the context of the law-declaring function: the court is required to declare what the law is and to determine whether the agency's decision is fairly within the statutory confines. That is, was the judgment a permissible one? If the decision was within the range of permissible decisions, it still remains to be determined whether the decision was "arbitrary, capricious, or an abuse of discretion." This standard is often phrased in the negative: an agency decision would be arbitrary, capricious or an abuse of discretion if it were not based on those factors that the legislature thought relevant, ignored an important aspect of the problem, provided an explanation that ran counter to the evidence before the agency, or involved a clear error in judgment.⁴⁸⁷ The focus of this inquiry is on the methods by which the agency arrived at its decision: for example, did the agency not only consider all the right questions, did it consider some wrong ones? Does the relationship between the facts found and the conclusion reached reveal gaps in the logic of the reasoning process? Again, the question of judicial review largely devolves into a question of whether the agency was reasonable.⁴⁸⁸

485. STRAUSS, *supra* note 376, at 261.

486. § 67-5279(2)(d) (not-record-based decisions); § 67-5279(3)(e) (record-based decisions).

487. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971).

488. As Kenneth Culp Davis concluded, "[C]ourts usually substitute judgment on the kinds of questions of law that are within their special competence, but on other questions they limit themselves to deciding reasonableness; they do not clarify the meaning of reasonableness but retain full discretion in each case to stretch it in either direction." 5 KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE § 29:1, at 332 (2d ed. 1984).

Judicial review — be it of law-declaring, factfinding, law-applying, or discretion-exercising acts by agencies — returns repeatedly to the fundamental question of whether the agency action was reasonable. In evaluating the law-declaring function the issue is — at least once the agency's interpretation has been found to be a permissible one — whether the agency's decision reasonably advances the legislative goals.⁴⁸⁹ In reviewing the facts as found by the agency the issue is the reasonableness of the inferences, credibility evaluations, persuasive impact, and the like: did the agency reasonably sift and weigh the information? In the law-applying and discretion-exercising judgments the questions focus on the reasonableness of the agency's decision processes and the reasons it offers for its decisions.

E. Type of Relief: Section 67-5279

The relief available under the new APA differs from that available under the old APA. Previously, the reviewing court was authorized to "reverse or *modify* the decision of the agency."⁴⁹⁰ Under the new APA, on the other hand, "[i]f the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary."⁴⁹¹ The reviewing court is no longer authorized to modify the agency's decision: judicial review does not shift decisionmaking from an agency to the court.

Finally, the APA has a "harmless error" rule.⁴⁹² Unless the agency's error affects a substantial right of the petitioner, the agency action is to be affirmed.

V. LEGISLATIVE REVIEW OF FINAL AGENCY RULES

The fifth part of the APA — §§ 67-5291 to 67-5292 — contains the provisions on legislative review of agency regulations adopted in compliance with the APA. The new APA leaves unchanged the substantive provisions on this topic.

Section 67-5291 provides that the legislature may by concurrent resolution reject, amend, or modify final rules.⁴⁹³ The legislature's

489. *E.g.*, Rhodes v. Industrial Comm'n, 93 Idaho Sup. Ct. Rep. 1417, 1417-18 (1993); Holly Care Ctr. v. State Dep't of Employment, 110 Idaho 76, 78-79, 714 P.2d 45, 47-48 (1986).

490. Act of March 29, 1965, ch. 273, § 15(g), 1965 Idaho Sess. Laws 701, 711 (formerly codified § 67-5215(g)).

491. § 67-5279(2)-(3).

492. § 67-5279(4).

493. § 67-5291.

constitutional power to exercise the authority to reject a previously promulgated rule was upheld by the Idaho Supreme Court in *Mead v. Arnell*.⁴⁹⁴ In *Mead*, the court explicitly reserved the question of the validity of amending or modifying a rule by concurrent resolution.⁴⁹⁵

Section 67-5292 provides that all agency rules expire annually on July 1 unless they are specifically extended by statute.⁴⁹⁶

494. 117 Idaho 660, 791 P.2d 410 (1990); see Phillip M. Barber, *Mead v. Arnell: The Legislative Veto and Too Much Separation of Powers*, 27 IDAHO L. REV. 157 (1991); Dale D. Goble, *Through the Looking-Glass and What the Idaho Supreme Court Found There*, 27 IDAHO L. REV. 81 (1990).

495. 117 Idaho at 668, 791 P.2d at 418.

496. § 67-5292.