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# CONFLICTS OF JURISDICTION IN CALIFORNIA WATER LAW\*

Leo A. Huard\*\*

Administrative law is a much abused term which has many meanings for many people. In some contexts, administrative law is equated with the term "administration" which is, in turn, related to the verb "to administer." In that sense, an administrative agency becomes an executive agency and administrative law is the law which concerns the executive branch of government. In the legislative history of the Reorganization Act of 1956, the Department of Water Resources is occasionally described as an administrative agency, where the documents obviously have reference to the executive branch of government. This identity of meaning between "executive" and "administrative" is unnecessarily restrictive, and, if widely used, would make nameless a large segment of administrative law. We avoid such use of the terms "executive" and "administrative."

In this text, the term administrative law refers to the rules, regulations and decision of the administrators, boards and commissions to whom the law has given rule-making and adjudicatory powers. Generally these agencies fall outside the time-honored branches of government: *i.e.*, executive, legislative and judicial, but have some of the powers of each of the classic branches. For that reason, they are ordinarily described as independent, quasi-legislative and quasi-judicial agencies. In California, the State Water Rights Board is such an agency. Occasionally, a part of the executive branch is also given quasi-legislative and quasi-judicial powers and duties. In that case, its output of rules, regulations and decisions forms a part of administrative law. The Department of Water Resources is an executive department which has been assigned some quasi-legislative and quasi-judicial duties by law. This does not change the fact that the department is still an executive agency—a part of the executive branch of government. The agencies studied herein are described by their principal characteristics, using the terms executive, legislative, judicial and administrative within the context of the preceding paragraphs.

This article is divided into two parts. The first part outlines the principal powers and duties of each of the agencies under study: The Department of Water Resources, the State Water Rights Board and the California Water Commission.

The second part is devoted to identifying the areas where the jurisdiction of each agency overlaps the jurisdiction of one or both of the other agencies. These instances of interfering or concurring powers and duties are isolated and discussed.

## I. POWERS AND DUTIES

### a. Department of Water Resources

The functions of the department are many and varied. They fall, however, into certain well-defined categories. The department has promotional duties.<sup>1</sup>

\* The substance of this paper was first issued as a Report prepared for the Fact-Finding Committee on Water of the Senate of the State of California. Minor editorial changes have been made for the present publication. The purpose of the Report was to examine the statutory jurisdiction of the State Department of Water Resources, the California Water Commission and the State Water Rights Board. The views expressed are those of the author and should not be attributed to the Senate Fact-Finding Committee on Water, its chairman, members or staff.

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1. Cal. Ann. Water Code § 205 (West 1954). Further references to West's Annotated California Codes of 1954 will be to code name and section number only.

It carries out several varieties of investigations,<sup>2</sup> and supervises<sup>3</sup> a number of operations. In many respects the department is an enforcement agency,<sup>4</sup> and, since it plans and executes, it is also an operational agency.<sup>5</sup>

Promotion, investigation, supervision, enforcement and operations are typical of the executive branch of government. The department makes few rules and holds few hearings. It is not primarily a regulatory agency nor is it primarily a judicial agency. The rules and regulations<sup>6</sup> which fall within the scope of departmental activities are incidental to its executive duties as are its hearing<sup>7</sup> functions. The department could not be described as a quasi-legislative and quasi-judicial agency in the nature, for instance, of the Federal Trade Commission. By contrast, it could be described as resembling the Interior Department—an agency whose quasi-legislative and quasi-judicial functions are secondary to its executive functions.

The legislature has delegated certain policy-making powers to the department. These are rather carefully circumscribed and are shared with the California Water Commission.<sup>8</sup> They are discussed *infra*. For the present, it should be noted that policy-making is not *per se* inconsistent with the character of the department as an executive agency. At both the federal and state levels, executive departments frequently make important policy under the guidance of the chief executive, president or governor.

#### b. California Water Commission

In the 1956 reorganization, the Department of Water Resources was established as a strong executive department to interpret and carry out the water policies of the legislature under the direction and control of the governor.<sup>9</sup> At the same time, the commission was created as a citizens' advisory group to operate as a watchdog on the activities of the department in the public interest. In order to better protect the public interest, the law provided that all parts of the state be represented on the commission so far as practicable.<sup>10</sup> It seems to have been conceived as a conduit through which the legislative intent would be piped directly to the department.<sup>11</sup>

The commission consists of nine members appointed by the governor and confirmed by the senate. The commission is charged by law with the duty of advising the director of the department with respect to all matters under his jurisdiction.<sup>12</sup> All rules and regulations of the department, other than purely internal rules, "shall be first presented by the director to the commission and shall become effective only upon approval *thereof* by the commission."<sup>13</sup> The plain and ordinary meaning of this language is that the director's rule-making power is ineffective without the commission's approval. No rule promulgated by the department subsequent to the enactment of this section should have any legal effect unless the procedure set out in the section was followed. Stand-

2. E.g. Water Code §§ 225, 227-232, 32670-32672.

3. E.g. Water Code §§ 226, 275, 400-415, 6000-6452.

4. E.g. Water Code §§ 400-415, 8300 et seq., 20822-20823.

5. E.g. Water Code §§ 7076, 400-4407, 8300 et seq., 22335-22338.

6. E.g. Water Code § 4150.

7. E.g. Water Code § 414.

8. Water Code §§ 120-139, 150-163.

9. A Department of Water Resources for California, Report of the Assembly Interim Committee on Government Organization. California Legislature (Feb. 8, 1956), pp. 73-90.

10. Water Code § 152.

11. Report *supra*, note 9 at pp. 84-86.

12. Water Code §§ 150, 151, 155, 161.

13. Water Code § 161. Author's italics.

ing alone, this section seems to make the department powerless to issue any rules of which the commission disapproves.

The statute uses the word "shall" rather than "must." Ordinarily, it could be argued that "shall" might be directory and that the statute only points out a desirable way of making rules rather than the only way. However, section 15 of the Water Code sets this matter at rest: "'shall' is mandatory and 'may' is permissive." Approval of rules by the commission is then a prerequisite to validity.

Section 162 expressed the intention of the legislature that "in the making of all major departmental determinations, policies and procedures, such as departmental recommendations to the legislature, the director and the California Water Commission shall be in agreement whenever possible; but for the purpose of fixing responsibility to the governor and to the legislature, in the event of disagreement between the director and the commission upon such matters, the views of the director shall prevail."<sup>14</sup> The commission and the director are then to make written reports of the disagreement to the governor, the president *pro tem* of the senate and the speaker of the assembly. Again the lines of authority cross, but in this instance, the commission finds itself in the completely ineffectual position of giving advice which the director is virtually urged to ignore.

In eminent domain proceedings, the director must first issue a declaration that public interest requires that the particular proceeding be undertaken, and such declaration "supported by a resolution of the California Water Commission . . . shall be conclusive evidence" of necessity for public improvement and other matters.<sup>15</sup> It should be noted, however, that in California it is unconstitutional to exercise the power of eminent domain for other than public use. Determination of a public use is, therefore, reserved to the courts. The nature of a use as public or private is ultimately a judicial question. Determination by the department and the commission of public use would carry no conclusiveness in court.<sup>16</sup>

Jurisdiction over state applications for water (state filings) has become clouded. Originally, the basic objective of water rights administration was to provide an orderly procedure for applying the principle of the law of appropriation, that first in time is first in right. The procedure adopted required applicants to proceed with due diligence toward perfecting an appropriation by prescribing specific times within which a project must be completed and the water applied to beneficial use. Applicants and permittees who failed to act with the prescribed "due diligence" soon found that their applications or permits had been cancelled. This is still the practice.

During the early 1920's, it became apparent that California would also have to exercise control over use of its waters in order to insure a coordinated development of its water resources and make certain that fast-growing areas did not deprive slow-growing areas of water in the future. The mechanism of water rights was used to achieve the required control. In this scheme, the legislature created a special type of water right usually referred to as "state filings," and specifically exempted such filings from the requirements of "due diligence" until they were assigned. This contradicted a

14. Water Code § 162.

15. Water Code § 251. A similar resolution applies specifically to eminent domain proceedings within the Central Valley Project.

16. 17 Cal. Jur. 2d 721; *Sherman v. Butck*, 32 Cal. 241; *Nickey v. Stearns Ranchos Co.*, 126 Cal. 150; *Hercules Water Co. v. Fernandez*, 5 Cal. App. 726; *Rindge Co. v. Los Angeles County*, 262, U.S. 700.

normal condition of appropriative water rights and set the stage for some of our present difficulties.

There was little activity in state filings until the latter part of the 1940's and administrative confusion was kept to a minimum during this period until 1956. This was principally due to two factors then in existence. First, the Department of Finance was responsible for the administration of state filings until 1956, but it had no staff to handle the matter and little familiarity with the subject. Consequently, that department usually acted upon the recommendations of the State Engineer, who was also responsible for water rights administration. Second, until the late 1940's state filings were concentrated on the principal streams within the Central Valley Basin and were generally filed in contemplation of the Central Valley Project. Within the last ten years, new state filings have been made covering nearly all the remaining unappropriated water in California. In addition, counties of origin have begun to recognize the importance of these filings to their future growth.

The first factor outlined above, *i.e.*, reliance by the Department of Finance on the technical expertise of the State Engineer, is of prime importance to the study of jurisdiction over water rights. Under that system, for all practical purposes, the State Engineer: (a) administered water rights; (b) controlled the procedures on state filings; and (c) determined and resolved conflicts with the general or coordinated plan of development of state water resources. Today these functions are carried on by the State Water Rights Board, the California Water Commission and the Department of Water Resources.

Since 1959, the commission may release from priority or assign any portion of any application filed as a state filing when such release or assignment is not in conflict with the state's general water plan.<sup>17</sup> Release and assignment can only be made after a public hearing upon sixty days' notice to all interested parties.<sup>18</sup> Recipients of releases from priority or assignments are required to submit project changes and amendments to the commission for prior approval.<sup>19</sup> There is in this provision an overlap of jurisdiction with the State Water Rights Board.<sup>20</sup> Commission actions are subject to judicial review by a species of statutory mandamus. It should be noted that these hearings are not legislative hearings for the purpose of investigation or inquiry. They are judicial hearings to adjudicate rights between opposing parties. It should be noted also that Section 162 is made inapplicable to matters subject to Sections 10504-10507.<sup>21</sup>

Section 12602 empowers the director or his representative to appear before Congress and the executive departments of the Federal Government regarding any water matters of concern to California.<sup>22</sup> This section is sometimes considered to give the commission the enumerated representative powers as agent of the department. It should be noted, however, that section 12602 spells out a power formerly belonging to the State Water Resources Board. Section 150 continues the board in existence as the California Water Commission but only with the "powers and duties provided in this article."<sup>23</sup> The powers of section 12602 are specifically reposed in the de-

17. Water Code § 10504.

18. Water Code § 10504.1.

19. Water Code § 10504.5(a).

20. Water Code § 10504.4(b).

21. Water Code 10504.2. Section 162 holds that in the event of a disagreement between the director and the commission, the director shall prevail.

22. Water Code § 12602.

23. *Id.* at § 150.

partment and are not "provided" for the commission "in this article." There is, therefore, some doubt that the commission can represent the department by virtue of section 12602. It seems reasonable to assume, however, that the director of the department can appoint the commission as the department's representative under his general executive powers.

Section 12883 requires prior approval by the commission before the director of the department can make a loan under the Davis-Grunsky Act.<sup>24</sup> Section 12885 requires prior commission approval before the director can make a grant for fish, wildlife and recreational purposes under the Davis-Grunsky Act.<sup>25</sup> In both cases, the authority of the director clashes with the power of the commission.

At first glance, the commission seems to be primarily a legislative agent. Its watchdog function is a hallmark of legislative committees and its representative membership parallels that of a legislative organization. The language of the statute imposes upon the commission the duty of checking on the department's activities, thereby making it unlikely that the commission is also a part of the executive branch. However, it seems clear that the chairman of the Senate Fact Finding Committee and the committee staff regard the commission as part and parcel of the executive branch. The department and the commission itself seem to share this view. If the commission was in fact intended to be a legislative agent this intent certainly has never been realized.

The commission also has policy-making and adjudicatory functions. This mixture of functions gives the commission a somewhat schizoid character.

### c. State Water Rights Board

The California legislature has delegated three areas of activity to the State Water Rights Board. The board administers the water appropriation statutes of the state,<sup>26</sup> assists the courts and the parties in the adjudication of water rights<sup>27</sup> and administers state statutes providing for the recording of extraction of ground water and diversion of surface water.<sup>28</sup>

The first of these functions is largely quasi-judicial, *i.e.*, the board engages in holding adjudicatory hearings between adversary parties.<sup>29</sup> In reaching its decisions, however, the board must estimate future conditions in order to prescribe rules for the future as required by the public interest. To the extent that future rules are involved, the hearing function is quasi-legislative<sup>30</sup> as well as quasi-judicial.

The second function is to a limited extent quasi-judicial. The third function operates only upon four Southern California counties and the action of the board thereunder is ministerial.<sup>31</sup>

Policy-making by the board is an incidental effect of the rules it promulgates and the cases it decides. The board is an independent tribunal rather than an arm of the legislature or of the executive.

24. *Id.* at § 12883.

25. *Id.* at § 12885.

26. Holsinger, *Procedures and Practice before the California State Water Rights Board*, 45 *Cal. L. Rev.* 676 (1957), *Water Code* ss. 1200-1801.

27. *Ibid.* *Water Code* §§ 2000-2900.

28. *Ibid.* *Water Code* §§ 4999-5008; see also, *Water Code* § 179.

29. Holsinger, *supra*, note 25 at 677-678.

30. *Ibid.*

31. *Ibid.*

## II. OVERLAPPING AND CONCURRENT JURISDICTION

### a. The Department and the Commission

The major overlap of jurisdiction between these two agencies is caused by sections 161 and 162 of the Water Code. The contents of these sections have been discussed in considerable detail earlier in this report. They will be reviewed only briefly here.

Section 161 first ordains that the commission shall confer with and advise the director on all matters under his jurisdiction. The section goes on to split rule-making authority by requiring that all departmental rules and regulations shall be subject to commission approval.

It should be noted that this approval requirement of section 161 thrusts the commission directly into the administration of the department. The proponents of the 1956 reorganization purported to deplore any arrangement having this effect.<sup>32</sup> Yet section 161 establishes the commission as a super-director of the department in rule-making matters.

Section 162 expresses the "intention" of the legislature that the director and the commission be in agreement whenever possible in formulating all major departmental determinations, policies and procedures. This is not an enactment of law. At best, it expresses a pious and hopeful sentiment. It fails to take into account that the policy-making interests of the directors and of the commission may be at odds in the normal course of honest and effective government. It may be healthy for the public interest to have this moderate amount of disagreement.

The next clause of section 162 elaborates on this relationship between director and commission by providing that in the event of disagreement between the director and the department, the views of the director shall prevail. As indicated earlier, this is an open invitation for a strong director to ignore the commission. For a weak director, it may well provide an excuse to give up strong points and compromise established positions. In either case, the statutory proviso is the antithesis of good government.

Sections 12883 and 12885, dealing with Davis-Grunsky loans and grants, are instances of workable concurrent jurisdiction. The department makes the loans—an executive function. The commission approves each loan—an *ad hoc* policy determination. The department and the commission both have a certain measure of authority. However, commission approval of the department's action is required in clear, unequivocal language. There is no doubt that ultimate authority lies with the commission.

The conflicts arising out of overlapping and concurrent jurisdiction between the department and the commission are largely due to the following causes:

- a. Failure to recognize that the department is primarily an operational executive agency whereas the commission is conceptually at least, a policy-making legislative agency.
- b. Failure to recognize that the executive *initially*<sup>33</sup> interprets the law and then carries it into being whereas the policy-maker expresses and explains the law and points out *how* it should be carried out.
- c. Allowing the commission to intrude into the administration of the department's purely executive business.

32. A Department of Water Resources for California, *supra*, note 9 at pp. 84-86.

33. The courts finally interpret the law but the executive must give it a *prima facie* interpretation in order to put it into effect.

### b. The Department and the State Water Rights Board

There appear to be no areas of overlapping jurisdiction between the board and the department. The jurisdiction of the board has been clearly spelled out.<sup>34</sup> The function of the department with respect to board activities is equally clear:

"The department . . . shall have an interest and may appear as a party in any hearing held by the board and may commence or appear in any judicial proceeding brought to inquire into the validity of any action, order, or decision of the board."<sup>35</sup>

Section 187 provides for an exchange of information between the department and the board to avoid unnecessary duplication. The possibility of conflict inherent in this requirement is eliminated by the proviso that no exchange be made when "in the opinion of the agency possessing the . . . information, such exchange would be detrimental to the public interest."<sup>36</sup>

The board is an independent regulatory agency, and the present statutory framework between it and the department adequately protects the board's independence. Such independence is vital to an agency adjudicating controversies between adversary parties. It is not clear that the board is equally protected from legislative interference. There are no apparent signs of undue legislative influence, however.

There is some urging that the Watermaster Service (Water Code §§ 4000-4407) be placed within the control of the State Water Rights Board. This seems undesirable since the board has no other operational functions. Supervision of the Watermaster Service is foreign to the normal quasi-judicial functions of this agency.

### c. The Commission and the State Water Rights Board

The commission is primarily a watchdog and policy-making agency. In both capacities it is conceptually an agent of the legislature although, in practice, it is widely regarded to be an executive agent.

In addition to this, it has adjudicatory functions under sections 10504-10507. These adjudications deal with state applications for water and involve judicial-type hearings between parties who are technically adversaries. In such hearings, the tribunal must be an independent one free of undue influence. Recognizing this, the law frees the commission from any possible domination by the department.<sup>37</sup> There is, however, no proviso specifically freeing the commission from legislative influence in these hearings. We have heretofore raised this point with respect to the State Water Rights Board. We raise it again because of the current scandal involving *ex parte* contacts in quasi-judicial hearings before federal administrative agencies. Some of these *ex parte* contacts have been shown to come from members of Congress. As in the case of the board, there are no apparent signs of undue legislative influence over the commission.

Of more immediate concern is the fact that section 10504.5(b) provides for duplicate hearings—first before the commission and then again before the State Water Rights Board. This procedure seems unwise and it is certainly inefficient. However, this duplicate system of adjudication has been

34. Water Code § 179.

35. Water Code § 184.

36. Water Code § 187.

37. Water Code § 10504.2 specifically providing that § 162 (agreement between department and commission) is inapplicable to §§ 10504-10507 matters.

determined to be necessary because of the historical development of the law relating to state filings. History discloses, so the reasoning runs, that state filings are different from all other applications to appropriate water. State filings are *per se* a matter of public interest affecting the overall water plans of the State of California. For that reason, they should be assigned or released only with the greatest care and deliberation. They should not be disposed of by an agency whose normal function it is to deal with private rights.

Without assessing the merits of this argument, it should be noted that this reasoning has little validity, taken in the whole context of administrative law. There is no reason, in administrative law, why an independent regulatory agency dealing with private rights cannot, at the same time, also deal with public rights without loss of honesty, integrity and regard for the public interest. Nothing in such law disqualifies the State Water Rights Board from disposing of state filings.

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