Study N-200 November 8, 1996

First Supplement to Memorandum 96-76

Judicial Review of Agency Action:
More Comments on Tentative Recommendation

Evidence Outside the Administrative Record

In the basic Memorandum, the staff recommended limiting the closed record requirement to cases where interested persons were given notice and an opportunity to be heard and the agency maintained a record of its proceedings. Professor Asimow suggests making clear that being "heard" is not limited to oral input, and that agency "record" is not limited to a transcript. The staff suggests the following revised draft to replace the draft on page 7 of the basic Memorandum:

> 1123.810. (a) Except as provided in Section 1123.850 or as otherwise provided by statute, the administrative record is the exclusive basis for judicial review of agency action if both of the following requirements are satisfied:
>
> (1) The agency gave interested persons notice and an opportunity to submit oral or written comment.
>
> (2) The agency maintained a record or file of its proceedings.
>
> (b) If the requirements of subdivision (a) are not satisfied, the court may either receive evidence itself or may remand to the agency to do so.
>
> **Comment.** . . . The closed record rule of subdivision (a) is limited to cases where the agency gave interested persons notice and an opportunity to submit oral or written comment, and maintained a record or file of its proceedings. These requirements will generally be satisfied in most administrative adjudication and quasi-legislative action. In other cases, subdivision (b) makes clear the court may either receive evidence itself or may remand to the agency to receive the evidence. This will apply to most ministerial and informal action. These rules are generally consistent with Western States Petroleum Ass'n v. Superior Court, 9 Cal. 4th 559, 888 P.2d 1268, 38 Cal. Rptr. 2d 139 (1995).
>
> If the closed record requirement of Section 1123.810(a) applies, the court still has some discretion to remand to the agency. See Section 1123.850(c).

§ 1121. Proceedings to Which Title Does Not Apply

The State Water Resources Control Board pointed out provisions in the Water Code authorizing a court to order a reference to the Water Board in water rights

cases. The Water Board suggests we make clear the judicial review statute does not apply to board action in such cases. **The staff recommends adding language to Section 1121 to do this:**

> 1121. This title does not apply to any of the following:
>
> . . . .
>
> (e) Judicial review of agency proceedings pursuant to a reference to the agency ordered by the court.
>
> **Comment.** . . . Subdivision (e) makes clear this title does not apply where an agency acts as referee in a court-ordered reference. See, e.g., Water Code §§ 2000-2048. However, notwithstanding subdivision (e), Chapter 2 (commencing with Section 1122.010) on primary jurisdiction may still apply. Section 1122.010; see generally National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 451, 658 P.2d 709, 731, 189 Cal. Rptr. 346, 368, *cert. denied*, 464 U.S. 977 (1983); Environmental Defense Fund v. East Bay Mun. Util. Dist., 26 Cal. 3d 183, 193-200, 605 P.2d 1, 5-9, 161 Cal. Rptr. 466, 470-74 (1980).

Respectfully submitted,

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