SUPREME COURT COPY

No. S150518

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
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CALIFORNIA FARM BUREAU FEDERATION ET AL.

Plaintiffs, ~~Petitioners, and~~ Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ~~ET AL~~.

Defendants and Respondents.

After A Decision By The Court Of Appeal,
Third Appellate District, Case No. C050289
From The Sacramento County Superior Court
The Honorable Raymond M. Cadei
Case No. 03CS01776 consolidated with Case No. 04CS00473

OPENING BRIEF ON THE MERITS OF CALIFORNIA FARM BUREAU FEDERATION ~~ET AL.~~

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STATEMENT OF ISSUES

As stated in this Court's "Case Summary," this case presents the following issues:

> (1) Does Water Code section 1525, which was amended by the Legislature by majority vote in 2003 to impose annual fees on the persons and entities holding permits and licenses issued by the State Water Resources Control Board, impose an invalid tax or a lawful regulatory fee? (2) If section 1525 is valid, may the Water Resources Control Board permissibly collect a fee levied on an entity which has sovereign immunity from a person or entity who has a contract with the immune sovereign? (3) If the statutory scheme is valid, but the regulations implementing it are invalid, did the Court of Appeal err in limiting refunds to only those persons and entities filing petitions for reconsideration before the Water Resources Control Board?

(California Supreme Court Case Summary, <http://appellatecases courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=46 1169&doc_no=S150518>.)

Appellants and petitioners California Farm Bureau Federation et al. ("Farm Bureau") respectfully submit their Opening Brief On The Merits.

INTRODUCTION

As amended by the voters in 1978, the California Constitution prohibits the Legislature from imposing any new taxes except by a two-thirds vote, and categorically prohibits any new taxes whatsoever based on the value of property. (Cal. Const., arts. XIII & XIIIA, §§ 1–4 (hereafter Proposition 13).) Water Code section 1525 et seq. (section 1525), which imposes annual water right "fees," is an unconstitutional violation of both these strictures, and its implementing Emergency Regulations only exacerbate the constitutional problem. Indeed, if these challenged "fees" are not illegal taxes, it would be difficult to conceive how any levy could violate Proposition 13.

The Court of Appeal correctly held that section 1525's implementing Emergency Regulations violate Proposition 13. But the court erroneously concluded that section 1525 is not, on its face, an improper tax. The court further erred when it decided that the appropriate remedy for the unconstitutional taxation was for the State Water Resources Control Board (SWRCB) to keep the illegally exacted pay-

ments from all feepayors except those who had filed futile petitions for reconsideration and who now file claims for refund. This Court, accordingly, should declare section 1525 unconstitutional and invalid, and order the refund of all the illegal "fees" collected pursuant thereto.

1. Subdivision (a) of section 1525, requires the SWRCB to impose an "annual fee" on each person or entity who holds a permit or license to divert water, and each lessor of water under a water lease. As the State concedes, subdivision (c) requires that the "fee" schedules generate "fees" in an amount necessary to "recover [the] costs incurred" in performing *all* the activities of the Division of Water Rights (DWR), including extensive work for the general public and for water rights holders who are not required to hold permits or licenses (accounting for more than two-thirds of appropriated water in the State). Subdivision (d)(3) similarly mandates that the SWRCB "set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity."

According to the express statutory language, therefore, (a) "fees" are imposed on only a relatively small subset (about one-third) of all water right holders in California; and (b) the "fees" are

intended to fund all the DWR's activities by whatever amount the Legislature's annual budget demands—although the costs of such activities are imposed in substantial part by other classes of water right holders and the general public. As a result, under the statutory scheme the "fees" cannot possibly correlate to the benefits purportedly received or burdens created by the small class of water right holders subject to the "fees".

But in order for an exaction to qualify as a valid regulatory fee, rather than an invalid tax, the government must carry its burden to demonstrate that, among other things, the "charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*Cal. Ass'n of Prof'l Scientists v. Dep't of Fish & Game* (2000) 79 Cal.App.4th 935, 945 (hereafter *CAPS*).)

Because the plain language of section 1525 requires the SWRCB to collect the costs incurred in connection with all activities intended to benefit all water right holders—whether or not they are subject to the "fees"—as well as the general public, no way exists under section 1525 for the SWRCB to comply with both the statute's funding mandate and the legal requirements for a valid regulatory fee,

namely, that the "fees" be reasonably related to the burdens and benefits of the "fee" payors. Accordingly, because there is no dispute that the subject levies were not enacted by the requisite two-thirds vote of the Legislature, or that they are levied upon real property, section 1525 facially violates Proposition 13.

2. Section 1525 likewise is unconstitutional "as applied" through the SWRCB's Emergency Regulations, as the Court of Appeal properly held, because, inter alia, the implementing Emergency Regulations mandate that the "fees" cover the costs of all the activities of the Water Rights Program, including the costs of the burdens imposed by and benefits received by non-fee-payors. (See *California Farm Bureau Federation et al. v. Cal. State Water Resources Control Board*, No. C050289 (January 17, 2007) (hereafter slip opn.), pp. 36–42.) Indeed, as but only one example: "'Approximately 30 percent of the appropriated water in California is held by the federal government, which refuses to pay [regulatory] fees,'" and thus the "fees" of the annual "fee" payors were *inflated by 40 percent* to cover the costs of those who refuse to pay the "fees", claiming sovereign immunity or otherwise. (Slip opn., pp. 39–40, italics added.)

Furthermore, in order to show that the "fees" are valid, the government bears the burden of demonstrating that "the cumulative amount of the fees does not surpass the cost of the regulatory program or service" (*CAPS*, *supra*, 79 Cal.App.4th at p. 939), but defendants expressly concede that the SWRCB collected *millions* of dollars in excess of the $4.4 million the Legislature authorized it to collect to fund the costs of the DWR. For these additional reasons, section 1525 is unconstitutional "as applied."

3. While the Court of Appeal correctly ruled that the "fees" were unconstitutional, it ordered that the "fees" be refunded only to those who: (1) had filed petitions for reconsideration with the SWRCB before filing suit; and (2) now file claims for refunds with the Board of Equalization (BOE). (Slip opn., pp. 51–53.) The illegal "fees", however, should be refunded to all those who paid them, regardless of whether those "fee" payors filed prior petitions for reconsideration for the following three reasons:

a. Established California law does not require the exhaustion of administrative remedies where, as here, such exhaustion would be futile because the administrative agency does not have the power

(as it readily concedes) to grant the relief sought—here, to declare section 1525 and the subject levies unconstitutional;

b. The express language of California Revenue and Taxation Code section 55221 requires that illegally collected fees "shall" be refunded; and

c. The Takings Clause contained in the Fifth Amendment to the United States Constitution, and the similar provision contained in article I, section 19, of the California Constitution require that illegally collected moneys be returned to their rightful owners.

In sum, the procedural hoops the Court of Appeal imposed will result in the SWRCB's retention of perhaps millions of dollars of illegally collected "fees"—an enormous and undeserved windfall reaped off the backs of those assessed the improper taxes. Refunds to all those who paid the illegal taxes are necessary to conform the Court of Appeal's ruling to California law, the United States and California Constitutions, and common justice.

Consequently, the Farm Bureau respectfully requests that this Court (1) affirm the Court of Appeal's holding that the Emergency Regulations unconstitutionally violate Proposition 13, but (2) reverse the Third District's ruling that section 1525 is constitutional on its

face, and (3) order the BOE to refund all the unconstitutionally collected taxes to their rightful owners.

STATEMENT OF THE CASE

I. Factual Background

A. The Legislature Decided That All Of The SWRCB's Activities Should Be Funded By The New "Fees" And Not By The General Fund

The water in California's streams and rivers belongs to the people of the state, and individuals may acquire the right to use the water under common and statutory law. (Water Code, §§ 102, 1201.)[1] The California Constitution sets forth the state policy of reasonable use:

> It is hereby declared that because of the conditions prevailing in this State *the general welfare requires* that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof *in the interest of the people and for the public welfare*.

(Cal. Const., art. X, § 2, italics added.) "Beneficial use" includes, but is not limited to "use for domestic, irrigation, municipal, industrial, preservation and enhancement of fish and wildlife, recreational, min-

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[1] Unless indicated otherwise, all statutory citations refer to the Water Code.

ing and power purposes." (§ 1257; see also Cal. Code Regs., tit. 23, § 659 et seq.) The SWRCB is charged with the "orderly and efficient administration of the water resources of the state." (§ 174.) Through the DWR, it exercises both adjudicatory and regulatory functions. (*Ibid*; slip opn., p. 5.)

Given the public nature and importance of ensuring that California's water is used beneficially, the General Fund funded the DWR for the 90 years preceding the enactment of section 1525. (See slip opn., p. 13; 3 AA522–524.[2]) Due to California's budget deficit in 2003, however, the Legislature decided to cut virtually all general funding and to replace it with a "fee"-based system.[3] (See slip opn., p. 13; 3 AA528, 533.)

The Legislature thus enacted section 1525 to fund all the costs of the State's Water Rights Program, including all the activities of the

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2 "AA" refers to Appellants' Appendix.

3 In the same bill, Senate Bill 1049 ("SB 1049"), the State also attempted to impose "fees" on real property owners for costs of fire protection in "State Responsibility Areas." When this was challenged in the trial court by the Farm Bureau and certain members, and while their writ petition was pending, the State repealed the imposition of these new levies rather than face continued litigation. (See Cal. Pub. Resources Code § 4138 [section repealed Stats. 2004 ch. 219 § 1].)

DWR for the second half of Fiscal Year ("FY") 2003–2004 and annually thereafter, through the creation of new annual water right "fees" to be imposed by the SWRCB upon a limited class of water right holders.[4] (See slip opn., p. 13; 3 AA526, 540–541.)

As enacted, section 1525, subdivision (a), requires the SWRCB to adopt a schedule of annual "fees" to be paid by each holder of a permit or license to appropriate water and each lessor of certain leased water.[5] Subdivision (b) requires the SWRCB to establish a schedule of one-time fees to be paid by applicants for permits to appropriate water and to approve leases, and for petitions relating to those applications. Subdivision (c) requires that the fee schedules generate "fees"

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[4] Surface water rights in California arise generally under state law under two major theories: riparian or prior appropriation (pre-1914 and post-1914). Riparian rights exist by virtue of ownership of land that abuts, or is riparian to, a waterway. Appropriative rights are established by appropriating water (i.e., diverting it from a natural channel) and putting it to beneficial use (e.g., irrigation or livestock watering). Appropriative water rights that were established prior to December 19, 1914 ("pre-1914 rights"), did not require a permit from the State. Since December 19, 1914, the only way to establish appropriative water rights in California has been to file a permit application with the SWRCB ("post-1914 rights"). (See §§ 1200–1675.) <u>It is this latter class of persons, many of whom are small ranchers and farmers, that is required to fund the entire costs of the Water Rights Program</u>.

[5] The full text of section 1525 is set forth in Appendix A attached hereto.

in an amount necessary to "recover [the] costs incurred" in performing all the activities of the DWR. Subdivision (d)(3) mandates in pertinent part that the SWRCB "set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity." In other words, the "fees" are required to correlate to the entire costs of the Water Rights Program as budgeted by the Legislature, including any and all of the activities of the DWR—not to the benefits purportedly received or burdens created by the class of water right holders subject to the annual "fees".[6]

Section 1530 directs the SWRCB to set the "fees" by emergency regulation. Section 1536 provides that annual "fees" be paid to the State Board of Equalization (BOE). And sections 1550 and 1551

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[6] The SWRCB's budget was about $9 million for FY 2003–2004. As the SWRCB admits, the new "fees" could not be implemented in time to fund operations for the first half of the Fiscal Year; thus, roughly the first half of the Fiscal Year was funded by about $4.5 million from the General Fund. (3 AA576.) As the SWRCB further admits, the $4.4 million that the Legislature mandated the SWRCB collect in "fees" was intended to fund the *all of the* costs of the DWR in the *remaining portion* of that year. (3 AA540–543, 545–547, 549–552.) In subsequent years, such as FY 2004–2005, the "fees" are intended to fund the entire Water Rights Program with essentially nothing from the General Fund. (3 AA526.)

establish a "Water Rights Fund" into which all of the moneys collected by the BOE are deposited.

B. Prior To The Passage Of Section 1525, The SWRCB Recognized The Clear Inequity Of Imposing All Program Costs On A Single Class Of Water Right Holders And Opposed The Legislation As Crafted

During the time that the Legislature was considering enacting section 1525, the SWRCB objected strenuously and repeatedly to the proposed change in the source of funding on the grounds that its activities properly should be partially funded by the General Fund, because the work of the SWRCB benefits the public generally as well as the large classes of water right holders upon whom the "fees" were not imposed. (See slip opn., pp. 13–14; 3 AA581–586 [Whitney Depo.].)

For example, when the Legislative Analyst's Office (LAO) initially recommended replacing General Funding with the new "fees" through section 1525, the SWRCB objected that a statute imposing all "fees" on water right permit and license holders would be founded upon a misunderstanding of who benefits from its regulatory activities:

> The LAO's recommendation is based on an assumption that all water right actions benefit to the regulated com-

munity (water right permit and license holders). *This assumption is not true. In many instances, the prior rights that are protected by the imposition of permit conditions in new permits or by the enforcement of permits and licenses are rights that are held by parties other than post-1914 appropriative right holders.* If the goal is that the party receiving the benefit pay their proportional share of the costs of the program, individuals who use groundwater and those who use surface water under some other basis of right should pay a portion of the program costs. The SWRCB's responsibility over non-permit holders is not included in the LAO recommendation. *Certainly a portion of the SWRCB's regulatory/supervision function can and should be logically supported by the General Fund.*

(Slip opn., pp. 13–14, quoting 3 AA588–589, italics added.) The DWR's current chief, Victoria Whitney, "testified under oath at her deposition that [this] was a correct statement." (Slip opn., p. 14; see also 3 AA593 [Whitney Depo.].)

The SWRCB also identified for the Legislature the "problem" that other water right holders impose costs on the program but would not be subject to the "fees":

> The Legislative Analyst has recommended that the Water Rights Program be converted from almost an exclusively General Fund program to an entirely fee supported effort. *In investigating this proposal the Board has encountered some problems for which solutions do not currently exist.* These problems are: . . . Approximately *30 percent* of the appropriated water in California is held by the federal government, which refuses to pay [regulatory] fees[; and of] the total water beneficially used, *30 percent or more* may be held by . . . water right holders whose use is not

> routinely supervised by the Board. *Nonetheless, such users receive benefits from the Water Rights Program in terms of complaint resolution, protection of existing rights, and on occasion, adjudication of present rights.*

(3 AA597, italics added.) The LAO itself likewise acknowledged this problem: "The fee schedule also assumes that no fees would be collected from the federal government. . . . This presents an issue concerning equity among fee payers since fee payers would be paying for work performed by the board for the benefit of water rights held by the federal government."[7] (4 AA843.)

The SWRCB emphasized consistently that members of the general public impose significant costs on the program, but would not be paying "fees": "Many of the Division's activities also support the State's public trust resources benefiting all Californians. These activities should be supported by the State's General Fund." (3 AA599; see also slip opn., p. 14.)

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7 The LAO report is a proper part of the legislative history. (*San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1142 [relying upon Legislative Analyst's Office's report as legislative history].)

C. The SWRCB Adopted Emergency Regulations Implementing Section 1525 Following Its Enactment

Given the Legislative directive in section 1525, the SWRCB was left with the impossible task of attempting to legally impose all of the costs of the program on one class of water right holders, while other classes of water right holders and the general public would get a free ride.

In late 2003, the SWRCB adopted Resolution No. 2003-0077, "Adopting Emergency Regulations Establishing Water Right and Water Quality Certification Fee Schedules in Title 23, Division 3, of the California Code of Regulations" (10 AA2468–2469). These Emergency Regulations implemented the annual "fees" mandated by section 1525 setting the amount of the "fees" as equal to the greater of $100 or $0.03 per acre-foot[8] of the total annual diversion authorized by the permit or license of post-1914 appropriative water right holders. (See Cal. Code Regs., tit. 23, §§ 1061, 1066(a) (2003 version).)

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[8] An acre-foot equals 43,560 cubic feet. It is an irrigation-based measurement, equaling the quantity of water required to cover an acre of land to a depth of one foot. (Slip opn., p. 11, fn.9.)

Because the $4.4 million to be raised in "fees" from this class of water rights holders in FY 2003–2004 was a statutory mandate (3 AA528), the SWRCB was required to "reverse-engineer" the "fees" rather than set them according to any analysis of the actual costs of the benefits received, or burdens imposed, by those water right holders. (See slip. opn., p. 23; 3 AA506–510.)

In determining how to distribute the costs of the program upon that subset of water right holders over whom the SWRCB has legal authority to impose fees, the SWRCB identified the following "constraints": (1) the "fees" had to generate $4.4 million to plug the hole in the budget as mandated by the Legislature; (2) the funding source had to be "relatively stable"; and (3) because the "fees" had to be implemented by January 2004, the SWRCB had to calculate the "fees" using its "existing database." (See slip opn., p. 21; 3 AA502, 639–640.)

The SWRCB did not include in its list of "constraints" the legal requirement established by Proposition 13 that the amount of any "fee" imposed must bear a reasonable relationship to the costs of benefits received, or burdens imposed, by "fee" payors. (See *CAPS*, *supra*, 79 Cal.App.4th at p. 945.)

1. The New Class Of Annual "Fee" Payors Was Required To Pay For Benefits Accorded To And Burdens Created By The Federal Government

The first step in the SWRCB's "fee" allocation process was to adjust the amount of revenue to be raised by applying a "noncollection factor." (3 AA643.01 [Whitney Depo.].) The SWRCB assumed that *40%* of the billed revenues would not be collected from water right holders who claim sovereign immunity or who violate the law by not paying their bills. (See slip opn., p. 23; AA505 [SWRCB presentation stating that "40 percent of billed revenues are not collectable" because of, inter alia, "Sovereign immunity."].)

Rather than reaching the logical conclusion that the SWRCB could collect only 60% of its costs from the remaining class of water right holders subject to the "fees", the SWRCB admits that it simply increased the "target revenue" for the remaining "fee" payors to "account for" those who would not pay. (See slip opn., p. 23; 3 AA643.01–644.) The SWRCB did so by dividing the $4.4 million mandated by the Legislature by 0.6, and thereby increased the "target revenue" to be collected from annual "fee" payors to $7.2 million. (See slip opn., p. 23; 3 AA505–506, 643.01–644.)

This "adjustment" thus had the effect of charging "fee" payors the *entire* cost of the benefits accorded to and burdens created by those refusing to pay the "fees" based on sovereign immunity or otherwise. (Slip opn., p. 23.) Because the "fees" to be collected from the annual "fee" payors were increased by 40% to pay for the benefits to and burdens from non-paying water right holders, the annual "fees" necessarily exceed the benefits to or burdens created by paying water right holders by 40%. (4 AA664–665 [Transcript of SWRCB Fee Workshop, October 27, 2003] ["Forty percent of billed revenues are not collectible. This is an important assumption because it drives up the amount that we would be billing people, and it seems like a high number."].)

Yet, as the Court of Appeal noted, and as the SWRCB admits, those water right holders who refuse to pay the "fees", whether delinquent or claiming sovereign immunity, still benefit from the SWRCB's activities "'[t]he same way that everybody else benefits.'" (Slip opn., p. 23, quoting 4 AA848.)

2. "Fee" Payors Were Required To Pay For Substantial Benefits To And Burdens Created By Other Water Right Holders

As the Court of Appeal recognized, other non-paying water right holders, including holders of riparian, pre-1914 appropriative, and pueblo water rights, also benefit substantially from the activities of the SWRCB. (See slip opn., p. 23; 4 AA870–873, 875-876, 879.) By law, however, the SWRCB cannot impose annual "fees" on these water right holders who hold rights to about *38%* of all water diverted. (Slip opn., p. 23; 3 AA567; 4 AA875–876.)

Rather than concluding that the costs to the Water Rights Program for burdens imposed, or benefits received, by all riparian, pre-1914, and pueblo water right holders were uncollectible, the SWRCB imposed those costs on the annual "fee" payors. (4 AA881–882.) As the Enrolled Bill Report for section 1525 put it, "because many water users in California are not required to obtain a water right permit or license (most groundwater users, riparian water right holders, and pre-1914 water right holders), *they will get a 'free ride' because they will not be subject to the annual fees* . . . ." (4 AA891, italics added [SB 1049 Enrolled Bill Report]; 5 AA1123–1124 [Whitney Depo.]; see also 4 AA901–902 [Whitney Depo.].)

Combining riparian, pre-1914, and pueblo water rights holders with those claiming sovereign immunity and those who simply refuse to pay, annual "fee" payors are forced to shoulder the burdens and benefits attributable to *more than two-thirds* of all water right holders. This is demonstrated by a pie chart created by the SWRCB that the Court of Appeal attached to its decision (see Appendix B attached hereto). It demonstrates that 38% of water rights are held by riparian, pre-1914, and pueblo water right holders who are not required to pay any "fees," and that 40% of the remaining water right holders are assumed not to pay the "fees" because of sovereign immunity or otherwise. (3 AA567; slip opn., p. 23.)

3. The New Class Of Annual "Fee" Payors Are Required To Pay For Substantial Benefits Accorded To And Burdens Created By The Public Generally

While the "fees" imposed by section 1525 and the Emergency Regulations are intended to fund the Water Rights Program and all of the activities of the DWR (3 AA549), as the Court of Appeal noted, at least *33%* of the work of the DWR is done in the interest of preserving the public trust and for the benefit of the general public who are not subject to the SWRCB's direct authority to levy "fees". (See slip opn., p. 40; 4 AA904, 907 [April 15, 2004 letter from SWRCB to As-

semblyman Joseph Canciamilla, explaining, "the SWRCB is expending about one-third of its resources for public interest or public trust purposes"], 912–913 [Whitney's April 7, 2004 memo] ["approximately one-third of the Division's time is spent for the purpose of protecting the environment and the public interest"], 917–918 [Answer to the Complaint in this action, ¶ 17] ["defendants admit that the general public benefits substantially from the activities of the DWR"]; 5 AA959–960.)

Nonetheless, section 1525 and the Emergency Regulations impose the costs of benefits received and burdens imposed by the general public on the small class of annual "fee" payors. (4 AA947–948 [Whitney Depo.]; 5 AA961–962 [Whitney Depo.], 1119–1120 [Whitney Depo.].)

4. The Annual "Fee" Payors Are Required To Subsidize Artificially Low Service Fees

The SWRCB next set the amounts for "one-time" service fees—fees imposed on those requesting services from the DWR. As the Court of Appeal noted, the SWRCB admits it set service fees artificially low based on the assumption that higher fees might discourage people from seeking services. (Slip opn., p. 21; 3 AA646–652; 4 AA663.) For example, the SWRCB admits it determined that the av-

erage cost of processing a water right petition is $17,000–$20,000; yet it set the petition fee at $1,000. (See slip opn., p. 21; 4 AA749–750.) The SWRCB determined the remaining costs of one-time services would be paid for by the annual "fees". (3 AA505; 4 AA748–752.)

The end result is that while about *60%* of the DWR's costs are associated with one-time services, the SWRCB collected only about 10% of those costs in one-time service fees; the remainder was subsidized by the annual "fee" payors. (See slip opn., p. 40; 4 AA761.)

5. The "Fees" Are Unevenly Apportioned Even Among Annual "Fee" Payors

After the SWRCB estimated what would be needed to make up for the estimated two-thirds of rights holders from whom it could not collect fees (such as the federal government and pre-1914 water rights holders), as well as the amount to be collected in artificially low service fees and for substantial work on behalf of the general public, the SWRCB next "divided the remaining revenue needs by the number of acre-feet" of water held by post-1914, non-sovereign water right holders to come up with the rate at which "fee" payors would be charged: 3 cents per acre-foot. (4 AA780–784 [Whitney Depo.]; see also 3 AA508.) Using the same rate for all "fee" payors, however, would result in most "fee" payors paying a fee that would not cover even the

costs of sending out the bill. (4 AA786–787.) Indeed, as the Court of Appeal noted, *45%* of permits or licenses for less than 10 acre-feet of water (each of which would have generated only 30 cents or less in "fees"), and *70%* are for less than 100 acre-feet of water (each of which would have generated only $3.00 or less in "fees").[9] (Slip opn., pp. 23–24; 3 AA561; 4 AA789.)

The SWRCB thus imposed a $100 "minimum fee" on those "fee" payors holding permits or licenses for 3,333 acre-feet of water or less, causing those individuals who have rights to few acre-feet paying substantially more per acre foot than persons with rights to many thousands of acre-feet. (4 AA791–794.)

Furthermore, water right holders with several permits for less than 3,333 acre-feet of water must pay the $100 minimum fee for *each* permit held. (5 AA1033.) A water right holder with ten permits to use amounts totaling no more than 3,333 of acre-feet of water therefore would be charged $1,000—the same fee as a water right holder with a single permit to use a maximum of ten times that amount, or 33,333 acre-feet of water. (5 AA1034–1035.) Similarly,

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[9] About 13,000 permits and licenses exist. (4 AA726.)

as the SWRCB concedes, water right holders who use substantially less water than the "face value" amount of their permit, or even no water in a given year, are charged the same "fee" they would be charged had they reached their maximum annual limit. (5 AA1064.)

D. The SWRCB Substantially Over-Collects "Fees", But Refuses To Provide Refunds To Those Who Were Required To Overpay

In January 2004, the BOE sent water right fee bills to the persons and entities described in section 1525. (Slip opn., p. 25; 2 AA268.) The result was that the SWRCB collected millions of dollars more than it was authorized to collect from "fee" payors in FY 2003–2004 to fund the costs of the Water Rights Program:

> In FY 2003–04, the SWRCB collected *$7.4 million* in water right fees and water quality certification fees associated with water right actions. *This is $2.8 million in excess of the SWRCB's $4.6 million allocation from the Water Rights Fund specified in the Budget Act of 2003.*

(3 AA519; see also slip opn., p. 25, italics added.)

The SWRCB, however, did not consider refunds for those who overpaid. (5 AA1090.) Instead, as provided in section 1525, the SWRCB kept the over-collection in the Water Rights Fund to fund services in FY 2004–2005. (5 AA1091–1095.)

The “fees” set for FY 2004–2005 did not fix this problem; most water right holders were obliged to continue to overpay at the same *or a higher* rate. (5 AA1107.) The SWRCB conceded that it did not conduct any study to determine who overpaid in FY 2003–2004, and thus who deserved a fee reduction in FY 2004–2005. (5 AA1109–1114.)

II. Procedural Background

On February 12, 2004, appellants California Farm Bureau Federation and its member county Farm Bureaus, on behalf of all of their members including certain named individuals, filed with the SWRCB a petition for reconsideration[10] challenging the “fees” as unconstitutional. (2 AA271–293.) They sought full refunds to all of their members who paid the “fees”, contending the “fees” were illegal under Proposition 13. (2 AA273–79.)

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[10] Section 1120 et seq. requires the filing of a “petition for reconsideration” pursuant to section 1537, subdivision (b)(3), for claims for refund that are “based on the assertion that a determination by the board improperly or erroneously calculated the amount of a fee, or incorrectly determined that the person or entity is subject to the fee.” As explained in Section IV.B., *infra*, the Farm Bureau was not required to file a petition for reconsideration under the circumstances here, but did so in any event.

On April 6, 2004, the SWRCB denied that petition. (10 AA2482–2504.) The SWRCB emphasized that it had no authority to rule on the constitutionality of the "fees," because "the SWRCB has no power to declare a statute unconstitutional or unenforceable." (10 AA2488, fn.6.)

On April 13, 2004, the Farm Bureau, among others, filed this lawsuit against the SWRCB in the Superior Court of the County of Sacramento, seeking declaratory and injunctive relief, and a writ of mandate (Code Civ. Proc. §§ 526, 863, 1060, 1085). (Slip op., p. 26.) Among other things, the Farm Bureau sought invalidation of the statutes it contends are unconstitutional, rescission of the Emergency Regulations, and refund of "fees" paid.

On June 23, 2005, the trial court entered judgment denying the Farm Bureau's Petition. (13 AA3409–3412.) On July 8, 2005, the Farm Bureau timely appealed. (13 AA3405–3407.)

On January 17, 2007, the Court of Appeal issued its decision, finding section 1525 constitutional on its face, but holding that "as applied" under the Emergency Regulations, it imposed illegal and unconstitutional levies. (See slip opn., pp. 36–43.) The court determined, however, that the SWRCB could keep these improperly col-

lected "fees", unless "fee" payors already had filed petitions for reconsideration with the SWRCB before filing suit and now filed claims for refunds with the BOE.

On February 16, 2007, the Court of Appeal denied the SWRCB's Petition for Rehearing.

All parties petitioned for review, which, on April 11, 2007, this Court granted.

DISCUSSION

In 1978, California voters approved Proposition 13, codified in relevant part in the California Constitution at Articles XIII and XIII A. Proposition 13 prohibits any new taxes enacted for the purpose of increasing revenues unless they are imposed by a *two-thirds* vote of the Legislature. (Cal. Const. art. XIII A, §§ 1–3.) It also separately prohibits the imposition of *any* new taxes based on the assessed value of real property. (*Id.* §§ 3–4.)[11]

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[11] Usufructuary water rights are real property rights for all purposes, including taxation. (See *Jurupa Ditch Co. v. County of San Bernardino* (1967) 256 Cal.App.2d 35, 40 ["an appropriative right to take water from a stream is real property, is a fee simple interest and subject to taxation . . ."]; *North Kern Water Storage Dist. v. County of Kern* (1960) 179 Cal.App.2d 268, 271 ["[a] water right is land" for

[Footnote continued on next page]

The Court of Appeal clearly was correct when it declared the implementing Emergency Regulations invalid, but it did not go far enough and should have held the authorizing statute itself unconstitutional. Nor did the Court of Appeal go far enough in its remedy. This Court should preclude the SWRCB from retaining any of the improperly held funds and instead order them refunded to their rightful owners.

I. The State Bears The Burden Of Proving That The Levies Are Valid Regulatory "Fees", Not Illegal Taxes Under Proposition 13

That the subject levies are formally denominated "fees" is "of minor importance in light of the realities underlying [their] adoption and [their] probable object and effect." (*Rider v. County of San Diego* (1991) 1 Cal.4th 1, 14–15.) Indeed, in order to prevent this sort of "namesmanship," courts have held that any such State-imposed levy

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[Footnote continued from previous page]

the purposes of taxation and the California Constitution].) In fact, water rights holders *already* are taxed on their ownership of these real property rights. In fact, the *Assessors' Handbook* used by the BOE to calculate real property taxes provides: "A water right is real property and is, specifically, land within the meaning of section 1 of article XIII of the California Constitution, and assessable as such." (See California State Board of Equalization, *Assessors' Handbook*, Part II, "Assessment of Water Companies and Water Rights", p. 20 (December 2000) [http://www.boe.ca.gov/proptaxes/pdf/ah542.pdf].)

will be deemed a tax under Proposition 13 unless *the State* can show that it meets the requirements of a valid fee. (*CAPS*, *supra*, 79 Cal.App.4th at p. 945; *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146 (hereafter *SDG&E*).) Thus, "[t]he government bears the burden of proof," not the party challenging the levy. (*CAPS*, *supra*, 79 Cal.App.4th at p. 945.)

In order to establish that a new levy is not an illegal tax under Proposition 13, the government must show both (1) "the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity"; and that (2) "the fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and [they] are not levied for unrelated revenue purposes." (*CAPS*, *supra*, 79 Cal.App.4th at p. 945; *SDG&E, supra*, 203 Cal.App.3d at p. 1146; see also *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 876-77 (hereafter *Sinclair.*)

"[W]hether impositions are 'taxes' or 'fees' is a question of law for the appellate courts to decide on independent review of the facts."

(*Sinclair*, *supra*, 15 Cal.4th at p. 874; accord *CAPS*, *supra*, 79 Cal.App.4th at p. 944.) Accordingly, this Court's review is de novo, and is made "without deference to the [lower] court's determination." (*Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216.)

If this Court finds that the levies here are not proper regulatory fees, they are clearly unconstitutional for two separate reasons: (1) they were enacted by less than a two-thirds vote by each house (5 AA1183–1184); and (2) they are new taxes on real property that are barred regardless of any Legislative directive. (See Cal. Const. art. XIIIA, §§ 1–4.)

II. Section 1525 Is Unconstitutional On Its Face

A statute is facially unconstitutional where no set of circumstances exists under which the statute would be valid because it poses a "'total and fatal conflict with applicable constitutional prohibitions.'" (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; accord *California State Personnel Bd. v. California State Employees Assn.* (2005) 36 Cal.4th 758, 769.) Given the language, structure, and legislative history of the statute, there is no set of circumstances under which section 1525 could be implemented such that it does not di-

rectly conflict with Proposition 13. Accordingly, it is unconstitutional on its face.

A. The Plain Language, Statutory Context, And Legislative History Of Section 1525 Mandate That Annual "Fee" Payors Pay For Costs Imposed By And Benefits That Accrue To Others

Section 1525, subdivision (a), requires that "[e]ach person or entity who holds a permit or license to appropriate water, and each lessor of water leased . . . shall pay an annual fee according to a fee schedule established by the [SWRCB]." The statute thus mandates that annual "fees" shall be imposed on only the small subset of water right holders who have permits or licenses, and not other water right holders or members of the general public.

First, analyzing the statutory language, Section 1525, subdivision (c), requires that:

> [t]he [SWRCB] shall set the fee schedule authorized by this section so that the total amount of fees collected pursuant to this section equals that amount necessary to recover costs incurred in connection with the issuance, administration, review, monitoring, and enforcement of permits, licenses, certificates, and registrations to appropriate water, water leases, and orders approving changes in point of discharge, place of use, or purpose of use of treated wastewater. The board may include, as recoverable costs, but is not limited to including, the costs incurred in reviewing applications, registrations, petitions and requests, prescribing terms of permits, licenses, registrations, and change orders, enforcing and evaluating

> compliance with permits, licenses, certificates, registrations, change orders, and water leases, inspection, monitoring, planning, modeling, reviewing documents prepared for the purpose of regulating the diversion and use of water, applying and enforcing the prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division, and the administrative costs incurred in connection with carrying out these actions.

It is undisputed that the "activities" listed in subdivision (c) constitute *all* of the activities of the DWR, which are performed on behalf of all classes of water right holders and the general public. (3 AA526 [Whitney Depo.], 540–541.) Subdivision (c) thus mandates that "the total amount of fees collected pursuant to this section equals that amount necessary to recover costs incurred in connection with" *all* of the activities of the DWR, which necessarily includes the costs of activities imposed by all classes of water right holders—whether or not they are subject to the "fees", as well as members of the general public.

Taken together, subdivisions (a) and (c) thus require that one class of water right holders pays for the costs incurred in connection with all activities of the DWR on behalf of all classes of water right holders and the general public. The "fees" paid by the annual "fee" payors therefore cannot under any circumstance be commensurate

with the burdens they impose or benefits they receive because they are paying for the burdens imposed and benefits received by others. For this reason, section 1525 is facially unconstitutional. (See *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.)

If there could be any question as to the intended effect of subdivisions (a) and (c), subdivision (d)(3) confirms that in fact the annual "fees" never were intended to correlate to the burdens imposed or benefits received by the "fee" payors alone. Subdivision (d)(3) requires that the SWRCB "shall set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity." The "fees" thus are required to correlate to whatever the Legislature budgets annually to pay for all of the "activities" of the DWR—not to the benefits purportedly received or burdens created by the class of water right holders subject to the annual "fees".

Second, the Court of Appeal misunderstood the breadth of section 1525's mandate. The Court of Appeal held that section 1525 was not unconstitutional on its face, concluding that "nothing" in section 1525 "requires the SWRCB to set the fees so as to collect anything more than the 'costs incurred' in carrying out the permit functions au-

thorized in subdivisions (a), (b) and (c)." (Slip opn., p. 34.) Subdivision (c), however, which lists the activities to be funded by the annual "fees", is not limited to some subset of the DWR's activities related to discrete "permit functions," as the Court of Appeal apparently assumed. Rather, subdivision (c), as explained above, mandates that "fees" be imposed on permit and license holders to fund all the activities of the DWR, which *necessarily* include the substantial activities performed on behalf of non-fee-paying water right holders and the general public.

Indeed, ***the SWRCB now concedes*** that the Court of Appeal misunderstood the breadth of section 1525's mandate: "On its face, section 1525, subdivision (c) is very broad, and includes essentially *all* water right regulatory activities. The activities listed under subdivision (c) of section 1525 necessarily include actions taken against other types of water right holders to protect permittees and licensees, and vice versa." (State's Petition for Rehearing at p. 16; see also *id.* at p. 17 ["The Legislature understood—as Plaintiffs and the SWRCB both understand—that the activity potentially subject to fees under section 1525 represented essentially all of the water rights program."]; *id.* at p. 9 [explaining "the view, argued by . . . the SWRCB, that

(subject to the revenue target set by the Budget Act) section 1525 of the Water Code authorized the SWRCB to impose fees to cover the entire cost of the water right program," italics added].)

Third, given the breadth of the SWRCB's statutory mandate and the legal limitations on the classes of water rights holders upon whom "fees" may lawfully be imposed, the imposition of "fees" on permittees and licensees for the burdens and benefits of others is not a matter of mere "application" of section 1525 via the specific Emergency Regulations enacted (though, as explained *infra*, those specific regulations render the levies illegal as well). Rather, it is a product of the statutory and legal context within which the SWRCB operates— and, indeed, has operated for decades.

The SWRCB also has continuing supervisory authority over the diversion and use of water to protect fish, wildlife, recreation, and other public trust uses. (See *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447.) Section 275 confers upon the SWRCB the authority to take all appropriate action to "prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion." The SWRCB's authority under section 275 and its continuing supervisory authority extend to all water right holders,

including non-permitted and non-licensed water right holders. (See *In re Water of Hallett Creek Stream System* (1988) 44 Cal.3d 448, 472, fn.16; see generally *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1986) 186 Cal.App.3d 1160.) Indeed, the SWRCB admits that it exercises this authority over non-permitted and non-licensed water right holders both as part of its regulation of permittees and licensees and as *independent* regulation of non-permitted and non-licensed water right holders. (See Respondents' Brief in the Court of Appeal at pp. 14–15.) But, as the Court of Appeal noted, it is well established that the SWRCB cannot impose fees on a large portion of those its programs serve. "By quirk of historical development, the SWRCB lacks authority to impose annual fees on the holders of riparian, pueblo and pre-1914 appropriative rights that account for 38 percent of the water subject to water rights." (Slip opn., p. 39.)

Fourth, the Legislative history of section 1525 also demonstrates the inequity in the present statute. As the Enrolled Bill Report for SB 1049 explained: "[B]ecause many water users in California are not required to obtain a water right permit or license (most groundwater users, riparian water right holders, and pre-1914 water

right holders), they will get a 'free ride' because they will not be subject to the annual fees. . . ." (4 AA891.)[12]

B. The SWRCB Cannot Promulgate Regulations That Comply With Both The Funding Mandate And Proposition 13

In this statutory and legal context, it is impossible for the SWRCB to adopt regulations that adhere to Proposition 13's requirement that fees assessed be reasonably related to the benefits accorded to or burdens imposed by individuals or classes.

While the Court of Appeal erroneously held that section 1525 is not unconstitutional on its face (slip opn., pp. 31–32), the court correctly held that section 1525 was illegal "as applied" through the Emergency Regulations because, inter alia, the Emergency Regulations mandate that "fees" cover the costs of all the activities of the DWR, including the costs of the burdens imposed by and benefits received by non-fee-payors and the general public. (*Id.* at pp. 36–42.) The Court of Appeal apparently misunderstood that it is *section 1525* that mandates the imposition of "fees" in this manner, and no way ex-

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[12] Enrolled Bill Reports are properly considered as Legislative history. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn.19 ["we have routinely found enrolled bill reports . . . instructive on matters of legislative intent"].)

ists for the SWRCB to implement section 1525 so that it complies with Proposition 13.

Section 1525 accordingly is unconstitutional on its face for the very same reason the Court of Appeal found it unconstitutional as applied: the mandated "fees" cannot "bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity" where it mandates that annual "fee" payors *necessarily* bear the costs attributable to other classes of water right holders and the general public. (See *CAPS*, *supra*, 79 Cal.App.4th at p. 945; *SDG&E*, *supra*, 203 Cal.App.3d at p. 1146; see also *Sinclair*, *supra*, 15 Cal.4th at p. 878.) Neither the Court of Appeal nor the SWRCB has suggested any fee structure under the statute that would satisfy constitutional requirements. Accordingly, section 1525 is facially unconstitutional. (See *Rust v. Sullivan* (1991) 500 U.S. 173, 191 [constitutionality of statute ripe for decision where "it was likely that any set of regulations promulgated . . . would be challenged on constitutional grounds"].)

C. This Case Differs Materially From Cases Where The Apportionment Of "Regulatory Fees" Has Been Upheld

Heretofore, no case has upheld a regulatory fee where the costs of essentially an entire regulatory program are allocated to only one of several classes imposing burdens on or benefiting from that program. To the contrary, California courts have upheld regulatory fees *only* where costs are distributed to all who impose a quantitative burden on the regulatory system or receive a commensurate benefit.

For example, in *Sinclair*, *supra*, 15 Cal.4th 866, this Court upheld fees mandated by the Childhood Lead Poisoning Prevention Act of 1991, which provided medical services for children who were victims of lead poisoning, and which was entirely supported by fees paid by *all* those who had significantly contributed or were currently contributing to environmental lead contamination. (*Id.* at pp. 870-871.) Those able to show that their industry did not contribute to lead contamination, or whose activities did not result in "'quantifiably persistent environmental lead contamination,'" were exempt from the levies. (*Id.* at p. 872.) In other words, an exception existed for those whose impact on the environment was so slight as to be unquantifi-

able, and all who created a quantifiable burden on the regulatory system were responsible for its costs. (*Id.* at pp. 870-872.)

The fee structure upheld in *Sinclair* bears no resemblance to the challenged fee structure here. In this case, pursuant to both section 1525 and the Emergency Regulations, all of the annual "fees" have been apportioned to one select class of water right holders, which pays for all activities performed on behalf of the general public and all other classes of water right holders. (5 AA1118–1124 [Whitney Depo.].) Further, no de minimus or other exception exists here for those "fee" payors who impose little or no burden on the SWRCB, or even for those who do not divert any water in a given year. (5 AA1116–1117 [Whitney Depo.].)

Nor does the fee structure here bear any resemblance to the fee structure upheld in *CAPS*. In *CAPS*, the Third Appellate District upheld the challenged fees as valid regulatory fees where the Legislature had enacted a statute to fund "[the Department of] Fish and Game's review functions," and imposed fees on "all who avail themselves of the opportunity to obtain discretionary government services." (*CAPS*, *supra*, 79 Cal.App.4th at pp. 943, 954.) The statute imposed a flat filing fee of $850 for projects for which an "environmental impact re-

port" was prepared, and a fee of $1,250 for projects that required the preparation of a "negative declaration," given that such projects occupy more of the Department's time. (*Id.* at pp. 940, 955.) The statute also provided for a de minimus exception for the approximately 68% of projects with minimal impact on fish and wildlife: "[O]nly those . . . which have more than a de minimus impact upon fish and wildlife are required to bear the cost of review." (*Id.* at p. 943.)

As in *Sinclair*, therefore, the challenged fees in *CAPS* were imposed appropriately on *all* those who created quantitative burdens on the regulatory system. (*Ibid.*; see also *SDG&E*, 203 Cal.App.3d at p. 1135 [fees that "are not reasonably identifiable with specific industrial polluters (indirect costs)" may be apportioned "among *all* monitored polluters according to a formula based on the amount of emissions discharged by a stationary pollution source," italics added].) Again, this differs substantially from the circumstance here where a small group is required to fund *all* of the costs attributed to other groups and the general public, and not just its own benefits and burdens.

Moreover, the petitioner in *CAPS* challenged a statute enacting fees to fund particular services provided by the Department of Fish

and Game—specifically, its review functions. (*CAPS*, *supra*, 79 Cal.App.4th at 943.) In contrast, here the annual "fees" are imposed merely as an incident of ownership of a water right permit or license—regardless of whether water right holders "avail themselves of the opportunity to obtain discretionary government services" from the DWR. (5 AA1072 [Whitney Depo.] ["It applies to people who may not request specific services . . . in a particular year"].)

Of course, as noted *supra*, even those who do avail themselves of the DWR's discretionary services here, such as those filing applications or petitions, do not pay the equivalent costs associated with those services. (3 AA646–652; 4 AA663.) Instead, the majority of the fees to fund those one-time services are shouldered by the annual "fee" payors. (4 AA748–752 [Whitney Depo.].)

D. The Court Of Appeal Correctly Held That The "Polluter Pays" Rationale Does Not Justify The Apportionment Of Costs Caused By Others To The Annual "Fee" Payors

Several cases upholding the apportionment of costs of regulation to "fee" payors, rather than the general public, do so based on a "polluter pays" rationale, whereby fees are apportioned such that polluters bear responsibility for contribution to pollution, and fees offer an incentive to reduce pollution. The Court of Appeal properly found

that the "polluter pays" rationale has no application here. (Slip opn., pp. 42–43.)

For example, *SDG&E*, with which the Court of Appeal contrasts this case (slip opn., p. 42), and in which the "polluter pays" rationale was applicable, is readily distinguishable. (203 Cal.App.3d 1132.) There, a utility company challenged an air pollution control district's method of apportioning the actual costs of operating its permit programs that were "not reasonably identifiable with specific industrial polluters . . . among all monitored polluters according to a formula based on the amount of emissions discharged by a stationary pollution source." (*Id.* at p. 1135.) Under that fee program, costs that were susceptible of "labor tracking" were billed directly to the particular fee schedule to which they were attributable, while indirect costs were distributed among polluters by basing the annual fees on the average pollution generated by a facility within a specific industry. (*Id.* at pp. 1135-1136.)

In *SDG&E*, "[t]he purpose of the district's existence is to achieve and maintain air quality standards," and thus the court observed that the emissions-based fee system was reasonable given that it "would provide an incentive to large polluters to reduce existing

emissions to reduce fees." (*Id.* at p. 1147.) Further, the court noted that the LAO advocated an emissions-based system because it would "impose[] a portion of the cost to control pollution on its sources and provide[] an incentive for emissions reduction." (*Id.* at pp. 1138–1139.)

Similarly, the court in *CAPS* upheld the apportionment of the fees there, reasoning that a "reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling . . . pollution from the tax-paying public to the pollution-causing industries themselves." (79 Cal.App.4th at p. 949, citing *SDG&E*, *supra*, 203 Cal.App.3d at pp. 1148–1149.)

Relying on the "polluter pays" rationale, this Court in *Sinclair* also held that "the Act imposed bona fide regulatory fees, not taxes," because it required those "whose products have exposed children to lead contamination to bear a fair share of the cost of mitigating the adverse health effects their products created in the community." (15 Cal.4th at pp. 871, 877–879.) The "police power," this Court explained, "is broad enough to include mandatory remedial measures to mitigate . . . the adverse impact of the fee payer's operations, at least where, as here, the measure requires a causal connection or nexus be-

tween the product and its adverse effects." (*Id.* at pp. 877–78.) The Court reasoned, such fees "'regulate[]' future conduct by deterring further manufacture, distribution, or sale of dangerous products." (*Id.* at p. 877.)

Here, no such "incentives" are in play. The State's purpose is not to discourage "fee" payors' right to use water. Rather, as the SWRCB admits, it is "required by law" to "ensure that water is put to its fullest beneficial use." (9 AA2042.) Indeed, as the Court of Appeal recognized, the SWRCB enforces the constitutional mandate that "the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . in the interest of the people and for the public welfare . . . ." (Slip opn., pp. 4–5, quoting Cal. Const. art. X, § 2.) Section 100 likewise mandates that "the water resources of the State be put to beneficial use to the fullest extent of which they are capable." (5 AA1136.)

Given the mandate of the DWR and the SWRCB, as well as the plain fact that water right holders treat and deliver drinking water to the population of California and irrigate the crops that provide both food and economic strength to this State, the position that the "fee" schedule here is intended to offer an incentive to water right holders to

reduce the amount of water diverted is simply untenable and unsupported.

Furthermore, as the Court of Appeal recognized, the "polluter pays" rationale is inapplicable here because no evidence exists that the "fees" are allocated in a way that apportions responsibility for burdens imposed on the regulatory system. (See slip opn., pp. 42–43.) In *SDG&E*, the logic underlying the fee scheme was that polluters would bear their "fair share" of the costs of burdens on the program. (*Sinclair*, *supra*, 15 Cal.4th at pp. 878–79.) In contrast, here, as discussed in detail *supra*, the annual "fees" have been apportioned to one class of water right holders, i.e., post-1914 appropriative rights holders, which pays for *all* of the burdens caused by and benefits accorded to all classes of water right holders and the general public who do not pay "fees". (5 AA1118, 1121–1124.) The Court of Appeal thus properly rejected that the polluter pays rationale "justifies" the apportionment of "fees" here. (See slip opn., p. 42.)

III. Section 1525 Is Unconstitutional "As Applied" Through The Emergency Regulations

The Court of Appeal correctly held that section 1525 is unconstitutional as applied through the Emergency Regulations. The government cannot satisfy its burden to show that the fee schedule im-

posed by the Emergency Regulations resulted in a "reasonable relationship" between the "fees" paid and the burdens imposed and benefits received by "fee" payors because the fee schedule (1) imposes the costs of other water right holders and members of the general public upon annual "fee" payors; (2) imposes the costs disproportionately *among* annual "fee" payors; and (3) the "fees" levied actually resulted in payments far in excess of the amount of money mandated by the Legislature.

A. The Emergency Regulations Allocate Costs Caused By Others To The Annual "Fee" Payors

Based on each of the following facts, which were identified by the Court of Appeal, there is no real question that "fee" payors necessarily pay substantial costs associated with others:

(1) "Approximately 30 percent of the appropriated water in California is held by the federal government, which refuses to pay [regulatory] fees," and thus the "fees" of the annual "fee" payors were *inflated by 40 percent* to cover the costs of those who refuse to pay the "fees", claiming sovereign immunity or otherwise (see slip opn., p. 40, italics added);

(2) "'Of the total water beneficially used, 30 percent or more may be held by [non-permitted and non-licensed water right holders

(including holders of riparian, pre-1914 appropriative, and pueblo water rights) who are not subject to fees]. Nonetheless, such users receive benefits from the Water Rights Program in terms of complaint resolution, protection of existing rights, and on occasion, adjudication of present rights . . . .'"—the costs of which are funded by the annual "fee" payors (*ibid.*, italics added);

(3) An estimated "*one-third* of [the DWR's work] is for the benefit of the general public to protect the public trust and the environment"—all of which is funded by the annual "fee" payors (*ibid.*, italics added);

(4) "[T]he SWRCB collected only 10 percent of [the] cost [of] one-time service fees" even though about *60 percent* of the costs the Division of Water Rights are associated with one-time services, and "the SWRCB admits that the holders of water rights representing 40 percent of California's water [who] were assessed the annual fee subsidized" the remaining costs (*ibid.*, italics added).

Any single one of these reasons is enough to render the "fees" paid disproportionate to the burdens imposed or benefits received by "fee" payors. Taken together, they represent an overwhelming (and

unprecedented) demonstration of the absence of the requisite proportionality to justify the new charge as a "regulatory fee."

B. The Emergency Regulations Disproportionately Allocate Costs Among "Fee" Payors

The Court of Appeal stated that "[a]lthough the SWRCB did not offer evidence of the actual cost of billing the annual fees, we cannot say a $100 minimum annual fee was an unreasonable estimate of that cost." (Slip opn., p. 43.) Having acknowledged that the government did not present sufficient evidence to satisfy its burden to show that costs were properly apportioned to the "fee" payors here in the first instance, any conclusion that the minimum fee nonetheless may be "reasonable" is unwarranted. To conclude otherwise would fundamentally depart from regulatory fee law as set forth in *CAPS*, *Sinclair*, and *SDG&E*, among other cases. Furthermore, the imposition of the "minimum fee" is in fact one of the plainest examples of the inequitable distribution of "fees" among "fee" payors.

Indeed, the $100 minimum fee was not the result of any determination of the costs associated with burdens imposed or benefits received by annual "fee" payors holding permits or licenses for less than 3,333 acre-feet of water. (3 AA526.04.) The SWRCB conducted no study or analysis to determine whether any of these "fees" correlated

to burdens imposed by or benefits to annual "fee" payors. (3 AA526.03, 642.) Indeed, the SWRCB even considered a de minimus exception that included having no minimum fee at all, but imposed one nonetheless without any reasoned analysis. (4 AA834, 836–837.)

The minimum fee was simply a matter of raising the amount of money the Legislature directed the SWRCB to raise:

> So [section 1525] is a bill that was passed. It is not something, again, that we have a lot of discretion over. We have discretion to some extent how we implement it. And whether we have a lot of comments on the hundred dollar fee, we will maybe reduce that to 50. If we reduce that to 50, that means we have to raise some other fee someplace else. We have to come out with a bottom line dollar.

(4 AA658–659.)

The end result of this is that individuals who have rights to a few acre-feet of water pay substantially more per acre-foot than persons with rights to many thousands of acre-feet. Someone with a permit to use a maximum of one acre-foot pays at a rate of $100 per acre-foot (pursuant to the minimum fee), while someone with a permit to use a maximum of 10 acre-feet pays $10 per acre-foot, and someone with a permit to use a maximum of 3,333 or more of acre-feet pays at a rate of only 3 cents per acre-foot.

Furthermore, as the Court of Appeal pointed out, this "effectively charged persons who diverted less than 10 acre-feet of water . . . the same as those who diverted 3,333 acre-feet of water". (Slip opn., p. 24.) Because the annual "fees" do not distribute the costs of the regulatory program among "fee" payors such that the "fees" reasonably relate to the burdens imposed and benefits received by "fee" payors, section 1525 is unconstitutional as applied for this independent reason.

C. Section 1525 Is Unconstitutional As Applied For The Separate And Additional Reason That "Fees" Collected In FY 2003–2004 Surpass The Costs Of The Regulatory Activity

The SWRCB has not satisfied its burden of demonstrating that the annual "fees" collected do not exceed the costs of the regulatory program for FY 2003–2004. (See *CAPS*, *supra*, 79 Cal.App.4th at p. 945; *SDG&E*, *supra*, 203 Cal.App.3d at p. 1146.) The SWRCB admits that it collected at least $7.4 million in FY 2003–2004 "fees," which it likewise specifically admits was millions "in excess of" the $4.4 million it was authorized to collect to fund the costs of its regulatory activities in FY 2003-2004. (3 AA519; see also slip opn., p. 25.) The fee program generated $2.8 million more than the Budget Act allocated to fund the regulatory program at the time the trial court is-

sued its order. (3 AA519.) The "fees" collected thus vastly surpassed the costs of the SWRCB's regulatory activities.

Whether the "fees" were "intended" to exceed the costs is irrelevant. The court in *CAPS* explains: "It is well established that the amount of fees collected *must not surpass* the cost of the regulatory services or programs they are designed to support." (79 Cal.App.4th at p. 939, italics added.)

No court has upheld a fee where, as here, the "fees" collected *did in fact* exceed the costs of the program and no refund was provided. Indeed, in contrast, the court in *CAPS* upheld the challenged fee program where "[t]here was evidence that $11 million had been collected in fees, but the cost of the reviews was in excess of $20 million. Thus, the fees . . . did not generate income which surpassed the cost of the services provided." (See *CAPS*, *supra*, 79 Cal.App.4th at p. 946.)

Nor does the so-called "annual adjustment" provision in section 1525 (where over-collected "fees" in the Water Rights Fund are designated for use in future years) save the statute. It is not a "fail-safe," as the Court of Appeal identified it (slip opn., p. 35), because it does not compensate the vast majority of "fee" payors for their over-

payment in FY 2003–2004. As the SWRCB admits, most "fee" payors will pay the same "fees" or an even higher fee in FY 2004–2005, despite their overpayment in FY 2003–2004. (5 AA990–1001 [2004–2005 Emergency Regulations], 1107.)

To conclude that the SWRCB may grossly over-collect "fees" without providing a refund would render this requirement of a valid fee a nullity. By such logic, the SWRCB could charge any amount in purported "annual fees," allegedly to fund one Fiscal Year's costs, as long as they asserted that at some point in future years the funds would be used to regulate some water right holders, *whether or not those who paid the "fees" benefit from that future regulation*. In sum, the SWRCB cannot establish that the excessive "fees" collected do not surpass the costs of the regulatory program, and thus cannot meet its burden of satisfying this requirement of a valid "regulatory fee." (*SDG&E*, *supra*, 203 Cal.App.4th at pp. 1146–1147.) For this independent reason, section 1525 is unconstitutional as applied.

IV. Remedy: All Those Who Paid The Illegal "Fees" Are Entitled To Full Refunds

When the Farm Bureau initially protested the levies to the SWRCB, the SWRCB responded that it "has no power to declare a statute unconstitutional or unenforceable." (10 AA2488, fn. 6.) The

SWRCB was correct. Article III, section 3.5(b) of the California Constitution states: "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power . . . [t]o declare a statute unconstitutional." As a result, California courts consistently have held that under such circumstances the exhaustion of an administrative remedy is unnecessary before seeking relief in the courts as such an act would be futile.

While the Court of Appeal found that refunds of the "unlawfully imposed" levies are appropriate (slip opn., p. 51), it wrongly concluded that (a) in order to receive refunds, "fee" payors "must first [have] exhaust[ed] their remedies before the SWRCB," and (b) once a reviewing court sets aside the fee following a petition for a writ of mandate to the superior court, then "fee" payors must file refund claims with the BOE. (Slip opn., p. 52, citing Cal. Code Regs., tit. 23, § 1074, subd. (j), as added in Register 2004, No. 42 (Oct. 14, 2004).) But, as shown below, refunds to all who paid the illegally collected "fees" are appropriate here—whether or not prior petitions for reconsideration or subsequent claims for refunds are filed.

A. Exhaustion of Administrative Remedies Is Not Required Where The Administrative Agency Does Not Have The Power To Grant The Relief Sought

The Court of Appeal correctly observed that "the SWRCB lacks the power to rule a statute unconstitutional or unenforceable unless an appellate court has made that determination . . ." (Slip. opn., p. 52, citing Cal. Const. art. III, § 3.5(b).) The Court of Appeal nonetheless held that "fee" payors must have filed a petition for reconsideration with the SWRCB in order to receive a refund of the illegally collected "fees" because "the SWRCB advises that the California Constitution 'does not prohibit a party from raising a constitutional issue as part of [a] petition challenging a decision or order applying the statute.'" (Slip opn., p. 52.) While a party certainly is not "prohibited" from raising constitutional issues in a petition for reconsideration, the SWRCB's "advice" that a constitutional challenge *must* be raised in a petition for reconsideration simply is wrong under California law.

It is well settled that the law does not require measures in the name of exhaustion of administrative remedies where such measures would be futile because the administrative agency is without the authority to grant the relief sought. (See *Park 'N Fly of San Francisco, Inc. v. City of South San Francisco* (1987) 188 Cal.App.3d 1201,

1208–1209 ["The exhaustion doctrine does not . . . preclude consideration of appellant's constitutional objections to the ordinance, which provides the taxpayer with no mechanism either for challenging its essential validity or raising constitutional questions. . . . Where, as here, the administrative agency is not empowered to correct the situation from which judicial relief is sought, resort to the courts need not be preceded by an administrative action"]; see also *Howard Jarvis Taxpayers Ass'n v. City of Roseville* (2002) 97 Cal.App.4th 637, 639 ["[T]he legal validity of the in-lieu fee is a question properly raised through an action seeking declaratory, injunctive and mandate relief; to the extent the complaint seeks a judicial determination of the legal validity of the in-lieu fee, it does not involve an issue subject to determination through the administrative refund remedy available to plaintiffs."]; cf. *Rashtabadi v. INS* (9th Cir. 1994) 23 F.3d 1562, 1567 ["An exception to the exhaustion requirement has been carved out for constitutional challenges [because an agency] has no jurisdiction to adjudicate constitutional issues."].)

Here, where the SWRCB admittedly did not have the authority to declare the challenged statute unconstitutional, any exhaustion of administrative remedies would be futile. Nor does the Court of Ap-

peal's suggested procedure make practical sense. That more than 7,000 water rights holders subject to the levies should have had to file petitions for reconsideration that would be rejected summarily because the SWRCB has no authority to declare the "fees" unconstitutional in the first place has no basis in either law or logic.

B. No Petitions For Reconsideration Or Claims For Refund Need Have Been Filed Because Revenue And Taxation Code Section 55221 Makes Mandatory Refunds To All Who Paid The Improper "Fees"

Under the plain language of California Revenue and Taxation Code section 55221 (the "Fee Collection Procedures Law"), once a determination has been made that an illegal fee has been collected, it must be refunded:

> If the [Board of Equalization] determines that any amount of the fee . . . has been . . . illegally collected . . . the board shall set forth that fact in its records and certify the amount collected in excess of what was legally due and the person from whom it was collected or by whom paid. The excess amount collected or paid shall be credited on any amounts then due from the person from whom the excess amount was collected . . . and the balance shall be refunded to the person . . . .

(Rev. & Tax. Code, § 55221, subd. (a).) Here, the Court of Appeal correctly determined that the challenged "fees" are illegal; therefore those "fees" "*shall* be refunded" by the BOE. (See *ibid.*, italics

added.) The Fee Collection Procedures Law thus does not require the filing of a prior petition for reconsideration, nor the subsequent filing of a claim for refund. (See *ibid.*)

The Court of Appeal nonetheless ruled that in order to receive refunds, a petition for reconsideration must have been filed and a claim for refund with the BOE now must be filed. (Slip opn., pp. 52–53.) The Court of Appeal reasoned that "the BOE's typical role under the Fee Collection Procedures Law (Rev. & Tax. Code §§ 55001 et seq.)" is "limit[ed]" here by Water Code sections 1126 and 1537, and the Emergency Regulations. (Slip opn., pp. 51–52.) But Water Code section 1120 et seq. and 1537 are inapplicable here, and the court's analysis of those statutory provisions is contradicted by the language of the statutory provisions themselves, as well as by the SWRCB's own prior statements regarding the inapplicability of those statutory provisions.

Section 1120 et seq. requires the filing of a petition for reconsideration pursuant to section 1537, subdivision (b)(3), for claims of a refund "based on the assertion that a determination by the board improperly or erroneously calculated the amount of a fee, or incorrectly determined that the person or entity is subject to the fee . . . ." Section

1537, furthermore, specifically states, however: "This subdivision [requiring the filing of a petition for reconsideration] *shall not be construed to apply Chapter 4 (commencing with Section 1120) of Part 1 to the adoption of regulations under this chapter . . .*" (Italics added.) A petition for reconsideration thus is required to challenge an erroneously charged fee or fee amount, but not to challenge "the adoption of regulations."

By its express terms, therefore, section 1537 is not applicable here, and accordingly, section 1120 et seq. is not applicable either. Indeed, the SWRCB has not alleged that one or another of the "fee" payors was mistakenly charged or that any fee was "erroneously calculated" under the fee schedule adopted through the Emergency Regulations. Rather, the Farm Bureau challenged the constitutionality of section 1525 and the adoption of the Emergency Regulations pursuant to section 1525.

The SWRCB itself conceded the inapplicability of these statutory provisions and denied the petitions for reconsideration filed by all plaintiffs on this very ground:

> On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee

> or a determination regarding the amount of the fee. (Wat. Code §§ 1122, 1537, sub. (b)(2)). *Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration.*

(10 AA2483 [Order denying Farm Bureau's Petition for Reconsideration], italics added.)

The Court of Appeal's conclusion that the Fee Collection Procedures Law (Rev. & Tax. Code section 55001 et seq.), which mandates the refund of illegally collected fees, is "limit[ed]" by these statutory provisions thus is unsupported by the plain language of those statutory provisions. Indeed, the Fee Collection Procedures Law mandates that illegally collected fees "shall" be refunded.

C. The Takings Clause Of The United States Constitutions Also Mandates Full Refunds To All Who Paid The Illegal "Fees"

The Court of Appeal's conclusion that in order to receive refunds, "fee" payors must file a petition for reconsideration and then file a claim for refund with the BOE (slip opn., pp. 51–53) also is inconsistent with the Takings Clause contained in the United States and California Constitutions. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 19.) Pursuant to an unconstitutional statute and regulatory scheme, the SWRCB has "taken" water right holders' money

by requiring the payment of a fee that bears no reasonable relation to the benefits derived from or burdens imposed on a governmental program designed in significant part to benefit entities and members of the public that are not subject to the "fees". (See *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 162–163 (hereafter *Webb's Fabulous Pharmacies*).) The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49.)

The Takings Clause requires the State to refund the illegally collected "fees." For example, the plaintiffs in *Webb's Fabulous Pharmacies*, *supra*, challenged a Florida statute that permitted the clerks of court to keep the interest on moneys deposited in the registry of the state court. (449 U.S. at pp. 159–160.) The Florida circuit court held that the provision was illegal and *directed the clerk to pay the moneys it had illegally taken directly to those to whom the moneys properly belonged.* (*Id.* at p. 158.)

The Supreme Court of Florida reversed that order, but the United States Supreme Court reversed the Supreme Court of Florida, holding that the exaction was an unconstitutional taking, and explain-

ing: "[T]he exaction is a forced contribution to general governmental revenues, and is not reasonably related to the costs of using the courts. Indeed, '[the Takings Clause] . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (*Id.* at p. 163, citing *Armstrong v. United States*, *supra*, 364 U.S. at p. 49.)

Here, the Court of Appeal correctly ruled that the challenged "fees" were collected pursuant to an unlawful administrative scheme. As in *Webb's Fabulous Pharmacies*, therefore, the government has taken "fee" payors' moneys without compensation or justification, and the proper remedy for this illegal taking is the return of the moneys to those from whom they were taken.[13] The State should not ob-

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[13] Section 1525 and the Emergency Regulations likewise unconstitutionally deprive water right holders of their rights contained in the Fourteenth Amendment to the United States Constitution and in 42 U.S.C. section 1983, and the similar provision contained in Article I, Section 7, of the California Constitution, for all the reasons discussed in detail *supra*. The classifications the State has drawn are irrational and arbitrary, and thus violate the Equal Protection clauses. (See *D'Amico v. Bd. of Med. Exam'rs* (1974) 11 Cal.3d 1, 16–17.) Likewise, the imposition of the new "fees" constitutes arbitrary, capricious and unreasonable State action, and thus violates the substantive due process clause contained in article XIV, section 1, of the United States Constitution and 42 U.S.C. section 1983, as well as article I, section 7 of the California Constitution. (See *Nebbia v. New*

[Footnote continued on next page]

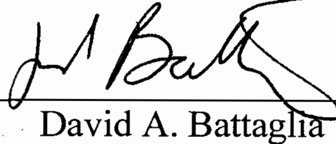
tain a windfall by being permitted to keep levies that the courts have determined were unconstitutionally imposed in the first instance.

CONCLUSION

For all of the foregoing reasons, section 1525 should be declared unconstitutional on its face and as applied, and the BOE should be ordered to issue full refunds to all who paid the illegal taxes.

June 11, 2007

Respectfully submitted,



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[Footnote continued from previous page]

York (1934) 291 U.S. 502, 525; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771.)

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, the undersigned hereby certifies that the foregoing Opening Brief On The Merits Of California Farm Bureau Federation is in 14 point Times New Roman font and contains 13,098 words, exclusive of those items identified in subdivision (c)(3) of Rule 8.520, according to the word count generated by the computer program used to produce the brief.

June 11, 2007

David A. Battaglia

Attorneys for California Farm Bureau Federation et al.

APPENDIX A

LEXSTAT CA WATER CODE 1525

DEERING'S CALIFORNIA CODES ANNOTATED
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*** THIS DOCUMENT REFLECTS ALL URGENCY LEGISLATION ENACTED ***
*** THROUGH 2007 CH. 10, APPROVED 6/5/07 ***

WATER CODE
Division 2. Water
Part 2. Appropriation of Water
Chapter 8. Water Right Fees
Article 1. Fee Schedules

GO TO CALIFORNIA CODES ARCHIVE DIRECTORY

Cal Wat Code § 1525 (2007)

§ 1525. Schedule of fees; Adoption of schedule by board

(a) Each person or entity who holds a permit or license to appropriate water, and each lessor of water leased under Chapter 1.5 (commencing with Section 1020) of Part 1, shall pay an annual fee according to a fee schedule established by the board.

(b) Each person or entity who files any of the following shall pay a fee according to a fee schedule established by the board:

(1) An application for a permit to appropriate water.

(2) A registration of appropriation for a small domestic use or livestock stockpond.

(3) A petition for an extension of time within which to begin construction, to complete construction, or to apply the water to full beneficial use under a permit.

(4) A petition to change the point of diversion, place of use, or purpose of use, under a permit or license.

(5) A petition to change the conditions of a permit or license, requested by the permittee or licensee, that is not otherwise subject to paragraph (3) or (4).

(6) A petition to change the point of discharge, place of use, or purpose of use, of treated wastewater, requested pursuant to Section 1211.

(7) An application for approval of a water lease agreement.

(8) A request for release from priority pursuant to Section 10504.

(9) An application for an assignment of a state-filed application pursuant to Section 10504.

(c) The board shall set the fee schedule authorized by this section so that the total amount of fees collected pursuant to this section equals that amount necessary to recover costs incurred in connection with the issuance, administration, review, monitoring, and enforcement of permits, licenses, certificates, and registrations to appropriate water, water leases, and orders approving changes in point of discharge, place of use, or purpose of use of treated wastewater. The board may include, as recoverable costs, but is not limited to including, the costs incurred in reviewing applications, registrations, petitions and requests, prescribing terms of permits, licenses, registrations, and change orders, enforcing and evaluating compliance with permits, licenses, certificates, registrations, change orders, and water leases, inspection, monitoring, planning, modeling, reviewing documents prepared for the purpose of regulating the diversion and use of

water, applying and enforcing the prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division, and the administrative costs incurred in connection with carrying out these actions.

(d)

(1) The board shall adopt the schedule of fees authorized under this section as emergency regulations in accordance with Section 1530.

(2) For filings subject to subdivision (b), the schedule may provide for a single filing fee or for an initial filing fee followed by an annual fee, as appropriate to the type of filing involved, and may include supplemental fees for filings that have already been made but have not yet been acted upon by the board at the time the schedule of fees takes effect.

(3) The board shall set the amount of total revenue collected each year through the fees authorized by this section at an amount equal to the revenue levels set forth in the annual Budget Act for this activity. The board shall review and revise the fees each fiscal year as necessary to conform with the revenue levels set forth in the annual Budget Act. If the board determines that the revenue collected during the preceding year was greater than, or less than, the revenue levels set forth in the annual Budget Act, the board may further adjust the annual fees to compensate for the over or under collection of revenue.

(e) Annual fees imposed pursuant to this section for the 2003-04 fiscal year shall be assessed for the entire 2003-04 fiscal year.

HISTORY:

Added Stats 2003 ch 741 § 85 (SB 1049).

APPENDIX B

APPENDIX

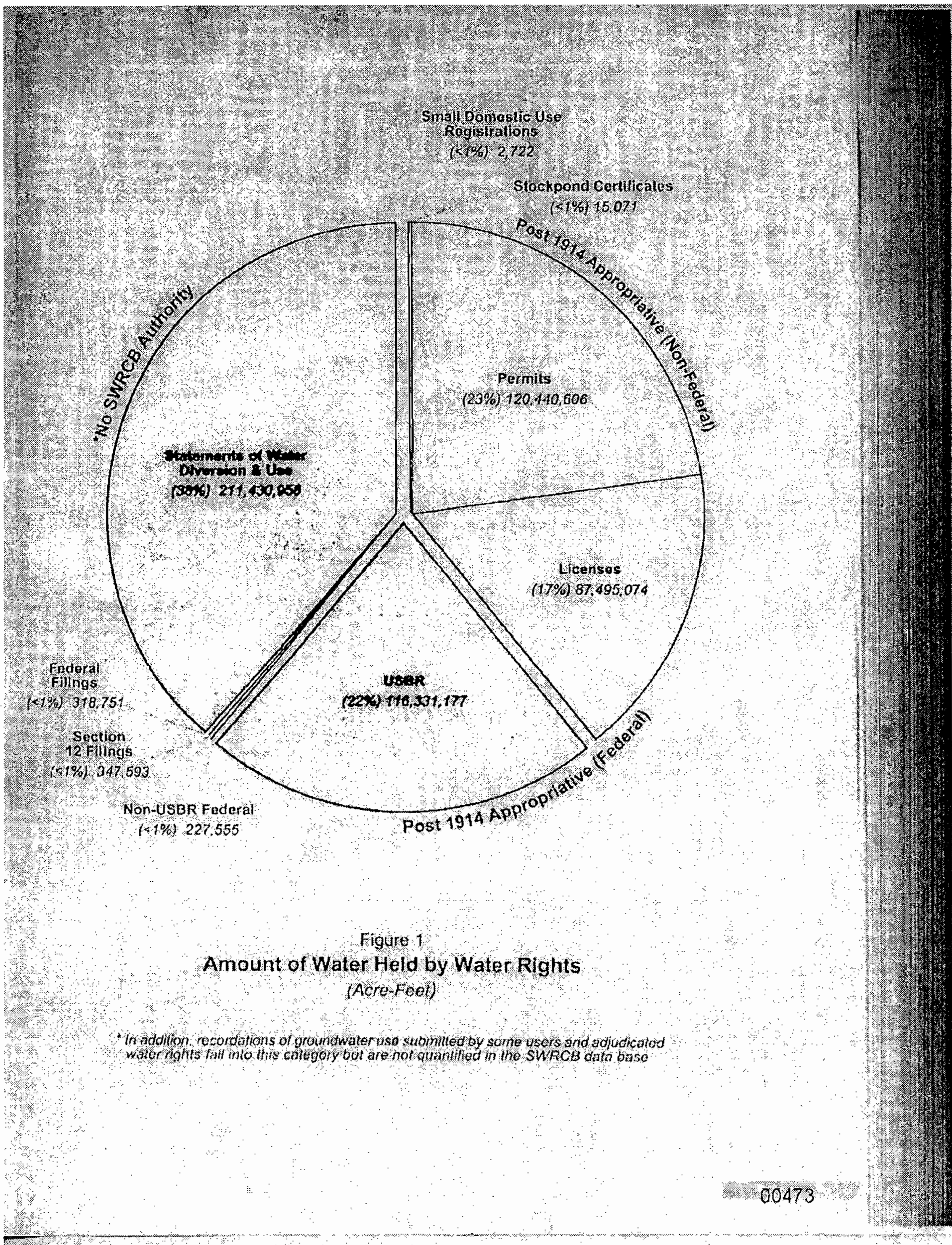

Figure 1
Amount of Water Held by Water Rights
(Acre-Feet)

** In addition, recordations of groundwater use submitted by some users and adjudicated water rights fall into this category but are not quantified in the SWRCB data base*

Handout at Stakeholder Meeting, November 6, 2003.

CERTIFICATE OF SERVICE

I, Kathlene Crutchfield, declare as follows:

I am employed in the County of Los Angeles, State of California; I am over the age of eighteen years and am not a party to this action; my business address is 333 South Grand Avenue, Los Angeles, California 90071, in said County and State; I am employed by Gibson, Dunn & Crutcher and am currently working with Eileen Ahern, a member of the bar of this Court, and at her direction, on **June 11, 2007** I served the within:

OPENING BRIEF ON THE MERITS OF THE CALIFORNIA FARM BUREAU FEDERATION ET AL.

by placing a true copy thereof in an envelope addressed to the person named below at the address shown:

Court Clerk, Court of Appeal
Third Appellate District
Library and Courts Annex
900 N Street, Room 400
Sacramento, CA 95814-4869

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Sacramento County Superior Court
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Sacramento, CA 95814-1398

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