No. S150518

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION ET AL.

Plaintiffs 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

REPLY BRIEF OF CALIFORNIA FARM BUREAU FEDERATION ET AL.

GIBSON, DUNN & CRUTCHER LLP
DAVID A. BATTAGLIA, SBN 130474
dbattaglia@gibsondunn.com
WILLIAM E. THOMSON, SBN 187912
wthomson@gibsondunn.com
EILEEN M. AHERN, SBN 216822
eahern@gibsondunn.com
333 South Grand Avenue
Los Angeles, California 90071
Telephone: (213) 229-7000
Facsimile: (213) 229-7520

CALIFORNIA FARM BUREAU FEDERATION
NANCY N. MCDONOUGH, SBN 84234
nmcdonough@cfbf.com
CARL G. BORDEN, SBN 87943
cborden@cfbf.com
2300 River Plaza Drive
Sacramento, California 95833
Telephone: (916) 561-5650
Facsimile: (916) 562-5691

Attorneys for California Farm Bureau Federation et al.

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eahern@gibsondunn.com
333 South Grand Avenue
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CARL G. BORDEN, SBN 87943
cborden@cfbf.com
2300 River Plaza Drive
Sacramento, California 95833
Telephone: (916) 561-5650
Facsimile: (916) 562-5691

Attorneys for California Farm Bureau Federation et al.

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INTRODUCTION

To add some perspective to the current dispute: The new water rights levies were enacted during the lame-duck tenure of former Governor Gray Davis by Senate Bill 1049, which also imposed new "fire-protection fees" on ranchers and farmers. (Former Pub. Resources Code, § 4138, added by Stats. 2003, ch. 741, § 74.) The fire "fees" also were challenged in court by the Farm Bureau. While a summary judgment motion was pending, arguing, as here, that the fire "fees" were illegal taxes, the Legislature repealed them. (Stats. 2004, ch. 219, § 1, effective Aug. 11, 2004.)

But the State inexplicably refused, and continues to refuse, to repeal the water rights "fees" that were part of the same statute, instead imposing them on an annual basis despite the objections of the Farm Bureau, its members, and numerous other parties. There was an easy solution to the dilemma faced here, namely, repeal of the statute as it applies to the new water rights levies. The State instead chose to continue litigation, and hence is responsible for the consequences that flow directly from that decision—including paying full refunds to all those who paid the illegal "fees."

DISCUSSION

A. Section 1525 Is Unconstitutional "On Its Face" And "As Applied."

Respondents argue that section 1525 is not unconstitutional, based upon a "factual" assertion made *for the very first time in this Court*: permitted and licensed water right holders purportedly impose 95 percent of the "burden" upon the Water Rights Program, and thus the costs of the program are properly allocated to them through the "fees." (RAB, p. 14.) This eleventh-hour assertion directly contradicts even the evidence cited by Respondents in support: one sentence in one memo written *months after* the lawsuit was filed. When read completely and in context, the memo simply says the SWRCB spends approximately five percent of its resources protecting non-permitted and non-licensed water right holders "in the areas of application/petition processing and in investigation of complaints"—not that this is the *only* activity undertaken on behalf of non-permitted and non-licensed water right holders. (10 AA2298.) As discussed in detail in the Farm Bureau's Answer Brief (pp. 10–13) and *infra*, Re-

spondents admit, *and the law requires*, that the SWRCB undertake substantial other activities on behalf of these water right holders.

Nor does the memo state that the remaining 95 percent of SWRCB resources are spent "regulating" the permit and license holders subject to the "fees." Such a statement could not be made, because *in the very same memo* the SWRCB states: "the SWRCB is expending about one-third of its resources for public interest or public trust purposes." (10 AA2298.)

Furthermore, Respondents' newfound assertion is entirely contradicted by the following undisputed facts identified by the Court of Appeal:

(i) "'Of the total water beneficially used, 30 percent or more may be held by [non-permitted and non-licensed water right holders 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 "fee" payors (slip opn., p. 40);

(ii) 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 "fee" payors (slip opn., p. 40);

(iii) "'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 "fee" payors were inflated by 40 percent to pay for those who refuse to pay the "fees," claiming sovereign immunity or otherwise (slip opn., p. 40);

(iv) "[T]he SWRCB collected only 10 percent of [the] cost [of one-time services] in one-time service fees" even though about 60 percent of the DWR's costs 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 (slip opn., p. 40.)

Moreover, the Legislature *mandated* through section 1525 that the costs of non-permitted and non-licensed water right holders and the general public, described in (i) and (ii) respectively, be paid for by "fee" payors. Indeed, Respondents do not dispute that section 1525,

subdivision (a) requires the SWRCB to impose "fees" only upon water right holders who have permits or licenses. Nor do Respondents dispute that section 1525, subdivision (c) mandates that the "fees" collected recover costs of virtually *all* of the activities of the DWR—which necessarily include the costs of non-permitted and non-licensed water right holders and the public. (RAB at pp. 1–2.) Section 1525 thus is unconstitutional on its face because, where "fee" payors must pay for the burdens and benefits of others, the "fees" cannot under any circumstance be commensurate with the burdens they impose or benefits they receive as required by *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 878 (hereafter *Sinclair*).[1] (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.)

In addition to the costs described in (i) and (ii), the SWRCB mandated through its Emergency Regulations that costs attributable to

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[1] Subdivision (d)(3), which requires the "fees" be set to the amount mandated by the Budget Act," confirms that the "fees" are not intended to correlate to "fee" payors' burdens or benefits. And, the Budget Act itself confirms that the Legislature intended the "fees" to be spent on other water right holders and the public—the "Program Objectives" listed in the Budget Act include, *inter alia*, activities undertaken on behalf of "riparian and pre-1914 rights," and the public. (Respondents' Request for Judicial Notice, Ex. 2, p. EP 25.)

those who refuse to pay fees and those who seek one-time services, described in (iii) and (iv) respectively, be paid for by the new "fee" payors. As the Court of Appeal properly found, section 1525 thus is unconstitutional "as applied" because the "fees" paid cannot possibly correlate to the benefits or burdens of the class of water right holders subject to the "fees" as required by *Sinclair*.

1. The Costs Of The Public And Non-Permitted And Non-Licensed Water Right Holders Are Imposed On "Fee" Payors By Section 1525 Without Legal Justification.

Respondents admit, and the Water Code requires, that Respondents expend significant resources on the general public. (See, e.g., 3 AA599, 4 AA935, Water Code, §§ 1062, subd. (b), 1253, 1255, 1256, 1335, subd. (d).) Respondents argue that such costs are properly allocated to "fee" payors based upon the "polluter pays" rationale, which justifies the imposition of "fees" upon polluters as an incentive to reduce pollution where costs are allocated such that polluters bear responsibility for their "fair share" of mitigating their ill effects on society. (See RAB, p. 17.) But this assertion fails given that Respondents: (i) do not assert "fee" payors are polluters, (ii) do not assert the

"fees" offer an incentive to reduce the use or ownership of water—certainly not in light of the SWRCB's constitutional mandate to ensure water is put to beneficial use, and (iii) cannot show that "fees" are allocated such that they apportion responsibility for costs. (See FBAB at pp. 15–20.) As the Court of Appeal properly held, this rationale has no application here. (See slip opn., pp. 42–43.)

Respondents also admit, and the Water Code mandates, that the SWRCB undertakes substantial activities on behalf of non-permitted and non-licensed water right holders. (See also, e.g., 3 AA599; Water Code, §§ 100, 275, 1005.1–13, 1052, 1330–35, 5100–5108.) Respondents attempt to justify imposing the costs of these activities on "fee" payors by asserting that the "fee" schedule simply provides a "*de minimis* exception." (RAB, p. 16.) But again, as detailed in the Farm Bureau's Answer Brief (pp. 26–28), this "fee" scheme provides no "*de minimis* exception" for anyone.

2. The Costs Of Others Are Imposed On "Fee" Payors By The Emergency Regulations.

a. "Fees" Were Artificially Inflated By Forty Percent.

Respondents assert, *for the very first time*, that the Farm Bureau "disingenuously represents" that "fees were inflated by 40 percent because the federal government refused to pay the fees." (RAB, p. 21.) As the Farm Bureau represented and the Court of Appeal found, the federal government holds 30 percent of appropriated water and refuses to pay fees; thus, the "fees" were inflated by 40 percent to pay for those who refuse to pay the "fees," claiming sovereign immunity *or otherwise*. (Slip opn., p. 40; see also *id.* at p. 23.) Respondents assert this: (i) ignores the "actual reasons" for the "noncollection factor"; (ii) "makes no sense mathematically"; and (iii) ignores that "fees" are imposed upon federal contractors. (RAB, pp. 21-22.)

Respondent and Division Chief, Victoria Whitney, made "sense mathematically" of these percentages and the "actual reasons" at her deposition: "we adjusted the budget amount of $4.4 million by dividing by .6 to account for the 40 percent noncollection factor," explain-

ing that the "purpose" was to "account for the noncollections that [the SRWCB] expected" from those who they "believed would assert sovereign immunity," and those they "assumed would not pay fees when billed . . ." (3 AA643.01.)

That "fees" were imposed on federal contractors in an effort to collect from them what was due from those claiming sovereign immunity does not change the fact that "fees" still were inflated by 40 percent on the assumption that the federal government would not pay. (See *id.* at p. 644.) The Farm Bureau's representation thus is entirely accurate.

b. The "Fees" Include Costs Associated With Those Who Seek One-Time Services.

Respondents do not dispute that about *60 percent* of the SWRCB's costs are associated with those who seek one-time services (5 AA1015), but, as the Court of Appeal noted, "the SWRCB collected only 10 percent of [these] cost[s] in one-time service fees," and annual "fee" payors paid the balance. (Slip opn., pp. 21, 40; 3 AA646–652; 4 AA663, 761.) Respondents argue that such costs are properly allocated to the annual "fee" payors because they file peti-

tions and "the persons paying application fees are seeking to become permit holders." (RAB, p. 22.) Simply because those seeking petitions already have permits and licenses cannot justify imposing their costs on other permit and license holders. (See *San Diego Gas & Elec. Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1135–1136, 1144 [fees upheld where costs that were susceptible of "labor tracking" were billed directly to the particular party to which they were attributable, such that the "[fee] schedule does not charge a permit holder for work on another's permit"].) Moreover, as discussed in detail in the Farm Bureau's Answer Brief (23–25), applicants are members of the public—simply because they are seeking a permit or license does not mean that costs associated with their applications should be borne by those who *already* have permit and licenses.

c. The Minimum "Fee" Misallocates The Costs Of The Program.

Respondents assert that the Farm Bureau misrepresents the record with regard to the lack of evidence to support the $100 minimum fee. (RAB, p. 23.) To the contrary, the Farm Bureau relied only upon

Respondents' own statements that undermine any argument that the minimum "fee" was based on any analysis of the burdens or benefits of minimum "fee" payors. (See FBOBM, pp. 48–50; see also 3 AA642 ["Q: Was there any study conducted of the precise costs imposed upon the Department of the 70 percent of water users who have less than 100-acre feet? A: No."].) Respondents assert for the first time that the $100 minimum "fee" "was based on the minimum estimated yearly cost, on average, of overseeing small water rights." (RAB, p. 23). This statement has absolutely no basis in the record—Respondents do not point to any "yearly costs" or "average" costs associated with minimum "fee" payors. Respondents thus cannot meet their burden to demonstrate proper proportionality.

3. This Court Should Not Ignore Section 1525's Legislative History And The SWRCB's Arguments In Opposition To Section 1525.

Respondents urge this Court to ignore section 1525's legislative history and the SWRCB's "arguments" as "opponents" of section 1525 at the time it was proposed. (RAB, p. 19.) While such arguments do not determine section 1525's validity, they are relevant as acknowledgments that stand true today regarding to whom costs are

attributable and that the imposition of "fees" on various groups cannot be justified. (See FBOBM, pp. 11–13.)

Respondents' assertion that these admissions are irrelevant because certain aspects of the proposed legislation did not come to "fruition" is a red herring. (RAB, p. 19.) For example, Respondents assert their arguments assumed that Central Valley Project ("CVP") costs would be paid for by "fee" payors, but in the final legislation, CVP "fees" were allocated to CVP contractors. (RAB, p.19.) Respondents thus imply that their arguments to the Legislature, consistent with a statement in the Legislative Analyst Office's Report that the "fees" presented "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," would not apply equally to the final legislation. (See 4 AA843.) But, as noted *supra*, the SWRCB *admits* it still inflated the "fees" forty percent to compensate for those who would refuse to pay "fees," including for federal government. (3 AA 643.01–644.) Respondents' suggestion that other "fee" payors did not pay for work for the benefit of federal government water right holders thus is belied by the record.

Respondents also assert that the Farm Bureau's reliance on a statement in an Enrolled Bill Report that non-permitted and non-licensed water right holders "will get a 'free ride' because they will not be subject to the annual fees . . ." is improper because it is an argument against the bill and not the Legislature's "position." (RAB, p. 20.) Whether it is anyone's "position" is irrelevant; what is relevant, and what Respondents do not deny, *is that this statement is true.* Enrolled Bill Reports are properly relied upon as legislative history. (See *Elsner v. Uveges* (2004) 34 Cal.4th 915, 934, fn.19.)

B. The "Fees" Substantially Exceeded The Costs.

Respondents concede they collected $7.4 million in "fees"—millions beyond the $4.4 million mandated by the Legislature. (RAB, p. 26.) Respondents disingenuously assert that "fees" were not over-collected because the program's budget for Fiscal Year 2003–2004 was $9 million, and "[o]bviously, $7.4 is less then $9 million." (*Ibid.*) But the difference between the $9 million budget and the $4.4 million was funded by the General Fund and other moneys. (3 AA531, 722.) The over-collection of "fees" therefore caused the SWRCB to take in about *$12 million* for the fiscal year—*far in excess of its $9 million*

budget. (3 AA519–20, 576, 619; 5 AA1085–1088.) The "fees" thus cannot be valid regulatory "fees" because they surpassed the costs here.

Despite yet another attempt at an eleventh-hour denial of previous admissions (RAB, p. 26), the record unequivocally shows "fees" were intended to fund only half of program costs in 2003–2004 because they could not be implemented in time to fund the first half of the fiscal year. (3 AA575–576.) General Fund and other moneys thus funded roughly the first half of the year, and the $4.4 million in new "fees" was intended to fund, *but exceeded*, all program costs in the remaining portion of that year.[2] (*Ibid.*; 3AA526, 540–543 545–547, 549–552; RAB, p. 26.)

Nor can the "annual adjustment" excuse the over-collection. Respondents admit the "annual adjustment" is "not a refund remedy for an 'overpayment,'" thereby erroneously suggesting that no refund is necessary here. (RAB, p. 30.) Respondents ignore that no Califor-

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[2] Consistent with this, "fees" cover essentially all program costs going forward—90 percent of program funding in 2004–2005, and 94 percent of funding in 2005–2006. (ROBM, p. 14.)

nia court even suggests that over-collection of fees without a refund is legal. (See, e.g., *Garrick Development Co. v. Hayward Unified School District* (1992) 3 Cal.App.4th 320, 332.)

C. If The "Fees" Are Not Valid Fees Then They Are Illegal Taxes.

Respondents assert that the fact that water rights are a type of real property does not "make the fees ad valorem taxes on real property in violation of Proposition 13." (RAB, p. 20.) Respondents are wrong:

(i) The flat $100 minimum "fee" violates Article XIII, Section 1, of the California Constitution, which provides that assessments on real property be ad valorem.

(ii) The per acre-foot "fee" violates Article XIII A, Section 3, which provides, "no new ad valorem taxes on real property, or sales or transaction taxes on real property may be imposed."

(iii) Whether or not the "fees" are ad valorem, the charge on property owners is barred by the cap on assessments in Article XIII A, Sections 1-3, without the requisite two-thirds vote of each house of the Legislature.

The imposition of this illegal tax also is actually double-charging "fee" payors because water right holders are *already* taxed on their water rights. (*Jurpa Ditch Co. v. County of San Bernardino* (1967) 256 Cal.App.2d 35, 40.)

D. Refunds Must Be Paid To All "Fee" Payors.

1. Even If Petitions For Reconsideration Were Required Here, The Farm Bureau And County Farm Bureaus Complied On Behalf Of Their Members, And Hence Are Entitled To Full Refunds.

Despite the Water Code's unequivocal language that no petition for reconsideration was necessary to challenge the "fees" (see *infra*), it is undisputed that, in an abundance of caution, the Farm Bureau and its member County Farm Bureaus filed a petition on behalf of their members who paid the levies, and subsequently identified all of those members for the SWRCB.

The principal basis for the petition was that the statute and regulations were unconstitutional under Proposition 13. The SWRCB responded with a 23-page denial, asserting it did not have the authority to address the constitutional challenges. (10 AA 2488, fn.6 ["Pursuant to the California Constitution, an administrative agency such as

the SWRCB has no power to declare a statute unconstitutional or unenforceable, or to refuse to enforce a statute on the basis that the statute is unconstitutional or unenforceable . . . ."].)

While the SWRCB also purported to reject the Farm Bureau's associational standing in the denial, the trial court rejected Respondents' arguments in this respect, unequivocally holding in denying Respondents' Motion for Judgment on the Pleadings: "the . . . farm bureaus, which allege they are acting on behalf of parties that are subject to the fees" "are 'associational' petitioners." (2 AA374, citing *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Insurance Appeals Bd.* (1987) 190 Cal. App. 3d 1515, 1522.) Respondents never challenged this ruling in the Court of Appeal, and this Court should not consider their belated challenge (raised in a footnote, no less) here. (See *Franz v. Bd. of Medical Quality Assurances* (1982) 31 Cal.3d 124, 143.)

The Farm Bureau and its member County Farm Bureaus have at all times had standing to seek relief in an associational capacity, including full refunds for their members. To hold otherwise would ab-

rogate the legal notion of associational standing and would require a flood of individual lawsuits to deluge the court system.

2. Regardless, Petitions For Reconsideration Were Not Required Here Because The SWRCB Does Not Have The Authority To Grant The Relief Sought.

Respondents do not deny that the SWRCB does not have the authority to declare section 1525 unconstitutional. (See Cal. Const., art III § 3.5(b).) This Court unequivocally has held that an exception to the general rules of administrative exhaustion outlined in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, exists where, as here, exhaustion would be futile: they "are inapplicable where . . . the agency is given no jurisdiction to make a judicial determination of the type involved." (*County of Alpine v. County of Tuolumne* (1958) 49 Cal.2d 787, 798.) This exception applies even when the administrative remedy is statutorily-created and is regularly enforced, including by this Court. (See, e.g., *Ibid*; *Automotive Management Group, Inc. v.*

New Motor Vehicle Bd. (1993) 20 Cal.App.4th 1002, 1015–16.) Respondents' assertion to the contrary thus fails on its face.[3]

3. The Water Code Does Not Require The Filing Of A Petition For Reconsideration Here.

Moreover, whether or not the SWRCB *could* have granted the relief sought in the course of ruling on a petition for reconsideration, because of the nature of the Farm Bureau's challenge, no exhaustion was *required* by the Water Code. (Water Code § 1537.)

The Water Code provides that the BOE shall collect the "fees" pursuant to the Fee Collections Procedures Law (section 55001, et seq.). It also provides an exception to the applicability of the Fee Collections Procedures Law where a person seeks a refund on the grounds that the SWRCB "erroneously calculated the amount of a fee, or incorrectly determined that the person or entity is subject to the fee." (Water Code § 1537(b)(3).) Respondents ask this Court to ignore the Water Code's plain language, and to read this exception to

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[3] The sole case cited by Respondents in support of their argument, *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, is inapposite. The court's conclusion that the exception did not apply was compelled by article XIII, section 32, of the Constitution, which has no application here. (*Id.* at p. 1214.)

apply where a person seeks a refund *on any ground.* But that is not what the statute provides, and this Court is not required to do so. (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1207 ["[I]nterpretations which render any part of a statute superfluous are to be avoided."].)

Respondents assert section 1537, subdivision (b)(2) provides: "'Notwithstanding the appeal provisions in the Fee Collections Procedures Law,' . . . a fee determination by the SWRCB is subject to review [by petition for reconsideration to the SWRCB]." (RAB, p. 38.) But it actually provides: "Notwithstanding the appeal provisions in the Fee Collection Procedures Law, a determination by the board *that a person or entity is required to pay a fee, or a determination by the board regarding the amount of that fee*, is subject to review [by petition for reconsideration to the SWRCB]." Similarly, Respondents assert section 1537, subdivision (b)(3) provides: the BOE "cannot accept any claim for refund unless that determination has been set aside by the SWRCB or a court . . . ." (RAB, p.38.) In fact, it states: the BOE "shall not accept any claim for refund *that is based on the assertion that a determination by the board improperly or erroneously cal-*

culated the amount of a fee, or incorrectly determined that the person or entity is subject to the fee . . . ." In other words, the BOE may provide refunds under the Fee Collections Procedures Law, *except* where the claim for refund is based upon a claim that a person was erroneously charged fee or the fee amount was incorrectly calculated.

Here, Respondents *do not dispute* the Farm Bureau challenges the constitutionality of section 1525 and the adoption of the Emergency Regulations, and does not allege that any "fee" payor was mistakenly charged or any "fee" "erroneously calculated." Under the statute's plain language, the Fee Collections Procedures Law, *not* the Water Code's refund procedure, is applicable here.

Furthermore, as Respondents admit, section 1537, subdivision (b)(4) provides: a petition "cannot be filed to challenge the mere adoption of fee regulations." (RAB, p. 33.) Indeed, the SWRCB cited this subdivision in denying the Farm Bureau's petition. (10 AA2483.) Thus, while a "fee" payor is not *prohibited* from raising a constitutional challenge to regulations in a petition filed on other grounds, petitions are only *required* to be filed on other grounds.

4. Because No Petition For Reconsideration Need Be Filed Here, The Fee Collections Procedure Law Applies And Mandates Refunds.

Respondents argue only that the Fee Collections Procedures Law does not apply, but do not deny that if it applies, refunds are mandatory. (RAB, pp. 38-40.) For the reasons set forth *supra*, the Water Code's refund procedure is inapplicable; thus, under the Fee Collections Procedures Law, the BOE "shall" refund the "illegally collected" "fees" to all who paid them. (Rev. & Tax. Code, § 55221, subd. (a).)

5. The Takings Clause Mandates Full Refunds.

Respondents argue that the Takings Clause does not mandate refunds "in the absence of the exhaustion of administrative remedies." (RAB, pp. 40-41.) As set forth in detail *supra*, on the one hand, the Farm Bureau exhausted administrative remedies on behalf of its members, and on the other hand, no exhaustion was required here. The Takings Clause thus mandates refunds of the "fees" to all from whom they were illegally collected. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 19; *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 162–163.)

CONCLUSION

The Farm Bureau requests that section 1525 be declared unconstitutional on its face and as applied, and the BOE be ordered to issue refunds to all Farm Bureau members and others who paid "fees."

July 31, 2007

Respectfully submitted,

/s/David C. Battaglia (ERH)
David A. Battaglia

GIBSON, DUNN & CRUTCHER LLP
David A. Battaglia
William E. Thomson
Eileen M. Ahern

CALIFORNIA FARM BUREAU FEDERATION
Nancy N. McDonough
Carl G. Borden

Attorneys for California Farm Bureau Federation et al.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c)(1), of the California Rules of Court, the undersigned hereby certifies that the foregoing Reply Brief Of California Farm Bureau Federation is in 14 point Times New Roman font and contains 4,198 words, exclusive of those items identified in subdivision (c)(3) of Rule 8.204, according to the word count generated by the computer program used to produce the brief.

July 31, 2007

Eileen M. Ahern

Attorneys for California Farm Bureau Federation et al.

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 **July 31, 2007** I served the within:

REPLY BRIEF OF 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

Court Clerk, Department 25
The Honorable Raymond Cadei
Sacramento County Superior Court
720 Ninth Street, Appeals Unit
Sacramento, CA 95814-1398

Edmund G. Brown, Jr., David S. Chaney, William L. Carter, Matthew J. Goldman, Molly K. Mosley
Attorney General's Office
Business and Tax Section
1300 I Street, Suite 125
Sacramento, CA 94244-2550

Kevin M. O'Brien, Esq.
Jennifer L. Harder, Esq.
Joseph S. Schofield, Esq.
Downey Brand LLP
555 Capitol Mall, 10th Floor
Sacramento, CA 95814-4686

Stuart L. Somach, Esq.
Dan Kelley, Esq.
Somach, Simmons & Dunn
813 Sixth Street, Third Floor
Sacramento, CA 95814-2403

Nancy N. McDonough, Esq.
Carl G. Borden, Esq.
California Farm Bureau Federation
2300 River Plaza Drive
Sacramento, CA 95833

Tim O'Laughlin, Esq.
O'Laughlin & Paris
2580 Sierra Sunrise Terrace
Suite 210
Chico, CA 95928

Kirk C. Rodgers
Regional Director
U.S. Bureau of Reclamation
2800 Cottage Way, Rm. W-1105
Sacramento, CA 95825

Maria A. Iizuka, Esq.
U.S. Department of Justice
Environmental & Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814-2322

Ed Gee
U.S. Department of the Interior
Office of the Solicitor
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

Courtesy Copy:
Erin Mahaney, Staff Counsel
CA State Water Resources Control Bd.
Office of the Chief Counsel
1001 I Street, P. O. Box 100
Sacramento, CA 95812

Courtesy Copy:
Anthony S. Spolite, Sr. Tax Counsel
Board of Equalization, Legal Dept.
P. O. Box 942879
Sacramento, CA 94279-0082

Jason Everett Resnick, Esq.
Western Growers Law Group
17620 Fitch Street
Irvine, CA 92614

☑ **BY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY FACSIMILE**: From facsimile machine telephone number (213) 229-7520, on the above-mentioned date, I served a full and complete copy of the above-referenced document[s] by facsimile transmission to the person[s] at the number[s] indicated.

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☐ **BY NEXT DAY MAIL**: I placed a true copy in a sealed envelope addressed as indicated above, on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for delivery by Next Day Mail. Pursuant to that practice, envelopes placed for collection at designated locations during designated hours with a fully completed airbill, under which all delivery charges are paid by Gibson, Dunn & Crutcher, that same day in the ordinary course of business.

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document(s) were printed on recycled paper, and that this Certificate of Service was executed by me on **July 31, 2007** at Los Angeles, California.

Kathlene Crutchfield

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