SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

COPY

CALIFORNIA FARM BUREAU FEDERATION, ET AL.

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD, ET AL.,

Defendants and Respondents.

S 150518

SUPREME COURT
FILED
NOV - 2 2007
Frederick K. Ohlrich Clerk
Deputy

Court of Appeal, Third Appellate District, Case No. C050289
Sacramento County Superior Court Case Nos. 03CS01776, 04CS00473
The Honorable Raymond Cadei, Judge

OBJECTION TO NCWA'S REQUEST FOR JUDICIAL NOTICE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Pursuant to California Rules of Court, Rule 8.420, subdivision (g), the State Water Resources Control Board (SWRCB) and the State Board of Equalization (collectively, the State), petitioners and respondents, hereby oppose the "NCWA AND CALIFORNIA FARM BUREAU APPELLANTS' MOTION REQUESTING JUDICIAL NOTICE" ("Motion") filed by petitioners Northern California Water Association et al. (NCWA), and the California Farm Bureau Federation et al.

INTRODUCTION

This Court should not take judicial notice of argument from a brief filed in a very different case defending a very different statute. Facts in a court record that are subject to dispute are not the proper subjects of judicial notice. The "fact" that the State's arguments are "inconsistent" is highly disputable and certainly cannot be immediately and accurately verified from the material provided.

The material has no relevance to this case and its only use is to impugn the credibility of the Office of the Attorney General and the California State Legislature. The untimely nature of NCWA's request underscores its inappropriateness.

ARGUMENT

I.

The "fact" that the State's arguments are inconsistent is not a proper subject of judicial notice under Evidence Code Section 452

NCWA requests this Court take judicial notice of the arguments presented in pages 23 through 30 (part of section I and all of section II of the brief) and the conclusion and signature block on page 43 of a brief filed in 2004 (2004 WL 2031024,

publicly available on Westlaw). The case, *Morning Star Co. v. State Bd. of Equalization and Department of Toxic Substance Control* (2006) 38 Cal.4th 324 (*Morning Star*), held that the Department's implementation of Health & Safety Code section 25205.6 without a written regulation was an underground regulation.[1]

NCWA does not identify its authority for claiming the matter is judicially noticeable. Only two categories under Evidence Code section 452, providing for the court to take permissive judicial notice, might apply: subdivisions (d), the records of a court of this state; and (h), "facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination. . . ."

Subdivision (d) of Evidence Code section 452 does not apply because the "fact" that the arguments are inconsistent is not self-evident from the "court record," i.e., the appellate brief filed in *Morning Star*. Nor does subdivision (h) apply: facts in a court record that are subject to dispute are not the proper subjects of judicial notice. (2 Jefferson, Cal. Evidence Benchbook (3d ed., March 2007 Update) Judicial Notice, § 47.10, p. 1123; see Evid. Code, § 452, subd. (h); *Gould v. Maryland Sound Industries* (1995) 31 Cal.App.4th 1137, 1145-1146 [addressing requirements of subdivision (h)].)

The "fact" that the State's arguments are "inconsistent" is highly disputable and certainly cannot be immediately and accurately verified. (Evid. Code, § 452, subd. (h); see *id.*, § 453, subd. (b) [insufficient information to enable court to take judicial notice of the matter].) Whether the arguments are inconsistent obviously depends on whether

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[1] The Court did not address the arguments referenced in pages 23 through 30 or decide the issue they support.

the relevant facts of the two cases are substantially similar. NCWA does not even try to make that argument. NCWA's request for judicial notice reaches into the very heart of the conflict between the State and plaintiffs. To accept as true the fact the State's arguments are inconsistent, this Court must accept other factual characterizations of plaintiffs, including the argument that most of what the water right program does has nothing to do with the fee payers.

The water right fees at issue in the instant case are nothing like the charges imposed under Health & Safety Code section 25205.6. The revenue collected under section 25205.6 funds a broad range of hazardous waste control programs overseen by the Department.[2] None of these various programs have any particular tie to the businesses paying the fee. The charge was imposed on "virtually all corporations with 50 or more employees" (*Morning Star, supra,* 38 Cal.4th at p. 329), regardless of whether the business activity engaged in required a permit from the Department, was subject to substantial regulation, or was substantially responsible for the problems addressed by the various programs funded. In contrast, the water right fee pays for the state's water right program, a coherent program that spends all but a de minimis amount of its resources regulating the permitted and licensed state water rights under

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[2] The funds pay specified costs of removal and remediation under the federal Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Health & Safety Code, § 25205.6, subd. (g)), and support programs such as the state's hazardous substance response authority and DTSC's Human and Ecological Risk Division, the Hazardous Materials Laboratory, and the Office of Pollution Prevention and Technology Development. (§ 25205.6, subd. (g)(2); § 25173.6, subd. (b).)

which the fee payers use and divert water.

Because the facts of *Morning Star* are completely different, the arguments presented in the request for judicial notice do not "demonstrate[] that the State has taken inconsistent positions with regard to the tax/fee distinction," would not "invalidate the charges at issue in the instant litigation" (Motion, p.2), and generally provide no assistance whatsoever in resolving the issues presented. (NCWA's Answer to Legislature's Amicus Brief, p. 6.) Not surprisingly, the application of a rule to a different set of facts results in a different conclusion.

II.

The material is irrelevant.

For the same reasons, the material is irrelevant. "No evidence is admissible except relevant evidence." (Evid. Code, § 350.) Consequently, "it is reasonable to hold that judicial notice, which is a substitute for formal proof of a matter by evidence, cannot be taken of any matter that is irrelevant. . . ." (*People v. Rowland* (1992) 4 Cal.4th 238, 268, fn. 6, quoting 12 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Judicial Notice, § 47.1, p. 1749.) The selected pages cannot be a "source of pertinent information" (Evid. Code, § 454, subd. (a)(1)) and will not "provide the Court with a more complete and accurate picture of the matters at issue in this appeal" (Motion, p. 3) because the facts of the case are completely different from those of the case at bar.

Nor does NCWA claim judicial estoppel. The doctrine of judicial estoppel prevents a party from asserting a position in one legal proceeding that is contrary to a position previously taken in the same or a prior proceeding. (*Jackson v. County of Los*

Angeles (1997) 60 Cal.App.4th 171, 181.) The two positions must be totally inconsistent so that one precludes the other. (*Id.* at pp. 182-183.) Judicial estoppel "preclude(s) litigants from playing 'fast and loose' with the courts" to gain an advantage. (*People v. Torch Energy Services, Inc.* (2002) 102 Cal.App.4th 181, 189 [citations omitted].)[3] Not only does NCWA fail to show that the positions are inconsistent, it fails to show that the parties are the same. Agencies of the State of California are separate legal entities and cannot bind each other in litigation. (See e.g., *People v. Hy-Lond Enterprises, Inc.* (1979) 93 Cal.App.3d 734, 751-752 [rejecting proposition that California is a single entity and a judgment obtained in its name is final and binding on all its agencies].)

The pages from the *Morning Star* brief have only one use here: to impugn the credibility of the Office of the Attorney General and the California State Legislature. NCWA uses the material to attack the Legislature's honesty: "The Legislature's arguments to the Court here are convenient and fabricated in order to meet it's [sic] needs today." (NCWA's Answer to Legislature's Amicus Brief, p. 6, fn. 3.) And the only reason to include the conclusion and signature block on page 43 was to demonstrate the identity of the deputy attorney general who signed the brief.

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[3] The only party playing "fast and loose" with the courts is NCWA. Having argued the SWRCB had absolutely no authority to regulate water rights held under some other basis of right than permit and license at trial (Reporter's Transcript Hearing on Writ of Mandamus Held on Friday, April 15, 2005, pp. 14:27 to 15:25), it argues on appeal that the SWRCB expends substantial resources regulating such rights (e.g., NCWA's Answer to the California Legislature's Amicus Brief, p. 9).

III.

The untimeliness of the request supports the State's position.

The untimeliness of the request underscores its lack of relevance and inappropriateness. NCWA requests judicial notice in response to an amicus brief after all briefing on the merits has concluded. The decision in *Morning Star* was published in early 2006; the state's brief (in .pdf format) has been accessible on Westlaw at least as long. NCWA does not explain why, when it groups all state entities together as one legal entity, it did not make this request sooner.

CONCLUSION

For the reasons stated, the Court should deny the motion.

Dated: November 2, 2007

Respectfully submitted,

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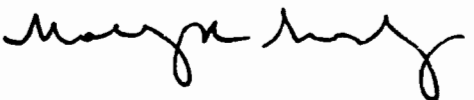

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CERTIFICATION OF WORD COUNT

The text, including footnotes, of the State's Objection to NCWA's Request for Judicial Notice consists of 1,623 words according to the word processing program used to prepare the brief.

Dated: November 2 , 2007

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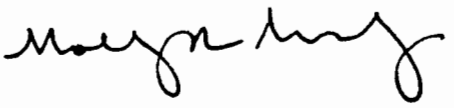

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **California Farm Bureau Federation v. SWRCB**

No.: **S150518**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On November 2, 2007, I served the attached **OBJECTION TO NCWA'S REQUEST FOR JUDICIAL NOTICE** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on November 2, 2007, at Sacramento, California.

D. Burgess	D. Burgess
Declarant	Signature

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