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.

S 150518

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

STATE'S ANSWER TO FARM BUREAU'S PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

Under California Rules of Court, Rule 8.500, the California State Board of Equalization (BOE) and the California State Water Resources Control Board (SWRCB) (SWRCB and BOE, collectively, the State) submit the following Answer to the California Farm Bureau Federation's Petition for Review.

The Court of Appeal denied the State's Petition for Rehearing on February 16, 2007, without modifying the judgment. While upholding the challenged fee statutes, section 1525 et seq. of the Water Code, the Court of Appeal struck the SWRCB's regulations, sections 1066 and 1073 of the California Code of Regulations, title 23, based on its determination that the fee allocation established by the regulations was unconstitutional and invalid.

ISSUES PRESENTED

1. Does a court have the power to fashion a refund remedy for all those persons who paid an illegal fee, regardless of whether those persons have followed the statutory administrative process for claiming a refund and, having filed a timely action seeking a refund, are properly before the court?

2. If this Court grants the State's Petition for Review of the Court of Appeal's decision striking down the SWRCB's regulations, should the Court also grant review to consider the constitutionality of the governing statute, Water Code section 1525?

3. If this Court grants the State's Petition for Review, should this Court grant review "to clarify, to the extent any potential ambiguities exist, that the Court of

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Appeal's decision cannot be construed to conclude that the minimum fee [of $100] may be 'reasonable'. . . ."? (Farm Bureau Petition for Review, p. 4.)

STATEMENT OF THE CASE

The SWRCB and its Division of Water Rights are responsible for the regulation of water rights in California. New legislation that took effect in fiscal year 2003-2004 aimed to shift most of the burden of water right regulation from the General Fund to the regulated community of state water right permit and license holders by enacting new, annual permit and license fees and revising the existing filing fees. (Slip op., pp. 2, 13.) The activities potentially subject to fees under Water Code section 1525 represent essentially all of the SWRCB's water rights program. All of these fees are deposited in the Water Right Fund. (Wat. Code, § 1525, subd. (d)(1); *id.*, §§ 1550, 1551.)

The total cost of the water rights regulatory program for fiscal year 2003-2004 was about $9 million. (Slip op., p. 21, fn. 16.) To implement the fee-based funding in fiscal year 2003-2004, the law required SWRCB to adopt emergency regulations immediately (slip op., p. 21) to collect a budget "target" for the Water Right Fund of about $4.4 million. (Appendix 2341-2342.) Thus, for fiscal year 2003-2004, the new fees were intended to provide about half of the program's funding.[1]

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[1] The State disagrees with most of the "facts" contained in the Farm Bureau's statement of the factual and procedural background. Most of their statement is argument. For example, it is *not* a "fact" that because the fees are set to correlate with the cost of the regulatory program, the fees are not related to the regulatory burden. (Farm Bureau Petition for Review, p. 11.)

The SWRCB maintains records of every water right held under permit and license, and has an ongoing duty to prevent waste, unreasonable use, unreasonable method of use or unreasonable method of diversion. (Slip op., pp. 4-5.) This constitutionally-based charge includes protecting the public trust against the actions of water right holders by regulating their diversion and use of water. (Cal. Const., art. X, § 2; slip op., pp. 4-5.) The SWRCB must also act to ensure that each permittee and licensee is obeying the complex terms and conditions of the permits or licenses under which they hold their water rights. (Wat. Code, § 1825.) The SWRCB must periodically reevaluate those terms and conditions because what constitutes the most beneficial use can change over time. Because of the interlocking nature of water rights, the regulation of water rights is necessarily complex. (E.g., slip op., pp. 4-12 [describing complex system of water rights].)

The SWRCB spends most of its time regulating state permitted and licensed water right holders. The SWRCB oversees processes by which permitted water rights are perfected and licensed, and permitted and licensed water rights may be changed. (E.g., Wat. Code, §§ 1395 et seq.; 1600 et seq.; 1701 et seq.; 1825 [calling for vigorous enforcement of the terms and conditions of permits and licenses, and against diversions that are subject to the permit and license system but have not been approved].).

The SWRCB has less regulatory authority over other types of water rights. (Slip op., p. 7 [SWRCB's "core regulatory program, the administration of water right permits and licenses, does not apply" to holders of other types of water rights].) It estimates

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that it spends only a de minimus amount (about five percent) of its time regulating other types of water rights that are not subject to the annual fees. (Appendix 2298.)

After considerable review and two public workshops, the SWRCB rejected a "fee-for-service" approach as infeasible because the program is a regulatory program, and is not based on requested "services." (Appendix 2305.) Funding required a stable funding source (as opposed to sporadic filing fees). The calculation of actual costs would be difficult, if not impossible, and increase the administrative costs of the fee. (Appendix 2249:11 - 2250:24.) The SWRCB does not track fund expenses by entity; it tracks by type of work performed. (Appendix 2249:19-21, 2305.) Moreover, collecting actual costs would entail very high fees (e.g., $23,000 per application), increasing the likelihood of unauthorized diversions and a greater enforcement burden. (Appendix 2423.)

For these reasons, the SWRCB determined that annual fees most reasonably apportioned the costs of regulation and should provide most of the fee funding. (Appendix 2304-2305.) It adopted fee regulations that held one-time filing fees (e.g., application fees) relatively low to encourage voluntary filings and to reduce enforcement problems associated with unauthorized diversions. (Appendix 2423.) It set the annual fees based on the "face value" (the total annual amount of the diversion authorized by each permit and license) of the water held under the permit or license, reasoning that, in general, the more water held under the permit or license, the greater the regulatory burden (due to greater costs, greater environmental impacts, more controversial issues, and a greater number of people impacted). (Appendix 2243:17 -

2244:15.) The SWRCB initially set the annual fees at .03 cents an acre-foot, with a minimum fee of $100. (Slip op., p. 22.)[2] Seventy percent of current permits and licenses have a "face value" of less than 100 af, while 45 percent have a face value of less than 10 af. (Appendix 2242:4-12.) In setting the minimum fee, the SWRCB took into consideration the cost of billing the fees as well as an estimate of the minimum amount of time spent regulating these smaller water rights. (Appendix 2307, 2242:20-24 [explanatory testimony]; Administrative Record 2].)[3]

One problem for the SWRCB in allocating the fees was the likelihood that the United States Bureau of Reclamation ("Bureau") would refuse to pay the fees, claiming sovereign immunity. (Slip op., p. 11.) (The Bureau holds about 20 percent of all state permitted and licensed water rights because of the permits and licenses it holds for the Central Valley Project ("CVP").) The new fee statutes took this possibility into consideration. (Wat Code, §§ 1540, 1560; slip op., p. 19, fn. 15.) Pursuant to these statutes, the SWRCB decided that the fees for permits and licenses held by the Bureau

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[2] In 2004, the regulations were amended to change the way in which the fees are calculated. They were calculated as follows: "A person who holds a water right permit or license shall pay a minimum annual fee of $100. If the total annual amount of diversion authorized by the permit or license is greater than 10 acre-feet, then the permittee or licensee shall pay an additional $0.025 for each acre-foot in excess of 10 acre-feet." (Cal.Code Regs., tit. 23, § 1066, subd. (a) (2004).) In 2005, the fees were similarly calculated, but the rate per acre foot changed to reflect the required adjustment. (See Wat. Code, § 1525, subd. (d)(3).)

[3] The Court of Appeal *did not say* that the SWRCB "did not offer evidence to support that minimum fee." (Farm Bureau Petition for Review, p. 16.)

for the purpose of water delivery could, by regulation, be passed through to the CVP contractors who have the contractual right to the water developed under those permits and licenses, subject to certain discounts. (Cal. Code Regs., tit. 23, §§ 1071, 1073; Appendix 2332 [main purpose of CVP is to supply water]; see Appendix 2322 et seq. [examples of contracts]; slip op., pp. 24-25 [describing the regulatory allocation to the CVP contractors].)

Together, sections 1066 and 1073 of the California Code of Regulations, title 23, impose fees on about 60 percent of all water held under water rights (and all of the water held under water rights subject to the core regulatory program). The regulations impose annual permit and license fees on all permits and licenses, either directly (section 1066) or by passing the fees through to the federal water contractors (section 1073). As it does for many other fee programs, BOE acts as the SWRCB's collector for the annual fees, but it does not have any authority to review SWRCB's fee determinations. (Slip op. p. 51.)

After the denial of their petitions for reconsideration challenging the fees, persons subject to the annual permit and license fees filed lawsuits against SWRCB and BOE to challenge the constitutionality of the statutes and the validity of the regulations. With each subsequent year's imposition of the fees, the fee payers have filed duplicate actions to challenge the fees and to obtain refunds. All of the actions have been stayed pending the outcome of this consolidated action.

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The consolidated action (brought as writs of administrative mandate and complaints for declaratory relief) alleges that the fee statutes and regulations are unconstitutional because they fail to meet the test for a valid regulatory fee. Plaintiffs/petitioners below ("Plaintiffs") contend: (1) the fees collected exceed the regulatory program costs they are designed to support; and (2) there are insufficient facts to support the basis for determining the manner in which the costs are apportioned, so that charges allocated have not been shown to bear a fair or reasonable relationship to the payer's burdens on or benefits from the regulatory activity. (Slip op., p. 26.) Plaintiffs allege, among other things, that requiring state permit and license holders to pay for most of the program, when 40 percent of all water rights in the state are held under other types of rights, is not reasonably related to the burden imposed or the benefits received. They also allege that the SWRCB's fee schedule is invalid because it is not based on actual costs. Finally, Plaintiffs allege that the pass through of fees associated with the CVP to the water supply contractors violates the Supremacy Clause of the United States Constitution.

In 2005, the trial court entered its judgment denying the consolidated petitions for writ of mandate and complaints for declaratory and injunctive relief. Giving deference to the agency's factual findings and considerations in allocating the fees, the trial court found that the SWRCB satisfied the requirements of law in developing its fee structure. (Appendix 3364.)

In January 2007, the Court of Appeal issued its opinion upholding the fee statutes but striking down the regulations based on its determination that the fee

allocation established under the regulations failed to meet the second prong of the test this Court set out in *Sinclair Paint Co. v. State Bd. of Equalization et al.* (1997) 15 Cal.4th 866 (*Sinclair Paint*). (Slip op., pp. 30, 43, and 44.) Although the Court of Appeal held that the statutes imposed valid regulatory fees (slip op., p. 29), it invalidated the water right fee regulations because (1) section 1066 violates the California Constitution, article XIII A, section 3 (Proposition 13) by failing to show the basis for apportioning costs as between fee payers subject to annual permit and license fees and other types of water right holders who are not regulated pursuant to the permit and license system (but who "benefit" from the regulatory program) (slip op., pp. 40-43); and (2) the allocation of most of the Bureau's fees to the federal water contractors under section 1073 violates the Supremacy Clause because the SWRCB failed to determine what share of the costs of regulating the CVP should be allocated to the contractors (slip op., pp. 44-45).

The Court remanded the case to the trial court with instructions to stay further proceedings before the SWRCB and BOE and to maintain the existing fee schedule until a new fee schedule is adopted.

REASONS FOR DENIAL OF THE PETITION

While this Court should grant the State's Petition for Review for the reasons stated therein, the Farm Bureau's petition presents no real conflicts or otherwise important issues of law. The Court need not re-litigate minor points that were properly resolved by the Court of Appeal.

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I.

Courts do not have the power to fashion a refund remedy out of thin air when the Legislature has provided the remedy.

In striking down the SWRCB's regulations, the Court of Appeal stated that only persons or entities who paid annual fees and filed timely petitions for reconsideration [which together, the court noted, constituted a "claim for refund"] (slip op., p. 52) were entitled to receive a refund.[4] The Farm Bureau claims, however, that the requirement of the exhaustion of administrative remedies conflicts with (1) "well-established California law" that does not require exhaustion if the agency from which relief is sought lacks the authority to determine any constitutional issues raised; (2) "the plain language" of the "relevant" statute mandates the refunds and does not require the filing of a petition for reconsideration; and (3) the Takings Clause in the United States and California Constitutions requires the return of illegally collected fees. (Farm Bureau Petition for Review, p. 18.)

A. The issue of whether administrative exhaustion is required even if the agency cannot grant the relief requested is not presented.

The Farm Bureau argues that administrative exhaustion is not required here because the SWRCB does not have the power to grant the relief sought: i.e., to receive a refund based on the *statute's* unconstitutionality, because it has no authority to rule a statute unconstitutional. (Farm Bureau Petition for Review, p. 19.) But that issue is

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[4] There is *no* language suggesting that, to receive a refund, persons must "now file claims for refunds with the BOE." (Farm Bureau Petition for Review, p. 5.)

not presented by this case. The Court of Appeal upheld the statute; it struck down the *regulations*. While a petition for reconsideration to obtain a refund is not the proper method for challenging the adoption of the regulations, the SWRCB has the authority to declare the regulations unconstitutional "as applied" to the fee payer. (Wat. Code, § 1537, subd. (b)(4) [review by writ of administrative mandate not appropriate for review of the adoption of regulations].) Moreover, the petition for reconsideration can bring flaws in the regulations (and statutes) to the SWRCB's attention; certainly, the SWRCB has the authority to recognize that its own regulations are unconstitutional (or otherwise flawed). Thus, the Court of Appeal properly limited the refund to parties who exhausted their administrative remedies, in accordance with settled law. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292-293; *Patane v. Kiddoo* (1985) 167 Cal.App.3d 1207, 1214; see *Modern Barber Colleges, Inc. v. California Employment Stabilization Comm.* (1948) 31 Cal.2d 720, 725-726 [due process clause does not guarantee the right to judicial review of tax liability before payment].)

B. It is well established that exhaustion of administrative remedies is a jurisdictional prerequisite where mandated by statute.

Regardless of whether a challenge is to the constitutionality of the statutes or the validity of the regulations, however, the Farm Bureau identifies no conflict of law on the issue of whether a fee payer can bypass an administrative process mandated by statute. "[I]t has long been the law in this state that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy

exhausted before the courts will act." (*Marquez v. Gourley* (2003) 102 Cal.App.4th 710, 713 [citing *Abelleira v. District Court of Appeal, supra,* 17 Cal.2d at p. 292 and other cases].) The exhaustion of administrative remedies "is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts. . . . [E]xhaustion of the administrative remedy is a jurisdictional prerequisite to resort to the courts." (*Abelleira v. District Court of Appeal, supra,* 17 Cal.2d 280, 293 [italics in the original].)

Here, most notably, the requirement to exhaust administrative remedies is *mandated by the statute*. (Wat. Code, § 1537, subd. (b)(2)-(3).) No refund may be issued by BOE unless "the determination has been set aside by [the SWRCB] or a court *reviewing the determination* of [the SWRCB]." (*Id.*, § 1537, subd. (b)(3).) A petition for reconsideration is *required* to exhaust administrative remedies in cases where, as here, the decision is issued under authority delegated to an officer or employee of the SWRCB. (*Id.*, § 1126, subd. (b).)[5] The actual fee bill sent out by BOE is the "Notice

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[5] The Farm Bureau claims that the Court of Appeal ordered refunds to persons who "filed timely petitions for reconsideration with the SWRCB (whether on behalf of themselves or as associations on behalf of their members). . . ." (Farm Bureau Petition for Review, p. 5.) This is not true: the Court of Appeal did not order the payment of refunds, if any, to members of associations who did not file valid petitions for refund. The Farm Bureau did not raise the issue of the validity of its petition for reconsideration in its opening brief or its reply brief to the Court of Appeal. Consequently, the Court of Appeal did not rule on this issue. The Farm Bureau does not seek review here, but Respondents wish to preserve their objection to the Farm Bureau's mistaken assumption.

of Decision" by the Division of Water Rights setting that person's fee based on the regulations and the SWRCB's database. (CATA, p. 172 and fn. 5.)[6] Consequently, the judicially developed rule of exhaustion of administrative remedies (and the exceptions thereto) have no application here, where the Legislature has provided the manner of proceeding. (*Patane v. Kiddoo, supra,* 167 Cal.App.3d at p. 1214.)

There are other reasons for requiring the exhaustion of administrative remedies. An exception that allowed litigants to avoid the requirement to exhaust administrative remedies by stating a constitutional cause of action would swallow the general rule. Under such reasoning, a litigant challenging the constitutionality of a statute enforced by the agency should skip the superior court and go directly to the appellate court, since the agency must continue to enforce a statute until an *appellate* court – not the superior court – has declared the statute unconstitutional. (Cal. Const., art. III, § 3.5(a).)

The SWRCB determined that the state and county farm bureaus and their *unnamed*, individual members did *not* file petitions for reconsideration. (Clerk's Augmented Transcript on Appeal (CATA), pp. 173-175; [SWRCB Order WRO 2004-0010 - EXEC, pp. 5-7].) The SWRCB refused to accept the Farm Bureau petition to the extent it purported to seek review of any fee determinations other than those of the eight specifically named fee payers. (CATA, p. 174.) Clearly, persons who did not file valid petitions for reconsideration are not entitled to a refund.

Similarly, persons who filed a timely petition for reconsideration but did not timely seek judicial review of the SWRCB's denial of the petition are not entitled to any refund because the decision has become final and, by statute, is not subject to judicial review: "If no aggrieved party petitions for a writ of mandate within the time provided by this section, the decision or order of the board is not subject to review by any court." (Wat. Code, § 1126, subd. (d).)

[6] Although the initial Notices of Determination (e.g., CATA, p. 142) incorrectly specified the procedure for seeking a refund, BOE immediately sent out a correction. (CATA, pp. 172-173, fn. 5.)

Moreover, a petition for reconsideration must contain certain information, including the specific order or decision for which it seeks review. (Cal. Code Regs., tit. 23, §§ 769, 1077.) This specificity is required "to enable the SWRCB to know exactly which fee determinations are before it, for purposes of its own review, for purposes of notifying BOE which bills to adjust. . . and for purposes of judicial review." (CATA, p. 173.)[7] To allow a fee payer to bypass the specific administrative refund procedures required would deprive the agency of stability and certainty regarding its funding and financial planning.

In addition, an agency might make relevant factual findings regarding the fee as applied to that particular fee payer, as it did here. (E.g., CATA, p. 191.) The SWRCB can check the fee calculations and the facts, and in response to meritorious claims, direct BOE to refund or cancel fees, as appropriate.

Under the Farm Bureau's theory, an administrative agency would have to bear the burden of trying to identify exactly who is subject to a court's order and, in a factual vacuum, determine the proper refund and recipient. It is the agency that would be unreasonably burdened, not the court system. It is incredible to assert that the court system would "have to bear the burden of more than 7,000 petitions for a writs [sic] of mandate" (Farm Bureau Petition for Review, p. 22) under the rule; as evidenced by this consolidated litigation, it is possible to bring one writ of mandate that covers numerous

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[7] Parties to the consolidated actions who are petitioners for reconsideration are set forth in the attachments to the SWRCB's orders on the petitions for reconsideration. (See Appendix, p. 297 et seq. and fn. 1; Admin. Record, pp. 3106-3114, 3170-3172, 3143.)

petitioners. (See Appendix, p. 297 et seq. and fn. 1; Admin. Record, pp. 3106-3114, 3170-3172, 3143.) No court can fashion a remedy for the fee payers who are not properly before it. (*Jordan v. Department of Motor Vehicles* (1999) 75 Cal.App.4th 449, 466-468.)

In sum, it is well-established that review of the SWRCB's determination regarding a refund may not be had absent exhaustion of administrative remedies. The Farm Bureau has failed to state any grounds for review of the decision on this basis.

C. The provisions of Revenue and Taxation Code section 55221 are not applicable.

The Farm Bureau argues that the "plain language" of the relevant statutes mandates the refund of illegal water right fees to all who paid them. All of the Farm Bureau's arguments are based on the mistaken presumption that Revenue and Taxation Code section 55221 is applicable to claims for refund of the water right fees, which it is not.

The applicable statutes are in the Water Code. Water Code section 1537 provides that BOE "shall *collect* the fees pursuant to the Fee Collection Procedures Law [Rev. & Tax. Code, § 55001 et seq.]." (Wat. Code, § 1537, subd. (b)(1) [italics added].) "*Notwithstanding* the *appeal* provisions in the Fee Collection Procedures Law," however, a fee determination by the SWRCB is subject to review under Water Code section 1120 et seq. (*Id.*, § 1537, subd. (b)(2).) And finally, "[n]otwithstanding the *refund* provisions of the Fee Collection Procedures Law," BOE cannot accept any

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claim for refund unless that determination has been set aside by the SWRCB or a court reviewing the SWRCB's determination. (*Id.*, § 1537, subd. (b)(3).)

Accordingly, the Court of Appeal found that section 55221 is not applicable. (Slip op., p. 19 ["the BOE has no role in reviewing refund claims under section 1537 or the emergency regulations"].) It found that the governing statutes in the Water Code limited BOE's typical role under the Revenue and Taxation Code:

> As we explained, the SWRCB contracts with the BOE to collect and refund annual fees. Sections 1126 and 1537 and regulations 1074 and 1077 limit the BOE's typical role under the Fee Collection Procedures Law (Rev. & Tax. Code, § 55001 et seq.). Thus it is for the SWRCB, not the BOE, to determine whether "a person or entity is required to pay a fee" and whether the amount of the fee was incorrectly calculated. (Cal. Code Regs., tit. 23, § 1077, subd. (c)."

(Slip op., pp. 51-52 [footnote omitted].)

Further, the Court of Appeal found that review of a water right fee refund determination is "by writ of mandate in the superior court, not by petition for redetermination by the BOE." (Slip op., p. 52.) It also recognized that BOE is "authorized to accept a refund claim only after the SWRCB or a reviewing court has set the fee determination aside." (Slip op., p. 52, citing Wat. Code, § 1537, subd. (b)(3).) Accordingly, the Court of Appeal ordered refunds only to "persons and entities who paid annual fees and filed petitions for reconsideration" which together constitute a "claim for refund" under the regulations. (Slip op., p. 53.)

Of course, any party may seek prospective, declaratory relief to have the statutes or regulations declared invalid without exhausting administrative remedies. (Wat. Code, § 1537, subd. (b)(4); see Govt. Code, § 11350, subd. (a); see *Pacific Motor*

Transport Co. v. State Bd. of Equalization (1972) 28 Cal.App.3d 230 [allowing prepayment declaratory action to test the validity of a tax regulation subject to the rulemaking provisions of the California Administrative Procedure Act].) As the Court of Appeal notes, Water Code section 1537, subdivision (b)(4) "provides that the administrative adjudication provisions of section 1126 shall not be construed to apply to the adoption of quasi legislative regulations pursuant to section 1530." (Slip op., p. 19.)

Here, Appellants combined a writ of administrative mandate seeking a refund of the water right fees with an action for declaratory relief seeking to strike down the statutes and regulations as invalid. (See e.g., CATA, p. 1.) Only those named individuals who filed valid petitions for reconsideration and exhaust their administrative and judicial remedies through the statutory procedures for a refund claim may be entitled to the remedy of a refund.

D. The Takings Clause is not implicated by the requirement of the exhaustion of administrative remedies.

Again, the Farm Bureau misconstrues the issue. Some fee payers may not receive a refund under the Court of Appeal's decision because they failed to exhaust their administrative remedies. An exhaustion requirement is not a "taking." "[A] constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*Yakus v. United States* (1944) 321 U.S. 414, 64 S.Ct. 660, 677; accord, *Walker v. Birmingham* (1967) 388 U.S. 307, ~~87 S.Ct. 1824~~, *Metcalf v. Los Angeles* (1944) 24

Cal.2d 267, 269.) If the Takings Clause is not violated by the requirement of administrative exhaustion in tax cases, why would it be violated by an analogous requirement for fee cases?

The cases the Farm Bureau relies on in this regard have nothing to do with a requirement to exhaust administrative remedies. No case law supports Appellants' argument that the Takings Clause requires payment of a blanket refund in the absence of the exhaustion of administrative remedies.

In *San Remo Hotel v. San Francisco,* this Court held that "the taking of money is different, under the Fifth Amendment, from the Taking of real or personal property. The imposition of various monetary exactions – taxes, special assessments, and user fees – has been accorded substantial deference." (*San Remo Hotel v. San Francisco* (2002) 27 Cal.4th 643, 664.) For example, in *Webb* (one of the rare cases to find that a fee amounted to a taking), the Court held that "under the narrow circumstances" present, it was unconstitutional for a county to take the interest accruing in an interpleader fund when it already charged a fee for the county court clerk's services in receiving money into the account. (*Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155, 164.) By double-dipping, the county's charge was *arbitrary.* (Compare *id.* at p. 164 with *Fresno Fire Fighters Local 753 v. Jernagan* (1986) 177 Cal.App.3d 403, 412 [upholding county's use of interest accrued on bail bonds to cover court administrative and security costs, distinguishing *Webb's*].)

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Appellants apparently believe, however, that the imposition of fees under Proposition 13 is somehow entitled to some higher standard of review. Given the instability the decision creates in the law, and the importance of fee revenue to the state, this Court should grant review, but not to determine whether administrative exhaustion is necessary for to obtain a refund. This Court should grant review for the reasons stated in the State's Petition for Review.

II.

The second "issue" -- whether the Court should grant review to consider an alternative basis for striking down the fees -- is based on an alleged concession that doesn't exist.

The Farm Bureau's only argument in support of its request that the Court grant review to consider the constitutionality of the statute as an alternative basis for striking down the fees is that the State's arguments in their Petition for Rehearing concede the unconstitutionality of the statute. The Respondents deny that they "essentially concede that Water Code section 1525 is unconstitutional 'on its face,' not merely 'as applied' through the regulations." (Farm Bureau Pet. for Review, p. 8.)

The State does, however, construe the statute differently from the Court of Appeal. All assert that the statute itself requires the SWRCB to set the annual fees and filing fees provided for in section 1525 "so that the total amount of fees collected pursuant to this section" is enough to recover the costs of the water right program activities, as set forth in the annual Budget Act for these activities. (Wat. Code, § 1525, subd. (c) and (d)(3); Farm Bureau Petition for Review, p. 30.) The Budget Act provides that the program is funded in part by an appropriation from the Water Rights

Fund (the fund into which the fee revenues are deposited) and the SWRCB must set fees in the amount necessary to support that appropriation. (See Wat. Code, § 1551.) But the Court of Appeal (erroneously) assumed the "activities" these fee revenues are to support are set forth specifically somewhere else in the Budget, as opposed to the appropriation from the Water Rights Fund, and that the "activities" listed in section 1525 do not include activities related to non-permitted and licensed water right holders. (Slip op., p. 34, fn. 21, Appendix, 2341-2342 [Budget Act from Administrative Record].)[8]

Review of the issues presented by Respondents in this case would necessarily include construction of the governing statutes. While this Court should grant review for the reasons stated in the State's Petition for Review, it should not do so under the premise that Respondents concede the statute's unconstitutionality. They do not.

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[8] The Court of Appeal's discussion of the Budget in footnote 21 of the Slip Opinion is not clear as to how the court believes the budget detail that it claims exists (but was not in the record) breaks down the water rights program by activity. Based on the Court of Appeal's discussion of the fee schedule formula set by regulation, it appears that the Court of Appeal believes the budget is broken down to distinguish activities that "benefit" permit and license holders from activities that "benefit" holders of riparian and pre-1914 rights. (See Slip. op., pp. 40-41.) It is unclear how the Court of Appeal came to that view. No party argued that the budget includes that information, and the regulatory activities that protect prior rights holders protect both kinds of prior right holders (both permittees and licensees with prior rights and holders of prior water rights not requiring a permit and license).

III.

The Farm Bureau's request for this Court to grant review to "clarify" whether the Court of Appeal determined the minimum fee to be reasonable is based on false premises.

The Farm Bureau asserts that if this Court grants review, "this Court also should grant review to clarify that the Court of Appeal's determination that the $100 minimum fee was not necessarily an "unreasonable estimate" of an appropriate fee is not a ruling that the minimum fee is "reasonable" -- which Respondents contend, but Appellants dispute." (Farm Bureau Petition for Review, p. 31.) The Farm Bureau claims that "such a ruling would be contrary to the very cases upon which the Court of Appeal relied in holding that the challenged fees are illegal." The Farm Bureau suggests that this conflict with Supreme Court precedent warrants review. Once again, the premise upon which the Farm Bureau bases its argument is false.

The Farm Bureau suggests that the Court of Appeal (1) did not clearly state that the minimum fee was reasonable and (2) that its opinion cannot be construed to find the minimum fee reasonable because it struck down the regulation for the lack of "sufficient evidence to satisfy its burden to show that costs were properly apportioned. . . ." (Farm Bureau Petition for Review, p. 32.) The Court of Appeal very clearly upheld the allocation of fees *among* the annual fee payers as reasonable, stating:

> [W]e reject plaintiffs' argument there was an inequitable apportionment of fees among the designated annual fee payers. Although 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 op., p. 43.) The Court of Appeal did *not* find that the SWRCB had not presented evidence; it found that the SWRCB had not presented evidence of *actual costs*. All things considered, the Court of Appeal held that the minimum amount of $100 was a *reasonable estimate*, but did not require the SWRCB to demonstrate "actual costs."[9] Accordingly, the opinion needs no clarification.

Second, the Court of Appeal's determination that the allocation *among* the permittees and licensees was reasonable has nothing to do with its holding that the allocation of the regulatory program cost *between* these designated annual feepayers and the non-paying water right holders was unsupported. The Court of Appeal struck down the regulation because the SWRCB failed to show that "the services *and* benefits provided to the *non-paying* water right holders were de minimis." (Slip op., p. 41 [italics added].) That is, having the permit and license holders pay for most of the regulatory program was not reasonable (according to the Court of Appeal) because the SWRCB had not shown that the non-paying water right holders received little *benefit* from the regulation. Thus, the Court of Appeal held invalid the allocation as *between*

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[9] The Court of Appeal's statement that the annual fee was based on an estimate of the cost of merely billing the fees, as opposed to an estimate of the *minimum cost of the regulation*, conflicts with the SWRCB's findings in the administrative record. (Compare slip op., pp. 21 and 43 with Admin. Record 2 ["the minimum fee of $100 is adequate to cover the cost of processing the fee, the water use reports that water right holders are required to submit and any notices that the Division is required to provide to the water right holder"].) Either way, however, the SWRCB has provided an adequate justification for the minimum fee.

the fee paying water right holders (those subject to the SWRCB's annual permit and license fee) and the non-paying water right holders.

In claiming that no evidence supports the minimum fee and that the evidence does not support the conclusion that the fee is reasonable (Farm Bureau Petition for Review, pp. 32-34), the Farm Bureau simply wants to rehash an evidentiary issue. The evidence, however, does support the minimum fee. The SWRCB justified the fee as follows: "the minimum fee of $100 is adequate to cover the cost of processing the fee, the water use reports that water right holders are required to submit and any notices that the Division is required to provide to the water right holder." (Administrative Record, p. 2.) The SWRCB set the amount in the context of its rationale for the entire fee schedule and the universe of water right holders subject to the SWRCB's permitting and licensing authority. (See Statement of the Case, *supra*, pp. 3-5 [discussing the reasons for the allocation].)

The mundane evidentiary issue presented by the Farm Bureau is not worthy of this Court's review. But the issue of the standard of review applied to agency rule making in the context of a Proposition 13 challenge is. The Court of Appeal analyzes the statutes as though they impose regulatory fees and upholds them. But it analyzes the regulations as though they impose benefit fees, requiring the government to demonstrate that the non-paying water right holders received only a "de minimus" benefit. This important issue of law, the proper interpretation of *Sinclair Paint* in the context of fee regulations, merits this Court's review for the reasons stated in the State's Petition for Review.

CONCLUSION

The State urges this Court to grant the State's Petition for Review on the grounds stated therein. However, for the reasons stated above, the Farm Bureau has not established grounds for review of the issues it presents. The Farm Bureau's petition should, therefore, be denied.

Dated: March 14, 2007

Respectfully submitted,

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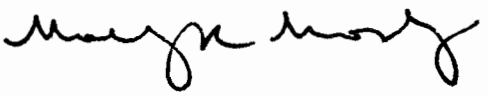

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CERTIFICATION OF WORD COUNT

The text of the State's Answer to the California Farm Bureau's Petition for Review consists of 7,054 words according to the word processing program used to prepare the brief.

Dated: March 14, 2007

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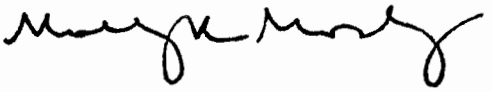

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DECLARATION OF SERVICE BY OVERNIGHT COURIER AND HAND-DELIVERY

Case Name: **California Farm Bureau Federation et al. v. California State Water Resources Control Board, et al.**

No.: **S 150518**

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; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On March 15, 2007, I served the attached **STATE'S ANSWER TO FARM BUREAU'S PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with the **Golden State Overnight**, 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 March 15, 2007, at Sacramento, California.

D. Burgess
Declarant

D. Burgess
Signature