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 THE NORTHERN CALIFORNIA WATER ASSOCIATION'S PETITION FOR REVIEW

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ANSWER TO PETITION FOR REVIEW

Under California Rules of Court, Rule 8.500 et seq., 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 Northern California Water Association, et al.'s (NCWA'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. Whether Water Code section 1525 et seq., requiring adoption of regulations establishing a regulatory fee structure to fund the State Water Resources Control Board's (SWRCB) Division of Water Rights, is unconstitutional for the following reasons:

a. the statutory scheme does not permit the adoption of regulations that can meet constitutional requirements;

b. water rights are a type of real property right, ipso facto, a statutory scheme imposing a charge related to those real property rights imposes an unconstitutional ad valorem tax on real property;

c. the statutory scheme permits imposition of an unlawful tax on the United States; and

d. this state statutory scheme creates "new federal law" by permitting the pass-through of a regulatory fee imposed on the United States to contractors with the United States.

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2. Whether the State has provided sufficient evidence to demonstrate that a minimum $100 fee bears a fair or reasonable relationship to the fee payer's burdens on or benefits from the regulatory activity.

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; Wat. Code, § 1525 [providing for new fee schedule of annual permit and license fees and filing fees].) 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, a source of funding for the SWRCB's water right program. (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.

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 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.)

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The SWRCB 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.)[1/] 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].) "Face value" is based on the numerical limitations set in the permits and licenses, and should not be confused with the amount actually available for delivery or use.

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 for the purpose of water delivery could, by regulation, be passed through to the CVP

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1. 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).)

contractors who have the contractual right to the water developed under those permits and licenses, subject to certain discounts, because the main purpose of the CVP is to supply water. (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 (including 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.

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.) Further, it found that the statutes did not violate the Supremacy Clause because they "explicitly" provide that the fees established under them apply to the United States only " . . . to the extent authorized under federal law." (Appendix 3358:15 - 3359:9.)

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 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

In its Petition for Review, NCWA makes no claim to satisfy any of the grounds for review by the California Supreme Court as set forth in California Rules of Court, Rule 8.500, subdivision (b). NCWA basically complains that the lower court erred. The correction of error, however, is not the job of the Supreme Court. With one exception, the brief makes no attempt to explain how the issues are important, whether the case has broader implications for other programs, or whether it conflicts with other cases.

I.

Error correction is not a ground for Supreme Court review.

A. The statutory scheme permits the adoption of valid regulations.

Both the State (and plaintiffs) contend 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); NCWA Petition for Review, pp. 5, 19; 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.)

The Court of Appeal's error with regard to the statutes lies in its assumption that 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]; see NCWA Petition for Review, p. 20.)

Regarding the statute's construction, the State has always construed Water Code section 1525, subdivision (c) to set forth the activities that essentially amount to the entire water rights program. The State has always construed Water Code section 1525,

subdivision (d) to direct the SWRCB to set the fees to recover a lesser amount based on that portion of the program funded through the Budget Act appropriation from the Water Right Fund. The State has not changed its position in any way or "attempted to jettison its failed position in favor of a new mix of concepts from California's regulatory fee law." (NCWA, p. 20.) Likewise, the State has always argued -- and the superior court agreed -- that the SWRCB's quasi-legislative determinations are entitled to deference. (Appendix 3358:10-14 ["References to agency discretion and deference thereto in the tentative ruling applied to the issue of the allocation of fees among payors"].) It is and has been the State's position that both Water Code section 1525 and the implementing regulations are valid because the SWRCB could validly impose most of the cost of water right regulation on the post-1914 permitted and licensed water right holders through the annual permit and license fees, should the Legislature so direct through the budget appropriation.

NCWA claims that it would be good public policy to declare the statute unconstitutional because the SWRCB will be unable to draft proper regulations due to this alleged flaw in the statute. The State appreciates their concern, but that is not a reason to grant review. If the problem were with the statute, as NCWA contends, the solution would be with the Legislature.

As the State explained in its Petition for Review, the problem is the Court of Appeal's ruling on the regulations, which changes the *Sinclair Paint* standard and conflicts with other cases in a manner that will not only make it difficult for the SWRCB to create a valid fee in this case, but also will threaten regulatory fees that support other important programs. Review of the Court of Appeal's ruling on the regulations is necessary to secure uniformity of decision and to settle an important question of law, as provided under California Rules of Court, Rule 8.500, subdivision (g)(1).

The State concurs with NCWA's contention that if the Supreme Court does not grant review, "The SWRCB will be caught in a never-ending cycle of revising fee regulations. . . ." (NCWA Petition for Review, p. 4 and fn. 2.) But the problems don't stem from the Court of Appeal's upholding of the statutes. Rather, as discussed in the State's Petition for Review, they arise from two main factors: (1) the Court of Appeal's

apparent view that under the requirements of Article XIII A, section 3 of the California Constitution, the validity of any allocation must be decided by the reviewing court, without any deference to the rulemaking agency (or to the Superior Court, when its decision is appealed); and (2) the decision changes the *Sinclair Paint* test for a valid regulatory fee.

The test for a valid fee under Proposition 13 requires the state to show (1) "the estimated costs of the service or regulatory activity, and (2) 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." (*Sinclair Paint, supra,* 15 Cal.4th at p. 878, quoting *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1988) 203 Cal.App.3d 1132, 1146 (*SDG&E*).) The SWRCB has maintained that it can validly allocate the majority of its water right regulatory costs to permitted and licensed water right holders because *it spends most of its time regulating the water rights that are made subject to the annual permit and license fees* by Water Code section 1525, subdivision (a). (Appendix 2298 [SWRCB spends only a de minimus amount of its time regulating other types of water rights that are not subject to the annual fees].)

The Court of Appeal struck down California Code of Regulations, title 23, section 1066 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* the fee paying water right holders (those subject to the SWRCB's annual permit and license fee) and the non-paying water right holders (who are not subject to the permit and license system administered by the SWRCB).

The State has *never* asserted that its regulation of permitted and licensed water rights in California is merely nominal oversight, although plaintiffs have done so and the Court of Appeal apparently agreed. (Slip op., p. 5.) Of course "the SWRCB's role in

protecting the State's water supplies for the benefit of the people of the state is significant and important." (NCWA, p. 4, fn. 4.) Ensuring that the state's water supply is protected "for the benefit of the people" requires the SWRCB to regulate water rights; that *is* the SWRCB's "regulatory function." The SWRCB protects the state's water supply for the benefit of the people, including the public trust and other interests, *through* its regulation of water rights. The "benefit" is the result of the *regulation*, not some separate action by the SWRCB having nothing to do with the regulation of water rights subject to the permit and license system administered by the SWRCB.

The SWRCB will be caught in a "never-ending cycle of revising the fee regulations" because of the inappropriate standard of review applied by the Court of Appeal. The Court of Appeal apparently believed that the deferential standard applied to the review of quasi-legislative actions was inapplicable here because "plaintiffs do not argue that the agency overstepped its quasi-legislative, rule-making authority under section 1525." (Slip op., p. 30.) The case law is very confusing about the appropriate standard of review and burden of proof in challenges to the constitutional validity of a fee under Proposition 13.

B. Whether a fee becomes an ad valorem tax merely by its association with a property right is not a substantial issue.

NCWA states it is black letter law that water rights are real property. (NCWA Petition for Review, p. 22.) Ipso facto, a statutory scheme imposing a charge related to those real property rights imposes an unconstitutional ad valorem tax on real property. This argument for the unconstitutionality of the statute is frivolous, and the Court of Appeal correctly waved it aside: "[p]otentially conflicting water right claims and uses, not real property ownership, give rise to the need for regulation through the system of permits and licenses administered by the Division." (Slip op., p. 36.) A fee charged in support of the water right program does not become a property tax merely by virtue of its association with a property right.

Many fees, if not most, are associated with a property right. Calculating the annual fee based on the total amount of water that theoretically could be diverted in any

year under the permit or license does not make the annual fee a property tax. (Cal. Code Regs., tit. 23, § 1066, subd. (a).) If it did, the fees in *Pennell v. City of San Jose* (1986) 42 Cal.3d 365 (imposed on landlords and calculated based on the number of rental units owned) would be property taxes.

Nor is a fee based on the cost of the regulatory program an "ad valorem tax" on real property. "Ad valorem property taxation" means "any source of revenue derived from applying a property tax rate to the assessed value of *property*." (Rev. & Tax. Code, § 2202; *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487, fn. 4.) The water right fees are set based on the cost of the regulation of water rights, not the assessed value of the water right involved.

C. Whether a fee violates the supremacy clause merely because it is associated with permits and licenses held by the united states is not a substantial issue.

NCWA asks this Court to reverse the Court of Appeal's ruling upholding Water Code section 1540 and 1560, allowing for the pass through of the fees associated with state water right permit and licenses held by the United States. (NCWA Petition for Review, p. 26 ["This conclusion is simply wrong"].) Correction of error is not a ground for review. The brief makes no attempt to explain how the issue is important, whether the decision has broader implications for other programs, or whether it conflicts with other cases.

NCWA's argument here is similar to its argument that the fees are void ad valorem property taxes under Proposition 13 simply because they are associated with a property right. Here, NCWA contends that because the fee cannot be imposed on the United States, it is void, and cannot be passed through to the contractors. (NCWA Petition for Review, p. 26.) "Passing on the fee imposed on the United States [sic] water rights does not at all cure the constitutional defect in the statute. The fees are still imposed on the United States [sic] water rights." (*Id.* at p. 27.) The mere association of the water right fee with the United States' property does not cause the fee to violate the Supremacy Clause, and no state or federal case supports the proposition.

Absent its consent, the federal government and its instrumentalities are absolutely immune from direct taxation by the State. The Supremacy Clause, however, does not bar a state from imposing a "tax" (as defined under federal law) in connection with property held by the United States as long as that property is *used* by a non-federal entity[2/] and it is their *use or* interest that is taxed. A state may accommodate for the fact that it cannot impose a tax on the federal government as the project owner by instead imposing a tax on the federal contractor. (*Washington v. United States* (1983) 460 U.S. 536, 543, fn. 8.)

A fee may be imposed on federal contractors' beneficial *use* of the United States' water rights equivalent to the cost of the regulation that makes that use possible. The fact that the water right is held by the United States, rather than the contractors, is irrelevant. The federal employees living in federally-owned houses on federal property in *County of Fresno* did not need to own the houses for the pass through of the state tax to be valid. (*County of Fresno* (1977) 429 U.S. 452, 466 (*County of Fresno*).) The tax could be imposed on the basis of the contractors' *use*: "The use by the contractor of federal property for his own private ends – in connection with commercial activities carried on for profit – is a separate and distinct taxable activity." (*TRW Space and Defense Sector* (1996) 50 Cal.App.4th 1703, 1711 citing *United States v. Boyd* (1964) 378 U.S. 39, 44; accord, *United States v. Nye County Nevada* (9th Cir. 1991) 938 F.2d 1040, 1042 [noting tax measures imposed on an isolated possessory interest *or on a beneficial use* of government property survived, while tax measures levied on the property itself perished]; *United States v. County of San Diego* (9th Cir. 1992) 965 F.2d 691, 695-696 [upholding ad valorem tax on federal contractor's beneficial use characterized as possessory interest in public property].)

The water right regulatory fees are imposed based on a reasonable allocation of the costs of the regulatory program that makes possible the water deliveries to which

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2. NCWA has never contended that the federal contractors are federal instrumentalities.

the contractors are entitled. As the federal contractors have a separate interest in the use of the Bureau's water subject to state permitted and licensed water rights, the "legal incidence" of the fee falls neither on the federal government nor on any federal property.

II.

NCWA'S claim that the SWRCB did not "sustain its burden to justify the $100 fee" is an evidentiary issue not worthy of this court's review; however, the appropriate allocation of the burden of proof is worthy of review.

NCWA argues that the Court of Appeal's decision upholding the fee allocation among the permittees and licensees under California Code of Regulations, title 23, section 1066, including the $100 minimum fee, is "arbitrary and capricious" because, while the court referenced "actual costs" in its discussion of the lack of evidence regarding benefits received by the riparian and pre-1914 water right holders, it upheld the $100 minimum fee without "evidence of the actual cost of billing the annual fees." (NCWA Petition for Review, p. 29.) 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."[3/] (Slip op., p. 43.)

The mundane evidentiary issue presented by NCWA is not worthy of this Court's review. But NCWA's claim that the SWRCB did not "sustain its burden to justify the $100 fee" highlights the decision's internal inconsistencies and, more importantly for purposes of this Court's review, the confusion in Proposition 13 case law regarding the burden of proof. The latter *is* an important issue of law worthy of this Court's review.

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3. 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 Court of Appeal's decision adds to the confusion regarding the burden of proof in facial challenges to state fees. Based on some language in *Sinclair Paint,* the Court of Appeal held that the burden of proof in a case challenging the constitutionality of a fee falls on the government, rather than the fee payer. (Slip op., p. 29 ["language in the [superior] court's order suggests the court erroneously placed the burden of proof on plaintiffs"].) In placing the burden of proof on the State, the Court of Appeal is only half right. It is true that if the SWRCB cannot identify sufficient evidence in the rulemaking record to support its findings of fact under the "arbitrary and capricious" standard of review, then the regulations must be found invalid. Otherwise, however, the regulations are presumed to be valid. (See generally *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 421.)

Sinclair Paint is consistent with these principles. Immediately after noting that "Sinclair has not yet sought to establish that the amount of the fees bears no reasonable relationship to the social or economic 'burdens' that Sinclair's operations generated," the court cited the general rule that "*persons challenging fees have [the] burden of establishing invalidity.*" (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 877 [italics added], citing *Sea & Sage Audubon Society, Inc.*, *supra*, 34 Cal.3d at p. 421.) The court also ended the opinion by discussing issues that Sinclair should be "permitted to attempt to prove at trial" on remand. (*Sinclair Paint*, *supra*, 15 Cal.4th at p. 881, emphasis added.) The court did not suggest any departure from traditional principles regarding the burden of proof.

The SWRCB bears the burden of proof only to the extent of providing an adequate rulemaking record for the court to determine whether the SWRCB's factual findings were arbitrary and capricious. For example, in *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, the court stated that local water district should bear the "burden of proof" as to whether a fee for water hook-ups on new construction had been reasonably allocated. (*Id.*, 165 Cal.App.3d at pp. 235-236.) But the circumstances of the case were that the court had been provided with an insufficient record to understand the basis for the allocation. (*Id.*, 165 Cal.App.3d at pp. 236-237.) Thus, the

impact of the court's holding was merely to require the agency to provide a sufficient record to explain its decision.[4/] To the extent that *Beaumont* stands for any broader shifting of the burden of proof, it has been limited to the context of development fees and otherwise questioned. (See, e.g., *Knox v. City of Orland* (1993) 4 Cal.4th 132, 147; *Brydon v. East Bay Municipal Utility Dist.* (1994) 24 Cal.App.4th 178, 191.)

Other decisions regarding fees have repeated *Beaumont*'s general statement that the government bears the burden of proof. (See, e.g., *California Assoc. of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945 [allocation method was set entirely by statute, rather than by a regulation supported by a rulemaking record] (*CAPS*).) At most, these decisions should be construed to mean that the government should bear the burden of proof regarding facts that may be within the government's own special knowledge, such as whether the total fees collected exceed the reasonable costs of the program (an issue not usually subject to dispute with state regulatory program fees, where the amount is set by the Legislature).

In claiming that the State "did not sustain its burden to justify the $100 fee" (NCWA Petition for Review, pp. 31-32), NCWA simply wants to rehash an evidentiary issue. Neither NCWA nor the Farm Bureau called this evidentiary issue to the Court of Appeal's attention by filing a petition for rehearing. (See Cal. Rules of Court, Rule 8.500, subd. (c)(2) [as a matter of policy the Supreme Court normally will accept the Court of Appeal's evidentiary determinations unless the party has called the Court of Appeal's attention to any alleged error in a petition for rehearing].)

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4. As noted in the State's Petition for Review, the Court of Appeal could find no evidence or insufficient evidence in the record to support the SWRCB's findings. (See Petition for Review, p. 13.) But the Court's findings arise from its application of the wrong standard of review, as well as its demands for specific types of evidence. (See slip op., pp. 36, 41 [requiring evidence of the both the burdens *and benefits*]; *id.*, pp. 42-43 [suggesting requirement of "actual costs" of benefits provided to riparian and pre-1914 water right holders].)

Moreover, the evidence in the record supports the minimum fee. (E.g., 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. 3-6 [discussing the reasons for the allocation].)

Consequently, whether the SWRCB sustained its evidentiary burden is a proper ground for this Court's review, but not because this Court should determine whether the Court of Appeal abused its discretion in finding the $100 minimum fee to be reasonable. Rather, this Court should grant review to identify the appropriate allocation of the burden of proof in a Proposition 13 challenge to fee regulations, for the reasons stated herein and in the State's Petition for Review.

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CONCLUSION

In short, the Court should grant the State's petition for review and deny NCWA's.

Dated: March 16, 2007

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

The text of the State's Answer to NCWA's Petition for Review consists of 6,035 words according to the word processing program used to prepare the brief.

Dated: March 16, 2007

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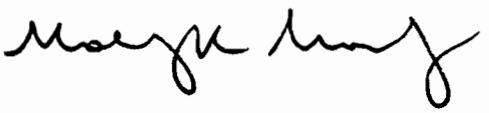

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DECLARATION OF SERVICE BY OVERNIGHT COURIER AND HAND-DELIVERY

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 19, 2007, I served the attached **STATE'S ANSWER TO NORTHERN CALIFORNIA WATER ASSOCIATION'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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Hand Delivered To:
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Third Appellate District
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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 19, 2007, at Sacramento, California.

D. Burgess
Declarant

D. Burgess
Signature