

SUPREME COURT COPY

CASE NO. S150518

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA FARM BUREAU FEDERATION, et al.,

Plaintiffs and Appellants,

v.

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD,
et al.,

Defendants and Respondents.

**NCWA PETITIONERS' REPLY
TO ANSWER TO PETITION FOR REVIEW**

After Decision by the
Court of Appeal, Third Appellate Dist., No. C050289

From Judgment
of the Sacramento County Superior Court, Case No. 03CS01776
The Honorable Raymond M. Cadei, Judge

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**NCWA PETITIONERS' REPLY TO
RESPONDENTS' ANSWER**

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California: Northern California Water Association and Central Valley Project Water Association, et al., Plaintiffs and Appellants, and Petitioners before this Court (“NCWA Petitioners”), hereby reply to Respondents State Water Resources Control Board and State Board of Equalization’s (collectively the “State”) Answer to NCWA Petitioners’ Petition for Review of the opinion of the Court of Appeal, Third Appellate District, filed January 17, 2007 (“Opinion”).

I.

**NCWA PETITIONERS' PETITION STATES
A BASIS FOR REVIEW**

“The Supreme Court may order review of a Court of Appeal decision: (1) When necessary to secure uniformity of decision or to settle an important question of law....” (Cal. Rules of Court, rule 8.500(b).) NCWA Petitioners’ Petition sets forth important questions of law that are appropriate for Supreme Court consideration. Contrary to the State’s assertion that NCWA Petitioners’ Petition fails to provide a basis for review, the State itself quotes, in support of its own Petition, NCWA Petitioners’ contention that if review is not granted, “[t]he SWRCB will be caught in a never-ending cycle of revising fee

regulations....” (State’s Answer at p. 8, quoting NCWA Petitioners’ Petition at p. 4 and fn. 2.) All Parties to this action apparently agree that this situation is a significant issue of State-wide concern and importance, substantial enough to justify Supreme Court review. Moreover, each of the issues NCWA Petitioners has identified for review raises substantial legal questions and is critical to creating uniformity in application of regulatory fee case law.

A. Review of the Constitutionality of the Statutes Is Appropriate

NCWA Petitioners request review of the constitutionality of the statutes that underlie the challenged “fees.” As NCWA Petitioners have explained, this is an important legal question of critical importance that affects water right holders and those who rely upon those rights throughout the State of California. The need for settling this important question of law has become even more apparent since the State itself has asserted that it is virtually impossible to craft regulations that comply with the Court of Appeal’s opinion, given the current statutory structure. (NCWA Petitioners’ Petition at pp. 1, 2-4, 20-21.) Indeed, the State’s Answer acknowledges that any problem that exists with the challenged fees is statutory in nature and therefore should be fixed by the Legislature. (State’s Answer at p. 8.) NCWA Petitioners agree.

The infirmities that exist with the challenged fee scheme emanate from the underlying statutes and this Court should, therefore, grant review in

order to resolve these important and substantial issues and direct the Legislature to enact constitutional statutes.¹

The Court of Appeal properly applied existing “regulatory fee” case law in striking the regulations. These unconstitutional regulations charged a small subset of water right holders for burdens caused by and benefits bestowed upon a much larger class. The unconstitutional scheme struck down by the Court of Appeal also imposed substantial charges on existing water right holders in order to subsidize applications for new water rights. The State, through its Answer to NCWA Petitioners’ Petition, reiterates that the State believes the statutes authorize and, in fact, mandate this unconstitutional scheme. (State’s Answer at p. 8.) The State’s contention, regarding the statutes, therefore simply confirms NCWA Petitioners’ position; they do not refute them.

¹ The State’s Reply to Answer to Petition for Review (“State’s Reply”), dated March 22, 2007, further demonstrates this point. The State asserts the Court of Appeal’s “problem was the allocation of the majority of program costs to the permit holders.” (State’s Reply at p. 4, citing Opinion at pp. 40-42.) The State has conceded that the statute requires the fees to fund essentially all of the water rights program. (State’s Petition for Rehearing at pp. 9, 17; State’s Answer to the Northern California Water Association’s Petition for Review (“State’s Answer”) at p. 7.) In this regard, the statute permits collection of fees only from water right permit and license holders. (Wat. Code, § 1525(a).) If the Court of Appeal is correct that the costs of the water right program are not properly allocated between fee payors and non-fee payors, and if the State is correct that the statute requires the fees imposed on permit and license holders to pay for the entire water rights program, then the statute is necessarily unconstitutional.

This Court can, and should, review the constitutionality of the statutes without passing on the question of whether the regulations are proper. The Court of Appeal properly applied the case law to determine that the regulatory scheme fails to meet constitutional requirements. That decision does not affect the question of whether the statutes are constitutional.

B. Whether the State May Impose “Fees” Based Solely Upon the Ownership of Real Property Raises an Important Question of Law

NCWA Petitioners request review of the question whether the State’s imposition of a “regulatory” fee on real property is proper. The State argues that NCWA Petitioners’ legal argument, in this regard, is frivolous. (State’s Answer at p. 10.) Notwithstanding the State’s position, as NCWA Petitioners have stated, the Court of Appeal’s opinion with respect to the nature of water rights and the State’s attempt, in this regard, to tax those rights, is contrary to well-established case law and statutory law. (NCWA Petitioners’ Petition at pp. 2, 22-25.) The State ignores this well-established body of law.

Review by this Court is appropriate to determine whether the State can impose “fees” based solely upon the ownership of real property for the sake of funding the “regulation” of that real property; and whether the State can impose ongoing charges on real property to

cover the costs associated with processing applications that are unrelated to the real property on which the charges are imposed.

In attempting to minimize the importance of this question, the State misconstrues the nature of NCWA Petitioners' Petition and thereby attempts to circumvent it by suggesting that the challenged "fees" are simply "associated with" or "related to" real property. Both the State's position and the Court of Appeal's decision, however, ignore the plain language of Water Code section 1525, which provides that the charges are based *solely* on the ownership of real property.²

The clear and unambiguous language of Water Code section 1525, subdivision (a) provides: "Each person or entity *who holds a*

² The classification of a water right as "usufructuary" is not relevant to its status as real property for the purposes of the case at bar. Indeed,

Although there is no private property right in the corpus of the water while flowing in the stream, the right to its use is classified as real property. [Citations.] The concept of an appropriative water right is a real property interest incidental and appurtenant to land. [Citations.] (*Fullerton v. State Water Resources Control Bd.* (1979) 90 Cal.App.3d 590, 598.)

Classifying appropriative water rights as real property did not change when the Legislature implemented the statewide permitting program in 1914. (See *Fullerton v. State Water Resources Control Bd.*, *supra*, 90 Cal.App.3d at p. 600 ["[the SWRCB] contends that as the term 'appropriation' was not defined in the code, the Legislature left unchanged the meaning of the term, as it had consistently developed, including its characterization as essentially a possessory right like other interests in real property. We agree."])

permit or license to appropriate water ... shall pay an annual fee according to a fee schedule established by the board.” (Emphasis added.) By virtue of “holding” the property right, that is, by simply owning property, one becomes subject to the charge. The annual fees at issue are not simply “associated” with a property right; they are imposed as an incident of ownership.

The State’s reliance on *Pennell v. City of San Jose* (“*Pennell*”) (1986) 42 Cal.3d 365, for the proposition that fees may be “associated” with a property right is inapposite. In *Pennell*, landlords were charged a per-unit fee for all rental units owned. The fees in *Pennell* were not imposed on real property as an incident of ownership. Instead, they were imposed on a business activity, i.e., renting apartments. (*Id.* at p. 375, fn. 10.)

The annual charges at issue here are imposed not on a business activity, but solely because one owns real property, and the funds collected are used for the various purposes of the Division of Water Rights, including regulating persons not subject to the annual charges. The Court of Appeal’s decision, in this regard, is inconsistent with existing case law and obliterates the distinction between taxes and regulatory fees. This Court should grant review to determine whether the State can impose a charge, under the guise of a “regulatory fee,” based solely on the ownership of real property.

C. Review of the Pass-Through of Regulatory Fees to Federal Contractors Is Appropriate

It should be without question that the creation of an entirely new method of assessing levies on the United States, by “collecting” them from federal contractors, also posits a critically important issue of law for this Court to settle. As NCWA Petitioners noted in their Petition, the Court of Appeal has created new federal law, which would allow the pass-through of regulatory fees to federal contractors. (NCWA Petitioners’ Petition at pp. 2, 26-28.) No case has ever sanctioned, under the guise of a “regulatory fee,” imposing the cost associated with regulating the United States on federal contractors. While federal case law has recognized a state’s ability to *tax* a federal contractor based upon the contractor’s possessory interest in federal property, no case law has done so with respect to purported “regulatory fees.”

The State has relied upon federal *tax* cases to support this otherwise unconstitutional scheme and, in doing so, has itself criticized the Court of Appeal for confusing taxes and regulatory fees. (State’s Petition for Review at p. 18.) The State’s Answer discusses the federal law permitting the pass-through of a tax (not a regulatory fee), and then makes a leap, not supported by any citation to authority, to conclude that federal law also permits the pass-through of a regulatory fee. The State (again ignoring the distinction between a “fee” and a “tax”) then

proceeds to discuss cases that support a pass-through of a tax. (State's Answer at p. 12.)

The State's own statements that the Court of Appeal confused the federal law regarding taxes with regulatory fee case law provides a basis for Supreme Court review of the Court of Appeal's extension of federal tax law to regulatory fees. In any event, it does not provide a basis to deny such review.

D. Review of the State's Demonstration to Support the \$100 Minimum Fee Is Appropriate

NCWA Petitioners' Petition presents the legal question of whether the State can meet its burden of demonstrating a charge is not a tax where it offers *no* evidence in support of its actions. While the State characterizes this issue as "mundane" (State's Answer at p. 13), this issue is critically important to the development of a proper, constitutional regulatory fee structure. (NCWA's Petition at pp. 3-4, and fn. 1, 2.)

The Court of Appeal's opinion thoroughly evaluates the basis for the State Water Resources Control Board's fee structure and makes clear that there is insufficient evidence to support the allocation of fees among fee payors. (Opinion at pp. 39-42.) A significant portion of the State's fee structure is comprised of the minimum \$100 fees.

Notwithstanding the fact that the Court of Appeal found that there is no

evidence to support the \$100 minimum fee, it nonetheless suggests that the \$100 fee is reasonable. (Opinion at p. 43.) This suggestion is contrary to the conclusions in the Opinion regarding the legal requirements for establishment of a lawful regulatory fee. This suggestion, therefore, creates a legal conflict that is appropriate for Supreme Court resolution.

The Court should grant review to consider the Court of Appeal's decision because, as noted, it upholds fees without any evidence whatsoever of the reasonableness of the charge. The Court of Appeal's sanctioning of fees without requiring the State to supply any evidence with regard to the benefits and burdens of the program creates a conflict with existing case law, and with the Court of Appeal's own interpretation of that case law.

In responding to NCWA Petitioners' request for review of the Court of Appeal's conclusions regarding the \$100 minimum fee, the State simply reargues its contention that the Court of Appeal applied the wrong standard of review. (State's Answer at pp. 13-16.) This reiteration is not appropriate here and NCWA Petitioners have, in any event, already addressed the State's contention that this Court should review the standard of review.

II.

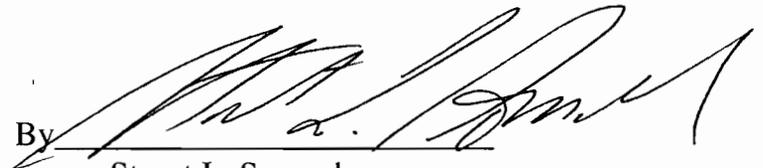
CONCLUSION

Based upon the foregoing, NCWA Petitioners respectfully request that their Petition for Review be granted.

Respectfully submitted,

SOMACH, SIMMONS & DUNN
A Professional Corporation

DATED: March 28, 2007

By 

Stuart L. Somach

Attorneys for Petitioner
Northern California Water
Association, et al.

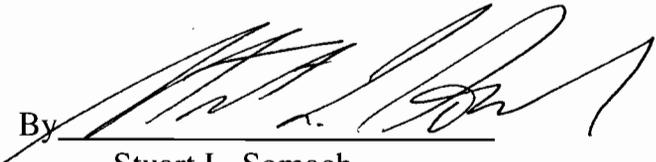
WORD COUNT CERTIFICATION

(California Rules of Court, Rule 28.1(d))

The text of Northern California Water Association, et al.'s Reply to Answer to Petition for Review consists of 2,120 words according to the "word count" feature of the Word processing program utilized in creating this document.

Dated: March 28, 2007

SOMACH, SIMMONS & DUNN
A Professional Corporation

By 

Stuart L. Somach

Attorneys for Petitioner
Northern California Water
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PROOF OF SERVICE

I am employed in the County of Sacramento; my business address is 813 Sixth Street, Third Floor, Sacramento, California; I am over the age of 18 years and not a party to the foregoing action.

On March 28, 2007, I served the following document(s):

**NCWA PETITIONERS' REPLY TO
ANSWER TO PETITION FOR REVIEW**

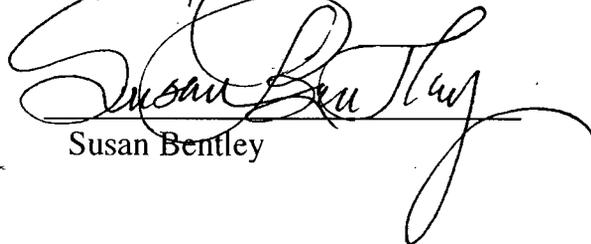
X (by mail) on all parties in said action, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At Somach, Simmons & Dunn, mail placed in that designated area is given the correct amount of postage and is deposited that same day, in the ordinary course of business, in a United States mailbox in the City of Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California. Executed on March 28, 2007, at Sacramento, California.


Susan Bentley

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