SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	**: April 26, 2005**	**DEPT. NO**	**: 25**
JUDGE	**: Raymond M. Cadei**	**CLERK**	**: Cindy Jo Miller**
REPORTER	**: none**	**CT ATTNT**	**: M. Jeremiah**

NORTHERN CALLIFORNIA WATER ASSOCIATION; CENTRAL VALLEY PROJECT WATER ASSOCIATION,
Petitioners and Plaintiffs,

vs.
Case No.- Lead Case: 03CS01776 ***(cons w/ 04CS00473)***

STATE WATER RESOURCES CONTROL BOARD; EDWARD C. ANTON, CHIEF, DIVISION OF WATER RIGHTS; STATE BOARD OF EQUALIZATION; and DOES 101 – 200,
Respondents and Defendants,

UNITED STATES OF AMERICA, BY AND THROUGH THE DEPARTMENT OF THE INTERIOR, BUREAU OF RECLAMATION,
Real Parties in Interest.

CALIFORNIA FARM BUREAU FEDERATION,
Petitioner/Plaintiffs,
vs. ***(04CS00473)***
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD,
Respondent.

COUNSEL OF RECORD:

Stuart L. Somach, Esq.
Daniel Kelly, Esq.

Matthew J. Goldman,
Deputy Attorney General

Molly Mosely, Deputy Attorney General (Board of Equalization

William L. Carter, Supervising Deputy Attorney General, (Board of Equalizaton)

David A. Battaglia, Esq.
(Ca. Farm Bureau Fed.)

Nancy N. McDonough, Esq.
(Ca. Farm Bureau Fed.)

Nature of Proceedings: **RULING ON SUBMITTED MATTER – PETITIONERS' MOTION FOR PERMPTORY WRIT OF MANDATE OF PROHIBITION (Taken Under Submission 4/15/05)**

This matter came on regularly for hearing on Friday, April 15, 2005. Stuart L. Somach appeared and argued the matter on behalf of petitioners Northern California Water Association, et al. David A. Battaglia appeared and argued the matter on behalf of petitioners California Farm Bureau Federation, et al. Deputy Attorney General Matthew J. Goldman appeared and argued the matter on behalf of respondents California State Water Resources Board, et al. The Court heard oral argument and took the matter under submission.

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Having considered the written and oral arguments of the parties and the matters in the pleadings and the administrative record, the Court rules as follows:

As a matter of clarification of the tentative ruling, the Court has exercised its independent judgment on issues of law presented by the motion as required by law. References to agency discretion and deference thereto in the tentative ruling applied to the issue of the allocation of fees among payors, as set forth in *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal. App. 4th 935.

The Court finds that the statutes implementing the challenged fees do not violate the supremacy clause of the United States Constitution by imposing a tax on the United States. Although Water Code section 1525(a) imposes a fee on "each person or entity who holds a permit or license to appropriate water", which in this case includes the federal Central Valley Project, Water Code section 1560(a) explicitly provides that "the fees and expenses established under this chapter…apply to the United States… to the extent authorized under federal law." The applicable statutes further provide that if a fee payor (such as the United States) will not pay the fee based on the assertion of sovereign immunity, the fee may be allocated to another party. (Water Code sections 1540, 1560.) The statutes therefore do not, on their face, violate the supremacy clause by imposing a tax on the United States.

With regard to the allocation of fees to Central Valley Project contractors, the Court has reviewed and considered the federal court cases of *U.S. v. Nye County* (9th Cir., 1991) 938 F. 2d 1040 and *U.S. v. County of San Diego* (9th Cir., 1992) 965 F. 2d 691, which were discussed extensively by Mr. Somach during oral argument. The Court finds that those cases dealt with pure ad valorem taxes imposed by a state or county on federal property used by private contractors, and not with the issue of whether a party that takes water under contract from the federal government for its own or commercial use may be allocated a valid regulatory fee that, but for sovereign immunity, would be assessed against the federal government. On that basis, the Court finds that the cited cases are not controlling authority holding that the regulatory fees challenged in this case are void under the supremacy clause of the United States Constitution, either on a facial basis or as applied in this case.

The tentative ruling is hereby confirmed as the final ruling of the Court, as follows: The motion for peremptory writ of mandate or prohibition is denied.

Counsel for the parties are directed to meet and confer regarding the scheduling of further proceedings in this matter and thereafter to set a status conference at a mutually-agreeable time after confirming the Court's availability with the Clerk.

Counsel for respondent is directed to prepare a formal order and judgment denying the petition for writ of mandate, submit them to counsel for petitioner for approval as to form, and thereafter submit them to the Court for signature and entry of judgment pursuant to Rule of Court 391.

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For informational purposes, the tentative ruling issues by the Court April 14, 2005 is stated below:

"The following shall constitute the Court's tentative ruling on the Motion for Peremptory Writ of Mandate and Prohibition, set for hearing on Friday, April 15, 2005. The tentative ruling shall become the ruling of the Court unless a party desiring to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

The Requests for Judicial Notice of plaintiffs/petitioners Northern California Water Association, et al., filed on February 1, 2005, and March 29, 2005, are granted. No objection has been made by respondents, and the matters contained in the Requests are proper subjects for judicial notice pursuant to Evidence Code section 452(c) as official acts of the legislative department of this State.

With regard to respondents' Request for Judicial Notice filed March 9, 2005, to which certain objections have been filed, the Court makes the following rulings:

1. The objections to Exhibits A, F, J, K and M are sustained on the ground that these materials do not fall within the scope of permissive judicial notice under Evidence Code section 452. The Request is therefore denied as to these items.
2. The objections to Exhibits B, C, D, E, G, H, I L, N P,Q R and S are sustained in part and overruled in part. These materials are subject to judicial notice pursuant to Evidence Code section 452(c) in that they are official acts of the executive or legislative departments of this State and the United States. While the Court may take judicial notice of the fact that the orders, reports, decisions and resolutions were issued, and of their contents, the Court may not take judicial notice of the truth of the facts stated in those documents. (See, *Shaeffer v. State* (1970) 3 Cal. App. 3d 348, 354.)

In this matter, plaintiffs/petitioners have mounted a broad-based challenge to the system of fees respondent enacted pursuant to Water Code section 1525. The fee system, which is set forth in 23 C.C.R. sections 1061, et seq., is intended to fund the operations of respondent's Division of Water Rights. Plaintiffs/petitioners allege numerous deficiencies in the fee program and in the details of its structure. Among these alleged deficiencies, the principal ones are that the fees constitute an illegal ad valorem property tax, that the fees are not charged for a valid regulatory program, that the gross amount of the fees collected exceeds the

cost of any regulatory program that may exist, and that the allocation of the fees among the payors is improper. Other deficiencies are also alleged as a basis for invalidating the fee program. Many of those alleged deficiencies are related to or flow from the principal points listed above; the fact that the Court has not described or ruled on all of the myriad of arguments raised by plaintiffs/petitioners specifically in this tentative ruling should not be taken as an indication that the Court has not considered them in detail in rendering this ruling.

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Distilled to its essence, this is a dispute over whether the charges imposed by respondent are valid fees or an invalid tax that violates the State Constitutional provisions commonly referred to as Proposition 13. (Constitution, Article 13A.)

The parties have cited the Court to a number of reported cases that deal with the distinction between taxes and fees. Although none of the cases appear to be directly on point, certain basic principles can be drawn from them that provide a framework for resolving this case. The overriding principle that emerges from the case law is that a charge imposed by a governmental entity that may be characterized as a legitimate regulatory fee is not a tax within the scope of Article 13A. (See, *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866.) Flowing from this basic concept is the principle that a charge may be found to be a valid regulatory fee when three conditions are satisfied: 1) the charge is imposed to pay the costs of a legitimate regulatory program; 2) the gross amount collected through the charge from all payors does not exceed the cost of the program; and 3) the allocation of charges among the payors is done on a reasonable basis that bears some relationship to the benefits the payors receive from the system and the burdens they impose upon it. (See, *Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal. 4th 866; *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal. App. 4th 935.)

The Court has applied these principles to the issue of respondent's fee structure and finds that the three conditions described above have been satisfied. The charge respondent has imposed pursuant to Water Code section 1525 and applicable regulations therefore constitute a valid regulatory fee.

The Court finds that the activities of respondent's Division of Water Rights for which the charges are imposed constitute a legitimate regulatory program. The specific activities, which the charges are intended to support, are listed in Water Code section 1525(c). All such activities appear to the Court to be clearly related to the regulation and supervision of the legal system of water rights and water appropriation in California. With its reference to such classically regulatory activities as "issuance, administration, review, monitoring and enforcement of permits, licenses, certificates and registrations to appropriate water, water leases", etc., Section 1525 specifically limits the charges to funding a program of regulation. On its face, therefore, the statute does not violate the law by imposing an improper tax; nor do the fee regulations that implement the statute by providing the specifics of the charge.

The Court further finds that the gross amount collected through the charge from all payors does not exceed the cost of the regulatory program. From the material contained in the record submitted to the Court, it is apparent that the total budget of the Division of Water Rights for fiscal year 2003-2004 was approximately $9,000,000. The record further demonstrates that respondent was directed by the Legislature to collect approximately $4,400,000 in charges during that fiscal year, and that respondent actually collected approximately $7,600,000. Neither amount exceeded the budget of the Division of Water Rights. Plaintiffs/petitioners have not demonstrated that the gross amount collected will exceed the budget of the Division of Water Rights in the current fiscal year or thereafter. At most, they have suggested that collections may exceed the target figure set forth in the Budget Act and thereby temporarily exceed the budget in a given fiscal year. Given the procedure set forth in Water Code section 1525(d)(3) for adjustment of the fees to compensate for any over-collection, the Court does not find that the fee program is intended to or, or will in effect, collect more than is needed to fund the regulatory program and on that basis generate revenue for unrelated purposes.

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Plaintiffs/petitioners argue that the Division of Water Rights engages in activities that are not properly characterized as regulatory and that as collections approach the total budget of the Division, the charges are therefore being used as a general revenue-raising tool. The Court finds that the record does not support this contention. Although the record demonstrates that the Division of Water Rights does engage in activities that appear to be of a general planning or environmental protection nature, such as Bay-Delta planning and protection of public trust resources, these activities appear to bear a sufficiently close relation to the regulation of water rights that they may be legitimately considered to be part of the water rights regulatory program. The Court notes from the record that the budget of the Division of Water Rights is only a minor part of the budget and expenditures of respondent State Water Resources Control Board as a whole. This suggests that any planning or public trust activities the Division of Water Rights engages in are related to its own regulatory mission rather than to more generalized policy matters as suggested by plaintiffs/petitioners. Certainly, plaintiffs/petitioners have not persuasively demonstrated otherwise.

The Court further finds that the allocation of charges among the payors has been made on a reasonable basis that bears some relationship to the benefits the payors receive from the system and the burdens they impose upon it. Under *California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal. App. 4th 935 ("*CAPS*"), a decision from the Third District which appears to be one of the most recent and extensive discussions of this issue, a state agency is permitted a fair degree of latitude in developing a system of regulatory fees, and in setting up a system of charges is permitted to consider factors such as the administrative burden of allocating costs to certain services, the difficulty of quantifying benefits, and practical issues of collection and enforcement. The primary requirement that may be distilled from CAPS opinion, as well as other cases in this area, is that agencies are entitled to exercise discretion in setting up a regulatory fee structure and they may do so based on a variety of reasonable financing schemes, with flexibility being an inherent component of reasonableness, provided that they apply sound judgment, engage in reasoned analysis and consider probabilities according to the best honest view of informed officials. Exact apportionment is not required, and apportionment need not be based on a precise cost-fee ratio. Thus, whether an agency has acted appropriately in setting up a fee structure must be evaluated under a flexible analytic approach that takes into account the particular circumstances of that agency. (See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365; *San Diego Gas and Electric Co. v. San Diego Air Pollution Control District* (1988) 203 Cal. App. 3d 1132; *Shapell Industries, Inc. v. Governing Board of Milpitas Unified School District* (1991) 1 Cal. 4th 218; *City of Oakland v. Superior Court* (1996) 45 Cal. App. 4th 740.)

The Court finds that respondent satisfied the requirements of the law in developing its fee structure. The Memorandum of Division Chief Victoria Whitney that is part of the record of this matter (AR 781-794) articulates the basis on which respondent adopted the fee structure set forth in 23 C.C.R. sections 1061, et seq. That Memorandum demonstrates that the fee structure that is challenged here was not adopted on a merely arbitrary basis, but was developed after careful consideration of factors specific to the regulatory program of the Division of Water Rights. In reviewing respondent's exercise of its discretion in this matter, it is significant that the water rights regulatory program presented unique challenges that appear to be unprecedented in the case law regarding regulatory fees. Perhaps the greatest of these challenges was the fact that a significant portion of overall California water rights are held by the federal government.

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Although such rights may be within the reach of state regulation to the extent not inconsistent with Congressional directives regarding federal water projects in California (see, *California v. U.S.* (1978) 438 U.S. 645 and *U.S. v. California* (9th Cir., 1982) 694 F. 2d 1171), it is unclear whether respondent may be able to impose fees on the U.S. due to sovereign immunity. From the record, it appears that the federal government, through the Department of the Interior and the Bureau of Reclamation, has taken the position that respondent may not do so (and on that basis respondent made a reasonable determination, as provided by Water Code section 1560, that the federal government likely would not pay fees). The record demonstrates that respondent carefully considered this problem in developing its fee structure, and that its approach to overcoming the difficulties presented by these issues, for example, by providing for the allocation of fees to federal government contractors pursuant to Water Code section 1560(b)(2), was reasonable. Similarly, the Court finds that respondent appropriately considered relevant factors and articulated a reasonable basis for other aspects of the system, including: imposing a two-tiered system of annual fees in combination with fees for certain activities; setting the fees for petitions, etc. below the actual average cost of acting on such petitions; setting a minimum annual fee of $100; setting a fee above the minimum annual fee based on the size of the regulated water right; and in all other respects challenged by the plaintiffs/petitioners. Respondent therefore acted within the legitimate scope of its discretion. The fact that other approaches might have been chosen or that reasonable minds might differ regarding the method chosen suggests that respondent acted within the legitimate scope of its discretion. (See, *Shapell Industries, Inc. v. Governing Board of Milpitas Unified School District* (1991) 1 Cal. 4th 218.)

On the basis of the foregoing, the Court finds that the fees that are challenged in this action are legitimate regulatory fees and that the allocation of those fees was not improper. Because the fees in question are legitimate regulatory fees, the Court finds that they do not constitute ad valorem taxes on real property within the scope of Article 13A. A regulatory fee is not an ad valorem tax on real property merely because it is imposed on real property. (See, e.g., *Pennell v. City of San Jose* (1986) 42 Cal. 3d 365; *Garrick Development Co. v. Hayward Unified School District* (1992) 3 Cal. App. 4th 320.)

The Court has considered the plaintiff/petitioners' remaining constitutional arguments and finds that in light of the fact that the fee structure has a reasonable basis and a legitimate regulatory function, no violation of the due process, equal protection or takings clauses of the U.S. or State Constitutions have been established. The Court also finds that the provisions of the Water Code permitting fees for federal government water rights to be allocated to contractors do not violate Constitutional prohibitions against state taxation of federal property. Under the "pass through" provisions, the fee does not fall on the United States itself or on an agency so closely connected to the government that the two cannot realistically be viewed as separate entities. (See, *U.S. v. New Mexico* (1982) 455 U.S. 720.)

The Court therefore denies the motion for a peremptory writ of mandate and prohibition."

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