

## **California Supreme Court Opinion in Water Right Fee Litigation: *California Farm Bureau Federation v. State Water Resources Control Board***

On January 31, 2011, the California Supreme Court issued an opinion *in California Farm Bureau Federation v. State Water Resources Control Board* (S150518) that addresses litigation over annual water right fees adopted for Fiscal Year 2003-2004. The Supreme Court's opinion upholds the water right fee statutes on their face, including the pass-through provisions for the federal water contractors, and remands issues concerning the application of the fee statute through the State Water Board's regulations setting annual permit and license fees back to the trial court for further fact-finding.

### Water Right Fee Background

Since 2004, the Water Code requires the State Water Board to adopt emergency regulations revising and establishing water right fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. In addition to assessing annual fees and one-time filing fees, the State Water Board may pass through fees to federal water contractors who contract for water supply under a federally held water right (commonly referred to as the "pass-through fees"). The State Water Board must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues, which is the amount appropriated from the Water Rights Fund, after taking into account other sources of money in the fund. The State Water Board also must review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. The Board of Equalization (BOE) is responsible for collecting annual water right fees on behalf of the State Water Board. The fee regulations first became effective January 1, 2004, and have been revised annually since then.

### Litigation Background

Each year since the State Water Board first adopted emergency water right fee regulations in 2003, the Northern California Water Association and the Central Valley Project Water Association (co-plaintiffs hereafter referred to as "NCWA-CVPWA"), and the California Farm Bureau Federation (Farm Bureau) have sued the State Water Board and BOE over the water right fees. The plaintiffs allege, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The NCWA-CVPWA and Farm Bureau actions over the 2003-2004 fees have been consolidated and the other actions have stayed pending resolution of the first two consolidated cases.

In 2005 the trial court upheld the water right fees adopted in Fiscal Year 2003-2004 as legitimate regulatory fees, and the plaintiffs appealed to the Third District Court of Appeal. In January 2007 the appellate court issued a decision upholding the fee statute, but invalidating the State Water Board's water right fee regulations. The appellate court invalidated the State Water Board's regulations that establish the amount of annual fees that water right permit and license holders pay each year. The appellate court also invalidated the regulations that establish the pass-through fees for the federal Central Valley Project's (CVP) contractors. The State Water Board, NCWA-CVPWA, and the Farm Bureau all petitioned the Supreme Court for review, which granted review on April 11, 2007. The Court of Appeal's decision was superseded when the Supreme Court granted review. The Supreme Court heard oral argument on December 7, 2010, and issued its opinion on January 31, 2011.

### The Supreme Court's Decision

The Supreme Court affirmed the Court of Appeal's judgment that the fee statutes are constitutional. The Supreme Court also reversed the two adverse holdings of the appellate court concerning the State Water Board's regulations governing annual permit and license fees (Cal. Code Regs., tit. 23, § 1066) and the pass-through fees (*id.*, § 1073). The Supreme Court remanded these two issues to the trial court to make factual findings to resolve the issue of whether the regulations are constitutional as applied.

#### **1. Is this the final decision on the water right fees?**

In general, a Supreme Court decision is final 30 days after the decision is filed; in this case, by March 2, 2011. Parties to the litigation, however, may petition the Supreme Court for rehearing.

If the Supreme Court's decision becomes final, it will conclusively decide issues regarding the constitutionality of the fee statutes. The Supreme Court, however, remanded to the trial court issues relating to the application of the State Water Board's fee regulations. Thus, the trial court will need to evaluate the fee regulations further. This process will take some time.

Moreover, the Supreme Court's decision only addresses the fee regulations adopted in Fiscal Year 2003-2004. Litigation over subsequent years' fees has been stayed.

#### **2. Will the State Water Board continue to assess water right fees?**

Yes. The Supreme Court upheld the fee statutes that require the State Water Board to collect water right fees.

#### **3. Does the Supreme Court's decision apply to all water right fees?**

No. The fee schedule includes both annual fees and filing fees. The plaintiffs did not challenge the filing fees and those fees are not affected by the Supreme Court's decision.

#### **4. What is the deadline for petitioning for reconsideration of the annual fees assessed on December 6, 2010?**

A petition for reconsideration is timely filed only if the State Water Board receives the petition within 30 days of the date the fee was assessed. In this case, the deadline was January 5, 2011.

#### **5. Now that the Supreme Court has rendered its decision, do I need to petition for reconsideration of future fee assessments if I believe no fee is due or the fee has been miscalculated?**

Yes, pursuant to the fee statutes and the State Water Board's regulations, a person who believes that a fee assessment is inappropriate or improper must timely file a petition for reconsideration of that assessment.

#### **6. What effect will the Supreme Court's decision have on future fees?**

As explained above, because the Supreme Court upheld the statute as constitutional, the State Water Board will continue to collect annual water right fees. In setting fees and in deciding petitions for reconsideration of those fees the State Water Board will take into account the Supreme Court's decision, but because the decision upholds the statute, and does not invalidate any of the fee schedules, it is not likely to result in major changes to the fees.