

It's never over till it's over, but for now California is breathing a little easier as it defends its cap-and-trade allowance auctions from two high-profile industry challenges. The cases, which Ann has discussed [here](#) and [here](#), were filed by the California Chamber of Commerce and the Pacific Legal Foundation, and they make both statutory and constitutional arguments against the auction. Plaintiffs argue that ARB exceeded its authority under AB 32 when deciding to distribute allowances, in part, by auctioning them off. Plaintiffs also argue the auction is an illegal tax, enacted with less than the two-thirds majority of the Legislature required by California's constitution for tax increases.

The superior court judge hearing the case has issued a tentative ruling in ARB's favor on the first of these sets of issues, re statutory authority. The Sac Bee has the story [here](#). I haven't read the tentative but have read accounts of it. Not surprisingly, he concludes that AB 32 gave ARB wide discretion to design a system of emissions reductions that meets the statutory goals, including authority to employ an auction within that design. I say this isn't surprising because AB 32 delegated almost all decisions about how to meet its reduction goals to ARB, and every case that has challenged ARB's statutory authority under AB 32 has come up short (see, for example, my post [here](#) discussing another such case).

The tentative ruling does not address the constitutional questions concerning whether the auction amounts to a tax. This set of arguments is trickier; the auction has raised more than \$300 million for the state so far, largely from businesses regulated under the cap, and much of this revenue will initially be loaned to the General Fund. Nevertheless (and as defendants argue), the auction is missing many of the classic hallmarks of a tax. Here are some aspects of the program that make it seem really different from a tax:

- Purchasers at auction receive a commodity at its market value that they may turn around and sell;
- The market, not the State, sets the auction prices;
- The auction was not created for the purpose of raising revenue; and
- Participation in the auction is not compulsory for any buyer.

The Court held a hearing this morning on the case, focused largely on these tax questions. Apparently the hearing went relatively well; the Judge gave no sign of veering from his tentative on the statutory questions, and he did not spend any time addressing questions of what remedy would be appropriate should he rule against defendants on the tax issue. According to Tim O'Connor and Erica Morehouse, who were there for respondent-intervenor EDF, the judge's questions on the tax issue were "pointed but not hostile." We'll keep a lookout for the final decision.