

Pacific Legal Foundation [filed suit](#) today against the state's Air Resources Board on the grounds that the auction of allowances under California's cap-and-trade program constitutes an unconstitutional tax. In the new suit, *Morning Star Packing Company v. California Air Resources Board*, PLF argues that a) the auctioning of revenues constitute a tax which b) requires a two-thirds vote of the Legislature which c) it hasn't received because AB 32 doesn't authorize the auctioning of allowances and didn't receive a 2/3s vote of the Legislature when passed. The lawsuit is an extension of arguments made in an earlier Chamber of Commerce lawsuit arguing that AB 32 doesn't authorize the Air Resources Board to adopt an auction. I described the Chamber lawsuit [here](#). Central to PLF's claim is that the auctioning of revenue in the cap-and-trade system constitutes a tax. In California, the Legislature cannot enact a tax without a 2/3s vote, as required by Proposition 13 under the state's constitution. The argument that cap-and-trade auctions constitute taxes is a novel one that I have previously argued is weak. Here's my reasoning:

Regulated parties with compliance obligations, many of whom are allocated allowances for free, need not buy the allowances. Indeed conceivably all of the allowances could be purchased by a non-profit environmental group and retired in order to keep an emitter from purchasing them in order to emit more greenhouse gases. Moreover an emitter subject to a compliance obligation under the cap-and-trade program could cut its emissions rather than purchase allowances at auction to cover emissions. Thus the auction could be viewed as akin the selling off of state property, not the levying of a tax. If the auction is not a tax, the lawsuit should be dismissed.

Rhead has expanded on this argument, arguing that emitters don't have the right to pollute and thus have no right to be given free allowances under a cap-and-trade system to be allowed to pollute. You can read his arguments [here](#). And finally, Berkeley's Center for Law, Energy and the Environment argue that auction revenues are not taxes because the Air Board did not enact an auction for the purpose of raising revenue, which is part of Proposition 13's definition of a tax. CLEE suggests instead that auction revenues are more akin to development or regulatory fees, not taxes, and thus not subject to Prop 13's vote requirements.

The *Morning Star* plaintiffs also argue that the auction violates Prop 26, an initiative on the 2010 ballot that placed new voting restrictions on the raising of fees. The Emmett Center has previously concluded that Prop 26 doesn't apply to AB 32 so the Prop 26 portion of the lawsuit seems particularly weak.

It's always hard to predict the outcome of litigation, but my best guess is that today's suit, like the Chamber's suit before it, will not succeed. But the court will need to weigh in on an interesting and challenging question — whether an auction is a tax — in order to decide the case.