

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0005-EXEC

In the Matter of the Petitions for Reconsideration of the
**CORDUA IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT,
IVANHOE IRRIGATION DISTRICT, KAWEAH RIVER POWER AUTHORITY,
LINDMORE IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT,
LOMO COLD STORAGE, M & T INCORPORATED,
MCPHERRIN LAND COMPANY, NEVADA IRRIGATION DISTRICT, ORANGE COVE
IRRIGATION DISTRICT, PARADISE IRRIGATION DISTRICT,
SAUCELITO IRRIGATION DISTRICT, SOLANO IRRIGATION DISTRICT, AND
SOUTH FEATHER WATER & POWER AGENCY**
Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Cordua Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Kaweah River Power Authority, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, Lomo Cold Storage, M & T Incorporated, McPherrin Land Company, Nevada Irrigation District, Orange Cove Irrigation District, Paradise Irrigation District, Saucelito Irrigation District, Solano Irrigation District, and South Feather Water & Power Agency, collectively referred to herein as "Petitioners",² individually petition the State Water Resources Control Board (State Water Board) for reconsideration and a refund of annual water right fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2009-2010. Each Petitioner contends that its fees were unlawfully imposed and asks the State Water Board to find that the Notices of Determination,

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the board, the Executive Director's consideration of petitions for reconsideration of disputed fees falls within the scope of authority under Resolution No. 2002-0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment.

² Attachment 1 contains a list of petitioners who meet the legal requirements for filing a petition for reconsideration and whose requests for reconsideration are addressed by this order.

setting forth the fees to be paid, were improperly made and the fees were improperly assessed. Petitioners request refunds for annual water right fees paid this fiscal year and every other period beginning July 1, 2003. For the reasons discussed below, the petitions for reconsideration are denied.

2.0 GROUND FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board's determination that the fee payer is required to pay a fee or the determination of the amount of the fee (Cal. Code Regs., tit. 23, § 1077).³ A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768; 1077.) The State Water Board's adoption of regulations may not be the subject of a petition for reconsideration. (Wat. Code, § 1537, subd. (b)(4).) When a State Water Board decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in a decision or order.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific State Water Board action of which reconsideration is requested, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes the fee has been miscalculated, and the specific action which petitioner requests. (§§ 769, subd. (a)(1)-(6); 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment or certain information. (§ 1077, subd. (a).) Section 769, subdivision (c) of the regulations further provides that a petition shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition. The State Water Board will not consider allegations if Petitioners fail to include points and authorities in support of the legal issues raised.

If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding an assessment is deemed adopted on the date of assessment by BOE (§ 1077, subd. (b).) A petition is timely filed only if received by the State Water Board within 30

³ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise cited.

days of the date an assessment is issued. (*Ibid.*) The deadline for filing a petition for reconsideration of the November 3, 2009 assessment was December 3, 2009.⁴ The State Water Board will not consider late petitions.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the petition may be denied if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

This order addresses the principal issues raised by Petitioners. To the extent that this order does not address all of the issues raised by the Petitioners, the State Water Board finds that either these issues are insubstantial or that the Petitioners have failed to meet the requirements for a petition for reconsideration. (§§ 768-769, 1077.)

3.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the State's water right program. The primary source of funding for the water right program is regulatory fees deposited in the Water Rights Fund in the State Treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, Stats. 2003, ch. 741) required the State Water Board to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board reviews the fee schedule each fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount set forth in the

⁴ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1); see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

annual Budget Act. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater or less than the revenue levels set forth in the annual Budget Act, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2009-2010, the Budget Act of 2009 appropriates \$11.658 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.447 million – is appropriated from the Water Rights Fund.⁵ In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$397,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$40,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program. (Stats. 2009, 3rd Ex. Sess., ch. 1.)⁶

In accordance with the Water Code, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁷ To account for higher than anticipated fee revenues and lower than anticipated expenditures in FY 2008-2009,⁸ the State Water Board revised the emergency regulations establishing annual permit and license fees to provide a one-time credit in FY 2009-2010 of \$.007 for each acre-foot by which the annual diversion authorized by the permit or license is greater than 10 acre-feet. (§ 1066, subd. (a).) The State

⁵ In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program includes \$3.772 million in general funds, \$291,000 in tobacco tax funds, and \$148,000 in federal trust funds. The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund, and do not include appropriations from the Water Rights Fund that are attributable to transfers from other funds.

⁶ In addition to making appropriations that are specific as to the particular fund and agency involved, the Budget Act includes appropriations that are allocated by the Department of Finance. The Budget Act also includes generally applicable sections that provide for adjustments of appropriations by the Department of Finance.

⁷ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)), penalties collected for water right violations (*id.*, § 1551, subd. (b)), and money transferred from other funds.

⁸ As explained in the December 3, 2009 Memorandum to File entitled "Water Right and Water Quality Certification Fee Schedule for Fiscal Year 2009-2010," from Victoria A. Whitney, Deputy Director for Water Rights, on June 30, 2009, the Water Rights Fund had an ending balance of \$4.09 million. Fee revenues were higher than anticipated, in part due to the unexpectedly high collection of one-time filing fees, and budgeted expenditures were lower projected, in part, due to furloughs. The Division ultimately anticipates total fee revenues of \$7.05 million for FY 2009-2010.

Water Board also revised other portions of the fee schedule for FY 2009-2010, which are not the subject of this petition for reconsideration.⁹

On September 15, 2009, the State Water Board adopted Resolution 2009-0071, revising the emergency regulations governing water right fees for FY 2009-2010. The Office of Administrative Law approved the emergency regulations on October 21, 2009.

4.0 PENDING LITIGATION

The State Water Board must consider the petitions for reconsideration at a time when the statute authorizing water right fees and the basic structure of the implementing regulations are being challenged in pending litigation. Each year since 2003, the Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA), and the California Farm Bureau Federation (CFBF) have filed suit against the Board and BOE, alleging, in part, that the fee legislation and the Board's fee regulations are unconstitutional and invalid. The NCWA, CVPWA, and CFBF actions over the FY 2003-2004 fees have been consolidated, and the other actions have been stayed pending resolution of the consolidated case. In 2005 the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety, and NCWA, CVPWA, and CFBF appealed. On January 17, 2007, the Third District Court of Appeal issued a decision in *California Farm Bureau Federation v. State Water Resources Control Board* (hereinafter "*Farm Bureau*") upholding the fee statute and invalidating the fee regulations for FY 2003-2004. All parties petitioned the California Supreme Court for review, and the court granted review on April 11, 2007. The case is still pending before the Supreme Court.

5.0 FEE DETERMINATIONS COVERED BY THE PETITIONS

Although the Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments. Ten Petitioners are represented by a single law firm.¹⁰ The remaining Petitioners submitted petitions with language that is identical to the petitions filed by that law firm. With certain exceptions noted below, none of the petitions provide any additional

⁹ The State Water Board adjusted the upper limit on certain filing fees, reduced groundwater recordation filing fees, and clarified that fees for change petitions involving water transfers also apply to petitions for temporary urgency changes involving water transfers. It merits noting that over the past two years, water right application processing has been fully supported by application filing fees, application annual fees, and general fund revenue. Over the past four years, the State Water Board has collected a total of \$3,212,551 in application filing fees and expended a total of \$3,144,658 in water right fee revenues on application processing—an average difference of slightly less than \$17,000 per year.

¹⁰ Minasian, Spruance, Meith, Soares & Sexton, LLP.

arguments, information or supporting authorities that materially distinguishes it from the others. Accordingly, the State Water Board has decided to consolidate its consideration of these individual petitions in this order.

The State Water Board's review in this order is limited to annual water right fee assessments issued on November 3, 2009. Petitioners' requests made in 2009 for refunds of fees paid between July 1, 2003, and June 30, 2009, are not timely. (§ 1077, subd. (b).)

The petitions are supported by Notices of Determination of the fees assessed on or about November 3, 2009. These notices include assessments for:

- annual petition fees under section 1065;
- annual permit and license fees under sections 1066;
- annual permit and license fees passed through to the United States Bureau of Reclamation's (Reclamation's) contractors under section 1073; and
- annual fees for Federal Regulatory Energy Commission (FERC)-licensed hydroelectric projects under section 3833.1.

To the extent that Petitioners' contentions are not related to any of these fee assessments, those contentions are not within the scope of their petitions for reconsideration.

6.0 PETITIONERS' ARGUMENTS REGARDING THE VALIDITY OF THE FEES ARE WITHOUT MERIT

6.1 Petitioners Arguments Based on the *Farm Bureau* Decision have No Merit

Petitioners contend that the State Water Board emergency fee regulations are unlawful as described in the Third District Court of Appeal's *Farm Bureau* decision. They specifically point to the court's invalidation of the annual permit and license fees and the annual fees allocated to federal Central Valley Project contractors based on the permits and licenses held by Reclamation to provide water for contract deliveries. (See §§ 1066 (annual permit and license fees), 1073, subd. (b)(2) (pass-through fees).) Therefore, Petitioners claim, the State Water Board's decision to impose water right fees is an error in law and not supported by substantial evidence.

As Petitioners acknowledge, the Third District Court of Appeal's *Farm Bureau* decision is currently pending before the California Supreme Court. The appellate court's opinion was superseded when the California Supreme Court granted review. Thus, the opinion is no longer considered published and may not be cited or relied on. (Cal. Rules of Court, Rule 8.1105 and Rule 8.1115.) To the extent Petitioners rely on the unpublished *Farm Bureau* opinion in support of their claims, their arguments have no merit. If Petitioners intended to rely on other grounds, then their challenge is deficient because they failed to specify those grounds and to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

Petitioners previously raised these issues, nearly verbatim, in the petitions that they filed challenging the FY 2008-2009 annual fees. The State Water Board rejected Petitioners' arguments by Order WR 2009-0004-EXEC. Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in their earlier petitions. With respect to the issues that were raised in the previous petitions and are repeated in the petition now before the State Water Board, this order adopts the reasoning of Order WR 2009-0004-EXEC and the documents incorporated by reference in that Order. To the extent that this order does not address all of the issues raised by Petitioners, the State Water Board finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the board's regulations. (§§ 768-769, 1077.)

Nonetheless, it merits noting that in order to be a valid regulatory fee, an assessment must bear a fair or reasonable relationship to the fee payers' burdens on or benefits from the regulatory activity. (*California Assn. of Professional Scientists v. Dept. of Fish and Game* (2000) 79 Cal.App.4th 935.) The annual permit and license fees are imposed on the group of water users—permittees and licensees—that account for the majority of the State Water Board's regulatory efforts. (Wat. Code, § 1525, subds. (a), (c).) Certain water users who are regulated by the State Water Board to a far lesser degree, such as surface water users not under the permitting authority of the board, do not pay water right permit and license fees. To address concerns that certain water users benefit from, or place burdens on, the water right regulatory program but do not pay fees, the Division has analyzed the program resources dedicated to those non-paying water users. As explained in the Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated February 1, 2010, regarding "Analysis of Water Right Program Activities and Expenditure of Resources", the Division has found that the

State Water Board directs a *de minimis* amount of resources toward those water users who do not pay annual permit or license fees.

6.2 Petitioners' Claims Regarding Water Quality Certification Fees have No Merit

Water Code section 13160.1 authorizes the State Water Board to recover costs incurred in connection with applications for water quality certification requested pursuant to section 401 of the Clean Water Act by applicants for a federal permit or license. The State Water Board assesses annual fees for projects under review for water quality certification for FERC licensing and FERC-licensed projects for which water quality certification has been issued. (§ 3833.1.) Fees associated with water quality certification for FERC licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

South Feather Water and Power Agency and the Nevada Irrigation District (NID) contest the FERC fees, arguing that for "the same or similar reasons described in [the] *Farm Bureau* [decision]," the FERC fees assessed to them are unlawful and invalid.¹¹ The appellate court did not consider the annual FERC fees in its decision, and Petitioners do not provide specific allegations supporting their contentions. If Petitioners intended to rely on other grounds, then their challenge is deficient because they failed to specify those grounds and to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

6.3 Petitioners' Claims Regarding Annual Petition Fees have No Merit

The State Water Board has adopted regulations assessing annual petition fees for certain projects that require continuing staff oversight. (§ 1065.) NID and Paradise Irrigation District contest these fees, arguing that for "the same or similar reasons described in [the] *Farm Bureau* [decision]," the fees are unlawful and invalid. The appellate court did not consider the annual petition fees in its decision, and Petitioners do not provide specific allegations supporting its contentions. To the extent that Petitioners' challenge to these fees is based on the same contentions as they make concerning the annual permit and license fees, those contentions are addressed in this order. If Petitioners intended to rely on other grounds, then their challenge is deficient because they failed to specify those grounds and to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

¹¹ It is unclear whether Paradise Irrigation District also challenges the FERC fees. Its petition refers to FERC 2266, which is a project belonging to NID. It appears that the reference to FERC 2266 in Paradise's petition is a typographical error. Nonetheless, to the extent that Paradise intends to challenge the FERC fees, its claim is denied for the same reasons discussed herein.

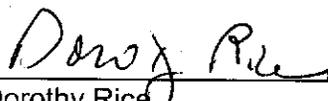
7.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to impose water right fees was appropriate and proper. The petitions for reconsideration are denied.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are denied.

Dated: 2-08-10



Dorothy Rice
Executive Director

Attachment