STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011 -0006- 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, MCPHERRIN LAND COMPANY, NEVADA IRRIGATION DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PARADISE IRRIGATION DISTRICT, SOLANO IRRIGATION DISTRICT, SOUTH FEATHER WATER & POWER AGENCY AND TERRA BELLA IRRIGATION DISTRICT

Regarding Annual Water Right and Water Quality Certification Fee Determinations

---

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]

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, McPherrin Land Company, Nevada Irrigation District, Orange Cove Irrigation District, Paradise Irrigation District, Solano Irrigation District, South Feather Water & Power Agency, and Terra Bella Irrigation District, 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 fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2010-2011. Each Petitioner contends that its fees were unlawfully imposed and asks the State Water Board to find that the Notices of Determination, setting forth the fees to be paid,

---

[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.

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 STATUS OF LITIGATION

On January 31, 2011, the California Supreme Court issued a decision in long-standing litigation over the statute authorizing the water right fees and the implementing regulations adopted for FY 2003-2004. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (S150518) (hereinafter *Farm Bureau*).) Each year since 2003, the same parties (the Northern California Water Association, the Central Valley Project Water Association, and the California Farm Bureau Federation) have filed suit against the State Water Board and BOE, alleging, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The actions over the FY 2003-2004 fees have been consolidated, and the other actions have been stayed pending resolution of the consolidated cases. In 2005, the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety and the petitioning parties appealed. In January 2007, the Third District Court of Appeal issued a decision upholding the fee statute and invalidating the fee regulations for FY 2003-2004. The California Supreme Court granted review in April 2007.

In its decision, the Supreme Court upheld the water right fee statutes. (E.g., Wat. Code, §§ 1525, 1540, 1560.) The Supreme Court also reversed the two adverse holdings of the Court of Appeal concerning the State Water Board's regulations governing annual permit and license fees and the annual fees passed through to the federal water contractors. (Cal. Code Regs., tit. 23, § 1066, 1073.)[3] The Supreme Court remanded issues concerning the application of these fees through the State Water Board's regulations back to the trial court for further fact-finding. Specifically, the Supreme Court directed the trial court to make factual findings as to whether the annual permit and license fees were reasonably related to the costs of the regulatory activity and findings related to the annual water right fees passed through to the federal water contractors. The Supreme Court's decision otherwise left intact the appellate court's holdings that were favorable to the State Water Board.

[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 indicated.

3.0 GROUNDS 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). 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 a petitioner fails 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 days of the date an assessment is issued. (*Ibid.*) The deadline for filing a petition for reconsideration of the December 6, 2010 assessment was January 5, 2011. 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.[4] (§ 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.)

4.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency entity primarily responsible for administering the State's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act, and includes funding from several different sources. (See Stats. 2009, ch. 712, § 2.00, Item 3940-001-0439, schedules (2), (6), (11), (18) & (19).) 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 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.)

---

[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.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated February 25, 2011, entitled "Recommended Water Right and Water Quality Certification Fee Schedule for [FY] 2010-2011" (hereinafter "Evoy Memorandum"), in FY 2010-2011, the Legislature appropriated $18.012 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in sum, this amount includes a $9.104 million appropriation from the Water Rights Fund in the Budget Act of 2010[5] and a continuing appropriation from the Water Rights Fund of $3.75 million for enforcement positions,[6] for a total of $12.854 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's budget for the water right program also includes $4.698 million in general funds and $460,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates $429,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates $39,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the board's water right program.

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 fund in the annual Budget Act, taking into account money in the fund from other sources.[7] As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of $5.701 million for the fiscal year, and the Division determined that the fund condition projections for FY 2010-2011 should include a reserve for economic uncertainty of about $2.7 million. For the purposes of calculating this year's fees, the amount by which reserves would be spent down to reduce the fund balance to a $2.7 million

---

[5] Stats. 2010, ch. 712.

[6] In addition to the Budget Act appropriation of $9.104 million, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess.) ch 2) (SB 7X 8) authorizes a continuous appropriation to the Water Rights Fund of $3.75 million for water right enforcement positions.

[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)) and penalties collected for water right violations (*id.*, § 1551, subd. (b)). The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of $8.959 million.

Also as described in the Evoy Memorandum, the Division recommended continuing to charge water right permit and license holders an annual fee of $100 plus $0.03 for each acre-feet in excess of 10 acre-feet.[8] (§ 1066.) The Division also recommended increasing the annual water quality certification fees for projects licensed, or subject to licensing, by the Federal Energy Regulatory Commission (§ 3833.1) and revising certain filing fees.

On October 19, 2010, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2010-0052, revising the emergency regulations governing water right fees for FY 2010-2011. The Office of Administrative Law approved the emergency regulations on November 17, 2010.

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.[9] The remaining Petitioners submitted petitions with language that is substantially the same as the petitions filed by that law firm. With certain exceptions noted below, none of the petitions provide any additional 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 December 6, 2010. Petitioners' requests made in this fiscal year for refunds of fees paid between July 1, 2003, and June 30, 2009 are not timely. (§ 1077, subd. (b).) The petitions seek reconsideration of the following fee assessments:

- annual petition fees under section 1065;
- annual permit and license fees under sections 1066;

[8] Last fiscal year, annual permit and license fee payers received a one-time credit to reduce the fund surplus. As explained in the Evoy Memorandum, the one-time credit is no longer in effect in FY 2010-2011.

[9] Minasian, Spruance, Meith, Soares & Sexton, LLP.

- 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 Energy Regulatory 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 Third District Court of Appeal's *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 appellate court's invalidation of the annual permit and license fees (§ 1066) and the annual fees annual fees passed through to the federal water contractors (§ 1073 (referred to as the "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.

Petitioners' arguments have no merit. Their reliance on the Third District Court of Appeal's *Farm Bureau* decision, which was superseded when the Supreme Court granted review, is misplaced. As explained above, the recent Supreme Court opinion in the *Farm Bureau* litigation affirmed the Court of Appeal's holding regarding the constitutionality of the fee statutes. Further, the Supreme Court reversed the two adverse holdings of the Court of Appeal concerning the State Water Board's regulations governing annual permit and license fees and the annual pass through fees and remanded those issues back to the trial court for further fact-finding. To the extent Petitioners rely on the Court of Appeal's *Farm Bureau* opinion in support of their claims, or independently adopt the reasoning in the opinion, their arguments fail. 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).)

With respect to those issues not resolved by the Supreme Court's opinion, and except as discussed below, Petitioners have not provided any new arguments, new information, or

supporting authorities that materially change any of the issues raised in their previous petitions challenging the annual water right fees. Petitioners previously raised these issues, nearly verbatim, in the petitions that they filed challenging the FY 2009-2010 annual fees. The State Water Board rejected Petitioners' arguments by Order WR 2010-0005-EXEC. 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 2010-0005-EXEC and the documents incorporated by reference in that Order.

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 *Farm Bureau*," the FERC fees assessed to them are unlawful and invalid. 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).)

As it has in past years, NID contends that it was overcharged by $205.20 for its FERC fee for the Yuba Bear Project (FERC 2266). Pursuant to section 3833.1, subdivision (b)(4) of the State Water Board's regulations, the annual fee for a FERC-licensed hydroelectric project is $1,000 plus $0.342 per kilowatt, based on the authorized or proposed installed generating capacity of the hydroelectric facility. The State Water Board assessed NID a fee of $ 28,332.64 based on the authorized installed generating capacity of 79,920 kilowatts. NID claims that the State Water Board should have used the installed generating capacity of 79,320 kilowatts, as identified in NID's Notification of Intent, which would amount to a fee of $28,127.44. Section

3833.1, subdivision (b)(4)(A), however, provides that "[i]n the case of an application for an original, new or subsequent license . . . the annual fee shall be based on the installed generating capacity of the facility as proposed in the notification of intent, application for FERC license, application for certification, or existing license that is proposed for takeover or relicensing, whichever is greatest." NID has applied for relicensing of a FERC licensed project; accordingly, the State Water Board correctly based the annual fee on the installed generating capacity of the facility in the existing license that is proposed for relicensing. The fee was correctly assessed. There is no cause for reconsideration.

6.3 Petitioners' Claims Regarding Annual Petition Fees Are Deficient

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 *Farm Bureau*," 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).)

6.4 Proposition 26 Does Not Apply to the Annual Fees

On November 2, 2010, California voters approved Proposition 26, which amended the California Constitution to require that any change in state statute resulting in higher taxes be approved by a third-thirds vote of the Legislature. (Cal. Const., Article XIII A, § 3, amended by initiative, Gen. Elec. (Nov. 2, 2010).) Petitioners claim that this fiscal year's fees are invalid taxes under Proposition 26 because they were not approved by a two-thirds majority of both houses of the Legislature. Alternatively, Petitioners argue, if the State Water Board contends that the water right fees are not taxes under Proposition 26, the board must produce the evidence required by the proposition.

Petitioners' claims have no merit. Proposition 26 simply does not apply to the statutes authorizing the annual fees or to the State Water Board's regulations. Proposition 26 sets requirements for enactment of new or increased taxes, and applies those requirements to taxes

adopted after January 1, 2010. (Cal. Const., Article XIII A, § 3, subd. (c).) The fee statutes were enacted in 2003 as part of Senate Bill No. 1049 (Stats. 2003, ch. 741, §§ 85, 96) and have not been amended since then. Nonetheless, Petitioners argue that Proposition 26 applies because State Water Board purportedly increased the fees this fiscal year when it removed the one-time credit for annual permit and license fees that was in effect the previous fiscal year. (§ 1066, subd. (a).) Proposition 26, however, only applies to changes in state statutes, not to administrative regulations. (Cal. Const., Article XIII A, § 3, subd. (a).) Thus, Proposition 26 does not apply to the fee statutes or regulations and the State Water Board need not demonstrate that the fees are not taxes subject to the proposition.

7.0 CONCLUSION

The State Water Board finds that its decision to impose the annual fees was appropriate and proper. This order addresses the principal issues raised by the Petitioners. 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.) The petitions for reconsideration are denied.

ORDER

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

Dated: MAR 7 2011

Thomas Howard
Executive Director

Attachment