

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0007- EXEC

In the Matter of the Petitions for Reconsideration
of the California Department of Fish and Game and of Grasslands Water District Regarding
Water Right Fee Determinations

Order Granting Reconsideration

BY THE EXECUTIVE DIRECTOR¹

The California Department of Fish and Game (DFG) petitioned for reconsideration of two Notices of Determination assessing annual water right fees against DFG. DFG holds water supply contracts with the United States Bureau of Reclamation (USBR) to acquire water for several wildlife refuges, for which the Board of Equalization (BOE) account numbers for fee payments are WR MT 94-000094 0 and WR MT 94-000093 0. The fees assessed to DFG are \$31,788 and \$9,418, respectively.

The Grasslands Water District (Grasslands) also petitioned for reconsideration of one Notice of Determination assessing annual water right fees pursuant to its water supply contract with the USBR to convey and deliver water to wetland habitat areas on lands within the Grassland Resource Conservation District (GRCD). The BOE account number is WR MT 94-000100 8. The fee assessed to Grasslands is \$66,069.

Both petitioners contract for two kinds of water supply from the USBR: "Level 2" and "Level 4." Both petitioners point out that the USBR is required, under the Central Valley Improvement Act (CVPIA) (106 Stat. 4706), section 3406(d), to provide either directly or through contractual agreements, firm water supplies to maintain and improve wetland habitat areas on units of the National Wildlife Refuge System, on each of wildlife refuges for which DFG has contractual water supplies,² and on the Grasslands Resource Conservation District in the Central Valley of California. The lands receiving water within the state refuges and within Grasslands are wetland

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

² The refuges receiving water under the two DFG contracts are Gray Lodge, Los Banos, Volta, North Grasslands, and Mendota state wildlife management areas.

habitat areas. The majority of the lands within Grasslands are subject to federal conservation easements that restrict their use to wetland habitat purposes.

DFG and Grasslands both argue that Level 2 water supplies should be excluded from the requirement to pay fees because this is a base supply within the meaning of California Code of Regulations, title 23, section 1073. DFG and Grasslands also request that the SWRCB not charge a fee for the Level 4 water supplies. Grasslands argues, specifically, that it should not pay fees on Level 4 water supplies because this water is to be provided either from non-CVP sources or from CVP sources that have already been assessed a fee.

Under subdivision (d)(1) of section 3406 of the CVPIA, the CVP does not charge either DFG or Grasslands for the costs of delivering Level 2 and Level 4 water. The federal government is responsible for 75% of the cost of delivering Level 4 water, and this is a non-reimbursable expense of the federal government. The State of California is responsible for paying a 25% share of the cost of Level 4 water either by direct reimbursement or through in-kind contributions. Grasslands does not pay for either Level 2 or Level 4 water, and while the state pays the 25% share of the Level 4 water, the 25% obligation with respect to Level 4 supplies apparently is not based on the two contracts DFG has for refuge water, but rather is based on water deliveries statewide for wetland habitat. The DFG and Grasslands contracts are fundamentally different from those held by other contractors, who seek out water supplies from the USBR. Here, the USBR is using the contracts to satisfy its own statutory obligation to provide the water to these contractors at no charge. These deliveries basically carry out the same obligation that the USBR satisfies when it releases water from its reservoirs for fish and wildlife protection without having a contract.

Under California Code of Regulations, title 23, section 1073, subdivision (b)(2) a fee is not to be charged to a CVP contractor for a “base supply” that the USBR provides under the contract. The USBR does not charge water supply contractors for base supplies because this is water the contractors are entitled to receive outside of the contract. The USBR contracts to deliver this water because it agrees that it is legally obligated to provide it. Under section 3406(d)(1) of the CVPIA, the Secretary of the Interior is required to provide Level 2 water supplies to the lands that are the subject of the DFG and Grasslands contracts described above, and to supplement the Level 2 supplies with the increment of Level 4 water provided under section 3406(d)(2). Section 3406(d)(1) provides that the “Secretary [of the Interior] shall be obligated to provide such water whether or not such long-term contractual agreements are in effect.”

Because the contracts recognize a legal obligation of the USBR to provide the Level 2 and Level 4 water to these petitioners, this water constitutes a base supply³, for which section 1073 does not require a fee to be paid by the water supply contractor.

³ Subdivision (e)(1) of section 1073 provides that: “Base supply means the amount of water delivered to a water user by USBR from the Central Valley Project that is designated as base supply in a water supply contract between the user and the USBR.” In this case, the Grasslands contract does not use the term “base supply,” and the DFG did not provide a copy of its contracts, but the water delivered by the USBR is treated as a base supply in the contract, because the USBR does not charge the contractor for the water and the USBR is obligated to provide the water regardless of the existence of the contract. The Grasslands contract expressly recognizes the legal obligation of the Secretary under section 3406(d) to provide the water.

This interpretation is consistent with the basic structure of the water right fees for USBR contractors. In practical effect, the allocation of fees to USBR water supply contractors under section 1073 of the regulations passes the fees attributable to USBR permits and licenses through to USBR water supply contractors, in much the same way as the State Water Project or an irrigation district that pays the fees would pass those fees through to its water supply contractors. If USBR paid the annual fees for its permits and licenses, it would not pass through any portion of those fees as a charge to contractors receiving Level 2 or Level 4 deliveries. Nor would the State Water Project or an irrigation district pass those fees through under similar circumstances. The deliveries of Level 2 and Level 4 water for wetland habitat are similar to water bypassed or released to meet water quality standards or prior rights. They are part of the costs of overall project operation. Where the State Water Project or an irrigation district has similar obligations, the fees will be distributed among the water suppliers who pay to reimburse the water supplier for its expense, not charged to the persons or entities that are protected by those obligations. Interpreting Level 2 and Level 4 deliveries to constitute base supplies helps assure that similarly situated USBR and non-federal water supply contractors are treated similarly in terms of the ultimate burden of paying for the increased expense of water project operations resulting from the imposition of water right fees.

Based on the foregoing discussion, the petitions for reconsideration filed by DFG and Grasslands are granted. These parties made additional arguments challenging the assessment of fees against them, but those arguments need not be addressed herein because the petition is granted. Pursuant to California Code of Regulations, title 23, section 1074, subdivision (g), both DFG and Grasslands have elected to postpone payment of the fee assessment while their petitions for reconsideration are pending. The SWRCB will notify the Board of Equalization to cancel these assessments issued to the DFG and to Grasslands.

ORDER

IT IS HEREBY ORDERED THAT the petitions for reconsideration are granted. The fee assessments against DFG under Account Nos. WR MT 94-000094 0 and WR MT 94-000093 0 shall be cancelled, and the fee assessment against Grasslands under Account No. WR MT 94-000100 8 shall be cancelled.

Dated: March 31, 2004

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director