

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0014- EXEC

In the Matter of the Petition for Reconsideration of the
WASHOE COUNTY WATER CONSERVATION DISTRICT
Regarding Water Right Fee Determination

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Washoe County Water Conservation District (District) petitions the State Water Resources Control Board (SWRCB) for reconsideration of the water right fee assessed by the State Board of Equalization (BOE) on January 8, 2004. The SWRCB finds that its decision to impose the fee was appropriate and proper and denies the District's petition for reconsideration.

2.0 GROUND FOR RECONSIDERATION

On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code, §§ 1122, 1537, subd. (b)(2).) Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration. When an SWRCB decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in the decision or order.

¹ 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 disputed fees falls within the scope of the authority delegated 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.

California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:²

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific board action of which petitioner requests reconsideration, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated, and the specific action which petitioner requests. (Cal. Code Regs., tit. 23, § 769, subd. (a)(1)-(6); § 1077, subd. (a).) In addition, the petition may include a claim for refund. (*Id.* § 1074, subd. (g).)

The SWRCB 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. (*Id.* § 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB also may deny the petition if the SWRCB 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.* § 770, subd. (a)(2)(A)-(C).)

3.0 LEGAL AND FACTUAL BACKGROUND

The SWRCB's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) requires the Division's program to be supported by fee revenues amounting to \$4.4 million, replacing a General Fund reduction of \$3.6 million. The Budget Act

² All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

of 2003 allocates a total of \$9.0 million for support of the water right program. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues. Accordingly, the SWRCB will collect fees for the 2003-2004 fiscal year, but the fees will support half of the program costs this fiscal year. The SWRCB will review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. BOE is responsible for collecting the annual fees.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the water right applicants and water right holders regulated by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) With respect to existing water right holders, the Legislative Analyst observed:

[T]he water rights program provides *ongoing* benefits directly to water rights holders. This is mainly because SWRCB is charged with assuring that applications for new water rights do not cause harm to any other existing legal water rights holder. In addition, the program conducts routine compliance and inspections of existing water rights. These activities also provide direct benefits to water rights holders by ensuring the terms and conditions of the water rights permits and licenses held by others are upheld.

(*Id.* at p. B-125 [italics in original].) Accordingly, the Legislative Analyst recommended an increase in application fees, plus new annual fees assessed on all permit and license holders, and establishment of a new special fund for deposit of the revenues generated by the fees. (*Ibid.*)³

³ The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water right related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water rights program (*id.* at p. B-125), this statement simply recognizes that the fee payers benefit from the program, even though the program also serves to protect against harm to a public resource. The Legislative Analyst recognized that the water right program is a regulatory program that includes environmental review of proposed appropriations and continuing oversight of permitted and licensed diversion and use. (See *id.* at pp. B-123 through B-124.) The Legislative Analyst proposed fees for various resource and environmental programs that included a combination of fees for services that directly benefit the fee [footnote continues on next page]

On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the fee regulations increase filing fees for applications, petitions, registrations, and other filings and adopt annual fees for permits, licenses, water leases, and projects subject to water quality certification. Most fees will be deposited in the Water Rights Fund, which can be used to support all activities in the water right program. The Office of Administrative Law approved the emergency regulations on December 23, 2004, and both Senate Bill 1049 and the emergency regulations became effective on January 1, 2004. BOE issued the first bills by Notice of Determination on January 8, 2004.⁴

4.0 THE SWRCB PROPERLY ASSESSED A WATER RIGHT FEE AGAINST THE DISTRICT

The District, which holds a license based on water right application 005169 (License 003723; WR MT 94-001219),⁵ requests the SWRCB to reconsider its annual water right fee, stating that “Boca Dam and Reservoir is a Federal Reclamation Act project and is exempt from such fees.” The District further notes that “[n]egotiations are ongoing between the U.S. Department of Interior, Bureau of Reclamation and [SWRCB] on this issue.” Thus, the sole basis for the District’s petition is its claim that its water right is exempt from the water right fees.

The fee regulations apply equally and without exception to each person who *holds* a water right permit or license—any entity capable of holding a water right must pay the annual permit or license fee. (Cal. Code Regs., tit. 23, § 1066, subd. (a); compare with § 1064, subd. (a))

payer, such as fire protection fees, and regulatory fees, such as fees for dam safety inspections. (*Id.* at pp. B-3 through B-4.) Senate Bill 1049 establishes the water right fees as regulatory fees, which may be based on the need for regulation instead of basing the fees on the value of the benefits conferred. (See Wat. Code, § 1525, subd. (c).)

⁴ BOE issued bills on January 8, 2004, for annual permit and license fees under section 1066 of the regulations, annual permit and license fees passed through to Bureau of Reclamation contractors under section 1073, and annual water quality certification fees under section 3833.1. The District received a bill for an annual permit or license fee and accordingly, this order will only address issues specific to that fee. Fee determinations that were not the subject of the fee bills issued on January 8, 2004, such as the filing fees for applications and petitions, are not within the scope of the District’s petition for reconsideration.

⁵ The BOE account number, which begins with “WR MT,” includes a ninth digit that is unnecessary for the purposes of this order and is not included herein.

(requiring person *filing* petition to pay the filing fee for each water right permit or license covered by the petition.) Although Senate Bill 1049 and the fee regulations recognize that claims of sovereign immunity may prevent collection of some of the fees, neither the statute nor the regulations create an exemption for federal reclamation projects. (Wat., Code §§ 1540, 1560; Cal. Code Regs., tit. 23, § 1073.) Instead, Water Code section 1560 identifies several actions that the SWRCB may take if the United States or an Indian tribe declines, or is likely to decline, to pay a fee or expense. For example, if the SWRCB determines that a fee payer such as the Bureau of Reclamation (Bureau) is likely to decline to pay a fee or expense based on a claim of sovereign immunity,⁶ then the SWRCB may allocate the fees due to the Bureau's water supply contractors or enter into a contract for reimbursement of the SWRCB's services. (Wat. Code, §§ 1540, 1560, subd. (b)(2)-(3).) In this case, however, the District, not the Bureau, is the water right holder. Accordingly, the SWRCB properly imposed the annual water right fee on the District.

5.0 CONCLUSION

For the reasons discussed above, the SWRCB finds that its decision to impose a water right fee on the District was appropriate and proper. The District's petition for reconsideration is denied.

ORDER

IT IS HEREBY ORDERED THAT the District's petition for reconsideration is denied.

Dated: April 7, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director

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⁶ The Division's records indicate that the Bureau holds rights to over 30 percent of the water that is authorized for diversion under water right permits or licenses. In the past, the Bureau has declined to pay water right fees to the state, claiming sovereign immunity.