

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2005-0005-EXEC

In the Matter of the Petition for Reconsideration of
PALO VERDE IRRIGATION DISTRICT
Regarding Water Right Fee Determination

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director denies Palo Verde Irrigation District's (PVID) petition for reconsideration of the State Water Resources Control Board's (SWRCB) determination that PVID was required to pay an annual water right fee in the amount of \$27,248.91 for Permit 7652 (Application 9280). PVID argues that annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders. In addition, PVID argues that assessment of the fee against PVID is unconstitutional because PVID's rights to Colorado River water arise solely from PVID's water delivery contract with the United States and the SWRCB has no authority over waters of the Colorado River.

For the reasons set forth below, the Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition for reconsideration is denied.

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.

2.0 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. The primary source of funding for the water rights program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, 2003-2004 Reg. Sess., Stats. 2003, ch. 741) required the SWRCB 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 SWRCB revises the fee schedule each fiscal year, so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.* § 1525, subd. (d).) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year 2004-2005, the Budget Act of 2004 appropriates \$10.79 million for the state's water right program, including \$10.362 million for water right administration by the SWRCB and \$0.428 million for water right fee collection by BOE.² The appropriation includes an appropriation of \$9.69 million from the Water Rights Fund. In accordance with the Water Code fee provisions, the SWRCB 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.³ In Fiscal Year 2003-2004, the SWRCB collected \$7.44 million in water right fees and water quality certification fees deposited in the Water Rights Fund.⁴ This amount

² The budget figures referenced in this order for Fiscal Year 2004-2005 are based on the line item appropriations in the Budget Act of 2004. (Stats. 2004, ch. 208.) These figures are subject to adjustment based on control sections in the Budget Act. (See, e.g., *id.* § 3.60.) After these adjustments are made, the precise amounts budgeted will be slightly different than the line appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this Order.

³ 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 money transferred from other funds. The budget allocation of \$9.69 million from the Water Rights Fund includes \$1.5 million to pay for work described in Assembly Bill 2121 (Stats. 2004, ch. 943). The Budget Act provides for the transfer of funds from the Resources Trust Fund, which is supported by tidelands oil revenues, to cover this work, but in the event that those funds are not available, the Governor's Office has directed the Division not to perform the work described in Assembly Bill 2121. The water right fees have not been set to cover this work.

⁴ Fees associated with water quality certification for Federal Energy Regulatory Commission (FERC) licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

exceeded the \$4.6 million appropriation from the Water Rights Fund made under the Budget Act of 2003 (Stats. 2003, ch. 157) by \$2.84 million.⁵ The 2004-2005 budget assumes that the Water Rights Fund will have a balance of \$0.89 million at the end of the year. Taking into account the over-collection of fees from last fiscal year, the amount to remain in reserve, and \$1.5 million to be funded through a transfer from the Resources Trust Fund to the Water Rights Fund, the SWRCB determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$6.24 million this fiscal year. Assuming a non-collection rate of 15 percent,⁶ the Division determined that the total amount to be billed is \$7.34 million.

On September 30, 2004, the SWRCB adopted emergency regulations amending the water right and water quality certification fee schedules to meet the requirements of the Water Code and the Budget Act. (SWRCB Resolution No. 2004-0061.) Like the previous fiscal year, the fee schedule establishes annual permit and license fees that will continue to fund most of the Division's work in Fiscal Year 2004-2005. The emergency regulations became effective on October 14, 2004. On October 18, 2004, BOE sent out most of the notices of determination for annual permit and license fees under section 1066 of the SWRCB's regulations,⁷ including a notice of determination that PVID owed an annual water right fee for Permit 7652.

⁵ The 2003-2004 fee calculations were based on a fee revenue target of \$4.4 million, which was the amount specified in the Governor's proposed budget. The final budget, which included the adjustments called for by control sections in the Budget Act, provided for a \$4.6 million allocation from the Water Rights Fund.

⁶ This assumption is based on the rate of collection in Fiscal Year 2003-2004. Although over a quarter of the fee payers did not pay their fees by the end of the last fiscal year, most of the delinquent fee payers owed relatively small amounts of money. Most of the fee payers who owed larger amounts paid their fees on time. The figures available to the SWRCB indicate that during Fiscal Year 2003-2004, BOE collected 88 percent of the amount billed. Some uncertainty exists as to whether fee collections this year will run as high as last year. In fact, several larger fee payers who paid their fees for Fiscal Year 2003-2004 on time failed to do so this year. (See § 1074, subd. (d) [annual fees are due and payable 30 days after BOE issues a notice of assessment].) The SWRCB anticipates that after it has acted on pending petitions for reconsideration and BOE issues notices of redetermination, these larger fee payers will pay their fees in order to avoid late penalties. (See *id.*, subd. (g)(1) [allowing postponement of payment during the pendency of a petition for reconsideration, subject to interest from the original due date].) The assumption made when the SWRCB adopted the fee regulations for Fiscal Year 2004-2005--that collection rates would approximate those for Fiscal Year 2003-2004--still provides the most reliable basis available for projecting fee collections.

⁷ All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

Permit 7652 authorizes the diversion of water from the Colorado River for irrigation and domestic purposes at an average rate not to exceed 1,500 cubic feet per second from January 1 to December 31. Pursuant to section 1066, subdivision (a) of the SWRCB's regulations, the annual fee for PVID's permit was \$0.025 per acre-foot, based on the total amount of water authorized to be diverted under the permit. The amount of water authorized to be diverted was calculated by multiplying the maximum average rate of diversion authorized by the length of time in the authorized season. (§ 1066, subd. (b)(1).)

PVID filed a petition for reconsideration of this fee, which was received on November 17, 2004.

3.0 GROUNDS FOR RECONSIDERATION

A fee payer may petition for reconsideration of the SWRCB's determination that the fee payer is required to pay a fee, or the SWRCB's determination regarding the amount of the fee. (§ 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.)

A petition for reconsideration of a fee determination must include certain information, including the name and address of the petitioner, the specific SWRCB 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 that petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) Section 769, subdivision (c) of the regulations provides further that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment and must be received by BOE or the SWRCB within 30 days of the date the assessment was issued. (§ 1077, subds. (a) & (b).)

The SWRCB may refuse to reconsider a fee determination if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the SWRCB's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB may deny the petition if the SWRCB finds that the determination was appropriate and proper, set aside or modify the determination, or take other appropriate action. (*Id.*, subd. (a)(2)(A)–(C).)

4.0 DISCUSSION

4.1 The Annual Permit Fee Is a Lawful, Regulatory Fee

PVID contends that the annual permit fees are taxes that violate article XIII A, section 3 of the California Constitution because Senate Bill 1049, the legislation which authorizes the fees, was not passed by a two-thirds vote of the Legislature. PVID's main argument in support of this contention is that the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders.

The petition that PVID previously filed challenging the annual permit fee assessed against PVID in Fiscal Year 2003-2004 included the contention that the annual fees are unlawful taxes. In Order WRO 2004-0021-EXEC, the SWRCB rejected PVID's contention and denied PVID's petition for reconsideration. Unlike its current petition, PVID's previous petition did not include a memorandum of points and authorities in support of the contentions raised in that petition. In large part, however, Order WRO 2004-0021-EXEC addressed the arguments now advanced by PVID. This Order adopts the reasoning of Order WRO 2004-0011-EXEC, and incorporates that order by reference.⁸ In addition, the specific arguments raised in PVID's current petition are addressed briefly below.

⁸ Order WRO 2004-0021-EXEC also addressed contentions that are not included in the petition currently before the SWRCB. To the extent that Order WRO 2004-0021-EXEC addressed contentions that are not properly before the SWRCB in this Order and are not relevant to the contentions addressed in this Order, the incorporation by reference of Order WRO 2004-0021-EXEC does not extend to those contentions and those contentions are not addressed by this Order.

Under California Constitution, article XIII A (Proposition 13), the state cannot impose a new tax or tax increase except by statute approved by a two-thirds vote of each house of the Legislature.⁹ The Legislature, however, may authorize a state agency to charge a regulatory fee through a statute enacted by a majority vote.

A regulatory fee is a fee “charged in connection with regulatory activities, which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes.” (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].) A state agency must demonstrate “(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on or benefits from the regulatory activity.” (*California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945 [94 Cal.Rptr.2d 535] (citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 235-236 [211 Cal.Rptr. 567]).)

In Order WRO 2002-0021-EXEC, the SWRCB explained at length why the annual permit fees satisfy the test for regulatory fees. In addition, the relationship between the annual permit and license fees and the fee payers’ burdens on and benefits from the SWRCB’s regulatory activities is discussed in greater detail in a memorandum dated October 6, 2004, that was prepared in connection with the SWRCB’s adoption of the fee schedule for this fiscal year.¹⁰ The reasoning in those documents is incorporated by reference and will not be repeated in its entirety here.

⁹ Section 3 of Proposition 13 states:

From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

¹⁰ Memorandum to File by Victoria A. Whitney, Chief, SWRCB Division of Water Rights (Oct. 6, 2004), entitled “Water Rights Fee Program Summary and Recommended Fee Schedule for Fiscal Year 2004-2005.”

One of the specific arguments that PVID raises in its petition is that the imposition of annual permit fees is unreasonable because the fees relate primarily to “new applications and new activities.” The SWRCB’s costs of processing new water right applications are borne at least in part by application filing fees. Moreover, this argument ignores the explanation contained in Order WRO 2004-0021-EXEC concerning how the SWRCB’s review of new applications benefits permittees and licensees, and how existing permit and license holders contribute to the cost of processing new applications.

PVID also argues that, while it would be reasonable to assess “guilty parties” with the cost of investigating violations, or to assess petitioners for the costs associated with processing their petitions, it is unreasonable to charge “unrelated” permit holders for these costs. This amounts to an argument that the SWRCB should institute a transactional fee. There are a number of problems with this approach, as discussed in the October 6 memorandum referenced above. One significant problem stems from the fact that most water right applicants propose to divert a relatively small amount of water. Similarly, most permittees and licensees are authorized to divert relatively small amounts of water. Charging such applicants, permittees, and licensees the entire cost of processing their applications and petitions would result in enforcement problems. Another significant drawback to transactional fees is that quantifying the actual cost of services on an individual project basis would substantially increase administrative costs.

By contrast, annual permit and license fees are feasible, and they are appropriate because all of the SWRCB’s regulatory activities concerning water rights either benefit permittees and licensees, or address the impacts of permitted or licensed diversions, or both. Moreover, the SWRCB is not required to demonstrate that the annual fees are directly proportional to the benefits to or burdens created by each individual permittee or licensee. (See *CAPS, supra*, at p. 946 [rejecting argument that an agency must demonstrate an individual correlation between the amount of the fee and the cost of the benefit or burden].) “Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising.” (*Id.* at p. 948.)

PVID’s final argument is that the annual permit fee imposed on PVID is an unreasonable and discriminatory tax because the fee is calculated based on the amount of water authorized to be

diverted. PVID complains that the fee does not take into account the extent to which water diverted by PVID is not consumptively used and returns to the river where it is available to downstream users. It is unclear how this issue relates to the question whether the annual fees are valid regulatory fees. Order WRO 2004-0021-EXEC addressed the validity of the SWRCB's regulation that provides that annual permit and license fees are to be calculated based on the amount of water authorized to be diverted. The reasoning in WRO 2004-0021-EXEC also serves to address PVID's argument that this method of calculating annual fees is unreasonable and discriminatory. As explained in Order WRO 2004-0021-EXEC, the amount of water authorized to be diverted under a permit or license provides an objective and practical mechanism for apportioning the SWRCB's costs among users. Moreover, if annual fees were based on consumptive use, PVID's fee actually would increase because many permitted and licensed diversions are for nonconsumptive uses, such as hydropower generation.

In summary, the water right fees are regulatory fees, not taxes. Accordingly, the fees do not violate article XIII A, section 3 of the Constitution.

4.2 The Annual Permit Fee Is Constitutional as Applied to PVID

PVID contends that the annual permit fee is unconstitutional as applied to PVID because PVID's right to Colorado River water stems solely from its water delivery contract with the United States. PVID asserts that at the time it applied for and obtained its permit, it was unclear whether PVID's rights were based on California law or PVID's water delivery contract with the United States. PVID argues that the subsequent U.S. Supreme Court decision in *Arizona v. California* (1963) 373 U.S. 546 [83 S.Ct. 1468] established that PVID's rights are determined solely by the terms of PVID's contract, and that the SWRCB has no authority over the Colorado River and no authority over PVID arising from PVID's right to divert from the Colorado River. PVID asserts that it derives no benefit from its permit.

Preliminarily, it bears emphasis that PVID's petition for reconsideration presents the issue whether PVID, having applied for and received a water right permit, is required to pay an annual permit fee; the issue is not whether PVID was required to obtain a permit in the first instance, or whether the terms of the permit itself are valid. For the reasons set forth below, the SWRCB

concludes that, having elected to apply for and retain a permit, PVID is required to pay the annual permit fee.

It is unclear from PVID's petition whether PVID's theory is that the annual fee is unconstitutional because the SWRCB's authority to impose the fee is preempted by federal law, or because PVID derives no benefit from its permit and therefore the fee is an unconstitutional tax. Both arguments are based on an overly broad interpretation of the holding in *Arizona v. California*, *supra*, 373 U.S. 546.

In *Arizona v. California*, the U.S. Supreme Court held that the Boulder Canyon Project Act of 1928 (Project Act) authorized the Secretary of Interior to carry out the apportionment of Colorado River water among Arizona, California, and Nevada, and to decide which users within each state would get water, through water delivery contracts made under section 5 of the Project Act. (*Arizona v. California*, *supra*, 373 U.S. at pp. 579-580.) The Court stated that the Project Act established a comprehensive scheme for the distribution of Colorado River water pursuant to section 5 contracts. The Court stated further that this scheme left no room for inconsistent state law, but that States are free "to do things not inconsistent with the Project Act or with federal control of the river" (*Id.* at pp. 587-588.) In other words, federal law does not displace state law governing the use of Colorado River water, provided that state law does not interfere with the Secretary's ability to regulate the distribution and use of Colorado River water. (See also *Imperial Irrigation District v. State Water Resources Control Board* (1990) 225 Cal.App.3d 548, 561 [275 Cal.Rptr. 250] [upholding SWRCB's authority to apply California Constitutional and statutory prohibition against the unreasonable use of water to Imperial Irrigation District's use of Colorado River water pursuant to "unique blend" of federal and state, statutory and contractual rights].)

PVID has not alleged that the requirement that PVID pay an annual permit fee conflicts with federal law governing the use of Colorado River water. Moreover, no evidence exists that payment of the fee will force PVID to violate its federal contract or otherwise interfere with the Secretary's ability to control the distribution and use of Colorado River water. Therefore, the requirement under State law that PVID pay the fee is not preempted.

An argument that PVID derives no benefit from its permit also lacks merit. Federal law does not somehow invalidate PVID's permit, or preclude PVID from having a permit, provided that the permit is not used in a manner inconsistent with federal law.¹¹ As PVID notes in its petition for reconsideration, the terms of the permit itself provide that the permit supplements PVID's rights under its federal contract. Similarly, the benefits of the permit supplement the benefits of the contract. PVID's permit affords PVID unique benefits under California law. For example, California water right law protects PVID's permitted right from injury caused by unauthorized diversions; diversions by junior water right holders; or changes in point of diversion, place of use, or purpose of use by senior water right holders; and provides a forum before the SWRCB to address any such claim of injury. Even assuming that as a federal contractor PVID would be afforded the same protections as the water right holder, in this case the U.S. Department of the Interior, Bureau of Reclamation, that simply undercores the fact that the water right program administered by the SWRCB helps protect PVID's interests, a benefit which justifies charging PVID a fee to help pay for the program.¹²

Moreover, the benefits of PVID's permit are not the sole basis for a valid regulatory fee. A regulatory fee is valid if it bears a reasonable relationship to the fee payer's regulatory benefits from or burdens on the regulatory activity. Diversion and use of Colorado River water is subject to the regulatory authority of the SWRCB, even if that use is authorized by pre-1914 rights or a federal contract. (See *Imperial Irrigation District v. State Water Resources Control Board* (1986) 186 Cal.App.3d 1160, 1163 fn. 4, 1170-1171 [231 Cal.Rptr. 283, 284 fn. 4, 289-290] .) Administration of diversions like PVID's, which are supported by both water right permits and federal contracts, including regulatory oversight of use pursuant to those diversions, has in fact required a substantial commitment of time from SWRCB Members and staff. (See, e.g., SWRCB Order WRO 2002-0013; SWRCB Decision 1600 (1984).) The burden on the regulatory

¹¹ In fact, conflict between the use of water pursuant to PVID's contract and permit is unlikely because both the contract and the permit incorporate the terms of the 1931 Seven-Party Agreement between PVID and other Colorado River water users concerning their use of Colorado River water and relative priorities of right.

¹² In addition to its permit and federal contract, PVID holds a pre-1914 appropriative right with an 1877 priority date. (*Arizona v. California* (1979) 439 U.S. 419, 428-429 [99 S.Ct. 995, 1000].) PVID's pre-1914 right does not, however, authorize PVID to divert as much water as PVID's permit, and therefore PVID's pre-1914 right does not afford PVID the same benefits as PVID's permit.

program, in terms of the need for the regulatory activity for which the fee is charged, is essentially the same for permits like PVID's, where the permittee also claims a right under federal contract, as it is for other water right permits and licenses. Accordingly, and for the reasons discussed in section 4.1, above, the annual permit fee is a valid regulatory fee, not an unconstitutional tax.

It should also be noted that the \$0.025 per acre-foot fee imposed on PVID is trivial compared to the value of the water PVID may divert under the permit, as evidenced by the fact that Metropolitan Water District of Southern California (MWD) will pay PVID approximately \$153 to \$206 per acre-foot of water transferred to MWD pursuant to a recent agreement reached between the parties. (*Palo Verde Land Management, Crop Rotation and Water Supply Program . . . at a glance*, <http://mwdh2o.com/mwdh2o/pages/yourwater/supply/paloverde01.html> (as of January 11, 2005).)

5.0 CONCLUSION

For the reasons discussed above, the SWRCB's decision to impose the annual water right permit fee on PVID was appropriate and proper. Accordingly, PVID's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT PVID'S petition for reconsideration is denied.

Dated: January 12, 2005

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director