

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2005-0008-EXEC**

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In the Matter of the Petitions for Reconsideration of the  
**DELANO-EARLIMART IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT,  
IVANHOE IRRIGATION DISTRICT, LINDMORE IRRIGATION DISTRICT  
LINDSAY-STRATHMORE IRRIGATION DISTRICT, M&T INCORPORATED,  
SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, AND TERRA BELLA  
IRRIGATION DISTRICT**  
Regarding Annual Water Right Fee Determinations

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**ORDER DENYING RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR<sup>1</sup>**

**1.0 INTRODUCTION**

The Delano-Earlimart Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, M&T Incorporated, Southern San Joaquin Municipal Utility District, and Terra Bella Irrigation District, collectively referred to herein as “Petitioners,”<sup>2</sup> individually petition the State Water Resources Control Board (State Water Board or SWRCB) for reconsideration and a refund of water right fees assessed by the State Board of Equalization (BOE) on November 23, 2004. In general, Petitioners allege that the Senate Bill 1049 (2003-2004 Reg. Sess., Stats. 2003, ch. 741), SWRCB Resolution No. 2004 - 0061, the State Water Board’s emergency fee regulations, and the water right fees are unconstitutional and invalid. They request the State Water Board to find that the fee assessments were improperly made and to refund Petitioners’ payments. The State

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<sup>1</sup> SWRCB 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 State Water Board, 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.

<sup>2</sup> The term “Petitioners” is used for ease of reference in this order and does not confer the legal status of petitioner.

Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' requests for reconsideration.

## **2.0 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 State Water Board's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)<sup>3</sup> 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.) Pursuant to Water Code section 1537, subdivision (b)(4), the State Water Board's adoption of the regulations may not be the subject of a petition for reconsideration. 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 the 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 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. (§§ 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. (§ 1077, subd.(a).) Section 769, subdivision (c) of the regulations further provides 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.

If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding the assessment is deemed adopted on the date of assessment by BOE.

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<sup>3</sup> 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.

(§ 1077, subd. (b).) A petition is timely filed only if the State Water Board or BOE receives it within 30 days of the date the assessment is issued. (*Ibid.*)

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 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after reviewing the record, the State Water Board also may deny the petition 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 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 State Water Board's regulations. (§§ 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) 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 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).) 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 State Water Board and \$0.428 million for water right fee collection by BOE.<sup>4</sup> The appropriation includes an

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<sup>4</sup> 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 [footnote continues on next page]

appropriation of \$9.69 million from the Water Rights Fund. In accordance with the Water Code fee provisions, 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.<sup>5</sup> In Fiscal Year 2003-2004, the State Water Board collected \$7.44 million in water right fees and water quality certification fees deposited in the Water Rights Fund.<sup>6</sup> This amount 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.<sup>7</sup> 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 the \$1.5 million to be funded through a transfer from the Resources Trust Fund to the Water Rights Fund, the State Water Board 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,<sup>8</sup> the State Water Board determined that the total amount to be billed is \$7.34 million.

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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 item appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this order.

<sup>5</sup> 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.

<sup>6</sup> Fees associated with water quality certification for Federal Energy Regulatory Commission licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

<sup>7</sup> 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.

<sup>8</sup> 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 fee payers who owed larger amounts paid their fees on time. The figures available to the State Water Board indicate that during Fiscal Year 2003-2004, BOE collected 88 percent of the amount billed. There is some uncertainty 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 State Water Board 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  
*[footnote continues on next page]*

On September 30, 2004, the State Water Board 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.) The emergency regulations became effective on October 14, 2004, and on November 23, 2004, BOE sent out the notices of determination for annual permit and license fees that are passed through to the United States Bureau of Reclamation's (USBR) water supply contractors (often referred to as "pass-through fees") and for annual water quality certification fees for Federal Energy Regulatory Commission licensed hydroelectric projects. (§§ 1073; 3833.1.)

#### **4.0 FEE DETERMINATIONS COVERED BY THE PETITION**

Although Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments nearly verbatim and none of the petitions provide any additional arguments, information or supporting authorities that distinguishes it from the others.

Accordingly, the State Water Board has decided to consolidate its consideration of the petitions in this order instead of issuing an individual order on each petition. Attachment 1 identifies the persons or entities who timely and properly filed a petition for reconsideration and are considered to be petitioners for purposes of this order.<sup>9</sup>

The State Water Board's review in this order is limited to the November 23 assessments for annual pass-through fees. (Wat. Code § 1537, subd. (b)(2); Cal. Code Regs., tit. 23, § 1077.) BOE previously assessed certain annual fees on October 18, 2004, and will issue additional assessments for some annual fees that were not included in October 18 or November 23 assessments. Those earlier- and later-assessed fees are not properly within the scope of review of the November 23 fee assessments.<sup>10</sup> Petitioners' contentions that may be relevant to earlier-

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due date].) The assumption made when the State Water Board 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.

<sup>9</sup> This order and Attachment 1 use identification numbers starting with "USBR" to refer to annual permit or license fees passed through to USBR water supply contractors.

<sup>10</sup> Properly filed petitions requesting reconsideration of those later-issued assessments will be considered separately as appropriate.

or later-issued assessments, but are not relevant to any of the fee determinations that were issued on November 23, will not be considered in this order. Additionally, the State Water Board will not consider allegations where the Petitioners have failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

The State Water Board will not consider late petitions for reconsideration. A petition for reconsideration must be *received* by either BOE or the State Water Board within 30 days of the date of the assessment is issued, i.e., December 23, 2004, for bills issued on November 23, 2004. (§ 1077, subd. (b).) The State Water Board received the petitions of Exeter Irrigation District (USBR 1291, 1292), Lindmore Irrigation District (USBR 1281, 1282), Southern San Joaquin Municipal Utility District (USBR 1278, 1279), and Terra Bella Irrigation District (USBR 1288) after the deadline of December 23, 2004, and accordingly will not reconsider the fee assessments that are the subject of those petitions.<sup>11</sup>

Several Petitioners failed to include the notice of assessment with their petitions. (See § 1077, subd. (a).) Although the State Water Board requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely filed petition if the petition substantially complies by providing all of the required information, in a manner that is clearly identified and readily accessible, even though the information may not be in the proper format. In this case, the State Water Board has accepted certain petitions that did not include a notice of assessment as long as the petitioner included and clearly identified the same information contained in a notice: the fee payer's name, either the water right or BOE identification number, the amount assessed, and the billing period or assessment date.

It bears emphasis, however, that the requirement for including a copy of the notice of assessment serves an important function. A petition is not acceptable simply because the information provided in the notice of assessment might be available somewhere in the materials included in or incorporated by reference in the petition. The State Water Board receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief

period, and the information included in the notice of assessment is necessary to properly process the petitions for reconsideration.<sup>12</sup> To the extent the State Water Board is required to track down information because the petitioner fails to comply with the requirements specified in State Water Board regulations, the processing of petitions for reconsideration would be delayed, and for many petitions the staff time that would have to be devoted to the effort would be disproportionate to the amount of the fee involved. In the future, the State Water Board may deny a petition for failure to include a copy of the notice of assessment as required under the regulations, without considering whether the information that would be provided in the notice of assessment is set forth elsewhere in the petition.

#### **5.0 SENATE BILL 1049, RESOLUTION NO. 2004-0061, AND THE FEE REGULATIONS ESTABLISH LAWFUL REGULATORY FEES**

Petitioners raise a variety of general constitutional and statutory challenges to Senate Bill 1049, Resolution No. 2004 - 0061, and the water right fees.<sup>13</sup> The petitions repeat verbatim arguments previously made in other petitions to the State Water Board regarding annual permit and license fees assessed on October 18, 2004, and although the identity of persons or entities who submitted those petitions generally varies from that of the current Petitioners, Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions. With respect to the issues that were raised in the earlier petitions and are repeated in the petitions now before the State Water Board, this order adopts the reasoning of Order WRO 2005-0004-EXEC and incorporates that order by reference.

Petitioners also specifically challenge the pass-through fees on four main grounds. They first claim that they should not subject to the water right fees, alleging that the water they receive is

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<sup>11</sup> Nonetheless, the State Water Board notes that the issues raised by these districts are identical to the issues raised in the petitions properly before the State Water Board and that are disposed of in this order.

<sup>12</sup> For example, more than 300 persons or entities petitioned fee assessments sent out on October 18, 2004.

<sup>13</sup> Petitioners claim that (1) the fees are unconstitutional and invalid, (2) Senate Bill 1049, SWRCB Resolution No. 2004-0061 and the State Water Board's regulations impose a new tax in violation of California Constitution Article XIII A (Proposition 13), (3) SWRCB Resolution No. 2004 - 0061 and the State Water Board's regulations impose ad valorem taxes prohibited by Proposition 13, (4) Senate Bill 1049, SWRCB Resolution No. 2004 - 0061 and the emergency regulations are unconstitutionally discriminatory against water right holders, and (5) the fee schedule exceeds the reasonable cost of providing services necessary to the State Water Board's regulatory activity.

“supported in substantial part upon pre-1914 rights and/or riparian rights which the Bureau of Reclamation either acquired outright or acquired by exchange.” Second, Petitioners argue that even if they are subject to the fees, Friant Class II contractors are being treated in an arbitrary, capricious, unreasonable, and irrational manner because they get less yield from Class II supplies. Presumably, Petitioners’ argument is that Class II supplies should be assessed at a lower rate. Third, Petitioners claim that the USBR’s sovereign immunity extends to its Central Valley Project (CVP) water service contractors. Finally, asserting that the SWRCB has determined that the CVP contractors are not legal users of water and they do not hold water rights to the water subject to the USBR’s contracts, Petitioners contend that there is no basis for assessing a fee against them.

The SWRCB has already considered and rejected nearly identical claims in its previous orders regarding the 2003-2004 and 2004-2005 pass-through fees. (See, e.g., SWRCB Orders WRO 2004-0011-EXEC, WR 2005-0007-EXEC.) In fact, Petitioners’ first and second claims regarding the pass-through fees duplicate, nearly word-for-word, those raised by the Northern California Water Agency (NCWA) in its petitions. (See, e.g., NCWA et al., Petition for Reconsideration and Request for Refund of Water Rights Fees (Feb. 9, 2004), p. 21, lines 19-27; NCWA et al., Petition for Reconsideration and Request for Refund of Water Rights Fees (Dec. 22, 2004), p. 21, lines 13-20; Petition for Reconsideration of Ivanhoe Irrigation District (Dec. 14, 2004), p. 2, ¶ 4.a.) With respect to the issues regarding the pass-through fees that were raised in earlier petitions and are repeated in the petitions now before the State Water Board, this order adopts the reasoning of Order WRO 2004-0011-EXEC and incorporates that order by reference.<sup>14</sup> Petitioners’ causes of reconsideration are denied.

Nonetheless, it may be helpful to further explain the basis for the water right fees that are passed through to the USBR’s CVP contractors. Since first adopting a revised water right fee schedule in 2003, the SWRCB has assessed an annual water right fee to each holder of a water right

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<sup>14</sup> To the extent Orders WRO 2004-0011-EXEC and WRO 2005-0004-EXEC address issues that are not properly before the SWRCB in this order and are not relevant to the issues decided in this order, the incorporation by reference of these orders does not extend to those issues, and those issues have not been decided by this order.



permit or license based upon the total authorized diversion amount of that permit or license. Under Water Code sections 1540 and 1560, if the SWRCB determines that a fee payer is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the SWRCB may allocate the fees due to that fee payer's water supply contractors. Historically, the USBR has refused to pay water right fees to the state, claiming sovereign immunity. The SWRCB has consulted with the USBR as to whether it would pay the revised water right fees and the USBR has stated that it will not pay the fees. Based on this information and past experience, the SWRCB has determined that the USBR would decline to pay the fees this fiscal year.<sup>15</sup> Accordingly, the SWRCB has passed the USBR's water right fees through to its CVP contractors by prorating the fees for the CVP among the water supply contractors for the project based on either the contractor's entitlement under the contract, or if the contractor has a base supply under the contract, the contractor's supplemental supply entitlement. (§ 1073, subds. (b)(2), (e).)

Petitioners claim that there is no basis for the SWRCB to impose regulatory fees on the CVP contractors. There is no question, however, that the SWRCB has the authority to regulate the diversion and use of water subject to USBR contracts. (Wat. Code. §§ 275, 1051, 1052, 1211; *California v. United States* (1978) 438 U.S. 645 [98 S.Ct. 2985]; see *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183 [161 Cal.Rptr. 466][regulation of point of diversion where USBR contractor takes water]; SWRCB Decision 1600 (1984) [regulation to prevent waste or unreasonable use of water delivered under water supply projects with the Secretary of the Interior].) When a permit or license holder diverts water for use by another person or entity that contracts for delivery of the water, the SWRCB ordinarily expects the permit or license holder to assure compliance with the terms of the permit or license. The SWRCB regulates the contractors indirectly, through the conditions of the permits and licenses held by the water suppliers who serve those contractors. Water used under contract with the permit or license holder must be used in compliance with the terms of the permit or license.

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<sup>15</sup> More recently, at the State Water Board's January 4, 2005, workshop, the USBR indicated again that it would not pay the fees.

Although the SWRCB's regulation is indirect, the activities of the water supply contractors impose a burden on, and benefit from, the regulatory water right program. The contractors' demand for water is a primary purpose of the USBR's water supply projects and they benefit from the USBR's appropriation of water under the state's regulatory permit and license system, which administers the water rights on which the contractors depend for their contracted water. The contractors' use of the water delivered by permit and license holders such as the USBR is subject to the permit and license system, and oversight is necessary to prevent violations. Thus, it is reasonable for the contractors pay the regulatory fees for the water right permits and licenses that are necessary to operate the water supply projects from which they have contracted to receive and use water.

To constitute a valid fee, the basis for allocating charges to a payer must bear a fair or reasonable relationship to the fee payer'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, 945-950 [94 Cal.Rptr.2d 535].) A precise cost-fee ratio is not required. (*Id.* at p. 950). Nor is it necessary that the agency imposing the fee have a direct regulatory relationship with the fee payer. (*Id.* at p. 535.) The pass-through fees are fair and reasonable because the water supply contractors benefit from the state's administration of water rights, and their activities create a need for the regulatory program. The fees attributable to USBR projects are paid for by beneficiaries of those projects, instead of having other fee payers who do not rely on USBR projects cover the costs that would be allocated to the USBR's projects but for the USBR's claim of sovereign immunity. The pass-through fees also serve to treat USBR contractors similarly to contractors of other projects, like the State Water Project, where the water right holder includes water right fees among the costs it passes through to its contractors. Ideally, the USBR would waive sovereign immunity and the state would impose fees directly on USBR. But the law does not require that the basis for allocating fees be ideal, and if the USBR paid the fees it would pass those costs through to its contractors. Apportioning the fees attributable to USBR projects among the USBR's water supply contractors is fair and reasonable.

## **6.0 CONCLUSION**

For the reasons discussed above, the State Water Board finds that its decision to impose water right fees was appropriate and proper. To the extent that this order does not address all of the issues raised in the petitions for reconsideration, 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 State Water Board's regulations. The petitions for reconsideration are denied.

### **ORDER**

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

Dated: February 9, 2005

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

**In the Matter of the Petition for Reconsideration of the  
Delano-Earlimart Irrigation District et al.  
Attachment 1**

<b>NAME</b>	<b>SWRCB ID</b>
DELANO-EARLIMART IRRIGATION DISTRICT	USBR1300
DELANO-EARLIMART IRRIGATION DISTRICT	USBR1301
IVANHOE IRRIGATION DISTRICT	USBR1284
IVANHOE IRRIGATION DISTRICT	USBR1285
LINDSAY-STRATHMORE IRRIGATION DISTRICT	USBR1280
M&T INCORPORATED	USBR1241