

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0010-EXEC

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In the Matter of the Petition for Reconsideration of the  
**PALO VERDE IRRIGATION DISTRICT**  
Regarding Water Right Fee Determination for Fiscal Year 2006-2007

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**ORDER DENYING RECONSIDERATION**

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

**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 (State Water Board or SWRCB) determination that PVID was required to pay an annual water right fee in the amount of \$32,678.69 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 State Water Board 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.

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<sup>1</sup> Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director. 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 a petition for reconsideration of a disputed fee 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. This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 Cal.Rptr.3d 898]. In that case, the Court held that the State Water Board could not defer making findings that were prerequisite to approving a water right application by delegating to its staff the authority to make the findings after the application had been approved. The holding in *Central Delta* applies to State Water Board action on water right applications; it does not apply to water right fee assessments.

## 2.0 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 (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 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 water right fees include one-time filing fees and annual fees. (*Id.* § 1525.) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year (FY) 2006-2007, the Budget Act appropriates \$14.105 million for the water right program, including \$13.642 million for water right administration by the State Water Board, \$35,000 for support functions by the California Environmental Protection Agency (Cal/EPA), and \$428,000 for water right fee collection by BOE. (Stats. 2006, ch. 47, as amended by Stats. 2006, ch. 48.)<sup>2</sup> Most of the funding for the water right program – a total of \$12.166 million – is appropriated from the Water Rights Fund. As required by 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 Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.<sup>3</sup>

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<sup>2</sup> The Budget Act of 2006 includes a \$2.32 million loan from the Underground Storage Tank Cleanup Fund to the Water Rights Fund to be used for a new water rights information management system and to be repaid with interest by June 30, 2011. For purposes of calculating fees for FY 2006-2007, the State Water Board did not include appropriations from the Water Rights Fund attributable to this loan. Principal and interest to be repaid on the loan will be included in the fee calculations for the years in which the loan is repaid. Subtracting the amount loaned from the Underground Storage Tank Cleanup Fund, the amount appropriated from the Water Rights Fund is \$9.846 million.

The budget figures referenced in this order for FY 2006-2007 are based on estimated expenditures for FY 2006-2007, as projected in the Governor's Budget for 2007-2008 (California Budget 2007-08, <http://www.ebudget.ca.gov/>). They differ from the line item appropriations to the State Water Board, BOE and Cal/EPA in the Budget Act of 2006 because the Budget Act includes unallocated appropriations and control sections that result in the actual amount appropriated being slightly different than the line item appropriations. The Governor's Budget for the next fiscal year includes projected expenditures for the current fiscal year, and because these projections include adjustments to take into account unallocated appropriations and control sections in the Budget Act, they provide a more accurate projection of what actual expenditures will be for the current fiscal year.

<sup>3</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)), penalties collected for water right violations (*id.*, § 1551, subd. (b)), and money transferred from other funds.

At a meeting of the State Water Board held on September 21, 2006, the State Water Board adopted regulations revising the water right and water quality certification fee schedule and regulations in accordance with the Budget Act of 2006. (SWRCB Resolution 2006-0065; see Memorandum to File by Victoria Whitney, Division Chief, dated Sept. 21, 2006 [explaining basis for FY 2006-2007 fee schedule].) The State Water Board amended sections 1066 and 3833.1 of the fee regulations to increase annual permit and license fees and water quality certification fees from the fees in effect during FY 2005-2006, and to adjust certain filing fees. The emergency regulations adopted under Resolution 2006-0065 were not sent to the Office of Administrative Law for approval. The State Water Board subsequently learned that additional general fund support in FY 2006-2007 was available to reduce the need for an increase in annual fees.

Accordingly, on November 30, 2006, the Executive Director revised and re-adopted the emergency regulations to eliminate the annual fee and filing fee increases.<sup>4</sup> (SWRCB Resolution 2006-0094-EXEC.) The fee regulations as revised were re-adopted to reinstate and allow collection of annual permit and license fees, annual water quality certification fees, and filing fees in FY 2006-2007 at the same rates and subject to the same upper limits as were in effect during FY 2005-2006. On December 19, 2006, BOE sent out notices of determination for annual permit and license fees, including a notice of determination that PVID owed an annual water right fee for Permit 7652.

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, subd. (a), of the State Water Board's regulations,<sup>5</sup> the annual fee for PVID's permit was \$100, plus \$0.03 per acre-foot for each acre-foot in excess of 10 acre-feet, 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

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<sup>4</sup> Resolution 2002-0104 delegates to the Executive Director the authority to revise or re-adopt emergency regulations that have been adopted by the State Water Board. By Resolution 2006-0065, the State Water Board adopted emergency regulations revising the water right and water quality certification fees. Accordingly, the Executive Director had the authority to revise and re-adopt the emergency regulations.

<sup>5</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.

the maximum average rate of diversion authorized by the length of time in the authorized season. (§ 1066, subd. (b)(1).)

PVID filed for a petition for reconsideration of this fee, which was received on January 12, 2007.<sup>6</sup>

### **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 State Water Board'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 State Water 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 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 the State Water Board within 30 days of the date the assessment was issued. (§ 1077, subds. (a) & (b).)

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<sup>6</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water 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 State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (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]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

The State Water Board 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 State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board 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

PVID contends that (1) the annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders, and (2) the assessment of the fee against PVID is unconstitutional because PVID's right to Colorado River water stems solely from PVID's water delivery contract with the United States and the State Water Board has no authority over the Colorado River.

PVID made these same contentions in petitions that PVID previously filed challenging annual fees issued in FY 2003-2004 and FY 2004-2005. The Executive Director denied those petitions in Order WRO 2004-0021-EXEC and Order WRO 2005-0005-EXEC, respectively. PVID's current petition repeats the same arguments in support of its contentions verbatim.

The Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition should be denied. PVID has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in Order WRO 2004-0021-EXEC and Order WRO 2005-0005-EXEC. Accordingly, this order incorporates by reference and adopts the reasoning of Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, and the documents that supported those orders.<sup>7</sup>

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<sup>7</sup> Order WRO 2004-0021-EXEC also addressed contentions that are not included in the petition currently before the State Water Board. To the extent that Order WRO 2004-0021-EXEC addressed contentions that are not properly before the State Water Board in this proceeding 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.

5.0 **CONCLUSION**


For the reasons discussed above, the State Water Board'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:

3/23/07

  
Thomas Howard  
Acting Executive Director