

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0006-EXEC

In the Matter of the Petition for Reconsideration of

**ANDERSON-COTTONWOOD IRRIGATION DISTRICT, CORDUA IRRIGATION DISTRICT,
EXETER IRRIGATION DISTRICT, IVANHOE IRRIGATION DISTRICT, LINDMORE
IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT, LOMO COLD
STORAGE, M & T INCORPORATED, McPHERRIN LAND CO., NEVADA IRRIGATION
DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PARADISE IRRIGATION DISTRICT,
SOLANO IRRIGATION DISTRICT, SOUTH FEATHER WATER & POWER AGENCY, AND
TERRA BELLA IRRIGATION DISTRICT**

Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Anderson-Cottonwood Irrigation District, Cordua Irrigation District, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, M & T Incorporated, McPherrin Land Company, Nevada Irrigation District, Lomo Cold Storage, Orange Cove Irrigation District, Paradise Irrigation District, Solano Irrigation District, South Feather Water & Power Agency, and Terra Bella Irrigation District, collectively referred to herein

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to conduct and 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 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.

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 State Water Board action of which the 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 the petitioner requests.

(§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include either a copy of the notice of assessment or certain information.

(§ 1077, subd. (a)(2).) 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.

(§ 1077, subd. (b).) A petition is timely filed only if the State Water Board receives it within 30 days of the date the assessment is issued. (*Ibid.*) The deadline for filing a petition for reconsideration of the November 2, 2011 assessment was December 2, 2011. The State Water Board will not consider late petitions or late-filed letters referencing the jointly filed petition for reconsideration.

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 board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the 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).)⁵

⁵ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the 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 board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

4.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency primarily responsible for administering the State's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act and includes funding from several different sources. 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, Stats. 2003, ch. 741 (S.B. 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 reviews the fee schedule each fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount appropriated by the Legislature from the Water Rights Fund, taking into account the reserves in the fund. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater, or less than, the amounts appropriated, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated January 23, 2012, entitled "Recommended Water Right Fee Schedule for Fiscal Year 2011-12" (hereinafter "Evoy Memorandum"), in FY 2011-2012, the Legislature appropriated \$17.769 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in sum, this amount includes a \$12.591 million appropriation from the Water Rights Fund in the Budget Act of 2011⁶ and a continuing appropriation from the Water Rights Fund of \$3.75 million for enforcement positions,⁷ for a total of \$16.341 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's budget for the water right program also includes \$1 million in general funds and \$428,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$437,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$38,000

⁶ Stats. 2011, ch. 33.

⁷ In addition to the annual Budget Act, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess.) ch 2) (SB 7X 8), § 11, makes a continuous appropriation from the Water Rights Fund of \$3.75 million for water right enforcement. In 2011, the Legislature amended Water Code section 1525, subdivision (d)(3) to clarify that the amounts collected through fees should be sufficient to cover the appropriations set forth in the Budget Act and the continuous appropriation in SB 7X 8. (Stats. 2011, ch. 579, § 9.)

from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the board's water right program.

In accordance with 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 fund in the annual Budget Act, taking into account money in the fund from other sources.⁸ As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of \$5.52 million for the fiscal year, and the Division determined that the fund condition projections for FY 2011-2012 should include a reserve for economic uncertainty of about 20 percent of annual expenditures, which is approximately \$3.36 million. Without a fee increase for the FY 2011-12, however, the Water Rights Fund would have an ending balance of \$149,000, which is below a prudent reserve. Thus, the Division proposed a fee increase for FY 2011-12 in which the Water Rights Fund balance would be drawn down to an ending balance of \$5.09 million, leaving the fund with a 30 percent reserve. For the purposes of calculating this year's fees, the amount by which reserves would be spent down to reduce the fund balance to a \$5.09 million reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of \$14.419 million.

As described in the Evoy Memorandum, the Division recommended amending the annual permit and license fee by increasing the base fee from \$100 to \$150 and increasing the rate per acre-foot from \$0.03 per acre-foot to \$0.05 per acre-foot for diversions exceeding 10 acre-feet. (See Cal. Code Regs., tit. 23, § 1066.) The Division also recommended revising other portions of the fee schedule for FY 2011-2012, which are not the subject of these petitions for reconsideration.

On September 19, 2011, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2011-0043, revising the emergency regulations governing water right fees for FY 2011-2012. The Office of Administrative Law approved the emergency regulations on October 20, 2011.

⁸ 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 penalties collected for water right violations (*id.*, § 1551, subd. (b)). The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

5.0 FEE ASSESSMENTS ADDRESSED IN THIS ORDER

Although the Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments. Twelve individual Petitioners are represented by a single law firm.⁹ The remaining Petitioners submitted petitions with language that is substantially the same as the petitions filed by that law firm. None of the petitions provide any additional arguments, information, or supporting authorities that materially distinguishes it from the others. Accordingly, the State Water Board has decided to consolidate its consideration of these individual petitions in this order.

The State Water Board's review in this order is limited to annual fee assessments issued on November 2, 2011. Petitioners' requests made in this fiscal year for refunds of fees paid between July 1, 2003, and June 30, 2010 are not timely. (§ 1077, subd. (b).) The petitions seek reconsideration of the following fee assessments:

- annual petition fees under section 1065;
- annual permit and license fees under sections 1066;
- annual permit and license fees passed through to the United States Bureau of Reclamation's (Reclamation's) contractors under section 1073; and
- annual fees for Federal Regulatory Energy Commission (FERC)-licensed hydroelectric projects under section 3833.1.

To the extent that Petitioners' contentions are not related to any of these fee assessments, those contentions are not within the scope of their petitions for reconsideration.

Furthermore, under California Code of Regulations, title 23, section 1077, subdivision (a), only a fee payer may submit a petition for reconsideration regarding the amount of a fee. No Petitioner has argued that an allegedly unfair fee assessment against another makes the fees actually assessed against the individual unlawful, and each petition seeks only a refund of the annual expenses for the named Petitioner. Therefore, to the extent that the petitions raise arguments concerning a fee that has not been assessed against the individual Petitioner, such claims are dismissed.

⁹ Minasian, Spruance, Meith, Soares & Sexton, LLP.

6.0 PETITIONERS' ARGUMENTS REGARDING THE CONSTITUTIONALITY OF THE FEES AND THE ADMINISTRATION OF THE FEES ARE WITHOUT MERIT

Petitioners set forth two arguments as to why the challenged fees are invalid. First, they claim that the 2011 Budget Act violated Proposition 26, which imposed a two-thirds vote requirement on statutes that increase taxes, and expanded the definition of tax to some charges that may have been considered regulatory fees under prior law. (See Cal. Const., art. XIII A, § 3, amended by initiative, Gen. Elec. (Nov. 2, 2010).) The purposes of Proposition 26 include restraining the Legislature and local governments from enacting fees that "exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program." (Proposition 26, § 1, subd. (e), 2A West's Ann. Cal. Const., art. XIII A (Supp. 2012) foll. § 3, p. 123.) Secondly, they claim that the fees are actually unlawful taxes. Petitioners also incorporate by reference the arguments in a petition for reconsideration filed by NCWA, CVPWA, and CFBF.

6.1 THE INCREASE IN WATER RIGHT FEES DOES NOT VIOLATE PROPOSITION 26

On November 2, 2010, California voters approved Proposition 26, which amended the California Constitution to require that any change in state statute resulting in higher taxes be approved by a two-thirds vote of the Legislature.¹⁰ Proposition 26 applies retroactively to statutes enacted after January 1, 2010, but does not apply to previously enacted statutes. (See *id.*, subd. (c).) With respect to regulatory fees, Proposition 26 imposes a two-thirds vote requirement on some types of charges that previously could be established by statutes enacted by majority vote. The proposition recognizes certain exceptions from the two-thirds vote requirement, including statutes establishing charges for (i) a specific benefit conferred or privilege granted directly to the payor, (ii) a specific government service or product provided directly to the payor, and (iii) the reasonable regulatory costs incident to issuing licenses and permits, performing inspections, and enforcement. (*id.*, subd. (b)(1)-(3).) The State has the burden to demonstrate by a preponderance of the evidence that a levy, charge, or other exaction is not a tax. (*id.*, subd. (d).)

Petitioners argue that the increase in annual water right fees specified in the regulations governing water right fees for FY 2011-2012 violates Proposition 26, because the 2011 Budget

¹⁰ Proposition 26 also amended constitutional provisions applicable to local fees, which are not relevant here.

Act was not approved by a 2/3 majority of both houses of the State Legislature, and the increase constitutes a “tax.” Without developing their argument, Petitioners state: “If the [State Water Board] contends that the water right fees are not a ‘tax’ under Proposition 26, then it must produce evidence of its reasons, including demonstrating by a preponderance of the evidence that the water right fees are not a tax.”

As a preliminary matter, in their Proposition 26 argument, Petitioners mention both the 2011 Budget Act and Resolution No. 2011-0043, under which the State Water Board adopted emergency regulations that increased certain annual water right fees. Proposition 26 only applies to changes in state statutes, not to administrative regulations. (*Id.*, subd. (a).) Thus, a Proposition 26 challenge necessarily is a challenge to the validity of a statute enacted by the Legislature, and any changes in the water right fee regulations are not subject to Proposition 26 except insofar as the regulations are challenged on grounds that they apply to or rely on authority provided by an invalid statute.

Petitioners are left with the argument that the Budget Act of 2011 is invalid because it was enacted by majority vote. The Budget Act includes appropriations for the water rights program and other state regulatory programs supported by regulatory fees. (See *Planned Parenthood Affiliates of California v. Swoap* (1985) 173 Cal.App.3d 1187, 1197 [“The main purpose of the annual budget bill is that of ‘itemizing recommended expenditures’ for the ensuing fiscal year.”]) Because regulatory fees are based on program costs, annual appropriations will affect amounts recovered through fees, and thus may indirectly increase the amounts recovered through regulatory fees, even without any change in the statutes establishing those regulatory fees. But this does not mean that a Budget Act appropriation requires a two-thirds vote simply because it may result in higher fees.

Proposition 26 applies to changes in the statutes that set taxes and fees, not enactments that affect tax and fee revenues only indirectly. Otherwise, any statute that affected regulatory agencies’ administrative costs would require a two-thirds vote, because pre-existing fees statutes provide for the recovery of increased program costs. The Budget Act did not enact or amend any tax or fee statute. While the State Water Board must adjust the water right fees as necessary to generate revenues consistent with the amounts appropriated by the Legislature from the Water Rights Fund, the Budget Act itself does not increase the fee. Instead, the State Water Board makes a decision to set the fee based on a number of factors, including other sources of revenue in the Water Rights Fund, the amount of revenue collected the

previous year, and the maintenance of a prudent reserve. These factors are considered during the rulemaking process, which is not subject to Proposition 26.

Even assuming that Proposition 26 applies to statutes that affect fees only indirectly, it does not operate to require a two-thirds vote for Budget Act appropriations. Proposition 25, enacted in the same election as Proposition 26 and approved by a larger number of voters provides: "Notwithstanding any other provision of law or of this Constitution, the budget bill . . . may be passed in each house by roll call vote entered in the journal, a majority of the membership concurring . . ." (Cal. Const, art. IV., § 12, subd. (e)(1).) Accordingly, Proposition 26 cannot reasonably be interpreted to require a two-thirds vote for a Budget Act appropriation, merely because some of the appropriations in the Budget Act will be recovered through regulatory fees. (See Proposition 26, § 4., 2A West's Ann. Cal. Const., art. XIII A (Supp. 2012) foll. § 3, p. 124 [voiding conflicting tax or fee vote measures on the same ballot only if Proposition 26 gained a higher number of votes than the conflicting measure].)

The fee statutes were enacted in 2003 as part of S.B. 1049. The State Water Board's adoption of a new fee schedule based on the fee statutes is not subject to Proposition 26, even though those fees necessarily are affected by changes in program costs resulting from statutes enacted after January 1, 2010.¹¹

For the reasons stated above, Petitioners' argument based on Proposition 26 is denied.

6.2 THE WATER RIGHT FEES DO NOT CONSTITUTE AN UNLAWFUL TAX

Petitioners argue that, even though *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421 ("*CFBF v. State Water Board*") upheld Water Code section 1525, the statute under which the Board sets its water right fees, the fees are unconstitutional "as applied," because they "do not bear a fair and reasonable relationship to the fee payers' burdens on or benefits from the regulatory activity." Petitioners assert two theories that purport to show unreasonableness in the fees. First they allege that 60% of water

¹¹ Even if Proposition 26 were found to apply to the increase in water right fees, the State Water Board has explained at length over the years in its orders on reconsideration and annual fee memoranda that the fee revenues collected do not surpass the costs of the water right program and that the cost allocations to individual fee payers bear a fair or reasonable relationship to the payer's burdens on, or benefits received from, the regulatory activity. The State Water Board has already met any burden arguably imposed by Proposition 26, and Petitioners fail to raise specific concerns with these analyses, except as addressed in section 6.2, below. (See California Constitution, Article XIII A, § 3, subd. (b).)

in the state is not subject to fees, but that all water holders' benefit from State Water Board actions and such discrepancy is unlawful. Secondly, they assert that fees assessed against contractors for water supplies from the Reclamation amount to half of the fees that Reclamation would have to pay, were they subject to state fees, but that the contracts only account for 6.6 million acre-feet of the 116 million acre-feet of Reclamation's permits. They allege that such allocation is "excessive and unlawful insofar as the [State Water Board] has not demonstrated that the total water in question is necessary to support the quantity of water actually delivered to federal contractors."

Petitioners' statement that 60% of water in the state is not subject to fees is not only incorrect, it is also irrelevant. *CFBF v. State Water Board, supra*, 51 Cal.4th at pages 441-442 addressed whether a court should focus on the amount of water subject to fees or on the costs of the regulatory program in determining whether a water right fee "as applied" constitutes an unlawful tax. Petitioners' first argument, which focuses on the relative amounts of water held under permitted appropriative rights and other rights, ignores the holding on this issue in *CFBF v. State Water Board*:

The trial court's findings [on remand] should include whether the fees are reasonably related to the total budgeted costs of the Division's "activity" (see [Wat. Code] § 1525, subd. (c)), keeping in mind that a government agency should be accorded some flexibility Focusing on the *activity* and its associated costs will allow the trial court to determine whether the assessed fees were reasonably proportional and thus not a tax. [citation omitted] The court must determine whether the statutory scheme and its implementing regulations provide a fair, reasonable, and substantially proportionate assessment of all *costs related to the regulation of the affected payors.*"

(*Id.* at p. 442 [italics added].)

The California Supreme Court has rejected the Petitioners' focus on amount of water, as opposed to amount of regulatory costs, as the focus of an inquiry as to whether the water right annual fees constitute an unlawful tax. A trial on the application of the 2003 water right fees will be held in 2012. Therefore, Petitioners' arguments regarding the amount of water subject to fees are denied.

Petitioner's second argument is that the allocation of fees for Reclamation's water rights to contractors, who hold contracts for roughly 5% of the face value of the rights, is unlawful "insofar as the [State Water Board] has not demonstrated that the total water in question is necessary to support the quantity of water actually delivered to federal contractors." Petitioner

mischaracterizes the manner in which the State Water Board assesses fees for federal contract holders by stating that the Board assesses fees for 50% of the face value of Reclamation's permits. The State Water Board assesses fees against contractors with the Reclamation in accordance with Water Code sections 1540 and 1560, subdivision (b) and California Code of Regulations, title 23, sections 1071 subdivision (a)(2) and 1073. California Code of Regulations, title 23, section 1073, subdivision (b) lays out a specific formula for fee assessments for contractors in Reclamation's Central Valley Project. Specifically, as discussed in numerous fee memoranda and in the State Water Board's previous orders dismissing petitions for reconsideration by this law firm and many of the same Petitioners in previous years, the State Water Board assesses fees for federal contractors based on the full face value of Reclamation's permits, including a 50% reduction in fees for those permits that are for hydropower projects. (See e.g. Evoy Memorandum; Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, February 1, 2010 "Analysis of Water Right Program Activities and Expenditure of Resources;" Memorandum to File by Victoria A. Whitney, Chief, Division of Water Rights, January 7, 2008 "Water Right and Water Quality Certification Fee Schedule for Fiscal Year 2007-08;" Memorandum to File by Victoria A. Whitney, Chief, Division of Water Rights, October 6, 2004, "Water Right Fee Program Summary and Recommended Fee Schedule for Fiscal Year 2004-2005;" Order WR 2009-0004-EXEC, pp. 7, 10-11; Order WR 2008-0011 pp. 8-9.) The same memoranda and prior orders also explain why the full face value of the Bureau of Reclamation's permits supports deliveries to the contractors. Petitioners have failed to articulate a specific concern with these explanations, and their petitions for reconsideration on this ground are denied.

6.3 ARGUMENTS IN THE NCWA, CVPWA, AND CFBF PETITION

Petitioners incorporate by reference the "Petition for Reconsideration, Request for Refund, and Points and Authorities in Support of Petition" filed by NCWA, CVPWA and CFBF. On February 3, 2012 the State Water Board has issued Order WR 2012-0003-EXEC, denying that petition for reconsideration. This order adopts and incorporates by reference the reasoning in Order WR 2012-0003-EXEC and of the Board's prior orders regarding NCWA, CVPWA and CFBF's fee petitions for reconsideration, including Order WR 2011-0007-EXEC and Order WR 2007-0007-EXEC and the orders incorporated by reference in those orders. Reconsideration based on incorporation of the NCWA, CVPWA and CFBF petitions is denied.

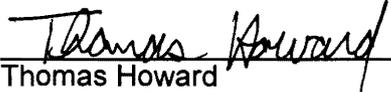
7.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was appropriate and proper. This order addresses the principal issues raised by the petitions. 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 board's regulations. (§§ 768-769, 1077.) The petitions for reconsideration are denied.

ORDER

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

Dated: 2/16/12



Thomas Howard
Executive Director

Attachment