

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0008-EXEC

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

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

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.

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

¹ State Water Board 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.

amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)² 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. (§ 1077, subd. (b); see also § 769, subd. (a)(3) [requiring petitioner to identify the date on which the State Water Board made its decision].) 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 October 15, 2007, assessment was November 14, 2007.

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

² All further regulatory references are to the State Water Board's regulations located in tit. 23 of the California Code of Regulations unless otherwise indicated.

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 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).)

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 (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 Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.* § 1536.)

In FY 2007-2008, the Budget Act authorizes the expenditure of \$11.592 million to support the regulatory activities of the State Water Board's water right program. Most of the funding for the water right program – a total of \$7.384 million – is appropriated from the Water Rights Fund.³ This allocation includes \$6.929 million for administration of the State Water Board's water right program, \$420,000 for the water right fee collection efforts of BOE, and \$35,000 for support functions provided by the California Environmental Protection Agency. (Stats. 2007, ch. 171, as amended by Stats. 2007, ch. 172.) The State Water Board estimated that mid-year budget adjustments would increase the Water Rights Fund budget to \$7.984 million.⁴

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 Water Rights Fund in the annual Budget Act, taking

³ In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program also includes \$3.848 million in general funds, \$212,000 in tobacco tax funds, and \$148,000 in federal trust funds.

⁴ In addition to making appropriations that are specific as to the particular fund and agency involved, the Budget Act includes appropriations that are allocated by the Department of Finance. The Budget Act also includes generally applicable sections that provide for adjustments of appropriations by the Department of Finance.

into account money in the fund from other sources.⁵ The State Water Board has determined the current fee schedule for FY 2006-2007 will continue to generate sufficient revenues to support the water right program activities for FY 2007-2008.⁶ Accordingly, it did not revise the regulations this year. The fee schedule for this fiscal year is identical to the fee schedule for FY 2006-2007.

4.0 DISCUSSION

The State Water Board established the fee schedule that was applied in FY 2006-2007 on November 30, 2006, when the Executive Director revised and re-adopted the emergency regulations previously adopted by the Board on September 21, 2006. The Executive Director's revisions eliminated the annual fee and filing fee increases that would have been imposed if the September 21, 2006 revisions to the fee schedule had taken effect.⁷ (SWRCB Resolution 2006-0094-EXEC.) The fee regulations as revised were re-adopted to reinstate and allow collection of annual water right permit and license fees, annual water quality certification fees, and filing fees in FY 2007-2008 at the same rates and subject to the same upper limits as were in effect during FY 2006-2007. As noted above, the State Water Board has determined that the fee schedule in effect during FY 2006-2007 should apply again in FY 2007-2008. On October 15, 2007, 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 7652.⁸

⁵ 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.

⁶ As explained in the Memorandum to File dated January 7, 2008 from Victoria A. Whitney, Chief, Division of Water Rights, as of June 30, 2007 the Water Rights Fund had collected \$9.168 million from water right and water quality certification fees assessed in FY 2006-07. After accounting for funds remaining from previous years and subtracting program costs and encumbrances, approximately \$0.082 million was left in the Water Rights Fund at the end of the fiscal year. The State Water Board has accounted for this excess by subtracting it from the budget target for FY 2007-08. Thus, for the purposes of calculating this year's fees, the State Water Board's revenue target is \$7.902 million (\$7.984 - \$.082 million). Assuming a non-collection rate of 5 percent, the total amount to be collected from filing fees and billed under annual fees is \$8.318 million.

⁷ 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. On September 21, 2006, the State Water Board adopted Resolution No. 2006-0065, which adopted emergency regulations revising the water right and water quality certification fee schedule and regulations in accordance with the Budget Act of 2006. Accordingly, the Executive Director had the authority to revise and re-adopt the emergency regulations.

⁸ PVID contests the State Water Board's decision to impose the water right fees, stating that the State Water Board decided to impose the FY 2007-2008 annual water right fees when it adopted Resolution No. 2006-0065 on September 21, 2006. The emergency regulations adopted under Resolution No. 2006-0065 were not sent to the Office of Administrative Law for approval. On November 30, 2006, the State Water Board's Executive Director revised and re-adopted the FY 2006-2007 emergency regulations. (SWRCB Res. No. 2006-0094-EXEC.) Because
[footnote continues on next page]

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, 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 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 November 13, 2007.⁹

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, and, most recently, FY 2006-2007. The Executive Director denied those petitions in Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, and Order WR 2007-0010-EXEC, respectively. PVID's current petition repeats the same arguments verbatim in support of its contentions.

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, Order WRO 2005-0005-EXEC and Order WR 2007-0010-EXEC. Accordingly, this order incorporates by reference and adopts the

PVID included notices of determination dated October 15, 2007, however, the State Water Board will construe their request for reconsideration to include only those assessments.

⁹ 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.)

reasoning of Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, and the documents that supported those orders.¹⁰

5.0 PVID'S PROPOSED INCORPORATION BY REFERENCE OF CALIFORNIA FARM BUREAU FEDERATION'S PETITION CHALLENGING STATE WATER BOARD RESOLUTION NOS. 2006-0065 AND 2006-0094-EXEC

In PVID's petition for reconsideration, PVID seeks to incorporate by reference the points made in the California Farm Bureau Federation's (Farm Bureau) petition challenging State Water Board Resolution No. 2006-0065 and Resolution No. 2006-0094-EXEC, and in the complaint and briefs filed by the Farm Bureau in the pending litigation. PVID also joins in the Farm Bureau's petition. The State Water Board will not consider allegations that PVID seeks to incorporate by reference other documents, such as the Farm Bureau's complaint or briefs if PVID has failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).) The State Water Board does permit a petitioner to satisfy the requirement for points and authorities by joining or incorporating by reference a petition filed by another party that includes the required points and authorities. Accordingly, PVID has by incorporation raised the issues properly raised by the Farm Bureau petition, but only to the extent that those issues are relevant to the fee assessed to PVID on October 15, 2007, that is the subject of this order. In response to the issues PVID has raised by joining in the Farm Bureau petition, this order incorporates by reference and adopts the reasoning of Order WRO 2008-0003-EXEC, which denies the Farm Bureau petition.

6.0 CONCLUSION

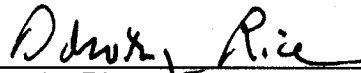
For the reasons discussed above, the State Water Board's decision to impose the annual water right permit fee on PVID was appropriate and proper. Accordingly, PVID's petition for reconsideration should be denied.

¹⁰ 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.

ORDER

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

Dated: 1-17-08



Dorothy Rice
Executive Director