

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0008-EXEC

In the Matter of the Petition for Reconsideration of

PALO VERDE IRRIGATION DISTRICT

Regarding Water Right Fee Determinations for Fiscal Year 2008-2009

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 Board) 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 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.

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 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.

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 2008-2009, the Budget Act appropriates \$11.377 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.382 million – is appropriated from the Water Rights Fund.² In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$420,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$35,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program. (Stats. 2008, ch. 268, as amended by Stats. 2008, ch. 269.)³

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 into account money in the fund from other sources.⁴ The State Water Board has determined the current annual permit and license fee schedule for FY 2007-2008 will continue to generate sufficient revenues to support the water right program activities for FY 2008-2009.⁵ Accordingly, it did not revise the regulations applicable to annual permits and licenses this year, and the

² In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program includes \$3.558 million in general funds, \$289,000 in tobacco tax funds, and \$148,000 in federal trust funds. The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund, and do not include appropriations from the Water Rights Fund that are attributable to transfers from other funds.

³ 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.

⁴ 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.

⁵ As explained in the Memorandum to File dated October 6, 2008, from Victoria A. Whitney, Chief, Division of Water Rights, as of June 30, 2008 the Water Rights Fund had collected \$10.1 million in revenues from water right and water quality certification fees associated with water supply actions. The Division ultimately anticipates total fee revenues of \$5.91 million for FY 2008-2009.

annual permit and license fee schedule for this fiscal year is identical to the fee schedule for FY 2007-2008.⁶ On November 10, 2008, 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,⁷ 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 December 4, 2008.

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 assessment must include certain information, including the name and address of the petitioner, the specific Board action of which petitioner requests reconsideration, the date on which the State Water Board made its decision, the reason the

⁶ The State Water Board, however, revised other portions of the fee schedule for FY 2008-2009, which are not the subject of this petition for reconsideration. By Resolution No. 2008-0074, the State Water Board increased water quality certification fees, increased the upper limit on certain filing fees, and decreased fees for most temporary permits filed under Water Code section 1425. Fees for most fee payers, however, remained unchanged from the previous fiscal year.

⁷ 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.

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).) 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. A petition for reconsideration of a fee assessed by BOE must include either a copy of the notice of assessment or all of the following information: (1) the fee payer's name, (2) the water right or BOE identification number, (3) the amount assessed, and (4) the billing period or assessment date. (§ 1077, subd.(a)(2).)

A petition for reconsideration must be filed not later than 30 days from the date on which the State Water Board adopts a decision. (Wat. Code, § 1122.) 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).) The deadline for filing a petition for reconsideration of BOE's November 10, 2008, assessment was December 10, 2008.

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 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).)

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, supported by the same memorandum of points and authorities, in petitions that PVID previously filed challenging annual fees issued in FY 2003-2004 and FY 2004-2005, FY 2006-2007, and, most recently, FY 2007-2008.

The Executive Director denied those petitions in Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, and Order WR 2008-0008-EXEC, respectively.

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, Order WR 2007-0010-EXEC, and Order WR 2008-0008-EXEC. Accordingly, this order incorporates by reference and adopts the reasoning of Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, Order WR 2008-0008-EXEC, and the documents that supported those orders.⁸


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 the Palo Verde Irrigation District petition for reconsideration is denied.

Dated:
FEB 05 2009



Dorothy Rice
Executive Director

⁸ 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.