

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2023-0039-EXEC

In the Matter of the Petition for Reconsideration of

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, CORDUA IRRIGATION DISTRICT, FRIANT POWER AUTHORITY, GORRILL LAND COMPANY, IVANHOE IRRIGATION DISTRICT, KAWEAH RIVER POWER AUTHORITY, LINDMORE IRRIGATION DISTRICT, LINDSAY-STRATHMORE IRRIGATION DISTRICT, MCPHERRIN LAND COMPANY, NEVADA IRRIGATION DISTRICT, ORANGE COVE IRRIGATION DISTRICT, PARADISE IRRIGATION DISTRICT, SOLANO IRRIGATION DISTRICT, SOUTH FEATHER WATER & POWER AGENCY, SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, AND TERRA BELLA IRRIGATION DISTRICT

Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

¹ State Water Board [Resolution No. 2012-0061](#) 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. 2012-0061. 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.

1.0 INTRODUCTION

The Anderson-Cottonwood Irrigation District, Cordua Irrigation District, Friant Power Authority, Gorrill Land Company, Ivanhoe Irrigation District, Kaweah River Power Authority, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, McPherrin Land Company, Nevada Irrigation District (NID), Orange Cove Irrigation District, Paradise Irrigation District, Solano Irrigation District, South Feather Water & Power Agency, Southern San Joaquin Municipal Utility District, and Terra Bella Irrigation District, collectively referred to herein as “Petitioners,”² individually petition the State Water Resources Control Board (State Water Board or Board) for reconsideration and a refund of annual fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2014-15. Each Petitioner contends that its fees, as applied, were unlawful taxes. Certain Petitioners raise arguments relating to the assessment of annual petition fees and water quality certification fees. Petitioners further incorporate the arguments made in the petitions for reconsideration filed by Northern California Water Association (NCWA) and Central Valley Project Water Association (CVPWA) (hereafter “NCWA petition”) and the California Farm Bureau Federation (Farm Bureau).³ They ask the State Water Board find that the Notices of Determination imposing the fees were improperly made and that the fees were improperly assessed. Petitioners request refunds for fees paid this fiscal year and every other period beginning July 1, 2003.

² Attachment 1 contains a list of Petitioners who meet the legal requirements for filing a petition for reconsideration and whose requests for reconsideration are addressed by this order.

³ For several prior years’ petitions, NCWA and CVPWA’s counsel also represented the Farm Bureau, which had been represented by other counsel and filed petitions separately from NCWA and CVPWA in prior years. For this year’s petition NCWA/CVPWA and the Farm Bureau have again filed separate petitions with separate counsel, though the signature block on the NCWA Petition still references the Farm Bureau. Each petition cover letter also still “incorporates by reference the arguments, requests for refund, and petitions for reconsideration made by other water right fee payors, including Northern California Water Association, the California Farm Bureau Federation, and Central Valley Project Water Association,” notwithstanding the facts that NCWA/CVPWA and the Farm Bureau filed separate petitions and that NCWA, CVPWA, and the Farm Bureau are not fee payers.

For the reasons discussed below, and in Order WR 2023–0038–EXEC, the order denying reconsideration decision of the NCWA petition, the State Water Board finds that the decision to impose the fees was appropriate and proper and denies Petitioners’ requests for reconsideration.

2.0 GROUND FOR RECONSIDERATION

According to the State Water Board’s regulations governing reconsideration of fees, only 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.)⁴ 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 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,

⁴ 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.

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 4, 2014 assessment was December 4, 2014. The State Water Board will not consider late petitions.

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 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 action⁵. (*Id.*, subd. (a)(2)(A)-(C).)

3.0 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 through a continuous appropriation

⁵ 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 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 WR 2009-0061 at p. 2, fn. 1; State Water Board Order WQ 98-05-UST at pp. 3-4.)

discussed below) 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.)⁶

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated March 10, 2015, entitled “Recommended Water Right Fee Schedule for Fiscal Year 2014-15” (hereinafter “Evoy Memorandum”), in FY 2014-15, the Legislature appropriated \$25.278 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 included \$13.84 million for the support of the State Water Board from the Water Rights Fund and a continuous appropriation from the Water Rights Fund of \$3.75 million for enforcement⁷, for a total of \$17.59 million

⁶ As of June 27, 2017, the Department of Tax and Fee Administration was vested with many of the BOE’s former authorities, including but not limited to collection of water right fees pursuant to the Water Code and the State Water Board’s fee regulations. (Gov. Code, §§ 15570.22 & 15570.24.)

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.)

appropriated to the State Water Board from the Water Rights Fund. The State Water Board also received additional expenditure authority through mid-year budget revision for two personnel expenditures of \$130,000 and \$712,000. Thus, in calculating fees, the State Water Board had to ensure sufficient revenues to support a total of \$18.441 million appropriated from the Water Rights Fund for FY 2014-15. The State Water Board's budget for the water right program also included \$7.18 million in General Fund, \$276,000 from Cigarette and Tobacco products, and \$223,000 from the Federal Trust Fund. In addition to the amounts appropriated to the State Water Board, the Legislature appropriated \$484,000 from the Water Rights Fund to BOE for its water right fee collection efforts, \$37,000 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, and \$14,000 to the Financial Information System of California.

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 appropriations made from the fund, taking into account money in the fund from other sources.⁸ In calculating the amount needed to be collected through fee revenues, the Division also considered the Water Rights Fund balance at the beginning of the fiscal year, which serves as a prudent reserve for economic uncertainty. In reviewing the fee schedule, the Division considered a 10 percent fund reserve to be prudent. In some years, the fund reserve has been drawn down by collecting less revenue annually than is expended. As explained in the Evoy Memorandum, the Water Rights Fund had a balance of \$3.851 million at the beginning of the fiscal year. Without any annual fee increase, the projected reserve for FY 2015-16 was expected to be 9.1 percent, which would have been below the amount

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.

the Division considered to be prudent. To prevent the projected fund reserve from being drawn down below 10 percent, the Division proposed increasing annual permit, license, and pending application fees by increasing the per acre-foot charge from \$0.053 to \$0.058 and increasing the annual Federal Energy Regulatory Commission (FERC) license-associated water quality certification per kilowatt charge from \$0.342 to \$0.43. The Division also proposed adjusting the caps on application and petition filing fees based on changes in the consumer price index. With these increases, the projected fee revenue was \$16.431 million and total Water Right Fund projected revenue was \$17.517 million. With estimated total expenditures of \$18.441 million for the fiscal year, expenditures were projected to exceed revenues by \$924,000, thereby ending the fiscal year with a reserve of \$2.927 million, which amounted to a 15.9 percent fund reserve. Although this fee schedule would not draw down the fund reserve to 10 percent of annual expenditures, the Evoy Memorandum later stated, based on the Budget Act for FY 2014-15, the Governor's proposed budget for FY 2015-16, and implementation of the projected fees for FY 2015-16, that the fund reserve was expected to get closer to a minimum prudent reserve level in FY 2016-17.⁹ The proposed and adopted FY 2014-15 fee schedule was intended to maintain a prudent reserve while minimizing the need for a larger increase in future fiscal years.

On September 23, 2014, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2014-0052, revising the emergency regulations governing water right fees for FY 2014-15. The Office of Administrative Law approved the emergency regulations on October 30, 2014. BOE issued the annual fee assessments on behalf of the State Water Board on November 4, 2014.

⁹ On September 16, 2015, the State Water Board adopted [Resolution No. 2015-0061](#), increasing the annual per acre-foot fee for permits and licenses consistent with the projections made prior to adoption of the FY 2014-15 fee increases discussed in this order.

4.0 JUDICIAL ACTION REGARDING THE ANNUAL WATER RIGHT FEES

In 2011, the California Supreme Court issued a decision on the statute authorizing the water right fees and the State Water Board's annual fee regulations for FY 2003-04. (*California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 (hereafter *Farm Bureau*)). The Supreme Court upheld the water right fee statutes (e.g., Wat. Code, sections 1525, 1540, 1560), (*Farm Bureau, supra*, at p.446). It also reversed the two adverse holdings of the Court of Appeal concerning the State Water Board's regulations governing annual permit and license fees and the annual fees passed through to the federal water contractors. (*Id.*, at pp. 446-447; see Cal. Code Regs., tit. 23, § 1066, 1073.)¹⁰ The Supreme Court remanded issues concerning the application of these fees through the State Water Board's regulations back to the trial court for further fact-finding. Specifically, the Supreme Court directed the trial court to make factual findings as to whether the annual permit and license fees were reasonably related to the costs of the regulatory activity and findings related to the annual water right fees passed through to the federal water contractors. (*Farm Bureau, supra*, at pp. 442, 446.) The Supreme Court's decision otherwise left intact the appellate court's holdings that were favorable to the State Water Board.

In December 2012, a trial was held in the Sacramento Superior Court on the application of the water right fees for FY 2003-04. On November 12, 2013, the Superior Court issued its Final Statement of Decision, invalidating the FY 2003-04 fee regulations.

On March 2, 2018, the Court of Appeal issued a 40-page decision completely reversing the trial court decision on the three key issues. (*Northern California Water Association v. State Water Resources Control Board* (Mar. 2, 2018, C075866) 20 Cal.App.5th 1204 [2018 WL 1127892].) The appellate court found that the State Water Board reasonably apportioned fees amongst the fee payers and that the fee payers in FY 2003-04 did not subsidize the State Water Board's work on behalf of non-fee payers. The court similarly found that the fees assessed on permit and license

¹⁰ 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.

holders were proportionate to the benefits derived by them or the burdens they placed on the Division of Water Rights, satisfying the constitutional test for a regulatory fee.

The appellate court also concluded that the State Water Board's decision to allocate all of the United States Bureau of Reclamation's (Reclamation) annual permit and license fee for the federal Central Valley Project (CVP) to the water supply contractors was reasonable. The record and the case law establish that the CVP is a water supply project and that Reclamation provides the contractors with all available water after satisfying its obligations under state and federal law. As a result, the fees paid by CVP contractors were reasonably related to their beneficial interest in CVP water rights.

Finally, the appellate court concluded that the trial court erred in determining that the fee regulations were invalid based on their application to a single payer (Imperial Irrigation District). Prevailing law requires that the fees have to be evaluated collectively, and a regulatory fee is not invalid simply because it may be disproportionate as applied to a particular fee payer.

On May 16, 2018, the California Supreme Court denied NCWA's petition for review. On October 15, 2018, the United States Supreme Court denied NCWA's petition for writ of certiorari.

5.0 FEE ASSESSMENTS ADDRESSED IN THIS ORDER

Although the Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments. Thirteen individual Petitioners are represented by a single law firm.¹¹ Kaweah River Power Authority submitted a petition with language that is substantially the same as the petitions filed by that law firm, as did Friant Power Authority and the Southern San Joaquin Municipal Utility District, whose petitions are substantially the same as the petitions submitted by the others but do not include the additional argument addressed in section 6.2, *infra*. None of the petitions, except for NID's, provide any additional arguments, information, or supporting

¹¹ Minasian, Meith, Soares, Sexton & Cooper, LLP.

authorities that materially distinguish themselves from each other.¹² 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 4, 2014. Petitioners' requests made in this fiscal year for refunds of fees paid in previous fiscal years beginning July 1, 2003, are not timely. (§ 1077, subd. (b).)¹³ The petitions seek reconsideration of the following fee assessments, although not every petition expressly addresses each type of fee assessment:

- annual petition fees under section 1065;
- annual permit and license fees under section 1066;
- annual permit and license fees passed through to Reclamation's contractors under section 1073; and
- annual water quality certification fees for 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 Petitioner

¹² NID's petition for reconsideration includes an additional argument, regarding miscalculation of its fees, that is addressed in this order.

¹³ Petitioners filed timely petitions for reconsideration of fee assessments in previous years, although the list of Petitioners changes each year. Where a Petitioner timely filed a petition for judicial review of the denial of the petition for reconsideration or has obtained a tolling agreement and files a petition for judicial review as allowed under that agreement, that petition may still pursue a refund as part of that litigation. But a Petitioner cannot overcome the failure to pursue timely challenges to previous years' assessments through a petition for reconsideration of the assessments for FY 2014-15.

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, those claims are dismissed.

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

Petitioners claim that the fees are actually unlawful taxes as applied. In making this argument, certain individual Petitioners also argue that the annual petition fees and water quality certification fees are invalid. Petitioners also incorporate by reference the arguments made in the NCWA petition.

6.1 The Water Right Fees Do Not Constitute an Unlawful Tax

Petitioners argue that the fees are unconstitutional "as applied," because they "do not bear a fair and reasonable relationship to the fee payors' burdens on or benefits from the regulatory activity." (See, e.g., Cordua Irrigation District Petition, at p. 4.)

Petitioners appear to rely on two primary theories to support their argument. First they allege that sixty percent of water in the state is not subject to fees even though all water right holders benefit from State Water Board actions. They assert that such a discrepancy is unlawful.

Second, Petitioners assert that fees charged to federal contractors who contract for water supplies from the Reclamation are improper. They contend:

Federal contracts account for only 6.6 million acre-feet of the nearly 116 million acre-feet of water held under the [Reclamation's] permits. However, Federal contractors are expected to pay water rights fees for 50% of [Reclamation's] entire 116 million acre-feet entitlement.

(See, e.g., Cordua Irrigation Petition at p. 5.) 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." (*Ibid.*)

Petitioners' statement that sixty percent of water in the state is not subject to water right fees is both false and irrelevant. The statement is false because it assumes that no fees are charged in connection with the water rights held by Reclamation. In fact, and as noted in Petitioners' own second argument, fees are passed through to federal contractors in connection with the vast majority of Reclamation's water rights, including the water rights for the CVP and for the Solano and Cachuma Projects. In connection with the Washoe (Truckee River) and Santa Margarita Projects, the State Water Board recovers its costs for regulatory oversight pursuant to a contract with Reclamation. (See Wat. Code, § 1560, subd. (b)(3).)

As for diversion and use that is not subject to the water right permit and license system, including riparian and pre-1914 rights, the Supreme Court in *Farm Bureau, supra*, 51 Cal.4th at pages 441-442, weighed the arguments over whether the fees are disproportionately assessed relative to the benefits derived or burdens imposed or whether there is a reasonable relationship between the scope and costs of the Division's regulatory activity and the fees imposed. Petitioners' argument, which focuses on the relative amounts of water held under permitted appropriative rights and other rights, ignores the Supreme Court's holding on this issue:

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.] 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.)

Thus, the Supreme Court affirmed that, in assessing the validity of a regulatory fee, the focus is properly on the regulatory activity and its associated costs. Therefore, Petitioners' argument regarding the relative amount of water held by various water right holders that are not regulated by the State Water Board under the water right permit

and license system, and which account for only a very small percentage of water right program expenditures, has no merit.

Petitioners' second argument regarding the pass through of annual water right fees to Reclamation's water supply contractors is also without merit. Under Water Code sections 1540 and 1560, if the State Water Board determines that a fee payer is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the State Water Board may allocate the fees due to that fee payer's water supply contractors. Based on past experience, the State Water Board has determined that Reclamation is likely to decline to pay the fees and has passed the fees through to its CVP water supply contractors based on the formula set forth in section 1073 of the State Water Board's regulations. These "pass through fees," which are based on the full face value of Reclamation's CVP water rights and not on the total amount of all water right rights held by Reclamation, include a fifty percent discount for hydropower projects. (§§ 1066, 1071.)

Petitioners' claim that contracts subject to the pass-through fees account for only 6.6 million acre-feet of the nearly 116 million acre-feet of Reclamation's water rights is misleading in several respects. The face value of Reclamation's water rights, which was approximately 116 million acre-feet in 2003, is a theoretical measure, requested by Reclamation in its applications for those rights, of the maximum amount authorized to be diverted, without regard to factors that are practical limitations on how much can be diverted and used. Face value typically is much higher—an order of magnitude or more—than the amounts actually diverted. For more junior water rights, like Reclamation's CVP permits, applications often request very large face value amounts designed to allow for a much lower expected average annual yield after consideration of factors like water availability and environmental mitigation for the proposed diversions. Of course, if adequate water is available, the right holder may be able to take up to the face value amount, but applicants usually can reasonably expect that a junior right will not be able to take the full face value in most years. Although there is a rough correlation between face value and diversions, in that permit and license holders with a higher face value are likely to divert greater amounts of water (a permit or license holder has the right, when the opportunity is present and after senior rights and other

conditions of the right are met, to divert up to the face value amount of the permit or license), face value is not a direct measure of diversion and use in any particular year. The suggestion that water developed by a project is being used for other purposes when the face value of the water rights for the project exceeds contracted deliveries has no basis in fact and amounts to nothing more than a false comparison of numbers measuring two different things.

In addition, Petitioners compare the face value for all permits and licenses held by Reclamation with the amount contracted for delivery to CVP contractors, creating the false impression that the fees for permits and licenses for projects other than the CVP were passed through to CVP contractors. It should also be noted that both the face value of the permits held by Reclamation and the contractual entitlements of those subject to the pass-through fees have changed since 2003. (See, e.g., State Water Board Order WR 2008-0045 [revoking the permits for Auburn Dam].) At the time the water right fees for FY 2014-15 were assessed, the face value of the permits and licenses held by Reclamation, including water rights held for all Reclamation projects in California, not just the CVP, was approximately 106 million acre-feet. The face value of the permits and licenses used to support deliveries by the CVP was approximately 101 million acre-feet. The CVP contractors subject to pass through fees had contracts for delivery of approximately six million acre-feet.

The State Water Board and the Division have explained at length why the full-face value of Reclamation's CVP water rights was designed to and does support deliveries to the federal contractors. (See e.g. Recommended Water Right Fee Schedule for Fiscal Year 2014-15, from Barbara Evoy, Deputy Director for Water Rights, dated March 10, 2015; Memorandum to File from Victoria A. Whitney, Deputy Director for Water Rights, dated February 1, 2010, regarding "Analysis of Water Right Program Activities and Expenditure of Resources"; Memorandum to File by Victoria A. Whitney, Chief, Division of Water Rights, dated January 7, 2008, regarding "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, dated October 6, 2004, regarding "Water Right Fee Program Summary and Recommended Fee Schedule for Fiscal Year 2004-2005"; Order WR 2008-0011 pp. 8-9; Order WR 2009-0004-EXEC, pp. 7, 9-11.) Furthermore,

the face values of those permits are based entirely on the applications submitted by Reclamation for the right to such diversions. Notwithstanding the information provided by the State Water Board, and without any explanation or information to support their grounds for reconsideration, Petitioners continue to argue that the State Water Board has not demonstrated that the total amount of water diverted under these permits is necessary to support the quantity of water delivered to the federal contractors, as though the State Water Board were responsible for justifying why Reclamation chose to apply for the right to divert those amounts or why the full face value of the permits is not available every year. The petitions for reconsideration on this ground are denied.¹⁴

6.2 The Increase in Water Right Fees Does Not Violate Proposition 26

Petitioners raise again a contention, made in Petitioners' 2012 petitions but not in Petitioners' 2013 petitions, that the increase in fees approved by the State Water Board on September 23, 2014, violates Proposition 26 because the 2014/2015 Budget Act was not approved by a 2/3 majority of both houses of the Legislature. (See, e.g., Anderson-Cottonwood Irrigation District Petition, at pp. 3-4.)

As Petitioners note in their petitions, "[t]he yearly Budget Act is a state statute passed by the Legislature. (Cal. Const. Art. IV, § 12)." (See, e.g., Anderson-Cottonwood Petition at p. 2.) As already described in section 3, *supra*, the State Water Board reviews the fee schedule each fiscal year pursuant to Water Code section 1525 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. (Wat Code, § 1525, subd. (d)(3).) Petitioners' contention seems to be that, notwithstanding Proposition 25 (Cal. Const., Art. XII, § 12, subd. (e)(1)), which provides that the Budget Act may pass by only a simple majority vote of the Legislature, the increase in the

¹⁴ Also without explanation, Petitioners also allege that it is unlawful to pass through fees to federal contractors when the United States itself is immune from taxation, citing *United States v. Nye County* (9th Cir. 1991) 938 F.2d 1040 (hereafter *Nye County*.) To the contrary, as the Supreme Court noted in *Farm Bureau, supra*, 51 Cal.4th at p. 444, the practice of passing through a fee is "permitted under federal law when a private contractor's use of United States property may be" charged.

amount budgeted for work charged to the water rights fund that necessitated an increase in the water rights fees is unlawful because it was not passed by a 2/3 majority of both houses of the Legislature and therefore the fees are void.

The Legislature passed the Budget Act in accordance with Proposition 25. Accordingly, Petitioners' contention is without merit as to the Legislature's compliance with Proposition 26.¹⁵

Inasmuch as it is unclear whether Petitioners are challenging, in their petitions to the State Water Board, action taken by the Legislature or action taken by the State Water Board, it should be clear their contention is also without merit as to the State Water Board. Proposition 26 by its terms applies only to acts of the Legislature and, therefore, does not govern the State Water Board's adoption of Resolution No. 2014-0052 revising the emergency regulations governing water right fees for FY 2014-15, and imposition of those fees on Petitioners. Neither of those actions constitute "[a]ny change in a state statute' that results in any taxpayer paying a higher tax," as alleged by Petitioners. (See, e.g., Anderson-Cottonwood Irrigation District Petition, at p. 3.) For this additional reason, Petitioners' contention is without merit.

Petitioners request that "[i]f the [State Water Board] contends that the water rights fees are not a 'tax' under Proposition 26" that it "produce evidence of its reasons, including demonstrating by a preponderance of the evidence that the water rights fees are not a tax." (*Id.* at p. 4.) As justification for their request Petitioners cite to section 2 of Proposition 26 (Cal. Const., Art. XIII, § 3, subd. (d)). As explained above, the water rights fees are not a tax because they fall within one or more of the exceptions clearly identified in Proposition 26, section 2, subdivision (b). Furthermore, as already discussed in section 6.1, *supra*, the amount of the fees "is no more than necessary to cover the reasonable costs of the governmental activity," and "the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." (Cal. Const., Art. XIII,

¹⁵ To the extent that additional explanation is needed, Section 6.1 of Orders WR 2012-0006-EXEC and WR 2013-0013-EXEC are hereby incorporated by reference.

§ 3, subd. (d).) Accordingly, Proposition 26 imposes no obligation on the State Water Board to provide any further evidence that the water right fees are not a tax.

6.3 Petitioners' Individual Claims Regarding Other Annual Fees are Without Merit

As part of their argument that the annual water right fees are unlawful taxes as applied, certain individual Petitioners also assert that the annual petition and annual water quality certification fees are invalid taxes. These claims are without merit.

The State Water Board has adopted regulations assessing annual petition fees for certain projects that require continuing staff oversight (§ 1065) and annual fees for projects under review for water quality certification for FERC licensing and for FERC-licensed projects for which water quality certification has been issued. (§ 3833.1.) Some Petitioners contest the annual petition fees assessed under section 1065 of the State Water Board's regulations. Some Petitioners also expressly contest the annual water quality certification fees assessed under section 3833.1.

Each Petitioner alleges that there is no fair and reasonable relationship between the cost of the fees and the services provided. To the extent that Petitioners' challenge to these fees is based on the same contentions as they make concerning the annual permit and license fees, those contentions are addressed in this order. If Petitioners intended to rely on other grounds, then their challenge is deficient because they failed to specify those grounds and to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

NID also argues that the annual petition fees and annual water quality certification fees are unlawful and invalid for "the same or similar reasons described in Farm Bureau." (NID Petition, at p. 5.) It is somewhat unclear whether the reference to "Farm Bureau," which is contained in prior year's petitions, is to the appellate court's decision (as it was in prior petitions) or to the Supreme Court's decision (which is referenced on the preceding page of the petition). Regardless, neither court considered the validity of the annual petition fees or the annual water quality certification fees in its decision, and NID does not provide specific allegations supporting its contentions. This allegation has no merit and is deficient.

As it has in past years, NID contends that it was overcharged for its water quality certification fee for the Yuba-Bear Hydroelectric Project (FERC Project No. 2266). (NID Petition, at p. 5.) Pursuant to section 3833.1, subdivision (b)(4) of the State Water Board's regulations, the annual water quality certification fee for a hydroelectric project pursuing certification for a FERC license is \$1,000 plus \$0.43 per kilowatt (kw), based on the authorized or proposed installed generating capacity of the hydroelectric facility. In addition to the applicable fee structure changing from last year to this year, NID proposed adding a new powerhouse in its 2012 License Application, thereby increasing the total proposed generating capacity upon which NID's project fee is calculated. That proposal to add 11,400 kw of capacity would bring NID's total generation capacity to 90,720 kw. Section 3833.1, subdivision (b)(4)(A) provides that "[i]n the case of an application for an original, new or subsequent license . . . the annual fee shall be based on the installed generating capacity of the facility as proposed in the notification of intent, application for FERC license, application for certification, or existing license that is proposed for takeover or relicensing, whichever is greatest." NID has applied for relicensing of a FERC-licensed project, with a proposed increase in total generating capacity; accordingly, the State Water Board correctly based the annual fee on the proposed installed generating capacity of the facility. The fee was correctly assessed. There is no cause for reconsideration.

6.4 Arguments in Other Referenced Petitions

Petitioners incorporate by reference the petitions for reconsideration filed by NCWA, CVPWA, the Farm Bureau¹⁶ and other parties. On November 25, 2014, NCWA, CVPWA and individual Petitioners submitted a petition for reconsideration of the FY 2014-15 annual fees. On December 4, 2014, the Farm Bureau submitted a petition for reconsideration of the FY 2014-15 annual fees on behalf of the Farm Bureau, a number of individual county farm bureaus, and several individual identified fee payors.

¹⁶ While the Petition submitted by NCWA, CVPWA, et al. is signed by "Attorneys for Petitioners/Plaintiffs Northern California Water Association, Central Valley Project Water Association, California Farm Bureau Federation, et al.," the Farm Bureau is not listed among the Petitioners identified in that petition, and, in any case, NCWA, CVPWA, and the Farm Bureau are not fee payors.

The State Water Board has issued Order WR 2023-0038-EXEC denying the NCWA/CVPWA petition for reconsideration and Order WR 2023-0037-EXEC denying the Farm Bureau petition for reconsideration. This order adopts and incorporates by reference the reasoning in Order WR 2023-0038-EXEC, Order WR 2023-0037-EXEC, and of the State Water Board's previous orders regarding NCWA and the other parties' petitions for reconsideration, including [Order WR 2014-0012-EXEC](#), [Order WR 2007-0007-EXEC](#), and the orders incorporated by reference in those orders. To the extent Petitioners request reconsideration based on the incorporation by reference of the NCWA/CVPWA and the Farm Bureau petitions, that request is denied.

7.0 CONCLUSION

The State Water Board finds that its decision to impose water right fees was appropriate and proper, and that the fees imposed were calculated and billed correctly. This order addresses the principal issues raised by the petitions. To the extent that this order does not address all 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.) The petitions for reconsideration are denied.

ORDER

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

Dated: July 13, 2023



Eileen Sobeck
Executive Director

**Attachment 1:
Petitioners for Fiscal Year 2014-15 Water Rights Fees in the Matter of the Petition
for Reconsideration of Anderson-Cottonwood Irrigation District, Cordua Irrigation
District, Friant Power Authority, et al.**

State Water Board ID	Primary Owner
USBR1085	ANDERSON-COTTONWOOD IRRIGATION DISTRICT
A009927	CORDUA IRRIGATION DISTRICT
A025882	FRIANT POWER AUTHORITY
A030593	FRIANT POWER AUTHORITY
A031186	FRIANT POWER AUTHORITY
FERC11068C	FRIANT POWER AUTHORITY
A002777	GORRILL LAND COMPANY
A004664	GORRILL LAND COMPANY
A004665	GORRILL LAND COMPANY
A022321	GORRILL LAND COMPANY
A025717	GORRILL LAND COMPANY
USBR1284	IVANHOE IRRIGATION DISTRICT
USBR1285	IVANHOE IRRIGATION DISTRICT
A026607	KAWEAH RIVER POWER AUTHORITY
USBR1281	LINDMORE IRRIGATION DISTRICT
USBR1282	LINDMORE IRRIGATION DISTRICT
USBR1280	LINDSAY-STRATHMORE IRRIGATION DISTRICT
A014546	MCPHERRIN LAND CO
A015710	MCPHERRIN LAND CO
01270P090320	NEVADA IRRIGATION DISTRICT
01614P090403	NEVADA IRRIGATION DISTRICT
01615P090320	NEVADA IRRIGATION DISTRICT
02275P090320	NEVADA IRRIGATION DISTRICT
02372P090320	NEVADA IRRIGATION DISTRICT
02652BP090404	NEVADA IRRIGATION DISTRICT
05193P090403	NEVADA IRRIGATION DISTRICT
20017P090403	NEVADA IRRIGATION DISTRICT
20072P090403	NEVADA IRRIGATION DISTRICT
24983P090403	NEVADA IRRIGATION DISTRICT
27132P090403	NEVADA IRRIGATION DISTRICT
27559P090403	NEVADA IRRIGATION DISTRICT
6229P090320	NEVADA IRRIGATION DISTRICT
8180P090403	NEVADA IRRIGATION DISTRICT
A001270	NEVADA IRRIGATION DISTRICT
A001614	NEVADA IRRIGATION DISTRICT
A001615	NEVADA IRRIGATION DISTRICT

State Water Board ID	Primary Owner
A002275	NEVADA IRRIGATION DISTRICT
A002276	NEVADA IRRIGATION DISTRICT
A002372	NEVADA IRRIGATION DISTRICT
A002652A	NEVADA IRRIGATION DISTRICT
A002652B	NEVADA IRRIGATION DISTRICT
A004309	NEVADA IRRIGATION DISTRICT
A004310	NEVADA IRRIGATION DISTRICT
A005193	NEVADA IRRIGATION DISTRICT
A006229	NEVADA IRRIGATION DISTRICT
A006529	NEVADA IRRIGATION DISTRICT
A006701	NEVADA IRRIGATION DISTRICT
A006702	NEVADA IRRIGATION DISTRICT
A008177	NEVADA IRRIGATION DISTRICT
A008178	NEVADA IRRIGATION DISTRICT
A008179	NEVADA IRRIGATION DISTRICT
A008180	NEVADA IRRIGATION DISTRICT
A015525	NEVADA IRRIGATION DISTRICT
A020017	NEVADA IRRIGATION DISTRICT
A020072	NEVADA IRRIGATION DISTRICT
A021151	NEVADA IRRIGATION DISTRICT
A021152	NEVADA IRRIGATION DISTRICT
A024983	NEVADA IRRIGATION DISTRICT
A026866	NEVADA IRRIGATION DISTRICT
A027132	NEVADA IRRIGATION DISTRICT
A027559	NEVADA IRRIGATION DISTRICT
FERC2266	NEVADA IRRIGATION DISTRICT
A028552	ORANGE COVE IRRIGATION DISTRICT
A028691	ORANGE COVE IRRIGATION DISTRICT
USBR1283	ORANGE COVE IRRIGATION DISTRICT
00476P071228	PARADISE IRRIGATION DISTRICT
A000476	PARADISE IRRIGATION DISTRICT
A022061	PARADISE IRRIGATION DISTRICT
FERC2088	SOUTH FEATHER WATER & POWER
A025176	SOLANO IRRIGATION DISTRICT
A001651	SOUTH FEATHER WATER & POWER
A002142	SOUTH FEATHER WATER & POWER
A002778	SOUTH FEATHER WATER & POWER
A002979	SOUTH FEATHER WATER & POWER
A013676	SOUTH FEATHER WATER & POWER
A013956	SOUTH FEATHER WATER & POWER
A014112	SOUTH FEATHER WATER & POWER

State Water Board ID	Primary Owner
USBR1278	SOUTHERN SAN JOAQUIN MUNICIPAL
USBR1279	SOUTHERN SAN JOAQUIN MUNICIPAL
USBR1288	TERRA BELLA IRRIGATION DISTRICT