

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2013-0013-EXEC**

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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, M & T INCORPORATED, McPHERRIN  
LAND COMPANY, NEVADA IRRIGATION DISTRICT, ORANGE COVE IRRIGATION  
DISRICT, PARADISE IRRIGATION DISTRICT, SOLANO IRRIGATION DISTRICT, SOUTH  
FEATHER WATER & POWER AGENCY, AND TERRA BELLA IRRIGATION DISTRICT**

Regarding Annual Water Right Fee Determinations

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**ORDER DENYING RECONSIDERATION**

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

**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, M & T Incorporated, McPherrin Land Company, Nevada Irrigation District, Orange Cove Irrigation District, Paradise Irrigation District, Solano Irrigation District, South Feather Water & Power Agency, and Terra Bella Irrigation District, collectively referred to herein as "Petitioners",<sup>2</sup> individually petition the State Water

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<sup>1</sup> 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.

<sup>2</sup> 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.

Resources Control Board (State Water Board) for reconsideration and a refund of annual fees assessed by the State Board of Equalization (BOE) for Fiscal Year (FY) 2012-2013. Each Petitioner contends that its fees, as applied, were unlawful taxes, and that the fees violate Proposition 26. 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 petition for reconsideration jointly filed by Northern California Water Association (NCWA) and Central Valley Project Water Association (CVPWA). They ask the State Water Board find that the Notices of Determination imposing the fees were improperly made and the fees were improperly assessed. Petitioners request refunds for fees paid this fiscal year and every other period beginning July 1, 2003.

For the reasons discussed below, and in Order WR 2013 – 0010– EXEC, the order denying reconsideration decision of the NCWA and CVPWA 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   GROUNDS FOR RECONSIDERATION**

According to the State Water Board's regulations governing reconsideration of fees, only a fee payer may petition for reconsideration of the board's determination that the fee payer is required to pay a fee, or the board's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)<sup>3</sup> 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

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<sup>3</sup> All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

the 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 13, 2012 assessment was December 13, 2012. 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 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).)<sup>4</sup>

### **3.0 LEGAL AND FACTUAL BACKGROUND**

The State Water Board is the state agency entity 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 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

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<sup>4</sup> 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.)

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 February 8, 2013, entitled “Recommended Water Right Fee Schedule for [FY] 2012-13” (hereinafter “Evoy Memorandum”), in FY 2012-2013, the Legislature appropriated \$18.056 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 \$12.701 million appropriation from the Water Rights Fund in the Budget Act of 2012 (Stats. 2012, ch. 21) and a continuous appropriation from the Water Rights Fund of \$3.75 million for enforcement positions,<sup>5</sup> for a total of \$16.451 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 \$425,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$459,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$38,000 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 appropriations made from the fund, taking into account money in the fund from other sources.<sup>6</sup> As explained in the Evoy Memorandum, the Water Rights Fund had a

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<sup>5</sup> 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.)

<sup>6</sup> Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)) and penalties

beginning balance of \$5.591 million for the fiscal year. In calculating the amount needed to be collected through fee revenues, the Division also considered the amount of carryover in the Water Rights Fund, which serves as a prudent reserve for uncertainty. In recent years, the fund reserve has been drawn down by collecting less revenue annually than is expended. This fiscal year, the forecasted fund reserve is approximately 28 percent. The Division determined that the fund condition projections for the following fiscal year, FY 2013-2014, should include a reserve of about 20 percent of annual expenditures. To draw down the fund reserve, the Division proposed no change to the current annual fee schedule this year.<sup>7</sup> Thus, for the purposes of calculating this year's fees, the Division forecasted a total of \$14.490 million to be collected in regulatory fees for FY 2012-13. The total projected revenue for the Water Rights Fund in FY 2012-13 is \$15.541 million.

On September 19, 2012, the State Water Board accepted the Division's recommendations and adopted Resolution 2012-0047, revising the emergency regulations governing water right fees for FY 2012-2013. The Office of Administrative Law approved the emergency regulations on November 14, 2012.

#### **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 2003-2004. (*California Farm Bureau Federation (CFBF) v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421 (hereafter *CFBF v. State Water Board*.) The Supreme Court upheld the water right fee statutes (e.g., Wat. Code, §§ 1525, 1540, 1560), but 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 Central Valley Project contractors. (*CFBF v. State Water Board, supra*, at pp. 442,

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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.

<sup>7</sup> The Division recommended revising other portions of the fee schedule for FY 2012-2013, which are not the subject of the petitions for reconsideration. In general, the emergency regulations amended the existing fee schedule to: (1) adjust the upper limits on filing fees for applications, petitions, and transfers based on changes in the consumer price index; and (2) add a one-time \$250 filing fee for a Small Irrigation Use Registration, a \$100 5-year renewal fee, and a one-time \$250 filing fee for a petition to change a point of diversion or place of use for a Small Irrigation Use Registration. (§§ 1062, 1064, 1068.)

446.) In December 2012 a trial was held in the Sacramento Superior Court on the application of the water right fees for FY 2003-2004. The matter is still pending before the trial court.

## **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.<sup>8</sup> The remaining Petitioner submitted a petition with language that is substantially the same as the petitions filed by the 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 13, 2012. 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).)<sup>9</sup> 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 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.

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<sup>8</sup> Minasian, Meith, Soares, Sexton & Cooper, LLP.

<sup>9</sup> Petitioners filed timely petitions for reconsideration of fee assessments in previous years, although for each year 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 petitioner 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 fiscal year 2012-2013.

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.

## **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, Petitioners effectively claim that the 2011 Budget Act violated Proposition 26, because it served as a basis for the FY 2011-2012 annual fees. Proposition 26 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 (2013 supp.) foll. § 3, p. 142.) Because this year’s annual water right fees and water quality certification fees are unchanged from the previous fiscal year (FY 2011-2012), Petitioners appear to argue that the fees were established by the 2011 Budget Act. Second, Petitioners claim that the fees are actually unlawful taxes as applied. In making these arguments, certain individual Petitioners also argue that the annual petition fees and water quality certification fees are invalid. Petitioners also incorporate by reference the arguments in a petition for reconsideration filed on behalf of NCWA and CVPWA.

## **6.1 THE ANNUAL WATER RIGHT FEES DO 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.<sup>10</sup> Proposition 26 applies retroactively to statutes enacted after January 1, 2010, but does not apply to previously enacted statutes. (See Cal. Const., art. XIII A, § 3, subd. (c).) With respect to regulatory fees, Proposition 26 imposes a two-thirds vote

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

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, (iii) the reasonable regulatory costs incident to issuing licenses and permits, performing inspections, and enforcement, and (iv) entrance to or use of state property, or the purchase, rental or lease of state property.<sup>11</sup> (*Id.*, subd. (b)(1)-(4).) 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 2011 Budget Act triggered an increase in the annual water right fees in FY 2011-2012, which in turn formed the basis for the fees assessed in FY 2012-2103. They contend that the fees for FY 2012-2013 were established by a change in state statute, the 2011 Budget Act, and thus violate Proposition 26 because the 2011 Budget Act was not approved by a two-thirds vote of the Legislature. They argue that the increase in the FY 2011-2012 fees is void until the requisite two-thirds approval is obtained. Without explication, Petitioners further argue that “[i]f 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.” (See, e.g., Petition for Reconsideration filed on behalf of McPherrin Land Co. (Nov. 29, 2012) (hereafter McPherrin petition), p. 4.)

As a preliminary matter, 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 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 Cal. 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.”])

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<sup>11</sup> “All water within the State is property of the people of the State . . . .” (Wat. Code, § 102.)



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 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 rollcall 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 (2012 supp.) foll. § 3, p. 142 [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.<sup>12</sup>

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 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." (See, e.g., McPherrin petition, 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 the [Reclamation's] entire 116 million acre-feet entitlement.

(McPherrin Petition at pp. 4-5.) 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." (*Id.*, at p. 5.)

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

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<sup>12</sup> As discussed above, Proposition 26 contains several exceptions from the two-thirds vote requirement. (Cal. Const., article XIII A, § 3, subd. (b)(1)-(4).) 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. Petitioners have failed to raise specific concerns with these analyses in connection with their Proposition 26 claims. Moreover, the petition for reconsideration jointly filed by NCWA, CVPWA, and the California Farm Bureau Federation (CFBF) over assessment of the FY 2012-2013 annual fees does not raise any arguments concerning Proposition 26. To the extent Petitioners purport to incorporate arguments regarding regulatory fees in the petition filed by NCWA, CVPWA, and the CFBF, those arguments are addressed in the State Water Board orders incorporated by reference herein.

in connection with the water rights held by Reclamation. In fact, 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 *CFBF v. State Water Board*, *supra*, 51 Cal.4<sup>th</sup> 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 Reclamation's Central Valley Project (CVP) water supply contractors based on the formula set forth in section 1073 of the 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 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. 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, face value is not a direct measure of diversion and use. 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 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 2012-2013 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 supports deliveries to the federal contractors. (See e.g. 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.) 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 is necessary to support the quantity of water delivered to the federal contractors. The petitions for reconsideration on this ground are denied.<sup>13</sup>

### **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 FERC-licensed projects for which water quality certification has been issued. (§ 3833.1.) The Nevada Irrigation District (NID) and Paradise Irrigation District expressly contest the annual petition fees assessed under section 1065 of the State Water Board's regulations. NID and the South Feather Water and Power Agency expressly contest the annual water quality certification fees assessed under section 3833.1.

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<sup>13</sup> 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* (9<sup>th</sup> Cir. 1991) 938 F.2d 1040 (hereafter *Nye County*.) To the contrary, as the Supreme Court noted in *CFBF v. State Water Board, supra*, 51 Cal.4<sup>th</sup> 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.

Each Petitioner alleges that there is no fair and reasonable relationship between the cost of the fees and the services provided, and that the fees are taxes under Proposition 26. 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." (Petition for Reconsideration of NID (Dec. 4, 2012), 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 by \$205.20 for its water quality certification fee for the Yuba Bear Project (FERC 2266). Pursuant to section 3833.1, subdivision (b)(4) of the State Water Board's regulations, the annual water quality certification fee for a FERC-licensed hydroelectric project is \$1,000 plus \$0.342 per kilowatt, based on the authorized or proposed installed generating capacity of the hydroelectric facility. The State Water Board assessed NID a fee of \$ 28,332.64 based on the authorized installed generating capacity of 79,920 kilowatts. NID claims that the State Water Board should have used the installed generating capacity of 79,320 kilowatts, as identified in NID's Notification of Intent, which would amount to a fee of \$28,127.44. Section 3833.1, subdivision (b)(4)(A), however, 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; accordingly, the State Water Board correctly based the annual fee on the installed generating capacity of the facility in the existing license that is proposed for relicensing. The fee was correctly assessed. There is no cause for reconsideration.

**6.4 ARGUMENTS IN THE NCWA AND CVPWA PETITION**

Petitioners incorporate by reference the petition for reconsideration filed by NCWA, CVPWA, and other parties. On December 12, 2012, NCWA, CVPWA, CFBF, and individual petitioners submitted a petition for reconsideration of the FY 2012-2013 annual fees. The State Water Board has issued Order WR 2013-0010-EXEC, denying those entities' petition for reconsideration. This order adopts and incorporates by reference the reasoning in Order WR 2013-0010-EXEC and of the State Water Board's previous orders regarding NCWA and the other parties' petitions for reconsideration, including Order WR 2012-0003-EXEC and Order WR 2007-0007-EXEC and the orders incorporated by reference in that order. To the extent Petitioners' request reconsideration based on the incorporation by reference to the petition filed by NCWA and others, that request 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: 2/21/13

  
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Thomas Howard  
Executive Director

Attachment

In the matter of the Petition for Reconsideration of the  
Anderson-Cottonwood Irrigation District, et al.

Attachment 1: Petitioners for Reconsideration FY 12/13

Primary owner	Application ID
ANDERSON-COTTONWOOD IRRIGATION DISTRICT	USBR1085
CORDUA IRRIGATION DISTRICT	A009927
CORDUA IRRIGATION DISTRICT	A012371
FRIANT POWER AUTHORITY	A025882
FRIANT POWER AUTHORITY	A030593
FRIANT POWER AUTHORITY	A031186
FRIANT POWER AUTHORITY	31186P110804
FRIANT POWER AUTHORITY	FERC11068C
GORRILL LAND COMPANY	A002777
GORRILL LAND COMPANY	A004664
GORRILL LAND COMPANY	A004665
GORRILL LAND COMPANY	A022321
GORRILL LAND COMPANY	A025717
IVANHOE IRRIGATION DISTRICT	USBR1285
KAWEAH RIVER POWER AUTHORITY	A026607
LINDMORE IRRIGATION DISTRICT	USBR1281
LINDMORE IRRIGATION DISTRICT	USBR1282
LINDSAY-STRATHMORE IRRIGATION DISTRICT	USBR1280
M & T INCORPORATED	USBR1241
M & T INCORPORATED	A005109
M & T INCORPORATED	A008188
M & T INCORPORATED	A008213
M & T INCORPORATED	A008565
M & T INCORPORATED	A009735
M & T INCORPORATED	A015866
MCPHERRIN LAND COMPANY	A014546
MCPHERRIN LAND COMPANY	A015710
NEVADA IRRIGATION DISTRICT	A001270
NEVADA IRRIGATION DISTRICT	A001614
NEVADA IRRIGATION DISTRICT	A001615
NEVADA IRRIGATION DISTRICT	A002275
NEVADA IRRIGATION DISTRICT	A002276
NEVADA IRRIGATION DISTRICT	A002372
NEVADA IRRIGATION DISTRICT	A002652A
NEVADA IRRIGATION DISTRICT	A002652B
NEVADA IRRIGATION DISTRICT	A004309



Primary owner	Application ID
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	20072P090403
NEVADA IRRIGATION DISTRICT	20017P090403
NEVADA IRRIGATION DISTRICT	1615P090320
NEVADA IRRIGATION DISTRICT	1614P090403
NEVADA IRRIGATION DISTRICT	2372P090320
NEVADA IRRIGATION DISTRICT	2275P090320
NEVADA IRRIGATION DISTRICT	8180P090403
NEVADA IRRIGATION DISTRICT	24983P090403
NEVADA IRRIGATION DISTRICT	2652BP09404
NEVADA IRRIGATION DISTRICT	2652BP090403
NEVADA IRRIGATION DISTRICT	27132P090403
NEVADA IRRIGATION DISTRICT	27559P090403
NEVADA IRRIGATION DISTRICT	5193P090403
NEVADA IRRIGATION DISTRICT	6229P090320
NEVADA IRRIGATION DISTRICT	1270P090320
ORANGE COVE IRRIGATION DISTRICT	USBR1283
ORANGE COVE IRRIGATION DISTRICT	A028552
ORANGE COVE IRRIGATION DISTRICT	A028691
PARADISE IRRIGATION DISTRICT	A000476
PARADISE IRRIGATION DISTRICT	A022061
PARADISE IRRIGATION DISTRICT	22061P071228

Primary owner	Application ID
SOLANO IRRIGATION DISTRICT	A025176
SOUTH FEATHER WATER & POWER	FERC2088
SOUTH FEATHER WATER & POWER	A001651
SOUTH FEATHER WATER & POWER	A002142
SOUTH FEATHER WATER & POWER	A002778

\* NOTE: This order and attachment includes corrections made on April 8, 2013 and July 24, 2013. (Wat. Code, § 1124; State Water Board Res. 2012-0029, § 4.1.3.)