

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0011-EXEC

In the Matter of the Petitions for Reconsideration of the
**CORDUA IRRIGATION DISTRICT, DELANO-EARLIMART IRRIGATION DISTRICT,
EXETER IRRIGATION DISTRICT, FRIANT POWER AUTHORITY,
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,
SAUCELITO IRRIGATION DISTRICT, SOLANO IRRIGATION DISTRICT,
SOUTH FEATHER WATER & POWER AGENCY AND
TERRA BELLA IRRIGATION DISTRICT**
Regarding Annual Water Right Fee Determinations

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The Cordua Irrigation District, Delano-Earlimart Irrigation District, Exeter Irrigation District, Friant Power Authority, 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, Saucelito Irrigation District, Solano Irrigation District, South Feather Water & Power Agency and Terra Bella Irrigation District, collectively referred to herein as "Petitioners",² individually petition the

¹ State Water Board Resolution No. 2002-0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of petitions for reconsideration of disputed fees falls within the scope of authority 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. This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 cal.Rptr.3d 898]. In that case, the court held that the State Water Board, after a hearing, could not defer making findings that were prerequisite to issuing water right permits by delegating the remaining findings to its staff for subsequent determinations.

² The term "Petitioners" is used for ease of reference in this order and does not confer the legal status of petitioner.

If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding an assessment is deemed adopted on the date of assessment by BOE (§ 1077, subd. (b).) A petition is timely filed only if received by the State Water Board within 30 days of the date an assessment is issued. (*Ibid.*)

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. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the petition may be denied 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).)

This order addresses the principal issues raised by Petitioners. To the extent that this order does not address all of the issues raised by the Petitioners, the State Water Board finds that either these issues are insubstantial or that the Petitioners have failed to meet the requirements for a petition for reconsideration under State Water Board regulations. (§§ 768-769, 1077.)

3.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the State's water right program. The primary source of funding for the water right program is regulatory fees deposited in the Water Rights Fund in the State treasury. Legislation enacted in 2003 (Senate Bill No. 1049, 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 reviews the fee schedule each fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.*, § 1525, subd. (d).) BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2007-2008, the Budget Act authorizes the expenditure of \$11.592 million to support the regulatory activities of the State Water Board's water right program. Most of the funding for the water right program – a total of \$7.384 million – is appropriated from the Water Rights Fund.⁴

⁴ In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program also includes \$3.848 million in general funds, \$212,000 in tobacco tax funds, and \$148,000 in federal trust funds.

This allocation includes \$6.929 million for administration of the State Water Board's water right program, \$420,000 for the water right fee collection efforts of the BOE, and \$35,000 for support functions provided by the California Environmental Protection Agency. (Stats. 2007, ch. 171, as amended by Stats. 2007, ch. 172.) The State Water Board estimated that mid-year budget adjustments would increase the Water Rights Fund budget to \$7.984 million.⁵

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 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.⁶ The State Water Board has determined that the FY 2006-2007 fee schedule will continue to generate sufficient revenues to support the water right program activities for FY 2008-2007.⁷ Accordingly, the State Water Board did not revise the emergency regulations or the fee schedule for FY 2007-2008.

4.0 FEE DETERMINATIONS COVERED BY THE PETITIONS

Although the Petitioners filed their petitions for reconsideration individually, their petitions repeat the same legal arguments. Nine Petitioners are represented by a single law firm.⁸ The remaining Petitioners used petition language that is identical to 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 the petitions in this order.

The State Water Board's review in this order is limited to annual water right fee assessments issued on or about October 15, 2007. Petitioners' requests for refunds of fees paid between

⁵ 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.

⁶ 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.

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

⁸ Minasian, Spruance, Meith, Soares & Sexton, LLP.

July 1, 2003 and July 1, 2007 are untimely because they were not filed within 30 days of the assessments of those fees.

Most of the petitions are supported by notices of determination of the fees assessed on or about October 15, 2007. These notices include assessments for:

- annual permit and license fees under sections 1066 and 1071; and
- annual permit and license fees passed through to the United States Bureau of Reclamation's (USBR's) contractors under section 1073.

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. Additionally, the State Water Board will not consider allegations if Petitioners fail to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

The following Petitioners did not include a notice of determination with their petitions as required by State Water Board regulations. (See § 1077, subd. (a).)

- South Feather Water & Power Agency
- Friant Power Authority
- Ivanhoe Irrigation District
- Saucelito Irrigation District
- Delano-Earlimart Irrigation District
- Exeter Irrigation District

Although the State Water Board requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely-filed petition if the petition substantially complies by providing all of the required information in a manner that is clearly identified and readily accessible, even though the information may not be in the proper format. In this case, the State Water Board accepted certain petitions that did not include a notice of determination provided the submission clearly identified key information contained in the notice of determination, e.g., the fee payer's name, the water right or BOE identification number, the amount assessed, and the billing period or assessment date. Attachment 1 identifies the persons who were assessed an annual water right fee, have met the regulatory requirements for

filing a petition for reconsideration, and are properly considered petitioners for the purposes of this order.

It bears emphasis, however, that the requirement for including a copy of the notice of determination serves an important function. In response to the FY 2007-2008 notices of determination mailed by BOE, the State Water Board received 653 petitions for reconsideration.⁹ All of these petitions must be evaluated and responded to within 90 days from the date on which BOE made the assessment.¹⁰ (Wat. Code, §§ 1537, subd. (a)(2); 1122.) Because all of these petitions must be decided in a short period of time, the information included in the notice of determination is necessary to timely process the petitions for reconsideration.

The processing of petitions for reconsideration consumes finite staff resources. When Petitioners fail to comply with the regulations governing the filing of petitions for reconsideration, the value of staff resources spent searching for the required information may exceed the amount of the fee involved. In the future, the State Water Board may deny a petition for failure to include a copy of the notice of determination as required under the regulations without considering whether the information that would be provided in the notice is set forth elsewhere in a petition or incorporated by reference.¹¹

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

Petitioners raise three arguments challenging the annual water right permit and license fees:

- (1) the water right permit and license fees are invalid because they are not applied to water right holders who do not hold permits and licenses,
- (2) the fees passed through to the USBR contractors are unreasonable because the contractors benefit from only a small fraction of the USBR's water rights,

⁹ The State Water Board received 1,128 petitions for reconsideration for FY 2006-2007 annual water right assessments.

¹⁰ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

¹¹ Because many petitions for reconsideration are identical, or nearly so, the State Water Board is able to address many petitions in orders consolidating many petitions. Nevertheless, the fact that the State Water Board is able to consolidate large numbers of petitions does not diminish the amount of time staff must spend reviewing each petition for completeness nor in searching for information petitioners fail to include in petitions for reconsideration.

(3) the fee regulations are unlawful because the Third District Court of Appeal invalidated the regulations establishing the annual amount of fees that water right permit and license holders must pay, and further invalidated the annual fees for federal Central Valley Project (CVP) contractors.

5.1 Because the Water Right Program Primarily Regulates State Permits and Licenses, it is Appropriate that Fee Revenues Comes Primarily from Annual Permit and License Fees.

The annual fees deposited to the Water Rights Fund are intended to support water right program activities. Water Code 1525, subdivision (c) authorizes the State Water Board to set permit and license fees based on all costs incurred in administering the State's water rights. The activities described in subdivision (c) of section 1525 represent virtually all water right program activities, including application processing, petitions and requests, change orders, planning, monitoring and enforcement.

The State Water Board estimates that only about five percent of program activities focus on water rights that are not permits or licenses. By contrast, about sixty percent of the rights to the use of water in the state are held under permits or licenses, and the regulation of permitted and licensed water rights claims about 95 percent of the State Water Board's water right program expenditures. (State Water Board letter dated April 15, 2004 from Arthur G. Baggett, Jr., Chair, to the Honorable Joseph Canciamilla concerning water right fees, p.2.) Thus, it is appropriate that revenues be generated from assessment of annual water right fees because the water right program primarily regulates state permits and licenses.

The USBR operates large federal water projects, including the CVP, under permits issued by the State Water Board. The State Water Board cannot impose permit or license fees on the USBR, except to the extent authorized under federal law. Nevertheless, because the fees attributable to USBR permits are passed through to project contractors, non-USBR permitted and licensed water right holders are not being required to pay for program costs attributable to regulating the federal projects.

5.2 The Fees Passed Through to Central Valley Project Contractors are Reasonable because the Water Rights for the Central Valley Project are Held to Support Deliveries to the Contractors.

The State Water Board has the authority to regulate the diversion and use of water that the USBR contracts to deliver. (*California v. U.S.* (1978) 438 U.S. 645; *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183; *Imperial Irrig. Dist. V. State Wat. Resources Control Bd.* (1990) 225 Cal.App.3d 548, 561.) The State Water Board allocated annual fees to contractors based on the permits and licenses held by the USBR to provide water for contract deliveries. (See § 1073, subd. (b)(2).) The annual fees for USBR projects having no water supply contracts were not passed through to contractors. (State Water Board letter dated January 9, 2004 from Victoria A. Whitney, Chief, Division of Water Rights, to Kirk C. Rodgers, Regional Director, Mid-Pacific Region and Robert W. Johnson, Regional Director, Lower Colorado Region, United States Bureau of Reclamation.)

As is the case for all permittees and licensees, the USBR contractors' annual fees are calculated based on the face value of the permits and licenses for the projects providing contract deliveries even though the contractors cannot be delivered all of that face value. (See § 1073, subd. (b)(2).) It is important to understand that the quantity of water that can actually be delivered to contractors under a permit or license is not equivalent to the face value of the water right. Generally, the face value of a permit or license is an order of magnitude, or more, larger than the amount of water that can actually be delivered to contractors. (State Water Board Order WRO 2004-0011-EXEC, p. 20.)

Annual fees are allocated among the contractors, as provided in Water Code section 1540, based on each contractor's proportional share of the total fees attributed to the water right permits and licenses for projects owned or operated by the USBR. The State Water Board used the amount of water deliverable under USBR water supply contracts to apportion the contractors share of the fees. (§ 1073, subd. (b)(2).) Approximately half of the face value of USBR permits and licenses is for amounts of water that may be appropriated for hydroelectric power production. (State Water Board Memo to File dated December 29, 2003, p. 2, Discount for Hydroelectric Power.) Basing contractors' fees on only water delivery contracts ignores the fact that the power generated by the CVP benefits the contractors by offsetting the CVP's power consumption costs, supplying water required for instream flow obligations, and increasing overall carryover storage for future years. Accordingly, because contractors are assessed fees

for their proportionate share of the project water rights and benefit from power generation and storage capabilities of the project, the fees passed through to contractors are reasonable.

5.3 It is Inappropriate to Contend that the State Water Board's Fee Regulations are Invalid based on an Unpublished Judicial Opinion.

The Petitioners' contend the State Water Board's fee regulations are unlawful because the Third District Court of Appeal (Court of Appeal) invalidated the regulations establishing the annual amount of fees that water right permit and license holders must pay, and further invalidated the annual fees for federal Central Valley Project contractors. To a limited extent, as noted above, the Petitioners' elaborate on this contention, but such contentions are based on the Court of Appeal's decision. Petitioners do recognize that the California Supreme Court has granted review of the Court of Appeal's decision, but fail to recognize the effect of that action. Because the California Supreme Court granted review, the Court of Appeal's decision is unpublished. (See Cal. Rules of Court, rule 8.1105(d).) An unpublished opinion cannot be cited as precedent. (*Id.*, rule 8.1115(a).) Thus, it is inappropriate to contend that the State Water Board's fee regulations are invalid based on an unpublished judicial opinion.

6.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that its decision to impose water right fees was appropriate and proper. To the extent that this order does not address all of the issues in the petition for reconsideration, 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. Accordingly, the petitions for reconsideration are denied.

ORDER

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

Dated: **JAN 30 2008**



Dorothy Rice
Executive Director

Attachment

In the matter of the Petitions for Reconsideration of the Cordua Irrigation District, et al.
Attachment 1: Petitioners for Reconsideration

Name	State Water Board ID
Cordua Irrigation District	A009927
Cordua Irrigation District	A012371
Delano-Earlimart Irrigation District	USB1300
Delano-Earlimart Irrigation District	USB1301
Exeter Irrigation District	USB1291
Exeter Irrigation District	USB1292
Friant Power Authority	A025882
Ivanhoe Irrigation District	USB1284
Ivanhoe Irrigation District	USB1285
Kaweah River Power Authority	A026607
Lindmore Irrigation District	USB1281
Lindmore Irrigation District	USB1282
Lindsay-Strathmore Irrigation District	USB1280
M & T Incorporated	A005109
M & T Incorporated	A008188
M & T Incorporated	A008213
M & T Incorporated	A008565
M & T Incorporated	A009735
M & T Incorporated	A015866
M & T Incorporated	USB1241
McPherrin Land Co.	A014546
McPherrin Land Co.	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
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

In the matter of the Petitions for Reconsideration of the Cordua Irrigation District, et al.
Attachment 1: Petitioners for Reconsideration

Name	State Water Board ID
Orange Cove Irrigation District	A028552
Orange Cove Irrigation District	A028691
Orange Cove Irrigation District	A030593
Orange Cove Irrigation District	A031186
Orange Cove Irrigation District	USBR1283
Paradise Irrigation District	A000476
Paradise Irrigation District	A022061
Saucelito Irrigation District	USBR1294
Saucelito Irrigation District	USBR1295
Solano Irrigation District	A025176
South Feather Water & Power Agency	A001651
South Feather Water & Power Agency	A002142
South Feather Water & Power Agency	A002778
South Feather Water & Power Agency	A002979
South Feather Water & Power Agency	A013676
South Feather Water & Power Agency	A014112
South Feather Water & Power Agency	FERC2088
Terra Bella Irrigation District	USBR1288