

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006-0002-EXEC

In the Matter of the Petitions for Reconsideration of the
**CORDUA IRRIGATION DISTRICT, EXETER IRRIGATION DISTRICT,
IVANHOE IRRIGATION DISTRICT, KAWEAH RIVER POWER AUTHORITY,
LINDMORE IRRIGATION DISTRICT,
LINDSAY-STRATHMORE IRRIGATION DISTRICT,
M&T INCORPORATED, NEVADA 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, Exeter Irrigation District, Ivanhoe Irrigation District, Kaweah River Power Authority, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, M&T Incorporated, Nevada Irrigation District (NID), South Feather Water and Power Agency (South Feather), and Terra Bella Irrigation District collectively referred to herein as “Petitioners,” individually petition the State Water Resources Control Board (State Water Board) for reconsideration and a refund of water right fees assessed by the State Board of Equalization

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director’s consideration of petitions for reconsideration of disputed fees falls within the scope of the authority delegated under Resolution No. 2002 - 0104. Accordingly, the Executive Director has the authority to refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment. 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 by the staff. 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.

(BOE) on November 7, 2005. In general, Petitioners allege that the water right fees are unconstitutional and invalid. They request the State Water Board to find that the fee assessments were improperly made and to refund Petitioners' payments. The State Water Board finds that its decision to impose the fees was appropriate and proper and denies Petitioners' petitions for reconsideration.

2.0 GROUNDS FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board's determination that the fee payer is required to pay a fee, or the State Water Board's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)² A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768, 1077.) Pursuant to Water Code section 1537, subdivision (b)(4), the State Water Board's adoption of the regulations may not be the subject of a petition for reconsideration. When a State Water Board decision or order applies those regulations, a petition for reconsideration may include a challenge to the regulations as they have been applied in the decision or order.

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific board action of which petitioner requests reconsideration, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated, and the specific action which petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment. (§ 1077, subd. (a).) Section 769, subdivision (c) of the regulations further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition.

² 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.

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 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 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 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.)

3.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights is the entity primarily responsible for administering the state's water right program. The primary source of funding for the water rights program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Senate Bill 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 revises the fee schedule each fiscal year, so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.* § 1525, subd. (d).) BOE is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year (FY) 2005-2006, the Budget Act appropriates \$11.447 million for the water right program, including \$11.085 million for water right administration by the State Water Board and

\$0.362 million for water right fee collection by BOE.³ (Stats. 2005, ch. 38, as amended by Stats. 2005, ch. 39.) Most of the funding for the water right program – a total of \$9.589 million – is appropriated from the Water Rights Fund. In accordance with the Water Code fee provisions, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁴

In FY 2004-2005, the State Water Board collected \$8.01 million in water right fees and water quality certification fees deposited in the Water Rights Fund.⁵ Additional funds were remaining in the Water Rights Fund from previous years' fees. After subtracting program costs and accounting for encumbrances, approximately \$1.831 million was left in the Water Rights Fund at the end of the fiscal year. The State Water Board accounted for this excess, which exceeded the State Water Board's allocation specified in the Budget Act of 2004, by subtracting it from the budget target for FY 2005-06. Thus, for the purposes of calculating this year's fees, the State Water Board determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$7.886 million (\$9.717 - \$1.831 million) this fiscal year. Assuming a non-collection rate of 10 percent,⁶ the total amount billed in annual fees was \$8.029 million, with the remaining balance expected to be collected from one-time filing fees.

³ The budget figures referenced in this order for FY 2005-2006 are based on the line item appropriations in the Budget Act of 2005. (Stats. 2005, ch. 38, amended by Stats. 2005, ch. 39.) These figures are subject to adjustment based on control sections in the Budget Act. After these adjustments are made, the precise amounts budgeted will be slightly different than the line appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this order.

⁴ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)) and money transferred from other funds. The Budget Act of 2005 reappropriates \$1.5 million that was appropriated in the Budget Act of 2004, but not expended, to pay for work described in Assembly Bill 2121 (Stats. 2004, ch. 943). This appropriation was based on a transfer from the Resources Trust Fund, a fund that is supported by tidelands oil revenues, and is reappropriated in the Budget Act of 2005 because insufficient funds were deposited in the Resources Trust Fund to make the transfer in FY 2004-05. The State Water Board did not include this amount in calculating the amount of revenue to be collected from fees.

⁵ Fees associated with water quality certification for Federal Energy Regulatory Commission licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

⁶ The State Water Board assumed a 90 percent rate of collection for this fiscal year. This assumption is based on BOE's rate of collection in FY 2004-2005. The amount attributed to non-collection includes reductions in fee revenues because the State Water Board may reduce or rescind some fees after the fee payer files a petition for
[footnote continues on next page]

On September 22, 2005, the State Water Board adopted emergency regulations amending the water right and water quality certification fee schedules to meet the requirements of the Water Code and the Budget Act. (State Water Board Resolution No. 2005 - 0069.) The emergency regulations became effective on October 21, 2005, and on November 7, 2005, BOE sent out notices of determination for the annual fees.

4.0 FEE DETERMINATIONS COVERED BY THE PETITION

Although Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments nearly verbatim. It appears that Petitioners are represented by the same law firm and the petition language was copied wholesale. The petitions either were filed under the same firm's letterhead or the firm was copied on the petition. 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 instead of issuing an individual order on each petition. Attachment 1 identifies the persons whose petitions are the subject of this order.

The State Water Board's review in this order is limited to certain annual fee assessments issued on November 7, 2005. Petitioners have submitted notices of determination for annual permit and license fees under section 1066, annual permit and license fees passed through to Bureau of Reclamation (USBR) contractors under section 1073, and a water quality certification fee under section 3833.1, subdivision (c). To the extent that Petitioners' contentions are not relevant to any of these fee assessments for which their petition for reconsideration has been filed, those contentions are not within the scope of the petitions for reconsideration. Additionally, the State Water Board will not consider allegations if the Petitioners have failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

reconsideration identifying a problem, as well as fees that are properly assessed but not paid by the end of the fiscal year. Unpaid fees are still subject to collection, with interest, but it may take some time before the Water Rights Fund receives significant revenues as a result of collection actions against parties who failed to pay their fees on time.

Many Petitioners failed to include the notice of assessment with their petitions. (See § 1077, subd. (a).) 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 has accepted certain letters referencing the petitions that did not include a notice of assessment as long as the petitioner included and clearly identified the same information contained in a notice: the fee payer's name, either the water right or BOE identification number, the amount assessed, and the billing period or assessment date.

It bears emphasis, however, that the requirement for including a copy of the notice of assessment serves an important function. A petition is not acceptable simply because the information provided in the notice of assessment might be available somewhere in the materials included in or incorporated by reference in the petition. The State Water Board receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief period, and the information included in the notice of assessment is necessary to properly process the petitions for reconsideration. To the extent the State Water Board is required to track down information because the petitioner fails to comply with the requirements specified in State Water Board regulations, the processing of petitions for reconsideration would be delayed, and for many petitions the staff time that would have to be devoted to the effort would be disproportionate to 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 assessment as required under the regulations, without considering whether the information that would be provided in the notice of assessment is set forth elsewhere in the petition.

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

Petitioners raise a variety of constitutional and statutory challenges to the water right fees, including claims that: (1) the fees are unconstitutional and invalid because they were adopted in violation of law, (2) the fees impose a new tax in violation of California Constitution Article XIII

A (Proposition 13), (3) the fees are unconstitutionally discriminatory as applied to water right holders, (4) the fees amount to an unlawful taxes or *ad valorem* taxes prohibited by Proposition 13, and (5) the fee regulations are inconsistent with statutory mandates that a state agency can only adopt a fee schedule that does not exceed the reasonable cost of providing services necessary to the agency's regulatory activity.

In addition, Exeter Irrigation District, Ivanhoe Irrigation District, Lindmore Irrigation District, Lindsay-Strathmore Irrigation District, M&T Incorporated, and Terra Bella Irrigation District contest the imposition of fees passed through to the USBR's contractors. (§ 1073, subd. (b).) These Petitioners claim that assessment of the pass-through fees was inappropriate because the USBR's sovereign immunity extends to its Central Valley Project (CVP) water service contractors. They also assert that because the State Water Board has determined that the CVP contractors are not legal users of water, there is no basis for assessing a fee against them.

Petitioners do not make any specific arguments regarding the water quality certification fee. To the extent that Petitioners' challenge to this fee is based on their same contentions concerning the annual permit and license fees, those contentions are already addressed in this order and in the orders incorporated by reference. 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).)

The State Water Board previously considered and rejected Petitioners' same arguments raised in their petitions for reconsideration challenging the FY 2004-2005 water right fees. The State Water Board denied the petitions raising general arguments about the annual water right fees in Order WRO 2005-0004-EXEC and denied the petitions contesting the pass-through fees in Order WR 2005-0008-EXEC. The petitions now before the State Water Board repeat the same arguments nearly verbatim. Petitioners have not provided any new arguments, new information, or supporting authorities that materially change any of the issues raised in the earlier petitions. With respect to the issues that were raised in the previous petitions and are repeated in the petitions now before the State Water Board, this order adopts the reasoning of Order

WRO 2005-0004-EXEC and Order WR 2005-0008-EXEC, and incorporates the reasoning of those orders by reference.⁷ The petitions are denied for the reasons set forth in those orders.

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 raised in the petitions 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. The petitions for reconsideration are denied.

ORDER

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

Dated: January 26, 2006

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director

Attachment

⁷ All of the Petitioners were parties to Order WRO 2005-0004-EXEC or Order WR 2005-0008-EXEC, and their petitions do not raise any new issues. Because Petitioners failed to pursue their judicial remedies for reviewing Order WRO 2005-0004-EXEC and Order WR 2005-0008-EXEC, those orders are conclusive and binding on Petitioners as to all issues that they seek to raise again in the petitions they have filed in response to the fees assessed for this fiscal year. (See *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 69-70 [99 Cal.Rptr.2d 316] [finding that a party to a quasi-judicial administrative proceeding is bound in later civil actions if the party fails to exhaust its judicial remedies]; *Westlake Community Hosp. v. Superior Court* (1976) 17 Cal.3d 465, 484 [131 Cal.Rptr. 90].)

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

NAME	STATE WATER BOARD ID
CORDUA IRRIGATION DISTRICT	A009927
CORDUA IRRIGATION DISTRICT	A012371
EXETER IRRIGATION DISTRICT	USBR1291
EXETER IRRIGATION DISTRICT	USBR1292
IVANHOE IRRIGATION DISTRICT	USBR1285
IVANHOE IRRIGATION DISTRICT	USBR1284
KAWEAH RIVER POWER AUTHORITY	A026607
LINDMORE IRRIGATION DISTRICT	USBR1281
LINDMORE IRRIGATION DISTRICT	USBR1282
LINDSAY-STRATHMORE IRRIGATION DISTRICT	USBR1280
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	USBR1241
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
SOUTH FEATHER WATER & POWER	A001651
SOUTH FEATHER WATER & POWER	A002142
SOUTH FEATHER WATER & POWER	A002778

**In the Matter of the Petitions for Reconsideration of the
Cordova Irrigation District, et al.
Attachment 1: Petitions for Reconsideration**

NAME	STATE WATER BOARD ID
SOUTH FEATHER WATER & POWER	A002979
SOUTH FEATHER WATER & POWER	A013676
SOUTH FEATHER WATER & POWER	A013956
SOUTH FEATHER WATER & POWER	A013957
SOUTH FEATHER WATER & POWER	A014112
SOUTH FEATHER WATER & POWER	A014113
SOUTH FEATHER WATER & POWER	FERC2088
TERRA BELLA IRRIGATION DISTRICT	USBR1288