

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2010-0011-EXEC

In the Matter of the Petition for Reconsideration of

PALO VERDE IRRIGATION DISTRICT

Regarding Water Right Fee Determinations for Fiscal Year 2009-2010

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

By this order, the Executive Director denies Palo Verde Irrigation District's (PVID) petition for reconsideration of the State Water Resources Control Board's (State Water Board or Board) determination that PVID was required to pay an annual water right fee in the amount of \$25,076.99 for Permit 7652 (Application 9280). PVID argues that annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders. In addition, PVID argues that assessment of the fee against PVID is unconstitutional because PVID's rights to Colorado River water arise solely from PVID's water delivery contract with the United States and the State Water Board has no authority over waters of the Colorado River.

For the reasons set forth below, the Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition for reconsideration is denied.

2.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board's Division of Water Rights (Division) is the entity primarily responsible for administering the State's water right program. The primary source of funding for the water

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

right program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Stats. 2003, ch. 741) required the State Water Board to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board 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)(3).) If the revenue collected in the preceding year was greater or less than the revenue levels set forth in the annual Budget Act, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.* § 1536.)

In FY 2009-2010, the Budget Act of 2009 appropriates \$11.658 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.447 million – is appropriated from the Water Rights Fund.² In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$397,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$40,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program. (Stats. 2009, 3rd Ex. Sess., ch. 1.)³

In accordance with the Water Code, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.⁴ To account for higher than anticipated fee

² In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program includes \$3.772 million in general funds, \$291,000 in tobacco tax funds, and \$148,000 in federal trust funds. The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund, and do not include appropriations from the Water Rights Fund that are attributable to transfers from other funds.

³ In addition to making appropriations that are specific as to the particular fund and agency involved, the Budget Act includes appropriations that are allocated by the Department of Finance. The Budget Act also includes generally applicable sections that provide for adjustments of appropriations by the Department of Finance.

⁴ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)), penalties collected for water right violations (*id.*, § 1551, subd. (b)), and money transferred from other funds.

revenues and lower than anticipated expenditures in FY 2008-2009,⁵ the State Water Board revised the emergency regulations establishing annual permit and license fees to provide a one-time credit in FY 2009-2010 of \$0.007 for each acre-foot by which the annual diversion authorized by the permit or license is greater than 10 acre-feet. (Cal. Code Regs., tit. 23, § 1066, subd. (a).) The State Water Board also revised other portions of the fee schedule for FY 2009-2010, which are not the subject of this petition for reconsideration.⁶ On November 3, 2009, BOE sent out notices of determination for annual permit and license fees, including a notice of determination that PVID owed an annual water right fee for Permit 7652.

Permit 7652 authorizes the diversion of water from the Colorado River for irrigation and domestic purposes at an average rate not to exceed 1,500 cubic feet per second from January 1 to December 31. Pursuant to section 1066, subd. (a), of the State Water Board's regulations,⁷ the annual fee for PVID's permit was \$100, plus \$0.023 per acre-foot for each acre-foot in excess of 10 acre-feet, based on the total amount of water authorized to be diverted under the permit. The amount of water authorized to be diverted was calculated by multiplying the maximum average rate of diversion authorized by the length of time in the authorized season. (§ 1066, subd. (b)(1).)

PVID filed for a petition for reconsideration of this fee, which was received on November 23, 2009.

⁵ As explained in the Memorandum to File, dated December 3, 2009, from Victoria A. Whitney, Deputy Director for Water Rights, on June 30, 2009, the Water Rights Fund had an ending balance of \$4.09 million. Fee revenues were higher than anticipated, due in part to the unexpectedly high collection of one-time filing fees, and budgeted expenditures were lower than projected due, in part, to furloughs. The Division ultimately anticipates total fee revenues of \$7.05 million for FY 2009-2010.

⁶ The State Water Board adjusted the upper limit on certain filing fees, reduced groundwater recordation filing fees, and clarified that fees for change petitions involving water transfers also apply to petitions for temporary urgency changes involving water transfers. It merits note that over the past two years, water right application processing has been fully supported by application filing fees, application annual fees, and general fund revenue. Over the past four years, the State Water Board has collected a total of \$3,212,551 in application filing fees and expended a total of \$3,144,658 in water right fee revenues on application processing—an average difference of slightly less than \$17,000 per year.

⁷ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

3.0 GROUND FOR RECONSIDERATION

A fee payer may petition for reconsideration of the State Water Board's determination that the fee payer is required to pay a fee, or the State Water Board's determination regarding the amount of the fee. (§ 1077.) A fee payer may petition for reconsideration on any of the following grounds: (1) irregularity in the proceeding, or any ruling, or abuse of discretion, by which the fee payer was prevented from having a fair hearing; (2) the fee determination is not supported by substantial evidence; (3) there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced; or (4) error in law. (§§ 768, 1077.)

A petition for reconsideration of a fee assessment must include certain information, including the name and address of the petitioner, the specific Board action of which petitioner requests reconsideration, the date on which the State Water Board made its decision, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes that the amount of the fee has been miscalculated, and the specific action that the petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).)

Section 769, subdivision (c) of the regulations further provides that a petition for reconsideration shall be accompanied by a statement of points and authorities in support of the legal issues raised in the petition. A petition for reconsideration of a fee assessed by BOE must include either a copy of the notice of assessment or all of the following information: (1) the fee payer's name, (2) the water right or BOE identification number, (3) the amount assessed, and (4) the billing period or assessment date. (§ 1077, subd. (a)(2).)

A petition for reconsideration must be filed not later than 30 days from the date on which the State Water Board adopts a decision. (Wat. Code, § 1122.) If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) The deadline for filing a petition for reconsideration of BOE's November 3, 2009, assessment was December 3, 2009.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board

finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)⁸

4.0 DISCUSSION

PVID contends that (1) the annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders, and (2) the assessment of the fee against PVID is unconstitutional because PVID's right to Colorado River water stems solely from PVID's water delivery contract with the United States and the State Water Board has no authority over the Colorado River.

PVID made these same contentions, supported by the same memorandum of points and authorities, in petitions that PVID previously filed challenging annual fees issued in FY 2003-2004, FY 2004-2005, FY 2006-2007, FY 2007-2008, and, most recently, FY 2008-2009. The Executive Director denied those petitions in Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, Order WR 2008-0008-EXEC, and Order WR 2009-0008-EXEC, respectively.

The Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition should be denied. PVID has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, Order WR 2008-0008-EXEC, and Order WR 2009-0008-EXEC. Accordingly, this order incorporates by reference and adopts the reasoning of Order WRO 2004-0021-EXEC, Order WRO 2005-0005-EXEC, Order WR 2007-0010-EXEC, Order WR 2008-0008-EXEC, Order WR 2009-0008-EXEC and the documents that supported those orders.⁹

⁸ 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 [43 Cal.Rptr.2d 681]; State Water Board Order WQ 98-05-UST at pp. 3-4.)

⁹ Order WRO 2004-0021-EXEC also addressed contentions that are not included in the petition currently before the State Water Board. To the extent that Order WRO 2004-0021-EXEC addressed contentions that are not properly before the State Water Board in this proceeding and are not relevant to the contentions addressed in this order, the incorporation by reference of Order WRO 2004-0021-EXEC does not extend to those contentions and those contentions are not addressed by this order.

5.0 CONCLUSION

For the reasons discussed above, the State Water Board's decision to impose the annual water right permit fee on PVID was appropriate and proper. Accordingly, PVID's petition for reconsideration should be denied.

ORDER

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

Dated: 3/8/10

Thomas Howard
Dorothy Rice
Executive Director