

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 89-64

RESOLUTION APPROVING THE FINAL STATEMENT OF EXPENSE
AND THE APPORTIONMENT OF THE EXPENSE AMONG THE PARTIES
TO THE AMERICAN RIVER COURT REFERENCE

WHEREAS:

1. The Alameda County Superior Court appointed the State Water Resources Control Board (Board) as referee for the Lower American River Court Reference pursuant to Water Code Section 2000 (Environmental Defense Fund, et al. v. East Bay Municipal Utility District, et al., No. 425,955).
2. The Board conducted an investigation, prepared the Draft Report of Referee, held a hearing on objections to the draft report and adopted the Report of Referee. The Board incurred expenses during the conduct of the reference and the Board is entitled to be reimbursed (Water Code Section 2040).
3. The total expenses of the reference are \$507,607. During the conduct of the reference the Board asked the parties to make periodic payments. The parties have paid \$345,967, leaving an unpaid balance of \$161,640. The following amounts have been paid by the parties: East Bay Municipal Utility District (EBMUD), \$188,000; Department of Fish and Game (DFG), \$17,000; State Lands Commission (SLC), \$16,887; and the Environmental Defense Fund (EDF), Save the American River Association (SARA) and the County of Sacramento (County), \$124,080.
4. The County, an intervenor, agreed to pay the expenses apportioned to EDF and SARA, the plaintiffs. The expenses apportioned to EDF and SARA have been paid by the County.
5. The Board is required to equitably apportion the expense of the reference against the parties (Water Code Section 2043). The interim expense charges have been apportioned equally between defendant EBMUD and the complainants; i.e., the plaintiffs and the interveners.
6. Subsequent to intervention, DFG and SLC were included in the expenses apportioned to the complainants; however, the assessments against DFG and SLC were reduced to reflect the limited scope of intervention ordered by the court.

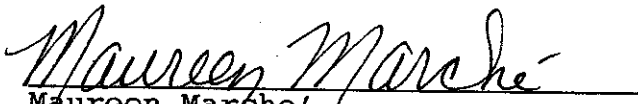
7. The final expenses should be apportioned 40 percent to the defendant East Bay Municipal Utility District (EBMUD) and 60 percent to the complainants as set forth in Attachment B. This equitable apportionment is based upon considerations which include the following: (a) both defendant and complainants benefited from the Board's investigation and the Report of Referee; (b) the plaintiffs' failure to include a party necessary for the entry of an order that could protect lower American River instream uses, the U. S. Bureau of Reclamation; (c) the complainants' failure to demonstrate that EBMUD's proposed diversion would harm reasonable uses made of the lower American River; and, (d) the similarity between the physical solution proposed by EBMUD during the initial phases of the Board's investigation and the physical solution included in the Report of Referee.
8. The expense apportioned to the complainants should be equally apportioned among EDF, SARA, and the County. Because the court limited their role in intervention, DFG and SLC should be apportioned a lesser share of the complainants expenses.
9. The share of expenses apportioned to DFG and SLC should be applied to all expenses incurred from the beginning of the court reference, not just to the expenses incurred after they formally intervened. DFG participated in the factual investigation, and SLC to a lesser extent, in the same manner as the initial parties to the reference proceeding. Both DFG and SLC filed legal briefs during the investigation. More fundamentally, the answers to the issues raised by DFG and SLC are based upon the work product of the initial investigation to the same extent as the parties present when the matter was referred to the Board.
10. Neither DFG nor SLC should be exempted from the apportionment of expenses on the grounds that they are state agencies. Moreover, the Board should not be required to pay for studies DFG conducted to gather evidence to support its position. As a consequence of intervention by DFG and SLC, the Board incurred expenses in the conduct of the reference. It is neither reasonable nor consistent with the law that the Board, as referee, should assume the expense of other state agencies voluntarily injecting themselves into a litigated matter (Water Code Section 2043).

THEREFORE BE IT RESOLVED:

1. The Statement of Final Expense set forth in Attachment A is approved.
2. The apportionment of the expenses set forth in Attachment B is approved.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 20, 1989.


Maureen Marche
Administrative Assistant
to the Board