STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004 -0011- EXEC

In the Matter of the Petitions for Reconsideration of the

NORTHERN CALIFORNIA WATER ASSOCIATION, THE CENTRAL VALLEY PROJECT WATER ASSOCIATION, AND INDIVIDUAL PETITIONERS[1]

Regarding Water Right and Water Quality Certification Fee Determinations

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ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[2]

1.0 INTRODUCTION

The Northern California Water Association (NCWA), the Central Valley Project Water Association (CVPWA) and other persons and entities, collectively referred to herein as "Petitioners," petition the State Water Resources Control Board (SWRCB) for reconsideration and a refund of fees assessed by the State Board of Equalization (BOE) on or about January 8, 2004. In general, Petitioners allege that the SWRCB's decision to impose the water right and water quality certification fees constitutes an abuse of discretion, is not supported by substantial evidence, and is illegal. They request the SWRCB to vacate and rescind SWRCB Resolution No. 2003 - 0077 authorizing the fees and to refund Petitioners' payments. The SWRCB finds that its decision to impose the fees was appropriate and proper and denies Petitioners' petitions for reconsideration that are based on legal arguments. Certain Petitioners have raised factual issues relating to their fee bills; the SWRCB has recalculated the fees where

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[1] The individual petitioners are identified in Attachment 1.

[2] SWRCB Resolution No. 2002 - 0104 delegates to the Executive Director the authority to supervise the activities of the SWRCB. Unless a petition for reconsideration raises matters that the SWRCB wishes to address or requires an evidentiary hearing before the SWRCB, 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.

those claims are meritorious claims and has directed BOE to refund or cancel fees, as appropriate. Accordingly, the SWRCB denies reconsideration of those meritorious claims on the basis that they are now moot and also denies reconsideration of the factual claims that are without merit.

2.0 GROUNDS FOR RECONSIDERATION

On petition by any interested person or entity, the SWRCB may order reconsideration of all or part of a decision or order adopted by the SWRCB, including a determination that a person or entity is required to pay a fee or a determination regarding the amount of the fee. (Wat. Code, §§ 1122, 1537, subd. (b)(2).) Pursuant to Water Code section 1537, subdivision (b)(4), the SWRCB's adoption of the regulations may not be the subject of a petition for reconsideration. When an SWRCB 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.

California Code of Regulations, title 23, section 768 provides that an interested person may petition for reconsideration upon any of the following causes:[3]

(a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

(b) The decision or order is not supported by substantial evidence;

(c) There is relevant evidence that, in the exercise of reasonable diligence, could not have been produced;

(d) Error in law.

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. (Cal. Code Regs., tit. 23,

[3] All further regulatory references are to the SWRCB's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

§ 769, subd. (a)(1)-(6); § 1077, subd. (a).) In addition, the petition may include a claim for refund. (*Id*. § 1074, subd. (g).)

The SWRCB 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. (*Id*. § 770, subd. (a)(1).) Alternatively, after review of the record, the SWRCB also may deny the petition if the SWRCB 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*. § 770, subd. (a)(2)(A)-(C).)

This order addresses the principal issues raised by NCWA and CVPWA and the individual petitioners. To the extent that this order does not address all of the issues raised in each of the petitions for reconsideration, the SWRCB finds that either these issues are insubstantial or that Petitioners have failed meet the requirements for a petition for reconsideration under the SWRCB's regulations. (*Id*. §§ 768-769, 1077.)

3.0 LEGAL AND FACTUAL BACKGROUND

The SWRCB's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) requires the Division's program to be supported by fee revenues amounting to $4.4 million, replacing a General Fund reduction of $3.6 million. The Budget Act of 2003 allocates a total of $9.0 million for support of the water right program. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues. Accordingly, the SWRCB will collect fees for the 2003-2004 fiscal year, but the fees will support half of the program costs this fiscal year. The SWRCB will review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. BOE is responsible for collecting the annual fees.

The Legislature enacted the water right fee provisions of the Budget Act and Senate Bill 1049 based on the recommendations of the Legislative Analyst. The Legislative Analyst concluded that the water right program provides benefits to the water right applicants and water right holders regulated by the program. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at pp. B-123 through B-126.) With respect to existing water right holders, the Legislative Analyst observed:

> [T]he water rights program provides *ongoing* benefits directly to water rights holders. This is mainly because SWRCB is charged with assuring that applications for new water rights do not cause harm to any other existing legal water rights holder. In addition, the program conducts routine compliance and inspections of existing water rights. These activities also provide direct benefits to water rights holders by ensuring the terms and conditions of the water rights permits and licenses held by others are upheld.

(*Id.* at p. B-125 [italics in original].) Accordingly, the Legislative Analyst recommended an increase in application fees, plus new annual fees assessed on all permit and license holders, and establishment of a new special fund for deposit of the revenues generated by the fees. (*Ibid.*) [4]

On December 15, 2003, the SWRCB adopted Resolution No. 2003 - 0077 approving emergency fee regulations to meet the requirements of the Budget Act and Senate Bill 1049. In general, the fee regulations increase filing fees for applications, petitions, registrations, and other filings and adopt annual fees for permits, licenses, water leases, and projects subject to water quality certification. Most fees will be deposited in the Water Rights Fund, which can be used to support all activities in the water right program. The Office of Administrative Law approved the emergency regulations on December 23, 2004, and both Senate Bill 1049 and the emergency

[4] The Legislative Analyst recommended that the entire water right program be funded through fees, and that the fees also support the water right related activities of the Department of Fish and Game. (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125 through B-126.) Although the Legislative Analyst states that water right holders "benefit directly" from the water rights program (*id.* at p. B-125), this statement simply recognizes that the fee payers benefit from the program, even though the program also serves to protect against harm to a public resource. The Legislative Analyst recognized that the water right program is a regulatory program that includes environmental review of proposed appropriations and continuing oversight of permitted and licensed diversion and use. (See *id.* at pp. B-123 through B-124.) The Legislative Analyst proposed fees for various resource and environmental programs that included a combination of fees for services that directly benefit the fee payer, such as fire protection fees, and regulatory fees, such as fees for dam safety inspections. (*Id.* at pp. B-3 through B-4.) Senate Bill 1049 establishes the water right fees as regulatory fees, which may be based on the need for regulation instead of basing the fees on the value of the benefits conferred. (See Wat. Code, § 1525, subd. (c).)

regulations became effective on January 1, 2004. BOE issued the first bills by Notice of Determination on January 8, 2004.

On December 17, 2003, NCWA and CVPWA filed suit against the SWRCB and BOE challenging Senate Bill 1049, SWRCB Resolution No. 2003 - 0077, and the SWRCB's fee regulations. By subsequent Stipulation and Order, dated January 20, 2004, the parties agreed, in part, that by February 9, 2004, NCWA and CVPWA would file a petition for reconsideration with the SWRCB asking the SWRCB to reconsider the disputed fee bills and to set them aside. The Stipulation also provides that NCWA and CVPWA would file the petition for reconsideration on behalf of any individual who pays its fee in full by February 9, 2004, under cover of a letter of protest that references the Stipulation and adopts the NCWA-CVPWA petition for reconsideration. (Stipulation and Order, 4(a)-(b).)

4.0 FEE DETERMINATIONS COVERED BY THE PETITIONS

NCWA and CVPWA filed a petition for reconsideration on behalf of all their members and non-members who have paid their billed fees in full, under protest, with reference to the Stipulation. According to the NCWA-CVPWA petition, Petitioners are NCWA, CVPWA, persons identified in Exhibit A of the petition for reconsideration, and persons filing timely protests in accordance with the Stipulation.

The SWRCB requires strict adherence to the statute and regulations governing a petition for reconsideration. As explained above, a petition for reconsideration of a fee assessment must include certain information, including identification of the specific order or decision for which it seeks review. (Cal. Code Regs., tit. 23, §§ 769, 1077.) It is questionable whether certain individual Petitioners have met these requirements, primarily because they failed to identify the specific board action of which they are requesting reconsideration, i.e., the specific fee. (*Id*. § 769, subd. (a)(2).) Nonetheless, in light of the Stipulation, the SWRCB will treat those Petitioners who paid their fees under letter of protest as specified in the Stipulation as having filed or joined in a properly filed petition for reconsideration. Where individual Petitioners have failed to identify a specific board action, the SWRCB will presume that they are contesting the fee bills issued on or about January 8, 2004.

The SWRCB will not consider the claims of a person who failed to timely file a petition for reconsideration in accordance with the applicable law or the terms of the Stipulation and Order. Any persons or entities identified as petitioners in Exhibit A of the NCWA-CVPWA petition who failed to comply with the terms of the Stipulation because they either did not pay the fee or did not adopt the NCWA-CVPWA petition in a timely manner have not complied with the requirement for the timely filing of a petition for reconsideration. The NCWA-CVPWA petition is denied, as applied to those persons or entities, for that reason.

Accordingly, the SWRCB will not consider late amendments to the NCWA-CVPWA petition for reconsideration. The deadline for filing a petition for reconsideration was February 9, 2004. On March 11, 2004, NCWA and CVPWA sought to amend their petition for reconsideration by identifying certain Friant Class II Contractors in Exhibit A of the petition and adding Darin and Laura Claiborne (water right application A025024)[5] as a petitioner. They also submitted a second addendum to Exhibit A. A person cannot circumvent the legal deadlines for a petition for reconsideration by continuously filing amendments to the petition.

BOE issued bills on or about January 8, 2004, for annual permit and license fees under section 1066 of the regulations, annual permit and license fees passed through to Bureau of Reclamation (Bureau or USBR) contractors under section 1073, and annual water quality certification fees under section 3833.1. Fee determinations that were not the subject of the fee bills issued on or about January 8, 2004, such as the filing fees for applications and petitions, and fees bills issued to fee payers who did not seek reconsideration of those fee determinations, are not within the scope of the petitions for reconsideration.[6]

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[5] The SWRCB notes that the Claibornes, who claim that they should not have been charged a fee because they divert water under riparian and pre-1914 right, hold License 11539 and accordingly, are properly subject to the annual fee. The Claibornes may request revocation of their license if they choose to rely on other bases of right.

[6] In addition to receiving petitions from parties who received a fee bill, the SWRCB received a petition from Pajaro Valley Water Management Agency (Pajaro), which receives water from Westlands Water District. Pajaro petitions for reconsideration as an "interested person" under Water Code section 1122. Pajaro alternatively joins the NCWA petition and the Westlands petition, and seeks a refund of the assessment it expects to be passed through to it under Westlands' BOE Account No. WR MT 94-000014. Pajaro's petition is based on the fees assessed to Westlands, and is not based on any fees assessed directly to Pajaro. Westlands' petition for reconsideration is denied herein; Pajaro's petition likewise is denied.

Some of the contentions argued by Petitioners are not within the scope of the petitions for reconsideration because those contentions are not relevant to any of the fee determinations for which a petition for reconsideration has been filed. For example, Petitioners object to annual fee for projects for the holder of a Federal Energy Regulatory Commission (FERC) license for which water quality certification has been issued.[7] (See *id*. § 3833.1, subd. (c).) Only a small number of entities are subject to this fee, however, and none of them filed a petition for reconsideration. Therefore, Petitioners have not properly raised any issue concerning the validity or computation of that fee.

Attachment 1 identifies the individual petitioners who have received a fee bill[8] and who are properly considered Petitioners for purposes of this Order.[9]

5.0 ARGUMENTS REGARDING CONSTITUTIONALITY OF SENATE BILL 1049 AND THE SWRCB'S ADOPTION OF THE FEE REGULATIONS

Petitioners raise a variety of constitutional challenges to Senate Bill 1049[10] and the SWRCB's fee regulations. These challenges are without merit.

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[7] Petitioners raise this argument in a complaint filed against the SWRCB and the BOE, and incorporate the argument by reference in their Petition.

[8] This order and Attachment 1 use both the SWRCB identification number and the BOE account number in identifying the fee payers or the type of fees assessed. SWRCB identification numbers include the following: (1) numbers starting with "application" or "A" refer to the permittee or licensee's water right application number, and indicate that the fee payer has been assessed an annual permit or license fee; (2) numbers starting with "USBR" refer to annual permit or license fees passed through to Bureau contractors; and (3) numbers starting with "FERC" refer to annual water quality certification fees. The BOE account number begins with "WR MT" and includes a ninth digit that is unnecessary for the purposes of this order and is not included herein. Where both numbers are used as a reference in this order, they may be separated by a slash (e.g., SWRCB ID/BOE Account Number).

[9] At the time of issuance of this order, the SWRCB has not received from BOE a complete list of persons who have timely paid the water right fee. The SWRCB reserves the right to dismiss as a Petitioner any person identified as a Petitioner in Attachment 1 who the SWRCB later determines has not paid the fee in accordance with the Stipulation and Order.

[10] Pursuant to the California Constitution, an administrative agency such as the SWRCB has no power to declare a statute unconstitutional or unenforceable, or to refuse to enforce a statute on the basis that the statute is unconstitutional or federal law prohibits enforcement of the statute unless an appellate court has made that determination. (Cal. Const., art. III, § 3.5.) This provision does not prohibit a party from raising a constitutional issue as part of petition challenging a decision or order applying the statute, however, and any constitutional issues should be raised before the administrative agency if a party wants to preserve those issues for judicial review. Although a state agency cannot declare a statute unconstitutional in the absence of a judicial determination of that *[footnote continues on next page]*

5.1 Senate Bill 1049 and the Fee Regulations Establish Lawful Regulatory Fees

Petitioners contend that the fees established by Senate Bill 1049 and the fee regulations amount to an unconstitutional tax because (1) the fees exceed the reasonable cost of providing the regulatory service and (2) the fee regulations constitute a tax based solely on property ownership. Petitioners' claims are without merit.

5.1.1 The Fees are Regulatory Fees Charged in Connection with Regulatory Activities

Under California Constitution, article XIII A (Proposition 13), the state cannot impose a tax unless the tax is approved by a two-thirds vote of each house of the Legislature.[11] The Legislature, however, can authorize a state agency to charge a regulatory fee by passing a bill by a majority vote. A regulatory fee is a fee "charged in connection with regulatory activities, which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866, 876 [64 Cal.Rptr.2d 447].)

Regarding cost-fee ratios, a state agency must demonstrate "(1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." (*California Association of Professional Scientists v. Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945-950 [94 Cal.Rptr.2d 535] (hereinafter *CAPS*) (citing *Beaumont Investors v. Beaumont-Cherry Valley Water Dist*. (1985) 165 Cal.App.3d 227, 235 [211 Cal.Rptr. 567]).) A regulatory fee, however, does not require a precise cost-fee ratio to survive as a fee. (*CAPS*, *supra,* 79 Cal.App.4th at p.

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issue, the agency retains the power to interpret the statute, and may take constitutional issues into account in determining how the statute should be interpreted.

[11] Section 3 of Proposition 13 states:

> From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

950.) In *CAPS*, the court recognized that flexibility is an inherent component of reasonability and that regulatory fees, unlike other types of fees, often are not easily correlated to a specific, ascertainable cost due to the complexity of the regulatory scheme, the multifaceted responsibilities of the responsible agency and its employees, intermingled funding sources, and accounting systems that are not designed to track specific tasks.
(*Id*. at p. 950.)

Through Senate Bill 1049, the Legislature has authorized the SWRCB to charge regulatory fees to water users. Water Code section 1525, subdivision (c) requires the SWRCB to set the fee schedule so that the total amount of fees collected equals the amount necessary to recover the water right program's costs. The SWRCB must set a fee schedule that will generate revenues in the amount the Budget Act sets for water right fee revenues, and it must review and revise the fees each fiscal year as necessary to conform to the revenue levels set forth in the annual Budget Act. If the revenue collected is greater or less than the amount set in the annual Budget Act, then the SWRCB may further adjust the annual fees to compensate for the over or under collection of revenue. (Wat. Code, § 1525, subd. (d)(3).) In accordance with the Water Code, the water right fees are calculated solely to cover the costs of the SWRCB's regulatory program and not to generate additional revenue.

In addition, Senate Bill 1049 created a special fund, the Water Rights Fund, to assure that the fees are used for water right program costs and not for unrelated revenue purposes. (See Wat. Code, § 1550). All water right fees and all water quality certification fees for FERC licensed hydroelectric projects are deposited in the Water Rights Fund. (*Id.* § 1551.) These funds may be expended only for specified purposes, all of which involve administration of the water rights program, administration of water quality certification for FERC licensed hydroelectric projects, a program carried out by the Division, or administration of the fees by the SWRCB and BOE.
(*Id.* § 1552.)

Petitioners argue that the primary purpose of the fees is revenue generation because Senate Bill 1049 and the fee regulations were adopted to replace revenue lost from the General Fund. The requirement that the fee not be levied for unrelated revenue purposes is not violated simply

because a fee is intended to allow a shift in program funding from the General Fund to fee revenues, thereby allowing more money from the General Fund to be spent on other programs. For example, in rejecting a challenge to an emission-based fee to support air pollution control programs made on grounds similar to those raised by Petitioners, the Fourth District Court of Appeal concluded:

> Proposition 13's goal of providing . . . tax relief is not subverted by the increase in fees or the emissions-based apportionment formula. A reasonable way to achieve Proposition 13's goal of tax relief is to shift the costs of controlling . . . sources of pollution from the tax-paying public to the pollution causing industries themselves . . . .

(*San Diego Gas & Electric Co. v. San Diego County Air Pollution Control District* (1988) 203 Cal.App.3d 1132, 1148 [250 Cal.Rptr. 420, 430]. See also, *Brydon v. East Bay Mun. Util. Dist*. (1994) 14 Cal.App.4th 178 [29 Cal.Rptr.2d 128] [approving an inclined rate structure for water customers as a regulatory fee, in part, because it achieved the regulatory goal of water conservation].)[12]

Petitioners also contend that the fees exceed the reasonable cost of the SWRCB's regulatory activity because Senate Bill 1049 authorizes the SWRCB to recover costs for the Division's entire operations and not just the costs of its regulatory activities. They argue that costs associated with certain activities of the SWRCB, such as its adjudicatory functions, are not within the scope of costs authorized by Water Code section 1525. As Water Code section 1525, subdivision (c) recognizes, regulatory costs include those costs incident to the issuance of a permit or license, such as administration, monitoring, and enforcement. (*CAPS*, *supra,* 79 Cal.App.4th at p. 945.) Petitioners argue that adjudicative hearings and public workshops related to the administration of water rights are "unrelated to the existing regulatory program." But these activities are an integral part of the regulatory program. Adjudicative hearings often

[12] As in the case of emission-based fees, the water right fees are based in part on the principle that the activities of the fee payers create the need for the regulatory program, and they benefit from it. As the Legislative Analyst observed: "Since water rights holders benefit directly from all aspects of the water rights program—including permit issuance and compliance monitoring—we conclude that the existing fee structure should be revised so that fee revenues replace all General Fund support budgeted for the board's program." (Legislative Analyst's Office, Analysis of the 2003-04 Budget Bill at p. B-125.)

are necessary before the SWRCB to apply or enforce regulatory requirements. Public workshops enable the SWRCB to obtain input from water right holders and the affected public on both specific regulatory decisions under consideration and on broader proposals to more effectively administer the regulatory program. A water right hearing, for example, may be integral to the determination of whether or under what conditions a water right permit should be issued, what enforcement action should be taken in response to a permit violation, or what permit terms should be considered to coordinate operations under permits to divert from the same stream. Moreover, Petitioners fail to recognize that a regulatory program is for the protection of the health and safety of the public; accordingly, a regulatory fee is enacted for purposes broader than assigning the privilege to use a service or to obtain a permit. For example, costs of environmental protection may be shifted to persons who seek to impact the state's natural resources without subverting Proposition 13's objectives. (*Id*. at p. 950.)

Petitioners also object to the use of funds for program oversight. In particular, they object to a recent effort by the SWRCB to examine how it implements its permitting authority over subterranean streams in known and definite channels. (See Wat. Code, § 1200.) Petitioners claim that such activities are unrelated to the existing regulatory program. In fact, however, the effort involved a review of how the regulatory program was being implemented to ensure consistency with the legal requirements governing that program and to hear comments from persons and entities subject to regulation under the program. That kind of review clearly is an appropriate element of administration of a regulatory program, and is properly charged to the fee payers who are subject to that regulatory program.

Petitioners contend that "the fees will impermissibly generate income that surpasses the costs of the services provided" because Water Code section 1525, subdivision (d)(3) permits the SWRCB to adjust the annual fees to compensate for the over or under collection of revenues. To the contrary, however, the purpose of this provision is to ensure that the fees are reevaluated to avoid collection of revenues in excess of long term program needs. (See, e.g., *CAPS*, *supra,* [upholding constitutionality of statute imposing fee where statute provided for annual review and recommendations for adjustment of fees as necessary to pay the program's costs].) In combination with the deposit of fee revenues in a special fund that can be used only for program

purposes, the periodic recalculation of the fees under Water Code section 1525, subdivision (d)(3) assures that the fees will not be used for unrelated revenue purposes.

Petitioners claim that, because fees may be adjusted in later years to make up for under collection in earlier years, some fee payers will effectively be charged more to make up for those who fail to pay their fees. Similarly, they object to the SWRCB's assumption of 40 percent nonpayment when it estimated the revenues to be generated in Fiscal Year 2003-04, claiming that this assumption has the effect of charging those who pay their fees extra in order to make up for those who do not pay.[13] Petitioners seek a mechanism that apportions to each individual permittee and licensee a proportionate share of the cost of the SWRCB's services. The SWRCB, however, is not required to demonstrate the proportionality of the fees on an individual basis. (See *CAPS*, *supra*, at p. 946 [rejecting argument that an agency must demonstrate an individual correlation between the amount of the fee and the cost of the benefit or burden].) "Proportionality is measured collectively to assure that the fee is indeed regulatory and not revenue raising." (*Id*. at p. 948.) According to the Budget Act of 2003, the total cost of the SWRCB's water right program in Fiscal Year 2003-2004 is approximately $9 million. Less than half, $4.4 million, is to be collected through fee revenues, and a portion of the fee revenues is being spent on administration of the fee. Accordingly, the fees collected are not intended to exceed the costs of the SWRCB's water right program, including costs of administering and collecting the fee, and to the extent that fees are over collected in any given year, the SWRCB will adjust the annual fees accordingly.

Moreover, Senate Bill 1049 requires the SWRCB to set the fees so that the amount "collected" covers the water right program's costs (Wat. Code, § 1525, subd. (c)). Thus, it is necessary for the SWRCB to assume a certain non-collection rate to ensure that it collects the proper amount of revenue. To assume a 100 percent collection rate, as Petitioners seem to suggest, is an

[13] These arguments fail to take into account how fees will be allocated and revenues collected over the long term. The SWRCB used the 40 percent nonpayment assumption to estimate revenues that would be collected this fiscal year; it does not mean those fees will never be collected. The SWRCB and BOE will continue to seek collection of the fees from those who fail to pay. In many cases, the fees still will be collected later, with interest and penalties, and deposited in the Water Rights Fund. (Wat. Code, § 1551.) To the extent the SWRCB and BOE are able to collect delinquent fees, those revenues will be used to support the water rights program, and the fees set in later years will be adjusted to take into account these additional revenues.

unrealistic assumption even for an established fee program. The SWRCB assumed a 60 percent rate of collection for this fiscal year. This assumption is based upon staff's experience with return rates on required water right filings, recognition that certain fee payers may claim sovereign immunity from paying fees,[14] recognition that some water right holders will refuse to pay the fees, consideration of likelihood that some of the fees had been miscalculated and refunds would be awarded as part of the petition process, and recognition that some of the addresses in the Division's files are out of date, resulting in substantial delays before fees can be collected on some permits and licenses. As the fee program is implemented in the first few years, the SWRCB expects that the collection rate will increase and that fees will be reduced accordingly.

In alleging that the Division "has little continuing responsibility over water right permit and license holders once a permit or license has been issued," Petitioners fail to recognize that more than half of the Division's costs are related to actions that are for the primary purpose of managing existing water rights. These actions include the following: investigating complaints alleging violation of permit or license conditions, waste of water, or violation of the public trust in water; conducting compliance inspections of existing diversion facilities; processing petitions to amend permit or license conditions; conducting field inspections of permitted diversion projects to determine the amount of water beneficially used prior to issuing a water right license; and administering the requirements for SWRCB approval of changes in point of diversion, place of use, or purpose of use.[15] Additionally, a substantial portion of the cost of processing applications and petitions is devoted to protecting other water right holders, including providing notification to permit and license holders when applications or petitions are filed and considering

[14] Senate Bill 1049 includes a mechanism by which fees may be passed through to the water supply contractors of a water right holder who claims sovereign immunity. (Wat. Code, § 1560.) Some federal and tribal projects do not have water supply contractors, however, and the SWRCB had good reason to believe, based on comments submitted in workshops on the proposed fee regulations, that many water supply contractors would contend that the fees could not be passed through to them.

[15] The fee schedule adopted by the SWRCB also includes fees for change petitions, but these fees will not cover the entire cost of those proceedings. It can be difficult to determine how much water should be deemed to be involved when a change in permit or license terms is proposed. Furthermore, the costs of processing a petition are not closely related to the amount of water involved. In addition, imposing higher fees for change petitions may result in unauthorized activities, thus raising additional enforcement issues. Accordingly, the SWRCB decided that most of the cost of administering changes in permits and licenses should be supported by annual permit and license fees instead of petition fees.

protests filed by those permit and license holders. Similarly, much of the environmental review costs associated with processing new applications involves consideration of the cumulative impacts of the proposed diversion in combination with the diversions of others holding permits and licenses to divert from the same stream system.

In sum, the fees adopted by the SWRCB do not violate Proposition 13 because the fee revenues collected do not surpass the costs of the SWRCB's regulatory programs they support and the cost allocations to individual payers have a reasonable basis in the record. (*CAPS, supra,* at p. 950.)

5.1.2 The Fees are Regulatory Fees and Not Property Taxes

Although water rights are considered to be property rights that are usufructuary in nature,[16] Petitioners contend that water rights should be considered to be real property falling within the aegis of Proposition 13.[17] More specifically, Petitioners contend the fees constitute real property taxes in violation of Proposition 13 and the equal protection clause of the Fourteenth Amendment of the United States Constitution.

The water right fees are fees, not taxes. Moreover, the fees bear none of the indicia of taxation that Proposition 13 purports to address. For example, the terminology in Proposition 13 contemplates land and buildings, not water, as the property to be protected. Appropriative water rights differ, in part, because they can be separated from the land and moved to other land.

In addition, the fees are not ad valorem. Section 3 of Proposition 13 prohibits new ad valorem taxes on real property.[18] Revenue and Taxation Code section 2202 defines ad valorem tax to

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[16] The right of property in water "consists not so much of the fluid itself as the advantage of its use." (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 100 [227 Cal.Rptr. 161] [quoting *Eddy v. Simpson* (1853) 3 Cal. 249, 252].)

[17] Petitioners do not argue that California Constitution, article XIII D, section 3, is applicable here. This provision generally prohibits a local agency from assessing a tax, assessment, fee, or charge on any parcel of property or on any person as an incident of property ownership, and is not applicable to state agencies.

[18] Certain Petitioners also allege that Senate Bill 1049 imposes a new tax in violation of sections 1 and 2 of Proposition 13. Section 1 establishes the maximum amount of ad valorem tax on real property, which is restated in section 3, *Kennedy Wholesale, Inc. v. State Board of Equalization* (1991) 53 Cal.3d 245, 253 [279 Cal.Rptr. 325], and section 2 addresses full cash value assessments. As discussed herein, the fees are not property taxes under Proposition 13 and these arguments have no merit.

mean "any source of revenue derived from applying a property tax rate to the assessed value of property." (See *Heckendorn v. City of San Marino* (1986) 42 Cal.3d 481, 487, fn. 4 [229 Cal.Rptr. 324] [finding it reasonable to construe ad valorem tax in light of the definition found in the Revenue and Taxation Code's chapter on property tax rates for local agencies since Proposition 13 related to the general subject of property tax relief].) The water right fees, however, are not based on the assessed value of the water right involved. (See, *id*. at p. 487 [finding no ad valorem tax where ordinance imposed tax based on residential zones that included lots varying in size and no appraisal of value was made].)

Petitioners also argue, inconsistent with their attempt to characterize the fees as ad valorem property taxes subject to Proposition 13, that the fees are discriminatory because they are not based on the value of the water right, but instead are based on the amount of water involved. But the SWRCB has a rational basis for concluding that permits and licenses that authorize larger diversions require more regulatory oversight. Indeed, the amount of the diversion authorized is a more rational basis for allocating fees than the economic value of the water right. The need for SWRCB oversight and the potential impact on third party water right holders and instream beneficial uses corresponds more closely to the amount of water diverted than to the economic value the appropriator gets out of that diversion.

5.2 Senate Bill 1049 and the Fee Regulations are Constitutionally Applied to the Federal Water Supply Contractors

Petitioners contend that Senate Bill 1049 and the fee regulations are unconstitutional because they discriminate against federal contractors.[19] Under Senate Bill 1049, if the SWRCB determines that a fee payer such as the Bureau is likely to decline to pay a fee or expense based on a claim of sovereign immunity, then the SWRCB may allocate the fees due to that fee payer's water contractors.[20] (Wat. Code §§ 1540, 1560.) Section 1073 of the regulations passes through the Bureau's water right fees to its Central Valley Project (CVP) contractors by prorating the fee

[19] Petitioners do not expressly allege any violation of the equal protection clause in support of their allegation that Senate Bill 1049 and the emergency regulations are discriminatory and unconstitutional.

[20] The Division's records indicate that the Bureau holds rights to over 30 percent of the water that is authorized for diversion under water right permits or licenses. In the past, the Bureau has declined to pay water right fees to the state, claiming sovereign immunity.

or expense of the CVP among the contractors for the project based on either the contractor's entitlement under the contract or, if the contractor has a base supply under the contract,[21] the contractor's supplemental supply entitlement.[22] The regulations do not specify how fees for other Bureau projects should be allocated, but instead leave that determination to the Division Chief. As discussed below, Petitioners' claim has no merit.

5.2.1 The Fee Regulations Are Equally Applied to Water Right Holders

The fee regulations apply equally to each permit or license. With certain exceptions to which the Petitioners do not object, all fee payers pay the same rate – the greater of $100 or $0.03 per acre-foot based on the total annual amount of diversion authorized by the permit or license. (Cal. Code Regs., tit. 23, § 1066, subd. (a).) Thus, the water right fee assessed against the Bureau's permits and licenses is calculated based on the same rate that is applied to all other fee payers. Petitioners have not alleged that the SWRCB applied a different rate in calculating the Bureau's water right fees than is used in calculating the fees for non-federal water right holders.

After calculating the fee for the Bureau's permits and licenses, and consulting with the Bureau and concluding that the Bureau would not be willing to pay the fees or agree to contractual arrangements providing an adequate substitute, the Division prorated the Bureau's water right fees among the contractors. Because the Bureau has issued contracts for less water than the sum of its rights, and because the amount of water the Bureau actually delivers to its contractors varies (both by geographical location and contract type), the fee passed through to the individual contractors may vary as a function of the amount of water available under the contract, but the sum of the amounts prorated to the contractors is the total fees assessed for the Bureau's permits and licenses. These permit and license fees are calculated without any discrimination against federal projects or federal contactors.

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[21] Inbasin contracts for water from the CVP are, in most cases, characterized as being water supply contracts or settlement contracts. Settlement contractors claim to have water rights senior to the CVP's rights and their contracts are intended both to settle any claims that project operations interfere with those rights and provide a supplemental supply. The amount of water delivered to the settlement contractors in lieu of their claimed senior rights is referred to as the base supply. Deliveries to other water supply contractors are not based on claims of senior water rights.

[22] Petitioners acknowledge that "contractors with the federal government are subject to state taxation even if the burden of the tax ultimately falls on the United States." (NCWA-CVPWA Petition for Reconsideration, p. 9.)

5.2.2 The Allocation of Fees to Water Supply Contractors Does Not Make the Fees a Tax

Water Code sections 1540 and 1560, subdivision (b)(2), authorize the SWRCB to allocate fees to the Bureau's water supply contractors if the Bureau does not pay the fees. Section 1540 provides in part that, "The allocation of the fee or expense to these contractors does not affect ownership of any permit, license, or other water right, and does not vest any equitable title in the contractors." Petitioners argue that the Bureau's water supply contractors should not be charged a fee because they "have no legal right to water that they receive under contract with the USBR." They cite SWRCB Decision 1641 (D-1641) as authority for this assertion as to the water supply contractors' legal status.[23] On this basis, Petitioners argue that the water supply contractors are not the regulated entities,[24] and that therefore the water supply contractors should not be required to pay a fee.

Petitioners' argument that the water supply contractors are not the regulated entities is not an obstacle to assessing a fee against them. It is not necessary that the agency imposing the fee have a direct regulatory relationship with the fee payer. (*CAPS, supra,* 79 Cal.App.4th 935 [94 Cal.Rptr.2d 535].)

Where water is diverted by a water supplier for use by another person or entity that contracts for delivery of the water, the need for and benefits of the regulatory program may be attributed to either the supplier or the user. The water supply contractors of the Bureau receive the benefit of the Bureau's appropriation of water and pay for the water supply. Their demand for water is a primary purpose of the Bureau's water supply projects. Because they are the recipients of the water, it is reasonable that they should pay the regulatory fees for the water right permits and licenses that are necessary to operate the project.

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[23] D-1641 does not, in fact, say that the contractors have no legal right to the water; they have a legal contractual right that they can enforce against the Bureau. Their contractual rights allow them to obtain water appropriated by the Bureau under its water right permits and licenses. D-1641 holds that the Bureau, not the contractors, is the water right holder.

[24] In making this argument, Petitioners fail to recognize that the SWRCB's regulatory authority is not limited to water right holders, and extends to water users. (See Wat. Code, §§ 275, 1052; SWRCB Decision 1463 (1977) [ordering water supply contractor to cease activities constituting waste or unreasonable use].)

5.2.3 The Fee Regulations Do Not Have a Discriminatory Impact on Federal Contractors

The allocation of the fees for the Bureau's permits and licenses passes those fees through to those water supply contractors, in much the same way as a water supplier who is subject to the fees passes the fees through to its water supply contractors. In so doing, this serves to avoid unequal and inequitable impacts, as would occur if fees were imposed on other water right holders and passed through to their water supply contractors by those water right holders but not imposed on the Bureau or passed through to its contractors. Similarly situated water supply contractors are treated similarly in terms of the ultimate burden of paying for the increased expense of water project operations resulting from the imposition of water right fees.

The SWRCB has not imposed a heavier fee burden on the Bureau's water supply contractors than is imposed on other persons to whom the water right fee may be passed through. Evidence in the administrative record indicates that the Department of Water Resources will pass through its water right fees to state water project contractors. Accordingly, both federal and state water supply contractors ultimately receive similar treatment with the only difference being which entity is responsible for passing through the fee—the SWRCB or the water right holder.

Petitioners also allege that Senate Bill 1049 and the fee regulations "fail to require a pass through to other contractors should their water right holder claim immunity" or should the water right holder otherwise be tax exempt. But there are no other entities, aside from federal agencies and Indian tribes, that can claim immunity from the fees. Any entity capable of holding a water right is subject to the fee. The only entities that are exempt are those entities that are exempt because they have sovereign immunity under federal law, and do not waive that immunity. (See Wat. Code, § 1560, subd. (a).) This is not a case where the state has exempted the state, its political subdivisions, or charitable organizations from fees without passing those fees through to the contractors of those exempt entities, while at the same time setting fees on federal entities and passing those fees through to federal contractors.[25] Water Code sections 1540 and 1560 simply

[25] Petitioners rely on *Phillips Chemical Co. v. Dumas Independent School Dist.* (1960) 361 U.S. 376 [80 S.Ct. 474], a case in which the Supreme Court invalidated a tax that was imposed on lessees of federal land under circumstances where no tax or a lower tax was imposed on lessees of state owned land or other exempt public property. The case *[footnote continues on next page]*

recognize that federal entities and Indian tribes are the only entities that can legitimately claim an exempt status, and provide a means of passing through the fees to those who have contracts for the water supplies made available by the permits and licenses involved. In purpose and effect, the law does exactly what Petitioners suggest the law should do to avoid discrimination: the law allows fees to be passed through to the water supply contractors in any case where the water right holder declines to pay based on a legitimate claim to a legal status that makes it exempt from the fee. (See *Washington v. United States* (1983) 460 U.S. 536 [103 S.Ct. 1344] [noting that a state may accommodate for the fact that it cannot impose a tax on the federal government as the project owner by instead imposing tax on federal contractor without running afoul of the Supremacy Clause]; *United States v. Fresno County* (1977) 429 U.S. 452 [97 S.Ct. 699] [finding no discrimination against federal employees when California counties imposed tax on real property renters only when the land owner was exempt from tax].)

5.2.4 The Fee Charged to the Bureau's Water Supply Contractors Is Not Discriminatory Compared With the Fee for Other Fee Payers

Petitioners argue that the fees charged to the Bureau's water supply contractors are discriminatory because the fees exceed the rate of $0.03 per acre-foot established under section 1066, subdivision (a) of the regulations. This argument confuses the total annual amount of diversion authorized by the permit or license, or "face value" of the permitted or licensed water right, which was the basis on which the fees attributable to the Bureau were calculated, with the amount of water that is deliverable under the Bureau's water supply contracts, which was used to apportion those fees among the water supply contractors. The diversions authorized by the permits and licenses generally exceed the amount of the water supply contracts, both for the Bureau's projects and for other large water supply projects.

As discussed above, the fees for water supply contractors of the Bureau's CVP are based on a proportional share of the fee attributed to the Bureau's water right permits and licenses. (Cal. Code Regs., tit. 23, § 1073, subd. (b)(2).) The fee assessed to the Bureau's non-CVP water supply contractors are similarly apportioned. (Wat. Code, §§ 1560, subd. (b)(2), 1540.) The

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is clearly inapposite to the fees at issue here, where there is no other exempt public property. Publicly held property, including water rights held by the State and its political subdivisions, is subject to the fees.

amount of water that the Bureau can appropriate under its CVP water rights exceeds the amount that it actually delivers to its water supply contractors, just as the amount that a water right holder can appropriate exceeds the amount that it actually puts to beneficial use. The difference between the amount available under the water rights and the amount delivered under the contracts is due to factors that include hydrological variation, the need to hold some water in storage for future dry years, conveyance and evaporation losses, and water releases to mitigate for project impacts on fish and wildlife. These considerations do not decrease the amounts of water that are authorized to be diverted under the Bureau's CVP water rights, and do not decrease the proportional share of those fees that may be passed through to CVP contractors based on a proration of those fees among all water supply contractors with contracts for CVP water.

Petitioners argue that: "CVP contractors are charged approximately $0.37 per acre foot for their contractual allocations while non-federal water users are charged only $0.03 per acre foot for the face value of their water right." This comparison is meaningless, however, because the contractual allocations are not based on the face value of the Bureau's water rights. In fact, the face value of all permits and licenses statewide exceeds the amounts actually delivered for consumptive use by an order of magnitude. As discussed above, one would expect contractual allocations to be substantially less than the face value of water rights. Petitioners' arguments are based on an invalid comparison, and provide no basis for arguing discrimination.

5.3 The Fees Are Not Unconstitutionally Discriminatory as Applied to Non-CVP Contractors

In addition to alleging that the fees discriminate against CVP contractors, Petitioners argue that the fees discriminate against non-CVP contractors.[26] This argument is based on the fact that Senate Bill 1049 recognizes that claims of sovereign immunity may prevent collection of some of the fees. Petitioners argue that if sovereign immunity prevents collection of some of the fees, then other fee payers may be required to pay more in order to ensure that payments cover program requests. They argue that this discriminates against non-CVP contractors.

[26] Petitioners raise this argument in a complaint filed against the SWRCB and the BOE, and incorporate the argument by reference in their Petition.

In areas of environmental and economic policy, including requirements setting regulatory fees, a classification that is not based on a suspect class and does not infringe on fundamental constitutional rights must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 313 [113 S.Ct. 2096].) A state law that treats entities differently based on the different treatment of those entities under federal law, in a manner that does not discriminate against federal interests, almost unquestionably must be upheld against a discrimination claim. The Legislature rationally could have exempted permits and licenses for facilities that have sovereign immunity under federal law, based on belief that claims of sovereign immunity would impede the prompt collection of the fees, or that relationships between the state and federal governments might be undermined by efforts to collect the fees.

The provisions of Senate Bill 1049 and the fee regulations providing for the allocation of fees to water supply contractors help to assure a fair distribution of the costs of the program as between those who receive their water from the CVP and other federal facilities and those who receive their water from state or local projects. But that feature of the regulations is not essential to avoid unconstitutional discrimination against non-federal water users. Moreover, other permit and license holders benefit from regulation of federal facilities. Regulation of federal facilities helps protect other water right holders, and application and enforcement of environmental requirements as part of that regulation helps avoid the need for stricter regulation of other water right holders who contribute cumulatively to environmental problems.[27]

[27] Of course, the converse is also true: federal interests benefit from the regulation of non-federal permit and license holders. The fact that each fee payer benefits from the regulation of other fee payers, and that diversion and use by one fee payer may affect the need for regulation of others, simply underscores the point that the fee system can provide for a fair an reasonable allocation of costs, based on the fee payers' burdens on or benefits from the regulatory activity, even though a substantially different allocation of program costs could also be supported.

5.4 The Fee Regulations Do Not Unlawfully Seek to Assess the Federal Government and its Contractors

Petitioners contend that the emergency regulations unlawfully seek to assess the federal government and its contractors and that Water Code section 1560 is unconstitutional because it imposes a tax on the United States. This argument is flawed for several reasons.

First, neither Water Code section1560 nor the emergency regulations impose an unlawful fee or expense on the United States. Although the Supremacy Clause of the United States Constitution prohibits a state from directly taxing the federal government without its consent, it does not prohibit federal agencies from paying fees or from entering into contracts to reimburse state administrative expenses when authorized by law. (See, e.g., *Jorling v. United States Department of Energy* (2d Cir. 2000) 218 F.3d 96 [federal government is subject to a state's regulatory fees for hazardous waste].) Accordingly, section 1560 instead expressly limits fees and expenses imposed on the United States and Indian tribes "*to the extent authorized under federal or tribal law*." (Wat. Code, § 1560, subd. (a) (italics added).) The statute then identifies several actions that the SWRCB may take if the United States or an Indian tribe declines, or is likely to decline, to pay a fee or expense. (*Id*., subd. (b); Cal. Code Regs., tit. 23, § 1073.) Thus, Water Code section 1560 and the SWRCB's fee regulations recognize that the United States may pay fees and expenses to the extent authorized by federal law.

Second, federal immunity from taxation applies "only when the state levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." (*U. S. v. New Mexico* (1982) 455 U.S. 720, 735 [102 S.Ct. 1373] [upholding state use tax on finding that federal contractors who managed federal property and purchased materials with government funds were not constituent parts of government].) The water supply contractors are not so closely connected to the federal government that they can viewed as one entity; to the contrary, the contractors' use of the Bureau's water rights in connection with their commercial activities is a separate and distinct activity from that of the federal government's use. (*Id*. at pp. 734-735.) The water supply contractors do not, and cannot, claim that they are instrumentalities of the United States.

Moreover, a state may raise revenues on the basis of property held by the United States as long as that property is used by a non-federal entity and it is the possession or use that is taxed. (*United States v. County of Fresno, supra*, at p. 462.) Here, the SWRCB has imposed a fee, not a tax, but the principle is the same—the SWRCB may raise revenues on the basis of property that is federally held but is used by non-federal entities.

5.5 The Emergency Regulations Do Not Unlawfully Interfere With Contracts

Petitioners contend that Senate Bill 1049 and the emergency regulations violate the contract clause of the United States Constitution by substantially impairing the contracts between the Bureau and all Petitioners who contract with the Bureau to receive water from the CVP. (See, U.S. Const. art., I, §10 (stating "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .").) Petitioners' claim fails to survive the threshold inquiry under the United States Supreme Court's analysis of the contract clause—whether state law has, "in fact, operated as a substantial impairment of a contractual relationship."[28]
(*Allied Structural Steel Co. v. Spannaus* (1978) 438 U.S. 234, 244 [98 S.Ct. 2716]; *Energy Reserves Group, Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 411 [103 S.Ct. 697].)

Despite Petitioners' bare claim that imposition of the fees "dramatically changes their contractual relationship with the Bureau," Senate Bill 1049 and the emergency regulations do not affect the contractual relationship between the Bureau and Petitioners. Neither the statute nor the regulations affect, or require the parties to amend, any provision of the CVP contracts. The Bureau is not responsible for passing through the water right fees and, hence, has no additional obligation to the SWRCB or Petitioners under the regulations. Petitioners have failed to identify any change in their contractual relationship arising from imposition of the water right fees.

[28] Moreover, even if Senate Bill 1049 and the emergency regulations arguably operate as a substantial impairment of a contractual relationship, Petitioners' claim fails because the State has a significant and legitimate purpose behind the regulations—the administration of water rights in California. (*Energy Reserves Group, Inc., supra,* 459 U.S. at pp. 411-412.)

Moreover, the Supreme Court has recognized that the contract clause's prohibition does not prevent a state from exercising its inherent police power for the promotion of the public good, "though contracts previously entered into between individuals may thereby be affected." (*Allied Structural Steel, Co*., *supra*, 438 U.S. at p. 241.) In determining the extent of a purported impairment of contract, the Court has considered whether a complaining party has been regulated in the past. As the Court observed, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." (*Energy Reserves Group, Inc., supra,* 459 U.S. at p. 411 [quoting *Hudson Water Co. v. McCarter* (1908) 209 U.S. 349, 357 [28 S.Ct. 529]].) There is no question that the State has authority to regulate the diversion and use of water subject to Bureau contracts. (*California v. United States* (1978) 438 U.S. 645 [98 S.Ct 2985]; see *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 193 [161 Cal.Rptr. 466, 470] [regulation of point of diversion where Bureau contractor takes water]; SWRCB Decision 1600 (1984) [regulation to prevent waste or unreasonable use of water delivered under water supply projects with the Secretary of the Interior]. See also NCWA-CVPWA Petition for Reconsideration, ex. J, art. 22 of Contract No. 14-06-200-3367A [agreeing to comply with all federal and state laws concerning water pollution control].) Additionally, Petitioners knew that their contractual rights are subject to statutory amendment and cannot make a viable argument to the contrary. (See, e.g., NCWA-CVPWA Petition for Reconsideration, ex. J, art. 22 of Contract No. 14-06-200-3367A [containing provisions recognizing possible amendment of federal reclamation law].) Their constitutional claim has no merit.

5.6 The Fee Regulations Are Properly Applied to Water Right Filings Made Before January 1, 2004

Petitioners assert that the fees have an unlawful, retroactive effect, referring to the supplemental filing fees that apply to applications filed prior to the effective date of Senate Bill 1049.
The El Dorado Irrigation District (EID) challenges the annual water quality certification review fee that EID was assessed on the basis that the fee was imposed retroactively. The Sacramento Municipal Utility District (SMUD) alleges that the fees are unlawful to the extent that they were applied retroactively. As explained below, these arguments lack merit.

Senate Bill 1049 was enacted on October 9, 2003, and took effect on January 1, 2004. The bill sets fees for the 2003-2004 fiscal year, beginning July 1, 2003. (Wat. Code, § 1525, subd. (e).) Like the bill, the SWRCB's implementing regulations took effect January 1, 2004, and determine the fees to be paid into the Water Rights Fund for Fiscal Year 2003-2004.

None of the fee determinations that were issued on or about January 8, 2004, and are the subject of these petitions for reconsideration, have been applied retroactively. The annual fees that Petitioners have challenged were applied prospectively to permits and licenses that existed as of January 1, 2004, or to existing hydroelectric projects for which water quality certification had been requested and FERC licensing or relicensing was still pending. Although all of the fees paid into the Water Rights Fund are available for expenditure to pay for costs incurred during the entire 2003-2004 fiscal year, according to the Budget Act the fees collected will cover only half of the SWRCB's costs incurred over this fiscal year in conducting activities for which fees have been imposed. In other words, the fees are essentially the same as they would have been if the SWRCB had recovered all of its estimated costs for the period January 1, 2004, through June 30, 2004, and relied exclusively on General Funds for costs incurred in 2003.[29]

The only fees that even arguably will be applied retroactively are the increases in one-time filing fees for applications and petitions filed between July 1, 2003, and December 31, 2003.[30] For applications and petitions filed during that timeframe, the Division plans to assess fees based on the difference between the filing fees that were in effect in 2003 and the increased filing fees

[29] In fact, the fees will cover less than half of the program costs for Fiscal Year 2003-2004 and will support less than 100 percent of the program costs in Fiscal Year 2004-2005, even if General Fund support for Fiscal Year 2004-2005 is eliminated, as proposed by the Governor's Budget. The water right program is supported by funds other than the General Fund and the new Water Rights Fund, including tobacco tax funding and payments to reimbursement accounts that were established before the new fees took effect. This conclusion holds true even if the amount actually collected turns out to exceed the amount specified in the Budget Act. Any collections in excess of estimated revenues will be held in the Water Rights Fund, will reduce fees that would otherwise apply in future years, and will not support a larger portion of the program costs for Fiscal Year 2003-2004. (Wat. Code, § 1525, subd. (d)(3).)

[30] Two of the one-time filing fees under the new fee structure, the fee for filing a petition to revise the Declaration of Fully Appropriated Streams and the fee for water lease applications filed under Water Code section 1025.5, are new filing fees, not increases in existing filing fees. But no such petitions or applications were filed between July 1, 2003, and December 31, 2003, and therefore these new fees will not be applied retroactively.

under the new regulatory fee structure. These fees have not been assessed and therefore are not the subject of the petitions for reconsideration presently before the SWRCB.

Petitioners cite one example of an application subject to the supplemental filing fee, an application filed in December 2003 by the Colusa Drain Mutual Water Company.[31] Senate Bill 1049 expressly authorizes the imposition of supplemental filing fees on previously filed applications that are still pending when the fee schedules take effect. (Wat. Code, § 1525, subd. (d)(2).) Given that statutory authorization, and because the application was filed after Senate Bill 1049 was enacted, the one example raised by Petitioners does not raise any of the concerns that might ordinarily be raised by regulations that apply retroactively.

Even as applied to applications filed before the enactment date of Senate Bill 1049, there does not appear to be any basis for arguing that the regulations cannot validly be applied. The only case cited by any of the Petitioners in support of their arguments about retroactive application of the fees is a case cited by SMUD: *Coolidge v. Long* (1931) 282 U.S. 582 [51 S.Ct. 306]. In that case, the United States Supreme Court held that the taxation of trust property upon the death of the trust settlors and the succession to the trust income by the remaining trust beneficiaries violated the contract clause and the due process clause of the United States Constitution where the declaration of trust had been executed and the property transferred to the trust before the legislation that imposed the tax had been enacted. (*Id*. at pp. 593-594, 605-606.) Based on its citation to this case, it appears that SMUD is arguing that retroactive application of the fees violates the due process clause.

The retroactive application of legislation that imposes an economic burden satisfies due process requirements, provided that retroactive application of the legislation is justified by a rational legislative purpose. (*Pension Benefit Guaranty Corp. v. R.A. Gray & Co*. (1984) 467 U.S. 717, 729-730 [104 S.Ct. 2709, 2717-2718].) Even if it is applied retroactively, economic legislation

[31] Petitioners also cite as an "example" an application filed in 1998, but the supplemental filing fee applies only to applications filed on or after July 1, 2003.

is presumed constitutional and the person who alleges a due process violation has the burden of establishing that retroactive application of the legislation is arbitrary and irrational. (*Id*., at p. 729.)

Although the regulatory fees at issue here are not taxes, the Supreme Court's treatment of due process challenges to retroactive tax legislation is informative. Consistent with the deferential standard of review afforded economic legislation in general, the Supreme Court repeatedly has upheld retroactive tax legislation against a due process challenge. (*United States v. Carlton* (1994) 512 U.S. 26, 30-31 [114 S.Ct. 2018, 2021-2022]; *United States v. Darusmont* (1981) 449 U.S. 292, 296-298 [101 S.Ct. 549, 551-553]; see generally *Quarty v. United States* (9th Cir. 1999) 170 F.3d 961, 965-967.) As the Supreme Court has noted, it is common practice for Congress to apply tax legislation retroactively to the calendar year preceding the date when the legislation is enacted. (*Darusmont*, *supra*, 449 U.S. at pp. 296-297.) Generally, this practice "has been confined to short and limited periods required by the practicalities of producing national legislation." (*Ibid*.)

In *Carlton*, *supra*, the Supreme Court upheld the retroactive application of a legislative amendment that rendered a taxpayer ineligible for an estate tax deduction that the taxpayer had claimed a full year before the amendment was enacted. (*Id*., 512 U.S. at pp. 28-29, 32.) The Court held that raising revenue through retroactive application of the amendment was a legitimate legislative purpose. (*Id*. at p. 32; see also *Quarty*, *supra*, 170 F.3d at p. 967.) The Court upheld the amendment even though the taxpayer had no notice of the pending legislative change and detrimentally relied on the law that existed prior to the change. (*Carlton, supra,* 512 U.S. at pp. 33-34.) Similarly, in *Darusmont*, *supra*, the Supreme Court upheld the retroactive application of a legislative amendment enacted on October 4, 1976, that increased the minimum tax due for a sales event that occurred on July 15, 1976. (*Darusmont*, *supra*, 449 U.S. at pp. 295, 301.)

In this case, the retroactive application of filing fees satisfies due process requirements because it serves the legitimate legislative purpose of recovering the SWRCB's costs incurred conducting specified regulatory activities during the 2003-2004 fiscal year. Assessing the fees based on the

state's fiscal year supports the Legislature's ability to conduct the budget planning process in a uniform and efficient manner. In addition, like the retroactive tax legislation discussed above, the increase in filing fees will be applied retroactively to a short period of time preceding the enactment of Senate Bill 1049. Moreover, the retroactive fees at issue here are even more likely than a retroactive tax to withstand constitutional challenge because the fees do not merely raise revenue, but have been imposed on water users who benefit from or contribute to the need for the SWRCB's regulatory activities. (See *Commonwealth Edison Co. v. United States* (Fed. Cir. 2001) 271 F.3d 1327, 1342.) The supplemental fees apply only to applications that are still pending after the effective date of the regulations. The legislative authorization of supplemental filing fees also helped to avoid the possibility that parties who were aware of the potential for higher application fees – something under consideration by the Legislature as part of its review of the budget bill for Fiscal Year 2003-2004 – would file their applications early in an attempt to avoid the increased fees.

In a few older cases, including the case cited by SMUD, the Supreme Court has invalidated the retroactive application of a "wholly new" gift or estate tax to a transaction that previously had not been subject to any tax. (See, e.g., *Blodget v. Holden* (1928) 275 U.S. 142; [48 S.Ct. 105]; *Untermyer v. Anderson* (1928) 276 U.S. 440 [48 S.Ct. 353].) But those cases were decided when economic legislation was subject to a much more strict standard of review, and for that reason their authority since has been questioned by the Supreme Court. (*Carlton*, *supra*, 512 U.S. at p. 34.) In addition, the supplemental filing fees at issue here are not wholly new taxes. Rather, they are increases in previously existing filing fees. (See *Quarty*, *supra*, 170 F.3d at p. 967 [change in existing tax rate not wholly new tax].)

In sum, none of the fees challenged by Petitioners were applied retroactively. Moreover, the retroactive application of an increase in existing fees, including the supplemental filing fees to be assessed based on the difference between the filing fees that were in effect in 2003 and the increased filing fees under the new regulatory fee structure, satisfies due process requirements.

6.0 CONSISTENCY OF FEE REGULATIONS WITH STATUTORY AUTHORITY

Petitioners claim that the emergency regulations are arbitrary, capricious, exceed the SWRCB's authority under Senate Bill 1049, and violate Gov. Code section 11010. Senate Bill 1049 delegates to the SWRCB substantive rulemaking authority; accordingly, the SWRCB's regulations are quasi-legislative rules with the dignity of a statute and as such, are subject to a more narrow scope of judicial review than an administrative interpretation. (Wat. Code, § 1530; *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 10 [78 Cal.Rptr.2d 1].) "If satisfied that the rule in question lay within the lawmaking authority delegated by the Legislature, and that it is reasonably necessary to implement the purpose of the statute, judicial review is at an end." (*Id*. at pp. 10-11.)

6.1 The Fees Are Reasonably Calculated Based on the Total Annual Amount of Diversion Authorized by a Water Right Permit or License

The annual permit or license fees are calculated based on the total annual amount of diversion authorized by the permit or license, or face value[32] of the water right, and not on actual water use. (Cal. Code Regs., tit. 23, §1066, subd. (a).) Section 1066, subdivision (b)(2) specifies that if "a permit or license contains an annual use limitation that is applicable only to that permit or license, and the limitation is less than the calculated diversion volume," then the fee shall be based on that limitation. If, however, a person holds multiple water rights with a combined annual use limitation, but the person may divert the full amount of water under a particular right, then the fee shall be based on the face value of that individual right. (*Id*. § 1066, subd. (b)(3).) Additionally, the fee is calculated without regard to the availability of water, bypass requirements, or any limitation on the diversion of water that does not constitute a condition in the permit or license that expressly sets a maximum amount of diversion. (*Id*. § 1066, subd. (b).)

[32] One Petitioner argues that SWRCB Resolution No. 2003-0077 and the fees are unconstitutionally vague, thus violating due process, because the term "face value" is vague and amorphous. The grounds for this argument are unclear because section 1066 refers to the "total annual amount of diversion" and does not mention face value. This argument need not be addressed further.

Petitioners contest the SWRCB's decision to base the annual permit or license fee on the face value of the water right.[33] Specifically, Petitioners allege that the fee regulations are irrational because (1) fee payers cannot avoid duplicative charges when the same water is subject to more than one permit, (2) the fees are based on the face value of a permit or license and not on the actual quantity of water used, and (3) the fees are calculated based on individual rights even when multiple permits or licenses have a combined annual use limit. Petitioner's arguments are not persuasive because they ignore the flexibility afforded to the SWRCB in establishing the regulatory fee and they demand more precision than is required under law or is administratively feasible.

The SWRCB has discretion and flexibility in developing a regulatory fee structure, so long as it is reasonable. (*CAPS, supra,* 79 Cal.App.4th at p. 950.) As explained above, the SWRCB's fee regulations meet the legal standards for a regulatory fee. Annual fees provide the majority of funding for the Division's regulatory activities in the second half of Fiscal Year 2003-2004, and a significant portion of the Division's costs are related to managing and protecting existing water rights. Those regulatory costs are distributed in proportion to the distribution of water among permit and license holders. Accordingly, after considering several methods for calculating fees, the SWRCB determined that a fee based on the face value of each permit or license provides the most fair and efficient method of calculation. In general, the Division's workload is related to size of the authorized diversion, and the Water Code expressly authorizes the SWRCB to set fees schedules that are graduated. (Wat. Code, § 1530, subd. (a).) Because permittee and licensees pay the same rate per acre-foot, larger diverters pay higher fees. Larger diversions generally have a greater impact on the environment and on other water right holders. Thus, the fee allocation bears a reasonable relationship to the benefits provided by and burdens to the regulatory activity. Absolute precision is not required.

[33] Petitioners also claim that the annual fees are illegal because the fees were not actually calculated on the amounts of authorized diversions, but on data in the SWRCB's "erroneous computer database." This argument is specious. All water right permits and licenses are included in the water right database, and thus the fees were based on the amounts of authorized diversions as reflected in the database. As discussed below, to the extent Petitioners have identified any erroneous information, the Division has corrected the database and, as appropriate, directed BOE to adjust the fee.

An annual fee that is based on the total annual amount of diversion authorized by each permit and license provides an objective measure that is easily determined on the face of the permit or license. Sometimes a person will hold multiple water rights with an annual use limitation that is applicable to a combination of those rights. These limitations tend to occur in the most junior rights held by the diverter. If a water right does not contain the combined use limitation, then the water right holder may divert the full amount authorized under that particular right if no diversions occur under the right(s) containing the limiting condition or if those rights are transferred or revoked. Because the water right holder still has the flexibility to divert the full amount of water under an individual right, the fee is based on the total annual amount for that individual right. While Petitioners may prefer a different approach, this does not render the SWRCB's approach irrational or unreasonable.

Nonetheless, certain Petitioners[34] request a reduction in their fees because they hold multiple water rights with a combined use limitation. Their fees, however, were appropriately based on the total annual amount of water that they may divert under an individual water right. The water right fees assessed for permits and licenses that contain a combined annual use limit should not be reduced and no correction in the fees is required. Water right holders may request revocation of unused portions of permits or licenses to avoid payment of water right fees beginning with Fiscal Year 2004-2005.[35]

Similarly, each water right holder is assessed a fee based on the amount authorized under each individual permit or license regardless of whether certain non-consumptive and consumptive water rights overlap. Each permit or license requires administrative oversight and it is reasonable for the SWRCB to assess the water right fee accordingly.

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[34] These petitioners include: Reclamation District No. 2068 (A024961/WR MT 94010086 and A002318/WR MT 94000611); and Sacramento Municipal Utility District (A014963/WR MT 94004336 and A012323/ 94003192).

[35] Long-standing state policy discourages "cold storage" of water rights for speculative projects or projects that no longer exist. (*California Trout, Inc. v. State Water Resources Control Bd*. (1989) 207 Cal.App.3d 585, 618-619 [255 Cal.Rptr. 184].) The fee schedule adopted by the SWRCB furthers this policy by encouraging the voluntary reduction of unused water rights.

To assess a fee, as Petitioners suggest, that accounts for the detailed minutia of actual water use each year for each individual permit or license is administratively impossible for the SWRCB at this time, due to a variety of factors, including the annual changes that occur as a result of the inherent variability of the water supply, the lack of adequate measuring devices and reporting, database constraints, and limited staff resources. The number of variables that the SWRCB would need to consider in calculating each individual fee assessment, if based on actual water use, renders this approach impracticable (as is evidenced by the numerous issues raised in these petitions). The "face value" approach adopted by the SWRCB constitutes a reasonable method of efficiently calculating the fees because it relies on an objective measure that is easily determined from the four corners of the permit or license.

Moreover, a fee system based on the amount of water used would ignore the fact that much of the water right system is based on water that is authorized for diversion under a permit or license, but not currently being put to use. For instance, before approving an application for a water right, the SWRCB must find that water is available for appropriation. (Wat. Code, § 1375, subd. (d).) This requirement is intended to avoid over-committing the water supply. Therefore, the evaluation is by necessity conservative. This evaluation includes consideration of other diversions authorized under permits and licenses in determining whether and on what conditions to approve new appropriations. Further, much of the ongoing administration of water rights under the program involves the continuing oversight of permits and licenses and the water right holder's compliance with applicable terms and conditions. These activities include the Division's review of whether permitted water rights are being developed in accordance with the due diligence requirements of the Water Code and SWRCB regulations, consideration of changes proposed to make use of appropriations that are authorized but have not yet been perfected by putting the water to beneficial use, and monitoring and enforcement to determine when permits and licenses should be revoked for non-use.

It should also be recognized that, because the fees are set to cover program costs as specified in the Budget Act, a change in the approach by which the amount of water involved is calculated would not necessarily reduce the fee charged to Petitioners who argue for that change. For example, because the combined face value of all permits and licenses vastly exceeds the amount

of water diverted each year, the amount charged per acre-foot would be many times higher if permit and license fees were based on actual use instead of face value. Thus, many of the Petitioners would pay similar annual fees if those fees were calculated based on amounts actually used, and the charge per acre-foot was increased accordingly. Other suggested changes, such as changes to reflect overlapping water rights or permits and licenses for multiple diversions of the same water, would have a similar effect of increasing the fee per acre-foot.

6.2 The Fees Are Consistent With Government Code Section 11010

Petitioners contend that the fees violate Government Code section 11010, stating, "[a]s discussed in more detail above, the fee undoubtedly exceeds the estimated actual or reasonable cost of providing the service . . . ." Section 11010, subdivision (b)(1) prohibits a state agency, supported from the General Fund, from levying or collecting "any fee or charge in an amount that exceeds the estimated actual or reasonable cost of providing the service, inspection, or audit for which the fee or charge is levied or collected . . . ." Petitioners do not offer any support or further explanation of how the fees violate section 11010. Accordingly, the SWRCB assumes that the reference to a discussion "above" is a reference to another claim that Senate Bill 1049 and the fee regulations establish a tax because the fees exceed the reasonable cost of providing the regulatory service.

Without deciding whether section 11010 applies to the water right fees,[36] it merits noting that this provision follows the same language as had been used in cases determining whether local exactions were special taxes or regulatory fees. (See, e.g. *Kern County Farm Bureau v. County of Kern* (1993) 19 Cal.App.4th 1416, 1421 [23 Cal.Rptr.2d 910] [charges are regulatory fees if they "do not exceed the reasonable cost of providing the service or activity for which the fee is charged"] quoting *City of Dublin v. County of Alameda* (1993) 14 Cal.App.4th 264, 280-281

[36] Section 11010 applies when an agency is "supported by the General Fund," and may not necessarily apply when fees are charged for activities supported by a special fund and the fees are paid into that special fund. In addition, many of the features that Petitioners find objectionable, such as taking estimated collections into account in setting fees and including program costs not attributable to any specific fee payer among the activities paid for from fee revenues, are expressly authorized by Senate Bill 1049. (See Gov. Code, § 11010, subd. (b)(3), Wat. Code, § 1525, subd. (c).)

[17 Cal.Rptr.2d 845].) These cases recognize that the service can be administration of a regulatory program, and that the fees may include programmatic costs, not just costs attributable to a specific fee payer. (E.g., *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* (1998) 203 Cal.App.3d 1132 [250 Cal.Rptr. 420].) Section 11010 also expressly recognizes that fees may be based on estimates; absolute precision is not required. In adopting virtually identical language to that used in these cases, section 11010 adopts the same standard as had been adopted by the courts to distinguish local regulatory fees from taxes, and was later adopted by the courts to distinguish state regulatory fees from taxes. As explained elsewhere herein, the fees are regulatory fees that are reasonably related to the costs of the water right program and thus, do not contravene section 11010.

6.3 The SWRCB Had the Authority to Adopt the Fee Regulations Prior to the Effective Date of Senate Bill 1049

Petitioners contend that the SWRCB did not have the power to adopt the fee regulations on December 15, 2003, because that was before the January 1, 2004, effective date of Senate Bill 1049. Petitioners' statement of points and authorities does not provide any analysis or citation to authorities to explain the basis for this claim. Accordingly, the petition is defective, and the claim is denied. (See Cal. Code Regs., tit. 23, § 769, subd. (c).)

The SWRCB clearly had authority to adopt the regulations. (See Gov. Code, § 11349, subd. (b) [defining authority for purposes of adopting administrative regulations].) Water Code section 1058, as in effect both before and after January 1, 2004, authorizes the SWRCB to make rules and regulations that it deems advisable to carry out its powers and duties. The effective date of the fee regulations was January 1, 2004, the same date as Senate Bill 1049. It was reasonable, and within the discretion granted to the SWRCB in section 1058, to adopt regulations implementing a change in the statutes governing water right fees, to take effect at the same time as that statutory change took effect. Because the regulations did not take effect before January 1, 2004, adopting the regulations did not create any conflict between the regulations and the statutes in effect before that date. By updating its regulations, with an effective date of January 1, 2004, the SWRCB assured consistency between its regulations and the relevant provisions of Senate Bill 1049 as soon as those provisions took effect. (See Gov. Code, § 11349,

subd. (d).) The SWRCB proceeded in a manner fully consistent with the fundamental requirement that administrative regulations be consistent with applicable statutes.

6.4 It Is Within the SWRCB's Discretion to Charge the $100 Minimum Annual Permit and License Fees and a Flat Fee for Stockponds

Petitioners contend that the SWRCB's decision to charge the $100 minimum annual permit and license fee and a flat fee for stockponds is arbitrary and capricious. The SWRCB determined that an appropriate annual fee rate is $0.03 per acre-foot. However, approximately half of water right permits and licenses authorize the diversion of 10 acre-feet of water or less. For permits and licenses authorizing very small diversions, the costs of administering the permit or license substantially exceeds $0.03 per acre-foot. Indeed, even the costs of administering the fee system exceed that amount. If these water right holders were billed based on the per acre-foot charge of $0.03, the cost of billing would exceed the amount of the bill.

Staff determined that a minimum charge of $100 is appropriate to recover the cost of providing services to these water right holders. While for larger water rights costs generally increase as the authorized diversion increases, certain basic costs apply for every permit or license, no matter how small. These include the costs of maintaining records, costs of processing address and ownership changes, costs of reviewing and filing reports of permittee and licensee, costs of processing revocations where the right has not been used, and costs of providing notification to water right holders of proceedings that may affect their rights.

In fact, the process of making fee determinations has generated a substantial workload for the Division, especially with respect to holders of permits and licenses subject to the $100 annual fee. This includes efforts to update the database before the bills were sent out, and processing requests submitted in response to the billings. The Division has received hundreds of requests for change in address, change in ownership, and revocation. Many of these staff requests require significant staff time for processing, including cases where the record owner to whom BOE sent the bill does not know who the current owner is, or the current owner refuses to accept responsibility. Similarly, there may be a substantial workload in processing requested revocations because they include cases where the permit or license holder has diversion

structures in place and cases where the SWRCB's records indicate that water has recently been diverted and used. Before approving the requested revocation, the Division will need to consider the potential for unauthorized diversions or consider any adverse environmental effects from removing the diversion structures.

The imposition of annual fees for all permits and licenses, no matter how small the authorized diversion, has had a positive effect on water right administration. It has helped the Division to update its records by compelling water right holders who previously had not complied with reporting requirements to inform the Division of ownership changes and changes of address, and is resulting in the revocation of many permits and licenses that should be revoked for nonuse. It has also imposed a substantial burden in staff costs. Imposing a minimum fee on all permits and licenses is consistent with the need for and costs of this regulatory activity.

Additionally, the minimum fee for filing a small domestic use or livestock pond registration is $250, and the five-year renewal fee is $100. (Cal. Code Regs., tit. 23, § 1068.) The registration amount is less than the smallest water right applicants will pay because a streamlined registration process is implemented for these types of smaller water right applications as compared to the traditional water right application process. Because less staff effort is required to process these registrations, a smaller fee is appropriate than for permits and licenses.

6.5 The Fee Regulations Properly Provide for Cancellation for Nonpayment of Annual Fees

Section 1076 of the fee regulations allows the SWRCB to cancel an application, petition, or request for release from priority for failure to pay either an initial filing fee or the annual fee that applies to certain pending applications and petitions.[37] Petitioners argue that the fee regulations exceed the authority granted by Senate Bill 1049 because the bill authorizes the SWRCB to

[37] The fee assessment issued on or about January 8 did not include assessments for these annual application and petition fees. The Petitioners' argument does not challenge the validity or calculation of these fees. As applied to these fees, the Petitioners challenge the regulations only insofar as the regulations address the consequences of nonpayment. When the assessments for these fees are issued, payment of the fee and petitioning for a refund would effectively moot the issue of whether the SWRCB may cancel for nonpayment. Accordingly, the SWRCB will address the issue in this order, even though the issue does not involve the fee assessments that are the subject of these petitions for reconsideration.

cancel applications and petitions for nonpayment of filing fees, but not for the nonpayment of the annual fees. Petitioners' claim has no basis in the language of the statute.

Water Code section 1535, subdivision (b) authorizes the SWRCB to cancel an application or petition (or refer the matter to BOE) if a person does not pay a fee established under Water Code sections 1525, subdivision (b), 1528, or 13160.1. Section 1525, subdivision (b) authorizes the SWRCB to establish a fee schedule applicable to applications and petitions. It does not limit that fee schedule to initial filing fees. In fact, if a filing is subject to subdivision (b) of section 1525, then subdivision (d)(2) authorizes the SWRCB to adopt a single fee or an initial filing fee followed by a annual fees for that filing. Accordingly, the SWRCB may cancel a filing for failure to pay the required filing or annual fee. Moreover, Water Code section 1530, subdivision (a) authorizes the SWRCB to include regulatory provisions governing administration and collection of the fees. This authority certainly includes the authority to establish regulations regarding the failure to pay fee.

7.0 PREEMPTION UNDER THE FEDERAL POWER ACT

In its petition, SMUD asserts that the Federal Power Act (FPA) preempts the SWRCB's authority to regulate "most aspects" of hydroelectric projects subject to FERC's jurisdiction. SMUD asserts further that the SWRCB has not established that the SWRCB's fees are reasonably related to the SWRCB's regulatory activity regarding SMUD's Upper American River Project (UARP) (FERC Project Number 2101).

SMUD operates the UARP under a license issued by FERC pursuant to the FPA. The license will expire in 2007, and SMUD has applied to FERC for a new project license. Pursuant to section 401 of the Clean Water Act, SMUD must obtain water quality certification from the SWRCB before FERC may issue a new project license. In addition to its FERC license, SMUD operates the UARP pursuant to a water right permit and several water right licenses issued by the SWRCB:[38] Permit 19025 (A026768/WR MT 94-011250), License 10495 (A014963/WR MT

[38] SMUD and Pacific Gas and Electric jointly hold water right applications: A012323, A012624, and A020522. Only SMUD has petitioned the water right fees.

94-004336), License 11073 (A012323/WR MT 94-003192), License 11074 (A012624/WR MT 94-003300), License 10496 (A020522/WR MT 94-007425), and License 10513 (A 022110/WR MT 94-008335).[39]

In accordance with section 3833.1 of the SWRCB's regulations, the SWRCB assessed a $54,480 annual water quality certification review fee for the UARP because SMUD is seeking water quality certification in connection with the FERC relicensing process for the project. In addition, the SWRCB assessed annual fees for the water right permit and licenses listed above in accordance with section 1066 of the SWRCB's regulations. SMUD received a 70 percent discount or reduction in the annual water right permit and license fees in accordance with section 1071, subdivision (a) of the regulations.

Contrary to SMUD's assertions, the fees imposed on FERC-licensed hydroelectric projects, including the UARP, are reasonably related to the SWRCB's regulatory activities that are not preempted by the FPA. First, the annual water quality certification review fees do not present a preemption issue. The SWRCB's authority to grant, waive or deny water quality certification of FERC-licensed hydroelectric projects under section 401 of the Clean Water Act is not preempted by the FPA. (*PUD No. 1 of Jefferson County* v. *Washington Department of Ecology* (1994) 511 U.S. 700, 721-723 [114 S.Ct. 1900, 1914].)

In addition, the annual water quality certification review fees are reasonably related to the SWRCB's costs of reviewing requests for water quality certification. These fees were based on the revenue levels specified under the annual Budget Act for review of requests for water quality certification for FERC-licensed hydroelectric projects. In calculating fees for this purpose, the SWRCB set fees projected to generate revenues of $272,000. A section of the Budget Act specifies that $272,000 of the amount appropriated to the SWRCB shall be used for this purpose. In fact, the SWRCB's costs for this activity for the fiscal year will substantially exceed fee

[39] SMUD's petition also states that SMUD operates the UARP pursuant to a contract with the Bureau for Central Valley Project water (USBR Water Service Contract No. 14-06-200-5198A, dated November 20, 1970). SMUD did not submit a copy of the contract, however, and according to the SWRCB's records this contract is for water delivered through the Folsom-South Canal. Accordingly, it does not appear that the fee assessed for water delivered to SMUD under this contract presents a FPA preemption issue.

revenues. As of January 2004, the SWRCB already had expended $316,644 for this activity, which exceeds the $272,000 revenue level set forth in the Budget Act. The SWRCB's regulations allocate the fees for this program among hydroelectric projects for which water quality certification review is required by assessing each project a flat fee of $500, and allocating the remaining costs based on the generating capacity of each project. This method of allocation is reasonable because even minor projects will require some review, and projects with greater generating capacity are likely to require more extensive review.

The annual water right permit and license fees imposed on FERC-licensed hydroelectric projects also are reasonably related to the SWRCB's regulatory activities that are not preempted by the FPA. The FPA preempts the SWRCB's authority to regulate water right permits or licenses for single-purpose, FERC-licensed hydroelectric facilities for purposes of protecting the environment or the public interest. (*Sayles Hydro Associates* v. *Maughan* (9th Cir. 1993) 985 F.2d 451, 455-456.) The FPA does not preempt, however, the SWRCB's authority to regulate such projects for purposes of protecting third-party water right holders, nor does it preempt the SWRCB's authority to regulate diversions for irrigation, municipal, or other non-power uses using hydroelectric project facilities. (*Ibid*.)

The SWRCB's regulatory fee structure takes into account the extent to which the SWRCB's authority over hydroelectric projects is preempted. Approximately two-thirds of the time the SWRCB spends administering water rights is for purposes of protecting third-party right holders. Accordingly, the SWRCB provided for a 70 percent discount in the annual fees for water right permits and licenses for FERC-licensed hydroelectric projects, making the fee for FERC-licensed hydroelectric projects less then two-thirds the fee charged for other hydroelectric projects. (Cal. Code Regs., tit. 23, § 1071, subds. (a)(1) & (2).)

8.0 FACTUAL CLAIMS RAISED BY PETITIONERS REGARDING ANNUAL PERMIT OR LICENSE FEES

Certain individual petitioners raised factual claims specific to their annual permit or license fees. As discussed below, these claims have no merit.

8.1 Alleged Miscalculations Not Specifically Identified in the Petitions

A number of Petitioners included a boilerplate allegation stating that they protest the fee assessed against them because it is based on the miscalculation or factual error "as is more specifically described in the adopted and referenced Petition for Reconsideration, Request for Refund, and Points and Authorities in Support of Petition submitted by NCWA and CVPWA." (See, e.g., Letter of protest submitted by Saucelito Irrigation District, dated February 4, 2004.) The NCWA-CVPWA petition, however, does not identify miscalculations or factual errors that are specific to those Petitioners. Those claims do not meet the requirements of specificity required in a petition for reconsideration and are denied. (Cal. Code Reg., tit. 23, §§ 769, 1077.)

8.2 El Dorado Irrigation District

EID contends that the $1,437.93 fee assessed for Permit 21112 (A005645B/WR MT 94-001290) was miscalculated and amounts to a charge of $.044 per acre-foot. Permit 21112 authorizes the diversion to storage of 32,931 acre-feet per annum (afa) and the direct diversion of 15,000 afa.

The SWRCB properly calculated the fee for Permit 21112 based on the total amount authorized to be diverted under the permit: 47,931 afa (47,931 x $0.03 = $1,437.93). Apparently, EID assumes that the fee should have been based only on the amount authorized to be diverted to storage. The fee was properly based, however, on both the maximum storage amount and the maximum direct diversion amount because Permit 21112 authorizes the direct diversion of 15,000 afa in addition to the diversion to storage of 32,931 afa.

8.3 Marian Anderson

On behalf of Licensee Marian Anderson, NCWA claims that the "water rights subject to [Application 005151] are pre-1914 water rights" and therefore should not be subject to a fee. According to California Code of Regulations, title 23, section 1066, a person who holds a water right permit or license must pay an annual fee. The Division issued a water right fee to Ms. Anderson pursuant to water right Application 005151 (License 1487/WR MT 94-001208), and not a pre-1914 right dating back to 1876 as NCWA alleges. If Ms. Anderson wishes to rely

solely on a pre-1914 water right, she may request revocation of her license to avoid payment of water right fees in the next fiscal year.

8.4 Pelger Mutual Water Company

Pelger Mutual Water Company (Pelger) disputes the fee assessed under water right Application 012470B (WR MT 94-003245), arguing that when the Division converted cubic feet per second (cfs) to afa,[40] it improperly rounded up the fifth decimal place and used only four significant figures rather than five, thus resulting in an extra $3.19 charge to Pelger. The Division relied on a commonly used conversion factor, 1.9835. (See Brater and King, Handbook of Hydraulics (McGraw Hill Book Co., 6th ed. 1976) Table 1-5 "Factors for Conversion of Units," page 1-5.) Pelger's fee would have been lower if the Division had used a conversion factor with one more decimal place: 1.98347. The regulations specify that the SWRCB shall "calculate" the fee based on the amount of diversion authorized. The regulations do not specify the conversion factor to be used in making the calculation, and do not prohibit use of a conversion factor that has been rounded. The Division's use of a standard conversion factor was a reasonable way of calculating the fees, consistent with the direction provided by the regulations. The Division's approach was reasonable, and any differences in fee calculations that would result from a different conversion factor with more decimal places are insubstantial. (See Civ. Code, § 1533.)

Pelger also requests a reduction in the amount of the $100 minimum annual fee assessed under water right Application 001765A (WR MT 94-000541). The fee regulations require a person who holds a water right permit or license to pay an annual fee that is the greater of $100 or $0.03 per acre-foot. (§ 1066, subd. (a).) This fee was correctly calculated in accordance with the fee regulations and no correction is required.

8.5 Sacramento Municipal Utility District

SMUD requests a reduction in its fees for water right Applications 012323 (WR MT 94-003192), 012624 (WR MT 94-003300), 020522 (WR MT 94-007425), 022110 (WR MT 94-008335), and

[40] Annual fees are calculated based on the following formula: (licensed rate) x (diversion days) x (1.9835) x ($0.03 per afa) = fee (minimum fee = $100).

026768 (WR MT 94-011250) because it believes the SWRCB should account for various in-stream flow requirements in its licenses and permits, hydrological limitations of the stream system, and physical limitations of its facilities when calculating the fees. Annual permit or license fees are based on the "face value" of the application, which is the total amount of water that may be diverted in any year, not the actual use in a given year. (Cal. Code Regs., tit. 23, § 1066, subd. (a).) SMUD's fees were calculated in accordance with the fee regulations and no correction is necessary.

SMUD also requests the SWRCB to reduce the fee under its Licenses 11073 (A012323/ WR MT 94-003192) and 10513 (A022110/ WR MT 94-008335) because the City of Sacramento also holds storage rights at Union Valley and Ice House reservoirs under water right Application 012321 for the same water at the same time. SMUD's request again ignores the structure of the SWRCB's regulatory fee program, which is based on the face value of a permit or license, and not on the actual quantity of water used by one water user or several water users. Although certain non-consumptive and consumptive water rights may overlap, each water right holder is assessed a fee based on the amount authorized under each individual permit or license. (*Id*. § 1066, subd. (a).) Accordingly, no correction of SMUD's fees assessed under Licenses 11073 and 10513 is required.

8.6 Stevinson Water District

Stevinson Water District (Stevinson) states that it has "overfiled" its water rights to "provide the maximum protection of those rights" and alleges that it should not pay fees based on the overfiling. (A001885/WR MT 94-000555; A006111/WR MT 94-001401; A005724/WR MT 94-001332; A007012/WR MT 94-001605.) Annual permit and license fees are based on the total annual amount of diversion authorized by the permit or license, and Stevinson's fees were calculated accordingly. (Cal. Code Regs., tit 23, § 1066.) The fees were not based on Stevinson's claimed pre-1914 appropriative rights nor were they based on deliveries of water from Merced Irrigation District. Stevinson may request revocation or reduction in its licensed rights of any duplicative licensed amounts if it wants to avoid paying fees next fiscal year on the "overfiling."

8.7 Sutter Extension Water District

In addition to the objections raised in the NCWA petition, Sutter Extension Water District (SEWD) raises a specific objection to the $2,979.77 annual fee imposed for License 9063 (A010529/WR MT 94-002505). License 9063 authorizes the diversion of water at the rate of 234 (cfs) from April 1 to October 31. The license does not limit the total amount that may be diverted in a given year.

The SWRCB calculated the annual fee for License 9063 consistent with the SWRCB's regulations. The fee was based on the total amount authorized to be diverted, which was calculated by multiplying the authorized rate of diversion by the length of time in the authorized season of diversion. (Cal. Code Regs., tit. 23, § 1066, subds. (a) & (b)(1).)

SEWD objects to this fee on the basis that License 9063 is not exercised continuously, and the total amount that may be diverted under the license is limited pursuant to a contract with the Department of Water Resources. The SWRCB has determined, however, that annual fees should be based on the face value of permits and licenses, not on the amount of water that actually may be used. Limitations to which a water right holder voluntarily agrees under contract with other parties are not enforceable by the SWRCB and may change as a result of subsequent negotiations with the other parties. For the reasons discussed above, the face value of permits and licenses provides a reasonable and objective basis for allocating annual fees among permittees and licensees. SEWD may request the SWRCB to impose a maximum annual limitation amount on its license to restrict the authorized diversion amount to be consistent with the amount it diverts under its own right pursuant to its contract with the Department of Water Resources if it wants to reduce its fees in future years.

8.8 Yolo County Flood Control and Water Conservation District

In addition to the objections raised in the NCWA petition, Yolo County Flood Control and Water Conservation District (Yolo County) raises a specific objection to the annual fee of $12,930 which was assessed for both Permit 12848 (A011389/WR MT 94-002808) and Permit 12849 (A015975/WR MT 94-004811). Originally, both permits authorized the direct diversion of 1,000 cfs from October 1 through June 30. In addition, Permit 12848 authorized the diversion to

storage of 250,000 afa, and Permit 12849 authorized the diversion to storage of 1,480,000 afa. Both permits were subject to a combined limitation of 1,000 cfs by direct diversion and 1,480,000 afa by storage. In Order WR 76-14, the SWRCB amended both permits to limit the total amount of water that may be directly diverted and diverted to storage to 431,000 afa.

The SWRCB properly calculated the fee for each permit based on the total amount authorized to be diverted under each permit: 431,000 afa. Yolo County objects to these fees on the basis that the permits are subject to a combined diversion limit. Yolo County maintains that assessing a fee for each permit based on the maximum amount authorized to be diverted under that permit constitutes double counting.

Where multiple permits or licenses are subject to a combined diversion limitation, the SWRCB's regulations still require annual fees to be based on the total amount that may be diverted under each individual permit or license. (Cal. Code Regs, tit. 23, § 1066, subd. (b)(3).) In any particular year, Yolo County may divert the entire authorized amount under either of its permits. To the extent the permits are dissimilar (i.e., the permits authorize diversions from different points of diversion, to different places of use, or for different purposes of use), these differences afford Yolo County greater flexibility in its operations. Moreover, in this case, the combined diversion limit for Permits 12848 and 12849 was effectively superseded by the 431,000 afa limitation imposed on each individual permit. The amount that may be diverted under both permits combined is less than the combined limitation of 1,000 cfs and 1,480,000 afa. Similarly, the annual fees assessed for the permits are less what they would have been if they had been assessed based on the outdated combined diversion limit.

9.0 FACTUAL CLAIMS WARRANTING MODIFICATION OF THE WATER RIGHT DATABASE OR PERMIT OR LICENSE FEE ASSESSMENTS

Certain individual petitioners raised factual claims specific to their annual permit or license fee bills and, on further review, the SWRCB has agreed with those claims and, as appropriate, the Division either has modified its database and, as appropriate, has directed BOE to cancel the fee

assessment, issue a revised assessment, or issue a refund.[41] Accordingly, these claims, which are summarized below, are now moot and will not be considered further in this order.

9.1 Maxwell Irrigation District

Maxwell Irrigation District alleges that the fee assessed for water right Application 030445 (Permit 21004/WR MT 94-013137) is too high because the SWRCB failed to take into account the term of Permit 21004 that limits diversions to 13,600 afa. The Division has agreed that the fee was incorrectly calculated. The annual amount limitation on Permit 21004 is 13,630 afa and the fee should be $408.90. The Division already has directed BOE to take appropriate action.

9.2 Natomas Mutual Water Company

In addition to the objections raised in the NCWA petition, Natomas Mutual Water Company (Natomas) raises a specific objection to the $709.36 annual fee assessed for License 9794 (A015572/WR MT 94-004624). License 9794 authorizes the direct diversion of water at a rate of 131 cfs from April 1 to June 30. The maximum amount that may be diverted is limited to 11,846 afa.

The SWRCB based the fee on the total amount authorized to be diverted, which was calculated by multiplying the authorized rate of diversion by the length of time in the authorized season of diversion. Natomas correctly points out the fee should have been based on the 11,846 afa use limitation. (Cal. Code Regs., tit. 23, § 1066, subd. (b)(2).) Accordingly, the annual fee for License 9794 should be $355.38 (11,846 x $0.03 = $355.38). The Division already has directed BOE to take appropriate action.

[41] The Division Chief has the authority to assess, impose, and collect fees pursuant to section 2.6.3 of the attachment to Resolution No. 2002 - 0106. This authority includes the ability to correct any billings that were mistakenly made, thus obviating a fee payer's need to file a petition for reconsideration or rendering a pending petition moot.

9.3 Pelger Mutual Water Company

Pelger requests a reduction of the fee assessed under water right Application 030410 (WR MT 94-013126) because its permit limits the quantity of water that may be diverted to 5,000 afa. The Division agrees and has adjusted its water right database to reflect the maximum diversion limit of 5,000 afa. The correct fee is $150.00. The Division already has directed BOE to take appropriate action.

9.4 Reclamation District No. 2068

Reclamation District No. 2068 requests a reduction of the fee under water right Application 019229 (License 9339/WR MT 94-006631) because its license limits the quantity of water that may be diverted to 5,153 afa. The Division agrees and has adjusted its water right database to reflect the maximum diversion limit of 5,153 afa. The correct fee is $154.59. The Division already has directed BOE to take appropriate action.

9.5 Sacramento Municipal Utility District

SMUD requests a reduction of the fee under water right Application 012624 (License 11074/WR MT 94-003300) because its license limits the quantity of water that may be diverted to 281,100 afa. The Division agrees and has adjusted its water right database to reflect the maximum diversion limit of 281,100 afa. The correct fee is $2,529.90. The Division already has directed BOE to take appropriate action.

SMUD requests a reduction of its fees under License 10495 (A014963/WR MT 94-004336) and License 11073 (A012323/WR MT 94-003192) because License 11073 limits the total combined amount of water that may be put to beneficial use under both licenses to 528,400 afa. Each fee is based on the total annual amount of water authorized to be diverted under each individual right. (Cal. Code of Regs., tit. 23, § 1066, subd. (b)(3).) Accordingly, no correction based on the beneficial use limitation is necessary. SMUD correctly points out, however, that License 11073 also limits the total amount that may be directly diverted and diverted to storage under that license to 459,300 afa. The fee for this license should have been calculated based on this

limitation. The correct fee is $4,122.70. The Division already has directed BOE to take appropriate action.

SMUD also requests a reduction in the fee assessed under License 11230 (A023404/WR MT 94-009097) because its license limits the amount of water that may be diverted to 833 afa. The Division agrees and has adjusted its database to reflect the maximum diversion limit of 833 afa. Under either calculation, however, SMUD's fee remains the same—the $100 minimum annual fee, and no additional correction is required. (*Id*. §1066, subd. (a).)

9.6 Tri-Dam Power Authority

The Tri-Dam Project and Tri-Dam Power Authority points out that fee accounts FERC 2005 (WR MT 94-013273)and FERC 2067 (WR MT 94-013274) relate to FERC licenses issued to Oakdale Irrigation District and the South San Joaquin Irrigation District, and that the Tri-Dam Project, not the Tri-Dam Authority, is in charge of the operation and management of the facilities. The Division has updated its records to list Tri-Dam Project instead of Tri-Dam Power Authority on billings for FERC 2005 and FERC 2067.

9.7 Turlock Irrigation District

Turlock Irrigation District requests that the Division include Modesto Irrigation District as joint owner on two water right permits associated with Applications 006711 (WR MT 94-001532) and 009997 (WR MT 94-002303). The Division has updated the water right database records for A006711 and A009997 and those records now identify Turlock Irrigation District and Modesto Irrigation District as the current owners and mail code receivers.

9.8 Yuba County Water Agency

Yuba County Water Agency requests a reduction in the fee under water right Application 005632 (Permit 15026/WR MT 94-001287) because a term was added to its permit that limits the total quantity of water that may be diverted under the permit to 1,159,000 afa. The Division agrees that the fee assessed under Permit 15026 should reflect the maximum diversion limit of 1,159,000 afa. The Division has corrected its database accordingly. The corrected fee is

$34,770.00. Yuba County Water Agency has already paid the corrected fee amount, and BOE has been informed of the corrected fee amount.

10.0 FACTUAL CLAIMS RAISED BY THE BUREAU'S WATER SUPPLY CONTRACTORS

This section addresses the factual allegations raised by Petitioners who received a fee bill as a water supply contractor of the Bureau.

10.1 The Fees Charged to the Bureau's Water Supply Contractors Have Been Correctly Calculated Based on Their Proportional Share of the Bureau's Fee

Certain Petitioners below, who are water supply contractors of the Bureau, argue that their fees are incorrectly calculated or otherwise are too high, because the fees exceed the rate of $0.03 per acre-foot for permits and licenses. (See Cal. Code Regs., tit. 23, § 1066, subd. (a).)

El Dorado Irrigation District

EID is a water supply contractor of the Bureau. It states that the fees under its accounts, USBR 1314/WR MT 94-000034, USBR 1164/WR MT 94-000033, and USBR 1027/WR MT 94-000032 were charged at $0.049 per acre-foot, $0.38 per acre-foot, and $0.374 per acre-foot, respectively, while others were charged $0.03 per acre-foot. As discussed above, this statement ignores the fact that the fees charged to EID were based on a fee assessment to the Bureau of $0.03 per acre-foot, calculated based on the diversions authorized under the Bureau's permits and licenses, then allocated among the Bureau's water supply contractors based on their water supply contracts.

Because EID is the only water supply contractor under BOE Account Number WR MT 94-000034 (Sly Park Reservoir, which is not part of the CVP), the fee charged for this water supply is 100 percent of the water right of the Bureau for the project. The amount of the fee is based on $0.03 per acre-foot times the maximum appropriation under the water right, which apparently exceeds the maximum delivery under the water supply contract, due to the various factors discussed above involving losses and carryover requirements.

For the other two fee accounts listed above, EID was charged for one account at the rate of 0.001145 of the Bureau's CVP fee, and for the other account at the rate of 0.000008 of the CVP fee. The charges are correct for these accounts, which are water supplies provided by the Bureau to EID under the Bureau CVP water rights and pursuant to the contract. Accordingly, this cause of reconsideration is denied.

Pelger Mutual Water Company

Pelger has a water supply contract with the Bureau for 1,750 acre-feet per year. (USBR 1053/ WR MT 94-000059.) It states that the fee under its account was charged at more than $0.37 per acre-foot, which it argues is a discriminatory rate since non-federal contractors are assessed a lower fee. Pelger's proportional share of the Bureau's CVP fee is 0.000267, which amounts to the $655 that was assessed to Pelger under this account. This is the correct amount. Accordingly, this cause of reconsideration is denied.

Pleasant Grove-Verona Mutual Water Company

Pleasant Grove-Verona Mutual Water Company (Pleasant Grove) is a water supply contractor of the Bureau's CVP. (USBR 1146/WR MT 94-000147.) Pleasant Grove argues that it is being overcharged and should pay no more than the minimum fee of $100 because it receives only 2,500 acre-feet of Project Water in a normal year and 1,875 acre-feet in critically dry years. If Pleasant Grove were charged at the rate of $0.03 per acre-foot it receives, instead of a prorated share of the fees attributable to the Bureau's permits and licenses, the fee would be less than $100. Pleasant Grove's proportional share is 0.000382 of the CVP fee, however, which is the $936 that was assessed. This amount is correct. Accordingly, this cause of reconsideration is denied.

10.2 The Fees Were Properly Based on the Contractor's Contractual Entitlement

Certain Petitioners contend that the fees should be based on actual deliveries or diversion of water instead of their entitlement under their water supply contract. These claims are without merit.

Feather Water District

Feather Water District received two fee bills, one for $1,173.75, for its own right to divert 39,125 afa of water from the Feather River, and one for $7,487 based on its water supply contract to buy 20,000 afa of Sacramento River water from the Bureau. (A014803/WR MT 94-004267; USBR 1324/WR MT 94-000274.) The Bureau delivers the Sacramento River water below the confluence of the Feather and Sacramento rivers to replace water the Petitioner takes above the confluence. Petitioner objects to paying a fee for its water supply contract, because Petitioner does not divert or use the water, but lets it flow down the river for senior water right holders.

The fee on the Bureau's CVP water supply purchased by Feather Water District is appropriate, and does not merit reconsideration. Instead of bypassing water to satisfy senior water right holders downstream along the Sacramento River and in the Delta, Petitioner is buying CVP water for use by others who have water right seniority over Petitioner. Thus, Petitioner is receiving the benefit of 59,125 acre-feet of water, the sum of both the Feather River diversion and the Sacramento River water it is buying. In some years, in the absence of the purchase, Petitioner might have to bypass as much as 20,000 acre-feet of the maximum 39,125 acre-feet of water it has available under its own right.

Petitioner also asserts that charging a fee for the 20,000 acre-feet constitutes double charging because others divert and use the water and pay fees for it. Petitioner has not provided evidence that others are paying fees for this water, however. Since they are senior water right holders, it is possible that they are taking the water under riparian or pre-1914 water rights.

Even if another fee payer is diverting and using the water, Petitioner's argument is without merit. The fee system is based on the maximum amount of water that a water right holder is authorized to divert, not the actual diversion. If a permit or license holder does not divert all of the water it is authorized to divert under a permit or license, or a downstream water right holder receives unused water or return flows, the fees still are based on the maximum amount that can be diverted under the permit or license, not on the amount actually diverted. Setting the fees based on the maximum quantity of water authorized to be diverted under a permit or license, and the prorating of such fees to water supply contractors of the Bureau's CVP, bears a reasonable

relationship to the need for regulatory oversight of water right permits and licenses. This cause of reconsideration is denied.

Sacramento Municipal Utility District

SMUD has a water supply contract with the Bureau for CVP water. (USBR 1135/WR MT 94-000140.) Petitioner was assessed a fee of $22,460, based on a contract amount of 60,000 afa. Petitioner points out that the Bureau also delivers 15,000 afa of water through its facilities under another water right that Petitioner uses first, that Petitioner does not always receive the entire 60,000 acre-feet available under its water supply contract, that the Bureau delivers unused quantities of water to other contractors, and that Petitioner has temporarily assigned some of its contractual water supply to Arden-Cordova Water Service (ACWS). The fee is based on the maximum quantity available under the Bureau's water right and prorated to SMUD based on the maximum quantity available under the contract. Lesser deliveries are not a basis for reducing the fee. The alleged temporary assignment of water to ACWS is not substantiated in the petition for reconsideration by a contract reducing Petitioner's contractual allocation, and consequently does not provide a basis for reducing Petitioner's fee. Further, the alleged assignee, ACWS, was not billed as a Bureau water supply contractor, so there is no double billing in this case for the same water. This cause of reconsideration is denied.

Stockton East Water District

Stockton East Water District objects to being assessed a fee for its full contractual entitlement to water appropriated by the Bureau's New Melones Project, on the basis that the Bureau has placed a limit of 90,000 afa on all of its contract supplies from New Melones, while the maximum allocation under the New Melones Project contracts totals 155,000 acre-feet. (USBR 1247/WR MT 94-000231.) Petitioner was assessed a fee of $28,074 based on its water supply contract with the Bureau's CVP for 75,000 afa. The New Melones Project is part of the CVP, and Petitioner's fee for this account is a proportional share of the total CVP fee, or 0.011446 of the CVP fee. As discussed below, this cause of reconsideration is denied.

Petitioner's argument is that it is not equitable to charge a fee to Petitioner based on its full contract amount when the Bureau refuses to deliver the full amount under the contract. The

SWRCB concludes the fee is appropriate. First, it is calculated in the same manner as all other CVP water supply contractors' fees, which allocate the fees among CVP contractors based on the amounts in the contracts, not the amounts actually delivered. Second, if Petitioner does not expect to receive the full amount of the contract, it can seek to reduce its contract amount. Finally, the fee assessed to Petitioner is not based solely on the maximum amount of water appropriated by the New Melones Project separately, but is assessed as a proportion of the entire CVP fee. Thus, the fees for the New Melones appropriations that are released for mitigation of the effects of the CVP are distributed among all of the CVP water users and are not assessed solely to the New Melones water supply contractors.

10.3 The Fees Were Charged for Deliveries Under the Bureau's Permits and Licenses and Not for Base Supplies or Other Water Rights

The following Petitioners claim that they should not be subject to the fees, alleging that the water they receive is "supported in substantial part upon pre-1914 rights and/or riparian rights which the Bureau of Reclamation either acquired outright or acquired by exchange." In effect, these Petitioners are claiming either (1) that some part of the water they receive from the CVP is a base supply that is under their own pre-1914 or riparian right or (2) that the Bureau's water rights constitute pre-1914 or riparian water rights that are not subject to a fee. The fees, however, are based solely on the permits and licenses of the Bureau, and not on any other right. Also, the Bureau does not claim to have pre-1914 or riparian water rights. Accordingly, the SWRCB rejects the latter argument.

The question of whether the Petitioners have base supplies that are delivered to the petitioners by the Bureau is considered individually below. Under the SWRCB's regulations, the fee is to be charged only for project water supplies and not for base supplies. (Cal. Code Regs, tit. 23, § 1073(b)(2).)

Chowchilla Water District

Chowchilla Water District is a water supply contractor of the Bureau's CVP, Friant Division. (USBR 1102/WR MT 94-000110; USBR 1287/WR MT 94-000112; USBR 1286/WR MT 94-000111.) The information provided by the Bureau shows that none of Petitioner's water

allocation under its contracts is base supply and that 100 percent (24,000 acre-feet unclassified, 55,000 acre-feet of Class I and 160,000 acre-feet of Class II) is project water. Chowchilla Water District submitted no evidence to support its claim. In the absence of proof that part of the Petitioner's water supply is base supply, this cause of reconsideration is denied.

Delano-Earlimart Irrigation District

Delano-Earlimart Irrigation District is a water supply contractor of the Bureau's CVP, Friant Division. (USBR 1300/ WR MT 94-000263; USBR 1301/ WR MT 94-000264.) The information provided by the Bureau shows that none of Petitioner's water allocation under its contract is base supply and that 100 percent (108,800 acre-feet of Class I and 74,500 acre-feet of Class II) is project water. Delano-Earlimart Irrigation District submitted no evidence to support its claim. In the absence of proof that part of the Petitioner's water supply is base supply, this cause of reconsideration is denied.

Lindmore Irrigation District

Lindmore Irrigation District is a water supply contractor of the Bureau's CVP, Friant Division. (USBR 1281/WR MT 94-000250; USBR 1282/WR MT 94-000251.) The information provided by the Bureau shows that none of Petitioner's water allocation under its contract is base supply and that 100 percent (33,000 acre-feet of Class I and 22,000 acre-feet of Class II) is project water. Lindmore Irrigation District submitted no evidence to support its claim. In the absence of proof that part of the Petitioner's water supply is base supply, this cause of reconsideration is denied.

Lindsay-Strathmore Irrigation District

Lindsay-Strathmore Irrigation District is a water supply contractor of the Bureau's CVP, Friant Division. (USBR 1280/WR MT 94-000249.) The information provided by the Bureau shows that none of Petitioner's water allocation under its contract is base supply and that 100 percent (27,500 acre-feet) is project water. Lindsay-Strathmore Irrigation District submitted no evidence to support its claim. In the absence of proof that part of the Petitioner's water supply is base supply, this cause of reconsideration is denied. (Petitioner also implies that it is a Class II

contractor, but there is no basis for this statement, and in any event, Class II status does not affect the amount of the fee.)

Terra Bella Irrigation District

Terra Bella Irrigation District is a water supply contractor of the Bureau. (USBR 1288/WR MT 94-000255.) The information provided by the Bureau shows that none of Petitioner's water allocation is base supply and 100 percent (29,000 acre-feet) is project water. Terra Bella Irrigation District submitted no evidence to support its claim. In the absence of proof that part of the Petitioner's water supply is base supply, this cause of reconsideration is denied.

10.4 The Fee Regulations Do Not Recognize a Lower Rate for Class II Water Supplies

The following Petitioners with Class II water supplies claim that their Class II water supplies should be charged lower fees, because the water they receive is "supported in substantial part upon pre-1914 rights and/or riparian rights which the Bureau either acquired outright or acquired by exchange." They also allege that a Class II water supply yields about as much water as 43 percent of a Class I supply. They argue that because Class II supplies are less dependable and no CVP storage is available, charging them the same amount of fees as for other CVP project supplies is arbitrary and capricious, unreasonable and irrational. In other words, these Petitioners are asking for a lower rate for Class II supplies because (1) part of the Class II water they receive from the CVP is base supply and (2) they get less yield from Class II supplies.

Under the SWRCB's regulations, the fee is to be charged only for project water supplies and not for base supplies. (Cal. Code Regs, tit. 23, § 1073, subd. (b)(2).) Accordingly, to the extent that part of a Class II water supply is a base supply under the Bureau contract, the contractor's fee will be reduced to account only for the project supply.

With respect to the argument that the fees should be lower because Class II supplies yield less water to the contractor, this order does not reduce the fees for Class II supplies. Both Class I and Class II water supplies are integrally part of the water right of the CVP for which fees are allocated. The fact that the Petitioner has accepted a contract with the Bureau for a Class II supply reflects a decision on the part of the Petitioner to take this amount of water whenever it is

available, and it gives this Petitioner the right to obtain Class II water in preference to other potential contractors. The contractor compensates the CVP for the right to obtain the water when it is available. The regulations of the SWRCB make no distinction between Class II and Class I supplies; these categories simply reflect the degree of risk the contractor accepts by taking a lower priority contract. Like a junior holder of a water right permit or license compared with a more senior water right holder, a Class II contractor does not have water available as often as a Class I contractor. The fee schedule does not differ based on the priorities of permittees or licensees, and likewise, it does not differ based on the priority of contract supplies.[42] Accordingly, this order does not reduce the fees for Class II supplies.

Chowchilla Water District

Chowchilla Water District has water supply contracts with the CVP's Friant Division that allow for 160,000 acre-feet of Class II supplies, in addition to Class I supplies. (USBR 1102/WR MT 94-000110; USBR 1287/WR MT 94-000112; USBR 1286/WR MT 94-000111.) Petitioner argues that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

Petitioner also alleges that part of its entire CVP water supply is based on pre-1914 or riparian water rights. Petitioner's argument is addressed above.

Delano-Earlimart Irrigation District

Delano-Earlimart Irrigation District has a water supply contract with the CVP's Friant Division that allows for 74,500 afa of Class II supplies and 108,800 afa of Class I supplies. (USBR 1300/WR MT 94-000263; USBR 1301/WR MT 94-000264.) Petitioner argues that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

[42] While distinctions based on priorities arguably could have been made in adopting a fee schedule, the fee schedule is not required to incorporate these kinds of distinctions in order to assure a fair and reasonable allocation of the costs of the water rights program.

Petitioner also alleges that part of its entire water supply is based on pre-1914 or riparian water rights. Petitioner's argument is addressed above.

Fresno Irrigation District

Fresno Irrigation District has a water supply contract with the CVP's Friant Division that allows for 75,000 acre-feet of Class II supplies. (USBR 1019/ WR MT 94-000022.) Petitioner argues that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

Lindmore Irrigation District

Lindmore Irrigation District has a water supply contract with the CVP's Friant Division that allows for 33,000 acre-feet of Class I supplies and 22,000 acre-feet of Class II supplies. (USBR 1281/WR MT 94-000250; USBR 1282/WR MT 94-000251.) Petitioner argues in both its petition for reconsideration of the fee for the Class II water and in its petition for reconsideration of the fee for the Class I water that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

Petitioner also alleges that part of its entire water supply is based on pre-1914 or riparian water rights. Petitioner's argument is addressed above.

Porterville Irrigation District

Porterville Irrigation District has a water supply contract with the CVP's Friant Division that allows for 30,000 acre-feet of Class II supplies, in addition to Class I supplies. (USBR 1304/WR MT 94-000267.) Petitioner argues that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

Saucelito Irrigation District

Saucelito Irrigation District has a water supply contract with the CVP's Friant Division that allows for 32,800 acre-feet of Class II supplies, in addition to Class I supplies. (USBR 1294/WR MT 94-000261; USBR 1295/WR MT 94-000262.) Petitioner argues that the fee for its Class II supplies from the CVP's Friant Division is arbitrary and capricious, unreasonable and irrational, because the Class II supply is less dependable. As discussed above, this cause of reconsideration is denied.

10.5 Factual Claims Warranting Recalculation of the Fees Assessed to Petitioners Charged as Water Supply Contractors

Certain individual petitioners charged as water supply contractors raised factual claims specific to their fee bills and, on further review, the SWRCB has agreed with those claims and, as appropriate, the Division either has modified its database or the fee bills or has directed BOE to issue a refund.

10.5.1 The Fee Was Based on the Incorrect Contract Amount

East Bay Municipal Utility District

East Bay Municipal Utility District (EBMUD) has a water supply contract with the Bureau for CVP water. (USBR 1134/WR MT 94-000139.) Petitioner was assessed a fee of $56,149, which Petitioner surmises is based on a contract amount of 150,000 acre-feet. Petitioner alleges, however, that the correct contract amount is 55,000 acre-feet. Petitioner and the Bureau executed an amendatory contract effective July 20, 2001, that reduced the contract amount. The amendatory contract entitles EBMUD to take delivery of water at Freeport on the Sacramento River of up to a total of 133,000 acre feet of project water for municipal and industrial purposes in any year that certain hydrologic conditions exist, provided that EBMUD cannot receive more than 165,000 acre-feet in any three consecutive years in which EBMUD's storage forecast is below 500,000 acre-feet. One third of 165,000 acre-feet is 55,000 acre-feet, and this apparently is the basis for Petitioner's assertion that its contract amount should be 55,000 acre-feet. In fact, however, Petitioner has the option to take up to 133,000 acre-feet in any single year under its water supply contract. The fee is based on the maximum contract amount. The SWRCB agrees that the fee for Petitioner should be recalculated based on a contract amount of 133,000 acre-feet,

which results in the correct fee amount of $49,785.45. The Division has provided direction to BOE accordingly. This cause of reconsideration is moot.

10.5.2 The Fee Is Charged to a Person Who Does Not Buy Water From the Bureau

Orland Water Users' Association

Orland Water Users' Association has a contract with the Bureau for the exchange of water and of storage space, allowing Petitioner to receive some of its deliveries from Black Butte Reservoir. (USBR 1007/WR MT 94-000007.) The water Petitioner receives, however, is in exchange for water and storage space in Petitioner's upstream reservoirs. Petitioner is not a water supply contractor with the Bureau and should not be required to pay a fee. The SWRCB agrees that Petitioner is not required to pay a fee of $6,110, and the Division has directed BOE to take appropriate action. This cause of reconsideration is moot.

10.5.3 Part of the Contract Supply Has Been Assigned to Someone Else Who Has Been Billed

The following Petitioners allege that part of their contract supply has been assigned to someone else who has been billed.

Colusa County

Colusa County received a bill for $22,460, which represents a fee calculated based on a contract supply of 60,000 acre-feet. (USBR 1204/WR MT 94-000006.) Colusa County, however, assigned 40,000 acre-feet of its original 60,000 acre-foot contract to Westside Water District by a three-way contract among the Bureau, Petitioner, and Westside Water District, dated March 27, 2002. Westside Water District was billed for fees calculated based on the 40,000 acre-feet assigned to it by Colusa County. Accordingly, Colusa County's bill should have been based on an allocation of 20,000 acre-feet ($600.00). The SWRCB agrees that Colusa County's fee should be recalculated based on a contractual supply of 20,000 acre-feet, and the Division has directed BOE accordingly. This cause of reconsideration is moot.

Shasta County Water Agency

Shasta County Water Agency received a bill for $1,872, which was based on a 5,000 acre-foot Bureau contract supply. (USBR 1090/WR MT 94-000030.) Petitioner assigned 2,900 acre-feet of its original 5,000 acre-foot contract to Centerville Community Services District by a three-way contract among the Bureau, Petitioner, and Centerville Community Services District, dated April 11, 2001. Centerville Community Services District was billed for fees based on the 2,900 acre-feet assigned to it by Shasta County Water Agency. Accordingly, Petitioner's bill should have been based on an allocation of 2,100 acre-feet. The SWRCB agrees that Petitioner's fee should be recalculated based on the 2,100 acre-feet remaining after the assignment of 2,900 acre-feet to Centerville. The correct billing amount is the minimum fee of $100.00, and the Division has directed BOE accordingly. This cause of reconsideration is moot.

10.5.4 The Wrong Person Was Billed

Shasta County Water Agency received a bill for $187, based on a 500 acre-foot Bureau contract supply, under BOE Account Number WR MT 94-000029 (USBR 1025). The water supply contractor for this water supply is County Service Area #25 - Keswick, not Shasta County Water Agency. Shasta County paid the bill on behalf of the County Service Area, and also paid another fee bill on behalf of Shasta County Water Agency. Shasta County paid both fees in one check. The SWRCB will correct its records on this account, but this cause of reconsideration is denied, since the "letter of protest" states that the bill was paid on behalf of County Service Area #25 - Keswick, not the Petitioner.

10.6 Recalculation of Fees to Water Supply Contractors Based on Disposition of Petitions of Other Water Supply Contractors

The Division allocated fees to Bureau water supply contractors based on a proration of the fees, with each contractor's fee determined by the ratio of that contractor's entitlement to the sum of all relevant entitlements. (See Cal. Code Regs., tit. 23, § 1073, subd. (b)(2).) This means that, to the extent that the Division calculated any individual contractor's fee too high, because the contract amount was in fact less than that used in making the calculation for that contractor, the Division also set the fees of other contractors too low, because that same number was included in the sum of all entitlements used in the ratio setting the fee. Put another way, any petition

showing the need for a change in the numerator of the ratio used to calculate a particular petitioner's fee also shows the need to change the denominator in the ratios used to calculate all of the fees for water supply contractors served by the same project. If the numerator, the amount of one of the water supply contracts from a project, is reduced for any specific contractor, the denominator is also necessarily reduced, because it is the sum of the various contract amounts.

In reviewing these and other pending petitions, the SWRCB has identified several instances where the fee allocated to a particular CVP contractor is too large, and has directed BOE to pay a refund. In so doing, the SWRCB has only looked at the numerator, adjusting the ratio to reflect the correct amount for the individual contractor, without adjusting the denominator. In acting on these petitions, the SWRCB could recalculate the fees of all CVP contractors who are petitioners to reflect a corrected amount for the sum of all relevant contract entitlements, resulting in an upward adjustment of those fees. SWRCB regulations specify that if a water supply contractor successfully petitions to reduce or eliminate that contractor's allocation, it shall not provide a basis for reallocation of the fee for other contractors who have not petitioned for reconsideration. (*Id.* § 1073, subd. (d).) Thus, where a water supply contractor has petitioned for reconsideration, the SWRCB may recalculate that contractor's fee to take into account how other petitions may affect the SWRCB's calculation of the total of all relevant contractual entitlements.

Although the SWRCB has authority to recalculate the fees of CVP contractors, Senate Bill 1049 and the fee regulations do not require it to do so. In estimating fee revenues, the SWRCB took into account the likelihood that some fees would not be paid because incorrect information was used in calculating the fee, and refunds would be ordered as part of the SWRCB's consideration of petitions for reconsideration. The magnitude of the refunds being ordered is not large enough to require the SWRCB to recalculate the fees for CVP contractors in order to assure that adequate revenues are collected to continue the water rights program this fiscal year, or to ensure that the combined payments of all CVP contractors add up to a reasonable share of overall program costs. Accordingly, the SWRCB will not order any increase in the fees of CVP contractors who unsuccessfully petitioned to have their fees reduced or eliminated, nor will the

SWRCB recalculate the fees to offset or reduce the size of the refunds due to those CVP contractors who successfully petitioned to have their fees reduced, at this time.[43]

11.0 CONCLUSION

For the reasons discussed above, the SWRCB finds that its decision to impose water right fees was appropriate and proper or that it has remedied certain erroneous fee bills, thus rendering those claims moot. To the extent that this order does not address all of the issues raised in each of the petitions for reconsideration, the SWRCB finds that either these issues are insubstantial or that Petitioners have failed to meet the requirements for a petition for reconsideration under the SWRCB's regulations. The petitions for reconsideration are denied.

ORDER

IT IS HEREBY ORDERED THAT, except insofar as certain causes for reconsideration are dismissed as moot because the Division has directed BOE to make refunds or take other appropriate action in specific cases, the petitions for reconsideration are denied.

Dated:_April 7, 2004

ORIGINAL SIGNED BY HARRY M. SCHUELLER for
Celeste Cantú
Executive Director

[43] The SWRCB reserves the right to reconsider this issue if further proceedings before the SWRCB are required after judicial review of these petitions.

Attachment 1
NCWA-CVPWA Petitioners

Name	SWRCB ID *	BOE Account Number **
2017 RANCH LTD PARTNERSHIP	A016185	94004921
AGENCY 5	A005549	94001277
ALBIN JENSEN	A026174	94010938
ALFRED G MONTNA & GAIL E MONTNA FAMILY TRUST	A019083	94006553
	A006348	94001449
ALTA VISTA RANCH	A030536	94013165
ANDERSON-COTTONWOOD IRRIGATION DISTRICT	USBR1085	94000095
ANDREW NOBLE	A021231B	94007853
	A021381	94007947
	A021382B	94007949
BANTA-CARBONA IRRIGATION DIST	A005248	94001240
	A001933	94000564
	USBR1115	94000127
BELLA VISTA WATER DISTRICT	USBR1214	94000202
BROWNS VALLEY IRRIGATION DISTRICT	A027302	94011501
	A023757	94009303
	A013873	94003838
	A008986	94002009
	A013130	94003482
CALAVERAS COUNTY WATER DISTRICT	USBR1307	94000269
CARMEL CAVANAGH	A017459	94005611
CENTERVILLE COMMUNITY SERVICES DISTRICT	USBR1091	94000099
CENTINELLA WATER DISTRICT	USBR1265	94000242
CENTRAL SAN JOAQUIN WATER CONS. DISTRICT	USBR1248	94000232
CHIAPPE FARMS, INC	A018671	94006320
CHOWCHILLA WATER DISTRICT	A013175	94003503
	A011047	94002685
	USBR1102	94000110
	USBR1287	94000112
	USBR1286	94000111
CHRIS MILLS	A024367	94009707
CITY OF WEST SACRAMENTO	A025616	94010575
CLEAR CREEK COMMUNITY SERVICES DI	USBR1130	94000136
COALINGA, CITY OF	USBR1112	94000124
COLUSA, COUNTY OF	USBR1204	94000006
COLUSA COUNTY WATER DISTRICT	USBR1082	94000090
COLUSA DRAIN MUTUAL WATER COMPANY	USBR1270	94000246
COLUSA-SOLANO JPA	A031155	94013238
	A029335	94012740
CONTRA COSTA WATER DISTRICT	A020245	94007232
	A005941	94001368
	A027893	94011824
	A025516A	94010497
	A025829	94010721
	USBR1302	94000265
CORDUA IRRIGATION DISTRICT	A009927	94002284
	A012371	94003210
CORNING WATER DISTRICT	USBR1153	94000153
CRAIG S CHENOWETH REVOCABLE TRUST DATE 11/6/96	A024148	94009562
	A024150	94009564
CYRUS M ROLLINS	A004731	94001110
DANNA & DANNA INC	A010739	94002578
DAVID HERSHBERGER	A023514	94009155
	A026065	94010868
DEL PUERTO WATER DISTRICT	USBR1233	94000219
DELANO-EARLIMART IRRIGATION DISTRICT	USBR1300	94000263

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Attachment 1
NCWA-CVPWA Petitioners

Name	SWRCB ID *	BOE Account Number **
DELANO-EARLIMART IRRIGATION DISTRICT	USBR1301	94000264
DENNY LAND & CATTLE COMPANY, LLC	A019145	94006583
	A022669	94008639
	A022677	94008647
	A022676	94008646
	A022675	94008645
	A022674	94008644
	A022673	94008643
	A022672	94008642
	A022671	94008641
	A022670	94008640
DONALD D MURPHY	A024149	94009563
DUNNIGAN WATER DISTRICT	USBR1103	94000113
EAGLE FIELD WATER DISTRICT	USBR1173	94000169
EAST BAY MUNICIPAL UTILITY DISTRICT	A002593	94000649
	A018672	94006321
	A000465	94000335
	A004228	94000984
	A004768	94001117
	A005128	94001202
	A006707	94001531
	A013156	94003496
	A015201	94004440
	A025056	94010155
	USBR1134	94000139
EL DORADO IRRIGATION DISTRICT	A006383	94001452
	A011675	94002922
	A015140	94004410
	A000654	94000369
	A001692	94000526
	A001440	94000481
	A001441	94000482
	A005645B	94001290
	A007478	94001701
	USBR1314	94000034
	USBR1164	94000033
	USBR1027	94000032
	FERC184	94013247
EL SOLYO WATER DISTRICT	A001476	94000494
EXETER IRRIGATION DISTRICT	USBR1291	94000258
EXETER IRRIGATION DISTRICT	USBR1292	94000259
FEATHER WATER DISTRICT	USBR1324	94000274
	A014803	94004267
FRESNO IRRIGATION DISTRICT	USBR1019	94000022
FRESNO, CITY OF	USBR1229	94000217
FRIANT POWER AUTHORITY	A025882	94010752
GARDEN HIGHWAY MUTUAL WATER COMPANY	A015893	94004782
	A001699	94000528
	A023045	94008874
	A026098	94010886
	A014415	94004103
GARRETH B SCHAAD	A000735	94000379
	A017853	94005861
	A028985	94012523
GEORGETOWN DIVIDE PUBLIC UTILITY DISTRICT	A027174	94011440
	A016688	94005168

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Name	SWRCB ID *	BOE Account Number **
GEORGETOWN DIVIDE PUBLIC UTILITY DISTRICT	A016212	94004933
	A005644A	94001289
GLENN E MATHIS JR	A017503	94005643
	A017502	94005642
	A017501	94005641
	A017504	94005644
	A017505	94005645
GLENN-COLUSA IRRIGATION DISTRICT	A000018	94000283
	A001624	94000513
	A008688	94001936
	A030838	94013214
	A001554	94000505
	A012125	94003112
	A023005	94008848
	USBR1215	94000203
GLIDE WATER DISTRICT	USBR1262	NA
GORRILL LAND COMPANY	A004664	94001095
	A002777	94000683
	A004665	94001096
	A022321	94008439
	A025717	94010647
HILLS VALLEY IRRIGATION DISTRICT	USBR1212	94000200
HOLLIS E REIMERS	A020603	94007471
	A022776	94008705
	A023740	94009296
IMPERIAL IRRIGATION DISTRICT	A007739	94001753
	A007740	94001754
	A007741	94001755
	A007742	94001756
	A007743	94001757
	A008534	94001910
	A007482	94001702
IVANHOE IRRIGATION DISTRICT	USBR1284	94000253
	USBR1285	94000254
JACK A CUSHMAN	A020803	94007604
JACK BABER, ET AL	USBR1035	94000043
JACK W BABER	A001617	94000512
JAMES IRRIGATION DISTRICT	USBR1155	94000155
JAMES J STEVENSON, A CORPORATION	A001730	94000533
JAMES M SPURLOCK	A019437	94006749
	A019911	94007017
	A019910	94007016
JERRY SPURLOCK	A019912	94007018
JIM JONES	A015223	94004452
JOHN B CROOK	A002227	94000593
	A025231	94010290
JOHN R POWERS III & JANEY H POWERS REVOC TRUST DATED 9/6/00	A026073	94010874
JOHN S & EST OF KENNETH D FOBES	A011381	94002801
JUDITH S BABER	A012087	94003092
	A022696	94008655
JUDITH W ISAAC	A025131	94010214
KERN-TULARE WATER DISTRICT	USBR1220	94000208
KIDCO #11 L P	A012916	94003402
KINGS RIVER CONSERVATION DISTRICT	A025169	94010241
KNAGGS FARMING COMPANY L P	A001725	94000532
	A003423	94000804

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Name	SWRCB ID *	BOE Account Number **
KNAGGS FARMING COMPANY L P	A004351	94001018
	A004901	94001153
	A004902	94001154
	A005359	94001260
	A012256	94003165
	A012995	94003428
	A012996	94003429
	A012997	94003430
	A016361B	94005001
	A029471	94012816
KNAGGS WALNUT RANCHES COMPANY L P	A013031	94003446
LAGUNA WATER DISTRICT	USBR1245	94000230
LEAL FAMILY TRUST	A008830	94001969
LEDBETTER FARMS INC	A013267	94003548
	A022608	94008612
	A027149	94011427
	A013453	94003639
	A014333	94004065
	A029405	94012780
LINDMORE IRRIGATION DISTRICT	USBR1281	94000250
	USBR1282	94000251
LINDSAY-STRATHMORE IRRIGATION DISTRICT	USBR1280	94000249
LOWER TULE RIVER IRRIGATION DISTRICT	A026169	94010935
	USBR1193	94000188
	USBR1297	94000190
	USBR1296	94000189
M & T INCORPORATED	A008565	94001917
	A009735	94002220
	A005109	94001196
	A008188	94001841
	A008213	94001846
	A015866	94004771
	USBR1241	94000226
MADERA IRRIGATION DISTRICT	A017311	94005531
	USBR1106	94000116
	USBR1298	94000117
	USBR1299	94000118
MADERA-CHOWCHILLA WATER AND POWER AUTHORITY	A027456	94011560
MARIAN ANDERSON	A005151	94001208
MAUDRIE M SMITH	A029726	94012937
MAXWELL IRRIGATION DISTRICT	A013919	94003864
	A011958	94003044
	A011957	94003043
	A011956	94003042
	A011955	94003041
	A008631	94001928
	A013735	94003777
	A014378	94004083
	A030445	94013137
	USBR1150	94000151
MERCED IRRIGATION DISTRICT	A016187	94004923
	A010572	94002516
	A016186	94004922
	A001224	94000456
	A001222	94000455
	A001221	94000454

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Name	SWRCB ID *	BOE Account Number **
MERCY SPRINGS WATER DISTRICT	USBR1086	94000096
MIKE LANDINI	A024810	94009973
	A025118	94010200
	A019913	94007019
	A024811	94009974
MJM	A028685	94012335
MONTEREY COUNTY WATER RESOURCES AGENCY	A016587	94005119
	A030532	94013163
	A026901	94011310
	A016124	94004883
	A013225	94003533
	A016761	94005208
MOUNTAIN GATE COMMUNITY SERVICES	USBR1154	94000154
NATOMAS CENTRAL MUTUAL WATER COMPANY	A025727	94010654
	A001056	94000428
	A022309	94008430
	A015572	94004624
	A001413	94000479
	A001203	94000450
	A000534	94000349
	USBR1227	94000215
NICOLA D MUZZI	A026125	94010906
	A026126	94010907
NORTH MARIN WATER DISTRICT	A025062	94010160
	A013599	94003713
	A013965B	94003891
	A025927	94010785
	A025079	94010172
ODYSSEUS FARMS PARTNERSHIP	A011058	94002690
	USBR1218	94000206
ORLAND UNIT WATER USERS ASSOCIATION	USBR1007	94000007
ORLAND-ARTOIS WATER DISTRICT	USBR1210	94000198
ORO LOMA WATER DISTRICT	USBR1175	94000171
PACHECO WATER DISTRICT	USBR1251	94000235
PAJARO VALLEY WATER MANAGEMENT AGENCY	A030522	94013162
PANOCHE WATER DISTRICT	USBR1181	94000176
PARK LIVESTOCK COMPANY	A015105	94004396
PATTERSON IRRIGATION DISTRICT	USBR1098	94000106
PELGER MUTUAL WATER COMPANY	A030410	94013126
	A012470B	94003245
	A001765A	94000541
	USBR1053	94000059
PIXLEY IRRIGATION DISTRICT	USBR1194	94000191
PLACER COUNTY WATER AGENCY	A018084	94005995
	A018085	94005996
	A018086	94005997
	A018087	94005998
	A026637	94011196
	A029721	94012933
	USBR1133	94000138
PLEASANT GROVE-VERONA MUTUAL WATER COMPANY	USBR1146	94000147
PLUMAS MUTUAL WATER COMPANY	A000480	94000337
PORTERVILLE IRRIGATION DISTRICT	USBR1304	94000267
PRINCETON-CODORA-GLENN IRRIGATION DISTRICT	A030812	94013211
	A017066	94005379
	A000770	94000386

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NCWA-CVPWA Petitioners

Name	SWRCB ID *	BOE Account Number **
PRINCETON-CODORA-GLENN IRRIGATION DISTRICT	A000244	94000310
	USBR1213	94000201
PROBERTA WATER DISTRICT	USBR1163	94000163
PROVIDENT IRRIGATION DISTRICT	A010595	94002525
	A000462	94000334
	A013452	94003638
	A001422	94000480
	A000892	94000404
	A000640	94000366
	A030813	94013212
	USBR1217	94000205
RAG GULCH WATER DISTRICT	USBR1209	94000197
RECLAMATION DISTRICT NO. 1606	USBR1101	94000109
RECLAMATION DISTRICT #1004	A000027	94000285
	A023201	94008970
	USBR1230	94000218
RECLAMATION DISTRICT #108	A011899	94003013
	A000576	94000357
	A001589	94000509
	A000763	94000385
	USBR1224	94000212
RECLAMATION DISTRICT #2068	A002318	94000611
	A019229	94006631
	A024961	94010086
RECLAMATION DISTRICT #999	A001666	94000523
	A004099	94000959
	A004100	94000960
	A004101	94000961
REDFERN RANCHES INC	A017000	94005357
RICHARD MOORE	A012411	94003223
RICHARD L JENNINGS	A010835	94002619
RIVER BEND VINEYARDS, LTD	A010976	94002669
RIVER GARDEN FARMS COMPANY	A011910	94003020
	A000575	94000356
	A000577	94000358
	USBR1225	94000213
ROBERT L WALLACE	A023946	94009435
ROBERT P STAUDENRAUS	A022630	94008620
ROSEMARIE K BUSBEE	A018780A	94006380
ROSEVILLE, CITY OF	USBR1094	94000102
SACRAMENTO COUNTY WATER AGENCY	USBR1066	94000070
	USBR1253	94000071
SACRAMENTO MUNICIPAL UTILITY DISTRICT	A012323	94003192
	A012624	94003300
	A014963	94004336
	A020522	94007425
	A022110	94008335
	A026768	94011250
	A023404	94009097
	FERC2101	94013261
	USBR1135	94000140
SAN BENITO COUNTY WATER DISTRICT	A008642	94001931
	A017782	94005815
	A002937	94000710
	USBR1268	94000245
SAN JUAN WATER DISTRICT	A005830	94001350

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Name	SWRCB ID *	BOE Account Number **
SAN JUAN WATER DISTRICT	USBR1033	94000040
	USBR1254	94000041
SAN LUIS WATER DISTRICT	USBR1174	94000170
SANTA CLARA VALLEY WATER DISTRICT	A005654	94001310
	A005653	94001309
	A007140	94001626
	A007141	94001627
	A007142	94001628
	A007143	94001629
	A008098	94001817
	A008099	94001818
	A008387	94001880
	A008388	94001881
	A009455	94002143
	A011010	94002679
	A011751	94002951
	A013016	94003440
	A013791	94003803
	A013886	94003845
	A021128	94007785
	A019679	94006908
	USBR1261	94000098
	USBR1089	94000097
SAUCELITO IRRIGATION DISTRICT	USBR1294	94000261
	USBR1295	94000262
SEMITROPIC WATER STORAGE DISTRICT	A025117	94010199
	USBR1107	94000119
	USBR1108	94000120
SHASTA COMMUNITY SERVICES DISTRICT	USBR1221	94000209
SHASTA COUNTY WATER AGENCY	USBR1090	94000030
	USBR1025	94000029
SILVERADO PREMIUM PROPERTIES	A013277	94003557
	A021245	94007863
SILVERADO PREMIUM PROPERTIES II LLC	A024762B	94009939
	A024762A	94009938
	A024268B	94009629
	A024268A	94009628
SILVERADO PREMIUM PROPERTIES LLC	A021756	94008130
	A015399	94004536
	A014245	94004023
	A013376	94003609
	A004977	94001170
SMITH FAMILY LIVING TRUST	A015123	94004405
SOLANO COUNTY WATER AGENCY	USBR1316	94000273
SOLANO IRRIGATION DISTRICT	A025176	94010247
SOUTH SUTTER WATER DISTRICT	A014430	94004112
	A023838	94009357
	A022102	94008332
	A010221	94002388
	A014804	94004268
	A026162	94010930
SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT	USBR1278	94000247
	USBR1279	94000248
STEVINSON WATER DISTRICT	A001885	94000555
	A005724	94001332
	A006111	94001401

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Name	SWRCB ID *	BOE Account Number **
STEVINSON WATER DISTRICT	A007012	94001605
STOCKTON EAST WATER DISTRICT	USBR1247	94000231
	A006522	94001490
	USBR1306	94000268
SUTTER EXTENSION WATER DISTRICT	A010529	94002505
	A012230A	94003153
	A013349	94003596
	A014665	94004200
	A015177	94004429
	A015178	94004430
	A015587	94004629
	A011319	94002779
	A014588	94004174
	A015179	94004431
SUTTER MUTUAL WATER COMPANY	A012470A	94003244
	A000880A	94000398
	A001758	94000539
	A001160	94000442
	A016677	94005163
	A000581	94000359
	A001763	94000540
	A000879	94000397
	A000878	94000396
	A003195	94000768
	A010658	94002548
	A007886	94001776
	A009760	94002230
	A011953	94003039
	A001769	94000543
	A001772	94000544
	USBR1191	94000185
TEA POT DOME WATER DISTRICT	USBR1167	94000166
TERRA BELLA IRRIGATION DISTRICT	USBR1288	94000255
TERRY M BENGARD	A022489	94008540
THE WEST SIDE IRRIGATION DISTRICT	USBR1263	94000240
THERMALITO IRRIGATION DISTRICT	A001739	94000534
	A003040	94000746
TOM BENGARD	A021537	94008032
	A021665	94008090
	A021536	94008031
	A020927	94007678
	A020925	94007676
	A020926	94007677
	A020874	94007641
	A022489	94008540
TRACY, CITY OF	USBR1177	94000173
TRIDAM POWER AUTHORITY	FERC2067	94013274
	FERC2005	94013273
TRI-VALLEY WATER DISTRICT	USBR1216	94000204
TULARE IRRIGATION DISTRICT	USBR1289	94000256
	USBR1290	94000257
TURLOCK I D & MODESTO I D	A003648	94000857
	A001532	94000502
	A001233	94000459
	A001232	94000458
	A014127	94003979

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TURLOCK I D & MODESTO I D	A014126	94003978
	A009996	94002302
TURLOCK IRRIGATION DISTRICT	A003139	94000761
	A006711	94001532
	A009997	94002303
U S EL DORADO NATL FOREST	A004740	94001112
UCC VINEYARDS GROUP	A013269	94003550
VIOLET M ANDERSON	A019858	94006985
W G IRVING	A017560	94005679
W P & R L WALLACE DBA WALLACE BROS	A023945	94009434
	A011881	94002998
WALLACE BROTHERS	A025793	94010700
	A025792	94010699
WEAVER PROPERTIES, LLC	A012023	94003066
	A012129	94003114
WEST SACRAMENTO, CITY OF	USBR1010	94000010
WEST SIDE IRRIGATION DISTRICT	A000301	94000317
WEST STANISLAUS IRRIGATION DISTRICT	USBR1016	94000019
	A001987	94000570
WESTLANDS WATER DISTRICT	USBR1011	94000011
	USBR1088	94000012
	USBR1131	94000013
	USBR1273	94000014
WESTROPE RANCHES, LTD	A007989	94001797
	A006582	94001506
WESTSIDE WATER DISTRICT	USBR1192	94000186
	USBR1206	94000187
WIDREN WATER DISTRICT	USBR1185	94000180
WILLIAM WEAVER JR	A012024	94003067
	A012130	94003115
WILLIAM A SPENCE	A017756	94005798
	A017757	94005799
	A017758	94005800
	A017759	94005801
	A017843	94005855
	A018050	94005981
	A018895	94006449
WILLIAM T GRAY	A012994	94003427
YOLO COUNTY F C & W C DISTRICT	A011389	94002808
	A015975	94004811
	A026469	94011102
YUBA COUNTY WATER AGENCY	A015563	94004617
	A015205	94004443
	A015204	94004442
	A010282	94002399
	A009516	94002162
	A005631	94001286
	A005004	94001176
	A003026	94000743
	A002197	94000589
	A015574	94004625
	A029837	94012967
	A005632	94001287

* ID numbers starting with A = permit and license annual fees, USBR = pass through for USBR contractors, FERC = active FERC relicensing projects.

** The BOE number includes a prefix of WR-MT and a suffix number which is unnecessary for proper identification of the account with the Board of Equalization.