

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0010-EXEC

In the Matter of the Petition for Reconsideration of
PALO VERDE IRRIGATION DISTRICT
Regarding Water Right Fee Determination for Fiscal Year 2011-2012

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

By this order, the Executive Director denies Palo Verde Irrigation District's (PVID) petition for reconsideration of the State Water Resources Control Board's (State Water Board) determination that PVID was required to pay an annual water right fee for Permit 7652 (Application 9280). PVID argues that annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders or the burden they place on the regulatory system. For the reasons set forth below, the Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition for reconsideration is denied.

2.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency primarily responsible for administering the state's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act and includes funding from several different sources. The primary source of funding for the water right program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Stats. 2003, ch. 741) required the State Water Board to adopt emergency regulations revising and establishing water right fees and revising fees for

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

water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the State Water Board reviews the fee schedule each fiscal year, and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount appropriated by the Legislature from the Water Rights Fund, taking into account the reserves in the fund. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater or less than the amount appropriated, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.*, § 1536.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated January 23, 2012, entitled "Recommended Water Right Fee Schedule for Fiscal Year 2011-12" (hereinafter "Evoy Memorandum"), in FY 2011-2012, the Legislature appropriated \$17.769 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in summary, this amount includes a \$12.591 million appropriation from the Water Rights Fund in the Budget Act of 2011 (Stats. 2011, ch. 33) and a continuing appropriation from the Water Rights Fund of \$3.75 million for enforcement positions,² for a total of \$16.341 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's budget for the water right program also includes \$1 million in general funds and \$428,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$437,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$38,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program.

In accordance with the Water Code, the State Water Board sets a fee schedule each fiscal year so that the amount collected and deposited into the Water Rights Fund during that fiscal year will support the appropriation made from the Water Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.³ As explained in the Evoy Memorandum,

² In addition to the annual Budget Act, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess.) ch. 2 (SB 7X 8), § 11), makes a continuous appropriation from the Water Rights Fund of \$3.75 million for water right enforcement. In 2011, the Legislature amended Water Code, section 1525, subdivision (d)(3) to clarify that the amounts collected through fees should be sufficient to cover the appropriations set forth in the Budget Act and the continuous appropriation in SB 7X 8. (Stats. 2011, ch. 579, § 9.)

³ Other sources of money in the Water Rights Fund, in addition to fee collections made during the fiscal year, include unexpended reserves from fee collections in previous years (see Wat. Code, § 1525, subd. (d)(3)) and penalties
[footnote continues on next page]

the Water Rights Fund had a beginning balance of \$5.52 million for the fiscal year, and the Division determined that the fund condition projections for FY 2011-2012 should include a reserve for economic uncertainty of about 20 percent of annual expenditures, which is approximately \$3.36 million. Without a fee increase for the FY 2011-2012, however, the Water Rights Fund would have an ending balance of \$149,000, which is below a prudent reserve. Thus, the Division proposed a fee increase for FY 2011-2012 in which the Water Rights Fund balance would be drawn down to an ending balance of \$5.09 million, leaving the fund with a 30 percent reserve. For the purposes of calculating this year's fees, the amount by which reserves would be spent down to reduce the fund balance to a \$5.09 million reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of \$14.419 million.

As described in the Evoy Memorandum, the Division recommended amending the annual permit and license fee by increasing the base fee from \$100 to \$150 and increasing the rate per acre-foot from \$0.03 per acre-foot to \$0.05 per acre-foot for diversions exceeding 10 acre-feet. (See Cal. Code Regs., tit. 23, § 1066.) The Division also recommended revising other portions of the fee schedule for FY 2011-2012, which are not the subject of this petition for reconsideration.

On September 19, 2011, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2011-0043, revising the emergency regulations governing water right fees for FY 2011-2012. The Office of Administrative Law approved the emergency regulations on October 20, 2011. On November 2, 2011, BOE sent out notices of determination for annual permit and license fees, including a notice of determination that PVID owed an annual water right fee for Permit 7652.

Permit 7652 authorizes the diversion of water from the Colorado River for irrigation and domestic purposes at an average rate not to exceed 1,500 cubic feet per second from January 1 to December 31. Pursuant to section 1066, subd. (a), of the State Water Board's regulations,⁴ the annual fee for PVID's permit was \$150, plus \$0.05 per acre-foot for each

collected for water right violations. (*Id.*, § 1551, subd. (b).) The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

⁴ All further regulatory references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

acre-foot in excess of 10 acre-feet, based on the total amount of water authorized to be diverted under the permit. The amount of water authorized to be diverted was calculated by multiplying the maximum average rate of diversion authorized by the length of time in the authorized season. (§ 1066, subd. (b)(1).)

PVID filed for a petition for reconsideration of this fee, which was received on December 1, 2011.

3.0 GROUNDS FOR RECONSIDERATION

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

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

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

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

filing a petition for reconsideration of BOE's November 3, 2009, assessment was December 2, 2011.

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)⁵

4.0 DISCUSSION

PVID contends that (1) the annual permit fees are unlawful taxes because the fees do not bear a reasonable relationship to the benefits conferred upon existing permit holders or the burden they place on the regulatory system. In support of this contention, PVID incorporates by reference four petitions for reconsideration that PVID filed previously challenging annual permit fees issued in FY 2010-2011, FY 2009-2010, FY 2008-2009, and FY 2007-2008. In addition to the contention that annual permit fees are unlawful taxes, three of the petitions for reconsideration that PVID incorporates by reference included the contention that the assessment of an annual permit fee against PVID was unconstitutional because PVID's right to Colorado River water stems solely from PVID's water delivery contract with the United States, and the State Water Board has no authority over the Colorado River. The Executive Director denied PVID's previous petitions for reconsideration in Order WR 2011-0008-EXEC, Order WR 2010-0011-EXEC, Order WR 2009-0008-EXEC, and Order WR 2008-0008-EXEC, respectively.

The Executive Director finds that the decision to impose the fee was appropriate and proper and therefore PVID's petition should be denied. PVID has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in Order WR 2011-0008-EXEC, Order WR 2010-0011-EXEC, Order

⁵ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

WR 2009-0008-EXEC, and Order WR 2008-0008-EXEC. Accordingly, this order incorporates by reference and adopts the reasoning of Order WR 2011-0008-EXEC, Order WR 2010-0011-EXEC, Order WR 2009-0008-EXEC, Order WR 2008-0008-EXEC, and the documents that supported those orders.

5.0 CONCLUSION

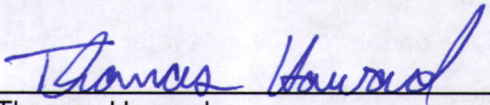
For the reasons discussed above, the State Water Board's decision to impose the annual water right permit fee on PVID was appropriate and proper. Accordingly, PVID's petition for reconsideration should be denied.

ORDER

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

Dated: _____

9/10/2012



Thomas Howard
Executive Director