STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2004-0027-EXEC

In the Matter of the Petition for Reconsideration of the
COLUSA DRAIN MUTUAL WATER COMPANY
Regarding Supplemental Water Right Application Filing Fee
for Pending Application 31481

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR[1]

1.0 INTRODUCTION

The Colusa Drain Mutual Water Company (Colusa) petitions the State Water Resources Control Board (SWRCB) for reconsideration of the SWRCB's assessment of a supplemental filing fee for pending Water Right Application 31481. Under Application 31481, Colusa seeks on behalf of its members to divert water from the Colusa Basin Drain, Knights Landing Ridge Cut, Tule Canal, Sycamore Slough, Salt Creek, and Powell/Hopkins Slough in Glenn, Colusa, and Yolo Counties. Colusa filed the application on December 12, 2003, and submitted a filing fee in the amount of $4,120. By letter dated March 3, 2004, the SWRCB billed Colusa for a supplemental filing fee, to bring the total fee to $850,000. The net amount due is $845,880.

Colusa requests that the SWRCB hold Application 31481 in suspension until a court has determined the validity of the SWRCB's fee regulations, and that the SWRCB issue an order addressing the applicability of its fee regulations to the facts presented by Colusa's circumstances. Colusa generally argues that the imposition of the supplemental fee to

[1] 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 deny a petition for reconsideration or set aside or modify the water right fee assessment.

Application 31481 is contrary to law, is improperly retroactive, violates article X, section 2, of the California Constitution, and is not supported by substantial evidence.

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 to 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:[2]

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

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

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).)

Colusa raises issues that implicate the causes listed in section 768, subdivisions (b) and (d). To the extent that this order does not address all of the issues raised in the petition for reconsideration, the SWRCB finds that either these issues are insubstantial or that Colusa failed to meet the requirements for a petition for reconsideration under the SWRCB's regulations. (*Id*. §§ 768-769, 1077.)

3.0 BACKGROUND

3.1 Basis for Fee Requirement

The SWRCB's Division of Water Rights (Division) has the primary responsibility for administering the state's water right program. In Fiscal Year 2003-2004, the Budget Act of 2003 (Stats. 2003, ch. 157) requires the water rights program to be supported by fee revenues. Senate Bill 1049 (Stats. 2003, ch. 741) requires the SWRCB annually to adopt emergency regulations revising and establishing fees to be deposited in the Water Rights Fund in the State Treasury.

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.) Accordingly, the Legislative Analyst recommended fee changes, including an increase in application and other filing fees, assessment of new annual fees, and establishment of a new special fund for deposit of the revenues generated by the fees.

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 regulations became effective on January 1, 2004.

3.2 The Petition for Reconsideration

Colusa argues that imposition of the supplemental filing fee is invalid for the reasons stated in *Northern California Water Association* v. *State Water Resources Control Board* (Sacramento County Superior Court No. 03CS01776) (*NCWA* v. *SWRCB*) and in a petition for reconsideration, also filed by the *NCWA* petitioners. Colusa also argues that the fee is invalid because it is improperly retroactive; there is no reasonable relationship between the fee and the costs of processing the application; it violates article X, section 2 of the California Constitution; it is not supported by substantial evidence because of the unique character of the water right at issue. Colusa requests that the SWRCB hold the application in suspension without further action until a court determines the validity of the current water right fee regulations and the SWRCB issues an order after an evidentiary hearing addressing the applicability of the fee regulations under the allegedly unique facts and circumstances surrounding Application 31481.

Colusa recites the history of water rights to divert water from the Colusa Drain as the basis for arguing that Application 31481 should receive special treatment. The Colusa Drain is a tributary to the Sacramento River. It is a drainage canal that receives water from return flows and drainage from irrigated fields. It flows from north to south on the west side of the Sacramento River, and meets the river near Knight's Landing. In SWRCB Decision 1045 (D-1045), adopted in 1961, the SWRCB approved numerous water right applications, including applications to appropriate water from the Colusa Drain. The SWRCB excluded at least July and August from the season of diversion, however, because the Sacramento River and the Delta below the confluence with the Sacramento River were fully appropriated during those months. Water was physically present in the Colusa Drain during these months, but the SWRCB found that the irrigators would have to make arrangements to satisfy the rights of the senior appropriators

downstream of the confluence with the Sacramento River before taking water from the drain during these months. The SWRCB suggested a contract with the U.S. Bureau of Reclamation (Reclamation), but recognizing that another source of water for senior rights might be available, did not direct that the contract be with Reclamation.

In 1987, Colusa was formed as a mutual water company with the purpose of contracting with Reclamation to purchase water. Colusa and Reclamation executed the contract on July 12, 1988. Under the contract, Reclamation provides water in the Sacramento River below the confluence of the Colusa Drain, allowing the Colusa irrigators to take water from the Drain in exchange for paying Reclamation to provide water downstream. Article 3(b) of the contract provides: "The Contractor agrees that it or its water users receiving benefits under this contract have or will obtain a water right permit allowing it or them to divert water from the Drain for agricultural purposes." The purpose of Application 31481 is to comply with Article 3(b) of the contract by obtaining water rights to cover the diversions that do not currently have water rights and to cover the July and August period when water generally is not available under the water right priorities of the Colusa Drain water users. Considering that the Colusa Drain is a tributary of the Sacramento River, the water users in the Colusa Drain who want to use water during the entire irrigation season, including the period when water is unavailable, must have two things: (1) a water right that allows diversions during the entire irrigation season, and (2) a water supply contract that, during the season when no water is available under the water users' priorities, replaces the water taken from the Colusa Drain that does not reach senior downstream water users along the Sacramento River and Delta.

Colusa argues that the water right fees and SWRCB Resolution No. 2003-0077 are invalid and illegal. Colusa lists the constitutional and statutory arguments made in the NCWA petition for reconsideration and in the *NCWA* v. *SWRCB* litigation. Colusa more specifically makes four arguments pertaining to the assessment of supplemental fees against Colusa, which are addressed below. These are: (1) there is no reasonable relationship between the supplemental water right application fee and the costs of processing Application 31481; (2) the fee is improperly retroactive as applied to Application 31481; (3) the fee will result in ineffective and wasteful

water rights administration on the Colusa Drain; and(4) the fee is not supported by substantial evidence because of the unique character of the water right at issue.

The arguments made in the petition for reconsideration filed by the *NCWA* petitioners and incorporated by reference in Colusa's petition are addressed in SWRCB Order WRO 2004-0011. These include several arguments that are inapplicable to the supplemental application fees at issue in this proceeding. Except as discussed below, Colusa does not provide any points and authorities or other argument or supporting information to support the arguments in the *NCWA* petition. Order WRO 2004-0011-EXEC correctly decides the issues raised by Colusa through its incorporation by reference of that petition for reconsideration. For the reasons set forth in Order WRO 2004-0011-EXEC, the arguments raised by Colusa by virtue of its incorporation by reference of the petition for reconsideration filed by the *NCWA* petitioners are denied.

3.2.1 Colusa Argues that the Supplemental Fee Is Improperly Retroactive

Colusa argues that the supplemental filing fee is improperly and illegally retroactive as applied to Application 31481, because Application 31481 was filed prior to the effective date of the Emergency Regulations and Senate Bill 1049, both of which took effect on January 1, 2004. Colusa relies on the California Supreme Court opinion in *Myers* v. *Phillip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841 [123 Cal.Rptr.2d 40] as authority for the principle that "unless there is an 'express retroactivity provision, a statute will *not* be applied retroactively unless it is *very clear* from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (citing *Evangelatos* v. *Superior Court* (1988) 44 Cal.3d 1188, 1206 [246 Cal.Rptr. 629].) Colusa argues that the Legislature did not intend the fees to be applied retroactively to applications filed between July 1, 2003 and the effective date of January 1, 2004. This argument is based on the Legislature having appropriated general fund dollars for the Division of Water Rights for approximately half of its annual budget for 2003-2004. Based on that appropriation, Colusa argues that the Division was funded by general fund money for the period of July 1, 2003 through December 31, 2003.

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Colusa's argument fails based on the statutory language adopted in SB 1049. Water Code section 1527, added by SB 1049 (Stats. 2003, c. 741, §85), provides, at subdivision (d)(2):

> "For filings subject to subdivision (b), the schedule may provide for a single filing fee or for an initial filing fee followed by an annual fee, as appropriate to the type of filing involved, and *may include supplemental fees for filings that have already been made but have not yet been acted upon by the board at the time the schedule of fees takes effect*." (Wat. Code, § 1527(d)(2).) (Italics added.)

This provision clearly states that the fee schedule may include supplemental filing fees for filings that have already been made at the time the fee schedule takes effect. This establishes that the Legislature expressly did intend to authorize supplemental fees that would apply retroactively. This meets the test in the *Myers* case relied upon by Colusa.

Further, it is clear based on section 1527, subdivision (e), that the Legislature also intended that both the general funds and the annual fees were to be applied to the Division's budget for the entire 2003-04 fiscal year, even though only half of the annual budget was to be collected in fees.[3] This provision states: "Annual fees imposed pursuant to this section for the 2003-04 fiscal year shall be assessed for the entire 2003-04 fiscal year." (Wat. Code, § 1527(e).)

Applying a legislative authorization retroactively when it imposes an economic burden does not violate 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 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

[3] For example, some general funds remained available to the water rights program after January 1, 2004, for expenditure throughout the year, and these funds are being expended during the entire fiscal year.

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.)

The retroactive application of filing fees satisfies due process requirements because it serves the legitimate legislative purpose of recovering the SWRCB's costs that it will incur to process an application. The filing fee charged before the effective date of the regulations was a fraction of the cost of processing a water right application of this size. Additionally:

- 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;
- 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 (and effective date) of Senate Bill 1049;

- Most of the costs of reviewing and processing applications filed six months or less before the new fee regulations took effect will occur in the future. Accordingly, it is reasonable to charge fees to these applications consistent with the new fee system;
- 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. Accordingly, the supplemental filing fees may be viewed as prospective; and
- The legislative authorization of supplemental filing fees also helped to avoid more occurrences of the action apparently taken by Colusa: being 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 – the water supply project proponents would rush to file their applications in an attempt to avoid the increased fees.

Each of these factors promotes a legitimate legislative purpose. Based on the foregoing, the imposition of supplemental fees retroactively, assessed based on the difference between the filing fees that were in effect when Colusa filed the applications in December 2003 and the increased filing fees under the new regulatory fee structure, satisfies due process requirements.

The applicability of the supplemental fees to Colusa is particularly appropriate. Colusa filed its application on December 12, 2003. As a result, essentially none of the cost of application processing was incurred before Senate Bill 1049 and the fee regulations took effect. Moreover, Colusa filed the application more than two months after Senate Bill 1049 was enacted. By the time Colusa filed its application, the SWRCB had circulated draft regulations, held public workshops on the proposed regulations, and issued notice of the special meeting at which the SWRCB adopted the fee regulations. Colusa should have known that supplemental filing fees would be applied to its application.

3.2.2 The Amount of the Supplemental Filing Fee Is Reasonably Related to the Costs of Application Processing

Colusa argues that the supplemental water right application fee exceeds the reasonable cost of processing Application 31481. The filing fee in effect on December 12, 2003, when Colusa filed its application, was $4,120. On the effective date of the revised regulations, the application filing fee was raised to $850,000, calculated at the rate of $10 per acre-foot pursuant to California Code of Regulations, title 23, section 1062(a)(1), times the 85,000 acre-feet for which Colusa applied.

On March 3, 2004, the SWRCB billed Colusa for the difference between the new filing fee and the fee Colusa paid when filing the application. Pursuant to section 1062(b) of the regulations, "A person who filed a water right application on or after July 1, 2003, and prior to the effective date of this section, shall pay a supplemental filing fee equal to the difference between the filing fee already paid and the amount due pursuant to subdivision (a)." As discussed above, Water Code section 1527(d)(2) specifically authorizes the SWRCB to require a supplemental fee such as is required in section 1062(b).

Colusa argues that the supplemental fee will exceed the reasonable cost of providing the service. Because the supplemental fee is based on a formula,[4] Colusa argues that it is not reasonably related to the cost of application processing and is illegal. Colusa argues that the SWRCB has the burden to 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 the payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity." Colusa cites as authority *Sinclair Paint Company* v. *State Board of Equalization* (1997) 15 Cal.4th 866, 878 and *California Association of Professional Scientists* v. *Department of Fish and Game* (2000) 79 Cal.App.4th 935, 945. Colusa also cites these cases for

[4] The formula is set to meet revenue targets.

the proposition that the fee must not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged.[5]

Colusa fails to note, however, that the court in *California Association* concluded that a precise cost-fee ratio is not required for a regulatory fee to survive as a fee. Particularly with respect to regulatory fees, the court recognized a need for flexibility in establishing the amount of regulatory fees. Nevertheless, there must be evidence to support the apportionment of costs under the regulatory fee. As the court in *California Association* observed, the courts have accepted various methods of apportioning fees. In one case, a court reviewed the ratio of fees to costs by considering both the estimated costs and the basis for apportioning the costs. In another case, a court approved an inclined rate structure for water customers as a regulatory fee because it achieved the regulatory objective of conservation. (*Brydon* v. *East Bay Mun. Util. Dist*. (1994) 24 Cal.App.4th 178.) In *Brydon*, the users of more water were required to pay more per cubic foot than those who used less. The court stated: "In pursuing a constitutionally and statutorily mandated conservation program, cost allocations for service provided are to be judged by a standard of reasonableness with some flexibility permitted to account for system-wide complexity."

The application fees meet the criteria enunciated by the courts. For the first criterion, the overall amount of the water right fees is targeted to meet the amount set in the Budget Act for the Water Rights Fund. The fees are based on collecting less than the total cost of the regulatory activity[6] for which the fees were charged, and may be spent only by the SWRCB's water right program and for collection of water right fees. (See Wat. Code §§ 1525, subd. (c)(3), 1552; Stats. 2003, c. 157, Item 3940-001-0001, Schedules (2), (21.5), pp. 234-235.)

The second part of the test for determining the validity of regulatory fees requires that the fees be allocated in a manner that bears a fair and reasonable relationship to the fee payor's burdens on

[5] The second part of the test for determining the validity of regulatory fees requires that the fees be allocated in a manner that bears a fair and reasonable relationship to the fee payor's burdens on or benefits from the regulatory activity.

[6] The regulatory activity for which water right fees are charged is the SWRCB's water right program.

or benefits from the regulatory activity. Regarding the second criterion, SWRCB made a fair allocation as between charges to applicants and charges to water right permit and license holders. The SWRCB set the fees so that most of the program costs will be paid by permit and license fees, consistent with the fact application processing constitutes less than half of the costs of water right administration.[7] The application fees are based on the costs of processing an average water right application, with some adjustments to 1) make the applications for smaller appropriations affordable; 2) avoid increasing the enforcement burden due to small water users' taking water without a right; 3) relate the fee to the face amount of water to be appropriated by the project, to further the State's policy of discouraging the "cold storage" of water rights that are far in excess of actual use[8] and to encourage conservation; 4) add charges for the more expensive processing of assignments or releases from priority of state-filed applications and petitions to amend the Fully Appropriated Streams Declaration; and 5) account for the fact that larger applications cost more to process and impose a greater need for regulation because of the potential for greater impacts on the public interest, other water right holders, and the environment. Generally, applying these principles means that the fee for filing an application is less than the actual cost of processing the application.

The Division estimates the cost of processing an average water right application to be $22,326. The face values of seventy percent of permits and licenses are less than 100 acre-feet per annum, and forty-five percent are less than ten acre-feet per annum. Based on the sizes of most projects, a charge of $10 per acre-foot is less than the full cost of processing an application. Further, the application fee of $10 per acre-foot, which is a one time fee so long as the applicant diligently pursues the application, is comparatively low considering the annual cost of buying water at wholesale from the Department of Water Resources at rates varying from $24 per acre-foot to

[7] Colusa does not appear to challenge the apportionment of fees as between water right applicants and holders of permits and licenses. Indeed, Colusa incorporates by reference the arguments in a petition for reconsideration filed by the *NCWA* petitioners. That petition for reconsideration includes arguments against the permit and license fees that if accepted would result in having applicants pay for a larger portion of the total fees than is provided for under the fee regulations.

[8] See *California Trout, Inc. v. State Water Resources Control Board* (1989) 207 Cal.App.3d 585, 618 [255 Cal.Rptr. 184, 204] ["cold storage is not permitted by law"].

$246 per acre-foot at a turnout.[9] If Colusa were to buy this amount of water every year instead of obtaining a water right, it would spend many times more than the one-time $10 per acre-foot application fee under the current fee schedule.

Further, it can be anticipated that reviewing and processing an application like Colusa's would require a substantial commitment of resources by the SWRCB. To appropriate water during periods when Reclamation is not providing replacement water, Colusa or its members will have to establish that water is available for appropriation. Analysis of water availability is difficult and time consuming in the Sacramento River system. SWRCB will not be able to rely on the water availability assessment in D-1045. The Sacramento River system currently is fully appropriated during much of the year. The season of unavailability often exceeds the July and August period when Reclamation is providing replacement water.

3.2.3 The Supplemental Fee Does Not Violate Article X, Section 2 of the California Constitution

Colusa argues that imposing the supplemental fee on it would destroy the water administration system it envisions under Application 31481. Colusa further states that imposing the fee will cause Colusa's effective demise, and will make it unable to continue performing as the collective representative of the Colusa Drain water users. As a result, Colusa argues the SWRCB would have to regulate as many as 80 different water users in order to enforce limits of water diversions from the Colusa Drain. Colusa also suggests that if Application 31481 is cancelled for nonpayment of the supplemental fee, its contract with Reclamation would end, and that each of its 80 members would then require a contract with Reclamation. Colusa asserts that by assessing the supplemental fee, thereby interfering with its plan to administer the water rights of the Colusa Basin, the SWRCB would violate the constitutional mandate to put the water resources of the

[9] The application fee also is comparatively low considering the overall cost of constructing a large water storage project. For example, Los Vaqueros Reservoir cost $450 million to construct, with a capacity of 100,000 acre-feet. If the Los Vaqueros application were filed now for its current capacity, it would be charged an application fee of $1 million. Considering the extensive hearings and decision-making process involved in that case, it is likely that the SWRCB spent considerably more than $1 million processing the application.

State to beneficial and reasonable use to the fullest extent possible, thereby violating California Constitution, article X, section 2.[10]

Colusa's argument is unavailing. Division 2 of the Water Code is in furtherance of article X, section 2 of the California Constitution. (See Wat. Code, § 1050.) The due diligence requirements and the water right fee provisions are imposed pursuant to Division 2 of the Water Code.

The SWRCB also disagrees with Colusa's assertion that imposing the supplemental fee is unreasonable. In effect, Colusa is stating that assessment of the supplemental filing fee will result in cancellation of the application, that its members may in the future take water during times when their water rights are inadequate, and that the SWRCB will have to take enforcement action to protect other legal users of the water. In other words, Colusa is arguing that the SWRCB should waive Colusa's fees in order to promote administrative efficiency, because the SWRCB might otherwise be forced to take enforcement action against unauthorized diversions by its members. Improving administrative efficiency is a worthy goal. If the SWRCB did as Colusa suggests, however, it would encourage others to divert illegally in the hopes of obtaining similar treatment. (See Governor's Commission to Review California Water Rights Law, Final Report (1978) at 70 [rejecting proposals for legislation establishing a streamlined water right application process for small, unauthorized diversions because it would reward illegal diverters and could harm other water users].) Further, Colusa's argument is inapposite to the provision under which it seeks relief: promoting administrative efficiency is not a purpose of article X, section 2 of the California Constitutional; this section is intended to promote efficiency of water use. It does not necessarily follow that waiving the fee would promote more efficient water use or would be needed to meet constitutional requirements, and Colusa has provided nothing that would prove this argument.

[10] The language referenced in California Constitution, Article X, section 2 actually states: ". . . the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, . . ."

Obtaining water rights for water users taking water from the Colusa Drain is an important, and long-delayed, step in ensuring that the water users legally can divert water during the season when no water is available in their priority level. Despite the apparent lack of water rights of some of the diverters from the Colusa Drain, the SWRCB has forborne taking enforcement action against these diverters on the basis that they are working on getting water rights. The fact that Colusa has obtained a contract with Reclamation to replace the water that some of Colusa's members otherwise would take without compensation from senior downstream water right holders has helped avoid harm to others. Nevertheless, these water users cannot legally take water without having a water right or a water supply contract that covers any water diversions that are not covered by a water right. As discussed above, the filing fee, as supplemented, is in fact reasonably related to the cost of processing the application. Requiring these water users to have a water supply contract for water during periods when water is unavailable to their water right priority, and requiring them to obtain a permit or permits, including paying the reasonable fees for processing the application, does not amount to a failure to put water resources to beneficial use to the fullest extent of which they are capable,[11] rather, it puts them in a position where they may be subject to enforcement action if they take water that should be left in the watercourse for a senior user downstream.

3.2.4 Colusa's Intention to Issue Partial Assignments of Application 31481 Does Not Justify Special Treatment

Colusa states that Application 31481 should be treated as a state-filed application, not as a "typical" water right application. Colusa states that it does not intend to pursue a permit and license, but instead intends to hold this application as agent for its shareholders, who will be assigned portions of the application to get their own permits and licenses. Because Colusa itself does not plan to pursue this application, Colusa argues that it should not be required to pay the supplemental fee. This argument, however, ignores several issues, including: Who should pay the fee if Colusa does not pay it? How long can the application remain on file without cancellation if someone does not diligently pursue its approval? How do the costs of processing

[11] The reason that these water users need additional supplies is the converse of their argument -- because the water resources already are fully used, these water users' use of the water would unreasonably deprive the senior beneficial uses of water in the absence of their providing replacement water to the senior users.

numerous partial assignments of this application compare with the costs of processing it as a single application?

Under California Code of Regulations, title 23, section 1062(a)(3), $5000 is to be added to the fee if the application involves an assignment of a state-filed application pursuant to Water Code section 10504. If Application 31481 were treated as a state-filed application, therefore, each assignment would be subjected to an additional $5000 charge. Application 31481 is not, however, a state-filed application, and it therefore does not qualify for relief from the diligence requirements of Part 2 of Division 2 of the Water Code. Under Water Code section 10500, state-filed applications are relieved from the diligence requirements, thereby allowing them to be held in trust without being processed for extended periods of time. Water Code section 10500 provides in pertinent part as follows:

> "The statutory requirements of Part 2 (commencing at Section 1200) of Division 2 relating to diligence shall not apply to applications filed under this part, except as otherwise provided in Section 10504."

Section 10504 provides, among other matters, that after a state-filed application or portion thereof is assigned, the diligence requirements in Part 2 of Division 2 of the Water Code apply to the assignee.

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Part 2 of Division 2 of the Water Code includes numerous provisions requiring diligence on the part of a water right applicant. These provisions function to keep an applicant from delaying processing of an application and to keep the applicant from tying up a water right priority, which could cause uncertainty to more junior but more diligent applicants for water rights from the same source.[12] Diligence requirements for applicants are set forth in Water Code sections 1270, 1271, 1276, 1311-1317, 1320, 1322-1324, 1333-1335, and 1346. Additional diligence requirements apply after the SWRCB approves an application and issues a permit. Additionally, the annual application fees authorized pursuant to Water Code section 1525, subdivisions (b)(1) and (d)(2), promote diligence on the part of the applicants.

Based on the diligence requirements, Colusa's plan to hold Application 31481 in trust without seeking a permit appears non-viable. Because Application 31481 is not a state-filed application, Colusa must diligently pursue Application 31481 to keep it from being cancelled, and for each year that Colusa delays pursuing this application, the SWRCB will charge an annual application fee. Instead of the process Colusa suggests it will follow, Colusa could assign all of Application 31481 to its members promptly so that all pieces can either proceed at once or be cancelled, or Colusa could assist its members individually to file and pursue necessary water right applications, or Colusa could promptly pursue Application 31481 and subsequently either assign parts of its resulting water right permit to its members or sell water to its members for their use. Because Colusa's asserted plan to keep its application on file without pursuing it is not consistent with the statutory requirements for diligent pursuit of a water right application, Colusa has no basis for arguing that it should not be charged the full amount of the application fee. Accordingly Colusa must pay the supplemental fee to keep Application 31481 from being cancelled. Colusa's argument highlights one of the positive features of the fees: they help

[12] The Governor's Commission to Review California Water Rights Law, Final Report (1978) at 18-19 discusses the importance of reducing uncertainty in California water rights law and the use of diligence requirements to achieve this end. As the Governor's Commission noted, a major objective of the statutory provisions now codified in Part 2 of Division 2 of the Water Code, was to reduce uncertainty. (*Id.* at 16). Uncertainty as to how much water may ultimately be claimed under previously filed applications that are not being diligently pursued imposes a burden on subsequent applicants who are planning projects to divert water for beneficial use. It also imposes a substantial burden on the SWRCB in determining how much water is actually available for appropriation for the subsequently filed applications, increasing the cost of processing those applications. (See *People v. Shirokow* (1980) 26 Cal.3d 301, 310 [162 Cal.Rptr. 30, 36, 605 P.2d 859, 866] ["the board is hindered in its task by any uncertainty as to the availability of water for appropriation."].)

promote the statutory policies requiring diligent pursuant of water right applications and permits to prevent water rights from being held in "cold storage."

IT IS HEREBY ORDERED THAT the petition for reconsideration filed by Colusa Drain Mutual Water Company seeking reconsideration of the March 3, 2004, assessment by the Division of Water Rights of the State Water Resources Control Board of a supplemental filing fee for pending Application 31481, is denied.

Dated: June 1, 2004

ORIGINAL SIGNED BY HARRY SCHUELLER for
Celeste Cantú
Executive Director

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