

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WRO 2005-0004-EXEC**

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In the Matter of the Petitions for Reconsideration of the

**CORDUA IRRIGATION DISTRICT, FRIANT POWER AUTHORITY,  
KAWEAH RIVER POWER AUTHORITY, M&T INCORPORATED,  
NEVADA IRRIGATION DISTRICT, PARADISE IRRIGATION DISTRICT,  
SOLANO IRRIGATION DISTRICT, AND SOUTH FEATHER  
WATER AND POWER AGENCY**

Regarding Annual Water Right Fee Determinations

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**ORDER DENYING RECONSIDERATION**

**BY THE EXECUTIVE DIRECTOR**

**1.0 INTRODUCTION**

The Cordua Irrigation District, Friant Power Authority, Kaweah River Power Authority, M&T Incorporated, Nevada Irrigation District (NID), Paradise Irrigation District, Solano Irrigation District, and South Feather Water and Power Agency (South Feather) collectively referred to herein as "Petitioners," individually petition the State Water Resources Control Board (SWRCB) for reconsideration and a refund of water right fees assessed by the State Board of Equalization (BOE) on October 18, 2004. In general, Petitioners allege that the Senate Bill 1049, SWRCB Resolution No. 2004-0061, the SWRCB's emergency fee regulations, and the water right fees are unconstitutional and invalid. They request the SWRCB to find that the fee assessments were improperly made 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. Additionally, NID raises a factual issue relating to its fee assessment, which the SWRCB has determined is meritorious. The SWRCB has directed BOE to correct NID's assessment and, accordingly, denies reconsideration of NID's claim on the basis that it is now moot.

## **2.0 GROUND FOR RECONSIDERATION**

A fee payer may petition for reconsideration of the SWRCB's determination that the fee payer is required to pay a fee, or the SWRCB's determination regarding the amount of the fee. (Cal. Code Regs., tit. 23, § 1077.)<sup>1</sup> 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.) 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.

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. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) A petition for reconsideration of a fee assessed by BOE must include a copy of the notice of assessment. (§ 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.

If the subject of the petition relates to an assessment of a fee by BOE, the SWRCB's decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) A petition is timely filed only if the SWRCB or BOE receives it within 30 days of the date the assessment is issued. (*Ibid.*)

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<sup>1</sup> 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 of the SWRCB's regulations. (§ 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.*, subd. (a)(2)(A)-(C).)

This Order addresses the principal issues raised by Petitioners. To the extent that this Order does not address all of the issues raised by Petitioners, 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. (§§ 768-769, 1077.)

### **3.0 LEGAL AND FACTUAL BACKGROUND<sup>2</sup>**

The SWRCB's Division of Water Rights (Division) is the entity primarily responsible for administering the state's water right program. The primary source of funding for the water right program is regulatory fees deposited in the Water Rights Fund in the state treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, 2003-2004 Reg. Sess., Stats. 2003, ch. 741) required the SWRCB to adopt emergency regulations revising and establishing water right fees and revising fees for water quality certification. (Wat. Code, §§ 1525, 1530.) Pursuant to this legislation, the SWRCB revises the fee schedule each fiscal year, so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.* § 1525, subd. (d).) BOE is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year 2004-2005, the Budget Act of 2004 appropriates \$10.79 million for the state's water right program, including \$10.362 million for water right administration by the SWRCB

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<sup>2</sup> SWRCB Order WRO 2004-0011-Exec, which denied reconsideration of petitions for reconsideration filed by the Northern California Water Agency and other petitioners, contains an extensive discussion of the history of, and basis for, the SWRCB's water right and water quality certification fee program.

and \$0.428 million for water right fee collection by BOE.<sup>3</sup> The appropriation includes an appropriation of \$9.69 million from the Water Rights Fund. In accordance with the Water Code fee provisions, the SWRCB 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.<sup>4</sup> In Fiscal Year 2003-2004, the SWRCB collected \$7.44 million in water right fees and water quality certification fees deposited in the Water Rights Fund.<sup>5</sup> This amount exceeded the \$4.6 million appropriation from the Water Rights Fund made under the Budget Act of 2003 (Stats. 2003, ch. 157) by \$2.82 million.<sup>6</sup> The 2004-2005 budget assumes that the Water Rights Fund will have a balance of \$0.89 million at the end of the year. Taking into account the over-collection of fees from last fiscal year, the amount to remain in reserve, and the \$1.5 million to be funded through a transfer from the Resources Trust Fund to the Water Rights Fund, the SWRCB determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$6.26 million this fiscal year. Assuming a non-collection rate of 15 percent,<sup>7</sup> the SWRCB determined that the total amount to be billed is \$7.36 million.

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<sup>3</sup> The budget figures referenced in this Order for Fiscal Year 2004-2005 are based on the line item appropriations in the Budget Act of 2004. (Stats. 2004, ch. 208.) These figures are subject to adjustment based on control sections in the Budget Act. (See, e.g., *id.* § 3.60.) After these adjustments are made, the precise amounts budgeted will be slightly different than the line appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this Order.

<sup>4</sup> 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 money transferred from other funds. The budget allocation of \$9.69 million from the Water Rights Fund includes \$1.5 million to pay for work described in Assembly Bill 2121 (Stats. 2004, ch. 943). The Budget Act provides for the transfer of funds from the Resources Trust Fund, which is supported by tidelands oil revenues, to cover this work, but in the event that those funds are not available, the Governor's Office has directed the Division not to perform the work described in Assembly Bill 2121. The water right fees have not been set to cover this work.

<sup>5</sup> Fees associated with water quality certification for Federal Energy Regulatory Commission (FERC) licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

<sup>6</sup> The 2003-2004 fee calculations were based on a fee revenue target of \$4.4 million, which was the amount specified in the Governor's proposed budget. The final budget, which included the adjustments called for by control sections in the Budget Act, provided for a \$4.6 million allocation from the Water Rights Fund.

<sup>7</sup> This assumption is based on the rate of collection in Fiscal Year 2003-2004. Although over a quarter of the fee payers did not pay their fees by the end of the last fiscal year, most of the delinquent fee payers owed relatively small amounts of money. Most fee payers who owed larger amounts paid their fees on time. The figures available to the SWRCB indicate that during Fiscal Year 2003-2004, BOE collected 88 percent of the amount billed. There is some uncertainty as to whether fee collections this year will run as high as last year. In fact, several larger fee  
*[footnote continues on next page]*

On September 30, 2004, the SWRCB adopted emergency regulations amending the water right and water quality certification fee schedules to meet the requirements of the Water Code and the Budget Act. (SWRCB Resolution No. 2004-0061.) The emergency regulations became effective on October 14, 2004, and on October 18, 2004, BOE sent out most of the notices of determination for annual permit and license fees under section 1066 of the SWRCB's regulations.

#### **4.0 FEE DETERMINATIONS COVERED BY THE PETITION**

Although Petitioners individually filed their petitions for reconsideration, their petitions repeat the same legal arguments nearly verbatim.<sup>8</sup> Other than a factual issue raised by NID and South Feather,<sup>9</sup> none of the petitions provide any additional arguments, information or supporting authorities that distinguishes it from the others. Accordingly, the SWRCB has decided to consolidate its consideration of the petitions in this Order instead of issuing an individual order on each petition. Attachment 1 identifies the persons whose petitions are the subject of this Order.<sup>10</sup>

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payers who paid their fees for Fiscal Year 2003-2004 on time, failed to do so this year. (See § 1074, subd. (d) [annual fees are due and payable 30 days after BOE issues a notice of assessment].) The SWRCB anticipates that after it has acted on pending petitions for reconsideration and BOE issues notices of redetermination, these larger fee payers will pay their fees in order to avoid late penalties. (See *id.*, subd. (g)(1) [allowing postponement of payment during the pendency of a petition for reconsideration, subject to interest from the original due date].) The assumption made when the SWRCB adopted the fee regulations for Fiscal Year 2004-2005--that collection rates would approximate those for Fiscal Year 2003-2004--still provides the most reliable basis available for projecting fee collections.

<sup>8</sup> For the most part, it appears that the petitioners are represented by the same law firm and the petition language was copied wholesale. Five of the petitions were filed under the same law firm's letterhead and although three other petitions were filed under different letterhead, they all contain identical arguments.

<sup>9</sup> South Feather asserts that it should not have been assessed a fee for A014948 because it does not own the water right. According to the SWRCB's records, South Feather is correct in that it does not own A014948. The SWRCB, however, has no record indicating that a fee was assessed for A014948 in the October 18 billing cycle and South Feather did not provide a Notice of Determination for that water right with its petition. South Feather's claim is unsubstantiated and will not be considered further.

<sup>10</sup> This order and Attachment 1 use the SWRCB identification number in identifying the fee payers. SWRCB identification numbers start with "application" or "A," which refers to the permittee's or licensee's water right application number.

The SWRCB's review in this Order is limited to annual permit and license fee assessments issued on October 18, 2004. (Wat. Code § 1537, subd. (b)(2); Cal. Code Regs., tit. 23, § 1077.) Requests for reconsideration of fees that had not been issued when the petitions for reconsideration were filed are premature because there was no SWRCB determination to review at that time. BOE assessed other annual fees on November 23, 2004, after the petition period for fees assessed on October 18 had closed, and will issue additional assessments for some annual fees that were not included in October 18 or November 23 assessments. Those later-assessed fees are not properly within the scope of review of the October 18 fee assessments.<sup>11</sup> Petitioners' contentions that may be relevant to later-issued assessments, but are not relevant to any of the fee determinations that were issued on October 18, will not be considered in this order.<sup>12</sup> Accordingly, Petitioners' contentions that are not relevant to any of the fee determinations for which a petition for reconsideration has been filed will not be considered herein. Additionally, the SWRCB will not consider allegations where the Petitioners have failed to include points and authorities in support of the legal issues raised. (§ 769, subd. (c).)

Most Petitioners failed to include the notice of assessment with their petitions. (See § 1077, subd. (a).) Although the SWRCB requires strict adherence to the statute and regulations governing a petition for reconsideration, it can accept a timely filed petition if the petition substantially complies by providing all of the required information, in a manner that is clearly identified and readily accessible, even though the information may not be in the proper format. In this case, the SWRCB has accepted certain letters referencing the petitions that did not include a notice of assessment as long as the petitioner included and clearly identified the same information contained in a notice: the fee payer's name, either the water right or BOE identification number, the amount assessed, and the billing period or assessment date. This

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<sup>11</sup> Properly filed petitions requesting reconsideration of those later-issued assessments will be considered separately as appropriate. Prematurely filed petitions are not timely and will not be considered further.

<sup>12</sup> For example, Petitioners contest the imposition of water right fees on persons holding water supply contracts with the United States Bureau of Reclamation. As noted above, however, the SWRCB's review in this Order is limited to annual permit and license fee bills issued on October 18, 2004, and fees subsequently assessed are not properly within the scope of review of the October 18 fee assessments.

includes petitioners who submitted a copy of a Statement of Account, instead of a copy of the assessment, where the Statement of Account includes an October 18 assessment.

It bears emphasis, however, that the requirement for including a copy of the notice of assessment serves an important function. A petition is not acceptable simply because the information provided in the notice of assessment might be available somewhere in the materials included in or incorporated by reference in the petition. The SWRCB receives a very large number of petitions for reconsideration on annual fees, which must be decided in a relatively brief period, and the information included in the notice of assessment is necessary to properly process the petitions for reconsideration. For example, more than 300 persons or entities petitioned fee assessments sent out on October 18, 2004. To the extent the SWRCB is required to track down information because the petitioner fails to comply with the requirements specified in SWRCB regulations, the processing of petitions for reconsideration would be delayed, and for many petitions the staff time that would have to be devoted to the effort would be disproportionate to the amount of the fee involved. In the future, the SWRCB may deny a petition for failure to include a copy of the notice of assessment as required under the regulations, without considering whether the information that would be provided in the notice of assessment is set forth elsewhere in the petition.

#### **5.0 SENATE BILL 1049, RESOLUTION NO. 2004-0061, AND THE FEE REGULATIONS ESTABLISH LAWFUL REGULATORY FEES**

Petitioners raise a variety of constitutional and statutory challenges to Senate Bill 1049, Resolution No. 2004-0061, and the water right fees, including claims that (1) the fees are unconstitutional and invalid, (2) Senate Bill 1049, SWRCB Resolution No. 2004-0061 and the SWRCB's regulations impose a new tax in violation of California Constitution Article XIII A (Proposition 13), (3) SWRCB Resolution No. 2004 - 0061 and the SWRCB's regulations impose ad valorem taxes prohibited by Proposition 13, (4) Senate Bill 1049, SWRCB Resolution No. 2004-0061 and the emergency regulations are unconstitutionally discriminatory against water right holders, and (5) the fee schedule exceeds the reasonable cost of providing services necessary to the SWRCB's regulatory activity. Petitioners' claims are meritless.

## 5.1 The Fees are Regulatory Fees Charged in Connection with Regulatory Activities

The gravamen of Petitioners' argument is that the water right fees are not regulatory fees, but are illegal taxes in violation of the California Constitution. 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.<sup>13</sup> 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. 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.) Thus, the

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<sup>13</sup> 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.



SWRCB has discretion and flexibility in developing a regulatory fee structure as long as it is reasonable.

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, the Legislature 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 right 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.)

Thus, the evidence in the record, including the Budget Act and the Governor's Budget clearly demonstrate that the estimated program costs that form the basis of the water right fees are reasonable. The amount budgeted for the water right program provides a good estimate of what the costs of the SWRCB's regulatory program plus the BOE's costs for collection will be.<sup>14</sup>

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<sup>14</sup> The Governor's Budget includes expenditures from previous fiscal years, as well as the amount the Governor proposes to be appropriated for the upcoming fiscal year. This information clearly indicates that the amount budgeted for the water right program is a fair estimate of the amount that will be expended.

Appropriations from the Water Rights Fund are less than total program costs, the fees are calculated based on the amounts appropriated from the Water Rights Fund, and the fees are not used for any other purpose. The estimated costs of the regulatory activity for which the fees are assessed have been clearly established, and the fees do not exceed the estimated costs of that regulatory activity.

Without citation or analysis, Petitioners state that the fees regulations are inconsistent with statutory mandates requiring an agency to adopt fees that do not exceed the reasonable cost of providing services necessary to the SWRCB's regulatory activity. 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.) Adjudicative hearings and public workshops related to the administration of water rights also are an integral part of the regulatory program. Adjudicative hearings often 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. All of the costs of the SWRCB's water right program are within the scope of the costs that may be recovered through fees under Water Code section 1525, subdivision (c), and all of these costs may be recovered through regulatory fees.

The evidence in the record also demonstrates that the fee schedule allocates program costs among fee payers so that the charges allocated to a payer bear a fair or reasonable relationship to the payer's burdens on or benefits from the regulatory activity. The basis for this conclusion is summarized below, and discussed in greater detail in a memorandum prepared in connection

with the SWRCB's adoption of the fee schedule for this fiscal year.<sup>15</sup>

In establishing the fees, the SWRCB decided that annual permit and license fees should fund most of the program in Fiscal Year 2004-2005. These 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.) 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 and reasonable allocation of costs, based on the fee payers' burdens on or benefits from the regulatory activity.

For example, most 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: 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; monitoring and enforcement to determine when permits and licenses should be revoked for non-use; administering the requirements for SWRCB approval of changes in point of diversion, place of use, or purpose of use; and investigating complaints alleging violation of permit or license conditions, waste of water, or violation of the public trust. Moreover, 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, considering protests filed by those permit and license holders, and determining whether and on what conditions to approve new appropriations. Similarly, much of the environmental review costs associated with processing new applications involves consideration of the cumulative impacts of

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<sup>15</sup> Memorandum to File by Victoria A. Whitney, Chief, SWRCB Division of Water Rights (October 6, 2004), entitled "Water Rights Fee Program Summary and Recommended Fee Schedule for Fiscal Year 2004-2005."

the proposed diversion in combination with the diversions of others holding permits and licenses to divert from the same stream system. Thus, each water right holder both benefits from, and imposes a burden on, the Division's administration of water rights.

Permit and license holders also benefit from the activities of the SWRCB to prevent unauthorized diversions, including review of diversions made under claim of riparian or pre-1914 rights to make sure that diversions do not exceed what is authorized under those rights. Unauthorized diversions deprive permit and license holders of water to which they are entitled. Where unappropriated water is available, and the ultimate effect of enforcement is to require a permit for a previously unauthorized diversion, that action still serves to provide better regulatory control over diversions, providing better protection for those holding previously issued permits and licenses, as well as to require the diverter to pay its fair share of fees.

Moreover, a regulatory program is for the protection of the health and safety of the public, which benefits from the orderly management of the state's water resources; accordingly, a regulatory fee is enacted for purposes broader than assigning the privilege to use a service or to obtain a permit. Fees may be charged because the activities of the fee payer create the need for the regulatory program, even if the program provides no clear benefit to the fee payer, other than the benefits of greater predictability and uniformity.<sup>16</sup> In particular, the costs of environmental protection may be shifted from the general public to persons who propose or carry out activities that impact the state's natural resources, without subverting Proposition 13's objectives. (*CAPS, supra*, 79 Cal.App.4th at p. 950. See also, *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] [finding that shifting pollution control costs from the tax-paying public to the pollution-causing industries to be a reasonable way to achieve Proposition 13's goal of tax relief]; *Brydon v. East*

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<sup>16</sup> The courts have concurrent jurisdiction to apply many of the requirements applied as part of the SWRCB's regulatory program. (See generally, *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426 [189 Cal.Rptr. 346, 350].) The existence of a regulatory program means that these requirements are applied more predictably and more uniformly than if these requirements were applied only through private actions in court. Regulatory proceedings will also be less expensive than litigation. In these respects a regulatory program may be seen as a benefit to regulated entities, even where regulation focuses on protecting the public from harm threatened by regulated activities instead of protecting the interests of the regulated entities.

*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].)

In sum, the water right fees adopted by the SWRCB are regulatory fees and do not violate Proposition 13. The fee revenues collected do not surpass the costs of the regulatory program they support and the fee allocation bears a reasonable relationship to the fee payers' burdens on and benefits from water right regulatory activity.

## **5.2 The Fees Are Regulatory Fees and Not Ad Valorem Taxes Subject to Proposition 13**

Petitioners contend that SWRCB Resolution No. 2004-0061 and the emergency regulations impose ad valorem taxes prohibited by Proposition 13. As explained above, Senate Bill 1049, SWRCB Resolution No. 2004-0061 and the emergency regulations establish a regulatory fee, not a tax, and therefore are not prohibited under Proposition 13. Nonetheless, and although water rights are considered to be property rights that are usufructuary in nature,<sup>17</sup> Petitioners apparently contend that water rights should be considered to be real property falling within the aegis of Proposition 13. The fees, however, 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 taxes on real property. Revenue and Taxation Code section 2202 defines ad valorem tax to 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

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<sup>17</sup> 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].)

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].) Rather, the fees are based on the amount of water authorized to be diverted or stored under each permit or license. Petitioners' claim that the fees are ad valorem taxes has no basis.

### **5.3 The Fees Are Not Unconstitutionally Discriminatory as Applied to Water Right Holders**

Petitioners baldly assert that Senate Bill 1049, SWRCB Resolution No. 2004-0061, and the emergency regulations are unconstitutionally discriminatory as applied to water right holders. It is unclear from this statement what Petitioners are arguing, and in that respect the petitions are defective. If Petitioners mean to state that the Senate Bill 1049, SWRCB Resolution No. 2004-0061, and the emergency regulations discriminate between water right holders and Central Valley Project (CVP) water supply contractors, then the petitions should specify which interests are being given less favorable treatment and how. Moreover, as discussed above, any objections to fees imposed on CVP water supply contractors are not within the scope of this Order. If Petitioners mean to challenge the allocation of fees based on the amount of water authorized to be diverted, this argument also lacks merit. The SWRCB has a rational basis for concluding that permits and licenses that authorize larger diversions require more regulatory oversight. This approach distributes the costs of regulation in proportion to the distribution of water. Although far from uniform, the Division's workload is related to the size of the project and, in general, larger diverters generally have a greater impact on the environment. Therefore, the cost allocation bears a reasonable relationship to the benefits provided.

### **6.0 FACTUAL ISSUE RAISED BY NEVADA IRRIGATION DISTRICT**

Nevada Irrigation District requests a reduction of its annual license fee under water right application A002372 because annual permit and license fees for projects for hydropower generation receive a 70 percent discount. (§ 1071.) The Division agrees that the correct fee is \$1,246.58, not the amount billed of \$4,155.27, and has directed BOE to take appropriate action. This claim is moot.

## **7.0 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 any erroneous fee bills, thus rendering those claims moot. To the extent that this order does not address all of the issues raised in 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** the petitions for reconsideration are denied.

Dated: January 12, 2005

*ORIGINAL SIGNED BY*  
Celeste Cantú  
Executive Director

**Attachment 1**

<b>NAME</b>	<b>SWRCB ID</b>
CORDUA IRRIGATION DISTRICT	A009927
CORDUA IRRIGATION DISTRICT	A012371
FRIANT POWER AUTHORITY	A025882
KAWEAH RIVER POWER AUTHORITY	A026607
M & T INCORPORATED	A005109
M & T INCORPORATED	A008188
M & T INCORPORATED	A008213
M & T INCORPORATED	A008565
M & T INCORPORATED	A009735
M & T INCORPORATED	A015866
NEVADA IRRIGATION DISTRICT	A001270
NEVADA IRRIGATION DISTRICT	A001614
NEVADA IRRIGATION DISTRICT	A001615
NEVADA IRRIGATION DISTRICT	A002275
NEVADA IRRIGATION DISTRICT	A002276
NEVADA IRRIGATION DISTRICT	A002372
NEVADA IRRIGATION DISTRICT	A002652A
NEVADA IRRIGATION DISTRICT	A002652B
NEVADA IRRIGATION DISTRICT	A004309
NEVADA IRRIGATION DISTRICT	A004310
NEVADA IRRIGATION DISTRICT	A005193
NEVADA IRRIGATION DISTRICT	A006229
NEVADA IRRIGATION DISTRICT	A006529
NEVADA IRRIGATION DISTRICT	A006701
NEVADA IRRIGATION DISTRICT	A006702
NEVADA IRRIGATION DISTRICT	A008177
NEVADA IRRIGATION DISTRICT	A008178
NEVADA IRRIGATION DISTRICT	A008179
NEVADA IRRIGATION DISTRICT	A008180
NEVADA IRRIGATION DISTRICT	A015525
NEVADA IRRIGATION DISTRICT	A020017
NEVADA IRRIGATION DISTRICT	A020072
NEVADA IRRIGATION DISTRICT	A021151
NEVADA IRRIGATION DISTRICT	A021152
NEVADA IRRIGATION DISTRICT	A024983
NEVADA IRRIGATION DISTRICT	A026866
NEVADA IRRIGATION DISTRICT	A027132
NEVADA IRRIGATION DISTRICT	A027559
PARADISE IRRIGATION DIST	A000476
PARADISE IRRIGATION DIST	A022061
SOLANO IRRIGATION DISTRICT	A025176
SOUTH FEATHER WATER & POWER	A001651
SOUTH FEATHER WATER & POWER	A002142
SOUTH FEATHER WATER & POWER	A002778
SOUTH FEATHER WATER & POWER	A002979
SOUTH FEATHER WATER & POWER	A013676
SOUTH FEATHER WATER & POWER	A013956
SOUTH FEATHER WATER & POWER	A013957
SOUTH FEATHER WATER & POWER	A014112
SOUTH FEATHER WATER & POWER	A014113