

Water Right Fee Litigation Update 2013

California Farm Bureau Federation v. State Water Resources Control Board

Water Right Fee Background

Since 2004, the Water Code requires the State Water Board to adopt emergency regulations revising and establishing water right fees to be deposited in the Water Rights Fund in the State Treasury and revising fees for water quality certification. In addition to assessing annual fees and one-time filing fees, the State Water Board may pass through fees to federal water contractors who contract for water supply under a federally held water right (commonly referred to as the “pass-through fees”). The State Water Board must set a fee schedule that will generate revenues in the amount appropriated by the Legislature for expenditure from the Water Rights Fund for support of water right program activities. The State Water Board also must review and revise the fees each fiscal year as necessary to conform to these revenue levels. The Board of Equalization (BOE) is responsible for collecting annual water right fees on behalf of the State Water Board. The fee regulations first became effective January 1, 2004, and have been revised annually since then.

Litigation Background

Each year since the State Water Board first adopted emergency water right fee regulations in 2003, the Northern California Water Association and the Central Valley Project Water Association (NCWA-CVPWA) and the California Farm Bureau Federation (Farm Bureau) have sued the State Water Board and BOE over the water right fees. These entities allege, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The NCWA-CVPWA and Farm Bureau actions over the Fiscal Year 2003-2004 fees have been consolidated and the other actions have stayed pending resolution of the first two consolidated cases.

In 2005 the trial court upheld the water right fees adopted in Fiscal Year 2003-2004 as legitimate regulatory fees, and NCWA-CVPWA and the Farm Bureau appealed to the Third District Court of Appeal. In January 2007 the appellate court issued a decision upholding the fee statute, but invalidating the State Water Board's annual water right fee regulations. The Court of Appeal's decision was superseded when the California Supreme Court granted review.

In 2011 the Supreme Court issued an opinion *in California Farm Bureau Federation v. State Water Resources Control Board* (S150518) that addressed litigation over the annual water right fees adopted for Fiscal Year 2003-2004. The Supreme Court's opinion upheld the water right fee statutes on their face, including the pass-through provisions for the federal water contractors, and remanded issues concerning the application of the fee statute through the State Water Board's regulations setting annual permit and license fees back to the trial court for further fact-finding.

In December 2012, a trial was held on the Fiscal Year 2003-2004 annual water right fees. On September 6, 2013, the trial court issued a proposed statement of decision. In his proposed decision, the trial court judge invalidated the fee regulations. A hearing on the proposed statement of decision was held on October 30, 2013. A final decision is anticipated in the next few months and the parties will then consider whether to appeal the decision.

Effect of Litigation on Current Water Right Fees

1. Will the State Water Board continue to assess water right fees?

Yes. The Supreme Court upheld the fee statutes that require the State Water Board to collect water right fees.

2. Does the trial court's decision apply to all water right fees?

No. The fee schedule includes both annual fees and filing fees. The filing fees have not been challenged.

3. Do I need to petition for reconsideration of future fee assessments if I believe no fee is due or the fee has been miscalculated?

Yes, pursuant to the fee statutes and the State Water Board's regulations, a person who believes that a fee assessment is inappropriate or improper must timely file a petition for reconsideration of that assessment.

4. What is the deadline for petitioning for reconsideration of the annual fees assessed on November 5, 2013?

A petition for reconsideration is timely filed only if the State Water Board receives the petition within 30 days of the date the fee was assessed. In this case, the deadline is December 5, 2013.

5. What effect will the trial court's decision have on future fees?

At this point, the trial court's decision does not affect the State Water Board's assessment of current and future water right fees. As explained above, because the Supreme Court upheld the fee statute as constitutional, the State Water Board must continue to collect annual water right fees. Moreover, the trial court's decision only addresses the Fiscal Year 2003-2004 fees. Once the State Water Board receives a final decision from the trial court, it will then consider whether to appeal that decision.