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5 **Motion for Dismissal of A06-02-026**
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9 **Attachment 11**

10 **Exhibit 11**

11 **State Water Resources Control Board**

12 **Order WR 2006-0011-EXEC**
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15 **Dated 4/10/06**
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17 http://www.waterrights.ca.gov/hearings/WaterRightOrders/2006/wro2006_0011_exec.pdf
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19 **Pages = cover, 1 - 8**
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STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2006-0011-EXEC

In the Matter of the Petition for Reconsideration of the
SANTA BARBARA COUNTY WATER AGENCY
Regarding Water Right Fee Determination for Fiscal Year 2005-2006.

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

By this order, the Executive Director denies Santa Barbara County Water Agency's (Santa Barbara) petition for reconsideration of the Notice of Determination of an annual water right fee in the amount of \$5,073.70 for the U.S. Bureau of Reclamation's (USBR) license for the Twitchell Project (License 10416, Application 11343, USBR1009), which is located on the Cuyama River in San Luis Obispo and Santa Barbara Counties. The State Water Resources Control Board (State Water Board or SWRCB) allocated the fee to Santa Barbara pursuant to Water Code section 1540 because Santa Barbara has a contract for the delivery of Twitchell Project water from the USBR and the USBR declined to pay the fee.

For the reasons set forth below, the Executive Director finds that the decision to impose the fee was appropriate and proper. Therefore, Santa Barbara's petition for reconsideration is denied.

¹ SWRCB Resolution No. 2002-0104 delegates to the Executive Director the authority to 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 a petition for reconsideration of a disputed fee 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. This delegation is not affected by *Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245 [20 Cal.Rptr.3d 898]. In that case, the Court held that the State Water Board could not defer making findings that were prerequisite to approving a water right application by delegating to its staff the authority to make the findings after the application had been approved. The holding in *Central Delta* applies to State Water Board action on water right applications; it does not apply to water right fee assessments.

2.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board'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 (Stats. 2003, ch. 741) required the State Water Board 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 State Water Board 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).) The water right fees include one-time filing fees and annual fees. (*Id.* § 1525.) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.* § 1536.)

In Fiscal Year (FY) 2005-2006, the Budget Act appropriates \$11.447 million for the water right program, including \$11.085 million for water right administration by the State Water Board and \$0.362 million for water right fee collection by BOE. (Stats. 2005, ch. 38, as amended by Stats. 2005, ch. 39.)² Most of the funding for the water right program – a total of \$9.589 million – is appropriated from the Water Rights Fund. As required by 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

² The budget figures referenced in this order for FY 2005-2006 are based on the line item appropriations in the Budget Act of 2005. These figures are subject to adjustment based on control sections in the Budget Act. 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.

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 money transferred from other funds. The Budget Act of 2005 reappropriates \$1.5 million that was appropriated in the Budget Act of 2004, but not expended, to pay for work described in Assembly Bill No. 2121 (Stats. 2004, ch. 943). This appropriation was based on a transfer from the Resources Trust Fund, a fund that is supported by tidelands oil revenues, and is reappropriated in the Budget Act of 2005 because insufficient funds were deposited in the Resources Trust Fund to make the transfer in FY 2004-2005. The State Water Board did not include this amount in calculating the amount of revenue to be collected from fees.

In FY 2004-2005, the State Water Board collected \$8.01 million in water right fees and water quality certification fees deposited in the Water Rights Fund.⁴ Additional funds remained in the Water Rights Fund from previous years' fees. After subtracting program costs and accounting for encumbrances, approximately \$1.831 million was left in the Water Rights Fund at the end of the fiscal year. The State Water Board accounted for this excess, which exceeded the State Water Board's allocation specified in the Budget Act of 2004, by subtracting it from the budget target for FY 2005-2006. Thus, for the purposes of calculating this year's fees, the State Water Board determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$7.886 million (\$9.717 - 1.831 million) this fiscal year. Assuming a non-collection rate of 10 percent,⁵ the total amount billed in annual fees was \$8.029 million, with the remaining balance expected to be collected from one-time filing fees.

On September 22, 2005, the State Water Board 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. 2005-0069.) The emergency regulations became effective on October 21, 2005, and on November 7, 2005, BOE sent out notices of determination for annual permit and license fees, including a notice of determination that Santa Barbara owes an annual water right fee in the amount of \$5,073.70 for License 10416.

Santa Barbara filed a petition for reconsideration of the fee determination, which was received on December 6, 2005.⁶

⁴ Fees associated with water quality certification for Federal Energy Regulatory Commission licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

⁵ The State Water Board assumed a 90 percent collection for this fiscal year. This assumption is based on BOE's rate of collection in FY 2004-2005. The amount attributed to non-collection includes reduction in fee revenues because the State Water Board may reduce or rescind some fees after the fee payer files a petition for reconsideration identifying a problem, as well as fees that are properly assessed but not paid by the end of the fiscal year. Unpaid fees are still subject to collection, with interest, but it may take some time before the Water Rights Fund receives significant revenues as a result of collection actions against parties who failed to pay their fees on time.

⁶ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the State Water 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 State Water Board is not divested of jurisdiction to act upon the petition simply because the State Water Board failed to complete its review of the petition on time. (See *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151 [43 Cal.Rptr.2d 681]; SWRCB Order WQ 98-05-UST at pp. 3-4.)

3.0 GROUNDS FOR RECONSIDERATION

Pursuant to the State Water Board's regulations,⁷ 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 determination must include certain information, including the name and address of the petitioner, the specific State Water 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 that petitioner requests. (§§ 769, subd. (a)(1)-(6); 1077, subd. (a).) Section 769, subdivision (c), of the regulations provides further 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 a copy of the notice of assessment and must be received by the State Water Board within 30 days of the date the assessment was issued. (§ 1077, subds. (a) & (b).)

The State Water Board may refuse to reconsider a fee determination 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

⁷ 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.

that the determination was appropriate and proper, set aside or modify the determination, or take other appropriate action. (*Id.*, subd. (a)(2)(A)-(C).)

4.0 DISCUSSION

Santa Barbara contends that the notice of determination was invalid because Santa Barbara does not hold a water right permit or license and Santa Barbara does not hold a contract with the USBR for the delivery of water. Santa Barbara requests the State Water Board to revoke the notice of determination.⁸

Water Code section 1525 and section 1066 of the State Water Board's regulations authorize the assessment of annual water right permit and license fees. If a permit or license is owned by the United States or an Indian tribe, and the United States or the Indian tribe declines to pay the annual permit or license fee on the basis of sovereign immunity, the State Water Board may allocate the fee "to persons or entities who have contracts for the delivery of water from the [United States or the Indian tribe]." (Wat. Code, § 1540.) In this case, the USBR holds License 10416 and the USBR declined to pay the annual license fee. Accordingly, the State Water Board allocated the fee to Santa Barbara because Santa Barbara has a contract for the delivery of water from the USBR.

The contract between the USBR and Santa Barbara, dated April 6, 1956, provides that "[Santa Barbara], upon behalf of the [Santa Maria Valley Water Conservation] District, shall have the perpetual right to use all water that becomes available through the construction and operation of the [Twitchell] Project." (Santa Barbara's Petition for Reconsideration, Exhibit D, p. 9.) The contract requires the USBR to deliver the water directly to the Santa Maria Valley Water Conservation District (Santa Maria), a district within Santa Barbara's boundaries. (*Id.* at pp. 3, 9.)

⁸ Santa Barbara's petition for reconsideration requests the State Water Board to revoke the notice of determination and notify BOE of the decision to revoke the notice of determination. Santa Barbara filed a request to amend its petition, which was not received by the Division until December 23, 2005, which added an express request for a refund of the fee. Because Santa Barbara's petition for reconsideration lacks merit, it is unnecessary to reach the issue whether the amendment was necessary to cure a defect in the petition, or whether it was permissible to amend the petition after the 30-day deadline to file the petition.

Santa Barbara entered into a subcontract with Santa Maria, dated December 29, 1955, which grants to Santa Maria the right to use all of the water available from the Twitchell Project. (Santa Barbara’s Petition for Reconsideration, Exhibit E, p. 11.) The subcontract requires Santa Barbara, when it is operating the Project, to release water for the use and benefit of Santa Maria. (*Ibid.*) The subcontract specifies that “the delivery or furnishing of . . . water to Santa Maria from [the Twitchell Project] by the United States shall be construed as furnishing or delivery by [Santa Barbara].” (*Id.* at p. 5.)

Santa Barbara’s contract with the USBR constitutes a contract for the delivery of water from the United States within the meaning of Water Code section 1540, even though the contract, as well as Santa Barbara’s subcontract with Santa Maria, requires the water to be delivered directly to Santa Maria. Santa Barbara contends that it does not have a contract with the United States for the delivery of water because Santa Maria has the right to use water made available from the Twitchell Project. Similarly, Santa Barbara contends that it does not take or deliver water from the Project because Santa Maria has assumed control over Project operations.⁹ Contrary to Santa Barbara’s contentions, however, Water Code section 1540 requires only that the person or entity to which a fee is allocated hold a contract for the delivery of water from the United States. Section 1540 does not require that the contract provide for the delivery of water from the United States to the contractor, nor does section 1540 require that the contractor physically take or deliver the water.

Santa Barbara also contends that no water is delivered from the Twitchell Project. This contention is based on section 51-5.1 of the Santa Barbara County Water Agency Act, which provides in relevant part: “There shall not be delivered to any member unit more water than the amount to which such member unit is entitled under the contract entered into by [Santa Barbara] and such member unit; provided that the release of water from any reservoir in the amount

⁹ In support of these contentions, Santa Barbara cites to the two contracts discussed above. (Santa Barbara also cites to License 10416 itself, which, like Santa Barbara’s contract with the USBR, provides that Santa Barbara, on behalf of Santa Maria, has the right to use all of the water that becomes available through the construction and operation of the Twitchell Project.) The copies of the contracts that Santa Barbara submitted in support of its petition for reconsideration are missing the even-numbered pages. Accordingly, it was impossible to verify all of Santa Barbara’s assertions concerning the content of the contracts. The ability to verify all of Santa Barbara’s assertions, however, would not have changed the conclusions reached in this order.

required to satisfy any vested right shall not constitute a delivery of water” (Stats. 1945, ch. 1501, § 5.1, p. 2785, West’s Ann. Wat.-Appen. (1999 ed.) § 51-5.1, subd. (c).) Santa Barbara asserts that all of the water that is released from the Twitchell Project is released in order to satisfy the prior vested rights of Santa Maria and its landowners and therefore no water is “delivered” from the Project.

This contention lacks merit for several reasons. First, section 51-5.1 of the Santa Barbara County Water Agency Act governs contracts between Santa Barbara and its member units. That section has no bearing on the proper interpretation of Water Code section 1540. Second, as stated above, Water Code section 1540 requires only that the person or entity to which a fee is allocated hold a contract for the delivery of water from the United States; section 1540 does not require that water actually be delivered pursuant to the contract. Third, Santa Barbara has not submitted any evidence in support of its assertion that all of the water released from Twitchell Reservoir is needed to satisfy prior rights, and therefore no water is ever delivered to Santa Maria under License 10416. Moreover, if this assertion is correct, then License 10416 should be revoked for non-use. Santa Barbara may request the USBR to request revocation of the license to avoid payment of water right fees in the future.

In summary, the decision to allocate the annual fee for License 10416 to Santa Barbara was consistent with Water Code section 1540 because Santa Barbara holds a contract for the delivery of water from the USBR. It also merits note that the decision to allocate the fee to Santa Barbara was supported by practical considerations. The State Water Board maintains records of water right permittees and licensees. For purposes of allocating fees pursuant to Water Code section 1540, the State Water Board has obtained from the USBR records of persons and entities that have contracts with the USBR for the delivery of water from the USBR. But the State Water Board does not have records of every person or entity to which water ultimately may be delivered pursuant to a subcontract, and it would be impracticable to acquire and maintain this information. In the instant case, Santa Maria appears to be the only subcontractor, but in the case of the USBR’s Central Valley Project, for example, numerous subcontractors exist.

5.0 CONCLUSION

For the reasons discussed above, the Executive Director finds that the decision to impose the annual license fee on Santa Barbara was appropriate and proper and therefore Santa Barbara's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED that Santa Barbara's petition for reconsideration is denied.

Dated: April 10, 2006

ORIGINAL SIGNED BY
Celeste Cantú
Executive Director

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