

State Water Resources Control Board

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SUPERIOR COURT UPHOLDS WATER RIGHT FEES

Challenge to State Water Board's adoption of water right fees denied

Sacramento – A Sacramento County Superior Court judge has rejected a challenge brought against water rights fees adopted by the State Water Resources Control Board. The State Water Board established the fees at the Legislature's direction to support the State's water right program. The court found that the fees are legitimate regulatory fees and not unconstitutional taxes.

The State Water Board's Division of Water Rights administers water rights through a permit and license system that protects water right holders, the public interest, and the environment. The Legislature required the State Water Board to adopt regulations establishing fees to support its water right program.

Historically, the program has been primarily supported by the General Fund. The Legislature changed the program's funding source following a recommendation by the State Legislative Analyst's Office that water right holders should bear the costs of the program.

Without the funding from fees, the State Water Board would have had to shut down much of the State's water right program. "The court's decision allows the State Water Board to continue to administer and protect water rights in California," said Arthur G. Baggett Jr., Chair of the State Water Board. "The regulatory program, which is supported by these fees, is essential to the administration of the State's water allocation system and protection of the environment. While we didn't request the change in our budget from general funds to fees, we were confident that the court would recognize that the fee structure we developed was reasonable and fair."

"The Legislature recognized that the activities of the water right holders create the need for the regulatory program," said Victoria Whitney, Chief, Division of Water Rights, "and it decided that the water right holders and not the general public should pay for that regulation."

The court's ruling was in response to a challenge brought by the Northern California Water Association, the Central Valley Project Water Association and the California Farm Bureau Federation. Those entities claimed that the legislation authorizing the fees and the State Water Board's regulations were unconstitutional.

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Fees: Litigation

- NCWA and Farm Bureau files suit claiming that the fee is an illegal tax
- Test for a “Regulatory Fee”
 - may not generate funds that exceed the cost of the regulatory program
 - reasonable relationship between the cost allocation and the burdens from and benefits to the payors from the regulatory activity

Fees Effectuate Water Policy

- The fee schedule enforces principles of beneficial use, diligence and forfeiture.
 - Voluntary revocations
 - Amount claimed on original application
 - Pending applications

Fees: Changes This Year

- Slight decrease in annual fee (2.5 cents/acre-foot)
- Slight increase in filing fees
- No consensus on how to readjust annual fees
 - big projects v. the little guy
 - problems with fee for service

Fees: Administration

- BOE processes and collects all assessed annual fees.
- 13,000 bills sent. 1,749 Petitions for Reconsideration received.
- 17 recalculations
- Quirks

FEES: Structure

- Annual Fees based upon the volume of water authorized for diversion under water right permit or license. Fee is the greater of \$100 or \$0.03 per acre-foot based on the total annual amount of diversion.
- Pass-through provision prorates US Bureau of Reclamation fees among its water supply contractors.
- Other fees for pending applications, small domestic or stock pond registrations, petitions, water quality certification on hydroelectric projects, new applications, groundwater recordation.

Water Right Fees 2-2-2

Judge Raymond Cadei upheld the water right fees in their entirety, recognizing that the fees challenged in the action are legitimate regulatory fees and that the State Water Board satisfied the law in developing the water right fee structure. His decision states that the fee structure was "developed after careful consideration of factors specific to the regulatory program of the Division of Water Rights."

Judge Cadei further noted the challenges that the State Water Board faced in developing a fee structure, stating "[I]t is significant that the water rights regulatory program presented unique challenges that appear to be unprecedented in the case law regarding regulatory fees. Perhaps the greatest of these challenges was the fact that a significant portion of overall California water rights are held by the federal government." The court concluded that it was reasonable for the State Water Board to determine that the federal government was unlikely to pay the fees and to allocate the fees to the federal government contractors. Judge Cadei also found that other aspects of the water right fee structure were reasonable. "The fact that other approaches might have been chosen or that reasonable minds might differ regarding the method chosen suggests that [the State Water Board] acted within the legitimate scope of its discretion."

A copy of Judge Cadei's opinion can be seen at http://www.waterrights.ca.gov/Fees/docs/fee_court_ruling.pdf. Additional information about the State Water Board's water right program can be seen at <http://www.waterrights.ca.gov/>.

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