

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2009-0006-EXEC

In the Matter of the Petition for Reconsideration of
KINGS RIVER WATER ASSOCIATION
Regarding Water Right Fee Determinations for Fiscal Year 2008-2009

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

By this order the Executive Director denies the petition filed by Kings River Water Association (KRWA) for reconsideration of the State Water Resources Control Board's (State Water Board or Board) notices determining that KRWA was required to pay the following annual water right fees for Fiscal Year 2008-2009:

<u>Basis of Right</u>	<u>Fee</u>
License 11517 (Application 353)	\$ 6,834.70
License 11518 (Application 360)	83,679.70
License 11519 (Application 5640)	27,502.07
License 11520 (Application 10979)	3,939.70
License 11521 (Application 15231)	28,920.70
License 11522 (Application 16469)	3,174.70

KRWA contends that the assessed fees are: (1) based on a misinterpretation of the State Water Board's regulations, (2) in violation of a June 18, 2004, settlement agreement with KRWA, (3) illegal because KRWA's licensed rights overlap with each other and with KRWA's claimed pre-1914 appropriative rights, and (4) illegal taxes. KRWA requests the State Water Board to cancel the fees assessed or, in the alternative, to reduce portions of the amounts assessed.

¹ State Water Board Resolution No. 2002 - 0104 delegates to the Executive Director the authority to conduct and 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 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 refuse to reconsider a petition for reconsideration, deny the petition, or set aside or modify the fee assessment.

For the reasons set forth below, the Executive Director finds that KRCA is collaterally estopped from relitigating the issues raised in its petition. In the alternative, the decision to impose the fees was appropriate and proper. Accordingly, KRWA's petition for reconsideration is denied.

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 rights program is regulatory fees deposited in the Water Rights Fund in the State treasury. Legislation enacted in 2003 (Sen. Bill No. 1049, 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)(3).) The State Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2008-2009, the Budget Act appropriates \$11.377 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.382 million – is appropriated from the Water Rights Fund.² In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$420,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$35,000 from the Water Rights Fund to the California Environmental Protection Agency for support functions that the agency provides for the State Water Board's water right program. (Stats. 2008, ch. 268, as amended by Stats. 2008, ch. 269.)³

In accordance with 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

² In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program includes \$3.558 million in general funds, \$289,000 in tobacco tax funds, and \$148,000 in federal trust funds. The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund, and do not include appropriations from the Water Rights Fund that are attributable to transfers from other funds.

³ In addition to making appropriations that are specific as to the particular fund and agency involved, the Budget Act includes appropriations that are allocated by the Department of Finance. The Budget Act also includes generally applicable sections that provide for adjustments of appropriations by the Department of Finance.

into account money in the fund from other sources.⁴ The State Water Board has determined the current annual permit and license fee schedule for FY 2007-2008 will continue to generate sufficient revenues to support the water right program activities for FY 2008-2009.⁵ Accordingly, it did not revise the regulations applicable to annual permits and licenses this year, and the annual permit and license fee schedule for this fiscal year is identical to the fee schedule for FY 2007-2008.⁶

On November 10, 2008, BOE mailed notices of determination for annual permit and license fees, including the notices received by KRWA for Licenses 11517, 11518, 11519, 11520, 11521 and 11522. Pursuant to section 1066, subdivision (a) of the State Water Board's regulations,⁷ the annual fee for each of KRWA's licenses was \$100, plus \$0.03 per acre-foot for each acre-foot in excess of 10 acre-feet, based on the total amount of water authorized to be diverted under each license. KRWA filed a petition for reconsideration of the fee determinations for its licenses, which was received on November 25, 2008.

3.0 GROUNDS FOR RECONSIDERATION

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 determination of 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.) The State Water Board's adoption of regulations may not be the subject of a petition for reconsideration. (Wat. Code, § 1537, subd. (b)(4).)

⁴ 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)), penalties collected for water right violations (*id.*, § 1551, subd. (b)), and money transferred from other funds.

⁵ As explained in the Memorandum to File dated October 6, 2008, from Victoria A. Whitney, Chief, Division of Water Rights, as of June 30, 2008 the Water Rights Fund had collected \$10.1 million in revenues from water right and water quality certification fees associated with water supply actions. The Division ultimately anticipates total fee revenues of \$5.91 million for FY 2008-2009.

⁶ The State Water Board, however, revised other portions of the fee schedule for FY 2008-2009, which are not the subject of this petition for reconsideration. By Resolution No. 2008-0074, the State Water Board increased water quality certification fees, increased the upper limit on certain filing fees, and decreased fees for most temporary permits filed under Water Code section 1425. Fees for most fee payers, however, remained unchanged from the previous fiscal year.

⁷ All further references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

When a State Water Board 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 State Water Board action of which reconsideration is requested, the date on which the State Water Board made its decision, the reason the action was inappropriate or improper, the reason why the petitioner believes that no fee is due or how the petitioner believes the fee has been miscalculated, and the specific action that the petitioner requests. (§§ 769, subd. (a)(1)-(6), 1077, subd. (a).) Section 769, subdivision (c) of the regulations further provides that a petition 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 either a copy of the notice of assessment or all of the following information: (1) the fee payer's name, (2) the water right or BOE identification number, (3) the amount assessed, and (4) the billing period or assessment date. (§ 1077, subd. (a)(2).)

A petition for reconsideration must be filed not later than 30 days from the date on which the State Water Board adopts a decision. (Wat. Code, § 1122.) If the subject of the petition relates to an assessment of a fee by BOE, the State Water Board's decision regarding the assessment is deemed adopted on the date of assessment by BOE. (§ 1077, subd. (b).) The deadline for filing a petition for reconsideration of BOE's November 10, 2008 fee assessments was December 10, 2008.

The State Water Board 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. (§ 770, subd. (a)(1).) Alternatively, after review of the record, the petition may be denied if the State Water Board 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).)

4.0 PETITIONERS' ARGUMENTS THAT THE FEES WERE MISCALCULATED OR OVERSTATED AND THAT THE REGULATIONS AND ASSESSMENTS ARE ILLEGAL ARE WITHOUT MERIT.

KRWA contends that the assessed fees are: (1) based on a misinterpretation of the State Water Board's regulations, (2) in violation of a June 18, 2004, settlement agreement with KRWA, (3) illegal because KRWA's licensed rights overlap with each other and with KRWA's claimed pre-1914 appropriative rights, and (4) illegal taxes. KRWA requests the State Water Board to cancel the fees assessed or, in the alternative, to reduce portions of the amounts assessed.

KRWA has made all of these contentions in petitions that KRWA previously filed challenging annual fees assessed for FY 2003-2004, FY 2004-2005, FY 2005-2006, FY 2006-2007, and FY 2007-2008. The Executive Director denied those petitions in Order WRO 2004-0017-EXEC, Order WRO 2005-0011-EXEC, Order WR 2006-0008-EXEC, Order WR 2007-0011-EXEC, and Order WR 2008-0004-EXEC, respectively. KRWA's current petition repeats the same arguments in support of its contentions nearly verbatim.

KRWA has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in the previous orders. Accordingly, this order incorporates by reference and adopts the reasoning of Orders WRO 2004-0017-EXEC, WRO 2005-0011-EXEC, WR 2006-0008-EXEC, WR 2007-0011-EXEC, and the documents that supported those orders.⁸ For the reasons set forth in Order WR 2006-0008-EXEC, KRWA is collaterally estopped from relitigating most if not all of the issues raised in its current petition. Assuming for the sake of argument that collateral estoppel does not apply, the Executive Director finds that the decision to impose the fees was appropriate and proper for the reasons set forth in Orders WRO 2004-0017-EXEC, WRO 2005-0011-EXEC, WR 2006-0008-EXEC, and WR 2007-0011-EXEC, and therefore KRWA's petitions should be denied.⁹

⁸ Order WRO 2005-0011-EXEC also addressed contentions that are not included in the petition currently before the State Water Board. To the extent that Order WRO 2005-0011-EXEC addressed contentions that are not properly before the State Water Board in this proceeding and are not relevant to the contentions addressed in this order, the incorporation by reference of Order WRO 2005-0011-EXEC does not extend to those contentions and those contentions are not addressed by this order.

⁹ This order addresses the principal issues raised by KRWA. To the extent that this order does not address all of the issues raised by the KRWA, the State Water Board finds either that these issues are insubstantial or that KRWA has failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations. (§§ 768-769, 1077.)

5.0 CONCLUSION

As explained in Order WR 2006-0008-EXEC, collateral estoppel bars KRWA from re-litigating the issues raised in its current petition for reconsideration. Alternatively, the Executive Director finds that the decision to impose annual license fees on KRWA was appropriate and proper for the reasons set forth in Orders WRO 2004-0017-EXEC, WRO 2005-0011-EXEC, WR 2006-0008-EXEC, and WR 2007-0011-EXEC. Accordingly, KRWA's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT the Kings River Water Association petition for reconsideration is denied.

Dated: FEB 05 2009



Dorothy Rice
Executive Director