

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2011-0009-EXEC

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In the Matter of the Petitions for Reconsideration of  
**KINGS RIVER WATER ASSOCIATION**  
Regarding Water Right Fee Determinations for Fiscal Years 2009-2010 and 2010-2011

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR:<sup>1</sup>

**1.0 INTRODUCTION**

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

Fiscal Year 2009-2010

<u>Basis of Right</u>	<u>Fee</u>
License 11517 (Application 353)	\$ 5,263.27
License 11518 (Application 360)	64,177.77
License 11519 (Application 5640)	21,108.26
License 11520 (Application 10979)	3,043.77
License 11521 (Application 15231)	22,195.87
License 11522 (Application 16469)	2,457.27

Fiscal Year 2010-2011

<u>Basis of Right</u>	<u>Fee</u>
License 11517 (Application 353)	\$ 6,834.70
License 11518 (Application 360)	83,679.70

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<sup>1</sup> 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.

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.

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

## 2.0 LEGAL AND FACTUAL BACKGROUND

The State Water Board is the state agency entity primarily responsible for administering the State's water right program. The State Water Board administers the program through its Division of Water Rights (Division). The funding for the water right program is scheduled separately in the Budget Act, and includes funding from several different sources.

(See Stats. 2009, ch. 712, § 2.00, Item 3940-001-0439, schedules (2), (6), (11), (18) & (19).)

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, 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 reviews the fee schedule each fiscal year and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount set forth in the annual Budget Act. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater, or less than, the revenue levels set forth in the annual Budget Act, the State Water Board may adjust the annual fees to compensate for the over- or under-collection of revenue. (*Ibid.*) The Board of Equalization (BOE) is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2009-2010, the Budget Act of 2009 appropriated \$11.658 million to the State Water Board for regulatory activities included in the Board's water right program. Most of this funding – a total of \$7.447 million – was appropriated from the Water Rights Fund. The State Water Board's budget for the water right program also included \$3.772 million in general funds, \$291,000 in tobacco tax funds, and \$148,000 in federal trust funds. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriated \$397,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriated \$40,000 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. 2009, 3rd Ex. Sess., ch. 1.)

In FY 2010-2011, the Legislature appropriated \$18.012 million from all funding sources for water right program expenditures by the State Water Board. This amount includes a \$9.104 million appropriation from the Water Rights Fund in the Budget Act of 2010<sup>2</sup> and a continuing appropriation from the Water Rights Fund of \$3.75 million for enforcement positions,<sup>3</sup> for a total of \$12.854 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's current budget for the water right program also includes \$4.698 million in general funds and \$460,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act of 2010 appropriates \$429,000 from the Water Rights Fund to BOE and appropriates \$39,000 from the Water Rights Fund to the California Environmental Protection Agency.

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 fund in the annual Budget Act, taking into account money in the fund from other sources.<sup>4</sup> In FY 2008-2009, the annual permit and license fee was \$100 plus \$0.03 for each acre-foot in excess of 10 acre-feet, based on the total amount of water

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<sup>2</sup> Stats. 2010, ch. 712.

<sup>3</sup> In addition to the Budget Act appropriation of \$9.104 million, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 7th Ex. Sess. ch. 2) (SB 7X 8) authorizes a continuous appropriation to the Water Rights Fund of \$3.75 million for water right enforcement positions.

<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 penalties collected for water right violations (*id.*, § 1551, subd. (b)). The calculations used to determine water right fees do not include appropriations from funds other than the Water Rights Fund.

authorized to be diverted under each permit or license. In FY 2009-2010, the State Water Board revised the emergency regulations establishing annual permit and license fees to provide a one-time credit for that fiscal year of \$.007 for each acre-foot in excess of 10 acre-feet.<sup>5</sup>

The State Water Board revised the emergency regulations governing water right fees for FY 2009-2010 on September 15, 2009. (State Water Board Resolution No. 2009-0071.) The Office of Administrative Law approved the emergency regulations on October 21, 2009. On November 3, 2009, 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. KRWA filed a petition for reconsideration of the fee determinations for its licenses, which was received on November 18, 2009.

This fiscal year, the Division recommended continuing to charge water right permit and license holders an annual fee of \$100 plus \$0.03 for each acre-foot in excess of 10 acre-feet. As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated February 25, 2011, entitled "Recommended Water Right and Water Quality Certification Fee Schedule for [FY] 2010-2011" (hereinafter "Evoy Memorandum"), the one-time credit is no longer in effect in FY 2010-2011.<sup>6</sup>

On October 19, 2010, the State Water Board adopted Resolution No. 2010-0052, revising the emergency regulations governing water right fees for FY 2010-2011. The Office of Administrative Law approved the emergency regulations on November 17, 2010. On December 6, 2010, 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. KRWA filed a petition for reconsideration of the fee determinations for its licenses, which was received on December 28, 2010.

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<sup>5</sup> The one-time credit was designed to account for higher than anticipated fee revenues and lower than anticipated expenditures in FY 2008-2009. As explained in the memorandum to File, dated December 3, 2009, from Victoria A. Whitney, Deputy Director for Water Rights, on June 30, 2009, the Water Rights Fund had an ending balance of \$4.09 million. Fee revenues were higher than anticipated, due in part to the unexpectedly high collection of one-time filing fees, and budgeted expenditures were lower than projected, due in part to furloughs.

<sup>6</sup> As also explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of \$5.763 million for the current fiscal year, and the Division determined that the fund condition projections for FY 2010-2011 should include a reserve for economic uncertainty of about \$2.7 million. For the purposes of calculating this year's fees, the amount by which reserves would be spent down to reduce the fund balance to a \$2.7 million reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of \$8.997 million.

### 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. (Cal. Code Regs., tit. 23, § 1077.)<sup>7</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.) The State Water Board's adoption of regulations may not be the subject of a petition for reconsideration. (Wat. Code, § 1537, subd. (b)(4).) 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

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

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 3, 2009 fee assessments was December 3, 2009. The deadline for filing a petition for reconsideration of BOE's December 6, 2010 fee assessments was January 5, 2011.

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).)<sup>8</sup>

#### **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, FY 2007-2008, and FY 2008-2009. 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, Order WR 2008-0004-EXEC, and Order WR 2009-0006-EXEC, respectively. In its current petitions, KRWA acknowledges that the petitions repeat the same arguments in support of its contentions nearly verbatim, and KRWA states that it does not expect the State Water Board to alter its position relative to KRWA's arguments. In addition,

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<sup>8</sup> The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the 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 Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147-1148, 1150-1151; State Water Board Order WQ 98-05-UST at pp. 3-4.)

KRWA stipulates that in response to KRWA's current petitions, the Board may incorporate by reference the Board's prior responses to KRWA's previous petitions. 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.<sup>9</sup> 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 petitions. 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 2004-0017-EXEC, WRO 2005-0011-EXEC, WR 2006-0008-EXEC, and WR 2007-0011-EXEC, and therefore KRWA's petitions should be denied.<sup>10</sup>

## 5.0 CONCLUSION

As explained in Order WR 2006-0008-EXEC, collateral estoppel bars KRWA from relitigating the issues raised in its current petitions 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 2004-0017-EXEC, WRO 2005-0011-EXEC, WR 2006-0008-EXEC, and WR 2007-0011-EXEC. Accordingly, KRWA's petitions for reconsideration should be denied.

## ORDER

**IT IS HEREBY ORDERED THAT KRWA's petitions for reconsideration are denied.**

Dated: **MAR 24 2011**



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Thomas Howard  
Executive Director

<sup>9</sup> Order WRO 2005-0011-EXEC also addressed contentions that are not included in the petitions 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 these proceedings 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.

<sup>10</sup> 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.)

