

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2012-0009-EXEC

In the Matter of the Petition for Reconsideration of
KINGS RIVER WATER ASSOCIATION
Regarding Water Right Fee Determinations for Fiscal Year 2011-2012

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) notices determining that KRWA was required to pay the following annual water right fees for Fiscal Year (FY) 2011-2012:

<u>Basis of Right</u>	<u>Fee</u>
License 11517 (Application 353)	\$11,374.50
License 11518 (Application 360)	\$139,449.50
License 11519 (Application 5640)	\$45,820.12
License 11520 (Application 10979)	\$6,549.50
License 11521 (Application 15231)	\$48,184.50
License 11522 (Application 16469)	\$5,274.50

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

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.

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 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 is the state agency 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. 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 reviews the fee schedule each fiscal year, and, as necessary, revises the schedule so that the fees will generate revenues consistent with the amount appropriated by the Legislature from the Water Rights Fund, taking into account the reserves in the fund. (*Id.*, § 1525, subd. (d)(3).) If the revenue collected in the preceding year was greater or less than the amount appropriated, 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.)

As explained in the Memorandum to File from Barbara Evoy, Deputy Director for the Division of Water Rights, dated January 23, 2012, entitled "Recommended Water Right Fee Schedule for Fiscal Year 2011-12" (hereinafter "Evoy Memorandum"), in FY 2011-2012, the Legislature appropriated \$17.769 million from all funding sources for water right program expenditures by the State Water Board. The Evoy Memorandum provides more detail, but in summary, this amount includes a \$12.591 million appropriation from the Water Rights Fund in the Budget Act of 2011 (Stats. 2011, ch. 33) and a continuing appropriation from the Water Rights Fund of

\$3.75 million for enforcement positions,² for a total of \$16.341 million appropriated to the State Water Board from the Water Rights Fund. The State Water Board's budget for the water right program also includes \$1 million in general funds and \$428,000 from other sources. In addition to the amounts appropriated to the State Water Board, the Budget Act appropriates \$437,000 from the Water Rights Fund to BOE for its water right fee collection efforts and appropriates \$38,000 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.

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 into account money in the fund from other sources.³ As explained in the Evoy Memorandum, the Water Rights Fund had a beginning balance of \$5.52 million for the fiscal year, and the Division determined that the fund condition projections for FY 2011-2012 should include a reserve for economic uncertainty of about 20 percent of annual expenditures, which is approximately \$3.36 million. Without a fee increase for the FY 2011-2012, however, the Water Rights Fund would have an ending balance of \$149,000, which is below a prudent reserve. Thus, the Division proposed a fee increase for FY 2011-2012 in which the Water Rights Fund balance would be drawn down to an ending balance of \$5.09 million, leaving the fund with a 30 percent reserve. 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 \$5.09 million reserve was subtracted from the total amount that would otherwise be collected in fee revenues, resulting in a fee revenue target of \$14.419 million.

As described in the Evoy Memorandum, the Division recommended amending the annual permit and license fee by increasing the base fee from \$100 to \$150 and increasing the rate per acre-foot from \$0.03 per acre-foot to \$0.05 per acre-foot for diversions exceeding 10 acre-feet. (See

² In addition to the annual Budget Act, Senate Bill No. 8 of the 2009-2010 Seventh Extraordinary Session (Stats. 2009 (7th Ex. Sess.) ch. 2 (SB 7X 8), § 11), makes a continuous appropriation from the Water Rights Fund of \$3.75 million for water right enforcement. In 2011, the Legislature amended Water Code section 1525, subdivision (d)(3) to clarify that the amounts collected through fees should be sufficient to cover the appropriations set forth in the Budget Act and the continuous appropriation in SB 7X 8. (Stats. 2011, ch. 579, § 9.)

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 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.

Cal. Code Regs., tit. 23, § 1066.) The Division also recommended revising other portions of the fee schedule for FY 2011-2012, which are not the subject of this petition for reconsideration.

On September 19, 2011, the State Water Board accepted the Division's recommendations and adopted Resolution No. 2011-0043, revising the emergency regulations governing water right fees for FY 2011-2012. The Office of Administrative Law approved the emergency regulations on October 20, 2011. On November 2, 2011, 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 17, 2011.

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.)⁴ 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,

⁴ All further references are to the State Water Board's regulations located in title 23 of the California Code of Regulations unless otherwise indicated.

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 no 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 2, 2011 fee assessments was December 2, 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).)⁵

4.0 PETITIONER'S 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.

⁵ 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 has made all of these contentions in petitions that KRWA previously filed challenging annual fees assessed for the last eight fiscal years. 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, Order WR 2009-0006-EXEC, and Order WR 2011-0009-EXEC. In its current petition, KRWA has eliminated several arguments concerning the legality of the statutes authorizing the imposition of water right fees, in apparent recognition of the fact that the California Supreme Court disposed of those arguments in its recent decision in *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421. Otherwise, as KRWA acknowledges, KRWA's current petition repeats verbatim the arguments made in KRWA's past several petitions.

KRWA states that it does not expect the State Water Board to alter its position relative to KRWA's arguments. In addition, KRWA stipulates that in response to KRWA's current petition, 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.⁶ 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 petition should be denied.⁷

5.0 CONCLUSION

As explained in Order WR 2006-0008-EXEC, collateral estoppel bars KRWA from relitigating the issues raised in its current petition for reconsideration. Alternatively, the Executive Director

⁶ To the extent that the orders incorporated by reference 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 the orders does not extend to those contentions and those contentions are not addressed by this order.

⁷ 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 [footnote continues on next page]

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, KRWA's petition for reconsideration is denied.

Dated: 9/10/2012

Thomas Howard
Thomas Howard
Executive Director

failed to meet the requirements for a petition for reconsideration under the State Water Board's regulations.
(§§ 768-769, 1077.)