

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2007-0011-EXEC

In the Matter of the Petition for Reconsideration of the
KINGS RIVER WATER ASSOCIATION
Regarding Water Right Fee Determinations for Fiscal Year 2006-2007

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

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 SWRCB) determination that KRWA was required to pay the following annual water right fees: \$6,834.00 for License 11517 (Application 353); \$83,679.70 for License 11518 (Application 360); \$27,502.07 for License 11519 (Application 5640); \$3,939.70 for License 11520 (Application 10979); \$28,920.70 for License 11521 (Application 15231); and \$3,174.70 for License 11522 (Application 16469). In general, KRWA contends that (1) the fees were based on a misinterpretation of the State Water Board's regulations, (2) the State Water Board violated a June 18, 2004, settlement agreement with KRWA, and (3) the fees are illegal for a variety of reasons.

For the reasons set forth below, the Executive Director finds that KRWA is collaterally estopped from relitigating most if not all of the issues raised in its petition. In the alternative, the decision

¹ Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director. 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.

to impose the fees was appropriate and proper. Therefore, 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 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) 2006-2007, the Budget Act appropriates \$14.105 million for the water right program, including \$13.642 million for water right administration by the State Water Board, \$35,000 for support functions by the California Environmental Protection Agency (Cal/EPA), and \$428,000 for water right fee collection by BOE. (Stats. 2006, ch. 47, as amended by Stats. 2006, ch. 48.)² Most of the funding for the water right program – a total of \$12.166 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

² The Budget Act of 2006 includes a \$2.32 million loan from the Underground Storage Tank Cleanup Fund to the Water Rights Fund to be used for a new water rights information management system and to be repaid with interest by June 30, 2011. For purposes of calculating fees for FY 2006-2007, the State Water Board did not include appropriations from the Water Rights Fund attributable to this loan. Principal and interest to be repaid on the loan will be included in the fee calculations for the years in which the loan is repaid. Subtracting the amount loaned from the Underground Storage Tank Cleanup Fund, the amount appropriated from the Water Rights Fund is \$9.846 million.

The budget figures referenced in this order for FY 2006-2007 are based on estimated expenditures for FY 2006-2007, as projected in the Governor's Budget for 2007-2008 (California Budget 2007-08, <http://www.ebudget.ca.gov/>). They differ from the line item appropriations to the State Water Board, BOE and Cal/EPA in the Budget Act of 2006 because the Budget Act includes unallocated appropriations and control sections that result in the actual amount appropriated being slightly different than the line item appropriations. The Governor's Budget for the next fiscal year includes projected expenditures for the current fiscal year, and because these projections include adjustments to take into account unallocated appropriations and control sections in the Budget Act, they provide a more accurate projection of what actual expenditures will be for the current fiscal year.

Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.³

At a meeting of the State Water Board held on September 21, 2006, the State Water Board adopted regulations revising the water right and water quality certification fee schedule and regulations in accordance with the Budget Act of 2006. (State Water Board Res. No. 2006-0065; see Memorandum to File by Victoria Whitney, Division Chief, dated Sept. 21, 2006 [explaining basis for FY 2006-2007 fee schedule].) The State Water Board amended sections 1066 and 3833.1 of the fee regulations to increase annual permit and license fees and water quality certification fees from the fees in effect during FY 2005-2006, and to adjust certain filing fees. The emergency regulations adopted under Resolution 2006-0065 were not sent to the Office of Administrative Law for approval. The State Water Board subsequently learned that additional general fund support in FY 2006-2007 was available to reduce the need for an increase in annual fees.

Accordingly, on November 30, 2006, the Executive Director revised and re-adopted the emergency regulations to eliminate the annual fee and filing fee increases.⁴ (State Water Board Res. No. 2006-0094-EXEC.) The fee regulations as revised were re-adopted to reinstate and allow collection of annual permit and license fees, annual water quality certification fees, and filing fees in FY 2006-2007 at the same rates and subject to the same upper limits as were in effect during FY 2005-2006. On December 19, 2006, BOE sent out notices of determination for annual permit and license fees, including notices of determination that KRWA owed annual water right fees for Licenses 11517, 11518, 11519, 11520, 11521, and 11522.

Pursuant to section 1066, subd. (a), of the State Water Board's regulations,⁵ 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.

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

⁴ Resolution 2002-0104 delegates to the Executive Director the authority to revise or re-adopt emergency regulations that have been adopted by the State Water Board. By Resolution 2006-0065, the State Water Board adopted emergency regulations revising the water right and water quality certification fees. Accordingly, the Executive Director had the authority to revise and re-adopt the emergency regulations.

⁵ 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.

KRWA's annual license fees for this fiscal year are the same as KRWA's annual license fees for FY 2005-2006. KRWA filed for a petition for reconsideration of the fee determinations for its licenses, which was received on January 18, 2007.⁶

The State Water Board must consider KRWA's petition for reconsideration at a time when the statute authorizing water right fees and the basic structure of the implementing regulations are being challenged in pending litigation. Each year since 2003, the California Farm Bureau Federation (Farm Bureau), the Northern California Water Association (NCWA), and the Central Valley Project Water Association (CVPWA) have filed suit against the State Water Board and BOE, alleging, in part, that the fee legislation and the State Water Board's fee regulations are unconstitutional and invalid. The Farm Bureau, NCWA, and CVPWA actions over the FY 2003-2004 fees have been consolidated and the other actions have been stayed pending resolution of the consolidated case.

In 2005, the Sacramento County Superior Court issued a judgment upholding the water right fees in their entirety. The Farm Bureau, NCWA, and CVPWA appealed. On January 17, 2007, the Third District Court of Appeal issued a decision upholding the fee statute and invalidating the fee regulations for FY 2003-2004. (*California Farm Bureau Federation v. California State Water Resources Control Board* (2007) 146 Cal.App.4th 1126 [53 Cal.Rptr.3d 445].) The Court of Appeal remanded the case to the trial court with instructions to maintain the existing fee schedule until the State Water Board adopts a new fee schedule. The State Water Board and BOE have filed a petition for review by the California Supreme Court.

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 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

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.)

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 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

KRWA contends that (1) the fees were based on a misinterpretation of the State Water Board's regulations, (2) the State Water Board violated a June 18, 2004, settlement agreement with KRWA, (3) the fees are illegal because KRWA's licensed rights overlap with one another and with KRWA's claimed pre-1914 rights, and (4) the fees are illegal taxes. KRWA requests the State Water Board to cancel the fees or, in the alternative, to reduce the fees in accordance with KRWA's interpretation of the regulations.

KRWA made these same contentions in petitions that KRWA previously filed challenging annual fees issued in FY 2003-2004, FY 2004-2005, and FY 2005-2006. The Executive Director denied those petitions in Order WRO 2004-0017-EXEC, Order WRO 2005-0011-EXEC, and

Order WR 2006-0008-EXEC, respectively. KRWA's current petition repeats the same arguments in support of its contentions nearly verbatim. KRWA made only one substantive change, which was the addition of a citation to the Court of Appeal's recent decision in the *California Farm Bureau Federation* case, discussed above, in support of KRWA's contention that the fees are illegal taxes.

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 KRWA's current petition. Arguably, collateral estoppel does not operate to bar KRWA from relitigating KRWA's contention that the fees are illegal taxes, based on the Court of Appeal's recent decision in the *California Farm Bureau Federation* case. Even if collateral estoppel does not apply, however, either to this contention or any of KRWA's other contentions, the Executive Director finds that the decision to impose the fees was appropriate and proper and therefore KRWA's petition should be denied.

The Court of Appeal's decision in the *California Farm Bureau Federation* case provides a remedy only for those fee payers who timely sought administrative and judicial review of fees assessed for FY 2003-2004, and KRWA did not seek judicial review of the annual fees assessed against KRWA for that fiscal year. Nonetheless, the decision sets a precedent that could apply to the fee schedules for later fiscal years, including the FY 2006-2007 fee schedule at issue in this order. Notwithstanding the Court of Appeal's decision, however, and until the California Supreme Court either issues its own opinion or denies review of the Court of Appeal's decision, the State Water Board's position remains that the fees are valid regulatory fees, not illegal taxes, for the reasons set forth in Order WRO 2004-0017-EXEC and Order WRO 2005-0011-EXEC.

The State Water Board believes that the Court of Appeal's decision was incorrectly decided, in several respects, and is seeking review by the California Supreme Court. If the State Water Board were to grant refunds based on the Court of Appeal's decision, that action would become final and unreviewable. (See Wat. Code, § 1126, subd. (d).) Applying the Court of Appeal's decision in this order would effectively deprive the State Water Board and other fee payers, who will eventually be charged additional fees to the extent necessary to restore the condition of the Water Rights Fund, of the benefit of any subsequent decision by the California Supreme Court. (See *id.*, § 1525, subd. (d)(3) [requiring that in setting fees, the State Water Board must take into account any overcollection or undercollection in previous years].)

Moreover, to follow the Court of Appeal's decision in acting on KRWA's petition for reconsideration would be inconsistent with the orderly process envisioned by the Court of Appeal. To avoid serious disruptions to the work of the Division of Water Rights, the Court of Appeal directed that the fee schedule formula as presently implemented by the State Water Board should remain in effect until the State Water Board adopts a new fee schedule in accordance with the Court's decision. The State Water Board will then reevaluate the fees of the petitioners involved in the litigation, based on the new fee schedule. That process, which the Court directed to be applied to the FY 2003-2004 fees, would also be appropriate for the subsequent fee schedules adopted before the Court's decision, including the fee schedule for FY 2006-2007. It is not feasible, however, to adopt a new fee schedule within the statutory deadline for acting on this petition for reconsideration. And to follow the Court's decision in acting on KRWA's petition, without first reviewing and revising the FY 2006-2007 fee schedule, would result in the disruption that the Court was trying to avoid.⁷

Except for the citation to the *California Farm Bureau Federation* case, KRWA has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in Order WRO 2004-0017-EXEC, Order WRO 2005-0011, and Order WR 2006-0008-EXEC. Nor does the Court of Appeal's decision in the *California Farm Bureau Federation* case compel a different conclusion, for the reasons explained above. Accordingly, this order incorporates by reference and adopts the reasoning of Order WRO 2004-0017-EXEC, Order WRO 2005-0011-EXEC, Order WR 2006-0008-EXEC, and the documents that supported those orders.⁸

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⁷ In acting on a petition for reconsideration, the State Water Board has authority to consider the validity of its regulations as applied to the petitioner. In appropriate cases, the State Water Board could construe the regulation in a manner that resolves the issue or determine that the regulation cannot be applied to the petitioner. The State Water Board could also conduct rulemaking proceedings to revise the fee schedule based on the information or arguments presented by the petitioner. In this case, however, the Court of Appeal has directed that the fee schedule be revised in a manner that will take several months to complete, and further directed that the fee collection process should not be disrupted. In these circumstances, and recognizing that the Court of Appeal's opinion will be superseded if the California Supreme Court grants review, it would not be appropriate to attempt to revise the regulations before acting on Petitioner's petition for reconsideration.

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.


5.0 CONCLUSION

As explained in Order WR 2006-0008-EXEC, collateral estoppel bars KRWA from relitigating most if not all of the issues raised in its current petition for reconsideration. Alternatively, the Executive Director finds that the decision to impose the annual license fees on KRWA was appropriate and proper, for the reasons set forth above and in Order WRO 2004-0017-EXEC, Order WRO 2005-0011-EXEC, and Order WR 2006-0008-EXEC. Accordingly, KRWA's petition for reconsideration should be denied.

ORDER

IT IS HEREBY ORDERED THAT KRWA's petition for reconsideration is denied.

3/23/07
Dated:


Thomas Howard
Acting Executive Director