

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WRO 2005-0011-EXEC

In the Matter of the Petition for Reconsideration of the
KINGS RIVER WATER ASSOCIATION
Regarding Water Right Fee Determinations

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: \$5,711.67 for License 11517 (Application 353); \$69,749.75 for License 11518 (Application 360); \$22,935.06 for License 11519 (Application 5640); \$3,299.75 for License 11520 (Application 10979); \$24,117.25 for License 11521 (Application 15231); and \$2,662.25 for License 11522 (Application 16469). In general, KRWA contends that (1) procedural defects in the notices of determination issued to KRWA violated KRWA's due process rights, (2) the fees were based on a misinterpretation of the State Water Board's regulations, (3) the State Water Board violated a June 18, 2004 settlement agreement with KRWA, and (4) the fees are illegal for a variety of reasons. For the reasons set forth below, the Executive Director finds that the decision to impose the fees was appropriate and proper and therefore KRWA's petition for reconsideration is denied.

¹ 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.

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 (Sen. Bill No. 1049, 2003-2004 Reg. Sess., 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 2004-2005, the Budget Act of 2004 appropriates \$10.79 million for the state's water right program, including \$10.362 million for water right administration by the State Water Board and \$0.428 million for water right fee collection by BOE.² The appropriation includes an appropriation of \$9.69 million from the Water Rights Fund. In accordance with the Water Code fee provisions, 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 In Fiscal Year 2003-2004, the State Water Board collected \$7.44 million in water right fees and water quality certification fees deposited in the

² The budget figures referenced in this order for Fiscal Year 2004-2005 are based on the line item appropriations in the Budget Act of 2004. (Stats. 2004, ch. 208.) These figures are subject to adjustment based on control sections in the Budget Act. (See, e.g., *id.* § 3.60.) After these adjustments are made, the precise amounts budgeted will be slightly different than the line appropriations indicated in the Budget Act, but the differences are not material for purposes of any of the issues addressed in this order.

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 money transferred from other funds. The budget allocation of \$9.69 million from the Water Rights Fund includes \$1.5 million to pay for work described in Assembly Bill 2121 (Stats. 2004, ch. 943). The Budget Act provides for the transfer of funds from the Resources Trust Fund, which is supported by tidelands oil revenues, to cover this work, but in the event that those funds are not available, the Governor's Office has directed the Division not to perform the work described in Assembly Bill 2121. The water right fees have not been set to cover this work.

Water Rights Fund.⁴ This amount exceeded the \$4.6 million appropriation from the Water Rights Fund made under the Budget Act of 2003 (Stats. 2003, ch. 157) by \$2.84 million.⁵ The 2004-2005 budget assumes that the Water Rights Fund will have a balance of \$0.89 million at the end of the year. Taking into account the over-collection of fees from last fiscal year, the amount to remain in reserve, and \$1.5 million to be funded through a transfer from the Resources Trust Fund to the Water Rights Fund, the State Water Board determined that the fee schedule should be set so that fee collections deposited in the Water Rights Fund would amount to \$6.24 million this fiscal year. Assuming a non-collection rate of 15 percent,⁶ the Division determined that the total amount to be billed was \$7.34 million.

On September 30, 2004, the State Water Board adopted emergency regulations amending the water right and water quality certification fee schedules to meet the requirements of the Water Code and the Budget Act. (SWRCB Resolution No. 2004-0061.) Like the previous fiscal year, the fee schedule establishes annual permit and license fees that will continue to fund most of the Division's work in Fiscal Year 2004-2005. The emergency regulations became effective on October 14, 2004.

On October 18, 2004, BOE sent out most of the notices of determination for annual permit and license fees, including notices of determination that KRWA owes annual water right fees for

⁴ Fees associated with water quality certification for Federal Energy Regulatory Commission (FERC) licensing are deposited in the Water Rights Fund. (Wat. Code, § 1551, subd. (c).)

⁵ The 2003-2004 fee calculations were based on a fee revenue target of \$4.4 million, which was the amount specified in the Governor's proposed budget. The final budget, which included the adjustments called for by control sections in the Budget Act, provided for a \$4.6 million allocation from the Water Rights Fund.

⁶ This assumption is based on the rate of collection in Fiscal Year 2003-2004. Although over a quarter of the fee payers did not pay their fees by the end of the last fiscal year, most of the delinquent fee payers owed relatively small amounts of money. Most of the fee payers who owed larger amounts paid their fees on time. The figures available to the State Water Board indicate that during Fiscal Year 2003-2004, BOE collected 88 percent of the amount billed. Some uncertainty exists as to whether fee collections this year will run as high as last year. In fact, several larger fee payers who paid their fees for Fiscal Year 2003-2004 on time failed to do so this year. (See § 1074, subd. (d) [annual fees are due and payable 30 days after BOE issues a notice of assessment].) The State Water Board anticipates that after it has acted on pending petitions for reconsideration and BOE issues notices of redetermination, these larger fee payers will pay their fees in order to avoid late penalties. (See *id.*, subd. (g)(1) [allowing postponement of payment during the pendency of a petition for reconsideration, subject to interest from the original due date].) The assumption made when the State Water Board adopted the fee regulations for Fiscal Year 2004-2005--that collection rates would approximate those for Fiscal Year 2003-2004--still provides the most reliable basis available for projecting fee collections.

Licenses 11517, 11518, 11519, 11520, 11521, and 11522. Licenses 11517, 11518, and 11519 authorize the diversion of water from the Kings River. License 11520 authorizes the diversion of water from the North Fork Kings River, and License 11522 authorizes the diversion of water from Helms Creek, a tributary to the North Fork Kings River. License 11521 authorizes the diversion of water from Tulare Lake. 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 \$0.025 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 these fees, which was received on November 17, 2005.⁸

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 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

⁷ 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.

⁸ 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.)

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 BOE or 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) procedural defects in the notices of determination issued to KRWA violated KRWA's due process rights, (2) the fees were based on a misinterpretation of the State Water Board's regulations, (3) the State Water Board violated a June 18, 2004 settlement agreement with KRWA, (4) the fees are illegal because KRWA's licensed rights overlap with one another and with KRWA's claimed pre-1914 rights, and (5) 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.

This order focuses on KRWA's first three contentions. KRWA raised all of its arguments in support of its fourth and fifth contentions in a petition that KRWA previously filed challenging annual fees issued in Fiscal Year 2003-2004. The State Water Board denied that petition in Order WRO 2004-0017-EXEC. Among other things, Order WRO 2004-0017-EXEC explained at length why the annual permit and license fees are valid regulatory fees, not illegal taxes. In addition, the relationship between the annual permit and license fees and the fee payers' burdens

on and benefits from the State Water Board's regulatory activities is discussed in greater detail in a memorandum dated October 6, 2004, that was prepared in connection with the State Water Board's adoption of the fee schedule for this fiscal year.⁹ In large part, KRWA's current petition repeats the same arguments in support of KRWA's fourth and fifth contentions verbatim; 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. Accordingly, this order adopts the reasoning of Order WRO 2004-0017-EXEC and the October 6, 2004, memorandum to the extent that those documents address KRWA's fourth and fifth contentions. The reasoning in those documents is incorporated by reference and will not be repeated here.

4.1 The Notices of Determination Complied With Due Process Requirements

KRWA's first contention is that the notices of determination issued to KRWA contained two procedural defects that violated KRWA's due process rights. For the following reasons, this contention lacks merit.

First, KRWA argues that the fees were not assessed by BOE, as required by section 1074, subdivision (d) of the regulations because the notices of determination were sent out under the State Water Board's letterhead. Water Code sections 1536 and 1537 require BOE to collect annual fees. Section 1074, subdivision (d) of the regulations, cited by KRWA, provides only that annual fees are due and payable 30 days after BOE issues an assessment. Neither the Water Code nor the regulations specify a letterhead format for the form used to collect annual fees, and nothing precludes the State Water Board's name from appearing on the form. Moreover, the facts demonstrate that BOE collected the annual fees as required by the Water Code. BOE printed BOE's seal and form number BOE-1210 (S1) REV. 11 (1-04) on the notices of determination for annual permit and license fees, mailed the notices in BOE envelopes, and enclosed with each notice a pre-printed envelope with BOE's address for return of payment. In

⁹ Memorandum to File by Victoria A. Whitney, Chief, State Water Board's Division of Water Rights (Oct. 6, 2004), entitled: "Water Rights Fee Program Summary and Recommended Fee Schedule for Fiscal Year 2004-2005." The memorandum also explains the amendments to section 1066, paragraphs (b)(2) & (3), discussed in section 4.3, below.

addition, the second page of each notice states: “Note: This billing was issued by the State Board of Equalization (BOE) on behalf of the State Water Resources Control Board.”

KRWA’s second argument is that section 1077, subdivision (b) of the regulations requires a petition for reconsideration to be received within 30 days of the date the assessment is issued, but the notices of determination bear a “determination issued” date. Section 1061, subdivision (b) of the regulations defines “assessment” as “an amount owing, as in a notice of determination or similar billing document issued by [BOE]” In addition, the notices of determination explain that the “above assessment” is based on the amount due for an annual fee on a water right permit or license. Thus, the regulations and the notices themselves make clear that an assessment and a determination mean the same thing in this context, and the fee assessments against KRWA were issued on the “determination issued” date indicated on the notices of determination sent to KRWA.

4.2 The Fees Were Based on a Proper Interpretation of the Regulations

KRWA’s second contention is that the State Water Board misinterpreted its regulations when it calculated the fees for Licenses 11518 and 11521 based on the total amount of water authorized to be diverted under the licenses, as opposed to the total amount of water authorized to be beneficially used. License 11518 limits the “total amount of water to be taken from the source (direct diversion plus collection to storage)” to 2,786,000 acre-feet per annum (afa), and limits the “total amount of water to be placed to beneficial use (direct diversion plus withdrawal from storage)” to 2,565,000 afa. (Emphasis added.) Similarly, License 11521 limits the amount of water diverted (direct diversion plus collection to storage) to 960,700 afa, and limits the amount of water applied to beneficial use (direct diversion plus withdrawal from storage) to 569,600 afa. If the annual fees for both licenses had been based on the annual use limitations, the fees would have been \$15,302.50 less.

Section 1066 of the regulations requires annual permit and license fees to be based on the total amount of water authorized to be diverted under a permit or license. KRWA argues that the State Water Board’s interpretation of the regulations ignores the “legal reality” that a water user cannot divert more water than can be put to beneficial use. KRWA argues that a beneficial use

limitation is the same thing as a diversion limitation. In law and in fact, however, KRWA's argument is incorrect.

By law, KRWA is authorized under its licenses to divert more water than KRWA may apply to beneficial use. In fact, it is physically possible for KRWA to divert more water in a given year than KRWA applies to beneficial use. This is particularly true in the case of a storage project, like KRWA's, where water can be diverted and stored for use later in the year or in subsequent years. (In the case of a right only to directly divert, by contrast, the difference between the amount of water diverted and the amount beneficially used depends on conveyance losses and any waste.)

The diversion and use limitations contained in KRWA's licenses themselves establish that it is possible for KRWA to divert more water than KRWA can apply to beneficial use. The diversion and use limitations are not arbitrary figures; they are based on the maximum amount of water that KRWA actually diverted and the maximum amount of water that KRWA actually applied to beneficial use, respectively, under KRWA's permits. During the licensing process, the State Water Board verified KRWA's highest annual diversion and use amounts and included those amounts in KRWA's licenses. In sum, a beneficial use limitation is not the same thing as a diversion limitation, in law or in fact, and the State Water Board did not misinterpret its regulations when it based KRWA's fees on the diversion limitations contained in KRWA's licenses.

KRWA also argues that pursuant to section 1066, subdivision (b)(3) of the regulations, the total fee for Licenses 11518, 11519, 11520, and 11522 should have been based on the cumulative beneficial use limitation of 2,565,000 afa that applies to those four licenses, and the total fee for Licenses 11517 and 11521 should be have been based on the cumulative beneficial use limitation of 569,000 afa that applies to those two licenses. Subdivision (b)(3) provides: "If a person holds multiple water rights that contain an annual diversion limitation that is applicable to the combination of those rights, but the person may still divert the full amount authorized under a particular right, then the fee shall be based on the total annual amount for that individual right."

The first flaw in KRWA's argument is that subdivision (b)(3) applies where multiple rights are subject to an annual diversion limitation, not an annual beneficial use limitation. The second flaw in KRWA's argument is that subdivision (b)(3) requires the fee for each individual right to be based on the maximum amount of water that may be diverted under that right; subdivision (b)(3) does not authorize the fees for multiple rights under common ownership to be based on the combined maximum that may be diverted under those rights.

4.3 The Fees Are Consistent With the State Water Board's Settlement Agreement With KRWA

KRWA contends that the State Water Board breached its June 21, 2004 settlement agreement with KRWA by assessing the fees for Licenses 11518 and 11521 based on the amount of water authorized to be diverted under those licenses. As explained below, this contention lacks merit.

Before the State Water Board amended its regulations on October 14, 2004, section 1066 of the regulations contained an ambiguity. On the one hand, subdivisions (a) and (b) required annual permit and license fees to be based on the total amount of water authorized to be diverted. Similarly, paragraph (1) of subdivision (b) specified how to calculate the amount authorized to be diverted under a permit or license when the permit or license did not expressly identify the total annual amount of diversion in acre-feet. On the other hand, paragraph (2) of subdivision (b) specified that when a permit or license contained an annual *use* limitation, the fee was to be based on that limitation. Similarly, paragraph (3) contained the words "use limitation" instead of "diversion limitation."

In light of this ambiguity, the State Water Board entered into a settlement agreement with KRWA whereby the State Water Board agreed to reduce KRWA's annual license fees for fiscal year 2003-2004 based on the beneficial use limitations contained in Licenses 11518 and 11521. The State Water Board reserved the authority, however, to amend its regulations and render moot the methodology used to calculate KRWA's 2003-2004 fees. Subsequently, the State Water Board amended paragraphs (2) and (3) and replaced the word "use" with the word "diversion." The amendment clarifies that annual permit and license fees are required to be based on

diversion limitations, not use limitations. This amendment renders moot the methodology used to calculate KRWA's 2003-2004 fees.

5.0 CONCLUSION

For the reasons discussed above, the State Water Board's decision to impose the annual license fees on KRWA was appropriate and proper. Accordingly, KRWA's petition for reconsideration should be denied.

ORDER

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

Dated: February 25, 2005

ORIGINAL SIGNED BY
HARRY M. SCHUELLER FOR
Celeste Cantú
Executive Director