

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2008-0004-EXEC

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

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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 petition 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 for Fiscal Year (FY) 2007-2008:

<u>State Water Board ID</u>	<u>FY 2007-2008 Fee</u>
License 11517 (Application 353)	\$ 6,834.70
License 11518 (Application 360)	83,679.70
License 11519 (Application 5640)	27,502.70
License 11520 (Application 10979)	3,939.70
License 11521 (Application 15231)	28,920.70
License 11522 (Application 16469)	3,174.70

In general, KRWA contends that the assessed fees are: (1) in violation of a June 18, 2004 Settlement Agreement with KRWA, (2) based on a misinterpretation of the State Water Board's regulations, (3) illegal because KRWA's licensed rights overlap with each other and with 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.

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<sup>1</sup> State Water Board 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 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.



(§ 1077, subd. (b).) A petition is timely filed only if received by the State Water Board within 30 days of the date an assessment is issued.<sup>3</sup> (*Ibid.*)

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).)

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

### **3.0 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).) The BOE is responsible for collecting the annual fees. (*Id.*, § 1536.)

In FY 2007-2008, the Budget Act authorizes the expenditure of \$11.592 million to support the regulatory activities of the State Water Board's water right program. Most of the funding for the

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<sup>3</sup> 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.)

water right program – a total of \$7.384 million – is appropriated from the Water Rights Fund.<sup>4</sup> This allocation includes \$6.929 million for administration of the State Water Board's water right program, \$420,000 for the water right fee collection efforts of the BOE, and \$35,000 for support functions provided by the California Environmental Protection Agency. (Stats. 2007, ch. 171, as amended by Stats. 2007, ch. 172.) The State Water Board estimated that mid-year budget adjustments would increase the Water Rights Fund budget to \$7.984 million.<sup>5</sup>

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.<sup>6</sup> For FY 2007-2008, the State Water Board determined that the FY 2006-2007 fee schedule would generate sufficient revenues to support the water right program activities.<sup>7</sup> Accordingly, it did not revise the regulations this year. On November 15, 2007, the 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.

#### **4.0 KRWA'S ARGUMENTS THAT THE FEES WERE MISCALCULATED OR OVERSTATED AND THAT THE REGULATIONS AND ASSESSMENTS ARE ILLEGAL ARE WITHOUT MERIT**

In general, KRWA contends that the assessed fees are: (1) in violation of a June 18, 2004 Settlement Agreement with KRWA, (2) based on a misinterpretation of the State Water Board's regulations, (3) illegal because KRWA's licensed rights overlap with each other and with claimed

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<sup>4</sup> In addition to appropriations from the Water Rights Fund, the State Water Board's budget for the water right program also includes \$3.848 million in general funds, \$212,000 in tobacco tax funds, and \$148,000 in federal trust funds.

<sup>5</sup> 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.

<sup>6</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)), penalties collected for water right violations (*Id.*, § 1551, subd. (b)), and money transferred from other funds.

<sup>7</sup> As explained in the Memorandum to File dated January 7, 2008 from Victoria A. Whitney, Chief, Division of Water Rights, as of June 30, 2007 the Water Rights Fund had collected \$9.168 million from water right and water quality certification fees assessed in FY 2006-07. After accounting for funds remaining from previous years and subtracting program costs and encumbrances, approximately \$ 0.082 million was left in the Water Rights Fund at the end of the fiscal year. The State Water Board has accounted for this excess by subtracting it from the budget target for FY 2007-08. Thus, for the purposes of calculating this year's fees, the State Water Board's revenue target is \$7.902 million (\$7.984 - \$.082 million). Assuming a non-collection rate of 5 percent, the total amount to be collected from filing fees and billed under annual fees is \$8.318 million.

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 the foregoing contentions in petitions filed in 2004, 2005 and 2006 challenging annual fees. Issues (1) and (2) were responded to in Order WRO 2005-0011-EXEC. (4.3 The Fees Are Consistent with the State Water Board's Settlement Agreement with KRWA; 4.2 The Fees were Based on a Proper Interpretation of the Regulations.) Issues (3) and (4) were responded to in Order WRO 2004-0017-EXEC. Regarding Issue (3), the order found that the fees were reasonably calculated based upon the total annual amount of diversions authorized. (6.1 The Fees are Reasonably Calculated based on the Total Annual Amount of Diversion Authorized by a Water Right Permit or License.) With regard to Issue (4), the order found that the constitutional challenges were without merit. (5.0 Arguments regarding Constitutionality of Senate Bill 1049 and the SWRCB's Adoption of the Fee Regulations.)

KRWA once again repeats the same contentions, nearly verbatim as it did in on December 5, 2005. For the reasons set forth in Order WR 2006-0008-EXEC, KRWA is collaterally estopped from relitigating the same issues in its current petitions. (4.1 Collateral Estoppel Bars KRWA from Relitigating the Issues Raised in Its Petitions.)

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 WRO 2005-0011-EXEC, WRO 2004-0017-EXEC and WR 2006-0008-EXEC and their supporting documents, including the October 6, 2004 Memorandum to File by Victoria A. Whitney, Chief, Division of Water Rights.

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, and therefore KRWA's petition should be denied for the reasons set forth in orders WRO 2005-0011-EXEC and WRO 2004-0017-EXEC.

**4.0 CONCLUSION**

For the reasons discussed above, collateral estoppel bars KRWA from relitigating the issues raised in its current petition for reconsideration. Alternatively, the Executive Director finds that the decision to impose annual water right fees on KRWA was appropriate and proper for the reasons set forth in Orders WRO 2004-0017-EXEC, WRO 2005-0011-EXEC and 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.

Dated: 1.11.08

  
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Dorothy Rice  
Executive Director