

STATE OF CALIFORNIA  
STATE WATER RESOURCES CONTROL BOARD

**ORDER WR 2006-0008-EXEC**

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In the Matter of the Petition for Reconsideration of the  
**KINGS RIVER WATER ASSOCIATION,**  
Regarding Water Right Fee Determinations for Fiscal Year 2005-2006.

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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) 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 the issues raised in its petition. In the alternative, the

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<sup>1</sup> 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.

decision 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) 2005-2006, the Budget Act appropriates \$11.447 million for the water right program, including \$11.085 million for water right administration by the State Water Board and \$0.362 million for water right fee collection by BOE. (Stats. 2005, ch. 38, as amended by Stats. 2005, ch. 39.)<sup>2</sup> Most of the funding for the water right program – a total of \$9.589 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 Rights Fund in the annual Budget Act, taking into account money in the fund from other sources.<sup>3</sup>

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<sup>2</sup> The budget figures referenced in this order for FY 2005-2006 are based on the line item appropriations in the Budget Act of 2005. These figures are subject to adjustment based on control sections in the Budget Act. 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.

<sup>3</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 money transferred from other funds. The Budget Act of 2005 reappropriates \$1.5 million that was appropriated in the Budget Act of 2004, but not expended, to pay for work described in Assembly Bill No. 2121 (Stats. 2004, ch. 943). This appropriation was based on a transfer from the Resources Trust Fund, a fund that is supported by tidelands oil [footnote continues on next page]

In FY 2004-2005, the State Water Board collected \$8.01 million in water right fees and water quality certification fees deposited in the Water Rights Fund.<sup>4</sup> Additional funds remained in the Water Rights Fund from previous years' fees. After subtracting program costs and accounting for encumbrances, approximately \$1.831 million was left in the Water Rights Fund at the end of the fiscal year. The State Water Board accounted for this excess, which exceeded the State Water Board's allocation specified in the Budget Act of 2004, by subtracting it from the budget target for FY 2005-2006. Thus, for the purposes of calculating this year's fees, 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 \$7.886 million (\$9.717 - \$1.831 million) this fiscal year. Assuming a non-collection rate of 10 percent,<sup>5</sup> the total amount billed in annual fees was \$8.029 million, with the remaining balance expected to be collected from one-time filing fees.

On September 22, 2005, 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. 2005-0069.) The emergency regulations became effective on October 21, 2005, and on November 7, 2005, 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.

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revenues, and is reappropriated in the Budget Act of 2005 because insufficient funds were deposited in the Resources Trust Fund to make the transfer in FY 2004-2005. The State Water Board did not include this amount in calculating the amount of revenue to be collected from fees.

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

<sup>5</sup> The State Water Board assumed a 90 percent collection for this fiscal year. This assumption is based on BOE's rate of collection in FY 2004-2005. The amount attributed to non-collection includes reduction in fee revenues because the State Water Board may reduce or rescind some fees after the fee payer files a petition for reconsideration identifying a problem, as well as fees that are properly assessed but not paid by the end of the fiscal year. Unpaid fees are still subject to collection, with interest, but it may take some time before the Water Rights Fund receives significant revenues as a result of collection actions against parties who failed to pay their fees on time.

Pursuant to section 1066, subd. (a), of the State Water Board's regulations,<sup>6</sup> 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. KRWA's annual license fees for this fiscal year are the same as KRWA's annual license fees for FY 2004-2005, except that the fee for each license increased from \$0.025 to \$0.03 per acre-foot for each acre-foot in excess of 10-acre-feet.

KRWA filed a petition for reconsideration of the fee determinations for its licenses, which was received on December 5, 2005.<sup>7</sup>

### **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 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

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<sup>6</sup> 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.

<sup>7</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.)

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 a petition that KRWA previously filed challenging annual fees issued in FY 2004-2005. The Executive Director denied that petition in Order WRO 2005-0011-EXEC. KRWA's current petition repeats the same arguments in support of its contentions nearly verbatim. For the reasons set forth below, KRWA is collaterally estopped from relitigating these issues 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, and therefore KRWA's petition should be denied, for the reasons set forth in Order WRO 2005-0011-EXEC.

KRWA has not provided any new arguments, information, or supporting authority that would compel different conclusions from the conclusions reached in Order WRO 2005-0011-EXEC. Accordingly, this order incorporates by reference and adopts the reasoning of Order WRO 2005-0011-EXEC and the documents that supported it, including Order WRO 2004-0017-EXEC and the October 6, 2004, Memorandum to File by Victoria A. Whitney, Chief of the Division of Water Rights.

#### **4.1 Collateral Estoppel Bars KRWA from Relitigating the Issues Raised in Its Petition**

“Collateral estoppel precludes a party to an action from relitigating in a second proceeding matters litigated and determined in a prior proceeding.” (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 [272 Cal.Rptr. 767, 795 P.2d 1223].) Collateral estoppel bars relitigation of an issue if: (1) the issue decided in a prior proceeding is identical to the issue sought to be relitigated, (2) the issue was actually litigated in the prior proceeding, (3) the issue was necessarily decided in the prior proceeding, (4) the prior proceeding resulted in a final judgment on the merits, and (5) the party against whom collateral estoppel is asserted is the same as, or in privity with, a party to the prior proceeding. (*Ibid.*)

In addition to these five prerequisites, a court or agency must consider the public policies underlying the doctrine of collateral estoppel in evaluating whether collateral estoppel should be applied in a given case. (*Lucido v. Superior Court, supra*, 51 Cal.3d at pp. 342-343.) Those policies include promotion of judicial economy, preservation of the integrity of the judicial system by avoiding inconsistent judgments, and protection of litigants from harassment by repeated litigation. (*Id.* at p. 343.) In addition, the statutory scheme governing a particular proceeding may counsel for or against the application of collateral estoppel. (Compare *People v. Sims* (1982) 32 Cal.3d 468, 489 [186 Cal.Rptr. 77, 651 P.2d 321] [statutory scheme governing welfare fraud prosecutions favored application of collateral estoppel] with *Pacific Lumber v. State Water Resources Control Board* (2006) 37 Cal.4th 921, 945 [38 Cal.Rptr.3d 220] [statutory scheme governing timber harvest plan review process did not favor application of collateral estoppel].)

In *People v. Sims*, *supra*, the California Supreme Court held that collateral estoppel may be applied to decisions made by administrative agencies “[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate . . . .” (*Id.* at p. 479, quoting *United States v. Utah Construction Company* (1966) 384 U.S. 394 [86 S.Ct. 154, 516 L.Ed.2d 642]; see also Rest.2d, Judgments, § 83.)

The first prong of the test formulated in *Utah Construction* and adopted in *People v. Sims* is that an agency must have acted in a judicial capacity. Indicia of an administrative proceeding that is judicial in nature include: (1) a hearing before an impartial decision-maker; (2) testimony is submitted under oath or affirmation; (3) parties are allowed to call, examine, and cross-examine witnesses; (4) parties are allowed to submit documentary evidence; (5) parties are allowed to make oral or written argument; (6) parties may subpoena witnesses; (7) the agency maintains a record of testimony and exhibits; (8) the agency issues a written decision including a statement of reasons; and (9) administrative rehearing or judicial review is available. (*People v. Sims*, *supra*, 33 Cal.3d at pp. 479-480; *Pacific Lumber v. State Water Resources Control Board*, *supra*, 37 Cal.4th at p. 944.) All of these procedural safeguards do not necessarily need to be available, however, and an evidentiary hearing does not necessarily need to be held, so long as the party against whom collateral estoppel is asserted was afforded due process. (*French v. Rishell* (1953) 40 Cal.2d 477, 481 [254 P.2d 26]; see also *Kremer v. Chemical Construction Corporation* (1982) 456 U.S. 461, 480-485 [102 S.Ct. 1883, 72 L.Ed.2d 262].)

The second prong of the test set forth in *People v. Sims* requires an agency to have resolved disputed issues of fact properly before it. Although the Court referred to an agency’s resolution of disputed issues of fact, it is well settled that, with certain exceptions not relevant here, issue preclusion extends to an agency’s determination of legal as well as factual issues. (Rest.2d, Judgments, §§ 28, subsection (2), 83, com. b, pp. 268-271; *Louis Stores, Inc. v. Department of Alcoholic Beverage Control* (1962) 57 Cal.2d 749, 757 [22 Cal.Rptr. 14, 371 P.2d 758] [citing to § 70 of the first Restatement; see also *Miller v. County of Santa Cruz* (9th Cir. 1994) 39 F.3d 1030, 1032-1033 [issue preclusion extends to agency determination of legal issue, provided that proceeding in which issue was litigated satisfied the fairness requirements outlined in *Utah*

*Construction*]; *Guild Wineries and Distilleries v. Whitehall Co., LTD* (9th Cir. 1988) 853 F.2d 755, 758-759 [same].)

Under the third prong of the test set forth in *People v. Sims*, a party is not barred from relitigating an issue unless the party was afforded an adequate opportunity to litigate the issue in the previous administrative proceeding. So long as the party had an adequate *opportunity* to litigate, it does not matter whether the party took advantage of the opportunity to present evidence or legal argument or otherwise actively participated in the proceeding. (*People v. Sims, supra*, 33 Cal.3d at pp. 481, 484 [failure to present evidence or participate in hearing]; *Barker v. Hull* (1987) 191 Cal.App.3d 221, 226 [231 Cal.Rptr. 285] [no need to show that any particular type of evidence, such as oral testimony, was presented, provided that opportunity to present evidence was not restricted]; see also *Dodd v. Hood River County* (9th Cir. 1998) 136 F.3d 1219, 1226-1227 [failure to request evidentiary hearing].)

In this case, KRWA is barred from relitigating the issues previously raised in its petition for reconsideration of the 2004-2005 fees. All of the prerequisites to the application of collateral estoppel are satisfied. First, the issues decided in Order WRO 2005-0011-EXEC are identical to the issues that KRWA seeks to relitigate in its current petition for reconsideration. In large part, KRWA's current petition repeats verbatim the same contentions and arguments that KRWA made in its previous petition. The current petition does not contain one of the contentions that KRWA made in the previous petition. Otherwise, the current petition contains only minor changes that are immaterial to the issues raised in the petition, including changes to reflect the increase in the annual license fees for FY 2005-2006. (See *Tait v. Western Maryland Ry. Co.* (1933) 289 U.S. 620, 624-625 [53 S.Ct. 706, 77 L.Ed. 1405] [collateral estoppel a bar to relitigating in subsequent tax years permissibility of deduction from gross income where there is no change in applicable law or material facts].)

The second and third prerequisites are satisfied because the issues that KRWA seeks to relitigate were properly raised in KRWA's previous petition for reconsideration, submitted for determination, and determined in Order WRO 2005-0011-EXEC. (*People v. Sims, supra*, 33 Cal.3d at p. 484, quoting Rest.2d, Judgments, § 27, com. d, p. 255 ["An issue is actually

litigated “[w]hen it is properly raised, by the pleadings or otherwise, and is submitted for determination, and is determined . . . .”].)

The fourth prerequisite is satisfied because KRWA’s previous petition resulted in a final judgment on the merits. A judgment is final if it is free from direct attack. (*People v. Sims, supra*, 33 Cal.3d. at p. 486.) Order WRO 2005-0011-EXEC became free from direct attack when KRWA did not file a petition for writ of mandate within 30 days of the adoption of the order on February 25, 2005. (Wat. Code, § 1126.) Finally, the fifth prerequisite is satisfied because the same party, KRWA, filed both petitions for reconsideration.

In addition to satisfying the five prerequisites discussed above, public policy supports application of collateral estoppel in this case. Precluding KRWA from raising the same issues in successive petitions for reconsideration will promote judicial economy and protect the State Water Board from being harassed by repeated litigation. Moreover, nothing in the statutory scheme governing the review of water right fee determinations disfavors application of collateral estoppel here.

The State Water Board’s decision on KRWA’s prior petition for reconsideration also satisfies the special requirements necessary for an administrative decision to be afforded preclusive effect, as set forth in *People v. Sims*. Specifically, a review of the State Water Board’s procedures governing petitions for reconsideration indicates that the State Water Board was acting in a judicial capacity and resolved disputed issues properly before it, which KRWA had an adequate opportunity to litigate.

As stated in section 3.0 above, the State Water Board’s regulations allow a fee payer to petition the State Water Board for reconsideration of a determination that the fee payer is required to pay a fee, or the determination regarding the amount of the fee. (§ 1077.) A fee payer may petition for reconsideration on the grounds that the fee payer was prevented from having a fair hearing, or the fee determination was not supported by substantial evidence, or constituted error in law. (§§ 768, 1077.) The fee payer may submit relevant evidence which, in the exercise of reasonable diligence, could not have been produced earlier, and must submit a memorandum of points and authorities in support of the legal issues raised in the petition. (§ 769, subs. (b) & (c).)

On reconsideration, the State Water Board may, in its discretion, hold a hearing for the purpose of allowing oral argument or receiving additional evidence. (§ 770.) If the State Water Board conducts an evidentiary hearing, the hearing is governed by chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400), Evidence Code sections 801-805, and Government Code section 11513. (§ 648.) Government Code section 11513 requires testimony to be submitted under oath or affirmation, and affords parties the right to call and examine witnesses, introduce exhibits, and cross-examine opposing witnesses. A fee payer may request the State Water Board to issue a subpoena or subpoena duces tecum for the attendance of witnesses or production of documents. (Gov. Code, § 11450.20.) The State Water Board's decision must be in writing and include a statement of reasons. (Gov. Code, § 11425.10.)

Even if an evidentiary hearing is not held, a fee payer may request the State Water Board to issue a subpoena duces tecum for the production of documents. (Wat. Code, § 1080; § 649.6.) Finally, the State Water Board's decision taking action on a petition for reconsideration is subject to judicial review. (Wat. Code, § 1126.)

In this case, KRWA had an opportunity to submit documentary evidence and legal argument in support of its previous petition for reconsideration. An impartial decision-maker, in this case the Executive Director acting pursuant to authority delegated by the State Water Board, took action on the petition.<sup>8</sup> The Executive Director rendered a written decision, which included a statement of reasons. KRWA could have filed a petition for writ of mandate challenging Order WRO 2005-0011-EXEC, but it elected not to. Although the State Water Board did not hold an evidentiary hearing, KRWA did not request an evidentiary hearing, and an evidentiary hearing was not required in order to resolve the issues raised in KRWA's petition. Most of the issues raised in KRWA's petition were legal issues, and the documentary evidence contained in the record was adequate to address the factual issues raised. In summary, the State Water Board's

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<sup>8</sup> The Chief of the Division of Water Rights initially assessed the fees against KRWA pursuant to delegated authority. (SWRCB Resolution No. 2002-0106, § 2.6.3.)

procedures afforded KRWA due process and an adequate opportunity to litigate the issues raised in its previous petition for reconsideration. KRWA is therefore barred from relitigating those issues in its current petition for reconsideration.<sup>9</sup>

## **5.0 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 the annual license fees on KRWA was appropriate and proper for the reasons set forth in Order WRO 2005-0011-EXEC. Accordingly, KRWA's petition for reconsideration should be denied.

### **ORDER**

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

Dated: March 27, 2006

*ORIGINAL SIGNED BY*  
Celeste Cantú  
Executive Director

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<sup>9</sup> It merits note that collateral estoppel probably does not apply to the Division Chief's initial water right fee assessments. Accordingly, if Kings River had not filed a petition for reconsideration of the 2004-2005 fees, collateral estoppel would not operate to bar litigation of issues pertaining to the validity of the 2005-2006 fees, even if the 2004-2005 fees and the 2005-2006 fees were substantially the same. Having elected to file a petition for reconsideration of the 2004-2005 fees, however, Kings River is barred from relitigating in its current petition the issues raised in its previous petition and resolved by the Executive Director in Order WRO 2005-0011-EXEC.