

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2014—0025—EXEC

In the Matter of the Petition for Reconsideration of

M A & S Manuli Trust

Regarding Order WR 2014-0010-DWR
Imposing Administrative Civil Liability for Violation of a Cease and Desist Order

SOURCE: San Joaquin River

COUNTY: Stanislaus

**ORDER GRANTING PETITION FOR RECONSIDERATION, IN PART, AND MODIFYING
ORDER WR 2014-0010-DWR**

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

The M A & S Manuli Trust (Manuli Trust), through its current trustee Bryant L. Young (Mr. Young), petitions the State Water Resources Control Board (State Water Board or Board) for reconsideration of Order WR 2014-0010-DWR. Order WR 2014-0010-DWR imposes administrative civil liability upon the Manuli Trust in the amount of \$5,000.00 for failure to comply with Order WR 2013-0039-DWR, which requires the Manuli Trust to cease and desist its violation of the term in its water license requiring it to file an annual report of its water diversion and use. For the following reasons, I find that Order WR 2014-0010-DWR was appropriate and proper based upon the information available at the time it was issued. On the basis of new information brought to the State Water Board's attention for the first time in the Manuli Trust's

¹ State Water Resources Control Board (State Water Board or Board) Resolution 2012-0061 delegates to the Executive Director the authority to conduct and supervise the activities of the Board. Unless a petition for reconsideration raises matters that the Board wishes to address or requires an evidentiary hearing before the Board, the Executive Director's consideration of a petition for reconsideration of an order imposing administrative civil liability falls within the scope of the authority the Board delegated in Resolution 2012-0061. Accordingly, the Executive Director has the authority to: 1) refuse to reconsider the order or decision for which reconsideration is sought; 2) deny the petition; 3) set aside or modify the decision or order for which reconsideration is sought; or 4) take other appropriate action. (See Cal. Code Regs., tit. 23, § 770, subd. (a).)

Order WR 2014-0010-DWR imposes. I therefore grant the Manuli Trust's petition, in part, and modify Order WR 2014-0010-DWR to reduce the administrative civil liability imposed to \$1,000.00.

2.0 PROCEDURAL, LEGAL, AND FACTUAL BACKGROUND

The Manuli Trust holds License 5434 authorizing it to divert water from the San Joaquin River in Stanislaus County. A term of its license requires the Manuli Trust to file an electronic report of water diversion and use for the prior calendar year (annual use report) on or before June 30th of each year. (Cal. Code Regs., tit. 23, § 929.)

2.1 PROCEDURAL AND LEGAL BACKGROUND

On January 30, 2013, the Division of Water Rights (Division) mailed a notice to the Manuli Trust reminding it of the requirement to file an annual use report for 2012 on or before June 30, 2013. The Manuli Trust did not do so. On August 22, 2013, Division staff then prepared and transmitted to the Manuli Trust a draft cease and desist order (Draft CDO) directing it to cease and desist its violation of the term of its license requiring it to file its 2012 annual use report on or before June 30, 2013. (Wat. Code, § 1831, subs. (a), (d)(2).) The Draft CDO directed the Manuli Trust to file its annual use report or request a hearing before the State Water Board within twenty days of its receipt of the Draft CDO. (Wat. Code, § 1834, subd. (a).) The Manuli Trust neither filed its annual use report nor requested a hearing within twenty days of delivery of the Draft CDO.

On October 7, 2013, James W. Kassel, then-Assistant Deputy Director of the Division's Permitting and Enforcement Branch (Assistant Deputy Director), issued Order WR 2013-0039-DWR, directing the Manuli Trust to cease and desist its violation of the term of its license requiring it to file its 2012 annual use report on or before June 30, 2013.² (Wat. Code, § 1834, subd. (b).) Order WR 2013-0039-DWR became effective upon its issuance. (Wat. Code, § 1832.)

On October 25, 2013, the Assistant Deputy Director issued an administrative civil liability complaint (complaint) against the Manuli Trust. The complaint proposed that civil liability be administratively imposed upon the Manuli Trust in the amount of \$5,000.00 for violation of Order

² In Resolution 2012-0029, the State Water Board delegated the authority to issue cease and desist orders pursuant to Water Code section 1834, subdivision (b) to the Deputy Director for Water Rights (Deputy Director) and empowered the Deputy Director to redelegate this authority to the Assistant Deputy Directors. On July 6, 2012, the Deputy Director redelegated this authority to the Assistant Deputy Director of the Permitting and Enforcement Branch.

WR 2013-0039-DWR. (Wat. Code, §§ 1055; 1845, subs. (b)(1), (3).) The complaint informed the Manuli Trust of its right to request a hearing within twenty (20) days of its receipt of the complaint. (Wat. Code, § 1055, subd. (b).) The complaint also made a conditional settlement offer, offering to settle the complaint if the Manuli Trust filed its annual use report and paid \$500.00 within twenty (20) days of its receipt of the complaint. The complaint was transmitted via certified United States mail and was delivered on October 29, 2013. (*Ibid.*) The Manuli Trust neither accepted the conditional settlement offer nor requested a hearing within twenty days of delivery of the complaint.

On March 21, 2014,³ the Assistant Deputy Director issued Order WR 2014-0010-DWR, imposing administrative civil liability upon the Manuli Trust in the amount of \$5,000.00 for violation of Order WR 2013-0039-DWR.⁴ On March 28, 2014, Mr. Young, an attorney who is the current trustee of the Manuli Trust, tendered a cashier's check in the amount of \$500.00 to the Division on behalf of the Manuli Trust. On April 4, 2014, Mr. Young filed a petition for reconsideration of Order WR 2014-0010-DWR on behalf of the Manuli Trust.

2.2 FACTUAL BACKGROUND

In its petition for reconsideration (petition), the Manuli Trust presents relevant information to the State Water Board for the first time. On the basis of this new information, the Manuli Trust argues that it: 1) made good faith efforts to cause the 2012 annual use report's filing, but was hindered by circumstances beyond its control; and 2) did not timely receive the administrative civil liability complaint. The petition sets forth the following facts in support of these arguments.

The Manuli Trust was formed by three brothers who permanently reside in Europe. Some time ago, the Manuli Trust invested in property in the Central Valley and secured License 5434 to make use of water on a property it owned for agricultural irrigation. Initially, Alvin Pelavin, a California attorney based in San Francisco, served as trustee and handled the interests of the

³ The State Water Board is directed to act on a petition for reconsideration within 90 days of the date upon which the Board adopts the decision or order that is the subject of the petition. (Wat. Code, § 1122.) If the Board fails to act during that 90-day period, a petitioner may seek judicial review, but the Board retains jurisdiction to act on the petition. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see also *California Correctional Peace Officers Ass'n v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1145-48; *Edwards v. Steele* (1979) 25 Cal.3d 406, 409-10; State Water Board Order WQ 98-05-UST at pp. 3-4.)

⁴ In Resolution 2012-0029, the State Water Board delegated the authority to issue orders imposing administrative civil liability pursuant to Water Code section 1055 to the Deputy Director and empowered her to redelegate this authority to the Assistant Deputy Directors. On July 6, 2012, the Deputy Director redelegated this authority to the Assistant Deputy Director of the Permitting and Enforcement Branch.

Manuli Trust.⁵ However, Alvin Pelavin fell into poor health some years ago and elements of his practice were assumed by Peter Pelavin (Mr. Pelavin), also an attorney.⁶ Though Mr. Pelavin ostensibly handled the affairs of the Manuli Trust for some years, there were significant problems with his execution of his duties, and he was terminated in early 2013. On June 5, 2013, the Manuli Trust's farming consultant, a rice farmer from Italy who visits the United States twice a year, met with Mr. Young and requested that Mr. Young assume the position of trustee.

Mr. Young agreed to this request but encountered immediate challenges. Mr. Young had great difficulty in securing the Manuli Trust's documents from Mr. Pelavin and, consequently, Mr. Young was not appointed trustee until November 2013. Mr. Young further did not receive a copy of the Draft CDO until September 23, 2013. After reviewing the Draft CDO, Mr. Young determined that the Manuli Trust had sold the property upon which the place of use for License 5434 was located in December 2012 and further determined that the property was presently leased to Cerutti Brothers, LLC (Cerutti). Cerutti also leased the property from the Manuli Trust when the Manuli Trust owned the property. Mr. Young attempted to contact Robert Fantazia (Mr. Fantazia), Cerutti's Chief Financial Officer, but Mr. Fantazia was out of the office for a family funeral.

Mr. Young thereafter contacted Andrew Tauriainen (Mr. Tauriainen), Senior Staff Counsel in the State Water Board's Office of Enforcement, who advised Mr. Young that the Final CDO had not yet been issued and further advised Mr. Young to "get the lessee to file the information as soon as possible to avoid any fines." Mr. Tauriainen further directed Mr. Young to the "Change of Ownership" form for license holders available on the State Water Board's website.

⁵ I take official notice of the records of the State Bar of California, indicating that Alvin Hirsh Pelavin was at one time licensed to practice law, held State Bar license number 23067, had a practice in San Francisco, and is now deceased. (See *Whispering Pines Mobile Home Park, Ltd.v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 161 [an agency may take official notice in making decisions]; see also Gov. Code, § 11515 [an agency may take official notice of any fact which may be judicially noticed by the courts of this state]; Evid. Code, § 452, subds. (c) [judicial notice may be taken of any official act of the executive, legislative, or judicial departments of the state]; (h) [judicial notice may be taken of a fact that is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy].)

⁶ I take official notice of the records of the State Bar of California, indicating that Peter Norman Pelavin has been licensed to practice law since 1987, holds State Bar license number 131033, and practices with Pelavin & Tighe in San Francisco. (See *Whispering Pines Mobile Home Park, Ltd.v. City of Scotts Valley*, *supra*, 180 Cal.App.3d at p. 161 [an agency may take official notice in making decisions]; see also Gov. Code, § 11515 [an agency may take official notice of any fact which may be judicially noticed by the courts of this state]; Evid. Code, § 452, subds. (c) [judicial notice may be taken of any official act of the executive, legislative, or judicial departments of the state]; (h) [judicial notice may be taken of a fact that is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy].)

- “(1) Refuse to reconsider the decision or order if the petition fails to raise substantial issues related to the causes for reconsideration set out in [California Code of Regulations, title 23, section 768]; or
- (2) After review of the record, including any hearing transcript and any material submitted in support of the petition:
 - (A) Deny the petition upon a finding that the decision or order was appropriate and proper; or
 - (B) Set aside or modify the decision or order; or
 - (C) Take other appropriate action.”

(Cal. Code Regs., tit. 23, § 770, subd. (a).)

4.0 DISCUSSION

I have reviewed the record in this matter. I find that the Manuli Trust timely filed its petition for reconsideration of Order WR 2014-0010-DWR (Order). (Wat. Code, § 1122.) I further find that the Order was appropriate and proper given the information available to the Assistant Deputy Director when he issued it. Upon review of the new information the Manuli Trust presents in its petition, however, I find that the amount of civil liability imposed upon it should be reduced to reflect its good faith efforts to diligently file the annual use report for License 5434, as those efforts were hindered by circumstances beyond its control.

The Order states that the Assistant Deputy Director has “considered all relevant circumstances [...] in determining that Manuli shall be assessed the civil liability of \$5,000.” I find that the Assistant Deputy Director indeed considered all relevant circumstances presented to him at the time he issued the Order and therefore complied with the requirements of Water Code sections 1055.3 and 1845, subdivision (c).

Because the Manuli Trust did not request a hearing after the Assistant Deputy Director issued the complaint, the facts underlying the delayed filing of the annual use report for License 5434 were not part of the record before the Assistant Deputy Director. Consequently, the Assistant Deputy Director was unable to consider: 1) the Manuli Trust’s delayed notice of the complaint, 2) the Manuli Trust’s sale of the property served by License 5434 in 2012, 3) the difficulty the Manuli Trust faced in obtaining information pertaining to License 5434 from Mr. Pelavin, and 4) the good faith efforts the Manuli Trust made to cause Cerutti to file the 2012 annual use report

for License 5434. Having considered these facts, I find it appropriate to reduce the amount of administrative civil liability imposed upon the Manuli Trust.

I also find, however, that the Manuli Trust was obligated to immediately inform the Board of the sale of the property served by License 5434 when the sale occurred. (Cal. Code Regs., tit. 23, §§ 831, 833.) Though the petition sets forth that Mr. Young has “no knowledge or experience with the applicable law or the State Water Resources Control Board’s policies or procedures,” I find that this lack of familiarity does not excuse the Manuli Trust’s failure to comply with the Board’s regulations, which required it to immediately report the property’s sale. I further find that after Mr. Tauriainen directed Mr. Young to the “Change in Ownership” form on the Board’s website in their September 23, 2013 conversation, Mr. Young had actual knowledge of precisely how to alert the Board of both the property’s new owner and the Manuli Trust’s new agent. Regrettably, the Manuli Trust did not file a “Change in Ownership” form and its failure to do so: 1) was a significant factor in its violation of the Final CDO, which was the underlying basis for issuance of the Order; and 2) caused the Board to expend unnecessary costs in an effort to bring the Manuli Trust into compliance.

The Manuli Trust has not proposed an appropriate course of action other than to make a general request that the order be reconsidered. I find that California Code of Regulations, title 23, section 770, subdivision (a)(2)(C) empowers me to take any appropriate action following review of the record, and I further find that I am constrained neither by the amount of civil liability imposed in the Order nor the action that the Manuli Trust requests.⁷ I find that an appropriate civil liability should reflect both: 1) the Manuli Trust’s good faith efforts to file the annual use report for License 5434, which were hindered by circumstances beyond its control; and 2) the Manuli Trust’s failure to diligently alert the Board of its change in agent and the transfer of the property License 5434 serves. Upon consideration of the foregoing facts and all other relevant circumstances, I reduce the civil liability imposed upon the Manuli Trust to \$1,000.00. (Cal. Code Regs., tit. 23, § 770, subd. (a)(2)(C).) I find that this reduction of the civil liability is only appropriate given the rare and exceptional circumstances presented in the Manuli Trust’s

⁷ Though State Water Board Order WQ 89-11 states that the Board will “generally give great deference to a decision by a Regional Board when considering administrative civil liability orders,” this standard is not applicable to my review of a decision by the Division of Water Rights. While the Regional Water Quality Control Boards are independent agencies whose findings and conclusions are entitled to great deference, the Division of Water Rights is a subordinate division of the State Water Resources Control Board. When, as here, I act with the Board’s authority, I exercise my independent judgment in reviewing the Division of Water Rights’ actions.

petition, including its diligent efforts to file the 2012 annual use report following its delayed receipt of the Draft CDO.

To the extent that the Manuli Trust's petition asserts any other reasons that the Order should be reconsidered, I find that its petition fails to raise substantial issues related to the causes for reconsideration set forth in the Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).)

Finally, I note that in the Manuli Trust's petition, Mr. Young states that he is still endeavoring to report the change in ownership of the property served by License 5434 to the Board. I urge him to do so on as soon as possible via the Board's "Change in Ownership" form, available at the Board's website, and that he indicate the name and address of the new owner upon the form.⁸ (Cal. Code Regs., tit. 23, § 831.)

5.0 CONCLUSION

For the foregoing reasons, I find that Order WR 2014-0010-DWR was appropriate and proper, given the information available to the Assistant Deputy Director at the time he issued it. On the basis of the new, relevant information in the Manuli Trust's petition for reconsideration, I find that a reduction in the amount of civil liability imposed is appropriate. I therefore grant the Manuli Trust's petition for reconsideration, in part.

I have considered all relevant circumstances in determining the amount of civil liability imposed upon the Manuli Trust, and I accordingly modify Order WR 2014-0010-DWR to impose civil liability upon the Manuli Trust in the amount of \$1,000.00, pursuant to California Code of Regulations, title 23, section 770, subdivision (a)(2)(C).

ORDER

IT IS HEREBY ORDERED that:

1. The Manuli Trust's petition for reconsideration of Order WR 2014-0010-DWR is granted, in part.
2. Order WR 2014-0010-DWR is modified to reduce the amount of civil liability imposed upon the Manuli Trust to \$1,000.00.

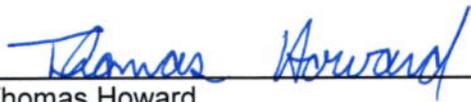
⁸ The "Change in Ownership" form is available at:
http://www.waterboards.ca.gov/water_issues/programs/ewrims/ownership/change_of_ownership.pdf

3. Having already tendered payment in the amount of \$500.00 to the State Water Resources Control Board towards the outstanding administrative civil liability, the Manuli Trust shall remit, within thirty days of the date of this order, a cashier's check or money order in the amount of \$500.00 to:

State Water Resources Control Board
Division of Water Rights
Enforcement Section
P.O. Box 2000
Sacramento, CA 95812-2000

4. If the Manuli Trust fails to remit the outstanding penalty this order imposes within thirty (30) days of the date of this order, the Assistant Deputy Director is directed to seek recovery of the outstanding liability, pursuant to Water Code section 1055.4.
5. Pursuant to Water Code section 1123, this order shall have the same force and effect as Order WR 2014-0010-DWR.
6. The State Water Resources Control Board's right to take future enforcement action against the Manuli Trust for any future violations is reserved.

Dated: JUN 30 2014



Thomas Howard
Executive Director