

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2015—0012—EXEC

In the Matter of the Petition for Reconsideration of

HARRY H. BAKER, Jr. and JOHN H. BAKER

Regarding Order WR 2014-0008-DWR
Imposing Administrative Civil Liability for Violation of a Cease and Desist Order

SOURCES: Fresno River

COUNTY: Madera

**ORDER GRANTING PETITION FOR RECONSIDERATION, IN PART, AND MODIFYING
ORDER WR 2014-0018-DWR**

BY THE EXECUTIVE DIRECTOR:¹

1.0 INTRODUCTION

Harry H. Baker, Jr. and John H. Baker (collectively, Bakers), through their attorney David A. Linn, petition the State Water Resources Control Board (State Water Board or Board) for reconsideration of Order WR 2014-0008-DWR. Order WR 2014-0008-DWR imposes administrative civil liability upon Harry H. Baker, Jr. in the amount of \$10,000.00 for failure to comply with Order WR 2013-0051-DWR, which requires Harry H. Baker, Jr. to cease and desist his violation of the term in his water license requiring him to file an annual report of his water diversion and use. For the following reasons, I find that Order WR 2014-0008-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

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).)

Bakers' petition for reconsideration, however, I find limited grounds to reduce the administrative civil liability that Order WR 2014-0018-DWR imposes. I therefore grant the Bakers' petition, in part, and modify Order WR 2014-0018-DWR to reduce the administrative civil liability imposed to \$3,000.00.

2.0 LEGAL, FACTUAL, AND PROCEDURAL BACKGROUND

Harry H. Baker, Jr. holds License 10673 authorizing him to divert water from the Fresno River in Madera County. Harry H. Baker, Jr.'s license requires him 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.) In January 2013, the Division of Water Rights (Division) mailed a notice to Harry H. Baker, Jr. reminding him of the requirement that he file an annual use report for 2012 on or before June 30, 2013. Harry H. Baker, Jr. did not file an annual use report on or before June 30, 2013.

Division staff then prepared and transmitted to Harry H. Baker, Jr. a draft cease and desist order (Draft CDO) directing him to cease and desist his violation of the term of his license requiring him to file his 2012 annual use report on or before June 30, 2013. (Wat. Code, § 1831, subds. (a), (d)(2).) The Draft CDO directed Harry H. Baker, Jr. to file his annual use report or request a hearing before the State Water Board within twenty days of his receipt of the Draft CDO. (Wat. Code, § 1834, subd. (a).) Harry H. Baker, Jr. received the Draft CDO via certified United States mail on August 26, 2013. (*Ibid.*) Harry H. Baker, Jr. neither filed his annual use report nor requested a hearing within twenty days of his receipt 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 2013-0051-DWR, directing Harry H. Baker, Jr. to cease and desist his violation of the term of his license requiring him to file his 2012 annual use report on or before June 30, 2013.² (Wat. Code, § 1834, subd. (b).) Order WR 2013-0051-DWR became effective upon its issuance. (Wat. Code, § 1832.)

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.

On October 25, 2013, the Assistant Deputy Director issued an administrative civil liability complaint (complaint) against Harry H. Baker, Jr.. The complaint proposed that administrative civil liability be imposed upon Harry H. Baker, Jr. in the amount of \$10,000.00 for violation of Order WR 2013-0051-DWR. (Wat. Code, §§ 1845, subds. (b)(1), (3); 1055.) The complaint informed Harry H. Baker, Jr. of his right to request a hearing within twenty (20) days of his receipt of the complaint. (Wat. Code, § 1055, subd. (b).) The complaint also made a conditional settlement offer, offering to settle the complaint if Harry H. Baker, Jr. filed his annual use report and paid \$1,000.00 within twenty (20) days of his receipt of the complaint. Harry H. Baker, Jr. received the complaint via certified United States mail on October 28, 2013. (*Ibid.*) Harry H. Baker, Jr. neither accepted the conditional settlement offer nor requested a hearing within twenty days of his receipt of the complaint.

On March 21, 2014,³ the Assistant Deputy Director issued Order WR 2014-0008-DWR, imposing administrative civil liability upon Harry H. Baker, Jr. in the amount of \$10,000.00 for violation of Order WR 2013-0051-DWR.⁴ On April 17, 2014, Harry H. Baker, Jr. along with John H. Baker, through their attorney David A. Linn, filed a petition for reconsideration of Order WR 2014-0008-DWR.

3.0 GROUND S FOR RECONSIDERATION

Within thirty (30) days of adoption of a State Water Board order or decision, any interested person may file a petition for reconsideration of the order or decision pursuant to Water Code section 1122 and California Code of Regulations, title 23, sections 768-770. Section 768 of the Board's regulations provides that an interested person may petition for reconsideration upon any of the following grounds:

- (a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;

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.

- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

On reconsideration, the State Water Board may:

- “(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

The Bakers’ petition for reconsideration (petition) of Order WR 2014-0008-DWR (Order) sets forth the following facts about Harry H. Baker, Jr.: 1) he is 86 years old; 2) he is in poor health, of “limited physical and mental capacity,” and “incompetent and incapable” of filing the annual use report; and 3) he has little, if any, working knowledge of his water rights or the place of use served by License 10673. The Bakers’ petition further asserts that Harry H. Baker, Jr. no longer owns the place of use served by License 10673 and that John H. Baker is the new owner of said place of use.⁵ The Bakers’ petition acknowledges that Harry H. Baker, Jr. received the complaint and the Draft CDO but asserts that John H. Baker did not.

Relying upon these allegations, the Bakers argue: 1) that License 10673 effectively transferred to another owner and therefore Harry H. Baker, Jr. is not liable for failing to file an annual use

⁵ As discussed herein, the petition is internally contradictory as to whether John H. Baker is the current owner of the place of use served by License 10673 or whether there is doubt as to the true owner.

report; 2) John H. Baker is the true licensee and, because he received no actual notice of the complaint, he was denied due process of law; and 3) Harry H. Baker, Jr. "is incompetent and incapable of providing the [State Water Board] with the information they required" and therefore cannot be subject to administrative civil liability. The Bakers also assert a fourth argument without factual support: the Board is "arbitrarily applying the requirement of annual online reporting" and "the Petitioners have been deprived of equal protection of law."

4.1 The State Water Board Can Justifiably Presume That Harry H. Baker, Jr. Retains Ownership of the Place of Use Served by License 10673

The petition seems to argue both that John H. Baker, either individually or as trustee of the John H. Baker Revocable Trust, holds legal title to the place of use served by License 10673 and that there is doubt as to who holds legal title to the place of use served by License 10673 (Baker Ranch).⁶ To the extent that the Bakers argue that Harry H. Baker is not subject to liability for violation of Order WR 2013-0051-DWR (Final CDO) because John H. Baker is the true licensee, their argument is an impermissible collateral attack on the Final CDO.

Harry H. Baker, Jr. did not petition the Board for reconsideration of the Final CDO, which identified him as the holder of License 10673. Having failed to do so, he cannot now challenge the final CDO's requirement that he file the 2012 annual use report for License 10673. (Wat. Code, § 1126, subd. (b) [if an aggrieved party fails to petition for the Board for reconsideration of an order issued under delegated authority, it cannot seek review of that order in any court].)

Regardless, even if the Bakers had timely argued that John H. Baker is the true licensee, and that Harry H. Baker, Jr. is not responsible for compliance with License 10673's terms, the argument would be unavailing. The owner of Baker Ranch is required to comply with the term of License 10673 requiring the filing of an annual use report. (See Cal. Code Regs., tit. 23, § 833 [when a license stands upon the records of the Board in the name of the owner of the place of use, the right will be considered appurtenant to the land unless there is evidence to the contrary].) Indeed, the Bakers concede as much. (See Bakers' Petition for Reconsideration at

⁶ At page two, the petition states: "The property in fact has been owned by the John H. Baker, Revocable Trust, John H. Baker Trustee, and/or another unknown Trust, and a Corporation." At page four, the petition states "[the property] appears to be owned by two (2) different trusts, a corporation and individuals, and it may be solely owned by the John H. Baker, Revocable Trust, or Harry H. Baker, Jr. and John H. Baker may be joint or co-tenants to said property." Also on page four, the petition states: "The Madera County Assessor's office lists the current owner of the property as the John H. Baker, Revocable Trust, with John H. Baker, as trustee of that trust."

p. 2 [asserting that License 10673 should be treated as appurtenant to the place of use it serves].)

If Harry H. Baker, Jr. had indeed transferred Baker Ranch to another person, he was obligated to immediately inform the State Water Board of the transfer and identify the new owner. (Cal. Code Regs., tit. 23, §§ 831.) Harry H. Baker, Jr. gave no such notice to the Board. Therefore, it was appropriate for the Final CDO to presume that no transfer occurred, that Harry H. Baker, Jr. is the owner of Baker Ranch, and that Harry H. Baker, Jr. was responsible for filing the 2013 annual use report for License 10673. (See also Wat. Code, § 5106, subd. (b)(1) ["The [B]oard may rely on the names and addresses included in [statements of diversion and use] for the purpose of determining the names and addresses of persons who are to receive notices with regard to proceedings before the [B]oard"].)⁷

Indeed, while the Bakers argue that that Harry H. Baker Jr. should not be treated as the owner of the rights under License 10673, their petition is unclear as to exactly who should be. The Bakers make several contradictory statements as to the identity of Baker Ranch's legal owner, but state that the legal owner is either: 1) Harry H. Baker, Jr.; 2) John H. Baker; 3) a trust controlled by Harry H. Baker, Jr.; 4) a trust controlled by John H. Baker; or 5) some combination thereof that includes another unidentified corporation.

Harry H. Baker, Jr., John H. Baker, or both are included in every possible iteration of Baker Ranch's ownership that the petition sets forth. The Bakers are effectively arguing that one of them owns Baker Ranch but because they cannot determine which of them does, neither of them is responsible for filing an annual use report for License 10673. This argument seems calculated solely to attempt to persuade the Board that no one may be held liable for failure to file the annual use report for License 10673. The argument underscores why it was appropriate to treat Harry H. Baker, Jr. as the owner unless and until the State Water Board receives proper notification that the rights under License 10673 have been transferred, including clear identification of the name and address of the new owner.

⁷ The Bakers rely upon *Dixon v. Schermeier* for the proposition that a license that the State Water Board issues is appurtenant to the land it serves and passes with the transfer of that land. (*Dixon v. Schermeier* (1895) 110 Cal. 582.) *Dixon v. Schermeier*, which concerns the passage of an easement upon a water ditch with the transfer of land and predates the Water Commission Act of 1914, provides no support for that proposition. (*Id.* at p. 584-86.) The Board's regulations, however, presume that a water right passes with a transfer of land "when [a] license stands upon the records of the board in the name of the owner of the place of use." (Cal. Code Regs., tit. 23, § 833.)

Because the Final CDO requires Harry H. Baker, Jr. to file the annual use report for License 10673 and no report was filed, imposition of civil liability against Harry H. Baker, Jr. is appropriate. The argument that he is not the proper licensee is both untimely and disingenuous.

4.2 The Bakers Were Denied Neither Due Process of Law Nor Equal Protection of Law

Order WR 2014-0008-DWR imposes administrative civil liability upon Harry H. Baker, Jr. Consequently, John H. Baker was not denied due process of law, as no rights to due process exist where a person does not face deprivation of a significant property interest. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.)

The Bakers also assert, without support, that the "Division of Water Rights is arbitrarily applying the requirement of annual online reporting, and that the Petitioners have been deprived equal protection of the law." I find that this assertion is without support, and I further take official notice that the Division of Water Rights issued cease and desist orders against 285 persons or entities for failure to file 2012 annual use reports.⁸ I find that this fact supports the inference that the Division of Water Rights is consistently and frequently enforcing the requirement that licensees submit annual use reports.

4.3 Harry H. Baker, Jr.'s Health Status Merits a Reduction in Civil Liability

I find that the Bakers have not introduced sufficient evidence in their petition to support the conclusion that Harry H. Baker, Jr. was incapable of complying with License 10673's requirement that he file an annual use report. Though the Bakers do make repeated reference to Harry H. Baker, Jr.'s age and "debilitated condition," this information alone does not offer a basis for a reasonable person to conclude that Harry H. Baker, Jr. was unable to conduct his normal affairs. Further detail comes only in the form of conclusory statements that equally fail to provide a basis to conclude that Harry H. Baker, Jr.'s health precluded him from complying with the requirement of his license that he file an annual use report: "it is *highly unlikely*, (sic) that [Harry H. Baker, Jr.] was ever aware of any notice requiring him to report any water usage on an

⁸ 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].

annual basis and it is also *significantly questionable* that he was capable of reporting any such usage by way of online transmission.” (Emphasis added.)

Nonetheless, I find that the Bakers’ petition does set forth facts from which a reasonable person could conclude that Harry H. Baker, Jr.’s failure to timely file his annual use report should be excused, in part. I infer that Harry H. Baker, Jr.’s advanced age hindered his ability to file an annual use report, and I find that the amount of civil liability imposed upon Harry H. Baker, Jr. should be reduced to reflect these circumstances.

I find that the Assistant Deputy Director 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 Harry H. Baker, Jr. did not request a hearing after the Assistant Deputy Director issued the complaint, however, the circumstances of his health were not part of the record before the Assistant Deputy Director. Having considered these facts, I find it appropriate to reduce the amount of administrative civil liability imposed upon Harry H. Baker, Jr.

I also find, however, that the State Water Board was forced to expend unnecessary costs in an effort to bring Harry H. Baker, Jr. into compliance due to his failure to request a hearing on the Draft CDO, his failure to seek reconsideration of Order WR 2013-0051-DWR, and his failure to request a hearing on the complaint.

The Bakers have not proposed an appropriate course of action other than to make a general request that the Board reconsider the Order and not require Harry H. Baker, Jr. “to remit a penalty of \$10,000.00.” 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 that the Order imposes nor the action that the Bakers request.⁹ I find that an appropriate civil liability should reflect both: 1) Harry H. Baker, Jr.’s poor health and 2) the unnecessary costs that the

⁹ 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.

Board incurred in bringing Harry H. Baker, Jr. into compliance. Upon consideration of the foregoing facts and all other relevant circumstances, I reduce the civil liability imposed upon Harry H. Baker, Jr. to \$3,000.00. (Cal. Code Regs., tit. 23, § 770, subd. (a)(2)(C).)

To the extent that the Bakers' petition asserts any other reasons that Order WR 2014-0008-DWR should be reconsidered, I find that their 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).)

5.0 CONCLUSION

For the foregoing reasons, I find that Order WR 2014-0008-DWR was appropriate and proper but that on the basis of new, relevant information in the Bakers' petition, a reduction in the amount of civil liability is appropriate. I therefore grant the Bakers' petition for reconsideration, in part, and reduce the amount of administrative civil liability imposed to \$3,000.00.

ORDER

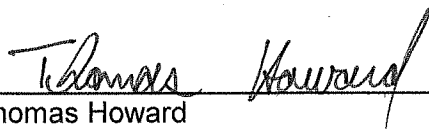
IT IS HEREBY ORDERED that:

1. Harry H. Baker, Jr.'s and John H. Baker's petition for reconsideration of Order WR 2014 0008-DWR is granted, in part.
2. Order WR 2014-0008-DWR is modified to reduce the amount of civil liability imposed upon Harry H. Baker, Jr. to \$3,000.00, provided that the Bakers notify the State Water Board as to whether ownership of the rights under License 10673 have been transferred from Harry H. Baker, Jr., and, if so, stating the name and address of the new owner, within thirty (30) days of the date of this Order.
3. Harry H. Baker, Jr. shall remit, within thirty (30) days of the date of this Order, a cashier's check or money order in the amount due under this Order. If the State Water Board is provided notice of ownership, as set forth above, the cashier's check shall be in the amount of \$3,000.00. If the notice of ownership is not provided, the cashier's check shall be in the amount of \$10,000.00. The check shall be remitted to:

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

4. If Harry H. Baker, Jr. fails to remit the outstanding penalty imposed by this Order 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 2014-0008-DWR.
6. The State Water Resources Control Board reserves the right to take enforcement action against Harry H. Baker, Jr. for any violations that may occur unless and until the State Water Board receives notice that the rights under License 10673 have been transferred and the Board is provided the name and address of the new owner.

Dated: 3/19/15



Thomas Howard
Executive Director