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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP	**FAHEY'S CLOSING BRIEF**

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I. INTRODUCTION.

The evidence presented to the Hearing Officers in this matter conclusively demonstrates that the Prosecution Team has not met its burden of proving the elements of the Administrative Civil Liability Complaint and Draft Cease And Desist Order ("ACL/CDO") against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively "Fahey"). Instead, the evidence establishes that Fahey had a valid exception to curtailment in 2014 and 2015. Fahey did not have any unauthorized diversion of water under his two permits during those curtailment periods. Furthermore, the manner in which the State Water Resources Control Board ("Board") ignored Fahey's explanation of his curtailment exception, as well as the manner in which the Prosecution Team initiated the instant ACL/CDO and (most-recently) withheld relevant documents from Fahey until three (3) months *after* the close of the Hearing, violates Fahey's constitutional due process rights. Accordingly, the ACL/CDO must be denied and dismissed in their entirety.

II. THESE PROCEEDINGS SHOULD BE DISMISSED. THREE MONTHS AFTER THE EVIDENTIARY HEARING, THE PROSECUTION TEAM FINALLY PRODUCED RELEVANT BOARD DOCUMENTS IN RESPONSE TO FAHEY'S DEMANDS OF DECEMBER 1, 2015. THAT DELAY PREJUDICED FAHEY BY PREVENTING HIM FROM DIRECTLY REFUTING THE PROSECUTION TEAM'S TESTIMONY ON KEY ISSUES WITH THOSE NEW DOCUMENTS.

Fahey's counsel wrote a letter to the Prosecution Team, dated December 1, 2015, in which Fahey made several demands for production of documents. (*See* Declaration of Kenneth Petruzzelli In Support Of Prosecution Team Post-Hearing Evidence Brief, ¶5, Attachment 1.) Those demands included a request for the following documents: "3. All written correspondence from April 1, 2014 and July 1, 2015, between the Board and the Primary Owners of the water right applications who signed the [Curtailment Certification] Forms described in item 2, above, which correspondence was made or sent following the submission by the Primary Owners of the Forms." (*Ibid.*)[1] In an email sent on December 8, 2015, the Prosecution Team's Kenneth

[1] Item 2 requested the following documents: "2. All Curtailment Certification Forms ('Forms') received by the Board from any and all primary owners between April I, 2014, and July 1, 2015, where the box on the Form for "OTHER I have additional information explaining how much water I am diverting, the use of that water, the measure being undertaken to reduce use, and the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency" was marked or checked off."

Petruzzelli objected to providing any document in response to Item 3 that was not signed by Fahey on the grounds that the request for such documents "is exceedingly broad and *lacks relevance* to this ACL proceeding" and "is typically one the Division would treat as a request for public records." (*Ibid.* (emphasis added).) In a letter to Fahey's counsel, dated *April 29, 2016*, Mr. Petruzzelli confirmed the Prosecution Team's conduct in response to Fahey's document demand: "Of the nine categories [in Fahey's document demands on December 1, 2015], ***I*** determined … that the remaining four (categories 2, *3*, 5, and 6) *did not relate* to the Fahey ACL/CDO and were more appropriately addressed through a request for public records." (Letter from Kenneth Petruzzelli to Glen Hansen, dated April 29, 2016 (emphasis and bold added), attached as Exhibit 1 to Declaration of Glen Hansen In Support Of Fahey's Closing Brief, filed herewith ("Hansen Declaration").) Fahey made a PRA request that was identical to the discovery demand for production of documents. (*Ibid.*; R.T., Jan. 25, 2016, 9:9-14.)

On April 29, 2016, the Prosecution Team finally responded to Item 3 and produced 42 pages (attached to Mr. Petruzzelli's letter of that date).[2] *The documents were produced by the Prosecution Team over 3 months after the Evidentiary Hearing was closed.* Contrary to the Prosecution Team's email on December 8, 2015, those 42 pages of new documents are relevant to the issues in this proceeding for the following four (4) reasons.

First, the recently-disclosed documents include materials relating to the City of Portola's water permit A017069. Those documents address water rights and "developed springs" located on National Forest lands (Hansen Declaration, ¶3, Ex. 1 (Bates-stamped pages 24-39)), which appear to contradict the Prosecution Team's legal position in this proceeding. (R.T., Jan. 25, 2016, 128:16-22; WR-9, ¶35.) That evidence is relevant here as to the developed water issue. (R.T., Jan. 25, 2016, 127:17-128:18; Jan. 26, 2016, 26:22-29:22.)

[2] If, between December 8, 2015, and the Hearing held on January 25-26, 2015, Fahey was supposed to locate and review the Tuolumne River water availability analysis on the Board's website that was "at most, two mouse clicks away" from the link provided by the Prosecution Team (Hearing Officer's Ruling on Post-Hearing Evidence Motions, dated May 23, 2016, p. 12), then certainly the Prosecution Team should have likewise, during that *same* time frame, been able to review and produce the Board's records relating to the only six (6) Curtailment Certification Forms that are responsive to Item 3. Also, the fact that there are merely 42 pages of documents relating to those 6 Forms demonstrates that, contrary to the Prosecution Team's alternative argument, Item 3 was not "exceedingly broad." The Prosecution's Team's delay was not only unwarranted, it was also irreparably prejudicial to Fahey.

Second, the newly-disclosed documents include an undated letter to the City Manager of the City of Portola from John O'Hagan, Assistant Deputy Director, Division of Water Rights, State Water Resources Control Board (and member of the Prosecution Team in this proceeding) that states that "California water law presumes that the source of groundwater is a percolating aquifer unless evidence is available to support that a specific groundwater diversion is from a subterranean stream flowing in a known and defined channel." (Hansen Declaration, ¶3, Ex. 1 (Bates-stamped pages 38-39).) That evidence would not only reinforce Fahey's testimony that is directly related to the lack of harm from his diversions (F-1, pp. 4-5; F-71; F-73; R.T., Jan. 25, 2016, 161:10-162:13, 242:20-243:25; F-87),[3] but it would also establish that the Prosecution Team had the burden of overcoming the developed water presumption, which it did not do in this case. (R.T., Jan. 26, 2016, 27:20-29:22, 29:2-22.)

Third, nowhere in the 42 pages is there any discussion of an administrative process under which the Board responded to the "Other" box being marked on the Curtailment Certification Forms. (Hansen Declaration, ¶4, Exhibit 1.) The absence of such an administrative process is relevant to the civil penalty issues in this case. (*See e.g.,* R.T., Jan. 25, 2016, 122:17-123:7.)

Fourth, the recently-produced documents include documents related to a Curtailment Certification Form filed by the Cold Springs Water Company ("CSWC") for a 1969 water right in the Tuolumne River watershed above New Don Pedro Reservoir ("NDPR"). (Hansen Declaration, ¶5, Ex. 1 (Bates-stamped pages 40-42).) Those documents, along with the CSWC water permit file in the Board possession that those documents refer and point to, address numerous relevant issues raised at the Hearing in this case, including:

- The flow of Tuolumne River during July, August, and September is now almost completely controlled by MID/TID;
- There is "no diminution of supply to the Delta" during the annual FAS period, despite CSWC's year-round diversions under its 1969 right, because MID/TID/CCSF have a right to divert or store nearly the entire flow of the Tuolumne River upstream of NDPR;
- Where a potential diverter (such as Fahey) is above a reservoir which has an all year season of collection or diversion and exercises full control of the stream

[3] Fahey's exhibits are referred to with an "F" (e.g., Fahey Exhibit no. 1 is cited as "F-1"). The transcript for the Hearing is referred to as "R.T." with the applicable day of the Hearing.

during the FAS season (such as NDPR), and if the applicant (such as Fahey) can eliminate the protest of the agency controlling or diverting the entire stream (such as the Districts and CCSF), then "all year diversion is allowed." (Hansen Declaration, ¶6, Exhibit 2 (Bates-stamped pages 136-138, 148, 152, 165-170.)

In short, Fahey has been irreparably prejudiced by the Prosecution Team's decisions (a) to declare that Item 3 in Fahey's demand "*lacks relevance* to this ACL proceeding;" (b) to treat Item 3 as only a Public Records Act request; and (c) to delay production of the documents. That conduct, alone, warrants a dismissal of the ACL/CDO on fundamental due process grounds.

III. FAHEY HAS ACTED IN GOOD FAITH IN PERFORMING HIS OBLIGATIONS UNDER HIS PERMITS, AND IN TIMELY EXPLAINING TO THE BOARD HIS EXCEPTION TO CURTAILMENT UNDER THE PERMITS (WHICH EXPLANATION THE BOARD IGNORED AND THEN FILED THE ACL/CDO).

A. Fahey's First Application To Appropriate Spring Water (A029977).

On May 28, 1991, Fahey applied to the Board for the right to divert water (primarily groundwater) by appropriation from Deadwood Springs and Cottonwood Springs, in Tuolumne County. (F-1, p. 12; F-3) On December 12, 1992, he executed a water exchange agreement with the Modesto Irrigation District ("MID") and Turlock Irrigation District ("TID") (collectively, the "Districts") as part of the process of gaining approval of his application, number A029977. ("1992 Agreement") (R.T., Jan. 25, 2016, 158:2-13; 215:5-216:18; F-1, p. 1; F-6; F-7; F-8.) The Board's Yoko Mooring wrote a *Memorandum*, dated January 14, 1993, recognizing the 1992 Agreement. (F-1, p. 2; F-9.) The Board approved an exception to a Declaration of a Fully Appropriated Stream System (FASS) subject to a Water Exchange Agreement, described as the 1992 Agreement (F-1, p. 2; F-10), and issued a Notice of Application to Appropriate Water for A029977. (F-1, p. 2; F-11.) After that 1992 Agreement was entered into, TID's Leroy Kennedy instructed Fahey not to contact Districts about water replacement, unless first contacted by Districts. (R.T., Jan. 25, 2016, 158:14-160:6; R.T., Jan. 26, 2016, 74:22-75:14.) To date, the Districts have never contacted Fahey. (R.T., Jan. 25, 2016, 239:22-24.)

B. CCSF's Protest Is Resolved By The Addition Of Term 20 To The Permit.

Because City and County of San Francisco ("CCSF") was not a party to 1992 Agreement, and therefore CCSF's water rights with respect to the Fourth Agreement involving New

Don Pedro Reservoir ("NDPR") would be impacted (R.T., Jan. 25, 2016, 47:1-6), CCSF filed a protest to A029977. (R.T., Jan. 26, 2016, 105:5-23; 226:18-20; F-1, p. 12; F-12.) In a letter dated December 19, 1994, CCSF provided the conditions under which it would withdraw its protest, (F-1, p. 2; F-15; F-19), which terms the Board's Yoko Mooring agreed to include in any permit issued pursuant to A029977. (F-1, p. 2; F-16; F-18.) Those terms, which formed the basis of Term 20 in the permit, included the following: "Permittee shall provide replacement water within one year of the annual notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions. … *Replacement water may be provided in advance and credited to future replacement water requirements*." (R.T., Jan. 25, 2016, 97:1-25; 229:9-22; R.T., Jan. 26, 2016, 106:13-25; F-16 (emphasis added).)

C. Board Staff Concluded That There Are No Water Rights Of Record Between The Points Of Diversion And New Don Pedro Reservoir ("NDPR").

The Board conducted a Field Investigation, which led the Board's Yoko Mooring to issue a *Report Of Field Investigation Under Water Code Section 1345* in February 1995. (F-1, pp. 2, 3; F-13; F-17.) That report stated the following as to "Availability Of Unappropriated Water":

> As a prerequisite to issuance of a permit to appropriate water, there must be water available to supply the applicant taking into consideration prior rights and instream needs.
>
> Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect all prior rights at and below the reservoir during this period. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir. [F-1, p. 3; F-17.]

Thus, the Board has always known that, other than the Districts and CCSF, there are no prior rights of record between Fahey's points of diversion and NDPR.

D. The Application Of Term 19 In Permit 20784 Is Controlled By Term 20.

On March 23, 1995, the Board issued the *Permit For Diversion And Use Of Water, Permit 20784* pursuant to A029977. (F-1, p. 3; F-20.) Terms 19 and 20 of Permit 20784 provide:

19. Diversion of water, under this permit during the period from June 16 through October 31 of each year is subject to maintenance of the Water Exchange Agreement executed on December 12, 1992 between the Permittee and the Modesto and Turlock Irrigation Districts. Pursuant to the Agreement, Permittee shall provide replacement water to New Don Pedro Reservoir for all water diverted under this permit during the period from June 16 to October 31 of each year. The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.

20. Permittee shall comply with the following provisions which are derived from the City and County of San Francisco (San Francisco) letter dated December 19, 1994 filed with the State Water Resources Control Board:

1) Permittee shall not interfere with San Francisco's obligations to the Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any implementing Agreement between the Districts and San Francisco.

2) Permittee shall provide replacement water to New Don Pedro Reservoir for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made annually by the latter parties in accordance with water accounting procedures being used by said parties.

Permittee shall provide replacement water within one year of the annual notification by San Francisco or the Districts of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. [F-1, p-p. 3-4; F-20.]

As discussed above, the Districts, the Board and Fahey initially agreed to Term 19 (of Permit 20784) in order to incorporate the 1992 Agreement. (F-1, pp. 1-2; F-6; F-7; F-8; F-9; F-20.) But then those parties, CCSF and the Board agreed to Term 20 (in Permit 20784), in response to a protest by CCSF, in order to prevent interference with the governing procedures of the Raker Act and Fourth Agreement. Thus, Paragraph (1), of Term 20, requires that "Permitee *shall not interfere* with San Francisco's obligations to the Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any implementing Agreement, currently the Fourth Agreement, between the Districts and San Francisco." (F-20 (emphasis added).) Paragraph (2), of Term 20, provides that Fahey shall provide replacement water to NDPR for water he diverts that is adverse to the prior rights of CCSF and the Districts, and provides that: (a) such water shall be replaced after the Districts and CCSF engage in the accounting procedures required by

the Fourth Agreement; (b) replacement must occur within one year of being notified by CCSF or the Districts to do so; and (c) "[r]eplacement water may be provided in advance and credited to future replacement water requirements." (F-20.) (Fahey explained how the water replacement provisions of Term 20 work at R.T., Jan. 25, 2016, 107:11-108:10, 154:14-155:2, 199:9-200:21.)

The manner in which Term 20 came into existence (F-1, pp. 2-3; F-12; F-13; F-15; F-16; F-18; F-19) demonstrates that the parties, including the Board, intended that Term 20 control over any inconsistent provisions in Term 19, for the following three (3) reasons.

First, the terms of the 1992 Agreement that the Districts entered into with Fahey must be interpreted consistent with the *Districts'* obligations to protect CCSF's water rights under the Raker Act and the Fourth Agreement. (*See In Re Quantification Settlement Agreement Cases,* (2011) 201 Cal.App.4th 758, at p. 798 ["'[A]greements will be construed, if possible, as intending something for which [the parties] had the power to contract.'"]) Any water replaced by Fahey under the provisions of the 1992 Agreement to comply with Term 19, without following the exact procedures of paragraph (2) of Term 20 (i.e., the Prosecution Team's position), would necessarily interfere with what CCSF describes as the "complicated but comprehensive set of agreements, including the Fourth Agreement" (F-1, p. 15; F-14; F-80), which interference would violate paragraph (1) of Term 20. Thus, water replacement procedures for Term 19 incorporate the terms of the 1992 Agreement which requires compliance with Term 20. (R.T., Jan. 25, 2016, 155:13-15.)

Second, the Board explicitly rejected language in paragraph (2) of Term 20 that would have limited that provision to the time frame not covered by Term 19. (F-18.)

Third, Term 19 does not provide any particular requirements as to how Fahey should replace water, but requires water replacement "pursuant to" the 1992 Agreement. So, if the compliance terms of the 1992 Agreement change, so would the manner of complying with Term 19 change. Thus, the fact that all of the parties to the 1992 Agreement later agreed to the provisions of Term 20, demonstrates that the particular requirements for water replacement in the 1992 Agreement were intended to be replaced by the specific water replacement provisions in paragraph (2) of Term 20. (*In Re Quantification, supra,* 201 Cal.App.4th, at p. 799 ["the whole of the contract must be taken together so as to give effect to every part."])

E. The Second Application To Appropriate Water (A031491) Similarly Led To Permit Terms That Also Prevent Interference With The NDPR Accounting.

On August 9, 2002, Fahey filed an application to appropriate water (primarily groundwater) from the Wet Meadow Springs (later adding the "Marco Spring" and "Polo Spring" points of diversion) in Tuolumne County (F-1, p. 4; F-27; F-34), the number of which eventually was A031491. (F-1, p. 4; F-28.) The Board's Yoko Mooring questioned the need for Fahey to even apply for such a water right ("WR") because "*His source appears to be groundwater.*" (F-1, p. 4; F-29; R.T., Jan. 26, 100:4-101:74:12.) The Board's Kathy Mrowka also considered that the water proposed for appropriation was mostly percolating groundwater. (F-1, p. 4; R.T. Jan. 25, 2016, 98:1-11.) In fact, only about 30% of the water diverted and sold by Sugar Pine Spring Water is jurisdictional surface water. (F-1, pp. 4-5; F-71; F-72; F-73; F-74; R.T. Jan. 25, 2016, 151:2-25, 177:16-178:7, 180:13-181:5, 233:5-10, 243:4-20; R.T., Jan. 26, 2016: 100:4-104:12.)[4]

F. The New Surplus Water Agreement With TUD Covered Both Permits.

The Board staff approved an *Agreement For Surplus Water Service* with the Tuolumne Utilities District ("TUD") that was inclusive of both the original and the new water rights. (F-1, p. 5; F-27; F-29; F-30; F-31; F-32; F-40; F-42; R.T., Jan. 25, 2016, 49:7-11, 209:10-210:20, 231:17-22; R.T., Jan, 26, 2016, 100:18-24, 109:3-14.) That agreement with TUD was executed on October 20, 2003. (F-1, p. 5; F-33; F-35.) The Board's Yoko Mooring then wrote in a *Memorandum*: "Permittee's obligations to provide replacement water, under this agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement." (F-1, p. 5; F-36.) On January 26, 2004, the Board's Victoria A. Whitney wrote a *Statement for File*, in which she approved an Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FASS) for Fahey to "provide replacement water to NDPR for all water diverted during the FASS period each year by way of a Water Exchange Agreement, executed on October 20, 2003, with TUD for surplus water." (F-1, p. 5;

[4] Fahey has claimed "developed water" on every relevant annual use report since in 1997. (See Progress Reports cited at F-1, p. 10.) Fahey's testimony about groundwater is not an attempt to change or modify his permit terms. The Prosecution Team overlooks that this testimony demonstrates that Fahey has put the largest volume of water to beneficial use under his permits (*see* http://www.waterboards.ca.gov/ about_us/performance_report_1415/allocate/), which is a requirement needed for the issuance of his licenses.

F-37.) The *Notice of Application to Appropriate Water*, which was issued on January 28, 2004, stated: "Applicant accepts and understands that Application 31491 shall be conditioned and subjected to the same terms and conditions as the previous agreements." (F-1, p. 5; F-39.)

G. CCSF's Protest To The Second Permit Application Led To Permit Terms Under Which Notification By CCSF Was Required Before Replacement Water Was To Be Provided By Fahey.

CCSF was concerned about the effects of A031491 on CCSF in conjunction with the Districts due to the complex water supply accounting procedures between the three entities. So CCSF filed a protest to A031491, proposing changes to the permit, including the following:

> Finally, we propose the following changes be made to the terms enumerated in permit conditions as they appear in the SWRCB's letter of January 24, 1995, which the City assumes are the same as those enumerated by the SWRCB in Permit 20784, Item 20.
>
> > Strike the word "annually" from the last sentence of the first paragraph of provision (2). That sentence would then read "A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures being used by said parties."
> >
> > Strike the words "the annual" from the first sentence of the second paragraph of provision (2). That sentence would then read "Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions."
> >
> > ...
>
> San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when their use has lead [sic] to a reduction, or has a strong potential of reducing, the supplies delivered San Francisco. The wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. Short of notifying the applicant each and every year that their diversions potentially could affect the supplies of San Francisco, thus triggering replacement water each year, our requested modifications to the term will leave the notification to a judgment on our part as to whether the need for replacement water is critical. [F-1, p. 6; F-40.]

Fahey agreed to the changes sought by CCSF, and the Board followed with a letter, dated January 31, 2005, confirming that the CCSF protest could be dismissed as a result of using the wording as corrected by the CCSF letter, dated November 8, 2004, which wording would be

included in any permit issued by the Board. (F-1, p. 7; F-42; F-43; F-44; F-46.)[5]

> In a letter dated March 21, 2011, CCSF later repeated the application of that wording: *As noted in the City's November 8, 2004 letter, San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when the applicant's use has led to a reduction, or has a strong potential of reducing, the water supply of San Francisco.* Also as noted, the wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. [F-1, p. 7; F-54 (emphasis added); R.T., Jan. 26, 2016, 77:2-12.]

The Board never responded or disagreed with that letter (R.T., Jan. 25, 2016, 96:19-97:11), which indicated the Board's acceptance of that understanding of the terms of the new permit.

The Districts also protested A031491 (F-1, p. 7; F-41), but later agreed that the terms sought by CCSF "specifically protect the prior rights of both CCSF and the Districts and inclusion of those terms in the permit would be sufficient to resolve the Districts' Protest." (F-1, p. 7; F-53.) Those terms became the basis of Terms 33 and 34. (R.T., Jan. 25, 2016, 97:1-25.)

H. Permit 21289, Issued On Application 31491, Includes Terms 33 and 34.

On August 1, 2011, the Board issued the *Permit For Diversion And Use Of Water For Permit 21289 On Application 31491.* (F-1, p. 8; F-55.) Item 33 of that permit provides: "Permittee shall not interfere with San Francisco's obligations to Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or implementing agreement between the Districts and San Francisco." (F-55.) Item 34 of that permit provides, in pertinent part:

> Permittee shall provide replacement water to New Don Pedro Reservoir (NDPR) for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures used by said parties.
>
> *Permittee shall provide replacement water within one year of* ***notification*** *by San Francisco of potential or actual water supply reduction caused by permittee's diversion.* Permittee shall provide replacement water in a manner that will offset

[5] During seven-years between the protest being submitted and resolved, neither the Board, nor the Districts, nor CCSF even said to Fahey, "Prior to going forward you're not fulfilling your FAS obligations" under the first permit. (R.T., Jan. 26, 2016, 76:1-12.)

> the separate reductions in water supplies of San Francisco and the Districts. ***Replacement water may be provided in advance and credited to future replacement water requirements.*** Permittee shall not be obligated to provide replacement water for diversions that occur during periods when the Districts and San Francisco's reservoirs are spilling or are being operated in anticipation of spill.
>
> Permittee's obligations to provide replacement water under this letter agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between Permittee and the Districts. The source, amount and location at NDPR of replacement water discharged into NDPR shall be mutually agreed upon by the Permittee, the Districts, and San Francisco, and shall be reported to the State Water Board with the annual Progress Report by Permittee.
>
> Permittee shall not provide replacement water from a source that is hydraulically connected to surface water tributary to the Tuolumne River. If Permittee replaces water diverted pursuant to this permit with groundwater which it extracts, Permittee shall demonstrate that any extracted groundwater which replaces diverted surface water is water which would not otherwise reach NDPR. Permittee shall demonstrate that there is hydrologic separation between the groundwater extracted and groundwater flow into NDPR; or, alternatively, Permittee shall demonstrate that aquifer characteristics are such that subsurface flow to NDPR is not substantial and that any extraction of groundwater by Permittee would have essentially no impact on groundwater recharge via subsurface flow to NDPR. [F-1, pp. 8-9; F-55 (emphasis and bold added).]

Thus, Term 34 explicitly provides that it is the Districts' and CCSF's responsibility whether or not to request TUD surplus water to be used as FASS replacement water, when or if it is ever needed. (Fahey described how Term 34 works at R.T., Jan. 25, 2016, 155:16-156:1.) Term 34 allows a credit for foreign water wheeled into NDPR. (R.T., Jan. 26, 2016, 48:3-49:2.) To date, neither the Districts nor CCSF have ever provided Fahey with notification pursuant to Term 20 (A029977) or Term 34 (A031491). (R.T., Jan. 25, 2016, 239:1-25; F-1, p. 9.) At no time have the Districts or CCSF ever notified Fahey of the need to provide replacement water. (F-1, p. 9.)

I. Terms 33 And 34 Of Permit 21289 Were Intended To Govern All The Water Replacement Provisions In Both Permits (Including Terms 19 And 20 In The Earlier Permit 20784).

Term 34 of Permit 21289 was intended to be the procedures as to how water should be replaced by Fahey for his diversions under *both* permits, for the following three reasons.

First, Fahey and the Board initially agreed to make his new permit "conditioned and subjected to the same terms and conditions as the previous agreements." (F-39.) But later the

Board resolved the CCSF protest by including language that protected CCSF's water rights (i.e., Term 34). That language in Term 34 modified the terms and conditions of the previous agreements. (R.T., Jan. 25, 2016, 105:18-25; 238:2-13; F-39; F-40; F-44; F-46.)

Second, Term 33 of Permit 21289 repeated the same prohibition against interference that is in the earlier paragraph (1), of Term 20, of Permit 20784. Also, Term 34 of Permit 21289 incorporated and modified the water replacement provisions of *both* Term 19 *and* paragraph (2), of Term 20, of Permit 20784. In fact, Term 34 of the new permit includes language that references the "obligations" under the 1992 Agreement (just like Term 19), but also states: "*Replacement water may be provided in advance and credited to future replacement water requirements*." Thus, all water replacement, including that made pursuant to the 1992 Agreement, was thereafter to be governed by Terms 33 and 34 of the new permit. The Districts acquiesced to the inclusion of these terms. (F-41; F-53.)

Third, the language in the letter from CCSF to the Board on March 21, 2011 (F-54) unequivocally provided that *any* water replacement could interfere with the accounting procedures at NDPR, and so Term 34 must be followed for *all* water replacements under *both* permits. (*See* Civ. Code §1643 ["A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."]) Indeed, the Prosecution Team's witness admitted Term 34 combined all of Fahey's obligations to other water rights holders, and Term 34 does not require him, without notice, to replace the water he diverts. (R.T., Jan. 25, 2016, 104:8-105:25.)

J. The Board Notified Fahey In 2009 Of the Need To Proactively Obtain Replacement Water.

On February 26, 2009 the Board sent Fahey a *Notice of Surface Water Shortage for 2009*. (F-1, p. 7; F-69.) That notice stated: "If you plan to…..need water beyond the limited supply available, you may find yourself in a very serious dilemma"; and "[y]ou may….contract for water deliveries from a water supplier, such as…… a local water….district." That was the first time that anyone had given Fahey notice that surplus water should be purchased in case it is needed as replacement water whether for a diversion, curtailment or otherwise. (F-1, p. 7.) In good-faith

reliance on the Board's direction set forth in that notice to "contract for water deliveries from a water supplier…", from June 15, 2009, through June 15, 2011, Fahey purchased from and had TUD wheel 88.55 acre-feet of surplus water to NDPR pursuant to the terms of the water rights emanating from the A029977 and A031491 permits. (R.T., Jan. 25, 2016, 232:1-12; R.T., Jan. 26, 2016, 74:13-21; F-1, p. 7; F-70.) Thus, Fahey had that water standing by in case it was needed as replacement water. (R.T., Jan. 25, 2016, 232:1-12; F-1, pp. 7-8; F-71.)

K. In The 2014 Curtailment Certification Form (The Only Procedure Made Available By The Board), And In A Letter Attached To The Form, Fahey Timely Explained How His Diversions Fell Within An Exception To Curtailment.

On May 27, 2014, the Board sent to Fahey a *Notice Of Unavailability Of Water And Immediate Curtailment For Those Diverting Water In The Sacramento And San Joaquin River Watersheds With A Post-1914 Appropriative Right.* (F-1, p. 9; F-59.) In a timely response, on June 6, 2014, Fahey submitted to the Board a Curtailment Certification Form for both A029977 and A031491. (R.T., Jan, 26, 2016, 116:22-118:13, F-1, p. 9; F-61.) On both of those forms, Fahey marked the box "OTHER I have additional information explaining … the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency." Attached to those forms Fahey provided a detailed written explanation in a letter, dated June 3, 2014, as to why those diversions were exempt from curtailment (F-1, p. 9; F-60), adding: "After consultation with San Francisco and the Districts regarding this matter they concur, therefore, I contend that the diversion and use of water authorized by the referenced water rights applications is legally authorized." That statement was based on several phone calls that Fahey had with Jonathan Knapp between June 2nd and 4th, 2014. (R.T., Jan. 26, 2016, 130:9-12; F-1, p. 9; F-60.) The Prosecution Team concedes that Fahey "went through at the proper manner" trying to get an exception to curtailment. (R.T., Jan. 25, 2016, 85:11-12.)

The Board never responded to Fahey's form or the letter that he sent to the Board in June 2014, and the Board never informed Fahey that his legal justification for an excption from curtailment was rejected. (F-1, p. 10. R.T., Jan. 25, 2016, 162:14-163:15; 181:6-17, 248:6-249:3;

R.T., Jan. 26, 2016, 30:24-31:2, 96:19-23.)) The Board never provided a hearing under Term 17 of Permit 20784 prior to affecting his water rights. (R.T., Jan. 25, 2016, 161:4-9.)

L. Fahey Immediately Responded To The 2015 Curtailment Notice, Again Providing An Explanation For His Exception To Curtailment.

On April 23, 2015, the Board sent Fahey a Notice of Unavailability of Water and Immediate Curtailment, in which the "Exceptions to Curtailment" provision states: "If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you may beneficially use that previously-stored water consistent with the terms and conditions of your post-1914 water right." (F-1, p. 10; F-63.)[6] That exception language in the April 23, 2015, notice is precisely what Fahey had done between June 15, 2009, through June 15, 2011, when he purchased from and had TUD wheel 88.55 acre-feet of surplus water to NDPR in response to the Board's earlier notice of February 26, 2009. (R.T., Jan. 25, 2016, 165:1-9.) Thereafter, "the previously collected water" stored in NDPR offset the water being diverted from Fahey's springs during curtailment. The "beneficially use that previous stored water" achieves is that surplus water converts to curtailment "replacement water" as fungible stored water in NDPR; therefore, the State's Water System experienced a no-net-loss due to Fahey's spring surface water diversion during the 2014 and 2015 curtailments. In response to the April 23, 2015 notice by the Board, Fahey resubmitted to the Board on April 29, 2015, his letter of June 3, 2014, which explained why his diversions were exempt from curtailment. (F-1, p. 10; F-60.)

M. In June 2015, A Board Representative Acknowledges Fahey's Exception To Curtailment When Informed Of The True Facts.

On June 12, 2015, Fahey had several phone calls with the Board's David LaBrie. (R.T., Jan. 25, 2016, 165:15-168:13; R.T., Jan. 26, 2016, 82:10-90:8; F-1, pp. 11-12.) In the second call, after Fahey explained the facts in this case (outlined above), LaBrie stated: "If that is true, then you could be the first person in California to be issued an exemption to the curtailment; but I doubt that is going to happen." (F-1, p. 11.) LaBrie informed Fahey that it had to be confirmed

[6] The Board also failed to respond to Fahey's progress report, dated March 3, 2015, which described his diversions during 2014. (F-1, p. 10; R.T., Jan 25., 2016, 164:6-21 ["There was nothing that [the Board] indicated to me that I was doing anything wrong."])

that there were no instream diverters between the points of diversion and NDPR. Fahey asked LaBrie to get back to Fahey if anything is found contrary to what he had told LaBrie. (*Ibid.*) In an email sent to Fahey later that day, LaBrie implicitly recognized that Fahey could have an exception to the curtailment if there were no other senior rights holders other than the Districts and CCSF. (F-1, p. 11; F-64.) After those phone calls and that email with LaBrie on June 12, 2015, Fahey never heard back from LaBrie. (F-1, p. 12.)

N. Another Board Representative Who Expressed His Personal Opinion That Fahey Had No Exception (Without Knowing The Permit Terms) Refused To Take The Matter To A More Senior Staff Official.

On August 12, 2015, Fahey received a phone call from the Board's Sam Cole. (R.T., Jan. 25, 2016, 168:14-169:21; R.T., Jan. 26, 2016, 91:9-93:22; F-1, pp. 13-14; F-66.) In that phone call, Fahey mentioned to Cole the prior discussion with LaBrie and explained why both Permits are exempt from curtailment. (F-1, p. 13; F-66.) Cole responded that the agreements were "very complicated and difficult to understand." (Ibid.) When Fahey suggested that Cole speak with the Board's Mrowka (who knew all about the agreements), Cole simply commented that Mrowka is too busy and is several levels above him, so he would probably not have an opportunity to discuss these issues with her. (*Ibid.*) Cole ended the conversation stating that Fahey would be considered to be diverting and not in compliance with the curtailment, but he did not explain why in light of Fahey's explanations. (*Ibid.*) Cole completed an internal "Contact Report" about that phone call on August 12, 2015, in which he recognizes that Fahey "wishes to continue operating in a legal and valid way," that Fahey "believes he has a valid exemption" to curtailment, and that Fahey told him "he had received no response to the letter he sent the Division and that he interpreted that to mean that the exemption was approved, that no news was good news." (F-66.) Nevertheless, even with that specific internal knowledge, the Board still never responded to Fahey with any response to his June 2014 letter explaining his curtailment exception, and made no further contacts with Fahey until issuing the ACL/CDO in this case (F-1, p. 14). In this case, the Prosecution Team seeks civil penalties for that time when the Board did not respond to Fahey.

O. Even As The Board Staff Failed To Take The Matter Of Fahey's Curtailment Exception To The Designated Board Officer Who Made Those Exception Decisions, The Staff Also Failed To Inform Fahey Of Any Opportunity He Might Have To Present The Matter To That Official.

The Prosecution Team admitted that any exceptions to curtailment could only be granted by Tom Howard. (R.T., Jan. 25, 2016, 135:11-13.) However, Mr. Howard was never made aware of Fahey's Curtailment Certification Form on which he marked the box "other" because "Staff reviewed the information that was submitted" and Ms. Mrowka "did not feel that there was a reason to further that to a higher level of review." (R.T., Jan. 25, 2016, 135:14-24.) Nowhere in the record is there any evidence that Ms. Mrowka had the legal authority to do that. Also, Fahey was never told that a staff decision had been made that the staff was not forwarding Fahey's information on to the person who could grant an exception. (R.T., Jan. 25, 2016, 135:25-136; R.T., Jan. 26, 2016, 93:2-23, 94:4-24.) That failure to inform Fahey prevented him from appealing the staff decision to Mr. Howard, and from at least obtaining an explanation from the staff about its decision so he could assess the validity of his curtailment exception to avoid potential civil penalties. In short, the Board staff violated Fahey's due process rights.

P. The Board's Decision To File The ACL/CDO.

The Board's decision to file the ACL/CDO and seek civil penalties against Fahey (and to simultaneously issue a press release, F-83) was made (1) without any consideration of Fahey's explanation of his exception to curtailment that he made according to the only procedure provided to him by the Board; (2) without any determination of that curtailment exception by the only official with the authority to make that decision; (3) without any formal response to Fahey of his claim of exception to curtailment; (4) without any notification to Fahey of an opportunity to be heard by the Board regarding his curtailment exception; and (5) without any consideration of whether the only senior water right holders were in any way harmed by Fahey's diversions. (R.T., Jan. 25, 2016, 90:21-22, 91:13-25, 102:19-103:3, 109:17-18; R.T., Jan. 26, 2016, 93:24-94:3.)

IV. THE PROSECUTION TEAM HAS FAILED TO MEET ITS BURDEN OF PROVING ITS CLAIMS AGAINST FAHEY.

The Prosecution Team bears the burden of proof in this enforcement proceeding. To prove its case against Fahey, the Prosecution Team must demonstrate by a preponderance of the evidence the existence of each fact that is essential to the causes of action in the ACL/CDO. (Evid. Code, § 500.) Here, the ACL/CDO should be dismissed because the Prosecution Team has failed to prove the elements of its claims against Fahey.

A. The ACL/CDO Is Based On An Erroneous Interpretation Of Fahey's Permits That Would Require Fahey To Interfere With The Complicated Water Accounting Procedures at NDPR, In Violation Of The Terms Of His Permits.

1. Fahey's permits explicitly require him to not interfere with the complicated water accounting procedures at NDPR.

Terms 19 and 20 of Permit 20784 (F-20), and Terms 33 and 34 of Permit 21289 (F-55), were purposefully designed by all of the parties to prohibit Mr. Fahey from interfering with the accounting procedures at NDPR under the Raker Act and the Fourth Agreement. (R.T., Jan. 25, 2016, 152:10-12; 153:18-25; 156:10-157:8.) The Prosecution Team witnesses admit as much. (R.T., Jan. 26, 2016, 32:24-34:4.) The water rights at NDPR and the relevant portion of the Tuolumne River are governed by the Raker Act and the complicated water accounting procedures in the Fourth Agreement between the Districts and CCSF. (F-77; F-78, pp. 2, 3, 5-6; F-79; F-80, p. 13 ["All other natural flow in the Tuolumne River during these flow conditions has been prescripted by [CCSF] and the Districts as a result of more than 100 years of operations."]. *See Fahey's Supplemental Brief On Evidentiary Objections*, filed April 11, 2016, pp. 2-4.) The accounting procedures under the Raker Act and the Fourth Agreement, which the Board has acknowledged, necessarily altered the application of Decisions 995 and 1594 on the relevant part of the Tuolumne River and NDPR. (R.T., Jan. 25, 2016, 205:13-209:9, 227:4-24; F-1, p. 15; F-9; F-81, 2012 Board Evaluation, §5.2.4, p. 5-22, §5.3.3, pp. 5-53 – 5-54.) The Prosecution Team concedes that "the accounting is difficult at the [NDPR] facility...." (R.T., Jan. 25, 2016, 126:13-15.) Thus, the Board is well aware that the accounting procedures that became effective with the Fourth Agreement in 1966 and the completion of NDPR in 1971 essentially rendered the earlier

Decision 995 "obsolete" as to the Tuolumne River above NDPR. Any interpretation of Fahey's permits must account for the reality that there are no senior water right holders in this matter other than the Districts and CCSF, who are governed by a "complicated but comprehensive set of agreements, including the Fourth Agreement."

2. The Prosecution Team's interpretation cannot be correct because it requires Fahey to interfere with accounting procedures at NDPR, in violation of the explicit terms of the Permits.

If Mr. Fahey simply replaced water that he diverted without notice, as the Prosecution Team argues in this case, then Mr. Fahey would be forced to interfere with the complicated water accounting procedures at NDPR, in violation of paragraph (1) of Term 20 of Permit 20784, and Term 33 of Permit 21289. (R.T., Jan. 25, 2016, 156:10-157:8; R.T., Jan. 26, 2016, 121:4-122:10; F-1, p. 15; F-14.) The Prosecution Team concedes that violations of Term 20 and Term 34 could harm the Districts' and CCSF's water rights. (R.T., Jan. 25, 2016, 127:13-16, 128:1-7.)

B. Fahey's Diversions Fell Within An Exception To Curtailment Because He Provided Replacement Water In Advance Of His Diversions In Accord With The Terms Of His Water Permits And At The Urging Of The Board.

As discussed above, the parties intended that the water replacement provisions of Term 20 of Permit 20784 (F-20) were intended to govern the water replacement provisions of Term 19 in Permit 20784 and the 1992 Agreement between Mr. Fahey and the Districts; and the parties later intended that Terms 33 and 34 of the subsequent Permit 21289 (F-55) were intended to govern *all* of the water that is supposed to be replaced under the provisions of *both* permits.

Furthermore, in July 2010, a member of the Board's staff reviewed and approved a Water Availability Analysis that stated that Fahey can and has been purchasing "out of basin water in advance as a credit to future replacement water requirements." (F-1, 17.)

In this case, Fahey's actions satisfied the water replacement terms of Term 34 of Permit 21289 (as well as Term 20 of Permit 20784), as those terms were explained in the letter from CCSF, dated March 21, 2011 (which letter the Prosecution Team's Mrowka never disagreed with, and after which letter the Board issued Permit 21289). In reliance on the Board's 2009 Notice (F-69), and in compliance with explicit language in Terms 20 and 34 of his respective permits that

state, "[r]*eplacement water may be provided in advance and credited to future replacement water requirements,*" Fahey had 88.55 acre feet of water wheeled into NDPR from 2009 to 2011. (R.T., Jan. 26, 2016, 80:7-81:13; F-1, p. 7.)[7] That replacement water was provided in advance and credited to future water replacements, which covered all of Fahey's diversions during the curtailment periods in 2014 and 2015. (R.T., Jan. 26, 2016, 126:9-11.) As the Board's John O'Hagan explains: "[O]nce water is stored or imported from another watershed, the entity that stored or imported the water has the paramount right to that water." (F-75, ¶4.) Fahey's letter of June 3, 2016, correctly states that the foreign water was prepositioned by Fahey so if "replacement water" was called for it "would already be available in NDPR for its owners' beneficial use." (F-60.) Thus Fahey provided a 'physical solution' of imported water (not "storage" or "drafting from previously stored water") that met the exception to the 2014 and 2015 curtailments. (R.T., Jan. 25, 2016, 100:12-101:22; R.T., Jan. 26, 2016, 126:9-11; F-1, pp. 9, 10; F-59; F-60; F-63; F-75, ¶4.)

Also, it is undisputed in this case that, at no time, have either the Districts or the City ever notified Mr. Fahey of his need to provide replacement water pursuant to the terms of his permits or any related agreement. (R.T., Jan. 25, 2016, 238:14-239:25.) At no time did Fahey fail to follow the requirements of his permits in regards to notifying the Districts and CCSF of his diversions. While there is no term in either one of Fahey's permits that requires him to directly disclose his diversions to the Districts or the City (R.T., Jan. 26, 2016, 79:7-10), the Districts and CCSF nevertheless had and have the ability to determine Fahey's diversions under his permits. "[T]they can go to the [Board] website. It's all public record. They can go to the public record." "And in addition…[the Districts and CCSF]] can always do the worst-case analysis by…seeing [if] the maximum amount of water that can be diverted" have or has a strong potential of impacting their water supply. (R.T., Jan. 26, 2016, 79:11-80:6.) Thus, Fahey remained in compliance with his permits at all times.

[7] The Board's February 2009 Notice indicated that a physical-solution between a diverter and others should be arranged, so "available water" could be created for future use.

C. The Prosecution Team Failed To Prove That Water Was Not Available For Fahey's Diversions, Which Is A Critical Element Of The Claims In The ACL.

The basis of this enforcement action against Fahey is the alleged "lack of available water supply under the priority of the right." (WR-1, ¶44; WR-2, ¶40.) The burden of proof rests on the Prosecution Team to demonstrate by a preponderance of the evidence that water was unavailable to serve the priorities of right claimed by Fahey. It failed to do that here.

The Prosecution Team sought to make this showing by comparing "the current and projected available water supply with the total water right diversion demand." (WR-1, ¶22; WR-2, ¶19; WR-7, ¶6; R.T., Jan. 25, 2016, 50:25-51:2, 52:13-16.) That comparison, also referred to as a water availability analysis, was compiled from "demand data from annual use reports filed by diverters, as well as some other data," which the Prosecution Team described as follows: "To determine water demand, we relied on information supplied by water right holders on annual or triennial reports of water diversion." (WR-7, ¶7.) But nowhere does the Prosecution Team provide testimony as to the accuracy of the information in such reports that were used in the analyses in 2014 and 2015; nowhere is there any evidence as to the participation rates of diverters in actually providing such reports; and nowhere is there any evidence as to the dependability of incorporating the "2014 diversion data" in order to determine the demand analysis for 2015. The Prosecution Team explained: "Forecasted flow data is uncertain, so DWR provides the data in the form of 'levels of exceedance' or simply 'exceedance' to show the statistical probability that the forecasted supply will occur." (WR-7, ¶7.) But that kind of speculative evidence may be sufficient as a planning tool for forecasting; it is legally insufficient to support the ACL/CDO.[8] Furthermore, the water availability analysis relied on by the Prosecution Team completely ignores the existence of NDPR and how it is operated, the water that is released from NDPR, and even the supply of foreign water that Fahey imported into the Tuolumne River watershed that covered his diversions. (R.T., Jan. 25, 2016, 77:10-15, 89:10-15, 131:1-132:3.) Also, that analysis does not account for the fact that there are no in-stream demands, or riparian demands, or pre-1914

[8] The river-wide water availability analysis that is being relied on by the Prosecution Team also constitutes an invalid underground regulation. (*See Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 259-260.)

appropriative rights (other than the Districts and CCSF) between Fahey's points of diversion and NDPR. (R.T., Jan. 25, 2016, 171:10-172:22, 173:2-18; R.T., Jan. 26, 2016, 42:10-23; 43:4-11; 45:23-47:23, 97:7-98:25, 134:20-24.)

Thus, the Prosecution Team's water availability analysis fails to accurately show the water available for Fahey's diversions during curtailment.

V. CIVIL PENALTIES SHOULD NOT BE IMPOSED AGAINST FAHEY.

As applied in this case, the factors listed in Water Code section 1055.3 demonstrate that no civil penalties should be assessed against Fahey for the following ten (10) reasons.

First, Fahey's interpretation of his rights and duties under the permits, especially the replacement water provisions in Term 20 and Terms 33 and 34, is correct and reasonable.

Second, even though water replacement was never requested by the Districts or the City, in good faith reliance on the Board's notice to Mr. Fahey in February 2009 (F-1, p. 7; F-69), Fahey reasonably relied on Terms 20 and 34 of his respective permits and had 88.55 acre-feet of water wheeled into NDPR from 2009 through 2011, in order to make water available for his operation in the event of future curtailment. The 88.55 acre feet of water covered all of Fahey's water diversions during: (1) the 2014 and 2015 curtailment periods; and (2) all of the FAS periods from 1996 to the present. (R.T., Jan. 25, 2016, 161:10-162:13; F-87.)

Third, in reliance on the Board's notice of February 2009 (F-69), the 2014 Curtailment Notice and response form (F-61), the 2015 Curtailment Notice (WR-34), and the discussions that he had in June 2014 with the Deputy City Attorney for the City (F-1, pp. 9-10), Fahey reasonably concluded that he was entitled to an exception to curtailment since May 27, 2014, due to the 88.55 acre-feet he had wheeled into NDPR in 2009-2011.

Fourth, Fahey immediately responded to each curtailment notice from the Board and timely provided to the Board his explanation of the applicable exception to curtailment by using the official form provided by the Board for that very purpose and in an accompanying letter of his own, dated June 3, 2014. (F-1, pp. 9-10; F-60; F-61). The Board's complete failure to ever respond to that letter reasonably caused Fahey to believe that his explanation of his exception to the 2014 curtailment period was correct.

Fifth, Fahey reasonably concluded that he fully satisfied the "available water" exception to curtailment for the 2015 curtailment period because of the Board's lack of response both to Fahey's letter of June 3, 2014, and the curtailment response form sent with it; because of the open disclosure of his diversions during the 2014 curtailment period that he presented to the Board in the Progress Report he filed in March 3, 2015, which the Board never responded to either (F-62); because of the "available water" exception that was explicitly stated in the April 2015 curtailment notice (WR-34); and because of the lack of any response by the Board to his resending his June 3, 2014 letter after receipt of the April 2015 curtailment notice. (F-1, p. 10.)

Sixth, in reliance on Fahey's phone calls with, and the email from, the Board's David LaBrie on June 12, 2015 (F-1, pp. 11-12; F-64), and in reliance upon Mr. LaBrie's complete failure to follow up those phone calls and that email with any evidence or factual argument refuting Fahey's interpretation or application of his permit terms, Mr. Fahey again had a good faith reason to believe that he had fully satisfied the "available water" exception to curtailment in 2015. Also, nothing stated by the Board's Samuel Cole to Fahey in a phone call on August 12, 2015 (F-1, p. 13; F-66), refuted Fahey's good faith understanding that he fit within the "available water" exception to curtailment. Indeed, Mr. Cole even told Fahey that Mr. Cole would not communicate with Ms. Mrowka regarding Fahey's right to the curtailment exception.

Seventh, Mr. Fahey has demonstrated a willingness to take whatever corrective action was appropriate and "wished to continue operating in a legal and valid way." (F-66.)

Eighth, Fahey was never informed about any administrative procedure that existed within the Board staff to consider an exception to curtailment of water rights, other than the completion of the Curtailment Certification Forms, which he did both timely and repeatedly.

Ninth, the Prosecution Team has failed to produce any evidence of any harm to any senior water right holder as a result of Fahey's diversions during the 2014 and 2015 curtailment periods. There are no in-stream users or diverters between any Fahey points of diversion downstream to NDPR other than the Districts and CCSF. (R.T., Jan.25, 2016, 75-16-76:14; 172:13-173:18; F-1, p. 3; F-17.) In fact, CEQA analysis for Fahey's permits was not required downstream of NDPR because the Districts sole control over NDPR breaks the hydraulic continuity and nexus between

Fahey's diversions and the Tuolumne River below NDPR, the San Joaquin River Basin and the Delta. (R.T., Jan. 25, 2016, 77:16-79:5; 198:22-13; F-84), The uncontroverted evidence is that Fahey's diversions did not reduce any water going downstream for beneficial uses, because Fahey added 88.55 acre-feet of supply to the system that fully covered his diversion during the 2014 and 2015 curtailment periods, as well as all of the FAS period from 1996 to the present. (R.T., Jan. 25, 2016, 161:10-162:13; 171:7-9; F-87.) Contrary to the Prosecution Team's argument, there is no evidence that NDPR ever spilled, and so Fahey had a credit for the foreign water of 88.55 acre-feet was in NDPR. Once in NDPR, that imported water is not controlled by Fahey, but by the Districts. (R.T., Jan. 25, 2016, 77:4-9, 141:7-15, 173:21-174:7; R.T., Jan. 26, 2016, 82:6-9.) The Districts control the operations of NDPR under their FERC license, and Fahey has absolutely no control over those operations or over whether the Districts and the City laid claim to the water that Fahey had wheeled in advance into NDPR. Fahey does not control water released from NDPR. (R.T., Jan. 25, 2016, 77:4-9; R.T., Jan. 26, 2016, 82:6-9.) There is no evidence that the Districts or CCSF did not have a right to divert, that there is any pending enforcement action against them, that there are any complaints concerning a failure to bypass water from NDPR, or that the Districts failed to comply with their discharge requirements from NDPR. (R.T., Jan. 26, 2016, 71:9-72:7, 82:6-9.) Furthermore, the curtailment notices do *not* mention either in-stream resources or riparian habitat as the basis for curtailment (R.T., Jan. 25, 2016, 81:22-82:21), but even if they did, the Prosecution Team conceded that Fahey would not impact in-stream resources and riparian habitat if the 5 GPM by-pass flow was maintained at Fahey's points of diversion, which flow was maintained. (R.T., Jan. 25, 2016, 78:22-79:5; 150:25-151:25; 177:16-178:7.)

Thus, the Prosecution Team concedes "I don't have an answer" as to which downstream prior right holders have been harmed by Fahey's diversions during curtailment. (R.T., Jan. 25, 2026, 75:4-7.)[9] The Prosecution Team did not even both to confer with the Districts to ascertain whether such harm actually occurred (R.T., Jan. 25, 2016, 102:19-23) because it admits that, for the water availability analysis that supports the entire ACL/CDO, "we don't need to necessarily

[9] Prosecution Team's alleged evidence to the contrary (R.T., Jan. 25, 2016, 99:15-24), either failed to actually show any harm (R.T., Jan. 25, 2016, 99:25-100:11), or was simply incorrect. (R.T., Jan. 25, 2016, 157:9-158:1.)

identify the specific party who is hurt by the fact that there is not enough water. It's not a harm evaluation." (R.T., Jan. 25, 2016, 129:8-130:1.) Indeed, because the Prosecution Team merely argues that Fahey's diversions "have an impact because it [sic] reduces the available flow to other right holders and beneficial uses" (R.T., Jan. 26, 2016, 5022-51:1), the Prosecution Team's harm analysis cannot be correct because they failed to produce any evidence that Fahey's diversions reduced the available flow in any way (since he wheeled in sufficient foreign water to cover all of his diversions). Under the facts in this case, where there is no evidence at all that Fahey's diversions resulted in any loss of water in the system (due to his 'physical solution'), the Prosecution Team had to resort to speculation and irrelevant hypotheticals. For example, when asked by Mr. Mona to summarize the extent of the harm caused by Fahey's alleged unauthorized diversions, the Prosecution Team's Mrowka stated, in the key part of her explanation: "And when somebody uses water, you know, it can affect those other parties who had to cut off their water use, There's no water." (R.T., Jan. 25, 2016, 117:8-18.) That statement completely ignores the 88.55 acre feet of foreign water that Fahey had available that covered his diversions. Similarly, when the Prosecution Team's LaBrie was asked what evidence he had that any senior water right holder downstream of NDPR have in any way been harmed by Fahey's diversions during curtailment, he answered: "I rely on the analysis that was done for the water availability." (R.T., Jan. 25, 2016, 77:10-15.) In other words, the numerous deficiencies and inadequacies in the water availability analysis, discussed above, also proves the complete lack of evidence by the Prosecution Team for their allegations of harm. In short, the Prosecution Team failed to show any harm resulting from Fahey's diversions during curtailment.

Tenth, the Prosecution Team wrongfully seeks to recover civil penalties that allegedly recover financial costs that the Board staff unreasonably wasted on surveillance efforts *after* the Board Staff knew that Mr. Fahey was continuing those diversions. (WR-1, ¶¶52, 53; WR-9, ¶37; WR-11, ¶¶10, 15-27; F-1, p. 13; F-62; F-66; R.T., Jan. 25, 2016, 22:17-21, 57:8-11; 72:1-3.)

Thus, no civil penalties should be awarded under Water Code sections 1052 and 1055.3.

VI. CONCLUSION.

The Prosecution Team's argument underlying the ACL/CDO is summarized as follows:

Where Fahey had (and still has) a reasonable and good faith belief that he has an exception to the 2014 and 2015 curtailment based on what Board staff admit are "very complicated and difficult to understand" permit terms and agreements; and where a CCSF attorney even informed Fahey that the exception was correct; and where Fahey timely responded to his 2014 Curtailment Certification Form - what Board staff admit was the only "proper manner" afforded him to present the validity of that exception to the Board; and where the Board completely failed to provide any response to that Form or the attached letter of explanation; and where the Board failed to communicate to Fahey that a staff decision on that exception was allegedly made, but not by the only official who had the authority to make that decision; and where Fahey is never informed of any other process to present the issue to such official, or even the existence of such official; and where the ACL/CDO is filed (with a "Press Release") without a decision ever being made by such official, without any consideration of Fahey's explanation for his curtailment exception, without even considering whether any harm resulted from his diversions; *nevertheless*, Fahey must have stopped his diversions and "waited until the division informed him that he could continue diverting," even if that means waiting for over a year for a response that never did come (R.T., Jan. 25, 2016, 85:17-86:4; Jan. 26, 2016, 58:6-12), or else face retroactive civil penalties back to the date when Fahey received the 2014 curtailment notice. Thus, not only has the Prosecution Team failed to satisfy its burden on proving its claims in the ACL and CDO, but the Prosecution Team's conduct, including its pursuit of retroactive civil penalties and its withholding of relevant documents until three months after the Hearing, constitutes multiple violations of Fahey's constitutional due process rights. (*See Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1033-1034.) Accordingly, the ACL and the CDO must be denied and dismissed in their entirety.

Dated: June 17, 2016

Respectfully submitted,

ABBOTT & KINDERMANN, LLP

By: _____

Glen C. Hansen
Attorneys for G. Scott Fahey and
Sugar Pine Spring Water, LP

PROOF OF SERVICE

I, Lisa Haddix, declare as follows:

I am employed in the County of Sacramento, over the age of eighteen years and not a party to this action. My business address is 2100 21st Street, Sacramento, California 95818.

On June 17, 2016, I served the foregoing document(s) described as:

FAHEY'S CLOSING BRIEF

On the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHED SERVICE LIST

X **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

X **BY ELECTRONIC SERVICE [EMAIL]:** Sending a true copy of the above-described document(s) via electronic transmission from email address lhaddix@aklandlaw.com to the persons listed above on June 17, 2016, before 5:00 p.m. The transmission was reported as complete and without error. [CRC 2.256 (a)(4), 2.260].

BY FEDEX: On the above-mentioned date, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed on the attached service list. I placed the envelope or package for collection and overnight delivery following our ordinary business practices.

BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on June 17, 2016, at Sacramento, California.

Lisa Haddix

SERVICE LIST

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