STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2019-00XX

In the Matter of Draft Cease and Desist Order and Administrative Civil Liability Complaint

against

G. Scott Fahey and Sugar Pine Spring Water, LP

SOURCE: Unnamed Spring (aka Sugar Pine Spring), tributary to an unnamed stream, thence Cottonwood Creek, thence Clavey River, thence Tuolumne River; Deadwood Spring, tributary to an unnamed stream, thence Basin Creek, thence North Fork Tuolumne River, thence Tuolumne River; and two Unnamed Springs (aka Marco Spring and Polo Spring) each tributary to an unnamed stream, thence Hull Creek, thence Clavey River, and thence Tuolumne River

COUNTY: Tuolumne

ORDER ADOPTING A CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE CIVIL LIABILITY

BY THE BOARD:

1.0 SUMMARY

In this order the State Water Resources Control Board (State Water Board or Board) issues a final Cease and Desist Order (CDO) and Administrative Civil Liability Complaint (ACL Complaint) against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively Fahey) for unauthorized diversion of water in 2014 and 2015. Fahey holds water right Permits 20784 (Application 29977) and 21289 (Application 31491), with

priority dates of 1991 and 2004, respectively. (PT-15; PT-16; Fahey-20; Fahey-55.)[1] These permits conditionally authorize Fahey to divert water year-round for industrial use from several spring sources tributary to the Tuolumne River in Tuolumne County, California. (PT-15; PT-16; Fahey-20; Fahey-55.)

A separate team of Board staff assigned to perform prosecutorial functions (Prosecution Team) issued a draft CDO and ACL Complaint to Fahey in 2015 and notified Fahey of his right to an evidentiary hearing on this matter. Fahey requested a hearing, which was held on January 25 and 26, 2016, and included Fahey, the Prosecution Team, Modesto Irrigation District (MID), Turlock Irrigation District (TID), and the City and County of San Francisco (CCSF). MID, TID, and CCSF (collectively, the Interveners) participated in the hearing "for the limited purpose of protecting their respective prior rights and interests in the waters of the Tuolumne River." (Interveners' Closing Brief, June 17, 2016, p. 2:17–20.) MID and TID jointly operate New Don Pedro Reservoir (NDPR) on the Tuolumne River downstream from Fahey's point of diversion, and CCSF maintains a water bank account in NDPR that is administered in accordance with the requirements of the Raker Act and a series of agreements between MID, TID, and CCSF. (See generally, e.g., Fahey-79, pp. 7–10.) This order is based on the evidentiary record developed through the hearing on this matter.

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[1] Citations to the evidentiary record identify primary support for a particular fact or proposition but are not intended to identify every piece of supporting evidence in the record. Exhibits are identified by the name or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the referenced material within the exhibit. Page numbers refer to internal page numbers or Bates stamped page numbers in the exhibit or to the PDF page number of the exhibit when no internal page numbers or Bates stamped page numbers are provided or the exhibit combines multiple documents. Numbers following the pilcrow symbol refer to the identifier given to a paragraph or section (such as a term of a permit or agreement) if provided in the exhibit, or, if an identifier is not provided in the exhibit, a paragraph's order of appearance on the exhibit page.

A. The following abbreviations are used when citing to the exhibits:
"PT" is used for the Board's Prosecution Team;
"Fahey" is used for G. Scott Fahey and Sugar Pine Spring Water, LP;
"SWRCB" is used for the Hearing Team.

B. Citations to the Certified Reporter's Transcript are indicated by "R.T." followed by the date, page, and line numbers.

Before addressing the case on the merits, this order resolves a motion to dismiss the ACL Complaint and draft CDO presented in Fahey's June 17, 2016 closing brief and addresses related procedural issues. Fahey alleges that the Prosecution Team violated his constitutional right to procedural due process by failing to produce certain requested documents until after the close of the evidentiary proceeding, preventing Fahey from using the documents for various purposes. Fahey contends that this alleged violation of his rights irreparably injured him and that the only viable remedy is to dismiss the enforcement action against him. This order finds that Fahey's due process rights have not been violated, denies Fahey's motion to dismiss, and admits into evidence some of the records he identified as new exhibits. Subsequent sections of this order address legal arguments that Fahey attempted to raise by referencing the disputed records.

To address the merits of this case, this order summarizes the history and requirements of Fahey's water rights, describes his diversions in 2014 and 2015, and evaluates whether Fahey unlawfully diverted water during either of those years. A key component of the Board's analysis of this case regards the applicability of a fully appropriated stream period to Fahey's permits. Fahey's water sources are located in the Tuolumne River watershed[2] upstream of New Don Pedro Reservoir, which is fully appropriated from July 1 through October 31 (e.g., Decision 995; Order WR 91-07), and the larger Sacramento-San Joaquin Delta watershed (Delta watershed)[3] upstream of the Delta, which is fully appropriated from June 15 or 16[4] (depending on the volume of water right) through August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07). This order separately evaluates Fahey's diversions from June 16 through October 31, the fully appropriated stream period, or "FAS Period," and from November 1 through June

[2] In this order, the terms "watershed" and "basin" are used interchangeably.
[3] The Delta watershed is the largest watershed, or basin, by area and volume in California. The Delta watershed includes the Sacramento River watershed and the San Joaquin River watershed, which, in turn, include all of their respective tributaries' watersheds. The Tuolumne River is tributary to the San Joaquin River; therefore, the Tuolumne River watershed is within the San Joaquin River watershed and the larger Delta watershed.
[4] For permittees who directly divert less than one cubic foot per second or divert to storage less than 100 acre-feet per annum, the Delta watershed upstream of the Delta is fully appropriated between June 16 and August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07).

15, the "non-FAS Period," due to differences in the way Fahey's permit terms apply to each period. Section 5.1 of this order discusses these differences in detail.

Permit 20784 explicitly requires Fahey to provide "make-up" water to MID and TID for his diversions during the FAS Period, pursuant to a water exchange agreement dated December 12, 1992 (Water Exchange Agreement). (See PT-15, p. 6, ¶ 19.) This order finds that Permit 21289 contains the same requirement because of language in both the Water Exchange Agreement and Permit 21289. Other conditions in Fahey's permits require him, upon receiving appropriate notice, to provide "replacement water" for diversions during the non-FAS Period when those diversions adversely impact MID, TID, or CCSF's diversions, as applicable. Fahey's permits allow him to pre-position replacement water for his non-FAS Period diversions in NDPR and do not prohibit replacement water credit from being carried over from year to year, while the Water Exchange Agreement requires him to provide MID and TID's FAS Period make-up water to NDPR during the same year that he diverts.

The Prosecution Team presented evidence to indicate that water was not available for diversion under Fahey's rights and that Fahey violated his permit terms by diverting.[5] The Prosecution Team presented expert testimony and computational analyses comparing supply and demand in the Delta watershed to indicate that water supplies were insufficient to support Fahey's diversions in 2014 from May 27 through October 30, inclusive, and from November 4 through 18, inclusive, and again in 2015 from April 23 through November 1, inclusive. (E.g., PT-31; PT-32; PT-34; PT-37; PT-42; PT-43; PT-44; PT-153.) These dates span the FAS Period and part of the non-FAS Period in both years. Prosecution Team analyses of supply and demand in the Tuolumne River

[5] The Prosecution Team also raised arguments about Fahey's alleged failure to comply with bypass flow requirements in his permits, which this order considers as a factor for setting the appropriate administrative civil penalty pursuant to section 1055.3 of the Water Code.

watershed confirm this result. This order refers to the 2014 and 2015 Prosecution Team analyses collectively as the "water availability analysis."

This order finds that the water availability analysis is a reasonable method of demonstrating whether water is generally available to divert in a particular stream system at a particular priority of right. The priority dates of Fahey's rights—July 12, 1991 and January 28, 2004—are well within the range of priority dates for which the water availability analysis shows that water was not generally available during the periods at issue in 2014 and 2015. Therefore, this order finds that the Prosecution Team made a satisfactory showing that Fahey diverted water when it was not available to serve his priority of right absent a defense. Fahey presented arguments to the effect that the water availability analysis is an underground regulation and is inconsistent with certain non-precedential memoranda prepared by staff for the State Water Rights Board, our predecessor agency, in the 1960s. This order concludes that both arguments are without merit.

Fahey raised three affirmative defenses to unlawful diversion. First, Fahey argues that he delivered water to NDPR between 2009 and 2011 for the Interveners. This argument succeeds for Fahey's non-FAS Period diversions. Fahey's diversions, within the scope of the hearing, appear to have been adverse to MID and TID's pre-1914 claim of right at La Grange Dam downstream from NDPR. Evidence in the record indicates that Fahey had approximately 33.99 acre-feet of non-FAS Period replacement water available in NDPR if called for by the Interveners. Unlike the FAS Period, Fahey's permits do not prohibit him from carrying replacement water over from year to year to compensate MID and TID for his non-FAS Period diversions. (See PT-15, pp. 6–7, ¶ 20; PT-16, pp. 9–10, ¶ 34.) Accordingly, this order finds that Fahey has complied with permit terms obligating him to provide replacement water to the Interveners for non-FAS Period diversions in 2014 and 2015 adverse to their rights and, separately, that his compliance establishes a defense to unlawful diversion during the portion of the non-FAS Period when water was not available under his priority of right in this case.

In regards to Fahey's FAS Period diversions, Fahey admits that he did not provide make-up water into NDPR in 2014 or 2015 (R.T., Jan. 25, 2016, p. 196:4-21) but argues that other terms in his permits forbidding him from interfering with NDPR operations or the Interveners' water accounting also forbid him from providing FAS Period "make up" water on an annual basis (see generally, Fahey's Closing Brief, June 17, 2016, pp. 17:7 to 18:12). The Board finds Fahey's argument unpersuasive, noting that his 1992 Water Exchange Agreement with MID and TID requires Fahey to provide notice of make-up water deliveries through semi-annual reports and thereby enable the Interveners to include Fahey's FAS Period make-up water in their accounting. Fahey also argues that he pre-positioned 88.31 acre-feet of water in NDPR between 2009 and 2011 and that this water was available to offset his diversions in 2014 and 2015. Fahey's Water Exchange Agreement with MID and TID clearly states that in regards to FAS Period make-up water "no carryover" of water "will be allowed to subsequent years," so this argument lacks merit as applied to Fahey's FAS Period diversions in 2014 and 2015. (See PT-19, p. 2, ¶ 4.)

Fahey further argues that his diversions are percolating groundwater or developed water not subject to the normal rules of prior appropriation for surface streams. In *Churchill v. Rose* (hereinafter *Churchill*) (1902) 136 Cal. 576, 578–579, the California Supreme Court held that a landowner who "dug out" a spring such that its flow "increased three fold" was "entitled to the increased amount of water thus developed." California law also presumes, however, that a spring tributary to a stream is part of the stream and is therefore subject to the dual doctrines of riparian rights and prior appropriation. (*Gutierrez v. Wege* (1905) 145 Cal. 730, 734.) As such, Fahey has the burden of proof to establish that his diversions from a spring are not diversions of surface water. There is not substantial evidence in the record sufficient to meet this burden. Accordingly, this order finds that there is not sufficient evidence in the record to support a finding that Fahey diverted groundwater or developed water during the period at issue in 2014 or 2015.

Lastly, Fahey argues that the case *City of Los Angeles v. Pomeroy* (hereinafter *Pomeroy*) (1899) 124 Cal. 597, establishes a presumption under California law that water diverted from a spring is developed water. *Pomeroy* does not address diversions of developed water from springs. Instead, *Pomeroy* describes the concept of an underground stream flowing in known and definite channels, an exception to the general rule concerning percolating groundwater. Fahey cites no case or precedent in support of his argument that water diverted from a spring is developed water, and the State Water Board is unable to identify legal support for this alleged presumption. Accordingly, this order finds that Fahey's argument that a "developed water presumption" should apply to his diversions lacks merit.

This order finds that Fahey unlawfully diverted 25.33 acre-feet of water over 178 days during the FAS Period in 2014 and 2015. Evidence in the record also suggests that Fahey did not provide FAS Period make-up water, as required by his permits, on a consistent basis prior to these years. Accordingly, this order finds that a cease and desist order is warranted and that administrative civil liability is warranted. The maximum penalty allowed by section 1052 of the Water Code for Fahey's unlawful FAS Period diversions in 2014 and 2015 is $241,325. After applying the administrative civil liability factors identified in section 1055.3 of the Water Code, this order assesses administrative civil liability in the amount of $215,000 against Fahey.

Of this amount, $50,000 is due immediately. The remaining $165,000 will be indefinitely suspended if Fahey completes certain actions necessary to correct his unlawful diversion and prevent future violations. Specifically, the remaining penalty will be suspended if Fahey provides restitution to MID and TID equivalent to his 2014 and 2015 FAS Period Diversions and prepares and implements a detailed Curtailment Operations Plan for future droughts. This penalty and these corrective actions are appropriate to make injured parties whole, correct the unlawful diversion, discourage purposeful and negligent unlawful diversion by others, and recover the State Water Board's enforcement costs. The cease and desist order requires Fahey to cease continued and threatened unauthorized diversion under his permits; cease diversion under Permit

21289 (Application 31491) in a manner inconsistent with the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID, as it may be amended; file reports related to his compliance with bypass flow requirements; file reports with MID and TID showing his diversion amounts and replacement water deliveries; report the source, amount, and location at NDPR of replacement water discharged into NDPR to the Board along with his annual Progress Report of Permittee; prepare a Curtailment Operations Plan for approval by the Deputy Director of the Division of Water Rights (Division); and timely implement the final approved Curtailment Operations Plan during the FAS Period and any period when water is not available to serve his priority of right.

2.0 BACKGROUND

2.1 Declaration of Drought State of Emergency

On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014 declaring a State of Emergency to exist in California due to severe drought conditions. (PT-1, p. 3, ¶ 11.) On April 25, 2014, Governor Brown issued Proclamation No. 4-25-2014, declaring a Continued State of Emergency due to drought conditions, to strengthen California's ability to manage water and fish and wildlife habitat effectively in drought conditions. (*Id.*, ¶ 13.) On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order). Condition 1 of this Executive Order specified that the orders and provisions contained in the January 17, 2014 Proclamation, April 25, 2014 Proclamation, and Executive Orders B-26-14 and B-28-14 remain in full force and effect except as modified. (PT-27, p. 2.) Condition 10 of this Executive Order directed the State Water Board to require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water. (*Id.*, p. 3.) This included the authority, pursuant to Government Code sections 8570 and 8627, to inspect property and diversion facilities to ascertain compliance with water rights laws and regulations. (*Ibid.)*

2.2 Notices of Surface Water Shortage and Unavailability

On January 17, 2014, State Water Board staff issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions." (PT-29 [notice]; see also PT-7, p. 3, ¶ 12; PT-1, p. 3, ¶ 12.) This notice's purpose was to alert diverters in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities. (See PT-7, p. 3, ¶ 12; *id.*, p. 5, ¶ 23.) On May 27, 2014, staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice). (Fahey-59 [notice]; PT-32 [same].) The 2014 Unavailability Notice sought to inform post-1914 appropriative water right holders within the Delta watershed that Board staff projected insufficient water supply to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. (See Fahey-59, p. 1276; PT-7, p. 3, ¶ 13; PT-1, p. 3, ¶ 12; Fahey-75, pp. 4–5, ¶ 6.) For example, the 2014 Unavailability Notice warned that "[e]ven if there is water physically available at your point of diversion, that water is necessary to meet senior water right holders' needs or is water released from storage that you are not entitled to divert." (Fahey-59, p. 1276.)

State Water Board staff continued to project insufficient water supply for post-1914 rights until late October. On October 31, 2014, the Board issued a "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin Watershed River." (PT-31.) This notice was intended to "temporarily lift[] the curtailment of water rights" (PT-7, p. 3, ¶ 15), which is to say that the 2014 Unavailability Notice informed post-1914 water right holders that projections indicated water was available until November 3, 2014, to serve their rights. (See ibid.) The changed water supply forecast was based on a predicted rain event. (PT-31.) The Board issued a second "Notice of Temporary Lifting of Curtailments for Diversions in the Sacramento-San Joaquin Watershed" on November 19, 2014. (PT-37; PT-7, p. 4, ¶ 16.)

On January 23, 2015, State Water Board staff issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015." (PT-38 [notice]; see also PT-7, p. 4, ¶ 17; PT -1, p. 3; ¶ 17.) The notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities. Facing "a distinct possibility . . . that the current drought will stretch into a fifth straight year" (PT-27, p. 1), on April 23, 2015, Board staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (2015 Unavailability Notice) (Fahey-63 [notice]; PT-39 [same].) Like the 2014 Unavailability Notice, the 2015 Unavailability Notice informed post-1914 appropriative water right holders within the San Joaquin River watershed of the projection that there was insufficient water available to serve their priorities of right. (See Fahey-63, p. 1294; PT-1, p. 3, ¶ 19; PT-7, p. 4, ¶ 18; *id.*, p. 5, ¶ 23; Fahey-75, pp. 4–5, ¶ 6.)

On July 15, 2015, the State Water Board staff issued an additional notice and a fact sheet confirming that the 2015 Unavailability Notice and certain other notices were informational. (PT-40, [notice]; PT-41, p. 1 [explaining purpose of notice].) The notice further informed that background principles of water law, including the prohibition against unlawful diversion, apply. Board staff continued to monitor the water supply situation in 2015, issuing a "Notice of Diversion Opportunity for all Post-1914 Water Rights for the Sacramento and San Joaquin River Watersheds and the Sacramento-San Joaquin Delta" on November 6 of that year. (PT-44.) That notice advised post-1914 water right holders that the Board staff projected sufficient water available to serve post-1914 rights until further notice. (See *ibid.*) The Board staff committed to continue "monitoring weather forecasts and stream gages to determine if conditions change." (*Ibid.*)

2.3 Notice of Draft CDO and Administrative Civil Liability Complaint

Fahey received the 2014 Unavailability Notice and 2015 Unavailability Notice. (Fahey-1, p. 16; see also Fahey-59, p. 1276; Fahey-63, p. 1294.) In response to the 2014 Unavailability Notice, Fahey submitted curtailment certification forms in 2014 and

a letter identifying specific reasons why Fahey believed he was entitled to continue diverting. (Fahey-60; Fahey-61; PT-35; PT-36; PT-47.) Mr. Fahey communicated with Prosecution Team witnesses David LaBrie and Samuel Cole during 2015 (e.g., PT-48; PT-51), but Fahey and the Prosecution Team did not reach agreement as to whether he was entitled to continue diverting. Mr. Fahey testified that, prior to issuing the draft CDO and ACL Complaint, the Prosecution Team never formally rejected the exception described in his 2014 letter. (Fahey-60; R.T., Jan. 25, 2016, 29:2–10.)

On September 1, 2015, the Assistant Deputy Director for the Division issued a draft CDO, an ACL Complaint, and Information Order WR 2015-0028-DWR[6] (Information Order) to Fahey. (PT-1; PT-2; PT-3; PT-9, p. 1; Fahey 67.) The draft CDO would require Fahey to "immediately cease the unauthorized diversion of water from Unnamed Spring (AKA Cottonwood Spring),[7] Deadwood Spring and Two Unnamed Springs (AKA Marco and Polo Springs) until the State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of Permits 20784 and 21289." (PT-2, p. 6.) The ACL Complaint calculated a maximum administrative civil liability of $394,886 and recommended civil liability of $224,875. (PT-1, p. 8, ¶¶ 48, 53.) Fahey requested a hearing by letter dated September 8, 2015. (PT-5.)

2.4 Notice of Public Hearing

On October 16, 2015, the State Water Board issued a Notice of Public Hearing (Hearing Notice). The Hearing Notice identified the following key issues:

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[6] The Information Order directed Fahey to provide specific information for the water diversions that are conducted under any basis of right at facilities covered by Permits 20784 and 21289.

[7] The draft CDO erroneously lists "Unnamed Spring (AKA Cottonwood Spring)." It should instead list "Unnamed Spring (AKA Sugar Pine Spring)" because on March 6, 2002, the Division of Water Rights issued an Order Approving Extension of Time, Change in Point of Diversion, and Amending the Permit, which approved a December 12, 1997 petition from Fahey to change the first point of diversion listed on Permit 20784 from the "unnamed spring (a.k.a. Cottonwood Spring)" to a new location called the "unnamed spring (a.k.a. Sugar Pine Spring)." (PT-15, pp. 1-2 [order approving Permit 20784 change petition]; PT-56, p. 1 [2014 Progress Report for Permittee lists "UNSP (AKA SUGAR PINE SPRING)" as a source under Permit 20784]; R.T., Jan. 25, 2016, p. 45:16–18 [Katherine Mrowka testified that Fahey submitted a change petition to change the Cottonwood Spring point of diversion to Sugar Pine Spring].)

1) Has Fahey violated, or is Fahey threatening to violate, the prohibition set forth in Water Code section 1052 against the unauthorized diversion or use of water (trespass)? This may include, but is not limited to consideration of the following questions related to allegations or defenses:
   a) Did Fahey divert water under Permits 20784 and 21289 when water was unavailable for diversion under his priority of right?
   b) If Fahey diverted water, does Fahey hold or claim any water rights other than Permits 20784 and 21289 that would authorize the diversion?
   c) What other relevant circumstances should be considered by the State Water Board in determining whether unauthorized diversion of water has occurred or is threatening to occur?
2) If a trespass occurred, should the State Water Board adopt the September 1, 2015 draft CDO against Fahey with revision or without revision?
3) Should the State Water Board impose administrative civil liability upon Fahey for trespass and, if so, in what amount and on what basis? In determining the amount of civil liability, the State Water Board must take into consideration all relevant circumstances (Wat. Code, § 1055.3), including but not limited to:
   a) What is the extent of harm caused by Fahey[’s] alleged unauthorized diversions?
   b) What is the nature and persistence of the alleged violation?
   c) What is the length of time over which the alleged violation occurred?
   d) What corrective actions, if any, have been taken by Fahey?
   e) What other relevant circumstances should be considered by the State Water Board in determining the amount of any civil liability?

2.5 Evidentiary Hearing, Closing Briefs, and Supplemental Briefs

Adjudicative proceedings before the State Water Board are governed by California Code of Regulations, title 23, sections 648–648.8, 649.6, and 760, and the statutes specified in the regulations, including applicable provisions of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400). The State Water Board separates its advisory and prosecutorial functions in its

enforcement proceedings. Vice Chair Frances Spivy-Weber and Board Member Dorene D'Adamo presided over the hearing as Hearing Officers. The State Water Board was assisted by a staff Hearing Team. The staff who acted in a prosecutorial role (i.e., the Prosecution Team) were separated from the Hearing Team and subject to a prohibition on ex parte communications. The prohibition was observed.

On January 25 and 26, 2016, the State Water Board held an adjudicative hearing to consider the ACL Complaint and draft CDO. At the hearing, the State Water Board's Prosecution Team and Fahey appeared and presented cases-in-chief and rebuttal testimony and exhibits. Among the Interveners, MID and TID jointly participated in the hearing through the presentation of an opening statement and through cross-examination, while CCSF participated solely through the presentation of an opening statement. The Prosecution Team, Fahey, and the Interveners submitted closing briefs on June 17, 2016. The State Water Board provided two opportunities to submit supplemental briefs in 2019 in response to Fahey's January 14, 2019 motion to dismiss and a March 29, 2019 comment letter filed by the Interveners. The Board circulated a draft order on February 8, 2019 and received comments from the parties. The Board has considered all of the evidence in the hearing record and all of the arguments and comments presented by the parties. The findings and conclusions of this order are based on the record.

3.0 MOTION TO DISMISS AND EVIDENTIARY ISSUES

3.1 Fahey's June 17, 2016 Motion to Dismiss

3.1.1 Introduction

Fahey moved to dismiss this proceeding in his June 17, 2016 closing brief, alleging that the Prosecution Team violated his right to procedural due process by failing to produce certain documents until April 29, 2016, after the close of the evidentiary proceeding. Fahey requested production of several categories of documents by letter dated December 1, 2015, including "[a]ll 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 . . . which correspondence was made or sent following the submission by the Primary Owners of the Forms." (Fahey's Closing Brief, June 17, 2016, p. 1:20–24; see also Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 2, Attachment 1 [attaching a true and correct copy of Fahey's December 1, 2015 letter].) The Prosecution Team received over 3,500 certification forms in 2014 and over 3,600 certification forms in 2015. (PT-153, p. 15.) The Prosecution Team objected to Fahey's document request by email dated December 8, 2015, contending that the document request "is exceedingly broad and lacks relevance to this ACL proceeding" and "is typically one the Division would treat as a request for public records." (Decl. of Kenneth Petruzzelli In Support of Prosecution Team Post-Hearing Evidence Brief, April 8, 2016, ¶ 5, Attachment 1, p. 1.)

Fahey submitted a Public Records Act request on or about December 7, 2015 with identical requests for information. (See Decl. of Glen Hansen in Support of Fahey's Closing Brief [hereinafter Hansen Declaration], June 17, 2016, Exh. 1, pp. 1–3;[8] accord R.T., Jan. 25, 2016, 9:9–14; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 3, Attachment 2 [enclosing a true and correct copy of Fahey's December 7, 2015 Public Records Act request].) Nothing in the record indicates that Fahey ever subpoenaed the curtailment certification form correspondence he requested in his December 1, 2015 letter. (E.g., Hansen Decl., ¶ 2; Decl. of Glen Hansen in Support of Opposition to the Prosecution Team's Motions, Dec. 18, 2015, ¶¶ 1-14 [providing detailed chronology of Fahey's efforts to obtain documents].)

Fahey served a series of separate deposition notices on Prosecution Team witnesses on December 9 and 11, 2015, and demanded production of correspondence with Fahey, correspondence regarding Fahey's permits, and documents used to prepare witnesses' written testimony. (See Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 6, Attachment 5 [enclosing true and correct copies of Notice of

[8] For citations to the Hansen Declaration, paragraphs correspond to paragraphs in the declaration itself. Page numbers correspond to Bates stamped page numbers in the exhibits attached to the declaration.

Deposition of David LaBrie and Notice of Deposition of Katherine Mrowka]; Letter from Kenneth Petruzzelli, Prosecution Team to Hearing Service List and Ernest Mona, State Water Board (Dec. 11, 2018) [enclosing copy of Fahey's December 11, 2015 Notice of Deposition of Samuel Cole].)[9] On December 10, 2015, Fahey also noticed the deposition of a Person Most Knowledgeable of certain matters related to some of the correspondence requested in Fahey's December 1, 2015 letter. (See Decl. of Kenneth Petruzzelli in Support of Motion re: Dec. 10, 2015 Deposition Notice, Dec. 10, 2015, ¶ 2, Attachment 1 [enclosing a true and correct copy of Fahey's December 10, 2015 Notice of Deposition of Person Most Knowledgeable].) This deposition notice did not demand the production of any documents. (See *ibid.*) The following day, the Prosecution Team filed a Motion for Protective Order or, Alternatively, Motion to Quash in response to Fahey's deposition notices.

All of the people Fahey attempted to depose were Prosecution Team witnesses except, potentially, the Person Most Knowledgeable. (See Prosecution Team, Notice of Intent to Appear (Nov. 5, 2015).) The Hearing Officers issued a Procedural Ruling on December 21, 2015 that granted the Prosecution Team's motion for protective order with respect to Katherine Mrowka, Samuel Cole, and David LaBrie, directed the Prosecution Team to identify the Person Most Knowledgeable; set conditions to make the Person Most Knowledgeable available for Fahey's cross-examination at the hearing; and established a schedule to rule on motions related to the document demands enclosed in Fahey's December 9 and 11, 2015 deposition notices. (December 21, 2015 Procedural Ruling, p. 5.) The Prosecution Team promptly identified one of their witnesses, Ms. Mrowka, as the Person Most Knowledgeable. (Letter from Kenneth Petruzzelli, Prosecution Team, to Hearing Service List and Ernest Mona, State Water Board (December 22, 2015).)[10] Fahey's counsel cross-examined Ms. Mrowka, Mr. Cole, and Mr. LaBrie on January 25, 2016 during the first day of the hearing. (See

[9] The letter, received on December 11, 2015, is erroneously dated December 9, 2015.
[10] The letter, received on December 22, 2015, is erroneously dated December 23, 2015.

generally R.T., Jan. 25, 2016, p. 74:1, et. seq. [cross-examination of Prosecution Team witnesses).

The Hearing Officers resolved Fahey's December 9 and 11, 2015 deposition notice document demands through a January 21, 2016 Procedural Ruling that construed the document demands as administrative subpoenas duces tecum and established a schedule for the Prosecution Team to produce undisclosed, responsive, non-privileged documents. (See January 21, 2016 Procedural Ruling, pp. 4, 10.) Nothing in Fahey's December 9 or 11, 2015 deposition notices sought to compel production of the documents requested in Fahey's December 1, 2015 letter, and the Hearing Officers' ruling did not address that issue.

The Prosecution Team completed its response to Fahey's Public Records Act request by letter dated April 29, 2016, releasing 42 responsive documents. (Hansen Decl., ¶ 2; see also Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶¶ 5-9 [summarizing Public Records Act response].) Fahey's counsel declares that none of these responsive documents discuss an administrative process under which the Board responded to diverters that claimed a defense to unlawful diversion by marking the "Other" box on their Curtailment Certification Forms. (See Hansen Decl., ¶ 4.) Fahey objects that withholding the documents until after the hearing violated his procedural due process rights because it prevented him from using the documents to prove that there was no administrative process regarding claimed exceptions to curtailment. (Fahey's Closing Brief, June 17, 2016, p. 3:12–15; id., p. 4:4–7.) Fahey also contends that certain specific disclosed documents are relevant to this proceeding and should have been disclosed in response to Fahey's December 1, 2015 letter. Because the Prosecution Team failed to disclose these records until April 29, 2016, Fahey contends that he has been irreparably injured and that the enforcement proceeding should be dismissed. (Ibid.)

First, Fahey contends that various documents concerning the City of Portola's Water Right License 10013 (Application 17069) contradict Prosecution Team witnesses'

position on whether the doctrine of developed water applies to Fahey's diversions. (See Fahey's Closing Brief, June 17, 2016, p. 2:18–23; see also PT-9, ¶ 35 [Ms. Mrowka opining that Fahey's springs are subject to prior appropriation]; R.T., Jan. 25, 2016, p. 128:16–22 [same].) To support this argument, Fahey submits an August 6, 2014 Curtailment Inspection Report (Hansen Decl., Exh. 1, pp. 26–37 [hereinafter the Portola Inspection Report]) and certain related correspondence, specifically an August 25, 2014 letter prepared by Burkhard Bohm, a California registered geologist (*id.*, pp. 24–25 [hereinafter the Bohm Letter]), and an undated letter from John O'Hagan, Assistant Deputy Director for the Division, to the City of Portola (*id.*, pp. 38–39 [Hereinafter the Portola Letter]). In the Portola Letter, Mr. O'Hagan appears to respond to the City of Portola's argument that most of the points of diversion for License 10013 divert groundwater and, as such, are not subject to the Board's permitting authority. (See id., at p. 38.)

Second, Fahey argues that the Portola Letter is relevant to this proceeding because it states a legal position that Fahey contends is contrary to the Prosecution Team's position in this proceeding. (Fahey's Closing Brief, June 17, 2016, p. 3:1–11.) In the Portola Letter, Mr. O'Hagan 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 definite channel." (Hansen Decl., Exh. 1, p. 38.) Fahey contends that the Portola Letter would "reinforce Fahey's testimony . . . related to the lack of harm from his diversions" (Fahey's Closing Brief, June 17, 2016, p. 3:7–8) and establish a "developed water presumption" that the Prosecution Team had the burden of overcoming (id., p. 3:9–10).

Third, Fahey argues that certain documents pertaining to Water Right License 9120 (Application 21647), held by the Cold Springs Water Company (CSWC), are relevant to this proceeding and should have been disclosed. (Hansen Decl., ¶ 5; Hansen Decl., Exh. 2, p. 108.) Apparently, the license associated with Application 21647 gives CSWC the right to divert from the North Fork Tuolumne River, whose confluence with the Tuolumne River is upstream of NDPR. (Hansen Decl., ¶ 5.) The Prosecution Team

included CSWC's April 29, 2015 curtailment certification for this license and related correspondence in its April 29, 2016 document disclosure to Fahey. (*Ibid*; see also *id.*, Exh. 1, pp. 40–42 [hereinafter CSWC Certification].) CSWC requested that it be allowed to continue diverting under a 73 percent reduction, to provide drinking water for "530 families in the Cold Springs area of Tuolumne County" with no other source except a "very unreliable" well. (*Id.*, Exh. 1., p. 41.) Evidently, nothing in the Prosecution Team's disclosure indicated that the Division responded to CSWC. (Id., ¶ 5.) However, Fahey's counsel asked to review the permitting file for Application 21647 and received a copy on June 15, 2016. (Id., ¶ 6.) Fahey attached the entire permitting file for Application 21647 to the Hansen Declaration as Exhibit 2. (Ibid.)

Fahey contends that three specific documents within the file for Application 21647 are relevant to this proceeding. The first is an August 28, 1964 memorandum prepared by L.D. Johnson, a senior engineer then employed by the State Water Board's predecessor agency, the State Water Rights Board,[11] regarding Application 21647. (Hansen Decl., Exh. 2, pp. 165–170 [hereinafter Johnson Memo].) The Johnson Memo states that, although continuity of flow exists between the proposed point of diversion and the Delta, "approval of the application would not diminish the supply to the Delta during the critical months in years of water shortage" because "[t]he flow of the Tuolumne River during July, August and September is now almost completely controlled by . . . [old] Don Pedro Reservoir." (*Id.*, pp. 165, 167.) The memo predicts that, with the completion of the project that would become NDPR, "uncontrolled flows during July, August and September in the Tuolumne River below the reservoir can be expected to be practically nonexistent." (*Id.*, p. 167.) The Johnson Memo concludes that Application 21647 should be approved, citing an August 2, 1963 memorandum from L.C. Jopson signed in his capacity as the State Water Rights Board's Chief Engineer. (*Id.*, pp. 167, 169; see also *id.*, pp. 136–138 [hereinafter Jopson Memo].) The Jopson

[11] The Legislature merged the State Water Quality Control Board and the State Water Rights Board in 1967, creating the State Water Resources Control Board. (See Stats. 1967, ch. 284, p. 1441 et seq.; see also Wat. Code, § 179.)

Memo provides general direction for how State Water Rights Board staff should resolve unprotested applications to appropriate water. For example:

> d. Where applicant is above a reservoir which has an all year season of collection or diversion and exercises full control of the stream during the critical season; or where a downstream diverter takes the entire flow during the critical season. If applicant can eliminate the protest of the agency controlling or diverting the entire stream, all year diversion is allowed subject to higher level of staff approval.

(Hansen Decl., Exh. 2, p. 136; see also *id.*, p. 169.)

The third document consists of a route slip and signature page for Permit 14633, issued to Application 21647 on December 22, 1964. (Hansen Decl., Exh. 2, pp. 148-152 [hereinafter CSWC Signature Pages].) Fahey argues that the Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant to the issue of MID and TID's control of the flow of the Tuolumne River during July, August, and September; the effects of diversions above NDPR on water availability in the Delta, and whether "all year diversion is allowed" when an applicant to appropriate water above a reservoir resolves protests by the reservoir owner. (Fahey's Closing Brief, June 17, 2016, pp. 3:16 to 4:3; see also Hansen Decl., ¶ 6.)

3.1.2 Prosecution Team's Objection and Fahey's Response

The Prosecution Team objected to the Hansen Declaration on June 21, 2016, and revised its objection on June 23, 2016. In essence, the Prosecution Team argues that its decision to decline Fahey's document request as overly broad was appropriate (Prosecution Team Objection to Declaration of Glen Hansen in Support of Fahey's Closing Brief [hereinafter PT Objection], p. 1:14 to 2:7), that Fahey's due process argument is not timely because he failed to object at the hearing itself (*id.*, p. 2:3–5), and that the documents attached to the Hansen Declaration as evidence "are irrelevant and offer nothing new that could not have been offered previously or otherwise obtained

through discovery" (*id.*, p. 2:6–7). The Portola Letter, according to the Prosecution Team, is not relevant because it relates to whether some other diversion, not Fahey's diversion, caused harm. (*Id.*, p. 2:8–10; see also Water Code, § 1055.3.) Fahey's arguments concerning a "developed water presumption," per the Prosecution Team, are legal arguments for which "Fahey cites no legal authority in support of his assertion." (PT Objection, p. 2:13.) The Prosecution Team contends that the Johnson Memo and the Jopson Memo are not consistent with current law and that they are therefore irrelevant. (See *id.*, pp. 2:22 to 3:2.)

Fahey filed a response to the PT Objection on July 5, 2016. Fahey replies that his due process objection is timely because he could not have objected to the Prosecution Team withholding documents for which he "had no way of knowing the existence or contents." (Fahey's Response to Prosecution Team's Objection to Declaration of Glen Hansen in Support of Fahey's Closing Brief [hereinafter Fahey's Response], p. 1:11-12.) Fahey contends that the Prosecution Team's argument that Fahey could have obtained the disputed documents through discovery, per Fahey's Response, is "circular" (*id.*, p. 1:17) and "nonsensical" (*id.*, p. 1:21). Fahey's Response reiterates arguments as to why Exhibits 1 and 2 to the Hansen Declaration, including the Portola Letter, Bohm Letter, Portola Inspection Report, Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant (Fahey's Response, pp. 3:1 to 4:6; *id.*, p. 4:10–21; *id.*, p. 5:9–20) and clarifies Fahey's position that the CSWC curtailment certification reasonably led to discovery of the Johnson Memo, Jopson Memo, and CSWC Signature Pages (*id.*, p. 4:7–9). It also presents the new argument that the Prosecution Team's failure to disclose the disputed documents "den[ied] Fahey the opportunity to cross-examine the Prosecution Team's witnesses with these documents" in further "violation of Fahey's constitutional due process rights." (*Id.*, p. 1:26–28.) However, Fahey does not identify or make an offer of proof as to what specific testimony he might have developed on cross-examination using Exhibits 1 or 2 to the Hansen Declaration.

3.1.3 Legal Standard

The Fourteenth Amendment to the United States Constitution commands that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1; see also *id.*, art. VI, cl. 2 [Supremacy Clause].) The California Constitution likewise guarantees the right to due process of law. (Cal. Const., art. I, §§ 7, subd. (a), 15.) The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (hereinafter *Mathews*) (1976) 424 U.S. 319, 333.) Due process is not a technical conception with a fixed content unrelated to time, place, or circumstances. (*Id.*, 424 U.S. at 334; accord *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895; *Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720, 725–726.) Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) In determining what process is due, courts weigh the following factors:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Mathews*, 324 U.S. at 335.)

For example, "some form of hearing is required before an individual is finally deprived of a property interest." (Mathews, 424 U.S. at 333; see also Bd. of Regents of State Colleges v. Roth (1972) 408 U.S. 564, 577 [To exist, a property interest requires a "legitimate claim of entitlement."].) When a hearing is required, due process requires an impartial adjudicator. (Withrow v. Larkin (1975) 421 U.S. 35, 46.) Adjudicators are presumed to be impartial. (Id., at 47; see also Morongo Band of Mission Indians v. State Water Resources Control Bd. (2009) 45 Cal.4th 731, 741–742.) Where important

decisions turn on questions of fact, due process generally requires an opportunity to confront and cross-examine adverse witnesses. (Goldberg v. Kelly (hereinafter Goldberg) (1970) 397 U.S. 254, 269.) Likewise, in this situation, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to rebut it. (See Greene v. McElroy (1959) 360 U.S. 474, 497.) The opportunity to be heard must be tailored to the capacities and circumstances of those who participate in the hearing. (Goldberg, 397 U.S. at 268–269.)

Consistent with the constitutional right to due process, the State Water Board's hearing regulations incorporate trial-type procedural requirements as codified in section 11513 of the Government Code. (See Cal. Code Regs., tit. 23, § 648, subd. (b).) All parties to adjudicative proceedings before the Board have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut the evidence against themselves. (Gov. Code, § 11513, subd. (b); see also Cal. Code Regs., tit. 23, § 648.5.) Any relevant evidence shall be admitted in a water rights hearing if it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c).) However, Hearing Officers have discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (*Id.*, subd. (f).)

To facilitate discovery, the State Water Board's regulations provide for administrative subpoenas duces tecum as follows. The Board may issue subpoenas duces tecum for production of documents on its own motion or upon the request of any person. (Cal. Code Regs., tit. 23, § 649.6, subd. (a).) The Board's regulations incorporate the Administrative Procedure Act's subpoena process. (See *id.*, subd. (b); see also Gov. Code, § 11450.05, subd. (b).) This means that attorneys of record for a party may also issue subpoenas duces tecum. (Gov. Code, § 11450.20, subd. (a).) Persons served with subpoenas duces tecum may object to their terms by a motion for protective order or a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The Water Code also

establishes procedures for the deposition of witnesses prior to a hearing. (See Wat. Code, § 1100.)

The State Water Board's regulations allow the Hearing Officer, through the hearing notice, to require submission of case-in-chief exhibits and direct testimony prior to the hearing. (Cal. Code Regs., § 648.4, subd. (c).) Accordingly, the hearing notice for this proceeding required prior submission of direct testimony and exhibits. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings pp. 3–4.) The Hearing Officer may refuse to admit proposed testimony or evidence that does not comply with this requirement and is required to do so when there is a showing of prejudice to any party or the Board. (Cal. Code Regs., § 648.4, subd. (e).) However, this rule may be modified where a party demonstrates that compliance with the rule would create severe hardship. (*Ibid.*)

3.1.4 Discussion

3.1.4.1 Fahey's Due Process Rights Have Not Been Violated

The State Water Board agrees with Fahey that his due process objection is timely filed. (See generally Fahey's Response, p. 1:11–12.) However, the Board is not persuaded that its pre-hearing discovery procedures violated Fahey's constitutional rights. The *Mathews* factors address whether a trial-type hearing is required at all to satisfy due process and, if so, when that hearing must be provided. (See *Mathews*, 324 U.S. at 348 ["The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."]; accord Order WR 97-02, p. 6; Order WR 2014-0029, p. 46.) In this case, the Board has *provided* Fahey with a trial-type hearing, complete with trial-type discovery procedures and the opportunity to subpoena documents, compel the attendance of witnesses, and confront opposing witnesses. Accordingly, it is unnecessary to apply the *Mathews* factors further. (Cf. Order WR 2014-0029, p. 46 [declining to apply *Mathews* factors where no deprivation of property occurred.])

We grant that the State Water Board's discovery procedures may not be exactly the same as those that exist in state or federal courts. Yet "differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" (*Mathews*, 424 U.S. at 348, quoting *Fed. Com. Commission v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 143.) To the extent that Fahey may have argued that due process requires new or different discovery procedures, the Board finds that it does not. Accordingly, the Board holds that its existing hearing procedures satisfy constitutional due process requirements.

Likewise, the State Water Board is not persuaded that the Prosecution Team's conduct violated Fahey's right to due process. Fahey's counsel's December 1, 2015 letter was a letter requesting production of documents, not a subpoena. (See Hansen Decl., ¶ 2 [describing letter]; Fahey's Closing Brief, June 17, 2016, p. 1:17–24 [same].) Specifically, the letter asks that Kenneth Petruzzelli, attorney for the Prosecution Team, "[p]lease immediately provide a formal response . . . as to whether the Board will produce the following documents." (Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 2, Attachment 1, p. 1 [enclosing a true and correct copy of Fahey's December 1, 2015 letter].) We see nothing in the record to indicate that Fahey ever *commanded* production of these documents through a subpoena or by filing a motion to compel production. (But see, e.g., Fahey's Opposition to the Prosecution Team's Motions, Dec. 18, 2015, p. 5:21–27 [discussing the Board's discovery procedures and subpoena powers].) The Prosecution Team declined Fahey's document request and proposed a Public Records Act request as an alternative means for Fahey to obtain the requested documents. (Decl. of Kenneth Petruzzelli In Support of Prosecution Team Post-Hearing Evidence Brief, April 8, 2016, ¶ 5, Attachment 1, p. 1.) Fahey submitted a December 7, 2015 Public Records Act request (see Hansen Decl., Exh. 1, pp. 1–3; accord R.T., Jan. 25, 2016, 9:9–14), essentially accepting the Prosecution Team's alternative proposal.

Subsequently, Fahey sought to use the State Water Board's discovery procedures to compel deposition of certain Prosecution Team witnesses and the production of certain correspondence and of documents used in preparing their testimony. (See Wat. Code, § 1100 [describing deposition procedures]; see generally Decl. of Glen Hansen in Support of Opposition to the Prosecution Team's Motions, Dec. 18, 2015, ¶¶ 1–14 [chronology of Fahey's discovery efforts]; *id.*, Exh. 3 [Fahey's deposition notices and document demands for Samuel Cole and the Person Most Knowledgeable]; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 6, Attachment 5 [Fahey's deposition notices and document demands for Katherine Mrowka and David LaBrie].) To resolve procedural motions related to the deposition notices, the Hearing Officers compelled the Prosecution Team to deliver certain documents described in Fahey's deposition notices, declined to compel the production of other documents, and compelled the attendance of witnesses for cross-examination by Fahey at the hearing in lieu of pre-hearing depositions. (See Jan. 21, 2016 Procedural Ruling, pp. 10–11; December 21, 2015 Procedural Ruling, p. 5; R.T., Jan. 25, 2016, p. 16:1–6.) Post-hearing, the Hearing Officers exercised their discretion to exclude from the evidentiary record certain documents that were not disclosed to Fahey and that Fahey argued should have been disclosed. (See generally May 23, 2016 Procedural Ruling, pp. 10, 17; see also Gov. Code, § 11513, subd. (f); Cal. Code Regs., tit. 23, § 648, subd. (b).)

Because Fahey never subpoenaed or moved to compel production of the curtailment certification form correspondence that he requested, the State Water Board need not consider a hypothetical situation in which the Prosecution Team continued, after receiving a subpoena duces tecum, to withhold the documents and to insist that a Public Records Act request was the appropriate discovery tool. (But see Cal. Code Regs., tit. 23, § 649.6, subd. (b) [State Water Board may compel production of evidence].) As discussed below, the documents identified in Exhibits 1 and 2 to the Hansen Declaration are either irrelevant or eligible to be introduced into evidence under the Board's existing procedural rules. Denying Fahey the opportunity to introduce irrelevant evidence cannot violate his right to due process. Providing a procedural

mechanism to introduce appropriate, late-filed exhibits serves Fahey's right to due process. For the foregoing reasons the Board finds that, under the circumstances of this case, the Prosecution Team did not violate Fahey's right to due process by resolving Fahey's document request as a Public Records Act request.

3.1.4.2 Some Documents Identified by Fahey Are Relevant to This Proceeding, but Others Are Not

Any relevant evidence shall be admitted in State Water Board hearings if it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c); See Cal. Code Regs., tit. 23, § 648, subd. (b).) Exhibits 1 and 2 to the Hansen Declaration, including the Portola Letter, Bohm Letter, Portola Inspection Report, Johnson Memo, Jopson Memo, and CSWC Signature Pages are public records or official correspondence of public agencies prepared in the course of executing their statutory responsibilities. (See generally Hansen Decl., ¶¶ 2, 6.) As such, they are "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" and are admissible to the extent that they are relevant. Fahey argues that Hansen Declaration Exhibit 1 is relevant in its entirety because the documents establish the absence of an administrative process to respond to claimed exceptions to curtailment. (Fahey's Closing Brief, p. 3:12–15; Hansen Decl., ¶ 4.) However, we note that Prosecution Team witness John O'Hagan has already conceded on cross-examination that no such administrative process existed. (R.T., Jan. 25, 2016, p. 109:12–23.) As such, even if Hansen Declaration Exhibit 1 was relevant to prove the absence of a process, the Board may exclude it. (See Gov. Code, § 11513, subd. (f).)

Fahey also contends that specific documents within Hansen Declaration Exhibit 1—the Portola Letter, the Portola Inspection Report, and the Bohm Letter—are relevant because they contradict the Prosecution Team's legal position on developed water and reinforce Fahey's testimony regarding "the lack of harm from his diversions." (See Fahey's Closing Brief, June 17, 2016, p. 2:18 to 3:11.) In the Portola Letter, Mr. O'Hagan 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 definite channel." (Hansen Decl., Exh. 1, p. 38.) Mr. O'Hagan is a member of the Prosecution Team. (See Hansen Decl., Exh. 1, p. 39; see also, e.g., R.T., Jan. 25, 2016, p. 16:5–6 [compelling John O'Hagan to participate as a Prosecution Team witness for cross-examination]; *id.*, pp. 89:16–22 [Prosecution Team witness Brian Coats testifying that he collaborated with John O'Hagan]; PT-7, p. 25, ¶ 25 [same].) However, we are not persuaded that these documents are relevant.

Mr. O'Hagan summarizes the holding of *City of Los Angeles v. Pomeroy* and related groundwater cases. (See *City of Los Angeles v. Pomeroy, supra*, 124 Cal. at 628 [finding presumption that "waters moving in the ground . . . are not part of a stream or watercourse nor flowing in a definite channel."]; accord, e.g., *Arroyo Ditch & Water Co. v. Baldwin* (1909) 155 Cal. 280, 284; *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1594–1596.) The letter responds to a technical analysis prepared for the City of Portola (Portola or the City) which concluded that the City is diverting groundwater, not spring water. (Hansen Decl., Exh. 1, p. 38; *id.*, pp. 24–25 [Bohm Letter].) Per *Pomeroy*, Mr. O'Hagan correctly states that, if the City of Portola is in fact diverting groundwater, then its diversions are presumed to be outside the water rights permitting authority of the State Water Board. (See also Wat. Code, §§ 1200, 1201; but see *id.*, §§ 10735–10736 [describing Board's role in sustainable groundwater management].

The State Water Board does not agree with Fahey's argument that Mr. O'Hagan's statement concedes that diversions from springs are diversions of groundwater or developed water. Mr. O'Hagan makes no such concession in the Portola Letter. One does not concede that an argument is correct by responding to it. Mr. O'Hagan merely assumed for the sake of argument that Portola's diversions are groundwater in order to suggest a possible course of action for Portola if the City wishes to pursue its argument further. Mr. O'Hagan goes on to say that Portola may "request the revocation of License 10013" if the City wishes to pursue its claim that its "points of diversion . . . are

solely diversions of percolating groundwater." (Hansen Decl., Exh. 1, p. 38.) "Until such a request is made, the Division [of Water Rights] must presume that" at least some of the water diverted "is subject to [the Division's] permitting authority and to the current curtailment." (*Id.*, p. 39.)

Even if Mr. O'Hagan had not correctly stated the law, the State Water Board disagrees with Fahey's argument that Mr. O'Hagan's opinions on legal issues would have legal significance to the extent that they contradict well-established precedents. Although administrative agencies may designate agency decisions as precedent (Gov. Code, § 11425.60, subd. (b)) the Board has determined that only Board decisions or orders adopted by the Board at a public meeting are precedential (Order WR 96-01, p. 17, fn. 11). Therefore, the personal opinions of individual Board employees on water rights law, such as the Portola Letter, are not agency precedent. Even if Mr. O'Hagan had stated a different rule for springs, groundwater, or developed water, his opinion would not bind the Board.

Because Fahey did not learn of Mr. O'Hagan's opinions expressed in the Portola Letter until April 29, 2016 (Fahey's Closing Brief, June 17, 2016, p. 2:13–15) Fahey cannot argue, and does not argue, that Mr. O'Hagan's opinion on legal matters is relevant because Fahey relied on the opinion in good faith. Accordingly, this order does not consider this theory of relevance. For the foregoing reasons, the State Water Board finds that the Portola Letter, Portola Inspection Report, and the Bohm Letter are not relevant to the Key Issues identified in the Hearing Notice. Because there is well-developed judicial and administrative precedent on this legal issue, there is no reason Fahey could not have presented his legal argument without first obtaining the Portola Letter. We will consider Fahey's legal arguments regarding developed water further, below, in section 5.3.2.2.

Fahey contends that the Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant because they support his argument that MID and TID control the flow of the Tuolumne River during July, August, and September. (Fahey's Closing Brief, June 17,

2016, pp. 3:16 to 4:3; see also Hansen Decl., ¶ 6.) Per Fahey's argument, "[t]here is 'no diminution of supply to the Delta'" by diverters above NDPR, such as Fahey, "during the annual FAS Period . . . because MID/TID/CCSF have a right to divert or store nearly the entire flow of the Tuolumne River upstream of NDPR." (Fahey's Closing Brief, June 17, 2016, p. 3:24–25; see also *id.*, pp. 3:26 to 4:3.) The Johnson Memo and Jopson Memo are evidently public records of our predecessor agency, the State Water Rights Board. (See Wat Code, § 179; Hansen Decl., Exh. 2, pp. 136–138, 165–170.) As such, statements contained therein are arguably attributable to the Prosecution Team, a special subdivision of the State Water Board, as statements of a party-opponent. Unlike the Portola Letter, these documents involve both legal issues and factual issues, such as the hydrologic continuity of similarly situated Tuolumne River and San Joaquin River diverters.

The State Water Board finds that the Johnson Memo and the Jopson Memo are relevant to Key Issues 1, 2, and 3 in the Hearing Notice. The CSWC Signature Pages are also relevant because they establish that the State Water Rights Board issued a permit under the circumstances discussed in the Johnson Memo. This order evaluates the probative value of these documents below in section 5.2.2.3. Fahey presents no argument as to whether the remainder of Exhibit 2 to the Hansen Declaration, i.e., the remaining permit file for Application 21647, is relevant to this proceeding. Fahey appears to have introduced these documents to authenticate and provide foundation for the Johnson Memo, Jopson Memo, and CSWC Signature Pages. Accordingly, the Board finds the remainder of Exhibit 2 relevant for this purpose only.

3.1.4.3 The Johnson Memo, Jopson Memo, and CSWC Signature Pages Should Be Admitted into Evidence

Parties to this proceeding were required to submit case-in-chief exhibits and direct testimony prior to the hearing and were required to submit rebuttal testimony and rebuttal exhibits during the hearing itself. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings pp. 3–4; *id.*, p. 6; see also Cal. Code Regs., tit. 23, § 648.4, subds. (c), (f).) Surprise testimony or exhibits are

disfavored, and the Hearing Officers may refuse to admit proposed testimony or evidence that does not comply with the Board's requirements. (Cal. Code Regs., tit. 23, § 648.4, subds. (a), (e).) Such refusal is mandatory when there is a showing of prejudice to any party or the Board. (*Id.*, subd. (e).) However, this rule may be modified where a party demonstrates that compliance with the rule would create severe hardship. (*Ibid.*)

The State Water Board concludes that Fahey has successfully shown that the Johnson Memo, Jopson Memo, and CSWC Signature Pages should be admitted. These documents were not made available to Fahey until June 15, 2016. (Hansen Decl., ¶ 6.) Although Fahey chose to file a Public Records Act request in lieu of a subpoena for Hansen Declaration Exhibit 1 documents, he did so at the request of the Prosecution Team and only after the Prosecution Team advised Fahey that they had "determined that" Fahey's document requests "were exceedingly broad, did not relate to the Fahey ACL, and were more appropriately addressed through a request for public records." (Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶ 5.) Although Exhibit 2, the permitting file for Application 21647, is a public record normally available for inspection, the State Water Board does not see any particular reason for Fahey to have known to request these records until he received the documents contained in Hansen Declaration Exhibit 1. Fahey promptly brought all the documents to the Hearing Officers' attention in his June 17, 2016 closing brief.

The State Water Board does not believe that admitting part of Exhibit 2 to the Hansen Declaration would prejudice the Prosecution Team or the Board. The Prosecution Team opined that Fahey should obtain documents that became Exhibit 1 through the Public Records Act, and Fahey did so. (See Hansen Decl., Exh. 1, pp. 1–3; Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶¶ 2–3; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 3.) Fahey waited patiently, giving the Prosecution Team ample time to review and sort the requested documents. The Prosecution Team did not complete Public Records Act disclosures until April 29, 2016, after the close of the evidentiary proceeding. (Hansen Decl.,

Exh. 1, pp. 1–3; Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶ 9.) MID, TID, and CCSF do not claim to be prejudiced. Because there is not a showing of prejudice to any party or the Board, the authority to exclude these documents is discretionary. (Cal. Code Regs., § 648.4, subd. (e).) Accordingly, The Board finds that the Johnson Memo, Jopson Memo, and CSWC Signature Pages should be admitted into evidence.

3.1.5 Conclusions

Fahey's motion to dismiss is denied. The Prosecution Team's motion to strike is denied in part and granted in part, as described herein. The State Water Board admits the Johnson Memo, Jopson Memo, and CSWC Signature Pages into evidence as Fahey exhibits, marked next in order, as designated in the table below:

Table 1. New Exhibits Admitted Into Evidence

Exhibit	Description	Hansen Declaration	Bates Stamp Pages
Fahey-88	Johnson Memo	Exhibit 2	165–170
Fahey-89	Jopson Memo	Exhibit 2	136–139
Fahey-90	CSWC Signature Pages	Exhibit 2	148–152

To the extent that other documents submitted as Exhibits 1 or 2 of the Hansen Declaration may be necessary to authenticate or create foundation for Fahey-88 through Fahey-90, the State Water Board finds that those exhibits are authenticated and that sufficient foundation exists. It is therefore unnecessary to admit the other pages of Exhibit 2 to the Hansen Declaration into evidence. Accordingly, the Board strikes from the record those pages of Exhibit 2 that do not constitute Fahey-88, Fahey-89, or Fahey-90. This is appropriate pursuant to the Board's authority to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f); Cal. Code Regs., tit. 23, § 648, subd. (b).)

The State Water Board also strikes all pages of Hansen Declaration Exhibit 1, i.e., the Prosecution Team's April 29, 2016 disclosure to Fahey. For the reasons discussed above, Exhibit 1 would only be relevant to establish the absence of an administrative process to respond to claimed exceptions to curtailment. This has already been established through Mr. O'Hagan's testimony. (R.T., Jan. 25, 2016, p. 109:12–23.) Therefore, striking Exhibit 1 is appropriate pursuant to the Board's authority under section 11513, subdivision (f), of the Government Code.

3.2 Fahey's January 14, 2019 Motion to Dismiss

3.2.1 Introduction

Fahey filed an additional motion to dismiss this proceeding on January 14, 2019.[12] In this motion, Fahey contends that "[s]ince Fahey, a junior user, was using pre-1914 appropriators' water under the authorization of a contract with the pre-1914 appropriators," MID and TID, "and since the pre-1914 appropriators' water that was used by Fahey in 2014 and 2015 was available under the pre-1914 appropriators' priority of right, therefore the Board did not have authority under section 1052 to demand that Fahey curtail his water use in 2014 and 2015 as alleged in the ACL/CDO." (Fahey's Motion to Dismiss, Jan. 14, 2019, p. 1.) Fahey cites Water Code, sections 1375 and 1706 and State Water Board Decision 1290 in support of the argument that he was using pre-1914 appropriators' water, arguing that "the Board relies on the senior right involved in the exchange agreement as the basis of diversion priority and uses the junior right as a de facto change petition for the senior right." (*Id.,* p. 3.) In addition, Fahey argues that a superior court's unpublished conclusions regarding notices similar to the 2014 Unavailability Notice and the 2015 Unavailability Notice require the State Water Board to find that these notices violated Fahey's right to procedural due process. (*Id.*, p. 5.)

[12] On July 22, 2019, Fahey filed a third motion to dismiss this proceeding. The motion raises similar arguments to those addressed in this order. Fahey's third motion to dismiss is denied for the reasons stated in section 3.2 of this order.

Hearing Officer Dorene D'Adamo established a briefing schedule for the new motion on January 15, 2019. (See Letter from Mara Irby, State Water Board to Hearing Service List (Jan. 15, 2019).) The Prosecution Team filed an opposition brief on January 24, 2019, arguing that Water Code section 1052 provides authority for the enforcement action, that Fahey has additional civil liability irrespective of the Water Exchange Agreement, and that Fahey has been afforded legally required due process. [See generally Prosecution Team's Memorandum in Opposition, Jan. 24, 2019.] Fahey filed a reply brief on January 30, 2019 that largely reiterated his previous arguments and added additional arguments to the effect that "MID/TID/CCSF and Fahey agreed to the WEA memorialized in the Aug. 11, 2011 Fahey Mitigated Negative Declaration" that "allows Fahey to divert 'non-jurisdictional' water year-around, [sic] when that is the only water available . . . ." (See generally Fahey's Reply Brief, Jan. 30, 2019, pp. 1–2.)

The Interveners declined to submit an opposition brief before the deadline. However, MID and TID filed a letter on January 31, 2019 registering their support for the Prosecution Team's Memorandum in Opposition. (See Letter from Arthur F. Godwin, Attorney for the Turlock Irrigation District and Kelsey Gowans, Attorney for the Modesto Irrigation District to Hearing Service List (Jan. 31, 2019).) Fahey filed an additional letter on February 1, 2019 summarizing his arguments. (Letter from Glen Hansen, Attorney for Fahey to Mara Irby and Lily Weaver, State Water Board (Feb. 1, 2019).)

3.2.2 Fahey's Motion Is Untimely and Need Not Be Considered

The hearing officers' May 23, 2016 procedural ruling closed the evidentiary record except for closing briefs, which were due by June 17, 2016. (See May 23, 2016 Procedural Ruling, p. 17.) The opportunity to present new arguments, new evidence, or new interpretations of Fahey's permits is long past.

3.2.3 Water Code Section 1052 Authorizes the State Water Board to Take Enforcement Action Against Fahey for Unlawful Diversion

Fahey contends that the State Water Board lacks authority to bring an enforcement action against him because the Water Exchange Agreement allows him to divert under

MID and TID's claimed pre-1914 appropriative water rights. Nothing in the Water Exchange Agreement authorizes "a de facto change petition for the senior right." To the contrary, it expressly provides that "Fahey shall not accrue any interest in the District's water rights by virtue of this Agreement. Nothing contained herein shall be construed as a grant of water rights or an interest in the District's water rights." (PT-19, p. 2, ¶ 9.) The Water Exchange Agreement merely allows Fahey to provide "make-up water" to MID and TID at any time of the year between January 1 and December 31 to compensate them for his FAS Period diversions in a given year. (PT-19, pp. 1–2, ¶¶ 3–5.)

The Water Exchange Agreement allowed the State Water Board to issue Fahey's permits notwithstanding the FAS determination and the requirement in Water Code, section 1375, subdivision (d) that there be unappropriated water available. (See also Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22.) Section 1706 of the Water Code, which provides for certain changes to pre-1914 water rights under certain conditions, is not applicable. Decision 1290 applied Water Code section 1706 and declined to adopt conditions that riparian diverters' requested to address possible future injury from possible future changes to the petitioners' claimed pre-1914 appropriative rights. These facts are distinguishable from the present matter before the Board.

Even if the Water Exchanger Agreement did allow Fahey to divert under MID and TID's claimed pre-1914 water rights, it would only do so if Fahey had performed his obligations under the Water Exchange Agreement by providing "make-up" water in 2014 and 2015. He failed to do so, as is explained in greater detail in sections 5.2.3 and 5.3.1, below. Table 3, below in section 5.3.1.1, provides a summary of Fahey's water deliveries to NDPR. Fahey has not positioned water in NDPR since 2011. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21.) Even if the State Water Board were to accept Fahey's argument, which the Board does not, Fahey's diversions would still be unlawful.

Fahey's motion relies on the legal conclusion that Water Code section 1052 does not authorize the State Water Board to "demand" that pre-1914 appropriators "curtail"

diversions. The only legal authority Fahey cites in support of this position is an unpublished superior court decision. Unpublished opinions are not precedential. (Cf. Cal. Rules of Court, rule 8.1115; cf. also, e.g., *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299 fn.5 [Disregarding unpublished superior court opinion]; *County of San Bernardino v. Cohen* (2015) 242 Cal.App.4th 803, 816 [declining to take judicial notice of trial court opinions].) None of the exceptions in Rule of Court 8.115 apply to this proceeding and Fahey does not argue otherwise. The superior court decision Fahey cites does not control the outcome of this proceeding.

Fahey's reply brief raised an additional argument related to CCSF. Although the reply brief is not entirely clear, the argument appears to be that a further agreement "memorialized in the Aug. 11, 2011 Fahey Mitigated Negative Declaration" made CCSF a party to the Water Exchange Agreement or otherwise made the arguments presented in Fahey's original motion to dismiss applicable to CCSF as well. Fahey has not provided a copy of this document and it is unclear whether it is part of the record. Without further explanation, it is not clear how a California Environmental Quality Act document could constitute a contract or an amendment to the Water Exchange Agreement. If CCSF is a party to the Water Exchange Agreement, a matter on which the State Water Board takes no position, then CCSF's claimed pre-1914 water rights do not immunize Fahey from enforcement for the same reasons that MID and TID's claimed pre-1914 water rights do not immunize Fahey from enforcement.

3.2.4 The 2014 Unavailability Notice and 2015 Unavailability Notice Did Not Violate Fahey's Due Process Rights

Fahey argues that the conclusions of an unpublished superior court decision regarding notices similar to the 2014 Unavailability Notice and the 2015 Unavailability Notice require the State Water Board to find that these notices violated Fahey's right to procedural due process. Unpublished opinions are not precedential. (Cf. Cal. Rules of Court, rule 8.1115.) The 2014 Unavailability Notice and 2015 Unavailability Notice were informational, as is explained more fully above in section 2.2. In discussing the unpublished opinion, Fahey appears to insinuate that the 2014 Unavailability Notice and

the 2015 Unavailability Notice in some way coerced him to cease diversion. Yet evidence in the record demonstrates that Fahey was not deterred by these notices from diverting water. Table 2 in section 5.2.1, below, summarizes evidence of Fahey's diversions during the time period at issue.

The purpose of this proceeding is to investigate whether Fahey violated or is threatening to violate the prohibition against unlawful diversion set forth in Water Code section 1052 and determine an appropriate penalty in the event of a violation. (See section 2.4, *supra* [summarizing key issues]; PT-6 [hearing notice].) This proceeding arose following an investigation by the Prosecution Team and the issuance of an ACL Complaint and draft CDO. (See section 2.3, *supra*; see also generally PT-1 [ACL Complaint]; PT-2 [Draft CDO]; PT-8 through PT-14 [Prosecution Team staff's written testimony describing investigation and enforcement efforts.].) The basis for this proceeding is the investigation and evidence in the record, not the 2014 Unavailability Notice or the 2015 Unavailability Notice.

The State Water Board provided Fahey with a trial-type hearing regarding the ACL Complaint and draft CDO. Fahey had ample opportunity to present evidence, testimony, and argument through the hearing process. In addition, Fahey had ample opportunity to cross-examine each of the Prosecution Team's witnesses and, after the hearing, submit written argument and thoroughly address evidentiary objections raised at the hearing. This proceeding has afforded Fahey the due process required by law. (E.g., *Mathews*, 424 U.S. at 333 [Some form of hearing is required before an individual is finally deprived of a property interest.]; *Goldberg*, 397 U.S. at 269 [Where important decisions turn on questions of fact, due process generally requires an opportunity to confront and cross-examine adverse witnesses.].)

3.2.5 Conclusion

For the foregoing reasons, Fahey's January 14, 2019 motion to dismiss is denied.

4.0 LEGAL AUTHORITIES

4.1 Cease and Desist Order Authority

The State Water Board may issue a CDO when it determines that any person is violating, or threatening to violate, the prohibition against unlawful diversion. (Wat. Code, § 1831, subds. (a) & (d)(1–3).) The Board may issue a CDO only after notice and an opportunity for hearing. (*Id.*, subd. (c).) A CDO is effective immediately upon being issued. (Wat. Code, § 1832.)

4.2 Authority to Assess Civil Liability

Unauthorized diversion of water is a trespass against the state. (Wat. Code, § 1052, subd. (a).) The State Water Board may administratively impose civil liability in an amount not to exceed limits specified by statute. (*Id.*, subd. (c).) Under specified drought conditions, including where the Governor has issued a proclamation of a state of emergency based on drought conditions, the statutory maximum is $1,000 per day for each day of unauthorized diversion plus $2,500 per acre-foot diverted in excess of the diverter's rights. (*Id.*, subd. (c)(1).) The Board must provide notice of the ACL Complaint and an opportunity for a hearing. (Wat. Code, § 1055, subd. (b).) An order setting administrative civil liability is effective and final upon being issued. (*Id*., subd. (d).) If the administrative civil liability is not paid, the State Water Board may seek recovery of the civil liability as provided in Water Code section 1055.4.

5.0 DISCUSSION

5.1 Background and Fahey's Water Rights

5.1.1 Permits 20784 and 21289

On March 23, 1995, the State Water Board issued Permit 20784 to Fahey, pursuant to Application 29977, the priority of which dates back to July 12, 1991. (PT-15, pp. 3, 7; Fahey-20, pp. 311, 315.) Permit 20784 authorizes the direct diversion and use of water from: (1) an Unnamed Spring (a.k.a. Cottonwood Spring) at a rate of diversion not to exceed 0.031 cubic feet per second (cfs) and (2) Deadwood Spring at a rate of

diversion not to exceed 0.031 cfs. (PT-15, p. 4.) On March 6, 2002, the Division of Water Rights issued an Order Approving Extension of Time, Change in Point of Diversion, and Amending the Permit, which approved a December 12, 1997 petition from Fahey to change the first point of diversion listed on Permit 20784 from the "unnamed spring (a.k.a. Cottonwood Spring)" to a new location called the "unnamed spring (a.k.a. Sugar Pine Spring)." (PT-15, pp. 1-2 [order approving Permit 20784 change petition]; PT-56, p. 1 [2014 Progress Report for Permittee lists "UNSP (AKA SUGAR PINE SPRING)" as a source under Permit 20784]; R.T., Jan. 25, 2016, p. 45: 16-18 [Katherine Mrowka testified that Fahey submitted a change petition to change the Cottonwood Spring point of diversion to Sugar Pine Spring].) The water appropriated under Permit 20784 is limited to a total combined diversion rate of 0.062 cfs from January 1 to December 31 of each year for Industrial Use at "[b]ottled water plant(s) off premises." (PT-15, p. 4.) The maximum amount diverted under Permit 20784 shall not exceed 44.82 acre-feet per year. (*Ibid.*)

On August 1, 2011, the State Water Board issued Permit 21289 to Fahey, pursuant to Application 31491, the priority of which dates back to January 28, 2004. (PT-16, pp. 4, 12; Fahey-55, pp. 1197, 1205.) Permit 21289 authorizes the direct diversion and use of water from: (1) Unnamed Spring (a.k.a. Marco Spring) at a rate of diversion not to exceed 0.045 cfs and; (2) Unnamed Spring (a.k.a. Polo Spring) at a rate of diversion not to exceed 0.045 cfs. (PT-16, p. 5.) The springs are named for Mr. Fahey's dogs. (SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Contact Report, Yoko Mooring, State Water Board (Oct. 10, 2003).) The water appropriated under Permit 21289 is limited to a total combined diversion rate of 0.089 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at "[b]ottled water plant(s) (off premises)." (PT-16, p. 5.) The maximum amount diverted under Permit 21289 shall not exceed 64.5 acre-feet per year. (*Ibid.*)

Permits 20784 and 21289 authorize the appropriation of water from spring sources that are tributary to unnamed streams, thence Cottonwood Creek, Basin Creek, or Hull Creek, thence the Clavey River or the North Fork of the Tuolumne River, and thence the

Tuolumne River upstream of NDPR. (PT-15, p. 3; PT-16, p. 4; R.T., Jan. 25, 2016, p. 44:13–16.) The Clavey River and the North Fork of the Tuolumne River are among the five tributaries that join the Tuolumne River from the north between Hetch Hetchy and NDPR, the others being Cherry Creek, Jawbone Creek, and Turnback Creek. From the south, the Tuolumne River is joined by the South Fork of the Tuolumne River. Moccasin Creek and Woods Creek drain directly into NDPR.[13]

Testimony provided by Prosecution Team witness Katherine Mrowka described the permitted diversion system and operation of Fahey's project as follows:

> According to Permit 20784 and Permit 21289, separate pipes convey water diverted from all four springs subject to Permits 20784 and 21289. All four springs are located on property owned by the United States Forest Service.[14] The pipes combine into a common pipe system. The pipeline connects to two 35,000 gallon tanks and an overhead bulk water truck filling station (collectively referred to as the transfer station) located on Tuolumne County Assessor Parcel Number (APN) 052-060-48-00, owned by Sugar Pine Spring Water, LP. Fahey operates the transfer station, and bulk water hauler trucks access the property through a locked gate to remove the water for delivery off-premises.

(PT-9, p. 2, ¶ 10.)

[13] The State Water Board takes official notice of the foregoing information pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.
[14] Fahey clarified in his April 9, 2019 proposed changes to the draft order that Deadwood Spring is located on property now owned by W.D. Fahey Tuolumne Ranches LLC and Fahey as tenants-in-common. He stated that the other three springs are located on property owned by the United States Forest Service, consistent with Ms. Mrowka's cited testimony. (Fahey's April 9, 2019 Proposed Draft Order Changes, p. 34.)

Permits 20784 and 21289 include terms for the protection of downstream prior rights. (PT-15, pp. 3, 6; PT-16, pp. 4, 5; PT-9, p. 4, ¶ 19.) Permit Term 17 in Permit 20784 and Term 9 in Permit 21289 each similarly state:

> This permit is subject to prior rights. Permittee is put on notice that, during some years, water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the San Joaquin River Basin are such that, in any year of water scarcity, the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing.

(PT-15, p. 6; PT-16, p. 5.)

5.1.2 Tuolumne River Senior Water Rights and Fully Appropriated Stream Determination

MID and TID hold numerous post-1914 appropriative water rights and pre-1914 claims of right for diversion and use of the waters of the Tuolumne River, including diversion and storage of water at NDPR and La Grange Dam. (PT-9, p. 6, ¶ 33 [describing post-1914 rights]; Decision 995, p. 1–2 [same]; Interveners' Closing Brief, June 17, 2016, pp. 1:26 to 2:2.) NDPR is located on the mainstem of the Tuolumne River, downstream of the springs and creeks from which Fahey diverts pursuant Permit 20748 and Permit 21289. (See PT-45, pp. 4–6; see also SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 1, Letter from G. Scott Fahey to James Kassel, State Water Board (August 6, 1991) [enclosing Mr. Fahey's hand-drawn schematic].) The Interveners designed NDPR with a capacity of 2,030,000 acre-feet**,** of which 340,000 acre-feet is reserved for flood control according to an agreement between CCSF, MID, and TID, executed in 1966. (Fahey-79, p. 6.) La Grange Dam is located approximately two miles downstream of NDPR and is used to divert and regulate NDPR outflows into the irrigation canal systems of MID and TID. (Fahey-85.) MID and TID's appropriative water rights are senior to Fahey's. (PT-15, p. 7; PT-16, p. 12; R.T., Jan. 25, 2016, p. 192:13–15.)

CCSF holds numerous pre-1914 appropriative claims of right for diversions from the Tuolumne River and its tributaries, which are upstream from NDPR and the tributaries' confluence to the Tuolumne River of the spring sources with Fahey's points of diversion. (PT-9, p. 6, ¶ 34; Interveners' Closing Brief, June 17, 2016, p. 2:10–13.) Pursuant to various agreements between CCSF, MID, and TID, CCSF maintains a water bank account in NDPR. (E.g., Fahey-79, pp. 7–10.) The water rights and operating agreement for NDPR also include seasonal storage in the CCSF upstream reservoirs and water bank accounting between TID, MID, and CCSF. (See generally, e.g., PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34; Fahey-79.) The water bank account implements a physical solution between TID, MID, and CCSF for management of their respective senior claims of right and is built on calculation of the natural flow of the Tuolumne River. (See Interveners' Closing Brief, June 17, 2016, p. 12:7–9.) Fahey's diversions have the potential to impact the inflow to NDPR which, in turn, can affect the water bank accounting. (See, e.g., Fahey-14; Fahey-79, pp. 7–10.)

Pursuant to State Water Board Order WR 89-25 and Order WR 91-07, the Delta watershed upstream of the Delta is fully appropriated between June 15 or 16[15] and August 31. (Decision 1594; see also PT-9, p. 3, ¶ 11; PT-80; PT-81.) In addition, the Tuolumne River upstream from NDPR is fully appropriated from July 1 to October 31. (Decision 995; see also PT-9, p. 3, ¶ 11; PT-18.) New diversions may be authorized during the FAS Period if the applicant provides replacement water to senior rights under an exchange agreement. (Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22; see PT-9, p. 4, ¶¶ 18–19.) In general, an exchange agreement or "physical solution" allows the appropriation of water if the permittee supplies downstream senior rights with an equal quantity of water of comparable quality from another source. (*E.g.*, *Peabody v.*

[15] For permittees who directly divert less than one cubic foot per second or divert to storage less than 100 acre-feet per annum, the Delta watershed upstream of the Delta is fully appropriated between June 16 and August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07).

City of Vallejo (1935) 2 Cal.2d 351, 358–359, 380; *City of Lodi v. East Bay Municipal Water District* (1936) 7 Cal.2d 316, 339–340; Decision 949; Decision 1365; PT-9, p. 4.)

The record is not entirely clear whether the FAS Period begins on June 15 or June 16 for the purposes of implementing Fahey's FAS Period make-up water obligations to MID and TID. Term 19 of Permit 20784 requires Fahey to provide replacement water for diversions during the period from June 16 to October 31 of each year "[p]ursuant to" the Water Exchange Agreement executed on December 12, 1992. (PT-15, p. 6, ¶ 19.) The Water Exchange Agreement specifies that Fahey shall provide make-up water for diversions during the period from June 15 to October 31. (See PT-19, pp. 1–2, ¶¶ D, 2–3.) For this analysis, the State Water Board conservatively treated the period of June 16 to October 31 as the FAS Period in which Fahey's make-up water obligations apply. This should not be interpreted to alter any responsibilities Fahey may have to MID and TID per the Water Exchange Agreement.

5.1.3 Permit Terms to Protect the Prior Rights of MID, TID, and CCSF

Fahey's points of diversion described under Permits 20784 and 21289 are within the fully appropriated stream system identified in State Water Board Orders WR 89-25 and WR 91-07. (E.g., Fahey-10; PT-9, p. 3, ¶¶ 12, 13; see also generally PT-45 [maps].) Therefore, Fahey was required to submit proof of an exchange agreement with senior diverters, i.e., MID and TID, before the Board could accept his applications to appropriate water. (E.g., Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22.) Fahey did so. (PT-19, pp. 1–2, ¶¶ 3–5; see also Fahey-6; Fahey-10; Fahey-37.) The Water Exchange Agreement allows Fahey to provide "make-up water" to MID and TID at any time of the year between January 1 and December 31 to compensate MID and TID for his diversions during the FAS Period. (PT-19, pp. 1–2, ¶¶ 3–5.) Fahey is obligated to provide semi-annual reports to MID and TID documenting his diversions and the make-up water provided. (PT-19, p. 2, ¶ 7.)

Fahey's Water Exchange Agreement with MID and TID "shall be incorporated into and made a part of any permit or license granted to Fahey" by the Board. (PT-19, p. 2, ¶ 6.)

Carryover of FAS Period make-up water from one year to the next is not allowed under the agreement. (PT-19, p. 2, ¶ 4.) Pursuant to the Water Exchange Agreement, Term 19 of Permit 20784 requires Fahey to provide exchange water to MID and TID at NDPR for all water diverted under the permit, during the period from June 16 through October 31 of each year, as stated below:

> 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.

(PT-15, p. 6; Fahey-20, p. 314.)

Permit 21289 does not contain a term identical to Term 19 in Permit 20784. However, the Water Exchange Agreement states that it "shall be incorporated into and made a part of any permit or license granted to Fahey" by the Board (PT-19, p. 2, ¶ 6), and Fahey's application for what became Permit 21289 "accepts and understands" that it shall "be conditioned and subjected to the same terms and conditions as the previous agreements" (Fahey-39, p. 650). The State Water Board accepted the application that became Permit 21289 because of the Water Exchange Agreement. (Fahey-37, p. 641.) Term 34 of Permit 21289, which establishes other replacement water requirements, discussed below, further supports this interpretation. (PT-16, p. 6.) Fahey's separate obligation under Term 34 "shall take into consideration [Fahey]'s obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between [Fahey, MID, and TID]." (*Ibid.*; see also PT-20, p. 2.) The purpose of this language appears to be to ensure that Fahey is not responsible for providing both "make-up water" and Term 34 replacement water for the same diversion. (E.g., Fahey-15, pp. 247–249 [CCSF letter discussing the Water Exchange Agreement]; see also Interveners' Closing Brief, June 17, 2016, pp. 7:28 to 8:13.) Including this

language in Permit 21289 would only make sense if Fahey's "obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992" applied to the permit. Accordingly, the State Water Board finds that Permit 21289 requires that Fahey provide make-up water for his diversions during the FAS Period pursuant to Fahey's Water Exchange Agreement with MID and TID.

Fahey's permits also contain terms to prevent injury to MID and TID during the non-FAS Period and to CCSF throughout the year. Term 20 in Permit 20784 and Term 34 in Permit 21289 require Fahey to provide replacement water to NDPR under certain circumstances for water diverted adverse to the prior rights of CCSF, MID, and TID. (PT-15, pp. 6–7; PT-16, pp. 9–10.) Pursuant to these terms, Fahey must provide replacement water within one year of notification that Fahey's diversion "has potentially or actually reduced the water supplies of" the Interveners. (PT-15, p. 6; PT-16, p. 9.) Under Permit 20784, the notification of the need for replacement water may be made by any of the Interveners; under Permit 21289, only CCSF will provide the notification. (PT-15, p. 6; PT-16, p. 9.) Permit 21289 requires that "[t]he 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 reported to the State Water Board (PT-16, p. 9), while Permit 20784 merely requires that "[t]he source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the" Board (PT-15, p. 7).[16] Replacement water may be provided in advance and credited to future replacement water requirements under both permits. (PT-15, p. 6; PT-16, p. 9.) Unlike the Water Exchange Agreement between Fahey, MID, and TID for diversions during the FAS Period, Term 20 of Permit 20784 and Term 34 of Permit 21289 do not expressly prohibit Fahey from pre-positioning

[16] The Intervener's March 11, 2019 comment letter argued that the requirement for Fahey and the Interveners to mutually agree on the source, amount, and location of replacement water discharged into NDPR applies to both permits. Hearing Team staff were not able to identify textual support for this argument.

replacement water and carrying it over from year to year. (Compare PT-15, p. 6 and PT-16, p. 9 with PT-19, p. 2, ¶ 4.)

Fahey obtains his alternate supply of water for the Water Exchange Agreement from Tuolumne Utilities District (TUD), which holds water rights under licenses corresponding to Applications 16173, 18549, 20565, and 23813. (PT-9, p. 6, ¶ 29; Fahey-33; Fahey-70; R.T., Jan. 25, 2016, pp. 185:20 to 186:23; Fahey-65 [July 28, 1995 Letter from David Berringer accepting TUD contract as an alternative source of water for the Water Exchange Agreement].) TUD notifies Fahey on an annual basis if water is available for purchase, at which time Fahey may decide whether to buy water. (R.T., Jan. 25, 2016, pp. 154:3–9, 191:9–20; see also Fahey-31 [sample agreement]; Fahey-33 [same].) This arrangement is ongoing. (R.T., Jan. 25, 2016, p. 193:10–24.) As is discussed in more detail in section 5.3.1.1, Fahey purchased 88.31 acre-feet of water for $60 per acre-foot, which were wheeled into NDPR between May 15, 2009 and June 15, 2011. (R.T., Jan. 25, 2016, p. 193:6–9 [price]; see Fahey-70, pp. 2–3 [utility bill indicating "[c]onsumption" of 1,781 unspecified units with reading, not delivery, dates noted]; R.T., Jan. 25, 2016, p. 193:2–4 [unspecified units in Fahey-70 are miner's inch-days]; Wat. Code, § 24 [conversion factor for miner's inch-days to acre-feet]; PT-72, p. 46 [price]; cf. Fahey-1, p. 7 [TUD wheeled 88.55 acre-feet to NDPR from June 15, 2009 through June 15, 2011].)

Fahey did not purchase water from TUD in 2014 or 2015, apparently because water was not available for sale. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; accord PT-9, p. 6, ¶ 30; PT-72, pp. 41–42.) This is consistent with Ms. Mrowka's testimony that, although water was available under TUD's pre-1914 claims of right identified in statements 10402, 10403, 997, 996, 1007, and 1006, "the overall water supply situation for TUD was significantly constrained" in both years. (PT-9, p. 6, ¶ 29.) In 2014 and 2015, the State Water Board notified TUD that there was inadequate water to serve the priorities of TUD's post-1914 water right permits. (Ibid.) Fahey, the Prosecution Team, and the Interveners dispute whether and to what extent the 88.31 acre-feet Fahey

wheeled into NDPR between 2009 and 2011 may be used to satisfy Fahey's obligations under Terms 19 and 20 of Permit 20794 and Term 34 of Permit 21289.

5.1.4 April 10, 2019 Supplemental Briefing[17]

5.1.4.1 Introduction

On March 29, 2019, the Interveners requested that the State Water Board move consideration of the adoption of a draft order in this matter, then scheduled to be heard on April 2, to a subsequent Board meeting. The Interveners argued that additional time was needed to further consider arguments about the meaning of Fahey's permit terms related to non-FAS Period replacement water, whether credits for replacement water delivered in one year may be carried over to a subsequent year, and whether interpreting Fahey's permits to operate in this matter constituted a right to store water in NDPR. Fahey requested a continuance on April 1, in which the Interveners and the Prosecution Team joined. The Board continued consideration of the item on April 1, announced a schedule for supplemental briefing on April 3, and asked the parties to respond to the following questions:

- Under Permit 20784, may Fahey provide replacement water in advance and credit it to future replacement water requirements for non-FAS Period diversions in a future year to comply with the terms of the permit? If so, then under what conditions may Fahey do so?
- Under Permit 21289, may Fahey provide replacement water in advance and credit it to future replacement water requirements for non-FAS Period diversions in a future year to comply with the terms of the permit? If so, then under what conditions may Fahey do so?
- Does Fahey have the right to store water in New Don Pedro Reservoir (NDPR)?
- Is it possible to provide replacement water in advance and credit it towards future replacement water requirements without pre-positioning water into NDPR?

[17] Section 5.1.4 is non-precedential. (Order WR 96-01, p. 17, fn. 11).

- Is it possible to distinguish a property interest in water stored in NDPR from credit for Fahey's non-FAS Period replacement water deliveries to NDPR towards compliance with Fahey's permit terms?

Fahey, the Interveners, and the Prosecution Team submitted supplemental briefs before the April 10, 2019 deadline. All parties appear to agree that Fahey's permits do not authorize storage in NDPR, (Prosecution Team's Supplemental Brief, April 10, 2019, pp. 1–2; Interveners' Supplemental Brief, April 10, 2019, p. 5; Fahey's Supplemental Brief, April 10, 2019, p. 2), and that credit for replacement water is distinguishable from a property interest in stored water, (Prosecution Team's Supplemental Brief, April 10, 2019, p. 2; Interveners' Supplemental Brief, April 10, 2019, p. 6; Fahey's Supplemental Brief, April 10, 2019, p. 3). The parties also appear to agree that Fahey's permits only authorize him to pre-position replacement water at NDPR, not another location. (See Prosecution Team's Supplemental Brief, April 10, 2019, p. 2; Interveners' Supplemental Brief, April 10, 2019, pp. 5–6; Fahey's Supplemental Brief, April 10, 2019, p. 2.) Fahey argues that Permit 20784 and Permit 21289 both allow him to carry credit for replacement water deliveries over to subsequent years, citing the language of his permits and various documents associated with their adoption. (See Fahey's Supplemental Brief, April 10, 2019, pp. 1–2.)

The Prosecution Team and the Interveners argued that Fahey's permits do not allow him to carry over replacement water credits into subsequent years. To reach this conclusion, the Prosecution Team and Interveners point out that Term 20 of Permit 20784 and Term 34 of Permit 21289 do not "specifically authorize carryover" or "explicitly allow Fahey to carry over a credit to subsequent years." (Prosecution Team's Supplemental Brief, April 10, 2019, p. 1; Interveners' Supplemental Brief, April 10, 2019, p. 2.) Both parties also argue that replacement water credit language in Fahey's permits should be interpreted to have the same meaning as language in the Water Exchange Agreement that expressly forbids carryover of FAS Period "make-up" water for MID and TID from year to year. (Prosecution Team's Supplemental Brief, April 10, 2019, p. 1; Interveners' Supplemental Brief, April 10, 2019, p. 2.) To support this

argument, the Prosecution Team and the Interveners both point to language in Fahey's permits stating that "permittee's obligation to provide replacement water … shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement." (See also PT-15, p. 7; PT-16, p. 9). The Interveners argued that Fahey's failure to provide certain information required under his permits and the Water Exchange Agreement prevented them from being able to notify Fahey when his diversions adversely affected their water rights. (Interveners' Supplemental Brief, April 10, 2019, p. 4.) The Prosecution Team raised a similar argument in the alternative to the effect that, if Fahey has the right to carry replacement water credit over to future years, he "lost it through his own negligence" by not complying with reporting or other requirements in his permits. (Prosecution Team's Supplemental Brief, April 10, 2019, p. 3.)

In addition to these arguments, the Intervener's contend that interpreting Term 20 of Permit 20784 and Term 34 of Permit 21289 to allow Fahey to carry over replacement water credits from year to year would be contrary to their protest settlement agreement with Fahey memorialized in a December 19, 1994 letter included in the record as exhibit PT-21. (Interveners' Supplemental Brief, April 10, 2019, p. 3.) Per the Interveners, the letter agreement "was intended to provide Fahey flexibility to provide replacement water *after* he diverted in an injurious manner" and the ability to pre-position water "was to allow him to prepare for *that year's* reductions in water supply, rather than having to come up with the requested amount all at once." (*Ibid.*, original italics.) The Interveners cite Fahey's apparent failure to pre-position water in NDPR prior to 2009 and the absence of terms they describe as necessary for the Interveners to implement carryover credit in NDPR as additional evidence that Fahey's permits do not authorize him to carryover credit for replacement water deliveries to NDPR from year to year. (*Id.*, pp. 3–4.)

5.1.4.2 Fahey's Permits Do Not Authorize Storage

The defining feature of storage requiring an appropriative right is the detention of surplus water for future use at the convenience of one appropriator, while depriving others of their use of the stream in its natural condition. (See *Seneca Consolidated Gold Mines Ltd. v. Great Western Power Co.* (1930) 209 Cal. 206, 217 [distinguishing riparian and appropriative use for hydropower]; accord *Still v. Palouse Irr. & Power Co.* (1911) 117 P. 466, 467.) Storing water for future use, whether cyclic or seasonal, constitutes an appropriation of water. (See *Moore v. California-Oregon Power Co.* (1943) 22 Cal.2d 725, 731; *City of Lodi v. East Bay Municipal Utility Dist.* (1936) 7 Cal.2d 316, 335; *Colorado Power Co. v. Pacific Gas and Electric Co.* (1933) 218 Cal. 559, 564; *Seneca*, *supra* 209 Cal. at 216–217.) A right to store water would allow the right holder to impound water when natural flow is available for their priority of right and retain that water for future beneficial use.

Permit 20784 and Permit 21289 authorize direct diversion, not storage. (PT-15, p. 4; PT-16, pp. 4–5.) Separately, the two permits require that Fahey provide "make-up" water to MID and TID for his diversions during the FAS Period and replacement water to the Interveners for other qualifying diversions. (PT-19, pp. 1–2, ¶¶ 3–5; (PT-15, pp. 6–7; PT-16, pp. 9–10; see also generally section 5.1.3, *supra*.) Fahey satisfies this requirement by contracting with TUD to deliver water under its rights to MID and TID at NDPR. (PT-9, p. 6, ¶ 29; Fahey-33; Fahey-70; R.T., Jan. 25, 2016, pp. 185:20 to 186:23; Fahey-65.) Once delivered, the water intermingles with other water impounded in the reservoir, Fahey and TUD lose the ability to control it, and it becomes the Interveners' possession. Inasmuch as Fahey can prove delivery, for example, through contracts, he obtains "credit" for having satisfied his obligations. Fahey cannot be said to be "storing" the water, however, because he has lost control of it and he has no right to call on it for future use.

For the foregoing reasons, the State Water Board finds that Fahey's permits do not provide a right to store water in NDPR or any other reservoir. Fahey's permits merely

allow him to accrue credit for having satisfied his permit obligations. Nothing in this order should be interpreted to the contrary.

5.1.4.3 Term 20 of Permit 20784 and Term 34 of Permit 21289 Allow Fahey to Deliver Replacement Water to NDPR in One Year and Obtain Credit Towards Compliance with His Replacement Water Obligations in a Subsequent Year

At its core, the dispute raised in this round of supplemental briefing involves the interpretation of a contract. Language in both permits to the effect that "[r]eplacement water may be provided in advance and credited to future replacement water requirements" originated in a December 19, 1994 offer by CCSF to cancel its protest against Fahey's water right application 29977 in exchange for Fahey's acquiescence to include certain terms in his permit. (PT-21, pg. 3; see also generally Fahey-12 [CCSF's March 22, 1993 protest].) The proposed permit language appears to have been drafted by counsel for CCSF. (See PT-21, pg. 3.) Fahey accepted CCSF's offer on or about January 24, 1995. (See Fahey-16, p. 1.) State Water Board staff reorganized CCSF's proposed terms and clarified other portions of the proposal for consistency with the Board's practice of using permit terms to set specific requirements or actions to be taken by the permittee. (*Ibid*.) CCSF accepted the Board's proposed language, with further modification, on or about March 16, 1995. (See Fahey-18, p. 1.)

The State Water Board cancelled CCSF's protest accordingly and issued Permit 20784 on March 23, 1995. (*Ibid.*; PT-15, p. 7.) CCSF protested the application for Fahey's second permit, application 31491, by letter dated November 8, 2004 and indicated that it would dismiss its protest if the Board included a similar replacement water term in Fahey's new permit with slightly modified language. (Fahey-40; see also Fahey-43 [discussing CCSF letter as protest].) Fahey accepted CCSF's proposal, (Fahey-42; Fahey-43), and Board staff communicated Fahey's acceptance to CCSF through subsequent correspondence, (see Fahey-44; Fahey-46). The Board dismissed CCSF's protest and issued Permit 21289 on August 1, 2011. (PT-16, p. 12.) The final wording of the requirement in both permits that "[r]eplacement water may be provided in

advance and credited to future replacement water requirements" is unchanged from CCSF's original December 19, 1994 proposal. (Compare PT-15, p. 6 and PT-16, p. 9 with PT-21, p. 3; accord Fahey-16, p. 2 [same language]; Fahey-18, p. 2 [same]; Fahey-46, p. 1 [same].)

Contracts are interpreted to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as their mutual intent is ascertainable and lawful. (Civ. Code, § 1636.) When the language of a contract is clear and not absurd, it will be followed. (*Id.*, § 1638; e.g., *Fuentes v. TMCSF, Inc.* (2018) 26 Cal.App.5th 541, 549; *Dore v. Arnold Worldwide* (2006) 39 Cal.4th 384, 392; *Apra v. Aureguy* (1961) 55 Cal.2d 827, 830; *Pierce v. Merrill* (1900) 128 Cal. 464, 472.) The words of a contract are to be understood in their ordinary and popular sense unless used by the parties in a technical sense or unless given a special meaning by local usage. (Civ. Code, § 1644; e.g., *In re Marriage of Simundza* (2004) 121 Cal.App.4th 1513, 1518; see also Civ. Code, § 1645 (interpretation of technical words); *id.*, § 1646 (interpretation re: local usage).) For written contracts, evidence generally cannot be admitted to show intent independent of the written instrument. (E.g., *Sass v. Hank* (1951) 108 Cal.2d 207, 214; *Barnhart Aircraft v. Preston* (1931) 212 Cal. 19, 22.) Outside evidence may be admissible for other purposes, such as providing context for the circumstances surrounding contract formation so that the adjudicator can be placed in the position of those whose language they are to interpret. (Civ. Code, §§ 1647, 1860.)

If the meaning of contract terms is ambiguous, adjudicative bodies apply the general rules of contract interpretation and canons of construction. (Civ. Code, § 1637; e.g., *Burns v. Peters* (1936) 5 Cal.2d 619, 623 [applying rules].) In cases where these rules do not remove the uncertainty, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist, i.e., the author. (Civ. Code, § 1654; e.g. *Victoria v. Superior Court* (1985) 40 Cal.3d 734, 745; *Taylor v. J.B. Hill Co.* (1948, 31 Cal.2d 373, 374.) This rule "applies with peculiar force in the case of a contract of adhesion" where "the party of superior bargaining power prescribes not only the words of the instrument but the party who subscribes to it lacks the economic

strength to change such language." (*Neal v. State Farm Ins. Cos.* (1961) 188 Cal.App.2d 690, 695; accord, e.g., *Sandquist v. Lebo Automotive, Inc.* (2016) 1 Cal.5th 233, 248; *Healy Tibbitts Construction Co. v. Employers' Surplus Lines Ins. Co.* (1977) 72 Cal.App.3d 741, 754.) Adjudicative bodies will not strain to create an ambiguity where none exists. (E.g., *Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 807; *California State Auto Assn. Inter-Ins. Bureau v. Hoffman* (1978) 77 Cal.App.3d 768, 775; see also Civ. Code, § 1638). The language in a contract must be interpreted as a whole under the circumstances of the case and cannot be found to be ambiguous in the abstract. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265; *Producers Dairy Delivery Co. v. Sentry Ins. Co.* (1986) 41 Cal.3d 903, 916 fn. 7; see also Civ. Code, § 1641.)

Here, the language of Fahey's permits and the protest settlement agreement they implement is unambiguous. "Replacement water may be provided in advance and credited to future replacement water requirements," without limiting language, to satisfy Fahey's replacement water obligations to the Interveners. Water provided in a previous year is provided "in advance" of replacement water obligations that may arise in the current year. Replacement water provided in the current year is provided "in advance" of a subsequent year. No limitation in the text of the agreement requires otherwise. (See also Civ. Code, §§ 1636, 1638.) This understanding is consistent with the ordinary meaning of the words used in CCSF's 1994 proposed language, which Fahey accepted and which the State Water Board transcribed, without modification of the words at issue, into Fahey's permits. The Board is unaware of any technical or local usage that would give these words a different meaning and the parties do not argue that a meaning other than the ordinary meaning of the words at issue should apply.

The State Water Board acknowledges the Prosecution Team's and Intervener's arguments that this language does not specifically authorize carryover credit for replacement water from year to year. A contract that authorizes one party to collect goods purchased from another after 12:00 PM the following Monday clearly authorizes the promisee to collect the goods on a subsequent Tuesday at 10:49 AM even in the

absence of specific language to that effect. A merchant advertising special pricing for a "Memorial Day Weekend" sale need not specifically state that sale prices are valid at 4:35 PM on Memorial Day to communicate this fact to their customers. A place of business that is "open 24 hours" need not specifically advertise that it is open between two and four o'clock in the afternoon to communicate the fact that it is open at that time. When the text of an agreement clearly identifies a time range, such as the future, it need not identify every constituent within that category for it to be included within the scope of the agreement. The Interveners and Fahey could have drafted and included a provision preventing carryover of replacement water credit from year to year if that was their intent. (Cf. *Avidity Partners, LLC v. State of California* (2013) 221 Cal.App.4th 1180, 1202 [declining to find a contractual agreement assuring a minimum timber harvest level to plaintiff "when there is no explicit agreement to that effect in any of the documents making up the Agreement" and "the parties were sophisticated players with knowledgeable legal counsel engaged in high-profile negotiations."].) They did not.

The Water Exchange Agreement does not require a different conclusion. Fahey's obligation to provide "make-up" water to MID and TID for his FAS Period diversions under the Water Exchange Agreement is separate from his obligation to provide replacement water under Term 20 of Permit 20784 and Term 34 of Permit 21289. (See section 5.1.3, *supra*.) The requirement in Fahey's permits that "permittee's obligation to provide replacement water … shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement," (see PT-15, p. 7; PT-16, p. 9), appears to have been included to ensure that Fahey is not required to provide water twice for the same diversion, (see PT-21, p. 1 [referencing the Water Exchange Agreement in explanation of Interveners' water accounting procedures]). This requirement cannot reasonably be construed to require reading words from the Water Exchange Agreement into Term 20 of Permit 20784 and Term 34 of Permit 21289 where they are absent.

CCSF's December 19, 1994 letter to Fahey does not require a different conclusion. The letter, exhibit PT-21, does not appear to provide textual support for the Interveners'

characterization that Fahey may not credit his prepositioned replacement water towards future years' obligations. (Contra Intervener's Supplemental Brief, April 10, 2019, p. 3.) In their supplemental brief, the Interveners state that "the ability to preposition water" from Term 20 of Permit 20784 and Term 34 of Permit 21289 was "intended to provide Fahey flexibility to provide replacement water after he diverted in an injurious manner" and "to allow [Fahey] to prepare for *that year's* reductions in water supply, rather than having to come up with the requested amount all at once." (Interveners' Supplemental Brief, April 10, 2019, p. 3, original italics.) The letter discusses a range of possible situations when Fahey could provide replacement water. While it does appear that the letter proposes to allow Fahey to provide replacement water after he diverts during the same year to cover those diversions, at least under certain circumstances, same-year replacement is not the only circumstance under which the letter proposes to allow Fahey to provide replacement water.

CCSF's December 19, 1994 letter discusses a mechanism by which Fahey is afforded greater flexibility in how he meets his replacement water obligations as a result of early notification by CCSF that his diversions have caused "'potential' reductions in water supply available to San Francisco" (PT-21, p. 2). The letter indicates that CCSF would not "wait to set the amount of replacement water required based on its perceived water supply needs in a shortage caused by drought." (*Ibid.*) This discussion appears to be an attempt to explain CCSF's proposed permit requirement 2.a, contained in the same letter, that "[i]f the determination is of 'potential' reductions in water supplies not yet realized due to the existence of a multi-year-drought, such potential reduction will be identified by San Francisco and the Districts." (*Ibid.*) Per the letter, this provision "allows San Francisco to notify you [Fahey] ahead of time of potential deficits so that you will have an opportunity to arrange for a replacement supply. It also creates greater flexibility, as it avoids the necessity for providing replacement water each year for the past year." (*Ibid.*) The December 19, 1994 letter does not specifically discuss carryover credit, although providing replacement water for "'potential' reductions … due to the existence of a multi-year drought" (*ibid.*) could be understood to involve multiple years

at once. Providing a mechanism for CCSF to notify Fahey in advance of potential deficits, whether during a drought or in some other water year type, is not in any way inconsistent with the interpretation that Fahey's permits allow carryover credit for replacement water from year to year. (See also Civ. Code, §§ 1647, 1860.)

Additionally, the December 19, 1994 letter states that CCSF and the districts "will determine if either or both of their water supplies have been potentially or actually reduced by Permittee's diversions" and that "[s]uch [a] determination will take into account replacement water provided to the Districts pursuant to the Agreement between Permittee and the Districts, dated December 12, 1992, *and any other replacement water provided by Permittee in advance of Permittee's diversions*." (PT-21, p. 2, italics added.) No limiting language is included to qualify this statement. As noted earlier, the proposed terms in the letter also contain the source of Fahey's permit term language, i.e., "[r]eplacement water may be provided in advance and credited to future replacement water requirements," again provided without qualification. (PT-21, p. 3; compare with PT-15, p. 6, ¶ 20 and PT-16, p. 9, ¶ 34.) Therefore, the letter does not require a different conclusion.

Although Fahey appears to have never delivered replacement water to NDPR before 2009, (see R.T., Jan. 25, 2016, 247:7–19), this fact is unhelpful in evaluating Fahey's permit terms' meaning because the Interveners never called for replacement water, (see also Civ. Code, §§ 1647, 1860). The Interveners argue that Fahey's failure to provide the notice required by his permits and the Water Exchange Agreement prevented them from determining whether Fahey owed replacement water in a given year. (See Interveners' Supplemental Brief, April 10, 2019, p. 3.) However, Fahey's non-compliance with other permit requirements is not helpful as an aid interpreting the language presently at issue. The State Water Board considers Fahey's failure to comply with reporting requirements further, below, in sections 5.2.3.2 and 7.1.2.2.

The Interveners object that Fahey's permits must not allow Fahey to carry over credit for replacement water from one year to the next because of "the complete lack of terms

that would be present if Fahey *were* authorized" to do so. (Interveners' Supplemental Brief, April 10, 2019, p. 3.) Apparently, the missing terms would include "compensation for storage or credits in NDPR, a limit on the amount of water that may be stored or credited in NDPR, and specific account procedures related to carryover storage, losses, seepage, and spills." (*Ibid.*) However, the final requirement in both permits that "[r]eplacement water may be provided in advance and credited to future replacement water requirements" is unchanged from CCSF's original December 19, 1994 proposal. (Compare PT-15, p. 6 and PT-16, p. 9 with PT-21, p. 3; accord Fahey-16, p. 2 [same language]; Fahey-18, p. 2 [same]; Fahey-46, p. 1 [same].) Fahey's applications could not move forward at all without the Water Exchange Agreement and resolution of CCSF's protest. Apparently, the Interveners enjoyed a bargaining position so strong that TID successfully required Fahey to put down a $500 deposit "to cover any necessary legal fees and staff time" before TID "evaluates any serious proposals." (Letter from Arthur F. Godwin, Attorney for the Turlock Irrigation District, to G. Scott Fahey (Feb. 7, 1992).) To the extent that the absence of additional terms identified by the Interveners creates ambiguity that cannot be resolved by the rules of contractual interpretation, that ambiguity should be interpreted most strongly against the Interveners. (See Civ. Code, § 1654.)

For the foregoing reasons, the Board finds that Term 20 of Permit 20784 and Term 34 of Permit 21289 allow Fahey to deliver replacement water to NDPR in one year and obtain credit towards compliance with his replacement water obligations in a subsequent year. This finding is subject to the distinction described above in section 5.1.4.2.

5.1.4.4 Matters Not Considered

The State Water Board observes that there is not evidence in the record of NDPR having spilled at any time after Fahey provided replacement water between 2009 and 2011. (See May 23, 2016 Procedural Ruling, pp. 9–10, 17.) Accordingly, the Board is not presented with and does not consider the question of whether replacement water

credit from a previous year has still been "provided in advance" in a subsequent year following a spill event. The principle of "last in, first out" may suggest that it has not.

5.1.4.5 Other Arguments Raised in Supplemental Briefing

The Prosecution Team further argued, as a consequence of the distinction between replacement water credit and a right to store water, that advance replacement water credits do not authorize diversion when water is unavailable for Fahey's priority of right. They asserted that Fahey's rights under the physical solution, i.e., his permit terms requiring him to provide the Interveners with replacement water for diversions adverse to their senior rights, "are extremely limited." (Prosecution Team's Supplemental Brief, April 10, 2019, p. 2.) Specifically, they contend that:

> [Fahey] may only use replacement water and advance replacement water credit, assuming its availability, for the narrow and singular purpose of offsetting diversions adverse to the Intervenor's [sic] prior rights. He may not use replacement water or advance replacement water credits to offset his diversions during the FAS period, to offset diversions adverse to other prior rights, or to divert or use water when water is unavailable for his priority of right, even during the non-FAS period.

(Prosecution Team's Supplemental Brief, April 10, 2019, p. 2–3.)

Elsewhere in this order, the State Water Board finds that Fahey may establish a defense to unlawful diversion for diversion of water when it is unavailable to his priority of right when he offsets the potential injury caused by those diversions for all of the parties to whom his diversions would be adverse through an established and lawful process. In response to the Prosecution Team's arguments on this issue, the Board clarified its findings regarding defenses to unlawful diversion based on replacement water below in sections 5.3.1.2 and 5.3.1.3 and elsewhere in the order.

In their supplemental brief, the Prosecution Team calculated additional civil liability for Fahey's non-FAS Period diversions under the theory that they are unlawful without carryover credit for Fahey's replacement water deliveries to NDPR between 2009 and

2011 or "if the Board finds that the Respondent's advance replacement water credits do not authorize diversion during the non-FAS [P]eriod when water was unavailable for his priority of right." (See Prosecution Team's Supplemental Brief, April 10, 2019, p. 4.) This would mean that Fahey unlawfully diverted an additional 7.62 acre-feet over an additional 63 days according to the Prosecution Team, which would allow for a maximum civil penalty of $323,375. (*Ibid.*) The Prosecution Team calculated Fahey's economic benefit from the violation and provided legal arguments in support the principle that, all else equal, an appropriate civil penalty for unlawful diversion should disgorge the economic benefit obtained from the violation. (*Id.*, pp. 4–5.) In an accompanying filing to show good cause, the Prosecution Team explains that changes in section 7.1.2.1 are necessary to reflect the higher economic benefit calculated from sales of spring water. (Prosecution Team's Showing of Good Cause, April 10, 2019, p. 1.)

The State Water Board does not believe that Fahey's non-FAS Period diversions were unlawful for the reasons stated above in section 5.1.4.4 and below in sections 5.2.3.2, 5.3.1.1, and 5.3.1.2. At the same time, the Prosecution Team's arguments in support of setting administrative civil liability that disgorges the economic benefit obtained from a violation are compelling. Good cause exists to incorporate this analysis into section 7.1.2.1.

5.2 Alleged Unlawful Diversion and Trespass Against the State

5.2.1 Fahey's Diversions During 2014 and 2015

The record contains information regarding Fahey's recorded diversion of water in 2014 and 2015 during the FAS Period from June 16 to October 31. (See generally PT-1; PT-55; PT-56; PT-57; PT-58; PT-59; PT-65; PT-67; PT-69; PT-72; PT-151; Fahey-62.) According to the Prosecution Team, for 2014 and 2015, video surveillance and invoices show that Fahey diverted about 13.48 acre-feet over the course of 175 days during the FAS Period in those years. (Prosecution Team's Closing Brief, June 17, 2016, p. 21:17–18 [summarizing testimony and exhibits].) There is no video surveillance or

invoice information for prior years, but invoices and video surveillance from 2014 and 2015 demonstrate that Fahey typically diverted water at least six days a week. (*Ibid*.; PT-61, pp. 30–34; PT-55.)

David LaBrie's testimony describes the Prosecution Team's investigation into Fahey's diversion and use of water during the period in which the State Water Board forecasted that water was not available to serve Fahey's priority of right. (PT-11, p. 1, ¶¶ 1–3; see also *infra*, section 5.2.2.1.) Samuel Cole's testimony discusses his activities surveilling Fahey's diversions. (See PT-13, pp 1–2. ¶¶ 1–5.) During oral testimony, Mr. LaBrie clarified how he calculated the maximum penalty for 2014 included in the ACL Complaint:

> The maximum penalty included in the ACL complaint for 2014 was based on Mr. Fahey's progress reports, as well as information about his operations that we gained through the surveillance in 2015. Upon receipt of the invoice information pursuant to the information order I tabulated the days of diversion and the number of loads reported in the invoices, and I calculated the volume of water diverted during the time period when there was no water available under Mr. Fahey's priority of right. . . . [¶] . . . The invoices indicate that Mr. Fahey diverted water on 123 days during this period. To calculate the amount of water diverted I used the number of loads reported by invoice during that period, a total of 456 loads, and multiplied that number by an average of 6,600 per load.

(R.T., Jan. 25, 2016, 62:14 to 63:13; PT-151, slide 8.)

Mr. LaBrie's oral testimony also clarified that the maximum penalty for 2015 included in the ACL Complaint was based on the surveillance data gathered between July 12 and August 5. (R.T., Jan. 25, 2016, p. 63:14–16.) Additional surveillance data gathered between August 5 and August 27 added 22 days of diversion and 110 loads of water to the maximum penalty calculation. (*Id.*, p. 63:16–21.) Mr. LaBrie calculated a revised maximum ACL penalty for 2015 based on 90 days of diversion. (*Id.*, 65:5–6; PT-151, slides 9–10.)

Table 2, below, summarizes reported, invoiced, contracted, and surveilled water diversions in 2014 and 2015 under Permits 20784 and 21289 from May 27 through October 31 and November 4 through 18, 2014 and from April 23 through November 1, 2015. These dates are inclusive of the FAS Periods in both years and the dates staff issued the 2014 Unavailability Notice and the 2015 Unavailability Notice, for 2014 and 2015 respectively, and exclude the dates during the non-FAS Period of each year for which staff forecasted that water would again become available per a "notice of temporary opportunity to divert water." (See also PT-31; PT-32; PT-33; PT-37; PT-44.) There is evidence in the record that water was not available for diversion by post-1914 right holders prior to May 27, 2014 and April 23, 2015. (See PT-42; PT-43.) The State Water Board may impose administrative civil liability for unlawful diversion regardless of when or whether staff have issued an informational notice. (Wat. Code, § 1052, subd. (a); *id.*, § 1055, subd. (a).) Based on the circumstances of this case, this order selects the date staff issued the 2014 Unavailability Notice and the 2015 Unavailability Notice as the start date for its analysis of Fahey's diversions, as a matter of discretion. This analysis includes October 31, 2014, the last day of the 2014 FAS Period, because of Fahey's obligations under his permit terms. The issue is discussed further, below, in section 5.2.3.

The evidence supports the conclusion that during the non-FAS Period portions of 2014 and 2015 when State Water Board staff projected insufficient water supply to serve Fahey's priority of right, Fahey diverted at least 2.80 acre-feet over 26 days in 2014 and at least 4.82 acre-feet over 37 days in 2015, for a total of at least 7.62 acre-feet over 63 days across both years. During the FAS Period in 2014 and 2015, Fahey diverted at least 16.55 acre-feet over 102 days in 2014 and at least 8.78 acre-feet over 76 days in 2015, for a total of at least 25.33 acre-feet over 178 days across both years.

Table 2. Summary of water diversion days and volume under Permits 20784 and 21289 during the non-FAS portion of the noticed periods of water unavailability and the FAS Periods of 2014 and 2015

		Non-FAS Portion of the Noticed Period of Unavailability[a]		FAS Period[b]	
		Days[c]	Volume (af)	Days[c]	Volume (af)
2014	May	3	0.39[d]	-	-
	June	12	1.76[e]	13	2.17[e]
	July	-	-	24	4.24[f]
	August	-	-	21	3.37[f]
	September	-	-	20	3.21[f]
	October	-	-	24	3.57[f]
	November	11	0.65[d]	-	-
	Total	**26**	**2.80**	**102**	**16.55***
2015	April	6	0.35[d]	-	-
	May	18	3.03[f]	-	-
	June	13	1.44[e]	10	1.48[e]
	July	-	-	25	2.98[f]
	August	-	-	26	3.06[f]
	September	-	-	15	1.06[f]
	October	-	-	NA	0.20[f]
	November	NA	NA[g]	-	-
	Total	**37**	**4.82**	**76**	**8.78**
Grand Total		**63**	**7.62**	**178**	**25.33***

* All totals in this table are the sum of unrounded figures. As a result, some totals (those marked) differ slightly from the sum of the rounded component values shown.

"-" - null

af - acre-feet

NA - Not available in the hearing record

[a] In 2014, the non-FAS Period overlapped with the period in which State Water Board staff forecasted insufficient water supply to serve Fahey's priority of right from May 27 through June 15, inclusive, and November 4 through November 18, inclusive. In 2015, the non-FAS Period overlapped with the period in which Board staff forecasted insufficient water supply to serve post-1914 water rights from April 23 through June 15, inclusive, and on November 1. Water availability is discussed in more detail in section 5.2.2.2 of this order.

[b] The FAS Period under consideration in this order is June 16 through October 31, inclusive. Every day of the 2014 and 2015 FAS Periods overlapped with the period in which State Water Board staff forecasted insufficient water supply to serve post-1914 water rights except October 31, 2014. Diversion data for this day are included for the reasons stated in Section 5.2.3.1.

[c] Data Source: PT-66, pp. 26–112; PT-67, pp. 6–10; PT-68, p. 3; PT-72, pp. 8–31; and PT-151, p. 9. The number of days of diversion in each month includes invoice sales days, contract sales days, and days when water diversion was observed through surveillance during the specified period, as applicable. These counts presented are conservative because the only available dates of contract sales in the hearing record occur in June of 2014 and June, August, and September of 2015. Surveillance data in the hearing record are available only from July 12 through August 27, 2015. For this period, only surveillance data were used to count the days of diversion (i.e., invoice sales, contract sales, and surveillance data were not combined).

[d] Data Source: PT-66, pp. 26–108. Only invoice sales data were used to calculate the volume of water diversions due to only a portion of the month falling within the specified period and the lack of daily contract sales data in the hearing record for these months. Because daily contract sales data were unavailable, the volume of diversion presented in this table is highly conservative. To calculate the volume, the number of gallons Fahey invoiced each vendor over the period (number of loads * gallons/load) was summed across all vendors and converted to acre-feet.

[e] Data Source: PT-67, pp. 6–10 and PT-72, pp. 8–31. Invoice and contract sales data reported in Fahey's responses to the September 1, 2015 Informational Order (PT-67) and to the October 30, 2015 subpoena (PT-72) were used to calculate the volume of diversion. The number of gallons sold to each vendor over the period (number of loads * gallons/load) was summed across all vendors and converted to acre-feet. Invoice sales data for June 2014 and June 2015 are available in both PT-66 and PT-72; however, only PT-72 data were used for the June calculations because it represents the most recently submitted data for these months.

[f] Data Source: PT-56, p. 2; PT-57, p. 2; and the 2015 Progress Report by Permittee for Permits 20784 and 21289, of which the State Water Board takes official notice pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code. The volume of water diversions reported in the Progress Report by Permittee for Permits 20784 and 21289 was used for months for which the entire month fell within the specified period. The volume was calculated by summing the volume of water directly diverted or collected to storage under each permit and converting to acre-feet. The volume includes diversions claimed as developed water for the reasons discussed in section 5.3.2.1 of this order. These reported values are greater than the volume of diversion estimated by the Prosecution Team using surveillance data for the dates for which surveillance data are available (July 12–August 27, 2015). The reported values vary by no more than 0.22 acre-feet for any given month from the total monthly diversion volumes based on the invoice (PT-66, pp. 26–112; PT-67, pp. 6–9) and contract sales (PT-66, pp. 113–114; PT-67, p. 10) data provided by Fahey.

[g] Although the volume of diversion for the entire month of November 2015 is available in the hearing record (0.17 af), daily diversion information for that month was not available.

5.2.2 Fahey Diverted Water During 2014 and 2015 When It Was Not Available to Serve His Priority of Right

5.2.2.1 Water Availability Analysis Background

During 2014, the forecasted period of water unavailability for post-1914 water rights in the Sacramento and San Joaquin River watershed was May 27 through October 30 and from November 4 through 11. The forecasted period of water unavailability continued

for post-1953 water rights through November 18, 2014.[18] During 2015, the forecasted period of water unavailability for post-1914 water rights in the Sacramento and San Joaquin River watershed was April 23 through November 1. (PT-7, pp. 3–4, ¶¶ 11, 13, 16, 21, 22; PT-30; PT-39; see also R.T., Jan. 25, 2016, p. 54:6–9.)

To determine the availability of water for water rights of varying priorities, the Prosecution Team compared current and projected available water supply with the total diversion demand. (PT-7, p. 2, ¶ 6.) Evaluations used for both the 2014 Notice of Unavailability and 2015 Notice of Unavailability relied on the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 publication and in subsequent monthly updates. (PT-7, p. 2, ¶ 7.) "Full natural flow," or "unimpaired runoff," "represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds." (*Ibid*.)

For water demand, the Prosecution Team relied on information supplied by diverters in annual or triennial reports. (PT-7, p. 2, ¶ 8.) The Division's watershed (basin) supply and demand evaluations forecasted that by May 27, 2014 and April 23, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights, such as Fahey's, throughout the San Joaquin River watershed in the respective year. (PT-7, p. 3, ¶ 11.) The Prosecution Team entered into evidence a graphical analysis of the San Joaquin River basin supply/demand for 2014 (see PT-42) and a separate graphical analysis of the San Joaquin River basin supply/demand for 2015 (see PT-43). This order refers to the 2014 and 2015 graphical analyses and the information supporting them collectively as the water availability analysis.

[18] The State Water Board takes official notice of this information, obtained from the November 12, 2014 Notice of Curtailment Lifting for pre-1954 water rights within the Sacramento & San Joaquin River Watersheds (available on the State Water Board's website), pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

5.2.2.2 There Is Sufficient Evidence in the Record to Support a Finding That Fahey Diverted Water During the FAS Period and Non-FAS Period in 2014 and 2015 When It Was Not Available to Serve His Priority of Right

Analyzing and evaluating full natural flow against reported or projected demand is a reasonable method of demonstrating whether there would generally be water available to divert in a particular stream system for a particular priority date, particularly for diversions from headwaters where return flows are unlikely to be present. Therefore, information on full natural flow is sufficient to satisfy the Prosecution Team's initial burden of production. Fahey may dispute whether this general showing of water unavailability should apply to his specific water rights, for example by challenging the water availability analysis or by asserting an affirmative defense.

The San Joaquin River basin supply/demand graphical analysis for 2014 (PT-42) shows that actual daily full natural flow was less than average monthly pre-1914 demand in the San Joaquin River and its tributaries from May 27, 2014 through at least October 19, 2014, which is the last day for which data are provided in the exhibit. (PT-42; PT-7, p. 3, ¶ 10–11.) Prosecution Team witness Brian Coats testified that "Mr. Fahey's point of diversion, being a post-1914 water right[], would be above the pre-1914 demand line indicated on Exhibit [PT]-42." (R.T., Jan. 25, 2016, p. 88:15–17.) The record indicates that the trend shown in the 2014 San Joaquin River basin analysis continued until at least October 31, 2014, when Board staff issued a "Notice of Temporary Lifting of Curtailments for Diversions in the Sacramento-San Joaquin Watershed" for post-1914 water rights in the basin "based on a predicted rain event." (PT-31.) Staff again forecasted that water was not available for post-1953 permits and licenses beginning on the morning of November 3, 2014 and continued for all post-1953 permits and licenses until November 19, 2014, when Board staff issued a new notice "based on [the] week's rain event and associated projected runoff." (PT-31; PT-37.) This notice remained in effect through the end of the year.

The San Joaquin River basin supply/demand graphical analysis for 2015 (PT-43) shows that actual daily full natural flow was less than average monthly pre-1914 demand in the

San Joaquin River basin beginning April 1, 2015 and continuing through April 19, 2015, the last day for which actual daily full natural flow data are provided in the exhibit. (PT-43; but see PT-7, p. 3, ¶ 11 [referencing April 23, 2015]; PT-7, p. 3, ¶ 10.) Although Exhibit PT-43 specifies that full natural flow data are current through April 19, 2015, and although post-April 19 full natural flow data should have been available well before the December 16, 2015 deadline to file case-in-chief exhibits, the Prosecution Team has not submitted such data for the San Joaquin River into evidence. For the period from mid-April 2015 through mid-September 2015, the exhibit presents forecasted full natural flow instead of actual daily full natural flow. (PT-43.) The exhibit (PT-43) predicts that water would continue to be unavailable to satisfy much or all of pre-1914 and riparian demand from mid-April until mid-September. Per the exhibit, satisfying a very junior right, such as Fahey's, would require an additional 5,000 to 10,000 cfs of full natural flow within the entire San Joaquin River basin between May and July during the dry season. There is no evidence in the record to suggest that such unprecedented dry season inflows occurred. As stated earlier, it was not until November 2, 2015 that, based on forecasted precipitation, Board staff issued a notice of opportunity for diversion for all post-1914 water rights in the San Joaquin River basin. (See PT-44.) The notice remained in effect through the end of the year.

Fahey objects that the water availability analysis' evaluation of conditions on the entire San Joaquin River basin is too general to support meaningful conclusions about water availability at his particular point of diversion. (E.g., R.T., Jan. 26, 2016, p. 5:17.) In rebuttal, the Prosecution Team introduced specific graphical analyses of Tuolumne River conditions during 2014 and 2015.[19] (PT-153.) Slide 3 of PT-153 shows the boundary of the Tuolumne River watershed. Slides 4 and 5 of PT-153 are graphical analyses of water supply and demand for the Tuolumne River watershed during 2014 and 2015, respectively. Mr. Coats testified that exhibit PT-153 confirms that there was

[19] Fahey's motion to strike this evidence in Exhibit PT-153 and associated testimony was denied by the Hearing Officers. (May 23, 2016 Procedural Ruling, p. 12.)

no Tuolumne River water available for diversion under Fahey's priority of right. (R.T., Jan. 26, 2016, pp. 13:3–7, 14:2–13.)

The Prosecution Team determined supply using DWR's supply information for the Tuolumne River at La Grange Dam, which was obtained from the California Data Exchange Center. (See R.T., Jan. 26, 2016, 13:8-16, 41:12–21.) La Grange Dam is located approximately two miles downstream of NDPR.[20] The Tuolumne demand analysis for 2014 (PT-153, p. 4) depicts the riparian and pre-1914 demands of diverters within the Tuolumne River watershed, which was calculated using the demand reported in 2010 under riparian and pre-1914 claims of right. (R.T., Jan. 26, 2016, 13:10–16.) The analysis demonstrates that by late May even when using a more optimistic forecast, supply would fall below riparian and pre-1914 demand and remain at or below riparian and pre-1914 demand through mid-September, which is the latest period presented on the graph. Therefore, the 2014 Tuolumne River watershed supply and demand analysis follows the same pattern—demand exceeding supply—for the time period presented as the supply and demand analysis for the San Joaquin River basin as a whole. (Compare PT-153, p. 4 with PT-42.)

The Tuolumne demand analysis for 2015 (PT-153, p. 5) depicts the "adjusted senior demand" within the Tuolumne River watershed, which was calculated by refining the demand projections used in 2014 with information reported by diverters in response to the State Water Board's 2015 Informational Order and limiting the demand to diverters with a riparian claim of right or a pre-1914 claim of right with a priority date of 1902 or earlier. (R.T., Jan. 26, 2016, pp. 14:2–4, 14:17 to 15:15; PT-153, pp. 4–5; see also PT-28.) Senior demand for the months of October and November of 2015 was forecasted using 70 percent of the demand projections used in 2014 refined to riparian and pre-1914 appropriative demand for claims with priority dates through 1902.

[20] The State Water Board takes official notice of this information, obtained from our eWRIMS database system, pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

(PT-153, p. 5.) The analysis shows that actual daily full natural flow was less than the adjusted or projected senior demand for almost the entire period for which full natural flow data are provided, i.e., mid-June through mid-October. (*Ibid*.) This is consistent with and supports the prediction of the San Joaquin River basin supply/demand graphical analysis that water would continue to be unavailable to satisfy much or all of pre-1914 and riparian demand from mid-April until mid-September in 2015.

This is not a case where the diverter accused of unlawful diversion can plausibly argue that the Prosecution Team's analysis was too restrictive when determining unavailability, or that, had less restrictive assumptions been used, the analysis would show that the diverter was entitled to divert. (But see generally Order WR 2016-0015, pp. 11–16.) Fahey's permits are very junior post-1914 rights, with priority dates of 1991 and 2004, respectively, in a watershed subject to FAS for part of the year. Absent an affirmative defense to unlawful diversion, Fahey's rights would normally be among the first obligated to cease diversion during a shortage. Fahey diverts exclusively from springs located at an elevation of approximately 5,300 feet. (See PT-45.) Fahey's diversions are either served entirely by full natural flow, as the Prosecution Team argues, or by some combination of full natural flow and developed water or groundwater, as Fahey argues. Evidence in the record indicates that return flows from upstream diverters are unlikely to be present in Fahey's springs. (E.g., PT-45 [maps]; PT-46, p. 2 [describing Fahey's operation]; PT-49, p. 4 [aerial photos].)

There are numerous downstream post-1914 right holders in the Tuolumne River watershed with water rights senior to Fahey's. (See generally Table 5, *infra.*) For example, MID and TID hold a pre-1914 claim of right at La Grange Dam with a claimed priority date of 1900. Water would be available to serve this claim of right if the water availability analysis accurately predicted a cutoff for water availability everywhere in the San Joaquin River basin for all post-1914 rights in 2014 and all post-1902 rights in 2015. (But see generally Order WR 2016-0015, pp. 14–16). The Prosecution Team does not appear to disagree with this conclusion. (E.g., Prosecution Team's Closing Brief, June 17, 2016, pp. 7:23–24 ["In 2015, the drought was so bad there was no water

available for any right junior to 1903 in the watershed."].) If, assuming for the sake of argument that the water availability analysis was too conservative in calculating the priority date at which water ceased to be available for diversion, then there are still numerous downstream post-1914 water rights on the Tuolumne River with priority dates senior to Fahey. License 2425 (Application 006711), alone, allows MID and TID to divert up to 800 cfs from the Tuolumne River from February through November for agricultural use when water is available.[21]

The water availability analysis at issue in this case is not reasonably vulnerable to the criticisms raised in Order WR 2016-0015. If no natural flow was available for post-1914 right holders in 2014 or even for some pre-1914 diverters for part of the year in 2015, it is reasonable to conclude that no full natural flow was available for a very junior post-1914 diverter during the same period. Under the circumstances of this case, based on the evidence in this record, the State Water Board finds that the Prosecution Team has met its burden of proof to show that water was not available to serve Fahey's priority of right in 2014 from at least May 27 through October 30, inclusive, and November 4 through 18, inclusive, and in 2015 from at least April 23 through at least November 1, inclusive. As discussed in section 5.2.1 and shown in Table 2, above, Fahey diverted a total of at least 32.95 acre-feet over 241 days when water was not available to serve his priority of right. Absent a defense, Fahey's diversions were unlawful. The Board considers Fahey's defenses to unlawful diversion below in section 5.3.

5.2.2.3 Fahey-88 and Fahey-89 Are Not to the Contrary

Fahey cites the documents admitted as exhibits Fahey-88 and Fahey-89 to support an argument that "year round diversion is allowed" under his permits.[22] (See Fahey's Closing Brief, June 17, 2016 p. 4:2–3; see generally *id.*, pp. 3:16 to 4:7.) Fahey-89 is

[21] The State Water Board takes official notice of the foregoing information pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.
[22] It is not a defense to an enforcement action for diverting in a manner not authorized by the permit that the permit should have authorized the diversion. (See Wat. Code, § 1126, subd. (c); *Lynch v. California Coastal Commission* (2017) 3 Cal.5th 470, 476–77.)

an August 2, 1963 memorandum from L.C. Jopson, who was then the Chief Engineer of our predecessor agency, the State Water Rights Board. (Fahey-89, p. 136; see also generally Wat. Code, § 179; Stats. 1967, ch. 284, p. 1441 et seq.) The memorandum provides general instructions for staff when processing unprotested applications to divert water. Fahey contends that one instruction, Scenario D, is relevant to this case. Scenario D of the Jopson Memo directs that:

> Where applicant is above a reservoir which has an all year season of collection or diversion and exercises full control of the stream during the critical season; or where a downstream diverter takes the entire flow during the critical season. If applicant can eliminate the protest of the agency controlling or diverting the entire stream, all year diversion is allowed subject to higher level of staff approval.

(Fahey-89, p. 136.)

Fahey-88 is an August 28, 1964 memorandum prepared by an L.D. Johnson, who was then a senior engineer with the State Water Rights Board, regarding Application 21647 to appropriate water from an unnamed stream tributary to the North Fork Tuolumne River. The memo states that, although continuity of flow exists between the proposed point of diversion and the Sacramento-San Joaquin Delta, "approval of the application would not diminish the supply to the Delta during the critical months in years of water shortage" because "[t]he flow of the Tuolumne River during July, August and September is now almost completely controlled by . . . [Old] Don Pedro Reservoir." (Fahey-88, pp. 165, 167.) The memo predicts that, with the completion of the then-proposed NDPR, "uncontrolled flows during July, August and September in the Tuolumne River below the reservoir can be expected to be practically nonexistent." (Fahey-88, p. 167.) The Johnson memo applies Scenario D of the Jopson Memo, Fahey-89, to conclude that approving Application 21647 would be appropriate.

Fahey-88 and Fahey-89 are not precedential decisions or orders of the State Water Board. The Board has held that only decisions or orders adopted by the Board itself, as opposed to decisions or orders issued by staff under delegated authority, are precedential. (Order WR 96-01, p. 17, fn. 11; see also Gov. Code, § 11425.60, subd.

(b).) Fahey-88 and Fahey-89 are staff memos, not decisions or orders of the Board itself. Additionally, Fahey-88 and Fahey-89 do not support an argument that unappropriated water is available under the circumstances presented here, where a junior appropriator seeks to divert upstream of a reservoir that has the necessary water rights, capacity, and needs to make use of all inflows during the period in question. Rather, these memoranda are consistent with the understanding that upstream diversions will not come from unappropriated water but will instead come at the expense of those who divert at the reservoir. Their approach assumes that the only water right holders affected by the upstream diversion are those with rights to the downstream reservoir, and that if these concerns are resolved through protest resolution, a permit can be issued even though it allows a diversion when no unappropriated water is available.

Even if this assumption were valid, Fahey-88 and Fahey-89 would not support the conclusion that a diversion under a junior water right is authorized if it occurs in violation of permit terms or protest resolution terms established to protect the water rights for the downstream reservoir. Moreover, the assumption that any harm will fall exclusively on the reservoir operator is invalid if natural flow and other sources are so limited that there is no water available under even the reservoir operator's water rights. In this case, the harm will fall on other, more senior water right holders. Similarly, the harm may not fall exclusively on the reservoir operator if, due to reduced reservoir inflows, the reservoir cannot be operated to meet all requirements set to protect senior rights downstream or instream beneficial uses. For the foregoing reasons, the State Water Board rejects Fahey's argument that year-round diversion is allowed under his water rights pursuant to Fahey-88 and Fahey-89.

5.2.2.4 The Water Availability Analysis Is Not an Underground Regulation

In a footnote, Fahey objects that the water availability analysis prepared by the Prosecution Team is an underground regulation, citing *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 259–260. (Fahey's Closing

Brief, June 17, 2016, p. 20, fn. 8.) The Administrative Procedure Act (APA) requires that every regulation be adopted consistent with the APA's procedural requirements unless an exception applies. (Gov. Code, § 11340.5, subd. (a).) A "regulation" is a rule, regulation, order, or standard of general application or "the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." (*Id.*, § 11342.600.) An "underground regulation" is "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation" within the APA's definition, that has not been adopted as a regulation under the APA, and that is not exempt. (Cal. Code Regs., tit. 1, § 250, subd. (a).)

The water availability analysis is not a "regulation" within the meaning of the APA. The water availability analysis attempts to comprehensively forecast and evaluate water supply and demand conditions in the Sacramento San Joaquin Rivers and Delta and waterways tributary thereto. (See PT-7, p. 2, ¶¶ 6–9.) The Prosecution Team used this information, among other things, to "alert[] water right holders in critically dry watersheds that water may be unavailable to satisfy beneficial uses of junior priorities," via notices, and to assist water resources management and planning. (PT-7, p. 3, ¶ 12; accord *id.*, pp. 3–4, ¶¶ 13–18; Fahey-75, pp. 4–5, ¶ 6; see also R.T., Jan. 25, 2016, 109:19–23 [testimony of John O'Hagan re: notices].) In doing so, the water availability analysis investigates stream systems and gathers evidence pursuant to the State Water Board's authority to perform these functions. (See Wat. Code, § 183; PT-7, p. 2, ¶ 6.) Fahey has not explained how gathering, analyzing, and disseminating information pursuant to a predictive model could be a "regulation" as defined in section 11340.5 of the Government Code.

Unlike a regulation, the water availability analysis does not "declare how a certain class of cases will be decided." (See *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333–334.) Whether an individual diverter is engaged in an unauthorized use of water depends on the actual water supply and demand under particular

circumstances, the diverter's priority of right, and other factors. These facts may be established through evidence presented at adjudicative hearings. (See Wat. Code, §§ 1055, subd. (c), 1831, subd. (b).) The watershed analysis does not implement, interpret, or make specific any law administered by the State Water Board, nor does it govern any procedures. (See *Morning Star Co., supra*, 38 Cal.4th at 334.) The water availability analysis is simply evidence presented by a party to this proceeding to determine the existence of a fact relevant to the Board's inquiry in this proceeding, which concerns an alleged violation of Water Code section 1052. (See October 16, 2015 Notice of Public Hearing, p. 3.) The existence of a statute prohibiting diversion when certain facts are present does not transmute those facts into regulations. (See *Patterson Flying Service v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 429 [Contents of registered pesticide label were not an underground regulation where agency penalized exterminator for violating statutory prohibition against using a pesticide in conflict with its registered labeling.].)

The fact that the Division issued notices to diverters does not make the water availability analysis a regulation within the meaning of the APA. The notices are not enforceable decisions or orders of the State Water Board. (Fahey-75, pp. 4–5, ¶ 6; PT-7, p. 3, ¶¶ 12–13; see also Wat. Code, §§ 1052, 1831 [describing process by which the Board may issue enforceable orders].) The notices do not make a determination that any individual diverter is taking water without authorization under the Water Code. (Fahey-75, pp. 4–5, ¶ 6.) Diverters who continue diverting after receiving a notice are not subject to penalties for violating the notice but may separately be subject to enforcement for violations of section 1052 of the Water Code if their diversions are in fact unlawful. (Ibid.; cf. Duarte Nursery, Inc. v. U.S. Army Corps of Engineers (E.D. Cal. 2014) 17 F.Supp.3d 1013, 1016, 1025 ["Notice of Violation" issued by Central Valley Regional Water Quality Control Board that "notifies plaintiffs of the Board's view that they are in violation of the law" was not ripe for judicial challenge absent an enforcement action.].) For the foregoing reasons, the Board finds that the water availability analysis is not an underground regulation.

5.2.3 Fahey Diverted Water During 2014 and 2015 in Violation of His Permit Terms

In some cases, permit terms may establish specific requirements necessary to ensure that diversions under the permit are lawful. State Water Board precedent establishes that violating such permit terms is an unlawful diversion under section 1052 of the Water Code. For example, past Board orders have found that using water outside the authorized place of use for an appropriative right is trespass. (See Order WR 1999-01, p. 8.) Violating permit terms to the effect that water shall not be diverted until certain requirements are met, such as constructing a fish screen and entering into an operating agreement with fish agencies, is an unlawful diversion. (Order WR 2008-0017, pp. 14–15.)

5.2.3.1 There Is Sufficient Evidence in the Record to Support a Finding That Fahey Diverted Water During the FAS Period in Violation of His Permit Terms in a Manner That Rises to a Violation of Section 1052 of the Water Code

Here, Fahey's permits require him to provide "make-up" water into NDPR from a non-tributary source in an amount equal to his diversions during the FAS Period. (PT-19, pp. 1–2, ¶¶ 3–6; PT-15, pp. 6–7; Fahey-20, pp. 314–315; PT-16, pp. 9–10; Fahey-55, pp. 1202–1203.) Although Fahey may provide make-up water at any time of year, "no carryover will be allowed to subsequent years." (PT-19, p. 2, ¶ 4.) This means that Fahey must provide make-up water on an annual basis. By Mr. Fahey's own admission, Fahey has not positioned water in NDPR since 2011. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21.)

Fahey contends that other terms in his permits forbidding him from interfering with NDPR operations or the Interveners' water accounting also forbid him from providing replacement water on an annual basis. (See generally, Fahey's Closing Brief, June 17, 2016, pp. 17:7 to 18:12.) "If Mr. Fahey simply replaced water that he diverted without notice . . . then Mr. Fahey would be forced to interfere with the complicated water accounting procedures at NDPR." (*Id.*, p. 18:7–9; see also Fahey-1, p. 15 [arguing that Decision 995 is "obsolete."].) Fahey is correct that delivering water into NDPR without

notice could have this effect. It is perhaps for this reason that Fahey's Water Exchange Agreement with MID and TID requires him to notify MID and TID, through semi-annual reports, of any FAS make-up water that he provides. (See PT-19, p. 2, ¶ 7.) MID and TID could then account for Fahey's make-up water deliveries when coordinating their own activities with CCSF. Accordingly, the Board is not persuaded by Fahey's argument that Terms 19 and 20 of Permit 20784 or Term 34 of Permit 21289 are incompatible or inconsistent.

As discussed in section 5.2.1 and Table 2, above, Fahey diverted 16.55 acre-feet over 102 days during the 2014 FAS Period and 8.78 acre-feet over 76 days during the 2015 FAS Period. In total, Fahey diverted 25.33 acre-feet over 178 days during the FAS Period in both years in violation of his permits terms in a manner that rises to a violation of section 1052 of the Water Code.

5.2.3.2 There Is Not Sufficient Evidence in the Record to Support a Finding That Fahey Diverted Water During the Non-FAS Period in Violation of His Permit Terms in a Manner That Rises to a Violation of Section 1052 of the Water Code

During the non-FAS Period, Term 20 of Permit 20784 allows Fahey to divert water "adverse to the prior rights of San Francisco and the Districts," i.e., the Interveners, if Fahey provides replacement water within one year of an annual notification by the Interveners of their determination that Fahey's diversion "has potentially or actually reduced the water supplies of" the Interveners. (PT-15, p. 6.) Replacement water may be provided in advance and credited to future replacement water requirements. (*Ibid.*) Unlike the Water Exchange Agreement between Fahey, MID, and TID for diversions during the FAS Period, Term 20 does not expressly prohibit Fahey from pre-positioning replacement water and carrying it over from year to year. (Compare *ibid.* with PT-19, p. 2, ¶ 4.) Permit 20784 requires Fahey to report the source, amount, and location of replacement water discharged to NDPR to the State Water Board with the annual Progress Report by Permittee. (PT-15, p. 7.) Pursuant to the Water Exchange

Agreement, Fahey must also provide semi-annual reports to MID and TID documenting his diversions and the make-up water provided. (PT-19, p. 2, ¶ 7.)

Term 34 of Permit 21289 allows Fahey to divert "adverse to the prior rights" of the Interveners if Fahey provides replacement water within one year of notification by CCSF of potential or actual water supply reduction caused by Fahey's diversion. (PT-16, p. 9.) Curiously, unlike Term 20 of Permit 20784, Term 34 of Permit 21289 *only* discusses notification by CCSF, not MID or TID. (Compare PT-15, p. 6 with PT-16, p. 9.) Fahey's obligations under Term 34 "shall take into consideration" Fahey's obligations under the Water Exchange Agreement. (PT-16, p. 9.) Replacement water may be provided in advance and credited for future replacement water requirements. (*Ibid.*) Like Term 20 of Permit 20784 but unlike the Water Exchange Agreement, Term 34 of Permit 21289 does not expressly prohibit Fahey from pre-positioning replacement water and carrying it over from year to year. (Compare *ibid.* with PT-19, p. 2, ¶ 4.) Like Permit 20784, Permit 21289 directs Fahey to report the source, amount, and location of replacement water discharged to NDPR as part of his annual Progress Report by Permittee. (See PT-16, p. 9.) In addition, Permit 21289 requires that Fahey and the Interveners mutually agree upon the source, amount, and location at NDPR of replacement water discharged into NDPR. (*Ibid.*)

As discussed in section 5.2.1 and shown in Table 2, above, Fahey diverted at least 2.80 acre-feet over 26 days in 2014 and 4.82 acre-feet over 37 days in 2015 during the non-FAS Period when water was not available to serve Fahey's priority of right. In total, Fahey diverted at least 7.62 acre-feet over 63 days during the non-FAS Period in both years when water was not available to serve Fahey's priority of right. Fahey argues that he caused 88.31 acre-feet of water to be wheeled into NDPR by TUD between 2009 and 2011. Fahey appears not to have included information on the source, amount, or location of replacement water in his annual reports for those years as required by his permits. (See Fahey-50; Fahey-51; Fahey-52.) Fahey provided the required information to the State Water Board in a June 3, 2014 letter that carbon copied CCSF attorney Jonathan Knapp. (PT-72, p. 48 ["The Stanislaus River was the origin of that

water. That water was released by TUD from Phoenix Lake to New Lake Don Pedro Reservoir (NDPR), via Sullivan Creek."])

Although the Interveners participated in the hearing for purposes of cross-examination and rebuttal, nothing in the record indicates that MID, TID, or CCSF ever notified Fahey as to whether his diversions had potentially reduced water supply to the Interveners, as required by Term 20 of Permit 20784 or Term 34 Permit 21289. (Fahey-1, p. 9; R.T., Jan. 25, 2016, pp. 34:3–7, 170:13–15; see also Fahey Closing Brief, June 17, 2016, p. 11:21–22.) The record also does not indicate that Fahey provided MID and TID with bi-annual reports of his diversions and replacement water deliveries to NDPR as is required by the Water Exchange Agreement. (PT-19, p. 2, ¶ 7.) These reports would have likely been useful to the Interveners to assess whether Fahey's diversions had potentially or actually reduced their water supplies and evaluate whether to request Fahey provide non-FAS Period replacement water. (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34.) Fahey did report his 2014 and 2015 diversions to the State Water Board and this information was publicly available through the State Water Board's Electronic Water Rights Information Management System (eWRIMS) database.[23]

Although failing to report replacement water information on time is a significant omission, full compliance with these reporting requirements is not, by itself, necessary to ensure that diversions under the permit are lawful pursuant to Water Code section 1052 in this case.[24] Fahey reported his diversion information to the State Water Board, as required by his permits. Even if Fahey's failure to fully comply with his reporting obligations did prevent the Interveners from detecting the need to call for replacement

[23] The eWRIMS Database System provides information about water rights throughout California, and is searchable by name, watershed, stream system, or county. The Board takes official notice of this information obtained from our eWRIMS Database System pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

[24] Section 1846 of the Water Code authorizes the State Water Board to impose administrative civil liability of up to $500 per violation per day for failure to comply with water rights permit terms. (Wat. Code, § 1846, subd. (a)(1).) The effective date of this provision is June 27, 2016. (See Stats. 2016, Ch. 27, Sec. 16.)

water, evidence in the record demonstrates that Fahey had sufficient replacement water credits to cover non-FAS Period diversions in 2014 and 2015, as is more fully explained below in section 5.3.1. These facts can be distinguished from Order WR 2008-0017, in which the Board found an unlawful diversion where the permittee failed to comply with permit terms specifying that no water shall be diverted prior to the permittee meeting certain conditions. (Order WR 2008-0017, pp. 14–15.)

The Interveners contend that Fahey failed to comply with requirements in Permit 21289 that Fahey and the Interveners mutually agree upon the source, amount, and location at NDPR of replacement water discharged into NDPR. (E.g., Interveners' Supplemental Brief, April 10, 2019, p. 4; see also PT-16, p. 9.) The Division appears to have advised Fahey in a July 28, 1995 letter that TUD water was an acceptable source of replacement water for compliance with Term 20 of Permit 20784. (See Fahey-65.) None of the Interveners are carbon copied on this letter. (*Ibid.*) However, other evidence in the record indicates that the Interveners were aware of Fahey's proposal to use TUD water as a source of replacement water during the period that Fahey and the Interveners negotiated protest resolution terms for Permit 21289. For example, Division employee Yoko Moring discussed TUD as a source of replacement water in a December 4, 2004 letter to Donn Furman, a deputy city attorney for CCSF. (See Fahey-44.)

In a March 18, 2011 letter, Roger Masuda, then TID's general counsel, states that:

> In reviewing the Initial Study/Mitigated Negative Declaration, there does not appear to be any reference to the MID-TID-CCSF-Fahey water exchange agreement, the Fahey-Tuolumne Utilities District water exchange agreement, or the more restrictive and detailed requirements in the [Division]-accepted CCSF permit terms. Since compliance with those water exchange agreements and the accepted CCSF permit terms are to be an integral part of the proposed project, it would appear that they should be at least referenced in Section C, Project Description.

(Fahey-53, p. 1044.)

Mr. Masuda made this argument, that "the Fahey-Tuolumne Utilities District water exchange agreement" is "an integral part of the proposed project" that should be referenced in the project description on behalf of MID and TID. (See Fahey-53, p. 1043.) Representatives for MID, TID, and CCSF are carbon copied on Mr. Masuda's letter. (*Id.*, p. 1044.) Based on this record, it would not be reasonable to find that Fahey failed to mutually agree with the Interveners on the source, amount, and location at NDPR of replacement water discharged into NDPR.

Fahey did not receive allegations that his non-FAS Period diversions were unlawful until the Prosecution Team issued a draft CDO and an ACL Complaint on September 1, 2015 (see PT-1; PT-2). The draft CDO and ACL Complaint are different, however, from the Interveners' notice to provide non-FAS replacement water under the terms of Fahey's permits. Under Permit 20784, the notification of the need for replacement water must be made by one of the Interveners, while Permit 21289 requires that CCSF, specifically, provide the notice. (See PT-15, p. 6; PT-16, p. 9.) Having never received a qualifying call for replacement water, Fahey could not be faulted under Water Code section 1052 if he failed to provide it during the non-FAS Period in 2014 and 2015.

For the foregoing reasons, the State Water Board finds that there is not sufficient evidence in the record to support a finding that Fahey diverted water during the non-FAS Period in violation of his permit terms in a manner that rises to a violation of section 1052 of the Water Code. The Board will consider the issue of Fahey's incomplete reporting further below in section 7.1.2.2.

5.3 Fahey's Defenses to Alleged Unlawful Diversion

Fahey's case-in-chief includes written testimony from G. Scott Fahey himself (Fahey-1), Ross R. Grunwald, a California Professional Geologist and a California Certified Hydrologist, (Fahey-71), and Gary F. Player, a professional geologist, (Fahey-73). Mr. Fahey's testimony provides (1) a history regarding the State Water Board's issuance of Permits 20784 and 21289, (2) a description of Water Exchange Agreement terms currently incorporated into Permits 20784 and 21289, and (3) a description of

Fahey's response to the State Water Board's Notices of Unavailability issued during 2014 and 2015. (Fahey-1.)

Dr. Grunwald's written testimony consists of a December 15, 2015 letter to Fahey providing a summary of potential water supply impacts that could be attributed to Fahey's permitted operations. (See Fahey-71.) Dr. Grunwald's letter states:

> [W]ater extractions from the various components of the system are much greater than any observed reduction in surface spring flow. . . . [¶] . . . [T]he reduction of spring flow is, on average, on the order of 30% of the volume of water removed from the wells and infiltration galleries installed by Sugar Pine Spring Water, LP. Since only 30% of the water withdrawn from system impairs the spring water flows, the remaining 70% is clearly sourced from percolating ground water beneath the site. . . . [¶] . . . [I]t is clear that the impairment of surface flow from the springs is much less than that reporting to the Sugar Pine Spring Water, LP, collection system.

(Fahey-71, p. 3.)

A July 14, 2010 water availability analysis prepared by Dr. Grunwald as a basis for issuance of Permit 21289 is enclosed with the letter.

Mr. Player's written testimony is limited to a December 14, 2015 letter to Fahey that compares the "natural features" of the springs developed by Fahey to "four distinguishing features of a spring." (Fahey-73, p. 1.) Mr. Player's testimony is presented to show "how little the Sugar Pine Springs diversions affect water availability." (Fahey-73, p. 4.)

5.3.1 Defenses to Unlawful Diversion Related to Replacement Water

5.3.1.1 There Is Sufficient Evidence in the Record to Support a Finding That Fahey Made Water Available in NDPR to Meet Fahey's Non-FAS Replacement Water Obligations

Fahey argues that he caused 88.31 acre-feet of water to be wheeled into NDPR by TUD between 2009 and 2011. In support of this argument, Fahey submitted an agreement for surplus water service from TUD, a TUD utility billing account history report, and testimony. (E.g., Fahey-33 [initial agreement for surplus water service between Fahey and TUD]; Fahey-70 [TUD utility billing account history report of deliveries between 2009 and 2011]; R.T., Jan. 25, 2016, pp. 185:20 to 186:23 [arrangement to provide replacement water though agreement with TUD], p. 196:18–19 [time period of deliveries]; but see Fahey-1, pp. 7, 10; R.T., Jan. 25, 2016, p. 193:2–5, p. 247:15–16.) The TUD utility billing account history report indicates that non-zero "[c]onsumption" occurred between May 15, 2009 and ended June 15, 2011. (Fahey-70, pp. 2–3 [note that dates listed are "read" dates].) This consumption was reported in unspecified metered units totaling 1,781. (Fahey-70, pp. 2–3.)

During cross-examination, Mr. Fahey testified that his contract with TUD was for delivery of water in miner's inch-days. (R.T., Jan. 25, 2016, p. 193:2–4.) This testimony is supported by the 2003 contract between Fahey and TUD for surplus water service, which shows a miner's inch as the rate listed on the application form prior to handwritten modification. (Fahey-33, p. 634; accord, Fahey-31.) If the metered units in the TUD utility billing account history report are miner's-inch days, then the report supports the consumption of 1,781 miner's-inch days of water. Using the standard conversion for miner's inches specified by Water Code section 24,[25] 1,781 miner's-inch days is equivalent to 88.31 acre-feet. This is close to the 88.55 acre-feet and 1,751 miner's-inch days (i.e., 86.83 acre-feet using the standard conversion) to which Fahey testified.

[25] The standard miner's inch is a rate of flow of water equivalent to 1.5 cubic feet per minute, measured through any aperture or orifice. (Wat. Code, § 24.) A miner's-inch day is a volume of water equivalent to the flow of one miner's inch for a period of one day, i.e., 2,160 cubic feet or approximately 0.049587 acre-feet.

(Fahey-1, pp. 7, 10 [88.55 acre-feet]; R.T., Jan. 25, 2016, p. 193:2–5 [1,751 miner's-inch days and 88.55 acre-feet], *Id.* p. 247:15–16 [88.55 acre-feet].)

The Prosecution Team and the Interveners had the opportunity to cross-examine Mr. Fahey and attempt to rebut his testimony regarding the volume of water he testified that TUD wheeled into NDPR on his behalf (i.e., approximately 88.31 acre-feet); neither challenged it. (See R.T., Jan. 25, 2016, p. 224:10–20.) The Prosecution Team instead focused its rebuttal on the issue of whether NDPR had spilled after June 15, 2011, which might impact the amount of wheeled water available to Fahey to meet the terms of his permits and the Water Exchange Agreement following a spill. The hearing officers' May 23, 2016 Procedural Ruling determined that the rebuttal evidence and testimony submitted by the Prosecution Team on this point should be excluded. (See May 23, 2016 Procedural Ruling, pp. 9–10, 17; but see PT-72, p. 45 [Mr. Fahey stating that NDPR was "being operated to avoid the overflow of its dam" as of July 7, 2011].) The Prosecution Team did not pursue the issue further in its closing brief. (But see May 23, 2016 Procedural Ruling, p. 10 [discussing legal questions raised].) We are not presented with and do not consider arguments as to the legal significance of operating NDPR to avoid the overflow of its dam vis-à-vis the replacement water Fahey pre-positioned in NDPR prior to such operations. However, we note that both Term 20 of Permit 20784 and Term 34 of Permit 21289 relieve Fahey of his obligation to provide replacement water "during periods when the [Interveners'] reservoirs are spilling or being operated in anticipation of a spill." (PT-15, pp. 6–7; PT-16, p. 9.)

The Interveners' closing brief contends that "Fahey has provided no evidence or information . . . that the water he acquired from TUD was actually delivered to NDPR." (Interveners' Closing Brief, June 17, 2016, p. 9:18–19.) Characterizing the TUD utility billing account history report, exhibit Fahey-70, as "a billing leger," the Interveners assert that "Fahey has provided no information in this proceeding or otherwise about the source, amount and location of the deliveries to NDPR." (*Id.*, p. 9:20–22.) In general, the purpose of a closing brief is to summarize and interpret evidence in the record and advance legal arguments. Cross-examination is an appropriate means to challenge the

credibility of a witness. Rebuttal exhibits are an appropriate means to explain, contextualize, or challenge case-in-chief exhibits and testimony. Mr. Fahey's testimony to the effect that he "had TUD wheel 88.55 acre-feet of surplus water to [NDPR]" was available to the Interveners well in advance of the hearing. However, the Interveners declined to question Fahey on cross-examination and declined to introduce rebuttal exhibits or testimony. (R.T., Jan. 25, 2016, p. 115:16–19; *id.*, p. 224:10–20; R.T., Jan. 26, 2016, pp. 69:25 to 70:7; *id.*, pp. 136:22 to 137:4; but see R.T., Jan. 25, 2016, p. 112:11 et seq. [MID counsel asking that certain Prosecution Team exhibits be read into the record].) As such, the Interveners' late, conclusory assertions of doubts presented in their closing brief deserve little weight, if any at all.

The State Water Board finds that Fahey's exhibits and witness testimony support a finding that Fahey delivered about 88.31 acre-feet of water to NDPR between 2009 and 2011. Table 3 below summarizes the consumption of water per year between 2009 and 2011 according to the TUD utility billing account history report (Fahey-70).

Table 3. Yearly water deliveries via TUD to NDPR for 2009–2011.

Year	Read Date Range[a]	"Consumption" Units[a] (miner's-inch days[b])	"Consumption" Volume (af)
2009	6/15 – 10/15	685	33.97
2010	5/15 – 10/15	822	40.76
2011	5/15 – 6/15	274	13.59
	Total	**1,781**	**88.31***

* This total is the sum of unrounded figures. As a result, it differs slightly from the sum of the rounded component values shown.

[a] Data Source: Fahey-70.

[b] Mr. Fahey testified that the unspecified units in Fahey-70 are miner's-inch days. (R.T., Jan. 25, 2016, p. 193:2–4.) The standard miner's inch is a rate of flow of water equivalent to 1.5 cubic feet per minute, measured through any aperture or orifice. (Wat. Code, § 24.) A miner's-inch day is a volume of water equivalent to the flow of one miner's inch for a period of one day, or 2,160 cubic feet or approximately 0.049587 acre-feet.

From the TUD utility billing account history report (Fahey-70), as summarized by Table 3, the Board concludes that Fahey caused TUD to deliver 685 metered units to NDPR in 2009, 822 metered units in 2010, and 274 metered units in 2011. Per the Water Exchange Agreement, this water would be used to satisfy Fahey's make-up water obligations for diversions during the FAS Period (June 16 to October 31) in each respective year that it was delivered. (See PT-19, p. 2, ¶ 4.) Fahey's FAS Period diversions in 2009, 2010, and 2011, as reported in exhibits Fahey-51, Fahey-52, and Fahey-56, are summarized in the Table 4 below.

Table 4. Yearly balance of FAS Period water diversion and delivery via TUD for 2009-2011.

Month	Volume of Diversion During FAS Period by Year (af)		
	2009[a]	2010[b]	2011[c]
June[d]	3.06	2.07	3.40
July	4.85	4.62	5.70
August	4.86	5.06	6.57
September	4.23	4.46	4.57
October	3.80	3.72	4.62
Total Diversion	**20.81***	**19.93**	**24.87***
TUD Delivery[e]	**33.97**	**40.76**	**13.59**
Balance	**13.16***	**20.83**	**-11.28***

* All totals in this table are the sum of unrounded figures. As a result, some totals (those marked) differ slightly from the sum of the rounded component values shown.

af - acre-feet

[a] Data Source: Fahey-51.

[b] Data Source: Fahey-52.

[c] Data Source: Fahey-56.

[d] The FAS Period under consideration in this order is June 16 through October 31. Diversion data for 2009-2011 were only available in the record as a monthly total. To estimate the volume of diversion that occurred in the latter half of June (i.e., June 16 through 30), the volume of diversion shown in the table is half of that reported in the associated sources.

[e] Data Source: Fahey-70. For the purpose of this analysis, this order assumes that TUD's metered "consumption" unit, which is unspecified in Fahey-70, is miner's-inch days.

Assuming that Fahey's June FAS Period (June 16 through 30) diversions for 2009 through 2011 are half of Fahey's total June diversions, 13.16 acre-feet from the 2009 TUD deliveries and 20.83 acre-feet from the 2010 TUD deliveries remained in the reservoir after accounting for Fahey's FAS Period diversions under the Water Exchange Agreement. For 2011, Fahey's FAS Period diversions exceeded TUD deliveries by 11.28 acre-feet, creating a deficit in that year. Absent a spill, approximately 33.99 acre-feet[26] remained in the reservoir at the end of 2011.[27]

In addition to the arguments addressed in section 5.1.4, above, the Prosecution Team objected that Fahey does not have rights to store water in NDPR (Prosecution Team's Closing Brief, June 17, 2016, p. 12:15–19); however, Fahey's permits do not require that he provide replacement water under his own rights or at a rate identical to his rate of direct diversion. (See generally PT-15; PT-16.) Such a requirement would be inconsistent with permit terms that allow Fahey to provide water via credit for diversions adverse to CCSF's claims of right upstream of both NDPR and Fahey. (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34; see generally, e.g., Fahey-14; Fahey-15.) Therefore, at the end of 2011, approximately 33.99 acre-feet of Fahey's "wheeled water" remained in the reservoir and were available to satisfy Fahey's non-FAS obligations if he was called

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[26] This value was calculated using unrounded component values and, as a result, differs slightly from a sum calculated using the rounded monthly component values shown in Table 4.

[27] An earlier, public draft of this order proposed to deduct the 11.28 acre-foot deficit between Fahey's FAS Period diversions and water deliveries in 2011 from the surplus 33.99 acre-feet available from Fahey's 2009 and 2010 deliveries. Fahey's March 11, 2019 comment letter expressed concerns with this approach and these concerns are well taken. Hearing Team staff reviewed the matter further and determined that, in addition to Fahey's concerns, the 2011 deficit between Fahey's deliveries and FAS Period diversions could not be satisfactorily distinguished from similar deficits in 2012 and 2013. (See also Fahey-57 [Permit 20784 2012 diversion data]; Fahey-58 [Permit 20784 2013 diversion data]; SWRCB-1, Permit 21289 Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013].)

This order evaluates the 2011 deficit further below in section 7.1.2. and accounts for Fahey's 2009 and 2010 surplus deliveries to NDPR separately. This approach is most consistent with the requirement in the Water Exchange Agreement that "make-up" water owed to MID and TID for Fahey's diversions during the FAS Period cannot be carried over from year to year. (PT-19, p. 2, ¶ 4.)

upon by the Interveners to provide replacement water. This finding is subject to the distinction described above in section 5.1.4.2.

Fahey's permits require him to provide non-FAS Period replacement water to the Interveners under certain circumstances, which can be accounted for through credits. Both permits state that "[r]eplacement water may be provided in advance and credited to future replacement water requirements." (PT-15, p. 6; PT-16, p. 9.) This order calculates the volume of water Fahey delivered to the Interveners at NDPR between 2009 and 2011 and evaluates the ability of those deliveries to satisfy Fahey's non-FAS Period replacement water obligations to the Interveners.

5.3.1.2 There Is Sufficient Evidence in the Record to Support a Finding That Fahey Had a Defense to Unlawful Diversion for Diversions During the Non-FAS Period in 2014 and 2015 When Water Was Not Available to Serve His Priority of Right

Fahey's permit terms, which incorporate agreements between Fahey and the Interveners, provide the opportunity for a partial defense to unlawful diversion during the non-FAS Period when water is not available to serve his priority of right. Specifically, if Fahey provides replacement water to NDPR within one year of being properly notified that his diversion "has potentially or actually reduced the water supplies of" the Interveners, then Fahey may divert "adverse to" the rights of MID, TID, and CCSF in an equal amount. (See PT-15, pp. 6–7 [Permit 20784 Term 20]; PT-16, pp. 9–10 [Permit 21289 Term 34]; see also section 5.1.3, *supra*.)

Fahey's permits do not identify a specific right held by MID, TID, or CCSF against which Fahey may adversely divert. The permits specify only that Fahey "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." (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34.) A natural interpretation of this sentence is that Fahey may provide replacement water to NDPR for diversions adverse to any prior right or claim of right held by MID, TID, or CCSF. This understanding is consistent with permit language

that waives Fahey's obligation to provide replacement water "during periods when the Districts' and San Francisco's reservoirs are spilling . . . ." (PT-15, pp. 6–7, ¶ 20; PT-16, p. 9, ¶ 34; accord Fahey-15, p. 248 [original protest dismissal term proposed by CCSF].) The use of the plural "reservoirs" strongly suggests that the parties intended the replacement water term to apply to diversions "adverse to" the Interveners' claims of prior right at other reservoirs in addition to NDPR. CCSF exercises claims of right at other reservoirs, further supporting this view. Table 5, below, summarizes the Interveners' recorded rights and claims of right on the Tuolumne River according to the State Water Board's eWRIMS database.[28]

[28] The Board takes official notice of this information obtained from our eWRIMS Database System pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

Table 5. eWRIMS Records of Interveners' Water Rights and Claims of Right on the Tuolumne River

Type of Right/Claim	Reported Year of First Use and/or Priority Claim	Registered Owner(s)*	Diversion Works Name	Use	Water Right ID
Riparian	1923	MID & TID	Don Pedro Powerhouse	P	S013849
Pre-1914	1900	MID & TID	La Grange Dam	Ir, M, P, R	S013848
	1908	CCSF (c/o HHW&P)	O'Shaughnessy Dam	M, P, R	S002635
	1918	CCSF	Lake Eleanor Dam	Ir, M, P	S002636
	1918	CCSF	Lake Cherry Diversion Dam	Ir	S014379
	1925	CCSF (c/o HHW&P)	Early Intake Reservoir	In, M, P	S002637
	1927	CCSF	Unnamed diversion from Canyon Ranch Creek	Ir	S018735
	1960	CCSF	Cherry Valley Dam	In, M, P	S002638
	Unknown	CCSF	Scoggins Dam	D	S018734
Post-1914	1919	MID & TID	NDPD	P, R	A001232
	1919	MID & TID	NDPD, La Grange Dam	Ir	A001233
	1919	MID & TID	NDPD	P	A001532
	1922	TID	La Grange Power Plant	P	A003139
	1923	MID & TID	La Grange Dam	Ir	A003648
	1930	MID & TID	La Grange Dam	Ir	A006711
	1940	MID & TID	NDPD, La Grange Dam	P	A009996
	1940	MID & TID	La Grange Dam	Ir	A009997
	1951	MID & TID	NDPD, La Grange Dam	Ir, R	A014127
	1951	MID & TID	NDPD, NDPP	P, R	A014126
	1961	MID, TID, & others	Multiple locations tributary to NDPR	S	A020324

* "Registered Owner(s)" include non-primary owners.
D - Domestic
HHW&P – Hetch Hetchy Water and Power
In - Industrial
Ir – Irrigation
M – Municipal
NDPD – New Don Pedro Dam
NDPP – New Don Pedro Powerhouse
P – Power
R – Recreation
S – Stockwatering

According to Table 5, MID and TID's most senior claim of right to which Fahey can adversely divert is at La Grange Dam with a claimed priority date of 1900. Assuming for the sake of argument that the water availability analysis accurately predicted a cutoff for water availability everywhere in the San Joaquin River basin for all post-1914 rights in 2014 and for all post-1902 rights in 2015 (but see generally Order WR 2016-0015, pp. 14–16), water would still be available to serve this claim of right. The Prosecution Team does not appear to disagree with this conclusion. (E.g., Prosecution Team's Closing Brief, June 17, 2016, p. 7:21–24 [discussing priority date cutoffs for water availability in 2014 and 2015].) Fahey could have physically provided replacement water to MID and TID's operations at La Grange Dam by coordinating releases of the water he pre-positioned in NDPR. Alternatively, MID and TID could use water that Fahey delivered to NDPR to serve the same uses as those claimed at La Grange Dam.

The record and eWRIMS do not contain evidence of an active water right or claim of right that is senior to Fahey's on the mainstem Tuolumne River or on its tributaries downstream of Fahey between Fahey's points of diversion and NDPR.[29] (R.T., Jan. 25, 2016, pp. 75:19–23, 76:9–14.) Given this, Fahey's diversions cannot reasonably be considered "adverse to" a diverter between Fahey's points of diversion and MID and TID's operations at NDPR. Depending on the amount of water available at the time of Fahey's diversions, the water right priorities and water demands of any diverters with rights senior to Fahey's priority of right downstream of NDPR, and the method of operation of MID and TID's reservoirs, it is conceivable that Fahey's non-FAS Period diversions in 2014 and 2015 when water was unavailable to serve his priority of right were adverse to a diverter downstream of NDPR, other than MID or TID, with priority senior to Fahey's. However, in the absence of evidence to this effect and considering the large proportion of the total flow of the Tuolumne River for which MID

[29] The eWRIMS Web Mapping Application provides the spatial location of water rights throughout California and is searchable by name, watershed, stream system, or county. The State Water Board takes official notice of this information obtained from our eWRIMS Web Mapping Application pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

and TID have or claim water rights, the Board proceeds with their analysis in this case under the assumption that Fahey's diversions were adverse to MID and TID's operations.

Section 5.4 below describes the Prosecution Team's allegation that Fahey failed to comply with Term 20 of Permit 21289, which requires Fahey to bypass five gallons per minute at both Marco and Polo springs. (R.T., Jan. 25, 2016, p. 120:6–19; PT-16, p. 6, ¶ 20.) These bypass flow requirements were designed to mitigate the impact of Fahey's diversions on wetland habitat to be less than significant. (Fahey-84, p. 9, ¶ 6; id., p. 27, ¶ 4.) If Fahey did fail to meet his bypass flow obligations during the non-FAS Period when water was unavailable to serve Fahey's priority of right, Fahey's diversions during this period could have been adverse to other legal users of water.

In section 5.2.2.2, the State Water Board determined that water was not available from at least May 27 through October 30 and November 4 through 18, 2014, and from April 23 through at least November 1, 2015 to serve Fahey's priority of right. As discussed in section 5.2.1, Fahey diverted at least 7.62 acre-feet over 63 days during the non-FAS Period from May 27 through June 15, 2014, November 4 through 18, 2014, April 23 through June 15, 2015, and November 1, 2015. In section 5.3.1.1, the Board determined that about 33.99 acre-feet of the wheeled water that Fahey provided to NPDR remained in the reservoir and was available to satisfy his non-FAS replacement water obligations if he received notice pursuant to his permit terms.[30] Therefore, Fahey had more than enough water in NDPR to satisfy his replacement water obligation to the Interveners for his non-FAS Period diversions in 2014 and 2015 when water would not otherwise be available to serve his priority of right. For the foregoing reasons, the Board finds that there is sufficient evidence in the record to

[30] The stated amount of wheeled water remaining in NDPR in 2011, 33.99 acre-feet, assumes NDPR did not spill, and was not operated in anticipation of spill, since 2009. (See May 23, 2016 Procedural Ruling, pp. 9–10, 17 [rebuttal evidence and testimony submitted by the Prosecution Team on the issue of whether NDPR spilled after June 15, 2011 should be excluded].) Nothing in this order shall be construed as a finding on the amount of water Fahey has available to serve his current or future water obligations.

support a finding that Fahey had a defense to unlawful diversion for his diversions during the non-FAS Period in 2014 and 2015 when water was not available to serve his priority of right under the specific facts presented in this case. Different facts in future cases may compel a different result.

5.3.1.3 There Is Sufficient Evidence in the Record to Support a Finding That Fahey Did Not Have a Defense to Unlawful Diversion for Diversions During the FAS Period in 2014 and 2015 When Water Was Not Available to Serve His Priority of Right

The Water Exchange Agreement between Fahey, MID, and TID provides the possibility of a partial defense to unlawful diversion for Fahey's diversions during the FAS Period. If Fahey provides "make-up" water to MID and TID in the same year before, during, or after the FAS Period, he may divert adverse to MID and TID's rights and claims of right during the FAS Period. (PT-19, pp. 1–2, ¶¶ 3–5; but see *id.*, p. 1, ¶ 2.) During the FAS Period, water would ordinarily never be available to Fahey at his priority of right. Providing make-up water to MID and TID may provide a defense to unlawful diversion when water is available for diversion under MID and TID's rights. Water availability and defenses to unlawful diversion are evaluated separately for each water right and each right holder.

Providing water to MID and TID under the Water Exchange Agreement would not by itself provide Fahey with a defense to unlawful diversion relative to other downstream water rights with priority dates senior to Fahey's. The record does not contain evidence of a claim of right senior to Fahey's on the mainstem Tuolumne River or on its tributaries downstream of Fahey between Fahey's points of diversion and NDPR. (R.T., Jan. 25, 2016, pp. 75:19–23, 76:9-14; see also section 5.3.1.2, *supra*.) However, Prosecution Team witnesses testified that there are other water rights or claims of right downstream of both NDPR and Fahey and senior both to Fahey's rights and to MID and TID's post-1914 rights at NDPR. (E.g., R.T., Jan. 25, 2016, pp. 49:23 to 50:9; R.T., Jan. 26, 2016, pp. 18:8 to 19:9; PT-9, p. 6, ¶ 32; see also R.T., Jan. 25, 2016, p. 36:23–25.) If the water right holder or claimant to whom Fahey's diversions are adverse is not

MID or TID, Fahey's FAS Period diversions would be unlawful absent an arrangement to provide replacement water to injured diverters. In this situation, Fahey's diversions would deprive a third-party downstream senior right holder of water to which the downstream senior was entitled. In order to have a defense to unlawful diversion in this situation, Fahey would need to establish a separate agreement with the third party downstream senior right holder or otherwise provide them with "make-up" water.

Unlike non-FAS Period replacement water under Term 20 and Term 34, "make-up" water owed to MID and TID for diversions during the FAS Period cannot be carried over from year to year. (PT-19, p. 2, ¶ 4.) The Water Exchange Agreement between Fahey, MID, and TID is unmistakably clear that "Fahey may pump more water than is required under this Agreement and build a surplus prior to the period of unavailability; however, no carryover will be allowed to subsequent years." (*Ibid*.) Fahey last caused water to be delivered into NDPR in 2011. (R.T., Jan. 25, 2016, pp. 195:24 to 196:5.) Fahey conceded on cross-examination that he did not buy water from TUD in 2014 or 2015. (*Id.*, p. 196:4–5, 16–21; see also PT-9, p. 6, ¶¶ 29–30; PT-72, pp. 41–42.) Because Fahey does not have water in NDPR capable of satisfying his obligations to MID and TID for the water he diverted during the 2014 and 2015 FAS Periods, Fahey does not have a defense against unlawful diversion for his FAS Period diversions even if his diversions were adverse to MID and TID. Because the terms of the Water Exchange Agreement were not met, it does not provide the possibility for a defense to unlawful diversion.

5.3.2 Defenses to Unlawful Diversion Related to Developed Water

5.3.2.1 There Is Not Sufficient Evidence in the Record to Establish That Fahey's Diversions Constitute Percolating Groundwater or "Developed Water" That Could Establish a Defense to Unlawful Diversion

Fahey contends that part of his diversions for 2014 and 2015 constitute groundwater or developed water and were therefore lawful. Fahey's 1997–2014 progress reports for Permit 20784 have generally included a separate monthly tally of the volume of water "appropriated" and "developed" under the permit. (See generally Fahey-21 through

Fahey 26; Fahey-45; Fahey-48 through Fahey-52; Fahey-56 through Fahey-58; Fahey-62.) Mr. Fahey described a general process for evaluating output from springs during his rebuttal testimony (R.T., Jan. 26, 2016, p. 101:8–20), indicating his familiarity with methods for distinguishing the spring's natural output from percolating groundwater. However, Fahey's progress reports do not provide calculations, records, or other supporting information to substantiate or explain why some of his diversions are characterized as developed water.

At the hearing, Mr. Fahey testified that he understands his reported diversions of "developed water" to be percolating groundwater. (R.T., Jan. 25, 2016, p. 220:9–13.) He also testified that he reports his diversions this way based on a 1994 conversation with a State Water Board employee during a field investigation for his application to appropriate water. (*Id.*, p. 220:18–22.) Prosecution Team witness Katherine Mrowka disputed whether Fahey's reported diversions of developed water constituted developed water or groundwater and argued that the reported diversions were surface water. (R.T., Jan. 26, 2016, pp. 27:20 to 29:1.)

Fahey's 2014 progress reports for Permit 20784 and Permit 21289 do not allege to have diverted any developed water. (See Fahey-62, p. 1285 [indicating zeros in the "Developed Right" rows for each month of 2014]; PT-59 [same]; PT-57 [foundation for PT-59].) These admissions would appear to preclude the possibility of a developed water defense to unlawful diversion under either permit for 2014, and Fahey does not explain the discrepancy. Fahey's 2015 progress report and the attached spreadsheet for Permit 20784, filed April 13, 2016, do not report diversions of developed water. For Permit 21289, Fahey's revised 2014 progress report, 2015 progress report, and the attached 2014 spreadsheet and 2015 spreadsheet, all of which were filed on April 13, 2016, do report that Fahey diverted developed water in 2014 and 2015. The State Water Board takes official notice of the foregoing information pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

Fahey's case-in-chief included expert witness testimony by Dr. Grunwald to further support his argument that he diverts groundwater or developed water. (See Fahey-72.) Dr. Grunwald estimated that Fahey's diversions reduce spring flow tributary to the Tuolumne River "on the order of 30[percent] of the volume of water removed from the wells and infiltration galleries installed by Sugar Pine Spring Water, LP." (Fahey-71, p. 3.) Dr. Grunwald also testified that "the remaining 70[percent]" of Fahey's diversions are "clearly sourced from percolating ground water beneath the site." (*Ibid.*) These estimates are based on Dr. Grunwald's experience with Fahey's diversion facilities from 1996 to the present. (*Ibid.*; see also R.T., Jan. 25, 2016, p. 177:16–25.) However, Dr. Grunwald concedes that these 70 percent and 30 percent figures are "estimates," and that "[a] detailed study of water withdrawals and spring flow must be made in order to establish a more definitive ratio between surface flow impairment and withdrawal of percolating ground water." (Fahey-71, p. 3.)

Fahey also relies on a conversation between Mr. Fahey and Division employee Yoko Mooring in support of his argument that he diverts groundwater. Fahey's exhibits include a January 30, 2003 contact report prepared by Ms. Mooring obtained from the correspondence file for Permit 21289 (Application 31491). (See Fahey-29, p. 618.) In the contact report, Ms. Mooring opines that "[h]is [Fahey's] source appears to be groundwater." (*Ibid.*) In rebuttal, Ms. Mrowka testified that determining whether or not Fahey's diversions constitute developed water would require site-specific analysis of each spring, in its undeveloped state by a geologist, and would also require analysis of the subsurface formation supplying water to the spring. (R.T., Jan. 26, 2016, p. 29:2–15.)

The State Water Board's water right permitting and licensing authority is limited to diversions from surface streams and underground streams flowing in known and definite channels. (Wat. Code, §§ 1200–1201.) California law presumes that a spring tributary to a stream is part of the stream and is therefore subject to the dual doctrines of riparian rights and prior appropriation. (E.g., *Gutierrez v. Wege* (hereinafter *Gutierrez*) (1905) 145 Cal. 730, 734.) The Board's permitting and licensing authority over water in a

stream is not abrogated or limited by the fact that, in many cases, some of the flow in a stream or from a spring is supported by hydrologically interconnected groundwater. Instead, "[a]ll water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code." (Wat. Code, § 1201.) Even if the effect of diversion from a surface water body, subterranean stream, or spring is to increase the amount of hydrologically interconnected groundwater flowing into the surface water body, subterranean stream, or spring, the diversion is still subject to the Board's water right permitting and licensing authority and subject to the prohibition against unauthorized diversion or use of water under section 1052 of the Water Code. (See *id.*, §§ 1052, 1201.)

Evidently, Ms. Mooring was employed by the State Water Board as an Engineering Associate at the time that she filed her January 30, 2003 contact report. (See Fahey-36, p. 639.) For the reasons largely discussed above in section 3.1.4.2, we find that Ms. Mooring's opinion is irrelevant as to the truth of the legal question of whether Fahey is diverting groundwater or surface water. (Contra Fahey-29, p. 618.) Factually, the record is clear that Fahey's springs are tributary to various surface streams and ultimately to the Tuolumne River. (See Fahey-20, p. 311; Fahey-55, p. 1197.) As such, they are part of the surface stream and subject to the Board's authority. (*Gutierrez*, *supra* 145 Cal. at 734; see Wat. Code, §§ 1200, 1201.) We are not presented with a situation in which Fahey can be said to have been prejudiced by relying on non-precedential legal conclusions offered by Board staff. To the contrary, obtaining surface water rights subject to conditions negotiated to protect other legal users of water and the environment would have insulated Fahey's diversions from challenge to the extent that he complied with those conditions.

Some early cases recognize a right to "developed water" from improvements to spring yields. In *Churchill v. Rose*, *supra*, 136 Cal. at 578–579, the Supreme Court held that a

landowner who "dug out" a spring such that its flow "increased three fold" was "entitled to the increased amount of water thus developed." The court made this finding notwithstanding the senior rights of a downstream plaintiff to the spring's natural flow. (See *id.*, at 577.) But in *Gutierrez*, *supra*, 145 Cal. at 734, the court rejected an argument that a landowner who digs out a spring would thereby be entitled to "'all the waters'" of the spring. *Churchill* relied on "the uncontradicted testimony of several witnesses" to the effect that the spring was dug out by the defendant's predecessor and that yields from the spring increased thereafter. (*Churchill*, *supra*, 136 Cal. at 578.) Both *Churchill* and *Gutierrez* involved disputes among private landowners.

More recently, legal scholars have questioned whether the developed water concept remains legally sound. For example, Wells Hutchins contends, in what is arguably the lead treatise on early California water law, that, if groundwater is "developed" by digging out a spring that was already tributary to the stream, the rights of the landowner should be limited to a reasonable share of the common groundwater supply. (See Hutchins, The California Law of Water Rights (1956), pp. 386, 407.) As Scott Slater observes:

> Although some of the early cases considered spring water added to the stream by artificial means to be "developed water," these cases would seem to be of limited validity under the modern view that the rights to hydrologically interconnected sources should be correlated.

(1 Slater, California Water Law & Policy (2015) ch. 8, §§ 8.03.)

Slater goes on to argue that, unless the spring water never joins the surface or percolating ground water supply under natural conditions, it would not qualify as developed water. (*Ibid.*)

Here, we need not rule on the developed water concept's soundness because Fahey has not presented sufficient evidence to support a finding that he diverts developed water. Dr. Grunwald conceded that water extraction from Fahey's springs would decrease surface flows. (Fahey-71, p. 3; R.T., Jan. 25, 2016, pp. 222:18–22, 223:10–

25.) The extent to which Fahey's diversions affect surface flows is one to one, potentially, in a worst-case scenario. (See Fahey-71, p. 3). According to Fahey's own expert witness, "[n]o definitive studies have been made to determine" what the actual reduction ratio of surface water to groundwater is. (*Ibid*.) Such studies would require detailed examination of the springs before they were developed, at least according to Ms. Mrowka (R.T., Jan. 26, 2016, p. 29:2–15), which is no longer possible for Fahey's existing diversion facilities. For the foregoing reasons, we find that there is not sufficient evidence in the record to support a finding that Fahey diverts developed water or percolating groundwater.

5.3.2.2 *Pomeroy* Does Not Support a "Developed Water Presumption" or an Authorization for Division Under the Facts of This Proceeding

As discussed above in section 3.1.4.2, Fahey appears to argue that there is a presumption under California law that water diverted from a spring is developed water. However, this conclusion does not follow from the *Pomeroy* presumption that groundwater is not in a subterranean stream flowing in known and definite channels. California law presumes that a spring tributary to a stream is part of the stream. (*Gutierrez*, *supra*, 145 Cal. at 734; see also *Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 931–932, 937 fn. 5 [declining to apply groundwater case law in dispute concerning riparian rights to a spring].)

Subterranean streams are an exception to a general rule governing groundwater. Judicial precedent has placed the burden of proving the existence of a subterranean stream, i.e., proving the exception, on the party seeking to establish the exception. (E.g., *Pomeroy*, *supra*, 124 Cal. at 628.) Similarly, developed water is an exception to a general rule governing the priority and availability of spring water. (See *Churchill*, *supra*, 136 Cal. at 577; 578–579.) We are not aware of any precedent placing the burden of proof on the party seeking to establish that this exception does *not* apply, and Fahey cites no such precedent. If anything, *Churchill*, *supra*, 136 Cal. at 578, which explicitly relied on uncontradicted witness testimony introduced by the party claiming a developed water exception, indicates that the party claiming to divert developed water

bears the burden of proof. Accordingly, the State Water Board rejects Fahey's argument that a "developed water presumption" should apply to this case.

5.4 Fahey's Noncompliance with Bypass Flow Requirements in His Permits

The Prosecution Team's exhibits and closing brief present evidence and arguments to the effect that Fahey has not met the bypass flow requirements in his permits. (See generally Prosecution Team's Closing Brief, June 17, 2016, pp. 18:20 to 19:7.) The Prosecution Team cites Order WR 2008-0017 and Order WR 99-001 in support of its argument that "[c]ontinued diversion in violation of permit terms that limit diversion amounts, require certain bypass flows, and require the maintenance of an exchange agreement is necessarily an 'unauthorized diversion of water' and subjects the diverter to liability under section 1052." (*Id.*, p. 10:24–28, fn. 6.) Order WR 2008-0017 acknowledged the possibility that not all violations of permit terms would constitute unlawful diversion. (See Order WR 2008-0017, p. 15.)Term 20 of Permit 21289 requires that Fahey "continuously bypass a minimum of 5 gallons per minute" at each point of diversion. (PT-16, p. 6, ¶ 20.) For each point of diversion, when total streamflow is less than 5 gallons per minute, the entire flow must be bypassed. (*Ibid.*) Diverting water without complying with the bypass flow terms is itself an unauthorized diversion that would provide an independent basis for imposing civil liability even if Fahey's diversions occurred at a time when water was available at Fahey's priority of right. The Prosecution Team did not charge separate violation days or propose a distinct administrative civil liability amount for Fahey's alleged non-compliance with bypass flow requirements in their September 1, 2015 ACL Complaint or in an amended or additional ACL complaint. The Prosecution Team's closing brief states that "[a]ccording to Fahey's response to the Information Order, he bypassed less than the required flow in June, July, September, and October in 2014 and April through August in 2015. [Citation.] Based on video surveillance and invoices, evidence shows that Fahey violated Term 20 [of Permit 21289] for 200 days and diverted a total of 15.21 acre-feet on those days." (Prosecution Team's Closing Brief, June 17, 2016, pp. 21:26 to 22:2.)

This alleged unlawful diversion is arguably within the scope of the October 16, 2015 Hearing Notice. Although Fahey encountered the general allegation that he failed to meet bypass flows during the hearing process, it does not appear that the Prosecution Team identified or expressly sought a separate penalty amount for bypass flow violations in its ACL Complaint prior to filing its closing brief. Accordingly, the State Water Board declines to further evaluate whether Fahey's alleged failure to meet bypass flows is a separate trespass for which additional civil liability would be appropriate. We consider Fahey's bypass flow obligations further, below, in section 7.1.2.2.

6.0 A CEASE AND DESIST ORDER IS WARRANTED

Fahey unlawfully diverted water during a severe drought emergency in 2014 and 2015 when water was not available to serve his priority of right. There is evidence in the record to suggest that Fahey failed to provide FAS Period make-up water, as required by his permits, for a very long time prior to the current drought. Fahey has violated the prohibition against the unauthorized diversion of water and threatens to continue doing so. Accordingly, the State Water Board finds that issuance of a CDO is warranted.

6.1 Requirements of the Cease and Desist Order

The State Water Board finds that Fahey has violated and threatens to violate Water Code section 1052 by engaging in and threatening to engage in an unauthorized diversion of water. An order directing Fahey to cease and desist the continued and threatened unauthorized diversion by developing and implementing a Curtailment Operations Plan to prevent future unauthorized diversion of water during the FAS Period and periods of water unavailability is appropriate. Once implemented, the operations plan must require Fahey to secure all approvals necessary to implement the operations plan from any local, state, or federal agencies.

7.0 ADMINISTRATIVE CIVIL LIABILITY IS WARRANTED

For the following reasons, the State Water Board finds that administrative civil liability is warranted for unlawful diversion under section 1052 of the Water Code.

7.1 Amount of Administrative Civil Liability

In determining the amount of civil liability, the board has taken into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator. (Wat. Code, § 1055.3.)

7.1.1 Extent of Harm Caused by the Violation

The State Water Board finds above that Fahey unlawfully diverted 25.33 acre-feet over 178 days during the FAS Periods in 2014 and 2015. Fahey's unlawful diversions occurred during a period for which the Governor has proclaimed a state of emergency due to drought conditions. (PT-27, pp. 1–2; see also PT-7, pp. 1–2, ¶ 5.) During these two years, water shortages were so severe that water was not available for many senior water right holders and claims of right on the Sacramento-San Joaquin Rivers and Delta (E.g., PT-42, PT-43, PT-153.) At the hearing, the Prosecution Team presented evidence that Fahey's unauthorized diversion reduced the amount of water available for every senior water right holder downstream (e.g., PT-9, pp. 6–7, ¶ 32–34; R.T., Jan. 25, 2016, pp. 129:14 to 130:9), making an already dire water supply situation even worse.

It appears, based on officially noticed information in the State Water Board's files, that the most likely injured parties were MID and TID, whose most senior claim of right at La Grange Dam claims a priority date of 1900 for irrigation uses. (See Table 5, *supra*.) In the event that the water availability analysis was significantly too conservative, it is conceivable that MID and TID's licenses at NDPR with 1919 priority dates were injured. (See Table 5, *supra*). This is an unlikely possibility, based on the record, but one on which the Board cannot definitely rule given the available evidence. (See also generally Order WR 2016-0015, pp. 11–16 [discussing methods of proving unlawful diversion due

to unavailability of water]; section 5.2.2.2, *supra* [same]). Fahey has not presented, and we did not consider, any argument or defense to the effect that the water would not have reached anyone entitled to divert it if Fahey had not curtailed his diversions. Fahey would have the burden of proving a claim that curtailment would be futile.

The Prosecution Team need not prove a specific injury to a specific diverter or a specific public trust resource to show harm under Water Code section 1055.3. To the contrary, the statute authorizes the State Water Board to consider "all relevant circumstances" when assessing a civil penalty, including but not limited to the relevant circumstance of whether a general or specific injury occurred. (Wat. Code, § 1055.3.) Requiring the Prosecution Team to prove harm to a specific diverter or public trust resource could perversely incentivize indiscriminate injury. This would be contrary to law and contrary to sound public policy. (Cf. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 447 [state has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible].) Identifying particular injured parties could support a larger civil penalty under some circumstances, but this is not required. Proving unlawful diversion that deprived an identifiable class of downstream senior right holders or claimants of the unlawfully diverted water is sufficient.

7.1.2 Nature and Persistence of the Violation

Fahey unlawfully diverted 25.33 acre-feet over 178 days during the FAS Period in 2014 and 2015 without providing make-up water to MID and TID as would have been required by his permits and the Water Exchange Agreement. Evidence in the record shows that Fahey did not provide make-up water for his FAS Period diversions on a consistent basis in prior years. As discussed in section 5.3.1.1, Fahey provided make-up water for his full FAS Period diversions in 2009 and 2010 but failed to do so in 2011 and other years. (See Table 4 [demonstrating that Fahey did not provide sufficient make-up water for FAS Period diversions in 2011]; Prosecution Team's Closing Brief, June 17, 2016, p. 15:15–25.) In addition, during the FAS Periods in 2012 and 2013,

Fahey diverted at least 28.3 acre-feet and at least 10.4 acre-feet, respectively,[31] without providing any FAS Period make-up water in those years. (Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; Fahey-58, p. 1269 [Permit 20784 reported 2013 diversions]; SWRCB-1, Permit 21289 Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013 because it was unavailable].) In 2009 through 2012, Fahey's FAS Period diversions also violated Term 2 of the Water Exchange Agreement, which requires that Fahey divert no more than 17 acre-feet during the FAS Period in any year. (Fahey-51, p. 929 [Permit 20784 reported 2009 diversions]; Fahey-52, p. 1016 [Permit 20784 reported 2010 diversions]; Fahey-56, p. 1243 [Permit 20784 reported 2011 diversions]; Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; PT-19, p. 1, ¶ 2 [Term 2].)

The record suggests that Fahey would have continued violating his permit terms and obligations under the Water Exchange Agreement indefinitely but for the Prosecution Team's intervention. Additional relevant circumstances related to the nature and persistence of the violation are discussed below.

7.1.2.1 Fahey Obtained an Economic Benefit from the Unlawful Diversion

Through Fahey's unlawful FAS Period diversions, he obtained the economic benefit of diverting water during a severe drought emergency while depriving downstream diverters of water to which they were entitled and avoiding the cost of providing make-up water to senior diverters. It is the State Water Board's duty to protect senior rights and the environment from unlawful diversion. (See Wat. Code, §§ 1051–1052.) All else equal, a civil penalty for unlawful diversion should at minimum recover enforcement costs and disgorge the economic benefit obtained from the violation. Disgorgement is particularly important during a critically dry year where scarce water is especially valuable and hence when incentives for unlawful diversion are especially strong. Fahey's economic benefit from his unlawful diversion during the FAS Period in 2014

[31] Of the total FAS Period water Fahey reported diverting in 2012 and 2013, Fahey claimed that 2.7 acre-feet and 8.0 acre-feet, respectively, was developed water. (But see section 5.3.2.1, *supra*.)

and 2015 is not more than Fahey's gross sales during the period and is not less than the avoided cost of providing make-up water to senior diverters in those years, assuming, as is reasonable in this case, that this amount is not more than Fahey's net profit.

The record contains evidence as to Fahey's sales during two five- to six-month periods in 2014 and 2015 inclusive of much of the FAS Periods in those years. Fahey admitted that his "Invoice and Contract Sales" for the period from May to October 2014 totaled $119,300.00 and that his "Invoice and Contract Sales" for the period from April to October 2015 was $136,346.36. (PT-72, p. 4.) To estimate Fahey's total sales during the FAS Period in 2014 and 2015, the two years were considered separately due to customer pricing apparently increasing from 2014 to 2015. (PT-66, pp. 26-112; PT-67, pp. 6-9; PT-72, pp. 8-31 [invoiced sales volume]; PT-66, p. 113-114; PT-67, p. 10; and PT-72, pp. 8-31 [contract sales volume]; PT-56, p. 2; PT-57, p. 2; PT-65, pp. 6-8; and PT-67, pp. 6-10 [total volume of diversion reported]; PT-72, p. 4 [dollar amount of sales in 2014 and 2015]; Decl. of G. Scott Fahey in Support of Opposition to Motion, Dec. 8, 2015, ¶ 4 [invoiced customers pay more than contract customers].)[32] During the aforementioned period in 2014 (i.e., May 1, 2014 through September 30, 2014), Fahey reported a total diversion of 18.04 acre-feet (PT-56, p. 2; PT-57, p. 2)[33]; therefore,

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[32] Fahey sold less water overall and less water to invoiced customers, who pay a higher price per acre-foot, during the period for which he reported sales in 2015 than in 2014, yet his sales total was $17,046.36 greater in 2015 than 2014. (PT-66, pp. 26-112; PT-67, pp. 6-9; PT-72, pp. 8-31 [invoiced sales volume]; PT-66, p. 113-114; PT-67, p. 10; and PT-72, pp. 8-31 [contract sales volume]; PT-56, p. 2; PT-57, p. 2; PT-65, pp. 6-8; and PT-67, pp. 6-10; 2015 Progress Report by Permittee for Permits 20784 and 21289 [total volume of diversion reported]; PT-72, p. 4 [dollar amount of sales in 2014 and 2015]; Decl. of G. Scott Fahey in Support of Opposition to Motion, Dec. 8, 2015, ¶ 4 [invoiced customers pay more than contract customers].) Therefore, assuming that the foregoing information is accurate, customer pricing could not have been consistent in 2014 and 2015. The State Water Board takes official notice pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

[33] The reported volume of water diversions from May through September 2014 was calculated by summing the volume of water directly diverted or collected to storage that was reported in the 2014

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Fahey sold water he diverted during this period for an average of $6,611.52 per acre-foot[34] (PT-72, p. 4 [sales during period in 2014]). During the aforementioned period in 2015 (i.e., April 1, 2015 through September 30, 2015), Fahey reported a total diversion of 16.74 acre-feet (PT-65, pp. 6-8; PT-67, pp. 6-10)[35]; therefore, Fahey sold water he diverted during this period for an average of $8,146 per acre-foot[36] (PT-72, p. 4 [sales during period in 2015]). Per Table 2, Fahey diverted 16.55 acre-feet during the FAS Period in 2014 and 8.78 acre-feet during the FAS Period in 2015. Therefore, a reasonable estimate of Fahey's gross sales, or maximum economic benefit, during the FAS Periods of 2014 and 2015 is $181,000.[37]

There is no evidence in the record as to the avoided cost of providing FAS Period make-up water during 2014 and 2015 or other years during the drought emergency, making it difficult to precisely quantify Fahey's minimum economic benefit from unlawful

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Progress Report by Permittee for Permits 20784 (PT-56) and 21289 (PT-57) and converting to acre-feet. The total reported volume of water diversion from May 1, 2014 through September 30, 2014 based on the aforementioned sources is 18.04 acre-feet. This total value was calculated using unrounded figures and then rounded based on the accuracy of the component values.

[34] This value was calculated using unrounded figures and then rounded based on the accuracy of the component values.

[35] The reported volume of water diversion from April through September 2015 was calculated by summing the volume of water directly diverted or collected to storage that was reported in the 2015 Progress Report by Permittee for Permits 20784 and 21289. The volume includes diversions claimed as developed water for the reasons discussed in section 5.3.2.1 of this order. The total reported volume of water diversion from April 1, 2015 through September 30, 2015 based on the aforementioned sources is 16.74 acre-feet. This total value was calculated using unrounded figures and then rounded based on the accuracy of the component values.

[36] This value was calculated using unrounded figures and then rounded to four significant figures based on the accuracy of the component values.

[37] This value is a reasonable estimate but not a precise calculation because Fahey's customers do not all pay the same price for the water Fahey provides and the proportion of the total water sold to each customer type (i.e., contract customer, invoiced customer, or "Special Invoice Customer") varies between the period for which total dollar amount of sales were reported and the FAS Period. (Decl. of G. Scott Fahey in Support of Opposition to Motion, Dec. 8, 2015, ¶ 4 [describing differences in unit price for spring water charged to "Special Invoice Customer" and other customers]).) Pricing may also vary within years as it does between years (see footnote 32.) The estimate of Fahey's FAS Period earnings was calculated using unrounded figures and then rounded to four significant figures based on the accuracy of the component values.

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diversion. In non-drought years, FAS Period replacement water was available from TUD for $60 per acre-foot (R.T., Jan. 25, 2016, p. 191:2–8; see PT-72, p. 46), suggesting that Fahey normally sells his spring water to bottlers at a significant markup compared to what other users would normally pay to acquire water for other purposes. The Prosecution Team's opening statement acknowledges that the spring water "isn't raw ag. water, or even treated municipal water. It's a premium food-grade product that[,] fresh from the spring[,] needs little or no treatment." (R.T., Jan. 25, 2016, pp. 21:25 to 22:3; accord PT-46 [newspaper article discussing market value of Fahey's spring water as a food product].) During 2014 and 2015, the record shows that TUD water was unavailable. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; PT-72, pp. 41–42.) The severity of drought conditions in 2014 and 2015, when water was not available to serve many senior claims of right on the San Joaquin River and its tributaries (e.g., PT-42, PT-43, PT-153), suggests that an alternative source of FAS make-up water would have been more expensive. Therefore, Fahey's minimum economic benefit from unlawful FAS Period diversions can be reasonably assumed to be more than $60 per acre-foot, or more than $1,520.[38]

In disgorgement, a claimant must show a causal connection between a defendant's wrongdoing and a reasonable approximation of the measurable increase in the defendant's net assets attributable to the wrongful conduct. (Rest. (Third) Restitution and Unjust Enrichment, § 51(5)(a) (2011).) Even if damages are unascertainable amount below an upper limit and uncertainty arises from a defendant's wrong, the upper limit is still considered the proper amount. (*Gratz v. Claughton* (2d Cir. 1951) 187 F.2d 46, 51–52.) The defendant bears the risk of uncertainty arising from the wrong and the evidentiary burden to demonstrate wrongfully gained profits are less than the upper limit. (Rest. (Third) Restitution and Unjust Enrichment, § 51(5)(d) (2011).)

[38] Fahey's minimum economic benefit was calculated by multiplying the cost of water from TUD in non-drought years ($60 per acre foot) by the volume of water unlawfully diverted by Fahey during the FAS Period in 2014 and 2015 (25.33 acre-feet). The value was calculated using the unrounded volume and then rounded to four significant figures based on the accuracy of the component values.

The Prosecution Team offered evidence reasonably approximating the Fahey's economic benefit. (PT-72, p. 4; PT-65, pp. 6–8; PT-67, pp. 6–10.) The Prosecution Team utilized every available means to reasonably approximate the Fahey's economic benefit, with an information order, subpoena, and a motion to compel. (PT-3, pp. 6–7; Prosecution Team, Motion to Compel Production of Documents in Response to Subpoena Duces Tecum (Nov. 25, 2015).) The Prosecution Team met its burden. Although Fahey's exact net profits may be uncertain, his gross sales are nonetheless the "upper limit" considered an appropriate and reasonable approximation of the economic benefit attributable to his unauthorized diversion.

Once the Prosecution Team met its burden of reasonably approximating Fahey's economic benefit, the burden shifted to Fahey to offer evidence showing his economic benefit was less than the Prosecution Team's reasonable approximation. (Rest. (Third) Restitution and Unjust Enrichment, § 51(5)(d) (2011).) However, Fahey refused to disclose this information, waiving any argument his economic benefit was less than the Prosecution Team's reasonable approximation. (Opposition of G. Scott Fahey and Sugar Pine Spring Water, L.P. to Motion to Compel Production of Documents in Response to Subpoena Duces Tecum (Dec. 18, 2015); Procedural Ruling: Motion by Prosecution Team to Compel Production of Documents in Response to Subpoena Duces Tecum (Dec. 21, 2015), p. 5.) This is not to say Fahey must disclose confidential financial information; only that Fahey had the burden to present evidence and argument demonstrating that his economic benefit was less than the Prosecution Team's reasonable approximation. He did not do so. Thus, there is no evidence that Fahey's economic benefit for unauthorized diversion was less than $181,000.

The State Water Board will consider the issue of Fahey's economic benefit further, below, in section 7.2.

7.1.2.2 Fahey's Failure to Demonstrate and Potentially Meet Mandatory Bypass Flows and Comply with Other Permit Terms Demonstrates Negligence

Section 5.4 of this order described the Prosecution Team's allegation that Fahey failed to meet bypass flow requirements under Permit 21289 during nine months between 2014 and 2015 based on information provided by Fahey in response to the September 1, 2015 Information Order. Mr. LaBrie testified that the information Fahey provided in response to the September 1, 2015 Information Order showed that Fahey was diverting in violation of his bypass flow requirements during at least nine of the eleven months from May through October, inclusive, in 2014 and from April through August, inclusive, in 2015. (See PT-11, p. 8, ¶ 45; R.T., Jan. 25, 2016, p. 120:13–19.) This conclusion appears to be based on PT-66 pages three to five, titled "Response to Information Request 2(B)(1)," that "reported bypass amounts in what appear to be average monthly rate of flow." (R.T., Jan. 25, 2016, p. 120:14–15.) Part 2(B)(1) of the Information Order states the Fahey shall provide "documentation of compliance with bypass amounts as required by Permit 21289." (PT-3, p. 6.)

Term 20 of Permit 21289 requires that Fahey "continuously bypass a minimum of 5 gallons per minute" at each point of diversion. (PT-16, p. 6, ¶ 20.) For each point of diversion, when total streamflow is less than 5 gallons per minute, the entire flow must be bypassed. (*Ibid.*) Therefore, when diverting from both Marco and Polo springs, Fahey is required to bypass 10 gallons per minute or the total streamflow, and when diverting from only one of these springs, Fahey is required to bypass 5 gallons per minute or the total streamflow. In response to the Information Order, Fahey reported bypassing a monthly average of less than 10 gallons per minute in June, July, September, and October of 2014 and from April through August of 2015. (PT-66, pp. 3–5; see also R.T., Jan. 25, 2016, pp. 119:25 to 120:19.) Fahey reported diverting from Marco and Polo Springs in all months of 2014 except January. (PT-59.) He reported diverting from Marco and Polo Spring in all months of 2015 except August, for which he only reported diverting from Marco Spring. (PT-65, pp. 3–8.) However, for August 2015, Fahey reported bypassing only 2.1 gallons per minute. (PT-66, pp. 5.) Given that Fahey reported average monthly bypass flows below the 5 or 10 gallon per minute

thresholds and he did not provide information regarding total streamflow, Fahey's response to the information order was insufficient to demonstrate his compliance with his bypass flow requirements as required by the Information Order. (PT-3, p. 6, ¶ 2(B).)

In his oral testimony, Mr. Fahey disputed the allegation that he failed to meet his bypass flow requirements under Permit 21289 in 2014 and 2015. He testified that the bypass flow information he provided in response to the Information Order represented a calculation of the flow released "to the stream beyond" at the water tank, not at the point of diversion of the springs. (R.T., Jan. 25, 2016, p. 151:15–25; see also PT-9, p. 2, ¶ 10 [describing water tanks].) He also testified that he had maintained the required bypass flows at the points of diversion, including during curtailment in 2014 and 2015. (R.T., Jan. 25, 2016, p. 151:6–25.) Mr. Fahey did not provide documents or other evidence to support this testimony. However, his explanation is consistent with other testimony he provided regarding his method and frequency of his measurement of bypass flows at his points of diversion. (See R.T., Jan. 25, 2016, pp. 180:13 to 181:5.) Assuming his testimony is accurate, Mr. Fahey did not provide an explanation for why his response to the Information Order did not contain the requested documentation of compliance with his bypass amounts required by Permit 21289.

The hearing record demonstrates that Fahey failed to take sufficient measures to demonstrate compliance with his bypass flow obligations in response to the Information Order. In addition, if Fahey's response to the Information Order is accurate, Fahey also likely failed to meet his bypass flow obligations on at least some occasions time during 2014 and 2015.

Fahey failed to meet other requirements of his permits even prior to 2014 and 2015. For example, between 2010 and 2014, Fahey's annual water use reports indicate violations of Term 5 of Permit 20784 by diverting at a rate exceeding the maximum rate of diversion allowed by the permit at one or both springs during 33 months of the

48-month period, including the entire FAS Period in 2010, 2011, and 2012.[39] (PT-15, p. 4, ¶ 5 [maximum combined rate of diversion]; SWRCB-1, Permit 20784 Report of Permittee for 2010 and 2011; Fahey-57, p. 1265 [Permit 20784 Report of Permittee for 2012]; Fahey-58, p. 1269 [Permit 20784 Report of Permittee for 2013].) In addition, Fahey testified that he did not notify the State Water Board that he had positioned water in NDPR prior to his June 3, 2014 letter in violation of Terms 19 and 20 of Permit 20784 and Term 34 of Permit 21289, which require that he report to the Board the source, amount, and location at NDPR of replacement water discharged to the reservoir with his annual Progress Reports of Permittee. (R.T., Jan. 25, 2016, pp. 170:24 to 171:9 [Fahey did not inform Board of water replacement for his diversions in 2014]; PT-15, pp. 6–7, ¶¶ 19–20 [Term 19 and 20, Permit 20784]; PT-16, p. 9, ¶ 34 [Term 34, Permit 21289].) Section 5.2.3.2 of this order described how Fahey also failed to report necessary information to MID and TID in 2014 and 2015 consistent with the format and deadlines specified in his permits.

While violation of other permit term requirements does not add to the number of days of violation or the amount unlawfully diverted, and thus does not increase the maximum liability that may be imposed, the violations are relevant circumstances in determining the liability to impose. Violation of multiple requirements over a given period is more serious than violation of a single requirement over the same period. It is also indicative of a lack of attention to permit requirements. Failing to properly report, as well as potentially meet, bypass flow requirements and comply with other reporting requirements suggests that Fahey has been careless, at best, in understanding and honoring his obligations.

[39] In Fahey's Reports of Permittee for 2010 through 2013, Fahey reported a portion of the total water diverted in these years to be under a developed water right, not under Permit 20784. (But see section 5.3.2.1, *supra*.)

7.1.2.3 Fahey Genuinely Misunderstood His Obligations to Senior Diverters

There is evidence that Fahey genuinely believed that the water he pre-positioned in NDPR from 2009 to 2011 counted towards FAS Period make-up water requirements in 2014 and 2015 and that his actions were sufficient to satisfy MID and TID. At the hearing, Mr. Fahey gave testimony about a conversation he had with one LeRoy Kennedy circa 1992. According to Mr. Fahey, Mr. Kennedy represented MID and TID during their negotiations of the 1992 Water Exchange Agreement with Fahey. (R.T., Jan. 25, 2016, p. 158:14–24.) Per Mr. Fahey's description of the conversation, Mr. Kennedy told Mr. Fahey that preparing the Water Exchange Agreement "was more effort than the amount of water deserved," and that Mr. Kennedy "didn't want me corresponding with regards to this document," i.e., the Water Exchange Agreement, "to either of the districts." (*Id.*, p. 159:22–25.) Mr. Fahey further testified that Mr. Kennedy "wanted me to respond. If they contacted me, and he said, '[y]ou will know when we contact you,' . . . [b]ut prior to that I was not to correspond with the districts regarding the matter." (*Id.*, pp. 159:25 to 160:4.) In their May 23, 2016 Procedural Ruling, the Hearing Officers found that Mr. Kennedy's hearsay statements were admissible to support a finding as statements of a party-opponent and were also admissible to supplement and explain other evidence and to explain Mr. Fahey's intent and understanding. (See May 23, 2016 Procedural Ruling, p. 14.)

The State Water Board is generally skeptical of this kind of testimony. Even if it is admissible, hearsay statements by party-opponents are unlikely to be credible if they are unsubstantiated, are uncorroborated by other evidence, or were made in the distant past. Here, however, there is at least some evidence in the record to corroborate Mr. Fahey's recollection of his conversation with Mr. Kennedy. Other evidence in the record demonstrates that Mr. Kennedy existed and that he worked with Mr. Fahey on the Water Exchange Agreement and other matters related to Application 29977. (E.g., SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 1, Letter from G. Scott Fahey to LeRoy Kennedy, Turlock Irrigation District (April 7, 1992); *id.*, Letter from Arthur F. Godwin, Attorney for the Turlock Irrigation District, to G. Scott Fahey (Feb. 7, 1992)

[cc'ing LeRoy Kennedy] [hereinafter Godwin Letter].) In the Godwin Letter, MID and TID's attorney, Arthur F. Godwin, opines that "[a]ny water transfer will require considerable supervision by the Districts to ensure that a sufficient amount of water is being transferred." (Godwin Letter.) MID and TID required Mr. Fahey to make a $500 deposit "to cover any necessary legal fees and staff time" before TID "evaluates any serious proposals." (*Ibid.*) Mr. Godwin's letter and the fact that TID required a deposit are consistent, at minimum, with the general idea that MID and TID were concerned about the amount of time and effort needed to supervise Fahey's diversions during the period in which Fahey, MID, and TID were negotiating the Water Exchange Agreement.

Other evidence in the record corroborates at least a general understanding that the Interveners have been imperfect in their attention to the task of supervising Fahey's activities since he received his first permit in 1995. The 1992 Water Exchange Agreement between Fahey, MID, and TID specifies that Fahey shall provide make-up water to NDPR for his FAS Period diversions by pumping an equivalent amount of groundwater from a specific well defined with specific geographic coordinates. (PT-19, pp. 1–2, ¶ 3.) By its terms, the Water Exchange Agreement "may be amended only by a written instrument executed by all the parties." (PT-19, p. 2, ¶ 11.) Fahey contacted MID and TID by letter dated April 29, 1995 to formally request an amendment allowing him to provide make-up water from TUD instead of from a well. (SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 2, Letter from G. Scott Fahey to Attn: General Manager, Turlock Irrigation District (April 29, 1995); *id.*, Letter from G. Scott Fahey to Attn: General Manager, Modesto Irrigation District (April 29, 1995).) Fahey's letters enclosed draft language proposing to amend paragraphs three and seven of the Water Exchange Agreement. (*Ibid.*) Fahey specifically requested MID and TID's written approval of his proposed amendment before he would execute an agreement with TUD. (*Ibid.*)

MID and TID knew, or should have known, that Fahey's 1995 protest settlement agreement with CCSF required water deliveries from a source other than the well. (E.g., SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 2, Letter from G. Scott

Fahey to David Beringer, State Water Board (June 20, 1995) [clarifying that TUD replacement water is not hydrologically connected to NDPR; cc'ing MID and TID].) Yet nothing in the record or the correspondence file indicates that MID and TID ever required that the Water Exchange Agreement be amended in writing, notwithstanding the express condition that changes could only be made "by a written instrument executed by all the parties." MID and TID protested Fahey's Application 31491 on November 9, 2004. (Fahey-41, p. 687; see also SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Protest of Modesto Irrigation District and Turlock Irrigation District, p. 4 (Nov. 9, 2004) [containing fourth page of protest not included in Fahey-41].) Response 3.F. of the protest states that "[t]he Districts further request that the State Board, prior to granting the Application, require that the applicant provide to the Districts proof that it provided replacement water to New Don Reservoir [sic] as required by Paragraph 19 of Permit 20784 and subparagraph 2 of Paragraph 20 of said permit." (SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Protest of Modesto Irrigation District and Turlock Irrigation District, p. 4 (Nov. 9, 2004).) This request is notwithstanding the Water Exchange Agreement's requirement that Fahey provide bi-annual reports to MID and TID showing the amount of water diverted monthly by Fahey and the amount of water discharged into NDPR. (PT-19, p. 2, ¶ 7.) The two permit terms referenced in MID and TID's protest both explicitly refer to the Water Exchange Agreement. (See PT-15, p. 6, ¶ 19; *id.*, pp. 6–7, ¶ 20, subd. 2.)

Fahey replied to MID and TID's protest by letter dated November 16, 2004. The letter states, among other things, that "Regarding response 3.F. of the Districts' protest: the Districts may call Tuolumne Utility District, Joe Whitmer . . . to confirm that during 2004 41 ac-ft of Stanislaus River water was released into Lake Don Pedro, and that 41 ac-ft will be released from the same source to Lake Don Pedro in 2005." (SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Letter from G. Scott Fahey to Scott Tiffin, Counsel for MID and TID (Nov. 16, 2004).) Nothing in the correspondence file or the

record indicates whether MID or TID ever contacted Mr. Whitmer or TUD.[40] A March 18, 2011 letter from MID and TID's attorney regarding their protest discusses Fahey's agreement with TUD and quotes notice language discussing "a water exchange agreement with Turlock Irrigation District, Modesto Irrigation District, and the City and County of San Francisco for the period from June 16 to October 31 of each year when water is not available for appropriation in the Tuolumne River and the Sacramento-San Joaquin Delta systems." (See Fahey-53, p. 1043; see also Fahey 39, p. 1.) However, MID and TID's counsel's letter does not discuss or even mention Fahey's 1995 written request to amend the Water Exchange Agreement or the draft terms that Fahey provided to MID and TID. (See Fahey-53, pp. 1043–1044.) This letter does not discuss or even mention Fahey's 2004 letter providing instructions for how to confirm that Fahey had delivered TUD water to NDPR in 2004. (*Ibid.*) The version of the water exchange agreement offered into evidence by both the Prosecution Team and Fahey—apparently, the operative version of the agreement—still requires Fahey to provide make-up water from the well identified in 1992. (PT-19, pp. 1–2, ¶ 3; Fahey-6, pp. 130–131, ¶ 3.)

Fahey and CCSF negotiated a separate protest settlement agreement for Application 29977 between 1993 and 1995. (See section 5.1.4.3, *infra*; see also generally, Fahey-12 to Fahey-19.) Ultimately, CCSF agreed to dismiss its protest in exchange for adding what is now Term 20 to Permit 20784. (Fahey-15; Fahey-19; see also PT-15, pp. 6–7, ¶ 20.) Fahey appears to have sent CCSF's attorney, Christiane Hayashi, a draft copy of his replacement water contract with TUD under cover letter dated April 29, 1995. (SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 2, Letter from G. Scott Fahey to Christiane Hayashi, City and County of San Francisco (April 29, 1995).) The Division questioned whether TUD was an appropriate source of replacement water by letter dated June 14, 1995. (*Id.*, Letter from David Beringer, State

[40] There is some evidence in the record indicating that records of water deliveries from TUD into NDPR prior to 2009 were not preserved, or that no deliveries occurred. Exhibit PT-72 includes an email from TUD staff to Fahey regarding an unsuccessful search for such records. (PT-72, p. 35.) Mr. Fahey also testified that no FAS replacement water was provided from TUD before 2009. (R.T., Jan. 25, 2016, 247:7–19.)

Water Board to G. Scott Fahey (June 14, 1995).) Fahey evidently addressed these concerns during a June 20, 1995 telephone conversation, memorialized in a letter that carbon-copied all the Interveners, and the Division confirmed that it was satisfied by letter dated July 28 of that year. (*Id.*, Letter from G. Scott Fahey to David Beringer, State Water Board (June 20, 1995); *id.*, Letter from David Beringer, State Water Board to G. Scott Fahey (July 28, 1995); see also Fahey-65 [copy of July 28, 1995 letter].)

Fahey filed Application 31491 nearly a decade later. Fahey posted notices of the application on or about October 13, 2004. (SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Statement of Posting Notice (rec'd Oct. 18, 2004); see also Fahey-39.) Dennis Herrera, City Attorney for CCSF, objected to the Notice's contents by letter dated November 8, 2004. (Fahey-40, p. 685.) Among other concerns, Mr. Herrera objects that CCSF was "unaware that the applicant previously executed an agreement. On April 25, 1995 [sic] applicant submitted a draft agreement with Tuolumne Utilities District to the SWRCB, but the Board did not approve it as indicated in its letter of June 14, 1995." (*Ibid*.) The State Water Board's correspondence files do not contain an April 25, 1995 letter from Fahey to CCSF. Mr. Herrera is most likely referring to Fahey's letter dated April 29, 1995, or perhaps to a similar letter. Copies of the Division's June 14 and July 28, 1995 letters retained in the Board's correspondence files do not indicate that CCSF was carbon copied on either letter, and it is unclear how Mr. Herrera obtained or reviewed a copy of the June 14 letter. (See SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 2, Letter from David Beringer, State Water Board to G. Scott Fahey (June 14, 1995); *id.*, Letter from David Beringer, State Water Board to G. Scott Fahey (July 28, 1995).) Nothing in the correspondence files or the record indicates that CCSF ever contacted Fahey or the Board between 1995 and 2004 to obtain a copy of Fahey's final agreement with TUD.

Mr. Kennedy's hearsay statements would be stronger evidence, of course, if Fahey had contemporaneously documented them in some way. However, the fact that Fahey did not do so is not fatal. Likewise, under the circumstances of this case, the State Water Board is not troubled by the long passage of time that occurred between Mr. Kennedy's

utterance and Mr. Fahey's opportunity to testify at the hearing. The conversation apparently happened when Mr. Fahey personally reached out to Mr. Kennedy to thank him for his help. (R.T., Jan. 25, 2016, pp. 158:25 to 159:8.) It is not so difficult to believe that an unexpected or ungracious response to being thanked could have endured in Mr. Fahey's memory for all these many years. MID, TID, and CCSF were all represented by counsel at the hearing. Each party had the opportunity to cross-examine Mr. Fahey and to challenge his recollection of the 1992 conversation with Mr. Kennedy. The Interveners declined to do so. (See R.T., Jan. 25, 2016, p. 224:10–20; R.T., Jan. 26, 2016, pp. 136:22 to 137:4.)

For all these reasons, Mr. Fahey's recollection of his conversation with Mr. Kennedy circa 1992 is credible. In section 5.3.1.1, above, the State Water Board found that Fahey delivered about 88.31 acre-feet of water into NPDR. The Board also found that about 33.99 acre-feet were still available if called upon to meet non-FAS Period replacement water requirements. Fahey's recollection of Mr. Kennedy's statements, and the pattern of interactions with the Interveners' described above, give credence to Mr. Fahey's testimony that he genuinely believed providing this water was good enough to meet his make-up water requirements during the FAS Period. They also provide context to Fahey's failure to report his diversions to MID and TID, as described in section 5.2.3.2 above; Fahey may have understood Mr. Kennedy's alleged direction not to correspond with the Interveners to include the biannual reporting requirement described in the Water Exchange Agreement. These considerations do not excuse or justify unlawful diversion, but it does inform the Board's civil penalty calculations and the Board's determination of what corrective measures are appropriate.

Fahey contends, in essence, that permit terms forbidding him from interfering with the Interveners' water accounting at NDPR prevent him from providing FAS Period make-up water unless called upon by the Interveners. (E.g., Fahey's Closing Brief, June 17, 2016, pp. 17:7 to 18:12.) This argument is without merit for the reasons stated in section 5.2.3.1, above. At the hearing, Mr. Fahey also testified that:

> I am not going to risk 25 years of my life now, and my entire livelihood to save $2,500 to gyp somebody out of a very miniscule amount of water in the big picture. This is a very minor expense in my business. What reasonable person would risk a very small expense to go through something like this?

(R.T., Jan. 26, 2016, p. 78:3–8.)

The State Water Board is inclined to agree. Fahey has invested decades of his life in his spring water business. He has worked to develop it since 1991. (Fahey-3.) FAS Period replacement water was available from TUD for $60 an acre-foot in other years. (See PT-72, p. 46.) TUD water was not available in 2014 or 2015 (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; PT-72, pp. 41–42), and the record does not indicate the going rate for other make-up water that may then have been available. Although the price of make-up water would probably have exceeded $60 per acre-foot, it would be very surprising if Fahey could not obtain an acre-foot of replacement water from somewhere for less than $6,612 to $8,146. Fahey promptly filed curtailment certifications when asked, gave timely responses to inquiries from Board staff, and continued to report his diversions to the Board as required. (E.g., Fahey-60; PT-35; PT-36; PT-11, p. 3–4, ¶¶ 11–15; PT-13, p. 4, ¶ 20.)

The better explanation for the unlawful diversion is that Fahey genuinely believed he had already met his obligations to downstream senior diverters. Fahey's mistake, his apparent reliance on long-ago representations by the Interveners, his apparent reliance on the Interveners' failure to timely inform him of his error, and his experience working with the Interveners does not justify or excuse an unlawful diversion. All of these considerations, however, are relevant to setting an appropriate civil penalty for unlawful diversions that most likely deprived the very same senior diverters of water and violated permit terms specifically crafted to protect their interests. Going forward, Fahey must now be aware that he must provide the Interveners with notice of his water diversions and deliveries to NDPR pursuant to the terms of his permits and the Water Exchange Agreement.

7.1.3 Length of Time over Which the Violation Occurred

Fahey made unauthorized diversions of water during the FAS Period for 178 days in 2014 and 2015. By his own admission, Fahey did not provide any water to MID or TID, as required by his permits and the Water Exchange Agreement with MID and TID, in either year. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; accord PT-9, p. 6, ¶ 30.) Fahey admitted that he last arranged to deliver water to NDPR in 2011. (R.T., Jan. 25, 2016, pp. 195:24 to 196:5.) Evidence in the record shows that Fahey did not provide make-up water for his FAS Period diversions on a consistent basis in prior years. As discussed in section 5.3.1.1, Fahey failed to meet his obligation to provide make-up water for his full FAS Period diversions in 2011. (See Table 4, *supra* [demonstrating that Fahey did not provide sufficient make-up water for FAS Period diversions in 2011]; Prosecution Team's Closing Brief, June 17, 2016, p. 15:15–25.) During the FAS Periods in 2012 and 2013, Fahey diverted at least 28.3 acre-feet and at least 10.4 acre-feet, respectively,[41] without providing any FAS Period make-up water in those years. (Fahey-57, p. 1265 [Permit 20784 Report of Permittee for 2012]; Fahey-58, p. 1269 [Permit 20784 Report of Permittee for 2013]; SWRCB-1, Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013 because it was unavailable].)

As discussed above in section 7.1.2, Fahey also appears to have violated numerous other permit terms including maximum diversion rates, reporting requirements, and potentially bypass flow requirements for times between 2010 and 2015.

7.1.4 Corrective Action

The record does not identify any corrective actions taken by Fahey. As was discussed above in section 7.1.2.3, evidence in the record supports a finding that Fahey genuinely believed that he had FAS Period make-up water available for MID and TID if they called

[41] Of the total FAS Period water Fahey reported diverting in 2012 and 2013, Fahey claimed that 2.7 acre-feet and 8.0 acre-feet, respectively, was developed water. (But see section 5.3.3.)

for it. Fahey promptly submitted a curtailment certification in response to the 2014 Unavailability Notice and 2015 Unavailability Notice. (See PT-35; PT-36.)

7.1.5 Other Relevant Circumstances

The Prosecution Team expended an estimated $15,624 investigating Fahey's diversions and preparing the enforcement action and estimated, as of December 15, 2015, that taking the case to a hearing would cost an additional $10,000. (PT-9, p. 7, ¶¶ 37–38 [costs]; *id.*, p. 8 [date signed].) Apparently, actual Prosecution Team costs for the hearing were higher than initially anticipated due to attorney and staff time spent responding to prehearing motions. (R.T., Jan. 25, 2016, p. 43:21–23.) These figures do not include costs associated with the Hearing Officers' time or staff costs for the personnel assisting them. All else equal, the State Water Board should set administrative civil penalties for unlawful diversion that at least recover the costs of an enforcement hearing.

Fahey's pre-enforcement efforts to establish a defense to unlawful diversion are also relevant to determining an appropriate civil penalty for unlawful diversion. Fahey responded to the 2014 Unavailability Notice with a letter dated June 3, 2014 (Fahey-60) providing a Curtailment Form (Fahey-61). These documents describe the TUD water Fahey had delivered to NDPR between 2009 and 2011. (Fahey-60, p. 1277; Fahey-61, pp. 1278–1279; accord PT-7, p. 3, ¶ 14.) The record indicates that the Division did not deny or even follow-up on Fahey's claimed defense prior to commencing its investigation. Prosecution Team witness John O'Hagan testified that there was not a process for responding to claimed defenses to unlawful diversion. (R.T., Jan. 25, 2016, 109:12–23.) Prosecution Team witness David LaBrie testified that he left three voicemail messages for Mr. Fahey over the course of several weeks beginning in late May 2015, seeking to schedule a compliance inspection (*Id.,* p. 56:19–22). Mr. LaBrie testified that Fahey first returned his calls on June 12, 2015. (*Id.,* p. 56:23–24). Mr. LaBrie sent an email later the same day, which appears to be the Division's earliest statement to Fahey that identifies a potential problem. (See Fahey-64; R.T., Jan. 25, 2016, 35:22 to 36:4.)

In rebuttal, the Prosecution Team introduced evidence and testimony explaining that the Division issued 9,254 unavailability notices and received 3,531 curtailment certification forms for 2014. (PT-153, p. 15.) For 2015, the Prosecution Team testified that it issued more than 9,300 unavailability notices and received 3,688 curtailment certification forms. (PT-153, p. 15.) At the hearing, Mr. Coats testified that it was "[c]orrect" that "the fact that Mr. Fahey filed his curtailment certification form in 2014 and it took roughly a year to get to him, that was largely due to allocation of staffing resources in response to drought management." (See R.T., Jan. 26, 2016, p. 31:3–7.) Among other tasks, the Division apparently performed over 1,000 inspections in each year between 2014 and 2015. (*Id.*, p. 30:24–25.) The record indicates that Mr. Fahey never received a response to his June 3, 2014 curtailment certification form claiming a defense to unlawful diversion. (R.T., Jan. 1, 2016, 162:14 to 163:3.) According to Mr. Fahey's testimony, if the Division had told him that a decision had been made by Board staff that rejected his 2014 claimed defense to unlawful diversion, Mr. Fahey "would have asked immediately for a hearing." (R.T., Jan. 25, 2016, 169:22 to 170:6.)

7.2 Conclusion Regarding Amount and Suspension of Administrative Civil Liability

In determining the amount of civil liability, the State Water Board has taken into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator. The State Water Board finds that the evidence shows that Fahey unlawfully diverted 25.33 acre-feet during 178 days of diversion during the FAS Period in 2014 and 2015. During a period for which the Governor had issued a proclamation of a state of emergency based on drought conditions, the Board has the authority to assess administrative civil liability in an amount not to exceed the sum of $1,000 per day in which trespass occurs and $2,500 per acre-foot diverted or used in excess of the diverter's water rights. (Wat. Code, § 1052, subd. (c)(1).) Therefore, the maximum civil

liability in this case for unlawful 2014 and 2015 FAS Period diversions is $241,325, i.e., (178 days * $1,000 per day) + (25.33 acre-feet * $2,500 per acre-foot).[42]

Fahey earned on average $6,612 to $8,146 per acre-foot in gross receipts for the unlawful diversion during the FAS Period in 2014 and 2015, respectively, resulting in an economic benefit of $181,000. Fahey presented no argument or evidence that his economic benefit was less than this amount. Despite the apparent increase in the price for which Fahey sold water between these years (see section 7.1.2.1), there is no evidence in the record that Fahey's gross receipts increased as a result of the drought. Therefore, Fahey's earnings may be consistent with his normal operations. All else equal, a civil penalty for unlawful diversion should at minimum recover the economic benefit obtained from the violation.

It appears that Fahey has a long history of failing to provide make-up water under the terms of his permits, although the record also suggests that Fahey genuinely misunderstood this obligation and that this misunderstanding arose, in part, because of the Interveners' longstanding statements and actions. In addition, there is no evidence in the record of any specific harm to the Interveners and it appears, based on the record, that Fahey could make them whole by delivering the water they are owed or otherwise providing restitution. Regardless, Fahey's obligation to provide FAS Period make-up water is clear under the plain language of his permits and the Water Exchange Agreement between Fahey and MID and TID. Fahey was negligent, however genuine his mistake may have been. Fahey's failure to file reports and take sufficient measures to demonstrate his compliance with bypass flow requirements in response to the Information Order is, at best, further evidence of negligence. Water rights are a serious matter. Administrative civil liability is warranted to deter even violations that occur

[42] Fahey has two water right permits. The Board does not determine in this order how to apply the unlawful diversion to two permits.

despite the exercise of due care, with higher penalties justified for negligent or knowing violations.

The Prosecution Team incurred costs of more than $25,000 investigating and prosecuting this case, while the State Water Board incurred additional costs associated with holding the hearing, resolving pre- and post-hearing motions, and preparing an order. Administrative civil liability is warranted to recover these costs.

Corrective actions, restitution to MID and TID for the water they are owed, and an operations plan to prevent unlawful diversion in the future, are necessary to ensure that Fahey complies with his permits. In these circumstances, suspension of administrative civil liability is warranted to promote timely completion of the necessary corrective actions.

For the foregoing reasons and the reasons stated in this order, the State Water Board finds that administrative civil liability in the amount of $215,000 is appropriate in response to Fahey's unlawful diversions. Of this amount, $50,000 should be due immediately and the remaining $165,000 should be suspended pending the successful implementation by Fahey of all corrective actions described below by the applicable deadline.

First, no later than June 30, 2020, Fahey shall provide restitution to MID and TID for his FAS Period diversions during 2014 and 2015 and timely provide documentation of the restitution to the State Water Board. Water delivered to MID, TID, or CCSF for any other purpose may not be credited as restitution. This includes but is not limited to water delivered to MID, TID, or CCSF for the purpose of complying with Fahey's permit terms in years other than 2014 or 2015. Restitution may be made either by causing not less than 25.33 acre-feet of lawfully diverted water to be delivered to New Don Pedro Reservoir from a non-tributary source, whether from TUD or another suitable transferor; or in another manner on which Fahey, TID, and MID mutually agree and memorialize in a written instrument that is signed by all parties.

Second, Fahey shall submit a draft Curtailment Operation Plan to the Division by June 30, 2020 for review and comment by the Division. The plan must be sufficient to ensure that all downstream senior diverters are not injured by Fahey's diversions and shall, at minimum: (1) describe measures sufficient to ensure that Fahey complies with the terms of Permits 20784 and 21289 and the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID as it may be amended, including during years when water is not available from the transferor designated by the agreement and (2) describe measures sufficient to ensure that Fahey does not divert adverse to downstream senior claims of right other than MID or TID. These measures may include ceasing diversion, providing water from a transferor, or such other measures as Fahey and the owner of the downstream senior claim of right may mutually agree and memorialize in a written instrument that is signed by all parties. Fahey may satisfy this obligation for claims of right in the Sacramento-San Joaquin Delta (Delta) downstream of the confluence of the San Joaquin River and Middle River by identifying a cumulative estimate of lawful diversion demand in the Delta, in situations when water is not available for the most senior water right upstream of the confluence of the San Joaquin River and Middle River.

Third, Fahey shall submit a final Curtailment Operations Plan to the Division by June 30, 2021 for review and approval by the Deputy Director. If applicable, Fahey shall resubmit an amended final Curtailment Operations Plan to the Deputy Director within ninety (90) days of the date of the written notice of rejection if the Deputy Director rejects the final Curtailment Operations Plan. Nothing in the final Curtailment Operations Plan shall be construed to modify Fahey's obligations to MID, TID, or CCSF in any way.

The Deputy Director may extend these compliance deadlines upon a showing of good cause.

8.0 CONCLUSIONS

a. Fahey is making unauthorized diversions of water, which constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a).

b. A cease and desist order is appropriate to require Fahey to take corrective action pursuant to the compliance milestones described above.

c. Administrative civil liability in the amount of $215,000 is appropriate in response to the unlawful diversion of water during the 2014 and 2015 FAS Period in violation of his permit terms and when water was not available to serve his priority of right. Of this amount, $50,000 should be due immediately. The remaining $165,000 should be suspended pending Fahey's completion of all corrective actions in compliance with the required schedule.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT, based upon the foregoing findings:

I. The State Water Resources Control Board (State Water Board or Board) hereby ORDERS that, pursuant to Water Code sections 1831 through 1836, G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) shall:

A. Cease and desist continued and threatened unauthorized diversion under Permit 20784 (Application 29977) and Permit 21289 (Application 31491);

B. Cease and desist diversion under Permit 20784 (Application 29977) and Permit 21289 (Application 31491) in a manner inconsistent with the December 12, 1992 Water Exchange Agreement between Fahey, Modesto Irrigation District (MID), and Turlock Irrigation District (TID), as it may be amended;

C. File an annual report with the Division of Water Rights (Division) documenting and substantiating Fahey's compliance with his bypass flow obligations under

Permit 20784 and Permit 21289 for diversions occurring in 2018 and thereafter. Unless Fahey and the Division agree to an alternative arrangement, the bypass flow report for each year shall be due on the same day as the report of permittee filed for that year, as specified in title 23, section 925 of the California Code of Regulations as it may be amended;

D. File reports with MID and TID showing his diversion amounts and replacement water deliveries to MID and TID as required by the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID, as it may be amended;

E. Annually report the source, amount, and location at New Don Pedro Reservoir (NDPR) of replacement water discharged into NDPR to the State Water Board with the annual Progress Report by Permittee pursuant to term 20 of Permit 20784 and term 34 of Permit 21289;

F. Provide restitution to MID and TID no later than June 30, 2020, for his fully appropriated stream period (FAS Period) diversions during 2014 and 2015 and timely provide documentation of the restitution provided to the State Water Board. Water delivered to MID, TID, or the City and County of San Francisco (CCSF) for any other purpose may not be credited as restitution. This includes but is not limited to water delivered to MID, TID, or CCSF for the purpose of complying with Fahey's permit terms in years other than 2014 or 2015. Restitution may be made in either of the following ways:

    1. By causing not less than 25.33 acre-feet of lawfully diverted water to be delivered to NDPR from a non-tributary source, whether from the Tuolumne Utilities District (TUD) or another suitable transferor; or

    2. In such other manner as Fahey, TID, and MID may mutually agree and memorialize in a written instrument that is signed by all parties.

G. Submit a draft Curtailment Operations Plan to the Division by June 30, 2020 for review and comment by the Division. The draft Curtailment Operations Plan shall, at minimum:

1. Describe measures sufficient to ensure that Fahey complies with the terms of Permits 20784 and 21289 and the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID as it may be amended, including during years when water is not available from the transferor(s) designated by the agreement. These measures may include ceasing diversion, providing water from another transferor, or such other measures as Fahey, MID, and TID may mutually agree and memorialize in a written instrument that is signed by all parties.

2. Describe measures sufficient to ensure that Fahey does not divert adverse to downstream legal users of water other than MID or TID. These measures may include ceasing diversion, providing water from a transferor, or such other measures as Fahey and the owner of the downstream senior claim of right may mutually agree and memorialize in a written instrument that is signed by all parties. Fahey may satisfy this obligation for claims of right in the Sacramento-San Joaquin Delta (Delta) downstream of the confluence of the San Joaquin River and Middle River by identifying a cumulative estimate of lawful diversion demand in the Delta, in situations when water is not available for the most senior water right upstream of the confluence of the San Joaquin River and Middle River.

3. Describe any approvals necessary to implement the Curtailment Operations Plan from any local, state, or federal agencies.

H. Submit a final Curtailment Operations Plan to the Division by June 30, 2021, for review and approval by the Division of Water Rights Deputy Director (Deputy Director). The Deputy Director will review and approve the final Curtailment

Operations Plan upon a showing that it complies with the requirements of this order in a feasible, legal, and expeditious manner. The Deputy Director may revise the final Curtailment Operations Plan and approve it as modified in order to ensure compliance with the requirements of this order. The Deputy Director will reject the final Curtailment Operations Plan if the Deputy Director determines that the plan does not comply with the requirements of this order.

I. If applicable, resubmit an amended final Curtailment Operations Plan to the Deputy Director within ninety (90) days of the date of the written notice of rejection if the Deputy Director rejects the final Curtailment Operations Plan. The written notice of rejection will state the Deputy Director's reasons for rejecting the proposed operations plan and will identify an employee or employees within the Division with whom Fahey shall immediately engage in good faith consultation to remedy the reasons for rejection. The Deputy Director will approve, reject, or modify the revised final Curtailment Operations Plan in accordance with paragraph I.F.

J. Timely obtain all necessary approvals to implement the final Curtailment Operations Plan from applicable local, state, and federal agencies.

K. Timely implement the final approved Curtailment Operations Plan during the FAS Period and any period when water is not available to serve his priority of right.

II. The State Water Resources Control Board ORDERS that, pursuant to Water Code section 1052, subdivision (c), G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) shall pay administrative civil liability (ACL) in the amount of $215,000, which is due in three installments as follows:

A. The First Installment of the ACL is $50,000 and is due immediately. If this amount of the ACL is unpaid after the time for review under Water Code

section 1120, et seq. has expired, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

B. If Fahey meets all requirements of sections I.F. and I.G. of this order and has fully and timely paid the First Installment, then $50,000 of the remaining ACL, the Second Installment, will be indefinitely suspended. If Fahey fails to timely meet any of the requirements of sections I.F. and I.G. of this order or fails to timely pay any portion of the First Installment, the Deputy Director will issue a written finding directing Fahey to make immediate payment of the Second Installment. If any portion of the Second Installment is unpaid after 30 days of the date of the Deputy Director's written finding, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

C. If Fahey meets all requirements of sections I.H. and I.I. of this order, receives approval of his Curtailment Operations Plan from the Deputy Director, and has fully and timely paid the First Installment and Second Installment, if required, then the remaining ACL of $115,000, the Third Installment, will be indefinitely suspended. If these requirements are met, the Deputy Director will issue a letter to Fahey confirming that Fahey has satisfied his payment of administrative civil liability and that Fahey is not obligated to pay the remainder of the liability. If, however, Fahey fails to timely meet any of the requirements of sections I.H. and I.I. of this order, fails to receive approval of his Curtailment Operations Plan from the Deputy Director, or fails to timely pay any portion of the First or Second Installment, the Deputy Director will issue a written finding directing Fahey to make immediate payment of the Second and Third Installment. If any portion of the Second and Third Installment is unpaid after 30 days of the date of the Deputy Director's written finding, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

III. Nothing in this order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law or from limiting any future liability the State Water Board may impose on Fahey.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____.

AYE:

NO:

ABSENT:

ABSTAIN:

_____
Jeanine Townsend
Clerk to the Board