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## State Water Resources Control Board

December 21, 2015

### VIA ELECTRONIC MAIL

To: Enclosed Service List of Participants

### **Hearing Officers' Partial Ruling on Prosecution Team's December 10 and December 11 Motions for Protective Order or, Alternatively, Motions to Quash; Fahey's Opposition; and Fahey's December 18 Motion to Compel Depositions and Document Disclosures**

#### **Background**

On December 9, 2015, Scott Fahey and Sugar Pine Spring Water, LP (Fahey) served deposition notices on the Division of Water Rights Prosecution Team (Prosecution Team) witnesses Katherine Mrowka and David LaBrie. The notices call for depositions to commence on December 22, 2015, and include the following requests for certain documents, as defined, "whether or not privileged":

- (1) All DOCUMENTS utilized or relied on to create, formulate or prepare your written testimony, conclusions, reports and/or opinions in this matter.
- (2) All DOCUMENTS constituting or relating to correspondence between YOU and Fahey and/or between YOU and Fahey's agents, employees or representatives.
- (3) All DOCUMENTS constituting or relating correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491).

On December 10, 2015, the Prosecution Team filed a Motion for Protective Order or, Alternatively, Motion to Quash the deposition notices issued to Ms. Mrowka and Mr. LaBrie and the accompanying document requests. The Prosecution Team argued that (1) Fahey cannot demonstrate a need for depositions or document requests, (2) the depositions will place an undue burden on Prosecution Team staff should they have to sit for potentially lengthy depositions regarding matters already covered by witness statements and supporting evidence or through prior disclosures, (3) the document requests are unreasonably cumulative or duplicative in that they seek documents already disclosed to Fahey, or which would be disclosed on December 16, (4) the document requests also seek potentially privileged documents and attorney work product, and (5) the December 10 deposition notices and document requests are duplicative, unreasonable and oppressive.

Also on December 10, 2015, Fahey filed an additional notice of deposition on the Person Most Knowledgeable in order to ascertain relevant testimony on the Board's rules, procedures and/or policies regarding submittals of Curtailment Certification Forms received by the Board and appropriate compliance with forms contending a right to continue diversion, certain written

correspondence between the Board and water right holders who submitted such Curtailment Certification Forms, and Board rules, procedures, or policies for responding to such Curtailment Certification Forms. The notices call for deposition to commence on December 23, 2015.

On December 11, 2015, the Prosecution Team filed an additional Motion for Protective Order or, Alternatively, Motion to Quash the deposition notice issued to the Person Most Knowledgeable. The Prosecution Team argued that (1) Fahey's request for every curtailment form from throughout the state with the "OTHER" box checked, as well as all of the correspondence associated with those forms is irrelevant to the current proceeding, (2) Fahey's request is also exceedingly burdensome, (3) given the December 16, 2015 deadline to submit exhibits and the January 25, 2016 hearing date, the size, scope, and breadth of Fahey's Deposition Notice, is oppressive, burdensome, and nothing short of harassment, and finally, (4) Fahey will see all of the Prosecution Team's evidence and have an opportunity to respond, consistent with the Hearing Notice.

Also on December 11, 2015, Fahey served an additional notice of deposition on Prosecution Team witness Samuel Cole. The notice call for deposition to commence on December 23, 2015, and include the following requests for certain documents, as defined:

All DOCUMENTS constituting or relating to correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491).

On December 14, 2015, the Prosecution Team submitted a letter requesting that its pending Motions for Protective Order or, Alternatively, Motions to Quash deposition notices and accompanying document requests be broadened to include to Mr. Cole and all prospective deposition notices and document requests submitted and served by Fahey in connection with these proceedings. The Prosecution Team argued that expanding the motions was necessary because (1) Fahey is using public record requests and the State Water Board's subpoena power for unreasonable, burdensome, and oppressive documents requests, (2) Fahey is unwilling to reschedule deponents given conflicts with planned holiday vacations, and (3) Fahey's discovery requests, serve no other purpose other than harassment because the discovery cannot be used to support a case-in-chief.

On December 16, 2015, Fahey and the Prosecution Team filed their proposed testimony, exhibits, lists of exhibits, witness qualifications, and statement of service. On December 18, 2015, Fahey filed its Opposition to the Prosecution Team's Motions for Protective Orders / To Quash and a new Motion to Compel Depositions and Document Disclosures. Fahey argued that (1) Fahey is entitled to these depositions and related document discovery because relevant correspondence to/from State Water Board staff involved in this matter apparently was permanently deleted, (2) depositions are required to ascertain relevant discussions among State Water Board, and (3) Fahey's deposition notices were both within the discovery cutoff deadline and the proper time to give adequate notice of the depositions, given that Fahey only served the discovery notices when it became apparent that documents were missing for the 2012-September 2015 time period, and when the Prosecution Team confirmed that State Water Board staff "... likely destroyed relevant emails, even months after the ACL was filed in this matter."

### **Legal Analysis**

The State Water Board conducts adjudicative proceedings in accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code. (Cal. Code Regs., tit.

23, § 648.5.1.) Pursuant to the Government Code, the Board shall admit evidence “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).) Any party to a proceeding before the Board may take the deposition of witnesses in the manner described by title 4 (commencing with section 2016.010) of part 4 of the Code of Civil Procedure. (Wat. Coe, § 1100.) The scope of discovery shall be limited if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood of discovering admissible evidence. (Civ. Code Proc., § 2017.020.) The use of depositions may be restricted if the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. (*Id.*, § 2019.030, subds. (a)(1)-(2); see also *id.*, § 2019.010, subd. (a).)

This partial ruling is limited to the deposition notices and associated motions. The Hearing Officers will rule separately on the requests for document production and associated motions.

### **1. Relevancy of the requested deposition**

Fahey’s deposition notices issued to Ms. Mrowka, Mr. LaBrie, and Mr. Cole do not describe the intended scope of questioning. However, the accompanying document requests suggest that Fahey intends to question Ms. Mrowka and Mr. LaBrie as to their correspondence concerning Water Right Permits 20784 and 21289, their correspondence with Fahey and his agents, and their written testimony, conclusions and opinions in these proceedings. The document request issued to Mr. Cole further suggests that Fahey intends to question Mr. Cole as to correspondence relating to the two water rights at issue in these proceedings.

Fahey’s December 18, 2015 Opposition elaborates that the depositions are necessary to discover admissible evidence in support of Fahey’s defense against allegations of unlawful diversion or factor in to the calculation of administrative civil liability pursuant to section 1055.3 of the Water Code if the alleged unlawful diversion is proven. Fahey’s opposition papers provide five specific examples of facts he hopes to discover. These include 1) descriptions of certain policies of the Board, 2) any steps taken by Mr. Cole or Mr. LaBrie to evaluate Fahey’s claim that he could continue to lawfully divert, 3) certain reasons or motivations for certain actions taken or not taken by Mr. LaBrie, 4) an explanation of whether Ms. Mrowka reviewed or approved a certain 2010 water availability analysis, and 5) descriptions of certain conversations between Ms. Mrowka, Mr. Cole, and Mr. LaBrie, if they occurred.

The lines of questioning implied by Fahey’s deposition notices and opposition papers could lead to facts that support a defense to unlawful diversion pursuant to section 1052 of the Water Code or establish relevant circumstances meriting a reduction in administrative civil liability under section 1055.3. Therefore, the Hearing Officers find that the requested depositions of Ms. Mrowka, Mr. LaBrie, and Mr. Cole are relevant to these proceedings. This finding does not preclude any party from making appropriate objections to specific questions. (See generally Gov. Code, § 11513.)

Fahey’s deposition notice issued to the Person Most Knowledgeable requests information on general State Water Board procedures for responding to Curtailment Certification forms that contend that the diversion and use is legally authorized. It also requests copies of Curtailment Certification Forms submitted by other water rights holders and their associated correspondence with Board staff. Collectively, these requests appear intended to discover the Board’s general effectiveness at following internal policies that may or may not exist. It is unclear whether this line of inquiry will lead to information relevant to this proceeding.

## **2. Burden, expense, or intrusiveness of production vs. likelihood of discovering admissible evidence**

Fahey's deposition notices issued to Ms. Mrowka, Mr. LaBrie, and Mr. Cole appear calculated to lead to the discovery of admissible evidence. However, producing witnesses for deposition requires a considerable commitment of time and expense. This burden is particularly heavy when depositions are scheduled immediately before a holiday and conflict with the longstanding travel plans of some witnesses according to the Prosecution Team. Although the proposed discovery is likely to produce admissible evidence, we are not convinced that imposing this burden and expense on the Prosecution Team witnesses is warranted for the reasons discussed below.

As discussed above, Fahey's deposition notice issued to the Person Most Knowledgeable appears calculated to discover the Board's general effectiveness at following internal policies that may or may not exist, based on an evaluation of interactions that may or may not have occurred with other unrelated water rights holders. It is unclear what relevance, if any, such information would have to these proceedings. The deposition notice issued to the Person Most Knowledgeable does not appear calculated to lead to the discovery of admissible evidence. In contrast, the burden and expense of producing witnesses for deposition under any circumstances is considerable. We are not convinced that imposing this burden and expense on the Prosecution Team witnesses is warranted for the reasons discussed below.

## **3. Cumulativeness, duplication, and adequacy of other methods of discovery**

Water rights hearings before the State Water Board differ from civil litigation in important respects. Cross examination of either party's witnesses is not limited to the scope of direct testimony. (Cal Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (b).) Each party has the right to cross-examine opposing witnesses on any matter relevant to the issues. (Gov. Code, § 11513, subd. (b).) For this reason, cross examination at the hearing often provides a sufficient opportunity to obtain the testimony of witnesses.

Here, Fahey has noticed the depositions of Ms. Mrowka, Mr. LaBrie, and Mr. Cole. However, all three of the potential deponents are identified as witnesses on the Prosecution Team's November 5, 2015 Notice of Intent to Appear. Thus, the hearing itself already provides Fahey the opportunity to question these witnesses on relevant issues identified in the deposition notices. Because cross examination is not limited to direct testimony, we find that cross examination of these witnesses will provide an adequate alternative method of discovery. We further find that pre-hearing deposition of the same witnesses concerning the same issues would be needlessly duplicative of the hearing itself.

Fahey has also noticed the deposition of the Person Most Knowledgeable of certain matters. The Prosecution Team has also identified Laura Lavalley, Taro Murano, and Brian Coats, as witnesses who will testify at the hearing. Therefore, Fahey will already have the opportunity to cross examine Ms. Mrowka, the program manager for the Division of Water Rights Enforcement Section, and the supervisors for three of the five units within the Enforcement Section.<sup>1</sup> Collectively, these witnesses appear likely to have significant knowledge and expertise

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<sup>1</sup> The Hearing Officers take official notice of the [Division of Water Rights Organizational Chart](#). Official notice is authorized pursuant to title 23, section 648.2 of the California Code of Regulations (authorizing the State Water Board to take official notice of matters that may be judicially noticed) and section 452, subdivision (h) of the Evidence Code (authorizing judicial notice of facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

concerning those matters identified in the deposition notice for the Person Most Knowledgeable that are relevant to this proceeding. In the event that the Person Most Knowledgeable is not already scheduled to appear as a witness, Fahey may compel the attendance of the Person Most Knowledgeable at the hearing through an appropriate subpoena. (See generally Gov. Code, §§ 11450.10, 11450.20; Code Civ. Proc., §§ 1985-1985.4.)

We find that, if the Prosecution Team properly identifies the Person Most Knowledgeable and makes that person available for cross examination at the hearing, then such cross examination will provide an adequate alternative method of discovery. Pre-hearing deposition of the Person Most Knowledgeable would be duplicative.

### **Conclusion**

The prosecution team's motion is granted with respect to the deposition of Ms. Mrowka, Mr. LaBrie, and Mr. Cole.

The prosecution team's motion is conditionally granted with respect to the deposition of the Person Most Knowledgeable, provided that the following conditions are met. By 5:00 PM on December 22, 2015, the Prosecution Team shall issue a letter identifying the Person Most Knowledgeable, as described in Fahey's December 10, 2015 deposition notice. The Prosecution team shall serve this letter upon all parties to this proceeding, and shall produce the Person Most Knowledgeable to attend the hearing upon Fahey's filing of an appropriate subpoena pursuant to sections 11450.10 and 11450.20 of the Government Code. The subpoena should be calculated to lead to the discovery of admissible evidence, reflecting the discussion of this issue above.

Fahey's Motion to Compel Depositions is denied. If the Person Most Knowledgeable is not already a witness to this proceeding, Fahey may file an amended Notice of Intent to Appear to include the identified Person Most Knowledgeable at any time before 12:00 PM on January 7, 2016.

The Hearing Officers will rule separately on Fahey's Motion to Compel Document Disclosures and the Prosecution Team's Motions for Protective Order or, Alternatively, Motions to Quash as they relate to document production. The Prosecution Team may file an opposition to Fahey's Motion to Compel Document Disclosures at any time before 12:00 PM on December 31, 2015. This ruling is made without prejudice to any party filing a subsequent motion based on information not previously offered.

Sincerely,

  
Frances Spivy-Weber, Vice-Chair

  
Dorene D'Adamo, Board Member

Enclosure: Service List

**SERVICE LIST OF PARTICIPANTS**  
**G. Scott Fahey and Sugar Pine Spring Water, LP**  
**Administrative Civil Liability Complaint and Cease and Desist Order**  
**(November 13, 2015; Revised 11/30/15)**

| Parties  |  |
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| THE FOLLOWING <b><u>MUST BE SERVED</u></b> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)  |  |
| <p><b>DIVISION OF WATER RIGHTS</b><br/>                     SWRCB Office of Enforcement<br/>                     Prosecution Team<br/>                     Kenneth P. Petruzzelli<br/>                     1001 I Street, 16th Floor<br/>                     Sacramento, CA 95814<br/> <a href="mailto:kenneth.petruzzelli@waterboards.ca.gov">kenneth.petruzzelli@waterboards.ca.gov</a></p> <p><del>Andrew Tauriainen, Attorney III<br/>                     1001 I Street, 16th Floor<br/>                     Sacramento, CA 95814<br/> <a href="mailto:Andrew.Tauriainen@waterboards.ca.gov">Andrew.Tauriainen@waterboards.ca.gov</a></del></p> <p>(revised: 11/30/15)</p> | <p><b>G.SCOTT FAHEY AND SUGAR PINE SPRING WATER , LP</b><br/>                     Abbott &amp; Kindermann, LLP<br/>                     Diane G. Kindermann<br/>                     Glen C. Hansen<br/>                     2100 21<sup>ST</sup> Street<br/>                     Sacramento, CA 95818<br/> <a href="mailto:dkindermann@aklandlaw.com">dkindermann@aklandlaw.com</a><br/> <a href="mailto:ghansen@aklandlaw.com">ghansen@aklandlaw.com</a></p> <p>Bart Barringer<br/>                     Law Offices of Mayol &amp; Barringer<br/>                     P.O. Box 3049<br/>                     Modesto, CA 95353<br/> <a href="mailto:bbarringer@mblaw.com">bbarringer@mblaw.com</a></p> <p>(revised 11/30/15)</p> |
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