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10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

11 In the matter of Administrative Civil) **PROSECUTION TEAM CLOSING**
12 Liability Complaint issued against G. Scott) **BRIEF**
13 Fahey and Sugar Pine Spring Water, LP)
14 _____)

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1 **I. INTRODUCTION**

2 The Prosecution Team for the State Water Resources Control Board (“State Water Board”
3 or “Board”) Division of Water Rights (Division) submits this closing brief in support of an
4 administrative civil liability (ACL) complaint (Complaint) and proposed cease and desist order
5 (CDO) against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively “Fahey”).
6 (Prosecution Team Exhibit WR-1.¹) Evidence admitted at the hearing shows that Fahey diverted
7 16.5 acre-feet of water over the course of 213 days in 2014 and 2015, a period of severe drought,
8 when there was no water available for his priority of right. Evidence also demonstrates a pattern
9 and practice of unauthorized diversion for nearly Fahey’s entire history as a permittee.

10 Based on the evidence, the Prosecution Team recommends an ACL of \$224,875 for past
11 violations and a strong CDO to assure future compliance.

12 **II. BACKGROUND**

13 **A. Fahey’s Water Rights**

14 Fahey diverts water from four springs in the Tuolumne River watershed ultimately tributary
15 to the Tuolumne River upstream of New Don Pedro Reservoir and tributary to the San Joaquin
16 River. (WR-9 at ¶ 2; RT² (Jan. 25, 2016), p. 44:13-16.) He sells wholesale spring water to bottling
17 companies. (WR-46; WR-72, pp. 2, 8, 12, 16.) Fahey holds two water rights: Permit 20784
18 (Application 29977) and Permit 21289 (Application 31491). (WR-9 at ¶¶ 5-8; RT (Jan. 25, 2016),
19 p. 44:13-16.) Together, Fahey’s permits authorize him to divert and use up to 109.32 acre-feet of
20 water annually at up to 0.107 cfs. (WR-15; WR-16; RT (Jan. 25, 2016), p. 44:17-20.) Fahey pipes
21 the water to his facility where bulk water trucks pick up the water and deliver it to customers.
22 (WR-9 at ¶5; RT (Jan. 25, 2016), p. 44:24-45:3.) Both permits are subject to prior rights. (WR-15;
23 WR-16; RT (Jan. 25, 2016), p. 49:24.) The applications for both permits were also approved
24 subject to limitations and conditions in each permit. (WR-15, WR-16.) The Board has no record of
25 Fahey holding or claiming any other water rights. (WR-9 at ¶4; RT (Jan. 25, 2016), p. 44:20-21.)

26 **1. Permit 20784 (Application 29977)**

27 **a. Priority Date, Diversion Amount, and Place of Use**

28 Permit 20784 authorizes the direct diversion and use of water from two springs, Deadwood

¹ Further references to Prosecution Team exhibits will be “WR-[Exhibit Number].” References to Fahey exhibits will be “Fahey-[Exhibit Number].” References to Hearing Team Staff Exhibits will be “SWRCB-[Exhibit Number].”

² Citations to the Reporter’s Transcripts are indicated by “RT,” followed by the date of the transcript, page(s), and line(s).

1 Spring and Cottonwood Spring, and has a priority date of July 12, 1991. (WR-15; RT (Jan. 25,
2 2016), p. 45:11-14.) In 2002, the State Water Board approved a petition filed by Fahey in 1997 to
3 change the Cottonwood Spring point of diversion to Sugar Pine Spring. (WR-15; RT (Jan. 25,
4 2016), p. 45:16-18; SWRCB-1; Declaration of Kenneth Petruzzelli in Support of Prosecution Team
5 Closing Brief (Petruzzelli Decl.), Attach. 2; WR-15.) Permit 20784 authorizes Fahey to divert up to
6 0.031 cfs from each spring, the equivalent of 14 gallons per minute (gpm) or 20,000 gallons per
7 day for each spring, from January 1 to December 31 of each year for Industrial Use at one or more
8 bottled water plant(s) located off the premises. (WR-15; WR-9 at ¶6) Fahey’s diversions under
9 Permit 20784 may not exceed 44.82 acre-feet per year. (*Id.*)

10 **b. Term 19 and the 1992 Exchange Agreement**

11 Term 19 in Permit 20784 requires Fahey to provide exchange water pursuant to a 1992
12 water exchange agreement (1992 Exchange Agreement) with Modesto Irrigation District (MID)
13 and Turlock Irrigation District (TID) (collectively “the Districts”). (WR-9 at ¶18; RT (Jan. 25,
14 2016), p. 45:19-22.) The Districts hold senior rights to appropriate water from the Tuolumne River.
15 (WR-9, p. 6 at ¶ 33.) They also own and operate New Don Pedro Reservoir. (WR-18.) The State
16 Water Board included Term 19 as a condition for accepting Application 29977, because Fahey's
17 points of diversion are within a fully appropriated stream (FAS) system. (WR-9 at ¶9; RT (Jan. 25,
18 2016), pp. 45:19-46:2.) Term 19 and the 1992 Exchange Agreement were also necessary to
19 eliminate concerns raised by the Districts that Fahey’s diversions could harm their water rights and
20 project operations. (SWRCB-1; Petruzzelli Decl., Attach. 3 at p. 4.)

21 **i. Fully Appropriated Stream Determinations**

22 The State Water Board may declare a stream fully appropriated after notice and a hearing.
23 (Water Code § 1205.) It may only revoke or revise a FAS declaration after notice and a hearing.
24 (Water Code § 1205, subd. (c).) The Permitting Reform Act requires the Division to report
25 annually to the State Water Board on the availability of unappropriated water in stream systems
26 which may become fully appropriated in the next reporting period. (Water Code § 1228.2, subd.
27 (c); WR-80, p. 54.) If it is reasonably anticipated that a stream system will become fully
28 appropriated during the next reporting period, the Board, after notice and hearing, shall determine
whether that stream system should be declared fully appropriated. (Water Code § 1228.2, subd.
(d).) The State Water Board may revoke or revise the FAS status of a stream system. (23 Cal. Code
Regs., §871, subd. (a), (c).) Taken together, these statutes and regulations comprise a system
whereby FAS declarations are maintained, updated, and never become obsolete. (WR-80, p. 55.)

1 year and build a surplus prior to the FAS period, but he cannot carry over any surplus replacement
2 water to subsequent years. (WR-19, p. 2 at ¶ 4.) He accrues no interest in the Districts' water rights
3 through the 1992 Exchange Agreement. (*Id.* at ¶ 9.)

4 Fahey initially planned to provide replacement water using groundwater, but the City and
5 County of San Francisco (San Francisco) protested in part on the basis that it considered any
6 groundwater in the Tuolumne River Basin linked to Lake Don Pedro. (Petruzzelli Decl., Attach. 4.)
7 Fahey eventually agreed to instead purchase replacement water for the 1992 Exchange Agreement
8 from the Tuolumne Utilities District (TUD). (RT (Jan. 25, 2016), p. 186:8-14.)

8 c. Term 20

9 Term 20 in Permit 20784 prohibits Fahey from interfering with San Francisco's obligations
10 to the Districts under the Raker Act and/or any other implementing agreement between the
11 Districts and San Francisco. (WR-15.) Term 20 also requires Fahey to provide replacement water
12 to New Don Pedro Reservoir for water diverted under his permit which is adverse to the Districts
13 or San Francisco. (*Id.*) Fahey has up to a year to provide replacement water upon notice from the
14 Districts or San Francisco. (*Id.*) He may provide water in advance and credit that water to future
15 water replacement. (*Id.*) However, nothing in Permit 20784 states that Fahey may carry any
16 "credit" over to a subsequent year. (*Id.*) Fahey's obligations under Term 20 shall take into account
17 his obligations under the 1992 Exchange Agreement. (*Id.*) Finally, Fahey shall report the source,
18 amount, and location of replacement water he discharges to New Don Pedro Reservoir to the State
19 Water Board in his annual progress report. (*Id.*)

20 The State Water Board added Term 20 to resolve the protest by San Francisco. (WR-15; RT
21 (Jan. 25, 2016), p. 47:20-26.) Fahey agreed to accept the term to resolve the protest. (*Id.*) In
22 addition to the Districts, San Francisco also holds senior rights to the Tuolumne River. (WR-9, p. 6
23 at ¶ 34.) Under the Raker Act and the Fourth Agreement, San Francisco has a right to use up to
24 740,000 acre-feet of storage in New Don Pedro as a water bank. (Fahey-81, p. 9.) San Francisco
25 was not a party to the 1992 Exchange Agreement between Fahey and the Districts. (WR-19.) As a
26 result, San Francisco protested and requested additional permit terms to protect its rights. (*Id.*) It
27 proposed the narrative language in Term 20, rather than a fixed formula, to accommodate the
28 complex accounting it and the Districts use for managing New Don Pedro Reservoir. (WR-21.)

26 d. Other Important Terms

27 Term 17 in Permit 20784 is Standard Term 90. (WR-15.) Standard Term 90 protects senior
28 rights and beneficial uses in the Sacramento-San Joaquin Delta, and is included in all new permits

1 for diversion from the Sacramento-San Joaquin Delta watershed when hydraulic continuity with
2 the Delta exists during some portion of the authorized diversion season. (WR-16; WR-25, p. 54;
3 WR-82, p. 39; RT (Jan. 25, 2016), p. 50:2-9.)

4 **2. Permit 21289 (Application 31491)**

5 **a. Priority Date, Diversion Amount, and Place of Use**

6 Permit 21289 has a priority date of January 28, 2004 and authorizes the direct diversion and
7 use of water from two springs, Marco Spring and Polo Spring, at up to 0.045 cfs from each spring
8 from January 1 to December 31 of each year for Industrial Use at one or more bottled water
9 plant(s) located off the premises. (WR-16; WR-9 at ¶ 7; RT (Jan. 25, 2016), p. 48:22-49:2.) Under
10 Permit 21289, Fahey may divert up to 64.5 acre-feet per year from Marco and Polo Spring
11 combined. (WR-16.)

12 Due to the FAS determinations for the San Joaquin River Basin and Tuolumne River,
13 Fahey included a statement with Application 31491, signed under penalty of perjury, stating that
14 his application would be “conditional upon and subject to the terms and conditions” of the 1992
15 Exchange Agreement, as enumerated in Permit 20784’s Term 19, and the resolution San
16 Francisco’s protest, as enumerated in Permit 20784’s Term 20. (Fahey-27, Bates-stamped 579.) To
17 demonstrate he had a means of providing the replacement water for the FAS period for both
18 permits, Fahey submitted a contract to purchase surplus water from TUD. (Fahey-29; Fahey-30;
19 Fahey-32, Fahey-33.) Based on Fahey’s representations, the Division issued him an exception from
20 the prohibition of diverting during the FAS period that would have otherwise applied and accepted
21 his application. (Fahey-37, Bates-stamped 641.) However, Fahey’s exception was subject to
22 maintaining the 1992 Exchange Agreement with the Districts and providing FAS replacement
23 water through purchases from TUD. (*Id.*)

24 **b. Term 20**

25 Under Term 20 in Permit 21289, Fahey shall continuously bypass a minimum of 5 gallons
26 per minute (gpm) from each point of diversion (i.e. each spring). (WR-16.) Whenever a spring’s
27 flow is less than 5 gpm, Fahey shall bypass all of that spring’s flow. (*Id.*) This term was added to
28 protect riparian habitat and to mitigate potential water temperature increases that could reduce
29 habitat suitability for amphibians and other species. (*Id.*)

30 **c. Terms 33 and 34**

31 Terms 33 and 34 in Permit 21289 are similar to Term 20 in Permit 20784, prohibiting
32 Fahey from interfering with San Francisco’s obligations to the Districts under the Raker Act and/or

1 any other implementing agreements between the Districts and San Francisco. (WR-16.) Term 34,
2 like Term 20 in Permit 20784, requires Fahey to replace water he diverts that is adverse to the
3 rights of the Districts and San Francisco. (*Id.*) Term 34 also requires Fahey to take into
4 consideration his obligations under the 1992 Exchange Agreement. (*Id.*) Fahey shall also report the
5 source, amount, and location of replacement water he discharges to New Don Pedro Reservoir in
6 his annual progress report. (*Id.*) Term 34 recognizes Fahey's duty under the 1992 Exchange
7 Agreement to provide sufficient make-up water and meet the requirements of D995 and D1594 and
8 thereby requires Fahey to replace all water he diverts during the FAS period.

8 **d. Other Important Terms**

9 Permit 21289 includes Standard Term 80 as Term 8, Standard Term 90 as Term 9, and
10 Standard Term 93 as Term 11. (WR-16.) Standard Terms 80 and 93 also protect senior rights and
11 beneficial uses in the Sacramento-San Joaquin Delta. (WR-16; RT (Jan. 25, 2016), p. 50:2-9.)

11 **B. California's Drought and Its Response to the Drought**

12 **1. Governor Brown Declares Drought and Emergency**

13 On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order),
14 finding that ongoing severe drought conditions presented urgent challenges across the state,
15 including water shortages and additional water scarcity if drought conditions persist. (WR-7 at ¶ 6;
16 RT (Jan. 25, 2016), p. 51:25-52:5.) The Executive Order confirmed the orders and provisions in the
17 Governor's previous drought proclamations and orders, the Proclamations on January 17, 2014 and
18 April 25, 2014 and Executive Orders B-26-14 and B-28-14, remained in full force and effect. (WR-
19 7 at ¶ 6; RT (Jan. 25, 2016), p. 52:5-8.)

20 **2. The State Water Board's Drought Response**

21 In response to the Executive Orders, the State Water Board assumed responsibility for
22 determining available water supply during the 2014 and 2015 drought years. (WR-7 at ¶ 7; RT
23 (Jan. 25, 2016), p. 52:9-13.) The Division compared current and projected available water supply
24 with the total water right diversion demand to determine the availability of water for water rights of
25 varying priorities. (WR-7 at ¶ 7.) By May 27 in 2014, and April 23 in 2015, the San Joaquin River
26 watershed lacked available supply to meet the demands of post-1914 appropriative rights such as
27 Fahey's. (WR-7 at ¶ 12.) In response, the State Water Board issued several notices of shortage and
28 unavailability, including 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" on May 27, 2014 (2014 Unavailability Notice) and a "Notice of

1 Unavailability of Water and Immediate Curtailment for Those Diverting Water in The San Joaquin
2 River Watershed With a Post-1914 Appropriative Right” on April 23, 2015 (2015 Unavailability
3 Notice). (WR-7 at ¶¶ 12, 14.) These notices informed Fahey and all other post-1914 appropriators
4 that there was insufficient water available to support their priority of right. (*Id.*; RT (Jan. 25, 2016),
5 p. 53:14-17.) Fahey received these notices, because he is in the San Joaquin River watershed and
6 has post-1914 water rights. (WR-7, p. 5 at ¶ 24.)

6 **3. Water Supply and Demand Analysis**

7 Mr. Brian Coats, and those under his supervision at the Division, created the water supply
8 and demand analysis to determine the availability of water during the drought using the best
9 available data as directed by management. (WR-7, pp. 2-3.) To forecast water availability, the
10 Division relied on the forecasted full natural flows of watersheds calculated by the Department of
11 Water Resources (DWR) in its Bulletin 120 and in subsequent monthly updates. (WR-7, p. 2 at ¶
12 7.) As actual data became available, the Division used DWR’s daily full natural flow calculations
13 to evaluate the supply retrospectively. (*Id.*) To determine water demand, the Division relied on
14 information supplied by water right holders on annual or triennial reports of water diversion. (WR-
15 7, p. 2 at ¶ 8; RT (Jan. 25, 2016), p. 52:13-16.) The Division also incorporated 2014 diversion data
16 submitted pursuant to Order WR 2015-0002-DWR. (*Id.*) It then compiled all reported monthly
17 water diversion data by watershed, type of right, and priority date. (*Id.*) It also performed quality
18 control checks and removed obvious errors, excess reporting, removed demand for direct diversion
19 for power, and made additional changes based on stakeholders' input. (*Id.*) The Division
20 consistently adjusted the water availability and demand analyses based on new information
21 obtained from stakeholders or adjustments to projected flows from DWR. (WR-7, p. 2 at ¶ 9.) The
22 Division reviewed this information and revised the data set and graphs. (*Id.*)

23 Using the Watershed Supply and Demand Analysis for the San Joaquin River Basin, the
24 Division determined that by May 27 in 2014 and April 23 in 2015 available supply was insufficient
25 to meet the demands of any water right with a priority after 1914 anywhere in the watershed. (WR-
26 7, p. 3 at ¶ 11; WR-42; WR-43; RT (Jan. 25, 2016), p. 52:17-53:11.) In 2015, the drought was so
27 bad there was no water available for any right junior to 1903 in the watershed. (WR-9, p. 6 at ¶ 34.)
28 The Division did a separate analysis for the Tuolumne River in both 2014 and 2015. (WR-153,
pp. 3-5; RT (Jan. 26, 2016), p. 12:7-12.) Since the Tuolumne River is a tributary to the San
Joaquin River and within the San Joaquin River Basin, senior demands in the San Joaquin River
Basin also imposed demands on the Tuolumne River. (RT (Jan. 26, 2016), p. 12:7-11.) In each
year, the analysis showed insufficient water for Fahey’s priority based on DWR’s reported daily

1 full natural flows.³ (WR-153, p. 4-5; RT (Jan. 26, 2016), pp. 13:3-7, 14:2-13; 15:12-15.)

2 **C. Investigation and Surveillance Concluded Fahey Was Still Diverting Water**

3 The Division's Enforcement Units started conducting compliance inspections of post-1914
4 appropriative water rights in the San Joaquin River watershed for 2015 shortly after the State
5 Water Board issued the 2015 Unavailability Notice.⁴ (WR-11, p. 2 at ¶ 6; RT (Jan. 25, 2016), p.
6 56:8-15.) Division staff member David LaBrie initially attempted to contact Mr. Fahey to schedule
7 a compliance inspection. (WR-11, p. 2 at ¶ 9; RT (Jan. 25, 2016), p. 56:19-22.) Mr. Fahey
8 eventually returned the call. (WR-11, p. 2 at ¶ 10; RT (Jan. 25, 2016), p. 56:23-25.) Over the
9 course of communication Mr. Fahey indicated he was still diverting and that if he ceased diverting
10 he would go out of business. (WR-11, p. 2 at ¶ 10; RT (Jan. 25, 2016), p. 56:23-25.) In a letter that
11 Mr. Fahey submitted in response to the 2014 Unavailability Notice, dated June 3, 2014, he asserted
12 he could continue diverting, because he purchased 82 acre-feet of water from TUD, discharged that
13 water to New Don Pedro Reservoir from 2009 through 2011, and used that water to offset his
14 diversions during the period of unavailability. (WR-11, p. 3 at ¶¶ 11-12; WR-47; WR-11, p. 2 at ¶
15 10; RT (Jan. 25, 2016), p. 57:8-11.) Mr. LaBrie informed Mr. Fahey that he disagreed with Mr.
16 Fahey's basis for exemption. (WR-11, p. 3 at ¶¶ 13-14; RT (Jan. 25, 2016), p. 58:1-8.) Based on
17 the communication with Mr. Fahey and a review of Fahey's progress reports, it was clear that
18 further investigation was required. (WR-11, p. 3 at ¶ 15; RT (Jan. 25, 2016), p. 59:2-11.)

19 On July 12, 2015, Division staff visited the area immediately surrounding Fahey's transfer
20 facility and placed surveillance cameras capable of viewing activity at the facility's entrance. (WR-
21 13, pp. 1-2 at ¶¶ 5-9; WR-49, pp. 2-3; WR-152, p. 3.) Over the course of the next 47 days the
22 surveillance cameras captured time-lapse video of bulk water trucks entering and leaving Fahey's
23 facility. (WR-11, p. 5 at ¶ 24; WR-13, p. 3 at ¶¶ 18; WR-83 through 146; WR-152, pp. 4-6; WR-
24 62.) Fahey was clearly continuing to divert water.

25 ³ The water supply availability analysis for Fahey is fundamentally different from the analysis the State Water Board
26 recently determined was insufficient in Order WR 2016-0015, which dismissed enforcement actions against Byron-
27 Bethany Irrigation District (BBID) and West Side Irrigation District (WSID). (accessible at
28 http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2016/wro2016_0015.pdf) The
analysis for Fahey is much simpler. It is stream-specific, rather than regional, the stream gage used by DWR for its
daily full natural flow determination is almost immediately below Fahey's diversions, there are no intervening
demands or sources of supply, and there is only one source of supply, the Tuolumne River, as opposed to the San
Joaquin River, Sacramento River, and return flows. BBID and WSID also had very senior rights, leaving less room for
error in the analysis to still determine water was unavailable for their respective rights. By comparison, Fahey's rights
are so junior that given the severity of the drought there is no reasonable possibility that he had water available for his
priority of right even if the analysis has the kind of deficiencies the Board identified in Order WR 2016-0015.

⁴ Although the Unavailability Notice was based on projected water supplies, the enforcement action is based on daily
full natural flows.

1 During the investigation, Division staff person Sam Cole contacted Mr. Fahey on August
2 12, 2015 to schedule an inspection. (WR-13, p. 4 at ¶ 20.) In the course of that conversation, Mr.
3 Fahey stated he was still diverting and again asserted his belief that he had an exemption and could
4 continue diverting water. (*Id.*; RT (Jan. 25, 2016), p. 71:10-23.) Mr. Cole responded that Fahey had
5 no water available for his priority of right, lacked an exemption, and should not divert water until
6 receiving confirmation from the Division stating there was water available for his right. (RT (Jan.
7 25, 2016), p. 71:19-23.) Fahey reiterated his belief that he was exempt and stated he would
8 continue diverting water. (RT (Jan. 25, 2016), p. 72:3-7.) Since the purpose of the inspection was
9 to verify whether Fahey was still diverting water and Fahey admitted he was still diverting water,
10 no inspection was scheduled. (RT (Jan. 25, 2016), p. 71:2-72:3.)

11 **D. The State Water Board Issues the ACL Complaint and Information Order**

12 In response to the investigation by the Division staff, the State Water Board issued the
13 Complaint and Draft CDO on September 1, 2015. (WR-1; WR-2.) The State Water Board issued an
14 order for additional information, Order WR 2015-0028-DWR (Information Order), with the
15 Complaint. (WR-3.) Fahey partly responded to the Information Order. (RT (Jan. 25, 2016), pp.
16 61:9-62:13.) The Prosecution Team subpoenaed the remaining information pursuant to Water Code
17 section 1080. Based on information developed from Fahey's responses to the Information Order,
18 the Subpoena, and ongoing surveillance, the Prosecution Team obtained additional relevant
19 information about Fahey's diversions and activities. An assessment of the additional information
20 led to the conclusion that Fahey diverted 9.23 acre-feet of water over the course of 123 days in
21 2014 and 7.27 acre-feet of water over the course of 90 days in 2015 during the period when no
22 water was available under his priority of right, for a total of 213 days and 16.5 acre-feet. (WR-11,
23 pp. 8-9 at ¶¶ 44, 46-47; RT (Jan. 25, 2016), p. 62:14-65:9.)

24 **III. ARGUMENT**

25 **A. Key Issue 1 - Fahey Violated Water Code section 1052's Prohibition Against 26 the Unauthorized Diversion or Use of Water**

27 **1. Diversion or Use of Water When No Water is Available for One's 28 Priority of Right is a Trespass Under Water Code section 1052**

Under Water Code section 1052, the diversion or use of water subject to Division 2 of the
Water Code (commencing with section 1000) other than as authorized in Division 2 is a trespass.⁵

⁵ Harm is not a required element to prove a trespass under Water Code section 1052. (Water Code § 1052, subd. (a).) The unauthorized diversion or use of water is a trespass against the state and is subject to penalty as defined in Water
[Footnote continued on next page.]

1 Since 1914 a statutory scheme established in the Water Code has provided the exclusive method of
2 acquiring water rights by appropriation. (Water Code § 1225; *People v. Shirokow* (1980) 26 Cal.3d
3 301, 308; *U.S. v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 102.) Once the
4 State Water Board issues a permit to appropriate water, the permit holder has the right to take and
5 use the water subject to the terms and conditions of the permit. (*Id.*) Diverting or using water in
6 violation of a permit term constitutes a trespass under Water Code section 1052.⁶

7 Diverting or using water when no water is available for a priority of right constitutes a
8 trespass under Water Code section 1052. In times of shortage, riparians are entitled to fulfill their
9 needs before appropriators are entitled to any use of the water. (*U.S. v. State Water Resources
10 Control Bd.*, *supra* 182 Cal.App.3d at 101-102.) As between appropriators, the rule of priority is
11 “first in time, first in right.” (*Id.* at 102.) In times of shortage, junior appropriators shall cease
12 diverting before senior appropriators. (*Id.*)

13 **2. Key Issue 1(a) – Fahey Diverted Water under Permits 20784 and 21289
14 When Water Was Unavailable for His Priority of Right**

15 **a. In 2014 and 2015 There Was No Water Available for Fahey's
16 Priority of Right**

17 The watershed supply and demand analysis for the San Joaquin River Basin shows that
18 after May 27 in 2014 and after April 23 in 2015 there was no water available for post-1914 rights.
19 (WR-7, p. 3 at ¶ 11; WR-42; WR-43; RT (Jan. 25, 2016), p. 52:17-53:11; WR-9, p. 6 at ¶ 34.)
20 Fahey diverts water from four springs tributary to the Tuolumne River, thence the San Joaquin
21 River, all within the San Joaquin River watershed. (WR-9 at ¶ 2; WR-7, p. 5 at ¶ 24; RT (Jan. 25,

22 Code section 1052. (*Shirokow*, *supra* 26 Cal.3d at 304; Water Code § 1052, subd. (c); WRO 2006-0001 p. 18, available
23 at http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2006/wro2006_0001.pdf;
24 WRO 2008-0015 p. 11, accessible at

25 http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0015.pdf; WRO
26 2008-0017, accessible at

27 http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0017.pdf; WRO
28 2015-0025 p. 15, accessible at

29 http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2015/wro2015_0025.pdf.)

30 Common law definitions of trespass do not apply and no specific showing of harm against a specific party is required.
31 Good faith and intent are irrelevant as to whether a trespass occurs under Water Code section 1052.

32 ⁶ Continued diversion in violation of permit terms that limit diversion amounts, require certain bypass flows, and
33 require the maintenance of an exchange agreement is necessarily an “unauthorized diversion of water” and subjects the
34 diverter to liability under section 1052. The alternative interpretation would “lead to the dubious conclusion that
35 violating a water right permit term or condition is somehow authorized within the meaning of section 1052.” (WRO
36 2008-0017, fn. 13; accessible at

37 http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/2008/wro2008_0017.pdf; *see also*

38 WRO 99-01, p. 8 (“The use of water on nonriparian land or the use of water inconsistent with the terms and the
conditions of a permit or license constitutes a trespass against the State of California which can be enjoined by the
SWRCB.”) accessible at

http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1999/wro99-01.pdf.)

1 2016), p. 44:13-16.) Fahey has post-1914 rights with priority dates in 1991 and 1997 for Permit
2 20784 and 2004 for Permit 21289. There was nowhere near enough water for any of Fahey's
3 rights. He is so junior in priority that there is no reasonable possibility that any water was
4 available for his rights.

5 The Division's tributary-level analyses for the Tuolumne River in 2014 and 2015 further
6 confirmed there was no water available for Fahey in 2014 and 2015. (WR-153, p. 4-5; RT (Jan.
7 26, 2016), pp. 12:7-12, 13:3-7, 14:2-13; 15:12-15.) The analysis used the stream gage at La
8 Grange Dam, which is immediately below New Don Pedro Reservoir, which itself is
9 immediately below Fahey's diversions. (RT (Jan. 26, 2016), pp. 13:10-15, 41:17-21; Fahey-81, p.
10 9.) For demands, there were no diverters between Fahey and New Don Pedro Reservoir. (RT (Jan.
11 26, 2016) pp. 85:22-24, 95:24-25.) The Tuolumne River analysis therefore captured the supply and
12 demand immediately proximate to Fahey. Like the San Joaquin River Basin analysis, the
13 Tuolumne River analysis showed there was nowhere near enough water for Fahey's priority. (RT
14 (Jan. 26, 2016), pp. 12:7-12, 13:3-7; RT (Jan. 25, 2016), p. 54:10-13.)

15 Although the 1992 Exchange Agreement authorized Fahey to divert water during the FAS,
16 it does not alter his priority of right. (*City of Barstow, supra* 23 Cal.4th at 1250.) He still had to
17 cease diverting, because there was no water available for his priority of right.

18 **b. Fahey Diverted Water When There was No Water Available for
19 His Priority of Right**

20 Surveillance footage, water sales invoices, Fahey's progress report for 2014, and Fahey's
21 own admission confirm that he diverted water throughout the periods when water was unavailable
22 for his priority of right in 2014 and 2015.

23 For 2014, Fahey filed progress reports stating that he diverted and used water during the
24 period of unavailability in 2014 from June 3 through November 18. (WR-56; WR-57; WR-11, pp.
25 5-6 at ¶ 29; RT (Jan. 25, 2016), p. 60:11-20.)

26 For 2015, video surveillance over the course of 47 days, from July 12, 2015 through August
27 27, 2015, captured images of bulk water hauling trucks entering and leaving Fahey's facility. (WR-
28 11, p. 5 at ¶ 24; WR-13, p. 3 at ¶¶ 18; WR-62; WR-83 through 146; WR-152, pp. 4-6.) Staff also
personally observed trucks entering and leaving the facility. (WR-11, p. 4 at ¶¶ 20-22; WR-13, p. 3
at ¶ 16; WR-152, p. 2.)

For both 2014 and 2015 Mr. Fahey reported continued water sales in invoices that he
disclosed in response to the Information Order and Subpoena. (RT (Jan. 25, 2016), p. 62:17-22;
WR-66, pp. 25-112; WR-67; WR-72 Exh. A, pp. 1-24.)

1 Finally, Fahey admitted to diverting and using water during the periods of unavailability on
2 at least four occasions. First, in a conversation with Mr. LaBrie, he indicated he was still diverting,
3 stating that if he stopped diverting he would no longer be in business. (WR-11, p. 2 at ¶ 10; RT
4 (Jan. 25, 2016), p. 56:23-25.) Second, in a conversation with Mr. Cole, Mr. Fahey again stated that
5 he was still diverting and would continue diverting. (RT (Jan. 25, 2016), p. 72:3-7.) Third, Fahey
6 acknowledged that he diverted during the periods of unavailability in 2014 and 2015 in his
7 responses to the Information Order and Subpoena. (WR-65, pp.2-8; WR-72, Exh. C pp. 41-61.)
8 Finally, during the hearing Fahey admitted that he diverted water during the period of
9 unavailability. (RT (Jan. 26, 2016), pp. 92:21-93:13; WR-52.)

10 Evidence clearly shows that Fahey diverted and used water in 2014 and 2015 when there
11 was no water available for his priority of right – an unauthorized diversion and use of water and a
12 trespass under Water Code section 1052.

13 **3. Key Issue 1(b) - Fahey Holds No Other Water Right That Would Have 14 Authorized Diversion**

15 **a. Fahey Has No Other Water Rights**

16 The State Water Board has no record of Fahey holding or claiming any water rights other
17 than Permit 20784 and Permit 21289. (WR-9 at ¶4; RT (Jan. 25, 2016), p. 44:20-21.) In addition,
18 Fahey has not claimed any riparian rights or pre-1914 appropriations. In addition, neither of
19 Fahey's permits grants him any storage right or the equivalent. (WR-15, 16; RT (Jan 25, 2016), p.
20 100:19-22, 124:19-124:17, 174:8-10, 181:18-25, 182:1-8; 187:2-10.) On cross-examination Fahey
21 acknowledged that he has no water right for storage and that his permits do not authorize storage.
22 (RT (Jan. 25, 2016), p. 181:18-25.) He also acknowledged that he has no water right for storage in
23 New Don Pedro Reservoir. (RT (Jan. 25, 2016), pp. 174:8-10, 182:1-4.) There is also no evidence
24 that he has any agreement with the Districts or with San Francisco allowing him to discharge water
25 into New Don Pedro Reservoir and then have that water available for his use in later years. (RT
26 (Jan. 25, 2016), pp. 182:5-183:1; RT (Jan. 25, 2016), p. 182:5-8.)

27 The 1992 Exchange Agreement does not grant Fahey a storage right or the equivalent.
28 Fahey accrues no interest in the Districts' water rights through the agreement and nothing in the
agreement may be construed as a grant of water rights or an interest in the Districts' water rights.
(WR-19; RT (Jan. 25, 2016), pp. 187:2-10.) Fahey may build a surplus of replacement water prior
to the FAS period, but he cannot carry that surplus over to subsequent years. (*Id.*) Any surplus he
has at the end of the year is lost.

1 Term 20 in Permit 20784 and Term 34 in Permit 21289 states that “Replacement water may
2 be provided in advance and credited to future replacement water requirements.” (WR-15, 16.)
3 However, since the permits themselves do not authorize storage, this clause cannot be read to
4 entitle Fahey to the equivalent of a storage right. (RT (Jan 25, 2016), p. 125:20-126:2-6, 138:4-11.)
5 Fahey loses any “credit” or “surplus” remaining at the end of each year.

6 Fahey admitted on cross-examination that he did not buy any water from TUD after 2011.
7 (RT (Jan. 25, 2016), p. 196:4-21.) Consistent with his admission, Fahey’s account history with
8 TUD shows that TUD delivered no water to him after June 15, 2011. (WR-66, pp. 11-13.) There is
9 no evidence that Fahey made any other water purchases. Since Fahey has no right to store the water
10 he purchases for use in subsequent years and cannot carry over surplus “credits” into subsequent
11 years, any water he discharged to New Don Pedro Reservoir was lost by the end of 2011 and no
12 longer available to him in 2014 or 2015. Fahey consequently had no alternative water supply
13 available in 2014 or 2015 that would have authorized his diversions.

14 **b. Fahey Has No Groundwater Rights That Would Have**
15 **Authorized His Diversions**

16 Fahey has indicated his diversions are mostly groundwater. (Fahey 1, pp. 1, 4, 7, 10, 16,
17 17.) However, whether Fahey’s diversions draw groundwater does not necessarily exempt his
18 diversions from the State Water Board’s permitting authority. Percolating groundwater, if it gathers
19 sufficient volume and forms a stream, is treated as surface water and becomes water subject to
20 appropriation and the State Water Board’s permitting authority. (*Cross v. Kitts* (1886) 69 Cal. 217,
21 222; *Cohen v. La Canada Land & Water Co.* (1904) 142 Cal. 437, 439-440; *City of Los Angeles v.*
22 *Pomeroy* (1899) 124 Cal. 597, 622-623; *Wolfskill v. Smith* (1907) 5 Cal.App. 175, 181; *North*
23 *Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, 1599-1600
24 [*as modified on denial of reh'g*]); Water Code §§ 1201, 1225.)

25 The water supply analysis that Fahey’s consultant, Dr. Ross Grunwald, prepared for
26 Application 31491 describes Deadwood, Sugar Pine, and Marco Springs as percolating
27 groundwater forming surface streams tributary to the Tuolumne River.⁷ (Fahey 3, Bates-stamped 2;
28 Fahey 27, Bates-stamped 575; RT (Jan. 25, 2016), pp. 128:23-129:7.) Fahey, consistent with his
water supply analysis for Application 31491, stated in Applications 29977 and 31491, under
penalty of perjury, that the springs were tributary to the Tuolumne River. (Fahey 3, Bates-stamped
5; Fahey 27, Bates-stamped 580; RT (Jan. 25, 2016), pp. 196:22-198:25.)

⁷ The analysis did not address Polo Spring. (RT (Jan. 25, 2016, p.241:24-25.)

1 Fahey cites correspondence with Division staff that processed his applications who
2 speculated that the springs may originate from groundwater as evidence that he diverts
3 groundwater. (Fahey 29, Bates-stamped 618.) This merely shows that Division staff was aware of
4 and considered the groundwater issue. Nonetheless, the Board issued Fahey his permits, rather than
5 denying his applications on the basis that the springs were outside its permitting authority. (WR-
6 15; WR-16.) Consistent with his permits, Fahey has never reported using groundwater in lieu of
7 surface water in his progress reports. (RT (Jan. 25, 2016), p. 220:23-25.)

8 Any water Fahey diverts from the springs is limited by his permits.

9 **c. Fahey Has No Right to Divert “Developed” Water in Excess of
10 His Permitted Right**

11 Fahey has asserted a right to divert “developed” water in addition to his permitted right.

12 When a diverter artificially augments a water source, such as by digging out a spring, the
13 diverter has a right to the increased flow. (*Churchill v. Rose* (1902) 136 Cal. 576, 578-579;
14 *Pomona Land & Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618, 623; *City of Santa*
15 *Maria v. Adam* (2012) 211 Cal.App.4th 266, 304; WR-80, p. 41.) However, the diverter is not
16 entitled to water that would naturally reach a stream and to which prior rights have attached.
17 (*Roberts v. Crafts* (1903) 141 Cal. 20, 27; *L. Mini Estate Co. v. Walsh* (1935) 4 Cal.2d 249, 254;
18 *Vineland Irrigation Dist. v. Azusa Irrigation Co.* (1899) 126 Cal. 486, 490-491; *Cohen v. La*
19 *Canada Land & Water Co.* (1904) 142 Cal. 437, 439-440; Cohen, *supra* 142 Cal. at 439-440.) The
20 diverter therefore has the burden to prove it has not injured a senior appropriator. (*Pomona Land &*
21 *Water Co.*, *supra* 152 Cal. at 630.) If the water source falls within the State Water Board’s
22 permitting authority, a permit is required to appropriate the developed water. (Water Code § 1225.)

23 Fahey has not demonstrated that augmented flow from developed water is available for
24 appropriation or that diverting the augmented flow will not injure prior rights. San Francisco
25 protested Fahey’s proposal to use groundwater to offset his diversions for Application 29977 in
26 part on the basis that it considered any groundwater in the Tuolumne River Basin linked to Lake
27 Don Pedro. (SWRCB-1; Petruzzelli Decl., Attach. 4.) Division staff at the hearing testified that
28 Fahey’s reported diversions of developed water did not show the expected characteristics of non-
tributary percolating groundwater. (RT (Jan. 26, 2016), p. 29:2-23.) In the fully appropriated
Tuolumne River, even developed water would not be available for appropriation.

Even the water availability analysis that Fahey’s consultant, Dr. Grunwald, prepared for
Application 31491 assumed a “one to one” ratio of extractions from the springs to reduced surface
flows. (RT (Jan. 25, 2016, p. 223:10-24.) Mr. Fahey’s own measurements supported Dr.

1 Grunwald’s analysis. (*Id.* at pp. 240:19-241:10; Fahey 71, pp. 50-52 fig. 8-10.) In addition, Dr.
2 Grunwald acknowledged that no definitive studies have been done and that “A detailed study of
3 water withdrawals and spring flow must be made in order to establish a more definitive ratio
4 between surface flow impairment and withdrawal of percolating ground water.” (Fahey-71, p. 2;
5 RT (Jan. 25, 2016), p. 242:9-119.) Division staff agreed that site-specific study would be necessary
6 to establish whether Fahey was drawing non-tributary percolating groundwater as developed water
7 and that such study has not been performed. (RT (Jan. 26, 2016), p. 29:2-23.)

8 Even if Fahey has developed the springs and augmented their natural flows, he has not
9 applied for or been issued a permit to divert water in addition to his permitted right. He also has yet
10 to establish how much of his permitted right is developed water. Finally, he has yet to demonstrate
11 whether diverting developed water in excess of his permitted right will not harm prior rights. For
12 now he has no claim of right to any developed water, whether as part of his permitted right or in
13 addition to his permitted right.

14 **4. Key Issue 1(c) – The State Water Board Should Consider Relevant
15 Circumstances Demonstrating a History of Permit Violations.**

16 **a. Fahey Violated Permit Terms Requiring Him to Replace Water
17 Diverted During the Fully Appropriated Stream Period.**

18 **i. Fahey’s Failure to Provide Replacement Water During
19 the Fully Appropriated Stream Period Violated Water
20 Code section 1052.**

21 Terms 19 and 20 in Permit 20784 and Term 34 in 21289, require Fahey to replace water he
22 diverts during the FAS period. (WR-15; WR-16.) However, Fahey testified that he never purchased
23 any replacement water until 2009 – almost fifteen years after receiving his first permit. (WR-72, p.
24 26; RT (Jan. 25, 2016), p. 247:9-10.) He also testified that he did not purchase any water after
25 2010. (WR-9, p. 6 at ¶¶ 30-31; RT (Jan. 26, 2016), pp. 17:24-18:6) He nonetheless diverted
26 throughout the FAS period every year since at least 1997 – 18 years in total. (RT (Jan. 26, 2016), p.
27 32:12-22; SWRCB-1; Petruzzelli Decl., Attach. 1.) Since Fahey’s right to divert water during FAS
28 periods is subject to replacing water he diverts, his permit violations constitute an unauthorized
diversion and use of water and trespass under Water Code section 1052.

ii. Decision 995 Still Applies and Remains Relevant

Fahey has asserted that the “correct” interpretation of his permits does not require
compliance with Term 19 in Permit 21289, because D995 became “obsolete” due to the
construction of New Don Pedro and therefore never should have been used to “mandate” the 1992

1 Exchange Agreement. To the contrary, New Don Pedro did not make D995 “obsolete.” The
2 Districts filed their applications for New Don Pedro in 1951. (WR-187, p. 11.) The State Water
3 Board adopted D995 ten years later in 1961. (WR-18, p. 2-3; WR-187, p. 11.) The list of water
4 right applications the State Water Board considered in D995 includes Applications 14126 and
5 14127 – the water right applications for New Don Pedro. (WR-153, slide 11; RT (Jan. 26, 2016),
6 pp. 23:22-24:13.) Consequently, although the State Water Board adopted D995 before the
7 construction of New Don Pedro, by considering the water right applications for New Don Pedro in
8 D995 it considered New Don Pedro’s impact on the availability of water for appropriation. The
9 State Water Board revisited and renewed the D995 FAS determination at least three times in
10 Orders WR 89-25, WR 91-07, and WR 98-08, ensuring it remains current. (WR-80, 81; WR-187,
11 slide 11; RT (Jan. 26, 2016), pp. 24:14-25:3.) Fahey cites no order rescinding the FAS
12 determinations for the Tuolumne River or for the Sacramento-San Joaquin Delta.

13 The Fourth Agreement followed D995 in 1966, but stated that it did not “affect, alter, or
14 impair in any manner the rights of the respective parties hereto in or to the waters or the use of
15 waters of the Tuolumne River or its watershed acquired or existing under the laws of the State of
16 California” and was not intended to do so. (Fahey-79, p. 4) The Fourth Agreement did not change
17 the availability of water for appropriation by third parties such as Fahey.

18 Fahey claims that complying with Permit 20784’s Term 19 and Permit 21289’s Term 34
19 would force him to violate the prohibitions in Permit 20784’s Term 20 and Permit 21289’s Term
20 33 against him interfering with San Francisco’s obligations to the Districts under the Raker Act
21 and/or any other implementing agreements between the Districts and San Francisco. (Fahey-1, p.
22 15.) However, Permit 20784’s Term 20 and Permit 21289’s Term 34 were included to mitigate
23 such impacts. Fahey could have complied with his permit terms by simply communicating and
24 coordinating with the Districts and with San Francisco, but he did not.

25 Nonetheless, the Board may only revoke or revise a FAS declaration through a noticed
26 hearing and the current proceeding has not been noticed as a hearing to revoke or revise a FAS
27 declaration. (WR-6.) Fahey cannot challenge the FAS determinations in the current proceeding.

28 **iii. Terms in Both Permits 20784 and 21289 Apply**

Fahey has contended that Permit 21289 Terms 33 and 34 govern all water replacement
provisions in both permits. (Fahey Opp. to PT Mot. to Strike, p. 5-9.) This is incorrect. Fahey filed
Application 31491 for an additional and separate permit to appropriate water from Marco and Polo
Spring. (Fahey-27.) The State Water Board then issued Permit 21289, a new, separate, and
additional permit, for Fahey to appropriate water from Marco and Polo Spring. (WR-16.) The only

1 amendment on file for Permit 20784 is the addition of Sugar Pine Spring as a point of diversion.
2 (Petruzzelli Decl.), Attach. 2.) There is no evidence of any other change.

3 Fahey characterizes the 2003 TUD Purchase Agreement as a replacement of the 1992
4 Exchange Agreement, when in fact the 2003 TUD Purchase Agreement was intended to provide
5 replacement water for both permits. (Fahey 1, p. 5; RT (Jan. 25, 2016), p. 212:21-25.) It provided
6 Fahey a means to comply with his permit terms and show the State Water Board he would have a
7 supply of replacement water sufficient for both permits, but it did not modify Permit 20784. Term
8 34 in Permit 21289 and the exemption to the FAS for Application 31491 both require Fahey to
9 comply with and maintain the 1992 Exchange Agreement as a condition to diverting water during
10 the FAS period. (WR-16; Fahey-37; RT (Jan. 25, 2016), pp. 210:21-214:7.)

11 **iv. Fahey Waived the Opportunity to Contest the**
12 **Replacement Water Requirements in His Permits.**

13 Fahey's opportunity to contest the FAS conditions in his permits expired long ago. Under
14 Water Code section 1126, a party aggrieved by a decision or order of the State Water Board has 30
15 days to file a petition for writ of mandate. (Water Code § 1126, subd. (b).) If the party does not file
16 a petition for writ of mandate within 30 days, the party waives its right to judicial review and to
17 otherwise challenge the decision or order. (Water Code § 1126, subd. (d); *North Gualala Water*
18 *Co.*, *supra* 139 Cal.App.4th at 1607; *Phelps v. State Water Resources Control Bd.* (2007) 157
19 Cal.App.4th 89, 100-101.) Fahey could have challenged his permit terms at issuance. He never did.
20 Fahey also could have challenged the FAS declaration when the State Water Board issued Order
21 98-08. Again, he never did. (WR-187, slide 11.) Finally, Fahey could have petitioned the Board to
22 rescind the FAS determinations *any time* in the last twenty years. He never did. (23 Cal. Code
23 Regs., §871, subd. (a), (c).) Fahey has waived his rights to challenge his permit terms and the FAS.

24 **v. Fahey Has a Duty to Provide Replacement Water For**
25 **Water He Diverts During the FAS Period**

26 Under the 1992 Exchange Agreement, Fahey has the responsibility to provide sufficient
27 make-up water and to meet the requirements of D995 and D1594. (WR-19, p. 2 at ¶ 5.)

28 Fahey nonetheless claims that after the Districts approved the 1992 Exchange Agreement,
Mr. Leroy Kennedy from TID told him not to contact them and that they would let him know when
to provide replacement water.⁸ (RT (Jan. 25, 2016), pp. 159:20-160:6.) However, when this

⁸ Fahey's counsel offered Mr. Kennedy's statement as evidence of Fahey's understanding of his permit obligations and show Fahey acted in good faith, not as evidence of Fahey's permit requirements. (RT (Jan. 25, 2016) p. 159:13-18.)

1 conversation occurred Fahey and the Districts planned on using groundwater as a source of
2 replacement water. (SWRCB-1; Petruzzelli Decl., Attach. 3.) Fahey contemplated attaching a
3 meter to the groundwater pump and a meter at his facility. (*Id.*) Communication would only be
4 necessary if the meters indicated Fahey failed to provide sufficient replacement water. (*Id.*) Due to
5 San Francisco's subsequent protest, however, Fahey agreed to use water purchased from TUD
6 instead. (RT (Jan. 25, 2016), p. 186:8-14.) Fahey's claim that the Districts told him not to contact
7 them does not reflect the obligations ultimately contained in his permits.

8 Fahey's testimony regarding any statements by Mr. Kennedy is also hearsay. (Evid. Code §
9 1200, subd. (a).) There is no evidence Mr. Kennedy had the authority to make the alleged
10 statements. The 1992 Exchange Agreement may only be modified by written instrument duly
11 executed by the parties. (WR-19, p. 2 at ¶ 11.) There is no evidence of any such modification.
12 There is also no evidence Mr. Kennedy had the authority to alter the agreement for TID, especially
13 since the 1992 Exchange Agreement was adopted by resolution of TID's Board of Directors. (WR-
14 19, p. 3.) Neither is there any evidence he had the authority to speak for MID, since there is no
15 evidence he was even an agent of MID, much less that he also had the authority to make binding
16 statements for MID.

17 The alleged conversation occurred more than twenty years ago and Mr. Kennedy's
18 statements lack corroborating non-hearsay testimony. (RT (Jan. 25, 2016), p. 238:24-239:23.) The
19 purported statements are also inconsistent with the Districts' position reflected in the 1992
20 Exchange Agreement and the resolution approving the agreement. (WR-19.) Fahey's testimony
21 regarding Mr. Kennedy's statements is not reliable, does not relate to Fahey's permit requirements,
22 and should receive no weight.

23 **b. Fahey Violated Bypass Flow Requirements**

24 Fahey disclosed his bypass flows in response to the Information Order. (WR-55, pp. 3-5;
25 WR-11, p. 8 at ¶ 45; RT (Jan. 25, 2016), pp. 119:17-120:19.) Fahey did not disclose the total flow
26 or bypass flow for each spring. (WR-66, pp. 3-5.) Rather, he disclosed the average monthly flow
27 and average bypass flow for all four springs combined. (*Id.*) Nonetheless, if Fahey reported
28 diverting from either Marco or Polo Spring, he had to bypass at least 5 gpm for each spring. (WR-
16.) If he diverted from both springs then he had to bypass at least 10 gpm. (*Id.*)

Fahey reported bypassing less than 10 gpm in 2014 in June, July, September, and October
and in 2015 from April through August. (WR-66, pp. 3-5.) Fahey reported diverting from Marco
and Polo Springs in all months of 2014. (WR-59.) In 2015, he reported diverting from Marco and
Polo Spring in every month except for August, when he only reported diverting from Marco

1 Spring. (WR-65, pp. 3-8.) However, in August 2015, Fahey only reported bypassing 2.1 gpm.
2 (WR-66, pp. 5.) Since he diverted from at least one spring in that month, he still had to bypass at
3 least 5 gpm. Fahey therefore violated the bypass flow requirement in Permit 21289 Term 20 for
4 nine months in 2014 and 2015. This was water he was not authorized to divert. Fahey's violation of
Term 20 therefore constitutes an unauthorized diversion under Water Code section 1052.

5 **c. Fahey Has Unlawfully Diverted Water In Excess of His**
6 **Permitted Rights as "Developed Water."**

7 Fahey reports diverting and using water in excess of his permitted right in every progress
8 report for Permit 20784 filed before 2014. (RT (Jan. 26, 2016), p. 103:21-104:12; SWRCB-1;
9 Petruzzelli Decl., Attach. 1.) He describes the excess water as "developed water." (*Id.*) He always
10 reports diverting developed water when he diverts in excess of 20,000 gallons per day from a
11 spring (or 14 gpm). Since these diversions exceed Fahey's right, they constitute unauthorized
diversions and trespass under Water Code section 1052.

12 According to Mr. Fahey, Mr. William Van Dyck, a staff person for the Division, instructed
13 him to report his diversions up to his permitted right and then to report anything diverted in excess
14 of his permitted right as "developed water." (RT (Jan. 26, 2016), p. 103:3-104:12.) However, this
15 statement was only offered as evidence of Fahey's understanding of his permit obligations and to
16 demonstrate the reasonableness of his reporting method. (RT (Jan. 26, 2016), pp. 103:24-104:12.)
Fahey did not offer the statement as evidence to support a claim of right to divert additional water.

17 Fahey's testimony regarding Mr. Van Dyck's statements constitutes hearsay. (Evid. Code, §
18 1200, subd. (a).) Mr. Van Dyck was Division staff, but lacked the authority to tell Fahey that
19 developing the spring and reporting the additional diversion amount would be sufficient to
20 establish a right to developed water.

21 No evidence corroborates Mr. Van Dyck's statement. A report of a field investigation
22 conducted on September 29, 1994 only states that "The concept of developed water was discussed
23 as a possible means to avoid infringement on prior rights at New Don Pedro Reservoir without
24 having to provide makeup water" and that "Mr. Fahey was advised to keep good records of the
25 flow rate for different periods under natural conditions in order to establish a claim to developed
26 water through a horizontal boring(s)." (SWRCB-1; Petruzzelli Decl., Attach. 5.) This indicates
27 Fahey intended to utilize developed water as part of his permitted right, but not in addition to that
28 right. Mr. Van Dyck followed up on the field investigation's discussion with a letter to Mr. Fahey
dated October 11, 1994. (SWRCB-1; Petruzzelli Decl., Attach. 6.) Per Mr. Fahey's request, Mr.
Van Dyck attached "a copy of a legal counsel opinion on the need for a water right to divert

1 developed water” to the letter. (*Id.*) However, the letter does not recount the substance of any
2 conversations with Mr. Fahey and the legal counsel opinion is not attached to the copy of the letter
3 in the permit file. (*Id.*) There is no other evidence in the evidentiary record regarding developed
4 water.

5 Mr. Fahey’s testimony concerns a discussion he had over twenty years ago. It constitutes
6 hearsay and lacks corroborating non-hearsay evidence. On the issue of whether Fahey now has a
7 right to developed water, Fahey’s testimony regarding his conversation with Mr. Van Dyck is
8 unreliable and should receive no weight.

9 **B. Key Issue 3 - The State Water Board Should Impose Administrative Civil**
10 **Liability on Fahey for Trespass in Violation of Water Code section 1052**

11 **1. Water Code section 1052 Establishes the Maximum Administrative**
12 **Civil Liability**

13 Water Code § 1052 provides that the maximum civil liability the Board may impose for the
14 unauthorized diversion or use of water during a drought period is \$1,000 for each day of trespass
15 plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
16 2014 and 2015 were both declared drought years. (WR-7 at ¶6.) In other years the Board may
17 impose administrative civil liability of up to \$500 per day. (Water Code, §1052 subd. (c)(2).)

18 **2. Fahey’s Maximum Administrative Civil Liability for Diverting Water**
19 **When None Was Available for His Priority of Right is \$467,250.**

20 Over the course of 213 days in 2014 and 2015, Fahey diverted 16.5 acre-feet of water when
21 there was no water available for his priority of right. Under Water Code section 1052, this would
22 amount to a maximum ACL of \$467,250.⁹ (WR-11 at ¶¶ 43-47.)

23 To determine the number of days Fahey diverted in 2014 and how much he diverted, the
24 Prosecution Team relied on Fahey’s progress reports and on invoices he provided in response to
25 the Information Order. (RT (Jan. 25, 2016), p. 62:14-25.) For 2014, evidence demonstrates that
26 Fahey's unauthorized diversions began on May 27 and continued, with a four-day interruption,
27 until November 18, for a total of 123 days of unauthorized diversion under each permit in 2014.
28 (WR-11 at ¶ 34; WR-151, p. 8; RT (Jan. 25, 2016), p. 62:14-63:13.) To determine how much

⁹ Information available at the time of the Complaint supported a maximum ACL of \$394,866, but the Prosecution Team refined the calculation based on information later developed through Fahey’s responses to the Information Order and Subpoena. After submitting its case in chief, the Prosecution Team realized that 17 days were inadvertently omitted from the calculation, underreporting 17 days and approximately 0.75 acre-feet of water. (RT (Jan. 25, 2016), p. 64:4-12.) This would increase Fahey’s maximum ACL for diverting when no water was available for his priority of right by approximately \$18,875 to \$486,125. (*Id.*) The penalty calculation also does not include diversions made after September 2015 and through the end of the period of water unavailability. (*Id.* at p.64:13-17.)

1 Fahey diverted, Mr. LaBrie conservatively estimated that the trucks averaged around 6,600 gallons
2 each. (RT (Jan. 25, 2016), p. 63:6-13.) Based on the number of truck loads and the volume of each
3 load, Mr. LaBrie calculated that Fahey diverted 9.23 acre-feet of water in excess of that available to
4 serve his permitted right. (WR-11 at ¶ 34; WR-151, p. 8; RT (Jan. 25, 2016), p. 62:14-63:13.)

5 For 2015, the Prosecution Team relied on surveillance data gathered from July 12 through
6 August 27 and then supplemented that data with information from the invoices. (RT (Jan. 25,
7 2016), p. 63:14-15.) Evidence demonstrates that Fahey diverted and used water for at least 117
8 days in 2015 and diverted approximately 7.27 acre-feet of water over that period. (WR-11 at ¶¶ 35,
9 37, 47; WR-151, pp. 9-10; RT (Jan. 25, 2016), p. 63:14-64:3; WR-83 through WR-146.)

10 **3. Evidence Supports Administrative Civil Liability For Permit Term** 11 **Violations.**

12 In addition to diverting water when there was not water available for his priority of right,
13 evidence obtained through the Information Order and Subpoena and through testimony at the
14 hearing revealed a pattern and practice of extensive permit violations.

15 Fahey violated Permit 20784's Terms 19 and 20 and Permit 21289's Term 34 by diverting
16 during the FAS period without providing replacement water. (RT (Jan. 26, 2016), p. 32:12-22;
17 SWRCB-1; Petruzzelli Decl., Attach. 1.) In all but three years from 1997 through 2015, Fahey
18 failed to discharge any water to New Don Pedro to replace water he diverted during the FAS. (WR-
19 72, p. 26; RT (Jan. 25, 2016), p. 247:9-10; WR-9, p. 6 at ¶¶ 30-31; RT (Jan. 26, 2016), pp. 17:24-
20 18:6.) For 2014 and 2015, video surveillance and invoices show that Fahey diverted 13.48 acre-feet
21 over the course of 175 days during the FAS periods in those years. There is no video surveillance
22 and no invoice information for prior years, but invoices and video surveillance from 2014 and 2015
23 demonstrate that Fahey typically diverts water at least six days a week. (WR-61, pp. 30-34; WR-
24 55.) For the years in which Fahey did not discharge replacement water to New Don Pedro
25 Reservoir (1997-2008 and 2012-2013), this would amount to a total of 1,548 days during the FAS
26 periods (not including Sundays). For 2014 and 2015, both drought years when Fahey had two
27 permits, this would total \$208,700. For 2012, a non-drought year when Fahey had two permits, the
28 total would be 119 days for \$119,000. For 1997-2008, when Fahey had only one permit, the total
would be 1,429 days for \$714,500. The total, for all of these years, would be \$1,042,200.

Fahey also violated the bypass flow requirement in Term 20 of Permit 21289. According 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. (WR-55, pp. 4-5.) Based on
video surveillance and invoices, evidence shows that Fahey violated Term 20 for 200 days and

1 diverted a total of 15.21 acre-feet on those days. Since 2014 and 2015 were both drought years,
2 under Water Code section 1052 the maximum ACL for this violation would be \$238,022.

3 Finally, Fahey reported diverting in excess of his right under Permit 20784 as “developed
4 water.” (SWRCB-1; Petruzzelli Decl., Attach. 1.) He reports diverting in excess of his permitted
5 right in every year except 2014. The Prosecution Team evaluated compliance with this term by
6 reviewing Fahey’s progress reports for months with reported diversions totaling more than 20,000
7 gallons per day for either spring. In some months Fahey’s diverted more than twice his permitted
8 right from a spring. From 1997 through 2013, he reported diverting in excess of his permitted right
9 a total of 110 months, or 2,855 days (not counting Sundays). Under Water Code section 1052,
10 Fahey’s maximum ACL for diverting in excess of his permitted right would be \$1,427,500.

11 **4. Relevant Considerations for Determining Amount of Administrative**
12 **Civil Liability**

13 **a. The State Water Board Shall Consider All Relevant**
14 **Circumstances**

15 In determining the amount of civil liability, State Water Board shall consider all relevant
16 circumstances, including, but not limited to, the extent of harm caused by the violation, the nature
17 and persistence of the violation, the length of time over which the violation occurs, and any
18 corrective action taken by the violator. (Water Code § 1055.3.)

19 Based on information available at the time of the Complaint, the Prosecution Team
20 recommended an ACL of \$224,875. (WR-1, p. 8 at ¶ 53; RT (Jan. 2016), p. 66:4-13.) This was
21 based on reducing the number of violation days to a single violation between the two rights per
22 day, Fahey's continued diversions despite a lack of available water to serve his rights, the economic
23 benefit Fahey derived from selling premium bottled spring water, and the need to provide a strong
24 disincentive for continued unauthorized diversions by Fahey and any similarly-situated parties.
(*Id.*) This is, however, only a recommendation. The State Water Board has discretion to determine
25 an appropriate penalty up to the statutory maximum permitted by Water Code section 1052.

26 Fahey has not asserted that he cannot afford to pay the penalty proposed in the ACL and
27 there is no evidence of any corrective action.

28 **b. Fahey’s Unlawful Diversions Occurred During Severe Drought,**
Harming Prior Rights and Instream Beneficial Uses

Fahey’s diversions impact hydrologic conditions downstream in the Tuolumne River below
New Don Pedro all the way into the San Joaquin River Basin. When the State Water Board issued
Fahey’s permits it included Standard Terms 80, 90, and 93, indicating it determined his diversions

1 could impact senior rights and beneficial uses downstream on the Tuolumne River below New Don
2 Pedro Reservoir and all the way into the San Joaquin River Basin. (WR-15; WR-16; WR-25, p. 54;
3 WR-82, p. 39; RT (Jan. 25, 2016), p. 50:2-9.) New Don Pedro does not cut off Fahey’s hydrologic
4 link or prevent him from harming others downstream. (RT (Jan. 26, 2016), p. 18:7-16.)

5 Fahey’s junior priority is sufficient to presume harm to senior rights and instream beneficial
6 uses. (RT (Jan. 25, 2016), p. 109:24-110:8.) Fahey illegally diverted and used water during extreme
7 drought, when there was insufficient water for rights as senior as 1903, reducing the amount of
8 water available for every senior water right downstream. (WR-9 at ¶ 32.) Even Fahey’s attempts at
9 providing replacement water caused harm, as he acknowledged that if he had the responsibility to
10 provide replacement water and “simply unannounced” had water replaced into New Don Pedro
11 Reservoir based on his diversions, that he would interfere with the obligations of Districts and San
12 Francisco under the Raker Act and Fourth Agreement. (RT (Jan. 25, 2016), p. 156:10-16.)

13 Fahey also reduced water that otherwise would have been available for instream beneficial
14 uses. (RT (Jan. 25, 2016), p. 77:16-23.) In the protest to Fahey’s Application 31491, the Districts
15 explained that “Any reduction in inflow to Don Pedro Reservoir could also significantly affect the
16 amount of water available for such additional releases” for the Vernalis Adaptive Management
17 Plan. (Fahey 41, Bates-stamped 688.) Fahey further harmed instream beneficial uses by diverting
18 water he was required to bypass as a requirement of Term 20 in Permit 21289.

19 **c. Fahey Derived Substantial Economic Benefit through His**
20 **Unauthorized Diversions**

21 Fahey derived substantial economic benefit from illegally diverting and using water. Fahey
22 extracts spring water, a food-grade product, and sells it to commercial water bottling operations.
23 (WR-9 at ¶¶ 6-7, WR-11 at ¶¶ 8, 39.) The spring water is nearly bacteria free and requires no
24 pumping. (WR-46) The replacement water he buys from TUD costs only \$60 per acre-foot. (WR-
25 72, p. 38.) At that price buying the 16.5 acre-feet of water he diverted would have cost him \$990.
26 However, Fahey stated he made \$255,646.36 during the period the Complaint alleges he was
27 illegally diverting and using water – roughly \$1,500 per day for the 170 days alleged in the
28 Complaint. (WR-72, p.4.) He also avoided a \$2 million loss. In a conversation with Mr. LaBrie,
Fahey stated he would go out of business if he stopped diverting. (WR-11, p. 2 at ¶ 10; RT (Jan.
25, 2016), p. 56:23-25.) At the hearing he testified that he has spent “millions of dollars – probably
close to \$2 million to create this business.” (RT (Jan. 26, 2016), p. 77:20-25.) Combined with the
\$255,646.36 he made in spring water sales, Fahey’s economic benefit for unlawful diversions in
2014 and 2015 amounted to roughly \$2.25 million. This does not include any money he made

1 diverting water in excess of his right as developed water or water he diverted during FAS periods
2 for fifteen years without providing replacement water.

3 **d. Staff Costs for Investigating Fahey and Going to Hearing.**

4 The Division estimates that its staff cost to investigate the unauthorized diversion issues
5 and develop the enforcement documents to be \$15,624. (WR-9 at ¶ 37.) When the Division issued
6 the Complaint it estimated the additional staff costs to go to hearing at approximately \$10,000.
7 (WR-9 at ¶ 38.) However, responding to Fahey’s pre-hearing discovery motions, deposition
8 notices, and document requests required substantial staff time in addition to that initially
9 contemplated at the time of the Complaint. (RT (Jan. 26, 2016), p. 43:21-23.) As a result, staff
10 costs for preparing the case and going to hearing were higher than initially anticipated. (*Id.*)

11 **C. Key Issue 2 – The State Water Board Should Adopt the Cease and Desist
12 Order With Revisions to Ensure Fahey Ceases Unauthorized Diversions.**

13 The State Water Board may issue a CDO to “any person ... violating, or threatening to
14 violate ... the prohibition set forth in Section 1052 against the unauthorized diversion or use of
15 water subject to this division.” (Water Code §§ 1052, subd. (a), 1831 (d)(1).)

16 California remains in a drought and Fahey has a very junior priority. (RT (Jan. 26, 2016), p.
17 36:5-38:1.) It is reasonably foreseeable that water could again become unavailable for his rights.
18 (RT (Jan. 26, 2016), p. 36:5-38:1.) Given Fahey’s past conduct and economic incentives to
19 continue diverting, he will likely divert water illegally again in the future should water again
20 become unavailable for his priority of right. (RT (Jan. 26, 2016), p. 38:8-14.) Fahey has
21 demonstrated, through a history of persistent and ongoing noncompliance, that he presents a
22 continuing compliance problem. Fahey will require close supervision and monitoring.

23 The Prosecution Team therefore recommends a very strong CDO to assure compliance now
24 and in the future with conditions requiring Fahey to:

- 25 · Comply with all permit terms.
- 26 · Cease unauthorized diversions of water.
- 27 · Cease the diversion or use of water under Permits 20784 and 21289 when there is no water
28 available for the priority of right of those permits.
- Cease diverting any water in excess of his permitted right.
- Replace all water diverted during the FAS period within the calendar year.
- Cease diverting during the FAS period in any year when no replacement water is to be provided.

- 1 · Submit an agreement between himself, the Districts, and San Francisco within 90 days of
2 the State Water Board's adoption of the CDO. The agreement shall provide, at a minimum,
3 for Fahey's method of annually providing replacement water pursuant to Terms 19 and 20
4 in Permit 20784 and Term 34 in Permit 21289. This agreement may update the 1992
5 Exchange Agreement and include additional provisions as the parties deem appropriate.
6 The agreement shall be served on the parties pursuant to the procedures described in the
7 Hearing Notice. If Fahey does not submit the agreement the State Water Board should
8 notice a hearing to consider revoking Fahey's rights to divert water during the FAS period.
- 9 · Report in his annual progress report the source, amount, location, and timing of the
10 replacement water he discharges to New Don Pedro Reservoir.
- 11 · Submit with his annual progress report any and all purchase agreements for the replacement
12 water he discharges to New Don Pedro Reservoir.
- 13 · Report in his annual progress report the amount diverted daily from each spring in both
14 total gallons per day and gpm.
- 15 · Maintain bypass flows at a continuous rate of 5 gpm at both Marco and Polo Spring.
- 16 · Report in his annual progress report for Permit 21289 the daily continuous bypass flow
17 rates for Marco Spring and Polo Spring, individually, in gpm.
- 18 · Report in his annual progress report by permittee the name(s) and location(s) of the
19 company(s) that will be bottling the diverted water.

17 **IV. CONCLUSION**

18 Evidence shows that Fahey diverted 16.5 acre-feet of water over the course of 213 days in
19 2014 and 2015 when there was no water available for his priority of right. Fahey has no rights,
20 agreements, or alternative water supply that would have otherwise authorized his diversions. In
21 addition, evidence at the hearing shows an established pattern and practice of ongoing, persistent
22 permit violations resulting in unauthorized diversions. Fahey also has a strong economic incentive
23 to violate his permit terms in the future. The Prosecution Team recommends an ACL of \$224,875
24 for past violations and a strong CDO to assure compliance in the future.

25 Respectfully submitted,

26 

27 Kenneth Petruzzelli
28 **OFFICE OF ENFORCEMENT**
 Attorney for the Prosecution Team

Service List
(November 13, 2015; Revised January 5, 2016)

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