

April 10, 2018

VIA EMAIL AND U.S. MAIL

Division of Water Rights
State Water Resources Control Board
Attention: Ernest Mona
P.O. Box 2000
Sacramento, CA 95812-2000
wrhearing@waterboards.ca.gov

**Re: Fahey ACL/CDO Hearing
Application ID: A029977 and A031491**

Dear Mr. Mona:

As you know, this office represents Scott Fahey and Sugar Pine Spring Water LP (collectively, "Fahey") in the above-entitled matter. The purpose of this correspondence is to prompt the Water Resources Control Board's ("Board") to immediately issue a final decision on the ACL/CDO in this proceeding.

Fahey Is Being Damaged By The Lack Of A Board Decision

The ambiguity of Fahey's rights in his *Permits For Diversion And Use Of Water Nos. 20784 and 21289* ("Permits") caused by this unwarranted administrative proceeding continues to have a direct and substantial financial impact on Fahey, years after the underlying curtailment periods expired. Specifically, Fahey's main customer confirmed in November 2017 that it will continue to only purchase 50% of its spring water from Fahey solely because the ACL/CDO issue has not been resolved. In addition, Fahey is being denied business loans explicitly due to the lack of a decision by the Board in the matter, which further diminishes the survival of Fahey's business that relies on such lending opportunities. In short, the Board's delay in issuing a final decision on the ACL/CDO is now directly causing tens of thousands of dollars of continuing pecuniary injury to Fahey, which to date totals hundreds of thousands of dollars of injury. Indeed, the current injury to Fahey greatly exceeds the monetary civil penalties sought by the Prosecution Team against Fahey.

Fahey's Due Process Rights Continue To Be Violated

The substantial injury caused by the Board's delay in issuing a final decision is compounded by the fact that the ACL/CDO proceeding itself has, in numerous ways, constituted a violation of Fahey's constitutional due process rights. (*See Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1033-1034 [substantive due process claim is actionable where state officials are guilty of grave unfairness in the discharge of their legal responsibilities, or a deliberate flouting of the law that trammels significant personal or property rights.]) As Fahey summarized on page 25 of his Closing Brief (filed in *June 2016*):

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

Thus, the current delay of over one and a half years in obtaining a final decision from the Board regarding such egregious prosecutorial misconduct, which is continuing to result in substantial injury to Fahey's business, constitutes both a substantive due process violation (*see Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 266-267) as well as a temporary taking of

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taking of Fahey's property. (*See Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161, 184-187.)

Accordingly, we look forward to the Board's immediate release of its final decision on the ACL/CDO in this matter.

Sincerely,



Glen C. Hansen

GCH/lh

cc: See attached service list

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