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

11 **In the matter of Administrative Civil) Prosecution Team Objection to**
12 **Liability Complaint issued against G.) Declaration of Glen Hansen in Support of**
13 **Scott Fahey and Sugar Pine Spring) Fahey's Closing Brief**
14 **Water, LP)**

15 The Prosecution Team objects to the Declaration of Glen Hansen in Support of Fahey's
16 Closing Brief (Hansen Declaration), submitted June 17, 2016, and to the two exhibits attached to
17 that declaration.¹

18 The Hansen Declaration pertains to records disclosed in a response to a request for public
19 records. On December 7, 2015, Fahey requested copies of public records pursuant to the Public
20 Records Act (Govt. Code § 6250 *et seq.*). (Exhibit WR-74.) Fahey's Public Records Act request
21 followed an identical request for documents Fahey sent the Prosecution Team on December 1,
22 2015. (WR-75.) Counsel for the Prosecution Team responded to Fahey's December 1, 2015 letter
23 by e-mail on December 8, 2015. (WR-77; WR-78.) Fahey's requests included nine categories of
24 documents. Of the nine categories, the Prosecution Team determined that five (categories 1, 4, 7, 8,
25 and 9) related to Fahey's administrative civil liability (ACL) proceeding and that the remaining
26 four categories (categories 2, 3, 5, and 6) were exceedingly broad, did not relate to the Fahey ACL
27 proceeding, and were more appropriately addressed through a request for public records. (*Id.*) The
28 Prosecution Team disclosed documents with regard to categories 1, 4, 7, 8, and 9 to the extent they
were not privileged or attorney client work product and had not previously been disclosed. (*Id.*)
The Prosecution Team responded with regard to categories 5 and 6 on December 9, 2015. (WR-
79.) The Prosecution Team responded with regard to category 2 in two disclosures, one on
February 26, 2016 and another on April 21, 2016. (Declaration of Kenneth Petruzzelli in

¹ Although the parties have had opportunities to submit closing briefs, the Prosecution Team nonetheless objects to the Hansen Declaration and its two exhibits in order to preserve its objection in the administrative record.

1 Prosecution Team Objection to Declaration of Glen Hansen in Support of Fahey’s Closing Brief, ¶
2 8.) The Prosecution Team completed the Public Records Act responses with disclosures pertaining
3 to category 3 on April 29, 2016. (*Id.* at ¶ 9.)

4 Regardless of when the Prosecution Team disclosed the records, Fahey’s offer of evidence
5 is not timely. Fahey had an opportunity at the hearing to argue that the Prosecution Team’s failure
6 to disclose those documents *at that time* prejudiced him. He did not raise that argument. The
7 documents offered as evidence are irrelevant and offer nothing new that could not have been
8 offered previously or otherwise obtained through discovery.

9 According to Fahey, Exhibit 1 “would... reinforce Fahey’s testimony that is directly related
10 to the lack of harm from his diversions.” (Fahey Closing Br., p. 3.) However, the issue in the
11 present proceeding with respect to Water Code section 1055.3 is whether Fahey’s diversions
12 caused harm, not whether another diversion causes harm.²

13 Fahey further contends that “it would also establish that the Prosecution Team had the
14 burden of overcoming the developed water presumption...” (*Id.*) In seeking to establish that the
15 Prosecution Team has an evidentiary burden, Fahey is making a legal argument, not a factual
16 argument, and Fahey cites no legal authority to support his assertion.

17 Fahey additionally claims that Exhibit 1 demonstrates the lack of any administrative
18 process through which the State Water Board responded to those water right holders who marked
19 the “Other” box on the curtailment certification form. However, Fahey already cross-examined the
20 Prosecution Team’s witnesses on this issue, including the Assistant Deputy Director for the
21 Division of Water Rights Mr. John O’Hagan. Fahey’s assertion regarding a lack of administrative
22 process in response to the notices of unavailability and with regard to the curtailment certifications
23 is similarly irrelevant. The notices of unavailability were not administrative determinations or
24 orders, but notifications for water rights holders that the State Water Board had information that
25 water was unavailable for certain water rights. (WR-31; WR-32; WR-33; WR-34.)

26 Exhibit 2 is the permitting file for License 9120 (Application 21647), which was issued in
27 1969. Exhibit 2 pre-dates the Water Code sections pertaining to fully appropriated stream systems,
28 which were enacted in 1987. (Water Code §§ 1205-1207.) It also pre-dates State Water Board
orders with regard to fully appropriated stream systems and, in particular, processing applications
to appropriate water from fully appropriated stream systems. (WR-80; WR-81.) Exhibit 2 therefore
does not reflect current law or current orders of the State Water Board with regard to fully

² The issue of harm is not relevant to whether a trespass occurs under Water Code section 1052. (*see* Prosecution Team Closing Brief, pp. 9-10, fn. 5.)

1 appropriated stream systems. It is not relevant to the present proceeding and should not be accepted
2 into evidence.

3 Exhibit 1 and 2 are not relevant for Fahey's. Insofar as Fahey offers Exhibits 1 and 2 to
4 support certain assertions, Fahey had ample opportunity to establish evidentiary burdens through
5 legal arguments and obtain discovery through pre-hearing discovery motions and through cross-
6 examination at the hearing. Fahey has not been prejudiced. Exhibits 1 and 2 should not be admitted
7 into evidence. If they are admitted into evidence they should receive no weight.

8 Respectfully submitted,

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10 Kenneth Petruzzelli
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12 Attorney for the Prosecution Team
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Service List
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