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9 Attorneys for the Prosecution Team

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

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

15 **) Declaration of Kenneth Petruzzelli in
16 Support of Prosecution Team Post-
17 Hearing Evidence Brief**

18 I, Kenneth Petruzzelli, declare as follows:

- 19 1. I am an Attorney III (Specialist) with the Office of Enforcement of the State Water
20 Resources Control Board (State Water Board). I have been a practicing attorney
21 since 2003, California Bar No. 227192. I joined the Office of Enforcement in 2015. I
22 have represented the Prosecution Team as lead counsel in the matter of the
23 Administrative Civil Liability Complaint and Draft Cease and Desist Order issued
24 against G. Scott Fahey and Sugar Pine Spring Water, LP (Fahey) since about
25 November 17, 2015, when I replaced Andrew Tauriainen. Mr. Tauriainen still
26 serves as co-counsel in the matter.
- 27 2. Paragraph 25 of the Administrative Civil Liability Complaint (ALCLC) states:
28 The State Water Board consistently adjusts the water availability and
demand analyses based on new information obtained from
stakeholders, or adjustments to projected flows from the DWR. State
Water Board staff reviews this information and provides revisions to
its data set and graphs that are all shown on the Watershed Analysis
website
(http://www.waterboards.ca.gov/waterrights/water_issues/programs/droughUanalysis/).
3. Paragraph 26 in the ALCLC states:
The State Water Board's Watershed Analysis website provides
updated graphical summations and spreadsheets containing
supporting analysis of the availability and demand analyses. The
graphical summations show priorities with monthly demands for the
total riparian demand at bottom, the pre-1914 demands added to

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riparian and depicted above the riparian demand. The monthly-amounts are averaged into cubic feet per second for graphical purposes.

4. The ACLC was served on Mr. Fahey on September 1, 2015. The Prosecution Team also submitted the ACLC as an exhibit to for its case in chief on December 16, 2015.
5. On or about on or about December 1, 2015, Mr. Glen Hansen, counsel for G. Scott Fahey and Sugar Pine Spring Water, LP (collectively "Fahey" or "Mr. Fahey") sent the Prosecution Team a document request. Item 1 requested "Any and all documents that support the Administrative Civil Liability Complaint in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP, dated September 1, 2015 ("ACL")." In addition, Item 7 requested "Any and all documents that support, sustain and/or justify 'the graphical summations' described in Item 26, on pages 4 through 5, of the ACL, for any and all streams, rivers, and/or waterways between the Permittee's point of diversions and New Don Pedro Reservoir."
6. I spoke with Mr. Hansen by phone on December 2, 2015. I directed him to the State Water Board Watershed Analysis website described in paragraph 25 of the ACLC. I informed him that all of the information he requested in Item 7 of his December 1, 2015 document request was available on that website.
7. I responded to Mr. Hansen by e-mail on December 8, 2015. In that e-mail, I provided a link to the webpage with the "graphical summations" for the San Joaquin River Basin and tributaries. I believed the most effective way to respond to Mr. Hansen's request would be to direct him to the webpage, because, upon inspection and to the best of my knowledge and belief, it appeared to have all of the information that could potentially fit his request. I also provided a link to the page with all of the drought water availability notices. My electronic mail correspondence to Mr. Hansen is marked as Attachment 1 to this declaration.
8. On or about December 15, 2015, Mr. Fahey's counsel submitted written testimony and exhibits to support their case in chief.
9. The Prosecution Team submitted written testimony and exhibits to support its case in chief on December 16, 2015.
10. Mr. Sam Cole is a member of the Prosecution Team and listed as a witness. He is also listed as an expert.

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11. The Hearing Notice states “Rebuttal testimony and exhibits need not be submitted prior to the hearing, although the hearing officers may require submittal of rebuttal testimony and exhibits before they are presented in order to improve hearing efficiency.” A true and correct copy is Prosecution Team Exhibit WR-6.

12. In examining Mr. Fahey’s exhibits, I noticed several statements.

- Mr. Fahey stated in a June 3, 2014 letter to the State Water Board that he had previously purchased water from the Tuolumne Utilities District (TUD) and, from 2009 through 2011, wheeled that water to New Don Pedro, “pre-positioned” it there for use in later years, and used that water to offset his diversions during the period of unavailability. (Exhibit Fahey 1, p. 7, 9, 11; Exhibit Fahey 60.)
- Mr. Fahey stated that in the June 3, 2014 letter that if New Don Pedro had “spilled” he would have lost any water he had pre-positioned in New Don Pedro. (Exhibit Fahey 1, p. 17; Exhibit Fahey 60.)
- Mr. Fahey stated in an e-mail to Kelly Klyn of the Tuolumne Utilities District (TUD), dated July 7, 2011, that he would not be purchasing water that year, because New Don Pedro was operating to avoid “overflow.” (Prosecution Team Exhibit WR-72, p. 37.)

13. Although I found Mr. Fahey’s reasoning in error, as there is no evidence he has any right to store water in New Don Pedro for use in subsequent years, I wanted to know if New Don Pedro was spilling. I believed that if we could show New Don Pedro had spilled and Mr. Fahey knew it had spilled that we could use this evidence as impeachment to show that, by his own reasoning, any water he wheeled into New Don Pedro would have been lost by 2011.

14. On December 22, 2015, at my direction, Mr. Sam Cole contacted the Turlock Irrigation District (TID) to determine whether New Don Pedro spilled in 2011. He spoke with Mr. Wes Monier at TID. His testimony was intended as rebuttal evidence. The contact report describing his conversation with Mr. Monier is Prosecution Team Exhibit WR-147. Mr. Cole’s discussion with Mr. Monier and contact report documenting that discussion (WR-147) helped me understand the facts of the case and Mr. Fahey’s statements. It also helped me develop a strategy for rebuttal and impeaching Mr. Fahey. I therefore deemed WR-147 work product and did not disclose it in response to the *Hearing Officers’ Partial Ruling on Prosecution Team’s December 10 and December 11 Motions for Protective Order*

1 or, Alternately, *Motions to Quash: Fahey's Opposition; and Fahey's December 18*
2 *Motion to Compel Depositions and Document Disclosures* (January 21, 2016
3 Order).

4 15. Prosecution Team Exhibit WR-153 is the Prosecution Team's rebuttal presentation.

5 Mr. Fahey's counsel objected to slides 3-5. These slides are –

- 6 • Slide 3 is a map depicting the boundary of the Tuolumne River supply and
7 demand analyses.
- 8 • Slide 4 is a chart depicting the Tuolumne River supply and demand analysis for
9 2014.
- 10 • Slide 5 is a chart depicting the Tuolumne River supply and demand analysis for
11 2015.

12 16. The purpose of WR-153, slides 3-5, was to rebut Mr. Fahey's contention that the
13 supply and demand analysis did not specifically depict the availability of water for
14 the Tuolumne River or at his diversion.

15 17. I obtained the map on Slide 3 and the charts on Slide 4 and Slide 5 on January 25,
16 2016 in the evening after the hearing ended that day from the State Water Board's
17 watershed analysis webpage. I incorporated the map and the charts into the
18 Prosecution Team's rebuttal presentation that evening and the next morning.

19 18. I corresponded with Mr. Brian Coats, the Prosecution Team's witness for the San
20 Joaquin River Basin and Tuolumne River supply and demand analyses the
21 morning of January 26, 2016, to the charts and develop his rebuttal testimony.

22 19. The Prosecution Team finalized WR-153 and printed paper copies of the
23 presentation immediately before the hearing on January 26, 2016.

24 20. I obtained the map and charts in Slides 3-5 from the State Water Board's drought
25 information website. The website is publicly accessible. Upon navigating to the
26 State Water Board's homepage, I found the Tuolumne River watershed supply and
27 demand analysis information in less than 5 minutes. I could have found it even
28 faster by searching the page for the word "Tuolumne."

 21. Mr. Fahey's counsel also objected to slide 18 in Prosecution Team Exhibit WR-
 153. The Prosecution Team did not use this slide in its rebuttal presentation,
 because Mr. Fahey never claimed he lacked the ability to pay the ACL penalty.

 22. Fahey Exhibit 73 is the "Expert Witness Testimony of Gary F. Player" and Fahey
 Exhibit 74 is the "Statement of Qualifications of Gary F. Player with Resume." Mr.

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Player did not testify at the hearing on January 25-26, 2016. Mr. Player’s written statement supports Mr. Fahey’s assertion that Dr. Ross Grunwald’s analysis is “professional, technically competent, and an accurate portrayal of the quality, quantity, and type of water diverted by [Fahey’s] system.” (Fahey 1, p. 5.)

- 23. Gary Player did not appear at the hearing on January 25-26, 2016.
- 24. A true and correct copy of Exhibit Fahey 1, Expert Witness Testimony of G. Scott Fahey, is marked as Attachment 2 to this declaration with annotated numbered paragraphs and highlighted portions that the Hearing Officers should strike or consider for only limited purposes.
- 25. A true and correct copy of the relevant portion of Exhibit Fahey 71, Expert Witness Testimony of Ross. R. Grunwald, is marked as Attachment 3 to this declaration with annotated numbered paragraphs and highlighted portions that the Hearing Officers should strike or consider for only limited purposes.
- 26. A true and correct copy of the hearing transcript for January 25, 2016 is marked as Attachment 4 to this declaration and includes highlighted portions that the Hearing Officers should strike or consider for only limited purposes.
- 27. A true and correct copy of the hearing transcript for January 26, 2016 is marked as Attachment 5 to this declaration and includes highlighted portions that the Hearing Officers should strike or consider for only limited purposes.
- 28. A true and correct copy of a letter from Mr. William Van Dyck, an associate water resources engineer at the State Water Board, dated October 11, 1994, is marked as Attachment 6 to this declaration. It is included in Exhibit Staff-1. The letter references a discussion about developed water during a field inspection on September 29, 1994. According to the letter, a legal counsel opinion regarding the need for a water right to divert developed water was forwarded with the letter and the letter indicates it has enclosures, but nothing is attached to the letter in the permit file.
- 29. I searched the State Water Board’s staff directory. There is no “William Van Dyck” listed.
- 30. I searched the Water Right Division’s legal opinions and found only one memorandum addressing the issue of “developed water.” The memorandum is dated September 15, 1987 and signed by then-Staff Counsel Daniel Frink. Since this is the only legal opinion concerning the issue of developed water that Division

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legal counsel has ever authored, no other legal opinion could have been attached to Mr. Van Dyck's letter. It's omission from the permit file, Exhibit Staff-1, is clearly erroneous. A true and correct copy of the legal opinion is marked as Attachment 6 to this declaration.

31. Exhibit Staff-1 includes a letter Yoko Mooring mailed to Mr. Fahey on February 1, 1995 with an attached report regarding a field inspection conducted on September 29, 1994. A true and correct copy of the cover letter and attached report of field inspection is marked as Attachment 7 to this declaration. I have not included attachments to the report, because they are not immediately relevant. The inspection report is included in Exhibit Staff-1. The relevant portion is highlighted on page 4 and states:

The concept of developed water was discussed as a possible means to avoid infringement on prior rights at New Don Pedro Reservoir without having to provide makeup water. Mr. Fahey was advised to keep good records of the flow rate for different periods under natural conditions in order to establish a claim to developed water through a horizontal boring (s).

32. The permit file, Staff-1, has been made available to Fahey. It is my understanding that before I became involved in this case, the Prosecution Team made the permit file available to his attorneys. On December 10, 2015, at approximately 3:25 p.m., I even personally met with Mr. Daniel Cucchi, an attorney with Abbott & Kindermann LLP, who was visiting the water right records room requesting to see anything new in the files.

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed this 8th day of April 2016, at Sacramento, California.



Kenneth Petruzzelli

Service List
(Revised January 5, 2016)

<p>DIVISION OF WATER RIGHTS SWRCB Office of Enforcement Prosecution Team Kenneth P. Petruzzelli 1001 I Street, 16th Floor Sacramento, CA 95814 kenneth.petruzzelli@waterboards.ca.gov</p>	<p>G.SCOTT FAHEY AND SUGAR PINE SPRING WATER , LP Abbott & Kindermann, LLP Diane G. Kindermann Glen C. Hansen 2100 21st Street Sacramento, CA 95818 dkindermann@aklandlaw.com ghansen@aklandlaw.com</p> <p>Bart Barringer Law Offices of Mayol & Barringer P.O. Box 3049 Modesto, CA 95353 bbarringer@mblaw.com</p>
<p>TURLOCK IRRIGATION DISTRICT Arthur F. Godwin Mason, Robbins, Browning & Godwin, LLP 700 Loughborough Driver, Suite D Merced, CA 95348 agodwin@mrgb.org</p>	<p>MODESTO IRRIGATION DISTRICT William C. Paris, III O'Laughlin & Paris LLP 2617 K Street, Suite 100 Sacramento, CA 95816 bparis@olaughlinparis.com anna.brathwaite@mid.org lwood@olaughlinparis.com</p>
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Petruzzelli, Kenneth@Waterboards

From: Petruzzelli, Kenneth@Waterboards
Sent: Tuesday, December 08, 2015 10:26 AM
To: 'Glen Hansen'
Cc: Weaver, Nathan@Waterboards; Buckman, Michael@Waterboards; Tauriainen, Andrew@Waterboards; Mona, Ernie@Waterboards; Bill Paris; Diane Kindermann Henderson; Brathwaite, Anna; Linda Wood; jonathan.knapp@sfgov.org; Bart Barringer (bbarringer@mblaw.com); agodwin@MRGB.ORG; Prager, John@Waterboards
Subject: RE: G. Scott Fahey and Sugar Pine Spring Water, LP - ACL/CDO Hearing - Demand For Production of Documents
Attachments: Division of Water Rights Record Retention Policy.pdf; Dave LaBrie e-mail 9-22-15a.pdf; David LaBrie email 6.18.15.pdf; www.uniondemocrat.com_News_Business_Fresh-water-flows-fr (attachment to David LaBrie email 6.18.15).pdf; Dave LaBrie e-mail 9-22-15.pdf; RE Most Recent Fahey video surveillance.pdf; CDPH Email re Sugar Pine Spring Water Bottled Water Operation Records1.pdf

Mr. Hansen,

I am responding to your letter dated December 1, 2015. I am also following up on our telephone conversation from earlier today at approximately 11:20 a.m. Please treat this e-mail and our telephone conversation as an opportunity to meet and confer regarding your demand for production of documents.

1. Any and all documents that support the Administrative Civil Liability Complaint in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP, dated September 1, 2015 ("ACL").

Any and all documents supporting the ACL will be made available as exhibits on or by December 16, 2015. We are in the process of consolidating these documents.

2. All Curtailment Certification Forms ("Forms") received by the Board from any and all primary owners between April 1, 2014, and July 1, 2015, where the box on the Form for "OTHER I have additional information explaining how much water I am diverting, the use of that water, the measure being undertaken to reduce use, and the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency" was marked or checked off.
3. All written correspondence from April 1, 2014 and July 1, 2015, between the Board and the Primary Owners of the water right applications who signed the Forms described in item 2, above, which correspondence was made or sent following the submission by the Primary Owners of the Forms.

For Item 2 and 3, I anticipate including all Curtailment Forms that Fahey signed as exhibits. Beyond that, your request for these items is exceedingly broad and lacks relevance to this ACL proceeding. Furthermore, a preliminary evaluation by the Water Rights Division (Division) indicated that 340 primary owners checked the box on the Form in 2014 and 521 checked the box in 2015. As a result, responding to this request would also prove exceedingly burdensome. Item #3, which asks for correspondence, is even broader and more burdensome. Although you have not made your request a request for public records, the nature of your request, given its breadth and lack of relevance to the Fahey ACL proceeding, is typically one the Division would treat as a request for public records.

If you wish to make this a request for public records, consider this the required 10 day response pursuant to Government Code section 6253 subd. (c) and I will request that Division staff search for and collect records responsive to your request. The Division would then review the files to determine whether any public records responsive to your

request may be disclosable and to compile any disclosable records for your access and review. Given the scope of your request, this process will take some time. I estimate that searching for and consolidating the records could take a few weeks, but I will provide a more precise timeline if you choose to pursue this as a public records request. Certain documents otherwise responsive to your request may be withheld as exempt from disclosure pursuant to Government Code sections 6254 and 6255. At this time, it is unclear whether any records will need to be withheld or for what specific reason.

The Public Records Act provides for a requestor to pay for the costs of producing documents. Once we have identified and compiled all disclosable documents that are responsive to your request, I will contact you with an estimate of the costs for reproduction or scanning of the requested documents prior to sending any documents out for reproduction or scanning. Included with any documents sent in response to this request you will find an invoice for the costs of producing those documents. Please remit payment immediately for the amount specified. Any additional documents will necessitate an additional charge, and that charges will be invoiced as they accrue.

4. Any and all documents contained in the Permit Files for Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491), for the time period of January 1, 2012 to the present, including, but not limited to, curtailment notices and all related documents, Board staff notes and correspondence, and water use and/or diversion reports.

The Permit Files for Fahey's water right permits have been made available. Progress reports and other information is now stored electronically and not reproduced for the physical file. Please verify with the Records Unit whether you have received the entire file and let me know if you have any issues.

5. Any and all documents that support the State of California's determination of the required discharge from New Don Pedro Reservoir during the 2014 and 2015 curtailment periods.
6. Any and all documents that support any and all violations of the required discharge from New Don Pedro Reservoir by its authorized discharge operator, owner, &/or authority during the 2014 and 2015 curtailment periods.

For Item 5 and 6, I do not anticipate producing such documents as exhibits for the ACL hearing. I also fail to see how this request is relevant. As above, if you wish to pursue this as a request for public records consider this the required 10 day response pursuant to Government Code section 6253 subd. (c) and I will request that Division staff search for and collect records responsive to your request. At this time, however, we do not know if we have documents responsive to this request. However, the water right files related to New Don Pedro Reservoir are on file with the Records Unit and available for review.

7. Any and all documents that support, sustain and/or justify "the graphical summations" described in Item 26, on pages 4 through 5, of the ACL, for any and all streams, rivers, and/or waterways between the Permittee's point of diversions and New Don Pedro Reservoir.

The "graphical summations" referenced in Item 26, pages 4 through 5, of the ACL complaint are available on the State Water Board's "Watershed Analysis" webpage at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/, along with supporting datasets and analysis. Another water supply graph is available on the "Notices of Water Availability" webpage under "San Joaquin River Watershed" for April 23, 2015 at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/water_availability/sjglobal_apr212015.pdf.

8. Any and all documents relating to any and all phone conversations and written communications between David LeBrie and Scott Fahey that occurred or were sent or received in the months of June, July and August 2015 regarding the following:
 - (a) Water Right Permit 20784 (Application A029977);

- (b) Water Right Permit 21289 (Application A031491);
- (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491).

9. Any and all documents relating to any and all correspondence and communications between Sam Cole and David LeBrie, between June 1, 2015, and September 30, 2015, regarding the following:
- (a) Water Right Permit 20784 (Application A029977);
 - (b) Water Right Permit 21289 (Application A031491);
 - (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491);
 - (d) Cease and Desist Order in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP;
 - (e) Order for Additional Information, Order WR 2015-0028-DWR, in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP; and/or
 - (f) The ACL.

For item 8 and 9, I anticipate including documents relating to phone conversations between David LaBrie and Scott Fahey as exhibits. However, to the degree those documents do not constitute work product or confidential communications, they are included in the investigation file that we have already made available to you. With respect to Item 9, in our telephone conversation, you amended your request to also include communications between Sam Cole, David LeBrie, and “third parties” about items (a) through (f). To the extent these communications are not privileged or work product, it is my understanding have already been made available. Nonetheless, I am working to collect and review those emails.

Under the document retention policy for the Division of Water Rights, e-mail for staff is automatically purged after 90 days. As a result, e-mail correspondence regarding this issue that would have occurred more than 90 days ago (September 3, 2015) has been deleted. The Division’s record retention policy is available at http://waternet.waterboards.ca.gov/das/files/busserv/records_retention/dwr.pdf (see page 6 for electronic mail). I also attached a copy. We normally do not set litigation holds, but in this case we have as of December 3, 2016. Since you also asked about e-mail between Sam Cole, David LaBrie, and third persons, I also checked with management – Kathy Mrowka and John O’Hagan. As “managerial staff,” they retain e-mail for five years.

Once investigations reach the point of drafting ACLs and attorneys from the Office of Enforcement get involved, e-mail is retained by the attorneys. Emails still retained by Sam Cole and David LaBrie that have not been deleted are, by and large, privileged attorney-client communications or attorney work product. We typically do not prepare privilege logs, because they are burdensome and oppressive. I am nonetheless examining their remaining e-mails for any e-mail communications that may not be privileged.

David LaBrie has three e-mails that are not privileged communications or work product that fall within the scope of your request. I have attached those e-mails, along with the attachment to one of those e-mails.

Sam Cole has two e-mails that are not privileged communications or work product and falls within the scope of your request. This e-mails do not have attachments.

I found no e-mail among managerial staff matching your inquiry that was not a privileged communication or work product.

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kenneth.petruzzelli@waterboards.ca.gov

From: Glen Hansen [<mailto:GHansen@aklandlaw.com>]

Sent: Tuesday, December 01, 2015 4:52 PM

To: Petruzzelli, Kenneth@Waterboards

Cc: Weaver, Nathan@Waterboards; Buckman, Michael@Waterboards; Tauriainen, Andrew@Waterboards; Mona, Ernie@Waterboards; Bill Paris; Diane Kindermann Henderson; Brathwaite, Anna; Linda Wood; jonathan.knapp@sfgov.org; Bart Barringer (bbarringer@mblaw.com); agodwin@MRGB.ORG

Subject: RE: G. Scott Fahey and Sugar Pine Spring Water, LP - ACL/CDO Hearing - Demand For Production of Documents

Mr. Petruzzelli:

Attached is a letter with a demand for production of documents served by counsel for Scott Fahey/Sugar Pine Spring Water LP on the State Water Resources Control Board and its Staff. Your immediate response is appreciated.

Glen C. Hansen

Senior Counsel

Email: ghansen@aklandlaw.com



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EXHIBIT 1

1 Diane G. Kindermann (SBN 144426)
2 Glen C. Hansen (SBN 166923)
3 ABBOTT & KINDERMANN, LLP
4 2100 21st Street
5 Sacramento, CA 95818
6 Telephone: (916) 456-9595
7 Facsimile: (916) 456-9599

8 Attorneys for
9 G. Scott Fahey and Sugar Pine Spring Water, LP

10
11 **BEFORE THE STATE OF CALIFORNIA**
12 **STATE WATER RESOURCES CONTROL BOARD**

13 **IN THE MATTER OF**
14 **ADMINISTRATIVE CIVIL**
15 **LIABILITY COMPLAINT ISSUED**
16 **AGAINST G. SCOTT FAHEY AND**
17 **SUGAR PINE SPRING WATER, LP**

18 **EXPERT WITNESS TESTIMONY OF G.**
19 **SCOTT FAHEY**

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TESTIMONY OF G. SCOTT FAHEY

I. WITNESSES' STATEMENT OF QUALIFICATIONS

Para. 1 Since September 1, 2001, I have been the Manager of the General Partner of Sugar Pine Spring Water, LP, a Nevada Limited Partnership. I have sole and complete authority regarding any and all management decisions of Sugar Pine Spring Water, LP. Sugar Pine Spring Water, LP has no employees.

Para. 2 I am qualified to testify as an expert witness as to the matters of the water right Permits emanating from the Applications to Appropriate Water by Permit Nos. 029977 and 031491, and to the terms pertaining to those Permits and/or any and all contractual agreement relating thereto. I personally applied, negotiated, researched, read, and understand the basis of these Permits and contracts, and to the best of my ability in good-faith have abided by those written agreements and/or any oral instructions given to me after their respective full execution. By Profession, I am a Registered Professional Civil Engineer, Idaho License No. 5763 (Ret.), who graduated from the University of Idaho in 1980 with BSCE degree. For twenty (20) years I worked in the construction industry as a Project Engineer in Hawaii, Field Engineer in Papua New Guinea, Assistant Utilities Coordinator in Australia, State Dept. Perimeter Security Supervisor in Istanbul, Turkey, Dam Engineer in South Carolina, Site Construction Manager Ar' Ar', Saudi Arabia, Upper Farmington Canal Resident Engineer, California, and Engineering Supervisor Idaho Dept. of Parks and Recreation. Since October 2, 1996 I have been a purveyor of Federally Certified *Spring Water* licensed as a Private Water Source Operator by the California Dept. of Public Health, which allows State licensed water bottlers to identify on their labels; Source: Sugar Pine Springs. (See Statement of Qualifications of G. Scott Fahey, **Exhibit 2**.)

II. APPROPRIATIVE RIGHTS CHRONOLOGY

A. Application To Appropriate Water (A029977) Deadwood and Cottonwood Springs.

Para. 3 On May 28, 1991, I applied to the State Water Resources Control Board ("Board") for the right to divert water (primarily groundwater) by appropriation from Deadwood Springs and Cottonwood Springs, in Tuolumne County. (**Exhibit 3**, Bates-Stamped pages 2-30.) My application was assigned number A029977. (**Exhibit 4**, Bates-Stamped pages 35.) On December 12, 1992, I executed a water exchange agreement with the Modesto Irrigation District and Turlock Irrigation District (collectively, the "Districts") as part of the process of gaining approval of A029977. ("1992 Agreement")(**Exhibit 6**, Bates-Stamped pages 130-132; **Exhibit 7**, Bates-Stamped pages 134-135; **Exhibit 8**, Bates-Stamped page 136.) The purpose of the 1992 Agreement is generally explained in the recitals as follows:

Para. 4 C. SWRCB Decision 995 declares that the waters of the Tuolumne River are fully appropriated from July 1 to October 31, and SWRCB Decision 1594 declares that the waters of the Sacramento-San Joaquin Delta are fully appropriated from June 15 to August 31. As a result Fahey is unable to appropriate water from Deadwood and Cottonwood springs

Written Testimony of G. Scott Fahey
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Para. 4 (cont.) from June 15 through October 31 (hereinafter referred to as the "period of unavailability").

Para. 5 D. Fahey proposes an exchange of water with TID and MID (collectively "the Districts") by pumping into Lake Don Pedro an amount equal to the amount of water appropriated from Deadwood and Cottonwood springs during the June 15 through October 31 period of unavailability (hereinafter referred to as "make-up water"). [Exhibit 6.]

Para. 6 The Board's Yoko Mooring wrote a *Memorandum*, dated January 14, 1993, recognizing the 1992 Agreement. (Exhibit 9, Bates-Stamped page 137.) Edward C. Anton, Chief of the Board's Division of Water Rights, approved an Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FASS) subject to a Water Exchange Agreement, described as the 1992 Agreement, in a *Statement for File*, dated January 15, 1993. (Exhibit 10, Bates-Stamped page 138.) At that point, the Board issued a *Notice of Application to Appropriate Water* on January 29, 1993 for A029977. (Exhibit 11, Bates-Stamped pages 142-143.)

B. Protest Resolved.

Para. 7 The City and County of San Francisco ("CCSF" filed a protest to A029977. (Exhibit 12, Bates-Stamped page 174.) While CCSF and I were in the process of reaching an agreement to resolve that protest, the Board conducted a Field Investigation on September 29, 1994. (Exhibit 13, Bates-Stamped page 227.) In a letter dated December 19, 1994, CCSF provided the conditions under which it would withdraw its protest, (Exhibit 15, Bates-Stamped pages 247-249), which terms I accepted and the Board's Yoko Mooring agreed to include in any permit issued pursuant to A029977. (Exhibit 16, Bates-Stamped pages 251-253.) Those terms included, among others, that

Para. 8 Permittee shall provide replacement water within one year of the annual notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. [Exhibit 16, Bates-Stamped page 252.]

Para. 9 The Board's Yoko Mooring announced in a letter on March 10, 1995, that any permit issued by the Board would include the terms that CCSF, I and the Board agreed to. (Exhibit 18, Bates-Stamped pages 280-281.) Thereafter, CCSF's protest to A029977 was dismissed on March 16, 1995. (Exhibit 19, Bates-Stamped page 284.)

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C. Staff Concluded That There Are No Water Rights Of Record Between The Points Of Diversion And New Don Pedro Reservoir.

Para. 10 Meanwhile, on February 1, 1995, the Board's Yoko Mooring issued a *Report Of Field Investigation Under Water Code Section 1345* (**Exhibit 17**, Bates-Stamped pages 254-271), which stated the following under the heading "Availability Of Unappropriated Water":

Para. 11 As a prerequisite to issuance of a permit to appropriate water, there must be water available to supply the applicant taking into consideration prior rights and instream needs.

Para. 12 Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect all prior rights at and below the reservoir during this period. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir.

Para. 13 In view of the above, staff concludes that water is available for appropriation. [**Exhibit 17**, Bates-Stamped page 259.]

Para. 14 The Board recognized, after investigation, that other than those held by the Districts and CCSF, there are no prior rights of record between the springs at issue in A029977 and the New Don Pedro Reservoir "(NDPR)", and that the replacement water provisions in a permit will protect the prior rights of the Districts and CCSF.

D. Permit 20784 Issued On Application A029977.

Para. 15 On March 23, 1995, the Board issued the *Permit For Diversion And Use Of Water, Permit 20784* pursuant to A029977. (**Exhibit 20**, Bates-Stamped pages 311-315.) Terms 19 and 20 of that permit provide:

Para. 16 19. Diversion of water, under this permit during the period from June 16 through October 31 of each year is subject to maintenance of the Water Exchange Agreement executed on December 12, 1992 between the Permittee and the Modesto and Turlock Irrigation Districts. Pursuant to the Agreement, Permittee shall provide replacement water to New Don Pedro Reservoir for all water diverted under this permit during the period from June 16 to October 31 of each year. The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.

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Para. 17 20. Permittee shall comply with the following provisions which are derived from the City and County of San Francisco (San Francisco) letter dated December 19, 1994 filed with the State Water Resources Control Board:

Para. 18 1) Permittee shall not interfere with San Francisco's obligations to the Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any implementing Agreement between the Districts and San Francisco.

Para. 19 2) Permittee shall provide replacement water to New Don Pedro Reservoir for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made annually by the latter parties in accordance with water accounting procedures being used by said parties.

Para. 20 Permittee shall provide replacement water within one year of the annual notification by San Francisco or the Districts of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. [Exhibit 20, Bates-Stamped pages 314-315.]

E. Application To Appropriate Water (A031491) Marco and Polo Springs.

Para. 21 On August 9, 2002, I filed an application to appropriate water (primarily groundwater) from the Wet Meadow Springs (later adding the "Marco Spring" and "Polo Spring" points of diversion) in Tuolumne County. (Exhibit 27, Bates-Stamped pages 575-615; Exhibit 34, Bates-Stamped page 635.) A temporary application number X003488 was issued, but later changed and given number 31491. (Exhibit 28, Bates-Stamped pages 616-617.) The Board's Yoko Mooring questioned the need for me to even apply for such a water right ("WR"). In her own notes of a phone call she had with me on January 30, 2003, she stated: "I also questioned the need of WR. His source appears to be groundwater." (Exhibit 29, Bates-Stamped page 618.) Additionally, I was informed by my designated representative for A031491, Diane Kindermann, during the final submission of the CEQA, NEPA, and WAA reports to the Division of Water Rights that Kathy Mrowka considered that the water proposed for appropriation was mostly percolating groundwater too. They were both correct.

Para. 22 During my September 2 through 8, 2015 site visit I observed that every spring that would normally be issuing water that time of year was dry; including the Marco and Polo spring sites, which stopped running May 2014 and July 2015 respectively. The other sites issuing water to my pipeline conveyance system were providing 22 gallons/minute. I did not consider it reasonable that that much water would issue at those sites if undeveloped and in their natural state. Therefore, I contacted Ross Grunwald a hydro-geologist certified by the State of California,

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Para. 23

Beginning in 1996, Ross had previously conducted every pre and post spring development analysis for each spring. I asked Ross to consider the amount of water that he believed the conveyance system intercepted that is surface water versus percolating ground water. In Ross's professional opinion, he considers that on average 30% is surface water and 70% is percolating ground water. Additionally, Gary Player a hydro-geologist, formally certified in the State of California, was asked to conduct a peer review of the analysis Ross had conducted in the past. Gary considers the work Ross has done to be professional, technically competent, and an accurate portrayal of the quality, quantity, and type of water diverted by my system. Therefore, I shall testify that only 30% of the water diverted and sold by Sugar Pine Spring Water is jurisdictional surface water. As such, any future annual Permittee Use Reports will report the surface water diverted accordingly. (Witness Testimony and Statement of Qualifications of Ross Grunwald, Exhibits 71 and 72 and Witness Testimony and Statement of Qualifications of Gary Player, Exhibits 73 and 74.)

F. Surplus Water Agreement With TUD And Exception Approved.

Para. 24

In Application X003488 (A031491), I confirmed, under penalty of perjury, that the terms of A029977 would adhere to the X003488 diversions. (Exhibit 27, Bates-Stamped page 579.) However, Board employees Manas Thananant and Larry Attaway considered my statement, but believed that "we need something more to clarify that those agreements are expandable for the new app." (Exhibit 29, Bates-Stamped page 618.) In response, I began preparing a new, expandable agreement that is inclusive of both water rights, A29977 and X003488.

Para. 25

Thereafter, I submitted for the Board's review an *Agreement For Surplus Water Service* with the Tuolumne Utilities District ("TUD"), which Board staff approved. (Exhibit 30, Bates-Stamped page 620; Exhibit 31, Bates-Stamped page 622; Exhibit 32, Bates-Stamped pages 630.) I executed that agreement with TUD on October 20, 2003. (Exhibit 33, Bates-Stamped page 634; Exhibit 35, Bates-Stamped page 636.) The Board's Yoko Mooring wrote a *Memorandum*, dated December 23, 2003 (Exhibit 36, Bates-Stamped pages 639-640), in which she stated that

Para. 26

Permittee's obligations to provide replacement water, under this agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement. [Exhibit 36, Bates-Stamped page 640.]

Para. 27

On January 26, 2004, the Board's Victoria A. Whitney wrote a *Statement for File*, in which she approved an Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FASS) for me to "provide replacement water to NDPR for all water diverted during the FASS period each year by way of a Water Exchange Agreement, executed on October 20, 2003, with TUD for surplus water." (Exhibit 37, Bates-Stamped page 641.) With the Board's approved FASS exception of record in the Board's X003488 file, the *Notice of Application to Appropriate Water* was issued on January 28, 2004 for A031491. (Exhibit 39, Bates-Stamped pages 650-651.) That notice stated: "Applicant accepts and understands that Application 31491 shall be conditioned and subjected to the same terms and conditions as the previous agreements." (Exhibit 39, Bates-Stamped page 650.)

G. Protest Resolved And Notification By CCSF Required For Water From Fahey.

Para. 28 On November 8, 2004, CCSF filed a protest to A031491 based on its desire to make minor changes to the wording of certain terms in the prior permit and A031491. (**Exhibit 40**, Bates-Stamped pages 685-686.) CCSF was concerned about the effects on CCSF in conjunction with the Districts due to the complex water supply accounting procedures between the three entities. Specifically, CCSF wrote:

Para. 29 Finally, we propose the following changes be made to the terms enumerated in permit conditions as they appear in the SWRCB's letter of January 24, 1995, which the City assumes are the same as those enumerated by the SWRCB in Permit 20784, Item 20.

Para. 30 Strike the word "annually" from the last sentence of the first paragraph of provision (2). That sentence would then read "A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures being used by said parties."

Para. 31 Strike the words "the annual" from the first sentence of the second paragraph of provision (2). That sentence would then read "Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions."

Para. 32 Replace "and/or" with "and" in the last sentence of the second paragraph of provision (2). That sentence would then read "The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be mutually agreed upon by the Permittee, the Districts and San Francisco."

Para. 33 San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when their use has lead [sic] to a reduction, or has a strong potential of reducing, the supplies delivered San Francisco. The wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. Short of notifying the applicant each and every year that their diversions potentially could affect the supplies of San Francisco, thus triggering replacement water each year, our requested modifications to the term will leave the notification to a judgment on our part as to whether the need for replacement water is critical. [**Exhibit 40**, Bates-Stamped page 686.]

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Para. 34

I immediately informed the Board staff and CCSF that I had no objection to those changes proposed by CCSF. (**Exhibit 42**, Bates-Stamped page 693; **Exhibit 43**, Bates-Stamped page 695.) Therefore, Board staff told CCSF: “It appears that his acceptance of the conditions alleviates your concern.” (**Exhibit 44**, Bates-Stamped pages 711-712.) The Board followed with a letter, dated January 31, 2005, confirming that the CCSF protest could be dismissed as a result of using the wording as corrected by the CCSF letter, dated November 8, 2004, which wording would be included in any permit issued by the Board. (**Exhibit 46**, Bates-Stamped pages 726-727.) Later, CCSF reiterated that

Para. 35

The Initial Study/Mitigated Negative Declaration does not refer to the terms accepted by the applicant to dismiss San Francisco’s protest. As compliance with the accepted terms are part of the proposed project, we request that the accepted terms be referred to in the project description and discussed in Section IX, Hydrology and Water Quality. As noted in the City’s November 8, 2004 letter, San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when the applicant’s use has led to a reduction, or has a strong potential of reducing, the water supply of San Francisco. Also as noted, the wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. [**Exhibit 54**, Bates-Stamped page 1050.]

Para. 36

The Districts also protested A031491 (**Exhibit 41**, Bates-Stamped pages 687-689), but later agreed that the terms sought by CCSF (described above) “specifically protect the prior rights of both CCSF and the Districts and inclusion of those terms in the permit would be sufficient to resolve the Districts’ Protest.” (**Exhibit 53**, Bates-Stamped pages 1043-1044.)

H. Surface Water Shortage, 2009 Notice.

Para. 37

On February 26, 2009 the Board sent me (presumably as a “Diverter of Surface Water”) a *Notice of Surface Water Shortage for 2009*. (**Exhibit 69**.) That notice stated: “If you plan to.....need water beyond the limited supply available, you may find yourself in a very serious dilemma”; and “[y]ou may.....contract for water deliveries from a water supplier, such as..... a local water....district.” That was the first time that anyone had given me notice that surplus water should be purchase in case it is needed as replacement water whether for a diversion curtailment or otherwise. In good-faith reliance on the Board’s direction set forth in that notice to “contract for water deliveries from a water supplier...”, from June 15, 2009 through June 15, 2011, I purchased from and had TUD wheel 88.55 acre-feet of surplus water to New Don Pedro Reservoir (“NDPR”) (**Exhibit 70**.), pursuant to the terms of my existing water rights emanating from the A029977 and A031491 permits.

Para. 38

Therefore, despite the fact that my diversions were primarily groundwater, with the TUD Agreement in place for that very reason with its out-of-basin water source approved by the Board (**Exhibit 65**, Bates-Stamped page 342.), I was able to purchase surplus water from TUD and TUD had it wheeled to NDPR, and it is standing by in case it is needed as replacement water

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Para. 38 (Cont.) (Exhibit 71, Testimony of Ross Grunwald - A031491 Water Availability Analysis, Sec. 3.2, page 5), which is exactly what the Board directed me to do in its notice of February 26, 2009.

I. Permit 21289 Issued On Application 31491.

Para. 39 On August 1, 2011, the Board issued the *Permit For Diversion And Use Of Water For Permit 21289 On Application 31491*. (Exhibit 55, Bates-Stamped pages 1197-1205.) Item 34 of that permit provides:

Para. 40 Permittee shall provide replacement water to New Don Pedro Reservoir (NDPR) for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures used by said parties.

Para. 41 Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversion. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. Permittee shall not be obligated to provide replacement water for diversions that occur during periods when the Districts and San Francisco's reservoirs are spilling or are being operated in anticipation of spill.

Para. 42 Permittee's obligations to provide replacement water under this letter agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between Permittee and the Districts. The source, amount and location at NDPR of replacement water discharged into NDPR shall be mutually agreed upon by the Permittee, the Districts, and San Francisco, and shall be reported to the State Water Board with the annual Progress Report by Permittee.

Para. 43 Permittee shall not provide replacement water from a source that is hydraulically connected to surface water tributary to the Tuolumne River. If Permittee replaces water diverted pursuant to this permit with groundwater which it extracts, Permittee shall demonstrate that any extracted groundwater which replaces diverted surface water is water which would not otherwise reach NDPR. Permittee shall demonstrate that there is hydrologic separation between the groundwater extracted and groundwater flow into NDPR; or, alternatively, Permittee shall demonstrate that aquifer characteristics are such that subsurface flow to NDPR is not substantial and that any extraction of groundwater by Permittee would have essentially no impact on groundwater recharge via

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Para. 43 (Cont.) subsurface flow to NDPR. [**Exhibit 55**, Bates-Stamped pages 1202-1203.]

J. Districts And CCSF Confirm Their Responsibility To Request The Surplus Water From Fahey.

Para. 44 Those two interactions between the Districts and the Board (**Exhibit 41**, Bates-Stamped pages 687-689) and CCSF and the Board (**Exhibit 40**, Bates-Stamped pages 685-686.), are the reasons why the A031491 permit terms include only one term, number 34, which has anything to do with replacement of diverted water. The Districts and CCSF made it clear that it is their responsibility whether or not to request TUD surplus water to be used as FASS replacement water, when or if it is ever needed. My water service agreement with TUD (**Exhibit 33**, Bates-Stamped page 634; **Exhibit 35**, Bates-Stamped page 636), is the Water Exchange Agreement for “all water diverted” and it provides that I do not have to provide replacement water unless it is asked for by the Districts or CCSF. However, there is nothing prohibiting me from wheeling TUD surplus water to NDPR, to remain there until needed; unless however, NDPR were to spill, then any TUD surplus water would be the first to spill. Surplus water is a separate entity that floats above the balance of the water stored in NDPR, which is the reason it spills first. It is surplus water until, as replacement water, it converts to fungible stored water.

Para. 45 To date, neither the Districts nor CCSF has ever provided me with an “annual notification” pursuant to Term 20 (A029977) or Term 34 (A031491). At no time have they ever notified me of the need to provide replacement water.

III. CURTAILMENT NOTICES AND RESPONSES

A. Correspondence From SWRCB 2014 and Fahey Response.

Para. 46 On May 27, 2014, the Board sent to me a *Notice Of Unavailability Of Water And Immediate Curtailment For Those Diverting Water In The Sacramento And San Joaquin River Watersheds With A Post-1914 Appropriative Right*. (**Exhibit 59**, Bates-Stamped page 1276.) In a timely and diligent response to that notice, on June 6, 2014, I submitted to the Board a Curtailment Certification Form for both A029977 and A031491. (**Exhibit 61**, Bates-Stamped pages 1278-1279.) On both of those forms I marked the box “OTHER I have additional information explaining ... the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency.” Attached to those Curtailment Certification Forms I provided a detailed written explanation in a letter, dated June 3, 2014, explaining why those diversions were exempt from curtailment (the same argument I am making in this testimony). (**Exhibit 60**, Bates-Stamped page 1277.) In that letter of June 3, 2014 I accurately stated that “After consultation with San Francisco and the Districts regarding this matter they concur, therefore, I contend that the diversion and use of water authorized by the referenced water rights applications is legally authorized.” (document no. 1277.) That statement was based on several phone calls that I had with Jonathan Knapp between June 2nd and 4th, 2014, which resulted in the letter, dated June 2, 2014 (**Exhibit 60**) being amended to the letter, dated June 4, 2014 (**Exhibit 60**), with the exception of the last four (4) lines of text, which I added; thereafter, I refined the letter sending it

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Para. 46 (Cont.) as is, dated June 3, 2014, [**Exhibit 60** (three versions of the same letter, refined pursuant to conversations with Jonathan Knapp).] The Board never responded to the written explanation contained in my letter of June 3, 2014, and did not inform me that my legal justification for an exemption from curtailment was incorrect.

B. Progress Report Submitted For 2014.

Para. 47 On March 3, 2015, I diligently submitted the 2014 Progress Report by Permittee for Both Permits documenting the amount of water diverted from each Point of Diversion (hereinafter “POD,” or plural “PODs”) each month in 2014, just like I did for every other year. (**Exhibit 62**, Bates-Stamped pages 1282-1285. See also **Exhibit 21**, Bates-Stamped pages 410-413 (1997); **Exhibit 22**, Bates-Stamped pages 469-473 (1998); **Exhibit 23**, Bates-Stamped pages 498-503 (1999); **Exhibit 24**, Bates-Stamped pages 509-514 (2000); **Exhibit 25**, Bates-Stamped pages 560-561 (2001); **Exhibit 26**, Bates-Stamped pages 569-574 (2002); **Exhibit 38**, Bates-Stamped pages 642-647 (2003); **Exhibit 45**, Bates-Stamped pages 721-723 (2004); **Exhibit 47**, Bates-Stamped pages 755-757 (2005); **Exhibit 48**, Bates-Stamped pages 795-797 (2006); **Exhibit 49**, Bates-Stamped pages 829-831 (2007); **Exhibit 50**, Bates-Stamped pages 877-879 (2008); **Exhibit 51**, Bates-Stamped page 929-930 (2009); **Exhibit 52**, Bates-Stamped pages 1014-1016 (2010); **Exhibit 56**, Bates-Stamped pages 1240-1243 (2011); **Exhibit 57**, Bates-Stamped pages 1264-1267 (2012); **Exhibit 58**, Bates-Stamped pages 1268-1271 (2013).) Thus, in no way was I hiding any use of otherwise curtailed water; that is because I had a legally valid exception from the surface water curtailment as explained in my letter of June 3, 2014 **and 70% of the water is groundwater and not the subject of the curtailment.**

C. Correspondence From SWRCB 2015 And Response.

Para. 48 On April 23, 2015, the Board sent me a Notice of Unavailability of Water and Immediate Curtailment, in which the “Exceptions to Curtailment” provision states: “If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you may beneficially use that previous stored water consistent with the terms and conditions of your post-1914 water right.” (**Exhibit 63**, Bates-Stamped pages 1294-1296.) That exception language in the April 23, 2015 notice is precisely what I had done between June 15, 2009 through June 15, 2011, when I purchased from and had TUD wheel 88.55 acre-feet of surplus water to NDPR in response to the Board’s earlier notice of February 26, 2009. Thereafter, “the previously collected water” stored in NDPR offset the water being diverted from my springs during curtailment. The “beneficially use that previous stored water” achieves is that surplus water converts to curtailment “replacement water” as fungible stored water in NDPR; therefore, the State’s Water System experienced a no-net-loss due to my spring surface water diversion during the 2014 and 2015 curtailments.

Para. 50 In response to the April 23, 2015 notice by the Board, I resubmitted to the Board on April 29, 2015 my letter of June 3, 2014, which explained why my diversions were exempt from curtailment. (**Exhibit 60**, the final June 3, 2014 letter, Bates-Stamped page 1277.)

IV. EXCEPTION TO CURTAILMENT ACKNOWLEDGED BY BOARD

Para. 51

On June 12, 2015, I received a phone call from a representative of the Board named David Le Brie ("Le Brie"), initially regarding whether a Curtailment Certification Form had been filed for 2015. Le Brie had left three messages on my office phone in Idaho between June 6th and the 11th, while I was on site in California. I returned to the office on June 12th and called Le Brie. Le Brie appreciated the call, asking immediately if I had provided a 2015 Curtailment Certification Form. I informed him that in lieu of that form, the June 3, 2014 letter regarding justification for exemption sent with the 2014 Curtailment Certification Form had been sent again via the Board's email address. Le Brie then understood why it appeared that I had not complied with returning the 2015 form. He had to find the letter to confirm certification in 2015, and a few hours later, Le Brie returned a call to Fahey, stating the email had been found, and compliance with certification established.

Para. 52

In that second phone call, Le Brie said he had read the letter from Fahey, dated June 3, 2014, and had questions. The first question was the source of the replacement water, which I answered by informing him of the TUD Exchange Agreement approved pursuant to A031491. Second, Le Brie and I discussed the reason for the exchange agreement, which was to provide replacement water to the Districts and CCSF if one of them ever called for it. I informed Le Brie that none of them ever had called for replacement water, so there was plenty of surplus water available to replace the spring water I sold and was selling during the 2014 and 2015 curtailment periods. Third, Le Brie and I discussed whether any potential impacts could occur downstream of NDPR, concluding there were none since Fahey does not control the discharge from NDPR. Le Brie mentioned that the parties to NDPR are covered by the TUD Exchange Agreement, everyone downstream is covered by the appropriate discharge from NDPR and in addition I have no control over NDPR. Le Brie stated that I had not considered the impact to senior instream diverters between Both Permits' PODs and NDPR. I replied that there are no instream appropriators between the PODs and NDPR. Le Brie said that may be true, but I must consider any pre-1914 and/or riparian rights. I informed Le Brie that there were not any. Le Brie doubted that was the case. I mentioned that a Water Availability Analysis was completed prior to the issuance of the A031491 Permit, which stated that no senior water right would be impacted by either Permit. Le Brie said, "If that is true, then you could be the first person in California to be issued an exemption to the curtailment; but I doubt that is going to happen." Le Brie informed me that it had to be confirmed that there were no instream diverters between the PODs and NDPR. I told Le Brie that could be confirmed with Kathy Mrowka ("Mrowka"), since Mrowka was in charge of compiling all the information needed to issue the A031491 Permit. I informed Le Brie that I would examine the Board's Electronic Water Rights Information Management System ("eWRIMS") again, that Le Brie should contact Mrowka and search the eWRIMS too, and Le Brie should get back to me if anything is found contrary to what I had told Le Brie. Otherwise, I told Le Brie, "No news is good news." La Brie did not attempt to correct me.

Para. 53

In an email sent to me that same day at 3:02 p.m., Le Brie acknowledged my explanation in the letter of June 3, 2014. (**Exhibit 64**, Bates-Stamped page 1297.) Le Brie then implicitly recognized that I could have an exception to the curtailment if there were no other senior rights holders other than the Districts and CCSF. (**Exhibit 64**, Bates-Stamped page 1297.) Le Brie wrote:

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Para. 54 The problem is, while the water stored in Don Pedro may satisfy San Francisco and the Districts, it does nothing for the prior right holders between your points of diversion and Don Pedro who may be adversely affected by your diversions. [Exhibit 64, Bates-Stamped page 1297.]

Para. 55 He added:

Para. 56 Remember, the Water Exchange Agreement with the Districts and the letter of understanding with San Francisco only apply to the settlements with those parties as they resolved the protests filed by those parties, The Curtailment Notices were designed to protect all prior right holders. [Exhibit 64, Bates-Stamped page 1297.]

Para. 57 Apparently, Le Brie had not reviewed the Board's file on my water rights either before he called to discuss my letter of June 3, 2014, or before he emailed me on June 12, 2015. Had he reviewed the Permit Files, he would have found the *Report Of Field Investigation Under Water Code Section 1345*, February 1, 1995 that I discussed in our phone call on June 12, 2015. That report (discussed above) states:

Para. 58 Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect **all prior rights at and below the reservoir during this period**. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. ***Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir.*** [Exhibit 17, Bates-Stamped page 259.]

Para. 59 After my phone calls with Le Brie on June 12, 2015, and after that email from him the same day, I never heard back from him. Neither Le Brie nor any other Board representatives contacted me again to dispute the exception to curtailment until I received the Administrative Civil Liability Complaint ("ACL") and related documents in early September 2015. After the June 12, 2015 phone call with Le Brie I confirmed there were no instream water rights holders between the PODs in my permits and NDPR, and therefore I reasonably continued to believe that my diversions were exempt from the curtailment. Furthermore, there is *no* evidence in any of the documents produced by the Board and Prosecution Team in this matter that Le Brie, or anyone else at the Board, ever researched whether there were any other prior rights holders between the PODs in my permits and NDPR before filing the ACL in this matter against me. If they ever did such research, they never contacted me to correct my June 3, 2014 letter, or my explanation to Le Brie on June 12, 2015.

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V. BOARD CONTACTS FAHEY AND DEMONSTRATES NO CLEAR KNOWLEDGE OF FILE

Para. 60

Two months later, on August 12, 2015, I received a phone call from a representative of the Board named Sam Cole (“Cole”) who demanded that I appear for a site inspection the following day. I informed Cole that would not be possible, because I live in and was presently in Boise, Idaho; however, I informed Cole that I was planning to be at the site on September 2, 2015 and could meet with Cole then. I asked Cole what needed to be inspected, and Cole replied the “entire site”. I asked Cole if licenses for Both Permits were going to be issued because of the inspection of Both Permits’ sites. Cole responded that it was to ensure I was not still diverting under the permits. In that phone call, I mentioned to Cole my prior discussion with Le Brie and explained why Both Permits are exempt from curtailment. I explained to Cole why I was exempt. During that explanation of the exemption and the water exchange agreements, Cole responded that the agreements were “very complicated and difficult to understand.” I suggested that Cole speak with Mrowka, as she knew all about the agreements. Cole simply commented that she is too busy and is several levels above him, so he would probably not have an opportunity to discuss these issues with her. I wrapped up the conversation by telling Cole that I would meet him on September 3 out at the site. I asked if Cole looked at the file because in fact I was diverting under the permits due to an exemption, and because I had twice notified the Board in writing of this exemption. I also advised Cole that staff person La Brie advised me that I might well be exempt. Cole ended the conversation stating that I would be considered to be diverting and not in compliance with the curtailment. Cole never explained why that was the case in light of my explanations.

Para. 61

In his own note of our phone conversation on August 12, 2015, Cole admits that I explained “that there are no senior water rights holders, other than the senior water right holders that [I] already has agreement with that would be injured by [my] diversion.” (**Exhibit 66**, Bates-Stamped pages 1313-1314.) Cole also stated the following about me and that phone call on August 12:

Para. 62

He described a letter that he previously sent to the Division indicating that he has purchased and stored 82 acre-feet of water in Don Pedro reservoir to offset diversions for times of drought and that he believes he is exempt from the curtailment. He stated that he had received no response to the letter he sent the Division and that he interpreted that to mean that the exemption was approved, that no news was good news. ... He stated that he believes his exemption is valid and he is going to “stick to his story” so to speak. Mr. Fahey was very helpful, calm and not hostile in any way. He even stated that he has put a lot of time, money and effort into getting this facility setup the right way and wishes to continue operating in a legal and valid way. (**Exhibit 66**, Bates-Stamped page 1313.)

Para. 63

Again referring to me, Cole wrote: “[H]e believes he has a valid exemption” to curtailment. (**Exhibit 66**, Bates-Stamped page 1314.)

Written Testimony of G. Scott Fahey
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Para. 64 The phone call with Cole on August 12, 2015, again demonstrates that the Board staff refused to even consider my explanation for an exception to curtailment, despite the complete absence of any rationale as to how I was wrong. They certainly never got back to me before they filed the ACL with any explanation as to how my legal and factual argument for an exception was wrong. And the excuses that the permits and agreements are “very complicated and difficult to understand” or that Mrowka is “too busy and is several levels above him, so he is not going to discuss these with her” are invalid reasons for not at least responding to my requests for an explanation as to how my arguments may be incorrect. But that lack of communication to me has not stopped the Board in this matter from seeking penalties during that same time they never responded to me with a reasonable (or any) explanation.

Para. 65 The Board now seeks to impose severe penalties on me for that *same time period* during which they never responded back to me about whether my explanation for a curtailment exception was correct. That was the same time period when Le Brie indicated that, without any other senior rights holders, I would have a right to be exempt from curtailment under the facts in this case. It is quite telling that the factual statements in the ACL about the communications I had with Board staff during the summer of 2015 completely omit any reference to my several requests to obtain ANY reasonable explanation that refutes my legal right to an exception to the curtailment. (**Exhibit 67**, Bates-Stamped pages 1357-1359.)

VI. ACL FILED AGAINST FAHEY WITHOUT ACKNOWLEDGEMENT OF FULL FACTUAL BACKGROUND

A. Introduction

Para. 66 On September 1, 2015, two (2) days before I was scheduled to meet with Cole onsite, the Board filed an ACL against me for my diversions. Prior to filing this ACL, no representative from the Board ever followed up with me to discuss or provide notice of a dispute regarding his legal justification for the exemption for Both Permits.

B. Correct Facts

Para. 67 Contrary to the implicit allegations in paragraph 9 of the ACL, Term 19 of A29977 does *not* obligate me to provide water to the Districts on an annual basis whether or not the Districts request it, for three (3) reasons.

1. Districts And CCSF Must Request The Water.

Para. 68 First, Term 19 of A029977 is followed by Term 20, the latter of which further explains the mechanics of any annual provision of water to the Districts. The Districts or CCSF must request it annually under Term 20. Thus, the contractual interpretation upon which the ACL is based is incorrect, as a matter of law.

2. D995 Is Obsolete And Term 20 Must Control.

Para. 69

Second, the Board's requirement for Fahey to establish the 1992 water exchange agreement with the Districts was based on the Tuolumne River being managed as a fully appropriated stream system as determined by decision 995 (hereinafter "D995"). (Exhibit 5, Bates-Stamped pages 38-40.) However, D995 was adopted in 1961, under a different water infrastructure and delivery regime. (Exhibit 76). In other words, 995 became obsolete with the creation of NDPR 10 years later. It should have never been referenced or been used to mandate the 1992 agreement. CCSF's financial contribution for the construction of New Don Pedro Reservoir ("NDPR") in return created a 570,000 acre-feet impoundment (hereinafter the "water bank") dedicated to CCSF. (Exhibit 68.) NDPR and the water bank enable 60% of the Tuolumne River's unimpaired flow to be allocated to the CCSF and the remaining 40% to the Districts. Therefore, D995 was obsolete long before 1992 and should never have been used to justify the WEA obligations. Term 20 of A029977, unlike D995, is relevant to the hydrodynamics of the Tuolumne River as they have existed since 1971 and should control how the demand for replacement water was managed. Term 20 takes into consideration the post NDPR infrastructure and the water bank hydrodynamics that were not contemplated when the Board determined that the Tuolumne River was a fully appropriated stream system by D995 in 1961. Thus, Term 20 necessarily must control over Term 19.

3. Protection Of CCSF's Water Rights Mandates Notification To Fahey If It Wants Fahey To Provide Water.

Para. 70

Third, the September 26, 1994, memo from Daniel B. Steiner, a CCSF Civil Engineering consultant, to CCSF attorney Chris Hayushi, explains some of the complex accounting scenarios that must be considered for CCSF senior rights to be protected. (Exhibit 14, Bates-Stamped pages 230-232.) Regardless of A029977, if CCSF has a positive balance in its water bank, it loses water as a result of any upstream third-party diversion and the Districts are shielded from that loss by the NDPR water bank accounting system, which, at the expense of CCSF, shields the Districts from any loss. To protect their water rights and the unfair loss of CCSF water due to the NDPR water bank accounting process, Term 20 of A029977 must have primacy of operation with regard to Term 19. Term 19 in A029977 must be subordinate to Term 20. Conversely to those four (4) accounting examples, if the CCSF diverts the unimpaired flow of the Tuolumne River during the month of July, contrary to D995, while its water bank is being debited and I release replacement water, e.g. 30 acre-feet, to NDPR, then the water flowing into NDPR would have a net increase of 30 ac-ft. and the CCSF water bank would be debited 30 ac-ft. less than it should be for the water it diverted, thereby, the Districts suffer a loss. That is why CCSF insisted that the "and/or" in Term 20 of the A029977 permit be change to "and" in Term 34 of the A031491 permit; thereby, neither the Districts nor CCSF can call for replacement water without the other party knowing when it will be released and how much will be allocated to each party. Thus, the allegation in the ACL about my alleged obligation under Term 19 to replace water without CCSF and the District's request cannot be correct interpretation of the permits. Additionally, that is why the A03149 permit is without a condition similar to "Term 19."

Para. 71 Additional correct facts support the exemption as set forth below in 4, 5, and 6.

Written Testimony of G. Scott Fahey
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4. Board Has Failed To Demonstrate The Lack Of Water At The PODs. In Fact There Is Ample Groundwater And Surface Water.

Para. 72

Also contrary to paragraphs 26 and 27 of the ACL, the Board has completely failed to show any lack of availability of water between my PODs and NDPR. In response to my attorney's request for "Any and all documents that support, sustain and/or justify "the graphical summations" described in Item 26, on pages 4 through 5, of the ACL, for any and all streams, rivers, and/or waterways between the Permittee's points of diversion and New Don Pedro Reservoir. The graphic representations that were provided do not represent any stream, river, and/or waterway between those two points. That is obvious, because the graphs show pre-1914 and riparian diversion quantities allocations; however, there is not one instream diverter between any and all of my PODs and NDPR. So I can only conclude that the Board does not have any documents that support, sustain and/or justify "the graphical summations" described in Item 26 of it ACL.

5. Annual Reports Were Not Necessary Because It Was Surplus Water.

Para. 73

The water purchased from and wheeled by TUD to NDPR is surplus water, which I own. Once "replacement water" is called for by the Districts and CCSF or upon the States acceptance of my diversions of that surplus water to its system, then a respective accounting of the "replacement water" allocations shall be made in the next Progress Report by Permittee due.

6. Fahey's Diversion Did Not Reduce Water Available For Instream Resources and Riparian Habitat Downstream.

Para. 74

I was given notice to curtail based specifically on a perceived lack of water for downstream senior diverters, NOT because of water needs for instream resources and riparian habitat downstream. (See 2014 and 2015 curtailment notices, **Exhibits 59 and 63**; and see **Exhibit 75**, Declaration of John O'Hagan dated June 22, 2015, including, paragraph 15) which confirms that the goal of curtailment is to ensure that water to which senior water right holders are entitled is available to them. This Declaration was used in court proceedings which ultimately found the May 27, 2014 curtailment notice unconstitutional. This is yet another reason for Fahey's lack of culpability.

C. Decision 1594 Obligations Are Not Impacted By The Fahey Diversions.

Para. 75

Furthermore, Decision 1594 does not apply in this case for several reasons. **First, the water that I diverted is primarily groundwater, as discussed above.** Second, I have no control of the amount of water discharged from NDPR. The amount of water discharged to meet the requirements of D1594 is controlled by the Districts. The only thing that I can do in regard to D1594 is replace the water that I diverted during a D1594 FASS period, June 15 through August 31, after it is requested by the Districts. I have no NDPR discharge authority; therefore, I cannot be liable and am not liable for any D1594 NDPR discharge flow. Third, the Districts and CCSF are not Term 80 permittees. Minimum discharge requirements from NDPR are governed by non-1594 protocol. The minimum fishery surface flows below the dam are maintained per an agreement between the TID, MID, City of San Francisco, Dept. of Fish and Game and others

Written Testimony of G. Scott Fahey
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Para. 76 under FERC Agreement 2299. NDPR is operated in accordance those requirements, the Districts' pre-1914 water rights and CCSF Raker Act authority. As a result, the hydraulic continuity between the PODs in my permits and the Delta is severed by NDPR. Once again I do not control the amount of surface water discharged from NDPR. The amount of water discharged to meet the minimum fish flow requirements is controlled by the Districts. I can do only one thing, replace the surface water when requested by the Districts. I have neither NDPR discharge authority nor hydraulic continuity with the Delta; therefore, a nexus between me and D1594 does not exist.

Para. 77 In conclusion, the only analysis which could lead to a determination that I have trespassed on the State water system is to consider that the surplus water I purchased and sent to NDPR cannot be used as "replacement water." However, in July of 2010 a member of the Board's staff reviewed and approved a Water Availability Analysis, which stated, "[I] can and [have] been purchasing out of basin water in advance as a credit to future replacement water requirements." Therefore, it is deemed surplus and can be used as replacement water. At my own personal expense and risk, water is now available in NDPR as surplus water. If a portion of it is diverted to and accounted for as a credit to the State water system, then my sale of spring water during the 2014 and 2015 curtailments could not have created a net-loss to the State system even if my diversions were all surface water and no exemption applied. A water for water exchange would have occurred between me and the State, which is exactly what I intended to do in good-faith from the beginning of this process.

Para. 78 Nonetheless, as to Fahey's diversions, an exemption does apply to any surface waters, and the curtailments (not found unconstitutional) only apply to non-exempted surface water and do not apply to any groundwater.

VII. INABILITY TO PAY DEPENDING UPON THE FINDINGS OF THE HEARING OFFICER.

Para. 79 I may be unable to pay any penalties, fines, costs, fees and the like. That determination cannot be made until a decision is rendered by the hearing officer.

Para. 80 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct based on my personal knowledge, and based on what I am informed and believe to be true and correct. Executed on December 15, 2015, at Boise, Idaho.


G. Scott Fahey

EXHIBIT 71

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5 Attorneys for
G. Scott Fahey and Sugar Pine Spring Water, LP
6

7
8 **BEFORE THE STATE OF CALIFORNIA**
9 **STATE WATER RESOURCES CONTROL BOARD**

10
11 **IN THE MATTER OF**
12 **ADMINISTRATIVE CIVIL**
13 **LIABILITY COMPLAINT ISSUED**
AGAINST G. SCOTT FAHEY AND
SUGAR PINE SPRING WATER, LP

EXPERT WITNESS TESTIMONY OF
ROSS R. GRUNWALD

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GeoResource Management



December 13, 2015

Mr. Scott Fahey
 Sugar Pine Spring Water, LP
 2787 Stony Fork Way
 Boise, ID 83706

Re: Evaluation of Ground Water Withdrawals to the Sugar Pine Spring Water System

Dear Mr. Fahey,

Para. 1 I have been associated with Sugar Pine Spring Water Company since spring of 1996. Development of water collection facilities has evolved over the intervening twenty years. Most recently water flowing to your collection tank was derived from three development wells and two subsurface infiltration galleries installed below the water table at Deadwood, Sugar Pine, Marco and Polo springs.

Para. 2 In my report: "Water Availability Analysis" prepared for and submitted to the Chief, Division of Water Rights, California State Water Resources Control Board, on July 14, 2010, the assumption was made that all of the water extractions from the various components of the system would directly impact the surface spring flow. Thus, the reduction of water volume reporting to the drainage basin would correspond to the total water extracted. **However, in reality, this is a worst case scenario and does not relate to the actual case. In fact, water extractions from the various components of the system are much greater than any observed reduction in surface spring flow.**

Para. 3 **No definitive studies have been made to determine what this difference may be. However, in my professional opinion, the reduction of spring flow is, on average, on the order of 30% of the volume of water removed from the wells and infiltration galleries installed by Sugar Pine Spring Water, LP. Since only 30% of the water withdrawn from system impairs the spring water flows, the remaining 70% is clearly sourced from percolating ground water beneath the site.**

Para. 4 **The above estimate is based on my experience with the project from its inception in 1996 to the present. A detailed study of water withdrawals and spring flow must be made in order to establish a more definitive ratio between surface flow impairment and withdrawal of percolating ground water. Nevertheless, it is clear that the impairment of surface flow from the springs is much less than that reporting to the Sugar Pine Spring Water, LP, collection system.**

Sugar Pine Spring Water
December 13, 2015
Page 2

Respectfully submitted,



Ross R. Grunwald
California Professional Geologist #3948
California Certified Hydrogeologist #269

Water Availability Analysis Attached

STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
PUBLIC HEARING

In the Matter of:

Draft Cease and Desist Order and
Administrative Civil Liability
against G. Scott Fahey and
Sugar Pine Spring Water, LP

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

Tuolumne County

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
SIERRA HEARING ROOM
1001 I STREET, SECOND FLOOR
SACRAMENTO, CALIFORNIA

MONDAY, JANUARY 25, 2016

9:00 A.M.

Reported by:
Peter Petty

APPEARANCES

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Ms. Frances Spivy-Weber

HEARING TEAM STAFF:

Nathan Weaver, Esq., Staff Counsel

Ernest Mona, Water Resources Engineer

Michael Buckman, Hearing Unit Supervisor

PROSECUTION TEAM:

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Kenneth Petruzzelli, Esq., Office of Enforcement

John Prager, Esq., Office of Enforcement

Katherine Mrowka, Manager, Enforcement Section

Brian R. Coats, Senior WRCE (Sup.)

David LaBrie, Sanitary Engineer

Samuel Cole, WRCE

John O'Hagan, Asst. Deputy Director

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I N D E X

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EXAMINATIONS

DIVISION OF WATER RIGHTS PROSECUTION TEAM

	DIRECT	CROSS	REDIRECT	RECROSS
Ms. Katherine Mrowka, Mr. Brian R Coats, Mr. David LaBrie, Mr. Samuel Cole, and Mr. John O'Hagan	43	74	119	134

G. SCOTT FAHEY AND
SUGAR PINE SPRING WATER, LP

	DIRECT	CROSS	REDIRECT	RECROSS
G. Scott Fahey, and Ross Grunwald	149	179	225	234

E X H I B I T S

(Further detailed listing of exhibits can be found at www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/exhibits/)

DIVISION OF WATER RIGHTS PROSECUTION TEAM

	Description	(First	EVD	
		Reference)		
WR-1	Administrative Civil Liability Complaint dated September 1, 2015			255
WR-2	Draft Cease and Desist Order WR 20135-00XX-DWR dated September 1, 2015			255
WR-3	Information Order WR 2015-0028-DWR			255
WR-4	ACLIC and Draft CDO Cover Letter dated September 1, 2015			255
WR-5	Fahey Letter acknowledging receipt of ACL and CDO and Request for Hearing to Division dated September 8, 2015			255
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WR-17	August 9, 2002 Fahey attachment to Application 31491	208	255
WR-18	State Water Resources Control Board Decision 995 - Decision Denying Application: no unappropriated water from July 1 to October 31 of each year upstream of Don Pedro Reservoir. Dated May 4, 1961	207	255
WR-19	TID and MID Exchange Agreement, Dated December 12, 1992		255
WR-20	State Board Memo Dec, 23 2003 - Authorization to Accept Application in FAS		255
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WR-26	State Water Resources Control Board Decision 1365		255
WR-27	Executive Order B-29-15		255
WR-28	State Water Resources Control Board Order WR 2015-0002-DWR: Order for Additional Information in the Matter Of Diversion of Water From The Sacramento and San Joaquin River Watersheds		
WR-29	State Water Resources Control Board "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversion" (2014 Shortage Notice), issued on January 17, 2014		255
WR-30	State Water Resources Control Board "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento And San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), issued on May 27, 2014	79	255
WR-31	State Water Resources Control Board "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin River Watershed." (2014 Temporary Diversion Notice), issued on October 31, 2014		255
WR-32	2014 Unavailability Notice mailed to Fahey (May 27, 2014)		255

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WR-36	Curtailment Certification A031491		255
WR-37	State Water Resources Control Board "Notice of Temporary Lifting of Curtailments for Diversions in the Sacramento-San Joaquin Watershed" (2014 Temporary Lifting of Curtailment), issued on November 19, 2014		255
WR-38	State Water Resources Control Board "Statewide Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice), issued January 23, 2015	82	255
WR-39	State Water Resources Control Board "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (2015 Unavailability Notice), issued April 23, 2015	82	255
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WR-66	Fahey Info Order Response 2(B)	184	255
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WR-69	Fahey Info Order Response 2(A) & 2(C) Excel		255
WR-70	Water Board Subpoena issued to Fahey, 10-30-2015		255
WR-71	Letter from Fahey to PT re Subpoena, dated 11-3-2015 (from Barringer)		255

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WR-77	Petruzzelli first response to Fahey Counsel, Dec 1, 2015 demand for documents, dated Dec 8, 2015		255
WR-78	Petruzzelli Second response to Fahey Counsel, Dec 1, 2015 demand for documents, dated Dec 8, 2015		255
WR-79	SWRCB response to Fahey PRA request, Dated Dec 9, 2015		255
WR-80	State Water Resources Control Board Order WR 89-25 : Order Adopting Declaration of Fully Appropriated Stream Systems And Specifying Conditions For Acceptance Of Applications and Registrations, available on the State Water Board's website at: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1989/wro89-25.pdf		255
WR-81	State Water Board Order WR 91-07 : Order Revising Declaration of Fully Appropriated Stream System, available on the State Water Board's website at: http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1991/wro91-07.pdf		255

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	Description	(First Reference)	EVD
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WR-83- WR-146	Video Surveillance Files June - August. 27, 2015. See Exhibit 53 for filenames and descriptions. Video files are available at: The Records Office; https://www.youtube.com/playlist?list= PLb4ywLqRQSorZxMcHrOb- cuJIN_yApB00 ;or https://droughtwt.waterboards.ca.gov (username drought, password Sb@d2014)		255
WR-147	Contact Report: Samuel Cole and TID New Don Pedro Spill, 1.21.2016 (TENTATIVE, PENDING RULING ON EVIDENTIARY OBJECTIONS)		--
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E X H I B I T S

G. SCOTT FAHEY AND
SUGAR PINE SPRING WATER, LP

	Description	(First Reference)	EVD
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Fahey-7	Dec. 22, 1992 - Resolution No. 92-207		255
Fahey-8	Dec. 30, 1992 - Ltr to SWRCB from G. Scott Fahey enclosing fully-executed water exchange agreement		255
Fahey-9	Jan. 14, 1993 - Memorandum recognizing the water agreement		255
Fahey-10	Jan. 15, 1993 - Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FAS)		255
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	Description	(First Reference)	EVD
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	Description	(First Reference)	EVD
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Fahey-33	Oct. 20, 2003 - Executed Application and Agreement for Surplus Water Service	190	255
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	Description	(First Reference)	EVD
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Fahey-46	Jan. 31, 2005 - SWRCB letter to CCSF re-dismissal of protest		255
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	Description	(First Reference)	EVD
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Fahey-59	May 27, 2014 - Notice of Unavailability of Water and Immediate Curtailment		255
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	Description	(First Reference)	EVD
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Fahey-72	Statement of Qualifications of Ross R. Grunwald with Resume	177	255
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Fahey-78	Memorandum by water law expert Stuart L. Somach 20 to Environmental Defense, dated July 2004		255
Fahey-79	Fourth Agreement Between The City And County 2 Of San Francisco And The Turlock Irrigation District And The Modesto Irrigation District, dated 3 June 1966 ("Fourth Agreement")	153	255

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	Description	(First Reference)	EVD
Fahey-80	Letter from Jonathan P. Knapp, Deputy City Attorney 7 for the City and County of San Francisco, to the Board, dated June 27, 2014, and received by the 8 Board on June 27, 2014 ("City Attorney Letter")		255
Fahey-81	Board's December 2012 "Evaluation of San Joaquin 13 River Flow and Southern Delta Water Quality Objectives and Implementation," which is part of 14 the "Draft Substitute Environmental Document in Support of Potential Changes to the Water 15 Quality Control Plan for the Bay-Delta: San Joaquin River Flows And Southern Delta Water 16 Quality" ("20 12 Board evaluation"),		255
Fahey-82	Power Point Presentation Slides		255
Fahey-83	Copies of State Water Board Emails: John O'Hagan to Tom Howard (08/31/15); Tom Howard to Board Members(08/31/15)	106	255
Fahey-84	Initial Study/Mitigated Negative Declaration for Water Right Application 31491, December 2010.	78	255
Fahey-85	Chronological History: Â La Grange Ditch Right; The Wheaton Right; The Turlock Irrigation District Postings; The Modesto Irrigation District Postings; Modesto Irrigation District Appropriation; Turlock Irrigation District Appropriation; Notice of Appropriation of Waters of the Tuolumne River		255
Fahey-86	Not Offered into Evidence		--
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E X H I B I T S

DIVISION OF WATER RIGHTS HEARING TEAM

	Description	(First Reference)	EVD
SWRCB-1	By Reference: Division of Water Rights Correspondence Files for Fahey's water right Applications A029977 and A031491	17	255

EXHIBITS

<u>Exhibit</u>	<u>Description</u>	(First Reference)	EVD
SWRCB-2	January 18, 2016 - Prosecution Team Email Regarding clarification to submitted prehearing brief	18	255
SWRCB-3	January 16, 2016 - Fahey email Regarding needed correction to PT-55	18	255
SWRCB-4	February 17, 2012 - Tom Howard Memo: Management and Retention of E-Mails		255
SWRCB-5	BBID Letter 1-20-16		255
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P R O C E E D I N G S

3 January 25, 2016

9:00 a.m.

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HEARING OFFICER D'ADAMO: Good morning. This is the time and place for the hearing regarding an Administrative Civil Liability Complaint and Draft Cease and Desist Order against G. Scott Fahey and Sugar Pine Springs Water, LP, hereinafter referred to as Fahey. The Administrative Civil Liability Complaint and Draft Cease and Desist Order were issued by the Assistant Deputy Director for Water Rights on September 1, 2015.

My name is Dorene D'Adamo, Board Member for the State Water Resources Control Board. And with me is fellow Board Member and Co-Hearing Officer Fran Spivy-Weber, who is also our Vice Chair. We will be assisted by Staff Counsel Nathan Weaver and Staff Engineer Ernest Mona.

Before we get started, a few words about safety. Please look around now and identify the exits closer to you. In the event of a fire alarm we're required to evacuate this room immediately. Please take your valuables with you and exit down the stairways. Do not use the elevators. While Staff will endeavor to assist you to the nearest exit, you should also know that you may find an exit door by following the ceiling-mounted exit signs. Our evacuation location is across the street in Cesar Chavez Plaza.

1 This hearing is being held in accordance with the
2 Notice of Public Hearing dated October 16, 2015. The
3 purpose of this hearing is to afford the parties with an
4 opportunity to present relevant oral testimony and other
5 evidence which addresses the noticed key issues. Unless any
6 party objects, I will skip reading all of the key issues
7 that have already been specified in the notice.

8 Any objection? Okay.

9 We're broadcasting this hearing on the internet
10 and recording both audio and video. In addition, a court
11 reporter is present to present -- to prepare a transcript of
12 the proceeding. To assist the court reporter, please
13 provide him with your business card. When you speak please
14 be sure to use a microphone so that everyone can hear you,
15 and make sure that it's close, that the microphone is close
16 to your mouth.

17 Policy statements. Before we begin the
18 evidentiary portion of the hearing and hear from the
19 Prosecution Team and Fahey, we will hear from any speakers
20 who did not submit a notice of intent to appear but wish to
21 make a policy statement. A policy statement is a non-
22 evidentiary statement. It is subject to the limitations
23 identified in the hearing notice. Persons making policy
24 statements must not attempt to use their statements to
25 present factual evidence, either orally or by introduction

1 of written exhibits. Policy statements should be limited to
2 five minutes or less.

3 After hearing any policy statements we will move
4 to the evidentiary portion of the hearing for presentation
5 of evidence and related cross-examination by parties who
6 have submitted Notices of Intent to Appear.

7 Is there anyone here who wishes to make a non-
8 evidentiary policy statement? If so, please step forward.
9 Okay. We will note for the record that no one has indicated
10 they wish to make --

11 MS. BRATHWAITE: (Off mike.) (Inaudible.)

12 CO-HEARING OFFICER D'ADAMO: Excuse me. Go ahead.

13 MS. BRATHWAITE: (Inaudible.)

14 CO-HEARING OFFICER D'ADAMO: Please step up.

15 THE REPORTER: Go to the podium.

16 CO-HEARING OFFICER D'ADAMO: If you could identify
17 yourself and spell your name, please, for the court
18 reporter.

19 MS. BRATHWAITE: Of course, I'm very sorry. I
20 thought you waiting for those who had not submitted a Notice
21 of Intent to Appear.

22 My name is Anna Brathwaite. I am Staff Counsel
23 with Modesto Irrigation District. And I'm giving this
24 policy statement on behalf of --

25 MR. BUCKMAN: Wait. Wait, hold on. Sorry. This

1 is for people that have not submitted a blue card, that have
2 not submitted an NOI.

3 MS. BRATHWAITE: Oh, great. I was good the first
4 time. Very sorry. Thank you.

5 CO-HEARING OFFICER D'ADAMO: Okay. Anyone else?
6 All right.

7 CO-HEARING OFFICER D'ADAMO: And then please spell
8 your name also.

9 MR. DONLAN: Robert -- Robert Donlan, D-O-N-L-A-N,
10 Ellison, Schneider and Harris, 2600 Capital Avenue,
11 Sacramento, 95816, here on behalf of the City and County of
12 San Francisco. I just want to clarify that a few of the
13 parties that have submitted notices of intent to appear
14 intend to provide policy statements in lieu of providing
15 evidence. And if there's an opportunity for an opening
16 statement, we'll reserve the right to do it then.

17 CO-HEARING OFFICER D'ADAMO: Okay. Just one
18 moment.

19 That's good?

20 STAFF COUNSEL WEAVER: We're good.

21 CO-HEARING OFFICER D'ADAMO: All right.

22 Same with Modesto then? That works for you, as
23 well? All right. Okay.

24 I think I started to say that we will note for the
25 record that no one has indicated they wish to make a non-

1 evidentiary policy statement, but that is not the case. We
2 will reserve that during the period for opening statements.
3 All right.

4 We will allow all of the parties to make an
5 opening statement before presentation of testimony. Opening
6 statement from parties presenting a case in chief should
7 briefly summarize the party's position and, if applicable,
8 what the party's evidence is intended to establish.

9 After all opening statement are presented we will
10 hear oral testimony from the parties' witnesses. Before
11 testifying witnesses should identify their written testimony
12 as their own and affirm that it is true and correct.
13 Witnesses should summarize the key points in their written
14 testimony and should not read their written testimony into
15 the record.

16 Oral testimony will be followed by cross-
17 examination by the other parties and, if necessary, by the
18 Hearing Team and Hearing Officers. After completion of
19 direct testimony and cross-examination, redirect testimony
20 and recross examination limited to the scope of the redirect
21 testimony may be permitted.

22 After the cases in chief are completed the parties
23 may present rebuttal evidence. The parties will present
24 their opening statement, oral testimony, conduct cross-
25 examination, present any redirect testimony, and conduct

1 recross examination and present any rebuttal testimony and
2 rebuttal cross-examination in the following order. First of
3 all, Division of Water Rights, Prosecution Team, Kenneth
4 Petruzzelli; then G. Scott Fahey and Sugar Pine Springs
5 Water, LP, represented by Glen C. Hansen; Turlock Irrigation
6 District, represented by Arthur G. Godwin, I saw him walk
7 in, okay; Modesto Irrigation District, represented by
8 William C. Paris, III; City and County of San Francisco,
9 Robert E. Donlan.

10 We encourage the parties to be efficient in
11 presenting their oral testimony and their cross-examination.
12 Except where Co-Hearing Officer Spivy-Weber or I approve a
13 variation, we will follow the procedures set forth in the
14 Board's regulations and the hearing notice.

15 As we stated in our November 13, 2015 letter, and
16 confirmed in our December 14, 2015 procedural ruling
17 regarding Fahey's request to submit a revised Notice of
18 Intent to Appear, the parties' presentations are subject to
19 the following time limits.

20 Opening statements are limited to 20 minutes.
21 Oral summaries by witnesses of direct testimony submitted by
22 parties presenting a case in chief will be limited to 20
23 minutes per witness and up to one hour total to present all
24 of the parties' direct testimony. Cross-examination will be
25 limited to one hour per witness or panel of witnesses.

1 Additional time may be granted upon a showing of good cause.
2 Oral arguments will not be permitted -- or excuse me, oral
3 closing arguments will not be permitted. An opportunity
4 will be provided for submission of written closing briefs.
5 I will set the briefing schedule at the close of the
6 hearing.

7 Before we begin, does any party have any
8 procedural issue or other requests that need to be
9 addressed?

10 MR. HANSEN: Yes. This is Glen Hansen on behalf
11 of Mr. Fahey. There are two issues.

12 First is that we understand from the
13 communications by the -- Mr. Mona on Friday that there was
14 still pending a final ruling on the Prosecution Team's
15 motion to strike, motion in limine. We received tentative
16 word from Mr. Mona. And we would like clarification, if we
17 can, as to a final ruling on that.

18 And then there is one other issue that was -- that
19 arose very late on Friday that bears great relevance, we
20 believe, to the proceeding. On Thursday the court -- oh,
21 I'm -- pardon me -- the Hearing officers announced their
22 ruling on the motion to compel, the document-related motion,
23 and said among other things that to the extent that the
24 Prosecution Team has not yet disclosed or made available
25 specific documents or portions of specific documents, we

1 find that Fahey's document requests are calculated to lead
2 to the discovery of admissible evidence, the proper standard
3 here.

4 We received that on the morning or thereabouts on
5 Thursday. And then what happened was that at 4:56 p.m. a
6 third-party who knows about this matter sent me some
7 documents that that attorney had received from a Public
8 Records Act response by the Board itself with no privileges
9 attached to that document whatsoever and sent it to me, and
10 I received that. And they were later on sent by me to
11 everyone at 8:34 p.m.

12 Now what happened then, at around five o'clock, a
13 few minutes after I received that document, was that I then
14 got an email from the Prosecution Team, which was followed
15 up by a confirming email to everyone by the Prosecution Team
16 at 7:35 p.m. stating that they had no other documents as the
17 hearing officers had directed them to make that statement,
18 or at least respond on the last -- I'm sorry, page ten of
19 the hearing officer's ruling of January 21st, 2016.

20 That document demonstrated to us immediately that
21 there were, in fact, other documents that fit exactly within
22 that criteria, Items A through E on page ten of the court's
23 ruling on Thursday morning, January 21st, which -- which
24 caused me then to send out that email at 8:34 to everyone,
25 believing that there were additional documents.

1 What happened the next morning is that in response
2 to that, and our entire legal office was at a conference
3 late Friday so we had no opportunity to file any kind of
4 motions or anything else, we were simply out of the office,
5 is at 7:14 I received an email from a member of the
6 Prosecution Team that mentioned that those documents that we
7 had sent in my email the night before that we had received
8 "is arguably within the scope of the PRA request."

9 Well, if you look at our PRA request which was
10 done the beginning of December and was identical to the
11 production demand that we made, the exact same language,
12 that demonstrates obviously not only the PRA request, but
13 also the document demands themselves with the Prosecution
14 Team's admission that it's arguably within that.

15 However, 3 hours and 14 minutes later they sent an
16 email out at 10:30 to everybody in which they completely
17 deny what they told me and --

18 CO-HEARING OFFICER D'ADAMO: Just a second. They,
19 meaning the Prosecution Team?

20 MR. HANSEN: I'm sorry, the Prosecution Team --

21 CO-HEARING OFFICER D'ADAMO: Right.

22 MR. HANSEN: -- saying that the emails that I sent
23 do not fall under the nine categories described in my Public
24 Records Act request of December 7th.

25 What's most troubling to us is what that email at

1 10:30 a.m. on Friday, January 22nd, reveals to us. To begin
2 with that document itself, which they call a pro forma
3 document, is in our opinion absolutely within the scope of
4 the production that -- and the PRA which basically asks for
5 "any and all documents that support the ACL in this matter."
6 That's probably why I got that email at 7:30 saying it's
7 arguably within that scope.

8 The other thing is that this email that I received
9 at 10:30 that was sent to everyone says that that
10 communication from Mr. O'Hagan, which is what we're talking
11 about here, was "privileged." Well, it was sent out by the
12 Board itself under a PRA response, never claiming any
13 privilege whatsoever. And just as, I believe, that the
14 hearing officers got it absolutely right when they tried
15 identifying what is an attorney-client privilege with the
16 reflecting attorney's impressions, conclusions, opinions,
17 legal research, theories or the like, that email of Mr.
18 O'Hagan has none of that. Just because you cc: the attorney
19 does not mean it's privileged.

20 The other thing that is bothering us is that
21 it's -- the court -- I'm sorry again, the hearing officers
22 stated that we are entitled to documents that are
23 "calculated to lead to the discovery of admissible
24 evidence." That document absolutely falls within that. At
25 a minimum it demonstrates what the opinions and the -- well,

1 I'll -- actually, what it states is evidence we believe or
2 certainly could lead to relevant evidence showing that, in
3 fact, this ACL in this case was brought without any
4 consideration whatsoever of Mr. Fahey's numerous
5 opportunities to explain his position for over a year prior
6 to this time. And it appears to us that they never
7 considered any of that in filing this ACL.

8 Now they might challenge that. But certainly
9 this, back in October, would have -- had I received this
10 would have informed us that we do need to change our notice
11 of who we want to have appear. We could have very easily
12 subpoenaed Mr. O'Hagan to appear and explain this. And
13 furthermore, it demonstrates to us that there are other
14 documents that could potentially be out there. For them to
15 state at 10:30 a.m. last Friday that they never -- the
16 Prosecution Team never received this document is indicative
17 to me that, well, what other documents does Staff have that
18 the Prosecution Team does not have, that we therefore have
19 not received?

20 That's part of the reasons why we wanted to
21 depose. And the hearing officers believed that, no, we
22 could do that under cross-examination. It's a little late
23 for that, to get these documents that they now admit are out
24 there.

25 CO-HEARING OFFICER D'ADAMO: Okay.

1 MR. HANSEN: So therefore, what we request --

2 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, can
3 you -- yeah, go ahead and wrap up.

4 MR. HANSEN: We request two things, in light of
5 all that.

6 Number one, we request a full motion to dismiss
7 the entire ACL at this point. We believe that the court --
8 the hearing officers, rather, stated that any kind of
9 testimony that's given, depending upon documents that are
10 relevant that should have been produced, the cannot testify,
11 we believe that that document shows they can't testify that
12 the ACL was actually even filed properly in this case.
13 Furthermore, it would have changed the way we would have
14 definitely done our procedures back in October and November
15 when they claimed at the end of December it was too late for
16 us to pursue that.

17 In the alternative, however, we request an order
18 from the hearing officers that all documents must be
19 produced to us and that we continue this hearing to allow
20 that to happen. Secondly, that Mr. O'Hagan be required to
21 appear as a witness in cross-examination. And third, that
22 the parties be ordered to a settlement meeting -- well,
23 rather that Mr. Fahey be ordered to a settlement meeting
24 with the Board to see if we can resolve this during that
25 continuance period. And then a settlement meeting with the

1 districts and the city, as necessary.

2 And on that grounds, I rest.

3 CO-HEARING OFFICER D'ADAMO: All right. We'll
4 take that under submission.

5 MR. TAURIAINEN: Madame Hearing Officer, will the
6 Prosecution Team be allowed to respond to any of the
7 points --

8 CO-HEARING OFFICER D'ADAMO: Yes.

9 MR. TAURIAINEN: -- just raised?

10 Good morning, members of the Hearing Team. My
11 name is Andrew Tauriainen. I'm an attorney with the Office
12 of Enforcement. I'm a member of the Prosecution Team.

13 The 10:30 a.m. or thereabouts email from Friday
14 morning I sent. That email is now part of the record. It
15 describes the Prosecution Team's position regarding the
16 document that Mr. Hansen is concerned about. I'll summarize
17 that email here. It was -- the -- first, I need to take a
18 step back.

19 When the assistant deputy director completes an
20 investigation and --

21 CO-HEARING OFFICER D'ADAMO: We have that email.

22 MR. TAURIAINEN: Okay.

23 CO-HEARING OFFICER D'ADAMO: So I think --

24 MR. TAURIAINEN: Then I would ask --

25 CO-HEARING OFFICER D'ADAMO: -- there's no need to

1 summarize.

2 MR. TAURIAINEN: Then I would not summarize the
3 email and ask that the Hearing Team deny both motions,
4 either the first motion or the motion in the alternative.
5 There are no other documents that the Prosecution Team that
6 Mr. Fahey's team is entitled to. We've given them all the
7 documents that have been relevant for months and months.
8 They've had everything yet they've repeatedly accused us of
9 withholding documents, and that is simply not true. And
10 those accusations shouldn't be allowed to stand. Thank you.

11 MR. PETRUZZELLI: Kenneth Petruzzelli, also for
12 the Prosecution Team.

13 I do recall reviewing that email from John
14 O'Hagan. When Fahey's attorneys made that -- their request,
15 I deemed that privileged because it discussed the content
16 and nature of the ACL complaint to be issued. So that is
17 why I did not disclose it. To the degree it was not -- it
18 was disclosed the Prosecution Team did not waive its
19 privilege with regard to that document.

20 CO-HEARING OFFICER D'ADAMO: All right. I think
21 what we're going to do is take a brief break so that we can
22 confer. And we should be back within, I'd say ten minutes
23 approximately.

24 (Off the record at 9:20 a.m.)

25 (On the record at 9:22 a.m.)

1 CO-HEARING OFFICER D'ADAMO: Sorry for the
2 additional time, but I think we've got some rulings here
3 that will be helpful in moving forward. Okay.

4 First of all, Mr. Weaver has a statement to make.

5 STAFF COUNSEL WEAVER: Sure. So I -- Nathan
6 Weaver with the Office of Chief Counsel. I'm one of the
7 attorneys who advises the Board on water rights issues on
8 this and other matters. I wanted to just go over briefly
9 the -- the particular documents that are at issue in this
10 case. My name is on them. The reason my name is on them is
11 because I assisted with responding to Public Records Act
12 requests in the unrelated BBID and WSID hearings.

13 The particular batch of documents that this email
14 was included in I released to the BBID and WSID attorneys, I
15 believe last Thursday. The -- these were documents in which
16 the Hearing Team determined that the public interest in
17 nondisclosure did not clearly outweigh the public interest
18 in disclosure, so we released them for that reason. The
19 Hearing Team, therefore, would have waived any applicable
20 privileges. But the -- these documents were not released to
21 the Prosecution Team, to my knowledge, so they would not
22 have been aware, to my knowledge.

23 CO-HEARING OFFICER D'ADAMO: Okay. So in response
24 to Mr. Hansen's motions, first of all, we deny the motion to
25 dismiss. Secondly, we deny the motion to continue.

1 And regarding the alternate motion to compel
2 production of documents, the email in question -- the emails
3 in question don't appear to have been used by the
4 Prosecution Team to form an opinion, nor are they
5 privileged. Nonetheless, we direct the Prosecution Team to
6 make Mr. O'Hagan available for cross-examination.

7 Regarding Mr. Hansen's request for an update on
8 the motion to strike, we've determined that the evidence is
9 relevant with regards to Water Code 1055.3 and will take
10 under submission whether the evidence is relevant as to
11 whether water was available for diversion? Okay.

12 And then lastly, Mr. Hansen's motion regarding
13 settlement, we have a question for the Prosecution Team, an
14 inquiry as to whether the Prosecution Team is interested in
15 settling this case?

16 MR. PETRUZZELLI: The prosecution team had a
17 settlement meeting with Mr. Fahey and his counsel. I
18 believe it was in October. And we thought that was, you
19 know, not productive. But we also believe we have, you
20 know, a good strong case and we believe that should go
21 forward today.

22 CO-HEARING OFFICER D'ADAMO: Okay. So the reason
23 for the inquiry is that if you -- if the prosecution -- oh,
24 wait a moment.

25 (off the record discussion.)

1 CO-HEARING OFFICER D'ADAMO: Anything further?

2 MR. PETRUZZELLI: There was also another attempt
3 at a settlement meeting in January, but that was canceled.

4 CO-HEARING OFFICER D'ADAMO: By?

5 MR. PETRUZZELLI: That was canceled by Mr. Fahey's
6 counsel.

7 CO-HEARING OFFICER D'ADAMO: Okay. So the reason
8 for the question is that if the parties are interested in
9 having settlement discussions, we would be willing to
10 entertain just a brief recess, you know, 20 minutes, a half-
11 an-hour for a brief discussion so that the parties could
12 determine whether or not a postponement could lead to
13 fruitful discussions and a final settlement. So we're
14 willing to entertain that if that is something that the
15 parties would be interested in at this time.

16 MR. PETRUZZELLI: We are not. The prosecution
17 team is not interested in that.

18 CO-HEARING OFFICER D'ADAMO: Okay. So at this
19 point we'll be going forward then. And I would like to turn
20 it over to Mr. Mona.

21 MR. MONA: Thank you. Unless any party objects
22 the Hearing Team will include the Division of Water Right's
23 correspondence files for Water Right Application numbers
24 29977 and 31491 as exhibit -- Staff Exhibit 1 in the hearing
25 record.

1 Also, unless any party objects, the Hearing Team
2 will include the Prosecution Team's January 18, 2016 email
3 regarding clarification of submitted prehearing brief with
4 attachment as Staff Exhibit number 2 in the hearing record.

5 And finally, unless any party objects, the Hearing
6 Team will include Fahey's January 16, 2016 emails regarding
7 needed correction to Prosecution Team Exhibit WR-55 as Staff
8 Exhibit number 3 in the hearing record. Thank you.

9 CO-HEARING OFFICER D'ADAMO: Okay. Before we
10 begin with the evidentiary hearing we will hear from -- hear
11 policy statements from anyone who has submitted a blue card
12 or parties that are interested in making a policy statement
13 in lieu of presenting evidence. One moment.

14 (Colloquy)

15 CO-HEARING OFFICER D'ADAMO: That's right. Those
16 individuals would be making opening statements. All right.
17 When I -- so we're going to move forward then. Okay.

18 Now I invite the appearances by the parties who
19 are participating in the evidentiary portion of the hearing.
20 Will those making appearances please state your name,
21 address and whom you represent so that the court reporter
22 can capture this information for the record? And please
23 remember to spell your last name.

24 Division of Water Rights?

25 MR. PETRUZZELLI: Kenneth Petruzzelli,

1 K-E-N-N-E-T-H, Petruzzelli, P-E-T-R-U-Z-Z-E-L-L-I,
2 representing the Division of Water Rights for the
3 Prosecution Team, address, 1001 I Street in Sacramento.

4 CO-HEARING OFFICER D'ADAMO: All right. Then G.
5 Scott Fahey and Sugar Pines -- Sugar Pine Springs Water, LP.

6 MR. HANSEN: Glen C. Hansen, H-A-N-S-E-N, of the
7 Law Firm of Abbott and Kindermann.

8 MS. KINDERMANN: Diane Kindermann with the Law
9 Firm of Abbott & Kindermann.

10 MR. FAHEY: Scott Fahey.

11 CO-HEARING OFFICER D'ADAMO: Just the attorneys.
12 Oh, okay. All right. All right.

13 Turlock Irrigation District, Arthur Godwin?

14 MR. GODWIN: Arthur Godwin, G-O-D-W-I-N, with
15 Mason, Robbins, Browning and Godwin.

16 CO-HEARING OFFICER D'ADAMO: Modesto Irrigation
17 District, William C. Paris?

18 MR. PARIS: My apologies. William C. Paris,
19 P-A-R-I-S, with the Law Firm of O'Laughlin and Paris, 117
20 Myers Street, Chico, California 95928.

21 CO-HEARING OFFICER D'ADAMO: Thank you. City and
22 County of San Francisco, Robert Donlan.

23 MS. BRATHWAITE: Actually, if I may, I'd like to
24 enter my name into the record. My name is Anna Brathwaite,
25 B-R-A-T-H-W-A-I-T-E. And I'm with Modesto Irrigation

1 District, as well.

2 CO-HEARING OFFICER D'ADAMO: Okay. City and
3 County of San Francisco, Robert Donlan?

4 MR. DONLAN: Robert Donlan, Ellison, Schneider and
5 Harris, 2600 Capital Avenue, Suite 400, Sacramento, 95816.

6 MR. KNAPP: Jonathan Knapp with the City and
7 County of San Francisco. The last name is K-N-A-P-P. It's
8 1390 Market Street, Suite 418, San Francisco, California
9 94102.

10 CO-HEARING OFFICER D'ADAMO: Okay. I will now
11 administer the oath. Will those persons who may testify
12 during the proceeding please stand and raise your right
13 hand?

14 (Whereupon all prospective witnesses were sworn.)

15 CO-HEARING OFFICER D'ADAMO: Thank you. You may
16 be seated. Okay.

17 We will now hear opening statements from the
18 parties. Okay. The opening statements from the parties, 20
19 minutes.

20 First of all, Division of Water Rights Prosecution
21 Team.

22 OPENING STATEMENT BY PROSECUTION TEAM

23 MR. PETRUZZELLI: Good morning. My name is Ken
24 Petruzzelli. I am with the Office of Enforcement and
25 represent the Division of Water Rights in this enforcement

1 action.

2 Mr. Fahey, through his company, Sugar Pine Spring
3 Water, LP, diverted and sold food-grade spring water in
4 violation of his water rights during the summer months of
5 2014 and 2015. Mr. Fahey has indicated that he has no
6 intention of stopping. We are here today to discuss whether
7 the Board will impose an administrative civil liability and
8 issue a cease and desist order.

9 Over the last four years the State of California
10 has been subject to an unprecedented drought. In both 2014
11 and 2015 the governor declared a state of emergency due to
12 the drought. Over the past two years the drought has become
13 so severe that in the San Joaquin River Basin all post-1914,
14 and even some pre-1914 water right holders were notified
15 that there was insufficient water to satisfy their needs.
16 These pre-1914 water right holders are some of the most
17 senior in the state, which is a good indication of the
18 drought's severity.

19 Mr. Fahey has two post-1914 water right permits
20 authorizing diversion from four springs, two for each
21 permit. These springs are all ultimately tributary to the
22 Tuolumne River upstream of New Don Pedro. Mr. Fahey's
23 diversion facilities piped the water from the springs to a
24 transfer station that fills bulk water trucks from bottled
25 water companies, such as Arrowhead. This isn't raw ag

1 water, or even treated municipal water. It's a premium
2 food-grade product that fresh from the spring needs little
3 or no treatment.

4 Mr. Fahey's water rights are very junior with
5 priority dates in 1991 and 2004. Consequently, in times of
6 drought his rights are the among the first impacted.

7 In 2014 and 2015 there was no water available for
8 his priority of right during the summer months, meaning he
9 had no right to divert water at those times. The Board
10 notified him there was no water for his priority, but he
11 kept diverting and selling water anyway.

12 How do we know he kept diverting? First,
13 surveillance captured video of water trucks going in and out
14 of his facility during the period of water unavailability.
15 And Mr. Fahey's invoices sent to bottled water companies
16 indicate that his water sales continued during that period.
17 Moreover, Mr. Fahey submitted progress reports to the Board
18 stating the amount he diverted from the springs in the --
19 for the year 2014, and those reports state that he diverted
20 during the period of unavailability. Finally, if that
21 wasn't enough, Mr. Fahey told us he was still diverting.

22 While investigating compliance with the Board's
23 Notice of Unavailability last summer, division staff
24 contacted Mr. Fahey who explained that he received the
25 notice but that he was still diverting, and that if he

1 stopped he would be out of business. Later, when division
2 staff contacted Mr. Fahey to schedule an inspection he
3 stated outright that he was still diverting and had no
4 intention of stopping.

5 Together this shows us that Mr. Fahey continued
6 diverting water over the course of two years when there was
7 no water available for his priority of right, even though
8 the Board told him there was no water available for his
9 priority of right. Mr. Fahey has not shown us any evidence
10 of any alternative or supplemental right, or of any
11 alternative water supply that would have been available.

12 It is important to note now that in an effort to
13 avoid the consequences of his actions, Mr. Fahey has
14 submitted testimony where he's actually asserted for the
15 first time that due to new information and changed
16 conditions some of his permit terms are no longer relevant
17 and should not apply. But permit terms apply unless and
18 until the Board changes them. This is not a change
19 proceeding, this is an enforcement proceeding. Whether his
20 permits should be different is not an issue, nor should it
21 be an issue.

22 Mr. Fahey's diversion of water when there was none
23 available for his priority of right was unauthorized
24 diversion. Under Water Code section 1052, unauthorized
25 diversion of water is a trespass. During drought the Board

1 may impose an administrative civil liability of up to \$1,000
2 per day and up to \$2,500 per acre foot. Again, 2014 and
3 2015 were both drought years.

4 Evidence supports a statutory maximum civil
5 liability of roughly \$467,000 for violations occurring in
6 2014 and 2015. This is based on the number of days and the
7 volume of water Mr. Fahey diverted in excess of his right,
8 213 days and 16.5 acre feet. The complaint alleges a
9 statutory maximum of about \$395,000. But the Prosecution
10 Team revised that amount based on evidence later obtained
11 through an information order and surveillance.

12 There are other considerations in an ACL penalty.
13 Based on those considerations the complaint proposes a
14 penalty of about \$225,000. This is mostly based on treating
15 the violation days as a single violation per day for Mr.
16 Fahey's two permits. However, we still desire a strong
17 penalty to discourage Mr. Fahey from violating his permits
18 in the future, and to discourage others who are similarly
19 situated.

20 This case is a little different than most other
21 unauthorized diversion cases. Normally we have water
22 diverted for agriculture, but this is an industrial
23 diverter. The amount he diverts is relatively small but the
24 amount of money he makes diverting is relatively large which
25 incentivizes him to divert water, even when none is

1 available, and to violate his permit terms.

2 A cease and desist order is necessary to assure
3 compliance, now and in the future. Mr. Fahey continued
4 diverting in the past and stated he would continue diverting
5 in the future. There is also evidence of prior permit
6 violations. If water is again unavailable for his priority
7 of right, he must stop diverting. He must also comply with
8 his permits. A cease and desist order is necessary.

9 With that said, I would like to introduce the
10 other members of the Prosecution Team. They are all from
11 the Division of Water Rights and represent the key staff
12 involved in the investigation. They are Ms. Katherine
13 Mrowka who will talk about Mr. Fahey's water rights, his
14 permits, and his permit terms, Mr. Brian Coats who will tell
15 us what the State Board did to manage the drought and
16 protect beneficial uses and senior water rights, Mr. David
17 LaBrie who -- who will tell us about the investigation, how
18 we developed the ACL, and how we calculated the penalty
19 based on the evidence, and then finally, Mr. Sam Cole will
20 talk about the surveillance.

21 I also want to mention Mr. John Prager and Andrew
22 Tauriainen who are also attorneys with the Office of
23 Enforcement. They have worked on this and will assist us
24 today.

25 As you listen please remember, Mr. Fahey has a

1 very junior water right, first in time is first in right.
2 This has been and, even with the recent rains, continues to
3 be a very severe drought. Mr. Fahey had no water for his
4 rights and no alternative supply. Nothing changes his
5 priority or the fact that there was no water available for
6 him to divert. The State Board told him there was no water
7 for his right, but he kept diverting anyway. Therefore, an
8 ACL and CDO are both necessary. Thank you.

9 CO-HEARING OFFICER D'ADAMO: All right. Thank
10 you.

11 MR. PETRUZZELLI: Thank you.

12 CO-HEARING OFFICER D'ADAMO: All right. Okay.

13 Next we have Mr. Hansen, G. Scott Fahey and Sugar
14 Pine Springs Water, LP.

15 OPENING STATEMENT BY MR. HANSEN

16 MR. HANSEN: Thank you for the opportunity of
17 being able to present Mr. Fahey's responses to the
18 Prosecution Team's opening statement.

19 On August 12th, 2015, after the staff of the State
20 Water Resources Control Board had talked with Scott Fahey
21 about the curtailment order and his diversions the staff
22 person wrote this down in the contact report, "Mr. Fahey was
23 very helpful, calm, and not hostile in any way. He wishes
24 to continue operating in a legal and valid way."

25 That is exactly how Mr. Fahey and his company,

1 Sugar Pine Spring Water, LP has been operating in diverting
2 water all along, even during the 2014 and 2015 curtailment
3 periods. In good faith he has interpreted and performed his
4 obligations under his two permits in a manner that is legal
5 and valid. He has protected the only senior water right
6 holders on that stretch of the Tuolumne River and the New
7 Don Pedro Reservoir, or NDPR. Those senior right holders,
8 the only ones, are the Turlock Irrigation District and the
9 Modesto Irrigation District, which we will refer to as the
10 districts, and the City and County of San Francisco, which
11 we'll refer to the city, or CCFS in the written materials.

12 In good faith Mr. Fahey relied on the language in
13 both of his permits and related water exchange agreements
14 and numerous communications with the districts, the city and
15 the Board itself. In good faith Mr. Fahey has all along
16 been very open and responsive to the Board about his
17 diversions, about his annual reports, and about how his
18 diversions in 2014 and 2015 fit within the available water
19 exception to curtailment, which a few moments ago you heard
20 nothing about.

21 That exception was introduced to Mr. Fahey in a
22 Board notice in 2009 in light of future potential
23 curtailment. That exception was repeated in their
24 curtailment notices, as follows. No I killed it. There we
25 go.

1 "If you have previously collected water to storage
2 in a reservoir covered by a post-1914 right prior to this
3 curtailment notice you still may beneficially use that
4 previously stored water, consistent with the terms and
5 conditions of your post-1914 water right."

6 That exception was even mentioned by the Board's
7 John O'Hagan in sworn court testimony in June 2015. But
8 prior to filing the ACL and CDO in this matter the Board
9 staff never provided an explanation to Mr. Fahey based on
10 accurate facts that refuted the application of the available
11 water exception to Mr. Fahey's diversions during the
12 curtailment periods in 2014 and 2015. No reasonable person
13 would have shut down their business based on the factually
14 incorrect responses, or often lack of response, that Mr.
15 Fahey received from Board staff prior to the filing of the
16 ACL in this case.

17 In fact, at one point when the Board's David
18 LaBrie appeared to understand the true facts from what Mr.
19 Fahey told him, and from Mr. Fahey's explanation of the
20 available water exception, the response from Mr. LaBrie to
21 Mr. Fahey demonstrated that Mr. Fahey was correct all along.
22 He is exempt from curtailment. Why? Because he had water
23 available for all of his diversions during curtailment in
24 2014 and '15 which, of course was never discussed a few
25 moments ago in the opening statement by the Prosecution

1 Team.

2 What they are doing is seeking enormous civil
3 penalties in this proceeding against Mr. Fahey for the 2014
4 curtailment period, in part. But that is precisely when Mr.
5 Fahey was diligently following all of the Board's procedures
6 and required disclosures to openly present his explanation
7 of the applicability of the curtailment exception to his
8 diversions. And the Board never responded to his
9 disclosures or to his claim of that exception at any time in
10 2014.

11 The Prosecution Team is also seeking huge civil
12 penalties for curtailment period during 2015. But that is
13 precisely when the Board staff either had not responded to
14 Mr. Fahey's repeated reasonable explanation for the
15 curtailment exception and how it applies here, or the Board
16 staff failed to provide Mr. Fahey with any response that was
17 based on accurate facts of either his permits or the
18 hydrology at NDPR, or even a reasonable explanation was to
19 why he was not entitled to the exception to curtailment.
20 Even the ACL itself is based on an interpretation of the
21 permits by the prosecution team that inserts language into
22 the permits. That is not even there, and the parties never
23 agreed to.

24 In short, Mr. Fahey had a water exchange agreement
25 with the Tuolumne Utilities District. They gave him foreign

1 water from the Stanislaus River that he had placed into the
2 Tuolumne River via NDPR. That gave him a credit for future
3 water diversions, and that gave him an exception to
4 curtailment in 2014 and 2015. This case can be understood
5 therefore. And the ACL and the CDO should be dismissed in
6 their entirety for the following seven reasons.

7 First, NDPR and the water rights on the relevant
8 portion of the Tuolumne River are governed by the districts'
9 senior pre-1914 water right, the Federal Raker Act, and the
10 Complicated Water Accounting Procedures in the Fourth
11 Agreement between the districts and the city, entered into
12 in 1966. Those procedures, under the Fourth Agreement,
13 effectively altered, in fact, even made obsolete the
14 application of the Board's decisions 995 and 1594 for that
15 portion of the Tuolumne River that is relevant here, and for
16 NDPR.

17 Second, Term 19 and 20 of the first permit, his
18 Permit 20784, and Term 34 of Permit 21289, were purposely
19 designed by all of the parties, including the Board, to
20 prohibit Mr. Fahey from interfering with those accounting
21 procedures at NDPR under the Raker Act and the Fourth
22 Agreement. All of the terms and conditions of both permits
23 must be interpreted and applied with that understanding.

24 The fundamental rules of contract interpretation
25 that apply here that the Prosecution Team has ignored

1 include the following:

2 "The whole of a contract, in this case the permit,
3 is to be taken together so as to give effect to every part
4 if reasonably practicable, each clause helping to interpret
5 the other.

6 "Also, even if one provision of a contract is clear and
7 explicit, it does not follow that that portion alone must
8 govern its interpretation. The whole of the contract must
9 be taken together so as to give effect to every part."

10 The third argument that we have is that if Mr.
11 Fahey simply replaced water that he diverted under the
12 Prosecution Team's interpretation of Term 19 of Permit
13 20784, and the 1992 agreement, the Water Exchange Agreement
14 that will be discussed, then Mr. Fahey would be forced to
15 interfere with that Complicated Water Accounting Procedures
16 at NDPR in violation of the permit itself, Term 20 in the
17 first permit and Terms 33 and 34 in the second permit. The
18 districts could not themselves, under the '92 agreement,
19 have agreed that Mr. Fahey could interfere with those
20 accounting procedures. Why? Because of the existence of
21 the Fourth Agreement with the city, and because "Agreements
22 will be construed, if possible, as intending something for
23 which the parties," in this case the districts, "had the
24 power to contract.

25 Fourth, the evidence here will show that the

1 parties intended that the water replacement provisions of
2 Term 20 of his first permit, 20784, were intended to govern
3 the water replacement provisions of Term 19 in that same
4 permit, and the 1992 agreement between Mr. Fahey and the
5 districts.

6 Also, the evidence will show that the parties
7 later intended that Terms 33 and 34 of the subsequent Permit
8 20289 were intended to govern all of the water that is
9 supposed to be replaced under the provisions of both
10 permits. In compliance with the Board's notice to Mr. Fahey
11 in February 2009 and in compliance with the explicit
12 language in Terms 20 and 34 of his respective permits that
13 state, "Replacement water may be provided in advance and
14 credited to future replacement water requirements," in
15 reliance upon that language Mr. Fahey had 88.55 acre feet of
16 water wheeled into NDPR from 2009 through 2011. That
17 replacement water was provided in advance and credited to
18 future water replacements which covered all of Mr. Fahey's
19 diversions during the curtailment periods in 2014 and 2015.

20 As the Board's John O'Hagan himself explained in
21 sworn testimony in a declaration in June of 2015, "Once
22 water is stored or imported from another watershed the
23 entity," Mr. Fahey, "that stored or imported the water has
24 the paramount right to that water."

25 Sixth, the Prosecution Team's evidence completely

1 fails to show that the water was not available during the
2 2014 or 2015 curtailment periods, either at the point of Mr.
3 Fahey's diversions or between those points of diversions and
4 NDPR. Basically, the River-Wide Water Availability Analysis
5 that you will hear from the Prosecution Team that is being
6 relied on in this proceeding fails to do that and is, in
7 essence, an invalid underground regulation. Thus, there is
8 insufficient factual basis for either the curtailment
9 notices to Mr. Fahey in 2014 and '15, or for the ACL and CDO
10 itself.

11 Seventh, all of the factors listed in Water Code
12 section 1033.5 when applied to the facts in this case
13 demonstrate that no civil penalties should be assessed
14 against Scott Fahey and his company for the following 13
15 reason, which we have identified here as Points A through M.

16 A, Mr. Fahey's interpretation of his rights and
17 duties under his permits are reasonable because of the
18 language in the permits and the related agreements, because
19 of the clear prohibition not to interfere with the Water
20 Accounting Procedures at NDPR, because of the oral
21 communications he had with the districts' representatives
22 after executing the 1992 agreement, and because of the
23 language in the city's letter to the Board of March 21st,
24 2011, to the city -- or rather, that stated the following
25 about water procedures in his permits, "As noted in the

1 city's November 8, 2004 letter, San Francisco only intends
2 to notify the application," Mr. Fahey, "of the need to
3 provide replacement water when necessary." At not time --
4 it is undisputed that at no time have either the districts
5 or the city ever notified Mr. Fahey of the need to provide
6 replacement water pursuant to the terms of his permit or any
7 related agreement.

8 B, even though water replacement was never
9 requested by the districts or the city, in good faith
10 reliance on the warnings of potential future curtailment in
11 the Board's notice to Mr. Fahey in February 2009, Mr. Fahey
12 reasonably relied on those Terms 20 and 34 of his respective
13 permits and had 88.55 acre feet wheeled into NDPR from 2009
14 through 2011 in order to make water available for his
15 operation in the event of future curtailment. The 88.55
16 acre feet of water covered all of his water diversions
17 during the 2014 curtailment periods, and all of the FAS
18 periods from 1996 to the present.

19 C, in reliance on both the Board's notice of
20 February 2009, as well as language in the May 27, 2014 c
21 curtailment notice itself, and the related response form,
22 Mr. Fahey reasonably concluded when he received the May 2014
23 curtailment notice that he had fully satisfied the available
24 water curtailment exception.

25 D, in reliance on the discussions that he had in

1 June '14 with the deputy city attorney for the city, Mr.
2 Fahey reasonably concluded again that the 88.55 acre feet
3 that he had wheeled into NDPR provided him with available
4 for his diversions during the curtailment period.

5 E, Fahey immediately responded to each curtailment
6 notice from the Board and timely provided to the Board his
7 explanation of the available exception to curtailment by
8 using the official form provided by the Board for that very
9 purpose, and in an accompanying letter of his own dated June
10 3rd, 2014. However, the Board never responded to that
11 letter of to that official response in the official form.

12 F, Mr. Fahey also reasonably concluded that he
13 fully satisfied the available water exception of curtailment
14 for the 2015 curtailment period because of the Board's lack
15 of response to his letter of 2014, because of the open
16 disclosure of his diversions that he made to the Board in
17 the progress report on March 3rd, 2015 that the Board never
18 responded to, because the available water exception that was
19 explicitly stated in the April 2015 curtailment notice, and
20 because of the lack of response by the Board to his
21 resending that letter in April of 2015.

22 G, in reliance on Mr. Fahey's phone calls with and
23 email from the Board's David LaBrie on June 12th, 2015, and
24 in reliance on Mr. LaBrie's complete failure to follow-up
25 those phone calls and that email with any evidence or

1 factual argument that actually refuted Mr. Fahey's legal
2 interpretation, Mr. Fahey again had a good faith reason to
3 believe that he had fully satisfied the available water
4 exception.

5 H, nothing stated in the -- by the Board's Samuel
6 Cole to Mr. Fahey in a phone call of August 12th, 2015
7 refuted or even challenged Mr. Fahey's good faith
8 understanding that he fit within the available water
9 exception to curtailment. Rather than provide a factual or
10 legal response to Mr. Fahey's explanation of his curtailment
11 exception, Mr. Cole simply described the agreements as "very
12 complicated and difficult to understand." And he even
13 refused to communicate with a Board officer that could have
14 understood and provided clarity to the Board's perspective
15 on Mr. Fahey's right to the curtailment exception.

16 I, at all relevant times Mr. Fahey has
17 demonstrated a willingness to take whatever corrective
18 action was warranted under a proper understanding of his
19 permits and the true facts in this case. Even Mr. Cole
20 accurately concluded from his conversation with Mr. Fahey on
21 August 12th, 2015 that Mr. Fahey wished to continue
22 operating in a valid and legal way.

23 J, it is patently unfair to hold Mr. Fahey liable
24 for penalties in this case for the failure to have water
25 released to senior water right holders downstream of NDPR,

1 as the Prosecution Team seems to suggest in this case,
2 because the districts control the operations of NDPR under
3 their FERC license, and because Mr. Fahey has absolutely no
4 control whatsoever over those operations.

5 K, it is also unfair, or rather the Prosecution
6 Team seeks civil penalties for those periods of time during
7 which the Board staff knew about Mr. Fahey's claim of
8 exemption from curtailment but either failed to research the
9 Board's files to provide a factually actually response to
10 Mr. Fahey's claim, or purposely even refused his request to
11 have the staff investigate the validity of those claims. In
12 fact, it was during those times that the Board staff was
13 already undergoing surveillance, even as he's explaining his
14 position. The request for civil penalties is outrageous,
15 egregious and a true abuse of power and violation of Mr.
16 Fahey's substantive due process right.

17 L, the Board wrongfully seeks to recover penalties
18 that allegedly recover financial costs that the Board staff
19 unreasonably wasted on surveillance efforts after the Board
20 knew that Mr. Fahey was continuing those diversions because
21 Mr. Fahey repeatedly told them that he was, as even the
22 Prosecution Team's opening argument seems to indicate.

23 M, the Prosecution Team has failed to produce any
24 evidence of any harm to any senior water right holder as a
25 result of Mr. Fahey's diversions in 2014 and 2015, either

1 between Mr. Fahey's point of diversions and NDPR, or even
2 downstream of NDPR. Every reference in the Prosecution
3 Team's testimony that you're going to hear today about any
4 alleged harm is pure speculation. There is no evidence of
5 any prior violations of permit terms by Mr. Fahey.

6 For all these reasons the Board should deny and
7 dismiss the ACL and the CDO in its entirety.

8 I apologize. Now as to the testimony, we're going
9 to have Mr. Scott Fahey speak to basically everything you
10 have heard me talk about. And Mr. Ross Grunwald will speak
11 to the groundwater itself and how it plays a part in Mr.
12 Fahey's diversions and how that implicates a number of
13 issues in this case, including the fact that there was
14 curtailment water -- there was water available during
15 curtailment. Thank you very much.

16 CO-HEARING OFFICER D'ADAMO: All right. Thank
17 you, Mr. Hansen.

18 Next is Turlock Irrigation District, Arthur
19 Godwin; right?

20 OPENING STATEMENT BY MS. BRATHWAITE

21 MS. BRATHWAITE: Good morning again. This is Anna
22 Brathwaite with Modesto Irrigation District, Staff Counsel.
23 And we appreciate the opportunity to speak this morning. As
24 Mr. Godwin mentioned, I'm giving this policy statement on
25 behalf of both Modesto and Turlock.

1 MID and TID hold some of the most senior water
2 rights on the Tuolumne River and have invested a great deal
3 of resources over the last 125 years to develop the
4 infrastructure necessary to maximize the beneficial use of
5 those senior water rights, and that includes the
6 construction and operation of New Don Pedro Dam and
7 Reservoir in 1971.

8 As a result of our efforts the districts provide
9 highly reliable irrigation water to over 200,000 acres of
10 prime Central Valley farmland, as well as domestic and
11 municipal water to the City of Modesto and the community of
12 LaGrange.

13 Pursuant to Irrigation District Law, the
14 District's Board of Directors act as trustee to ratepayer
15 assets and are obligated to protect and defend the
16 respective agency's assets against unlawful encroachment.
17 These assets include but are not limited to our water
18 rights, our water storage, and the right to direct and
19 control both.

20 In furtherance of these obligations the districts
21 depend on the State Water Board's Water Right Order 98-08
22 and the fully appropriated Stream System Declaration for the
23 Tuolumne River as the threshold requirement for the State
24 Water Board to accept applications for appropriations in the
25 Tuolumne River Watershed. In particular, the districts rely

1 on WRO 98-08's requirement for a replacement water agreement
2 for a non-hydrologically connected source as a prerequisite
3 to the State Water Board's authority to accept and approve
4 such an application.

5 MID and TID don't have a direct interest in Mr.
6 Fahey's administrative civil liability fine, or the draft
7 cease and desist order that is before the Hearing Team
8 today. However, the defenses to the ACL and the draft CDO
9 that are offered by Mr. Fahey deal with the meaning and
10 interpretation of the terms and conditions of his permits to
11 appropriate water generally, and thus may have applicability
12 beyond the scope of this particular curtailment proceeding.
13 Because MID and TID do not agree with the interpretations
14 proffered by Mr. Fahey, we are participating to ensure that
15 our rights to divert water from the Tuolumne River are
16 protected and that there is a clear understanding of the
17 relationship between Mr. Fahey's water rights and those of
18 the districts.

19 Specifically, the districts contend that Mr.
20 Fahey's permit require him to replace any and all water he
21 diverts during the fully appropriated stream period of June
22 16th through October 31st of each year, and that such an
23 obligation does not require a notification of request to Mr.
24 Fahey or any other oversight on the part of the districts,
25 except as provided in the 1992 Water Replacement Agreement

1 between the districts and Mr. Fahey.

2 The districts do look forward to working with the
3 State Water Board to clarify the meaning and intent of Mr.
4 Fahey's permits through this process. And although the
5 districts disagree with the interpretations and
6 characterizations offered by Mr. Fahey, we do look forward
7 to working with Mr. Fahey and the Board to clarify the scope
8 and extent of Mr. Fahey's obligations to deliver replacement
9 water in the future.

10 While the districts don't intend to introduce
11 direct evidence or testimony, we would like to reserve the
12 right to conduct cross-examination, introduce rebuttal
13 evidence and submit a post-hearing brief. Thank you.

14 OPENING STATEMENT BY MR. KNAPP

15 MR. KNAPP: Good morning. My name is Jonathan
16 Knapp. I'm from the City and County of San Francisco. I'm
17 here today to provide a policy statement on behalf of the
18 City and County and the San Francisco Public Utilities
19 Commission.

20 San Francisco is participating in this proceeding
21 in order to protect its senior water rights to the Tuolumne
22 River that it relies on to serve over 2.6 million water
23 users throughout the Bay Area. San Francisco shares the
24 concerns of the Modesto Irrigation District and Turlock
25 Irrigation District regarding certain defenses raised by Mr.

1 Fahey in response to the State Water Board's administrative
2 civil liability complaint and draft cease and desist order,
3 in particular, Mr. Fahey's interpretations of terms and
4 conditions in his water right permits that protect San
5 Francisco and the districts' senior water right -- as senior
6 water right holders.

7 To be clear, San Francisco does not share Mr.
8 Fahey's interpretations of his permit obligations and permit
9 compliance and disputes Mr. Fahey's characterization of his
10 replacement water obligations under the permits. San
11 Francisco is nevertheless willing to work with Mr. Fahey and
12 State Water Board staff to confirm and clarify, as
13 necessary, an acceptable process for delivery of replacement
14 water going forward.

15 San Francisco does not intend to introduce direct
16 evidence or testimony in this hearing, but reserves the
17 right to cross-examine witnesses, introduce rebuttal
18 evidence, and submit a post-hearing brief, as necessary, to
19 protect San Francisco's interests and senior water rights.
20 Thank you.

21 CO-HEARING OFFICER D'ADAMO: Okay. Thank you, Mr.
22 Knapp.

23 Mr. Paris?

24 We'll now hear from the Prosecution Team's direct
25 testimony, followed by any cross-examination in the order I

1 previously identified.

2 MR. PETRUZZELLI: At this time the Prosecution
3 Team would like to begin its case in chief with Ms.
4 Katherine Mrowka.

5 TESTIMONY AND EXAMINATION BY PROSECUTION TEAM

6 BY MR. PETRUZZELLI:

7 Q. Can you state your name for the record, please?

8 A. (Ms. Mrowka) Yes. My name is Kathy Mrowka,
9 M-R-O-W-K-A.

10 Q. And is Exhibit 9 a true and a correct copy of your
11 written testimony?

12 A. It is, however, I have some corrections to it.

13 Q. Can you describe those corrections?

14 A. Yes. On page two, paragraph nine I state that the
15 year of priority for Permit 21289 is 1994. It should be
16 2004.

17 On page three, paragraph nine should not include
18 highlighting.

19 On page 5, paragraph 21, Turlock Utilities
20 District should be Tuolumne Utilities District.

21 Page 7, paragraph 37, due to attorney and staff time
22 responding to prehearing motions, staff costs have been
23 higher than anticipated.

24 Q. And, Ms. Mrowka, is Exhibit 10 a true and correct
25 copy of your CV?

1 A. Yes, it is.

2 Q. Okay. And did you prepare your written testimony?

3 A. I did.

4 Q. Thank you. Please start.

5 (Whereupon an overhead presentation was presented
6 as follows:)

7 A. My name is Kathy Mrowka. I am the Program Manager
8 for the Enforcement Program in the State Water Board's
9 Division of Water Rights. I also served as the lead for
10 processing the application for Mr. Fahey's second permit,
11 and addressing the protest to his application. I will be
12 discussing Mr. Fahey's water right permits and permit terms.

13 Mr. Fahey holds Permits 20784 and 21289 to
14 appropriate water from four springs that are ultimately
15 tributary to the Tuolumne River upstream of New Don Pedro
16 Reservoir, and tributary to the San Joaquin River.
17 Combined, Mr. Fahey's permits authorize him to divert up to
18 about 109 acre feet of water annually at about 0.15 cubic
19 foot per second for industrial use at one or more bottled
20 water plants. The division has no other water rights on
21 file for Mr. Fahey.

22 The four springs are located on property owned by
23 the U.S. Forest Service and/or private parties. Separate
24 pipes convey water diverted from the four springs. The
25 pipes combine and deliver the water by gravity flow to 2-

1 35,000 gallon tanks and an overhead bulk water truck filling
2 station owned by Sugar Pine Spring Water. Mr. Fahey
3 operates the transfer station. Bulk water hauler trucks
4 access the property through a locked gate and remove the
5 water for delivery off premises.

6 And before you see another picture, this is a map
7 showing Fahey's diversions and transfer station, the
8 relative location on the Tuolumne River, and New Don Pedro
9 Reservoir. It's simply included to provide a point of
10 reference of how these facilities relate.

11 Permit 20784 has a priority date of July 12th,
12 1991, and authorizes year-round diversion of water from two
13 springs referred to as Cottonwood Spring and Deadwood
14 Spring. Both springs are tributary to the Tuolumne River
15 upstream of New Don Pedro Reservoir.

16 In 2002, just so you're aware, Mr. Fahey submitted
17 a change of petition to change the Cottonwood Spring point
18 of diversion and substitute Sugar Pine Spring.

19 Permit 20784 has an important term, Term 19. This
20 term requires Mr. Fahey to provide exchange water to New Don
21 Pedro Reservoir for all water he diverts under this permit
22 during the fully appropriated stream of FAS season. Mr.
23 Fahey has this term because the State Water Board has
24 identified the Sacramento-San Joaquin Delta Watershed
25 upstream of the delta, and the Tuolumne River as fully

1 appropriated between June 16th and October 31st of each
2 year.

3 As a result of the FAS determinations the State
4 Water Board in the FAS orders shall cancel pending water
5 right applications that are inconsistent with conditions
6 established in the FAS determination. However, the FAS
7 orders provide that the State Water Board may accept an
8 application to appropriate water on a fully appropriated
9 stream if the application makes replacement water available
10 under an exchange agreement.

11 So what is an exchange agreement? An exchange
12 agreement is essentially a water transfer from a non-
13 hydraulically connected water source to a senior water right
14 to offset diversion by a junior water right. So there are
15 two parties using water in exchange agreements. An exchange
16 agreement allows the State Water Board to issue a permit to
17 a junior appropriator to divert otherwise unavailable water
18 because the senior diverter is made whole in so far as the
19 quantities the junior diverts. However, it does not change
20 the priority of any of the parties involved.

21 First in time is still first in right. In times of
22 shortage a junior right with an exchange agreement still
23 gets cut off based on the priority of the water right. An
24 exchange agreement also does not bind the State Water Board
25 in administering water rights or determining compliance with

1 permit conditions.

2 To divert water during the fully appropriated
3 stream period, Mr. Fahey needs to comply with Term 19.
4 Under this term Mr. Fahey shall establish and maintain and
5 exchange agreement with Turlock Irrigation District and
6 Modesto Irrigation District. They established this
7 agreement in 1992.

8 Under the exchange agreement Mr. Fahey shall
9 provide an amount of water necessary to offset his diversion
10 during the annual FAS period. At his discretion Mr. Fahey
11 may purchase water at any time during the calendar year.
12 Should he purchase more water than needed to offset his
13 diversion during the annual FAS period such water becomes
14 unavailable for future accounting purposes. There is a no-
15 carryover provision in the exchange agreement. Mr. Fahey
16 shall purchase water every year to satisfy this term. And
17 he's also required to document in his annual progress
18 report, in accordance with this term, that he purchased such
19 water.

20 The other important term is Term 20. The State
21 Water Board added this term to address injury to the prior
22 rights of the City and County of San Francisco and the
23 districts. Term 20 requires Mr. Fahey to repay San
24 Francisco and the districts for any water he diverts adverse
25 to their rights. Mr. Fahey shall repay the water when

1 requested to do so. Mr. Fahey may not provide any
2 replacement water that is hydraulically connected to a
3 surface water tributary to the Tuolumne River. If he uses
4 groundwater he shall demonstrate that it would not have
5 otherwise reached New Don Pedro.

6 This term reflects a private agreement regarding
7 operations between these parties. The State Water Board
8 retains its authority and jurisdiction to manage water right
9 priorities within the watershed, and to inform parties when
10 there is no water available under their priority of right.

11 To comply with FAS, Mr. Fahey shall obtain an
12 alternate water supply. He has identified the Tuolumne
13 Utilities District as his alternate supply. TUD uses water
14 from the Stanislaus River. Mr. Fahey has submitted evidence
15 of purchase agreements for TUD water for 2003, 2009 and
16 2010. The purchase agreements each last from their date of
17 execution to the end of the calendar year. So in other
18 words, the 2010 purchase agreement ended in 2010. Mr. Fahey
19 has not submitted evidence of any other purchase agreements
20 for water, specifically he has not submitted evidence of any
21 purchase agreements for 2014 or 2015.

22 Under Permit 21289, which is the other permit,
23 this priority date is January 28th, 2004. The permit
24 authorizes year-round diversion and use of water from two
25 springs, referred to as Marco and Polo Springs. Both

1 springs are ultimately tributary to the Tuolumne River
2 upstream of New Don Pedro.

3 Permit 21289 lacks an exact term matching Term 19
4 in the first permit. But since this second permit is more
5 junior, if there is no water available for the first permit
6 there is also no water available for this permit.
7 Nonetheless, Mr. Fahey agreed to maintain the exchange
8 agreement that is a part of Term 19 in the first permit for
9 this permit, as well, as a condition for submitting his
10 application. His application would not have even been
11 considered had he not agreed to accept this condition.

12 Term 34 in this permit is similar to Term 20 in
13 the first permit in that it requires Mr. Fahey to provide
14 replacement water equivalent to the amount he diverts that
15 is adverse to the rights of San Francisco and the districts.
16 Term 34 also requires consideration of Mr. Fahey's
17 obligations under the exchange agreement. So in other
18 words, the exchange agreement is simply referenced in this
19 term in this water right, and we don't have the set of two
20 terms that you saw in the first permit. And Term 34 is,
21 itself, premised on FAS and precludes any carryover to
22 subsequent years.

23 Other permit terms. Both permits include common
24 terms. Both are subject to prior rights. And both
25 acknowledge that in some years water will not be -- not be

1 available for diversion during some or all of the authorized
2 season. Both permits have Standard Term 90. Permit 21289
3 also has Standard Terms 80 and 93. These terms protect
4 senior water rights and beneficial uses in the delta. They
5 were included because Mr. Fahey's diversions are
6 hydraulically connected and tributary to the Tuolumne River
7 below New Don Pedro and to the San Joaquin River Basin and
8 Delta, and can therefore impact the senior water rights and
9 beneficial uses in those areas.

10 As Brian will discuss next -- next, this drought
11 was so bad that senior water rights in the San Joaquin River
12 Basin and Delta, and even in the upper tributaries, lacked
13 available water for diversion. Mr. Fahey has among the most
14 junior water rights.

15 This concludes my presentation.

16 MR. PETRUZZELLI: And next we have Mr. Brian
17 Coats.

18 BY MR. PETRUZZELLI:

19 Q. Mr. Coats, can you state your name for the record
20 please?

21 A. (Mr. Coats) Brian Coats.

22 Q. And can you also spell that and state your address?

23 A. Brian, B-R-I-A-N, last name Coats, C-O-A-T-S,
24 address, 1001 I street.

25 Q. Mr. Coats, is Exhibit 7 a true and correct copy of

1 your written testimony?

2 A. Yes.

3 Q. And is Exhibit 9 [sic] a true and correct copy of
4 your CV?

5 A. Yes.

6 Q. Mr. Coats, did you prepare your written testimony?

7 A. Yes, I did.

8 Q. Would you like to make any corrections to your
9 written testimony?

10 A. No.

11 Q. Okay. Mr. Coats, you may start.

12 (Whereupon an overhead presentation was presented
13 as follows:)

14 A. Okay. Good morning, Board Members.

15 My name is Brian Coats and I'm an Enforcement Supervisor of
16 the State Water Board's Division of Water Rights. Today I
17 will be talking about the drought, the State Water Board's
18 response to the drought, its water supply and demand
19 assessments, and how it notified water right holders,
20 including Mr. Fahey, of insufficient supply for their water
21 rights.

22 For nearly four years California has had a severe
23 drought. In January 2014 the government proclaimed a state
24 of emergency due to the severe drought with other
25 proclamations and executive orders following. One of those

1 orders is Executive Order B-29-15 issued on April 1st, 2015
2 which -- which found that ongoing severe drought conditions
3 presented urgent challenges across the state, including
4 water shortages and additional water scarcity if drought
5 conditions persisted. The executive order confirmed the
6 orders and provisions in the governor's 2014 drought
7 proclamations and retained the full force and effect of the
8 governor's prior orders.

9 In response to the proclamations and executive
10 orders the State Water Board assumed responsibility for
11 determining the water supply and demand analysis for 2014
12 and '15, which were drought years, and compiling the
13 reported demands. We collected demand data from annual use
14 reports filed by diverters, as well as some other data, and
15 compared those demands to natural flow data provided by the
16 Department of Water Resources.

17 This is a graphical depiction of the Water Supply
18 and Demand Analysis for the San Joaquin River Basin in 2014,
19 which was posted to the State Water Board's drought webpage.
20 In the presented graph the charted lines show summations of
21 priorities with monthly demands for the total riparian
22 demand at the bottom and the pre-'14 demands added to the
23 riparian and layered above the riparian demand as depicted.
24 The graphs show the reported monthly amounts as a daily
25 average to time step with the units of cubic feet per

1 second. The important thing you see here is that starting
2 at the end of May pre-1914 and riparian demand exceeds
3 natural flow. Riparian and pre-1914 rights have a senior
4 priority over post-1914 water rights, so there was no water
5 available for post-1914 appropriators, like Mr. Fahey.

6 This is a supply and demand graphical analysis for
7 the same San Joaquin River Basin for 2015, which was also
8 posted to the State Water Board's drought webpage. Similar
9 to the prior graph you see that starting in April, reported
10 demand from even pre-1914 appropriators exceeded the
11 available water supply.

12 The State Water Board started notifying water
13 users immediately after the governor declared a drought and
14 state of emergency. These notices notified those with post-
15 1914 rights, like Mr. Fahey, that there could be
16 insufficient water available to support their priority of
17 right. Some of these notices were for a "curtailment". The
18 curtailment language in these notices was later rescinded
19 and clarified. There was no curtailment in the sense that
20 water right holders were ordered to stop diverting, but
21 there was still no water available for their priority of
22 right. As a result, they should not have been diverting.
23 If you hear us use the term curtailment today, we really
24 mean there was no water available for that person's priority
25 of right.

1 For Mr. Fahey, the important notices were issued
2 on May 27th, 2014 and April 23rd, 2015 because by those
3 dates in those years the San Joaquin River Watershed lacked
4 available water to meet the demands of post-1914
5 appropriators. We notified all post-1914 appropriators in
6 the Sacramento and San Joaquin River Watersheds. Both of
7 these notices apply to Mr. Fahey because of his priority
8 being a post-1914 water right holder, and his geographic
9 location within the San Joaquin River Watershed.

10 And lastly, the notices were sent to Mr. Fahey and
11 put him on notice that there was insufficient water for his
12 rights. He is in the geographic area, he has post-1914
13 water rights, and he received both notices.

14 This concludes my presentation.

15 MR. PETRUZZELLI: Thank you, Mr. Coats.

16 We will now hear from Mr. David LaBrie.

17 BY MR. PETRUZZELLI:

18 Q. Mr. LaBrie, would you please state and spell your
19 name for the record?

20 A. (Mr. LaBrie) Yes. My name is David LaBrie,
21 L-A, capital B-R-I-E.

22 CO-HEARING OFFICER D'ADAMO: Speak into the
23 microphone.

24 MR. LABRIE: Is that better? Yeah. Okay.

25 BY MR. PETRUZZELLI:

1 Q. And your address?

2 A. My address is 1001 I Street.

3 Q. Mr. LaBrie, is Exhibit 7 [sic] a true and correct
4 copy of your written testimony?

5 A. Yes, it is.

6 Q. And is Exhibit 12 a true and correct copy of your
7 CV?

8 A. Yes, it is.

9 Q. Did you prepare your written testimony?

10 A. Yes, I did.

11 Q. Are there any corrections you would like to make
12 to your written testimony?

13 A. Yes. In preparing for this hearing I revised my
14 calculation of the maximum ACL penalty based upon the
15 available evidence, including information provided by Mr.
16 Fahey regarding his invoice sales of water.

17 The second table included in Exhibit 55 depicts
18 the days of diversion and the number of loads reported by
19 invoice. For 2015 I used this table to identify diversions
20 outside of the period for which we had video surveillance.
21 Upon later review I discovered that I had left out an entire
22 month of invoice data in summarizing the number of days and
23 loads. I will discuss the implications of this omission
24 later in my presentation.

25 Q. Please start, Mr. LaBrie.

1 (Thereupon an overhead presentation was presented
2 as follows:)

3 A. Good morning. My name is David LaBrie. I'm a
4 Sanitary Engineering Associate with the State Water
5 Resources Control Board Division of Water Rights. I will be
6 discussing my investigation into Mr. Fahey's unauthorized
7 diversions during the drought periods of 2014 and 2015.

8 As part of the division's overall effort to ensure
9 compliance with the 2015 unavailability notice, the
10 enforcement units were provided with a list of water rights
11 to inspect. Mr. Fahey's water rights were within the list
12 that was assigned to me. My initial investigation into Mr.
13 Fahey's diversion and use of water began with a review of
14 the basic provisions of his two water rights, Permits 20784
15 and 21289.

16 After reviewing a number of the water rights
17 assigned to me in the San Joaquin River Watershed, I began
18 contacting the water right owners to schedule compliance
19 inspections. Beginning in late May, and over the course of
20 the next few weeks, I attempted to contact Mr. Fahey three
21 separate times to schedule a compliance inspection. Each
22 time I left a message asking him to please return my call.

23 On June 12th, 2015 Mr. Fahey finally returned my
24 calls. In that conversation I asked to meet with Mr. Fahey
25 at his diversion facility for a compliance inspection.

1 However, Mr. Fahey responded that he would not be available
2 until after the summer season and told me that there was no
3 one else familiar with the project that was available to
4 meet with me. Mr. Fahey told me that he had responded to
5 the 2015 Notice of Unavailability with a letter explaining
6 that his diversions were exempt from curtailment due to a
7 previous purchase of water that had been placed into storage
8 in New Don Pedro Reservoir. During the conversation Mr.
9 Fahey indicated he was still diverting water from the
10 springs with words to the effect, "If I had to curtail my
11 diversions I'd be out of business."

12 After this telephone conversation I reviewed the
13 terms and conditions of Mr. Fahey's permits that require him
14 to provide replacement water. I also found and reviewed the
15 letter to which Mr. Fahey had referred. In the letter dated
16 June 3rd, 2014 Mr. Fahey stated that he had purchased 82
17 acre feet of water from the Tuolumne Utilities District
18 between 2009 and 2011 and placed that water into storage in
19 New Don Pedro. Mr. Fahey explained that the stored water
20 was to be made available to the Turlock and Modesto
21 Irrigations Districts and the City of County of San
22 Francisco upon demand for replacement water. Ultimately,
23 Mr. Fahey concluded in the letter that because he had
24 purchased some water several years ago the notice of
25 unavailability did not apply to him.

1 On the afternoon of June 12th I wrote an email to
2 Mr. Fahey explaining that the purchase of surplus water and
3 the placement of such into New Don Pedro did not necessarily
4 offset harm to other downstream prior right holders. I
5 concluded the email by indicating that Mr. Fahey would need
6 to provide further explanation to demonstrate that the 2015
7 Notice of Water Unavailability did not apply to his water
8 rights.

9 On June 15th Mr. Fahey called me to acknowledge
10 receipt of my email and to disagree with my findings. Mr.
11 Fahey argued that there were no prior right holders between
12 his points of diversion and New Don Pedro that would be
13 injured by his diversions. I pointed out that there were
14 prior right holders below New Don Pedro who could be
15 injured. Mr. Fahey told me that he would review his permit
16 applications and water availability analysis for further
17 information, but again told me that he would not be
18 available for an inspection of his water rights before the
19 end of summer.

20 I did not tell Mr. Fahey he was exempt from
21 curtailment, nor did I have the authority to tell him that.
22 While I was willing to consider any explanation Mr. Fahey
23 might have to offer and to present that to diversion
24 management as necessary for guidance, my goal throughout our
25 communication was to schedule and conduct a compliance

1 inspection.

2 The comments that Mr. Fahey made during our
3 telephone conversations, along with the explanation he
4 provided in the June 3rd, 2014 letter and his unwillingness
5 to agree to a timely inspection all lead me to suspect that
6 Mr. Fahey was diverting water, even after the 2015
7 Unavailability Notice informed him that there was
8 insufficient water for his priority of right.

9 My supervisor agreed that the potential diversions
10 would likely constitute a violation of the Water Code and
11 warranted further investigation. Division management
12 suggested that I consider using video surveillance of the
13 Sugar Pine Spring transfer facility to verify whether Mr.
14 Fahey was continuing to make unauthorized diversions.
15 Senior staff determined that video surveillance would be
16 used to gather information, and direct Samuel Cole to place
17 surveillance cameras near the entrance to the transfer
18 station.

19 Sam Cole deployed the surveillance cameras on July
20 12th, 2015. And his testimony regarding this surveillance
21 will follow my presentation.

22 On two occasions I accompanied Sam Cole to
23 retrieve data from the cameras. On both occasions I
24 personally observed tanker trucks entering and exiting the
25 transfer station. The tanker truck pictured in this slide

1 holds approximately 6,600 gallons of water and is
2 representative of the tanker trucks observed hauling water
3 from the transfer station.

4 The division collected video evidence from July
5 12th through August 27th, 2015. And I reviewed video
6 footage from the entire period of surveillance. With the
7 exception of Sundays, the video footage showed multiple
8 tanker trucks entering and exiting the transfer station on
9 almost every single day with a maximum of 11 trucks in 1
10 day, and an average of about 4.5 trucks per day.

11 During the investigation I reviewed Mr. Fahey's
12 progress reports by permittee for 2014. The progress report
13 for each permit includes the total amount of water directly
14 diverted and used by month and for the whole year. The
15 progress reports were personally submitted by G. Scott
16 Fahey, certifying that the information is true and correct
17 to the best of his knowledge and belief. The progress
18 reports are an admission by Mr. Fahey that he diverted water
19 throughout 2014, including the period when water was
20 unavailable for his priority of right. The video
21 surveillance in 2015 confirmed that Mr. Fahey was diverting
22 water almost daily during the period when water was
23 unavailable for his priority of right.

24 By late July 2015 we had gathered enough evidence
25 to move forward with formal enforcement action. It was

1 clear from the video surveillance, Mr. Fahey's conversations
2 with me and Samuel Cole, and Mr. Fahey's progress reports by
3 permittee for 2014 that Mr. Fahey had previously diverted
4 and was continuing to divert water, even after receiving the
5 2014 and 2015 Notices of Unavailability.

6 On September 1st, 2015 the State Water Board
7 issued an ACL complaint, a draft CDO, and an Information
8 Order to G. Scott Fahey and Sugar Pine Spring Water, LP.

9 Mr. Fahey responded to the request for
10 information. However, in some cases his responses were
11 incomplete, especially with regard to the invoices for sale
12 of water. Mr. Fahey redacted the price per load and the
13 total sales amount from the invoices. Mr. Fahey provided
14 purchase agreements with Tuolumne Utilities District for
15 surplus Stanislaus River water for the years 2003, 2009 --

16 MR. HANSEN: I object to the testimony. This is
17 Mr. Hansen. I object to the testimony on the grounds that
18 the testimony here is going to what Mr. Fahey had redacted.
19 And already the Hearing Officers have made a ruling that
20 that was appropriate.

21 MR. PETRUZZELLI: Hearing Team, the Prosecution
22 Team is submitting evidence of the purchase agreements
23 themselves to establish Mr. Fahey's compliance during the
24 FAS period, and his access to an alternative water supply.

25 We also do not have the redacted information, in

1 any event, because that was redacted. We are simply
2 explaining that that information was redacted to explain the
3 course and process of our investigation and why we took
4 certain actions.

5 CO-HEARING OFFICER D'ADAMO: Right. It's
6 overruled. Thank you.

7 MR. LABRIE: Mr. Fahey provided purchase
8 agreements with Tuolumne Utilities District for surplus
9 Stanislaus River water for the years 2003, 2009 and 2010,
10 but not for any other year. Mr. Fahey provided a very
11 limited account history from TUD that only listed water
12 service in 2009 and '10, and briefly in 2011, but showed no
13 service for water prior to 2009, nor after June 2011.

14 The maximum penalty included in the ACL complaint
15 for 2014 was based on Mr. Fahey's progress reports, as well
16 as information about his operations that we gained through
17 the surveillance in 2015. Upon receipt of the invoice
18 information pursuant to the information order I tabulated
19 the days of diversion and the number of loads reported in
20 the invoices, and I calculated the volume of water diverted
21 during the time period when there was no water available
22 under Mr. Fahey's priority of right. While this lowered the
23 calculation of the maximum penalty for 2014, we felt that
24 the invoice information provided better evidence of the days
25 of diversion and the amount of water diverted.

1 The slide shows an excerpt from the table
2 depicting Mr. Fahey's invoiced sales of water for 2014. The
3 highlighted area covers the period that water was
4 unavailable under Mr. Fahey's priority of right for that
5 year. The invoices indicate that Mr. Fahey diverted water
6 on 123 days during this period. To calculate the amount of
7 water diverted I used the number of loads reported by
8 invoice during that period, a total of 456 loads, and
9 multiplied that number by an average of 6,600 per load.
10 This is a conservative estimate of the amount of water as
11 the invoices indicate that the majority of the tankers had a
12 capacity of 6,700 gallons, and that all tankers held at
13 least 6,500 gallons.

14 The maximum penalty included in the ACL complaint
15 for 2015 was based solely on the surveillance data gathered
16 between July 12th and August 5th. Additional surveillance
17 data was gathered between August 5th and August 27th and has
18 been added to the maximum penalty calculation. The
19 additional surveillance data added 22 days of diversion and
20 110 loads of water to the maximum penalty calculation for
21 2015.

22 This slide shows an excerpt of the table depicting
23 Mr. Fahey's invoiced sales of water for 2015. We used the
24 invoice data to supplement the evidence provided by
25 surveillance. The highlighted areas in this table are

1 supposed to include the period that water was unavailable
2 under Mr. Fahey's priority of right in 2015 and for which we
3 did not have surveillance data.

4 Note: The period from June 13th through July 12th
5 was inadvertently left out of the computation. The video
6 surveillance data actually began on July 12th. This under-
7 reported the number of diversion days and the total amount
8 of water diverted during the period of water unavailability
9 in 2015. The invoices indicate that an additional 37 loads
10 of water, or about three-quarters of an acre foot, were
11 diverted over the course of 17 days between June 13th and
12 July 12th.

13 Additionally, pursuant to the information order,
14 Mr. Fahey was supposed to provide invoices for October but
15 did not. Any unauthorized diversions made in October would
16 have added to the calculation of maximum penalties under the
17 ACL.

18 Under Water Code section 1052 the unauthorized
19 diversion and use of water is a trespass. During a drought
20 the maximum penalty for a trespass is \$1,000 per day, plus
21 \$2,500 per acre foot of water.

22 Based on the additional surveillance and the
23 invoices that Mr. Fahey provided in his response to the
24 information order I refined my calculations of the maximum
25 civil liability that Mr. Fahey is subject to under Water

1 Code section 1052 for unauthorized diversions in 2014 and
2 2015. With this new information I calculated a new maximum
3 ACL penalty of \$269,087 for 2014 which is based on 123 days
4 of diversion at \$1,000 per day per permit and 9.23 acre feet
5 at \$2,500 per acre foot. I calculated a maximum ACL penalty
6 of \$198,163 for 2015 based on 90 days of diversion at \$1,000
7 per day per permit and 7.2 acre feet of water at \$2,500 per
8 acre foot. The refined maximum ACL penalty for 2014 and
9 2015 is \$467,250.

10 Bear in mind, the above calculation does not
11 include the days of diversion or the amount of water
12 diverted during the period June 13th through July 12th, 2015
13 for which we have evidence. The associated penalties would
14 amount to an additional \$37,875 and would have pushed the
15 maximum penalty to over \$500,000.

16 Also, any unauthorized diversions made after
17 September 30th, 2015 and until water was deemed available
18 under Mr. Fahey's priority right would have added to the
19 calculation of maximum penalty under the ACL.

20 My presentation.

21 MR. PETRUZZELLI: And now Ms. Katherine Mrowka
22 will discuss the specific ACL penalty recommended in the
23 complaint.

24 It should be the last slide.

25 (Thereupon an overhead presentation was presented

1 as follows:)

2 MS. MROWKA: So I'm going to discuss now the Water
3 Code section 1055.3 considerations.

4 In imposing an ACL the State Water Board shall
5 consider all relevant factors. Based on those
6 considerations the complaint recommends an ACL of about
7 \$225,000. This is also based on treating the violation days
8 as a single violation per day for Mr. Fahey's two permits.
9 The Prosecution Team desires a strong penalty to discourage
10 Mr. Fahey from violating his permits in the future, and to
11 discourage others who are similarly situated. However, this
12 is only a recommendation and the State Water Board may
13 impose a different ACL penalty.

14 And now Sam Cole will discuss the surveillance.

15 BY MR. PETRUZZELLI:

16 Q. Mr. Cole, can you state your name for the record
17 please?

18 A. Samuel Cole.

19 Q. Can you spell your name?

20 A. S-A-M-U-E-L C-O-L-E.

21 Q. Can you state your address?

22 A. 1001 I Street.

23 Q. Mr. Cole, is Exhibit 13 a true and correct copy of
24 your written testimony?

25 A. Yes.

1 Q. Is Exhibit 14 a true and correct copy of your CV?

2 A. Yes.

3 Q. Did you prepare your written testimony?

4 A. I did.

5 Q. Would you like to make any corrections to your
6 written testimony?

7 A. No, I would not.

8 Q. Please begin.

9 (Whereupon an overhead presentation was presented
10 as follows:)

11 A. Good morning. My name is Samuel Cole. I'm a
12 Water Resources Control Engineer with the State Water
13 Resources Control Board Division of Water Rights and a
14 licensed professional engineer. I will be discussing the
15 placement, maintenance and retrieval of surveillance
16 equipment deployed during the investigation into Mr. Fahey's
17 unauthorized diversion.

18 On July 12th, 2015 I performed a covert inspection
19 of Mr. Fahey's transfer facility as could be best be
20 accessed via the public right of way. This limited the
21 inspection to Cottonwood Road and the gravel driveway
22 leading to the transfer facility.

23 The transfer facility is located about six miles
24 northeast of the town of Tuolumne. The springs that Mr.
25 Fahey diverts from under his two permits are located about

1 three miles further to the northeast.

2 I reached the front entrance of the transfer
3 facility by driving on Cottonwood Road, which becomes Forest
4 Route 1-N-04. Due to the surrounding properties all being
5 privately owned I was restricted to areas along the public
6 right of way of Cottonwood Road.

7 This picture depicts visible dust tracks exiting
8 the facility onto Cottonwood Road, which suggested the
9 existence of recent heavy truck activity.

10 This slide is a map with an aerial overlay of Mr.
11 Fahey's transfer facility. The locations of the
12 surveillance cameras are marked on the map as shown. I
13 placed one TLC200 Pro Time Lapse Camera at the base of a
14 tree near the stop sign where the gravel access road meets
15 Cottonwood Road. This is referred to as the stop sign
16 camera. The intent of this camera was to potentially
17 collect license plates, logos or other close-up details of
18 the trucks.

19 I placed the other TLC200 Pro Time Lapse Camera on
20 the opposite side of Cottonwood Road in a publicly
21 accessible turnout at the base of a rock. This is referred
22 to as the primary rock camera. This rock camera is the
23 primary vantage point with the best field of view that we
24 used to collect data for analyzing the number of truckloads.

25 The third camera, a TLC200, has a standard non-

1 wide-angle lens which is useful for collecting data at a
2 further distance with a narrower field of view. I placed it
3 in a tree branch that I accessed from the shoulder of
4 Cottonwood Road approximately 100 feet north of the gravel
5 access road. This is referred to as the tree camera. I
6 placed this camera as a redundant measure to capture any
7 tanker trucks coming down the road, entering the gravel
8 facility access road, that the first two cameras may have
9 missed, to monitor the other cameras for potential theft,
10 and also to capture any activity other than what was
11 expected. This camera proved to be unnecessary and was
12 later removed from future surveillance.

13 On July 23rd, 2015 I visited the facility to
14 retrieve and analyze the camera data. While traveling on
15 Cottonwood Road about five miles from the transfer station I
16 observed two tanker trucks apparently having just left the
17 transfer facility. While parked across from the site a
18 third tanker truck arrived at the diversion facility at
19 approximately 12:15 p.m. I observed this truck directly
20 entering the diversion facility through the gate. I briefly
21 reviewed the video footage in the field to verify that
22 proper settings and camera positioning were used.

23 After reviewing the footage and discovering that
24 some trucks were captured entering -- operating in evening
25 and early morning hours when it was still dark, I determined

1 that we would need one of the cameras to capture images 24/7
2 and not just during the daylight hours. The settings on the
3 stop sign camera were adjusted to capture these nights
4 images. The photographs in this slide were captured by the
5 primary rock camera on July 14th, 2015.

6 On August 5th, 2015 I again visited Mr. Fahey's
7 transfer station and collected the surveillance data. I
8 briefly reviewed the video footage in the field to verify
9 that we were using optimal settings and positioning for the
10 cameras. Unfortunately, in an effort to collect night
11 images the settings previously selected for the stop sign
12 camera caused a rapid consumption of battery life and
13 resulted in blurred images due to the increased shutter
14 opening duration.

15 I reconfigured the position and settings of the
16 cameras in an effort to extend battery life and reduce
17 memory consumption. I determined that complimentary cameras
18 and settings should be used to best capture images 24/7 and
19 not just during daylight hours. Two TLC200 Pro Cameras were
20 deployed. The traditional primary rock cam was left in
21 place, but settings were adjusted for night filming only.
22 The stop sign camera was relocated across Cottonwood Road,
23 very near the primary rock camera, and was concealed in a
24 fake rock housing. This complimentary fake rock cam was set
25 for daytime-only filming. The truck in this photo was

1 captured entering the transfer facility using the fake rock
2 camera on August 12th, 2015 at approximately 12:13 p.m.

3 This slide is actually a video clip. Perhaps we
4 can get you to play it.

5 The is a compressed video of the entire day of
6 July 23rd, 2015 from roughly 5:00 a.m. to 9:30 p.m., showing
7 a total 11 tanker trucks entering and exiting Mr. Fahey's
8 transfer station. It's about 30 seconds.

9 (Whereupon an audio-free video was presented.)

10 I contacted Mr. Fahey by telephone on August 12th,
11 2015 to schedule an inspection. During the conversation Mr.
12 Fahey alluded to the June 3rd, 2014 letter to the division
13 indicating that he had purchased and stored 82 acre feet of
14 water in New Don Pedro Reservoir to offset his diversions.
15 Mr. Fahey indicated that he believed he was exempt from the
16 unavailability notice. Mr. Fahey stated that he had
17 received no response to the letter he sent the division and
18 that he interpreted this to mean that the exemption was
19 approved, that, in his words, "no news was good news." I
20 informed him there was still no water available for his
21 priority of right and that he did not have an exemption
22 until he received confirmation from the division stating
23 that there was water available for his right.

24 At the conclusion of the phone call I told him
25 that since the purpose of the inspection would be to verify

1 whether diversions are still taking place, there would be no
2 need for me to perform the inspection if he confirmed with
3 me now that diversions are continuing to take place. He
4 responded that, yes, he will continue to divert water,
5 despite being aware of the water availability notices and my
6 verbal confirmation that he was not exempt from the
7 unavailability notice.

8 On August 27th I visited Mr. Fahey's transfer
9 station one last time to retrieve the surveillance cameras.
10 The total amount of footage spans roughly 220,312 minutes
11 and consumed roughly 112 gigabytes of memory, capturing
12 hundreds of water trucks entering and exiting the transfer
13 station. One thing to note, it is highly likely that we did
14 not observe all trucks during this time period because we
15 did not have nighttime surveillance between July 11th --
16 sorry, July 12th and July 23rd, meaning that the amount
17 diverted for 2015 is likely higher than we were able to
18 actually calculate.

19 Thank you. This concludes my presentation.

20 MR. PETRUZZELLI: And at this time the Prosecution
21 Team would like to enter its presentations and exhibits into
22 the record as evidence.

23 CO-HEARING OFFICER D'ADAMO: We'll need to do
24 cross before entering into evidence.

25 MR. PETRUZZELLI: Thank you.

1 CO-HEARING OFFICER D'ADAMO: All right. Okay. At
2 this time we should take a break. So we'll take a ten-
3 minute break, coming back in at 11:30. And the plan would
4 be to have Mr. Hansen proceed with cross-examination. And
5 you have a one-hour period for cross. And so we will try
6 and wrap up that cross by 12:30 so that we could take a
7 lunch break at that time. All right?

8 (Off the record at 11:20 a.m.)

9 (On the record at 11:34 a.m.)

10 CO-HEARING OFFICER D'ADAMO: And, Mr. Hansen, I
11 just wanted to remind you that this might be your
12 opportunity to cross-examine Mr. O'Hagan on the issues
13 identified in the notes.

14 And, Mr. Hansen, I understand that you've been
15 notified that your cross-examination is not restricted to
16 the direct testimony, that it's open.

17 MR. HANSEN: Understood.

18 CO-HEARING OFFICER D'ADAMO: Okay. So are you
19 prepared to cross examine Mr. O'Hagan at this time? Did you
20 want to call him up, or just at some point?

21 MR. HANSEN: Well, we'll probably call him up at
22 the end.

23 CO-HEARING OFFICER D'ADAMO: Okay. All right.
24 Proceed.

25 CROSS-EXAMINATION

1 BY MR. HANSEN:

2 Q. Mr. LaBrie, the phone calls that you had with Mr.
3 Fahey were actually both on June 12th, 2015; isn't that
4 correct?

5 A. (Mr. LaBrie) That is not my recollection.

6 Q. Okay. Did --

7 A. That is not my recollection.

8 Q. Did you ever take any records notating the time
9 that you had that phone -- those phone calls?

10 A. No.

11 Q. Earlier you stated that your understanding is that
12 Mr. Fahey, if I got your testimony wrong please correct me,
13 that he said he will not agree to inspection. Is that your
14 testimony, that at any time he said he would not agree to
15 inspection?

16 A. He said he would not be available to meet with me.

17 Q. Okay. Was that because he said he was in Idaho
18 and not available during the summer season?

19 A. I believe during the first conversation he said
20 that he was on his way back to Idaho. I believe he was
21 speaking on his cell phone while he was driving. And on
22 Monday when he called me back he reconfirmed that he would
23 not be available to meet with me until the end of the summer
24 season.

25 Q. In paragraph 13 of your declaration you state that

1 you -- you explained to Mr. Fahey that his placement of
2 surplus -- surplus water into NDPR "did not necessarily
3 offset harm to other downstream prior right holders."

4 Please state exactly which downstream prior right
5 holders have been harmed by Mr. Fahey's diversions during
6 the curtailment?

7 A. I don't have an answer for that.

8 Q. In paragraph 41 of your testimony you state that
9 Mr. Fahey's diversions during curtailment "have reduced the
10 amount of water available for downstream water right holders
11 during a state of drought emergency."

12 What evidence does the Board have for you to make
13 that statement?

14 A. I relied on the water right staff that performed
15 the water availability analysis.

16 Q. And then I have placed in front of you several
17 binders and loose documents right there. If I could have
18 you look at what is Volume I, is Exhibit 17? And look at
19 page 259 please, Bate Stamp page 259. In that paragraph,
20 about four lines from the bottom of that full paragraph
21 there, this document that was "prepared by Yoko Mooring,"
22 that last line says, "Lastly, there are no prior rights of
23 record between the springs and New Don Pedro Reservoir."

24 In essence, isn't that what Mr. Fahey told you in
25 that phone call?

1 A. In essence that is what he told me.

2 Q. Did you believe Mr. Fahey when he told you that?

3 A. I didn't know because I had not reviewed our --
4 the water right records at that point, at the time of our
5 conversation.

6 Q. After the conversation with Mr. Fahey did you then
7 ever review those records?

8 A. I did.

9 Q. And what did you find about the subject regarding
10 whether there were any prior rights of record between the
11 springs of Mr. Fahey and New Don Pedro Reservoir?

12 A. I found that there were no post-1914 appropriative
13 rights listed in our records. And there were no statements
14 of diversion and use on record in our files.

15 Q. Okay. Earlier I believe you testified that you
16 told Mr. Fahey something to the effect that he needed to get
17 more information to state -- to defend his position on the
18 exemption of the curtailment, something to that effect. Do
19 you recall that testimony?

20 A. I do.

21 Q. Okay. What additional information were you
22 looking for Mr. Fahey to produce to convince you or as to
23 whether what he was saying was accurate or not on his right
24 to curtailment?

25 A. I believe I was looking for evidence that he had

1 provided replacement water to offset the water that he was
2 diverting that year.

3 Q. Okay. Was the -- and why -- strike that.

4 Does Mr. Fahey, in your understanding, control the
5 water that is released from NDPR?

6 A. No, that is not my understanding.

7 Q. In fact, Mr. Fahey does not control the water
8 that's released from NDPR; isn't that correct?

9 A. Not my understanding.

10 Q. Well, if -- what evidence do you have that the
11 senior -- that any senior water right holders downstream of
12 NDPR have in any way been harmed by Mr. Fahey's diversions
13 during curtailment?

14 A. Again, I rely on the analysis that was done for
15 the water availability.

16 Q. In paragraph 41 of your testimony you state that
17 "Fahey's diversion likely reduced the water available for
18 in-stream resources and riparian habitat downstream."

19 What is the evidence that you have to support that
20 statement?

21 A. Simply my understanding that any reduction in
22 surface water by diversion results in less water available
23 for in-stream uses and habitat.

24 Q. Yeah. Direct your attention to that loose set of
25 documents right there held by the binder clip there, I

1 believe in front of Ms. Mrowka. I'm looking for you to open
2 up to Exhibit 84, page 27.

3 MR. BUCKMAN: Could you be more specific on the
4 Exhibit please? Is that your --

5 MR. HANSEN: It's 84. It is the Initial Study
6 Mitigated Negative Declaration for Water Right Application
7 31491 of G. Scott Fahey, Exhibit 84, page 27.

8 BY MR. HANSEN:

9 Q. That paragraph states, "The Marco and Polo Stream
10 Basins are considered Waters of the United States. The only
11 construction in or near a Water of the United States is
12 installation of the wellheads. As noted previously,
13 construction has been designed to avoid, cut or fill in
14 waterhead. A possible indirect impact could be the
15 reduction in surface flows of hydrologic intervention by the
16 soil moisture regime of the wetland/riparian community. The
17 diversions could ultimately change the wetland
18 characteristics to non-wetland if not mitigated. The five
19 GPM bypass flow and the mitigation measures listed below
20 have been designated to mitigate this impact to less than
21 significant."

22 In light of that language which was for Mr.
23 Fahey's Permit 21289, let me ask you, if that mitigation of
24 five GPM bypass flow was maintained by Mr. Fahey during the
25 curtailment, then how would in-stream resources ever be

1 harmed by his diversions during curtailment?

2 A. If he met the -- the bypasses?

3 Q. Correct.

4 A. Then it's likely he would not cause harm, based on
5 this statement, if he bypassed the flows.

6 Q. Please look at Prosecution Team Exhibit WR-30.

7 That's in the black binder. That's Exhibit WR-30.

8 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, one
9 moment.

10 STAFF COUNSEL WEAVER: I'm sorry to interrupt. I
11 just wanted to make sure that we have the right exhibit in
12 the record so that we know which exhibit you're cross-
13 examining. Is this -- this is Exhibit 84 in the Prosecution
14 Team's --

15 MR. HANSEN: I'm sorry.

16 STAFF COUNSEL WEAVER: -- packet --

17 MR. HANSEN: This is -

18 STAFF COUNSEL WEAVER: -- or is it one of the ones
19 you gave us this morning?

20 MR. HANSEN: WR-30. This was the Prosecution's
21 Exhibit 30.

22 STAFF COUNSEL WEAVER: Okay.

23 MR. HANSEN: It's the May 27th, 2014 curtailment
24 notice, I believe.

25 STAFF COUNSEL WEAVER: And then you previously

1 mentioned Exhibit 84.

2 MR. HANSEN: Yes, 84 was in a stack of documents
3 that I handed to Mr. Mona --

4 STAFF COUNSEL WEAVER: Okay.

5 MR. HANSEN: -- prior to the proceeding this
6 morning.

7 STAFF COUNSEL WEAVER: So this will be numbered
8 Fahey 84, but it hadn't previously been submitted, is that
9 right?

10 MR. PETRUZZELLI: The Prosecution Team objects to
11 the inclusion of this evidence. This is -- if this was the
12 notice, the notice per -- the notice discouraged surprise
13 evidence and possibly permits the introduction of new
14 evidence on rebuttal. And I'm speaking to number 84 for Mr.
15 Fahey.

16 STAFF COUNSEL WEAVER: Mr. Hansen, have you
17 provided copies of the packet, it looks like you've numbered
18 them 77 through 87, have you provided these to any of the
19 parties in the hearing, either this morning or previously?

20 MR. HANSEN: I gave them to them this morning.
21 Did I give them to the districts? I apologize for that. I
22 definitely gave it to the Prosecution Team. I have other
23 copies. If we could pause on the time, please, if that's
24 possible.

25 MR. MONA: Excuse me. At the end of your cross

1 could you also provide us with the, if you have them,
2 electronic copy of these new exhibits, if you have them
3 available?

4 MR. HANSEN: Yes. Shall we send it to the email
5 address?

6 MR. MONA: Sure. That's good enough.

7 MR. HANSEN: Do you want them sent now, we can
8 have the office immediately, or do you want that during the
9 lunch period?

10 MR. MONA: Now, if you've got them available.

11 CO-HEARING OFFICER D'ADAMO: All right. So one
12 moment. Okay. So on the objection, we're going to overrule
13 the objection. Normally this type of information would come
14 in during rebuttal. But just in the interest of time we're
15 going to go ahead and allow it and have it be labeled as
16 Fahey 77 through 87.

17 MR. HANSEN: And we have omitted 86, so that's not
18 an error. That has been omitted, 86.

19 CO-HEARING OFFICER D'ADAMO: All right. Okay.
20 Ready to proceed?

21 BY MR. HANSEN:

22 Q. Mr. LaBrie, if you could please look at the
23 Prosecution Team's exhibit WR-30? It looks like that's the
24 May 27, 2014 curtailment notice. Do you have that there in
25 front of you? Have you ever looked at that document in the

1 past?

2 A. (Mr. LaBrie) Yes, I have.

3 Q. Where in that document is there -- or is there
4 anywhere in that document any description relating to in-
5 stream resources and riparian habitat downstream as a reason
6 for the curtailment?

7 A. I don't believe there is.

8 Q. Now if you can go forward to Exhibit WR-39.
9 That's the Prosecution Team's Exhibit 38. That's the April
10 23rd, 2015 curtailment notice. It states in there, "Water
11 is necessary to meet senior water right holders' needs."

12 Do you recall that language?

13 A. I'm not sure where it's located.

14 Q. Well, let me ask you this question. Have you ever
15 looked at the April 23rd, 2015 curtailment notice prior to
16 today?

17 A. Yes, I have.

18 Q. Are you aware of it ever stating in there that
19 curtailment is needed for in-stream resources and riparian
20 habitat downstream?

21 A. No, I am not.

22 Q. What emails relating to Mr. Fahey or his company
23 or permits or water diversions, anything dealing with Mr.
24 Fahey or his company have you ever deleted?

25 A. I don't believe I've deleted any emails. The

1 State Water Board has a retention policy that automatically
2 deletes emails from retention after 90 days.

3 Q. Do you know whether any email that you received or
4 sent was automatically deleted in the manner you just
5 described regarding Mr. Fahey?

6 A. It's likely.

7 Q. And if it was deleted would it ever have been --
8 strike that.

9 MR. HANSEN: A question for Samuel Cole.

10 BY MR. HANSEN:

11 Q. Mr. Cole, after your phone call with Mr. Fahey on
12 August 12th, 2015, did you ever tell anyone about Mr.
13 Fahey's statements to you about his explanation as to why he
14 believed he had an exception to curtailment?

15 A. (Mr. Cole) Yes, I did.

16 Q. Who did you tell?

17 A. The pt.

18 Q. Yeah, I do not want to get into any privileged
19 communications there. But did you ever inform anyone prior
20 to September 1st, 2015? That's the date I believe the ACL
21 was filed in this case.

22 MR. PETRUZZELLI: I would caution my client to
23 avoid speaking to anything regarding confidential
24 communications with his attorneys.

25 MR. HANSEN: I'm not seeking any kind of

1 communications like that.

2 BY MR. HANSEN:

3 Q. I'm just asking, did you ever speak with anyone --
4 you testified that you told the Prosecution Team. I just
5 want to know, did you ever have those communications prior
6 to September 1st, 2015?

7 A. Yes.

8 Q. Did you ever tell anybody at the Board that they
9 should respond to Mr. Fahey and as to his claim of an
10 exception to curtailment prior to filing the ACL?

11 A. Can you repeat the question?

12 Q. Yes. Did you ever inform -- since you had the
13 phone call with Mr. Fahey on August 12th and he -- now he
14 did explain to you, did he not, that -- his rationale as to
15 why he believed he had an exception to curtailment?

16 A. Yes.

17 Q. Okay. Did you ever tell anybody else at the
18 Board, hey, we need to get back to Mr. Fahey here and, you
19 know, explain to him why he's not entitled to this exception
20 of curtailment?

21 A. Other than telling him myself that he was not
22 exempt from curtailment, yes, I did tell other -- I did
23 speak to other staff about it, about the conversation.

24 Q. I believe in your testimony you said that you told
25 him he would need confirmation of his right to that

1 exception of curtailment; wasn't that your testimony?

2 A. Yes.

3 Q. Okay. If Mr. Fahey described to you, as he did in
4 your written testimony, you say this, that he had sent this
5 June 2014 letter explaining his position, he had responded
6 to the form that the Board provided in 2014 with regards to
7 curtailment, he had this phone call with Mr. LaBrie that's
8 cited in your contact report, what more in your
9 understanding was Mr. Fahey supposed to do in order to
10 receive this confirmation that you talked about?

11 A. I believe that he went through at the proper
12 manner.

13 Q. And what is that in your understanding?

14 A. Stating the exemption on -- or stating why he
15 believes he has an exemption, or checking the "other" box on
16 the -- the certification form.

17 Q. Now if Mr. Fahey had done that, checked the
18 "other" box and even provided an explanation in a letter
19 that went with that box, what more should he have done?

20 A. Prior to continuing diverting?

21 Q. Correct.

22 A. He should have waited for the division to say that
23 he has an exemption --

24 Q. And how long --

25 A. -- from curtailment.

1 Q. I'm sorry. I'm sorry. Forgive me for cutting you
2 off. I'm sorry. You were saying what?

3 A. He should have waited until the division informed
4 him that he could continue diverting.

5 Q. Okay. And how long in your understanding should
6 that wait time have been?

7 A. I don't make that decision.

8 Q. Should he have waited a year?

9 MR. PETRUZZELLI: Objection; calls for
10 hypothetical.

11 MR. HANSEN: Strike the question. I'll rephrase
12 it.

13 BY MR. HANSEN:

14 Q. If the evidence shows that the Board never
15 responded to him marking a box "other" that he marked on
16 June -- in June of 2014 and they never responded to that
17 marking of that box for over a year, how is Mr. Fahey during
18 that year supposed to understand his right to curtailment,
19 in your understanding?

20 MR. PETRUZZELLI: Again, calls for hypothetical,
21 vague.

22 CO-HEARING OFFICER D'ADAMO: Could you ask that
23 question again?

24 MR. HANSEN: Yes.

25 BY MR. HANSEN:

1 Q. If Mr. Fahey received no response to marking the
2 "other" box for over a year, shouldn't he take that lack of
3 response as a tacit admission by the Board that his
4 curtailment exception that he gave in that other box with an
5 attached letter is correct?

6 A. No, as I explained in the conversation with him.

7 Q. What procedure are you aware of that the Board has
8 to respond to anyone who marks that box "other" on the
9 curtailment form?

10 A. On the --

11 Q. On the form that came with the curtailment notice?

12 A. My duties involve conducting compliance
13 inspections through enforcement. That wasn't part of my
14 duties.

15 Q. Fair enough. I'll ask, do you know whether any
16 emails that you sent or received regarding Mr. Fahey or his
17 company have ever been automatically deleted in the fashion
18 that Mr. LaBrie testified to?

19 A. No, I don't believe so.

20 BY MR. HANSEN:

21 Q. Mr. Coats, Prosecution Team's Exhibit 42 through
22 43 please?

23 A. (Mr. Coats) Okay.

24 Q. I believe you testified that this was the water
25 availability analysis for 2015?

1 A. For 2014 and '15. You referred to two separate
2 exhibits.

3 Q. Okay. And 2014, is that Exhibit 42?

4 A. Yes, it is.

5 Q. And Exhibit 43 is 2015?

6 A. Yes, it is.

7 Q. Okay. You describe in paragraph nine in your
8 declaration about a water availability analysis that's
9 posted on the Board's website. Are these two documents what
10 you were talking about in your declaration?

11 A. They were initially posted to the website.

12 Q. Okay. Do either one of these analyses state what
13 water was available at Mr. Fahey's point of diversion under
14 his permits?

15 A. Mr. Fahey's point of diversion, being a post-1914
16 water rights, would be above the pre-1914 demand line
17 indicated on Exhibit WR-42.

18 Q. Okay. Let me ask you, do either one of 42 or 43
19 depict the availability of water at Don Pedro Reservoir or
20 above it?

21 A. WR-42 and WR-43 are for the entire San Joaquin
22 River Basin Watershed.

23 Q. But isn't it true that both 42 and 43 measure it
24 from actually below Don Pedro Reservoir?

25 A. The full natural flow supplies which were used in

1 the supply and demand analysis were at LaGrange Dam. And
2 that measures the available supply for everything upstream
3 of the full natural flow point.

4 Q. So that is actually below Don Pedro, isn't it,
5 LaGrange?

6 A. I'd have to review a map to answer that question
7 affirmatively.

8 Q. Does your water availability -- oh, I'm sorry.
9 Strike that.

10 Exhibit 42 and 43, do they take into account any
11 water that Mr. Fahey had wheeled into NDPR between 2009 and
12 2011?

13 A. There was a storage release. If it was any of
14 that type of water, no. It only accounts for full natural
15 flow or what is more commonly known as unimpaired water.

16 Q. You state in paragraph 25 of your declaration that
17 you collaborated with David LaBrie, Kathy Mrowka, John
18 O'Hagan, legal counsel and staff working under our
19 supervision to calculate Fahey's proposed penalty, and
20 that's the penalty that was proposed in paragraph 53 of the
21 ACL; isn't that correct?

22 A. I'd have to review these documents but --

23 Q. Okay. Please look at Exhibit 75. I'm sorry,
24 that's -- yes, that's our exhibit -- I'm sorry, no, that's
25 in our Volume I of the white binder. That's a Declaration

1 of John O'Hagan. Paragraph six --

2 A. Okay.

3 Q. -- at the last part of paragraph six it says, "A
4 diverter who continues to divert after receiving a notice of
5 curtailment is not subject to penalties for violation of the
6 curtailment notice but may be subject to enforcement for
7 unauthorized diversion if their diversions do not fall
8 within the exceptions enunciated in the notice and not
9 entirely authorized by other non-curtailed water rights."

10 In determining the penalties in this case, which
11 you said that you helped collaborate with, are the penalties
12 that the Prosecution Team is seeking here considering at all
13 whether Mr. Fahey's diversions fell within an exception
14 enunciated in any of those curtailment notices?

15 A. No.

16 Q. When you all collaborated in determining the
17 proposed penalty did you take into consideration the fact
18 that Mr. Fahey had 88.55 acre feet of surplus water
19 previously wheeled into NDPR that was available for his
20 future water diversions?

21 A. That 88-acre claim is as it is, a claim, and we
22 didn't take that into account, no.

23 Q. In your consideration of civil penalties did you
24 ever consider the arguments that Mr. Fahey presented in his
25 letter of June 3rd, 2014 as to why he believed he was

1 entitled to an exception to curtailment?

2 A. I don't believe so, no.

3 Q. In your consideration of the civil penalties did
4 you ever consider the explanations that he provided to Mr.
5 LaBrie and Sam Cole in their phone calls in June and August
6 2015?

7 A. I'm sorry

8 Q. Okay. I'll rephrase it.

9 A. Yeah. Yeah. It sounded like you were going to
10 continue there --

11 Q. Okay.

12 A. -- and you just abruptly stopped.

13 Q. In your consideration of civil penalties did you
14 ever consider the explanations that Mr. Fahey provided to
15 Mr. LaBrie and Mr. Cole in their phone calls?

16 A. As those were from those staff, you would be
17 probably better served asking them that question.

18 Q. Fair enough. Mr. LaBrie states in paragraph 12 of
19 his declaration that Mr. Fahey told him in June 2015 that
20 "Fahey concluded that he believed that the 2015
21 unavailability notice did not apply to him."

22 Did that subject ever come up in your assessment
23 of civil penalties for the ACL?

24 A. Since we did not issue Mr. Fahey an exception to
25 curtailment, no.

1 Q. You state in paragraph 19 of your testimony that
2 the notice on July 15, 2015 clarified that all prior notices
3 containing language that could have been construed as an
4 order requiring water rights holders to curtailment
5 diversions under effected water rights, that language was
6 rescinded.

7 In light of that statement, how can you be now
8 assessing Mr. Fahey's civil penalties for those time periods
9 prior to that July 15, 2015 notice?

10 A. The use of the word "curtailment" was misconstrued
11 by certain parties as implying an order. However, since no
12 order number accompanied that notice it was not an order.

13 Q. What emails relating to Mr. Fahey or his company
14 that you have ever received or sent have been deleted
15 according to this automatic deleting policy that Mr. LaBrie
16 earlier discussed?

17 A. The automatic deleting policy that's been
18 referenced is a policy that deletes the emails from the
19 users account but is still available on the State Water
20 Board servers for legal staff to pull up for up to a period
21 of years. So it doesn't get deleted, it's not just not
22 available for the users to look at.

23 Q. So are you saying that the legal staff has access
24 to all of the emails that otherwise would be deleted under
25 that automatic deletion policy?

1 A. The use of the word deleted is inappropriate.
2 It's just it's removed from the user's view. Legal staff
3 still has -- the actual emails are still stored on our
4 server. And the legal staff has the ability to retrieve
5 those emails.

6 BY MR. HANSEN:

7 Q. Ms. Mrowka, turn your attention to the large white
8 binder there, Exhibit 20. That's Permit Number 20784.

9 MR. BUCKMAN: When you're -- excuse me. Michael
10 Buckman, Hearing Unit Supervisor over here.

11 When you're referring to exhibits can you please
12 be specific of --

13 MR. HANSEN: Yes.

14 MR. BUCKMAN: -- whether they're your exhibits or
15 whether they're the Prosecution's?

16 MR. HANSEN: Thank you.

17 MR. BUCKMAN: That's just for the record.

18 MR. HANSEN: I appreciate that.

19 MR. BUCKMAN: Thank you.

20 BY MR. HANSEN:

21 Q. Fahey Exhibit 20.

22 A. (Ms. Mrowka) Yes.

23 Q. Do you have that there in front of you?

24 A. All right. Is there any language in that permit
25 that specifically states the timing for the replacement of

1 water that must be -- I'm sorry, strike that.

2 Is there any language in that permit that
3 specifically states that the timing for the replacement of
4 water must be daily, as you stated in your written
5 testimony?

6 A. Under the Fully Appropriated Stream System
7 Declaration there is no water available to appropriate. And
8 availability is determined on a day-by-day basis during the
9 season of diversion for a direct diversion right. And so
10 they would need to replace on a one-for-one basis the water
11 that was otherwise unavailable.

12 MR. HANSEN: Move to strike the testimony as
13 unresponsive. Let me ask the question again.

14 BY MR. HANSEN:

15 Q. Is there any language in the permit 20784, their
16 Exhibit 20 of Fahey's Exhibits, that specifically states
17 that the timing for the replacement of water must be daily,
18 as you testified?

19 MR. PETRUZZELLI: Objection; the permit -- the
20 language of the permit speaks for itself. The document
21 speaks for itself.

22 CO-HEARING OFFICER D'ADAMO: I'm going to overrule
23 that.

24 It's just up to you, Mr. Hansen, if that's how you
25 want to use your time. It's in the record.

1 MR. HANSEN: All right.

2 BY MR. HANSEN:

3 Q. Are you aware of any actual language in that
4 permit, as you testified, that talks about the daily need to
5 replace water?

6 A. (Ms. Mrowka) The language in the permit refers to
7 two different things. There's the Water Exchange Agreement
8 that must be in effect from June 16th to October 31st of
9 each year. And it talks to a second provision which is
10 noninterference with Modesto and Turlock irrigation rights,
11 and San Francisco rights. Neither of those say daily. They
12 say -- basically, the second one says noninterference with
13 the rights.

14 Q. If you look at that Term 20, it's actually Bate
15 Stamp page number 314, the second paragraph (2), at the very
16 bottom, near the very, very bottom it says, "Replacement
17 water may be provided in advance and credited to future
18 replacement water requirements."

19 Is there any requirement in there that says that
20 that language is not applicable?

21 A. No.

22 Q. Turn to Fahey Exhibit 6. That is the, I'll
23 represent, the 1992 agreement between the districts and Mr.
24 Fahey that we've been discussing. In your understanding, is
25 there any specific language in this agreement that states

1 that water must be replaced daily?

2 MR. PETRUZZELLI: Objection; the document speaks
3 for itself.

4 MR. HANSEN: In response to that, Ms. Mrowka
5 testified earlier that these documents have that provision,
6 and that is the testimony that I'm seeking to cross-examine.

7 CO-HEARING OFFICER D'ADAMO: All right. I'm going
8 to overrule the objection.

9 MS. MROWKA: The agreement does not talk to the
10 word "daily."

11 BY MR. HANSEN:

12 Q. Turn your attention to --

13 MR. PETRUZZELLI: And the Prosecution Team again
14 objects because it is not the recollection of the
15 Prosecution Team that Ms. Mrowka actually testified that a
16 daily, and I'm hoping I phrase this correctly, a daily
17 replacement is required.

18 BY MR. HANSEN:

19 Q. Have you -- turn your attention to Exhibit 54,
20 that's Fahey Exhibit 54, the March 21st, 2011 letter. This
21 letter is dated March 21st, 2011 and is addressed to you, I
22 believe; is that correct?

23 A. (Ms. Mrowka) It is.

24 Q. Did you receive this letter?

25 A. I believe I did.

1 Q. Did you ever respond to this letter, in your
2 understanding?

3 A. This letter is a letter regarding resolution of a
4 protest. And there was -- it's discussing whether or not
5 certain terms were included in the environmental document.
6 I may have responded, yes.

7 Q. Do you recall whether you ever refuted or
8 disagreed with what was stated in this letter?

9 A. I believe I indicated to City and County of San
10 Francisco that not all terms must be in the environmental
11 document.

12 Q. Is it your understanding that the permit 20784,
13 the first permit in Term 20, paragraph two, includes the
14 resolution of what you called the protest for the first
15 permit?

16 A. Could you repeat please?

17 Q. Yeah. Isn't it true that Term 20 of the first
18 permit constituted the terms that would resolve the protest
19 of the City and County of San Francisco to the first permit;
20 isn't that correct?

21 A. That is my understanding.

22 Q. And Term 34 of Permit 21289 resolved the conflict
23 that the City and County of San Francisco had to the
24 application for that second permit; is that correct?

25 A. That is my understanding.

1 Q. Did you ever acknowledge in a phone call with
2 Diane Kindermann during 2011 during the CEQA process for the
3 application of Mr. Fahey's Permit 21289 that Mr. Fahey's
4 water to be diverted was groundwater?

5 A. I believe I discussed the issue.

6 Q. Didn't you acknowledge in a phone call with Ms.
7 Kindermann during 2011 that the state was doing Mr. Fahey a
8 favor in providing a permit for him when one was necessary
9 by the state, but only to satisfy the United States Forest
10 Service?

11 A. I may have.

12 Q. In paragraph 28 of your written declaration what
13 do you mean by the statement "these terms do not modify,
14 amend or enhance the seniority of either or both permits?"

15 A. I stated that because it's my understanding that
16 only the State Water Board itself can modify the priority of
17 a water right.

18 Q. How in your understanding is Mr. Fahey, by citing
19 a curtailment exception, seeking to modify his right? I
20 forget the word you used there.

21 A. I don't --

22 MR. PETRUZZELLI: Objection; assumes facts not in
23 evidence, argumentative, vague. Is Mr. Fahey attempting to
24 modify his right or his priority?

25 MR. HANSEN: Well, let me strike that. I'll re-

1 ask the question. Thank you.

2 BY MR. HANSEN:

3 Q. Is it your testimony that Mr. Fahey is trying to
4 change the priority of his permits?

5 A. (Ms. Mrowka) No. I'm simply stating for clarity's
6 purpose that the water right priority is unchanged as a
7 result of any of the terms or conditions of the right.

8 Q. Are -- is it your testimony that Mr. Fahey is
9 attempting to amend the seniority of either of his permits?

10 A. Again, my testimony is just to clarify that
11 there's no modification in priorities.

12 Q. Okay. In paragraph 32 of your declaration you
13 allege that Mr. Fahey's diversions during 2014 and 2015
14 "could injure senior right holders."

15 What evidence does the Board have for you to make
16 that statement?

17 A. What evidence? Well, what we have for evidence is
18 in the water availability analysis that was submitted for
19 the second permit. Mr. Fahey indicated that there was an
20 Application 20636 for a cabin downstream of him that there
21 are federal reserve rights for the Hole Creek Campground and
22 range cattle. And in addition to that we have also the
23 evidence with respect to City and County of San Francisco
24 and the districts.

25 Q. What evidence do you have for the districts and

1 the city that you just talked about, what evidence?

2 A. The evidence which we have is the priorities of
3 those water rights.

4 Q. So are you saying that the evidence you have is
5 not that they lost any water but simply the mere fact that
6 they had priority rights; is that your testimony?

7 A. My testimony is that during times of shortage we
8 look to the priorities of the water rights. We identified
9 senior rights and we identified that there was inadequate
10 supply to serve all of those senior rights at times. 2014
11 and 2015 were different analyses.

12 Q. In paragraph 32 of your declaration you state
13 that, "The terms and conditions of a permit are not in
14 affect when there is no water available to divert under the
15 priority of right."

16 Doesn't the curtailment have an exception that
17 when water is actually available to the diverter that their
18 permit is still in effect and they have the right to divert?

19 A. Mr. Fahey's permit is for direct diversion. It
20 has no storage component, and consequently he was not
21 himself drafting from previously stored water put into a
22 storage in a time of availability.

23 Q. Turn your attention to plaintiff's -- I'm sorry,
24 the -- Mr. Fahey Exhibit 75, that is the Declaration of Mr.
25 O'Hagan, in paragraph four he says, "However, once water is

1 stored or imported from another watershed the entity that
2 stored or imported the water has the paramount right to that
3 water."

4 When Mr. Fahey had 88.55 acre feet of water
5 wheeled into NDPR, wasn't he entitled then to use that water
6 for future curtailment because he was the one who had that
7 water imported?

8 A. Mr. Fahey was not personally using that imported
9 water at his diversion location.

10 Q. Where was the water supposed to be replaced by Mr.
11 Fahey under either one of his permits?

12 MR. PETRUZZELLI: Objection; calls for
13 hypothetical.

14 BY MR. HANSEN:

15 Q. No. Under the language in the permits as you
16 understand it, where was the point he was supposed to
17 replace the water?

18 A. (Ms. Mrowka) We're talking -- okay. So the water
19 right conditions simply are exchange agreements,
20 satisfaction of prior rights of the City and County of San
21 Francisco and the districts. And the permit does not
22 specifically state a coordinate, like a U.S. Geological
23 Survey map coordinate.

24 Q. Now look at paragraph 33 of your declaration.
25 That is, I believe, WR-9. Do you have that there in front

1 of you?

2 A. Yes, I do.

3 Q. Okay. Paragraph 33 seems to talk about the
4 districts holding post-1914 rights. Isn't it true that the
5 districts have senior pre-1914 water rights, as well?

6 A. The districts have a combined, so it would be pre-
7 '14 and post-'14 rights.

8 Q. Okay. In fact, at New Don Pedro Dam and the
9 Tuolumne River there, isn't it true that the districts'
10 water rights are actually senior to that, even of the City
11 and County of San Francisco?

12 A. I have not looked to see that.

13 Q. Okay. In light of the fact that you just
14 acknowledged that the districts do hold pre-1914, what is
15 the purpose for paragraph 33 in your declaration?

16 A. The purpose of that is to simply identify the very
17 senior nature of those post-1914 rights as compared to the
18 Fahey rights.

19 Q. Do you have any evidence that Mr. Fahey's
20 diversions during 2014 and 2015 in any way harmed the
21 districts under their pre-1914 rights?

22 A. I have not conferred with the districts to
23 ascertain that.

24 Q. So the ACL was filed without your understanding
25 whether that's true or not?

1 A. The ACL was filed because our records show that
2 there was unavailability of water under the Fahey
3 priorities.

4 Q. Exhibit 55 of -- in our binder, that's Fahey
5 Exhibit 55, is the second permit, 21289. If you look at
6 Term 34, there, it's on Bate Stamp page 1202, you stated
7 earlier, I believe, that permit -- that Term 34 -- strike
8 that.

9 If you look at -- why don't you look at 34 there,
10 because you've discussed a lot of it in your testimony, does
11 exhibit -- I'm sorry, does Term 34 have any language at all
12 about whether Mr. Fahey could carry over water from year to
13 year?

14 MR. PETRUZZELLI: Objection; the document speaks
15 for itself.

16 CO-HEARING OFFICER D'ADAMO: I'm going to overrule
17 that. If that's how Mr. Hansen chooses to use his time.

18 MS. MROWKA: The document talks to when water is
19 lost from the reservoir. And so absent that loss, you would
20 presume that the water could potentially be in the
21 reservoir.

22 BY MR. HANSEN:

23 Q. I'd direct your attention to the second paragraph
24 of 34. In the middle of that paragraph it says,
25 "Replacement water may be provided in advance and credited

1 to future replacement water requirements."

2 Isn't that a carryover term, contrary to what you
3 testified earlier?

4 A. (Ms. Mrowka) My testimony has dealt with two
5 different concepts. My testimony has dealt with the
6 exchange agreements, and it's also dealt with this
7 particular concept which is a different injury term.

8 Q. But isn't it true that all of the water
9 replacement provisions under the second permit were all
10 within Term 34?

11 A. That's correct.

12 Q. If Mr. Fahey replaced water in NDPR for his
13 diversions in the daily manner that I believe you testified
14 to, how in your understanding can Mr. Fahey be assured and
15 guaranteed that he will not, quoting language, Term 33 here
16 on that same page, "will not interfere with San Francisco's
17 obligation to Modesto and Turlock Irrigation Districts,
18 pursuant to the Raker Act and/or any implementing agreement
19 between the districts and San Francisco?"

20 And if you want me to rephrase that question, I
21 will.

22 A. It was a long question.

23 Q. Fair enough. Looking at that language in Term 33,
24 do you see that there in front of you?

25 A. I certainly do.

1 Q. Okay. If Mr. Fahey replaced water into NDPR for
2 his diversions in the daily manner that you described, in
3 fact, it's even in paragraph 20 of your declaration, how can
4 Mr. Fahey be assured and guaranteed that he will not
5 interfere in the manner there that's prohibited in Term 33?

6 A. He would need to discuss that with the districts
7 and San Francisco.

8 Q. In fact, why don't you, in light of what you just
9 said, why don't you look at that Term 34, the third
10 paragraph? It says the source -- halfway through that
11 paragraph it says, "The source, amount and location at NDPR
12 of replacement water discharged into NDPR shall be mutually
13 agreed upon by the permittee, the districts and San
14 Francisco and shall be reported to the State Water Board
15 with the annual progress report by permittee."

16 Do you see that?

17 A. Yes, I do.

18 Q. How then can you testify that he must replace his
19 water without notice?

20 A. I testified because there's two water rights at
21 issue here. In the first water right it clearly has the
22 water exchange agreement, and it has a separate term with
23 respect to the water rights of the downstream entities. And
24 this one has a combined term that can make the testimony a
25 little more difficult to distinguish between the two rights.

1 MR. HANSEN: Well, this language right here --
2 strike that.

3 We'll call Mr. O'Hagan.

4 BY MR. HANSEN:

5 Q. Thank you very much, Mr. O'Hagan, for making
6 yourself available on such an extremely short notice.
7 Appreciate that.

8 I'd have you turn your attention to what is
9 Fahey's Exhibit 83. That should be in that loose binder of
10 exhibits out there somewhere.

11 A. (Mr. O'Hagan) I just first want to read my name
12 into the record. My name is John O'Hagan, J-O-H-N, and
13 O'Hagan is O- apostrophe, capital H-A-G-A-N. And I have
14 taken the oath.

15 Q. Thank you, Mr. O'Hagan, I appreciate that.

16 A. Excuse me. What exhibit now.

17 Q. I'm sorry. Exhibit 83. You might even want to
18 take off that binder clip and make it easier for you. There
19 you go. There is an email there at the sort of lower two-
20 thirds of that page. Do you see that? It says, "From:
21 O'Hagan.John@Waterboards. Do you see that there?"

22 A. Yes.

23 Q. With a date of August 31st, 2015?

24 A. Yes.

25 Q. Okay. Did you draft this email?

1 A. Yes

2 Q. And what was the purpose of that email?

3 A. The purpose of this email is a requirement under
4 my re-delegated authority to issue enforcement actions.

5 Q. When you drafted this email were you aware that
6 Mr. Fahey had been in communications with Board staff about
7 his belief that he had a right to an exception to
8 curtailment?

9 A. I believe the email suggested that he was claiming
10 agreements. So is that the exception you're talking about?

11 Q. Well, I'm not asking you to -- and you may have
12 to, I'm not sure. Is it your understanding -- let's back
13 up.

14 What -- what is the purpose of this email?

15 MR. PETRUZZELLI: Objection; vague.

16 MR. HANSEN: They've already argued in their email
17 that it was a pro forma type --

18 CO-HEARING OFFICER D'ADAMO: Right.

19 MR. HANSEN: -- blah, blah, blah.

20 CO-HEARING OFFICER D'ADAMO: I'm going to overrule
21 that. Go ahead. Proceed.

22 BY MR. HANSEN:

23 Q. Yeah. What is the purpose of this email?

24 A. (Mr. O'Hagan) The purpose of this email is a
25 requirement under my re-delegated authority. In the Water

1 Code the Executive Director is authorized to issue ACL
2 complaints and draft - and draft cease and desist orders.
3 That authority from the Executive Director was delegated to
4 the Deputy Director for Water Rights. In turn, the Deputy
5 Director for Water Rights re-delegated that authority to the
6 Assistant Deputy Director for Water Rights, for which I am.

7 Q. Thank you. And when -- before you sent this email
8 out were you ever informed that Mr. Fahey had been in
9 discussions with Board staff about his belief that he had an
10 exception to curtailment?

11 A. I can't recall about the exception, but I was
12 aware of the contents of the administrative civil liability
13 and a draft cease and desist order, since I was issuing it.

14 Q. So your knowledge about this came from that draft
15 ACL; is that correct?

16 A. The information regarding the content of the draft
17 ACL and everything was based on my meeting with the
18 prosecution teams.

19 Q. And again, I'm not trying to get into privileged
20 communications. I just want to make that clear.

21 A. Right.

22 Q. The last paragraph in that says, "I'm also
23 recommending that the Deputy Director issue an informational
24 order to require Fahey to report diversions and any basis of
25 right that authorizes the diversion of water in 2014 and

1 2015."

2 Do you see that language there?

3 A. Yes.

4 Q. Do you know whether -- did you know whether or not
5 Mr. Fahey had ever provided a basis of right that authorizes
6 his diversions of water in 2014 and 2015 when you wrote this
7 email?

8 A. I believe those other basis of rights, we're
9 talking about rights such as riparian and/or pre-'14. And
10 our records show that he did not have any records on file
11 with the State Water Board.

12 Q. Is it the policy of the Board to file an ACL, in
13 your understanding, when a water diverter has stated a claim
14 as to exemption from curtailment before giving formal
15 response to that diverter as to what the Board believed he
16 had a right to do?

17 A. There is no policy about such a procedure that
18 you're talking about, that I'm aware of.

19 As far as the information Mr. Fahey received, two
20 notices of curtailment. The one in 2014, he submitted his
21 information. The -- the Prosecution Team made their
22 findings. And another notice of curtailment was issued in
23 2015.

24 Q. If the Board had no evidence that any senior --
25 downstream senior water right holder had been harmed from a

1 diversion during curtailment, would that fact have in any
2 way changed your decision to have this ACL issued?

3 A. I would say that there's a lot of downstream water
4 right holders with a lot higher priority than Mr. Fahey that
5 were curtailed. And any water that he would have had a
6 right to should have gone to them. So they would have been
7 injured by his diversion in that analysis because they were
8 also curtailed.

9 Q. If you had been informed -- well, let me ask you
10 this. Were you ever informed that Mr. Fahey had, in fact,
11 had 88.55 acre feet of water wheeled into NDPR below his
12 diversions prior to sending this email?

13 A. I was aware that he had an agreement. That water
14 is stored in New Don Pedro Reservoir. I know of no basis of
15 right in which Mr. Fahey has claim to that water in that
16 reservoir. That reservoir is owned and operated by Turlock-
17 Modesto Irrigation District, and they have the rights to
18 that water and use it as they fit -- see fit under their
19 water rights.

20 Q. Well, if he had provided or imported that water,
21 according to your declaration that you signed in June of
22 2015, wouldn't he then have the right to that water if he
23 had imported it under his permits?

24 A. That water is being put in to satisfy the rights
25 of the district, so that's the district's water, and it's

1 stored under their water right. I don't know of water right
2 that Mr. Fahey has to store water in New Don Pedro Reservoir

3 Q. Would he get a credit from -- for future water
4 replacement if he had placed that water in New Don Pedro?

5 A. His agreement speaks for itself. But as I believe
6 Ms. Mrowka had testified, then that credit doesn't last year
7 to year under the agreement.

8 MR. HANSEN: We have no further cross-examination.

9 Thank you very much for appearing, each and every
10 one of you.

11 CO-HEARING OFFICER D'ADAMO: All right. Thank
12 you, Mr. Hansen.

13 At this point we will take a break. And just a
14 minute. I want to check with everyone up here. We're going
15 to start up at 1:30 when we return. And we will start with
16 cross by the -- by the other parties. And in addition,
17 Staff had some questions that they will be posing. So we'll
18 see you all at 1:30.

19 (Whereupon a recess and break for lunch was taken
20 from 12:39 p.m. to 1:40 p.m.)

21 STAFF COUNSEL WEAVER: Mr. Weaver has a statement.

22 STAFF COUNSEL WEAVER: So just a couple
23 housekeeping items. We're proposing to enter three
24 documents into the record as staff exhibits. The first is
25 the current email retention policy for the Division of Water

1 Rights. The second and third are cover letters sent to
2 Counsel for BBID and WSID accompanying the January 20th,
3 2016 disclosure under the Public Records Act request that
4 those water agencies filed with the Board.

5 MR. TAURIAINEN: I have a request as a member of
6 the Prosecution Team in those matters, that the Prosecution
7 Team could be copied on that disclosure.

8 STAFF COUNSEL WEAVER: I think that would not be
9 germane to this proceeding.

10 MR. TAURIAINEN: Okay. Understood.

11 CO-HEARING OFFICER D'ADAMO: All right. Moving
12 forward with cross-examination, Turlock Irrigation District,
13 do you have any cross-examination?

14 MS. BRATHWAITE: Yes. Actually, this is Anna
15 Brathwaite from Modesto Irrigation District. I'll be asking
16 the questions on behalf of both Modesto and Turlock.

17 CO-HEARING OFFICER D'ADAMO: Okay.

18 MS. BRATHWAITE: And --

19 CO-HEARING OFFICER D'ADAMO: Would you like to --
20 would you like to step up?

21 MS. BRATHWAITE: Thank you. Sorry about that.
22 And I'd like to just direct the questions to Ms. Mrowka.

23 And we just wanted to have one or two issues just
24 mildly clarified, and we thought you could assist.

25 CROSS-EXAMINATION

1 BY MS. BRATHWAITE:

2 Q. And I am looking at Exhibit WR-75. And I am at
3 Exhibit C. And this is the Permit 20784. So that was WR-
4 75.

5 MR. PETRUZZELLI: Which binder are you referring
6 to?

7 MS. BRATHWAITE: I only had one binder. But this
8 is the Prosecution Team's --

9 (Off mike commentary.)

10 BY MS. BRATHWAITE:

11 Q. Oh, perfect. I can see you have it, Ms. Mrowka.
12 That's it.

13 A. (Ms. Mrowka) Okay.

14 Q. And then we were in Exhibit C, at Permit 20784.
15 And I was hoping just to again have you maybe clarify a
16 little bit, and perhaps read Term 17 into the record.

17 A. Certainly. Term 17 states, "This permit is
18 subject to prior rights. Permittee is put on notice that
19 during some years water will not be available for diversion
20 during portions or all of the season authorized herein. The
21 annual variations in demands and hydrologic conditions in
22 the San Joaquin River Basin are such that in any year of
23 water scarcity the season of diversion authorized herein may
24 be reduced or completely eliminated on order of this Board
25 made after notice to interested parties and opportunity for

1 hearing."

2 Q. Great. Thank you. And again, you were -- you
3 were discussing part of that a little bit earlier in, I
4 believe --

5 A. Yes.

6 Q. -- Term 17. Yes. Great.

7 And just maybe one more clarification. Under
8 Exhibit S in that -- that same packet, and this is a
9 memorandum.

10 A. Yes. Uh-huh.

11 Q. Great. And maybe moving to the second page, and
12 then the second full paragraph starting with the words,
13 "Therefore," would you be so kind as to perhaps read that
14 into the record to clarify?

15 A. Yes. "Therefore, with this experience behind,
16 when Mr. Fahey submitted a new application, X3488, he
17 included the statement under penalty of perjury that the new
18 application shall be conditional upon and subject to the
19 terms and conditions of the previous agreements: One,
20 agreement dated December 12th, 1992 between G. Scott Fahey
21 and the TID and MID, and as innumerated by the State Water
22 Resources Control Board Division of Water rights, Permit
23 Number 20784, Item 19; two, conditions 1, 2(a), 2(b), 2(c),
24 2(d) and 2(e) within the City of San Francisco letter dated
25 December 19th, 1994, and as innumerated by the State Water

1 Resources Control Board Division of Water Rights, Permit
2 20784, Item 20."

3 MS. BRATHWAITE: I have no further --

4 MR. HANSEN: (Off mike.) Excuse me one second.
5 What exhibit?

6 MS. BRATHWAITE: It was WR-75. It was Exhibit S
7 as in Sam.

8 MR. HANSEN: Thank you.

9 MS. BRATHWAITE: I have no further questions.
10 Thank you, Ms. Mrowka.

11 CO-HEARING OFFICER D'ADAMO: All right. Thank
12 you.

13 Now we'll move on to redirect testimony from the
14 Prosecution Team.

15 (off the record discussion.)

16 CO-HEARING OFFICER D'ADAMO: All right. City and
17 County of San Francisco. Okay.

18 Modesto Irrigation System, I'll just double check.

19 MS. BRATHWAITE: No, no further questions.

20 CO-HEARING OFFICER D'ADAMO: Okay. You have
21 questions. All right.

22 CROSS EXAMINATION BY HEARING TEAM

23 BY STAFF COUNSEL WEAVER:

24 Q. So I have a question for Sam Cole, and this is
25 about PT-13, and specifically paragraph 20 which is on page

1 4. So it's Exhibit PT-13, paragraph 20, page 4.

2 A. (Mr. Cole) Okay.

3 Q. So I just want to ask about the third sentence
4 that reads, "I explained that the letter did not lift
5 curtailment but revised the language, changing it from an
6 order to a notice of water unavailability."

7 To me this reads a bit like either a legal
8 conclusion or a policy conclusion. So I just wanted to make
9 sure I understand the role in which you work for the State
10 Water Board.

11 You're a Water Resources Control Engineer;
12 correct?

13 A. Yes.

14 Q. And your rank and file under Civil Service Law?

15 A. Correct.

16 Q. Okay. Do you -- has the authority to make this
17 kind of law and policy conclusion been delegated to you?

18 A. No.

19 Q. So this is -- this is basically your personally
20 opinion, but it's not any kind of decision or order --

21 A. It was the way that it was explained to me.

22 Q. -- of the Board?

23 A. Yeah. It was the way that it was explained to me.

24 Q. Got it. Thank you.

25 MR. MONA: Hi. This is for Ms. Mrowka.

1 BY MR. MONA:

2 Q. Ms. Mrowka, issue three of the notice states, "In
3 determining the amount of civil liability the State Water
4 Board must take into consideration all relevant
5 circumstances."

6 So I was just -- there's a couple of circumstances
7 listed, and two of which I think the record needs a little
8 more clarification. Can you provide a summary of what the
9 extent of harm has been caused by Fahey's alleged
10 unauthorized diversions?

11 A. (Ms. Mrowka) Yes. Mr. Fahey, being post-1914
12 water right, by his diversion, that amount of water was not
13 available to others. And so we saw an inability of some
14 downstream parties to use water this year. We had, you
15 know, parties that received notices of shortage. And when
16 somebody uses water, you know, it can affect those other
17 parties who had to cut off their water use. There's no
18 water. You know, to the whole class that received the
19 notice of shortage, there's no water. And so when somebody
20 uses water, then the parties that didn't receive the notice
21 of shortage, they have a shortfall.

22 So, for instance, if somebody in an upper
23 watershed diverts water the party -- the physical water
24 isn't there for the parties that weren't subject to the
25 notice of curtailment. The physical water is missing

1 because someone that was subject to the notice took water.
2 And so it effects the people that still had the ability to
3 divert because they didn't receive the notice of shortage.

4 Q. Okay. Thank you. And finally, do you know of any
5 corrective actions that -- that have been taken by Fahey
6 since the issuance of the ACL?

7 A. I'm unaware of any.

8 MR. MONA: Thank you.

9 CO-HEARING OFFICER D'ADAMO: All right. Any
10 further Staff questions?

11 MR. BUCKMAN: Michael Buckman, Hearing Unit Chief.

12 This is for Kathy probably, but whoever is most
13 qualified to answer.

14 BY MR. BUCKMAN:

15 Q. Why exactly was the ACL issued in 2015 as opposed
16 to 2014, after this had potentially been going on for a
17 year? And according to the testimony you had already
18 received Mr. Fahey's form that he had filled out, reflecting
19 his current diversions.

20 A. (Ms. Mrowka) Yes. On our enforcement case
21 development one of our focuses is that we try to do the site
22 inspection. And as was testified to here today, we had a
23 lot of hindrances to doing site inspection at the Fahey
24 site, particularly with not being able to schedule in 2015.
25 Now in 2014, you know, we received this information in the

1 form of the progress reports that he was still diverting.
2 We didn't feel a need to, you know, do a site inspection in
3 2014 for that type of confirmation. But then when we were
4 trying to confirm the facts of the case in 2015 we were
5 receiving these, you know, no, don't come to my site until
6 September, don't come and don't do this.

7 And so what we were faced with at that point was a
8 party who was -- you know, we had reason to suspect he's
9 diverting. He diverted in 2014. And it got to be an
10 aggregarious (phonetic) where we had a continuous diversion-
11 type situation. So at that point we were looking at whether
12 it would be appropriate to do an enforcement action.

13 CO-HEARING OFFICER D'ADAMO: All right? We'll
14 proceed with redirect testimony, the Prosecution Team.

15 REDIRECT TESTIMONY BY PROSECUTION TEAM

16 BY MR. PETRUZZELLI:

17 Q. Mr. LaBrie, has Mr. Fahey provided any records to
18 us regarding his bypass flows?

19 A. (Mr. LaBrie) Yes, in --

20 Q. And how did he provide that information?

21 A. In response to the information order. He --

22 Q. And did -- oh, I'm sorry.

23 A. He provided a table with bypass information for
24 2014 and 2015.

25 Q. And did you have an opportunity to review that

1 information?

2 A. Yes, I did.

3 Q. And did his report of bypass flows, are you
4 familiar with his bypass flow requirement and his permits?

5 A. I am.

6 Q. Okay. And did his reported bypass flows comply
7 with his permit requirements?

8 A. Based on the information that he reported it
9 showed -- it appears that he was not in compliance with the
10 bypass term --

11 Q And in what --

12 A. -- most of the time.

13 Q. Okay. And in what manner?

14 A. He reported bypass amounts in what appears to be
15 average monthly rate of flow. His bypass requirement under
16 his second permit is to bypass five gallons per minute from
17 each point of diversion. And the information that he
18 provided indicates less than a total of 10 gallons per
19 minute in 9 out of the 11 months that he reported.

20 Q. Okay. Thank you.

21 Mr. Coats, I think you testified that attorney --
22 that emails, that legal email is indefinitely retained. Is
23 that all email of a legal nature or just email that goes to
24 attorneys?

25 A. Email that just goes to attorneys.

1 Q. And this is maybe a better panel question, but can
2 somebody on the panel please maybe explain for the record
3 retention policy? As a general matter, how long does Line
4 Staff retain email?

5 A. (Ms. Mrowka) Line Staff retains email for 90
6 days, and it's not discretionary on the part of the staff.
7 The email simply is no longer available on the server.

8 Q. Okay. And does Line Staff at that point have
9 access to those deleted emails?

10 A. No. And so that's why we instruct Staff to make
11 sure and print out hardcopies of materials that we need for
12 the files.

13 Q. Okay. And when you say "that we need for a file
14 -- "the materials we need for the files," does that include
15 investigation files?

16 A. Yes, as far as, you know, a lot of Staff materials
17 go into those files. However, some communication is
18 privileged and doesn't go into public file.

19 Q. Okay. And what kind of emails would -- do go
20 into, say an investigation file?

21 A. We would typically put in emails that relate to
22 diversions such as truck traffic, things like that. For a
23 bottled water company it might be regarding who the sellers
24 of the water are, like if it's Crystal Geyser or something
25 like that, you know, the companies that bottle the water.

1 Q. But if it's anything substantive to an
2 investigation it would go in the file; correct?

3 A. If it's -- yes, that's correct.

4 Q. Okay. So, you know, even though that email has
5 been deleted from that Staff person's, you know, personal
6 email account, it hasn't been deleted in the sense that it's
7 gone from the investigation file?

8 A. No. Staff is always reminded to please print out
9 materials that are relevant to their inspections and put
10 those inspection materials in the files.

11 Q. Okay. Thank you.

12 And Kathy or John, maybe this is a good question
13 for you, when there were responses to the curtailment
14 certifications and a person checked other, who -- were there
15 any exceptions granted for people who claimed that they had
16 an exception, like checking the "other" box?

17 A. (Ms. Mrowka) So under the delegations of
18 authority the only party that can grant an exception is Tom
19 Howard. And so when we had -- we had a number of folks that
20 checked the other box. When we went out on the Staff
21 inspections, and there were 1,200 of those in 2014 and about
22 1,325 of those in 2015, Staff would review all the materials
23 that were relevant to their inspection, and that included
24 looking at those forms, seeing what other claim they had. A
25 lot of the time we look at the other claims in order to

1 determine whether we should send that party to our Division
2 of Drinking Water for checking to make sure about
3 enforcement. Because Division of Drinking Water handled the
4 claims for those parties that were under their jurisdiction.

5 So we used that very actively, that box, to decide
6 which division should look at the matter, and also as we did
7 our field investigation work.

8 Q. But ultimately only Tom Howard had the authority
9 to issue an official exemption?

10 A. It was not delegated to anyone below his level.

11 Q. Okay. So say for instance, you know -- you know,
12 Mr. Coats, Mr. LaBrie, neither of them could have told, you
13 know, Mr. Fahey, you're exempt, and it would have been an
14 official exemption?

15 A. No.

16 Q. Okay.

17 And, Mr. Coats, very briefly, was there a separate
18 analysis, water availability analysis done for the Tuolumne
19 River?

20 A (Mr. Coats) Yes, there was.

21 Q. And what would it have shown in relationship to
22 Mr. Fahey?

23 MR. HANSEN: I object on the grounds that if this
24 testimony is based on documents that we have not been
25 received, it's expert testimony that fits perfectly within

1 the Board's determination last Thursday morning. And if
2 this expert testimony is based upon a document not been
3 produced to on a water availability analysis, therefore
4 there's no credibility to this testimony. And that appears
5 to be what's happening right now.

6 CO-HEARING OFFICER D'ADAMO: Do you have response,
7 Mr. Petruzzelli?

8 MR. PETRUZZELLI: We can -- we can put that
9 document in the record.

10 CO-HEARING OFFICER D'ADAMO: But it's not already
11 in the record?

12 MR. PETRUZZELLI: It is not already in the record.

13 CO-HEARING OFFICER D'ADAMO: Well, unless Mr.
14 Hansen agrees to allow it in, I'm going to have to sustain
15 the objection.

16 MR. PETRUZZELLI: Okay. Thank you.

17 CO-HEARING OFFICER D'ADAMO: Okay.

18 BY MR. PETRUZZELLI:

19 Q. Ms. Mrowka, do we have any -- do Mr. Fahey's
20 permits include a storage right?

21 A. (Ms. Mrowka) No, they do not.

22 Q. And what would a storage right mean?

23 A. A storage right would mean that you have a
24 reservoir facility and you're entitled to seasonally store
25 water.

1 Q. Okay. And seasonal -- and what does seasonal
2 storage mean?

3 A. It means a collection, a time of plenty for use at
4 a time when there is insufficient otherwise.

5 Q. Okay. So that -- that would actually mean putting
6 water -- putting water in the reservoir in one year and then
7 diverting that water out of the reservoir in a subsequent
8 year?

9 A. Or during the same year, basically. Most of the
10 reservoir facilities are operated based on winter storage
11 and continual year-round use for -- if you were domestic.
12 If you were irrigation you'd typically see the water used
13 during the irrigation season.

14 Q. Okay. But absent some kind of storage right you
15 couldn't put water into a reservoir and draw on it in a
16 later season?

17 A. No.

18 Q. Okay.

19 A. No, you would not be able to.

20 Q. Does -- did Mr. Fahey's permits modify in any way
21 the water rights of TID, MID or CCSF with regard to New Don
22 Pedro Reservoir?

23 A. No. As I explained, an exchange agreement is
24 essentially like a water transfer. In a water transfer
25 you're not receiving any portion of the other party's water

1 rights. All you're receiving is a portion of water.

2 Q. So in -- so where Term 20 and Term 34 state that
3 Mr. Fahey may be credited with that water, it would not
4 include a right to storage that water and use it in a
5 subsequent season?

6 A. No, he would not have that right.

7 Q. Okay. However, is it correct that those two terms
8 were intentionally drafted to provide flexibility on the
9 part of CCSF and Mr. Fahey in developing their own
10 management arrangements for accounting?

11 A. Yes. It's our understanding --

12 Q. Okay.

13 A. -- that the accounting is difficult at the
14 facility, and we wanted to provide the maximum leeway we
15 could.

16 Q. Okay. But that specifically wasn't -- but that
17 specifically wasn't provided in the terms?

18 A. The storage right or -- I don't know what you're
19 asking.

20 Q. I'm sorry. I will rephrase. But -- but the term
21 specifically did not permit storage?

22 A. No. The term does not speak to that.

23 Q. Okay. And did the exchange agreement with TID and
24 MID grant Mr. Fahey any interest in their water rights?

25 A. No, it does not.

1 Q. And that would include water rights to store water
2 in New Don Pedro?

3 A. Yes.

4 Q. Ms. Mrowka, do you recall a letter that the City
5 and County of San Francisco submitted in association with
6 the application for the second permit? I believe it is Mr.
7 Fahey's Exhibit Number 14.

8 A. I do recall.

9 Q. And -- and in that letter does CCSF essentially
10 explain how Mr. Fahey could harm their water rights?

11 A. Yes, it does. They had done the calculations and
12 they had made that determination.

13 Q. Okay. So if Mr. Fahey did not comply with Terms
14 20 and 34 he could harm their water rights?

15 A. According to the materials we received from these
16 parties.

17 Q. Thank you. Kathy -- or Ms. Mrowka, Mr. Fahey
18 asked you about groundwater earlier. Was it correct that
19 that was part of the discussion with regarding to Mr.
20 Fahey's second permit?

21 A. Yes. I had questions regarding the topic because
22 percolating groundwater is generally not subject to our
23 permitting jurisdiction.

24 Q. Now, can you explain the jurisdiction of the Water
25 Board with regards to groundwater?

1 A. Yes. As far as groundwater is concerned it's only
2 those groundwaters which are part of a subterranean stream
3 flowing through known and definite channels which are
4 subject to our permitting jurisdiction.

5 Q. Now what about percolating groundwater that comes
6 out of the ground and forms a defined stream or channel?

7 A. We excerpt jurisdiction on that water as it's in
8 the channel.

9 Q. Okay. So given that there was a discussion about
10 groundwater in -- when the Board considered granting Mr.
11 Fahey's second permit, this was an issue the Board was aware
12 of?

13 A. Yes.

14 Q. And it was considered when the Board granted his
15 permit?

16 A. Yes. I was made aware of the fact that there is a
17 section of law pertaining to springs on federal lands that
18 say that such springs are subject to appropriation.

19 Q. And are -- can rights to those springs be obtained
20 by methods other than appropriation?

21 A. I did not see any text regarding that. I was
22 informed that they were subject to appropriation.

23 Q. Okay. And in Mr. Fahey's applications did he
24 state that the springs are tributaries ultimately to the
25 Tuolumne River?

1 A. Yes, he did. And you can see that, especially on
2 his water availability analysis work where he shows that the
3 stream flow is diminished by the quantity he diverts, even
4 as you progress downstream from the point of diversion.

5 Q. And for reference, is that analysis the attachment
6 to Mr. Grunwald -- Dr. Grunwald's testimony?

7 A. Yes, it is.

8 Q. Okay. Is -- and I'm not sure who is best to
9 answer this. Is evidence of harm necessary in -- for an
10 unauthorized diversion ACL? For instance, would we have to
11 show that a specific water right holder is deprived of water
12 they would otherwise divert?

13

14 A. We do evaluations that don't have to take that
15 into consideration. When we're looking at, like in this
16 instance, the fact that there was insufficient water to
17 serve the various priorities of water rights, we don't need
18 to necessarily identify the specific party who is hurt by
19 the fact that there is not enough water. We're looking at
20 within the watersheds. We separate and analyze San Joaquin
21 River Watershed, which is where this one is located, and we
22 looked at, you know, is there sufficient water in this
23 drought year to serve the priorities of right. It's not a
24 harm evaluation. It's an evaluation of water shortage. So
25 it doesn't name the particular party, but it identifies the

1 priorities of rights that were harmed.

2 Q. Okay. So -- so if a lower priority water user
3 diverts water that they are not entitled to divert under
4 their priority, is there essentially a presumption that they
5 harm all of the other water users below -- above them in
6 priority?

7 A. They would because the water physically would be
8 removed from the stream and that's -- the loss of the
9 physical water supply would harm.

10 Q. And, Ms. Mrowka, between Mr. Fahey's two permits,
11 is it correct that they include Standard Terms 80, 90 and
12 92?

13 A. Yes, it is.

14 Q. And can you briefly explain in the broader sense
15 what these terms are supposed to do?

16 A. Yes. They look to the watersheds as to impacts to
17 -- throughout the watersheds on water diverters.

18 Q. Okay. And do they look downstream to the delta?

19 A. They do.

20 Q. Okay. And are they included to protect senior
21 users and beneficial uses in the delta?

22 A. They are certainly to protect the senior users.

23 Q. Okay. And that's below New Don Pedro Dam;
24 correct?

25 A. That is correct.

1 Q. Okay. So the State Board included those terms in
2 Mr. Fahey's permits to protect senior users and -- senior
3 water rights and beneficial uses downstream in the Delta?

4 A. Correct.

5 Q. Even though they're below Don Pedro?

6 A. Correct. So --

7 Q. Because when we look at water availability we
8 don't consider a dam as, you know, as the reason not to look
9 throughout the watershed at the various priorities of right.
10 When you stop to think about it, the priorities of right in
11 a watershed are interspersed and we have to consider all of
12 them. And the fact that there is a dam or isn't a dam isn't
13 how you do a water availability analysis. It's based on the
14 quantities assigned to each, the priorities of right holder.
15 So you have to look at all the priorities and all the
16 assignments of water.

17 Q. So putting up New Don Pedro Reservoir didn't just
18 cut off the upper and the lower Tuolumne River from the
19 delta?

20 A. No. The significance of the facility is that it
21 has specific water rights assigned to it and specific
22 priorities that it is operated under. And so when we do our
23 evaluation work we simply look at those priorities and those
24 water rights. But there are other priorities, such as
25 riparian, that are senior downstream that we also have to

1 look at when we're going to look at the complete picture on
2 water availability.

3 Q. Thank you.

4 Mr. LaBrie, do you recall Mr. Fahey's letter of
5 June 3rd, 2014?

6 A. (Mr. LaBrie) I do.

7 Q. And in that letter did he state that any water he
8 had stored in New Don Pedro would be lost if New Don Pedro
9 had spilled?

10 A. Yes, he did.

11 Q. And has New Don Pedro spilled?

12 A. It's my understanding that it --

13 Q. Actually, Mr. Coats, has New Don Pedro spilled?

14 Excuse me, Mr. Cole?

15 A. (Mr. Cole) Yes. I contacted Wes Monier with the
16 Turlock Irrigation District who is responsible for water
17 accounting and forecasting and New Don Pedro Reservoir. And
18 he indicated that the -- while the reservoir -- it doesn't
19 operate in a typical fashion of spilling passively over the
20 spillway. If that were to happen it would -- it would -- it
21 only happened once in 1997 and that wiped out the road
22 below. So they operate in a manner that incorporates active
23 pre-flood releases, and that took place. The reservoir was
24 operated in that manner from November 27th, 2010 through
25 September 11th, 2011.

1 Q. Okay. Thank you. And did you create a record of
2 that communication?

3 A. I did.

4 Q. I would like to submit into evidence, I believe it
5 is -- we intended it as a rebuttal exhibit, but we have it
6 identified as Rebuttal 1. It is a record of Mr. Cole's
7 communication --

8 MR. HANSEN: We object to that --

9 MR. PETRUZZELLI: -- with the TUD.

10 MR. HANSEN: -- document, not having ever been
11 brought into this litigation. And apparently we don't even
12 know from the testimony when this conversation took place,
13 if it took place prior to when we should have had the
14 documents. We object to the admissibility of that and the
15 testimony that is based upon that.

16 MR. PETRUZZELLI: There is, however, an email from
17 Mr. Fahey to TUD in 2011 indicating that he does not need to
18 purchase water because New Don Pedro is being operated to
19 avoid overflow. The purpose of this rebuttal evidence is,
20 in part, to confirm that communication by Mr. Fahey.

21 CO-HEARING OFFICER D'ADAMO: All right. I'm going
22 to overrule the objection and allow it in, just in the
23 interest of time. It's rebuttal evidence. But in the
24 interest of time we're going to go ahead and allow it in.

25 MR. PETRUZZELLI: Thank you. And I believe that

1 is all of the questions that I have.

2 CO-HEARING OFFICER D'ADAMO: All right. All
3 right. Now we're going to move on. Recross Examination.
4 So let's start with Mr. Fahey's team.

5 Mr. Hansen?

6 RECCROSS EXAMINATION

7 BY MR. HANSEN:

8 Q. I think, Mr. LaBrie, you mentioned that you looked
9 at records with regards to bypass flows; is that correct?

10 A. (Mr. LaBrie) Yes.

11 Q. Okay. Were those records you looked at, did they
12 indicate to you where those bypass flows were being
13 measured?

14 A. No.

15 Q. If those bypass flows were being measured at the
16 tank rather than the springs themselves, would that change
17 potentially the analysis of where the bypass flows were for
18 purposes of Mr. Fahey's permit at the springs themselves?

19 A. Yes. I believe that the permit term specified
20 that the bypasses are to be made at the point of diversion.

21 Q. Ms. Mrowka, you talked about people who had marked
22 the "other" box on that form; do you recall that testimony?

23 A. (Ms. Mrowka) Yes.

24 Q. And then you had also mentioned something about
25 1,200 and 1,300. And I wanted you to clarify here. Are you

1 saying that it was 1,200 or 1,300 site inspections or number
2 of people who had marked the box "other?"

3 A. Site inspections or 2014 and 2015.

4 Q. Okay. And then do you know how many people marked
5 the box "other" in 2014?

6 A. I would have to look at the records to tell you
7 that.

8 Q. Or how many marked the box "other" in 2015?

9 A. Again, I'd have to look at the records to state
10 that.

11 Q. You mentioned that any exceptions could only be
12 granted by Tom Howard; is that correct?

13 A. That is correct.

14 Q. Was Tom Howard ever made aware of Mr. Fahey's form
15 in which he marked the box "other?"

16 A. No.

17 Q. Is there a reason why?

18 A. Yes. Because Staff reviewed the information that
19 was submitted, and in conjunction with the 2015
20 investigation efforts to go out on site, and informed me
21 about the box and the, you know, the status of the
22 investigation and what had been going on. And I did not
23 feel that there was a reason to further that to a higher
24 level of review.

25 Q. At that moment when you made that decision did

1 anybody contact Mr. Fahey that that decision had been made?

2 A. Sam Cole talked to him directly.

3 Q. Mr. Cole, did you ever tell Mr. Fahey directly
4 that a decision had been made that we're not forwarding his
5 information on to the person who could grant an exception?

6 A. No, I did not tell him that the information was
7 not forwarded. Is that your question?

8 Q. Yes. Then at that point how was Mr. Fahey to know
9 that the Board was not going to grant that exception that he
10 had indicated he believed he had 14 months earlier?

11 A. You're asking me -- could you repeat the question
12 again?

13 Q. Yeah. If you did not tell him that the
14 information was not being forwarded or that some,
15 apparently, some Staff decision had already been made on his
16 exception, how was he supposed to know that that decision
17 had been made that, apparently by default, there was going
18 to be no exception granted?

19 MR. PETRUZZELLI: Objection; hypothetical. Calls
20 for speculation by the witness.

21 CO-HEARING OFFICER D'ADAMO: Overruled.

22 MS. MROWKA: I'd like to address that question.
23 The only --

24 MR. HANSEN: That's not how the procedure works
25 here, when it's directed to one person and someone else

1 wants to jump in.

2 So this is your ball, not mine.

3 CO-HEARING OFFICER D'ADAMO: Well, I think if Mr.
4 Cole is not able to answer the question, it's up to you if
5 you want to ask another --

6 MR. HANSEN: Okay. Fair enough.

7 CO-HEARING OFFICER D'ADAMO: -- participant.

8 MR. HANSEN: Thank you. Appreciate that.

9 BY MR. HANSEN:

10 Q. Ms. Mrowka?

11 A. (Ms. Mrowka) Yes. So the letters that were sent
12 out with respect to water shortage in 2014 and 2015 stated
13 that if you had a reservoir and you had stored it previously
14 outside of the season of unavailability, you could continue
15 to use that water.

16 Now, Mr. Fahey does not own such a reservoir. And
17 so when I looked at his information that was submitted to
18 the staff I noted that he does not own such a reservoir.
19 Mr. Fahey should have been aware he does not own such a
20 reservoir.

21 So I asked Staff to please convey to Mr. Fahey
22 that we did not feel that, you know, his use was authorized.

23 Q. Mr. Cole, is that what you told Mr. Fahey?

24 A. (Mr. Cole) I did.

25 Q. Ms. Mrowka, if you could turn to Fahey Exhibit 55?

1 That is the Permit 21289, Term 34. You testified that the
2 permit here for Mr. Fahey does not give him storage rights.

3 A (Ms. Mrowka) Correct.

4 Q. But doesn't he have the right to, in the second
5 paragraph in 34, "Replacement water may be provided in
6 advance and credited to future replacement water
7 requirements?"

8 A. That's a mathematical accrediting. Yes.

9 Q. So he is allowed to do that then?

10 A. Water credits doesn't mean ownership or operation
11 ability at a facility.

12 Q. Well, what if that was done through exchange water
13 under and exchange agreement?

14 MR. PETRUZZELLI: Objection; calls for
15 hypothetical.

16 MR. HANSEN: That's exactly what happened here.
17 It's not the hypothetical.

18 CO-HEARING OFFICER D'ADAMO: Yeah. I'm going to
19 allow it in.

20 MS. MROWKA: So what's your question sir?

21 BY MR. HANSEN:

22 Q. Well, what if the replacement water is provided,
23 as if from an exchange contract, and it's therefore added as
24 a credit for exchange, isn't that permissible?

25 MR. PETRUZZELLI: Compound question.

1 CO-HEARING OFFICER D'ADAMO: Sustained.

2 Rephrase. Rephrase your question.

3 BY MR. HANSEN:

4 Q. Isn't it possible under this agreement that
5 replacement water, for purposes of that provision, can be
6 done through an exchange agreement?

7 A. (Ms. Mrowka) Under the permit term it does allow
8 exchange agreements.

9 Q. In your understanding, what is the difference
10 between a water -- a water transfer versus a water exchange?

11 A. In a water transfer, generally water is going from
12 a seller to one or more purchasers. In a water exchange
13 somebody else also receives water. So there's two parties
14 receiving water in the exchange, where in the, you know, in
15 the transfer you generally see one party moving water off to
16 others. So they're -- they're very similar as far as how
17 they operate.

18 Q. Is there any difference between an exchange during
19 the FAS period and an exchange during the curtailment
20 period?

21 A. The letters on water shortage did not provide that
22 an exchange was a valid means to continue exercising the
23 rights. Because the problem there is that the priority of
24 the right, there's no water to serve it in the water
25 shortage period. So there is -- there's nothing to operate.

1 You can't operate the internal terms of the right. There's
2 nothing to operate under the entirety of the right.

3 Q. Did the curtailment notice prohibit that?

4 A. The curtailment notice actually is a water
5 shortage notification and it says there's no water under
6 various priorities of right because the water supply is
7 inadequate.

8 Q. You had testified that, well, the harm here could
9 be that the water is simply not available to water users
10 downstream of NDPR; do you recall that testimony?

11 A. Yes.

12 Q. Okay. But if there is water in NDPR that Mr.
13 Fahey had placed there as a credit for future water
14 replacements, so that water is there, how is it possible
15 then that downstream users could in any way be harmed by the
16 water he diverted that's fully covered by that replacement
17 water?

18 MR. PETRUZZELLI: Vague, compound question, calls
19 for hypothetical.

20 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, could you
21 rephrase your question?

22 MR. HANSEN: Absolutely.

23 BY MR. HANSEN:

24 Q. If water is in NDPR, under the provision there in
25 Term 34 that replacement water may be provided in advance,

1 and that water covers Mr. Fahey's diversions during
2 curtailment, then how is it possible for any downstream
3 water right user to be harmed by his diversions?

4 A. (Ms. Mrowka) It's my understanding that the water
5 was no longer resident in the facility. As you heard Mr.
6 Cole testify, there were events, spill events. The water
7 was not there, number one. The water, also, once it is --
8 flows into the facility isn't under the control of Mr. Fahey
9 anymore. It's simply under the control of the right holder
10 for the facility. So at that point Mr. Fahey has no ability
11 to do anything regarding that water.

12 If there a credit sheet, that's between these
13 parties, that's one thing. That's just the mathematical
14 calculations of credits. But the water itself is -- it's
15 not subject to Mr. Fahey's control.

16 Q. But aren't -- but isn't the Prosecution Team here
17 asking for administrative penalties under 1055.3 for the
18 harm created, in part by Mr. Fahey's diversions?

19 A. Yes.

20 Q. And if he has no control then over what water
21 leaves that reservoir from the water that was then provided
22 as a credit for future replacement, and he has no control
23 over that, then how could he be responsible for any
24 downstream water user that may be injured because the water
25 is still there out of his control?

1 A. The -- in my opinion, the water isn't there. We
2 had the spill events. We had the exchange agreement terms
3 which require annual replacement of water. The water would
4 have long since been gone because of the annual replacement.
5 These terms do not require anybody to call for the water.
6 The exchange agreement term is because of the Fully
7 Appropriated Streams Declaration. It says that you have to
8 offset the water you use. He would have long since pulled
9 down that water just in service of the exchange agreement.
10 I don't believe there was water at the start of the drought.

11 Q. Have you ever undertaken a formal analysis of the
12 water that he had wheeled in there versus his diversions to
13 give us this testimony you just gave?

14 A. I had Staff conduct the technical work for me.

15 Q. Okay.

16 I have a question about this spill testimony that
17 was asked. Did the water actually ever spill as you have
18 testified, I believe, Mr. Cole?

19 A. (Mr. Cole) According to Wes Monier with Turlock
20 Irrigation District the reservoir was operated in that
21 manner. Yes, the water spilled.

22 Q. Or did he tell you that the reservoir was being
23 operated in anticipation of a potential spill and then
24 actually never did spill?

25 A. I clarified that point with him. Again, the

1 reservoir is not designed to passively spill. That is
2 reserved for emergency situations only. And it happened
3 once in 1997, as I mentioned. It wiped out the roadway
4 below. In light of that, New Don Pedro is operated in a
5 manner by monitoring the water flowing into it from the
6 watershed above, and among several other things that they
7 take into account. And then they release the waters in a
8 pre-flood manner to prevent spilling.

9 Q. So what you've testified to is that it is
10 impossible then for a spill event to occur for purposes of
11 this spill language; isn't that true?

12 A. It's impossible for a passive spill to occur,
13 correct.

14 Q. And there --

15 A. But the reservoir had spilled.

16 Q. And in your case you do not have any testimony
17 that it actually did spill; isn't that correct?

18 A. I believe this was entered into testimony.

19 MR. HANSEN: I object on the grounds that it was
20 nonresponsive.

21 CO-HEARING OFFICER D'ADAMO: Well, if you could
22 answer the question.

23 MR. HANSEN: The struggle that we're having --

24 CO-HEARING OFFICER D'ADAMO: It's okay, just
25 answer.

1 MR. HANSEN: -- with the Hearing Officers here is
2 that there is testimony now that is brand new that we have
3 not seen before with no opportunity to be able to have some
4 kind of a third party subpoenaed to be able to challenge
5 what Mr. Cole had said, and it was never in his written
6 testimony. So I do object to all the testimony about the
7 spill aspects. And let the record reflect that.

8 CO-HEARING OFFICER D'ADAMO: So noted.

9 BY MR. HANSEN:

10 Q. Mr. Cole, how much water spilled in your
11 testimony, spilled?

12 A. (Mr. Cole) I do not know that specific
13 information. I was given an example by Wes Monier of an
14 example date on April 20th, 2011. New Don Pedro was
15 releasing 7,330 CFS while the minimum in-stream FAS required
16 releases were only 300 CFS.

17 Q. So you cannot tell us how much water Mr. Fahey had
18 wheeled into NDPR as replacement water in advance and credit
19 to future water replacement requirements that actually
20 spilled, can you?

21 A. My understanding is that if the reservoir spills
22 at all, then any credits or any water that Mr. Fahey had put
23 into New Don Pedro would not be available.

24 Q. But you don't know how much, do you?

25 A. How much of Mr. Fahey's water spilled out of --

1 Q. Correct.

2 A. I did not directly measure it.

3 That said, however, at 7,330 CFS, if it was
4 spilling for one day that would have easily released more
5 than Mr. Fahey put into storage.

6 Q. Do you know how much other water was put into
7 storage that would have fallen within those spill situations
8 --

9 A. I believe --

10 Q. -- in your estimation of spill?

11 A. I'm sorry. Say that again. How much other water?
12 I believe Mr. Fahey had stated that his water floated on
13 top, and so it was the first -- first out.

14 Q. Again, I go back to your testimony. I'm trying to
15 make it clear because now I'm confused. Did you -- are you
16 testifying that the water, based upon what someone else told
17 you, that the water did spill, in fact, or that it was
18 released in anticipation of spilling, and therefore did not
19 actually spill?

20 A. My testimony is that according to Wes Monier of
21 Turlock Irrigation District who is responsible for handling
22 the water accounting and forecasting for New Don Pedro
23 Reservoir, when I asked him that question he explained to me
24 that the reservoir did spill.

25 Q. I thought you just testified that they're not

1 allowed to let it spill?

2 CO-HEARING OFFICER D'ADAMO: Do you want to
3 clarify what you just said?

4 MR. COLE: It was operated in anticipation of a
5 spill by using -- incorporating active pre-flood releases
6 because there was more inflow than the reservoir could
7 handle. And the reservoir is not designed to spill
8 passively, so it has to be operated in this manner.

9 BY MR. HANSEN:

10 Q. But didn't you testify that it's impossible for a
11 passive spill to occur?

12 A. (Mr. Cole) It is not impossible. It is avoided.

13 Q. Oh. So they did not let it spill then?

14 A. They did not let it passively spill, correct?

15 Q. So there was no spill?

16 A. There was no passive spill over the reservoir.

17 MR. HANSEN: No further cross examination.

18 CO-HEARING OFFICER D'ADAMO: All right. Let's go
19 to the other parties.

20 Ms. Brathwaite, were you going to handle any
21 questions on recross for both districts?

22 MS. BRATHWAITE: Could you just give us --

23 CO-HEARING OFFICER D'ADAMO: Certainly.

24 We're going to take a five-minute break, give you
25 some time, give us some time.

1 (Off the record at 2:35 p.m.)

2 (On the record at 2:52 p.m.)

3 MS. BRATHWAITE: We don't have any questions on
4 cross. Thank you.

5 CO-HEARING OFFICER D'ADAMO: Oh, all right.
6 Nothing further. Okay.

7 MR. HANSEN: If I may once again --

8 CO-HEARING OFFICER D'ADAMO: The city?

9 MR. HANSEN: -- we want to restate our objection
10 to the testimony of Mr. Cole about the spill. I believe he
11 was testifying from a document that we have never seen.

12 CO-HEARING OFFICER D'ADAMO: Correct. And your
13 objection is noted, and we will be taking this matter under
14 submission. Thank you. All right.

15 City and County of San Francisco?

16 MR. KNAPP: No questions for San Francisco. Thank
17 you.

18 CO-HEARING OFFICER D'ADAMO: All right. At this
19 point we're going to request that the Prosecution Team offer
20 exhibits into evidence.

21 MR. PETRUZZELLI: At this time the Prosecution
22 Team would like to offer its presentations and exhibits into
23 evidence.

24 CO-HEARING OFFICER D'ADAMO: All right. And at
25 this point we'd like to see if the parties have any

1 objections, other than those that are already noted and
2 under submission?

3 MR. HANSEN: This is Mr. Hansen. No, just what
4 has already been noted as objection. But outside of that we
5 do not have any other objections.

6 CO-HEARING OFFICER D'ADAMO: All right. Then the
7 exhibits are entered into the record and the -- one moment.
8 All right. So just for clarification, the exhibits are
9 entered into the record, except for the document in
10 question, the -- do you have a copy of it?

11 MR. PETRUZZELLI: I provided -- we provided ten
12 copies of that document. That should be enough for the --
13 for the Hearing Team and for Mr. Fahey and for the district
14 parties.

15 MR. MONA: And I -- yeah, we're going to define
16 that document as WR, next in line, 147.

17 CO-HEARING OFFICER D'ADAMO: All right. So any
18 questions on that?

19 All right, we'll now hear Mr. Fahey's direct
20 testimony, followed by any cross-examination in the order
21 previously identified.

22 MR. HANSEN: The PowerPoint that we have please.
23 (Pause)

24 MR. MONA: Excuse me. Also, with regards to the
25 PowerPoint presentation submitted by our Prosecution Team,

1 we're going to identify that as next in line, WR-148. Thank
2 you.

3 MR. PETRUZZELLI: Question: Is that all of the
4 presentations together as a single exhibit or are they each
5 identified as separate exhibits.

6 MR. MONA: We'll try the -- Keith Petruzzelli, WR-
7 148; Kathy Mrowka, WR-149; Brian Coats PowerPoint, WR-150;
8 David LaBrie's PowerPoint, WR-151, and Sam Cole's
9 PowerPoint, WR-152. Thank you.

10 MR. PETRUZZELLI: Thank you.

11 CO-HEARING OFFICER D'ADAMO: All right, Mr.
12 Hansen.

13 MR. HANSEN: Thank you. I'd like to call Mr.
14 Fahey to testify.

15 DIRECT TESTIMONY AND EXAMINATION

16 BY MR. HANSEN:

17 Q. Please state your name and your address please?

18 A. (Mr. Fahey) My name is George Scott Fahey and I
19 reside at 2787 South Stony Fork Way, Boise, Idaho 83706.

20 Q. And I'll have you open up that binder right in
21 front of you. That Exhibit Number 1, is that your written
22 testimony?

23 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, I'm
24 having a hard time hearing you. Could you move the
25 microphone a little closer?

1 MR. HANSEN: Thank you.

2 CO-HEARING OFFICER D'ADAMO: Thanks.

3 MR. HANSEN: Is that better? Okay.

4 MR. PETRUZZELLI: And I'm having a hard time
5 hearing Mr. Fahey, too.

6 CO-HEARING OFFICER D'ADAMO: It's the big binders
7 in front of you. Yeah.

8 MR. HANSEN: Okay.

9 MR. FAHEY: How is that?

10 CO-HEARING OFFICER D'ADAMO: Thank you.

11 MR. FAHEY: Okay. You're welcome.

12 BY MR. HANSEN:

13 Q. Is that -- Exhibit Number 1, is that your written
14 testimony in this matter?

15 A. (Mr. Fahey) Yes, it is.

16 Q. And for the record, if you look at Exhibit Number
17 2, Fahey Exhibit Number 2, is that your CV and list of
18 qualifications?

19 A. Yes, it is.

20 Q. Okay. Did you prepare your written testimony?

21 A. Yes, I did.

22 Q. And do you have any corrections to your written
23 testimony here today?

24 A. No, I do not.

25 Q. Is there any minimum bypass flows that are

1 required for your permits?

2 A. Yes, there are. At the Marco and Polo sites it's
3 five gallons a minute minimum bypass flows. And at the
4 Deadwood site it's two-and-a-half gallons a minute. And at
5 the Sugar Pines site, two gallons a minute.

6 Q. At all times have you maintained those minimum
7 flows?

8 A. Yes, I have.

9 Q. Even during curtailment in 2014?

10 A. Yes.

11 Q. How about the curtailment period during 2015?

12 A. Yes.

13 Q. You maintained it all that time?

14 A. Yes. The -- the minimum flows are maintained.

15 Q. Okay. And then the measurements that were
16 provided, were those provided at the place of the tank that
17 you have or at the place of the point of diversion at the
18 springs?

19 A. Yes, those were measured flows that were
20 determined from the inflow minus the water sold equals the
21 amount that went into the tanks and then bypassed to the
22 stream beyond.

23 Q. But at the points of diversion during curtailment
24 you maintained all those minimum required flows?

25 A. Yes. Those are up at the spring sites themselves.

1 Q. I'd like you to open up to Fahey Exhibit 20. That
2 is your Permit 20784 -- or rather, why don't we look here at
3 the PowerPoint. We have a slide number 27, I believe. And
4 if you'll look at that language in Permit 20784, Term 20,
5 paragraph 1, in your understanding what is required by that
6 term? It's up on the screen, if it's easier.

7 A. Oh. Term 20, paragraph 1?

8 Q. Yes.

9 A. Yes.

10 Q. What is required of you in that term?

11 A. Not to interfere with the -- San Francisco's
12 obligations to MID and TID.

13 Q. In your understanding is that the same thing
14 that's required of you in Term 33 in your Permit 21289?

15 A. Yes, I believe so. Yes. Shall I -- yes, it is.

16 Q. In your understanding on that language when it
17 talks about the Raker Act, what is your understanding of the
18 Raker Act as that provision talks about?

19 A. The Raker Act is the act passed by congress
20 allowing the City and County of San Francisco right-of-way
21 and impoundment area in New Hetch Hetchy, and power
22 production obligations, and also recognition of the
23 preexisting water rights of the Modesto and Turlock
24 Irrigation Districts.

25 Q. Okay. Looking at that language, and it's up on

1 the screen there, that permit, Term 20, paragraph 1, what is
2 your understanding of the any implementing agreement between
3 the districts and San Francisco?

4 A. That's currently the Fourth Agreement.

5 Q. Okay. If you can get that smaller binder -- or
6 actually the loose-leaf, yeah, right in front of you, and
7 look at Exhibit 79.

8 A. Okay.

9 Q. 79; is that in front of you there?

10 A. Yes. The Fourth Agreement.

11 Q. Is that the Fourth Agreement that you've been
12 testifying to?

13 A. Yes.

14 Q. Okay. And the question I have is what is your
15 understanding as to what that Term 20, paragraph 1, and the
16 same language there in Term 33, requires of you with regards
17 to the Fourth Agreement?

18 A. Not to interfere with the parties to where they
19 would breach Article 2 of the agreement, to where the -- the
20 parties, MID, TID and City and County of San Francisco
21 wouldn't affect or alter or impair in any way their
22 preexisting agreements with regards to either the Raker Act
23 or their preexisting water rights --

24 Q. Yeah. I'm going to come back to that.

25 A. -- amongst themselves.

1 Q. Okay. I'm going to come back to ask you in a
2 minute here.

3 Did you ever have a purchase agreement with TUD
4 that covered the years 2014 and 2015?

5 A. I have an open-ended account. I'm an account
6 holder at TUD. So as water is available in their old
7 system, they give me notice. And if water is available, I
8 have the option to purchase it. They provide me that on an
9 annual basis.

10 Q. And during the time that you wheeled water into
11 NDPR in 2009 to 2011, did you have a purchase agreement in
12 effect with TUD?

13 A. Yes, for both years respectively.

14 Q. Mr. Fahey, please describe to us how the water
15 replacements provisions in that Term 20, that second
16 paragraph, how do they work, in your understanding?

17 A. After the initial water right permit was noticed,
18 and this is after the agreement was entered into with the
19 districts, the 1992 agreement, the City and County of San
20 Francisco protested because they weren't a party to that
21 agreement. Since they were not a party to that agreement
22 they complained that the Raker Act and the Fourth Agreement
23 could be -- could be effected by the districts' sole
24 agreement with me, exclusive agreement with me. So
25 therefore a letter was written. And then the districts and

1 the City and County of San Francisco started working
2 together to put together Term 20.

3 Q. So in your mind does Term 20 then control over the
4 water replacement provisions in Term 19 because of that
5 development?

6 A. I always perceived Term 20 as kind of like a mini
7 Fourth Agreement. It -- the parties were the Fourth
8 Agreement parties plus myself. And it was a way of doing
9 the accounting, taking into account the Fourth Agreement,
10 the debiting and crediting that I didn't truly understand
11 until San Francisco's protest and their follow-up letters
12 that explained it in detail.

13 Q. In your opinion are you able to comply with Term
14 19 without compliance with Term 20?

15 A. No.

16 Q. How did the water replacement provisions in Term
17 34 work? Is that the same as in the second permit? Are
18 they the same as or different than Terms 20, paragraph 2 in
19 your first permit?

20 A. Yeah. Term 34, when -- when we were working on
21 our second set of water rights Term 34, and also the TUD
22 Water Exchange Agreement, were combined to be overarching to
23 handle all the water diverted with regards to both permits.
24 So Term 34, in my opinion, speaks to what is required to
25 replace the water if it's requested with regards to both

1 permits.

2 Q. And how did the water -- well, does the TUD
3 Agreement, the water exchange agreement you have, does that
4 cover the water rights in both permits?

5 A. No. That's just -- that was the initial -- that
6 was the initial agreement that was required in order for a
7 good faith effort of providing an exchange mechanism that
8 was established. And with that exchange mechanism
9 established the water rights application could be accepted.

10 Q. If you followed what the Prosecution Team here has
11 advised in the way in which they're interpreting Term 19
12 that you simply unannounced have water replaced into NDPR
13 based on your diversions, is there any way that you could --
14 well, would you be interfering with what the Term 20 and
15 Term 33 do not allow you to do?

16 A. Yes. Because any time during the -- the debiting
17 and crediting process with regards to the Fourth Agreement,
18 that San Francisco is debiting or crediting their water bank
19 in New Don Pedro, if I discharge water to the -- to New Don
20 Pedro Reservoir, because of the debiting and crediting
21 procedures the converse occurs to the city's example of when
22 I divert upstream. When I divert upstream the city is
23 harmed in all instances. When I provide replacement water
24 to the city, if they don't know the allocations to the city
25 and the districts, then there's an interference with their

1 accounting.

2 But more importantly, when water is sent into the
3 reservoir as replacement water the -- because of the
4 accounting the districts would be credited with nothing,
5 none of it, and the city would be credited with all of it.
6 It's the contrary to the example that they provide of me
7 always impacting the city's rights when I'm diverting
8 upstream while they're debiting and crediting.

9 Q. I'm going to change gears here real quick. And
10 you heard earlier testimony about some campground being near
11 you?

12 A. Oh, yeah, in the -- I think Kathy Mrowka was
13 discussing impacts to downstream water users. And she
14 mentioned a cabin that was downstream and a campground that
15 was downstream. The campground is upstream. It's in Hall
16 Meadow (phonetic). And the cabin that she's referring to is
17 my grandfather's cabin, and that's in Fahey Meadows, and
18 that's also upstream.

19 Q. And the cattle there, have they been running any
20 of that cattle?

21 A. No. Due to the Rim Fire in 2013 the -- the cattle
22 herds have been greatly reduced, so --

23 Q. Okay.

24 A. And most -- most of that cattle grazing is also on
25 the upper -- called the Upper Hall Range (phonetic), so

1 that's upstream of the springs.

2 Q. The 1991 Agreement that you had with the
3 districts, who told you to get that agreement?

4 A. It was a letter. It was a letter from the Board
5 to me because I provide -- I provided a -- I proposed
6 pumping water into Dry Creek, and then that water would go
7 down to the delta. And they said that would satisfy 1594,
8 but it wouldn't satisfy 995. And therefore I had to find a
9 solution that addressed 995 upstream of New Don Pedro. But
10 since I made a good faith effort to come up with an exchange
11 mechanism they'd allow me the acceptance of the application
12 -- they'd allow me the acceptance of the application so an
13 exchange agreement could be worked out.

14 Q. Who at the districts was your contact person?

15 A. During the entire process it was Leroy Kennedy
16 with Turlock Irrigation District.

17 Q. And what was his position there?

18 A. I believe he was like in charge of water
19 resources.

20 Q. Did he tell you that?

21 A. Tell me what?

22 Q. What his position was? Did he tell you who he
23 was?

24 A. Yes.

25 Q. Okay. Did you ever speak with Mr. Kennedy after

1 you entered into the '92 agreement?

2 A. Yeah. When the agreement was fully executed I
3 asked Mr. Kennedy if I could come and meet him because I
4 wanted to personally thank him for all his work he had done.
5 He worked for about a year-and-a-half getting this all put
6 together. And so I went over to his office, I think it was
7 over on Canal Street in Turlock, and met with him and he
8 gave me the agreement.

9 Q. And did he tell you -- did he say anything about
10 contacting the districts under the terms of the '92
11 agreement?

12 A. Yeah. What -- what --

13 MR. PETRUZZELLI: Objection; hearsay.

14 MR. HANSEN: No. It's the truth of what he was
15 told, and therefore it's the impressions of the person who
16 receives it, not the truth of what the declarant is saying.

17 CO-HEARING OFFICER D'ADAMO: All right. We'll
18 allow it in. We'll allow it in.

19 BY MR. HANSEN:

20 Q. So what did Mr. Kennedy tell you?

21 A. (Mr. Fahey) Mr. Kennedy told me that, you know,
22 this was a lot of effort to create this document. And it
23 was more effort than -- than the amount of water deserved.
24 And that he didn't want me corresponding with regards to
25 this document to either of the districts. He wanted me to

1 respond. If they contacted me, and he said, "You will know
2 when we contact you," if they contacted me then I was to
3 respond. But prior to that I was -- I was not to correspond
4 with the districts regarding the matter.

5 Q. Respond to what?

6 A. Anything that they corresponded to me with.

7 Q Okay. Earlier there was testimony about a March
8 21st, 2011 letter. That's Exhibit 54 from Fahey, this
9 letter to the city -- from the city to Ms. Mrowka. Do you
10 recall that letter?

11 A. Yes, I do.

12 Q. Did you get a copy of that letter --

13 A. Yes, I did.

14 Q. -- in March --

15 A. Yes, I did.

16 Q -- of -- okay. That was 2011 you got it?

17 A. Yes. That was the last letter in the -- in the
18 series --

19 Q. Yeah.

20 A. -- of letters over about --

21 Q. And what was your --

22 A. -- a nine-year period.

23 Q. What was your understanding after receiving that
24 letter?

25 A. I was -- I was very happy because it very much

1 clarified that I stand by and wait for the districts and the
2 city to contact me prior to providing them any replacement
3 water.

4 Q. Okay. Mr. Fahey, Permit 20784 in item 17 says,
5 and it was read earlier by Ms. Mrowka, in the last lines of
6 that is an opportunity for a hearing. Have ever had an
7 opportunity for a hearing before that -- those rights are in
8 some way affected under that Term 17?

9 A. No.

10 Q. The 88.55 acre feet of water, did that cover all
11 of your water diversions during 2014 and 2015 curtailment
12 periods?

13 A. Yes, all the -- all -- from the beginning of the
14 curtailment to the end of the curtailment there was ample
15 surplus water to be used as replacement water for the water
16 diverted during curtailment.

17 Q. Okay. I'll have you turn your attention to number
18 87, Fahey Exhibit 87. And what is the amount -- looking at
19 that chart, is this a chart that you created?

20 A. Yes, it is.

21 Q. Okay. What is the amount of your water diversions
22 during the 2014 curtailment period?

23 A. It would be 16.35 acre feet?

24 Q. And what about for your 2015 curtailment period?

25 A. 9.86 acre feet.

1 Q. Did that 88.55 acre feet cover all of the water
2 for your curtailment in 2014 and 2015?

3 A. Yes, it does.

4 Q. Did it also cover --

5 A. Yes, it does. It also covers the additional water
6 in 2014 and 2015 that were outside the FAS period but were
7 also in the curtailment.

8 Q. Did that 88.55 acre feet also cover all of the FAS
9 period from 1996 to the present?

10 A. If -- if it is considered that and accepted that
11 something slightly more than 31 -- or 30 acre -- 30 percent
12 of the diversions are surface water, then, yes, it would
13 cover all those surface water diversions.

14 Q. In -- on June 3rd, 2014, moving on here, you wrote
15 a letter to the Board in response to the curtailment notice
16 of -- in May of 2014. Do you recall that testimony?

17 A. The June letter --

18 Q. Yes.

19 A. -- of 2014? Yes.

20 Q. And did you also complete and send to the Board an
21 official response to that curtailment notice --

22 A. Yes, the --

23 Q. -- marking the box "other?"

24 A. Yes, and --

25 Q. Okay.

1 A. -- I did in 2014.

2 Q. Did the Board ever respond to that letter?

3 A. No.

4 Q. And with the Board not responding to that response
5 in that official form, what was your understanding in 2014
6 about your right to a curtailment exception?

7 A. Well, I considered that the curtailment is just an
8 expansion of the FAS period. And the same mechanism that
9 would govern during the FAS period with regards to someone
10 that doesn't have the right to divert water that's fully
11 appropriated would -- would be the same mechanism during the
12 curtailment period. Because it followed the example that
13 was provided in their February 2009 letter to me asking that
14 I buy water from others and send it to a reservoir for
15 future use.

16 MR. HANSEN: If we can stop the clock for a
17 second? I just have a point of clarification here.

18 Mr. Fahey and Mr. Grunwald, and Mr. Grunwald is
19 maybe five minutes at the most, will be the entirety of our
20 direct testimony. And I do have quite a bit more direct for
21 Mr. Fahey. It will also supplant, if you will, part of what
22 we would have in a rebuttal testimony as well. And so we're
23 requesting more than 20 minutes for just Mr. Fahey. We're
24 certainly -- the total of both of my witnesses is going to
25 be way under one hour.

1 CO-HEARING OFFICER D'ADAMO: All right. That's
2 fine.

3 MR. HANSEN: Okay. So long as I stay within the
4 hour and -- okay. Thank you very much. I appreciate that.

5 BY MR. HANSEN:

6 Q. In your written testimony, Mr. Fahey, you
7 discussed how you stated exactly all of your water diversion
8 in 2014 in the progress report that you filed with the Board
9 on March 3rd, 2015. Do you recall that testimony?

10 A. (Mr. Fahey) Yes.

11 Q. Did that report cover all of your water diversions
12 during curtailment in 2014?

13 A. Yes.

14 Q. And did the Board ever contact you in any way or
15 respond to that progress report?

16 A. No.

17 Q. What was your understanding about your right to
18 continue water diversions during curtailment when the Board
19 did not respond to your progress report?

20 A. There was nothing that indicated to me that I was
21 doing anything wrong.

22 Q. There was also a curtailment notice that was sent
23 to you in April of 2015. Do you recall that notice

24 A. Yes.

25 Q. And did that notice, and I'll posit for the

1 record, I believe it's the Prosecution Team's WR-34. Did
2 that notice contain language about an exception to
3 curtailment?

4 A. Yes. It described the exact situation that I was
5 in. I provided water prior to curtailment to a storage
6 facility that was covered by terms and conditions of my
7 post-1914 water rights. And since it was there prior to the
8 curtailment it could be used in accordance with the terms
9 and conditions of the post-1914 water right.

10 Q. When you received that curtailment form in April
11 2015 did you immediately respond to it?

12 A. Yes. I attached my letter of June 3rd, 2014 to
13 the State Water Board's web -- or email address and sent the
14 letter back to them.

15 Q. In your written testimony you described phone
16 conversations that you had with the Board's David LaBrie on
17 June 12th, 2015. Do you recall that testimony?

18 A. Yes, I do.

19 Q. Did you ever have a phone call with Mr. LaBrie on
20 June 15?

21 A. No, I didn't.

22 Q. And your written testimony is an accurate
23 recitation of the dates and how those phone calls and emails
24 took place?

25 A. Yes.

1 Q. Okay. And did you also receive an email from Mr.
2 LaBrie on that same day?

3 A. Yes, I did.

4 Q. What did you do after those phone calls and email
5 with Mr. LaBrie?

6 A. I searched the State Water Board website for any
7 pre-1914 water right holders and any riparian water right
8 holders that were in-stream between my points of diversion
9 and Lake Don Pedro.

10 Q. So you didn't blow off Mr. LaBrie, you definitely
11 took into consideration his -- his argument, and then went
12 to go research it yourself; isn't that correct?

13 A. Yeah. My heart stopped when he said pre-1914 and
14 riparian water right users, because all I had considered to
15 that point is -- is in-stream appropriators. And when he
16 said that I was very worried that there could indeed be some
17 preexisting in-stream pre-1914 or riparian diverters that I
18 hadn't considered. So I dug right into it because I knew if
19 there was my exemption would -- would not be satisfied.

20 Q. And what did your research show you?

21 A. That there are no pre-1914 or riparian diverters
22 between my points of diversion and Lake Don Pedro.

23 Q. So after that research and what you received from
24 Mr. LaBrie on the phone calls, what was your understanding?

25 A. That I was -- I was -- I had met the standards.

1 Q. I've got my little clicker here. If we can go to
2 -- there we go.

3 Exhibit 29, it's actually an -- Mr. LaBrie's
4 email, I believe, of June 12th, 2014.

5 It's Exhibit 64 in the -- Mr. LaBrie's exhibits.
6 There's language in there in which he says, "If you have
7 diminished the quantity of water in storage by the amount of
8 water that you have diverted during the curtailment period
9 it could be argued that you have offset your diversions by
10 releasing the purchased water placed into storage."

11 After you read that sentence what was your
12 understanding?

13 A. That's exactly what I had done.

14 Q. In your written testimony --

15 A. The diminishment of quantity hasn't occurred yet.
16 That has to occur when I do my 2015 permittee use report.

17 Q. Now the ACL in this case accuses you of not having
18 done your reporting for 2015. Under your permits is the
19 reporting requirement even yet due for 2015?

20 A. It's due, I believe June 30th, 2016.

21 MR. PETRUZZELLI: Objection. It's not the
22 recollection of the Prosecution Team that the ACL complaint
23 accuses Mr. Fahey of failing to file a progress report for
24 2015.

25 MR. HANSEN: We did not say a progress report. We

1 talked about water -- if I said progress, please forgive me.

2 BY MR. HANSEN:

3 Q. A water replacement --

4 A. (Mr. Fahey) Accounting.

5 Q. -- requirement?

6 A. The accounting occurs during the permittee use
7 report.

8 Q. For the water replacement, as well?

9 A. Yes.

10 Q. Okay. And that's still due sometime in 2016 for
11 the --

12 A. Before June 30th. That's usually when it's
13 required, June 30th.

14 Q. In your written testimony you discuss a phone call
15 that you had with the Board's Sam Cole on August 12th. Do
16 you recall that testimony?

17 A. Yes, I do.

18 Q. After your phone call with Mr. Cole what was your
19 understanding of your right to the available water exception
20 to curtailment?

21 A. Well, Mr. Cole noted that I was still diverting,
22 which I confirmed. And as such he put me down as not in
23 compliance with the curtailment order.

24 Q. If Mr. Cole had told you that a decision had been
25 made rejecting your exception to curtailment, would you have

1 immediately stopped your diversions?

2 A. I would have immediately asked for that in writing
3 and then, yes, stopped my diversions.

4 Q. Did you ever get anything in writing?

5 A. No. I was never told that.

6 Q. Did he ever say a decision had been made?

7 A. No.

8 Q. He just told you he didn't believe you had the
9 exception?

10 A. No. He told me that if I was still diverting then
11 he considered that I was in noncompliance of curtailment.

12 Q. Did he ever say that any staff member had looked
13 at your June 3rd, 2014 letter?

14 A. I told him that -- okay, we're talking about Mr.
15 Cole's telephone conversation. I believe during that
16 telephone conversation I informed Mr. Cole of the
17 conversation I had with Mr. LaBrie, which --

18 Q. Okay.

19 A. -- which that letter was mentioned, and -- and the
20 exchange agreements and my water rights terms and, you know,
21 we kind of went all over the whole thing again.

22 Q. If in 2014 you had been told that a decision had
23 been made that rejected your exemption to curtailment, what
24 would you have done?

25 A. Not curtailed -- not diverted, pardon me, not

1 diverted.

2 Q. If in 2015 you were told that a decision had been
3 made by Board staff that rejected your exception to
4 curtailment, what would you have done?

5 A. Not -- not diverted. And in addition to that, in
6 2014 I would have asked immediately for a hearing.

7 Q. Have the districts or the city ever requested
8 water replacement for your diversions in 2014?

9 A. No.

10 Q. Have they ever requested water replacement for
11 your diversions in 2015?

12 A. No.

13 Q. So in your mind has the duty to report a water
14 replacement for the year 2014 ever even arisen yet?

15 A. No. No one has asked for replacement water. I've
16 kind of taken the ACL as that request for 2014. So prior to
17 June 30th of 2016 I was going to report the entire
18 accounting of all the water diverted during curtailment,
19 show a reduction in the surplus water that I --

20 Q. Even --

21 A. -- that I imported to --

22 Q. I'm sorry.

23 A. -- New Don Pedro.

24 Q. Even though the districts and the city have never
25 requested water replacement for your diversions in 2014, did

1 you anyway inform the Board of your water replacement for
2 2014?

3 A. No.

4 Q. Did you ever inform the Board in your June letter
5 in 2014 what you were doing with regards to water
6 replacement?

7 A. Yes, what my plans were to make sure that the
8 senior water right holders weren't harmed, they had adequate
9 water to replace the water I was diverting.

10 Q. Earlier today, and also in paragraph 25 of the
11 ACL, we heard about a water availability and demand analysis
12 and a website on the Board's website where that analysis had
13 been done. I believe it's 42 and 43 of -- you don't have to
14 pull it up -- of the Prosecution Team's witnesses.

15 Have you ever looked at that water analysis at the
16 website?

17 A. Yes, I have.

18 Q. And did you look at what's Exhibit 42 and 43, the
19 water availability analysis?

20 A. Yes, I have it.

21 Q. Okay. And does that water availability analysis
22 for 2014 that you saw on the Board's website describe the
23 available water at your points of diversion for your
24 permits?

25 A. No. I don't believe that, and I stated that in my

1 written testimony, that I don't believe that does properly
2 describe the waterway between my points of diversion, or
3 waterways between my points of diversion and New Don Pedro
4 Reservoir because that graph clearly shows riparian demands
5 and pre-1914 demand as part of that in-stream -- those in-
6 stream needs. There's none of those types of diverters
7 between my points of diversion and New Don Pedro. So I knew
8 that that graph didn't pertain to that stretch of river.

9 Q. Paragraph 50 of the ACL alleges that "These
10 unauthorized diversions has reduced the amount of water
11 available for downstream water rights holders during an
12 extreme drought emergency."

13 Are there any senior downstream water right
14 diverters between your points of diversion and NDPR, other
15 than the city and the districts?

16 A. No.

17 Q. Paragraph 50 of the ACL also alleges that "Fahey's
18 diversions reduced the water available for in-stream
19 resources and riparian habitat downstream."

20 Are there any in-stream or riparian diverters
21 between your points of diversion and NDPR?

22 A. No.

23 Q. Okay. And did you find that out from that
24 research after you spoke with Mr. LaBrie?

25 A. Yes. And then -- and then looked back in my

1 records and found confirmation elsewhere.

2 Q. And earlier there was that field investigation
3 that Yoko had done that we had discussed with Mr. LaBrie, I
4 believe. And was it your understanding from that field --
5 did you ever get that field report back --

6 A. From Yoko.

7 Q. -- for your first permit?

8 A. From --

9 Q. The field investigation report?

10 A. Yeah. Yoko. Yeah, I have -- I have that permit -
11 - I mean, I have that field investigation report.

12 Q. And did that report, in your understanding, speak
13 to the issue of whether there were any other senior water
14 right holders?

15 A. Yes. That and also the water availability
16 analysis that Mr. Grunwald authored. In there it's
17 described that there's no in-stream water right users
18 downstream of any of the points of diversion.

19 Q. Okay. If there is physical water missing -- well,
20 let me ask you this.

21 If you had placed water in NDPR that covers all of
22 your diversions that you did upstream as a credit for water
23 replacement for you, is there any way that there can be
24 "physical water missing downstream of the dam" as a result
25 of your diversions?

1 A. Turlock Irrigation District operates the discharge
2 from the dam. I have no ability to increase or decrease the
3 amount of water that discharges from the dam. The only
4 thing I can do is replace the water requested from -- as a
5 result of my diversions upstream of the dam and replace that
6 water with surplus water to be accounted for as exchange
7 water once it's requested.

8 Q. Are you claiming that you have a storage right in
9 NDPR?

10 A. No.

11 Q. What -- or are you claiming that you have some
12 kind of a credit at NDPR?

13 A. I have an exchange credit. I've introduced
14 foreign water into their reservoir. It's their water to
15 store and use. The only thing I am, I don't know if I want
16 to say demanding, or the only thing that I should be allowed
17 to be provided is the credit for -- for increasing the
18 volume of water inside their reservoir by the amount of
19 foreign water that I imported. I'm not -- I am not -- I
20 have nothing to do with interfering with any of their
21 operations or water rights.

22 Q. Let's switch over to slide three here. And is
23 this what you were explaining to us? Is this what you were
24 trying to explain? Or why don't you explain your
25 understanding of -- of your water rights?

1 A. My -- my understanding of my water rights is this
2 is not a water transfer. A water transfer is taking water
3 from one owner and sending it to another owner. A water
4 exchange agreement is explained in, I believe it's footnote
5 8 on page 25 of Water Order. I think it's 92-7 that deals
6 with fully appropriated streams. Okay.

7 In that footnote they explain that when you do a
8 water exchange agreement you're bringing water into a senior
9 water right user. That senior water right user is allowing
10 you, because of the foreign water you bring to him, he's
11 allowing you to take a portion of his right to a point
12 that's not described as a point of diversion and for a
13 purpose that's not described in his purpose of use. And
14 that's -- that -- a water exchange agreement allows those
15 things in a water right to be changed. So you can -- you
16 can -- in an exchange agreement you can divert water during
17 curtailment, as long as the senior party to the exchange
18 agreement, MID, TID and City and County of San Francisco,
19 can divert water. If they can't divert water then the --
20 then the junior party of the exchange agreement can't divert
21 water either.

22 Q. Switch gears for two additional questions here.
23 Did you provide invoices in this case to the Prosecution
24 Team for October 2015?

25 A. Yes, I did, via email, as --

1 Q. At any --

2 A. -- as ordered.

3 Q. I'm sorry"?

4 A Via email, as ordered.

5 Q. At any time did you ever simply ignore the
6 requests by the Board staff for site visits?

7 A. No. I told Sam -- I told David LaBrie that I was
8 not scheduled to be back in -- back onsite. I was there
9 while Mr. LaBrie was calling me between June 5th, I think it
10 was June 5th and June 11th. And then I returned to my
11 office on June 12th and I had three calls from Mr. LaBrie.
12 And then I called him and informed him that I wasn't
13 planning to come back until the 1st of September. And I
14 informed Sam Cole of that during our conversation, because
15 he wanted to have a complete site visit. And I said that on
16 September 2nd or 3rd I could meet with him onsite, and that
17 was the plan when the phone call was completed.

18 MR. HANSEN: I have no further questions for Mr.
19 Fahey, but I'd like to turn over now to Mr. Grunwald.

20 BY MR. HANSEN:

21 Q. Mr. Grunwald, if you can state your name and
22 address for the record please?

23 A. (Mr. Grunwald) Yes. My name is Ross Grunwald, G-
24 R-U-N-W-A-L-D. And my I'm a professional geologist with
25 California and a certified hydrogeologist. And my address

1 is 17279 Table Mountain Road in Jamestown, California.

2 Pardon me?

3 Q. Sorry about that. I'll have you look at the
4 plaintiff's exhibit at the bottom there -- well, rather it's
5 Fahey's Exhibit 71. Is that your written testimony in this
6 case?

7 A. Yes, it is.

8 Q. And if you look at Exhibit 72 right past that, is
9 that your qualifications and CV?

10 A. Yes, they are.

11 Q. And did you prepare that written testimony?

12 A. Yes, I did.

13 Q. And do you have any corrections to that written
14 testimony here today?

15 A. No, I do not.

16 Q. Did you ever see the bypass flows at any of Scott
17 Fahey's springs?

18 A. Yes, I have observed them on several -- or several
19 times. I've probably been to the site about 50 times over
20 the last 20 years. And -- but they haven't been evenly
21 spaced. They have been during periods of mapping and
22 planning and drilling and so forth.

23 Q. And the last time you went to go visit the site
24 was it your understanding that Mr. Fahey -- well, let me ask
25 you this.

1 Are you aware of what the bypass flows, what they
2 were required under his permits?

3 A. Yes, I am.

4 Q. When you saw those springs was it your
5 understanding that those bypass flows at the spring location
6 was being complied with?

7 A. Yes.

8 MR. HANSEN: I have no further questions, and no
9 further testimony on direct.

10 CO-HEARING OFFICER D'ADAMO: All right. Thank
11 you, Mr. Hansen.

12 Cross-examination. We'll start with the
13 Prosecution Team. Mr. Petruzzelli.

14 MR. PETRUZZELLI: The Prosecution Team would like
15 a very brief break before cross-examination.

16 CO-HEARING OFFICER D'ADAMO: All right. We'll be
17 back in ten minutes?

18 MR. PETRUZZELLI: Five is fine, but --

19 CO-HEARING OFFICER D'ADAMO: Five works for you?
20 Okay.

21 MR. PETRUZZELLI: Yeah.

22 CO-HEARING OFFICER D'ADAMO: Yeah. We'd like to
23 move along if we can. Okay, five minutes.

24 (Off the record at 3:39 p.m.)

25 (On the record at 3:50 p.m.)

1 CO-HEARING OFFICER D'ADAMO: Mr. Petruzzelli?

2 MR. PETRUZZELLI: Thank you.

3 CROSS-EXAMINATION

4 BY MR. PETRUZZELLI:

5 Q. Mr. Fahey, in your response to the subpoena, is it
6 correct that you state on page four that your total invoice
7 and contract sales from May to October 2014 were \$119,000 --
8 \$119,300? That's Exhibit WR-72, page four. Can we bring
9 that up?

10 MR. HANSEN: It's in the black binder.

11 MR. PETRUZZELLI: Oh.

12 BY MR. PETRUZZELLI:

13 Q. It is Exhibit WR-72, page four of that exhibit.

14 A. (Mr. Fahey) Four?

15 Q. It's page four of that exhibit.

16 A. Exhibit 72?

17 Q. Yeah. It's on --

18 A. Yes.

19 Q. I thought I saw it on the screen just now but --

20 A. It's down beneath seven.

21 Q. Okay.

22 A. There it is.

23 Q. Thank you. And then you -- and then you -- and
24 then you state further that your invoice and contract sales
25 for April -- but first, your contract and invoice sales from

1 May to October 2014 were \$119,300?

2 A. That's correct.

3 Q. And your invoice and contract sales for April
4 through October 2015 was \$136,346.36?

5 A. That's correct, with one correction --

6 Q. Okay.

7 A. -- which will help --

8 Q. Okay.

9 A. -- you folks.

10 Q. Okay. And then you stated further that the --
11 that that combined amount was \$255,646.36?

12 A. Correct. Correct.

13 Q. Okay. Thank you. In your second permit, and I
14 believe we have that as WR-16, in Term 20 -- it's on the
15 screen now. Is it correct that you were -- you were to
16 provide bypass flows for each point of diversion?

17 A. That's correct.

18 Q. And would you then measure the bypass flow at each
19 point of diversion?

20 A. I'm waiting for a letter to be returned to
21 describe to me exactly how that needs to be -- or the
22 approved method for doing that.

23 Q. But you currently do not measure bypass flows at
24 the point of diversion?

25 A. I -- I measure them from time to time with, yeah,

1 a five-gallon bucket and stopwatch.

2 Q. But not -- but you don't consistently measure your
3 bypass flow at the point of diversion?

4 A. No, because it's consistently above five gallons a
5 minute.

6 Q. Mr. Fahey, with regard to your curtailment
7 certifications, did you -- after you submitted your
8 certification in 2014 did you wait for approval --

9 A. I'm still waiting for approval.

10 Q. Did you continue -- did you wait for approval
11 before continuing to divert?

12 A. I still am waiting for approval.

13 Q. So you did not -- so you did not resume diverting
14 before getting some approval from the Board?

15 A. No. I continued to divert because I informed the
16 Board in a timely manner that I had legal justification for
17 diverting.

18 Q. Okay. Thank you. I'm going to ask you about your
19 water right permits. So I believe those are Prosecution
20 Team Exhibits 15 and 16. Do those permits -- do either of
21 those permits include a storage right?

22 A. No.

23 Q. Do you have any other water rights authorizing you
24 to store water?

25 A. No.

1 Q. Is it you -- has it -- have you testified at all
2 today that you have a right, a water right to store water in
3 New Don Pedro Reservoir?

4 A. No.

5 Q. Do you have any special agreements with the
6 districts or with CCSF permitting you to store water in New
7 Don Pedro? And by that I mean a formal written agreement.

8 A. No.

9 Q. Do you have any formal written accounting
10 arrangements with the districts or with CCSF that would
11 allow you to store water in New Don Pedro?

12 A. They take care of that.

13 Q. Is that in writing?

14 A. Yes.

15 Q. Have you submitted that document with any of your
16 exhibits as part --

17 A. No. It's --

18 Q. -- in association with that hearing -- this
19 hearing?

20 A. It's the districts and the cities [sic] that take
21 care of that responsibility in their annual report to me
22 under Term 20 of the first permit.

23 Q. But you have no written documentation of any kind
24 of accounting that they take to track how much water you put
25 in?

1 A. No. I would have to tell them. They would
2 request the replacement water, and I have a year to provide
3 it. That's why I wrote them the letter of June 3rd, 2014,
4 to let them know that the water is there so they wouldn't
5 have to wait a year for it.

6 Q. So it was in that letter of June 2014 that you let
7 them know it was there?

8 A. Correct.

9 Q. But you didn't let them know it was there until
10 that letter?

11 A. Correct.

12 Q. So you wheeled this water from -- I think you have
13 agreements in 2003, 2009 and 2011. At any of those times
14 did you inform them that you were putting this water in
15 their reservoir?

16 A. No.

17 Q. So you never told them you were putting it there?

18 A. I did June 3rd -- well, actually, June 2nd, 2014.

19 Q. So -- and so that was the first time you told
20 them?

21 A. Yes.

22 Q. All right. Have you very told them how much
23 watershed you divert from the springs?

24 A. Annually, in my use permit.

25 Q. Is that the progress report that you file with --

1 A. Yes.

2 Q. -- the State Water Board? But you don't tell them
3 throughout the year when you divert water?

4 A. No.

5 Q. And you don't tell them throughout -- during the
6 year how much water you divert?

7 A. No.

8 Q. And you don't tell them during the year when you
9 divert water?

10 A. No.

11 Q. Thank you. I'd like to ask you about the exchange
12 agreement with TID and MID, the 1992 exchange agreement. It
13 is Exhibit WR-66 at page, I believe 18. It's WR-66. That's
14 invoices. There it is. So, Mr. Fahey, that exhibit is, you
15 know, on the screen.

16 Does this agreement entitle you to make up water
17 that you appropriate from Deadwood and Cottonwood Spring?

18 A. Allow me to make up?

19 Q. Yeah. Is that what this agreement permits?

20 MR. HANSEN: Object; vague and ambiguous as to
21 meaning of make-up water.

22 MR. PETRUZZELLI: I believe that is the term used
23 in the exchange agreement. That is the terminology in the
24 agreement.

25 --

1 CO-HEARING OFFICER D'ADAMO: And we'll allow it
2 in.

3 MR. FAHEY: -- ask me the question again.

4 BY MR. PETRUZZELLI:

5 Q. Is it correct this exchange agreement allows you
6 to make up water appropriated from Deadwood and Cottonwood
7 Spring?

8 A. (Mr. Fahey) Yeah, it allows that.

9 Q. Okay. And does this agreement entitle you to make
10 up or exchange water from any other springs?

11 A. No.

12 Q. All right. Does this agreement limit you to
13 making up 17 acre feet during the period of June 13 through
14 October 31 of any year?

15 A. I believe so, that's the number.

16 Q. Okay.

17 A. Yeah.

18 Q. And this amount is roughly 40,000 gallons per day?

19 A. Yes, I think that's correct.

20 Q. Is it correct that under this exchange agreement
21 you are to provide make-up water by pumping groundwater from
22 a well?

23 A. That was the -- that was the mechanism. When this
24 agreement was being constructed --

25 Q. Right.

1 A. -- I purchased property adjacent to New Don Pedro
2 and drilled a well, improved the well. And at the time that
3 was -- that was going to be the source of the foreign water.
4 But then, I believe it was a TID hydrologist came forward
5 and said, "Well, before you do that there has to be testing
6 done to make sure there's no hydraulic connection between
7 this well and New Don Pedro Reservoir."

8 So as a result of that I discovered that there was
9 the opportunity to purchase make-up water from the
10 Stanislaus River that was provided by TUD. So the well
11 never pumped water into New Don Pedro. We went -- and the
12 Board approved the TUD -- pardon me, TUD surplus water
13 source in 1995, prior to the issuance of the first water
14 right permit.

15 Q. Do you have that approval in -- in your exhibits?

16 A. No. It's in my file that you've put into the
17 record. I think it's October of 1995. Let me see if it's
18 here. Let me look real quick. You can keep asking me
19 questions if you want.

20 Q. Is it correct that this exchange agreement permits
21 you to provide make-up water at any time of the year between
22 January 1 and December 31?

23 A. Yes, I believe it does say that.

24 Q. And does it allow you to build a surplus early in
25 the year?

1 A. I believe it does say that.

2 Q. But is it also correct that it does not allow you
3 to carry over that surplus to any subsequent years?

4 A. I believe it does say that.

5 Q. Okay. Is it also correct that this agreement does
6 not give you any interest in the districts' water rights?

7 A. That's absolutely correct.

8 Q. And would that include water rights to store water
9 in New Don Pedro Reservoir?

10 A. Absolutely. Absolutely.

11 Q. The -- since we talked over each other a little
12 bit, can you repeat your answer to that?

13 A. I am not allowed to store water in New Don Pedro
14 Reservoir. I'm only allowed to provide foreign water,
15 import foreign water.

16 Q. Okay. Thank you. Is it also correct that the
17 exchange agreement requires you to file a semiannual report
18 with TID and MID stating the amount you divert monthly from
19 the springs?

20 A. I was told not to do that.

21 Q. But that is in the exchange agreement; correct?

22 A. I was told not to do that.

23 Q. But does the exchange agreement --

24 A. The --

25 Q. -- state that you --

1 A. The agreement --

2 Q. -- for you to do that?

3 A. -- says that, yes.

4 Q. Thank you. Have you ever filed one of those
5 reports?

6 A. No

7 Q. Do you have documentation in your exhibits of any
8 correspondence where you were instructed not to comply with
9 this exchange agreement by not submitting those annual
10 reports to TID or MID?

11 A. Only the oral instructions I received on receipt
12 of the fully executed agreement.

13 Q. So you have no documentation of that?

14 A. No, no correspondence between us. Over -- in over
15 20 years there has been no correspondence between us.

16 Q. So there has never been any correspondence between
17 you and MID and TID and CCSF?

18 A. Never. None. No. This is -- this agreement
19 involved only the districts.

20 Q. Okay.

21 A. And I've never had any correspondence with the
22 districts.

23 Q. Is this your most current exchange agreement?

24 A. No. My most current exchange agreement is the TUD
25 October 2003 Agreement which encompasses both permits.

1 Q. But is it -- is it correct that Term 20 -- that
2 Term 19 and Term 20 in Permit 20784 specifically references
3 this exchange agreement?

4 A. It references this exchange agreement in that the
5 water that's owed under this exchange agreement needs to be
6 taken -- needs to be accounted for in the districts' and the
7 city's annual accounting when they report to me annually.

8 Q. But is it correct that those -- that that permit -
9 -

10 A. What permit?

11 Q. -- 20784 specifically states that you shall, you
12 know, maintain this exchange agreement?

13 A. Yes. It's -- in Term 20 it says that this
14 exchange agreement has to be considered when they conduct
15 their annual report and provide me the amount of water that
16 I need to replace --

17 Q. And it specifically --

18 A. -- within one year.

19 Q. Right. And it specifically -- and that exchange
20 agreement is this exchange agreement. And when I say --

21 A. Right.

22 Q. -- this exchange agreement --

23 A. Yeah.

24 Q. -- the one with TID and MID.

25 A. That's correct. They have to take that into

1 account when they -- when they determine their annual
2 accounting of what I'm required to replace to them.

3 Q. And when it says exchange agreement it does not
4 mean an exchange agreement with TUD; is that correct?

5 A. No. That exchange agreement was accepted by the
6 director of the Water Rights. And she specifically says
7 it's an exchange agreement for surplus water from TUD for --
8 for all water diverted, all water diverted, both permits.

9 Q. I will be asking you about that later, but first I
10 wanted to ask you more about some of your TUD purchase
11 agreements.

12 So I believe it's WR-66, page ten. I think it's
13 also your Exhibit Number 33. It's your purchase agreement
14 from 2003 for TUD.

15 STAFF COUNSEL WEAVER: Can you repeat the Exchange
16 Number please so we can put it on the screen?

17 MR. PETRUZZELLI: I believe for the Prosecution
18 Team it's WR-66, page 10. I believe Mr. Fahey has the
19 identical document as his Exhibit Number 33.

20 MR. FAHEY: Yes, I have it in front of me.

21 BY MR. PETRUZZELLI:

22 Q. Okay. Is it correct that this agreement was dated
23 October 20, 2003?

24 A. (Mr. Fahey) Correct.

25 Q. And it was for the purchase of 41 acre feet?

1 A. Correct.

2 Q. And what was your price per acre foot; do you
3 recall that?

4 A. I believe it's \$60.00 under this scenario.

5 Q. Okay. Was it \$60.00 in all of your purchase
6 agreements?

7 A. Yes. I believe the price was the same in 2009 and
8 2010.

9 Q. Okay. Thank you. And is it correct that this
10 contract was to last until the end of the calendar year?

11 A. Yes. This is an annual. I have -- I'm an account
12 holder at TUD. So annually they call me and say there's
13 water available, and then we enter this agreement.

14 Q. So the contract ends at the end of each calendar
15 year; correct?

16 A. Well, I have a contract as a customer.

17 Q. Okay. But you have to get a new purchase
18 agreement like this every year; correct?

19 A. That used to be their policy. That's no longer
20 their policy.

21 Q. Okay. Do you have -- but this agreement ended
22 December 31, 2003; correct?

23 A. Yeah. This is the agreement that the -- that the
24 state --

25 Q. Okay.

1 A. -- (inaudible) file is referring to.

2 Q. And --

3 A. Because there's -- there's additional policy
4 behind this agreement that backs up all the terms and
5 conditions and how it all works.

6 Q. Understood.

7 A. And that's in -- that's in my file, too, that was
8 accepted into the record.

9 Q. I understand that. So similarly, much like this
10 agreement, your 2009 Agreement would have ended at the end
11 of that year?

12 A. Yes.

13 Q. And how much -- and was that also for the sum of
14 41 acre feet?

15 A. Yes, it was.

16 Q. I think -- and then your 2010 Purchase Agreement,
17 that also ended at the -- on December 10 -- or on December
18 31, 2010?

19 A. Yeah, it's annual, because -- for the water year,
20 yeah.

21 Q. Okay. And was that also for 41 acre feet?

22 A. Yes, it was.

23 Q. Okay. So I think there's some mix-up in your
24 testimony. I think at times you've stated you purchased 88
25 acre feet, at others 82?

1 A. Yeah. The 82 is what's purchased per this
2 contract. But then when they provided the accounting of
3 what was actually wheeled, they wheel in miner inches --
4 miner-inch days. So the 1,751 miner-inch days was converted
5 to acre feet, and they actually wheeled 88.55 acre feet.

6 Q. Okay. Thank you. And the price per acre foot for
7 this agreement, for the 2010 Agreement was also about \$60.00
8 an acre foot?

9 A. I believe it was, yes.

10 Q. Okay. Do you have any other -- any new
11 correspondence that says you don't -- you just have an
12 ongoing agreement, that you don't have to have a new
13 purchase agreement every year?

14 A. Well, their -- their account -- their account
15 structure has changed since there was a case, San Juan
16 Capistrano versus somebody, Water District versus somebody,
17 and because of that their accounting system had to change.
18 And so when their accounting system changed the surplus
19 water providers that were -- were kind of orphaned because
20 of that. And to correct that problem they grandfathered in
21 everybody and made them permanent customers. And I'm in as
22 a permanent customer at 41 acre feet.

23 Q. Do you remember what year that was?

24 A. That's this year.

25 Q. That was this year?

1 A. That was this year. Yeah, this is -- I think
2 they're going to vote on the -- the -- it's all been
3 finalized and the Board is going to vote on it on February
4 25th, I believe, or 24th.

5 Q. So that -- so that change in policy was this year
6 in 2015 or --

7 A. Yes, it was. It's just --

8 Q. -- or last year in 2015?

9 A. Yeah, it's just --

10 Q. I'm sorry.

11 A. Yeah. But it's just -- I mean, it's in the --

12 Q. Okay.

13 A. It's occurring as we --

14 Q. Okay.

15 A. -- talk.

16 Q. So then did you have a purchase agreement in 2011?

17 A. No, I didn't, because I wrote the letter you
18 referred to earlier.

19 Q. Okay. The -- the -- that was the -- that being
20 the June 3rd -- the June 2014 letter with your certification
21 form?

22 A. No. You said 2011.

23 Q. Which letter are you referring to?

24 A. The -- the letter that you mentioned that I wrote
25 TUD and told them that I didn't want water in 2011 because

1 the dam was being managed in anticipation of spill.

2 Q. Okay. So you did not buy water in 2011?

3 A. No. Because if the dam spills I was going to lose
4 my previous water and that year's water. So I didn't want
5 to risk --

6 Q. Okay.

7 A. -- buying water and then -- and also you're --
8 you're exacerbating their problems. If their dam does spill
9 and you're sending water to them, you're making things
10 worse.

11 Q. So the dam was spilling in 2011?

12 A. No. No.

13 Q. Oh.

14 A. It was being operated in anticipation of spill.
15 So if I sent water to them it would make -- it would -- it
16 would make their problem worse.

17 Q. Okay. But because of your concern with that issue
18 you didn't -- you chose not to purchase water that year?

19 A. Yeah. Also making their situation worse, that's
20 one. But two is then you buying it something and it
21 immediately goes to waste. So --

22 Q. Right.

23 A. -- it wasn't worth the risk.

24 Q. Okay. So then did you buy water from TUD in 2012?

25 A. No. There wasn't water available.

1 Q. There was not water available. Did you buy water
2 from TUD in 2013?

3 A. No, I didn't.

4 Q. Did you buy water from TUD in 2014?

5 A. It wasn't available.

6 Q. It was not available. Thank you.

7 So I wanted to ask you about your TUD account. I
8 think we have it as in Exhibit WR-72 at about page -- at
9 page 30. And I think it's page 30 to the attachments to the
10 subpoena response.

11 A. 32 or 72?

12 Q. 72. But -- but do you recall your deliveries from
13 TUD?

14 A. No. There's no -- there's no delivery schedule.
15 It's just, you know, as they -- as they provide it.

16 Q. Did you have -- did TUD deliver -- provide --
17 deliver water for you after 2010?

18 A. Yeah, they delivered water from, I believe, June
19 15th, 2009 to June 15th, 2011.

20 Q. But no deliveries after 2011?

21 A. That's correct.

22 Q. Okay. I'd like to ask you about some of your
23 permit applications. Your first permit application, I
24 believe you have it as Fahey Exhibit 3, Bates 2. And this
25 was your application for what eventually became Permit

1 20784; correct?

2 A. Yes.

3 Q. And did you sign that application?

4 A. I'm sure I did. I can't see it right now. I'm
5 sure I've signed it, yeah. I wouldn't be accepted if it
6 wasn't signed, yeah.

7 Q. So you signed it?

8 A. Yeah.

9 Q. Okay. And did you sign that under penalty of
10 perjury?

11 A. I believe so.

12 Q. And on that application did you state that
13 Cottonwood and Deadwood Springs were both ultimately
14 tributary to the Tuolumne River?

15 A. Yes.

16 Q. Similarly, on your second permit application,
17 which I believe is Fahey Number 27, did you sign that
18 application?

19 A. Yes.

20 Q. And was that signature under penalty of perjury?

21 A. Yes.

22 Q. And on that application did you state that Marco
23 and Polo Springs are both ultimately tributary --

24 A. Yes.

25 Q. -- to the Tuolumne River?

1 Do you -- I'd like to ask you about your first
2 permit, Permit 20784. It is Prosecution Team Exhibit Number
3 15. On that permit, I believe if you go down to the second
4 or third page, does it state that the springs are both
5 ultimately tributary to the Tuolumne River?

6 A. I believe it does. I don't know.

7 Q. Probably farther down.

8 A. Yeah, there it is.

9 Q. Are you familiar with Term 17 in this permit?

10 A. I believe that's the "do not interfere" clause.

11 Q. Okay. Do you understand -- do you know what the
12 number codes in parenthesis on the right side mean?

13 A. No, I don't.

14 Q. Okay. Do you recognize Term 17 as Standard Term
15 90?

16 A. Oh, yeah. Yeah, I've read 90.

17 Q. And do you understand that that term is added to
18 permits to protect water users and beneficial uses
19 downstream in the San Joaquin River Basin?

20 A. Yeah. This -- I did read that. And after
21 considering the way that New Don Pedro is operated by the
22 Turlock Irrigation District, I don't believe I have nexus
23 with that.

24 Q. But this is --

25 A. It doesn't concern me.

1 Q. -- in your permit?

2 A. Pardon me?

3 Q. But this is in your permit; correct?

4 A. It could be a mistake.

5 Q. But it is in your permit?

6 A. Yeah. There it is --

7 Q. Okay.

8 A. -- right there.

9 Q. Thank you. Are you also familiar with Term 20 in
10 this permit?

11 A. Yes, I am.

12 Q. A little farther down.

13 A. Yeah.

14 Q. Is it correct that sub two -- that paragraph two
15 requires you to report to the State Water Board the source,
16 amount and location of replacement water discharged to New
17 Don Pedro Reservoir?

18 A. Yes, it does.

19 Q. Have you done that?

20 A. I haven't provided any replacement water yet.

21 Q. I think you -- did you state that you provided
22 replacement water?

23 A. I imported foreign water as --

24 Q. You imported foreign water?

25 A. -- as surplus water.

1 Q. Was that -- but that was not for Term 20?

2 A. If they ask for it I'll --

3 Q. So you haven't provided Term 20 water because they
4 haven't asked for it?

5 A. That's correct.

6 Q. Okay. But you've never told them what you divert
7 or how much; correct?

8 A. It's in my annual reports.

9 Q. But you've never informed the districts --

10 A. Yeah. It's a public record.

11 Q. Okay.

12 A. It's in the reports.

13 Q. You just -- you've only filed it in your reports?

14 A. That's where I have to file it.

15 Q. You haven't specifically --

16 A. If I --

17 Q. -- contacted the districts to let them know how
18 much you divert, when and how much?

19 A. No. The -- the Term 20 says that they're going to
20 provide an annual report. I've never been provided an
21 annual report.

22 Q. Is it correct -- I'd also like to ask you about
23 your second permit which is Prosecution Team Exhibit 16.

24 Are you familiar with Term 8 in this permit? I think it's a
25 little -- it's Term 8. I think it's a little farther down.

1 These are terms that were added to address protests. Keep
2 going. There it is.

3 Are you familiar with the numeric codes on the
4 right hand side of this permit?

5 A. Yeah. I think that's -- from what I can guess
6 from the last 90, this 80 is probably a Term 80 diverter
7 under the 1594.

8 Q. Well, is it correct that this term, this -- do you
9 recognize this as Standard Term 80 --

10 A. I don't know this.

11 Q. -- or would it --

12 A. You know.

13 Q. -- would it appear --

14 A. I think I understand the Term 90-Term 80
15 structure, and that's what they're discussing here.

16 Q. Right. But this term, it's Term 8 in your permit,
17 is this term here to perfect -- to protect senior -- senior
18 users and beneficial uses in the San Joaquin River Basin?

19 A. Pardon? Pardon me?

20 Q. Is this term -- is this term here to protect
21 beneficial uses in the San Joaquin River Basin?

22 A. Yeah, it -- it's -- it's doing that, but I don't
23 have the -- I don't have any power or authority to do that.

24 Q. Well, I'm just -- I'm asking you about the permit.

25 A. Yeah. Yeah. That permit term.

1 Q. And the San Joaquin River Basin is, of course,
2 below your diversion?

3 A That's correct.

4 Q. And below New Don Pedro;

5 A. That's correct.

6 Q. Correct?

7 A. Yes.

8 Q. Okay.

9 A. That's correct.

10 Q. Are you familiar with Term 9 in this permit? Do
11 you recognize this Term 9 as Standard Term 80?

12 A. No, it's 90, isn't it? Isn't 9 90?

13 Q. Excuse me, Term 90, standard term -- do you
14 recognize this as Standard Term 90? I apologize.

15 A. Yes. It's like the last one.

16 Q. Is it correct that this term subjects your permits
17 to senior rights?

18 MR. HANSEN: I object to the point that he's
19 asking for a legal conclusion.

20 MR. PETRUZZELLI: I'm asking him for his
21 understanding of the permits that are -- of the terms that
22 are in his permits.

23 CO-HEARING OFFICER D'ADAMO: All right. Why don't
24 you restate your question.

25 BY MR. PETRUZZELLI:

1 Q. Is it your understanding, Mr. Fahey, that Term 9
2 in permit -- in your second permit subjects this permit to
3 prior rights?

4 A. (Mr. Fahey) Yeah. It says the permit is subject
5 to prior rights.

6 Q. Thank you. Is it correct that this term is also
7 here -- that is also here provides protections for the San
8 Joaquin River Basin?

9 MR. HANSEN: Object; the document speaks for
10 itself.

11 MR. PETRUZZELLI: Again, I'm asking Mr. Fahey for
12 his understanding.

13 CO-HEARING OFFICER D'ADAMO: For his
14 understanding. Yes. I'm going to allow that in.

15 MR. FAHEY: Okay. One thing I'm unclear about is
16 when I read 1594 and Term 80 and Term 90, and trying to get
17 a handle on the whole thing, the Tuolumne River isn't
18 mentioned in term -- in Decision 1594. And in the figures
19 that show all the rivers and dams and everything that are
20 involved in 1594, New Don Pedro Reservoir nor any part of
21 the Tuolumne River is shown.

22 So is the Tuolumne River subject to 1594, even
23 though it's not mentioned in the decision?

24 MR. PETRUZZELLI: You know, just answer the
25 questions.

1 MR. FAHEY: Sure.

2 MR. PETRUZZELLI: Yeah.

3 BY MR. PETRUZZELLI:

4 Q. Are you familiar with Term 11 in this permit?

5 A. (Mr. Fahey) Yes, I've -- I've read that before.

6 Q. Okay. And do you recognize this as Standard Term
7 93?

8 A. No, I don't. I didn't -- I'm not familiar with --

9 Q. Okay. But --

10 A. -- Standard Term 93.

11 Q. But this term --

12 A. But I understand the concept.

13 Q. Okay. But this term prohibits you from diverting
14 when the bureau is releasing stored water from New Melones
15 Reservoir to meet the water quality objective at Vernalis;
16 correct?

17 A. Yeah. I've never -- I don't know if that's ever
18 occurred because --

19 Q. But --

20 A. -- because of TDS.

21 Q. But this term is here?

22 A. Yes, it is.

23 Q. Okay.

24 A. Yes, that term is there.

25 Q. And this term -- and Vernalis is downstream in the

1 delta; correct?

2 A. Yes.

3 Q. And that's below your diversion; correct?

4 A. Not in the control of my diversion but downstream
5 from my diversion.

6 Q. But it -- but it is downstream --

7 A. Yes, it is.

8 Q. -- from your diversion?

9 A. Yes, it is.

10 Q. Yeah. And it's also downstream from New Don
11 Pedro; correct?

12 A. Yes, it is.

13 Q. Yeah. Okay. So I think is it in your testimony
14 that you argue that New Don Pedro altered the hydrologic
15 regime of the Tuolumne River?

16 A. The -- it, yeah, it altered how Decision 995 with
17 respect to all -- all unimpaired flow had to go unimpeded to
18 -- to Old Don Pedro Reservoir.

19 Q. I think you -- I -- and do you characterize this
20 in your testimony as stating that the construction of New Don
21 Pedro in roughly 1971 made D-995, and I think this is a term
22 you use, obsolete?

23 A. Yes.

24 Q. Okay. Do you know when the applications for New
25 Don Pedro were filed?

1 A. I think they were filed sometime in the '40s, '48
2 or something like that.

3 Q. So they were filed before D-995?

4 A. I mean, I don't know when they were filed. I'm
5 thinking that it was in the '40s. Yes, it was --

6 Q. Are you familiar with D-995?

7 A. Yes, I've read it.

8 Q. Okay. And --

9 A When I was a kid I understood how it worked
10 because of the return flow from the Moccasin Powerhouse to
11 Don Pedro Reservoir via Moccasin Creek.

12 Q. And are the --

13 A. So I had a physical experience with it.

14 Q. Are the permit applications -- did the State Water
15 Board consider the permit applications for New Don Pedro in
16 D-995?

17 A. I don't think they did. When you read it, it's
18 silent on that.

19 Q. I -- briefly, I'd like to ask you about the -- the
20 FAS exception that you were issued for your first permit. I
21 think it shows up as Fahey 10 at Bates 138. Is it correct
22 the division granted you this exception for your
23 application?

24 A. Yes, they did.

25 Q. And the exception stated that the diversions from

1 -- during the FAS period were subject to a water exchange
2 agreement between you and the districts?

3 A. Yes.

4 Q. Okay. And did the exception state that you were
5 making up for deficiencies the Board had identified in D-995
6 and D-1594?

7 A. Yes.

8 Q. I'd like to ask you more specifically about D-995.
9 I believe it's Prosecution Team Exhibit 18. And I believe
10 it's on the last page of that exhibit. It lists the
11 applications for -- that were considered. Do you -- okay.
12 I'm going to resume asking you about the FAS.

13 Actually, I would ask the Hearing -- the Hearing
14 Team to take notice that I believe it is -- Application
15 14126 and Application 14127 were applications for New Don
16 Pedro Reservoir.

17 MR. HANSEN: We object to that judicial notice on
18 the grounds that, A, no document was ever given, and it
19 certainly was never included in the December 15th
20 determination as to exactly all exhibits that the
21 Prosecution Team said that we would get in support, which
22 they promised in their documents that all documents in
23 support of the ACL we would receive. We haven't.

24 MR. PETRUZZELLI: This is specifically questioning
25 Mr. Fahey's contention that somehow New Don Pedro was not a

1 consideration in D-995 or is somehow irrelevant. If the New
2 Don Pedro water right applications were considered in the
3 adoption of D-995 then it was certainly considered in the
4 determination of, you know, no water available for
5 appropriation.

6 MR. FAHEY: The problem with that is the Fourth
7 Agreement wasn't executed until July of -- or, pardon me,
8 1966. The Fourth Agreement --

9 MR. PETRUZZELLI: Mr. Fahey, I haven't asked you a
10 question about that.

11 MR. FAHEY: Oh, okay. I'll --

12 CO-HEARING OFFICER D'ADAMO: Just a second.

13 MR. FAHEY: I'll wait.

14 CO-HEARING OFFICER D'ADAMO: Okay. So we're going
15 to overrule your objection on the grounds that it's a public
16 record.

17 MR. PETRUZZELLI: Thank you.

18 CO-HEARING OFFICER D'ADAMO: So if you could
19 proceed.

20 BY MR. PETRUZZELLI:

21 Q. Mr. Fahey, I'd like to ask you about your second
22 permit application and the FAS exception that you had for
23 that application. I believe it is Exhibit WR-17.

24 MR. HANSEN: If I could restate the prior
25 objection on the grounds that under judicial notice a

1 document must be provided that they are relying upon. And
2 so I don't see how we can take judicial notice of a document
3 we have never received and have any opportunity to reflect
4 whether it is true and correct and whether it's relevant and
5 whether it's actually the document they say it is.

6 MR. PETRUZZELLI: Both of those applications are
7 public record. And they're both subject to notice under
8 Title 23, section 648.3.

9 BY MR. PETRUZZELLI:

10 Q. I believe this document also appears as Fahey
11 Number 27, Bates 579. And did you sign this additional
12 statement?

13 A. (Mr. Fahey) Yes, I did.

14 Q. And you signed that under penalty of perjury?

15 A. Yes, I did.

16 Q. And is it correct that this application was
17 conditional upon the 1992 agreement with MID and TID?

18 A. No.

19 Q. Did you state in this -- this statement that this
20 --

21 A. It wasn't accepted.

22 Q. This statement was not accepted?

23 A. The statement was not accepted.

24 Q. So you submitted this statement with your
25 application --

1 A. Yes, I did --

2 Q. -- and this part --

3 A. -- under -- by --

4 Q. -- was not accepted?

5 A. -- the -- Yoko Mooring instructed me to do this
6 prior to submitting my second water rights, because Yoko and
7 I had worked together for a long time. And she suggested I
8 do this to expedite the procedure.

9 Q. But the division did grant you an exception for
10 the FAS for this application; correct?

11 A. Yes. But it didn't pertain to this.

12 Q. But it was not pursuant to this --

13 A. No. They wanted something more --

14 Q. -- (inaudible)?

15 A. -- more -- more expansive and inclusive of both
16 water rights.

17 Q. And that was the TUD purchase agreement?

18 A. Yes, it was.

19 Q. Right.

20 A. Exchange agreement. TUD exchange agreement.

21 Q. Does the TUD exchange agreement -- strike that.

22 So I'd like to ask you about the FAS exception
23 itself. I think that is Prosecution Team Exhibit 64, page
24 64. It's also your Exhibit Number 37 at -- at Bate 641. I
25 think it's quicker if you go to Fahey 37 at Bate 641.

1 A. Did you say Fahey 37?

2 Q. Yes. And is this the exception that was
3 specifically granted you for your second permit?

4 A. Yes.

5 Q. And it states that the exchange agreement would
6 make up for any deficiencies identified in D-995 and D-1594?

7 A. Yes.

8 Q. And does it also state that your diversions
9 between June 16 and October 31 each year are subject to a
10 water exchange agreement between you and the districts?

11 A. 995 water is for the districts.

12 Q. Does this exception state that your diversions
13 between June 16 and October 31 are subject to a water
14 exchange agreement between you and MID and TID?

15 A. That's the way that sentence reads.

16 Q. And then specifically, the 1992 Water Exchange
17 Agreement?

18 A. That is not clear to me.

19 Q. But it specifically is a water exchange agreement
20 between you and MID and TID?

21 A. Yeah. Is that the water exchange agreement
22 executed on October 20th, 2003 --

23 Q. It says --

24 A. -- the Tuolumne --

25 Q. Is there -- is there a water exchange agreement

1 executed between you and TID and MID in 2003?

2 A. No. The water exchange agreement that pertains to
3 Term 34 is the October 20th, 2003 agreement. That's the
4 agreement that allowed me to have my application accepted.

5 Q. Okay. But I'm asking you about something a little
6 earlier in that paragraph which specifically asks about the
7 period between June 31 and October 31. That corresponds to
8 the FAS period; correct?

9 A. Yes, it does.

10 Q. Okay. And your diversions during that period are
11 conditioned on maintaining a water exchange agreement with
12 MID and TID; is that correct?

13 A. I can't do that without interfering with the
14 Fourth Agreement.

15 Q. But is that what is in this statement?

16 A. Well, that's what's in the statement --

17 Q. I'm asking you about --

18 A. Yes.

19 Q. -- what's in the statement.

20 A. That's what's in the statement.

21 Q. Okay. Does it also state that you would provide
22 replacement water for all water diverted to New Don Pedro?

23 A. Yeah. It says that this is for all water
24 diverted, so I've taken that as this -- this covers both
25 water right permits, all water, both permits.

1 Q. When you -- did this permit include a change
2 application -- a change petition for your first permit?

3 A. No, it didn't.

4 Q. No, it didn't.

5 A But that was -- that was why my -- my additional
6 statement was not accepted because they wanted a more
7 expansive exchange agreement that would entail -- that would
8 encompass -- that would expand, would be expandable to both
9 permits.

10 Q. Right. I -- so they wanted something stronger than
11 what you had in your first permit; correct?

12 A. They wanted something --

13 Q. Okay.

14 A. -- that handled both -- both --

15 Q. Okay.

16 A. -- all the -- all the water for both permits.

17 Q. Okay. But this permit and this application did
18 not alter any of the terms in your first permit; is that
19 correct?

20 A. I don't believe it did.

21 Q. Okay. That's what I was trying to clarify.

22 A. Confusing.

23 Q. Did this -- did this exception also state that you
24 would use your -- get your replacement water for the
25 exchange agreement with MID and TID through your purchase

1 agreements with TUD?

2 A. No. It would get -- it would get the replacement
3 water I was required to provide.

4 Q. But does it state that you will provide
5 replacement water to New Don Pedro pursuant to your TUD
6 purchase agreement?

7 A. Yes, it does.

8 Q. And that agreement terminated at the end of the
9 year?

10 A. No. No. That's -- that's -- that's a fiction.

11 Q. It specifically references --

12 A. I have -- I have an account --

13 Q. -- the October --

14 A. -- an account there. That -- that is just an
15 annual mechanism for getting the -- for signing up that --
16 to contractually obligate you to send you the water that
17 year. But they ask you that every year as part of being a
18 customer.

19 Q. Because you have to get -- because you have to get
20 a new purchase agreement every year?

21 A. Because they don't know if they have the surplus
22 water or not.

23 Q. Right.

24 A. So that --

25 Q. But you have to get a new agreement every year;

1 right?

2 A. A contractual agreement to obligate you to pay --
3 pay for the water they wheel.

4 Q. Okay. And -- okay. Thank you.

5 I wanted to go back to the TID-MID exchange
6 agreement very quickly. And I -- it's WR, again, it's WR-
7 66, pages 18 through 20. It's also, I think, Fahey Number 6
8 which might be a little quicker to find. I think it's on
9 page one of the agreement in the Recitals. Do the recitals
10 specifically mention -- state that this agreement was
11 adopted to meet the FAS condition --

12 A. Yeah.

13 Q. -- in permit -- in Permit 20784. At the time that
14 was application 29977.

15 A. Yeah.

16 Q. Okay.

17 A. Yes.

18 Q. And --

19 A. C?

20 Q. -- does --

21 A. Paragraph C, you're talking about?

22 Q. Yes, Recital C.

23 A. Okay.

24 Q. And is it also correct that Recital C states that
25 the State Water Board Decision 1594 declared that the waters

1 of the Southern California-San Joaquin Delta are fully
2 appropriated from June 15 through October -- through August
3 31?

4 A. Yes, it does.

5 Q. And does it also state that D-995 declared the
6 waters of the Tuolumne were fully appropriated from July 1
7 to October 31?

8 A. Yes, it does.

9 Q. And it further states that because of the fully
10 appropriated stream conditions you are unable to appropriate
11 water from Deadwood and Cottonwood for that period; correct?

12 A. That's correct.

13 Q. Or you would have been absent this exchange
14 agreement, correct, or you would have been unable to
15 appropriate water absent this exchange agreement; is that
16 correct?

17 A. Yes. My application wouldn't have been accepted
18 for year-round diversions.

19 Q. Okay. Thank you. I'd like to, I think -- is this
20 still Exhibit 66? Can we go back to page seven? I think
21 this is -- I believe this is a letter you sent to TUD in
22 2009; is that correct?

23 A. Yes.

24 Q. And in this letter did you state you were
25 purchasing makeup water for the FAS?

1 A. I think somewhere in that I did say that.

2 Q. All right. So your purchase in 2009 was for FAS
3 replacement water?

4 A. No. The -- what caused this was the Board's
5 February, I think it's February 20th, 2009 notice of
6 possible curtailments in the near future, and that if I
7 didn't purchase water from a water district and provide it
8 for future use I could myself in a, I think it was dire
9 situation. So I heeded their warning and started buying --

10 Q. But --

11 A. -- replacement water.

12 Q. But does this letter state that in the second
13 paragraph that water purchase will be used for exchange for
14 water diverted from the Tuolumne River during the period of
15 full appropriation?

16 A. Yeah. Yes, it does.

17 Q. Thank you. And do you recall a phone conversation
18 with Ms. Yoko Mooring from the Division of Water Rights on
19 or about September 25th, 2003? I think it is your Exhibit
20 Number 32. And in that -- in that conversation was it
21 stated that your proposal to purchase water was acceptable
22 for clearing the FAS conflict? And again --

23 A. Okay. Yeah, I recall -- I recall this -- I recall
24 this phone conversation.

25 Q. Okay. So your 2003 purchase agreement with TUD

1 was to resolve the FAS conflict in your second application;
2 correct?

3 A. Yes. And I was going to fully -- you know, as
4 long as the Board said they'd accept that, then I'd sign the
5 agreement. We were kind of, you know, in one of those you
6 do this and then I'll do it kind of situation.

7 Q. Great. Thank you. Something I'm unclear about in
8 your written testimony, I think you state that Marco and
9 Polo Springs stopped working in May 2014; is that correct?

10 A. Yeah. Marco, the underwater galley that I created
11 on Marco stopped flowing in 2014, and Polo in July, I
12 believe, I think it's June or July of 2015.

13 Q. But do you recall your progress report filed for
14 2014?

15 A. Yes.

16 Q. And you -- do you -- did you -- do you recall
17 reporting diversions from the springs throughout the year in
18 2014?

19 A. Yes, and I corrected that.

20 Q. Okay. Are you -- do you recall the water supply
21 analysis that was done for your second permit application?

22 A. Yes.

23 Q. And I think -- and do you recall your testimony,
24 your written testimony with regard to that analysis?

25 A. What page is it? What page in my written

1 analysis?

2 Q. You know, I do not have that page handy.

3 A. Upper left? Upper left? Does it -- does it give
4 you the page?

5 Q. We'll come back to that. Yeah.

6 Do you recall a conversation, a phone conversation
7 with Ms. Yoko Mooring from the division on or about January
8 30, 2003? I think it's documented in your Exhibit Number
9 29. And was this conversation related to your second
10 application?

11 A. Yeah. X, the X. It was a temporary --

12 Q. Right. And in the course of this conversation did
13 you state that the -- that since the springs are on U.S.
14 Forest Service land you needed a water right permit?

15 A. Yes. In order to -- in order -- because of the
16 changes in the Federal Land Management Act of 1976, even
17 though the states own all the water in the state they know
18 longer have the authority to grant a conveyance right of way
19 across national forest land. So prior to having the right
20 to convey water across national forest land, one needs a
21 water right. Otherwise, the national -- the U.S. Forest
22 Service won't recognize that you have a right to convey
23 anything.

24 Q. Yeah. And it couldn't just be any water right, it
25 had to a permit; correct?

1 A. I'm not sure of that.

2 Q. Or a water --

3 A. You know, you --

4 Q. Have a permitted right of the --

5 A. I'm not sure about that.

6 Q. Okay.

7 A. You have to have -- you have to have some type of
8 right to convey.

9 Q. Did you -- in your 2014 progress report, either of
10 them, did you report using groundwater in lieu of available
11 surface water?

12 A. No. I've always reported everything as
13 groundwater.

14 Q. Did you state that you've always reported
15 everything as groundwater?

16 A. That's how my reports -- if you look at my reports
17 you'll see that.

18 Q. Are you familiar with a box on those reports that
19 say "Check this box if you're using groundwater in lieu of
20 surface water?"

21 A. I'm reporting it how I was instructed during my
22 field -- during the field investigation in 1994.

23 Q. But you never checked that box in your progress
24 reports that said I'm using groundwater in lieu of surface
25 water?

1 A. No. I was informed that I should show it as
2 developed water, and that's how I report it in my reports.

3 Q. Did you report diversion of developed water from
4 Marco and Polo Springs in 2014?

5 A. I don't believe so. I don't think there's enough
6 -- enough water.

7 Q. Okay. But you stated that you've always reported
8 your diversions as developed water.

9 A. No. I said I always -- I've always reported my
10 diversions as surface water and developed water.

11 Q. Okay. So even though you think of them as
12 groundwater you've always reported them as surface water; is
13 that correct?

14 A. I report them like I was instructed to report them
15 during my field investigation in 1994.

16 Q. Right. But on your progress reports are they
17 reported as surface water?

18 A. Yes.

19 Q. Okay. Thank you. And I wanted to ask you about
20 the water supply analysis again. That water supply analysis
21 was submitted in association with your permit application;
22 correct?

23 A. Yes.

24 Q. And it supported your permit application?

25 A. Yes. It's a requirement.

1 Q. And Dr. Grunwald, I would like to ask you a
2 question about that analysis.

3 MR. GRUNWALD: Okay.

4 BY MR. PETRUZZELLI:

5 Q. And I think in the -- in the cover letter that you
6 submitted with your testimony I think you stated that in
7 that analysis that you submitted in association with that
8 application you assumed there was, and I think it was a
9 direct -- oh, what was the term -- direct and corresponding
10 impact of extractions from the springs versus surface flow?

11 A. (Mr. Grunwald) Well, it's kind of important to
12 know how those springs are developed.

13 Q. But is that what you stated in your testimony?

14 A. Yeah. I know that once the -- there's a diversion
15 through the -- the borehole the amount of water extracted
16 through the borehole is -- is greater than the -- the impact
17 on the --

18 Q. I'm not asking you about the analysis. I'm asking
19 you about what you stated in your testimony. And in that
20 testimony do you state -- do you state that water
21 extractions from the system directly impact surface flow?

22 A. To some extent, yes.

23 Q. But -- but directly? And that was the assumption
24 you made when -- in the water supply analysis for that
25 second permit application; is that correct?

1 A. Well, we use that number to -- to look at the
2 worst case that might happen --

3 Q. Right. But that was your --

4 A. -- with that version.

5 Q. That was the underlying assumptions --

6 A. Yeah.

7 Q. -- that you based that analysis upon in the -- for
8 the permit application?

9 A. Yes.

10 Q. Okay. And did you -- do you also state in your
11 testimony that the reduced water amount corresponds directly
12 to the volume of water extracted?

13 A. Would you restate that please?

14 Q. Based on that assumption did you -- did your
15 report therefore -- and that's the water supply analysis,
16 did your report conclude that reduced water volume -- volume
17 reporting to the drainage basin corresponds to the total
18 water extracted? Well, I think is it -- did you assume it
19 was roughly a one-to-one ratio?

20 A. Yes, I did in that --

21 Q. Okay.

22 A. -- water available analysis.

23 Q. And I think that -- is that relationship reflected
24 in the tables and charts attached to that report?

25 A. Yes. That was the assumption.

1 Q. Okay. And that's why, if you look at say Table 10
2 there always a 20 GPM difference?

3 A. Yes. Oh, yes.

4 MR. PETRUZZELLI: Okay. Thank you. Thank you.

5 CO-HEARING OFFICER D'ADAMO: All right. Are you
6 finished?

7 MR. PETRUZZELLI: Yes.

8 CO-HEARING OFFICER D'ADAMO: All right.

9 MR. PETRUZZELLI: We are done.

10 CO-HEARING OFFICER D'ADAMO: Okay. Now we're
11 going to go to the other parties, Turlock and Modesto
12 Irrigation Districts, and the City and County of San
13 Francisco.

14 MR. PARIS: Thank you. But thankfully we have no
15 cross-examination for either of these witnesses

16 CO-HEARING OFFICER D'ADAMO: Okay. Including the
17 City and County of San Francisco?

18 MR. DONLAN: (Off mike.) (Inaudible.)

19 CO-HEARING OFFICER D'ADAMO: All right. Okay.
20 Thank you.

21 Now we'll go to redirect testimony, Mr. Hansen.
22 Mr. Hansen, do you have an estimate on how much time you'll
23 need for redirect?

24 MR. HANSEN: (Off mike.) (Inaudible.)

25 CO-HEARING OFFICER D'ADAMO: Okay. And for

1 recross, any estimate on how much time that will take for
2 the Prosecution Team?

3 MR. PETRUZZELLI: You know, recross would be very
4 short.

5 CO-HEARING OFFICER D'ADAMO: All right. Well,
6 unless there are any objections we're just going to forge
7 ahead, all right?

8 Mr. Hansen?

9 REDIRECT EXAMINATION

10 BY MR. HANSEN:

11 Q. Mr. Fahey, are you claiming a water storage right?

12 A. (Mr. Fahey) No.

13 Q. Again, you're claiming this credit language, is
14 that correct, in your Terms 20 in the first permit and Term
15 34 in the second permit?

16 A. Yes. I should be allowed a credit for the foreign
17 water I've imported to New Don Pedro to justify their --
18 their enrichment of the water.

19 Q. And there was some testimony that was given by you
20 with regards to the reporting of diversions to the districts
21 and the city. And I think you testified that you had not
22 done that reporting. Do -- is it your understanding --
23 strike that.

24 Do you understand your permits as having any duty
25 placed upon you to report your diversions to the districts

1 and the city?

2 A. No.

3 Q. Are you aware of any language in any water
4 exchange agreement that requires you to have a duty to
5 report your diversions to the districts and the city?

6 A. The 1992 agreement mentioned that.

7 Q. Does the -- well, let's talk about that '92
8 agreement. Please turn to Exhibit 18 of -- Fahey Exhibit
9 18. This is a letter that's dated March 10th, 1995 to the
10 city from Yoko Mooring of the Board. Do you see that
11 letter?

12 A. Yes.

13 Q. Okay. Do you understand or do you know why this
14 letter was sent to the city?

15 A. Because the city -- the city was trying to, you
16 know, make sure that they weren't left out of the mix with -
17 - because of the 1992 agreement and the Fourth Agreement.
18 They felt like since they weren't a party to the fourth --
19 or, pardon me, to the 1992 agreement that they would be
20 impacted with respect to the Fourth Agreement?

21 Q. Was the city part of that 1992 agreement?

22 A. No. That was their objection. That was the
23 city's -- that was the -- the root of their objection to my
24 -- their protest of my water right was they were not a party
25 to that agreement.

1 Q. And they had to be involved because of the
2 requirements under the Fourth Agreement between the
3 districts and the city; is that your understanding?

4 A. Yeah. The Fourth Agreement was written in 1966,
5 five years after Decision 995, so that -- that changes.
6 It's not just a straightforward -- it used to be a
7 straightforward pass through where when water was generated
8 through the Moccasin Power Plants in the early '60s, then
9 they would have to run that water from the -- the forebay at
10 the Moccasin Powerhouse, down Moccasin Creek to Old Don
11 Pedro Dam. And that used to occur on a regular basis,
12 because we'd fish along that creek and you had to get out of
13 the way when the water came.

14 So until -- until the Fourth Agreement even the
15 city was required, under 995, to send any unimpaired flow
16 that they diverted upstream in their power plants and
17 pipelines. Once it got down to Moccasin Creek, it still had
18 to go to -- or the Moccasin Powerhouse, it still had to go
19 downstream, down Moccasin Creek to the Don Pedro -- the Old
20 Don Pedro Dam. So even the city couldn't interfere with the
21 unimpaired flow on the Tuolumne prior to the 1966 fourth --
22 Fourth Agreement. After that Fourth Agreement, then that
23 changed how the unimpaired flow was managed upstream of New
24 Don Pedro Reservoir.

25 Q. And was this letter here, this Exhibit 18, was

1 this part of the process under which the Board and the city
2 was coordinating to create that Term 20 in your first
3 permit?

4 A. Yes. Yes.

5 Q. So Term 20 then was designed to be able to take
6 care of the problems created by the '92 agreement because
7 the city had not been involved in that; is that correct?

8 A. That's correct. They had to be represented with
9 respect to keeping things balanced.

10 Q. Is that part of the reasons why you have testified
11 that Term 20 actually controls the way in which the water
12 replacement is to be done under the Term 19?

13 A. Yeah, that was my understanding, that now we have
14 something that involves all -- all three parties.

15 Q. And that required that you not interfere with the
16 water accounting procedures at NDPR; is that correct?

17 A. Correct.

18 Q. Now if you turn to Exhibit 37 for a moment. You
19 had earlier testified to that language there. You were
20 cross-examined on that language in that last sentence. Do
21 you recall that testimony?

22 A. Concerning the last sentence?

23 Q. Yes.

24 A. Yes.

25 Q. Okay. And then I think you made some mention

1 about the TUD agreement as somehow encompassing both
2 agreements. Do you recall that testimony?

3 A. Yes. That was the -- that was the intent when --
4 when my sworn statement was -- was not accepted and we had
5 to expand. We needed a more expansive agreement to take in
6 all water diverted.

7 Q. Okay. Turn your attention to Exhibit 40.

8 A. Yes.

9 Q. And have you look at the second to the last -- I'm
10 sorry, the second paragraph on that first page there, the
11 last sentence, "The city was not a party to the water
12 exchange agreement dated December 30, 1992 between the two
13 districts and the applicant. The city and applicant did
14 agree to terms that were proposed by the city in its letter
15 of December 19, 1994 which the SWRCB stated the applicant
16 had agreed to in its letter of January 24, 1995."

17 Do you see that language?

18 A. Yes.

19 Q. What is your understanding of what is being
20 communicated by that language?

21 A. Term 20, they're -- they're constructing --
22 they're setting the basis for constructing Term 20.

23 Q. In order to control the way in which the 1992
24 agreement is carried out; is that your understanding?

25 A. Yeah, that's right. That's -- that's what the

1 city was really working hard to do, to make sure that they
2 were -- they were creating a stool with three legs so the
3 stool could stand.

4 Q. In fact, isn't it your understanding that there's
5 no way that you could have followed the terms and conditions
6 in the 1992 agreement unless you followed that first
7 paragraph of Term 20 that says you're not allowed to
8 interfere with that water accounting procedure?

9 A. That's correct.

10 Q. Now looking at the last paragraph on that first
11 page, again Exhibit 40, that last sentence, "We seek
12 confirmation that the updated water exchange agreement is" -
13 - strike that. Let me go back.

14 In that paragraph, if you notice there, that last
15 paragraph there, the second sentence says, "The updated
16 agreement was executed on October 20, 2003 and submitted to
17 the WRCB."

18 Is your understanding that that's the agreement
19 with Tuolumne Utilities District?

20 A. Yes, that's correct.

21 Q. Okay. And have you flip back to -- just one
22 second, keep your finger there, however -- that Exhibit 37.

23 A. Yeah.

24 Q. Now that Tuolumne Utilities District water
25 exchange agreement, isn't that the same agreement in that

1 Exhibit 27 that is referenced then in Exhibit 40 in that
2 last paragraph?

3 A. Yes, it is.

4 Q. Okay. Now look at the last sentence on that first
5 page of Exhibit 40. "We seek confirmation that the updated
6 water exchange agreement is inclusive of the quantities
7 required under Permit 20784 and Application 31491."

8 Do you see that language?

9 A. Yes, I do. I remember that.

10 Q. Permit 20784 is your first permit; right?

11 A. Correct.

12 Q. And Application 31491 became the second permit;
13 right?

14 A. Correct.

15 Q. That was 21289?

16 A. Correct.

17 Q. So was it your understanding when you saw this
18 language from the city that was directed to the Board that,
19 in fact, that TUD agreement was the water exchange agreement
20 that was to cover both permits?

21 A. That's correct. That's what it was supposed to --
22 I confirmed that in writing.

23 Q. Thank you. Did New Don Pedro Reservoir ever spill
24 in 2011?

25 A. No, it didn't. I'm a registered professional

1 civil engineer. I understand what it is when a dam spills.

2 The dam did not spill.

3 Q. And how do you know that?

4 A. Because it didn't go over the brink of the dam and
5 down the emergency spillway.

6 Q. And how do you know that?

7 A. Well, I read the State Water Board's site on a
8 regular basis with respect to the Tuolumne River and watch
9 how, you know, watch how it's performing. And also you'd
10 see it in the local newspaper. That would be big news in
11 Tuolumne County if that happened again. That was a big
12 event in 1997 when it happened.

13 Q. I'm trying to recall your testimony in which I
14 think you were asked whether the springs become, in some
15 respect, a tributary to the Tuolumne River. Do you recall
16 that testimony?

17 A. Yes.

18 Q. Okay. To the extent to which it's -- how much of
19 the water that comes from the springs becomes a tributary to
20 the Tuolumne River?

21 A. The -- the springs that -- the water that
22 naturally issues from a spring in most cases in that area
23 finds its way down to the, you know, the creek below, and
24 then down to New Don Pedro. If it -- if it naturally issues
25 it -- it remains, for the most part, it remains a surface

1 water all the way down to the reservoir.

2 Q. And did you develop or do any changes to the
3 spring that increased the flow beyond what was "natural" in
4 your testimony?

5 A. Yeah. Typically it's -- it's accepted that
6 whatever the -- whatever the spring is running at normal,
7 you know, whatever it's normal flow is, typically you get
8 twice as much water out of the spring source after
9 development than prior to. That's just a general industry
10 standard.

11 Q. Okay. Turn your attention to Fahey Exhibit 20,
12 that's your first permit, 20784, and have you bring up that
13 Term 17. Were you ever given notice to interested parties
14 and an opportunity for hearing, as that last line states?

15 A. No.

16 Q. Has the Board ever in its curtailment notice
17 stated anything with regards to -- in Term 17, that you can
18 recall? Strike that question. It's -- I didn't phrase it
19 well and I apologize.

20 BY MR. HANSEN:

21 Q. Mr. Grunwald, some testimony was given on the
22 water supply analysis, and it was some phrase about directly
23 impact the surface flow. Do you recall that?

24 A. (Mr. Grunwald) Yes.

25 Q. Okay. And then you said to some extent, and then

1 you talked about worst case scenario. What do you mean by
2 that?

3 A. Well, when we did the analysis, I don't know
4 whether I had a conversation with Scott or not, but I
5 thought it would be appropriate to assume that all of the
6 water that was diverted was -- impacted this -- this spring
7 directly, although I was aware that it would not be -- not
8 necessarily be true. So I used that, what I call the worst
9 case scenario where you had 100 percent of the water
10 diverted, reducing the spring flow by 100 percent, by the
11 same amount.

12 Q. In fact, didn't you do that worst case scenario
13 because it was required by the California Environmental
14 Quality Act?

15 A. I believe so, yes.

16 Q. So it was not based upon what you actually saw, it
17 was based upon a worst case scenario that was required by
18 CEQA of 100 percent?

19 A. Yes.

20 MR. HANSEN: We have no further questions.

21 CO-HEARING OFFICER D'ADAMO: All right. Recross,
22 Mr. Petruzzelli?

23 RE CROSS EXAMINATION

24 BY MR. PETRUZZELLI:

25 Q. Mr. Fahey, I have some additional questions for

1 you about your course of communications with the districts.

2 I believe you stated that you never communicate with them
3 directly?

4 A. (Mr. Fahey) No, not that I recall.

5 Q. Okay. So you never told them directly how much
6 you were diverting from the springs?

7 A. No, I don't think I've directly ever said that to
8 them. No.

9 Q. You never told them when you divert water from the
10 springs?

11 A. I do. My water rights are for a year-round
12 diversion.

13 Q. Okay. But you specifically never informed them
14 directly when you divert from the springs --

15 A. On a day --

16 Q. -- how much?

17 A. On a day-to-day basis or month-to-month basis, no,
18 I don't.

19 Q. Okay.

20 A. I provide that monthly in an annual permittee use
21 report.

22 Q. So you -- so you report it in your annual report"?

23 A. Yes, I do.

24 Q. But you don't tell them directly?

25 A. That's correct.

1 Q. Okay. And you never told them how much water you
2 wheeled into their reservoir when you purchased it from TUD;
3 correct?

4 A. Not until June of 2014.

5 Q. Not until June 2014? And that's what you said?

6 A. Yes, that's correct.

7 Q. Okay. So, I mean, since you don't talk to them
8 directly, do you expect them to be able to assess whether
9 you've diverted adversely to their water rights?

10 A. When they correspond to me, I'll get back to them.
11 I was told not to correspond with them unless it was to
12 return correspondence from them.

13 Q. But you said you've had no direct communications
14 with them?

15 A. I haven't.

16 Q. And you haven't directly communicated to them?

17 A. No.

18 Q. Okay.

19 A. Because they haven't directly communicated to me
20 to initiate it.

21 Q. Okay. But again, because I'm not sure you
22 answered this, if you don't inform them directly of how much
23 you're diverting, when, how much, or when you're depositing
24 water in their reservoir or how much, do you expect them to
25 be able to tell you how much water to repay them under your

1 Term 20 or your Term 34?

2 A. Well, since the Tuolumne River is a very complex
3 system that, you know, they have to look years back and
4 years forward to determine if there's going to be an impact
5 to their water supply, it's a very -- as they've explained,
6 it's a very complex process. If they --

7 Q. I --

8 A. If they believed that one of those events has
9 occurred or is upcoming they will contact me, or they can go
10 to the State Water Board and get the annual reports.

11 MR. PETRUZZELLI: I -- can -- can I get that time
12 back, please, since he didn't answer my question?

13 BY MR. PETRUZZELLI:

14 Q. Because my question was how you expect them to
15 tell you how much water to repay based on Term 20 and Term
16 34 if you never directly tell them, if you don't correspond
17 to them --

18 A. (Mr. Fahey) If they directly -- if they --

19 Q. -- when you divert, how much, and how much water
20 you put in the reservoir and when?

21 A. If they directly ask me for that information I
22 will provide it, plus. Anything they want they can have.
23 All they have to do is ask.

24 Q. So since they never asked for it you never
25 provided it?

1 A. I don't have an obligation to provide it.

2 Q. Is that obligation stated in Term 20?

3 A. The obligation in Term 20 is that I'll do an
4 annual report and advise me of how much replacement water is
5 required.

6 Q. Is that obligation in Term 34?

7 A. I -- no, because that's what they changed.
8 Between Term 20 and Term 34 they dropped the word "annual"
9 because they explained the complexities of the Tuolumne
10 River and they had to look back in time and forward in time.
11 So the annual requirement required in the first permit is
12 not required once the first permit evolved into the water
13 exchange agreement that covers both permits.

14 Q. But you expect that they will only -- that they
15 will have to ask you first how much you divert, when,
16 whether you put water in their reservoir before you have to
17 tell them those things --

18 A. Yes.

19 Q. -- is that correct?

20 A. Yes. They'll tell me that they've gone through a
21 dry cycle or that something has occurred and they need to
22 consider my impacts. And I have no problem providing them
23 all the information going all the way back to 1996.

24 Q. Do you have any documentation of that arrangement?

25 A. The arrangement in Term 20?

1 Q. That you only have to provide -- that you only
2 have to tell them --

3 A. Yeah, the last 20 --

4 Q. -- whether you divert --

5 A. The last 20 years.

6 Q. -- adverse to their right?

7 A. Yes, I have documentation. The last 20 years they
8 have not contacted me, and as a result I have not contacted
9 them.

10 Q. But do you have documentation of an agreement that
11 you do not have to contact them first, that they have to ask
12 you first whether you diverted adverse to their rights?

13 A. My documentation is the truth under oath, and I'm
14 telling you, that's what I was told to do and that's who
15 I've performed.

16 Q. So --

17 A. And if they start writing me, I will start
18 corresponding with them. I have no problem doing that. I'm
19 here to get along with them, not to --

20 Q. But is it your testimony today that there is no
21 evidence of that in the record?

22 A. Just the last 20 years of no correspondence. That
23 would be the evidence of --

24 Q. Thank you.

25 A. -- of that.

1 Q. And is it correct that -- I want -- I'd like to
2 ask you about some of the modeling that CCSF had Mr. Dan
3 Steiner do in association with your second permit. I think
4 it is your Exhibit Number 14. And is it correct that Mr.
5 Steiner determined that, through modeling, that depending,
6 you know, how much water you diverted at certain times of
7 the year and when you deposited certain water in the
8 reservoir at certain times of the year it could potentially
9 impact adversely their water rights?

10 A. Yes. He discussed upstream diversions by third
11 parties.

12 Q. And that became the basis for -- that was, in
13 part, the basis for their protest; correct?

14 A. Yeah. They were documenting why the protests
15 needed to be addressed and what -- what their impacts were.
16 They had to physically described it --

17 Q. Okay. Thank you.

18 A. -- describe it.

19 Q. Okay. Thank you. Mr. Fahey, I wanted to ask you
20 about the water supply analysis that was done for the second
21 permit. Did you perform the measurements that were done for
22 that analysis?

23 A. The -- I believe I collected all the -- all the
24 flow data with a five gallon bucket and a stopwatch.

25 Q. So you did the onsite measurements, and Dr.

1 Grunwald wrote the report, I mean, is that --

2 A. I believe that --

3 Q. -- essentially how --

4 A. Yeah.

5 Q. -- how you did it?

6 A. I believe a time or two Ross was with me when we
7 collected.

8 Q. Okay.

9 A. You know, but I would say, what, 80, at least 80,
10 85, 90 percent of the information I collected.

11 Q. Okay. And that report -- and that analysis was
12 for Marco and Polo Spring; correct?

13 A. Correct.

14 Q. Okay. And -- and the testimony that you have
15 where you say that the water extractions from various
16 components of the system are greater than any observed
17 reductions. Is that for all four springs or is that only
18 for Marco and Polo?

19 A. Where did I -- where did I say that?

20 Q. Actually, I'm sorry, it's in -- Dr. Grunwald, I
21 think that's in your testimony.

22 So -- so that analysis is only for Marco and Polo
23 Springs?

24 A. (Mr. Grunwald) No. No. It's not for Polo. I've
25 never observed the final.

1 Q. So it's only for Marco Spring?

2 A. Marco and Sugar Pine and Deadwood.

3 Q. Okay. Marco, Sugar Pine and Deadwood, but not
4 Polo?

5 A. Correct.

6 Q. Okay. And did you -- have you actually measured
7 that phenomenon?

8 A. No, I have not.

9 Q. Okay. Have you done any definitive studies to
10 determine that difference?

11 A. No.

12 Q. Okay. And do you state in your testimony that
13 further measurements would be required to make that
14 conclusion?

15 A. That's correct.

16 Q. And you -- is it -- do you also state that
17 definitive studies would be required to determine that ratio
18 that you propose?

19 A. Yes.

20 Q. Okay. And it's -- and I'm not sure which of you
21 is better to answer this because it's a little unclear. Is
22 it your testimony that only 30 percent of that is
23 groundwater or only 30 percent would have otherwise reached
24 the Tuolumne River as surface water?

25 A. No. The testimony is that 30 percent of the water

1 that's diverted is -- is -- would impact the spring, but 70
2 percent comes from -- from groundwater because -- can I
3 explain how those -- those springs are developed?

4 Q. Well, what -- what I need to ask is what is -- how
5 much of that water coming out of the spring would otherwise
6 reach the Tuolumne River. Are you saying that only 30
7 percent would have otherwise reached the Tuolumne River?

8 A. That's my opinion from what I've observed --

9 Q. Okay.

10 A. -- with those restrictions.

11 Q. And the other 70 percent, is that groundwater?

12 A. The other 70 percent should be groundwater because
13 of the -- the location of the extraction facilities through
14 boreholes or infiltration galleries which are either below
15 or beyond the spring.

16 Q. Just groundwater?

17 A. I believe so, yeah.

18 Q. Okay. Not hydrologically connected to the
19 Tuolumne River?

20 A. I don't think so.

21 Q. Can you make that determination based on your --
22 your observations so far?

23 A. Yeah. It's just -- at this point more studies
24 would have to be done to -- to define that --

25 Q. Okay.

1 A. -- ratio, yeah.

2 CO-HEARING OFFICER D'ADAMO: I'm sorry, I didn't -
3 - I didn't hear your answer. Could you repeat it?

4 MR. GRUNWALD: I said more definitive studies
5 would have to be done to define that ratio.

6 BY MR. PETRUZZELLI:

7 Q. But, you know, even though you have this new
8 information, when you did the analysis to support the second
9 permit application you assumed that all of the water, all of
10 the water coming out of the spring would otherwise flow to
11 the Tuolumne River; is that correct?

12 A. (Mr. Grunwald) Yes, I did.

13 Q. Okay. And that was the premise for the permit
14 application; is that correct?

15 A. Yes.

16 Q. Okay. Mr. Fahey, I think you said you had a
17 purchase -- you purchased water from TUD in 1995, roughly
18 around '95, '94?

19 A. (Mr. Fahey) No.

20 Q. No. Did you have a TUD -- did you purchase water
21 from TUD before 2003?

22 A. No.

23 Q. No. Okay.

24 A. The -- the State Water Board, prior to the
25 issuance of the first water right permit, approved the TUD

1 water, Stanislaus River Water as foreign water for my water
2 exchange.

3 Q. Okay. But that was for the second permit; right?

4 A. No, that was for the first permit.

5 Q. That was for the first permit?

6 A. Yeah, 1995.

7 Q. Okay. But you did not have a purchase agreement
8 with TUD until 2003?

9 A. That's correct.

10 Q. Okay.

11 A. Because we had -- we had a contract that was in
12 the formation stage. And the -- and the State Water Board
13 accepted that. And then when we went to the second water
14 rights, the City of San Francisco brought up that that water
15 exchange agreement that the State Water Board referred to in
16 my second set of water rights has not been fully executed.
17 And they -- they caught -- and they were right there. And
18 so went back and got that done.

19 Q. Okay. Thank you. Did you -- did you divert
20 during the FAS period before that time?

21 A. Yes.

22 Q. Thank you. I think you testified earlier that
23 your original plan was to use a groundwater well as the
24 source of replacement water for the FAS period?

25 A. Yeah. It was in -- I bought two subdivision lots

1 in Lake Don Pedro Subdivision. And it was adjacent -- I
2 think they call it the Rodgers Creek Arm of New Don Pedro.
3 And I was just going to -- I drilled a well and improved it
4 for some groundwater. And that's -- that's what the 1992
5 agreement was written around because that was the scheme
6 that we thought would work.

7 Q. But I think you also -- and I think you also
8 testified that for various reasons your plan to use that
9 groundwater well couldn't go forward?

10 A. Well, it was just problematic trying to prove that
11 there wasn't a hydraulic connection. And then the -- the
12 opportunity to purchase Stanislaus River out of basin water
13 came up, and that was, you know, that was --

14 Q. So --

15 A. -- the purest well --

16 Q. -- prior to --

17 A. -- as far as foreign water goes.

18 Q. So prior to your purchase agreement for TUD in
19 2003, what did you use as a replacement water source for the
20 FAS period?

21 A. I would have used TUD if it would have been asked
22 for.

23 Q. Did you use it?

24 A. No, I didn't. I said I didn't purchase any.

25 Q. Okay. What did you use for -- as a replacement

1 water source if you did not have TUD water?

2 A. I would have -- I would have gone to them.

3 Q. I didn't ask you what you would have used, I asked
4 you what you did use?

5 A. I didn't. I already answered that. I didn't do
6 any FAS water replacement.

7 Q. So you did no FAS water replacement before 2003?

8 A. No, before 2009.

9 Q. You did no FAS water replacement before 2009?

10 A. Correct.

11 Q. Okay. So even though you had a purchase agreement
12 for 2003, you didn't actually do any FAS replacement until
13 2009?

14 A. That's correct. I've never claimed that I did.

15 Q. So you're saying no FAS replacement until 2009?

16 A. Yeah, 2009 to June of 2011, 88.55 acre feet.

17 Q. No prior -- so prior to that, no replacement water
18 under the FAS?

19 A. I've never claimed that I have.

20 Q. Thank you. That will be -- that will be all for
21 the Prosecution Team. Thank you.

22 And thank you, Mr. Fahey.

23 MR. FAHEY: You're welcome.

24 CO-HEARING OFFICER D'ADAMO: Thank you. All
25 right. We have some Staff questions.

1 Mr. Weaver?

2 STAFF COUNSEL WEAVER: I have a couple questions
3 for Mr. Fahey. And thank you for bearing with me. I know
4 it's been a long day.

5 BY STAFF COUNSEL WEAVER:

6 Q. So first of all, I just wanted to ask you about
7 your communications with the Water Board. I know we've
8 talked about the -- your 2014 curtailment certification,
9 your June 3rd, 2014 letter, and then the 2015 letter, and
10 your June 12th, 2015 call with Mr. LaBrie. I think I'm
11 getting all of them.

12 But I wanted to ask whether there's any other
13 communications that you've had with State Water Board staff
14 between June -- pardon me, between January 1st, 2014 and
15 your June 12th, 2015 phone call with Mr. LaBrie?

16 That was a no.

17 So no one -- they've never called you or emailed
18 you or anything like that?

19 A. (Mr. Fahey) No.

20 Q. And you've never called the Board or emailed the
21 Board, other than -- or sent letters, other than what we've
22 talked about today?

23 A. No. They've sent me standard notices.

24 Q. Sure.

25 A. Yeah.

1 Q. Right. Right. But no one -- no personal letter
2 or personal email or anything like that or --

3 A. No.

4 Q. -- personal -- okay. Got it. Thank you.

5 And then I also wanted to ask you a little bit
6 more about your -- the place of use and purpose of use of
7 your -- your two water rights that we've been talking about.
8 And I know we've made you look at a lot of pieces of paper
9 today, so thank you for bearing with me.

10 So first, if we could turn to Water Rights 15,
11 which is Permit 20784, page one. So we see under one --
12 I'll wait for Mr. Buckman to get there. So it's -- keep
13 scrolling down. Okay, it's this page, which I think is
14 actually the -- this is the third page of the exhibit. And
15 it lists the place of use as -- or the point of diversion as
16 being unnamed spring, Cottonwood Spring, and then Deadwood
17 Spring.

18 To the best of your knowledge and belief these are
19 both in Tuolumne County, California; correct?

20 A. Yes.

21 Q. Okay. Thank you. And then turning to the next
22 page, so page four of the exhibit, it lists the place of
23 use. The purpose of use is industrial, and the place of use
24 as a bottled water plants off premises; is that correct to
25 your best understanding?

1 A. Yes. And I provided the exact locations prior to
2 diversion on my second water rights permit. That was one of
3 the permit terms.

4 Q. Okay. Thank you. Do you happen to recall which
5 exhibit that was? If not, we can find it. It's all right.

6 A. It was -- it was an email. I can give you the,
7 not the precise, the approximate time. It was diversion of
8 -- under the first permit didn't occur until late December,
9 I think 2011 --

10 Q. Okay.

11 A. -- or December 2011. So it would have been just
12 prior to that, maybe October or November of 2011 I --

13 Q. Got it.

14 A. -- sent an email.

15 Q. Thank you. That's very helpful.

16 And I next want to ask you about Water Rights 16.
17 And it's the -- this is your other permit. And
18 specifically I wanted you to look at the fourth page of the
19 document, after those first three pages that look like an
20 order.

21 STAFF COUNSEL WEAVER: I think one more page,
22 Michael. One more. One more. So can you -- we're looking
23 for the -- it's the place of use and purpose of use. I'm
24 not -- what you have isn't quite matching up with what I
25 have.

1 MR. FAHEY: Page two of nine.

2 STAFF COUNSEL WEAVER: Okay. There it is. Thank
3 you. So --

4 MR. FAHEY: The next one below. There you go.

5 STAFF COUNSEL WEAVER: So this -- so the place
6 that we want, the place of use -- pardon me, the point of
7 diversion first, if you could go up one more page, Michael?

8 BY STAFF COUNSEL WEAVER:

9 Q. So these are two unnamed springs, Marco and Polo
10 Spring. And to the best of your knowledge and belief these
11 are both in Tuolumne County, California; correct?

12 A. (Mr. Fahey) Yes.

13 Q. Perfect.

14 A. Yes.

15 Q. Thank you. Now if we could go down. All right.
16 And the purpose of use is industrial. The place of use is
17 listed as bottled water plants off premises. To the best of
18 your knowledge and belief, is that how the water is used and
19 where it's used?

20 A. Yes.

21 Q. Okay. Thank you. Now I know we've -- I don't
22 want to get into who the specific water bottling operations
23 are because that's -- that's private. But I am curious
24 whether, to the best of your knowledge and belief, any of
25 those bottles plants are somewhere other than Tuolumne

1 County, California?

2 A. Yes. There's --

3 Q. You don't need to tell me specifics. I just
4 really need a yes or no, unless you want to.

5 A. There's none in Tuolumne County.

6 Q. There's none in Tuolumne County? Okay. Got it.
7 Have you ever applied for a permit to export groundwater out
8 of Tuolumne County?

9 A. I believe when that county code was implemented my
10 existing operation was carved from that county ordinance.

11 Q. It was grandfathered in?

12 A. Yes.

13 Q. Okay. To the -- to the best of your understanding
14 and belief?

15 A. I had someone that was there and I was informed
16 that that gotten done.

17 Q. Okay. About when would that have been?

18 A. Man, I'm going to say, I don't know, 2004, 2005 --

19 Q. Okay.

20 A. -- in there sometime. That's about the time frame
21 that was going on, I think.

22 Q. Got it.

23 A. No, but I know what ordinance you're talking
24 about.

25 STAFF COUNSEL WEAVER: Right. Right. And I think

1 that answers all my questions. Thank you very much.

2 MR. FAHEY: You're welcome.

3 CO-HEARING OFFICER D'ADAMO: All right. At this
4 time, Mr. Hansen, are you prepared to offer exhibits into
5 evidence?

6 MR. HANSEN: Thank you. Sorry about that. We
7 would move that all of our exhibits, 1 through 87, I
8 believe, except for 86 which should be not there, would be
9 moved into evidence.

10 CO-HEARING OFFICER D'ADAMO: All right. Does
11 anyone have any objections? Do any of the parties have
12 objections?

13 CO-HEARING OFFICER D'ADAMO: I'd just like to
14 remind the parties that the Prosecution Team's January 13th,
15 2016 motion to strike and motion in limine, and Mr. Fahey's
16 January 20th, 2016 opposition to Prosecution Team's motion
17 to strike motion in limine have been received and are being
18 taken under submission.

19 And the objection on Water Right's 147 is also
20 being taken under submission.

21 So aside from that, if there are no other
22 objections --

23 MR. HANSEN: If -- if I may ask --

24 CO-HEARING OFFICER D'ADAMO: Yes?

25 MR. HANSEN: -- 187, is that the document that Mr.

1 Cole was testifying to?

2 CO-HEARING OFFICER D'ADAMO: That's 147, yes.

3 MR. HANSEN: Okay. And is that objection still --

4 CO-HEARING OFFICER D'ADAMO: Yes.

5 MR. HANSEN: I do want to repeat that.

6 CO-HEARING OFFICER D'ADAMO: It's still under
7 submission.

8 MR. HANSEN: Okay. All right. Thank you.

9 CO-HEARING OFFICER D'ADAMO: All right.

10 MR. HANSEN: Because it was created a week after
11 their documents were supposed to have been produced.

12 CO-HEARING OFFICER D'ADAMO: Yes. I understand.

13 MR. HANSEN: So --

14 CO-HEARING OFFICER D'ADAMO: That's --

15 MR. HANSEN: Thank you very much.

16 CO-HEARING OFFICER D'ADAMO: -- that's, to me --

17 MR. HANSEN: And --

18 CO-HEARING OFFICER D'ADAMO: -- taken under
19 submission.

20 MR. HANSEN: So it's 187 and 147 are both -- those
21 are the two objectives we have to the documents, if I can
22 just recap some?

23 CO-HEARING OFFICER D'ADAMO: Just a second. Let's
24 clarify here.

25 MR. HANSEN: Thank you.

1 (Off the record discussion.)

2 CO-HEARING OFFICER D'ADAMO: Remind us, what's 187
3 again -- no, 147, the document that Mr. Cole was testifying
4 as to earlier? Not 187. Are you --

5 MR. HANSEN: So it's -- I got 147.

6 CO-HEARING OFFICER D'ADAMO: Right.

7 MR. HANSEN: So 187, that's just an error, there
8 is no objection to that?

9 CO-HEARING OFFICER D'ADAMO: Correct.

10 MR. HANSEN: Okay. Thank you.

11 CO-HEARING OFFICER D'ADAMO: All right. All
12 right. So the exhibits are entered into the record, except
13 for the earlier statements regarding Exhibit 147 and the
14 Prosecution Team's motion.

15 (Whereupon the above-referenced exhibits were
16 admitted into evidence by the Hearing Officers.)

17 CO-HEARING OFFICER D'ADAMO: All right.

18 MR. HANSEN: And if I can just clarify, that
19 objection went to not only that document but the entire
20 testimony of Mr. Cole --

21 CO-HEARING OFFICER D'ADAMO: Yes.

22 MR. HANSEN: -- regarding the communications
23 surrounding that document?

24 CO-HEARING OFFICER D'ADAMO: Correct.

25 MR. HANSEN: Thank you very much.

1 CO-HEARING OFFICER D'ADAMO: Correct.

2 All right, at this point we're going to recess for
3 the evening and come back in tomorrow.

4 But before we do that, it would be helpful if we
5 could get an idea as to rebuttal testimony. So does any
6 party plan on presenting rebuttal testimony?

7 MR. PETRUZZELLI: Yes.

8 CO-HEARING OFFICER D'ADAMO: Okay. And do you
9 have an estimate as to how much time you'd be requesting?

10 MR. PETRUZZELLI: Probably an hour.

11 CO-HEARING OFFICER D'ADAMO: Approximately?

12 MR. PETRUZZELLI: Yeah.

13 CO-HEARING OFFICER D'ADAMO: One hour? All right.
14 Any other party?

15 MR. HANSEN: Yes. Mr. Fahey. Probably one hour,
16 as well, on rebuttal.

17 CO-HEARING OFFICER D'ADAMO: All right. We will
18 reconvene tomorrow morning at nine o'clock. Thank you and
19 have a good evening.

20 (The hearing was adjourned at 5:34 p.m., until
21 9:00 a.m. Tuesday, January 26, 2016)

22

23

24

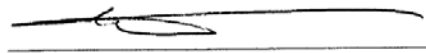
25

REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of February, 2016.



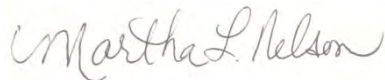
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Notary Public

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I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.



March 17, 2016

MARTHA L. NELSON, CERT**367

STATE OF CALIFORNIA
WATER RESOURCES CONTROL BOARD
PUBLIC HEARING

In the Matter of:

Draft Cease and Desist Order and
Administrative Civil Liability
against G. Scott Fahey and
Sugar Pine Spring Water, LP

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

Tuolumne County

_____ /

JOE SERNA, JR. BUILDING
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
SIERRA HEARING ROOM
1001 I STREET, SECOND FLOOR
SACRAMENTO, CALIFORNIA

TUESDAY, JANUARY 26, 2016

9:00 A.M.

Reported by:
Peter Petty

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I N D E X

EXAMINATIONS

DIVISION OF WATER RIGHTS PROSECUTION TEAM

	REBUTTAL	CROSS	REDIRECT
Ms. Katherine Mrowka	10	41	
Mr. Brian R. Coats			
Mr. David LaBrie and			
Mr. Samuel Cole			

G. SCOTT FAHEY AND
SUGAR PINE SPRING WATER, LP

	REBUTTAL	CROSS	REDIRECT
Mr. G. Scott Fahey	73	112	

E X H I B I T S

(Further detailed listing of exhibits can be found at www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/exhibits/)

DIVISION OF WATER RIGHTS

	Description	(First Reference)	EVD
WR-153	Power Point Presentation Slides: Rebuttal (except Slide No. 18 struck from the record) (TENTATIVE, PENDING RULING ON EVIDENTIARY OBJECTIONS)	10	136

1 P R O C E E D I N G S

2 January 26, 2016

9:12 a.m.

3 CO-HEARING OFFICER D'ADAMO: Good morning.

4 We will resume the matter of G. Scott Fahey and
5 Sugar Pine Spring Water, LP Administrative Civil Liability
6 Complaint and Draft Cease and Desist Order.

7 Before we proceed with rebuttal testimony, I
8 wanted to indicate that conducting rebuttal, we will be
9 conducting rebuttal under normal procedures.

10 We would like to clarify that the Hearing
11 Officers' ruling on document disclosure that was made
12 yesterday was limited to the case in chief. Exhibits that
13 are properly in rebuttal may be submitted as normal.

14 Any party may object to a rebuttal exhibit and
15 should provide an offer of proof as to why they would be
16 prejudiced as to the exhibit.

17 All right. We'll proceed with rebuttal
18 testimony, Division of Water Rights Prosecution Team,
19 Mr. Petruzzelli.

20 MR. HANSEN: This is Mr. Hansen, if I can make --

21 CO-HEARING OFFICER D'ADAMO: Yes?

22 MR. HANSEN: -- a motion *in limine* at this moment
23 as to rebuttal testimony that the Prosecution Team, is I
24 believe, going to put on. Basically it's two different
25 motions *in limine*.

1 One, is we want to reassert our objection to any
2 kind of testimony based upon a analysis of the Tuolumne
3 River, which I was just now handed for the first time. We
4 believe that document, and that testimony, is completely
5 within the parameters of the ruling by the Hearing Officers
6 on January 21st, 2016.

7 Obviously, it's a document that's within the
8 scope of the document requests. They're relying upon it,
9 because it is in support of the ACL. It was certainly not
10 disclosed to us previously other than two minutes ago. The
11 document was not made available to us, and it's not subject
12 to any privilege, and they never disclosed it.

13 So we ask that all testimony with regards to that
14 analysis and that document be stricken on the basis that
15 there can be no expert testimony on that basis. And that
16 replies to both the rebuttal as well as direct.

17 Secondly, we ask for another --

18 CO-HEARING OFFICER D'ADAMO: Sorry, it replies to
19 the rebuttal as well as?

20 MR. HANSEN: Direct.

21 Secondly, we want to make a motion *in limine* to
22 strike all rebuttal testimony with regards to Mr. Sam Cole
23 talking about the NDPR Spill in 2011, as well as Exhibit
24 147, to the extent that it's going to be used on rebuttal.
25 That is, not only is it uncorroborated double hearsay, the

1 document should have been produced per the Hearing Officers
2 Order of January 21st as well, because it also fit all five
3 criteria.

4 It was not produced to us by five o'clock p.m. as
5 the Prosecution Team was instructed to do so. In fact, as
6 of 7:30 on Thursday January 21st, we were informed by the
7 Prosecution Team that no such document existed.

8 We'll take the Prosecution Team at its word.
9 That means that that document, that has a date of December
10 22nd on it, was either hid by the staff from the
11 Prosecution Team up until who knows when -- yesterday or
12 so. Or that document itself must've been then created over
13 the weekend, or on Friday or possibly even yesterday during
14 the morning hearing, and then presented in the afternoon.

15 So we ask that there be a motion to -- be granted
16 to not allow any kind of testimony as to that Exhibit 147
17 or Mr. Sam Cole on that issue, on rebuttal. Thank you.

18 CO-HEARING OFFICER D'ADAMO: Okay.

19 Mr. Petruzzelli, your response?

20 MR. PETRUZZELLI: The Prosecution Team had
21 previously stated that it had -- that everything Mr. Fahey
22 had asked for it had disclosed, was privileged, or was
23 previously made available.

24 The Tuolumne River Analysis is a public document.
25 It's on the website, on the Water Shed Analysis webpage.

1 It is subject to notice under 648.2. It has been available
2 for the entire year. The 2014 analysis was available last
3 year. That set of documents was, and has been, available
4 for some time.

5 So is the CDEC full natural flow data. CDEC is a
6 public website. That data is publicly available. That
7 data is also referenced in Mr. Coats' written testimony as
8 well, which to my recollection includes a link to DWR 160
9 website that has the full natural flow data.

10 As to Mr. Cole's testimony, that was intended as
11 rebuttal. It was intended to clarify Mr. Fahey's statement
12 regarding the overflow operations of New Don Pedro.

13 It is also important that the notice -- the
14 ruling, to my recollection, referred to the document
15 demands in association with the deposition. And that
16 document was produced, I believe, after the deposition
17 notice.

18 The various document demands also had certain
19 dates associated with them. In general, as I remember, the
20 last date for the document demand was about September 15th.
21 So it wasn't, you know, this ongoing obligation to disclose
22 documents that we continue to produce -- that we might
23 continue to produce -- just because we're preparing for a
24 hearing or continuing to assess information. I mean there
25 were specific timeframes with respect to the email

1 disclosures that were expected.

2 And the request for documents that support the
3 ACL -- he asked for documents supporting the ACL. And
4 those are referenced in the ACL Complaint and they were
5 submitted in association with our case in chief when we had
6 those documents. Mr. Cole's email was produced after that,
7 because it was only later that we did that follow up, so --

8 CO-HEARING OFFICER D'ADAMO: Okay. And then with
9 respect to -- just a minute -- just with respect to
10 Mr. Cole's testimony you indicated how it's related to
11 rebuttal testimony, but I didn't hear what you said on --
12 or if you did -- on the Tuolumne Analysis.

13 MR. PETRUZZELLI: Yes.

14 CO-HEARING OFFICER D'ADAMO: How is it that
15 you're presenting it as rebuttal testimony, rebutting what
16 point?

17 MR. PETRUZZELLI: The Tuolumne Analysis is
18 intended to rebut Mr. Fahey's contention that the
19 Prosecution Team does not have a supply analysis showing
20 that there is not water available for his priority of right
21 on the Tuolumne. And to the degree he states that that was
22 not -- that we did not comply with his document request, we
23 informed him that everything was otherwise available. I
24 had previously informed him that those documents were
25 available on the State Water Board's Drought Analysis

1 website. That is a public website. Mr. Fahey's attorneys
2 are free to explore the website at their leisure.

3 So, you know, that and all of the other
4 information concerning the water supply analyses and flow
5 analysis that was done for the drought, is there.

6 CO-HEARING OFFICER D'ADAMO: All right, thank
7 you.

8 Mr. Hansen?

9 MR. HANSEN: If I may, I'll respond to that
10 first.

11 I am not aware of any rule, at all, governing
12 this proceeding unlike in court where there is a specific
13 rule about documents that are demanded on the eve of trial.
14 And there's such a thing called a Discovery Cut-Off Rule.
15 There is no such rule here that states that I was supposed
16 to, last week, send another document demand.

17 In light of the kind of motion practice I'm sure
18 the Hearing Officers are now weary of in this case if I had
19 done such a thing -- well, you can only imagine what
20 Mr. Petruzzelli's opposition would have looked like. Now
21 he's saying I had that duty. That's not in the rules and
22 we know full well that's ridiculous. If they had this
23 document and they were relying upon it they absolutely --
24 okay, let's go back to Mr. Cole's.

25 And with regards to Mr. Cole's document, my

1 understanding, and I've been pounded by the Prosecution
2 Team on this, is that there's not supposed to be surprises
3 at this hearing. Now we hear that, "Oh, but after you go
4 through a late document production," which even they
5 complained it was so late -- into December-- now we're
6 hearing that oh, no I'm supposed to do yet another document
7 production at the last second to collect everything else
8 they might have. And that totally flies in the face of any
9 kind of good faith and fair dealing and fundamental
10 fairness in this proceeding.

11 Secondly, with regards to Tuolumne River
12 Analysis, Mr. Fahey looked at that website and never found
13 this, never saw this. For them to say that in a document
14 production demand that we make, that somehow we're supposed
15 to go look and search over their websites for all documents
16 that they're relying upon and not actually produce them,
17 again I have no idea now what they're going to bring up
18 that's on that website.

19 They have a duty to show us what they're relying
20 upon. And nowhere ever, in any of the statements did we
21 receive, or any of the declarations that were made exhibits
22 on December 16th when they said we would get everything in
23 their -- in the stuff that they said that we would get
24 everything in on the December 15-16 production. This was
25 not in there.

1 They didn't say, "Everything is coming." I can
2 even read Mr. Petruzzelli's letter to you. We're going to
3 get everything that's "in support of the ACL." We will
4 receive it. It was not in there. And now they're saying,
5 "Oh, it's not only in there it's also on the website though
6 we haven't given it to you yet. And we're going to give it
7 to you on the second day of trial." Oh, I'm sorry, on the
8 second day of the hearing.

9 MR. PETRUZZELLI: Mr. Hansen is mischaracterizing
10 the course of our communications.

11 He specifically asked for the website in his
12 first informal document request, containing the graphical
13 analysis for the water supply analysis. I directed him to
14 that website. I may have actually provided the links to
15 the specific documents. And I also instructed him that
16 additional information concerning the drought and the water
17 supply analyses that were done for the drought are
18 available on that website. And again, it is a public
19 website.

20 CO-HEARING OFFICER D'ADAMO: Okay, just one
21 moment.

22 MR. HANSEN: Two responses I can make to that.
23 There is a letter that I have here dated December 8th,
24 10:26 a.m. by Mr. Petruzzelli --

25 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, one

1 moment, please?

2 MR. HANSEN: Okay.

3 CO-HEARING OFFICER D'ADAMO: All right,
4 Mr. Hansen you may proceed.

5 MR. HANSEN: The watershed analyses that we were
6 referenced in Mr. Petruzzelli's December 8th email, we do
7 not find, and did not find those documents, in that.
8 Furthermore he said this, and I was going off of this
9 language. "Any and all documents supporting the ACL will
10 be made available as exhibits on or by December 16th,
11 2015." He didn't say, "Except for my reference down the
12 road, lower in the email, about this website."

13 CO-HEARING OFFICER D'ADAMO: All right, very
14 good.

15 So the Hearing Officers will be ruling that we
16 will allow both Mr. Cole's testimony and Exhibit 147, and
17 the Tuolumne River Analysis. We will allow both items in
18 as rebuttal testimony, but we will be taking both items in
19 -- and the objections are noted -- we'll be taking them in
20 under submission.

21 Additionally, the nondisclosure objection and the
22 hearsay objections will also be taken under submission.

23 All right, you may proceed Mr. Petruzzelli.

24 MR. PETRUZZELLI: Thank you, Hearing Officers.
25 We would like to start by reiterating just the basics.

1 And can we bring up the PowerPoint Presentation,
2 first? Can we pause the clock while we're waiting for the
3 PowerPoint? Thank you.

4 REBUTTAL TESTIMONY And EXAMINATION

5 BY PROSECUTION TEAM

6 (Thereupon an overhead presentation was presented
7 as follows:)

8 BY MR. PETRUZZELLI:

9 Q. So Ms. Mrowka, Mr. Fahey's permits include Term
10 17 and Term 8 that subject him to prior rights, but on
11 irrespective of those terms, are his permits still subject
12 to prior rights?

13 A. (Ms. Mrowka) Yes. Mr. Fahey has a junior
14 priority.

15 Q. And that's stated very clearly right at the top
16 of his permits as we see on the slide, is correct?

17 A. Yes, that is.

18 Q. Okay. And can you tell us again about
19 Mr. Fahey's priority, and whether an exchange agreement
20 would allow him to divert at times when there is water not
21 available for his priority?

22 A. Yes. Mr. Fahey has two post-1914 water rights.
23 He is among the most junior of the diverters in his
24 particular watershed. And the permits are subject to
25 senior rights irrespective of Terms 17 and Term 8.

1 Exchange agreements do -- they allow for diversion during
2 the fully appropriated streams period, but they don't
3 change priority. If there is unavailable water for the
4 permittee's priority, then the permittee can't divert
5 water.

6 Q. Okay. And then Mr. Fahey's second permit, even
7 though it does not specifically have a Term 19, since it's
8 more junior to his first, what does that mean?

9 A. Well, under the water rights priority system a
10 junior diverter can't divert when the senior is unable to
11 divert. And it doesn't matter if both water rights are
12 held by one individual or by separate parties. Seniority
13 is the rule, so if there's no water for the first permit
14 there's no water for the second.

15 Q. Okay. Thank you.

16 And Mr. Coats, did you do the watershed analysis,
17 a separate watershed analysis, specifically for the
18 Tuolumne River Watershed?

19 A. (Mr. Coats) Yes, I did.

20 Q. Okay. And this is a portion of that analysis
21 that is offered as a portion of our rebuttal analysis -- of
22 our rebuttal testimony. It is available on the State Water
23 Board's drought website, under the Watershed Analysis for
24 the San Joaquin Water Basin? It is a public document and
25 subject to notice under 648 --

1 MR. HANSEN: I object that the Counsel is giving
2 testimony and not the witness.

3 CO-HEARING OFFICER D'ADAMO: Sustained.

4 BY MR. PETRUZZELLI:

5 Q. So Mr. Coats, can you tell us about this portion
6 of the watershed analysis?

7 A. Yeah, this map is for the Tuolumne River Sub-
8 watershed that we did, which was inclusive or actually
9 contained within the entire San Joaquin River Basin. This
10 particular map shows the boundary for which we did a supply
11 and demand analysis on a tributary level.

12 Q. So this was -- so we had the analysis yesterday
13 that we did for the whole San Joaquin River Basin?

14 A. Correct.

15 Q. And then this is an analysis specific for the
16 Tuolumne River?

17 A. Correct.

18 Q. Okay. So and then Brian can you -- or Mr. Coats,
19 can you explain what this is?

20 A. This is the same Tuolumne River Analysis for
21 supply and demand for 2014.

22 Q. And can you tell us what it depicts?

23 A. This particular graph shows the priorities of the
24 riparian and pre-1914 demands that we received from
25 diverters, mapped against a forecasted Department of Water

1 Resources supply, both on a 50 percent and 90 percent
2 supply exceedance.

3 Q. And would this graph show that there was water
4 available for Mr. Fahey?

5 A. No, it does not.

6 Q. So it shows there is not water available?

7 A. Correct.

8 Q. Okay. Thank you. And what data is this graph
9 based on?

10 A. This data is based on -- for the supply
11 information, the Department of Water Resources supply
12 information for the Tuolumne River at La Grange Dam, which
13 was obtained from the CDEC website -- both on the 50 and 90
14 percent exceedance forecasts. And the demand was based off
15 of the -- for 2014 was based off of the 2010 statement
16 demand for riparian and pre-1914 rights.

17 Q. And these are both publicly available documents?

18 A. Yes, they are.

19 Q. CDEC is a publically accessible website?

20 A. Yes, it is.

21 Q. And the map we saw on the last slide is part of
22 the publically available documents associated with the
23 Tuolumne River Analysis?

24 A. Yes. It's also posted on the website.

25 Q. Thank you. And is this -- and then can you

1 explain what this is?

2 A. This is the same Tuolumne River Analysis with
3 different colors and additional information for 2015, based
4 on that same boundary.

5 Q. And would this analysis show that there's water
6 available for Mr. Fahey's priority?

7 A. No, it does not.

8 Q. So it does not show there was water available for
9 his priority?

10 A. No, it does not.

11 Q. Rather, it shows there is no water available for
12 his priority?

13 A. Correct.

14 Q. I'm getting confused with my negatives. And
15 similarly, what is this -- what data is this analysis based
16 on?

17 A. Now, this data in addition to the -- we don't
18 actually have the forecasted monthly amounts on this
19 particular chart because they were forecasted to be zero.
20 So instead in the interests of the diverters, we opted to
21 use the more positive daily full natural flow, which was
22 calculated by the Department of Water Resources. And we
23 mapped that against the 2014 reported demands and also the
24 demands that were obtained from the February 2015
25 Informational Order. And so we charted both of those.

1 And that's why you see -- on the exhibit you'll
2 see an adjusted senior demand line, which for some reason
3 in July diverters within the Tuolumne River Basin actually
4 increased their diversions relative to 2014. And so you
5 see an actual increased demand line there, mapped against
6 the blue daily full natural flow data.

7 And so when you extrapolate a trend line for the
8 daily full natural flow, you'll see that through the summer
9 months it's actually less than the reported senior demand,
10 which includes the riparian and pre-1914 appropriative
11 rights.

12 Q. And so since the full natural flow is less than
13 riparian and pre-'14 demands that would show that there's
14 no water for Mr. Fahey at that time, correct?

15 A. Correct.

16 Q. And this too is a publicly available document?

17 A. Yes, it is posted on the website.

18 Q. And the data it's based on is publically
19 available?

20 A. Yes.

21 Q. And this is part of, one of -- all of these
22 Tuolumne River analyses and the CDEC data are included in
23 our rebuttal exhibits, correct?

24 A. Correct.

25 Q. Okay. Thank you.

1 And again, Ms. Mrowka, has Fahey shown us -- do
2 his permits allow for storage?

3 A. (Ms. Mrowka) No, the permits do not allow for
4 storage.

5 Q. And does the exchange agreement allow for
6 storage?

7 A. The exchange agreement does not provide any of
8 the District's water rights, which you would need for
9 storage.

10 Q. Okay. And Term 20 and 34, I believe, allow him
11 to credit water in the future. But does that necessarily
12 grant him a storage right in New Don Pedro?

13 A. No. He would have to have some specific document
14 from the owners of the facility saying, "We are allowing
15 you to use a portion of our storage right in order for you
16 to store your water here." And we haven't seen that
17 entered into evidence.

18 Q. Or if it were a more formal right with the State
19 Water Board is it correct that there would actually have to
20 be a change in the permits for New Melones granting him
21 some storage interest?

22 A. Pardon, you said New Melones. Is it New Don
23 Pedro?

24 Q. Or New Don Pedro, I apologize.

25 A. Could you repeat?

1 Q. Yeah. So his permits, is it correct that they
2 did not modify the permits for New Don Pedro?

3 A. No. There has been no action to modify those
4 rights.

5 Q. Right, so since there was no modification for the
6 terms for New Don Pedro they certainly did not give him a
7 storage interest in New Don Pedro, right?

8 A. That is my understanding.

9 Q. Okay. So even though Mr. Fahey purchased this
10 water, did he have a right to store it anywhere?

11 A. I have no seen any documents allowing him
12 storage.

13 Q. Okay. Thank you. And as for other water
14 supplies on the exchange agreement, the TUD purchase
15 agreements that we've seen in evidence, would those have
16 been in effect in 2000, say 2011?

17 Or I'll ask this to the panel.

18 A. To the panel?

19 Q. I think, Dave maybe you're good to answer this?

20 MR. HANSEN: I'm sorry, can you repeat the
21 question?

22 MR. PETRUZZELLI: I'll strike that.

23 BY MR. PETRUZZELLI:

24 Q. Mr. LaBrie, do we have any evidence of water
25 purchases for 2013, from Mr. Fahey?

1 A. (Mr. LaBrie) No, we do not.

2 Q. Do we have any evidence of water purchases for
3 2015?

4 A. No, we do not.

5 Q. And Mr. Fahey has not testified to that, correct?

6 A. No, he has not.

7 Q. Okay. So Kathy, Brian -- or Ms. Mrowka,
8 Mr. Coats, Mr. Fahey has emphasized that there's no rights
9 between him and New Don Pedro. But does Don Pedro isolate
10 him from the rest of the basin?

11 A. (Mr. Coats) No, it does not.

12 Q. So he is hydraulically connected to the rest of
13 the basin?

14 A. Yes, he is.

15 Q. And so his diversions would impact rights and
16 beneficial uses downstream, correct?

17 A. Yes, he would.

18 Q. And would you say that the incorporation of
19 standard terms like 80, 90 and 93 is proof that when his
20 permits were issued the Board determined that his
21 diversions can have an impact downstream?

22 Maybe I'll ask you, you answer that. Why don't
23 you answer that question?

24 A. (Ms. Mrowka) Yes, because I have extensively
25 reviewed his water right permits. And as you note they

1 have the standard Terms 80, 90 and 93. And those terms are
2 inserted in water rights where there is a potential that
3 there could be impacts to downstream beneficial uses and
4 other water right holders.

5 Q. So basically, every acre foot he diverts, when
6 his right does not permit him to divert that water, is an
7 acre foot that is not going downstream for seniors or for
8 beneficial uses, correct?

9 A. That is correct.

10 Q. Okay. Thank you. Ms. Mrowka, could the State
11 Water Board have issued Mr. Fahey's permits had it not
12 issued these exemptions to the FAS determination?

13 A. No. The Division of Water Rights has to comply
14 with prior Board determinations and the FAS determination
15 is such an item. In that document, the Board has specified
16 the limited conditions under which an application can be
17 accepted on a stream declared to be fully appropriated.

18 Q. Maybe you can talk to us about -- tell us about
19 how FAS determinations are made, how they're updated, and
20 how they would be changed?

21 A. Certainly, so a FAS determination really is a
22 two-part process.

23 First, the State Water Board had to have had a
24 hearing or issued either a order or determination of some
25 sort that found there was no water available in a

1 particular stream. Usually, it's a seasonal determination
2 that says the period when water's not available. That's
3 the first action.

4 To then incorporate that earlier decision or
5 order into the FAS determination requires a second hearing.
6 And that is a FAS-specific hearing. So it's really a very
7 complicated process to enter a stream into the FAS, plenty
8 of opportunity for public comment and participation in
9 those proceedings.

10 And then after that, if a party wishes to
11 challenge a FAS determination it's again a complicated
12 procedure. First, the Deputy Director for Water Rights has
13 to find cause for modification of the FAS determination.
14 And then after that the item must be brought to the Board
15 for another subsequent determination that it's appropriate
16 to modify FAS.

17 Q. And has Mr. Fahey asked -- requested a
18 modification of the FAS in that manner?

19 A. No, he has not.

20 Q. Okay, thank you. So as a result of the FAS
21 process are D-995 and D-1594 still "valid," so to speak?

22 A. Well, when the Board determines what decisions
23 it's going to list in the FAS it does a review to make sure
24 it wants to incorporate those into the FAS. And they made
25 that decision. The Board made a decision, a determination,

1 to include those decisions as a basis to find fully
2 appropriated status.

3 Q. So, as determined in -- so the Tuolumne River and
4 the San Joaquin River Basin, for those dates, is still
5 fully appropriated?

6 A. That is correct.

7 Q. And that decision hasn't been changed?

8 A. No, the Board has not changed it.

9 Q. Okay. And did Mr. Fahey challenge that when he
10 applied for either of his permits?

11 A. No. Mr. Fahey determined that he would follow up
12 on the FAS issue by requesting one of the exceptions to FAS
13 that is available, and that is the exchange agreements.

14 Q. And these specific exemptions were made because
15 he had exchange agreements, correct?

16 A. That is correct. It's one of the very few ways
17 that a party can get a water right in a fully appropriated
18 stream.

19 Q. And the second one not only because he had the
20 exchange agreement, and I mean the 1992 exchange agreement
21 with TID and MID, but also because he had a water purchase
22 agreement with TUD, correct?

23 A. Yes. Those are the materials that we've reviewed
24 in order to issue the exception.

25 Q. So he actually had proof of the exchange

1 agreement and a mechanism to provide the water for the
2 exchange agreement, correct?

3 A. That is correct.

4 Q. Okay.

5 A. For the second permit.

6 Q. And would this second permit have eliminated Term
7 19 from his first permit?

8 A. No. The only way to modify a water right is the
9 change petition process. And I've been here 29 years now
10 and I've never seen a water right modified to remove terms
11 dealing with prior rights.

12 Q. Okay. Thank you. And this is Mr. Fahey's
13 statement accepting the Term 19 and 20 conditions for a
14 second permit. What would have happened to Mr. Fahey's
15 application had he not included this statement?

16 A. We would not have been able to proceed forward.

17 Q. Okay. So he proceeded under -- he made his
18 application under the premise that he would have these
19 terms or equivalents in his permits?

20 A. That is correct. Under FAS, we can't even accept
21 an application for lodging if there isn't a valid
22 exception.

23 Q. Thank you. So I mean do permit terms -- you
24 know, if somebody wants to -- thinks their permit terms
25 shouldn't really apply any more, can they just stop

1 complying?

2 A. No. That's not an option.

3 Q. What would they need to do?

4 A. They would need to petition for modification of
5 the terms. And there's a lot of specifics that go into
6 that, especially if the terms were derived from Board
7 orders.

8 Q. Okay. And what's included in that change
9 process?

10 A. Well, after a change petition is submitted we
11 review it and notice it. And the public has opportunity to
12 protest it. And it can only be approved if the protests
13 are resolved, either through negotiations or through Board-
14 level actions.

15 Q. Okay. But and again, did Mr. Fahey -- were his
16 permits granted based on what he stated in his applications
17 and in the associated material with those applications?

18 A. We took his submittals at face value.

19 Q. Thank you. And Kathy, I think you already told
20 us about FAS determinations. Can you maybe talk to us
21 about what this timeline represents?

22 A. Certainly. So when Decision 995 was issued it
23 looked at all of the water rights that had been both --
24 everything that was pending at the time the Decision was
25 issued. And so the New Don Pedro applications, they were

1 filed in 1951, D-995 was 1961. It specifically takes note
2 of the two water rights that were intended for construction
3 of the reservoir. And when you're looking at construction
4 of a large reservoir that's a lot of water right permits,
5 permits from other agencies such as Army Corps of
6 Engineers, things like that.

7 It takes a bit of time after you secure all your
8 permits before you can actually start to build the
9 facility. Plus there are requirements as to how fast you
10 can fill a new reservoir that's a large capacity reservoir,
11 so there's a lot of procedures that occur.

12 The fact is these are 1951 water right priorities
13 recognized in D-995.

14 Q. And the FAS determinations, the subsequent orders
15 on this timeline represent when those FAS determinations
16 were renewed?

17 A. Yes. What had happened with FAS is that there is
18 a periodic review provision in it. And that's so that we
19 can pick up new orders and determinations by the Board and
20 incorporate those, if it's appropriate to do so, in these
21 subsequent renewals or subsequent orders.

22 On the FAS orders -- like Order 91-07 does not
23 supersede 89-25 unless there's specific text on a specific
24 item. What they generally are intended to do is to pick
25 up, like I say, those subsequent findings of the Board and

1 bring those forward in time. So that people are aware of
2 all the other decisions that affected availability of
3 water.

4 Q. And on -- so looking at some of these FAS renewal
5 determinations would Mr. Fahey have had the opportunity to
6 participate in these proceedings?

7 A. Every time that the Board takes up the FAS issue,
8 it has a hearing in order to make its subsequent decision
9 whether FAS should be modified in any fashion.

10 Q. And that's a publicly noticed hearing, correct?

11 A. That is.

12 Q. Okay. And including especially the hearing in
13 1998 for Order 98-08?

14 A. The FAS hearings tend to be some of our more
15 broadly noticed hearings because what we're looking at is
16 any Board order or determination effecting water
17 availability throughout the State. And so the
18 notifications tend to be very broad.

19 Q. Okay. But the notification for Order 98-08, what
20 it eventually became, that followed his first permit,
21 correct?

22 A. That is correct.

23 Q. Okay. So he was certainly aware of the FAS
24 determinations at that time?

25 A. Especially so, because Division staff had talked

1 to him regarding that. If they had not talked to him he
2 would not have made the declaration in his application
3 itself.

4 Q. Thank you. So, and Kathy, maybe you can tell us
5 again in what situations does the State Water Board have
6 jurisdiction over groundwater?

7 A. We have jurisdiction over -- I'm sorry?

8 Q. Well, I'll rephrase that. What is the State
9 Board's jurisdiction with respect to groundwater?

10 A. The State Water Board has jurisdiction over
11 groundwater flowing through known and definite channels.

12 Q. Okay. Does that include percolating ground
13 waters that form defined surface streams?

14 A. Yes. At the defined surface stream, we
15 definitely have jurisdiction.

16 Q. Okay. And is that how the springs are
17 characterized in Mr. Fahey's application materials?

18 A. Yes, he has indicated that.

19 Q. So the springs as he described them in his
20 applications would be jurisdictional?

21 A. Yes.

22 Q. And would the location of the springs have any
23 impact as to how he had to go about securing water rights?

24 A. Absolutely. Springs that are located on Forest
25 Service lands such as the Fahey Springs require a permit

1 from the State Water Board.

2 Q. So, and in addition to simply requiring a permit,
3 did his application materials also show that diverting
4 water from those springs would have a direct and
5 corresponding impact on surface flows?

6 A. Yes. His water availability analysis indicated
7 this.

8 Q. Okay. Thank you. And, Ms. Mrowka, do
9 Mr. Fahey's permits address groundwater at all?

10 A. No. These are for surface waters.

11 Q. So there's no mention of groundwater in his
12 actual permits?

13 A. No, the permits don't say that. What they say is
14 they list the springs as the water sources that were
15 identified for permitting purposes.

16 Q. And has he ever reported using ground water in
17 his progress reports?

18 A. The progress reports have a specific checkbox
19 related to groundwater and he does not check that box.

20 Q. Thank you. Ms. Mrowka and Mr. Coats, can you
21 explain to us -- I think we've heard the term "developed
22 water" -- can you maybe tell us what that is?

23 A. The term developed water is used to refer to
24 water that is added to the native supplies from non-
25 tributary sources or foreign sources.

1 Q. So in the context of Mr. Fahey's spring, what
2 would you look for as developed water?

3 A. I would be looking to see if there were a non-
4 tributary source in that particular case.

5 Q. Okay. So in his report, so say in his progress
6 reports, does he have a line for developed water or a space
7 in his progress reports for developed water?

8 A. Yeah. He adds an addendum to the reports, and
9 that he has like an Excel spreadsheet where he talks to
10 that issue.

11 Q. And is his reporting of developed water
12 characteristic of what you would see from developed water?

13 A. Yeah, his reporting of developed water is really
14 kind of interesting, because it is not consistent. Like if
15 I were looking at a developed percolating groundwater
16 source that was non-tributary I would kind of expect to see
17 a consistent pattern, because you're into percolating
18 ground waters and things like that. I wouldn't expect to
19 see a highly seasonal pattern to the percolating
20 groundwater. And we do see a seasonality in this
21 particular reporting that Mr. Fahey makes.

22 I would certainly expect if we were in the
23 percolating groundwater that we wouldn't see the all zeros
24 reported like we did for 2014 and the all zeros for 2015.
25 That really looks more like a surface water type issue

1 rather than a percolating groundwater type issue.

2 Q. And again, Mr. Coats or Ms. Mrowka, you can
3 answer this. How would you go about determining whether
4 it's percolating groundwater or subsurface flow, that how
5 would you know you're drawing developed water?

6 A. Well, you would have to do a site-specific study.

7 Q. Okay. Has that kind of -- what would that kind
8 of study entail, just in general?

9 A. Well, you have to -- you know, a geologist would
10 have to need to do that work. And they would need to go
11 out there and do measurements in the undeveloped state,
12 compare it to the measured developed state water. Plus
13 they'd also have to give us information about the
14 subsurface formation and what it looks like. You know, a
15 lot of different parameters regarding that.

16 Q. So has Mr. Fahey's testimony and evidence so far
17 supported the kind of analysis necessary to make that
18 determination?

19 A. What I heard on the testimony was that there was
20 not -- that they hadn't done that kind of work. They
21 hadn't compared the undeveloped state to the developed
22 state.

23 Q. Okay. Thank you.

24 MR. HANSEN: This is Glen Hansen. Is it possible
25 for the Hearing Officers to -- Mr. Mona to -- actually I'm

1 sorry, if they could have those slides emailed to my
2 office, so I have them here as well?

3 CO-HEARING OFFICER D'ADAMO: Certainly.

4 MR. HANSEN: Thank you, so much. I apologize for
5 the interruption.

6 BY MR. PETRUZZELLI:

7 Q. Kathy and Brian, maybe you can talk about the
8 certification notices that were sent out, how many, how
9 many in 2014, how many in 2015?

10 A. (Mr. Coats) Sure. This is a certification
11 summary for the notices for the water unavailability
12 notices that were issued in 2014 and 2015.

13 As you can see over 9,300 unavailability notices
14 were issued in 2015. Of those, we received about 3,688
15 certifications. Of the 3,688, 523 checked the "other
16 source" box.

17 In 2014 a similar amount of unavailability
18 notices were issued, totaling roughly 9,254. Of those,
19 3,531 of those notices submitted a certification form. And
20 out of that 3,531, 340 checked the "other source" box. And
21 we've indicated here claiming exemption on the curtailment
22 form is not permission to divert water that's determined to
23 be unavailable.

24 We had over 1,000 curtailment inspections for
25 each year, and limiting staff resources, it took time to

1 get to Fahey. We just didn't have enough people or
2 manpower.

3 Q. So the fact that Mr. Fahey filed his curtailment
4 certification form in 2014 and it took roughly a year to
5 get to him, that was largely due to allocation of staffing
6 resources in response to drought management?

7 A. Correct.

8 Q. Okay. And very quickly, did Mr. Fahey's
9 testimony indicate that he stopped diverting after he got
10 the Notice of Unavailability?

11 Dave, maybe you can answer that?

12 A. (Mr. LaBrie) No.

13 Q. Okay.

14 So Kathy, Mr. Fahey has the FAS replacement
15 requirements in his permits, correct?

16 A. (Ms. Mrowka) Yes.

17 Q. Yeah. And Dave, when did Mr. Fahey say he has
18 provided FAS replacement water?

19 A. (Mr. Coats) He's reported that he's provided
20 replacement water in 2009, 2010 and 2011.

21 Q. But his 2010 agreement did not -- ended at the
22 end of the year, correct?

23 A. I understand that the agreement ends at the end
24 of the year.

25 Q. Okay. All right, so in 2011 he didn't have the

1 purchase agreement at that time to purchase that water?

2 A. That's what I understand.

3 Q. Okay. So he didn't testify that he purchased any
4 water for 2012, correct?

5 A. No.

6 Q. Or for 2013?

7 A. No, he did not.

8 Q. Or for 2014?

9 A. No.

10 Q. Or for 2015?

11 A. No.

12 Q. And did you also hear him testify yesterday that
13 he didn't provide any FAS replacement water before 2009.

14 A. Yes, that's what he said.

15 Q. And do his progress reports -- so and in these
16 periods where he said he didn't provide FAS replacement
17 water, are you familiar with his progress reports from
18 prior years?

19 A. Yes, I am.

20 Q. And has he reported diversions during the FAS
21 period in those years?

22 A. Yes he has.

23 Q. Thank you.

24 Ms. Mrowka, or maybe Mr. LaBrie, either of you is
25 probably good to answer this question. Do Mr. Fahey's

1 permit terms prohibit him from harming or interfering with
2 the rights of the Districts?

3 A. (Ms. Mrowka) Yes, the terms do.

4 Q. And they specifically provide for not interfering
5 or harming with the obligations that the City of San
6 Francisco has under the Raker Act, correct?

7 A. That is correct.

8 Q. Okay. And were Terms 20 and 34 included largely
9 to resolve protests by the City and County of San Francisco
10 to resolve those concerns?

11 A. They are to address the concerns.

12 Q. Okay. And the fact that Mr. Fahey's permits
13 state that he has the duty not to harm or interfere with
14 these rights; does that put an affirmative duty upon him to
15 do that?

16 A. That is correct, and under the priority system,
17 it's really junior diverter's responsibility to assure and
18 take the steps necessary to address senior right holders.

19 Q. So it was his duty then, it has been his duty, to
20 adequately notify the City and the Districts that he's
21 diverting water or putting water in their reservoir,
22 etcetera?

23 A. The permit terms are directives to Mr. Fahey on
24 what he must do under the water right. They're not
25 directives to another party.

1 Q. But it does charge him with the affirmative duty
2 to take those steps necessary not to harm their rights,
3 correct?

4 A. That is correct.

5 Q. Okay. And then, Ms. Mrowka, you're probably a
6 good person to answer this question again. So on the
7 record retention policy do we -- are emails -- maybe you
8 can tell us again about the record retention policy?

9 A. Yeah, the records retention policy for line staff
10 is that the emails are deleted automatically from the
11 system. After the 90 days there's an automatic deletion
12 feature. They're not retrievable.

13 Now, managerial staff emails are retained for
14 five years. And attorney emails are retained for five
15 years, but only those which they send and receive. So the
16 policy is different depending on your rank.

17 Q. So the attorneys don't get all the email that
18 everybody has, and then they can access it even when it's
19 otherwise deleted from everybody else's email account?

20 A. No. Once a email is deleted, especially from the
21 line staff, it's not retrievable.

22 Q. Okay. So for instance, if one of Dave LaBrie's
23 emails had been deleted 100 days ago I would not normally
24 be able to go -- you know, I would not be able to access
25 it, find it, get to it?

1 A. No, and that's the point of a document retention
2 policy is it makes it clear to everybody what is retained
3 and it clarifies that. Ninety days for line staff, you
4 cannot access it in any fashion. For managerial staff,
5 it's longer.

6 Q. So what happens with material substantively
7 important to an investigation?

8 A. It's the staff's job to copy that and put it in
9 the correct files.

10 Q. So even though their emails are deleted the
11 substantively important material goes in the investigation
12 file?

13 A. That's correct.

14 Q. And is that retained?

15 A. Yes.

16 Q. How long is that retained?

17 A. The investigation files, the Board does not have
18 policy on that at this time, so we just retain them. It's
19 an indefinite retention.

20 Q. Okay. Kathy, are you familiar with the current
21 Draft Cease and Desist Order or Dave, are you familiar with
22 the current Draft Cease and Desist Order?

23 A. (Mr. LaBrie) Yes.

24 Q. Okay. And what does it order Mr. Fahey not to
25 do?

1 A. I believe the Draft Cease and Desist Order orders
2 Mr. Fahey to cease diverting water until the Board
3 determines that water is available, under his priority of
4 right.

5 Q. And Mr. Coats, even though we've had rain are we
6 still in a period of drought?

7 A. (Mr. Coats) Yes.

8 Q. Okay. So, we could have a recurrence -- so it's
9 reasonably foreseeable we could have a recurrence of
10 unavailability this year?

11 A. Very likely.

12 Q. Okay. So given Mr. Fahey's actions and
13 activities diverting water I think the current draft --
14 strike that.

15 Has there been notice that water is now available
16 for diversion?

17 A. We temporarily lifted all of the unavailability
18 notices as of last year.

19 Q. Okay. So would it be appropriate then to have a
20 Cease and Desist Order that is sufficient to insure that
21 Mr. Fahey does not divert water when water is not available
22 for him in the future?

23 A. That is correct.

24 MR. HANSEN: Object, calls for speculation and
25 asks for hypothetical effects that we have no clue what

1 that potential order would be based on.

2 MR. PETRUZZELLI: Is it reason --

3 CO-HEARING OFFICER D'ADAMO: Just, yeah why don't
4 you rephrase your question?

5 BY MR. PETRUZZELLI:

6 Q. Mr. Coats, is it reasonably foreseeable that
7 there would be water unavailable for Mr. Fahey's priority
8 in the reasonably foreseeable future?

9 MR. HANSEN: Object, calls for speculation as to
10 the witness who's not been disclosed as an expert on
11 atmospheric conditions into 2016.

12 MR. PETRUZZELLI: Well, Mr. Coats is it --

13 CO-HEARING OFFICER D'ADAMO: I'm going to
14 overrule that, proceed.

15 BY MR. PETRUZZELLI:

16 Q. Okay. Let's say for example, this year coming up
17 I think you said it was likely that there would be water
18 unavailable for -- there would be another unavailability
19 notice?

20 A. Correct.

21 Q. Would that likely impact Mr. Fahey and his
22 priority of right?

23 A. Yes.

24 MR. HANSEN: Object, calls for speculation.

25 Q. Does Mr. Fahey have a very junior right?

1 A. He has a very junior post-1914 water right.

2 Q. Given the very junior nature of his right,
3 is it reasonably foreseeable that an unavailability notice
4 would impact his priority of right?

5 MR. HANSEN: Object, calls for speculation.

6 CO-HEARING OFFICER D'ADAMO: Overruled.

7 BY MR. PETRUZZELLI:

8 Q. Would it therefore be reasonable to include in a
9 Cease and Desist Order an order not to divert water when
10 water is unavailable in the future?

11 A. Correct.

12 Q. And not just when water is again available for
13 diversion as it is now?

14 A. Correct.

15 Q. Okay. Thank you.

16 And Ms. Mrowka, I wanted to go back to this slide
17 briefly. Under Section 1055.3 that you talked about
18 yesterday, I think you said that that requires the Board to
19 consider all relevant factors in assessing an ACL penalty?

20 A. (Ms. Mrowka) Yes it does.

21 Q. And would say a diverter's history of compliance
22 or lack thereof be a relevant consideration in 1055.3?

23 A. It would.

24 Q. Okay, thank you.

25 Mr. LaBrie is it correct that Mr. Fahey had

1 stated to you previously if he stopped diverting he would
2 be out of business?

3 A. (Mr. LaBrie) Yes.

4 Q. So would you characterize that as a strong
5 economic incentive to continue diverting?

6 A. I would.

7 Q. Even when no water is available for priority
8 right?

9 A. Yes.

10 Q. So would you say that he has a strong economic
11 incentive to continue diverting -- strike that -- I don't
12 think that's necessary.

13 MR. PETRUZZELLI: That concludes our rebuttal
14 testimony. Thank you.

15 At this time the Prosecution Team would -- or
16 does entering that into evidence wait until after cross on
17 this?

18 CO-HEARING OFFICER D'ADAMO: We wait until after
19 cross. Yeah, we'll wait until all the rebuttal.

20 MR. MONA: But we'll identify the Prosecution
21 Team's PowerPoint slides as Rebuttal WR-153.

22 CO-HEARING OFFICER D'ADAMO: All right, we'll
23 proceed with cross-examination.

24 MR. HANSEN: Fahey requests that we have a break
25 in order to be able evaluate the brand-new analyses that we

1 just received. And we ask that we have a break to lunch to
2 be able to do that, please?

3 Mr. Fahey is an expert in the area -- has been
4 disclosed as an expert in the area in hydrology and we need
5 to analyze this, which we have never seen this document
6 before.

7 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, are you
8 saying that you're requesting until lunch, that we come
9 back at 12:00?

10 MR. HANSEN: That we come back after lunch.

11 CO-HEARING OFFICER D'ADAMO: After lunch, okay.
12 We'll reconvene at 12:30

13 MR. HANSEN: Thank you.

14 (Whereupon a recess and break for lunch were
15 taken 10:13 a.m. to 12:32 p.m.)

16 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, are you
17 ready to proceed?

18 MR. HANSEN: Yes, I am.

19 My co-counsel here, if she appears, I don't know
20 if she's in court or --

21 CO-HEARING OFFICER D'ADAMO: Oh, yes.

22 UNIDENTIFIED SPEAKER: She's here.

23 MR. HANSEN: Oh, okay. I just don't want it to
24 be awkward that she, you know, walks right past you and
25 all.

1 CO-HEARING OFFICER D'ADAMO: Oh, that's fine.

2 MR. HANSEN: Do you want to wait for her, for a
3 moment or?

4 CO-HEARING OFFICER D'ADAMO: Okay, that's fine.
5 (Off the record.)

6 CO-HEARING OFFICER D'ADAMO: All right,
7 Mr. Hansen?

8 MR. HANSEN: Thank you.

9 CROSS-EXAMINATION BY G. SCOTT FAHEY

10 AND SUGAR PINE SPRING WATER LP

11 BY MR. HANSEN:

12 Q. Mr. Coats, I request that you review your Slide
13 No. 4 there, that Tuolumne Analysis 2014 of what is marked
14 as Rebuttal Exhibit WR-153, the slides. Do you see that
15 analysis there is at page 4?

16 A. (Mr. Coats) Yes, I do.

17 Q. Again, I think you testified that that is based
18 upon the water supply and demand at the La Grange Dam;
19 isn't that correct?

20 A. That's based on the unimpaired flow data at La
21 Grange Dam.

22 Q. Okay. And that is actually then downstream from
23 the New Don Pedro Reservoir; isn't that correct?

24 A. If I looked on a map and verified that, yes.

25 Q. Okay. Do you have any reason to believe that

1 it's not below the NDPR?

2 A. I haven't actually reviewed the map. It's not in
3 front of me right now.

4 Q. Okay. Is the La Grange Dam below the Fahey
5 diversions?

6 A. Yes, it is.

7 Q. Are there any instream riparian and pre-1914
8 demands between Fahey's point of diversion and NDPR?

9 A. I don't have that information available in front
10 of me right now to confirm that.

11 Q. Now, if we assume for the sake of an argument
12 here, because the testimony from yesterday repeatedly that
13 there are none -- so let's go with that assumption. What
14 would be the shape of the demand curve if there are no in-
15 stream riparian and pre-1914 demands?

16 A. I can only speculate as to what that is. And I
17 don't actually have the data to confirm anything that I
18 would testify to today.

19 Q. Okay. I'll try to repeat the question, maybe
20 it's helpful or not.

21 What would be the shape of the demand curve if
22 there are no in-stream riparian and pre-1914 demands
23 between Mr. Fahey's points of diversion and NDPR?

24 A. I can't distinguish between in-stream and off-
25 stream.

1 Q. Well, you used those words. Riparian and -- okay
2 how about that -- okay, strike that. Thank you for
3 clarifying, I'll ask that again.

4 What would be the shape of the demand curve if
5 there are no riparian and pre-1914 demands between
6 Mr. Fahey's points of diversion and NDPR?

7 A. Because the boundary included everything upstream
8 at his point of diversion as referenced on that boundary
9 map, and all the way to the confluence of the San Joaquin
10 River, I would have to perform a separate analysis to give
11 you an estimate on what that shape would be.

12 Q. Well, let's say you did that analysis that you
13 just talked about and you found out that --

14 MR. PETRUZZELLI: Objection, calls for
15 speculation.

16 MR. HANSEN: Well, he said he would do a study.
17 And so I'm trying to determine what his study would likely
18 result if in fact he finds out that, as we're saying here
19 today, there are no riparian and pre-1914 demands between
20 Mr. Fahey's points of diversion and NDPR.

21 MR. PETRUZZELLI: Which sounds like speculation.

22 MR. HANSEN: Testifying as an expert.

23 MR. PETRUZZELLI: And you're also asking for a
24 hypothetical.

25 CO-HEARING OFFICER D'ADAMO: All right,

1 Mr. Hansen. Ask your question again, please?

2 BY MR. HANSEN:

3 Q. Yes. You mentioned, I think a moment ago, that
4 you'd have to do a separate analysis for that portion --
5 well for that location of between Mr. Fahey's points of
6 diversion and NDPR and take into consideration that there
7 are no riparian and pre-1914 demands in that location -- in
8 order to determine what the new graph would look like;
9 isn't that correct?

10 A. No.

11 Q. Okay, let me ask it this way. Would your
12 analysis here change -- would the change -- I'm sorry.

13 Would the shape of the supply curve on this
14 analysis change if there are no riparian and pre-1914
15 demands between Mr. Fahey's points of diversion and NDPR?

16 MR. PETRUZZELLI: Objection, calls for
17 hypothetical.

18 CO-HEARING OFFICER D'ADAMO: Well, I'm going to
19 allow some limited questioning here. Just phrase your
20 question in such a way that you would -- well I don't want
21 to tell you what to ask, but phrase it in such a way that
22 you would ask about this study that you're talking about.

23 MR. HANSEN: Fair enough, thank you.

24 BY MR. HANSEN:

25 Q. So if you did a study, as you said, to determine

1 -- Well, let me ask you this. What does this slide depict
2 in your understanding; how would you describe what this
3 slide is supposed to depict?

4 A. This graph of the Tuolumne Analysis for 2014,
5 which is the entire basin upstream of La Grange all the way
6 down to the confluence with the San Joaquin River, compares
7 the unimpaired flow as provided by Department of Water
8 Resources in the form of 50 and 90 percent exceedance
9 forecast to the reported demands.

10 Q. If you were to do this same analysis for the
11 location that exists between Mr. Fahey's diversions and
12 NDPR, what factors would you want to know?

13 MR. PETRUZZELLI: Objection, calls for
14 hypothetical.

15 CO-HEARING OFFICER D'ADAMO: Yeah, overruled.

16 THE WITNESS: In order to do that analysis I
17 would need the unimpaired flow supply for that particular
18 stream reach.

19 Q. Would it be relevant as to whether there are any
20 riparian or pre-1914 demands in that location?

21 A. No, supply is different than the demand.

22 Q. Okay, let me ask you again. As to the --

23 In order to determine the demand curve for an
24 analysis between Mr. Fahey's points of diversion and NDPR,
25 wouldn't you have to know what riparian and pre-1914

1 demands there are in that location?

2 A. In addition to the post-1914 demands, correct.

3 Q. How many acre feet does Mr. Fahey divert per
4 year?

5 A. That wasn't part of my testimony this morning,
6 sir. You might have to ask someone else that.

7 Q. Okay. I'll have you look at page 5. Does any of
8 the riparian demand on page 5 depict any riparian demand
9 requirements that exist between Mr. Fahey's point of
10 diversion and NDPR?

11 A. The riparian demand depicted include the entire
12 riparian demand for the Tuolumne River Watershed that's
13 mapped as a prior exhibit to my testimony this morning.

14 Q. Now, if you did this same analysis just that's on
15 that page 5, just for the location that exists between Mr.
16 Fahey's points of diversion and NDPR, would your analysis
17 depend upon whether there are any riparian demands in that
18 location?

19 A. I couldn't perform an accurate analysis without
20 an unimpaired flow supply to compare to the demand that
21 you're referring to.

22 Q. So it is relevant whether there are any riparian
23 demands in the location that you're trying to do this
24 analysis for?

25 A. In this hypothetical analysis on a sub-watershed

1 level that you're referring to I would need to find the
2 unimpaired flow data for that particular stream reach and
3 compare that to the demands.

4 Q. Does any of the pre-1914 demand on page 5 depict
5 any pre-1914 demand requirements between Mr. Fahey's points
6 of diversion and NDPR?

7 A. I can't speculate on that. I'd have to look at
8 an actual map with our GIS points of divergence.

9 Q. If in fact there were no pre-1914 demands in the
10 location --

11 MR. PETRUZZELLI: Objection, calls for
12 hypothetical.

13 BY MR. HANSEN:

14 Q. If there no pre-1914 demands that exist in the
15 location that you were doing this analysis for, would your
16 analysis be different?

17 A. Again, since we don't have supply information
18 from the Department of Water Resources on a sub-tributary
19 level stream reach, I can't answer that affirmatively.

20 Q. So you would need to know what 1914 demands
21 before you can perform this analysis; isn't that correct?

22 A. I would need to know the entire demand and supply
23 information for that particular stream reach.

24 Q. What portion of the daily full natural flow is
25 attributable to the spring flow from Mr. Fahey's points if

1 diversion?

2 A. I can't affirmatively answer that.

3 Q. Ms. Mrowka, you mentioned something in your
4 testimony about Mr. Fahey has credit. I think you used the
5 word credit; do you recall that? There was something, you
6 used the word credit with regards to Mr. Fahey.

7 A. (Ms. Mrowka) I don't believe that was in this
8 morning's testimony.

9 Q. Okay. Well, actually okay let's do this. Let's
10 turn to page 6, were you testifying --

11 A. (Indiscernible) thank you. Thank you for the
12 reminder.

13 Q. Well, no you're welcome here. Term 20 and 34
14 allow credit, but no storage Do you see that?

15 A. Uh-huh, yes.

16 Q. Okay. Have you turn to Plaintiff's Exhibit 55 in
17 the big binder there. And why don't you look at what is
18 Bates-Stamped on page 1202, that's Term 34. And if you
19 look at the -- are you on that page 1202?

20 A. Yes.

21 Q. Oh, great. Now, if you look at that second
22 paragraph, about halfway through that second paragraph, in
23 Term 34 it says the word, "...replacement water may be
24 provided in advance and credited to future replacement
25 water requirements." Is that what you meant by the word

1 credit on that page 6?

2 A. Yes.

3 Q. And go back to that PowerPoint. I appreciate you
4 trying to bounce around. I'm making it hard on you, sorry.
5 On page 7 there it says, "Fahey's diversions impact rights
6 and beneficial uses downstream in Tuolumne and Delta." Do
7 you see that language there on your slide?

8 A. I do.

9 Q. What impacts are those or impact -- yeah,
10 "Fahey's diversions impact the rights and beneficial uses."
11 What impact are you referring to?

12 A. In the Declaration of Fully Appropriated Streams
13 it identifies water rights in this watershed that could
14 potentially be impacted. And that's why it was declared to
15 be fully appropriated. And so diversions at times that
16 impact those listed rights that are in the Fully
17 Appropriated Streams, and its related references, do have
18 those impacts to the rights of others.

19 As to the beneficial uses downstream when water
20 is diverted under these rights that is not -- during the
21 season when it's not allowed, because conditions of the
22 rights have not been met, then there is an impact on the
23 amount of water in the downstream stream reaches which
24 would have impacts to other beneficial uses.

25 Q. Well, if I'm wrong please correct me, but I

1 thought what I just heard from your testimony is you were
2 basically saying that Fahey's diversions theoretically
3 could or they may -- or something to the effect that it's
4 theoretical that they could impact rights and beneficial
5 users downstream in Tuolumne Delta; am I accurate on that?

6 MR. PETRUZZELLI: Objection, I don't think that
7 was Ms. Mrowka's testimony. I think her testimony is that
8 the inclusion of Terms 80, 90 and 93 is itself proof and
9 evidence that Mr. Fahey's diversions can impact rights and
10 beneficial uses downstream. That's why they're there.

11 MR. HANSEN: Thank you for the statement. That
12 was not your testimony, so I'll go back. What actual
13 impact --

14 MR. PETRUZZELLI: Can we check the record to
15 verify Ms. Mrowka's testimony since there seems to be a
16 dispute?

17 MR. HANSEN: My comment was the fact that she
18 used different words and therefore it's different. So
19 let's go back and start the testimony just to clear the
20 record.

21 BY MR. HANSEN:

22 Q. What exact impact do Mr. Fahey's diversions have,
23 in your testimony, on the rights and beneficial uses
24 downstream in Tuolumne and Delta?

25 A. They have an impact because it reduces the

1 available flow to other right holders and beneficial uses.

2 Q. And what is your evidence for that?

3 A. My evidence for that is that the fact that we had
4 determined this year that there was insufficient water
5 available for diversions. And under such conditions
6 diversions by persons, who aren't allowed to under the
7 priority of their rights, has an impact on others due to
8 limited supplies.

9 Q. Now the prosecution witnesses have already
10 testified repeatedly that Mr. Fahey has no control over the
11 releases from NDPR. So if the water he wheeled into NDPR
12 from 2009 to 2011 accounted for all of his diversions, then
13 how can there possibly be any impacts on rights and
14 beneficial users downstream in Tuolumne and Delta?

15 MR. PETRUZZELLI: Mr. Hansen, can you repeat that
16 question?

17 MR. HANSEN: Sure.

18 BY MR. HANSEN:

19 Q. Now, the prosecution witnesses have already
20 testified repeatedly that he has no control over the
21 releases from NDPR. So --

22 MR. PETRUZZELLI: Objection. I don't think
23 that's been the testimony of the prosecution witnesses. I
24 think the testimony of the prosecution witnesses is that he
25 has no control over NPDER [sic] period, because it's not

1 his reservoir.

2 MR. HANSEN: I'll take that.

3 Q. In light of that fact, if water is wheeled into
4 NDPR from 2009 to 2011, and that has accounted for all of
5 his diversions, than how can there possibly be any impacts
6 to the rights and beneficial users downstream in Tuolumne
7 and Delta?

8 A. (Ms. Mrowka) I believe yesterday's testimony
9 indicated that I personally believe that he does not have a
10 credit at NDPR. And that's due to the fact that he has an
11 every year obligation under the exchange agreement
12 provision of the water rights to offset diversions during
13 the fully appropriated stream season.

14 Q. So therefore, whether in fact his diversions do
15 impact the rights and beneficial uses downstream in
16 Tuolumne and Delta depend upon whether, in fact, he has
17 that credit or not; is that your testimony?

18 A. No. My testimony was also that this year,
19 because there is insufficient supply, his diversions
20 directly affect others.

21 MR. PETRUZZELLI: I have to object to some of
22 these questions because they're vague, because Mr. Hansen
23 seems to be confusing the term credit with storage.

24 MR. HANSEN: I am not. I'm using the word
25 "credit" from her own testimony in the previous slide.

1 CO-HEARING OFFICER D'ADAMO: I'm going to
2 overrule that. It seems that you're trying to narrow down
3 exactly what a credit is versus storage or --

4 MR. PETRUZZELLI: Well, we have done that.

5 CO-HEARING OFFICER D'ADAMO: -- whatever it is
6 that you're --

7 MR. HANSEN: Right.

8 CO-HEARING OFFICER D'ADAMO: If you could be more
9 specific --

10 MR. HANSEN: Sure.

11 CO-HEARING OFFICER D'ADAMO: -- in what you're
12 looking for as far as response.

13 BY MR. HANSEN:

14 Q. Has there ever been any discharge violations from
15 NDPR to your knowledge?

16 A. I did not enter testimony on that.

17 Q. Well, if there are no violations can there ever
18 be any impact on Fahey's -- that Fahey's diversions can
19 have to rights and beneficial users downstream in Tuolumne
20 and Delta?

21 MR. PETRUZZELLI: Objection, calls for
22 hypothetical.

23 CO-HEARING OFFICER D'ADAMO: Rephrase your
24 question.

25 Q. If there have never been any discharge violations

1 from NDPR isn't it true then that Mr. Fahey's diversions
2 simply could not impact rights and beneficial uses
3 downstream in Tuolumne and Delta?

4 A. I don't think those concepts are linked. If
5 Mr. Fahey diverts in a fashion that's injurious to prior
6 right holders then he creates injury irrespective of
7 actions by others.

8 Q. Ms. Mrowka, this -- I think you testified to this
9 screen eight; is that true?

10 A. Yes.

11 Q. And I believe you testified to what's on the
12 second left, well the left column rather. It says "Fahey
13 10." Do you see that left column material there?

14 A. Yes.

15 Q. Okay. There is a reference in there to a, "This
16 exception is subject to a water exchange agreement executed
17 on December 12th, 1992 with the Modesto Irrigation District
18 and the Turlock Irrigation District." Do you see that?

19 A. Yes.

20 Q. Did that agreement include the City of San
21 Francisco?

22 A. I believe that was in yesterday's exhibits.

23 Q. Let me rephrase the question. The water exchange
24 agreement executed on December 12th, 1992 with the Modesto
25 Irrigation District and the Turlock Irrigation District,

1 was the City of San Francisco a party to that particular
2 water exchange agreement?

3 A. I would want to recheck the agreement before I
4 answered.

5 Q. I'll have you look at Exhibit 6, there in that
6 large binder, Fahey Exhibit 6.

7 So I'll repeat my question, because I think you
8 testified yesterday to the '92 agreement on a number of
9 occasions. So I'm just asking is the City a party to that
10 particular agreement?

11 MR. PETRUZZELLI: Objection. The cross-
12 examination on rebuttal is to cross examine the rebuttal,
13 not testimony from yesterday.

14 MR. HANSEN: We're not doing yesterday. We're
15 doing what's on the slide this morning.

16 CO-HEARING OFFICER D'ADAMO: Mr. Hansen, if you
17 could tie your question to cross examination as to rebuttal
18 testimony?

19 MR. HANSEN: Sure.

20 BY MR. HANSEN:

21 Q. Let's go back to that No. 8, that slide. Could
22 you please repeat what your testimony was this morning with
23 regards to Fahey 10, there on the left column, because I'm
24 trying to come off of that testimony; I believe you were
25 testifying something to the effect that that was required

1 under the first permit?

2 A. I'm just reviewing my notes for a minute. Yes,
3 this morning I testified that he would have not been -- we
4 would not have processed the water rights without complying
5 with FAS and the FAS exemption. And to do so, we needed
6 the exchange agreement.

7 Q. And are you aware as to whether that 1992
8 agreement that's referenced there in what you -- strike
9 that.

10 Did that permit upon which that document there
11 was based, was it drafted after that date, January 15th,
12 1993?

13 A. I did not draft the earlier permit. I need to
14 look the permit to refresh myself.

15 Q. Ms. Mrowka, I believe you testified to the
16 concept of developed water this morning.

17 A. Yes, I did.

18 Q. Did you also testify to a process to determine
19 developed water?

20 A. Yes, I did.

21 Q. And when does that process take place in the
22 context of the permitting scheme?

23 A. Our permits can cover developed water. A person
24 would have to advise us that they are claiming developed
25 water. Because what a water right permit does it serves to

1 inform the public that there's that claim to water out
2 there. Development of water does not excuse a person from
3 having to also comply with the appropriative water rights
4 scheme.

5 Q. Mr. LaBrie, after -- well strike that.

6 Are you testifying that upon receipt of a
7 curtailment notice, Mr. Fahey should have completely
8 stopped his diversions before receiving a reply from the
9 Board to his form response on June 3rd, 2014?

10 A. (Mr. LaBrie) Could you repeat the question?

11 Q. Sure. Are you testifying that upon receipt of a
12 curtailment notice -- strike that.

13 Are you testifying that upon the receipt of the
14 curtailment notice in May of 2014 Mr. Fahey should have
15 completely stopped his diversions before he received a
16 reply from the Board to the form response that he filed on
17 June 3rd, 2014?

18 A. I'm not sure that I testified to that.

19 Q. Mr. LaBrie, I'm sorry. You didn't?

20 A. I'm not sure that I did. I don't recall that.

21 Q. Well, let me ask you, once Mr. Fahey received
22 that curtailment notice in May of 2014 should he have
23 completely stopped his diversions before receiving a reply
24 from the Board to the form response that he filed on June
25 3rd, 2014?

1 A. Again, I don't think I testified to that this
2 morning.

3 Q. I'm not asking for testifying, because it is
4 responsive to the testimony that you gave this morning.

5 A. Again, can you repeat the question then?

6 Q. Yes. After Mr. Fahey received the curtailment
7 notice in May of 2014, should Mr. Fahey have completely
8 stopped his diversions before he received a reply from the
9 Board to the form that he filed with the Board on June 3rd,
10 2014?

11 A. If there was no water available for his priority
12 of right then yes he should have.

13 Q. How would he have known during that time, waiting
14 for the reply from the Board to that form response, as to
15 whether he had a right of an exception to curtailment or
16 not?

17 MR. PETRUZZELLI: Objection. That was not in
18 Mr. LaBrie's testimony this morning.

19 CO-HEARING OFFICER D'ADAMO: Yeah, if you could
20 please walk us through as to how you believe that would be
21 related to Mr. LaBrie's testimony?

22 MR. HANSEN: If you would turn to Slide No. 16.
23 And whoever testified to this I would like to ask them --
24 whoever testified to this slide this morning, if you could
25 turn to Exhibit 41, please?

1 MR. PETRUZZELLI: Question, is that Fahey Exhibit
2 41?

3 MR. HANSEN: Yes, please. Thank you.

4 MR. PETRUZZELLI: Thank you

5 CO-HEARING OFFICER D'ADAMO: Would you care to
6 re-ask the question and we'll find somebody on the panel
7 for you?

8 MR. HANSEN: Yes, if you look at Exhibit 41 the
9 second page, I believe it's Bates-Stamped No. 688, there's
10 a subparagraph E at the very bottom. It says, "This
11 application would result in diversion of additional water
12 beyond the amounts," -- hold on one second. Strike that.

13 "This application would result in diversion of
14 additional water beyond the accounts previously authorized
15 under Permit 20784. The State Board should evaluate the
16 cumulative impacts of the diversions under this application
17 in light of the diversions occurring under Permit 20784."

18 MR. PETRUZZELLI: Objection. This was not part
19 of the testimony this morning. It is specifically a part -
20 - it appears to be a part of the protest with regard to
21 this application, which was not part of the testimony this
22 morning.

23 MR. HANSEN: I'm bringing this up in order to
24 address the page 16 of their slide, the first point that
25 says "testified no replacement water for FAS before 2009"

1 and reported diversions in -- oh well, for that first
2 point.

3 THE WITNESS: (Ms. Mrowka) It is unclear how a
4 protest relates to a no replacement water for FAS?

5 MR. HANSEN: Okay.

6 MR. PETRUZZELLI: And if I recall the testimony
7 on this slide was whether Mr. Fahey testified that he
8 provided no replacement water for FAS. And that was on
9 cross-examination yesterday.

10 BY MR. HANSEN:

11 Q. Go back to Slide No. 15 for a moment. I believe
12 Mr. LaBrie testified to this?

13 A. (Ms. Mrowka) No, this was Mr. Coat's testimony.

14 A. (Mr. Coats) That was my testimony.

15 Q. Oh, thank you.

16 The very last point, limited staffing resources
17 took time to get Mr. Fahey. Was that your testimony?

18 A. Yes, it is.

19 Q. Okay. Are you testifying that -- strike that.

20 If the Board had limited staffing resources and
21 therefore did not respond to Mr. Fahey's June 3rd, 2014
22 form and letter that he filed, prior to or let's just say
23 within the year 2014, could Mr. Fahey be penalized with
24 civil penalties that were accruing during that time of
25 limited staffing resources?

1 A. (Ms. Mrowka) I think I'm your person most
2 knowledgeable on that question.

3 Q. Okay.

4 A. And as I testified yesterday Mr. Fahey claimed an
5 exemption only available to owners of reservoirs who had
6 stored water in a period of availability, and they had the
7 ability to use that water now during this period of non-
8 availability due to drought circumstances. And so since he
9 claimed an exemption, which he clearly wasn't qualified for
10 I believe that the enforcement action we're bringing today
11 is the correct action.

12 Q. So as Mr. Fahey waits for a response that's not
13 coming because of limited staffing resources, in your
14 opinion it's fair that he should be hit with accruing
15 penalties during that time; is that your testimony?

16 A. My testimony is that Mr. Fahey claimed an
17 exemption he was unqualified for. And consequently, he had
18 no other basis to believe that the water shortage
19 notification didn't apply.

20 Q. Under this testimony of certification summary,
21 the first two points, I have some questions about this.

22 Have any exemptions to curtailment ever been
23 granted after any one marked this "other source" box?

24 MR. PETRUZZELLI: Objection. I don't think that
25 was testimony today. That might have been testimony

1 yesterday, but I don't recall it from testimony today.

2 BY MR. HANSEN:

3 Q. I am referring to this document that was given
4 and testified to this morning?

5 A. (Mr. Coats) As far as the certification summary
6 goes anyone that had checked the other box, if those people
7 were granted an exception by Tom Howard they may have been
8 included in those other boxes. I'd have to actually look
9 at the records.

10 Q. Do you know if anybody has been granted an
11 exemption after marking the other source box?

12 A. Again, since I haven't actually looked at the all
13 of -- what is it? -- 3,500 plus records right now it would
14 take some time to actually verify that.

15 Q. Ms. Mrowka, I believe you testified that in your
16 opinion Mr. Fahey has a duty to notify the Districts of his
17 diversion. Do you recall that testimony?

18 A. (Ms. Mrowka) I do.

19 Q. I'll have you turn to Fahey Exhibit 55. And can
20 you please identify for us exactly the provision and the
21 language in this permit that explicitly states that
22 Mr. Fahey has a duty to notify the Districts of his
23 diversion?

24 A. There is no direct permit term that states that.
25 But in operation of the permit, it is Mr. Fahey's duty to

1 document compliance with all the terms and conditions that
2 are contained therein.

3 The only way to document compliance, when you
4 have an exchange agreement, is to show that you've
5 fulfilled your portion of the exchange agreement. And to
6 do that you would need to show the party involved in this
7 exchange, you know, the quantities that you used so that
8 they would exchange an appropriate amount of water, so
9 you're purchasing the correct amount from the seller to
10 exchange.

11 You can only purchase the correct amount if you
12 tell the seller of the water, in his case Tuolumne -- no,
13 Tuolumne? Yeah, Tuolumne -- how much water you need to
14 buy. And then you would then need to tell the other
15 parties who you delivered the water to, how much water you
16 were taking from the system so that everybody could make
17 their books work, could account for the water buyers,
18 sellers, recipients. Everybody would be able to account
19 for things.

20 This is the only way I can envision being able to
21 comply with the permit conditions.

22 Q. And where is that requirement that you just
23 testified to, stated in this permit?

24 A. I am simply stating that it is the only way that
25 I could foresee that you'd be able to comply with the

1 language of the terms themselves.

2 Q. So if someone else was able to foresee doing that
3 duty you described in a different way, then they wouldn't
4 have the duty to be able to disclose. Isn't that true?

5 A. Under the condition, you know, they have to
6 report on the Report of Permittee what they've done to
7 comply with the permit condition. And in that case the
8 only way that I can see that is numbers, providing numbers.

9 Q. So you're talking about the reporting that's
10 needed to be made to the State Board; isn't that correct?

11 A. Right. And on the reporting to the State Board,
12 there are the ability to attach different documents to your
13 reports. And if your water right says that you have to
14 report additional information beyond the standard
15 information that's in the boxes, in where your term says
16 you need to report on this, then you need to report on
17 that. And you would do that usually through attachments.

18 Q. And do you have any evidence that Mr. Fahey did
19 not do that, that State Board reporting that you're talking
20 about?

21 A. We have not been receiving information with
22 respect to the exchange agreement quantities bought on an
23 annual basis. No, we have not.

24 Q. So you're -- no, I thought our testimony started
25 about a reporting requirement for diversions. Didn't he

1 report every year in the manner you described, his
2 diversions?

3 A. He has other requirements in his water right
4 besides just diversion reporting. He needs to comply with
5 these permit conditions that say you provide information on
6 it in your reporting.

7 Q. Where does it say that he has to report more than
8 his diversions on an annual reporting basis?

9 A. Okay. On Term 34 of Exhibit 55, paragraph 3,
10 "The source, amount and location at NDPR of replacement
11 water discharged into NDPR shall be mutually agreed upon by
12 the permittee, the Districts, and San Francisco, and shall
13 be reported to the State Water Board with the annual
14 Progress Report by Permittee."

15 This is what creates the obligation.

16 Q. How does that create the -- well, hold on a
17 second here, the reporting that I'm talking about is the
18 reporting of the -- well, let's back up.

19 Your testimony this morning was that there's a
20 duty to notify the Districts of his diversions. And you
21 said that was your testimony?

22 A. And that is correct. That's the text which I
23 just read.

24 Q. Okay. The diversions, right. And so we're
25 talking now, your testimony, about what reporting Mr. Fahey

1 did about his diversions. Isn't it true that he reported
2 to that website every year, the diversions that he had
3 made?

4 A. As I just read that quote to you, he had to have
5 these discussions between Permittee, the Districts and San
6 Francisco, and report that with the annual reporting too.

7 Q. Okay. You're not answering my question. Isn't
8 it true that he reported his diversions in that State
9 reporting process every year?

10 A. Yes, he did.

11 Q. Isn't that information available on the website?

12 A. The annual reporting information has only been
13 electronically available for the past five or six years.
14 And prior to that, it was available in paper format only.

15 Q. Okay. So during the 2014-2015 curtailment that
16 information has been available on the website; is that
17 correct.

18 A. 2015 reports have not yet been submitted.

19 Q. That is correct. And so you stated that's been
20 available for a few years.

21 Does Mr. Fahey have any additional -- I'm trying
22 to clarify your testimony from this morning -- does he have
23 any additional duty to notify the Districts of his
24 diversions other than that State reporting that you just
25 admitted he did?

1 A. I have read the language of the term. It is my
2 understanding from the language of the term he is obligated
3 to have discussions with these parties.

4 Q. Okay. What language of the term are you talking
5 about?

6 A. The language which states, "The source, amount
7 and location at NDPR of replacement water discharged into
8 NDPR shall be mutually agreed upon by the permittee, the
9 Districts and San Francisco, and shall be reported to the
10 State Water Board with the annual Progress Report by
11 Permittee."

12 Q. That is correct. But didn't you just say the
13 replacement -- okay, "...source amount and location at NDPR
14 of replacement water discharged." It doesn't say
15 diversions. So that's why I'm wondering is this the
16 language that you're relying upon for your testimony that
17 he has a duty to notify the Districts of his diversions,
18 other than the State reporting that he did every year.

19 A. As I stated just a moment ago, I don't know how
20 the other parties could be expected to know how much Mr.
21 Fahey would need to purchase as part of the exchange
22 agreement, and without that information being provided by
23 the junior right holder. It's the junior right holder's
24 responsibility to inform the senior right holders what he's
25 doing and document that there's no injury.

1 Q. Where is that duty found in the language of this
2 permit?

3 A. It is my understanding, and my personal
4 understanding that in order to comply with the priority
5 system, the junior right holders need to take the actions
6 necessary to make sure they don't divert an injury of
7 senior right holders. The only way to take such action is
8 to clarify that he is not diverting water to which he's not
9 entitled.

10 Q. I appreciate that's your opinion, but is that
11 anywhere stated in this permit?

12 A. The permit terms speak for themselves.

13 Q. Thank you. Wouldn't today the Districts be able
14 to go on the Board's website to find out all of Mr. Fahey's
15 diversion information for the year 2014?

16 A. Yes. However the issue here, as using that for a
17 sole means of information, is that reports are filed about
18 six months in arrears of the diversion year.

19 So the diversion year, January 1 to December
20 31st, that's the reporting year that is in the reports.
21 Reports come in on July 1. So July 1 is too late to make
22 somebody whole for the prior year's diversions. The
23 information needs to be provided on the year as you go, in
24 order to offset your diversions during fully appropriated
25 streams.

1 Coming in much later, six months after the close
2 of that year, is too late to make somebody whole.

3 Q. Isn't it possible for the Districts to estimate
4 the worst case scenario, in other words the maximum amount
5 that could have been diverted under the permit, to
6 determine their analysis at any given time?

7 A. There's two terms here. One is exchanging water
8 for the FAS season, and the other is this other accounting
9 term. And certainly under the exchange provision, you
10 would need to have very active information going between
11 the parties to make sure everything is made whole.

12 Q. I'd like to go to slide 18. I think, was it --

13 MR. PETRUZZELLI: I don't think anybody -- nobody
14 testified to that slide this morning. We skipped that
15 slide.

16 MR. HANSEN: Oh. Okay. Well then we ask that
17 that whole slide be stricken from the record.

18 MR. PETRUZZELLI: And that's fine.

19 MR. HANSEN: Okay, thanks.

20 If I could get a ruling on that to clarify that
21 for the record, thank you.

22 CO-HEARING OFFICER D'ADAMO: Stricken from the
23 record.

24 MR. HANSEN: No further questions.

25 CO-HEARING OFFICER D'ADAMO: All right, cross-

1 examination by the Interveners Turlock and Modesto
2 Irrigation Districts?

3 MS. BRATHWAITE: No. We have no questions for
4 the witness.

5 CO-HEARING OFFICER D'ADAMO: City and County of
6 San Francisco?

7 MR. DONLAN: No questions.

8 CO-HEARING OFFICER D'ADAMO: All right. We'll
9 proceed with rebuttal.

10 MR. PETRUZZELLI: Is there a redirect on this?

11 CO-HEARING OFFICER D'ADAMO: All right, we're
12 going to take a ten-minute break.

13 And before we move forward with rebuttal for
14 Mr. Fahey there may be some staff questions on the rebuttal
15 for the Prosecution Team. Questions?

16 Staff from the Hearing Officer Team has some
17 questions of the Prosecution Team.

18 MR. PETRUZZELLI: Before that, the Prosecution
19 Team asks if there is an opportunity for redirect?

20 CO-HEARING OFFICER D'ADAMO: No.

21 MR. PETRUZZELLI: Thank you.

22 (Whereupon a recess was taken

23 2:47 p.m. to 2:54 p.m.)

24 ///

25 ///

CROSS-EXAMINATION BY THE HEARING TEAM

1
2 STAFF COUNSEL WEAVER: Nathan Weaver, with the
3 Office of Chief Council.

4 BY STAFF COUNSEL WEAVER:

5 Q. I have a question for, I think, Ms. Mrowka. It
6 may be a question for the panel, but I think it's for
7 Ms. Mrowka. And I wanted to go back to the testimony we've
8 heard during rebuttal and cross-examination concerning
9 injury to downstream water users. And I know we heard
10 testimony today on the New Don Pedro Reservoir.

11 And I wanted to ask whether, to the best of your
12 knowledge and belief, that reservoir has any sort of
13 accounting methods or other protocols in place to bypass
14 water that they don't have a right to divert?

15 A. (Mr. Cole) You're asking if they have an
16 alternative of measuring how much they bypass or --

17 Q. So the -- well I guess then, Mr. Cole, does New
18 Don Pedro Reservoir bypass water that they don't have a
19 right to, to the best of your knowledge and belief?

20 A. (Ms. Mrowka) I have not reviewed their water
21 rights though I don't believe there are any pending
22 enforcement actions for failure to comply with their water
23 rights.

24 Q. Okay. So it's your testimony that you're not
25 aware of any pending enforcement against those dams for

1 noncompliance with the terms of their water rights. Are
2 you aware of any complaints concerning failure to bypass
3 water that they wouldn't have a right to divert -- against
4 New Don Pedro?

5 A. Victor Vasquez in my shop handles all of the
6 incoming complaints. And I'm made aware of them after case
7 development is fairly well along.

8 A. Got it. Okay, thank you.

9 CO-HEARING OFFICER D'ADAMO: All right. We will
10 proceed with rebuttal by Mr. Fahey, Mr. Hansen?

11 MR. PETRUZZELLI: Prosecution Team requests that
12 its exhibits and presentations be entered into the record.

13 CO-HEARING OFFICER D'ADAMO: We'll be doing that
14 after rebuttal. We'll take that up after rebuttal has been
15 complete.

16 MR. PETRUZZELLI: And the Prosecution Team would
17 like to clarify that it only seeks to enter the slides, and
18 not the notes associated with the slides, into the record.

19 CO-HEARING OFFICER D'ADAMO: With the exception
20 of slide 18.

21 MR. PETRUZZELLI: Which I believe is the one
22 titled "Economic"? Yes.

23 CO-HEARING OFFICER D'ADAMO: Correct.

24 MR. PETRUZZELLI: Yes.

25 CO-HEARING OFFICER D'ADAMO: All right, so noted.

1 STAFF COUNSEL WEAVER: So, Mr. Petruzzelli, just
2 to clarify is that -- you're talking about everything
3 that's in this packet except slide 18, but not the notes
4 that would be in the digital version of the PowerPoint
5 file?

6 MR. PETRUZZELLI: That is correct.

7 STAFF COUNSEL WEAVER: Okay, got it.

8 MR. PETRUZZELLI: And I believe I provided a .pdf
9 version of the presentation, which was intended for the
10 exhibit file and is only the slides and does not include,
11 embedded within it, the notes. So our intent is to only
12 include the slides, but not the notes that would accompany
13 the slides.

14 STAFF COUNSEL WEAVER: So that file, with the
15 exception of slide 18?

16 MR. PETRUZZELLI: Yes.

17 STAFF COUNSEL WEAVER: Perfect.

18 CO-HEARING OFFICER D'ADAMO: Mr. Hansen?

19 MR. HANSEN: Thank you, that's okay.

20 REBUTTAL TESTIMONY AND EXAMINATION BY G. SCOTT FAHEY

21 AND SUGAR PINE SPRING WATER, LP

22 BY MR. HANSEN:

23 Q. Mr. Fahey, why was FAS water not provided by you,
24 in the past?

25 A. (Mr. Fahey) It was provided by me the first time

1 it was ever requested when I received a notice from the
2 State Water Board, dated February, I believe it was 20th,
3 2009. They recommended that water be purchased from an
4 available source and sent to --

5 MR. PETRUZZELLI: Oh, can we start the timer
6 please?

7 CO-HEARING OFFICER D'ADAMO: Yes, please.

8 MR. HANSEN: Oh, I should re-ask the question?

9 CO-HEARING OFFICER D'ADAMO: All right, go ahead.

10 BY MR. HANSEN:

11 Q. Mr. Fahey, why was FAS water not provided by you
12 in the past?

13 A. Replacement water was provided by me as of
14 February -- pardon me -- February, I believe it was
15 February 20th, 2009; the very first time anyone requested
16 that I provide replacement water. The State Water Board
17 sent out a notice involving the possibility of upcoming
18 curtailments.

19 Based on that notification I purchased water from
20 TUD, which is the approved source of foreign water for its
21 importation into New Don Pedro Reservoir.

22 Q. Are there any other reasons why you didn't
23 provide FAS water in the past?

24 A. Prior to that time -- after about a year or year
25 and a half working with Leroy Kennedy with the Turlock

1 Irrigation Districts in order to construct the 1992
2 agreement. Upon the full execution, and going to meet
3 Mr. Kennedy to thank him for all his efforts in providing
4 what he has provided in dealing with me over the last year
5 or year and a half, Mr. Kennedy handed me the agreement and
6 I thanked him. And I was very happy that we could work
7 through that. It took a lot of work, a lot of effort on
8 his part.

9 And he informed me that it did take a lot of
10 effort and now I could go forward with this, but when I do
11 go forward do not contact them regards to this agreement
12 unless they contact me first. If they contact me first,
13 then I am supposed to respond and he said, "You will
14 clearly know when we contact you."

15 Q. And is there any other reason you did not provide
16 FAS water in the past?

17 A. After six years I applied for a second set of
18 water rights.

19 And upon the application of the second set of
20 water rights the Turlock and Irrigation District protested
21 those water rights and made it -- one of their protest
22 terms was that an evaluation was conducted by the State
23 Water Board to determine if there had been any -- I'm not
24 sure of the "language" here.

25 Q. Okay. Why don't you open up to Fahey Exhibit 41?

1 A. One of the conditions was the State Water Board
2 should evaluate cumulative impacts of the diversions under
3 the application, in light of the diversions occurring under
4 the first set of water rights.

5 That protest was resolved by the City or by the
6 Districts, by the insertions of the City's language that
7 created Term 34. With that insertion of the City's
8 language to create Term 34 the MID and TID protest was
9 resolved. And as a result of that I was not informed that
10 I had caused any FAS violations. No one ever came to me
11 and said, "Prior to going forward you're not fulfilling
12 your FAS obligations."

13 Neither the State came to me, nor the Districts,
14 nor the City during this protest period.

15 Q. Now, at any time did you ever receive a letter
16 from the City to the Board that related to your FAS
17 reporting requirements?

18 A. Yes. After the State noticed everyone that the
19 water rights application was going to be permitted then I
20 think the procedure is everybody gets to look at what's
21 going to be permitted, the actual language. And people get
22 a chance to comment.

23 And the City wrote the State Water Board and made
24 it clear in their March 21st, 2011 letter --

25 Q. Well, why don't we open up to that? It's Exhibit

1 54, Fahey Exhibit 54.

2 A. Yes, that's it. "San Francisco only intends to
3 notify the applicant of the need to provide replacement
4 water when necessary; that is, when the applicant's use has
5 led to reductions, or has a strong potential of reducing,
6 the water supply."

7 So I was told directly don't -- you know, "We
8 will contact you. We will tell you when you have impacted
9 us, when you've reduced our supply. When you do that,
10 we're going to tell you what you owe us."

11 And I've always been ready for that. And I was
12 ready to react when I got the State's notice in 2009 and I
13 did react immediately.

14 Q. Are there any other reasons that you have not
15 provided FAS water in the past?

16 A. Yeah. I would like to speak to the Board to --
17 directly to the Board on this. And I know you've been here
18 the whole time, but this entire thing -- this is just not
19 reasonable.

20 I have spent with -- to create the infrastructure
21 I've created and to complete the environmental, both State
22 and Federal documents that are required for this project, I
23 have spent millions of dollars -- probably very close to \$2
24 million to create this business. And to create receipts of
25 -- gross receipts, not net receipts as were displayed

1 earlier, but gross receipts of approximately \$250,000 to
2 \$300,000 a year.

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

9 And the first time I was informed "buy
10 replacement water," the State told me and I immediately did
11 it. I have never had a stop sign put in front of me
12 telling me I'm doing anything wrong. If anybody would have
13 come to me and said, "You haven't done this correctly. You
14 need to do this," I would have done it.

15 Not even during the curtailment period when I
16 tried -- when I did reach out, did anybody get a hold of
17 me. I didn't know about this until September 1st. And I
18 had scheduled with Sam Cole to meet with him onsite on
19 September 2nd or September 3rd. I could have easily been
20 in the car and on my way to California when the public
21 press release went out and then when this was emailed to
22 me.

23 And I would have been totally unaware that this
24 occurred.

25 Q. Mr. Fahey, we're going to actually go through

1 specifically. So why don't we --

2 A. Okay, thank you. Thank you for listening to me.

3 Q. We're going to head in that direction.

4 Is there any term in either one of your permits
5 that requires you to disclose diversions directly to -- let
6 me rephrase that.

7 Is there any term in either one of your permits
8 that requires you to directly disclose to the Districts of
9 the City, your diversion?

10 A. No, no.

11 Q. Is there any way, to your knowledge, that the
12 Districts or the City could find out about your diversions,
13 under your permits?

14 A. Yes, they can go to the website. It's all public
15 record. They can go to the public record.

16 And in addition to that if they want to determine
17 -- if the City or the Districts ever want to do an analysis
18 if I'm impacting their water rights, they can always do the
19 worst-case analysis by going to my water rights, seeing the
20 maximum amount of water that can be diverted, plug that
21 into their analysis. Say, "This is worst-case scenario.
22 Oh, he's impacted us. We need to get a hold of him."

23 "Hey, did you divert the maximum amount during
24 this time frame?"

25 "No, I didn't. I only did 95 percent of it."

1 "Oh, well you still impacted us. You impacted us
2 on this many acre feet. This is what you owe us in the
3 next year."

4 You know, "x" number of acre feet based on their
5 analysis that they can conduct at any time based on the
6 maximum amount of water that I can divert.

7 Q. Changing gears here, I'll have you open up to
8 Exhibit 20. That is your first permit. And have you open
9 up to Term 18 on Bates-Stamped page 314. I'm sorry, Term
10 17 rather, see that Term 17?

11 A. Yes.

12 Q. Okay. Now, just keep your finger right there.
13 Look at that carefully, that language, and then put your
14 finger in if you could, and flip over to Exhibit 55.
15 That's your second permit.

16 And have you look at Term No. 9. That is on page
17 Bates-Stamped 1198. And again, that's Term No. 9. Is that
18 Term 9 in your second permit the same as Term 17 in your
19 first permit?

20 A. I believe so.

21 Q. Okay. Let's just look at Exhibit 20 then, the
22 first permit then. In your understanding what does this
23 paragraph refer to?

24 A. Well, I think it refers to 2014 and 2015. That,
25 you know, during unusual events such as the drought we've

1 experienced the last four-to-five years that the State can
2 reduce or stop any water that you divert. And I would say
3 that that is these years.

4 And if but not for me putting down that surplus
5 water I would match Term 17 and Term 9, and I cannot
6 permit. But I heeded the State's advice. They were
7 warning people. We have -- things are changing. I heeded
8 their advice and I should be allowed to receive a credit
9 for the benefit of increasing the amount of water I
10 provided to the storage inside Lake Don Pedro. I'm not
11 claiming storage. I'm just claiming the credit for future
12 water replacements and that's what I am applying to avoid
13 the impacts of 17 and 9, in each permit.

14 Q. Okay. Go back to Exhibit 55, your second permit,
15 and go to Term 11. Take a look on Bates-Stamped 1198?

16 A. Yes.

17 Q. What is your understanding of this term and the
18 impact any exchange agreement might have with it?

19 A. Repeat that, please?

20 Q. Yeah. What is your understanding of this term
21 and any impact any exchange agreement might have with it?

22 A. This term is for the health of the Delta, keeping
23 the water quality of the Delta up. So there needs to be
24 certain discharge requirements coming down from the San
25 Joaquin River, from the various drainages that flow into

1 the San Joaquin River. And if the water quality at
2 Vernalis is degraded due to low flows then there needs to
3 be an increase of flows to the Delta, to improve that water
4 quality. And so, maybe there would be an increase of
5 discharges at New Don Pedro to accomplish that.

6 Q. And you have no control over those discharges, do
7 you?

8 A. No. And from previous testimony it appears that
9 they've complied with all their discharge requirements.

10 Q. Okay. Did you hear the testimony yesterday, of
11 David LaBrie?

12 A. Yes.

13 Q. Did you have a phone call with him on June 12th,
14 2015?

15 A. Yes.

16 Q. And how many phone calls did you have with him on
17 June 12th, 2015?

18 A. One.

19 Q. Did you ever have a phone call with him on June
20 15th, 2015?

21 A. Oh, David LaBrie? Pardon me, I was thinking of
22 Sam Cole.

23 Q. All right, June 12th, 2015?

24 A. Yeah, two calls. I had two calls with -- there
25 was two phone calls on the 12th.

1 Q. Okay. And then did you, after seeing his
2 testimony, did you try to determine whether you ever had a
3 phone call on June 15?

4 A. Yes, I did.

5 Q. And what did you find out?

6 A. I did not, I never called David LaBrie on June
7 15th.

8 Q. And how do you know that?

9 A. I got a copy of my phone records to check them.

10 Q. Okay. Can you please explain how those phones
11 calls with Mr. LaBrie came about, in your understanding?

12 A. I had three phone messages on my phone while I
13 was in California, I believe between June 5th or 6th and
14 June -- the morning of June 12th that I got home, so I had
15 three messages on my phone from David LaBrie. And the last
16 message said if I didn't call him immediately he was going
17 to have a sheriff issue a warrant for a search or something
18 like that.

19 I called David LaBrie and the immediate issue was my
20 Certificate of Compliance of Curtailment. And he couldn't
21 find that. And he wanted to know if I had certified that I
22 was complying with curtailment. And I said that I had sent
23 the June 3rd, 2014 letter attached to the State Water Board
24 website address back to the State Water Board, in lieu of
25 the 2015 Curtailment Form.

1 And Mr. LaBrie said, "Okay. That's the main
2 thing we need right now. And I need to go find that, and
3 see if you're in compliance with certification." And that
4 was the end of that first call.

5 Q. Okay. Let me direct your attention to his
6 testimony there on Exhibit 11 of -- I'm sorry the black
7 binder, the Prosecution Team WR-11, paragraph 14. And do
8 you see that paragraph 14 there?

9 A. Yes.

10 Q. Okay. If you look on the far-right column about
11 five lines down, it looks like a sentence that starts with
12 the word, "I explained that."

13 "I explained that since Fahey himself had
14 indicated that the protestants had not laid claim to the
15 replacement water, and because Fahey maintains that the
16 replacement water remains available in NDPR, it stands that
17 any replacement water that Fahey purchased has never been
18 made available to downstream prior right holders below
19 NDPR, and that those downstream prior right holders below
20 NDPR have likely been harmed by Fahey's diversions during
21 the current drought years."

22 Do you see that language?

23 A. Yes.

24 Q. Did he ever say that to you?

25 A. No.

1 Q. Did you ever say to Mr. LaBrie, "That no news is
2 good news?"

3 A. Yes I did.

4 Q. What did you mean by that?

5 A. Mr. LaBrie and I discussed downstream of New Don
6 Pedro, and considered that since there is no control over
7 anything that happened downstream from New Don Pedro, and
8 since -- that no one could be impacted.

9 And I believe I discussed with him in the CEQA
10 analysis -- there wasn't any CEQA analysis required for any
11 fisheries downstream from New Don Pedro. Because I didn't
12 impact anything downstream from New Don Pedro there needed
13 to be no environmental analysis of anything downstream from
14 New Don Pedro. And that was kind of the, "Yeah, well that
15 should carry with respect to water rights." ,

16 So then we discussed the people in New Don Pedro,
17 the three senior parties that I need to protect. And he
18 said, "Well, if you can document that you have water in
19 there and that's what you sent it down for, those are the
20 people that are protected by that water. Then that would
21 cover them.

22 And then I mentioned to Mr. LaBrie, in between
23 New Don Pedro and the points of diversion, there's no
24 appropriated instream users. There's no one instream that
25 diverts water. And he said, "Well, that might be true. I

1 doubt it. That might be true. But you have to consider
2 any riparian instream diverters or any pre-1914 instream
3 diverters."

4 And that gave me pause. That really concerned
5 me, because I thought, "Oh, my God. If I have missed one
6 of those, I'm done." You know, this exemption is done.

7 And so I said, "Okay. Well, I'll go back and
8 look again for riparian or pre-1914 instream diverters.
9 And you do the same thing and if I don't hear from you, no
10 news is good news. That means we have not found any
11 riparian or pre-1914 water right users instream between my
12 points of diversion and New Don Pedro Reservoir."

13 Q. Now, at any point in that phone call or in any
14 email he sent you did he ever say, "No, you're going to
15 have go through the process of getting Tom Howard to
16 approve any curtailment exception?"

17 A. No, I never heard Tom Howard's name until
18 yesterday.

19 Q. Did he ever tell you that you have to go through
20 some process to get Kathy Mrowka to determine whether you
21 have the Curtailment Exception or not?

22 A. No. I asked David LaBrie to go speak with
23 Kathy Mrowka, because she's the one that can --

24 Q. Which did you ask, was that Mr. LaBrie or your
25 testimony was that Mr. Cole?

1 A. Both.

2 Q. Oh, okay?

3 A. I've told them -- I said to both of them, "Go
4 talk to Kathy Mrowka, because Kathy Mrowka constructed the
5 terms of this Water Right Agreement and she's very familiar
6 with it and understands exactly how it works."

7 Q. Did Mr. LaBrie ever tell you that there is some
8 kind of a process that they have, other than that form that
9 you filled out in response to the curtailment notice, that
10 you need to follow in order to get some final determination
11 as to whether you have the curtailment exception?

12 A. No, he didn't. But he said to me that based on
13 what I've explained to him that I might be the first person
14 in California to be provided an exemption to curtailment.
15 So from that, I assume that there's some process as far as
16 the -- there must be some standard of review set up to make
17 that determination.

18 Q. Did he ever tell you what that was?

19 A. No.

20 Q. Did he ever tell you there was some more form or
21 document you need to fill out?

22 A. No.

23 Q. Did Mr. LaBrie ever say to you to contact
24 Ms. Mrowka because she makes some initial decision as to
25 whether even to have Mr. Howard consider a request for an

1 exemption?

2 A. No.

3 Q. Did Mr. LaBrie ever indicate in his email that
4 you need to contact Ms. Mrowka or Mr. Howard about your
5 exception to curtailment?

6 A. No.

7 Q. Did Mr. LaBrie ever tell you about any Board
8 policy or process or procedure, other than that curtailment
9 form response that you'd already filled out, that you need
10 to follow to have your curtailment exception considered by
11 the Board?

12 A. No.

13 Q. In that phone call, what was the only thing that
14 Mr. LaBrie indicated -- well strike that.

15 In that phone call was the only thing that Mr.
16 LaBrie indicated to you, that you needed to do, the
17 determination of whether there was any instream or other
18 senior right holders that you had already testified to?

19 I apologize for that. In that phone call, did
20 Mr. Brie (sic) ever tell you that there was anything else
21 that you needed to do, other than to find out whether there
22 was any other instream or senior right holders?

23 A. No. That was the riparian and pre-1914 -- the
24 instream riparian and pre-1914 diverters, between my points
25 of diversion and New Don Pedro Reservoir, were the only

1 item that had to be confirmed before it appeared.

2 And I'm not saying anybody was issuing an
3 exemption to curtailment before it appeared, you know, two
4 people talking back and forth before it appeared that I
5 could be exempt from curtailment.

6 Q. Did he ever tell you to stop your diverting?

7 A. No.

8 Q. Did he ever tell you that should have stopped
9 before?

10 A. No. He was trying to determine whether I was in
11 compliance of the curtailment requirements.

12 Q. Did you hear the testimony of Sam Cole yesterday?

13 A. Yes.

14 Q. And do you recall him testifying that you should
15 have been willing for over a year to testify to get a reply
16 from the Board to your response to that official form; do
17 you recall that testimony?

18 A. Yes.

19 Q. Did Mr. LaBrie state on June 12, 2015, that he
20 was willing to wait for three months for you to return to
21 California to a site inspection?

22 A. Mr. LaBrie?

23 Q. Yeah. Did Mr. LaBrie ever say, "Well, I'm
24 willing to wait for three months for you to return to
25 return to California to do a site inspection."?

1 A. No. I just informed him that that's when I was
2 planning to come, the very first part of September. And he
3 didn't -- it was more like, "We have to check out to make
4 sure there's no instream diverters. We were concerned
5 about (indiscernible) --

6 Q. Did you ever say anything to Mr. LaBrie that
7 indicated that you were unwilling to do a site inspection?

8 A. No. I never said I was unwilling, no.

9 Q. Do you recall the testimony of Mr. Cole,
10 yesterday, about his phone call with you on August 12th,
11 2015?

12 A. Yes.

13 Q. I'll have you turn to Exhibit 66 of Fahey. And
14 do you have that there in front of you?

15 A. Yes.

16 Q. Okay. That second paragraph, about five lines
17 down there, he stated that you told him, "No news was good
18 news." Do you recall that?

19 A. Bates-Stamped 1313?

20 Q. Yes. Second paragraph, about five lines down.
21 That contact report.

22 A. You know, I can't say I recall saying that. I'm
23 not going to say I didn't say it though. I don't know.

24 Q. Okay. At that time, were you still waiting for
25 Mr. LaBrie to call you back about your Curtailment

1 Exception Claim?

2 A. Yes, I was. But not really, because I researched
3 the Board's website and there were no instream riparian
4 users or pre-1914 between me and the point of diversion.
5 And since there weren't any, you know, he and I discussed
6 it. And he didn't call me back to say there was. So I was
7 like, well that's good news. He agrees. There's nobody
8 instream.

9 Q. Well, in this phone call that you had with
10 Mr. Cole, on August 12th, 2015, did he ever say to you that
11 Kathy Mrowka has rejected your -- or denied your claim for
12 an exemption to curtailment?

13 A. No.

14 Q. Did he ever say to you that you need to
15 communicate with Ms. Mrowka, because she decides whether
16 you have an exception to curtailment?

17 A. No.

18 Q. Did he ever say that you need to communicate with
19 Ms. Mrowka, because she determines in some preliminary
20 fashion whether Tom Howard determines an exception to
21 curtailment?

22 A. No.

23 Q. Now --

24 A. Again, I said to Sam Cole -- I again said, "Go
25 speak with Kathy," because Sam wasn't familiar at all with

1 the exchange agreement or very many of the terms of the
2 water rights. He said it was complex. And so then I said
3 "Well, go talk to Kathy Mrowka, because she knows all about
4 it." And Sam said, "Well, Kathy's several levels above me
5 and it's not like I just walk into Kathy's office."

6 So it was like there were some -- there's a chain
7 of command and he wasn't in that portion of the chain of
8 command, but he definitely had a supervisor he was going to
9 bring it up to.

10 Q. Well, since that was his response did that
11 indicate to you that he had already talked to Ms. Mrowka
12 about your exception to curtailment?

13 A. No. I didn't get the impression that he had.

14 Q. Was it your understanding after you spoke with
15 him that somehow he was going to talk to Ms. Mrowka after
16 he said that to you about your curtailment exception?

17 A. I was having a good conversation with both guys.
18 I assumed that if they had the chance they would -- if they
19 crossed paths or it came up in some meeting or something
20 that they'd bring it up, yeah.

21 Q. If Mr. Cole had already heard from Ms. Mrowka
22 that your curtailment exception wasn't going to be
23 accepted, and he told you that, "Well, your curtailment
24 exception has been considered and has been denied," What
25 would you have done?

1 A. I'm sure I would have stopped.

2 Q. Did Mr. Cole give you any indication that any
3 decision had been made as to your curtailment exception
4 claim?

5 A. No. At the end of the conversation he directly
6 asked me, "Are you still diverting?" And I said, "Yes, I
7 am." And he said, "Well, I'm going to put you down as
8 non-compliant. You're in non-compliance of diversion."

9 And I remember my comment being, "Well, at least
10 we accomplished something today. You know, that the State
11 finally understands that based on my letter going back -- I
12 mean, at that time 16 months. You know, I told you that 16
13 months ago. Yes."

14 Like I said, that's my business.

15 Q. Did he ever say to you, Mr. Cole that is, that
16 there is this process that you need to go through to
17 determine whether your curtailment exception has been
18 approved or not?

19 A. No.

20 Q. Did he ever indicate that there was any other
21 procedure you had to take, other than what you had already
22 done, to fill out that response to the curtailment form?

23 A. No.

24 Q. Were you ever given any kind of notice or
25 opportunity to be heard by the Board, prior to receiving

1 the ACL that you need to go through some procedure to
2 determine your exception to curtailment?

3 A. No.

4 Q. Has anyone at the Board, prior to yesterday's
5 hearing here, ever told you that Tom Howard is the one who
6 makes decisions on curtailment exceptions?

7 A. No.

8 Q. If you had known that before September 1st, 2015
9 that Tom Howard is the one who makes decisions on
10 curtailment exceptions, what would you have done?

11 A. If I would have known that June 3rd, 2014 before
12 this whole thing started, I would have written him
13 directly, if I knew that was the person that made the
14 decisions.

15 Q. Before you received the ACL, were you ever sent
16 any correspondence from the Board that indicated that
17 anyone at the Board had made a decision as to your
18 curtailment exception?

19 A. No.

20 Q. Before the testimony you heard yesterday, here in
21 this proceeding, were you ever informed that the Board has
22 any other process to consider or review exceptions to
23 curtailment?

24 A. No.

25 Q. Have you had contacts with Ms. Mrowka in the

1 past?

2 A. Yes, during the application process for my second
3 water rights permit.

4 Q. So, if you were informed that you need to talk to
5 Ms. Mrowka about your curtailment exception claim, were you
6 able to do that very readily, because you had had those
7 prior communications in the past?

8 A. I was never informed to get a hold of her.

9 Q. Okay. Did you ever review the investigation and
10 permit files produced by the Prosecution Team in this case?

11 A. What -- have I ever?

12 Q. Yes. Did you ever review the prosecution or the
13 investigation or permit files that the Prosecution Team
14 provided?

15 A. I'm sorry. I'm --

16 Q. Okay. Let, me move on then.

17 A. No, no. Ask me again.

18 Q. Well, yeah. Did you ever review the permit files
19 that were produced by the Prosecution Team in this case?

20 A. Oh, yeah. My permit files.

21 Q. Yes, your permit files?

22 A. Yeah, yes I did. Yeah.

23 Q. And in those, did you ever review the, I think
24 they call it an investigation file?

25 A. No. I don't have access to the investigation

1 file.

2 Q. Okay. In your review of -- I'm going to strike
3 that. Please look at your Exhibit -- I'm sorry -- no
4 please look at Exhibit 75, Fahey Exhibit 75 and paragraph
5 8.

6 Oh, I apologize. I've got the wrong one, Exhibit 83.
7 It's the email from Mr. O'Hagan. Do you have that there in
8 front of you?

9 A. Yes.

10 Q. Could you please read that last line, at the
11 very, very bottom?

12 A. "A press release is also being prepared."

13 Q. Do you know if there was a press release prepared
14 in this matter?

15 A. Yes, there was.

16 Q. How do you know about that?

17 A. I believe the press release was sent to me along
18 with the ACL Complaint on September 1st.

19 Q. So was that how the Board then responded to your
20 completion of marking the other box on that curtailment
21 form -- was a press release with an ACL; is that correct?

22 A. Yes. That's the first time I ever received
23 anything in writing in response to any of this.

24 Q. Are there any other instream diverters or pre-
25 1914 diverters between your points of diversion and NDPR?

1 A. No.

2 Q. I'd like you to look at the slides, if we can
3 bring it up from the slide here, from this morning's
4 Prosecution Team's rebuttal slide. And I'd like you to
5 explain in your -- oh, the prior one, the prior page, page
6 4. There we go.

7 Does this in your opinion, this Exhibit page 4 depict
8 the analysis of supply and demand between your points of
9 diversion and NDPR?

10 A. No.

11 Q. And why is that?

12 A. Because there's no 1919 Demand, there's no
13 riparian demand, and there's no pre-1914 Demand between my
14 points of diversion and New Don Pedro Reservoir.

15 Q. And how would that change this analysis?

16 MR. FAHEY: The curves would equal zero. There would
17 be no demand curves because there's no demand.

18 Q. In fact, if they had tried to track the amount of
19 your diversions where would the line that depicts your
20 diversions, where would that -- or rather here there would
21 be a line as to what is it, your demand or your supply?

22 A. What my demand would be?

23 Q. Yes.

24 A. Over those months?

25 Q. Yeah.

1 A. It could be pretty much reflected by the line at
2 the bottom of the graph that goes horizontally from zero to
3 September. The magnitude of my diversion would be inside
4 that line.

5 Q. Inside that, below that, almost a small part that
6 zero line?

7 A. Yeah, it's be a small part of that baseline. It
8 would be a small part of the baseline.

9 Q. And that's because of how much acre feet are you
10 diverting?

11 A. Yeah. That's because of the magnitude of my
12 diversion.

13 Q. How much is that?

14 A. A little over 100-acre feet.

15 Q. Okay. I'll have you turn to the next page,
16 number 5, thank you. And does this analysis depict what it
17 looks like between your points of diversion and NDPR?

18 A. No. Again, there's a riparian demand shown here
19 and there's none between my points of diversion and New Don
20 Pedro. And that's the same case with the pre-1914 demand.
21 There's no demand between my points of diversion and New
22 Don Pedro, so neither the shaded riparian demand nor the
23 pre-1914 demand would be shown on that graph.

24 Q. So this in no way depicts between your points of
25 diversion and NDPR; is that correct?

1 A. That's correct.

2 Q. I'll have you look at page 9 of that same slide,
3 and have you open up to Exhibit No. 27, that's Fahey
4 Exhibit 27. And I think its Bates-Stamped 579?

5 A. Yes.

6 Q. Okay. Is this Slide No. 9, also there in that
7 Exhibit 27, there in front of you?

8 A. Yeah, that's the same language that they
9 highlighted earlier today.

10 Q. Okay. How did this language come about and what
11 happened to this language in your understanding?

12 A. This language, when I contacted Yoko Mooring to
13 let her know that I was going to be --

14 Q. I'm sorry. And who's she?

15 A. Yoko Mooring was a staff -- I believe she was an
16 engineer, a staff engineer in the Water Rights, Division of
17 Water Rights.

18 And so Yoko Mooring and I, we worked together to
19 create the first set of water rights. And so I called Yoko
20 and I said again, "I've got again good news, bad news.
21 Scott Fahey here, the bad news is I'm applying for more
22 water rights."

23 And so, Mr. Fahey (sic) -- she's good to work
24 with. And so she came up with this idea that I do this to
25 streamline things as far as being able to notice the

1 acceptance of the application. So I put this together
2 myself and signed it and sent it to Yoko.

3 Q. And then what happened?

4 A. Well, Yoko called me back oh I would say a week
5 or ten days later. And Yoko was upset. I'll use that
6 word. Yoko was upset that her recommendation that I send
7 this in order to alleviate any problems with the acceptance
8 of my second application, this was not being accepted for
9 that purpose.

10 Q. Okay. I'll have you turn to Exhibit 29. And why
11 don't you describe to me what this document is, in your
12 understanding?

13 A. Yeah, this is something that I've discovered in
14 my files, because of this process -- that Yoko was very
15 good at writing down contact reports, which brings back a
16 lot of memories when you read all this. And she's telling
17 me that this isn't going to be accepted.

18 Q. And she's referring to what is in then Fahey
19 Exhibit 27; what is that?

20 A. Yeah, the personal statement. That this is not
21 going to be accepted. They need something that's more
22 expansive, that entails both permits. And then she brought
23 up, "Why are you even doing this, because this is a
24 groundwater?"

25 Q. Well, here. Let's go over that language there.

1 It's, let's see I guess it's almost two-thirds of the way
2 down at the left column that starts with "I also." Do you
3 see that there?

4 A. Yeah. "I also question the need of water rights.
5 His source appears to be groundwater. He said that since
6 the source spring was within National Forrest he needed the
7 water rights."

8 Q. Okay. And so when you saw that language from
9 her, what did that make you think about the groundwater
10 situation at your spring?

11 A. Well, it was the same as the other springs. When
12 you come to a spring and you analyze its flow and you watch
13 it over a period of years to see how that spring fluctuates
14 with -- it's kind of a sinusoidal wave with respect to time
15 as the precipitation comes in, annually.

16 Then there's about typically a two-month lag
17 between the rise in the spring flow. So you monitor that
18 over a three-to-five year period prior to any development
19 to ensure that you have something that has continuity in
20 its discharge.

21 Q. Were you ever introduced to the concept of
22 developed water?

23 A. Yes. During our field trip to the Deadwood and
24 Sugar --

25 Q. I'm sorry, a field trip or a field inspection?

1 A. Field inspection more really.

2 Q. Okay, thank you. Maybe he considered it a field
3 trip?

4 A. Well, it was a good day. I enjoyed it, learned a
5 lot. So when we were at Deadwood Spring, Bill Van Dyke --
6 I believe that's his last name, Bill Van Dyke --

7 Q. And who's he?

8 A. He was, I believe getting ready to retire. He
9 was pretty senior; he had been there for quite awhile.

10 Q. Been where?

11 A. At the State Water Board.

12 Q. Okay.

13 A. He was looking at Deadwood Spring and he said,
14 "This is a very good example of how someone can claim a
15 developed right."

16 And I didn't know much about anything with
17 regards to all this back then. But so I said "Well what's
18 that?" So then he explained the process of the developed
19 right and how it worked.

20 Q. And what did he explain to you?

21 A. Well, what he explained to me was that when you
22 go in there and you, first of all you need records going
23 back years to determine what the base flow is with this
24 spring, year-in and year-out, month after month. And I
25 said "Yeah, I keep records like that whenever I can get up

1 here because of weather, I typically take a flow reading at
2 the spring. So I have those records."

3 And he said, "Well, that's good. Because when
4 you go in there and you develop that spring -- and let's
5 say on average it runs 18-20 gallons a minute. And you go
6 in there and you develop the spring. And now you're
7 getting 50 gallons a minute, which was the case at Deadwood
8 Spring.

9 He said, "That differential is developed water."
10 You've taken the expense and the risk to go in there and
11 develop and bring water to the source that -- bring water
12 to the surface, which brings within the jurisdiction of the
13 State Water Board. And the State encourages to bring water
14 to the surface for its beneficial use, so if you can
15 document before and you can document after, than you can
16 claim a developed right.

17 And that developed right, because you spent the
18 time and expense and risk to develop, bring that water
19 forward to the surface for the State's benefit then you had
20 a senior right to that developed water.

21 Q. And when, is you understanding, do you have the
22 ability to be able to make those determinations on your
23 permits whether you have developed water or not?

24 A. Well, it's because of Bill Van Dyke that I report
25 my water diversions the way I do.

1 Q. Why is that?

2 A. So I can show the amount of water that is
3 developed water.

4 Q. How did he tell you to report that?

5 A. He told me to report my surface water diversions
6 up to the maximum amount allowed and then anything over
7 that show as developed water.

8 Q. And have you done that?

9 A. Yes. That's why I do it the way I do it because
10 I was instructed by him that that's the way it needed to be
11 documented. So when you claim your developed right, you
12 have the documentation to back up that claim.

13 Q. I'll have you look at -- I'm going to walk you
14 through the process here in the remaining time that we
15 have. In Exhibit 6, Fahey Exhibit 6, the 1992 agreement,
16 this was testified to yesterday. Do you recall that -- I'm
17 sorry, by the Prosecution Team -- they talked about this
18 '92 agreement?

19 A. Yes.

20 Q. Okay. And who told you to get this '92
21 agreement?

22 A. The State Water Board. I'm not exactly sure who
23 the person was that wrote me the letter, but they explained
24 the exchange process and why it was required and that I had
25 made a good faith effort to unknowingly attempt an

1 exchange. And they said, "Because of that, you're showing
2 good faith to try to keep from harming others. And we're
3 going to allow you to approach others to enter into an
4 exchange agreement."

5 Q. Okay. Then flip over to Fahey Exhibit 10. And
6 that exchange agreement allowed you to be able to get this
7 exception for the legal effects of State Water Board
8 Declaration of Fully Appropriated Stream Systems; isn't
9 that true?

10 A. Yes. It allowed the notification that the
11 application to appropriate water by permit had been
12 accepted.

13 Q. But then the City learned about all of this and
14 what did the City do?

15 A. Well, this allowed notice to be given, which was
16 typically within a week to ten days, notice is provided
17 that the application has been accepted.

18 And very soon after that the City wrote a very
19 strong letter that indicated that this exchange agreement
20 had absolutely nothing to do with them. And because they
21 were not a party to this exchange agreement their water
22 rights would be impacted with this agreements between me
23 and the Districts.

24 Q. Okay. I'll have you turn to page 12. Is this
25 the protest that the City filed in response?

1 STAFF COUNSEL WEAVER: Could you please identify
2 the exhibit?

3 MR. HANSEN: I'm sorry, Exhibit 12, Fahey Exhibit
4 12.

5 BY MR. HANSEN:

6 Q. Strike that. Let me ask you this question. In
7 your understanding does the City protest your application
8 for a permit?

9 A. Yes. That's right here, Exhibit 12.

10 Q. Okay. And then have you look at -- and what
11 happened then in your understanding with your permit
12 process at that time?

13 A. Let me look at that. Yeah, so then it was about
14 over a year and a half that Christine Hayashi and I, and
15 the State Water Board, had a lot of correspondence going
16 back and forth as Christine Hayashi was trying to educate
17 us. And provide us documentation on how the Fourth
18 Agreement worked and how complex it was and why that had to
19 be considered in order to protect their interest, which
20 involved all three parties.

21 Q. And did that then develop into what became Term
22 20?

23 A. Yes. I think it was a letter in November of the
24 following year, '94 I think, that it was a letter that the
25 City wrote that Yoko had to rewrite, because of the

1 structure of -- Yoko had a letter in there that said she
2 had to rewrite it, so it was phrased correctly. I remember
3 that.

4 Q. Okay. I'll have you look at Exhibit 15. Is that
5 the City's letter, to your understanding, that they wrote?

6 A. Yeah. Yeah, that's the letter.

7 Q. Okay. And then have you look at -- that was
8 Exhibit 15, I believe -- and have you look at Exhibit 16.
9 Was that the rewriting by Yoko that you talked about?

10 A. Yes.

11 Q. Okay. And then have you look at page 252, at the
12 bottom, second paragraph about halfway down, on the right
13 side. "Replacement water may be provided in advance and
14 credited to future replacement water requirements." Do you
15 see that language?

16 A. Yes.

17 Q. Was that the origin then of the credit language
18 that was then inserted into your permit?

19 A. Yes.

20 Q. And that was then therefore in response to the
21 City not being fully protected then under that '92
22 agreement. Is that your understanding?

23 A. Yes. That's why this was created.

24 Q. So this language here is designed to protect the
25 City's interests that may not have been protected under the

1 '92 agreement. Is that your understanding?

2 A. Well, and the District's too, because of the
3 accounting. It protects all three parties. It considers
4 it when they're doing their accounting.

5 Q. And then if you look at Exhibit 18, is that the
6 formal notice from the Board itself that they were going to
7 accept those terms as Term 20 -- well that they were going
8 to accept it into the permit?

9 A. Yes it is, because they thereby dismissed the
10 protest.

11 Q. Okay. And then you filed for another permit,
12 right?

13 A. Yes.

14 Q. Okay. And in the course of that permit, was the
15 same language in Term 20 then brought over into that new
16 permit?

17 A. The new permit --- I've got to think how that
18 worked.

19 Okay. They gave notice with respect to the new
20 permit and gave me a temporary number. And when they gave
21 the temporary number the reason they provided it a
22 temporary number is because they needed the TUD source of
23 water. They needed an agreement executed.

24 There was an agreement, but it wasn't fully
25 executed and the City and County of San Francisco brought

1 that to our attention. So we had to fully execute a
2 foreign source of water, so TUD.

3 Q. Okay. I'll have you turn to Exhibit 40. And
4 have you look at the third paragraph on that first page of
5 that letter, the very last line. Do you see that "We seek
6 confirmation?"

7 A. Yes.

8 Q. Can you read that for me?

9 A. "We seek confirmation that the updated" -- that
10 means the 2003 TUD Water Exchange Agreement -- "is
11 inclusive of the quantities required for the Permit 2784
12 and Application 31491."

13 Q. So that was for both permits then?

14 A. Yes.

15 Q. Okay. I'll have you flip it over to the next
16 page. There is some proposed language in there and it
17 talks about strike something and strike something. It
18 looks like strike the word "annually" and then "annual."
19 Do you see that?

20 A. Yes.

21 Q. What was your understanding of the purpose for
22 striking the word "annual"?

23 A. In the Term 20, an annual analysis, you run into
24 a problem doing an annual analysis because one, the delay
25 in data -- knowing what the diversions were over time in

1 that year, because the data isn't required to be reported
2 until six months later. So doing an annual analysis has to
3 always look back in time with respect to the data they have
4 in hand.

5 So in order to get away with that problem they
6 changed the language to delete any type of annual
7 requirement and require that the -- not require, but allow
8 the Districts -- and I accepted this condition -- to allow
9 the Districts and the City to look at my diversions year-
10 over-year and do an analysis. And look back in time to
11 determine if I've impacted them or to look forward in time
12 and warn me that there's a very good possibility that I
13 will impact them.

14 Q. Why don't you look at the last paragraph in that
15 letter, not the "please call me" but right before that.
16 Can you please read that for us?

17 A. "San Francisco only intends to notify the
18 Applicant of the need to provide replacement water when
19 necessary; that is when their use has led to the reduction,
20 or has a strong potential, for reducing the supply
21 deliveries (sic) to San Francisco. The wide range of year-
22 to-year hydrology on the Tuolumne River makes it impossible
23 to predict whether or not the diversions of the applicant
24 in one year will have a negative impact on San Francisco
25 the next year or later. Short of notifying the applicant

1 each and every year that their diversions potentially could
2 affect the supplies of San Francisco, thus triggering
3 replacement water each year, our requested modification of
4 the terms will leave the notification to a judgment on our
5 part as to whether the need for replacement water is
6 critical."

7 Q. Now, please turn to Exhibit 54, please. Right
8 before the issuance of your second permit, Ms. Mrowka was
9 sent a letter from Dennis Herrera of the City, that if you
10 look at that language in the second paragraph could you
11 read that -- the second paragraph that says, "As noted in
12 the City's --" November 8th?

13 A. Yes.

14 Q. Can you read that for us?

15 A. In the November 8, 2014 letter. Then they
16 reiterate, "San Francisco only intends to notify the
17 applicant of the need to provide replacement water when
18 necessary; that is when the applicant's use had led to the
19 reduction, or has a strong potential of reducing, the water
20 supply of San Francisco. Also as noted, the wide range of
21 year-to-year hydrology on the Tuolumne River makes it
22 impossible to predict whether or not the diversions of the
23 applicant in one year will have a negative impact on San
24 Francisco the next year or later."

25 Q. What did that language and the similar language

1 that we've read already, what did that lead you to believe
2 then about your duties to report under your permits?

3 A. They were going to take the information that I
4 provide annually and analyze it to determine whether I have
5 impacted them in the past or am going to impact them in the
6 future.

7 MR. HANSEN: No further questions.

8 CO-HEARING OFFICER D'ADAMO: Cross-examination,
9 Prosecution Team?

10 MR. PETRUZZELLI: The Prosecution Team would like
11 a very brief break like three, five minutes?

12 CO-HEARING OFFICER D'ADAMO: Okay, five minutes.

13 MR. PETRUZZELLI: Thank you.

14 CO-HEARING OFFICER D'ADAMO: Great.

15 (Whereupon a recess was taken.)

16 CO-HEARING OFFICER D'ADAMO: The Prosecution Team
17 is ready. And we're just waiting for Mr. Fahey.

18 All right, Mr. Petruzzelli?

19 CROSS-EXAMINATION BY THE PROSECUTION TEAM

20 BY MR. PETRUZZELLI:

21 Q. Thank you. Mr. Fahey, did you testify earlier
22 today that you would have stopped diverting had the Water
23 Board told you, you had to stop diverting?

24 A. Yes.

25 Q. After the ACL was issued did you continue

1 diverting?

2 A. Yes. After the ACL? Yes, I have provided water
3 to a small farming community that doesn't have any other
4 water.

5 Q. Okay, so you continued diverting after the ACL
6 was issued?

7 A. Yes.

8 Q. Okay. Would you not consider the ACL a strong
9 indication or a strong message from the State Board that
10 you are being instructed to stop diverting?

11 A. I was advised that that didn't occur until a
12 determination had been made.

13 Q. Excuse me?

14 A. I was advised that that doesn't occur unless the
15 determination is made.

16 Q. I -- well correct me, I think you testified that
17 you were -- that you testified that through this
18 curtailment, unavailability notice process, that had the
19 State Board told you, "You have to stop diverting," that
20 acting in good faith, and because you act in good faith and
21 because you want to protect your business, you would have
22 stopped diverting; is that correct?

23 A. If they rejected my exception to curtailment.

24 Q. Okay. Because you checked the other box on the
25 curtailment certification; is that correct? I'll ask you

1 about that in a minute. Strike that.

2 Did you testify earlier that you report diverting
3 developed water when you divert more than your permitted
4 amount?

5 A. Did I do what?

6 Q. That you report -- in your progress reports that
7 you report diverting "developed water" if you divert more
8 than your permitted amount?

9 A. Yes, that's what I was instructed to do.

10 Q. But you did testify to that?

11 A. Yes, that's what I was instructed to do by the
12 Board.

13 Q. Okay. In 2014 did you report any diversion of
14 developed water from under either permit?

15 A. It's a drought, so I don't think so. It wouldn't
16 be much if it was, I don't think so.

17 Q. We can pull up those exhibits to refresh your
18 recollection if --

19 A. Yeah, if you want. Yeah, I mean --

20 Q. That would be Exhibit --

21 A. -- if it shows developed water then I did.

22 Q. -- that would be Exhibit 58 and 59.

23 A. Of yours or mine?

24 Q. Of the Prosecution, can we pull those up on the
25 screen please, 58 first.

1 So Mr. Fahey this is the Table of Diversions that
2 are included in your progress report, correct?

3 A. Correct, yes.

4 Q. And do you report any diversion of a developed --
5 and this is for 2014, correct?

6 A. Yes.

7 Q. Now, it's on the screen.

8 A. Yes, it is. Yeah. Yeah, it is.

9 Q. Okay. And did you report any diversions of
10 developed water on this, in this table?

11 A. No.

12 Q. Okay. Then can we pull up No. 59? So, Mr.
13 Fahey, this is also the table attached to your progress
14 report for 2014, for Marco and Polo Springs, your second
15 permit. Is that correct?

16 A. Yes.

17 Q. And in this table do you report diverting under a
18 developed right?

19 A. In this one, no.

20 Q. And the ACL includes 2014, correct?

21 A. Yeah, but I amended this one I believe. Yeah, I
22 amended this one.

23 Q. Is that amendment on file, in evidence?

24 A. I don't know. I know --

25 Q. Can you point to where that amendment is in the

1 evidence file?

2 A. No, but it's in my record, so it's part of the
3 hearing. It's in my permit records. Christine Hayashi,
4 not Christine Hayashi, pardon me, Karna --

5 Q. Harrigfeld?

6 A. Herrigfeld, Karna Herrigfeld forwarded that to
7 the --

8 Q. But did you submit a copy of that report with
9 your exhibits for evidence? Of that amended -- strike
10 that. Did you submit a copy of that amended report? Is
11 that -- strike that.

12 Is that amended report included in your exhibits,
13 in evidence?

14 A. I don't know it is or not. But it's part of --

15 Q. So you cannot identify that exhibit at this time?

16 A. Well, what I did, I can tell you what I did --

17 Q. Can you identify that piece of evidence?

18 A. No, but I can tell you the amendment I made.

19 Q. I'm not asking you for the amendment, I'm asking
20 you for the evidence?

21 A. It's in my file

22 Q. Okay. So, Mr. Fahey, I'm going to ask you about
23 the curtailment certification again. And you stated that
24 you checked the other box claiming an exemption, or you
25 contend that by checking the other box you claimed an

1 exemption; is that correct?

2 A. A legal justification.

3 Q. Okay. And I believe that is the language that is
4 used on the curtailment certification form. Does it not
5 state that by checking that other box -- and I think that
6 is Prosecution Team Exhibit 35 -- that you contend you are
7 diverting from a legally authorized source?

8 A. Yeah, I amended the language in "others." I
9 lined out certain things and initialed it.

10 Q. So you asserted something other than what's on
11 this form?

12 A. I lined out certain texts, and initialed it to
13 let them know that I lined it out. So I was -- what's the
14 term -- you know, I was testifying or letting them know, or
15 making a statement that it comported to the language that
16 was not lined out.

17 Q. So by lining --

18 A. I wanted them to know exactly what I was telling
19 them the other condition was.

20 Q. But by lining that out you did not actually
21 respond to what was being asked on the curtailment
22 certification; is that correct?

23 A. No. I was honestly answering what the situation
24 was.

25 Q. But you did not respond to the question; is that

1 correct?

2 A. There was no question there.

3 Q. So by --

4 A. There was no question --

5 MR. HANSEN: Object, he's badgering the witness.

6 THE WITNESS: There's no question, where's the
7 question? There's no question mark there. It's a
8 statement. I made a statement and I lined out the
9 appropriate verbiage so my statement matched what I was
10 claiming.

11 BY MR. PETRUZZELLI:

12 Q. And did you also state that you did not get a
13 response from the Board regarding this certification?

14 A. Yes.

15 Q. Okay. Did you also state that you assumed no
16 response could be taken as permission to continue
17 diverting?

18 A. No, I don't think I ever said that.

19 Q. Okay. Would you be surprised to hear that the
20 Board did not respond to most certification forms?

21 A. No. That wouldn't surprise me at all.

22 Q. But did you expect a response?

23 A. This is pretty serious business, yeah. They said
24 I'll be in a dire situation if I don't provide replacement
25 water. I did, so I would avoid this dire situation.

1 Q. But I asked you, so you did expect a response
2 from the Board?

3 A. This is serious, yes.

4 Q. Okay. That's fine. But you would not be
5 surprised that the Board did not respond to most people who
6 responded to these forms?

7 A. I'm not going to disparage the Board.

8 Q. Okay. I'm just asking you a yes or no question.
9 I don't think the Board will take it personally.

10 Or did you read the curtailment -- strike that.

11 Did you testify earlier today that you tried
12 reaching out to the Board during the curtailment period
13 after you received the unavailability notice?

14 A. Yeah, I wrote them a letter. The June 3rd --

15 Q. Wrote them a letter?

16 A. Yeah. And then in March 3rd of 2015, I reported
17 what I diverted during curtailment.

18 Q. Did you read that notice?

19 A. Read what notice?

20 Q. The Unavailability Notice of 2014?

21 A. Yes.

22 Q. Okay. That is Prosecution Team Exhibit No. 32,
23 can we pull that up please?

24 When you reviewed this letter did you notice that
25 near the end of this letter there is a hotline, I think

1 it's in the last complete paragraph. It reads, "If you
2 have any questions please call our Curtailment Hotline."

3 Did you read this letter?

4 A. Yes.

5 Q. Okay. Did you call the Curtailment Hotline?

6 A. Not that I recall, no.

7 Q. Okay, thank you. So you were concerned with your
8 business, but you never contacted the Board through this
9 Curtailment Hotline?

10 A. No. I have no recollection of doing that.

11 Q. Okay. I think you also stated earlier today that
12 you provided FAS water starting February 20, 2009?

13 A. No. I was given notice that I should provide
14 replacement -- not replacement water, but -- I guess it
15 would be replacement water. I think that's what the
16 language in the letter says, from an alternate source, or
17 there was some language like that.

18 Q. Okay. But did you say you started providing that
19 starting February 20th?

20 A. No, I immediately started making arrangements to
21 have it provided two months --

22 Q. Okay. And that's when you signed the June 17,
23 2009 Agreement with TUD?

24 A. Yeah, because it takes them a while to determine
25 whether they have the surplus water. And once they make

1 the surplus water determination then they give you notice
2 and send out the --

3 Q. Okay, thank you.

4 I'm going to ask you about your permits again.
5 And I think you -- is it correct that your permits prohibit
6 you from interfering with or harming the City's Raker Act
7 duties and obligations?

8 A. Yes.

9 Q. Okay. And I think that is Term 20, paragraph two
10 in your first permit, and Term 33 in your second permit; is
11 that correct?

12 A. Without looking at it, I believe that's correct.

13 Q. Okay. Do you recall that the City, in
14 association with your second permit application included --
15 submitted a letter with modeling by Mr. Dan Steiner,
16 showing how your diversions and repayment activities could
17 impact their water rights?

18 A. Yeah, just diversions, not repayments. That was
19 in for the first permit. That was in when Christine
20 Hayashi was leading the charge for the City and County of
21 San Francisco.

22 Q. But Mr. Steiner's modeling also show that
23 depositing water into New Don Pedro at certain times could
24 impact their water rights?

25 A. Depositing water?

1 Q. Yes.

2 A. No he didn't, I did.

3 Q. Oh. So you said that depositing water into New
4 Don Pedro at certain times could impact their rights?

5 A. Yeah, I said Dan Snyder -- that's the fellow, the
6 engineer from Roosevelt.

7 Q. Yes?

8 A. Yeah, I said the contrary is true. If you change
9 the sign on the equation from negative diversion to
10 positive replacement then the contrary takes place in that
11 mathematical solution.

12 Q. So by depositing water into New Don Pedro, you
13 can harm the City's rights?

14 A. No.

15 Q. Is that what you just stated?

16 A. No. You harm the District's.

17 Q. The District's rights?

18 A. Yeah, the District is shorted depletion -- the
19 Districts are shorted the amount that should be depleted
20 from the water bank if that occurs.

21 Q. Okay. And is this the kind of shorting that you
22 would expect them to notify you of under your Term 20 or
23 Term 34?

24 A. What shorting?

25 Q. Is this under Term 20 and Term 34 -- do you

1 notify the Districts when you deposit water in their
2 reservoir?

3 A. No.

4 Q. Okay. Do you include that in your annual
5 Progress Report?

6 A. No.

7 Q. Okay. Do you -- but they've never called for
8 water?

9 A. They've never called for water.

10 Q. Right, but you've also never given them notice
11 that you deposit water in their reservoir?

12 A. No. I was just proceeding under the Board's
13 direction to do that.

14 Q. Okay. Even though I think you stated that
15 depositing water into their reservoir at certain times can
16 harm their rights, correct?

17 A. No. There's no measurement device on Solomon
18 Creek. They wouldn't know that occurred.

19 Q. So they would have no idea that you put water
20 into their reservoir?

21 A. No.

22 Q. So you can just put water in their reservoir
23 without them knowing it?

24 A. Yeah.

25 Q. Okay. And you don't tell them?

1 A. No, when they ask for replacement, but I did tell
2 them. I told them prior to sending my letter of June 3rd
3 to the Board.

4 Q. Right, so you told them in your June 3rd, 2014
5 letter that you put water --

6 A. Oh, no. No, I told them prior to the letter
7 being sent.

8 Q. Actually, yesterday I think you said that that
9 was the first time you ever told them --

10 A. That was. That was.

11 Q. -- you put water into the reservoir?

12 A. Yeah, that was.

13 Q. Okay. So the June 3rd, 2014 letter was the first
14 time you ever notified them that you deposited water into
15 their reservoir.

16 A. Yes, a few days prior to that. Yes.

17 Q. Okay. But you also deposited water into their
18 reservoir in 2009, 2010, 2011, correct?

19 A. I purchased 82 acre-feet from TUD and they
20 wheeled it to New Don Pedro in the amount of 88.55 acre
21 feet between June 2009 and June 2011.

22 Q. And that is the water --

23 A. And it takes in the two water right purchases:
24 one is in 2009, one is in 2010.

25 Q. And that is the water that you contend you should

1 get a credit for, for future water replacement?

2 A. Yes.

3 Q. Okay. By future water replacement do you mean
4 that you should have -- that that should extend to a
5 subsequent season?

6 A. Yes.

7 Q. So you believe you should have the right to
8 deposit water and have it available for your use in a
9 subsequent season?

10 A. Yes.

11 Q. Okay. You believe you should have the right to
12 deposit water in New Don Pedro and have a right to that
13 water in a subsequent season?

14 A. I don't have a right to the water. I have a
15 right to the credit --

16 Q. But you just said that --

17 A. -- for increasing the volume of water, because of
18 the imported foreign water.

19 Q. Well, I think you just testified that when you
20 say you should get a credit for future water replacement
21 you're claiming that you should have that water, that
22 credit for a subsequent season; is that correct?

23 A. Yeah, because it's a year forward, year backwards
24 analysis.

25 Q. Okay. So when you say a credit you mean that you

1 should be able to deposit that water in the reservoir and
2 have it available for you in a later subsequent season; is
3 that correct?

4 A. Yes.

5 Q. Okay. And that reservoir is New Don Pedro,
6 correct?

7 A. Correct.

8 Q. Is that your reservoir?

9 A. I'm not storing water there. I'm not using water
10 there. I am importing foreign water and I deserve a credit
11 for increasing the volume in that reservoir.

12 Q. But you just said that you -- but you just stated
13 that you want a, you call it a credit, but what you said is
14 that you want to deposit water into that reservoir and
15 have it available for your use in a subsequent season; is
16 that correct?

17 A. A credit.

18 Q. Well, you want to deposit -- you call it a
19 credit, but what it is -- you did say that you want to
20 deposit that water and have it available for your use in a
21 subsequent season?

22 A. No. I'm saying I did wheel the water down there.

23 Q. Okay.

24 A. The water's down there.

25 Q. And you contend that you should have that

1 available for a subsequent season, correct?

2 A. Yes.

3 MR. HANSEN: Asked and answered repeatedly.

4 MR. PETRUZZELLI: Okay

5 BY MR. PETRUZZELLI:

6 Q. How is that different, is that any different than
7 a water right for storage?

8 A. 88.5 written on a piece of paper is a lot
9 different than 88.5 acre feet of water sitting in this
10 room.

11 Q. Is that a right to storage?

12 A. No.

13 Q. So you do not have a right to store that water in
14 New Don Pedro?

15 A. Yeah, that was asked and answered yesterday.

16 Q. Okay. But yet you contend that you should be
17 able to deposit that water in the reservoir and have it
18 available for your use in a future season?

19 A. Yes, the use being the reduction of the credit
20 amount. And the reduction is debited to whoever the party
21 is that informs me, "This is the amount of water you owe
22 us." I don't know that until I'm informed of that. I
23 don't know who to debit the account to unless they tell me
24 how much to debit to TID, how much to debit to MID, and how
25 much to debit to debit to the City and County of San

1 Francisco.

2 Q. And that's because you have no accounting
3 arrangement with them, correct?

4 A. No. It's because they do the analysis.

5 Q. But you all -- So they do the analysis?

6 A. Uh-huh.

7 Q. But you don't tell them when you put water there,
8 correct?

9 A. That's correct. I have a year to get water
10 there.

11 Q. Okay. Well --

12 A. If they tell me, if I don't have enough --

13 Q. -- that's not my question.

14 A. If I don't have enough --

15 Q. Please respond to my question?

16 A. Okay.

17 Q. I asked you, so there is no accounting method; is
18 that correct?

19 A. I'm not privileged to the Fourth Agreement
20 accounting process. I'm not privy to that.

21 Q. But there's no accounting method with respect to
22 the water that you put in?

23 A. I can't impact the Fourth Agreement. The
24 accounting process is the Fourth Agreement.

25 Q. But I asked you is there an account that -- is

1 there an accounting. Did you testify yesterday that
2 there's no accounting method for the water that you put in
3 the reservoir?

4 A. I don't think I shouldn't have. If I did, I
5 shouldn't have, there is an accounting method. The City
6 and the Districts have it.

7 Q. For the water that you put in?

8 A. For the water that I -- No, for determining how
9 much I've impacted them. I'm talking about when they
10 allocate the amount of replacement water needed to make
11 them whole, who gets allocated how much, that's their
12 accounting process.

13 Q. So they do need to consider the water that you
14 put into their reservoir for repayment, correct?

15 A. No. They make an analysis, they determine how
16 I've impacted them. And then they give me notice of how
17 much replacement water is required. I have to replace that
18 water within one year of their notification.

19 I am allowed to put water in, in advance, for
20 future credits. So if they advise me I can say I have
21 water in there for future credits. I document how much
22 water's in there.

23 Q. Yet yes, you said you believe you have a right to
24 store water there?

25 A. I didn't say that.

1 Q. Well, that's what --

2 A. And don't put words in my mouth. I didn't say
3 that.

4 Q. But I think you also testified that you don't
5 tell them when you put water there?

6 A. I didn't. When I put the water in, in 2009 and
7 they knew right at the end -- let me think about this.

8 Q. I think you testified?

9 A. No, they didn't. They didn't know when I put the
10 water in, in 2009 and 2011. When they were informed of
11 that in June of 2014, they had no objection upon hearing
12 that.

13 Q. So if you don't tell them you put water in the
14 reservoir, and if you don't tell them when you put water in
15 the reservoir, how are they supposed to know to ask you for
16 water?

17 A. They know to ask me for water when they put in
18 the worst-case scenario of the maximum amount of water I
19 can divert, into their analysis. And when they're
20 completed with their analysis they can determine if that
21 maximum amount of water I can divert has impacted their
22 water supply. If it has impacted their water supply they
23 give me notice of that.

24 Q. Do you have documentation of that arrangement, is
25 that in evidence, is that in the record, can you point to

1 an exhibit where that is?

2 A. That's what Term 34 is all about.

3 Q. Can we bring up Fahey Exhibit No. 17, please?

4 We'll come back to this. I think it's Exhibit 14.

5 STAFF COUNSEL WEAVER: Is that Prosecution Team
6 or Fahey?

7 MR. PETRUZZELLI: It's a Fahey Exhibit.

8 BY MR. PETRUZZELLI:

9 Q. We'll come back to this. I'd like to ask you
10 about some of your conversations with Sam Cole, with Mr.
11 Cole?

12 A. Sure.

13 Q. And I believe it relates to his phone call on
14 August 12th?

15 A. That's the only time I've ever talked to him.

16 Q. Okay. And did he tell you that the Notice of
17 Unavailability applied to you?

18 A. No. It had to do with a complete site inspection
19 of all four springs and the conveyance pipelines and the
20 tanker storage facility and tanker fill station.

21 Q. Okay. Can we pull up that contact report, I
22 think its Fahey 66, Bates 1313. And I think it states in
23 the second paragraph that he tells you that you are subject
24 to the Notice of Unavailability?

25 A. I never said I would not curtail my diversions.

1 I said I was diverting.

2 Q. But I think he asked -- I think in the course of
3 that conversation he said that the purpose of his contact
4 was to schedule inspection to determine whether you were
5 still diverting; is that correct?

6 A. No. I asked him why the inspection, because of
7 the conversation with David LaBrie two months earlier. I
8 was asking why the sudden interest in all the inspections.
9 Was he planning to, or were they planning to license my
10 permits? And he said, "No. This has to do with
11 curtailment."

12 And so when he said it had to do with curtailment
13 I said I discussed this at length with David LaBrie.

14 Q. Okay. I think in the -- did he inform you, so
15 you wanted to know if your exemption had been approved; is
16 that correct?

17 A. No. No.

18 Q. I think, did you tell him that you believed you
19 were exempt from the curtailment?

20 A. Yes. And I explained why.

21 Q. Okay. And I think he told you that as far as he
22 knew, you were still subject to it?

23 A. He said he didn't know, because the water rights
24 he read. He looked at them, but they were really complex
25 and he didn't really understand all those. He wasn't very

1 -- he was not -- for calling me about my water rights he
2 didn't have a very good understanding of the water right
3 terms and conditions.

4 Q. But I think he did state that he did not have the
5 authority to tell you that you were exempt; is that
6 correct?

7 A. Yeah. We didn't really -- he and I didn't really
8 talk about it exemption much. That was David LaBrie and I
9 that really we did. I felt like that conversation with
10 David LaBrie was a very good one as far as an analysis from
11 my springs all the way to downstream at Don Pedro.

12 Q. Did Sam Cole tell you that the unavailability of
13 applied to you?

14 A. No, I don't believe that. You know, at the end
15 of the conversation I said, "Yes, I'm diverting. I've sent
16 the letter. I've reported how much I've diverted." And he
17 said "Well, I'm going to put you down as noncompliant with
18 the curtailment." That's how the --

19 And I kind of said something like, "Well at least
20 we accomplished something positive here. We got that
21 established."

22 Q. Okay. I'd like to go to slide 4 in the
23 Prosecution Rebuttal. And is it correct that this analysis
24 is the demand for the entire Tuolumne River?

25 A. I believe it is. It's the full natural flow or

1 something.

2 Q. Right, but your diversions divert from the
3 Tuolumne River, correct?

4 A. Yes they do.

5 Q. And this is a supply and demand curve, correct?

6 A. Yes, from New Don Pedro. Or pardon me, from La
7 Grange Dam upstream.

8 Q. Okay. And so your diversion puts -- is part of
9 the demand, correct?

10 A. Not those demand curves.

11 Q. But your diversion is part of the demand on the
12 river; is that correct?

13 A. Yeah. It's the bottom baseline is my demand on
14 the river.

15 Q. And just in the interest of time if we were to
16 look at the 2015 analysis that's also the entire river; is
17 that correct?

18 A. Yeah, that is. You're right. It doesn't pertain
19 to the stretch that I'm on.

20 Q. Okay. But it is the analysis for the entire
21 river?

22 A. No. No, that graph doesn't pictorially describe
23 the conditions between my points of diversion and New Don
24 Pedro.

25 Q. Right. But I'm just asking is this the supply

1 and demand analysis for the river as a whole?

2 A. Yeah, from La Grange Dam upstream.

3 Q. And you divert from the river?

4 A. Yes, I do.

5 Q. Okay. Thank you.

6 MR. PETRUZZELLI: And that is all of our
7 questions.

8 THE WITNESS: Thank you.

9 CO-HEARING OFFICER D'ADAMO: At this time, would
10 the parties like to move their rebuttal exhibits into
11 evidence?

12 MR. PETRUZZELLI: Yes

13 MR. HANSEN: This is Mr. Hansen, yes we would.

14 I don't believe that we had any additional
15 exhibits on rebuttal.

16 CO-HEARING OFFICER D'ADAMO: All right.

17 MR. HANSEN: But we stand with all the objections
18 that we raised at the beginning of this morning's
19 proceeding about the rebuttal testimony and the rebuttal
20 exhibits that the Prosecution Team sought to have
21 introduced.

22 CO-HEARING OFFICER D'ADAMO: All right, so noted.

23 MR. HANSEN: We reassert those objections here
24 once again.

25 CO-HEARING OFFICER D'ADAMO: All right. So

1 Prosecution Team's rebuttal exhibits with the exception of
2 slide 18, which has been already stricken from the record,
3 will be entered into the record.

4 (Whereupon the above-referenced exhibit was admitted
5 into evidence by the Hearing Officer.)

6 And at this point, we're going to take a five-
7 minute break to come back and announce how we plan on
8 proceeding on closing briefs.

9 MR. HANSEN: Now, excuse me. Is that the
10 accepted into evidence with the objections pending?
11 Pending the submission of the --

12 CO-HEARING OFFICER D'ADAMO: Yes, the objections
13 are taken under submission. Yes.

14 MR. HANSEN: Thank you, very much.

15 So, if as you do the briefing schedule the only
16 thing that we are concerned about is how that relates to
17 the obtaining the transcript, of course, and how long that
18 will take, the written transcript.

19 CO-HEARING OFFICER D'ADAMO: All right. When we
20 come back, we'll let you know.

21 MR. HANSEN: Excellent thank you.

22 CO-HEARING OFFICER D'ADAMO: And I apologize, but
23 I failed to ask the intervenors if you had any cross on
24 Mr. Fahey?

25 MR. DONLAN: San Francisco does not.

1 CO-HEARING OFFICER D'ADAMO: Thank you.

2 Ms. Brathwaite?

3 MS. BRATHWAITE: Either.

4 CO-HEARING OFFICER D'ADAMO: All right, we'll
5 take a five-minute break.

6 (Whereupon a recess was taken 3:29 p.m. to 3:42 p.m.)

7 CO-HEARING OFFICER D'ADAMO: The submission of
8 written closing briefs will be as follows: Supplemental
9 briefs on evidentiary objections are due two weeks after
10 receipt of the hearing transcript. Written supplemental
11 briefs shall not exceed 20 pages.

12 Reply briefs on evidentiary objections will be
13 permitted, and will be due one week after the due date for
14 supplemental briefs. Reply briefs shall not exceed 10
15 pages. Reply briefs may discuss any issues raised in the
16 supplemental brief of any party.

17 Closing briefs will be due two weeks after we
18 issue a ruling on evidentiary objections. Such ruling will
19 include instructions on closing briefs.

20 Modesto Irrigation District, Turlock Irrigation
21 District, and the City and County of San Francisco may also
22 file briefs, same page limits and deadlines for the
23 Intervenors.

24 Briefs shall not exceed 1.5 spacing and 12 point
25 font size. Staff will provide notification to the service

1 list when the transcripts have been posted and when the due
2 dates are set for supplemental reply and closing briefs.

3 We will hold the record open until we rule on
4 whether Exhibits WR-147 and WR-153 should be admitted.
5 However, no new exhibits may be submitted.

6 Supplemental briefs on evidentiary objections
7 should address the following issues. Number one, whether
8 the evidence objected to in the Prosecution Team's pre-
9 hearing motion to strike, motion *in limine*, is relevant to
10 determining whether an unlawful diversion occurred per key
11 issue number one.

12 Number two, whether Exhibit WR-147 and related
13 testimony is admissible per Fahey's objections on cross-
14 examination and rebuttal and his associated motions.

15 Briefs should address: a) Mr. Fahey's hearsay
16 objection and Section 11513 of the Government Code, b)
17 Mr. Fahey's objection that the Prosecution Team failed to
18 disclose Exhibit WR-147 prior to the hearing.

19 The third supplemental brief on evidentiary
20 objections should include three, whether Rebuttal Exhibit
21 WR-153 and related testimony is admissible, per Mr. Fahey's
22 objections on rebuttal and his associated motions.

23 Briefs should address Mr. Fahey's objection that
24 the Prosecution Team failed to disclose Rebuttal Exhibit
25 WR-153, prior to the hearing.

1 The court reporter estimates that the transcript
2 will be available within 11 to 15 working days after the
3 close of the hearing. The Hearing Team will post the
4 transcript on the project webpage at that time.

5 Anyone who would like an advance copy of the
6 transcript must make separate arrangements with the court
7 reporter.

8 Upon receipt of the closing briefs, the Board
9 will take this matter under submission. Board staff will
10 prepare a proposed order for consideration by the Board.
11 The participants in this hearing will be sent Notice of the
12 Board's Proposed Order in this matter and date of the Board
13 meeting at which the Proposed Order will be considered.

14 After the Board adopts an order any interested
15 person has 30 days within which to submit a written
16 petition for reconsideration by the Board.

17 Thank you all for your interest, cooperation, and
18 participation in this hearing. This hearing is adjourned.

19 (The hearing was adjourned at 3:47 p.m.)

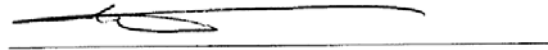
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REPORTER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of February, 2016.



PETER PETTY
CER**D-493
Notary Public

TRANSCRIBER'S CERTIFICATE

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were transcribed by me, a certified transcriber and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of March, 2016.



Myra Severtson
Certified Transcriber
AAERT No. CET**D-852

STATE WATER RESOURCES CONTROL BOARD

PAUL R. BONDERSON BUILDING
901 P STREET
SACRAMENTO, CALIFORNIA 95814
(916) 653-0438
FAX: 657-1485

Mailing Address

DIVISION OF WATER RIGHTS

P.O BOX 2000, Sacramento, CA 95812-2000



In Reply Refer
to: 331:WV:29977

OCTOBER 11 1994

Mr. G. Scott Fahey
2418 Pleasanton Avenue
Boise, ID 83702

Dear Mr. Fahey:

APPLICATION 29977--DEADWOOD AND COTTONWOOD SPRINGS IN
TUOLUMNE COUNTY

I enjoyed meeting you on September 29, 1994 at the field investigation on the above referenced application and hope that further negotiations with Ms. Chris Hayashi will be fruitful.

As per your request, I am forwarding a copy of a legal counsel opinion on the need for a water right to divert developed water. If you have any questions, I can be reached at (916) 653-0438.

Sincerely,
ORIGINAL SIGNED BY:

Wm. Van Dyck
Associate WRC Engineer
Application Unit #1

Enclosures

WVanDyck:pminer:10-6,7-94
o:wv:29977

(916) 657-1965
 FAX: 657-1485

FEBRUARY 1 1995

In Reply Refer
 to:331:YM:29977

Mr. G. Scott Fahey
 2418 Pleasanton
 Boise, ID 83702

City & County of San Francisco
 c/o Ms. Christiane Hayashi
 City Hall, Room 287
 San Francisco, CA 94102

Dear Mr. Fahey and Ms. Hayashi:

APPLICATION 29977 OF FAHEY, DEADWOOD SPRING AND COTTON WOOD SPRING IN
 TUOLUMNE COUNTY

Enclosed for your information is a copy of our report of the field
 investigation which was conducted on September 29, 1994 pursuant to
 Section 1345 of California Water Code.

If you have any questions, please call me at (916) 657-1965.

Sincerely,

ORIGINAL SIGNED BY:

Yoko Mooring
 Sanitary Engineering Technician
 Application Unit #1

Enclosure

YMOORING:ym:1/24/94:cover

gm 1/31/95
 WV 1/31/95

REPORT OF FIELD INVESTIGATION UNDER WATER CODE SECTION 1345
APPLICATION 29977 OF FAHEY
UNNAMED SPRING TRIB. COTTONWOOD CREEK AND
DEADWOOD SPRING TRIB. BASIN CREEK IN THE TUOLUMNE RIVER WATERSHED
TUOLUMNE COUNTY

SUBSTANCE OF APPLICATION 29977:

Application 29977 was filed on July 12, 1991 to appropriate water from two springs as follows:

SOURCE: (1) Unnamed Spring (aka Cottonwood Spring) tributary to Cottonwood Creek thence Clavey River thence Tuolumne River, and (2) Deadwood Spring tributary to Unnamed Stream (aka Deadwood Creek) thence Basin Creek thence North Fork Tuolumne River in Tuolumne County

AMOUNT SOUGHT: 20,000 gallons per day (0.031 cubic foot per second) from Cottonwood Spring and 20,000 gallons per day from Deadwood Spring; Total of 40,000 gallons per day (0.062 cubic foot per second) not to exceed 44.82 acre-feet per year

USE: Industrial (Bottled Water)

SEASON OF COLLECTION: January 1 to December 31 of each year

PLACE OF USE: Not specified at this point. The water will be transported off-site to a bottled water plant.

DECLARATION OF FULLY APPROPRIATED STREAM SYSTEM:

In Order WR 91-07, the State Water Resources Control Board (SWRCB) declared the Tuolumne River fully appropriated from July 1 to October 31 (Decision 995) and Sacramento-San Joaquin Delta fully appropriated from June 15 to August 31 (Decision 1594). Section 5.1 of Order 91-07, however, provides some exceptions for the continued processing of certain applications, such as Application 29977.

Section 5.1

"...transactions may occur which, in effect, make water available for diversion and use by specific persons from stream systems wherein water is not otherwise available for appropriation. These transactions include water service contracts and water transfers, where a natural stream channel is used for delivery, and water exchanges. Under certain circumstances the Board requires that an application be filed and permit issued. In such cases, the Declaration should not preclude acceptance of the application nor should any such pending applications be canceled. The application process will help assure protection of other lawful users of water and instream uses."

The applicant has entered into a water exchange agreement with the Turlock Irrigation District and the Modesto Irrigation District for the period from June 16 to October 31 of each year. The agreement was executed on December 12, 1992. The Chief, Division of Water Rights, subsequently approved an exception to Order WR 91-07 pursuant to Section 5.1 of the order on January 15, 1993.

PROTESTS:

Application 29977 was noticed on January 29, 1993 and four protests were received against approval of the application. Two protests (Banta-Carbona Irrigation District and Central Sierra Environmental Resource Center) were withdrawn before acceptance. A protest by Tuolumne Group of the Sierra Club was accepted on March 16, 1993 and subsequently dismissed unconditionally on May 12, 1994. A protest by City and County of San Francisco (City) was accepted on March 23, 1993. The City protested the application based on injury to vested rights and environmental considerations. The City claims pre-1914 rights, and has filed Statements of Water Diversion and Use 2635, 2636, 2637 and 2638. The City contends that any diversion of water flowing into New Don Pedro Reservoir from the Tuolumne Basin could adversely affect the City's ability to meet its obligation to release water from the upstream facilities (Hetch Hetch Reservoir, Lake Eleanor, and Cherry Lake) into New Don Pedro Reservoir pursuant to the Raker Act of 1913. The City also alleges that Mr. Fahey's proposed pumping of groundwater into New Don Pedro Reservoir, pursuant to the applicant's water exchange agreement with the Modesto & Turlock Irrigation Districts, would occur in an area that the irrigation districts claim to be already overdrafted, thereby causing the potential for adverse environmental impacts. Due to the unresolved protest of the City, the matter of Application 29977 was scheduled for a field investigation.

FIELD INVESTIGATION:

An on-site investigation of the above application was conducted on September 29, 1994, pursuant to Water Code Section 1345. Parties present during the investigation were as follows:

G. Scott Fahey	Applicant
City & County of San Francisco.....	Protestant
represented by Christiane Hayashi	
Yoko Mooring.....	SWRCB
William Van Dyck.....	SWRCB

All parties met at the post office in Tuolumne City. Prior to proceeding to the proposed points of diversion, the investigation convened at a nearby picnic bench at the request of Ms. Hayashi.

Division staff explained the field investigation procedures under Water Code Section 1345 and also how staff wished to proceed with the investigation. Since the applicant and the protestant had been actively communicating with each other for the last few months in order to resolve the City's protest, the substance of the application and the protest were not summarized and the discussion was soon opened, starting with the applicant's presentation.

The applicant briefly explained his proposed project and how he had resolved the other protests. He stated that the protest filed by the Banta Carbona Irrigation District (prior vested right protest) was withdrawn because their concerns were alleviated based on a water exchange agreement. He also added that all environmental documents necessary for a water right permit had been completed.

Ms. Hayashi explained about the water bank accounting system in effect between the Irrigation Districts and the City, the flow release under the Raker Act of 1913, and the City's pre-1914 rights. She also presented an example of protest dismissal permit terms from Application 22980, which the City had protested and leading to Decision 1320 rendered in 1968. She stated that the applicant's diversion may be too insignificant to be able to assess any damage; nevertheless, his diversion would be in conflict with the City's interest. Therefore, the City could not ignore any diversion occurring in the Tuolumne watershed for its future protection.

The applicant questioned how his diversion would be counted on the City's water bank system because his streams are not listed and not measured on the City's schematic chart for accounting purposes. He also requested some revisions to the proposed dismissal conditions, especially wording regarding the collection season. Ms. Hayashi agreed to get back to him after discussing the matter with the City's consultant.

We next proceeded to the proposed points of diversion in one vehicle. On the way to the springs, we observed the location where the tanker fill station is proposed on USFS Roadway 1N04. The elevation is estimated to be approximately 3,300 feet on the Twain Harte quadrangle map. Since two springs are located at the elevation of approximately 5,300 feet, snow will prohibit access during the winter months. Accordingly, the project is proposed to divert water from the springs through a conduit, approximately 15,000 feet down to the tanker fill station. This would be the location where the applicant would actually sell the water to the bottling company. Company tanker trucks would transport the water from the fill station to their bottling plant site(s).

We next observed Deadwood Creek as it flowed down the rocky mountain side and passed underneath the highway. We also stopped at two locations affording a panoramic view facing Marble Mountain. The applicant pointed out the location of the springs and the pipe route. Photos showing this panoramic view with POD marked were submitted with the original application.

After approximately 11 miles, from Tuolumne City, on Forest Road 1N04 (Cottonwood Road), unpaved Forest Road 3N07 spurs to the north. A road sign at Road 3N07 turnoff indicates 3 miles to Fahey Meadow. The Deadwood Spring (Point of Diversion #2) is located approximately three miles north on Forest Road 3N07. Water was seeping from the spring and coming down the mountain side through a culvert underneath the road, then going down the hill forming a creek channel. Since the spring site was heavily covered by vegetation, the sound of water flowing down the mountain side could be heard, but water could not be seen until it entered the culvert.

The applicant explained that there were three springs and that the drainage of all three springs merged to create Deadwood Creek. He would divert only from one spring. He had documented the flow rate since 1989 at the discharge end of the culvert. The highest recorded flow was 24 gallons per minute and the lowest was 8 gallons per minute. Staff measured the undeveloped spring flow at 13 gallons per minute (bucket and stopwatch) at the discharge end of the culvert.

The applicant indicated that he eventually wished to drill a horizontal well to the spring for health purposes. However, this would be done in conjunction with a bottling company contract. The concept of developed water was discussed as a possible means to avoid infringement on prior rights at New Don Pedro Reservoir without having to provide makeup water. Mr. Fahey was advised to keep good records of the flow rate for different periods under natural conditions in order to establish a claim to developed water through a horizontal boring(s).

We then proceeded to Cottonwood Spring (Point of Diversion #1), which required a walk of approximately 1/4 mile. When we reached a flat area appearing as a wet meadow, a natural stream channel with about one foot width was observed immediately down from the spring. The water was flowing steadily, but the flow rate was not measured at this point. Because of dense vegetation we could not reach the spring source itself, which is almost on the southeast section corner of Section 16, T2N. R17E, MDB&M.

The applicant told us that there were also three springs here but he would divert only from one spring. He also mentioned that he was required to install a culvert at the intersection of Cottonwood Creek and the private dirt road immediately downstream from Cottonwood Spring.

Upon returning to Tuolumne City, Ms. Hayashi left the investigation. The applicant and staff then proceeded to the applicant's well site south of New Don Pedro Reservoir.

The applicant has purchased seven acres of land southeast of New Don Pedro Reservoir and has drilled a well for replacement water in order to enter into a water exchange agreement with the Modesto/Turlock Irrigation Districts. The well is located in the SW1/4 of the NE1/4 of the NE1/4 of Section 8, T3S, R15E, MDB&M. The applicant plans to discharge makeup water from this well, during the period of unavailability, into an unnamed stream tributary to the Roger Creek arm of New Don Pedro Reservoir. The water level in the well was measured at 67' below the ground surface which is at an elevation of approximately 1,030'. Spillway elevation of New Don Pedro Reservoir is 800' and the reservoir was down about 100' on September 29, 1994. The applicant advised us that the well was inspected by the Irrigation District's personnel before the water exchange agreement was executed. Yield of the well is only about 6 gallons per minute or 8,640 gallons per day and thus is considered an interim source of makeup water until the applicant can contract for bringing in out of basin water. The investigation concluded at the well site.

SUBSEQUENT PROCEEDINGS:

In December 1994, staff was advised by both Mr. Fahey and the City that they had come to an agreement on permit conditions for resolution of the City's protest.

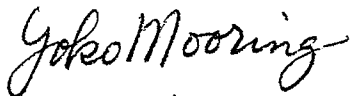
AVAILABILITY OF UNAPPROPRIATED WATER:

As a prerequisite to issuance of a permit to appropriate water, there must be water available to supply the applicant taking into consideration prior rights and instream needs.

Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect all prior rights at and below the reservoir during this period. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir. Minimum instream bypass flows from the springs are required as part of the Streambed Alteration Agreement between the applicant and the Department of Fish and Game.

In view of the above, staff concludes that water is available for appropriation.

PREPARED BY:



Yoko Mooring
Sanitary Engineering Technician

SUPERVISED BY:



Wm. Van Dyck
Associate WRC Engineer

Attachments