

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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Ms. Frances Spivy-Weber

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SUGAR PINE SPRING WATER, LP

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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

P R O C E E D I N G S

1
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.)

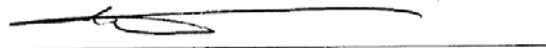
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REPORTER'S CERTIFICATE

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