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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP	**FAHEY'S OPPOSITION TO PROSECUTION TEAM'S MOTION TO STRIKE, MOTION IN LIMINE**

I. Introduction.

In its Motion to Strike / Motion in Limine ("Motion"), the Prosecution Team argues that G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, "Fahey") takes the position "that his permits and his permits' terms should be different or that permit terms are now irrelevant, obsolete, or inapplicable," which "do[es] not relate to any of the key issues outlined in the Hearing Notice," and makes this a "change proceeding." Those arguments are incorrect.

Fahey does *not* take the position that his permits or the permits' terms "should be different" or "are now irrelevant, obsolete, or inapplicable." The Prosecution Team's primary argument - "[b]y arguing that D995 and the FAS determination no longer apply, Fahey is attempting to argue that Term 19 in Permit 20784 no longer has effect" – is wrong because it is based on a fundamentally erroneous interpretation as to how Fahey was supposed to comply with Term 19. Both of Fahey's permits included the requirement that Fahey "shall not interfere" with the operations of New Don Pedro Reservoir ("NDPR") under the Raker Act and the Fourth Agreement between the Turlock Irrigation District and Modesto Irrigation District (collectively, "the Districts") and the City and County of San Francisco ("CCSF"). The Fourth Agreement altered the role of Decision 995 and the FAS determination at NDPR. The Prosecution Team ignores those realities and forces Fahey to violate that "shall not interfere" requirement. Fahey's correct interpretation of how he must comply with Term 19 in light of Term 20 of Permit 20784 and Terms 33 and 34 of Permit (discussed below) demonstrates (1) that Fahey's diversions in 2014 and 2015 fit within the "available water" exception to the Board's curtailment orders (so Fahey's diversions were not "unauthorized" or "trespass" under Water Code section 1052 – a key issue here); and (2) that Fahey acted in good faith at all relevant times such that there is no basis for civil penalties under Water Code sections 1052 and 1055.3 (another key issue here).

Furthermore, the Prosecution Team incorrectly argues about Fahey's testimony regarding the amount of his spring water that is groundwater. That testimony does not seek a change in his permit; it is relevant as to licensing and as to establishing that the water that Fahey wheeled into NDPR in 2009-2011 covered all of his water diversions during the curtailment and FAS periods.

Accordingly, the Hearing Officers should deny the Motion in its entirety.

II. The Water Rights At NDPR And The Relevant Portion Of The Tuolumne River Are Governed By The Raker Act And The Complicated Water Accounting Procedures In The Fourth Agreement Between The Districts And CCSF.

"By the Raker Act of December 19, 1913 [63 P.L. 41; 38 Stat. 242], Congress granted the City and County of San Francisco, subject to express conditions, certain lands and rights-of-way in the public domain in Yosemite National Park and Stanislaus National Forest." (*United States v. City and County of San Francisco* (1940) 310 U.S. 16, 18.) One of those conditions in section 9(b) of the Raker Act provides: "That the said grantee [i.e., CCSF] shall recognize the prior rights of the Modesto Irrigation District and the Turlock Irrigation District as now constituted under the laws of the State of California, … and that the grantee shall never interfere with said rights." **(Exhibit 77.)**[1] That condition was described in a memorandum by water law expert Stuart L. Somach that was presented to the Board on March 25, 2013 ("Somach Memorandum").[2] The Somach Memorandum explains:

> CCSF's right to Tuolumne River water is a relative right. In this context, and by way of example, the Raker Act is very protective of the rights of the Turlock Irrigation District ("TID") and Modesto Irrigation District ("MID"). (TID and MID are referred to collectively as the "Districts.") The Raker Act protections, however, are limited to the Districts and may not be exercised by others. Further, California law prohibits exercise of CCSF's rights, existing or expanded, in a manner that injures the Districts or other senior water right holders. **(Exhibit 78**, Somach Letter, p. 2.)
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> *The Districts hold water rights that are senior to CCSF's*. Further, CCSF's rights and obligations with respect to "storage" in New Don Pedro Reservoir are governed by its agreement with the Districts. Without that agreement and its integration into various water rights and the Districts' Federal Energy Regulatory Commission ("FERC") licenses, CCSF would have no rights in New Don Pedro Reservoir. The Raker Act protections identified above give the Districts additional power to restrict CCSF's expansion of its Hetch Hetchy facilities. **(Exhibit 78**, Somach Letter, p. 3 (emphasis added).)
>
> CCSF and the U.S. Army Corps of Engineers joined with the Districts in the construction of "New" Don Pedro Reservoir (capacity 2,030,000 acre feet), which became operational in 1971. In exchange for CCSF's financial participation, CCSF obtained (among other things) relief from flood control responsibility on the Tuolumne River plus up to 740,000 acre feet of exchange storage rights in the reservoir. The Districts are the owners of New Don Pedro and TID is the Don

[1] Fahey requests that the Hearing Officers admit the Raker Act into evidence (Govt. Code §11513(c)), a true and correct copy of which is attached to the Declaration Of Glen Hansen In Opposition To Motion To Strike/In Limine, as **Exhibit 77**.

[2] Fahey requests that the Hearing Officers admit the Somach Memorandum into evidence, a true and correct copy of the which is available on the Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/baydelta_pdsed/docs/comments032913/spreck_rosekrans.pdf, on page 29 of 154 through page 65 of 154, and a true and correct copy of which is attached to the Hansen Declaration as **Exhibit 78**.

Pedro Project Manager. Under the exchange agreement, increased diversions to the CCSF water system are not made physically from the New Don Pedro Reservoir. Instead, CCSF's exchange storage space in the reservoir is operated to store water that is credited to CCSF, and CCSF is allowed to make additional diversions upstream to the extent that a credit exists in the reservoir, thus permitting its use by CCSF when the Raker Act would otherwise obligate it to release water for the benefit of the Districts. This exchange storage and credit system is known as the "water bank" in New Don Pedro. The Districts own and have the exclusive control and use of all water stored in Don Pedro Reservoir, including all water in the water bank. Therefore, the water bank should be more realistically viewed as being "paper water" or accounting storage as far as CCSF's "storage" rights are concerned. (**Exhibit 78**, Somach Letter, p. 5-6.)

The physical and legal relationship of CCSF to the Districts is that of an upstream, junior rights holder. The Raker Act, in addition to granting San Francisco authority to build on federal land, obligated CCSF to make releases to satisfy the Districts' prior rights. All releases from CCSF's facilities upstream flow into New Don Pedro. *Releases from New Don Pedro are under the exclusive control of the Districts, with minimum flows set pursuant to the terms of their FERC license.* No further development of the water supply system on the Tuolumne River has occurred since 1965. However, in 1967, CCSF completed Canyon Power Tunnel and the Robert C. Kirkwood Powerhouse. At that time, diversion of water changed from Early Intake Dam to Hetch Hetchy Reservoir, upstream, evidently to capitalize on additional hydroelectric development capability. (**Exhibit 78**, Somach Letter, p. 6 (emphasis and underline added).)

The "Fourth Agreement" between CCSF and the Districts, dated June 1996 ("Fourth Agreement") was designed to "set forth the respective responsibilities of the District and the City in the New Don Pedro Project," and contains extensive "Water Accounting" procedures. (**Exhibit79**.)[3] A letter from a Deputy City Attorney for CCSF to the Board, dated June 27, 2014,[4] carefully explains the nature of the Fourth Agreement, as follows:

[T]he 1966 Fourth Agreement between San Francisco and the Modesto and Turlock Irrigation Districts ("Districts") established a "physical solution" that maximizes the beneficial use of water from the Tuolumne River while respecting the priority of the parties' respective water rights. San Francisco and the Districts operate under a *complicated but comprehensive set of agreements, including the Fourth Agreement*, that protect the parties' respective rights to divert. These agreements, together with the Raker Act, allocate 100 percent of the flow that will be available in the Tuolumne River after the effective date of the Emergency Regulations, except water that is bypassed at La Grange Dam pursuant to the obligations of the Districts' Federal Energy Regulatory Commission license for the Don Pedro Project. *All other natural flow in the Tuolumne River during these flow conditions has been prescripted by [CCSF] and the Districts as a result of*

[3] Fahey requests that the Hearing Officers admit the Fourth Agreement into evidence, a true and correct copy of which is attached to the Hansen Declaration as **Exhibit 79**.

[4] Fahey requests that the Hearing Officers admit the City Attorney Letter into evidence, a true and correct copy of which is available on the Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/comments063014/docs/dennis_herrera.pdf, and a true and correct copy of which is attached to the Hansen Declaration as **Exhibit 80**.

more than 100 years of operations. [**Exhibit 80**, p. 13 (emphasis added).]

Thus, any interpretation of Fahey's permits must account for the reality that there are no senior water right holders in this matter other than the Districts and CCSF, who are governed by a "complicated but comprehensive set of agreements, including the Fourth Agreement."

III. The Accounting Procedures Under The Raker Act And The Fourth Agreement, Which The Board Has Acknowledged, Necessarily Altered The Application Of Decisions 995 And 1594 On The Relevant Part Of The Tuolumne River And NDPR.

According to the Board, "Decision 995 found that the Modesto Irrigation District and the Turlock Irrigation District hold water right licenses to appropriate all of the flow of the Tuolumne River water for power purposes from July through October of each year." (**Exhibit 9**.) However, after 1966, the Fourth Agreement now controls the water accounting for that part of the Tuolumne River that is relevant to this proceeding. The Board understands that fact. According to the Board's December 2012 "*Evaluation of San Joaquin River Flow and Southern Delta Water Quality Objectives and Implementation*" (which is part of the "Draft Substitute Environmental Document in Support of Potential Changes to the Water Quality Control Plan for the Bay-Delta: San Joaquin River Flows And Southern Delta Water Quality") ("2012 Board Evaluation")[5]:

> The Fourth Agreement specifies the storage in New Don Pedro is shared between MID, TID, and CCSF (see Section 5.3.3 of this chapter). CCSF does not divert water directly from Don Pedro but owns the right to store up to 740 TAF in the reservoir, using part of Don Pedro as a water "bank." In the event CCSF needs water has and there is a balance in the water bank, CCSF is permitted by the districts to bypass a lesser flow than that entitled to the districts under the Raker Act (see Section 5.3.1 of this chapter). [¶] *The water rights on the Tuolumne River are shared.* [**Exhibit 81**, 2012 Board Evaluation, §5.2.4, p. 5-22.]
>
> The Fourth Agreement, between CCSF, TID, and MID (1966), sets forth conditions for CSSF to partially fund the construction of the New Don Pedro Reservoir. Under this agreement, if CCSF is able to bypass flows in excess of TID's and MID's Raker Act entitlements, and then the CCSF "banks" this amount of water, up to a seasonal high of 740 TAF, for later use. If CCSF bypasses less than the two districts Raker Act entitlements, then the CCSF would withdraw water from the water bank; a negative balance (CCSF bank depleted) would require prior agreement with the two irrigation districts. The Fourth Agreement

[5] Fahey requests that the Hearing Officers admit into evidence the relevant portions of the 2012 Board Evaluation, a true and correct copy of which is available on the Board's website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/ , http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/docs/2012_title.pdf , http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bay_delta_plan/water_quality_control_planning/2012_sed/docs/2012ch_05.pdf , and a true and correct copy of which is attached to the Hansen Declaration as **Exhibit 81**.

> also states that in the event any future changes to the New Don Pedro FERC water release conditions negatively impact the two irrigation districts, CCSF, MID, and TID would apportion the burden prorated at 51.7121 percent to CCSF and 48.2879 percent to MID and TID. (CCSF/TID/MID 1966.) [**Exhibit 81**, 2012 Board Evaluation, §5.3.3, pp. 5-53 – 5-54.]

Thus, the Board is well aware that the accounting procedures that became effective with the Fourth Agreement in 1966 and the completion of NDPR in 1971 essentially rendered the earlier Decision 995 "obsolete" as to the Tuolumne River and NDPR. (**Exhibit 1**, page 15.)

III. Terms 19 And 20 Of Permit 20784, And Later Terms 33 And 34 of Permit 21289, Were Designed, And Must Be Complied With, In A Manner That Prohibits Fahey From Interfering With The Accounting Procedures Under Fourth Agreement.

A. The application of Term 19 in Permit 20784 is controlled by Term 20.

Initially, the Districts, the Board and Fahey agreed to Term 19 (of Permit 20784) in order to incorporate a 1992 water exchange agreement with the Districts that referenced the requirements of D995 ("1992 Agreement"). (**Exhibit 1**, pages 1-2; **Exhibits 6-9**.) But then those parties, CCSF and the Board agreed to Term 20 (in Permit 20784), in response to a protest of CCSF, in order to prevent interference with the governing procedures of the Raker Act and Fourth Agreement. (*Id.*, at p. 2.) Paragraph (1), of Term 20, requires that "Permitee *shall not interfere* with San Francisco's obligations to the Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any implementing Agreement between the Districts and San Francisco." (**Exhibit 20**, Bates-Stamped pages 314-315.) Paragraph (2), of Term 20, provides that Fahey shall provide replacement water to NDPR for water he diverts that is adverse to the prior rights of CCSF and the Districts, and provides that: (a) such water shall be replaced after the Districts and CCSF engage in the accounting procedures required by the Fourth Agreement; (b) replacement must occur within one year of being notifited by CCSF or the Districts to do so; and (c) "[r]eplacement water may be provided in advance and credited to future replacement water requirements." (*Ibid.*)

Term 19 must be interpreted in a manner that is consistent with paragraphs (1) and (2) of Term 20. That is because of the fundamental rule of interpretation that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other.'" (*Quantification Settlement Agreement Cases* (2011) 201

Cal.App.4th 758, 799.) Thus, Term 19 cannot be interpreted and applied (as the Prosecution Team does) in any manner that would cause Fahey to violate paragraph (1) of Term 20.

The manner in which Term 20 came into existence (see **Exhibit 1**, pages 2-3; **Exhibits 12, 13, 15, 16, 18, 19**) demonstrates that the parties, including the Board, intended that Term 20 control over any inconsistent provisions in Term 19. That is evidence for these five (5) reasons.

- First, the terms of the 1992 Agreement that the Districts entered into with Fahey must be interpreted consistent with the *Districts'* obligations under the Raker Act and the Fourth Agreement. (*See Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 798 ["'[A]greements will be construed, if possible, as intending something for which [the parties] had the power to contract.'"]) So, because Term 19 incorporates the water replacement provisions in 1992 Agreement, compliance with Term 19 must be consistent with those accounting procedures.

- Second, any water that is replaced by Fahey under the provisions of the 1992 Agreement and Term 19 without following the exact procedures of paragraph (2) of Term 20 (i.e., the Prosecution Team's position) would necessarily interfere with what CCSF describes as the "complicated but comprehensive set of agreements, including the Fourth Agreement." (**Exhibit 80**. *See* explanation in **Exhibit 1**, page 15, and **Exhibit 14**.) Because CCSF explained that it "was not a party to the water exchange agreement dated December 30, 1992 between the two districts and the applicant" (**Exhibit 40**), the 1992 Agreement (and Term 19 that references the 1992 Agreement) must be applied in a manner that protected CCSF's rights. That was accomplished by permit terms sought in CCSF's letter of December 19, 1994, and memorialized in Term 20. (**Exhibits 18, 40**.) In other words, any water replacement under Term 19 must follow the water replacement procedures of paragraph (2) of Term 20 in order to protect the rights of CCSF and the Districts. Thus, Term 20 must have primacy of operation with regard to Term 19, and Term 19 must be subordinate to Term 20. (*See* Fahey testimony, **Exhibit 1**, page 15.)

- Third, Term 19, itself, does not provide any particular requirements as to how Fahey should replace water. Instead, Term 19 merely requires water replacement "pursuant to" the 1992 Agreement. Thus, the fact that all of the parties to the 1992 Agreement also later agreed to the provisions of Term 20 (**Exhibits 6,7, 8, 16, 18**) is a further indication that the particular

requirements for water replacement specified in the 1992 Agreement were intended to be replaced by the specific water replacement provisions in paragraph (2) of Term 20. "'[E]ven if one provision of a contract is clear and explicit, it does not follow that that portion alone must govern its interpretation; the whole of the contract must be taken together so as to give effect to every part.'" (*Quantification Settlement Agreement Cases, supra,* 201 Cal.App.4th at p. 799.)

- Fourth, the Board *both* included language in paragraph (2) of Term 20 referencing the 1992 Agreement, and explicitly rejected language in paragraph (2) that would have limited that provision to the time frame not covered by Term 19 (**Exhibit 18**). That also demonstrates an intent that paragraph (2) govern the water replacement provisions under the 1992 Agreement.
- Fifth, Fahey will provide additional oral testimony at the Hearing about additional instructions he received directly from the Districts immediately after the 1992 Agreement was executed that further reinforced his good faith understanding that paragraph (2) of Term 20 was to control the water replacement practices under the 1992 Agreement (and therefore Term 19).

Thus, the correct interpretation of Term 19 is stated in Fahey's testimony: "Term 20 takes into consideration the post NDPR infrastructure and the water bank hydrodynamics that were not contemplated when the Board determined that the Tuolumne River was a fully appropriated stream system by D995 in 1961. ...Term 20 necessarily must control over Term 19." (**Exhibit 1.**)

B. Terms 33 and 34 of the later Permit 21289 were intended to govern all the water replacement provisions in both permits (including Term 19 in Permit 20784).

The development of Fahey's subsequent Permit 21289 demonstrates that Terms 33 and 34 were intended by all of the parties to be the governing procedures as to how water should be replaced by Fahey for his diversions under *both* permits, for the following four (4) reasons.

- First, Fahey and the Board initially agreed to make his new permit "conditioned and subjected to the same terms and conditions as the previous agreements." (**Exhibit 39.**) But later the Board resolved a protest by CCSF to the application for the new permit by including language that protected CCSF's water rights (i.e., Term 34). That language in Term 34 modified the terms and conditions of the previous agreements. (**Exhibits 40, 44, 46.**)
- Second, a new water exchange agreement was entered into by Fahey that was

intended to be "inclusive" of the water quantities required under both Permit 20784 and the new Permit 21289. (**Exhibits 40, 42.**) Thus, the two permits were intended to operate together.

- Third, Term 33 of Permit 21289 repeated the same prohibition against interference that is in the earlier paragraph (1), of Term 20, of Permit 20784. Also, Term 34 of Permit 21289 incorporated and modified the language regarding water replacement provisions of *both* Term 19 *and* paragraph (2), of Term 20, of Permit 20784. In fact, Term 34 of the new permit includes language that references the "obligations" under the 1992 Agreement (just like Term 19), but also states: "*Replacement water may be provided in advance and credited to future replacement water requirements.*" (**Exhibit 55.**) Thus, all water replacement, including that made pursuant to the 1992 Agreement, was thereafter to be governed by Terms 33 and 34 of the new permit.

- Fourth, if Fahey simply replaced water that he diverted in the manner that the Prosecution Team interprets Term 19 of Permit 20784, then Fahey would necessarily be forced to interfere with the complicated water accounting at NDPR, in violation of Term 33 of Permit 21289. (*See* extensive explanation, **Exhibit 1**, page 15, Section IV.B.3.) The following language in a letter from CCSF to the Board on March 21, 2011 placed Fahey on unequivocal notice that *any* water replacement by Fahey under the permits would interfere with the accounting procedures at NDPR, so Term 34 must be followed for *all* water replacements under *both* permits:

> As noted in the City's November 8, 2004 letter, San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when the applicant's use has led to a reduction, or has a strong potential of reducing, the water supply of San Francisco. Also as noted, the wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. [**Exhibit 54** (emphasis added).]

The Board never contradicted that letter, but instead immediately issued Permit 21289. Fahey therefore reasonably believed that the letter accurately depicted how water was to be replaced under Term 34. The Prosecution Team's interpretation of Term 19 in this matter not only contradicts that letter, but would cause Fahey to violate Terms 20, 33 and 34, and therefore cannot be correct. (*See* Civ. Code §1643 ["A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."])

In short, Term 19 must be interpreted and complied with according to the parties' intent that is expressly articulated in Term 20 of Permit 20784, and Terms 33 and 34 of Permit 21289.

VI. Fahey's Correct Interpretation Of Term 19 Is Relevant To Issues Outlined In The Hearing Notice Because That Interpretation Proves That (1) Fahey's Diversions In 2014 and 2015 Fit Within An Exception To Curtailment; And (2) Fahey Acted In A Good Faith Manner That Precludes Any Civil Penalty Award Against Him.

The correct interpretation of Terms 19, 20, 33 and 34, and how they must be harmonized and complied with, is a key issue in this proceeding. Based on his good faith reliance on that proper interpretation of the various water replacement requirements in his permits, and based on the urging of the Board in a notice to Fahey in February 2009 regarding potential future water curtailment (**Exhibit 69**), Fahey caused 88.55 acre feet of water to be wheeled into NDPR. (*See* **Exhibit 1**, pages 7-8.) In a letter that he sent to the Board on June 3, 2014 (resent on April 29, 2015) Fahey explained that his actions satisfied the "available water" exception to curtailment. (**Exhibit 60**.) The curtailment notices describe that exception as follows: "If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you still may beneficially use that previously stored water consistent with the terms and conditions of your post-1914 water right." (**Exhibit WR-34**. *See also* **Exhibit 75,** ¶¶4, 6.) Fahey satisfied that curtailment exception because he had water placed in NDPR in advance of curtailment as a credit pursuant to Terms 20 and 34 of his post-1914 water rights, which explicitly provide: "*Replacement water may be provided in advance and credited to future replacement water requirements.*" (**Exhibits 20, 55**.) The Board never responded or challenged Fahey's curtailment exception in the June 3, 2014 letter until June 2015, and even then the Board staff made clearly erroneous arguments that proved to Fahey that his interpretation was correct.

The intent of curtailment is also satisfied by Fahey's actions. According to the Board's John O'Hagan: "The goal of curtailments is principally to ensure that water to which senior water right holders are entitled is actually available to them." (**Exhibit 75**, ¶15. (See **Exhibits WR-30, WR-32** [water during curtailment is **"**necessary to meet senior water right holders' needs.**"**]) However, the only senior water right holders that could be affected by Fahey's diversions are CCSF and the Districts (**Exhibits 17, 80**), and their needs were satisfied according

to Terms 20 and 34. As explained above, the provisions of Term 20 were requested by CCSF because they "reference various determinations to be made by the Districts and effects on the Districts' water supplies caused by the proposed diversion [by Fahey]," and "[t]he water accounting procedures between San Francisco and the Districts, as they may be modified from time to time in the future, shall be the basis of all calculations concerning Permittee's impact on the water supplies of San Francisco and the Districts." (**Exhibit 15.**) Thus, the very purpose of curtailment – protect senior water rights holders - was satisfied when Fahey properly followed the water replacement provisions of Terms 20 (as it modified Term 19) and of Term 34.

The foregoing explanation regarding the correct interpretation and application of Term 19 is also relevant in that it shows how Fahey acted in good faith at all times. That is a key factor under Water Code Section 1055.3 as to why civil penalties should not be assessed against Fahey.

VII. Fahey's Testimony Regarding Groundwater Is Relevant To This Proceeding.

Fahey's testimony about groundwater is not an attempt to change or modify his permit terms. The Prosecution Team overlooks that this testimony demonstrates that Fahey has put the largest volume of water to beneficial use under his permits (see http://www.waterboards.ca.gov/about_us/performance_report_1415/allocate/), which requirement is needed for the issuance of his licenses. More importantly, the groundwater analysis (based on recently observed facts and admissions by Board staff) is relevant because it demonstrates that the 88.55 acre feet of water that Fahey had wheeled into NDPR in 2009-2011 covered all of his water diversions during: (1) the 2014 and 2015 curtailment periods; and (2) all of the FAS periods from 1996 to the present. That issue addresses the "extent of harm" and "corrective action" factors under Water Code section 1055.3, such that civil penalties should not be assessed against Fahey in this proceeding.

VIII. Conclusion.

The Hearing Officers should deny the Motion in its entirety.

Dated: January 20, 2016

Respectfully submitted,
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By: _____
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