

**STATE WATER RESOURCES CONTROL BOARD**

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

**Declaration of Kathy Mrowka in Support of  
Prosecution Team's Case in Chief**

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I, Kathy Mrowka, declare as follows:

1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the Division's recommendation to issue an Administrative Civil Liability (ACL) Order and Cease and Desist Order (CDO) against G. Scott Fahey and Sugar Pine Spring Water, LP (referred to collectively as Fahey). The ACL Complaint and Draft Cease and Desist Order are attached as Exhibit WR-1.
2. I have been an employee of the State Water Resources Control Board (State Water Board) for the past 29 years, and am currently employed by the State Water Board. Since September 2014, I have been the Program Manager for the Enforcement Program in the State Water Board's Division of Water Rights. I am a Supervising Water Resources Control Engineer.. As a Program Manager, I manage five units (there are normally four units, but the program has been temporarily expanded to five units to provide additional resources for drought response). The units which I manage are responsible for complaint inspections, compliance inspections, drought response, development of regulations, and other tasks. The drought response has included determination of adequacy of water supply to serve the various priorities of water rights in the Sacramento-San Joaquin Bay Delta watersheds. It has also included enhanced field presence to determine whether persons or entities have been diverting water after receiving notification from the State Water Board that there is inadequate water supply to serve their priority of right. My Statement of Qualifications is attached as Exhibit WR-10.
3. G. Scott Fahey and Sugar Pine Spring Water, LP (Fahey) hold Permits 20784 and 21289 to appropriate water from sources tributary to the Tuolumne River upstream of New Don Pedro Reservoir and tributary to the San Joaquin River. Fahey's address of record for both permits is G. Fahey, 2787 Stony Fork Way, Boise, Idaho, 83706. A true and correct copy of Permit 20784 is attached as Exhibit WR-15. A true and correct copy of Permit 21289 is attached at Exhibit WR-16.
4. On September 1, 2015, the Division issued Fahey an ACL Complaint, Draft CDO, and Information Order WR 2015-0028-DWR. The Division issued the ACL Complaint for \$224,875 for the unauthorized diversion and use of water during a drought period. The Draft CDO would order Fahey to immediately cease the unauthorized diversion of water from the springs under his water rights until the State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of Permits 20784 and 21289. Finally, the Information Order directed Fahey to provide specific information for the water diversions that are conducted under any basis of right at facilities covered

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by Permits 20784 and 21289. True and correct copies of the ACL Complaint, draft CDO, and Information Order are attached as Exhibit WR-1 through WR-3, respectively.

5. Prior to becoming a Supervising Engineer, I was a Senior Engineer in the Water Right Permitting Section for more than 8 years. My tasks included supervising the unit staff, processing difficult water right matters, and coordinating with other agencies. I served as the lead for processing Application A031491, with staff providing technical assistance. I approved the terms and conditions for the water right application, for purposes of permit issuance. I also addressed the protests to the application, through development of permit terms and conditions.
6. I reviewed the records of the State Water Board and found no record of Fahey holding any other appropriate water right or riparian water right for diversion from the sources listed in the two permits.
7. Fahey holds water right Permit 20784 (Application A029977) and Permit 21289 (Application A031491) to appropriate water from sources that are ultimately tributary to the Tuolumne River upstream of New Don Pedro Reservoir. I have reviewed the permits and associated orders and decisions of the State Water Board.
8. Permit 20784 has a priority date of July 12, 1991, and authorizes the direct diversion and use of water from: (1) an Unnamed Spring (a.k.a. Cottonwood Spring) for a rate of diversion not to exceed 0.031 cubic foot per second (cfs) and; (2) Deadwood Spring for a rate of diversion not to exceed 0.031 cfs. The water appropriated under Permit 20784 is limited to a total combined of 0.062 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at one or more bottled water plants located off the premises. The maximum amount Fahey may divert under Permit 20784 may not exceed 44.82 acre-feet per year.
9. Permit 21289 has a priority date of January 28, 1994, and authorizes the direct diversion and use of water from: (1) Unnamed Spring (a.k.a. Marco Spring) for a rate of diversion not to exceed 0.045 cfs and; (2) Unnamed Spring (a.k.a. Polo Spring) for a rate of diversion not to exceed 0.045 cfs. The water appropriated under Permit 21289 is limited to a total combined diversion rate of 0.089 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at one or more bottled water plants located off the premises. The maximum amount Fahey may divert under Permit 21289 may not exceed 64.5 acre-feet per year.
10. According to Permit 20784 and Permit 21289, separate pipes convey water diverted from all four springs subject to Permits 20784 and 21289. All four springs are located on property owned by the United States Forest Service. The pipes combine into a common pipe system. The pipeline connects to two 35,000 gallon tanks and an overhead bulk water truck filling station (collectively referred to as the transfer station) located on Tuolumne County Assessor Parcel Number (APN) 052-060-48-00, owned by Sugar Pine Spring Water, LP. Fahey operates the transfer station, and bulk water hauler trucks access the property through a locked gate to remove the water for delivery off-premises. Several maps detailing Fahey's diversion facility and transfer station are attached as Exhibit WR-45.

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11. State Water Board Orders WR 89-25 and WR 91-07 identify the Sacramento-San Joaquin Delta watershed upstream of the Delta, and the Tuolumne River upstream from New Don Pedro Reservoir, as fully appropriated between June 16 and October 31 (Decisions 995 and 1594). A fully appropriated stream determination means that the State Water Board cannot accept any application to appropriate water from a specified stream system, except where the proposed appropriation is consistent with conditions established in the fully appropriated stream (FAS) determination. The State Water Board must also cancel pending water right applications that are inconsistent with conditions established in the FAS determination. However, under Order WR 91-07 the State Water Board may accept an application to appropriate water on a fully appropriated stream if the applicant would make replacement water available under an exchange agreement. A true and correct copy of State Water Board Order WR 89-25 is available on the State Water Board's website at [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/1989/wro89-25.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1989/wro89-25.pdf) and, as a relevant and otherwise admissible public record of the State Water Board, submitted as evidence by reference, pursuant to California Code of Regulations, title 23, section 648.3, as Exhibit WR-80. A true and correct copy of State Water Board Order WR 91-07 is available on the State Water Board's website at [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/orders/1991/wro91-07.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/orders/1991/wro91-07.pdf) and, as a relevant and otherwise admissible public record of the State Water Board, submitted as evidence by reference, pursuant to California Code of Regulations, title 23, section 648.3, as Exhibit WR-81.
12. In Decision 995, the Board determined that there was no unappropriated water from July 1 to October 31 of each year. Decision 995 affects the Tuolumne River from Don Pedro Reservoir upstream, including all tributaries where hydraulic continuity exists. A true and correct copy of State Water Board Decision 995 is attached as **Exhibit WR-18**.
13. In Decision 1594 and Order WR 84-2, the Board determined that permittees diverting less than 1.0 cfs by direct diversion or less than 100 acre-feet by diversion to storage should receive a fixed season of diversion which excludes the period of June 16 to August 31. Decision 1594 affects the Sacramento-San Joaquin Delta upstream, including all tributaries where hydraulic continuity exists. A true and correct copy of State Water Board Decision 1594 is available on the State Water Board's website at [http://www.waterboards.ca.gov/waterrights/board\\_decisions/adopted\\_orders/decisions/d1550\\_d1599/wrd1594.pdf](http://www.waterboards.ca.gov/waterrights/board_decisions/adopted_orders/decisions/d1550_d1599/wrd1594.pdf) and, as a relevant and otherwise admissible public record of the State Water Board, submitted as evidence by reference, pursuant to California Code of Regulations, title 23, section 648.3, as Exhibit WR-82. A true and correct copy of State Water Board Order WR 84-2 attached as Exhibit WR-25.
14. Decisions 995 and 1594 were incorporated into the FAS declaration, and both apply to Fahey. In processing water right applications, the procedure is that staff reviews the FAS declaration to determine whether water is available for appropriation based on all applicable limitations listed in the FAS declaration. For Fahey, both Decision 995 and Decision 1594 identify applicable restrictions on water availability.
15. "Physical solutions," which enable beneficial use of water by subsequent appropriators without material injury to owners of prior rights, have been upheld by the courts on numerous occasions. Such solutions generally take the form of a substitute supply of water furnished to the prior user in place of the existing supply. (see *City of Lodi v. East*

*Bay Municipal Utility District (1936) 7 Cal. 2d 316.*

16. In the matter of Water Right Decision 1365 on the Chowchilla River, the State Water Board determined it could properly issue permit to the U.S. Bureau of Reclamation for appropriation of Chowchilla River water if the to the U.S. Bureau of Reclamation supplied downstream rights with an equal quantity of water of comparable quality from another source. An agreement for such an arrangement between parties is commonly referred to as an "exchange agreement." A true and correct copy of State Water Board Decision 1365 is attached as Exhibit WR-26.
17. The State Water Board's determinations that it can issue a permit in furtherance of a water exchange agreement allowing a junior permittee to divert water not otherwise available under the priority of the application do not change the priorities of any of the parties involved. (Water Right Decisions 949, 1365.) A true and correct copy of State Water Board Decision 949 is attached as Exhibit WR-24.
18. In the case of permits with incorporated exchange agreements, the State Water Board addresses two disparate facts: (a) there is no unappropriated water during a specified diversion period sought in the application; and (b) there must be unappropriated water to approve an application (Water Code § 1375(d)). The State Water Board therefore relies on the senior right involved in the exchange agreement as the basis of diversion priority, and using the junior right as a de facto change petition for the senior right. Approving a water right application with an exchange agreement allows the senior right holder to provide water to the junior right holders' point of diversion and place of use and for the identified purposes of use. This interpretation is supported by Order WR 91-07, footnote 8, which states that when water service contracts, water transfers, and water exchanges are used to provide water on a fully appropriated stream, the water right impact of these transactions may be dealt with through the various procedures set forth in the Water Code for changing a point of diversion, place of use, or purpose of use. (See, e.g., Water Code § 1700 et seq.) Proposed change in point of diversion, place of use, and purpose of use are specifically exempt from the legal consequences of a declaration that a stream system is fully appropriated. (See Water Code § 1206(c).) This interpretation is also supported by the fact that only the State Water Board can modify water right priorities. This type of action has not been re-delegated to the Deputy Director for the Division of Water Rights, since it is considered controversial. Permits 20784 and 29977 were issued under delegated authority at the level of the Division of Water Rights, and were not elevated to the Board for consideration during a water right hearing.
19. Term 17 in Permit 20784 and Term 9 in Permit 21289 each state that the permits are subject to prior rights and that in some years water will not be available for diversion during parts or all of the authorized season.
20. Term 19 in Permit 20784 requires Fahey to provide exchange water to New Don Pedro Reservoir for all water diverted under the permit during the period from June 16 through October 31 of each year. This term was included as a condition for accepting Application A029977 because Fahey's points of diversion are within the Fully Appropriated Stream systems identified in State Water Board Orders WR 89-25 and WR 91-07. The timing for the exchange of water should be daily during the period of non-availability, since these are direct diversion rights. For direct diversion rights, the Enforcement Section evaluates compliance with diversion conditions on a daily basis.

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21. Fahey entered into an exchange agreement with the Turlock Irrigation District and Modesto Irrigation District (Districts) on December 12, 1992 (Exchange Agreement). A true and correct copy of the Exchange Agreement with the Districts is attached as Exhibit WR-19.
22. A water right holder may enter into an agreement upon terms deemed favorable to the right holder and parties may agree to exchange water in accordance with a schedule which they set. However, nothing in an agreement between parties binds the State Water Board regarding administration of the water right(s). Compliance with water right requirements set forth in permit conditions is determined by the State Water Board based on the language of the permit conditions, and applicable sections of the Water Code and tit. 23, California Code of Regulations.
23. Under Term 19 in Permit 20784, Fahey must report any exchange water he provides to New Don Pedro Reservoir pursuant to the Exchange Agreement. In 2014 and 2015, Fahey did not report that he provided any exchange water.
24. Term 4 of the Exchange Agreement allows Fahey to build a surplus prior to the period of unavailability; however, no carryover is allowed to subsequent years. Per the language in the Exchange Agreement, the Exchange Agreement applies to any water right the State Water Board issues Fahey.
25. Only Permit 20784 carries the Exchange Agreement term. Consequently, Fahey cannot divert under his more junior right, Permit 21289, absent an ongoing showing that there is water available under the priority of the right. During the period of June 16 to October 31 of each year, the watershed is fully appropriated. Therefore, Permit 21289 lacks sufficient priority for diversion to be allowable, absent an Exchange Agreement. As a result, Fahey agreed to condition Permit 21289 to require an Exchange Agreement. (August 9, 2002 Fahey attachment to Application 31491.) The presence of an Exchange Agreement was found by the Division to provide a basis to process the application, since during the fully appropriated season water would be obtained through exchange with a senior water right holder. (December 23, 2003 Division Memo to Files.) In the absence of an Exchange Agreement, unauthorized diversion occurs during the period of June 16 to October 31 due to the low seniority of the permit. However, the permit does not enunciate the requirement to maintain an Exchange Agreement. A true and correct copy of the August 9, 2002 Fahey attachment to Application 31491 is attached as Exhibit WR-17. A true and correct copy of the December 23, 2003 Division Memo to Files is attached as Exhibit WR-20.
26. The Board should take note of the fact that Fahey lacks seniority to divert from June 16 to October 31 in any year and maintain the Cease and Desist Order for diversions during this time period, until the permit is changed through the petition process. In the alternative, Fahey may request that any order issued in this proceeding address the need to include the Exchange Agreement requirement in Permit 21289.
27. For Enforcement purposes, documentation that there is sufficient water available to divert under a water right (i.e., that no unauthorized diversion is occurring) is separately analyzed each water year based on current hydrologic conditions.
28. Term 20 in Permit 20784 and Term 34 in Permit 21289 require Fahey to provide replacement water to New Don Pedro Reservoir for water diverted adverse to the prior

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rights of the City and County of San Francisco (San Francisco) and the Districts. These terms describe certain provisions of a December 19, 1994 letter (December 19, 1994 Agreement Letter), wherein San Francisco agreed to withdraw its protest of Fahey's water right applications, including the method by which Fahey would compensate San Francisco and the Districts, upon a finding of injury, with replacement water. Under the December 19, 1994 Agreement Letter's terms, Fahey must repay the water that he diverts adverse to the prior rights of San Francisco and the Districts in the same calendar year. The December 19, 1994 Agreement Letter's requirement to replace water diverted adverse to the rights and San Francisco and the Districts only applies during the fully appropriated stream period determined in State Water Board Decisions 995 and 1594. These terms do not modify, amend or enhance the seniority of either or both permits. Fahey's compliance with these terms does not prevent or preclude the State Water Board from finding that there is insufficient water for diversion under the priorities of Permits 20784 and 21289. A true and correct copy of the December 19, 1994 Letter is attached as Exhibit WR-21.

29. Fahey obtains his alternate supply of water for the Exchange Agreement from Tuolumne Utilities District (TUD). The water source is the Stanislaus River. TUD holds water rights under A016173, A018549, A020565 and A023813. On May 27, 2014 and April 23, 2015, the State Water Board issued notification that there was inadequate water to serve the priorities of these rights. TUD also claims pre-1914 rights under S010403, S010402, S000997, S000996, S001007 and S001006. There was water available under the priority of these rights. However, the overall water supply situation for TUD was significantly constrained.
30. There is no evidence that Fahey purchased water from TUD under the Exchange Agreement in 2014 and 2015.
31. There is no evidence that Fahey purchased any water from any alternative source in 2014 and 2015.
32. Inasmuch as Fahey diverted during 2014 and 2015, such diversions could injure senior right holders. There are three factors to consider: (a) there was no water available to divert under the priority of the right, (b) when there is no water under the priority of a right, diversion is unauthorized. The terms and conditions of a permit are not in effect when there is no water available to divert under the priority of the right and all diversions must cease; and (c) the Exchange Agreement does not excuse unauthorized diversion. As noted previously, determination of whether diversion is unauthorized is based on daily conditions for a direct diversion right. Regardless, there is no evidence that TUD provided water under the Exchange Agreement in 2014 and 2015.
33. The Districts hold the following post-1914 rights: A001232, A001233, A001532, A003648, A006711, A009996, A009997, A014126 and A014127. As post-1914 right holders, they were subject to the water shortage notifications on May 27, 2014 and April 23, 2015. Junior right holders, such as Fahey, cannot divert when senior right holders are unable to divert under the priorities of their rights without causing injury.
34. The City and County of San Francisco (San Francisco) hold pre-1914 water rights with a 1902 priority date. On June 12, 2015, the State Water Board found that there was insufficient supply to serve pre-1914 rights with a 1903 or later priority in the San Joaquin River watershed. This meant that in 2015 diversions by junior right holders had

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the potential to affect very senior right holders. In 2014, diversions by junior right holders also had the potential to affect senior right holders. In 2014, there was insufficient supply to serve the post-1914 right holders.

35. In the Reports of Permittee for Permit 21289, Fahey distinguishes “developed water” from other diversions under the right. The term “developed water” is used to refer to water added to the native supplies from non-tributary sources or “foreign sources”. Under the two permits, the water sources are four springs. Unless the spring water would not join the surface or percolating ground-water supply under natural conditions, it would not qualify as developed water.<sup>1</sup> The springs are located on federal lands. The rights to springs on public (federal) lands may be acquired by appropriation. There is no requirement that the spring water be tributary to a watercourse.<sup>2</sup> Accordingly, all water in the public domain was made subject to appropriation by Congress.<sup>3</sup> Thus, all water was subject to appropriation and none should be considered “developed” water. Insofar as diversions exceeded the permitted quantities, the claim of “developed” water should be disallowed. Similarly claims of developed spring water do not excuse diversions during periods of non-availability.
36. I collaborated with David LaBrie, John O’Hagan, legal counsel, and staff working under my supervision to calculate Fahey’s proposed penalty.
37. I estimate the Division’s staff cost to investigate the unauthorized diversion issues and develop the enforcement documents was \$15,624.
38. Should this matter go to hearing, I estimate additional staff costs would be approximately \$10,000.
39. **Authentication of Exhibits from the Enforcement File:** Throughout this enforcement action, my staff and I have prepared and maintained the file for this matter. The Prosecution Team Exhibits contain true and correct copies of the following from the Enforcement file:
1. WR-46. Union Democrat news article “Fresh Water Flows from Sugar Pine Spring,” dated November 25, 2011.
  2. WR-70. Water Board Subpoena issued to Fahey, 10-30-2015
  3. WR-71. Letter from Fahey to PT re Subpoena, dated 11-3-2015
  4. WR-72. Fahey Subpoena Response, dated 11-22-2015
  5. WR-73. Letter from Fahey Counsel to PT re bottlers Fahey supplies to, dated Nov 18, 2015
  6. WR-74. Letter from Fahey Counsel to PT re demand for documents, dated Dec. 1, 2015
  7. WR-75. Letter from Fahey Counsel to PT re “legal justification,” dated Dec. 7, 2015
  8. WR-76. PRA request from Fahey to SWRCB, dated Dec. 7, 2015
  9. WR-77. Petruzzelli first response to Fahey Counsel, Dec 1, 2015 demand for documents, dated Dec 8, 2015

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<sup>1</sup> (See Cohen v. La Canada Land & Water Co. (1904) 142 Cal. 437, 439-440 [76 P. 47]; see generally Hutchins, California Law of Water Rights (1956) at p. 407.)

<sup>2</sup> 14 Stats. L. 253 § 9; U.S. Rev. Stats., § L. 218; U.S. Rev. Stats., § 2340; 19 Stats. L. 377.

<sup>3</sup> Wilkins v. McCue (1873) 46 Cal. 656, 661; Civ. Code, § 1007.

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10. WR-78. Petruzzelli Second response to Fahey Counsel, Dec 1, 2015 demand for documents, dated Dec 8, 2015
11. WR-79. SWRCB response to Fahey PRA request, Dated Dec 9, 2015

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed this 15th day of December 2015, at Sacramento, California.

  
Kathy Mrowka