

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 David LaBrie in Support of
Prosecution Team's Case in Chief**

I, David Edwin LaBrie, declare as follows:

1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the State Water Resources Control Board (State Water Board), Division of Water Rights' (Division) 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 hereafter as Fahey).
2. I am a Sanitary Engineering Associate at the State Water Resources Control Board (State Water Board) Division of Water Rights (Division). My duties at the State Water Board include investigating the diversion and use of water and making findings of fact pertaining to: the basis of right for subject diversions; compliance with the terms and conditions of water right permits and licenses; waste or unreasonable use of water or unreasonable method of diversion; and, unreasonable adverse impacts to public trust resources. My duties also include researching and gathering information regarding stream systems and water diversion projects that are subject to investigation, as well as conducting field inspections and collecting physical data regarding diversion works. A copy of my CV is attached hereto as Exhibit WR-12.
3. My role in the investigation into Fahey's diversion and use of water during the drought periods of water unavailability encompassed the following actions: reviewing Fahey's water right permit terms and conditions, contacting Fahey in an attempt to schedule a field inspection to verify compliance with the notice of water unavailability, reviewing Fahey's claim that his water rights were exempt from curtailment during the drought period of water unavailability, collecting and reviewing video surveillance data of tanker trucks entering and/or leaving Fahey's water transfer station, reviewing Fahey's water right permit files, analyzing Fahey's reported diversion and use of water, and determining whether Fahey was in compliance with his permit terms and conditions and applicable sections of the Water Code.
4. On May 27, 2014, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), which notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights. A true and correct copy of the 2014 Unavailability Notice is attached hereto as Exhibit WR-30.

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5. On April 23, 2015, the State Water Board issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (2015 Unavailability Notice), which notifies all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights. A true and correct copy of the 2015 Unavailability Notice is attached hereto as Exhibit WR-39.
6. The Division's Enforcement Units began conducting compliance inspections of post-1914 appropriative water rights in the San Joaquin River watershed for 2015 shortly after the State Water Board issued the 2015 Unavailability Notice. Division staff Brian Coats and Jeff Yeazell generated a list of post-1914 appropriative water rights to be inspected in the San Joaquin River watershed. Yeazell grouped the water rights on a geographic basis and distributed the grouped lists among the enforcement units on or about May 5, 2015. The enforcement units further divided the list of water rights to be inspected among the enforcement staff that would be conducting inspections. Water Right Permit 20784 (A029977) and Permit 21289 (A031491) were on my list of water rights to inspect.
7. My initial investigation into Fahey's diversion and use of water during the drought periods of water unavailability began with a review of the basic terms and conditions of Water Right Permit 20784 (A029977) and Permit 21289 (A031491). The basic terms of a water right include the source of water, point of diversion, purpose of use, place of use, and the amount, rate and season of diversion.
8. My understanding of Fahey's diversion system is that Fahey diverts water from four springs located within the Tuolumne River watershed. Two springs (Cottonwood and Deadwood) are covered under Permit 20784 and two springs (Marco and Polo) are covered under Permit 21289. Water from each spring is conveyed by gravity flow through a pipeline that terminates at a pair of 35,000 gallon, underground storage tanks. The tanks are located on a parcel (Tuolumne County APN 052-060-48-00) that is used as a transfer station for loading the bulk water into large tanker trucks. The tanker trucks haul the water diverted from the springs to off-site locations for bottling purposes.
9. On or about May 28, 2015, and over the course of the next two weeks, I attempted to contact Fahey to set up an inspection of his diversion facilities. In total, I attempted to contact Fahey three times and left messages asking him to contact me each time.
10. On June 12, 2015 Fahey responded to my telephone messages and called me on the phone. In that conversation, Fahey told me that he had responded to the 2015 Notice with a letter explaining that he believed his diversions were exempt from curtailment due to a purchase of water that had been placed into storage in New Don Pedro Reservoir (NDPR). Fahey told me that he was required to provide replacement water according to the terms and conditions of his permits. In that telephone conversation on June 12, 2015, Fahey said that would not be available to meet with me for a compliance inspection until after the summer season and he indicated that he was continuing to divert water from the springs covered by his water rights with words to the effect that, if he had to curtail his diversions, he'd be out of business.

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11. In reviewing the Division's records, I found that Fahey submitted an email to the State Water Board on April 29, 2015 with a letter attached that was dated June 3, 2014 (Fahey June 3, 2014 Letter). The letter was addressed to the State Water Resources Control Board, Division of Water Rights. A review of the Division's 2014 Drought files revealed that the June 3, 2014 letter was originally submitted to the State Water Board, by mail, attached to a hard copy of the 2014 Curtailment Certification Form that recipients of the 2014 Unavailability Notice were directed to submit online. A true and correct copy of the Fahey June 3, 2014 is attached as Exhibit WR-47.
12. In the June 3, 2014 letter, Fahey stated that he purchased 82 acre-feet of Stanislaus River water from Tuolumne Utilities District (TUD) between July 15, 2009 and July 15, 2011 and placed that water into storage in NDPR. Fahey explained that he purchased the surplus water to ensure that there would be replacement water available for the Turlock Irrigation District and Modesto Irrigation District (Districts), and the City and County of San Francisco (San Francisco), in the event that he received notification from San Francisco of potential or actual water supply reductions as a result of diversions made under his junior water rights. Fahey further explained that neither San Francisco nor the Districts had ever notified him of the need to actually provide replacement water, but that by pre-positioning the replacement water, the flow of water from NDPR would not be affected and no senior water right holders would be impacted by diversions made under his junior water rights. Ultimately, Fahey concluded that he believed that the 2015 Unavailability Notice did not apply to him.
13. After reviewing Fahey's permits and the June 3, 2014 letter on June 12, 2015, I responded via email to Fahey's claim that the surplus water purchased between 2009 and 2011 exempted his permits from curtailment during the drought period of water unavailability. I explained that the purchase of surplus water, and the placement of such into NDPR to protect certain parties that had protested Fahey's water right applications, did not necessarily offset harm to other downstream prior right holders. In the email, I indicated that Fahey would need to provide further explanation to demonstrate that the Notice of Water Unavailability did not apply to his water rights. A copy of the email is attached as Exhibit WR-48.
14. Fahey called me on June 15, 2015 to acknowledge receipt of the email and disagree with the findings. Fahey indicated that there were no prior right holders between his points of diversion and NDPR that would be injured by his diversions. I pointed out that it was likely that there were prior right holders downstream of NDPR that could be harmed by Fahey's diversions if those diversions were not actually offset. I explained that, since Fahey himself had indicated that the protestants had not laid claim to the replacement water, and because Fahey maintains that the replacement water remains available in NDPR, it stands that any replacement water that Fahey purchased has never been made available to downstream prior right holders below NDPR, and that those downstream prior right holders below NDPR have likely been harmed by Fahey's diversions during the current drought years. Fahey did not agree and indicated that he would review his permit applications and water availability analysis for further information, but again told me that he would not be available for an inspection of his water rights before the end of summer.

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15. Together with the telephone conversations on June 12 and 15, 2015, the June 3, 2014 letter indicated that Fahey may have been diverting water even after the 2015 Unavailability Notice informed him that there was insufficient water for his priority of right in violation of the Water Code, and that the potential diversions warranted further investigation.
16. I visited the transfer facility twice during the investigation of Fahey's water diversions, once on July 23 2015 and again on August 5, 2015.
17. I consulted with Division management regarding the fact that Fahey was unwilling to make himself or his water rights available for compliance inspection in a timely manner or to provide reasonable access to the project works. Division management suggested that I consider using video surveillance of the transfer facility that would provide a definitive determination as to whether Fahey was continuing to make unauthorized diversions and directed me to consult with senior enforcement staff regarding the use of surveillance cameras. Senior staff determined that video surveillance would be used to gather information and directed Samuel Cole, a State Water Board staff engineer, to deploy surveillance cameras at the entrance to Fahey's transfer station.
18. On July 23, 2015 I visited the location of the diversion facility accompanied by Samuel Cole, who assisted me in my investigation. The purpose of the visit was to collect data from surveillance cameras that Samuel Cole had placed outside the diversion facility.
19. The transfer facility is located about six miles northeast of the town of Tuolumne. The springs that are the source of water and points of diversion under Permits 20784 and 21289 are located about three miles further to the east-northeast. I reached the front entrance of the diversion facility by driving on Cottonwood Road, which becomes Forest Route 1N04. Maps of the properties are attached as Exhibit WR-45.
20. While travelling to the location of the transfer facility on July 23, 2015, Samuel Cole and I passed two tanker trucks, about 10 minutes apart, heading west on Cottonwood Road. The proximity to the transfer station suggested that the trucks may have just left the transfer station, loaded with water from Fahey's transfer station
21. From a location across the road from the entrance to the transfer facility on July 23, 2015, I could see the access road to the property, from Cottonwood Road up to the locked gate.
22. While I was across Cottonwood Road from the entrance to the transfer facility on July 23, 2015, I observed a tanker truck arrive at and enter the transfer facility at about 12:15 PM. I observed the tanker truck leave the transfer facility at about 12:55 PM. At approximately 1:06 PM, I observed another tanker truck arrive at and enter the transfer facility. We left the site before that tanker truck exited the transfer facility, but the surveillance cameras captured its departure.
23. On August 5, 2015 I again visited the location of the transfer facility accompanied by Samuel Cole. Again, the purpose of the visit was to collect the data from and maintain the surveillance cameras. While en route to the transfer facility on August 5, 2015, we passed a tanker truck, heading west on Cottonwood Road at about

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- 11:30 AM, a few miles from the transfer station. Shortly after arriving at the site of the transfer facility and while parked along Cottonwood Road across from the entrance to the transfer facility, I observed another tanker truck leave the transfer facility at about 11:45 AM. At about 12:35 PM, I observed another tanker truck arrive at and enter the transfer facility. We finished maintaining the surveillance equipment and left the site before the tanker truck exited the transfer facility.
24. On August 27, 2015, Samuel Cole and Skyler Anderson, a State Water Board staff engineer, collected the surveillance equipment that was last deployed on August 5, 2015. While on site, they observed no tanker truck activity. Measurements were taken from the cameras to both the edge and center of the road for documentation purposes.
 25. I reviewed all of the video surveillance data that we used for enforcement purposes. Samuel Cole and Jean Bandura, Associate Government Program Analyst employed by State Water Board also reviewed the data. I reviewed the video data collected on July 23, 2015, which included surveillance data for the period of 10:16 AM on July 12, through 12:12 PM on July 23, and I established a protocol for tabulating the information pertaining to all vehicles, including the tanker trucks, observed entering and leaving the transfer facility. The tabulated information included the day and date, the time in and the time out, the vehicle type, a description of the truck and a description of the tanker. I tallied the number of tanker trucks observed entering and/or leaving the transfer facility (loads) for each day during the surveillance period. I added the tanker trucks Samuel Cole and I personally observed while the cameras were off-line to the tabulation with annotation.
 26. Under my close supervision, Jean Bandura reviewed the surveillance video footage collected on August 5 and August 27 and tabulated the information regarding the tanker trucks observed entering and leaving the transfer facility using the previously established protocol. I personally reviewed the surveillance video footage and verified the date, time and number of tanker trucks observed entering and/or leaving the transfer facility.
 27. I summarized the surveillance data from July 12 through August 5, 2015 as follows: Of the 25 days covered by video surveillance, our surveillance observed tanker trucks entering and/or leaving the transfer facility on 22 days. Our surveillance observed a total of 99 tanker trucks entering and/or leaving the transfer facility during the period of 10:16 AM, July 12 through 11:48 AM, August 5. The number of tanker trucks observed entering and/or leaving the transfer facility on any given day ranged from zero to eleven, with an average of about 4.5 tanker trucks per day on days that trucks were observed. No trucks were observed on Sundays.
 28. The conclusion I was able to draw from the above data is that Fahey was continuing to divert water from the sources covered under his water rights and for the purpose authorized under his water rights during the period in which no water was available under his priority of right in 2015. I prepared a report of investigation based on the inspections, surveillance, and communications with Fahey. A true and correct copy of my Report of Investigation is attached as Exhibit WR-61.
 29. I reviewed Fahey's 2014 diversion and use reports covering the year of 2014 to determine if Fahey had, in fact, been diverting water during the 2014 period of water

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unavailability even after he had received the 2014 Unavailability Notice. Fahey submitted Progress Reports by Permittee for the year 2014 on March 3, 2015; those reports cover the diversion and use of water under Permits 20784 and 21289 for 2014. The progress report for each permit includes the monthly amount of water directly diverted and used under the permit, the total annual amount of water diverted and used, and the maximum rate of diversion for each month. Each progress report includes an attached file that breaks down the above information for each spring covered by the permit. The progress reports were personally submitted by G Scott Fahey, certifying that the information is true and correct to the best of his knowledge and belief. True and correct copies of the 2014 Progress Report by Permittee for Permits 20784 and 21289 and the table of diversions for each permit are attached as Exhibit WR-56 through WR-59.

30. I reviewed the progress reports for 2014. I created a table to analyze the information as follows: I tabulated the total amount of water directly diverted under Permits 20784 and 21289 for each month of the year. I converted the total amount of water directly diverted (reported in gallons) to acre-feet. I determined the number of days in each month in which no water was available for diversion under Fahey's priority of right beginning with the date that the State Water Board issued its 2014 Unavailability Notice. Based on observed operations in 2015 and to more accurately estimate the number of days of diversion, the number of days in each month in which no water was available for diversion under Fahey's priority of right was reduced by the number of Sundays during that period (24, in total). After estimating the number of days in each month during the drought period of water unavailability that water was likely diverted under Permits 20784 and 21289, I calculated the percentage of the month that those days represented. Using the percentage of the month described above, and the total amount of water reported for each month, I calculated the total amount of water diverted during the drought period in which no water was available for diversion under Fahey's priority of right.
31. The information in the progress reports lead me to the conclusion that Fahey diverted water from the sources covered under his water rights during the period in which no water was available under his priority of right in 2014.
32. The above evidence demonstrates that Fahey's unauthorized diversions in 2014 began on May 27, 2014, and continued, with a four-day interruption, until November 18, 2014, for a total of 148 days of unauthorized diversion under each Permit (assuming that diversions occurred six out of every seven days), for a combined total of 296 days of unauthorized diversion in 2014. During that period, Fahey diverted 19.95 acre-feet of water in excess of that available to serve his permitted water rights.
33. The above evidence demonstrates that Fahey's unauthorized diversions in 2015 occurred from at least July 13 through August 5, 2015, for a total of 22 days under each water right, or a combined total of 44 days of unauthorized diversion. Over that period, Fahey diverted approximately 2.00 acre-feet of water (99 tanker trucks at approximately 6,600 gallons per tanker) in excess of that available to serve his permitted water rights.
34. In order to calculate the maximum civil penalty for 2014, I used the above determination that Fahey's unauthorized diversions were carried out over a period of

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148 days, under each water right, and doubled the number (to 296 days) as violations occurred under each water right. I also used the above determination that Fahey diverted a total of 19.95 acre-feet of water in excess of that available to serve his permitted water rights

35. In order to calculate the maximum civil penalty for 2015, I used the above determination that Fahey's unauthorized diversions were carried out over a period of 22 days, under each water right, and doubled the number (to 48 days) as violations occurred under each water right. I also used the above determination that Fahey diverted a total of 2.0 acre-feet of water in excess of that available to serve his permitted water rights.
36. Water Code section 1052 provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights.
37. Based on the determination of number of days of unauthorized diversion and the amount of water diverted during the drought period of water unavailability in 2014 and 2015, I calculated that the maximum civil liability for the alleged violations in 2014 was \$345,866 [296 days at \$1,000 per day plus 19.95 acre-feet at \$2,500 per acre-foot], and the maximum civil liability for the alleged violations in 2015 is \$49,000 [44 days at \$1,000 per day plus 2.00 acre-feet at \$2,500 per acre-foot], for a total combined maximum civil liability of \$394,866 for the alleged violations.
38. In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.
39. I drafted the ACL and calculated Fahey's maximum civil penalty under Water Code section 1052. I forwarded the draft ACL Complaint to senior enforcement staff for review and comment, and made revisions as appropriate. My senior, Laura Lavallee, forwarded the revised ACL Complaint to Division management and enforcement legal staff for consideration.
40. In this case, Fahey has made unauthorized diversions of water from the Tuolumne River watershed during a severe drought, when there was insufficient water supply available for Fahey's permitted water rights. Fahey was aware that the State Water Board had determined that there was insufficient water supply available for Fahey's permitted water rights.
41. These unauthorized diversions have reduced the amount of water available for downstream water right holders during a state of drought emergency. Moreover, Fahey's diversions likely reduced the water available for instream resources and riparian habitat downstream.
42. Fahey likely received a significant economic benefit by continuing to divert water under his post-1914 appropriative rights during the drought periods of water

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- unavailability. During 2015, irrigation districts north of the Delta have paid at least \$250 per acre-foot of replacement water. Thus, by illegally diverting 19.95 acre-feet of water from June 3, 2014 through November 18, 2014, and 2.00 acre-feet of water from July 13, 2015 through August 5, 2015, Fahey avoided purchased water costs of at least \$5,488. However, Fahey sells the spring water as a food grade product to commercial water bottling operations, likely at significantly higher costs than that paid by irrigation districts for replacement water. Fahey has refused to disclose the price that he charges for the spring water diverted under his post-1914 appropriative rights. However, a spring water vender in Texas advertises bulk spring water for between \$0.045 and \$0.06 per gallon (depending on volume and where the buyer provides for the truck and transportation costs). At those rates, an acre-foot of spring water will sell for \$14,666 to \$19,554 and Fahey's economic benefit from the documented unauthorized diversions in 2014 and 2015 would range from \$321,908 to \$429,210.
43. 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 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.
 44. Fahey responded to the Information Order. His responses are attached as Exhibit WR-65 through WR-69.
 45. Pursuant to the Information Order, Fahey provided bypass flow information for the months of May - October, 2014 and April - August, 2015. Fahey also provided information regarding his diversions from Marco and Polo springs for the same periods. The information provided by Fahey indicates that he was in violation of the bypass flow requirements in Permit 21289 Term 20 during at least nine of the eleven months from May through October in 2014 and from April through August, 2015.
 46. The State Water Board, at the request of the Prosecution Team, issued a subpoena for information Fahey failed to provide pursuant to the Information Order (Subpoena). Fahey responded to the Subpoena on November 18, 2015. A true and correct copy of Fahey's response to the Subpoena is attached as Exhibit WR-72.
 47. Based on additional surveillance and invoices and diversion dates Fahey provided in his responses to the Information Order, I refined my calculations of Fahey's maximum civil liability under Water Code section 1052 for the years 2014 and 2015. With this new information, I calculated a new maximum civil liability of \$269,087 for 2014 [123 days at \$1,000 per day per permit plus an additional 9.23 acre-feet at \$1,000 per acre-foot]. I calculated a maximum civil penalty of \$198,163 for 2015 [90 days at \$1,000 per day per permit plus an additional 7.27 acre-feet at \$2,500 per acre-foot]. The refined

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maximum ACL for 2014 and 2015 is \$467,250. A true and correct copy of my revised calculation is attached as Exhibit WR- 60. A true and correct copy of tables summarizing invoices, diversion days, and reported loads versus observed loads is attached as Exhibit 55.

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.


David LaBrie