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9 **BEFORE THE STATE OF CALIFORNIA**

10 **STATE WATER RESOURCES CONTROL BOARD**

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

16 **FAHEY'S REPLY TO PROSECUTION**
17 **TEAM'S MEMORANDUM IN OPPOSITION**
18 **TO MOTION TO DISMISS**

19 G. Scott Fahey and Sugar Pine Spring Water LP ("Fahey") responds to the Prosecution
20 Team's Opposition to Fahey's Motion to Dismiss, as follows:

21 **I. The Tuolumne River Water At Issue Here Is Pre-1914 Appropriator Water**

22 To accept Fahey's applications (A029977/A031491) for year-around diversion the Div. of
23 Water Rights required Fahey to enter a Water Exchange Agreement (WEA) with MID/TID,
24 because between June 15th and October 31st (FASS period) the Tuolumne River is fully
25 appropriated by Modesto Irrigation District/Turlock Irrigation District/City and County of
26 San Francisco ("MID/TID/CCSF"). The WEA was established by MID/TID and Fahey, pursuant
27 to Water Code section 1706. The WEA did not require Board permission to implement, because as
28 stated in section 1706 the MID/TID water rights were established prior to the Water Commission
Act and "no such jurisdiction over pre-1914 appropriative rights is given to [the] Board." (SWRCB
D-1290, p. 32.) Therefore, the water diverted by Fahey as contemplated by the WEA is "non-
jurisdictional" water. However, CCSF was not a party to the initial WEA and in order to protect its
right to divert "non-jurisdictional" water outside of the FASS period MID/TID/CCSF and Fahey
agreed to the WEA memorialized in the Aug. 11, 2011 Fahey Mitigated Negative Declaration.
Thereby, the WEA allows Fahey to divert "non-jurisdictional" water year-around, when that is the

1 only water available, and when water would otherwise be unavailable under his priority of right,
2 which was exactly the situation encountered during the 2014/2015 curtailments.

3 The 2014 and 2015 *Notices of Immediate Curtailment* both state that all holders of post-
4 1914 appropriative water rights within the San Joaquin River watershed need to immediately stop
5 diverting; therefore, it follows, only “non-jurisdictional water” was flowing in that watershed at
6 that time. In that condition, the entire watershed replicates the Tuolumne River when annually all
7 its water is fully appropriated by MID/TID/CCSF with water rights established prior to the WCA
8 thus “non-jurisdictional”. The year around diversion and use of “non-jurisdictional” water is legally
9 authorized by the WEA, and the Board was provided Notice of that fact when the “OTHER” box
10 was check on the 2014 Curtailment Certification Form by Fahey. During periods when only “pre-
11 1914 water” flows Fahey does not have to cease diverting and using water when water would
12 otherwise be unavailable for his Permits’ (20784/21289) priority of right. The Prosecution Team
13 citing citation of *City of Barstow v. Mojave Water Agency* to argue that a WEA cannot change a
14 permit’s priority of right is inapposite as that is not this situation. Continuing to divert and use water
15 during a drought emergency is “legally authorized” because of the WEA, not because the WEA
16 changes the Permits’ priority of right.

17 The Prosecution Team asserts Fahey breached the WEA and that the WEA’s commodity is
18 non-jurisdictional water. If the Prosecution Team believes the WEA has been breached, then the
19 court is available to prosecute a breach of contract complaint which is the only proper venue for
20 such a claim, and it is for the courts (not the Board) to determine that as a matter of law.

21 The Prosecution Team also asserts that Fahey has not been by-passing 5 GPM as required
22 by Permit 21289. That is simply untrue. The testimony establishes “it’s consistently above five
23 gallons per minute.” (Hearing Transcript (“Hr. Tr.”), p.181.) The documentation produced by the
24 Prosecution Team to support its assertion is a misreading of the data and based on incorrect
25 assumptions.

26 The testimony repeatedly established there are no prior rights of record and no post-1914
27 appropriative rights between Fahey’s springs and the New Don Pedro Reservoir (NDPR). Also,
28 there is no evidence that any senior water right holders downstream of NDPR were harmed in any

1 way by Fahey's diversions during curtailment. (Hr. Tr., pp. 75-77, 172-173.)¹

2 **II. Fahey's Due Process Rights Have Been Violated.**

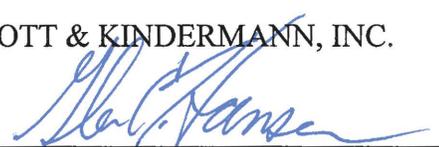
3 Pursuant to the holding in the *California Water Curtailment Cases*, Judicial Council
4 Coordination Proceeding No. 4838 (Santa Clara County Superior Court, Feb. 21, 2018), the Board
5 violated Fahey's due process rights by issuing curtailment notices in this case (Exs. WR-1, ¶¶28,
6 31, 46, 47; WR-2, ¶¶11, 16), "which ordered immediate curtailments and threatened large fines
7 accruing from the time the notices issued, without first providing water users [such as Fahey] with
8 an opportunity to challenge the findings upon which they were based." Indeed, the Prosecution
9 Team's own witnesses who communicated with Fahey during curtailment made it explicitly clear
10 that once Fahey received the curtailment notices, he was to stop all water diversions, even if he
11 satisfied all of the procedural avenues the Board made available to him, until he heard back from
12 the Board about whether he was exempt from curtailment. (Hr.Tr. 85-87.) That same testimony
13 establishes that, at no time, was Fahey ever informed of his right or even a forum to challenge the
14 water availability findings before the curtailment notices ordered him to stop diverting water.

15 Thus, according to the Prosecution Team's witnesses, once the curtailment notices were
16 received, Fahey (1) should have stopped all diversions during the curtailment periods without any
17 administrative opportunity to either challenge the water availability findings or determine Fahey's
18 right to an exemption; or (2) could continue to divert during curtailment, wait for an ACL/CDO
19 proceeding to challenge the water availability analysis, but be subject to civil penalties for not
20 having stopped diversions during the curtailment period. That is a due process violation.

21 **III. Conclusion.**

22 Accordingly, the Board should dismiss this ACL/CDO proceeding in its entirety.

23 Dated: January 30, 2019 ABBOTT & KINDERMANN, INC.

24
25 By: 

26 Glen C. Hansen

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

27 ¹ That is further confirmed in the Memorandum from L. C. Jopson to Engineering Staff, dated Aug. 2, 1963,
28 "General Instructions for the Handling of Unprotested Applications, para. d., which document the Prosecution Team
wrongly withheld from Fahey until after the close of the evidentiary hearing – another due process violation.

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