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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 SUPPLEMENTAL BRIEF ON EVIDENTIARY OBJECTIONS**

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I. INTRODUCTION.

The Prosecution Team requested supplemental briefing on three issues.

First, the evidence objected to in the Prosecution Team's pre-hearing Motion to Strike/Motion in Limine ("Motion") is relevant to determining whether an unlawful diversion occurred per Key Issue 1. Contrary to the Prosecution Team's arguments in that Motion, 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arguing that D995 and the FAS determination no longer apply, Fahey is attempting to argue that Term 19 in Permit 20784 no longer has effect" – is wrong because it is based on a fundamentally erroneous interpretation as to how Fahey was supposed to comply with Term 19.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, Fahey's testimony regarding the amount of his spring water that is groundwater 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.

Second, "Exhibit WR-147 and related testimony" is not admissible because (1) that exhibit and testimony was impermissibly allowed as either direct testimony or as rebuttal

testimony; and (2) it is inadmissible multi-layered hearsay.

Third, "Exhibit 153 and related testimony" is not admissible because they were wrongly withheld by the prosecution team.

II. THE EVIDENCE OBJECTED TO IN THE PROSECUTION TEAM'S PRE-HEARING MOTION TO STRIKE/MOTION IN LIMINE IS RELEVANT TO DETERMINING WHETHER AN UNLAWFUL DIVERSION OCCURRED PER KEY ISSUE 1

A. 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.)
>
> *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

[1] The Raker Act is admitted into evidence as **Exhibit 77** (Govt. Code §11513(c)).
[2] The Somach Memorandum is admitted into evidence as **Exhibit 78**.

> 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 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 1966 ("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*

[3] The Fourth Agreement is admitted into evidence as **Exhibit 79**.

[4] The City Attorney Letter is admitted into evidence as **Exhibit 80**.

> *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 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"; thereby, only those parties can be damaged.

B. 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

[5] The 2012 Board Evaluation is admitted into evidence as **Exhibit 81**.

> 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 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.)

C. 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.

1. 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 by 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, currently the Fourth 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 notified 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.'" (*In Re 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 In Re Quantification Settlement Agreement Cases, supra,* at p. 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 the 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.'" (*In Re 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.)**

2. <u>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).</u>

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.

D. 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. The first and only time anyone, i.e., the Board, did *notify the applicant of the need to provide replacement water* in good faith, Fahey did, as prescribed by the City's November 8, 2004 letter.

E. 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 is a requirement 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.

III. EXHIBIT WR-147 AND THE RELATED TESTIMONY ABOUT NDPR ALLEGEDLY "SPILLING" IN 2011 IS INADMISSIBLE BECAUSE: (1) THAT EXHIBIT AND TESTIMONY WAS WRONGLY INTRODUCED AS EITHER DIRECT TESTIMONY OR AS REBUTTAL TESTIMONY; AND (2) THAT EXHIBIT AND TESTIMONY IS INADMISSIBLE DOUBLE HEARSAY.

The Board should not allow or admit Exhibit WR-147 and the related multi-layered hearsay testimony by Samuel Cole and Katherine Mrowka regarding the allegations of NDPR "spilling" in 2011, which is reported in the January 25, 2016 Transcript at pages 132:11-133:24, 140:24-141:5, 141:20-142:2, 142:16-146:16, and in the January 26, 2016 Transcript at pages 2:21-9:22 (collectively, "Alleged Spilling Testimony"). (See Fahey's motion in limine to exclude such testimony, January 26, 2016 Transcript, 2:21-9:22.) Wrongful admission of that testimony is not an insignificant matter, because it forms the primary argument by the Prosecution Team to support its incorrect allegations of harm caused by Fahey's diversions during curtailment. Admission of that improper testimony should not be allowed, and is patently unfair to Fahey, for the reasons explained below.

A. The Prosecution Team Purposefully Violated Multiple Procedural Rules When It Attempting To Introduce Exhibit WR-147 And The Related Alleged Spilling Testimony.

1. Admission of WR-147 violates the Hearing Officers' January 21 Order regarding disclosure of all documents.

As already argued to the Hearing Officers (January 26, 2016 Transcript, 2:25-3:17), the Prosecution Team wrongfully concealed Exhibit WR-147 until late into the first day of the Hearing in direct violation of at least three (3) explicit requirements in the "Hearing Officer's Partial Ruling on Prosecution Team's December 10 and December 11Motions for Protective Order or, Alternatively, Motions to Quash; Fahey's Opposition; and Fahey's December 18 Motion to Compel Depositions and Document Disclosures," issued on January 21, 2016.

First, Exhibit WR-147 is a "DOCUMENT utilized or relied on to create, formulate or

prepare your written testimony, conclusion, reports and/or opinions in this matter," which the Prosecution Team was required to produce to Fahey by "5:00PM, Pacific Time, on Friday, January 22, 2016." But the Prosecution Team intentionally did not do that with Exhibit WR-147. The January 21 Order certainly applied to all evidence in the case-in-chief, and the Prosecution Team admitted, "The purpose of this rebuttal evidence is, *in part*, to confirm that communication by Mr. Fahey [to TUD in 2011]." (January 25, 2016 Transcript, 133:19-20 (emphasis added).) Thus, the Prosecution Team's intent to use WR-147 and the related testimony, "in part," for direct expert testimony required disclosure under the January 21 Order.

Second, under that January 21 Order, the Prosecution Team was allowed to "request the Hearing Officers' permission to file *additional exhibits*. To be considered, the request shall include a short description of the document sought to be introduced, an explanation of why the exhibit was not previously introduced, and a showing of good cause why leave should be granted to admit the late exhibit. The Prosecution Team shall serve the request upon the hearing list for this proceeding." (Emphasis added.) That procedure was never followed by the Prosecution Team as to Exhibit WR-147 (or any other document), even though they sought to use WR-147 as an "additional exhibit."

Third, the Alleged Spilling Testimony is used by the Prosecution Team to arrive at a variety of expert opinions by Mr. Cole and Ms. Mrowka in the Prosecution Team's case-in-chief (see below) about whether water was available at NDPR and whether water was available "to offset future diversions from the watershed above New Don Pedro reservoir." (Exhibit WR-147.) Therefore, failing to disclose WR-147 violated the following provisions of the January 21 Order:

> The Prosecution Team may also withhold documents containing the opinions of non-testifying experts developed as a result of the initiative of counsel in preparing for the hearing and not relied upon by testifying experts to form their opinion$ and conclusions. However, the Prosecution Team is advised that it withholds those documents at its peril. We will carefully consider evidentiary objections as to lack of foundation by testifying experts and resolve those objections as appropriate to prevent unfairness.

Furthermore, the January 21 Order was not limited to just evidence in support of the Prosecution Team's case-in-chief, but also included any rebuttal exhibits that fit within the parameters of the documents covered by the January 21 Order. Thus, the Prosecution Team purposefully violated

the procedures set by the Hearing Officers in order to surprise Fahey with WR-147 in literally the middle of the proceeding. The Hearing Officers should not allow such unfair and prejudicial actions by the Prosecution Team.

2. The Alleged Spilling Testimony was wrongfully raised as direct testimony.

The Prosecution Team introduced the Alleged Spilling Testimony in the "direct testimony" portion of the proceedings, in a blatant violation of the procedures established by the Hearing Officers for this proceeding. It is clear that the Prosecution Team intended that the Alleged Spilling Testimony be part of its case-in-chief. The Prosecution Team admitted as much at the hearing when it stated that the Alleged Spilling Testimony was being used to "confirm" "an email from Mr. Fahey to TUD in 2011 (January 25, 2016 Transcript, 133:16-20), which email was only part of the Prosecution Team's case in chief as Exhibit WR-72, page 37. Furthermore, Ms. Mrowka relied on that testimony for her opinions in the case-in-chief phase of the proceeding that Fahey's diversion caused harm during curtailment (a required element of the Prosecution Team's case in chief). She testified: "As you heard Mr. Cole testify, there were events, spill events. The water was not there"; "the water isn't there. We had the spill events …." (January 25, 2016 Transcript, 140:24-141:7, 141:20-142:2.) Thus, the Prosecution Team's argument that Exhibit 147 did not fall within the Hearing Officer's January 21 Order is patently false.

It is quite apparent that the Prosecution Team simply did not want Fahey to offer any rebuttal testimony by experts or percipient witnesses (who could have otherwise been subpoenaed), which rebuttal testimony would have demonstrated the numerous factual and legal errors in WR-147 and the Alleged Spilling Testimony. Certainly, the Prosecution Team was hoping to rely on the element of surprise in bringing up that testimony when it did, in the manner that it did.

3. The Alleged Spilling Testimony cannot be raised as rebuttal testimony.

Recognizing that it violated the procedural rules as to direct testimony, the Prosecution Team backed up and argued that the Alleged Spilling Testimony "was intended as rebuttal. It was intended to clarify Mr. Fahey's statement regarding the overflow operations of New Don Pedro." (January 25, 2016 Transcript, 133:19-20; January 26, 2016 Transcript, 4:10.) The Hearing Officers stated that they were permitting that testimony as "rebuttal testimony" (January 26, 2016 Transcript, 9:17-18), even though the Prosecution Team is still attempting to use it in its case in chief to explain its own Exhibit WR-72.

More importantly, however, the Alleged Spilling Testimony cannot be admitted even as rebuttal evidence, because it is not "rebuttal" testimony. The Alleged Spilling Testimony goes way beyond being evidence that is "used to rebut evidence presented by another party"; it is not limited "to evidence that is responsive to evidence presented in connection with another party's case-in-chief"; and it wrongfully "includes evidence that should have been presented during the case-in-chief of the party submitting rebuttal evidence." (Notice of Public Hearing (filed October 16, 2015), page 6.) The Prosecution Team purports to introduce the Alleged Spilling Testimony (a) to "confirm" a communication by Mr. Fahey in the form of "an email from Mr. Fahey to TUD in 2011indicating that he does not need to purchase water because New Don Pedro is being operated to avoid overflow"; (b) in response to Mr. Fahey's letter of June 2014 that "any water he had stored in New Don Pedro would be lost if New Don Pedro had spilled"; and (c) in response to "Mr. Fahey's statement regarding the overflow operations of New Don Pedro." (January 25, 2016 Transcript, 132:7-25, 133:16-20; January 26, 2016 Transcript, 4:10-12.) However, the Alleged Spilling Testimony is not rebuttal evidence because it should have been presented during the Prosecution Team's case in chief, in that it was obviously relied on in Ms. Mrowka's direct testimony arguments as to available water in NDPR, as discussed above. The Alleged Spilling Testimony also should have been introduced in the Prosecution Team's case-in-chief because the June 2014 letter that the testimony purports to respond to was extensively described in paragraph 29 of the Administrative Civil Liability Complaint (WR-1), which was filed at the very

onset of this proceeding. Furthermore, the Alleged Spilling Testimony is not responsive to any testimony presented by Fahey in his case in chief, but instead is designed to "confirm" an "email" in the Prosecution Team's case-in-chief. (WR-72, page 37.) Even if the Prosecution Team provided this "rebuttal" testimony in *anticipation* of what Mr. Fahey may testify to in the Hearing on cross-examination after this "rebuttal" evidence is presented, such rebuttal testimony does not rebut Mr. Fahey's subsequent testimony that the NDPR "was being operated in anticipation of spill" and "Q. So the dam was spilling in 2011? A. No. No." (January 25, 2016 Transcript 194:23-195:16)

Even more tellingly, the Alleged Spilling Testimony introduces – for the first and only time – the following entirely new matters (none of which are responsive to Fahey's case-in-chief):

(a) Whether NDPR is operated in a "typically passive spill fashion";

(b) Whether a roadway beneath the spillway would be compromised if a "spill event" was to occur;

(c) Whether the declarant, Mr. Monier, has personal knowledge or expertise as to the matters for which that declarant testifies;

(d) Whether the declarant is qualified as an expert on the expert witness issues contained in WR-147;

(e) Whether the "intent of asking whether a reservoir has spilled or not is essentially asking whether the reservoir had reached capacity";

(f) Whether such "intent" is even legally correct or legally relevant in this proceeding;

(g) Whether such "intent" by the *Mr. Monier* (the declarant) has any relevance to, or can in any way interpret, what *Mr. Fahey* meant in his June 2014 letter about if NDPR "spills in the future" (Fahey Exhibit 60);

(h) Whether NDPR had "active pre-flood" releases;

(i) Whether there are fundamental inconsistencies in the Alleged Spilling Testimony, because testimony that NDPR was "being operated in anticipation of spill," "is not designed to spill passively," and "there was no passive spill over the reservoir" flatly contradicts the

testimony of Mr. Cole that "the water spilled" and "the reservoir did spill";

(j) Whether the expert opinions made in Exhibit WR-147 that there was no water "stored for future uses" is at all relevant when Mr. Fahey testified repeatedly that he was not storing water, but had a "credit" toward future water diversions;

(k) Whether Mr. Cole's admission that "there was no passive spill over the reservoir" (January 25, 2016 Transcript 146:10-16) renders the entire Alleged Spilling Testimony irrelevant because the language "spills in the future" in Mr. Fahey's June 2014 Letter refers to actual spilling over the reservoir, and not the fiction created by the prosecution Team about "passive spilling";

(l) Whether Mr. Cole has been designated as an expert witness for the purpose of opining on the legal issue of whether "anticipation of spill" equals "spill," and whether "passive spill" equals "spill" for purposes of Fahey's credit under his permit language; and

(m) Whether the explicit language in Fahey's water permits (Ex. 20, para. 20; Ex. 55, para. 34) - that "the Districts and San Francisco's reservoirs *are spilling* **or** *are being operated in anticipation of spill*" (emphasis added)) - demonstrates that the fact of the reservoir "spilling" and the fact that the reservoir is "being operated in anticipation of spill" are two entirely different legal and factual concepts, and therefore the Alleged Spilling Testimony is wrong, as a matter of fact and law.

All of these issues (a) through (m) are new issues, and not responsive to Mr. Fahey's case-in-chief. Most importantly, all of these new issues were dumped on Fahey in the middle of the hearing to unfairly surprise him in these proceedings.

B. Exhibit WR-147 And The Related Cole Testimony Is Inadmissible Double Hearsay.

1. Hearsay evidence is only allowed here in narrowly defined instances, which are not present in this proceeding.

Government Code section 11513, subdivision (d), describes that hearsay provision that govern this proceeding. That section provides:

> (d) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. An objection is timely if made before submission of the case or on reconsideration.

According to that statute, hearsay evidence may be admissible if (1) the evidence is to supplement or explain other evidence at the hearing; or (2) it is admissible over objection in civil actions. Here, Exhibit WR-147 and the related Cole testimony fails to meet either one of those requirements, and is therefore inadmissible hearsay, for the reasons explained below.

2. The Alleged Spilling Testimony does not supplement or explain any other evidence in the record.

The hearsay evidence sought by the Prosecution Team is not admissible under section 11513, subdivision (d), because it is being used, in and of itself, as the sole support for the issues outlined above, and not to supplement or explain any other evidence in the record. (*See Martin v. State Personnel Board* (1972) 26 Cal.App.3d 573, 583 [under section 11513, hearsay evidence "shall not be sufficient in itself to support a finding."]) For the reasons explained above, there is no other evidence in this case regarding the numerous issues (outlined above) for which the Prosecution Team is seeking to introduce the Alleged Spilling Testimony. Therefore, the Alleged Spilling Testimony is inadmissible hearsay, even in this administrative proceeding. (*See e.g., DeMattini v. Dept. of Alcoholic Beverage Control* (1963) 215 Cal.App.2d 787, 809 *overrruled on other grounds*, *Harris v. Alcoholic Beverage Control Appeals Board* (1965) 62 Cal. 2d 589, 596 [hearsay evidence not admitted because there was no direct evidence of the factual conclusions that the hearsay could supplement.])

Also, the Alleged Spilling Testimony does not supplement or explain what Fahey meant in his June 2014 Letter because the Prosecution Team has not and cannot demonstrate that what declarant Mr. Monier allegedly meant in the purported hearsay statement is the same thing as what Fahey meant in his June 2014 letter.

Furthermore, the Alleged Spilling Testimony is inadmissible hearsay because it contradicts the existing evidence, and does not supplement or explain the existing evidence. As

discussed above, the Alleged Spilling Testimony contradicts the explicit language in Fahey's water permits. Contrary to the Alleged Spilling Testimony, *anticipating* a spill is not the same as *experiencing* a spill. The language in the permits, cited above, demonstrates that the fact of the reservoir "spilling" is entirely different and distinct from the reservoir "being operated in anticipation of spill." Fahey's testimony is consistent with that distinction. He testified that NDPR "was being operated in anticipation of spill," and he provided with following testimony: "Q. So the dam was spilling in 2011? A. No. No." (January 25, 2016 Transcript 194:23-195:16) Thus, the Prosecution Team wrongly seeks to use the hearsay testimony to contradict existing evidence, rather than supplement or explain it.

3. The Alleged Spilling Testimony is not admissible in civil actions.

At the Hearing, the Prosecution Team provided no valid argument as to how Exhibit WR-147 and the related testimony of Mr. Cole and Ms. Mrowka about NDPR "spilling" in 2011 would be admissible in civil actions. Nor could it. The Prosecution Team is seeking to use the testimony for the truth of the matter of two layers of hearsay. The Alleged Spilling Testimony does not fit within any hearsay exception in the Evidence Code. Furthermore, the Prosecution Team has not even laid the requisite (or any) foundation as to the personal knowledge or expertise of the alleged declarant as to the matters for which that declarant testifies. Nor has the declarant or Mr. Cole been qualified as an expert on the expert witness issues contained in WR-147. Accordingly, the Hearing Officers should entirely exclude and not admit either Exhibit WR-147, or the related testimony by Mr. Cole and Ms. Mrowka regarding the allegations of NDPR "spilling" in 2011, which is reported, at a minimum, in the January 25, 2016 Transcript at pages 132:11-133:24, 140:24-141:5, 141:20-142:2, 142:16-146:16, and in the January 26, 2016 Transcript at pages 2:21-9:20.

IV. REBUTTAL EXHIBIT 153 AND RELATED TESTIMONY ARE NOT ADMISSIBLE BECAUSE THEY WERE WRONGLY WITHHELD BY THE PROSECUTION TEAM.

Exhibit 153 and related testimony regarding the Tuolumne Watershed Analysis should not be admitted as evidence in this case, as Fahey objected at the Hearing. (January 26, 2016

Transcript 1:22-16; 7:11-25, 9:5-22.) In an email to Fahey's counsel on December 8, 2015, the Prosecution Team explicitly stated: "*Any and all* documents supporting the ACL will be made available as exhibits on or by December 16th, 2015." (January 26, 2016 Transcript 9:5-12 (emphasis added).) That email did not give any exceptions to that promise. Furthermore, the testimony of Brian R. Coats (which was presented to Fahey's counsel on or about December 16, 2015) relies entirely on the "Sacrament-San Joaquin Watershed Analysis" for 2014 and 2015, which were presented as Exhibits WR-42 and WR-43. (See Declaration of Brian Coats, WR-7, para. 11.) Nowhere in his written testimony does Mr. Coats state that he relied on the Tuolumne Watershed Analysis, Exhibit 153. Nowhere in the Exhibits produced on or about December 16, 2015, is there the document that is now marked as Exhibit 153. In short, either the Prosecution Team never relied on the Tuolumne Watershed Analysis in prosecuting this case against Fahey, or the Prosecution Team did not follow its promise that "[a]ny and all documents supporting the ACL will be made available as exhibits on or by December 16th, 2015" by withholding that document until the second day of the hearing. (January 26, 2016 Transcript 7:19-25.)

Furthermore, contrary to the arguments of the Prosecution Team at the hearing, Fahey could not find the Tuolumne Watershed Analysis, Exhibit 153, on the alleged webpage cited by the Prosecution Team. (January 26, 2016 Transcript 7:11-18.) That kind of surprise is not permitted in this proceeding.

Finally, the January 21 Order required such documents to be produced to Fahey. The Prosecution Team admits that Exhibit 153 was in existence prior to December 8, 2015. Thus, it fell within the documents demanded by Fahey. In that Order, the Hearing Officers granted Fahey's motion to produce "for any document that meets all five of the following criteria:

a. The document is within the scope of Fahey's document requests;
b. The document was not previously disclosed to Fahey;
c. The document was not otherwise made available to Fahey;
d. The document is not subject to any privilege, or, alternatively, the document is a report or similar document relied on by an expert witness in reaching his or her opinions; and

e. The document does not "reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories," (Code Civ. Proc., § 2018.030, subd. (a)), or that information is isolated within the document and can be redacted."

Exhibit 153 met all five of those criteria. However, in violation of that Order, the Prosecution Team never produced Exhibit 153 by the deadline of 5:00 p.m., Friday January 22, 2016.

Nor did the Prosecution Team follow the procedure laid out in the January 21 Order to include Exhibit 153 as an additional exhibit in this proceeding: "The Prosecution Team may request the Hearing Officers' permission to file additional exhibits. To be considered, the request shall include a short description of the document sought to be introduced, an explanation of why the exhibit was not previously introduced, and a showing of good cause why leave should be granted to admit the late exhibit."

Accordingly, Exhibit 153 and the related testimony regarding the Tuolumne Watershed Analysis should not be admitted as evidence in this case.

V. CONCLUSION

For the reasons stated above, Fahey requests that the Hearing Team deny the Prosecution Team's pre-hearing Motion In Limine/Motion To Strike in its entirety because the evidence objected to in that motion is relevant to determining whether an unlawful diversion occurred per Key Issue 1. Fahey also requests that "Exhibit WR-147 and related testimony" not be allowed as evidence because (1) that exhibit and testimony was impermissibly allowed as either direct testimony or as rebuttal testimony; and (2) it is inadmissible multi-layered hearsay. Finally, Fahey requests that "Exhibit 153 and related testimony" also not be allowed as evidence because it is inadmissible as they were wrongly withheld by the prosecution team.

Dated: April 11, 2016

Respectfully submitted,

ABBOTT & KINDERMANN, LLP

By: _____

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

PROOF OF SERVICE

I, Lisa Haddix, declare as follows:

I am employed in the County of Sacramento, over the age of eighteen years and not a party to this action. My business address is 2100 21st Street, Sacramento, California 95818.

On April 11, 2016, I served the foregoing document(s) described as:

FAHEY'S SUPPLEMENTAL BRIEF ON EVIDENTIARY OBJECTIONS

On the parties stated below, by placing a true copy thereof in an envelope addressed as shown below by the following means of service:

SEE ATTACHED SERVICE LIST

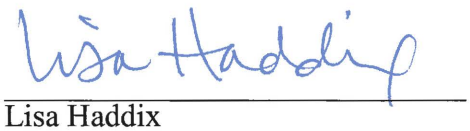
X **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

X **BY ELECTRONIC SERVICE [EMAIL]:** Sending a true copy of the above-described document(s) via electronic transmission from email address lhaddix@aklandlaw.com to the persons listed above on April 11, 2016, before 5:00 p.m. The transmission was reported as complete and without error. [CRC 2.256 (a)(4), 2.260].

BY FEDEX: On the above-mentioned date, I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed on the attached service list. I placed the envelope or package for collection and overnight delivery following our ordinary business practices.

BY PERSONAL SERVICE: I placed a true copy in a sealed envelope addressed to each person[s] named at the address[es] shown and giving same to a messenger for personal delivery before 5:00 p.m. on the above-mentioned date.

I declare, under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on April 11, 2016, at Sacramento, California.



Lisa Haddix

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