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10 **BEFORE THE STATE WATER RESOURCES CONTROL BOARD**

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

15 **PROSECUTION TEAM'S**
16 **SUPPLEMENTAL EVIDENCE BRIEF**

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1 **I. INTRODUCTION**

2 The Hearing Officers have requested supplemental briefing on evidentiary
3 objections raised at and shortly before the hearing in the matter of G. Scott Fahey and
4 Sugar Pine Spring Water, LP (collectively “Mr. Fahey” or “Fahey”) on January 25-26,
5 2016. Specifically, the Hearing Officers requested briefing on the issues of¹:

- 6 1. Whether the evidence objected to in the Prosecution Team’s pre
7 hearing motion to strike/motion in limine is relevant to determining
8 whether an unlawful diversion occurred per Key Issue 1.
- 9 2. Whether exhibit WR-147 and related testimony is admissible, per Mr.
10 Fahey’s objections on cross-examination and rebuttal and his
11 associated motions. Briefs should address:
- 12 a. Mr. Fahey’s hearsay objection and section 11513 of the
13 Government Code.
- 14 b. Mr. Fahey’s objection that the Prosecution Team failed to
15 disclose exhibit WR-147 prior to the hearing.
- 16 3. Whether rebuttal exhibit WR-153 and related testimony is admissible,
17 per Mr. Fahey’s objections on rebuttal and his associated motions.
18 Briefs should address Mr. Fahey’s objection that the Prosecution
19 Team failed to disclose rebuttal exhibit WR-153 prior to the hearing.

20 Much of Fahey’s evidence, argument, and testimony are not relevant to whether an
21 unlawful diversion occurred per Key Issue 1. The Prosecution Team also objects to
22 exhibits that were not authenticated, to testimony and argument relying on evidence that
23 was not authenticated, and to hearsay testimony by Mr. Fahey.

24 **II. EVIDENCE THE PROSECUTION TEAM OBJECTED TO IN ITS PRE-HEARING
25 MOTION TO STRIKE/MOTION IN LIMINE IS NOT RELEVANT TO WHETHER AN
26 UNLAWFUL DIVERSION OCCURRED PER KEY ISSUE 1**

27 On January 13, 2016, the Prosecution Team filed a Motion to Strike and Motion in
28 Limine requesting that the Hearing Officers strike evidence, argument, and testimony
submitted by Fahey that he did not divert water unlawfully, because his water right permits
and permits’ terms should be different or that certain permit terms are now irrelevant,

¹The briefing schedule with the list of issues for post-hearing briefing on evidentiary issues, is available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_briefingschedule_distributed012516.pdf

1 obsolete, or inapplicable.² This evidence, argument and testimony are not relevant to Key
2 Issue 1 in the Hearing Notice, which states:

3 1) Has Fahey violated, or is Fahey threatening to violate, the
4 prohibition set forth in Water Code section 1052 against the
5 unauthorized diversion or use of water (trespass)? This may include,
6 but is not limited to consideration of the following questions related to
7 allegations or defenses:

- 8 a) Did Fahey divert water under Permits 20784 and 21289 when
9 water was unavailable for diversion under his priority of right?
- 10 b) If Fahey diverted water, does Fahey hold or claim any water
11 rights other than Permits 20784 and 21289 that would
12 authorize the diversion?
- 13 c) What other relevant circumstances should be considered by
14 the State Water Board in determining whether unauthorized
15 diversion of water has occurred or is threatening to occur?

16 (WR-6³)

17 Key Issue 1 solely relates to whether Mr. Fahey violated or threatened to violate
18 the prohibition against unauthorized diversion and use in Water Code section 1052.
19 Although Key Issue 1(c) addresses “other relevant circumstances” the Hearing Notice
20 limits this issue to relevant circumstances “that should be considered... in determining
21 *whether* an unauthorized occurred or is threatening to occur.” (emphasis added) Fahey’s
22 evidence, argument, and testimony may address issues related to Water Code section
23 1055.3 under and Key Issue 3, such as the extent of harm, nature and persistence of the
24 violation, and other considerations affecting the amount of administrative civil liability, but
25 they are nonetheless irrelevant to whether an unlawful diversion occurred.

26 In an adjudicative hearing, the State Water Board shall admit any relevant
27 evidence if it is the sort of evidence responsible persons are accustomed to rely on in the
28 conduct of serious affairs, regardless of the existence of any common law or statutory rule

29 ² See the Prosecution Team’s Motion to Strike, Motion in Limine (Jan. 13, 2016) at
30 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahay_pt_motion_to_strike_limine011316.pdf. See also Declaration of Kenneth Petruzzelli in Support of Post-Hearing Evidence
31 Brief, Attachments 2-5 where highlighted portions of Fahey’s exhibits and of the transcripts indicate portions
32 the Hearing Team should strike or only consider for limited purposes.

33 ³ A true and correct copy of the Hearing Notice is also available at
34 http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/notice_fahey.pdf

1 which may make improper admitting the evidence over objection in civil actions. (Govt.
2 Code, § 11513 subd. (c).) The presiding officer has discretion to exclude evidence if the
3 likelihood its admission will necessitate undue consumption of time substantially
4 outweighs its probative value. (Govt. Code, § 11513 subd. (f).)

5 **A. Fahey’s Claim that Decision 995 is “Obsolete” is Not Relevant to**
6 **Whether He Diverted Water When There was No Water Available for His**
7 **Priority of Right.**

8 **1. Fahey’s Claim that Decision 995 is “Obsolete” is Not Relevant to**
9 **Whether He Diverted Water When There was No Water Available**
10 **for His Priority of Right and Procedurally Improper.**

11 Mr. Fahey asserts in written and oral testimony that the State Water Board should
12 interpret his permits in a manner that allows him to disregard requirements to provide
13 replacement water during the fully appropriated stream (“FAS”) periods from June 16
14 through October 31 for the Tuolumne River and Sacramento-San Joaquin Delta. (Fahey
15 1, p. 15 at ¶ 69 [“D995 is Obsolete and Term 20 Must Control”]⁴.) Water Right Decision
16 995 (“D995”) was the basis for the FAS determination for the Tuolumne River. (WR-9, p. 2
17 at ¶¶ 11-14; WR-18.) According to Fahey, the Raker Act, the construction of New Don
18 Pedro, and the Fourth Agreement made D995 “obsolete” and, as a result, it “should have
19 never been referenced or been used the mandate the 1992 [Exchange] Agreement” in
20 Permit 20784 Term 19. (*Id.*) Fahey then argues that Term 20 therefore “necessarily must
21 control over Term 19.” (*Id.*) However, this is not relevant to Key Issue 1, because it has
22 nothing to do with Fahey’s priority of right or with any alternative right.

23 The State Water Board may declare a stream fully appropriated after notice and a
24 hearing. (Water Code § 1205.) It may only revoke or revise a FAS declaration after notice
25 and a hearing. (Water Code § 1205, subd. (c).) The Permitting Reform Act requires the
26 Division of Water Rights (“Division”) to report annually to the State Water Board on the
27 availability of unappropriated water in stream systems which may become fully
28 appropriated in the next reporting period. (Water Code § 1228.2, subd. (c); WR-80, p. 54.)
If it is reasonably anticipated that a stream system will become fully appropriated during
the next reporting period, the State Water Board, after notice and hearing, shall determine

⁴ For this assertion, Mr. Fahey relies on Exhibits Fahey 5, pp. 38-40, Fahey 68, and Fahey 76. (*Id.*) Mr. Fahey further relies on exhibits Fahey 77-81 to support his opposition to the Prosecution Team’s Motion to Strike and Motion in Limine. (Fahey 1, p. 15; Fahey Opp. to PT Mot. to Strike.)

1 whether that stream system should be declared fully appropriated. (Water Code § 1228.2,
2 subd. (d).) Taken together, these statutes comprise a system whereby FAS declarations
3 are maintained, updated, and never become obsolete. (WR-80, p. 55.)

4 The State Water Board shall not accept for filing any application to appropriate
5 water from a fully appropriated stream system unless that application is consistent with
6 conditions contained in the FAS declaration. (Water Code § 1206, subd. (a), (b); WR-81,
7 p. 3.) In Order 91-07, the State Water Board stated that a FAS determination would not
8 preclude it from accepting applications for filing if transactions such as exchange
9 agreements, water service transfers, or water service contracts make water available for
10 diversion and use from stream systems that do not otherwise have water available for
11 appropriation. (WR-81, p. 25; WR-9 ¶¶ 11-13.) Such “physical solutions” that enable
12 beneficial use of water by subsequent appropriators without material injury to owners of
13 prior rights generally take the form of a substitute supply of water furnished to a prior user
14 in place of the existing supply. (WR-9 ¶ 15; *City of Lodi v. East Bay Municipal Utility*
15 *District* (1936) 7 Cal. 2d 316; 339-341.) However, a physical solution does not change
16 water right priorities or alter a prior right holder’s water right. (*City of Barstow v. Mojave*
17 *Water Agency* (2000) 23 Cal.4th 1224, 1250.) First in time remains first in right.

18 In D995, the State Water Board determined that the Tuolumne River upstream
19 from New Don Pedro, including all tributaries where hydraulic continuity exists, had no
20 unappropriated water from July 1 to October 31 of each year. (WR-18.) Then, in Water
21 Right Decision 1594 (D1594) and Order WR 84-2, the State Water Board determined that
22 the Sacramento-San Joaquin Delta upstream, including all tributaries where hydraulic
23 continuity exists, had no unappropriated water from June 16 to August 31. (WR-25.) The
24 State Water Board later renewed and affirmed D995, D1594, and the FAS determinations
25 in Orders WR 89-25, WR 91-07, and WR 98-08. (WR-80, 81; WR-187, slide 11; Hrg. Trns.
26 (Jan. 26, 2016), pp. 24:14-25:3.) Each noticed hearing and order followed the 1971
27 completion of New Don Pedro and each time the State Water Board renewed the FAS
28 determination for the Tuolumne River. Combined with the mandated reporting
requirements of the Permitting Reform Act, the Sacramento-San Joaquin Delta and the
Tuolumne River upstream of New Don Pedro remained fully appropriated from June 16
through October 31 and the FAS determination remained current and relevant. The 1992
Exchange Agreement, the physical solution ordered in Permits 20784 Term 19 and and
agreed to in Application 31491, allowed the State Water Board to accept Fahey’s

1 applications for filing and issue him permits to appropriate water during the FAS period.
2 (Fahey 10, Bates-stamped 138; Fahey 37, Bates-stamped 641; Hrg. Trns. (Jan. 25,
3 2016), p. 216:9-18.) But for the 1992 Exchange Agreement, the State Water Board would
4 have been required to deny Mr. Fahey’s permit applications. (Water Code § 1206, subd.
5 (a), (b); WR-9, p. at ¶ 20, Hrg. Trns. (Jan. 25, 2016), pp. 46:3-10, 49:10-11.) Fahey cites
6 no order rescinding the FAS determination for the Tuolumne River or for the Sacramento-
7 San Joaquin Delta and no authority permitting the State Water Board to rescind or modify
8 the FAS determinations absent a noticed hearing pursuant to Water Code section 1205.

9 Contrary to Fahey’s assertions, the Raker Act, the construction of New Don Pedro,
10 and the Fourth Agreement could not alter the State Water Board’s FAS declarations.
11 Congress enacted the Raker Act in 1913. (63 Cong. Ch. 4, December 19, 1913, 38 Stat.
12 242.) None of these actions altered the availability of water for appropriation from the
13 Sacramento-San Joaquin Delta and Tuolumne River, because none of these are actions
14 of the State Water Board. Only the State Water Board, through a noticed hearing, may
15 revise or revoke a FAS declaration. (Water Code § 1205, subd. (c).)

16 Furthermore, in D995 the State Water Board considered the impacts of New Don
17 Pedro on water rights and the availability of water for appropriation. The Modesto
18 Irrigation District and Turlock Irrigation District (collectively the “Districts”) had previously
19 filed their applications for New Don Pedro in 1951. (WR-187, p. 11.) The State Water
20 Board adopted D995 ten years later and considered New Don Pedro’s water right
21 applications in the course of making its decision. (WR-18, p. 2-3⁵; WR-187, p. 11.) The
22 Fourth Agreement followed in 1966, but specifically stated that it did not, nor was it
23 intended to, “affect, alter, or impair in any manner the rights of the respective parties
24 hereto in or to the waters or the use of waters of the Tuolumne River or its watershed
25 acquired or existing under the laws of the State of California.” (Fahey 79, p. 4) Fahey’s
26 contention is therefore procedurally improper, inconsistent the Water Code with regard to
27 FAS determinations, and inconsistent with the facts.

28 Whether D995 is “obsolete” and whether it should have been used to justify the
1992 Exchange Agreement is not relevant to the issue of whether Fahey unlawfully
diverted water, because it does not affect his priority of right or the availability of water for

⁵ The list of water right applications considered in D995 includes Applications 14126 and 14127 – the water right applications for New Don Pedro. (WR-153, slide 11; Hrg. Trns. (Jan. 26, 2016), pp. 23:22-24:13.)

1 his priority of right. Fahey’s arguments about D995’s obsolescence are therefore not
2 relevant to Key Issue 1(a) – whether he diverted water under his permits when there was
3 no water available for his priority or right. The 1992 Exchange Agreement is also not
4 relevant to Key Issue 1(b), because it specifically states that Fahey shall not accrue any
5 interest in any water rights held by the Districts. Finally, whether the 1992 Exchange
6 Agreement should have been included in Fahey’s permits is not relevant to Issue 1(c),
7 because the fact is the 1992 Exchange Agreement was included in Fahey’s Permit 20784
8 through Term 19 and Term 20 and in Permit 21289 in Term 34.⁶ In addition, this is not the
9 proper proceeding for Fahey to challenge the FAS determination or for State Water Board
10 to consider revising or revoking to the FAS determination, because the Hearing Notice
11 does not state that this is a proceeding to consider revising or revoking the FAS
12 declarations for the San Joaquin River Basin and Tuolumne River, as required by Water
13 Code section 1206, subd. (c).

14 **2. Fahey’s Testimony That His Diversions Do Not Impact Senior
15 Rights and Beneficial Uses Downstream is Inconsistent With His
16 Permit Terms**

17 Fahey repeatedly states “there are no senior water right holders in this matter other
18 than the Districts and [San Francisco].” (Fahey Opp. to PT Mot. to Strike, p. 4.) He
19 similarly states repeatedly, as if nothing below New Don Pedro matters, that there are no
20 other senior water right holders between his diversion and New Don Pedro. However,
21 New Don Pedro did not sever Fahey’s diversion from the rest of the Tuolumne River or
22 from the Delta watershed. To the contrary, Permits 20784 and 21289 both include
23 Standard Term 90, while Permit 21289 also includes Standard Term 80 and 93. (WR-15,
24 16) Standard Permit Term 90 is included in all new permits for diversion from the
25 Sacramento-San Joaquin Delta watershed when hydraulic continuity with the Delta exists
26 during some portion of the authorized diversion season.⁷ (WR-25, p. 54; WR-82, p. 39;
27 Hrg. Trns. (Jan. 25, 2016), p. 50:2-9.) Standard Terms 80, 90, and 93 also protect senior
28

25 ⁶ This evidence may bear on other issues, such as whether Fahey previously violated his permit terms and
26 has a history of non-compliance. This would be relevant to Key Issue 3 – the amount of administrative civil
27 liability the State Water Board should impose in light of all relevant circumstances.

28 ⁷ Standard Term 90 provides that, due to annual variations in demands and hydrologic conditions in the San
Joaquin River Basin, in any year of water scarcity, the season of diversion may be reduced or completely
eliminated by order of the State Water Board after notice to interested parties and opportunity for hearing.
(WR-15, 16)

1 rights and beneficial uses in the Sacramento-San Joaquin Delta. (WR-16; Hrg. Trns. (Jan.
25, 2016), p. 50:2-9.)

2 Fahey's permits have these terms, because when the State Water Board issued
3 his permits it determined his diversions have hydraulic continuity with the Delta and
4 impact senior rights and beneficial uses downstream in the Tuolumne River and in the
5 Delta below New Don Pedro. Contrary to Fahey's characterizations, San Francisco and
6 the Districts are not the only senior water rights "in this matter." Any argument to the
7 contrary is an argument that Fahey's permits should be different and improper for this
8 proceeding. The Hearing Officers should strike this argument and its accompanying
9 testimony and evidence.

10 **3. Fahey's Testimony That Permit 21289 Modified Permit 20784 and
"Controls" Permit 20784 Mischaracterizes His Permits**

11 Fahey contends that Permit 21289 Terms 33 and 34 govern all water replacement
12 provisions in both permits. (Fahey Opp. to PT Mot. to Strike, p. 5-9.) This is incorrect.
13 Rather than file a change petition to add two points of diversion to Permit 20784, Fahey
14 filed Application 31491 for an additional and separate permit to appropriate water from
15 Marco and Polo Spring. (Fahey 27.) The State Water Board then issued Permit 21289, a
16 new, separate, and additional permit, for Fahey to appropriate water from Marco and Polo
17 Spring. (WR-16.) To modify Permit 20784 in the manner Fahey contends the State Water
18 Board then would have had to issue an order adding Marco and Polo springs as points of
19 diversion to Permit 20784, but this never occurred. (Hrg. Trns. (Jan. 25, 2016), p. 213:1-
20 22.) The 2003 Tuolumne Utilities District (TUD) Purchase Agreement was intended to
21 provide replacement water for both permits. (Fahey 1, p. 5; Hrg. Trns. (Jan. 25, 2016), p.
22 212:21-25.) It provided a means for Fahey to comply with his water right terms and show
23 the State Water Board he would comply, but it did not affect his water rights. Fahey
24 characterizes his argument as "interpretation" but in reality it is an argument that Permit
25 20784 should be different than it clearly is so Fahey can avoid complying with Term 19.
26 The Hearing Officers should therefore strike this argument and its accompanying
27 testimony and evidence, because it is not relevant to Key Issue 1.

28 **4. Judicial Estoppel Precludes Fahey's Arguments that Decision
995 is "Obsolete" and Never Should Have Been Used to Justify
the 1992 Exchange Agreement.**

Fahey's claims regarding D995, the FAS declaration and Term 19 are precluded by

1 judicial estoppel. Judicial estoppel is an equitable doctrine designed to maintain the
2 integrity of the courts and to protect the parties from unfair strategies. (*Owens v. County*
3 *of Los Angeles* (2013) 220 Cal.App.4th 107, 121.) Judicial estoppel prohibits a party from
4 asserting a position in a legal proceeding that is contrary to a position he or she
5 successfully asserted in the same or some earlier proceeding. (*Id.*) “The elements of
6 judicial estoppel are “(1) the same party has taken two positions; (2) the positions were
7 taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful
8 in asserting the first position (i.e., the tribunal adopted the position or accepted it as true);
9 (4) the two positions are totally inconsistent; and (5) the first position was not taken as a
10 result of ignorance, fraud, or mistake.” (*Id.*)

11 In filing Application 31491, Fahey agreed to accept Term 19 and to maintain the
12 1992 Exchange Agreement. (Fahey 27, Bates-stamped 579.) He also agreed to meet the
13 water replacement demands for both permits through the 2003 Purchase Agreement with
14 TUD. (*Id.*) Fahey signed that agreement under penalty of perjury. (*Id.*) Had he not agreed
15 to accept Term 19, the Division would not have even accepted his application. (WR-9, ¶
16 20.) Relying on Fahey’s representations, the Division issued an exemption to the FAS and
17 the State Water Board issued Fahey Permit 21289. (Fahey 37; WR-16.) Then, in
18 accepting Permit 21289, Fahey agreed to the FAS terms and agreed to provide water for
19 the FAS to replace water he diverted during the FAS.

20 Nonetheless, Fahey now asserts that, because D955 was “obsolete” this term
21 never should have been included and, as a result, he should be able to interpret his
22 permit in a manner that effectively lets him ignore Term 19. This is different and contrary
23 to the position Fahey took when he filed Application 31491 and accepted Permit 21289.
24 After his experience with Permit 20784, he was well aware of the FAS and of Term 19. He
25 did not assert his position through fraud, ignorance, or mistake and he had the assistance
26 of legal counsel. (Fahey 1, p. 4.) Fahey accepted Term 19 and the FAS obligations when
27 he accepted his permits. He is estopped from disavowing those duties now.

28 **B. Fahey’s Testimony Regarding Groundwater is Not Relevant to Whether
an Unlawful Diversion Occurred, per Key Issue 1.**

The Prosecution Team also moved to strike Fahey’s assertions that his diversions
are mostly groundwater. (PT Mot. to Strike, p. 4.) Fahey asserts that his testimony about
groundwater does not seek a change in his permit. (Fahey Opp. to PT Mot. to Strike, p.
10.) Rather, he claims it is relevant as to “licensing,” because it establishes that his

1 surface water diversions were small enough for the water he wheeled into New Don
2 Pedro from 2009 through 2011 to cover all of his surface water diversions during the
3 period water was unavailable for his priority of right.⁸ (*Id.*) To the contrary, Fahey
4 necessarily depends on arguing his permits should be different, because his applications
5 and permits established that his diversions from the springs were tributary to the
6 Tuolumne River rather than independent groundwater.

7 When Fahey filed Applications 29977 and 31491 he stated, under penalty of
8 perjury, that the springs were tributary to the Tuolumne River. (Fahey 3, Bates-stamped 5;
9 Fahey 27, Bates-stamped 580; Hrg. Trns (Jan. 25, 2016), pp. 196:22-198:25.) Fahey's
10 applications and the water supply analysis his consultant Dr. Ross Grunwald prepared
11 based on his measurements describe the springs as percolating groundwater that form
12 surface streams tributary to the Tuolumne River. (Fahey 3, Bates-stamped 2; Fahey 27,
13 Bates-stamped 575; Hrg. Trns. (Jan. 25, 2016), pp. 128:23-129:7.) Fahey's Water Supply
14 Analysis for Application 31491, prepared by Dr. Grunwald, assumed that extractions from
15 the springs had a "direct" and "corresponding" impact on surface water flow. (Fahey 71, p.
16 1.) There is no assertion that any portion of the spring water is hydraulically independent
17 of any surface water. On cross-examination, Dr. Grunwald acknowledged that the Water
18 Supply Analysis for Application 31491 assumed a "one to one" ratio of extractions from
19 the springs to reduced surface flows. (Hrg. Trns. (Jan. 25, 2016, p. 223:10-24.) The Water
20 Supply Analysis covered Deadwood, Sugar Pine, and Marco spring. (*Id.* at p. 241:11-
21 242:5.) The analysis did not address Polo Spring. (*Id.* at p.241:24-25.) Fahey's own
22 measurements reinforced Dr. Grunwald's analysis. (*Id.* at pp. 240:19-241:10; Fahey 71.)
23 Consequently, Mr. Fahey filed Application 31491 under the auspices that the entire spring
24 flow formed surface streams tributary to the Tuolumne River. (*Id.* at p. 244:13-15.) The
25 State Water Board ultimately issued Fahey's permits based on Fahey's representations.

26 Fahey cites correspondence with Division staff that processed his applications and
27 speculated that the springs may originate from groundwater. (Fahey 29, Bates-stamped
28 618.) If anything, this only shows the Division was aware of and considered that possibility
when processing Fahey's applications. However, the State Water Board eventually issued
Permits 20784 and 21289 for the appropriation of water from springs tributary to the

⁸ For this assertion Fahey relies on Exhibit Fahey 1, pp. 3, 4, 7, 10, 16, and 17; Exhibits Fahey 71, p. 2, and Exhibits Fahey 72-74. (Petruzzelli Decl. ¶¶ 24-25.)

1 Tuolumne River. (WR-15, 16.) Nothing in Fahey's permits recognizes any groundwater
2 right or any spring flow hydraulically independent from surface water. (WR-15, 16) Fahey
3 has also never reported using groundwater in lieu of surface water in his progress reports.
(Hrg. Trns. (Jan. 25, 2016), p. 220:23-25.)

4 Fahey's evidence, argument, and testimony that a portion of his spring water
5 diversions are groundwater is irrelevant to Key Issue 1(a). Groundwater is not a part of his
6 permits. It has no relevance to whether he diverted water under his permits when water
7 was unavailable for diversion under his permitted priority of right.

8 Groundwater is also not relevant to Key Issue 1(b). Fahey argues that the springs
9 draw groundwater and, consequently, that he has a groundwater right. However, in
10 applying for and obtaining his permits, Fahey represented that the springs are tributary to
11 the Tuolumne River. For the purposes of his permits, there can be no groundwater
12 component. Fahey waived this argument by applying for his permits under the auspices
13 that the springs were tributaries to the Tuolumne River, representing that withdrawals
14 from the springs would have a direct and corresponding impact on surface flow, and
15 accepting permits to appropriate water from springs tributary to the Tuolumne River. Even
16 now Dr. Grunwald acknowledges in his written testimony that although "water extractions
17 from the various components of the system are much greater than any observed
18 reduction in surface spring flow," that "No definitive studies have been made to determine
19 what this difference may be." (Fahey 71, p. 2.) Further, "A detailed study of water
20 withdrawals and spring flow must be made in order to establish a more definitive ratio
21 between surface flow impairment and withdrawal of percolating ground water." (*Id.*) Dr.
22 Grunwald confirmed this part of his written testimony on cross-examination. (Hrg. Trns.
23 (Jan. 25, 2016), p. 242:9-15.) Consistent with his written testimony, Dr. Grunwald
24 confirmed on cross-examination that further study was necessary to establish that non-
25 hydraulically connected groundwater contributed to Fahey's diversions. (*Id.* at p. 242:12-
26 19.) Dr. Grunwald also confirmed that even if non-hydraulically connected groundwater
27 contributed to the spring flow further study would be required to determine how much non-
28 hydraulically connected groundwater contributed to the spring flow. (*Id.* at p. 243:21-
244:5.) Despite Mr. Fahey's assertions, there is insufficient evidence to establish that
hydraulically independent groundwater contributes flow to the springs.

1 **C. Fahey’s Arguments Regarding Decision 995 and Groundwater are**
2 **Time-Barred Pursuant to Water Code Section 1126 and Inappropriate in**
3 **an Enforcement Action**

4 Fahey’s contentions that D995 is “obsolete,” that his permits never should have
5 required the 1992 Exchange Agreement, and that the spring flow is hydraulically
6 independent of groundwater are all barred by Water Code section 1126. Under Water
7 Code section 1126, a party aggrieved by a decision or order of the State Water Board has
8 30 days to file a petition for writ of mandate. (Water Code § 1126, subd. (b).) If the party
9 does not file a petition for writ of mandate within 30 days, the party waives its right to
10 judicial review and to otherwise challenge the decision or order. (Water Code § 1126,
11 subd. (d).) For a water right permit, a permittee cannot manifest acceptance of conditions
12 in a water right permit and then wait to challenge the premise the permit is based on.
13 (*North Gualala Water Co. v. State Water Resources Control Bd.* (2007) 139 Cal.App.4th
14 1577, 1607.) A permittee also cannot waive multiple opportunities to challenge a State
15 Water Board order or decision and then wait years to challenge that order or decision.
16 (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 100-101.)

17 Fahey accepted the FAS condition for both permits. (Fahey 8, Bates-stamped 136;
18 Fahey 9, Bates-stamped 137; Fahey 27, Bates-stamped 579.) Fahey likewise applied for
19 his permits representing that the springs were tributaries to the Tuolumne River and that
20 all withdrawals would directly and correspondingly impact surface flows. (Fahey 3, Bates-
21 stamped 2, 5; Fahey 27, Bates-stamped 575, 580; Fahey 71, p. 1; Hrg. Trns.(Jan. 25,
22 2016), pp. 196:22-198:8; 222:5-223:9.) The State Water Board then issued him permits to
23 appropriate water from springs ultimately tributary to the Tuolumne River and with
24 conditions to replace water diverted during the FAS period. (WR-15, 16.) Fahey could
25 have challenged his permit terms at issuance, but he never did. Fahey also could have
26 challenged the FAS declaration when the State Water Board renewed the FAS
27 declarations in Order 98-08 but like his permit terms he never did. (WR-187, slide 11.)

28 All told, Fahey has had at least three opportunities to challenge his permit terms
and the FAS. Now, in an enforcement proceeding twenty years after the State Water
Board issued Fahey Permit 20784 and five years after it issued him Permit 21289, after
Fahey accepted his permits and permit conditions and waived opportunities to challenge
the FAS determinations, he cannot now challenge those terms, say those terms should be
different, or say they never should have been added to his permits. Fahey has waived any

1 argument that D995 is “obsolete,” that his permits should not have required the 1992
2 Exchange Agreement, and that the spring flow is mostly groundwater. He cannot raise
3 those arguments now.

4 The Hearing Officers should not accept or consider any testimony, evidence, or
5 argument challenging permit terms in this or any enforcement proceedings. Doing so
6 would encourage parties to turn enforcement proceedings into permit change
7 proceedings. Enforcement proceedings and permit change proceedings are governed by
8 different portions of the Water Code and have different requirements.⁹ As a practical
9 matter, different State Water Board staff handles each type of proceeding. The Division’s
10 Enforcement Section handles enforcement proceedings, assisted by the Office of
11 Enforcement. The Division’s Permitting & Licensing Section handles permit change
12 proceedings, assisted by the Office of Chief Counsel. Neither Section/Office has capacity
13 to handle the others’ functions. Accepting and considering Fahey’s testimony, evidence,
14 and argument challenging his permit terms would encourage permittees to forego any
15 permit challenge or change petition and instead violate any terms they do not like with the
16 expectation that they will be able to raise any such arguments during enforcement
17 proceedings. The State Water Board could not administer water rights in an orderly
18 manner under such a precedent.

16 **III. EXHIBIT WR-147 AND RELATED TESTIMONY IS ADMISSIBLE**

17 **A. Exhibit WR-147 is Admissible Under Government Code Section 11513.**

18 Fahey’s counsel objected to Exhibit WR-147 in part on the basis that it constituted
19 hearsay. (Hrg. Trns. (Jan. 26, 2016), p. 2:21-3:7.) Hearsay evidence is evidence of a
20 statement that was not made by a witness while testifying at the hearing and is offered to
21 prove the truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) In administrative
22 proceedings, hearsay may be used to supplement or explain other evidence and, on its
23 own, may support a finding if it would be admissible over objection in a civil action. (Gov.
24 Code § 11513, subd. (d).) In a civil action, hearsay is admissible to attack the credibility of

25
26 _____
27 ⁹ Enforcement proceedings are governed by Chapter 2 of Part 1, commencing at section 1050. Permit
28 change petitions are governed by Chapter 10 or Chapter 10.5 of Part 2, depending on the type,
commencing at section 1700. Among other differences, permit change petition proceedings allow for
protests and may require compliance with the California Environmental Quality Act.

1 a declarant that would be admissible if the declarant were a witness at the hearing. (Evid.
2 Code § 1202; see also *People v. Marquez* (1979) 88 Cal.App.3d 993, 998.)

3 Exhibit WR-147 is a contact report by Mr. Sam Cole documenting a phone call to
4 Wes Monier of TID on December 22, 2015 to determine whether New Don Pedro “spilled”
5 in 2011. (WR-147) Mr. Monier explained that New Don Pedro did not “spill” by releasing
6 water through the physical spillway, because it could compromise a roadway beneath the
7 spillway. (*Id.*) Instead, as Mr. Monier also explained, a reservoir more generally “spills”
8 when it reaches capacity and has more inflow than it can reasonably collect for later use.
9 (*Id.*) From November 27, 2010 through September 11, 2011, New Don Pedro reservoir
operated in this manner by incorporating active pre-flood releases to the downstream
channel. (*Id.*)

10 The Prosecution Team planned to use Mr. Cole’s testimony and WR-147 as
11 rebuttal evidence to attack Mr. Fahey’s credibility. Exhibit WR-147 would also supplement
12 and explain Fahey’s e-mail to Kelly Klyn of the Tuolumne Utilities District (“TUD”), dated
13 July 7, 2011. (WR-72, p. 37.) In that e-mail, Fahey stated that he would not buy water that
14 year, because New Don Pedro was operating to avoid “overflow.” (*Id.*) Fahey asserted in
15 his June 3, 2014 letter that he could continue diverting, because he had “pre-positioned”
16 water that he had wheeled into New Don Pedro from 2009-2011 and could use to offset
17 his diversions in later years during a period of unavailability. (Fahey 1, p. 7, 9, 11; Fahey
18 60; Hrg. Trans. (Jan. 25, 2016), pp. 217:2-9; Hrg. Trans. (Jan. 26, 2016), pp. 81:7-13,
19 124:25-125:2, 126:9-11, 127:16-25, 129:19-20.) However, Fahey also stated in the letter
20 that any water he collected in New Don Pedro was “surplus” and if New Don Pedro spilled
21 he would lose that water. (Fahey 1, p. 17; Fahey 60; Hrg. Trans. (Jan. 25, 2016), p. 195:2-
22 5.) Consistent with the June 3, 2014 letter, he stated in written testimony that if “[New Don
23 Pedro] were to spill, then any TUD surplus water would be the first to spill. Surplus water
is a separate entity that floats above the balance of the water stored in [New Don Pedro],
which is the reason it spills first.” (Fahey 1, p. 9.)

24 In the broad use of the term “spill,” New Don Pedro had spilled. Based on Mr.
25 Fahey’s testimony about losing any pre-positioned water if New Don Pedro spilled it would
26 mean that, even by his reasoning, all of his “pre-positioned” water was lost by 2011. WR-
27 147 and Mr. Cole’s testimony could therefore supplement and explain other evidence and
28

1 attack the credibility of Mr. Fahey's testimony that he had water available in 2014 and
2 2015 to offset his diversions.¹⁰ (*Id.*) Under both Government Code section 11513 and
3 Evidence Code section 1202, Mr. Cole's testimony and WR-147 were admissible.

4 **B. The Prosecution Team Had no Obligation to Disclose Exhibit WR-147
5 Prior to the Hearing**

6 Fahey's counsel further objected to the introduction of WR-147 on the basis that
7 the Prosecution Team failed to disclose it before the hearing. (Hrg. Trans. (Jan. 25, 2016),
8 pp. 133:8-15, 147:9-14; Hrg. Trans. (Jan. 26, 2016), p. 2:21-3:7.) Fahey's counsel cited
9 the *Hearing Officers' Partial Ruling on Prosecution Team's December 10 and December*
10 *11 Motions for Protective Order or, Alternately, Motions to Quash: Fahey's Opposition;*
11 *and Fahey's December 18 Motion to Compel Depositions and Document Disclosures*
12 (January 21, 2016 Order), but that order did not require the Prosecution Team to disclose
13 anything privileged.¹¹ It also only applied to the document requests Fahey made in the
14 December 9, 2015 deposition notice. (January 21, 2016 Order, p. 10.) Most importantly,
15 that ruling also only applied to the case in chief. (*Id.*; Hrg. Trns. (Jan. 26, 2016), p. 1:10-
16 13.) It did not apply to evidence introduced on rebuttal. In addition, the Hearing Notice
17 provided that parties may introduce additional evidence on rebuttal. (WR-6, p. 6 ["Rebuttal
18 testimony and exhibits need not be submitted prior to the hearing"].)

19 WR-147 was also attorney work product until was introduced at the hearing. Under
20 the attorney work product privilege, "a writing that reflects an attorney's impressions,
21 conclusions, opinions, or legal research or theories is not discoverable under any
22 circumstances." (Code Civ. Proc., § 2018.030, subd. (a).) Work product includes "material
23 of a derivative or interpretive nature obtained or produced in preparation for trial, such as
24 findings, opinions, or reports of experts." (*Nat'l Steel Products Co. v. Superior Court*
25 (1985) 164 Cal.App.3d 476, 487.) This protection preserves the rights of attorneys to
26 prepare their cases thoroughly and prevents other attorneys from taking undue advantage
27 of opposing counsel's efforts. (*Kizer v. Sulnick* (1988) 202 Ca1App.3d 431, 441.)

28 The attorney work product privilege extends to work produced by an attorney's

¹⁰ This reasoning was solely for impeachment purposes and the Prosecution Team does not concede that Mr. Fahey has any right to store water in New Don Pedro.

¹¹ See http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_proceduralruling012116.pdf

1 agents and consultants. (*Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889,
2 911.) It includes reports rendered in an agent's or consultant's advisory capacity designed
3 to assist an attorney in matters such as preparing pleadings, the manner of presenting
4 proof, and cross-examining opposing expert witnesses. (*Nat'l Steel Products Co., supra*
5 164 Cal.App.3d at 489.) Such matters often reflect the mental processes of the attorney
under whose direction the expert works. (*Id.*)

6 Mr. Cole prepared WR-147 on December 22, 2015 at the request of the
7 Prosecution Team's counsel to clarify Fahey's statement that New Don Pedro was
8 operating to avoid "overflow." (Petruzzelli Decl., ¶¶12-14; Hrg. Trns. (Jan. 25, 2016), p.
9 133:16-20; Hrg. Trns. (Jan. 26, 2016), p. 4:10-12.) Since this post-dated the deadline for
10 submitting exhibits for the case in chief, the Prosecution Team planned to introduce WR-
11 147 as rebuttal evidence. (Petruzzelli Decl., ¶¶13-14.) WR-147 would clarify that New Don
12 Pedro was spilling and aid in impeaching Fahey on rebuttal by showing that Fahey knew
13 New Don Pedro spilled and, even by his reasoning, all of the water he purchased from
14 TUD was lost. (*Id.*) WR-147 assisted counsel in developing an understanding of the facts
15 of the case and a strategy for cross-examination and rebuttal. (*Id.*) It fell within the
16 definition of work product and was privileged until such time as counsel for the
Prosecution Team chose to waive that privilege. The Prosecution Team was therefore not
required to disclose WR-147 before hearing.

17 **IV. REBUTTAL EXHIBIT WR-153 AND RELATED TESTIMONY IS ADMISSIBLE**
18 **AND THE PROSECUTION TEAM WAS NOT OBLIGATED TO DISCLOSE WR-**
19 **153 BEFORE THE HEARING.**

20 Exhibit WR-153 is the Prosecution Team's rebuttal presentation. (WR-153;
21 Petruzzelli Decl., ¶ 15.) Fahey's counsel specifically objected to slides 3-5, which included
22 a map showing the boundary of the Tuolumne River supply and demand analysis and the
23 charts depicting the Tuolumne River supply and demand analysis for 2014 and 2015.
24 (Hrg. Trans. (Jan. 26, 2016), pp. 1:22-2:16; Petruzzelli Decl., ¶ 15.) Fahey's counsel
25 objected on the basis that slides 3-5 were within their request for documents supporting
26 the Administrative Civil Liability ("ACL") Complaint ("ACLC"). (*Id.*) The Prosecution Team
27 introduced the evidence in slides 3-5 to rebut the claim of Fahey's counsel that Brian
28 Coat's supply and demand analysis for the San Joaquin River Basin was insufficient,
because it did not specifically depict supply and demand at Fahey's point of diversion.
(Hrg. Trans. (Jan. 26, 2016), pp. 3:24-4:9, 5:17-18:5; see also WR-7 ¶¶ 7-12; WR-42;

1 WR-43; Petruzzelli Decl., ¶ 16.) Fahey’s counsel did not object to any other portions of
2 WR-153 that the Hearing Officers have not already stricken.¹² (Hrg. Trns. (Jan. 26, 2016),
3 pp. 69:12-70:18, 135:28-136:3; Petruzzelli Decl., ¶ 21.)

4 **A. Rebuttal Exhibit WR-153 and Related Testimony is Admissible**

5 In a State Water Board hearing parties may introduce evidence by requesting
6 official notice of “such facts as may be judicially noticed by the courts of this state...
7 official notice may also be taken of any generally accepted technical or scientific matter
8 within the Board’s field of expertise, provided parties appearing at the hearing shall be
9 informed of the matters to be noticed.” (23 Cal. Code Regs. § 648.2.) Parties may also
10 introduce evidence by reference if the evidence is any public record of the State Water
11 Board relevant to the subject of the hearing, as well as any book, report, or other evidence
12 prepared and published by a public agency that is otherwise admissible. (23 Cal. Code
13 Regs. § 648.3.) Consistent with the State Water Board’s regulations, the Hearing Notice
14 recognizes that “the hearing officers have discretion to receive into evidence by reference
15 relevant, otherwise admissible, public records of the State Water Board and documents or
16 other evidence that have been prepared and published by a public agency, provided that
17 the original or a copy was in the possession of the State Water Board before the notice of
18 the hearing is issued.” (WR-6, p. 4.)

19 Slides 3-5 were developed by Mr. Coats and posted to the State Water Board’s
20 watershed analysis webpage. (WR-7 ¶ 9; Hrg Trns. (Jan. 26, 2016), p. 11:16-15:25.) As
21 Mr. Coats explained in his written testimony, the State Water Board’s watershed analysis
22 website includes supply and demand information for watersheds throughout the state,
23 including the San Joaquin River Basin and its tributary the Tuolumne River. (WR-7 ¶¶ 7-
24 8.) His written testimony provides a link to the webpage. (WR-7 ¶ 9.)

25 Fahey’s counsel requested everything supporting the ACLC. (Petruzzelli Decl., ¶
26 5.) In response, counsel for the Prosecution Team provided this link to Fahey’s counsel as
27 early as December 8, 2016 and explained that the website also included additional
28 information regarding the drought and the water supply and demand analysis. (Petruzzelli
Decl., ¶ 7.) The link was even included in the ACLC, which also describes the State Water

¹² Fahey’s counsel also objected to slide 18. The Prosecution Team did not use this slide in its rebuttal presentation, because Fahey never claimed he lacked the ability to pay the ACL penalty and did not offer any testimony to support such a claim. The Hearing Officers therefore struck slide 18.

1 Board's Watershed Analysis website and information available through that website.¹³
2 (WR-1, p. 4 ¶ 25; Petruzzelli Decl. ¶¶ 2-3.) The State Water Board served the ACLC on
3 Fahey on September 1, 2015. (WR-4.)

4 The Watershed Analysis website, including the San Joaquin River Basin web
5 page, is publicly accessible. (Petruzzelli Decl., ¶ 7; Hrg. Trns. (Jan. 26, 2016), pp. 4:5-9,
6 13:8-24; 15:16-24.) It is proper for official notice by the Hearing Officers pursuant to the
7 State Water Board's regulations. In addition, Mr. Fahey and his counsel had over four
8 months to visit the State Water Board Watershed Analysis website where they could have
9 easily found the Tuolumne River analysis. Nonetheless, Fahey's counsel claims that Mr.
10 Fahey checked the website and could not find the document. (Hrg. Trans. (Jan. 26,
11 2016), p. 7:11-18.) Interestingly, Fahey's counsel did not state that counsel could not find
12 the document. (*Id.*) The map and the charts on slides 3-5 were easily discoverable by
13 anyone with reasonable effort that is, by following the internet link provided. (Petruzzelli
14 Decl., ¶ 20.) The map and charts in slides 3-5 are admissible by official notice pursuant to
15 State Water Board regulations and as rebuttal evidence pursuant to the Hearing Notice.

16 **B. The Prosecution Team Was Not Obligated to Disclose WR-153 Before**
17 **the Hearing**

18 The Hearing Notice provided that parties could introduce additional evidence on
19 rebuttal. (WR-6, p. 6.) The January 21, 2016 Order, consistent with the Hearing Notice,
20 only applied to the case in chief and did not apply to exhibits properly submitted as
21 rebuttal evidence. (Hrg. Trns. (Jan. 26, 2016), p. 1:10-13.) The map and charts contained
22 in slides 3-5 were not part of the Prosecution Team's case in chief. (Hrg. Trans. (Jan. 26,
23 2016), p. 5:17-18:5; see also WR-7 ¶¶ 7-12; WR-42; WR-43.) Rather, they were
24 introduced as rebuttal evidence. The Hearing Notice therefore permitted the Prosecution
25 Team to introduce the map and charts in slides 3-5 as rebuttal evidence and did not
26 require the Prosecution Team to produce this evidence sooner. Fahey's objection is
27 without merit and the entire presentation (other than slide 18) is admissible.
28

¹³ Paragraph 25 in the ACLC states "The State Water Board consistently adjusts the water availability and demand analyses based on new information obtained from stakeholders, or adjustments to projected flows from the DWR. State Water Board staff reviews this information and provides revisions to its data set and graphs that are all shown on the Watershed Analysis website (http://www.waterboards.ca.gov/waterrights/water_issues/programs/droughUanalysis/)." (WR-1, p. 4 ¶ 25.)

1 **V. PROSECUTION TEAM EVIDENCE OBJECTIONS.**

2 **A. Testimony of Mr. Gary Player is not Authenticated**

3 All writings must be authenticated before they are received into evidence and
4 before secondary evidence of its content may be received into evidence. (Evid. Code §
5 1401.) Evidence must establish a document’s authenticity for that writing to be admissible.
6 (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 321; *Interinsurance Exchange v. Velji*
7 (1975) 44 Cal.App.3d 310, 318.) Authenticating a writing requires introducing evidence
8 sufficient to sustain a finding that the writing is what the proponent of the evidence claims
it is or establishing such facts by other means provided by law. (Evid. Code § 1400.)

9 Fahey Exhibit 73 is the “Expert Witness Testimony of Gary F. Player” and Fahey
10 Exhibit 74 is the “Statement of Qualifications of Gary F. Player with Resume.” Mr. Player
11 did not testify at the hearing on January 25-26, 2016. (Petruzzelli Decl. ¶ 23.) This
12 testimony was therefore not authenticated. The Hearing Officers should not accept it into
evidence and strike it from the record.

13 Mr. Player’s written statement supports Mr. Fahey’s assertion that Dr. Ross
14 Grunwald’s analysis is “professional, technically competent, and an accurate portrayal of
15 the quality, quantity, and type of water diverted by [Fahey’s] system.” (Fahey 1, p. 5.)
16 Since this statement lacks foundation the Hearing Officers should strike it from the record.

17 **B. Fahey’s Hearsay Testimony is Insufficient to Support Findings**

18 Hearsay evidence is evidence of a statement that was made other than by a
19 witness while testifying at the hearing and that is offered to prove the truth of the matter
20 stated. (Evid. Code, § 1200, subd. (a).) In administrative proceedings, over timely
21 objection hearsay evidence shall not be sufficient in itself to support a finding unless it
would be admissible over objection in a civil proceeding. (Govt. Code § 11513, subd. (d).)

22 **1. Fahey Testimony Regarding Statements by Turlock Irrigation**
23 **District Telling Him Not to Contact Them**

24 During the hearing, the Prosecution Team objected on the basis of hearsay to
25 testimony by Mr. Fahey that Leroy Kennedy, a person allegedly from Turlock Irrigation
26 District, told Mr. Fahey not to contact the Districts or San Francisco regarding Fahey’s
replacement water obligations. (Hrg. Trns. (Jan. 25, 2016), pp. 158:25-160:4.)

27 Mr. Kennedy was not present and his identity was not disclosed until the hearing.
28 Fahey’s testimony regarding Mr. Kennedy’s statement is testimony regarding an out of

1 court statement. Inasmuch as Fahey seeks to use it to prove he was not required to
2 provide replacement water under Permit 20784 Terms 19 and 20 or under Permit 21289
3 Terms 11 and 34 it goes to the truth of the matter asserted and therefore constitutes
4 hearsay. The Prosecution Team objected to this statement before submitting the case and
5 therefore objected timely. (Hrg. Trns. (Jan. 25, 2016), p. 159:13-18.) No other evidence,
6 hearsay or otherwise, supports Fahey's testimony that the Districts told him not to contact
7 them. (Hrg. Trns. (Jan. 25, 2016), p. 238:24-239:23.) There is also no evidence that Mr.
8 Kennedy had the authority to speak for Turlock Irrigation District, let alone Modesto
9 Irrigation District or San Francisco. Mr. Kennedy's statements cannot support a finding
10 that Fahey complied with his permit obligations.

11 **2. Fahey Testimony Regarding Statements By State Water Board** 12 **Staff About Developed Water**

13 During the hearing, Fahey testified that "Bill Van Dyke," a staff person for the
14 Division, told him about developed water. (Hrg. Trns. (Jan. 26, 2016), pp. 102:13-104:12.)
15 Fahey also testified that Mr. Van Dyke told him to report his surface water diversions up to
16 the maximum and anything over that as developed water. (Hrg. Trns. (Jan. 26, 2016), pp.
17 104:4-12.) Mr. Van Dyke was not present at the hearing. It is unclear who Mr. Van Dyke
18 was, what his position was at the State Water Board, or whether he had the authority and
19 expertise to make such representations to Fahey. Furthermore, since this evidence was
20 not disclosed before the hearing, the Prosecution Team did not have an opportunity to
21 subpoena Mr. Van Dyke. As an out of court statement, Fahey's testimony about Mr. Van
22 Dyke's statement constitutes hearsay.

23 Fahey's permit file (Exhibit Staff-1) includes a letter, dated October 11, 1994, from
24 a "William Van Dyck," then an associate water resources engineer at the State Water
25 Board. (Petruzzelli Decl., p. ¶ 28-29, Attach. 6.) The letter references a meeting with Mr.
26 Fahey during a field investigation on September 29, 1994, but does not describe any of
27 the content or substance of discussions from that meeting. (*Id.*) At Mr. Fahey's request,
28 Mr. Van Dyck forwarded him a copy of a "legal counsel opinion on the need for a water
right to divert developed water" with the letter, but nothing is attached to the letter in the
permit file. The only legal opinion found during a search of Division files that addresses
developed water is a memorandum authored by Daniel Frink dated September 15, 1987.
(Petruzzelli Decl., p. ¶ 29 Attach. 6.) No other "legal counsel opinion" could have been
attached to Mr. Van Dyck's letter. Its omission from the permit file is clearly erroneous.

1 The only other reference to developed water in the permit file is a report documenting the
2 September 29, 1994 field investigation, noting a discussion during the field investigation
3 wherein “The concept of developed water was discussed as a possible means to avoid
4 infringement on prior rights at New Don Pedro Reservoir without having to provide
5 makeup water” and “Mr. Fahey was advised to keep good records of the flow rate for
6 different periods under natural conditions in order to establish a claim to developed water
through a horizontal boring(s).” (Petruzzelli Decl., p. ¶ 30 Attach. 7.)

7 Although there is non-hearsay evidence that a discussion occurred between Mr.
8 Van Dyck and Mr. Fahey about developed water, there is no non-hearsay evidence of the
9 content and nature of that discussion. Fahey’s testimony therefore cannot support a
finding that he has a right to divert developed water from the springs.

10 **VI. CONCLUSION**

11 Fahey has submitted substantial evidence, argument, and testimony asserting that
12 D995 is now obsolete and, as a result, Term 19 and his obligations under the 1992
13 Exchange Agreement should no longer apply. He also asserts he primarily diverts
14 groundwater. However, these are arguments that Fahey’s permits and permit terms
15 should be different, not that he unlawfully diverted water. This evidence, argument, and
16 testimony are procedurally improper and irrelevant to Key Issue 1.

17 In addition, WR-147 and the related testimony of Mr. Sam Cole is admissible. It
18 was submitted to attack Mr. Fahey’s credibility and to supplement and explain other
19 evidence. Since it was attorney work product and intended as rebuttal evidence, the
Prosecution Team was also not obligated to disclose WR-147 before the hearing.

20 WR-153 is also admissible. Fahey objected to slides 3-5, which contained a map
21 and two charts depicting supply and demand for the Tuolumne River in 2014 and 2015.
22 These are publicly available documents in the State Water Board’s possession and
23 subject to official notice and reference pursuant to the State Water Board’s regulations.
24 They were also properly submitted rebuttal evidence. The Prosecution Team was not
required to disclose the map and graphs depicted in slides 3-5 before the hearing.

25 Respectfully submitted,

26 

27 Kenneth Petruzzelli

OFFICE OF ENFORCEMENT

28 Attorney for the Prosecution Team

Service List
(November 13, 2015; Revised January 5, 2016)

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