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

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

2 G. Scott Fahey and Sugar Pine Spring Water, LP (collectively “Mr. Fahey” or  
3 “Fahey”) responded to the Hearing Officer’s request for supplemental briefing.

4 With regard to responding to the Prosecution Team’s Motion to Strike/Motion in  
5 Limine, Fahey’s arguments about the Raker Act, the Fourth Agreement, and the  
6 obsolescence of Water Right Decision 995 (“D995”) are not relevant to whether an  
7 unlawful diversion occurred, because they are not relevant to Fahey’s priority of right or  
8 the availability of water for his priority of right. The evidence, argument, and testimony are  
9 similarly irrelevant to whether Fahey has a right in addition to his permits that would have  
10 authorized his diversions, because none of the evidence, argument, and testimony are  
11 relevant to whether Fahey has a storage right or something similar. Fahey even  
12 acknowledged that he has no such right.

13 Fahey also asserts that the Prosecution Team improperly withheld Exhibit WR-147,  
14 but WR-147 and the associated testimony of Mr. Sam Cole was intended as rebuttal  
15 evidence and, until disclosed at the hearing, privileged as attorney work product. Fahey  
16 also objects to this evidence on the basis of hearsay, but WR-147 and Mr. Cole’s  
17 associated testimony are nonetheless admissible, because they supplement and explain  
18 other evidence. They are also submitted for the purpose of attacking Mr. Fahey’s  
19 credibility and not for the truth of the matter asserted.

20 Finally, Fahey objects to slides 3-5 that were included in Prosecution Team Exhibit  
21 WR-153 – the Prosecution Team’s rebuttal presentation. However, this evidence is  
22 admissible as properly submitted rebuttal testimony. Fahey also claims the Prosecution  
23 Team wrongfully withheld these documents, but contrary to Fahey’s assertions they were  
24 made available to him long before the hearing.

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

28 **A. None of the Disputed Evidence is Relevant to Whether an Unlawful  
Diversion Occurred, Because it Does Not Alter Fahey’s Priority of Right  
or the Availability of Water for His Priority of Right.**

In his Supplemental Evidence Brief, Fahey argues that his “correct interpretation”  
of how he must comply with his permits demonstrates he fit into the “available water”  
exception during the period water was not available for his priority of right. (Fahey’s

1 Supplemental Brief on Evidentiary Objections<sup>1</sup> (“Fahey Evid. Br.”), pp. 1, 9-10.) As the  
2 Prosecution Team explained in its Post-Hearing Evidence Brief however, nothing Fahey  
3 asserts with regard to the Raker Act, the Fourth Agreement, D995, or the “correct  
4 interpretation” of his permit terms affects his priority of right or the availability of water for  
5 his priority of right. (PT Evid. Br., pp. 1-12.)

6 Fahey’s arguments about the Raker Act, the Fourth Agreement, and his permit  
7 terms are straw men that only confuse the issues.<sup>2</sup> Fahey does not explain how the Raker  
8 Act or the Fourth Agreement would affect his priority of right or the availability of water for  
9 his priority of right. He alleges that the Raker Act and Fourth Agreement “altered” Water  
10 Right Decision 1594 (“D1594”) and D995, but D995 and D1594 are only relevant to fully  
11 appropriated stream (“FAS”) determinations, which have nothing to do with Fahey’s  
12 priority of right or the availability of water for his priority of right. Fahey also cites no order  
13 or decision of the State Water Board rescinding or modifying the FAS determinations for  
14 the San Joaquin River and Tuolumne River. Terms 19 and 20 in Permit 20784 or Term 34  
15 in Permit 21289, all of which require Fahey to maintain and comply with the 1992  
16 Exchange Agreement, allow Fahey to divert water during the FAS by means of a physical  
17 solution, but a physical solution cannot affect his priority of right. (PT Evid. Br., p. 4;  
18 Fahey-44; see *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250.)  
19 Regardless, Fahey cannot contest the FAS determinations in the current proceeding,  
20 because it has not been noticed as a FAS proceeding pursuant to Water Code section  
21 1205. (PT Evid. Br., pp. 4-5.) He cites no statute or other authority that would authorize  
22 the State Water Board to modify or rescind a FAS determination outside of a properly  
23 noticed FAS proceeding.

24 Fahey’s evidence, argument, and testimony regarding his “correct interpretation” of  
25 his permits based the Raker Act, the Fourth Agreement, D995, and D1594 is irrelevant to  
26

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27 1

28 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/fahey\\_faheysuppbrief041116.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_faheysuppbrief041116.pdf)

<sup>2</sup> Fahey’s portion of the post-hearing evidence brief appears copied from his opposition to the Prosecution Team’s Motion to Strike/Motion in Limine. It even describes oral testimony that Fahey “will” make at the hearing as an offer of proof. (Fahey Evid. Br., p. 7:14-17.) Fahey clearly does not take this issue seriously and is only using these arguments to sow confusion.

1 Key Issue 1(a) – whether Fahey diverted water under his permits when water was  
2 unavailable for diversion under his priority of right.

3 **B. None of the Disputed Evidence is Relevant to Whether Fahey Has a**  
4 **Water Right in Addition to His Permits That Would Have Authorized His**  
5 **Diversions.**

6 With respect to Key Issue 1(b), none of the evidence the Prosecution Team  
7 objected to in its Pre-Hearing Motion to Strike/Motion in Limine would establish that Fahey  
8 holds or claims any water rights other than his permits that would authorize the diversions.

9 Neither of Fahey’s permits grants him a storage right or the equivalent. (WR-15,  
10 16; Hrg. Trns. (Jan 25, 2016), p. 100:19-22, 124:19-124:17.) Neither do his permits modify  
11 the rights for New Don Pedro in manner allowing him to store water in New Don Pedro for  
12 use in subsequent seasons. (Hrg. Trns. (Jan 25, 2016), p. 125:20-126:1.) Terms 19 and  
13 20 in Permit 20784 and Term 34 in Permit 21289 both require Fahey to maintain and  
14 comply with the 1992 Exchange Agreement. (WR-15: WR-16; WR-9, p. 4 at ¶ 20, pp. 5 at  
15 ¶ 25, pp. 5-6 at ¶ 28; Hrg. Trns. (Jan. 25, 2016), pp. 45:19-46:2, 48:21, 49:3-22.) The  
16 1992 Exchange Agreement allows him to “build a surplus prior to the period of  
17 unavailability,” but specifically states “no carryover will be allowed to subsequent years.”  
18 (WR-19.) The 1992 Exchange Agreement further states that “Fahey shall not accrue any  
19 interest in the Districts’ water rights by virtue of this Agreement” and “Nothing contained  
20 herein shall be construed as a grant of water rights or an interest in the Districts’ water  
21 rights.” (*Id.*) Term 20 in Permit 20784 and Term 34 in Permit 21289 also state that  
22 “Replacement water may be provided in advance and credited to future replacement  
23 water requirements.” (WR-15, 16.) However, since the permits themselves do not  
24 authorize storage, this clause cannot be read to entitle Fahey to water he diverts into New  
25 Don Pedro for his use in subsequent years. (Hrg. Trns. (Jan 25, 2016), p. 125:20-126:2-6,  
26 138:4-11.) Any “credit” or surplus he retains at the end of a year is lost.

27 On cross-examination, Fahey did not disagree, acknowledging that -

- 28 • He has no water right for storage. (Hrg. Trns. (Jan. 25, 2016), p. 181:23-25.)
- His permits do not authorize storage. (Hrg. Trns. (Jan. 25, 2016), p. 181:18-22.)
- He has no storage right for New Don Pedro. (Hrg. Trns. (Jan. 25, 2016), pp. 174:8-10, 182:1-4.)

- 1 • He has no agreement with the Districts or with San Francisco allowing him to store  
2 water in New Don Pedro for his use in subsequent years. (Hrg. Trns. (Jan. 25,  
3 2016), p. 182:5-8.)
- 4 • He has not submitted any evidence into the record documenting any accounting  
5 method used by the Districts or with San Francisco that would reflect an  
6 entitlement for him to divert water into New Don Pedro and use it in subsequent  
7 years. (Hrg. Trns. (Jan. 25, 2016), pp. 182:9-183:1.)
- 8 • Under the 1992 Exchange Agreement with the Districts, he cannot carry over any  
9 surplus water he diverts into New Don Pedro to a subsequent season. (Hrg. Trns.  
10 (Jan. 25, 2016), pp. 187:2-4.)
- 11 • Under the 1992 Exchange Agreement with the Districts, he is not entitled to any  
12 interest in the Districts' water rights, including the right to store water in New Don  
13 Pedro. (Hrg. Trns. (Jan. 25, 2016), pp. 187:5-10.)
- 14 • He never communicated with the Districts or with San Francisco with regard to his  
15 diversions prior to his June 3, 2014 letter. (Hrg. Trns. (Jan. 25, 2016), p. 183:17-  
16 21.)
- 17 • During the year he does not tell the Districts when he diverts water or how much  
18 water he diverts. (Hrg. Trns. (Jan. 25, 2016), p. 184:8-10.)

19 In short, Fahey acknowledged that he has no right to divert water into New Don Pedro  
20 and use it in subsequent years. The contrary would require granting him the equivalent of  
21 a storage right in New Don Pedro, a reservoir he does not own, and interfere with the  
22 water rights of the Districts and San Francisco, something his permits prohibit and  
23 something Fahey states he cannot do and does not wish to do. (WR-15 at ¶¶ 15, 20; WR-  
24 16 at ¶ 33, Hrg. Trns. (Jan. 25, 2016), pp. 95:9-13, 105:1-7; 152:1-12; 228:15-17.) He is  
25 also not a party to the Fourth Agreement. (Fahey-77; 63 Cong. Ch. 4, December 19,  
26 1913, 38 Stat. 242; Fahey-79.) The evidence, argument, and testimony the Prosecution  
27 Team objected to in its Pre-Hearing Motion to Strike/Motion in Limine are not relevant to  
28 whether Fahey has any water rights in addition to his permits that would have authorized  
his diversions. They are therefore irrelevant to Key Issue 1(b).

The disputed evidence does not otherwise establish that Fahey has any other right  
to wheel water into New Don Pedro and keep it there until he needs it. It is therefore also  
irrelevant to Key Issue 1(c).

1                   **C. Fahey’s Groundwater Arguments Are Irrelevant to Key Issue 1,  
2 Because His Rights Exclude Groundwater**

3                   With respect to groundwater, Fahey argues the evidence is relevant to “licensing”  
4 to establish that the water he wheeled into New Don Pedro Reservoir in 2009-2011  
5 covered all of his water diversions during the period of unavailability and FAS period.  
6 (Fahey Evid. Br., pp. 1, 10-11.) However, as the Prosecution Team explains in its Post-  
7 Hearing Evidence Brief, Fahey’s permits, in establishing that the springs are tributaries to  
8 the Tuolumne River, preclude any groundwater right associated with the springs  
9 independent of any water tributary to the Tuolumne River. (PT Evid. Br., pp. 8-10.) Fahey  
10 and his consultant Dr. Ross Grunwald even acknowledged that, although the springs  
11 appear to draw groundwater, additional studies are necessary to determine how much  
12 groundwater they draw. (Fahey 71, p. 2; Hrg. Trns (Jan. 25, 2016), p. 242:12-244:5.)  
13 Fahey’s testimony is therefore irrelevant as to “licensing.”

14                   **D. “Good faith” is Irrelevant to Whether a Trespass Occurs Under Water  
15 Code Section 1052**

16                   Fahey also asserts that his “correct interpretation” of how he must comply with his  
17 permits is relevant to show he acted in good faith. (Fahey Evid. Br., pp. 1, 10-11.)  
18 Although Water Code section 1055.3 requires consideration of all relevant factors in  
19 determining the amount of administrative civil liability (“ACL”), whether a diverter acts in  
20 “good faith” is not relevant to whether a trespass occurs under Water Code section 1052,  
21 which provides that “the diversion or use of water subject to [Division 2] other than as  
22 authorized in this division is a trespass.” Nothing in Division 2 of the Water Code  
23 recognizes “good faith” or allows an appropriation based on “good faith.” Fahey’s “good  
24 faith” is therefore irrelevant to Key Issue 1.

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

26                   **A. The Prosecution Team Was Not Required to Disclose WR-147 Before  
27 the Hearing.**

28                   Fahey’s counsel objected to the WR-147 and the related testimony of Mr. Sam  
Cole on the basis that the Prosecution Team did not disclose it before the hearing. (Hrg.  
Trans. (Jan. 25, 2016), pp. 133:8-15, 147:9-14; Hrg. Trans. (Jan. 26, 2016), p. 2:21-3:7;  
Fahey Evid. Br., pp. 11-13.) However, the Prosecution Team had no such obligation.

As explained in the Prosecution Team’s Post-Hearing Evidence Brief, WR-147 was  
prepared after the Prosecution Team submitted its case in chief and was intended as

1 rebuttal evidence. (PT Evid. Br., pp. 12-14.) The Hearing Notice, which set forth the  
2 procedures for the hearing, specifically allowed the parties to introduce new evidence on  
3 rebuttal. (WR-6, p. 6 [“Rebuttal evidence is new evidence used to rebut evidence  
4 presented by another party... Rebuttal testimony and exhibits need not be submitted prior  
to the hearing.”].)

5 In addition, the *Hearing Officers' Partial Ruling on Prosecution Team's December*  
6 *10 and December 11 Motions for Protective Order or, Alternately, Motions to Quash:*  
7 *Fahey's Opposition; and Fahey's December 18 Motion to Compel Depositions and*  
8 *Document Disclosures*<sup>3</sup> (“January 21, 2016 Order”) only applied to the case in chief.  
9 (January 21, 2016 Order, p. 10; Hrg. Trns. (Jan. 26, 2016), p. 1:10-13.) Consistent with  
10 the hearing procedures set forth in the Hearing Notice, it did not require disclosure of  
11 evidence potentially intended for rebuttal. (*Id.*) Since WR-147 was prepared after the  
12 Prosecution Team submitted its case in chief, it was not used to prepare any of the  
testimony, conclusions, or reports for the case in chief.

13 The January 21, 2016 Order also did not require the Prosecution Team to disclose  
14 anything privileged. (*Id.* [“The Prosecution Team's motion is also granted for those  
15 documents to which the attorney-client communications privilege or the attorney work  
16 product privilege actually applies and has not been waived.”].) WR-147 was attorney work  
17 product and therefore privileged. (PT Evid. Br., pp. 14-15.) Until the Prosecution Team  
18 chose to waive that privilege, it had every right not to disclose WR-147. The Prosecution  
Team was therefore not required to disclose WR-147 before the hearing.

19 **B. WR-147 and the Related Testimony is Admissible.**

20 Fahey's counsel also objected to WR-147 and the associated testimony of Mr. Cole  
21 and Ms. Katherine Mrowka on the basis of hearsay. Hearsay is evidence of a statement  
22 that was not made by a witness while testifying at the hearing and is offered to prove the  
23 truth of the matter asserted. (Evid. Code, § 1200, subd. (a).) In an administrative hearing,  
24 hearsay is admissible to supplement or explain other evidence and, on its own, may  
25 support a finding if it would be admissible over objection in a civil action. (Gov. Code §  
11513, subd. (d).) In a civil action, hearsay evidence is admissible to attack the credibility

26 \_\_\_\_\_  
27 <sup>3</sup>See  
28 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/fahey\\_proceduralruling012116.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_proceduralruling012116.pdf)



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

3 WR-147 and Mr. Cole's testimony was intended to supplement and explain Mr.  
4 Fahey's statement in his e-mail referencing New Don Pedro operating to avoid overflow  
5 and Fahey's other statements that any water he diverted into New Don Pedro would have  
6 been lost if New Don Pedro spilled. (PT Evid. Br., pp 13-14; Hrg. Trns. (Jan. 25, 2016),  
7 pp. 132:11-133:24<sup>4</sup>, 142:16-146:16<sup>5</sup>.) This evidence would explain and supplement  
8 Fahey's previous statement acknowledging that New Don Pedro was operating to avoid  
9 overflow to attack the credibility of his later statement that he still had water available in  
10 New Don Pedro to offset his diversions in 2014 and 2015. (*Id.*) Since the purpose of WR-  
11 147 and Mr. Cole's related testimony was to attack Mr. Fahey's credibility and not for the  
12 truth of the matter asserted, it is admissible over objection in a civil proceeding.  
13 Consequently, WR-147 and the related testimony of Mr. Cole may be used to supplement  
14 or explain other evidence in the record.

15 Ms. Mrowka referenced spills by New Don Pedro in response to cross-examination  
16 questions by Fahey's counsel. (Hrg. Trns. (Jan. 25, 2016) p. 141:4-7<sup>6</sup>, 142:1-2<sup>7</sup>.) The  
17 questions asked whether downstream water right holders could be harmed if Fahey  
18 provided water in advance and if Fahey had no control over storage releases. (*Id.*) Other  
19 parts of her responses to cross-examination questions do not reference New Don Pedro  
20 spilling and are not subject to Fahey's objection. Ironically, this line of questioning by  
21 Fahey's counsel is irrelevant. Fahey claims harm is a required element of the Prosecution  
22 Team's case in chief. (Fahey Evid. Br., p. 13:12-16.) This is incorrect. Water Code section  
23 1052 requires no such element to prove a trespass. (Water Code § 1052, subd. (a).) The  
24 unauthorized diversion or use of water is a trespass against the state and is subject to

25 \_\_\_\_\_  
26 <sup>4</sup> Testimony by Mr. Cole on redirect, with the objection by Mr. Hansen, Fahey's attorney.

27 <sup>5</sup> Cross-examination testimony by Mr. Cole in response to questions from Fahey's attorney regarding the  
28 "Alleged Spill Testimony."

<sup>6</sup> In response to a cross-examination question from Fahey's counsel with regard to whether a downstream  
water right holder could be harmed if Fahey provided replacement water in advance, Ms. Mrowka replied  
"It's my understanding that the water was no longer resident in the facility. As you heard Mr. Cole testify,  
there were events, spill events. The water was not there, number one." (Hrg. Trns. (Jan. 25, 2016) p. 141:4-  
7.)

<sup>7</sup> On cross-examination, Fahey's counsel asking whether a downstream water right holder could be harmed  
by Fahey's actions if Fahey has no control over when water leaves New Don Pedro. (Hrg. Trns. (Jan. 25,  
2016), p. 141:20-25.) Ms. Mrowka responded "The -- in my opinion, the water isn't there. We had the spill  
events." (Hrg. Trns. (Jan. 25, 2016), p. 142:1-2.)

1 penalty as defined in Water Code section 1052. (*People v. Shirokow* (1980) 26 Cal.3d  
2 301, 304; Water Code § 1052, subd. (c).) Common law definitions of trespass do not  
3 apply and no specific showing of harm against a specific party is required. (see Hrg. Trns.  
4 (Jan. 2016), pp. 129:8-130:9.)

4 **IV. REBUTTAL EXHIBIT WR-153 AND RELATED TESTIMONY IS ADMISSIBLE**  
5 **AND THE PROSECUTION TEAM WAS NOT OBLIGATED TO DISCLOSE WR-**  
6 **153 BEFORE THE HEARING.**

6 In his Post-Hearing Evidence Brief, Fahey objects to the entirety of WR-153 and  
7 related testimony regarding the Tuolumne River watershed analysis. (Fahey Evid. Br., pp.  
8 18-19.) However, the post-hearing brief only addresses issues regarding testimony and  
9 evidence related to the Tuolumne River watershed analysis. (*Id.*) Furthermore, at the  
10 hearing Fahey only objected to slides 3-5, which contained a slide of the Tuolumne River  
11 watershed and a graphical depiction of the water supply and demand for the Tuolumne  
12 River watershed for 2014 and 2015.<sup>8</sup> (Hrg. Trns. (Jan. 26, 2016), pp. 1:22-2:16;  
13 Petruzzelli Decl., ¶ 15.) Fahey therefore does not dispute anything in WR-153 other than  
14 slides 3-5 and testimony related to those slides.

14 The Prosecution Team relied on the San Joaquin River Basin supply and demand  
15 analysis for its case in chief. (WR-7, pp. 2-3 at ¶¶ 7-11; WR-42, 43; Hrg. Trns. (Jan. 25,  
16 2016), pp. 52:17-53:11.) Since the Tuolumne River is in the San Joaquin River Basin, the  
17 analysis for the San Joaquin River Basin included the analysis for the Tuolumne River.  
18 (WR-153, slides 3-5; Hrg. Trns. (Jan. 25, 2016), pp. 54:1-9, 88:18-22; Hrg. Trns. (Jan. 26,  
19 2016), pp. 12:5-11.) It included both the supplies and demands for the Tuolumne River  
20 and senior demands downstream in the San Joaquin River Basin. (*Id.*) This included  
21 Fahey's diversion. (*Id.*) Since the State Water Board informed diverters with rights as  
22 senior as 1903 that water was unavailable for their rights at their priorities, Fahey lacked  
23 supply for his 1991 and 2011 rights. (WR-9, p. 6 at ¶ 34; WR-7, p. 3 at ¶ 11.) The  
24 Prosecution Team later submitted the Tuolumne River analysis as rebuttal evidence to  
25 address Fahey's assertion that, even though he diverts from the San Joaquin River Basin,  
26 that the San Joaquin River Basin analysis failed to depict supply and demand at his point

26 \_\_\_\_\_  
27 <sup>8</sup> Fahey also objected to WR-153, slide 18, on the basis that it was not presented. Since Fahey did not  
28 dispute his ability to pay to pay, the Prosecution Team did not need to present slide 18 and therefore did not  
dispute Fahey's objection to that slide.

1 of diversion. (WR-9, pp. 9, 6-7 at ¶¶ 34.) Since the Tuolumne River analysis was based  
2 on flows gaged at LaGrange Dam, immediately downstream from New Don Pedro, and  
3 similarly showed insufficient supply for rights with much more seniority than Fahey, it  
4 similarly showed that water was unavailable for Fahey’s rights. (Hrg. Trns. (Jan. 26,  
5 2016), pp. 12:5-13:5, 134:6-7, 134:25-135:2.) Slides 3-5 were properly submitted rebuttal  
6 evidence and admissible.

7 The Prosecution Team did not withhold the content of slides 3-5. It made the map,  
8 watershed analyses, and supporting information available before the hearing. As  
9 described in great detail in the Prosecution Team’s Post-Hearing Evidence Brief, the  
10 Tuolumne River watershed analysis information and supporting data was available on the  
11 State Water Board watershed analysis webpage. (PT Evid. Br., pp. 15-17.) The link was  
12 included in the ACL complaint (“ACLC”) and then again provided by electronic mail in  
13 response to Fahey’s document request. (*Id.* at 16-17, Declaration of Kenneth Petruzzelli  
14 in Support of Post-Hearing Evidence Brief (“Petruzzelli Decl.”), p. 2 at ¶¶ 2, 7.) The  
15 Prosecution Team’s counsel even directed Fahey’s counsel to the watershed analysis  
16 webpage in discussions on the telephone and described the nature of information  
17 available through the website. (Petruzzelli Decl., p. 2 at ¶ 6.)

18 The Prosecution Team response cited by Fahey mischaracterizes the Prosecution  
19 Team’s position, as the Prosecution Team was responding specifically to a request for  
20 documents supporting the ACLC. (Petruzzelli Decl., Attach. 1.) The Prosecution Team  
21 also responded to a subsequent question about the San Joaquin River Basin watershed  
22 analysis referenced in the ACLC by directing Fahey’s counsel to the watershed analysis  
23 webpage and explaining supporting datasets and analysis were also available through the  
24 webpage, stating –

25 The “graphical summations” referenced in Item 26, pages 4 through  
26 5, of the ACL complaint are available on the State Water Board’s  
27 “Watershed Analysis” webpage at  
28 [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/analysis/](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/), along with supporting datasets and analysis. Another  
water supply graph is available on the “Notices of Water Availability”  
webpage under “San Joaquin River Watershed” for April 23, 2015 at  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/docs/water\\_availability/sjglobal\\_apr212015.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/water_availability/sjglobal_apr212015.pdf).

(Petruzzelli Decl., Attach. 1.)

Fahey and his attorneys had over four months to find the map and charts in slides

1 3-5 on the webpage. The information could have been found easily with any reasonable  
2 effort. Fahey's attorneys allege *Fahey* could not find the Tuolumne River watershed  
3 analysis, but they do not allege that *they* could not find it.

4 Finally, the January 21, 2016 Order only applied to the case in chief. (January 21,  
5 2016 Order, p. 10; Hrg. Trns. (Jan. 26, 2016), p. 1:10-13.) It did not apply to anything the  
6 Prosecution Team potentially would have submitted on rebuttal. (*Id.*) It also did not  
7 require the Prosecution Team to disclose documents it had already disclosed or otherwise  
8 made available, which with respect to the content in slides 3-5 it already had.

9 WR-153, including slides 3-5 and related testimony, is admissible.

## 10 **V. CONCLUSION**

11 Fahey's arguments about the Raker Act, the Fourth Agreement, and D995's  
12 obsolescence are not relevant to whether an unlawful diversion occurred, because they  
13 are not relevant to his priority of right or whether water was available for his priority of  
14 right. They are also not relevant to whether Fahey had an additional right that would have  
15 authorized his diversions, because none of them establish any additional right such as a  
16 storage right or the equivalent. Fahey even denied having such a right.

17 WR-147 and the associated testimonies of Sam Cole and Kathy Mrowka are also  
18 admissible and were not wrongfully withheld. WR-147 and Mr. Cole's testimony  
19 supplements and explains other evidence for the purpose of attacking Mr. Fahey's  
20 credibility. In addition, as rebuttal evidence the Prosecution Team was not required to  
21 disclose WR-147 with its case in chief and, as attorney work product WR-147 was  
22 privileged until the Prosecution Team chose to waive that privilege by disclosing WR-147.

23 Finally, WR-153, including slides 3-5, is admissible. It was rebuttal evidence and  
24 properly submitted as rebuttal in response to Fahey's assertions that the San Joaquin  
25 River Basin watershed analysis failed to depict the supply and demand at his point of  
26 diversion. Fahey claims the Prosecution Team also wrongfully withheld these documents,  
27 but they were made available to Fahey long before the hearing. They were not withheld.

28 Respectfully submitted,



29 Kenneth Petruzzelli  
30 **OFFICE OF ENFORCEMENT**  
31 Attorney for the Prosecution Team

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

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