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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 RESPONSE TO PROSECUTION  
TEAM'S OBJECTION TO DECLARATION  
OF GLEN HANSEN IN SUPPORT OF  
FAHEY'S CLOSING BRIEF**

1 G. Scott Fahey and Sugar Pine Spring Water, LP (collectively “Fahey”) submits the  
2 following response to the Prosecution Team’s Objection To Declaration Of Glen Hansen In  
3 Support Of Fahey’s Closing Brief (“Objection”).

4 **I. The Prosecution Team Wrongly Withheld Documents From Fahey That Were**  
5 **Timely Demanded In Discovery Requests, And The Prosecution Team Does Not**  
6 **Deny That.**

7 The Prosecution Team refuses to accept any responsibility for its failure to timely disclose  
8 the relevant documents that Fahey demanded in discovery requests served on the Prosecution  
9 Team on December 1, 2015. Incredibly, the Prosecution Team argues that *Fahey* should be  
10 blamed for that error on the part of the Prosecution Team: “Fahey had opportunity at the hearing  
11 to argue that the Prosecution Team’s failure to disclose *those* documents at that time prejudiced  
12 him. He did not raise that argument.” But how was Fahey supposed to know the nature (let  
13 alone the prejudice to him) of documents that were being concealed by the Prosecution Team  
14 during the Hearing when Fahey had no way of knowing the existence and contents of those  
15 documents? The error lies in (a) the Prosecution Team’s improper treatment of Category 3 as  
16 only a Public Records Act request (when it was served as a demand for production of documents)  
17 and (b) its wrongful delay in produced the responsive documents until well after the Hearing.

18 The Prosecution Team also makes the circular argument that these documents, which  
19 Fahey demanded in pre-hearing discovery requests, are not necessary because Fahey could have  
20 obtained the same evidence in “discovery through pre-hearing discovery motions and through  
21 cross-examination at the hearing.” (Objection, 3:3-5.) In other words, the Prosecution Team  
22 makes the nonsensical arguments (1) that these documents that Fahey sought in discovery could  
23 have obtained in discovery; and (2) that cross-examination at the hearing (which was not possible  
24 because Fahey did not know of the existence of the documents and did not have the evidence  
25 within such documents available for cross-examination) could have revealed the evidence in  
26 those documents. The Prosecution Team must be held accountable for denying Fahey the  
27 opportunity to enter these relevant documents into evidence, and denying Fahey the opportunity  
28 to cross-examine the Prosecution Team’s witnesses with these documents, all in violation of  
Fahey’s constitutional due process rights.

1 **II. The Prosecution Team Simply Ignores The Fact That Its Withholding Of The**  
2 **Documents From Fahey Until After The Hearing Warrants Dismissal Of This**  
3 **Action.**

4 The Prosecution Team mischaracterizes Mr. Hansen's Declaration and the attached  
5 documents. The Prosecution Team states that the documents attached to Mr. Hansen's  
6 Declaration are "documents offered as evidence," that Mr. Hansen's Declaration with attached  
7 documents constitutes "Fahey's offer of evidence," that "Fahey offers Exhibits 1 and 2 to support  
8 certain assertions," and that such documents "should not be admitted into evidence." (Objection,  
9 2:3-6, 3:2-3.) But that characterization purposefully ignores the stated basis of Mr. Hansen's  
10 Declaration and the attached documents: *Dismissal of this action*. On page 25 of his Closing  
11 Brief, Fahey explained: "[T]he Prosecution Team's conduct, including ... its withholding of  
12 relevant documents until three months after the Hearing, *constitutes multiple violations of*  
13 *Fahey's constitutional due process rights.*" (Emphasis added.) Fahey similarly stated on page 1  
14 of his Closing Brief: "[T]he manner in which the Prosecution Team ... withheld relevant  
15 documents from Fahey until three (3) months after the close of the Hearing, *violates Fahey's*  
16 *constitutional due process rights. Accordingly, the ACL/CDO must be denied and dismissed in*  
17 *their entirety.*" (Emphasis deleted, in part, and added, in part.) Fahey again explained the  
18 significance of withholding those documents in heading "II" on page 1 of his Closing Brief:

19 **THESE PROCEEDINGS SHOULD BE DISMISSED. THREE**  
20 **MONTHS AFTER THE EVIDENTIARY HEARING, THE**  
21 **PROSECUTION TEAM FINALLY PRODUCED RELEVANT**  
22 **BOARD DOCUMENTS IN RESPONSE TO FAHEY'S DEMANDS**  
23 **OF DECEMBER 1, 2015. THAT DELAY PREJUDICED FAHEY**  
24 **BY PREVENTING HIM FROM DIRECTLY REFUTING THE**  
25 **PROSECUTION TEAM'S TESTIMONY ON KEY ISSUES WITH**  
26 **THOSE NEW DOCUMENTS. [Bold in original.]**

27 Tellingly, the Prosecution Team offers no argument regarding Fahey's position that withholding  
28 those documents "alone, *warrants a dismissal of the ACL/CDO on fundamental due process*  
*grounds.*" (Fahey's Closing Brief, 4:4-7.) The Prosecution Team falsely treats Mr. Hansen's  
Declaration as an untimely offer of evidence rather than an argument for dismissal of this action  
on constitutional due process grounds. Fahey was denied the opportunity to seek admission of the  
documents into evidence, and then to use those documents in his cross-examination at the Hearing.

1 **III. Contrary To The Prosecution Team’s Arguments, The Documents Recently**  
2 **Produced By The Prosecution Team Are Highly Relevant To Rebutting The**  
3 **Positions That Have Been Taken By The Prosecution Team In This Proceeding.**

4 Doubling down on its erroneous decision in December 2015 to declare that everything  
5 Fahey demanded in Category 3 of his document demands “did not relate to the Fahey ACL  
6 proceeding” (Objection, 1:21-22), the Prosecution Team again argues that “Exhibit 1 and 2 are  
7 not relevant for Fahey’s. [Sic]” (Objection, 3:2.) But there are two errors in that argument.

8 First, the Prosecution Team did not have the legal right to deny discovery simply because  
9 the Prosecution Team stated the documents are not relevant. Fahey was entitled to discovery of  
10 matters that are “either in itself admissible in evidence *or appears reasonably calculated to lead*  
11 *to the discovery of admissible evidence.*” (Code Civil. Proc., §2017.010 (emphasis, bold added).)

12 Second, if Fahey had been able to present the evidence in the documents at the Hearing,  
13 then he could have shown how this evidence is relevant. The Prosecution Team’s relevancy  
14 arguments in its Objection are wrong for the following three (3) reasons:

15 A. The Prosecution Team’s argument—that “the issue in the present proceeding with  
16 respect to Water Code section 1055.3 is whether Fahey’s diversions caused harm, not whether  
17 another diversion causes harm” (Objection, 2:8-10)—fundamentally misrepresents a key issue in  
18 this case. For example, as shown on page 2 of Fahey’s Closing Brief, the documents withheld by  
19 the Prosecution Team relating to the City of Portola’s water permit A017069 demonstrate that the  
20 Board has a fixed policy of developed springs on National Forest lands that directly contradicts  
21 the Prosecution Team’s legal position in this proceeding, especially the testimony of Kathy  
22 Mrowka. (R.T., Jan. 25, 2016, 128:16-22; WR-9, ¶35.) Also, as shown on page 3 of the Fahey’s  
23 Closing Brief, those documents present the ‘legal authority’ articulated by the Prosecution  
24 Team’s own John O’Hagen (which is also a binding party admission) that the Prosecution Team  
25 has the burden of overcoming the presumption that Fahey’s groundwater is developed water.  
26 That evidence not only contradicts the Prosecution Team’s position in this case, but it highlights  
27 the Prosecution Team’s failure to overcome that presumption at the Hearing. Thus, the  
28 Prosecution Team’s conduct in withholding the documents prevented Fahey from cross-  
examining the Prosecution Team on that key issue, which prejudiced Fahey in his ability make

1 his argument to the Hearing Officers regarding the developed water at his springs, which  
2 argument about developed water establishes that the water Fahey had wheeled into New Don  
3 Pedro Reservoir fully covered all of his diversions during the curtailment periods in 2014 and  
4 2015. (Fahey Exhibit 87.) Therefore, the documents withheld by the Prosecution Team would  
5 have been highly relevant at the Hearing to prove that Fahey’s diversions did not cause any harm  
6 during the curtailment periods, which is a key issue in the Water Code section 1055.3 analysis.

7 B. The Prosecution Team’s argument regarding Exhibit 2 is itself an excellent  
8 example of how Fahey has been prejudiced by the Prosecution Team’s withholding of the  
9 documents demanded by Fahey on December 1, 2015, which documents reasonably led to the  
10 discovery of Exhibit 2. The Prosecution Team does not deny that the official comments about the  
11 relevant portion of the Tuolumne River made in that 1969 licensing file for Application 21647  
12 directly contradict the Prosecution Team’s positions in this proceeding. Instead, the Prosecution  
13 Team simply makes sweeping legal conclusion (without any citation or analysis) that the official  
14 comments in that 1969 file “do not reflect current law or current orders”; but Fahey was never  
15 given an opportunity at the hearing to provide evidence or conduct cross-examination to rebut that  
16 legal conclusion. That is highly significant, because the Prosecution Team’s conclusory argument  
17 appears to be contradicted (1) by the Prosecution Team’s own distinction between “regional”  
18 water issues and “stream-specific” water issues discussed in footnote 3 on page 3 on page 8 of its  
19 Closing Brief,<sup>1</sup> and (2) by the fact that the 1969 licensing documents describe water availability  
20 on that particular stretch of the Tuolumne River *after* D-995 (which was issued in “1961” (R.T.,  
21 Jan. 26, 2016, 23:25-24:1)), and the Prosecution Team hugely relies on D-995 in this proceeding.  
22 Indeed, the discussion about the water availability on the Tuolumne River that is made in those  
23 withheld documents involving License 9120 is so relevant to this proceeding, that such

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25 <sup>1</sup> The Prosecution Team’s pattern of denying Fahey the opportunity to address key issues (and evidence) is glaringly  
26 evident in that Footnote 3 of the Prosecution Team’s Closing Brief. There, the Prosecution Team introduces entirely  
27 new issued, argument and even *evidence* regarding Order WR 2016-0015. That new evidence addresses the water  
28 availability analysis that forms the fundamental basis of many of the Prosecution Team’s claims. (WR-1, ¶¶22, 44;  
Ruling, pp. 10-11, Footnote 3 about that new evidence is completely wrong. However, Fahey has no ability to  
respond since he is not allowed any reply. (See email from Michael Buckman dated June 28, 2016, at 11:49 a.m.)  
The Prosecution Team knows this. Once again, the Prosecution Team’s seeks to deny Fahey his fundamental due  
process rights in this case.

1 documents *must have* been “utilized or relied on to create, formulate or prepare [the Prosecution  
2 Team’s] written testimony, conclusions, reports and/or opinions in this matter.” (Hearing  
3 Officer’s Partial Ruling, Jan. 21, 2016, p. 1 (“Ruling”).) That is because, *if* such documents were  
4 *not* considered by the Prosecution Team, then its water availability analysis for the Tuolumne  
5 River (WR-153, Slides 3, 4, 5) is fatally flawed. Such documents should therefore have been  
6 disclosed pursuant to pages 10-11 of the Ruling; the Prosecution Team’s failure to comply with  
7 the Ruling warrants a dismissal sanction. (*See generally. Los Defensores, Inc. v. Gomez* (2014)  
8 223 Cal.App.4th 377, 390; *Kuhns v. State of California* (1992) 8 Cal.App.4th 982, 988-989.)

9 C. The Prosecution Team’s relevancy arguments regarding the documents it withheld  
10 are based on its position that “Fahey’s assertion regarding a lack of administrative process in  
11 response to the notices of unavailability and with regard to the curtailment certification is  
12 similarly irrelevant.” But that argument is wrong. That argument is contradicted by the  
13 Prosecution Team’s own witnesses who testified (a) that Fahey was supposed to stop all  
14 diversions upon receipt of the curtailment notices, despite his good faith belief in his exception to  
15 curtailment that he immediately expressed in the only procedure made available by the Board;  
16 and (b) that Fahey should have “waited until the division informed him that he could continue  
17 diverting,” even if that meant waiting for over a year for a response from the Board, which never  
18 came (R.T., Jan. 25, 2016, 85:17-86:4; Jan. 26, 2016, 58:6-12), or *else face retroactive civil*  
19 *penalties back to the date when Fahey received the 2014 curtailment notice.* (WR-1; ¶46; PT  
20 Closing Brief, 20:20-21:3.) “Fahey’s assertion” is relevant to the civil penalty analysis here.

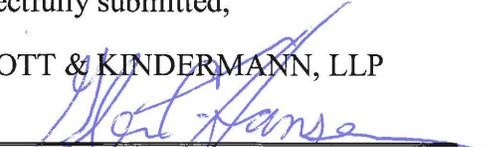
21 **IV. Conclusion**

22 Accordingly, the Hearing Officers should reject the Prosecution Team’s Objection, and  
23 dismiss the ACL/CDO for the reasons stated on pages 1 through 4 of Fahey’s Closing Brief.

24 Dated: July 5, 2016

Respectfully submitted,

ABBOTT & KINDERMANN, LLP

26 By:   
27 Glen C. Hansen  
28 Attorneys for G. Scott Fahey and  
Sugar Pine Spring Water, LP

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**PROOF OF SERVICE**

I, Sharon Buckenmeyer, 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 July 5, 2016, I served the foregoing document(s) described as:

**FAHEY'S RESPONSE TO PROSECUTION TEAM'S OBJECTION TO DECLARATION OF GLEN HANSEN IN SUPPORT OF FAHEY'S CLOSING BRIEF**

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**

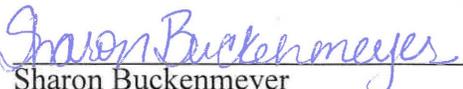
**X BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above on the above-mentioned date. I am familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. 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.

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**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 July 5, 2016, at Sacramento, California.

  
Sharon Buckenmeyer

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