

# G. SCOTT FAHEY AND SUGAR PINE SPRING WATER LP – ADMINISTRATIVE CIVIL LIABILITY (ACL) CEASE AND DESIST ORDER (CDO) HEARING

JANUARY 25-26, 2016

*David LaBrie  
State Water Resources Control Board,  
Division of Water Rights*

*Witness for the Prosecution Team  
PT EXHIBIT WR-*

# Initial investigation into Mr. Fahey's Diversion

- Following April 23, 2015 Issuance of Notice of Unavailability, the Division of Water Rights initiated a program to ensure compliance.
- The Division's Enforcement Units began conducting compliance inspections of post-1914 water rights.
- Fahey's water rights were included in a list of post 1914 water rights that were assigned to me for inspection.

# Communication Between Division Staff and Fahey

- June 12, 2015 Phone Call from Fahey
  - Fahey claims exception to curtailment, indicates he is continuing to divert, and will not agree to inspection of his diversion facility.
- June 12, 2015 Email to Fahey
  - I reviewed Fahey's June 3, 2014 letter and permit terms, and disagreed that the replacement water requirement exempted him from curtailment.
- June 15, 2015 Phone Call from Fahey
  - Fahey again denies inspection; asserts exemption despite Staff statements to the contrary and potential harm to downstream diverters.

# Continued Investigation and Beginning of Surveillance

- Communication with Fahey raised issue of potentially unauthorized diversion.
- Senior Division Staff agreed that further investigation was warranted.
- Division Management suggested using video surveillance to verify whether diversions were continuing.
- Senior Division Staff determined that video surveillance equipment should be deployed.
- Samuel Cole placed Video Surveillance Equipment near the entrance to the Sugar Pine Spring Water property on July 12, 2015.

# On-site Inspections

## July 23 & August 5 2015

On two occasions, I accompanied Sam Cole to retrieve data from the surveillance cameras.

Photograph taken near the entrance of the transfer station on July 23, 2015, showing an Arrowhead Mountain Spring water tanker truck approaching the Sugar Pine Spring Water property.



# Issuance of ACLC, Draft CDO, and Information Order on September 1, 2015

- ACL Complaint
  - Based on consideration of the available information at the time of the issuance of the complaint, the proposed penalty amounted to \$224,875 for the unauthorized diversion and use of water during a drought period.
- Draft CDO
  - Would order Fahey to immediately cease the unauthorized diversion of water from the springs under his water rights until the State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of Permits 20784 and 21289.
- Information Order
  - Directed Fahey to provide specific information for the water diversions that are conducted under any basis of right at facilities covered by Permits 20784 and 21289, within thirty days.

# Information Order Response

Fahey responded to the September 1, 2015 Information Order. Information he provided included:

- The monthly amounts of water diverted and the basis of right allowing for the diversions for each month from May 2014 through October 2014 and April 2015 through September 1;
- Documentation of the bypasses made pursuant to the requirements of Permit 21289;
- Documentation of purchases and use of replacement water required by Permits 20784 and 21289;
- A copy of the 1992 Exchange Agreement between Fahey and the Turlock and Modesto Irrigation Districts;
- A copy of the 1994 letter from the City and County of San Francisco;
- Copies of invoices for water sold from the diversions covered by Permits 20784 and 21289 for the period of May 2014 through September 1, 2015.

# Fahey's 2014 Diversions

2014	May			June				July				August				September				October				November				
	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3	1=Yes	V1	V2	V3
1	1	3						1	4	1		1	2							1	3	1	1					
2				1	1			1	1	1		1	4		2	1	2	1		1	2	1						
3								1	7	1						1	2	1	1	1	3		1	1	2	1		
4				1	4							1	2			1	2	1					1	2	1			
5	1	10		1	10			1			1	1		2		1	2		1				1					
6	1	3		1	4			1			1	1	4	1					1	4	1		1	3				
7	1	6		1	2			1	6			1	3	2					1	2	1		1	2				
8	1	7						1	5	1		1	6			1	2			1	3	1						
9	1	3	1	1	4			1	6	1						1	4	1		1	2	1						
10				1	3			1	5	1						1	4	1		1	4				1	1	1	
11				1	4			1	6			1	1	1		1	2	1					1	2	1			
12	1	4		1	5							1	1	1	1								1	3	1	1		
13	1	3		1	3							1	1	1					1		1		1	3	1			
14	1	3						1	3			1	3	1					1		1		1	2				
15	1	2						1	3	1		1	6			1	1		1	1			1					
16				1	8			1	4	1		1	1			1	3	1		1	3	1						
17								1	4	1						1	5	1					1	1				
18				1	1			1	5			1	2	1		1	4	1		1	5		1	4	1			
19	1	3		1	2			1	2			1	1	1		1	1						1	2				
20				1	6							1		1					1	3	1		1	1				
21								1	5			1	1			1			1	2	1							
22	1	7						1	6	1						1	4	1		1		1						
23	1	6		1	6			1	7	1						1	2	1		1	1	1	1					
24				1	6			1	3							1	2	1		1	4					1	4	1
25				1	2	2						1	1			1	2	1		1	4				1	2		
26				1	2	2						1	4	1									1	2	1			
27	1	8		1	4							1	1						1	3	1	1						
28	1	3		1	7			1	1			1	2						1	2	1							
29	1	8						1	4							1	4	1		1	2	1						
30				1	3			1	6							1	1	1		1		1						
31								1	4										1	2								
<b>2014 Curtailment Period</b>	16	79	0	1	21	87	4	0	24	97	11	2	21	46	13	3	20	49	15	3	24	55	17	4	17	36	10	1
<b>Total Days and Loads</b>	3	19			21	91			24	110			21	62			20	67		23	76			11	31			



## Tabulating Fahey's 2015 diversions

Surveillance observed tanker trucks entering and/or leaving the transfer facility on 42 out of 49 days, and a total of 208 tanker trucks entering and/or leaving the transfer facility during the period of July 12, 2015 through August 27, 2015

Review of Fahey's invoices for water sales during the period of unavailability in 2015 supplemented my calculation of the total days and amount of water diverted, adding an additional 48 days and 150 loads.

Surveillance Data - Daily Basis				
Date	Diversion (Y/N)	Number of Loads	Volume (gallons)	Volume (acre-feet)
July 12, 2015	N	0	0	0.00
July 13, 2015	Y	3	19,800	0.06
July 14, 2015	Y	7	46,200	0.14
July 15, 2015	Y	4	26,400	0.08
July 16, 2015	Y	7	46,200	0.14
July 17, 2015	Y	7	46,200	0.14
July 18, 2015	Y	1	6,600	0.02
July 19, 2015	Y	2	13,200	0.04
July 20, 2015	Y	6	39,600	0.12
July 21, 2015	Y	4	26,400	0.08
July 22, 2015	Y	3	19,800	0.06
July 23, 2015	Y	11	72,600	0.22
July 24, 2015	Y	5	33,000	0.10
July 25, 2015	Y	3	19,800	0.06
July 26, 2015	N	0	0	0.00
July 27, 2015	Y	7	46,200	0.14
July 28, 2015	Y	3	19,800	0.06
July 29, 2015	Y	3	19,800	0.06
July 30, 2015	Y	5	33,000	0.10
July 31, 2015	Y	5	33,000	0.10
August 1, 2015	Y	2	13,200	0.04
August 2, 2015	N	0	0	0.00
August 3, 2015	Y	6	39,600	0.12
August 4, 2015	Y	1	6,600	0.02
August 5, 2015	Y	4	26,400	0.08
August 6, 2015	Y	10	66,000	0.20
August 7, 2015	Y	5	33,000	0.10
August 8, 2015	Y	2	13,200	0.04
August 9, 2015	Y	1	6,600	0.02
August 10, 2015	Y	8	52,800	0.16
August 11, 2015	Y	5	33,000	0.10
August 12, 2015	Y	4	26,400	0.08
August 13, 2015	Y	10	66,000	0.20
August 14, 2015	Y	7	46,200	0.14
August 15, 2015	Y	4	26,400	0.08
August 16, 2015	N	0	0	0.00
August 17, 2015	Y	9	59,400	0.18
August 18, 2015	Y	7	46,200	0.14
August 19, 2015	Y	6	39,600	0.12
August 20, 2015	Y	8	52,800	0.16
August 21, 2015	Y	6	39,600	0.12
August 22, 2015	Y	1	6,600	0.02
August 23, 2015	N	0	0	0.00
August 24, 2015	Y	5	33,000	0.10
August 25, 2015	Y	3	19,800	0.06
August 26, 2015	Y	3	19,800	0.06
August 27, 2015	Y	5	33,000	0.10
<b>Totals</b>	<b>42 Days</b>	<b>208 Loads</b>	<b>1,372,800 gallons</b>	<b>4.21 acre-feet</b>

# Further Tabulating 2015 Diversions

2015	April				May				June				July				August				September		
	1 = Yes	V1	V2	V3	1 = Yes	V1	V2	V3	1 = Yes	V1	V2	V3	1 = Yes	V1	V2	V3	1 = Yes	V1	V2	V3	1 = Yes	Loads	
1		1	4							1	2		1	1	1			1	2			1	8
2		1	1							1	4		1	1		2		1				1	3
3		1	6							1	2	1	0					1	3			1	2
4		1	2			1	3						0					1		2		1	3
5		1	2			1	3						0					0				1	9
6		1	4			1	2						1	1			1	1	2	2	1	0	0
7		1	2			1	4						1	3			1	0				1	4
8		1	1			1	3						1		2		1	1	1			1	4
9		1	3							1		1	1		1		1	1	1			1	7
10		1	4							1			1		3	1	1	2				1	2
11		1	2			1	1			1		2	0				1		2			0	0
12		1	6			1	5		1	1			0				0					1	1
13		1	2			1	4						0				1	3	2			0	0
14		1	3		1	1	3						1		2		1	2				0	0
15		1	2			1	1			1	1	1	0				1	4				1	1
16		1	5										1			2		0				1	1
17										1		2	1				1	1	3			0	0
18						1	5			1		1	0				1	3	1			0	0
19						1	9			1	6		1	2			1	1				0	0
20		1	2			1	3						1	3			1	1	1	1	1	0	0
21		1	4			1	3						1	3	1		1		1			1	1
22		1	4			1			1	1		2	0				0			1		0	0
23		1	3						1	1	2	1	1	4	2		0					1	2
24		1	2							1	1		1	1			0					0	0
25										1		2	1	3			1		1	1	1	0	0
26						1	3			1	1		0				0					0	0
27		1	2		1	1	5						1	3			1	3	1			0	0
28		1	4			1	2						1		2		1	3	1			0	0
29		1	2										0				0					1	1
30		1	3						1		2		1		2		0					0	0
31													1	2			1	3					0
		25	75	0	2	18	59	0	2	17	19	15	4	20	29	17	2	21	37	14	3		
			25				17				8				12				16				
<b>2015 Curtailment Period</b>		6	17			18	61			7	16							2	7			15	49
<b>Total Days and Loads</b>																							

# Fahey's Diversions During Curtailment Period is a Violation of Water Code section 1052

- Diversion when there is no water available under the priority of the water right constitutes *unauthorized water diversion and use*.
- Water Code section 1052(a): “The diversion or use of water...other than as authorized...is a trespass.
- Water Code section 1052(c)(1)(A) and (B):
  - Any person or entity committing a trespass...may be liable in an amount not to exceed \$1000 for each day in which a trespass occurs, plus \$2500 for each acre-foot of water diverted or used in excess of that diverter's water rights.

# Maximum ACL Calculation

<b>Calculation of Maximum Penalty for Unauthorized Diversion</b>	<b>2014</b>	<b>2015</b>
Days of Diversion	123	90
Penalty per Day for Unauthorized Diversion	\$1,000	\$1,000
Penalty per Permit	\$123,000	\$90,000
Permits	2	2
<b>Penalty for the Number of Days of Unauthorized Diversion - Both Permits</b>	<b>\$246,000</b>	<b>\$180,000</b>
Reported or Observed Loads of Water	456	359
Average # of Gallons/Load	6600	6600
Calculated # of Gallons Diverted	3009600	2369400
Gallons/Acre-foot	325900	325900
Amount of Water Diverted (Acre-feet)	9.23	7.27
Penalty per Acre-foot of Unauthorized Diversion	\$2,500	\$2,500
<b>Penalty Based upon the Amount of Water Taken by Unauthorized Diversion</b>	<b>\$23,087</b>	<b>\$18,163</b>
<b>Maximum Penalty for Unauthorized Diversion in Each Year</b>	<b>\$269,087</b>	<b>\$198,163</b>
<b>Maximum Penalty for Unauthorized Diversion in 2014 and 2015</b>	<b>\$467,250</b>	