

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

JANUARY 25-26, 2016
REBUTTAL

Prosecution Team

PT EXHIBIT WR-

No Water for Fahey During Drought

Fahey has a junior right in the Tuolumne River and San Joaquin River Basin. Both permits were approved subject to prior rights – FIRST IN TIME FIRST IN RIGHT!

PERMIT 20784

Application 29977 of G. Scott Fahey

2418 Pleasanton Avenue, Boise, ID 83702

filed on July 12, 1991, has been approved by the State Water Resources Control Board **SUBJECT TO PRIOR RIGHTS** and to the limitations and conditions of this permit.

Exhibit WR-15

Therefore, Application 31491 filed on January 28, 2004 has been approved by the State Water Board **SUBJECT TO PRIOR RIGHTS** and to the limitations and conditions of this permit.

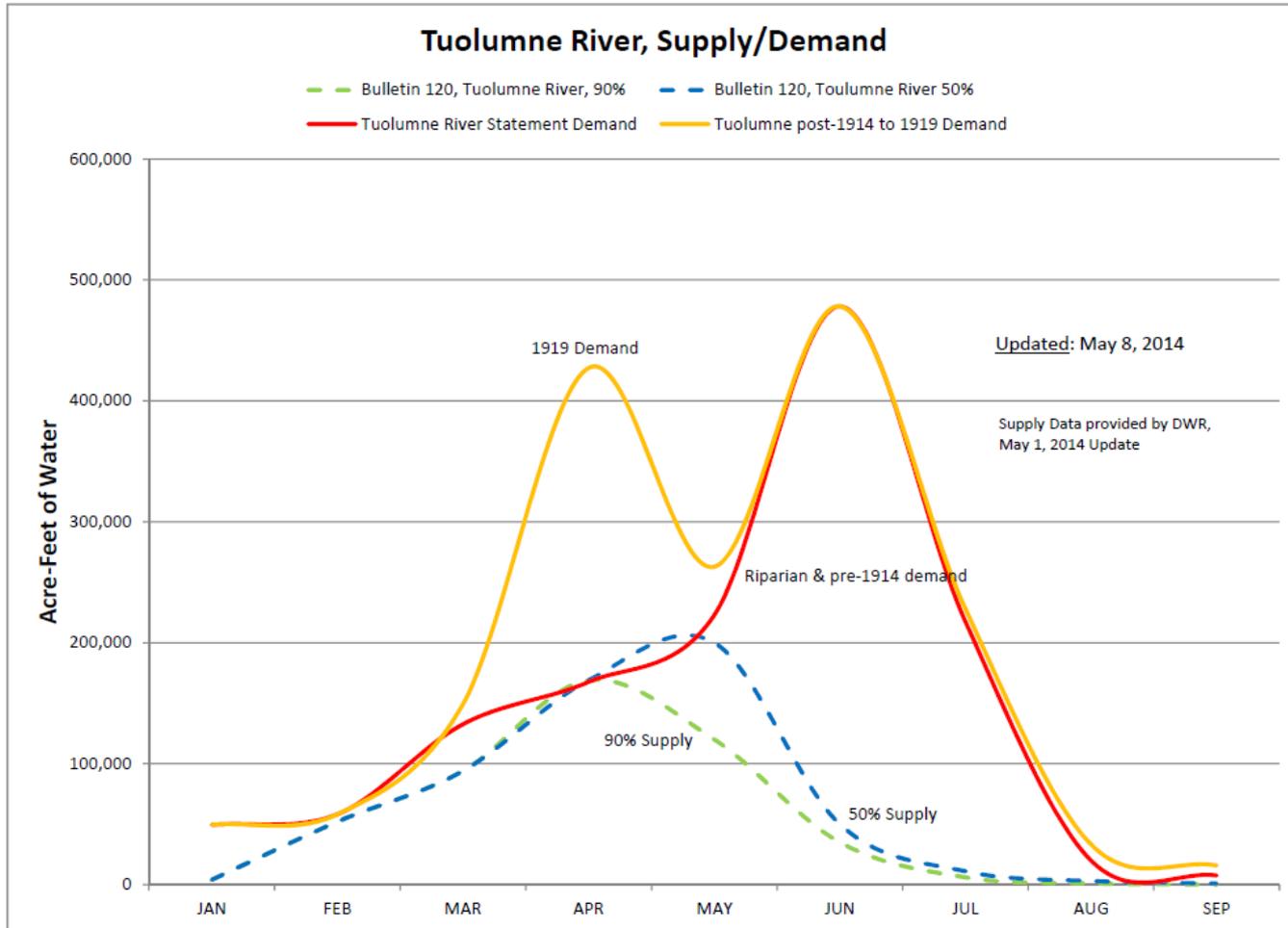
Exhibit WR-16

Tuolumne River Analysis

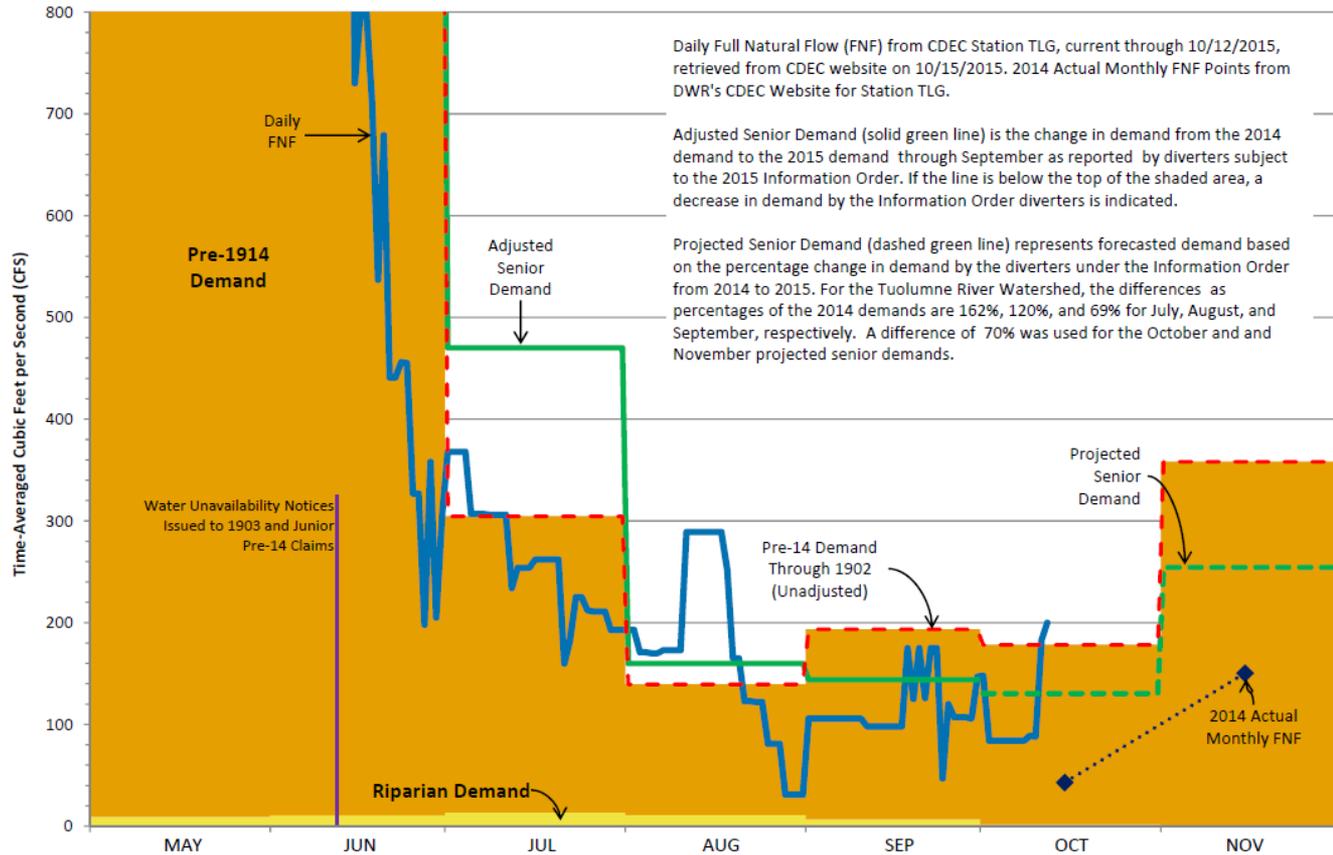


Boundary for Tuolumne River Watershed to San Joaquin River Supply/Demand Analysis

Tuolumne Analysis 2014



Tuolumne Analysis 2015



2015 Tuolumne R. To San Joaquin R. Supply/Demand Analysis

No Justification for Diversion

- No storage right or agreement
- Exchange Agreement prohibits carrying surplus water to subsequent seasons
- Term 20 & 34 allow “credit,” but no storage
- No alternative supply – no water purchases in 2014 or 2015

Hydrologic Connectivity

- Determined in permit proceeding
- Exemption required for D1594 FAS
- Fahey's diversions impact rights and beneficial uses downstream in Tuolumne and Delta
- Permits include standard Terms 80, 90, and 93 to protect downstream rights and beneficial uses below NDPR

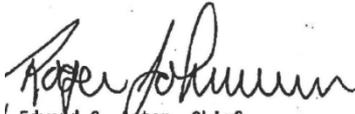
PERMIT TERMS APPLY

Permits Granted With FAS Exception

- Fahey granted exception to FAS determination

AN EXCEPTION FROM THE LEGAL EFFECTS OF STATE WATER BOARD DECLARATION OF FULLY APPROPRIATED STREAM SYSTEMS PURSUANT TO ORDER WR 91-07, SECTION 5.1

I hereby approve an exception to Board Orders WR 89-25 and WR 91-07 pursuant to Section 5.1 of Board Order WR 91-07 as it pertains to an application by G. Scott Fahey to appropriate water from two springs in the Tuolumne River water system in Tuolumne County. This exception is subject to a Water Exchange Agreement, executed on December 12, 1992, with the Modesto Irrigation District and the Turlock Irrigation District. The Agreement will make up for any water right deficiency identified in Board Decisions 995 and 1594, in the above declarations, that specify water is not available for appropriation in the watershed upstream from Sacramento-San Joaquin Delta and the Tuolumne River during the period from June 15 to October 31 of each year.



Edward C. Anton, Chief
Division of Water Rights

Dated: 1-15-93

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AN EXCEPTION FROM THE LEGAL EFFECTS OF STATE WATER RESOURCES CONTROL BOARD DECLARATION OF FULLY APPROPRIATED STREAM SYSTEMS PURSUANT TO ORDER WR 98-08

I hereby approve an exception to Board Order WR 98-08 pursuant to Section 4.10 as it pertains to Application X3488 by G. Scott Fahey to appropriate water from the three springs in the Tuolumne River watershed in Tuolumne County. Diversion of water during the period from June 16 through October 31 of each year would be subject to maintenance of a water exchange agreement between the applicant and the Modesto Irrigation District and the Turlock Irrigation District. The Agreement will make up for any water right deficiency identified in Board Decisions 995 and 1594, in the above declarations. The applicant would provide replacement water to New Don Pedro Reservoir for all water diverted during the period from June 16 to October 31 of each year by a Water Exchange Agreement, executed on October 20, 2003, with the Tuolumne Utilities District for surplus water.



Victoria A. Whitney, Chief
Division of Water Rights

Dated: JAN 26 2004

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PERMIT TERMS APPLY

Fahey Accepted Terms 19 & 20 for Permit 21289

- Fahey accepted terms 19 and 20 when he applied for Permit 21289

The applicant hereby accepts and understands that the current application to appropriate and use water from Wet Meadows Springs shall be conditional upon and subject to the terms and conditions of the following:

- Agreement, dated December 12, 1992, between G. Scott Fahey and the Turlock & Modesto Irrigation Districts, and as enumerated by the State Water Resource Control Board, Division of Water Rights, Permit #20784, Item 19.
- Conditions 1, 2a, 2b, 2c, 2d, and 2e within the City of San Francisco letter, dated December 19, 1994, and as enumerated by the State Water Resource Control Board, Division of Water Rights, Permit #20784, Item 20.

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Fahey's Permit Terms Apply

- Permit terms apply unless and until the Board changes them
- Enforcement proceedings are based on the existing terms and conditions of the water rights
- Fahey applied for and SWRCB granted permits based on representations Fahey made and duties he accepted

WHETHER PERMITS SHOULD BE DIFFERENT IS NOT RELEVANT

FAS Determinations Still Apply

- 1951 – New Don Pedro applications filed (A14126, A14127)
- 1961 - D995
- 1984 - D1594 and Order 84-2
- 1989 - Order 89-25 renewing FAS determination
- May 1991 - Application 29977
- August 1991 - Order 91-07 renewing FAS determination
- 1994 - Application 31491
- 1995 - Permits 20784 issued
- 1998 - Order 98-08 renewing FAS determination
- 2011 - Permit 21289 issued

PERMIT TERMS APPLY

Jurisdictional Water

- Permits apply
- Rights to springs on federal lands may only be acquired by appropriation regardless of whether tributary to watercourse
- Applied for permits stating springs tributaries to Tuolumne River & diversions impact flows

In my report: “Water Availability Analysis” prepared for and submitted to the Chief, Division of Water Rights, California State Water Resources Control Board, on July 14, 2010, the assumption was made that all of the water extractions from the various components of the system would directly impact the surface spring flow. Thus, the reduction of water volume reporting to the drainage basin would correspond to the total water extracted. However, in reality, this is a worst case scenario and does not relate to the actual case. In fact, water extractions from the various components of the system are much greater than any observed reduction in surface spring flow.

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Groundwater

- Surface water from springs jurisdictional
- Stated in applications that springs tributary to Tuolumne River
- Permits state springs tributary to Tuolumne River
- Water supply assessment for Permit 21289 assumed direct & corresponding impact on surface water → 1:1 impact ratio
- No reported groundwater use

No Developed Water for Permits

- No measurements of developed water
- Reporting of “developed water” inconsistent
- Never reported groundwater use in progress report
- “Developed water” reporting spotty

No definitive studies have been made to determine what this difference may be. However, in my professional opinion, the reduction of spring flow is, on average, on the order of 30% of the volume of water removed from the wells and infiltration galleries installed by Sugar Pine Spring Water, LP. Since only 30% of the water withdrawn from system impairs the spring water flows, the remaining 70% is clearly sourced from percolating ground water beneath the site.

The above estimate is based on my experience with the project from its inception in 1996 to the present. A detailed study of water withdrawals and spring flow must be made in order to establish a more definitive ratio between surface flow impairment and withdrawal of percolating ground water. Nevertheless, it is clear that the impairment of surface flow from the springs is much less than that reporting to the Sugar Pine Spring Water, LP, collection system.

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Certification Summary

- 2015 - 9,300+ unavailability notices issued requesting certification form, 3,688 certifications received, 523 checked the “Other Source” box.
- 2014 - 9,254 unavailability notices in 2014, responses were received for 3,531 rights, 340 checked the “Other Source” box.
- Claiming exemption on the curtailment form not permission to divert unavailable water
- Over a thousand curtailment inspections
- Limited staffing resources , took time to get to Fahey

History of Noncompliance

- Testified no replacement water for FAS before 2009
- Reported diversions in all years during FAS
- No communication with Districts, so Districts couldn't know rights impacted
- Never reported name and location of companies bottling diverted water

Document Retention

- Record Retention Policy
- Line staff emails automatically deleted after 90 days
- Managerial staff emails retained for 5 years
- Attorney emails retained for 5 years, but only those send and receive
- Substantive e-mail communications go in investigation file – retained 50 years

Ability to Pay/Economic Benefit

- Fahey disclosed net income of \$255,646.36 in subpoena response
- Has not disclosed profits or price/gallon
- Bulk pricing \$0.045-\$0.06/gallon (\$14,666-\$19,554/af) = \$241,989-\$322,641
- Stayed in business



Cease and Desist Order Necessary

- Drought condition persist, even with rains
- Fahey could again have water unavailable for his priority - likely because very junior
- Fahey continued diverting during period of unavailability
- History of noncompliance
- Strong economic incentive to continue diverting