

Petruzzelli, Kenneth@Waterboards

From: Petruzzelli, Kenneth@Waterboards
Sent: Tuesday, December 08, 2015 10:26 AM
To: 'Glen Hansen'
Cc: Weaver, Nathan@Waterboards; Buckman, Michael@Waterboards; Tauriainen, Andrew@Waterboards; Mona, Ernie@Waterboards; Bill Paris; Diane Kindermann Henderson; Brathwaite, Anna; Linda Wood; jonathan.knapp@sfgov.org; Bart Barringer (bbarringer@mblaw.com); agodwin@MRGB.ORG; Prager, John@Waterboards
Subject: RE: G. Scott Fahey and Sugar Pine Spring Water, LP - ACL/CDO Hearing - Demand For Production of Documents
Attachments: Division of Water Rights Record Retention Policy.pdf; Dave LaBrie e-mail 9-22-15a.pdf; David LaBrie email 6.18.15.pdf; www.uniondemocrat.com_News_Business_Fresh-water-flows-fr (attachment to David LaBrie email 6.18.15).pdf; Dave LaBrie e-mail 9-22-15.pdf; RE Most Recent Fahey video surveillance.pdf; CDPH Email re Sugar Pine Spring Water Bottled Water Operation Records1.pdf

Mr. Hansen,

I am responding to your letter dated December 1, 2015. I am also following up on our telephone conversation from earlier today at approximately 11:20 a.m. Please treat this e-mail and our telephone conversation as an opportunity to meet and confer regarding your demand for production of documents.

1. Any and all documents that support the Administrative Civil Liability Complaint in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP, dated September 1, 2015 ("ACL").

Any and all documents supporting the ACL will be made available as exhibits on or by December 16, 2015. We are in the process of consolidating these documents.

2. All Curtailment Certification Forms ("Forms") received by the Board from any and all primary owners between April 1, 2014, and July 1, 2015, where the box on the Form for "OTHER I have additional information explaining how much water I am diverting, the use of that water, the measure being undertaken to reduce use, and the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency" was marked or checked off.
3. All written correspondence from April 1, 2014 and July 1, 2015, between the Board and the Primary Owners of the water right applications who signed the Forms described in item 2, above, which correspondence was made or sent following the submission by the Primary Owners of the Forms.

For Item 2 and 3, I anticipate including all Curtailment Forms that Fahey signed as exhibits. Beyond that, your request for these items is exceedingly broad and lacks relevance to this ACL proceeding. Furthermore, a preliminary evaluation by the Water Rights Division (Division) indicated that 340 primary owners checked the box on the Form in 2014 and 521 checked the box in 2015. As a result, responding to this request would also prove exceedingly burdensome. Item #3, which asks for correspondence, is even broader and more burdensome. Although you have not made your request a request for public records, the nature of your request, given its breadth and lack of relevance to the Fahey ACL proceeding, is typically one the Division would treat as a request for public records.

If you wish to make this a request for public records, consider this the required 10 day response pursuant to Government Code section 6253 subd. (c) and I will request that Division staff search for and collect records responsive to your request. The Division would then review the files to determine whether any public records responsive to your

request may be disclosable and to compile any disclosable records for your access and review. Given the scope of your request, this process will take some time. I estimate that searching for an consolidating the records could take a few weeks, but I will provide a more precise timeline if you choose to pursue this as a public records request. Certain documents otherwise response to your request may be withheld as exempt from disclosure pursuant to Government Code sections 6254 and 6255. At this time, it is unclear whether any records will need to be withheld or for what specific reason.

The Public Records Act provides for a requestor to pay for the costs of producing documents. Once we have identified and compiled all disclosable documents that are responsive to your request, I will contact you with an estimate of the costs for reproduction or scanning of the requested documents prior to sending any documents out for reproduction or scanning. Included with any documents sent in response to this request you will find an invoice for the costs of producing those documents. Please remit payment immediately for the amount specified. Any additional documents will necessitate an additional charge, and that charges will be invoiced as they accrue.

4. Any and all documents contained in the Permit Files for Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491), for the time period of January 1, 2012 to the present, including, but not limited to, curtailment notices and all related documents, Board staff notes and correspondence, and water use and/or diversion reports.

The Permit Files for Fahey's water right permits have been made available. Progress reports and other information is now stored electronically and not reproduced for the physical file. Please verify with the Records Unit whether you have received the entire file and let me know if you have any issues.

5. Any and all documents that support the State of California's determination of the required discharge from New Don Pedro Reservoir during the 2014 and 2015 curtailment periods.
6. Any and all documents that support any and all violations of the required discharge from New Don Pedro Reservoir by its authorized discharge operator, owner, &/or authority during the 2014 and 2015 curtailment periods.

For Item 5 and 6, I do not anticipate producing such documents as exhibits for the ACL hearing. I also fail to see how this request is relevant. As above, if you wish to pursue this as a request for public records consider this the required 10 day response pursuant to Government Code section 6253 subd. (c) and I will request that Division staff search for and collect records responsive to your request. At this time, however, we do not know if we have documents responsive to this request. However, the water right files related to New Don Pedro Reservoir are on file with the Records Unit and available for review.

7. Any and all documents that support, sustain and/or justify "the graphical summations" described in Item 26, on pages 4 through 5, of the ACL, for any and all streams, rivers, and/or waterways between the Permittee's point of diversions and New Don Pedro Reservoir.

The "graphical summations" referenced in Item 26, pages 4 through 5, of the ACL complaint are available on the State Water Board's "Watershed Analysis" webpage at 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.

8. Any and all documents relating to any and all phone conversations and written communications between David LeBrie and Scott Fahey that occurred or were sent or received in the months of June, July and August 2015 regarding the following:
 - (a) Water Right Permit 20784 (Application A029977);

- (b) Water Right Permit 21289 (Application A031491);
- (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491).

9. Any and all documents relating to any and all correspondence and communications between Sam Cole and David LeBrie, between June 1, 2015, and September 30, 2015, regarding the following:
- (a) Water Right Permit 20784 (Application A029977);
 - (b) Water Right Permit 21289 (Application A031491);
 - (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491);
 - (d) Cease and Desist Order in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP;
 - (e) Order for Additional Information, Order WR 2015-0028-DWR, in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP; and/or
 - (f) The ACL.

For item 8 and 9, I anticipate including documents relating to phone conversations between David LaBrie and Scott Fahey as exhibits. However, to the degree those documents do not constitute work product or confidential communications, they are included in the investigation file that we have already made available to you. With respect to Item 9, in our telephone conversation, you amended your request to also include communications between Sam Cole, David LeBrie, and “third parties” about items (a) through (f). To the extent these communications are not privileged or work product, it is my understanding have already been made available. Nonetheless, I am working to collect and review those emails.

Under the document retention policy for the Division of Water Rights, e-mail for staff is automatically purged after 90 days. As a result, e-mail correspondence regarding this issue that would have occurred more than 90 days ago (September 3, 2015) has been deleted. The Division’s record retention policy is available at http://waternet.waterboards.ca.gov/das/files/busserv/records_retention/dwr.pdf (see page 6 for electronic mail). I also attached a copy. We normally do not set litigation holds, but in this case we have as of December 3, 2016. Since you also asked about e-mail between Sam Cole, David LaBrie, and third persons, I also checked with management – Kathy Mrowka and John O’Hagan. As “managerial staff,” they retain e-mail for five years.

Once investigations reach the point of drafting ACLs and attorneys from the Office of Enforcement get involved, e-mail is retained by the attorneys. Emails still retained by Sam Cole and David LaBrie that have not been deleted are, by and large, privileged attorney-client communications or attorney work product. We typically do not prepare privilege logs, because they are burdensome and oppressive. I am nonetheless examining their remaining e-mails for any e-mail communications that may not be privileged.

David LaBrie has three e-mails that are not privileged communications or work product that fall within the scope of your request. I have attached those e-mails, along with the attachment to one of those e-mails.

Sam Cole has two e-mails that are not privileged communications or work product and falls within the scope of your request. This e-mails do not have attachments.

I found no e-mail among managerial staff matching your inquiry that was not a privileged communication or work product.

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From: Glen Hansen [<mailto:GHansen@aklandlaw.com>]

Sent: Tuesday, December 01, 2015 4:52 PM

To: Petruzzelli, Kenneth@Waterboards

Cc: Weaver, Nathan@Waterboards; Buckman, Michael@Waterboards; Tauriainen, Andrew@Waterboards; Mona, Ernie@Waterboards; Bill Paris; Diane Kindermann Henderson; Brathwaite, Anna; Linda Wood; jonathan.knapp@sfgov.org; Bart Barringer (bbarringer@mblaw.com); agodwin@MRGB.ORG

Subject: RE: G. Scott Fahey and Sugar Pine Spring Water, LP - ACL/CDO Hearing - Demand For Production of Documents

Mr. Petruzzelli:

Attached is a letter with a demand for production of documents served by counsel for Scott Fahey/Sugar Pine Spring Water LP on the State Water Resources Control Board and its Staff. Your immediate response is appreciated.

Glen C. Hansen

Senior Counsel

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