Change Sheet #1 for Draft Order Issuing a Cease and Desist Order and Imposing Administrative Civil Liability Against G. Scott Fahey And Sugar Pine Spring Water, LP

Staff proposes the following amendments to the draft Order issuing a Cease and Desist Order and imposing Administrative Civil Liability against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) that was released for public comment on February 8, 2019. These amendments are proposed in response to comments timely received by Fahey and jointly by the Modesto Irrigation District, Turlock Irrigation District, and City and County of San Francisco. In addition, staff made necessary format and other typographical changes to the February 8, 2019 draft Order.

Additional text is shown in underline and deletions are shown in ~~strikeout~~. The page numbers refer to the draft order released on February 8, 2019.

1) On page 3 of the draft Order, change the second paragraph as follows:

Permit 20784 explicitly requires Fahey to provide "make-up" water to MID and TID for his diversions during the FAS Period, pursuant to a water exchange agreement dated December 12, 1992 (Water Exchange Agreement). (See PT-15, p. 6, ¶ 19.) This order finds that Permit 21289 contains the same requirement because of language in both the Water Exchange Agreement and Permit 21289. Other conditions in Fahey's permits require him, upon receiving appropriate notice, to provide "replacement water" for diversions during the non-FAS Period when those diversions adversely impact MID, TID, or CCSF's diversions, as applicable. Fahey's permits allow him to pre-position replacement water for his non-FAS Period diversions in NDPR and ~~carry it~~do not prohibit replacement water credit from being carried over from year to year, while the Water Exchange Agreement requires him to provide MID and TID's FAS Period make-up water to NDPR during the same year that he diverts.

2) On page 4 of the draft Order, change the first paragraph as follows:

The Prosecution Team presented evidence to indicate that water was not available for diversion under Fahey's rights and that Fahey violated his permit terms by diverting.[1] The Prosecution Team presented expert testimony and computational analyses comparing supply and demand in the Delta watershed to indicate that water supplies were insufficient to support Fahey's

diversions in 2014 from May 27 through October 30, inclusive, and from November 4 through 18, inclusive, and again in 2015 from April 23 through November 1, inclusive. (E.g., PT-31; PT-32; PT-34; PT-37; PT-42; PT-43; PT-44; PT-153.) These dates span the FAS Period and part of the non-FAS Period in both years. Prosecution Team analyses of supply and demand in the Tuolumne River watershed confirm this result. This order refers to the 2014 and 2015 Prosecution Team analyses collectively as the "water availability analysis."

3) On page 4 of the draft Order, change the third paragraph as follows:

Fahey raised three affirmative defenses to unlawful diversion. First, Fahey argues that he delivered water to NDPR between 2009 and 2011 for the Interveners. This argument succeeds for Fahey's non-FAS Period diversions. Fahey's diversions, within the scope of the hearing, appear to have been adverse to MID and TID's pre-1914 claim of right at La Grange Dam downstream from NDPR. Evidence in the record indicates that Fahey had ~~at least 22.70~~approximately 33.99 acre-feet of non-FAS Period replacement water available in NDPR if called for by the Interveners. Unlike the FAS Period, Fahey's permits do not prohibit him from carrying replacement water over from year to year to compensate MID and TID for his non-FAS Period diversions. (See PT-15, pp. 6–7, ¶ 20; PT-16, pp. 9–10, ¶ 34.) Accordingly, this order finds that Fahey has complied with permit terms obligating him to provide replacement water to the Interveners for non-FAS Period diversions in 2014 and 2015 and, separately, that his compliance establishes a defense to unlawful diversion during the portion of the non-FAS Period when water was not available under his priority of right.

4) On page 36 of the draft Order, change the first full paragraph as follows:

Fahey's permits also contain terms to prevent injury to MID and TID during the non-FAS Period and to CCSF throughout the year. Term 20 in Permit 20784 and Term 34 in Permit 21289 require Fahey to provide replacement water to NDPR under certain circumstances for water diverted adverse to the prior rights of CCSF, MID, and TID. (PT-15, p. 6–7; PT-16, pp. 9–10.) Pursuant to these terms, Fahey must provide replacement water within one year of notification that Fahey's diversion "has potentially or actually reduced the water supplies of" the Interveners. (PT-15, p. 6; PT-16, p. 9.) Under Permit 20784, the notification of the need for replacement water may be made by any of the Interveners; under Permit 21289, only CCSF will provide the notification. (PT-15, p. 6; PT-16, p. 9.) Permit 21289 requires that "[t]he source, amount and

location at NDPR of replacement water discharged into NDPR shall be mutually agreed upon by the permittee, the Districts, and San Francisco" and reported to the State Water Board (PT-16, p. 9), while Permit 20784 merely requires that "[t]he source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the" Board (PT-15, p. 7).[14] Replacement water may be provided in advance and credited to future replacement water requirements under both permits. (PT-15, p. 6; PT-16, p. 9.) Unlike the Water Exchange Agreement between Fahey, MID, and TID for diversions during the FAS Period, Term 20 of Permit 20784 and Term 34 of Permit 21289 do not expressly prohibit Fahey from pre-positioning replacement water and carrying it over from year to year. (Compare PT-15, p. 6 and PT-16, p. 9 with PT-19, p. 2, ¶ 4.)

[14] The Intervener's March 11, 2019 comment letter argued that the requirement for Fahey and the Interveners to mutually agree on the source, amount, and location of replacement water discharged into NDPR applies to both permits. Hearing Team staff were not able to identify textual support for this argument.

5) On page 38 of the draft Order, change the fourth full paragraph as follows:

Table 2, below, summarizes reported, invoiced, contracted, and surveilled water diversions in 2014 and 2015 under Permits 20784 and 21289 from May 27 ~~to~~through October 31 and November 4 through 18, 2014 and from April 23 ~~to~~through November 1, 2015. These ~~correspond to~~dates are inclusive of the FAS Periods in both years and the dates staff issued the 2014 Unavailability Notice and the 2015 Unavailability Notice, for 2014 and 2015 respectively, and exclude the ~~date~~dates during the non-FAS Period of each year for which staff forecasted ~~in each year~~ that water would again become available per a "notice of temporary opportunity to divert water." (See also PT-31; PT-32; PT-33; PT-37; PT-44.) There is evidence in the record that water was not available for diversion by post-1914 rightholders prior to May 27, 2014 and April 23, 2015. (See WR-42; WR-43.) The State Water Board may impose administrative civil liability for unlawful diversion regardless of when or whether staff have issued an informational notice. (Wat. Code, § 1052, subd. (a); *id.*, § 1055, subd. (a).) Based on the circumstances of this case, this order selects the date staff issued the 2014 Unavailability Notice and the 2015 Unavailability Notice as the start date for its analysis of Fahey's diversions, as a matter of discretion. This analysis includes October 31, 2014, the last day of the 2014 FAS Period, because of Fahey's obligations under his permit terms. The issue is discussed further, below, in section 5.2.3.

6) On page 40 of the draft Order, change footnotes a and b of Table 2 as follows:

[a] In 2014, the non-FAS Period overlapped with the period in which State Water Board staff forecasted insufficient water supply to serve Fahey's priority of right from May 27 through June 15, inclusive, and November 4 through November 18, inclusive. In 2015, the non-FAS Period overlapped with the period in which Board staff forecasted insufficient water supply to serve post-1914 water rights from April 23 through June 15, inclusive, and on November 1. Water availability is discussed in more detail in section 5.2.2.2 of this order.

[b] The FAS Period under consideration in this order is June 16 through October 31, inclusive. Every day of the 2014 and 2015 FAS Periods overlapped with the period in which State Water Board staff forecasted insufficient water supply to serve post-1914 water rights except October 31, 2014. Diversion data for this day are included for the reasons stated in Section 5.2.3.1.

7) On page 41 of the draft Order, change the first paragraph as follows:

During 2014, the forecasted period of water unavailability for post-1914 water rights in the Sacramento and San Joaquin River watershed was May 27 through October 30 and from November 4 through ~~18.~~11. The forecasted period of water unavailability continued for post-1953 water rights through November 18, 2014.[15] During 2015, the forecasted period of water unavailability for post-1914 water rights in the Sacramento and San Joaquin River watershed was April 23 through November 1. (PT-7, pp. 3–4, ¶¶ 11, 13, 16, 21, 22; PT-30; PT-39; see also R.T., Jan. 25, 2016, p. 54:6–9.)

[15] The State Water Board takes official notice of this information, obtained from the November 12, 2014 Notice of Curtailment Lifting for pre-1954 water rights within the Sacramento & San Joaquin River Watersheds (available on the State Water Board's website), pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

8) On page 46 of the draft Order, change the first partial paragraph as follows (note that the paragraph begins on page 45):

The water availability analysis at issue in this case is not reasonably vulnerable to the criticisms raised in Order WR 2016-0015. If no natural flow was available for post-1914 rightholders in 2014 or even for some pre-1914 diverters for part of the year in 2015, it is reasonable to conclude that no full natural flow was available for a very junior post-1914 diverter during the same period. Under the circumstances of this case, based on the evidence in this record, the State Water Board finds that the Prosecution Team has met its burden of proof to show that water was not available to serve Fahey's priority of right in 2014 from at least May 27 through October 30, inclusive, and November 4 through 18, ~~2014~~inclusive, and in 2015 from at least April 23 through at least November 1, ~~2015~~inclusive. As discussed in section 5.2.1 and shown in Table 2, above, Fahey diverted a total of at least 32.95 acre-feet over 241 days when water

was not available to serve his priority of right. Absent a defense, Fahey's diversions were unlawful. The Board considers Fahey's defenses to unlawful diversion below in section 5.3.

9) On page 51 of the draft Order, change the second full paragraph, which continues to page 52, as follows:

As discussed in section 5.2.1 and shown in Table 2, above, Fahey diverted at least 2.80 acre-feet over 26 days in 2014 and 4.82 acre-feet over 37 days in 2015 during the non-FAS Period when water was not available to serve Fahey's priority of right. In total, Fahey diverted at least 7.62 acre-feet over 63 days during the non-FAS Period in both years when water was not available to serve Fahey's priority of right.

Although the Interveners participated in the hearing for purposes of cross-examination and rebuttal, nothing in the record indicates that MID, TID, or CCSF ever notified Fahey as to whether his diversions had potentially reduced water supply to the Interveners, as required by Term 20 of Permit 20784 or Term 34 Permit 21289. (Fahey-1, p. 9; R.T., January 25, 2016, pp. 34:3–7, 170:13–15; see also Fahey Closing Brief, June 17, 2016, p. 11:21–22.) The record also does not indicate that Fahey provided MID and TID with bi-annual reports of his diversions and replacement water deliveries to NDPR as is required by the Water Exchange Agreement. (PT-19, p. 2, ¶ 7.) These reports would have likely been useful to MID and TID to assess whether Fahey's diversions had potentially or actually reduced their water supplies and evaluate whether to request Fahey provide non-FAS Period replacement water. (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34.) Fahey did report his 2014 and 2015 diversions to the State Water Board and this information was publicly available through the State Water Board's Electronic Water Rights Information Management System (eWRIMS) database.[20]

Fahey did not receive allegations that his non-FAS Period diversions were unlawful until the Prosecution Team issued a draft CDO and an ACL Complaint ~~to Fahey~~ on September 1, 2015 (see PT-1; PT-2~~), which had the effect of communicating to Fahey the Prosecution Team's allegations that Fahey's non-FAS diversions where unlawful.~~). The draft CDO and ACL Complaint are different, however, from the Interveners' notice to provide non-FAS replacement water under the terms of Fahey's permits. ~~Accordingly, we find~~Under Permit 20784, the notification of the need for replacement water must be made by one of the Interveners, while Permit 21289 requires that CCSF provide notice ~~pursuant~~. (See PT-15, p. 6; PT-16, p. 9.)

Accordingly, the State Water Board finds that there is not sufficient evidence in the record to support a finding that Fahey's non-FAS diversions violated his permit terms.

[20] The eWRIMS Database System provides information about water rights throughout California, and is searchable by name, watershed, stream system, or county. The Board takes official notice of this information obtained from our eWRIMS Database System pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

10) On page 56 of the draft Order, change the first paragraph and the second paragraph, which continues onto page 57, as follows:

Assuming that Fahey's June FAS Period (June 16 through 30) diversions for 2009 through 2011 are half of Fahey's total June diversions, 13.16 acre-feet from the 2009 TUD deliveries and 20.83 acre-feet from the 2010 TUD deliveries remained in the reservoir after accounting for Fahey's FAS Period diversions under the Water Exchange Agreement. For 2011, Fahey's FAS Period diversions exceeded TUD deliveries by 11.28 acre-feet, creating a deficit in that year. ~~Therefore,~~ Absent a spill, ~~and setting aside the requirement to provide all FAS Period make-up water during the same year it is diverted (see 2011 water delivery deficit shown in Table 4 above),~~ approximately ~~22.70~~33.99 acre-feet[22] remained in the reservoir at the end of 2011.[23]

The Prosecution Team objected that Fahey does not have rights to store water in NDPR (Prosecution Team's Closing Brief, June 17, 2016, p. 12:15–19); however, Fahey's permits do not require that he provide replacement water under his own rights or at a rate identical to his rate of direct diversion. (See generally PT-15; PT-16.) Such a requirement would be inconsistent with permit terms that allow Fahey to provide water via credit for diversions adverse to CCSF's claims of right upstream of both NDPR and Fahey. (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34; see generally, e.g., Fahey-14; Fahey-15.) Therefore, at the end of 2011, approximately ~~22.70~~33.99 acre-feet of Fahey's "wheeled water" remained in the reservoir and were available to satisfy Fahey's non-FAS obligations if he was called upon by the Interveners to provide replacement water.

The Interveners March 11, 2019 comment letter raised additional arguments to the effect that Fahey does not have a right to store water in NDPR. Fahey's permits do not provide a right to store water in NDPR or any other reservoir and nothing in this order should be interpreted to the contrary. Permit 20784 and Permit 21289 authorize direct diversion, not storage. (PT-15, p. 4; PT-16, pp. 4–5.) Fahey's permits require him to provide non-FAS Period replacement water to

the Interveners under certain circumstances, which can be accounted for through credits. Both permits state that "[r]eplacement water may be provided in advance and credited to future replacement water requirements." (PT-15, p. 6; PT-16, p. 9.) This order calculates the volume of water Fahey delivered to the Interveners at NDPR between 2009 and 2011 and evaluates the ability of those deliveries to satisfy Fahey's non-FAS Period replacement water obligations to the Interveners.

[22] This value was calculated using unrounded component values and, as a result, differs slightly from ~~the~~a sum ~~of~~calculated using the rounded monthly component values shown in Table 4.
[23] An earlier, public draft of this order proposed to deduct the 11.28 acre-foot deficit between Fahey's FAS Period diversions and water deliveries in 2011 from the surplus 33.99 acre-feet available from Fahey's 2009 and 2010 deliveries. Fahey's March 11, 2019 comment letter expressed concerns with this approach and these concerns are well taken. Hearing Team staff reviewed the matter further and determined that, in addition to Fahey's concerns, the 2011 deficit between Fahey's deliveries and FAS Period diversions could not be satisfactorily distinguished from similar deficits in 2012 and 2013. (See also Fahey-57 [Permit 20784 2012 diversion data]; Fahey-58 [Permit 20784 2013 diversion data]; SWRCB-1, Permit 21289 Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013].)

This order evaluates the 2011 deficit further below in section 7.1.2, and accounts for Fahey's 2009 and 2010 surplus deliveries to NDPR separately. This approach is most consistent with the requirement in the Water Exchange Agreement that "make-up" water owed to MID and TID for Fahey's diversions during the FAS Period cannot be carried over from year to year. (PT-19, p. 2, ¶ 4.)

11) On page 57 of the draft Order, delete the text in the second full paragraph as follows, which is now included earlier in the document (see change #9 above):

Fahey's permits do not identify a specific right held by MID, TID, or CCSF against which Fahey may adversely divert. The permits specify only that Fahey "shall provide replacement water to New Don Pedro Reservoir for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts." (PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34.) A natural interpretation of this sentence is that Fahey may provide replacement water to NDPR for diversions adverse to any prior right or claim of right held by MID, TID, or CCSF. This understanding is consistent with permit language that waives Fahey's obligation to provide replacement water "during periods when the Districts' and San Francisco's reservoirs are spilling . . . ." (PT-15, pp. 6–7, ¶ 20; PT-16, p. 9, ¶ 34; accord Fahey-15, p. 248 [original protest dismissal term proposed by CCSF].) The use of the plural "reservoirs" strongly suggests that the parties intended the replacement water term to apply to diversions "adverse to" the Interveners' claims of prior right at other reservoirs in addition to NDPR. CCSF exercises claims of right at other reservoirs, further supporting this view. Table 5, below, summarizes the Interveners' recorded rights and claims of right on the Tuolumne River according to the State

Water Board's ~~Electronic Water Rights Information Management System (eWRIMS)~~eWRIMS database.[24]

[24]~~The eWRIMS Database System provides information about water rights throughout California, and is searchable by name, watershed, stream system, or county.~~ The Board takes official notice of this information obtained from our eWRIMS Database System pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

12) On page 60 of the draft Order, change the second paragraph as follows:

In section 5.2.2.2, the State Water Board determined that water was not available from at least May 27 through October ~~31~~30 and November 4 through 18, 2014, and from April ~~1~~23 through at least November 1, 2015 to serve Fahey's priority of right. As discussed in section 5.2.1, Fahey diverted at least 7.62 acre-feet over 63 days during the non-FAS Period from May 27 through June 15, 2014, November 4 through 18, 2014, April 23 through June 15, 2015, and November 1, 2015. In section 5.3.1.1, the Board determined that about ~~22.70~~33.99 acre-feet of the wheeled water that Fahey provided to NPDR remained in the reservoir and was available to satisfy his non-FAS replacement water obligations if he received notice pursuant to his permit terms.[26] Therefore, Fahey had more than enough water in NDPR to satisfy his replacement water obligation to the Interveners for his non-FAS Period diversions in 2014 and 2015 when water would not otherwise be available to serve his priority of right. For the foregoing reasons, the Board finds that there is sufficient evidence in the record to support a finding that Fahey had a defense to unlawful diversion for his diversions during the non-FAS Period in 2014 and 2015 when water was not available to serve his priority of right.

[26] The stated amount of wheeled water remaining in NDPR in 2011, ~~22.70~~33.99 acre-feet, assumes NDPR did not spill, and was not operated in anticipation of spill, since 2009. (See May 23, 2016 Procedural Ruling, pp. 9–10, 17 [rebuttal evidence and testimony submitted by the Prosecution Team on the issue of whether NDPR spilled after June 15, 2011 should be excluded].) Nothing in this order shall be construed as a finding on the amount of water Fahey has available to serve his current or future water obligations.

13) On page 69 of the draft Order, change the second paragraph as follows:

Fahey unlawfully diverted 25.33 acre-feet over 178 days during the FAS Period in 2014 and 2015 without providing make-up water to MID and TID as would have been required by his permits and the Water Exchange Agreement for the diversion to be authorized. Evidence in the record shows that Fahey did not provide make-up water for his FAS Period diversions on a consistent basis in prior years. As discussed in section 5.3.1.1, Fahey ~~failed to meet his~~

~~obligation to provide~~provided make-up water for his full FAS Period diversions in 2009 and 2010 but failed to do so in 2011 and other years. (See Table 4 [demonstrating that Fahey did not provide sufficient make-up water for FAS Period diversions in 2011]; Prosecution Team's Closing Brief, June 17, 2016, p. 15:15–25.) In addition, during the FAS Periods in 2012 and 2013, Fahey diverted at least 28.3 acre-feet and at least 10.4 acre-feet, respectively,[2] without providing any FAS Period make-up water in those years. (Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; Fahey-58, p. 1269 [Permit 20784 reported 2013 diversions]; SWRCB-1, Permit 21289 Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013 because it was unavailable].) In 2009 through 2012, Fahey's FAS Period diversions also violated Term 2 of the Water Exchange Agreement, which requires that Fahey divert no more than 17 acre-feet during the FAS Period in any year. (Fahey-51, p. 929 [Permit 20784 reported 2009 diversions]; Fahey-52, p. 1016 [Permit 20784 reported 2010 diversions]; Fahey-56, p. 1243 [Permit 20784 reported 2011 diversions]; Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; PT-19, p. 1, ¶ 2 [Term 2].)

14) On page 78 of the draft Order, change the second full paragraph as follows:

For all these reasons, Mr. Fahey's recollection of his conversation with Mr. Kennedy circa 1992 is credible. In section 5.3.1.1, above, the State Water Board found that Fahey delivered about 88.31 acre-feet of water into NPDR. The Board also found that about ~~22.70~~33.99 acre-feet were still available if called upon to meet non-FAS Period replacement water requirements. Fahey's recollection of Mr. Kennedy's statements, and the pattern of interactions with the Interveners' described above, give credence to Mr. Fahey's testimony that he genuinely believed providing this water was good enough to meet his make-up water requirements during the FAS Period. This does not excuse or justify unlawful diversion, but it does inform the Board's civil penalty calculations and the Board's determination of what corrective measures are appropriate.

15) On page 79 of the draft Order, change the first full paragraph as follows:

The State Water Board is inclined to agree. Fahey has invested decades of his life in his spring water business. He has worked to develop it since 1991. (Fahey-3.) FAS Period replacement water was available from TUD for $60 an acre-foot in other years. (See PT-72, p. 46.) TUD

water was not available in 2014 or 2015 (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; PT-72, pp. 41–42), and the record does not indicate the going rate for other make-up water that may then have been available. Although the price of make-up water would probably have exceeded $60 per acre-foot, it would be very surprising if Fahey could not obtain an acre-foot of replacement water from somewhere for less than $6,612 to $8,146. Fahey promptly filed curtailment certifications when asked, gave timely responses to inquiries from Board staff, and continued to report his diversions to the Board as required. (E.g., Fahey-60; PT-35; PT-36; PT-11, p. 3–4, ¶¶ 11–15; PT-13, p. 4, ¶ 20.)

16) On page 81 of the draft Order, change the second paragraph as follows:

In rebuttal, the Prosecution Team introduced evidence and testimony explaining that the Division issued 9,254 unavailability notices and received ~~9,254~~3,531 curtailment certification forms in~~for~~ 2014~~, of which 340, claimed, like Fahey, that because of water from another source, curtailment of their diversion was unnecessary despite the projected lack of water availability under the right for which the 2014 Unavailability Notice was issued.~~. (PT-153, p. 15~~; see also Fahey-61, pp. 1278–1279 [marking box for "other" alternative source].)~~.) For 2015, the Prosecution Team testified that it ~~received 523~~ issued more than 9,300 unavailability notices and received 3,688 curtailment certification forms~~ claiming this exception, out of more than 9,300 total forms~~. (PT-153, p. 15.) At the hearing, Mr. Coats testified that it was "[c]orrect" that "the fact that Mr. Fahey filed his curtailment certification form in 2014 and it took roughly a year to get to him, that was largely due to allocation of staffing resources in response to drought management." (See R.T., Jan. 26, 2016, p. 31:3–7.) Among other tasks, the Division apparently performed over 1,000 inspections in each year between 2014 and 2015. (*Id.*, p. 30:24–25.) The record indicates that Mr. Fahey never received a response to his Jun. 3, 2014 curtailment certification form claiming a defense to unlawful diversion. (R.T. Jan. 1, 2016, 162:14 to 163:3.) According to Mr. Fahey' testimony, if the Division had told him that a decision had been made by Board staff that rejected his 2014 claimed defense to unlawful diversion, Mr. Fahey "would have asked immediately for a hearing." (R.T., Jan. 25, 2016, 169:22 to 170:6.)