STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2019-00XX

In the Matter of Draft Cease and Desist Order and Administrative Civil Liability Complaint

against

G. Scott Fahey and Sugar Pine Spring Water, LP

SOURCE: Unnamed Spring (aka Sugar Pine Spring), tributary to an unnamed stream, thence Cottonwood Creek, thence Clavey River, thence Tuolumne River; Deadwood Spring, tributary to an unnamed stream, thence Basin Creek, thence North Fork Tuolumne River, thence Tuolumne River; and two Unnamed Springs (aka Marco Spring and Polo Spring) each tributary to an unnamed stream, thence Hull Creek, thence Clavey River, and thence Tuolumne River

COUNTY: Tuolumne

ORDER ADOPTING A CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE CIVIL LIABILITY

BY THE BOARD:

1.0 SUMMARY

In this order the State Water Resources Control Board (State Water Board or Board) issues a final Cease and Desist Order (CDO) and Administrative Civil Liability Complaint (ACL Complaint) against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively Fahey) for unauthorized diversion of water in 2014 and 2015. Fahey holds water right Permits 20784 (Application 29977) and 21289 (Application 31491), with priority dates of 1991 and 2004, respectively. (PT-15; PT-16; Fahey-20; Fahey-55.)[1] These permits conditionally authorize

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[1] Citations to the evidentiary record identify primary support for a particular fact or proposition but are not intended to identify every piece of supporting evidence in the record. Exhibits are identified by the name or abbreviation for the party submitting the exhibit, the exhibit number, and the page number or other location of the referenced material within the exhibit. Page numbers refer to internal page numbers or Bates stamped page numbers in the exhibit or to the PDF page number of the exhibit when no internal page numbers or Bates stamped page numbers are provided or the exhibit combines multiple documents. Numbers following the pilcrow symbol refer to the identifier given to a paragraph or section (such as a term of a permit or agreement) if provided in the exhibit, or, if an identifier is not provided in the exhibit, a paragraph's order of appearance on the exhibit page.
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Fahey to divert water year-round for industrial use from several spring sources tributary to the Tuolumne River in Tuolumne County, California. (PT-15; PT-16; Fahey-20; Fahey-55.)

A separate team of Board staff assigned to perform prosecutorial functions (Prosecution Team) issued a draft CDO and ACL Complaint to Fahey in 2015 and notified Fahey of his right to an evidentiary hearing on this matter. Fahey requested a hearing, which was held on January 25 and 26, 2016, and included Fahey, the Prosecution Team, Modesto Irrigation District (MID), Turlock Irrigation District (TID), and the City and County of San Francisco (CCSF). MID, TID, and CCSF (collectively, the Interveners) participated in the hearing "for the limited purpose of protecting their respective prior rights and interests in the waters of the Tuolumne River." (Interveners' Closing Brief, June 17, 2016, p. 2:17–20.) MID and TID jointly operate New Don Pedro Reservoir (NDPR) on the Tuolumne River downstream from Fahey's point of diversion and CCSF maintains a water bank account in NDPR, which is administered through a series of agreements between MID, TID, and CCSF. (See generally, e.g., Fahey-79, pp. 7–10.) This order is based on the evidentiary record developed through the hearing on this matter.

Before addressing the case on the merits, this order resolves a motion to dismiss the ACL Complaint and draft CDO presented in Fahey's June 17, 2016 closing brief and addresses related procedural issues. Fahey alleges that the Prosecution Team violated his constitutional right to procedural due process by failing to produce certain requested documents until after the close of the evidentiary proceeding, preventing Fahey from using the documents for various purposes. Fahey contends that this alleged violation of his rights irreparably injured him and that the only viable remedy is to dismiss the enforcement action against him. This order finds that Fahey's due process rights have not been violated, denies Fahey's motion to dismiss, and admits into evidence some of the records he identified as new exhibits. Subsequent sections of this order address legal arguments that Fahey attempted to raise by referencing the disputed records.

A. The following abbreviations are used when citing to the exhibits:
"PT" is used for the Board's Prosecution Team;
"Fahey" is used for G. Scott Fahey and Sugar Pine Spring Water, LP;
"SWRCB" is used for the Hearing Team.

B. Citations to the Certified Reporter's Transcript are indicated by "R.T." followed by the date, page, and line numbers.

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To address the merits of this case, this order summarizes the history and requirements of Fahey's water rights, describes his diversions in 2014 and 2015, and evaluates whether Fahey unlawfully diverted water during either of those years. A key component of the Board's analysis of this case regards the applicability of a fully appropriated stream period to Fahey's permits. Fahey's water sources are located in the Tuolumne River watershed[2] upstream of New Don Pedro Reservoir, which is fully appropriated from July 1 through October 31 (e.g., Decision 995; Order WR 91-07), and the larger Sacramento-San Joaquin Delta watershed (Delta watershed)[3] upstream of the Delta, which is fully appropriated from June 15 or 16[4] (depending on the volume of water right) through August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07). This order separately evaluates Fahey's diversions from June 16 through October 31, the fully appropriated stream period, or "FAS Period," and from November 1 through June 15, the "non-FAS Period," due to differences in the way Fahey's permit terms apply to each period. Section 5.1 of this order discusses these differences in detail.

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.

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[2] In this order, the terms "watershed" and "basin" are used interchangeably.

[3] The Delta watershed is the largest watershed, or basin, by area and volume in California. The Delta watershed includes the Sacramento River watershed and the San Joaquin River watershed, which, in turn, include all of their respective tributaries' watersheds. The Tuolumne River is tributary to the San Joaquin River; therefore, the Tuolumne River watershed is within the San Joaquin River watershed and the larger Delta watershed.

[4] For permittees who directly divert less than one cubic foot per second or divert to storage less than 100 acre-feet per annum, the Delta watershed upstream of the Delta is fully appropriated between June 16 and August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07).

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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.[5] 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."

This order finds that the water availability analysis is a reasonable method of demonstrating whether water is generally available to divert in a particular stream system at a particular priority of right. The priority dates of Fahey's rights—July 12, 1991 and January 28, 2004—are well within the range of priority dates for which the water availability analysis shows that water was not generally available during the periods at issue in 2014 and 2015. Therefore, this order finds that the Prosecution Team made a satisfactory showing that Fahey diverted water when it was not available to serve his priority of right absent a defense. Fahey presented arguments to the effect that the water availability analysis is an underground regulation and is inconsistent with certain non-precedential memoranda prepared by staff for the State Water Rights Board, our predecessor agency, in the 1960s. This order concludes that both arguments are without merit.

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

[5] The Prosecution Team also raised arguments about Fahey's alleged failure to comply with bypass flow requirements in his permits, which this order considers as a factor for setting the appropriate administrative civil penalty pursuant to section 1055.3 of the Water Code.

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.

In regards to Fahey's FAS Period diversions, Fahey admits that he did not provide make-up water into NDPR in 2014 or 2015 (R.T., Jan. 25, 2016, p. 196:4-21) but argues that other terms in his permits forbidding him from interfering with NDPR operations or the Interveners' water accounting also forbid him from providing FAS Period "make up" water on an annual basis (see generally, Fahey's Closing Brief, June 17, 2016, pp. 17:7 to 18:12). The Board finds Fahey's argument unpersuasive, noting that his 1992 Water Exchange Agreement with MID and TID requires Fahey to provide notice of make-up water deliveries through semi-annual reports and thereby enable the Interveners to include Fahey's FAS Period make-up water in their accounting. Fahey also argues that he pre-positioned 88.31 acre-feet of water in NDPR between 2009 and 2011 and that this water was available to offset his diversions in 2014 and 2015. Fahey's Water Exchange Agreement with MID and TID clearly states that in regards to FAS Period make-up water "no carryover" of water "will be allowed to subsequent years," so this argument lacks merit as applied to Fahey's FAS Period diversions in 2014 and 2015. (See PT-19, p. 2, ¶ 4.)

Fahey further argues that his diversions are percolating groundwater or developed water not subject to the normal rules of prior appropriation for surface streams. In *Churchill v. Rose* (hereinafter *Churchill*) (1902) 136 Cal. 576, 578–579, the California Supreme Court held that a landowner who "dug out" a spring such that its flow "increased three fold" was "entitled to the increased amount of water thus developed." California law also presumes, however, that a spring tributary to a stream is part of the stream and is therefore subject to the dual doctrines of riparian rights and prior appropriation. (*Gutierrez v. Wege* (1905) 145 Cal. 730, 734.) As such, Fahey has the burden of proof to establish that his diversions from a spring are not diversions of surface water. There is not substantial evidence in the record sufficient to meet this burden. Accordingly, this order finds that there is not sufficient evidence in the record to support a finding that Fahey diverted groundwater or developed water during the period at issue in 2014 or 2015.

Lastly, Fahey argues that the case *City of Los Angeles v. Pomeroy* (hereinafter *Pomeroy*) (1899) 124 Cal. 597, establishes a presumption under California law that water diverted from a spring is developed water. *Pomeroy* does not address diversions of developed water from springs. Instead, *Pomeroy* describes the concept of an underground stream flowing in known and definite channels, an exception to the general rule concerning percolating groundwater. Fahey cites no case or precedent in support of his argument that water diverted from a spring is developed water, and the State Water Board is unable to identify legal support for this alleged presumption. Accordingly, this order finds that Fahey's argument that a "developed water presumption" should apply to his diversions lacks merit.

This order finds that Fahey unlawfully diverted 25.33 acre-feet of water over 178 days during the FAS Period in 2014 and 2015. Evidence in the record also suggests that Fahey did not provide FAS Period make-up water, as required by his permits, on a consistent basis prior to these years. Accordingly, this order finds that a cease and desist order is warranted and that administrative civil liability is warranted. The maximum penalty allowed by section 1052 of the Water Code for Fahey's unlawful FAS Period diversions in 2014 and 2015 is $241,325. After applying the administrative civil liability factors identified in section 1055.3 of the Water Code, this order assesses administrative civil liability in the amount of $215,000 against Fahey.

Of this amount, $50,000 is due immediately. The remaining $165,000 will be indefinitely suspended if Fahey completes certain actions necessary to correct his unlawful diversion and prevent future violations. Specifically, the remaining penalty will be suspended if Fahey provides restitution to MID and TID equivalent to his 2014 and 2015 FAS Period Diversions and prepares and implements a detailed Curtailment Operations Plan for future droughts. This penalty and these corrective actions are appropriate to make injured parties whole, correct the unlawful diversion, discourage purposeful and negligent unlawful diversion by others, and recover the State Water Board's enforcement costs. The cease and desist order requires Fahey to cease continued and threatened unauthorized diversion under his permits; cease diversion under Permit 21289 (Application 31491) in a manner inconsistent with the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID; file reports related to his compliance with bypass flow requirements; prepare a Curtailment Operations Plan for approval by the Deputy Director of the Division of Water Rights (Division), and comply with all of the terms and conditions of Permits 20784 (Application 29977) and 21289 (Application 31491).

2.0 BACKGROUND

2.1 Declaration of Drought State of Emergency

On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014 declaring a State of Emergency to exist in California due to severe drought conditions. (PT-1, p. 3, ¶ 11.) On April 25, 2014, Governor Brown issued Proclamation No. 4-25-2014, declaring a Continued State of Emergency due to drought conditions, to strengthen California's ability to manage water and fish and wildlife habitat effectively in drought conditions. (*Id.*, ¶ 13.) On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order). Condition 1 of this Executive Order specified that the orders and provisions contained in the January 17, 2014 Proclamation, April 25, 2014 Proclamation, and Executive Orders B-26-14 and B-28-14 remain in full force and effect except as modified. (PT-27, p. 2.) Condition 10 of this Executive Order directed the State Water Board to require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water. (*Id.*, p. 3.) This included the authority, pursuant to Government Code sections 8570 and 8627, to inspect property and diversion facilities to ascertain compliance with water rights laws and regulations. (*Ibid.)*

2.2 Notices of Surface Water Shortage and Unavailability

On January 17, 2014, State Water Board staff issued a "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions." (PT-29 [notice]; see also PT-7, p. 3, ¶ 12; PT-1, p. 3, ¶ 12.) This notice's purpose was to alert diverters in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities. (See PT-7, p. 3, ¶ 12; *id.*, p. 5, ¶ 23.) On May 27, 2014, staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice). (Fahey-59 [notice]; PT-32 [same].) The 2014 Unavailability Notice sought to inform post-1914 appropriative water right holders within the Delta watershed that Board staff projected insufficient water supply to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. (See Fahey-59, p. 1276; PT-7, p. 3, ¶ 13; PT-1, p. 3, ¶ 12; Fahey-75, pp. 4–5, ¶ 6.) For example, the 2014 Unavailability Notice warned that "[e]ven if there is water physically available at your point of diversion, that water is necessary to meet

senior water right holders' needs or is water released from storage that you are not entitled to divert." (Fahey-59, p. 1276.)

State Water Board staff continued to project insufficient water supply for post-1914 rights until late October. On October 31, 2014, the Board issued a "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin Watershed River." (PT-31.) This notice was intended to "temporarily lift[] the curtailment of water rights" (PT-7, p. 3, ¶ 15), which is to say that the 2014 Unavailability Notice informed post-1914 water right holders that projections indicated water was available until November 3, 2014, to serve their rights. (See *ibid.*) The changed water supply forecast was based on a predicted rain event. (PT-31.) The Board issued a second "Notice of Temporary Lifting of Curtailments for Diversions in the Sacramento-San Joaquin Watershed" on November 19, 2014. (PT-37; PT-7, p. 4, ¶ 16.)

On January 23, 2015, State Water Board staff issued a "Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015." (PT-38 [notice]; see also PT-7, p. 4, ¶ 17; PT -1, p. 3; ¶ 17.) The notice alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities. Facing "a distinct possibility . . . that the current drought will stretch into a fifth straight year" (PT-27, p. 1), on April 23, 2015, Board staff issued a "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (2015 Unavailability Notice) (Fahey-63 [notice]; PT-39 [same].) Like the 2014 Unavailability Notice, the 2015 Unavailability Notice informed post-1914 appropriative water right holders within the San Joaquin River watershed of the projection that there was insufficient water available to serve their priorities of right. (See Fahey-63, p. 1294; PT-1, p. 3, ¶ 19; PT-7, p. 4, ¶ 18; *id.*, p. 5, ¶ 23; Fahey-75, pp. 4–5, ¶ 6.)

On July 15, 2015, the State Water Board staff issued an additional notice and a fact sheet confirming that the 2015 Unavailability Notice and certain other notices were informational. (PT-40, [notice]; PT-41, p. 1 [explaining purpose of notice].) The notice further informed that background principles of water law, including the prohibition against unlawful diversion, apply. Board staff continued to monitor the water supply situation in 2015, issuing a "Notice of Diversion Opportunity for all Post-1914 Water Rights for the Sacramento and San Joaquin River Watersheds and the Sacramento-San Joaquin Delta" on November 6 of that year. (PT-44.)

That notice advised post-1914 water right holders that the Board staff projected sufficient water available to serve post-1914 rights until further notice. (See *ibid.*) The Board staff committed to continue "monitoring weather forecasts and stream gages to determine if conditions change." (*Ibid.*)

2.3 Notice of Draft CDO and Administrative Civil Liability Complaint

Fahey received the 2014 Unavailability Notice and 2015 Unavailability Notice. (Fahey-1, p. 16; see also Fahey-59, p. 1276; Fahey-63, p. 1294.) In response to the 2014 Unavailability Notice, Fahey submitted curtailment certification forms in 2014 and a letter identifying specific reasons why Fahey believed he was entitled to continue diverting. (Fahey-60; Fahey-61; PT-35; PT-36; PT-47.) Mr. Fahey communicated with Prosecution Team witnesses David LaBrie and Samuel Cole during 2015 (e.g., PT-48; PT-51), but Fahey and the Prosecution Team did not reach agreement as to whether he was entitled to continue diverting. Mr. Fahey testified that, prior to issuing the draft CDO and ACL Complaint, the Prosecution Team never formally rejected the exception described in his 2014 letter. (Fahey-60; R.T. Jan. 25, 2016, 29:2–10.)

On September 1, 2015, the Assistant Deputy Director for the Division issued a draft CDO, an ACL Complaint, and Information Order WR 2015-0028-DWR[6] to Fahey. (PT-1; PT-2; PT-3; PT-9, p. 1; Fahey 67.) The draft CDO would require Fahey to "immediately cease the unauthorized diversion of water from Unnamed Spring (AKA Cottonwood Spring),[7] Deadwood Spring and Two Unnamed Springs (AKA Marco and Polo Springs) 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." (PT-2, p. 6.) The ACL Complaint calculated a maximum administrative civil liability of $394,886 and recommended civil liability of $224,875. (PT-1, p. 8, ¶¶ 48, 53.) Fahey requested a hearing by letter dated September 8, 2015. (PT-5.)

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[6] The 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.

[7] The draft CDO erroneously lists "Unnamed Spring (AKA Cottonwood Spring)." It should instead list "Unnamed Spring (AKA Sugar Pine Spring)" because on March 6, 2002, the Division of Water Rights issued an Order Approving Extension of Time, Change in Point of Diversion, and Amending the Permit, which approved a December 12, 1997 petition from Fahey to change the first point of diversion listed on Permit 20784 from the "unnamed spring (a.k.a. Cottonwood Spring)" to a new location called the "unnamed spring (a.k.a. Sugar Pine Spring)." (PT-15, pp. 1-2 [order approving Permit 20784 change petition]; PT-56, p. 1 [2014 Progress Report for Permittee lists "UNSP (AKA SUGAR PINE SPRING)" as a source under Permit 20784]; R.T. Jan. 25, 2016, p. 45:16–18 [Katherine Mrowka testified that Fahey submitted a change petition to change the Cottonwood Spring point of diversion to Sugar Pine Spring].)

2.4 Notice of Public Hearing

On October 16, 2015, the State Water Board issued a Notice of Public Hearing (Hearing Notice). The Hearing Notice identified the following key issues:

1) Has Fahey violated, or is Fahey threatening to violate, the prohibition set forth in Water Code section 1052 against the unauthorized diversion or use of water (trespass)? This may include, but is not limited to consideration of the following questions related to allegations or defenses:
   a) Did Fahey divert water under Permits 20784 and 21289 when water was unavailable for diversion under his priority of right?
   b) If Fahey diverted water, does Fahey hold or claim any water rights other than Permits 20784 and 21289 that would authorize the diversion?
   c) What other relevant circumstances should be considered by the State Water Board in determining whether unauthorized diversion of water has occurred or is threatening to occur?
2) If a trespass occurred, should the State Water Board adopt the September 1, 2015 draft CDO against Fahey with revision or without revision?
3) Should the State Water Board impose administrative civil liability upon Fahey for trespass and, if so, in what amount and on what basis? In determining the amount of civil liability, the State Water Board must take into consideration all relevant circumstances (Wat. Code, § 1055.3), including but not limited to:
   a) What is the extent of harm caused by Fahey['s] alleged unauthorized diversions?
   b) What is the nature and persistence of the alleged violation?
   c) What is the length of time over which the alleged violation occurred?
   d) What corrective actions, if any, have been taken by Fahey?
   e) What other relevant circumstances should be considered by the State Water Board in determining the amount of any civil liability?

2.5 Evidentiary Hearing

Adjudicative proceedings before the State Water Board are governed by California Code of Regulations, title 23, sections 648–648.8, 649.6, and 760, and the statutes specified in the regulations, including applicable provisions of chapter 4.5 of the Administrative Procedure Act (commencing with Government Code section 11400). The State Water Board separates its

advisory and prosecutorial functions in its enforcement proceedings. Vice Chair Frances Spivy-Weber and Board Member Dorene D'Adamo presided over the hearing as Hearing Officers. The State Water Board was assisted by a staff Hearing Team. The staff who acted in a prosecutorial role (i.e., the Prosecution Team) were separated from the Hearing Team and subject to a prohibition on ex parte communications. The prohibition was observed.

On January 25 and 26, 2016, the State Water Board held an adjudicative hearing to consider the ACL Complaint and draft CDO. At the hearing, the State Water Board's Prosecution Team and Fahey appeared and presented cases-in-chief and rebuttal testimony and exhibits. Among the Interveners, MID and TID jointly participated in the hearing through the presentation of an opening statement and through cross-examination, while CCSF participated solely through the presentation of an opening statement. The Prosecution Team, Fahey, and the Interveners submitted closing briefs on June 17, 2016. The State Water Board has considered all of the evidence in the hearing record; the findings and conclusions of this order are based upon it.

3.0 MOTION TO DISMISS AND EVIDENTIARY ISSUES

3.1 Fahey's June 17, 2016 Motion to Dismiss

3.1.1 Introduction

Fahey moved to dismiss this proceeding in his June 17, 2016 closing brief, alleging that the Prosecution Team violated his right to procedural due process by failing to produce certain documents until April 29, 2016, after the close of the evidentiary proceeding. Fahey requested production of several categories of documents by letter dated December 1, 2015, including "[a]ll 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 [Curtailment Certification] Forms . . . which correspondence was made or sent following the submission by the Primary Owners of the Forms." (Fahey's Closing Brief, June 17, 2016, p. 1:20–24; see also Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 2, Attachment 1 [attaching a true and correct copy of Fahey's December 1, 2015 letter].) The Prosecution Team received over 3,500 certification forms in 2014 and over 3,600 certification forms in 2015. (PT-153, p. 15.) The Prosecution Team objected to Fahey's document request by email dated December 8, 2015, contending that the document request "is exceedingly broad and lacks relevance to this ACL proceeding" and "is typically one the Division would treat as a request for public records." (Decl.

of Kenneth Petruzzelli In Support of Prosecution Team Post-Hearing Evidence Brief, April 8, 2016, ¶ 5, Attachment 1, p. 1.)

Fahey submitted a Public Records Act request on or about December 7, 2015 with identical requests for information. (See Decl. of Glen Hansen in Support of Fahey's Closing Brief [hereinafter Hansen Declaration], June 17, 2016, Exh. 1, pp. 1–3;[8] accord R.T., Jan. 25, 2016, 9:9–14; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 3, Attachment 2 [enclosing a true and correct copy of Fahey's December 7, 2015 Public Records Act request].) Nothing in the record indicates that Fahey ever subpoenaed the curtailment certification form correspondence he requested in his December 1, 2015 letter. (E.g., Hansen Decl., ¶ 2; Decl. of Glen Hansen in Support of Opposition to the Prosecution Team's Motions, Dec. 18, 2015, ¶¶ 1-14 [providing detailed chronology of Fahey's efforts to obtain documents].)

Fahey served a series of separate deposition notices on Prosecution Team witnesses on December 9 and 11, 2015, and demanded production of correspondence with Fahey, correspondence regarding Fahey's permits, and documents used to prepare witnesses' written testimony. (See Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 6, Attachment 5 [enclosing true and correct copies of Notice of Deposition of David LaBrie and Notice of Deposition of Katherine Mrowka]; Letter from Kenneth Petruzzelli, Prosecution Team to Hearing Service List and Ernest Mona, State Water Board (Dec. 11, 2018) [enclosing copy of Fahey's December 11, 2015 Notice of Deposition of Samuel Cole].)[9] On December 10, 2015, Fahey also noticed the deposition of a Person Most Knowledgeable of certain matters related to some of the correspondence requested in Fahey's December 1, 2015 letter. (See Decl. of Kenneth Petruzzelli in Support of Motion re: Dec. 10, 2015 Deposition Notice, Dec. 10, 2015, ¶ 2, Attachment 1 [enclosing a true and correct copy of Fahey's December 10, 2015 Notice of Deposition of Person Most Knowledgeable].) This deposition notice did not demand the production of any documents. (See *ibid.*) The following day, the Prosecution Team filed a Motion for Protective Order or, Alternatively, Motion to Quash in response to Fahey's deposition notices.

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[8] For citations to the Hansen Declaration, paragraphs correspond to paragraphs in the declaration itself. Page numbers correspond to Bates stamped page numbers in the exhibits attached to the declaration.
[9] The letter, received on December 11, 2015, is erroneously dated December 9, 2015.

All of the people Fahey attempted to depose were Prosecution Team witnesses except, potentially, the Person Most Knowledgeable. (See Prosecution Team, Notice of Intent to Appear (Nov. 5, 2015).) The Hearing Officers issued a Procedural Ruling on December 21, 2015 that granted the Prosecution Team's motion for protective order with respect to Katherine Mrowka, Samuel Cole, and David LaBrie, directed the Prosecution Team to identify the Person Most Knowledgeable; set conditions to make the Person Most Knowledgeable available for Fahey's cross-examination at the hearing; and established a schedule to rule on motions related to the document demands enclosed in Fahey's December 9 and 11, 2015 deposition notices. (December 21, 2015 Procedural Ruling, p. 5.) The Prosecution Team promptly identified one of their witnesses, Ms. Mrowka, as the Person Most Knowledgeable. (Letter from Kenneth Petruzzelli, Prosecution Team, to Hearing Service List and Ernest Mona, State Water Board (December 22, 2015).)[10] Fahey's counsel cross-examined Ms. Mrowka, Mr. Cole, and Mr. LaBrie on January 25, 2016 during the first day of the hearing. (See generally R.T., Jan. 25, 2016, p. 74:1, et. seq. [cross-examination of Prosecution Team witnesses).

The Hearing Officers resolved Fahey's December 9 and 11, 2015 deposition notice document demands through a January 21, 2016 Procedural Ruling that construed the document demands as administrative subpoenas duces tecum and established a schedule for the Prosecution Team to produce undisclosed, responsive, non-privileged documents. (See January 21, 2016 Procedural Ruling, pp. 4, 10.) Nothing in Fahey's December 9 or 11, 2015 deposition notices sought to compel production of the documents requested in Fahey's December 1, 2015 letter, and the Hearing Officers' ruling did not address that issue.

The Prosecution Team completed its response to Fahey's Public Records Act request by letter dated April 29, 2016, releasing 42 responsive documents. (Hansen Decl., ¶ 2; see also Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶¶ 5-9 [summarizing Public Records Act response].) Fahey's counsel declares that none of these responsive documents discuss an administrative process under which the Board responded to diverters that claimed a defense to unlawful diversion by marking the "Other" box on their Curtailment Certification Forms. (See Hansen Decl., ¶ 4.) Fahey objects that withholding the documents until after the hearing violated his procedural due process rights because it prevented him from using the documents to prove that there was no administrative process

[10] The letter, received on December 22, 2015, is erroneously dated December 23, 2015.

regarding claimed exceptions to curtailment. (Fahey's Closing Brief, June 17, 2016, p. 3:12–15; *id.*, p. 4:4–7.) Fahey also contends that certain specific disclosed documents are relevant to this proceeding and should have been disclosed in response to Fahey's December 1, 2015 letter. Because the Prosecution Team failed to disclose these records until April 29, 2016, Fahey contends that he has been irreparably injured and that the enforcement proceeding should be dismissed. (*Ibid.*)

First, Fahey contends that various documents concerning the City of Portola's Water Right License 10013 (Application 17069) contradict Prosecution Team witnesses' position on whether the doctrine of developed water applies to Fahey's diversions. (See Fahey's Closing Brief, June 17, 2016, p. 2:18–23; see also PT-9, ¶ 35 [Ms. Mrowka opining that Fahey's springs are subject to prior appropriation]; R.T., Jan. 25, 2016, p. 128:16–22 [same].) To support this argument, Fahey submits an August 6, 2014 Curtailment Inspection Report (Hansen Decl., Exh. 1, pp. 26–37 [hereinafter the Portola Inspection Report]) and certain related correspondence, specifically an August 25, 2014 letter prepared by Burkhard Bohm, a California registered geologist (*id.*, pp. 24–25 [hereinafter the Bohm Letter]), and an undated letter from John O'Hagan, Assistant Deputy Director for the Division, to the City of Portola (*id.*, pp. 38–39 [Hereinafter the Portola Letter]). In the Portola Letter, Mr. O'Hagan appears to respond to the City of Portola's argument that most of the points of diversion for License 10013 divert groundwater and, as such, are not subject to the Board's permitting authority. (See *id.*, at p. 38.)

Second, Fahey argues that the Portola Letter is relevant to this proceeding because it states a legal position that Fahey contends is contrary to the Prosecution Team's position in this proceeding. (Fahey's Closing Brief, June 17, 2016, p. 3:1–11.) In the Portola Letter, Mr. O'Hagan states that "California water law presumes that the source of groundwater is a percolating aquifer unless evidence is available to support that a specific groundwater diversion is from a subterranean stream flowing in a known and definite channel." (Hansen Decl., Exh. 1, p. 38.) Fahey contends that the Portola Letter would "reinforce Fahey's testimony . . . related to the lack of harm from his diversions" (Fahey's Closing Brief, June 17, 2016, p. 3:7–8) and establish a "developed water presumption" that the Prosecution Team had the burden of overcoming (*id.*, p. 3:9–10).

Third, Fahey argues that certain documents pertaining to Water Right License 9120 (Application 21647), held by the Cold Springs Water Company (CSWC), are relevant to this proceeding and should have been disclosed. (Hansen Decl., ¶ 5; Hansen Decl., Exh. 2, p. 108.) Apparently, the license associated with Application 21647 gives CSWC the right to divert from the North Fork Tuolumne River, whose confluence with the Tuolumne River is upstream of NDPR. (Hansen Decl., ¶ 5.) The Prosecution Team included CSWC's April 29, 2015 curtailment certification for this license and related correspondence in its April 29, 2016 document disclosure to Fahey. (*Ibid*; see also *id.*, Exh. 1, pp. 40–42 [hereinafter CSWC Certification].) CSWC requested that it be allowed to continue diverting under a 73 percent reduction, to provide drinking water for "530 families in the Cold Springs area of Tuolumne County" with no other source except a "very unreliable" well. (*Id.*, Exh. 1., p. 41.) Evidently, nothing in the Prosecution Team's disclosure indicated that the Division responded to CSWC. (*Id.*, ¶ 5.) However, Fahey's counsel asked to review the permitting file for Application 21647 and received a copy on June 15, 2016. (*Id.*, ¶ 6.) Fahey attached the entire permitting file for Application 21647 to the Hansen Declaration as Exhibit 2. (*Ibid.*)

Fahey contends that three specific documents within the file for Application 21647 are relevant to this proceeding. The first is an August 28, 1964 memorandum prepared by L.D. Johnson, a senior engineer then employed by the State Water Board's predecessor agency, the State Water Rights Board,[11] regarding Application 21647. (Hansen Decl., Exh. 2, pp. 165–170 [hereinafter Johnson Memo].) The Johnson Memo states that, although continuity of flow exists between the proposed point of diversion and the Delta, "approval of the application would not diminish the supply to the Delta during the critical months in years of water shortage" because "[t]he flow of the Tuolumne River during July, August and September is now almost completely controlled by . . . [old] Don Pedro Reservoir." (*Id.*, pp. 165, 167.) The memo predicts that, with the completion of the project that would become NDPR, "uncontrolled flows during July, August and September in the Tuolumne River below the reservoir can be expected to be practically nonexistent." (*Id.*, p. 167.) The Johnson Memo concludes that Application 21647 should be approved, citing an August 2, 1963 memorandum from L.C. Jopson signed in his capacity as the State Water Rights Board's Chief Engineer. (*Id.*, pp. 167, 169; see also *id.*, pp. 136–138

[11] The Legislature merged the State Water Quality Control Board and the State Water Rights Board in 1967, creating the State Water Resources Control Board. (See Stats. 1967, ch. 284, p. 1441 et seq.; see also Wat. Code, § 179.)

[hereinafter Jopson Memo].) The Jopson Memo provides general direction for how State Water Rights Board staff should resolve unprotested applications to appropriate water. For example:

> d. Where applicant is above a reservoir which has an all year season of collection or diversion and exercises full control of the stream during the critical season; or where a downstream diverter takes the entire flow during the critical season. If applicant can eliminate the protest of the agency controlling or diverting the entire stream, all year diversion is allowed subject to higher level of staff approval.

(Hansen Decl., Exh. 2, p. 136; see also *id.*, p. 169.)

The third document consists of a route slip and signature page for Permit 14633, issued to Application 21647 on December 22, 1964. (Hansen Decl., Exh. 2, pp. 148-152 [hereinafter CSWC Signature Pages].) Fahey argues that the Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant to the issue of MID and TID's control of the flow of the Tuolumne River during July, August, and September; the effects of diversions above NDPR on water availability in the Delta, and whether "all year diversion is allowed" when an applicant to appropriate water above a reservoir resolves protests by the reservoir owner. (Fahey's Closing Brief, June 17, 2016, pp. 3:16 to 4:3; see also Hansen Decl., ¶ 6.)

3.1.2 Prosecution Team's Objection and Fahey's Response

The Prosecution Team objected to the Hansen Declaration on June 21, 2016, and revised its objection on June 23, 2016. In essence, the Prosecution Team argues that its decision to decline Fahey's document request as overly broad was appropriate (Prosecution Team Objection to Declaration of Glen Hansen in Support of Fahey's Closing Brief [hereinafter PT Objection], p. 1:14 to 2:7), that Fahey's due process argument is not timely because he failed to object at the hearing itself (*id.*, p. 2:3–5), and that the documents attached to the Hansen Declaration as evidence "are irrelevant and offer nothing new that could not have been offered previously or otherwise obtained through discovery" (*id.*, p. 2:6–7). The Portola Letter, according to the Prosecution Team, is not relevant because it relates to whether some other diversion, not Fahey's diversion, caused harm. (*Id.*, p. 2:8–10; see also Water Code, § 1055.3.) Fahey's arguments concerning a "developed water presumption," per the Prosecution Team, are legal arguments for which "Fahey cites no legal authority in support of his assertion." (PT Objection, p. 2:13.) The Prosecution Team contends that the Johnson Memo and the Jopson Memo are not consistent with current law and that they are therefore irrelevant. (See *id.*, pp. 2:22 to 3:2.)

Fahey filed a response to the PT Objection on July 5, 2016. Fahey replies that his due process objection is timely because he could not have objected to the Prosecution Team withholding documents for which he "had no way of knowing the existence or contents." (Fahey's Response to Prosecution Team's Objection to Declaration of Glen Hansen in Support of Fahey's Closing Brief [hereinafter Fahey's Response], p. 1:11-12.) Fahey contends that the Prosecution Team's argument that Fahey could have obtained the disputed documents through discovery, per Fahey's Response, is "circular" (*id.*, p. 1:17) and "nonsensical" (*id.*, p. 1:21). Fahey's Response reiterates arguments as to why Exhibits 1 and 2 to the Hansen Declaration, including the Portola Letter, Bohm Letter, Portola Inspection Report, Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant (Fahey's Response, pp. 3:1 to 4:6; *id.*, p. 4:10–21; *id.*, p. 5:9–20) and clarifies Fahey's position that the CSWC curtailment certification reasonably led to discovery of the Johnson Memo, Jopson Memo, and CSWC Signature Pages (*id.*, p. 4:7–9). It also presents the new argument that the Prosecution Team's failure to disclose the disputed documents "den[ied] Fahey the opportunity to cross-examine the Prosecution Team's witnesses with these documents" in further "violation of Fahey's constitutional due process rights." (*Id.*, p. 1:26–28.) However, Fahey does not identify or make an offer of proof as to what specific testimony he might have developed on cross-examination using Exhibits 1 or 2 to the Hansen Declaration.

3.1.3 Legal Standard

The Fourteenth Amendment to the United States Constitution commands that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1; see also *id.*, art. VI, cl. 2 [Supremacy Clause].) The California Constitution likewise guarantees the right to due process of law. (Cal. Const., art. I, §§ 7, subd. (a), 15.) The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (hereinafter *Mathews*) (1976) 424 U.S. 319, 333.) Due process is not a technical conception with a fixed content unrelated to time, place, or circumstances. (*Id.*, 424 U.S. at 334; accord *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895; *Machado v. State Water Resources Control Bd.* (2001) 90 Cal.App.4th 720, 725–726.) Instead, "due process is flexible and calls for such procedural protections as the particular situation demands." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) In determining what process is due, courts weigh the following factors:

1. The private interest that will be affected by the official action;
2. The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
3. The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Matthews*, 324 U.S. at 335.)

For example, "some form of hearing is required before an individual is finally deprived of a property interest." (*Mathews*, 424 U.S. at 333; see also *Bd. of Regents of State Colleges v. Roth* (1972) 408 U.S. 564, 577 [To exist, a property interest requires a "legitimate claim of entitlement."].) When a hearing is required, due process requires an impartial adjudicator. (*Withrow v. Larkin* (1975) 421 U.S. 35, 46.) Adjudicators are presumed to be impartial. (*Id.*, at 47; see also *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 741–742.) Where important decisions turn on questions of fact, due process generally requires an opportunity to confront and cross-examine adverse witnesses. (*Goldberg v. Kelly* (hereinafter *Goldberg*) (1970) 397 U.S. 254, 269.) Likewise, in this situation, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to rebut it. (See *Greene v. McElroy* (1959) 360 U.S. 474, 497.) The opportunity to be heard must be tailored to the capacities and circumstances of those who participate in the hearing. (*Goldberg*, 397 U.S. at 268–269.)

Consistent with the constitutional right to due process, the State Water Board's hearing regulations incorporate trial-type procedural requirements as codified in section 11513 of the Government Code. (See Cal. Code Regs., tit. 23, § 648, subd. (b).) All parties to adjudicative proceedings before the Board have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses, impeach witnesses, and rebut the evidence against themselves. (Gov. Code, § 11513, subd. (b); see also Cal. Code Regs., tit. 23, § 648.5.) Any relevant evidence shall be admitted in a water rights hearing if it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c).) However, Hearing Officers have discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (*Id.*, subd. (f).)

To facilitate discovery, the State Water Board's regulations provide for administrative subpoenas duces tecum as follows. The Board may issue subpoenas duces tecum for production of documents on its own motion or upon the request of any person. (Cal. Code Regs., tit. 23, § 649.6, subd. (a).) The Board's regulations incorporate the Administrative Procedure Act's subpoena process. (See *id.*, subd. (b); see also Gov. Code, § 11450.05, subd. (b).) This means that attorneys of record for a party may also issue subpoenas duces tecum. (Gov. Code, § 11450.20, subd. (a).) Persons served with subpoenas duces tecum may object to their terms by a motion for protective order or a motion to quash. (Gov. Code, § 11450.30, subd. (a).) The Water Code also establishes procedures for the deposition of witnesses prior to a hearing. (See Wat. Code, § 1100.)

The State Water Board's regulations allow the Hearing Officer, through the hearing notice, to require submission of case-in-chief exhibits and direct testimony prior to the hearing. (Cal. Code Regs., § 648.4, subd. (c).) Accordingly, the hearing notice for this proceeding required prior submission of direct testimony and exhibits. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings pp. 3–4.) The Hearing Officer may refuse to admit proposed testimony or evidence that does not comply with this requirement and is required to do so when there is a showing of prejudice to any party or the Board. (Cal. Code Regs., § 648.4, subd. (e).) However, this rule may be modified where a party demonstrates that compliance with the rule would create severe hardship. (*Ibid.*)

3.1.4 Discussion

3.1.4.1 Fahey's Due Process Rights Have Not Been Violated

The State Water Board agrees with Fahey that his due process objection is timely filed. (See generally Fahey's Response, p. 1:11–12.) However, the Board is not persuaded that its pre-hearing discovery procedures violated Fahey's constitutional rights. The *Mathews* factors address whether a trial-type hearing is required at all to satisfy due process and, if so, when that hearing must be provided. (See *Mathews*, 324 U.S. at 348 ["The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness."]; accord Order WR 97-02, p. 6; Order WR 2014-0029, p. 46.) In this case, the Board has *provided* Fahey with a trial-type hearing, complete with trial-type discovery procedures and the opportunity to subpoena documents, compel the attendance of witnesses, and confront opposing witnesses. Accordingly, it is

unnecessary to apply the *Mathews* factors further. (Cf. Order WR 2014-0029, p. 46 [declining to apply *Mathews* factors where no deprivation of property occurred.])

We grant that the State Water Board's discovery procedures may not be exactly the same as those that exist in state or federal courts. Yet "differences in the origin and function of administrative agencies 'preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts.'" (*Mathews*, 424 U.S. at 348, quoting *Fed. Com. Commission v. Pottsville Broadcasting Co.* (1940) 309 U.S. 134, 143.) To the extent that Fahey may have argued that due process requires new or different discovery procedures, the Board finds that it does not. Accordingly, the Board holds that its existing hearing procedures satisfy constitutional due process requirements.

Likewise, the State Water Board is not persuaded that the Prosecution Team's conduct violated Fahey's right to due process. Fahey's counsel's December 1, 2015 letter was a letter requesting production of documents, not a subpoena. (See Hansen Decl., ¶ 2 [describing letter]; Fahey's Closing Brief, June 17, 2016, p. 1:17–24 [same].) Specifically, the letter asks that Kenneth Petruzzelli, attorney for the Prosecution Team, "[p]lease immediately provide a formal response . . . as to whether the Board will produce the following documents." (Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 2, Attachment 1, p. 1 [enclosing a true and correct copy of Fahey's December 1, 2015 letter].) We see nothing in the record to indicate that Fahey ever *commanded* production of these documents through a subpoena or by filing a motion to compel production. (But see, e.g., Fahey's Opposition to the Prosecution Team's Motions, Dec. 18, 2015, p. 5:21–27 [discussing the Board's discovery procedures and subpoena powers].) The Prosecution Team declined Fahey's document request and proposed a Public Records Act request as an alternative means for Fahey to obtain the requested documents. (Decl. of Kenneth Petruzzelli In Support of Prosecution Team Post-Hearing Evidence Brief, April 8, 2016, ¶ 5, Attachment 1, p. 1.) Fahey submitted a December 7, 2015 Public Records Act request (see Hansen Decl., Exh. 1, pp. 1–3; accord R.T., Jan. 25, 2016, 9:9–14), essentially accepting the Prosecution Team's alternative proposal.

Subsequently, Fahey sought to use the State Water Board's discovery procedures to compel deposition of certain Prosecution Team witnesses and the production of certain correspondence and of documents used in preparing their testimony. (See Wat. Code, § 1100 [describing deposition procedures]; see generally Decl. of Glen Hansen in Support of Opposition to the

Prosecution Team's Motions, Dec. 18, 2015, ¶¶ 1–14 [chronology of Fahey's discovery efforts]; *id.*, Exh. 3 [Fahey's deposition notices and document demands for Samuel Cole and the Person Most Knowledgeable]; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 6, Attachment 5 [Fahey's deposition notices and document demands for Katherine Mrowka and David LaBrie].) To resolve procedural motions related to the deposition notices, the Hearing Officers compelled the Prosecution Team to deliver certain documents described in Fahey's deposition notices, declined to compel the production of other documents, and compelled the attendance of witnesses for cross-examination by Fahey at the hearing in lieu of pre-hearing depositions. (See Jan. 21, 2016 Procedural Ruling, pp. 10–11; December 21, 2015 Procedural Ruling, p. 5; R.T., January 25, 2016, p. 16:1–6.) Post-hearing, the Hearing Officers exercised their discretion to exclude from the evidentiary record certain documents that were not disclosed to Fahey and that Fahey argued should have been disclosed. (See generally May 23, 2016 Procedural Ruling, pp. 10, 17; see also Gov. Code, § 11513, subd. (f); Cal. Code Regs., tit. 23, § 648, subd. (b).)

Because Fahey never subpoenaed or moved to compel production of the curtailment certification form correspondence that he requested, the State Water Board need not consider a hypothetical situation in which the Prosecution Team continued, after receiving a subpoena duces tecum, to withhold the documents and to insist that a Public Records Act request was the appropriate discovery tool. (But see Cal. Code Regs., tit. 23, § 649.6, subd. (b) [State Water Board may compel production of evidence].) As discussed below, the documents identified in Exhibits 1 and 2 to the Hansen Declaration are either irrelevant or eligible to be introduced into evidence under the Board's existing procedural rules. Denying Fahey the opportunity to introduce irrelevant evidence cannot violate his right to due process. Providing a procedural mechanism to introduce appropriate, late-filed exhibits serves Fahey's right to due process. For the foregoing reasons the Board finds that, under the circumstances of this case, the Prosecution Team did not violate Fahey's right to due process by resolving Fahey's document request as a Public Records Act request.

3.1.4.2 Some Documents Identified by Fahey Are Relevant to This Proceeding, but Others Are Not

Any relevant evidence shall be admitted in State Water Board hearings if it is "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11513, subd. (c); See Cal. Code Regs., tit. 23, § 648, subd. (b).) Exhibits 1 and 2 to the Hansen Declaration, including the Portola Letter, Bohm Letter, Portola Inspection

Report, Johnson Memo, Jopson Memo, and CSWC Signature Pages are public records or official correspondence of public agencies prepared in the course of executing their statutory responsibilities. (See generally Hansen Decl., ¶¶ 2, 6.) As such, they are "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs" and are admissible to the extent that they are relevant. Fahey argues that Hansen Declaration Exhibit 1 is relevant in its entirety because the documents establish the absence of an administrative process to respond to claimed exceptions to curtailment. (Fahey's Closing Brief, p. 3:12–15; Hansen Decl., ¶ 4.) However, we note that Prosecution Team witness John O'Hagan has already conceded on cross-examination that no such administrative process existed. (R.T., January 25, 2016, p. 109:12–23.) As such, even if Hansen Declaration Exhibit 1 was relevant to prove the absence of a process, the Board may exclude it. (See Gov. Code, § 11513, subd. (f).)

Fahey also contends that specific documents within Hansen Declaration Exhibit 1—the Portola Letter, the Portola Inspection Report, and the Bohm Letter—are relevant because they contradict the Prosecution Team's legal position on developed water and reinforce Fahey's testimony regarding "the lack of harm from his diversions." (See Fahey's Closing Brief, June 17, 2016, p. 2:18 to 3:11.) In the Portola Letter, Mr. O'Hagan states that "California water law presumes that the source of groundwater is a percolating aquifer unless evidence is available to support that a specific groundwater diversion is from a subterranean stream flowing in a known and definite channel." (Hansen Decl., Exh. 1, p. 38.) Mr. O'Hagan is a member of the Prosecution Team. (See Hansen Decl., Exh. 1, p. 39; see also, e.g., R.T., Jan. 25, 2016, p. 16:5–6 [compelling John O'Hagan to participate as a Prosecution Team witness for cross-examination]; *id.*, pp. 89:16–22 [Prosecution Team witness Brian Coats testifying that he collaborated with John O'Hagan]; PT-7, p. 25, ¶ 25 [same].) However, we are not persuaded that these documents are relevant.

Mr. O'Hagan summarizes the holding of *City of Los Angeles v. Pomeroy* and related groundwater cases. (See *City of Los Angeles v. Pomeroy, supra*, 124 Cal. at 628 [finding presumption that "waters moving in the ground . . . are not part of a stream or watercourse nor flowing in a definite channel."]; accord, e.g., *Arroyo Ditch & Water Co. v. Baldwin* (1909) 155 Cal. 280, 284; *North Gualala Water Co. v. State Water Resources Control Board* (2006) 139 Cal.App.4th 1577, 1594–1596.) The letter responds to a technical analysis prepared for the City of Portola (Portola or the City) which concluded that the City is diverting groundwater, not spring water. (Hansen Decl., Exh. 1, p. 38; *id.*, pp. 24–25 [Bohm Letter].) Per *Pomeroy*, Mr. O'Hagan

correctly states that, if the City of Portola is in fact diverting groundwater, then its diversions are presumed to be outside the water rights permitting authority of the State Water Board. (See also Wat. Code, §§ 1200, 1201; but see *id.*, §§ 10735–10736 [describing Board's role in sustainable groundwater management].

The State Water Board does not agree with Fahey's argument that Mr. O'Hagan's statement concedes that diversions from springs are diversions of groundwater or developed water. Mr. O'Hagan makes no such concession in the Portola Letter. One does not concede that an argument is correct by responding to it. Mr. O'Hagan merely assumed for the sake of argument that Portola's diversions are groundwater in order to suggest a possible course of action for Portola if the City wishes to pursue its argument further. Mr. O'Hagan goes on to say that Portola may "request the revocation of License 10013" if the City wishes to pursue its claim that its "points of diversion . . . are solely diversions of percolating groundwater." (Hansen Decl., Exh. 1, p. 38.) "Until such a request is made, the Division [of Water Rights] must presume that" at least some of the water diverted "is subject to [the Division's] permitting authority and to the current curtailment." (*Id.*, p. 39.)

Even if Mr. O'Hagan had not correctly stated the law, the State Water Board disagrees with Fahey's argument that Mr. O'Hagan's opinions on legal issues would have legal significance to the extent that they contradict well-established precedents. Although administrative agencies may designate agency decisions as precedent (Gov. Code, § 11425.60, subd. (b)) the Board has determined that only Board decisions or orders adopted by the Board at a public meeting are precedential (Order WR 96-01, p. 17, fn. 11). Therefore, the personal opinions of individual Board employees on water rights law, such as the Portola Letter, are not agency precedent. Even if Mr. O'Hagan had stated a different rule for springs, groundwater, or developed water, his opinion would not bind the Board.

Because Fahey did not learn of Mr. O'Hagan's opinions expressed in the Portola Letter until April 29, 2016 (Fahey's Closing Brief, June 17, 2016, p. 2:13–15) Fahey cannot argue, and does not argue, that Mr. O'Hagan's opinion on legal matters is relevant because Fahey relied on the opinion in good faith. Accordingly, this order does not consider this theory of relevance. For the foregoing reasons, the State Water Board finds that the Portola Letter, Portola Inspection Report, and the Bohm Letter are not relevant to the Key Issues identified in the Hearing Notice. Because there is well-developed judicial and administrative precedent on this legal issue, there

is no reason Fahey could not have presented his legal argument without first obtaining the Portola Letter. We will consider Fahey's legal arguments regarding developed water further, below, in section 5.3.2.2.

Fahey contends that the Johnson Memo, Jopson Memo, and CSWC Signature Pages are relevant because they support his argument that MID and TID control the flow of the Tuolumne River during July, August, and September. (Fahey's Closing Brief, June 17, 2016, pp. 3:16 to 4:3; see also Hansen Decl., ¶ 6.) Per Fahey's argument, "[t]here is 'no diminution of supply to the Delta'" by diverters above NDPR, such as Fahey, "during the annual FAS Period . . . because MID/TID/CCSF have a right to divert or store nearly the entire flow of the Tuolumne River upstream of NDPR." (Fahey's Closing Brief, June 17, 2016, p. 3:24–25; see also *id.*, pp. 3:26 to 4:3.) The Johnson Memo and Jopson Memo are evidently public records of our predecessor agency, the State Water Rights Board. (See Wat Code, § 179; Hansen Decl., Exh. 2, pp. 136–138, 165–170.) As such, statements contained therein are arguably attributable to the Prosecution Team, a special subdivision of the State Water Board, as statements of a party-opponent. Unlike the Portola Letter, these documents involve both legal issues and factual issues, such as the hydrologic continuity of similarly situated Tuolumne River and San Joaquin River diverters.

The State Water Board finds that the Johnson Memo and the Jopson Memo are relevant to Key Issues 1, 2, and 3 in the Hearing Notice. The CSWC Signature Pages are also relevant because they establish that the State Water Rights Board issued a permit under the circumstances discussed in the Johnson Memo. This order evaluates the probative value of these documents below in section 5.2.2.3. Fahey presents no argument as to whether the remainder of Exhibit 2 to the Hansen Declaration, i.e., the remaining permit file for Application 21647, is relevant to this proceeding. Fahey appears to have introduced these documents to authenticate and provide foundation for the Johnson Memo, Jopson Memo, and CSWC Signature Pages. Accordingly, the Board finds the remainder of Exhibit 2 relevant for this purpose only.

3.1.4.3 The Johnson Memo, Jopson Memo, and CSWC Signature Pages Should Be Admitted into Evidence

Parties to this proceeding were required to submit case-in-chief exhibits and direct testimony prior to the hearing and were required to submit rebuttal testimony and rebuttal exhibits during the hearing itself. (October 16, 2015 Notice of Public Hearing, Information Concerning

Appearance at Water Right Hearings pp. 3–4; *id.*, p. 6; see also Cal. Code Regs., tit. 23, § 648.4, subds. (c), (f).) Surprise testimony or exhibits are disfavored, and the Hearing Officers may refuse to admit proposed testimony or evidence that does not comply with the Board's requirements. (Cal. Code Regs., tit. 23, § 648.4, subds. (a), (e).) Such refusal is mandatory when there is a showing of prejudice to any party or the Board. (*Id.*, subd. (e).) However, this rule may be modified where a party demonstrates that compliance with the rule would create severe hardship. (*Ibid.*)

The State Water Board concludes that Fahey has successfully shown that the Johnson Memo, Jopson Memo, and CSWC Signature Pages should be admitted. These documents were not made available to Fahey until June 15, 2016. (Hansen Decl., ¶ 6.) Although Fahey chose to file a Public Records Act request in lieu of a subpoena for Hansen Declaration Exhibit 1 documents, he did so at the request of the Prosecution Team and only after the Prosecution Team advised Fahey that they had "determined that" Fahey's document requests "were exceedingly broad, did not relate to the Fahey ACL, and were more appropriately addressed through a request for public records." (Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶ 5.) Although Exhibit 2, the permitting file for Application 21647, is a public record normally available for inspection, the State Water Board does not see any particular reason for Fahey to have known to request these records until he received the documents contained in Hansen Declaration Exhibit 1. Fahey promptly brought all the documents to the Hearing Officers' attention in his June 17, 2016 closing brief.

The State Water Board does not believe that admitting part of Exhibit 2 to the Hansen Declaration would prejudice the Prosecution Team or the Board. The Prosecution Team opined that Fahey should obtain documents that became Exhibit 1 through the Public Records Act, and Fahey did so. (See Hansen Decl., Exh. 1, pp. 1–3; Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶¶ 2–3; Decl. of Kenneth Petruzzelli in Support of Motion, Dec. 10, 2015, ¶ 3.) Fahey waited patiently, giving the Prosecution Team ample time to review and sort the requested documents. The Prosecution Team did not complete Public Records Act disclosures until April 29, 2016, after the close of the evidentiary proceeding. (Hansen Decl., Exh. 1, pp. 1–3; Decl. of Kenneth Petruzzelli in Support of Prosecution Team Objection, June 21, 2016, ¶ 9.) MID, TID, and CCSF do not claim to be prejudiced. Because there is not a showing of prejudice to any party or the Board, the authority to exclude these documents is discretionary. (Cal. Code Regs., § 648.4, subd. (e).) Accordingly, The Board

finds that the Johnson Memo, Jopson Memo, and CSWC Signature Pages should be admitted into evidence.

3.1.5 Conclusions

Fahey's motion to dismiss is denied. The Prosecution Team's motion to strike is denied in part and granted in part, as described herein. The State Water Board admits the Johnson Memo, Jopson Memo, and CSWC Signature Pages into evidence as Fahey exhibits, marked next in order, as designated in the table below:

Table 1. New Exhibits Admitted Into Evidence

Exhibit	Description	Hansen Declaration	Bates Stamp Pages
Fahey-88	Johnson Memo	Exhibit 2	165–170
Fahey-89	Jopson Memo	Exhibit 2	136–139
Fahey-90	CSWC Signature Pages	Exhibit 2	148–152

To the extent that other documents submitted as Exhibits 1 or 2 of the Hansen Declaration may be necessary to authenticate or create foundation for Fahey-88 through Fahey-90, the State Water Board finds that those exhibits are authenticated and that sufficient foundation exists. It is therefore unnecessary to admit the other pages of Exhibit 2 to the Hansen Declaration into evidence. Accordingly, the Board strikes from the record those pages of Exhibit 2 that do not constitute Fahey-88, Fahey-89, or Fahey-90. This is appropriate pursuant to the Board's authority to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Gov. Code, § 11513, subd. (f); Cal. Code Regs., tit. 23, § 648, subd. (b).)

The State Water Board also strikes all pages of Hansen Declaration Exhibit 1, i.e., the Prosecution Team's April 29, 2016 disclosure to Fahey. For the reasons discussed above, Exhibit 1 would only be relevant to establish the absence of an administrative process to respond to claimed exceptions to curtailment. This has already been established through Mr. O'Hagan's testimony. (R.T., January 25, 2016, p. 109:12–23.) Therefore, striking Exhibit 1 is appropriate pursuant to the Board's authority under section 11513, subdivision (f), of the Government Code.

3.2 Fahey's January 14, 2019 Motion to Dismiss

3.2.1 Introduction

Fahey filed an additional motion to dismiss this proceeding on January 14, 2019. In this motion, Fahey contends that "[s]ince Fahey, a junior user, was using pre-1914 appropriators' water under the authorization of a contract with the pre-1914 appropriators," MID and TID, "and since the pre-1914 appropriators' water that was used by Fahey in 2014 and 2015 was available under the pre-1914 appropriators' priority of right, therefore the Board did not have authority under section 1052 to demand that Fahey curtail his water use in 2014 and 2015 as alleged in the ACL/CDO." (Fahey's Motion to Dismiss, Jan. 14, 2019, p. 1.) Fahey cites Water Code, sections 1375 and 1706 and State Water Board Decision 1290 in support of the argument that he was using pre-1914 appropriators' water, arguing that "the Board relies on the senior right involved in the exchange agreement as the basis of diversion priority and uses the junior right as a de facto change petition for the senior right." (*Id.,* p. 3.) In addition, Fahey argues that a superior court's unpublished conclusions regarding notices similar to the 2014 Unavailability Notice and the 2015 Unavailability Notice require the State Water Board to find that these notices violated Fahey's right to procedural due process. (*Id.*, p. 5.)

Hearing Officer Dorene D'Adamo established a briefing schedule for the new motion on January 15, 2019. (See Letter from Mara Irby, State Water Board to Hearing Service List (Jan. 15, 2019).) The Prosecution Team filed an opposition brief on January 24, 2019, arguing that Water Code section 1052 provides authority for the enforcement action, that Fahey has additional civil liability irrespective of the Water Exchange Agreement, and that Fahey has been afforded legally required due process. [See generally Prosecution Team's Memorandum in Opposition, Jan. 24, 2019.] Fahey filed a reply brief on January 30, 2019 that largely reiterated his previous arguments and added additional arguments to the effect that "MID/TID/CCSF and Fahey agreed to the WEA memorialized in the Aug. 11, 2011 Fahey Mitigated Negative Declaration" that "allows Fahey to divert 'non-jurisdictional' water year-around, [sic] when that is the only water available . . . ." (See generally Fahey's Reply Brief, Jan. 30, 2019, pp. 1–2.)

The Interveners declined to submit an opposition brief before the deadline. However, MID and TID filed a letter on January 31, 2019 registering their support for the Prosecution Team's Memorandum in Opposition. (See Letter from Arthur F. Godwin, Attorney for the Turlock Irrigation District and Kelsey Gowans, Attorney for the Modesto Irrigation District to Hearing Service List (Jan. 31, 2019).) Fahey filed an additional letter on February 1, 2019 summarizing

his arguments. (Letter from Glen Hansen, Attorney for Fahey to Mara Irby and Lily Weaver, State Water Board (Feb. 1, 2019).)

3.2.2 Fahey's Motion is Untimely and Need Not be Considered

The hearing officers' May 23, 2016 procedural ruling closed the evidentiary record except for closing briefs, which were due by June 17, 2016. (See May 23, 2016 Procedural Ruling, p. 17.) The opportunity to present new arguments, new evidence, or new interpretations of Fahey's permits is long past.

3.2.3 Water Code Section 1052 Authorizes the State Water Board to Take Enforcement Action Against Fahey for Unlawful Diversion

Fahey contends that the State Water Board lacks authority to bring an enforcement action against him because the Water Exchange Agreement allows him to divert under MID and TID's claimed pre-1914 appropriative water rights. Nothing in the Water Exchange Agreement authorizes "a de facto change petition for the senior right." To the contrary, it expressly provides that "Fahey shall not accrue any interest in the District's water rights by virtue of this Agreement. Nothing contained herein shall be construed as a grant of water rights or an interest in the District's water rights." (PT-19, p. 2, ¶ 9.) The Water Exchange Agreement merely allows Fahey to provide "make-up water" to MID and TID at any time of the year between January 1 and December 31 to compensate them for his FAS Period diversions in a given year. (PT-19, pp. 1–2, ¶¶ 3–5.)

The Water Exchange Agreement allowed the State Water Board to issue Fahey's permits notwithstanding the FAS determination and the requirement in Water Code, section 1375, subdivision (d) that there be unappropriated water available. (See also Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22.) Section 1706 of the Water Code, which provides for certain changes to pre-1914 water rights under certain conditions, is not applicable. Decision 1290 applied Water Code section 1706 and declined to adopt conditions that riparian diverters' requested to address possible future injury from possible future changes to the petitioners' claimed pre-1914 appropriative rights. These facts are distinguishable from the present matter before the Board.

Even if the Water Exchanger Agreement did allow Fahey to divert under MID and TID's claimed pre-1914 water rights, it would only do so if Fahey had performed his obligations under the Water Exchange Agreement by providing "make-up" water in 2014 and 2015. He failed to do so, as is explained in greater detail in sections 5.2.3 and 5.3.1, below. Table 3, below in section

5.3.1.1, provides a summary of Fahey's water deliveries to NDPR. Fahey has not positioned water in NDPR since 2011. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21.) Even if the State Water Board were to accept Fahey's argument, which the Board does not, Fahey's diversions would still be unlawful.

Fahey's motion relies on the legal conclusion that Water Code section 1052 does not authorize the State Water Board to "demand" that pre-1914 appropriators "curtail" diversions. The only legal authority Fahey cites in support of this position is an unpublished superior court decision. Unpublished opinions are not precedential. (Cf. Cal. Rules of Court, rule 8.1115; cf. also, e.g., *Aguirre v. Amscan Holdings, Inc.* (2015) 234 Cal.App.4th 1290, 1299 fn.5 [Disregarding unpublished superior court opinion]; *County of San Bernardino v. Cohen* (2015) 242 Cal.App.4th 803, 816 [declining to take judicial notice of trial court opinions].) None of the exceptions in Rule of Court 8.115 apply to this proceeding and Fahey does not argue otherwise. The superior court decision Fahey cites does not control the outcome of this proceeding.

Fahey's reply brief raised an additional argument related to CCSF. Although the reply brief is not entirely clear, the argument appears to be that a further agreement "memorialized in the Aug. 11, 2011 Fahey Mitigated Negative Declaration" made CCSF a party to the Water Exchange Agreement or otherwise made the arguments presented in Fahey's original motion to dismiss applicable to CCSF as well. Fahey has not provided a copy of this document and it is unclear whether it is part of the record. Without further explanation, it is not clear how a California Environmental Quality Act document could constitute a contract or an amendment to the Water Exchange Agreement. If CCSF is a party to the Water Exchange Agreement, a matter on which the State Water Board takes no position, then CCSF's claimed pre-1914 water rights do not immunize Fahey from enforcement for the same reasons that MID and TID's claimed pre-1914 water rights do not immunize Fahey from enforcement.

3.2.4 The 2014 Unavailability Notice and 2015 Unavailability Notice Did Not Violate Fahey's Due Process Rights

Fahey argues that the conclusions of an unpublished superior court decision regarding notices similar to the 2014 Unavailability Notice and the 2015 Unavailability Notice require the State Water Board to find that these notices violated Fahey's right to procedural due process. Unpublished opinions are not precedential. (Cf. Cal. Rules of Court, rule 8.1115.) The 2014 Unavailability Notice and 2015 Unavailability Notice were informational, as is explained more fully above in section 2.2. In discussing the unpublished opinion, Fahey appears to insinuate

that the 2014 Unavailability Notice and the 2015 Unavailability Notice in some way coerced him to cease diversion. Yet evidence in the record demonstrates that Fahey was not deterred by these notices from diverting water. Table 2 in section 5.2.1, below, summarizes evidence of Fahey's diversions during the time period at issue.

The purpose of this proceeding is to investigate whether Fahey violated or is threatening to violate the prohibition against unlawful diversion set forth in Water Code section 1052 and determine an appropriate penalty in the event of a violation. (See section 2.4, *supra* [summarizing key issues]; PT-6 [hearing notice].) This proceeding arose following an investigation by the Prosecution Team and the issuance of an ACL Complaint and draft CDO. (See section 2.3, *supra*; see also generally PT-1 [ACL Complaint]; PT-2 [Draft CDO]; PT-8 through PT-14 [Prosecution Team staff's written testimony describing investigation and enforcement efforts.].) The basis for this proceeding is the investigation and evidence in the record, not the 2014 Unavailability Notice or the 2015 Unavailability Notice.

The State Water Board provided Fahey with a trial-type hearing regarding the ACL Complaint and draft CDO. Fahey had ample opportunity to present evidence, testimony, and argument through the hearing process. In addition, Fahey had ample opportunity to cross-examine each of the Prosecution Team's witnesses and, after the hearing, submit written argument and thoroughly address evidentiary objections raised at the hearing. This proceeding has afforded Fahey the due process required by law. (E.g., *Mathews*, 424 U.S. at 333 [Some form of hearing is required before an individual is finally deprived of a property interest.]; *Goldberg*, 397 U.S. at 269 [Where important decisions turn on questions of fact, due process generally requires an opportunity to confront and cross-examine adverse witnesses.].)

3.2.5 Conclusion

For the foregoing reasons, Fahey's January 14, 2019 motion to dismiss is denied.

4.0 LEGAL AUTHORITIES

4.1 Cease and Desist Order Authority

The State Water Board may issue a CDO when it determines that any person is violating, or threatening to violate, the prohibition against unlawful diversion. (Wat. Code, § 1831, subds. (a) & (d)(1–3).) The Board may issue a CDO only after notice and an opportunity for hearing. (*Id.*, subd. (c).) A CDO is effective immediately upon being issued. (Wat. Code, § 1832.)

4.2 Authority to Assess Civil Liability

Unauthorized diversion of water is a trespass against the state. (Wat. Code, § 1052, subd. (a).) The State Water Board may administratively impose civil liability in an amount not to exceed limits specified by statute. (*Id.*, subd. (c).) Under specified drought conditions, including where the Governor has issued a proclamation of a state of emergency based on drought conditions, the statutory maximum is $1,000 per day for each day of unauthorized diversion plus $2,500 per acre-foot diverted in excess of the diverter's rights. (*Id.*, subd. (c)(1).) The Board must provide notice of the ACL Complaint and an opportunity for a hearing. (Wat. Code, § 1055, subd. (b).) An order setting administrative civil liability is effective and final upon being issued. (*Id.*, subd. (d).) If the administrative civil liability is not paid, the State Water Board may seek recovery of the civil liability as provided in Water Code section 1055.4.

5.0 DISCUSSION

5.1 Background and Fahey's Water Rights

5.1.1 Permits 20784 and 21289

On March 23, 1995, the State Water Board issued Permit 20784 to Fahey, pursuant to Application 29977, the priority of which dates back to July 12, 1991. (PT-15, pp. 3, 7; Fahey-20, pp. 311, 315.) Permit 20784 authorizes the direct diversion and use of water from: (1) an Unnamed Spring (a.k.a. Cottonwood Spring) at a rate of diversion not to exceed 0.031 cubic feet per second (cfs) and (2) Deadwood Spring at a rate of diversion not to exceed 0.031 cfs. (PT-15, p. 4.) On March 6, 2002, the Division of Water Rights issued an Order Approving Extension of Time, Change in Point of Diversion, and Amending the Permit, which approved a December 12, 1997 petition from Fahey to change the first point of diversion listed on Permit 20784 from the "unnamed spring (a.k.a. Cottonwood Spring)" to a new location called the "unnamed spring (a.k.a. Sugar Pine Spring)." (PT-15, pp. 1-2 [order approving Permit 20784 change petition]; PT-56, p. 1 [2014 Progress Report for Permittee lists "UNSP (AKA SUGAR PINE SPRING)" as a source under Permit 20784]; R.T. Jan. 25, 2016, p. 45: 16-18 [Katherine Mrowka testified that Fahey submitted a change petition to change the Cottonwood Spring point of diversion to Sugar Pine Spring].) The water appropriated under Permit 20784 is limited to a total combined diversion rate of 0.062 cfs from January 1 to December 31 of each year for Industrial Use at "[b]ottled water plant(s) off premises." (PT-15, p. 4.) The maximum amount diverted under Permit 20784 shall not exceed 44.82 acre-feet per year. (*Ibid.*)

On August 1, 2011, the State Water Board issued Permit 21289 to Fahey, pursuant to Application 31491, the priority of which dates back to January 28, 2004. (PT-16, pp. 4, 12; Fahey-55, pp. 1197, 1205.) Permit 21289 authorizes the direct diversion and use of water from: (1) Unnamed Spring (a.k.a. Marco Spring) at a rate of diversion not to exceed 0.045 cfs and; (2) Unnamed Spring (a.k.a. Polo Spring) at a rate of diversion not to exceed 0.045 cfs. (PT-16, p. 5.) The springs are named for Mr. Fahey's dogs. (SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Contact Report, Yoko Mooring, State Water Board (Oct. 10, 2003).) The water appropriated under Permit 21289 is limited to a total combined diversion rate of 0.089 cfs to be diverted from January 1 to December 31 of each year for Industrial Use at "[b]ottled water plant(s) (off premises)." (PT-16, p. 5.) The maximum amount diverted under Permit 21289 shall not exceed 64.5 acre-feet per year. (*Ibid.*)

Permits 20784 and 21289 authorize the appropriation of water from spring sources that are tributary to unnamed streams, thence Cottonwood Creek, Basin Creek, or Hull Creek, thence the Clavey River or the North Fork of the Tuolumne River, and thence the Tuolumne River upstream of NDPR. (PT-15, p. 3; PT-16, p. 4; R.T., Jan. 25, 2016, p. 44:13–16.) The Clavey River and the North Fork of the Tuolumne River are among the five tributaries that join the Tuolumne River from the north between Hetch Hetchy and NDPR, the others being Cherry Creek, Jawbone Creek, and Turnback Creek. From the south, the Tuolumne River is joined by the South Fork of the Tuolumne River. Moccasin Creek and Woods Creek drain directly into NDPR.[12]

Testimony provided by Prosecution Team witness Katherine Mrowka described the permitted diversion system and operation of Fahey's project as follows:

> According to Permit 20784 and Permit 21289, separate pipes convey water diverted from all four springs subject to Permits 20784 and 21289. All four springs are located on property owned by the United States Forest Service. The pipes combine into a common pipe system. The pipeline connects to two 35,000 gallon tanks and an overhead bulk water truck filling station (collectively referred to as the transfer station) located on Tuolumne County Assessor Parcel Number (APN) 052-060-48-00, owned by Sugar Pine Spring Water, LP. Fahey operates the transfer station, and bulk water hauler trucks access the property through a locked gate to remove the water for delivery off-premises.

(PT-9, p. 2; ¶ 10.)

[12] The State Water Board takes official notice of the foregoing information pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code.

The transfer station is located on private land owned by Mr. Fahey's family. (PT-46, p. 2; see also SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 1, Application to Appropriate Water Environmental Information (May 28, 1991) p. 3 [referencing estate of W.D. Fahey].) Permits 20784 and 21289 include terms for the protection of downstream prior rights. (PT-15, pp. 3, 6; PT-16, pp. 4, 5; PT-9, p. 4, ¶ 19.) Permit Term 17 in Permit 20784 and Term 9 in Permit 21289 each similarly state:

> This permit is subject to prior rights. Permittee is put on notice that, during some years, water will not be available for diversion during portions or all of the season authorized herein. The annual variations in demands and hydrologic conditions in the San Joaquin River Basin are such that, in any year of water scarcity, the season of diversion authorized herein may be reduced or completely eliminated on order of this Board made after notice to interested parties and opportunity for hearing.

(PT-15, p. 6; PT-16, p. 5.)

5.1.2 Tuolumne River Senior Water Rights and Fully Appropriated Stream Determination

MID and TID hold numerous post-1914 appropriative water rights and pre-1914 claims of right for diversion and use of the waters of the Tuolumne River, including diversion and storage of water at NDPR and La Grange Dam. (PT-9, p. 6, ¶ 33 [describing post-1914 rights]; Decision 995, p. 1–2 [same]; Interveners' Closing Brief, June 17, 2016, pp. 1:26 to 2:2.) NDPR is located on the mainstem of the Tuolumne River, downstream of the springs and creeks from which Fahey diverts pursuant Permit 20748 and Permit 21289. (See PT-45, pp. 4–6; see also SWRCB-1, A029977, Correspondence File, Cat. 1, Vol. 1, Letter from G. Scott Fahey to James Kassel, State Water Board (August 6, 1991) [enclosing Mr. Fahey's hand-drawn schematic].) The Interveners designed NDPR with a capacity of 2,030,000 acre-feet, of which 340,000 acre-feet is reserved for flood control according to an agreement between CCSF, MID, and TID, executed in 1966. (Fahey-79, p. 6.) La Grange Dam is located approximately two miles downstream of NDPR and is used to divert and regulate NDPR outflows into the irrigation canal systems of MID and TID. (Fahey-85.) MID and TID's appropriative water rights are senior to Fahey's. (PT-15, p. 7; PT-16, p. 12; R.T., Jan. 25, 2016, p. 192:13–15.)

CCSF holds numerous pre-1914 appropriative claims of right for diversions from the Tuolumne River and its tributaries, which are upstream from NDPR and the tributaries' confluence to the Tuolumne River of the spring sources with Fahey's points of diversion. (PT-9, p. 6, ¶ 34; Interveners' Closing Brief, June 17, 2016, p. 2:10–13.) Pursuant to various agreements

between CCSF, MID, and TID, CCSF maintains a water bank account in NDPR that has the potential to be impacted by Fahey's diversions. (E.g., Fahey-14; Fahey-79, pp. 7–10.) The water rights and operating agreement for NDPR also include seasonal storage in the CCSF upstream reservoirs and water bank accounting between TID, MID, and CCSF. (See generally, e.g., PT-15, p. 6, ¶ 20; PT-16, p. 9, ¶ 34; Fahey-79.) The water bank account implements a physical solution between TID, MID, and CCSF for management of their respective senior claims of right and is built on calculation of the natural flow of the Tuolumne River. (See Interveners' Closing Brief, June 17, 2016, p. 12:7–9.)

Pursuant to State Water Board Order WR 89-25 and Order WR 91-07, the Delta watershed upstream of the Delta is fully appropriated between June 15 or 16[13] and August 31. (Decision 1594; see also PT-9, p. 3, ¶ 11; PT-80; PT-81.) In addition, the Tuolumne River upstream from NDPR is fully appropriated from July 1 to October 31. (Decision 995; see also PT-9, p. 3, ¶ 11; PT-18.) New diversions may be authorized during the FAS Period if the applicant provides replacement water to senior rights under an exchange agreement. (Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22; see PT-9, p. 4, ¶¶ 18–19.) In general, an exchange agreement or "physical solution" allows the appropriation of water if the permittee supplies downstream senior rights with an equal quantity of water of comparable quality from another source. (*E.g.*, *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 358–359, 380; *City of Lodi v. East Bay Municipal Water District* (1936) 7 Cal.2d 316, 339–340; Decision 949; Decision 1365; PT-9, p. 4.)

The record is not entirely clear whether the FAS Period begins on June 15 or June 16 for the purposes of implementing Fahey's FAS Period make-up water obligations to MID and TID. Term 19 of Permit 20784 requires Fahey to provide replacement water for diversions during the period from June 16 to October 31 of each year "[p]ursuant to" the Water Exchange Agreement executed on December 12, 1992. (PT-15, p. 6, ¶ 19.) The Water Exchange Agreement specifies that Fahey shall provide make-up water for diversions during the period from June 15 to October 31. (See PT-19, pp. 1–2, ¶¶ D, 2–3.) For this analysis, the State Water Board conservatively treated the period of June 16 to October 31 as the FAS Period in which Fahey's

[13] For permittees who directly divert less than one cubic foot per second or divert to storage less than 100 acre-feet per annum, the Delta watershed upstream of the Delta is fully appropriated between June 16 and August 31 (e.g., Decision 1594; Order WR 89-25; Order WR 91-07).

make-up water obligations apply. This should not be interpreted to alter any responsibilities Fahey may have to MID and TID per the Water Exchange Agreement.

5.1.3 Permit Terms to Protect the Prior Rights of MID, TID, and CCSF

Fahey's points of diversion described under Permits 20784 and 21289 are within the fully appropriated stream system identified in State Water Board Orders WR 89-25 and WR 91-07. (E.g., Fahey-10; PT-9, p. 3, ¶¶ 12, 13; see also generally PT-45 [maps].) Therefore, Fahey was required to submit proof of an exchange agreement with senior diverters, i.e., MID and TID, before the Board could accept his applications to appropriate water. (E.g., Order WR 91-07, pp. 25–26; Order WR 98-08, pp. 21–22.) Fahey did so. (PT-19, pp. 1–2, ¶¶ 3–5; see also Fahey-6; Fahey-10; Fahey-37.) The Water Exchange Agreement allows Fahey to provide "make-up water" to MID and TID at any time of the year between January 1 and December 31 to compensate for diversions during the FAS Period. (PT-19, pp. 1–2, ¶¶ 3–5.) Fahey is obligated to provide semi-annual reports to MID and TID documenting his diversions and the make-up water provided. (PT-19, p. 2, ¶ 7.)

Fahey's Water Exchange Agreement with MID and TID "shall be incorporated into and made a part of any permit or license granted to Fahey" by the Board. (PT-19, p. 2, ¶ 6.) Carryover of FAS Period make-up water from one year to the next is not allowed under the agreement. (PT-19, p. 2, ¶ 4.) Pursuant to the Water Exchange Agreement, Term 19 of Permit 20784 requires Fahey to provide exchange water to MID and TID at NDPR for all water diverted under the permit, during the period from June 16 through October 31 of each year, as stated below:

> Diversion of water under this permit during the period from June 16 through October 31 of each year is subject to maintenance of the Water Exchange Agreement executed on December 12, 1992 between the permittee and the Modesto and Turlock Irrigation Districts. Pursuant to the Agreement, permittee shall provide replacement water to New Don Pedro Reservoir for all water diverted under this permit during the period from June 16 to October 31 of each year. The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.

(PT-15, p. 6; Fahey-20, p. 314.)

Permit 21289 does not contain a term identical to Term 19 in Permit 20784. However, the Water Exchange Agreement states that it "shall be incorporated into and made a part of any permit or license granted to Fahey" by the Board (PT-19, p. 2, ¶ 6), and Fahey's application for what became Permit 21289 "accepts and understands" that it shall "be conditioned and

subjected to the same terms and conditions as the previous agreements" (Fahey-39, p. 650). The State Water Board accepted the application that became Permit 21289 because of the Water Exchange Agreement. (Fahey-37, p. 641.) Term 34 of Permit 21289, which establishes other replacement water requirements, discussed below, further supports this interpretation. (PT-16, p. 6.) Fahey's separate obligation under Term 34 "shall take into consideration [Fahey]'s obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between [Fahey, MID, and TID]." (*Ibid.*; see also PT-20, p. 2.) The purpose of this language appears to be to ensure that Fahey is not responsible for providing both "make-up water" and Term 34 replacement water for the same diversion. (E.g., Fahey-15, pp. 247–249 [CCSF letter discussing the Water Exchange Agreement]; see also Interveners' Closing Brief, June 17, 2016, pp. 7:28 to 8:13.) Including this language in Permit 21289 would only make sense if Fahey's "obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992" applied to the permit. Accordingly, the State Water Board finds that Permit 21289 requires that Fahey provide make-up water for his diversions during the FAS Period pursuant to Fahey's Water Exchange Agreement with MID and TID.

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

[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

Continued

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.)

Fahey obtains his alternate supply of water for the Water Exchange Agreement from Tuolumne Utilities District (TUD), which holds water rights under licenses corresponding to Applications 16173, 18549, 20565, and 23813. (PT-9, p. 6, ¶ 29; Fahey-33; Fahey-70; R.T., Jan. 25, 2016, pp. 185:20 to 186:23; Fahey-65 [July 28, 1995 Letter from David Berringer accepting TUD contract as an alternative source of water for the Water Exchange Agreement].) TUD notifies Fahey on an annual basis if water is available for purchase, at which time Fahey may decide whether to buy water. (R.T., Jan. 25, 2016, pp. 154:3–9, 191:9–20; see also Fahey-31 [sample agreement]; Fahey-33 [same].) This arrangement is ongoing. (R.T., Jan. 25, 2016, p. 193:10–24.) As is discussed in more detail in section 5.3.1.1, Fahey purchased 88.31 acre-feet of water for $60 per acre-foot, which were wheeled into NDPR between May 15, 2009 and June 15, 2011. (R.T., Jan. 25, 2016, p. 193:6–9 [price]; see Fahey-70, pp. 2–3 [utility bill indicating "[c]onsumption" of 1,781 unspecified units with reading, not delivery, dates noted]; R.T., Jan. 25, 2016, p. 193:2–4 [unspecified units in Fahey-70 are miner's inch-days]; Wat. Code, § 24 [conversion factor for miner's inch-days to acre-feet]; PT-72, p. 46 [price]; cf. Fahey-1, p. 7 [TUD wheeled 88.55 acre-feet to NDPR from June 15, 2009 through June 15, 2011].)

Fahey did not purchase water from TUD in 2014 or 2015, apparently because water was not available for sale. (R.T., Jan. 25, 2016, pp. 195:24 to 196:21; accord PT-9, p. 6, ¶ 30; PT-72, pp. 41–42.) This is consistent with Ms. Mrowka's testimony that, although water was available under TUD's pre-1914 claims of right identified in statements 10402, 10403, 997, 996, 1007, and 1006, "the overall water supply situation for TUD was significantly constrained" in both years. (PT-9, p. 6, ¶ 29.) In 2014 and 2015, the State Water Board notified TUD that there was inadequate water to serve the priorities of TUD's post-1914 water right permits. (*Ibid.*) Fahey, the Prosecution Team, and the Interveners dispute whether and to what extent the 88.31 acre-feet Fahey wheeled into NDPR between 2009 and 2011 may be used to satisfy Fahey's obligations under Terms 19 and 20 of Permit 20794 and Term 34 of Permit 21289.

NDPR applies to both permits. Hearing Team staff were not able to identify textual support for this argument.

5.2 Alleged Unlawful Diversion and Trespass Against the State

5.2.1 Fahey's Diversions During 2014 and 2015

The record contains information regarding Fahey's recorded diversion of water in 2014 and 2015 during the FAS Period from June 16 to October 31. (See generally PT-1; PT-55; PT-56; PT-57; PT-58; PT-59; PT-65; PT-67; PT-69; PT-72; PT-151; Fahey-62.) According to the Prosecution Team, for 2014 and 2015, video surveillance and invoices show that Fahey diverted about 13.48 acre-feet over the course of 175 days during the FAS Period in those years. (Prosecution Team's Closing Brief, June 17, 2016, p. 21:17–18 [summarizing testimony and exhibits].) There is no video surveillance or invoice information for prior years, but invoices and video surveillance from 2014 and 2015 demonstrate that Fahey typically diverted water at least six days a week. (*Ibid.*; PT-61, pp. 30–34; PT-55.)

David LaBrie's testimony describes the Prosecution Team's investigation into Fahey's diversion and use of water during the period in which the State Water Board forecasted that water was not available to serve Fahey's priority of right. (PT-11, p. 1, ¶¶ 1–3; see also *infra*, section 5.2.2.1.) Samuel Cole's testimony discusses his activities surveilling Fahey's diversions. (See PT-13, pp 1–2. ¶¶ 1–5.) During oral testimony, Mr. LaBrie clarified how he calculated the maximum penalty for 2014 included in the ACL Complaint:

> The maximum penalty included in the ACL complaint for 2014 was based on Mr. Fahey's progress reports, as well as information about his operations that we gained through the surveillance in 2015. Upon receipt of the invoice information pursuant to the information order I tabulated the days of diversion and the number of loads reported in the invoices, and I calculated the volume of water diverted during the time period when there was no water available under Mr. Fahey's priority of right. . . . [¶] . . . The invoices indicate that Mr. Fahey diverted water on 123 days during this period. To calculate the amount of water diverted I used the number of loads reported by invoice during that period, a total of 456 loads, and multiplied that number by an average of 6,600 per load.

(R.T., Jan. 25, 2016, 62:14 to 63:13; PT-151, slide 8.)

Mr. LaBrie's oral testimony also clarified that the maximum penalty for 2015 included in the ACL Complaint was based on the surveillance data gathered between July 12 and August 5. (R.T., Jan 25, 2016, p. 63:14–16.) Additional surveillance data gathered between August 5 and August 27 added 22 days of diversion and 110 loads of water to the maximum penalty

calculation. (*Id.*, p. 63:16–21.) Mr. LaBrie calculated a revised maximum ACL penalty for 2015 based on 90 days of diversion. (*Id.*, 65:5–6; PT-151, slides 9–10.)

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.

The evidence supports the conclusion that during the non-FAS Period portions of 2014 and 2015 when State Water Board staff projected insufficient water supply to serve Fahey's priority of right, Fahey diverted at least 2.80 acre-feet over 26 days in 2014 and at least 4.82 acre-feet over 37 days in 2015, for a total of at least 7.62 acre-feet over 63 days across both years. During the FAS Period in 2014 and 2015, Fahey diverted at least 16.55 acre-feet over 102 days in 2014 and at least 8.78 acre-feet over 76 days in 2015, for a total of at least 25.33 acre-feet over 178 days across both years.

Table 2. Summary of water diversion days and volume under Permits 20784 and 21289 during the non-FAS portion of the noticed periods of water unavailability and the FAS Periods of 2014 and 2015

		Non-FAS Portion of the Noticed Period of Unavailability[a]		FAS Period[b]	
		Days[c]	Volume (af)	Days[c]	Volume (af)
2014	May	3	0.39[d]	-	-
	June	12	1.76[e]	13	2.17[e]
	July	-	-	24	4.24[f]
	August	-	-	21	3.37[f]
	September	-	-	20	3.21[f]
	October	-	-	24	3.57[f]
	November	11	0.65[d]	-	-
	Total	**26**	**2.80**	**102**	**16.55***
2015	April	6	0.35[d]	-	-
	May	18	3.03[f]	-	-
	June	13	1.44[e]	10	1.48[e]
	July	-	-	25	2.98[f]
	August	-	-	26	3.06[f]
	September	-	-	15	1.06[f]
	October	-	-	NA	0.20[f]
	November	NA	NA[g]	-	-
	Total	**37**	**4.82**	**76**	**8.78**
Grand Total		**63**	**7.62**	**178**	**25.33***

* All totals in this table are the sum of unrounded figures. As a result, some totals (those marked) differ slightly from the sum of the rounded component values shown.
"-" - null
af - acre-feet
NA - Not available in the hearing record

[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.

[c] Data Source: PT-66, pp. 26–112; PT-67, pp. 6–10; PT-68, p. 3; PT-72, pp. 8–31; and PT-151, p. 9. The number of days of diversion in each month includes invoice sales days, contract sales days, and days when water diversion

was observed through surveillance during the specified period, as applicable. These counts presented are conservative because the only available dates of contract sales in the hearing record occur in June of 2014 and June, August, and September of 2015. Surveillance data in the hearing record are available only from July 12 through August 27, 2015. For this period, only surveillance data were used to count the days of diversion (i.e., invoice sales, contract sales, and surveillance data were not combined).

[d] Data Source: PT-66, pp. 26–108. Only invoice sales data were used to calculate the volume of water diversions due to only a portion of the month falling within the specified period and the lack of daily contract sales data in the hearing record for these months. Because daily contract sales data were unavailable, the volume of diversion presented in this table is highly conservative. To calculate the volume, the number of gallons Fahey invoiced each vendor over the period (number of loads * gallons/load) was summed across all vendors and converted to acre-feet.

[e] Data Source: PT-67, pp. 6–10 and PT-72, pp. 8–31. Invoice and contract sales data reported in Fahey's responses to the September 1, 2015 Informational Order (PT-67) and to the October 30, 2015 subpoena (PT-72) were used to calculate the volume of diversion. The number of gallons sold to each vendor over the period (number of loads * gallons/load) was summed across all vendors and converted to acre-feet. Invoice sales data for June 2014 and June 2015 are available in both PT-66 and PT-72; however, only PT-72 data were used for the June calculations because it represents the most recently submitted data for these months.

[f] Data Source: PT-56, p. 2; PT-57, p. 2; and the 2015 Progress Report by Permittee for Permits 20784 and 21289, of which the State Water Board takes official notice pursuant to title 23, section 648.2 of the California Code of Regulations and section 452, subdivision (h) of the Evidence Code. The volume of water diversions reported in the Progress Report by Permittee for Permits 20784 and 21289 was used for months for which the entire month fell within the specified period. The volume was calculated by summing the volume of water directly diverted or collected to storage under each permit and converting to acre-feet. The volume includes diversions claimed as developed water for the reasons discussed in section 5.3.2.1 of this order. These reported values are greater than the volume of diversion estimated by the Prosecution Team using surveillance data for the dates for which surveillance data are available (July 12–August 27, 2015). The reported values vary by no more than 0.22 acre-feet for any given month from the total monthly diversion volumes based on the invoice (PT-66, pp. 26–112; PT-67, pp. 6–9) and contract sales (PT-66, pp. 113–114; PT-67, p. 10) data provided by Fahey.

[g] Although the volume of diversion for the entire month of November 2015 is available in the hearing record (0.17 af), daily diversion information for that month was not available.

5.2.2 Fahey Diverted Water During 2014 and 2015 When It Was Not Available to Serve His Priority of Right

5.2.2.1 Water Availability Analysis Background

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.