Fahey's pre-enforcement efforts to establish a defense to unlawful diversion are also relevant to determining an appropriate civil penalty for unlawful diversion. Fahey responded to the 2014 Unavailability Notice with a letter dated June 3, 2014 (Fahey-60) providing a Curtailment Form (Fahey-61). These documents describe the TUD water Fahey had delivered to NDPR between 2009 and 2011. (Fahey-60, p. 1277; Fahey-61, pp. 1278–1279; accord PT-7, p. 3, ¶ 14.) The record indicates that the Division did not deny or even follow-up on Fahey's claimed defense prior to commencing its investigation. Prosecution Team witness John O'Hagan testified that there was not a process for responding to claimed defenses to unlawful diversion. (R.T., January 25, 2016, 109:12–23.) Prosecution Team witness David LaBrie testified that he left three voicemail messages for Mr. Fahey over the course of several weeks beginning in late May 2015, seeking to schedule a compliance inspection (*Id.,* p. 56:19–22). Mr. LaBrie testified that Fahey first returned his calls on June 12, 2015. (*Id.,* p. 56:23–24). Mr. LaBrie sent an email later the same day, which appears to be the Division's earliest statement to Fahey that identifies a potential problem. (See Fahey-64; R.T. Jan. 25, 2016, 35:22 to 36:4.)

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

7.2 Conclusion Regarding Amount and Suspension of Administrative Civil Liability

In determining the amount of civil liability, the State Water Board has taken into consideration all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and the corrective action, if any, taken by the violator. The State Water Board finds that the evidence shows that Fahey unlawfully diverted 25.33 acre-feet during 178 days of diversion during the FAS Period in 2014 and 2015. During a period for which the Governor had issued a proclamation of a state of emergency based on drought conditions, the Board has the authority to assess administrative civil liability in an amount not to exceed the sum of $1,000 per day in which trespass occurs and $2,500 per acre-foot diverted or used in excess of the diverter's water rights. (Wat. Code, § 1052, subd. (c)(1).) Therefore, the maximum civil liability in this case for unlawful 2014 and 2015 FAS Period diversions is $241,325, i.e., (178 days * $1,000 per day) + (25.33 acre-feet * $2,500 per acre-foot).

Fahey earned on average $6,612 to $8,146 per acre-foot in gross receipts for the unlawful diversion during the FAS Period in 2014 and 2015, respectively. Despite the apparent increase in the price for which Fahey sold water between these years (see section 7.1.2.1), there is no evidence in the record that Fahey's gross receipts increased as a result of the drought. Therefore, Fahey's earnings may be consistent with his normal operations. At a minimum, however, Fahey received an economic benefit by avoiding the cost of providing FAS make-up water to the Interveners as required by his permits, which prior to the drought emergency cost Fahey $60 per acre-foot. It appears that Fahey has a long history of failing to provide make-up water under the terms of his permits, although the record also suggests that Fahey genuinely misunderstood this obligation and that this misunderstanding arose, in part, because of the Interveners' longstanding statements and actions. In addition, there is no evidence in the record of any specific harm to the Interveners and it appears, based on the record, that Fahey could make them whole by delivering the water they are owed or otherwise providing restitution.

Regardless, Fahey's obligation to provide FAS Period make-up water is clear under the plain language of his permits and the Water Exchange Agreement between Fahey and MID and TID. Fahey was negligent, however genuine his mistake may have been. Fahey's failure to meet bypass flows required by clear permit language is, at best, further evidence of negligence. Water rights are a serious matter. Administrative civil liability is warranted to deter even

violations that occur despite the exercise of due care, with higher penalties justified for negligent or knowing violations.

The Prosecution Team incurred costs of more than $25,000 investigating and prosecuting this case, while the State Water Board incurred additional costs associated with holding the hearing, resolving pre- and post-hearing motions, and preparing an order. Administrative civil liability is warranted to recover these costs.

Corrective actions, restitution to MID and TID for the water they are owed, and an operations plan to prevent unlawful diversion in the future, are necessary to ensure that Fahey complies with his permits. In these circumstances, suspension of administrative civil liability is warranted to promote timely completion of the necessary corrective actions.

For the foregoing reasons and the reasons stated in this order, the State Water Board finds that administrative civil liability in the amount of $215,000 is appropriate in response to Fahey's unlawful diversions. Of this amount, $50,000 should be due immediately and the remaining $165,000 should be suspended pending the successful implementation by Fahey of all corrective actions described below by the applicable deadline.

First, no later than December 31, 2019, Fahey shall provide restitution to MID and TID for his FAS Period diversions during 2014 and 2015 and timely provide documentation of the restitution to the State Water Board. Water delivered to MID, TID, or CCSF for any other purpose may not be credited as restitution. This includes but is not limited to water delivered to MID, TID, or CCSF for the purpose of complying with Fahey's permit terms in years other than 2014 or 2015. Restitution may be made either by causing not less than 25.33 acre-feet of lawfully diverted water to be delivered to New Don Pedro Reservoir from a non-tributary source, whether from TUD or another suitable transferor; or in another manner on which Fahey, TID, and MID mutually agree and memorialize in a written instrument that is signed by all parties.

Second, Fahey shall submit a draft Curtailment Operation Plan to the Division by December 31, 2019 for review and comment by the Division. The plan must be sufficient to ensure that all downstream senior diverters are not injured by Fahey's diversions and shall, at minimum: (1) describe measures sufficient to ensure that Fahey complies with the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID during years when transfer water is

not available from TUD and (2) describe measures sufficient to ensure that Fahey does not divert adverse to downstream senior claims of right during any period when water is not available for diversion by MID or TID under their most senior claim of right. These measures may include ceasing diversion, providing water from a transferor, or such other measures as Fahey and the owner of the downstream senior claim of right may mutually agree and memorialize in a written instrument that is signed by all parties. Fahey may satisfy this obligation for claims of right in the Sacramento-San Joaquin Delta (Delta) downstream of the confluence of the San Joaquin River and Middle River by identifying a cumulative estimate of lawful diversion demand in the Delta, in situations when water is not available for the most senior water right upstream of the confluence of the San Joaquin River and Middle River.

Third, Fahey shall submit a final Curtailment Operations Plan to the Division by December 31, 2020 for review and approval by the Deputy Director. If applicable, Fahey shall resubmit an amended final Curtailment Operations Plan to the Deputy Director within ninety (90) days of the date of the written notice of rejection if the Deputy Director rejects the final Curtailment Operations Plan. Nothing in the final Curtailment Operations Plan shall be construed to modify Fahey's obligations to MID, TID, or CCSF in any way.

The Deputy Director may extend these compliance deadlines upon a showing of good cause.

8.0 CONCLUSIONS

a. Fahey is making unauthorized diversions of water, which constitutes a trespass against the State as defined by Water Code section 1052, subdivision (a).
b. A cease and desist order is appropriate to require Fahey to take corrective action pursuant to the compliance milestones described above.
c. Administrative civil liability in the amount of $215,000 is appropriate in response to the unlawful diversion of water during the 2014 and 2015 FAS Period in violation of his permit terms and when water was not available to serve his priority of right. Of this amount, $50,000 should be due immediately. The remaining $165,000 should be suspended pending Fahey's completion of all corrective actions in compliance with the required schedule.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED THAT, based upon the foregoing findings:

I. The State Water Resources Control Board (State Water Board or Board) hereby ORDERS that, pursuant to Water Code sections 1831 through 1836, G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) shall:

A. Cease and desist continued and threatened unauthorized diversion under Permit 20784 (Application 29977) and Permit 21289 (Application 31491);

B. Cease and desist diversion under Permit 20784 (Application 29977) and Permit 21289 (Application 31491) in a manner inconsistent with the December 12, 1992 Water Exchange Agreement between Fahey, Modesto Irrigation District (MID), and Turlock Irrigation District (TID), as it may be amended;

C. File an annual report with the Division of Water Rights (Division) documenting and substantiating Fahey's compliance with his bypass flow obligations under Permit 20784 and Permit 21289 for diversions occurring in 2018 and thereafter. Unless Fahey and the Division agree to an alternative arrangement, the bypass flow report for each year shall be due on the same day as the report of permittee filed for that year, as specified in title 23, section 925 of the California Code of Regulations as it may be amended;

D. Provide restitution to MID and TID no later than December 31, 2019, for his FAS Period diversions during 2014 and 2015 and timely provide documentation of the restitution provided to the State Water Board. Water delivered to MID, TID, or the City and County of San Francisco (CCSF) for any other purpose may not be credited as restitution. This includes but is not limited to water delivered to MID, TID, or CCSF for the purpose of complying with Fahey's permit terms in years other than 2014 or 2015. Restitution may be made in either of the following ways:

1. By causing not less than 25.33 acre-feet of lawfully diverted water to be delivered to New Don Pedro Reservoir from a non-tributary source, whether from the Tuolumne Utilities District (TUD) or another suitable transferor; or

2. In such other manner as Fahey, TID, and MID may mutually agree and memorialize in a written instrument that is signed by all parties.

E. Submit a draft Curtailment Operations Plan to the Division by December 31, 2019 for review and comment by the Division. The draft Curtailment Operations Plan shall, at minimum:

1. Describe measures sufficient to ensure that Fahey complies with the December 12, 1992 Water Exchange Agreement between Fahey, MID, and TID during years when transfer water is not available from TUD. These measures may include ceasing diversion, providing water from another transferor, or such other measures as Fahey, MID, and TID may mutually agree and memorialize in a written instrument that is signed by all parties.

2. Describe measures sufficient to ensure that Fahey does not divert adverse to downstream senior claims of right during any period when water is not available for diversion by MID or TID under their most senior claim of right. These measures may include ceasing diversion, providing water from a transferor, or such other measures as Fahey and the owner of the downstream senior claim of right may mutually agree and memorialize in a written instrument that is signed by all parties. Fahey may satisfy this obligation for claims of right in the Sacramento-San Joaquin Delta (Delta) downstream of the confluence of the San Joaquin River and Middle River by identifying a cumulative estimate of lawful diversion demand in the Delta, in situations when water is not available for the most senior water right upstream of the confluence of the San Joaquin River and Middle River.

3. Describe any approvals necessary to implement the Curtailment Operations Plan from any local, state, or federal agencies.

F. Submit a final Curtailment Operations Plan to the Division by December 31, 2020, for review and approval by the Division of Water Rights Deputy Director (Deputy Director). The Deputy Director will review and approve the final Curtailment Operations Plan

upon a showing that it complies with the requirements of this order in a feasible, legal, and expeditious manner. The Deputy Director may revise the final Curtailment Operations Plan and approve it as modified in order to ensure compliance with the requirements of this order. The Deputy Director will reject the final Curtailment Operations Plan if the Deputy Director determines that the plan does not comply with the requirements of this order.

G. If applicable, resubmit an amended final Curtailment Operations Plan to the Deputy Director within ninety (90) days of the date of the written notice of rejection if the Deputy Director rejects the final Curtailment Operations Plan. The written notice of rejection will state the Deputy Director's reasons for rejecting the proposed operations plan and will identify an employee or employees within the Division with whom Fahey shall immediately engage in good faith consultation to remedy the reasons for rejection. The Deputy Director will approve, reject, or modify the revised final Curtailment Operations Plan in accordance with paragraph I.F.

H. Timely obtain all necessary approvals to implement the final Curtailment Operations Plan from applicable local, state, and federal agencies.

I. Timely implement the final approved Curtailment Operations Plan during any period when water is not available to serve his priority of right.

II. The State Water Resources Control Board ORDERS that, pursuant to Water Code section 1052, subdivision (c), G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) shall pay administrative civil liability (ACL) in the amount of $215,000, which is due in three installments as follows:

A. The First Installment of the ACL is $50,000 and is due immediately. If this amount of the ACL is unpaid after the time for review under Water Code section 1120, et seq. has expired, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

B. If Fahey meets all requirements of sections I.D. and I.E. of this order and has fully and timely paid the First Installment, then $50,000 of the remaining ACL, the

Second Installment, will be indefinitely suspended. If Fahey fails to timely meet any of the requirements of sections I.D. and I.E. of this order or fails to timely pay any portion of the First Installment, the Deputy Director will issue a written finding directing Fahey to make immediate payment of the Second Installment. If any portion of the Second Installment is unpaid after 30 days of the date of the Deputy Director's written finding, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

C. If Fahey meets all requirements of sections I.F. and I.G. of this order, receives approval of his Curtailment Operations Plan from the Deputy Director, and has fully and timely paid the First Installment and Second Installment, if required, then the remaining ACL of $115,000, the Third Installment, will be indefinitely suspended. If these requirements are met, the Deputy Director will issue a letter to Fahey confirming that Fahey has satisfied his payment of administrative civil liability and that Fahey is not obligated to pay the remainder of the liability. If, however, Fahey fails to timely meet any of the requirements of sections I.F. and I.G. of this order, fails to receive approval of his Curtailment Operations Plan from the Deputy Director, or fails to timely pay any portion of the First or Second Installment, the Deputy Director will issue a written finding directing Fahey to make immediate payment of the Second and Third Installment. If any portion of the Second and Third Installment is unpaid after 30 days of the date of the Deputy Director's written finding, the Deputy Director will seek a judgment against Fahey in accordance with Water Code section 1055.4.

III. Nothing in this order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____.

AYE:

NO:

ABSENT:

ABSTAIN:

DRAFT

_____
Jeanine Townsend
Clerk to the Board