January 14, 2019

VIA EMAIL AND U.S. MAIL

Division of Water Rights
State Water Resources Control Board
Attention: Ernest Mona
P.O. Box 2000
Sacramento, CA 95812-2000
wrhearing@waterboards.ca.gov

Re: Fahey ACL/CDO Hearing
Application ID: A029977 and A031491

FAHEY'S REQUEST TO IMMEDIATELY DISMISS THIS PROCEEDING PURSUANT TO *CALIFORNIA WATER CURTAILMENT CASES*.

Dear Mr. Mona:

As you know, this office represents G. Scott Fahey and Sugar Pine Spring Water LP (collectively, "Fahey") in the above-entitled matter. Based upon on the post-hearing decision in *California Water Curtailment Cases*, Judicial Council Coordination Proceeding No. 4838 (Santa Clara County Superior Court, issued February 21, 2018) (copy enclosed), and for the reasons stated below, Fahey hereby requests that the State Water Recourse Control Board ("Board") dismiss the Administrative Civil Liability Complaint and Cease And Desist Order in this matter ("ACL/CDO"), and immediately dismiss this proceeding in its entirety.

Summary of Motion To Dismiss

The ACL/CDO are based on the Board's alleged jurisdiction under Water Code section 1052. (Exhibits WR-1, ¶¶1, 2,43, 45; WR-2, pp. 1, 6.) However, the Superior Court in *California Water Curtailment Cases* explicitly held on page 24 of its decision that "The Board Does Not Have Jurisdiction to Curtail Pre-1914 Appropriators Under Water Code Section 1052." Since Fahey, a junior user, was using pre-1914 appropriators' water under the authorization of a contract with the pre-1914 appropriators, 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. The Board therefore did not have,

and still does not have, jurisdiction in this case to issue and prosecute the ACL/CDO, or to issue any relief under the ACL/CDO in this matter.

Furthermore, the ACL/CDO in this proceeding is based entirely on the curtailment notices that the Board issued to Fahey in 2014 and 2015. In the *California Water Curtailment Cases*, the court also held that the "Board violated petitioners' due process rights by issuing the curtailment notices, which ordered immediate curtailments and threatened large fines accruing from the time the notices issued, without first providing water users [including Fahey] with an opportunity to challenge the findings upon which they were based." Thus, the Board has, and still is, violating Fahey's due process rights by prosecuting this proceeding.

Accordingly, the ACL/CDO, and this entire proceeding, should be immediately dismissed.

The Tuolumne River Water At Issue Here Is Pre-1914 Appropriator Water

As established by the Raker Act (Pub.L. No. 63-41 (Dec. 19, 1913) 38 Stat. 242; Fahey Exhibit 77), the Modesto Irrigation and Turlock Irrigation Districts (collectively, "MID/TID") have a prior right to the entire flow of the Tuolumne River upstream of the La Grange Dam when the unimpaired flow at the dam is less than 2,350 CFS, then its flow to City and County of San Francisco ("City"). (*Cf. Restore Hetch Hetchy v. City and County of San Francisco* (2018) 25 Cal.App.5th 865, 873-876.) Those parties' rights to divert, store, and/or use the Tuolumne River's water is detailed in their Fourth Agreement. (Fahey Exhibit 79.) Those rights of MID/TID and the City are also pre-1914 rights that existed prior to the effective date of the Water Commission Act, and therefore those rights are outside of the Board's jurisdiction. (*California Water Curtailment Cases*, p. 24.)

Pursuant to Water Code section 1706, and without the approval of the Board, pre-1914 appropriators such as MID/TID and the City may change a point of diversion, place of use, and purpose of use, if others are not injured by such change. The Board is not authorized to take enforcement action "against pre-1914 appropriators based on their use of water in excess of that available under their priority of right." (*California Water Curtailment Cases*, p.30.) If the water available is less than the senior appropriator's full pre-1914 appropriation, then the senior's diversion and use of all the available water is authorized and the Board does not have jurisdiction to take action to enforce trespass pursuant to Water Code §1052. Thus, in this case when the unimpaired flow at La Grange Dam is less than 2,350 CFS, MID/TID is authorized to divert, store, and/or use all of it. It is at the sole discretion of MID/TID to determine whether to give it away (e.g. to the Cold Spring Water Co.), or to exchange it for foreign-water (e.g. by the Fahey Water Exchange Agreement) or sell it to its customers.

Fahey's Water That Is At Issue Here Was Procured Under A Water Exchange Agreement With Pre-1914 Water Appropriators, And So That Water Is Outside Of The Board's Jurisdiction

Under Water Code section 1375(d), 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. As the Board's own witness testified:

> Approving a water right application with an exchange agreement allows the senior right holder to provide water to the junior right holders' point of diversion and place of use and for the identified purposes of use. This interpretation is supported by Order WR 91-07, footnote 8 ….
> [Decalration of Kathy Mrowka (Exhibit WR-9), ¶18.]

The WEA was incorporated into the Fahey Permits pursuant to Water Code § 1706, which states:

> The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change.…

Therefore, as the senior right holder in a Water Exchange Agreement ("WEA"), a pre-1914 appropriator that is not subject to Division 2 of the Water Code (i.e., outside of the Board's jurisdiction) is "'authorized in' Division 2" by Water Code section 1706 "to provide water to the junior right holders' point of diversion and place of use and for the identified purposes of use acting as a senior right holder" without the need for Board approval or authorization. As a result, "acting as a senior right holder" the junior post-1914 right holder is "'authorized in' Division 2" to divert and use pre-1914 water, even when water would otherwise not be available under the junior's priority of right. The WEA is the basis on which the junior's diversion and use is legally authorized notwithstanding there would otherwise be no water available under the junior's priority of right, so long as the junior's diversion and use comply with the quantity, point of diversion, place of use, and purpose of use set forth in the junior's Permit to Divert and Use Water.

Here, MID/TID and the City are "entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or [the Water Code]" (Water Code §1706), and therefore the water provided to Fahey by the WEA is pre-1914 water. It is non-jurisdictional water authorized by section 1706 to be diverted at the Fahey points of diversion and used as prescribed by Permits Nos. 20784 and 21289. As affirmed by the Board in Decision 1290, the Board has "no such jurisdiction" in regard to this matter.

The Board Does Not Have Jurisdiction In This Matter

Fahey recognizes that the Board is authorized by section 1052 to take enforcement action against a diverter who diverts *outside* of the scope of a claimed pre-1914 or riparian water right. (*See generally*, *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397; *Millview County Water Dist. v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879.) However, even though the Tuolumne River flowed less than 2,350 CFS during the curtailment periods in 2014 and 2015, the Board did not have jurisdiction and MID/TID still had the right to divert and use water that was "'not subject to' Division 2." (*See California Water Curtailment Cases*, p. 30 ["section 1052 does not authorize the Board to 'curtail' or take enforcement action against pre-1914 appropriators based on their use of water in excess of that available under their priority of right."]) The WEA with Fahey and MID/TID allowed Fahey to divert and use the pre-1914 water within the scope of the pre-1914 water rights of MID/TID and the City. (Water Code §1706.) The WEA that shifts the quantity, point of diversion, place of use, and purpose of use of pre-1914 water to Fahey pursuant to Water Code §1706 allows Fahey to divert whenever MID/TID and the City is authorized to divert. Whenever water is not available under the Fahey priority of right the WEA allows it to be diverted no matter the time of year. (Also, if any party to the WEA believes an injury has occurred, then "[i]t is for the courts to determine whether such injury takes place; no such jurisdiction over pre-1914 appropriative rights is given to [the Board]." (Board Order D-1290, p. 32.) While the ACL/CDO alleges that Fahey diverted water when there was a lack of available water supply under his priority of the right, the hearing testimony established that the Board is fully aware that Fahey annually diverts water when water is unavailable under its priority of right, because Fahey is in a WEA with MID/TID and the City that involves pre-1914 (non-jurisdictional) water rights.

A preexisting contractual basis of right allowing an authorized diversion of non-jurisdictional water, such as that which exists here, results in a diversion that is not subject to enforcement authority of Division 2 of the Water Code. Such an authorized diversion of non-jurisdiction water is not a trespass, as a matter of law. Thus, contrary to the Board's curtailment orders upon which the ACL/CDO is based, Fahey was contractually and legally justified to divert pre-1914 water when otherwise water is unavailable under the claimed priorities of right. To the extent that the Board seeks to change this proceeding into a claim against Fahey for breach of contract of the WEA causing injuries, the Board is without authority to consider such allegations: "[I]t is for the courts to determine whether such injury takes place; no such jurisdiction over pre-1914 appropriative rights is given to" the Board.

In short, the *California Water Curtailment Cases* decision establishes that the Board was simply not authorized under the Water Code to prevent the diversion or use of the water by Fahey as alleged in the ACL/CDO, to enforce trespass claims or impose penalties against Fahey

in this matter, or even to compel Fahey's involvement in a hearing process pursuant to Water Code section 1052(a).

Post-Hearing Case Law Demonstrates That The Board Is Liable For Violating Fahey's Due Process Rights In This Case Which Further Warrants Dismissal

The due process analysis on pages 31 through 39 of the *California Water Curtailment Cases* decision applies to the curtailment notices that the Board issued to Fahey in 2014 and 2015. Those curtailment notices constitute the basis of the ACL/CDO in this matter. (*See* Exhibits WR-1, ¶¶28, 31, 46, 47; WR-2, ¶¶11, 16.) According to that decision, "[t]he Board violated petitioners' due process rights by issuing the curtailment notices, which ordered immediate curtailments and threatened large fines accruing from the time the notices issued, without first providing water users [including Fahey] with an opportunity to challenge the findings upon which they were based." Thus, the Board has been on notice since February 21, 2018, when the *California Water Curtailment Cases* decision was issued, that it has violated Fahey's due process rights since 2014, that the penalties that the Board seeks to impose on Fahey for the periods in 2014 and 2015 are a violation of Fahey's due process rights (Exhibit WR-9, ¶¶28, 31, 46, 47.) and that the Board continues to violate Fahey's due process rights by pursuing the ongoing prosecution of the ACL/CDO in this matter based on those curtailment notices. Those due process violations constitute further grounds for the Board to immediately dismiss the ACL/CDO in this matter.

Conclusion

For the reasons stated above, the Board should dismiss the ACL/CDO in this matter and should immediately dismiss this entire proceeding.

Sincerely,

Glen C. Hansen

GCH/lh
Enclosure
cc: See attached service list

SERVICE LIST

DIVISION OF WATER RIGHTS **Via Email**
Prosecution Team
Kenneth P. Petruzzelli
SWRCB Office of Enforcement
1001 I Street, 16th Floor
Sacramento, CA 95814
kenneth.petruzzelli@waterboards.ca.gov

TURLOCK IRRIGATION DISTRICT **Via Email**
Arthur F. Godwin
Mason, Robbins, Browning & Godwin, LLP
700 Loughborough Drive, Suite D
Merced, CA 95348
agodwin@mrgb.org

MODESTO IRRIGATION DISTRICT **Via Email**
William C. Paris, III
O'Laughlin & Paris LLP
2617 K Street, Suite 100
Sacramento, CA 95816
bparis@olaughlinparis.com
anna.brathwaite@mid.org
lwood@olaughlinparis.com

CITY AND COUNTY OF SAN FRANCISCO **Via Email**
Jonathan Knapp
Office of the City Attorney
1390 Market Street, Suite 418
San Francisco, CA 94102
Jonathan.knapp@sfgov.org

Robert E. Donlan **Via Email**
Ellison, Schneider & Harris, LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
red@eslawfirm.com

Bart Barringer, **Via Email**
Law Offices of Mayol & Barringer
P.O. Box 3049
Modesto, CA 95353
bbarringer@mblaw.com