May 23, 2016

**VIA ELECTRONIC MAIL**

To: Enclosed Service List of Participants

**Hearing Officer's Ruling on Post-Hearing Evidence Motions**

This ruling addresses outstanding evidentiary objections in the matter of: Draft Cease and Desist Order and Administrative Civil Liability against G. Scott Fahey and Sugar Pine Spring Water, LP. The State Water Resources Control Board (State Water Board or Board) Division of Water Rights Prosecution Team (Prosecution Team) and G. Scott Fahey and Sugar Pine Spring Water, LP (Fahey) filed supplemental briefs on April 8, 2016 and reply briefs on April 19, pursuant to the briefing schedule we established. Modesto Irrigation District, Turlock Irrigation District, and the City and County of San Francisco joined the Prosecution Team's supplemental brief and reply brief.

## 1. Legal Standard

The State Water Board conducts adjudicative proceedings in accordance with the provisions and rules of evidence set forth in section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648.5.1.) Pursuant to the Government Code, "[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." (Gov. Code, § 11513, subd. (c).) Parties to Board adjudicative proceedings have the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses; impeach witnesses, and rebut evidence against themselves. (*Id.*, subd. (b).)

Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. (Gov. Code, § 11513, subd. (d).) An objection is timely if made before submission of the case or on reconsideration. (*Ibid.*) Rules of privilege are effective in Board hearings to the extent that statute otherwise requires the State Water Board to recognize them in a hearing. (*Id.*, subd. (c).) The presiding officer has 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).)

Rebuttal evidence is new evidence used to rebut evidence presented by another party. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings p. 6.) Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case in chief, and it does not include evidence that should have been presented during the case in chief of the party submitting rebuttal evidence. (*Ibid.*) Rebuttal testimony and exhibits generally are not required to be submitted in writing or submitted prior to the hearing. (Cal. Code Regs., tit. 23, § 648.4, subd. (f); see also October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings p. 6.)

In our January 21 Procedural Ruling, we granted Fahey's December 18, 2015 motion to compel production of documents meeting all five of the following criteria:

a. The document is within the scope of Fahey's document requests;
b. The document was not previously disclosed to Fahey;
c. The document was not otherwise made available to Fahey;
d. The document is not subject to any privilege, or, alternatively, the document is a report or similar document relied on by an expert witness in reaching his or her opinions; and
e. The document does not "reflect[] an attorney's impressions, conclusions, opinions, or legal research or theories," (Code Civ. Proc., § 2018.030, subd. (a)), or that information is isolated within the document and can be redacted.

(January 21 Procedural Ruling, p. 10.)

State Water Board hearing regulations require that any witness provided written testimony shall appear at the hearing and affirm that the written testimony is true and correct. (Cal. Code Regs., tit. 23, § 648.4, subd. (d).) The Hearing Officer may refuse to admit any testimony that fails to meet this requirement. (*Id.*, subd. (e).) Upon a showing that admitting such testimony would prejudice any party or the Board, the Hearing Officers "shall" refuse to admit the written testimony of an expert who does not appear and affirm that the written testimony is true and correct. (*Ibid.*)

## 2. Prosecution Team's Motion to Strike and Motion in Limine re: Certain Fahey Exhibits and Testimony

### 2.1. Background

On January 13, 2016, the Prosecution Team filed a Motion to Strike and Motion in Limine objecting that certain evidence submitted by Fahey was not relevant to the key issues identified in the October 16, 2015 hearing notice. Fahey filed in opposition on January 20. Also on January 20, Modesto Irrigation District and the City and County of San Francisco filed motions joining and in support of the Prosecution Team's motion. On January 22, 2016, the hearing team advised all parties that:

> The Hearing Officers are considering a draft ruling on the Prosecution Team's Motion to Strike and Motion in Limine. Staff anticipate that Fahey will be allowed to present the disputed evidence to address the key issues in the hearing notice. As such, parties should take any steps reasonable and appropriate to prevent prejudice to themselves.

The hearing took place January 25 and 26, at which time Fahey presented the disputed evidence as part of his case in chief. At the close of the hearing, we requested supplemental briefing on, among other things, whether the evidence objected to in the Prosecution Team's pre-hearing motion to strike/motion in limine is relevant to determining whether an unlawful diversion occurred per Key Issue 1.

In its supplemental brief, the Prosecution Team renews its January 13 motion to strike and motion in limine, contending that the evidence to which it objected is not relevant to Key Issue 1. More specifically, the Prosecution Team argues that Fahey's claim that Decision 995 is "obsolete" is irrelevant to whether there was water available to serve Fahey's priority of right, that judicial estoppel precludes the argument that Decision 995 is "obsolete," that Fahey's testimony regarding groundwater is irrelevant, and that both the Decision 995 and groundwater arguments are time-barred. The Prosecution Team's supplemental brief includes a new motion to strike certain Fahey testimony concerning senior rights. (See generally Prosecution Team Supplemental Brief at pp. 6:12 to 7:8.) Fahey argues that the evidence is relevant based on a particular interpretation of the Raker Act, Decision 995, Fahey's permit terms, and certain agreements between Modesto Irrigation District, Turlock Irrigation District, and the City and County of San Francisco. In Reply, Fahey also objects that new evidentiary objections raised by the Prosecution Team are improper. (Fahey Reply Brief, pp. 8:19 to 9:16.)

### 2.2. Analysis

The disputed exhibits generally consist of government documents and informational material prepared by state and local government agencies. The disputed testimony is expert witness testimony. These things are all the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs. Therefore, the exhibits and testimony are admissible if they are relevant to the key issues raised in the hearing notice.

Here, the disputed exhibits and testimony are offered in support of Fahey's argument that his diversions were lawful because he complied with the "correct interpretation" of his permits and qualified for an exception to curtailment. (Fahey Supplemental Brief on Evidentiary Objections, p. 9.) These arguments directly address whether Fahey has violated, or is threatening to violate, the prohibition set forth in Water Code section 1052 against the unauthorized diversion or use of water. Therefore, the arguments and the underlying evidence are relevant to Key Issue 1 of the hearing notice. In addition, Fahey's understanding of his permits and efforts to comply with their terms speak to the nature and persistence of the alleged violation of Water Code section 1052. As such, they are relevant to Key Issue 3 in the hearing notice.

The Prosecution Team objects that Fahey's interpretation of his permit terms is incorrect, that his actions and testimony are inconsistent with his permit terms, that judicial estoppel precludes Fahey from presenting certain arguments concerning Decision 995, that Fahey's testimony concerning groundwater is improper and contradicts previous statements made by Fahey and his agents, and that Fahey's arguments are time barred. These are merits arguments. In essence, the Prosecution Team asks us to decide legal and factual issues central to the hearing in order to resolve a preliminary evidence issue. We decline to do so at this time. We will consider merits arguments at the appropriate time if they are properly presented in closing briefs.

## 3. Fahey's Objections to Admitting Exhibit WR-147 and Related Testimony

### 3.1. Background

Exhibit WR-147 is a contact report prepared by Samuel Cole, an expert witness for the Prosecution Team. It memorializes a December 22, 2015 telephone conversation between Mr. Cole and Wes Monier, an employee of the Turlock Irrigation District. (E.g., WR-147, Hrg. Trns. (Jan. 26, 2016), p. 133:1-7.) At the hearing, Mr. Cole testified to certain statements by Mr. Monier. The Prosecution Team then submitted WR-147 into evidence. For ease of reference, we use "WR-147" loosely to refer to both the exhibit and Mr. Cole's testimony concerning the exhibit and its contents.

Fahey objects to admitting WR-147, arguing that it violates our January 21, 2016 procedural ruling and that certain testimony is improper as direct testimony and rebuttal.[1] Fahey also objects that WR-147 is inadmissible hearsay because it does not supplement or explain any other relevant evidence in the record and because it would not be admissible in a civil action. The Prosecution Team argues that WR-147 and associated testimony are proper rebuttal, are admissible for truth and to supplement or explain other evidence, and did not violate the January 21 procedural ruling.

### 3.2. Analysis: Admissibility of Sam Cole's Testimony and WR-147 as Rebuttal Testimony

We first consider whether Sam Cole's testimony is appropriate as rebuttal testimony. In its April 8, 2016 Supplemental Brief, the Prosecution Team explains that it prepared WR-147 as rebuttal evidence to attack Mr. Fahey's credibility on the issue of water wheeled into New Don Pedro Reservoir between 2009 and 2011, and to explain certain statements made by Mr. Fahey in exhibits WR-72, Fahey 1, Fahey 60, and in his case in chief and rebuttal testimony. (Prosecution Team Supplemental Brief, p. 13:10-23; see also Petruzzelli Decl. in Support of

[1] Specifically, testimony by Samuel Cole and Katherine Mrowka regarding the alleged "spilling" of New Don Pedro Reservoir reported in the January 25, 2016 Hearing Transcript at pages 132:11 to 133:24, 140:24 to 141:5, 141:20 to142:2, and 142:16 to 146:16, and reported in the January 26, 2016 Hearing Transcript at pages 2:21 to 9:22. (Fahey Supplemental Brief on Evidentiary Objections, p. 11:8-12.)

Prosecution Team Supplemental Brief on Evidentiary Objections, ¶¶ 12-14 [hereinafter Petruzzelli Decl.].) Fahey counters that using Mr. Cole's testimony to rebut WR-72 is improper because WR-72 is a Prosecution Team case in chief exhibit. (Fahey Supplemental Brief, p. 14:6-9.) As such, Fahey argues, WR-147 is not responsive to evidence presented in another party's case in chief and includes evidence that should have been presented during the Prosecution Team's case in chief. (*Id.*, p. 14:10-16.)

During the hearing, the Prosecution Team explained that WR-147 was intended to confirm "an email from Mr. Fahey to [Tuolumne Utilities District (TUD)] in 2011." (Hrg. Trns. (Jan. 25, 2016) p. 133:16-17.) Upon reviewing the briefing and the record, it has become apparent that this "email" is page 37 of WR-72, a Prosecution Team exhibit. The next day, the Prosecution Team further explained that WR-147 was "intended to clarify Mr. Fahey's statement regarding the overflow operations of New Don Pedro," (Hrg. Trns. (Jan. 26, 2016) p. 4:10-12), which could refer to a singular "statement" memorialized in WR-72, Fahey 1, or Fahey 60. However, as far as we can discern, the Prosecution Team did not specifically identify a Fahey exhibit or Fahey testimony that it intended WR-147 to rebut until filing its April 8 brief. (E.g., Petruzzelli Decl., ¶ 12.)

Mr. Fahey argued in his written and direct testimony that he has an exception to curtailment because, in part, of water wheeled into New Don Pedro Reservoir under an exchange agreement with TUD. (E.g., Fahey 1, p. 11; see also *id*, p. 5.) He also took this position in a June 3, 2014 letter accompanying his curtailment certification form. (Fahey 60.) There, Fahey acknowledged that "if NDPR had spilled, or spills in the future, that the water I have purchased … and is now pre-positioned there as 'replacement water' would be lost and not available to me for its intended purpose." (*Ibid.*) Mr. Fahey has also testified that:

> [T]here is nothing prohibiting me from wheeling TUD surplus water to NDPR, to remain there until needed; unless however, NDPR were to spill, then any TUD surplus water would be the first to spill. Surplus water is a separate entity that floats above the balance of the water stored in NDPR, which is the reason it spills first. It is surplus water until, as replacement water, it converts to fungible stored water.

(Fahey 1, p. 9.)

Rebuttal evidence is new evidence used to rebut evidence presented by another party. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings p. 6; see also Cal. Code Regs., tit. 23, § 648.4, subd. (f).) Rebuttal evidence is limited to evidence that is responsive to evidence presented in connection with another party's case in chief, and it does not include evidence that should have been presented during the case in chief of the party submitting rebuttal evidence. Therefore, WR-147 cannot be proper rebuttal by the Prosecution Team against Fahey's statements in WR-72 because WR-72 is not evidence presented by another party. However, WR-147 is responsive to Mr. Fahey's statements in Fahey 1 and Fahey 60. Fahey has argued that he has a valid exception to curtailment because he has pre-positioned water that would still be available unless New Don Pedro Reservoir had

spilled, and that the reservoir has not spilled. Exhibit WR-147 is responsive to this argument because it would tend to show that the reservoir did in fact spill after Mr. Fahey pre-positioned his water into the reservoir.

The Prosecution Team has identified, at least belatedly, an appropriate rebuttal purpose for WR-147.[2] As such, it may be possible to admit WR-147 as a rebuttal exhibit, and Mr. Cole's testimony as rebuttal testimony, if appropriate limits can be set to prevent the possibility of prejudice. We revisit the issue below.

### 3.3. Analysis: Hearsay Objections to WR-147

WR-147 and Mr. Cole's testimony summarize out of court statements made by Wes Monier, a Turlock Irrigation District employee, concerning the operations of New Don Pedro Reservoir. (Gov. Code, § 11513, subd. (d); Cal. Code Regs. tit. 23, § 648.5.1; cf. Evid. Code, § 1200, subd. (a).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) At the hearing, Fahey's counsel timely objected to the introduction of WR-147 and restated his objection throughout the course of the hearing. (See Hrg. Trns. (Jan. 25, 2016), p. 133:8-15; *id.*, pp. 253:23 to 255:25; Hrg. Trns. (Jan. 26, 2016), pp. 2:21 to 3:17; *id.*, pp. 135:17-24, 136:9-14.) Therefore, WR-147 is not sufficient in itself to support a finding unless it would be admissible in a civil action.

Fahey contends that no hearsay exception would justify admitting WR-147 in a civil action. (See generally Fahey Supplemental Brief, p. 18:12-24.) The Prosecution Team argues that "hearsay is admissible to attack the credibility of a declarant that would be admissible if the declarant were a witness at the hearing," citing *People v. Marquez* (1979) 88 Cal.App.3d 993 (hereinafter *Marquez*) and section 1202 of the Evidence Code. (Prosecution Team Supplemental Brief, pp. 12:24 to 13:2.) In *Marquez*, the court admitted allowed hearsay testimony by a declarant, Henry Ramos, in order to impeach other statements by *the same declarant*. Specifically, the court upheld the prosecution's use of out of court statements by Ramos, who witnessed the crime for which Marquez was being tried, to impeach preliminary hearing testimony by Ramos that Marquez's defense introduced at Marquez's trial.[3] (See generally *Marquez*, 88 Cal.App.3d at 995-996, 998.) Ramos himself was unavailable to testify at Marquez's trial because he refused to testify at Marquez's trial and had been convicted of perjury for his statements in the Marquez preliminary hearing. (*Id.*, at 996.)

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[2] Because WR-147 was intended as a rebuttal exhibit, (Hrg. Trns. (Jan. 25, 2016), p. 133:16-20), and was only allowed to be presented during the Prosecution Team's case in chief redirect testimony in the interest of time, (*id.*, p. 133:21-24), we need not address whether WR-147 would also be proper as case in chief testimony. The Hearing Officers may modify the order of proceeding in a Board hearing for good cause. (Cal. Code Regs., tit. 23, § 648.5.)

[3] Specifically, the *Marquez* prosecution sought to impeach Ramos' preliminary hearing testimony to the effect that he (Ramos), not Marquez had committed the crime, "with testimony from Officer McConnell that Ramos, on two occasions prior to the preliminary hearing, had called him[ (McConnell)] to say that his[ (Ramos')] life was threatened if he (Ramos) did not do defendant's[ (Marquez's)] 'joint' time." (*Marquez*, 88 Cal.App.3d at 996.)

The Prosecution Team correctly states the holding in *Marquez*. But because the Prosecution Team seeks to introduce Mr. Monier's out of court statement to impeach Mr. Fahey, and not Mr. Monier, *Marquez* is inapposite. The most obvious choice to impeach Mr. Fahey with testimony from Mr. Monier would have been to subpoena Mr. Monier as a rebuttal witness. (See generally Cal. Code Regs., tit. 23, § 649.6 [describing subpoena process]; *id.*, § 648.4 [rebuttal testimony generally not required to be submitted in writing or prior to the hearing]; see also Prosecution Team, Notice of Intent to Appear (Nov. 5, 2015), p. 1 [reserving right to call rebuttal witnesses as necessary].) But the Prosecution Team declined to do so, depriving Fahey of the opportunity to cross examine Mr. Monier. (See Gov. Code, § 11513, subd. (a); Cal. Code. Regs., tit. 23, § 648, subd. (b); see also generally Evid. Code, § 804.)

Exhibit WR-147 is not sufficient in itself to support a finding. (Gov. Code, § 11513, subd. (d).) Below, we address whether WR-147 should be admitted to supplement or explain other evidence.

### 3.4. Analysis: Prosecution Team's Obligation to Disclose WR-147

Exhibit WR-147 was not previously disclosed to Fahey, was not otherwise made available to Fahey, and does not reflect an attorney's impressions, conclusions, opinions, or legal research or theories. However, Fahey and the Prosecution Team dispute whether WR-147 was privileged and whether it fell within the scope of Fahey's document requests.

The Prosecution Team argues that it was not obligated to disclose WR-147 because the document is privileged attorney work product. (Prosecution Team Supplemental Brief, p. 14:16.) Fahey objects that the Prosecution Team failed to follow appropriate procedures for asserting attorney work product privilege, citing *Coito v. Superior Court* (2012) 54 Cal.4th 480, 499-500 (hereinafter *Coito*). (Fahey Reply Brief, pp. 7:1 to 8:7.) *Coito* requires that, for documents entitled to at least qualified attorney work product protection under section 2018.030, subdivision (b) of the Code of Civil Procedure, "[a] party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense will result in an injustice." (*Coito*, 54 Cal.4th at 499.) Fahey also appears to object that the Prosecution Team's apparent failure to provide a privilege log denied Fahey the opportunity to make this showing. (See Fahey Reply Brief, p. 7:21-23; *id.*, p. 8 fn. 1.)

The attorney work product privilege normally extends to work produced by an attorney's agents and consultants. (E.g., *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911; *Scotsman Mfg. Co. v. Superior Court* (1966) 242 Cal.App.2d 627, 531.) However, in *People v. Combs* (2004) 34 Cal.4th 821, 862 (hereinafter *Combs*), the California Supreme Court arguably held that section 721 of the Evidence Code effects a waiver of the attorney work product privilege for reports produced by a party's non-testifying, consulting expert when the party's testifying expert relied on that report. (See also generally January 21 Procedural Ruling, pp. 5-10.) *Combs* considered a written report prepared by a psychiatric professional. (See *Combs*, 34 Cal.4th at 862-863.)

Exhibit WR-147 appears to have been prepared at the initiative of counsel in preparation for the January 25-26 hearing. (Petruzzelli Decl., ¶¶ 12-14.) Mr. Cole prepared WR-147 himself, to memorialize information communicated during a conversation with Mr. Monier, who did not testify. (E.g., *id.*, ¶ 14; WR-147; Hrg. Trns. (Jan. 25, 2016) pp. 132:15-17, 133:1-7; Hrg. Trns. (Jan. 26, 2016), p. 4:10-11.) As such, WR-147 is arguably distinguishable from *Combs*, in which a non-testifying expert prepared a written report that was then reviewed by testifying experts in forming the opinions to which they later testified. Mr. Cole testified to the contents of a conversation, which WR-147 memorializes, and not the contents of a written report prepared by another expert. (See Hrg. Trns. (Jan. 25, 2016) p. 132:15-25.)

The Prosecution Team also argues that it had no obligation to disclose Exhibit Wr-147 because the exhibit is outside the scope of Fahey's document requests addressed by our January 21 Procedural Ruling. (Prosecution Team Supplemental Brief, p. 14:11-12.) Specifically, the Prosecution Team argues that WR-147 was created after Fahey filed his deposition notices and document requests and created as a rebuttal exhibit, not a case in chief exhibit. (*Id.,* p. 14:11-13; Petruzzelli Decl., ¶¶ 12-14.) Fahey contends that WR-147 was prepared "'in part' for direct expert testimony" as part of the Prosecution Team's case in chief, and that the exhibit should have been introduced as a case in chief exhibit through procedures specified in our January 21 Procedural Ruling, (Fahey Supplemental Brief, p. 12:7-8, 12:9-16.) At the hearing, Fahey also objected that it was unreasonable for the Prosecution Team to argue that WR-147 was outside the scope of Fahey's December 11, 2015 document request, citing the absence of clear rules governing the production of documents demanded on the eve of the hearing. (See Hrg. Trns. (Jan. 26, 2016) p. 6:11-24.)

Fahey's December 11 deposition notice and document request issued to Mr. Cole demanded production of "[a]ll DOCUMENTS constituting or relating to correspondence (including but not limited to, letters and emails) from YOU and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491)." (Fahey Notice of Deposition of Samuel Cole and Request for Production of Documents (Dec. 11, 2015) p. 3:12-14.) "DOCUMENT" is defined to include "all written, recorded, or graphic materials, however produced or reproduced, pertaining in any way to the subject matter of this action," and specifically to include "originals, copies, or drafts" of "notes; summaries; …memoranda of telephone or in-person conversations." (*Id.*, p. 2:8-13.) "Correspondence" is not wholly defined in the document request. However, correspondence "includ[es], but[ is] not limited to, letters and emails." (*Id.*, p. 3:12-13.) In our January 21 Procedural Ruling, we "construe[d] Fahey's requests for document production as administrative subpoenas duces tecum filed pursuant to the Board's regulations" for the purposes of resolving the motions then at issue. (January 21 Procedural Ruling, p. 4; see also Cal. Code Regs., tit. 23, § 649.6.)

The document production request that Fahey issued to Mr. Cole differed from those issued to other Prosecution Team witnesses. In our January 21 Procedural Ruling, we noted that:

> Fahey's document request submitted to Mr. Cole excludes the language 'whether or not privileged' from the definition of 'document,' and did not request records relied on by Mr. Cole in forming his opinion as an expert. However, Fahey's [December 18, 2015] Motion to Compel Document Disclosures contends that, because the Prosecution Team identified Ms. Mrowka, Mr. LaBrie, and Mr. Cole as expert witnesses, 'privilege is waived to the extent any of the privileged discovery was relied upon or considered.' For the purposes of analysis, this ruling discusses a hypothetical document request to Mr. Cole that attempts to compel production of privileged documents. This ruling does not concede that Fahey has actually requested privileged records relied on by Mr. Cole in forming his opinions.

(January 21 Procedural Ruling, p. 2 fn. 1.)

Elsewhere, our ruling cautioned that it would "consider the general legal issue raised by Fahey" concerning *Combs* "without conceding whether Fahey has properly filed requests for documents considered by any particular Prosecution Team witness." (January 21 Procedural Ruling, p. 6.) Exhibit WR-147, Mr. Cole's contact report, is clearly a DOCUMENT within the meaning of Fahey's December 11 document request because it is written material pertaining to the subject matter of the enforcement proceeding and because it constitutes an original, copy, or draft of notes, summaries, or memoranda of a telephone conversation with Mr. Monier. However, the record is unclear as to whether Mr. Cole actually considered Exhibit WR-147 when preparing his testimony. He may only have considered his recollection when preparing his rebuttal testimony.

Is a contact report memorializing a telephone conversation "correspondence"? Correspondence is typically "communication by the exchange of letters" or "the letters exchanged." (E.g., Webster's II New College Dictionary (1995) p. 253, col. 2.) A letter is a "written or printed communication sent to a recipient," (*id.*, p. 629 col. 2), presumably including electronic documents that are sent to a recipient. This is consistent with Fahey's document request, which identified letters and emails as specific examples of correspondence. Exhibit WR-147 does not designate a recipient. However, Mr. Petruzzelli's declaration states that "Mr. Cole's discussion with Mr. Monier and contact report documenting that discussion (WR-147) helped me understand the facts of the case and Mr. Fahey's statements." (Petruzzelli Decl., ¶ 14.) This indicates that Mr. Cole sent WR-147 to at least one recipient, Mr. Petruzzelli, for the purpose of communicating information.

There is a reasonable argument that the contact report constitutes "correspondence" between Mr. Cole and Mr. Petruzzelli, but this is not dispositive. Mr. Petruzzelli is an attorney representing a client, the Prosecution Team. Because Mr. Cole is a member and agent of the Prosecution Team, there is also a reasonable argument that his correspondence and other communications with Mr. Petruzzelli is subject to attorney-client privilege. (See Evid. Code, § 954; Petruzzelli Decl., ¶¶ 1, 10; see also Evid. Code, §§ 950-952; Gov. Code, § 11513, subd. (e).) If so, their communications and correspondence, including WR-147, would be protected from disclosure unless the privilege has been waived. (Evid. Code, § 912; but see *Combs*, 34 Cal.4th at 862-863.)

Exhibit WR-147 may also have been used to communicate between Mr. Cole and Kathy Mrowka prior to the hearing. Ms. Mrowka briefly discussed the issue of water spilling from New Don Pedro Reservoir on re-cross examination, and her statements suggest that she may also have personally reviewed WR-147 prior to the hearing. For example, Ms. Mrowka testified that "It's my understanding that the water was no longer resident in the facility. As you heard Mr. Cole testify, there were events, spill events." (Hrg. Trns. (Jan. 25, 2016) p. 141:4-6; see also *id.*, p. 142:1-2 ["…in my opinion, the water isn't there. We had the spill events."] Although the record is unclear, it would be surprising if Ms. Mrowka was wholly unfamiliar with WR-147 before hearing Mr. Cole testify. But Ms. Mrowka is also a member and agent of the Prosecution Team, Mr. Petruzzelli's client. Communications among an attorney, their client, and their client's agents are ordinarily subject to privilege. (Evid. Code, §§ 951, 954.)

In summary, WR-147 raises several complex legal issues concerning privilege and discovery. Although it may be possible to resolve these issues, an attempt to do so is likely to necessitate considerable consumption of time. We consider this issue further below.

### 3.5. Additional Considerations

Lastly, we consider the probative value of WR-147. Exhibit WR-147 memorializes a conversation between Mr. Cole, a Prosecution Team witness, and Mr. Monier, a staff person for Turlock Irrigation District who did not participate in the hearing. It has some limited value in rebutting arguments presented in Fahey 1 and Fahey 60 as to whether a valid exception to curtailment existed. However, WR-147 is not particularly useful for supplementing or explaining WR-72, the Prosecution Team's original stated purpose for introducing WR-147. Exhibit WR-72 is already evidence to the effect that "Lake Don Pedro [was] being operated to avoid the overflow of its dam" on or about July 7, 2011. (WR-72, p. 37.) Whether "operat[ing]" New Don Pedro Reservoir "to avoid overflow" constitutes a "spill" under applicable law is a legal question. The professional opinion of a Turlock Irrigation District employee who on the legal significance of these facts is of little help in answering the legal question.

Mr. Monier's reliability as a witness is uncertain, further undermining the probative value of his opinions as they were conveyed by WR-147 and Mr. Cole. Presenting WR-147 and associated testimony had the effect of reading Mr. Monier's out-of-court testimony into the record. Mr. Monier did not take the oath, and the Hearing Officer's did not have the opportunity to directly observe him or to assess his credibility. Furthermore, because Fahey did not have the opportunity to cross-examine Mr. Monier, it is unclear how well his testimony holds up under scrutiny. (See also Evid. Code, § 804; Cal. Code Regs., tit. 23, § 648, subd. (b).)

It may yet be possible to resolve the difficulties presented by WR-147. But in light of its limited probative value and the substantial consumption of additional time required, we are disinclined to try. Accordingly, we strike WR-147 and associated testimony per our authority under section 11513, subdivision (f) of the Government Code. (See also Cal. Code Regs., tit. 23, § 648.5.1.)

## 4. Fahey's Objections to Admitting Rebuttal Exhibit WR-153 and Related Testimony

### 4.1. Background

Exhibit WR-153 is a PowerPoint presentation submitted by the Prosecution Team as a rebuttal exhibit. Slides 3, 4, and 5 of WR-153 contain graphical summations of water supply and demand analyses for the Tuolumne River during 2014 and 2015. Fahey argues that the three slides should be struck from the record because they were withheld in violation of our January 21 Procedural Ruling. (See generally Fahey Supplemental Brief, pp. 18:25 to 20:23.)

The Prosecution Team contends that it *did* disclose the disputed graphical materials to Fahey by email dated December 8, 2015. (Petruzelli Decl., ¶ 7; *id.*, Attachment 1, p. 2; see generally Prosecution Team Supplemental Brief, pp. 15:17 to 17:23.) Specifically, Mr. Petruzzelli sent Fahey's counsel a link to the State Water Board's Watershed Analysis webpage, which the Prosecution Team contends contains direct links to graphical summations displayed as slides 3-5 of WR-153. (Petruzelli Decl., ¶ 7; *id.*, Attachment 1, p. 2.) In reply, Fahey contends that "there is no evidence in the record regarding when Exhibit 153 was created," and objects that WR-153 and related testimony should have been included in the Prosecution Team's case in chief. (Fahey Reply Brief, p. 8:13-18.)

### 4.2. Analysis

The Prosecution Team introduced WR-153 to rebut Fahey's argument that the supply and demand analysis for the entire San Joaquin River Basin was insufficient to show that water was unavailable for Fahey's priority of right on the Tuolumne. (Hrg. Trans. (Jan. 26, 2016), p. 5:17-21; Petruzzelli Decl., ¶ 16.) As such, it is appropriate rebuttal testimony. (October 16, 2015 Notice of Public Hearing, Information Concerning Appearance at Water Right Hearings p. 6; see also Cal. Code Regs., tit. 23, § 648.4, subd. (f).) The parties agree that the graphical information presented as slides 3-5 of WR-153 were within the scope of Fahey's document requests, were not privileged, and do not reflect an attorney's impressions, conclusions, opinions, or legal research or theories. (E.g., Hrg. Trns. (Jan. 26, 2016) p. 3:24 [Mr. Petruzzelli: "The Tuolumne River analysis is a public document."].) They disagree as to whether the documents were previously disclosed or otherwise made available to Fahey.

The hyperlink provided by Mr. Petruzzelli to Fahey's counsel links directly to the "Watershed Analysis" sub-page of the State Water Board's Drought Year Actions webpage.[4] (Petruzzelli Decl., Attachment 1, p. 2.) Fahey does not dispute that his counsel received Mr. Petruzzelli's email. Headings on the "Watershed Analysis" page indicate specific files for the "2015 Water Availability Analysis," "2014 Pre-Curtailment Analysis Graphs," and other materials. There is a

[4] Specifically, Mr. Petruzzelli wrote that "[t]he 'graphical summations' referenced in Item 26, pages 4 through 5, of the ACL complaint are available on the State Water Board's "Watershed Analysis" webpage at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/, along with supporting datasets and analysis."

sub-heading for the "San Joaquin Watershed" under the "2015 Water Availability Analysis" heading, which contains hyperlinks for various tributaries of the San Joaquin River, including the Tuolumne River. The "Tuolumne River" hyperlink[5] leads directly to graphical material identical to slides 3 and 5 of WR-153. According to the webpage, the file was last updated on October 16, 2015.

There is another "Tuolumne River" hyperlink under the "2014 Pre-Curtailment Analysis Graphs." That hyperlink leads directly to a new sub-page of the Board's Drought Year Actions Page, which is entitled "Tuolumne River Watershed Analysis."[6] On this page, a hyperlink titled "Tuolumne River Seasonal Graph"[7] leads directly to a file identical to slide 4 of WR-153. The file and slide 4 of WR-153 both indicated that they were "[u]pdated: May 8, 2014."

All the Tuolumne River analyses presented in WR-153 were clearly marked, and were, at most, two mouse clicks away from the link that Mr. Petruzzelli provided to Mr. Fahey's counsel. Mr. Petruzzelli explicitly stated, in a formal discovery response, that exhibits contained on "Watershed Analysis" page were responsive to Fahey's discovery request. We find that the graphical material constituting slides 3 through 5 of WR-153 were "otherwise made available to Fahey" within the meaning of our January 21 Procedural Ruling. As such, these documents were outside the scope of our order to compel production.

## 5. Prosecution Team's Additional Evidence Motions

### 5.1. Propriety of Additional Evidence Motions

The Prosecution Team raised additional evidentiary objections in its supplemental brief. (See Prosecution Team Supplemental Brief, pp. 17:14 to 20:10.) In reply, Fahey argues that the new objections are improper and should be disregarded because they exceed the scope of our January 26, 2016 briefing schedule. (Fahey Reply Brief, p. 8:21-24.) Fahey also objected that certain paragraphs of Mr. Petruzzelli's declaration in support of the Prosecution Team's supplemental brief should be struck. (See *id.*, p. 10:10-21.)

We held the hearing record open at the close of proceedings on January 26, 2016, in order to address outstanding evidentiary issues. (See Hrg. Trns. (Jan. 26, 2016) p. 138:3-5.) This was the purpose of allowing supplemental and reply briefs on evidentiary issues. As such, it is not unreasonable for the Prosecution Team to raise new evidentiary objections. Although it would have been better for the Prosecution Team to ask permission, they raise the new objections within the page limit established for closing briefs and by presenting the new objections in their

[5] See http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/tuolumne_2015curt.pdf

[6] See http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/tuolumne.shtml

[7] See http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/docs/tuolumne_month.pdf

supplemental brief and allowing Fahey the opportunity to reply. As such, we see no potential for prejudice by considering the Prosecution Team's new objections on their merits.

### 5.2. Motion to Strike Exhibits Fahey 73 and Fahey 74

The Prosecution Team moves to strike Exhibits Fahey 73 and Fahey 74, the testimony and professional qualifications of Gary Player, respectively, and to strike certain statements in paragraph 5 of Fahey 1. (Prosecution Team Supplemental Brief, p. 18:2-16.) Fahey replies that Mr. Player's testimony and supporting materials are "self-authenticating" and do not need to be authenticated because they are being used as reasonable supporting material for Mr. Fahey's and Dr. Ross Grunwald's testimony. (Fahey Reply Brief, p. 9:17-24.)

Because Mr. Player did not testify or appear, his entire written testimony consists of out of court statements offered for proof of the matter asserted and is hearsay. (Gov. Code, § 11513, subd. (d); Cal. Code Regs. tit. 23, § 648.5.1; cf. Evid. Code, § 1200, subd. (a).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) Objections are timely if they are filed before submission of the case or on reconsideration. (*Ibid.*) We have not yet received closing briefs and have yet to take the matter under submission. (See Hrg. Trns. (Jan. 26, 2016) p. 139:8-9.) Therefore, the Prosecution Team's April 8, 2016 objection is timely. Fahey 73 and Fahey 74 may be used to supplement and explain other evidence, but are not sufficient in themselves to support a finding.

Fahey also argues, citing case law, that it is permissible for his other expert witnesses, i.e. Mr. Fahey and Dr. Grunwald, to give their own expert testimony based on Mr. Player's hearsay statements. (See Fahey Supplemental Brief, p. 9:17-24.) Pursuant to section 801, subdivision (b) of the Evidence Code, an expert witness may testify in the form of an opinion "[b]ased on matter … perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates." (See also Cal. Code Regs., tit. 23, § 648, subd. (b).) This includes "hearsay of a type reasonably relied upon by professionals in the field." (*People v. Cooper* (2007) 148 Cal.App.4th 731, 736.) We see no reason to doubt that the reports and analyses of geologists are reasonably relied upon by experts in the field of geology and water resources.

Pursuant to our regulations, Mr. Player was required to attend the hearing and attest that his written testimony was true and correct. (Cal. Code Regs., tit. 23, § 648.4, subd. (d).) He failed to do so. But because the Prosecution Team has not shown that admitting Mr. Player's testimony will prejudice the Board or any party, we are not required to exclude it. (See *id.*, subd. (e).) However, we note that the Prosecution Team did not have the opportunity to cross-examine Mr. Player, nor did we did have the opportunity to observe Mr. Player or assess his credibility. (But see Evid. Code, § 804, subd. (b); Cal. Code Regs., tit. 23, § 648, subd. (b).) We will consider the appropriate weight to assign to Mr. Player's hearsay testimony as we deliberate.

### 5.3. Objection to Fahey Testimony Regarding Certain Statements by Leroy Kennedy

The Prosecution Team objects that certain testimony by Mr. Fahey regarding statements by a Leroy Kennedy, whom Mr. Fahey reported to be a Turlock Irrigation District employee, is hearsay and is insufficient to support a finding. (See Prosecution Team Supplemental Brief, pp. 18:22 to 19:9; see also Hrg. Trns. (Jan. 25, 2016), pp. 158:14 to 160:6.) Fahey replies that Mr. Fahey's testimony is admissible to explain Mr. Fahey's intent and behavior in reliance on Mr. Kennedy's statements, and to supplement and explain Exhibit Fahey 54. (Fahey Reply Brief, pp. 9:25 to 10:6.)

Because Mr. Kennedy did not testify or appear, Mr. Fahey's testimony as to Mr. Kennedy's statements during their 1992 in-person meeting constitutes hearsay. (Gov. Code, § 11513, subd. (d); Cal. Code Regs. tit. 23, § 648.5.1; cf. Evid. Code, § 1200, subd. (a).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) The Prosecution Team filed a timely objection. (Hrg. Trns. (Jan. 25, 2016) p. 159:13-18.)

There is evidence in the record that Mr. Kennedy was an agent of Turlock Irrigation District. (E.g., Staff-1, A029977, Correspondence File, Cat. 1, Vol. 1, Letter from G. Scott Fahey to LeRoy Kennedy, Turlock Irrigation District (April 7, 1992); *id.,* Letter from Arthur F. Godwin, Attorney for the Turlock Irrigation District, to G. Scott Fahey (Feb. 7, 1992) [cc'ing LeRoy Kennedy]; accord Hrg. Trns. (Jan. 25, 2016) p. 158:19-24.) Turlock Irrigation District is a party to this proceeding, (Turlock Irrigation District, Notice of Intent to Appear (Nov. 5, 2015), p. 1), and has positioned itself adversely to Fahey, (e.g., Joinder by the City and County of San Francisco, Modesto Irrigation District, and Turlock Irrigation District to the Prosecution Team's Supplemental Evidence Brief and Post-Hearing Evidence Reply Brief, p. 2 ["San Francisco and the Districts intend to submit closing briefs on the merits of … the arguments and positions advanced by Fahey relative to Fahey's permit conditions and obligations to San Francisco and the Districts"]). Therefore, Mr. Kennedy's hearsay statements to Mr. Fahey would be admissible in civil court as a statement of party-opponent. (See Evid. Code, § 1222.)

Because they would be admissible in civil court, Mr. Kennedy's hearsay statements are admissible in this proceeding to support a finding. (Gov. Code, § 15513, subd. (d); Cal. Code Regs., tit. 23, § 648.5.1.) Mr. Kennedy's hearsay statements to Mr. Fahey are also admissible to supplement and explain other evidence, and to explain Mr. Fahey's intent, behavior, and understanding of his obligations. As we deliberate, we will consider the appropriate weight to assign Mr. Fahey's recollection of Mr. Kennedy's statements during their 1992 in-person meeting as we deliberate.

### 5.4. Objection to Fahey Testimony Regarding Certain Statements by State Water Board Staff

Lastly, the Prosecution Team represents that certain statements by a Mr. Bill Van Dyck, who Mr. Fahey reported to be a State Water Board employee, during a field inspection of Deadwood Spring are hearsay and are insufficient to support a finding. (See Prosecution Team Supplemental Brief, pp. 19:9 to 20:9; see also Hrg. Trns. (Jan. 26, 2016), pp. 101:21 to 104:12.) Fahey replies that Mr. Fahey's testimony is admissible to explain Mr. Fahey's intent and behavior in reliance on Mr. Van Dyck's statements and specifically to explain the reasonableness of Fahey's reporting practices. (Fahey Reply Brief, p. 10:6-10.)

Because Mr. Van Dyck did not testify or appear, Mr. Fahey's testimony as to Mr. Van Dyck's statements constitutes hearsay. (Gov. Code, § 11513, subd. (d); Cal. Code Regs. tit. 23, § 648.5.1; cf. Evid. Code, § 1200, subd. (a).) Hearsay evidence is admissible in State Water Board proceedings to supplement or explain other evidence, but, over timely objection, is not sufficient in itself to support a finding unless it would be admissible over objection in a civil action. (Gov. Code, § 11513, subd. (d).) The Prosecution Team filed a timely objection. (Prosecution Team Supplemental Brief, pp. 19:9 to 20:9.) In its objection, the Prosecution Team cites additional evidence in the record that substantiates that a September 29, 1994 field inspection occurred and that Mr. Fahey and William Van Dyck, a State Water Board employee, attended. (Staff-1, A029977, Correspondence File, Cat. 1, Vol. 2, Letter from Yoko Mooring, Sanitary Engineering Technician, State Water Board to G. Scott Fahey (Feb. 1, 1995) [with enclosed report of field inspection]; see also Prosecution Team Supplemental Brief, pp. 19:20 to 20:6; Petruzzelli Decl., ¶ 31.)

Because "Bill" is a common short form of the first name "William,"[8] we are confident concluding that the William Van Dyck who attended the September 29, 1994 field inspection is the same person as the Bill Van Dyck to whose statements Mr. Fahey testified. Mr. Van Dyck was an employee of the State Water Board at the time of his hearsay statements to Mr. Fahey. The Prosecution Team is an organization within the Board formed for the purposes of this proceeding and in keeping with the separation of functions and due process requirements. (See Cal. Code. Regs., tit. 23, § 648, subd. (b); Gov. Code, § 11425.30; *id.*, §§ 11430.10, 11430.30; see also *Morongo Band of Mission Indians v. State Water Resources Control Board* (2009) 45 Cal.4th 731; U.S. Const., 14th Amend., § 1.) Because Mr. Van Dyck's statements were made on or about September 29, 1994, well before separation of functions became necessary in this proceeding, we are comfortable construing Mr. Van Dyck as an agent of the entire Board, including the Prosecution Team. Therefore, his statements would be admissible in civil court as a statement of party-opponent. (See Evid. Code, § 1222.) Mr. Van Dyck's statements are

[8] The State Water Board may take official notice of facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute. (Evid. Code, § 451, subd. (f); Cal. Code Regs., tit. 23, § 648.2.) In addition, the Board may take official notice of facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. (Evid. Code, § 452, subd. (h); Cal. Code Regs., tit. 23, § 648.2; see also, e.g., Hanks et al., A Dictionary of First Names (2nd ed. 2006) pp. 34, 276.)

admissible to support a finding, to explain or supplement other evidence, and to explain Mr. Fahey's intent, behavior, and belief. (Gov. Code, § 11513, subd. (d); Cal. Code Regs., tit. 23, § 648.5.1.)

Developed water, and the means by which an appropriator may establish a right to developed water, are legal issues. We will consider these legal issues during our deliberations to the extent that deciding or applying them may be necessary to resolve the case at hand. As we deliberate, We will also consider the appropriate weight to assign Mr. Fahey's recollection of Mr. Van Dyck's statements during the Deadwood Spring field inspection, which evidently occurred on or about September 29, 1994.

**6. Fahey Motion to Strike Paragraphs 28 through 32 of Kenneth Petruzzelli's April 8, 2016 Declaration in Support of the Prosecution Team's**

Fahey moves to strike paragraphs 28 through 32 of Kenneth Petruzzelli's April 8, 2016 declaration, on the grounds that they constituted new evidence of counsel's research created after the hearing, that Mr. Petruzzelli has not taken the oath, and that Fahey was denied the opportunity to cross examine Mr. Petruzzelli concerning his testimony. (See Fahey Reply Brief, p. 10:10-21.) The Prosecution Team has not had the opportunity to reply to Fahey's motion. Fahey's motion is timely, and is appropriately timed because it is made in response to statements introduced for the first time in support of the Prosecution Team's Supplemental Brief.

Exhibit Staff-1 and its contents are properly part of the record. (Staff-1; Hrg. Trns. (Jan. 25, 2016), p. 17:21 to 18:8; see also Cal. Code Regs., tit. 23, § 648.3.) Paragraphs 28 and 31 reference documents confirmed to be part of Staff-1. These paragraphs constitute Mr. Petruzzelli's analysis of documents properly in the record and need not be struck. Paragraphs 29, 30, 31 are hearsay statements and, over Fahey's timely objection, are not sufficient to support a finding. (Gov. Code § 15113, subd. (d); Cal. Code Regs., tit. 23, § 648.5.12; cf. Evid. Code, § 1200.)

Although Fahey objects that the Prosecution Team "introduces a new exhibit," (Fahey Reply Brief, p. 10:16), and although paragraph 30 of the Petruzzelli references and purports to attach a 1987 legal memo prepared by Daniel Frink, (Petruzzelli Decl., ¶ 30), no such memorandum is actually attached. There is not sufficient evidence in the record to determine whether the Frink memo is actually the "legal counsel opinion" on developed water referenced in Mr. Van Dyck's October 11, 1994 letter to Mr. Fahey, and we decline the Prosecution Team's invitation to add a potentially privileged legal memorandum to the hearing record. Because the Petruzzelli Declaration does not actually include a copy of the Frink memo, it is unnecessary to strike it from the record.

## 7. Conclusion

The Prosecution Team's January 13, 2016 motion to strike and motion in limine is denied. The Prosecution Team's new motion to strike certain Fahey testimony concerning senior rights, (see generally Prosecution Team Supplemental Brief at pp. 6:12 to 7:8), is also denied.

Fahey's motion to strike WR-147 is granted. Fahey's motion to strike testimony by Ms. Mrowka and Mr. Cole related to WR-147 is also granted. Specifically, we strike page 132, lines 11-25; page 133, lines 1-3; page 141, lines 4-7, excluding the text "A. (Ms. Mrowka)" on line 4 and "The water, also, once it is --" on line 7; page 142, lines 1-2, excluding the text "A." on line 1 and "We had the exchange agreement terms" on line 2; page 142, lines 16-25; page 143, lines 1-18; page 144, lines 10-25; page 145, lines 1-25; and page 146, lines 1-8 and 10-16 from the January 25, 2016 hearing transcript. We decline to strike other portions of the transcript identified in Fahey's objection because they contain legal arguments by attorneys and factual testimony on other matters. Fahey's motion in limine is also granted with respect to Mr. Cole's communications with Mr. Monier and testimony pertaining thereto.

Fahey's motion to strike Exhibit WR-153 and associated testimony is denied. However, we strike page 18 of WR-153 by mutual consent of the parties, per our January 26, 2016 spoken ruling. (See Hrg. Trns. (Jan. 26, 2016) p. 69:12-24.)

The Prosecution Team's motion to strike Fahey 73, Fahey 74, and paragraph 5 of Fahey 1 is denied. The Prosecution Team's motion is also denied with respect to Mr. Fahey's testimony concerning hearsay statements by Mr. Kennedy and Mr. Van Dyck. Fahey's motion to strike paragraphs 28 through 32 of the Petruzzelli declaration is denied.

This Procedural Ruling resolves all outstanding evidentiary issues. Accordingly, we close the evidentiary record. However, the record will remain open for closing briefs. Closing briefs will be due June 17, 2016.

Sincerely,

*Original Signed By:*

Frances Spivy-Weber, Vice-Chair

*Original Signed By:*

Dorene D'Adamo, Board Member

Enclosure: Service List

**SERVICE LIST OF PARTICIPANTS**
**G. Scott Fahey and Sugar Pine Spring Water, LP**
**Administrative Civil Liability Complaint and Cease and Desist Order**
**(November 13, 2015; Revised 11/30/15; 01/05/16)**

<table>
<tr><td colspan="2">Parties<br>THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)</td></tr>
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