

1 William C. Paris, III (SBN 168712)
Anne E. Branham (SBN 317346)
2 **O’LAUGHLIN & PARIS LLP**
2617 K Street, Suite 100
3 Sacramento, CA 95816
Telephone: (916) 993-3962
4 Email: bparis@olaughlinparis.com
abranham@olaughlinparis.com

5 Attorneys for **MODESTO IRRIGATION DISTRICT**

6 Arthur F. Godwin (SBN 143066)
7 **ROBBINS, BROWNING, GODWIN & MARCHINI LLP**
700 Loughborough Drive, Suite D
8 Merced, CA 95348
Telephone: (209) 383-9334
9 Facsimile: (209) 383-9386
Email: afg@rbgmlaw.com

10 Attorneys for **TURLOCK IRRIGATION DISTRICT**

11 Robert E. Donlan (SBN 186185)
12 **ELLISON SCHNEIDER HARRIS & DONLAN LLP**
2600 Capitol Avenue, Suite 400
13 Sacramento, CA 95816
14 Telephone: (916) 447-2166
15 Email: red@eslawfirm.com

16 Attorneys for **CITY AND COUNTY OF SAN FRANCISCO**

17 **BEFORE THE STATE OF CALIFORNIA**
18 **STATE WATER RESOURCES CONTROL BOARD**

19
20 **IN THE MATTER OF THE DRAFT) JOINT BRIEFING BY MODESTO**
21 **ORDER ADOPTING CEASE AND DESIST) IRRIGATION DISTRICT, TURLOCK**
22 **ORDER AND IMPOSING) IRRIGATION DISTRICT, AND CITY AND**
23 **ADMINISTRATIVE CIVIL LIABILITY –) COUNTY OF SAN FRANCISCO IN**
24 **G. SCOTT FAHEY AND SUGAR PINE) RESPONSE TO STATE WATER**
25 **SPRING WATER, LP – DEADWOOD) BOARD’S PROMPT AND PROPOSED**
26 **SPRING AND THREE UNNAMED) CHANGES TO MARCH 28, 2019**
27 **SPRINGS TRIBUTARY TO TUOLUMNE) REVISED DRAFT ORDER**
28 **RIVER, TUOLUMNE COUNTY)**

1 The following Joint Brief is submitted on behalf of Modesto Irrigation District, Turlock
2 Irrigation District (collectively, “the Districts”), and the City and County of San Francisco
3 (“CCSF”). The comments address the State Water Resources Control Board’s (“SWB” or “Board”)
4 prompt in the email from Michael Buckman, dated April 3, 2019, regarding *Fahey Hearing Project*
5 *- Schedule for Briefing and Instructions*. This Joint Brief argues that: 1) Fahey may preposition
6 water to offset his injurious diversions, but only insofar as that water is prepositioned within a year
7 of the Districts and CCSF making Fahey aware of injury caused by his diversions, and insofar as
8 Fahey may not maintain a credit year over year for any such prepositioned water; and 2) Fahey
9 cannot store prepositioned water year over year to satisfy replacement water obligations in future
10 years, whether for FAS *or* Non-FAS Period diversions.

11 **I. Under Permit 20784, May Fahey Provide Replacement Water in Advance and Credit it**
12 **to Future Replacement Water Requirements for Non-FAS Period Diversions in a**
13 **Future Year to Comply with the Terms of the Permit? If so, Under What Conditions**
14 **May Fahey Do So?**

15 No. Term 20 of Permit 20784 (WR-15) memorializes the conditions by which the Districts
16 and CCSF agreed to withdraw their protests to Fahey’s application to divert during the Non-FAS
17 period. The clear language of the Term 20 in Permit 20784 states that “[r]eplacement water may be
18 provided in advance and credited to future replacement water requirements,” and also states that
19 “Permittee’s obligations to provide replacement water under this agreement shall take into
20 consideration permittee’s obligations to provide replacement water under the Water Exchange
21 Agreement.” In turn, the Water Exchange Agreement (WR-19) provides that “Fahey may provide
22 make-up water at any time of the year between January 1 and December 31. Fahey may pump more
23 water than is required under this Agreement and build a surplus prior to the period of unavailability
24 [the FAS Period]; however, no carryover will be allowed to subsequent years.” (Emphasis added).

25 “The issuance of a permit gives the right to take and use water only to the extent and for the
26 purpose allowed in the permit.” (Wat. Code, § 1381.) It is undisputed that Permit 20784 does not
27 explicitly allow Fahey to carry over a credit to subsequent years for purposes of mitigating injuries
28 from his diversions in the Non-FAS Period, and that no agreement was ever reached by the parties
giving Fahey such ability. While the Permit does not expressly prohibit Fahey from carrying a credit

1 over to subsequent years, the lack of such prohibition cannot be interpreted as authorization. To the
2 contrary, it means that the Board must limit the Permit to its explicit terms.

3 Even if the Board was inclined to treat the Permit's silence on the issue as authorization, the
4 circumstances giving rise to Term 20 show that Fahey may not credit his prepositioned replacement
5 water towards future years' obligations. Applying the language of the December 19, 1994 letter
6 from CCSF to Fahey (WR-21), which was then incorporated as terms in Fahey's Permit 20784
7 pursuant to a letter from the Board dated January 24, 1995 (Fahey-16), it is clear that the Board
8 cannot allow Fahey to carry water over from year to year to satisfy FAS *or* Non-FAS Period
9 obligations. The ability to preposition water, as developed through the December 19, 1994 letter and
10 adoption of the permits, was intended to provide Fahey flexibility to provide replacement water
11 *after* he diverted in an injurious manner. The prepositioning aspect was to allow him to prepare for
12 *that year's* reductions in water supply, rather than having to come up with the requested amount all
13 at once.

14 Moreover, until Fahey received a form letter from the Board in February 2009 (Fahey-69),
15 explaining that diversions would be curtailed by the Board unless water had been placed into
16 storage, Fahey had not once prepositioned water to carry over to meet his replacement obligations.
17 Indeed, his actions leading up to this initial notice of water shortage show that Fahey understood his
18 inability to carry over a replacement water credit year to year, and that Fahey understood he should
19 not be concerned with obtaining that replacement water *until* notified by the Districts or CCSF.

20 The Board also must consider the complete lack of terms that would be present if Fahey
21 *were* authorized to a carryover credit for year over year purposes. Such terms would necessarily
22 consist of compensation for storage or credits in NDPR, a limit on the amount of water that may be
23 stored or credited in NDPR, and specific accounting procedures related to carryover storage, losses,
24 seepage, and spills. The Districts' Fourth Agreement with CCSF is an example of the type of "water
25 bank" or "water credit" arrangement that Fahey inexplicably claims in this proceeding (SWB Public
26 Hearing on Jan. 25, 2016, at p. 15, Ins. 6-8; Fahey-79). Pursuant to the Fourth Agreement, CCSF
27 paid a specified percentage of dam construction and related operations costs, in exchange for a
28 "water bank" or "water credit" system that offsets the water rights impacts on the Districts of

1 CCSF’s upstream operations (Fahey-79, Articles 7, 10). The Fourth Agreement water bank
2 involves a complicated daily accounting that not only takes into consideration CCSF’s upstream
3 water diversions, but also water losses to spill and evaporation (Fahey 79, Article 7(a), (d)). In
4 contrast, none of these terms may be found in the Water Exchange Agreement or Fahey’s permits,
5 further evidencing Fahey’s lack of right to year over year carryover crediting.

6 In addition, the 1994 letter and term 20 of Permit 20784 demonstrate that Fahey’s
7 obligations to provide replacement water within one year are not triggered – in fact, cannot be
8 determined – unless and until Fahey provides his requisite notice of diversions to the Districts and
9 CCSF, and then the Districts and/or CCSF notify him that his diversions have adversely affected
10 their water rights. As discussed in our March 11, 2019 comment letter, Fahey has failed to
11 consistently provide the Districts or CCSF his requisite notice, and so the Districts’ and CCSF’s
12 obligation to notify him to provide replacement water could not be determined or triggered.

13 The only appropriate conclusion is that Fahey may not preposition water as a “credit” for
14 Non-FAS Period diversions in a future year under the terms of Permit 20784. He may preposition
15 the water to offset any injury to water supply occurring within that same year but may not carry that
16 prepositioned water over indeterminately to mitigate for future injury.

17 **II. Under Permit 21289, May Fahey Provide Replacement Water in Advance and Credit it**
18 **to Future Replacement Water Requirements for Non-FAS Period Diversions in a**
19 **Future Year to Comply with the Terms of the Permit? If so, Under What Conditions**
20 **May Fahey Do So?**

21 No. Term 34 of Permit 21289 (WR-16) provides that Fahey must “provide replacement
22 water to NDPR for water diverted...which is adverse to the prior rights” of CCSF and the Districts.
23 Again, Fahey’s replacement water obligations must “take into consideration [Fahey’s] obligations to
24 provide water under the Water Exchange Agreement.” While there are some “minor changes to the
25 wording” between Terms 20 and 34 affecting when the Districts and CCSF are to notify Fahey of
26 reduced water supply (Fahey-40), Permit 21289 is subject to Conditions 1, 2a, 2b, 2c, 2d, and 2e of
27 the 1994 CCSF letter (WR-17), making Fahey’s obligations under Permit 21289 identical to those
28 of Permit 20784. Therefore, for the reasons discussed in depth in Section I, Fahey may not carry
over any credit for replacement water towards Non-FAS Period diversions from year to year.

1 **III. Does Fahey Have the Right to Store Water in New Don Pedro Reservoir?**

2 No. During the hearing process, Mr. Fahey testified that he was not claiming any storage
3 right in NDPR, only an “exchange credit...for increasing the volume of water inside their reservoir
4 by the amount of foreign water that [he] imported.” (SWB Public Hearing on Jan. 25, 2016, at p.
5 174, Ins. 8-21.) He reiterated in testimony the following day, “I’m not claiming storage. I’m just
6 claiming the credit for future water replacements...” (SWB Public Hearing on Jan. 26, 2016, at p.
7 81, Ins. 10-12; see also p. 92, Ins. 9-11, p. 127, Ins. 6-22, and p. 128, Ins. 7-10) These excerpts
8 demonstrate that Mr. Fahey understands he does not have a storage right in NDPR.

9 Mr. Fahey’s understanding that he does not have storage rights is further supported by the
10 testimony of Ms. Mrowka of the Board’s Enforcement Section in the SWB Division of Water
11 Rights, who stated that Fahey’s permits do not allow for storage, the Water Exchange Agreement
12 does not provide for storage, that a “credit” right is not sufficient to grant any right of storage, and
13 that Fahey’s rights under the permits are to a “mathematical accrediting,” and that such a credit does
14 not equate to ownership or a storage right. (SWB Public Hearing on Jan. 26, 2016, at pp. 16-17, Ins.
15 1-25, 1-12; Hearing on Jan. 25, 2016 at pp. 125-126, Ins. 14-25, 1-6.)

16 Mr. Fahey has acknowledged, and Board staff has reiterated, that Fahey does not have a right
17 to storage in NDPR. Such a right would have required an application to appropriate water to storage
18 as well as an express agreement with the Districts and CCSF for the use of NDPR. No such
19 appropriative right was ever obtained, nor such agreement ever made, and there is no basis for
20 concluding that a storage right can exist otherwise.

21 **IV. Is it Possible to Provide Replacement Water in Advance and Credit it Towards Future**
22 **Replacement Water Requirements without Prepositioning Water Into NDPR?**

23 No. Fahey’s permit terms require that replacement water be deposited into NDPR. (WR-15;
24 WR-16.) Again, the Districts and CCSF recognize that Fahey is permitted to preposition water to be
25 credited towards his replacement water obligations, but only insofar as the water is making up for
26 injuries to water supply within that year, and only insofar as the water is deposited into NDPR as
27 required by the permits. If Fahey is going to exercise his ability to obtain a credit towards his
28 replacement water obligations, he must do so by prepositioning the appropriate amount of water in

1 NDPR within the same year that the injuries to water supply giving rise to the replacement
2 obligation occur.

3 **V. Is it Possible to Distinguish a Property Interest in Water Stored in NDPR from Credit**
4 **for Fahey’s Non-FAS Period Replacement Water Deliveries to NDPR Towards**
5 **Compliance with Fahey’s Permit Terms?**

6 Yes. In the present circumstance, it is important to distinguish between a credit for
7 prepositioned diversions that may only be maintained for a year at a time, and a property interest to
8 store water in a reservoir owned by the Districts. In the case of a credit, the water positioned into
9 NDPR becomes the property of the Districts. (*See, e.g.,* Fahey-79, Article 7(f)). In the case of
10 storage, the water positioned into NDPR would remain the property of Fahey.


11 That said, whether considered a credit or storage, each requires a physical allocation of space
12 in NDPR. For there to be a carryover of such credit or storage into subsequent years, terms that are
13 absent from Fahey’s permits, including accounting measures dealing with seepage and evaporation
14 and limits on the quantity of water that can be carried over, would need to be specified. As discussed
15 above, the absence of such terms demonstrates that Fahey does not have the ability to carryover
16 credit in NDPR to offset injuries to water supplies that may arise from Fahey’s future non-FAS
17 diversions.

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Dated: April 10, 2019

O’LAUGHLIN & PARIS LLP

By: 
WILLIAM C. PARIS, III (SBN 168712)
Attorneys for MODESTO IRRIGATION DISTRICT


Dated: April 10, 2019

ROBBINS, BROWNING, GODWIN & MARCHINI

By: 
ARTHUR F. GODWIN (SBN 143066)
Attorneys for TURLOCK IRRIGATION DISTRICT

Dated: April 10, 2019

ELLISON SCHNEIDER HARRIS & DONLAN

By: 
ROBERT E. DONLAN (SBN 186185)
Attorneys for CITY AND COUNTY
OF SAN FRANCISCO

SERVICE LIST OF PARTICIPANTS

**G. Scott Fahey and Sugar Pine Spring Water, LP
Administrative Civil Liability Complaint and Cease and Desist Order**

Parties

THE FOLLOWING **MUST BE SERVED** WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.)

DIVISION OF WATER RIGHTS
SWRCB Office of Enforcement
Prosecution Team
Kenneth P. Petruzelli
1001 I Street, 16th Floor
Sacramento, CA 95814
Kenneth.Petruzelli@waterboards.ca.gov

G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP
Diane G. Kindermann
Glen C. Hansen
Abbott & Kindermann LLP
2100 21st Street
Sacramento, CA 95818
dkindermann@aklandlaw.com
ghansen@aklandlaw.com

TURLOCK IRRIGATION DISTRICT
Arthur F. Godwin
ROBBINS, BROWNING, GODWIN, etc.
700 Loughborough Drive, Suite D
Merced, CA 95348
afg@rbgmlaw.com

MODESTO IRRIGATION DISTRICT
William C. Paris, III
O'LAUGHLIN & PARIS LLP
2617 K Street, Suite 100
Sacramento, CA 95816
bparis@olaughlinparis.com
abranham@olaughlinparis.com
lwood@olaughlinparis.com

CITY AND COUNTY OF SAN FRANCISCO
Robert E. Dolan
ELLISON, SCHNEIDER & HARRIS LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
red@eslawfirm.com