EXHIBIT 1

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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP	**EXPERT WITNESS TESTIMONY OF G. SCOTT FAHEY**

TESTIMONY OF G. SCOTT FAHEY

I. WITNESSES' STATEMENT OF QUALIFICATIONS

Since September 1, 2001, I have been the Manager of the General Partner of Sugar Pine Spring Water, LP, a Nevada Limited Partnership. I have sole and complete authority regarding any and all management decisions of Sugar Pine Spring Water, LP. Sugar Pine Spring Water, LP has no employees.

I am qualified to testify as an expert witness as to the matters of the water right Permits emanating from the Applications to Appropriate Water by Permit Nos. 029977 and 031491, and to the terms pertaining to those Permits and/or any and all contractual agreement relating thereto. I personally applied, negotiated, researched, read, and understand the basis of these Permits and contracts, and to the best of my ability in good-faith have abided by those written agreements and/or any oral instructions given to me after their respective full execution. By Profession, I am a Registered Professional Civil Engineer, Idaho License No. 5763 (Ret.), who graduated from the University of Idaho in 1980 with BSCE degree. For twenty (20) years I worked in the construction industry as a Project Engineer in Hawaii, Field Engineer in Papua New Guinea, Assistant Utilities Coordinator in Australia, State Dept. Perimeter Security Supervisor in Istanbul, Turkey, Dam Engineer in South Carolina, Site Construction Manager Ar' Ar', Saudi Arabia, Upper Farmington Canal Resident Engineer, California, and Engineering Supervisor Idaho Dept. of Parks and Recreation. Since October 2, 1996 I have been a purveyor of Federally Certified *Spring Water* licensed as a Private Water Source Operator by the California Dept. of Public Health, which allows State licensed water bottlers to identify on their labels; Source: Sugar Pine Springs. (See Statement of Qualifications of G. Scott Fahey, **Exhibit 2.**)

II. APPROPRIATIVE RIGHTS CHRONOLOGY

A. Application To Appropriate Water (A029977) Deadwood and Cottonwood Springs.

On May 28, 1991, I applied to the State Water Resources Control Board ("Board") for the right to divert water (primarily groundwater) by appropriation from Deadwood Springs and Cottonwood Springs, in Tuolumne County. (**Exhibit 3**, Bates-Stamped pages 2-30.) My application was assigned number A029977. (**Exhibit 4**, Bates-Stamped pages 35.) On December 12, 1992, I executed a water exchange agreement with the Modesto Irrigation District and Turlock Irrigation District (collectively, the "Districts") as part of the process of gaining approval of A029977. ("1992 Agreement")(**Exhibit 6**, Bates-Stamped pages 130-132; **Exhibit 7**, Bates-Stamped pages 134-135; **Exhibit 8**, Bates-Stamped page 136.) The purpose of the 1992 Agreement is generally explained in the recitals as follows:

> C. SWRCB Decision 995 declares that the waters of the Tuolumne River are fully appropriated from July 1 to October 31, and SWRCB Decision 1594 declares that the waters of the Sacramento-San Joaquin Delta are fully appropriated from June 15 to August 31. As a result Fahey is unable to appropriate water from Deadwood and Cottonwood springs

> from June 15 through October 31 (hereinafter referred to as the "period of unavailability").
>
> D. Fahey proposes an exchange of water with TID and MID (collectively "the Districts") by pumping into Lake Don Pedro an amount equal to the amount of water appropriated from Deadwood and Cottonwood springs during the June 15 through October 31 period of unavailability (hereinafter referred to as "make-up water"). [**Exhibit 6.**]

The Board's Yoko Mooring wrote a *Memorandum*, dated January 14, 1993, recognizing the 1992 Agreement. (**Exhibit 9**, Bates-Stamped page 137.) Edward C. Anton, Chief of the Board's Division of Water Rights, approved an Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FASS) subject to a Water Exchange Agreement, described as the 1992 Agreement, in a *Statement for File*, dated January 15, 1993. (**Exhibit 10**, Bates-Stamped page 138.) At that point, the Board issued a *Notice of Application to Appropriate Water* on January 29, 1993 for A029977. (**Exhibit 11**, Bates-Stamped pages 142-143.)

B. Protest Resolved.

The City and County of San Francisco ("CCSF" filed a protest to A029977. (**Exhibit 12**, Bates-Stamped page 174.) While CCSF and I were in the process of reaching an agreement to resolve that protest, the Board conducted a Field Investigation on September 29, 1994. (**Exhibit 13**, Bates-Stamped page 227.) In a letter dated December 19, 1994, CCSF provided the conditions under which it would withdraw its protest, (**Exhibit 15**, Bates-Stamped pages 247-249), which terms I accepted and the Board's Yoko Mooring agreed to include in any permit issued pursuant to A029977. (**Exhibit 16**, Bates-Stamped pages 251-253.) Those terms included, among others, that

> Permittee shall provide replacement water within one year of the annual notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. [**Exhibit 16,** Bates-Stamped page 252.]

The Board's Yoko Mooring announced in a letter on March 10, 1995, that any permit issued by the Board would include the terms that CCSF, I and the Board agreed to. (**Exhibit 18**, Bates-Stamped pages 280-281.) Thereafter, CCSF's protest to A029977 was dismissed on March 16, 1995. (**Exhibit 19**, Bates-Stamped page 284.)

C. Staff Concluded That There Are No Water Rights Of Record Between The Points Of Diversion And New Don Pedro Reservoir.

Meanwhile, on February 1, 1995, the Board's Yoko Mooring issued a *Report Of Field Investigation Under Water Code Section 1345* (**Exhibit 17**, Bates-Stamped pages 254-271), which stated the following under the heading "Availability Of Unappropriated Water":

> As a prerequisite to issuance of a permit to appropriate water, there must be water available to supply the applicant taking into consideration prior rights and instream needs.
>
> Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect all prior rights at and below the reservoir during this period. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir.
>
> In view of the above, staff concludes that water is available for appropriation. [**Exhibit 17**, Bates-Stamped page 259.]

The Board recognized, after investigation, that other than those held by the Districts and CCSF, there are no prior rights of record between the springs at issue in A029977 and the New Don Pedro Reservoir "(NDPR"), and that the replacement water provisions in a permit will protect the prior rights of the Districts and CCSF.

D. Permit 20784 Issued On Application A029977.

On March 23, 1995, the Board issued the *Permit For Diversion And Use Of Water, Permit 20784* pursuant to A029977. (**Exhibit 20**, Bates-Stamped pages 311-315.) Terms 19 and 20 of that permit provide:

> 19. Diversion of water, under this permit during the period from June 16 through October 31 of each year is subject to maintenance of the Water Exchange Agreement executed on December 12, 1992 between the Permittee and the Modesto and Turlock Irrigation Districts. Pursuant to the Agreement, Permittee shall provide replacement water to New Don Pedro Reservoir for all water diverted under this permit during the period from June 16 to October 31 of each year. The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.

> 20. Permittee shall comply with the following provisions which are derived from the City and County of San Francisco (San Francisco) letter dated December 19, 1994 filed with the State Water Resources Control Board:
>
> 1) Permittee shall not interfere with San Francisco's obligations to the Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any implementing Agreement between the Districts and San Francisco.
>
> 2) Permittee shall provide replacement water to New Don Pedro Reservoir for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made annually by the latter parties in accordance with water accounting procedures being used by said parties.
>
> Permittee shall provide replacement water within one year of the annual notification by San Francisco or the Districts of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. [**Exhibit 20**, Bates-Stamped pages 314-315.]

E. Application To Appropriate Water (A031491) Marco and Polo Springs.

On August 9, 2002, I filed an application to appropriate water (primarily groundwater) from the Wet Meadow Springs (later adding the "Marco Spring" and "Polo Spring" points of diversion) in Tuolumne County. (**Exhibit 27**, Bates-Stamped pages 575-615; **Exhibit 34**, Bates-Stamped page 635.) A temporary application number X003488 was issued, but later changed and given number 31491. (**Exhibit 28**, Bates-Stamped pages 616-617.) The Board's Yoko Mooring questioned the need for me to even apply for such a water right ("WR"). In her own notes of a phone call she had with me on January 30, 2003, she stated: "*I also questioned the need of WR. His source appears to be groundwater.*" (**Exhibit 29**, Bates-Stamped page **618**.) Additionally, I was informed by my designated representative for A031491, Diane Kindermann, during the final submission of the CEQA, NEPA, and WAA reports to the Division of Water Rights that Kathy Mrowka considered that the water proposed for appropriation was mostly percolating groundwater too. They were both correct.

During my September 2 through 8, 2015 site visit I observed that every spring that would normally be issuing water that time of year was dry; including the Marco and Polo spring sites, which stopped running May 2014 and July 2015 respectively. The other sites issuing water to my pipeline conveyance system were providing 22 gallons/minute. I did not consider it reasonable that that much water would issue at those sites if undeveloped and in their natural state. Therefore, I contacted Ross Grunwald a hydro-geologist certified by the State of California.

Beginning in 1996, Ross had previously conducted every pre and post spring development analysis for each spring. I asked Ross to consider the amount of water that he believed the conveyance system intercepted that is surface water versus percolating ground water. In Ross's professional opinion, he considers that on average 30% is surface water and 70% is percolating ground water. Additionally, Gary Player a hydro-geologist, formally certified in the State of California, was asked to conduct a peer review of the analysis Ross had conducted in the past. Gary considers the work Ross has done to be professional, technically competent, and an accurate portrayal of the quality, quantity, and type of water diverted by my system. Therefore, I shall testify that only 30% of the water diverted and sold by Sugar Pine Spring Water is jurisdictional surface water. As such, any future annual Permittee Use Reports will report the surface water diverted accordingly. (Witness Testimony and Statement of Qualifications of Ross Grunwald, **Exhibits 71 and 72** and Witness Testimony and Statement of Qualifications of Gary Player, **Exhibits 73 and 74**.)

F. Surplus Water Agreement With TUD And Exception Approved.

In Application X003488 (A031491), I confirmed, under penalty of perjury, that the terms of A029977 would adhere to the X003488 diversions. (**Exhibit 27**, Bates-Stamped page 579.) However, Board employees Manas Thananant and Larry Attaway considered my statement, but believed that "we need something more to clarify that those agreements are expandable for the new app." (**Exhibit 29,** Bates-Stamped page 618.) In response, I began preparing a new, expandable agreement that is inclusive of both water rights, A29977 and X003488.

Thereafter, I submitted for the Board's review an *Agreement For Surplus Water Service* with the Tuolumne Utilities District ("TUD"), which Board staff approved. (**Exhibit 30**, Bates-Stamped page 620; **Exhibit 31**, Bates-Stamped page 622; **Exhibit 32**, Bates-Stamped pages 630.) I executed that agreement with TUD on October 20, 2003. (**Exhibit 33**, Bates-Stamped page 634; **Exhibit 35**, Bates-Stamped page 636.) The Board's Yoko Mooring wrote a *Memorandum*, dated December 23, 2003 (**Exhibit 36**, Bates-Stamped pages 639-640), in which she stated that

> Permittee's obligations to provide replacement water, under this agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement. [**Exhibit 36**, Bates-Stamped page 640.]

On January 26, 2004, the Board's Victoria A. Whitney wrote a *Statement for File*, in which she approved an Exception from the Legal Effects of a Declaration of a Fully Appropriated Stream System (FASS) for me to "provide replacement water to NDPR for all water diverted during the FASS period each year by way of a Water Exchange Agreement, executed on October 20, 2003, with TUD for surplus water." (**Exhibit 37**, Bates-Stamped page 641.) With the Board's approved FASS exception of record in the Board's X003488 file, the *Notice of Application to Appropriate Water* was issued on January 28, 2004 for A031491. (**Exhibit 39**, Bates-Stamped pages 650-651.) That notice stated: "Applicant accepts and understands that Application 31491 shall be conditioned and subjected to the same terms and conditions as the previous agreements." (**Exhibit 39**, Bates-Stamped page 650.)

G. Protest Resolved And Notification By CCSF Required For Water From Fahey.

On November 8, 2004, CCSF filed a protest to A031491 based on its desire to make minor changes to the wording of certain terms in the prior permit and A031491. (**Exhibit 40**, Bates-Stamped pages 685-686.) CCSF was concerned about the effects on CCSF in conjunction with the Districts due to the complex water supply accounting procedures between the three entities. Specifically, CCSF wrote:

> Finally, we propose the following changes be made to the terms enumerated in permit conditions as they appear in the SWRCB's letter of January 24, 1995, which the City assumes are the same as those enumerated by the SWRCB in Permit 20784, Item 20.
>
> > Strike the word "annually" from the last sentence of the first paragraph of provision (2). That sentence would then read "A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures being used by said parties."
> >
> > Strike the words "the annual" from the first sentence of the second paragraph of provision (2). That sentence would then read "Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversions."
> >
> > Replace "and/or" with "and" in the last sentence of the second paragraph of provision (2). That sentence would then read "The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be mutually agreed upon by the Permittee, the Districts and San Francisco."
>
> San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when their use has lead [sic] to a reduction, or has a strong potential of reducing, the supplies delivered San Francisco. The wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. Short of notifying the applicant each and every year that their diversions potentially could affect the supplies of San Francisco, thus triggering replacement water each year, our requested modifications to the term will leave the notification to a judgment on our part as to whether the need for replacement water is critical. [**Exhibit 40**, Bates-Stamped page 686.]

I immediately informed the Board staff and CCSF that I had no objection to those changes proposed by CCSF. (**Exhibit 42**, Bates-Stamped page 693; **Exhibit 43**, Bates-Stamped page 695.) Therefore, Board staff told CCSF: "It appears that his acceptance of the conditions alleviates your concern." (**Exhibit 44**, Bates-Stamped pages 711-712.) The Board followed with a letter, dated January 31, 2005, confirming that the CCSF protest could be dismissed as a result of using the wording as corrected by the CCSF letter, dated November 8, 2004, which wording would be included in any permit issued by the Board. (**Exhibit 46,** Bates-Stamped pages 726-727.) Later, CCSF reiterated that

> The Initial Study/Mitigated Negative Declaration does not refer to the terms accepted by the applicant to dismiss San Francisco's protest. As compliance with the accepted terms are part of the proposed project, we request that the accepted terms be referred to in the project description and discussed in Section IX, Hydrology and Water Quality. As noted in the City's November 8, 2004 letter, San Francisco only intends to notify the applicant of the need to provide replacement water when necessary; that is, when the applicant's use has led to a reduction, or has a strong potential of reducing, the water supply of San Francisco. Also as noted, the wide range of year-to-year hydrology on the Tuolumne River makes it impossible to predict whether or not the diversions of the applicant in one year will have a negative impact to San Francisco the next year or later. [**Exhibit 54**, Bates-Stamped page 1050.]

The Districts also protested A031491 (**Exhibit 41**, Bates-Stamped pages 687-689), but later agreed that the terms sought by CCSF (described above) "specifically protect the prior rights of both CCSF and the Districts and inclusion of those terms in the permit would be sufficient to resolve the Districts' Protest." (**Exhibit 53**, Bates-Stamped pages 1043-1044.)

H. Surface Water Shortage, 2009 Notice.

On February 26, 2009 the Board sent me (presumably as a "Diverter of Surface Water") a *Notice of Surface Water Shortage for 2009* . (**Exhibit 69**.) That notice stated: "If you plan to…..need water beyond the limited supply available, you may find yourself in a very serious dilemma"; and "[y]ou may….contract for water deliveries from a water supplier, such as…… a local water….district." That was the first time that anyone had given me notice that surplus water should be purchase in case it is needed as replacement water whether for a diversion curtailment or otherwise. In good-faith reliance on the Board's direction set forth in that notice to "contract for water deliveries from a water supplier…", from June 15, 2009 through June 15, 2011, I purchased from and had TUD wheel 88.55 acre-feet of surplus water to New Don Pedro Reservoir ("NDPR") (**Exhibit 70**.), pursuant to the terms of my existing water rights emanating from the A029977 and A031491 permits.

Therefore, despite the fact that my diversions were primarily groundwater, with the TUD Agreement in place for that very reason with its out-of-basin water source approved by the Board (**Exhibit 65,** Bates-Stamped page 342.), I was able to purchase surplus water from TUD and TUD had it wheeled to NDPR, and it is standing by in case it is needed as replacement water

(**Exhibit 71**, Testimony of Ross Grunwald - A031491 Water Availability Analysis, Sec. 3.2, page 5), which is exactly what the Board directed me to do in its notice of February 26, 2009.

I. Permit 21289 Issued On Application 31491.

On August 1, 2011, the Board issued the *Permit For Diversion And Use Of Water For Permit 21289 On Application 31491.* (**Exhibit 55**, Bates-Stamped pages 1197-1205.) Item 34 of that permit provides:

> Permittee shall provide replacement water to New Don Pedro Reservoir (NDPR) for water diverted under this permit which is adverse to the prior rights of San Francisco and the Districts. A determination of whether permittee's diversion has potentially or actually reduced the water supplies of San Francisco and the Districts will be made by the latter parties in accordance with water accounting procedures used by said parties.
>
> Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversion. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. Replacement water may be provided in advance and credited to future replacement water requirements. Permittee shall not be obligated to provide replacement water for diversions that occur during periods when the Districts and San Francisco's reservoirs are spilling or are being operated in anticipation of spill.
>
> Permittee's obligations to provide replacement water under this letter agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between Permittee and the Districts. The source, amount and location at NDPR of replacement water discharged into NDPR shall be mutually agreed upon by the Permittee, the Districts, and San Francisco, and shall be reported to the State Water Board with the annual Progress Report by Permittee.
>
> Permittee shall not provide replacement water from a source that is hydraulically connected to surface water tributary to the Tuolumne River. If Permittee replaces water diverted pursuant to this permit with groundwater which it extracts, Permittee shall demonstrate that any extracted groundwater which replaces diverted surface water is water which would not otherwise reach NDPR. Permittee shall demonstrate that there is hydrologic separation between the groundwater extracted and groundwater flow into NDPR; or, alternatively, Permittee shall demonstrate that aquifer characteristics are such that subsurface flow to NDPR is not substantial and that any extraction of groundwater by Permittee would have essentially no impact on groundwater recharge via

subsurface flow to NDPR. [**Exhibit 55**, Bates-Stamped pages 1202-1203.]

J. Districts And CCSF Confirm Their Responsibility To Request The Surplus Water From Fahey.

Those two interactions between the Districts and the Board (**Exhibit 41**, Bates-Stamped pages 687-689) and CCSF and the Board (**Exhibit 40**, Bates-Stamped pages 685-686.), are the reasons why the A031491 permit terms include only one term, number 34, which has anything to do with replacement of diverted water. The Districts and CCSF made it clear that it is their responsibility whether or not to request TUD surplus water to be used as FASS replacement water, when or if it is ever needed. My water service agreement with TUD (**Exhibit 33**, Bates-Stamped page 634; **Exhibit 35**, Bates-Stamped page 636), is the Water Exchange Agreement for "all water diverted" and it provides that I do not have to provide replacement water unless it is asked for by the Districts or CCSF. However, there 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.

To date, neither the Districts nor CCSF has ever provided me with an "annual notification" pursuant to Term 20 (A029977) or Term 34 (A031491). At no time have they ever notified me of the need to provide replacement water.

III. CURTAILMENT NOTICES AND RESPONSES

A. Correspondence From SWRCB 2014 and Fahey Response.

On May 27, 2014, the Board sent to me a *Notice Of Unavailability Of Water And Immediate Curtailment For Those Diverting Water In The Sacramento And San Joaquin River Watersheds With A Post-1914 Appropriative Right*. (**Exhibit 59**, Bates-Stamped page 1276.) In a timely and diligent response to that notice, on June 6, 2014, I submitted to the Board a Curtailment Certification Form for both A029977 and A031491. (**Exhibit 61**, Bates-Stamped pages 1278-1279.) On both of those forms I marked the box "OTHER I have additional information explaining … the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency." Attached to those Curtailment Certification Forms I provided a detailed written explanation in a letter, dated June 3, 2014, explaining why those diversions were exempt from curtailment (the same argument I am making in this testimony). (**Exhibit 60**, Bates-Stamped page 1277.) In that letter of June 3, 2014 I accurately stated that "After consultation with San Francisco and the Districts regarding this matter they concur, therefore, I contend that the diversion and use of water authorized by the referenced water rights applications is legally authorized." (document no. 1277.) That statement was based on several phone calls that I had with Jonathan Knapp between June 2nd and 4th, 2014, which resulted in the letter, dated June 2, 2014 (**Exhibit 60**) being amended to the letter, dated June 4, 2014(**Exhibit 60**), with the exception of the last four (4) lines of text, which I added; thereafter, I refined the letter sending it

as is, dated June 3, 2014, [**Exhibit 60** (three versions of the same letter, refined pursuant to conversations with Jonathan Knapp).] The Board never responded to the written explanation contained in my letter of June 3, 2014, and did not inform me that my legal justification for an exemption from curtailment was incorrect.

B. Progress Report Submitted For 2014.

On March 3, 2015, I diligently submitted the 2014 Progress Report by Permittee for Both Permits documenting the amount of water diverted from each Point of Diversion (hereinafter "POD," or plural "PODs") each month in 2014, just like I did for every other year. (**Exhibit 62**, Bates-Stamped pages 1282-1285. See also **Exhibit 21**, Bates-Stamped pages 410-413 (1997); **Exhibit 22**, Bates-Stamped pages 469-473 (1998); **Exhibit 23**, Bates-Stamped pages 498-503 (1999); **Exhibit 24**, Bates-Stamped pages 509-514 (2000); **Exhibit 25**, Bates-Stamped pages 560-561 (2001); **Exhibit 26**, Bates-Stamped pages 569-574 (2002); **Exhibit 38**, Bates-Stamped pages 642-647 (2003); **Exhibit 45**, Bates-Stamped pages 721-723 (2004); **Exhibit 47**, Bates-Stamped pages 755-757 (2005); **Exhibit 48**, Bates-Stamped pages 795-797 (2006); **Exhibit 49**, Bates-Stamped pages 829-831 (2007); **Exhibit 50**, Bates-Stamped pages 877-879 (2008); **Exhibit 51**, Bates-Stamped page 929-930 (2009); **Exhibit 52**, Bates-Stamped pages 1014-1016 (2010); **Exhibit 56**, Bates-Stamped pages 1240-1243 (2011); **Exhibit 57**, Bates-Stamped pages 1264-1267 (2012); **Exhibit 58**, Bates-Stamped pages 1268-1271 (2013).) Thus, in no way was I hiding any use of otherwise curtailed water; that is because I had a legally valid exception from the surface water curtailment as explained in my letter of June 3, 2014 and 70% of the water is groundwater and not the subject of the curtailment.

C. Correspondence From SWRCB 2015 And Response.

On April 23, 2015, the Board sent me a Notice of Unavailability of Water and Immediate Curtailment, in which the "Exceptions to Curtailment" provision states: "If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you may beneficially use that previous stored water consistent with the terms and conditions of your post-1914 water right." (**Exhibit 63**, Bates-Stamped pages 1294-1296.) That exception language in the April 23, 2015 notice is precisely what I had done between June 15, 2009 through June 15, 2011, when I purchased from and had TUD wheel 88.55 acre-feet of surplus water to NDPR in response to the Board's earlier notice of February 26, 2009. Thereafter, "the previously collected water" stored in NDPR offset the water being diverted from my springs during curtailment. The "beneficially use that previous stored water" achieves is that surplus water converts to curtailment "replacement water" as fungible stored water in NDPR; therefore, the State's Water System experienced a no-net-loss due to my spring surface water diversion during the 2014 and 2015 curtailments.

In response to the April 23, 2015 notice by the Board, I resubmitted to the Board on April 29, 2015 my letter of June 3, 2014, which explained why my diversions were exempt from curtailment. (**Exhibit 60**, the final June 3, 2014 letter, Bates-Stamped page 1277.)

IV. EXCEPTION TO CURTAILMENT ACKNOWLEDGED BY BOARD

On June 12, 2015, I received a phone call from a representative of the Board named David Le Brie ("Le Brie"), initially regarding whether a Curtailment Certification Form had been filed for 2015. Le Brie had left three messages on my office phone in Idaho between June 6th and the 11th, while I was on site in California. I returned to the office on June 12th and called Le Brie. Le Brie appreciated the call, asking immediately if I had provided a 2015 Curtailment Certification Form. I informed him that in lieu of that form, the June 3, 2014 letter regarding justification for exemption sent with the 2014 Curtailment Certification Form had been sent again via the Board's email address. Le Brie then understood why it appeared that I had not complied with returning the 2015 form. He had to find the letter to confirm certification in 2015, and a few hours later, Le Brie returned a call to Fahey, stating the email had been found, and compliance with certification established.

In that second phone call, Le Brie said he had read the letter from Fahey, dated June 3, 2014, and had questions. The first question was the source of the replacement water, which I answered by informing him of the TUD Exchange Agreement approved pursuant to A031491. Second, Le Brie and I discussed the reason for the exchange agreement, which was to provide replacement water to the Districts and CCSF if one of them ever called for it. I informed Le Brie that none of them ever had called for replacement water, so there was plenty of surplus water available to replace the spring water I sold and was selling during the 2014 and 2015 curtailment periods. Third, Le Brie and I discussed whether any potential impacts could occur downstream of NDPR, concluding there were none since Fahey does not control the discharge from NDPR. Le Brie mentioned that the parties to NDPR are covered by the TUD Exchange Agreement, everyone downstream is covered by the appropriate discharge from NDPR and in addition I have no control over NDPR. Le Brie stated that I had not considered the impact to senior instream diverters between Both Permits' PODs and NDPR. I replied that there are no instream appropriators between the PODs and NDPR. Le Brie said that may be true, but I must consider any pre-1914 and/or riparian rights. I informed Le Brie that there were not any. Le Brie doubted that was the case. I mentioned that a Water Availability Analysis was completed prior to the issuance of the A031491 Permit, which stated that no senior water right would be impacted by either Permit. Le Brie said, "If that is true, then you could be the first person in California to be issued an exemption to the curtailment; but I doubt that is going to happen." Le Brie informed me that it had to be confirmed that there were no instream diverters between the PODs and NDPR. I told Le Brie that could be confirmed with Kathy Mrowka ("Mrowka"), since Mrowka was in charge of compiling all the information needed to issue the A031491 Permit. I informed Le Brie that I would examine the Board's Electronic Water Rights Information Management System ("eWRIMS") again, that Le Brie should contact Mrowka and search the eWRIMS too, and Le Brie should get back to me if anything is found contrary to what I had told Le Brie. Otherwise, I told Le Brie, "No news is good news." La Brie did not attempt to correct me.

In an email sent to me that same day at 3:02 p.m., Le Brie acknowledged my explanation in the letter of June 3, 2014. (**Exhibit 64**, Bates-Stamped page 1297.) Le Brie then implicitly recognized that I could have an exception to the curtailment if there were no other senior rights holders other than the Districts and CCSF. (**Exhibit 64**, Bates-Stamped page 1297.) Le Brie wrote:

> The problem is, while the water stored in Don Pedro may satisfy San Francisco and the Districts, it does nothing for the prior right holders between your points of diversion and Don Pedro who may be adversely affected by your diversions. [**Exhibit 64**, Bates-Stamped page 1297.]

He added:

> Remember, the Water Exchange Agreement with the Districts and the letter of understanding with San Francisco only apply to the settlements with those parties as they resolved the protests filed by those parties, The Curtailment Notices were designed to protect all prior right holders. [**Exhibit 64**, Bates-Stamped page 1297.]

Apparently, Le Brie had not reviewed the Board's file on my water rights either before he called to discuss my letter of June 3, 2014, or before he emailed me on June 12, 2015. Had he reviewed the Permit Files, he would have found the *Report Of Field Investigation Under Water Code Section 1345*, February 1, 1995 that I discussed in our phone call on June 12, 2015. That report (discussed above) states:

> Provisions, in any permit issued pursuant to Application 29977, requiring replacement water to New Don Pedro Reservoir for all water diverted from the springs during the period June 16 through October 31 will protect **all prior rights at and below the reservoir during this period**. Similar provisions during the period November 1 through June 15 will protect the prior rights of the Districts and the City at such times that diversion from the springs would be adverse to their rights at New Don Pedro Reservoir. ***Lastly, there are no prior rights of record between the springs and New Don Pedro Reservoir***. [**Exhibit 17**, Bates-Stamped page 259.]

After my phone calls with Le Brie on June 12, 2015, and after that email form him the same day, I never heard back from him. Neither Le Brie nor any other Board representatives contacted me again to dispute the exception to curtailment until I received the Administrative Civil Liability Complaint ("ACL") and related documents in early September 2015. After the June 12, 2015 phone call with Le Brie I confirmed there were no instream water rights holders between the PODs in my permits and NDPR, and therefore I reasonably continued to believe that my diversions were exempt from the curtailment. Furthermore, there is *no* evidence in any of the documents produced by the Board and Prosecution Team in this matter that Le Brie, or anyone else at the Board, ever researched whether there were any other prior rights holders between the PODs in my permits and NDPR before filing the ACL in this matter against me. If they ever did such research, they never contacted me to correct my June 3, 2014 letter, or my explanation to Le Brie on June 12, 2015.

V. BOARD CONTACTS FAHEY AND DEMONSTRATES NO CLEAR KNOWLEDGE OF FILE

Two months later, on August 12, 2015, I received a phone call from a representative of the Board named Sam Cole ("Cole") who demanded that I appear for a site inspection the following day. I informed Cole that would not be possible, because I live in and was presently in Boise, Idaho; however, I informed Cole that I was planning to be at the site on September 2, 2015 and could meet with Cole then. I asked Cole what needed to be inspected, and Cole replied the "entire site". I asked Cole if licenses for Both Permits were going to be issued because of the inspection of Both Permits' sites. Cole responded that it was to ensure I was not still diverting under the permits. In that phone call, I mentioned to Cole my prior discussion with Le Brie and explained why Both Permits are exempt from curtailment. I explained to Cole why I was exempt. During that explanation of the exemption and the water exchange agreements, Cole responded that the agreements were "very complicated and difficult to understand." I suggested that Cole speak with Mrowka, as she knew all about the agreements. Cole simply commented that she is too busy and is several levels above him, so he would probably not have an opportunity to discuss these issues with her. I wrapped up the conversation by telling Cole that I would meet him on September 3 out at the site. I asked if Cole looked at the file because in fact I was diverting under the permits due to an exemption, and because I had twice notified the Board in writing of this exemption. I also advised Cole that staff person La Brie advised me that I might well be exempt. Cole ended the conversation stating that I would be considered to be diverting and not in compliance with the curtailment. Cole never explained why that was the case in light of my explanations.

In his own note of our phone conversation on August 12, 2015, Cole admits that I explained "that there are no senior water rights holders, other than the senior water right holders that [I] already has agreement with that would be injured by [my] diversion." (**Exhibit 66**, Bates-Stamped pages 1313-1314.) Cole also stated the following about me and that phone call on August 12:

> He described a letter that he previously sent to the Division indicating that he has purchased and stored 82 acre-feet of water in Don Pedro reservoir to offset diversions for times of drought and that he believes he is exempt from the curtailment. He stated that he had received no response to the letter he sent the Division and that he interpreted that to mean that the exemption was approved, that no news was good news. ... He stated that he believes his exemption is valid and he is going to "stick to his story" so to speak. Mr. Fahey was very helpful, calm and not hostile in any way. He even stated that he has put a lot of time, money and effort into getting this facility setup the right way and wishes to continue operating in a legal and valid way. (**Exhibit 66**, Bates-Stamped page 1313.)

Again referring to me, Cole wrote: "[H]e believes he has a valid exemption" to curtailment. (**Exhibit 66**, Bates-Stamped page 1314.)

The phone call with Cole on August 12, 2015, again demonstrates that the Board staff refused to even consider my explanation for an exception to curtailment, despite the complete absence of any rationale as to how I was wrong. They certainly never got back to me before they filed the ACL with any explanation as to how my legal and factual argument for an exception was wrong. And the excuses that the permits and agreements are "very complicated and difficult to understand" or that Mrowka is "too busy and is several levels above him, so he is not going to discuss these with her" are invalid reasons for not at least responding to my requests for an explanation as to how my arguments may be incorrect. But that lack of communication to me has not stopped the Board in this matter from seeking penalties during that same time they never responded to me with a reasonable (or any) explanation.

The Board now seeks to impose severe penalties on me for that *same time period* during which they never responded back to me about whether my explanation for a curtailment exception was correct. That was the same time period when Le Brie indicated that, without any other senior rights holders, I would have a right to be exempt from curtailment under the facts in this case. It is quite telling that the factual statements in the ACL about the communications I had with Board staff during the summer of 2015 completely omit any reference to my several requests to obtain ANY reasonable explanation that refutes my legal right to an exception to the curtailment. (**Exhibit 67**, Bates-Stamped pages 1357-1359.)

VI. ACL FILED AGAINST FAHEY WITHOUT ACKNOWLEDGEMENT OF FULL FACTUAL BACKGROUND

A. Introduction

On September 1, 2015, two (2) days before I was scheduled to meet with Cole onsite, the Board filed an ACL against me for my diversions. Prior to filing this ACL, no representative from the Board ever followed up with me to discuss or provide notice of a dispute regarding his legal justification for the exemption for Both Permits.

B. Correct Facts

Contrary to the implicit allegations in paragraph 9 of the ACL, Term 19 of A29977 does *not* obligate me to provide water to the Districts on an annual basis whether or not the Districts request it, for three (3) reasons.

1. Districts And CCSF Must Request The Water.

First, Term 19 of A029977 is followed by Term 20, the latter of which further explains the mechanics of any annual provision of water to the Districts. The Districts or CCSF must request it annually under Term 20. Thus, the contractual interpretation upon which the ACL is based is incorrect, as a matter of law.

2. D995 Is Obsolete And Term 20 Must Control.

Second, the Board's requirement for Fahey to establish the 1992 water exchange agreement with the Districts was based on the Tuolumne River being managed as a fully appropriated stream system as determined by decision 995 (hereinafter "D995"). (**Exhibit 5**, Bates-Stamped pages 38-40.) However, D995 was adopted in 1961, under a different water infrastructure and delivery regime. (**Exhibit 76**). In other words, 995 became obsolete with the creation of NDPR 10 years later. It should have never been referenced or been used to mandate the 1992 agreement. CCSF's financial contribution for the construction of New Don Pedro Reservoir ("NDPR") in return created a 570,000 acre-feet impoundment (hereinafter the "water bank") dedicated to CCSF. (**Exhibit 68**.) NDPR and the water bank enable 60% of the Tuolumne River's unimpaired flow to be allocated to the CCSF and the remaining 40% to the Districts. Therefore, D995 was obsolete long before 1992 and should never have been used to justify the WEA obligations. Term 20 of A029977, unlike D995, is relevant to the hydrodynamics of the Tuolumne River as they have existed since 1971 and should control how the demand for replacement water was managed. Term 20 takes into consideration the post NDPR infrastructure and the water bank hydrodynamics that were not contemplated when the Board determined that the Tuolumne River was a fully appropriated stream system by D995 in 1961. Thus, Term 20 necessarily must control over Term 19.

3. Protection Of CCSF's Water Rights Mandates Notification To Fahey If It Wants Fahey To Provide Water.

Third, the September 26, 1994, memo from Daniel B. Steiner, a CCSF Civil Engineering consultant, to CCSF attorney Chris Hayushi, explains some of the complex accounting scenarios that must be considered for CCSF senior rights to be protected. (**Exhibit 14**, Bates-Stamped pages 230-232.) Regardless of AO29977, if CCSF has a positive balance in its water bank, it loses water as a result of any upstream third-party diversion and the Districts are shielded from that loss by the NDPR water bank accounting system, which, at the expense of CCSF, shields the Districts from any loss. To protect their water rights and the unfair loss of CCSF water due to the NDPR water bank accounting process, Term 20 of A029977 must have primacy of operation with regard to Term 19. Term 19 in A029977 must be subordinate to Term 20. Conversely to those four (4) accounting examples, if the CCSF diverts the unimpaired flow of the Tuolumne River during the month of July, contrary to D995, while its water bank is being debited and I release replacement water, e.g. 30 acre-feet, to NDPR, then the water flowing into NDPR would have a net increase of 30 ac-ft. and the CCSF water bank would be debited 30 ac-ft. less than it should be for the water it diverted, thereby, the Districts suffer a loss. That is why CCSF insisted that the "and/or" in Term 20 of the A029977 permit be change to "and" in Term 34 of the A031491 permit; thereby, neither the Districts nor CCSF can call for replacement water without the other party knowing when it will be released and how much will be allocated to each party. Thus, the allegation in the ACL about my alleged obligation under Term 19 to replace water without CCSF and the District's request cannot be correct interpretation of the permits. Additionally, that is why the A03149 permit is without a condition similar to "Term 19."

Additional correct facts support the exemption as set forth below in 4, 5, and 6.

4. Board Has Failed To Demonstrate The Lack Of Water At The PODs. In Fact There Is Ample Groundwater And Surface Water.

Also contrary to paragraphs 26 and 27 of the ACL, the Board has completely failed to show any lack of availability of water between my PODs and NDPR. In response to my attorney's request for "Any and all documents that support, sustain and/or justify "the graphical summations" described in Item 26, on pages 4 through 5, of the ACL, for any and all streams, rivers, and/or waterways between the Permittee's points of diversion and New Don Pedro Reservoir. The graphic representations that were provided do not represent any stream, river, and/or waterway between those two points. That is obvious, because the graphs show pre-1914 and riparian diversion quantities allocations; however, there is not one instream diverter between any and all of my PODs and NDPR. So I can only conclude that the Board does not have any documents that support, sustain and/or justify "the graphical summations" described in Item 26 of it ACL.

5. Annual Reports Were Not Necessary Because It Was Surplus Water.

The water purchased from and wheeled by TUD to NDPR is surplus water, which I own. Once "replacement water" is called for by the Districts and CCSF or upon the States acceptance of my diversions of that surplus water to its system, then a respective accounting of the "replacement water" allocations shall be made in the next Progress Report by Permittee due.

6. Fahey's Diversion Did Not Reduce Water Available For Instream Resources and Riparian Habitat Downstream.

I was given notice to curtail based specifically on a perceived lack of water for downstream senior diverters, NOT because of water needs for instream resources and riparian habitat downstream. (See 2014 and 2015 curtailment notices, **Exhibits 59 and 63**; and see **Exhibit 75**, Declaration of John O'Hagan dated June 22, 2015, including, paragraph 15) which confirms that the goal of curtailment is to ensure that water to which senior water right holders are entitled is available to them. This Declaration was used in court proceedings which ultimately found the May 27, 2014 curtailment notice unconstitutional. This is yet another reason for Fahey's lack of culpability.

C. Decision 1594 Obligations Are Not Impacted By The Fahey Diversions.

Furthermore, Decision 1594 does not apply in this case for several reasons. First, the water that I diverted is primarily groundwater, as discussed above. Second, I have no control of the amount of water discharged from NDPR. The amount of water discharged to meet the requirements of D1594 is controlled by the Districts. The only thing that I can do in regard to D1594 is replace the water that I diverted during a D1594 FASS period, June 15 through August 31, after it is requested by the Districts. I have no NDPR discharge authority; therefore, I cannot be liable and am not liable for any D1594 NDPR discharge flow. Third, the Districts and CCSF are not Term 80 permittees. Minimum discharge requirements from NDPR are governed by non-1594 protocol. The minimum fishery surface flows below the dam are maintained per an agreement between the TID, MID, City of San Francisco, Dept. of Fish and Game and others

under FERC Agreement 2299. NDPR is operated in accordance those requirements, the Districts' pre-1914 water rights and CCSF Raker Act authority. As a result, the hydraulic continuity between the PODs in my permits and the Delta is severed by NDPR. Once again I do not control the amount of surface water discharged from NDPR. The amount of water discharged to meet the minimum fish flow requirements is controlled by the Districts. I can do only one thing, replace the surface water when requested by the Districts. I have neither NDPR discharge authority nor hydraulic continuity with the Delta; therefore, a nexus between me and D1594 does not exist.

In conclusion, the only analysis which could lead to a determination that I have trespassed on the State water system is to consider that the surplus water I purchased and sent to NDPR cannot be used as "replacement water." However, in July of 2010 a member of the Board's staff reviewed and approved a Water Availability Analysis, which stated, "[I] can and [have] been purchasing out of basin water in advance as a credit to future replacement water requirements." Therefore, it is deemed surplus and can be used as replacement water. At my own personal expense and risk, water is now available in NDPR as surplus water. If a portion of it is diverted to and accounted for as a credit to the State water system, then my sale of spring water during the 2014 and 2015 curtailments could not have created a net-loss to the State system even if my diversions were all surface water and no exemption applied. A water for water exchange would have occurred between me and the State, which is exactly want I intended to do in good-faith from the beginning of this process.

Nonetheless, as to Fahey's diversions, an exemption does apply to any surface waters, and the curtailments (not found unconstitutional) only apply to non-exempted surface water and do not apply to any groundwater.

VII. INABILITY TO PAY DEPENDING UPON THE FINDINGS OF THE HEARING OFFICER.

I may be unable to pay any penalties, fines, costs, fees and the like. That determination cannot be made until a decision is rendered by the hearing officer.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct based on my personal knowledge, and based on what I am informed and believe to be true and correct. Executed on December 15, 2015, at Boise, Idaho.

G. Scott Fahey