OPENING STATEMENT

OF

SCOTT FAHEY AND

SUGAR PINE SPRING WATER LP

"Available Water" Exception to Curtailment

"If you have previously collected water to storage in a reservoir covered by a post-1914 right prior to this curtailment notice, you still may beneficially use that previous stored water consistent with the terms and conditions of your post-1914 water right." (*Exhibit WR-34*.)

Water Exchange Agreement With TUD

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Foreign Water From Stanislaus River to Tuolumne River into NDPR

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Credit for Future Water Diversions

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Exemption From Curtailment

1. Complicated Water Accounting Procedures at NDPR

NDPR and the water rights on the relevant portion of the Tuolumne River, are governed by the Districts' senior pre-1914 water rights, the federal Raker Act, and the complicated water accounting procedures in the Fourth Agreement between the Districts and the City entered into June 1966. (*Fahey Exhibits 77, 78, 79, 80, 81.*) Those procedures under the Fourth Agreement effectively altered - made obsolete - the application of the Board's Decisions 995 and 1594 for the portion of the Tuolumne River that is relevant here and for NDPR. (*Fahey Exhibit 1, pages 15, 16.)*

2. Fahey's Permits Forbid Him from Interfering with Those Accounting Procedures

Terms 19 and 20 of Permit 20784 (*Fahey Exhibit 20*), and Terms 33 and 34 of Permit 21289 (*Fahey Exhibit 55*), were purposefully designed by all of the parties to prohibit Mr. Fahey from interfering with those accounting procedures at NDPR under the Raker Act and the Fourth Agreement. All of the terms and conditions of both permits must be interpreted and applied with that understanding.

"The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

"'[E]ven if one provision of a contract is clear and explicit, it does not follow that that portion alone must govern its interpretation; the whole of the contract must be taken together so as to give effect to every part.'"

(*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 798.*)*

3. Prosecution Team's Interpretation – Fahey Must Wrongfully Interfere With Accounting Procedures

But if Mr. Fahey simply replaced water that he diverted under the Prosecution Team's interpretation of Term 19 of Permit 20784 and the 1992 Agreement, then Mr. Fahey would be forced to interfere with the complicated water accounting procedures at NPDR, in violation of Terms 20, 33 and 34. The Districts could not have agreed in the 1992 Agreement that Mr. Fahey could interfere with those accounting procedures because "'agreements will be construed, if possible, as intending something for which [the parties] had the power to contract.'"
(*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 798.)

4. Terms 33 & 34 of Permit 21289 Govern All Water Replacement By Fahey

The evidence here shows that the parties intended that the water replacement provisions of Term 20 of Permit 20784 (Fahey Exhibit 20) were intended to govern the water replacement provisions of Term 19 in Permit 20784 and the 1992 Agreement between Mr. Fahey and the Districts. (Fahey Exhibits 6-9.) Also, the evidence shows that the parties later intended that Terms 33 and 34 of the subsequent Permit 21289 (Fahey Exhibit 55) were intended to govern all of the water that is supposed to be replaced under the provisions of both permits.

5. At Board's Urging, Fahey Provided Replacement Water in Advance

In compliance with the Board's notice of potential future curtailment to Mr. Fahey in February 2009 (*Fahey Exhibit 69*), and in compliance with explicit language in Terms 20 and 34 of his respective permits that state, "[r]eplacement water may be provided in advance and credited to future replacement water requirements," Fahey had 88.55 acre feet of water wheeled into NDPR from 2009 to 2011. (*Fahey Exhibit 1*, *page 7*.) That replacement water was provided in advance and credited to future water replacements, which covered all of Fahey's diversions during the curtailment periods in 2014 and 2015. As the Board's John O'Hagan explains: "[O]nce water is stored or imported from another watershed, the entity that stored or imported the water has the paramount right to that water." (*Fahey Exhibit 75*, ¶*4*.)

6. Prosecution Team Fails to Show Lack of Available Water for Fahey's Diversions

The Prosecution Team's evidence completely fails to show that water was not available during the 2014 or the 2015 curtailment periods, either at the point of Fahey's diversions, or between Fahey's point of diversions and NDPR. (The river-wide water availability analysis that is being relied on by the Prosecution Team in this proceeding fails to do that, and what is therefore an invalid underground regulation. (See *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 259-260.) Thus, there is an insufficient factual basis for either the curtailment notices to Mr. Fahey in 2014 and 2015, or for the ACL and CDO.

7. Civil Penalties Should Not Be Imposed (Water Code §§1052, 1055.3)

All of the factors listed in Water Code section 1055.3, when applied to the facts in this case, demonstrate that no civil penalties should be assessed against Scott Fahey and Sugar Pine Spring Water LP for the following thirteen (13) reasons, which we are identifying as points “A” through “M”:

No Civil Penalties (Water Code §§1052, 1055.3):

A. Fahey's Interpretation of the Permit Terms is Reasonable

"As noted in the City's November 8, 2004 letter, *San Francisco only intends to notify the applicant* [i.e., Fahey] *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." [*Fahey Exhibit 54* (emphasis added).]

No Civil Penalties (Water Code §§1052, 1055.3):

B. Fahey Reasonably Had Replacement Water Prepared in Advance – Covering All His Diversions During the Curtailment and FAS Periods

No Civil Penalties (Water Code §§1052, 1055.3):

C. Fahey Reasonably Relied On The Language In 2009 Board Notice And The Curtailment Notice In 2014

No Civil Penalties (Water Code §§1052, 1055.3):

D. Fahey Reasonably Relied on Discussion with Deputy City Attorney in June 2014

No Civil Penalties (Water Code §§1052, 1055.3):

E. Fahey Timely Responded To Curtailment Notice For 2014 In The Manner Prescribed By The Board – But The Board Never Responded To This Explanations

No Civil Penalties (Water Code §§1052, 1055.3):

F. Fahey's Understanding That He Satisfied The Curtailment Exception In 2015 Was Reasonable

No Civil Penalties (Water Code §§1052, 1055.3):

G. Fahey Reasonably Relied On His Communications With The Board's David LaBrie In June 2015

No Civil Penalties (Water Code §§1052, 1055.3):

H. Mr. Fahey Reasonably Relied On His Phone Call With The Board's Samuel Cole In August 2015

No Civil Penalties (Water Code §§1052, 1055.3):

I. Mr. Fahey Willingly Took All Corrective Action the was Warranted Under the Facts

No Civil Penalties (Water Code §§1052, 1055.3):

J. It Is Unfair To Penalize Mr. Fahey For The Operations At NDPR That He Does Not Control

No Civil Penalties (Water Code §§1052, 1055.3):

K. It is Unfair to Penalize Mr. Fahey for Those Periods When the Board Staff Failed to Property Respond to Fahey's Claim of an Exception to Curtailment

No Civil Penalties (Water Code §§1052, 1055.3):

L. The Prosecution Team's Request for Surveillance Costs in Unreasonable

No Civil Penalties (Water Code §§1052, 1055.3):

M. The Prosecution Team Has No Evidence of Any Harm Caused by Fahey's Diversions During Curtailment

For all of these reasons, the Board should deny and dismiss the ACL and the CDO in their entirety.

Permit 20784, Term 20, Paragraph 1

"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."

Permit 21289, Term 33

"Permittee shall not interfere with San Francisco's obligations to Modesto and Turlock Irrigation Districts (Districts) pursuant to the Raker Act and/or any Implementing agreement between the Districts and San Francisco."

CITY AND COUNTY OF SAN FRANCISCO

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March 21, 2011

Ms. Katherine Mrowka
Division of Water Rights
State Water Resources Control Board
P. O. Box 2000
Sacramento, CA 95812-2000

Re: *Comment on February 22, 2011 Notice of Proposed Initial Study/Mitigated Negative Declaration for Water Right Application 31491 of G. Scott Fahey*

Dear Ms. Mrowka:

I write on behalf of the City and County of San Francisco regarding the above-referenced Notice. On November 8, 2004, San Francisco wrote a letter to the SWRCB Water Rights Division ("Board") notifying it of certain errors in the October 1, 2004 *Application 31491 – (1) Wet Meadows Springs tributary to Hull Creek; (2) Unnamed Spring (aqua) Marco Spring), and (3) Unnamed Spring (aqua Polo Spring), both tributary to Unnamed Stream thence Hull Creek in Tuolumne County.* The Board accepted the City's October 1st letter as a protest based on Injury to Prior Rights. Subsequently, the applicant accepted terms that were proposed by the City to resolve its protest, and the City dismissed the protest on December 16, 2004.

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.

Thank you for considering this comment and request.

Very truly yours,

DENNIS J. HERRERA
City Attorney

Donn W. Furman
Deputy City Attorney

cc: Steve Ritchie
Roger Masuda, TID

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Sugar Pine Spring Water LP

From:	LaBrie, Dave@Waterboards <Dave.LaBrie@waterboards.ca.gov>
Sent:	Friday, June 12, 2015 3:02 PM
To:	springwater@cableone.net
Cc:	Lavallee, Laura@Waterboards
Subject:	Water Rights A029977 and A031491

Scott,

Thank you again for returning my call this morning.

I found your letter in the stack of emails and it was marked to be considered as a certification response. Most Certification Forms were filed online and the emails have to be hand processed.

I have read your letter and your permit terms. I understand that you have a term that requires you to provide replacement water to the City and County of San Francisco and the Turlock and Modesto Irrigation Districts for water diverted under your permits that adversely affect San Francisco and the Districts. This term was included in your permits to resolve the protests by San Francisco and the Districts that your diversions would cause harm to their prior rights. I also understand that you have purchased 82 acre-feet of water that is stored in New Don Pedro Reservoir as replacement water.

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Question: Have you diminished the quantity of water in storage by the amount of water that you diverted last year and this during the time that the water rights have been curtailed. If not, it would seem that any water diverted from the springs would be in violation of the curtailment notice. If you have diminished the quantity of water in storage by the amount of water that you diverted during the curtailment period, it could be argued that you have offset your diversions by releasing the purchased water placed into storage. 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.

Term 17 in Permit 20784 and Term 9 in Permit 21289 clearly state that the permits are subject to prior rights and that in some years, water will not be available for diversion during parts or all of the authorized season. 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.

I look forward to any explanation that you may have that would demonstrate why the curtailment notice does not apply to your water rights.

David LaBrie
Engineering Associate
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Division of Water Rights
State Water Resources Control Board

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