

STATE WATER RESOURCES CONTROL BOARD

**In the matter of Administrative Civil
Liability Complaint issued against G. Scott
Fahey and Sugar Pine Spring Water, LP**

**Declaration of Brian Coats in Support of
Prosecution Team's Case in Chief**

I, Brian Coats, declare as follows:

1. I am a professional Chemical Engineer, registered in California (License CH 6521), and a Senior Water Resource Control Engineer with the State Water Resources Control Board (State Water Board), Division of Water Rights (Division).
2. I have over 16 years of water rights experience working in both the Petition and Enforcement Sections within the Division. My experience includes assessing water availability, processing changes to water rights, resolving protests, investigating complaints and compliance/enforcement issues, issuing enforcement actions and participating in enforcement hearings. I am currently the Supervisor of the Division's Enforcement Unit Number Two. A copy of my Statement of Qualifications is attached as Exhibit WR-8.
3. G. Scott Fahey and Sugar Pine Spring Water, LP (Fahey) hold Permits 20784 and 21289 to appropriate water from sources tributary to the Tuolumne River upstream of New Don Pedro Reservoir and tributary to the San Joaquin River. Fahey's address of record for both permits is G. Fahey, 2787 Stony Fork Way, Boise, Idaho, 83706. A true and correct copy of Permit 20784 is attached as Exhibit WR-15. A true and correct copy of Permit 21289 is attached at Exhibit WR-16.
4. On September 1, 2015, the Division issued Fahey an ACL Complaint, Draft CDO, and Information Order WR 2015-0028-DWR. The Division issued the ACL Complaint for \$224,875 for the unauthorized diversion and use of water during a drought period. The Draft CDO would order Fahey to immediately cease the unauthorized diversion of water from the springs under his water rights until the State Water Board determines that there is sufficient water in the system to support beneficial use at the priority of Permits 20784 and 21289. Finally, the Information Order directed Fahey to provide specific information for the water diversions that are conducted under any basis of right at facilities covered by Permits 20784 and 21289. True and correct copies of the ACL Complaint, draft CDO, and Information Order are attached as Exhibit WR-1 through WR-3, respectively.
5. Executive Order B-29-15 (Executive Order), issued by Governor Brown on April 1, 2015 found that the on-going severe drought conditions presented urgent challenges across the state, including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirmed that the orders and provisions in the Governor's previous drought proclamations and orders, the Proclamations on January 17, 2014 and April 25, 2014,

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and Executive Orders B-26-14 and B-28-14, remained in full force and effect. A true and correct copy of Executive Order B-29-15 is attached as Exhibit WR-27.

6. The State Water Board assumed responsibility for determining available water supply during the 2014 and 2015 drought years to serve various water right priorities, and advising water right holders of its findings. In 2014, I performed the water availability analysis in collaboration with John O'Hagan, Assistant Deputy Director of the Division. In 2015, I performed the analysis in collaboration with other staff persons in the Permitting and Enforcement Branch. The procedures for determining water availability were similar for 2014 and 2015. To determine the availability of water for water rights of varying priorities, we compared the current and projected available water supply with the total water right diversion demand.
7. To determine water availability, we relied upon the full natural flows of watersheds calculated by the Department of Water Resources (DWR) for certain watersheds in its Bulletin 120 and in subsequent monthly updates. "Full natural flow," or "unimpaired runoff," represents the natural water production of a river basin, unaltered by upstream diversions, storage, storage releases, or by export or import of water to or from other watersheds. The full natural flow amount is different than the measured stream flows at the given measurement points because the measured flows may be higher or lower due to upstream operations. Forecasted flow data is uncertain, so DWR provides the data in the form of "levels of exceedance" or simply "exceedance" to show the statistical probability that the forecasted supply will occur. The exceedance is simply the percent of the time that the actual flow is expected to exceed the projected flow. The 90 percent exceedance hydrology assumes inflows from rainfall and snowmelt at levels that are likely to be met or exceeded by actual flows with a 90 percent probability, or in other words, there is a ten percent or less chance of actual conditions turning out to be this dry or drier. In April and early May in 2014 and 2015, we used the 50%, 90%, and 99% exceedance amounts the Bulletin 120 reports for its analyses due to low flow conditions. We also used DWR's daily natural flow calculations in the analysis.
8. To determine water demand, we relied on information supplied by water right holders on annual or triennial reports of water diversion. Water right holders are legally required to file these reports and the reports must be true and accurate to the best of the knowledge of the diverters. We also incorporated 2014 diversion data submitted pursuant to Order WR 2015-0002-DWR, which ordered certain water right holders and claimants in the Sacramento and San Joaquin River watershed and Delta to provide information concerning their monthly diversion amounts, the location of each diversion, and the legal basis for each diversion. We compiled all reported monthly water diversion data by watershed, type of right and priority dates. We also performed quality control checks and removed obvious errors, excess reporting, removed demand for direct diversion for power and made additional changes based on stakeholders' input. The corrected demand data included the 2014 reported data for 90% of the watershed demand plus, for the remaining diverters, an averaged diversion amount for 2010 through 2013. These monthly diversion demands are grouped by modeling staff into water right types (riparian, pre-1914 and post-1914 rights). A true and correct copy of State Water Board Order WR 2015-0002-DWR attached as Exhibit WR-28.
9. We consistently adjust the water availability and demand analyses based on new information obtained from stakeholders or adjustments to projected flows from DWR. We

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review this information and provide revisions to the data set and graphs on the Watershed Analysis website at http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/analysis/.

10. The State Water Board's Watershed Analysis website provides updated graphical summations and spreadsheets containing supporting analysis of the availability and demand analyses. The graphical summations show priorities with monthly demands for the total riparian demand at bottom, the pre-1914 demands added to riparian and depicted above the riparian demand. For graphical purposes, the Watershed Analysis averages the monthly amounts into cubic feet per second.
11. The Watershed Supply and Demand Analysis shows that by May 27, 2014, and April 23, 2015, available supply was insufficient to meet the demands of post-1914 appropriative rights, such as Fahey's, throughout the San Joaquin River watershed in each year. A true and correct copy of the graphical representation of the Sacramento-San Joaquin Watershed Analysis for 2014 is attached as Exhibit WR-42. A true and correct copy of the graphical representation of the Sacramento-San Joaquin Watershed Analysis for 2014 is attached as Exhibit WR-43.
12. The State Water Board "Notice of Surface Water Shortage and Potential Curtailment of Water Right Diversions" (2014 Shortage Notice), issued on January 17, 2014 alerted water right holders in critically dry watersheds that water may be unavailable to satisfy beneficial uses of junior priorities. A true and correct copy of the 2014 Shortage Notice attached as Exhibit WR-29.
13. The State Water Board "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" (2014 Unavailability Notice), issued on May 27, 2014, notified all holders of post-1914 appropriative water rights within the Sacramento and San Joaquin River watersheds of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. A true and correct copy of the 2014 Unavailability Notice is attached as Exhibit WR-32. A true and correct copy of the 2014 Unavailability Notice mailed to Fahey is attached as Exhibit WR-34.
14. Fahey responded to the unavailability notices with a letter dated June 3, 2014 (Fahey June 3, 2014 Letter). In the letter Fahey states that over the course of two years (June 15, 2009 through June 15, 2011) he purchased a total of 82 acre-feet of water from the Tuolumne Utility District to ensure the City and County of San Francisco (San Francisco) and the Modesto and the Turlock Irrigation Districts (Districts) would have water standing by behind New Don Pedro Reservoir in the event San Francisco or the Districts notified him of an actual or potential water supply reduction. Fahey also acknowledges in the letter that if New Don Pedro Reservoir had spilled since his purchase or spilled in the future that his pre-positioned "replacement water" would be lost and unavailable for its intended purpose. A true and correct copy of the Fahey June 3, 2014 Letter is attached as Exhibit WR-47.
15. The State Water Board "Notice of Temporary Opportunity to Divert Water under Previously Curtailed Water Rights for Sacramento and San Joaquin River Watershed." (2014 Temporary Diversion Notice), issued on October 31, 2014, temporarily lifted the curtailment of water rights for post-1914 water rights holders in the Sacramento-San

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Joaquin watershed until 7 AM on November 3, 2014. The State Water Board temporarily lifted the curtailment based on a predicted rain event. A true and correct copy of the 2014 Temporary Diversion Notice is attached as Exhibit WR-31.

16. The State Water Board "Notice of Temporary Lifting of Curtailments for Diversions in the Sacramento-San Joaquin Watershed" (2014 Temporary Lifting of Curtailment), issued on November 19, 2014, temporarily lifted the curtailment of post-1953 water rights in the Sacramento-San Joaquin watershed. A true and correct copy of the 2014 Temporary Lifting of Curtailment is attached as Exhibit WR-37.
17. The State Water Board "Statewide Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions for 2015" (2015 Shortage Notice), issued January 23, 2015, alerted water right holders in critically dry watersheds that water may become unavailable to satisfy beneficial uses at junior priorities. A true and correct copy of the 2015 Shortage Notice is attached as Exhibit WR-38.
18. The State Water Board "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the San Joaquin River Watershed with Post-1914 Appropriative Rights" (2015 Unavailability Notice), issued April 23, 2015, notified all holders of post-1914 appropriative water rights within the San Joaquin River watershed of the lack of availability of water to serve their post-1914 water rights, with some minor exceptions for non-consumptive diversions. A true and correct copy of the 2015 Unavailability Notice is attached as Exhibit WR-39. A true and correct copy of the 2015 Unavailability Notice mailed to Fahey is attached as Exhibit WR-34.
19. The State Water Board issued a clarification to the Unavailability Notices on July 15, 2015 (July 15 Clarification Letter) indicating that, to the extent that any of the previous notices contained language that could have been construed as an order requiring water right holders to curtail diversions under affected water rights, that language was rescinded. Similarly, any language requiring affected water right holders to submit curtailment certification forms was also rescinded. However, for purposes of noticing water rights holder of the unavailability of water for their priority of right, the Unavailability Notices remained in effect. In anticipation of likely questions, the State Water Board issued a Fact Sheet with the July 15 Clarification Letter ("Fact Sheet"). A true and correct copy of the July 15 Clarification Letter is attached as Exhibit WR-40. A true and correct copy of the Fact Sheet is attached as Exhibit WR-41. A true and correct copy of the July 15, 2015 Clarification Letter mailed to Fahey is attached as Exhibit WR-34.
20. The 2014 Unavailability Notice, the 2015 Unavailability Notice, and the related notices apply to Fahey's permits, because both Permits are post-1914 appropriative rights within the covered geographic area.
21. The 2014 Notice of Unavailability put Fahey on notice that there was not enough water to fulfill his water rights under Permits 20784 and 21289 from May 27, 2014 through October 30, 2014, and from November 4 through 18, 2014.
22. The 2015 Unavailability Notice put Fahey on notice that there was not enough water to fulfill his water rights under Permits 20784 and 21289 from April 23, 2015 through November 1, 2015.

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23. The State Water Board issued the Unavailability Notices to advise the public and water diverters that water would not be available under the priority of rights each Notice identified.
24. Fahey's unauthorized diversion or diversions fall within time periods and geographic area for curtailments covered by the 2014 Notice of Unavailability and the 2015 Unavailability Notice.
25. I collaborated with David LaBrie, Kathy Mrowka, John O'Hagan, legal counsel, and staff working under our supervision to calculate Fahey's proposed penalty.

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed this 15th day of December, 2015, at Sacramento, California.



Brian Coats