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FILED
Superior Court of California
County of Placer
DEC 03 2019
Jake Chatters
Executive Officer & Clerk
By: O. Lucatuorto, Deputy

10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF PLACER

13 WATER AUDIT CALIFORNIA,)	Case No. SCV 0044119
14)	
15)	
16 Petitioner,)	VERIFIED PETITION FOR
17)	WRIT OF MANDATE AND
18 v.)	COMPLAINT FOR
19)	DECLARATORY
20)	JUDGMENT
21)	
22 NEVADA IRRIGATION DISTRICT, and)	CCP § 1060,1085, 1086
23 DOES 1 TO 100,)	
24)	
25 Respondents and/or)	
26 Interested Parties)	
27)	
28)	

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I.	Exhibit 1	1	2011 03	NID	Gaging Station Fish Passage Mitigated Negative Declaration
I.	Exhibit 2	120	2015 09 14	CDFW	Rotary Screw Trap Monitoring Report
II.	Exhibit 3	142	2014 07 09	NMFS	Public draft 2009 Recovery Plan for chinook salmon and steelhead
III.	Exhibit 4	416	2009 03	Placer	Love & Associates Fish Passage Alternatives for NID Gaging Station and Hemphill Dam
III.	Exhibit 5	481	2009 04	Placer	Love & Associates 30% engineering drawings for Hemphill Dam fish ladder
III.	Exhibit 6	487	2009 12 21	CDFW	Format Protest of Nevada Irrigation District's Water Rights Petition
III.	Exhibit 7	497	2010 08	PG&E	Technical Memorandum for Drum-Spauldng Project
III.	Exhibit 8	596	2013 02	Stantec	Midwestern Placer Regional Sewer Water Project - Fisheries Resources
III.	Exhibit 9	682	2016 06 07	NID	Approval of CDFW video monitoring installation
III.	Exhibit 10	684	2015 03 10	CDFW	Notice to NID of suspended processing permit processing due to FGC violations
IV.	Exhibit 11	687	2015 08 24	NID	Kleinschmidt contract authorization
IV.	Exhibit 11	698	2015 07 31	NID	Kleinschmidt scope of work alternatives analysis
IV.	Exhibit 11	710	2016 10 14	NID	Kleinschmidt scope of workre Alternative 4/5 bank permeability
IV.	Exhibit 11	719	2015 04 29	NID	Kleinschmidt scope of work supplemental compliance services
IV.	Exhibit 11	721	various	NID	Engineering invoicing - various vendors and dates
IV.	Exhibit 11	727	undated	NID	Auburn Ravine / Hemphil Dam images
IV.	Exhibit 11	741	2015 09 09	NID	Letter to Placer DA re CDFW complaint "unaware
IV.	Exhibit 11	742	2015 09 03	Placer	Letter from County to NID supporting efforts to remediate Hemphill Dam
IV.	Exhibit 11	743	2015 09 09	NID	Letter to Placer DA re CDFW complaint "unaware of any violations"
IV.	Exhibit 11	744	2015 09 03	Placer	Letter to NID advising investigation revealed environmental violations
IV.	Exhibit 11	745	2018 08 21	NID	Helix Enviro Redd Survery - Images

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IV.	Exhibit 11	754	2016 05 17	NID	Kleinschmidt engineering analysis of alternatives
IV.	Exhibit 11	778	2018 19 03	NID	Letters to the public
IV.	Exhibit 11	781	2017 05 01	NID	Letters to CDWF/ NOAA / public re fish studies
IV.	Exhibit 11	784	2017 03 30	NID	Email from/to CDFW grant program administration
IV.	Exhibit 11	791	2018 02 12	NID	Sign-in and agenda for TAC meeting 2-12-18
IV.	Exhibit 11	793	2017 03 31	NID	Request for proposals for water quality and fish studies
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IV.	Exhibit 11	860	2019 02 06	NID	HK/NV5 proposal for "ongoing engineering support"
IV.	Exhibit 11	865	2017 07 31	NID	Stantec proposal for "emergency enviromental compliance consulting"
IV.	Exhibit 11	880	2014 10 03	NID	Stantec scope of compliance services for "activites to facilitate fish passage"
IV.	Exhibit 11	884	2014 12 01	NID	NID - scope of services fo "biological surveys and monitoring at Hemphill Dam
IV.	Exhibit 11	887	2017 09 08	NID	Stantec invoicing
IV.	Exhibit 12	890	UNDATED	SYRCL	Yuba-Bear and Drum-Spalding Projects narrative
IV.	Exhibit 13	893	2016 12 20	NID	Staff memorandum re CDFW Notice of Grant Award
V.	Exhibit 15	916	undated	NID	Public statement in support of public trust
V.	Exhibit 15	918	2019 01 25	NID	Helix invoicing for "CEQA work"
V.	Exhibit 15	920	2018 10 31	NID	HK/NV5 correspondence re permeabilty
V.	Exhibit 15	922	2018 10 25	NID	Flow data correspondence
V.	Exhibit 15	928	2019 05 14	NID	Email with HK/NV5 re alternaive 5
V.	Exhibit 15	931	2019 04 11	NID	Email re water quality data
V.	Exhibit 15	933	2019 04 10	NID	Email corrspondence with CDFW re removal of dam

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V.	Exhibit 15	937	2019 04 09	NID	Email correspondence re water quality
V.	Exhibit 15	939	2019 03 26	NID	TAC meeting scheduling 03.26.2019
V.	Exhibit 15	941	2019 03 22	NID	FAR Redds survey report "citizen science"
V.	Exhibit 15	942	2019 01 20	NID	Email to CDFW/NMFSA "I don't believe we should meet ..."
V.	Exhibit 15	943	2019 01 25	NID	Helix invoicing for "CEQA work"
V.	Exhibit 15	949	2019 01 21	NID	Email to HK/NV5 re NMFS comments on diversion
V.	Exhibit 15	953	undated	NID	FAR comments on native interests in Aburn Ravine
V.	Exhibit 15	954	2019 10 23	NID	Email Helix Enviro re: TAC meeting
V.	Exhibit 15	955	2018 10 09	NID	Email with HK/NV5 re screening of canal diversion intake
V.	Exhibit 15	958	2018 10 23	NID	TAC meeting agenda 10.23.2018
V.	Exhibit 15	959	2018 10 04	NID	HK/NV5transmittal of geotechnical engineering and hydraulics report
V.	Exhibit 15	960	2018 09 06	NID	TAC scheduling
V.	Exhibit 15	961	2018 08 14	NID	Staff memo review Hemphill water and fish study
V.	Exhibit 15	963	2018 07 05	NID	Email from Helix re AB 52 consultaton
V.	Exhibit 15	967	2017 07 28	NID	Email from Kleinschmidt re Hemphill Dam; asking to "listen in" on agency metting
V.	Exhibit 15	968	2018 07 13	NID	CDFW grant - quarterly report
V.	Exhibit 15	979	2018 06 26	NID	Email Helix Enviro re: TAC meeting
V.	Exhibit 15	981	2018 05 11	NID	Helix interim report of redds survey and CEQA work
V.	Exhibit 15	982	2018 07 13	NID	CDFW grant quarterly report
V.	Exhibit 15	983	2018 05 22	NID	Email from NOAA offering to meet with NID consultant
V.	Exhibit 15	984	2018 05 11	NID	Email report to CDWF/NOAA on 2017 fish monitoring survey etc.

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V.	Exhibit 15	986	2018 04 17	NID	Helix proposal for preliminary infiltration and pump system
V.	Exhibit 15	990	2018 05 03	NID	Helix memorandum summary of progress to date
V.	Exhibit 15	991	2018 05 02	NID	Helix memorandum listing of CEQA efforts
V.	Exhibit 15	993	2018 04 24	NID	Email to CDFW/NOAA re delay in design production
V.	Exhibit 15	997	2018 03 12	NID	Email from FAR re Kleinschmidt and Helix reports
V.	Exhibit 15	999	2018 03 05	NID	Email from Helix re CEQA kick-off meeting
V.	Exhibit 15	1000	2018 03 21	NID	Email from NOAA re fish screening criteria - forwarded internally "wake up"
V.	Exhibit 15	1002	2018 03 05	NID	Email from Helix re CEQA kick-off & authorized contract
V.	Exhibit 15	1004	2018 06 29	NID	Contract with Helix \$115,427
V.	Exhibit 15	1010	2017 08 29	NID	Staff memorandum recommendation to accept Helix fish and water studies contract
V.	Exhibit 15	1011	2018 11 10	NID	Email from FAR re Hemphill on Prop 1 fish passage priorities Region 2
V.	Exhibit 15	1012	2019 05 15	NID	Email exchange re grant reporting
V.	Exhibit 15	1020	2019 05 14	NID	Transmission of memo re embankment infiltration galley & discussion
V.	Exhibit 15	1026	2019 04 02	NID	HK/NV5 correspondence "looking at screens"
V.	Exhibit 15	1028	2019 04 12	NID	Email exchange re CDFW grant invoicing
V.	Exhibit 15	1029	2019 04 12	NID	Email exchange re water quality
V.	Exhibit 15	1033	2019 04 10	NID	Email from/to CDWF re requirement for dam removal
V.	Exhibit 15	1039	2019 04 09	NID	Duplicate records
V.	Exhibit 15	1046	2019 03 25	NID	Email internal correspondence "I do not believe you will miss much." (Duplicates)
V.	Exhibit 15	1054	2019 03 --	NID	Email frm FAR re dam rehabilitation & soliciting CDFW and NOAA contributions
V.	Exhibit 15	1057	2019 03 05	NID	Draft public statement on public trust

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V.	Exhibit 15	1058	2019 01 29	NID	Correspondence to schedule TAC meeting (Duplicates)
V.	Exhibit 15	1063	2019 01 29	NID	Scheduling between HK/NV5 & NID
V.	Exhibit 15	1064	2018 12 21	NID	Email transmission of NMFS comments on infiltration gallery
V.	Exhibit 15	1066	2019 01 29	NID	Email to CDFW/NMFS "I do not believe we should meet until ..."
V.	Exhibit 15	1068	2019 01 29	NID	Email internal correspondence regarding website
V.	Exhibit 15	1071	2019 01 29	NID	Email re scheduling HK/NV5 meeting
V.	Exhibit 15	1072	2018 12 21	NID	Email transmission of NMFS comments on infiltration gallery
V.	Exhibit 15	1074	2018 12 05	NID	Email from CDFW re agency design process
V.	Exhibit 15	1075	2018 10 26	NID	Email from FAR re flow data obtained from third parties
V.	Exhibit 15	1077	2018 11 13	NID	Email from CDFW re NID eligibility for Prop 1 funding
VI.	Exhibit 16	1078	2016 06 01	NID	Staff memo to board of directors to approve Alternatives 4 and 5
VI.	Exhibit 16	1080	2016 04	NID	Kleinschmidt Hemphill Diversion Structural Alternatives Analysis
VI.	Exhibit 16	1113	2014 04	NID	Diversion locations per Friends of the Auburn Ravine (included in above Kleinschmidt Analysis)
VI.	Exhibit 16	1135	2016 10 05	NID	Notice of Exemption to State Clearing House
VI.	Exhibit 16	1141	2009 03	NID	Copy of Love & Associates Exhibit 4 this index (cover page missing)
VI.	Exhibit 16	1174	2016 11 02	NID	Staff engineering memo re Hemphill Dam Kleinschmidt Alternatives 4 and 5
VI.	Exhibit 16	1175	2016 10 14	NID	Kleinschmidt discussion for Alternatives 4 and 5
VI.	Exhibit 16	1180	2017 06 02	NID	Holdrege & Kull Sediment Characterization Report for Hemphill
VI.	Exhibit 16	1215	2017 07 03	CDFW	Watershed Restoration Grant Program Agreement
VI.	Exhibit 16	1232	2018 12 20	NID	CDFW Notice of Award of Grant
VI.	Exhibit 16	1259	2018 11 10	NID	Engineering memo re CDFW Grant

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VI.	Exhibit 16	1261	2016 09 28	NID	Response to Alternatives 4 and 5
VI.	Exhibit 16	1263	2015 03 10	NID	Suspension of Notification of Lake or Streambed Alteration
VI.	Exhibit 16	1265	2015 01 30	NID	Time Extension of Notification of Lake or Streambed Alteration
VI.	Exhibit 16	1266	2016 12 23	NID	NID press release re CDFW grant award
VI.	Exhibit 17	1267	2017 09	NID	Kleinschmidt Hemphill Final Report in Field Study Investigations
VII.	Exhibit 18	1306	2016 10 14	NID	Kleinschmidt Alter. 4 and 5 stream bank and sediment analysis
VII.	Exhibit 18	1320	Undated	NID	Auburn Ravine IMAGES
VII.	Exhibit 18	1334	2016 06 08	NID	Placer County letter of support for remediation of Hemphill Dam
VII.	Exhibit 18	1335	2015 09 09	NID	Correspondence with Placer County District Attorney (duplicate)
VII.	Exhibit 18	1337	2018 08 21	NID	Helix powerpoint & IMAGES
VII.	Exhibit 18	1371	Various	NID	Correspondence from/to NID from to members of the public
VII.	Exhibit 18	1374	2017 05 01	NID	NOAA, CDFW and FAR re Hemphill water quality & fish studies
VII.	Exhibit 18	1378	2018 02 12	NID	Agenda TAC 02-12-2018
VII.	Exhibit 18	1379	2017 03 31	NID	Request for Proposals for water quality fish studies in Auburn Ravine
VII.	Exhibit 18	1391	2017 03 30	NID	Helix proposal for water quality fish studies in Auburn Ravine
VII.	Exhibit 19	1420	2002	Placer	Auburn Ravine Coon creek Ecosystem Restoration Plan
VII.	Exhibit 20	1449	2014 -- --	NMFS	2014 Recovery Plan
VIII.	Exhibit 21	1581	2011 12 20	CDFW	Memorandum Hemphill Passage Summary
VIII.	Exhibit 22	1585	Undated	CDFW	Frequently Asked Questions re: Auburn Ravine
VIII.	Exhibit 23	1590	2015 05 17	FERC	Yuba-Bear River Drum-Spalding Draft Environmental Impact Report
VIII.	Exhibit 24	1592	2015 12 17	CDFW	Email (intra agency) re referral to Placer County District Attorney re NID Hemphill Dam

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VIII.	Exhibit 25	1601	2019 05 10	WAC	Demand for remedy
VIII.	Exhibit 26	1604	2015 09 14	CDFW	2015 Auburn Ravine Monitoring Report (REDDS survey)
VIII.	Exhibit 27	1621	2018 02	CDFW	2016/2017 salmon cam survey report with images
VIII.	Exhibit 28	1660	2017 09 08	NID	French Lake gaging station RWQCB approval
VIII.	Exhibit 29	1699	2019 10 19	SARSAS	Protest march notice
VIII.	Exhibit 30	1702	2008 01 04	CDFW	Summary of 2004- 2005 fish community survey - Auburn Ravine
VIII.	Exhibit 32	1715	Undated	SWRCB	Water Board - Division of Water Rights narrative of pending NID petitions
VIII.	Exhibit 33	1719	2016 10 25	FWN	Foothill Water Network Protest of Pending SWRCB Petitions and Applications
VIII.	Exhibit 34	1745	2008 08 11	CDFW	Excerpts from Joint Agency PAD Comment Letter and Attachment
IX.	Exhibit 35	1944	2011 12 22	Placer	ICF Report on fish relocation project
IX.	Exhibit 36	1957	2002	Placer	Auburn Ravine Coon creek Ecosystem Restoration Plan Chapter 10
IX.	Exhibit 39	1993	2009 10 21	SWRCB	Notice of NID Change Petitions
IX.	Exhibit 37	2035	2017 08 07	MYCC	ClubCorp stock / market price
IX.	Exhibit 38	2039	2008 09 04	SWRCB	DWR inspection report
X.	Exhibit 40	2081	2015 12	CDFW	2012 Instream Flow Study (pub. 2015 12)
X.	Exhibit 41	2215	2019 10 22	LSC	Lincoln/Sun City compiled fact sheet
X.	Exhibit 42	2231	2016 05 18	NID	Press release: NID Takes Lead on Auburn Ravine Fish Passage
X.	Exhibit 43	2235	2019 10 22	NID	Website: Hemphill Diversion Facility
XI.	Exhibit 45	2235	2010 04	PG&E	Technical Memorandum for Drum-SpaULDing Project
XI.	Exhibit 46	2269	2014 11 07	NID	CEQA for maintenance activity
XI.	Exhibit 47	2272	2019 -- --	NID	NID operating and non-operating budget for 2020

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VOL	EXHIBIT	PAGE	DATE	SOURCE	TITLE
XI.	Exhibit 48	2332	2018 12 13	NID	NOAA/NMFS opinion of Alternative 4 and fish entrainment
XI.	Exhibit 49	2338	2019 10 17	WAC	Declaration of Steve Hubbard
XI.	Exhibit 50	2342	2019 10 19	WAC	Declaration of Jack Sanchez
X.	Exhibit 44	2371	2009 06 16	NMFS	Central Valley Chinook fall-run ESU "special concern"
IV.	Exhibit 14				DUPLICATE RECORDS REDACTED
VIII.	Exhibit 31				DUPLICATE RECORDS REDACTED

1 I. INTRODUCTION

2 1. “It is a challenging undertaking to facilitate a change in practice and policy
3 that reverses the path towards extinction of a species to one of recovery.”

4 *McKinnon Dec. Ex. 2:3:000153*¹ “Merely increasing a species’ numbers, range
5 and abundance does not ensure its long-term health and sustainability; only by
6 alleviating threats can lasting recovery be achieved.” *McKinnon Dec. Ex.*
7 *2:3:000228*

8 2. Two distinct environments are required for the life cycle of anadromous
9 salmonids such as steelhead and Chinook salmon. An anadromous fish is
10 hatched and nurtured in gravel beds in clean, cold fresh water. They must have
11 access to saltwater to mature, then be able to return to spawn in the fresh waters
12 of their birth. Auburn Ravine is reported to be the best potential salmonid
13 spawning habitat in Placer County, greater than all other streams combined.

14 3. More than one hundred and fifty years of development has changed the
15 natural flows of water in Placer County. As set forth in this petition, the survival
16 of the Auburn Ravine salmonid population hangs uncertain, with its survival
17 dependent on our present decisions and conduct.

18 4. Petitioner WATER AUDIT CALIFORNIA seeks a judicial declaration that
19 NEVADA IRRIGATION DISTRICT’s Hemphill Diversion Facility² in Placer County
20 is an unlawful stream obstruction and an unlawful manner of diversion. Further,
21 Water Audit seeks a writ of mandate to compel the respondent to remediate the
22 Hemphill Dam’s impairment to fish passage, and to cease the unlawful kill of fish
23 caused by the inadequate manner of diversion.

¹ Declaration of William McKinnon In Support of Verified Petition for Writ of Mandate, Volume II: Exhibit No. 3: at page 000153.

² The Hemphill Diversion Facility (Hemphill Diversion) consists of two components. The Hemphill Dam raises the water level in Auburn Ravine to allow distribution for beneficial use by the Hemphill Canal. As discussed herein, each poses its own distinct injury to fish.

1 II. THE PARTIES

2 5. Petitioner WATER AUDIT CALIFORNIA (Water Audit) is a California
3 public benefit corporation, organized and existing under the laws of the State of
4 California. Its mission is advocacy for the public trust. Water Audit is a “person”
5 pursuant to California *Corporations Code* §§ 18 (“Person’ includes a corporation
6 as well as a natural person”); 15901.02 (“Person’ means an individual . . .
7 corporation . . .”); and 25013 (“Person’ means an individual, a corporation . .
8 .”). Water Audit maintains a website at www.WaterAuditCA.org.

9 6. Respondent NEVADA IRRIGATION DISTRICT (NID) is a public entity
10 formed and operating as a water district pursuant to *Water Code Chapter 11, §*
11 *20500 - 29978*, with offices located at 1036 W Main St, Grass Valley, CA 95945.
12 NID is the owner of the Hemphill Diversion. NID maintains a website at
13 www.NIDWater.com.

14 7. Water Audit does not know the identities of DOES 1 to 100, inclusive, and
15 therefore sues them by these fictitious names. Water Audit is informed and
16 believes, and on the basis of such information and belief alleges, that each of
17 these parties is in some manner legally responsible for, or affected by, the events
18 and happenings alleged herein. Specifically, Water Audit is informed that the
19 DOES may own or operate flash board dams downstream of Hemphill Dam.
20 *McKinnon Dec. Ex. 3:7:000567-72*

21 8. Water Audit is further informed and believes, and on the basis of such
22 information and belief alleges, that at all times mentioned the respondents were
23 the agents, coventurer, partner and/or employees of their co-respondents and
24 defendants, and in doing the things herein alleged were acting within the course
25 and scope of such agency and employment. In the alternative, Water Audit is
26 informed and believes, and on the basis of such information and belief alleges,
27 that each of these parties is in some manner an interested party concerning the
28 events and happenings alleged herein.

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III. STANDING

9. The fish and wildlife resources in California are held in trust for the people of the state. *National Audubon v. Superior Court* (1983) 33 Cal.3d 419; 189 Cal.Rptr. 346; 658 P.2d 709 (*Audubon*) The California Department of Fish & Wildlife³ (CDFW) is the state designated trustee. (*Fish & Game Code (FGC) § 711.7*) CDFW maintains a website at www.Wildlife.CA.gov.

10. The National Marine Fisheries Service (NMFS), informally known as NOAA Fisheries, is the United States federal agency responsible for the stewardship of national marine (saltwater) resources. Because anadromous fish spend part of their lives in fresh water and part in saltwater, and the health of both environments is critical to the sustainable survival of salmonids, the CDFW trustee’s role is joined with NMFS/NOAA efforts.

11. If trustee agencies do not act to sufficiently to protect the public trust, whether due to conflicting priorities, limited financial resources, political considerations, or for any other reason, a private person has standing to commence an action in the public interest. (*Code of Civil Procedure (CCP) § 1021.5; Green v. Obledo*, 29 Cal.3d 126, 144 (1981)). As a resident of California, Water Audit has an interest in preserving the public trust in fish. Water Audit has no greater potential benefit from this action than any other California resident.

³ CDFW’s Mission Statement: “To manage California's diverse fish, wildlife, and plant resources, and the habitats upon which they depend, for their ecological values and for their use and enjoyment by the public.”

1 IV. JURISDICTION

2 12. This Court has subject matter jurisdiction because the causes of action
3 and form of proceedings arise, *inter alia*, from the California Constitution; the Fish
4 & Game Code; the Code of Civil Procedure; the Civil Code; the Water Code; the
5 Government Code; and the California public trust doctrine.

6 V. VENUE

7 13. Venue is proper in this Court under CCP § 393 because the causes of
8 action arose in a stream located in part in the County of Placer, California.

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10 VI. AUTHENTICITY OF EXHIBITS ATTACHED

11 14. The documents accompanying this petition and supporting declaration of
12 William McKinnon (*McKinnon Dec.*) are true and correct copies of the original
13 documents. Any materials attached were obtained in the manner described in the
14 *McKinnon Dec.*, which is filed concurrently herewith. The documents attached to
15 the *McKinnon Dec.* are incorporated herein by reference as though fully set forth
16 in this Petition.

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1 VII. FACTS

2 A. HYDROLOGY



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Hemphill Dam

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McKinnon Dec. Ex. 2:3:000422

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15. Auburn Ravine is a 33-mile-long creek in the western Sierra Nevada foothills. “Surveys of potential salmonid spawning habitats conducted in 2004 within streams in western Placer County found that Auburn Ravine contained more potential spawning habitat than all other surveyed stream reaches combined.” *McKinnon Dec. Ex 1:1:00005*

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16. The headwaters of the Auburn Ravine originate at an elevation of 1,100 feet in Placer County at the PG&E Wise Powerhouse, located on the northern edge of the City of Auburn, approximately 1½ miles from the Auburn Historic Courthouse. *McKinnon Dec. Ex 1:1:00005*

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1 17. The reach from Auburn to Ophir is a steep and rocky cascade.
2 Downstream of Ophir the channel gradient decreases to approximately 2% and
3 the channel becomes dominated by pools, runs, and riffles. Various sized
4 gravels and coarse sediment, ideal for salmonid spawning, dominate channel
5 substrates. "Auburn Ravine has the potential for significant anadromous fish
6 resources especially fall-run and late fall-run Chinook salmon and steelhead
7 trout." *McKinnon Dec. Ex 1:1:00005*

8 18. Auburn Ravine is joined by Dutch Ravine near the Town of Gold Hill at an
9 elevation of 324 feet. *McKinnon Dec. Ex 8:34:001794*

10 19. Auburn Ravine is roughly bifurcated at the Joiner Bridge in the City of
11 Lincoln into highly desirable fish habitat upstream, and generally unsuitable
12 spawning habitat downstream. The downstream reach largely acts as a
13 migration corridor from the ocean to the spawning grounds upstream from
14 Lincoln. *McKinnon Dec. Ex. 1:1:000009*

15 20. Downstream from the Joiner Bridge the channel begins to contain fine
16 sediment and fine sediment transport, the riparian vegetation diminishes, and the
17 bottom is sand covered. There is little productivity or habitat complexity. Rice
18 farms and livestock ranches border the stream. In some portions the stream is
19 contained in levees, and riparian vegetation is restricted by grazing and human
20 activity. The lower 2 ½ miles of Auburn Ravine is rerouted into the East Side
21 Canal at the elevation of 40 feet, flowing south to Pleasant Grove, where it joins
22 the Cross Canal. The Cross Canal meets the Sacramento River immediately
23 downstream from the Feather-Sacramento River confluence at the
24 unincorporated community of Verona. *McKinnon Dec. Ex. 1:1:000066; Ex.*
25 *8:34:001794; Ex. 8:23:001593-1596; Image Ex. 3:7:000572*

26 51. In 2010 there were three permanent structures in Auburn Ravine that
27 obstructed fish passage: The Lincoln Gaging Station downstream from the Joiner
28 Bridge, (2) the Hemphill Diversion upstream from the bridge; and (3) the Gold Hill
29 Dam, further upstream from the Hemphill Diversion. (*McKinnon Dec. Ex.*

1 3:4:000419) The Gold Hill Dam, also known as Auburn Ravine One, will be
2 separately addressed in a subsequent proceeding as necessary, and will not be
3 discussed further herein.

4 21. A citizen's group, Dry Creek Conservancy, has published excellent drone
5 and video footage of Auburn Ravine from the headwaters in Auburn to the mouth
6 at Verona. See: <https://www.youtube.com/watch?v=xj5UgCM5kv4>. Overhead
7 images of Hemphill Dam appear at 5:48 et seq. See also a video of Auburn
8 Ravine, an entrant in the 2016 Wild & Scenic Film Festival, hosted by Gold
9 Country Images at <https://www.goldcountryimages.com/videos/>. Footage of
10 Hemphill Hill begins at 7:45. Images of failed attempts of fish passage begin at
11 8:15.

12 22. Prior to development Auburn Ravine flows were ephemeral, gradually
13 declining through the spring, summer, and early fall until the first seasonal storm
14 events. Rice farming has driven water management practices of timing and flow
15 during the spring through early fall. Irrigation flow augmentation typically begins
16 between April 15 and May 1 and ends by October 15 each year. *McKinnon Dec.*
17 *Ex. 1:1:00005; Ex. 1:1:00009; Ex. 1:1:00067; Ex. 3:8:000665; Ex. 3:7:000533-35*

18 23. NID does not measure Auburn Ravine flows year-round, and on occasion,
19 particularly in high flow events, flow is measured only opportunistically.
20 *McKinnon Dec. Ex. 3:4:000420; Ex. 10:41:002226-27* During irrigation season
21 flows are measured once daily by human observation of the water level on a
22 marked stick. Mean monthly flows are reported to range from 116 cubic feet per
23 second (CFS) in July to 37 CFS in September. *McKinnon Dec. Ex. 3:4:000420*
24 Flows are reported to be measured by the City of Auburn by gage AR-1 located
25 at river mile 27. This data set appears broadly consistent with NID reports, but
26 also shows off-season flows as low as 4.1 CFS. *McKinnon Dec. 3:7:000584*

27 24. Recorded data indicates that the average flow during irrigation season
28 ranged from 6 to 16 CFS and can range up to 180 CFS. *McKinnon Dec. Ex.*
29 *3:7:000525; Ex. 4:11:000807; Ex. 6:16:001247-48*

1 25. The Hemphill canal is variously estimated to have a peak demand of 15-
2 18 CFS by the year 2032. *McKinnon Dec. Ex. 4:11:000710; Ex. 4:11:000807;*
3 *Ex. 6:16:001084; Ex. 6:16:001175.* For both estimates on the same page see
4 *McKinnon Dec. Ex. 6:17:001271.*

5 26. Compared with the historical flow regime, current management practices
6 produce higher flows year-round and more consistent flows during the spring and
7 summer months, likely providing cold water habitat for salmonids during time
8 periods which historically lacked cold water habitat. *McKinnon Dec. Ex.*
9 *3:4:00420; Ex. 3:7:000515*

10 Water management in these watersheds is driven by agricultural
11 deliveries to land areas west of Highway 65. As a result, the volume
12 of water in the stream continually decreases downstream, until
13 agricultural return flows eventually increase the volume of water in
14 the stream channel. However, once water deliveries decrease in
15 the fall and the stream water may be of suitable water temperature
16 to support chinook salmon and steelhead, there may physically not
17 be sufficient water in the channel to allow upstream migration.
18 Chinook salmon and steelhead have minimum water depths that
19 are necessary in order for them to migrate upstream to spawning
20 areas. The low gradient of these streams once they reach the
21 valley floor, combined with a flat, sandy substrate, creates barriers
22 to upstream migration under low flow conditions. These conditions
23 can exist during most any month of the year during a severe
24 drought. *McKinnon Dec. Ex. 7:19:001605*
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1 B. RELATED PROCEEDINGS

2 27. **Although a sufficient supply of water is of critical importance to the**
3 **survival of salmonids, this petition does not seek to engage in the issue of**
4 **flow in Auburn Ravine.** That subject is already pending in two proceedings,
5 one before the Federal Energy Regulatory Commission (FERC)⁴ and the other
6 before the State Water Resources Control Board, Division of Water Rights
7 (Water Board)⁵. These preexisting proceedings are briefly discussed herein to
8 distinguish them from the instant petition: this matter concerns an *unlawful*
9 *stream obstruction and manner of diversion*, while the other proceedings concern
10 various aspects of *flow*. The FERC and Water Board proceedings could be fully
11 adjudicated, and the Hemphill Dam obstruction still remain. Conversely, this
12 issue can be remediated without consequence in the FERC or Water Board
13 proceedings.

14 28. The NID, PG&E, and the Placer County Water Agency have intertwined
15 projects through various power and water purchase and supply contracts. In
16 addition, PG&E and NID provide space to one another in their diversion
17 structures, so that they both may take full advantage of their water rights. The
18 Auburn Ravine is only one component in the FERC licenses for the Yuba-Bear and
19 Drum-Spalding (YBDS) projects, which were originally issued in 1963 and expired on
20 April 30, 2013. *McKinnon Ex 4:12:000891*

21 The YBDS relicensing process is the combined relicensing of three
22 hydroelectric projects. The Yuba-Bear Project (FERC #2266) is
23 operated by the Nevada Irrigation District (NID). The Drum-Spaulding
24 Project (FERC #2310) and the Rollins Transmission Line Project

4 FERC's Mission Statement: "Assist consumers in obtaining economically efficient, safe, reliable, and secure energy services at a reasonable cost through appropriate regulatory and market means, and collaborative efforts."

5 Water Board's Mission Statement: "To preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations."

1 (FERC #2784) are operated by Pacific Gas and Electric Company
2 (PG&E). For relicensing, these projects have been combined because
3 of their complex physical interconnectedness. In combination they
4 include 38 on stream reservoirs, three off stream impoundments,
5 five diversion dams, many miles of canals, 16 powerhouses, 270
6 megawatts of electrical power generation, and more than 350,000
7 acre feet of water storage on the Middle Yuba, South Yuba, Bear,
8 and North Fork American Rivers. These are among the most
9 controlled watersheds and basins anywhere. *McKinnon Dec. Ex.*
10 *4:12:000891*

11 29. FERC has stated: “The primary issues associated with relicensing the
12 projects are erosion control and restoration measures; flow regimes in project-
13 affected reaches for aquatic resources; spill cessation schedules following high-
14 flow periods to mimic natural conditions and for whitewater boating
15 opportunities⁶; protection of wildlife resources; recreation enhancements; and
16 protection of cultural resources.” *McKinnon Dec. Ex. 8:23:001590*

17 30. PG&E has filed an environmental Technical Memorandum in the FERC
18 process that references the Auburn Ravine but does not address the remediation
19 of Hemphill Dam. *McKinnon Dec. Ex. 3:7:000497*

20 31. Similarly, CDFW has filed “Comments” in the FERC proceedings that
21 references Auburn Ravine generally but makes no direct reference to the
22 remediation of Hemphill Dam. *McKinnon Dec. Ex. 8:34:001745; Ex. 11:45:2271*

23 32. Additionally, and concurrently, there is a proceeding pending before the
24 Water Board that concerns the volume, *but not the manner* of diversion to
25 beneficial use. *McKinnon Dec. Ex. 8:32:001715; Ex. 9:39:001993*

26 The development of NID’s existing conveyance system began
27 during the mid-1800s, which coincides with the establishment and
28 refinement of California water law. Over the past one-hundred
29 years, changes in California and Division policies, including a

⁶ This should be read, in part, as a general aspirational statement. Water Audit has found no evidence to suggest that Auburn Ravine is considered suitable for high flow white water boating.

1 heightened level of attention to water use and accounting within
2 California, together with the development of water measurement
3 and accounting tools, have dramatically changed water use
4 analysis and reporting. Simultaneously, NID has developed and
5 modernized its conveyance system, including refining the purposes
6 of use and places for using water, while diligently pursuing to place
7 water for beneficial use under its water rights. Continuous
8 improvement in the available technology relative to measurement,
9 calculating water use, identifying facilities using GPS, and other
10 factors have allowed NID to better describe current water use and
11 existing facilities. These converging topics directly affect the
12 licensing process; and have resulted in the need for NID to file
13 twenty-one (21) Petitions to nine (9) of the Permits listed above and
14 an additional five (5) Petitions to another five of NID's existing water
15 right licenses, pursuant to the request of Division staff. *McKinnon*
16 *Dec. Ex. 7:32:001716*

17 33. In 2009 the CDFW and Foothill Water Network (FWN) a consortium of
18 community environmental advocates, both filed protests to NID's Water Board
19 petitions. While the broad scope of the protests implicates Auburn Ravine, the
20 Water Board has not asserted express jurisdiction over this problem. *McKinnon*
21 *Dec. Ex. 7:33:001719; McKinnon Dec. Ex. 3:6:000487*

22 34. In preparation for the adjudication of the NID petition the Water Board has
23 conducted a comprehensive review and reporting of NID diversions. Providing a
24 sense of the time scale on which such matters are considered, a 2008 inspection
25 report pertaining to Auburn Ravine notes that the original petition for water rights
26 was filed in 1921. In the century since the applications were filed changes in
27 human use have reduced agricultural irrigation from 167,789 to 22,742 acres.
28 The Water Board's report does not address the Hemphill Dam obstruction except
29 by generic reference to the diversion being subject to the public trust. The
30 inspection report states that adequate diligence has been made to put water to
31 beneficial use, given the "normal delays due to development plan changes,
32 changes in community size and values, political forces, project financing, and the
33 sporadic nature of rural and urban area growth." It stated that an "*option is for*
34 *NID to obtain a time extension of 25 years to cover additional M & I growth.*

1 development and/or expansion of water use under this permit.” (Emphasis
2 added.) *McKinnon Dec. Ex. 9:38:002041*

3 35. There is a process by which technical and engineering issues have been
4 raised and resolved within FERC and Water Board proceedings. See for
5 example the French Lake gaging approval. *McKinnon Dec. Ex. 8:28:001660*

6 36. There is no evidence known to Water Audit that either the FERC or Water
7 Board proceedings have assumed jurisdiction over the existence or operation of
8 Hemphill Dam or the mechanism of diversion into Hemphill Canal.

9
10 D. FISH STATUS

11 37. Auburn Ravine is a designated critical habitat for Central Valley (CV)
12 steelhead, known to be supporting the migration, spawning, and rearing of the
13 Central Valley steelhead distinct population segment (DPS).⁷ *Dec. Ex.*
14 *7:20:001517 (Figure 2.10)*

15 38. In March 1998 NMFS listed the Central Valley steelhead as a threatened
16 species. In 2006 NMFS reaffirmed this DPS as threatened. *McKinnon Dec. Ex.*
17 *8:28:001670*

18 39. Auburn Ravine is designated an essential fish habitat (EFH) for the
19 Central Valley fall-run Chinook salmon Evolutionary Significant Unit (ESU)⁸ and
20 a California and federal Species of Concern. *McKinnon Dec. Ex. 8:28:001668*

21 40. Central Valley fall-run Chinook salmon ESU are classified as a California
22 State Species of Special Concern. At the federal level, it is considered a Species

⁷ A distinct population segment is the smallest division of a taxonomic species permitted to be protected under the U.S. Endangered Species Act. For listing/delisting criteria see *McKinnon Dec. Ex. 7:20:001557; Ex. 7:20:001559*.

⁸ An evolutionarily significant unit is a population of organisms that is considered distinct for purposes of conservation. This term can apply to any species, subspecies, geographic race, or population. Delineating ESUs is important when considering conservation action.

1 of Concern under the Endangered Species Act. Auburn Ravine is considered to
2 be essential fish habitat. *McKinnon Dec. Ex. 10:41:002220*

3 41. Fall-run Chinook are designated as a Species of Concern by the National
4 Marine Fisheries, as Sensitive by the USDA Forest Service, and as Vulnerable
5 by the American Fisheries Society. *McKinnon Dec. Ex. 1:1:000034*

6 42. Additionally, Auburn Ravine provides valuable non-natal support for
7 threatened spring-run Chinook and endangered Sacramento River (SR) winter-
8 run Chinook. *McKinnon Dec. Ex. 1:2:000128*

9 43. The latter species is wholly dependent on the Livingstone Hatchery at the
10 foot of Shasta Dam for its survival; there are no natural populations in this ESU to
11 buffer it from natural fluctuations. Events such as prolonged drought depleting
12 the cold-water pool in Shasta Reservoir, failure to manage cold-water storage, a
13 spill of toxic chemicals⁹, a persistent disease outbreak, or geological activity such
14 as earthquake or landslide could result in the total loss of the Sacramento River
15 winter-run Chinook. *McKinnon Dec. Ex. 7:20:001474*

⁹ In 1991 a Southern Pacific train derailed on the Cantera Loop near
Dunsmuir, CA, pouring 19,000 gallons of herbicide into the upper Sacramento
River. It was so toxic that it was three days before scientists were allowed near
the water. Almost every living organism downstream for 38 miles was dead.
Although fortuitously fish species appear to have recovered, nearly thirty years
later the river is still reported fundamentally changed.

1 D. FISH SAMPLING

2 44. Populations of the salmonid fish *Oncorhynchus mykiss* occur naturally in
3 the Auburn Ravine, both as a freshwater resident rainbow trout and as a sea-run
4 anadromous steelhead. Sampling events as early as 1959, 1971, 1979, and
5 1984 indicated the presence of steelhead in Auburn Ravine. *McKinnon Dec; Ex.*
6 *1:1:000036; Ex. 2:3:000201*

7 45. During the fall of 2004 through into the spring of 2005 the CDFW
8 conducted surveys on seven reaches in Auburn Ravine. In 2004, 689 fish were
9 collected, 309 were identified as steelhead or rainbow trout. In 2005, 674 fish
10 collected, 253 were identified as steelhead/rainbow trout; 2,163 juvenile
11 steelhead per river mile were estimated in a portion of the survey reach.
12 *McKinnon Dec. Ex. 1:1:000036; Ex 8:33:001702*

13 46. In 2012 CDFW did an instream flow study to determine sufficient to keep
14 fish in good condition and to inform future water rights, FERC licensing and other
15 local flow threshold setting processes. *McKinnon Dec. Ex. 10:40:002081*

16 47. A CDFW stream study published in September 2015 unambiguously
17 reported the deleterious effect of Hemphill Dam on spawning. In 2012 the
18 CDFW found 43 redds¹² downstream from the dam, and 3 redds upstream
19 above the dam. In 2013 a major storm event washed out all but 1 redd
20 downstream, and all redds upstream, but in 2014 the 2012 pattern reappeared,
21 with 22 redds downstream, and only 2 redds above the dam. *McKinnon Dec. Ex*
22 *8:26:001604 et seq. See also Ex. 1:2:000120 et seq.*

¹² A salmon redd is a depression created by the upstroke of the female salmon's body and tail, sucking up the river bottom gravel and using the river current to drift it downstream. The female salmon digs a number of redds, depositing a few hundred eggs in each during the one or two days she is spawning. A redds survey helps biologists accurately estimate the number of salmon and steelhead migrating to and spawning in rivers.

1 48. As a result of that survey CDFW was able to conclusively determine that
2 **Auburn Ravine supports the migration, spawning, and rearing of**
3 **threatened steelhead and fall-run Chinook.** It provides critical non-natal
4 rearing habitat for threatened juvenile spring-run Chinook and endangered
5 winter-run Chinook.¹³ It also reports the detrimental effect of the Hemphill Dam
6 on the ability of protected fish to reach suitable spawning grounds. *McKinnon*
7 *Dec. Ex. 1:2:000120*

8 49. A CDFW memorandum in August 2015 summarized the situation:

9 The natural [fall-run Chinook] population that is able to utilize the
10 Auburn Ravine is an important component of the Central Valley
11 Chinook salmon complex and is of management importance to the
12 California Department of Fish and Wildlife (Department).
13

14 The Auburn Ravine supports the migration, spawning, and rearing
15 of fall-run Chinook salmon. Most spawning and rearing occurs in
16 the reaches upstream of Highway 65. Below Highway 65 Auburn
17 Ravine provides an essential migratory corridor for adult fall-run
18 Chinook salmon during their spawning migration to upstream
19 reaches in the fall. The Auburn Ravine is important for juvenile fall-
20 run Chinook salmon that are emigrating from the upper reaches on
21 their journey to the Pacific Ocean via the Sacramento River during
22 winter and spring months. The Auburn Ravine also appears to
23 provide rearing habitat for non-natal rearing of juvenile winter and
24 spring-run Chinook salmon as documented in the Department's
25 2013 Auburn Ravine Rotary Screw Trap (RST) Monitoring Report.
26 *McKinnon Dec. Ex. 6:16:001583*
27

28 50. In June 2016 the NID approved the installation of a fish passage video
29 monitoring system. *McKinnon Dec. Ex. 3:9:000682* Images subsequently
30 captured provide additional proof of the presence of protected fish. *McKinnon*
31 *Dec. Ex. 8: 27:001621*

32 51. As an NID consultant wrote in January 2018: "This [research data]
33 indicates a potential barrier to upstream passage occurs at Hemphill Diversion

¹³ *Endangered Winter-run Chinook Salmon Rely on Diverse Rearing Habitats in a Highly Altered Landscape* Biological Conservation Volume 217, January 2018, Pages 358-362 <https://doi.org/10.1016/j.biocon.2017.10.023>

1 Facility when flows are unsuitably low to allow passage (thought to be somewhat
2 less than 150 CFS during an unspecified time, currently characterized as several
3 days). Much information was gained during the prior three years of survey.”

4 *McKinnon Dec. Ex. 4:11:000833*

5
6 VIII. OBSTRUCTIONS IN AUBURN RAVINE

7 A. THE LINCOLN GAGING STATION

8 52. In or about 1981 NID constructed a flow gaging¹⁴ station to measure
9 irrigation deliveries (Gaging Station). It is approximately 1,500 feet downstream
10 from the Joiner Bridge. Initially it consisted of a flat channel-spanning concrete
11 section that formed a broad flume with vertical sides. A level ogee shaped curb,
12 approximately 0.8 feet tall, spanned the outlet of the flume. The flume and curb
13 section were 25 feet wide, with flaring sidewalls and apron at the inlet and outlet.

14 The flume was approximately 28 feet in length. *McKinnon Dec. Ex. 1:1:000006*;
15 See images *McKinnon Dec. Ex 3:4:000421*

16 53. The channel bed downstream of the Gaging Station incised about 6 feet
17 after construction. The NID placed a field of boulder rip rap below the
18 downstream lip to prevent additional undermining of the gaging structure. Except
19 during very high flows, by 2011 the cumulative result was that the Gaging Station
20 constituted a full barrier to upstream salmonid migration. *McKinnon Dec. Ex.*

21 *1:1:000006; Ex. 6:16:1144*

22 54. The gaging station was remediated in 2011-12 with a pool and weir fish
23 ladder funded by NID, CalFed and Placer County.

24
25

¹⁴ Also spelled “gauging.”

1 B. THE HEMPHILL DIVERSION FACILITY

2 55. The Hemphill Dam and associated works prevent the migration of fish up
3 and downstream except in infrequent high flows, denying access to prime
4 spawning reaches and impairing natural reproduction. If fish manage to
5 overcome this obstruction and reproduce upstream of the Hemphill Diversion, the
6 fry¹⁵ can easily be entrained¹⁶ into the diversion into Hemphill Canal, where they
7 perish. Remediation therefore consists of two parts: the provision of
8 unencumbered passage up and downstream, and the prevention of entrainment
9 of fish into the Hemphill Canal.

10 56. The Hemphill Diversion is located in the Auburn Ravine, west of the City
11 of Lincoln, south of Virginiatown Road and north of Highway 193, proximate to
12 the Turkey Creek Golf Course. (Latitude: 38°53 148.28 11N, Longitude: 121
13 °15'6.92 11W). *McKinnon Dec. Ex 6:16:001220*

14 57. The NID reports that it built the Hemphill Canal in 1935. “A wooden
15 diversion structure, [the predecessor to the present Hemphill Dam] was
16 constructed in Auburn Ravine to divert flows into the Hemphill Canal. In 1969,
17 the concrete head works of the Hemphill canal were built.”¹⁷ *McKinnon Dec. Ex.*
18 *4:16:001246 See also 3:4:000421*

¹⁵ A fry is a young salmonid, 2.5 cm to 5.5 cm in length, (approximately two inches) living in fresh water that is older than an alevin, a newly hatched salmonid still attached to the yolk sac, and younger than a smolt. A smolt is up to about two years old, is from 5.5 cm to 9 cm in length, (approximately 3 ½ inches) and is at the stage of development when it assumes the silvery color of the adult and is ready to migrate to the sea.

¹⁶ Entrainment is the process of making something part of a liquid flow and carrying it along. In this instance fry or smolts are reported entrained in the water diversion that is subsequently used for golf course and landscape irrigation.

¹⁷ The subject grant application continues “and the existing concrete diversion dam was built in 1981,” but other documents indicate this statement may or may not be accurate.

1 58. “The crest of the diversion structure is lower than the invert of the culvert,
2 meaning that there will be no flow into the canal until the water surface elevation
3 in the stream exceeds the diversion structure crest, hence the need for the
4 flashboards.” The diversion culvert has an adverse slope – the outlet end is
5 higher than the inlet – and the volume of the culvert has been substantially
6 diminished by silt. *McKinnon Dec. Ex. 4:11:000761; Ex. 6:16:001087-89*

7 59. The Hemphill Canal diversion culvert inlet is located 40 feet upstream from
8 the Hemphill Dam, on the left side of the channel if looking downstream. It is
9 inadequately screened and does not prevent fry, smolt or fish entrainment. See
10 image below and at *McKinnon Dec. Ex. 6:16:001088-89*.

11



12

13 Diversion culvert from Auburn Ravine into Hemphill Canal

14 *McKinnon Dec. Ex. 6:16:001088*

15

16 60. Floods in late December 1996 and January 1997 are reported by NID to
17 have:

18 ... washed out the north abutment of the Hemphill Diversion
19 structure, eroded 1757 feet of channel slope on the north side,
20 washed out riprap on the north and south sides of the abutment,
21 and washed out fill under the concrete base of the structure.

18

1 Emergency repairs, completed in March 1997, included
2 replacement of 555 cubic yards of embankment, and 200 cubic
3 yards of riprap, and placement of 49 cubic yards of concrete. The
4 emergency work was approved by the Federal Emergency
5 Management Agency (FEMA) and the California Office of
6 Emergency Services. It cost \$46,686, and the work qualified for
7 FEMA¹⁸ funding. *McKinnon Dec. Ex. 8:24:001596*

8 61. The present Hemphill Dam is constructed with permanent concrete
9 trapezoidal dam abutments about 8 feet high and 64 feet apart, connected with a
10 horizontal concrete sill. The elevation of the sill is approximately 6 feet above the
11 natural invert of the stream channel, posing a similar obstruction as the Gaging
12 Station discussed above. Seasonal flashboards are installed on Hemphill Dam
13 from approximately April 15 to October 15 each year. A sprayed concrete apron
14 slopes downstream from the sill. There is not a downstream curb to raise water
15 level across the apron. Further, the apron is relatively smooth, producing a very
16 shallow super-critical sheeting (a very fast-moving flow) during low to moderate
17 stream flows. Except in very high flows, this configuration produces a velocity
18 barrier for fish for at least 30 feet. *McKinnon Dec. Ex. 8:21:001583*. See images
19 at *McKinnon Dec. Ex. 3:4:000422*.

20
21 IX. ONE FOOT IN THE ROWBOAT, ONE FOOT ON THE DOCK

22 62. Indecision is appropriate in a situation where there is much to be learned
23 about a project, but this conduct is rational for only for so long as there is
24 something new to be learned about the subject. That juncture was reached at
25 the Hemphill Diversion some years ago. For nearly twenty years NID,
26 NOAA/NMFS, CDFW, Placer County, Love & Associates, Kleinschmidt, HK/NV5,
27 Helix Environmental, citizen activists and scientists, and numerous others have
28 studied fish, habitat, and how to remediate the Hemphill Diversion. Alternatives

¹⁸ FEMA'S Mission Statement: "To reduce the loss of life and property and protect our institutions from all hazards by leading and supporting the nation in a comprehensive, risk-based emergency management program of mitigation, preparedness, response, and recovery."

1 have been presented, examined, debated, and further studies ordered. In 1997 it
2 took four months and cost FEMA less than \$50,000 to “repair” the dam structure.
3 The Hemphill Dam was and is not a major engineering work. It has taken over
4 200 months and over \$750,000 (thus far) to accomplish nothing on the ground.
5 The Hemphill Diversion remains the same environmental affront that it was
6 almost two decades ago.

7 63. The trustee agencies and local citizens have not quietly accepted this
8 paralysis by analysis, and have continually agitated NID for action, yet the
9 Hemphill Dam remains an unlawful obstruction to migration, and the diversion
10 into the Hemphill Canal remains a perennial killer of protected fish. An
11 abbreviated review of eighteen years of circular movement follows.

12 64. The community’s process of attempting remediation for Auburn Ravine
13 formally began in 2002 when Placer County set forth a list of objectives¹⁹
14 including:

- 15 (a) Providing adult chinook salmon and steelhead trout unrestricted
16 access over diversion structures or gauging stations to
17 spawning areas by 2008;
- 18 (b) Designing and constructing a fish passage structure at NID’s
19 Auburn Ravine One [Gold Hill] Diversion Dam by October 2005.
- 20 (c) Designing and constructing a fish passage structure at NID’s
21 Hemphill Diversion Dam by October 2006;
- 22 (d) Correcting fish passage impediments at the NID gauging
23 station, near Highway 65 either by improving structure
24 hydraulics or replacing the structure with a pool and chute
25 fishway. Complete this project by November 2006. *McKinnon*
26 *Dec. Ex. 9:36:001987-89*

¹⁹ The Restoration Plan as a whole was much broader in scope than the limited quotations reveal. See the entire “Project Identification” section. *McKinnon Dec. Ex. 9:36:001959-2015*

1 65. In 2005 a “conceptual fish passage design report was developed for the
2 NID Gaging Station and the Hemphill Dam (The Mines Group, 2005). The report
3 provided two alternative approaches in addressing fish passage at the NID
4 Gaging Station site. The first approach involved the removal of the structure and
5 the second involved rock-filled gabions to construct a pool and weir fish ladder.”

6 *McKinnon Dec. Ex 3:4:000423*

7 66. Subsequently Placer County:

8 ... employed the services of Winzler & Kelly (project engineers),
9 Michael Love & Associates (fish passage engineers) and McBain &
10 Trush (riparian vegetation and fisheries consultants) to design fish
11 passage improvements for salmonids at the NID Gaging Station
12 and Hemphill Dam sites. Comments and suggestions received were
13 then incorporated into the final alternatives presented ...A project
14 advisory group was composed of numerous stakeholders, which
15 included staff from the County of Placer, the City of Lincoln, NID,
16 and the California Department of Fish and Game (CDFG). Members
17 of the design team met with the advisory group for a design review
18 meeting on November 20, 2008 to review and provide comment on
19 the conceptual alternatives. *McKinnon Dec. Ex. 3:4:000419*

20 67. In 2009 Love & Associates produced a study that began by
21 acknowledging the presence of Chinook salmon and steelhead trout in Auburn
22 Ravine and that there were two obstructions limiting the fish population: the NID
23 Gaging Station and the Hemphill Dam. *McKinnon Dec. Ex. 3:4:00419*

24 68. Also, in 2009 National Marine Fisheries Service (NMFS) distributed its
25 *Draft Recovery Plan for Central Valley Chinook Salmon and Steelhead*, which
26 among other things recorded NID’s promise to the community to promptly
27 rehabilitate Auburn Ravine.

28 Placer Legacy and NID are currently in the process of retrofitting
29 the Lincoln Gaging Station and Hemphill Dam for fish passage.

30 ***These dams will be retrofitted by the end of Summer 2009.***

31 Fish will then be able to reach the base of NID’s Gold Hill Diversion
32 Dam. NID has identified retrofitting Gold Hill Dam to facilitate fish
33 passage as a focus for NID once fish are able to reach the dam.
34 (Emphasis added.) *McKinnon Dec. Ex. 2:3:000303*

1 69. In 2010, after discussion within the Placer County steering committee,
2 Love & Associates produced 30% engineering documents for one of the Hemphill
3 Dam remedial alternatives discussed in the 2009 study. *McKinnon Dec. Ex.*
4 *3:5:000481*. That alternative is similar to the pool and weir technique
5 subsequently used at the Gaging Station, as discussed below. *McKinnon Dec.*
6 *2:3:000482*

7 70. In March 2011 the NID published a Mitigated Negative Declaration that
8 proposed improvements to the Gaging Station, consisting of a roughened
9 channel approximately 34 feet wide, with a surface area of about 0.9 acres.
10 Averaging a 4 % slope, the artificial channel replaced the 6-foot drop with a
11 series of rock chutes and pools over a length of 188 feet. *McKinnon Dec. Ex.*
12 *3:5::000481*

13 71. In 2012 a “fish passage improvement project” was initiated by Placer
14 County in conjunction with the Placer County Flood Control Agency. Cal Fed
15 awarded the project partners a \$304,000 grant to fund two fish passage projects
16 on Auburn Ravine—the Gaging Station remediation discussed above, and the
17 Hemphill Dam fish passage improvement project. Only the Gaging Station project
18 has been performed. *McKinnon Dec. Ex. 4:13:000900*

19 72. Water Audit is unaware of any document that explains the fate of the
20 aforesaid Love & Associates proposal for the fish passage improvement project.

21 73. NID has written: “In 2012 the district installed a fish passage structure at
22 its Highway 65/Lincoln Gauging Station located on Auburn Ravine. The total
23 cost for the project was \$1,015,717. The district’s contribution was \$599,822.”

24 **NID avows that in 2013, the first migration after remediation, 270 salmon**
25 **were counted upstream from the remediated Gaging Station to the next**
26 **streambed obstruction, Hemphill Dam.** “Project partners and local groups in
27 Auburn and Lincoln were delighted with these results.” *McKinnon Dec. Ex.*
28 *4:13:000900*

1 74. After further research, public comment and revision, in 2014 NMFS
2 published its final *Recovery Plan for Central Valley Chinook Salmon and*
3 *Steelhead (Recovery Plan)*:

4 (a) “The overarching goal of this Recovery Plan is the removal
5 of the Sacramento River winter-run Chinook salmon
6 environmentally significant unit (ESU), Central Valley spring-run
7 Chinook salmon ESU, and California Central Valley steelhead
8 distinct population segment (DPS) from the Federal List of
9 Endangered and Threatened Wildlife (50 CFR 1711)”; *McKinnon*
10 *Dec. Ex. 7:20:001454*

11 (b) It declared two key salmonid conservation principles: (1)
12 Functioning, diverse, and interconnected habitats are necessary for
13 a species to be viable; and (2) a species viability is determined by
14 its spatial structure, diversity, productivity, and abundance;
15 *McKinnon Dec. Ex. 7:20:001452; Ex. 7:20:1521*

16 (c) The *Recovery Plan* assessed the presence and risk of
17 extinction of the protected Central Valley steelhead DPS and
18 classification of the Auburn Ravine watershed. It assigned the
19 channel the designation “Core 2,” concluding that the risk of
20 extinction was “uncertain.” *McKinnon Dec. Ex. 7:20:001453-55; Ex.*
21 *7:20:001532-33; Ex. 7:20:001536 (Figure 3.3)*

22 (d) As in the 2009 Draft, (*McKinnon Dec. Ex. 2:3:00196; Ex.*
23 *2:3:000237*) much of NMFS concern was directed to the
24 entrainment of fish as a result of unscreened or inadequately
25 screened irrigation diversion, as at Hemphill Canal, and
26 questionable water quality because of agricultural runoff; *McKinnon*
27 *Dec. Ex. 7:20:001463, Ex. 7:20:001480; Ex. 7:20:001515*

28 (e) Auburn Ravine was identified by the *Recovery Plan* as both
29 a historical and current migration, spawning and rearing location for

1 the Central Valley steelhead DPS; *McKinnon Dec. Ex. 7:20:001507*
2 (*Figure 2.9*)

3 (f) Auburn Ravine was identified as a steelhead “Designated
4 Critical Habitat.” *McKinnon Dec. Ex. 7:20:001517 (Figure 2.10)*

5 (g) As in the 2009 Draft (*McKinnon Dec. Ex. 2:3:000185; Ex.*
6 *2.3.000240*) the *Recovery Plan* advocated for local stewardship
7 and responsible development; *McKinnon Dec. Ex. 7:20:001487*

8 (h) The Plan stated a “Recovery Action” was to “Identify stream
9 reaches in Auburn Ravine and Conn Creek that have been most
10 altered by anthropogenic factors and reconstruct a natural channel
11 geometry scaled to current channel forming flows.” *McKinnon Dec.*
12 *Ex. 7:20:001525; Ex. 7:20:001577*

13 75. In November 2014 NID filed a California Environmental Quality Act
14 (CEQA) Notice of Negative Declaration for a “maintenance project” that intended
15 to move some of the riprap below Hemphill Dam.

16 NID aims to conduct maintenance activities on the Hemphill
17 diversion to restore the boulder apron in a manner that improves
18 column depth of existing freshwater. The proposed activities will
19 require maintenance modification of the existing diversion structure
20 apron. The activities will relocate existing boulders that have shifted
21 at the base of the structures apron. The activities will take place by
22 positioning an excavator on the excavator access road along an
23 open, un-vegetated area along the northern bank of Auburn
24 Ravine. The excavator will access and relocate existing boulders in
25 the boulder apron without significantly impacting the streambed,
26 bank, riparian vegetation, or habitat. *McKinnon Dec. Ex.*
27 *6:16:001136.*

28 76. The image at *McKinnon Dec. Ex. 3:4:000422* (paragraph 15, *supra*)
29 shows a field of boulders (riprap) below the skirt of the dam. The proposed
30 project would have moved a few aside to allow a gap for passage through the
31 boulder field, where unfortunately the fish would thereafter be confronted with the
32 equally impassable high velocity barrier across the concrete skirt. *McKinnon Dec.*
33 *Ex. 8:21:001583; Ex. 3:4:000422; Ex. 7:18:1327-29*

1 77. The following image was taken of a failed migration attempt at Hemphill
2 Dam. Take notice of the fish's alignment with the water column between the
3 concrete skirt segments in the near left corner of the image, and the riprap
4 boulder on its other side. To observe fish that have managed to pass the boulder
5 riprap, landed on the super-critical sheeting of the dam apron, and then have
6 been driven back down onto the boulders, see the Gold Country Images video
7 cited *supra* at page 7, paragraph 19, at 8:15 et seq.

8



9

10 *Image credit Steve Hubbard – www.GoldCountryImages.com*

11 78. In March 2015 CDFW advised NID that it was placing a hold on its review
12 of the proposed project until the NID proffered true Hemphill Diversion
13 remediation.

14 Under Fish and Game Code section 1613, the Department may
15 suspend processing a notification if it determines "the activity

1 described in the notification, or any activity or conduct by the entity
2 directly related thereto, violates any provision of the [Fish and
3 Game Code]." Section 1613 applies in this case for two reasons:
4 1) the dam violates Fish and Game Code section 5901 because it
5 "prevents, impedes, or tends to prevent or impede the passing of
6 fish up and downstream"; 2) the dam substantially diverts the
7 natural flow of Auburn Ravine Creek into Hemphill Canal, but NID
8 has yet to notify the Department under Fish and Game Code
9 section 1602 for this diversion. The Department understands the
10 primary objective of the project described in the notification is to
11 enhance the passage of anadromous fish at the dam. However,
12 even with the project, the dam will still impede or tend to impede
13 the passing of fish up and downstream. NID will need to address
14 the problems described above before the Department will continue
15 processing the notification. In the meantime, NID may not proceed
16 with the project described in the notification. *McKinnon Dec. Ex.*
17 *3:10:000684*

18 79. In August 2015 a CDFW environmental scientist wrote a memorandum "to
19 summarize and transmit the North Central Region's data, reports and expert
20 opinion on the use of Auburn Ravine in Placer County, by Chinook salmon
21 (*Oncorhynchus tshawytscha*) and steelhead trout (*O. mykiss*) as it relates to fish
22 passage at Hemphill Dam." It concluded: "**Department staff field observations**
23 **and reports indicate that Hemphill Dam, in its current state, limits and/or**
24 **delays upstream migration and impedes fish passage above the structure**
25 **for the species discussed herein.**" (Emphasis added.) *McKinnon Dec. Ex.*
26 *8:21:001584*

27 80. That same month NID employed Kleinschmidt Group to investigate
28 alternatives intended to ensure flows at the Hemphill canal, and to reduce water
29 deliveries impact on Auburn Ravine fish. It was anticipated that the study would
30 be completed in early January 2016. *McKinnon Dec. Ex. 4:11:000688 et seq.*

31 81. In autumn of 2015 CDFW filed a citation with the Placer County District
32 Attorney alleging NID/Hemphill Dam's violation of *FGC §§ 5901 and 1602(a)*.

1 Following an exchange of correspondence, a meeting was scheduled to discuss
2 the allegations. *McKinnon Dec. Ex. 4:11:000743-44*

3 82. In December 2015 NID responded in writing to the District Attorney. They
4 claimed that there was no basis for an allegation of violation of *FGC § § 5650*
5 and *5937* or *Water Code 13367* or *6200*. *McKinnon Dec. Ex. 8:24:1784*. Those
6 provisions were not set forth in the DFW citation, and therefore will not be further
7 discussed. *McKinnon Dec. Ex. 8:24:001595 et seq.*

8 83. In respect to the evident noncompliance with *FGC § 1602* NID raised
9 three arguments. First, they argued that *FGC § 1601* was then applicable, and it
10 did not require prior notification for emergency work. Second, they asserted that
11 extensive repairs represented to have been performed in March 1997 were
12 exempt as “immediate emergency work,” but did not explain why notice to FEMA
13 had not been given “within 14 days of the commencement of the project” as then
14 required. Third, they did not explain why a three month window to start
15 construction was such an emergency that it precluded notice to CDFW. In any
16 event, they argued in the alternative, that even if there was a statutory violation,
17 “any criminal or civil penalty for such work would be barred by the applicable
18 statutes of limitation and because of the pre-prosecution delay that has severely
19 prejudiced NID in its ability to determine and document efforts to respond to the
20 1997 emergency.” They did not explain how FEMA authority (1) precluded the
21 need to permit the obstruction, (2) authorized continuing injury to the public trust,
22 and (3) exempted the NID from the provisions of *FGC 5948*. *McKinnon Dec. Ex.*
23 *8:24:001595-1599*

24 84. Regarding *FGC § 5901* NID wrote, “**we are not aware of any evidence**
25 **that NID’s structure or operations [at Hemphill Diversion] substantially**
26 **adversely impact an existing fish resource.”** *McKinnon Dec. Ex. 8:24:001599*

27 85. NID identified the five (5) NID customers then served from the Hemphill
28 Canal: J.W. Duff (agricultural), Lincoln Crossing HOA (landscape and golf course
29 water), Christian Fellowship Church (landscape), Lincoln Hills/Sun City

1 (landscape and golf course water), and Turkey Creek Golf (golf course water).
2 Counsel wrote: “It is not feasible that this small group would absorb the burden of
3 a Lincoln Gauging Staging-like fix at the Hemphill Diversion.” *McKinnon Dec. Ex.*
4 *8:24:001599*

5 86. Turkey Hill Golf Course is part of a nationwide chain of facilities owned by
6 the publicly traded ClubCorp, SEC symbol “MYCC”. During a merger in 2017
7 ClubCorp had a valuation in excess of \$1.1 billion. The lush fairways and greens
8 standing in contrast with the arid native landscape is an essential part of the golf
9 course’s esthetic appeal and economic value. *McKinnon Dec. Ex. 9:37:2035*

10 87. Lincoln Hills/Sun City has a population of approximately 11,000 people,
11 resident in approximately 6,700 single houses, with an average listing price in
12 excess of \$600,000. The water that Auburn Ravine provides, and its effect on
13 the 300 acres of irrigated landscape, is a significant part of the premium value
14 accorded to this community. *McKinnon Dec. Ex. 10:41:002215 et seq.*²²

15 88. NID is a public entity with annual revenues in excess of \$75 million, and a
16 2020 capital projects budget in excess of \$40 million. As a public entity it has a
17 duty to protect the public trust. *McKinnon Dec. 11:47:002284 et. seq.*

18 89. Following receipt of NID’s response, a CDFW representative met with the
19 assigned Placer County Senior Deputy District Attorney. In an internal reporting
20 memorandum following the meeting, CDFW reiterated its objectives, *which have*
21 *been adopted as Water Audit’s Prayer for Relief herein.* “We would like to know
22 when NID’s board will be making a decision about the future of the dam based on
23 the results of [the Kleinschmidt] study,” and “Once the decision is made about
24 what to do with the facility, we would like a timeframe in writing of the steps
25 involved in that process, whichever project they take on. [The Senior Deputy
26 District Attorney] took this a step further and said that she would like an injunction

²² Contemporaneous correspondence from Placer County offers to “help provide funds to implement many of the improvements that are necessary for a successful project.” *McKinnon Dec. Ex. 4:11:000742*

1 to hold them accountable to continue through the process.” *McKinnon Dec. Ex.*
2 7:24:001592

3 90. In April 2016 Kleinschmidt published a report that considered the status
4 quo and seven alternatives. The status quo was summarily rejected, in part
5 because it is unlawful.

6 (a) Alternatives 1 and 2, not installing the flashboards or building a
7 wing wall, were rejected because the water level in Auburn
8 Ravine would not be raised high enough to cause flow into the
9 diversion canal;

10 (b) Alternative 3 was to install a 4-foot diameter pipe with an inlet
11 upstream of Hemphill Dam and discharge into the Hemphill
12 canal. Sedimentation and maintenance issues were listed as
13 design difficulties. The estimated cost was \$229,000;

14 (c) Alternative 4 proposed that a 12 to 15 feet in diameter steel or
15 concrete sump, 10 to 15 feet deep, be installed adjacent to the
16 Auburn Ravine. It would be perforated on the bottom to allow
17 water to enter and designed so that it would fill from the top
18 when water flows were adequately high. Two pumps would
19 deliver water into the canal, and for redundancy purpose either
20 pump could individually meet the beneficial uses. The estimated
21 cost was \$173,600, plus \$20,000 a year for electricity, and
22 maintenance;

23 (d) Alternative 5 was similar in principle, albeit more complex in
24 execution: a "Ranney well system" consisting "of a large
25 diameter vertical caisson installed in the bank of the stream with
26 horizontal collection arms drilled in a fan array under the river to
27 provide inflow from the saturated soil to the caisson." Water
28 would be delivered to use by two vertical turbine pumps. The
29 estimated cost was \$2,070,000, plus \$20,000 a year for
30 electricity, and maintenance;

1 (e) Alternatives 6 and 7 involved sourcing delivery from alternative
2 sources and were dismissed summarily as being beyond the
3 scope of the assignment. *McKinnon Dec. Ex. 6:16:001080*

4 91. NID showed a preference for Alternative 4, and interest in Alternative 5.
5 *McKinnon Dec. Ex. 6:16:001078*

6 92. In March 2016 the CDFW wrote: “Hemphill diversion in its current state
7 continues to substantially divert the natural flow of Auburn Ravine into Hemphill
8 canal. **Any future facility, including the proposed alternatives, will also**
9 **substantially divert the natural flow of Auburn Ravine. NID has yet to notify**
10 **the Department under Fish and Game Code section 1602 for this diversion.”**
11 (Emphasis added.) *McKinnon Dec. Ex. 3:10:000684*

12 93. In May 2016, the NID posted on its website a story headed “NID Takes
13 Lead on Auburn Ravine Fish Passage”:

14 The three-foot-tall seasonal impoundment has been identified as a
15 partial barrier to fish migration and NID officials have been studying
16 ways to improve the situation. The District studied seven
17 alternatives, which were presented at this week’s meeting. ... A
18 staff recommendation ... [Alternative 4] drew near unanimous
19 support from speakers at the meeting, representing local and state
20 agencies and area stakeholder groups. **NID Engineering**
21 **Manager Gary King ... estimated it may take four years [i.e. to**
22 **2020] to complete the work.”** (Emphasis added)
23 *McKinnon Dec. Ex. 10:42:002231*

24 94. In June 2016 the NID approved the installation of a fish passage video
25 monitoring at the remediated Gaging Station. *McKinnon Dec. Ex. 3:9:000682*
26 Images subsequently captured provide additional proof of the presence of
27 protected fish. *McKinnon Dec. Ex. 8:27:001621 et seq.*

28 95. In September 2016 CDFW advised NID that it had completed its review of
29 Kleinschmidt Alternatives 4 and 5, and neither provided sufficient information on
30 the fish exclusion issue to inform an opinion on the adequacy of the design.

1 While the Department supports NID's efforts to resolve the fish
2 passage problem at the diversion structure, the Department
3 reminds NID that its diversion operation is subject to Fish and
4 Game Code section 1602. The Department explained this to NID by
5 letter dated March 10, 2015, but NID has yet to notify the
6 Department as section 1602 requires. Section 1602 will continue to
7 apply even if the diversion structure is removed under Option 4 or 5
8 because under either option, NID will continue to divert water from
9 Auburn Ravine via the sump pit or Ranney well to serve its
10 customers. *McKinnon Dec. Ex. 6:16:001261*

11 96. In November 2016 NID approved Kleinschmidt to do additional hydraulic
12 and soils analysis. The project was anticipated to cost \$93,000 and take 180
13 days. Staff noted that NID had spent \$26,511 on the project that year so far, and
14 "over \$110,000 on this project." In spite of the CDFW concerns expressed earlier,
15 fish exclusion from the Hemphill Canal diversion were not considered within the
16 assigned scope of work. *McKinnon Dec. Ex. 6:16:001174*

17 97. In March 2017 NOA wrote to NID's General Manager:

18 In concept, infiltration galleries may provide suitable fish passage
19 conditions at a diversion site. However, if improperly sited, failure
20 may occur that results in severe adverse habitat impacts and loss
21 of habitat access in addition to the loss of the diversion. ... Given
22 the geologic conditions along Auburn Ravine, and the observed
23 sediment accumulation, plugging of the infiltration gallery is
24 considered likely. *McKinnon Dec. Ex. 11:48:002337*

25 98. In July 2017 CDFW gave a \$177,000 grant to NID, more than enough to
26 pay the entire estimated cost of Alternative 4. The money was invested in
27 another study.

28 The goal of this project is to collect geomorphic and fisheries data
29 necessary to advance ongoing efforts to design an alternative that
30 will reestablish year-round connectivity in Auburn Ravine for
31 anadromous salmonids in the Sacramento Valley region.
32 *McKinnon Dec. Ex. 4:13:000901*

1 99. In August 2017 NID entered into contract with Helix Environmental
2 Planning to provide geomorphic and fisheries data. *McKinnon Dec. Ex.*
3 *5:15:001010 et seq.*

4 100. In September 2017 Kleinschmidt produced a *Final Report on Field Study*
5 *Investigations*. It stated in conclusion: “[Geotechnical] field study investigations
6 confirmed the viability of the permeable embankment (Option 4) or Ranney well
7 (Option 5) from the Alternatives Analysis (Kleinschmidt 2016) for providing flow to
8 the Hemphill canal in the event the Structure is removed.” *McKinnon Dec. Ex.*
9 *6:17:001267*

10 101. In March 2018 NOAA wrote to NID discussing the problems with NID
11 proposed designs and offering alternative screening methods previously found to
12 be successful by the agency. *McKinnon Dec. Ex. 5:15:001000*

13 102. In April 2018 NOAA wrote to NID: “I was wondering how your consultants
14 are coming along on the 30% design for the fish screen and new diversion at
15 Hemphill? When might we be getting the plans to review?” *McKinnon Dec. Ex.*
16 *5:15:000994*

17 103. In May 2018 consultants were reporting to NID on their “CEQA action
18 items.” *McKinnon Dec. Ex. 5:15:000991*

19 104. In May 2018 NID wrote to NOAA “... please allow us to develop a design
20 based on the current criteria for this work. ... Once we have a design, then you
21 will be able to review. ... I would recommend we get a little farther along with the
22 design.” *McKinnon Dec. Ex. 5:15:000991*

23 105. In reply NOAA wrote to NID “requesting a more detailed status of where
24 the proposed fish passage facility design is ...” *McKinnon Dec. Ex. 5:15:000983*

25 106. In January 2019 the NID Chief Engineer wrote to NOAA and CDFW in
26 virtually the same words as was used a year earlier.

27 I am meeting with our consultant this week to discuss the options
28 based on the letters provided. I do not believe we should meet until
29 I have an understanding of what we can or cannot do based on the

1 direction in your letters. Please be patient, we are looking at
2 options.” *McKinnon Dec. Ex. 5:15:001066*

3 107. In March 2019, the NID Chief Engineer wrote a trio of nearly identical
4 letters to members of the public regarding Hemphill and Gold Hill dams. They
5 succinctly set forth NID’s unhurried view of the status quo:

6 Currently, the District has not been fined or is under any regulatory
7 direction to remove these facilities. However, we are currently
8 working to improve the Hemphill facility for fish passage.

9 Over the past few years, we installed a fish passage at our gaging
10 station in Lincoln. We are currently working on design options with
11 regulatory agencies to improve our diversion operation at Hemphill,
12 and California Environmental Quality Act (CEQA) studies.
13 Completion of CEQA for the Hemphill facility will follow that project
14 selection process. You can find our efforts for Hemphill project at
15 the following website address {[https://nidwater.com/hemphill-
17 diversion-facility/](https://nidwater.com/hemphill-
16 diversion-facility/)}. As of this date, we have spent or committed
\$611,310.33 of funds on the Hemphill project.

18 Currently, there is no firm schedule for the Hemphill project as we
19 are working with our project partners on the over design solutions.
20 Once the design is agreed upon and CEQA is complete, we will
21 able to provide a project timeline for implementation. We will not
22 commit to a schedule until an acceptable design is found and
23 CEQA is approved and cleared of any legal challenges.

24 Our current focus is on fish passage for the Hemphill facility, but we
25 will be looking at the Gold Hill Diversion facility in the future.
26 *McKinnon Dec. Ex. 4:11:000778-80*

27 108. The same month the NID issued a press release in support of a proximate
28 US Fish and Wildlife wetland rehabilitation project. It read in part:

29 There are many components to managing our local streams for our
30 fish & wild life. We all can better use this resource while still
31 providing water and flood control protection for our local
32 communities. We should always strive to best serve all of these
33 needs. Through scientific studies, California Department of Fish
34 and Wildlife has concluded that the biggest threat to salmonid runs

1 on Auburn Ravine is the entrainment of juvenile fish during their
2 downstream migration. *McKinnon Dec. Ex. 5:15:000916*

3 109. The NID Hemphill Diversion remediation has a Technical Advisory
4 Committee (TAC) which is intended to bring together all stakeholders: the NID,
5 state agencies including NOAA, CDFW, and Department of Water Rights, and
6 community groups such as Save Auburn Ravine Salmon and Steelhead
7 (SARSAS) (<http://www.sarsas.org>) and Friends of Auburn Ravine (FAR)
8 (<https://www.auburnravine.org/>)

9 110. The ineffectiveness of the TAC as a change agent is revealed in a series
10 of emails. In January 2019 a FAR representative wrote to NID's Chief Engineer,
11 noting that it had then been more than 3 months since the last TAC meeting.
12 *McKinnon Dec. Ex. 5:15:001058*

13 111. A TAC meeting was eventually set for March 2019. Shortly before the
14 meeting a community member wrote:

15 When we talked last week, you mentioned the idea that you might
16 ask CDFW and/or NOAA to bring their ideas to the table If you
17 could suggest that to them today or tomorrow, they might have time
18 to bring some viable options to the March 26 meeting.

19 Has anyone thought about constructing a really long gentle riffles
20 and pools from the existing sill of the dam down lo the stream bed?
21 That way, the dam could stay in place, maybe even be reinforced.
22 and the flashboards could still be used in irrigation season. If the
23 riffles and pools were constructed to extend 50 yards downstream.
24 the slope overall would be less than 3 degrees. Of course, with this
25 idea, screens would have to be installed at the intake to the
26 Hemphill Canal. *McKinnon Dec. Ex. 5:15:001054*

27 112. The day before the TAC meeting the NID Chief Engineer wrote to a
28 colleague that was unable to attend: "I do not believe you will miss much."
29 *McKinnon Dec. Ex. 5:15:001046*

30 113. After the meeting a newly assigned CDFW TAC representative wrote to
31 the NID Chief Engineer:

1 1. Since a lot of CDFW staff have come and gone since this
2 project started, we are trying to find clarity on historical
3 decisions regarding the removal of the Hemphill Dam. Gary
4 Flannigan stated that he was under the assumption that it was
5 our Department's position that the dam needed to be removed
6 completely. He alluded to a document or letter that provided that
7 position statement. Can you confirm what document Gary is
8 referencing?

9 2. In regard to cone screens, you made a comment that led us to
10 believe that you were not particularly fond of proprietary
11 products. We're just curious about your concerns on that topic.”
12 *McKinnon Dec. Ex. 5:15:001034*

13 114. NID's Chief Engineer replied:

14 1. The District's goal is to remove the facility completely, then the
15 District will no longer be subject to the issues from the public. If
16 we remain there will always be complaints about our
17 interference with the fish.
18 2. Proprietary systems there is always requirements to purchase
19 parts, etc. at extremely high prices. Depending on the product
20 modifications cannot be made without manufacture request. As
21 far as recommending a specific system by a specific
22 manufacture, government agencies should not be
23 recommending a proprietary system there is a conflict of interest
24 issue. *McKinnon Dec. Ex. 5:15:001033*

25 115. Later that day the CDFW representative wrote: "To clarify, is there a
26 document or letter that states it is CDFW's position that the dam needs to be
27 removed completely?" NID responded: "there is no current document but
28 remaining in the ravine is a direction of the District for the last few years." No
29 further explanation was offered. *McKinnon Dec. Ex. 5:15:001033*

30 116. Two citizens, founding executives of SARSAS and FAR, have declared in
31 support of this petition that the NID general manager has communicated on more
32 than one occasion that the removal of the dam is a "bargaining chip" in the
33 allocation process pending before the Water Board. See Declaration of Steve
34 Hubbard Declaration of Jack Sanchez and submitted herewith as *McKinnon Dec.*
35 *Ex. 49 and Ex. E50* respectively.

36 117. In October 2019, citizens assembled and marched to demand remediation
37 of the Hemphill Dam. *McKinnon Dec. Ex. 8:29:001700*

1 118. On October 17, 2019, NID announced on their website “Hemphill is Going
2 Forward.” The only progress that was reported: “The [fish] surveys were
3 reviewed and discussed during NID’s Oct. 15 Engineering Committee [TAC]
4 meeting.” *McKinnon Dec. Ex. 11:43:002234*

5 119. On October 24, 2019, counsel for Water Audit spoke with the two
6 representatives for NOAA and CDFW assigned to the Hemphill Diversion project.
7 Both confirmed that they had not as of my call received diversion plans from NID
8 for review and consultation. Both were TAC members, had attended the October
9 2019 TAC meeting, and stated they were unaware of any NID commitment to
10 remediation.

11
12 X. AUTHORITIES

13 120. In its Mitigated Negative Declaration for the Gaging station the NID
14 avowed that its conduct in Auburn Ravine is subject to, *inter alia*, the following
15 regulations.

16 Federal Regulations

17 Federal Regulation of Waters of the United States

18 The U.S. Army Corps of Engineers (USACOE) and the
19 Environmental Protection Agency (USEPA) regulate the discharge
20 of dredged or fill material into Waters of the United States, including
21 wetlands, under Section 404 of the Clean Water Act (CWA).

22 Projects that would result in the placement of dredged or fill
23 material into Waters of the U.S. require a Section 404 permit from
24 the USACOE. Some classes of fill activities may be authorized
25 under general permits if specific conditions are met; others will
26 require individual permits.

27 Section 401 of the CWA requires the issuance of a water quality
28 certification or waiver thereof for all Section 404 nationwide or
29 individual permits issued by the Corps. The USEPA has deferred
30 water quality certification authority to the Regional Water Quality
31 Control Board (RWQCB). The federal government also supports a
32 policy of minimizing “the destruction, loss, or degradation of

1 wetlands.” Executive Order 11990 (May 24, 1977) requires that
2 each federal agency take action to minimize the destruction, loss,
3 or degradation of wetlands and to preserve and enhance the
4 natural and beneficial values of wetlands.

5 Federal Endangered Species Act

6 Sections 9 and 4(d) of the Endangered Species Act of 1973 (ESA)
7 prohibit the “take” of any fish or wildlife species listed as
8 endangered or threatened, including the destruction of habitat that
9 could hinder species recovery. Section 9 also prohibits the removal,
10 possession, damage, or destruction of any endangered plant from
11 federal land as well as acts to remove, cut, dig up, damage, or
12 destroy an endangered plant species in non-federal areas in
13 knowing violation of any state law or in the course of criminal
14 trespass.

15 Federal Migratory Bird Treaty Act

16 The Migratory Bird Treaty Act states that without a permit issued by
17 the U.S. Department of the Interior, it is unlawful to pursue, hunt,
18 take, capture, or kill any migratory bird. Take is defined as harass,
19 harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or
20 attempt to engage in any such conduct.

21
22 State Regulations

23 State Regulation of Waters

24 The CDFG regulates activities that would interfere with the natural
25 flow of, or substantially alter, the channel, bed, or bank of a lake,
26 river, or stream. Section 1602 of the California Fish and Game
27 Code (CFG) requires notification of the CDFG for lake or stream
28 alteration activities. If, after notification is complete, the CDFG
29 determines that the activity may substantially adversely affect an
30 existing fish and wildlife resource, the CDFG has authority to issue
31 a streambed alteration agreement under Section 1603 of the
32 CFGC.

33 California Endangered Species Act

34 California implemented its own Endangered Species Act (CESA) in
35 1984. The CESA prohibits the take of state-listed endangered and

1 threatened species; however, habitat destruction is not included in
2 the state's definition of take. Section 2090 of CESA requires state
3 agencies to comply with endangered species protection and
4 recovery and to promote conservation of these species. CDFG
5 administers the CESA and authorizes take through Section 2081
6 agreements (except for designated "fully protected species").

7 Species of Special Concern

8 Those species experiencing serious population declines or range
9 retractions that, if continued, could qualify them for State
10 threatened or endangered status. Although this is an administrative
11 designation that carries no formal legal status, the intent of the
12 designation is to focus attention on the conservation risk, to
13 stimulate research on poorly known species, and to achieve
14 conservation and recovery of these species before they meet
15 CESA criteria for listing as threatened or endangered. As such,
16 Species of Special Concern are considered during the
17 environmental review process as described in Section 15380 of the
18 CEQA Guidelines.

19 Regarding listed rare and endangered plant species, CESA defers
20 to the California Native Plant Protection Act (NPPA) of 1977, which
21 prohibits importing of rare and endangered plants into California,
22 and the taking and selling of rare and endangered plants. The
23 CESA includes an additional listing category for threatened plants,
24 which are not regulated under the NPPA. In this case, plants listed
25 as rare or endangered under the NPPA are not protected under
26 CESA but can be protected under CEQA. In addition, plants that
27 are not state listed but meet the state standards for listing are also
28 protected under CEQA (Guidelines, Section 15380).

29
30 California Fish and Game Code Bird Protections

31 Section 3503 of the CFGC prohibits destruction of the nests or
32 eggs of most native resident and migratory bird species. Section
33 3503.5 of the CFGC specifically prohibits the taking of raptors or
34 destruction of their nests or eggs.

1 Regional Conservation Plans

2 Environmental review and permitting on a project-by-project basis
3 is being increasingly accomplished using Natural Community
4 Conservation Plans (NCCPs) and Habitat Conservation Plans
5 (HCPs). These programs are essentially streamlined listed species
6 take permitting processes, but they effectively allow for a
7 landscape-scale, ecosystem-based approach to conservation
8 planning on a regional scale. The Natural Communities
9 Conservation Planning process is authorized and codified in
10 Section 2800 of the California Fish and Game Code. The goal of
11 Natural Communities Conservation Planning is to conserve healthy
12 functioning ecosystems and the species that are supported by
13 them.

14 Habitat Conservation Plans are required under the Federal
15 Endangered Species Act as part of the Section 10(a) Incidental
16 Take Permit provision. The HCP standards are to fully mitigate for
17 impacts and must not jeopardize the continued existence of listed
18 species. *McKinnon Dec. Ex. 1:1:000033*

19 121. *Title 50 Code of Federal Regulations (CFR) § 223.203* subpart B provides
20 restrictions applicable to threatened marine anadromous species. Unlawful take
21 of designated protective species, for example by entrainment into diversions, is
22 prohibited. (*50 CFR § 17.31*)

23 122. The California *Constitution* Article 10, section 2, states in part: "The right
24 to water or to the use or flow of water in or from any natural stream or water
25 course in this State is and shall be limited to such water as shall be reasonably
26 required for the beneficial use to be served ..."

27 123. California *Water Code section 102* states: "all water within the State is the
28 property of the people of the State, but the right to the use of water may be
29 acquired by appropriation in the manner provided by law." "The right of property
30 in water is usufructuary and consists not so much of the fluid itself as the
31 advantage of its use." *Eddy v. Simpson* (1853) 3 Cal. 249.

32 124. *FGC § 5901* provides "Except as otherwise provided in this code, it is
33 unlawful to construct or maintain in any stream in [Placer County] device or

1 | contrivance that prevents, impedes, or tends to prevent or impede, the passing of
2 | fish up and down stream.”

3 | 125. *FGC § 1602* requires that “An entity shall not substantially divert or
4 | obstruct the natural flow of ... any river, stream, or lake ... unless all of the
5 | following occur: (1) The department receives written notification regarding the
6 | activity in the manner prescribed by the department.” Thereafter follows a
7 | detailed process that must be followed before building a “permitted” obstruction.

8 | 126. *FGC § 5948 (Stats. 1957, Ch. 456)* states in pertinent part: “No person
9 | shall cause or having caused, permit to exist any log jam or debris accumulation
10 | or any other artificial barrier, except a dam for the storage or diversion of water
11 | ... permitted by law ... which will prevent the passing of fish up and down stream
12 | or which is deleterious to fish as determined by the commission, subject to
13 | review by the courts.”

14 | 127. *CCP § 1060* provides that any person who desires a declaration of his or
15 | her rights or duties with respect to another, may, in cases of actual controversy
16 | relating to the legal rights and duties of the respective parties, bring an action for
17 | a declaration of rights and duties. The court may make a binding declaration of
18 | these rights or duties, whether or not further relief is or could be claimed at the
19 | time. The declaration may be either affirmative or negative in form and effect,
20 | and the declaration shall have the force of a final judgment.

21 | 128. *CCP § 1085* provides in part that a writ of mandate may be issued by any
22 | court to any inferior tribunal, corporation, board, or person, to compel the
23 | performance of an act which the law specially enjoins.

24 | 129. Water, and the fish that inhabit it, have had a distinct legal status since the
25 | earliest promulgation of law. In 535 C.E. the Roman *Institutes of Justinian*
26 | stated: “By the law of nature these things are common to mankind – the air,
27 | running water, the sea and consequently the shores of the sea.” *Orion Corp. v.*
28 | *State, 109 Wash. 2d 621, 747 P.2d 1062 (1987) cert. denied, 108 S.Ct. 1996*
29 | *(1988)* To provide for the protection and administration of this resource there has

1 developed the legal principle of a “public trust,” whereby the sovereign or state is
2 held to be a trustee for the public’s interests.

3 130. The phrase “common to mankind” connotes that water in its natural state
4 cannot become private property. All beneficial use of water in California is
5 subject to the public trust doctrine. Because of the changing circumstances over
6 long periods of time, public trust decisions cannot be conclusive or final. When
7 circumstances and the priorities of the people change, the public trust doctrine
8 requires revisiting prior decisions, and adjusting them to accommodate the
9 present conditions. *Audubon, supra*.

10
11
12 XI. CAUSES OF ACTION

13
14 FIRST CAUSE OF ACTION

15 Declaratory Relief

16 NID and Does 1 to 20
17

18 131. Water Audit restates paragraphs 1 to 130 above as if set forth in full here.

19 132. An actual controversy has arisen and now exists between Water Audit and
20 the NID. Petitioners contend that the continued obstruction to fish passage by
21 the Hemphill Dam and the manner of diversion into Hemphill Canal are unlawful
22 and require remediation by NID. A judicial determination the proper application
23 of the law and the duties of the NID in respect to the Hemphill Diversion is
24 necessary and appropriate at this time.

25
26 SECOND CAUSE OF ACTION

27 Petition for Writ of Mandate

28 NID and Does 1 to 20
29

30 133. Water Audit restates paragraphs 1 to 130 above as if set forth in full here.

31 134. Hemphill Diversion has been proven to prevent and/or impair the passage
32 of fish, and/or to entrain fish into diversions, including federally and state

1 | protected fish. This has resulted in an unlawful kill of protected fish as defined in
2 | *16 U.S.C. § 1538(a)(J)(C); 50 C.F.R. § 223.203(a); and 50 C.F.R. § 17.31.*

3 | 135. NID did not seek state or federal regulatory permission prior to the
4 | construction of the Hemphill Dam. Pursuant to *FGC § 5901* it is unlawful to
5 | obstruct the passage of fish, unless as permitted by *FGC § 1600 et seq.*

6 | 136. *FGC § 5948* requires the owner to remove an unpermitted obstruction that
7 | prevents the passage of fish up and down stream. The Hemphill Dam is such an
8 | obstruction.

9 | 137. For more than a decade the public has repeatedly sought to have the NID
10 | complete the remediation of the Hemphill Diversion, but the NID has not. Both
11 | federal and state regulators and trustee agencies have repeatedly sought to have
12 | NID remediate, but NID has not. Water Audit has demanded that NID commit to
13 | remediation, but the NID has not responded. NID has been promising
14 | remediation for a decade, but there remains daily continuing injury to protected
15 | public trust fish without any present commitment to remedy.

16 | 138. If the chosen method of remediation retains the dam structure, *FGC §*
17 | *5937* requires a dam owner to permit “sufficient” bypass to maintain downstream
18 | fish in good condition. In order to make that determination, and to ensure
19 | continuous compliance, best practices make it necessary for flow to be
20 | constantly measured for volume and water quality.

21 | 139. A preemptory writ is appropriate because there is not a plain, speedy, and
22 | adequate remedy in the ordinary course of law.

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1 XII. PRAYERS FOR RELIEF

2 WHEREFORE, Water Audit respectfully prays that:

3 1. On the First Cause of Action:

4 (a) The court find and declare that the Hemphill Dam is an unlawful stream
5 obstruction that must be remediated by the Nevada Irrigation District; and

6 (b) The Court find and declare that the manner of the Hemphill Diversion
7 causes an unlawful fish kill, and that it must be remediated by the Nevada
8 Irrigation District; and

9 2. On the Second Cause of Action:

10 (a) A peremptory writ issue under the seal of this Court commanding the
11 Nevada Irrigation District to promptly remediate Hemphill Diversion.

12 Remediation shall include the provision of unimpaired fish passage, and
13 the measurement and public reporting of water flows and quality (Project);

14 (b) The Nevada Irrigation District be ordered to forthwith present to the court a
15 detailed and scheduled scope of work that it will perform in order to
16 complete the Project by a date certain, but in any event before October
17 31, 2021, or such other date as the court shall consider reasonable; and

18 (c) This court establish a reasonable form and schedule for Nevada Irrigation
19 District to report to the court its progress on the Project, and that the court
20 shall set clear and substantial penalties for unwarranted delay; and

21 (d) This court retain jurisdiction over this matter until the Project is complete;
22 and

23 3. For both the First and Second Causes of Action:

24 (a) The Court award Water Audit the costs of this action; and

25 (b) The Court award reasonable attorney fees pursuant to *CCP § 1021.5* for
26 bringing this action in the public interest, without prejudice to the court
27 subsequently awarding such further additional fees may hereafter be
28 reasonable; an>

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(c) The Court enter such other and further relief to which Water Audit may be entitled as a matter of law or equity, or which the Court determines to be just and proper.

December 1, 2019.

William McKinnon
Attorney for Water Audit California

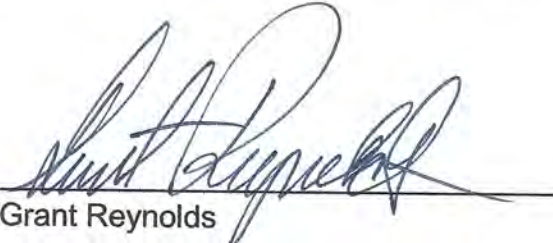
VERIFICATION

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I, GRANT REYNOLDS, declare as follows:

I am a director of the petitioner Water Audit California. I have read the above COMPLAINT FOR DECLARATORY JUDGMENT AND PETITION FOR WRIT OF MANDATE and know its contents. All of the facts alleged in the petition are true of my own personal knowledge.

I declare under the penalty of perjury that the foregoing is true and correct and that this affidavit was executed on December 1, 2019, at San Diego California.


Grant Reynolds

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CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the Water Audit California Verified Petition for writ of mandate was produced using 12-point Arial type including footnotes and contains approximately 12,050 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the Word computer program used to prepare this brief.

December 1, 2019

William McKinnon
Attorney for Water Audit California