STATE WATER RESOURCES CONTROL BOARD
DIVISION OF WATER RIGHTS

Response to Public Comments on Report of Investigation Dated December 20, 2017

Regarding a Complaint of Unauthorized Diversion against
Nestle Waters North America, Arrowhead Facility,
from Strawberry Creek in San Bernardino County

Date: January 30, 2020

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1 Introduction

The State Water Resources Control Board (SWRCB), Division of Water Rights (Division) staff received the following comments on the *Report of Investigation, INV 8217 – Nestlé Waters of North America* (ROI) during the comment period which began on December 17, 2017 and ended February 8, 2018. Division staff reviewed each of the comments, which are presented here in four categories: those from the complainants, those from the respondent, those from members of the public and interest groups, and those from public agencies. Over 8,000 comments were received, of which the majority contained information that was already available to and considered by Division staff prior to the comment period. Division staff appreciates such comments, which are generally acknowledged in the following sections as "Comment Received." Other comments, however, are addressed more thoroughly because they included new information, raised potentially relevant issues which may also have impacted the Revised ROI, or because they exemplified misconceptions about this case which merited explanation based on their frequency.

Division staff have considered the comments to improve the ROI's detail, thoroughness, and accuracy – goals for every report of investigation. Division staff, in conducting enforcement investigations, are not required, by statute or regulation, to solicit public comment on a report of investigation, let alone consider public comments. To the extent disagreement with the Revised ROI remains, such disagreements may be raised in the course of further enforcement proceedings, should they occur.

2 Complainant Comments

Dates Received	Format	Commenter Last, First	Organization
2/9/2018	Email	Doughty, Rachel	Greenfire Law, PC for Story of Stuff Project
1/12/2018 1/16/2018 1/21/2018 1/29/2018 1/30/2018 1/31/2018 2/1/2018	Email	Frye, Amanda	Individual
2/3/2018 2/6/2018	Email	Loe, Steve	Retired US Forest Service Biologist; Southern California Native Freshwater Fauna working group

2.1 Enforcement of Public Trust Doctrine

Most of the Complainants who commented stated that public trust resources have been negatively impacted by Nestlé's diversion of water from Strawberry Canyon. Their comments express concern that public trust resources will not be adequately protected, if the SWRCB does not act independently of the United States Forest Service (Forest Service). The following responses paraphrase their comments and concerns, and describe their desired/requested outcomes:

2.1.1 It is the SWRCB's responsibility to analyze the effects of Nestle's diversions on communities and natural resources served by the Strawberry Creek watershed.

Article X, section 2 of the California Constitution and section 100 of the Water Code both provide that the right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and that such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. To this end, Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."[1]

The State Water Board has the authority to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, regardless of the basis under which the right is held. (*Cal. Farm Bureau Federation v. St. Water Res. Control Bd.* (2011) 51 Cal.4th 421, 429, *as modified* (Apr. 20, 2011).) What constitutes unreasonable water use in an individual case depends upon the circumstances presented and varies as the current situation changes. (*Imperial Irrigation Dist. v. St. Water Res. Control Bd.* (1986) 186 Cal.App.3d 1160, 1166.) Methods of use once considered reasonable can become unreasonable due to their deleterious effects. (*U.S. v. St. Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 130.) A reasonable use inquiry, however, is not made in isolation. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140.) To the contrary, the Board must consider "statewide considerations of transcendent importance." (*Id.* at 140.)

The State Water Board has applied a series of factors as guidance in determining whether a misuse of water is occurring. The factors are: 1) Other potential beneficial uses for conserved water; 2) whether the excess water serves a reasonable and beneficial purpose; 3) the amount of water reasonably required for current use; 4) the availability of a physical plan or solution; 5) the amount and reasonableness of the cost of saving water; 6) whether the required methods of saving water are conventional and

[1] State Water Board regulations broadly characterize waste, unreasonable use, unreasonable method of use, or unreasonable method of diverting water as "misuse" or "misuse of water." (*See* Cal. Code Regs., tit. 23, §855, subd. (b).)

reasonable rather than extraordinary; and 7) the probable benefits of water savings. (State Water Board, Decision 1600 (June 21, 1984), pp. 24-29.) Not all factors apply or apply equally in every case. (State Water Board, Order WR 2012-0004 (February 7, 2012), p. 6.)

In addition, the public trust doctrine recognizes that "the sovereign owns all of its navigable waterways and the lands lying beneath them as trustee of a public trust for the benefit of the people." (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434.) The SWRCB has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible. (*Id.* at p. 446.) Under the public trust doctrine, the State retains supervisory control over navigable waters and the lands beneath those waters, as well as non-navigable waters that support a fishery. (*Id.* at 447.) The purpose of the public trust is to protect navigation, fishing, recreation, fish and wildlife habitat and aesthetics. (*Id.* at 436.) No person may acquire a vested right to appropriate water in a manner harmful to interests protected by the public trust unless if the public interest in the diversion outweighs the harm to public trust values. (*Id.* at 445-447.) The SWRCB has continuing authority to supervise the exercise of water rights under the public trust doctrine and may reconsider past water allocations when fulfilling its duty of continuing supervision over the taking and use of appropriated water under the public trust doctrine, regardless of the basis of right. (*Id.* at 447.)

The Revised ROI considers the misuse and public trust allegations based on information obtained during the investigation and concludes there is insufficient information for Enforcement staff to allege, utilizing the State Water Board's factors for evaluating misuse, that a preponderance of the evidence would show a misuse of water is occurring or has occurred or that violations of the public trust doctrine are occurring.

2.1.2 The SWRCB cannot wait for the outcome of a federal environmental review or permitting decisions, because the Forest Service and other federal resource agencies are subject to political pressures that undermine their role as trustees of public resources.

While the SWRCB has an independent mandate to consider public trust resources, Division staff may defer to State or Federal resource agencies with concurrent public trust responsibilities, especially if such agencies employ local or subject matter experts. After review of the Special Use Permit issued by the Forest Service to Nestlé on August 20, 2018 (new SUP), Division staff concluded that there is insufficient evidence that Nestlé's implementation of the new SUP, including the Adaptive Management Plan, will fail to prevent violations of the public trust doctrine while Nestlé conducts studies recommended by the Revised ROI to evaluate the impacts of Nestlé's extractions on public trust resources within Strawberry Canyon.

Additionally, the Revised ROI recommends that Nestlé immediately cease all diversions of water that is within the SWRCB's permitting authority in excess of a combined 7.26 ac-ft annually from all extraction facilities in Strawberry Canyon. Nestle must limit its appropriative diversion and use of water to 7.26 ac-ft annually unless it

has evidence of valid water rights to water within the permitting authority of the State Water Board and/or evidence documenting the extent of additional water claimed to be percolating groundwater, as any diversion or use without a valid basis of right is subject to enforcement actions in accordance with the Water Code. If Nestlé voluntarily complies with this recommendation, Nestlé's rate of water extraction from Strawberry Canyon is likely to be significantly reduced. If Nestlé does not voluntarily comply, the SWRCB may take formal enforcement action, such as a Cease and Desist Order. Both alternatives are likely to eliminate the identified unauthorized diversions and reduce actual or potential harm to public trust resources.

2.1.3 Nestle has failed to establish enforceable rights to groundwater to support its appropriations in a way that takes into account federal reserved rights, state-protected rights, or rights of Tribes and other water users.

Other than as described in Section 4.3 below, the SWRCB does not have authority to regulate overlying groundwater rights within the San Bernardino National Forest or prevent unauthorized groundwater appropriation if the extraction or use is not wasteful and unreasonable. As described in Section 4.2 of the Revised ROI, the SWRCB's authority applies to the majority of water extracted from Strawberry Canyon, but does not apply to groundwater that is shown to be percolating groundwater which does not support surface water flows at near-by springs and would not flow to a surface stream channel elsewhere in the watershed. If Nestlé's extraction of percolating groundwater injures the rights of overlying landowners or other groundwater users, the injured parties may seek remedy through the courts. Division staff has not received complaints from any such overlying landowners.

Furthermore, if the Forest Service determines that Nestlé's appropriation of percolating groundwater has injured the Forest Service's overlying groundwater rights or federal reserved water rights, the Forest Service may apply its own administrative remedies. The Forest Service, through its special use permitting process, has the authority to condition, limit, mitigate, or eliminate facilities or uses that infringe on the Forest Service's water rights and/or unreasonably impact public trust resources. The Forest Service's use (or non-use) of its permitting authority may obviate enforcement action by the SWRCB by either mitigating the injury or, conversely, indicating that no such injury exists.

2.2 Chain of Title and Ownership

Many commenters have stated that Nestlé has not adequately demonstrated ownership of any pre-1914 rights that may have been held by the Arrowhead Hot Springs Company (AHSC). For example, Steve Loe, a retired Forest Service Biologist, commented that "any surface water rights have been retained with ownership of the property." Amanda Frye stated "there is no proof of chain of title for the 'real property' water rights filed at the San Bernardino County recorder's office" and asks which 1909 Arrowhead Water bottling company is Nestle claiming as a predecessor in interest: "Arrowhead Spring Water Co. (Los Angeles) or Arrowhead Hot Springs Company or Arrowhead Springs Co. or Arrowhead Cold Springs Co.?"

In this case, Division staff has determined there is strong documentary evidence to support the transfer of some water rights, through a series of successors-in-interest, from Arrowhead Springs Company (ASC) to Nestlé. Division staff has also determined that the President of ASC, Seth Marshall, also owned the corporation[2] (AHSC) that created and perfected the pre-1914 water right based on the 1909 contract. Division staff has not identified documentary evidence that AHSC legally transferred ownership of the AHSC's pre-1914 right to ASC, but in light of the close business relationship between ASC and AHSC, has nevertheless concluded it is "more likely than not" that the transfer occurred, and that aspect of Nestlé's claim is valid.

2.3 Diversion from Indian Springs

Many commenters have expressed that there is no evidence that Nestlé's predecessors diverted or planned to divert water from Strawberry Canyon prior to 1914. They argue that absent such evidence, Nestlé cannot have initiated a pre-1914 right to divert water from Strawberry Canyon or claim to divert water from Strawberry Canyon under a pre-1914 water right. However, their analysis does not consider Water Code Section 1706. While Nestlé did not initiate a pre-1914 right to divert water from Strawberry Canyon, it may claim to divert some water from Strawberry Canyon under a pre-1914 right under Water Code Section 1706.

According to California Water Code Section 1706,

"The person entitled to the use of water by virtue of an appropriation other than under the Water Commission Act or this code may change the point of diversion, place of use, or purpose of use if others are not injured by such change, and may extend the ditch, flume, pipe, or aqueduct by which the diversion is made to places beyond that where the first use was made."

As discussed in Section 4.3.2 of the Revised ROI, Division staff determined that the 1909 Contract created an incipient appropriative water right that was progressively perfected by Nestlé's predecessor; so, Nestlé is "entitled to the use of water by virtue of an appropriation other than under the Water Commission Act." Since the right was initiated prior to 1914 and perfected, Nestlé's predecessors could lawfully change the point of diversion, in accordance CWC Section 1706, if others were not injured. Furthermore, since the point of diversion remained in the same watershed, Nestlé's source remains the same.

No information indicates that Nestlé's change in point of diversion has injured others. To the extent the Forest Service has rights that may be injured by the change in Nestlé's point of diversion, it has not made a complaint alleging such injury. Furthermore, the Forest Service can defend its water rights under its own authority, by limiting, conditioning, or denying Nestlé access to federal lands under its control. The fact that previous access permits issued by the Forest Service did not restrict or prevent Nestlé's extraction of water

[2] Arrowhead Hot Springs Company Article of Incorporation; September 29th, 1904; Exhibit I of Amanda Frye Comment Submittal

from the new location suggests that the change did not injure the Forest Service's water rights.

Although no evidence indicates Nestlé's change in point of diversion has injured others, the lack of such evidence does not preclude injury due to Nestlé's diversions in excess of 7.26 acre-feet per year.

3 Respondent Comments

Date Received	Format	Commenter Last, First	Organization
1/12/2018 2/9/2018 3/13/2018	Email	McGuire, Rita	NWNA

3.1 Response to Nestlé's Comments

3.1.1 Additional water rights based on the 1909 Contract

In its February 9, 2018 letter entitled *NWNA's Preliminary Response*, Nestlé claims that the 2017 ROI significantly underestimated the amount of water Nestlé can divert under its pre-1914 water right. Nestlé argues that in addition to the 26 AFA calculated in the 2017 ROI, Nestlé is also entitled to divert the amount of water sold to a third-party water bottler, Arrowhead Spring Water Company (ASWC), pursuant to a 10-year contract signed in 1909 by Nestlé's predecessor, Arrowhead Hot Springs Company (AHSC). Division staff obtained copies of the 1909 Contract, along with many other court documents generated by litigation over the 1909 Contract, from the comments submitted by Rachel Doughty and Amanda Frye. Based on a review of these documents, Division staff now conclude that Nestle's predecessor initiated a pre-1914 water right to 7.26 ac-ft of water and further conclude that these documents negate the evidence considered by Division staff in concluding in the 2017 ROI that Nestle's predecessor had a pre-1914 water right to 26 ac-ft of water. Division staff made appropriate revisions in the Revised ROI. The pre-1914 right determination presented in the Revised ROI is based on significantly stronger evidence than was available before the 2017 ROI was issued, and supersedes, rather than supplements, the determination presented in the 2017 ROI.

3.1.1.1 The 2017 ROI erred in concluding that the 1912 railroad survey created an incipient water right

According to the 2017 ROI, Division staff interpreted a 1913 Pacific Electric document provided by Nestlé, "Local Rail Lines in the Orange Empire"[3], as evidence

of AHSC's pre-1914 intent to appropriate some amount of water for beneficial use outside of Arrowhead Springs Hotel riparian parcel, and thereby create an incipient right to the future appropriative use of water (OE, 2020). The Pacific Electric document states that in July 1912, Pacific Electric began surveys which led to extending the line a quarter-mile to the Hotel itself and made available to tank cars the Arrowhead drinking water.[4] Division staff reasonably assumed that AHSC would not make drinking water available to train cars unless a plan to export water in bulk had been developed in or before July 1912. Division staff therefore concluded that the 1912 railroad survey initiated an incipient right with a priority date of 1912.

Based on new information provided by commenters, however, Division staff has since determined that a claim or appropriation and plan of development already existed at the time of the 1912 survey. As described in Section 4.3.2 of the Revised ROI, the 1909 Contract contains all the elements necessary to establish a claim of appropriation and plan of development. Since the 1912 railroad survey is within the scope of the plan detailed in the 1909 Contract to appropriate water from Cold Creek for bottling and sale in Los Angeles, the 1912 railroad survey did not establish a new claim or expand the plan of development. Instead, the 1912 survey is evidence of a claim of appropriation and implementation of the plan of development created by the 1909 Contract.

3.1.1.2 **The pre-1914 right should not be quantified based on the capacity of a bottling facility built in 1917**

In the 2017 ROI, Division staff considered the then-available evidence, identified a pre-1914 right, and determined the quantity of that incipient right based on the capacity of a bottling facility completed in 1917. While such a quantification was reasonable in the absence of more reliable source of information, other documents have become available that support a more robust pre-1914 water right determination. As described in Section 4.3.2 of the Revised ROI, the 1909 Contract and the associated legal filings provide a well-documented account of AHSC's pre-1914 plan to appropriate water. Based on the terms of the 1909 Contract, the maximum quantity of water ASWC planned to receive (and therefore the maximum AHSC conceived of appropriating) was seven 6,500-gallon tank cars per week, or 7.26 ac-ft per year, which the companies agreed was enough water to implement the plan to bottle and sell water in Los Angeles, for a period of up to 10 years.

Division staff does not have any evidence that ASWC took any steps prior to 1914 to increase their appropriation beyond the scope of the 1909 plan. To the contrary, because the 1909 Contract was terminated early, it is unlikely that ASWC ever took delivery of more than four tank cars per week, the maximum quantity to be delivered under the terms of the contract at the time of its termination. AHSC and ASWC sued each other over the contract in 1910 and 1912. As a result of the lawsuits, ASWC was pushed entirely out of the bottled water business by early 1913. Likewise, Division staff has no evidence that AHSC developed or implemented a plan that

[4] Maguire, Pearce & Storey, 2016b; see page 43

would have allowed for the export and then bottling of more than 7.26 acre-feet of water a year when AHSC assumed ASWC's role in the bottled water business. In fact, AHSC built a water bottling facility that likely had less capacity than the ASWC facility in Los Angeles that it replaced. On page 5 of their February 9th comment letter, Nestlé calculates that the capacity of AHSC's "Old Arrowhead" facility constructed in 1913 was 5.6 acre-feet annually, whereas the ASWC facility was presumably (based on the 1909 Contract terms) capable of producing at least 7.26 ac-ft per year.

The first indication of an AHSC plan to appropriate more than 7.26 ac-ft came in 1916, when it purchased the future site of its 1917 Los Angeles bottling facility. This purchase took place nearly two years after December 19, 1914, when any increase in appropriation would have required applying for a water right permit from the SWRCB's predecessor agency. Therefore, neither ASWC's nor AHSC's documented activities between 1909 and 1914 exceeded or expanded the scope of the plan of development detailed in the 1909 Contract (i.e., appropriating and bottling ≤ 7.26 ac-ft per year of water for bottling and sale in Los Angeles). So rather than proving that some additional amount of water right had been perfected at the Old Arrowhead facility, Nestlé's estimate of Old Arrowhead's capacity instead defines the upper limit of the amount of the pre-1914 right that AHSC could have perfect under any plan that existed prior to 1914.

Nestlé's February 9, 2018 comment letter claims that the "Old Arrowhead" bottling facility was constructed in 1912, but the two supporting articles Nestlé references contain no evidence that the facility was constructed that early. The July 1912 article states that AHSC had bottling plant "plans ready to be submitted to contractors." The October 1912 article described the bottling facility as "also designed," in a paragraph about future improvements, but described a gas plant project as "now being built." The first available reference to a constructed bottling facility on the property is in a June 1913 Los Angeles Times article, *Arrowhead Water is Being Bottled*, which memorializes "the first bottle of Arrowhead water, bottled by [AHSC] at its famous springs". This article states that "The bottling plant was recently constructed and placed in operation." Division staff therefore conclude that the "Old Arrowhead" plant was likely finished in late-May or early-June of 1913. Division staff also obtained a July 1913 AHSC advertisement which reads, "Absolutely the FIRST time this famous Arrowhead Water has ever been bottled and placed on the market."[5]

Division staff has no evidence that a later bottling facility built in 1917 was the result of a new or expanded plan developed between May 1913 and December 1914. Newspaper coverage of the 1917 bottling facility states that AHSC's decision to construct a bottling facility in Los Angeles was the result of a months-long (rather than years-long) investigation that initially considered building the facility on the

[5] "Sterilized by Nature, Arrowhead Springs Water", Advertisement, Los Angeles Times, page 14, July 16, 1913

Arrowhead Hotel property.[6] It is therefore unlikely that the 1917 Los Angeles plant was planned prior to 1914. Division staff also has no evidence that AHSC required additional capacity prior to 1914, but if they did, the evidence indicates that their first inclination was to build on the hotel property (i.e. riparian land). Since there is no evidence that the 1917 bottling facility was conceived or planned prior to 1914, it could not have initiated a new claim or expanded the plan of development detailed in the 1909 document. The only incipient right which existed, and therefore the only right which could have been perfected by progressive use and development in ASWC's Los Angeles bottling facility, or in either of AHSC's two bottling facilities, was the incipient right created by the 1909 Contract.

3.1.1.3 **Probative value of the 1909 Contract and Court Documents**

The 1909 Contract and associated court documents are inherently more reliable evidence of historical water rights than the articles, advertisements, and assumptions on which the 2017 ROI's pre-1914 water rights determination was based. The 1909 Contract was submitted as evidence and cross-examined during contemporaneous Court proceedings. Both parties to the 1909 Contract testified under oath in the 1910 and 1912 cases about the contract's terms, the circumstances surrounding its implementation, the value of each party's business, the scope of their operations, etc. Advertisements and newspaper articles, on the other hand, are not adversarial, and often contain claims or statements which are out of context, approximate, or exaggerated. While useful in some contexts, they have less probative value than the 1909 Contract and associated Court documents that became available to Division staff after the 2017 ROI was issued.

3.1.1.4 **Use of water by Old Arrowhead Factory was not simultaneous with deliveries under 1909 Contract**

Nestlé argues that Division staff should aggregate the maximum operating capacities of AHSC's Old Arrowhead bottling facility and ASWC/ACSC's Los Angeles bottling facilities to determine the quantity of Nestlé's pre-1914 right, based on the assumption that ASWC's and AHSC's water bottling facilities operated simultaneously using water from the same source. Based on a review of the historical evidence explained below, Division staff concludes that the two facilities did not operate simultaneously.

First, AHSC was not required to deliver any water to ASWC after May 1911, when the Court ruling terminating AHSC's contract with ASWC was upheld on appeal. Division staff has not found any evidence indicating that AHSC continued to provide water to ASWC/ACSC after 1911. The fact that AHSC sued ACSC for trademark infringement and bought a 1913 advertisement warning of "fraudulent, so-called 'Arrowhead Water' offered by irresponsible parties"[7] suggests that ACSC continued

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[6] Big Bottling Plant Is Planned for L.A., Los Angeles Evening Herald, Vol. 42, No. 21, Section 2, page 1, November 25, 1916

[7] "Sterilized by nature: Arrowhead Springs Water"; advertisement; Los Angeles Times; 16 July 1913, page 14

to operate its water business between 1911 and 1913, but it is unclear where such water was obtained. Contemporaneous reporting suggested that ACSC may have "been offering for sale common hydrant water under the name of Arrowhead Springs Water," or alternatively that ACSC may have "obtained the water secretly."[8] In either case, ACSC was not using water diverted under AHSC's pre-1914 water right.

Second, in its 1912 lawsuit, AHSC described how trademark infringement by ACSC injured the reputation of the Arrowhead Hotel and its water but did not allege injury to any offsite water bottling or vending operation which may have existed at that time. To the contrary, AHSC claimed that the value of its business "has depended and does depend, largely and mainly, . . . upon the fact that such use of said waters *can be had only upon said lands and at said business establishment of the plaintiff thereon*." [emphasis added] It was not until the end of 1912 that AHSC announced plans[9] to bottle water on its property near the hotel, and not until June 1913 that the Old Arrowhead bottling facility was completed and AHSC began shipping bottled water to Los Angeles.[10] Therefore, Division staff concludes that AHSC did not transport water to an offsite water bottling facility or use water on non-riparian land in 1912.

Since water used at the hotel was diverted from a riparian source for use on riparian lands, that water was not appropriated, but rather diverted and used under a riparian right. Therefore, AHSC did not simultaneously deliver water under the 1909 Contract and appropriate water for its own use at the Old Arrowhead bottling facility, but rather the opposite. The evidence indicates that AHSC likely ceased deliveries to ACSC by 1912, about a year before the Old Arrowhead facility was constructed in mid-1913. In summary, AHSC's pre-1914 right based on the 1909 contract was exercised by AHSC by delivering water to ACWC until 1912 at the latest, followed by delivery of water to AHSC's own Old Arrowhead bottling facility in mid-1913. Since the uses were not simultaneous, it follows that the quantity of water delivered to ACWC and the quantity bottled at the Old Arrowhead bottling facility should not be summed to determine the quantity of AHSC's pre-1914 water right.

3.1.2 Water Use Ratio

Nestlé comments that the amount of Nestlé's pre-1914 water right, which was calculated in the 2017 ROI based on the volume of product water of the 1917 ASC bottling facility, should be increased to account for the water use ratio (WUR) of the facility. The WUR is a metric of efficiency that relates the volume of water used by a facility to the volume of product water bottled. It is sensitive to the volume of water used in the manufacturing process for purposes such as general cleaning and sanitizing, cooling and heating, and providing drinking water to employees in the

[8] "Hydrant Water: Such Is Allegation in Connection with Litigation Over Use of Arrowhead Label"; Los Angeles Times; Jun 25, 1913; page II4
[9] "The Water of Arrowhead Bottled: Bottling Works to Be Constructed Near Hotel to Supply Big Demand"; San Bernardino Sun, Volume 36, Number 90, 18 July 1912
[10] "Arrowhead Water Is Being Bottled: First Car Load Will Be Sent to Los Angeles Some Time Today"; San Bernardino Sun, 12 June 1913, page 3

facility. By relating the quantity of water shipped by train car versus the quantity of drinking water bottled in 1926, Nestlé estimates in its comments that the WUR of ASC's 1917 bottling facility was 1.23. Multiplying the quantity of the water right identified in the ROI—26 ac-ft—by Nestle's estimated WUR of 1.23, Nestlé calculated that Division staff should have concluded that Nestlé's pre-1914 water right is for 31.9 ac-ft annually. For the reasons described below, Division staff does not agree.

Division staff only became aware after the 2017 ROI was issued that Arrowhead springs water was delivered and bottled at two other bottling facilities that existed prior to the completion of the 1917 ASC facility. As explained in the Revised ROI, Division staff determined that Nestlé's pre-1914 right is not based on the 26 ac-ft capacity of the 1917 bottling facility, but rather on the volume of water diverted and used under the incipient water right created by the 1909 Contract. This incipient water right was progressively perfected by beneficial use of water at three bottling facilities (the ASWC, AHSC Old Arrowhead facility, and the 1917 ASC facility). However, the incipient right could only have been expanded (via non-statutory appropriation) by operations at facilities that were both planned prior to 1914 and constructed with a capacity (after accounting for the WUR) exceeding the scope of the plan in the 1909 Contract. Since there is no evidence that the 1917 ASC facility was planned prior to 1914, the WUR of that facility is irrelevant to the quantity of Nestlé's pre-1914 water right.

Since the 1909 Contract with ASWC was terminated in 1911, before the full amount described in the appropriation plan could be delivered by AHSC to ASWC, the capacity of the ASWC facility, where water under the 1909 contract was to be used, is not relevant to a determination of AHSC's pre-1914 water right. Division staff has no evidence that AHSC delivered more than 4.15 ac-ft per year (i.e., four 6,500-gallon train cars per week, as described in the 1909 Contract). Furthermore, the 1909 Contract explicitly states that *all* water delivered under the contract was to be bottled and sold[11] (i.e. the contract required a WUR of 1.0), which is reasonable since the ASWC facility in Los Angeles had access to municipal water, and little, if any, Arrowhead water would have been necessary for production purposes. Therefore, the estimated WUR of the ASWC facility should not factor in the pre-1914 right determination, at all.

AHSC's "Old Arrowhead" facility, on the other hand, had no such contractual obligation to sell all the diverted water, and would not have had access to municipal water. Therefore, it is likely that the total volume of pre-1914 water consumed at the facility exceeded the volume of product water bottled at the facility (i.e. WUR > 1). However, rather than using a WUR of 1.7, which Nestlé based on data from a modern water bottling operation, it is appropriate to account for a WUR of 1.23, which Nestlé used for a contemporaneous water bottling operation. According to Nestlé's comments[12], the volume of product water bottled at the Old Arrowhead facility was 5.6 ac-ft per year. Therefore, Division staff calculates that the "Old Arrowhead" bottling facility would have

[11] 1909 Contract, paragraph 5
[12] Nestlé's Preliminary Response, February 9, 2018

used no more than a WUR-adjusted total of 6.88 ac-ft of water per year. Since this WUR-adjusted quantity does not exceed the quantity/scope of the 1909 incipient right (7.26 ac-ft), accounting for the WUR of the “Old Arrowhead” facility has no effect on Division staff’s determination of the quantity of Nestlé’s pre-1914 appropriative water right.

3.1.3 The Old Arrowhead Factory Was Located on Property Not Owned by AHSC, and Thus Bottling Was a Non-Riparian Beneficial Use

AHSC had two water rights under which it may have diverted water to supply its “Old Arrowhead” bottling facility: the riparian water right associated with the portion of its property in East Twin Creek watershed and the incipient pre-1914 appropriative right initiated by the 1909 Contract. Regardless of any claim represented in the 1909 Contract, however, an appropriation is only established through non-riparian beneficial use. (OE, 2020) If the “Old Arrowhead” bottling facility was located on property riparian to East Twin Creek, water used in the facility for bottling would have been put to beneficial use under AHSC’s riparian right. Water only could have been appropriated insofar as it was not taken from a riparian source, such as a different watershed, or put to non-riparian beneficial use, such as by diverting natural flow into a storage reservoir for later use, but there is no evidence this occurred. If the “Old Arrowhead” facility was located on non-riparian land, then the diversion and use by bottling could only be claimed as an exercise of a the pre-1914 right established under the 1909 contract.

Division staff delineated the Waterman Creek and East Twin Creek watersheds in the vicinity of the Old Arrowhead facility (attachment 1) using a USGS topographic elevation map (TEM) and surveys provided in Nestlé’s comment letters but could not conclusively determine in which watershed the Old Arrowhead facility was constructed. The facility is located at a saddle point (i.e. on a ridge between two peaks), where the topology has negative curvature and the direction of flow may be susceptible to significant variation caused by natural geographic features and human alterations below the resolution of the TEM. Division staff does not have pre-development elevation information for the vicinity, so the analysis was inconclusive.

However, Division staff considered the impact of both scenarios and determined that the outcome of the analysis would have no impact on the quantity of Nestlé’s pre-1914 right. It is unlikely that either the Old Arrowhead facility (up to 6.89 ac-ft/yr) or the ASWC facility (<4.15 ac-ft/yr) used enough water to fully perfect the incipient water right created by the 1909 Contract (up to 7.26 ac-ft/yr). And, as discussed above, since AHSC likely ceased deliveries to ACSC by 1912 and the Old Arrowhead facility was not constructed until at least a year later, around mid-1913, the two bottling plants would not have operated concurrently. The most AHSC would have bottled, and thus appropriated, even assuming the Old Arrowhead facility was located on non-riparian land, was 6.89 ac-ft/yr. The incipient right would not have been fully perfected through the plan of development until the amount appropriated and used under the right reached 7.26 ac-ft/yr—a feat which was not likely to have been accomplished until after ASC’s first Los Angeles bottling facility began operations in 1917. Therefore, the

riparian status of AHSC's "Old Arrowhead" bottling facility has no impact on the quantity of Nestlé's pre-1914 water right.

3.1.4 The Significance of the *Del Rosa* Judgment

3.1.4.1 The Del Rosa Judgment provides the "best evidence" of the rights of ASC and CCWC

Nestlé comments that the California trial court in *Pleasant Valley Canal Co. v. Borror,* (1998) 61 Cal.App.4th 742, relied on stipulated agreements as evidence, calling such agreements "persuasive evidence of the historic use of water . . . [and] water rights as they existed [at the time of the judgment]" (*Id.* at 766). Nestlé argues that the State Water Board should recognize the *Del Rosa* Judgment as a prior adjudication of the rights of ASC and CCWC, because the *Del Rosa* case does not suffer from the infirmities which prevented the Court from recognizing a prior adjudication of the water rights between the plaintiff and defendants in *Pleasant Valley:* 1) many water rights users were omitted and 2) the parties were not adverse to each other.

Division staff acknowledge that the *Del Rosa* Judgement should receive appropriate weight, especially given Nestlé's reliance on the judgment for over 80 years as a right for the Arrowhead operation. But the State Water Board is not bound by the *Del Rosa* Judgment. The Board was not a party to the judgment and is therefore not bound by *res judicata.* (OE, 2020.) The Legislature expressly vests authority in the Board to determine if any person is unlawfully diverting water. To determine whether a diversion and use of water is unauthorized, the Board necessarily must determine whether the diversion and use that the diverter claims is authorized under a valid claim of right, even when that claim is a riparian or pre–1914 appropriative rights. (*Id.*) Thus, even where a right has been previously adjudicated in court, the Board has jurisdiction to resolve allegations of unauthorized diversion and use by complainants who were not parties to the prior litigation and who, like the Board, are not bound by res judicata.

The *Western Municipal Water District v. East San Bernardino County Water District* (*Western*) Judgment and the *Orange County Water District v. City of Chino* (*Orange*) Judgment. ("*Western* Judgment"), which adjudicated rights for the Santa Ana River basin through reference to the State Water Board, is no less important. To the extent Nestlé has increased its diversions since the 1963 *Western* Judgment, it has deprived rights in the adjudicated of their legal entitlements to water. Parties to the *Western* Judgment include the cities of San Bernardino, Colton, Riverside, Corona, Chino, Anaheim, Pomona, Redlands, and Rialto and the San Bernardino Valley Municipal Water District, Inland Empire Utilities Agency (originally Chino Basin Municipal Water District), Big Bear Municipal Water District, Western Municipal Water District, and Orange County Water District, among others – municipal water supply for no less than 5 million people.

3.1.4.2 **The Del Rosa Judgment creates a prescriptive right by Nestlé's predecessors to the tributary flows of East Twin Creek**

Nestlé argues that "all the elements of a prescriptive acquisition of [Del Rosa's] rights were established, and, by the express findings of the Del Rosa Judgment, the elements ripened into a perfected pre-1914 right in favor of CCWC taken from [Del Rosa] by adverse possession." While the *Del Rosa* Judgment recognizes that the Arrowhead Springs Corporation (ASC) could collectively exercise its rights as "riparian owner and as appropriator and by prescription," it recognized no prescriptive rights for CCWC. The *Del Rosa* Judgment was a negotiated settlement and the parties were clearly aware of the doctrine of prescription. Had they agreed that CCWC had prescriptive rights, the judgment surely would have said so.

Even then, contrary to Nestlé's assertion, the judgment does not indicate the parties agreed that CCWC met all the elements of prescription. Under the doctrine of prescription, an appropriative taking of water which is not surplus may ripen into a prescriptive right where the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for a statutory period of five years, and under claim of right. (OE, 2020.) A prescriptive right extends only to the quantity put to beneficial use. (*Id.*) There is no reference that CCWC's diversion and use was "open and notorious." (*Id.*) Furthermore, although the judgment indicates that CCWC diverted water for at least five years, a typical period required for prescription, the five-year period also could have been relevant to establishing the CCWC's degree of reliance on the water purchased through Arrowhead – a required element for equitable estoppel. (*Id.*) The judgment also describes CCWC's diversions as "injurious" to Del Rosa, as opposed to "adverse." This is consistent with Del Rosa's acknowledgment that enjoining CCWC's continued diversions would be "inequitable" due to CCWC's good faith purchase of what reasonably appeared to be a valid right and then spending money in reliance on that purchase to develop a business, as opposed to a hostile effort to take water another person was entitled to use. (*Id.*)

Regardless, since the adoption of the Water Commission Act in 1913, the appropriation procedure established in the Water Code is the exclusive means of acquiring a right to use water subject to the State Water Board's permitting authority. (OE, 2020.) Although modern courts have not directly addressed the issue, it is likely that only a wrongful taking of water not subject to the statutory method of appropriation in Division 2 of the Water Code may ripen into a prescriptive right. (*Id.*) To the extent Nestlé claims a right by prescription, it would be limited to water appropriated and put to beneficial use before 1914 – an amount no more than 7.26 ac-ft/yr.

Division staff therefore maintains that CCWC's continued diversion and use of water recognized in the *Del Rosa* Judgment requires a post-1914 permit insofar as it was not based on an appropriation initiated before 1914 nor diverted under a claim for groundwater that is not within the State Water Board's permitting authority.

4 Comments from the Public

Date Received	Format	Commenter Last, First	Organization
2/8/2018	Email	Austerman, Inge	Individual
2/9/2018	Email	Belenky, Lisa	Center for Biological Diversity, Sierra Club (San Gorgonio Chapter)
2/12/2018	Email	Bialecki, Hugh	President, Save Our Forest Association, Inc.
2/12/2018	Email	Ellington, Lynda	Individual
12/31/2017	Email	Gilbert, Chris	Individual
2/12/2018	Email	Hansen, Judith	Individual
1/19/2018 2/8/2018	Email	Laws, Michele	Mountain Bears Democratic Club
1/16/2018	Postcard	Leach, Pat	Individual
1/30/2018	Email	Nash, Susan	Friends of the Northern San Jacinto Valley
2/9/2018	Email	Nussbaumer, Elizabeth	Food and Water Watch
1/29/2018	Email	Serrano, Anthony	Individual
2/7/2018	Email	Shubin, Marilyn	Individual
2/9/2018	Email	Starbuck, Betsy and Vassilakos, Jill	League of Women Voters® of San Bernardino
2/6/2018	Email	Thompson, Glenn	Individual
1/10/2018	Letter	Zoltan, Laszlo	Digital Video ExtraOrdinaire
2/6/2018 – 2/21/2018	Email	Meleon, M ; Tully, Sara; Egan, Michelle; Treadwell, Carol; Ortiz, Jim; Carlisle, Patrice; Aldrich, Annie; Villepique, Jeffery; Patterson, Lisa; And approximately 8000 other emails sent on behalf of a member of the public	Food and Water Watch

4.1 **Food and Water Watch**

Food and Water Watch, a national non-profit consumer advocacy organization focused on corporate governance, sustainability, and the protection of public resources, submitted a comment letter on February 9, 2018, which reflects the comments and concerns of many of the individual commenters listed above. Food and Water Watch's principal concerns can be paraphrased as follows:

Comment 1: Nestlé's diversions/extractions have egregiously exceeded their water rights.

Response: Division staff agree that Nestlé diversions have exceeded their water rights. The 2017 and Revised ROIs recommend the Nestlé immediately cease all unauthorized diversions and warn Nestlé that failure to do so may result in enforcement action.

Comment 2: California should not allow a corporate entity to continue to extract water from public lands for a cost that is disproportionate to the profit earned from the sale of the ill-gotten public resource.

Response: The purpose of Division staff's investigation was to identify water subject to the SWRCB's permitting authority and determine whether Nestlé's diversion, method of diversion, and/or use of water is wasteful or unreasonable. Food and Water Watch's concerns regarding the fees associated with Nestlé's special use access permit are not within the scope of the investigation or the SWRCB's regulatory authority. To the extent that Nestlé may continue to lawfully divert water under a pre-1914 water right claim or extract percolating groundwater that is not within the permitting authority of the State Water Board, no fees are levied by the State Water Board on anyone in California who diverts or extracts such water. Fees are levied by the State Water Board according to a fee schedule on anyone in California who lawfully diverts water under a post-1914 water right permit, license, or registration, but such fees are based only on volume, regardless of the diverter's eventual economic benefit. However, should the Division determine that administrative monetary penalties are an appropriate response to unauthorized diversions by Nestlé or any potential violations of a Cease and Desist Order (CDO) issued to Nestlé, the SWRCB will consider the economic benefit that Nestlé derives from unauthorized diversions when calculating Nestlé's penalty amount.

Comment 3: Nestlé is not a good steward of the state's public water resources, because they did not reduce water diversions during the 2011 to 2014 drought years.

Response: Under California's water right priority system, diverters with a valid water right are not typically expected or required to reduce their diversions if water is available under their priority of right or unless public trust resources are determined to have been negatively impacted by diversions. California's most recent drought was declared by the governor in January 2014 and officially ended in May 2017. While the governor encouraged all Californians to reduce their use of water during the drought, the State Water Board took specific actions that required water conservation or reduced water diversions. During the drought, the State Water

Board adopted regulations that required urban water suppliers to reduce water use in their service areas by an average of 25% relative to use in 2013. The Division also issued curtailment notices to junior water right holders to protect senior water rights and issued curtailment orders to certain water rights holders that could negatively impact public trust resources. Based on the then known status of Nestlé's water rights, Nestlé was not subject to the conservation or curtailment requirements issued by the State Water Board.

Comment 4: Nestlé's consumptive use of extracted groundwater is unreasonable in comparison with other potential uses of the water that return some water to local aquifers after use, such as local farming, domestic use, recreation, etc.

Response: The California Water Code recognizes use of water for domestic purposes as the highest use of water and irrigation as the next highest use. However, Division staff is not aware of any previous instance wherein the SWRCB has curtailed an otherwise reasonable diversion and use of water under a valid water right so the water could be used *more* reasonably by another diverter. Neither is Division staff aware of any instance wherein the SWRCB altered the priority of competing water rights based on the percentage of water returned to a source after beneficial use (return flow) solely on the basis that the competing right is determined to be a higher use.

4.2 Save Our Forests Association

Comment Received. The concerns and issues raised by the comment submitted by Save Our Forest Association did not differ significantly from the other comments and are collectively addressed in the responses to other comments.

4.3 Center for Biological Diversity

Comment: Federal reserved rights should be quantified because they apply to surface and groundwater rights and, being senior to Nestlé's pre-1914 water rights, may impose constraints on the validity and extent of Nestlé's water rights in Strawberry Canyon.

Response: Federal reserved rights are a class of water right that apply to instream and out-of-stream water uses, may be created without diversion and use, are not lost by non-use, and have priority dates that relate back to the date the land was withdrawn from the public domain.[13] They are limited to the minimum amount of water reasonably necessary to satisfy both existing and foreseeable future uses of water for the primary purpose for which the reserve is made. According to a notice of reservation posted by the U.S. Department of Interior, the San Bernardino forest reservation was made "for the benefit of the adjoining communities, being created to maintain a permanent supply of water for irrigation and wood for local use *by a*

[13] http://www.dnr.alaska.gov/mlw/water/fedrsrv.cfm

rational protection of the timber thereon."[14] (emphasis added) Division staff agree that the Forest Services' reserved rights to surface and groundwater within the forest pre-date and are senior to Nestlé's pre-1914 water rights. Division staff therefore examined two ways in which the Forest Service's federal reserved rights may affect Nestlé's pre-1914 rights: they may (1) prevent the change of Nestlé's point of diversion from Coldwater Creek to Strawberry Canyon or if not, they may (2) limit the amount of water available for Nestlé to divert.

It is unlikely that the Forest Service's federal reserved rights prevented Nestlé's change of POD, since the Forest Service's reserved rights are senior to Nestlé's pre-1914 rights and must be satisfied before Nestlé is authorized to divert water within the San Bernardino National Forest. California Civil Code §1412 (enacted in 1872 and replaced with the similarly worded CWC §1706 in 1943) states that a person entitled to the use of water may change the point of diversion, if others are not injured by the change. In theory, if Nestlé injured the Forest Service's reserved rights by changing its POD, some or all of the change may be unauthorized. However, if Nestlé, the junior water right in this case, diverted water only after the senior Forest Service right was satisfied, as is intended in California's water right priority system, there may be no injury regardless of the quantity of either right. Since the Forest Service did not include minimum flow requirements in special use permits issued prior to 2018, and did not indicate that the federal reserved right may be injured by Nestlé's diversion in the 70+ years since Nestlé's POD change, it is reasonable to assume that at the time the change was made, it did not injure the Forest Service's federal reserved rights. Based on the available information, Division staff conclude that Nestlé's change of POD was likely valid.

The Forest Service's federal reserved rights may limit the amount of water available for diversion or extraction from Strawberry Canyon insomuch as they are senior to Nestlé's water right and may, during some parts of the year, require all the available surface water and any groundwater that supports forest ecology. Except in the context of statutory adjudications, Division staff typically does not mediate disputes between parties entitled to divert water other than under a water right issued by the SWRCB. Division staff does, however, have the responsibility and authority to protect public trust resources and, in this case, the studies required to define the quantity of the federal reserved right are also likely to identify public trust resources that Division staff may have the authority and responsibility to protect. So, while Division staff may not act to protect the Forest Service's reserved rights to groundwater *per se*, it may do so incidentally while protecting public trust resources.

[14] Los Angeles Herald (Los Angeles, California) Wed. August 29, 1894; see also "Notice to Settlers", The Daily Courier (San Bernardino, California) Sun. May 13, 1894.

4.4 Division Staff Response to League of Women Voters

Comment 1: The League disagrees with the State Board's conclusions and recommendations on the grounds that all water on National Forest Service land was reserved upon its founding on February 25, 1893 for beneficial use.

Response: Federal reserved rights are limited to the minimum amount of water reasonably necessary to satisfy both existing and foreseeable future uses of water for the primary purpose for which the land is reserved. Surplus water may be appropriated for other beneficial uses. According to a notice of reservation (dated August 29, 1894) posted by the U.S. Department of Interior, the San Bernardino forest reservation was made "for the benefit of the adjoining communities, being created to maintain a permanent supply of water for irrigation and wood for local use *by a rational protection of the timber thereon*." [15] Division staff understands the forest reservation as not resulting in a direct reservation of water for irrigation use in adjoining communities, but rather authorizing the reservation of water for the protection of timber within the forest, which in turn results in maintaining a permanent water supply for irrigation. Since narrowly protecting *timber* does not have any direct effect on water supplies, Division staff understands that the *protection of timber* logically includes the *protection of forest ecology* (i.e. the relations of organisms within the forest biome to their physical surroundings), in general. The minimum quantity required for this purpose is unknown, but Division staff understands that by Nestle accepting the 2018 SUP, Nestlé agreed to conduct the studies necessary to make such a determination. Additionally, the AMP specifies minimum flows that are likely to protect forest ecology in the interim.

Comment 2: The League requests that the SWRCB require Nestlé to fund a reasonable proportion of the habitat conservation plan proposed by SBVMWD, and furthermore requests that the Board respond definitively to the League whether it has the authority to do so.

Response: The principal tools available to the Division to protect the waters of the State from public trust resource degradation, waste, and misuse are the Cease and Desist Order (CDO) and the Administrative Civil Liability (ACL) complaint, where an ACL may result directly from violation(s) of water rights permit/license terms, statutes, or regulations or from violation(s)of a CDO. Upon receipt of the ACL complaint, the diverter can contest the complaint, or propose to settle the matter. Proposed settlements can include a Supplemental Environmental Project (SEP) to offset a portion of the total liability. A SEP must improve, protect, or reduce risks to public health or the environment, but must not be a project that the violator would otherwise be legally mandated to perform under a federal, state, or local law. It must be the violator who proposes a SEP; the Water Board cannot impose a requirement on the violator to fund a SEP.

[15] Los Angeles Herald (Los Angeles, California) Wed. August 29, 1894; see also "Notice to Settlers", The Daily Courier (San Bernardino, California) Sun. May 13, 1894.

5 Public Agency Comments

Date Received	Format	Commenter Last, First	Organization
1/17/2018	email	Longville, Susan (Board President); Hedrick, Douglas (General Manager)	San Bernardino Valley Municipal Water District
1/19/2018	letter	Noiron, Jody	United States Forest Service
2/9/2018	letter	Noiron, Jody	United States Forest Service
2/9/2018	letter	Brandt, Jeff	California Department of Fish and Wildlife

5.1 United States Forest Service

Comment: The California Consolidated Water Company (CCWC) quit claimed Indian Springs back to the Arrowhead Springs Corporation in August of 1930, reserving the right to the surplus water. It would be logical to conclude from the agreement that Arrowhead continued to use water from Indian Springs for domestic purposes and CCWC continued to use the surplus water from the existing springs and pipelines. Is there any evidence in the record that Consolidated changed the point of diversion and extended the existing pipe by which the diversion is made as allowed by § 1706, or did both parties continue to use Indian Springs while developing additional water sources higher in the watershed using new facilities?

Response: Division staff has insufficient information to accurately describe the operations of CCWC and the Arrowhead Springs Corporations at Indian Springs in the 1930's or determine under what right such operations may have been conducted. Water from Indian Springs may have been used under a riparian claim of right, if used for domestic purposes on the property, while the portion removed from the property was simultaneously diverted under the pre-1914 right. There is no evidence of appropriation by Nestlé's predecessors other than for the purposes described in the 1909 Contract (appropriation of water for offsite bottling and sale), and no evidence of a pre-1914 plan to expand the scope of the 1909 plan. The 2017 ROI and the Revised ROI therefore conclude that CCWC's and ASC's operations did not create a new right, and do not affect the quantity or season of diversion of Nestlé's pre-1914 water right.

There is evidence that indicates that CCWC did, in fact, develop additional sources by extending a pipeline to higher elevations in the watershed after 1914 and that they may have done so while one or both companies continued to use Indian Spring water. However, since such development was not undertaken prior to 1914 and therefore did not create or expand a pre-1914 water right, any resulting increase in the total appropriation of water in excess of the quantity of the incipient right created by the 1909 Contract (excluding groundwater not subject to SWRCB's

regulatory authority) was unauthorized diversion. Division staff may never fully characterize such historical unauthorized diversion by Nestlé's predecessors, so such historical unauthorized diversion is unlikely to precipitate formal enforcement action. Instead, Division staff's priority is to bring Nestlé's contemporary diversion and use of water into compliance.

5.2 San Bernardino Valley Municipal Water District

Comment 1: Diversions from Strawberry Creek by Nestlé's predecessors prior to 1963 were included [inadvertently] in the water balanced used to develop the Western Judgment and constitute a baseline level of diversion by Nestlé that SBVMWD has determined would not injure the parties to the Western Judgement. However, diversion in excess of that baseline quantity could impose a replenishment obligation on SBVMWD that constitutes injury to said parties.

Response: Division staff agree that any unauthorized diversion of surface water by Nestlé above 1963 levels would injure the parties to the *Western Municipal Water District v. East San Bernardino County Water District* (*Western*) Judgment and the *Orange County Water District v. City of Chino* (*Orange*) Judgment. Division staff have recommended that Nestlé discontinue any unauthorized diversion. Failure to do so may result in formal enforcement action.

Comment 2: SWRCB should work with State and Federal resource protection agencies and Nestlé to participate in a physical solution to remediate the adverse effects of Nestlé's over-appropriation in Strawberry Creek, potentially by funding a "reasonable proportion" of habitat conservation plan developed by SBVMWD to benefit certain aquatic species that would likely have been affected by Nestlé's diversions.

Response: At this time, adverse impacts of Nestle's water extractions in the Strawberry Creek watershed have not been determined. As stated in the 2017 ROI and Revised ROI, Division staff recommended not taking further action at this time on allegations of unreasonable use and injury to public trust resources and recommended revisiting these issues if the adaptive management plan required by the Forest Service Special Use Permit does not mitigate for injuries to public trust resources. When the evidence supports taking formal enforcement action, Division staff will require appropriate corrective actions within the scope of the State Water Board's legal authority. Division staff may recommend an administrative civil liability (monetary penalties, ACL) and a cease and desist order, which considers any adverse impact to public trust resources. Participation by Nestlé in efforts to address adverse impacts resulting from its water diversions may be part of settlement agreements for ACLs or included in a CDO.