

January 17, 2018

VV

Victor Vasquez
Division of Water Rights
State Water Resources Control Board
P.O. Box 2000
Sacramento, California 95812-2000

Re: Report of Investigation – Findings of Unauthorized Diversion by Nestle Waters North America, Strawberry Creek, San Bernardino County

Dear Mr. Vasquez:

San Bernardino Valley Municipal Water District (“Valley District”) has received a copy of your December 20, 2017 letter to Mr. Larry Lawrence and Ms. Rita Maguire of Nestle Waters North America (“Nestle”) regarding Nestle’s diversion of water from Strawberry Creek in San Bernardino County. Valley District appreciates the opportunity to comment on the Report of Investigation and Staff Findings (the “ROI”).

As the State Water Resources Control Board (“SWRCB”) is well aware, Valley District (along with Western Municipal Water District of Riverside County, (“Western”)) serves as the Watermaster administering the judgment in *Western Municipal Water District v. East San Bernardino County Water District*, Superior Court of Riverside County, Case No. 78426 (April 17, 1969) (the “*Western Judgment*”). Under the terms of the *Western Judgment*, Valley District and Western represent all of the groundwater pumpers in the San Bernardino Basin Area, which is the groundwater basin at the base of Strawberry Creek. Valley District and Western are also responsible for ensuring that certain minimum “base flows” reach Orange County Water District under the terms of *Orange County Water District v. City of Chino et al.*, Superior Court of Orange County, Case No. 117628 (April 17, 1969) (the “*Orange County Judgment*”). Together, the *Orange County* and *Western Judgments* constitute a comprehensive adjudication of all of the rights to surface and groundwater in the Santa Ana River watershed.

Valley District understands that inflows from Strawberry Creek were included in the water balance that was used to develop the *Western Judgment*. Diversions from Strawberry Creek by Nestle’s predecessors began prior to 1947 when our records start, so some level of extraction can occur on the part of Nestle without adversely affecting the rights of the parties to the *Western* and *Orange County Judgments*. Specifically, for purposes of the *Western Judgment*, Nestle’s (or its predecessors) diversions during the period from 1959 through 1963 constitute the baseline level of diversions that would not injure the parties to the *Western Judgment*, and so by extension would not injure the parties to the *Orange County Judgment*. Any diversions in excess of that baseline quantity could impose a replenishment obligation on Valley District and/or Western, depending on the extractions by other parties to the *Western Judgment* or, more likely, would cause Valley District and/or Western to expend credits from prior years to ensure that the San Bernardino Basin Area remains in balance. In these ways, the diversion of water by Nestle in

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excess of the diversion of water during the 1959-63 base period represents an unauthorized diversion of water that constitutes injury to Valley District and/or Western.

Rather than litigate issues of injury, however, Valley District believes that this situation can and should be resolved by means of a physical solution. From Valley District's perspective, there have been two results from the over-appropriation of water by Nestle. First, there has been a reduction of water levels in the San Bernardino Basin Area that is approximately equal to the over-appropriation of water by Nestle. Under the doctrine of physical solution as articulated by the California Supreme Court in the *East Bay Municipal Utility District v. City of Lodi* decision and its progeny, the simplest way to remedy this situation would be for Nestle to purchase a quantity of replacement water to refill the "hole" in the San Bernardino Basin Area caused by the over-appropriation.

Second, the over-appropriation of water by Nestle has likely had an adverse impact on fish and wildlife in the Strawberry Creek watershed. Valley District, working with a large number of other local public agencies, the U.S. Fish & Wildlife Service and the California Department of Fish & Wildlife, is in the process of developing a habitat conservation plan that aims at recovering native species like the Santa Ana sucker, the arroyo chubb, the speckled dace, and the mountain yellow-legged frog, all of which would likely have been adversely affected by Nestle's over-appropriation of water. It would be appropriate for Nestle to fund a reasonable proportion of the activities proposed under the habitat conservation plan to holistically restore the habitats for these species, even if those conservation measures do not involve Strawberry Creek itself. The important thing is to remedy the adverse effects of over-appropriation on these *populations*, not necessarily to restore those species to Strawberry Creek.

For the foregoing reasons, Valley District believes that the over-appropriation of water by Nestle constitutes injury to the many parties that are signatories to the *Western* Judgment. This is a situation where an upstream junior diverter has caused injury to a downstream senior diverter, which is the classic situation where the courts have used the physical solution doctrine to require the junior diverter to make appropriate payments to make the senior whole. Moreover, because of the timing of the Report, there is the possibility for a similar "physical solution" to remedy any harm to public trust resources caused by Nestle's diversions by means of Nestle providing funding for recovery activities undertaken pursuant to the proposed habitat conservation plan. Valley District urges the SWRCB to work with Valley District, Nestle and the San Bernardino National Forest, as well as the U.S. Fish & Wildlife Service and the California Department of Fish & Wildlife, to craft a physical solution that will remedy these adverse effects of Nestle's over-appropriation of water from Strawberry Creek. Valley District stands ready to play a constructive role in resolving this matter amicably.

Very truly yours,



Susan Longville
Board President



Douglas D. Headrick
General Manager and Watermaster Committee Member

cc:

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