

## Eggers, Tomas@Waterboards

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**From:** Lisa Belenky <lbelenky@biologicaldiversity.org>  
**Sent:** Friday, February 09, 2018 4:21 PM  
**To:** Vasquez, Victor@Waterboards  
**Cc:** Larry Silver; Ileene Anderson  
**Subject:** Comments on Nestle report of investigation  
**Attachments:** CBD SC comments on SWRCB report 2 9 18 final.pdf

Mr. Vasquez, Attached please find comments regarding Report of Investigation, INV 8217, and Staff Findings of Unauthorized Diversion Regarding Complaints Against Nestle Waters North America, Strawberry Creek, San Bernardino National Forest from the Center for Biological Diversity and the Sierra Club. *Please acknowledge receipt of these comments.*

Do not hesitate to contact me if you have any questions about these comments. Lisa

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**From:** Vasquez, Victor@Waterboards [<mailto:Victor.Vasquez@waterboards.ca.gov>]  
**Sent:** Thursday, January 18, 2018 5:06 PM  
**To:** [Larry.Lawrence@waters.nestle.com](mailto:Larry.Lawrence@waters.nestle.com); [RMaguire@AZLandandWater.com](mailto:RMaguire@AZLandandWater.com); [rgtaylor@fs.fed.us](mailto:rgtaylor@fs.fed.us); Lisa Belenky; [info@couragecampaign.org](mailto:info@couragecampaign.org); [michael@storyofstuff.org](mailto:michael@storyofstuff.org); [amandafrye6@gmail.com](mailto:amandafrye6@gmail.com); [stevloe01@gmail.com](mailto:stevloe01@gmail.com); [Caleb\\_m\\_laieski@yahoo.com](mailto:Caleb_m_laieski@yahoo.com); [nancy.eichler@gmail.com](mailto:nancy.eichler@gmail.com); [gail@alpenhornnews.com](mailto:gail@alpenhornnews.com); [slongvil@gmail.com](mailto:slongvil@gmail.com); [ian.james@desertsun.com](mailto:ian.james@desertsun.com); [jnoiron@fs.fed.us](mailto:jnoiron@fs.fed.us); [jsteinberg@scng.com](mailto:jsteinberg@scng.com)  
**Cc:** Moran, Timothy@Waterboards; Kostyrko, George@Waterboards; Rose, David@Waterboards; Rizzardo, Jule@Waterboards; Petruzzelli, Kenneth@Waterboards; Carrigan, Cris@Waterboards  
**Subject:** Time extension to comment on Nestle report of investigation

The State Water Resources Control Board (State Water Board), Division of Water Rights, has received requests for additional time to submit comments on the Report of Investigation (ROI) of Nestlé Waters North America. **Staff will therefore extend the deadline for comments to February 9, 2018.** Staff will review comments and determine the most appropriate action.

References cited in the ROI are now available on the ROI web page at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/enforcement/complaints/nestle.html](https://www.waterboards.ca.gov/waterrights/water_issues/programs/enforcement/complaints/nestle.html).

This extension is not an order or decision of the State Water Board. As a result, it is not subject to a petition for review. Neither does it constitute a final agency action subject to judicial review.

Victor Vasquez  
Senior Water Resource Control Engineer

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*VIA EMAIL*

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Division of Water Rights  
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**Re: Report of Investigation, INV 8217, and Staff Findings of Unauthorized Diversion Regarding Complaints Against Nestle Waters North America, Strawberry Creek, San Bernardino National Forest**

Dear Mr. Vasquez,

These comments are submitted on behalf of the Center for Biological Diversity (the “Center”) and the Sierra Club’s San Gorgonio Chapter (“Sierra Club”) regarding the Report of Investigation, INV 8217, and the Staff Findings Regarding Unauthorized Diversion of Water by Nestle Waters North America in the vicinity of Strawberry Creek in the San Bernardino National Forest, dated December 20, 2017.

The Center is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has over 1.6 million members and online activists, many of whom reside and/or recreate in California and are affected by the water withdrawals at issue here. The Center has a long history of working to protect California’s natural resources on public and private lands and specifically within the San Bernardino National Forest. The Center is also a plaintiff in the case *Center For Biological Diversity et al. v. United States Forest Service*, Case No. EDCV 15-2098-JGB (DTBx), 2016 U.S. Dist. LEXIS 139309 (C.D. Cal. Sep. 20, 2016), currently on appeal, which is referenced in the report.

The Sierra Club is a national non-profit organization of with over 3 million members and supporters, many of whom live in California. As part of the Sierra Club, the San Gorgonio

Chapter is dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting responsible use of the earth's ecosystems and resources; to educating and encouraging humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. The Sierra Club has many members who use, enjoy, and value the San Bernardino National Forest lands and resources that are affected by the water withdrawals at issue here.

We agree with the SWRCB staff's conclusion that Nestle is diverting far more water than it has rights to from the Strawberry Creek watershed and appreciate the effort that went into producing the detailed report of investigation. We submit these comments in hopes that the SWRCB staff can clarify several issues and address others in more depth.

**I. Federal Reserved Water Rights are Senior To Any of Nestle's Claimed Pre-1914 Rights and Should Be Quantified**

**A. Federal Reserved Water Rights Include Both Surface Water and Groundwater Rights as of the Date of the Reservation and The Quantity of Water Reserved Is Measured By the Purpose of the Reservation**

When the national forests were created, water rights were reserved, including water necessary to fulfill the purposes of the reservation. (*United States v. New Mexico*, 438 U.S. 696, 702, (1978) ["Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water."]; *see also Cappaert v. United States*, 426 U.S. 128, 138 (1976) ["[W]hen the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."] "In so doing, the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." (*Cappaert v. United States*, 426 U.S. at 138.) Reserved rights are "[f]ederal water rights," which "are not dependent upon state law or state procedures." (*Id.* at 145.) "Thus, reserved rights represent an exception to the general rule that allocation of water is the province of the states." (F. Cohen, *Handbook of Federal Indian Law* 19.01[1] at 1204 (2012) (citing *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800); *Winters v. United States*, 207 U.S. 564, (1908).)<sup>1</sup>

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<sup>1</sup> Notably, the United States can be joined in any "suit" or adjudication regarding water rights in state court. (*See* 43 U.S.C. § 666. ) However, because "federal courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights claims of the United States," reserved rights "need not be adjudicated only in state courts." (*Cappaert v. United States*, 426 U.S. at 145.) Thus while the United States can be joined in any "suit" or adjudication in state court, "the 'volume and scope of particular reserved rights . . . [remain] federal questions.'" (*Colville Confederated*

Federal reserved water rights extend to groundwater rights as well as surface waters. (*Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al.*, 849 F.3d 1262, 1270 (9th Cir. 2017) (cert. denied 138 S. Ct. 468 (2017)) [holding that “the Winters doctrine applies to groundwater” underlying the reserved lands]; *see also Cappaert v. United States*, 426 U.S. at 143 [“Thus, since the implied-reservation-of-water-rights doctrine is based on the necessity of water for the purpose of the federal reservation, we hold that the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.”].)

The San Bernardino National Forest was first reserved from entry by settlers in 1893:

Whereas . . . the President of the United States may from time to time set apart and reserve in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations; and the President shall by public proclamation declare the establishment of such reservations and the limits thereof.

And whereas the public lands in the State of California within the limits hereinafter described are in part covered with timber, and it appears that the public good would be promoted by setting apart and reserving said lands as a public reservation:

Now, therefore, I, Benjamin Harrison, President of the United States by virtue of the power in me vested by section 24 of the aforesaid act of Congress, do hereby make known and proclaim that there is hereby reserved from entry or settlement and set apart as a public reservation all those certain tracts, pieces, or parcels of land lying and being situate in the State of California and within the boundaries particularly described as follows, to wit: [*Description of Area Encompassing Much of Current SBNF*]

. . .

Excepting from the force and effect of this proclamation all lands which may have been prior to the date hereof embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law and the statutory period within which to make entry or filing of record has not expired, and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith.

Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law

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*Tribes v. Walton*, 752 F.2d 397, 400 (9th Cir. 1985) (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976).)

under which the entry, filing, settlement, or location was made.

Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation.

President Benjamin J. Harrison, Proclamation 354—Setting Apart as a Public Reservation Certain Lands in the State of California, February 25, 1893 (available at <http://www.presidency.ucsb.edu/ws/index.php?pid=71172> )

A notice of the reservation posted by the Department of Interior, General Land Office, explained that the reservation was made “for the benefit of the adjoining communities . . . to maintain a permanent supply of water for irrigation and wood for local use by the rational protection of the timber thereon.” (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.)

### **B. The Federal Reserved Water Rights Vested In the National Forest Must Be Quantified and Taken Into Consideration In Determining the Extent And Validity of the Nestle Diversions**

In order to determine the extent and potential validity of any of the Nestle diversions, the Federal reserved water rights must be quantified and considered. These Federal reserved rights include, at minimum:

- sufficient surface and groundwater to sustain forest health in the affected watershed;
- sufficient surface and groundwater to maintain riparian woodlands in the affected watershed;
- sufficient surface and groundwater needed to sustain water flows in the affected watersheds for municipal and other downstream uses; and
- sufficient groundwater needed for other beneficial overlying uses.

## **II. Groundwater Issues**

### **A. Groundwater in California**

Under California law, groundwater use is treated differently than surface water or subterranean streams flowing in definite channels (Cal. Water Code § 1200), with overlying owners possessing the right to use groundwater. Rights to the use of groundwater consist of overlying rights, appropriative rights, and prescriptive rights. An overlying right is an incident of land ownership, and the use of the water on that land is a proprietary right. (*City of Barstow v. Mohave Water Agency* (2000) 23 Cal.4th 1224, 1240.) An appropriative right takes the water off

the land and uses it elsewhere. The report finds that some of the water Nestle is taking may be groundwater, and it is not clear from the report whether Nestle is claiming appropriative rights to some amount of that groundwater.

Under California law, to establish an appropriative right to groundwater that is hydrologically connected to a running stream, either through percolation through the soil, or reaching it in one or more running streams, a non-overlying owner must apply for a permit from the SWRCB, this includes water diverted from a spring or seep (including diversions through mechanical means that artificially augment flow such as here). (*Hutchins, California Law of Water Rights*, p. 403.) Waters of springs that form streams may be appropriated but, after 1914, such appropriation can only be made by following the permit application procedure set forth in the Water Code. (*Hutchins*, p. 404; see *De Wolfskill v. Smith* (1907) 5 Cal. App. 175, 181.) In contrast, a SWRCB permit is not necessary only if the appropriator can demonstrate that the water it has “developed” would not have reached the stream by percolation in the natural course of events and that it had not been “artificially drawn into the stream by the” appropriator’s work. (*Hutchins*, p. 406.) As the report acknowledges, hydrologically connected water that is taken below ground and other groundwater are subject to different rules of appropriation.

“An overlying right, analogous to that of the riparian owner in a surface stream, is the owner's right to take water from the ground underneath for use on his land within the basin or watershed; it is based on the ownership of the land and is appurtenant thereto.” (*California Water Service Co. v. Edward Sidebotham and Sons* (1964) 224 Cal.App.2d 715, 725.) Rights in groundwater can be obtained through appropriation, however the use of groundwater is generally limited to the overlying lands unless there is surplus water in the basin. (See *City of Barstow v. Mojave Water Agency* (2000). 23 Cal. 4th 1224, 1241.)<sup>2</sup> An appropriative right to groundwater is acquired by taking the water for a non-overlying use. (*City of Barstow, supra*, 23 Cal.4th at 1248.) Under California law “[p]roper overlying use ... is paramount, and the right of an appropriator, being limited to the amount of the surplus must yield to that of the overlying owner in the event of a shortage unless the appropriator has gained prescriptive rights through the taking of non-surplus waters.” (*Hi-Desert County Water Dist. v. Blue Skies Country Club, Inc.* (1994) 23 Cal.App.4th 1723, 1730-1731.)

The rights of the overlying owners to use groundwater cannot be impaired by an appropriation for a non-overlying use even one that has been reported pursuant to well

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<sup>2</sup> In order to appropriate groundwater under state law, a user must show that the water is “surplus” to existing use or does not exceed the “safe yield” of the affected basin. (*City of Los Angeles v. City of San Fernando* (1975) 14 Cal.3d 199 214-215, 277-282.) The appropriator must show that the water is surplus to all existing uses in the basin and the use will not harm or cause injury to any other legal user of water or overlying landowner. The burden is on the appropriator to demonstrate a surplus exists. (*Allen v. California Water and Tel. Co.* (1946) 29 Cal.2d 466, 481.)

registration reporting requirements. Such historical use would not have priority over the rights of the overlying land owners. (See *Katz v. Walkinshaw* (1902) 141 Cal. 116, and *Hutchins*, *The California Law of Water Rights*, p. 441 [“Ever since the decision in *Katz v. Walkinshaw*, 45 Cal. 116 (1903), it has been recognized that while justiciable rights can be acquired for the exporting of percolating water from the area in which it occurs, the rights of the overlying owner to the quantity of water necessary for use on his overlying land are paramount to an appropriation for distant use.”].) According to *Hutchins*: “As the overlying rights are correlative, the ground waters cannot be taken from the lands on which they are found for use elsewhere if the taking injuriously affects the rights of adjoining property owners.” (*Hutchins*, p. 442.)

In this area, the Forest Service is the primary overlying owner and its overlying rights cannot be impaired. As the report explains, the timing of when water is taken out of the system can affect recharge of the groundwater as well stream flow regimes in Strawberry Creek. (See Appx. C-3.) The report notes some of the overlying rights of the Forest Service, i.e. through License 1649, to provide water for drinking fountains, public campgrounds, and for car overheating and other uses at rest stops. But this does not fully address all overlying uses or reserved rights. The federal reserved rights to groundwater and overlying rights need to be more fully investigated and quantified as well as surface water rights, and the impact of water withdrawals on groundwater recharge and other resources must also be assessed. Even if some appropriative groundwater right could be established, which is uncertain at this time, Nestle can have no right to take water that significantly reduces the availability of water to the Forest Service in furtherance of its overlying groundwater uses or its reserved water rights, or that impairs any other prior rights in the basin.

#### **B. Groundwater Recordation Alone Cannot Create A Water Right Against the Overlying Owner Particularly on Federal Public Lands**

Once Nestle responds to the Staff report, it’s claims of appropriative rights to some of the water as groundwater may be more particularly made. In the event Nestle claims any appropriative rights to groundwater based on developed water (post-1914) that it claims has no hydrological connectivity to a stream, then detailed hydrological studies will have to be performed so that a determination can be made whether Nestle has any valid rights to groundwater, or rather, whether these are unlawful diversions of groundwater made without authorization.

Whatever Nestle’s claims with respect to appropriative rights, “no prescriptive title to the use of a spring on the public domain can be asserted while the land remains in government ownership, ‘for the reason that there can be no prescription as against the Government.’” (*Wilkins v. McCue* (1873) 46 Cal. 656, 661; *Hutchins*, 409.) Indeed, over the past 3 decades the Forest Service raised the issue of whether groundwater was being unlawfully taken with Nestle’s predecessors repeatedly and noted that Nestle and its predecessors could not prescript a right to

groundwater on federal lands. The Forest Service also clearly stated, in authorizations for wells and upgrading the water collection system, that the quantity of water removed following project completion should be limited to the amount historically removed, which Nestle's predecessors claimed they had rights to as spring water under California law. (*See, e.g.*, Letter 8/10/1992, SBNF to Arrowhead Letter of Authorization for Maintenance, Elliot Graham/District Ranger.) And, as explained before, even if Nestle claims some appropriative rights to any groundwater under State law, such rights cannot impair the dominant rights of the United States either as an overlying land owner or by reason of the reserved water rights it holds.

### **C. Groundwater Discussion in the Report and Need for Public Trust Analysis**

The report states that some of the water being taken by Nestle is groundwater or "developed water" and provides some estimate of the amount. However, the report appears to assume that recordation alone is sufficient to establish groundwater rights, which is inaccurate. Further, the report fails to clearly address the process for a determination of the amount or validity of any claimed groundwater rights going forward.

The report finds that approximately 52% of water being taken from Wells 7, 7A, 7B and 7C is developed water, and that all of the water being taken from Wells 10, 11 and 12 is developed water. (Report at 29-30.) Staff acknowledges that more needs to be done to confirm these estimates and in the interim protections put in place to ensure additional unauthorized taking of surface water or groundwater does not occur. The Appendix C to the Report provides some discussion of how the estimates for Wells 7, 7A, 7B and 7C were derived but no additional explanation is provided regarding Wells 10, 11, and 12. Unfortunately, it remains unclear what more needs to be done or can be done to increase the accuracy of these estimates in the face of the complete destruction of the natural springs in many of these areas. (*See, e.g.*, Appx. C-2 noting "Since the original spring orifice was destroyed during construction of the infiltration gallery, the amount of natural flow cannot be determined...".) The report is also unclear as to how the staff considered whether groundwater taken in one part of the watershed would affect surface water and springs elsewhere. These issues are mentioned but the discussion is not detailed or consistent throughout the report.

We appreciate that staff recognizes that taking water through wells that may tap both water that would naturally flow to the spring and groundwater further confounds the analysis. This practice can have significant impacts to the environment because among other things it "will deplete the fractured rock aquifer more quickly after recharge events than if flow was only diverted through natural springs. If storage is limited, this could result in low flows occurring earlier in the season and could result in shifting flow regimes in Strawberry Creek." (Appx. C-3.) Impacts to Strawberry Creek and its flow are not just a possibility but a near certainty in this instance and have gone on for decades. These changes in hydrology and impacts to stream resources and the public trust should be further addressed.

While the report indicates that additional hydrology studies are needed to quantify the amount of groundwater now being taken and recommends additional investigation and monitoring, we do not agree that these circumstances mean that all analysis of impacts to the public trust should be deferred until future hydrologic and riparian studies are completed. We believe there is ample information available to show that Nestle's activities have already injured public trust resources.

### III. Conclusion:

In light of the questions raised above, we hope that the SWRCB staff will clarify and revise several aspects of the investigative report including: accounting for federal reserved water rights to both surface water and groundwater; providing a clearer explanation of how groundwater taken by Nestle was quantified; and providing an analysis of the injury to public trust resources due to the long term unauthorized diversions from the watershed. We also request that any response by Nestle to the report be posted on the SWRCB website and be made available for public comment.

Thank you for the opportunity to submit these comments and please do not hesitate to contact either of us if you have questions regarding these comments. Please keep us informed of future actions and proceedings related to this investigation.

Sincerely,



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*On behalf of Sierra Club*