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From: Rachel Doughty <rdoughty@greenfirelaw.com>
Sent: Friday, February 09, 2018 5:00 PM
To: Vasquez, Victor@Waterboards; Petruzzelli, Kenneth@Waterboards
Cc: Michael O'Heaney; Miranda Fox
Subject: Story of Stuff Comments re INV 8217
Attachments: 2018-02-09 Comment Letter.pdf

Please see attached.

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February 9, 2018

Via email

State Water Resources Control Board
Division of Water Rights
Attn: Victor Vasquez
P.O. Box 2000
Sacramento, CA 95812-2000
Victor.Vasquez@Waterboards.ca.gov

Re: Comments of The Story of Stuff Project on Report of Investigation and Staff Findings of Unauthorized Diversion Regarding Complaint Against Nestlé Waters North America, Strawberry Creek, San Bernardino County (INV 8217)

Dear Mr. Vasquez:

The Story of Stuff Project (SOS) appreciates the opportunity to comment on the above-referenced Report of Investigation (ROI) and accompanying transmittal letter. The ROI and letter arose out of complaints it and others filed addressing unauthorized and unlawful diversions by Nestlé Waters North America (Nestlé) out of the Strawberry Creek watershed in the San Bernardino National Forest for its offsite Arrowhead bottling operations (Arrowhead).

SOS concurs in much of the ROI's analysis, and agrees that Nestlé is relying on unauthorized diversions that can and must be addressed in the Board's proceedings. However, SOS also takes issue with other aspects of the ROI and highlights several areas in need of further study, both to meet the Board's legal duties and to address well-founded concerns raised by the complainants about the consequences of these diversions. In particular:

1. To meaningfully consider whether valid water rights support any of Nestlé's diversions for Arrowhead, the Board must first analyze how they affect communities and natural resources served by the watershed, both under current conditions and in a wide range of twenty-first century hydrologic conditions that includes a potential multi-year drought. If left uncorrected in the ROI, this omitted analysis would fatally compromise the Board's ability to fulfill its cornerstone duties to protect against injury to other legal users of water, protect public trust resources, and enforce the prohibition of waste and unreasonable use of water in article X, section 2 of the California Constitution. These duties belong to the State Board, and cannot be finessed by waiting for the outcome of federal environmental review or permitting decisions.

2. Nestlé has failed to demonstrate, and is highly unlikely to establish, any enforceable pre-1914 appropriative right to divert water out of the affected watersheds, even for the estimated 26 annual acre-feet portion noted as a likely prospect for such rights from Indian Springs.

3. Nestlé has also failed to establish enforceable rights to groundwater to support its appropriations for Arrowhead bottling. Nestlé's points of diversion are located on federal land. Any water rights analysis must account for federal government rights, including federally reserved rights and any state-protected rights associated with overlying ownership, as well as the rights of Tribes and other water users.

Nestlé's Unlawful and Unauthorized Diversions of Water

SOS commends Board staff for the ROI's cogent analysis supporting its finding that "a significant portion of the water currently diverted by Nestlé appears to be diverted without a valid basis of right." (ROI, 33.) As noted in the transmittal letter, between 1947 and 2015, Nestlé reported extractions from the springs in the San Bernardino National Forest averaging192 acre-feet per year. Except for a 26 acre-feet per year portion from Indian Springs discussed below, the ROI concludes that these extractions are unsupported by rights to divert or use the water.

The ROI makes the following important points, among others:

- To avoid exercise of the Board's enforcement authority to limit these diversions, Nestlé has the burden to prove it has valid rights within the Board's permitting authority, evidence documenting the extent of percolating groundwater, or both. Nestlé also has the burden to show that the diversions will not injure prior rights (ROI, 21.)

- Nestlé's water rights claims are grounded in "poorly defined bases of right," notable for their deficiency in evidentiary support even after Board staff had made "multiple requests" for clarification (ROI, 28.)

- The Board has extensive regulatory authority to address unlawful and unauthorized diversions of surface water and groundwater in the affected watershed. (ROI, 7.)

- "The diversion of water from a spring that results in a depletion of streamflow, even if diverted using an artificial boring, is within the permitting authority of the State Water Board if appropriated after 1914 (OE, 2016)." (ROI, 21.)

- "[N]aturally flowing spring water, and developed water diverted at the headwaters of Strawberry Creek, is within the permitting authority of the State Water Board unless it is diverted under a valid riparian right, diverted under an appropriative basis of right initiated prior to 1914, or unless the water diverted is percolating groundwater that would not otherwise contribute to surface flow in a natural channel." (ROI, 21.)

- "Unless any information to the contrary is available, all diversions from springs that would flow to a channel are within the permitting authority of the State Water Board." (ROI, 22.)

- Nestlé cannot base its assertion of a pre-1914 appropriative water right on nineteenth century developments, such as the 1865 possessory claim by David Noble Smith. That claim

appears to have been limited to riparian uses, and "cannot be a basis of right for Nestlé's current off-site water bottling operations." (ROI, 22-23.)

- Nestlé cannot extrapolate rights to divert water for offsite bottling from the 1931 judgment confirming a settlement between private parties in *Del Rosa Mutual Water Company v. Carpenter, et al.* The perfunctory analysis of water rights in *Del Rosa* was "not binding" on the Board's own exercise of concurrent jurisdiction. (ROI, 24-26.) The settling parties may have achieved "different outcomes" through that judgment than those of a "full judicial proceeding," and the judgment occurred at a time when courts were "still absorbing" then-recent significant change in water law, including the California Constitution's restrictions on waste and unreasonable use of water. (*Id*. at 25.) That judgment, which may not even have fully applied the water law of *1931,* can neither supersede legislative requirements for post-1914 appropriative rights nor hamstring the Board's fulfillment of its own duties in 2018. (*Id.*)

- Nestlé's claim to "all the water in Strawberry Canyon" is baseless, resting on unproven and implausible assumptions about its predecessors' physical possession of the water, and ignoring the actions of other appropriators in the watershed. (ROI, 26.)

- Nestlé has no credible basis to anchor its pre-1914 water rights claim on other documents furnished to the State Board, such as a 1930 title report, a 1929 deed, and private agreements from 1930 and 1931. (ROI, 27.)

Federal Proceedings Provide No Excuse for the Board to Avoid Fulfilling Its Foundational Duties to Protect the Public Trust and Avoid Waste and Unreasonable Use of Water.

The ROI concedes that Nestlé's use of water for Arrowhead bottling "could be unreasonable if it injures public trust resources, such as instream habitat for certain species, in such a way that it outweighs the beneficial use." (ROI, 31.) Yet in a glaring omission, the ROI declines to provide substantive analysis addressing claims raised in the complaints of SOS and Loe that "Nestlé's diversions injure public trust resources." (ROI, 31.) Instead, the ROI asserts that the "Forest Service is the appropriate agency to address the environmental impacts in this case," and makes an elliptical reference to the future development of an adaptive management plan by the Forest Service "*and Nestlé*." (*Id*. (emphasis added).)

This passive approach would, if left uncorrected, amount to a foundational legal error at odds with the State Board's fulfillment of its own affirmative duty to protect the public trust and to enforce the California Constitution's proscription of waste and unreasonable use of water (Article X, section 2). The reference to Forest Service review of "environmental impacts" conflates a distinct legal responsibility of a federal agency addressing potential renewal of a federal permit (NEPA review of the proposed action's environmental impacts) with specific duties of the State Board that are in no way preempted or superseded by the Forest Service's present or future actions under federal law.

On the contrary, private rights to the use of water and even federal water rights remain subject to the public trust doctrine, as well as restrictions on unreasonable uses under state law. (See, e.g., *United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 83, 148-151; *State of California v. Superior Court* (2000) 178 Cal.App.4th 1020, 1024.) Moreover, even federal agencies are generally subject to state control in addressing matters relating to water rights, so long as the controls are not inconsistent with clear Congressional directives respecting the project. (*California v. United States* (1978) 438 U.S, 645.)

Here, no such directive exists; nor could one be extrapolated from the Forest Service-issued Special Use Permit whose present application is the subject of pending litigation, and whose potential renewal would require NEPA compliance. Far from constituting a federal attempt to render unnecessary the State Board's own work in protecting the public trust or enforcing article X, section 2, the federal Special Use Permit (SUP) simply confers a Right of Way. While it is possible that federal NEPA review might ultimately general useful information on public trust issues, it is inconceivable that the October 21, 1976 SUP, which expressly "confers no right to the use of water by the permittee" (¶26), could make it unnecessary for the Board to proactively consider whether Nestlé's diversions for Arrowhead bottling injure public trust resources, or address the reasonableness of that continued use during another multi-year drought.

Similarly, any mitigation from Nestlé's future engagement with the Forest Service in an adaptive management plan does not come close to excusing the State Board's refusal to investigate substantial claims of injury to public trust resources from Nestlé's continuing diversions for its bottling operations. Indeed, relying on the mere possibility of mitigation from future plans would stand the principle of adaptive management on its head, allowing it to become a rationalization for inaction with respect to the State Board's own fundamental legal duties. (See, e.g., E. Biber, *Adaptive Management and the Future of Environmental Law*, 46 Akron L. Rev. 934-962 (2013) (discussing reasons for adaptive management failure).)

In short, the State Board cannot use potential developments in federal proceedings as a reason to avoid the analysis requested by the complaints to ensure public trust resources are protected, and waste and unreasonable use are avoided. In *National Audubon Society v. Superior Court (Audubon)*(1983) 33 Cal. 3d 419, the California Supreme Court addressed the damage to Mono Lake caused by Los Angeles' diversion of nearly the entire flow of tributary streams to the lake. Expanding the trust to the waters themselves, the Court recognized a necessary balance between the state's system of appropriative rights versus its obligations under the public trust, finding that the State "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 447.) The State's affirmative duty "is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." (*Id*.) Whether it "predates or postdates 1914," a water right is "not exempt from reasonable regulation." (*People v. Murrison* (2002) 101 Cal.App.4th 349, 361.)

The seminal ruling of Judge Racanelli addressing the parameters of the State Board's public trust responsibilities, *United States v. State Board*, observes that "the public trust imposes a duty of

continuing supervision over the taking and use of the appropriated water. In exercising its sovereign power to allocate water resources in the public interest, the state is not confined by past allocation decisions which may be incorrect in light of current knowledge or inconsistent with current needs." (*United States v. State Board*, 182 Cal.App.3d at 149-150.)

To fulfill its cornerstone legal duties, the State Board must act diligently and proactively to protect the public trust, which relates to and is considered in light of the "cardinal principle" of California water law, article X, section 2's protection against waste and unreasonable use of water. (*United States v. State Board*, 182 Cal.App.3d at 106.) Consequently, "the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders," and "no one has a vested right to use water in a manner harmful to the state's waters" (*Id*.)

The State Board "shall 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." (Wat. Code, § 275.) The Board has plenary authority to investigate, condition permits, and enforce the constitutional requirement for reasonable use of the state's water resources.(*Imperial Irrigation Dist. v. State Board* (1990) 225 Cal. App.3d 548, 566-67.) The constitutional provisions on reasonable use apply to all sources of water, including groundwater and sources of surface water that might not otherwise come under the State Board's regulatory authority. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 14.)

The ROI recognizes that, should information "become available" indicating that Nestlé's diversions are injuring environmental resources, it "may" further investigate injury to public trust resources. (ROI, 31.) "May" is far too tentative an outcome to ensure fulfillment of the State's mandatory duties with respect to public trust and reasonable use. The still-unaddressed SOS and Loe complaints should have sufficed as a trigger for the ROI to include substantive analysis of public trust and reasonable use concerns. Should any question remain about the urgent need for the State Board to provide its own investigation, SOS incorporates by reference the February 5, 2018 comment letter of Steve Loe. That letter, filed by an eminent biologist whose decades of Forest Service experience included responsibility for the Strawberry Creek Watershed, eloquently speaks to the "severe immediate threat" to public trust resources from Nestlé's diversions, and the imperative need for a State Board investigation covering public trust and reasonable use issues.

Nestlé Does Not Have Pre-1914 Water Rights from Indian Springs

The ROI concludes that Nestlé likely established pre-1914 water rights to appropriation from Indian Springs, based upon inferences about planning for water bottling drawn largely from newspaper accounts and other informal sources. (ROI, 23-24.) But the referenced documents fall far short of showing even the definite steps in concrete locations that would be needed for an incipient or conditional right, much less an enforceable pre-1914 appropriative right. (See, e.g., *Madera Irrigation District v. All Pers*ons (1957) 47 Cal.2d 681, 689.)

According to the ROI, Indian Springs is located in the San Bernardino National Forest, in T1N R4W, 1000 feet north and 2000 feet west of the NE corner marker of Section 11, placing the tunnels directly in the E ½ of Section 2 in T1N R4W. (ROI, 16.) Yet as the ROI appears to recognize in its fact discussion, even the location of "Indian Springs" as used here is mired in uncertainty (ROI, 16, n. 15 (noting the absence of "groundwater recordations" or other evidence corroborating the location). The only reference in the ROI to support this appropriation from an "Indian Springs" location is a Byron Waters February 14, 1929 letter. (*Id*.) The letter itself is not supported by any specific evidence, nor does it refer to the date upon which any such appropriation commenced. It refers to "appropriation made more than thirty years ago." As an attorney for Nestlé predecessor Arrowhead, Mr. Waters is hardly a disinterested source, and his description of the location noted in the ROI appears at odds with another contemporaneous description from 1917. Even if his descriptions were accurate, however, the activities noted at the site would still post-date the 1893 creation of the San Bernardino National Forest. Nestlé's predecessors made no claim to this appropriation at any time; any removal of water from the National Forest lands is unauthorized.

The ROI's conclusion as to "likely" pre-1914 rights is based on multiple levels of conjecture. The ROI states:

"Arrowhead Springs Corporation (ASC) established by Seth Marshall in 1904 (San Buenaventura Research Associates, 2005), likely established a pre-1914 water right by appropriation based on the predecessor's plans to export water by rail for bottling in Los Angeles and subsequent progressive use and development occurring within a reasonable time and diligently pursued." (ROI, 23.) This statement is premised upon two documents:

1) "a Pacific Electric (PE) document, "Local Rail Lines in the Orange Empire", which states "In July 1912, PE *began surveys* which lead to extending the line a quarter-mile to the Hotel itself and made available to tank cars the Arrowhead drinking water" (sic) (Maguire, Pearce & Storey, 2016b; see page 43). This survey was likely sufficient to establish intent to appropriate an amount of water for beneficial use outside of Arrowhead Springs Hotel riparian parcel, and therefore, acquire a preliminary right to the future appropriative use of water (OE, 2016). The preliminary right would have vested upon completion of the project and application of the water to beneficial use."; and

2) "a Los Angeles Evening Herald article dated *September 22, 1917* states that the Arrowhead Springs plant in Los Angeles was completed and would commence operations the following week, indicating that appropriation of water for bottling at the plant began in 1917. Since construction of a bottling plant requires significant planning, and since the Pacific Electric document indicates that surveying for the rail line *began in 1912*, Division staff concludes that the available information is *prima facie evidence* that a valid pre-1914 appropriative water right was established by ASC with a *priority date of 1912*."

(*Id*. emphasis added.)

There is no evidence in these documents verifying the location and sufficiency if the water source; it is pure conjecture that the water is from Indian Springs. Moreover, assuming the survey for the rail (not building a rail line and with no mention of actual water removal) did begin in 1912, there is no evidence it was completed and water appropriation began "pre-1914." While the ROI states that the "preliminary right would have vested upon completion of the project and application of the water to beneficial use," *id.*, there is no evidence of project completion or application of the water to beneficial use pre-1914. The ROI relies on a newspaper report that the plant was "completed in 1917," more than three years after the time for establishing a "pre-1914" right, to establish the pre-1914 right.

Conjecture from this scant documentary record does not come close to meeting well-established standards for demonstrating pre-1914 appropriative rights. These rights are "limited to the amount of water actually put to beneficial use by a diverter, rather than the amount claimed or diverted." (*Millview County Water Dist. v. State Water Resources Control Board* (1988) (2014) 229 Cal.App.4th 879, 891.) Extending a benefit of water rights to Nestlé for which it has not met the burden to establish an actual beneficial use of water should, and should not be characterized as "prima facie evidence." (*Id.*)

The ROI is mistaken its assumptions that water was appropriated from Indian Springs outside of the Hotel's riparian parcel prior to 1914, and that Nestlé's predecessors commenced bottling appropriated Indian Springs water prior to 1914.

In 1909, the Arrowhead Hot Springs Company and James Mumford and C.H. Temple (copartners) entered into a contract which provided, among other things, that

> ¶ 1: Mumford and Temple agree to construct a pipeline at their own expense for *carrying water from Arrowhead's reservoir to the present terminus of the electric rail line*, either at the reservoir or into the existing pipe line leading from the reservoir, to be completed within 6 months.
>
> ¶ 3: For a period of 10 years, water to be supplied shall not exceed 4 tank cars in a week for the first three years, and not exceeding 7 tank cars in any one week during the remaining seven years.
>
> ¶ 4: water is to be from same source as reservoir is currently supplied, which is Cold Creek.
> ¶ 9: If Mumford and Temple have demand for larger quantities, and can handle larger quantities, Arrowhead agrees to supply larger quantities provided no detriment or inconvenience to Arrowhead as to its need or use of such water and Arrowhead can decide what quantity it can provide. (**Exhibit 1 January 22, 1909 Agreement**, emphasis added.)

Mumford and Temple assigned their interests in this contract to "Arrowhead Springs Water Company" on July 7, 1909 and June 1, 1909, respectively. Arrowhead Springs Water Company

was incorporated or on or about May 6, 1909, per notices in the Los Angeles Herald dated May 7, 1909 and the San Bernardino County Sun dated May 8, 1909.

The contract simply provides that Nestlé's predecessors were to extend the pipeline from "the reservoir" on the hotel property; it does not establish that any pipe was installed to appropriate water from Indian Springs. It does not identify Indian Springs as the source of the water; the source of the water is the "reservoir" at the Hotel. Importantly, the contract does not convey any pre-1914 water rights, to Indian Springs or elsewhere. A contract to the use of water is not the same as a deliverable water right. (See, e.g., *United States v. State Board*, 182 Cal.App.3d at 106; *Peterson v. Department of Interior* (9th Cir. 1990) 899 F.3d 799, 812.)

There is no evidence that in 1909, Nestlé's predecessors owned or were appropriating water from Indian Springs. At that time, the Arrowhead Hotel Company did not own the land where Indian Springs is located, because, as the ROI identifies, Indian Springs is located on the San Bernardino National Forest lands. The forest reserve was created in 1893; in 1894 the federal government published notices that "Plats were filed in US land office at Los Angeles, CA on April 2, 1894 for townships within the San Bernardino forest reserve, as a "Notice to Settlers," providing 90-days' notice to make filing for proof of settlement on land prior to Feb. 25, 1893. Thus, assuming *arguendo* that the Hotel had commenced appropriating the Indian Springs water prior to the establishment of the forest reserve, there is no evidence that the Hotel Company or any of Nestlé's predecessors ever provided notice to the federal government of any proof of settlement or appropriated water rights to preserve any such water rights.

The Hotel Company knew it needed to post notice of appropriation, as it did in November 1887, when it posted two "Amended Notices of Appropriation" for water: (1) the "exact point of diversion situated in SE 1/4 of NW 1/4, Section 12 T1N R4W SBBM"; and (2) the diversion as a "Short distance from North line of Section 12 T1N R4W." Neither of these notices an appropriation from or near Indian Springs in Section 2.

The Hotel's lack of ownership is further documented by the 1913 "Findings of Fact and Conclusions of Law" in *Arrowhead Hot Springs Company v. Arrowhead Cold Springs Company*, San Bernardino Superior Court Case No. 12532, which identifies the property then owned by Arrowhead: "Arrowhead Hot Springs Company owns [as relevant here] "the West one-half (W ½) of the Southwest Quarter (SW ¼) of Section 2 (2) [and] all of section 11 (11) except the North half (N ½) of the Northeast Quarter (NE ¼).." (**Exhibit 2, Findings of Fact and Conclusions of Law, ¶ 2.**) This legal description is also consistent with the legal description in a 1915 Deed of Trust whereby Arrowhead Hotel Company transferred all of its property to Charles W. Rice as Trustee. (**Exhibit 3, Deed of Trust dated August 2, 1915.)**

The first reference SOS finds to any pipeline from Indian Springs is by Bailey in 1917, where he describes a "closed pipe" from a tunnel into Indian Springs to the Hotel and Bottling Works. (Bailey, Gilbert Ellis, *Arrowhead Springs, California's Ideal Spa*. Los Angeles: The Union Lithograph Co., 1917, at 46.) We are unaware of any evidence which documents when this "pipe" or tunnel was installed, and most particularly whether it was installed prior to 1914.

Thus, there is no actual evidence that Nestlé's predecessors has a water right to, or were bottling water from, Indian Springs prior to 1914. The PE documents merely establishes that surveys for a rail line were commenced in July 1912. There is no evidence that water came from Indian Springs. Even counsel for Nestlé, placing the most favorable spin on the meager records and anecdotal discussion, could not clearly assert that operations commenced before *1915*, much less earlier. (MPS letter 2016b, p. 3.)

The ROI then extends this unfounded assumption of pre-1914 right to establish, in the absence of actual evidence, an amount of water which Nestlé's predecessors were removing prior to 1914. Admitting that "Nestlé has not provided any information indicating the planned capacity," the ROI relies on "[n]ewspaper articles and advertisements obtained during the post-inspection investigation (discussed in Section 3.4.2) indicate that Nestlé's predecessor produced 20,000 gpd in 1919 from water originating at Indian Spring, which is equivalent to 22 AFA, and also indicate that Nestlé's predecessor planned to provide 8,500,000 gallons of water from Indian Spring to customers in 1926, which is equivalent to 26 AFA. (ROI, 23-24, emphasis added.) Even assuming the water was from Indian Spring, these reports provide no evidence of the amount of water being appropriated "pre-1914." And the ROI expands that unsupported conclusion, again in the absence of any evidence, that "these [assumed] pre-1914 diversions" occurred "year-round." (ROI, 24.) There is no evidence, reliable or otherwise, to establish a pre-1914 water right to, or use of water from, Indian Springs by Nestlé or its predecessors in interest.

Moreover, there is no evidence as to what may be happening now with respect to water from Indian Springs. Nestlé has not established if it is even taking or using water from Indian Springs. The ROI does not cite to any evidence, because none exists, that Nestlé ever provided any groundwater recordation numbers for any Points of Diversion (PODs) from Indian Springs, as discussed for other PODs in Strawberry Creek. (ROI, 9.) Even if arguendo a pre-1914 water right existed, it remains subject to abandonment. (*Millview County Water Dist. v. State Water Resources Control Board*, 229 Cal.App.4th at 891 ("pre-1914 appropriation rights are subject to forfeiture for nonuse. Furthermore, it has been clear since the inception of California statehood that even the preliminary "right," if any, to later perfect an appropriative water right can also be lost by lack of diligence in perfecting the right. (*Nevada Co. & Sacramento Canal Co. v. Kidd* (1869) 37 Cal.3d 282, 313-314.)

Here, the ROI's speculation about the future potential of Nestlé to perfect an appropriative right must be measured against many decades marked by a lack of diligence by Nestlé and its predecessors in establishing appropriative rights. Nestlé has not established if it is taking or using water from Indian Springs, under what authority it claims a right to do so, whether pursuant to contract or otherwise. In the absence of this, as well as the paucity of evidence clearly documenting pre-1914 water rights, the ROI's claim that Nestlé likely has a pre-1914 water right to Indian Springs must be rejected. The absence of clear notice, a clearly identified location, and a documented plan for a specific course of action make this matter far different from the few cases in which conditional appropriative rights preserved for later perfection have been based on preliminary steps. (See, e.g., *Merritt v. City of Los Angele*s (1912) 162 Cal. 47, 51 (applicant provided notice at a precise location, and had already filed a still-

pending project application with the Forest Service); Inyo Consol. Water co. v. Jess (1911) 161 Cal. 516, 517.)

Nestlé's Right to Developed Groundwater in Strawberry Canyon Is Not Established

The ROI explains that "[d]eveloped spring water that does NOT contribute to flow in a natural channel is presumed to be "percolating groundwater" and, absent information to the contrary, is not within the permitting authority of the State Water Board." (ROI, 22.)

The ROI concludes that two areas of Nestlé's diversions may satisfy this criterion. The ROI finds, as to "Wells 7, 7A, 7B and 7C," 52% of the diverted water is developed water which "may not be within the permitting authority of the State Water Board." (ROI, 29.)

> According to The Hydrodynamics Group (1997a) and according to statements made by Nestlé staff and representatives during the inspection (see Section 3.3), when the wells are allowed to flow, surface flow from the Spring 7 infiltration gallery ceases. Therefore, some portion of the water diverted from these wells is flow that would have contributed to flow in natural channels. *Based on the extremely limited data available* to the Division and precipitation amounts obtained from the PRISM model (see Section 3.4.3), *52% of the water diverted on an annual basis from these wells may be developed water* (Appendix C). It is unknown if this developed water would have surfaced elsewhere in the watershed due to the fault barrier. The Division does not have any evidence of any upgradient dewatered springs at this time. Based on Google Earth imagery, the Rim-Forest Fault appears to intersect a well-defined drainage approximately 460 feet west of the well site, but the Division does not have any evidence of a spring in this location. Therefore, *at least approximately 48% of the water diverted on an annual basis from the Spring 7 Complex wells is within the permitting authority of the State Water Board, unless diverted under a valid pre-1914 claim, because this water would have contributed to flow in natural channels if not diverted by Nestlé.* The *remaining 52% of the water diverted may not be within the permitting authority of the State Water Board based on the limited information available to the Division at this time, because it may be developed flow that may not contribute to flow in channels elsewhere in the watershed*. This percentage should be refined with further data collection and analysis." (*Id.*, emphasis added.)
>
> For Wells 10, 11, and 12, the ROI states:
>
> "Based on the hydrology of the site and reported flow from the springs, diverted flow may be entirely developed water, and *it is unknown what portion of the developed water may contribute to streamflow*. At this time, the Division does not have any evidence that diversions from wells 10, 11, and 12 impact other springs or streamflow. Unless additional information indicates otherwise, the water from wells 10, 11, and 12 does not appear to be within the permitting authority of the State Water Board." (ROI, 30, emphasis added.)

The ROI bases these conclusions upon recognized insufficient information. The Water Board should not make a conclusion as to what is or is not under its permitting authority in the absence of "further data collection and analysis, including evaluation of impacts no spring flow at the toe of the meadow." (*Id.*) Until that data and analysis is adequately developed, the ROI's recommendation and conclusion must be rejected. Nestlé must be required to provide the requisite data and analysis to establish whether it is removing percolating groundwater, or the spring water it advertises.

Nestlé Must Be Required to Present Reliable Evidence Before the Water Board May Consider Any Potential Right to Available Water in Santa Ana River

The ROI documents that the Santa Ana River is fully appropriated, ROI at 7, 26, but speculates that further opportunities to secure available water may exist.

> "To obtain a water right permit to divert water from a fully-appropriated stream system, the water right applicant must demonstrate that water is available for appropriation. Nestlé's Strawberry Canyon diversions were reported annually under the Groundwater Recordation Program and were likely accounted for from a basin-wide perspective at the time the Santa Ana River was declared fully appropriated . . . some amount of water above 26 AFA may be available for appropriation subject to the permitting authority of the State Water Board." (ROI, 26.)

According to the ROI,

> "Nestlé may be able to apply for and receive a post-1914 appropriative water right for the water diverted by Nestlé's predecessors up to the time of the 1964 fully-appropriated stream determination in Decision 1194 (1964). The maximum diverted by Nestlé's predecessors, prior to 1964, was 257 AF in 1952, including the 26 AFA that may be claimed under a pre-1914 basis of right. Nestlé's would have to seek an exemption from the Declaration of Fully Appropriated Streams, similar to Orders WR 2000-12 and WRO-2002-0006.

(ROI, 30.)

The ROI's speculation must not be accepted for at least two reasons: (1) Nestlé's diversions prior to 1964 were unauthorized, without permit, and should not now be accepted; and (2) there is insufficient evidence to establish the actual levels of diversion prior to 1964.

The ROI recognizes that Nestlé does not have the water rights it claims in Strawberry Canyon. SOS and others are confident that when the Water Board undertakes its duty to understand the full environmental and public trust impact from Nestlé's illegitimate removal of water, it will be clear that maintaining the status quo to allow Nestlé to continue to take water is contrary to California water law. We urge the Water Board to not accept nor consider any application for an exemption from the Declaration of Fully Appropriate Streams. And as

discussed above, there is no basis under any circumstances to include the estimated 26 AFA from Indian Springs as a basis for such an exemption, as there is no evidence Nestlé or its predecessors had any valid pre-1914 rights to the water from Indian Springs.

The ROI maintains that Nestlé may be able to "demonstrate that the [Santa Ana River] water is available for appropriation" because the annual reports from Nestlé under the Groundwater Recordation Program "were likely accounted for from a basin-wide perspective at the time the Santa Ana River was declared fully appropriated." (ROI, at 26.) The ROI provides no evidence that (1) Nestlé's water diversions were taken into account at the time the Santa Ana River was found to be fully appropriated, or (2) that Nestlé's reporting of its illegitimate water use is accurate or the amount identified in the ROI.

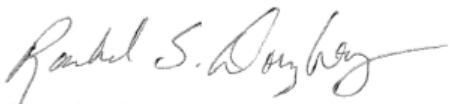
The ROI suggestion that Nestlé may be able to seek an exception from the fully appropriated Santa Ana River system must be rejected. Nestlé must not be rewarded for its illegitimate take of water since at least 1930, and the Water Board certainly must not entertain any request by Nestlé to divert water until the Water Board fully evaluates and understands the public trust impacts from such conduct.

Conclusion

SOS concurs in much of the ROI's analysis, and agrees that Nestlé is relying on unauthorized diversions that can and must be addressed in the Board's proceedings. However, SOS also asks that the Board revisit the questions of whether Nestlé's diversions damage public trust resources, the basis for any right (and even the location of) to water from Indian Springs, and the bases upon which Nestlé might assert a claim to groundwater in the area.

Time is of the essence. The Forest Service is considering issuing a new special use permit to Nestlé to maintain infrastructure and continue diversion of water from public lands, even as it becomes apparent that it has no right to that water. The Board must proactively ensure that it honors all duties within its responsibility, including protection of the public trust and taking steps needed to avoid unreasonable uses.

Sincerely,



Rachel S. Doughty

Exhibit 1

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES.

ARROWHEAD SPRINGS WATER COMPANY, a corporation,

Plaintiff,

-vs-

ARROWHEAD HOT SPRINGS COMPANY A CORPORATION, SETH MARSHALL, JOHN DOE and RICHARD ROE,

Defendants.

COMPLAINT

Plaintiff complains and alleges:

I.

That the plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of California having its principal place of business in the County of Los Angeles, State of California.

That the defendant is a corporation duly organized and existing under and by virtue of the laws of the State of California and doing business in the County of Los Angeles, State of California.

II.

That on or about the 22nd day of January, 1909, the defendant Company entered into an agreement in writing with plaintiff's assignors James Mumford and C. H. Temple, a copy of which agreement is hereto attached and marked Exhibit "A" and made a part of this complaint, which agreement was on the 7th day of July, 1909, assigned and transferred to plaintiff by an instrument in writing.

III.

That pursuant to the terms of said agreement plaintiff caused to be constructed a pipe line to extend from the reservoir of the defendant Company at Arrowhead, to the present terminus

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LOS ANGELES, CAL.

of the electric car line at said Arrowhead, together with the necessary connections and attachments and fully complied in all respects with the said agreement aforesaid; that plaintiff also within the period prescribed by said contract provided necessary tank cars to receive at the lower end of said pipe line t the quantity of water to be delivered according to the terms of said agreement.

-IV-

Plaintiff further alleges that immediately after the execution of said agreement and prior to the commencement of this action, and believing that said defendant would comply with said contract and deliver to said plaintiff the water as provided in said contract, it entered into an agreement of lease whereby plaintiff leased of and from the Pacific Stove Company a corporation, certain premises at #1515 East Seventh Street in the City of Los Angeles, State of California, to be used by it in conducting its business of selling said water as hereinafter more particularly described. That said lease is to continue for a period of five years from and after the ____day of _____1909, at the rental price of $100.00 per month.

That plaintiff agreed to pay for said premises during said full term. That plaintiff also purchased equipment, personal property and machinery necessary to operate the said business to be carried on by said plaintiff, to-wit: the bottling and sale of said water; said equipment consisting of bottles, crates, tank, horses, wagons, automobiles, machinery for bottling and sale of water, and that the reasonable value of said equipment so purchased by said plaintiff to be used in said business was and is the sum of about $25,000.00.

-V-

That the lease of said premises and the purchase of said personal property and equipment was necessary for the establishment and carrying on of said business and the bottling and sale

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of water which the defendant agreed under the terms of said contract to deliver to said plaintiff, and said premises were leased and said machinery and personal property was purchased to be used and was necessary in the establishment and carrying on of said business, all of which was well known to said defendant.

-VI-

That immediately after the lease of said premises and the purchase of said personal property by said plaintiff, said defendant at the request of said plaintiff, did commence and continue to deliver water to said plaintiff through said pipe line to the tank cars under the terms of said contract in such quantities as was required by said plaintiff and provided in said contract; and said plaintiff did commence the bottling and sale of said water and did advertise the sale of said water throughout the City of Los Angeles and the Southern part of the State of California and did create a large and growing demand for the said water and did sell and large quantities of said water and has now an established, growing and lucrative business in the bottling and selling thereof, all of which is well known to said defendant.

-VII-

Plaintiff further alleges that it has complied with all the terms and conditions of the said contract on its part agreed to be performed.

-VIII-

Plaintiff further allgges that the defendant has unlawfully and without the consent of plaintiff stopped the flow of said water through the pipes of the said plaintiff so constructed for the purpose of delivering the said water from the reservoir of said defendant to the tank car, as aforesaid, and is now unlawfully depriving plaintiff of the use of said water by preventing the same from flowing through said pipes to said tank cars and now threatens to and will continue to prevent and stop the said water from flowing through the said pipes of the said plaintiff to the

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said tank car to the great and irreparable damage of this plaintiff.

-IX-

Plaintiff further alleges that if the said defendant continues to deprive the plaintiff of the use of the said water and to stop the flow and delivery thereof through the said pipe line to its said car, as aforesaid, plaintiff will suffer great and irreparable injury, loss and damage.

That plaintiff has no other means of obtaining the said water and has not now sufficient of said water on hand to supply his patrons and persons who have been regular customers of plaintiff in the purchase of said water, and the business so created and established by said plaintiff in the bottling and selling of said water will be wholly destroyed to the great and irreparable injury, loss and damage of said plaintiff.

-X-

Plaintiff further alleges that he is informed and believes and on such information and belief alleges that the said defendant is unable to answer in damages for the great and irreparable injury, loss and damage which will be caused plaintiff by being deprived of the use of said water and the unlawful act of the said defendant in stopping the flow thereof, and that plaintiff is without any adequate remedy at law for the grevious loss and injury which will be sustained by him by reason of the continuance of the acts complained of on the part of said defendant.

WHEREFORE, plaintiff prays judgment that said defendant be enjoined and restrained from stopping or interferring with the flow of the said water through the pipes of said plaintiff from the reservoir of defendant to plaintiff's tank car, and that it be enjoined and restrained from depriving said plaintiff of the use of the said water and that it be required to allow and permit the

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Exhibit A

[illegible] Arrowhead Hot Springs Company, a

said water to flow through the said pipes to the said tank car; that plaintiff be permitted and allowed to return and restore the flow of said water through said pipe line, and for such damages as plaintiff may have suffered and sustained by reason of the said wrongful acts of the defendant, and for other and further relief as may be agreeable to equity.

Bernard Potter and
Powers & Holland
Attorneys for plaintiff

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Exhibit A

It is agreed between Arrowhead Hot Springs Company, a corporation, the first party, and James Mumford and C. H. Temple, co-partners, the second parties, as follows:

1. The second parties shall at their own expense, construct a pipe line, suitable for carrying water without waste, to extend from the first party's reservoir, at Arrowhead, in San Bernardino County, California, to the present terminus of the electric car line at said Arrowhead, together with such connections and attachments as may be necessary, such pipe line to be properly laid underground, wherever the first party may reasonably require it to be laid under ground, and all to be done and completed within six months after date hereof, and to maintain by second parties during the life of this contract; provided that second parties, instead of connecting the upper end of said pipe line with said reservoir, may, at their option connect it with first party's pipe line leading from said reservoir, at some point to be approved by first party.

2. The second parties shall also, within six months from date hereof, provide such tank cars as may be necessary to receive, at the lower end of said pipe line, to be constructed by them, the quantity of water that is to be delivered to second parties through said pipe line as hereinafter provided, and shall also provide such switches and appliances as may be necessary for convenient delivery of water from said pipe line into such tank cars, and to prevent the flow of water from said pipe line, except at such times and to such extent as may be required to fill such tank cars, and thereafter second parties shall maintain all such provisions for receiving water, during the life of this contract.

3. From and after the time of completion of said pipe line and said provisions for receiving water, first party will, during a period of ten years from date hereof, deliver into said pipe line from first party's reservoir or pipe line with which

such connection shall have been made, such quantities of water as shall be required by second parties, and at such times as shall be required by them, for the filling of tank cars provided by them, not exceeding, however, four tank cars in any one week during the first three years of said period, and not exceeding seven tank cars in any one week during the remaining seven years of said period.

4. Said water, so to be delivered, shall be derived from the same source as that from which said reservoir is now supplied, being that certain natural stream known as Cold Creek, and shall be delivered by first party from said creek into said pipe line(to be constructed by second parties) in its natural purity, free from any contamination caused or suffered by first party. Second parties shall have the right, at any and all times, to inspect said creek and its sources, and the means by or through which the water shall be delivered to them.

5. All water so delivered into tank cars for second parties shall be sold by them, at any place or places within the United States, on their own account, and in such manner as they shall deem proper; except in bottles or other receptacles bearing a label that shall be furnished by second parties after first having been approved by first party; and second parties shall use, on all their advertising matter, advertising such water, a cut likewise to be provided by them after first being approved by first party. Second parties shall provide all such cuts and labels that they may require for their said use; but except as to such use, all right to use such cuts or labels shall be and remain the property of first party, and it alone shall have the right to register or copyright the same.

6. Second parties shall use all reasonable diligence and effort to sell said water, during said term of ten years, to the extent of the quantities that may be delivered to them as aforesaid; during that period they shall not sell, or keep

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Los Angeles, Cal.

or offer for sale, any water other than the water that shall be supplied them by first party as aforesaid.

7. During said period of ten years, first party will not sell or furnish to any one other than second parties, nor cause or permit any one to take or have delivered, any water from said source, or any water of like character from said premises (in so far as such water shall be under the ownership or control of first parties), for sale or disposition in competition with second parties, nor will first party itself sell or furnish any such water in competition with second parties; provided that this shall not be construed to limit any right to the use of such water on the premises of the first party.

8. All water so delivered to second parties during the first three years after date hereof shall be without charge, and for all water delivered after said three years, second parties shall pay first party at the rate of two dollars per thousand gallons, the water delivered during each calendar month to be so paid for within sixty days thereafter.

9. Notwithstanding the foregoing limitations as to the quantities of water to be delivered to second parties, it is agreed that if second parties shall have demand for larger quantities, and shall be prepared to receive and dispose of such larger quantities, then first party will deliver to second parties such larger quantities, as they may desire the same, to the extent of first party's ability to deliver the same, without detriment or inconvenience to first party as to its own need or use of such water; but as to such larger quantities first party shall be its own judge as to such ability to deliver the same.

10. As to all the foregoing provisions, it is understood that first has not yet acquired title to the property now held by it at Arrowhead, nor to said water or the right to take or

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use the same, but that it holds all said property and water rights under contract, through which first party expects to acquire title to the same, and if, by reason of failure to acquire such title, or for any cause, first party shall lose the possession or control of said property and water rights, or shall not have the lawful rights to deliver said water to second parties as aforesaid or shall be prevented from delivery by some unavoidable cause, then any failure to deliver water, arising from such unavoidable cause or want of title, possession, control, or lawful right, shall thereby be excused, and shall not be ground for any claim of damage against first party.

11. If either party shall fail, in any substantial respect to comply with any of the provisions of this contract, after reasonable notice so to do, then, at any time during the continuance of such default, the other party may terminate this contract, by giving to the party in default written notice of such termination.

12. First party comtemplates, in near future, the preparation of a mineral or aperient water, from mineral springs at Arrowhead, and the placing of such water upon the market; and in that case first party will not enter into any contract with any party for the handling or marketing of such water, without first giving second parties hereto, if not then in default under this contract an option and reasonable opportunity to take such contract upon the like terms.

13. If second parties shall perform this contract on their part for the full period of said ten years, then first party will not, upon or after the expiration of said term, contract with any other party for the delivery or handling or marketing of any waters mentioned, either water from said cold creek or any mineral or aperient water, without first giving second parties

an option and reasonable opportunity to take such contract upon like terms.

14. All buildings or improvements, fixtures, machinery, appliances and articles of personal property placed upon the premises by second parties for permanent use upon the premises in connection with the receiving or handling of any of the waters herein mentioned, and which shall be upon the premises at the time of the expiration of this contract, shall become the property of first party, unless a renewal of this contract, or a new contract shall then be entered into with them, in which case this provision as to title of property shall apply to the expiration of such renewal or such new contract.

15. All provisions of this contract shall apply to and bind the successors and assigns of the parties respectively.

Executed in duplicate this 22nd day of January, 1909.

Arrowhead Hot Springs Company.

By (signed) Seth Marshall
President.

By (signed) W. L. Vestal
Secretary.

(signed) C. H. Temple

(signed) James Mumford.

For value received we hereby assign, sell and transfer to Dr. F. J. Nutting an undivided one-third (1/3) interest inth the within contract and rights and interests described therein.

April 28th, 1909.

(signed) C. H. Temple

(signed) James Mumford.

For and in consideration of two thousand nine hundred ninety-five (2995) shares of the common capital stock of the Arrowhead Springs Water Company, the undersigned, James Mumford of the City of Los Angeles, California, does hereby sell, assign, transfer and set over all his right, title and interest in and to the attached contract, being a contract between the above mentioned James Mumford as assignee and the Arrowhead Hot Springs Company, a corporation, to the Arrowhead Springs Water Company, a corporation duly organized and existing under the laws of the state of California.

IN WITNESS WHEREOF, the above mentioned James Mumford does hereby set his hand and seal this 7th day of July, 1909.

Witnesses: (signed) James Mumford

(signed N. B. Lyman

(signed) E. Busby

State of California,)
) ss.
County of Los Angeles,)

On this 18th day of August in the year one thousand nine hundred and nine, before me, Arthur Wright, a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared James Mumford known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same. IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at Los Angeles in said County, the day and year in this Certificate first above written.

(signed) Arthur Wright

Notary Public in and for Los Angeles County, State of California.

For and in consideration of One ($1.00) Dollar, and other good and valuable consideration, the undersigned, C. H. Temple, and Dr. F. J. Nutting do hereby transfer, sell, assign and set over all their right, title and interest in and to the attached contract, being a contract between C. H. Temple, James Mumford and Dr. F. J. Nutting, and the Arrowhead Hot Springs Company, a corporation, to James Mumford of the City of Los Angeles, California,

IN WITNESS WHEREOF, Dr. F. J. Nutting and C. H. Tample, have set their hands and seals hereto, this First day of June, 1909.

(signed) C. H. Temple.

(signed) Dr. F. J. Nutting.

State of Califronia,)
) SS.
County of Los Angeles,)

On this 1st day of June in the year one thousand nine hundred and nine, before me, Arthur Wright a Notary Public in and for said Los Angeles County, residing therein, duly commissioned and sworn, personally appeared C. H. Temple and Dr. F. J. Nutting known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Official Seal, at Los Angeles in said County, the day and year in this Certificate first above written.

(signed) Arthur Wright.

Notary Public in and for Los Angeles County, State of California.

RESOLVED, That the action of the President and Secretary of this company, in executing in duplicate a contract on the part of this company with James Mumford and C. H. Temple, relative to delivery of water from Cold Creek during a period of ten years, with option as to handling mineral or aperient water from mineral springs at Arrowhead (which contract, bearing date January 22, 1909, has been delivered), be, and said action is hereby approved and ratified and said contract declared to be a valid and binding contract on the part of this company: Provided, and upon the condition, that there be added to said contract, a supplement, to be executed by sais Mumford & Temple and by said President and Secretary, on behalf of this company, to the effect that all advertisement of said water in any publication, pamphlet, card, or otherwise, shall, as to form and contents, be satisfactory to this company, and shall first be submitted to and approved by this company.

I. W. L. Vestal, Secretary of the Arrowhead Hot Springs Company, hereby certify that the foregoing is a full, true and correct copy of a resolution adopted by the Board of Directors of the Arrowhead Hot Springs Company, ratifying the contract entered into between said Company and James Mumford and C. H. Temple.

(signed) W. L. Vestal Secretary.

Original 11599.

No. ..... Dept. .....

Superior Court

of the County of Los Angeles, State of California.

Arrowhead Springs Water Company etc
Plaintiff

vs.

Arrowhead Hot Springs Co. et al
Defendants

Complaint

By

Filed ..... 19.....

....., *Clerk,*

By .....

Deputy Clerk.

FILED
JAN 4 - 1910
C. G. KEYES, Clerk.
By ..... Deputy

Service of the within .....
admitted this .....
day of ..... 19.....

By .....

Attorney for .....

BERNARD POTTER
FILED
[illegible] MERCHANTS TRUST CO. BUILDING
207 SO. BROADWAY LOS ANGELES, CAL.
At ..... min. past ..... M.
Attorney for JAN 19 1910
Clerk.
PARKER & STONE [illegible] 238 NEW HIGGINS A.
By Clara Post Deputy Clerk.

STATE OF CALIFORNIA,
County of Los Angeles, } ss.

A B McDonald being first duly sworn, deposes and says:

I am the Secretary of the Plaintiff Corporation in the above entitled action. I have read the foregoing Complaint and know the contents thereof. The same is true of my own knowledge, except as to the matters therein stated on my information and belief, and as to those matters, I believe it to be true.

A B McDonald

Subscribed and sworn to before me this 4th *day of* Jan 1910

Bernard Potter

Notary Public in and for the County of Los Angeles, State of California.

Exhibit 2

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SAN BERNARDINO.

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Arrowhead Hot Springs Company, a corporation. Plaintiff. vs. Arrowhead Cold Springs Company, a corporation. Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW.

In this cause the court makes and adopts the following findings of fact, to-wit:

1. At and during all the times herein mentioned the plaintiff and the defendant each was, and it now is, a corporation, organized and existing under the laws of the State of California.

2. At and during all the times herein mentioned the plaintiff was, and it now is, the owner of and in the possession of and entitled to the possession of all that certain real property situate in the County of San Bernardino, State of California, known as the Arrowhead Hot Springs place, and particularly described as follows:

The West half (W. ½) of the Southwest Quarter (S.W. ¼) of Section Two (2); the East half (E.½) of the Northeast Quarter (N. E. ¼) of Section Three (3); all of section eleven (11), excert the North half (N. ½) of the Northeast Quarter (N.E. ¼); the Northwest Quarter (N.W.¼), the North half (N. ½) of the Southwest Quarter (S.W. ¼), the Northwest Quarter (N.W. ¼) and south half (S.½) of the North east

Quarter, (N.E. ¼), and the North half (N. ½) of the Southeast Quarter (S.E. ¼), of Section twelve (12) all the foregoing being in Township One (1) North, Range Four (4) West, San Bernardino Base and Meridian; and all of Section Seven (7), in Township One (1) North, Range Three (3) West, said Base and Meridian, containing in all Eighteen hundred (1800) acres, more or less.

3. At and during all said times there have been and there now are upon said lands certain natural hot springs, from which constantly flow small streams of hot water, naturally charged with various mineral substances, of such kind and in such amounts and proportions as to make such waters medicinal in character, and of great value and efficacy in the treatment of various diseases; and also during all said times there have been and there now are upon said lands certain natural springs from which constantly flow small streams of cold water, of exceptional purity, and of great and special value for drinking purposes; and during all said times said lands have been, and they now are, chiefly valuable for and on account of said hot waters and cold waters arising from said springs thereon, and because of the special character and value of said waters as aforesaid.

4. In order to utilize said lands and waters and to derive value and profit therefrom, the plaintiff, prior to the acts of the defendant hereinafter set forth, ~~alleged~~, and more than five years prior to the commencement of this action, ~~the plaintiff~~ erected on said lands and in the vicinity of said hot springs and cold springs a building for use as a hotel, and

sanitarium, and completely equipped and furnished the same for such use, and also, in connection therewith, erected a building for use as a bath house, and particularly for the giving of baths of said hot waters for the treatment and cure of various diseases, and completely equipped and furnished such bath house for such use, and by means of pipes conducted waters of said hot springs and of said cold springs to and into and through each and both of said buildings, for use therein for drinking and bathing purposes in the treatment and cure of various diseases, and also made other improvements on said lands and about and in connection with said buildings, to facilitate the use of said buildings for said purposes, all of which was done by the plaintiff at great expense, to wit at a cost exceeding the sum of $300,000.

5. Ever since the erection of said buildings the plaintiff has carried on, and it still carries on, in and in connection with said buildings and upon said lands, the business of a hotel, sanitarium and bathing establishment and general health resort, and in carrying on said business has at all times made, and does still make, use of said hot waters and said cold waters for drinking and bathing purposes, in the treatment and cure of various diseases.

6. In connection with so conducting said business, and in order to build up, establish and increase said business, the plaintiff, during all said times, has extensively advertised its said business and the healthful medicinal and curative properties of said waters, and the use thereof in said business as aforesaid for the treatment and cure of various

diseases, and in such advertising has expended large sums of money, to wit an aggregate of more than $50,000.

7. By the continued carrying on of said business as aforesaid and by advertising as aforesaid, the plaintiff's said business and the healthful, medicinal and curative properties of said waters as aforesaid have become extensively and favorably known throughout the State of California and elsewhere; and by reason of such favorable reputation of said waters, induced and established as aforesaid, the said business of the plaintiff has become and is a large and growing business, of great value.

8. The value of the plaintiff's said business has depended and does depend, largely and mainly, upon the reputation of said waters as valuable for use in the treatment and cure of various diseases as aforesaid, and 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.

9. Said lands comprise a locality that has been and is commonly and extensively known as Arrowhead, and said springs have been and are commonly and extensively known as Arrowhead springs, and said waters have been and are commonly and extensively known as Arrowhead waters, and said buildings have been and are commonly and extensively known by the general name of Arrowhead Hotel, and said business of the plaintiff has been and is commonly and extensively known as the Arrowhead Hotel business; and the plaintiff, in advertising its said business as aforesaid, advertised the same under the name of

Arrowhead Hotel, and advertised said springs and waters under the name of Arrowhead springs and Arrowhead waters; and the name Arrowhead has, during all said times, been appropriated and used by the plaintiff as a distinctive designation of its said business and of said springs and of said waters, and said name has become and is commonly and extensively known as a distinctive designation of said business and of said springs and of said waters, and the plaintiff has become and is the owner of the exclusive right to use the name Arrowhead Springs as such distinctive designation.

10. Prior to the year 1909, and while so conducting said business, the plaintiff adopted and appropriated, and continuously ever since has adopted appropriated and used, the name "Arrowhead" as a distinctive and distinguishing name for said hotel and business and for said springs and the waters thereof, and adopted and appropriated, and has continuously ever since adopted, appropriated and used, the figure of an arrowhead as a distinctive and distinguishing mark indicative of said hotel and business and of said springs and the waters thereof, and said name and said figure thereupon became and ever since have been and now are the trade name and trademark under which the plaintiff has conducted and still does conduct said business, and under which the plaintiff, in connection with said business, has furnished, supplied, used and disposed of the waters of said springs for the purposes aforesaid; and more than one year prior to the commencement of this action the plaintiff caused said name "Arrowhead" and said figure of an arrowhead

to be duly registered in the office of the Secretary of State of the State of California as such trade name and trademark, for the exclusive use of and by the plaintiff, as a distinctive and distinguishing designation of said hotel and business and of said springs and the waters thereof, and ever since then the plaintiff has been and it still is the exclusive owner of said trade name and trademark, with the exclusive right to use the same for said purposes.

11. For more than one year next before the commencement of this action the defendant has been and it still is engaged in the business of offering for sale and selling to the public, in bottles and other receptacles, large quantities of water as "Arrowhead" water, and as being water obtained from said Arrowhead hot springs and having the valuable, medicinal and curative properties of said waters of said springs, which business has been and is so carried on by the defendant in and about the City of Los Angeles and elsewhere in the State of California; and the defendant, in so carrying on its said business, has represented and does still represent to the public that said water, so offered for sale and sold by the defendant, is in fact water of and obtained from said Arrowhead ~~Hot~~ Springs, and possessing and retaining the valuable, medicinal and curative properties of the waters naturally flowing from said hot springs; and the defendant, in carrying on its said business, has used and does still use the name "Arrowhead" and the figure of an arrowhead as a distinctive and distinguishing name and mark to designate said water so offered for sale and sold by

the defendant.

12. None of the water so sold or offered for sale by the defendant has been or is water of or obtained from any of said Arrowhead springs, either hot or cold, and none of said water has been or is water possessing all or any of the medicinal or curative properties of the waters of said hot springs, or of any of them, or possessing any medicinal or curative properties whatever; and said representations and acts of the defendant, in representing and designating said water, so offered for sale and sold by the defendant, as water of and from said springs or any of said springs, have been and are false and fraudulent, and were and are made and done by the defendant falsely and fraudulently, with the intent and for the purpose of causing the public to understand and believe that the water, so offered forsale and sold by the defendant, has been and is water of and obtained from said ~~hot~~ springs and possessing the medicinal and curative properties of the waters of said springs, and with the intent and for the purpose of causing the public to understand and believe that by purchasing said water from the defendant they could and can obtain the benefit of the use of the waters of said ~~hot~~ springs, in the treatment and cure of diseases, without obtaining such waters from the plaintiff or patronizing the plaintiff in its said business, and with the intent and for the purpose of thereby inducing the public to purchase from the defendant the water so offered for sale and sold by the defendant, instead of obtaining the waters of said ~~hot~~ springs from the plaintiff, or patronizing the

plaintiff in its said business.

13. By reason of said representations and acts of the defendant, many persons have been and are induced to believe that the water so offered for sale and sold by the defendant has been and is water of and obtained from said ~~hot~~ springs and possessing the medicinal and curative properties of the waters of said springs; and thereby many persons, who otherwise would patronize the plaintiff in its said business, have been and are induced to withhold such patronage from the plaintiff and, instead thereof, to purchase from the defendant the water so offered for sale and sold by the defendant, and to use the same for the treatment and cure of diseases that might be successfully treated and cured by the use of the waters of said ~~hot~~ springs, and thereby the plaintiff has been and is deprived of patronage in its said business, to the great loss and damage of the plaintiff.

At the same time the water so sold by the defendant has been and is without any medicinal or curative properties, and the use thereof by persons who have purchased and do purchase the same from the defendant has been and is disappointing, in that such use has been and is without benefit in the treatment or cure of any disease; and such persons, believing as aforesaid that the water so purchased and used by them was and is water of and obtained from said ~~hot~~ springs, have been and are, by reason of such failure and disappointment, caused to believe that the waters of said ~~hot~~ springs are without medicinal or curative properties and without value or efficacy in the treatment and cure of disease, and have been

and are caused to believe that the plaintiff's advertisements of said springs and waters have been and are false and fraudulent, and that the plaintiff's said business in connection with the use of said waters has been and is carried on under false and fraudulent claims, and thereby the reputation of said springs and waters and of plaintiff's said business has been and is greatly impaired and injured, to the great loss and damage of the plaintiff.

15. All said representations and acts of the defendant have been and are without authorization or consent of the plaintiff, and without right, and the plaintiff, prior to the commencement of this action, has repeatedly demanded of the defendant that it cease and refrain from said representations and acts, but the defendant has failed and refused and it still fails and refuses so to do; and the defendant threatens to continue, and unless restrained by order of this court will continue, to offer for sale and to sell its said water as water of and obtained from said Arrowhead ~~hot~~ springs, in the manner and with the false representations aforesaid.

That within one year last past the Defendant has without right used the trade mark label set forth in finding 17 hereof as the trade mark label and property of this plaintiff as the label upon the bottles in which it has sold water as aforesaid, and threatens to continue such use of such label so used by defendant containing in detail the same design as that set forth in plaintiffs trademark and label, by which use defendant has deceived the public into the belief that defendant was furnishing to its trade and customers the water of the Arrowhead springs aforesaid.

As to the affirmative allegations as set forth in the answer of the defendant herein, in addition to the foregoing the court makes and adopts the following findings of fact.

16. That the facts set forth in par. 1 of said affirmative defense are true.

17. As to the fact set forth in par. 2 of said affirmative answer the court finds that it is not true that any of the springs of the locality about Arrowhead other than those situated upon plaintiff's land herein before described were ever known as Arrowhead springs or as Arrowhead water.

18. As to the 3 par. of the affirmative defense the court finds that none of the water offered for sale by defendant or of the water used by defendant in its manufactures was water obtained from any springs known as Arrowhead springs but was water known as East Twin Creek water.

19. That the trade mark so belonging to plaintiff is as set forth upon the following design and copy thereof, to-wit:

And upon the foregoing findings of fact the court makes and adopts the following conclusions of law to-wit:

1. That the plaintiff is entitled to judgment against the defendant to the effect that the defendant and all its agents be perpetually enjoined and restrained from in any manner selling or offering for sale any water as water of or obtained from said Arrowhead springs, or any of the same, and be so enjoined from representing that any water sold or offeredfor sale by the defendant is water of or from said springs, or any of them, and be so enjoined from using the name "Arrowhead Springs Water" or the label set forth in the findings herein, for any retainer of any water sold or offered for sale by the defendant.

2. That plaintiff recover its costs herein.

Frank F. Dey

Judge.

Dated April 18th 1913.

12532

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF
SAN BERNARDINO

Arrowhead Hot Springs Co.
a corporation
Plaintiff

vs

Arrowhead Cold Springs Co.
a corporation
Defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

FILED
APR 18 1913
CHARLES [illegible] Clerk
By [illegible] Deputy

Exhibit 3

known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same.

Witness my Hand and Official Seal.

(Notarial Seal) A. P. Nichols,

Notary Public in and for the County of Los Angeles, State of California.

No. 0. "Endorsed." Recorded at Request of Grantee, Jul. 30, 1915, at 9 Min. past 8 A. M. in Book 574 of Deeds. Page 160.. Records San Bernardino County. L. R. Patty, County Clerk and Ex-officio County Recorder. By Harry L. Allison, Deputy Recorder. Fee $1.00.

A full, true and correct copy of the original.

L. R. Patty, County Clerk and Ex-officio County Recorder.

By _____ Deputy Recorder.

THIS DEED OF TRUST, Made this 31st day of July 1915, between Arrowhead Hot Springs Company, a corporation organized under the laws of the State of California, Party of the first part, Charles M. Rice, of Duluth, Minnesota, Party of the second part, Trustee, and David Williams of Duluth, Minnesota, party of the third part;

WITNESSETH: THAT WHEREAS, said party of the first part is indebted to said party of the third part in the sum of Twenty-nine Thousand Five Hundred ($29,500) Dollars, and has agreed to pay the same, with interest, according to the terms of one certain Promissory Note, in words and figures as follows:

San Bernardino, California, July 31st 1915.

$29,500.00.

Sixty days after date for value received Arrowhead Hot Springs Company, a California corporation, promises to pay to David Williams of Duluth, Minnesota, at the first National Bank of Duluth, Minnesota, the sum of Twenty-nine Thousand Five Hundred ($29,500) Dollars with interest thereon from date until paid at 7% per annum. This note is secured by a certain deed of trust to Charles M. Rice of Duluth, Minnesota.

ARROWHEAD HOT SPRINGS COMPANY,

(Corporate Seal.) By Seth Marshall, President.

(Documentary Stamps $5.90 Cancelled July 31/15. S.M.) Attest: Fred C. Drew, Secretary.

NOW, THEREFORE, in consideration of the indebtedness evidenced by said Note, as therein and for the purpose of securing the payment thereof, provided, the repayment of any sum of money with interest thereon that may otherwise become due or payable to either the parties of the second or third part under the provisions of this Instrument, also such additional sums, not to exceed $10,000, with interest thereon, as may be hereafter borrowed and received by said party of the first part from the said party of the third part, to be evidenced by another Promissory Note or Notes and certified by said Trustee, said party of the first part does by these presents GRANT, BARGAIN, SELL, CONVEY and CONFIRM unto said party of the second part that certain real property situate in the County of San Bernardino, State of California, described as follows:

The East half of the South East Quarter, and the South East Quarter of the North East Quarter, of Section Eleven (11), the North West Quarter of the South

West Quarter, the South Half of the North West Quarter, the West Half of the North East Quarter, the North East Quarter of the South West Quarter, the North Half of the South East Quarter, and the South East Quarter of the North East Quarter, of Section Twelve (12) all in Township One (1), North, Range Four (4) West, San Bernardino Base and Meridian Lines; and also Section Seven (7), in Township One North, Range Three West, San Bernardino Base and Meridian Lines; all of said lands constituting and being known as the "ARROWHEAD HOT SPRINGS HOTEL PROPERTY", and containing 1122.28 acres of land, more or less, and subject to all public roads legally established on said land.

Together with all water rights, easements and privileges belonging to said real property, or any part thereof; and all water rights, and all easements, servitudes and privileges with respect to water, owned by said party of the first part, in regard to any waters of or in any canyon which enters said land.

And also the West half of the South West Quarter of Section Two (2), East Half of the North West Quarter of Section Three (3), South West Quarter of North East Quarter, West Half of the South East Quarter and West Half, of Section Eleven (11), all in Township One North, Range Four West, San Bernardino Base and Meridian Lines.

Together with all water of West Twin Creek and other water rights appurtenant to said premises more fully described in Decree rendered June 14th 1894, in action entitled West Twin Creek Water Company Vs. Mrs. J. G. Waterman, as executrix of the Estate of R. W. Waterman, deceased, et al., case #4733, also four inches of said stream measured under a four inch pressure, perpetual flow, also all spring water rising on the property, and 72 hours in regular turn perpetually commencing Thursday morning of each and every week, and continuing thereafter until the expiration of said 72 hours.

Together with all furniture, furnishings, fixtures and appliances of any and every kind and nature owned by the party of the first part, and used or suitable to be used in connection with said hotel property and carrying on of its hotel business; and also any and all other personal property of whatsoever kind and nature, except only cash on hand, accounts and bills receivable, and its corporate records and record books, owned by the party of the first part.

It is intended hereby to convey all of the property of every kind and nature owned by the party of the first part, except only the North Half of the North West Quarter of Section Twelve (12), Township One North, Range Four (4) West, San Bernardino Base and Meridian Lines; and cash on hand, accounts and bills receivable, and its corporate records and record books.

TO HAVE AND TO HOLD the same upon the trusts, hereinafter expressed, to-wit:

FIRST: During the Continuance of these trusts, party of the first part agrees to pay all taxes and assessments, including taxes levied or assessed upon the debt secured hereby, before delinquent, to pay when due all other incumbrances which may be or appear to be liens upon said property, or any part thereof; to keep the buildings insured against loss by fire to the amount required by and in such insurance companies as may be satisfactory to party of the third part, loss, if any, payable to said party of the third part; and to keep said property in good condition and repair and to permit no waste thereof.

Should said property, or any part thereof, require any inspection, care, attention, repair, cultivation, irrigation, fertilization, protection or insurance other than that provided by party of the first part, then the parties of the second and third parts, or either of them, may, without notice to party of the first part, provide the same in such manner or amount as they may deem necessary.

Said parties of the second and third parts, or either of them, may pay, purchase, compromise or contest all or any taxes, assessments, adverse claims, liens or incumbrances, affecting the title to said property or these trusts, or which, in their judgment, seem to affect the same, but they shall not be obligated to make any such payments nor to perform any such service.

It shall be no part of the duty of the Trustee to appear in or defend any suit brought against any of the parties to this Deed of Trust affecting the title to the property covered thereby, but all such suits shall be defended by the party of the first part at its cost and expense. The Trustee, may, however, defend or prosecute suits affecting the title to said property at its option, but shall not be required to do so, and any costs and expenses incurred by it in such suits shall be secured hereby.

The Trustee may, at any time without notice, upon written request of the party of the third part, reconvey portions of said property without affecting the personal liability of any person for the payment of the indebtedness mentioned as secured hereby or the effect of this Deed of Trust upon the remainder of said property and without liability of the Trustee for Reconveyances so made.

Said party of the first part agrees to repay at once, and without demand, all sums advanced or expended under the terms hereof, together with interest thereon at seven per cent. per annum from the date of advancement, and failure so to do, within 30 days thereafter, shall constitute a default for which all sums secured hereby shall become immediately due and payable at the option of the party of the third part, and for which the Trustee may proceed to sell as hereinafter provided.

SECOND: Upon payment of the aforesaid indebtedness, together with all other sums secured or intended to be secured hereby, including the costs, fees, charges and expenses of this trust, and of the reconveyance of the property aforesaid, and the surrender of said Promissory Note for cancellation, said Trustee shall, at the written request of said party of the third part, reconvey, without warranty, unto the said Arrowhead Hot Springs Company, a corporation, (the present owner of said property) all estate in the property aforesaid then held by said Trustee under the terms hereof.

THIRD: If default shall be made in the payment of any sums herein provided to be paid or repaid or in any of the obligations hereof, then said Trustee, on written demand of the party of the third part but without demand on the party of the first part, shall sell in San Bernardino County, California the above granted property in one parcel, or such part thereof as he shall deem necessary to accomplish the objects of these trusts.

Such sale or sales shall be made in the following manner, namely:

Said Trustee shall publish notice of the time and place thereof, with a description of the property to be sold, at least once a week for four successive weeks in some newspaper published in San Bernardino County, California, and may from time to time postpone the sale of all or any portion of said property by weekly publication of postponement in the same newspaper, or at his option, by public announcement thereof at the time and place of sale or sales so advertised or postponed; and on the day of any sale so fixed said Trustee may sell the property so advertised, or any portion thereof, at public auction to the highest bidder for cash in said Gold Coin; and the holder of any indebtedness secured to be paid by this Trust Deed, his agents or assigns, may bid and purchase at said sale; and after any such sale and after due payment made, shall execute and deliver, to the purchaser or purchasers, a Deed or Deeds of Grant, conveying the property so sold to such purchaser or purchasers, but without covenant or warranty of any kind, express or implied, regarding the title or incumbrances;

And out of the proceeds of such sale or sales shall pay

FIRST: The expenses of such sale, together with the costs, fees, charges and expenses of this trust, and a reasonable compensation to the Trustee hereunder all in said gold coin, which said amounts shall become due and payable upon any written demand made as above provided.

SECOND: All sums which may have been paid or advanced in accordance with the

provisions hereof and not repaid, together with the interest accrued thereon.

THIRD: The amount due and unpaid on said Promissory Note herein set out, with interest accrued thereon.

FOURTH: Any additional sums, with interest accrued thereon, borrowed by said party of the first part from said party of the third part, evidenced by another Promissory Note or Notes, as hereinbefore provided.

And, Lastly, the balance of such proceeds, if any, to the person or persons in law entitled thereto. If said property or any part thereof is sold and a deed is executed under this trust, then the recitals therein (whether said third party or anyone else become the purchaser thereof), shall be conclusive proof of all the facts therein recited; and such deed with such recitals, shall be conclusive proof against the said first party, his heirs and assigns, and all other persons, of full compliance with all the requirements of these trusts, leading up to and including such sale and the execution and delivery of such deed, and such deed shall operate to convey the property so sold to the purchaser thereof absolutely.

This Deed of Trust secures the payment of all the indebtedness and the performance of all of the obligations hereinbefore referred to, and in all its parts applies to, inures to the benefit of, and binds the heirs, administrators, executors, successors and assigns of all and each of the parties hereto.

IT IS AGREED, that Charles M.Rice, Trustee herein, accepts this trust when this deed is duly executed by the trustor herein; and all notes secured hereby may be registered on presentation to said Trustee, at Duluth, Minnesota.

IN WITNESS WHEREOF, the party of the first part has hereunto caused its corporation name to be signed and its corporate seal affixed by its President and Secretary, by the authority of a resolution of its Board of Directors, duly adopted on the 31st day of July, 1915, and the party of the second part has hereunto set his hand and seal all the day and year as first above written.

ARROWHEAD HOT SPRINGS COMPANY,

By Seth Marshall,President.

Attest: Fred C. Drew, Secretary.

(Corporate Seal.)

Charles M. Rice

STATE OF CALIFORNIA, }
COUNTY OF SAN BERNARDINO, } ss.

On this 31st day of July in the Year of Our Lord One Thousand Nine Hundred Fifteen, before me Grant Holcomb, a Notary Public, in and for said County of San Bernardino, State of California, residing therein, duly commissioned and sworn, personally appeared Seth Marshall, known to me to be the President, and Fred C. Drew, known to me to be the Secretary, of the Arrowhead Hot Springs Company, the corporation that executed the within instrument, and severally acknowledged to me that said corporation executed the same.

In Witness whereof, I have hereunto set my hand and affixed by official seal the date and year in this certificate first above written.

Grant Holcomb

(notarial seal.)

Notary Public in and for County of San Bernardino, California.

My commission expires Nov. 19, 1917.

No. 8. "Endorsed." Recorded at Request of S. Marshall, Aug. 2, 1915. at 4 min. past 9 A. M. in Book 574 of Deeds, page 161. Records San Bernardino County. L. R. Patty, County Clerk and Ex-officio County Recorder. By M. L. Aldridge, Deputy Recorder. Fee $3.50.

A full, true and correct copy of the original.

L. R. Patty, County Clerk and Ex-officio County Recorder.

By _____ Deputy Recorder.