

**DRAFT**  
April 21, 2023

**STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD**

**ORDER WR 2023-\_\_\_\_\_**

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**In the matter of the draft cease and desist order to  
BlueTriton Brands, Inc.  
(successor to Nestlé Waters North America, Inc.)  
issued by the State Water Resources Control Board,  
Division of Water Rights, Permitting and Enforcement Branch,  
on April 23, 2021**

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**COUNTY: San Bernardino**

**STREAM SYSTEM: Strawberry Creek, tributary to East Twin Creek, Warm Creek  
and the Santa Ana River**

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**CEASE AND DESIST ORDER**

**1.0 INTRODUCTION**

This matter came to the State Water Resources Control Board (State Water Board, Board or SWRCB) as a proposed order prepared and transmitted by the Senior Hearing Officer in the Board's Administrative Hearings Office (AHO), pursuant to Water Code section 1114, subdivision (c)(1). Pursuant to Water Code section 1114, subdivision (c)(2)(A), the Board adopts the AHO's proposed order in its entirety.

As described in this order, this order directs the Respondent, BlueTriton Brands, Inc. (BlueTriton), to cease its diversions through its Tunnels 2, 3 and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 in the Strawberry Creek watershed in San Bernardino County for its water-bottling operations because BlueTriton does not have any water rights that authorize these diversions and uses.

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This order does not prohibit BlueTriton from continuing to divert water through these facilities for deliveries to the San Manuel Band of Mission Indians (San Manuel Band) for beneficial uses at the Arrowhead Springs Hotel property, and this order does not prohibit BlueTriton from continuing to divert water through its Boreholes 10, 11 and 12 for its water-bottling operations or deliveries to the San Manuel Band.

## **2.0 BACKGROUND**

### **2.1 Summary of Proceeding**

Between April 2015 and September 2017, the State Water Board received seven complaints against Nestlé Waters North America (Nestlé) from individuals and organizations, and a petition signed by 500 individuals. (Exh. PT-13, p. 5.)<sup>1</sup> These complaints contained many allegations, including allegations that Nestlé was diverting water without a valid basis of right, was unreasonably using water, was injuring public trust resources, and was not reporting or was incorrectly reporting its diversions. (*Ibid.*)<sup>2</sup>

In May 2016, the Forest Supervisor for the San Bernardino National Forest sent a letter to the State Water Board's Division of Water Rights (Division). (Exh. PT-38.) This letter asked for the State Water Board's assistance in evaluating Nestlé's water-right claims. (*Ibid.*)

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<sup>1</sup> Unless the context indicates otherwise, references in this order to exhibits are to exhibits introduced during the AHO hearing in this proceeding. These exhibits are filed in a folder titled "Parties' Hearing Exhibits" within the Hearing Documents folder in the administrative record for this proceeding. Within the Parties' Hearing Exhibits folder, there is a separate sub-folder for the exhibits of each party that participated in the AHO hearing.

Unless otherwise indicated, citations in this order to page numbers of exhibits are to the pages of the pdf files of the exhibits. These page numbers often are different from the text page numbers in the exhibits.

<sup>2</sup> Copies of these complaints are filed in a separate folder labeled "Complaints" in the administrative record. Copies of these complaints and this petition also are exhibits PT-102 through PT-110.

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The Division issued a report of investigation on December 20, 2017. (Exh. PT-13.) That report contained several conclusions, including the following:

While Nestlé may be able to claim a valid basis of right to some water in Strawberry Canyon, a significant portion of the water currently diverted by Nestlé appears to be diverted without a valid basis of right.

(*Id.*, p. 33.)

The Division transmitted a copy of this report to Nestlé’s representatives, with copies to representatives of the complainants and other interested parties, on December 20, 2017. (Exh. PT-14.)

After receiving comments from Nestlé, some of the complainants, and several other agencies and organizations, the Division prepared a revised report of investigation, responses to comments and a draft cease-and-desist order (draft CDO) in April 2021. (Exhs. PT-1, PT-3 & PT-4.) If it had gone into effect, the draft CDO would have directed Nestlé to immediately cease all diversions greater than 7.26 acre-feet per year (af/yr) of water that is subject to Division 2 of the Water Code (Water Code, §§ 1000-5976) from Nestlé’s Tunnels 2, 3 and 7 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8.<sup>3</sup> (Exh. PT-1, p. 10, ¶ 1.) The draft CDO would have required Nestlé to submit a report regarding the amounts of diversions at Boreholes 10, 11 and 12 that, if not diverted, would have surfaced naturally at springs. (*Id.*, p. 11, ¶ 7.)

The revised report of investigation concluded that there was not sufficient information to determine if Nestlé’s authorized diversions were causing injuries to public trust resources that outweighed the beneficial uses of the diverted water. (Exh. PT-3, p. 51, ¶ 9.) Accordingly, the draft CDO did not contain any findings regarding public trust resources, or any orders based on potential impacts to such resources. (Exh. PT-1.)

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<sup>3</sup> These tunnels and boreholes are described in section 2.9, and their locations are shown in Figures 7, 8 and 9. Unless the context indicates otherwise, references to “Figures” and “Table” in this order are to the figures and table that are included as attachments at the end of this order, and references to “sections” are to sections of this order.

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The Assistant Deputy Director for the Division's Permitting & Enforcement Branch sent a letter transmitting the revised report of investigation, responses to comments and draft CDO to Nestlé and the other interested people, agencies and organizations on April 23, 2021. (Exh. PT-2.) This letter advised Nestlé that, if it wanted a hearing on the draft CDO, then it had to submit a written request for hearing within 20 days. (*Id.*, p. 5.)

On May 11, 2021, an attorney for BlueTriton filed a request for hearing on the revised report of investigation and draft CDO. (2021-05-11 BlueTriton Brands, Inc. Request for Hearing.)<sup>4</sup> This request stated that BlueTriton was Nestlé's "successor by name change." (*Id.*, p. 1.)

Water Code section 1112, subdivision (a)(2), provides that an AHO hearing officer shall preside over hearings on notices of proposed CDOs like the draft CDO issued by the Division in this proceeding. Following this statute, the AHO issued a notice of hearing, held a hearing on 16 days between January 10 and May 23, 2022, and conducted a site visit on February 16-17, 2022.<sup>5</sup>

The following parties participated in the AHO hearing:

- Amanda Frye;
- Anthony Serrano;
- BlueTriton;
- Center of Biological Diversity and Sierra Club;
- Hugh Bialecki (for Save Our Forest Association);
- San Bernardino Valley Municipal Water District (San Bernardino Valley MWD);
- State Water Board's Prosecution Team (consisting of attorneys from the Board's Office of Enforcement and staff from the Division's Permitting & Enforcement Branch);

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<sup>4</sup> Unless the context indicates otherwise, citations in this order to files without any exhibit names are to files in the Hearing Documents folder in the administrative record for this proceeding. The names of these files all begin with the date of the document in the file, and these files are arranged chronologically in the Hearing Documents folder. Citations to files in other folders in the administrative record besides the Hearing Documents folder and the exhibit folders list the folder where the file is saved.

<sup>5</sup> The AHO proceedings are described in more detail in sections 2.12.1 through 2.12.4.

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(continuation of list of parties)

-Steve Loe; and

-Story of Stuff Project (Story of Stuff).<sup>6</sup>

After completing the hearing and receiving closing briefs and related papers from the parties, the AHO prepared a draft proposed order, and circulated it to the parties for their review and comments on April 21, 2023. The AHO then prepared its final proposed order and transmitted it to the Clerk of the Board pursuant to Water Code section 1114, subdivision (c)(1) on **[insert date]**.

## 2.2 General Topography and Hydrogeology

Figure 1 shows the general locations of East Twin Creek and its tributaries, Warm Creek, and the Santa Ana River.<sup>7</sup> As shown in this figure, the channel of East Twin Creek is connected to the channel of Warm Creek, which is connected to the channel of the Santa Ana River.

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<sup>6</sup> The parties' exhibits are labeled with one of the following abbreviations, followed by the exhibit number:

-Amanda Frye: FR

-Anthony Serrano: Serrano

-BlueTriton: BTB

-Center of Biological Diversity and Sierra Club: CBD

-Hugh Bialecki: Bialecki

-San Bernardino Valley Municipal Water District: SBVMWD

-State Water Board's Prosecution Team: PT

-Steve Loe: Loe

-Story of Stuff Project: SOS

<sup>7</sup> AHO staff prepared Figure 1 using the World Street Map basemap layer from the ArcGIS Map Service database, the U.S. Geological Survey National Hydrography Dataset, and the U.S. Geological Survey topographic maps for the applicable 7.5-minute quadrangles, and adding the boxes depicting the approximate extents of Figures 2 and 7 and the Figure 8 inset. To show the general geographic locations of the channels of East Twin Creek, Warm Creek and the Santa Ana River, AHO staff included dashed blue lines that show the paths of these channels. This order does not address the issue of when there is hydraulic continuity from Strawberry Creek through East Twin Creek and Warm Creek to the Santa Ana River. Nothing in Figure 1 or the references to "tributary to" in the caption of this order should be construed as suggesting any position on this issue.

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The area covered by Figure 2 is shown on Figure 1.<sup>8</sup> Figure 2 shows East Twin Creek and its tributaries. As shown on this figure, the tributaries of East Twin Creek involved in this proceeding are, from west to east, Hot Springs Creek, Coldwater Creek<sup>9</sup> and Strawberry Creek. Waterman Canyon joins East Twin Creek from the west farther downstream.

Strawberry Creek has several branches. Some of the documents in the administrative record refer to the branch of Strawberry Creek depicted in Figure 7 and the Figure 8 inset as “Strawberry Creek,” and to the watershed of this creek as “Strawberry Canyon.” We use these terms in this order. Another branch of Strawberry Creek is located to the east. Some of the documents in the administrative record refer to this branch as the “East Fork of Strawberry Creek.” This order refers to this branch with this name and it has this label in Figure 2. There are no BlueTriton facilities in the watershed of the East Fork of Strawberry Creek.

During the AHO hearing, Mark Nichols, a certified hydrogeologist who testified for BlueTriton, submitted a technical report regarding the hydrologic characterization of surface water and groundwater resources in Strawberry Canyon. (Exh. BTB-7, p. 1.) This report states:

The San Bernardino Mountains are located within the Transverse Ranges geomorphic province. In the area of Strawberry Canyon, the south facing slopes of the San Bernardino Mountains are composed primarily of

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<sup>8</sup> AHO staff prepared Figure 2 using the U.S. Geological Survey National Hydrography Dataset, the U.S. Geological Survey topographic map database and the applicable 7.5-minute quadrangle maps, adding various creek and landmark names, including the creek names shown in exhibit PT-12, p. 5, and the approximate location of the areas covered by Figure 7 and the Figure 8 inset.

<sup>9</sup> Some of the maps that were submitted as exhibits during the AHO hearing label one of the creeks in Coldwater Canyon as the upper reach of East Twin Creek. To avoid confusion with the reach of East Twin Creek that is downstream of the confluence of Coldwater Canyon and Strawberry Creek, we refer to the creek that flows south in Coldwater Canyon to this confluence as “Coldwater Creek.” It is labeled with this name in Figure 2.

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crystalline granitic rocks. . . . The San Andreas Fault marks the mountain front boundary at the toe of the south flank of the mountain range approximately 3.5 miles south of the water sources. Many smaller faults are present within the San Bernardino Mountains and several transect the study area and have affected groundwater flow.

. . .

In addition to the fracturing and shearing resulting from tectonic forces, the crystalline rocks have locally been fractured from decompression of the plutonic mass. Granitic rocks are formed at great depth within the earth as magma slowly cools under pressure, allowing mineral crystals to form. As these rocks are later pushed to the surface of the earth, they are depressurized, resulting in the formation of decompression fractures and the slow break down of the crystalline mineral fabric. Fractures resulting from decompression allow water to penetrate the rock mass, further advancing the weathering process.

. . .

Intact crystalline igneous rocks are typically non-water bearing and essentially impervious to infiltration. However, locally intense fracturing within the rock mass in Strawberry Canyon gives these rocks substantial secondary porosity and permeability, resulting in considerable capacity for infiltration and storage of water. . . . The fractured bedrock aquifers of the San Bernardino Mountains discharge naturally to ground surface where fracture networks intersect the surface or are intercepted by fault planes.

(*Id.*, pp. 12-13.)

## 2.3 San Bernardino National Forest

In February 1893, President Benjamin Harrison issued a proclamation setting aside and reserving designated federal lands as the “San Bernardino Forest Reserve,” which later became the San Bernardino National Forest. (Exhs. FR-31, FR-33, FR-34.) An 1894 Department of the Interior notice stated that the purposes of the reservation were “for the benefit of the adjoining communities, being created to maintain a permanent supply of water for irrigation and of wood for local use by a rational protection of the timber thereon.” (Exh. FR-33.)

Figures 3 and 4 show the current boundaries of parts of the San Bernardino National Forest. Lands within these boundaries that are depicted with green shading on these figures are National Forest Lands.

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## 2.4 Historical Development and Water Use at the Arrowhead Springs Hotel Property

According to a 1999 report prepared by Dames & Moore, a consultant to one of BlueTriton's predecessors, variations in geology and soil conditions in part of the mountain side, and resultant variations in vegetation, formed a near-perfect "Arrowhead" shape on the side of the San Bernardino Mountains. (Exh. PT-23, p. 22.) This natural landmark is the source of the name "Arrowhead" that has been given to many of the developments in this area, including the Arrowhead Springs development (depicted in Fig. 3, in section 12, T1N, R4W, S.B.B.&M.) and Lake Arrowhead, which is located several miles to the northeast. (*Ibid.*) This natural landmark is located on the east side of the Hot Springs Creek watershed.<sup>10</sup> Figure 5 is a copy of a 1915 photograph of the Arrowhead Springs Hotel area, with the Arrowhead landmark on the mountainside visible in the background.

According to the Dames & Moore report, David Nobel Smith, a pioneer from Ohio, purchased land in 1857 at the base of the mountainside with the Arrowhead landmark. (Exh. PT-23, p. 22.) In 1864, he opened a spa on this land. In 1882, the United States issued a patent to Mr. Smith for this land. (Exh. PT-10, pp. 7-8, ¶ 24.) In 1885, the spa was converted into a hotel and resort. (Exh. PT-23, p. 22.) In 1895, a fire destroyed the hotel. (Exh. PT-10, p. 7, ¶ 22.)

In 1905, Seth Marshall built a new hotel on the property. In 1906, Mr. Marshall began bottling "Arrowhead Springs" water in the hotel basement and began selling spring-fed water that was captured near the hotel. (*Ibid.*) This bottled water was sold exclusively at the hotel. (*Id.*, p. 13, ¶ 37.)

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<sup>10</sup> Text in exh. PT-23, p. 22, states that the Arrowhead landmark is in the southeast corner of section 2, T1N, R4W (S.B.B.&M). Figure 3 shows this section 2 and depicts Arrowhead Peak in the section's northeast corner. The Arrowhead landmark is visible in the aerial photograph in exhibit PT-12, p. 5, to the right of Indian Springs. AHO staff included a depiction of the location of this landmark in Figure 2.



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In January 1909, the Arrowhead Hot Springs Company entered into a 10-year contract with James Mumford and C. H. Temple for the sale of water from Coldwater Creek (referred to in the contract as “Cold Creek”), for delivery to the buyers’ tank cars at the terminus of the electric car line at Arrowhead Springs. (Exh. PT-152, pp. 20-21, 24.) The contract provided that the buyers could sell the water in bottles with labels approved by the seller. (*Id.*, p. 21.) Mr. Mumford and Mr. Temple assigned their interests in the contract to the Arrowhead Springs Water Company in July 1909. (Exh. FR-27, pp. 121-122.) The Dames & Moore report indicates that the buyers transported this water to a bottling plant in Los Angeles. (Exh. PT-23, pp. 22-23.)<sup>11</sup> The Prosecution Team’s closing brief to the AHO asserted that the maximum annual amount of water that was transported to Los Angeles under this contract was 7.26 acre-feet per year (af/yr). (2022-08-05 Prosecution Team closing brief, p. 19:20-20:8.) BlueTriton’s closing brief to the AHO asserted that this annual amount may have been as high as 16.8 af/yr. (2022-08-05 BlueTriton closing brief, p. 18:19-19:7.)

In 1912, the Arrowhead Hot Springs Company built a water-bottling plant known as the “Old Arrowhead Factory.” The source for this plant was springs near the base of the Arrowhead landmark (exh. PT-10, p. 14, ¶¶ 41-42; exh. PT-52, p. 5), which, as shown in Figure 2, is in the Hot Springs Creek watershed. During the AHO proceedings, a Prosecution Team witness testified that he believed that water deliveries under the 1909 contract described in the preceding paragraph stopped in 1912, that the Old Arrowhead Factory began operations in 1913, and that the maximum annual amount bottled at this factory did not exceed the maximum 7.26 af/yr rate that had occurred under the 1909 contract. (Exh. PT-10, p. 16, ¶ 46.) BlueTriton’s closing brief to the AHO argued that there is no evidence that sales of water under the 1909 contract stopped in 1912, and that the Old Arrowhead Factory had a production capacity of 5.6

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<sup>11</sup> A 2005 draft report about the history of the Arrowhead Springs Hotel states that, with the completion of this railroad line, water was brought in from Waterman Canyon to a reservoir at Arrowhead Springs and then loaded into special glass-lined railroad cars for transport to the bottling plant in Los Angeles that had been established in 1915. (Exh. PT-39, p. 7.)

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af/yr and used an additional 3.9 af/yr in the production process, for total diversions of 9.5 af/yr. (2022-08-05 BlueTriton closing brief, p. 20:9-12, p. 21:13-20.)

In 1917, Arrowhead Hot Springs Company completed a water-bottling plant in Los Angeles that bottled water transported from Indian Springs, a tributary to Hot Springs Creek. (Exh. PT-10, pp. 16-17, ¶¶ 47-49.) During the AHO hearing, a Prosecution Team witness testified that there was no evidence that this plant was planned, conceived of, or noticed before December 19, 1914. (*Id.*, p. 17, ¶ 50.) BlueTriton's closing brief to the AHO argued that this plant was completed in 1916 after "many years" of preparation. (2022-08-04 BlueTriton closing brief, p. 22:17-18.) BlueTriton's closing brief pointed out that the Division's 2017 report of investigation had concluded that planning for this plant had begun in 1912. (*Id.*, p. 22:13-21; see exh. PT-13, p. 23.) BlueTriton's closing brief asserted that this plant had a bottling capacity of 26 af/yr and required an additional 5.9 af/yr for production, and thus required a total of 31.9 af/yr of water from Indian Springs. (2022-08-04 BlueTriton closing brief, p.21:25-22:2.)

According to the Division's revised report of investigation, the names "Arrowhead Hot Springs Company" and "Arrowhead Springs Corporation" both were used in historical newspaper articles and other documents to refer to the same company. (Exh. PT-3, pp. 35-36 & fn. 47.) The following sections of this order refers to this company as "Arrowhead Springs Corp."

**2.5 1929 Deed and 1930 and 1931 Agreements for Development of Springs in Strawberry Creek Watershed**

The California Consolidated Water Company (California Consolidated WC) was incorporated on February 18, 1929. (Exh. FR-116.)

On February 27, 1929, Arrowhead Springs Corp. signed a deed that granted to California Consolidated WC, among other interests, "all subterranean waters" in Waterman, Strawberry and Coldwater Canyons belonging to grantor, including all water being developed and produced by grantor and such additional subterranean waters that grantee may develop, and the necessary rights of way for pipelines to convey the water

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to grantee's reservoirs, but excluding all water from surface streams and hot springs. (Exh. BTB-13 pp. 25-27.)

In August 1930, California Consolidated WC entered into an agreement with Arrowhead Springs Corp. (Exh. PT-212.) This agreement referred several times to an "existing" pipeline in Strawberry Canyon that Arrowhead Springs Corp. had constructed in 1929. (Exh. PT-212, pp. 2-3.) The agreement provided that California Consolidated WC would construct a new pipeline from the intake of that existing pipeline to "the springs located in upper Strawberry Canyon," approximately 12,300 feet to the north. (*Id.*, p. 2.) The agreement further provided that Arrowhead Springs Corp. would be entitled to receive half the water California Consolidated WC developed in Strawberry Canyon, to be delivered to a reservoir at the back of the Arrowhead Springs Hotel building, and California Consolidated WC would be entitled to the other half of this water. (*Ibid.*)

In September 1931, these parties entered into a new agreement that amended the 1930 agreement. (Exh. FR-111.) The new agreement referred to the pipeline that had been constructed by California Consolidated WC, and it amended the prior allocation of water to a new allocation under which California Consolidated WC would receive 80 percent of the water it developed in Strawberry Canyon, and would deliver the remaining 20 percent for free to Arrowhead Springs Corp. (*Id.*, p. 2.)

**2.6 Judgment in *Del Rosa Mutual Water Company Case***

On October 19, 1931, the San Bernardino County Superior Court issued a judgment in a civil case the Del Rosa Mutual Water Company had brought against various defendants, including Arrowhead Springs Corp. and California Consolidated WC. (Exh. BTB-13, pp. 9-23.) The court entered this judgment following a stipulation by all but one of the parties. (*Id.*, p. 9.) The one non-stipulating party was not Del Rosa Mutual Water Company, Arrowhead Springs Corp. or California Consolidated WC. (*Ibid.*)

The judgment stated that the plaintiff, Del Rosa Mutual Water Company, was diverting all the water of East Twin Creek flowing at a point of diversion about one mile north of the creek's mouth into a ditch and was conveying the diverted water to non-riparian

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lands for beneficial uses. (*Id.*, pp. 11-12.) The judgment referred to the diversions from East Twin Creek and its tributaries upstream of plaintiff's point of diversion by Arrowhead Springs Corp. and its predecessors for over 50 years for uses at the Arrowhead Springs Hotel, and to its diversions from various springs in Hot Springs Canyon for shipping to outside the East Twin Creek watershed for water bottling. (*Id.*, pp. 12-15.) The judgment stated that California Consolidated WC was diverting water from springs at the headwaters of Strawberry Creek for conveyance to Los Angeles, where the water was bottled for domestic use and used to manufacture beverages and for other purposes. (*Id.*, pp. 15-16.)

Following these statements, the judgment concluded that Arrowhead Springs Corp. had the right to divert water from East Twin Creek and its tributaries for uses on the Arrowhead Springs property riparian to East Twin Creek, and to divert specified amounts of water from springs tributary to Hot Springs Creek for shipping outside the watershed for water bottling. (*Id.*, pp. 17-18.) The judgment concluded that California Consolidated WC had the right to the waters of springs in Strawberry Canyon, and to convey that water outside the Strawberry Creek watershed for bottling or other purposes of use. (*Id.*, pp. 18-19.) The judgment provided that plaintiff would recover \$15,000 from California Consolidated WC and \$5,000 from Arrowhead Springs Corp. (*Id.*, p. 19.)

**2.7 1930-1931 W. W. Rowe Investigation**

During the AHO hearing, attorneys for the Story of Stuff Project introduced copies of a diagram, field notes and reports prepared by W. W. Rowe as part of his investigation of the springs in the Strawberry Creek watershed during 1930-1931. A January 1931 letter from an attorney for California Consolidated WC and Arrowhead Springs Corp. indicates that these entities each were paying half of Mr. Rowe's fees for his investigation. (Exh. SOS-55, p. 20; see *id.*, p. 19.)

Mr. Rowe's field notes indicate that he conducted his investigation between August 4, 1930 and April 18, 1931. (Exh. SOS-48, pp. 2-78.) A diagram that he apparently prepared in connection with his reports shows Springs 1, 2, 3 and 4 at the head of

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Strawberry Creek. (Exh. SOS-49.)<sup>12</sup> This diagram shows the locations of Weirs 1-5, which are referenced in his reports, and of the Del Rosa Mutual Water Company's pipeline. (*Ibid.*)<sup>13</sup>

Mr. Rowe's May 15, 1931 letter states:

Strawberry Creek drains a portion of the south slope of the San Bernardino Mountain. It has its source at a group of springs which issue from the side of Strawberry peak. The elevation of the top of Strawberry peak is 6150 feet above sea level and the springs issue from the broken rock between elevation 5400 and 5050 feet above sea level. The flow from these springs being deep seated should be fairly regular, especially during the late summer season. The observations show this to be the case. The dependable supply will aggregate about 10 inches, of which 8 inches are at present diverted from spring # 2 into the pipe line leading to the Arrowhead Hotel and vicinity. The water not so diverted flows down the side hill to a common junction at a narrow bed rock gully lined with alder, sycamore, dogwood and cedar trees together with ferns and thimble berry bushes. The junction of flow from all of the upper springs at the head of Strawberry Creek is at station 123+00, or 12,300 feet upstream from the old intake to the 4" pipe from Strawberry creek to the Arrowhead Hotel which was laid in 1929.

(Exh. SOS-51, p. 1.)<sup>14</sup>

The table that was enclosed with Mr. Rowe's letter lists the flows he measured on various dates between September 29, 1930 and April 18, 1931, at Springs 1, 2, 3 and 4, and at the weirs referenced in his reports. (*Id.*, pp. 5-11.) The reported flow rates are in miner's inches under four inches of pressure. (*Ibid.*) A flow rate of one miner's inch

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<sup>12</sup> Mr. Rowe's diagram shows Spring 4 at the confluence of the streams that flowed from Springs 1, 2 and 3. (Exh. SOS-49.) This does not appear to be the Spring 4 depicted in Figure 7, which is located below, but very close to, Spring 1.

<sup>13</sup> This diagram depicts a reach of "East Twin Creek" southeast of Strawberry Creek. (Exh. SOS-49.) This is inconsistent with other maps, which depict Coldwater Creek as the upper reach of East Twin Creek. (See section 2.2.)

<sup>14</sup> The first sentence of Mr. Rowe's May 15, 1931 letter refers to his measurements since "September 29, 1931." (Exh. SOS-51, p. 1.) Because September 29, 1931 had not occurred when he signed the letter, and because the tabulation enclosed with the letter refers to measurements between September 29, 1930 and April 18, 1931 (*id.*, pp. 5-7), the "September 29, 1931" in this letter should have been "September 29, 1930."

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under four inches of pressure equals 9.0 gallons per minute (gpm).<sup>15</sup> The “dependable supply” of 10 inches discussed in Mr. Rowe’s letter therefore equaled 90 gpm, and the amount “at present diverted” of 8 inches equaled 72 gpm.

The tables in Mr. Rowe’s May 15, 1931 letter indicate that, on the dates on which he made measurements, flows from Spring 1 varied from 0.7 to 1.8 miner’s inches (*id.*, pp. 5-7), which equaled flows of 6.3 to 16.2 gpm. Measured flows from Spring 2 (including amounts diverted) varied from 7.9 to 9.2 miner’s inches (*id.*), which equaled flows of 71.1 to 82.8 gpm. Measured flows from Spring 3 varied from 0.9 to 1.4 miner’s inches (*id.*), which equaled flows of 8.1 to 12.6 gpm.

Mr. Rowe’s letter goes on to state:

About a quarter of a mile downstream from this junction point, the stream enters a little valley caused by faulting along the side of the San Bernardino Mountains. At this valley or cienega the flow is augmented by more springs.

(*Ibid.*) Mr. Rowe’s diagram and his letter indicate that this valley was between his Stations 107 and 84. (*Ibid*; exh. SOS-49.) This valley is about one-half mile downstream of Spring 2. As shown in Figure 7, Springs 10, 11 and 12 are located approximately one-half mile downstream of Spring 2. These approximate distances and the fact that there is no evidence in the record of any other springs in this area indicate that these springs discussed in Mr. Rowe’s letter are Springs 10, 11 and 12.

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<sup>15</sup> A miner’s inch of flow is the rate of flow through a one-square-inch orifice under a specified head or pressure. (*Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742, 762 fn. 12.) In California, there are two different definitions of a miner’s inch.

A miner’s inch measured under six inches of head equals a flow rate of 1/40 cubic-foot per second (cfs). (*Ibid.*) This is the miner’s inch flow rate defined in Water Code section 24 (1/40 cfs = 1.5 ft.<sup>3</sup>/min.).

A miner’s inch measured under four inches of head equals a flow rate of 1/50 cfs. (*Pleasant Valley Canal Co. v. Borrer, supra*, 61 Cal.App.4th, p. 762 fn. 12.) This is the miner’s inch flow rate referenced in Civil Code section 1415, Mr. Rowe’s reports, and this order. This flow rate equals 9.0 gallons per minute. (0.02 ft.<sup>3</sup>/sec. x 7.481 gal./ft.<sup>3</sup> x 60 sec./min. = 9.0 gal./min.)

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## 2.8 Successors to California Consolidated Water Company

During the AHO hearing, BlueTriton filed a document it stated described the chain of title for the water rights it stated were assigned to California Consolidated WC by the 1931 judgment in the *Del Rosa Mutual Water Company* case. (Exh. BTB-13, p. 1; see section 2.6.) This document begins by describing the 1929 deed from Arrowhead Springs Corp. to California Consolidated WC and the 1931 judgment. (Exh. BTB-13, pp. 3-4; see section 2.5.) This document then describes a variety of companies that, in succession, held these water-right claims. (Exh. BTB-13, pp. 4-5.) After California Consolidated WC merged into Arrowhead and Puritas Waters, Inc. in 1938 (*id.*, pp. 4, 30-32), all the successor companies had the word “Arrowhead” in their names until 1993 (*id.*, pp. 4-5). In 1993, Arrowhead Water Corp. and several other water-bottling companies merged into Deer Park Spring Water Inc., which then changed its name to Great Spring Waters of America, Inc. (*id.*, pp. 5, 85-96.) In 2002, Great Spring Waters of America, Inc. changed its name to Nestlé Waters North America, Inc. (*id.*, pp. 5, 99.)

BlueTriton’s chain of title does not discuss any conveyances to any of BlueTriton’s predecessors of any pre-1914 appropriative rights that the Arrowhead Springs Water Company might have perfected through its water-bottling operations under its 1909 contract with Arrowhead Hot Springs Company. (See section 2.4; exh. BTB-13.)

In April 2021, one of BlueTriton’s attorneys advised a Prosecution team attorney that an investor group comprised of One Rock Capital Partners, LLC and Metropoulos & Co. acquired Nestlé Waters North America Holdings, Inc. on March 31, 2021, and that, on April 12, 2021, Nestlé Waters North America changed its name to “BlueTriton Brands, Inc.” (with no space between “Blue” and “Triton”). (Exh. PT-117, p. 1.)<sup>16</sup>

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<sup>16</sup> References in this order to “BlueTriton” often are to one or more of BlueTriton’s predecessors, and references “BlueTriton’s facilities” often are referring to facilities now owned by BlueTriton that previously were owned by one or more of BlueTriton’s predecessors.)

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## 2.9 Springs, Tunnels and Boreholes in Strawberry Creek Watershed

In 1964, John F. Mann, Jr. prepared a geologic and hydrologic report regarding the area of the Arrowhead and Puritas Waters, Inc. springs to the company's production manager. (Exh. PT-317.) This report stated that the rocks in the area "are granitic and metamorphic types of the so-called 'basement complex'," and that "[g]round water in the area . . . occurs mainly in fractures in the basement rocks." (*Id.*, pp. 3-4.)

In 1988, Mr. Mann prepared a report to the director of production and logistics of the Arrowhead Drinking Water Company. (Exh. PT-319.) This report stated:

The Arrowhead Springs are located in an area of high rainfall. Especially during periods of heavy rainfall, the rain water which falls on the granite slopes enters fractures, follows fracture systems to lower elevations and exits as seeps along the steep south-facing slopes (Figure 2).

(*Id.*, p. 4.) Figure 6 attached to this order is a copy of the Figure 2 in Mr. Mann's 1988 report. (*Id.*, p. 5.) It shows a conceptual pathway of water flow from rain through fractures in the basement rocks to a spring.

Figure 7 shows the locations of the springs and some of the boreholes discussed in the following paragraphs. Figure 8 shows the locations of the tunnels and boreholes in Strawberry Canyon, and associated pipelines, that BlueTriton currently uses to divert water in this watershed and to convey the diverted water to BlueTriton's load station and the split valve from which water is conveyed to the Arrowhead Springs Hotel. Figure 9 is a photograph that shows the locations of these tunnels and boreholes. The following paragraphs discuss the historical development of these facilities.

Spring 2 and Tunnel 2. The 1999 Dames & Moore report states:

Spring No. 2 is a natural spring that has been improved by the installation of engineered collection facilities consisting of a hand dug tunnel and water collection piping. . . . The tunnel has concrete walls and gravel-lined floors to allow the spring water to enter the collection system from the fractures in the bedrock.

(Exh. PT-23, p. 14.) This tunnel is straight, about three feet wide, four- and one-half feet high, and 37 feet long. (*Id.*, p. 15; exh. BTB-9, p. 6.) This tunnel was constructed



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in 1930, and BlueTriton's predecessors began diverting water from it then. (Exh. FR-153, p. 5; exh. SOS-51, p. 1; exh. PT-44, p. 3.)

Spring 3 and Tunnel 3. The 1999 Dames & Moore report states:

Spring No. 3 is a natural spring that, like Spring No. 2, has been improved by the installation of engineered collection facilities. These include a hand dug tunnel, weirs, and water collection piping. . . . The tunnel has concrete walls and gravel-lined floors to allow the spring water to enter the collection system from the fractures in the bedrock.

(Exh. PT-23, p. 15.) This tunnel has five sections that curve to the left from the entrance. (*Id.*, p. 16.) The tunnel is approximately three feet wide, five feet high and 89 feet long. (*Ibid*; exh. BTB-9, p. 6.) This tunnel was constructed in 1933, and BlueTriton's predecessors began diverting water from it then. (Exh. FR-153, p. 5; exh. PT-44, p. 3.)

Spring 4 Complex, Springs 1 and 8, and Boreholes 1, 1A and 8. The 1999 Dames & Moore report discusses "Spring Complex No. 4" and the three associated boreholes, Boreholes 1, 1A and 8. (Exh. PT-23, p. 16.) The Dames & Moore report states:

Spring water in the vicinity of Spring No. 4 is harvested from three associated bore holes, Bore Holes No. 1, No. 1A, and No. 8. For convenience, this group of sources is referred to herein as Spring Complex No. 4.

. . .

Spring No. 4 . . . issues from the steep granite hillside between Spring No. 2 and Spring Complex No. 7, at an elevation of approximately 5,190 feet above msl. . . . As noted earlier, Spring No. 4 has not been developed by installation of collection facilities, and spring water is not harvested directly from this spring. Spring water from this source is captured by three bore holes, Bore Holes No. 1, No. 1A, and No. 8 located approximately 60 feet north (uphill) from Spring No. 4.

(*Ibid.*) The lengths of these boreholes are: 290 feet (Borehole 1), 130 feet (Borehole 1A), and 120 feet (Borehole 8). (*Id.*, pp. 16-17.) The lengths of the seals from the ground surface along the boreholes are: 126 feet (Borehole 1), 66 feet (Borehole 1A), and 100 feet (Borehole 8). (Exh. BTB-9, p. 6.) These boreholes were constructed by drilling two-and-seven-eighth-inch diameter boreholes and then lining them with two-

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inch diameter casings and screens. (Exh. PT-45, pp. 5-6.) The portals of all three boreholes are in one block house. (*Id.*, p. 9.)

Mr. Mann's 1988 report states that Spring 1 probably was developed in the 1930s as part of the original group of springs, and that the first recorded measurements of flows from this spring were in October 1948, when flows of 10,000 to 20,000 gallons per day (gpd) were measured. (Exh. PT-319, p. 17.) This report states that flows from this spring declined during the dry years of 1959 through 1961, and that this spring was closed in May 1962, when its flows were less than 5,000 gpd. (*Ibid.*) It was opened in February 1963, but its flows were intermittent after then, and no flows were recorded for ten years leading to May 1976, when the spring was capped and a horizontal hole (presumably new Borehole 1) was developed. (*Ibid.*)

A 1998 report by the Hydrodynamics Group for Perrier Group of America discusses the developments of Springs 1 and 8, states that Borehole 1 originally was developed in the 1930s, and that, after its discharge declined, a new borehole was slant drilled in 1976 from a lower elevation to intercept the original borehole. (Exh. PT-45, p. 5.) This report states that Borehole 8 originally was developed in the 1950s, and that, after its discharge declined, a new borehole was slant drilled in 1993 from a lower elevation to intercept the original borehole. (*Ibid.*) Borehole 1A was constructed in 1993. (*Id.*, p. 6.)

Spring 7, Tunnel 7 and Boreholes 7, 7A, 7B and 7C. The 1999 Dames & Moore report states:

Spring No. 7 . . . is a natural spring that has been improved by construction of an engineered collection facility, consisting of a short (30-foot) tunnel. . . . The tunnel is concrete lined and has a gravel floor to allow the collection of spring water. Four horizontal bore holes, Bore Holes No. 7, No. 7A, 7B, and No. 7C, have been placed down slope of the spring to harvest spring water from this spring. Since their installation, these bore holes have been used for harvesting of spring water and conveying it into the water supply pipeline at the site, and spring water is no longer harvested directly from Spring No. 7.

(Exh. PT-23, pp. 17-18.) Tunnel 7 is about four feet wide. (Exh. PT-43, p. 10.)

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The tunnel developed at Spring 7 was placed into service in 1934. (Exh. SOS-281, p. 19; see exh. PT-43, p. 20.) The original Boreholes 7A and 7B were constructed in 1950, and the original Borehole 7C was constructed in 1961. (Exh. PT-43, p. 20.) New Boreholes 7, 7A and 7B were constructed in 1992, and new Borehole 7C was constructed in 1993. (*ibid.*) The enclosure containing the portals of these boreholes is approximately 40 feet from the portal of the original Tunnel 7. (*Id.*, p. 10.) The lengths of these boreholes are: 290 feet (Borehole 7), 230 feet (Borehole 7A), 397 feet (Borehole 7B), and 300 feet (Borehole 7C). (*ibid.*) The lengths of the seals from the ground surface along the boreholes are: 126 feet (Borehole 7), 95 feet (Borehole 7A), 121 feet (Borehole 7B), and 168 feet (Borehole 7C). (Exh. BTB-9, p. 6.) These boreholes were constructed by drilling two-and-seven-eighth-inch diameter boreholes and then lining them with two-inch diameter casings and screens. (Exh. PT-43, p. 5.) The portals of all four boreholes are in one concrete block enclosure. (*Id.*, p. 10.)

Springs 10, 11 and 12 and Boreholes 10, 11 and 12.

The 1999 Dames & Moore report states:

Springs No. 10, No. 11, and No. 12 are natural springs that flow from the granitic hillside in the Lower Spring Complex. These springs are discussed as a group as they represent an area of measurable spring flow along this section of hillside.

...

Groundwater discharging from Springs No. 10, No. 11, and No. 12 is intercepted by Bore Holes No. 10, No. 11, and No. 12. Bore Hole No. 10 is located about 19 feet southwest of Spring No. 10, about 35 feet north of Spring No. 11, and approximately 60 feet north of Spring No. 12. Bore Holes No. 11 and No. 12 are located about 75 feet northnorthwest of Spring No. 10.

(Exh. PT-23, pp. 20-21.) The lengths of these boreholes are: 305 feet (Borehole 10), 310 feet (Borehole 11), and 320 feet (Borehole 12). The construction of these three boreholes is similar to that of the other boreholes discussed above. (*Id.*, p. 21.) The lengths of the seals from the ground surface along the boreholes are: 162 feet (Borehole 10), 67 feet (Borehole 11), and 152 feet (Borehole 12). (Exh. BTB-9, p. 6.)

## **2.10 Diversions and Uses of Water from Strawberry Canyon Sources**

All BlueTriton's tunnels and boreholes in Strawberry Canyon are located on San Bernardino National Forest lands. (See Figures 2-4 & 7; exh. BTB-2, p. 27.) Since 1930, BlueTriton and its predecessors have operated these tunnels and boreholes and associated pipelines under special-use permits issued by the National Forest. (Exh. BTB-2, p. 12, fn. 5.)<sup>17</sup> The locations of these facilities are shown on Figures 8 and 9. The former Arrowhead Springs Hotel now is owned and operated by the San Manuel Band. Water supplied from the BlueTriton facilities to the San Manuel Band under the 1931 agreement between Arrowhead Springs Corp. and California Consolidated WC (see section 2.5) is diverted from the BlueTriton pipeline at the "80/20/ SPLIT VALVE" shown in Figure 8. (See exh. SOS-80.)<sup>18</sup>

Water from BlueTriton's pipeline is loaded into tank trucks at the "LOAD STATION" shown in Figure 8. (Exh. PT-31, p. 34.) From this load station, BlueTriton transports the water to BlueTriton's bottling plants, which are located at several locations in southern California, to be bottled as "Arrowhead 100% Mountain Spring Water." (Recording, 2022-01-13, 1:50:15-1:51:06.)<sup>19</sup>

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<sup>17</sup> Copies of these special-use permits and amendments are in exhibit PT-31, at pp. 35-62.

<sup>18</sup> In response to a request from the AHO hearing officer (see 2022-02-04 A. Lilly ltr. to R. Donlan), BlueTriton provided the AHO with daily data of the amounts of water BlueTriton has delivered to the Arrowhead Springs Hotel property since 2018. AHO staff labeled the files of these data as exhibit AHO-6. These files are in the administrative record in a folder labeled "Historical Diversion Data," in a sub-folder labeled "Hotel property daily volume data."

<sup>19</sup> According to a page on the website, [www.arrowheadwater.com/brand/our-springs](http://www.arrowheadwater.com/brand/our-springs), the springs in the Strawberry Creek watershed, which the website refers to as "Arrowhead Spring," are the original spring sources for Arrowhead Spring water. Other pages on this website state that Arrowhead Spring water also comes from four springs in northern California, four springs at other locations in southern California, a spring in British Columbia, and a spring in Colorado. (2023-03-31 website downloads from [www.arrowheadwater.com/brand/our-springs](http://www.arrowheadwater.com/brand/our-springs). (This file is in the administrative record in AHO staff exhibits folder.)) The State Water Board takes official notice of these website downloads under Evid. Code, § 452, subd. (h), and Cal. Code Regs., tit. 23, § 648.2.

### **2.10.1 Groundwater Extraction Notices**

Since 1957, BlueTriton and its predecessors have filed notices of groundwater extractions pursuant to Water Code sections 4999-5009 for their operations of their tunnels and boreholes in the Strawberry Creek watershed. The AHO compiled copies of all these notices, which cover extractions since 1947, in a folder in the administrative record titled “Groundwater Extraction Notices.”<sup>20</sup>

In the first notices of extractions for the sources that BlueTriton’s predecessor, Arrowhead and Puritas Waters, Inc., called “Spring Nos. 1, 2, 3, 7, 7A, 7B and 8,” a company representative crossed out “well” each place it appeared in each form, and inserted “spring.” (See, e.g., exh. PT-98, pp. 1, 4-5.) The initial notice for Spring No. 1 (Notice G360476) states:

The waters from Springs 1, 2, 3, 7, 7a, 7a and [8] are diverted from said springs by means of a pipe line . . .

(*Id.*, p. 7.)

The Company springs are naturally developed springs . . .

(*Id.*, p. 5.) At the end of the table listing the annual extraction amounts, the following text was added:

The Company uses the total aggregate flow from each and all springs for each and every year.

(*Id.*, p. 3.) These same edits and this same language are in the notices for Spring Nos. 2, 3, 7, 7A, 7B, and 8 (Notices G360477, G360478, G360479, G360480, G360481, G360482). (Exh. PT-93, pp. 1-7, exh. PT-94, pp. 1-7, exh. PT-95, pp. 1-7, exh. PT-99,

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<sup>20</sup> Exhibits PT-93 through PT-95 and PT-98 through PT-100 contain the initial notices and annual notices for Spring Nos. 1, 2, 3, 7A, 7B and 8 (Notice Nos. G360476, G360477, G360478, G360480, G360481 and G360482). The “Groundwater Extraction Notices” folder compiled by the AHO contains copies of these notices and the notices for Spring Nos. 7, 7C, 10, 11 and 12 (Notice Nos. G360479, G361986, G362800, G362856, G362857 and G362894). The attached Table 1, prepared by AHO staff, lists all these notices, spring numbers and reported annual extraction amounts.

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pp. 1-6, exh. PT-100, pp. 1-7; Groundwater Extraction Notices folder, G360479 Notices, 1947-1957 subfolder, G360479 Notices, 1947-1957, pp. 1-6.)

**2.10.2 FDA Regulations**

BlueTriton bottles all water from its sources in the Strawberry Creek watershed as “spring water” under the federal Food and Drug Administration (FDA) regulations in title 21 of the Code of Federal Regulations, part 165. (Exh. BTB-2, p. 27; exh. BTB-6, p. 5, ¶ 14.) One of these regulations provides:

The name of water derived from an underground formation from which water flows naturally to the surface of the earth may be “spring water.” Spring water shall be collected only at the spring or through a bore hole tapping the underground formation feeding the spring. There shall be a natural force causing the water to flow to the surface through a natural orifice. The location of the spring shall be identified. . . .

(21 C.F.R., § 165.110, subd. (a)(vi)(2023).)

Text of the Arrowhead Water website states:

According to the U.S. Food & Drug Administration (FDA): “Spring Water is water derived from an underground formation from which water flows naturally to the surface of the earth.” To be able to label our product as “spring water,” we have to satisfy stringent standards— standards we proudly meet or exceed. That’s why you can be confident in the quality of every bottle of Arrowhead® Brand 100% Natural Spring Water.

(2023-03-31 website downloads from [www.arrowheadwater.com](http://www.arrowheadwater.com) brand our-springs (cited in footnote 19).)

**2.10.3 Hydrodynamics Group Reports**

In 1997 and 1998, the Hydrodynamics Group prepared three reports for the Perrier Group of America.

One report was titled “FDA Compliance Report: Arrowhead Spring No.’s 2 and 3 San Bernardino National Forest.” (Exh. PT-44.) The report stated:

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The objective of this study was to evaluate historical spring flows and chemical test data of Arrowhead Springs No. 2 and No. 3 to determine compliance with FDA regulations.

...

Our approach was to inspect the Arrowhead Springs No.'s 2 and 3 to confirm the existence of natural springs, and at the same time inspect the local hydrogeology. We reviewed historical data to confirm that the springs have flowed for a long time.

(*Id.*, p. 2.) After discussing the background geology, history of tunnel construction, and spring flows and spring chemistry (*id.*, pp. 3-5), the report concluded that these springs complied with the FDA regulations regarding spring water sources (*id.*, p. 5).

A second report (discussed in section 2.9) was titled "Investigation of the Arrowhead Complex 1 & 8 for FDA Compliance." (Exh. PT-45.) This report states:

The objective of this study was to conduct hydraulic and chemical testing of the Arrowhead Springs 1, and 8 and borehole 1A (collectively referred to as the Arrowhead Complex 1 & 8) to establish compliance with FDA regulations. Spring 4 was developed in the course of our compliance studies.

...

Our approach was to inspect the springs at Arrowhead Complex 1 & 8, and investigate the local hydrogeology. We reviewed historical data to confirm that the springs have flowed for a long period. Water samples were collected and analyzed to confirm the chemical similarity of water from the springs and bore-holes. As part of our investigation a catchment was constructed at Spring 4.

We performed hydraulic tests during which spring flows were monitored to demonstrate a hydraulic connection between springs 1 and 8 and bore-hole 1A, and another hydraulic test to investigate the hydraulic connection between 1, 1A, 8 and spring 4.

(*Id.*, p. 3.) After discussing the background geology, history of tunnel construction, and spring flows and spring chemistry (*id.*, pp. 3-18), the report reached several conclusions, including the following:

Spring 1 and 8 appear to have been natural springs that were developed by drilling bore-holes horizontally into the mountain at the spring orifices. .

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. . . Later when flow at the original bore-holes declined significantly, slant holes were drilled at a lower elevation to intercept the original bore-holes. Once the slant holes were completed the original bore-holes (the original spring orifices) were plugged. The spring flow is now through the slant bore-holes. It is a matter of interpretation as to whether the original spring orifices (or orifice) exist and continue to flow, as required by the new FDA regulations. We believe Perrier is not in compliance with the new FDA regulations at springs (bore-holes) 1 and 8; these are bore-holes not springs. No natural orifice continues to flow as required by the FDA regulations.

...

Further careful testing at the site may qualify spring 4 as a natural orifice that is in hydraulic connection with the bore-holes. Our testing, while not conclusive, is highly suggestive that this is the case. If it can be established that spring 4 is in hydraulic connection with the bore-holes it would meet the FDA criteria that an associated natural spring orifice continues to flow.

(*Id.*, p. 19.)

The third report was titled “FDA Compliance Report: Arrowhead Spring Complex No. 7 San Bernardino National Forest.” (Exh. PT-43.) This report states:

The objective of this study was to conduct hydraulic and chemical testing of the Arrowhead No. 7 Spring and bore-holes No. 7, 7A, 7B, and 7C (collectively referred to as the Arrowhead Complex 7) to determine compliance with FDA regulations.

...

Our approach was to inspect the Arrowhead Complex 7 to confirm the existence of a natural spring, and at the same time inspect the local hydrogeology.

(*Id.*, p. 2.) After discussing the background geology, history of tunnel construction, and spring flows and spring chemistry (*id.*, pp. 3-7), the report concluded that this spring complex complied with the FDA regulations regarding spring water sources (*id.*, p. 7).

The report also stated the following additional conclusions:

Spring tunnel No. 7 is a natural spring.

...



Flow at Spring No. 7 has been recorded since 1945.

...

Complex 7 bore-holes are in hydraulic connection to the Spring No. 7.

*(Ibid.)*

#### **2.10.4 Dames & Moore Report**

In 1999, Dames & Moore prepare a report (discussed in sections 2.4 and 2.9), titled “Assessment of History and Nature of Arrowhead Springs San Bernardino Mountains San Bernardino County, California.” (Exh. PT-23.) The report quoted the prior versions of the FDA Regulations discussed in section 2.10.2 (exh. PT-23, pp. 7-8,13-14, 28-29) and stated that the report discussed Spring Nos. 2 and 3, Spring Complexes Nos. 4 and 7, and the “Lower Spring Complex,” which included Spring Nos. 10, 11 and 12 and Borehole Nos. 10, 11 and 12 (*id.*, pp. 8, 10). The report described these springs and the developments of the associated tunnels and boreholes in detail. (*id.*, pp. 11-23.) After discussing in detail the environmental setting, topography, climate, geology, groundwater, vegetation, hydraulic connections, hydraulic testing, chemical analyses, potential influence of surface water and spring classifications (*id.*, pp. 24-61), the report reached several conclusions, including the following:

Springs No. 2 and No. 3 have been developed by construction of engineered collection facilities consisting of tunnels and piping that enhance the flow of spring water and provide protection to these sources.

The other springs have been developed by construction of associated bore holes that enhance the flow of spring water and provide protection to the spring water sources.

All springs and bore holes flow from fracture systems in quartz monzonite bedrock of the San Bernardino Mountains under the natural force of gravity.

There are two separate springs and three spring complexes from which spring water is harvested for bottling. Each spring complex contains one or more springs and multiple bore holes.

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Hydraulic connection testing between springs and associated bore holes shows a direct hydraulic connection between Bore Holes No. 7, No. 7A, No.7B and No. 7C and Spring No. 7.

Due to the site limitations, hydraulic testing for connectivity at Spring Complex No. 4 and the Lower Spring Complex was inconclusive. Thus, in accordance with FDA Regulations, hydraulic connectivity at these complexes was demonstrated by water quality comparisons.

**Bore holes No. 1, No. 1A, and No. 8 are hydraulically connected to Spring No. 4.**

**Bore Holes No. 7, No. 7A, No. 7B, and No. 7C are hydraulically connected to Spring No. 7**

**Bore Holes No. 10, No. 11, and No. 12 are hydraulically connected to Springs No. 10, No. 11, and No. 12.**

The water from Bore Holes No. 1, No. 1A, No. 8, No. 7, No. 7A, No. 7B, No. 7C, No. 10, No. 11, and No. 12 and Spring No. 2 and No. 3 meets the FDA and State of California regulatory requirements for "*spring water*."

(*Id.*, pp. 62-64, bolding and italics in original.)

## 2.10.5 Nestlé Attorney Letter

In a February 2018 letter to a staff engineer leading the Division's investigation of Nestlé, one of Nestlé's attorneys stated:

The tunnels and horizontal boreholes at [Nestlé's] collection points in the San Bernardino Mountains were constructed at or adjacent to naturally occurring spring sites for the purposes of capturing spring water and developing additional percolating groundwater from the same underground strata feeding the springs. The tunnels and horizontal boreholes successfully achieved these purposes. . . . A portion of the water collected may reasonably be assumed to have been intercepted before discharging at the spring site, where it may have flowed to the surface of the Earth becoming surface water. A portion of the water collected has been demonstrated to be groundwater percolating through the same strata feeding the spring, and may be considered to be "developed water" because it represents an increase in flow above the natural spring discharge.

(Exh. BTB-2, p. 28.)

### **2.11 Fully Appropriated Stream Declaration**

Water Code section 1205, subdivision (a), authorizes the State Water Board, following notice and hearing, to adopt a declaration that a stream system is fully appropriated. Subdivision (c) of section 1205 authorizes the Board, upon its own motion or the petition of any interested person, to revoke or revise such a declaration.

Water Code section 1206, subdivision (a), provides that, subject to the exceptions stated in any “fully appropriated” declaration, the Board shall not accept for filing any application for a permit to appropriate water from the stream system described in the declaration.

The Board adopted its first fully-appropriated stream declaration in Order WR 89-25.<sup>21</sup> Citing Decision 1070, the Board declared the Santa Ana River in San Bernardino County to be fully appropriated from January 1 to December 31 of each year. (Order WR 89-25, p. 105.)

Order WR 91-07 amended Order WR 89-25. Order WR 91-07 added a new footnote (1) for the table of fully appropriated streams, with the text “including all tributaries where hydraulic continuity exists.” (Order WR 91-07, p. 30.) In the entry in this table for the Santa Ana River in San Bernardino County, this order added a reference to Decision 1194, changed the name of the fully-appropriated stream system to the “Santa Ana

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<sup>21</sup> Unless the context indicates otherwise, references to “Decisions” and “Orders” in this order are to reported water-right decisions and orders of the State Water Board and its predecessors. These decisions and orders can be downloaded from the Board’s website at [https://www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/](https://www.waterboards.ca.gov/board_decisions/adopted_orders/).

In Order WR 96-01, on page 17 in footnote 11, the Board discussed Government Code section 11425.60, which went into effect on July 1, 1997 and authorized State agencies to designate precedent decisions. The Board noted that its practice had been to treat its decisions and orders as precedents, and, in Order WR 96-01, the Board designated all decisions and orders adopted by the State Water Board at public meetings to be precedent decisions, unless a decision or order indicates otherwise or is superseded by later-enacted statutes, judicial opinions or Board actions. The Board also treats water-right decisions of its predecessor agencies as precedent decisions.

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River Watershed,” added text stating that the critical reach was from the confluence of the Pacific Ocean upstream, and added a citation to footnote (1). (*Id.*, p. 73.)

Order WR 98-08 further amended Order WR 89-25 and amended Order WR 91-07. It included text discussing acceptance of applications proposing to develop or salvage water. (Order WR 98-08, pp. 16, 25.) It changed the description of the critical reach of the Santa Ana River watershed to be “from the mouth of the Santa Ana River at the Pacific Ocean upstream.” (*Id.*, p. 73.) It retained the reference to footnote (1). (*Ibid.*)

## **2.12 AHO Hearing**

### **2.12.1 AHO Notices and AHO Hearing Officer Orders and Rulings**

After receiving BlueTriton’s May 11, 2021 request for hearing (see section 2.1), the AHO issued its Notice of Pre-Hearing conference and Public Hearing on July 8, 2021. (2021-07-08 Notice of Hearing and Pre-Hearing Conference.)<sup>22</sup> After holding a pre-hearing conference on August 11, 2021, the AHO hearing officer re-scheduled the previously scheduled hearing days to give the parties time to file briefs regarding BlueTriton’s August 5, 2021 motion to dismiss the draft CDO and some other parties’ requests for additional hearing issues. (2021-08-16 Pre-Hearing Conference Order.)

On November 4, 2021, the AHO hearing officer issued his rulings on BlueTriton’s motion and these requests by other parties. (2021-11-04 Hearing Officer’s Ruling (BlueTriton.)) The rulings denied BlueTriton’s motion to dismiss, without prejudice to the rights of BlueTriton and other parties to make the same or similar arguments during the AHO’s hearing process. (*Id.*, p. 5.) Regarding the other parties’ requests, the rulings explained that the present proceeding was before the AHO under Water Code section 1112, subdivision (a)(2), for a hearing on the Division’s draft CDO, and that the issues the AHO could consider during this proceeding therefore were limited to those raised by

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<sup>22</sup> The AHO notices, orders and rulings discussed in this order are in a separate folder titled “AHO Notices, Orders and Rulings” that is within the Hearing Documents folder in the administrative record for this proceeding.

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the draft CDO. (*Id.*, p. 7.) Because the draft CDO did not allege injury to public trust resources or raise any issues regarding unreasonable use or misuse of water, the rulings concluded the AHO could not consider such issues during this proceeding. (*Ibid.*) For similar reasons, the rulings concluded that the AHO could not consider the water-right priority issues raised by San Bernardino Valley MWD. (*Id.*, pp. 7-8.) The rulings noted that any interested party could file a complaint with the Division that may raise any of these issues, and the Division's Enforcement Section then could consider such a complaint and decide whether to take any enforcement actions based on it. (*Id.*, p. 8.)

The AHO issued a revised notice of hearing on November 17, 2021. (2021-11-17 Notice of Public Hearing and Pre-Hearing Conference.) This notice specified the following hearing issues (as amended by the AHO hearing officer's December 8, 2021 orders):

- 1) Is the Respondent violating, or threatening to violate, the prohibition in Water Code section 1052, subdivision (a) (which is referred to in Water Code section 1831, subdivision (d)(1)) against the unauthorized diversion or use of water subject to Division 2 (sections 1000-5976) of the Water Code? This issue does not include the issue of whether Respondent is violating the judgments in *Western Municipal Water Dist. v. East San Bernardino County Water Dist.*, Riverside Superior Court No. 78426 (April 17, 1969) and *Orange County Water Dist. v. City of Chino*, Orange County Superior Court No. 117628 (April 17, 1969).
- 2) If any such violations or threatened violations are occurring, then should the State Water Board issue a cease-and-desist order to Respondent under Water Code section 1831?
- 3) If the State Water Board decides to issue a cease-and-desist order to Respondent under Water Code section 1831, then what provisions should be in the order?

(2021-11-17 Notice of Public Hearing and Pre-Hearing Conference, pp. 3-4; see 2021-12-08 second pre-hearing conference order, p. 2.)

The November 17, 2021 revised hearing notice specified detailed hearing procedures. (2021-11-17 Notice of Public Hearing and Pre-Hearing Conference, pp. 11-23.) These procedures included a requirement that parties submit written proposed testimony of the

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witnesses they planned to call during the hearing and summary slides. (*Id.*, p. 14, ¶ 6.) The notice also advised the parties that Government Code section 11513 would apply to all evidence offered during the hearing. (*Id.*, p. 21, ¶ 11.)

The hearing officer's December 8, 2021 orders gave BlueTriton the opportunity to add witnesses to its witness list, and to submit additional written proposed testimony or exhibits, that addressed any new substantial material facts or new substantial arguments in the Prosecution Team's exhibits that were not in the Draft CDO. (2021-12-08 second pre-hearing conference order, p. 1.) BlueTriton did not submit any such additional written proposed testimony or exhibits by this deadline. However, as discussed in the following paragraphs, BlueTriton and other parties subsequently had opportunities to submit rebuttal and sur-rebuttal evidence.

On January 20, 2022, after holding the first five hearing days, the AHO issued a supplemental notice of hearing, which specified additional hearing days, deadlines for parties to file rebuttal exhibits, and rebuttal hearing days. (2022-01-20 Supplemental Notice of Public Hearing.) On February 23, 2022, the AHO issued another supplemental hearing notice, which specified deadlines for parties to file sur-rebuttal evidence and hearing days for this evidence. (2022-02-23 Supp. Not. of Pub. Hrg. (BlueTriton.))

On March 25, 2022, the AHO hearing officer issued rulings denying the Prosecution Team's February 11, 2022 motion for judgment and BlueTriton's February 25, 2022 motion for nonsuit or judgment. (2022-03-25 hearing officer's rulings (BlueTriton).)

On May 26, 2022, the AHO issued a post-hearing order, which specified the detailed issues the hearing officer asked the parties to address in their closing briefs, and the filing deadlines for closing briefs, evidentiary objections, and responses to such objections. (2022-05-26 post-hearing order (BlueTriton Brands, Inc.))

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On June 27, 2022, BlueTriton's attorneys filed a motion for judgment after hearing with the AHO. (2022-06-27 BTB's Motion for Judgment After Hearing.) This motion asked the AHO to prepare a proposed order that would dismiss the draft CDO. (*Id.*, p. 2.)

This motion argued that the Prosecution Team had not met its burden of establishing that the State Water Board has permitting authority over the water subject to the draft CDO, and that the AHO therefore should prepare a proposed order for the Board to adopt that would dismiss the draft CDO. (*Id.*, p. 3.)

On June 27, 2022, BlueTriton's attorneys filed a separate motion with the State Water Board. (2022-06-27 BTB's Motion to Stay.) This motion asked the Board to stay the AHO hearing officer's May 26, 2022 post-hearing order and to direct the AHO hearing officer to issue a proposed final order on the issue raised by BlueTriton's motion for judgment to the AHO. (*Id.*, pp. 1-2, 9.) This motion is discussed in footnote 23.

On August 8, 2022, the AHO hearing officer issued a ruling denying BlueTriton's motion for judgment after hearing. (2022-08-08 Hearing Officer's Ruling (BlueTriton).) After discussing BlueTriton's motion and the Prosecution Team's opposition, this ruling concluded:

As discussed in my November 4, 2021 ruling on BlueTriton's motion to dismiss in this proceeding, and in my March 25, 2022 ruling on BlueTriton's motion for nonsuit and/or judgment, this proceeding involves complex legal issues, many of which are issues of first impression. There also are disputed factual issues. The AHO's hearing process has given the parties opportunities to address these issues in detail through exhibits and testimony and in their closing briefs.

Exercising my discretion to determine the appropriate post-hearing process for this proceeding, I conclude that I should consider the entire administrative record and all the parties' arguments in their closing briefs as I prepare my proposed order. For these reasons, I deny BlueTriton's motion for judgment. This ruling will not affect my consideration of the arguments BlueTriton and other parties have made in their closing briefs.

(*Id.*, p. 2.)<sup>23</sup>

On November 4, 2022, the AHO hearing officer issued a notice to the parties that he had determined this proceeding to be a complex proceeding under Water Code section 1114, subdivision (d)(3). (2022-11-04 notice to parties (BlueTriton Brands).)

### **2.12.2 Site Visit**

On February 9, 2022, the AHO issued its notice of site visit. (2022-02-09 Notice of Site Visit.)<sup>24</sup> That notice specified the proposed itinerary and schedule. (*Id.*, pp. 2-3.)

During the site visit, the AHO hearing officer made some amendments to this schedule because of weather conditions.

During the site visit, AHO staff members took photographs and made audio+video recordings.<sup>25</sup> The AHO hearing officer and AHO staff members viewed all of BlueTriton's collection facilities in Strawberry Canyon, viewed some of the related pipes and other infrastructure, and viewed the surrounding topography.

The San Manuel Band did not agree to the AHO hearing officer's request to view the parts of BlueTriton's infrastructure that are located on San Manuel Band lands. Instead, the San Manuel Band offered a "virtual visit," where a San Manuel Band photographer would take pictures and transmit them to the AHO with descriptions. (2022-02-10 K. Ramirez ltr. to A. Lilly.) After receiving this request, the AHO hearing officer agreed to

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<sup>23</sup> The Board did not issue any ruling on the June 27, 2022 motion to stay that BlueTriton filed with the Board. This is consistent with our conclusion in Order WR 2022-0087 that the Board will not review preliminary or procedural decisions, orders or rulings issued by the AHO, and instead will wait to consider any issues raised by such decisions, orders and rulings that merit Board review until after the AHO has completed its hearing process and presented a proposed order to the Board. (Order WR 2022-0087, pp. 6-12.)

<sup>24</sup> The files regarding the site visit are in a separate folder titled "Site Visit," which is within the Hearing Documents folder for this proceeding. There are various sub-folders within the Site Visit folder.

<sup>25</sup> These photographs and recordings and related logs are in the Site Visit folder in the administrative record for this proceeding.



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this offer and withdrew his request to view BlueTriton's infrastructure on San Manuel Band lands. (2022-02-13 A. Lilly ltr. to K. Ramirez.)

The AHO added the San Manuel Band photographs to the administrative record.<sup>26</sup> They show the 80/20 split valve, meters at the split valve, BlueTriton's water tanks and load station depicted on Figure 8, some ground-level views of the lower Coldwater and Strawberry Creek watersheds, and the Arrowhead Springs Hotel. The State Water Board thanks the San Manuel Band for providing these photographs to the AHO.

### **2.12.3 AHO Hearing**

The AHO held its hearing on 16 days between January 10 and May 23, 2022. Audio+video recordings of all these hearing days are in the administrative record, in the Hearing Documents folder, in the sub-folder titled "Hearing Recordings and Transcripts." There also are Zoom-generated transcripts of these hearings. These transcripts are computer-generated and have not been checked for accuracy or edited. The audio+video recordings are the official records of these hearing days.

The AHO hearing began on January 10, 2022 with the hearing officer's opening remarks, appearances by the parties and various preliminary rulings. (Recording, 2022-01-10, morning, 0:00:00-1:24:02.)<sup>27</sup> The following attorneys and people entered their appearances:

- Kenneth Petruzzelli and John Prager of the Board's Office of Enforcement, for the Prosecution Team
- Robert Donlan, Chris Sanders and Shawnda Grady, of Ellison, Schneider, Harris and Donlan, LLP, and Rita Maguire, for BlueTriton Brands, Inc.
- Nancee Murray and Kathleen Miller, for the California Department of Fish and Wildlife

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<sup>26</sup> These photographs are within the sub-folder titled "San Manuel Band Mission Indians photos" within the Site Visit folder.

<sup>27</sup> Citations in the order to "Recording" followed by a date, a designation of the morning or afternoon session, and elapsed times are to the hearing recordings, with the date, morning or afternoon session, and start and stop times of the cited part of the recording.

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- Meredith Nikkel and Sam Bivins, of Downey Brand, for the San Bernardino Valley Municipal Water District
- Rachel Doughty and Jessica Taylor of Greenfire Law, PC, and Michael O’Heaney, for the Story of Stuff Project
- Steve Loe, for himself
- Larry Silver, for the Sierra Club
- Lisa Belenky, for the Center for Biological Diversity
- Hugh Bialecki, for himself and the Save Our Forest Association
- Amanda Frye, for herself

(*Ibid.*)

After these parties entered their appearances, Mary Ann Dickinson, a Lake Arrowhead resident and San Bernardino Valley MWD member, and Betsy Starbuck, a representative of the San Bernardino League of Women Voters, made oral policy statements. (Recording, 2022-01-10, morning, 1:24:03-1:32:33.)<sup>28</sup>

Each party began the presentation of the party’s case-in-chief by having the party’s witness or witnesses take the oath and confirm that their written proposed testimony was their hearing testimony. The following paragraphs summarize the testimony of the parties’ witnesses.<sup>29</sup>

### **2.12.3.1 Prosecution Team Witnesses’ Testimony**

The Prosecution Team began its presentation with an opening statement by its attorney. (Recording, 2022-01-10, morning, 1:51:30-1:56:00.) The Prosecution Team called two

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<sup>28</sup> Numerous other parties filed written policy statements at various times during the AHO pre-hearing, hearing and post-hearing processes. They are in the Hearing Documents folder for this proceeding, in a sub-folder labeled “Policy Statements.”

<sup>29</sup> Files of each party’s exhibits are within a separate folder for that party and all these folders are within the folder titled “Parties Hearing Exhibits,” which is within the Hearing Documents folder in the administrative record for this proceeding. There is an Excel file within the folder for each party’s exhibits that lists each of the party’s exhibits with a brief description, the date and time during the hearing when the party offered the exhibit into evidence, and the hearing officer’s ruling on the offer.

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witnesses, Victor Vasquez and Tomas Eggers, who then summarized their written proposed testimony. (*Id.*, 1:56:40-2:46:51; see exhs. PT-7 & PT-10.)

Mr. Vasquez is a Senior Water Resource Control Engineer who supervised the Division's Sacramento Valley Enforcement Unit. (Exh. PT-7, p. 2, ¶ 2.) His testimony described the Division's investigation of the complaints filed against Nestlé (see section 2.1), the collection of data, information and evidence, the Division's field investigation, the Division's analysis used to develop the Division's conclusions, and the drafting and review of the report of investigation. (*Id.*, p 2, ¶ 3.)

Mr. Vasquez's testimony first described the Division's investigation of BlueTriton's facilities and the Strawberry Canyon topography. (Exh. PT-7, pp. 2-15.) His testimony then provided more details about BlueTriton's tunnels and boreholes, relying largely on the Dames & Moore and Hydrodynamics Group reports. (*Id.*, pp. 15-26; see section 2.9; exhs. PT-23, PT-43, PT-44, PT-45.)

Mr. Vasquez testified that Tunnels 2 and 3 and Boreholes 1, and 8 were constructed at the orifices of Springs 2, 3, 1 and 8, and that the construction of these tunnels and the original boreholes at these locations altered or destroyed the orifices of Springs 2 and 3, and obliterated the orifices of Springs 1 and 8. (*Id.*, pp. 16-17, ¶¶ 45-46, pp. 17-18, ¶¶ 53-54, pp. 21-22, ¶ 75.) He testified that BlueTriton replaced original Boreholes 1 and 8 with new Boreholes 1, 1A and 8, which were constructed near to, but "downgradient" of, the original boreholes. (*Id.*, p. 22, ¶ 77.) He testified that Springs 1, 2, 3 and 8 were adjacent to natural channels and surface water would have flowed from them to these channels under pre-development conditions. (*Id.*, p. 16, ¶ 45, p. 17, ¶ 53, p. 23, ¶ 85.) His summary slides for his testimony contain pictures of these natural channels. (Exh. PT-9, pp. 13, 18.) Based on these and related facts, he concluded that Tunnels 2 and 3 and Boreholes 1, 1A and 8 are "fully subject to the Board's permitting authority." (Exh. PT-7, p. 15:26, p. 17:2, p. 21:25.)

Mr. Vasquez testified that BlueTriton developed Spring 7 by constructing Tunnel 7 at the spring orifice, and that this construction altered or destroyed the natural spring orifice.

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(*Id.*, pp. 18, ¶¶ 55, 65.) He testified that Spring 7 was adjacent to a natural surface channel and that was “presumptively subject to” the Board’s water right permitting authority. (*Id.*, p. 19, ¶ 64.) He testified that BlueTriton constructed Boreholes 7, 7A, 7B and 7C about 40 feet downgradient from Tunnel 7 “to intercept the tunnel’s flows,” and that, after this construction, BlueTriton stopped diverting water through Tunnel 7. (*Id.*, p. 18, ¶¶ 56-57.)

Because flows in Tunnel 7 cease when these boreholes are allowed to flow, Mr. Vasquez concluded that “some portion of the water diverted from the boreholes is flow that would have naturally surfaced and flows in a natural surface channel adjacent to Spring Tunnel 7.” (*Id.*, p. 19, ¶ 66.) He further concluded that, “[b]ased on extremely limited hydrogeologic data and known precipitation amounts,” approximately 52 percent of the water diverted annually by these boreholes “may be water not within the permitting authority of the State Water Board,” but that this amount could be as low as zero percent, and that, conversely between 48 percent and 100 percent of the water diverted by these boreholes is subject to the Board’s water-right permitting authority. (*Id.*, pp. 20-21, ¶¶ 69-70, 73.) Based on these and related facts, he concluded that “[f]low from the Spring 7 Complex are partially subject to the Board’s permitting authority.” (*Id.*, p. 18:4.)

Mr. Vasquez testified that Boreholes 10, 11 and 12 were installed near, but not at, the natural orifices of Springs 10, 11 and 12. (*Id.*, pp. 24-25, ¶¶ 91-92.) He testified that hydraulic tests conducted by Dames & Moore were inconclusive on whether flows at these three springs were affected by these three boreholes. (*Id.*, p. 25, ¶ 95.) He also testified that the Division did not have information that these springs discharge natural flow to a stream channel. (*Id.*, p. 25, ¶ 96.) Based on this lack of information, Mr. Vasquez concluded:

[U]p to 100% of the flow collected from Boreholes 10, 11 and 12 may not be within the Board’s permitting authority. However, if information becomes available indicating that the boreholes diminish the flows of Springs 10, 11 and 12, and those affected springs contributed flow to a natural channel, then some percentage, up to 100%, would be within the Board’s permitting authority.

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(*Id.*, pp. 25-26, ¶ 97.)

Mr. Eggers is a Water Resource Control Engineer who worked in the Division investigating unauthorized diversions and violations of water-right permit and license terms. (Exh. PT-10, p. 2, ¶ 2.) He testified that he was assigned to take over the Division's investigation of the complaints filed against Nestlé in January 2018, in preparation for the departure of Natalie Stork, who had prepared the December 2017 report of investigation, from the Division. (*Id.*, p. 2, ¶ 3.)

Mr. Eggers testified about the Division's review of interested parties' comments on that report of investigation (*id.*, pp. 2-4), and about BlueTriton's claims of pre-1914 appropriative rights (*id.*, pp. 4-22). He testified about the Special Use Permit the San Bernardino National Forest issued to BlueTriton in June 2018 and the studies and adaptive management measures this permit requires (*id.*, p. 23, ¶¶ 67-69.)

Mr. Eggers testified that the Division had received many complaints alleging that BlueTriton's exporting water from the Strawberry Creek watershed violated the public trust doctrine and was an unreasonable use of water in violation of article X, section 2 of the California Constitution. (*Id.*, p. 24, ¶ 70.) He then stated:

While the State Water Board has an independent mandate to consider public trust resources, we may defer to State or Federal resource agencies with concurrent public trust responsibilities, especially if such agencies employ local or subject matter experts. We considered the complaints of unreasonable use and violations of the public trust doctrine and decided we had insufficient evidence at this time to pursue formal enforcement.

Furthermore, after review of the SUP issued by the US Forest Service to the Respondent on August 20, 2018, we concluded that implementation of the AMP outlined in the new SUP would likely prevent violations of the public trust doctrine, while the Respondent conducts studies recommended by the 2021 ROI to evaluate the impacts of its extractions on public trust resources within Strawberry Canyon.

(*Id.*, p. 24, ¶¶ 71-72.)

After Mr. Vasquez and Mr. Eggers summarized their written proposed testimony, they and Natalie Stork, the State Water Board staff member who previously worked for the

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Division and was the author of the Division's 2017 report of investigation (exh. PT-13), participated in a panel that answered cross-examination questions. (Recordings, 2022-01-10, afternoon, 0:02:45 to 2022-01-11, afternoon, 2:02:00.)

During the March 21, 2022 AHO hearing day, Mr. Eggers and Ms. Stork summarized their written proposed rebuttal testimony. (Recording, 2022-03-21, morning, 0:43:51-1:02:22.) They testified about exhibit PT-314 (revised),<sup>30</sup> which is an excerpt from a 1905 U. S. Geological Survey topographic map, on which they overlaid depictions of the locations of BlueTriton's diversions. (Exh. PT-312, pp. 2-3, ¶¶ 2-6; exh. PT-313, pp. 2-3, ¶¶ 2-4.) They testified that this 1905 map depicts two intermittent streams, one flowing from the area of Tunnels 2 and 3 and Boreholes 1, 1A and 8, and the other flowing from the Spring 7 complex, with the streams meeting just below the area of Springs 10, 11 and 12. (Exh. PT-312, p. 3, ¶¶ 5-6; exh. PT-313, p. 2, ¶ 3; see exh. PT-314.)

Ms. Stork testified that Mr. Mann's 1988 report (see section 2.9; exh. PT-319) lists the August monthly flows from Tunnel 7 in 1946-1949, and the August monthly total flows from Boreholes 7A and 7B in 1953-1957. (Exh. PT-313, pp. 3-5, ¶¶ 5-7.) She testified that these August monthly flows for 1946-1949 averaged 35,500 gpd, and that these August monthly flows for 1953-1957 averaged 34,000 gpd. (*Id.*, pp. 7-8, ¶ 7; see exh. PT-315.) She testified that, because these averages are so close to equal, it is questionable whether the boreholes resulted in any developed water. (Exh. PT-313, pp. 4-5, ¶ 7.)

During the April 25, 2022 AHO hearing day, Mr. Eggers summarized his written proposed sur-rebuttal testimony. (Recording, 2022-04-25, morning, 0:22:45-0:38:55.) He testified that he reviewed the Division's Electronic Water Right Information System

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<sup>30</sup> The Prosecution Team offered exhibit PT-314 (revised) instead of exhibit PT-314. The only difference is that the revised exhibit has the exhibit number in the upper right corner. (Recording, 2022-03-21, morning, 02:42:35-02:42:41.)

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and identified 800 active appropriative water-right permits and licenses for which the listed water source is a spring. (Exh. PT-316, p. 2, ¶ 2.)

Mr. Eggers testified that the 1931 W. W. Rowe letter stated that the flow of Strawberry Creek was augmented by flows from Springs 10, 11 and 12. (*Id.*, pp. 4-5, ¶ 7, citing exh. SOS-51, p. 1.) He testified that the 1964 John Mann report stated that there was “persistent spring flow” in the vicinity of these springs. (Exh. PT-316, p. 5, ¶ 8.) Citing testing conducted by BlueTriton’s consultants, Haley & Aldrich, in 2017 and 2021, Mr. Eggers concluded that water collected by Boreholes 10, 11 and 12 “has a measurable effect on surface water expression in the Lower Spring Complex, and Strawberry Creek.” (*Id.*, p. 6:9-10, see *id.*, pp. 6-9, ¶¶ 10-15.) He then concluded:

On balance, evidence indicates Boreholes 10-12 divert water from springs that supply a stream.

(*Id.*, p. 9, ¶ 16.)

**2.12.3.2 BlueTriton Witnesses’ Testimony**

BlueTriton began its presentation with an opening statement by its attorney. (Recording, 2022-01-12, morning, 0:50:56-0:56:20.) BlueTriton then called Larry Lawrence, who then summarized his written proposed testimony. (*Id.*, 1:00:15-2:04:22; see exh. BTB-10.)

Mr. Lawrence testified that he is a mechanical engineer with 26 years of experience. (Exh. BTB-10, p. 1, ¶ 2.) He has worked for BlueTriton as its Natural Resource Manager since 2003. (*Id.*, pp. 2-3, ¶¶ 5-8.) Since then, he has worked extensively to maintain BlueTriton’s water collection and conveyance system in Strawberry Canyon, including rebuilding the primary pipeline after a fire known as the “Old Fire” burned the area in October 2003 and major erosion followed in December 2003. (*Id.*, pp. 3-4, ¶¶ 10-14.)

Mr. Lawrence testified about BlueTriton’s water collection system, which includes two tunnels, ten boreholes, 7.3 miles of four-inch diameter stainless steel and high-density polyethylene pipelines, two stainless steel storage silos, and a facility to load tanker

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trucks. (*Id.*, p. 5, ¶¶ 20-21.) He testified that there are two points where BlueTriton can discharge excess water in the system, one that discharges to Strawberry Creek just downstream of Boreholes 10, 11 and 12 and one near the storage silos that discharges into East Twin Creek. (Recording, 2022-01-13, afternoon, 2:17:05-2:19:53.) Until 2021, all BlueTriton's discharges of excess water in the system were to East Twin Creek at the storage silos. At the San Bernardino National Forest's request, BlueTriton began discharging its overflow water at the point just downstream of Boreholes 10, 11 and 12 in 2021. (See exh. BTB-10, p. 6, ¶ 22.)<sup>31</sup> Since then, this has been the primary discharge point for overflow water, and the silo discharge point is used only for minor discharges to keep the system clean. (Recording, 2022-01-13, afternoon, 0:18:50-0:19:25.)

During the AHO hearing, Mr. Lawrence testified about exhibit SOS-80, a BlueTriton publication. Figure 10 is a copy of exhibit SOS-80. Mr. Lawrence testified that he was familiar with this exhibit and that the numbers in it are accurate. (Recording, 2022-01-13, morning, 0:43:03-48:45.) This exhibit lists the following annual amounts of diversions, discharges and deliveries for 2018, 2019 and 2020:

- diversions (collections) of water from BlueTriton's sources in Strawberry Canyon: 45.3, 68.4 and 59 million gallons (mgal.);
- discharges of overflow water: 19.5, 44.3 and 40.8 mgal.;
- deliveries to San Manuel Band (Arrowhead Springs property owners): 9.1, 13.7 and 11.8 mgal.; and
- deliveries to factory for bottling: 16.8, 10.4 and 6.4 mgal.

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<sup>31</sup> In response to a request from the AHO hearing officer (see 2022-02-04 A. Lilly ltr. to R. Donlan), BlueTriton provided the AHO with daily data of the amounts of water BlueTriton has discharged into Strawberry Creek at the new discharge location since May 24, 2021. AHO staff labeled the files of these data as exhibit AHO-5. They are in the administrative record in a folder labeled "Historical Diversion Data," in a sub-folder labeled "Strawberry Creek daily volume data."

During the AHO's hearing on February 2, 2022, Mr. Lawrence said that there are no records of the discharges from BlueTriton's storage silos into East Twin Creek. (See 2022-02-04 A. Lilly ltr. to R. Donlan, p. 2.)



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(Exh. SOS-80.)<sup>32</sup>

Mr. Lawrence testified about the process he uses for preparation of BlueTriton's groundwater extraction notices (see section 2.10.1). (Exh. BTB-10, p. 6, ¶¶ 23-26.) He testified about the August 2018 Special Use Permit the San Bernardino National Forest issued to BlueTriton and BlueTriton's adaptive management plan. (*Id.*, p. 7, ¶ 30.) He testified about BlueTriton's responses to various information requests from the Division and BlueTriton's comments on the Division's 2017 report of investigation. (*Id.*, pp. 7-11, ¶¶ 31-49.)

After Mr. Lawrence completed summarizing his testimony, he answered cross-examination questions from other parties' attorneys and other parties. (Recordings, 2022-01-12, morning, 2:12:20 to 2022-01-13, afternoon, 2:38:12.)

During the rebuttal phase of the AHO hearing, BlueTriton called Mark Nichols to testify. (Recording, 2022-03-21, afternoon, 0:28:01-0:39:11.) Mr. Nichols is a registered geologist and certified hydrogeologist in California, and also has professional registrations in three other states. (Exh. BTB-8, p. 1.) He has practiced hydrogeology in the southwestern United States for 25 years. (Exh. BTB-6, p. 1, ¶ 1.) He has worked on projects related to water collection in Strawberry Canyon regularly since 2001, and has personally visited Strawberry Canyon over 100 times. (*Id.*, p. 1, ¶ 2.)

Figure 11 is a copy of a figure in Mr. Nichols's technical report that depicts his conceptual site model for Springs 1, 1A, 2, 3, 7, 8, 10, 11 and 12. (Exh. BTB-7, pp. 22, 84.)

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<sup>32</sup> The amounts that BlueTriton listed in Figure 10 as being diverted during 2018, 2019 and 2020 correspond fairly closely to the total diversion amounts for these years that BlueTriton reported in its groundwater extraction notices. (See Table 1.)

For 2018: 45.3 mgal. x (3.07 af/mgal. = 139.1 af (reported total was 141.0 af)  
For 2019: 68.4 mgal. x 3.07 af/mgal. = 210.0 af (reported total was 211.0 af)  
For 2020: 59.0 mgal. x 3.07 af/mgal. =181.1 af (reported total was 180.0 af)

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Mr. Nichols testified that water from BlueTriton’s facilities in Strawberry Canyon is transported by trucks from the load station on the Arrowhead Springs Hotel property to bottling facilities: “where it is bottled in accordance with regulations set forth in Code of Federal Regulations Title 21 (21 CFR) Part 165.” (Exh. BTB-9, p. 5, ¶ 14.) He testified:

Criteria defining the relationship between the origin and collection method of spring water is [sic] set forth in 21 CFR Part 165.110. Water collected from BTB boreholes and tunnels is obtained from the same geologic underground strata feeding the springs in accordance with 21 CFR Part 165.110.

(*Id.*, pp. 5-6, ¶ 15.)

Mr. Nichols testified that “[u]se of the term spring water for FDA purposes does not convey a legal definition of a classification of water for water rights purposes associated with the water source.” (*Id.*, p. 5, ¶ 15.) He then discussed the State Water Board’s four-part test for determining whether “a subterranean stream flowing through a known and definite channel,” as that term is used in Water Code section 1200, is present. (*Id.*, pp. 6-7, ¶ 18; see *id.*, pp. 7-16.)<sup>33</sup> After discussing the water collection infrastructure, the geologic and hydrogeologic setting, and the subsurface geology (*id.*, pp. 7-16), Mr. Nichols concluded that the water collected by BlueTriton in Strawberry Canyon “does not originate within any geologic feature that may be defined as a subterranean stream flowing through known and definite channels” (*id.*, p. 16, ¶ 53). Instead, he testified that such water “is properly classified as percolating groundwater.” (*Id.*, p. 17, ¶ 58.)

Mr. Nichols testified about his analyses of current conditions in Strawberry Canyon in comparison to those that occurred in 1929-1931 and were described by Mr. Rowe (see section 2.7). (Exh. BTB-9, pp. 23-43.) Mr. Nichols described the surface-water flow data that he and his colleagues collected in Strawberry Canyon between 2016 and 2021. These included data collected during “shut-in” periods, during which the valves at BlueTriton’s boreholes were closed, to hold back the water that otherwise would discharge from the boreholes. (*Id.*, p. 27-28, ¶¶ 87, 90.) They also included “turn-out”

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<sup>33</sup> The State Water Board’s four-part test for determining the presence of subterranean streams flowing through known and definite channels is discussed in section 3.1.

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periods, during which the boreholes were opened and equilibrated to low piezometric pressure conditions. (See, *id.*, pp. 28-29, ¶¶ 91, 94.)

Based on his review of Mr. Rowe's papers and the data collected by Mr. Nichols and his colleagues, Mr. Nichols concluded:

The description of the upper Strawberry Creek watershed offered in the Rowe Papers reflects an intermittent stream system. An intermittent stream system does not flow continuously through the year and may not flow over the same spatial extent from season to season or year to year. An intermittent stream system is distinguished from an ephemeral stream which flows only in response to precipitation.

(*Id.*, p. 35, ¶ 115.)

It is not possible for any of the pre-development spring orifices that may have existed in Strawberry Canyon, to have been fed by a solitary fracture flow path that exactly matches the width and orientation of any one of the boreholes. . . . Consequently, advancing the boreholes did not obliterate or seal the subsurface flow path feeding pre-development spring orifices.

(*Id.*, p. 41, ¶ 131.)

It is scientifically unsound to assume that the maximum flows from boreholes that collect water at points between 66 and 320 feet beneath ground surface, or tunnels that collect water between 23 feet and 89 [sic] beneath ground surface, are equal to pre-development surface water flows. The boreholes and tunnels are larger in diameter than any natural flow path in the subsurface and serve to connect individual fractures that may have had no previous discharge to the ground surface. Consequently, the volume of water flowing from each of the BTB water collection facilities is greater than any flow that might occur at a natural surface water expression.

(*Id.*, p. 42, ¶ 134.)

During subsequent AHO hearing days, Mr. Nichols presented sur-rebuttal testimony on a variety of topics, including: (a) the differences in the U.S. Geological Survey's mapping objectives and practices between 1905 and subsequent mapping years (exh. BTB-38; exh. BTB-46), (b) the locations of natural spring orifices during the pre-development period (exh. BTB-42, p. 2, ¶ 5), and (c) responses to other witnesses' testimony about Mr. Nichols's analyses of Mr. Rowe's reports and the field data Mr. Nichols and his colleagues collected during 2017-2021 (*id.*, pp. 2-15).

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BlueTriton also called Ross Grunwald, a California professional geologist and hydrogeologist, to testify. (Recording, 2023-05-23, afternoon, 33:00-34:00.) Mr. Grunwald conducted a study of the Marco and Polo Springs that are discussed in Order WR 2019-0149 and prepared a report of this study, which BlueTriton offered as an exhibit. (Exh. BTB-40; exh. BTB-45; see section 3.5.)

### 2.12.3.3 Story of Stuff Witnesses' Testimony

The Story of Stuff Project began its presentation with an opening statement by its Executive Director, Michael O'Heaney. (Recording, 2022-01-31, afternoon, 0:35:40-0:42:35.) Story of Stuff then called three witnesses, Rachel Doughty, Amanda Frye and Steve Loe. (*Id.*, 45:00-1:23:13.)

Ms. Doughty is Story of Stuff's lead attorney. Her testimony authenticated many Story of Stuff exhibits. (Exh. SOS-29.)

Ms. Frye testified about her extensive research over the past seven years regarding the diversions of water by BlueTriton and its predecessors. (Exh. SOS-30.) During her research, she reviewed records of the U.S. Geological Survey, the U.S. National Archives, the State Water Board's website, the Water Resources Institute at California State University, San Bernardino, BlueTriton's website, the Automobile Club of Southern California, the U.S. Forest Service, the Santa Ana Watershed Project Authority, the American Presidency Project at the University of California, Santa Barbara, Newspapers.com, the San Bernardino County Recorder's Office, the San Bernardino County Archives, and the Desert Sun. (*Ibid.*) Her testimony authenticated many Story of Stuff exhibits. (*Ibid.*)

Steve Loe is a retired wildlife and fisheries biologist who worked for the Forest Service for 40 years, including 30 years at the San Bernardino National Forest. (Exh. SOS-31, p. 2, ¶¶ 2, 4.) He testified about Mr. Rowe's papers (see section 2.7) and his personal observations of physical conditions in Strawberry Canyon. (Exh. SOS-31, pp. 7-9, ¶¶ 22-31, pp. 13-14, ¶¶ 44-52.)

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Story of Stuff submitted sur-rebuttal testimony for these three witnesses. (Recording, 2022-04-25, afternoon, 1:10:50-2:00:00.) Ms. Frye's sur-rebuttal testimony presented additional historical information about the various sources of Arrowhead Springs water, which explained that neither Arrowhead Springs Hotel nor any of BlueTriton's predecessors diverted any water from Strawberry Canyon before 1930. (Exh. SOS-280, pp. 1-12.) Mr. Lowe's sur-rebuttal testimony presented additional information about historical hydrologic conditions in Strawberry Canyon (exh. SOS-282, pp. 1-9), and explained that neither the Arrowhead Springs Hotel nor any of BlueTriton's predecessors diverted any water from Strawberry Canyon before 1930 (*id.*, pp. 9-10). Ms. Doughty's testimony authenticated another Story of Stuff exhibit. (Exh. SOS-287.)

Story of Stuff also called Gregory Allord to provided sur-rebuttal testimony. (Recording, 2022-05-23, morning, 1:30:00-1:48:20.) Mr. Allord is a cartographer who worked for the U.S. Geological Survey for over 30 years. (Exh. SOS-289.) He testified about the procedures the Geological Survey has used since 1879 to prepare its topographic maps, citing several historical Geological Survey publications. (Exh. SOS-288, pp.1-5.) He testified that the methods used by the Geological Survey in the late 19th century "were sophisticated and accurate." (*Id.*, p. 5, ¶ 11.)

Mr. Allord testified that the misalignments between the streams depicted on the 1905 topographic map and the curves in the topographic contours depicting where watercourses would be expected to be the result of misaligned printing plates, and that this misalignment does not appear on the 1901 base map from which the 1905 map was created. (Exh. SOS-288, pp. 6-7, ¶ 15; exh. SOS-295, p. 7.)<sup>34</sup> He testified that a comparison of the 1901 and 1905 maps indicates that Boreholes 1 and 8 and the Spring 7 complex are on, or very close to, the forks of Strawberry Creek that are depicted as

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<sup>34</sup> Mr. Allord's testimony refers to "Plate 12," which his testimony states is the "1905 USGS subject matter map." (Exh. SOS-288, p. 2, ¶ 3.) Exhibit PT-314, revised, is an excerpt from this 1905 map. Mr. Allord's testimony incorrectly cites exhibit SOS-91 as "Plate 12." ((Exh. SOS-288, p. 2, ¶ 3.) Exhibit SOS-91 actually is the 1901 base map created from the Redlands and San Bernardino 15-minute quadrangles. (See exh. SOS-288, p. 2, ¶ 4.)

blue-line streams on the 1901 map. (Compare exh. PT-314, revised, with exh. SOS-297, p. 7.)

#### **2.12.3.4 Center for Biological Diversity Witness**

The Center for Biological Diversity called one witness, Anthony Zidon, to provide sur-rebuttal testimony. (Hearing, 2022-04-27, 16:14-30:03.) Mr. Zidon has 34 years of professional experience as a certified hydrogeologist in California, and also has professional registrations in other states. (Exh. CBD-2.) He testified that, based on his professional experience and his review of the relevant historical documents, his opinion was that “springs with substantial surface discharge have historically been present in the Strawberry Creek watershed.” (Exh. CBD-1, p. 3, ¶ 7.) He testified:

The changes in the hydraulics of the fractured rock springs providing preferential pathways in the subsurface fractured granitic bedrock (i.e., acting as a drain), which was not present in pre-development conditions. Therefore, hydraulic testing conducted such as that noted by Mr. Nichols [citation] were conducted on an altered hydrologic regime different from than was present during predevelopment condition.

(*Id.*, p. 4, ¶ 9.) For these reasons, Mr. Zidon’s opinion was that the shut-in and related tests conducted by Mr. Nichols and his colleagues “do not provide insight into predevelopment flow characteristics at those locations and to the Strawberry Creek hydrologic regime.” (*Id.*, pp. 6-7, ¶ 15; see ¶ 16.)

#### **2.12.3.5 Other Parties’ Testimony**

Besides testifying for the Story of Stuff Project, Amanda Frye also submitted an opening statement and testimony on behalf of herself. (Recording, 2022-01-31, morning, 1:04:19-2:08:49; see exh. FR-151.) This testimony provided more details about her historical research and authenticated additional exhibits. (Exh. FR-151.)<sup>35</sup>

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<sup>35</sup> Some of the exhibits Ms. Frye submitted also were submitted by the Prosecution Team or the Story of Stuff Project. In response to the AHO hearing officer’s request, Ms. Frye prepared and submitted a table listing all her exhibits and which of her exhibits are duplicates of PT or SOS exhibits. This table is in the administrative record, in the

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Mr. Loe submitted an opening statement and testimony on behalf of himself. (Recording, 2022-02-02, morning, 0:19:21-0:30:20; exh. Loe-1.) Mr. Loe also submitted rebuttal testimony (Hearing, 2022-03-21, afternoon, 4:47-11:32; see exh. Loe-2), and sur-rebuttal testimony (Hearing, 2022-04-26, 0:04:28-0:18:17).

Hugh Bialecki testified on behalf of himself and for the Save Our Forest Association. (Recording, 2022-01-14, 51:00-1:03:05; see exh. Bialecki-11.) He presented several photographs of BlueTriton's facilities and surrounding topography. (Exhs. Bialecki-1 through Bialecki-10.)

Anthony Serrano testified on behalf of himself. (Recording, 2022-01-14, 1:18:40-1:23:45.) He offered some exhibits regarding appropriative water rights and related topics. (Exhs. Serrano-1 through Serrano-7.)

#### **2.12.4 AHO Post-Hearing Proceedings**

As discussed in section 2.1, after completing the hearing and receiving closing briefs and related papers from the parties, the AHO hearing officer prepared a draft proposed order, and circulated it to the parties for their review and comments on April 21, 2023. The AHO hearing officer then prepared the AHO's final proposed order and transmitted it to the Clerk of the Board pursuant to Water Code section 1114, subdivision (c)(1) on **[insert date]**.

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folder for Ms. Frye's exhibits, with the filename "Amanda Frye cross-indexed - SOS exhibit list."

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## 3.0 DISCUSSION

### 3.1 State Water Board's Water-Right Permitting Authority; Legal Classifications of Surface Water and Groundwater

#### Surface Water Flowing in Natural Channels.

Water Code section 1200 provides:

Whenever the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels.

Water Code section 1201 provides:

All water flowing in any natural channel, excepting so far as it has been or is being applied to useful and beneficial purposes upon, or in so far as it is or may be reasonably needed for useful and beneficial purposes upon lands riparian thereto, or otherwise appropriated, is hereby declared to be public water of the State and subject to appropriation in accordance with the provisions of this code.

Water Code section 1202 provides:

The following are hereby declared to constitute unappropriated water:

- (a) All water which has never been appropriated.
- (b) All water appropriated prior to December 19, 1914, which has not been in process [of being put to beneficial use, or which has ceased to be put to beneficial use].
- (c) All water appropriated pursuant to the Water Commission Act or this code which has ceased to be put to [beneficial use or which has not, with due diligence, been put to beneficial use].
- (d) Water which having been appropriated or used flows back into a stream, lake or other body of water.

#### Groundwater in Subterranean Streams Flowing Through Known and Definite Channels.

In Decision 1639, the State Water Board ruled that, for groundwater to be classified as a subterranean stream flowing through a known and definite channel, as those terms are used in Water Code section 1200, the following physical conditions must exist:



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1. A subsurface channel must be present;
2. The channel must have relatively impermeable bed and banks;
3. The course of the channel must be known or capable of being determined by reasonable inference; and
4. Groundwater must be flowing in the channel.

(Decision 1639, p. 4.) The Board applied this same four-part test in Order WR 2003-0004. (Order WR 2003-0004, p. 13.) In *North Gualala Water Co. v. State Water Resources Control Bd.* (2006) 139 Cal.App.4th 1577, the court upheld this order.

## Diffused Surface Waters.

Citing several reported court decisions in cases involving flood damages, the 1956 treatise on California water-rights law by Wells Hutchins stated: “[d]iffused surface waters consist of surface drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse.” (Hutchins, The California Law of Water Rights, p. 372 (1956).)

In *City of Los Angeles v. Pomeroy* (1899) 124 Cal. 597, 626, the court quoted the following jury instruction from the trial court’s proceeding:

Waters, whether under or above ground, having no certain general course or definite limits, such as those merely percolating through the strata of the earth and those diffused over its surface, are not watercourses.<sup>36</sup>

In Decision 879, the State Water Rights Board held that “diffused water from adjacent lands which is recovered by the construction of drainage ditches . . . does not fall within the classification of unappropriated water as set forth in Section 1202 of the Water Code . . .”

In Order WR 88-04, the State Water Board held that “[u]nder the Water Code, the collection of sheet flow or diffused surface flow does not require an appropriative permit from the Board.” (Order WR 88-04, p. 10.)

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<sup>36</sup> In *North Gualala Water Co. v. State Water Resources Control Bd.*, *supra*, 139 Cal.App.4th, p. 839 fn. 16, the court quoted this text from the *Pomeroy* decision.

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Percolating Groundwater

“Groundwater which is not part of a subterranean stream is classified as ‘percolating groundwater’.” (Decision 1639, p. 3.) The State Water Board “does not have water-right permitting authority over percolating groundwater.” (*Ibid.*)

Summary

Under these statutes and court and Board decisions, any person or entity that seeks to divert and beneficially use surface water flowing in a natural channel or groundwater in a subterranean stream flowing through known and definite channel, where the water is not already being diverted and beneficially used under an existing water right, may apply for a water-right permit under the applicable provisions of the Water Code. This order, when discussing applications for permits to appropriate such water, refers to the water as being within the “Board’s water-right permitting authority.”<sup>37</sup> The Board’s water-right permitting authority does not extend to diffused surface waters or percolating groundwater.

**3.2 Salvaged and Developed Waters**

“[S]alvaged waters are parts of a particular stream or other water supply that are saved from loss from the supply by reason of artificial work, and therefore are retained within the supply and so made available for use.” (Hutchins, *supra*, p. 383.) “[D]eveloped waters are new waters that are added to a stream or other source or area by means of artificial work.” (*Ibid.*) “[A]lthough the physical situations and the processes differ, both salvaged and developed waters are made available as the result of artificial work and artificial devices.” (*Ibid.*) “The general rules governing rights to the use of salvaged and

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<sup>37</sup> The Board’s water-right permitting authority also extends to applications for permits to divert and use water flowing in artificial channels. (See *Modesto Properties Co. v. State Water Rights Bd.* (1960) 179 Cal.App.2d 856; Decision 1241 (1966).) No party has taken the position in this proceeding that this part of the Board’s water-right permitting authority applies to any of BlueTriton’s tunnels or boreholes in Strawberry Canyon.

Some prior decisions of the Board and its predecessors use the term “jurisdiction” when referring to the Board’s water-right permitting authority.

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developed waters are the same, viz., that the person who by his own efforts makes such waters available is entitled to use them, provided that in doing so he is not infringing the prior rights of others.” (*Ibid.*)

The principles of salvaged and developed water affect relative priorities of appropriative rights and availability of such water for appropriation. They do not directly affect the legal classifications of types of water as surface water flowing in natural channels, groundwater in subterranean streams flowing through known and definite channels, diffused surface waters, or percolating groundwater, all discussed in section 3.1.

In Decision 1194, the State Water Rights Board considered two applications for permits to appropriate water in the Santa Ana River watershed. (Decision 1194, pp. 1-2.) Although no unappropriated water was available in that watershed when the applications were filed, the applicants sought permits to appropriate water that would be salvaged by eliminating existing non-beneficial consumptive uses created by phreatophytes along a 15-mile reach of the river. (*Id.*, p. 4.) The Board concluded that unappropriated water potentially was available through applicants’ salvage operations, and therefore approved the applications, but limited to the amounts of water that would be salvaged. (*Id.*, pp. 7-8, 10-11.)

In Order WR 98-08, the revision to the Board’s fully-appropriated stream declaration (see section 2.11), the Board concluded that applications for permits to appropriate developed and salvaged water from stream systems that the Board otherwise had declared to be fully appropriated under Water Code section 1205 should be accepted and considered, and not be barred under Water Code section 1206, subdivision (a). (*Id.*, pp. 16, 24.)

### **3.3 General Principles of California Water-Rights Law**

For rights to divert and use surface waters flowing in natural channels:

California maintains a ‘dual system’ of water rights, which distinguishes between the rights of ‘riparian’ uses, those who possess water rights by

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virtue of owning the land by or through which flowing water passes, and ‘appropriators,’ those who hold the right to divert such water for use on noncontiguous lands. For historical reasons, California further subdivides appropriators into those whose water rights were established before and those after 1914. Post-1914 appropriators may possess water rights only through a permit or license issued by the Board, and their rights are circumscribed by the terms of the permit or license. Riparian uses and pre-1914 appropriators need neither a permit nor other governmental authorization to exercise their rights.

(*Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4<sup>th</sup> 879, 888-889, footnote and citations omitted.)

These water-right rules also apply to rights to divert and use groundwater in subterranean streams flowing in known and definite channels. (Wat. Code, § 1200; Order WR 2003-0004, p. 10.)

There are two types of rights to divert or pump and use percolating groundwater, overlying rights and groundwater appropriative rights. “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.’” (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224, 1240, internal citation omitted.) In contrast, a groundwater appropriative right “depends upon the actual taking of water.” (*Id.*, p. 1241.)

“Any [percolating ground] water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for non-overlying use, such as devotion to public use or exportation beyond the basin or watershed.” (*Ibid.*) Any pumping and use of percolating groundwater that is not authorized by overlying rights normally is made pursuant to groundwater appropriative rights. (See *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908, 925-926.)

No water-right permit or license from the State Water Board is required to exercise an overlying right, or to perfect a groundwater appropriative right, to pump and use

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percolating groundwater. No water-right permit or license from the Board is required to collect and use diffused surface waters.

**3.4 State Water Board Decisions on Applications for Water-Right Permits to Appropriate Water from Springs and Tunnels**

“Water rising to the surface of the earth from below, and either flowing away in the form of a small stream or standing as a pool or small lake,’ is the definition of a spring given by the Century Dictionary.” (*Wolfskill v. Smith* (1907) 5 Cal.App. 175, 181.)

The term “spring” in its common acceptance, at least in California, is a term which in general usage has been applied to a damp, marshy or boggy area, usually of small but definite extent, wherein underground waters from a larger tract of land find their way to the surface thereof and make their presence known either by a definite outflow or by the surface presenting such a quantity thereof as will render practicable their assembling in such receptacles as those described in the record herein as Box A and Box B; \* \* \*

(Hutchins, *supra*, p. 402, quoting *Harrison v. Chaboya* (1926) 198 Cal. 473, 476.)

Springwater is water that naturally percolates to the surface from an underground aquifer to become the source of a river or stream. The spring itself is the point where the water reaches the surface.

(*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 229.)

The State Water Board and its predecessors have issued numerous decisions involving the Board’s water-right permitting authority over waters associated with springs and tunnels. These decisions are listed and briefly summarized in Appendix A to this order.

Section A1.0 of Appendix A lists the decisions that involved applications for water-right permits for diversions from springs through spring boxes and similar devices at the ground surface. The 12 decisions listed in subsection A1.1 approved the applications. The two decisions listed in subsection A1.2 denied the applications. These denials both were because no water was available for appropriation.

Section A2.0 of Appendix A lists the decisions that involved applications for water-right permits for diversions from springs through pipes and tunnels that had been developed

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below the ground surface. The five decisions listed in subsection A2.1 approved the applications. The two decisions listed in subsection A2.2 denied the applications. Decision 802 denied the application because the mining claim owners could divert and use the spring water under riparian rights. Decision 915 denied the application because the water associated with the additional spring production for which applicant sought a permit all would be developed percolating groundwater.

Section A3.0 of Appendix A lists the decisions that involved applications for water-right permits for diversions from tunnels that had been developed below the ground surface and were not associated with any springs. The four decisions listed in subsection A3.1 approved the applications. The two decisions listed in subsection A3.2 denied the applications. Decision 968 denied the application because the water for which applicant sought a permit all was developed percolating groundwater that had not been abandoned and was being taken and applied to beneficial use by the entity that had developed it. Decision 1157 denied the application because no water was available for appropriation.

Decision 1482, discussed in section A4.0 of Appendix A, involved an application for a permit to appropriate water from four streams that were supplied by springs. The Board found that the waters for which applicant sought a permit were: (a) surface runoff collected in the streams during storms; (b) natural flows from the springs, and (c) flows from the springs that occurred through artificial improvements (that is, developed water). (Decision 1482, p. 13.) The Board approved the application for a permit to appropriate all three types of water, concluding that this approach was the best way to accomplish the goal (in article X, section 2 of the California Constitution) of assuring that the State's water resources are put to beneficial use to the fullest extent of which they are capable. (*Id.*, p. 14.)

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## 3.5 State Water Board's Water-Right Enforcement Authority

Water Code section 1052, subdivisions (a) and (c), provide:

- (a) The diversion or use of water subject to this division other than as authorized in this division is a trespass.
- (c) Any person or entity committing a trespass as defined in this section may be liable in an amount not to exceed the following: [listing various amounts for various circumstances]

Water Code section 1831, subdivisions (a) and (d)(1), provide:

- (a) When the board determines that any person is violating, or threatening to violate, any requirement described in subdivision (d), the board may issue an order to that person to cease and desist from that violation.
- (d) The board may issue a cease and desist order in response to a violation or threatened violation of any of the following:
  - (1) The prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.

The diversion and use of surface water flowing in a natural channel or of groundwater in a subterranean stream flowing in a known and definite channel normally are not allowed unless they are authorized by a riparian right, a pre-1914 appropriative right, or a post-1914 water-right permit or license. (See generally Wat. Code, §§ 1200-1202, 1225; *Young v. State Water Resources Control Bd.* (2013) 219 Cal.App.4th 397, 406; *Millview County Water Dist. v. State Water Resources Control Bd.*, *supra*, 229 Cal.App.4th, pp. 894-895; Order WR 2003-0004, p. 21.)

Considering Water Code sections 1200-1202, the term “water subject to this division” in Water Code section 1052 includes surface waters flowing in natural channels and groundwater in subterranean streams flowing in known and definite channels, and does not include diffused surface waters or percolating groundwater.

Water Code section 1052 authorizes the Board to impose administrative civil liability on any person who diverts or uses surface waters flowing in natural channels and groundwater in subterranean streams flowing through known and definite channels without a right authorizing the diversion and use. Section 1831 authorizes the Board to

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issue a cease-and-desist order to any person who is diverting or using, or threatening to divert or use, such water without a water right that authorizes the diversion and use. This order, when discussing enforcement actions involving such water, refers to the water as being within the “Board’s water-right enforcement authority.”<sup>38</sup>

The proceeding that led to Order WR 2019-0149 was a water-right enforcement action (to impose administrative civil liability and a cease-and-desist order) for unauthorized diversions of water from various springs, two of which were called the “Marco Spring” and the “Polo Spring.” (Order WR 2019-0149, pp. 36-37.) The Board previously had issued two water-right permits for diversions and use of water from the springs (*id.*, pp. 36-39), and Order WR 2019-0149 concluded that some of respondent’s diversions during 2014 and 2015 were not authorized by these permits (*id.*, pp. 46-73).

During the AHO’s hearing in this proceeding, BlueTriton called Ross Grunwald, a California professional geologist and hydrogeologist, to testify about the technical report he had prepared about the Marco and Polo Springs. (See section 2.12.3.2.) His report stated that these springs were developed by excavating backhoe pits at the apparent sources of the springs. (Exh. BTB-40, pp. 9-10.) The water-bearing fracture from which spring water had issued at the Marco Spring was exposed at approximately 25 feet below the ground surface. (*Id.*, p. 11.) A three-inch diameter, solid HDPE pipe was installed as far as possible into the spring orifice to divert the spring flow. (*Ibid.*) Then, to isolate the spring orifice and prevent any surface water from entering the pipe, three

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<sup>38</sup> The Board’s water-right enforcement authority also includes the authorities: (a) to issue cease-and-desist orders regarding violations and threatened violations of water-right decisions, orders, regulations, permits and licenses (Water Code, ¶ 1831, subd. (d)(2), (3) & (4)); (b) to take actions to prevent waste, unreasonable uses, unreasonable methods of use, and unreasonable methods of diversion (Water Code, § 275); and (c) to adopt regulations to implement that authority (Water Code, §§ 1058, 1058.5). These parts of the Board’s water-right enforcement authority are not applicable in this proceeding. They are not necessarily limited to surface waters flowing in natural channels and groundwater in subterranean streams flowing through known and definite channels.



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to four feet of bentonite chips were placed over the bottom of the excavation up to the interface between the unweathered and weathered bedrock, and a two-to-three-foot-thick layer of concrete was poured on top of the bentonite. (*Ibid.*) Figure 12 (Figure 7 in the report) shows a diagrammatic cross-section of the completion details at the Marco Spring orifice. (*Id.*, p. 23.) The Polo Spring was developed in a similar manner. (*Id.*, p. 11.) Figure 13 (Figure 9 in the report) shows a diagrammatic cross-section of the completion details at the Polo Spring orifice. (*Id.*, p. 25.)<sup>39</sup>

The respondent in the proceeding that led to Order WR 2019-0149 argued that his 2014-2015 diversions were diversions of percolating groundwater or developed water (greater than the springs' natural outputs) and therefore were lawful even if not authorized by the respondent's water-right permits. (Order WR 2019-0149, p. 73.) The Board found that there was not sufficient evidence in the record to support a finding that Respondent's 2014-2015 diversions were diversions of developed water or percolating groundwater. (*Id.*, pp. 74-75, 77-78.) The Board then stated:

California law presumes that a spring tributary to a stream is part of the stream and is therefore subject to the dual doctrines of riparian rights and prior appropriation. The Board's permitting and licensing authority over water in a stream is not abrogated or limited by the fact that, in many cases, some of the flow in a stream or from a spring is supported by hydrologically interconnected groundwater.

(*Id.*, p. 75, citation omitted.)

Even if the effect of diversion from a surface water body, subterranean stream, or spring is to increase the amount of hydrologically interconnected groundwater flowing into the surface water body, subterranean stream, or spring, the diversion still is subject to the Board's water right permitting and licensing authority and subject to the prohibition against unauthorized diversion or use of water under section 1052 of the Water Code.

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<sup>39</sup> Even though Order WR 2019-0149 does not discuss these details of the developments of the Marco and Polo Springs, we may consider the evidence of these details that BlueTriton submitted during the AHO hearing in this proceeding as we consider the actions the Board took when it adopted Order WR 2019-0149.

(*Id.*, p. 76.)<sup>40</sup>

### **3.6 Applicability of Board’s Water-Right Enforcement Authority to BlueTriton’s Diversions**

The parts of the Board’s water-right permitting and enforcement authorities that concern surface waters flowing in natural channels and subterranean streams flowing in known and definite channels both are based on Water Code sections 1200-1202, and both authorities apply to both types of water. Board decisions regarding this part of the Board’s water-right permitting authority therefore are precedents relevant to Board proceedings like this one, that concern the scope of this part of the Board’s water-right enforcement authority. These Board decisions are discussed in section 3.4 and Appendix A, and the applications of them to the Board’s water-right enforcement authority are discussed in the following sections 3.6.1 and 3.6.2.

In its closing brief to the AHO, BlueTriton argued:

Although the SWRCB has, at times, accepted permit applications for groundwater hydrologically connected to surface expressions, which would not otherwise be within the SWRCB’s permitting authority, it did so only “to establish a public record of the initiation of the use of the water.” (Sax Report at p. 45, fn. 145 [quoting *Third Biennial Report of the State Water Commission of California, 1919-1920* (Sacramento State Printing Office, 1921[]), at p. 17.])

(2022-08-05 BlueTriton closing brief, p. 7, fn. 5, italics and first set of brackets in

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<sup>40</sup> BlueTriton’s closing brief to the AHO argued that the Prosecution Team’s reliance on Order WR 2019-0149 in this proceeding was “misplaced,” because “the legal character of the source water was not at issue in the SWRCB’s final order.” (2022-08-05 BlueTriton closing brief, p. 14:6-17.)

We disagree. The respondent in that proceeding argued that the water he had diverted was percolating groundwater and therefore was not within the Board’s water-right permitting authority, and Order WR 2019-0149 rejected this argument. (Order WR 2019-0149, pp. 73, 75-76.) This argument and this ruling concerned the issue of the legal classification of the source water, and whether it was subject to the Board’s water-right permitting and enforcement authorities.

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original, second set of brackets added.)<sup>41</sup>

The statement of the State Water Commission that is quoted in this footnote in the Sax report states:

Applications are occasionally received for waters to be developed from wells or other works drawing from a body of broadly diffused percolating water. In such instances, if the applicant desires, the application is allowed in order to establish a public record of the initiation of the use of the water.

(Sax report, p. 45, fn. 145.)

BlueTriton's argument mischaracterizes this statement, by referring to "groundwater hydrologically connected to surface expressions," while the statement actually refers to "waters to be developed from wells or other works drawing from a body of broadly diffused percolating water." The actual statement thus focused on wells pumping diffused percolating groundwater, and not on springs or tunnels and boreholes that intercept water that otherwise would have flowed out of springs. Also, neither the Sax report nor BlueTriton's closing brief cites or describes any decisions by any Board predecessors that implemented this alleged policy, or any documents that discussed this issue after 1921.

We conclude that it is appropriate for us to consider, as precedents applicable to this proceeding, prior Board decisions on applications for permits to appropriate water from springs, including applications where tunnels and pipes intercepted the water that otherwise would have flowed out of springs.

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<sup>41</sup> The Sax report, titled "Review of the Laws Establishing the SWRCB's Permitting Authority over Appropriations of Groundwater Classified as Subterranean Streams and the SWRCB's Implementation of Those Laws" (2002) (Sax report), is posted on the State Water Board's website at [https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/groundwater\\_classification/docs/substreamrpt2002jan20.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/groundwater_classification/docs/substreamrpt2002jan20.pdf).

### **3.6.1 Hypothetical Application of Board's Water-Right Enforcement Authority to Historic, Undeveloped Springs**

After the AHO completed its hearing, the AHO hearing officer directed the parties to file closing briefs. One of the issues he asked the parties to brief was:

Hypothetically, if no one had constructed Tunnels 2, 3 and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C, 7D, 8, 10, 11 and 12 (collectively referred to as the "existing collection facilities"), and if Respondent now were to divert water for water-bottling purposes from unimproved springs in the vicinities of any of the existing collection facilities (through spring boxes or similar facilities located where the spring water flows from underground to the ground surface), would such diversions and uses be diversions and uses of surface water or water in subterranean streams flowing through known and definite channels, as those terms are used in Water Code section 1200, or diversions and uses of percolating groundwater?

(2022-05-26 post-hearing order (BlueTriton Brands, Inc.), pp. 1-2, ¶ 1.a.) Analyzing this issue is an appropriate first step in our analysis of whether the Board's water-right enforcement authority applies to BlueTriton's collections of water in Strawberry Canyon and its beneficial uses of this water. (See section 3.1)

In its closing brief to the AHO, the Prosecution Team argued that, if no one had constructed BlueTriton's existing collection facilities, then the State Water Board would have concluded that diversions and uses of water from unimproved springs at these locations through spring boxes or similar structures would have been diversions and uses of surface water under Water Code section 1200. (2022-08-05 Prosecution Team closing brief, p. 7:17-21.) For this argument, the Prosecution Team cited some of the Board decisions discussed in section 3.4, Order WR 2019-0149 (see section 3.5), and the over 800 water-right permits and licenses the Board has issued for diversions from springs (see section 2.21.3.1). (2022-08-05 Prosecution Team closing brief, p. 8:1-9:2.) The Story of Stuff Project, the Center for Biological Diversity and the Sierra Club, Amanda Frye, Steve Loe and Anthony Serrano made similar arguments in their closing briefs. (2022-08-05 Story of Stuff closing brief, p. 18:2-22; 2022-08-05 Center Bio Diversity closing brief, pp. 4-5; 2022-08-05 A. Frye closing brief, pp. 21-22; 2022-08-04 S. Loe closing brief, pp. 1-12; 2022-08-05 A. Serrano closing brief, pp. 1-2.)

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In its closing brief to the AHO, BlueTriton argued that, under this hypothetical question, BlueTriton's diversions and uses of water from the springs through spring boxes or similar structures would have been diversions and uses of diffused surface waters, and "would not be subject to the SWRCB's permitting authority." (2022-08-05 BlueTriton closing brief, p. 17:4-22.) BlueTriton referred to Mr. Nichols's testimony that, if all the water in BlueTriton's collection facilities were "turned out" at the borehole and tunnel boxes, the water would "simply seep[] down the hillside and [would] not discharge as a watercourse." (*Id.*, p. 17:17-20, citing exh. BTB-6, p. 43, ¶ 136, p. 33:17-19 (referring to Mr. Nichols's "turn-out" tests), and pp. 36-37, ¶ 118 (referring to Mr. Rowe's Oct. 1, 1930 report).)

Discussing the definition of a "channel," to which the "law of watercourses applies," Hutchins stated:

The channel may be worn deep by the action of water, or may follow a natural depression without any marked erosion of soil or rock; or it may be distinguished by a difference in vegetation or otherwise may be rendered perceptible.

(Hutchins, *supra*, p. 24, citing *Lux v. Haggin* (1884) 69 Cal. 255, 419.)

## Springs 1, 2, 3, 7 and 8

As shown in Figure 14, gullies begin at or near: (a) the portals of Boreholes 1, 1A and 8 (near the sites of Springs 1 and 8), (b) the portal of Tunnel 3 (the site of Spring 3), and (c) the portals of Boreholes 7, 7A, 7B and 7C, which are approximately 40 feet from the portal of Tunnel 7 (the site of Spring 7) (see section 2.9). If no tunnels, boreholes or other facilities ever had been constructed at Springs 1, 3, 7 and 8, and no water had been diverted from these springs, then water flowing out of these springs would have flowed down these gullies. Figure 14 also shows that there also are obvious breaks in the surrounding vegetation at these gullies. These gullies also are depicted in Appendix D to the Division's 2021 revised report of investigation, which is discussed in Mr. Vasquez's testimony. (Exh. PT-3, pp. 157-161; exh. PT-7, p. 9, ¶¶ 22-4, p. 23, ¶ 83.) The locations of Boreholes 1 and 8 and the Spring 7 complex also are on the blue-line streams depicted on the 1901 topographic map. (See exh. PT-314, revised; exh. SOS-

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296, p. 7; section 2.12.3.3.) Water from these springs therefore would have flowed into natural channels, as that term is used in Water Code section 1201.

Figure 14 does not clearly depict a natural channel from Tunnel 2 (the site of Spring 2). However, the existence of a historical flow path from Spring 2 is demonstrated by Mr. Rowe's October 1, 1930 letter. (Exh. SOS-53.) It discusses the flows he observed during times when diversions from Spring 2 into the pipeline were stopped and "turned into the creek." (*Id.*, p. 1.) This first occurred on August 6, 1930, when diversions into the pipeline were stopped while concrete was being poured in the tunnel. (*Ibid.*) After these diversions stopped and the spring's discharges started going into the creek, the extra flow "washed out the newly installed Weir # 1." (*Ibid.*) His letter states that "the flow from Spring # 2 undoubtedly continued to enter the creek and was not diverted until after August 11 when the forms in the tunnel had been stripped." (*Ibid.*) On August 24, 1930, "Spring # 2 was turned into the creek at the head of the side hill draw leading from the spring to the canyon and 43 hours elapsed before this flow reach Weir # 1 only 800 feet from Spring # 2." (*Id.*, p. 2.) On September 20, 1930, the flow from Spring 2 was "turned into the stream," and the flow reached Weir # 1 20 minutes later. (*Id.*, p. 3.)

Based on these findings, we conclude that, if Springs 1, 2, 3, 7 and 8 had not been developed with tunnels and boreholes, and if water now were diverted from these springs through spring boxes or similar diversion facilities at the ground surface, then such diversions would be diversions of surface water flowing in natural channels, and these diversions and associated beneficial uses would be subject to the Board's water-right permitting and enforcement authorities. (See *State v. Hansen* (1961) 189 Cal.App.2d 604, 610 (water-right permit required for appropriation of water from a spring).)

This conclusion is consistent with the decisions of the State Water Board and its predecessors that are discussed in section A1.1 of attached Appendix A. These decisions all approved applications for permits to appropriate water from springs

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through spring boxes or similar devices at the ground surface. This conclusion also is consistent with the decisions discussed in section A1.2 of Appendix A. While those decisions denied the requested applications, they did so because no unappropriated water was available, not because the Board lacked water-right permitting authority.

We disagree with BlueTriton's argument that the water flowing from these springs before development of the tunnels and boreholes was diffused surface water. (See 2022-08-05 BlueTriton closing brief, p. 17:4-13.) As discussed in section 3.1, diffused surface waters are derived from "surface drainage falling upon and naturally flowing from and over land before such waters have found their way into a natural watercourse." (Hutchins, *supra*, p. 372.) Such waters do not originate at any specific point source. In contrast, the evidence in the record indicates that Springs 1, 2, 3, 7 and 8 each historically discharged water at one specific point, from which the water flowed into a natural channel or flow path.

BlueTriton's closing brief to the AHO referred to Mr. Nichols's testimony on this issue. (2022-08-05 BlueTriton closing brief, p. 17:17-20.) Part of Mr. Nichols's testimony on this issue refers to Mr. Rowe's report about the release of water from Tunnel 2 on August 24, 1930, which did not appear at Weir # 1 for 43 hours. (Exh. BTB-7, p. 36, ¶ 118, referring to exh. SOS-53, p. 2.) Mr. Nichols's testimony does not discuss other parts of Mr. Rowe's report, which discuss the conditions when Tunnel 2 diversions were stopped on August 6 and September 20, 1930 and flows promptly appeared downstream at Weir # 1. (See exh. SOS-53, pp. 1-3.)

The other part of Mr. Nichols's testimony that BlueTriton's closing brief cited on this issue refers to when the full flows of Boreholes 7, 7A, 7B and 7C "were turned out to the ground surface at the vault . . . and did not generate contiguous surface water flow in any ravine tributary to Strawberry Creek." (Exh. BTB-6, p. 43, ¶ 136.) But a contiguous surface flow is not required for a natural channel to be present. Flows in many, perhaps most, creeks in California often at times have reaches where there is surface water and reaches without any surface water, particularly under low-flow conditions. Such creeks still flow in natural channels.

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Moreover, even if these springs did not historically flow into natural channels, diversions from them for beneficial uses still would have been subject to the Board's water-right permitting and enforcement authorities. (See *State v. Hansen, supra*, 189 Cal.App.2d, at pp. 607, 610 (water-right permit required for appropriation of water from spring that "merely moistened the ground thereabouts; and was not the source of any water course"); Decision 1022 (1961) (approving application for water-right permit for diversions from spring where, before applicants developed the spring, "all spring water had been consumed by vegetation within about 100 feet of the spring").)

Springs 10, 11 and 12

The evidence in the record regarding the existence of natural channels at historic Springs 10, 11 and 12 is conflicting.

Mr. Rowe's May 15, 1931 letter referred to the area where these springs were located as a "valley or cienega." (Exh. SOS-51, p. 1; see section 2.7.) According to the WordSense Online Dictionary, "cienega" means "[a] marshy spring where groundwater bubbles to the surface." (<https://www.wordsense.eu/cienegas/>, accessed on April 10, 2023.) This definition suggests water surfacing over an area, rather than water discharging at a specific point into a specific channel. Also, Mr. Rowe's letter did not refer to any specific discharges or flows from these springs, but instead just stated that the flow of Strawberry Creek was "augmented by more springs" in this area. (Exh. SOS-51, p. 1.)

On the other hand, a figure in the Dames & Moore report depicts specific locations for these three springs, at locations approximately 10 to 30 feet from Strawberry Creek. (See Figure 16.) This figure is consistent with Figures 14 and 15, which show the portals of Boreholes 10, 11 and 12 to be very close to the channel of Strawberry Creek.

In section 3.8, we conclude that, for procedural reasons, we may not issue a cease-and-desist order regarding BlueTriton's diversions through Boreholes 10, 11 and 12 in this proceeding. We therefore do not need to decide the issue of whether, if these boreholes never had been developed, diversions from Springs 10, 11 and 12 through



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spring boxes or similar structures at the ground surface for beneficial uses would have been subject to the Board's water-right permitting and enforcement authorities. The Division may investigate this issue and decide whether or not to prepare a new draft CDO against BlueTriton regarding BlueTriton's diversions through these boreholes.

### **3.6.2 Application of Board's water-right enforcement authority to BlueTriton's Present Diversions**

Having concluded that diversions for beneficial uses from historic Springs 1, 2, 3, 7 and 8 through spring boxes or similar devices at the ground surface would have been subject to the State Water Board's water-right permitting and enforcement authorities, the next step in our analysis is to determine whether BlueTriton's diversions through the tunnels and boreholes associated with these springs for beneficial uses also are subject to these authorities.

No party contends that any natural or artificial subterranean streams flowing through known and definite channels are present at or in the vicinity of any of these tunnels or boreholes. (2022-08-05 Prosecution Team closing brief, pp. 15-16; 2022-08-05 BlueTriton closing brief, pp. 4-6; 2022-08-05 Story of Stuff closing brief, pp. 18-19; 2022-08-05 A. Frye closing brief, pp. 26-27; 2022-08-04 S. Loe closing brief, pp. 13-15; 2022-08-05 A. Serrano closing brief, p. 2.)

In section 3.6.1 we concluded that none of the water that historically flowed from the springs was diffused surface water. While BlueTriton argued to the AHO that hypothetical diversions of water from springs through spring boxes or similar structures at the ground surface would have been diversions of diffused surface water (see section 3.6.1), neither BlueTriton nor any other party argued to the AHO that BlueTriton's present diversions of water through its tunnels and boreholes are diversions of diffused surface water.

The question here therefore is whether we should treat BlueTriton's present diversions by Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 as diversions of surface water, over which the State Water Board has water-right permitting and enforcement

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authorities, or as diversions of percolating groundwater, to which these authorities would not apply in this proceeding.

The Prosecution Team's closing brief to the AHO noted that BlueTriton has acknowledged that it constructed its tunnels and boreholes "for the purposes of capturing spring water and developing additional percolating groundwater from the same underground strata feeding the springs." (2022-08-05 Prosecution Team closing brief, p. 10:6-9.) The Prosecution Team's brief cited several Board decisions that approved applications for permits to appropriate water from springs as precedents for the conclusion that BlueTriton's diversions are within the Board's water-right permitting authority (*id.*, pp. 13:7-14:2), and this brief discussed the conclusion in Order WR 2019-0149 that the Board retains its water-right permitting authority when a diverter uses a borehole to divert water from a spring (*id.*, p. 13:15-14:2; see section 3.5.) The Prosecution Team's closing brief concluded:

The Respondent's PODs are all installed into or adjacent to the springs and divert surface water from the springs. Using tunnels and boreholes does not exempt the Respondent's diversions from the rules of appropriation, or from the State Water Board's permitting authority.

(*Id.*, p. 15:7-9.)

The Story of Stuff Project, Center for Biological Diversity, Amanda Frye, Steve Loe, Hugh Bialecki and Anthony Serrano all also argued in their closing briefs to the AHO that BlueTriton's diversions are diversions of surface water subject to the Board's water-right authorities. (2022-08-05 Story of Stuff closing brief, p. 18; 2022-08-05 Center for Bio Diversity closing brief, pp. 4-8; 2022-08-05 A. Frye closing brief, pp. 21-22; 2022-08-04 S. Loe closing brief, pp. 13-14; 2022-08-04 H. Bialecki closing brief, p. 1; 2022-08-05 A. Serrano closing brief, p. 2.)

BlueTriton's closing brief to the AHO argued that BlueTriton's facilities capture percolating groundwater. (2022-08-05 BlueTriton closing brief, p. 3:7.) BlueTriton's brief stated "BTB collects water deep underground through horizontal boreholes and tunnels." (*Id.*, p. 3:16-17.) BlueTriton's brief noted that Ms. Stork testified that "BTB collects water from underground sources from fractures in bedrock formations (*id.*, p.

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4:9-10), and that Mr. Eggers testified that “water from BTB’s boreholes is collected from beneath the surface of the ground,” at depths between 66 and 397 feet below the ground surface (*id.*, p. 4:11-14).

We conclude that, for water-right purposes, we should treat BlueTriton’s present diversions through Tunnels 2 and 3, and its historical diversions through Tunnel 7, as diversions of surface water at the tunnels’ portals, which are the points where Springs 2, 3 and 7 historically discharged water. We conclude that, for water-right purposes, we should treat BlueTriton’s diversions through Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 as diversions of surface water at the points where the springs associated with these boreholes historically discharged water. We reach these conclusions even though BlueTriton now intercepts this water through these underground facilities before the water reaches the ground surface.

The State Water Board and its predecessors almost always have treated applications for permits to appropriate water by diversions through pipes and tunnels below the ground surface that intercept water that otherwise would have discharged from springs as applications for permits to divert surface water. (See Appendix A, sections A2.1 and A2.2.) While none of these decisions explicitly discussed Water Code sections 1200-1202 or the Board’s water-right permitting authority, they still are precedents supporting the conclusion that the Board’s water-right permitting authority, and thus also the parts of the Board’s water-right enforcement authority involved in this proceeding, extend to underground pipes and tunnels that intercept water that otherwise would discharge from springs.

The only decision concluding that the water-right rules that apply to springs did not apply to diversions of groundwater that otherwise would have discharged from a spring is Decision 915. (See Appendix A, section A2.2.) In Decision 915, the State Water Rights Board denied the pending application, based on a finding that the entire natural flow of the spring already was being diverted and used under existing water rights, and that the application was for a new permit that would be solely to appropriate percolating groundwater that applicants would develop through a tunnel. (See section 3.4.)

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The facts involved in Decision 915 are distinguishable from the present proceeding, because they involved an application for a permit to appropriate only percolating groundwater that would be developed, and not to appropriate any water that naturally would have discharged, from the spring involved in that proceeding. (Decision 915, pp. 5-6 (1958).) In contrast, at least some of the water subject to each of BlueTriton's diversions involved in this proceeding is water that would have discharged from the historic springs under natural conditions.

In Decision 1482, the State Water Board considered a situation where waters from natural flows at springs were commingled with waters developed at the springs through artificial improvements. (Decision 1482, p. 13 (1978).) In that decision, the Board concluded that it should extend the water-right rules that apply to springs to the waters that were developed through improvements at the springs. (*Id.*, p. 14.) The Board recognized that a developer of such waters should have a priority right to divert and use the waters, but concluded that the developer still needed a permit to appropriate these waters. (*Ibid.*)

In Order WR 2019-0146, the Board concluded that the Board's water-right permitting and enforcement authorities extended to waters associated with natural springs that were developed through pipes extending from the ground surface near the sites of the springs into the underlying bedrock formations where they intercept water flowing in fractures in the bedrock. (See section 3.5.)

Consistent with Decision 1482 and Order WR 2019-0146, we conclude that, the Board's water-right permitting and enforcement authorities apply to diversions of water associated with springs through underground tunnels, boreholes or pipes, even if the diverted water contains both water that otherwise would discharge naturally from the springs and additional developed water. For water-right purposes, the Board should treat these diversions as diversions being made at the historic springs that were located at or near the portals of the tunnels, boreholes and pipes, even though the tunnels, boreholes or pipes now intercept that water before it can discharge from the historic

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springs.<sup>42</sup> Otherwise, anyone seeking to divert and use spring water could evade the water-right rules that apply to the water flowing from the spring by installing an underground tunnel, borehole or pipe to intercept the water that otherwise would discharge from the spring.<sup>43</sup>

The conclusion that, for water-right purposes, the Board should treat BlueTriton's diversions as diversions being made at the sites of the historical springs is consistent with the initial groundwater extraction notices filed by BlueTriton's predecessor. These notices referred to the sources of the water reported in the notices as "Spring Nos. 1, 2, 3, 7, 7A, 7B and 8," crossed out "well" each place it appeared in each form and inserted "spring," stated that the water reported in the notices was diverted from these springs, that the springs were "naturally developed springs," and that "[t]he Company uses the total aggregate flow from each and all springs for each and every year." (See section 2.10.1.) Neither these notices nor any subsequent annual notices refer to the underground fractures in the bedrock formations as sources of this water or as points of diversion for this water.

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<sup>42</sup> The Board and its predecessors normally have approved or denied applications for permits to appropriate water from tunnels not associated with springs based solely on whether water was available for appropriation. (See Appendix A, sections A3.1 and A3.2.) The only exception is Decision 968. In Decision 968, the State Water Rights Board denied the application based on the finding that all the water for which the applicant sought a water-right permit was percolating groundwater that applicant had developed through a tunnel. (See section A3.2.) That tunnel was not associated with any spring or former spring.

Because all BlueTriton's tunnels and boreholes in Strawberry Canyon are associated with former springs, we do not decide in this proceeding the issue of the extent to which the Board's water-right permitting and enforcement authorities apply to water diverted by tunnels not associated with springs.

<sup>43</sup> Our conclusion that the water-right rules that apply to springs also apply to diversions of water associated with springs through underground tunnels, boreholes or pipes is based on all the relevant factors described in this order. This conclusion is not based solely on the fact that BlueTriton's diversions impact surface-water flows. (Cf. *North Gualala Water Co. v. State Water Resources Control Bd.*, *supra*, 139 Cal.App.4th, p. 1606 ("impact" test alone is not appropriate test for determining legal classifications of groundwater).)

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This conclusion also is consistent with the positions taken by BlueTriton, its predecessors and its consultants that the water BlueTriton extracts through these facilities and bottles for sale is “spring water” under the FDA regulations. (See sections 2.10.2, 2.10.3 and 2.10.4.)

Based on our conclusion that we should treat BlueTriton’s diversions through Tunnels 2 and 3, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 as diversions of surface water at the historic springs associated with these tunnels and boreholes, we conclude that the diversions of water by these tunnels and boreholes and associated beneficial uses of the diverted water are subject to the State Water Board’s water-right permitting and enforcement authorities.

**3.7 BlueTriton’s Water-Right Claims**

**3.7.1 Riparian Right Claims**

For a parcel to have riparian rights to a stream: (a) the land in question must be contiguous to or abut on the stream, and (b) the land must be within the watershed of the stream. (*Rancho Santa Margarita v. Vail* (1938) 11 Cal.2d 501, 528-529.) For such lands, “[t]he riparian right extends only to the smallest tract held under one title in the chain of title leading to the present owner.” (*Id.*, p. 529.)

The holder of a riparian right to divert and use water from a surface water stream may divert water from the stream at a point of diversion that is not on the right holder’s parcel, and then convey the diverted water to the parcel for beneficial use there, provided no unreasonable loss of water is caused by these actions. (See *Holmes v. Nay* (1921) 186 Cal. 231, 240; *Turner v. James Canal Co.* (1909) 155 Cal. 82, 92.)

The Prosecution Team and BlueTriton agree that the San Manuel Band, the present owner of the Arrowhead Springs Hotel property, has riparian rights to East Twin Creek that authorize the diversion of water through BlueTriton’s facilities in the Strawberry Creek watershed and the conveyance of this water to the Hotel property for beneficial uses there. (2022-08-05 Prosecution Team closing brief, p. 17:10-24; 2022-08-05

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BlueTriton closing brief, p. 28:3-10.) This conclusion is supported by Mr. Eggers's testimony. (Exh. PT-10, pp. 8-9, ¶¶ 25-26.)

### **3.7.2 Pre-1914 Appropriative Right Claims**

In its closing brief to the AHO, the Prosecution Team discussed the historical diversions of water for conveyance to water-bottling facilities. These included diversions from a spring or springs in the Coldwater Creek watershed for conveyance to Arrowhead Springs Water Company's factory in Los Angeles for bottling there, and diversions from a spring in the Hot Springs Creek watershed for bottling at the Old Arrowhead Factory. (2023-08-05 Prosecution Team closing brief, pp. 18:1--21:13; see section 2.4.)

BlueTriton's closing brief to the AHO also discussed these diversions and water-bottling operations. (2022-08-05 BlueTriton closing brief, p. 17:23--22:28.) It argued that the stipulated judgment in the *Del Rosa Mutual Water Company* case (see section 2.6) provided that the California Consolidated Water Company was the owner of pre-1914 appropriative rights that were perfected by these diversions and uses. (*Id.*, p. 25:18-22.)

The Prosecution Team and BlueTriton agree that these diversions and water-bottling operations may have resulting in the perfection of pre-1914 appropriative rights, although they disagree about the amount of the authorized annual diversion rates for such rights. (2023-08-05 Prosecution Team closing brief, pp. 19:5--21:13; 2022-08-05 BlueTriton closing brief, pp. 17:23--22:28.)<sup>44</sup>

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<sup>44</sup> For water-right purposes, the place of use of water-bottling operations is the place where the water is placed into the bottles that then are sold to retail customers. (See 2022-08-05 Prosecution Team closing brief, p. 6:23-25.) The Old Arrowhead Factory was located on a parcel that apparently was not riparian to East Twin Creek. (See exh. PT-10, pp. 14-15, ¶ 43.) Water-bottling operations at this factory therefore probably were not authorized by riparian rights, and therefore may have resulted in the perfection of pre-1914 appropriative rights. (See 2023-08-05 Prosecution Team closing brief, pp. 19:13-19; 2022-08-05 BlueTriton closing brief, p. 20:8-28.)

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The Prosecution Team's closing brief to the AHO argued that, even if BlueTriton's predecessors perfected pre-1914 appropriative rights through their diversions of water from the Coldwater Creek and Hot Springs Creek watersheds for water bottling, and even if these rights were assigned to BlueTriton's predecessor, such rights do not authorize BlueTriton's present diversions from springs in the Strawberry Creek watershed, because these springs are different water sources. (2023-08-05 Prosecution Team closing brief, pp. 21:18--22:16.)

BlueTriton's closing brief argued that Water Code section 1706 authorized BlueTriton's predecessors to change the authorized points of diversion for these alleged pre-1914 rights from their original points to new points in Strawberry Canyon. (2023-08-05 BlueTriton closing brief, p. 26:10-17.)

In *Johnson Rancho County Water Dist. v. State Water Rights Bd.* (1965) 235 Cal.App.2d 863, 879, the court held that an appropriative water right may not be changed to authorize the taking of water "from a different river system." In Order WR 2009-0061, the State Water Board, following the *Johnson Rancho* decision, stated that an appropriator may not expand an existing right through various listed actions, including using water from a different source. (Order WR 2009-0061, pp. 5-6.)

In Decision 1651, the Board, following *Johnson Rancho* and Order WR 2009-0061, confirmed that an appropriative right may not be changed to start using a different source of water. (Decision 1651, p. 33.) The Board stated:

The source of water is a fundamental attribute of a water right that cannot be changed; thus, the diversion of water from a different source of supply results in an entirely new appropriation. [Citations.] What constitutes a new or different source of water requires a factual analysis by the State Water Board that may need to address various factors, including whether the existing and proposed points of diversion are hydrologically connected, and thus involve a common source of supply, and the geographic scale of the proposed change.

(*Id.*, pp. 33-34.)



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In the proceeding that led to Decision 1651, the water-right permittee sought to change the authorized points of diversion in permits for three reservoirs. Two of these reservoirs were on the Little Truckee River and the third was on a tributary, Independence Creek. (*Id.*, p. 34.) The Board stated:

In this case, however, the analysis is relatively simple. We find that the proposed changes in the points of diversion do not involve a potential change in source of supply that warrants further analysis. [footnote 23.] Independence Lake is located on Independence Creek, which is tributary to the Little Truckee River, on which Boca and Stampede Reservoirs are located. Thus, the proposed changes involve adding diversion points along the same stream system and the same source of supply as the original diversion points. [Citation.] The proposed changes do not involve a different source of supply.

(*ibid.*) Footnote 23 to the decision stated:

For example, a proposed change in point of diversion from one tributary to another tributary above the confluence of the two tributaries may raise a potential issue regarding a change in the source of supply.

(Decision 1651, p. 34, fn. 23.)

The present proceeding raises the issue discussed in footnote 23 of Decision 1651. Here, the sources of any pre-1914 rights that may have been perfected through the historical water-bottling operations were springs in the watersheds of Coldwater Creek and Hot Springs Creek, two tributaries of East Twin Creek. BlueTriton now argues that these alleged pre-1914 rights could be changed to authorize BlueTriton to divert water from springs in the watershed of Strawberry Creek, a third tributary of East Twin Creek.

Water Code section 1706 authorizes a change in the authorized point of diversion of a pre-1914 appropriative right where the change involves moving the point of diversion upstream along a watercourse, including moving upstream along both a stream and one of its tributaries. In such a case, water diverted at the new point of diversion otherwise would have flowed downstream to the old point of diversion. The water diverted at the new point of diversion therefore would be part of the source for the old point of diversion, so there would not be a change in source.

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Water Code section 1706 also authorizes a change in the authorized point of diversion of a pre-1914 appropriative right where the change involves moving the point of diversion downstream along a watercourse, including moving downstream along both a tributary stream and the stream into which the tributary flows. In such a case, some of the water diverted at the new point of diversion otherwise would have been diverted at the old point of diversion. Even though the water that flowed at the old point of diversion would be commingled with other water, the water diverted at the new point of diversion could be accounted for as having come from the old point of diversion. Thus, there would not be a change in source.

In both cases, the changes in points of diversion are authorized by Water Code section 1706 only to the extent that the change would not result in an increase in the amount of water that could be diverted, and only if no other water user would be injured by the change.

We resolve the issue that was noted in Decision 1651 footnote 23, but not decided, and conclude that the holder of a pre-1914 appropriative right may not move the authorized point of diversion from one tributary of a stream to another tributary of the same stream. For such a change, none of the water at the new point of diversion could have been diverted at the old point of diversion. Rather, the tributary containing the new point of diversion is a new source, so diversions of water from it for beneficial uses are a new appropriation.

Water in Strawberry Creek never flows into Coldwater Creek or Hot Springs Creek, and waters in Coldwater Creek and Hot Springs Creek never flow into Strawberry Creek. These creeks, and springs in their watersheds, therefore are different sources for appropriative water rights. Although the parties to the *Del Rosa Mutual Water Company* case could stipulate to a judgment involving their claims against each other and to transfers of their water rights, any stipulated change in the source of a pre-1914 appropriative right from sources in the Coldwater Creek and Hot Springs Creek watershed to sources in the Strawberry Creek watershed was not authorized by

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California water-rights law, and therefore was not valid.<sup>45</sup>

BlueTriton's present diversions from springs in the Strawberry Creek watershed therefore are not authorized by any appropriative rights that may have been perfected by the prior water-bottling operations that used water from Coldwater Creek or Hot Springs Creek.

As discussed in sections 2.5 and 2.7, construction of the diversion facilities of BlueTriton's predecessors in the Strawberry Creek watershed did not begin until 1929, and there is no evidence in the administrative record that there was any pre-1914 plan of development for these facilities. BlueTriton's predecessors therefore did not perfect any pre-1914 appropriative rights for the diversions by these facilities for beneficial uses.

During the AHO hearing, BlueTriton did not argue that any of the diversions from its facilities in the Strawberry Creek watershed are authorized by riparian rights, and Mr. Lawrence testified that none of the plants where water diverted by BlueTriton's facilities in the Strawberry Creek watershed is bottled are located on parcels that are riparian to the Santa Ana River. (Recording, 2022-01-13, afternoon, 1:50:15-1:51:23.) We therefore conclude that BlueTriton does not have any water rights that authorize these diversions.

### **3.8 Conclusions Regarding Issuance of Cease-and-Desist Order**

As discussed in section 3.6.2, we conclude that BlueTriton's diversions through Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 for beneficial uses are within the State Water Board's water-right permitting and enforcement authorities. As discussed in section 3.7.2, we conclude that BlueTriton does not have any water rights that authorize these diversions and uses. We therefore conclude that we should issue a cease-and-

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<sup>45</sup> Neither the State Water Board nor any of its predecessors was a party to the judgment in the *Del Rosa Mutual Water Company* case, and that judgment is not binding on the Board.

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desist order (CDO) directing BlueTriton to stop these diversions. The terms of this CDO are discussed in section 3.9.

As discussed in section 2.1, the Division's draft CDO would not have directed BlueTriton to stop its diversions at Boreholes 10, 11 and 12. Instead, the draft CDO would have required BlueTriton to submit a report "more precisely determining the amount of flow at Boreholes 10, 11 and 12 that if not diverted would have otherwise surfaced naturally at a spring." (Exh. PT-1, p. 11, ¶ 7.)

In its closing brief to the AHO, the Prosecution Team stated:

The draft CDO did not propose restricting diversions from Boreholes 10, 11, and 12, because information available at the time could not rule out the possibility that up to 100 percent of the water diverted and used from these PODs was developed water, and therefore not subject to the permitting authority of the State Water Board.

(2022-08-05 Prosecution Team closing brief, p. 28:8-11.) The Prosecution Team's closing brief then discussed the testimony and evidence presented during the AHO hearing, which the Prosecution Team argues demonstrates that no water diverted through these boreholes is developed water. (*Id.*, p. 28:12:24.) Arguing that BlueTriton had notice of the issue of whether these boreholes are subject to the Board's water-right permitting authority, and that this issue was "within the general scope of the Draft CDO's allegations of unauthorized diversions from springs," the Prosecution Team argued that the Board may include provisions regarding these boreholes in its CDO. (*Id.*, pp. 28:7-8, 29:2-3.)

BlueTriton's closing brief to the AHO argued that, because the Division's draft CDO did not propose any limitations on BlueTriton's diversions from Boreholes 10, 11 and 12, it would violate BlueTriton's due process rights if the AHO were to propose a CDO regarding these diversions. (2022-08-05 BlueTriton brief, p. 29:14-23.)

Water Code section 1834, subdivision (a), provides that, if a violation of a requirement described in Water Code section 1831, subdivision (d), is occurring, the Board shall give notice to the person allegedly engaged in the violation. This statute then states that:

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The notice shall contain a statement of facts and information that would tend to show the proscribed action, . . .

The Division's Enforcement Section provided this notice in this proceeding by transmitting the draft CDO and revised report of investigation to BlueTriton. (See section 2.1.)

Because this statute uses the language "would tend to show," the required notice does not need to provide every detail about the Division's factual and legal analyses, and the Board may adopt a final CDO that contains different factual and legal analyses. Nevertheless, this statute does require the Division to notify the respondent of the basic facts of each alleged violation that the Board's final CDO then will address.

In this proceeding, the Division's draft CDO and revised report of investigation did not allege that BlueTriton's diversions through Boreholes 10, 11 and 12 were unauthorized diversions. Absent such allegations, these documents did not provide sufficient notice to BlueTriton under Water Code section 1834, subdivision (a), for us to be authorized to issue a CDO to BlueTriton regarding these diversions. We therefore deny the request in the Prosecution Team's closing brief for us to issue such a CDO. This denial is without prejudice to the Division's rights to conduct further investigations regarding these diversions, or to issue a new draft CDO regarding them.

**3.9 Appropriate Cease-and-Desist Order Terms**

As discussed in section 3.8, we conclude that we should issue a CDO directing BlueTriton to stop its diversions through Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 for its beneficial uses. As discussed in section 3.7.1, we conclude that the San Manuel Band has riparian rights that authorize diversions through these facilities for beneficial uses on the Arrowhead Springs Hotel property. As discussed in section 3.8,

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we conclude that we should not issue a CDO regarding BlueTriton's diversions through Boreholes 10, 11 and 12.<sup>46</sup>

Based on these conclusions, our CDO limits the amount of BlueTriton's total diversions from Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 during each day to the amount BlueTriton delivers to the San Manuel Band on during the same day. The CDO also contains provisions requiring BlueTriton to report its daily diversions and deliveries to the Division's Enforcement Section each month, and to include copies of these reports in BlueTriton's annual groundwater extraction notices.<sup>47</sup>

Citing Water Code section 1051, the Prosecution Team's closing brief to the AHO argued that the Board may order BlueTriton to conduct technical studies and to provide additional information regarding the amounts of developed water, if any, BlueTriton diverts and uses. (2022-08-05 Prosecution Team closing brief, p. 29:13-22.) BlueTriton argued that the State Water Board does not have authority to require BlueTriton to conduct such studies. (2022-08-05 BlueTriton closing brief, pp. 29:24--30:5.)

The Prosecution Team did not specifically ask the AHO to include any requirements for such studies in this order. (See 2022-08-05 Prosecution Team closing brief, p. 29:13-

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<sup>46</sup> BlueTriton's groundwater extraction statements indicate that, during 2018-2020, BlueTriton diverted 23, 32 and 30 af from Spring 10, and diverted 1, 11 and 8 af from Spring 12. (See Table 1.) These amounts total 24, 43 and 38 af. These totals equal 7.8, 14.0 and 12.4 mgal. ( $24 \text{ mgal.}/(3.07 \text{ af/mgal.}) = 7.8 \text{ mgal.}$ ;  $43 \text{ mgal.}/(3.07 \text{ af/mgal.}) = 14.0 \text{ mgal.}$ ;  $38 \text{ af}/(3.07 \text{ af/mgal.}) = 12.4 \text{ mgal.}$ )

<sup>47</sup> During the AHO hearing, Mr. Lawrence testified that BlueTriton presently files its reports under Water Code sections 4999-5009 with the San Bernardino Valley MWD. (Exh. BTB-10, p. 6, ¶ 24.)

The Division should investigate whether, considering this order, these reports will satisfy the requirements of Water Code sections 5100-5107. (See Wat. Code, § 5101, subd. (a)(5).) If the Division concludes that these reports do not satisfy these requirements, then the Division shall notify BlueTriton of this conclusion and direct BlueTriton to begin to file statements of water diversion and use under these statutes. Our order includes a provision that will apply if BlueTriton begins filing such statements and stops filing reports under Water Code sections 4999-5009.

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22.) Also, while Water Code section 1051, subdivision (a), authorizes the Board to investigate stream systems, it does not authorize the Board to require other parties to conduct such investigations. For these reasons, we are not directing BlueTriton to conduct any technical studies. If the Division decides to further investigate BlueTriton's diversions through Boreholes 10, 11 and 12, then the Division may use its investigation powers to require BlueTriton to produce relevant information and documents.

**3.10 BlueTriton's Options for Future Water-Right Applications**

As discussed in section 2.11, the Board, through Orders WR 89-25, WR 91-07 and WR 98-08, has issued a declaration under Water Code section 1205 that the Santa Ana River watershed, including all tributaries where hydraulic continuity exists, is fully appropriated from January 1 to December 31 of each year. Order WR 98-08 contains an exception to this declaration for applications proposing to develop or salvage water. (Order WR 98-08, pp. 16, 25.)

Under Water Code section 1206, subdivisions (a) and (b), the Board may not accept for filing any application for a permit to appropriate water from a stream system described in this declaration, except where the declaration specifies conditions for acceptance of such applications. Considering the provisions of the orders discussed in the preceding paragraph, section 1206 does not prohibit the Board from accepting applications by BlueTriton for permits to appropriate water through Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8, if the applications are for permits for which diversions would be limited to times when BlueTriton can demonstrate there is no hydraulic continuity between Strawberry Creek and the Santa Ana River. Section 1206 also does not prohibit the Board from accepting applications by BlueTriton for permits to appropriate water that BlueTriton can demonstrate is developed water.

If BlueTriton decides to file any such applications, then BlueTriton should file separate applications for each source for which BlueTriton seeks a permit. If BlueTriton contends, for any such source, that there are flows based on pre-development

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conditions at the spring associated with the source, and additional flows due to developed water, then BlueTriton should file separate applications for permits to appropriate each type of water from that source. Specifically, for each such source, BlueTriton should file: (a) one application for a permit to appropriate the water that BlueTriton contends is based on pre-development flows and is available during times when BlueTriton contends there is no hydraulic continuity between Strawberry Creek and the Santa Ana River, and (b) a separate application for a permit to appropriate the water that BlueTriton contends is developed water.

These applications will be subject to all the statutes, regulations and procedures that apply to applications for permits to appropriate water. As the Division processes these applications, and, if necessary, when the Board considers these applications, they will evaluate any issues that arise regarding the amounts of water that are based on pre-development flows, the times when there is no hydraulic continuity between Strawberry Creek and the Santa Ana River, and the amounts of developed water. The Division and, if necessary, the Board, may include terms and conditions in the permits to address these issues.

As authorized by Water Code section 1205, subdivision (c), BlueTriton may file a petition to revoke or revise the fully appropriated declaration for the Santa Ana River watershed.

#### **4.0 CONCLUSIONS**

1. BlueTriton's diversions of water through its Tunnels 2 and 3, and its Boreholes 1, 1A, 7, 7A, 7B, 7C and 8, for beneficial uses are subject to the State Water Board's water-right permitting and enforcement authorities.
2. BlueTriton does not have any water rights that authorize such diversions or beneficial uses.
3. The San Manuel Band has riparian rights that authorize diversions of water through these facilities for beneficial uses on the Arrowhead Springs Hotel property.



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4. We should issue a cease-and-desist order that prohibits BlueTriton from diverting water through these facilities for any purpose besides delivering water to the San Manuel Band for its beneficial uses on the Arrowhead Springs Hotel property.
5. Our cease-and-desist order should require BlueTriton to file records of its daily diversions and deliveries that are sufficient to demonstrate its compliance with this order.
6. Because the Division of Water Rights Enforcement Section's draft cease-and-desist order did not contain any provisions that would have prohibited BlueTriton from diverting water through its Boreholes 10, 11 and 12, this order does not contain any such prohibitions. The Enforcement Section may investigate such diversions and, if it deems it appropriate, prepare a new draft cease-and-desist order regarding those diversions.

## **ORDER**

### **IT IS HEREBY ORDERED THAT:**

1. Pursuant to Water Code sections 1831-1836, the Respondent, BlueTriton Brands, Inc., and any successor owner of any of the facilities in the Strawberry Creek watershed in San Bernardino County that are described in this order (collectively referred to in the following paragraphs as "BlueTriton"), shall comply with the following orders, beginning on the first day of the second month following the month during which the Board adopted this order:
  - a. BlueTriton shall limit its diversions through its Tunnels 2 and 3, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8, so that the total amount diverted through these facilities during each day will not exceed the total amount of water BlueTriton delivers to the San Manuel Band of Mission Indians (San Manuel Band) during the same day. If necessary to account for time lags between the times of these daily diversions and the times of these daily deliveries, BlueTriton may provide for an appropriate difference between the times of the daily accountings of these diversions and the times of the daily accountings of these deliveries.

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- b. On or before the 15th day of each month, BlueTriton shall provide the Division of Water Rights Enforcement Section with separate accountings of: (i) the daily amounts of diversions at each of the facilities described in the preceding paragraph; (ii) the total daily amounts of diversions by all these facilities; (iii) the daily amounts of deliveries to the San Manuel Band; (iv) the daily amounts of water diverted at each of Boreholes 10, 11 and 12; (v) the daily amounts of the total diversions at Boreholes 10, 11 and 12; (vi) the daily amounts of water delivered to tank trucks from BlueTriton's facilities described in this order; (vii) the daily amounts of water discharged to Strawberry Creek through BlueTriton's discharge facility near Boreholes 10, 11 and 12; and (viii) the daily amounts of water discharged anywhere else, with a description of each point of discharge. These accountings of daily diversions, deliveries and discharges shall be sufficient to account for all diverted water. If there are any differences between the total amounts diverted on any day and the total amounts delivered and discharged on the same day, then BlueTriton shall explain the reason or reasons for the differences. BlueTriton and the Division may agree in writing to change the reporting frequency for these accountings, or to terminate the requirements of this paragraph.
- c. BlueTriton shall maintain totalizing flow meters and meter records sufficient to create the daily records of diversions, deliveries and discharges described in the preceding paragraph.
- d. BlueTriton shall include copies of the accountings described in paragraph b. with each annual groundwater extraction notice it files pursuant to Water Code sections 4999-5009 for any of the facilities described in the preceding paragraphs. If BlueTriton begins filing statements of water diversion and use under Water Code sections 5100-5107 and stops filing groundwater extraction notices under Water Code sections 4999-5009, then BlueTriton and the Division may agree in writing to change the requirements of this paragraph so they will provide for BlueTriton to file copies of these accountings with its statements of water diversion and use.

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- e. Upon request from the Division of Water Rights, Enforcement Section, to determine compliance with this order, BlueTriton: (i) shall provide any information or documents that the Enforcement Section requests to investigate BlueTriton's compliance; and (ii) shall provide reasonable access to Enforcement Section personnel to inspect BlueTriton's facilities and records.

**CERTIFICATION**

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on **[insert date]**.

AYE:

NAY:

ABSENT:

ABSTAIN:

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Courtney Tyler  
Acting Clerk to the Board

## APPENDICES, FIGURES AND TABLES

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## Appendix A

### Decisions by State Water Board and its Predecessors Involving Board's Water-Right Permitting Authority Over Waters Associated with Springs and Tunnels

#### A1.0 Decisions Involving Applications for Water-Right Permits for Diversions from Springs Through Spring Boxes and Similar Devices at the Ground Surface

##### A1.1 Applications Approved

Decision 320 (State Engineer 1932). Decision approved application for permit to appropriate water from spring that was being collected by a wooden box at spring and conveyed by pipe to place of use. (*Id.*, p. 4.)

Decision 542 (State Engineer 1946). Decision approved application for permit to appropriate water through several ditches that conveyed water from a "seepage area" into a wooden header box, from which water was conveyed through a pipe to a tank. (*Id.*, p. 5.)

Decision 607 (State Engineer 1949). Decision approved applications for permits to appropriate water from two springs. (*Id.*, pp. 2, 5.)

Decision 610 (State Engineer 1949). Decision approved application for permit to appropriate water from "spring group" through collections into a wooden box. From there, water would be conveyed by pipeline to a small reservoir. (*Id.*, p. 2.)

Decision 625 (State Engineer 1949). Decision approved application for permit to appropriate water from spring, to be collected in a 4' x 6' x 4' concrete box, and then conveyed by pipe to place of use. (*Id.*, p. 2.)

Decision 677 (State Engineer 1950). Decision approved applications for permits to appropriate water from spring through pipeline that would convey water to places of use. (*Id.*, pp. 1-2.)

Decision 1238 (State Water Rights Board 1965). Decision approved application for permit to appropriate water from spring through a timber spring box and two regulatory storage tanks. (*Id.*, p. 2.)

Decision 1149 (State Water Rights Board 1963). Decision approved application for permit to appropriate water from spring that was to be conveyed from a redwood box that enclosed spring through pipe to a tank. (*Id.*, pp. 1-2.)

Decision 1352 (State Water Resources Control Board, 1970). Decision approved application for permit to appropriate water from spring that was to be collected in a spring box and conveyed by hose to a tank. (*Id.*, p. 2.)

Decision 1451 (State Water Resources Control Board, 1975). Decision approved application for permit to appropriate water from spring that was to be diverted by spring box. (*Id.*, p. 2.)

Decision 1494 (State Water Resources Control Board, 1979). Decision approved application for permit to appropriate water from spring that had been developed into a small pond. (*Id.*, p. 8.)

Decision 1595 (State Water Resources Control Board, 1983). Decision approved application for permit to appropriate water from spring that had been diverted into a pipeline. (*Id.*, p. 9; see *id.*, p. 11.)

#### A1.2 Applications Denied

Decision 1 (Dept. Pub. Wks., Div. Water Rights 1924). Decision denied application for permit to appropriate water from spring that had been developed by two ditches conveying water from spring to places of use. (*Id.*, pp. 2-3.) Department denied application because there already were pre-1914 appropriative rights for these diversions and uses, and no unappropriated water was available for a new appropriation. (*Id.*, pp. 4-5.)

Decision 1246 (State Water Rights Board, 1966). Decision denied application for permit to appropriate water from unnamed spring that was being diverted by a spring box into a pipeline. (*Id.*, pp. 1-2.) Because spring did not produce any water surplus to quantity necessary to satisfy applicant's rights under his existing water-right license, Board denied application for new water-right permit. (*Id.*, pp. 2-3.)

#### A2.0 Decisions Involving Applications for Water-Right Permits for Diversions from Springs Through Pipes and Tunnels Developed Below the Ground Surface

##### A2.1 Applications Approved (or License Directed to be Issued)

Decision 259 (State Engineer, 1930). Decision discussed several applications for permits to appropriate water from various springs. (*Id.*, p. 1.) Decision approved Application 5955, which was for a permit to appropriate water from 17 springs, including seven (E-2 and F-3 through F-8) that were "developments of underground water proposed by applicant through the construction of tunnels, etc." (*Id.*, p. 8; see *id.*, pp. 13-14.)

Decision 337 (State Engineer, 1932). Decision approved request for water-right license to replace water-right permit to appropriate water from springs. (*Id.*, pp. 1-2.) Water "had been developed by means of a tunnel driven into

the hillside . . . The tunnel was round to be timbered and 4 feet by 6 feet in cross section and 155 feet long.” (*Id.*, p. 3.)

Decision 681 (State Engineer, 1950). Decision approved application for permit to appropriate water from spring. (*Id.*, pp. 1-2.) Diversion was “to be effected by means of a shored tunnel extending 20 to 50 feet into a water bearing spring area”. (*Id.*, p. 2.)

Decision 1022 (State Water Rights Board, 1961). Decision approved application for permit to appropriate water from spring. (*Id.*, p. 1.) Applicants had “developed most of the water in the source by excavating a shallow hole and driving some pipes into the side of a hill to collect water from what is probably seepage through a seam of fractured granite. (*Id.*, p. 2.)

Decision 1209 (State Water Rights Board, 1965). Decision approved application for a permit to appropriate water from spring. (*Id.*, p. 2.) Spring had been developed by digging down 4 feet in a green, mossy meadow approximately 300 feet in diameter and constructing a small dam about 1½ feet high, which created a regulatory reservoir with a surface area of approximately 100 square feet. Water was diverted from reservoir into a pipeline and conveyed to place of use. (*Id.*, pp. 1-2.)

## A2.2 Applications Denied

Decision 802 (State Engineer, 1954). Decision denied application for permit to appropriate water from spring that would be developed by a tunnel 4 feet wide by 7 feet high by about 100 feet long that tapped a fracture line. (*Id.*, pp. 2, 5, 7-9.) Water would be diverted by a concrete dam and then conveyed through a pipeline. (*Id.*, p. 2.) Decision denied application because owners of the mining claim within which spring was located could divert and use the spring water under riparian rights. (*Id.*, p. 11.)

Decision 915 (State Water Rights Board 1958). Decision denied application for permit to appropriate water from two springs through diversions by spring boxes and conveyed by pipelines to place of use. (*Id.*, pp. 1-2.) Springs had been developed by short tunnels into the hillside and the entire production of the springs was being used, apparently under pre-1914 appropriative rights. (*Id.*, pp. 2, 4.) Applicants proposed to increase production of springs by further development and to appropriate the increased flow. (*Ibid.*) Board concluded that water applicants “seek to develop in excess of the natural flow of the springs would be percolating groundwater over which the Board has no jurisdiction,” citing Water Code section 1200. (*Id.*, p. 6.)

A3.0 Decisions Involving Applications for Water-Right Permits for Diversions from Tunnels Developed Below the Ground Surface and Not Associated with Any Springs

A3.1 Applications Approved

Decision 932 (State Water Rights Board, 1959). Decision approved application for permit to appropriate water from a tunnel that was 180 feet long, “driven into decomposed granite,” 5.5 feet wide and 6 feet high. (*Id.*, pp. 1, 3.)

Decision 1263 (State Water Rights Board, 1966). Decision approved application for permit to appropriate water “from a spring in [a mine] tunnel.” (*Id.*, pp. 1-2.)

Decision 1325 (State Water Resources Control Board, 1969). Decision approved application for permit to appropriate water from a mine tunnel by diverting water “in a cut leading to the mine entrance.” (*Id.*, pp. 1-2.)

Decision 1363 (State Water Resources Control Board, 1970). Decision approved application for permit to appropriate water from a mine tunnel. (*Id.*, p. 1.)

A3.2 Applications Denied

Decision 968 (State Water Rights Board 1960). Decision denied application for permit to appropriate water developed in the Tecolote Tunnel in Santa Barbara County. (*Id.*, pp. 1, 3.) Tunnel was 7 feet in diameter and 6.4 miles long. (*Id.*, p. 2.) Board concluded that water intercepted by the tunnel “is percolating groundwater at the point of interception.” (*Id.*, p. 4.) Board further concluded that “where the percolating water developed in a tunnel is not abandoned, but is directly taken and applied to beneficial use by the person who developed it, the tunnel water is no more subject to the jurisdiction of the Board than is any other percolating water.” (*Id.*, p. 5.)

Decision 1157 (State Water Rights Board 1963). Decision denied application for permit to appropriate water from an unnamed stream “just below the point where the stream emerges from the Saratoga Mine Tunnel.” (*Id.*, p. 2.) Board concluded that there was no unappropriated water available to supply applicants, and therefore denied the application. (*Id.*, pp. 3-4.)

A4.0 Decision Involving Application for Permit to Appropriate Water from Surface Stream that was Derived from Developed Percolating Groundwater Associated with Springs

Decision 1482 (State Water Resources Control Board 1978). Application 24804 was for a permit to appropriate water from four unnamed streams



supplied by springs. (*Id.*, pp. 2, 6, 8, 11-12.) Surface flow from springs was largely attributed to a lateral pipe system applicant installed in the springs. (*Id.*, p. 12.) Applicant contended that springs were percolating waters, not subject to Board's water-right permitting authority. (*Id.*, pp. 11-12.) Citing Water Code sections 1200-1201, Board found that waters for which applicant sought a permit originated from: (1) surface runoff collected in the unnamed streams during storms, (2) natural flows from the springs, and (3) "flow from the springs to the unnamed streams that occurs solely from the man-made improvements" (developed waters). (*Id.*, p. 13.) Board noted that the State has a substantial interest in assuring that water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that this goal can be best accomplished through the administration of water rights under the Water Code (that is, by including such developed waters within the Board's water-right permitting authority). (*Id.*, p. 14.)