

8 February 2018

State Water Resources Control Board  
Division of Water Rights, PO Box 2000  
Sacramento, CA 95812-2000

Att: Victor Vasquez

Re: Report of Investigation, INV 8217, Nestle Waters North America (NWNNA)

The Save Our Forest Association, Inc., (SOFA), is focused on mountain quality of life concerns in the San Bernardino Mountains and has been engaged since 1989 with Federal, State, County and local jurisdictions regarding environmental sustainability, land use planning, species and habitat conservation, and natural resource protection.

SOFA provided comments to the SBNF Front Country Ranger District Office on 2 May 2016, in response to the 14 April 2016, Nestle Waters Special Use Permit Scoping Meeting, and provided copies of those comments to the SBNF Forest Supervisor, USFS Region 5 HQ, USFS National HQ, Senator Barbara Boxer, Senator Dianne Feinstein and Congressman Paul Cook. Those comments are also attached to this letter.

The SBNF proposed five-year NEPA study period is unreasonable in its lack of natural resource protection as it allows NWNNA to continue water extraction, with no limitations, during the study period. The State of California is experiencing historic drought with many restrictions placed on agricultural and domestic water use. Why should continued, uncontrolled water extraction be allowed, under an expired permit, with no evidenced pre-1914 water rights, during a five year study period, particularly when there is clear evidence of injury to signatories to the Western Judgement and the Strawberry Creek ecosystem ?

Our Board of Directors welcomes the Report of Investigation (ROI), INV 8217, in response to numerous complaints regarding Nestle water rights between April, 2015, and September, 2017. We support the contention that "Nestle claimed several poorly defined bases of right, but none of these claims are supported by evidence provided or found by Division staff."

On page 33 of the ROI it is stated that "Nestle likely has a pre-1914 right for an amount up to 26 AFA, including developed water." It would seem that for Nestle's (or their predecessor-in interest) claims to be legitimate there would be a documented water rights claim in the San Bernardino National Forest (SBNF) prior to 1894. There is no recorded claims at Nestle's water withdrawal sites on the SBNF lands including T2NR3W, upper Strawberry Creek, or Indian Springs, T1NR4W E 1/2 Sec 2. Neither the Upper Strawberry Creek or Indian Springs were the site of the water used for the first water bottling, and no pre-1914 rights can be conferred. The

historical record indicates that the first water bottling during the 1909-1913 period was from Coldwater Canyon, not Strawberry Creek or Indian Springs. We are of the opinion that no evidence-based proof of water rights translates to no water permitted removal, and that as the ROI states in Section 6, Recommendations, "Division staff recommends that Nestle immediately cease any unauthorized diversions."

We also appreciate the request, dated May 20, 2016, from the USFS Forest Supervisor Jody Noiron, asking for clarification of Nestle's basis of right. The SBNF Project Proposal, dated March 18, 2016, describes proposed actions regarding the Nwana Special Use Permit. Page 6, S46: Surface water diversions and groundwater extractions, including wells and spring developments will only be authorized when it is demonstrated by the user, and/or agreed to by the Forest Service, that the water extracted is excess to the current and reasonably foreseeable future needs of forest resources. Consideration of beneficial uses, existing water rights, and the absence of other available water sources will be part of the water extraction application. It is troubling that there has not been mention of the Federal Reserve Rights for those lands within the SBNF and the overlaying landowner groundwater rights associated with the SBNF. The federal reserve water rights have been repeatedly confirmed by the United States Supreme Court (*Winters v. United States*, 207 US 564 (1908), *Arizona v California*, 373 US 546 (1963), *Cappaert v United States*, 426 US 128 (1976) and the *United States v New Mexico*, 438 US 696 (1978). Most recently the federal reserve water rights were again upheld in the US Ninth Circuit Court of Appeals, *Agua Caliente Band of Cahuilla Indians, USA v Coachella Valley Water District et al* (2017), and this decision was upheld when the US Supreme Court refused to hear an appeal in November 2017.

On January 17, 2018, the San Bernardino Valley Municipal Water District (SBVMWD) submitted its response to the SWRCB regarding the ROI. The SBVMWD comments are particularly pertinent to the issue of unauthorized diversion by Nwana due to the District's role as Watermaster administering the terms of the Western judgement (April 17, 1969). "...the diversion of water by Nestle in excess of the diversion of water during the 1959-1963 base period represents an unauthorized diversion of water that constitutes injury to Valley District and/or Western." "Secondly, the over appropriation of water by Nestle has likely had an adverse impact on fish and wildlife in the Strawberry Creek watershed. Valley District, in working with a large number of other local public agencies, the US Fish & Wildlife Service and the California Department of Fish & Wildlife, is in the process of developing a habitat conservation plan that aims at recovering native species like the Santa Ana sucker, the arroyo chubb, the speckled dace, and the mountain yellow-legged frog, all of which would likely have been adversely affected by Nestle's over appropriation of water." The specific impacts noted by SBVMWD have been raised, for over the last three years by retired USFS Biologist Steve Loe, and been ignored by our SBNF Forest Supervisor, the Regional Office, and by Nestle. SOFA agrees with the recommendation that the SWRCB work with the SBMWD, Nestle, the SBNF, the CA Department of Fish & Wildlife and the US Fish & Wildlife Service and the public to determine

what the adverse effects are from Nestle's over appropriation of water from Strawberry Creek. The SWRCB should also determine from the historical record including documents revealed by Amanda Frye if there is any valid water right (including critical review of a "likely" pre-1914 water right for a maximum of 26 AFA).

I am attaching a Memo, dated 22 January, 2018, from hydrologist and Arrowhead Lake Association Board Member, Ralph Wagner, provided to me as President of SOFA, to be shared with all interested parties. Mr. Wagner expresses his opinion and concerns regarding the issue of pre-1914 water rights, groundwater resources on Federally owned property (Federal Reserve Rights) and the inherent financial inequity of scarce water resources being removed from public lands for the commercial benefit of a for-profit foreign corporation. Please include this letter as part of the public comments on the ROI.

Additionally attached is a press release from the League of Women Voters of the San Bernardino Area, subsequent to the January 29, 2017, public meeting co-hosted by the LWV and SOFA at the Twin Peaks Community Center. The USFS and NWNA were both invited to participate in this public meeting and declined to attend. This press release is the formal position of the LWV on the NWNA special use permit SBNF project proposal #7285 for continued water extraction in the SBNF.

The SOFA Board would submit that during the period of time that the SWRCB Recommendations are implemented, all water extraction from the currently identified well systems should be immediately ceased. All water extraction since January 1, 2018, should be documented and disclosed so that water extracted up to the 26 AFA possible water right be clearly identified and limited by the SWRCB. Given the fact that the Santa Ana River is a fully appropriated stream system that there be no allowed exceptions and that no post-1914 water right permit application be allowed.

The Save Our Forest Association recognizes the complexity of this issue including the historical record going back over 100 years ago, the responsibilities of the US Forest Service to prevent unreasonable use and injury to public trust resources, and the role that the State of California Water Resources Board has in defining and taking enforcement actions relative to water rights and groundwater diversions.

Sincerely,

Hugh A. Bialecki, DMD  
President, Save Our Forest Association, Inc.

cc: USFS SBNF Supervisor, Jody Noiron  
USFS Region 5 Headquarters, Vallejo, CA  
USFS National Headquarters, Washington, DC  
Congressman Paul Cook  
Senator Kamala Harris  
Senator Dianne Feinstein