

Closing Brief of Steve Loe

BTB Draft Cease and Desist Order

Issued April 23, 2021.

Mr. Lilly: My response is based on your direction and Closing Brief Issues given to us in your May 26, 2022 Post-Hearing Order.

CLOSING BRIEF ISSUES

The parties shall file written closing briefs that address the following issues:

- 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?
 - a. 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?

Response 1:

Yes. The Respondent is violating, and would be violating, the prohibition against the unauthorized diversion or use of water. There is no doubt the Board has jurisdiction over the headwater springs of the West Fk. of Strawberry Crk. ("Headwater Springs") (SOS 88). These Headwater Springs were all surface springs coming from underground pathways through rock draining a large land mass extending on both sides of the mountain, which then consolidated to form the year-round flows in the West Fk. of Strawberry Crk. (SOS 55:28, last para., SOS 283:1-6). The facilities were developed at the natural spring locations and not just randomly placed into a dry hillside. The natural springs were at specific visible and measurable locations on the surface (SOS 40, SOS 42:6-14), and as Nicholls has described it, reached the surface through pathways in the otherwise solid rock. (BTB 7:33, 2nd paragraph). At the time that the initial springs were developed, during a very dry period (PT 319:10, SOS 26:1, SOS 57:2 2nd Para.), all of the springs were natural surface springs that were visible and measurable (SOS 40:3-5, SOS 42:6-14, SOS 57:6 1st Para.).

The West Fork and thus Strawberry Creek as a whole was a much wetter place prior to BTB spring development and total export (SOS 31:8, par. 27-30, SOS-283:3,7, 9,12,13, SOS 31:par. 40, 54). The BTB diverted spring flows

historically provided for most of the natural spring, summer, and fall flow in the West Fork of Strawberry Creek and a majority of the surface water to the Strawberry Creek mainstem during those seasons (SOS 40:3-13, SOS 48:1-78, SOS 51:1-17). SOS 283-7 compares current flows to pre-development flows for some common locations during a similar precipitation period. BTB has documented how dry the headwaters around the springs are today with the diversions (BTB 7:540, SOS: 283, BTB 7: 214-215). In many summers today, with normal or below normal rainfall the previous and current year, there is almost no surface water in upper W.Fk. since the natural springs were diverted. This is a huge difference from the lush, flowing springs and stream encountered by Rowe prior to and during development (SOS 42: 6,7,8, SOS 40: 3-5, SOS 283: 3,7). BTB 7:214 and 215 shows the limited extent of surface water present in a dry summer nowadays while they were mapping surface expressions. These few and limited surface expressions were used to select monitoring points for the FS required monitoring.

If these natural springs comprising the Headwater Springs were developed today to provide spring water for bottling, they would be considered diversions of surface spring water requiring water rights, permitting and licensing from the Board. The springs were visible and measurable at the time of development on the surface when they were first monitored by Rowe and developed by BTB's predecessors, and they significantly contributed to West Fork Strawberry Creek (SOS 40:3-5, SOS 48:1-78, SOS 42:6-14, SOS:51-1-17). The flows from the Headwater Springs to the Hotel pickup (SOS 283:24) were able to keep stream

flow continuous all the way to the Hotel except for a few days in a drought on the hottest days of summer when late afternoon flows stopped (SOS 51:10, SOS 42:9-14). The entire length of stream to the Hotel pickup supported a lush growth of alder and other riparian species (SOS 283:12) which used a huge amount of water on the hot days. In all but a few cases, there were still nighttime flows on those days. Once the leaves were dropped, most of the flows from the springs reached the Hotel intake and in all likelihood, the Coldwater confluence (SOS 40, SOS 42:6-14). The combined flow from the natural springs created a year-round stream that was capable of supporting and helping to support aquatic dependent species including amphibians and fish from the springs all the way to the flood control basins (SOS 31:par.42,55, SOS 255, 256, 257, 261). The springs and the stream would have much higher summer and dry period flows and be continuous in the entire West Fork and below today if they hadn't been totally captured by the Headwater Spring developments (SOS 283:3,12,13, SOS 51:1,2, SOS 51:1-17, SOS 055:28, last par., SOS 40, SOS 42-6-4).

The area from the uppermost Springs (1,2,3,4,8) to the "Cienega" at Springs 10,11,12, has been almost dried up and minimum summer flows have gone from 126-170 gpm flowing below the springs in July 1930 (SOS 40-6,11) , to less than 1gpm summer low flow today in only a couple of locations during normal or dry years following development (SOS 283:6, BTB 7:540, SOS 42: 6,7,8).

The summer and fall flows in the stream below the Cienega have also been significantly affected by the year-round removal by BTB of all of the primary spring sources above, even during severe drought (SOS 42: 6,7,8, SOS 40: 3-5,BTB 7:540, 541, BTB 7: 62-64, SOS:283-20). Summer/fall flows measured by Rowe were much greater and more continuous than today with diversions. Flows varied from 102-137 gpm in July prior to development of Spring 2 (SOS 40:7,11) to 27 gpm in October following development (SOS 40:3-5, SOS 42: 6,7,8). BTB under similar climatic conditions today only measured 3-6 gpm in the same area (BTB 7:214,215, BTB 7:540, 541). When flows were measured by Rowe the stream was totally occupied by alder and other riparian species so there were much higher evapotranspiration rates and yet there were much higher flows.

Rowe documents the amount of surface flows at the springs and the streams in the upper West Fork of Strawberry Creek before development by BTB's predecessor (SOS 40:3-5, SOS 42:6,7,8, SOS 48:1-78, SOS 51:1-17,). The springs were expressing on the surface in sufficient amounts to justify high development costs. As previously demonstrated and discussed, the period of time when Rowe made his measurement in 1929-31 and 1948 were dry years (SOS 283:4) (PT 319:10) (SOS 57:6) and yet, his measurements show the headwaters to be much wetter than it is today even in good years. Now the springs and stream almost totally dry up in the spring, summer and fall months during average and dry years (BTB 7:540, 541, BTB/Board Field Trip to view springs and facilities). BTB 7:214-215 shows the limited areas with flow and

amount of flow under today's conditions during a low flow period, which is nothing compared to the Rowe measured flows.

Spring 1 was not added to the pipeline until 1948 when Rowe was monitoring and recommended developing Spring 1 right away because of anticipated water shortage (SOS:57-6). At that time the natural flows were estimated by Rowe to be 10.5 gpm. Rowe, in May of 1930 prior to development, measured 28 gpm at spring 1 and this dropped through the summer to 8.9 gpm on July 25, 1930. (SOS 40:3-10). For the rest of the very dry year and winter, the flow remained between 6-10 gpm. (SOS 42:6-8). Since these flows were recorded during a very dry period, they should be viewed as the minimum natural flow of Spring 1 before boreholes.

Spring flow diverted by BTB boreholes over the years at Spring 1 do not appear to be any greater than the natural spring flows measured by Rowe in the early 1930's or in 1948. Annual amounts diverted by BTB from Spring 1 during dry periods similar to when they were measured by Rowe were: (7gpm for 2003), (6 gpm for 2014), (6 gpm for 2015), and (3 gpm for 2016) (BTB 7:62-64). These amounts are as low, or lower, than the natural spring flows measured by Rowe. We have no way of knowing the historical flow during good and wet year prior to development. However we can assume flow would vary by year similar to the flow variability shown in the pipeline flow data for each spring BTB 7:62-64. It seems clear from the data, that boreholes and tunnels have not produced new sustainable flows over what were natural flows prior to development.

Spring 2 is and was a very large natural spring. Pre-development flows were 83 gpm in May of 1930 and 59 gpm on July 3, 1930 (SOS 40:3). Spring 4 which came from basically the same water was flowing at 67 gpm. After Spring 2's flow was captured by the tunnel, diverted and exported, combined flows in the pipeline continued to measure 60-80 gpm similar to pre-diversion (SOS 40:3, SOS 42: 6,7,8).

Tunnel 2 was only built to capture all the water that was surfacing at the natural spring orifices and was not looking for new groundwater. SOS 283:17 shows the schematic of the tunnel at Spring 2. It shows that the tunnel was dug in a manner intended to expose the spring orifices coming out of the bedrock.

Developing the tunnel did not result in increased flows over natural flows (SOS 40:3, SOS 42: 6,7,8, BTB 7:62-64). Following spring development, there is no longer any surface expression at or near Spring 2, Spring 4 flow has been reduced to a trace, and the stream downstream to the Cienega has been dewatered in the dry months as well (SOS 283:13) (BTB 7:214,540).

Prior to development by BTB's predecessor, Spring 2 flowed to Spring 4, the flow of which, when combined with the flows from Spring 3 and Springs 1/8) created year around flow in the upper headwaters of the W. Fk. of Strawberry Creek (SOS 40:3-5, SOS 042:6,7,8) (SOS 51:5-7).

We now know, and Rowe learned in 1930, that Springs 2 and 4 were connected by above ground and below ground flows and they appear to have been basically the same water. This is demonstrated by the pre-diversion flows at

Spring 2 and Spring 4, versus the continued high flows only from Spring 2 and virtually total loss of flow at Spring 4 following development and diversion. The surface flow from spring 2 was measurable before development, but was likely also running underground in spots to spring 4, presenting the appearance initially of two separate springs. After development of Spring 2, large Spring 4 basically stopped flowing (SOS 283:13 SOS 40:3-5, SOS 042:6-8). Therefore, pipeline flows from Spring 2 tunnel should be assumed to be the natural combined spring flow of Spring 2 and 4. Those late summer flows were 72 gpm in 1930 (SOS 42:6-8).

Spring 3 was naturally flowing 19 gpm at the surface in May, 1930 (SOS 40:3,4), and flow dropped throughout that very dry summer and fall, settling in at 10-13 gpm (SOS 42:6,7,8, SOS 51:4, last para.). This late summer/fall flow should represent the minimum natural flows for Spring 3. Developing Spring 3 with a tunnel did not increase the flows above natural flows. Pipeline flows during similar unusually dry conditions to when Rowe made his measurements had flows no greater than those initially found and measured on the surface from the natural springs. Flows during similar climatic conditions today have been no higher in the pipeline than measured by Rowe (SOS 40:3-5, SOS 42:6,7,8). Spring 3 flows measured in the pipeline during similar dry periods were: (5 gpm for 2003), (6 gpm for 2014), (7 gpm for 2015), and (7 gpm for 2016) (BTB 7:62-64).

Spring 7 is a tunnel developed in the 1930's at a natural spring. It was flowing 84,000 gallons per day or 58.3 gallons per minute when first developed,

recorded, and reported (SOS 12:3 1st par.). This must have been a very wet year. By 1950 when the tunnel was replaced with the first boreholes, the tunnel flows had settled into a sustained flow of 26,000 gpd, or 18 gpm. Two new boreholes 7A and 7B were drilled immediately down slope from the tunnel and by the end of 1950, the two boreholes had dewatered the tunnel and were only producing 27,600 gpd collectively. This was only estimated to be a 6% increase over natural tunnel flows) (SOS 12:3 2nd paragraph). Flows measured from the boreholes since 1950 have been up and down depending on the precipitation and age of the borehole. Based on the dry years 2003, and 2014-2017, flows measured from all of the boreholes are not significantly more than when there was only a tunnel capturing the natural flows (BTB 7:62-64). Tunnel 7 was initially developed to capture the water that was flowing to the surface through the natural spring orifice. It was not developed to find other groundwater pathways that weren't expressing at the surface. Boreholes that have been drilled, did very little to find new water, and primarily dried up the tunnel removing the same water that fed the tunnel. All iterations of different boreholes settled in around the 26,000 gpd figure that was present in the original tunnel and reflected natural flows when developed as a tunnel. This flow should be considered the minimum surface flow at Spring 7. Natural flows will increase significantly in good rainfall years.

Spring 8 is the least known of the springs historically and may be associated with and affected by Spring 2 based on the recent shut in tests. It was a short borehole (50 ft. later extended to 120 ft.) and has huge fluctuations in flow

based on precipitation. It was evidently a smaller spring as it was not initially described and monitored by Rowe. During dry periods BTB diverted amounts have been low (less than 10 gpm, generally much less (BTB 7:62-64). The last 20 years of diverted flows from Spring 8 have been low and probably approximate pre-development flows during equivalent dry periods. Spring development has not increased flows over natural conditions. With a 50 ft. borehole, they weren't trying to find new pathways to groundwater, they were merely trying to capture the water that was surfacing at the spring from the natural spring pathway.

Spring 10, 11, 12 Complex (also called the Cienega Springs was naturally flowing 4-20 gpm into Strawberry Creek during a dry summer/fall in a series of dry years (1929, 30, 31) (SOS 283:004). Rowe referred to measurements taken from the springs as "inflow at Cienega". (SOS 44:1,2,3 and SOS 42:6,7,8). Flows in the West Fk. were augmented by inflow from Springs 10,11 and 12 (SOS 51:1).

Flows at the 10,11,12 complex were affected greatly by the riparian vegetation it supported prior to development. It must have been a very lush spring complex from Rowe's description, mapping of the location, and measuring the inflow from springs at the Cienega (SOS 42:6-8). Flow measurements increased significantly when the riparian species leaves were lost in the fall (SOS 42-6,7,8). See the change from early November inflows prior to leaf drop, to late

November, after leaf drop. Notice the difference in flows on Nov, 18 when cloudy verses Nov. 10 and 25 when clear and higher evapotranspiration. Natural flows increased from 5 gpm in early November with high evapotranspiration to 17 gpm in December, with no rain, due to the reduction in evapotranspiration. This increase in flow, after riparian leaf drop, was also observed at multiple locations along the W.Fk. Strawberry Crk. (Weir 2 and Weir 3) affected (SOS 42:6-8)SOS 51:5-17. Seventeen (17) gpm measured pre-development after leaf drop by Rowe (SOS 42:6-14) should be viewed as the minimum natural flows at 10,11,12 that were contributing to Strawberry Creek and supporting the lush riparian vegetation at the Cienega.

The BTB recorded pipeline flows from the 10,11,12 complex (BTB 7:63,64), during the recent low flow periods of 2002-2003 and 2014-2017, which are the most similarly dry periods to the 1929-1931 period, were similar to those natural flows recorded by Rowe (SOS 42:6-14). Flows in the pipeline from 10, 11,12 during drought periods were (11 gpm for 2001), (19 gpm for 2002), (18 gpm for 2003), (17 gpm for 2014),(17 gpm for 2015), and (13 gpm for 2016). These are very similar to the flow recorded by Rowe (12.6- 20 gpm) when evapotranspiration wasn't taking all the flows from the springs due to the lush riparian vegetation at the spring complex in November 15- January 25, 1930-31(SOS 44:1,2,3 and SOS42:6,7,8).

Shut in test by Haley and Aldrich (BTB 7:25, 31) found a direct link from boreholes to the natural surface expression and flow at 10,11,12 (BTB 7;746-750). A relatively short shut in produced surface expression and flow from the

springs (BTB 7:746-750) during a dry series of years, during the dry season. This is very significant and demonstrates the importance of these Cienega springs to natural flows at the springs and contribution to the stream as measured by Rowe (SOS 42:6,7,8). This increased surface expression and flow in only one small rivulet that was measured gives an indication of what would happen to the spring complex if no water was captured and exported (BTB 7:46-50). BTB 739 falsely concludes that the spring at complex at 10,11,12 is unimportant to Strawberry Creek flows and less than natural seasonal fluctuation. The contribution of 17 gpm in the summer of surface water in the dry months was critical in maintaining the Cienega springs flows to the West Fk. during dry years and seasons and should be assumed to represent natural flows.

- i. How should the State Water Board apply prior decisions and orders of the State Water Board and its predecessors to decide this issue?

Response 2: The Board should strive to ensure that the State's waters are put to the best possible use, and that the public interest is served.

- ii. How should the State Water Board apply prior reported court decisions to decide this issue?

Response 3: The Board should strive to ensure that the State's waters are put to the best possible use, and that the public interest is served.

b. Is the water Respondent collects through its existing collection facilities surface water or water in subterranean streams flowing through known and definite channels, as those terms are used in Water Code section 1200, or percolating groundwater?

Response 4: It is surface water. (See above Response to question 1.a.) The water the Respondent collects is almost entirely surface water. These springs always delivered water to the surface, year-round, every year. This was so obvious to Rowe that he stated: "I have made no mention of the question of the origin of the springs and their source of supply because we can assume that they have been flowing for a great many years and that the water has been entering Strawberry Creek." (SOS 055:28 last para.) Although some of the boreholes were attempts to find additional water beyond the natural spring source with very deep wells (up to 495 ft. at Spring 11), the truth is that they really never produced much water in excess of what was flowing and measured naturally on the surface before the Headwater Springs were developed (See Response 1; also (BTB 7:62-64, SOS 40:3-5, SOS 42:6-14); see also Rowe's observation that Springs 1,2,3,4,8 in the extreme upper watershed would

reliably produce 10 Miners inches of flow (SOS 51:1 last para). There is no indication that the boreholes and tunnels have produced any significant gain over natural flows that were originally measured and planned on when they were developed.

- i. How should the State Water Board apply prior decisions and orders of the State Water Board and its predecessors to decide this issue?

Response 5: The Board should strive to ensure that the State's waters are put to the best possible use, and that the public interest is served.

- ii. How should the State Water Board apply prior reported court decisions to decide this issue?

Response 6: The Board should strive to ensure that the State's waters are put to the best possible use, and that the public interest is served.

- iii. Should the State Water Board treat any of the existing collection facilities as artificially created channels that, for water-right purposes, have become natural subterranean streams, under the doctrine stated in *Chowchilla Farms, Inc. v. Martin* (1933) 219 Cal. 1, 18, State Water Board Decision 1618, p. 15, and State Water Board Order WR 2021-0094, pp. 33-36?

Response 7: No. They are diversions of surface spring water through tunnel and boreholes to above ground pipeline and exported.

c. Which historical water diversions and uses, including water bottling, that occurred at the Arrowhead Springs Hotel complex were authorized by riparian rights?

Response 8: The Del Rosa judgment allowed for the Arrowhead Hotel to continue to use the water they had been taking from Indian Springs, Coldwater, Hot Springs Creek and Waterman Canyon as a riparian use (235:3 para. 1, 235:7 para.1) even though it was already fully appropriated by downstream users (SOS: 235:2 para. 2). There was no mention of prior use of any water from Strawberry Creek other than the new 1930-31 spring developments on National Forest tying into the 1929 pipeline. Any riparian rights would be tied to those streams and locations where water was being used on and diverted from private land adjacent to the stream and returned after use. There was not any riparian or other water use or any claim for water in Strawberry Creek by the hotel landowner prior to the 1929-31 pipeline and spring diversions in the upper Strawberry Cr watershed. The judge determined that the Headwater Spring diversions had injured the downstream water rights holders and Consolidated was ordered to pay the plaintiff \$20,000 for the right to divert at the springs (SOS 235:8 first para). Water obtained through Riparian rights cannot be exported off-site for

bottling purposes, and must drain back into the same drainage from where it was taken. A riparian user can't take the water on someone else's land under false claim, export it to private land downstream in a different drainage, and not consider the downstream users. The Forest Service as the real owner of the springs and primary downstream landowner has not been protected in this diversion and exportation due to false claims. None of the water taken is through valid riparian rights.

(https://www.waterboards.ca.gov/waterrights/board_info/faqs.html#toc178761088). Drainage from the Hotel property where the diverted water is used runs into Lower Waterman Canyon and lower East Twin Creek, not Strawberry Creek. Diverting the primary sources of surface and subsurface flows in the West Fk. of Strawberry Creek is having a significant adverse effect on Strawberry Creek and National Forest Resources (including Threatened and Endangered species) at the diversions and downstream.

- i. Are Respondent's present diversions of the water that Respondent delivers to the San Manual Band of Mission Indians at the Arrowhead Springs Hotel complex authorized by riparian rights?

Response 9: (See above Response 8). San Manual rights have not been an issue in the CDO. They have a long-expired Forest Service permit for a diversion and pipeline in Coldwater Canyon and the current Google Earth photography clearly shows an estimated 4 inch

PVC, well maintained surface pipeline into upper Coldwater above the hotel, on National Forest, leading to the Hotel. Diversions were being made historically in Waterman (Hot Springs Crk. and tributaries), Indian Springs and Coldwater as documented by Rowe and the Del Rosa judgement (SOS 48:12,19)(SOS 235:6, last para.). There was no mention of past water use from Strawberry Crk., only recognition of the newly constructed spring developments and pipeline (SOS235:7, last para.).

The deliveries currently provided by BTB to San Manuel are apparently based on an agreement between the two entities in the 1928-30 period to share in the cost and benefits of developing the Headwater Springs and pipeline. They were not based on any water rights, riparian rights, riparian use or any prior use by either party. They were seen as a new source of free water on the National Forest for BTB's predecessors and the hotel. The Forest Service unknowingly accepted the BTB claim of State surface water rights and permitted the diversions and pipelines. That permit is issued to BTB and not the tribe. The FS permit is not and has never been given to the tribe or the predecessors. The only diversion and pipeline permit to them is in Coldwater Canyon.

The dewatering of the Headwater Springs and the W.Fk. Strawberry Crk. through surface spring developments on National Forest and exporting it to the lower end of East Twin Creek Watershed that isn't

adjacent to (and dewater) Strawberry Creek is not valid riparian use or right. It is not a valid riparian diversion because it is diverted on NF under false pretenses, did not consider downstream water users (FS is primary downstream property owner), is returned to lower East Twin Creek and Waterman Canyon,(not Strawberry Crk.), and is not reasonable use as it substantially dewater a perennial stream for corporate profit.

d. Did Respondent's predecessors perfect any pre-1914 appropriative rights?

Response 10: No. Frye, the Prosecution Team and the Del Rosa Case, (SOS 235:2, para. 2) all document that Consolidated Water, BTB's predecessor, never had any pre-1914 rights or any subsequent authorization from the state to use the Headwater Springs. BTB's pre-1914 claim of surface water rights to the FS has been clearly shown to be false. BTB has never admitted to the need for, or applied to the FS for any groundwater extraction permit, and the Forest Service has never granted any water right to BTB. (See, e.g., SOS 165:14 (terms of Permit under which BTB asserts right to take groundwater from the National Forest). They have continued to claim State surface water rights to all the water in their FS permitting process while arguing it is all groundwater in this proceeding (Personal Observation).

i. If so, how did Respondent's predecessors perfect these rights?

ii. If Respondent's predecessors perfected any pre-1914 appropriative rights, what were:

No Response/No Rights

iii. If Respondent's predecessors perfected any pre-1914 appropriative rights:

1. may Respondent now use these rights to authorize its use of the existing collection facilities to collect water for water bottling purposes?

No Response/No Rights

e. Is any of the water that Respondent collects through the existing collection facilities for water-bottling purposes developed water?

- i. If so, what are the rates at which developed water flows into the existing collection facilities?
- ii. If so, what water rights does Respondent have or need to divert and use this developed water?

Response 11: All of the natural surface springs have been developed. The entire flow from the Headwater Springs has now been diverted through BTB's tunnels and boreholes which capture the natural flows. Developing unauthorized diversions of perennial springs and streams under false pretenses, should not give anyone rights to that spring and stream water. None of the tunnel flows, and only a very small portion of the water developed with the boreholes (see above Response 1) may be considered developed groundwater versus developed natural spring flow. The small amount of developed groundwater from boreholes conveys no right to BTB since it is National Forest groundwater, not BTB's groundwater. BTB has no right to take and export any of the developed spring water or the small amount of developed groundwater that is not spring water. They do not have a permit or license, nor have they admitted they even need a permit for groundwater from the FS.

2) If any violations or threatened violations of 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 are occurring, then should the State Water Board issue a cease and desist order to Respondent under Water Code section 1831?

Response 12: The Water Board should issue a cease and desist order to the Respondent under Water Code section 1831 because they do not have valid rights, they are adversely affecting the health and safety of the National Forest and adjacent communities during rapid climate change, severe drought and accompanying catastrophic fire threats from a drying environment. What may have seemed like no big deal 90 years ago when the Headwater Springs were first developed under false pretenses is now a very big deal and must be dealt with. There are many communities downstream affected by the removal of the water, thousands of residents above the Headwater Springs who are more threatened by fire with a dry Strawberry Creek headwaters, and downslope mountain communities affected by removal of groundwater that helps support Lake Gregory and Lake Arrowhead which are experiencing significant drought effects. Threatened, Endangered, and FS Sensitive species and their habitat are being adversely affected by this unauthorized diversion. (SOS 116, SOS 31, Loe 1,2).

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?

Response 13: The cease and desist order should require BTB to immediately stop the removal of all water from the Headwater Springs. Any removal of water in the future from the natural springs, boreholes or tunnels should be totally dependent upon BTB gaining surface water rights through the CA water rights process, or through a permit from the FS authorizing the take of some amount of public groundwater. A recommendation to the Board to pursue administrative penalties should also be made.

a. May the State Water Board include in such cease and desist order any provisions regarding Respondent's collections of water through Boreholes 10, 11 and 12, even though the April 23, 2021 draft cease and desist order does not contain any such provisions?

Response 14: Yes. (See Response 1 page 6) The Board should include the collection of water from the Cienega Springs (10, 11, and 12) because they were also surface springs that were visible and measurable prior to development by BTB. That is demonstrated by the Rowe measurements of Cienega Inflows (SOS 42:6,7,8), and the shut in test performed by BTB and others (SOS 7:25, second para.,31 next to last para.), BTB 7: 747, 748).

b. Are there any other limitations due to the language in the April 23, 2021 draft cease and desist order on what provisions the Board may include in the order?

Response 15: There should not be any. BTB appealed the original order, opening it back up for new information, new science, new analysis, and a new decision. New information learned and proven during the hearing should all be used in making the most informed and scientifically based determination. All of the Board's responsibilities and authorities for water use and management should be reflected in the decision and not be limited in any way. The Board should strive to ensure that the State's waters are put to the best possible use, and that the public interest is served. The Board should consider the Public Trust, fish and wildlife resources, NF health, global warming, fire risk and downstream users that must buy imported water.

In fact, the Board should also consider the reasonableness of the use, especially considering the dewatering of the public land on the National Forest and the admitted exporting and dumping of much of the water it collects downstream, putting it to no beneficial use, and having a significant adverse impact on trust resources and values. A recommendation to the Board to pursue administrative penalties should also be made.

c. May the State Water Board order Respondent to conduct technical studies and prepare and submit reports regarding its collection facilities and related hydrological conditions, like the proposed studies and reports described in paragraphs 6 and 7 on page 5 of the April 23, 2021 draft cease and desist order?

i. If so, what legal authorities authorize the Board to order Respondent to take these actions?

ii. If the Board may order Respondent to take these actions, then what technical studies should the Board direct Respondent to conduct and what technical reports should the Board direct Respondent to prepare and file with the Division of Water Rights?

Response 16 : There is no longer a need for BTB to do additional studies. We now have enough information/data stop the removal of any water due to a lack of water rights from the State or the FS for the water that is being removed, and the fact that we now know from the Rowe historical data, that almost all of the water being removed was and is surface spring water requiring state water rights (See Response 1) In these proceedings, we have seen BTB's willingness to bend the truth to fit their narrative, even going as far as acting like their expert (Lawrence) doesn't know if the water at the Headwater Springs is cold or not. Everyone that has ever been to the site in the summer months and touched and listened to the pipes knows that it is very cold,

mountain spring water. BTB cannot be trusted to do studies or monitoring and report results accurately. This was also obvious in the Forest Service review of the Model developed by BTB contractors. If there are additional studies that are needed, the Board should require an independent consultant, not BTB's chosen, long-term contractor that has supported BTB's claims instead of just reporting measurements and the science.

Another blatant example of the dishonesty and why BTB can't be trusted is the fact that for decades they have told the FS that they (FS) have no say because it is all surface spring water with State rights. Now that they are being challenged in this claim, they are now claiming it is all groundwater and the State has no say.

- d. If the State Water Board decides to issue a cease and desist order to Respondent, then what other actions, if any, should the State Water Board order Respondent to take?

Response 17:

Since BTB has no right to surface water from the Headwater Springs or Strawberry Creek and the diversions are adversely affecting other downstream water rights, NF health, T&E species, and community protection from fire and a drying environment, the State Board should order the

Respondent to immediately stop removing water. Water should not be exported until and if the FS and the State determines that there is surface water and/or groundwater available and accessible within BTB's actual proven rights.

The Board should order BTB to reimburse downstream water rights holders for the cost of imported water that had to be purchased to make up for the unauthorized of surface water take. A recommendation to the Board to pursue administrative penalties should also be made.

If you recommend to the Board that BTB is granted any water rights, the following should be done before any water is removed from the Headwater Springs:

- 1) Immediately stop the removal of any water from the springs and turn out the flows to the stream as near the source as possible. They have demonstrated that they have excess spring water that they have dumped in lower East Twin Creek, and they have multiple sources in s. California to use until properly permitted and licensed;
- 2) Require BTB and the tribe to file honest applications to the FS and the State for water rights and diversion of surface springs, and the take of National Forest groundwater;
- 3) Environmental analysis with NEPA and CEQA compliance, and public and agency involvement in permitting and licensing.

4) Streambed alteration permitting by CA Fish and WL, They have told F+WL that they don't need to, because they are having no effect.

5) New FS and State Permit and license reflecting current laws, regulations, policy etc. and the facts instead of false, ever-changing claims.

6) Any water not needed should be returned to stream at the spring source, not 1/3-1/2 mile downstream.

If BTB and their predecessors had been honest and compliant with State and Federal requirements, we would not be here today. They would have gone through a process to work with the State and FS to have a fully permitted and compliant operation that recognized State and FS water rights, laws, regulations, policies, and had local agency and water rights holders involved. This is our chance as the State and federal government along with us citizens to bring this operation on public land taking public water for profit into legal compliance and protect our citizens and natural resources.

The Water Board, Forest Service, and the public can use the Rowe spring and stream flow data that was measured pre-development and the pipeline flows reported by BTB to develop a very accurate groundwater/surface water model based on real current and historical data. The small amount of groundwater that is being removed can now be accurately estimated with the Rowe historical field measurements and appropriate decisions can be made by the Board and Forest Service on if and how much water is available for

BTB diversion and use. Thank you for the opportunity to be involved as a citizen. Thank you for the patience and understanding of my technical and legal understanding and limitations. Thank you for listening.

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Steve Loe

August 4, 2022