

Forest Ecology Advocates Sue USFS Over Continued Arrowhead H2O Diversions

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Three years after the California State Water Resources Control Board issued a tentative order to BlueTriton brands to discontinue diverting water from Strawberry Canyon at 5,200-foot to 5,600-foot elevation in the San Bernardino Mountains for use in its Arrowhead Spring Water bottling operation and nine months after that order was finalized, the Save Our Forest Association has sued the US Forest Service in an effort to force it to prevent the company from drafting any water from that mountain source.

Water originating in the San Bernardino Mountains and using the Arrowhead brand in one form or another had been marketed at least since 1909. Questions have long existed, however, as to whether the water rights originally claimed, attributed or granted to Arrowhead Puritas, the corporate predecessor to Arrowhead Spring Water, pertain to the current source of the water drawn at the 5,200-foot elevation level from Strawberry Creek in what is known as Strawberry Canyon rather than water drawn farther down the mountain at around the 2,000-foot above sea level. In 1929, the California Consolidated Waters Company was formed to merge three Los Angeles-based companies that bottled and distributed "Arrowhead Water," "Puritas Water" and "Liquid Steam." The property, bottling operations, water distribution and administration of Arrowhead Springs Company, Puritas of California Consumers Company and the water bottling division of Merchants Ice and Storage were all administered by California Consolidated Waters Company. In August 1930, California Consolidated Waters, on the basis of a single pipeline permit that was not based on any water rights and without having obtained a diversion permit or any further valid authorization or rights, started diverting spring water from a single "bedrock crevice" spring in the San Bernardino National Forest along Strawberry Creek at an elevation of 5,600 feet. Subsequently, in 1933 and 1934, the company put in place tunnels, ultimately accompanied by holes and horizontal wells at or near the headwaters of Strawberry Creek in Strawberry Canyon. Strawberry Creek was noted in maps and springs studies prior to the diversion to be a perennial stream which was fed by abundant flowing headwaters springs. The Arrowhead Water Bottling Company, under various names and corporate configurations, including divisions of Standard Oil of California and Rheem Manufacturing, continued to operate, drawing water from Strawberry Canyon throughout the 20th Century. In 1969, the Arrowhead Water Bottling Company was acquired by the Coca Cola Bottling Company of Los Angeles and in 1978, Chicago-based Northwest Industries acquired Arrowhead Puritas when it bought Coca Cola Bottling of Los Angeles. In 1982, Northwest Industries unloaded Coca-Cola Bottling of Los Angeles to Beatrice Foods. BCI subsequently acquired Beatrice in a leveraged buyout. While under BCI's control, the U.S. Forest Service-issued Arrowhead Puritas water drafting permit in Strawberry Canyon expired, and the BCI-Arrowhead Drinking Water

Company applied to extend the permit. In 1987, while that application was still pending, Perrier purchased the BCI-Arrowhead Drinking Water Company.

The then-pending water extraction permit renewal required a U.S. Forest Service review of the water drafting arrangement and its environmental/ecological impact, which the U.S. Forest Service then did not have the immediately available resources to carry out. In a gesture of compromise, Perrier was allowed, pending the eventual Forest Service review, to continue to operate in Strawberry Canyon by simply continuing to pay the \$524-per year fee to perpetuate the water extraction under the terms of the expired permit. In 1992, when Nestlé acquired the Arrowhead brand from Perrier, it inherited the Strawberry Canyon operation and continued to pay the \$524 annual fee without renewing the permit, which at that time existed under the name of the "Arrowhead Mountain Spring Water Co," one that was never listed legally in corporate filings, but which operated under Nestlé Waters of North America, Inc. until it was acquired by BlueTriton Brands.

Nestlé's intensive water-drafting activity, which has long been decried by environmentalists, came under increasing fire as a statewide drought, which lasted for more than five years after it first manifested in 2011, advanced.

In 2015, environmental groups were gearing up to file a lawsuit claiming the U.S. Forest Service had violated protocols and harmed the ecology of the mountain by allowing Nestlé Waters North America to continue its operations in Strawberry Canyon for 28 years after its permit expired. At that point, the Forest Service moved to make an environmental review. In the meantime, Nestlé continued its water extraction, pumping an average of 62.56 million gallons of water annually from the San Bernardino Mountains.

Among those was the Save Our Forest Association, Inc., which began writing to the US Forest Service protesting Nestlé's use of the expired special use permit to divert the water from Strawberry Canyon, below Rimforest, to its water bottling plants. The United States Forest Service never responded to multiple requests

for a meeting to discuss and review the environmental impacts of this long standing spring water diversion from our San Bernardino National Forest.

In April 2016, the United States Forest Service held a public scoping meeting, at which it proposed a 5-year National Environmental Policy Act Study to determine the possible impacts of the water diversions. The Save Our Forest Association objected to this plan and recommended a no action alternative in the National Environmental Policy Act study with no further water diversion for bottling and spring water capture at the bottom of the canyon with monitoring to determine if any excess water flow existed. Environmentalists lodged protests with the water rights division of the California Water Resources Control Board, alleging Nestlé was diverting water without rights, making unreasonable use of the water it was taking, failing to monitor the amount drawn or make an accurate accounting of the water it was taking, and wreaking environmental damage by its action.

Following a two-year investigation, state officials arrived at a tentative determination that Nestlé could continue to divert up to 26 acre-feet of water (8.47 million gallons) per year. Nestlé had gone far beyond the water drafting limit the company was entitled to, the State Water Resources Control Board said, and was actually drafting 192 acre-feet (62.56 million gallons), such that 166 acre-feet (54.09 million gallons) the company was taking on an annual basis was unauthorized, according to a report released on December 21, 2017.

Nestlé, however, continued to draft water from Strawberry Canyon well in excess of 26 acre-feet of water annually, running to an amount near or exceeding its historic 192 acre-feet annual use pattern. Responding to citizen complaints, the California State Water Resources Board issued a draft cease and desist order against Nestlé on April 23, 2021. A public hearing by the California State Water Resources Board took place between August 2021 and July 2023, in which the Save our Forest Association and other environmental organizations and citizen activists participated as witnesses, resulting in a revised cease and desist Order against BlueTriton Brands sent to the State Water Board of Directors which unanimously approved the order on September 19, 2023.

In March 2021, Nestlé's parent company, Nestlé S.A., a corporate conglomerate headquartered in Vevey, Vaud, Switzerland, sold its Nestlé Waters North America division, with the exception of its bottling rights to Perrier, to One Rock Capital Partners, LLC, in partnership with Metropoulos & Company. Nestlé Waters North America existed as Nestlé's operations pertaining to bottling drinking water in the United States and Canada, including eight of the leading water bottling operations in the United States. Upon the sale being completed to One Rock Capital and Metropoulos, Nestlé Waters North America was redubbed BlueTriton Brands.

Arrowhead Mountain Spring Water is among the most iconic of the brands now in the possession of BlueTriton. To the chagrin of the company, the California State Water Resources Control Board's finalized determination on September 19, 2023 to issue the cease & desist order entails a finding that "BlueTriton does not have any water rights that authorize these diversions and uses."

Despite the California State Water Resources Control Board's ruling, the U.S. Forest Service has extended the Strawberry Canyon water extraction permit first issued to BCI in the 1980s under the auspices of what the Forest Service now refers to as a "land use" fee that has grown from the previous the \$524 per year to \$2,500 annually.

On June 25, the Save Our Forest Association, represented by attorneys Rachel Doughty and Jennifer Rae Lovko filed suit in United States District Court in Riverside against the U.S. Forest Service and Michael Nobles in his official capacity as the acting district ranger for the San Bernardino National Forest, "challenging the U.S. Forest Service decision to allow BlueTriton Brands, Inc.'s illegal occupancy of San Bernardino National Forest lands and the dewatering of Strawberry Creek and its tributary Springs."

According to the suit, BlueTriton Brands does not have, nor can it obtain or maintain, a valid special use permit from the U.S. Forest Service. With this illegal occupancy, BlueTriton Brands has engaged and will continue to engage in the diversion of substantially all of the water from the San Bernardino National Forest's Strawberry Canyon, negatively impacting the forest, local communities, and downstream users."

According to the lawsuit, "Strawberry Creek is a tributary to the Santa Ana River and part of the Santa Ana River Watershed. The United States Geologic Service documented that Strawberry Creek is a recharge source for the Bunker Hill Basin. The dry and diminished Strawberry Creek has led to impaired riparian fauna and flora and a creek that cannot support fish, like the native Speckled Dace, as fish need water to survive. BlueTriton Brands' occupancy has dewatered Strawberry Creek and diverted natural springs leaving Strawberry Creek with only intermittent pooling water and fractured habitats. The Santa Ana River Watershed was decreed to have no water available for appropriation decades ago and is fully appropriated. The Bunker Hill Basin remains in deficit, giving diminished water for agricultural and

nearly a million people. BlueTriton Brands is taking the Strawberry Creek water that should be recharging the basin. Plaintiff files this complaint to prevent the United States Forest Service from continuing to allow BlueTriton Brands' occupancy and diversion of water in violation of the Federal Land Policy Management Act, The National Forest Management Act, the Administrative Procedure Act and the National Environmental Policy Act."

According to the lawsuit the "Federal Land Policy Management Act [r]equires that public land be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use." The Federal Land Policy Management Act also, according to the lawsuit, "states that the United States shall receive fair market value of the use of the public land and their resources." The suit further propounds that "Defendant United States Forest Service is authorized under the Federal Land Policy Management Act to grant or renew rights of way upon United States Forest Service lands for various special uses, including "pipes, pipelines . . . and other facilities and systems for the impoundment, storage, transportation, or distribution of water. However, special use permits for such rights of way must be subject to terms and conditions that ensure compliance with federal and state laws regarding air and water quality and environmental protection, and that "minimize damage to scenic and aesthetic values and fish and wildlife habitat and otherwise protect the environment."

According to the lawsuit, "The National Forest Management Act the San Bernardino National Forest land and resource management plan, San Bernardino National Forest's Forest Service Handbook National Environmental Policy Act Administrative Procedure Act requires the United States Forest Service to develop, maintain, and, as appropriate, revise a land and resource management plan for each unit of the National Forest System. The land and resource management plan must 'provide for . . . watershed, wildlife, and fish' and 'provide for diversity of plant and animal communities.' All projects within a national forest must comply with that forest's land and resource management plan. Here, the United States Forest Service must comply with the San Bernardino National Forest land and resource management plan which was adopted in 2005. Land and resource management plans must include enforceable design criteria—"the rules"—that managers legally must operate within in order to achieve desired conditions set forth in the land and resource management plan's 'vision.'" Special use permits must include terms and conditions 'which will . . . Require compliance with State standards for public health and safety, environmental protection, and siting, construction, operation, and maintenance if those standards are more stringent than applicable Federal standards.' Issuance of a new special use authorization for an existing use is subject to the holder being in compliance with all the terms of existing authorization and must be accompanied by 'appropriate environmental analysis.' All proposals for special use also must provide information demonstrating the proposal's compliance with applicable laws, regulations, and orders."

The suit holds that "In keeping with National Forest Management Act's mandates, the San Bernardino National Forest land and resource management plan requires that for surface water development projects, 'instream flows favorable to the maintenance and restoration of riparian dependent and aquatic resources and channel conditions will be required.' It also requires that surface water diversions and groundwater extractions, including well and spring developments, may only be authorized upon

demonstration that the water extracted is in excess to the current and reasonably foreseeable future needs of forest resources; approved extractions must provide for the 'long-term protection and reasonable use of surface water and groundwater resources.'"

The suit asserts that "The land resource management plan's mandates are intended to implement the overarching goals set forth in Part 1 of the San Bernardino National Forest land and resource management plan. One of those goals is that '[w]atersheds, streams, groundwater recharge areas, springs, wetlands and aquifers are managed to assure the sustainability of high quantity and quality water. Where new or reauthorized water extraction or diversion is allowed, those facilities should be located to avoid long-term adverse impacts to national forest water and riparian resources.' The land and resource management plan asks the 'outcome evaluation question' for Goal 5.1: 'Is the national forest making progress toward sustaining Class 1 watershed conditions while reducing the number of Condition Class 2 and 3 watersheds?' The San Bernardino National Forest land resource management plan incorporates the regarding soil and water conservation practices specific to the San Bernardino National Forest's Forest Service Handbook. For riparian conservation areas, activities are limited, and watersheds are to be managed to improve degraded riparian areas for native populations of riparian-dependent species. Riparian conservation areas include perennial and intermittent springs, seeps, springs, and inner gorges. The San Bernardino National Forest's Forest Service Handbook directs that: 'Existing uses, activities, or occupancy within riparian conservation areas should be evaluated for risks or impacts and mitigated during special use renewal or re-issuance. If mitigation measures are not effective, reassess with the option to modify or eliminate the use, activity or occupancy when impacts are unacceptable.'"

The suit further argues that the forest service is required to review new special use permit applications for surface and ground water extraction and for transport of water across National Forest System lands to assess the potential impacts on aquatic and riparian ecosystems on or off the forest. The applicants for those permits should be required, the Save Our Forest Association maintains, to demonstrate that the proposed development would meet the riparian management objectives."

The suit makes the point that "The San Bernardino National Forest's Service Handbook further directs the United States Forest Service to manage watersheds to "improve or restore degraded riparian areas to proper functioning condition for native populations of riparian-dependent species."

According to the suit, "The San Bernardino National Forest's Service Handbook describes the affirmative duty of the USFS to ensure that 'proof of water right is established prior to issuing or re-issuing [special use permits]' and that the applicant has complied with 'applicable environmental laws. . . . Where water use . . . is evident [the USFS must] ensure that all special use permit applicants have secured the appropriate . . . California Department of Fish and Game 1602 Stream Alteration [sic] Agreement . . . before issuing a special use permit that would result in channel alteration.'"

The lawsuit cites the National Environmental Policy Act's declared intention to "encourage productive and enjoyable harmony between man and his environment," to help "prevent or eliminate damage to the environment," and "to enrich the understanding of the ecological systems and natural resources important to the Nation."

According to the suit, "The National Environmental Policy Act has two fundamental purposes: (1) to guarantee that, before taking an action, federal agencies take a 'hard look' at the consequences of that action to ensure that 'the agency, in reaching its decision, will have available, and will carefully consider,

detailed information concerning significant environmental impacts;' and (2) to ensure that 'the relevant information will be made available to the larger audience that may also play a role in both the decision-making process and the implementation of that decision.' As a practical matter, National Environmental Policy Act requires comparing a baseline, determined from 'accurate information and defensible reasoning' against the conditions expected after approval of a proposed project in order to determine the impact on the environment."

Doughty and Lovko assert on the Save Our Forest Association's behalf that "Supplemental National Environmental Policy Act analysis is required when 'there are specific new circumstances or information relevant to the environmental concerns that have bearing on the proposed action or its impacts.'

Supplemental environmental impact statements may also be required when the agency determines that the purposes of the National Environmental Policy Act will be furthered by doing so."

The Administrative Procedure Act provides for judicial review of agency action.

Doughty and Lovko maintain "Under the Administrative Procedure Act, a reviewing court must 'hold unlawful and set aside agency action, findings, and conclusions' found to be 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or 'unsupported by substantial evidence in the record.' An agency action is arbitrary and capricious if the agency 'relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be . . . the product of agency expertise.' When reviewing agency action under the Administrative Procedure Act, a court must ensure that the agency reviewed the relevant data and articulated a satisfactory explanation establishing a "rational connection between the facts found and the choice made."

According to the suit, the United States Forest Service's allowing BlueTrion Brands to continue drawing water from Strawberry Creek after the determination by the California Board of Water Resources that it had no valid water rights relating to that water rendered its decision to grant BlueTriton Brands a continuation of the permit arbitrary and capricious, as it had 'entirely failed to consider an important aspect of the problem' that is at issue, which further represented a violation of the Administrative Procedure Act.

"Under the Administrative Procedure Act, a reviewing court must also set aside agency action, findings, and conclusions found to be without observance of procedure required by law," according to the suit. According to the lawsuit, Strawberry Creek is tributary to East Twin Creek and the Santa Ana River. The West Fork of Strawberry Creek originates in the San Bernardino National Forest. Both the Headwaters Springs and the Cienega Springs are located within the San Bernardino National Forest. All of the water at issue in this complaint is diverted from the West Fork of Strawberry Creek Watershed, which is within the Strawberry Creek Watershed, and all within the San Bernardino National Forest. In the early 1900s, before any water was diverted from Strawberry Canyon, the canyons near the Arrowhead Hot Springs Hotel were wet and lush, Prior to diversion, Strawberry Creek was a popular fishing stream. United States Geological Survey teams visited and mapped Strawberry Creek Watershed in the late 1890s, establishing that Strawberry Creek was a perennial stream prior to diversion. United States Geological Survey quadrangle maps show Strawberry Creek as a perennial stream, and the Headwaters Springs and the Cienega Springs, all as blue lines."

The suit references the survey work of Engineer W.P. Rowe, who was hired by BlueTrion Brand's

corporate predecessor to survey the area. The suit cites this statement from Rowe: "Strawberry creek drains a portion of the south slope of the San Bernardino Mountains. It has its source at a group of springs which issue from the side of Strawberry peak. . . . 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 [miner's] inches."

One Miner's Inch is the equivalent of 9 gallons per minute; 1 gallon per minute is the equivalent of 1,440 gallons per day; 1 gallon per minute is the equivalent of 1.61 acre-feet/year. Ten inches year-round even during dry periods, as described by Rowe, converts to 99 gallons per minute.

According to the suit, on July 27, 2018, Forest Ranger Joseph Rechsteiner signed a decision memo memorializing his decision to issue a new special use permit to Nestlé to operate and maintain existing diversion structures in Strawberry Canyon.

The suit maintains, "The initial studies provided by the permittee suggest that water extraction is reducing surface flow in Strawberry Creek. Ranger Rechsteiner himself performed only a perfunctory environmental review to support the 2018 decision memo, making findings of no extraordinary circumstances necessitating an environmental assessment or environmental impact statement, despite the acknowledged 'impaired' status of Strawberry Creek Watershed due to the diversion. Despite acknowledged changes in management direction since issuance of the 1978 special use permit, no consideration was apparently given to a no action alternative requiring a return to pre-diversion baseline conditions in Strawberry Canyon. On January 22, 2021, Nestlé asked the Forest Service to renew the Nestlé 2018 special use permit for one year, expiring on August 24, 2022. This request was granted, without modification to the 2018 Nestlé special use permit."

The suit propounds, "The contents of the Nestlé 2018 special use permit specified that the permit was not renewable, assignable, or transferable. The 2018 special use permit stated: 'Any change in control of the business entity [holding the permit] shall result in termination of this permit.'

On March 31, 2021, the privately held private equity firm of One Rock Capital Partners, LLC, in partnership with the also-privately-held Metropoulos & Co., acquired Nestlé in a leveraged buyout. This sale operated to terminate the Nestlé 2018 special use permit. Accordingly, on April 1, 2021, Nestlé filed with the USFS a 'Request for Revocation' of the August 24, 2018, Nestlé 2018 special use permit, on the basis that Nestlé had 'conveyed all my (our) right, title, and interest in and to the improvements,' the diversion infrastructure, to BlueTriton Brands."

BlueTriton Brands was the follow-on corporate entity to Nestlé Waters of America, which had previously operated the Arrowhead Spring Water Bottling Company.

According to the suit, "On August 18, 2022, Acting Ranger Joseph Jordan signed a special use permit for BlueTriton Brands. This special use permit expired six days later on August 24, 2022. It stated that 'The CA State Water Board enforcement hearing in 2022 may clarify the water rights related to the system and/or uphold the draft cease and desist order issued to the holder in 2021.'"

According to the suit, the ultimate finding by the California State Water Resources Board that neither BlueTriton Brands nor any of its corporate predecessors hold or held water rights to the water in Strawberry Canyon, under the applicable restrictions of the Federal Land Policy Management Act, the National Forest Management Act, the San Bernardino National Forest land and resource management plan, San Bernardino National Forest's Forest Service Handbook, National Environmental Policy Act and the Administrative Procedure Act requires that the United States Forest Service bring BlueTriton Brand's

diversion of water from Strawberry Canyon to a halt.

The suit asks the court to adjudge and declare that the United States Forest Service's actions in issuing the 2018 special use permit to

Nestlé and the 2023 special use permit to BlueTriton Brands violated the Federal Land Policy Management Act, the National Forest Management Act, the National Environmental Policy Act and the Administrative Procedure Act and that allowing BlueTriton Brands to continue to operate in Strawberry Canyon without a valid special use permit violates the Federal Land Policy Management Act, the National Forest Management Act and the Administrative Procedure Act.

The suit further asks for the court to vacate and set aside the BlueTriton Brand's 2023 special use permit, the 2018 decision memo, and the National Environmental Policy Act conclusions supporting the 2018 decision memo while enjoining the United States Forest Service from approving or allowing any third party to divert water from Strawberry Canyon by entry onto forest land unless and until the United States Forest Service has performed a new or supplemental environmental analysis taking into account the historical information illuminated through the California State Water Resources Control Board Hearing, continuing damage to resources on the San Bernardino National Forest, and the failure to meet goals and standards of the San Bernardino National Forest land and resource management plan.

This should be topped with, according to Doughty and Lovko, an order to the United States Forest Service to comply with the Federal Land Policy Management Act, the National Forest Management Act, the National Environmental Policy Act and the Administrative Procedure Act in connection with BlueTriton Brand's diversion of water from the Strawberry Creek

Watershed and the removal of the water diversion structures in Strawberry Canyon to restore Strawberry Canyon to its condition pre-diversion. The suit also seeks reimbursement of the Save Our Forest Association's cost in pursuing the suit.

The cease and desist order that was originally issued in draft form by the California State Water Resources Board against Nestlé and which is now in place against BlueTriton has been appealed by BlueTriton Brands and is assigned to a Fresno Superior Court to be heard this summer. Meanwhile, the water

diversions continue as BlueTriton and the United States Forest Service negotiate terms of a possible new special use permit despite the California State Water Control Board's determination that BlueTriton holds no water rights in Strawberry Canyon.

Hugh A. Bialecki, the president of the Save Our Forest Association, said, "Ten years of letter writing, collecting evidence and testifying to the California State Water Board has not yet resulted in the US Forest Service stopping the water giveaway to Nestlé/BlueTriton

Brands. The US Forest Service must be accountable for protecting our natural resources."

Steve Loe, a retired United States Forest Service Fish & Wildlife Biologist, said, "The US Forest Service has known for decades that taking the spring water for Arrowhead bottled water was drying up the stream below and adversely affecting threatened and endangered species and their habitat. Even during extreme drought when residents were being forced to ration water, Nestlé, now BlueTriton, and the US Forest Service have refused to put any water back into the stream. This is the public's land and water, not a corporation's that is using it for its profit at the public's expense."

United States Forest Service Spokesman Gustavo Bahena told the Sentinel, "In response to your inquiry about the lawsuit filed by Save Our Forest Association against the San Bernardino National

Forest, the forest does not comment during pending litigation. In regard to Blue Triton applying for a special use permit, the forest is in the review process for their most recent application.”

Bahena said, “Blue Triton Brands’ previous permit was issued on July 27, 2018, for a three-year term with two optional years that was reissued annually and expired on August 27, 2023. Because Blue Triton had a timely request for renewal of the permit, the current permit remains in effect by operation of law under the Administrative Procedures Act until the forest renders a decision on their new request. Blue Triton’s land use fee is \$2,500 annually. Blue Triton’s operations in the forest are governed by its permit, and all terms and conditions of the permit remain in full force and effect.”

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