

Amanda Frye
12714 Hilltop Drive
Redlands, CA 92373
Telephone: (909) 496-8015
Email: amandafrye6@gmail.com
California Resident
Citizen of the United States of America

**STATE WATER RESOURCE CONTROL BOARD
STATE OF CALIFORNIA
Administrative Hearing Office**

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

San Bernardino County
Strawberry Creek

V V:INV 8217

**COMMENTS AND OBJECTIONS OF
AMANDA FRYE
ON
PROPOSED DRAFT CEASE AND DESIST
ORDER
(April 21, 2023)**

I. INTRODUCTION

On April 21, 2023, a proposed draft Cease and Desist Order (CDO) for BlueTriton Brands, Inc. (BTB, Respondent) was issued for review by Senior Hearing Officer, Mr. Alan B. Lilly, of the California State Water Resource Control Board (SWRCB) Administrative Hearing Office (AHO). The proposed draft CDO followed a multi-year investigation and five months of public hearings regarding water rights and unauthorized water diversion of Strawberry Creek by BlueTriton Brands, Inc. in the San Bernardino National Forest (SBNF). Review, comments and objections on the AHO draft CDO were requested on April 21, 2023. After reviewing the proposed draft CDO, the following are my comments and objections for consideration. The hearing and case against BTB is complicated and the proposed draft CDO is well written. However, there are a few items that should be changed, added, clarified, or omitted. The following remarks address my concerns and objections.

1. CDO should include that BTB has no valid water right at Springs 10, 11, and 12 and the springs (1, 2, 3, 7, and 8) associated with the Tunnels and Boreholes.

During the hearing evidence confirmed that springs 10, 11, and 12 are surface water that feed Strawberry Creek. BTB had their notice and due process regarding springs 10, 11 and 12. Findings of surface spring water should be stated for 10, 11, and 12 for the record to minimize the redundant effort required in the future should the Prosecution Team later issue a CDO for springs 10, 11, and 12 .

The 2023 draft CDO introduction stated that BlueTriton **does not have valid water rights for spring water diversions** at Tunnels 2, 3, and 7, and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8. **A statement should be added in the CDO that BTB has no valid water rights in the**

SBNF Strawberry Canyon including Springs 10, 11, and 12 nor springs associated tunnels and boreholes at 1, 2, 3,7, 8 even if a Cease and Desist Order for withdrawals at 10, 11 and 12 cannot be issued at this time. It is important for the public and the USFS to understand with clarity that the springs are surface water in the SBNF which BTB has no valid water rights. The evidence of the surface water nature of springs 10, 11 and 12 is found in the Dames and Moore report (1999)¹ which contains a location map of springs along Strawberry Creek with photographs of natural springs 10, 11 and 12.² These springs have been confirmed to be hydraulically connected to boreholes 10, 11, and 12 by multiple sources including Exhibit BTB-7.³ BTB was given notice in the 2021 regarding springs 10, 11, 12 and due process was carried out during the hearing as the notice, testimony, and evidence included Springs 10, 11, and 12.

The 2021 draft CDO was cautious on springs 10,11, and 12 asking for more information.⁴ Evidence and testimony regarding these Springs and Boreholes 10, 11 and 12 confirmed that springs 10, 11, and 12 tapped by boreholes are surface water.⁵ BTB⁶'s own evidence (Exhibit BTB 7) confirmed this fact. Since it was determined that BTB had no valid water right to the upper springs 1,2, 3, 7 complex and 8; the same reasons and logic apply to

¹ See FR 3 pp. 1-9 - 1-11 Figures 1-11, 1-12, 1-13 and 1-14.

² See FR 3 p. 1-10 Figures 1-12, 1-13, and 1-14.

³ See BTB 7 pp. 749-750

⁴ See draft CDO April 23, 2021 transmittal letter p. 5 "7".

⁵ See BTB 7 Attachment 6 pp. 739-750. BTB 7- p. 740 paragraph 2. See also FR 3 pp. 1-9, 1-10, 1-11. See also FR 5 pp. 8, 29, 32, 37, Summary Table pp. 44-45. See also FR 7 pp. 24, 25-26 . See also FR 8 28-32. See also SOS 51 last paragraph discussing how Cienega Springs (site 10, 11, 12) augment Strawberry Creek stream flow.

⁶ See BTB 7 p. 749-750.

BTB's lack of valid water rights at springs 10, 11, and 12 even without a cease and desist order for boreholes 10, 11 and 12 at this time. The hearing provided BTB ample notice and due process regarding Springs and Boreholes 10, 11 and 12 so it is important to confirm that BTB has no valid water right to Springs 10, 11, and 12.

2. Condoning water withdrawals at spring boreholes 10, 11 and 12 with no valid water right should not be stated in CDO.

Evidence shows that water withdrawals at Spring boreholes 10, 11 and 12 negatively impact Strawberry Creek and its ecosystem even altering Strawberry Creek from a perennial stream to intermittent stream. Condoning unlimited water withdrawals at spring boreholes 10, 11 and 12 when there is no valid water right is wrong. The United States Forest Service (USFS) hydrological report (Exhibit FR 5)⁷ states that the channel below the 10,11,12 spring boreholes no longer supports "perennial flow." Historic USGS (United States Geological Survey) maps show Strawberry Creek as a perennial stream.⁸ The historic USGS maps of the Strawberry Creek watershed were based on physical observation⁹. The historic USGS quadrangle maps portrayed Strawberry Creek as a perennial stream¹⁰ with a solid blue line¹¹. The accuracy of this portrayal was confirmed by USGS historic map expert Greg Allord during the hearing¹² as discussed on page 45 of this draft CDOs. USFS hydrology report stated that shutting off the

⁷ See FR 5 p. 32 paragraph 1

⁸ See FR 62, SOS 290 and SOS 291

⁹See SOS 288 p. 3 paragraph 7 and 11.

¹⁰ See FR 156 and FR 157 for historic USGS notation of a perennial stream notation as a solid blue line.

¹¹ See SOS 281 slide 5

¹² See SOS 288 p. 3 paragraph 5

boreholes 10,11,12 could produce a perennial flow as the spring water was allowed to flow into the creek.¹³ The report further states that the removal of water at the springs 10, 11, 12 ¹⁴ causes poor water quantity,¹⁵“at-risk” water quality with nutrient and chemical changes, a fractured aquatic habitat putting aquatic habitat “at-risk”¹⁶ and decreased riparian habitat diversity. All of this supports the USFS’s conclusion that diversions of Springs 10, 11, 12 result in significantly decreased surface water in the West branch of Strawberry Creek.

3. Rulings or reference to the San Manuel Band of Missions Indians¹⁷ (“San Manuel Band”, or “Tribe”) and riparian rights issues of the Arrowhead Springs Property owners are inconsistent with the 2021draft CDO, the hearing scope and commitments to the Tribe. The Arrowhead Springs (Hotel) Property water rights including riparian would require a separate case in order for due process requirements to be met for the Tribe, public and all parties.

On page 2 of the draft CDO, the following statement is overreach and should be struck from the CDO document as there was no notice or due process applied to the secondary diversion to the San Manuel Band of Mission Indians and the Riparian Rights issues of the Arrowhead Springs Hotel property.

¹³ See FR 5 p. 37 paragraph 6 and p. 38 paragraph 1.

¹⁴ See FR 5 p. 37 paragraph 3

¹⁵ See FR 5 p. 44 Summary Table

¹⁶ See FR 5 pg. 45 Summary Table.

¹⁷ San Manuel Band of Mission Indians name was changed to Yuhaaviatam of San Manuel Nation. See Indian Entities Recognized by and Eligible to Receive Services From the United States Bureau of Indian Affairs, 87 Fed. Reg. 4636, 4684 (Jan. 28, 2022).

“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.”

Even if the Tribe does have a riparian right on the Arrowhead Springs property, the extent of that right is unknown as there was no due process in this matter. Cases involving downstream users¹⁸ were disallowed in this hearing.¹⁹ It is not appropriate to assume that Arrowhead Springs Property has unlimited riparian rights to receive the BTB’s diversion based on limited information and without due process.

The San Manuel Band of Mission Indians (Tribe) were not party to this case as reconfirmed during the hearing on January 13, 2022²⁰ and in February 10, 2023 letter sent from the “San Manuel Band of Mission Indians” to Mr. Lilly. In a letter dated February 13, 2022, Mr. Lilly again confirms to the San Manuel Tribe that the Tribe would not be participating in the AHO proceeding. Including the Tribe in this CDO could be construed as offensive, a broken promise, disrespectful or removal of the Tribe’s right to due process.

In the February 10, 2022 letter, the San Manuel Band of Mission Indians emphasized that they are not a party to the BTB AHO proceedings and “neither is it subject to the jurisdiction

¹⁸ *Western Municipal Water District or Orange County Water District* judgments which may have included the Arrowhead Springs property.

¹⁹ See March 25, 2022 “Public Hearing on Prosecution Team’s draft Cease-and-Desist Order to BlueTriton Brands, Inc.: Hearing Officer’s Rulings on Pending Motions p. 2 Paragraph 2.

²⁰ Transcript 1/13/2022 am - 00:04:12.9830—00:05:19.890

of the SWRCB, nor is it subject to any order the SWRCB Board may adopt.” Involving the San Manuel Band in this CDO, violates the Tribe’s²¹ request to not be considered as a participant in the administrative hearing process. The riparian rights of non-party San Manuel Tribe’s land holdings were not in the April 2021 draft CDO so should not be added to the CDO.

There is not adequate basis or evidence to make conclusions of the riparian rights regarding Arrowhead Springs Property allegedly owned by the Tribe so it is inappropriate to offer any opinion or ruling regarding matters as due process was not fulfilled for any party and especially the Tribe. Thus, all rulings and references to the San Manuel Band of Mission Indians or the riparian rights or secondary diversions from BTB received at the Arrowhead Springs Property should be struck from the CDO. In a February 10, 2022 letter to Mr. Lilly/AHO, the San Manuel Tribe made it abundantly clear that the Tribe was not “party to or participant in this proceeding” and “information...is not intended to be construed as a waiver ...nor participation in the administrative process.” The Tribe did not waive their right to due process. Furthermore, there is a lack of due process for the Tribe and all parties by issuing a ruling regarding the San Manuel Band of Mission Indians Riparian Rights, the Arrowhead Springs (Hotel) Property, water deliveries since as not included in the 2021 draft CDO.

Furthermore, it is important to eliminate any possible appearance of third party “ex-parte”²² communication with or via the Tribe. When the San Manuel Tribe was contacted by Mr. Lilly in regard to a possible site visit of the Arrowhead Springs Property, the meeting between Mr. Lilly and Tribal members, while disclosed, was held out of the purview of parties or the

²¹ See page 2 paragraph 3 of letter sent via email February 10, 2022 from the “San Manuel Band of Mission Indians” to Alan B. Lilly and distributed to all parties on service list.

²² See Transcript 1/14/2022 am 01:37:38.67 - 01:38:22.230.

public.²³ Full disclosure of the meeting with the hearing officer and Tribal representatives was given, but no party was present during this meeting.

The Tribe appears to be have been dragged into this case despite its vocal objections. It would be best and respectful to omit mentioning the San Manuel Band in this CDO thus, eliminating any appearance of disrespect by the AHO trying to involve the Tribe in this administrative process against their wish or somehow portraying the Tribe as an actor in “ex-parte” communication.²⁴

The San Manuel Tribe issues were unexpectedly introduced in the May 26, 2022, Post-Hearing Order.²⁵ The closing brief orders introduced the question regarding the San Manuel tribe and riparian rights. Now these issues are in the CDO despite no agreement between BTB and the San Manuel Band in evidence and no notice in the 2021 draft CDO making this ruling inconsistent with the 2021 draft CDO, hearing scope and evidence .

The authorization of water deliveries to the Tribe via BTB from Springs 10, 11, and 12 should be struck from the CDO as there was no agreement between the Tribe and BTB presented during the hearing. Like the upper springs, there was no proof of a BTB water right at springs 10,11 and 12 which like the other springs in this proceeding are in the San Bernardino National Forest. Importantly, the Forest Service is also not party to this proceeding.

²³ See Transcript Transcript 1/13/2022 pm 01:145:58- 01:54:01.170. And see also Transcript 1/13/2022 am 00:04:12.930-00:05:19.890

²⁴ See Transcript 1/13/2022 pm 01:145:58- 01:54:01.170. And see also Transcript 1/13/2022 am 00:04:12.930-00:05:19.890

²⁵ See May 26, 2022 Post-Hearing Order Closing Brief Issues 1. c.i. “Are Respondent’s present diversions of the water that Respondent delivers to the San Manuel Band of Mission Indians at the Arrowhead Springs Hotel complex authorized by riparian rights? “

4. Clarification is needed regarding the Reservation status of “San Manuel lands.”

In Section 2.12.2 Site Visit, it should be clarified that the Arrowhead Springs Property is not Tribal Reservation lands. The following statement should include that the Arrowhead Springs Property are not part of an Indian Reservation: “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.” This distinction between Indian Reservation land and non-Indian Reservation land status is important.

.5. Section 2.3. No mention of Federal Reserve Water Rights.

The San Bernardino National Forest’s (SBNF, Forest) federal reserve waters rights dating back to the Forest 1893²⁶ founding and primary purpose of the reservation were not considered. The primary purpose of the San National Forest Reservation was to protect the watershed for the benefit of local communities²⁷ and timber supply²⁸. The water involved in this case is integral to the Forest ecosystems and local communities whose water depends on the Bunker Hill Basin which is fed by Strawberry Creek.²⁹

²⁶ See FR 31 (President Benjamin Harrison Proclamation 354 February 25, 1893 Proclamation 354—Setting Apart as a Public Reservation Certain Lands in the State of California thus creating the San Bernardino Forest Reserve.)

²⁷ Anthony Serrano testimony from 1/14/22 transcript pdf p. 52 “509-514” 1:22:47.220-1:23:42.450 states from [“**a local resident standpoint in the city of Highland...** simply outrageous to the local residents, **we have 55,000 residents in the city of Highland....we have the bunker hill basin, which was our groundwater and all of these items were affected....**”] [emphasis added]

²⁸ See FR 33. Also see FR 31.

²⁹ See FR 63 ¶ 2 (p. 49/ pdf p.51). See also PT 24 ¶ 4 p. 49/pdf p.55) “The large streams entering the San Bernardino area are the Santa Ana River and Lytle, Cajon, and Mill Creeks; the small streams are Plunge, **Strawberry**, City, and San Timoteo Creeks and streams in Waterman and Devil Canyons. With the exception of Lytle and Cajon Creeks, which enter Lytle and Cajon basins, respectively, all enter Bunker Hill basin. All these streams supply recharge to the several ground-water basins in the area.”[emphasis added]

6. Historical documents show that BTB’s predecessor gave up any right in other watersheds in 1930.

The historical document discussion in Section 2.5 and pre-1914 rights in 3.7.2 should include the fact that BTB’s predecessor gave up any right to water in other watersheds in 1930³⁰as summarized in SOS 281 slide 23.

7. Del Rosa Case did not include San Bernardino National Forest boundaries. Neither the USFS nor the SWRCB were party to the Del Rosa Case.

The Del Rosa case made no mention of Forest land boundaries. Neither the USFS nor the SWRCB were party to the Del Rosa Case. Federal lands are not subject to adverse possession nor prescriptive rights³¹ (*Matthews v. Ferrea*, 45 Cal. 51 (1872)).

8. Delivery of water to Tribe is outside the hearing scope.

CDO has no valid basis to authorize the delivery of water to the Tribe. No agreement between BTB and the San Manuel Band was entered into evidence so no ruling on the water delivery to the Arrowhead Springs property is appropriate. An Infographic by BTB (FR 23) mentioned giving water from the their Strawberry Creek springs to the “Arrowhead Springs property owners” based on an “agreement.” Allegedly, the “Arrowhead Springs property owners” are the San Manuel Band although no deed was offered as evidence. The 2021 draft CDO did not include the San Manuel Band of Mission Indians nor did it involve Riparian Rights of the Arrowhead Springs property nor the delivery of water. Therefore, any ruling on BTB’s arrangement with the Tribe is inconsistent with the 2021 draft CDO, hearing or evidence.

³⁰ See FR 111 pp. 3-4.

³¹ Samuel C. Wiel, *Water Rights in the Western States*. §591 (3rd ed. 1911). [“§591. Against the United States or the State.—There can be no adverse use against the United States, and hence if the title to the water or land involved was in the government any part of the five years, no prescriptive right can arise.]

Rulings or reference to the San Manuel Band of Missions Indians, water deliveries and riparian rights issues of the Arrowhead Springs Property owners are inconsistent with the 2021 draft CDO and the hearing scope.

9. Clarification in Spring 4 Complex, Spring 1 and 8, Boreholes 1, 1A and 8 needed.

Rowe and Webb discuss the undiverted Spring 1 in their 1948 report (Exhibit FR 52 page 5). Page 18 of the draft CDO, a Mann report from 1988 and Hydrodynamics report claim that 1 and 8 were developed in the 1930s, but the three springs diverted in the 1930s were Springs 2, 3, and 7 based on Rowe's spring flow charts.³² The Rowe & Webb report of 1948 recommended tapping Spring 1 (Exhibit FR 52 p. 6). A state recordation report (Exhibit PT 98 pg. 3) says that Spring 1 was developed September 1948 and placed in service October 1, 1948. Exhibit PT 95 p. 3 says Spring 8 was developed in 1950.

Spring 4 is a natural undeveloped spring that is not diverted, but feeds the Strawberry Creek channel with flowing water. Spring 4 is the only spring in this group not diverted by BTB.

Summary

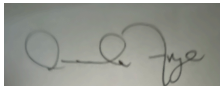
1. Statement needs to be added clarifying Springs 10, 11, and 12 are surface water with no valid water rights as are the springs (1, 2, 3, 7, 8) associated with the Tunnels and Boreholes.
2. Water withdrawals from Strawberry Canyon with no valid water right should not be condoned in CDO given evidence of negative impact on Strawberry Creek.
3. Rulings or reference to the San Manuel Band of Missions Indians and riparian rights issues of the Arrowhead Springs Property owners are inconsistent with the 2021 draft CDO, the hearing scope and commitments to the Tribe. The Arrowhead Springs (Hotel) Property riparian rights

³² See FR 55. See also FR 52 p. 4 discussion of springs 2,3, and 7 flow charts.

require a separate case in order for due process requirements to be met for the Tribe, public, U.S. Forest Service and all parties.

4. Clarification is needed regarding the non-reservation status of “San Manuel lands.”
5. Section 2.3 San Bernardino National Forest should mention Federal Reserve Water Rights.
6. Historical documents show that BTB’s predecessor gave up any right in other watersheds in 1930.
7. Del Rosa Case did not include San Bernardino National Forest boundaries. Neither USFS nor SWRCB were party to the Del Rosa Case.
8. No agreement between BTB and the San Manuel Band was entered into evidence so no ruling on delivery of water should be included in CDO.
9. Clarification of Spring 4 Complex and diversion dates are needed.

Respectfully Submitted on May 8, 2023,

A handwritten signature in black ink, appearing to read "Amanda Frye", is centered below the text.

Amanda Frye